IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2009-CA-00599

SHARON DUNN
Appellant

versus

DR. JOHN YAGER
Appellee

APPELLANT'S BRIEF

On Direct Appeal from the Circuit Court
of Jackson County, Mississippi
NO. CI-96-0124(3)

ORAL ARGUMENT REQUESTED

Submitted by:

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(1)

CERTIFICATE OF INTERESTED PERSONS

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

1) Sharon Dunn;

2) Gregg L. Spyridon;

3) Philip G. Smith;

4) Owen Bradley;

5) Dr. John Yager;

6) The Neurology Center, P.C.;

7) Richard Franklin;

8) Brett Williams;

9) Norman E. Waldrop; and

10) Kevin M. Melchi.

Certified, this the 15 day of February, 2010.

GREGG L. SPYRIDON
PHILIP G. SMITH

(2)
STATEMENT REGARDING ORAL ARGUMENT

This case arises from severe disabling injuries, including the permanent loss of eye-sight and burns and scarring over 75% of her body, sustained by Sharon Dunn, from an adverse reaction to the off-label use of an anti-seizure medication by Dr. Yager to treat Ms. Dunn's chronic low back pain. Appellant, Sharon Dunn, respectfully requests oral argument in connection with this appeal because oral argument will be helpful in resolving complex issues of law and fact that are involved in this case.

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STATEMENT OF THE ISSUES

I. Whether the trial court erred in precluding Sharon Dunn from timely adding or substituting a neurology expert of her choice more than four years or 1,509 days prior to trial, before any experts were deposed, and where there was no prejudice to the defendant.

II. Whether the trial court erred in precluding Sharon Dunn from establishing the standard of care owed by a neurologist by introducing the video deposition of defendant's neurologist, Dr. Harry Gould: (1) who had been designated by the defendant as an expert; (2) who had been deposed by all parties regarding the standard of care owed by a neurologist; (3) whose deposition had been used by both Dr. Yager and Sharon Dunn in support of Motions for Summary Judgment; and (4) who was never withdrawn or released by the Dr. Yager as a defense expert.

III. Whether the trial court erred in precluding Sharon Dunn from impeaching the defendant, Dr. Yager, at trial with the video deposition of defendant's neurology expert, Dr. Harry Gould, when the defendant, Dr. Yager: (1) was qualified, tendered and accepted by the court as a neurology expert at trial; (2) offered opinions at trial as to the proper standard of care required of a neurologist, and (3) acknowledged reading the deposition of Dr. Harry Gould and his opinions regarding the proper standard of care.

IV. Whether the trial court erred in precluding Sharon Dunn from introducing excerpts from the 2009 PDR while allowing Dr. Yager to introduce excerpts from the 1996, 1997, and 2008 PDR. The 2009 PDR quantifies well known material risks of

carbamezapine (generic Tegretol), including severe dermatological reactions, such as Stevens Johnson Syndrome, which would have mandated disclosure of those risks to a patient like Sharon Dunn in order to obtain her informed consent.

V. Whether the trial court erred in instructing the jury that in order to obtain a patient's "informed consent," a doctor need not disclose all the material risks associated with taking Tegretol, only those risks that are customarily and routinely disclosed by a physician pursuant to the "alleged" standard of care and that a finding that Dr. Yager did not breach the "alleged" standard of care absolved Dr. Yager of all theories of liability, including lack of informed consent.

VI. Whether the trial court erred in precluding Sharon Dunn from participating in her own trial by addressing the jury during closing argument in accordance with Article 3, Section 25, of the Mississippi Constitution.

VII. Whether the trial court erred in disclosing to the jury the fact that the plaintiff, Sharon Dunn, had settled with former defendants who did not participate in the trial without establishing the relevance of the settlement and that the probative value of the settlement outweighed the prejudicial effect of the disclosure of the settlement.

Malkin was denied by the Mississippi Supreme Court. This matter proceeded to trial without Sharon Dunn's neurology expert of choice and on January 8, 2009, the jury returned a verdict for the defendant, Dr. Yager (Excerpts: Record p. 3276) and Judgment was entered on January 13, 2009. (Excerpts: Record p. 3277) & (Record p. 65). On January 23, 2009, plaintiff filed her Motion for Judgment Notwithstanding the Verdict, Relief from Judgment, and New Trial, (Excerpts: Record pp. 3278-86)[3] which was denied on March 13, 2009. (Excerpts: Record p. 3367). Plaintiff's Notice of Appeal was filed on April 9, 2009. (Record p. 3367).

III. FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Prior to and during trial, which proceeded solely against Dr. Yager, a neurologist, the trial court erroneously (a) limited Sharon Dunn from putting on her case-in-chief with an expert neurologist of her choice; (b) precluded Ms. Dunn from impeaching Dr. Yager with his own neurology expert; (c) excluded evidence of the material risks of Tegretol; (d) gave inaccurate, misleading and unsupported jury instructions on informed consent; (e) restricted Sharon Dunn from participating in her own trial; and (f) allowed into evidence irrelevant and prejudicial evidence of her prior settlements.

A. Prior to the trial on the merits, the trial court improperly precluded Sharon Dunn from proceeding with the neurology expert of her choice

Sharon Dunn was severely prejudiced by the trial court's refusal to allow her to use her neurology expert of choice. The trial court's exclusive basis for precluding Sharon Dunn from using Dr. Stanley Malkin as her expert neurologist at trial was Sharon Dunn's failure to timely designate Dr. Malkin, a technical, but not substantive violation of an agreed Case

[3]The exhibits to this motion appear in the record at pp. 3287-3365.

Management Order. As demonstrated below, the procedural background of this case reveals that the inclusion of Dr. Malkin would not have resulted in any prejudice to Dr. Yager. More importantly, Sharon Dunn was entitled to present the best possible case, which was jeopardized when the trial court forced Sharon Dunn to hinge her success on the opinions of Dr. John Olson, who was ridiculed by the defendant throughout the trial for all of his shortcomings, and whom plaintiff tried to avoid by attempting to substitute Dr. Malkin for Dr. Olson or by calling defendant's expert, Dr. Harry Gould.

On July 20, 2004, the trial court entered an Agreed Case Management Order which required Sharon Dunn to designate her experts by August 20, 2004 and rebuttal experts by October 5, 2004. (Record p. 934). This Case Management Order also provided a trial date of January 10, 2005. On August 20, 2004, Sharon Dunn designated Dr. John Olson, who was not board certified, as an expert in Neurology. (Excerpts: Record pp. 1383-84). Thereafter, on September 27, 2004, Dr. Yager designated two board certified neurology experts, Dr. Kevin L. McKinley and Dr. Terry J. Millette. (Record p. 31). On October 13, 2004, in anticipation that Dr. Yager would claim that under Alabama law[4] only a board certified neurologist could testify against him, Sharon Dunn designated Dr. Stanley Malkin, a board certified neurologist. (Excerpts: Record pp. 2091-2111). Dr. Malkin's designation was identical to the designation of Dr. Olson. (Excerpts: Record pp. 2047-48, 2061-68, 2091-95 & 2096-2100). On October 25, 2004, the Mississippi Supreme Court granted Dr. Yager's interlocutory appeal on personal jurisdiction and stayed all proceedings in the trial court for two years. (Excerpts: Record p. 2195). At the time the Mississippi Supreme Court stayed this matter, no neurology experts

[4]See Ala. Code § 6-5-548(c)(3).

Dunn was precluded a second time from impeaching Dr. Yager with the testimony of Dr. Gould during defendant's case-in-chief. (Trial Transcript pp. 1526-27).

During Dr. Yager's direct examination by defense counsel, Dr. Yager was qualified, tendered, and accepted by the court as an expert in neurology, physiology, biophysics and neurophysiology. (Trial Transcript pp. 1551-65). During direct examination, Dr. Yager testified regarding the standard of care of neurologist. (Trial Transcript pp. 1755, 1816-18, 1822 & 1866). During Dr. Yager's cross-examination, the trial court precluded Sharon Dunn from questioning Dr. Yager regarding Dr. Gould's standard of care deposition testimony. (Trial Transcript pp. 2002-06). On December 11, 2008, Sharon Dunn sought to introduce the trial testimony of Dr. Gould by video deposition, to which Dr. Yager objected relying on the case of *General Motors Corp. v. Jackson*. (Trial Transcript pp. 2022-38). On December, 11, 2008, Sharon Dunn also filed her Memorandum in Support of the Introduction of Former Testimony of Defendant's Neurologist Expert Dr. Harry Gould distinguishing *Jackson* from the case at bar. (Record pp. 3051-3138). In response to Dr. Yager's objection to the introduction of Dr. Gould's testimony, the trial court precluded the introduction of Dr. Gould's testimony stating, in relevant part: "The Court noted that the jurors, at least at the outset of this trial, were taking copious notes. Under the *General Motors* case, I find the testimony of Dr. Gould to he highly prejudicial to the defense and will not allow it. That's the ruling of the court. . . ." (Trial Transcript p.2037, ln. 29 - p.2038, ln. 5) (See also Trial Transcript p.2034, ln. 29 - p.2038, ln. 5).

