

IN THE SUPREME COURT OF MISSISSIPPI

CHARLES BURNWATT and DEBRA BURNWATT,  
As Parents and Wrongful Death Beneficiaries of WILLIAM  
ALEXANDER BURNWATT, Deceased

APPELLANTS

VERSUS

CAUSE NO. 2008-IA-01563 -SCT

EAR, NOSE & THROAT CONSULTANTS OF NORTH  
MISSISSIPPI, PLLC, and JOHN F. LAURENZO, M.D.

APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY,  
MISSISSIPPI  
CAUSE NO. L-02-186

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**REPLY BRIEF OF APPELLANTS**

ORAL ARGUMENT IS REQUESTED

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## **STATEMENT REGARDING ORAL ARGUMENT**

This case presents serious issues regarding the defendant's attempt to avoid the effect of a stipulated agreed order, thereby prejudicing the plaintiffs and confusing the jury. The Burnwatts respectfully submit that oral argument would be of assistance to the Court in exploring these issues.

## **STATEMENT OF THE CASE**

### **A. Proceedings Below**

The plaintiffs will not reiterate herein the entire history of this case nor all of the relevant facts. However, there are a number of notable omissions or discrepancies in the defendant's version of events which must be addressed. Briefly stated, Alex Burnwatt, age nine, died on August 2, 2001, several days after a tonsillectomy by the defendant John Laurenzo. Original defendants in the case were Dr. Laurenzo and his clinic and Baptist Memorial Hospital-North Mississippi ["BMH-NM"], the hospital where the surgery was performed and where Alex died. Record at page 1 [hereinafter "R.1."] The case was litigated for a number of years, with written discovery exchanged and depositions taken of the doctor and hospital personnel. After discovery had revealed no evidence to support a claim against the hospital, the hospital filed a motion for summary judgment.

The Plaintiffs' interrogatories to the defendant Laurenzo had inquired regarding any expert witnesses which Dr. Laurenzo intended to call, together with the substance of the experts' expected testimony and the grounds therefor. Laurenzo identified no expert that was either critical of the care rendered by BMH-NM nor one who opined that any acts or omissions of the hospital caused or contributed to Alex's death. R.177-178; R.E. 18-19. Although the defendants Laurenzo and his clinic [hereinafter referred to collectively as "the defendant"] had raised an affirmative defense that the plaintiff's injuries were caused by and/or contributed to by other, third persons, Laurenzo failed to identify an expert who either criticized the hospital or who opined that any actions of the hospital caused or contributed to Alex's death.

Discovery having been done, and the defendant Laurenzo not having identified any expert putting any responsibility on the defendant hospital, the plaintiffs advised the Court that unless "Dr. Laurenzo intends to 'point the finger' at Baptist Memorial Hospital-North Mississippi personnel in any respect," the plaintiffs would confess the

motion for summary judgment as to the hospital. R.179; R.E.20. Dr. Laurenzo had previously been deposed and had testified that he was not critical of the defendant hospital. Laurenzo's counsel professed that he would not "point the finger" at the hospital. R.179; R.E.20. Plaintiffs' counsel had raised the issue of whether the defendant Laurenzo would attempt to present evidence that any actions of the defendant hospital had anything to do with Alex Burnwatt's death. Laurenzo's counsel expressly stipulated by the Agreed Order dismissing the hospital that Laurenzo had no expert testimony as to Baptist Memorial Hospital and that "neither Baptist Memorial Hospital-North Mississippi nor its employees were in any manner negligent and/or committed any acts of omission/commission which caused or contributed to cause the plaintiff's damages." Order on Baptist's motion for summary judgment, R.178-179; R.E.19-20. The Order dismissing the hospital was based on this explicit representation by Laurenzo, on which the plaintiffs relied. R.178-79; R.E.19-20.

The defendants do not seriously question this procedural background. Instead, they try to put a spin on these facts implying that plaintiffs' counsel somehow dropped the ball by not presenting an expert critical of the hospital. Perhaps the defendant should defer to the usual defense argument: if no expert is presented to establish negligence, there was no negligence. Neither the plaintiffs nor Laurenzo presented an expert who would opine that the hospital was negligent; Laurenzo stipulated that there was no negligence and that nothing the hospital did caused or contributed to Alex's death. The order was entered on June 6, and based on these facts, the parties prepared for trial on August 15, 2005.

The defendant's spin on this case causes it to omit significant events. After the entry of the order dismissing the hospital, the defendant blithely pretends that the next event of any significance was the plaintiffs' motion for relief from the June 6 judgment or alternatively for a continuance of the August 15 trial setting. Defendant's Brief at 3-4. R.

181. The defendant completely omits his own attempt, only a few weeks after the above agreed order disclaiming any responsibility on the part of the hospital, to designate an expert who **did** blame the hospital, or its resuscitative efforts, for Alex's death. R. 193-94. The designation of Dr. Mansel stated that Alex's death was "due to the resuscitation attempts [of BMH employees]." R. 193.

This designation was filed in direct contravention of Rule 4.04 of the Uniform Circuit and County Court which states:

Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least 60 days prior to trial.

UNIFORM CIRCUIT AND COUNTY COURT RULES, Rule 4.04.

Mansel was disclosed July 11, 2005, only 34 days prior to the August 15 trial.

