IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER **APPELLANT**

VS. **CASE # 2008-CA-01087**

JOEY GORE **APPELLEE**

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

BRIEF IN REPLY OF APPELLANT UNIVERSITY OF MISSISSIPPI MEDICAL CENTER

Oral Argument is requested.

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Mr. Gore's response brief concentrates on issues that are not material. Mr. Gore devotes a significant amount of his brief to his analysis of what caused the intimal tear. Whether the tear occurred in the car accident that caused the donor's death, or in the procurement surgery, is not material to the issue of whether UMC breached a standard of care. Mr. Gore's embellishment concerning Dr. Barber's opinions as to what the caused the tear is simply a red herring.[1] Although an understanding of how the tear likely occurred during the procurement procedure is helpful in understanding the involved medical concepts, contrary to plaintiff's argument, it has little effect on the issues in this appeal.

Mr. Gore, while taking significant liberties in paraphrasing the evidence[2], either remains confused, or refuses to acknowledge, the uncontroverted proof: the kidney's appearance when it was prepared for transplant, and its appearance after it was taken out of Mr. Gore's body, were significantly different. When the kidney was prepared for grafting in Mr. Gore's body, it was free of blood (and thus, any hemorrhaging), the renal artery was about 2 inches long, and the midpoint of the renal artery was completely obscured by paranephric fat. By the time the kidney had been

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[1] No matter how strongly Mr. Gore argues otherwise, opinions that the tear was caused after in situ perfusion, at the time of procurement, during the procurement procedure, during the surgery in Minnesota, and by traction on the kidney at the time of the procurement after the flush was initiated - all refer to the same thing.

[2] Throughout his brief, Mr. Gore's version of the evidence does not match up with the trial record. See e.g., Gore brief at p.6 wrongly stating that at T. 160 Dr. Barber said he surgically cut open the renal artery; Gore brief at p.8 wrongly stating that at T. 432-33 Dr. Barber had no explanation for the tear being visible in pathology; Gore brief at p. 9 wrongly stating that at T.374-75 that risk management had to go through the medical records before releasing them; that Dr. Bret Allen's deposition testimony was introduced into evidence at trial; Gore brief at p. 21 wrongly stating that at T552-54 Dr. Wynn chose to disregard facts about the visibility of the tear.

removed from Mr. Gore's body, blood had been introduced into the kidney, the paranephric fat covering the midpoint of the renal artery had been dissected so that adventitial hemorrhaging in the midpoint was evident, and the renal artery had been shortened to its former midpoint.

As to the issues identified by UMC, Mr. Gore's arguments are not persuasive and the circuit court decision in his favor should be reversed and rendered.

I. Dr. Rodrigo Galvez should not have been allowed to testify outside his tendered and accepted fields of expertise.

In this case, the plaintiff's expert, Dr. Galvez, was tendered to the court as an expert "in general medicine, anatomic and clinical pathology and psychiatry." [T.201; RE 47] The court accepted Dr. Galvez in those areas, yet improperly allowed him to give opinions well outside those accepted areas of expertise.

Mr. Gore wholly failed to address this issue in his brief. Such failure is a confession of error. *Peavy Electronics Corp. v. Baan U.S.A., Inc.*, 10 So.3d 945, 956-57 (Miss. App. 2009). The confession of error results in a finding that Mr. Gore did not establish his medical malpractice claim with expert support needed in the area of transplant surgery. Consequently, this case should be reversed and rendered in favor of UMC.

II. Dr. Rodrigo Galvez did not have the requisite familiarity, experience or training to qualify him to give expert opinion concerning transplant surgery matters.

Mr. Gore argues that Dr. Galvez was qualified to offer expert opinions concerning kidney transplant surgical standards of care. Gore argues that Dr. Galvez is an expert in surgery, but simply chooses not to practice surgery. [Gore brief, p. 17] Dr. Galvez made no such statement, instead he testified that his medical license includes a license to practice surgery but that he does not practice surgery "because I don't have the expertise." [T. 202; RE 48] No further testimony showed that Dr.

Galvez had any expertise in general surgery, much less organ transplant surgery. Familiarity by way of seeing one procedure should not be enough to make one an expert. If, as with Dr. Galvez, the familiarity is based on seeing one procedure 25 to 30 years ago when the procedure was markedly different from a modern procedure, there is even less support for a finding of expertise.

Mr. Gore further argues that Dr. Galvez's experience as a pathologist qualifies him to testify about the appearance of a live kidney procured for transplant. There was no testimony at trial that Dr. Galvez had seen a live kidney since presumably the one transplant surgery he saw some 30 years ago. Dr. Galvez was candid when he testified that if he attempted a surgery, he would probably kill the patient. [T.202; RE 48] That certainly does not diminish Dr. Galvez's qualifications as a pathologist, but it does highlight the fact that to do their jobs, pathologists do not have to be concerned with preserving the vitality of a dead body or an organ presented to them in a pathology laboratory. It further points to the reason surgeons receive and prepare organs for transplant, and not pathologists. UMC does not dispute that Dr. Galvez could perform an autopsy, work his way down to the intima of the renal artery, and identify an intimal tear. However, the question in this case was not the appearance of a kidney in an autopsy, or even in a pathology laboratory after an attempted transplant. The material question was the appearance of the kidney before grafting, at a time when a kidney transplant surgeon had prepared the end of the renal artery for grafting into the donee's body and at a time when the kidney transplant surgeon must be careful not to disturb any parts of the kidney more than necessary. On this point, the evidence showed no expertise on the part of Dr. Galvez.