C. *Sharon Dunn was prejudiced by the preclusion of the 2009 Physician's Desk Reference*

During the trial of the case, Dr. Yager and all of his experts contended that the risk of developing severe dermatological reactions such as SJS from Tegretol (carbamezapine) was about one (1) in a million. (Trial Transcript p. 1827, ln. 1 (Dr. Yager); pp. 2402-03 (Dr. Wilson)). Sharon Dunn contended that the risk was one hundred (100) times greater, or less than one in 10,000. (Excerpts: Plaintiff's Trial Exhibit 106, p. 15, ¶1, identification) (Excerpts: Trial Transcript pp. 3240-42 & 3274-76). In 2008, the FDA recognized the greater risk and included it in the package insert for generic carbamezapine, which was published in the 2009 PDR. (Excerpts: Plaintiff's Trial Exhibit 110, identification). Despite the fact that the Court freely allowed the defendant to introduce excerpts from the 1996, 1997, and 2008 PDR, (Defendant's Trial Exhibit 110, 130 & 131) the trial court precluded plaintiff from introducing this highly probative evidence, which would have not only aided the jury's understanding of the material risks of Tegretol, but also would have contradicted and impeached the defendant's experts, including Dr. Yager, regarding the material risks of using Tegretol.

D. *The trial court gave confusing and misleading jury instructions which improperly cumulated Sharon Dunn's informed consent and negligence causes of action.*

Sharon Dunn contends that her instruction P8A (Excerpts: Record pp. 3240-41) accurately reflected Mississippi's law on informed consent and that Dr. Yager's instructions D10 and D30 (Excerpts: Record pp. 3173 & 3195-96 respectively) directly conflict with P8A. In particular, Sharon Dunn contends that jury instructions D10 and D30 incorrectly instruct the jury that in order to obtain Sharon Dunn's informed consent, a doctor does not have to disclose all of the material risks associated with prescribing Tegretol, only those risks which are routinely disclosed by doctors of similar training under the same or similar circumstances.

Additionally, defendant's jury instructions D8A, 14, 18, 27, and 33, improperly instructs the jury that a finding that Dr. Yager's actions met the standard of care for a "similarly trained" doctor that he was absolved of all liability, including informed consent, which does not depend on the applicable standard of care, but rather disclosure of all material risks.

E. The trial court committed reversible error when it refused to allow Sharon Dunn to participate in closing argument.

In an attempt to also highlight the testimony and credibility of Sharon Dunn regarding the critical issue of what warnings Dr. Yager gave to Sharon Dunn, counsel for Sharon Dunn requested that Sharon Dunn be allowed to provide a portion of her closing argument. (Record, p. 3562-3564). Despite advising the trial court that a party's participation in their own civil trial was protected under of Article 3 Section 25, the trial court nevertheless refused to allow Sharon Dunn participate in closing argument. The trial court provided:

> Actually, in 1976, when I prosecuted Jimmy Lee Grafe for the murder of a three-year-old girl, Judge Palmer would not let him, at closing, address the Supreme Court - - or address the jury. The Supreme Court reversed; but that is in a criminal case only. It's not applicable to the civil case, and it's overruled. Move on.
> (Trial transcript p. 3564).

F. The trial court improperly notified the jury of Sharon Dunn's prior settlement before the defendant established its relevance and weighing its probative value.

The plaintiff, Sharon Dunn, was prejudiced before the opening statements were presented in this case. At the onset of this trial, and over the objection of plaintiff expressed in her Motion *In Limine* (Record, p. 2568), the trial court advised the jury that Sharon Dunn had received settlement funds from defendants not at trial. Addressing the jury directly, the trial court stated:

> There were a number of defendants. Some of those defendants have had their case concluded against them, some have settled, and you'll hear that from the

> lawyers. The settlement amounts, and how some of these cases have been resolved, are not your concern. You're here as a jury to give that lady in the back there, Ms. Dunn, and this gentleman to my right, Dr. Yager, a fair trial. And you need to listen to the facts about Dr. Yager and this lady, and not be concerned about these other individuals. As to Drs. Lehman, Coss and Novartis, the pharmaceutical company, you'll receive instructions at the end of the trial to explain what you need to do with respect to any other defendants. (Trial Transcript p. 620, lns. 3-18).

Despite the trial court's pre-trial instruction, the jury was never instructed by the trial court regarding how to handle the settling defendants because Dr. Yager never attempted to apportion fault to any of the absent defendants. In fact, the Defendant voluntarily withdrew their only proposed instruction which sought to cast liability onto the settling physician, Dr. Coss. (Record p. 3161-62). The verdict form submitted by Dr. Yager and allowed by the trial court did not provide for the apportioning of fault to any of the settling defendants. (Record p. 3272).

SUMMARY OF THE ARGUMENT

Sharon Dunn was prescribed Tegretol, an anti-epileptic drug, by defendant, Dr. Yager, to treat her persistent complaint of low back pain following a work-related fork lift accident at Ingalls Shipyard. According to the manufacturer's label (package insert), which was intended for the physician, patients should be made aware of the early signs and symptoms of fever, sore throat, ulcers in the mouth. (Excerpt: Plaintiff's Trial Exhibit 6).

Two weeks after Sharon Dunn began taking the Tegretol, she developed flu-like symptoms while at work at Ingalls, including fever and sore throat. She testified that she felt like she was getting the flu and went home at the end of her shift to try and sleep it off, but continued to take the Tegretol. The next morning, her symptoms had become worse. Her fever was elevated, she could not swallow and she had developed ulcers in her mouth. She could not see out of one eye and she had blurred vision in the other. She consulted a family physician, Dr. Coss, who initially diagnosed her with conjunctivitis, stomatitis and a bacterial infection. The following day she was rushed to the Emergency Room of Stone County Hospital where she was diagnosed with Stevens Johnson Syndrome (SJS), a life threatening dermatologic reaction to Tegretol which, if not treated early, can and did result in the permanent, irreversible, loss of her vision and severe burns and scarring over 75% of her body.

Despite the clear manufacturer's warning to physicians, Dr. Yager did not advise Sharon Dunn that if she developed flu-like symptoms like fever and sore throat or ulcers in the mouth, that it may not be the flu, but rather, could be a serious life-threatening reaction to her medication and that she should stop the medicine immediately and consult a physician. At

trial, Sharon Dunn contended that the standard of care for a neurologist prescribing Tegretol off label for pain required the neurologist to advise the patient that if they developed flu-like symptoms such as fever, sore throat, and ulcers in the mouth, that it may not be the flu, but rather an adverse reaction to the medication, even if the symptoms appear several weeks after she began taking the medication. Sharon Dunn also contends that she was never informed of all the material risks associated with Tegretol and, as a result, she never gave her informed consent to the use of a life threatening anti-seizure medication to treat her non-life threatening chronic low back pain.

Sharon Dunn was not allowed to support her contentions with her neurologist of choice, board certified neurologist, Dr. Stanley Malkin, who would have supported all of her contentions. She was also not permitted to call one of the defendant's neurologist experts, Dr. Harry Gould, who also would have supported her claims. Sharon Dunn was not even allowed to impeach Dr. Yager with his own expert, Dr. Gould, despite the fact that Dr. Yager had been qualified, tendered and accepted by the court as an expert in the field of neurology and allowed to testify about the standard of care owed by a neurologist. Furthermore, when it came time to instruct the jury on informed consent, the court erroneously instructed the jury that informed consent was based, in whole or in part, on the standard of care of the treating physician and that if the defendant didn't breach the standard of care, Sharon Dunn's informed consent was presumed.

Sharon Dunn also contends that the court erred in refusing to allow her to participate in her own trial and in allowing Dr. Yager to introduce evidence of Sharon Dunn's prior settlement without establishing its relevance and that its probative value outweighs its prejudicial effect. Finally, Sharon Dunn contends that the court erred in allowing the defendant

to use FDA excerpts from the 2008 PDR, while precluding Sharon Dunn from introducing excerpts from the 2009 PDR, which quantified the material risks of Tegretol [including severe life threatening dermatological reactions] which would mandate disclosure to a patient like Sharon Dunn in order to obtain her informed consent to take the anti-seizure medication.

