IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NUMBER: 2009-CA-00599

SHARON W. DUNN — PLAINTIFF / APPELLANT

VERSUS

JOHN G. YAGER, M.D. — DEFENDANT / APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI
CIVIL ACTION NO.: CI-96-0124(3)

BRIEF OF DEFENDANT / APPELLEE / CROSS-APPELLANT

ORAL ARGUMENT NOT REQUESTED

Brett K. Williams (MSB[redacted]
Kevin M. Melchi (MSB[redacted]
DOGAN & WILKINSON, PLLC
734 Delmas Avnue
P.O. Box 1618
Pascagoula, MS 39568
Phone: (228) 762-2272
Fax: (228) 762-3223

Richard W. Franklin (MSB[redacted]
ARMBRECHT JACKSON, LLP
Post Office Box 290
Mobile, AL 36601
Telephone: (251) 405-1300

Attorneys for Defendant / Appellee / Cross-Appellant
John G. Yager, M.D.

IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NUMBER: 2009-CA-00599

CERTIFICATE OF INTERESTED PERSONS

SHARON W. DUNN — PLAINTIFF / APPELLANT

VERSUS

JOHN G. YAGER, M.D. — DEFENDANT / APPELLEE

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.

John G. Yager, M.D.	Defendant
Brett K. Williams, Esq. (MSB [redacted] Kevin M. Melchi, Esq. (MSB #[redacted] DOGAN & WILKINSON, PLLC	Attorneys for Defendant / Appellee
Richard W. Franklin, Esq. (MSB[redacted] Norman E. Waldrop, Jr., Esq. ARMBRECHT JACKSON, LLP	Attorneys for Defendant / Appellee
Sharon W. Dunn	Plaintiff
Gregg L. Spyridon, Esq. (MSB[redacted] Philip G. Smith, Esq. (MS[redacted] SPYRIDON, PALERMO & DORNAN, PLLC	Attorneys for Plaintiff / Appellant
Owen Bradley, Esq.	Attorney for Plaintiff / Appellant
Paul B. Howell, Esq.	Attorney for Northrop Grumman

KEVIN M. MELCHI
Attorney of Record for the Defendant / Appellee:
John G. Yager, M.D.

Respectfully Submitted,

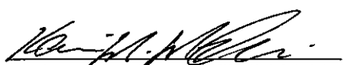
By: 
Kevin M. Melchi (MSB# 101441)

TABLE OF CONTENTS

Certificate of Interested Persons ii

Table of Contents iv

Table of Authorities vi

Statement of the Issues 1

Statement of the Case 2

I. Nature of the Case 2

II. Course of Proceedings And Disposition Below 2

III. Statement of the Facts 3

Summary of the Argument (Plaintiff's Appeal) 9

Summary of the Argument (Dr. Yager's Cross-Appeal) 11

Argument (Plaintiff's Appeal) 14

I. The Trial Court Did Not Abuse Its Discretion In Striking Plaintiff's Designation of Dr. Malkin 14

II. The Testimony Of Dr. Gould Was Properly Excluded 19

III. The 2009 Physician's Desk Reference Was Properly Excluded 26

IV. The Jury Was Properly Instructed On Informed Consent 28

V. Plaintiff's Constitutional Rights Under Article 3 Section 25 Were Not Violated 32

VI. The Trial Court Properly Allowed References To Parties Who Had Settled ... 34

Argument (Defendant's Cross-Appeal) 37

VII. The Circuit Court of Jackson County Did Not Have Personal Jurisdiction Over Dr. Yager 37

VIII. Plaintiff's Attorneys' Firm Should Have Been Excluded From Participating In This Case 51

IX. The Circuit Court Erred By Holding Ex Parte Hearings Regarding Prior Settlements And In Not Informing Dr. Yager Of The Aggregate Settlements . . 60

Conclusion 65

Certificate of Service 67

Authorities . . . . . Addendum

TABLE OF AUTHORITIES

Cases

Aldridge v. State, 583 So.2d 203 (Miss. 1991) 52, 57, 58

Allred v. Moore & Peterson, 117 F.3d 278 (5th Cir. 1997) 48

American Cable Corp. v. Triology Communications, Inc., 754 So.2d 545 (Miss.Ct.App. 2000). 48

Asahi Metal Industrial Co. v. Superior Court of California, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) 48

Barrett v. Parker, 757 So.2d 182 (Miss. 2000) 28

Beck v. Sapet, 937 So.2d 945 (Miss. 2006) 14

Bennett v. LaPere, M.D., 112 F.R.D. 136 (D.R.I. 1986) 62, 63

Blake v. Clein, 903 So.2d 710 (Miss. 2005) 24

Bowie v. Montfort Jones Memorial Hospital, 861 So.2d 1037 (Miss. 2003) 14, 17, 18

Broussard v. Olin Corp., 546 So.2d 1301 (La.App. 3rd Cir. 1989) 15

Bufkin v. Thermage, Inc., 2009 WL 114780 (S.D. Miss.) 42

Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482 (1984) 42

Caracci v. Int'l Paper Co., 699 So.2d 546 (Miss. 1997) 14

Clark v. Noyes, 871 S.W.2d 508 (Tex.App.-Dallas 1994) 50

Deeds v. State, 2009 WL 4350783 (Miss. 2009) 32

Directv, Inc. v. Puccinelli, 224 F.R.D. 677 (D.Kan. 2004) 63

Donald v. Amoco Prod. Co., 735 So.2d 161 (Miss. 1999) 34, 60

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2nd Cir. 1973) 55

Estate of Jones v. Phillips ex rel. Phillips, 992 So.2d 1131 (Miss. 2008) 37, 41-44

Fields-D'Arpino v. Restaurant Associates, Inc., 39 F.Supp.2d 412 (S.D. N.Y. 1999) 55

First Trust Nat. Ass'n v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 966 F.Supp. 585 (1998) 47

Forrest County General Hospital v. Conway, 700 So.2d 324 (Miss. 1997) 38, 39, 41

Gelineau v. New York University Hospital, 375 F.Supp. 661 (D. N.J. 1974) 50

General Motors Corporation v. Jackson, 636 So.2d 310 (Miss. 1994) 19-21, 23-26

Granger v. Wisner, 134 Ariz. 377, 656 P.2d 1238 (1982) 23

Gross v. Chevrolet Country, Inc., 655 So.2d 873 (Miss. 1995) 47

Guaranty Nat'l Ins. Co. v. Pittman, 501 So.2d 377 (Miss. 1987) 18

Hampton v. Daybrook Fisheries, Inc., 2001 WL 1444933 (E.D. La.) 57

Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) 45, 46

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) 44-46

Hogrobrooks v. Progressive Direct, 858 So.2d 913 (Miss.Ct.App. 2003) 37

Horne v. Mobile Area Water and Sewer System, 897 So.2d 972 (Miss. 2004) 40

In re American Airlines, Inc., 972 F.2d 605 (5th Cir. 1992) 57

In re Dresser Indus., 972 F.2d 540 (5th Cir. 1992) 57

Int'l Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) 43, 47

Jamison v. Kilgore, 903 So.2d 45 (Miss. 2005) 29

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) .. 43-45

Kekko v. K&B Louisiana Corporation, 716 So.2d 682 ..... 46, 47

Kennedy v. Ziesmann, 526 F.Supp. 1328 (D.C. Ky. 1981) 39-41

Kilpatrick v. Miss. Baptist Med. Ctr., 461 So.2d 765 (Miss. 1984) 14

Kulko v. California Superior Court, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978) 46

Mallet v. Carter, 803 So.2d 504 (Miss.Ct.App. 2002) 14

Matluck v. Matluck, 825 So.2d 1071 (Fla.App. 4 Dist. 2002) 54, 55

McDaniel v. Ritter, 556 So.2d 303 (Miss. 1989) 37, 43, 45, 47, 48

Narkeeta Timber Company, Inc. v. Jenkins, 777 So.2d 39 (Miss. 2001) 34, 60

Owens v. First Family Financial Services, Inc., 379 F.Supp.2d 840 (S.D. Miss. 2005) 51, 56, 57

Pilgrim v. State, 19 So.3d 148 (Miss.Ct.App. 2009) 28

Poly Software Intern., Inc. v. Su, 880 F.Supp. 1487 (D. Utah 1995) 54, 55

Rittenhouse v. Mabry, 832 F.2d 1380 (5th Cir. 1987) 38, 41

Robert v. Colson, 729 So.2d 1243 (Miss. 1999) 14

Robles v. Gollott and Sons Transfer and Storage, Inc., 697 So.2d 383 (Miss. 1997) ... 35, 36, 61

Smith v. Payne, 839 So.2d 482 (Miss. 2002) 35

Sorrells v. R&R Custom Coach Works, Inc., 636 So.2d 668 (Miss. 1994) 40

Starcher v. Byrne, 687 So.2d 737 (Miss. 1997) 28

Taylor v. State, 754 So.2d 598 (Miss.Ct.App. 2000) 30

Vaughn v. Mississippi Baptist Medical Center, 20 So.3d 645 (Miss. 2009) 26

Watts v. State, 936 So.2d 377 (Miss.Ct.App. 2006) 28

White v. Kenneth Warren & Son, Ltd., 203 F.R.D. 364 (N.D. Ill. 2001) 63

Whittley v. City of Meridian, 530 So.2d 1341 (Miss. 1988) 35, 36, 61

Williams v. Bell, 793 So.2d 609 (Miss. 2001) 57

Woodward v. Keenan, 79 Mich.App. 543, 261 N.W.2d 80 (Mich.App. 1977) 42

Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972) 39, 41, 50

Constitutional Authority

Mississippi Const. Art. 3 § 25 32

Mississippi Const. Art. 3 § 26 32

U.S. Const. amend. XIV 37, 43, 46, 48, 51

Statutes

Ala. Code § 6-5-540 (1975) 49

Ala. Code § 6-5-546 (1975) 49

Ala. Code § 6-5-548 (1975) 49

Miss. Code Ann. § 13-3-57 (1972) 37, 38

Miss. Code Ann. § 85-5-7 (1972) 62

Rules of Court

Court Annexed Mediation Rules for Civil Litigation XV.C 51, 52

Fed. R. Ev. 411, 1996 Advisory Committee Notes 62, 63

Miss. R. Ev. 403 . . . . . 20, 23, 24

Miss. R. Ev. 408 . . . . . 61, 63

Miss. Rule of Prof. Conduct 1.10 . . . . . 56, 58-60

Miss. Rule of Prof. Conduct 1.12 . . . . . 52, 53, 55, 56, 60

Miss. Rule of Prof. Conduct 2.4 . . . . . 55, 56

Other Authority

Mediator Qualifications Advisory Panel 94-002 (January 19, 1995) 54

Restatement [Second] Conflict of Laws § 35(3) (1971) 45

STATEMENT OF ISSUES

Plaintiff's Appeal

I. The Trial Court Did Not Abuse Its Discretion In Striking Plaintiff's Designation of Dr. Malkin

II. The Testimony Of Dr. Gould Was Properly Excluded

III. The 2009 Physician's Desk Reference Was Properly Excluded

IV. The Jury Was Properly Instructed On Informed Consent

V. Plaintiff's Constitutional Rights Under Article 3 Section 25 Were Not Violated

VI. The Trial Court Properly Allowed References To Parties Who Had Settled

Defendant's Cross Appeal

VII. The Circuit Court of Jackson County Did Not Have Personal Jurisdiction Over Dr. Yager

VIII. Plaintiff's Attorneys' Firm Should Have Been Excluded From Participating In The Case

IX. The Circuit Court Erred By Holding Ex Parte Hearings Regarding Prior Settlements And In Not Informing Dr. Yager Of The Aggregate Settlements

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Plaintiff was injured in 1993 while operating a forklift at Ingalls Shipyard in Pascagoula, Mississippi. She continued to experience pain and in 1995 saw Dr. John Yager in Mobile, Alabama. Plaintiff saw Dr. Yager on a referral from Dr. Fondren, an orthopedic surgeon who also practices in Alabama. Dr. Yager saw Plaintiff three times in 1995 and prescribed Tegretol to help treat her chronic pain. Plaintiff subsequently developed Stevens-Johnson Syndrome, an extremely rare skin disease. She filed suit against Dr. Yager for medical malpractice stemming from his prescribing of Tegretol.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Dr. Yager largely agrees with Plaintiff's recitation of the course of proceedings with some exceptions. First, Plaintiff states that defendant Dr. Lehman filed for bankruptcy after March 18, 2004 when in fact he filed February 23, 1998, with notice filed to all parties on March 9, 1998. Dr. Lehman was later granted a dismissal from this case by the trial court on July 1, 2003.

In addition, Plaintiff inserts argument into this section when speaking of proceeding "to trial without Sharon Dunn's neurology expert of choice" and misstates facts in the process. Plaintiff proceeded to trial with the neurology expert she duly designated as well as experts in several other fields.

Also, Dr. Yager filed a motion to reconsider the denial of summary judgment on the issue of personal jurisdiction on or about August 14, 2008. That motion was denied on or about September 4, 2008. Dr. Yager would also point out that Justice Easley wrote a dissent to this Court's ruling that Dr. Yager's interlocutory appeal had been "improvidently granted." That dissent provides

a clear analysis of the personal jurisdiction issue discussed *infra.*

III. STATEMENT OF THE FACTS

Plaintiff was injured in 1993 while driving a forklift at Ingalls Shipyard. (Record "R". at 90). She suffered injuries to her leg and back and continued to suffer severe pain through 1995. (R. at 91). Plaintiff was being seen by Dr. Fondren, an orthopedic surgeon in Mobile, Alabama, for treatment of her leg and back pain. (Transcript "T" at 692-93). Dr. Fondren referred Plaintiff to Dr. John Yager for neurology consultation. (T. at 694). Dr. Yager first saw Plaintiff on April 19, 1995 at his office in Mobile. (T. at 1491). He subsequently saw her twice more. (T. at 696, 697, 702). Dr. Yager prescribed Tegretol on Plaintiff's second visit to his office. (T. at 696-97). Plaintiff unfortunately developed Stevens-Johnsons Syndrome which she blamed on the Tegretol prescribed by Dr. Yager.

A. The Trial Court Did Not Abuse Its Discretion In Striking Plaintiff's Designation of Dr. Malkin

The parties in this matter entered into an **agreed** scheduling order on or about July 20, 2004, roughly eight (8) years after the case was filed. (R. at 933-936). In her disclosure of experts filed pursuant to that agreed order, Plaintiff did not designate Dr. Stanley Malkin as an expert in the field of neurology. (R. at 1368-1395). Instead, she designated Dr. John Olson. (R. at 1368-1395). Plaintiff later determined that Dr. Olson was not who she preferred as a neurology expert and attempted to substitute Dr. Malkin. (R. at 2091-2111). This designation was late and the trial court properly excluded it as such. (R. at 2235-36). Plaintiff has made issue of Dr. Yager's motion to apply Alabama law in this case as a reason to permit the substitution of Dr. Malkin for Dr. Olson, but that motion was ultimately denied. (T. at 206-216).

B. The Testimony Of Dr. Gould Was Properly Excluded

Dr. Gould was substituted as an expert witness for Dr. Yager on or about February 12, 2007 due to the death of a previously designated expert. (R. at 2276). Dr. Gould was deposed March 30, 2007. (R. at 2300). On November 26, 2008 counsel for Dr. Yager notified counsel for Plaintiff that Dr. Gould was not being called at trial and pointed Plaintiff to controlling Mississippi law regarding withdrawn experts. (R. at 3065-66).

During cross-examination of Dr. Yager, Plaintiff's counsel on three separate occasions referred to Dr. Gould as Dr. Yager's expert and attempted to improperly impeach him with Dr. Gould's deposition testimony. (T. at 1506,1507,1526). Dr. Yager later made a motion to exclude the admission of Dr. Gould's deposition testimony due to the improper and inaccurate comments made during cross examination regarding the relationship between Dr. Yager and Dr. Gould as a formerly designated expert. (T. at 2022-2038). The trial court heard extensive argument on the issue and properly ruled to exclude the deposition based on the references made as to Dr. Gould being Dr. Yager's expert when that was no longer the case. (T. at 2022-2038).

C. The 2009 Physician's Desk Reference Was Properly Excluded

Excerpts from the 1995, 1996, and 1997 editions of the Physician's Desk Reference (PDR) were admitted into evidence as exhibits for Dr. Yager. (T. at 2805, 2891). Plaintiff's only objection to the admission of the 1995 and 1996 excerpts is that they were cumulative of evidence already admitted, specifically package inserts for Tegretol, and in fact thought they were already in evidence before being offered by Dr. Yager. (T. at 2804-2805). Plaintiff had no objection to the admission of the 1997 PDR excerpt. (T. At 2891).

Plaintiff called Dr. Waring, an expert in epidemiology, as an expert in her rebuttal case. (T.

at 3183). He was accepted as an expert over the objections of Dr. Yager and proceeded to testify about the rate of incidence of Stevens-Johnsons Syndrome, precisely what Plaintiff hoped to get into evidence through the 2009 PDR. (T. at 3183-3336; Appellant's Brief at 38).

