2008-IA-01563-SCTE

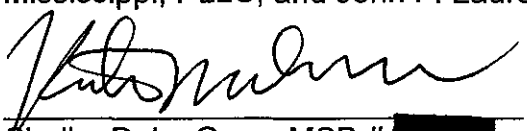
CERTIFICATE OF INTERESTED PERSONS

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

1.	Charles Burnwatt and Debra Burnwatt, as Parents of Wrongful Death Beneficiaries of William Alexander Burnwatt, Deceased	Appellant
2.	John H. Cocke, Esq.	Counsel for Appellants
3.	Charles M. Merkel, Esq.	Counsel for Appellants
4.	Cynthia I Mitchell Esq.	Counsel for Appellants
5.	Ear, Nose & Throat Consultants of North Mississippi, Pllc, and John F. Laurenzo, M.D ,	Appellee
6.	John F. Laurenzo, M.D	Appellee
7.	Shelby Duke Goza, Esq.	Counsel for Appellees Ear, Nose & Throat Consultants of North Mississippi, PLLC, and John F. Laurenzo, M.D
8.	S. Kirk Milam, Esq.	Counsel for Appellees Ear, Nose & Throat Consultants of North Mississippi, PLLC, and John F. Laurenzo, M.D
9.	Dion J. Shanley, Esq.	Counsel for Appellees Ear, Nose & Throat Consultants of North Mississippi, PLLC, and John F. Laurenzo, M.D

10.	Hon Robert Elliott	Circuit Court Judge of Lafayette County

Respectfully Submitted,
Ear, Nose & Throat
Consultants of North
Mississippi, PLLC, and John F. Laurenzo, M.D



Shelby Duke Goza, MSB #[redacted]
Shelby Kirk Milam, MSB #[redacted]
Hickman, Goza & Spragins, PLLC
P. O. Drawer 668
Oxford, MS 38655-0668
Counsel for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES/RULES

SECONDARY SOURCES

STATEMENT OF ORAL ARGUMENT

Appellee does not think that this case raises any novel issues of law or complicated factual disputes that would warrant oral argument pursuant to Miss. R. App. P. 34(b).

STATEMENT OF THE ISSUE

Phrased in a multitude of ways by Appellants, the sole issue involved in this appeal is whether or not the lower court abused its discretion in denying Appellants' renewed motion to exclude the testimony of Dr. Keith Mansel.

STATEMENT OF THE CASE

A. Procedural History

The Burnwatts commenced this action in the Circuit Court of Lafayette County, Mississippi on May 8, 2002 against Baptist Memorial Hospital-North Mississippi [BMH-NM], Ear, Nose & Throat Consultants of North Mississippi, PLLC, and John F. Laurenzo, M.D Defendants. R. 1-4. The Complaint broadly alleged general negligence with regard to a tonsillectomy performed on Alex Burnwatt and "in otherwise failing to exercise appropriate care." [Complaint, ¶ 10]. Defendants filed separate answers and affirmative defenses, each denying negligence or any departure from the applicable standard of care during the hospitalization, examination, treatment and care of Alex Burnwatt. R. 10-25.

On June 3, 2002, BMH-NM filed a motion to dismiss or in the alternative for a more definite statement. R. 19-23. On July 17, 2002, Defendants filed a motion for summary judgment or, in the alternative for a Protective Order. R. 34-38. The Burnwatts filed an Amended Complaint on October 3, 2002 [R. 75-77] and defendants answered that pleading in due course. R. 79-87. On October 21, 2002, the lower court denied BMH-NM's motion to dismiss but granted its motion for a more definite statement and denied Defendants' motion for summary judgment or, in the alternative for a protective order. R. 92-93. On May 15, 2003, BMH-NM filed a motion to stay proceedings pursuant to Miss. Code Ann. Sec. 83-24-29(1). R. 95-148. On August 9, 2004, the matter was set for trial to commence on August 15, 2005 and on May 5, 2005, BMH-NM filed a motion for summary judgment for failure of the Plaintiffs to identify an expert to testify against the hospital. R. 150-167. Plaintiffs never responded to the Motion nor

obtained an expert to testify against the hospital and on June 6, 2005, the lower court granted judgment of dismissal to BMH-NM R. 177-180.

On August 3, 2005, Plaintiffs filed a motion for relief from the judgment of June 6, 2005 or in the alternative, for a continuance of the trial setting. R. 181-195. On August 4, 2005, Plaintiffs filed a motion to exclude expert witness Dr. Keith Mansel and moved in limine to prevent Defendants from attempting to place blame for the incident giving rise to this action on any hospital employee. R. 196-202. On August 5, 2005, Defendants filed a motion in limine to exclude the testimony of expert witness Deborah Burton and responded to Plaintiffs ' motion for relief from judgment. R. 203-290. On August 8, 2005, Plaintiffs responded to Defendants' motion to exclude Burton [R. 291-339] while Defendants filed their response to Plaintiffs ' motion to exclude Mansel and motion in limine. R. 347-373.

On December 9, 2005, Plaintiffs filed their motion for partial summary judgment as to apportionment of fault to BMH-NM [R. 373-400] and on January 4, 2006, Defendants responded to the motion. R. 404-443. On April 9, 2007, the lower court granted Plaintiffs ' motion for partial summary judgment and denied their motion for relief from the judgment of June 6, 2005. R. 446-453. On May 23, 2007 Plaintiffs filed another motion in limine directed toward precluding the Defendants from presenting proof that they were not responsible for the death of Alex Burnwatt. R. 466-471. On June 4, 2007 the matter was tried and, with the jury being unable to reach a verdict, a mistrial declared on June 8, 2007. R. 578. The cause was reset for trial for September 2, 2008. R. 518.