ARGUMENT

I. SHARON DUNN WAS PREJUDICED BY THE EXCLUSION OF EXPERT WITNESS AND THE DENIAL OF SUBSTITUTION OF DR. JOHN OLSON

Sharon Dunn was severely prejudiced by the trial court's refusal to allow her to designate the neurology expert of her choice, board certified neurologist Dr. Stanley Malkin. The trial court's sole basis for precluding Sharon Dunn from designating Dr. Malkin as her expert neurologist was not based upon any potential prejudice to Dr. Yager but rather what the trial court viewed as a technical violation of the Case Management Order. The trial court put Sharon Dunn in the precarious position of having to choose between relying on no expert neurologist at all, calling Dr. Olson or defendant's expert, Dr. Gould.

On July 20, 2004, the trial court entered an Agreed Case Management Order which required Sharon Dunn to designate her experts within thirty (30) days or by August 20, 2004, and rebuttal experts by October 5, 2004. (Record p.933). On August 20, 2004, Sharon Dunn timely designated seven (7) different experts, including neurologist, Dr. John Olson, who was not board certified. (Record p.1383-84). Thereafter, on September 28, 2004, Dr. Yager designated two (2) board certified neurology experts, Dr. Kevin L. McKinley and Dr. Terry J. Millette. (Record p. 31). On October 13, 2004, in an attempt to level the playing field, Sharon Dunn timely designated Dr. Stanley Malkin; a board-certified neurologist, as a rebuttal expert. (Excerpts: Record pp. 2091-2111). On October 15, 2004, Dr. Yager filed a motion to strike Dr. Malkin on the grounds that he was not a rebuttal expert as defined by the Case Management Order. (Record pp. 2002-05). Dr. Yager did not suggest he was prejudiced in anyway by the inclusion of Dr. Malkin as a rebuttal expert. As a result of delays unrelated to

this issue, the motion was not heard until August 24, 2006, when the Court struck Dr. Malkin, 679 days after his designation as a rebuttal expert. (Record pp. 2235-36). More importantly, Dr. Malkin was struck before any experts were deposed, before a trial date had been set and without any showing of prejudice to Dr. Yager.

The procedural background of this case reveals that the inclusion of Dr. Malkin would not have resulted in any unfair surprise or ambush to Dr. Yager or impeded the judicial administration of this matter. Most importantly, Sharon Dunn had a substantial right under Mississippi law to present her case with the neurology expert of her choice. This substantial right was significantly compromised when the trial court refused to allow her to designate Dr. Malkin or later call defendant's expert, Dr. Harry Gould at trial.

A. All the parties agree that Dr. John Olson should not have testified.

Dr. Yager was keenly aware that Dr. Olson was not a credible expert witness in neurology and that Sharon Dunn's case could not prevail by reliance on Dr. Olson. Counsel for Dr. Yager provided the following narrative concerning Dr. Olson during his closing argument which amply demonstrates Dr. Olson's inadequacies:

> What we have here is, we only had three neurologists testify here. Dr. Millette, Dr. Yager and now let's talk about Dr. Olson. Now, let's think about it. Mr. Spyridon goes all the way to Chicago and hires Mr. Smith, the guy who came in and put all the damage figures up; so he hires a high-powered economist to come in here and talk about all those damage figures, but when it got down to a neurologist, this is his guy. That's his guy. ***Now, if you had a good case against a neurologist, why would you have that guy? You know, if you really had a legitimate case against Dr. Yager, why would you pick him? This guy charges $1,000.00 an hour to come in here and say that, twice as much as any other expert witness. That's what you've got to pay that guy. He's not Board Certified. He's got a restricted medical license, he's got no hospital privileges, and even more than that, if you went to see him, you couldn't use your Blue Cross, you couldn't use your Aetna card.*** Do you know why? He's not approved. He said, you know, I don't take those for 20 or 25 years. Well, think about it. Here's a guy that he claims to practice neurology,

> and you can't even use your card, because he has no hospital privileges, he's not Board Certified, he's got a restricted medical license. ***They want you to take that guy's testimony and convict him of medical malpractice as a neurologist. He didn't even mention him in his opening or his closing. I wouldn't mention him, either; but he didn't. I wouldn't bring him up.***
>
> ***You know, I've been doing this for 30 years, and I'll tell you this, I've seen some really good expert witnesses and I've seen some really bad ones. I don't know what to say about him. I want you to know that's not usual. I mean, that's off the charts. And I'm not trying to make fun of the guy. He shouldn't have been here. But what it does is, it sums up the case. What is says to you, there is no Board Certified neurologist that was willing to come in here and testify, after looking at his records, and looking at the depositions, and looking at the testimony, and come in here and testify that he violated the standard of care.*** That's the best you've got. And that ought to tell you a lot. So you compare Dr. John Olson against Dr. Terry Millette and Dr. John Yager and Dr. Merlin Wilson. You compare that, because that is his neurology guy.

(Trial transcript p. 3542, ln. 1 - p. 3544, ln. 11). As defense counsel correctly stated: "***I don't know what to say about [Dr. Olson]. I want you to know that's not usual. I mean, that's off the charts. And I'm not trying to make fun of the guy. He shouldn't have been here.***" (Emphasis added). Defense counsel goes on to highlight those exact points Sharon Dunn argued for the substitution of Dr. Malkin. ***"He's not Board Certified. He's got a restricted medical license, he's got no hospital privileges, and even more than that, if you went to see him, you couldn't use your Blue Cross, you couldn't use your Aetna card."*** (Emphasis added). Several other colorful trial exchanges between Mr. Waldrop and Dr. Olson further highlight why Sharon Dunn should have been able to substitute Dr. Malkin.

B. *Mississippi law promotes equitable curing of discovery violations when curing does result in undue or unfair prejudice.*

The extreme sanction of striking an expert should be reserved as a last resort, and trial courts should protect a plaintiff's right to offer expert testimony in a manner helpful to the trier of fact. In *Buskirk v. Elliott*, 856 So.2d 255 (Miss., 2003), the Mississippi Supreme Court recognized that the striking of a witness is a sanction of last resort: "Every reasonable alternative means of assuring the elimination of any prejudice to the moving party and a proper sanction against the offending party should be explored before ordering exclusion." *Id.*, at 260. Refusing to allow the substitution of one expert for another constitutes an abuse of discretion in this case because at the time the motion to substitution Dr. Malkin was denied: (1) no neurology experts had been deposed; (2) no trial dated existed; (3) Dr. Malkin's proposed testimony was identical to Dr. Olson's (Excerpts: Record pp. 2047-48, 2061-68, 2091-95 & 2096-2100); and (4) Dr. Yager did not claim any prejudice would result from the substitution.

In *Mississippi Power & Light Co. v. Lumpkin*, 725 So.2d 721, 733-34 (Miss., 1998), the Mississippi Supreme Court adopted a four (4) part test to determine whether exclusion of an expert witness' testimony due to a discovery violation is proper:

1) The explanation for the transgression;
2) The importance of the testimony;
3) The need for time to prepare to meet the testimony; and
4) The possibility of a continuance.

"The first consideration involves a determination whether the failure was deliberate, seriously negligent or an excusable oversight. The second consideration involves an assessment of

harm to the proponent of the testimony. The third and fourth considerations involve an assessment of the prejudice to the opponent of the evidence, the possibility of alternatives to cure that harm and the effect on the orderly proceedings of the court." *Mississippi Power & Light Co. v. Lumpkin*, 725 So.2d 721, 733-34 (Miss., 1998).

C. *Sharon Dunn was unaware of Dr. Olson's deficiencies at the time of this designation.*

The basis of the trial court's striking Dr. Malkin appears to be solely the wording of its July 20, 2004 agreed case management order that Plaintiff's rebuttal expert "shall be limited to a field of expertise designated by any defendant for which plaintiff does not designate an expert." Plaintiff maintains that this wording allowed for the designation of Dr. Malkin, as his expertise is different due to his board certification, and was to be offered in rebuttal to rehabilitate anticipated attacks on Dr. Olson's lack of board certification and the requirement claimed by Dr. Yager that under Alabama law only a board certified neurologist could testify against him.[5] The substitution was made even more important to the plaintiff in light of certain information discovered by plaintiff's counsel regarding Dr. Olson's qualifications after Dr. Malkin was struck.

While Dr. Olson's curriculum vitae (Record p. 2251) and affidavit (Record p. 2252) may have provided Sharon Dunn notice that he was not board certified, the documents did not alert plaintiff's counsel to any past disciplinary action against him or restriction on his license. In direct response to the trial court's August 22, 2006 order striking Dr. Malkin as a rebuttal witness, plaintiff's counsel investigated Dr. Olson's qualifications further on September 7, 2006 and learned that he was not board eligible, he had been disciplined by the Louisiana State

[5] See Ala. Code § 6-5-548(c)(3). See also footnote 4 on page 6 of appellant's brief.