The trial court disregarded Rule 4.04A, allowed the late designation of defendant's expert, and continued the trial, despite the fact that defendant had represented only one month earlier it was not going to proffer any expert on these issues.

As the defendant points out, the plaintiffs understandably filed a motion to exclude the newly designated expert witness Dr. Keith Mansel and moved in limine to prevent the defendants from attempting to place blame for the incident on the hospital. R.732-37, R.E. 52-57.

The critical event which the defendant would like to sweep under the rug is the defendant's filing of a designation of expert witness stating that Alex's death was caused by the hospital, only a month after representing to the Court that the defendant would have no expert testimony critical of the defendant hospital and that no act or omission of the hospital caused Alex's death. At that point, the defendant for the first time indicated its intention to call Dr. Keith Mansel as an expert.

The timing of the disclosure makes one somewhat suspicious that defense counsel had not at least considered consulting an expert with a view towards obtaining this

opinion at the time the order was agreed to and entered, even if he had not already taken steps to do so. Only weeks after the agreed order, the defendant filed the subject expert designation disclosing Dr. Mansel's anticipated opinion to be that Alex's death was "due to the resuscitation attempts [of BMH employee or staff]." Designation of expert witnesses, R.193.

It was Dr. Lorenzo's last minute designation of an expert who Lorenzo hired to place the blame for Alex's death squarely on the shoulders of the hospital that led to the plaintiffs' motion to set aside the order of dismissal as to the hospital and, later, to move for a partial summary judgment on Lorenzo's claim for apportionment of damages to the hospital. R.373-403; R.E.22-43.

The Defendant's Statement of Facts would have the Court believe that the defendant did nothing after his representation to the Court in June that the hospital had done nothing to cause or contribute to Alex's death, and that the plaintiffs' motion to set aside the agreed order dismissing the hospital was out-of-the-blue and due to no fault of Lorenzo. The defendant Lorenzo, conveniently and for obvious reasons, glosses over his misrepresentations that he would have no evidence that the hospital was negligent and no evidence that the hospital's actions caused or contributed to Alex's death.

After the defendant's Designation of Dr. Mansel, the plaintiffs filed a motion for relief from the order dismissing Baptist Memorial Hospital, a motion which the defendant states he did not oppose, another misleading statement. R.181. The defendant filed a Response to the motion giving all sorts of excuses and reasons for the suspicious timing of its disclosure of Dr. Mansel's testimony. R. 285-290. Recognizing the unfairness of allowing Lorenzo to put blame on the hospital after the hospital had been finally dismissed, although refusing to set aside the order of dismissal, the trial court did grant the Burnwatts' motion for partial summary judgment on any claim by the defendant Lorenzo for apportionment of damages to the hospital. R.373-403; R.E.22-43. The



Court's order acknowledged the previous adjudication that the hospital was "guilty of no negligence which contributed to the death of William Alexander Burnwatt" and therefore held that the defendants could not now be permitted to place blame or apportion fault on [the hospital].

The court went on to hold that:

There is no genuine issue of material fact that the dismissed Defendant BMH-NM or its employees were negligent **or that their actions proximately caused or contributed to the Plaintiffs' damages** and that the Defendants Lorenzo and ENT Consultants should not be permitted to place blame or allocate fault to BMH-NM or its employees.

Order on Plaintiffs' Motion for Partial Summary Judgement, R.449-50; R.E.47-48.

Despite having ruled that Dr. Lorenzo would not be allowed to contend that the hospital's acts or omissions contributed to Alex's death, at trial the Court nevertheless allowed the defendant's new expert Dr. Keith Mansel to go on for approximately two hours explaining how, he contended, Alex's death was caused by the bilateral pneumothoraces caused by the resuscitative efforts. Transcript 312-326 [hereinafter "T.312-326, 300-365"]].

Further, defense counsel spent most of his closing argument blaming Alex's death on the hospital's alleged puncture of Alex's lungs during the resuscitation and on numerous other events which occurred during the resuscitation. T.441-456.

After a mistrial, the case was reset for trial in September 2008. Prior to that trial, the plaintiffs renewed their motion to exclude the testimony of Dr. Keith Mansel. This Interlocutory Appeal followed after the trial court again denied that motion.

## **B. Statement of Facts**

The facts in this case are both tragic and compelling. The Appellee Brief's recitation of facts is misleading both in what it contains and what it does not contain. For present purposes, the facts can be summarized as follows.

On July 28, 2001, nine year old Alex Burnwatt underwent a tonsillectomy performed by Dr. John Laurenzo. His brother Jonathan had previously undergone a tonsillectomy by the same doctor. Jonathan's tonsillectomy took approximately 15 minutes; Alex's took twice that long, some 28 minutes. The defendant's expert Dr. Milburn testified that the procedure on Alex Burnwatt took 28 minutes [T.211], whereas the surgery on Jonathan Burnwatt, who had plugs in both ears and adenoids and tonsils took 14 minutes. Milburn, T.223; Dr. Laurenzo testimony, T.180.

