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

VS.

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

CERTIFICATE OF INTERESTED PARTIES

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

1. James K. Triplett.

2. Timothy W. Porter, Patrick C. Malouf, and John T. Givens of Porter & Malouf, Jackson, Mississippi, Counsel of Record for Plaintiff, Mary C. Pittman.

3. Andrew Maxwell Triplett.

4. Estate of Jean B. Triplett.

5. Rufus "Gene" E. Parker, Jr. of Varner, Parker & Sessums.

6. John Adams, M.D.

7. Patty Stone, Certified Nurse Anesthetist.

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

9. Lamar McMillin, M.D.

This the 28th day of December, 2009.

John T. Givens, *Attorney for Appellant*

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STATEMENT OF THE CASE: FACTS AND PROCEEDINGS IN THE CIRCUIT COURT

This was an action for medical malpractice. Jean Triplett had problems with her hip and consulted with a orthopaedic surgeon by the name of Dr. William Porter. It was recommended to Mrs. Triplett that she have elective hip replacement surgery. This surgery was scheduled for January 6, 2004. On or about December 30, 2003, a pre-op physical was conducted by Lamar McMillin, M.D. Based on the information provided to Dr. McMillin at this pre-op physical, Mrs. Triplett should not have been approved for elective hip replacement surgery, but Dr. McMillin declared her stable for surgery.

On January 6, 2004, Mrs. Triplett arrived at River Region hospital. Mrs. Triplett was

provided a consent form to sign that did not mention stroke being a risk of the surgery. When Mrs. Triplett's blood pressure was checked that morning it was found to be extremely elevated. The highest recorded reading was 249 over 94. In spite of this extremely elevated blood pressure, the anesthesiologist, Dr. John Adams decided it was safe to proceed with surgery. During the surgery, Mrs. Triplett's blood pressure was allowed to drop greater than fifty percent (50%) from her baseline. The Plaintiffs alleged that the elevated blood pressure combined with a significant drop caused Mrs. Triplett to suffer a stroke during surgery. The fact that Mrs. Triplett suffered a stroke was not disputed. It was disputed whether the stroke occurred during surgery or a day after surgery. It was also disputed at trial what kind of stroke Mrs. Triplett suffered. The Plaintiffs claimed that it was a thrombotic stroke while the Defendants claimed it was an embolic stroke.

The Plaintiffs claimed that Mrs. Triplett went in for an **elective** surgery, in other words it was a non-emergent surgery and could easily be rescheduled. The Plaintiffs further claimed that with her extremely elevated blood pressure it was a breach in the standard of care for the anesthesiologist to go forward with the anesthesia and surgery. Mrs. Triplett never fully recovered from the stroke. She was eventually able to go home but required around the clock care. Mrs. Triplett suffered from the complications of the stroke for over two and a half years before dying on October 25, 2006.

The Plaintiffs filed suit on March 3, 2006 against 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. (RE Tab 2) (CR 1:10). The Plaintiffs claims included negligence/malpractice, respondeat superior; breach of contract; and punitive damages. *Id.* On October 26, 2005, Mrs. Triplett died, and the Defendants filed a Suggestion of Death upon the record. (RE Tab 3) (CR 1:105). An agreed order was entered on March 1, 2007 substituting Andrew Maxwell Triplett and James Kevin Triplett as Plaintiffs on behalf of all wrongful death beneficiaries. (RE Tab 4) (CR

2:212). Subsequently, an agreed order was entered on August 30, 2007 joining the Estate of Jean Triplett as a necessary party to the litigation. (RE Tab 5) (CR 3:349).