Mr. Gore argues for the first time that he was not required to present expert testimony because the standards associated with kidney transplant surgery fall within the layman's exception.

The applicability of the layman's exception was never raised in the circuit court, consequently, this court need not even address the issue. *Dotson v. Jackson*, 8 So.3d 230, ¶ 39 (Miss. App. 2009).

However, even if the issue is considered, the result is that the layman's exception does not apply to this case. "The general rule in Mississippi is that medical negligence may be established only by expert medical testimony, with an exception for instances where laymen can observe and understand the negligence as a matter of common sense and practical experience." *Vaughn v. Miss. Bapt. Med. Ctr.*, 20 So.3d 645, ¶15 (Miss. 2009). The exception "apples to situations of obvious negligence." *Hubbard v. Wansly,* 954 So. 2d 951, ¶ 30 (Miss. 2007). Lay testimony cannot provide the basis of proof of any element in a medical malpractice case other than items "purely factual in nature or thought to be in the common knowledge of laymen." *Lyons v. Biloxi HMA, Inc.*, 925 So.2d 151, ¶ 18 (Miss. App. 2006); s*ee also Holt v. Summers*, 942 So.2d 284, ¶12 (Miss. App. 2006)(where issues "are not pure questions of fact within the common knowledge of layman," the layman's exception is not applicable).

The exception has been recognized in cases involving foreign items being left in patients and where a patient was given the wrong medication. *See Vaughn*, 20 So.3d 645 at ¶ 26 *citing Coleman v. Rice*, 706 So.2d 696, 698 (Miss. 1997). On the other hand, Mississippi courts have rejected the application of the exception to a number of medical issues, even where those issues are understandable by a lay person once explained by an expert. *See e.g., Dotson v. Jackson*, 8 So.3d 230 (Miss. App. 2009)(not applicable where surgery resulted in injury to bladder during hysterectomy); *Smith v. Gilmore Mem. Hosp.*, 952 So.2d 177 (Miss. 2007)(not applicable where nurse failed to advise family that surgery was begun on child's wrong eye); *Irby v. North Ms. Med. Ctr.*, 654 So.2d 495 (Miss. 1995)(not applicable to allegation that nurses failed to properly monitor blood sugar in

the face of family requests to do so). Even if the problem at issue is one that can be appreciated by a lay person, the lay person exception does not apply to cases where a lay person cannot provide a legitimate opinion as to the competence and skill at issue. *Walker v. Skiwski*, 529 So.2d 184, 187-88 (Miss. 1988).

This case is not one of obvious negligence, as in a retained sponge case. Instead, the overwhelming evidence indicates that there was no negligence. *See* argument III herein and in UMC principal brief. Moreover, 9 of the 12 laypersons on the jury evidently thought this was not a case of obvious negligence.

None of the material issues were pure factual questions within the common knowledge of laypersons. A typical layperson has no background concerning the appearance of a donated kidney, the preparation of a donated kidney for transplant, nor how a transplant procedure is performed. Even Dr. Galvez, the plaintiff's tendered expert, did not show an understanding of some of the critical items in this case, including the appearance of a kidney prepared for transplant (as opposed to one found in an autopsy); modern kidney procurement and kidney transplant surgeries; and the change in appearance of a kidney and its blood vessels after an attempted transplant procedure. *See* pp. 13-14 of UMC principal brief. Consequently, a layperson has no basis to judge the competence and skill of the UMC transplant surgeons, and this case is not one that falls within the layman's exception.

III. The trial court's findings supporting liability on the part of UMC were against the overwhelming weight of the evidence.

Even though Mr. Gore recognized that the applicable standard of care requires surgeons to inspect kidneys before the kidneys are grafted into a donee's body, Gore continues to focus his

argument on the appearance of the kidney after the attempted transplant surgery. By attempting to lump these two different times together, Mr. Gore glosses over the undisputed key facts.

Before the kidney was grafted into Mr. Gore's body, the location of the tear was in the midpoint of the renal artery, too far away from the artery's opening to be seen. [T.413; RE 81] At that time, the tear was in the innermost layer of the artery, a layer that could only be seen by cutting open the artery. *See* Dr. Galvez testimony at T. 208. At that time, the kidney had been flushed of all blood, thus there could be no hemorrhaging. [T.407; RE 77] At that time, the midpoint of the artery was covered in fat. [T. 188-89; RE 41-42] Before the kidney was grafted into Mr. Gore's body, the surgeons had to examine the opening of the artery as the opening of the artery had to be prepared for anastomosis. [T.507; RE 99]

