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

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

ALAN D. LANCASTER
JOHN M. MONTGOMERY
LISTON/LANCASTER PLLC
P. O. Box 645
WINONA, MS 38967

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE ISSUES

The issues presented in this appeal may be correctly framed thus:

1. Did the trial court commit reversible error by not excusing Juror #27 and Juror #26 from the venire for cause?

2. Did the Circuit Court commit reversible error by denying Vanlandingham's motion to strike the testimony of Dr. Steven Stain because his expert opinions were not based upon a reasonable medical probability or upon the applicable standard of care?

STATEMENT OF THE CASE

A.

NATURE OF THE CASE

Alice Vanlandingham filed suit against Dr. Gregory Patton and Oxford Obstetrics & Gynecology Associates, P.A. for medical malpractice, alleging that Dr. Patton negligently performed an exploratory laparotomy, a bilateral salpingooophorectomy, and lysis of adhesions, resulting in perforation of her colon. As a result Ms. Vanlandingham developed peritonitis, sepsis, and pulmonary failure. She also developed endocarditis, an infection in her heart, and underwent surgery in Memphis to replace a heart valve.

Ms. Vanlandingham presented expert testimony that Dr. Patton deviated from the standard of care in her case, and that his deviation from the standard of care proximately caused Ms. Vanlandingham's injuries. Likewise, Dr. Patton presented expert testimony that he did not deviate from the standard of care.

The issues in this appeal concern whether the trial judge should have excused two jurors for cause and whether the testimony of one of Dr. Patton's expert witnesses should have been struck.

B.

COURSE OF PROCEEDINGS IN THE COURT BELOW AND DURING THE PENDENCY OF THIS APPEAL

Ms. Vanlandingham filed her complaint in the Lafayette County Circuit Court on August 30, 2004. Extensive discovery was had by all parties and the case was tried in August, 2008, in Oxford, Mississippi. The jury returned a verdict in favor of the defendants.

Subsequent to the trial Ms. Vanlandingham filed a Motion For Judgment As A Matter Of Law, For Judgment Notwithstanding The Verdict, Or In The Alternative For A New Trial. The trial court overruled Ms. Vanlandingham's post trial motion.

C.

STATEMENT OF FACTS

Early in 2003 Alice Vanlandingham, age fifty, suffered from pelvic pain and went to see Dr. Paul Odom, her personal physician of ten years. Dr. Odom referred her to Dr. Greg Patton, a specialist in gynecology and obstetrics. (Vol. III, 352-353) Dr. Patton tried various nonsurgical treatments, none of which relieved Ms. Vanlandingham's pain. (Vol. VI, pages 731-734) Dr. Patton recommend surgery to remove Ms. Vanlandingham's ovaries, which he believed to be the likely source of her pain, and to reduce significant pelvic adhesions. (Vol. VI, page 724)

Dr. Patton performed an exploratory laparotomy, a bilateral salpingooophorectomy, and lysis of adhesions on June 23, 2003, at Baptist Memorial Hospital in Oxford. (Vol. III, page 354; Vol. II, page 214) Because of her history of prior surgery Dr. Patton expected that he would encounter adhesions during the surgery he performed on Ms. Vanlandingham. (Vol. VI, pages 723-724) During the surgery Dr. Patton encountered dense pelvic adhesions. (Vol. II, page 215) Dr. Patton removed the right ovary and cleared it from its adhesion to the pelvic wall. (Vol. VII, page 741) Dr. Patton stated that the left ovary was completely obscured by the left descending colon. (Vol. VII, page 744) Through dissection the left ovary was freed of adhesions and was removed. (Vol. VII, page 746) Adhesions were removed from the wall of Ms. Vanlandingham's colon, which Dr. Patton described as abraded, or

lightly skinned as a result of the removal of the adhesions. Dr. Patton did not put any sutures into the colon (Vol. VII, page 755)

Ms. Vanlandingham was discharged from the hospital on June 27, 2003, and went home. (Vol. II, page 166) Within a matter of hours of her discharge Ms. Vanlandingham suffered excruciating pain and her family returned her to the hospital emergency room and she was readmitted to the hospital. (Vol. II, page 167-168)