The Defendants filed a Motion for Summary Judgment alleging that the Plaintiffs did not have an expert qualified to testify to the standard of care of the physicians involved in Mrs. Triplett's care. (RE Tab 6) (CR 1:145 to 2:193). The Plaintiffs filed a response to the Motion for Summary Judgment attaching an affidavit from their medical expert Jeffrey Green, M.D. (RE Tab 7) (CR 3:324). A hearing was held on the Defendants' Motion for Summary Judgment on June 29, 2007. (RE Tab 8) (Supplemental CR 1:1). The trial court determined that the Plaintiffs' expert had not clearly stated the standard of care to be imposed and how that standard was violated, and therefore, the trial court held its ruling in abeyance until additional discovery could be accomplished. *Id.* at 20. The Plaintiffs filed an amended response to the Motion for Summary Judgment on September 7, 2007 attaching another affidavit from Dr. Jeffrey Green. (RE Tab 9) (CR 3:351). Without further oral argument, the trial court entered an order denying the Defendants' Motion for Summary Judgment on September 19, 2007. (RE Tab 10) (CR 3:361). The Defendants filed a Motion for Reconsideration on September 26, 2007. (RE Tab 11) (CR 3:362). The Plaintiffs filed a response to this Motion for Reconsideration on November 13, 2007 (RE Tab 12) (CR 3:369).

The Motion for Reconsideration was brought on for hearing on February 15, 2008. (RE Tab 8) (Supplemental CR 1:23). After hearing arguments of counsel, the trial court granted partial summary judgment as to William Porter, M.D., Gladys Howard, R.N., and to River Region for any liability it may possess for Lamar McMillin, M.D. An order granting partial summary judgment was entered on March 11, 2008. (RE Tab 13) (CR 3:406). This judgment was **not** entered pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure. The Plaintiffs believe it was error for the trial court to grant summary judgment as to Dr. McMillin based on the affidavit of Plaintiffs' expert.

A jury trial was conducted from May 12, 2008 through May 20, 2008. There were several reversible errors that occurred at the trial. The trial court failed to sustain Plaintiffs' challenge for cause as to Juror No. 102 who was an employee of a law firm that represented the Defendant River Region Medical Corporation. (RE Tab 14) (CR 8:180). Also in opening statements, Defense counsel stated that the Plaintiffs could only find one expert witness in all of the United States to support their theory of the case. (RE Tab 14) (CR 8:219). The Plaintiffs objected to this statement and moved for a mistrial the next morning. The trial court denied the Plaintiffs' Motion for a Mistrial. (RE Tab 14) (CR 8:239).

The Plaintiffs made a claim for lack of appropriate informed consent against the Defendants for failing to properly inform Jean Triplett of the risks of the elective hip surgery, one of which is stroke. (RE Tab 15) (CR 3:398). When the Plaintiffs attempted to introduce the consent form into evidence, the Defendants objected to its entry. The trial court sustained the objection and did not allow the Plaintiffs to introduce the consent form into evidence. (RE Tab 14) (CR 13:1029-1032). The Plaintiffs believe this was an abuse of discretion by the trial court.

During cross examination of the Defendants' expert witness, Ahmed Badr, M.D., Plaintiffs' counsel used an affidavit he had executed to impeach some of his testimony. Upon redirect, defense counsel moved to have the affidavit admitted into evidence to which the Plaintiffs objected. (RE Tab 14) (CR 12:818-19). Over objection of the Plaintiffs, the trial court admitted the affidavit as substantive evidence. The Plaintiffs submit that it was an abuse of discretion for the trial court to admit the affidavit into evidence. The jury received the case on May 20, 2008 and deliberated for a few hours before returning a verdict for the Defendants by a vote of eleven to one which was entered on the same day. (RE Tab 16) (CR 6:760). The Plaintiffs filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for New Trial. (RE Tab 17) (CR 6:785). This

motion was denied by the trial court, and an order was entered on June 17, 2008. (RE Tab 18) (CR 6:797). The Plaintiffs then timely filed a Notice of Appeal on June 20, 2008. (RE Tab 19) (CR 6:798).

SUMMARY OF ARGUMENT

The trial court committed reversible error in granting summary judgment to River Region for any liability it had for the actions of Lamar McMillin, M.D. The Plaintiffs' medical expert clearly demonstrated familiarity with the standard of care for a physician evaluating a patient to determine whether that patient is stable for surgery. Further, Plaintiffs' expert clearly stated a standard of care to be followed by Dr. McMillin and how that standard was breached. Therefore, the Plaintiffs would respectfully submit that this Court should find that the grant of summary judgment was improper and reverse and remand this case for further proceedings.