D. The Jury Was Properly Instructed On Informed Consent

The issue of jury instructions is primarily one of law and whether they were properly stated by the trial court. Specific facts are not required to determine if the instructions themselves were proper, only if they were applied properly by the jury. However, because Plaintiff seems to intertwine these two concepts, Dr. Yager notes that even with a warning that a drug could cause Stevens-Johnson Syndrome, Plaintiff still chose to take the drug. (T. at 1172-73). This was true even after her diagnosis. (T. at 1172-73).

E. Plaintiff's Constitutional Rights Under Article 3 Section 25 Were Not Violated

Plaintiff wanted to make part of her closing statement herself, rather than through counsel. (T. a 3562-63). The trial judge denied this request. (T. at 3563-64).

F. The Trial Court Properly Allowed References To Parties Who Had Settled

This case began with six (6) defendants named in Plaintiff's complaint. (R. at 86-97). On or about February 6, 2008 Plaintiff submitted a motion in limine attempting to preclude Dr. Yager from informing the jury of the settlements of other defendants. (R. at 2568). Dr. Yager responded on or about August 14, 2008. (R. at 3030-32). A hearing was held and the trial court ruled that the jury could learn of the existence of settlements, but not the amounts. (T. at 331-333).

G. The Circuit Court of Jackson County Did Not Have Personal Jurisdiction Over Dr. Yager

Dr. Yager is a board certified neurologist who practices in Mobile, Alabama. (T. at 1450-51).

The following facts have all been established at various phases of this case:

- Dr. Yager does not live in Mississippi and has never lived in Mississippi
- Dr. Yager owns no property in Mississippi and has no mailing address in Mississippi
- Dr. Yager has never practiced in Mississippi, never held a license in Mississippi, has no office in Mississippi, and never treated patients in Mississippi
- Dr. Yager practices medicine exclusively in Alabama
- Dr. Yager has treated patients who reside in Mississippi but travel to Alabama for treatment, but that number is estimated at just 2.2% of his overall patient roll
- Dr. Yager has never been a party to a lawsuit in Mississippi either as a plaintiff of defendant
- Dr. Yager does not and has never personally solicited patients from Mississippi to visit his office in Mobile, Alabama
- Plaintiff saw Dr. Yager only upon a referral from Dr. Fondren, another Alabama physician
- Dr. Yager had no contact with Plaintiff in Mississippi and never treated her in Mississippi
- Dr. Yager has no agent for service of process in Mississippi
- Dr. Yager pays no taxes in Mississippi
- In 1989 the group with which Dr. Yager practices executed a provider application with Mississippi Medicaid and asserted that no more than ten per cent (10%) of the group's business would be Mississippi Medicaid patients. In fact, there is no evidence Dr. Yager ever treated a Mississippi Medicaid patient

- In 1992, Dr. Yager contracted with Gulf Health Plans from Mobile, Alabama, which is a preferred provider organization. PPOs are third-party organizations that help provide health care services by hospitals, physicians and other providers to employees and their dependents covered by certain health care plans. Once a physician is on one PPO list, these third party plans then provide their lists of physicians to other PPOs who in turn trade those lists to still more PPOs. In fact, some of these PPOs will never have a contract with Dr. Yager, but instead have contracts with another PPO which has a contract with yet another PPO
- The initial PPO with whom Dr. Yager contracted (Gulf Health Plans), solicited Dr. Yager to join the PPO. At no time did Dr. Yager or anyone acting on his behalf expressly market to Mississippi residents.

(T. at 54-141; R. at 86-123, 127-162, 926-985, 1461-1903).

H. Plaintiff's Attorneys' Firm Should Have Been Excluded From Participating In The Case

This case was sent to mediation on August 29, 2002. The mediator was Don Dornan, who at the time was not part of the firm representing Plaintiff. (R. at 552). On or about November 22, 2002, Gregg Spyridon and Michael Rutledge from the firm Spyridon, Koch & Palermo, LLC moved to enroll as counsel of record for Plaintiff. (R. at 540). Mr. Dornan joined this firm November 15, 2003, and it was renamed Spyridon, Koch, Palermo & Dornan, LLC. (R. at 552).[1] There is no indication in the record that the SPD firm ever voluntarily notified the trial court or counsel for Dr. Yager that Mr. Dornan joined the firm in November 2003 in accordance with the Rules of

[1]The firm eventually became known as just Spryridon, Palermo & Dornan, LLC ("SPD").

Professional Conduct. Plaintiff's counsel did notify counsel for co-defendant Hyster about Mr. Dornan joining the firm, but only when they had settled. (T. at 33). Dr. Yager filed a motion to disqualify the SPD firm, a hearing was held, and the motion was denied. (R. at 544, 577; T. at 20-47).

I. The Circuit Court Erred By Holding Ex Parte Hearings Regarding Prior Settlements And In Not Informing Dr. Yager Of The Aggregate Settlements

Defendant Novartis (Ciba-Geigy) reached a settlement with Plaintiff on or about November 19, 2007. (R. at 2469). Dr. Yager and Defendant Dr. Pacita Coss each filed motions to compel the Novartis settlement information and briefed the issue. (R. at 2471, 2510). Hearing was held on these motions on January 24, 2008 and the trial judge denied the motions. (T. at 225-230, 268-274). Dr. Coss subsequently settled as well (R. at 2576), leaving only Dr. Yager as a party interested in the settlement information for all those who had settled. Numerous ex parte filings and communications regarding settlements were held to which counsel for Dr. Yager was barred by the trial court. (R. at 2930, 2934, 2936). It is Dr. Yager's position that he was entitled to see all settlement agreements and learn the terms thereof.

SUMMARY OF THE ARGUMENT
(Plaintiff's Appeal)

I. The Trial Court Did Not Abuse Its Discretion In Striking Plaintiff's Designation Of Dr. Malkin

The trial court did not err in excluding Plaintiff's proposed expert, Dr. Stanley Malkin. Dr. Malkin, a proposed expert in neurology, was designated after the agreed upon deadline for Plaintiff's designations of experts. Judge Krebs rightly held that this forbade his inclusion as a testifying expert. There was no good cause for Plaintiff not to designate Dr. Malkin in a timely manner. She claims prejudice due to the insufficiencies of the neurology expert who did testify on her behalf, Dr. Olson, but that charge is without merit. Dr. Olson was not board certified and had undergone disciplinary sanctions regarding his practice of medicine. These facts were knowable to Plaintiff long before the designation deadline since Dr. Olson first reviewed the case approximately six (6) years prior and is a personal friend of Plaintiff's counsel. Plaintiff was not prejudiced because she still had Dr. Olson to testify about neurology and the standard of care. The mere fact that he was not a credible witness and a poor choice of an expert does not create reversible error. Mississippi law is very clear that the trial courts have wide discretion in controlling their dockets, and demanding adherence to a scheduling order to which Plaintiff agreed is well within the court's discretion.

II. The Testimony of Dr. Gould Was Properly Excluded

The trial court also did not err in precluding Plaintiff from playing the video deposition of Dr. Harry Gould for the jury. Dr. Gould was originally a designated expert of Dr. Yager's. After his deposition, that designation was withdrawn. Mississippi law is clear that a withdrawn expert's testimony is admissible so long as he or she is not referred to as an expert of the opposition's. Plaintiff was made aware of this law and chose to poison the jury anyway. Three times during cross-examination of Dr. Yager Plaintiff's counsel referred to the opinions of Dr. Gould and referred to

him as Dr. Yager's expert. That is highly prejudicial and the trial court was correct to not allow the deposition to be played. Further, Dr. Gould's testimony would merely have been cumulative. Dr. Olson testified after Dr. Yager so any contradiction of Dr. Yager's testimony and opinions Plaintiff hoped to admit through Dr. Gould's deposition could have been accomplished through the testimony of her own retained expert, Dr. Olson.

III. The 2009 Physician's Desk Reference Was Properly Excluded

Plaintiff further cites as error the exclusion of excerpts from the 2009 Physician's Desk Reference. This evidence had no relevancy to the trial. Dr. Yager prescribed Tegretol to Plaintiff in 1995. What was included in the PDR in 2009 cannot be proof of warnings Dr. Yager should have given. Plaintiff supposedly wanted to use the PDR to show the rates of occurrence of Stevens-Johnson Syndrome from taking Tegretol. However, this exact testimony was presented by Plaintiff's retained epidemiologist, Dr. Waring. Dr. Waring testified over the objections of Dr. Yager, thus rendering the 2009 PDR cumulative and unnecessary.

IV. The Jury Was Properly Instructed On Informed Consent

The trial court did not commit reversible error based on the instructions given to the jury. Jury instructions must be read as a whole, and when this is done it is clear there was no error. Plaintiff advocates a position that an instruction on "material risk" should include those risks that do not form the basis of the lawsuit. In other words, an instruction should direct the jury to determine if a physician warned of conditions that never manifested in the plaintiff. That is not the law in Mississippi and Plaintiff cites to no law on the issue. It is clear upon a reading of all instructions that the jury was to consider each cause of action and render its verdict accordingly. The issues of informed consent and negligence were not improperly co-mingled in the instructions.

V. Plaintiff's Constitutional Rights Under Article 3 Section 25 Were Not Violated

Plaintiff's constitutional rights regarding her ability to prosecute her case under Article 3 Section 25 were not violated. When compared to Section 26 that deals with a defendant's right to be heard in a criminal matter, it is clear that this section on civil matters applies to access to the courts. She had access and a fair trial commenced. Plaintiff was simply attempting to avoid further cross-examination had she testified during her rebuttal case. To the extent Plaintiff wanted to just reiterate points made in her initial testimony, her counsel was certainly capable of accomplishing this. This was an attempt to garner sympathy from the jury without any substance to be added, and it was properly prevented.

VI. The Trial Court Properly Allowed References To Parties Who Had Settled

The trial court was correct in its decision to allow the jury to learn that the other defendants had settled. Mississippi law is clear that a jury can learn of the settlements themselves, just not the amounts. This is necessary to prevent juror confusion as to the presence, or lack thereof, of parties who clearly had potential liability in the matter. Also, it is irrelevant that Dr. Yager did not seek to apportion fault, which Plaintiff asserts is a reason not to disclose the existence of settlements. Dr. Yager was unable to completely evaluate the case regarding this issue because he and his counsel were prohibited themselves from knowing the settlement figures and the terms of the agreements.

SUMMARY OF THE ARGUMENT
(Dr. Yager's Cross-Appeal)

VII. The Circuit Court Of Jackson County Did Not Have Personal Jurisdiction Over Dr. Yager

The Circuit Court of Jackson County did not have personal jurisdiction over Dr. Yager. The conditions of the Mississippi Long-Arm Statute have not been met. As laid out in the Statement of Facts, *supra,* Dr. Yager had essentially no contacts with Mississippi, and was most certainly not

"doing business" in Mississippi. Also, the alleged tort occurred in Alabama. All of Dr. Yager's treatment of Plaintiff occurred in Alabama, as did his prescribing of Tegretol. Because Dr. Yager was not doing business in Mississippi and the alleged tort occurred in Alabama, the Long-Arm Statute was inapplicable.

However, even if the Mississippi Long-Arm Statute requirements had been met, those of the Fourteenth Amendment have not. Because the tort occurred in Alabama, specific jurisdiction cannot be had in Mississippi. In addition, Dr. Yager does not have sufficient minimum contacts to establish general jurisdiction. He owns no property in Mississippi, is not licensed in Mississippi, has never practiced in Mississippi, pays no taxes in Mississippi, and operates no businesses in Mississippi. There are no systematic and continuous contacts that trigger general jurisdiction and satisfy the requirements of the Fourteenth Amendment. The exercise of personal jurisdiction over Dr. Yager also offends traditional notions of fair play and substantial justice. Alabama put in place very specific laws for medical malpractice suits. He should not now lose the protection of the laws under which he has always practiced simply because a resident of Mississippi chose to have him treat her.

Finally, it would have a chilling effect on the ability of Mississippi residents to seek medical treatment and, likewise, the ability of Mississippi doctors to treat residents of other states if this ruling were to stand.

VIII. Plaintiff's Attorneys' Firm Should Have Been Excluded From Participating In The Case

Dr. Yager contends that the firm of Spyridon, Palermo & Dornan should have been excluded from participation in this case due to Mr. Dornan having acted as the mediator of this same matter prior to joining that firm. Rule of Professional Conduct 1.12 is explicit that a past mediator in an action may not then represent a party, and the disqualification will be imputed to the entire firm.

Plaintiff's counsel was required to promptly inform the trial court and the defendants that Mr. Dornan had joined the firm after serving as mediator and failed to do so. Without prompt written notice to the trial court, Rule 1.12 mandates the entire firm be disqualified.

Rule 1.10 also forbids SPD's representation of Plaintiff because when one lawyer in a firm may not represent a client, no member is permitted. Clearly Mr. Dornan could not represent Plaintiff, so therefore no one in the firm could. It is presumed that confidences obtained by Mr. Dornan will be learned by other members of the firm under this rule.

The Mediation Rules For Civil Litigation also disqualify the SPD firm. This rule is based on the appearance of impropriety and an impression of bias. Mediators are not to enter a professional relationship with any party to a mediation without the consent of the parties. No such consent was sought or given in this matter.

IX. The Circuit Court Erred By Holding Ex Parte Hearings Regarding Prior Settlements And In Not Informing Dr. Yager Of The Aggregate Settlements

The trial court erred in not permitting Dr. Yager and his counsel to learn of the settlement details, including the dollar figures, for those defendants who settled before trial. Mississippi law is clear that a party is entitled to know the settlement figures even though it is not admissible evidence. This helps in determining whether to apportion fault and whether to settle the case themselves. Dr. Yager also should have been permitted to review the settlement agreements to determine if there was anything potentially prejudicial to his case, such as the settlement being accepted on the condition of a witness testifying against him. The trial judge determined that there was no such prejudicial information in the agreements, but Dr. Yager should have been permitted to determine that himself.

ARGUMENT
(Plaintiff's Appeal)

I. The Trial Court Did Not Abuse Its Discretion In Striking Plaintiff's Designation of Dr. Malkin

A. Standard Of Review

This Court reviews a trial court's decisions in discovery matters under an abuse of discretion standard. *Beck v. Sapet,* 937 So.2d 945, 948 (Miss. 2006) (citing *Robert v. Colson*, 729 So.2d 1243, 1245 (Miss. 1999)). The trial court's decision should only be reversed if it committed a "clear error of judgment in the conclusion it reached" when evaluating the violation at hand. *Id.* (citing *Caracci v. Int'l Paper Co.,* 699 So.2d 546, 556 (Miss. 1997)).

B. The Trial Court Acted Within Its Authority

Mississippi law has long recognized the broad authority of our trial courts over matters such as this.

> Our trial judges are afforded considerable discretion in managing the pre-trial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of the cases. Our trial judges also have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril.

Bowie v. Montfort Jones Memorial Hospital, 861 So.2d 1037, 1042 (Miss. 2003). In fact, this Court has on numerous occasions upheld dismissals of entire cases for a party's failure to comply with a scheduling order and not timely designating experts. *See Id; See, e.g. Kilpatrick v. Miss. Baptist Med. Ctr.,* 461 So.2d 765, 767-68 (Miss. 1984) (dismissal of case for not designating experts according to guidelines of pre-rules statute); *Mallet v. Carter,* 803 So.2d 504, 507-08 (Miss.Ct.App. 2002) (dismissal of case for not adhering to designation dates in court's scheduling order). Clearly since this Court has previously permitted dismissal of cases for failing to designate experts on time,

simply striking the Plaintiff's additional designation of Dr. Malkin was not an abuse of discretion.

C. Dr. Malkin Was Not A Rebuttal Witness

Plaintiff alleges in her brief that Dr. Malkin was a rebuttal witness and not repetitive of Dr. Olson. (Appellant's brief at 18). The scheduling order defined a rebuttal witness as one from "a field of expertise designated by any defendant for which plaintiff does not designate an expert." (R. at 933-36). If evidence simply supplements that which a party has already presented, it is not rebuttal evidence. *See Broussard v. Olin Corp.*, 546 So.2d 1301, 1303-04 (La.App. 3rd Cir. 1989). "Rebuttal evidence is confined to new matters adduced by the defense and not to repetition of the plaintiff's theory of the case." *Id.*

As the trial court correctly noted in granting Defendants' Motion To Strike:

> [P]laintiff originally designated an expert in the field of neurology. Defendants likewise designated experts in the field of neurology. Following the Defendants' designations, the Plaintiff designated Dr. Stanley Malkin, a neurologist. Having already designated an expert in the field of neurology, the Plaintiff's designation of Dr. Malkin clearly falls outside the definition of a "rebuttal expert" as **agreed** in the Court's Order of July 20, 2004 and will be stricken for that reason.