Further, Dr. Laurenzo admitted that his operative report regarding this surgery was inaccurate: he used the same operative note for every tonsillectomy he performed, and he testified that the report incorrectly stated that he had used a blade on the right side of Alex but not on the left. [T.175]. He testified that he had used the same operative report on every patient since he came to Oxford in 1995 and that at some point the report developed a transcription error, which he assumed had been carried forward into all other reports. [T.174-176]. All of the reports produced by Dr. Laurenzo contained the same erroneous paragraph regarding use of the blade on one side of the patient. [T.179].

Likewise, Dr. Laurenzo testified that all of his notes after January began to say that the patient had lost less than 25cc of blood. He explained again that such was not the case here: he "usually loses less than 25cc, so that is what was contained in this [Alex's] report." [T.179]. Thus, there is no accurate report of what did happen during Alex's tonsillectomy, why it took twice as long as others Laurenzo typically performed, or how much blood Alex in fact lost.

After the tonsillectomy, Alex Burnwatt was sent home, despite the fact that he was vomiting. [T.34-35]. He continued to vomit whenever he attempted to eat or drink, so his mother called the doctor's office and obtained a prescription to attempt to control the nausea and vomiting. [T.35].

After Alex continued to vomit and was unable to take food or liquids, on August 2, 2001, his mother was instructed by Dr. Lorenzo's nurse to bring Alex back to the emergency room. She drove him from Clarksdale back to Oxford, where he was assessed as being stable. His blood pressure was 114/76, which is normal for a child of his age. His respirations were only slightly elevated; and no bleeding was noted. T.65-66; T.312 [Dr. Mansel- defendant's expert] All of this was consistent with Alex's being dehydrated. This assessment was made at 11:50 a.m. as Alex as being settled in his hospital room.

Five minutes later, at 11:55 a.m., the hospital records reflect that Alex began to cough and coughed up first a small amount of blood. According to the nurses' notes, Alex then ambulated across the room to the trash can and vomited a small amount of bright red blood. Nurse's record, Plaintiff's Trial Exhibit 1 at Bates #0063, Appendix A hereto.<sup>1</sup> Dr. Dye was then beeped. Alex had ambulated back to the end of the bed and got a wet cloth for his head, then back to the trash can and started "projectile vomiting bright red blood with clots. Then ambulated to bathroom continued vomiting in sink large amount bright red blood. Erratic behavior running around room vomiting attempting to get patient back in bed. Called for help to get patient back in bed. . . ." T.290, Plaintiffs' Trial Exhibit 1, Bates number page 63, Appendix A hereto. The nurse advised Alex to rinse his mouth out. He then "spit out a large amount of bright red blood." The nurses noted that he was "becoming weak." The nurse then lifted the patient onto the bed and at 11:59 called for a crash cart. At 12:00 it was noted that Alex was unresponsive and becoming blue around his lips. The nurse noted that they opened the airway and started bagging him. Plaintiffs' Trial Exhibit 1, page 63, Appendix A hereto.

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<sup>1</sup> The Supreme Court Clerk has advised that the trial exhibits were not transmitted to the Court, although the plaintiffs designated the entire record for appeal. The Clerk has advised that the Lafayette County Circuit Court is in the process of forwarding those exhibits to this Court.

Debra Burnwatt, Alex's mother, who was with him throughout these events, testified as follows:

They brought him up stairs to the room and started checking his vital signs. And when he got to the bed he coughed and blood just pouring [sic] out of his mouth. He ran into the bath room and started throwing up blood into the sink. He ran back out. He threw up blood in the trash can and it was blood just pouring out of his mouth. He got close to me, the nurse grabbed him and I begged him please don't die. He fell to the bed. The nurse started screaming for somebody to code and people came into the room when they just shoved me out and shoved me into the next room. When they shoved me out into the hallway a doctor was there and he asked me why didn't you tell me he was bleeding and I said, he wasn't bleeding until we got here. There wasn't any blood.

Debra Burnwatt testimony, T.37.

Describing the amount of blood, Mrs. Burnwatt testified that "at first it looked like cups were coming out of him. It was just shooting out of his throat, his mouth, it was in the sink. I don't know exactly how much it was. It was a lot of blood." Debra Burnwatt testimony, T.38.

After the code was concluded the Burnwatts were allowed in to see Alex. (During the lengthy code, Mr. Burnwatt arrived at the hospital). Mr. Burnwatt described the amount of blood as massive, and Alex as terribly pale:

Question [Mr. Merkel] Can you describe the appearance of the room for the jury?

Answer [Mr. Burnwatt] It was like something out of a horror movie. As soon as you walk in there was blood all over the wall. Blood on the floor. I just remember seeing him lay there. He was so pale.

Charles Burnwatt testimony, T.111.

The defendant's own expert agreed that there was a "significant amount of bleeding,"<sup>2</sup> describing the scene as follows:

There is noted blood in a small amount comes up in the trash can. There is then mention of projectile vomituous with blood with clots. We then know

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<sup>2</sup>Dr. Mansel, T. 313.

that he goes in the bathroom and there is a description of blood in the bathroom a large amount and he becomes what is described as panicky. He is running around the room, he is very panicked. Ruth, the nurse beeps Dr. Dye and then that is at 11:55. Then at noon is when he collapses back on the bed and the code is called.

Dr. Mansel testimony, T.313.

Amazingly, the Appellee Brief's recitation of facts completely omits any bleeding whatsoever:

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. . . .

Appellee Brief at 6.