The trial court also committed reversible error by failing to strike Juror No. 102 for cause. Juror No. 102 was employed by a law firm that represented River Region. The law is clear in Mississippi that an employee of a party to a suit is not competent to serve as a juror regardless of whether the juror states that he or she can remain impartial. Therefore, Plaintiffs' challenge for cause as to Juror No. 102 should have been sustained and failure to do so requires this Court to reverse and remand this case for further proceedings.

The trial court committed reversible error in failing to declare a mistrial when counsel for Defendants stated that the Plaintiffs' medical expert was the only person in the entire United States that agreed with their theory of the case. This statement was highly prejudicial especially in light of the fact that this was a medical malpractice action that comes down to a battle of the experts. The trial court's instruction to disregard the statement did not cure the prejudicial effect. The Plaintiffs would respectfully submit that the failure to grant a mistrial requires this Court to reverse and

remand this case for further proceedings.

The trial court committed reversible error by excluding from evidence the consent form signed by Jean Triplett. The Plaintiffs properly made a claim against the Defendants that they failed to obtain appropriate informed consent from Mrs. Triplett. This claim was not dismissed by the trial court prior to the trial. Further, the pretrial order entered in this matter clearly made consent an issue to be litigated. Therefore, the Plaintiffs would respectfully submit that it was an abuse of discretion for the trial court to exclude this evidence, and the trial court should be reversed.

The trial court committed reversible error in allowing the affidavit of the defense's medical expert Ahmed Badr, M.D. to be admitted into evidence. The law is clear in Mississippi and elsewhere that an affidavit may not be used as substantive evidence, and it should never be introduced into evidence. In essence, the allowance of this affidavit into evidence provided the jury with a written report from the defense's medical expert on why there was no breach in the standard of care. This is clearly improper and very prejudicial to the Plaintiffs as it improperly allowed the defense to bolster its expert's testimony and allowed the jury to re-examine the testimony of one of the key witnesses in the case. The Plaintiffs would respectfully submit that it was an abuse of discretion for the trial court to allow the affidavit to be admitted into evidence.

Finally, the Plaintiffs would respectfully submit that the trial court erred in refusing Plaintiff's proposed jury instruction P-25 especially since the trial court gave Defense Instruction D-13.

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.

This Court's standard of review for the grant or denial of summary judgment is *de novo.*

Slatery v. North Miss. Contract Procurement, 747 So.2d 257, 259 (¶4) (Miss. 1999). "Considered in the light most favorable to the nonmoving party, if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate." *Grimes v. Warrington,* 982 So.2d 365, 367 (¶8) (Miss. 2008); citing Miss. R. Civ. P. 56(c); *Jones v. Flour Daniel Servs. Corp.,* 959 So.2d 1044, 1046 (Miss. 2007); *Russell v. Orr,* 700 So.2d 619, 622 (Miss. 1997). Therefore, "the lower court's decision is reversed only if it appears that triable issues of fact remain when the facts are viewed in the light most favorable to the nonmoving party." *Slatery,* 747 So.2d at (¶4); quoting *Robinson v. Singing River Hosp. Sys.*, 732 So.2d 204, 207 (¶12) (Miss. 1999); citing *Box v. State Farm Mut. Auto. Ins. Co.,* 692 So.2d 54, 56 (Miss. 1997).

The Plaintiffs respectfully submit that the trial court committed reversible error when it granted summary judgment for any liability River Region may have had for the actions of Lamar McMillin, M.D. The Defendants in this case filed a Motion for Summary Judgment alleging the Plaintiffs did not have sufficient expert testimony. (RE Tab 6) (CR 1:145 to 2:193). The Plaintiffs filed a response to this Summary Judgment providing the Court with an affidavit from the Plaintiff's expert Jeffrey Green, M.D. (RE Tab 7) (CR 3:324). A hearing was held on the matter and the trial court took the matter under advisement and permitted the parties to explore the issue of whether Plaintiff's expert witness could articulate a standard of care that had been violated. (RE Tab 8) (Supplemental CR 1:18). The Plaintiffs filed an Amended Response to the Defendants' Motion for Summary Judgment providing the Court with another affidavit from Jeffrey Green, M.D. (RE Tab 9) (CR 3:351). Dr. Green clearly stated that Dr. McMillin inappropriately cleared Jean Triplett for surgery. *Id.* (CR 3:356). Dr. Green clearly demonstrated familiarity with the standard of care of a physician clearing a patient for surgery. Further, Dr. Green is qualified to give this opinion due to his daily participation in the surgery process.