(R. at 2235-36) (emphasis added). Plaintiff actually admitted that Dr. Malkin was not a rebuttal witness, albeit unintentionally, in her brief to this Court: "Sharon Dunn and her counsel were concerned that Dr. Olson's expertise would be questioned, so she designated **another** neurologist, Dr. Stanley Malkin..." (Appellant's Brief at 23) (emphasis added). She also acknowledged that "the designation of Malkins [sic] and Olson were identical." (Appellant's Brief at 25). Further, she states that Dr. Olson may not have been allowed to testify because of Dr. Yager's motion to apply Alabama law (Appellant's Brief at 23), which was ultimately denied. (T. at 206-216). This certainly negates the argument that Dr. Malkin was a rebuttal witness as he and Dr. Olson clearly were meant to provide substantially the same testimony. The need for a rebuttal witness is based on the testimony

and evidence presented by Dr. Yager, not the qualifications of Plaintiff's other experts. Certainly the two designated experts cannot have the same designation if one is supposedly rebuttal.

D. Plaintiff Was Not Prejudiced Because Dr. Olson Testified As An Expert

Plaintiff is essentially asking this Court to reverse the Circuit Court's decision to strike the designation of Dr. Malkin because Dr. Olson was, to be blunt, a lousy witness. In fact, she describes him as "woefully inadequate". (Appellant's Brief at 23). Plaintiff then makes disingenuous claims about the exclusion of Dr. Malkin affecting her "right to offer proof of her injuries at trial." (Appellant's Brief at 25). However, Plaintiff had, including Dr. Olson, experts "in the fields of epidemiology, FDA regulations, immunology, neurology, pharmacology, and warnings." (Appellant's Brief at 23). It strains the bounds of logic to imply she could not prove her injuries when all of these fields were represented by experts.

It also must be stressed that Dr. Olson was tendered as an expert in neurology by Plaintiff, was accepted as such by the trial court, and **did in fact testify** as an expert in the field of neurology over the objections of Dr. Yager. (T. at 2047-2049). In fact, Plaintiff's counsel conducted extensive direct and re-direct examination of Dr. Olson. (T. at 2039-2091, 2300-2302). This fact makes the cases cited by Plaintiff in support of her position inapplicable to the one at bar. Plaintiff does not cite to one case where error was found when a medical expert was not permitted to testify and another expert provided testimony on the same subject matter. This is not a case where Plaintiff was left without any expert witness, just the one they, in hindsight, would have preferred. Dr. Olson testified repeatedly about the standard of care for a neurologist in the prescribing of Tegretol during his time on the stand at trial, so Plaintiff was certainly able to put forth this testimony for the jury. (T. at 2063-2091 [specifically], and 2039-2302 [generally]). It is just not true that Plaintiff was

prohibited from putting on expert testimony as to the standard of care for neurologists.

Plaintiff, astonishingly, states that she did not know of Dr. Olson's "deficiencies" when he was designated. (Appellant's Brief at 22). These "deficiencies", of course, are his lack of board certification and the fact he has a restricted medical license. (Appellant's Brief at 19). What makes this claim astonishing is that Dr. Olson is a personal friend of Owen Bradley, **counsel of record for the Plaintiff.** (T. at 2190). Further, Dr. Olson has been involved with this case since **1998**. (T. at 2190). Dr. Yager presumes that Plaintiff is asking this Court to believe that these "deficiencies" could not have been discovered by her counsel at any point from 1998 until 2004 when designations were made. It takes no special investigative skill for an attorney to simply ask a retained expert "Are you board certified?" or to take a quick look at his curriculum vitae at some point during a six year span.

E. Plaintiff Simply Did Not Like Dr. Olson's Testimony

It is easy to see why Plaintiff did not want Dr. Olson to testify - his testimony hurt her case. At various times he described getting Stevens-Johnson's Syndrome as equivalent to getting hit by lightning. (T. at 2112-2114, 2213). He also stated this is an extremely rare disease and that everyone involved in the case was simply "tainted by rotten luck." (T. at 2113-2114). Further, Dr. Olson testified that he could not even say that a causal connection existed between the Tegretol prescribed by Dr. Yager and Plaintiff's Stevens-Johnson Syndrome, and in fact agreed that several other drugs she took are also associated with this rare disease. (T. at 2168, 2245-46).

F. The Time From Designation To Trial Is Immaterial

Plaintiff's designation of Dr. Malkin occurred fifty-four (54) days after the scheduling order deadline (Appellant's brief at 18). In *Bowie*, the trial court's scheduling order called for the plaintiffs

to designate their experts by December 31, 2000 but said designation was not made until February 5, 2001, a difference of only thirty-six (36) days. 861 So.2d at 1039. The trial court in *Bowie* noted that from the time the case was filed until the designation deadline the plaintiffs knew an expert was required, and the failure to follow such a simple task could not be allowed. *See* 861 So.2d 1040 fn1. Likewise, Plaintiff had known since 1996 that a neurology expert would be needed to testify against Dr. Yager, certainly enough time to find someone board certified.

In *Bowie,* this Court favorably quoted from a case involving a refusal to overturn a default judgment that is clearly applicable in this matter: "[I]t may be that people will miss fewer trains if they know the engineer will leave without them rather than delay even a few seconds....At some point the train must leave." 861 So.2d at 1042 (quoting *Guaranty Nat'l Ins. Co. v. Pittman,* 501 So.2d 377, 388-89 (Miss. 1987)). Likewise, the trial court must move the case along. It has been clearly shown that Dr. Malkin was not a true rebuttal expert. Therefore, allowing his designation could possibly lead to Dr. Yager needing to find another expert as well. When does it stop? This Court has previously stated that "litigants must understand that there is an obligation to timely comply with the orders of our trial courts. As we noted in *Guaranty National,* the parties must take seriously their duty to comply with court orders." *Bowie*, 861 So.2d at 1043.

It is important to note that this scheduling order was agreed to by the parties. (R. at 933). Plaintiff cannot now ask for relief from a date to which she agreed, particularly when that date was eight (8) years after the filing of the case.

G. Conclusion

The trial courts in Mississippi have great authority in controlling the cases before them. When orders are issued it should be expected that parties will follow them or be prepared to face the

consequences. In the case at bar, Plaintiff timely designated an expert, Dr. Olson, who was qualified to testify under the Rules of Evidence, though "woefully inadequate" in assisting her prosecution of the case. That is not reversible error. Nor is it reversible error that Plaintiff's counsel failed to adequately inquire into Dr. Olson's background and professional qualifications. Plaintiff has attempted to muddy the waters by claiming she was prejudiced and did not have means to prove damages, but she was not. Her duly designated expert in neurology provided 263 pages of trial testimony regarding the standard of care for prescribing Tegretol and other issues. Her right to put on proof of her injuries was well protected in the form of Dr. Olson and the numerous other experts at her disposal.

II. The Testimony Of Dr. Gould Was Properly Excluded

A. Standard Of Review

Whether to allow or preclude Plaintiff from playing the deposition of Dr. Gould was "within the sound discretion of the trial judge." *General Motors Corporation v. Jackson,* 636 So.2d 310, 314 (Miss. 1994). Reversal of such a decision is warranted only if the trial judge abused his discretion. *Id.*

B. Mississippi Law Mandates Exclusion Of Dr. Gould

Plaintiff contends that she should have been allowed to play the video deposition of Dr. Harry Gould, a pain management specialist originally retained by Dr. Yager. On November 28, 2008 Dr. Yager notified Plaintiff's counsel that Dr. Yager would not be calling Dr. Gould at trial. (R. at 3065). Plaintiff's counsel inquired about consulting with Dr. Gould and counsel for Dr. Yager notified Plaintiff's counsel that they objected to Dr. Gould being contacted and pointed Plaintiff to the *General Motors* case. (R. at 3066).

The law in Mississippi is very clear as to experts that have been withdrawn as trial witnesses: the adverse party may call the witness but it may not be disclosed to the jury that the expert had the prior affiliation with the opposition. *General Motors,* 636 So.2d at 315. Disclosing this prior affiliation of Dr. Gould with Dr. Yager was "highly prejudicial" and in violation of Rule 403 of the Mississippi Rules of Evidence. *See Id.* at 314-15. Dr. Yager does not dispute that Plaintiff could have called Dr. Gould as a witness. However, when Plaintiff's counsel referred to Dr. Gould as Dr. Yager's retained expert, in various forms, three times during his cross-examination of Dr. Yager, the guidelines of *General Motors* were violated. (T. at 1506, 1507, 1526). Plaintiff was made aware of the *General Motors* opinion long before trial and chose to ignore it. If she had wanted to call Dr. Gould, all that had to be done was not attempt to prejudice the jury by stating that he had previously been retained by Dr. Yager.

The trial court made a thorough and correct finding on this issue. (T. 2022-2038). It was correctly found, consistent with *General Motors* and Rule 403, that it would be highly prejudicial to Dr. Yager to permit the testimony of Dr. Gould after he was identified as Dr. Yager's expert.

C. Dr. Olson Was Competent And Dr. Gould's Testimony Would Have Been Cumulative

Plaintiff maintains that she had no "competent" witness to testify as to the standard of care for a neurologist and needed Dr. Gould to impeach Dr. Yager. (Appellant's Brief at 30). This is a completely false statement. Dr. Olson, the expert tendered by Plaintiff and accepted by the Court, testified **after** Dr. Yager. Anything Dr. Gould could have said by deposition certainly could have been said by Dr. Olson.

Competency of witnesses is defined by Rule 601, et seq. of the Mississippi Rules of

Evidence. Nothing in these rules prohibited Dr. Olson from testifying. Further, the trial court accepted Dr. Olson as an expert in the field of neurology (T. at 2049), and Dr. Olson subsequently gave over 260 pages of trial testimony on direct, cross, and re-direct examination. For Plaintiff to now claim that she had no one but Dr. Gould available to present her theory of the case is ludicrous. If that is so, this case should never have been brought since Plaintiff would not have known of Dr. Gould if not for Dr. Yager. It seems this is an admission that the lawsuit was baseless, and Dr. Yager agrees.

Because Dr. Olson provided expert testimony on the standard of care required, Dr. Gould's testimony would have been cumulative. In *General Motors* this Court held that the testimony of the withdrawn expert would have been "nearly identical to that articulated by General Motors' own experts. It added nothing new to the evidence presented and thus, would have been cumulative." 636 So.2d at 314. Certainly having a second expert in the field of neurology testify as to the standard of care would have been cumulative. Therefore, the potential prejudice to Dr. Yager of Plaintiff's previous disclosure to the jury of the prior retainment was greater than the need for cumulative testimony on the standard of care.

D. Dr. Gould's Testimony Was Not Proper Impeachment Of Dr. Yager

Plaintiff asserts that Dr. Gould's deposition testimony was necessary to impeach Dr. Yager's testimony as to the applicable standard of care. What Plaintiff was really seeking was not impeachment testimony, but simply an alternate opinion as to the standard of care. (Appellant's Brief at 31-32). Dr. Gould was completely unnecessary to this task because Dr. Olson testified **after** Dr. Yager. Any contradiction of Dr. Yager's opinions on the standard of care could be accomplished through Plaintiff's duly designated and accepted expert, Dr. Olson.

Plaintiff also claims error for not being permitted to use Dr. Gould's testimony against Dr. Yager in his role as an expert, rather than just as a party. Plaintiff asserts that "the court prohibited the plaintiff from impeaching Dr. Yager with the standard of care defined by Dr. Gould." (Appellant's Brief at 34). However, Plaintiff was not prohibited from using the standard of care as defined by Dr. Olson to contradict Dr. Yager's testimony. There was no prejudice because her expert still had not testified.

Plaintiff cites many cases relating to the ability of a party to cross-examine an expert as to bias, interest, and prejudice. (Appellant's Brief at 34). These are completely irrelevant. Dr. Yager does not dispute that Plaintiff's counsel was free to ask him about his bias and prejudice at trial, although it seems it would go without saying. However, bias and prejudice have nothing to do with questions regarding the standard of care.

Just as irrelevant are the citations to cases regarding Plaintiff's right to cross-examine Dr. Yager as to the basis of his opinion and what he reviewed. (Appellant's Brief at 35). Plaintiff's counsel questioned Dr. Yager on December 8 and December 10, 2009, gathering nearly 250 pages of trial testimony on cross examination. (T. at 1450-2022). Nothing precluded Plaintiff's counsel from questioning Dr. Yager about the basis of his opinion as to the standard of care. There also was nothing to prevent Dr. Yager from being questioned as to what he considered in forming his opinion. Where Plaintiff has strayed off course is seemingly stating that asking an expert the basis of his opinion is somehow the same as introducing the testimony of a withdrawn expert.

The cases cited by Plaintiff are not factually similar to the one at bar. (Appellant's Brief at 35). Not one of the cases cited in Plaintiff's brief deals with impeachment of an expert through the deposition testimony of a withdrawn expert. (Appellant's Brief at 34-35). Plaintiff is correct that

she could ask Dr. Yager about his bias and the basis of this opinions. Unfortunately for her, none of that is relevant to a discussion as to the admissibility of Dr. Gould's testimony.

E. Rule 403 Mandated Exclusion Of Dr. Gould's Deposition Testimony

Mississippi Rule of Evidence 403 prohibits the introduction of relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." As demonstrated above, Dr. Gould's testimony would have been cumulative of Dr. Olson's in violation of Rule 403. There also is no doubt that it would be misleading to the jury to have a witness presented as Dr. Yager's expert, when in fact he was not.

Unfair prejudice is, of course, the primary reason Dr. Gould's testimony was properly not allowed. *General Motors* is very clear that alluding to the fact that an expert had been retained and later withdrawn by a party "would be highly prejudicial." 636 So.2d at 315. This Court quoted the Arizona Supreme Court in stating:

> [t]he admission of this evidence on direct examination would only serve to unfairly prejudice the plaintiff. Jurors unfamiliar with the role of counsel in adversary proceedings might well assume that plaintiff's counsel had suppressed evidence which he had an obligation to offer. Such a reaction would destroy counsel's credibility in the eyes of the jury.

Id. (quoting *Granger v. Wisner,* 134 Ariz. 377, 379, 656 P.2d 1238, 1240 (1982)). Likewise, the trial court carefully considered this issue and found the possible prejudice to Dr. Yager was simply too great to allow Dr. Gould's testimony once the jury had been tainted by Plaintiff's reference to him as Dr. Yager's expert. (T. at 2022-2038). In particular, the trial court pointed out that many jurors had been taking notes throughout the trial, setting up the possibility of just the situation feared in *Granger* and prohibited by Rule 403. (T. at 2037-2038).

Plaintiff also argues that Dr. Yager's use of Dr. Gould's deposition in support of a motion for summary judgment is somehow relevant to this discussion, again without any citation to authority that supports this claim. (Appellant's Brief at 35-36). However, it must be pointed out that Dr. Yager lost the motion referenced by Plaintiff. (R. at 2308-2396; T. at 169-216). Plaintiff also believes it relevant that other defendants and she herself relied on Dr. Gould's testimony in pre-trial matters. (Appellant's Brief at 36). Surely the risk of prejudice noted and discussed in *General Motors* cannot be ignored if the party wishing to admit the testimony can itself create the exception to have it admitted. Plaintiff believes that this use of Dr. Gould's deposition somehow "opens the door" and enables her to have it played for the jury. (Appellant's Brief at 36). However, the case cited, *Blake v. Clein,* applies only to those instances when the party itself enters evidence before the jury. 903 So.2d 710, 726 (Miss. 2005). In this case, Dr. Yager did not seek to have the testimony of Dr. Gould admitted into evidence. The door was not opened to Plaintiff to put this testimony before the jury.

Plaintiff has not demonstrated that Rule 403's prohibition of unfairly prejudicial evidence, evidence that may mislead or confuse the jury, and cumulative evidence did not mandate the exclusion of Dr. Gould's testimony. The trial court did not abuse its discretion.

F. Dr. Gould Was Properly Withdrawn

Plaintiff has gone to great lengths to demonstrate that Dr. Gould "still is Dr. Yager's expert" and that rather than releasing or withdrawing him, Dr. Yager "simply declined to call him as a witness." (Appellant's Brief at 37). What Plaintiff fails to do is cite any law or rule of procedure that tells Dr. Yager and this Court why the semantics of the withdrawal are important. Dr. Yager clearly and unambiguously notified Plaintiff's counsel that Dr. Gould would not be appearing at trial,

which is of course, **withdrawing** him as a trial witness. Clearly by correspondence exchanged, and noted by Plaintiff in her brief, there was no confusion as to Dr. Yager's intent. (R. at 3051, et seq.; Appellant's Brief at 37).

Further, Plaintiff was put on notice of the *General Motors* case and still chose to disclose Dr. Gould's prior affiliation with Dr. Yager before the jury. (R. at 3065-66; T. at). Plaintiff states that Dr. Yager did not adequately distance himself from Dr. Gould's opinions, again without any citation to law supporting the relevance of this allegation. (Appellant's Brief at 37). However, instead of requesting guidance from the trial court as to whether Dr. Gould's testimony would be excluded should his prior affiliation to Dr. Yager be disclosed, Plaintiff chose instead to poison the jury first and ask questions later. This was nothing more than a tactical mistake by Plaintiff. Plaintiff's counsel had the *General Motors* case and knew the risk he was taking by stating before the jury the prior affiliation. If all Plaintiff really wanted was the testimony of Dr. Gould, that could have come in without the unnecessarily prejudicial comments regarding the prior affiliation as Dr. Yager's expert.

