IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2008-CA-01173-COA

JAMES K. TRIPLETT, AS THE ADMINISTRATOR OF THE ESTATE OF JEAN B. TRIPLETT, DECEASED AND ANDREW MAXWELL TRIPLETT — APPELLANTS/CROSS APPELLEES

VS.

RIVER REGION MEDICAL CORPORATION; JOHN ADAMS, M.D.; PATTY STONE, CRNA; AND JOHN AND JANE DOES 1-20 — APPELLEES/CROSS APPELLANTS

BRIEF OF APPELLEES/CROSS APPELLANTS

APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY

R.E. PARKER, JR.
VARNER, PARKER & SESSUMS, P.A.
Post Office Box 1237
1110 Jackson Street
Vicksburg, Mississippi 39181-1237
Telephone: 601/638-8741
Facsimile: 601/638-8666

ATTORNEYS FOR APPELLEES/CROSS APPELLANTS

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case:

1. James K. Triplett, Plaintiff

2. John T. Givens, Esquire
   Timothy W. Porter, Esquire
   Patrick C. Malouf, Esquire
   Porter & Malouf, PA
   Counsel for Plaintiff

3. Andrew Maxwell Triplett, Plaintiff

4. Estate of Jean B. Triplett, Plaintiff

5. R.E. Parker, Jr., Esquire
   Varner, Parker & Sessums, P.A.
   Counsel for Defendants

6. John Adams, M. D., Defendant

7. Patty Stone, Certified Nurse Anesthetist, Defendant

8. River Region Medical Corporation d/b/a River Region Medical Center, Defendant

9. Lamar McMillin, M.D., Employee of Defendant River Region Medical Corporation

10. William Porter, M.D., Defendant - Dismissed

11. Gladys Howard, R.N., Defendant - Dismissed

This the 2nd day of April, 2010.

R.E. PARKER, JR.,
Attorney for Appellees/Cross Appellants

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This is an action for medical malpractice. Jean Triplett was a seventy-one (71) year old, white female, who had smoked for 41 plus years. (CR 11:659 through 660) (RE - 2) In 1997, Mrs. Triplett was diagnosed with right carotid stenosis in the 70 to 80% range and a left carotid stenosis in the 70 to 80% range (Defendant's Trial Exhibit 17) (RE-3) At that time, Dr. Maples, one of her cardiovascular surgeons in Jackson, Mississippi, strongly recommended that she undergo a carotid endarterectomy but Mrs. Triplett refused surgical intervention. In 1998, a follow-up was done by Dr. Maples who noted that her carotid stenosis had not significantly changed and both were approximately 70 to 80%.

On May 25, 1999, Mrs. Triplett's right carotid artery had progressed to 80 to 90% stenosis and on June 15, 1999, she finally consented to and underwent a right carotid endarterectomy. In April of 2002, Mrs. Triplett was evaluated by Dr. O'Mara, Dr. Maples partner and also a cardiovascular surgeon because she was having episodes of being unaware of significant frames of time. Dr. O'Mara determined that Mrs. Triplett had a right side stenosis of 80 to 99% with a significant difference from per previous ultrasound two years ago, and a unchanged left stenosis of 70 to 80%. He strongly advised Mrs. Triplett to undergo a bilateral carotid endarterectomy however, despite the full explanation of high risk of stroke without endarterectomy surgery, Mrs. Triplett refused any treatment. (Plaintiffs' Trial Exhibit 2 and Defendants' Trial Exhibit 7) (RE - 4)

In late 2003, Jean Triplett presented to Dr. William Porter a Vicksburg orthopedic surgeon with bilateral degenerative hip disease. Dr. Porter recommended epidural steroid injections however, Mrs. Triplett chose surgery. (Plaintiffs' Trial Exhibit 43) (RE - 5) Dr. Porter then referred Mrs. Triplett to Dr. Lamar McMillin, a family practitioner, for pre-op history and physical. At the pre-op

history and physical, Mrs. Triplett did not disclose to Drs. Porter, McMillin or Adams (her anesthesiologist) nor the Certified Nurse Anesthetist, Patty Stone, that she had been having symptoms from her severely occluded stenotic internal carotid artery since 2002. Additionally, she affirmatively misrepresented to Dr. McMillin that she had no symptoms when Dr. McMillin questioned her about her endarterectomy of 1999, and subsequent problems, if any, in his pre-op history and physical on December 30, 2003. (CR 12:844 through 848) (RE - 6) (Defendant's Trial Exhibit 9) (RE - 7)

