IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE # 2008-CA-01994

ALICE VANLANDINGHAM **PLAINTIFF/APPELLANT**

VS.

GREGORY PATTON, M.D. AND OXFORD OBSTETRICS AND GYNECOLOGY ASSOCIATES, P.A. **DEFENDANTS/APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

BRIEF OF DEFENDANTS/APPELLEES GREGORY PATTON, M.D. AND OXFORD OBSTETRICS AND GYNECOLOGY ASSOCIATES, P.A.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Defendants/Appellees herein certifies that the following persons have or may have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Alice Vanlandingham, Plaintiff/Appellant
2. Alan D. Lancaster, Counsel for Plaintiff/Appellant, Alice Vanlandingham
3. John M. Montgomery, Counsel for Plaintiff/Appellant, Alice Vanlandingham
4. Gregory Patton, M.D., Defendant/ Appellee
5. Oxford Obstetrics and Gynecology Associates, P.A., Defendant/Appellee
6. Clinton M. Guenther, Counsel for Defendants/Appellees, Gregory Patton, M.D. and Oxford Obstetrics and Gynecology Associates, P.A.
7. Tommie Williams, Counsel for Defendants/Appellees, Gregory Patton, M.D. and Oxford Obstetrics and Gynecology Associates, P.A.
8. Honorable Henry L. Lackey, Circuit Judge

CLINTON M. GUENTHER, Counsel for Defendants/Appellees, Gregory Patton, M.D. and Oxford Obstetrics and Gynecology Associates, P.A.

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APPELLEES' NOTE TO THE COURT

References herein are as follows:

TT ___: to Trial Transcript

DRE ___: to Defendants'/Appellees' Record Excerpts

App Br ___: to Plaintiff's/Appellant's Brief

STATEMENT OF THE CASE

Prior to the spring of 2003, Plaintiff, Alice Vanlandingham, had had several abdominal surgeries, plus grafts for claudication/peripheral vascular disease. As a result of those surgeries, she had developed significant abdominal scar tissue, called adhesions, also known as pelvic adhesive disease, a condition in which scar tissue binds adjacent organs to each other. As a result of those adhesions, in early 2003 she began to experience such significant pelvic pain that it interfered with her work and married life. She was referred by her family physician to Dr. Gregory Patton, an OB/GYN in Oxford, Mississippi. After Dr. Patton tried treating Vanlandingham's pelvic pain conservatively with medical/non-surgical treatment, which proved unsuccessful, on the morning of June 23, 2003, Dr. Patton performed an operation to remove Vanlandingham's ovaries and to reduce her significant pelvic adhesions.

During the surgery, Dr. Patton found that scar tissue from her prior surgeries had adhered to an ovary and to the wall of her sigmoid colon. In removing the ovary and the adhesions from the colon wall, the outer portion of the wall of the colon - the serosa - was abraided or scraped, an unavoidable consequence of removing the ovary and the adhesions from the colon wall. However, Dr. Patton found no wound to or hole in the colon wall, or any other injury to the colon that required sutures. There was also no clinical evidence, such as bleeding or spillage of bowel contents, that indicated the need for surgical repair of the colon. On the evening of June 27, 2003, more than four days after her surgery, Mrs. Vanlandingham was discharged from the hospital, having made a good recovery. Later that evening, while at home, she very suddenly became very ill, after which it was discovered that she had a perforated colon, which resulted in peritonitis and numerous subsequent medical complications over the next several weeks.

Mrs. Vanlandingham sued Dr. Patton and his clinic for medical negligence, claiming that Dr.

Patton did not properly or adequately inspect her colon before he closed the surgery; and that if he had, he would have seen that her colon needed surgical attention, specifically the placement of sutures in the colon wall. She alleged that sutures would have prevented her colon from perforating, thereby preventing her other complications and alleged damages and injury. Dr. Patton responded that he did properly inspect the colon before closing surgery, and determined that there was no indication for surgical repair of her colon, that the abrasion would heal. Dr. Patton also responded that in all respects of his care and treatment of Vanlandingham, he complied with the applicable standard of care; and, therefore, that he did nothing to cause or contribute to Vanlandingham's perforated colon, peritonitis and subsequent medical complications.

At trial, Dr. Patton produced three highly qualified, board certified expert witnesses, two obstetrician/gynecologists and one surgeon, who testified that Dr. Patton complied with the applicable standard of care, as annunciated in *Hall v. Hilbun*, 466 So.2d 856 (Miss. 1985); that at the completion of Mrs. Vanlandingham's surgery on June 23, 2003, Dr. Patton had no indication that Mrs. Vanlandingham required further surgical attention; and, accordingly, that Dr. Patton did nothing to cause or contribute to Plaintiff's perforated colon and subsequent medical complications.

After a week's worth of testimony, eleven of the twelve jurors returned a verdict in favor of Dr. Patton and his clinic. Following entry of the jury verdict, Plaintiff filed a Motion for Judgment as a Matter of Law, Motion for Judgment Notwithstanding the Verdict or, in the Alternative, a Motion for a New Trial. Upon denial of those motions, Plaintiff perfected her appeal. From those post-trial motions, Plaintiff has refined her argument to contend that the trial judge committed reversible error when he failed to excuse two jurors for cause, and when he did not grant Plaintiff's motion to strike the testimony of one of Defendants' expert witnesses.

SUMMARY OF THE ARGUMENT

The trial court did not commit error when it did not strike for cause the two jurors about whom Plaintiff complains. Plaintiff's argument about those jurors is that each juror had a financial interest in the outcome of the case, such that they could not be fair and impartial. Not only is there no evidence that either juror had any financial interest in the outcome of the case, both jurors testified under oath, unequivocally, and more than once, that they could and would be fair and impartial. In addition, Plaintiff exercised three of her four peremptory challenges on three jurors that she did not challenge for cause.

The trial court also committed no error when it denied Plaintiff's motion to strike, in its entirety, the testimony of Defendants' expert witness, Dr. Steven Stain, a board certified surgeon, and the Chair of the American Board of Surgery. Plaintiff has "cherry picked" only snippets from one hundred pages of Dr. Stain's trial testimony, which she erroneously claims justify the exclusion of everything Dr. Stain testified at trial. Dr. Stain's testimony and opinions regarding the standard of care and causation were unquestionably stated in terms of reasonable medical probability, not only as specifically stated numerous individual times, but certainly when his testimony is taken as a whole.

Not only was no error committed with regard to juror selection or expert testimony, there was overwhelming evidence to support the jury's verdict, thus also clearly supporting the trial court's denial of Plaintiff's post-trial motions. Plaintiff received a trial by a fair and impartial jury, and there was no abuse of discretion by the trial judge. No reversible error was committed, and there is no basis to overturn the jury's verdict in this case.

STANDARD OF REVIEW

The standard of review of a trial court's decision to deny a challenge to a juror for cause is one of abuse of discretion, but also one which requires a showing of a clear abuse of discretion. "The selection of jurors is a 'judgment call peculiarly within the province of the Circuit Judge, and one we will not on appeal second guess in the absence of a record showing a **clear** abuse of discretion.' ...This Court is required to reverse the trial court when this Court **clearly** is of the opinion that a juror was not competent." *Adkins v. Sanders*, 871 So.2d 732, 740 ¶ 31 (Miss. 2004) (citations omitted) (**Emphasis** added). *See* also *Scott v. Ball,* 595 So.2d 848, 850 (Miss. 1992).

Abuse of discretion is also the standard by which a trial judge's decision to admit expert testimony is reviewed. The trial judge's decision will stand, unless the appellate court determines that the judge's decision was "arbitrary and **clearly** erroneous". *Kidd v. McRae's Stores Partnership*, 951 So.2d 622, 626, ¶ 17 (Miss. App. 2007). (Citations omitted). (**Emphasis** added).

A motion for a new trial should be granted only if the jury's verdict is contrary to the law or against the overwhelming weight of the evidence. Likewise, the appellate court should not overturn the trial court's denial of a motion for a new trial unless the trial judge has abused his discretion. All of the evidence supporting the verdict must be examined as true. The appellate court utilizes an abuse of discretion standard when reviewing the trial court's evidentiary rulings; and in order to reverse the case upon the admission or exclusion of evidence, the trial court's ruling must have resulted not only in prejudice, it must have adversely affected a substantial right of the aggrieved party. "Thus, not only must the trial judge abuse his discretion, the harm must be severe enough to harm a party's substantial right." *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611, 617 ¶ 18, 618 ¶ 21 (Miss. 2002).

