

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
2008-CA-01087**

**THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER**

**APPELLANT**

**V.**

**JOEY GORE**

**APPELLEE**

**APPEAL FROM THE CIRCUIT COURT FOR THE  
FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI**

**BRIEF OF APPELLEE  
JOEY GORE**

**Oral argument is requested**

**OF COUNSEL:**

**ROCKY WILKINS, ESQ., MSB# [REDACTED]  
ROCKY WILKINS LAW FIRM, PLLC  
475 EAST CAPITOL STREET (39201)  
POST OFFICE BOX 2777  
JACKSON, MISSISSIPPI 39207  
TELEPHONE: (601) 948-6888  
FACSIMILE: (601) 948-6889**

**JOHN P. FOX, ESQ.  
P.O. BOX 167  
HOUSTON, MS 38851  
TELEPHONE: (662) 456-4201**

**ATTORNEYS FOR APPELLEE**

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

- I. The University of Mississippi Medical Center, Appellant
- II. Joey Gore, Appellee
- III. Lanny R. Pace, Esq., Counsel for Appellant
- IV. J. Seth McCoy, Esq., Counsel for Appellant
- V. Rocky Wilkins, Esq., Counsel for Appellee
- VI. John P. Fox, Esq., Counsel for Appellee
- VII. Lifesource Upper Midwest Organ Procurement Organization, Inc.; Co-Defendant
- VIII. John A. Banahan, Esq., Counsel for Co-Defendant Lifesource, et al.
- IX. Timothy A. Sullivan, Esq., Counsel for Co-Defendant Lifesource, et al.
- X. Randi Peresich Mueller, Esq., Counsel for Co-Defendant Lifesource, et al.

RESPECTFULLY SUBMITTED, this the 14<sup>th</sup> day of December, 2009.

BY:

  
ROCKY WILKINS

OF COUNSEL:

ROCKY WILKINS, ESQ., MSB#99707  
ROCKY WILKINS LAW FIRM, PLLC  
475 EAST CAPITOL STREET (39201)  
POST OFFICE BOX 2777  
JACKSON, MISSISSIPPI 39207  
TELEPHONE: (601) 948-6888  
FACSIMILE: (601) 948-6889

JOHN P. FOX, ESQ.  
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## **STATEMENT OF THE ISSUES**

- I. WHETHER DR. RODRIGO GALVEZ WAS PROPERLY ACCEPTED AS AN EXPERT WITNESS BY THE TRIAL COURT
- II. WHETHER THERE OVERWHELMING EVIDENCE TO SHOW THAT THE DEFENDANT BREACHED THE STANDARD OF CARE
- III. WHETHER THE LAYMAN'S EXCEPTION ALLOWS RECOVERY
- IV. WHETHER THE ANATOMICAL GIFT ACT APPLIES
- V. WHETHER THE TRIAL COURT PROPERLY AWARDED DAMAGES

## **STATEMENT OF THE CASE**

### **A. Nature Of The Case**

This case involves medical malpractice. On February 14, 2002, Plaintiff/Appellee Joey Gore was injured during a failed kidney transplant surgery at Defendant/Appellant University of Mississippi Medical Center (hereinafter "UMC"). Joey Gore was provided a torn donor kidney while he was a patient at UMC. The donor kidney was located by Lifesource from a donor in Minnesota. The kidney had an intimal tear in the renal artery, which rendered it defective and useless to any human being. The transplant surgeon at UMC, Dr. William Henry Barber, either failed to inspect the donor kidney for damage, or caused the tear during surgery. Regardless, UMC is liable for the negligence that caused Joey Gore's injuries.

### **B. Course Of Proceedings And Disposition In The Court Below**

The subject lawsuit was filed on November 26, 2002. The initial Complaint was against UMC, a state entity. After initial discovery, the Complaint was amended to seek recovery against other parties involved in the procurement and transportation of the donor kidney to Mississippi. Voluminous discovery was conducted.

A trial was held in the Circuit Court of Hinds County against Lifesource and UMC starting on April 9, 2007, before the Hon. Winston L. Kidd. A jury was empaneled to determine the case against Defendant Lifesource. The same jury provided an advisory verdict against UMC. On April 13, 2007, after deliberating approximately four hours, the jury returned a 9-3 defense verdict as to both Defendants. However, the case against UMC was ultimately decided by the trial judge as the trial court was not required to accept the jury's verdict as it related to UMC. Due to the overwhelming evidence against UMC, on March 5, 2008, the trial court issued an Opinion and Order finding UMC liable to Joey Gore and awarding him \$326,678.13 in damages. (RE 1; R. 1969-1973).

A Final Judgment was entered by the trial court on March 13, 2008. (RE 2; R. 1975-1976). UMC has filed an appeal of this Final Judgment, and Joey Gore's response follows.

### **STATEMENT OF THE FACTS**

In 1998, at thirty-one (31) years old, Joey Gore was diagnosed with end stage renal disease and severe uncontrolled hypertension. (T. 289-290). In January 1999, Joey had a bilateral nephrectomy, which was for the removal of both of his kidneys. Joey began regular dialysis sessions. (T. 289-290). Dr. Shirley Schlessinger, who was the director of the kidney transplant department at UMC, testified that Joey was evaluated for possible kidney transplantation at UMC and was found to be a very good candidate. (T. 480).

In February 2002, a kidney became available for transplantation from a deceased donor in Minnesota. On February 12, 2002, the donor patient was pronounced brain dead from injuries sustained after falling out of a moving vehicle. Lifesource arranged for a transplant team from the University of Minnesota to remove the donor's organs at St. Mary's Hospital in Duluth, Minnesota. On February 13, 2002 at 8:24 a.m., the donor's kidneys were removed from the donor's body by surgeons from the University of Minnesota. Lifesource coordinated the procurement of the left kidney and packaged the organ. The left kidney was then flown to Jackson, Mississippi, and transported to UMC via courier. .