Board of Medical Examiners, and his license to practice medicine in Louisiana was restricted. (Excerpts: Record pp. 2237-59). If this information had been known to plaintiff at the time of the initial designation, Sharon Dunn would have selected and designated another expert prior to the initial report designation deadline of August 20, 2004. This was merely an inadvertent oversight on the part of plaintiff's counsel, who at the time of initial designation identified and retained six experts in the fields of epidemiology, FDA regulations, immunology, neurology, pharmacology, and warnings. (Record pp.1368-1460).

D. A breach of the standard of care for a neurologist was vital to the determination of this matter.

Sharon Dunn's medical malpractice/product liability case obviously involved significant medical and neurological issues for which expert testimony was required. Once all of Dr. Olson's shortcomings were discovered, it was obvious even to the most casual observer that Dr. Olson's qualifications were woefully inadequate and would not hold up against the defendant's experts. Sharon Dunn and her counsel were concerned that Dr. Olson's expertise would be questioned, so she designated another neurologist, Dr. Stanley Malkin, as a rebuttal expert. Dr. Malkin is board certified. Dr. Yager had previously filed a motion to apply Alabama law which would preclude Dr. Olson because he was not board certified. (Excerpts: Record p. 54, Dr. Yager's Motion to Apply Foreign Law).

E. Substitution of the testimony of Dr. Malkin would not necessitate additional time for either deposition or continuation of the trial.

Although the standard of review for the exclusion of evidence in Mississippi is abuse of discretion, exclusion of evidence substantiates reversal when exclusion results in prejudice and harm or adversely affect a substantial right of a party. *APAC Mississippi, Inc. v. Johnson* 15 So.3d 465, 471 (Miss. App. Ct., 2009)(internal citations omitted). When the trial court's

exclusion of evidence is "'arbitrary and clearly erroneous, amounting to an abuse of discretion, that decision will not stand.'" *APAC Mississippi, Inc. v. Johnson,* 15 So.3d 465, 471 (Miss. App. Ct., 2009)(quoting *Crane Co. v. Kitzinger*, 860 So.2d 1196, 1201 (Miss., 2003). Based on the lapse of time between designation and trial, it was arbitrary for the trial court to refuse the testimony of Dr. Stanley Malkin. Moreover, the purpose of the discovery rules were satisfied because Dr. Yager had ample notice to prepare and depose Dr. Malkin, eliminating any potential prejudice.

The purpose of the rules governing discovery of identification of expert witnesses, and generally of rules of civil procedure, is that trial by ambush should be abolished. *Buskirk v. Elliott*, 856 So.2d 255, 260 (Miss., 2003); see also *Jones v. Hatchett*, 504 So.2d 198, 201 (Miss.1987) (stating purpose of our civil discovery procedures is to prevent trial by ambush). "In determining whether the disclosure is seasonable, the paramount consideration is whether it was disclosed in time for the responding party to adequately examine, challenge and defend against the information." *Choctaw Maid Farms, Inc. v. Hailey*, 822 So.2d 911, 917 (Miss., 2002)(citing *Motorola Comm. & Elecs., Inc. v. Wilkerson*, 555 So.2d 713, 718 (Miss., 1989)).

On September 8, 2006, Sharon Dunn filed her Motion for Reconsideration or, Alternatively, to Substitute moving the Court to allow Dunn to use Dr. Malkin as a neurology expert. (Excerpts: Record pp. 2237-59). On September 29, 2006, the trial court refused to allow Sharon Dunn to substitute Dr. Malkin for Dr. Olson. (Record pp. 2269-70). At the time the trial court refused to allow Sharon Dunn to substitute Dr. Malkin, no neurology expert depositions had been taken, no trial was scheduled, and there was no showing of any prejudice to Dr. Yager. Based on actual trial date of December 1, 2008, more than 4 years, or 1,509 days, elapsed between Sharon Dunn's initial designation of Dr. Malkin and trial on

the merits. More importantly, Dr. Yager had two other board certified neurologists to counter anything Dr. Malkin may have offered as opinion.

In denying Sharon Dunn's Motion to Substitute Dr. Malkin, the trial court again based its denial on substitution solely on the timeliness of the substitution and did not consider the existence of prejudice. (Record p. 2269-70). The extreme measure of excluding credible proof is completely out of place in light of these circumstances and the complete lack of any prejudice to the Defendants. Defendants cannot possibly claim "trial by ambush." *Coltharp v. Camesale,* 733 So.2d 780 (Miss., 1999). The trial court's ruling resulted in prejudice and harm to Plaintiff Dunn and adversely affected her substantial right to offer proof of her injuries at trial. *See Palmer v. Volkswagen*, 904 So.2d 1077 (Miss., 2005)(this Court will reverse exclusion of evidence if error adversely affects substantial right of a party).

There are very few reported Mississippi cases dealing with the procedure and propriety of allowing a party to substitute one expert for another. Nonetheless, this Court's decisions in *Coltharp v. Camesale,* 733 So.2d 780 (Miss., 1990), *and Holladay v. Holladay,* 776 So. 2d 662 (Miss., 2001), both suggest that the substitution of one expert for another is permissible, as long as the new expert's opinions are either consistent with the original expert's or sufficiently and timely disclosed so that no surprise testimony will ambush the other side at trial. In the instant case, the designation of Malkins and Olson were identical. (Excerpts: Record pp. 2047-48, 2061-68, 2091-95 & 2096-2100). For that matter, these cases suggests that under proper circumstances a previously undisclosed expert may be permitted to testify if disclosed a mere ten (10) days prior to trial.

II. THE TRIAL COURT ERRED IN PRECLUDING SHARON DUNN FROM INTRODUCING THE VIDEO DEPOSITION OF DR. YAGER'S NEUROLOGY EXPERT, DR. HARRY GOULD

At trial, Dr. Yager's medical experts and Dr. Yager himself, who was qualified, tendered and accepted by the court as a neurological expert, all offered testimony to the effect that the standard of care for a neurologist and other physicians prescribing Tegretol does not require Dr. Yager to warn the patient that flu-like symptoms such as fever, sore throat and ulcers in the mouth, even when the onset is delayed, may not be the flu, but an adverse reaction to the Tegretol. They also testified that the standard of care does not require that Dr. Yager monitor the patient's blood. As noted above, Sharon Dunn was not permitted to call her preferred neurology expert, Dr. Malkin, who would have rebutted the defendant's claim. Faced with the prospect of having to rely on Dr. Olson, plaintiff attempted to call defendant's board certified neurologist, Dr. Harry Gould, who was retained by Dr. Yager and designated as an expert to be called at trial and who had been deposed by Sharon Dunn. Dr. Gould was clear in his deposition about what the standard of care required of a neurologist, like Dr. Yager, treating patients with Tegretol:

> Q: All right. What do you believe the standard of care is for a neurologist with respect to the information that he should convey to a patient who is being put on Tegretol for the treatment of pain?
>
> A. Okay. This is a medication that's not designed for pain. . . . This medication specifically has some - - some significant side effects that you should know about. **One is potential life threatening rashes. One is decrease in blood cell production**, both of white blood cells and red blood cells. You may not produce blood cells. If anything occurs other than those, that can be between you and the medicine. I want to know about it, give me a call. If there are any -- I blanked on one thing I was going to say.
> Q. Okay.
> A. It will come back.

Q. And what you just described is what you believe the standard of care is for a neurologist in terms of the type of information he needs to impart to a patient?
A. Correct. Oh, now, I've got it. If you have a -- **if you have fever, or you have chills**, or if you have any -- any adverse effects, stop the medicine, and then -- and give us a call.

(Excerpts: Plaintiff's Trial Exhibit 93, identification, Deposition of Dr. Harry Gould, p. 73, ln. 13 - p. 74, ln. 21)(Emphasis added).

BY MR. SPYRIDON:

Q: You would agree that regardless, there's no – there's no set list of things that a doctor does, but a neurologist or anybody prescribing medicine should arm the patient with enough information so that if she begins to experience some type of side effect that she can deal with it appropriately?
A: Right.
Q: Would you agree with that?
A: Yes. And if they – and again, if they have any questions, call, let us know.

MR. SPYRIDON

Thank you Doctor. That's all I have.

(Excerpts: Plaintiff's Trial Exhibit 93, identification, Deposition of Dr. Harry J. Gould, p. 165, ln. 23 - p. 166, ln. 10)(Emphasis added).