ARGUMENT

1. The trial court did not commit error by refusing to strike for cause Juror 27, Thomas Guest, and Juror 26, Lisa Daniels.

Plaintiff contends that Juror No. 27, Thomas Guest, and Juror No. 26, Lisa Daniels, should have been excused for cause because of their [alleged] "financial interest" in the outcome of the case. Since Plaintiff obviously did not want either Mr. Guest or Ms. Daniels to serve on the jury, she contends she was "forced" to save a peremptory challenge and choose between those two jurors as upon which of them she would exercise that peremptory challenge. Implicit in her argument, of course, is that she should not have had to have chosen between either juror, since she contends both jurors should have been struck for cause, allowing her to use a peremptory challenge on another juror. As such, Vanlandingham claims she was not afforded an opportunity to choose a fair and impartial jury.

Addressing the two jurors in the order in which Plaintiff addresses them in her brief, Defendants first consider Juror No. 27, Thomas Guest, and why the trial court did not commit error in not dismissing Mr. Guest for cause.

Plaintiff contends that Mr. Guest should have been excluded from the jury because of an alleged "financial interest" that Guest had in the outcome of the trial. At pages 8 and 11 of her brief, Vanlandingham states that Mr. Guest had "had **several real estate** transactions" (**Emphasis** added) with Dr. Glenn Hunt, Dr. Patton's partner (App Br 8, 11); however, the record does not reveal that. When counsel for Vanlandingham voir dired the jury and asked if anyone knew Dr. Hunt, Mr. Guest replied, "I am in the real estate business, and I have done business with Dr. Hunt." (TT 67/DRE 3). Vanlandingham's counsel did not inquire further, nor did Mr. Guest volunteer information, about what type of "business" Guest had done with Dr. Hunt, how much business, how often, or how

recently/long ago. Vanlandingham may infer or assume that Guest had done real estate business with Dr. Hunt, but Guest never said that. He specifically never said that he had had "**several** real estate transactions" with Dr. Hunt. (**Emphasis** added).

Next, Vanlandingham's counsel asked Guest that if Guest were to be chosen as a juror and were to find against Dr. Patton, would Guest feel like he would have to explain his vote to Dr. Hunt (or Dr. Patton). Guest replied, "**I feel like I could be fair**, but I feel like it would cost me some business in the future if I ruled against him, **but I feel like I could be fair**." (TT 67-68/DRE 3-4) (**Emphasis** added). Not once but twice Guest acknowledged that even though he felt like it could "cost him some business in the future", he nevertheless could be fair; he would perform his duty as an impartial juror.

The two cases cited by Plaintiff in her brief in support of her argument that Mr. Guest had a financial interest in the outcome of the case are as inapplicable to Mr. Guest as are Plaintiff's arguments. In *Berbette v. State*, 109 Miss. 94, 67 So.853 (1915), a juror was challenged by the appellant on the ground that the juror was an [actual] employee of the electric company from which the appellant had been charged with stealing. That is, in *Berbette*, the juror in question had not just "done business" with a party in interest, the juror was an actual "bona fide" employee of a party to the law suit. Not only was Guest not an employee of Dr. Patton (or of Dr. Hunt), the person with whom Guest had "done business" was not Dr. Patton. Plaintiff acknowledges that Dr. Hunt was "not directly a litigant in this case" and was someone against whom "no claim was made...individually." (App Br 11). Those outcome-determinative distinctions render *Berbette* of no support to Plaintiff's argument.

The second case cited by Plaintiff, *Overing v. Skrmetta*, 318 Miss. 648, 67 So.2d 606 (1953), is actually supportive not of Plaintiff's argument, but of Defendants'. On voir dire in *Skrmetta*, the

juror in question was asked by the plaintiff's counsel if he had ever worked for the defendants or any member of their family. The juror replied that he had worked for "Mrs. Skrmetta" when he had floored a building for her. In citing *Berbette v. State*, above, the *Skrmetta* court recognized that an employee of a party to a suit is incompetent to serve as a juror. However, they found that based upon the juror's testimony during voir dire, the juror in question was not regularly employed by "Mrs. Skrmetta", and that there was not even a "Mrs. Skrmetta" who was a party defendant to the suit. As such, the Court ruled that there was no error in allowing that juror to remain in the panel. In Dr. Patton's case, like the juror in *Skrmetta*, Mr. Guest was not an employee of Dr. Patton (or Dr. Hunt), and the business Guest had done was with Dr. Hunt, who was not a party to the lawsuit.

Plaintiff also takes an interpretive liberty with Mr. Guest's testimony when, at page 11 of her brief, she states that "Mr. Guest was concerned that his holding adversely for Dr. Patton in the lawsuit might cost him some money. That is an interest which, without doubt, would be calculated to influence his verdict." (App Br 11) First, Mr. Guest never stated that he was "concerned" about possibly losing future business. Next, just as Judge Lackey rightly recognized, that is only Plaintiff's interpretation of Mr. Guest's testimony. Judge Lackey understood Guest to mean that he could be fair, <u>even if it did</u> cost him some business in the future - not that Guest was <u>concerned that it might</u> cost him some future business. (TT 96/DRE 6). If, in fact, Mr. Guest was that "concerned", then he certainly appears to have laid that concern aside when he twice said that even if it cost him some future business, "...I feel like I could be fair." (TT 67-68/DRE 3-4).

Mr. Guest's having "done business" with Dr. Hunt, who was not a party to the lawsuit, does not square with either case cited by Plaintiff in support of her argument that Guest had any financial interest or conflicting business interest which should have caused him to have been excluded from the jury panel. Mr. Guest's comment was also speculative in nature, made with regard to the future,

and it was devoid of any evidence (or even any suggestion) that any such future "business" (whatever that might be) was of any substantial nature or significant financial interest to Mr. Guest.

Plaintiff's argument about Juror No. 26, Lisa Daniels, is also based upon nothing more than [just] Plaintiff's loosely woven theory, certainly not any credible evidence, that Ms. Daniels had a financial interest in the outcome of the case. In her brief, at page 12, even Vanlandingham characterizes Daniels' alleged interest as "an **indirect** financial interest." (App Br 12) (**Emphasis** added). Yet Ms. Daniels also was not an employee of Dr. Patton, and she testified that she did not have any contact with Dr. Patton or his clinic. (TT 53/DRE 1).

Although Daniels acknowledged that the clinic for which she worked part-time did get referrals from Dr. Patton's clinic, and vice versa, to accept Plaintiff's argument that Daniels, who was [only] a PRN ("as needed") part-time employee of another clinic had a "business relationship" with Dr. Patton and/or his clinic, which thereby constituted a "financial interest" in the trial's outcome, is a totally unsubstantiated assertion that requires a quantum leap in reasoning.

There was no inquiry by Vanlandingham's counsel or testimony by Daniels as to whether or not Daniels had ever even personally dealt with or known one of Dr. Patton's patients who had been referred to the clinic where Daniels worked, or vice versa. In fact, Daniels testified to just the opposite. (TT 53/DRE 1). There is also no basis for the conclusion that the decision of a single, part-time nurse would have any influence over or effect upon her clinic's or Dr. Patton's clinic's policy of acceptance from or referral to patients of Dr. Patton. In addition, like Mr. Guest, in answer to two specific questions posed by Vanlandingham's counsel, Daniels acknowledged that she could be fair and impartial; and that she could set aside her "relationship" with the two clinics, so as to not cause her to tend to believe Dr. Patton's testimony over someone else's. (TT 54/DRE 2).

In the recent case of *Heaney v. Hewes*, 8 So.3d 321 (Miss. App. 2009), the Mississippi Court of Appeals addressed an appeal in which it was found that the trial court had acted within its discretion when it decided not to dismiss all potential jurors who had had prior contacts with the two defendant doctors. Citing earlier Mississippi Supreme Court decisions, the *Heaney* court recognized that "Jurors take their oaths and responsibilities seriously, and when a prospective juror assures the court that, despite the circumstance that raises some questions as to his qualification, this will not affect his verdict, this promise is entitled to considerable deference." *Id.* at 226 ¶ 17, citing *Hamilton v. Hammons*, 792 So.2d 956, 962-963 ¶ 34 (Miss. 2001). The *Heaney* court went on to state: "Suffice it to say, we are not prepared to say that, in general, jurors commit perjury when they promise they can remain impartial." *Id.* at 228 ¶ 23.