At the first trial of this cause, the lower court precluded Defendants from

presenting a witness present during the resuscitation attempts on Alex Burnwatt, one Lydia Moak. R. 634-640. On April 10, 2008, the trial judge filed a statement in the record asking this Court to resolve the issue of the admissibility of Moak's testimony. R. 631-32. An interlocutory appeal was taken on the admissibility issue but ultimately denied as untimely. R. 519.

After another round of briefing by Defendants and Plaintiffs to exclude expert testimony [R. 536-715 (Burton); 732-843 (Mansel)], the trial was continued [R. 899] and the lower court denied Plaintiffs ' renewed motion to exclude Defendants' expert witness Dr. Keith Mansel. R. 900-903. On August 28, 2008, the lower court granted Defendants' request for permission to file an interlocutory appeal on the admissibility of Moak's testimony [R. 904-05] and this Court denied the petition on October 15, 2008. This Court granted Plaintiffs ' petition for interlocutory appeal on the admissibility of Mansel's testimony on October 16, 2008. R. 908.

B. Facts

On July 28, 2001, William Alexander Burnwatt underwent a tonsillectomy at Baptist Memorial Hospital - North Mississippi. The operation, a routine procedure performed by Dr. Laurenzo, went without incident[1] as demonstrated by both the medical records of the defendants, the hospital and anaesthesiologist in attendance as well as the testimony of the nurses participating in the procedure. Tr. 86-87; 131-51; 209-12.

[1]Counsel for Plaintiffs assert in their brief that the procedure took twice as long as the tonsillectomy performed on Alex's older brother Jonathan, (citing R.33 rather than Transcript at 33), suggesting that something went wrong during the procedure. While this suggestion is necessary to provide some semblance of plausibility to their theory of the case, Plaintiffs produced no evidence at trial that the length of the procedure suggested anything was amiss during the operation, as acknowledged by plaintiffs' expert. Tr. 61-62; 85-87. In point of fact, the medical records introduced at trial, coupled with undisputed testimony, affirmatively show that the procedure did not take twice as long Alex's older brother's tonsillectomy nor did it take 45 minutes. The actual procedure took 28 minutes. Tr. 148-49.

Specifically, there is nothing anywhere in the medical records of this procedure that indicates a major vessel was injured at any time during the 28 minute operation that would have necessitated immediate action by Dr. Laurenzo to prevent substantial bleeding. Tr. 88-90.[2]

Alex was discharged home and suffered a sore throat and nausea accompanied by spitting up, the usual effects from a tonsillectomy, but was not bleeding at any time while at home with his family. Tr. 107.

Five days later, on August 2, 2001, Alex Burnwatt returned to Baptist Hospital and was re-admitted with a diagnosis of dehydration, a normal complication of this surgery at 11:50 am that morning. Shortly after admission, Alex began coughing and vomiting. His condition worsened, Alex lost consciousness and went into respiratory distress. The Code team, along with several physicians began resuscitation efforts immediately thereafter. Shortly after noon, Dr. Lamb, assisting in the code, removed a large clot that was obstructing Alex Burnwatt's airway; chest compressions were commenced after his pulse was lost and, after several attempts, an IV line was placed at 12:10 pm by Dr. Lamb. Tr. 312-317, R.E. 1. Also at this time, blood was taken by Lydia Moak, one of the code responders, to the lab for testing. The result of that test showed that while Alex's hemoglobin level was low (7.99), he was not bleeding to death at 12:10 pm. Tr. 318-19, R.E. 1.

By 12:20, Alex Burnwatt developed swelling in his neck, the result of blood leaking into the tissues of this area, occasioned by a .4 centimeter tear in Alex's internal

---

[2]Confirmed by the pathologist's report to the effect that no muscle or vascular tissue was attached to the tonsils when Dr. Poston examined them after the surgery. Tr. 242-43.

jugular vein, resulting from the previous attempts to place the IV line under Alex's collar bone. The IV was then repositioned into the femoral vein. At 12:23 pm a unit of blood was begun while CPR continued. Tr. 318-19, R.E. 1. At 12:32, an x-ray was taken to ensure that the endotracial tube and IV line was placed correctly. Tr. 321, R.E. 1. At 12:40, blood gasses were drawn and reveled that his hemoglobin level had climbed to 11.7, almost normal for Alex Burnwatt, and further indication that plaintiffs' decedent was not actively bleeding during the code. Tr. 319-20, R.E. 1. Also at 12:40, Alex regained a pulse and maintained it for 16 minutes. By 12:56, chest compressions were begun again and his pulse lost.

At 12:57, the x-ray taken at 12:32 pm comes back and revealed the presence of bilateral pneumothoraxes, or air around Alex's lungs, probably the result of a piecing of the lung when the IV line was placed under the collar bone early in the code. Accordingly, Dr. Lamb then placed tubes through the ribs on both sides of the patient to remove the air which was ultimately only partially successful; Alex's lungs collapsed and, despite the two hour effort at resuscitation, a heart rhythm and spontaneous respirations were not obtained and death was pronounced at 1:45 p.m. Tr. 321-23, R.E. 1. An autopsy, performed by Stephen Hayne[3], concluded that the cause of death was acute internal-external hemorrhage with aspiration of blood. The manner of death was undetermined.

---

[3]As reported by CNN in August, 2009, the College of American Pathologists expressed concern relating to the volume of autopsies performed by Dr. Hayne on an annual basis (by his estimates, 1,200 to 1,800 autopsies per year) In 2008, the Mississippi Department of Public Safety terminated its contract with Dr. Hayne to perform autopsies, and Haynes work continues to be of concern to such nationally recognized organizations as the Innocence Project. *See* "Mississippi Pathologist Dismissed," *New York Times*, (August 6, 2009)

SUMMARY OF ARGUMENT

The lower court did not abuse its discretion in denying Plaintiffs ' renewed motion to exclude the testimony of Dr. Keith Mansel.