Dr. Yager and his medical experts also testified that the standard of care does not require a doctor to monitor a patient's blood when prescribing Tegretol for pain. However, the package insert for Tegretol and defendant's expert, Dr. Gould, disagreed. Dr. Gould testified in his deposition:

neurologist. Dr. Olson was not competent to give such testimony and Dr. Malkin had been excluded by the Court. That left only Dr. Harry Gould, the defendant's expert. However, the trial court excluded Dr. Harry Gould because earlier in the trial plaintiff's counsel had referred to Dr. Gould as defendant's expert in an attempt to impeach Dr. Yager, and as a result, the Court stated that the admission of Gould's testimony would have been "unfairly prejudicial" to the defendant citing Rule 403 and *General Motors Corporation v. Jackson*, 636 So.2d 310 (Miss., 1994). In response to Dr. Yager's objection to the introduction of Dr. Gould's testimony, the trial court precluded the introduction of Dr. Gould's testimony stating: "The Court noted that the jurors, at least at the outset of this trial, were taking copious notes. Under the *General Motors* case, I find the testimony of Dr. Gould to he highly prejudicial to the defense and will not allow it. That's the ruling of the court. . . ." (Excerpts: Trial Transcript p.2037, ln. 29 - p.2038, ln. 5)(See also Excerpts: Trial Transcript p.2034, ln. 29 - p. 2038, ln. 5).

In *General Motors*, the Mississippi Supreme Court affirmed the exclusion of the cumulative testimony of an expert initially retained by the plaintiff, but later withdrawn when his opinions were not only inconsistent with plaintiff's theory of the case, but consistent with the defendant's contentions. *General Motors Corp. v. Jackson*, 636 So.2d 310, 314-15 (Miss., 1992). Relying on Rule 403 of the Mississippi Rules of Evidence, the Mississippi Supreme Court held that the expert's theory of the accident was identical to that articulated by General Motors' own experts and would have added "nothing new to the evidence already presented and thus, would have been cumulative." *Id.* at 314. The Court went on to find that "allowing General Motors to call [the plaintiffs' expert] as a trial witness and to allude to the fact that he has been retained and later dismissed by the plaintiff would be highly prejudicial." *Id.* at 315. In affirming the exclusion of plaintiffs' former expert, the Mississippi Supreme Court concluded

that the trial court did not abuse its discretion in prohibiting General Motors from calling plaintiffs' former expert because the cumulative nature of the testimony was clearly outweighed by the prejudicial value. *Id.*

In the instant case, the probative value of Dr. Gould's testimony clearly outweighed its prejudicial value because: (1) Dr. Gould was the only competent expert that Sharon Dunn could call that supported her theory of the case regarding the standard of care; (2) the defendant had used Dr. Gould prior to trial to seek a dismissal of plaintiff's claim; (3) Dr. Gould's testimony was also impeachment evidence against Dr. Yager, who was qualified, tendered and accepted by the court as an expert neurologist and who offered opinion regarding the standard of care of a neurologist contrary to the opinions of Dr. Gould; and (4) defendants never released or withdrew Dr. Gould to prevent plaintiff from contacting or hiring Dr. Gould directly.

A. *Dr. Gould was the only expert witness plaintiff could call that supported her standard of care theory.*

As discussed earlier in this brief, when the trial court refused to allow Sharon Dunn to add or substitute neurologist, Dr. Malkin, as plaintiff's expert neurologist, Dr. Gould became the only competent witness whose testimony could be offered at trial that supported plaintiff's theory of the case that the standard of care of a neurologist required that the physician monitor the patient's blood and warn patient that flu-like symptoms could be an adverse reaction to the Tegretol. It was also consistent with the warnings in the package insert which the defendants claimed was outside the warnings required to be given by the standard of care. Thus, unlike the expert in *General Motors*, Dr. Gould's testimony was not cumulative, but rather, highly probative.

B. *Dr. Gould's Testimony was Impeachment Evidence: It was intended to be prejudicial.*

1. *Impeachment of Dr. Yager, the fact witness*

While the plaintiff initially called Dr. Yager as an adverse witness during her case in chief, the defendants elected to introduce his direct testimony during plaintiff's case in chief, immediately following his testimony as an adverse witness. While testifying as an adverse witness in plaintiff's case in chief, Dr. Yager was specifically asked what the standard of care required a neurologist to tell a patient being prescribed Tegretol. Dr. Yager was asked:

MR. SPYRIDON:

Q: Dr. Yager, I had asked you before the break about what you didn't tell Ms. Dunn when you were prescribing Tegretol, and my question to you is, isn't it true that the standard of care for a neurologist requires that the neurologist tell the patient that is receiving Tegretol, the following information: That the medicine is not designed for pain; that there is a good possibility or probability it will significantly improve the pain; there are some adverse effects to the medication. The frequent ones are drowsiness and light-headedness, but **the significant side effects are life-threatening rashes, and decrease in the white blood cells and red blood cells, and flu-like symptoms like fever and chills**, and that if you get any of these symptoms, that you're to stop the medicine and call the physician. **Do you agree that that's the standard of care for a neurologist**?

A: **No sir**.

(Trial Transcript, p. 1505, ln. 16 - p. 1506, ln. 4)(Emphasis added).

Q: In this case, you've retained expert neurologists to define what the standard of care is for a neurologist; isn't that true?

A: Yes, sir.

Q: All right. **Isn't it true that one of your experts testified that the standard of care is exactly what I read**?

A: **I don't believe so.**

Q: Let me show you the testimony of Dr. Gould at page 73, line 13 through 25, and through page 74, line 1 through 25.
THE COURT: Just a minute. Yes, sir, Mr. Franklin?
MR. FRANKLIN: Your Honor, he's trying to – I presume trying to impeach him with some other testimony from somebody else who

is not going to be – who has not testified. I object. It's improper impeachment. If so, if he does try to do this, in fairness to the witness, if he does try this tactic, we would ask that you make him put the rest of that deposition in.

THE COURT: This is the deposition of another retained expert who has supposedly set out the standard of care. Is that what I understand, first of all?

MR. SPYRIDON: Yes, sir, Your Honor.

MR. FRANKLIN: Yes, sir. Your Honor, may we approach on this?

THE COURT: No, sir. Objection sustained. Move on.

(Trial Transcript, p. 1506, ln. 5- p. 1507, ln. 9)(Emphasis added).

During Sharon Dunn's adverse examination of Dr. Yager, counsel for Sharon Dunn was precluded from impeaching Dr. Yager's expert neurology testimony with the deposition testimony of Dr. Gould. (Excerpts: Trial Transcript pp.1506-1508). The proposed deposition testimony of Dr. Gould was proffered into the record for identification as plaintiff's exhibit 83. (Excerpts: Trial Transcript pp. 1676-80). Sharon Dunn was precluded a second time during the adverse examination of Dr. Yager. (Excerpts: Trial Transcript pp. 1526-27). Dr. Yager testified regarding the standard of care during adverse examination. (Excerpts: Trial Testimony pp. 1505-09). The question posed to Dr. Yager regarding what the standard of care requires a neurologist to tell his patient was taken verbatim from the deposition of Dr. Yager's expert neurologist, Dr. Harry Gould. Since Dr. Yager disagreed with an expert that he admitted was hired by Dr. Yager to <u>define</u> the standard of care, it was proper to impeach him with Dr. Gould's testimony.[6]

[6]See Dr. Gould's testimony, appellant's brief at pp. 26-28.

2. *Impeachment of Dr. Yager, the Expert*

Immediately following his testimony as an adverse witness, he was called as a direct witness by the defendant during plaintiff's case in chief (Trial Transcript pp. 1551-52). Dr. Yager was qualified, tendered, and accepted by the court as an expert in the field of neurology, physiology, biophysics, and neuropsychology (Trial Transcript p. 1564-65). During the defense's direct examination, Dr. Yager was asked his opinions about the standard of care of a neurologist, not only based on his own education and experience, but based upon everything he reviewed in the case, including the medical depositions. (Trial Transcript p. 1866). Dr. Yager offered the following expert opinions:

MR. FRANKLIN:
Q: Dr. Yager, let me ask you this: You told us already that you've reviewed everything in the case; right?
A: Yes, sir.
Q: The medical records, **the medical depositions**, the laboratory works and the medical literature?
A: Correct.
Q: Now, I want to ask you your opinion, and this is based upon a reasonable degree of medical certainty. Based upon a reasonable degree of medical certainty, did you comply with the standard of care?
A: Yes, sir.
Q: Did you meet the standards that applied to neurologists practicing in the national medical community when you were treating your patient, Sharon Dunn?
A: Yes, sir.
Q: Did you meet the standard of care with regard to all of your treatment for Ms. Dunn?
A: Yes, sir.