Dr. Lovelace performed surgery on Ms. Vanlandingham on June 28, 2003, and found that her colon had perforated. (Vol. II, page 227) Ms. Vanlandingham developed peritonitis, and as a result got sepsis, and suffered from pulmonary failure which required the use of a respirator. Ms. Vanlandingham was given a colostomy and underwent surgery a year later to close the colostomy. (Vol. II, page 229) Ms. Vanlandingham was finally discharged from the hospital on September 23, 2003. (Vol. III, page 355) She also developed endocarditis, and infection in her heart (Vol. II, page 231) and underwent surgery in Memphis to replace a heart valve. Ms. Vanlandingham had a stormy recovery from her medical problems. (Vol. III, pages 356-357)

Dr. Patton agreed that Ms. Vanlandingham's peritonitis was occasioned by the perforation of her colon, which would not have occurred had she not undergone the June 23, 2003, surgery. (Vol. VII, page 756)

According to Ms. Vanlandingham's daughter and several other witnesses, Dr. Patton had a meeting with the family after Dr. Lovelace's surgery and told them that he had nicked her colon or scraped it too thin, and that the resulting perforation was his fault. (Vol. II, page 149). Dr. Patton denied that he told the family that the perforation of Ms. Vanlandingham's colon was his fault. (Vol. VI page 777)

D.

STANDARD OF REVIEW

The standard of review of the trial court's decision to deny a challenge to a juror for cause is abuse of discretion. *Parks v. State*, 853 So.2d 884, 887 (Miss. App. 2003); *Sewell v. State*, 721 So.2d 129 (Miss.1998).

The standard of review for the admission or exclusion of testimony, including expert testimony, is abuse of discretion. *Estate of Deiorio ex rel. Deiorio v. Pensacola Health Trust, Inc.*, 990 So.2d 804, 806 (Miss. App. 2008); *Hubbard v. Wansley*, 954 So.2d 951, 956 (Miss. 2007).

SUMMARY OF 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.**

A. By failing to excuse Juror number 27 and Juror number 26 from the venire for cause, the trial court denied Ms. Vanlandingham a trial by a jury which could render an impartial verdict.

B. Every party has a right to a fair trial by an impartial jury, free of bias and prejudice, and the trial court must endeavor to empanel such a jury.

C. Juror number 27 acknowledged that he and Dr. Patton's partner in medical practice had business relations, and that it might not be in his best financial interest to render a verdict against Dr. Patton. That acknowledgment rendered juror number 27 incompetent to serve on the trial jury.

D. When the trial court failed to remove this clearly incompetent juror, Ms. Vanlandingham was forced to expend a peremptory challenge to exclude him.

E. Juror number 26 worked part time for Internal Medicine Associates. Juror number 26's employer received business benefits from Dr. Patton through referrals of patients. That juror had an indirect financial interest through her employer which was calculated to influence her verdict, and should have been excused for cause.

F. Juror number 26 served on the jury. Ms. Vanlandingham exhausted all peremptory challenges. It was unfair and unreasonable to require Ms. Vanlandingham to make an election as to which incompetent juror to exclude with her four peremptory challenges.

2. The Circuit Court committed reversible error by denying the Vanlandinghams' motion to strike the testimony of Dr. Steven Stain because his expert opinions were not based upon a reasonable medical probability or upon the applicable standard of care.

A. Dr. Patton's expert Dr. Stain's opinions were not based upon a reasonable medical probability or upon the applicable standard of care.

B. Dr. Stain's opinions, in deposition and at trial, are laced with such terms as "my guess", and a direct "I don't know" about whether Dr. Patton's failure to put sutures in the colon fell below the standard of care. This places his medical opinions in the category of speculation, thus failing to meet the standard for testimony by an expert witness.

C. Though he testified that Dr. Patton followed the standard of care, Dr. Stain was unable to identify and articulate the requisite standard of care.

D. The trial judge abused his discretion in allowing the testimony of Dr. Stain after it became apparent that his opinions were not based upon a reasonable medical probability or upon the applicable standard of care, which he said he didn't know.

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.

By failing to excuse Juror #27 and Juror #26 from the venire for cause, the trial court denied Ms. Vanlandingham a trial by a jury which could render an impartial verdict. Every party has a right to a fair trial by an impartial jury, free of bias and prejudice, and the trial court must endeavor to empanel such a jury. In *Tighe v. Crosthwait*, 665 So.2d 1337, 1339 (Miss. 1995), the Supreme Court said:

> Mississippi Constitution Article III, Section 31 states that "The right to a jury trial is an inviolate right." This Court has interpreted that provision to mean that: "It is the duty of the court to see that a competent, fair and impartial jury is empanelled." *Stribling,* 3 So.2d at 810; *Marshall Durbin v. Tew,* 381 So.2d 152, 154 (Miss.1980).