During the cross-examination of James K. Triplett, the son of Jean Triplett, he testified that he was unaware of the findings and recommendations of doctors O'Mara, Maples, and a cardiovascular resident in 2002. He further testified, that Jean Triplett, despite past medical problems continued to smoke up until her surgery in 2004. (CR 11:607 through 609) (RE - 8). Finally, he testified that he was unaware that Dr. O'Mara, Dr. Maples and a cardiovascular resident strongly advised Mrs. Triplett to have a endarterectomy in 2002, failing which she was at high risk for stroke. (CR 11:613) (RE - 9)

Andrew Max Triplett, the husband of Jean Triplett, testified that in 1999 a right endarterectomy was performed but that Mrs. Triplett refused to do the left, against doctor's orders. (CR 11:658 through 659) (RE - 10). He also testified that she had smoked starting in 1962 up until her surgery and that numerous doctors had encouraged her to quit. (CR 11:659 through 660) (RE - 11). Additionally, he testified that he thought that Mrs. Triplett should have told Dr. McMillan about her symptoms and her history given to doctors Maples, O'Mara and the cardiovascular resident. (CR 11:671 through 673) (RE - 12). Finally, he admitted that he went to doctors Maples and O'Mara's office visits with Mrs. Triplett but that she never told him that her doctors had all strongly advised her to have bilateral endarterectomies, failing which she was at serious risk of stroke. (CR 11:671)

(RE - 13)

She presented for the hip replacement on January 6, 2004, with elevated blood pressure readings which both Dr. Adams, the Anesthesiologist and the CRNA, Patty Stone attributed to an anxious or excited patient, which is not abnormal prior to surgery. (CR 11:702) (RE - 14) Mrs. Triplett had been advised by three cardiovascular surgeons that she was at high risk for a stroke if she did not have bilateral endarterectomies and she had been advised by Dr. Adams (her anesthesiologist for hip surgery) that one of the risks of anesthesia was death, all the while knowing she had severe atherosclerotic vascular disease but did not disclose that to any of her doctors, her husband, or son.

Mrs. Triplett went to surgery without incident and was sent to PACU wherein neuro checks were normal. She was discharged from PACU to her room where she greeted family, visitors and during the night of the 6th and the morning of the 7th the nurses noted that she "continues to rest quietly with no signs or symptoms of distress." On January 7, 2004, Ms. Triplett awoke experiencing slurred speech and left sided weaknesses. An MRI performed concluded that a large right middle cerebral infarction with inclusion or slow flow involving the right internal carotid artery. The testimony established that Mrs. Triplett did not experience an ischemic stroke nor was it induced by surgery but was embolic in nature caused from her underlying disease by stenosis of her right side and smoking. A hypertensive stroke would have affected the water shield area of the brain not the right MCA distribution and from the size of the stroke it would not have been subtle for hours. In other words, the stroke was not surgery related. Mrs. Triplett died on October 25, 2006.

The Complaint in this matter was filed on March 3, 2006, naming River Region Medical Corporation, William C. Porter, M.D., John Adams, M.D., Patty Stone, CRNA, Gladys Howard, R.N., and John and Jane Does 1-20 as Defendants. (CR 1:10) (RE - 15) The Plaintiff's claims were

negligence, medical malpractice, respondent superior, breach of contract and punitive damages. *Id.*

The trial in this matter was conducted from May 12, 2008 through May 20, 2008. A verdict for the Defendants was returned by a vote of eleven to one. (CR 6:760) (RE - 16) The Plaintiffs filed their Notice of Appeal on June 20, 2008. (CR 6:798) (RE - 17) The Defendants timely filed their Cross Notice of Appeal on July 3, 2008. (CR 6:800) (RE - 18)

SUMMARY OF ARGUMENT

The trial court did not commit reversible error in granting summary judgment to River Region under the theory of respondent superior, for the actions of Lamar McMillin, M.D. The Plaintiff's medical expert, Dr. Jessie A. Green, M.D., submitted an affidavit in response to Defendants' Motion for Summary Judgment that was conclusionary in form. Further, Plaintiff's expert had failed to state with specificity the standard of care of each of the Defendants and the alleged violation nor that the said violation caused the injury. Plaintiff's expert did not state a standard of care to be followed by Dr. McMillin and therefore the grant of summary judgment was proper.