(Trial Transcript p. 1866, ln. 1-20) (Emphasis added).

MR. FRANKLIN:
Q: When you had your conversation with Ms. Dunn, whenever you did prescribe the medicine to Ms. Dunn, did you meet the standard of care that applied to neurologists during that conversation with Ms. Dunn?

A: Yes, sir.
(Trial Transcript p. 1867 ln. 5-9).

During Dr. Yager's direct examination by defense counsel, Dr. Yager was tendered and accepted as an expert in neurology, physiology, biophysics, and neurophysiology. (Trial Transcript p. 1551-65). Dr. Yager testified regarding the standard of care. (Trial Transcript pp. 1755, 1816-18, 1822 & 1866).

There was no doubt that he was familiar with Dr. Gould's testimony. Dr. Yager was also asked if he read deposition testimony of all the neurologist experts in the case and he acknowledged that he did. (Trial Transcript p. 2002 ln. 24-25). However, while he was able to offer self-serving expert opinion regarding the standard of care applicable to him when treating Sharon Dunn, the court prohibited the plaintiff from impeaching Dr. Yager with the standard of care defined by Dr. Gould, a board certified neurologist and pain management specialist[7] that was hired on Dr. Yager's behalf to define the standard of care.[8] It is well settled in Mississippi and most, if not all, jurisdictions that an expert may be cross-examined and impeached with testimony and opinions of other qualified experts in the same field.

The Mississippi Supreme Court has "expressed that the trial court should allow liberal cross-examination of experts regarding bias, interest, and prejudice in medical negligence cases." *McCarty v. Kellum*, 667 So.2d 1277, 1285 - 86 (Miss., 1995)(citing *Hall v. Hilbun*, 466 So.2d 856, 875 (Miss., 1985)). "Additionally, Miss. R. Evid. 616 reads: For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." *McCarty v. Kellum*, 667 So.2d 1277, 1285

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[7] Plaintiff's proffered Trial Exhibit 93, marked for identification, p. 6, line 8 - p. 7, line 11).

[8] See trial testimony of Dr. Yager at p. 29 in appellant's brief.

-1286 (Miss., 1995). "'An expert's . . . basis of his conclusions are open to cross-examination. The jury, as is their province, may reject the expert's testimony just as they might any other witness.'" *Blake v. Clein* 903 So.2d 710, 729 (Miss.,2005)(quoting *Hollingsworth v. Bovaird Supply Co.*, 465 So.2d 311, 314 (Miss., 1985)). In *State Highway Com'n of Mississippi v. Havard*, 508 So.2d 1099, 1102 (Miss.,1987), the Mississippi Supreme Court found that it was proper to cross-examine an expert to determine what matters the expert had considered and what the expert had not considered in forming his opinion. *Id.* at 1102.

The fact that Dr. Yager hired and designated Dr. Gould as a neurology expert makes it abundantly clear that Dr. Gould was acknowledged by Dr. Yager to be an expert in the field of neurology and an authority on the standard of care. It was therefore entirely appropriate for Dr. Yager, who provided expert testimony contrary to the opinions offered by Dr. Gould in his deposition, to impeach or at least cross-examine Dr. Yager with Dr. Gould's opinions. Any protection or insulation from Dr. Yager's affiliation with Dr. Gould under *General Motors* was removed when Dr. Yager was qualified tendered and accepted by the court as an expert in the field of neurology and offered opinions regarding the standard of care of neurologists in his community and nationwide.

C. *Any prejudice attached to the introduction of Dr. Gould's deposition was entirely fair.*

Rule 403 does require exclusion of all prejudicial evidence, but only requires the exclusion of evidence whose probative value is outweighed by the danger of unfair prejudice. Miss. R. Evid. 403. In the instant case, when Dr. Yager used Dr. Gould's deposition testimony in support of his Motion for Summary Judgment seeking to dismiss some of plaintiff's claim,[9]

[9]On May 10, 2007, Dr. Yager filed his Second Motion for Partial Summary Judgment and Itemization of Facts in which he relies in part on the testimony of Dr. Gould as the basis for partial summary judgment. (Excerpts: Record p. 2311-12 & 3086-87).

Dr. Gould became fair game for all parties. The use of Dr. Gould's depositions in support of Dr. Yager's Motion for Summary Judgment was not an isolated occasion. Dr. Gould was used by a co-defendant, by the plaintiff, and a second time by Dr. Yager in support of pre-trial dispositive motions and oppositions thereto. On May 17, 2007, in Plaintiff's Memorandum in Opposition to Dr. Yager's Second Motion for Partial Summary Judgment and Itemization of Disputed Issues of Fact, Sharon Dunn relies on the deposition testimony of Dr. Gould as a basis for declining summary judgment. (Excerpts: Record p. 2400). On April 14, 2008, Sharon Dunn filed her Itemization of Facts in Support of Plaintiff's Motion for Partial Summary Judgment and relied on Dr. Gould's testimony as a basis for summary judgment. (Excerpts: Record p. 2941). In her Memorandum in support thereof, Sharon Dunn also relies on the deposition testimony of Dr. Gould. (Excerpts: Record p. 2948). In Dr. John G. Yager's Opposition to Plaintiff's Second Motion for Partial Summary Judgment, Dr. Yager again relies on the deposition testimony of Dr. Gould. (Excerpts: Record p. 2979-80).

To allow Dr. Yager to use his own expert as both a sword to support a dispositive motion and a shield to protect him at trial is patently unfair and should not be allowed, especially since Dr. Yager offered expert testimony and never released or withdrew Dr. Gould as an expert witness at anytime discussed *infra*. Moreover, Dr. Yager waived any potential protection afforded under *General Motors* when Dr. Yager relied on Dr. Gould's deposition testimony to advance this position. In *Blake v. Clein*, 903 So.2d 710, 726 (Miss.,2005), the Mississippi Supreme Court recognized that "[e]vidence, even if otherwise inadmissible, can be properly presented where a party has 'opened the door.'" *Id.*, at 726 (citing *Crenshaw v. State*, 520 So.2d 131, 134 (Miss.1988)).

D. Dr. Gould was and still is Dr. Yager's expert.

From the time Dr. Gould was first designated as Dr. Yager's neurology expert through the present, Dr. Gould has been and still is Dr. Yager's expert, whose opinions were voluntarily disclosed to all parties and used in support of Dr. Yager's defense. Dr. Yager never released or withdrew Dr. Gould as his expert. Rather, Dr. Yager simply declined to call him as a witness at trial.[10] The following exchange of correspondence amply demonstrates that Dr. Gould was and still is Dr. Yager's expert.

a) By letter dated November 26, 2008, Dr. Yager provided the following: "We do not plan on calling Dr. Harry Gould. As you may know, under Mississippi law this places certain restrictions on how you describe Dr. Gould to the jury." (Excerpts: Record p. 3065).

b) Sharon Dunn responded as follows:

> . . .Our position is that Dr. Gould was designated and retained as an expert on behalf of Dr. Yager. He subsequently gave a deposition in his capacity as Dr. Yager's expert and to the extent his deposition may be introduced at trial, it is our intention to introduce it and refer to Dr. Harry Gould as one of Dr. Yager's neurological experts. . . .
>
> In the meantime, please advise if you have any objection to us contacting and/or calling Dr. Gould live at trial. If we do not hear from you immediately, we will assume that you have no objection to us contacting Dr. Gould.

(Excerpts: Record p. 3071).

C) Dr. Yager responded as follows: " . . . We do object to your contacting Dr. Gould." (Excerpts: Record p. 3066)(Emphasis added).

Dr. Yager's counsel was clearly given the opportunity to release Dr. Gould and distance himself from Dr. Gould and his opinions. Dr. Yager declined to do so even after Sharon Dunn gave them notice that she intended to refer to Dr. Gould as Dr. Yager's expert if Dr. Yager

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[10] See appellant's brief, pp. 9-10.

chose not to release him. Having refused to release Dr. Gould and after being qualified, tendered, and accepted as an expert in the field of neurology, it was entirely appropriate impeachment evidence to introduce Dr. Gould's testimony and impeach Dr. Yager.