The trial court denied the Defendants' Motion for Summary Judgment in its entirety. (RE Tab 10) (CR 3:361). The Defendants filed a Motion for Reconsideration of this issue. (RE Tab 11) (CR 3:362). The Motion for Reconsideration was brought on for hearing on February 15, 2008. At this hearing for the first time, the Defendants asked for summary judgment to be entered against River Region for any liability it may have for Lamar McMillin, M.D. The Court granted this request. (RE Tab 13) (CR 3:406). It was reversible error for the trial court to enter summary judgment against Dr. McMillin.

This Court has made clear the requirements of expert testimony in regards to medical malpractice cases. "It is generally not required that an expert testifying in a medical malpractice case be of the same specialty as the doctor about whom the expert is testifying." *Hubbard v. Wansley,* 954 So.2d 951, 957 (¶13) (Miss. 2007). The trial court should have looked to the reach of Dr. Green's knowledge and not his classification as an anesthesiologist to determine whether he could testify to the standard of care of Dr. McMillin. *Hubbard,* 954 So.2d at 957 (¶13); quoting *West v. Sanders Clinic for Women, P.A.,* 661 So.2d 714, 719 (Miss. 1995). Dr. Green was only required to show "satisfactory familiarity with the specialty of" Dr. McMillin. *Id.* That was clearly satisfied in this case.

In his affidavit, Dr. Green stated that he spends the majority of his practice taking care of surgical patients, the exact type patient that Jean Triplett was. (RE Tab 9) (CR 3:355). Dr Green further stated that "Having practiced and taught anesthesiology, I am very familiar with the standard of care of minimally competent, reasonably prudent physicians . . . pre-op, intra-op and post-op performing or assisting in this or similar procedures . . . ." *Id.* (CR 3:359). Dr. Green testified via affidavit that "The standard of care requires that a physician evaluating a patient prior to elective surgery investigate a patient with asymptomatic bilateral carotid stenosis with further testing to

determine the risk of perioperative stroke. The failure of Dr. McMillin to meet this standard constitutes a breach in the standard of care." *Id.* (CR 3:356).

At the hearing on the Motion for Reconsideration, the trial court stated as follows "He has not articulated the standard of care as to Porter, Howard, or McMillin, and the Court finds that he's not qualified to articulate a standard against them." (RE Tab 8) (Supplemental CR 1:45). The trial court further stated "He's testifying what internal medicine should do and others, and he's just – he has not shown his qualifications to set forth their standard." *Id.* The trial court was clearly in error when making this ruling. Dr. Green clearly stated that he was familiar with the standard of care for the treating of patients pre-operatively, which is what Dr. McMillin did. Further, Dr. Green stated what that standard of care was and how it was breached by Dr. McMillin. At a minimum, this was an issue that should have been decided on voir dire of Dr. Green, not at the summary judgment stage.

This Court has addressed a similar situation in *Univ. of Miss. Med. Center v. Pounders,* 970 So.2d 141 (Miss. 2007). In that case, the Defendants argued that the Plaintiff's expert could not offer opinions on aspiration pneumonia since the physician was not a pulmonologist. *Pounders,* 970 So.2d at 146 (¶17). The Plaintiff's expert testified that

> [H]e had the necessary knowledge to opine as to the diagnosis and causes of pneumonia. He further testified that, although he was not a pulmonologist, he was qualified as a neurologist, and that he had treated patients similar to Pounders.

Id. at (¶18). This Court affirmed the trial court's allowance of the plaintiff's expert testimony because of the expert's specialized training and medical school instruction along with the expert's experience in treating similar situated patients. *Id.* at (¶19).

Here, the Plaintiffs would respectfully submit that this Court should find the trial court committed manifest error in excluding Dr. Green's testimony in regards to Dr. McMillin and in turn granting summary judgment as to River Region's liability for Dr. McMillin's actions. First, Dr.