The trial court did not commit reversible error in failing to strike Juror No. 102 for cause. During voir dire, Jury No. 102 stated that she worked for a law firm that had performed some legal work for Defendant, River Region. Juror No. 102 stated under oath when questioned that she would not have any bias either way towards the parties and could judge the case fairly without prejudice. Furthermore, the Juror testified she was not aware of the type of case that the firm she worked for was handling for River Region nor did she have any direct connection with said case. The Plaintiffs failed to use a peremptory challenge upon this Juror and used peremptory challenges upon jurors whom they did not challenge for cause.

The trial court did not commit reversible error in failing to declare a mistrial when counsel for Defendants in his opening statement referred to Plaintiff's medical expert as the only expert they "apparently" could find in the whole Untied States to testify against the Defendants. Plaintiff's counsel made an objection, the court sustained the objection, and then further, instructed the jury to disregard that comment. Therefore, the statement did not have a prejudicial affect of improperly influencing the jury, and in addition, Plaintiffs' counsel failed to ask for a mistrial contemporaneously with the objection.

The trial court did not commit reversible error by excluding from evidence the consent form. The Plaintiff did assert in their complaint the claim of lack of informed consent under the heading of respondent superior but failed to bring it forth in the Pre-Trial Order and Plaintiffs did not address the issue of informed consent during their case in chief and further, waited until the last witness for the Defendants before even mentioning the issue. The Court properly denied the admission of the consent form and this testimony so late in the trial.

The trial court did not commit reversible error when it allowed the affidavit of Ahmed Badr, M.D., expert for the defense to be admitted. During the cross examination of Dr. Badr by the Plaintiffs, they questioned him extensively about the affidavit reading portions of it into the record. Defendants on redirect, in an effort to make the record clear moved to have the affidavit admitted in light of the Plaintiffs' questions. The court did not abuse it discretion in allowing the affidavit to be admitted into evidence.

The trial court did not err when it denied the Plaintiffs' proposed jury instruction P-25 because the jury instruction was a standard negligence instruction more notably, the "eggshell skull doctrine" which is improper under the facts of this case. Plaintiffs failed to disclose certain medical conditions prior to surgery and that if she had, surgery would not have been performed.

ARGUMENT

I.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT AND RELIEVING RIVER REGION OF ANY LIABILITY FOR LAMAR MCMILLIN, M.D.

In *Sheffield v. Goodwin*, 740 So.2d 854, 856 (Miss. 1999), this court held that "a trial judge's determination as to whether a witness is qualified to testify as an expert is given the widest possible discretion and that decision will only be disturbed when there has been a clear abuse of discretion." (citing *Palmer v. Biloxi Reg'l Medical Center, Inc.*, 564 So.2d 1346, 1357 (Miss. 1990)).

The Defendants filed a Motion for Summary Judgment on the grounds that the Plaintiffs had not produced a qualified expert witness stating the applicable standard of care of the defendants, that the defendants breached that standard of care, that the breach of standard of care caused damage to the plaintiff.(CR 1:145) (RE - 19) In response, Plaintiffs filed an affidavit from Dr. Jeffrey A. Green, a professor at Virginia Commonwealth University of Anesthesiology claiming to state what the standard of care was for the defendants and that the defendants breached that duty which caused Mrs. Triplett to suffer a stroke. (CR 3:324) (RE - 20) A hearing was conducted on June 29, 2007, the Court held that the Affidavit was conclusory and inadequate in that it failed to articulate the standard of care. (Sup. V. 1:17 to 21) (RE - 21) The Court gave the Plaintiffs an additional sixty (60) days until August 29, 2007, to examine the qualifications of the expert witness, as well as, allowing for a more specific affidavit to be produced with regards to the standard of care. On September 7, 2007, Plaintiffs filed their amended response submitting an Amended Affidavit of Dr. Jeffrey A. Green, M.D. (CR: 3:351) (RE - 22) The Court entered an Order on September 19, 2007 denying Defendant's Motion for Summary Judgment (CR 3:361) (RE - 23).