The *Heaney* court also recognized that when determining whether or not to excuse prospective jurors, including those challenged for cause, the trial court has wide discretion; such that the appellate court should reverse the trial judge's decision regarding prospective jurors only where the court's decision is "**clearly** erroneous or **against the overwhelming weight** of the evidence." Because of the trial court's proximity to the jury panel during voir dire, and because of the trial court's being better able to gauge the responses of prospective jurors, the appellate court defers to the Circuit Court in its decisions regarding whether or not to remove prospective jurors from the venire. *Heaney* at 225 ¶ 13 (Citations omitted). (**Emphasis** added).

"The promise of a prospective juror that he will remain impartial and that his verdict will not be affected is given great deference, even given circumstances which raise questions about his qualifications." *Adkins v. Sanders*, 871 So.2d 732, 742 ¶ 40 (Miss. 2004) (Citations omitted). *See* also *Scott v. Ball,* 595 So.2d 848, 850 (Miss. 1992), and *Ortman v. Cain*, 811 So.2d 457, 460-461 ¶ 10 (Miss. App. 2002). Judge Lackey heard and measured the responses given by Mr. Guest and

Ms. Daniels. Both jurors twice testified and/or acknowledged that they could be fair and impartial; and there was no evidence that either juror had any financial interest in the outcome of the case, especially not any foreseeably certain or substantial financial interest that could be reasonably calculated to influence their verdict.

In that regard, although Dr. Patton's case does not involve an alleged financial interest of a judge, *Washington Mutual Finance Group, LLC v. Blackmon*, 925 So.2d 780 (Miss. 2004) provides guidance as to what should constitute enough of a "financial interest" to disqualify a potential juror. In *Blackmon*, which dealt with a motion for recusal of a judge, the appellate court found that the judge in question needed to have had more than a "...remote, contingent, and speculative interest" in order to be deedmed to have a financial interest [within the meaning of a subject recusal statute]. *Id.* at 794 ¶ 56 (citations omitted.) That court also ruled that if the judge does not own an interest in a party litigant, then "...There must be a showing - **not mere speculation** - that he **will be substantially affected** by the decision of the case." *Id.* at 795 ¶ 60. (**Emphasis** added).

Although the *Blackmon* case dealt with an alleged financial interest of a judge and not a juror, it does not stand to reason that a judge should be held to a different standard for recusal than a juror should be held [in order to serve on a jury], at least not when considering an alleged financial interest in the outcome of the case. Both judge and juror should be fair, impartial and unbiased. If a "remote, contingent and speculative" financial interest is not enough to justify recusal of a judge, only that much or even less should not be considered sufficient to strike a juror for cause. Vanlandingham's contention that Mr. Guest and/or Ms. Daniels had a financial interest in the outcome of the case is, at best, "remote, contingent, and speculative." There was also no evidence or "showing" that either juror would be substantially affected by the decision or outcome of the case. Vanlandingham's argument that Guest and Daniels had any financial interest in the jury's decision

is only an unsupported assertion, not based upon evidence, and made in disregard of both jurors' repeated testimony that they could be fair and impartial. Neither juror should have been excused or struck for cause, and Judge Lackey committed no error in not doing so.

Nevertheless, even if both Daniels and Guest had been removed from the panel for cause, if Plaintiff had used her then remaining peremptory challenge on any one of the next potential five jurors who remained in the panel (Juror 29, James Trumbo; Juror 31, David Dyke; Juror 35, Betty Russell; Juror 36, Amanda Egerson; and Juror 40, Anita Ousley, who all were acepted as jurors), Juror 44, Jennifer Gafford, would have been the twelfth juror. As it was, Gafford was accepted by both sides as the first alternate. The next juror, 46, James Maples, was also accepted by both sides as the second alternate. (TT 103-106/DRE 8-11).

Since the jury found eleven to one in favor of Dr. Patton, with Juror David Dyke's being the one dissenting vote, it stands to reason that if Plaintiff had had one more peremptory challenge, she would have [had to have] used it against Gafford or Maples. However, since she accepted both those jurors as alternates, it does not stand to reason that she would have exercised a peremptory challenge on either of them. Even so, if she had peremptorily challenged either Gafford or Maples, then the other of those two jurors would have been the 12th juror. As it was, Gafford did end up serving as a juror when Juror Pruitt became ill on the morning of the third day of trial. Gafford's vote was in Dr. Patton's favor. (TT 927-929).

If Maples had served as a juror, and even if he had joined Mr. Dyke in his decision to find for Vanlandingham, the jury verdict would have been 10 to 2 in Defendants' favor. It also stands to reason that even if one more juror after Maples had been chosen to serve and had voted in Plaintiff's favor, the best outcome Plaintiff could have expected would have been a vote of 9 to 3 in Defendants' favor, and the outcome of the trial would still have been the same.

Finally, it should also be noted that Vanlandingham exercised three of her four peremptory challenges on jurors whom she had not challenged for cause: Juror 10, Diana Mobley; Juror 18, Jackie Rozier; and Juror 30, Kathryn Smith (TT 103/DRE 8). Vanlandingham should not be able to complain about the trial court's not removing for cause Juror 26, Daniels and/or Juror 27, Guest, when Vanlandingham could have exercised peremptory challenges on both, as she did on Guest.

As the Court ruled in *Adkins v. Sanders*, 871 So.2d 732, 742 ¶ 44, "Having exercised her peremptory challenges on jurors who were not challenged for cause, Adkins may not complain that the trial court erred in refusing to dismiss Juror No. 22 for cause." The *Adkins* court, citing *Herrington v. Spell*, 692 So.2d 93, 101 (Miss. 1997) noted that in *Herrington*, Herrington chose to exercise peremptory challenges on individuals who had not been challenged for cause, instead of on the jurors about which the Herringtons claimed should have been excused for cause. As in *Adkins*, the *Herrington* court refused to reverse the trial judge's refusal to dismiss those individuals from the jury panel. (*See* also *Scott v. Ball*, 595 So.2d 848, 851 ¶ 10 (Miss. 1992)). Likewise, and for the same reason, this Court should not reverse Judge Lackey's refusal to dismiss Mr. Guest and Ms. Daniels from the jury panel for cause.

For all of the above reasons, Judge Lackey committed no error, nor did he abuse his discretion in refusing to strike for cause Juror 27 and/or Juror 26.

2. The trial court did not commit error by refusing to strike the testimony of Dr. Patton's expert witness, Dr. Steven Stain, whose opinions were individually, and particularly when taken as a whole, expressed as being based upon reasonable medical probability and upon the applicable standard of care.

As to the matter of one of Defendants' expert witnesses, Dr. Steven Stain, the premise for

Plaintiff's *ore tenus* motion[1] at trial to strike Dr. Stain's testimony was several excerpts of testimony from Dr. Stain's deposition taken in this case almost two years before trial. That deposition testimony dealt with several potential causes of Plaintiff's bowel perforation. Although perhaps Plaintiff did not have to file a *Daubert*-style motion prior to trial, the fact is, and for whatever reason, she did not. Plaintiff also filed no motion to limit or strike Dr. Stain's testimony prior to trial. In fact, nothing specific arose with regard to an objection by Plaintiff to Dr. Stain's testimony until well into Dr. Stain's direct examination by Dr. Patton's counsel. And Plaintiff did not move to limit or strike Dr. Stain's testimony until the jury had heard it in its entirety.