The defendant concludes that "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." Defendant/Appellees Brief at 6-7. If you read only the defendant's facts, you would not even know that Alex had bled. This omission by the defendants is emblematic of the defendants' entire course of conduct with respect to this issue.

Even the defendant himself admits that Alex Burnwatt lost a "significant" amount of blood. Lorenzo testimony, T.170. He bled enough that he was given three units of blood, amounting to 1500cc of blood. This would amount, even according to the defendant's conservative estimate, to be over half of Alex's blood volume. T.170-171:

Question: So if you replace 1500ml of that, that would be in excess of half of that [total blood volume].

Answer: Correct. . .

T.171.

Alex's hemoglobin level was first reported at 7.99. T.318-19. It was not until after blood was transfused that his hemoglobin climbed to 11.7, a fact relied upon by the defendant. T.319-320. Further, contrary to the defendant's statement that Alex was not

“actively bleeding during the code,” nurse Dunlap clearly reported that Alex was still bleeding from the mouth during the code. They continued to suction blood from his mouth throughout the code. T.350-351. The autopsy reported that the organs were still pale even after the infusion of 3 liters of blood into Alex. R. 430 [Dr. Hayne deposition].<sup>3</sup>

Finally, although not critical to the decision in this case, the defendant’s claim that Alex regained a pulse and was able to maintain it for sixteen minutes is at best doubtful. At the time the code was started, there was no pulse. T.284. At that point, Alex did not have enough blood volume to maintain a pulse. T. 285. The CPR being performed mechanically creates a heart beat, but the patient’s heart is not beating by itself. T.78, 285.

Dr. Milburn, one of the defendant’s experts, admitted that “there was no circulation of blood going on after the initial event, and the organs were never perfuse[d].” T.228. Dr. Dye, the partner of Dr. Laurenzo who was called to come to the hospital, testified that there was no heartbeat by the time he arrived at the hospital at 12:05 p.m. T.284-85. Dr. Dye testified that there was some “electrical activity of his heart, but . . . there was not a coordinated heartbeat.” He stated that there was not a “coordinated, electrical beat to transmit a pulse.” T.285. He further admitted that it was possible that there was not enough blood in the system to transmit a pulse. T.285. Nurse Depriest testified that she did not get a heart rate and never did. She further testified that she did chest compressions for an hour, alternating with another nurse. She went on to testify that at one time she finally did get a sinus rhythm and at that point stopped chest compressions for “probably less than 30 seconds.” T.349-50.

Dr. Mansel, the expert whom the defendants proffer to place the blame for Alex Burnwatt’s death on the code itself, admits that there are different accounts of the code

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<sup>3</sup> The defendant’s attack on Dr. Hayne and his credibility by reference to matters entirely outside the record of this case is yet one more example of the defendant’s desperate attempt to win at any cost.

and the CPR. T.348. Regardless, however, whether Alex Burnwatt briefly obtained a weak pulse, the bottom line and the salient point is that the massive amount of bleeding described above preceded the code. Whether Alex coded because of lack of blood or because he aspirated or choked on the blood makes no difference. **Alex coded because of the bleeding episode**, and the defendant's pre-trial stipulation that nothing that the hospital did during the code caused or contributed to Alex's death therefore renders inadmissible the testimony that Alex died because of events occurring during the code.

Even the defendant himself admits it was Alex's episode of bleeding described above that caused everything that followed: Lorenzo volunteered at trial that "the bleeding precipitated the aspiration [of blood] and the aspiration precipitated the code and what happened after that." Lorenzo testimony, T.190.

Laurenzo's lawyers stipulated by the agreed order that nothing the hospital did caused or contributed to the death of Alex Burnwatt, and, accordingly, the defendant should not be allowed to try to blame Alex's death on events that occurred during the code. That is precisely what Dr. Mansel did during his presentation at the first trial, stating that Alex died because actions of the hospital nurse or doctor during the code caused pneumothoraces that prevented blood from getting back to the heart. The defendant should be precluded from presenting such testimony and theory on the retrial of this case.

### **ARGUMENT AND AUTHORITIES**

- A. The defendants, having entered an agreed order that "neither Baptist Memorial Hospital-North Mississippi nor its employees were in any manner negligent and/or committed any acts of omission/commission which caused or contributed to cause the Plaintiffs' alleged damages," cannot be allowed to introduce evidence that the plaintiffs' damages were caused by the hospital.**

This Honorable Court is faced with the decision as to whether a defendant can be allowed, after stipulating to matters on which the plaintiff relied, to avoid that stipulation

at trial and to present evidence contradictory to its previous stipulated position, a position further adopted by the court in a Rule 54(b) final judgment.

The defendant would have the Court believe that plaintiffs' counsel somehow is at fault for failing to obtain an expert witness to testify against the hospital. Nothing could be further from the truth: the truth of the matter is that the plaintiff propounded discovery to the defendant Lorenzo to determine whether he contended that any acts or omissions of the defendant hospital caused or contributed to the plaintiffs' damages (the death of Alex Burnwatt). R.177-178; R.E.18-19. Lorenzo identified no expert critical of the care rendered by the hospital. The defendant further agreed to the order negotiated by the attorneys declaring that "no expert testimony is anticipated from either of these parties, which testimony is critical of Baptist Memorial Hospital-North Mississippi or the care rendered by the Hospital's nursing staff and/or employees." R.178; R.E.19. This same order went on to state that "neither Baptist Memorial Hospital-North Mississippi nor its employees . . . committed any acts of omission/commission which caused or contributed to cause the Plaintiffs' alleged damages." R. 178; R.E.19.

