IN THE SUPREME COURT

STATE OF MISSISSIPPI

2008-CA-01994

ALICE VANLANDINGHAM ***APPELLANT***

vs.

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

APPEAL FROM THE CIRCUIT COURT OF
LAFAYETTE COUNTY, MISSISSIPPI

REPLY BRIEF OF THE APPELLANT

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ARGUMENT

1. The Circuit Court committed reversible error when it failed to excuse Juror number 27 and Juror number 26 from the venire for cause.

Medical malpractice cases often involve jurors who are or have been treated by the physician or who has family who is or has been treated by the physician. Indeed, in *Heaney v. Hewes,* 8 So.3d 221,(Miss. App. 2008), cited by Dr. Patton, the issue revolved around whether or not the trial court should have dismissed all the jurors who had prior contact with the doctors. Such a general objection to a large number of jurors is not the case here. In the instant case the financial interest of the two jurors at issue is implicated, not whether or not they knew or had been treated by Dr. Patton.

In his response to voir dire questioning Thomas Guest stated:

> Q: . . . Okay. Dr. Glenn Hunt. Any of you know Dr. Hunt? . . .
>
> A: Tom Guest, number 27. I am in the real estate business and I have done business with Dr. Hunt.
>
> Q: Would that relationship with Dr. Hunt if you had to find against Dr. Patton in this case, would you feel like if you saw him you would have to explain why you did what you did?
>
> A: "I feel like I could be fair <u>but I feel like it would cost me some business in the future if I ruled against him</u> but I feel like I could be fair." (R. Vol. I, pages 67-68) (Emphasis supplied)

In a clever bit of sophistry Dr. Patton asserts that Mr. Guest's answer did

not really mean, "I fear I might lose some business if I ruled against Dr. Patton," but rather, "I can be fair even though it might cost me some business." That interpretation of Mr. Guest's answer may appear to be plausible, but it is actually invalid and misleading. It seems crystal clear that loss of business was on Mr. Guest's mind.

In determining whether or not to dismiss a juror for cause the trial court must consider, first, the "factor or circumstance which tends to indicate a potential for bias on the part of that juror and secondly the juror's promise that he or she can and will be impartial." *Smith v. Parkerson Lumber, Inc.*, 888 So.2d 1197, 1205 (Miss. App. 2004) Dr. Patton emphasizes Mr. Guest's promise that he could be impartial rather than the real problem, which is Mr. Guest's revealed potential for bias.

In *Hamilton v. Hammons,* 792 So.2d 956, 963 (Miss.2001), cited by Dr. Patton as supportive of his position, the Supreme Court stated:

> To the extent that any juror, because of his relationship to one of the parties, his occupation, his past experience, or whatever, would normally lean in favor of one of the parties, or be biased against the other, or one's claim or the other's defense in the lawsuit, to this extent, of course, his ability to be fair and impartial is impaired.

Following the Supreme Court's reasoning, Mr. Guest's assertion that ruling against Dr. Patton could cost him some business in the future could tilt him in favor of Dr. Patton, and therefore his ability to be fair and impartial was impaired. Then the issue becomes whether the admitted impairment of Mr.

Guest's ability to be fair and impartial is outweighed by his promise that he could be fair.

It is instructive to take a look at some reasons why jurors have been dismissed for cause even though they claimed that they could be fair and impartial:

1. One juror had attended school with the defendant and was friends with the defendant's brother, and another juror's son was a first cousin to the defendant. *Poe v. State,* 739 So.2d 405 (Miss.Ct.App.1999)

2. Jurors had a long-time friendship with the defendant. *Coverson v. State,* 617 So.2d 642 (Miss.1993)

3. A juror stated she was acquainted with defendant because her daughter had once dated the defendant's son. *Ross v. State*, 16 So.3d 47 (Miss. App. 2009)

4. Two jurors were struck for cause where they failed to disclose the fact that they had problems with their bills at the clinic where the defendant worked. *Venton v. Beckham*, 845 So. 2d 676 (Miss. 2003)

5. In an alienation of affection case, two jurors stated that they did not believe that there should be actions for alienation of affection in existence. *Gorman v. McMahon*, 792 So.2d 307 (Miss. App. 2001)

It is quite true that the appellate courts are unwilling to say that jurors commit perjury when they say that they can be fair and impartial, and Ms. Vanlandingham certainly does not accuse Mr. Guest or Ms. Daniels of

lying to the trial court. But it is the trial judge's responsibility to examine the juror's promise that he or she can and will be impartial in light of the circumstances which tends to indicate a potential for bias. In this case, the potential for bias outweighs the promise of impartiality.