At trial, upon Plaintiff's opportunity to voir dire Dr. Stain (TT 515-58/DRE 25-28), Vanlandingham's counsel made no motion to strike or exclude Dr. Stain as an expert witness, nor did she make any objection to Dr. Stain's being accepted as an expert witness. In fact, during Plaintiff's voir dire of Dr. Stain, when Dr. Stain was asked by Plaintiff's counsel questions about his testimony given at his deposition, Dr. Patton's counsel interjected: "Your Honor, I think we are getting ahead of ourselves here. We are on qualifications at this point." Vanlandingham's counsel replied only, "We will just make that one at the appropriate time." (TT 518/DRE 28). However, at that time Vanlandingham's counsel did not object or make any motion to strike or disqualify Dr. Stain as an expert witness or to limit Dr. Stain's testimony. In addition, Plaintiff did not ask the Court for permission to voir dire Dr. Stain outside the presence of the jury. Without Vanlandingham's counsel's having informed Judge Lackey and having made a record of their intentions in so voir diring Dr. Stain, Judge Lackey had no way of knowing [what were] Plaintiff's

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[1] The trial transcript does not [appear to] contain the actual motion, although Judge Lackey does mention the motion at pp. 613 and 619 of the trial transcript.

counsel's intentions or their [future] objections to Dr. Stain's testimony.

Plaintiff argues that, "Upon reflection the Court realized that once the issue of competency of Dr. Stain's testimony arose, [Judge Lackey] should have at least allowed Mrs. Vanlandingham to voir dire Dr. Stain outside the presence of the jury. **He did not do so.**" (App Br 24) (**Emphasis** added). Yet the comment Plaintiff refers to, that Judge Lackey made, was made the day after Dr. Stain had testified, and after Dr. Stain had already been excused as a witness. More importantly, Plaintiff's counsel never asked Judge Lackey to allow them to voir dire Dr. Stain outside the jury's presence, at any time. They did not ask to do so during their opportunity to voir dire Dr. Stain before he began his testimony; they did not do so at any time during his testimony; nor did they ask to be allowed to do so before Dr. Stain was excused as a witness. Yet Plaintiff now criticizes the trial judge for not doing something which Plaintiff never asked or sought to do, herself.

It bears repeating that during Plaintiff's voir dire of Dr. Stain (TT 515-518/DRE 25-28), Judge Lackey did not know what Dr. Stain had said at a prior deposition; he did he know what Dr. Stain was going to be asked or say at trial; nor was Judge Lackey given any indication as to Plaintiff's counsel's intent in voir diring Dr. Stain. Plaintiff's voir dire of Dr. Stain ended with a question about Dr. Stain's opinions, expressed at his deposition, "...as to **what happened** in this case." (TT 518/DRE 28) (**Emphasis** added). Plaintiff's counsel asked Dr. Stain nothing about the standard of care during Plaintiff's voir dire of Dr. Stain. Also, again, if Plaintiff's counsel had wanted to voir dire Dr. Stain outside the presence of the jury, they should have explained their reasoning and intentions to Judge Lackey and asked him to allow pursuit of their line of questioning outside the jury's presence - none of which Vanlandingham's counsel did, and none of which Judge Lackey could have known about without Plaintiff's counsel's having informed him.

Ignoring Dr. Stain's testimony when taken as a whole, and relying only upon several small

excerpts of Dr. Stain's testimony - most of which were made not at trial, but at a deposition taken two years before - Plaintiff complains that Dr. Stain's testimony was "incompetent", because it was not stated "to a reasonable degree of medical probability". She also complains that it did not "articulate" the applicable standard of care. Plaintiffs are wrong on both accounts. As to the specifics of Dr. Stain's trial testimony, in order to not have to repeat the [qualifying] language of "to a reasonable degree of medical certainty or probability", Dr. Stain acknowledged to Dr. Patton's counsel that when he gave opinions, he would do so only if he held the opinion "...sincerely and with the required to **reasonable degree of medical certainty**" (TT 510/DRE 20). (**Emphasis** added.) Dr. Stain also agreed to use the definition of the standard of care that is accepted in Mississippi courts when asked questions regarding Dr. Patton's treatment and care of Vanlandingham (TT 520/DRE 30).

It was not until Dr. Stain was asked on direct examination, "...In your opinion was there a hole in the colon, a through-and-through hole in the wall of the colon, at the time Dr. Patton finished his surgery and closed the patient?", to which Dr. Stain responded, "You ask me to talk about probability, so I will use your terms", that Plaintiff's counsel approached the bench. (TT 535/DRE 45). At that time, Vanlandingham's counsel for the first time referred Judge Lackey to Dr. Stain's prior deposition testimony (TT 536/DRE 46) and argued, "**I don't think he can change his opinion like that**" [at trial]. (TT 538/DRE 48) (**Emphasis** added). Vanlandingham's counsel argued that at Dr. Stain's deposition, Dr. Stain had said he could not pick one of four possible causes of Plaintiff's colon perforations as being the one that had a 51% chance, or more than a 50% chance of being the cause. Yet, argued Vanlandingham's counsel, Dr. Stain "is going to say here today [at trial] that he can." (TT 538/DRE 48). Vanlandingham's counsel then argued that "...this is a Daubert type situation where it's not qualified...because he is giving [his opinion] to a possibility and not a

probability." (TT 540/DRE 50).

Judge Lackey ruled that any difference in Dr. Stain's deposition testimony and his testimony at trial would be a good subject for cross-examination (TT 539/DRE 49), and he also rightly recognized that "**We haven't** [even] **gotten there yet**...[Just] Because a man said something two years ago, **I can't keep him from changing his mind**." (TT 540/DRE 50). (**Emphasis** added). Vanlandingham's counsel then argued that Dr. Stain "...is not competent as a medical expert witness if he can't give an opinion to a medical probability. He says [at his deposition] he can't do that. It's a competency question." (TT 541/DRE 51). The Court again [and correctly] ruled that whether or not Dr. Stain had changed his mind since his deposition, and if so, what had caused him to change his mind, was up to Vanlandingham's counsel to explore on cross-examination. (TT 542/DRE 52).

During Dr. Stain's trial testimony, Plaintiff made no objection to his testimony as it applied to the standard of care. Plaintiff's counsel's objections during Dr. Stain's trial testimony concerned his opinions regarding the cause of Vanlandingham's bowel perforation, not Dr. Stain's "articulation" of the standard of care. Plaintiff never mentioned the words "standard of care" in her voir dire of Dr. Stain (TT 515-518/DRE 25-28), nor in her argument to the court that Dr. Stain's testimony as to causation was "incompetent" (TT 535-543/DRE 45-53). If Plaintiff did not thereby waive any specific objection as to Dr. Stain's responses to questions or as to his allegedly not having articulated the standard of care, she at least made no record of any such objection(s) at trial.[2]

Even so, there is no requirement in this state that a defendant physician or his expert

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[2] Although the trial transcript reflects Judge Lackey's comments regarding a motion by Plaintiff to exclude Dr. Stain's testimony "...based upon the allegation that he could not enunciate and did not know the standard of care" (TT 613, 619), the record does not reflect what testimony of Dr. Stain that Plaintiff objected to at trial, nor does it appear to include Plaintiff's motion as part of the record.

witnesses have the burden of proof of articulating the standard of care. That burden of proof is upon the plaintiff. It is encumbent upon a plaintiff, through expert testimony, to establish the requisite elements of a prima facie case of medical negligence, including "establishing the details of the standard of care to which a physician is held." *Busby v. Mazzeo,* 929 So.2d 368, 372 ¶10 (Miss. App. 2006) citing *Boyd v. Lynch,* 493 So.2d 1315, 1318 (Miss. 1986). Plaintiff wants to shift that burden to the defendants (App Br 22-23), but there is no case precedent or support for such a radical departure from the historic procedural concept that holds otherwise.

In addition, the seminal case of *Hall v. Hilbun*, 466 So.2d 856 (Miss. 1985) does not stand for the proposition for which Plaintiff appears to try to be using it. (App Br 23). In fact, that case, also, supports Judge Lackey's decision to deny Plaintiff's motion to strike Dr. Stain's testimony. The Court in *Hall v. Hilbun* held:

> In view of the refinements in the physician's duty of care articulated in Subsection III(C) above, we hold that **a qualified medical expert witness may** without more **express an opinion regarding the meaning and import of the duty of care** articulated in Subsection III(C) above, **given the particular circumstances of the case**. Based on the information reasonably available to the physician,... **a qualified medical expert may express an opinion regarding the conclusions... minimally knowledgeable and competent physicians in the same specialty or general field of practice would draw, or actions... they would take...**
>
> Once he has become informed of the facilities, etc. available to the defendant physician, the **qualified medical expert witness may express an opinion what the care duty of the defendant physician was and whether the acts or omissions of the defendant physician were in compliance with**, or fell substantially short of compliance with, that duty...
>
> We remind one and all that **the qualification of a medical expert witness in a malpractice action is no more a mechanical process than any other procedure in our law**. Within the limits of the general rule stated above, **the trial judge is necessarily called upon to exercise his sound discretion in determining whether a**

proffered witness is in fact qualified as an expert. *Id.* at 874-875. (**Emphasis** added).