Joey Gore was admitted to UMC for the kidney transplant on February 14, 2002. Dr. Barber and Dr. Donald were scheduled to perform the kidney transplant surgery that day. Upon obtaining the kidney, Dr. Barber started the process of transplanting it into Joey's abdomen. During the surgery, the renal vein and artery of the donor kidney were attached to Joey's blood vessels. Dr. Barber then realized that arterial blood was not entering the kidney properly. After several minutes, Dr. Barber made the decision that the kidney had warmed too long and should be removed.



It was discovered that the kidney had an intimal tear in the renal artery. The parties do not dispute that the kidney had an intimal tear. However, the parties hotly contest the cause of the intimal tear and whether Dr. Barber properly inspected the kidney. As shown below, there was overwhelming evidence that established the negligence of UMC.

#### **A. The Medical Records Show That The Kidney Was Torn During Surgery At UMC**

Joey Gore's UMC medical records clearly state that the kidney transplant failed **"due to intimal tear during surgery."** (RE 3; UMC00109, 112). The UMC medical billing codes also reflect that Joey Gore was charged for an "accidental puncture or laceration during a procedure." (RE 3; UMC78). Internal emails from Lifesource show that the kidney had "significant surgical damage." (RE 4; LS80042). UMC argued that these and other damaging records were simply not correct.

#### **B. Connie Lancaster and Amy Alford's Testimony**

Joey Gore's mother, Connie Lancaster, and his sister, Amy Alford, testified at trial. Ms. Lancaster testified that on February 14, 2002, Dr. Barber and Dr. Donald started the kidney transplant surgery on Joey Gore at UMC. After a long time passed, Dr. Barber rushed into the hospital room and spoke to Ms. Lancaster and Ms. Alford. (T. 118). Dr. Barber was nervous, shaking, and still in his surgical scrubs. (T. 119). Ms. Lancaster testified that Dr. Barber stated the following:

1. That Dr. Barber was in the process of attaching one side and was going to attach the other and noticed that the blood wasn't flowing through and that it was pooling in the bottom of the kidney and it went through the false canal which was a rip and when they noticed it, it had warmed too long and there was nothing they could do (T. 118)
2. That he had his choice of which kidney he wanted (T. 118-119)
3. That UMC had never had a defective kidney before (T. 119)

4. That he would get Joey a “good kidney” within a year (T. 120)
5. **That he felt like the kidney was “jerked on” when it was harvested** (T. 118-119)
6. **That the trauma of the auto accident did not cause the tear** (T. 118-119)

Ms. Alford corroborated her mother’s testimony regarding the above-referenced statements being made by Dr. Barber. (T. 369-370).

Ms. Lancaster testified that later that day Dr. Donald came into the room and said that the kidney never turned pink and had “never lived.” (T. 120). Ms. Lancaster asked Dr. Donald if they had a procedure to check the kidney before you put it into a sick individual, **and he replied that they “could have checked the arteries” but they did not.** (T. 121). Dr. Donald also said that the failed surgery made it harder for Joey to find a kidney match in the future. (T. 121). Ms. Alford also testified that Dr. Donald made these statements. (T. 369-372).

After the failed surgery, Joey was in extreme pain and was depressed. (T. 123-4, 140, 373). Joey had to live with his mother for several months. Joey vomited after eating, and could not walk for months. (T. 124). He had to be taken to the emergency room several times for complications from the failed surgery. (T. 124). Joey also had to go back on dialysis. (T. 374).

Dr. Barber told Ms. Alford that he let the kidney warm too long and did not notice the tear. (T. 369-370). **Dr. Barber said that if he had noticed the tear sooner, he could have fixed it.** (T. 369-370). However, since he did not notice the tear and it had warmed too long, he had to remove the kidney because it was defective. (T. 369-370).

Ms. Alford asked Dr. Barber how the tear happened, and Dr. Barber said that it was his professional opinion that it was “jerked on when it was harvested out of the donor” in Minnesota. (T. 370-372). Dr. Barber did not blame the tear on the automobile accident, even though Ms. Alford specifically asked Dr. Barber if that was the cause. (T. 370-371).

### **B. Dr. William Henry Barber's Conflicting Testimony Regarding the Cause of the Tear**

Dr. William Henry Barber was called during the Plaintiff's case in chief as an adverse witness. In February 2002, Dr. Barber and Joey Gore discussed the possibility of Joey's body rejecting the kidney. (T. 153). Dr. Barber did not warn Joey that the kidney could be defective or useless to any human being. (T. 153). However, Dr. Barber admitted that an intimal tear is a known risk and that he was in a better position than his patient to know of this risk. (T. 153).

Prior to surgery, Dr. Barber reviewed the donor's medical records sent to him from the Lifesource in Minnesota. There was nothing in the donor's medical records to indicate any damage to either of the kidneys. (T. 149-150). Dr. Barber conditionally accepted the left kidney, "pending anatomy." (T. 151-152). Thus, if the kidney was torn during harvesting in Minnesota, the medical records did not indicate such a finding. (T. 147; 152-153).

Dr. Barber testified about the February 14, 2002 surgery. Joey Gore was prepped, and an incision was made in his abdomen. Dr. Barber then received the donor kidney in the operating room at UMC and started trimming away fat with forceps and scissors. (T. 158-159). This required Dr. Barber to manually handle the kidney. (T. 158). Then, the iliac artery was prepared for anastomosis. This means that the renal artery of the kidney was attached to the iliac artery and also that the renal vein of the transplanted kidney was attached to the iliac vein of Joey Gore. (T. 158). At this point, Dr. Barber noted "very poor perfusion" of the kidney. (T. 158-159). Thus, at the time the clamps were removed from the artery and vein which had prevented blood flow during the attachment process, the kidney did not have the anticipated arterial flow into it. (T. 159). After several minutes, it became obvious to Dr. Barber that there was not normal arterial flow to the kidney. (T. 159-160). Dr. Barber claims that he then found an "intimal disruption with adventitial dissection" that extended

into the hilum of the kidney. (T. 159-160). Dr. Barber said that after they recognized that there was a problem with blood flow, he surgically cut open the renal artery in order to see where the blockage occurred. (T. 160). Dr. Barber then decided to remove the donor kidney from Joey's body and close the incision.