As stated in *Ross, supra*, at 53, "the type of relationship between the jurors and the parties is not the central issue but, rather, whether any such relationship could affect the juror's partiality." The fact that Mr. Guest could suffer a loss of business were he to rule for Dr. Patton, and Ms. Daniel's employer could suffer a loss of income, could clearly affect his partiality.

There is a dearth of authority in Mississippi as to the kind and character of the business relations which would render a juror incompetent to serve. In the Appellant's Brief Ms. Vanlandingham cited both *Berbette v. State*, 109 Miss. 94, 67 So. 853 (1915) and *Overing v. Skrmetta*, 218 Miss. 648, 67 So.2d 606, 609 (1953), for the proposition that business relations between potential a juror and one of the parties in interest, which might be calculated to influence his verdict, is sufficient to render such person incompetent to serve as a juror. Dr. Patton criticizes those cases as inapposite since the facts of this case are different from the facts of those two cases. But those cases are still good law: If a business relation exists between a juror and a party which might be calculated to influence his verdict, that is sufficient to disqualify the juror. And the holding in those cases apply to the facts of the case presently before this Court.

Dr. Patton, on the other hand, cites a case involving the requested recusal of judges and asserts that the standard for recusal of a judge is the same as the standard for determining whether a juror should be dismissed for cause. However, an examination of the case reveals that a judge is held to a different standard when it comes to recusal. In *Washington Mutual Finance Group, LLC v. Blackmon*, 9256 So. 2d 780 (Miss. 2004), members of the Supreme Court were accused, *inter alia*, of evidencing hostility toward a law firm involved in the case as well as owning CD's in a bank that sold credit insurance and other products involved in the case. Citing liberally to Canon 3 of the *Code of Judicial Conduct*, the Court pointed out the law presumes that the judge is qualified and unbiased, and a party seeking recusal must offer evidence which will produce a reasonable doubt about the validity of that presumption. That law has no application to this case The standard which must be used by the trial court for determining whether or not a juror should be dismissed for cause is much simpler: (1) are there factors or circumstances which tend to indicate a potential for bias on the part of a juror, and, if so, (2) does the potential for bias outweigh the promise of impartiality?

In this case the potential for bias outweighs the promise of impartiality. Consequently, this Court should reverse and remand this case for a new trial.

2. The Circuit Court committed reversible error by denying the Vanlandinghams' motion to strike the testimony of Dr. Steven Stain be-

cause his expert opinions were not based upon a reasonable medical probability or upon the applicable standard of care.

Dr. Patton has given the Court a carefully crafted and comprehensive discussion of how Dr. Stain expressed his opinions to a sufficient degree of reasonable medical certainty. But Dr. Stain's testifying repeatedly that Dr. Patton complied with the applicable standard of care does not mean that his opinion is reliable. Regardless of the form of words used, expert medical opinion testimony must be reliable. *Daughtery v. Conley*, 906 So.2d 108, 110 (Miss. App. 2004) It is true that there is no requirement that the subject of expert testimony be known to a certainty. *Poole ex rel. Wrongful Death Beneficiaries of Poole v. Avara*, 908 So.2d 716, 723-724 (Miss. 2005) But "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." *Catchings v. State,* 684 So.2d 591, 597 (Miss.1996); cited with approval in *Smith v. City of Gulfport*, 949 So.2d 844, 849-850 (Miss. App.2007).

In the Appellant's Brief Ms. Vanlandingham gave numerous examples of Dr. Stain's inability to articulate the standard of care, despite the fact that he agreed to give his opinions based upon it. Moreover, he "guessed" that Ms. Vanlandingham suffered a serosal injury which was not repaired and which led to the perforation of her colon. When pressed about the degree of injury to the colon which the standard of cares requires to be repaired, Dr. Stain replied:

> A. * * * The question I think you are asking me <u>is someone below the standard of care if they don't repair it</u>.

