

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO.2008-CA-01550

MARGERY MCDANIEL

APPELLANT

VS.

2008-CA-01550

MAGNOLIA REGIONAL HEALTH CENTER

APPELLEE

BRIEF OF APPELLANT

**APPEALED FROM THE CIRCUIT COURT OF ALCORN COUNTY, MISSISSIPPI
CAUSE NO. CV-2001-052-R-A**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or refusal.

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IN THE SUPREME COURT OF MISSISSIPPI

BRIEF OF APPELLANT

I.

FACTS AND COURSE OF PROCEEDINGS BELOW

This cause of action is a wrongful death medical malpractice case against Defendants Magnolia Hospital and Dr. Nanni Pidikiti, M.D. (Hereinafter "Magnolia" and "Pidikiti") for their treatment of Plaintiff/Appellee Terrell McDaniel, deceased, for treatment which occurred on or about February 16, 1999. Suit was filed on May 12, 2000 against Magnolia Hospital and Dr. Pidikiti. This is cause number 2000-138. Since Magnolia was a County Hospital, and therefore governed by the Tort Claim Act, Magnolia was governed by a one year statute of limitation. Pidikiti on the other hand was subject to a two-year statute of limitation. Magnolia filed its answer on about July 10, 2000. On August 3, 2000, in response to Magnolia's interrogatories, the Plaintiff identified their expert, Lois Vice, R.N. (R. 70-72). Because at the time it was uncertain how a tort claim act and a non tort claim act would be tried together, Dr. Pidikiti was dismissed without prejudice and a second suit was filed against her on or about February 9, 2001. (R. 192-194). The suit against Pidikiti is cause number 2001-052. Pidikiti answered on or about February 20, 2001. (R. 195-197). On April 12, 2001, in response to Pidikiti's interrogatories, the Plaintiff identified Dr. Enrique Gomez as their expert. (R. 263). The two causes were later consolidated.

Due to the death of Terrell McDaniel's widow, Marjorie McDaniel, her son Mike Rutledge was substituted in the Magnolia suit in March of 2003, and in the Pidikiti suit on March 27, 2003. (R. 2002). On May 19, 2003, Dr. Pidikiti's attorney filed a motion to stay proceedings due to the insolvency of Pidikiti's malpractice insurance carrier. (R. 203-237). On July 14, 2003, the trial court entered an order staying all proceedings for at least sixty days or until further order of the court. (R. 238-239). The trial court did not lift the stay until January 3, 2006. (R. 301). Although the stay was still in place, Pidikiti moved for Summary Judgment on February 10, 2005. (R. 242-266).

While the stay was in place, the Plaintiff's expert, Dr. Enrique Gomez unexpectedly passed away. The Plaintiff obtained another expert, Dr. James R. Shamblin and filed his response to Pidikiti's summary judgment motion on October 13, 2005. (R. 280-300). As previously stated, the stay was lifted on January 3, 2006. On May 19, 2006, Magnolia filed its motion for summary judgment. On July 12, 2006, the Plaintiff responded and attached an affidavit from his expert Lois Vice, R.N., who had previously been identified through interrogatories. (R. 79-83).

Although no hearing was ever set on Pidikiti's motion for summary judgment, the trial court set a jury trial for November 13, 2006. (R. 325). In preparation for trial, the Plaintiff took the deposition of his expert, Dr. Shamblin, on October 6, 2006. On October 13, 2006, Dr. Pidikiti's attorney filed a motion to consolidate the Magnolia suit and the Pidikiti suit. (R. 328-337). On October 18, 2006, the trial court entered an order consolidating the two suits, and continued the November 13, 2006 trial. (R. 356). On October 26, 2006, Pidikiti filed a motion to strike Dr. Shamblin. (R. 367-373). On November 7, 2006, the trial court reassigned both causes to the Honorable Thomas Gardner, Circuit Judge. (R. 430). The Plaintiff filed his response to the motion to strike on December 29, 2006. (R. 474-490). A hearing was set on Dr. Pidikiti's motion to strike Dr. Shamblin on January 4, 2007.