Jurors must go into the jury box with a mind free of bias or prejudice. While the trial judge cannot guarantee that a perfect trial jury is selected, it is his duty to make certain that the jury that is finally empanelled can render an impartial verdict. *Kimble v. State*, 920 So.2d 1058, 1060-1061 (Miss. App. 2006). In this case the lower court did not successfully insure the empanelling of such a jury through its failure to strike two members of the venire for cause.

A. Juror Number 27. Thomas Guest was juror number 27. The record reveals that juror number 27 had several real estate transactions with Dr. Glenn Hunt, a member of Defendant Oxford Obstetrics and Gynecology Associates, P.A., and Dr. Patton's partner in medical practice. Juror number 27 quite explicitly stated that it might not be in his best financial interest to render a verdict against Dr. Patton. That acknowledgment rendered juror

number 27 incompetent to serve on the trial jury. However, the trial court overruled Ms. Vanlandingham's challenge for cause.

The void dire of juror number 27 revealed the following:

> 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 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." (R. Vol. I, pages 67-68) (Emphasis supplied)

During voir dire the trial judge evidently agreed that Mr. Guest should be struck for cause:

> Q Juror 27. Mr. Guest. I think you have already told us that you - - is that correct, your Honor, on juror 27?
>
> By the Court: You need not pursue that. (R. Vol. I, page 74)

Later, Ms. Vanlandingham's counsel challenged juror 27 for cause:

> By Mr. Lancaster: Your Honor, the next challenge for cause . . . number 27, Mr. Guest. You know. I was asking him. And he said he had financial interest and you told me I could stop I didn't have to go any further.
>
> By the Court: Yes. He said that he had - - he is not the one.
>
> By Mr. Lancaster: He is real estate agent that it would cause him some business.. He said he dealt with Dr. Patton. And the court remembers that I turned around to the court and you said I didn't have to develop any further.
>
> By Mr. Williams: I seem to recall it and we would object to that challenge for cause. What Mr. Guest says is what you would expect any good potential juror to say. He said he had done business with Dr. Hunt at some point in the past. That was never developed as to when that might have been. That he would be fair and then on the side if it cost me some business.

> By Mr. Lancaster: He said it might cost me some business. That is a financial interest in the outcome, your Honor. Now how much more bias can you have. A financial interest.
>
> By the Court: The way I understand the gentleman was he said I'm going to be fair even if it cost me some business even.
>
> By Mr. Montgomery: I would request the court to voir dire him and let's clear that up.
>
> By the Court: All right. Well I'm going to overrule that challenge and he will be staying in the pool. All right. Next please. (R. Vol. I, pages 96-97)

During voir dire Ms. Vanlandingham's counsel pointed out that Dr. Glenn Hunt has a financial interest in the Oxford Obstetrics and Gynecology Associates, P.A., and was, by virtue of that business relation, a quasi-defendant with Dr. Patton for the purposes of selecting a jury. (R. Vol. I, page 93, line 24 – page 94, line 73) Defendants' Response In Opposition To Motion For Judgment As A Matter Of Law acknowledged that Dr. Glenn Hunt was one of Dr. Patton's partners and that juror 27 worked with him on several real estate transactions. (Clerk's papers, pages 192-193)

In *Berbette v. State*, 109 Miss. 94, 67 So. 853,854 (1915), the Supreme Court clearly stated the law which applies to a juror who has a potentially conflicting business interest:

> It is the purpose of the law to provide as jurors men who are fair and impartial and free from bias or prejudice. It has been held that one who is in the employee of a party to a suit is incompetent as a juror. The existence of any business relation between the one offered as 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.

Berbette, supra, was cited with approval in *Overing v. Skrmetta*, 218 Miss. 648, 67 So.2d 606, 609 (1953), in which the Court went a bit further, stating, "[T]he existence between a prof-

fered juror and a party to a suit of business relations which might be calculated to influence his verdict is sufficient to disqualify the juror."