On September 26, 2007, Defendants filed a Motion for Reconsideration of Defendants' Motion for Summary Judgment after an amended affidavit of Dr. Green had been submitted. (CR 3:362) (RE - 24). On November 9, 20007, Plaintiffs filed their Response to Defendant's Motion for Consideration. (CR 3:369) (RE - 25)

A hearing was conducted on February 15, 2008, the Defendants argued that Plaintiffs' expert had failed to articulate the standard of care with any specificity and that further, he only criticized Dr. McMillin for clearing Mrs. Triplett for surgery. The Defendants further pointed out during the hearing, that all Dr. Green said was that "I believe that Mrs. Triplett was inappropriately cleared for surgery." (Sup. V. 1:30 through 33) (RE - 26) The Court held that the Plaintiffs' expert was not qualified to articulate the standard of care for Dr. Porter an Orthopedic Surgeon, Nurse Gladys Howard or Dr. McMillan a Family Practitioner. (Sup. V. 1:44 through 48) (RE - 27) The Court entered an Order granting Partial Summary Judgment as to the allegations against William C. Porter, Jr., M.D., Gladys Howard, R.N., and River Region's liability under the theory of respondent superior for the actions of Lamar McMillian, M.D. (CR 3:406) (RE -28)

This Court has held that experts should demonstrate familiarity not with a particular subject, but with a specialty. *Hubbard v. Wansley*, 954 So.2d 951, 957 (¶ 17) (Miss. 2007). Additionally, the Court held that it is the scope of the experts knowledge and experience and not their classification that governs the admissibility of their testimony. *University of Mississippi Medical Center v. Pounders*, 970 so.2d 141, 146 (¶ 17) (Miss. 2007). Here, the Plaintiffs' expert could only opine that Dr. McMillan should have done "further testing to determine the risk of perioperative stroke" yet fails to demonstrate with specificity with any experience or knowledge, what further testing if any, Dr. McMillan should have performed. Clearly, Dr. Green lacked the specific experience and knowledge in terms of the speciality area of a family practitioner or general

practitioner and therefore could not establish the standard of care that Dr. McMillian should have been operating under.

Finally, Plaintiffs' in their brief, argue that qualification of their expert was "at a minimum" to have been decided not at the summary judgment stage, but on voir dire of Dr Green. Prior to the February 15, 2008, hearing, a letter dated December 10, 2007, was sent to Plaintiffs' counsel by the Defendant referring to the *Smith v. Clement*, 983 So.2d 285, (Miss. 2008), case and giving them the opportunity to have their expert present at that hearing. (Sup. V. 1:27, 37) (RE - 29) (Exhibit 1 to February 15, 2008, hearing) (RE - 30). At the February 15, 2008, hearing, Plaintiffs declined the opportunity to have their expert present.

Further, during the voir dire of Dr. Green at trial, Dr. Green admitted that his affidavits/opinions were based on the records from December 30, 2003 until February of 2004, which did not include any of the records of Drs. O'Mara, Maples or the Cardiovascular Resident. Dr. Green testified during voir dire that he did not need those records to form a "valid opinion" and that nothing in those records changed his opinion regarding Dr. McMillan. Yet later, Dr. Green does concede that Mrs. Triplett should have told Dr. McMillan about the issues she was having regarding her carotid arteries and that she should have told Dr. McMillan that her other doctors had strongly recommended bilateral endarterectomy by her cardiovascular surgeons but that she had refused treatment. (CR 9:301 through 339) (RE - 31)

The Court properly granted partial summary judgment as to Dr. McMillan in that the Plaintiffs' expert could not establish what the standard of care was for the specialty of a Family Practitioner for surgery clearance through knowledge and experience and therefore was not qualified.

II.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO STRIKE JUROR NO. 102 WHO WAS EMPLOYED BY A LAW FIRM THAT PERFORMED SOME LEGAL WORK FOR RIVER REGION MEDICAL CORPORATION.

The purpose of voir dire is to weed out potential jurors who, for whatever reason, have bias either based on a relationship with one or more of the parties, or who, cannot after hearing all of the evidence, remain impartial and render a verdict based upon that evidence. It is also important to note that the Mississippi Supreme Court has held that:

> [J]urors take their oath and responsibility seriously, and when a perspective juror assures the court that, despite the circumstance that raises some question as to his qualification, this will not affect his verdict, this promise is entitled to considerable difference[.]

Hearney v. Hewes, 87 3rd 228, (Miss. 2009); quoting *Hamiliton v. Hammons*, 792 So.2d 956, 963 (Miss. 2001).

During voir dire by the Court, Juror No. 102 informed the Court that she worked for an attorney's office that had performed some legal work for River Region. The Court inquired into her knowledge of the matter the firm had handled for River Region and she responded that she was not familiar with nor had she worked on the matter. The Court further inquired whether it would be a problem for her to serve on the jury and she stated it would not. (CR 7:74 through 75) (RE - 32). The Plaintiff's attorney during his voir dire at no time made additional inquires of Juror No. 102 to inquire what type of or how much legal work the firm performed for River Region or even when the work was done or if it was completed. Plaintiff did move to strike Juror No. 102 for cause and the Court denied removal for cause. (CR 8:180 through 181) (RE - 33). Even discounting Juror 102's vote, the verdict would have been 10 to 2 for the Defendant.