STANDARDS OF REVIEW

The "proper standard of review for the admission or exclusion of testimony, including expert testimony, is abuse of discretion." *City of Jackson v. Estate of Stewart*, 908 So. 2d 703, 708 (Miss. 2005). "Where error involves the admission or exclusion of evidence, this Court will not reverse unless the error adversely affects a substantial right of a party." *Floyd v. City of Crystal Springs*, 749 So. 2d 110 (Miss. 1999).

ARGUMENT

ARGUMENT: THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING Plaintiffs ' RENEWED MOTION TO EXCLUDE DR. KEITH MANSEL

The narrow issue now before this Court concerns the admissibility of testimony by Defendants' expert Keith Mansel. Dr. Mansel provided testimony during the first trial of this cause over the objection of the Plaintiffs concerning the medical events surrounding Alex Burnwatt's death and, in the process, detailed his disagreements with state pathologist Stephen Hayne's finding that Alex actually bled to death on August 2, 2001, the entire premise upon which this case is based. The lower court denied Defendants' initial motion to exclude Mansel's testimony prior to the first trial and, after hearing that testimony in its entirety [Tr. at pp. 300-365], denied the renewed motion to exclude Mansel. R. 900-903. Whether the lower court abused its discretion in ruling that Mansel's testimony was relevant, reliable and not unfairly prejudicial is the sole issue before this Court. Plaintiffs' submission to this Court seeks to substitute their

notion of relevancy for the one properly employed by the trial judge in this case. To reach this position, Plaintiffs posit two arguments: (1) that Mansel's testimony was inconsistent with the prior order of the lower court dismissing BMH-NM and therefore inadmissable (and/or Defendants were estopped from presenting said testimony); and (2) that Mansel's testimony is legally irrelevant pursuant to the Restatement of Torts (Second) Section 457. Prior to addressing these arguments, Defendants need present the procedural background giving rise to the current issue on appeal.

A. The June 6, 2005 Order

While Plaintiffs characterize the June 6 2005 order of the lower court granting the Hospital defendant summary judgment a "stipulation" throughout their submission, [Brief of Appellant at 12; 15; 22] that description falls far from the mark. As this record makes abundantly clear, from the filing of this action through the filing of BMH-NM's Motion for Summary Judgment, plaintiffs contended that the Hospital was negligent in connection with the care of the plaintiffs' decedent according to their theory of the case (excessive bleeding) as well as any other possible grounds later discovered. R. 1-4, Complaint at ¶ 10 ("failing to exercise appropriate care"). Despite the allegations of the Hospital's independent negligent acts or omissions, as of May, 2005, Plaintiffs' had failed to secure the services of a competent witness to support their position that the hospital was generally negligent, much less particularly so as regards Alex Burnwatt's "excessive bleeding," Plaintiffs ' theory of the case. With trial looming, Plaintiffs failure to obtain an expert against the hospital was the lapse that occasioned the filing of a motion for summary judgment by BMH-NM which was subsequently granted.

Despite a clear record now before this Court of this lapse, Plaintiffs assert that

failing to respond to the Hospital's Motion with expert testimony necessary to defeat summary judgment was justified by the personal opinions of Dr. Laurenzo (when deposed as a fact witness)[4] because Dr. Laurenzo stated that he saw nothing wrong with the care provided by the hospital. The support for Plaintiffs continual reliance on this personal opinion by a co-defendant (not even in the hospital on the day in question) becomes even more anemic once one considers the fact that Plaintiffs presented the testimony of Dr. Hayne at trial who opined that the cause of death could have been the result of actions taken by the medical staff at the hospital. Supplemental Transcript pp 17-19, R.E. 2, presented to the jury on June 4, 2007.

Plaintiffs' counsel knew that the advantage arguably gained from releasing the Hospital after failing to prove their case against this defendant would be all but lost if the lower court refused to prevent Defendants from presenting their theory of the case. Thus, the order granting judgment to the hospital becomes to the advocate a "stipulation" from which estoppel consequences may result.[5] The lower court understood that such a result could not be countenanced, particularly after Plaintiffs own proof provided a basis for the jury determining that Alex's death was the result of the efforts taken by the hospital to revive him. Whether those efforts were heroic or blameworthy was not an obligation that Defendants had to shoulder; the lower court

---

[4]Personal opinions, even of a physician, are incompetent proof of medical malpractice since the specific standard of medical conduct which must be met is measured objectively. *Phillips v. Hull*, 516 So. 2d 488, 491 (Miss. 1987). Such personal opinion medical testimony is clearly an incompetent basis from which Plaintiffs may rely to fashion their model of proof. See *Meek v. Shepard*, 484 A.2d 579 (D.C.App. 1984); *McNabb v. Landis*, 479 S.E.2d 194 (Ga. App. 1996) (personal opinions of physician as to care he would have provided plaintiff inadmissable); *Dine v. Williams*, 830 S.W.2d 453 (Mo. App. 1992) (opinion based upon personal standards rather than established standard of care inadmissable)

[5]This same language found its way into the instructions to the jury [p-12] over the objections of Defendants. Tr. 379-385.

understood that simple proposition. Yet, while acknowledging the rights of the Defendants to present their case, it likewise instructed the jury over objection of the Defendants that "no actions of omission or commission by any employee of BMH-NM during or after the code caused or contributed in any way to the death of Alex Burnwatt or the plaintiffs' damages." And while this was error, it was invited by Plaintiffs and should not form the predicate for now attacking the lower court's ruling on the admissibility of Mansel's testimony.