Green testified that he was familiar with and treated patients in similar situations as Jean Triplett. (RE Tab 9) (CR 3:355). Second, Dr. Green clearly stated that he was familiar with the standards of care for physicians that pre-operatively treat patients as Dr. McMillin did in this case. Third, Dr. Green clearly stated how that standard of care was violated. Therefore, under both *Hubbard* and *Pounders*, Dr. Green's testimony as to Dr. McMillin's breaches in the standard of care should have been allowed, and the refusal of this testimony by the trial court constitutes manifest error that requires reversal.

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

During Voir Dire it was discovered that Juror No. 102 worked for a law firm that represented River Region Medical Corporation, one of the Defendants in this case. Juror No. 102 stated in voir dire that "I work for an attorney's office, and we represent River Region. But I don't know the ins and outs of the case." (RE Tab 14) (CR 7:74). The juror stated that she would not feel any pressure one way or the other. *Id.* Juror No. 102 ended up serving on the jury that decided the case.

Just as an attorney would not be allowed to serve on a jury where a party is one of his/her clients, an employee of that attorney should not be allowed to serve either. While this Court has not addressed this exact issue, there are some opinions that can offer guidance to this Court. This Court has held that "It is the purpose of the law to provide as jurors men who are fair and impartial and free from bias or prejudice." *Berbette v. State,* 109 Miss. 94, 67 So. 853, 854 (Miss. 1915). This Court held that an employee of a party to a suit is not competent to serve as a juror. *Berbette,* 67 So. at 854. "The existence of ***any*** business relation between the one offered as a juror and one of the parties in interest is sufficient to render such person incompetent to serve as a juror." (Emphasis

added) *Id.*

The trial court in overruling the challenge for cause stated that "She said it wouldn't bother - - she said it wouldn't bother her." (RE Tab 14) (CR 8:180-81). While the juror did state that, it is not up to the juror to decide whether she is biased. This Court has held that "It does not matter that [the juror] had the self-confidence to swear he could try the cause impartially. It was not for him to determine his competency on that point." *Id.* at 854; quoting *L., N.O. & T. R.R. Co. v. Mask,* 64 Miss. 738, 2 South. 360 (Miss. 1887). This Court held that once the fact is determined that a juror is an employee of the defendant, the juror is adjudged incompetent as a matter of law. *Id.* This Court further relied on *Minich v. People,* 8 Colo. 440, 9 Pac. 4 (Colo. 1885) which allowed a sustaining of a challenge for cause when the juror in that case had a business relationship with one of the persons jointly indicted with the defendant, but was not on trial. *Id.* at 854.

As is the case here, Juror No. 102 was employed by a law firm that had a business relationship with River Region, and based on that, Juror No. 102 should have been determined to have a business relationship with the party defendant, River Region. Therefore, as a matter of law Juror No. 102 should have declared incompetent to serve as a juror in this case. The refusal of the trial court to sustain the Plaintiff's challenge for cause of Juror No. 102 is reversible error, and therefore, requires this jury verdict to be reversed and this case be remanded for a new trial.

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

The standard of review for determining whether the trial court was in error for failing to declare a mistrial is abuse of discretion. *Coho Resources, Inc. v. McCarthy,* 829 So.2d 1, 18 (¶50) (Miss. 2002). In opening statements, Defense counsel stated to the jury that the Plaintiffs were able

to find only one expert in the entire United States to agree with their theory of the case. Counsel specifically stated "a doctor from Virginia that's the only one, apparently, they could find in the whole United States to testify against [the Defendants]." (RE Tab 14) (CR 8:219). Counsel for Plaintiff immediately objected to this statement. The trial court sustained the objection and instructed the jury to disregard the last statement. (RE Tab 14) (CR 8:219). Openings were completed shortly thereafter, and the trial court recessed for the day. *Id.* (CR 8:221). The next morning before the jury was brought in the trial court heard motions in chambers. At this time, the Plaintiffs moved for a mistrial due to the highly prejudicial nature of the comment made by Defense counsel. *Id.* (CR 8:236). The trial court denied the motion for mistrial and held "Objection was made at the time, but no motion for mistrial as made at that time, contemporaneous with the statement, which I think is essential for granting a mistrial." *Id.* (CR 8:239). The trial court further held that despite the failure to contemporaneously move for a motion for mistrial "The Court dose not feel that it was that prejudicial of a comment that would require a mistrial . . . ." *Id.*