III. SHARON DUNN WAS PREJUDICED BY THE EXCLUSION OF THE 2009 PHYSICIAN'S DESK REFERENCE

During trial, Sharon Dunn attempted to admit into evidence the 2009 Physician's Desk Reference to refute the Defendant's position the incidence rate of Stevens-Johnson Syndrome was approximately one in a million. The 2009 Physician's Desk Reference was relevant in this matter because it confirmed higher incidence of Tegretol induced severe dermatological reactions, approximately "1 to 6 per 10,000 new users in countries with mainly Caucasian populations." (Excerpts: Plaintiff's Exhibit 110 identification). This higher incidence rate was known at the time Dr. Yager prescribed Tegretol to Sharon Dunn appearing in the New England Journal of Medicine in 1994. (Excerpts: Plaintiff's Exhibit 106, identification).[11] The 2009 PDR also confirmed the higher incidence rate estimate provided by Dr. Waring during his rebuttal testimony. (Excerpts: Trial Transcript pp. 3240-42 & 3274-76). Not only is the 2009 PDR relevant because it confirms the existence of a higher incidence rate of Tegretol induced severe dermatological reactions, Sharon Dunn was prejudice by the exclusion of the 2009 PDR in light of the introduction into evidence excerpts from the 1996, 1997 and 2008 Physician's Desk References by the defendant. (Defendant's Exhibits 110, 130 & 131 respectively).

[11]Plaintiff also proffered the 2008 generic carbamazepine package insert which also provided this higher incident rates. See Excerpts: plaintiff's trial exhibit 111.

IV. THE JURY WAS IMPROPERLY INSTRUCTED ON THE LAW OF INFORMED CONSENT

The trial of this case involved three separate theories of fault against Dr. Yager: (1) failure to obtain Sharon Dunn's informed consent to be treated with Tegretol for back and leg pain; (2) failure to warn Sharon Dunn of severe life-threatening dermatological, hematological, or hepatic adverse reactions to Tegretol, which manifest themselves in the early stages as flu-like symptoms and/or a decrease in white blood cells; and (3) failure to conduct proper blood work to monitor the effects of Tegretol. Defendant's jury instructions D8A, 10, 14, 18, 27 and 33 given by the trial court were abstract, misstated the applicable law, and were in direct conflict with plaintiff's jury instructions P8A and P7B, resulting in confusing, inaccurate and misleading jury instructions on the issue of "informed consent."

With regard to informed consent, Plaintiff Sharon Dunn submitted jury instruction P8A, which plaintiff contends accurately communicated the burden of proof for informed consent and supplied the jury with a legal basis for imposing or declining liability thereon. (Excerpt: Record p. 3240).[12] In stark contrast with Sharon Dunn's informed consent instruction (P8A), this Court also gave instruction D10 and D30 submitted by the Dr. Yager. (Excerpts: Record p. 3195-96 & 3173). Instructions D10 and D30 were improper because collectively they: (1) substitute a "customary practice" standard for disclosing risks as opposed to an absolute standard that requires the disclosure of **all** material risks; (2) required the jury to prematurely

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[12] *See Jamison v. Kilgore*, 903 So.2d 45, 49-50 (Miss., 2005)(quoting *Jamison v. Kilgore*, 905 So.2d at 612, (Miss. Ct. App., 2004)(citing *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So.2d 1346, 1363 (Miss., 1990)); *Jamison v. Kilgore*, 903 So.2d 45, 49-50 (Miss., 2005)(quoting *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So.2d 1346, 1363 (Miss., 1990)); *Reikes v. Martin*, 471 So.2d 385, 392 (Miss., 1985)(citing *Copeland v. Robertson*, 112 So.2d 236 (Miss., 1959)); *Whittington v. Mason*, 905 So.2d 1261, 1266 (Miss., 2005); *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So.2d 1346, 1364 (Miss., 1990).

absolve Dr. Yager of liability for negligence if the jury found Dr. Yager obtained Sharon Dunn's informed consent; (3) improperly suggested to the jury that Stevens Johnson Syndrome was the only potential material risk upon which Sharon Dunn could have declined treatment with Tegretol for her back and leg pain.

A. Dr. Yager was required to disclose all the material risks of Tegretol

Mississippi's law on informed consent is clear. A treating physician must disclose all known material risks of a recommended treatment. See *Jamison v. Kilgore*, 903 So.2d 45, 50 (Miss., 2005) and *Whittington v. Mason*, 905 So.2d 1261, 1266 (Miss., 2005). Despite this absolute and defined standard, Dr. Yager submitted D30 which was given by the trial court and incorrectly provided that Dr. Yager must only disclose Stevens-Johnson Syndrome to Sharon Dunn and then, only if such disclosure was customarily provided by neurologists. (Excerpts: Record p. 3196, item 4). Dr. Yager's D30 instruction diverted the jury's attention from determining all the known material risks of Tegetrol and instead focused on whether neurologists usually tell patients about one particular known risk of Tegretol, Stevens Johnson Syndrome. D30 submitted a burden of proof which is inconsistent with Mississippi law and rendered the jury instructions confusing and misleading as a whole.

B. Dr. Yager's informed consent instructions prematurely absolved Dr. Yager of negligence liability

Sharon Dunn's suit against Dr. Yager involve two distinct theories of liability: informed consent and negligence. The trial court improperly intertwined these theories of liability by giving Dr. Yager's D30 and D10 instructions. Instruction D30 directs the jury to return a verdict for Dr. Yager if the jury found Sharon Dunn failed to prove the elements of informed consent

liability.[13] D30 direct the jury that "if you believe the plaintiff failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict ***shall*** be for the Defendant, Dr. John Yager." (Excerpts, Record p. 3196)(Emphasis added). The trial court provided this directive to the jury a second time in instruction D-10 when it charged the jury that "[i]f you find from the evidence that Dr. Yager . . . reasonably advised the Plaintiff of the risks of taking Tegretol . . . then you ***must*** return a verdict for the Defendant, Dr. John Yager." (Excerpts, Record p. 3173). Both D30 and D10 commingled the theories of informed consent and negligence liability and mislead and confused the jury to such an extent that it could not have understood the verdict it was charged with rendering. In addition to D10 and D30, the trial court also gave Dr. Yager's instructions D8A, 14, 18, 27 and 33, which prematurely absolve Dr. Yager from informed consent liability in the event no negligence is found. (Excerpts: Record p. 3268, 3177, 3181, 3191 & 3224, respectively).

C. *Dr. Yager's informed consent jury instructions improperly limited the analysis of potential material risks to Stevens Johnson Syndrome*

Under Mississippi law, a treating physician must disclosure to the patient all the known material risks in order for the patient to make an informed decision whether or not he/she is willing to undergo the suggested treatment. See *Jamison v. Kilgore*, 903 So.2d 45, 49-50 (Miss., 2005) and *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So.2d 1346, 1363 (Miss., 1990)). Through Dr. Yager's D-30 instruction, the trial court improperly instructed the jury that the condition suffered by Sharon Dunn, Stevens Johnson Syndrome, must be a material risk of Tegretol before a physician's failure to obtain informed consent can be found. (Excerpts:

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[13]Sharon Dunn allow contends that D30 elevated the burden of proof for informed consent because item 1 required Sharon Dunn to prove that Dr. Yager should not have prescribed Tegretol in the first place because it was an improper treatment for back and leg pain.

Record p. 3195-96, items 2, 3 and 4). Although Sharon Dunn contends Stevens Johnson Syndrome was a known material risk of Tegretol, numerous other known material risks of Tegretol exist upon which the jury could have found that a reasonably prudent patient would have refused treatment including, but not limited to hematological conditions such as: blood dyscrasias, aplastic anemia, agranulocytosis's leukopenia which result from decreased white blood cells, which is one of the reasons a physician prescribing Tegretol monitors a patient's blood.

"On appellate review of the trial court's grant or denial of a proposed jury instruction, our primary concern is that 'the jury was fairly instructed and that each party's proof-grounded theory of the case was placed before it.'" *Young v. Guild*, 7 So.3d 251, 259 (Miss.,2009)(quoting *Splain v. Hines*, 609 So.2d 1234, 1239 (Miss., 1992)(citing *Rester v. Lott*, 566 So.2d 1266, 1269 (Miss.1990)). "[I]t would be error to grant an instruction which is likely to mislead or confuse the jury as to the principles of the law applicable to the facts in evidence." *Southland Enters. v. Newton County*, 838 So.2d 286, 289 (Miss., 2003)(citing *McCary v. Caperton*, 601 So.2d 866, 869 (Miss., 1992)). "Where we find two or more instructions in hopeless and substantive conflict with each other, we often reverse." *Fisher v. Deer*, 942 So.2d 217, 219 (Miss. Ct. App., 2006)(citing *Hillier v. Minas*, 757 So.2d 1034, 1039 (Miss. Ct. App., 2000)). "'Instructions should be tied to the specific facts of the case and when given merely in the abstract, may be grounds for error.'" *McCarty v. Kellum*, 667 So.2d 1277, 1287 (Miss., 1995)(quoting *T.K. Stanley, Inc. v. Cason*, 614 So.2d 942, 952 (Miss., 1992)). As demonstrated below, even considered as a whole, the jury instructions given by the trial court directly conflict one another, misquote the law and exist in the abstract to such an extent, the jury could not have comprehended the questions of law before them.