Notwithstanding the fact that it is a plaintiff's burden for a plaintiff's expert to articulate (i.e. establish the details of) the standard of care to which a defendant physician is held, Judge Lackey was manifestly correct in the exercise of his sound discretion in determining that Dr. Stain was qualified to testify as an expert witness; and that as such, having become informed of the facilities, etc. available to Dr. Patton, Dr. Stain could express opinions of what the duty of Dr. Patton was, and whether Dr. Patton's acts or omissions were in compliance with that duty, the standard of care. Dr. Stain did exactly that, repeatedly, when he testified that in dealing with a serosal abrasion of Mrs. Vanlandingham's sigmoid colon wall, Dr. Patton complied with the standard of care in not suturing the abrasion, because the standard of care does not mandate that serosal abrasions be repaired.

As Dr. Stain's direct examination continued, he was asked whether or not he agreed with the trial testimony of Plaintiff's [only medical] expert witness, Dr. E. B. Kleier, that there was "**most likely...not** a through-and-through perforation of the patient's colon **at the time the surgery ended**," with which Dr. Stain did agree (TT 544/DRE 54) (**Emphasis** added). Dr. Stain then testified that he would not stitch a serosal injury unless there was evidence of "outpouching" of the mucosa through the muscularis and serosa (TT 545-547/DRE 55-57). He later testified that from what he had read in Dr. Patton's operative note, based upon the description in that note, there was no such "outpouching"; and that the standard of care did not require Dr. Patton to make any further surgical intervention in the area of the colon before he closed the surgical procedure (TT 548-550/DRE 58-60).

Then, upon being given a summary of Vanlandingham's treatment and subsequent colon perforation diagnosed five days after the surgery, he was asked if "...**to a reasonable degree of**

medical certainty..." Dr. Patton had complied with the standard of care, Dr. Stain testified: "**I have no doubt** from all of the things you have mentioned and that I have reviewed that **he complied completely with the standard of care from the records I saw**." (TT 550-551/DRE 60-61) (**Emphasis** added). Dr. Stain was then asked how, in his opinion, Dr. Patton was not guilty of breaching the standard of care. He replied, first, that informed consent was documented; injury to the bowel is always a risk of an operation in the abdomen; and that his "guess" was that it was a serosal injury to the colon (TT 551/DRE 61).

When Plaintiff's counsel objected to Dr. Stain's use of the word "guess" (which objection the Court sustained), Dr. Stain was reminded that any opinions needed to be stated to a reasonable degree of medical certainty or probability (TT 552/DRE 62). As such, Dr. Stain replied: "I am sorry for using the term 'guess'. I believe certainly **a probability** that **the most likely thing that happened** in the patient was [that] there **was a serosal injury that progressed in her post-operative period to a perforation, which is what caused her peritonitis**. And I think in answer to your specific question, I think the things that were done from reading the operative note, reading the post-operative progress notes, that **Dr. Patton complied with the standard of care**." (TT 552/DRE 62) (**Emphasis** added).

On cross-examination, by Vanlandingham's counsel, Dr. Stain was asked, "**Did you testify today** that **based upon a reasonable medical probability** that **the most likely cause of the perforation was a serosal injury** which we were talking, **a tear of just the serosa**, that **you came down and drew for us; is that right**?" Dr. Stain acknowledged that he did testify so, and that he had drawn it for the jury (TT 554-555/DRE 64-65) (**Emphasis** added). When he was further questioned about his opinion that the injury was a serosal injury that could appear bruised, Dr. Stain

testified, "What I believe I said was, I thought **the most likely etiology for the perforation**, was, there was a **serosal injury that progressed to a full thickness injury**." (TT 555/DRE 65). (**Emphasis** added).

Later, also in response to Vanlandingham's counsel's specific question about whether or not the standard of care does not require a repair if the injury to the colon wall gets into the muscularis, Dr. Stain replied: "**The standard of care does not mandate that you fix a colon injury that went through the serosa and went through the superficial part of the muscularis**." (TT 557/DRE 67) (**Emphasis** added). Later, when Vanlandingham's counsel cross-examined Dr. Stain with an article written by another of Dr. Patton's expert witnesses, Dr. Mark Reed, Dr. Stain agreed that serosal abrasions need not be repaired (TT 558/DRE 68), and testified, "I would say that **the standard of care does not mandate that they** [serosal abrasions] **are repaired**." (TT 558-559/DRE 69). (**Emphasis** added).

When asked about whether or not Vanlandingham's endocarditis and other complications following the colon perforation were related to a bowel perforation (which Dr. Reed said were all related), Dr. Stain replied, "So I think Dr. Reed is entitled to his opinion. You asked if it was my opinion, and I said not all, but I could be **medically certain or probable that it was** all due to the colon perforation." (TT 569/DRE 79) (**Emphasis** added).

During further cross-examination, Dr. Stain was again asked about his deposition testimony where he had been discussing four potential scenarios for the cause of Vanlandingham's colon perforation. At trial, Plaintiff's counsel asked Dr. Stain about how, at his deposition in 2006, Dr. Stain had said (reading from his deposition), "...I cannot pick one of those that has more than 51%

chance of being right."[3] (TT 570-571/DRE 80-81). Then, after reading that portion of his deposition, Vanlandingham's counsel specifically asked Dr. Stain if his testimony at trial was that the injury was a serosal injury that progressed to a delayed perforation; to which Dr. Stain responded, "That is what I believe is **more probable than not** is what happened." (TT 571/DRE 81) (**Emphasis** added).

Finally, on cross-examination by Vanlandingham's counsel, asked about the deposition testimony of several fact of Plaintiff's family members, whose depositions Dr. Stain had read, Dr. Stain testified: "My assumption from what I heard, the numerous depositions and Mr. Vanlandingham's description, was that **there was a serosal injury and that Dr. Patton thought that would heal**; and **if you are asking me was that within the standard of care, my answer is that, yes, that is within the standard of care**." (TT 595/DRE 105) (**Emphasis** added).

On re-direct examination, after Dr. Stain was again presented with a summary of assumptions regarding Vanlandingham's surgery, and was again asked, based upon the evidence whether or not it was appropriate and within the standard of care for Dr. Patton to have terminated the surgical procedure and sent the patient to recovery, he replied, "Yes it was." (TT 600/DRE 110). At the end of his examination at trial, Dr. Stain was then asked whether or not any of the questions asked him on cross-examination had changed his opinion as to whether or not Dr. Patton had met the standard of care, to which he replied, "No, it did not." (TT 602/DRE 112).

As evidenced by Dr. Stain's trial testimony, certainly when taken as a whole and not "cherry

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[3] At Dr. Stain's deposition, Vanlandingham's counsel had designed the question posed to Dr. Stain, defining the legal term "reasonable medical probability" as which of the possible causes had "more than a 51% chance" of being the cause of Vanlandingham's perforated bowel. (TT 570-571, 573/DRE 80-81).

picked" (especially not just from excerpts of a deposition taken years earlier), it is abundantly clear that Dr. Stain provided ample testimony, all to a reasonable degree of certainty or probability, of what the standard of care did and did not require of Dr. Patton; that Dr. Patton did comply with the standard of care when he did not suture the abrasion of Mrs. Vanlandingham's colon wall; of what probably caused Vanlandingham's colon perforation; and that no alleged breach of the standard of care by Dr. Patton caused Vanlandingham's colon perforation and subsequent problems.

All of Dr. Stain's opinions were stated or acknowledged to be given to a reasonable degree of medical certainty or probability, and none were articulated in a way that did not make the opinion probable. And although no "magic" or specific words are required for an expert's opinion to be stated, as reiterated below, even the express language used by Dr. Stain was legally sufficient:

- **"I have no doubt...that [Dr. Patton] complied completely with the standard of care..."** (TT 550-551/DRE 60-61).
- **"I believe certainly a probability that the most likely thing that happened..."** (TT 552/DRE 62).
- **"...Dr. Patton complied with the standard of care."** (TT 552/DRE 62).
- **"[I did]...testify today that based upon a reasonable medical probability that the most likely cause of the perforation was..."** (TT 554-555/DRE 64-65).
- **"...The most likely etiology for the perforation, was..."** (TT 555/DRE 65).
- **"The standard of care does not mandate that you fix a colon injury that went through the serosa and went through the superficial part of the muscularis."** (TT 557/DRE 67).
- **"...The standard of care does not mandate that [serosal abrasions]** are

repaired." (TT 558-559/DRE 68-69).