Further, the Plaintiff used his peremptory challenges on Jurors 2, 26, 35 and 70. Plaintiff did

not challenge Jurors 2, 26 or 35 for cause. Clearly, Plaintiff used his peremptory challenges for strategic reasons only and now given the outcome, argues that it was error not to strike Juror No. 102 for cause. Plaintiffs had at least three if not all four of their peremptory challenges that they could have used if they felt that Juror No. 102 could not live up to her oath and decide the case based on the evidence.

Juror No. 102 clearly stated under oath, when questioned, that she did not have any bias either way towards the parties and could judge the case fairly without prejudice. Furthermore, she stated on the record that she was not even aware of the type of matter that the firm she worked for was handling for River Region and that she did not have any direct connection with the matter. Finally, if Plaintiffs' attorney felt that this juror would be biased, he clearly had an opportunity to use one of their peremptory challenges but voluntarily choose not to.

III.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO DECLARE A MISTRIAL WHEN DEFENSE COUNSEL IN OPENING STATEMENTS ARGUED THAT THE PLAINTIFFS APPARENTLY COULD ONLY FIND ONE EXPERT IN ALL OF THE COUNTRY THAT WOULD AGREE WITH THEIR THEORY OF THE CASE.

In determining if a statement made is prejudicial to a party this Court has held that it is of utmost importance that:

> "a judge can only make a determination of prejudice if the defendant makes a timely objection and motion for a mistrial. Strictly speaking, timeliness means the objection and motion must be made *contemporaneously with* the allegedly improper utterance."

Meena v. Wilburn, 603 So.2d 866, 874 (Miss. 1992). This has become known as the "contemporaneous objection rule." *West Cash & Carry Bldg. Materials of McComb v. Palumbo*, 371 So.2d 873, 876 (Miss. 1979). This allows a judge to avoid a mistrial by admonishing the jury to

disregard the improper utterance.

During the opening statement by Defense counsel, Defense stated for the record that in referring to Plaintiff's expert "a doctor from Virginia is the only one, apparently, they could find in the whole United States to testify against the Defendants." (Emphasis added) (CR 8:219) (RE - 43) Plaintiffs' counsel objected to this statement and thereafter the trial court sustained the objection and then instructed the jury to disregard the last statement. (CR 8:219) (RE - 43) Opening statements were continued, completed and the trial court recessed for the day. (CR 8:219 through 221) (RE -35)

Plaintiffs in their brief stated that the following morning, motions were heard in chambers and at the first opportunity Plaintiffs moved for a mistrial due to the comment made during Defendants' opening statement. After careful review of the record, the trial resumed in chambers on a motion to reconsider the damage issue regarding Medicaid payments not on the issue of mistake. Instead of moving immediately for a mistrial the day before, Plaintiffs instead argued the issue of the Medicaid payments. After that issue had been resolved then the Plaintiffs' counsel stated "I think a mistrial is warranted based upon the comment, but at a minimum, I think I should be allowed to designate a local expert..." (CR 8:221 through 240)(RE - 36) The Court in chambers denied the motion for mistrial and held that Plaintiff's counsel had not made the motion for mistrial contemporaneously with the objection.

Plaintiffs argue that the comment was so prejudicial as to warrant a mistrial but did not move for a mistrial contemporaneously with the objection. Plaintiffs then further requested the Court that if mistrial was denied, in the very least they should be allowed to bring in a local expert. Further, Plaintiffs' attorney's own actions after the statement was made do not reflect a party that feels that it was so prejudiced that it warranted a mistrial. The Court in ruling the next morning reiterated, that, not on motion of the Plaintiffs, but *sua sponte* the Court instructed the jury to disregard the

statement and that failure to spontaneously move for the mistrial precluded them from moving for it after the fact.

In *Burr v. Mississippi Baptist Medical Center*, 909 So. 2d 721, 725 (Miss. 2005) quoting *Haggerty v. Foster*, 838 So.2d 948, 961 (Miss. 2002) the Supreme Court held that "any alleged improper comment must be viewed in context, taking the circumstances of the case into consideration," this Court must take the trial as a whole to determine if there is any unjust prejudice. Plaintiffs in their brief did not demonstrate what, if any, prejudice they suffered as a result of the statement being made other than the fact the jury did not find for them. The fact that the jury did not find for them is not prejudice, but reflects that they did not make out their prima facie case.