Plaintiff's assertions that Dr. Gould was still Dr. Yager's expert are irrelevant and incorrect.

G. Dr. Gould Believed Dr. Yager Complied With The Standard Of Care

Even if Dr. Gould had been permitted to testify by deposition, his testimony would have ultimately supported Dr. Yager. Dr. Gould testified repeatedly that he felt Dr. Yager acted within the standard of care in his prescribing of Tegretol to Plaintiff. (Gould deposition marked as Plaintiff's Exhibit 93, pp. 22, 153-155). Therefore, any error there may have been in excluding Dr. Gould was harmless since his testimony ultimately would have bolstered the case of Dr. Yager.

H. Conclusion

Plaintiff continually ignores the fact that Dr. Gould's testimony was excluded solely because her counsel identified him as Dr. Yager's expert. The trial court did not exclude Dr. Gould based on the testimony itself being *per se* inadmissible. Plaintiff has made many arguments as to why the testimony should have been admitted, none of which are valid based on the unduly prejudicial statements made during Dr. Yager's testimony. For all of her arguments, none demonstrate that the clear rule of *General Motors* is not controlling in this case. Because Plaintiff's counsel informed the jury, three times, that Dr. Gould had been a retained expert for Dr. Yager, Dr. Gould's testimony had to be excluded.

III. The 2009 Physician's Desk Reference Was Properly Excluded

A. Standard of Review

The decision of a trial court to admit or exclude evidence is reviewed under an abuse of discretion standard. *See Vaughn v. Mississippi Baptist Medical Center,* 20 So.3d 645, 654 (Miss. 2009) (citations omitted). The Circuit Court did not abuse its discretion on this issue.

B. The 2009 Physician's Desk Reference Was Irrelevant

This case is based on Dr. Yager having prescribed Tegretol to Plaintiff in 1995. (R. at 90). The information available in the 2009 Physician's Desk Reference ("PDR") to Dr. Yager about Tegretol has no relevance on the warnings that should have been given in 1995. Only information available prior to the prescribing of Tegretol is relevant to this case against Dr. Yager. Such post-dated information may be relevant against the drug manufacturer, but not a prescribing physician.

C. Plaintiff Was Not Prejudiced

Plaintiff was clearly not prejudiced because, as she states in her brief, Dr. Waring testified

as to the precise information they hoped to have entered into evidence through the 2009 PDR. (Appeallant's Brief at 38). The PDR would have been simply cumulative at that point. Dr. Waring was called as a rebuttal witness in this matter (T. at 3183), accepted as an expert in epidemiology (T. at 3208), and provided extensive testimony for the Plaintiff. Dr. Yager objected to Dr. Waring being called on the grounds of him being an improper rebuttal witness (T. at 3135) and also to his qualifications as an expert in relation to the facts of this case but was overruled. (T. at 3207). Dr. Waring was called and provided testimony in dispute of Dr. Yager's and other experts' description of the rate of incidence of Stevens-Johnson's Syndrome. (T. at 3183-3336). Submitting the 2009 PDR to the jury would have added nothing unique to the evidence to be considered.

Plaintiff states that she was prejudiced because there were admitted into evidence "excerpts from the 1996, 1997, and 2008 Physician's Desk References by the defendant." (Appellant's Brief at 38). What Plaintiff fails to explain is how those admissions are at all related to the omission of the 2009 PDR. She is not challenging the admission into evidence of the 1996, 1997, and 2008 PDR excerpts, instead apparently arguing that the admission of **any** PDR without admitting **all** PDRs is somehow prejudicial, regardless of the reason for the introduction. However, Plaintiff makes no showing how the admission of the 2009 PDR would cure any prejudice created by the other PDR admissions.

D. Conclusion

The trial court did not abuse its discretion in not admitting the 2009 PDR. Plaintiff was not prejudiced because Dr. Waring provided all of the information during his rebuttal testimony that she hoped to have admitted through the 2009 PDR. Further, Plaintiff has not demonstrated how the admission of the 2009 PDR would have corrected prejudice created by the admission of sections

from earlier PDR volumes. This issue is without merit.

IV. The Jury Was Properly Instructed On Informed Consent

A. Standard of Review

The standard of review for jury instructions is that they must be read as a whole. *Pilgrim v. State,* 19 So.3d 148, 153 (Miss.Ct.App. 2009) (citing *Watts v. State,* 936 So.2d 377, 386 (Miss.Ct.App. 2006)). When read as a whole, if they "fairly announce the law of the case and create no injustice, no reversible error will be found." *Id.* In this case, the instructions when read as a whole did not create injustice and accurately stated the law.

B. The Instructions Were Not Confusing To The Jury

Jury instructions cannot be evaluated individually, but must be looked at in their totality.

> Allegedly faulty jury instructions are not to be considered in isolation. Rather, the duty of an appellate court is to review all of the jury instructions and determine whether, in their totality, the instructions properly apprized the jury of the applicable law and the proper method of applying that law to the facts as determined by the jury.

Barrett v. Parker, 757 So.2d 182, 187 (Miss. 2000) (quoting *Starcher v. Byrne,* 687 So.2d 737, 742 (Miss. 1997)). In the case at bar, the instructions, when read as a whole, provided the jury the appropriate law and how to apply it.

Plaintiff asserts that instruction P8A sits "in stark contrast" to instructions D10 and D30 regarding informed consent. (Appellant's Brief at 39). Plaintiff specifically asserts that these three instructions were improper for substituting "a 'customary practice' standard", ordered the jury to absolve Dr. Yager for negligence if they found informed consent existed, and improperly instructed that Stevens-Johnson Syndrome is the only material risk that required disclosure. (Appellants' Brief at 39-40). These arguments have no merit.

1. Taken as a whole the instructions were proper as to "material risk"

Plaintiff maintains the material risks that should be communicated to the patient include those risks beyond Stevens-Johnson Syndrome that she has not even suffered (Appellant's Brief at 40) and cites to *Jamison v. Kilgore* for this theory. 903 So.2d 45 (Miss. 2005). Unfortunately, Plaintiff has failed to correctly interpret *Jamsion.* This Court was very clear in *Jamison* that expert testimony is necessary to establish when a risk is **known before it can be determined if it is material**. *Id.* at 50 (emphasis added). If a risk is established to be a "known risk," it then must be shown to be "material", and then causation must be established. *Id.* Under Plaintiff's theory, experts must be brought to trial to discuss risks of a procedure or medication that are completely unrelated to the injury in question simply to determine if they are "known", and subsequently "material." A trial based on the prescribing of a drug would require experts to be qualified and testify as to every conceivable known risk of the drug that a plaintiff would like to later claim is "material" and would have impacted their decision to take the drug.

What Plaintiff is advocating is not the law and could never function in the real world. Trials would be bogged down for days discussing risks through the use of expensive experts unrelated to the injury in question. Further, Plaintiff does not cite to a single case wherein the issue of informed consent was being discussed for a risk unrelated to the cause of action. The jury in this matter had the task of determining if Stevens-Johnson Syndrome was a material risk of Tegretol. They determined it was not.

Plaintiff's argument is made all the more confusing given their inclusion of instruction P7B. This instructed the jury to find for Plaintiff only if Dr. Yager failed to warn her about "early toxic signs and symptoms of a skin reaction." Therefore, despite complaining that all material risks should

be discussed with the patient, even those that never materialize and are unrelated to the alleged injuries, Plaintiff herself instructed the jury to only consider adverse skin reactions as to what conditions Dr. Yager should have provided warnings.

Finally, Plaintiff took other drugs associated with Stevens-Johnson Syndrome even when she was supposedly properly informed of the risks involved. (T. at 1172-73). Therefore there is no reason to believe any other information provided to Plaintiff would have altered her decision to take Tegretol.

2. The jury was properly instructed on informed consent and negligence

Plaintiff asserts as error that instructions D10 and D30 co-mingled the informed consent and negligence causes of action. Plaintiff further asserts that D10 and D30 are misleading and that instructions D8A, D14, D18, D27, and D33 "prematurely absolve[d] Dr. Yager from informed consent liability in the event no negligence is found." (Appellant's Brief at 41). However, Plaintiff makes no analysis of these instructions to demonstrate how these instructions are inappropriate. Further, Plaintiff has not demonstrated what the proper instructions should be. Plaintiff has simply made a statement of error and is expecting this Court to determine how and why there is error. This Court should not, therefore, consider this assignment of error. *See Taylor v. State*, 754 So.2d 598, 604 (Miss.Ct.App. 2000) ("[f]ailure to cite relevant authority obviates the appellate court's obligation to review such issues." (citations omitted)).

In the interest of completeness, Dr. Yager points out, again, that these instructions must be taken as a whole. When this is done it is clear that the jury was to find for or against Dr. Yager as to the specific issue of each particular instruction. For instance, in D30 it is clear that the jury is to only consider issues of informed consent. To assume that the jury would review one instruction and

ignore all others is baseless.

3. It was proper to confine the material risk analysis to Stevens-Johnson Syndrome

This issue was largely addressed already in this brief and does not need lengthy repeating. However, the failings of Plaintiff's argument must be addressed. Plaintiff again cites numerous cases as to what is required of a physician to obtain adequate informed consent. Unfortunately, Plaintiff also again fails to cite a single case that addresses material risks as being those irrelevant to the proceedings; specifically, that a doctor's failure to obtain informed consent as to risks that never materialize is grounds for liability. The allegedly faulty warning and/or failure to obtain informed consent must be related to the injury that instigated the lawsuit. Plaintiff cites to no authority otherwise.

C. Conclusion

Plaintiff sets out to address the issue of whether the jury was adequately instructed as to informed consent. The sole ground for this argument appears to be that Dr. Yager did not warn of risks and/or side effects from taking Tegretol other than Stevens-Johnson Syndrome that never materialized. This case is about Plaintiff's unfortunate diagnosis of Stevens-Johnson Syndrome and whether Dr. Yager was at fault. It would only serve to lengthen and complicate all medical malpractice cases if every known risk or side effect of a drug or procedure must be evaluated by a jury to determine if it is "material" and should have been disclosed.

Plaintiff, throughout this discussion of instructions, cited to cases that mandate disclosure of material risks and that confusing instructions are not permitted. She thoroughly fails to provide any analysis that links these cases to her argument. There is no error involving the jury instructions on informed consent. The instructions must be read as a whole, not just those involving informed

consent. When done so in this complex case, it is clear there is no reversible error.

V. Plaintiff's Constitutional Rights Under Article 3 Section 25 Were Not Violated

A. Standard of Review

The standard of review for constitutional issues is *de novo*. *Deeds v. State,* 2009 WL 4350783 at *4 (Miss.) (So.3d cite not yet released). Undersigned counsel was able to find no similar cases and none were cited by Plaintiff. This is a case of first impression for this Court.

B. The Constitutional Provision For Criminal Prosecutions Is Not Instructive

Plaintiff claims that Article 3 Section 25 of the Mississippi Constitution mandates she had the right to give part of her closing argument. She is incorrect. Plaintiff attempts to analogize Article 3 Section 26 of the Mississippi Constitution to Article 3 Section 25. This Court has, Plaintiff correctly notes, held it to be reversible error in a criminal prosecution to not permit a defendant to address the jury. However, she cites to no cases on point in the civil context. (Appellant's Brief at 43-44).

Section 26 dealing with criminal prosecutions states that "[I]n all criminal prosecutions the accused shall have a right **to be heard** by himself, through counsel, or both...." MS Const. Art. 3 § 26 (emphasis added). That provision specifically states that the defendant shall be heard. To the contrary, Section 25 does not include any specific right **to be heard**, only that a defendant shall not be "debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both." MS Const. Art. 3 § 25. It is evident that access to the courts is the reason for Section 25.

Plaintiff was not prevented from prosecuting her case. She was represented by able counsel and testified extensively in presenting her case to the jury. A criminal defendant is on trial for his

freedom and, sometimes, his life. The Constitutional guarantee to be heard for a criminal defendant deals with presenting evidence to protect what is most precious to any person. Plaintiff makes the leap that because the refusal of a trial court to allow a criminal defendant to address the jury is reversible error, it automatically is reversible error in the civil context. However, no law is cited for this proposition.

C. Plaintiff Could Have Testified In Rebuttal

Plaintiff and her counsel made a strategic decision for her not to testify during her rebuttal case despite the clear opportunity to do so. Plaintiff's counsel represented to the Court that he was considering calling her, but did not. (T. at 3023-3024). The logical conclusion to draw from this is that they did not want her subject to another cross-examination. Instead, they chose to have her address the jury in closing arguments without Dr. Yager's counsel being able to conduct further cross-examination.

Plaintiff asserts in her brief that she needed to address the jury, essentially, to reiterate points already made when she testified during her case-in-chief. Specifically, she wished to tell the jury what they had already heard her testify to earlier in the trial about warnings she did or did not receive from Dr. Yager. (Appellant's Brief at 44). If the only purpose was for her to refute Dr. Yager's testimony regarding the warnings given, she could have taken the stand during her rebuttal case and done so. This is not an instance where Plaintiff was refused her right to prosecute her case, only that she was forbidden from doing so without cross-examination. There is nothing alleged in her brief that Plaintiff was going to address in closing arguments that could not have been done during her rebuttal case.

D. Conclusion

Plaintiff has attempted to use this Constitutional provision as a method to avoid cross-examination. There is nothing she wished to address in closing argument that could not have been addressed in her rebuttal case. Plaintiff was attempting to circumvent further cross-examination by testifying to the jury in closing arguments. Plaintiff admits in her brief that much of the subject matter of the proposed closing had already been put forth under direct examination. Therefore, there is absolutely no prejudice to having her counsel perform a summation and closing argument rather than Plaintiff herself. To the extent Plaintiff was attempting to offer new arguments to rebut Dr. Yager's testimony, that is improper and should have been presented on the witness stand.

VI. The Trial Court Properly Allowed References To Parties Who Had Settled

A. Standard Of Review

Whether a party is entitled to learn of settlements is clearly a question of law over fact. Therefore, *de novo* review is appropriate. *See Narkeeta Timber Company, Inc. v. Jenkins,* 777 So.2d 39, 41 (Miss. 2001) (*citing Donald v. Amoco Prod. Co.,* 735 So.2d 161, 165 (Miss. 1999)).

B. Plaintiff Was Not Prejudiced By The Jury Knowing Of Settlements

The opening statement of Plaintiff's brief on this topic reads as follows: "[D]uring the trial, any prior settlements of Sharon Dunn with other defendants was irrelevant to the establishment of the negligence of Dr. Yager." (Appellant's Brief at 45). Dr. Yager could not agree more, and since the jury correctly found Dr. Yager did not act negligently, this issue is completely without merit. Regardless of whether the jury knew or did not know that other defendants settled, they determined that Dr. Yager did not breach the standard of care. (R. at 3276-3277).

C. Mississippi Law Permits The Jury To Learn Of Settlements

Plaintiff has completely misstated the law in Mississippi regarding settlements. She asserts that *Smith v. Payne*, 839 So.2d 482 (Miss. 2002), "recognized a limited exclusion to the rule prohibiting reference to settlement...." However, she never cites to a single authority that pronounces as "the rule" that juries are not permitted to know of settlements. The *Smith* case is the only authority cited by Plaintiff and she misconstrues its holding. Nothing in that opinion states that it is recognizing a mere exception to any general rule about settlements. *See* 839 So.2d at 486-87. Instead, it provides but one example as to **why** a jury is permitted to know of the existence of settlements, that other parties had also been accused of wrongdoing in the accident in question. *Id.* (emphasis added).

This Court has made very clear that juries are permitted to know the existence of settlement agreements, but not the amounts. *See Whittley v. City of Meridian,* 530 So.2d 1341, 1346 (1988). In the case of *Robles v. Gollott and Sons Transfer and Storage, Inc.,* this Court permitted the jury to learn of settling defendants, though not the amounts, to show that other defendants had previously been sued in the action. 697 So.2d 383, 384-85 (Miss. 1997). This is simply a fairness issue. Plaintiffs in Mississippi should not be able to blame multiple parties for their injuries and the trier of fact not have the benefit of that knowledge.

D. That Dr. Yager Did Not Seek To Apportion Fault Is Irrelevant

Plaintiff maintains that the jury should not have learned of the settlement of other defendants because Dr. Yager did not seek to apportion fault in the final jury instructions. (Appellant's Brief at 46). Again, Plaintiff cites to no case whereby the communication of the prior settlements to the jury hinges on whether the opposing party seeks to apportion fault. (Appellant's Brief at 45-46).

Neither *Whittley* or *Robles* state that the apportionment of fault is a predicate to informing the jury about settlements. *See* 530 So.2d 1341; *See also* 697 So.2d 383.