To further seal this issue, plaintiffs' counsel inquired in deposition as to Dr. Lorenzo's position; Lorenzo testified that he had no criticism whatsoever and that everything was done appropriately during the code. R.178; R.E.19. While the defendant argues that such testimony is of no consequence, Dr. Lorenzo as an expert clearly, if designated, would be allowed to testify as to his opinion regarding the appropriateness of the hospital's conduct. Certainly the plaintiff is entitled to rely upon a defendant doctor's expert opinion as stated in a deposition as to what his contention is regarding the negligence or lack thereof of any other party. The law is well settled that a defendant doctor can testify and give his expert opinion regarding such matters, and a plaintiff can inquire of a party's contention during deposition. If Lorenzo had not known his



contentions, he could have said so, but he did not. Instead, he denied any contention that the hospital did anything inappropriate during the code.

As to the argument that the plaintiffs cannot have reasonably relied on Dr. Lorenzo's representations, either in the Order or in deposition, the agreed order entered by the parties and approved by defense counsel itself clearly expressed the plaintiffs' reliance upon the defendant's stated position that the defendant did not intend to "'point the finger' at Baptist Memorial Hospital-North Mississippi personnel in any respect." R.179; R.E.20. The order reflects that plaintiffs' counsel had represented that they would not oppose the motion, ***"unless Dr. Lorenzo intends to 'point the finger' at Baptist Memorial Hospital-North Mississippi personnel in any respect. . ."*** R. 179; R.E. 20. The trial court, also relying on the statement of defense counsel that Dr. Lorenzo would not attempt to point the finger at the hospital, entered an order agreed to in both form and substance, that there was no genuine issue as to any material fact **"that neither Baptist Memorial Hospital-North Mississippi nor its employees were in any manner negligent and/or committed any acts of omission/commission which caused or contributed to cause Plaintiffs' alleged damages."** R.179-180; R.E.20-21. That order was entered filed on June 6, 2005, and the plaintiffs justifiably relied on the order and on the representations of defense counsel.

Some thirty days later, (only 34 days before trial) the defendant filed a "designation of expert witness," for the first time indicating his intention to call an expert who would opine that Alex's death was "due to the resuscitation attempts of [BMH employees]." Designation of Expert Witnesses R.193. The timing of this Designation speaks for itself.

The defendants try to frame this issue as a failure by plaintiffs' counsel to obtain an expert against the hospital or, alternatively, a deliberate effort to seek an "advantage" from releasing the hospital. The defendants argue that there was no "stipulation" by

which they should be estopped. This argument is totally disingenuous and contrary to the actual facts that occurred. The defendant Hospital filed a motion for summary judgment. The matter was set for hearing, but prior to the hearing an agreed order was submitted to the court by Robert Ramsey, the attorney for the hospital, but negotiated with and approved by counsel for the plaintiffs and counsel for Lorenzo and ENT Consultants. By signing that agreed order, the defendants agreed to the matters stated therein; *i.e.*, that Lorenzo would have no testimony critical of the hospital, would not put any blame upon the hospital, would not “point the finger” at the hospital in any respect, and that neither the hospital nor its employees were negligent “and/or committed any acts of omission/commission which caused or contributed to cause Plaintiffs’ alleged damages.” R.179-180; R.E.20-21. There was no actual hearing on the motion because all parties agreed thereto. See trial court docket sheet, R.E.1-2.

The defendants’ agreement to the language in the order, including the agreement that nothing that the hospital did or failed to do caused or contributed to Alex’s death is in fact a stipulation, a representation to the court by an officer of the court. Within thirty days thereafter, the defendants presented a full expert opinion by Dr. Keith Mansel which blamed Alex’s death on the resuscitation efforts of the hospital. R. 193. Common sense compels the conclusion that the defendant was well aware at the time it entered into this stipulation on June 6 that it would in fact attempt to obtain an opinion, putting Alex’s death at the hands of the hospital. Such gamesmanship should not be tolerated.

The law of estoppel exists precisely to prevent this type of gamesmanship. It is undisputed that the plaintiffs relied upon the defendants’ representations that they would neither criticize the hospital nor contend that Alex’s death was caused by any act or omission of the hospital, and that they relied on the defendant’s representations when agreeing to the order of dismissal as to the defendant Hospital. Thus, the defendants are

equitably estopped from pursuing a contrary position through the testimony of Dr. Keith Mansel. See *Estate of Richardson v. Cornes*, 903So.2d 51, 55 (Miss. 2005).

Moreover, as noted above, the court's order on the motion for summary judgment in fact itself establishes the plaintiffs' reliance on the defendants' representations: the order states that the plaintiff would confess the motion "unless Dr. Lorenzo intends to 'point the finger' at Baptist Memorial Hospital-North Mississippi personnel in any respect . . . ." R.179; R.E.20. As stated in the defendants' own brief, "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 that action . . . ." Appellee's Brief at 23, citing *Barron v. Federal Land Bank of New Orleans*, 180 So. 75 (Miss. 1938). The defendants' conduct falls squarely within this doctrine.