Webster's New College Dictionary (2001) the word "contemporaneous" is defined as, arising, existing, or occurring during the same period of time. Based on the record, Plaintiffs after making the objection, failed to move for a mistrial. They instead stepped back and waited until after the opening statements were completed, the court recessed for the day, the court re-adjourned the next morning, made arguments in chambers regarding medicaid payments, and then, decided it was the appropriate time to make the motion for a mistrial. The Court in it's decision to deny the Plaintiffs' request, clearly understood the meaning of "contemporaneous" and ruled accordingly.

IV.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT ALLOWING THE CONSENT FORM TO BE INTRODUCED INTO EVIDENCE.

After the Plaintiffs rested, Defendants called expert witness, Ahmed E. Badr, M.D., followed by F. Lamar McMillin, Jr., M.D., who was a treating physician in this matter, followed by Taurra Smith, LPN, Patty Stone, CRNA, who was a defendant in this matter, and then John L. Adams, M.D. During the cross-examination of Dr. Adams, Defendants made an objection to the attempted use of

the consent form by Plaintiffs' counsel. Defendants argued that Plaintiffs had not put in to issue the lack of informed consent in their case-in-chief. After a bench conference was held, the Court ruled that the consent form was inadmissible because lack of informed consent was not in the Pre-Trial Order. (CR 6:761) (RE - 37) Plaintiffs' counsel on the record made a proffer of the consent form and the cross-examination continued. (CR 13:1029 through 1032) (RE - 38)

Plaintiffs had a duty to bring forward any alleged claim of lack of informed consent and failed to do so in their case-in-chief. Additionally, at no time during the direct examination of defense witnesses was there any testimony regarding informed consent and therefore, the line of question was beyond the scope of the direct examination and was not in issue. Plaintiffs in their brief spends a great deal of time arguing that there was a legitimate claim for lack of informed consent but fails to point to any part of the record were they brought out this claim during their case in chief. Clearly, the Plaintiffs either forgot or never had any intention of putting on testimony that would support a claim for lack of informed consent. Therefore, the trial court did not abuse its discretion when it excluded the consent form from evidence.

V.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE INTRODUCTION OF THE DEFENSE EXPERT AHMED BADR'S AFFIDAVIT INTO EVIDENCE.

Pursuant to M.R.E. 801(d)(1)(A) a statement is not hearsay if it is a prior statement by the witness which is inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury... The affidavit of Dr. Badr was a sworn statement previously given at the beginning of litigation. During cross-examination Plaintiffs' counsel continued to illicit information from Dr. Badr but at the same time read into evidence parts of the affidavit. Upon redirect, defense counsel moved to have the affidavit admitted at which point Plaintiffs' counsel objected and the trial

court overruled the objection allowing the affidavit to be admitted into evidence (Trial Exhibit D-6)(RE - 39).

Plaintiffs in their Appellant's Brief referred to *Moffett v. State*, 456 So.2d 714 (Miss. 1984) where the court held that prior inconsistent statements made by one not a party may not be used as substantive evidence. In *Moffett* the court referred to Hornbook Law, that firmly imbedded in the case law of this state, that "unsworn prior inconsistent statements may be used for impeachment of the witness' credibility regarding his testimony on direct examination." *Id.* 719. Plaintiffs erroneously refers to *Moffett* as support for the proposition that the affidavit could only be used for impeachment purposes only. Further, under the comment to M.R.E.801(d)(1)(A) prior inconsistent statements made under oath may be admissible as substantive evidence. Therefore, the Court did not err when it allowed the affidavit of Dr. Badr to admitted as evidence.

VI.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE DENIAL AND GRANTING OF CERTAIN JURY INSTRUCTIONS.

Plaintiffs in their brief state that Instruction D-13 is inaccurate and does away with the eggshell skull doctrine. (CR 5:733) (RE - 40) To the contrary, the eggshell skull doctrine does not apply in this case as the issue was whether Mrs. Triplett had a duty to advise her physicians of her physical symptoms and conditions prior to her surgery, and if she had would they performed the surgery. Mrs. Triplett misrepresented to Dr. McMillin that she was having no symptoms from her carotid stenosis she also failed to report the 80 to 99% stenosis of her right carotid artery and her cardiovascular surgeons recommendations to have bilateral endarterectomy. This failure to disclose prior to treatment precludes the eggshell skull doctrine. If on the other hand, she had disclosed this information and the surgery was still conducted, then the eggshell skull doctrine would apply.