- **"...I could be medically certain or probable that it was all due..."** (TT 569/DRE 79).
- **"That is what I believe is more probable than not..."** (TT 571/DRE 81).
- **"...There was a serosal injury and...Dr. Patton thought that would heal;...that was within the standard of care."** (TT 595/DRE 105).

As mentioned, there is no requirement in the state of Mississippi for any "magic words" that must apply to expert medical testimony in the first place, either as to causation or the articulation of the standard of care. In fact, virtually the same situation was addressed by the Mississippi Supreme Court in *West v. Sanders Clinic for Women, P.A.*, 661 So.2d 714, 720 (Miss. 1995), when it was contended that parts of an expert witness' deposition were speculative, because the witness testified in terms of possibilities, and not probabilities. The *West* court held that, **"This Court does not require magical language in an expert's answers, as long as the import of the testimony is apparent**. *Id.*, citing *Kelley v. Frederic*, 573 So.2d 1385, 1389 (Miss. 1990). (**Emphasis** added).

Vanlandingham cites *Kidd v. McRae's Stores Partnership*, 951 So.2d 622 (Miss. App. 2007) for the proposition that Mississippi law is clear that it is a necessity for an expert to base his opinions on a reasonable degree of medical certainty. However *Kidd* does not stand for that proposition. The *Kidd* court recognized that "It is the intent of the law 'that if a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision.'" *Id.* at 626. (Citations omitted). However, not only did Dr. Stain express his opinions to a sufficient and reasonable degree of medical certainty or probability, in fact, the *Kidd* court also allowed the deposition testimony of an expert witness, Dr. Simpson, where he discussed the

possibility of two surgeries on Kidd's arm. The Court disallowed the portion of the testimony regarding the cost of the surgeries, because the doctor never expressed an opinion to a degree of medical certainty that Kidd would ever require the surgeries.

Although expert medical testimony should be stated in terms of medical probability, rather than possibility *(Pittman v. Hodges*, 462 So.2d 330 (Miss. 1984)), an expert witness' testimony and opinions also must be taken as a whole.

> The central argument on appeal is whether Mississippi law requires expert medical testimony to be expressed in terms of medical probability or possibility. **The issue, however, is not whether a specific word must be spoken during testimony**. The Supreme Court's distinction in *Pittman* between the use of probability and possibility was employed in reference to the expert medical witness' ability to convey to the trial court the requisite level of reliability of the expert medical opinion. Neither *Pittman* nor *Whittington* [*Sutherland's Lumber & Home Center v. Whittington*, 878 So.2d 80 (Miss. App. 2003)] should be misread simply as an exercise in form over substance. **The mere use, or non-use, of the word probability in expert medical opinion testimony is never a substitute for determining the reliability of an expert medical opinion.** The semantic illustration was not offered as a script for expert medical testimony; rather **it reflects the substantive requirement that the expert medical opinion testimony must be reliable.** *Daughtery v. Conley*, 906 So.2d 108, 110 ¶ 9 (Miss. App. 2004) (**Emphasis** added.)

Interestingly, similar to Plaintiff's complaint that Dr. Stain's deposition testimony could not be stated in terms of a "greater than 51% chance", in *Pittman,* above, the testimony of the expert medical witness in question was that there could have been three possible causes of the Plaintiff's injuries. The defendant argued that the expert's opinion was incompetent, because the expert expressed his opinions in terms of medical possibilities and not probabilities. The *Pittman* court ruled that the inquiry should be, whether after a careful reading of all of the testimony of the expert, the expert's opinion as to causation is expressed in terms of medical probability or possibility. The

Pittman court ruled that, taken as a whole, the expert's testimony and his answers to the hypothetical questions posed to him did, in fact, express opinions based upon a reasonable degree of medical certainty and in terms of medical probability regarding the issue of causation. Dr. Stain testified that very same way when he testified at the trial in Dr. Patton's case, and his testimony, certainly taken as a whole, was not "unqualified" or "incompetent". Not only is there no requirement of the use of such "magic" words for an expert's testimony to be admissible, the definition of the word "probability" is not "greater than 51% chance". There is also no Mississippi case (at least none of which Dr. Patton is aware) that requires that an expert must testify in terms of "more than a 51% chance" (or, for that matter, even "more than a 50% chance").

The abovementioned cases regarding expert testimony (*West, Pittman* and *Daughtery)* also clearly hold that, on appeal, the scope of appellate review requires the court to consider all of the evidence, and in the light and with all reasonable inferences most favorable to the party opposed to the appeal; and that a motion, such as for judgment notwithstanding the verdict or for a new trial, will be granted only if the facts and inferences point so strongly and overwhelmingly in favor of the moving party such that reasonable men could not have reached a contrary verdict.

The *Daughtery* court also recognized that a trial court has considerable leeway in deciding in a particular case how to go about determining whether or not a particular expert's testimony is reliable, and, therefore admissible. *Daughtery*, 906 So.2d 108 at 112 ¶ 17. Judge Lackey duly considered, and even researched, the issue overnight, and he determined that Dr. Stain did understand the standard of care, and that his testimony should be allowed. Judge Lackey did not abuse his discretion in doing so, and the record reveals the basis for his sound reasoning and discretion.

In *Hartel v. Pruitt*, 998 So.2d 779, 991 (Miss. 2008), also relied upon by Vanlandingham, both plaintiff and defendant presented experts to testify as to the standard of care regarding prescribing medications for a patient with diverticulitis. Defendants' expert testified that he had treated hundreds of patients for diverticulitis and had prescribed the same antibiotic as the defendant doctor. The expert stated that it was his opinion that the defendant physician met the standard of care, as he treated the patient exactly as the expert testified he would have treated her under the same circumstances. On appeal after a verdict was rendered in favor of the defendant physician, the Mississippi Supreme Court affirmed the judgment of the Circuit Court, stating "Our case law is axiomatic on the proposition that the jury is arbitor of the credibility of testimony." *Id.* at 993.

The *Hartel* court found that the jury had weighed the conflicting testimony of well-qualified experts on the subject matter of whether or not the defendant had satisfied the applicable standard of care in his treatment plan for the plaintiff, after which the jury found for the defendants. The court ruled that given that conflicting testimony, and weighing the evidence in the light most favorable to the verdict in favor of defendants, the jury's verdict in favor of the defendants did not "sanction an unconscionable injustice." *Id.* The jury in Vanlandingham's case did the same, and their verdict, when weighing the evidence in the light most favorable to Dr. Patton and his clinic, should not be disturbed.

Finally, with regard to Plaintiff's contention that Dr. Stain testified that he did not know or understand the standard of care, the record reflects Dr. Stain's answer of "I'm not sure..." only to a single (although repeated) hypothetical question posed by Plaintiff; and the hypothetical assumed facts that Dr. Patton testified were not present at the time of his surgery on Mrs. Vanlandingham. Dr. Stain never testified that he did not know what the standard of care was with regard to Dr. Patton. To the contrary, he made it unequivocally clear that the standard of care did not require Dr.

Patton to suture a serosal injury of Plaintiff's colon (TT 552, 557/DRE 62, 67), which is the [only] "injury" Dr. Patton found on the wall of Plaintiff's colon. There is no "fuzziness" about Dr. Stain's opinion, as alleged by Plaintiff (App Br 17); Dr. Stain could not have stated his opinion any more clearly.

On cross-examination, Plaintiff's counsel used Dr. Stain's prior deposition testimony in an effort to impeach his testimony at trial, giving Dr. Stain the opportunity to address any alleged inconsistencies between his deposition and trial testimony. Assuming *arguendo* that Dr. Stain's trial testimony did differ from his deposition (a difference Defendants do not confess or agree existed), that "difference" was [nothing more than] a subject for cross-examination and impeachment, not any basis to prevent Dr. Stain from testifying, or to strike his testimony altogether. It was up to the jury to weigh the credibility of Dr. Stain's testimony and to determine if it differed from his deposition testimony, or if it was an explanation of it. The trial court did not abuse its discretion, and it committed no error when it denied Plaintiff's motion to strike Dr. Stain's testimony.