The "fundamental notions of justice and fair dealings provide [the] undergirding" of the doctrine of estoppel. As stated by the Court in *PMZ Oil Co. v. Lucroy*, also cited by the defendant, "[w]henver 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, supra*, 449 So.2d 201, 205 (Miss. 1984). If officers of the court do not have an obligation to act ethically towards each other, our judicial system will soon fail. Both "equity and good conscience" demand that the defendant be bound by the representations and stipulations, through the agreed order, which he entered into, and he should therefore be equitably estopped and precluded from offering the testimony of Dr. Mansel putting Alex's death at the hands of the hospital.

The defendant attempts to characterize Dr. Mansel's testimony as simply a rebuttal of the opinions of plaintiffs' experts, as nothing more than "presenting his theory" of the case. The defendant also makes an argument that due process of law is somehow implicated by a ruling that would hold him to a stipulation previously entered.

With all due respect to the defendant, due process has nothing to do with this case. The defendant will get his day in court. If through the actions of defense counsel in agreeing to the order dismissing the hospital, the defendant has stipulated away his “theory of the case,” so be it. He is bound by his representations.

Moreover, the plaintiffs would note that this framing of the issue—as preventing the defendant from proving “his theory of the case”—is a “buzz-word” appeal to the emotions, not rooted in reality. In fact, Dr. Lorenzo’s defense does not depend on proving that the hospital caused Alex’s death. His defense is that the bleeding was not caused by any negligence on his part. This is critical: **Dr. Lorenzo’s own testimony establishes that it was the bleeding that led to the code.** He volunteered that it was the bleeding that “precipitated the aspiration [of blood] and the aspiration precipitated the code and what happened after that.” Lorenzo testimony, R.190. While the parties may disagree about the amount of the bleeding and whether it was the amount of bleeding that led to the code or instead whether the blood choked Alex, leading to the code, it is undisputed that the bleeding precipitated the code. As such, both under the admitted facts of this case and the law of proximate cause,<sup>4</sup> evidence that the code itself caused Alex’s death should be excluded.

Laurenzo now wants to argue that this “was not a normal resuscitation,” implying again that it was the resuscitation that led to Alex’s death. It is this premise, that the resuscitation caused Alex’s death, that was presented by Dr. Mansel. Dr. Mansel’s proffered opinion in his designation was that Alex’s death was “due to the resuscitation attempts [of BMH employees].” Designation of expert witnesses, R.193. This was likewise his testimony at the first trial.

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<sup>4</sup> This issue is discussed more fully in Part II of Plaintiffs/Appellants’ original brief on appeal and below. See RESTATEMENT OF TORTS (SECOND), § 457 (1965); *Medlin v. Hazelhurst Emergency Physicians*, 889 So.2d 496, 499 (Miss. 2004).

Mansel testified that “pneumothoraces strongly contributed to [Alex’s] death.” R.356. He contended that a pulse was regained but was unable to say to a reasonable degree of medical certainty whether even without the pneumothoraces Alex would have survived the event. R.357. Mansel admitted in deposition and on the stand that Alex could have died from the occluded airway, which had been caused by the original bleeding, even without the pneumothoraces. However, he was allowed to testify at trial that “they [the pneumothoraces] in likelihood contributed to things,” [R.357-58] and that “it is certainly my opinion and strong opinion that the pneumothoraces contributed heavily . . . .” R.356. Of course, the pneumothoraces were caused, according to Dr. Mansel, by the hospital’s resuscitation efforts.

Dr. Mansel testified that the right lung was punctured during Dr. Lamb’s attempts to get a subclavian line inserted in Alex to assist with resuscitation. R.321-22. He stated that when that happened, air leaked out of the lungs and resulted in air between the lungs and the chest wall. He went on to testify that the lung then began to collapse. He opined that the most likely cause of this was Dr. Lamb’s puncture of the lung during attempted insertion of the subclavian line. Then after the right lung collapsed, the left lung also collapsed. R.322. Although Dr. Lamb, a hospital employee, inserted chest tubes to relieve the air buildup, Dr. Mansel opined that these did not remedy the situation and that the blood “can’t get back to the heart because of the tension pneumothoraces.” He went on to say that eventually Dr. Lamb had four chest tubes put in “but this has gone on long enough and lack of oxygen [sic] and by 1:15 or 1:30 Alex has expired.” His conclusion was “these lungs collapsed and he died but not from an artery being severed or something below the standard of care or exsanguination.” R.323.

All of this testimony of Dr. Mansel directly contradicted the defendant’s representation to the court that it would present no evidence that any actions by the hospital caused or contributed to Alex’s death. If this testimony described above, that Dr.

Lamb's puncture of the lung caused pneumothoraces which caused Alex's death is not a direct contradiction of the agreed order, then nothing is. If the defendant is not held to his representations, no plaintiff will ever be able to agree to dismiss a defendant based on a co-defendant's promise not to blame the events on the defendant about to be dismissed. Again, Dr. Lorenzo stipulated away his right to make the argument that the actions of Dr. Lamb caused Alex's death, and the doctrine of equitable estoppel should be enforced to hold him to that representation and to bar Dr. Mansel's testimony.