Plaintiffs are mistaken in believing that the granting of D-13 with the trial court's refusal of P-25 created an irreconcilable conflict in the instructions. (CR 5:723) (RE - 41) If the Court had allowed both instructions to be admitted, then there would have been an irreconcilable conflict. The Court in refusing Instruction P-25 properly avoided conflict and allowed an accurate statement of the law and therefore the jury verdict should stand.

CONCLUSION

Plaintiffs have failed to demonstrate reversible error by the trial court to any of the above issues.

There were no errors against the Plaintiffs that occurred in the trial of this matter and therefore, the verdict should stand as rendered.

BRIEF OF CROSS APPELLANTS

STATEMENT OF ISSUES

Whether the trial court committed reversible error in denial of Defendants' issue viii of their motion in limine.

STATEMENT OF THE CASE

The Defendant filed their Motions in Limine issue VIII, to limit the amount of damages that the Plaintiffs were seeking to that which they had actually paid. Plaintiffs were seeking the total amount including that which the Defendant pursuant with their agreement with Medicaid could not ever collect from the Plaintiffs. (CR 4:499) (RE - 42) The trial court granted that Motion at a hearing held just prior to the start of trial.

On May 12, 2008, Plaintiffs filed a Motion for Reconsideration on the issue of medical bills and payments by Medicare. (CR 5:621)(RE - 43) On May 13, 2008, in chambers, the trial court

overruled it's prior decision and granted the Plaintiffs' Motion for Reconsideration on that issue. (CR 8:221 through 233) (RE - 44).

SUMMARY OF ARGUMENT

The trial court committed reversible error when it granted the Plaintiffs' Motion for Reconsideration on the issue of medicare payments in that it allowed the Plaintiffs to seek damages they had never actually incurred.

ARGUMENT

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE DENIAL OF DEFENDANTS' ISSUE VIII OF THEIR MOTION IN LIMINE.

The proof of damages required of the Plaintiff in a case is the amount actually incurred as a result of the alleged negligence. Miss. Code Ann. § 41-9-119; *Boggs v. Hawks*, 772 So.2d 1082 (Miss. App. 2000). The Defendants do not dispute that the collateral source rule entitles the Plaintiffs to seek to recover for the medical expenses actually paid by Medicaid. *Coho Resources, Inc. v. McCarthy*, 829 So.2d 1 (Miss. 2002). However, these Defendants do not believe that the Plaintiffs are entitled to recover damages they did not actually incur or that the Defendants were ever entitled to collect.

Under the Medicaid regulations adopted by the United States Department of Health and Human Services, states such as Mississippi which adopt Medicaid plans must include provisions requiring providers to accept Medicaid payments as payment in full (subject to certain nominal co-payments not relevant here). The provider cannot seek to collect any deficiency from the patient. 42 C.F.R. §447.15. By necessity, the Mississippi Division of Medicaid follows this requirement. Thus, the Defendants were prevented by law and its agreements with the Division of Medicaid from ever collecting those amounts over that which Medicaid would pay.

In 2001, the Mississippi Supreme Court addressed the issue of the collateral source rule as it applies to Medicaid in *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611 (Miss. 2001). Justice Diaz, writing for the majority, held that the collateral source rule allows a plaintiff to claim the full amount of the medical bills and that the write-offs do not have to be excluded. 809 So.2d at 619-620. In so holding, the majority found determinative the fact that the provider on the one hand claimed that the deficiency was not "damages" because it could never be collected, and, on the other hand, it had sued the patient in an attempt to collect the deficiency. The Court discussed this point as follows:

> Bradshaw [the plaintiff] points out that she is presently being sued by Brandon [the defendant] for recovery of the very medical bills it asserts should not be included. The two arguments refute each other. Because it accepted payments from Medicaid, Brandon says that it cannot be paid for the services it rendered, so Bradshaw should not be allowed to count them as damages. At the same time, Brandon is busy filling suit trying to collect on the very same bills. Although there are other arguments in support of the admission of the past medical bills, the inconsistent actions on the part of Brandon convince us to reject Brandon's argument on this issue.

809 So.2d at 619. *See also*, *Wal-Mart Stores, Inc. v. Frierson*, 818 So.2d 1135 (Miss. 2002) (in which Justice Diaz, again writing for the majority, applied Brandon to allow *Medicare* write-offs, without significant discussion or analysis).