In sum, Plaintiffs failed to obtain an expert against the Hospital and approved the order prepared by the Hospital's attorney to the effect that no employee of the hospital contributed to the death of Alex Burnwatt. Plaintiffs then took every effort to make use of this order work as a sword to preclude relevant probative proof about the circumstances surrounding his death over the continuing objection of the Defendants. Defendants' position here remains as it has been at all times relevant below: the order should not have been read to the jury; it does not have preclusive effects that may deprive these parties of due process of law and Mansel's testimony is relevant, probative and material to the ultimate question of whether Defendants did or did not breach the standard of care or was the cause of death of Alex Burnwatt.

B. Dr. Mansel's Testimony in Context

Plaintiffs' entire case against Dr. Laurenzo hinges on the testimony of Dr. Burton who, in turn, rests her opinion entirely upon (1) former [and now discredited] state pathologist Stephen Haynes' conclusion concerning the manner of Alex Burnwatt's death (exsanguation), supplemented at trial with, (2) the testimony of witnesses in the hospital *during the Code*. As the record makes clear, Dr. Burton was allowed to testify

at trial about the possibility that defendant Laurenzo's alleged tearing of plaintiffs' decedents' jugular vein was the proximate cause of his death and that this alleged error is exactly what plaintiffs' counsel pointed to as the reason the case should go to the jury. Tr. at 114-115. How Dr. Mansel's opinion to the contrary could be excluded defies common sense.

C. Restatement (Second) of Torts § 457 (1965)

Plaintiffs argue that the Restatement (Second) of Torts § 457 (1965) support the proposition that regardless of what happened during the code, such evidence is irrelevant as Alex Burnwatt's bleeding resulted from Laurenzo's preceding negligence– had he not been bleeding, the resuscitation efforts would never have been undertaken. Apart from the fact that this argument assumes that which has yet to be proven [Defendants' negligence] and is, to that extent, logically fallacious, this attempted legal slight of hand is also predicated upon a gross misapprehension of the proof in this case, to wit:

(A) Alex Burnwatt went to the Hospital *for dehydration not bleeding*, eight days after the surgery. Tr. at 65 (Burton). At the time of his admission he was not actively bleeding; rather, the evidence was just the opposite. Tr. at 94-95, R.E. 3 (hemodynamically stable; no active bleeding); and,

(B) there is *no testimony from anyone in this case* that resuscitation efforts were commenced because Alex Burnwatt was bleeding; resuscitation efforts were commenced because Alex was not breathing. Tr. at 276-77 (Dr. Ford Dye);

Mansel's testimony is consistent with Plaintiffs ' Exhibit 1 (plaintiffs' decedent's medical records) as well as the testimony of all medical personnel actually in

attendance on August 2, 2001. Tr. 312-326. It is likewise consistent with medical personnel in attendance on August 2, 2001, who did not testify at trial. R. 803-12, R.E. 4, (Lydia Moak).

Nor does the Restatement support plaintiffs' motion to exclude Mansel. Section 457 renders an actor who negligently *injures* another liable for any additional bodily harm resulting from normal efforts of third persons in rendering aid. Restatement (Second) of Torts § 457 . The purpose of this Section is to compensate the injured party for injuries sustained as a result of medical treatment which is required *because of the initial injury*. *See* Restatement (Second) of Torts §457 (comments a and b). Needless to say, while Plaintiffs are entitled to argue their theory that these defendants' injured Alex Burnwatt on July 28, 2001, Defendants have just as much right to present the opinion of Mansel as to what proximately caused Alex Burnwatt's death. A tonsillectomy is not transformed into an "injury" within the meaning of the Restatement simply because it preceded the hospitalization. Only by accepting Plaintiffs ' counsel's confused perspective on traditional notions of foreseeability would this argument even suggest itself.

The Restatement provides:

> **Additional Harm Resulting From Efforts to Mitigate Harm Caused by Negligence**
>
> If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.

Restatement (Second) of Torts § 457 (1965). "[T]he rationale of the rule, as expressed

in the Restatement, finds its basis in the risks which in view of 'human fallibility' are 'normally recognized as inherent in the necessity of submitting to medical, surgical or hospital treatment.' *"Exner Sand & Gravel Corp. v. Petterson Lighterage & Towing Corp.*, 258 F.2d 1, 3 (2d Cir.1958) (quoting Restatement (Second) of Torts § 457 , comment (d.)) Contrary to the plaintiffs' oversimplified approach, the "[a]dditional harm" to which the Restatement speaks is that caused by efforts to remedy the original harm. As one court put it,

> The relationship between the harm inflicted by the first physician and the treatment initiated by the second is crucial to holding the first physician liable for subsequent malpractice. . . [A] physician could not "avoid liability for the harm caused by treatment from other physicians if his own negligence was the cause of the injury which necessitated that treatment . . The court had no difficulty linking the first physician's malpractice with that of the second. The first physician's negligence resulted in an identifiable harm; the second's course of treatment was designed to mitigate that harm. Under section 457, the first physician could be held liable for the malpractice of the second.

Daly v. United States, 946 F.2d 1467 (9th Cir. 1991). Plaintiffs ' argument is predicated entirely upon the temporal proximity of Alex Burnwatt's bleeding to the Code. Yet, it remains undisputed that Alex Burnwatt was not instructed to go to the hospital for bleeding nor was he bleeding upon arrival. Plaintiffs' expert is on record for disassociating actionable medical negligence from either post surgical dehydration/ vomiting and moderate post surgical bleeding. Tr. 87-88, R.E. 3. Indeed, Dr. Hayne's testimony is also consistent with this position. Supp. Tr. at 10-12. Plaintiffs ' entire argument against Mansel rests on conflating temporal proximity ("Alex Burnwatt's death. . ."precipitated by the bleeding") with proximate cause-- the only proximity that legally matters:

> [I]t is elemental that, in order that a wrongdoer may be held liable ... for

> negligence, it is necessary to show that the injury complained of was the natural and probable result of the negligence ... 'Actionable fault on the part of a defendant must be predicated on action or nonaction accompanied by knowledge actual or implied of the facts which make the result of his conduct not only a probable result but a result also which he should, in view of these facts, have reasonably anticipated.' That a particular result was a possible result does not establish a case....