V. SHARON DUNN'S CONSTITUTIONAL RIGHT TO ASSIST IN THE PROSECUTION OF HER CASE WAS INFRINGED BY THE TRIAL COURT'S REFUSAL TO ALLOW SHARON DUNN TO PARTICIPATE IN HER CLOSING ARGUMENT

During the trial of this matter, Sharon Dunn was precluded from assisting her counsel in presenting her closing argument to the jury; a violation of her rights guaranteed by the Mississippi Constitution. According to Mississippi Constitution Article 3 Section 25, "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."

During closing argument, counsel for Dr. Yager highlighted to the jury the testimony of Dr. Yager regarding the information and warnings he claims he presented Sharon Dunn at the time he prescribed Tegretol. In an attempt to also highlight the testimony and credibility of Sharon Dunn regarding identical issue, counsel for Sharon Dunn requested the Court allow Sharon Dunn to provide a portion of her closing argument. (Excerpts: Record pp. 3562-3564). Despite advising the trial court of Article 3 Section 25, the trial court nevertheless refused to allow Sharon Dunn participate in closing argument. The trial court provided:

> Actually, in 1976, when I prosecuted Jimmy Lee Grafe for the murder of a three-year-old girl, Judge Palmer would not let him, at closing, address the Supreme Court - - or address the jury. The Supreme Court reversed; but that is in a criminal case only. It's not applicable to the civil case, and it's overruled. Move on.
> (Trial transcript p. 3564).

In the criminal context failure to allow a defendant to participate in his closing argument was found to constitute reversible error. See *Ballard v. State*, 366 So.2d 668 (Miss. 1979); See also *Gray v. State*, 351 So.2d 1342 (Miss.1977). In the criminal context, the relevant portion of Miss. Const. Art. 3, § 26 provides that "in all criminal prosecutions the accused shall have the right to be heard by himself or counsel, or both, . . ." Based on this Constitutional

Right, the Mississippi Supreme Court found it reversible error to preclude Ballard from participating in his closing argument. *Id.* Miss. Const. Art. 3, § 26, conferring a criminal defendant's right to participate in his/her trial is nearly identical to Miss. Const. Art. 3, § 25, conferring a civil plaintiff's right to participate in his/her trial closing argument. Therefore, it was also reversible error for the trial court to preclude Sharon Dunn from participating in her closing argument.

After excluding Dr. Malkin and Dr. Gould and being forced to rely only on Dr. Olson, Sharon Dunn's case hung on a credibility issue between Dr. Yager and Sharon Dunn regarding what was communicated between doctor and patient when Dr. Yager prescribed the Tegretol. Sharon Dunn denied that Dr. Yager gave her any warnings. She denied that he even told her it was "seizure medication." She testified that the only thing he said was how to take Tegretol and to call him if she had any problems. (Trial Transcript, pp. 697 ln. 13 - p. 707, ln. 10). Dr. Yager claims he told Sharon Dunn that Tegretol was a seizure medication and she could experience sleepiness, possibly imbalance, an allergic reaction, nausea, to call his office with any problems she didn't understand and he wasn't sure if he mentioned to Sharon Dunn that she could have a rash. (Trial Transcript, pp. 1494-1506 & 1791-95). Because of this conflict, Sharon Dunn had a constitutional right to plead her case to the jury herself and not rely solely on her counsel. The trial court denied her that right and since two jurors had already accepted her contention, no one can argue that other jurors may have been persuaded to believe her.

VI. SHARON DUNN WAS PREJUDICED BY NUMEROUS REFERENCES TO SETTLEMENT

During the trial, any prior settlements of Sharon Dunn with other defendants was irrelevant to the establishment of the negligence of Dr. Yager. The prejudicial effect of settlement references also outweighed any probative value they might provide. Although Dr. Yager claimed that it was necessary for the purpose of apportioning fault to the settling defendants, Dr. Yager did not ask to apportion any fault against any settling defendant. Instead, Sharon Dunn was prejudiced by informing the jury she had already received some compensation for her injuries, which was improper and highly prejudicial and an improper basis for referencing prior settlements at trial.

In *Smith v. Payne*, 839 So.2d 482 (Miss., 2002), the Mississippi Supreme Court recognized a limited exclusion to the rule prohibiting reference to settlement and allowed references to settlement only to explain the absence of a settling defendant at trial for appointment of fault purposes. *Id.* at 487. In this particular case, the Defendant did not attempt to apportion fault to any of the settling defendants thereby eliminating the availability of the settlement exclusion. In fact, the Defendant voluntarily withdrew their only proposed instruction which sought to cast liability onto either the settling physician, Dr. Coss. (Record pp. 3161-62). The verdict form submitted by Dr. Yager and allowed by the trial court did not providing for the apportioning of fault to any of the settling defendants. Furthermore, it was improper for settlement to be mention under the *Payne* exclusion before any basis to do so existed. As a result, Sharon Dunn was prejudiced by the repeated references to her prior settlement.

In an attempt to preempt any prejudice, Sharon Dunn filed a Motion In Limine excluding any reference to settlement during the trial. (Record, p. 2568). Dr. Yager opposed Sharon Dunn, claiming apportionment of fault necessitated settlement disclosure. (Excerpts: Record pp. 3030-34). The trial court denied Dunn's motion and ordered the jury be notified of the existence of settlement before the trial even began. Addressing the jury directly, the trial court stated:

> There were a number of defendants. Some of those defendants have had their case concluded against them, some have settled, and you'll hear that from the lawyers. The settlement amounts, and how some of these cases have been resolved, are not your concern. You're here as a jury to give that lady in the back there, Ms. Dunn, and this gentleman to my right, Dr. Yager, a fair trial. And you need to listen to the facts about Dr. Yager and this lady, and not be concerned about these other individuals. As to Drs. Lehman, Coss and Novartis, the pharmaceutical company, you'll receive instructions at the end of the trial to explain what you need to do with respect to any other defendants.

(Trial Transcript p. 620, ln. 3 -18). The prejudicial effect of settlement references also outweighed any probative value since Dr. Yager did not attempt to apportion any fault to the settling defendants.

(9)

CONCLUSION

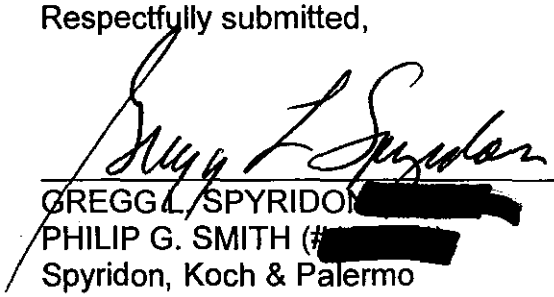
Sharon Dunn went to Dr. Yager for treatment of a chronic back condition and ended up permanently blind and scarred over 75% of her body. She will never regain her eyesight. She knows that. What she would like and what she is entitled to is a fair and reasonable opportunity to prove whether Dr. Yager should be held accountable for her injuries. That opportunity never came. Before she even stepped into the courtroom, the outcome of her trial was a foregone conclusion. Dr. Yager could not be held liable given the limitations imposed on Sharon Dunn. She was denied the right to select the best possible neurology expert she could find to support her claim. There were two outstanding board certified neurologists she should have been able to use: Dr. Malkin and/or Dr. Gould. She was denied the right to use either one. She was also denied her state constitutional right to participate in her own trial. She was prevented from clearly establishing the true material risks associated with Tegretol, such as severe life-threatening blood and skin disorders. These risks were recognized and quantified by the FDA, the very agency that regulated the drug, yet the trial court determined that their findings were too prejudicial to Dr. Yager, to be admitted into evidence. Of course they were prejudicial to Dr. Yager. He deviated from his own expert's opinion of the applicable standard of care and determined that the blood and skin disorders associated with Tegretol were too remote to pass on to Sharon Dunn.

When it came time to instruct the jury, the charges were so confusing and misleading that her separate claims of negligence and informed consent were improperly merged into one. Of course, not everything was kept from the jury. They were advised and reminded often that she had settled with other defendants, perhaps so they would not feel bad about entering

a verdict against her.

Justice and fair play mandate that the verdict in this case be set aside and a new trial granted to Sharon Dunn. Accordingly, for all the reasons set forth herein, Sharon Dunn prays that this Court set aside the verdict and judgment entered in the trial court and order a new trial, one in which Sharon Dunn may have a fair opportunity to prove that Dr. Yager should be held accountable for her injuries.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

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