It is, of course, true that Dr. Glenn Hunt, with whom juror 27 had several real estate transactions, was not directly a litigant in this case – no claim was made against him individually. However, in characterizing his business relations with Dr. Hunt, Mr. Guest unequivocally declared that in ruling against Dr. Patton, "[I] feel like it would cost me some business in the future." 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. Mr. Guest's statement rendered him incompetent to serve as a juror and the trial judge should have sustained the challenge for cause.

At the time of voir dire the record reveals that Ms. Vanlandingham's counsel believed that the trial judge also understood that juror number 27 was not competent to serve on the jury when the judge advised counsel that he "need not pursue" further inquiry into the matter. (R. Vol. I, page 74) When counsel realized that the trial judge had changed his mind about juror 27, counsel requested that the court perform additional voir dire on juror 27 to clear up the issue. The trial judge declined to do so and overruled the challenge of juror number 27 for cause. (R. Vol. I, page 97) Consequently, Ms. Vanlandingham was forced to use one of her few peremptory challenges to exclude this incompetent juror from the jury. (R. Vol. I, page 103, lines 15-18)

In *Fleming v. State*, 732 So.2d 172, 181 (Miss. 1999) the defense challenged a juror for cause because she was related to a witness for the State. When the trial judge declined to exclude the juror for cause, the defense used a peremptory challenge to remove her from the jury and then proceeded to exhaust all of its peremptory challenges. The Court fully appre-

ciated the injustice which results when a party is forced to use a peremptory challenge to prevent an incompetent juror from being empanelled:

> [S]uch cases fail to grasp the full ambit of the potential harm that may stem from a trial court's failure to grant a causal challenge. Indeed, it matters not when the peremptory challenges are used, because the expected loss of a peremptory challenge leaves the party wishing to otherwise utilize such a challenge with one less opportunity to strategically try its case. *Chisolm, Mettetal,* and their progeny are extended such that they are met when there is at least (1) all peremptory challenges but the challenge at issue or the simple use of the peremptory challenge at issue, and (2) any incompetent juror sits. Indeed, it does not matter whether the venire member at issue had such a high venire number that it was questionable the venire member would be challenged, nor does it matter that the venire member was the first or last to be peremptorily challenged. It simply matters that a party's right to use peremptory challenges has been limited by the trial court's failure to remove for an incompetent juror. (Emphasis supplied)

The trial Court should have excluded juror number 27 for cause because he had a business interest with Dr. Patton's partner and openly stated that a verdict adverse to Dr. Patton could cost him some business. The lower court's failure to remove this clearly incompetent juror resulted in Ms. Vanlandingham's loss of a precious peremptory challenge.

B. Juror number 26. Lisa Daniels, juror number 26, worked part time for Internal Medicine Associates. Dr. Patton referred Ms. Vanlandingham to Dr. Charles Hill, an internist with that group, prior to her June 23, 2003, surgery to evaluate whether or not she had any condition or problem that would necessitate postponing or foregoing the surgery. (Clerk's papers, page. 192) Juror number 26's employer received business benefits from Dr. Patton through referrals. The juror, therefor, had an indirect financial interest through her employer which was calculated to influence her verdict, and should have been excused for cause.

The voir dire examination of juror number 26 proceeded thus:

Q: What is your connection to either doctor, hospital, or health care?

A: I work on PRN basis for internal medicine and associates.

Q: A clinic here?

A: A clinic here.

Q: Do you have any contact with Dr. Patton or his client?

A: No

Q: Do you get referrals from his [Mr. Williams'] client?

A: Yes

Q: Does your clinic do referrals to Dr. Patton and his clinic?

A: Yes, sir.

Q: Would the fact that you are with that clinic and your clinic works closely with his clinic and his clinic with you, would that cause you to tend to believe Dr. Patton's testimony over someone else's testimony?

A. No.

Q: You think you could set aside that and be fair and impartial?

A: Yes (R. Vol. I, pp 53-54)

Dr. Patton refers patients to juror number 26's employer, resulting in income to it, and that same employer refers patients to Dt. Patton, resulting in income to him. It is beyond peradventure that referrals among and between physicians is an important source of patients – and income. The business relation between juror number 26's employer and Dr. Patton is enough to influence her verdict, and is sufficient to render juror number 26 incompetent to serve as a trial juror. *Berbette v. State, supra.* Unlike juror number 27, juror number 26 served on the trial jury. (R. Vol. I, page 105 lines 20-28) Ms. Vanlandingham did not remove juror number 26 with a peremptory challenge. The fact that the trial judge failed to

exclude her for cause required Ms. Vanlandingham to make an election as to which incompetent juror to exclude with her limited number of peremptory challenges.