3. Plaintiff's Motion for Judgment as a Matter of Law/for JNOV, or in the Alternative, Motion for a New Trial were appropriately denied.

When presented with a motion for judgment notwithstanding the verdict (JNOV),sometimes referred to as judgment as a matter of law, the evidence must be considered by the trial court in the light most favorable to the non-movant, and the court should look only to the sufficiency, and not the weight, of the evidence. *Prudential Ins. Co. of America v. Stewart*, 969 So.2d 17 (Miss. 2007). The non-movant must also be given the benefit of all favorable inferences that may be reasonably be drawn from the evidence. *3M Co. v. Johnson*, 895 So.2d 151 (Miss. 2005).

A motion for JNOV tests the legal sufficiency of the evidence in support of the verdict, asking the court to hold, as a matter of law, that the verdict should not stand. *White v. Yellow*

Freight System, Inc., 905 So.2d 506 (Miss. 2004). In order for a judgment notwithstanding the verdict to be granted, the facts, evidence and inferences therefrom must be so overwhelmingly in favor of the movant that a reasonable juror could not have agreed with the verdict. *Phan v. Denley*, 915 So.2d 504 (Miss. App. 2005). If there is substantial evidence opposed to the motion - that is, evidence that is of such quality and weight that reasonable and fair minded men, in the exercise of impartial judgment, might reach different conclusions - then the motion for JNOV should be denied. *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31 (Miss. 2004).

A motion for a new trial challenges the jury's verdict as being against the overwhelming weight of the evidence, or as being a product of bias, prejudice or passion. Great deference must be given to the jury's verdict by resolving all conflicts in the evidence, and by giving every permissible inference from the evidence, in favor of the non-movant. "Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will [the Appellate Court] disturb the jury verdict on appeal." *Venton v. Beckham*, 845 So.2d 676, 684 ¶ 26 (Miss. 2003).

The court should defer to the jury's determination of the credibility of witnesses and the weight of their testimony, and any conflicts in the evidence must be resolved by the jury. *Id.* at 684 ¶ 27, 687 ¶ 36. When considering a motion for new trial, the court should generally take as true the credible evidence that supports the claims or defenses of the non-moving party. When all of the evidence is so viewed, a motion for a new trial should be denied, unless upon a review of the entire record, the trial judge is left with the definite and firm conviction that, if allowed to stand, the jury's verdict would result in a miscarriage of justice. *Dorrough v. Wilkes*, 817 So.2d 567, 573 ¶ 22 (Miss. 2002).

Also, in cases such as *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611 (Miss. 2002), it is

made clear that a trial court should grant a motion for a new trial only if it believes that the jury's verdict is contrary to the law or against the overwhelming weight of the evidence; and that on review, the appellate court will not overturn the denial of a motion for a new trial unless the trial judge has abused his discretion. In making their review, the appellate court examines all of the evidence supporting the verdict as true, and it would have to find that evidence hopelessly lacking before they would overturn the trial court's denial of a motion for a new trial. *Id.* at 616-617 ¶ 13, ¶ 17.

In order for the appellate court to reverse a case on the admission or exclusion of evidence, the ruling must result in prejudice and adversely affect a substantial right of the aggrieved party. That is, not only must the trial judge have abused his discretion, the harm must be so severe as to have harmed a party's substantial right. As the Mississippi Supreme Court did in *Bradshaw*, in finding overwhelming evidence in the record to support the jury's verdict, the trial court's denial of Vanlandingham's Motion for JNOV was proper in this case.

Not only was Dr. Stain's testimony regarding the standard of care and the cause of Plaintiff's perforated bowel expressly and specifically, but especially when taken as a whole, stated in terms of medical certainty or probability, there was ample additional expert testimony and evidence provided by Dr. Patton himself and by his other expert witness, Dr. Mark Reed, that Dr. Patton did comply with the standard of care; and that no alleged breach of the standard of care caused Vanlandingham's bowel perforation and/or her subsequent problems.

Dr. Mark Reed testified following Dr. Stain. Dr. Reed, a board certified OB/GYN (TT 604), practices obstetrics and gynecology at the West Clinic in Memphis, Tennessee, which had recently been given recognition as the best clinical oncology practice in America (TT 605). Twenty percent of Dr. Reed's practice involves complicated gynecological patients, such as Alice Vanlandingham

(TT 606), and sixty percent of his practice involves surgery in the abdominal area where Vanlandingham's surgery was performed by Dr. Patton (TT 607). Dr. Reed agreed to state opinions only if he held them to a reasonable degree of medical certainty or probability (TT 610), and he also acknowledged that he agreed with and would be expressing opinions in accordance with the definition of the standard of care that is accepted in the courts of the state of Mississippi (TT 611).

With regard to Dr. Patton's operative note, Dr. Reed testified that it reflected that Dr. Patton's surgery on Mrs. Vanlandingham was very thorough and within the standard of care (TT 632-636), and that the operative note described an appropriate surgical procedure and technique (TT 638). Dr. Reed testified that Dr. Patton's use of irrigation and Interceed (a film-like substance to prevent future adhesion formation) was actually even above the standard of care (TT 639).

Dr. Reed testified that there was an abrasion of the serosa of the colon wall for which there was no need for Dr. Patton to have sutured (TT 640, 646, 647, 710), and that doing so can actually weaken the bowel wall (TT 640, 647). He testified that if the bowel wall was only abraided, then the standard of care required no further surgical intervention (TT 647). He testified that he saw no clinical evidence of an injury that needed surgical repair before Dr. Patton closed (TT 709), and that Dr. Patton did not describe any clinically significant injury that required further surgical repair (TT 712). Dr. Reed also testified that the pathology report does not evidence or mention any bowel wall tissue (serosa or muscularis) attached to the excised ovary that was adhered to the bowel wall (TT 650), further indication that Dr. Patton did not injure the bowel wall during his surgery.

Finally, with regard to follow-up care and Mrs. Vanlandingham's subsequent colon perforation, Dr. Reed testified if there had been an injury which required surgical repair before Dr. Patton closed his surgical procedure, Vanlandingham would have been clinically symptomatic long before her discharge, which came more than 4 days after Dr. Patton's operation (TT 642, 643, 710);

and that in reviewing the records of Vanlandingham's post-operative treatment prior to discharge, Dr. Patton had complied with the standard of care in every manner in which he had dealt with Vanlandingham (TT 643).

Even before Dr. Stain and Dr. Reed testified, Plaintiff's own [and only] medical expert witness, Dr. E. B. Kleier, another general surgeon (but not board certified like Dr. Stain), provided testimony that was supportive of Dr. Patton's position in this lawsuit. Dr. Kleier testified that an abrasion to the serosa of the colon is not required to be sutured or repaired in order to be in compliance with the standard of care (TT 223, 225, 267, 327), exactly as Dr. Stain and Dr. Reed testified. He testified that an abrasion is something which is generally superficial (TT 226), and he acknowledged that in Mrs. Vanlandingham's case, it was "impossible" that there was a full-thickness perforation of her colon at the time Dr. Patton closed his surgery (TT 222, 266). He testified that based upon her post-operative course, not only did Vanlandingham not have a full-thickness injury to her colon wall at the end of Dr. Patton's surgical procedure (TT 222, 225), she much more likely had an injury of her colon that progressed to a full-thickness perforation several days after surgery (TT 323, 325). That testimony was in agreement with Dr. Patton's experts, Dr. Stain and Dr. Reed.

Finally, Dr. Patton himself testified as an expert in his own defense. Dr. Patton is a board certified OB/GYN who has practiced obstetrics and gynecology for 19 years (TT 716-717). During that period of time, he performed approximately 200 hysterectomies, 300 abdominal procedures such as those performed on Mrs. Vanlandingham, and over a 1000 caesarean sections, totaling between 1500 and 1600 open abdominal surgeries (TT 718). He operates at least a couple of times per week. (TT 719).