Dr. Barber admitted that the donor kidney to be transplanted into Joey was torn and damaged with an intimal tear in the renal artery. (T. 143-144). However, Dr. Barber denied causing the intimal tear during surgery or being aware of the tear before releasing the clamps and trying to obtain blood flow. (T. 143-144). Throughout this litigation and at trial, Dr. Barber gave several versions as to the cause of the intimal tear:

Version 1 - On February 14, 2002, immediately after the unsuccessful surgery, Dr. Barber told Joey Gore's family that it was his opinion that the kidney was torn when harvested, **and that the tear was not caused by trauma from the automobile accident.** (T. 118-119, 370-372)

Version 2 - On February 20, 2002, Dr. Barber wrote Clint McDaniel at the Mississippi Organ Recovery Agency and stated that **it was his opinion that the kidney was torn after *in situ* perfusion.** (RE 3; UMC00352)<sup>1</sup>

Version 3 - On February 26, 2002, Dr. Barber wrote Joey Gore's treating physician, Dr. Thomas Wooldridge and stated that "[d]issection of the kidney revealed that there was a complete intimal disruption at the level of the hilum **which I believe occurred at the time of procurement.**" (RE 3; UMC00354)

Version 4 - On September 3, 2004, during his sworn deposition, Dr. Barber **gave the opinion that the intimal tear "probably was initiated at the time of the automobile accident..."** (RE 5; Deposition of Dr. William Barber, pp. 10-11)

Version 5 - On April 10, 2007, at trial, Dr. Barber testified **that the "automobile accident could have been responsible for weakening or partially tearing the intimal lining of this renal artery."** (T. 144)

Version 6 - On April 10, 2007, at trial, Dr. Barber also testified **that the tear "could have**

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<sup>1</sup>Perfusion occurs when a fluid is pumped through an organ. *In situ* means "in the natural or original position."

**been caused during the procurement procedure by the doctors in Minnesota,” and that “there’s no degree of certainty as to the relationship of the automobile accident to the complete intimal tear.” (T. 146; 174-176)**

Version 7 - On April 10, 2007, at trial, Dr. Barber testified **that the most likely event for the complete disruption was “during the surgery” in Minnesota.** (T. 177)

Version 8 - On April 11, 2007, at trial, Dr. Barber testified that the tear in the intima **was caused by traction on the kidney at the time of procurement** after the flush was initiated, and that was done in Minnesota by the renal or transplant fellows who were sent in to procure the organs (T. 427)

**Regardless of how the kidney was torn, Dr. Barber admitted that he had a duty to inspect it for intimal tears.** (T. 429).

Dr. Barber was re-called as a witness by UMC during its case in chief and again testified regarding the surgical procedure he performed on Joey Gore. (T. 403-405). He testified that he looked down the entire renal artery of the kidney and did not notice any blood staining or anything to cause him concern. (T. 405-406). **Dr. Barber testified that careful inspection of the kidney’s anatomy and renal artery were part of the standard of care.** (T. 405-406). **However, Dr. Barber conceded that his operative report does not contain reference to any inspection of the artery.** (T. 406; 426). As expected, Dr. Barber gave the self-serving testimony that although inspection of the kidney is not mentioned anywhere, that he performed an inspection that was consistent with the standard of care.<sup>2</sup> (T. 406).

After Dr. Barber realized that the kidney was not functioning properly, he claims he dissected or cut along the renal artery and saw what appeared to be an intimal disruption of the kidney. (T. 411). He said the intimal tear was about 3 cm from the opening of the ostium. (T. 413). Dr. Barber has previously encountered intimal tears at the ostium. (T. 413). However, he claimed the tear in

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<sup>2</sup>This is hardly surprising. There is a dearth of cases that actually see a medical doctor admit that they failed to follow the standard of care.

this case was not visible to the naked eye because it was too far down the renal artery, even though his records show it was in the "midpoint." (T. 413, 435; RE 3; UMC105). Shortly after ending the surgery, Dr. Barber took the kidney to the UMC Pathology Department. (T. 413-414). **He claims that Dr. Bret Allen from the UMC Pathology Department then cut the renal artery open so they could see the area in question.** (T. 414).

On re-cross, Dr. Barber admitted that there were two versions of the February 14, 2002 operative report. (T. 424). The resident's operative report dictated by Dr. Donald does not state that the renal artery was cut open after the problem with blood flow was realized. (T. 424; UMC120-121). Dr. Barber said Dr. Donald just "omitted" the important fact of dissection of the renal artery from the operative report. (T. 427). Dr. Barber is not sure if he made changes to his own operative report before or after the pathology report was dictated on February 20, 2002. (T. 424-425).

Dr. Barber was confronted with Dr. Bret Allen's testimony that the tear was visible to the naked eye and that the kidney was not cut on when first brought to the pathology department. (T. 431-432). **Dr. Barber has no explanation for Dr. Allen's conflicting testimony on this crucial point.** (T. 432-433). Finally, Dr. Barber said that the medical record and medical bill that state the tear was caused during surgery are wrong. (T. 433).

### **C. Dr. William Donald's Testimony Shows The Renal Artery Was Not Dissected After The Failed Surgery**

Dr. William Donald testified that he was a senior resident surgeon at UMC in February 2002 when Joey Gore came in. (T. 437). Dr. Donald testified that the surgery was uneventful at first. (T. 440). Dr. Donald and Dr. Barber exposed the iliac artery and vein where the kidney was going to be sewn into Joey Gore's blood supply and then sewed the vein and artery as they normally do in a kidney transplant. (T. 440). When they removed the clamps, the kidney normally goes from light

tan to pink or purple color, but this kidney did not do that. (T. 440). They began looking for the problem to try to figure out why the kidney did not appear to be getting adequate blood flow. (T. 440-441). After they could not find the problem, they cut open up the renal artery along its length and found the intimal tear. (T. 441). Dr. Donald testified he does not know the cause of the intimal tear.