Jarbon v. State, 172 Miss. 135, 139-40, 159 So. 406, 407 (1937). In other words, if puncture of the lung by medical personnel attending Alex Burnwatt after he ceased breathing could not be reasonably foreseen by surgery within the standard of care on July 28, 2001, Dr. Laurenzo is simply not liable; the jury is not precluded from viewing the events of August 2nd other than through the lens fashioned by Plaintiffs ' theory of the case. In short, Plaintiffs ' argument for exclusion of Mansel on relevancy grounds has no merit and the lower court did not abuse its discretion in overruling the motion in limine.

D. Confusion of the Issues; Waste of Time; Estoppel

Plaintiffs ' Miss. R. Evid. 403 argument likewise fails as it rests completely on the notion that Mansel's testimony is not probative of any fact of consequence at issue in this case. For the reasons outlined in the previous discussion, Mansel's testimony is consistent with all medical personnel who attended Alex Burnwatt on August 2, 2001. That it is inconsistent with Plaintiffs ' theory of the case and Dr. Burton's opinion is of no moment; indeed, the scenario outlined by Mansel's testimony is expressly not ruled out by the pathologist performing the autopsy. Supp. Tr. at 20-23, R.E. 2. Defendants have never disputed what Hayne recognized as "heroic efforts" by the hospital in their course of dealings with Plaintiffs ' decedent. It was up to the Plaintiffs however to prove medical negligence against the hospital; whether such a claim was provable or not, they

utterly failed in that effort but Mansel's testimony does not attempt to revisit that question in any event. Defendants are entitled to explain to the jury what was occurring during the entire course of Alex Burnwatt's treatment and have no obligation to prove another parties' liability for the tragic and unfortunate death of Plaintiffs decedent by testimony from their own experts. *Blailock v. Hubbs*, 2005 WL 1385214 (Miss. App. May 26, 2005) While Mansel's testimony may have proved prejudicial to the Plaintiffs ' case, it was not unfairly prejudicial inasmuch as Plaintiffs' right to recovery rested upon one theory of the case (exsanguation) while Defendants' defense rested upon a mutually exclusive other theory (pulmonary distress).

Even in jurisdictions that follow the Restatement, it is for the jury to decide whether or not the original party is or is not a "tortfeasor" to begin with. Plaintiffs acknowledge this fact. R. 486; Tr. 385 (Jury Instruction 14). Thus, an original tortfeasor may be held liable for subsequent injuries which were reasonably foreseeable, yet, it remains for the jury to decide, even in Restatement jurisdictions, the threshold issues of (1) whether the original physician was negligent and, if so, (2) whether plaintiffs' injuries were the result of *that underlying* negligence.[6]

---

[6]*See Hassan v. Begley*, 836 N.E.2d 303, 309 (Ind. App.2005)(where actions of nursing staff was an intervening cause of death, prior treating physician not liable where evidence established that patient's admission to the hospital was to monitor and treat existing conditions, and emergency physician's actions did not negligently cause any injury to patient that required further treatment) *See also Lindquist v. Dengel*, 595 P.2d 934, 936-937 (Wash. 1979) (physicians liable for additional harm incurred from treatment by another physician made necessary by the initial negligence of the physician; however, if the original doctor was not negligent he would not be liable for the acts of a later physician). Courts that have adopted § 457 have determined that in order for§ 457 to apply, a plaintiff must prove that additional harm was suffered due to the negligence of health care providers, and the underlying negligence is the commencement of the causal chain. *See Hausman v. Cowan*, 601 N.W.2d 547 (Neb.1999); *Avery v. Ward*, 326 Ark. 830, 934 S.W.2d 516 (1996); *Madrid v. Safeway Stores, Inc.*, 709 P.2d 950 (Colo.App.1985); Gonzalez v. Leon, 511 So.2d 606 (Fla.App.1987);*Younger v. Marshall Industries, Inc.*, 618 So.2d 866 (La.1993); *Dauzat v. Canal Ins. Co.*, 692 So.2d 739 (La.App.1997)

In short, the Restatement position is not a rule of evidence, of exclusion or even of relevancy; rather, it is a special form of vicarious liability which, when applicable, expands traditional notions of foreseeability to allow an injured party recovery were a more restrictive view of causation would not. If Mississippi follows the Restatement position[7], this issue may be handled by proper instructions to the jury. *See Rine By and Through Rine v. Irisari*, 420 S.E.2d 541, 544-45 (W.Va. 1992) (jury should have been instructed that a negligent physician was liable for injuries resulting from foreseeable medical treatment undertaken to mitigate the harm caused by the first physician); *Maxwell v. Powers*, 28 Cal.Rptr.2d 62, 68 (Cal.App. 1994) (defendant may be held liable for foreseeable harm caused by later treatment provided by plaintiff's other doctors due to subsequent negligent medical care); *Walker v. Giles*, 624 S.E.2d 191, 201 (Ga.App. 2005) (jury to decide whether it was reasonably foreseeable to defendants that the treatment provided to wife by subsequent doctors, made necessary by defendants' failure to diagnose and properly treat wife's appendicitis, would be rendered in a negligent manner). Because the jury gets to decide the issue of whether Laurenzo proximately caused plaintiffs' decedent's death, the Restatement may not be used to preclude a parties theory of the case from being presented.