This issue is further complicated by Dr. Yager's issue for cross-appeal, *infra,* that the trial court erred by not notifying him of the settlement amounts prior to trial. Dr. Yager cannot be penalized for not submitting an instruction apportioning fault when he and his counsel could not adequately evaluate the advantages or disadvantages of doing so. This Court made very clear in both *Whittley* and *Robles* that a party can learn of the settlement amounts outside the presence of the jury and receive a setoff equivalent to the amount already received. *See Id.* To truly assess whether it is best to receive a setoff or apportion fault on the verdict form, the amount of settlement must be disclosed. In this case it was not due to an error of the trial court.

E. Conclusion

Plaintiff cites to no authority in the law for the argument she makes regarding the disclosure of settlements to the jury. Mississippi law is clear that the jury is permitted to know of the existence of settlements so long as the amounts are not disclosed. Further, it is irrelevant whether Dr. Yager sought an apportionment instruction, particularly since the trial court refused his request to learn of the settlement figures. Finally, even if the trial court's informing the jury of settling defendants were error, it would be harmless since the jury found Dr. Yager did not breach the standard of care and damages were not considered.

ARGUMENT
(Defendant's Cross-Appeal)

VII. The Circuit Court Of Jackson County Did Not Have Personal Jurisdiction Over Dr. Yager

A. Standard of Review

All matters of jurisdiction are reviewed on a *de novo* basis. *Estate of Jones v. Phillips ex rel. Phillips,* 992 So.2d 1131, 1137 (Miss. 2008) (*citing McDaniel v. Ritter,* 556 So.2d 303, 308 (Miss. 1989)). Personal jurisdiction is determined at the time the case is filed. *Id.* (citations omitted). "The proper order when analyzing personal jurisdiction over nonresident defendants is to first consider whether the long-arm statute subjects a nonresident defendant to personal jurisdiction and then to consider whether the statute's application to that defendant offends the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Id.* (citations omitted). Because an evidentiary hearing was held in the Circuit Court on this issue (T. at 54-141, 354-376), Plaintiff must demonstrate the existence of personal jurisdiction by a preponderance of the evidence, rather than just presenting *prima facie* evidence of jurisdiction. *See Hogrobrooks v. Progressive Direct,* 858 So.2d 913, 919 (Miss.Ct.App. 2003).

B. Relevant Facts

The information contained in the Statement of the Facts, *supra* p. 5-7, is critical to the analysis of the personal jurisdiction issue. Dr. Yager refers to and incorporates those facts into the argument set forth below and encourages a review of them to provide greater context to the argument.

C. Dr. Yager Was Not Subject To The Mississippi Long-Arm Statute

The Mississippi Long-Arm Statute reads in relevant part:

> Any nonresident person, firm, or general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, ...who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state...."

Miss. Code Ann. § 13-3-57 (1972). Defendant did not meet the requirements of this statute at the time the case was filed.

1. The alleged tort did not occur in Mississippi

Defendant did not commit any tort against Plaintiff in Mississippi. The only interaction between them took place in Alabama and that is where Dr. Yager prescribed the drug Tegretol to Plaintiff. The fact Plaintiff's symptoms may have **manifested** in Mississippi is not sufficient to consider the tort **committed** in Mississippi.

One case factually similar to the one *sub judice* where a court found no jurisdiction is *Rittenhouse v. Mabry,* 832 F.2d 1380 (5th Cir. 1987).[2] The plaintiff in *Rittenhouse* was a Mississippi resident who visited a series of physicians who resided and practiced exclusively in Tennessee. 832 F.2d at 1381-82. All of the visits, treatments, and diagnoses occurred in Tennessee, though the plaintiff had painful symptoms at her home in Mississippi. *Id.* The Fifth Circuit held that "Rittenhouse's continuing pain and discomfort, suffered as a result of the injury after she returned to Mississippi, do not qualify as a tortious occurrence in Mississippi." *Id.* at 1384.

Another case instructive to this issue is *Forrest County General Hospital v. Conway* in which this Court was charged with determining the proper venue for a medical malpractice action based

---

[2] This case was overturned as to the "doing business" prong of the analysis upon amending of the Long-Arm Statute in 1991. *See Kekko v. K & B Louisiana Corporation,* 716 So.2d 682, 683 (Miss.App. 1998).

on where the alleged malpractice was committed. 700 So.2d 324 (Miss. 1997). *Conway* involved a failure to properly diagnosis meningitis in a minor child at Forrest County General Hospital that resulted in her being transferred to University Medical Center in Jackson when symptoms continued. *Id.* at 325. The minor subsequently underwent amputation of her limbs at University Medical Center. *Id.* The plaintiffs brought suit in Hinds County even though no treatment by the defendants was provided there and none of the defendants resided or practiced in Hinds County. *Id.* at 326. This Court held that damages occurred and accrued in Forrest County when the defendant physicians failed to properly diagnose the minor. *Id.* at 326-327. This Court went on to state that once the child was improperly diagnosed "...the initial damages occurred. The actions at the University Medical Center simply manifested the injury which had already occurred in Forrest County." *Id.*

Other courts around the country have also found that the tortious conduct is where treatment was received and not where injury manifested. In *Wright v. Yackley* it was held that a physician in South Dakota who treated an Idaho resident exclusively in South Dakota was not subject to jurisdiction in Idaho. 459 F.2d 287, 288-91 (9th Cir. 1972). The *Wright* Court noted that "[i]n the case of personal services focus must be on the place where the services are rendered, since this is the place of the receiver's (here the patient's) need." *Id.* at 289. They went on to state that "the idea that tortious rendition of such services is a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt is wholly inconsistent with the public interest in having services of this sort generally available." *Id.* at 290.

A Federal Court in Kentucky held that an Ohio physician was not subject to jurisdiction under the Kentucky long-arm statute when the treatments all occurred in Ohio. *Kennedy v. Ziesmann*, 526 F.Supp. 1328, 1329-31 (D.C. Ky. 1981). The *Kennedy* Court correctly ruled that

"the cause of action against Dr. Ziesmann did not arise from activities in Kentucky merely because he treated a Kentucky resident in Ohio who then returned to Kentucky." *Id.* at 1331.

In the case *sub judice* the alleged tort occurred when Dr. Yager allegedly failed to obtain informed consent for prescribing Tegretol, when he allegedly failed to warn Plaintiff of the dangers of Tegretol, and when he continued to prescribe Tegretol without a finding of a neurogenic origin for Plaintiff's pain. (R. 89-91). It is without contradiction in the record that all of the actions and/or inactions involved in these allegations occurred in Mobile, Alabama. Even assuming these allegations against Defendant are true, any warning given by Defendant, any informed consent received from Plaintiff, and the prescribing of Tegretol all would have occurred in Alabama. Plaintiff's eventual development of Stevens-Johnson Syndrome was, according to the allegations in the complaint, caused by actions and/or inactions that occurred in Alabama. Plaintiff's symptoms from Stevens-Johnson Syndrome simply manifested in Mississippi.

Plaintiff will no doubt argue that the alleged tort occurred in Mississippi at least in part because that is where the injury occurred, incorrectly relying, as the Circuit Court did, on the case of *Horne v. Mobile Area Water and Sewer System,* 897 So.2d 972 (Miss. 2004). *Horne* held that a tort is committed in Mississippi for purposes of the long-arm statute if any part of the tort occurs here, not just the negligent act. 897 So.2d at 977 (*citing Sorrells v. R&R Custom Coach Works, Inc.,* 636 So.2d 668, 672 (Miss. 1994)). However, the *Horne* case is not analogous. *Horne* involved the intentional release of water from a reservoir in Alabama that subsequently damaged the real and personal property of homeowners in Jackson County, Mississippi. *Id.* at 974. Clearly the tortious conduct in *Horne* occurred in Alabama. Just as clear is that the damage to the plaintiffs could **only** have occurred in Jackson County because that is where their property is located. The tort in that

instance was not complete until the water reached the plaintiffs' property in Mississippi and caused the subsequent damages. Until that time there was no injury.

The case at bar is clearly distinguishable. The common thread of Dr. Yager to the physicians in *Rittenhouse, Conway, Wright,* and *Kennedy* is that the diagnosis, treatment, and/or medical procedure that was alleged to be negligent conduct all occurred in the physician's home state. In addition, all of the plaintiffs, including Sharon Dunn, chose to cross state lines and see the physician at issue. Plaintiff's injuries were a result of receiving the prescription in Alabama. The aspects of the damages that occurred in Mississippi were incidental to the alleged tort. Plaintiff could have traveled to any state in the country and had her symptoms manifest there, but that would not mean Dr. Yager committed a tort wherever Plaintiff happened to be when symptoms were first noticed. A physician cannot be subject to jurisdiction wherever his patients happen to travel and have symptoms manifest. Dr. Yager did not commit a tort in Mississippi, thus the tort prong of the Long-Arm Statute analysis fails and jurisdiction is not obtained on that ground.

2. Dr. Yager did not do business in Mississippi

Dr. Yager is also not subject to jurisdiction under the Long-Arm Statute pursuant to the "doing business" analysis. The *Estate of Jones* case is illustrative of what is required of a physician to be subject to jurisdiction for doing business in Mississippi.

This Court in *Estate of Jones* found the Long-Arm Statute created jurisdiction over the defendant physician, Dr. Wright, for doing business in Mississippi. *See* 992 So.2d at 1138-39. This Court found that Dr. Wright and the clinic for whom he worked satisfied the "doing business" prong of the Mississippi long-arm statute because he was licensed to practice medicine in Mississippi and actively did so, if only occasionally. Id. at 1141. Dr. Wright sought the protection of Mississippi

Courts through his practice of medicine in this state and actively conducted business here, thus subjecting himself to jurisdiction. As shown, supra, Dr. Yager had no such contacts with the state of Mississippi. He did not hold a Mississippi license and did not seek or treat patients here. Further, even if Dr. Yager's office did meet the requirements for jurisdiction under the "doing business" prong, that cannot be imputed to him.[3] In Estate of Jones, this Court reiterated the long-standing principle that "an employee's contacts with the forum state are not to be judged according to the employer's activities there." Id. at 1139-40 (citing Calder v. Jones, 465 U.S. 783, 790, 104 S.Ct. 1482 (1984)).

A more recent case instructive to the issue is *Bufkin v. Thermage, Inc.*, 2009 WL 114780, *slip copy*, (S.D.Miss.). In *Bufkin,* a Mississippi resident traveled to Alabama to have the defendant perform plastic surgery. The defendant physician was licensed in Alabama, had never been licensed in Mississippi, owned no property in Mississippi, and practiced solely in Alabama. *Id.* at *1. In other words, his situation was factually almost identical to Dr. Yager's. The Federal District Court ruled there was no personal jurisdiction in Mississippi because the defendant physician was not "doing business" in Mississippi. The *Bufkin* court reasoned that

> Ms. Bufkin chose to travel out of state to have the procedures performed without being solicited to do so. As one court has observed, when a patient travels to another state to receive professional services without having been solicited, then she "ought to expect that [s]he will have to travel again if [s]he thereafter complains that the services sought by [her] in the foreign jurisdiction were therein rendered improperly."

Id. at *7 (quoting *Woodward v. Keenan,* 79 Mich.App. 543, 261 N.W.2d 80 (Mich.App. 1977)). Similarly, Plaintiff in the case at bar was not solicited by Defendant to come to his practice in Mobile, but was instead referred by another Alabama physician. (R. at 89-90). Dr. Yager's actions

[3]Dr. Yager's group was not sued in this case.

played no role in Plaintiff's decision to seek treatment from him.

Dr. Yager believes that he is not subject to jurisdiction in the Circuit Court of Jackson County because he lies outside the parameters of the Mississippi Long-Arm Statute. He did not commit a tort in Mississippi and has never done business in Mississippi. However, out of an abundance of caution, Defendant will address the Due Process issues that arise under the Fourteenth Amendment.

D. Defendant's Due Process Rights Were Violated By The Trial Court's Assertion Of Personal Jurisdiction

Should this Court determine that Dr. Yager was "doing business" in Mississippi, the analysis is not complete. It still must be determined if the exercise of jurisdiction pursuant to the Long-Arm Statute offends the Due Process Clause of the Fourteenth Amendment. *See Estate of Jones,* 992 So.2d at 1139; *See also McDaniel,* 556 So.2d at 308. "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Estate of Jones,* 992 So.2d at 1139. (quoting *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). Therefore, a two step analysis to determine personal jurisdiction is required: (1) if the contacts were sufficient, and if so (2) whether the maintenance of the suit would offend traditional notions of fair play and substantial justice. *Estate of Jones,* 992 So.2d at 1140.

There are two types of minimum contacts: "those which invoke specific jurisdiction over a defendant and those that lead to general jurisdiction over a defendant." *Id.* (citations omitted). Those contacts sufficient to support an assertion of specific jurisdiction can best be described as those that are "purposefully directed" at residents of the forum. *Id.* (*citing Keeton v. Hustler*

Magazine, Inc., 465 U.S. 770, 774, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984)), and the litigation results from "injuries that 'arise out of or relate to' those activities. *Id.* at 1140-41 (*quoting Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)). General jurisdiction arises when the litigation is unrelated to the defendant's contacts in the forum state so long as those contacts are "systematic and continuous." *Id.* at 1141 (*citing Helicopteros,* 466 U.S. at 415-418, 104 S.Ct. 1868).

1. The Circuit Court did not have specific jurisdiction over Dr. Yager

It cannot be said that Plaintiff's alleged injuries resulted from any contact Dr. Yager initiated in Mississippi. The fact is undisputed that Plaintiff was referred to Dr. Yager by another physician and that is why she went to him. Absolutely no actions by Dr. Yager precipitated Plaintiff to choose him over any other neurologist. Instead, it was actions by a third party that brought them together.

An analysis of the relevant case law makes clear that Dr. Yager's actions did not create specific jurisdiction. In *Estate of Jones,* defendant Dr. Wright called the plaintiff, a Mississippi resident, and specifically instructed him to come to his clinic in Memphis. 992 So.2d at 1141. This Court reasoned that the act of instructing the plaintiff while in Mississippi to go to Memphis specifically to Dr. Wright's clinic differed from a general direction to go to any hospital. *Id.* In short "this contact was directed toward a resident of Mississippi" and had the effect of "drawing that resident to another forum rather than the resident independently choosing to exit the state." *Id.* This set of facts sits in stark contrast to the ones at issue in the case at bar. Plaintiff sought out Dr. Yager and chose of her own volition to go to his office in Mobile. (R. at 86-98). There is no evidence that Dr. Yager solicited Plaintiff's business and in no way did he direct her to seek his assistance.

In *Keeton v. Hustler Magazine, Inc.* the United States Supreme Court held that personal

jurisdiction was found in New Hampshire even though the defendant's "activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities." 465 U.S. 770, 779, 104 S.Ct. 1473, 1481 (1984). They reasoned that the defendant magazine was "carrying on a 'part of its general business' in New Hampshire, and that is sufficient to support jurisdiction **when the cause of action arises out of the very activity being conducted, in part, in New Hampshire."** *Id.* at 780 (emphasis added). *Keeton* was a suit for libel wherein the Court determined that jurisdiction was proper in New Hampshire due to the fact that Hustler purposefully placed its product in the market in that state, and thus the alleged tort occurred from a purposeful act of the defendant. *Id.* at 779-781, 1481-1482. Again, this case sits in contrast to the one at bar. In *Keeton* the plaintiff was injured in New Hampshire because the defendant published the alleged libel in that state. Plaintiff was not harmed by any acts directed at the state of Mississippi by Dr. Yager. She chose to go to Alabama to see Dr. Yager based on the recommendation of another physician. Dr. Yager's actions were inconsequential. Specific jurisdiction does not exist.