In a civil case each party may exercise only four peremptory challenges. Rule 47(c), M.R.C.P. In this case Ms. Vanlandingham exhausted all of her peremptory challenges. (R. Vol. I, page 103, lines 15-18) In light of the minimum number of peremptory challenges available to a party, using them to remove incompetent jurors which the court should have removed for cause is unacceptable.

It is conceded that the trial court has broad discretion to determine whether to excuse prospective jurors who are challenged for cause. *Adkins v. Sanders*, 871 So.2d 732, 742 (Miss. 2004) But that discretion is not unfettered. The circuit judge has an absolute duty to see that the jury selected to try any case is fair, impartial and competent. "Trial judges must scrupulously guard the impartiality of the jury and take corrective measures to insure an unbiased jury." *Hudson v. Taleff*, 546 So.2d 359. 363 (Miss. 1989), quoted with approval in *Brown By and Through Webb v. Blackwood*, 697 So.2d 763, 769 (Miss. 1997).

Because the trial court failed to insure that a competent, fair and impartial jury was empanelled to try this case, the verdict which the jury rendered in favor of Dr. Patton is doubtful and certainly open to question. 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 because his expert opinions were not based upon a reasonable medical probability or upon the applicable standard of care.

The heart of this case is whether there was an injury to the colon which Dr. Patton should have recognized and repaired. Since he did not do so, Ms. Vanlandingham's colon perforated, spilling the contents of the colon into the abdominal cavity causing infection, sepsis, and endocarditis.

Ms. Vanlandingham called Dr. Earnest Kleier as her expert witness. After extensive testimony Dr. Kleier stated that, in his opinion, Dr. Patton's surgery fell below the standard of care because he did not recognize an injury to the sigmoid colon, did not repair it with sutures, and four days later the colon perforated. (Vol. II, page 218) Moreover, Dr. Kleier testified that in his opinion, based on reasonable medical probability, Dr. Patton's deviation from the standard of care proximately caused Ms. Vanlandingham's colon to perforate. (Vol. II, page 220) At this point Ms. Vanlandingham had established the applicable standard of acceptable professional practice, that Dr. Patton deviated from that standard, and that his deviation from the standard of acceptable professional practice was the proximate cause of her injuries.

Dr. Patton called Dr. Steven Stain to testify on his behalf as an expert witness, to rebut Ms. Vanlandingham's expert. (R. Vol. IV, page 502) Dr. Stain was tendered as an expert with regard to complications of abdominal surgery to include injuries to the colon, treatment and repair of intraoperative colon injuries, the proper inspection of the operative site for intraoperative colon injuries, post operative care of surgical patients, and care of critical pa-

tients to include the signs and symptoms of bowel injuries including perforation. (Vol. IV, pages 514-515) After voir dire Dr. Stain was accepted as an expert in the areas set out. (Vol. IV, page 518)

Dr. Stain cleared the first hurdle in his qualification to testify as a medical expert. It is uncontested that Dr. Stain appeared at first blush competent to testify as an expert witness given his experience, knowledge, skill, training, and education. The problem arises because Dr. Stain's opinions as revealed in his testimony were not based upon a reasonable degree of medical certainty, and he was unable to articulate the standard of care which he claims Dr. Patton followed.

Dr. Stain's testimony is of particular importance because, contrary to Dr. Kleier's opinion, he states that Dr. Patton "complied completely with the applicable standard of care." (Vol. IV, pages 550-551) The difficulty with Dr. Stain's opinion is that it was not based upon a reasonable medical probability or upon the applicable standard of care. If Dr. Stain can't articulate the standard of care or convey that his opinions are based upon a reasonable medical certainty, then he is incompetent to testify as an expert witness that Dr. Patton "complied completely with the applicable standard of care."