In *Peters v. Ballard*, 921, 795 P.2d 1158, 1163, *review denied* 803 P.2d 325

---

[7]*See Medlin v. Hazlehurst Emergency Physicians*, 889 So.2d 496 (Miss. 2004) (Acknowledging "this Court has never specifically applied the Restatement (Second) of Torts § 457. . [.]"); *Wilson v. Krasnoff*, 560 A.2d 335, 340 (R.I.1989) (under Rhode Island law an initial tortfeasor is liable only for the injury caused by his or her negligence, not for any additional harm caused by subsequent medical malpractice that aggravated the injury. Noting that the Restatement rule was inherently unsound, the court indicated that the subsequent medical malpractice constituted an independent intervening cause)

(Wash.App. 1990), plaintiff suffered injuries after a doctor performed a stomach stapling surgical procedure. The plaintiff sued the doctor for medical malpractice. The trial court dismissed the case after the jury found in favor of the defendant on the medical malpractice and informed consent claims. Affirming, the appellate court held, *inter alia*, that the trial court did not abuse its discretion in admitting evidence of negligence by the plaintiff patient's subsequent physician, because one of the defense theories was to show that the patient's physical problems were caused by her subsequent treatment, which entailed an operation for a stomach perforation. The court stated that the evidence regarding the subsequent doctor's care was clearly relevant to the defense's theories and was necessary to explain how the plaintiff received her injuries of a massive gastrointestinal bleed and resulting complications and hospital admissions. As in that case, here defendants' witness Mansel explains what precipitated the death of plaintiffs' decedent in accordance with the defendants' theory of the case and the evidence adduced by both parties to this action.

In *Ichelson v. Wolfe Clinic, P.C.*, 576 N.W.2d 308 (Iowa, 1998) the Iowa Supreme Court was confronted with a plaintiff who, in the lower court, alleged medical malpractice in performing lens implant surgery by the patient's eye clinic and its staff doctors. After the trial court entered judgment on a jury verdict for defendants, the plaintiff appealed arguing that the trial court erred in admitting evidence of medical care furnished by a university eye clinic subsequent to the defendant clinic's surgery. The appellate court affirmed, finding it proper for the trial court to allow evidence to be introduced by defendants regarding the university clinic's procedures in order to allow

the jury to sort out what effect, if any, those procedures had on the patient's condition.[8]

Plaintiffs rely in part upon an unpublished opinion of the Ohio Court of Appeals, *Bach v. Dicenzo*, 2005 WL 1245641 (Ohio App. 2005), for the proposition that Dr. Mansel's testimony is irrelevant. Before discussing the reasons why *Bach*, *supra*, is materially distinguishable from the facts of this case, it bears pointing out that Plaintiffs' position on the applicability of this line of authority, rests on the flawed premise that "Alex coded because of the bleeding episode . . . and the bleeding was caused by Dr. Laurenzo's negligence." Brief of Appellant at p.24. While it is true that Alex lost his airway because of its occlusion by the dislodged escar (or scab) that formed because of the tonsillectomy, it is for the jury to decide whether or not the "bleeding was caused by Dr. Laurenzo's negligence." Were it otherwise, plaintiffs would have been entitled to a directed verdict on liability in the court below. Only the appeal papers of the plaintiffs suggest this otherwise radical departure from the understanding of all of the parties and the court below. It is an untenable position under the circumstances of this case and one not supported by the plaintiffs' authorities.

In *Bach v. Dicenzo*, *supra,* the court had before it the argument of a physician whom the jury below determined was a proximate cause of the injuries sustained during the delivery of a premature infant by subsequent medical care providers who were also

---

[8]*See generally Henry v. Superior Court*, 72 Cal.Rptr.3d 808 (Cal. App.2008) where a contractor brought a negligence/premises-liability action against homeowners for injuries he sustained from a fall on defendants' property, the trial court ruling that defendants could not introduce evidence that contractor's injuries were aggravated as a result of medical malpractice by emergency-room doctors was held to be in error. The appellate court held that, while defendants, if negligent, were solely responsible for the initial injury, to the extent that plaintiff's overall injuries could be divided by causation into distinct component parts, liability for each indivisible component had to be considered separately in accordance with the rules of comparative fault)

alleged to have provided inadequate resuscitative care. The appellate court affirmed the jury's verdict and, in so doing, rejected the original physician's contention that he could not be liable for injuries sustained by the subsequent resuscitative care, reasoning that the jury could believe that his own negligence in not directing the infant's mother to a facility equipped to handle seriously premature infant deliveries "set the stage" for the "direct cause" of the injuries to the infant. *Bach*, 2005 WL 1245641 *3. And while the *Bach* decision did not rest upon Section 457 of the Restatement (Second) of Torts, to the extent plaintiff argues that 'setting the stage" in the absence of negligence is sufficient to harness a defendant with liability for the subsequent acts of others, such argument is a gross misreading of the *Bach* decision as well as repugnant to any reasonable understanding of common law assessment of fault.[9] The original medical care provider in *Bach* was found negligent for his own *actions by a jury after full trial on the merits*. It has no application to the evidentiary question at issue in this appeal.