After the hearing to strike was held on January 4, 2007, on January 17, 2007 the trial court set a trial for February 5, 2007. (R. 491-492). Because Magnolia's attorney had a prior conflict on that date, the trial court continued the February 5, 2007 trial until January 14, 2008. (R. 562). On December 20, 2007, just twenty-five days prior to trial, the trial judge entered an order striking the Plaintiff's expert and continuing the January 14, trial. (R. 593). The unexpected striking of the Plaintiff's expert sent the Plaintiff's attorney scrambling to find another expert. On January 20, 2008, on motion from the Plaintiff to hold the summary judgment in abeyance for sixty days in order to find another expert, the trial court granted the requested motion. (R. 639). Although the Plaintiff was successful in locating additional experts to replace Dr. Shamblin, his attorney was unable to obtain a final report from them. On April 24, 2008, the Plaintiff filed a motion with the court

disclosing the names and the curriculum vitae of his new retained experts, Dr. Philip Totonelly, M.D. and Crystal Keller, R.N. and requested an additional twenty one days for the filing of their reports. On May 5, 2008, the trial court denied the short extension request and without a hearing granted both summary judgment in favor of Pidikiti and of Magnolia. (R. 718-719). On May 12, 2008, the Plaintiff filed a motion to reconsider and requested that the trial court grant the short twenty one day extension to file the report of Dr. Totonelly, whose identity and curriculum vitae had previously been disclosed. The Plaintiff also pointed out that he had already provided an affidavit from his expert, Lois Vice, R.N., whose affidavit stated how the nursing staff at Magnolia failed to meet the applicable standard of care. (R. 725-731). Realizing its error, on August 20, 2008 the trial court vacated the order granting summary judgment in favor of Magnolia. However, the trial court abused its discretion in denying the short extension to obtain reports from Dr. Totonelly. (R. 735-736). From that order, the Plaintiff takes this appeal.

II.

SUMMARY OF ARGUMENT

The trial court abused its discretion in striking the Plaintiff's expert, Dr. James Shamblin. The trial court abused its discretion in refusing to grant the Plaintiff a short extension of twenty-one days to file a report of their retained expert, Dr. Philip Totonelly, M.D. Further the trial court abused its discretion in striking the testimony of Dr. James Shamblin and in granting summary judgment without a hearing.

III.

ARGUMENT

The trial court abused its discretion in striking the testimony of Dr. James Shamblin, the Plaintiff's expert. Dr. Shamblin was qualified to render an opinion in this cause and to offer testimony on the alleged failure of Dr. Pidikiti in her treatment of Terrell McDaniel, deceased. The trial court found that Dr. Shamblin was not familiar with the appropriate standard of care because he was not a cardiologist.

The trial court agreed with the Defendant Dr. Pidikiti that Dr. Shamblin should be disqualified from testimony because he is not a practicing cardiologist. However, that is not the requirement in Mississippi. A physician who is sufficiently familiar with the standards of care may testify as an expert even though he does not practice the specialty himself. *West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714, 718-19 (Miss. 1995). In *Mississippi Dep't of Health v. Hall*, 936 So.2d 917, 927-28 (Miss. 2006), this Court held that a family physician may testify about orthopedic injuries and infections because his testimony was based "merely on [the experts] lengthy experience as a physician." In the present case, Dr. Shamblin qualifies under the stated laws of this state as announced by the honorable Court.

In his Affidavit, he stated that he is familiar with the standard of care in Mississippi and has reviewed the medical records. He further stated that the treatment of Dr. Pidikiti fell below the applicable standard of care and was an approximate contributing cause of his death. In his Affidavit he stated the reasons why the care given fell below the applicable standard of care.

At first he stated that the procedure which Dr. Pidikiti did on Mr. McDaniel should not have been done because he was not a candidate for that surgery and there were non-evasive techniques which could be used. According to Dr. Shamblin, this fell below the standard of care. During the procedure, Dr. Pidikiti punctured an artery, which is a known risk. However, the treatment of Dr. Pidikiti after the artery was punctured fell below the standard of care. After the artery was punctured, Dr. Pidikiti failed to promptly diagnose the excess of bleeding from the punctured site and to treat it promptly. This fell below the applicable standard of care which would require prompt diagnosis of the arterial puncture followed by prompt treatment of the arterial puncture. Furthermore, according to Dr. Shamblin, Mr. McDaniel was kept on blood thinners which also fell below the applicable standard of care which would require the blood thinners be discontinued after the excessive leakage. Further, when he was finally transferred to the Northeast Regional Medical Center, he was transferred in an unstable condition which fell below the standard of care. All of this is found in his sworn Affidavit which was before the trial court.

In his deposition, Dr. Shamblin testified similarly. Dr. Shamblin is a general surgeon who specializes in bariatric surgery. He is currently teaching in the Tuscaloosa branch of the University of Alabama School of Medicine. Shamblin Deposition Page 9. He has had experience with vascular conditions during his residency at the Mayo Clinic. He spent six months in the cardiovascular department of surgery and did open heart surgery, as well as closed heart cases in vascular surgery, including aneurism of the aorta and bypasses of peripheral arteries. Shamblin Deposition (R. 99). He further testified that he has continued to treat patients with these problems over the years. *Id.* During his deposition, he testified extensively as to the procedures which Dr. Pidikiti utilized including the violations of the standard of care of Dr. Pidikiti.