Dr. Donald wrote his operative notes within a few hours of the failed surgery while it was still fresh on his mind. (T. 447; RE 3; UMC105). Dr. Donald's February 14, 2002, 4:00 p.m. handwritten operative note says **"arteriotomy showed intimal disruption of renal art.[artery] at midpoint."** (RE 3; UMC105). Further, Dr. Donald's February 15, 2002 operative report does not mention that the renal artery was cut open. (T. 444; RE 3; UMC357-358). **Thus, Dr. Donald's records do not mention any dissection or cutting of the renal artery after the problem with blood flow was found.** The dissection of the renal artery is mysteriously absent from his original, contemporaneous operative notes. (RE 3; UMC105, UMC357-358).

#### **D. The Conflicting Operative Reports**

When leaving UMC, the Gore family requested a copy of Joey's medical records. (T. 374). The family was told "no" by the Risk Manager. (T. 127). UMC said that Risk Management had to go through the medical records first before releasing them. (T. 374-375). At trial, it became apparent that UMC would not initially release Joey's medical records because the records revealed UMC's negligence.

When Dr. Barber was questioned about Joey Gore's medical records, it was revealed that there are actually two different versions of Joey Gore's operation report. (T. 158-160). Resident surgeon Dr. William Donald's operative report was dictated within twenty-four hours of the surgery, on February 15, 2002 and **does not state that the kidney was dissected during surgery or after**

**the problem with blood flow was noted.** (T. 183; RE 3; UMC 357-8). Conversely, Dr. Barber's operative note was dictated and authenticated on February 20, 2002 and says that "the renal artery was dissected along its length and what appeared to be an intimal disruption with adventitial dissection was noted to extend into the hilum of the kidney." (RE 3; UMC 120-122). **This discrepancy is crucial because UMC's own pathologist, Dr. Bret Allen, testified that the intimal tear was visible to the naked eye when brought to the UMC pathology lab.** (RE 6, pp. 58-59). Dr. Allen's testimony directly contradicts Dr. Barber, who said that the intimal tear was not visible to the naked eye. (T. 183-184). This conflict is also important because it shows that the kidney was not cut or dissected prior to being delivered to UMC's Pathology Department.

#### **E. The Standard Of Care Requires Careful Inspection For Intimal Tears**

There was testimony and other competent evidence presented regarding the standard of care for inspection of a transplanted kidney. A well known complication at the time of kidney transplantation surgery is the presence of an intimal flap, which presents a "dangerous threat to the arterial flow." (RE 7; Morris, *Kidney Transplantation, Principles and Practice*, 5<sup>th</sup> Ed.). The authoritative literature in the field also cites at least two known causes of tears to the renal artery: 1) damage to the renal artery during retrieval from undue traction which results in an intimal fracture; or 2) intimal damage from cannulation during perfusion. (RE 7). **Thus, the authoritative literature calls for "careful inspection of the artery and its ostium from within while preparing the kidney on the bench"** to detect an intimal flap, and that the problem "can be corrected by placing an intimal tacking stitch or by shortening the renal artery to a point distal to the damage." (RE 7). Dr. Barber testified that he was familiar with Professor Morris' textbook on kidney transplants and the risk of intimal tears. (T. 154, 156). The standard of care required a careful



inspection of the renal artery prior to implantation. (T. 154, 405; RE 7).

#### **F. Dr. Bret Allen And The UMC Pathology Report**

Dr. Bret Allen's testimony and his UMC Pathology Report were presented to the trier of fact.<sup>3</sup> (RE 3; UMC356; RE 6; R. 1114-1137). Dr. Allen described his involvement with the subject kidney. (RE 6, pp. 10-11, 15, 18-21). **Dr. Allen testified that when the kidney was presented to him in the pathology lab at 8:36 a.m. on February 15, 2002 the tear in the renal artery was visible to the naked eye.** (RE 6, pp. 23-25, 37-41, 58-59). The tear was approximately 3/4 of an inch and **was external to the mass of the kidney.** (RE 6, p. 41). He took photographs of the intimal tear. (RE 6, pp. 33, 49, 77-79; RE 8; R. 1111-1112). **The tear was clearly visible before Dr. Allen ever cut or dissected the renal artery.** (RE 6, pp. 58-59).<sup>4</sup>

#### **G. Dr. Rodrigo Galvez's Opinions**

Dr. Rodrigo Galvez was designated and testified as the Plaintiff's medical expert. (R. 1688-1703). Dr. Galvez explained that the kidneys essentially work as a filter, with blood coming through arteries and then sending clean blood back in to the body. (T. 204). The renal artery at issue is about 3-4 cm long. (T. 205). The outer lining of the renal artery is called the adventitia, the middle lining is called the media, and the inner lining is called the intima. (T. 206).

Dr. Galvez testified that the donor kidney was damaged with a tear midway in the renal

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<sup>3</sup>Dr. Bret Allen's entire deposition is a part of the record and was attached to Plaintiff's responses to Defendants' various Motions for Summary Judgment. (R. 1114-1137). Dr. Allen's deposition was also reviewed and relied upon by experts for the parties. Further, some of Dr. Allen's sworn deposition testimony was presented at trial.