The first intimation of difficulty came when counsel for the defense asked Dr. Stain if, in his opinion, there was a hole through and through the colon when Dr. Patton finished his surgery and closed the patient. Dr. Stain's response was, "You asked me to talk about probability and I will use your term." (Vol. IV, page 535) (Emphasis supplied) Later, when asked if there was anything in the operative notes that indicated Ms. Vanlandingham's colon was in need of further repair, Dr. Stain said, "I didn't see it from the opt note but I guess, you know, I believe that it is a judgment of the surgeon that is there and I have different. I

might have different criteria when I would put sutures in but I think if he thought it needed sutures he would have put sutures in." (Vol. IV, page 549) That response clearly exposes Dr. Stain's fuzziness about whether or not the standard of care required Dr. Patton to put sutures in Ms. Vanlandingham's colon. (The Court admonished the jury to disregard that response but, as all trial lawyers know, one can't un-ring the bell.)

Counsel pressed Dr. Stain to explain specifically how he held the opinion that Dr. Patton did not breach the standard of care. Rather than answer the question, Dr. Stain responded with a colloquy about his "guess" as to what happened to Ms. Vanlandingham:

> A. So I can answer. So I guess I would start with the informed consent that was done and documented that Dr. Patton explained to the patient that there was a risk of bowel injury. Nothing but a risk as well. I think when ever you do an operation there are complications in my hospital a large hospital, I mean I would say 2 or 3 times a week we, 2 or 3 times a month we have a bowel leak or injury and it is a risk of having operation in the abdomen. It's relatively much smaller for an operation on the ovary or uterus than it is for operating on the colon but those things happen. I think that my guess is that it was a serosal injury.[1]
>
> * * *
>
> I'm sorry for using the term guess, I believe certainly that a probability that the most likely thing that happened in the patient was there was a serosal injury which 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. (Vol. IV, page 551-552) (Emphasis supplied)

The issue was whether Dr. Patton should have noted and repaired damage to the colon. There was much testimony from all the experts about the degree of injury which the colon must sustain before the standard of care requires the injury to be repaired with the insertion of sutures. In response to a question 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 is someone below the standard of care if they don't repair it.

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)

Counsel inquired concerning Dr. Stain's 2006 deposition in which he discussed several medical probabilities which could have resulted in Ms. Vanlandingham's medical outcome:

Q. Okay. So in 2006 you can't say more likely than not which one of those things occurred; correct? Is that correct? Did I read it correctly?

A. Did you read it, correctly? Yes, you did.

Q. Now but here today you are telling us that this there is a serosal injury that progressed to a delayed perforation?

A. That is what I believe is more probable than not is what happened. (Vol. IV, page 571) (Emphasis supplied)

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[1] The serosa and the muscular layer are the two layers of the colon. Damage to the serosa doesn't need to be re-

In his September 29, 2006, deposition Dr. Stain furnished a smorgasbord of scenarios for Ms. Vanlandingham's outcome.[2] When asked what he thought had happened to cause the perforation of Ms. Vanlandingham's colon, Dr. Stain posited (1) a full-thickness injury at the time of the operation (R. E., page 38), or (2) a partial-thickness injury due to the dissection (R. E., page 43), or (3) a microscopic full-thickness injury not readily seen at the time of the surgery (R. E., page 43), or (4) Ms. Vanlandingham had diverticular disease and the perforated a diverticulum in that location. (R. E. page 46) Counsel pressed Dr. Stain as to which of his four scenarios was the one which caused Ms. Vanlandingham's outcome:

> Q. As you sit here today, can you give us an opinion, based upon a reasonable medical probability, as to which of those possibilities – or now probabilities – let me rephrase that
>
> Can you state those - - a medical probability on any of those possibilities that you just gave us?
>
> A. I'm not sure if I remember them all - -
>
> Q. There was three.
>
> A. I think the first and last – well I think I gave you more than three. I think that the one that said there was a full-thickness injury apparent, that they just - - I think that the fact that that there was a full-thickness injury made at the time of the operation that didn't manifest itself until three or four days later, I think is unlikely.
>
> I think diverticulitis developing de novo is unlikely. I think the other two or three which were the microperforation - -
>
> Q. At the time of surgery.
>
> A. - - at the time of surgery, and the partial thickness tear, which perforated or became full-thickness in the post-operative period, I think those two are the most likely.
>
> Q. Are you stating that based upon a reasonable medical probability, more like than not, this is what happened?

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paired whereas damage to muscular layer should be repaired. (Vol. II, pages 224-225)

[2] The applicable for portions of that deposition are located in the Record Excerpts, pages 37-50.