The Plaintiffs would respectfully submit that they timely moved for a mistrial, and that it was an abuse of discretion for the trial court to deny the motion. This Court has held that "timeliness means the objection and motion must be made contemporaneously with the alleged improper utterance." *Meena v. Wilburn,* 603 So.2d 866, 874 (Miss. 1992). While the motion for mistrial was not made contemporaneously with the objection, the motion was made in a timely manner. As discussed, the Court went into recess shortly after the prejudicial statement was made. At Plaintiffs' first opportunity the next morning, they moved for a mistrial. The Plaintiffs would respectfully submit that the motion was timely and should have been considered by the trial court. Further, since the motion for mistrial was made, the trial court should have further admonished the jury to disregard the prejudicial comments made by Defense counsel. If a motion for mistrial is timely made, the

judge can avert a mistrial by admonishing the jury to disregard the statement. *Meena*, 603 So.2d at 874. The trial court did not admonish the jury to disregard the statement of defense counsel after the motion for mistrial was made by the Plaintiffs.

Further, the Plaintiffs respectfully submit that even if this Court finds that the jury was sufficiently admonished, that the statement was so prejudicial that instructing the jury to disregard the statement was not sufficient to cure the prejudicial effect. This is medical malpractice case. As in all medical malpractice cases, it comes down to a "battle of the experts." The Plaintiffs can not imagine a more prejudicial statement in a medical malpractice case than the one made by defense counsel. The credibility of one's expert is of the utmost importance. The jury was led to believe by defense counsel that the Plaintiffs' expert was the only person in the entire United States to support their case. There was no evidentiary basis to support this statement. It should be clear that the prejudicial effect of this statement could not be cured by the trial court simply stating disregard that last comment. The statement went to the heart of the Plaintiffs' entire case and caused the jury to believe that the Plaintiffs' expert was paid to give an opinion that no one else in the United States agreed with. The failure of the trial court to declare a mistrial in light of this statement was an abuse of discretion, and this Court should reverse and remand this case for a new trial.

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

"When reviewing the trial court's decision to admit or exclude evidence, [this Court] is bound by an abuse of discretion standard of review." *Vaughn v. Miss. Baptist Med. Ctr.*, 20 So.3d 645, 654 (¶28) (Miss. 2009); citing *Webb v. Braswell,* 930 So.2d 387, 396-97 (Miss. 2006). If this Court finds that the trial court abused its discretion in failing to admit the consent form into evidence, then this Court is required to reverse and remand this case for a new trial. *Id.*; citing *Jones*

v. State, 918 So.2d 1220, 1223 (Miss. 2005).

One of the Plaintiffs' claims was that the Defendants failed to give Jean Triplett appropriate informed consent. (RE Tab 15) (CR 3:398). The Plaintiffs attempted to introduce the consent form into evidence at trial at which point the Defendants objected. The trial court sustained the objection and did not allow the Plaintiffs to questions the Defendants about the consent form. (RE Tab 14) (CR 13:1029-1032). The trial court sustained the objection due to the claim not being in the pretrial order. The Plaintiffs would respectfully submit that this was reversible error.

The pretrial order clearly covered and included whether or not informed consent was given. (RE Tab 20) (CR 6:761-784). Under contested issues of law, the Plaintiffs clearly stated "Whether the Defendants' action constitute negligent misrepresentation and/or omission." *Id.* (CR 6:771) Further, under the Defendants objections to Plaintiffs' exhibits, the Defendants stated numerous times that "Mrs. Triplett elected to have this surgery and she experienced a known complication . . . ." *Id.* (CR 6:773). Therefore, it is clear from the pretrial order that whether or not proper informed consent was given was an allegation to be made at trial. The claim was properly made in the Plaintiffs' complaint and was never dismissed by the trial court. Therefore, the jury should have been allowed to consider this evidence and issue.