<sup>4</sup>Dr. Allen explained the difference between a tear and dissection in pathology. "The intimal tear is a specific description of damage to that portion of the artery, the intima. Dissection involves damage to layers of the artery other than that, usually the media." (RE 6, p. 57). "...We're not talking about people with knives and scissors dissecting." (RE 6, p. 74). Thus, dissection, from a pathology perspective, does not mean a surgical cut.

artery. (T. 207). This is consistent with Dr. Barber's original findings. (T. 209, 216). The tear was about 3/4 inch long. (T. 207). The UMC Pathology Report from Dr. Bret Allen confirmed that the tear went down through the intima, the media, and that blood seeped through the adventitia causing blood to be visible on the outside of the renal artery. (T. 206; RE 3; UMC356). When looking at the outside of the renal artery, you normally only see the adventitia, but because the tear was midway in the renal artery, you can see the tear and that allows you to put in a stitch or cut off the problem. (T. 207-208). Accordingly, the tear in the subject kidney is easily visible as it is in the midpoint of the artery. (T. 207-208). This refutes UMC's claim that the tear occurred far into the branches of the artery and that it was hidden from sight.<sup>5</sup> (T. 209; RE 9).

Dr. Galvez also opined that the intimal tear did not happen at the time of the automobile accident, because if there was bleeding to the adventitia when they recovered the organs in Minnesota it would have been noted. (T. 210). His opinion is bolstered by the fact that there was no trauma noted to the donor's abdominal cavity or lower back. (T. 210). Dr. Galvez testified that the UMC Pathology Report from Dr. Bret Allen referenced a 1-2 cm (3/4 inch) intima tear **associated with recent adventitial hemorrhage**. (T. 208, 214; UMC356). This adventitial hemorrhage, or bleeding, is in the outside of the artery. (T. 214). This is extremely important because it establishes when the tear occurred. (T. 208). It rules out the automobile accident because the wreck was almost three days before the pathological examination at UMC. (T. 214-215). Thus, the tear and associated bleeding could not have been "recent" if it occurred in Minnesota at the time

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<sup>5</sup>Dr. Barber originally described the location of the intimal tear as being in the midpoint of the renal artery. (T. 435; RE 3; UMC105). However, by trial, Dr. Barber had mysteriously "moved" the location of the tear away from the midpoint and far into the tiny arterial branches at the base of the kidney. A comparison of the drawings by Dr. Barber on February 20, 2002 and April 10, 2007 at trial show this chicanery. (RE 3; UMC352; RE 9)

the kidneys were harvested. (T. 215).

Dr. Galvez also opined that the adventitial hemorrhaging and tear were visible to the naked eye and should have been seen by the UMC doctors. (T. 209). Dr. Galvez agreed with UMC's own pathologist, Dr. Bret Allen, that the tear was visible to the naked eye and that you did not need a microscope or magnifying lens to see it. (T. 215-216). Dr. Galvez marked the tear on the photographs. (T. 212-214; RE 8).

Dr. Galvez also testified regarding the violation of the standard of care. (T. 217; RE 7). He testified that the standard of care requires the surgeon to carefully inspect the renal artery from within for an intimal flap or intimal damage on the operation bench before implantation into the patient. (T. 218; RE 7). If there is an intimal tear, the authoritative literature states that a tacking stitch may be used. (RE 7). Or, if the tear is too close to the line of the section, the surgeon may sew it together with the healthy part of the kidney. (T. 217; RE 7). In this case, the donor kidney should have been carefully examined by Dr. Barber and Dr. Donald, and if a problem was encountered, they should check the procedure. Thus, either a tacking stitch or cutting off the damage should have been done. (T. 217-218).

Had Dr. Barber or Dr. Donald inspected the kidney at all, they would have detected the intimal tear which can be corrected. (T. 218). Accordingly, Dr. Galvez opined that either 1) Dr. Barber inspected the renal artery, found damage, and failed to take corrective action, or that 2) Dr. Barber did not see the visible damage and proceeded with the grafting. (T. 218-219). Either way, Dr. Barber was negligent. (T. 219). Dr. Galvez also disagrees with Dr. Barber's contention that the tear was caused at the time of harvesting in Minnesota. (T. 219). However, even if the kidney was torn in Minnesota, UMC would still be negligent because Dr. Galvez (and Dr. Barber for that matter) agreed that the UMC surgeons are still responsible for inspection of the renal artery to see if there

the kidneys were harvested. (T. 215).

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not reflect an inspection of the kidney. (T. 563).

### **SUMMARY OF THE ARGUMENT**

UMC provided Joey Gore with a defective kidney that had an intimal tear in the renal artery. It was the duty of Dr. William Henry Barber and Dr. William Donald to carefully inspect the kidney for intimal tears. This was not done, and as a result, Joey Gore suffered severe injuries. The Plaintiff presented evidence from Dr. Rodrigo Galvez regarding the breach of the standard of care and bolstered that testimony through other medical doctors, authoritative literature, and the Plaintiff's medical records. Further, the damages award was sufficient based on the evidence presented. Finally, the Anatomical Gift Act does not bar recovery in this case.

### **ARGUMENT**

#### **I. DR. RODRIGO GALVEZ WAS PROPERLY ACCEPTED AS AN EXPERT WITNESS BY THE TRIAL COURT**

Dr. Rodrigo Galvez testified for the Plaintiff as an expert medical witness. (T. 194-233; RE 10). At trial, Dr. Galvez placed liability for the failed kidney transplant squarely on UMC's doctors. UMC knows that it cannot win on appeal if this Court accepts Dr. Galvez's devastating testimony. Thus, UMC claims that the trial committed reversible error by allowing Dr. Rodrigo Galvez to testify outside of his expertise at trial, and claims that he did not have the education, training, or experience to testify about transplant surgery. (Appellant's Brief, pp. 9-11, 13). This argument has no merit and should be denied.

Rule 702 of the Mississippi Rules of Evidence governs the admissibility of expert testimony.

#### **Rule 702**

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 testify thereto in the form of an opinion

cause and manner of injury and death.