A. You have to explain that - - that must be a legal term, a reasonable medical probability. Explain to me what that means.

Q. Okay. It means based upon your education, training and experience as a general surgeon, that more likely than not, 51 per cent, that it happened this way. This is what happened.

Can you state any of those that you have given us, based upon a reasonable medical probability?

A. No. I'd have to - - I guess I would think - - I can say that those - - the ones that were the first and fourth, the diverticulitis and the apparent full-thickness perforation are the less like than the other two.

* * *

A. As you defined it to me was, reasonable medical probability, with more than 51 per cent certainty that it would happen, I cannot pick one of those that has more than a 51% chance of being right. (R. E., pages 47-50)

In September of 2006 Dr. Stain was unable to say, based upon a reasonable medical probability, what happened to Ms. Vanlandingham. If he couldn't determine what happened to Ms. Vanlandingham based upon a reasonable medical probability, then he couldn't form an opinion with sufficient certainty as to whether Dr. Patton deviated from the standard of care.

At trial, in seeking to explain why his opinion evolved from his 2006 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, Dr. Stain explained:

A. Well, what I think I did in my own mind is I took those first and fourth which was exceptionally unlikely and said those really are like 0 and point 5 per cent so I'm left with two others so before I'm putting them in range of four now I'm only ranging two that I think are likely and when he explained to me what the medical probability was that is what came in that I thought this was the most likely or most probable thing that happened. (Vol. IV, page 572)

Ms. Vanlandingham's counsel vigorously objected to Dr. Stain's testimony, essentially making an *ore tenus* motion *in limine*, arguing that Dr. Stain was not testifying based upon a reasonable medical probability, both in his deposition and at trial. (R. IV, pages 535-543) However, the court overruled the objection and allowed Dr. Stain continue to testify. The next day the trial judge revisited the plaintiff's objection that Dr. Stain's testimony revealed he could not enunciate nor did he understand the standard of care. The judge, conceding that he had perhaps made an error, stated:

> The Court has reviewed its notes and its recollection about Dr. Stain's testimony. 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)

Despite the damage which may have been done by Dr. Stain's testimony the Court made a finding on the record that Dr. Stain understood the standard of care, overruled the plaintiff's objection, and allowed Dr. Stain's testimony to stand. (Vol. V, page 620) Counsel raised the issue again in the Motion For Judgment As A Matter Of Law etc. (Clerk's papers, page 184, paragraph 9; Record Excerpts, page 6)

Mississippi law is clear on the necessity for an expert to base his opinions on a reasonable degree of medical certainty. In *Kidd v. McRae's Stores Partnership*, 951 So.2d 622, 626 (Miss. App. 2007), the Court stated:

> Mississippi Rule of Evidence 702 states that if expert testimony "will assist the trier of fact to understand the evidence" and the witness is qualified, the testimony will be admitted. Yet, when an expert's opinion is not based on a reasonable degree of medical certainty, or the opinion is articulated in a way that does not make the opinion probable, the jury cannot use that information to make a decision. *Catchings v. State,* 684 So.2d 591, 597 (Miss.1996) (citing *Schulz v. Celotex Corp.,* 942 F.2d 204, 207 (3rd Cir.1991) (internal citations omitted)). Failure to properly qualify an expert opinion typically occurs in testimony that is speculative, using phrases such as "probability" "possibility," or even "strong possibility." *Id.* (internal citations omitted). 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.* (internal citations omitted). (Emphasis supplied)

Dr. Stain's opinions are answers with such terms as "probability," "most likely," "most probable," "my guess," and a direct "I don't know" about whether Dr. Patton's failure to put sutures in the colon fell below the standard of care. Dr. Stain's opinions cannot be based upon a reasonable degree of medical certainty when his they are couched in terms of "probability," "most likely," "most probable," and "guess." It appears that Dr. Stain's opinions about the causes of Ms. Vanlandingham's medical nightmare are contingent, speculative, or merely possible, rather than being based upon a reasonable degree of medical certainty. Dr. Stain's opinions, couched in terms less than that of a reasonable degree of medical certainty, fail to meet the *Kidd* test.