Whether or not Mississippi follows the Restatement position, it certainly trusts juries to decide proximate cause and recognizes a party's right to present alternative scenarios if supported by evidence *via* a theory of the case instruction. *See Terry v. State* 718 So.2d 1115, 1123 (Miss.1998) ("This Court finds that the defendant was

[9]Plaintiffs' counsel asserts that "the evidence shows that Alex Burnwatt died before resuscitation efforts began. His heart stopped beating and he quit breathing." (Brief of Appellants at p. 28) While this is clearly an opinion and not a statement of fact, this assertion seems to change the entire theory of the case presented by the plaintiffs below. In any event, in the absence of expert opinion to the effect that the size and/or composition of the escar was the result of Laurenzo cutting too deeply five days previously, this assertion is a red herring. Plaintiffs tried the case under the theory that Alex bled to death and Mansel's testimony rebuts that theory.

entitled to present her theory of the case and have the jury determine whether someone else could have taken the money. Any fears of confusion the trial judge may have harbored could have been resolved by giving limiting instructions to the jury. By trying to avoid a second mistrial, he erroneously excluded any evidence of Friedman embezzling the money")[10]

Throughout their submission, Plaintiffs suggest that the allowance of Mansel's testimony is what caused the first jury to be hung. It follows from this argument that Mansel's testimony was more than a waste of time–it was confusing to the jury's ultimate task. Fortunately, this assertion may be compared with the record evidence: On June 8, 2007, the elected foreman for the jury empaneled in this case passed a note to the court, reading as follows:

> [W]e the jury have this morning reviewed once again and very thoroughly the evidence surrounding the events of August 2. The testimony of the expert witnesses with the purpose of determining a verdict on whether Dr. Laurenzo did not operate to standard and whether that fact caused, proximately caused the death of Alex. *We are hung up on the question of whether the amount of blood, the bleeding at the outset of the emergency was of a volume to indicate mistakes by Dr. Laurenzo.* We have not and do not believe we can move past 6 versus 6.

Tr. at 476-477 (emphasis added). After conversing with the jury, the court realized that they were hopelessly deadlocked and a mistrial was declared *Id.* at 477-479. And while Defendants contend it was error to submit instruction 12 to the jury that recited the language of the prior ruling in favor of the hospital, it seems clear that the jury was

---

[10]*See also United States v. Robinson*, 700 F.2d 205, 211(5th Cir. 1983)("A defendant is usually entitled to have the court instruct the jury on the defense's "theory of the case." This does not mean that any suggested instruction bearing the defense theory label must be given. The trial court may decline a suggested charge which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions.)" (Internal citations omitted)

focused on whether or not Plaintiffs ultimately made their case upon the exsanguation theory presented.[11] In short, if there was confusion of the issues giving rise to this result, it was consequent to the lower court's instruction P-12 rather than Mansel's testimony.

Nor will Plaintiffs ' invocation of preclusion by equitable and/or judicial estoppel apply to the issue of the appropriateness of Mansel's testimony. The doctrine of judicial estoppel "applies in cases where a party attempts to contradict his own sworn statements in the prior litigation," *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988)and this form of estoppel arises from the taking of a position that is inconsistent with a position previously asserted in prior litigation. *Thomas v. Bailey*, 375 So.2d 1049 (Miss. 1979) *citing Banes v. Thompson*, 352 So.2d 812 (Miss.1977); *Wright v. Jackson Municipal Airport Authority*, 300 So.2d 805 (Miss.1974); *Sullivan v. McCallum*, 231 So.2d 801 (Miss.1970). *See also Moore v. United Services Automobile Association*, 808 F.2d 1147, 1153 (5th Cir.1987) Here, Defendants have made no sworn statements from which an estoppel may be set up nor asserted a legal position as regards the hospital. Whether or not the hospital defendant failed to act in accordance with the standard of care with relation to Alex Burnwatt was not 'its position" to take one way or the other; there are no such things as compulsory cross-claims in Mississippi civil practice. When asked his *personal opinion* as to whether or not he had

---

[11]From opening to closing arguments, counsel for Plaintiffs relied upon the amount and/or volume of blood at the scene of the hospital code. Tr. at 11-12, 15-16, 19-20, 37-38, 57, 66-68, 78-80, 85-86, 93, 97-98, 170-171, 173, 189-192, 227-229, 289-291, 330-334, 337-338, 341, 343-344. Moreover, Mrs. Burnwatt also described the amount and/or volume of blood at the scene. *Id.* at 37-38 On top of that, counsel for Plaintiffs/Defendants also introduced into evidence several witness accounts concerning the amount and/or volume of blood at the scene. *Id.* at 85-86, 172-173, 227, 229.

"any criticism of the resuscitation efforts of the Hospital," Dr. Laurenzo stated he had none. Such statements are not sufficient to form a predicate against which an estoppel may be made out, but, in any event, Dr. Mansel's testimony is demonstrably not critical of the resuscitation efforts of the Hospital" in any event. Tr. 312-323, R.E. 1.

Plaintiffs' theory of equitable estoppel fares no better. This Court has had numerous occasions to delineate grounds under which an estoppel may be set up as well as the rationale for its application:

> We are concerned here with a doctrine which has its roots in the morals and ethics of our society. *See Kelso v. Robinson*, 172 Miss. 828, 840, 161 So. 135, 137 (1935); *Stokes v. American Central Insurance Co.*, 211 Miss. 584, 589, 52 So.2d 358, 360 (1951). Fundamental notions of justice and fair dealings provide its undergirding. Whenever in equity and good conscience persons ought to behave ethically toward one another the seeds for a successful employment of equitable estoppel have been sown.

PMZ Oil Co. v. Lucroy, 449 So.2d 201, 205 (Miss. 1984). *See also Ewing v. Adams*, 573 So.2d 1364, 1369 (Miss.1990). Unlike waiver which primarily focuses on the party charged with relinquishment, estoppel, equitable or promissory, examines the conduct of both parties. *See Barron v. Federal Land Bk of New Orleans*, 180 So. 75 (Miss. 1938) ("Estoppel by conduct arises from an act or declaration of a person intended or calculated to mislead another, on which that other has relied, and has so acted, or refrained from action, as that injury will befall him if the truth of the act or declaration be denied.") Plaintiffs cannot show that defendants agreed to the dismissal of the co-defendant Hospital in an effort to misled the plaintiffs for the simple reason that then, as now, defendants do not "point the finger" at the hospital through Mansel's testimony. Rather, Mansel's retention was necessary to rebut the opinions of Dr. Hayne that Alex Burnwatt bled to death. There is no other reason for presenting his testimony.