Q. Would it be below the standard of care whatever it gets across here would it be below the standard of care not to repair this?

A. And I answered I'm not sure.

Q. Whatever the truth is you may answer?

A. That is what I answered before I'm not sure.

* * *

A. If I saw the outpouching I would think it should be repaired.

Q. But Dr. Patton if he saw that the standard of care wouldn't require him to do that?

A. Is that a question?

Q. Yes?

A. I would say I'm not sure if the standard of care would require if that was my answer. (Vol. IV, pages 565-566) (Emphasis supplied)

Dr. Stain revealed that he did not know whether Dr. Patton's failure to put sutures into the colon was below the standard of care. Yet he repeatedly asserted that Dr. Patton complied with the standard of care in Ms. Vanlandingham's case.

Rather than basing her objection to the reliability of Dr. Stain's testimony on his 2006 deposition, Ms. Vanlandingham sought to determine why his opinion evolved from his deposition answer identifying four possibilities causing Ms. Vanlandingham's medical outcome to his trial testimony that there was simply a serosal injury that progressed to perforation. There was a clear difference between what he thought in 2006 and what he said at the trial of the case. Dr. Stain didn't just change his mind over what caused Ms. Vanlandingham's post operative course;

rather, he became certain that the cause was a serosal injury, but he still couldn't say that failure to repair it was below the standard of care.

Though counsel did not specifically request a re-voir dire of Dr. Stain outside, the presence of the jury, the Court understood what the problem was:

> The better procedure probably would have been, if the Court had dismissed the jury and allowed the defendant to - - I mean the plaintiff to voir dire Dr. Stain outside the hearing of the jury, but the Court didn't do it. So, Dr. Stain's testimony has been heard by the jury. If –if there's any damage done it's - - it's already been done. (Vol. V, pages 619-620)

If the trial court was unwilling to strike Dr. Stain's testimony at trial, the appropriate way to rectify the problem would have been for the trial court to sustain Ms. Vanlandingham's Motion For Judgment As A Matter Of Law. (Clerk's papers, page 184, paragraph 9; Record Excerpts, page 6).

Despite Dr. Patton's argument that Dr. Stain's testimony should be "taken as a whole," many of his answers are laced with the words "probability," "most likely," "most probable," "my guess," and an "I don't know" about whether Dr. Patton's failure to put sutures in the colon fell below the standard of care. As Ms. Vanlandingham pointed out in the Brief of Appellant, Dr. Stain's opinions about the causes of her medical nightmare were contingent, speculative, or merely possible.

Dr. Stain could not articulate the applicable standard of care and show how the standard of care was met by Dr. Patton. Indeed, when asked if Dr. Patton fall below the standard of care by failing to repair an injury to the colon, Dr. Stain's answered, "I'm not sure." (Vol. IV, pages 565-566)

In sum, the record reflects that, at the end of the day, Dr. Stain's testimony was unreliable. He couldn't articulate the standard of care, did not know if Dr. Patton fall below the standard of care by failing to repair an injury to the colon, and used terms like "probability," "most likely," "most probable," and "my guess" in describing what happened to Ms. Vanlandingham. The use by a medical expert of "magical language" is not required "as long as the import of the expert's testimony is apparent." *West v. Sanders Clinic for Women*, P.A., 661 So.2d 714, 720 (Miss. 1995), citing *Kelley v. Frederic,* 573 So.2d 1385, 1389 (Miss.1990). In this case the import of Dr. Stain's testimony is apparent: he was unclear about the standard of care and his opinions were speculative. In short his testimony was unreliable to the degree that the jury should not have used it in making their decision. Consequently, the lower court should have struck Dr. Stain's testimony or should have sustained Ms. Vanlandingham's Motion For Judgment As A Matter of Law and ordered a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ALAN D. LANCASTER, undersigned attorney of record for Appellant herein, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing REPLY BRIEF OF THE APPELLANT to the following attorneys, judges and parties of record:

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