Just as did Dr. Stain and Dr. Reed, Dr. Patton testified that he would only express opinions if he held them to a reasonable degree of medical certainty or probability, and he testified that he

agreed with and understood the definition of the standard of care with regard to what is required in the courts in the state of Mississippi (TT 721).

With regard to his surgery of Mrs. Vanlandingham, Dr. Patton testified in great detail about what he did and what he found. That testimony comprises virtually one hundred pages of the trial transcript, but some of the specifics include his testimony that her left ovary was obscured by the descending sigmoid colon (TT 744), which was one of the reasons that he carefully inspected her colon during the surgical procedure and prior to closing (TT 750). He testified that in removing Vanlandingham's ovaries, it would have been impossible to have done so without addressing her significant pelvic adhesions (TT 725); and that it would not have been possible to have removed the dense adhesions, which had also attached to her colon wall, without having left the colon wall with the abraided appearance which it had, a very common appearance following such surgical procedures (TT 755). Dr. Patton testified that at the end of the operation, and after removal of the extensive adhesions, a small portion of her colon wall did appear "abraided" or "lightly skinned" (TT 755, 773), but that there was no bleeding, spillage of bowel contents, or any other indication whatsoever to suture or give any other surgical attention to the colon wall (TT 751, 755, 773).

Dr. Patton testified that he closely inspected the colon following removal of the adhesions, and he saw only an abraided area, but, again, no bleeding or indication to suture or stitch the bowel wall (TT 773). He also testified that it would have been inappropriate to stitch a merely abraided area, since that could actually weaken the colon wall and make the abrasion worse (TT 773). He testified that before he closed, but after removal of the adhesions, he irrigated Mrs. Vanlandingham's pelvic cavity three times using a total of 1500 cc's of warm water over a period of several minutes, after which he again saw no bleeding, spillage of any bowel contents, or any other indication of injury which would have required surgical attention to Mrs. Vanlandingham's colon (TT 746-749).

With regard to her post-operative care, Dr. Patton testified that by post-op day one, Vanlandingham was having return of normal bowel function (TT 759); that she was continuing to improve on post-op day two, with no sign of peritonitis (TT 761). He further testified that, according to Mrs. Vanlandingham's medical records, on post-operative day three, another physician, Dr. Lovelace, had examined the patient and found no sign of a perforated colon (TT 766). By the morning of post-operative day four, Mrs. Vanlandingham was tolerating a regular diet (TT 767), and by the end of that day she was even downstairs, outside the hospital, smoking a cigarette (TT 768). By the evening of her fourth post-operative day, another physician, Dr. Henderson, also saw Mrs. Vanlandingham, who had no complaints and reported that she had even had a small bowel movement, after which she was discharged home (TT 771).

With regard to allegations that Mrs. Vanlandingham's family made, that Dr. Patton had said it was his "fault", Dr. Patton testified that although he did have several conversations with Mrs. Vanlandingham's family over several weeks (TT 775), and he told them that she had suffered a recognized potential complication of her surgical procedure (TT 777), he had never said to them that what had happened to her was "his fault" (TT 777).

Dr. Patton testified that in his 19 years of practice as an obstetrician/gynecologist, Mrs. Vanlandingham was the only one of his patients who had ever experienced a post-operative complication of colon perforation (TT 799, 812); and that with regard to his care and treatment of Mrs. Vanlandingham, which included her indications for surgery, his surgical technique and performance of the surgery, and his post-operative care, he in every way met the standard of care (TT 772).

In the trial of this case, not only was the jury's verdict not against the overwhelming weight of the evidence, there was more than sufficient legal evidentiary basis for the jury to find for the

defendants. The jury's verdict was, in fact, in accordance with the overwhelming weight of the evidence. Three highly and properly qualified experts - Dr. Steven Stain, Dr. Mark Reed, and Dr. Gregory Patton - all testified as to the standard of care, and that Dr. Patton complied with it in his treatment of Alice Vanlandingham. Dr. Stain, Dr. Reed and Dr. Patton were each thoroughly examined and testified about Dr. Patton's operative note and findings at surgery, which, they said, indicated that no surgical attention was required for her colon at the completion of Mrs. Vanlandingham's June 23, 2003 surgery.

Each expert testified that based upon the medical records, depositions and the other evidence presented to them in this case, they were of the opinion that, with regard to all aspects of this case, including indications for surgery, surgical technique and post-operative care, Dr. Patton's compliance with the standard of care did not cause or contribute to Mrs. Vanlandingham's perforated bowel and subsequent medical complications. Only one witness, Dr. E. B. Kleier, testified to the contrary. However, even Dr. Kleier admitted that if the only injury to Alice Vanlandingham's colon was an abrasion of the serosa - just as Dr. Patton, the only eye-witness to what he observed during the surgery, testified that it, in fact, was - then there was no deviation from the standard of care by Dr. Patton's making no surgical repair of the abrasion. The evidence was overwhelmingly in favor of the jury's verdict.

There was also no evidence of any bias or prejudice in the jury's verdict, and the jury's verdict was not contrary to the law. Further, there is no evidence that the jury's verdict was the result of, or influenced by, any passion or prejudice against Plaintiff and/or for Defendants. The Court committed no unduly prejudicial or reversible errors that provided any basis for granting Plaintiff's motion for JNOV or motion for new trial, which were properly denied.

CONCLUSION

There was no error or abuse of discretion by the trial court, either in its refusal to strike for cause Juror Guest and Juror Daniels, or in the Court's denial of Plaintiff's motion to strike the testimony of Defendants' expert witness, Dr. Steven Stain.

There was no evidence that either Juror Guest or Juror Daniels had any financial interest in the outcome of the case at trial, and both jurors made it clear that they could and would be fair and impartial in their deliberation and verdict. Plaintiff could have peremptorily challenged both jurors, but she chose not to, instead using three of her peremptory challenges on jurors whom she did not challenge for cause. There is also no evidence that even if Plaintiff had had an additional peremptory challenge, the outcome of the trial would have been different, particularly not in Plaintiff's favor.

Dr. Steven Stain's testimony could not have been stated any more clearly that the opinions he gave were probabilities, and not just possibilities. No "magic words" are required in that respect; but even so, the words he used made it unequivocally clear that in his opinion, the probable cause of Mrs. Vanlandingham's perforated bowel and ensuing problems was the result of a serosal abrasion that progressed over four to five days after surgery to a full thickness injury; but that the standard of care did not require surgical repair of such a serosal abrasion, which is exactly what Dr. Patton testified that he found at the end of Mrs. Vanlandingham's surgery. Dr. Stain's testimony was as competent, as qualified and as admissible as any offered at trial.

The jury's verdict was in accordance with the overwhelming weight of evidence, and Plaintiff's argument that she did not receive a trial by a fair and impartial jury, or that the evidence was slanted in Defendants' favor, is without basis in fact or law. The trial court's rulings and the jury's verdict should not be disturbed; they should all be affirmed.

CERTIFICATE OF SERVICE

I, Clinton M. Guenther, of counsel to Defendants/Appellees, Gregory Patton, M.D. and Oxford Obstetrics and Gynecology Associates, P.A., hereby certify that I have mailed by U.S. Mail, postage prepaid, a true and correct copy of Defendants'/Appellees' Brief to:

Hon. Alan D. Lancaster
Hon. John M. Montgomery
Liston/Lancaster, PLLC
Post Office Box 645
Winona, MS 38967

Honorable Henry L. Lackey
Circuit Judge
Post Office Box T
Calhoun City, Mississippi 38916

SO CERTIFIED this the 1st day of September, 2009.

CLINTON M. GUENTHER, MB [redacted]
Of Counsel to Defendants/Appellees,
Gregory Patton, M.D. and Oxford Obstetrics
and Gynecology Associates, P.A.

CERTIFICATE OF FILING

I, Clinton M. Guenther, certify that I have this day delivered via U.S. Mail, postage prepaid, the original and three copies of, and a CD containing the Brief of Defendants/Appellees, Gregory Patton, M.D. and Oxford Obstetrics and Gynecology Associates, P.A., on September 1st, 2009, addressed to Ms. Kathy Gillis, Post Office Box 249, Jackson, MS 39205-0249

CERTIFIED this the 1st day of September, 2009.

CLINTON M. GUENTHER, MB [redacted]
Of Counsel to Defendants/Appellees,
Gregory Patton, M.D. and Oxford Obstetrics
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