Moreover, Dr. Stain's testimony did not meet the standard required of an expert in a medical malpractice case. In order to prevail in a medical malpractice action, the plaintiff must establish, by expert testimony, the standard of acceptable professional practice, that the defendant physician deviated from that standard, and that the deviation from the standard of acceptable professional practice was the proximate cause of the injury of which plaintiff complains. *Hartel v. Pruett*, 998 So.2d 979, 991 (Miss. 2008). The expert witness must be able to identify and articulate the requisite standard of care. *Hammond v. Grissom,* 470 So.2d 1049, 1053 (Miss. 1985). That same yardstick applies to experts tendered by the defendant. If it is the defense expert's opinion that the defendant physician met the standard of acceptable medical practice, the expert witness must be able to identify and articulate the requisite standard of care, just as the plaintiff's expert is required to do. The standard of care is an objective standard. Accordingly, any expert must articulate the standard of care that should have

been applied in a particular case as an objective standard in order to establish the duty owed to the patient. *Hall v. Hilbun,* 466 So.2d 856, 873 (Miss.1985).

In this case Dr. Stain does not articulate the applicable standard of care and show how the standard of care was met by Dr. Patton. Did Dr. Patton fall below the standard of care by failing to repair an injury to the colon? Dr. Stain's answer: "I'm not sure." (Vol. IV, pages 565-566)

The way in which Mississippi law defines the standard of care in this case was not a mystery to Dr. Stain, having already heard it in his deposition. At trial defense counsel defined for Dr. Stain the meaning of the standard of acceptable professional practice:

> Q. * * * When I use the phrase standard of care here this afternoon, let me tell you that what I'm talking about is the standard of a reasonably prudent minimally competent surgeon when confronted with the same or similar circumstances as existed in connection with surgical care and treatment of Ms. Vanlandingham in 2003 and taking into account the resources available to Dr. Patton at that time. Would you utilize that definitions of the standard of care here this afternoon?
>
> A. Yes, I will. (Vol. IV, page 520)

Despite his agreement to use the definition provided by counsel, Dr. Stain's responses, especially the one in which he admits that he doesn't know what the standard of care is, reveals that his testimony on that issue is incompetent.

The standard of review for the admission or exclusion of testimony, including expert testimony, is abuse of discretion. *Estate of Deiorio ex rel. Deiorio v. Pensacola Health Trust, Inc., supra*; *Hubbard v. Wansley, supra.* In this case it appears beyond peradventure that the trial judge abused his discretion in allowing the testimony of Dr. Stain after it became apparent that his opinions were not based upon a reasonable medical probability or upon the applicable standard of care, which he said he didn't know. Early in Dr. Stain's testimony the trial

judge may have had a misunderstanding about whether the issue before the court was Dr. Stain's credibility or his competence to testify as an expert. Upon reflection the court realized that once the issue of the competency of Dr. Stain's testimony arose he should have at least allowed Ms. Vanlandingham to voir dire Dr. Stain outside the hearing of the jury. He did not do so. And so the jury heard all of Dr. Stain's incompetent testimony and used that information, imparted to them by an "expert," in reaching their decision.

Because of the trial court's failure to exclude Dr. Stain's incompetent testimony, this Court should reverse and remand this case for a new trial.

CONCLUSION

The litigants in any trial seek a level playing field. By failing to exclude juror number 26 and juror number 27 for cause, and by failing to exclude Dr. Stain's incompetent expert testimony, the trial court permitted the playing field tilt in Dr. Patton's favor. As a result, Ms. Vanlandingham did not have a trial by a jury free of bias; she did not have a trial in which incompetent expert testimony was excluded. For these reasons this Court should reverse and remand this case for a new trial.

Respectfully submitted,

ALICE VANLANDINGHAM, Appellant

ALAN D. LANCASTER MSB NO. [redacted]
JOHN M. MONTGOMERY, MSB NO. [redacted]
Liston/Lancaster, PLLC
P. O. Box 645
Winona, MS 38967
662-283-2132

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 BRIEF OF THE APPELLANT to the following attorneys, judges and parties of record:

The Honorable Henry Lackey
P. O. Drawer T
Calhoun City, MS 38916

Tommie Williams, Esq.
Clint Guenther, Esq.
Upshaw, Williams, Biggers, Beckham & Riddick, PLLC,
P. O. Drawer 8230
Greenwood, MS 38935-8230

SO CERTIFIED this the 26th day of June, 2009.

ALAN D. LANCASTER