In Mississippi, equitable "[e]stoppel may exist where based upon words, conduct, silence or delay." *In Re Stoball's Will*, 50 So. 2d 635 (Miss. 1951). That said, mere silence or inaction on the part of one party will generally not set up an estoppel unless the duty to speak has already arisen in that party. *See Davis v. Butler*, 128 Miss. 847, 91 So. 279, 280 (1922) ("Estoppel operates only in favor of one who in reliance upon the act, representation or silence of another, so changes his situation as that injury would result if the truth were shown.") *quoting Hart v. Foundry Co.*, 72 Miss. 809, 830, 17 So. 769, 774 (1895); *Canal-Commercial Trust & Savings Bank v. Brewer*, 108 So. 424, 430 (Miss. 1926) ("Estoppel must arise from some word spoken, some act done or some failure to speak when called on to speak") Here, as in the lower court, defendants have taken the consistent position that they have no duty to make claims against the Hospital and, in the absence of seeking apportionment, continue to have no obligation in this regard. Dr. Laurenzo believes the Hospital is free of legal negligence in the death of Alex Burnwatt; his counsel has consistently taken positions here, and in the lower court, to effectuate that belief.[12] In sum, the principles supporting the doctrine do not apply to the circumstances of this case and this argument should be rejected as well.

In the final analysis, all of the plaintiffs efforts from and after their failure

---

[12]Plaintiffs attempt to show detrimental reliance by the fact that they allowed the Hospital out of the litigation. Without detailing again the circumstances under which the Hospital obtained summary judgment, it bears pointing out that plaintiffs have never even sought to obtain an expert to rebut Mansel. Plaintiffs moved the court to vacate the order granting summary judgment to the hospital and the defendants did not object to that motion. Inasmuch as the principles informing the doctrine of equitable estoppel as it has developed in this jurisdiction are fairness and the promotion of the ends of justice, these defendants have not and would not object to plaintiffs seeking an order below to allow them another opportunity to rebut Mansel's testimony. As Plaintiffs are not interested in that course of action, detrimental reliance should not be found to exist under these circumstances.

to obtain an expert to testify against the Hospital, were designed to prevent defendants from mounting any defense to the allegations that Dr. Laurenzo cut too deeply into the tonsillar bed five (5) days before Alex Burnwatt's hospitalization, causing him to bleed to death during resuscitative efforts. Plaintiffs rested all of their hopes on a faulty investigation by Dr. Hayne into the cause of Alex Burnwatt's death and the speculations of Dr. Burton trying to make sense of those findings consistent with the plaintiffs' theory of the case. Dr. Mansel's expected testimony presents an alternate scenario whereby despite the heroic efforts of the hospital, Alex Burnwatt died from pulmonary complications arising from the resuscitative efforts of the hospital. Defendants' rights to due process of law as guaranteed by the Mississippi (Art. 1 Section 14) and federal constitutions (U.S.C.A. Const. Amend. 14) are implicated by the lower court's ruling which, as it now stands, is consistent with those guarantees. Dr. Mansel's testimony is relevant to the essential question of whether Alex Burnwatt bled to death or did not. As such it provides probative evidence that Dr. Hayne, as is often the case, again got it wrong. The jury is entitled to hear this testimony to determine what, if any weight to give to Dr. Burton's testimony as this witness, who could offer nothing but speculations on what Dr. Laurenzo actually did wrong, relies exclusively on the autopsy report to provide her causation opinion. This is the only issue presented in this appeal; everything else is commentary. Due process requires that the jury hear this evidence and decide for itself whether Hayne and Burton are entitled to be believed on the ultimate question of whether Laurenzo cut too deeply when performing the tonsillectomy. The lower court should be affirmed.

CONCLUSION

Defendants, Ear, Nose & Throat Consultants of North Mississippi, PLLC, and John F. Laurenzo, M.D. respectfully request that this Court affirm the lower court on the issue of the admissibility of Dr. Mansel's testimony and for all other relief the court finds warranted in the premises.

Respectfully submitted, this the 17th day of December, 2009

Respectfully Submitted,
Ear, Nose & Throat Consultants of North Mississippi, PLLC, and John F. Laurenzo, M.D

Shelby Duke Goza, MSB #
Shelby Kirk Milam, MSB #
Hickman, Goza & Spragins, PLLC
P. O. Drawer 668
Oxford, MS 38655-0668
Counsel for Appellees

Dion J. Shanley, MSB # 9025
Hickman, Goza & Spragins, PLLC
115 Homestead Drive
Madison, MS 39110

CERTIFICATE OF SERVICE

I Shelby Kirk Milam of Hickman, Goza & Spragins, do hereby certify that I have this day mailed by United States Mail, postage pre-paid, a true and correct copy of the foregoing to:

John H. Cocke, Esq.
Cynthia Mitchell
Merkel & Cocke
P. O. Box 1388
Clarksdale, MS 38614

THIS, the 17th day of December, 2009.

Shelby Kirk Milam, MSB #[redacted]
Hickman, Goza & Spragins, PLLC
P. O. Drawer 668
Oxford, MS 38655-0668
Counsel for Appellees

CERTIFICATE OF FILING

I, Shelby Kirk Milam, of Hickman, Goza & Spragins, do hereby certify that I have this day sent via FedEx, the original and three (3) copies of Appellees' Brief and an electronic disk containing the same to:

Kathy Gillis, Clerk
Supreme Court of Mississippi
450 High Street
Jackson Ms. 39201

THIS, the 17th day of December, 2009.

Shelby Kirk Milam, MSB #[redacted]
Hickman, Goza & Spragins, PLLC
P. O. Drawer 668
Oxford, MS 38655-0668
Counsel for Appellees