When asked what Dr. Pidikiti did to reasonable degree of medical probability that fell below the standard of care, he listed several things. The first was that she entered into the wrong artery to perform the arteriogram. Shamblin Deposition (R. 102). The standard of care would have been to have gone into the femoral arteriogram. Shamblin Deposition. *Id.* Other areas which he testified that fell below the standard of care was the diagnosis of the left inguinal hernia during the noon hour on the day that the arteriogram was done. Shamblin Deposition (R. 103). He then went on to explain what the standard of care would require at that point. Shamblin Deposition. *Id.* He also testified that there were a number of appropriate non-evasive studies which could have been done to determine Mr. McDaniel's condition which would have been the appropriate standard of care given the condition of Mr. McDaniel. Shamblin Deposition (R. 103). He further testified that the treatment of Dr. Pidikiti, which fell below the applicable standard of care, was the cause of Mr. McDaniel's death. Shamblin Deposition (R. 104).

Dr. Shamblin's testimony satisfies the requirements of *West*, supra. There is no requirement that a physician practice in the speciality of a defendant accused of malpractice. He only needs to be familiar with the standard of care. SEE *The University Medical Center v. Martin*, 994 So.2d 740, 747 (Miss. 2008)(physician expert qualified when familiar with standard of care of emergency room physician even though he was not a practicing emergency room physician at the time of trial). He

clearly is familiar with the standard of care and carefully identified the area in which the standard of care was not met. The trial court abused its discretion in striking his testimony, which ultimately left the Plaintiff without an expert and subject to summary judgment.

The trial court also abused its discretion in refusing to allow the Plaintiff an additional twenty-one days to obtain written reports from his experts Dr. Philip Totonelly, M.D. and Crystal Keller, R.N. whom he had previously identified. After the unexpected striking of his expert nearly one year after the motion to strike was filed and only a few weeks prior to trial, the Plaintiff requested and received sixty days to designate another expert. Since the striking of Dr. Shamblin occurred during the month of December, the Holiday seasons of Christmas and New Year proved to be more difficult than expected in allowing the Plaintiff's attorney to locate new experts on such a complicated case. After finally locating experts and disclosing their names and curriculum vitae, the Plaintiff requested a short extension to obtain written and signed reports. The trial court denied the short extension, despite the fact that the Defendant would have suffered no undue prejudice. Rule 56(f) of the Mississippi Rules of Civil Procedure contemplates that additional time may be granted to obtain affidavits or reports to defeat summary judgment. SEE *Cunningham v. Lanier*, 555 So.2d 685, 686 (Miss. 1990)(justice is served when a fair opportunity to oppose a motion is provided). A fair opportunity was not provided in the case *sub judice*. Further no hearing was ever held on the motion for summary judgment, as contemplated by Rule 56 MRAP. Therefore, the Plaintiff should have been allowed to obtain supplemental affidavits from his experts prior to the date set for the hearing. SEE *Young v. Meacham*, 999So.2d 368, 372 (Miss. 2009)(there is nothing in our rules which prevents a plaintiff from filing a supplemental affidavit in a medical malpractice case after discovery deadlines have expired and trial court is required to consider it).

IV.

CONCLUSION

In conclusion, the trial court abused its discretion in striking the testimony of Dr. Shamblin. Dr. Shamblin was qualified to testify as a surgeon to the standard of care of Dr. Pidikiti, a

cardiologist, despite the fact that Dr. Shamblin was not a cardiologist. Dr. Shamblin testified that he was familiar with the surgical techniques employed by Dr. Pidikiti and was familiar with the standard of care. He specifically outlined what the standard of care required and where Dr. Pidikiti violated the standard of care. He further testified that the violations of the standard of care were a proximate cause of the death of the Plaintiff's decedent. The trial court also abused its discretion in refusing to grant a short twenty one day extension to file reports from his new expert after their identity and curriculum vitae were disclosed and in granting summary judgment without a hearing.

THIS, the 2nd day of April, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

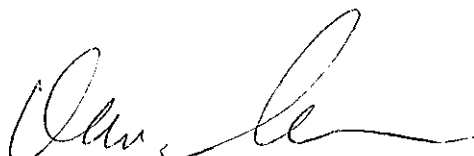
I, Dana J. Swan, do hereby certify that I have this day faxed a true and correct copy of the foregoing Appellant's Brief to:

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This the 2nd day of April, 2009.



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