The consent form from River Region was marked for identification purposes as Trial Exhibit P-44. (RE Tab 21). On page three of the consent form, the risks and consequences of the proposed treatment are listed. *Id.* The Plaintiffs alleged that Jean Triplett suffered a stroke as a result of the surgery. Stroke is not one of the listed risks or consequences. Therefore, the Plaintiffs submit that there was a legitimate claim for lack of informed consent since Mrs. Triplett was never informed that stroke was a risk of the surgery. On page 5 of P-44, Mrs. Triplett had to consent to another procedure, and under risks and consequences, stroke is clearly listed. It should be clear that the

Defendants failed to inform Mrs. Triplett that stroke was a potential consequence of the elective hip surgery since they included it on other consent forms. Therefore, the trial court abused its discretion in excluding the consent form from evidence and preventing the Plaintiffs from questioning Dr. Adams about the consent form.

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

"When reviewing the trial court's decision to admit or exclude evidence, [this Court] is bound by an abuse of discretion standard of review." *Vaughn v. Miss. Baptist Med. Ctr.*, 20 So.3d 645, 654 (¶28) (Miss. 2009); citing *Webb v. Braswell,* 930 So.2d 387, 396-97 (Miss. 2006). If this Court finds that the trial court abused its discretion in allowing Dr. Badr's affidavit to be admitted into evidence, then this Court is required to reverse and remand this case for a new trial. *Id.*; citing *Jones v. State,* 918 So.2d 1220, 1223 (Miss. 2005).

The Defendants' primary expert was Ahmed Badr, M.D. Dr. Badr had executed an affidavit during the litigation of this case. Plaintiffs' counsel used the affidavit on cross examination to question Dr. Badr about some inconsistences between his trial testimony and his sworn statements in the affidavit. Upon redirect, Defense counsel moved to have the affidavit admitted into evidence. Plaintiffs' counsel objected to the affidavit being admitted into evidence. (CR 12:818-19). The trial court overruled the objection and allowed the affidavit to be admitted into evidence. (RE Tab 22) (Trial Exhibit D-6).

This Court has held that "The prior inconsistent out-of-court statements made by one not a party may not be used as substantive evidence." *Moffett v. State,* 456 So.2d 714, 719 (Miss. 1984); citing Ellis & Williams, *Mississippi Evidence* 46 (1983). "Where the non-party witness admits having made the prior, out-of-court statement, the statement where reduced to written form, should

never be introduced into evidence. (Emphasis added) *Id.* If in an effort to avoid the hearsay rule, a party has statements admitted as substantive evidence which otherwise would not be admissible, the admission of that testimony would be error. *Cooper v. State Farm Fire & Casualty Co.,* 568 So.2d 687, 691 (Miss. 1990); other citations omitted. The Alabama Supreme Court has addressed this issue also and held that "As a general rule, affidavits can be used for impeachment purposes but cannot be admitted as substantive evidence, because they are hearsay." *Moseley v. Lewis & Brackin,* 583 So.2d 1297, 1300-01(Ala. 1991); citing *Pickering v. Townsend,* 118 Ala. 351, 23 So. 703 (1898); 6 *Wigmore on Evidence* § 1709, at 74 (Chadbourn rev. 1974).

The purpose behind this long standing rule is that a party should not be allowed to bolster a witness' testimony by having an affidavit admitted into evidence. If this was the law, then attorneys would have witnesses execute affidavits prior to testifying and have the affidavits admitted into evidence at every trial. That way the jury would have a written summary of the witness' testimony. Obviously, this is not allowed in our trial courts, as the jury is only allowed to rely upon the testimony presented at trial.

On cross examination, Plaintiffs' counsel used the affidavit for impeachment purposes only. The affidavit was not shown to the jury by Plaintiffs' counsel. Then upon redirect, defense counsel showed the affidavit to the jury and had it admitted into evidence over objection by the Plaintiffs. This was obviously very prejudicial to the Plaintiffs' case. The Plaintiffs' medical expert testified on the first and second day of trial. The jury did not get the case until a week after the Plaintiffs' medical expert testified. Therefore during deliberations, the jury had access to what was in essence written opinions of the Defendants' primary medical expert. The jury is required to rely upon the testimony as presented at trial, not reports or affidavits of expert witnesses. Therefore, the Plaintiffs would respectfully submit that it was an abuse of discretion by the trial court to admit the affidavit

into evidence. This abuse was highly prejudicial to the Plaintiffs' case and requires reversal and remand for a new trial.