Dr. Rodrigo Galvez arguably has more experience examining and inspecting human organs, including kidneys, than anyone in the State of Mississippi. At the very least, Dr. Galvez has more experience inspecting damaged kidneys than anyone that testified in this case. In fact, he has personally inspected over 10,000 kidneys, specifically analyzing kidneys for damage. (T. 197-198). He has extensive experience with kidney pathology, kidney disease, and injuries to the kidney. (T. 197-198). Dr. Galvez routinely removes and examines kidneys to analyze them for disease, as pathology involves the study of changes on human body or organs because of processes like disease, accident, or homicide. Dr. Galvez has expertise in anatomic pathology, which is the study of tissues or organs, and clinical pathology, which is the study of fluids and tissue. (T. 197-199). Dr. Galvez has practiced forensic pathology for the last thirty (30) years. This required him to examine a deceased body and its organs, and establish the cause, time, and manner of death and rule it an accident, homicide, or suicide.

Dr. Galvez is licensed to practice medicine in Mississippi and New York. (T. 202). He is board certified in anatomic clinical pathology, psychiatry, and neurology psychiatry. (T. 197-198). He is on staff at several hospitals in Mississippi, including but not limited to St. Dominic's, Brentwood, Claiborne County, Franklin County. (T. 199-200). He is licensed to practice surgery, but chooses not to do so. (T. 202).

Dr. Galvez also has knowledge, education, and experience of how a kidney transplant is performed. (T. 228-229). He has observed kidney transplant surgery. (T. 229). He is familiar with the procedures during removal of the kidneys while the kidneys are still in the body, including how the surgeons cut the renal artery and remove the kidney. (T. 229). Dr. Galvez is familiar with how surgeons dissect fat and tissue around the kidney so it can be freely removed. (T. 229). Dr. Galvez

was tendered and accepted as an expert in general medicine, anatomic and clinical pathology, and psychiatry. (T. 201, 203-204).

In the case at bar, Dr. Galvez reviewed the depositions, including Dr. Barber and Dr. Allen. He also reviewed Joey Gore's medical records, including the operation reports of Dr. Barber and Dr. Donald, and reviewed the donor's medical records in forming his opinions. (RE 12). He also marked the tear on photographs and reviewed the UMC Pathology Report. (RE 13). Dr. Galvez was also very familiar with the authoritative literature on kidney transplant surgery, (T. 200; RE 7).

This information and authoritative literature provided the standard of care for the kidney transplant surgeons at UMC, and provided the standard for what Dr. Barber should have done in observing the standard of care in transplanting this kidney. (T. 217-219). The *Morris* textbook states the surgeon should carefully inspect the kidney as it is placed on the operation bench. (T. 218). Dr. Galvez was familiar with careful inspection of the ostium (the opening) while preparing the kidney on the operation bench, which allows the surgeon to detect any intimal damage in the renal artery, which is a known complication. (T. 218; RE 7). The standard of care announced in the *Morris* textbook was acknowledged by Dr. James Wynn and purportedly followed by Dr. Barber. Thus, Dr. Galvez uses the exact same standard of care as the defendant, but reaches a different result. This is entirely proper under the Rules and often happens in cases where there is a "battle of experts."

Dr. Galvez was clearly qualified to testify about the intimal tear with recent adventitial hemorrhage being visible to the naked eye. Dr. Galvez's opinions were relevant in this case and helpful to the trier of fact. Through his education, training, and vast experience, Dr. Galvez explained the exact location of the intimal tear and why it was visible to the UMC surgeons. Again, Dr. Galvez likely has more experience analyzing damaged internal organs than anyone in the State.

Quite simply, that is one of the key components of his job as a forensic pathologist. Dr. Galvez is routinely asked to provide opinions regarding the location and extent of injuries. Moreover, his opinion in this area was corroborated by UMC's own pathologist, Dr. Bret Allen. Using all of the above, Dr. Galvez found that Dr. Barber did not adequately inspect the renal artery. This opinion is absolutely within Dr. Galvez's field of expertise.

Although not decided until the case *sub judice* was on appeal, the Plaintiff urges this Honorable Court to follow the well reasoned dissent in the *McDonald* case. *McDonald v. Memorial Hospital at Gulfport*, 8 So. 3d 175 (Miss. 2009, Kitchens, J., dissenting). In *McDonald*, Justice Kitchens found that Dr. Rodrigo Galvez had the education, training, and experience to testify against a gastroenterologist. *McDonald*, at ¶31. As argued in *McDonald*, Rule 702 is broadly constructed and should be broadly construed. Rule 702 does not purport to restrict expert testimony to the domain of a tiny class of geniuses, but merely to differentiate between experts and laypersons. *McDonald*, at ¶25. The broad construction of Rule 702 is practical, and accounts for the reality that doctors are reluctant to testify against other doctors in the same speciality. However, this Honorable Court has recently tightened the requirements of Rule 702 to require a Plaintiff to obtain a nearly identical expert to the defendant doctor. *See Cheeks v. Bio-Medical Applications, Inc.*, 908 So. 2d 117, 121 (Miss. 2005)(held trial court correctly excluded family physician from testifying about dialysis procedure). Such a rigid interpretation of Rule 702 is not required, and severely prejudices plaintiffs in other cases where expert testimony is required.<sup>6</sup> In light of the above, the trial court

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<sup>6</sup>Such a restrictive application of Rule 702 would require a plaintiff to find a "mirror image expert" in the exact same sub-specialty as the defendant doctor. This is not required in accident reconstruction (e.g. car v. boat), engineering (e.g. electrical v. mechanical), or real estate (e.g. residential v. commercial) cases. If the expert has the requisite education, training, and experience in their field, they are allowed to testify without having a sub-specialty. Thus, the sub-specialty requirement should not be used in medical malpractice cases.



correctly qualified Dr. Galvez as an expert witness, and his testimony regarding the failure to inspect the renal artery was within his areas of expertise.