2. The Circuit Court did not have general jurisdiction over Dr. Yager

"'Purposeful activity' by a non-resident in the forum state may subject him to general in personam jurisdiction there. If a nonresident corporate or individual defendant has 'purposefully availed itself of the privilege of conducting activities within the forum state', then it is considered not 'unfair' that the nonresident's important rights be adjudged in that forum." *McDaniel v. Ritter,* 556 So.2d 303, 309 (Miss. 1990) (*citing Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283, 1298 (1958)). The "non-resident defendant must have continuous and systematic general contacts" with Mississippi for this state to claim personal jurisdiction. *Id.* (*citing* Restatement [Second] Conflict of Laws § 35(3) (1971)); *Helicopteros Nacionales,* 466 U.S. at 414,

104 S.Ct. at 1872. Court decisions are numerous that demonstrate Dr. Yager is not subject to general jurisdiction.

The United States Supreme Court has made it clear that incidental and irregular contacts with a forum state do not subject a defendant to jurisdiction. The primary example is the *Helicopteros Nacionales* case. 466 U.S. 408, 104 S.Ct. 1868. The defendant (Helicol) was a Colombian corporation with its principal place of business in Bogota that provided transportation for oil and construction companies in South America. *Id.* at 409. One of the defendant's helicopters crashed in Peru and four United States citizens were killed. *Id.* at 410. The decedents were employed by a Peruvian company (Consorcio/WSH) headquartered in Houston, Texas, and that is where suit was brought. *Id.* Helicol had contacts with Texas in that they negotiated deals with Consorico/WSH there, purchased parts from Bell Helicopter Company in Fort Worth, sent pilots to training in Fort Worth, and sent management to tour the Bell facilities. *Id.* at 411. However, the defendant was never authorized to do business in Texas and never had an agent there for process. *Id.* The Court also noted that the defendant never had employees in Texas, never owned property in Texas, and has never maintained an office in Texas. *Id.* Ultimately, the Supreme Court determined that the defendant's activities were not systematic and continuous to satisfy the Fourteenth Amendment. *See Id.* at 416. The *Helicopteros Nacionales* Court also noted that "unilateral activity by another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts" to subject him to jurisdiction. *Id.* at 417 (*citing Kulko v. California Superior Court,* 436 U.S. 84, 93, 98 S.Ct. 1690, 1697, 56 L.Ed.2d 132 (1978); *Hanson v. Denckla,* 357 U.S. at 253). This is clearly analogous to show Dr. Yager's contacts were not systematic and continuous because he never practiced here, had no office or property here, and has never been licensed here.

In *Kekko v. K & B Louisiana Corporation* the defendant was a Louisiana corporation sued in Mississippi after the plaintiff slipped and fell in one of its stores in Louisiana. 716 So.2d 682. The plaintiff asserted that jurisdiction was proper in Mississippi because K & B had advertised in New Orleans newspapers and on New Orleans television stations that were broadcasted and distributed in Mississippi. *Id.* at 683. The Mississippi Court of Appeals held that when there was no evidence these advertisements were specifically directed at Mississippi residents to lure them into Louisiana there was "'no purposeful availment of the Mississippi market and no invocation of the benefits and protections of Mississippi law.'" *Id.* (quoting *Gross v. Chevrolet Country, Inc.,* 655 So.2d 873, 878 (Miss. 1995)). The Court of Appeals went on to state that "[w]e can only conclude that assertion of jurisdiction over K & B Louisiana Corporation would offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Int'l Shoe Co.,* 326 U.S. at 316, 66 S.Ct. 154, 90 L.Ed. 95). *Kekko* further illustrates that small, incidental contacts with Mississippi do not create jurisdiction.

The Southern District of Mississippi found in a legal malpractice matter that there were not sufficient minimum contacts to confer jurisdiction over a New Orleans law firm that never had an office in Mississippi, was not qualified to do business in Mississippi, had no agent for process in Mississippi, and had never solicited business in Mississippi. *First Trust Nat. Ass'n v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre,* 996 F.Supp. 585, 589 (1998). The defendant law firm in *First Trust* did have some Mississippi clients, just as Dr. Yager had some Mississippi patients. *Id.* Even though some members of the defendant law firm maintained Mississippi licenses, a fact that gives them even greater contacts with Mississippi than Dr. Yager, the District Court still did not find the contacts to be sufficient. *Id.*

The *McDaniel* case clearly demonstrates the type of contacts that do create jurisdiction in Mississippi by a foreign defendant. *See* 556 So.2d 303. This Court found it not to be unfair to the defendant in *McDaniel,* a Tennessee resident, to be sued in Mississippi and that his contacts were systematic and continuous to subject him to suit here. *Id.* at 309. Unlike Dr. Yager, that defendant was a native Mississippian, was a principal in a company incorporated in Mississippi, had entered into another partnership that conducted business and owned land in Mississippi, and was a principal stockholder in another business incorporated in Tennessee but qualified to do business in Mississippi. *Id.* Defendant Dr. Yager was a principal in no businesses incorporated or qualified to do business in Mississippi, or that owned land in this state.

This Court must determine if Dr. Yager availed himself to the laws of Mississippi and had "systematic and continuous" contact to not offend the Fourteenth Amendment. Clearly he did not.

3. The exercise of personal jurisdiction over Dr. Yager offends traditional notions of fair play and substantial justice

After determining whether a defendant is subject to specific or general jurisdiction, the Court must decide if the exercise of jurisdiction is "fair." *American Cable Corp. v. Triology Communications, Inc.,* 754 So.2d 545, 552 (Miss.Ct.App. 2000) (*citing Asahi Metal Industrial Co. v. Superior Court of California,* 480 U.S. 102, 105, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (plurality)). This requires an analysis of the interests of the forum state, the plaintiff's interest in securing relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the States in furthering substantive social policies. *Allred v. Moore & Peterson,* 117 F.3d 278, 286 n.7 (5th Cir. 1997). Dr. Yager believes that contacts are insufficient to even broach this analysis, but out of an abundance of caution will discuss in detail.

In 1987 the Alabama legislature passed sweeping reforms in response to a medical malpractice crisis then in existence. They made several specific findings, including:

> It is hereby declared by the Legislature of the State of Alabama that a crisis threatens the delivery of medical services to the people of Alabama and the health and safety of the citizens of this state are in jeopardy....This Legislature finds and declares that the increasing threat of legal actions for alleged medical injury causes and contributes to an increase in healthcare costs and places a heavy burden upon those who can least afford such increases,...and that the spiraling costs and decreasing availability of essential medical services caused by the threat of such litigation constitutes a danger to the health and safety of the citizens of this state,....

Alabama Code § 6-5-540.

As a result, physicians practicing in Alabama enjoy certain procedural safeguards. For example, under the Alabama Medical Liability Act, a plaintiff must have a "well plead" complaint. If it is not sufficiently detailed, then the complaint is "subject to dismissal for failure to state a claim upon which relief can be granted." Alabama Code § 6-5-540. Furthermore, in Alabama a plaintiff is "prohibited from even conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission." *Id.* A plaintiff is also limited or restricted in the type of expert witness required to testify. *See* Alabama Code § 6-5-548. Also, a plaintiff is restricted by a venue statute that is specific to claims against physicians. The action must be brought in the county where the alleged breach of duty occurred. *See* Alabama Code § 6-5-546.

Alabama physicians enjoy the benefit of these legislatively mandated protections, yet Dr. Yager, who treated Plaintiff in Alabama, will not enjoy these benefits and protections that he anticipated when establishing his practice.

E. Finding Dr. Yager Is Subject To Jurisdiction Will Have A Chilling Effect On The Treatment Of Mississippi Patients In Other States

The exercise of personal jurisdiction over physicians situated as Dr. Yager will have a

chilling effect on the ability of Mississippi residents to seek health care. Residents throughout Mississippi routinely travel to Mobile, New Orleans, Memphis and other locations outside the state to seek care. If doctors in other states will be subject to Mississippi jurisdiction without ever practicing in this state, the impact will be significant. A second impact could be on Mississippi's own resident physicians. If the position of the Circuit Court of Jackson County were adopted by neighboring states, Mississippi physicians treating non-resident patients would be subject to jurisdiction in the patients' home states. A physician who resides in Mississippi, is licensed only in Mississippi, and practices only in Mississippi should be subject to jurisdiction only in Mississippi.

Other courts have also addressed this concept in detail:

> Medical services in particular should not be proscribed by the doctor's concerns as to where the patient may carry the consequences of his treatment and in what distant lands he may be called upon to defend it. The traveling public would be ill served were the treatment of local doctors confined to so much aspirin as would get the patient into the next state. The scope of medical treatment should be defined by the patient's needs, as diagnosed by the doctor, rather than by geography.

Wright, 459 F.2d at 290 (quoted in Clark v. Noyes, 871 S.W. 2d 508, 514 (Tex.App.-Dallas 1994)). Other jurisdictions also have recognized that, by definition, the consequences of medical services will be felt wherever a patient travels. However, the focus should be on where the services were rendered, not where the patient resides.

> [W]hen a...patient travels to receive professional services without having been solicited,...then the [patient] ought to expect that he will have to travel again if he thereafter complains that the services sought by him in the foreign jurisdiction were therein rendered improperly.

Clark , 871 S.W.2d at 515 (quoting Gelineau v. New York University Hospital, 375 F.Supp. 661 at 667 (D.N.J. 1974)).

Although Mississippi has an interest in providing its citizens a forum, that interest is

tempered by constitutional constraints on jurisdiction, as well as the State's interest in insuring its citizens are not at risk of being denied medical services by foreign doctors who fear that treatment of Mississippi citizens will subject them to suit in our courts regardless of the lack of minimum contacts that offend traditional notions of fair play. Conversely, Mississippi physicians who are only licensed in Mississippi, reside in Mississippi, and whose practice is limited to the State of Mississippi should not bear the risk of being haled into foreign courts simply by seeing a patient from another state.

F. Conclusion

It is clear that Dr. Yager was not subject to personal jurisdiction in the Circuit Court of Jackson County. He falls outside the parameters of the Long-Arm Statute and it was a violation of his Fourteenth Amendment Due Process rights to subject him to suit in Mississippi. Also, sound public policy, in addition to the statutory and Constitutional constraints, mandates reversal of the trial court's ruling that it could exercise personal jurisdiction over Dr. Yager.

Dr. Yager further urges this Court to review the opinion of Justice Easley written in the interlocutory appeal stage in objecting to the appeal being found to have been "improvidently granted". It is sound reasoning that provides this Court a framework to hold that the Circuit Court of Jackson County did not have jurisdiction over Dr. Yager.

VIII. Plaintiff's Attorneys' Firm Should Have Been Excluded From Participating In This Case

A. Standard of Review

Interpretation of disciplinary rules is a question of law that requires *de novo* review. *See Owens v. First Family Financial Services, Inc.*, 379 F.Supp.2d 840, 846 (S.D. Miss. 2005). This Court must interpret the Mississippi Rules of Professional Conduct and the Court Annexed Mediation Rules to determine if disqualification of the law firm of Spyridon, Palermo & Dornan was

required. There is no *per se* disqualification rule in Mississippi. *Aldridge v. State,* 583 So.2d 203, 205 (Miss. 1991). Instead, disqualification is to be determined on a case-by-case basis. *Id.*

The law firm of Spyridon, Palermo & Dornan should have been disqualified from participating in this case because they hired the man who had previously acted as mediator, Don Dornan. This hiring violated the Mississippi Rules of Professional Conduct and the Court Annexed Mediation Rules For Civil Litigation, and the proper remedy was to disqualify the firm of Spyridon, Palermo & Dornan.

B. Rule 1.12 of the Mississippi Rules of Professional Conduct Mandates Exclusion

The current Rule 1.12 of the Mississippi Rules of Professional Conduct specifically addresses the client-lawyer relationship when a "former judge, arbitrator, **mediator**, or other third party neutral" is at issue. (Emphasis added).[4] Subpart (a) states that:

> ...a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer..., mediator or other third-party neutral, unless all parties to the proceeding give informed consent confirmed in writing.

It is undisputed that Mr. Dornan acted as mediator, and therefore is personally forbidden from representing Plaintiff in this same action. Further, Plaintiff's counsel was required by Rule 1.12(a) to seek "informed consent confirmed in writing" from all other parties to the litigation upon its hiring of Mr. Dornan. This informed consent was never sought by Plaintiff nor given by any of the defendants in this matter. Plaintiff's counsel admitted to the trial court that the only notification provided to any defendant was when that particular defendant had settled. (T. at 33). Clearly Plaintiff knew disclosure was proper and yet the conscious effort was still made to keep this

[4]Dr. Yager acknowledges that Rule 1.12 did not specifically include the terms "mediator, or other third party neutral" until November 3, 2005.

information from the trial court, Dr. Yager, and the other defendants who remained in the case at that time. Thus, the SPD law firm failed to follow this clear mandate of Rule 1.12(a).

Rule 1.12 goes on to state that:

> (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
>
> > (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; **and**
> >
> > (2) written notice is **promptly** given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(emphasis added). Because Mr. Dornan could not personally represent the Plaintiff in this matter, neither could SPD. Plaintiff's counsel will argue, as they did at the hearing of this matter, that Mr. Dornan was sufficiently screened in accordance with Rule 1.12(c)(1). However, they failed to follow the requirement of notice to the tribunal, in this case the Circuit Court of Jackson County and the Honorable Judge Krebs. Plaintiff's counsel gave no written notice to the Circuit Court, much less prompt written notice. If Dr. Yager had not raised the issue by motion, the Circuit Court may never have known of this violation of the Rule.

The comment to Rule 1.12 states "paragraph (c) provides that conflicts of the personally disqualified lawyers **will be imputed** to other lawyers in a law firm **unless the conditions of this paragraph are met.**" (Emphasis added). It has already been shown that Mr. Dornan is personally disqualified from representing Plaintiff under 1.12(a). Further, because Plaintiff's counsel did not notify the Circuit Court of this disqualification of their own volition, but only in response to Dr. Yager's motion, the conditions of 1.12(c) were not met. As the comment makes clear, the conflict and subsequent disqualification of Mr. Dornan "will be imputed" to the firm as a whole.

Undersigned counsel has found no cases directly on point interpreting Mississippi law. However, other courts have taken the stance that disqualification of the entire firm is the proper approach when one attorney has acted as a mediator or other third-party neutral. In the case of *Matluck v. Matluck* a Florida court examined whether a firm should be disqualified when one member acted as the mediator in a divorce proceeding, then subsequent to the mediation formed a firm with one party's counsel. 825 So.2d 1071 (Fla.App. 4 Dist. 2002). The *Matluck* Court extended Florida's imputed disqualification rule **even though that rule did not specifically address the situation of a mediator joining a party's representing firm**. *Id.* at 1073 (emphasis added). In doing so, the Court quoted from the chair of the Mediator Qualifications Advisory Panel (MQAP) in saying that if a mediator became counsel for a party:

> ...both the integrity of the mediator and the integrity of the mediation process itself would be severely compromised...Parties would no longer be able to confide in the mediator, knowing that their "confidential remarks" to the neutral and impartial third party could later be used against them by the same individual, who is now wearing the hat of "lawyer/adversary" at trial.

Id. (Quoting *MQAP 94-002* (January 19, 1995)). Ultimately the *Matluck* Court concluded that even though the firm in question had indeed made "reasonable efforts to screen [the mediator] from the case" this "could not defeat disqualification." *Id.* at 1074. As the *Matluck* Court did, the Circuit Court of Jackson County should have disqualified SPD despite their protestations of a "Chinese wall" and appropriate screening between Mr. Dornan and this case.

A Federal District Court in Utah disqualified an attorney who acted as a mediator in a separate but factually similar dispute in which the parties in the present action were co-defendants and business partners in the prior suit. *Poly Software Intern, Inc. v. Su,* 880 F.Supp. 1487 (D.Utah 1995). The *Poly Software* court did so on the basis of Rule 1.12(a) of the Utah Rules of Professional

Conduct: "a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person, unless all parties to the proceeding consent after disclosure." *Id.* at 1492. Obviously, the Utah rule, like Mississippi's prior to November 3, 2005, did not specifically mention "mediators". This, however, did not even warrant a mention on the part of that court. It simply goes without saying that Rule 1.12, even before it specifically included mediators, still applied to them.

When the firm in which a mediator worked later became counsel for one of the parties, a Federal Court in New York noted in disqualifying that firm that "[s]uccessful mediation, however depends upon the perception and existence of mutual fairness throughout the mediation process." *Fields-D'Arpino v. Restaurant Associates, Inc.,* 39 F.Supp.2d 412, 417 (S.D.N.Y. 1999). The New York Court further cited the "strong public policy favoring mediation" and that any "'appearance of impropriety requires prompt remedial action by the court'." *Id.* (quoting *Emle Industries, Inc. v. Patentex, Inc.,* 478 F.2d 562, 565 (2nd Cir. 1973)).

The *Matluck, Poly Software,* and *Fields-D'Arpino* cases make clear that a firm should be disqualified when one of its members acted as mediator in the same action. Plaintiff will surely point to the absence of the terms "mediator, or other third party neutral" from Rule 1.12 when this issue was argued before the Circuit Court in 2004, and also point to the definitions of "arbitrator" and "mediator" to argue that the rule should not apply to Mr. Dornan as it was then written. (*See* R. 558). However, an arbitrator and mediator are both considered third party neutrals under the Rules. *See* Miss. Rules Prof'l Conduct R. 2.4 cmt. In addition, the fact that Rule 1.12 may apply to Plaintiff's lawyers was not lost on them since they included an analysis in their brief to the Circuit Court and they informed the co-defendant who decided to settle. (R. at 558-559). This should have

prompted the SPD firm to follow the requirement of Rule 1.12, which they failed to do.

The SPD firm clearly failed to follow the guidelines of Rule 1.12 of the Mississippi Rules of Professional Conduct. Mr. Dornan was prohibited from representing Plaintiff due to his status as mediator. The SPD firm should have been disqualified for failing to obtain informed consent and not notifying the trial court of this clear conflict.