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

When reviewing the grant or denial of jury instructions, this Court has held:

> we are required to review all instructions as a whole. *Richardson v. Norfolk & Southern Ry.*, 923 So.2d 1002, 1010 (Miss. 2006). No instruction should be reviewed in isolation. *Burr v. Miss. Baptist Medical Ctr.*, 909 So.2d 721, 726 (Miss. 2005). When analyzing the grant or refusal of a jury instruction, two questions should be asked: Does the instruction contain a correct statement of law and is the instruction warranted by the evidence? *Hill v. Dunaway,* 487 So.2d 807, 809 (Miss. 1986). Defects in specific instructions will not mandate reversal when all of the instructions, taken as a whole fairly-although not perfectly- announce the applicable primary rules of law. *Burton v. Barnett,* 615 So.2d 580, 583 (Miss. 1993). The above standards notwithstanding, this Court will not hesitate to reverse if the instructions, when analyzed in the aggregate, do not fairly and adequately instruct the jury. *Richardson,* 923 So.2d at 1011.

Franklin Corp. v. Tedford, 18 So.3d 215, 239 (¶48) (Miss. 2009); quoting *Beverly Enter., Inc. v. Reed,* 961 So.2d 40, 43 (Miss. 2007). The trial court refused Plaintiffs' proposed jury instruction P-25. (RE Tab 23) (CR 5:723). In addition, the trial court granted defendants' D-13. (RE Tab 23) (CR 5:733-34). The Plaintiffs would respectfully submit that the refusal of P-25 with the granting of D-13 created a conflict when the instructions are viewed as a whole, and therefore reversal is required.

Instruction P-25 is an accurate statement of the law. "When a previous injury or condition is aggravated, liability for damages will follow because of the aggravation, if fault is established." *Lewis Grocer Co. v. Williamson,* 436 So.2d 1378, 1381(Miss. 1983). This is what is commonly known as the "eggshell skull doctrine." Instruction P-25 is the model instruction for this doctrine. While Instruction P-25 may have required some modifications prior to being given, it should not

have been refused by the trial court especially since the trial court granted D-13. The only noted objection by the Defendants to P-25 "was just a negligence instruction. It was garden-variety, not naming a case." (CR 14:1132). This is not a valid objection to this instruction.

Instruction D-13 is not an accurate statement of the law. D-13 basically does away with the eggshell skull doctrine as it exists in Mississippi today. When reading D-13, the jury is led to believe that if the Plaintiff had a pre-existing condition, then the Defendants would not be liable for any untoward event that occurred as a result of this condition. This is simply not the law in Mississippi. One of the primary defenses argued throughout the trial by the Defendants was that Mrs. Triplett's pre-existing conditions caused her stroke. Therefore, the Plaintiffs were entitled to have a jury instruction granted to cover the law regarding this issue. The granting of D-13 with the trial court's refusal of P-25 created an irreconcilable conflict in the instructions. Therefore, when the instructions were read as a whole, they were not an accurate statement of the law. The jury was not fairly and adequately instructed, and therefore, this jury verdict should be reversed and this case remanded for a new trial.

CONCLUSION

It is clear that numerous errors occurred at the trial of this matter. Any single one of the errors should be grounds for the judgment of the trial court to be reversed and this case remanded for a new trial. When the errors are cumulatively viewed, the Plaintiffs would respectfully submit that this Court should reverse the verdict of the jury and order a new trial.

DATED, this the 28th day of December, 2009.

Respectfully Submitted,

JAMES K. TRIPLETT, AS THE ADMINISTRATOR OF THE ESTATE OF JEAN B. TRIPLETT, DECEASED AND ANDREW MAXWELL TRIPLETT

By: _____
John T. Givens, MS Bar No. [redacted]

CERTIFICATE OF SERVICE

I, John T. Givens, attorney for the Respondent, certify that I have this day served a copy of Appellants' Brief by United States mail with postage prepaid on the following persons at these addresses:

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DATED, this the 28th day of December, 2009.

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JOHN T. GIVENS