Justice (now Chief Justice) Smith dissented in *Brandon* and stated:

> A plaintiff may not be compensated for damages he has not suffered. Bradshaw did not pay the excess expenses, and neither did Medicaid pay them on her behalf. The policy behind the collateral source rule simply does not apply where the plaintiff has incurred no expense, obligation, or liability in obtaining the services for which he or she seeks compensation. A recipient of free medical care provided at the expense of taxpayers should not be able to recover the excess from the tort feasor and pocket the windfall. As have other jurisdictions dealing with this question, I would hold that there is no right to recover medical expenses extinguished by operation of the statutes governing Medicaid. *See McAmis v. Wallace*, 980 F. Supp. 181 (W.D.Va.1997); *Hanif v. Housing Auth.*, 200 Cal. App.3d 635, 246 Cal. Rptr. 192, 194-97 (1988); *Gomez v. Black*, 32 Colo. App. 332, 511 P.2d 531 (1973); *Terrell v. Nanda*, 759 So.2d 1026 (La.Ct.App.2000); *Moorhead v. Crozer Chester Med. Ctr.*, 564 Pa. 156,

765 A.2d 786 (2001).

809 So.2d at 625. The dissent found it compelling that the statute dealing with the right of Medicaid patients to bring private damage suits specifically states that "the acceptance of Medicaid under this article or the making of a claim under this article shall not affect the *right of a recipient or his or her legal representative to recover Medicaid's interest as an element of damages* in any action at law." Miss. Code Ann. § 43-13-125(2) (Emphasis added.) Recovering "Medicaid's interest" clearly means the amounts actually paid by Medicaid and not an imaginary amount that includes a component which no one is obligated ever to pay. 809 So.2d at 624. *See Bozeman v. State*, 879 So.2d 692 (La. 2004) ("we conclude that Medicaid is a free medical service, and that no consideration is given by a patient to obtain Medicaid benefits. His patrimony is not diminished, and therefore, a plaintiff who is a Medicaid recipient is unable to recover the "write off" amounts.)

This case is entirely distinguishable from *Brandon.* Unlike the provider in *Brandon*, the Defendants were barred from collecting the Medicare deficiency nor did they ever seek to do so. Under the agreement with Medicaid, we are not sure why the provider was able to sue the patient for the deficiency in *Brandon*, but that fact convinced the majority that the write-offs at issue there, were not really true write-offs but were amounts owed by the plaintiff. Therefore, the Court concluded that the amounts fell within the collateral source rule. Here, where the provider cannot possibly collect the written off amounts, it would be patently inequitable and contrary to the law of damages for a patient to be able to recover those amounts.

"The collateral source rule in Mississippi provides that '[c]ompensation or indemnity for the loss received by plaintiff from a collateral source, *wholly independent of the wrongdoer*, as from insurance, cannot be set up by the [defendant] in mitigation or reduction of damages····'" *Busick v. St. John*, 856 So.2d 304 (Miss. 2003) (emphasis added). Restatement (Second) of Torts, § 920A

provides that "a payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability ..." The Defendant's Medicaid write-offs are tantamount to payments to the Plaintiffs by an alleged tortfeasor. They are not compensation received by the Plaintiffs from a source independent of these Defendants, as would be necessary for the collateral source rule to apply. *Rose v. Via Christi Health System, Inc./St. Francis Campus*, 113 P.3d 241, 246, 248 (Kan. 2005) (services which were not reimbursed by Medicare were services contributed by the defendant hospital and not a collateral source payment to be included in damages). The Plaintiffs should not be able to recover damages in the form of Medicare write-offs that the Defendants were never legally entitled to collect and therefore, it was reversible error to allow the amounts written off to be presented to the jury.

CONCLUSION

The Plaintiffs never legally incurred those amounts which the Defendants were statutorily required to write-off. Defendants would submit that it was reversible error for the medicare write-offs to be presented to the jury.

Respectfully submitted,

River Region Medical Corporation; John Adams, M.D.; Patty Stone, CRNA

By: _____

R.E. PARKER, JR., MSB[redacted]

CERTIFICATE OF SERVICE

I, R.E. Parker, Jr., Attorney for River Region Medical Corporation, John Adams, M.D., and Patty Stone, CRNA, do hereby certify that I have this day mailed, postage prepaid, by United States Mail, hand-delivered, or via facsimile, a true and correct copy of the above and foregoing document to the following counsel of record:

John T. Givens, Esq.
Timothy W. Porter, Esq.
Patrick C. Malouf, Esq.
Porter & Malouf, PA
PO Box 12768
Jackson MS 39236-2768

THIS THE 2nd day of April, 2010.

R.E. Parker, Jr.