C. Rule 1.10 of the Mississippi Rules of Professional Conduct Mandates Exclusion

Rule 1.10 on imputed disqualification also must be examined when determining whether disqualification is required. Rule 1.10(a) states that:

> While lawyers are associated in a firm, none of them shall knowingly represent a client **when any one of them** practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.4.

(Emphasis added). For purposes of this brief, Rule 2.4, entitled "Lawyers Serving as Third Party Neutrals" is applicable.[5] Subsection (a) of 2.4 states in part that "a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter." It is undisputed that Mr. Dornan served as the mediator in this case under the definition in Rule 2.4. Therefore, the disqualification is imputed to the firm under Rule 1.10.

The Federal Southern District Court in Mississippi has stated that a disqualification analysis must examine "'whether a conflict has (1) the appearance of impropriety in general, or (2) a possibility that a specific impropriety will occur, and (3) the likelihood of public suspicion outweighs any social interests which will be served by the lawyer's continued participation in the case.'" *Owens* 379 F.Supp.2d at 846 (quoting *In re Dresser Indus.*, 972 F.2d 540, 544 (5th Cir. 1992)). In *Owens*

---

[5]As with certain language of Rule 1.12, Rule 2.4, in its entirety, became effective November 3, 2005.

the plaintiffs' attorneys were disqualified because a paralegal in their office had formerly worked for the firm defending a consumer fraud action. *Id.* at 844-845. The defendants did not argue that the paralegal worked on the case that was currently before the court, only that she had worked on consumer fraud cases in the past for that client, which gave her access to confidential information that warranted disqualification. *Id.* The *Owens* plaintiffs argued that a so-called "Chinese Wall" had been created around the paralegal, but the District Court rejected this argument by pointing out that such a device has never been recognized by the Fifth Circuit. *Id.* at 851. In support, the court cited to *Hampton v. Daybrook Fisheries, Inc.,* 2001 WL 1444933, at *2 (E.D. La.) (stating that "'[the Fifth Circuit has never recognized the possibility of a 'Chinese Wall' to rebut [the] presumption' that '[t]he Rules presume that confidences obtained by an individual lawyer are shared with members of his or her firm.'") *Id.* The *Owens* court further cited the Fifth Circuit to say that "once the irrebuttable presumption that confidential information was disclosed has been established, '[a] second irrebuttable presumption is that confidences obtained by an individual lawyer will be shared with other members of his firm.'" *Id.* (*quoting In re American Airlines, Inc.,* 972 F.2d 605, 614 FN1 (5th Cir. 1992)).

This Court has made clear that in cases where an attorney for one party previously represented the other party in a separate matter, a presumption exists that confidential information was disclosed so long as the cases are substantially related. *Williams v. Bell,* 793 So.2d 609, 612 (Miss. 2001). Clearly, then the presumption of disclosure exists as to Mr. Dornan and SPD since the conflict arises not from substantially related matters, but the same matter. Plaintiff bears the burden of proving that no confidential information obtained by Mr. Dornan during the mediation was passed to other attorneys in the firm. *See Aldridge,* 583 So.2d at 205. That burden "is great and is

not to be treated lightly by the courts." *Id.*

There is little doubt that Mr. Dornan's function as a mediator created an appearance of impropriety upon his joining SPD. Discussion of confidential information and/or insight into a party's trial strategy and work product are at the essence of mediation. When a mediator becomes privy to such information then joins a law firm directly involved in the case, the appearance of impropriety is established. The integrity of the mediation process is at stake and counsel will be discouraged from openly sharing the strengths and weaknesses of their cases to effectuate a successful mediation if the mediator can then represent a party in that same action. There also is little doubt that the general public would become suspicious of such an action. Surely if the factual scenario at issue here were presented to the average citizen he or she would find it improper. Put in even plainer terms, it would not pass the smell test. Plaintiff's counsel can argue in perpetuity about the screening measures supposedly in place, but when the former mediator stands to greatly benefit financially from a resolution favorable to his firm's client, the appearance of impropriety is present, an actual impropriety is possible, and the general public would surely be suspicious.

"The comment to Rule 1.10 indicates that vicarious or imputed disqualification serves primarily to preserve a client's confidentiality." *Aldridge,* 583 So.2d at 205. While Dr. Yager was not Mr. Dornan's client at the time of mediation, the reason for the rule, to preserve confidentiality, is no less applicable. The burden is Plaintiff's to show that disqualification is not required under Rule 1.10, and that burden is great. *Id.* Mr. Dornan is clearly prohibited from representing Plaintiff individually, and that prohibition is imputed to SPD under Rule 1.10.

The purpose of the Rule prior to November 3, 2005 is the same as it is now - to prevent confidences disclosed in a prior relationship from being learned of and used by counsel opposite.

Because Mr. Dornan is disqualified from representing Plaintiff, that disqualification should be imputed to the whole SPD firm. Rule 1.10 states that no attorney "...shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so...." Disqualification is not optional.

D. Rule XV.C Of The Mediation Rules For Civil Litigation Mandates Exclusion

Rule XV.C of the Court Annxed Mediation Rules for Civil Litigation deals with conflicts of interest in mediation. It defines a conflict of interest as "a dealing or relationship that might create an impression of possible bias." It also imposes the following obligations on mediators:

> A mediator must avoid the appearance of conflict of interest **both during and after the mediation**. Without the consent of all parties, a mediator **shall not** subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

(Emphasis added). In the instant case Mr. Dornan went beyond what is prohibited specifically by this Rule and established a professional relationship in **the same matter** in which he acted as mediator, not merely a related matter.

This Rule is not optional. By definition a conflict and violation of this Rule was created when Mr. Dornan joined his current firm. Therefore, the SPD firm should have been excluded from this case.

E. Conclusion

It is a self-evident truth that alternate dispute resolution, such as mediation, is favored and encouraged in Mississippi, and its use is on the rise. This point is made even more clear by the changes to the Rules of Professional Conduct put into place in November 2005 dealing specifically

with mediators and other third party neutrals. Dr. Yager admits that this case was pending before the mediation-specific language was added, but also points out that they were added over three years before the case was resolved. Despite the specific inclusion of mediation in 2005, the spirit of the rules remained unchanged.

The imputed disqualification Rules, 1.10 and 1.12, were in place at the time this suit was filed. Their purpose, then and now, is to prevent lawyers who have had access to confidential information about one party in a matter from working for the opposition party. Plaintiff's counsel had an obligation to notify Dr. Yager's counsel and seek consent, and also to notify the Circuit Court. They wholly failed to do so. The SPD firm should be disqualified from this case in the event it is remanded.

IX. The Circuit Court Erred By Holding Ex Parte Hearings Regarding Prior Settlements And In Not Informing Dr. Yager Of The Aggregate Settlements

A. Standard of Review

Whether Dr. Yager is entitled to learn of the settlement amounts in this case is a question of law. Therefore, de novo review is appropriate. *Narkeeta Timber Company, Inc. v. Jenkins,* 777 So.2d 39, 41 (Miss. 2001) (*citing Donald v. Amoco Prod. Co.,* 735 So.2d 161, 165 (Miss. 1999)). This Court is thus not required to show deference on this issue to the trial court's ruling. *Id.*

B. Legal Analysis

Dr. Yager is raising this issue on appeal in the unlikely event the case is remanded for a second trial on another issue. It is Dr. Yager's position that he is entitled to know the total dollars received by Plaintiff from those defendants that settled their cases prior to trial. It is also Dr. Yager's position that he was entitled to see all settlement agreements and learn the terms thereof.

Plaintiff, and apparently the Circuit Court, mistakenly viewed this issue through the lens of Rule 408 of the Mississippi Rules of Evidence regarding the admissibility of compromises and offers to compromise. (R. 2505, 2555). Dr. Yager is not raising this issue on appeal in an attempt to have the settlement figures put before the jury should a second trial occur. Instead, Dr. Yager is following the reasoning put forth by Dr. Coss and asserts that this information is discoverable so that Dr. Yager can properly evaluate his position in the case as to settlement negotiations, so he can determine whether to seek an apportionment instruction or to take a setoff in the event of an adverse verdict, and because the disclosure of the settlement agreements may lead to a resolution of this case without the need for a second trial.

1. Mississippi permits the remaining defendants to know the settlement amounts

While undersigned counsel is aware of no Mississippi cases directly on point, the *Whittley* case makes clear that Dr. Yager was entitled to learn of the settlement amounts. 530 So.2d at 1346. In discussing the acceptable manners that a trial court can deal with settlements, this Court stated:

> The second acceptable procedure allows the parties to stipulate, outside the presence of the jury, that a settlement has been made by one or more of the defendants **and the amount of the settlement.** The jury would not be informed of the settlement or the payment, and, if a verdict were returned for the plaintiff, the trial judge would reduce the amount awarded by the jury by the amount of the settlement by the other defendant or defendants.

Id. (emphasis added). *See also Robles,* 697 So.2d at 385. While the issue in *Whittley* and *Robles* was whether to disclose to the jury **whether** parties had settled, the holdings presupposed that the other party would be permitted to learn the settlement amounts.

2. Other jurisdictions also permit the defendants to learn of settlement amounts

Courts in other jurisdictions have studied this issue and properly found the settlement

agreements to be discoverable. The case of *Bennett v. LaPere, M.D.* is particularly instructive to this Court. 112 F.R.D. 136 (D. R.I. 1986). *Bennett* was a medical malpractice action wherein the plaintiffs sued the physicians involved and the hospital. *Id.* at 137. The physicians settled prior to trial and the defendant hospital sought disclosure of the settlement documents. *Id.* The attorneys for the hospital were allowed to attend the hearing concerning the settlement, over the objections of the plaintiffs and the physicians, but were not initially permitted to know the fine details of the settlement. *Id.* The hospital then filed a motion for disclosure of the settlement documents. *Id.*

The *Bennett* court correctly stated that under the Federal Rule of Procedure 26(b) a party is entitled to "anything 'relevant' to the subject matter of the litigation." *Id.* at 138. It went on to hold that the "terms and dimensions" of the settlement between the plaintiffs and the physicians are relevant to the hospital for many reasons. *Id.* The first reason addressed is the Rhode Island statute regarding joint and several liability and/or set-off of the moneys received in settlement. *Id.* The court also noted that since the deal reached was a structured settlement rather than a flat sum of money, the defendant hospital needed access to the documents to assess what their real liability would be in the case of an adverse verdict. *Id.* This is, of course, similar to our § 85-5-7 of the Mississippi Code Annotated regarding joint and several liability. Under the version of § 85-5-7 in effect at the time this suit was filed, a defendant is only jointly and severally liable up to 50% of the total award to the plaintiff. Clearly when valuing a case and considering possible settlement the amount Plaintiff has already received are relevant and must be considered in light of § 85-5-7.

The *Bennett* court also analogized the discovery of settlements by defendants to the discovery of insurance by plaintiffs. 112 F.R.D. at 141. Neither may be admissible, but they are both discoverable. *Id.* As the Advisory Committee Notes to the 1996 Amendments to the Federal Rules

of Evidence stated in regard to disclosure of insurance coverage, it "will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation." *Id.* Clearly this same statement could be made about disclosure of settlements.

In *White v. Kenneth Warren & Son, Ltd.,* a Federal Court in Illinois, in addition to favorably citing to *Bennett* and its analogy to discovery of insurance, noted that the settlement documents could reveal a bias against the remaining defendant. 203 F.R.D. 364, 367 (N.D. Ill. 2001). The *White* court further pointed out that a *quid pro quo* may exist and the remaining defendants should be allowed to determine if "any promises have been made in connection with his dismissal as a party defendant or whether Plaintiffs chose to voluntarily drop their claims against [the defendant]." *Id.* (citations omitted). The *White* court also correctly noted that if the settling defendant "was dismissed without any monetary consideration, or for substantial monetary consideration, this would be relevant to the issue of liability for the remaining defendants because of overlapping claims." *Id.* at 368.

A third court to address this issue was the Federal District court in Kansas in *Directv, Inc. v. Puccinelli,* 224 F.R.D. 677 (D. Kan. 2004). There the court noted that the settlement agreements were relevant, and therefore discoverable, because they could show bias and a possible promise to cooperate with the plaintiffs at trial. 224 F.R.D. at 684. Because the defendant wanted the document for impeachment value they were not subject to Rule of Evidence 408. *Id.* at 687.

C. Conclusion

Dr. Yager here does not seek information or communication regarding the settlement negotiations, only the final settlement documents as to each settling defendant. These are relevant

in that they could show potential bias, reveal discoverable evidence, and assist Dr. Yager in his evaluation of the case regarding settlement and a possible apportionment instruction. Dr. Yager recognizes that the Circuit Court reviewed the documents and found there to be nothing of interest to Dr. Yager. (T. at 230). However, counsel for Dr. Yager should be permitted to draw that conclusion himself. Regardless, the sum of the settlements still must be disclosed for the reasons set forth herein.

In short, it was improper for the Circuit Court to conduct ex parte hearings and discussions regarding settlements. Dr. Yager was entitled to view the settlement agreements themselves and to know the amounts Plaintiff had received pursuant to Mississippi law and the prevailing law in other states. Although probably not admissible, this information is clearly relevant and discoverable.

CONCLUSION

When all of the evidence is considered, it is evident that Plaintiff's contentions on appeal are without merit. She makes a multitude of arguments without supporting those arguments with relevant law. Dr. Yager has showed conclusively that the trial court did not err on any of the topics on which Plaintiff bases her appeal.

On the contrary, Dr. Yager has been able to show clear and reversible error as to the issues on cross-appeal. The Circuit Court of Jackson County did not have personal jurisdiction over Dr. Yager. The requirements of the Mississippi Long-Arm Statute were not met due to the alleged tort occurring in Alabama, as opposed to Mississippi, and Dr. Yager not doing business in Mississippi. Further the minimum contacts and fairness tests required by the Fourteenth Amendment clearly fall in favor of Dr. Yager.

Dr. Yager also conclusively showed that, in the event of a remand, Plaintiff's counsel should be disqualified. Also, Dr. Yager should be permitted to learn the terms of the settlements of all settling defendants pursuant to Mississippi law.

Dr. Yager prays this Court to deny each of Plaintiff's appellate claims. Dr. Yager further prays this Court to rule that the Circuit Court of Jackson County did not have personal jurisdiction over him. In the unexpected event of a remand of this case to the trial court, Dr. Yager further prays for the disqualification of the Plaintiff's counsel's firm and to be permitted to learn the details of the settlement agreements.

Respectfully,

Dr. John G. Yager

By: _____

BRETT K. WILLIAMS (MSB[redacted]
KEVIN M. MELCHI (MSB [redacted]
Attorneys for Appellee
Dogan & Wilkinson, PLLC
734 Delmas Avenue
Post Office Box 1618
Pascagoula, Mississippi 39568-1618
(228) 762-2272

RICHARD W. FRANKLIN (MSB#[redacted]
Armbrecht Jackson, LLP
P.O. Box 290
Mobile, AL 36601
(251) 405-1300

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the undersigned has this day caused to be hand delivered or mailed, postage prepaid and firmly affixed thereto, a true and correct copy of the foregoing writing to the following:

Hon. Robert P. Krebs
Circuit Court Judge
Jackson County Courthouse
Post Office Box 998
Pascagoula, Mississippi 39568-1959
(228) 762-3244
Trial Judge

Owen J. Bradley
2700 Octavia Street
New Orleans, LA 70115
Counsel for Plaintiff

Philip G. Smith
Gregg L. Spyridon
SPYRIDON, PALERMO & DORNAN, LLC
3838 N. Causeway Blvd., Suite 3010
Three Lakeway Center
Metarie, LA 70002-8835
Phone: (504) 830-7800
Fax: (504) 830-7810
Counsel for Plaintiff

Paul B. Howell
FRANKE & SALLOUM
Post Office Drawer 460
Gulfport, MS 39502
Counsel for Northrop Grumman

SO CERTIFIED, this the 16th day of April, 2010, in Pascagoula, Jackson County, Mississippi.

Respectfully Submitted,
Dr. John G. Yager

By: _____
KEVIN M. MELCHI (MSB#[redacted])
Attorney for Appellee
Dogan & Wilkinson, PLLC
734 Delmas Avenue
Post Office Box 1618
Pascagoula, Mississippi 39568-1618
(228) 762-2272

ADDENDUM

C

West's Annotated Mississippi Code Currentness
The Constitution of the State of Mississippi
Article 3. Bill of Rights
Section 25. Access to courts

No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both.

Current through End of the 2009 Regular and Extraordinary Sessions

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness
The Constitution of the State of Mississippi
Article 3. Bill of Rights
Section 26. Rights of accused; state grand jury proceedings

In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in prosecutions for rape, adultery, fornication, sodomy or crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial. Notwithstanding any other provisions of this Constitution, the Legislature may enact laws establishing a state grand jury with the authority to return indictments regardless of the county where the crime was committed. The subject matter jurisdiction of a state grand jury is limited to criminal violations of the Mississippi Uniform Controlled Substances Law or any other crime involving narcotics, dangerous drugs or controlled substances, or any crime arising out of or in connection with a violation of the Mississippi Uniform Controlled Substances Law or a crime involving narcotics, dangerous drugs or controlled substances if the crime occurs within more than one (1) circuit court district of the state or transpires or has significance in more than one (1) circuit court district of the state. The venue for the trial of indictments returned by a state grand jury shall be as prescribed by general law.