## **II. OVERWHELMING EVIDENCE SHOWS THAT UMC BREACHED THE STANDARD OF CARE**

In a medical malpractice case, plaintiffs are required to prove the following elements:

Establish, by expert testimony, the standard of acceptable professional practice; that the defendant physician deviated from that standard; and that the deviation from the standard of acceptable professional practice was the proximate cause of the injury of which the plaintiff complains.

*Wayne General Hospital v. Hayes*, 868 So. 2d 997, ¶24 (Miss. 2003).

When proving these elements in a medical malpractice suit, expert testimony must be used. Not only must the expert identify and articulate the requisite standard that was not complied with, the expert must also establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries. *Barner v. Gorman*, 605 So. 2d 805 (Miss. 1992), citing *Latham v. Haynes*, 495 So. 2d 453 (Miss. 1986).

There was overwhelming evidence that UMC breached the standard of care when its doctors failed to adequately inspect the kidney for intimal tears. The trial court made detailed findings of fact and conclusions of law and ruled that the Plaintiff Joey Gore met his burden of proof.

The plaintiff established through the expert testimony of Dr. Rodrigo Galvez that Dr. Barber should have inspected the kidney specifically the renal artery prior to the transplant. If Dr. Barber had inspected the renal artery, he would have noticed the intimal tear because it was visible to the naked eye according to Dr. Allen and Dr. Galvez.

**Therefore, the Court finds that Dr. Barber did not inspect the kidney prior to the transplant thereby breaching the standard of care.** The Court also finds that Defendant University of Mississippi Medical Center is liable for Dr. Barber's negligence.

(RE 1, p. 4)(Emphasis added).

The following evidence was presented to the trier of fact regarding the negligence of UMC:

1. Authoritative literature stated the standard of care required careful inspection of the renal artery at the ostium on the operation bench prior to insertion. (RE 7)
2. Dr. Barber agreed that careful inspection was consistent with this standard of care. (T. 154, 405; RE 7)
3. The original UMC medical records do not contain any reference to an inspection of the renal artery by the UMC doctors. (T. 406, 426; RE 3; UMC120-121; UMC357-358)
4. The original UMC medical records do not state that the renal artery was dissected after the surgery by the UMC doctors to locate the location of the problem. (T. 183-184; RE 3; UMC121)
5. Dr. Bret Allen testified that the intimal tear with recent adventitial hemorrhage was visible to the naked eye when he first inspected the renal artery in the UMC Pathology Department. (RE 6, pp. 23-25, 37-41, 58-59)
6. Dr. Bret Allen testified that he did not cut the renal artery when the organ was first presented to the UMC Pathology Department. (RE 6, pp. 23-25, 37-41, 58-59)
7. Dr. Rodrigo Galvez testified that the intimal tear was approximately 3/4 of an inch long and was located at the midpoint of the renal artery. (T. 207-209)
8. Dr. Rodrigo Galvez testified that the intimal tear was visible to the naked eye. (T. 207-209)
9. The failure to inspect the kidney for a known complication such as an intimal tear constituted negligence, breached the standard of care, and proximately caused Joey Gore's injuries. (T. 217-221, 429)

Dr. Barber's credibility was called into question, because although Dr. Barber claimed that he inspected the kidney, his testimony was contradicted by the contemporaneous operation reports and two pathologists. Moreover, Dr. James Wynn admitted that Dr. Barber's credibility was an issue because Dr. Barber had given different versions regarding what had caused the tear. (T. 554). Dr. Wynn also chose to "disregard" several crucial facts to reach his opinion that the tear was not visible to the naked eye before the surgery started. (T. 552-554).

Obviously, the trial court was justified in not giving the testimony of Dr. Barber and Dr. Wynn much credibility. Once that testimony became suspect, the case is crystal clear based on the records: The kidney was torn during surgery or not sufficiently inspected and as a result Joey Gore was severely injured. Thus, there was more than enough evidence to support the trial court's finding of liability against UMC.

### **III. IN THE ALTERNATIVE, THE LAYMAN'S EXCEPTION ALLOWS RECOVERY**

Even if this Honorable Court finds that Dr. Galvez was not qualified as an expert witness, the facts of this case warrant recovery under the "layman's exception" to the expert requirement. The layman's exception applies to situations of obvious negligence such as amputating the wrong limb or leaving a sponge in a patient. "For instance, a layman can understand without expert testimony that the unauthorized and unexplained leaving of an object inside a patient during surgery is negligence." *Hubbard v. Wansley*, 954 So. 2d 951 (Miss. 2007), citing *Sheffield v. Goodwin*, 740 So. 2d 854, 857 (Miss. 1999).

Here, the medical records from UMC clearly state that the kidney was damaged "due to intimal tear during surgery." (RE 3; UMC109, 112). The UMC medical billing codes also reflect that Joey Gore was charged for an "accidental puncture or laceration during a procedure." (RE 3; UMC78). Also, as fully discussed in Section II. above, there was no notation of an inspection of the kidney in the medical records. It is not unreasonable to find that a layperson, given these facts, could find negligence on the part of UMC.

#### IV. THE ANATOMICAL GIFT ACT DOES NOT APPLY<sup>7</sup>

The Uniform Anatomical Gift Act (hereinafter “UAGA”) provides civil and criminal immunity for a person that acts in good faith in accordance with the terms of UAGA or with the anatomical gift clause of another state. Uniform Anatomical Gift Act §§ 2-7 (1968). The statute is unambiguous, and does not grant blanket immunity for all areas of organ transplantation. The Mississippi Anatomical Gift Law is modeled after the Uniform Anatomical Gift Act. Defendant UMC argues that the Mississippi Anatomical Gift Law (“MAGL”) shields it from liability for acting in good faith in the organ transplantation process. Miss. Code Ann. § 41-39-31 (1972) et seq.<sup>8</sup> UMC’s argument assumes that the MAGL applies to all actions connected with the transplant operation from the pre-death treatment of the donor to the transplantation of the donee. The terms of the MAGL are not so broad, and even a cursory reading of the statute shows that it is inapplicable to the case at bar.