In addition to equitable estoppel, judicial estoppel should also preclude the defendant from presenting the testimony of Dr. Mansel. Judicial estoppel "does not require the element of reliance and injury." *Great Southern Box Co. v. Barrett*, 94So.2d 912, 916 (Miss. 1957). Judicial estoppel is based on the need and desire for orderly expedition of litigation. *Id.* Judicial estoppel prevents a party from asserting a position, benefitting from it, and then retreating from that position later. *Estate of Richardson v. Cornes*, 903So.2d 56 (Miss. 2005). Yet that is precisely what the defendant has done in this case.

The defendant took a position, as stated in the agreed order on the hospital's motion for summary judgment, and has now retreated from that position. The benefit to the defendant was to have the hospital out of the case so that it would have an empty chair to point at. It did so and spent almost the entire trial blaming Alex Burnwatt's death on the resuscitation efforts at the hospital. Whether or not such efforts are negligent is completely irrelevant to the defendant's theory or to the result in this case. The defendant agreed and represented to the court that nothing the hospital did caused or contributed to Alex Burnwatt's death, and it should not now be allowed to reverse position on that matter and present evidence that the death of Alex Burnwatt was caused by the hospital's resuscitative efforts.

Finally, the fact that the dismissal of the hospital was a Rule 54(b) final judgment even more compelling the conclusion that Dr. Mansel's testimony should be excluded. According to the doctrine of the law of the case, once a judgment is final for purposes of appeal, it cannot be set aside by a later decision in the same case. *See, e.g., Trilogy Communications, Inc. v. Thomas Truck Lease, Inc.*, 790 So.2d 881, 885-86 (Miss. App. 2001); *Holland v. Peoples Bank & Trust Co.*, 3 So.2d 94, 103-105 (Miss. 2008). In this case, the Rule 54(b) judgment dismissing the hospital and concluding that nothing the hospital did caused or contributed to Alex's death is a final judgment. The time for appeal has run, no appeal was filed, the judgment has not been modified nor set aside, and that judgment is now the law of the case.

It therefore follows that any argument that is contrary to the June 6, 2005, final judgment is barred by that Judgment. Dr. Mansel's proffered opinion that the hospital resuscitative efforts caused Alex's death directly contradicts that Judgment and must therefore be excluded under the law of the case.

**B. Mansel's testimony is irrelevant and would be overly prejudicial and confusing to the jury.**

The above reasons to exclude Dr. Mansel's opinion are solidified even more in view of the fact that the proffered testimony is both irrelevant and overly prejudicial and confusing. The Restatement of Torts §457 sets out the accepted rule regarding superseding, or efficient intervening cause when medical malpractice follows an original tort: if a negligent actor is liable for another's bodily injury, he is also liable for any additional bodily injury resulting from efforts of third persons rendering aid which the original injury reasonably requires, regardless of whether such acts were done in a negligent manner. *RESTATEMENT OF TORTS (Second) §457 (1965), quoted with approval by Medlin v. Hazelhurst Emergency Physicians*, 889 So.2d 496, 499 (Miss. 2004). Even

if not expressly adopted by this Court, this Court has often deferred to the Restatement, and this rule corresponds with Mississippi law regarding proximate cause:

[W]here an act of negligence is a substantial factor in bringing about an injury, it does not cease to be a legal and proximate cause thereof because of the intervention of a subsequent act of negligence of another which contributed to the injury, if the prior act of negligence is still operating, and the injury inflicted is not different in kind from that which would have resulted from the prior act.

*Solomon v. Continental Baking Co.*, 172 Miss. 388, 160 So. 732, 733 (1935). *See also Cowan v. State*, 399 So.2d 1346 (Miss. 1981).

Rather than seriously challenging the Restatement, the defendant's principal contention is that Dr. Mansel's testimony does not contradict the Restatement rule. The defendant argues that Alex went to the hospital for dehydration, not bleeding, which is true enough. The defendant also argues that there is no evidence that resuscitation efforts were commenced because Alex Burnwatt was bleeding; rather, he contends resuscitation was necessary because Alex was not breathing. This argument gets the defendant nowhere. Alex was bleeding massively, as described above, and it was that bleeding which led to Alex's lack of respiration and lack of pulse, whether it was from lack of oxygen caused by lack of blood or from Alex's choking on the blood.<sup>5</sup>

The defendant wants the Court to believe that he is trying only to convince the jury that he was "not a 'tortfeasor' to begin with." Appellee Brief at 16. The flaw in the defendant's argument is clear when examining the chronology of events. The bleeding clearly precipitated the code. Even the defendant admits that "it is true that Alex lost his

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<sup>5</sup> In fact, no one testified one way or the other as to whether the code called on Alex was for respiratory failure or for lack of a pulse, and the defendant's expert admitted that codes can be called for either respiratory failure or lack of pulse, or both. T. 313. Dr. Burton, the plaintiffs' expert, has testified that when the code was called, there was no pulse. T. 78. The defendant quotes Dr. Dye as saying that he had been told that Alex was "not breathing and unresponsive and they had called a code." R.276; Defendant's brief at 12. Even Dr. Dye admitted that by the time he arrived a couple of minutes later, Alex was pulseless. The code flow sheet states that there was "no pulse palpable without CPR but pulse was palpable with CPR." Bates No. 50, Exhibit 1; R.284 [Dr. Dye]; R. 78 [Dr. Burton]. Chest compressions themselves were producing the pulse.



airway because of its occlusion by the dislodged eschar (or scar) that formed because of the tonsillectomy.” Appellee Brief at 19. He goes on to argue that “it is for the jury to decide whether or not the ‘bleeding was caused by Dr. Lorenzo’s negligence.” The plaintiffs do not dispute that fact, but the defendant’s own admission that Alex lost his airway because of the bleeding, which without dispute occurred prior to any act of the hospital, renders irrelevant the events occurring during the code. Nothing that happened during the code caused Alex’s initial bleeding, which occluded his airway, even according to the defendant.