UMC does not dispute that the tear was visible when the kidney was removed from Mr. Gore's body. At that point, the tear was no longer in the midpoint of the artery, as the artery had been tied off and cut at its former midpoint so that a portion of the donor renal artery was left in Mr. Gore's body. [T.414; RE 82; T.492; RE 88] In other words, once a portion of the renal artery had been left in Mr. Gore's body, the tear was now much closer to the opening. By the time the kidney was removed from Mr. Gore's body, blood had been introduced into the kidney so that hemorrhaging and blood staining was possible. [T. 581-82; RE 111-112] By the time the kidney had been removed from Mr. Gore's body, the fat around the renal artery had been dissected away to allow the surgeons to see more of the renal artery.[3] [T.160; RE 39] There is no real dispute on these key facts, therefore

[3]Contrary to Mr. Gore's argument, Dr. Barber did not testify that he sliced the artery open along its length during the surgery. Instead, Dr. Barber testified that after realizing a problem, he dissected the fat away from the renal artery so that he could see the adventitia of the artery. T. 160; RE 39 Although Mr. Gore implies otherwise, Dr. Donald's revision to the operation record is a typical occurrence in a teaching setting. T.401-02, T.448, T.559-60

Mr. Gore fell back to the position of attempting to argue that the tear was visible at the end of the procedure and that somehow this equates to its appearance before the procedure began.

Finally, the overwhelming weight of evidence showed that if the intimal tear had somehow been discovered before grafting, Mr. Gore's injuries would not have been any less. The evidence was clear that in a modern transplant procedure, no inspection of the kidney is made until after the surgery is begun on the donee, including preparation of the donee's blood vessels for the transplant.[T. 512; RE 102] Consequently, even if the tear could have been discovered, Mr. Gore would have still had to recover from the attempted transplant procedure and still had to undergo another transplant procedure.

IV. UMC is immune from liability in this case pursuant to the Anatomical Gift Law.

Mr. Gore cites various authorities for his proposition that the Mississippi version of the Uniform Anatomical Gift Act does not apply to Mr. Gore's claims against UMC. However, all of the out of state authorities cited by Mr. Gore considered earlier, more limited versions of the Uniform Gift Act immunity provision. In *Williams v. Hofmann*, the court considered an early version of the uniform act that provided:

> 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 damages in any civil action or subject to prosecution in any criminal proceeding for his act.

223 N.W. 2d 844, 846 (Wisc. 1974). Similarly, the *Gonzales* decision cited by Mr. Gore considered a provision that provided:

> that a person, including a corporation, agency, association or any other legal entity, acting "in good faith in accordance with the terms of G.L.c. 113, §§ 8-14, or under the anatomical gift laws of another state or foreign country shall not be liable for damages in any civil action or be subject to prosecution in any criminal

proceeding."

Gonzales v. Katz, 2006 WL 2424820, *2 (Mass. Super. 2006). When considering such language, the law review author cited by Mr. Gore in an article actually entitled ***Suggested Revisions to Clarify the Uncertain Impact of Section 7 of the Uniform Anatomical Gift Act on Determinations of Death,*** recognized that at least six legislatures considering this early version of the act "have impliedly shown that they have interpreted the clause to exculpate the negligence of physicians." 11 Ariz. L. Rev. 749, 766 (1969). Consequently, the author suggested that if legislatures did not intend to extend the immunity to medical malpractice, the language in the immunity provision should be revised. *Id.* at 768.

The Mississippi legislature did revise the Uniform Act framework and expressly broadened the immunity to surgeons. In contrast to the earlier versions considered by the *Hofmann* and *Gonzales* courts, the Mississippi version states:

> 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 [the Anatomical Gift Law Act] 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 § 41-39-45. As Mr. Gore argues, section 41-39-45 does apply to persons who fail to carry out the wishes of the donor, however, Mr. Gore fails to point out that that phrase is preceded by the word "*and.*" Accordingly, the immunity provision applies not only to claims concerning the wishes of the donor but also to "any person who, in good faith . . . takes possession of, [or] performs surgical operations upon . . . such a gift." It therefore follows that the immunity extends to Mr. Gore's claims against UMC.

V. Alternatively, the trial court's findings supporting the amount of the damage award were against the overwhelming weight of the evidence.

Mr. Gore does not address UMC's argument that the total of the UAB charges was miscalculated. Instead, Mr. Gore argues that the trial court's finding concerning the UAB charges was appropriate based on section 41-9-119 of the Mississippi Code. Section 41-9-119 simply establishes a presumption until other evidence is presented. Once the reasonableness of the total of the UAB charges was rebutted, the question became one for the fact finder. *See Herring v. Poirrier,* 797 So.2d 797, 809 (Miss. 2009). In this case, the overwhelming rebuttal evidence concerning the miscalculation of the charges was not contradicted at trial or in Mr. Gore's response brief. Mr. Gore has presented no argument as to how the UAB charges could total $226,678.13. Instead, the overwhelming evidence shows that the UAB charges totaled $123,895.85.

CONCLUSION

For any of the above reasons, UMC requests this court to reverse the judgment of the trial court and render a decision in favor of UMC.

Respectfully submitted this the 30th day of December, 2009.

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