Any person who, in good faith and acting in reliance upon and authorization made under the provisions of sections 41-39-31 to 41-39-51 and without notice of revocation thereof, takes possession of, performs surgical operations upon, removes tissue, substances or parts from the human body, or refuses such a gift, *and any person who unknowingly fails to carry out the wishes of the donor according to the provisions of said sections* shall not be liable for damages in a civil action brought against him for such act.

Miss. Code Ann. § 41-39-45 (1972)(Emphasis added).

On its face, the plain language of the MAGL concerns fulfilling “the wishes of the donor” regarding anatomical gifts. It is clear that the MAGL does not provide immunity for negligence

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<sup>7</sup>The Appellee incorporates the arguments in Section IV. in response to the Amicus Brief filed by Lifesource, et al. in this matter.

<sup>8</sup>As noted in Lifesource’s Amicus Brief, the MAGL was amended in 2008, but the substance of Section 41-39-45 has remained the same.

committed on **recipients** of donor organs such as the Plaintiff Joey Gore. In this case, the donor was from Minnesota. At the request of Lifesource, the donor's family agreed to donate both kidneys. There is no indication in the record, nor is any evidence cited by Defendant UMC, that the donor's family wishes were not carried out.

While UMC cites no case law to support its position that the MAGL immunizes UMC, two sources squarely reject the Defendant's argument. The Supreme Court of Wisconsin has previously addressed a similar liability limitation provision based on the Uniform Anatomical Gift Act and Section 155.06(7)(c) of the Wisconsin Code.<sup>9</sup> *Williams v. Hoffman*, 223 N.W.2d 844 (Wisc. 1974). The *Williams* Court expressly found that the terms of the section did "not extend to treatment of the donor patient prior to death, **nor to treatment of the live transplant donee.**" *Williams* at 846 (Emphasis added). A similar conclusion was reached by one commentator's analysis of Section 7 of the Uniform Anatomical Gift Act. *Section 7 of the Uniform Anatomical Gift Act on the Determination of Death*, 11 Ariz.L.Rev. 749, 764.<sup>10</sup> In light of the above, it is clear that no authority supports the Defendant's position that UMC is immune from liability under the MAGL. Thus, the Defendant's argument on this issue is completely without merit and should be denied.

## **V. THE TRIAL COURT PROPERLY AWARDED DAMAGES**

The trial court awarded damages in the amount of \$226,678.13 for medical bills and other

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<sup>9</sup>Section 155.06(7)(c) of the Wisconsin Code provides that "[a] person who acts in good faith in accord with the terms of this section or with the anatomical gift laws of another state (or a foreign country) is not liable for the damages in any civil action or subject to prosecution in any criminal proceeding for his act." Wisc. Code Ann. § 155.06(7)(c).

<sup>10</sup>See also, *Tis Better to Receive: The Case for an Organ Donee's Cause of Action*, 25 Yale L. & Pol'y Rev. 403 (citing *Gonzalez v. Katz*, No. 2005-00217, Mass. Super., LEX 358 at \*11 (Mass. Super. Ct. July 14, 2006)(The donee's right to sue seems mostly confined to medical malpractice cases in which she experiences harmful treatment at the hands of the transplanting surgeon).

expenses related to Joey Gore's successful kidney transplant at UAB. (RE 1; R. 1970-1973). The trial court also awarded \$100,000.00 for pain and suffering. (*Id.*). At trial, Dr. Galvez testified that Joey Gore incurred medical expenses from UAB totaling \$226,678.13, and these bills were admitted into evidence. (T. 221-223; RE 9). These bills include the screening process and a two week stay in the hospital after the actual surgery. Joey Gore also testified that he received a bill from UMC for \$52,000.00 for the failed surgery, but that the bill was much lower than the UAB bill because it did not include a two week hospital stay. (T. 297-298). The trial court found that these bills were reasonable and necessary and related to the incident. (T. 223).

Miss. Code Ann. § 41-9-119 states proof that medical bills were paid or incurred because of injury shall be *prima facie* evidence that such bills so paid or incurred were reasonable or necessary. In fact, the Plaintiff's testimony on this issue is sufficient. The Defendant argues that the UAB bill is excessive, but offered no credible evidence from UAB to rebut the presumption that the bills were that the bills were accurate, reasonable, and necessary. This argument is specious and without merit.

### CONCLUSION

In conclusion, the judgment of the trial court should be affirmed.

**CERTIFICATE OF SERVICE**

I, Rocky Wilkins, of counsel for the Appellee in the above-referenced matter, do hereby certify that I have this day served, by United States mail, postage pre-paid, the foregoing to the following:

Honorable Winston Kidd, Trial Court Judge  
Hinds County Circuit Court  
Post Office Box 327  
Jackson, Mississippi 39201

Lanny R. Pace, Esq.  
J. Seth McCoy, Esq.  
Steen Dalehite & Pace, LLP  
Post Office Box 900  
Jackson, Mississippi 39205

John A. Banahan, Esq.  
Jessica B. McNeel, Esq.  
Bryan, Nelson, Schroeder, Castigliola & Banahan, PLLC  
Post Office Drawer 1529  
Pascagoula, Mississippi 39568

Timothy A Sullivan, Esq.  
Sarah E. Crippen, Esq.  
Best & Flanagan LLP  
225 South Sixth Street, Suite 4000  
Minneapolis, Minnesota 55402-4690

Randi Peresich Mueller, Esq.  
Page, Mannino, Peresich, & McDermott, PLLC  
460 Briarwood Drive, Suite 415  
Jackson, Mississippi 39236

John P. Fox, Esq.  
Post Office Box 167  
Houston, Mississippi 38851

THIS the 14<sup>th</sup> day of December, 2009.

  
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ROCKY WILKINS, ESQ.