CREDIT(S)

Laws 1994, Ch. 668, eff. December 9, 1994.

Current through End of the 2009 Regular and Extraordinary Sessions

END OF DOCUMENT

U.S. Constitution - Amendment 14

Amendment 14 - Citizenship Rights

<<Back | Table of Contents | Next>>

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Notes for this amendment:
Proposed 6/13/1866
Ratified 7/9/1868
Note
History
Article 1, Section 2

<<Back | Table of Contents | Next>>

Last Modified: 24 Jan 2010

URL: http://www.usconstitution.net/xconst_Am14.html

C

Code of Alabama Currentness
Title 6. Civil Practice.
Chapter 5. Actions. (Refs & Annos)
Article 29. . Medical Liability Act of 1987. (Refs & Annos)
§ 6-5-540. Legislative intent.

It is hereby declared by the Legislature of the State of Alabama that a crisis threatens the delivery of medical services to the people of Alabama and the health and safety of the citizens of this state are in jeopardy. In accordance with the previous declaration of Legislature contained in Act 513 of the Regular Session of the 1975 Alabama Legislature it is the declared intent of this Legislature to insure that quality medical services continue to be available at reasonable costs to the citizens of the State of Alabama. This Legislature finds and declares that the increasing threat of legal actions for alleged medical injury causes and contributes to an increase in health care costs and places a heavy burden upon those who can least afford such increases, and that the threat of such actions contributes to expensive medical procedures to be performed by physicians and other health care providers which otherwise would not be considered necessary, and that the spiraling costs and decreasing availability of essential medical services caused by the threat of such litigation constitutes a danger to the health and safety of the citizens of this state, and that this article should be given effect immediately to help control the spiraling cost of health care and to insure its continued availability. Additionally, the Legislature finds that the increasing threat of legal actions for alleged medical injury has resulted in a limitation on the number of physicians providing specialized health care in this state. Because of the limited number of insurers offering professional liability coverage and because of the prejudice to the rights of the defendant health care provider through the interjection of evidence of insurance, the Legislature finds that the interest of all citizens will best be served by prohibiting the introduction of evidence that a witness testifying at trial is insured by the same insurer as the defendant health care provider.

CREDIT(S)

(Acts 1987, No. 87-189, p. 261, § 1.)

Amendments Received Through December 1, 2009.

END OF DOCUMENT

C

Code of Alabama Currentness
Title 6. Civil Practice.
Chapter 5. Actions. (Refs & Annos)
Article 29. . Medical Liability Act of 1987. (Refs & Annos)
§ 6-5-546. Venue of actions; transfer.

In any action for injury or damages or wrongful death whether in contract or in tort against a health care provider based on a breach of the standard of care, the action must be brought in the county wherein the act or omission constituting the alleged breach of the standard of care by the defendant actually occurred. If plaintiff alleges that plaintiff's injuries or plaintiff's decedent's death resulted from acts or omissions which took place in more than one county within the State of Alabama, the action must be brought in the county wherein the plaintiff resided at the time of the act or omission, if the action is one for personal injuries, or wherein the plaintiff's decedent resided at the time of the act or omission if the action is one for wrongful death. If at any time prior to the commencement of the trial of the action it is shown that the plaintiff's injuries or plaintiff's decedent's death did not result from acts or omissions which took place in more than one county, on motion of any defendant the court shall transfer the action to such county wherein the alleged acts or omissions actually occurred. For the convenience of parties and witnesses, in the interest of justice, a court may transfer any action to any other county where it might have been brought hereunder and/or may order a separate trial as to any claim or party.

CREDIT(S)

(Acts 1987, No. 87-189, p. 261, § 7.)

Amendments Received Through December 1, 2009.

END OF DOCUMENT

C

Code of Alabama Currentness
Title 6. Civil Practice.
Chapter 5. Actions. (Refs & Annos)
Article 29. . Medical Liability Act of 1987. (Refs & Annos)

§ 6-5-548. Burden of proof; reasonable care as similarly situated health care provider; no evidence admitted of medical liability insurance.

(a) In any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case.

(b) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, if the health care provider whose breach of the standard of care is claimed to have created the cause of action is not certified by an appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself or herself out as a specialist, a "similarly situated health care provider" is one who meets all of the following qualifications:

(1) Is licensed by the appropriate regulatory board or agency of this or some other state.

(2) Is trained and experienced in the same discipline or school of practice.

(3) Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred.

(c) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, if the health care provider whose breach of the standard of care is claimed to have created the cause of action is certified by an appropriate American board as a specialist, is trained and experienced in a medical specialty, and holds himself or herself out as a specialist, a "similarly situated health care provider" is one who meets all of the following requirements:

(1) Is licensed by the appropriate regulatory board or agency of this or some other state.

(2) Is trained and experienced in the same specialty.

(3) Is certified by an appropriate American board in the same specialty.

(4) Has practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred.

(d) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, no evidence shall be admitted or received, whether of a substantive nature or for impeachment purposes, concerning the medical liability insurance, or medical insurance carrier, or any interest in an insurer that insures medical or other professional liability, of any witness presenting testimony as a "similarly situated health care provider" under the provisions of this section or of any defendant. The limits of liability insurance coverage available to a health care provider shall not be discoverable in any action for injury or damages or wrongful death, whether in contract or tort, against a health care provider for an alleged breach of the standard of care.

(e) The purpose of this section is to establish a relative standard of care for health care providers. A health care provider may testify as an expert witness in any action for injury or damages against another health care provider based on a breach of the standard of care only if he or she is a "similarly situated health care provider" as defined above. It is the intent of the Legislature that in the event the defendant health care provider is certified by an appropriate American board or in a particular specialty and is practicing that specialty at the time of the alleged breach of the standard of care, a health care provider may testify as an expert witness with respect to an alleged breach of the standard of care in any action for injury, damages, or wrongful death against another health care provider only if he or she is certified by the same American board in the same specialty.

CREDIT(S)

(Acts 1987, No. 87-189, p. 261, § 9; Acts 1996, No. 96-511, p. 650, § 3.)

Amendments Received Through December 1, 2009.

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness
Title 13. Evidence, Process and Juries
Chapter 3. Process, Notice, and Publication
§ 13-3-57. Service on nonresidents; generally

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state. Service of summons and process upon the defendant shall be had or made as is provided by the Mississippi Rules of Civil Procedure.

Any such cause of action against any such nonresident, in the event of death or inability to act for itself or himself, shall survive against the executor, administrator, receiver, trustee, or any other selected or appointed representative of such nonresident. Service of process or summons may be had or made upon such nonresident executor, administrator, receiver, trustee or any other selected or appointed representative of such nonresident as is provided by the Mississippi Rules of Civil Procedure, and when such process or summons is served, made or had against the nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident it shall be deemed sufficient service of such summons or process to give any court in this state in which such action may be filed, in accordance with the provisions of the statutes of the State of Mississippi or the Mississippi Rules of Civil Procedure, jurisdiction over the cause of action and over such nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident insofar as such cause of action is involved.

The provisions of this section shall likewise apply to any person who is a nonresident at the time any action or proceeding is commenced against him even though said person was a resident at the time any action or proceeding accrued against him.

CREDIT(S)

Laws 1940, Ch. 246, § 1; Laws 1958, Ch. 245, § 1; Laws 1964, Ch. 320, § 1; Laws 1968, Ch. 330, § 1; Laws 1971, Ch. 431, § 1; Laws 1978, Ch. 378, § 1; Laws 1980, Ch. 437, § 1; Laws 1991, Ch. 573, § 98, eff. July 1, 1991.

Current through End of the 2009 Regular and Extraordinary Sessions

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness
Title 85. Debtor-Creditor Relationship
Chapter 5. Joint and Several Debtors (Refs & Annos)
§ 85-5-7. Joint tort-feasors; nature of liability

(1) As used in this section, "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent.

(2) Except as otherwise provided in subsection (4) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. In assessing percentages of fault an employer and the employer's employee or a principal and the principal's agent shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or omission of the employee or agent.

(3) Nothing in this section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly noted herein.

(4) Joint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it. Any person held jointly and severally liable under this section shall have a right of contribution from his fellow defendants acting in concert.

(5) In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tort-feasor is immune from damages. Fault allocated under this subsection to an immune tort-feasor or a tort-feasor whose liability is limited by law shall not be reallocated to any other tort-feasor.

(6) Nothing in this section shall be construed to create a cause of action. Nothing in this section shall be construed, in any way, to alter the immunity of any person.

CREDIT(S)

Laws 1989, Ch. 311, § 1, eff. July 1, 1989. Amended by Laws 2002, 3rd Ex. Sess., Ch. 2, § 4, effective January 1, 2003; Laws 2002 3rd Ex. Sess., Ch. 4, § 3, effective January 1, 2003; Laws 2004, 1st Ex. Sess., Ch. 1, § 6,

eff. September 1, 2004.

DATE EFFECTIVE AND APPLICATION

<Sections relating to tort reform, civil proceedings and jury service in civil actions were amended or added by Laws 2004, 1st Ex. Sess., Ch. 1. This section was amended by § 6 of Laws 2004, 1st Ex. Sess., Ch. 1. Section 19 of Laws 2004, 1st Ex. Sess., Ch. 1 is a severability provision. Section 20 of Laws 2004, 1st Ex. Sess., Ch. 1 provides:>

<"Sections 8 through 15 of this act shall take effect and be in force from and after January 1, 2007; the remainder of this act shall take effect and be in force from and after September 1, 2004, and Sections 1 through 7 of this act shall apply to all causes of action filed on or after September 1, 2004.">

Current through End of the 2009 Regular and Extraordinary Sessions

END OF DOCUMENT

court whether the case was settled. The report shall not disclose any particulars of the settlement.

[Amended November 2, 2000; amended effective June 27, 2002.]

EXHIBIT "B"

COURT ANNEXED MEDIATION RULES FOR CIVIL LITIGATION

XV. STANDARDS OF CONDUCT FOR MEDIATORS

The following standards shall apply to and govern the conduct of mediators conducting mediation pursuant to these Rules.

Comment

These standards are drawn from Model Standards of Conduct for Mediators promulgated by the American Arbitration Association and the Alternate Dispute Resolution Section of the American Bar Association. Certain adjustments have been made in the Model Standards to conform this Rule XV to the text and practices set forth in the other sections of these Court Annexed Mediation Rules for Civil Litigation.

A. Self–Determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self–Determination by the Parties.

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Having complied in good faith with any order entered under Rule III, any party may withdraw from mediation at any time.

Comment

The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.

A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

Mediation under these rules is conducted in association with proceedings pending in the courts of the state, pursuant to orders of the courts in which the subject cases are pending as described in Rule III. Mediation is commenced by an order of the assigning court, which must be complied with in good faith. Failure to abide by such an order is subject to sanctions under

Rule VI. Therefore, prior to withdrawing from or terminating a mediation, the parties must have fully performed her or his obligation under such an order and under the rules.

B. Impartiality: A Mediator shall Conduct the Mediation in an Impartial Manner.

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

Comment

A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator. When mediators are appointed by a court, the appointing court shall make reasonable efforts to ensure that mediators serve impartially.

A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

C. Conflicts of Interest: A Mediator shall Disclose All Actual and Potential Conflicts of Interest Reasonably Known to the Mediator.

After disclosure, the mediator shall decline to mediate unless all parties the mediator, or the court has assigned the mediator by order. The need to protect against conflicts of interest also governs conduct that occurs during and after the mediation.

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed, and the parties shall immediately notify the court that the mediator has so declined.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

Comment

A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.

Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressure from outside of the mediation process should never influence the mediator to coerce parties to settle.

C

West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Evidence
Article IV. Relevancy and Its Limits
Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

COMMENT

Relevant evidence may be inadmissible when its probative value is outweighed by its tendency to mislead, to confuse, or to prejudice the jury. If the introduction of the evidence would waste more time than its probative value was worth, then a trial judge may rightly exclude such otherwise relevant evidence. By providing for the exclusion of evidence whose probativeness is outweighed by prejudice, Mississippi is following existing federal and state practice. U.S. v. Renfro, 620 F.2d 497 (5th Cir. 1980), cert. denied 449 U.S. 921, 101 S.Ct. 321, 66 L.Ed.2d 149 (1980). Such a rule also keeps collateral issues from being injected into the case. Hannah v. State, 336 So.2d 1317 (Miss. 1976), cert. denied , 429 U.S. 1101, 97 S.Ct. 1125, 51 L.Ed.2d 551 (1977); Coleman v. State, 198 Miss. 519, 23 So.2d 404 (1945). This rule also gives the trial judge the discretion to exclude evidence which is merely cumulative. Carr v. State, 208 So.2d 886 (Miss. 1968).

Rules of Evid., Rule **403**, MS R REV Rule **403**

Current with amendments received through June 1, 2009

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Evidence
Article IV. Relevancy and Its Limits
➡ **Rule 408. Compromise and Offers to Compromise**

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

COMMENT

Evidence of an offer to compromise a claim is not receivable in evidence as an admission of either the validity or invalidity of the claim. The rule is based on two reasons. First, the evidence is irrelevant, since the offer may be motivated by a desire for peace rather than by a recognition of liability. Secondly, public policy favors the out-of-court compromises and settlement of disputes. The same policy underlines M.R.C.P. 48 which provides that evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

*Pre-rule practice in Mississippi was similar to the rule with one significant difference. Under Rule **408** statements of admission facts made in negotiations are excluded from evidence. In Mississippi, an admission made in a settlement negotiation has been admissible against the declarant. See McNeer & Dood v. Norfleet, 113 Miss. 611, 74 So. 577 (1917).*

*Rule **408** only excludes offers when the purpose is proving the validity or invalidity of the claim or amount. Therefore, an offer for another purpose may well be admissible at trial.*

Also, it is important to note that offers which are made in settlement negotiations are not necessarily excluded if they are otherwise discoverable.

Rules of Evid., Rule **408**, MS R REV Rule **408**

Current with amendments received through June 1, 2009

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Professional Conduct
Client-Lawyer Relationship
Rule 1. 10. Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.4.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

CREDIT(S)

[Amended effective November 3, 2005 to add reference to Rule 2.4.]

COMMENT

Definition of "Firm". *For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two prac-*

titioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether a law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.

*Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule **1. 10** were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule **1. 10** were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.*

***Principles of Imputed Disqualifications.** The rule of imputed disqualification stated in paragraph (a) gives effect to the principles of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owned by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).*

***Lawyers Moving Between Firms.** When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no*

longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

***Confidentiality.** Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.*

Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer

individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Adverse Positions. *The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1. 10(b) and (c) concerning confidentiality have been met.*

CODE COMPARISON

DR 5-105(D) provides that "If a lawyer is required to decline or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or affiliate with him or his firm, may accept or continue such employment."

See MSB Ethics Opinion Nos. 54, 58 and 87.

Rules of Prof. Conduct, Rule 1. 10, MS R RPC Rule 1. 10

Current with amendments received through June 1, 2009

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Professional Conduct
Client-Lawyer Relationship
Rule 1. 12. Former Judge, Arbitrator, Mediator or Other Third Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or as a law clerk to such person or as an arbitrator, mediator, or other third-party neutral.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

CREDIT(S)

[Amended effective November 3, 2005 to include third party neutrals generally.]

COMMENT

This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the

fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Terminology. Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. Rule 2.4.

Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

Requirements for screening procedures are stated in Terminology. Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[Amended effective November 3, 2005.]

CODE COMPARISON

Paragraph (a) is substantially similar to DR 9-101(A), which provides that "A lawyer shall not accept employment in a matter upon the merits of which he has acted in a judicial capacity." Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies. There is no counterpart in the Code to paragraphs (b), (c) or (d).

With regard to arbitrators, EC 5-20 states that "a lawyer who has undertaken to act as an impartial arbitrator or mediator, ... should not thereafter represent in the dispute any of the parties involved." DR 9-101(A) does not provide a waiver of the disqualification applied to former judges by consent of the parties. However, DR 5-105(C) is similar in effect and could be construed to permit waiver.

Rules of Prof. Conduct, Rule **1. 12**, MS R RPC Rule **1. 12**

Current with amendments received through June 1, 2009

END OF DOCUMENT

West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Professional Conduct
Counselor
Rule 2. 4. Lawyers Serving as Third Party Neutrals

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

CREDIT(S)

[Adopted effective November 3, 2005.]

COMMENT

Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

Unlike non-lawyers who serve as third-party neutrals, lawyers serving in this role may experience unique prob-

lems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration, the lawyer's duty of candor is governed by Rule 3.3 Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

[Adopted effective November 3, 2005.]

Rules of Prof. Conduct, Rule **2. 4**, MS R RPC Rule **2. 4**

Current with amendments received through June 1, 2009

END OF DOCUMENT