Dr. Mansel, the defendant’s own expert, has testified that Alex was not breathing because he either aspirated blood or was choking on a blood clot. T. 314-15. Admittedly, Alex was not bleeding before he arrived at the hospital. He was not bleeding when he got to the room. He began bleeding afterwards, and the bleeding precipitated the code. Lorenzo testimony, R. 190. As such, the only issue for the jury is whether the bleeding, which precipitated the code, was caused by Dr. Lorenzo’s negligence. Whether Alex died from the bleeding or from pneumothoraces which occurred during the code is therefore irrelevant, particularly as Dr. Mansel himself admitted that Alex might have died anyway, even without the pneumothoraces. T. 357-58. Either way, his death was caused by the bleeding.

Alex Burnwatt, according to the defense expert probably had about 3000cc, or 3 liters of blood. He was given 3 units of blood, or 1500cc, half or more of his blood volume during the code, which replaced blood that was lost. T. 315 [Mansel]; T. 170-71 [Lorenzo]. This transfusion was sufficient to bring his blood count back up, a fact upon which defendant relies while glossing over the blood transfusions, but as Dr. Mansel said, too much damage had been done. The code went on from 12:00 until 1:45 when CPR was stopped, and Alex was patient pronounced dead.

What is clear is that Alex Burnwatt died from an event triggered by “significant” bleeding at the tonsillectomy site, as admitted by all defense witnesses. The defendant claims that the plaintiff has changed theories in midstream. To the contrary, it has always been the plaintiffs’ position that regardless of whether Alex Burnwatt died from exsanguination or due to choking on the massive bleeding and clots that he suffered beginning at 11:55 a.m., his death was precipitated by the bleeding. He died, whatever the precise mechanism, from lack of oxygen either due to lack of blood or choking, all of which led to the code.

While the defendant’s sole desire to “present his theory of the case” may have some superficial appeal--after all, everyone should have a fair day in court--in actuality what the defendant is attempting is to renege on a representation made to the Court and plaintiffs that he would not contend that anything the hospital did caused or contributed to Alex Burnwatt’s death. Under the Restatement of Torts and Mississippi law on proximate cause, such evidence is not relevant. Certainly it presents a tragic story and perhaps arouses sympathy for the hospital personnel who did what they could to save Alex Burnwatt. Those factors do not, however, make the testimony as to the exact manner in which Alex died during and despite the code, which was necessitated by the initial bleeding episode, relevant to the issue in this case - whether Dr. Lorenzo was negligent.

It is for the jury to determine whether or not Dr. Lorenzo’s surgery was negligent and whether that negligence caused the massive bleeding described above, which, without dispute, led eventually to Alex Burnwatt’s death. The events occurring during the code, whether negligent or not, have nothing to do with that issue.

In conclusion, the defendant should not be allowed to make a representation, which the plaintiffs rely on, have it incorporated into a final judgment of dismissal as to a third party, and then to completely and directly renounce that representation. Equitable and judicial estoppel demand that the defendant be held to his representations. Dr. Mansel’s

testimony that pneumothoraces caused by a puncture of the lung caused Alex's death directly contradicts the defendant's prior representations and stipulation and should be excluded from the trial of this case.

### CONCLUSION

For the above forgoing reasons, the plaintiffs respectfully submit that the testimony of Dr. Keith Mansel should be excluded from the trial of this matter. The defendants are barred by the doctrines of equitable and judicial estoppel and the law of the case from presenting testimony that contradicts the prior agreed order in this case. Moreover, such evidence is irrelevant, overly prejudicial, and confusing to the jury.

WHEREFORE, PREMISES CONSIDERED, the plaintiffs respectfully request that this Honorable Court grant their petition for interlocutory appeal and enter an order that the testimony of Dr. Keith Mansel should be excluded on the retrial of this case.

Respectfully submitted, this, the 2<sup>nd</sup> day of February, 2010.

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### CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to:

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Attorneys for John F. Lorenzo, M.D. and Ear, Nose & Throat Consultants

Honorable Robert W. Elliott, Judge  
102 North Main Street, Suite F  
Ripley, MS 38663

This, the 2<sup>nd</sup> day of February, 2010.

  
CYNTHIA I. MITCHELL (MSB# )

### CERTIFICATE OF FILING

I, Cynthia Mitchell, certify that I have mailed, postage prepaid, the original and four copies of the Appellants' Reply Brief and an electronic disk containing the same on the 2nd day of February, 2010, addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

  
CYNTHIA I. MITCHELL, (MSB# )

APPENDIX

Plaintiff's Trial Exhibit 1 at Bates #0063 ..... A

TIME 31

**NURSING NOTES**

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