

**SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**VIRGINIA MCGEE**

**APPELLANT**

**VS.**

**CASE NO. 2009-CA-01384**

**RIVER REGION MEDICAL CENTER**

**APPELLEE**

**APPELLANT'S REPLY BRIEF**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record verifies 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 disqualifications or recusal:

1. Virginia McGee.....Appellant
2. Leroy Mitchell.....Conservator over the Estate of Virginia McGee
3. Honorable M. James Chaney, Jr.....Circuit Court Judge  
9<sup>th</sup> Circuit Court District of Mississippi
4. River Region Medical Center.....Appellee
5. Vicksburg Healthcare, LLC.....Appellee
6. Kenya R. Martin.....Attorney for Appellant  
Virginia McGee & Leroy Mitchell
7. Stuart H. Harmon.....Attorney for Appellee  
Vicksburg Healthcare, LLC

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### A. CASES

- Alabama Great Southern Railroad Co. v. Lee, 826 So. 2d 1232, 1235 (Miss. 2002)
- Brown v. McQuinn, 501 So. 2d 1093, 1095-96 (Miss. 1986)
- Burr v. Mississippi Baptist Medical Center, 909 So. 2d 721, 728-29 (Miss. 2005)
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- Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)
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- Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So. 2d 790, 795 (Miss. 1995)
- Poole ex rel. Poole v. Avara, 908 So. 2d 716, 721-25 (Miss. 2005)
- Purdon v. Locke, 807 So. 2d 373, 378-79 (Miss. 2002)
- Smith v. Gilmore Memorial Hospital, 952 So. 2d 177, 181 (Miss. 2007)
- Spotlite Skating Rink, Inc. v. Barnes, et al, 988 So. 2d 364, 368 (Miss. 2008)
- Vaughn v. Mississippi Baptist Medical Center, 20 So. 3d 645, 654 (Miss. 2009)
- Walker v. Skiwski, 529 So. 2d 184, 187 (Miss. 1988)
- Webb v. Braswell, 930 So. 2d 387, 397 (Miss. 2006)
- White v. Stewman, 932 So. 2d 27, 32 (Miss. 2006)

B. STATUTES

Mississippi Code Annotated § 11-1-60

Mississippi Code Annotated § 41-9-119 (2001)

Mississippi Code Annotated § 15-1-36(15)

Mississippi Code Annotated § 11-1-58

C. OTHER AUTHORITIES

Mississippi Rule of Evidence 702

Mississippi Rule of Civil Procedure 24(b)(4)

STATEMENT OF THE ISSUES

- A. DR. PATRICIA G. BEARE, ONCE ACCEPTED AS AN EXPERT, SHOULD HAVE BEEN ALLOWED TO TESTIFY, IF ONLY AS TO THE APPROPRIATE STANDARD OF CARE.
- B. APPELLANT DESIGNATED TWO (2) MEDICAL DOCTORS TO OFFER TRIAL TESTIMONY AS TO CAUSATION, INJURIES AND DAMAGES.

## SUMMARY OF THE ARGUMENT

The trial judge's decision to grant River Region's Motion for Directed Verdict, after striking Virginia McGee's expert was clearly erroneous and must be reversed. The only reason the trial court gave for striking Dr. Patricia Beare was the proper foundation questions had not been asked by counsel. However, the trial court satisfied itself to the point where it accepted Dr. Beare as an expert witness in the area of nursing standards and procedures. (TR. 564). Further, Dr. Beare testified that she had rendered expert testimony on prior occasions in Mississippi courts—the latest was May 2009. (TR. 526-27). Dr. Beare also testified that she had never been refused as an expert witness. (TR. 526-27). More specifically, she had never been refused as an expert witness in the State of Mississippi. (TR. 527). Once the trial court accepted Dr. Beare as an expert in the area of nursing, she should have been free to testify and render an opinion in this case. Obviously, the trial court committed reversible error in this regard.

The error was further compounded when Appellant was prevented from offering the testimony of Dr. Donald H. Butts, M.D., who opined that the medical negligence of the Appellees proximately caused the injuries and damages sustained by Virginia McGee. R.E. 192-202. Appellant also designated Dr. Paul Pierce, III, M.D. who opined that the medical negligence of the Appellees proximately caused the injuries and damages sustained by Virginia McGee. R.E. 192-202. The Appellants designated Dr. Butts as well as Dr. Pierce as testifying experts in this cause. Both were designated approximately six (6) months prior to the trial of this case. Neither Dr. Pierce nor Dr. Butts were even deposed by Appellees prior to the trial of this matter. Appellees never lodged any *Daubert* challenge to the qualifications or testimony of either physician. Without more, it is wholly problematic for the trial court to summarily grant a motion for directed verdict when two (2)

causation experts were never allowed to testify. It is impossible for the trial court to assume to know the opinions of these two (2) causation experts without any proffer of their proposed testimony. Based upon these assignments of error, the judgment of the Warren County Circuit Court must be reversed and the case remanded for the reasons stated herein.



## ARGUMENTS OF ISSUES ON APPEAL BY APPELLANT

- A. DR. PATRICIA G. BEARE, ONCE ACCEPTED AS AN EXPERT, SHOULD HAVE BEEN ALLOWED TO TESTIFY, IF ONLY AS TO THE APPROPRIATE STANDARD OF CARE.

River Region argues in its brief that Dr. Patricia Beare was properly excluded based upon two (2) flawed assumptions. First, River Region assumes that Dr. Beare was unfamiliar with the appropriate standard of care in this case. Secondly, River Region assumes that her testimony alone was insufficient to make out a prima facie case of medical negligence.

In addressing the first assumption, our appellate courts have addressed this issue previously. The Mississippi Supreme Court has held that effectively striking an expert witness in the context of a medical malpractice case constitutes reversible error, even when the allegation is made that the subject expert was unfamiliar with the standard of care in Mississippi. Brown v. McQuinn, 501 So. 2d 1093, 1095-96 (Miss. 1986). “We are of the opinion that the lower court erred in holding that the medical experts used by appellants...were not qualified to testify as such.” Id. “The credibility, weight and worth of their testimony is for the jury to decide.” Id.

Again, the only objection waged by River Region as to Dr. Patricia Beare was made at trial. River Region objected on the basis that Dr. Beare was not knowledgeable of the appropriate standard of care for nurses in the State of Mississippi. This important issue, which was ruled on by the trial court, was never raised on appeal by River Region. **As Dr. Beare was accepted as an expert witness by the trial court, and as River Region never appealed this issue, it is totally and legally undisputed that Dr. Beare was qualified as an expert witness.** (Bold for Emphasis). The trial court heard the entire voir dire of Dr. Beare, and admitted her to testify as an expert witness in this

matter as to the appropriate standard of care.<sup>1</sup> Thereafter, the trial court ruled that she was qualified as an expert witness in the area of nursing. See Trial Transcript Page 564, Lines 25-29. It is extremely important to note that the trial court's acceptance of Dr. Beare as an expert witness in the area of nursing was not appealed by River Region in this matter. During voir dire, Dr. Beare demonstrated that her testimony was scientifically valid and capable of being applied to the facts of the case. Dr. Patricia Beare was qualified to address the standard of care in this matter *only*. The causation and ultimate breach was to be addressed by two (2) medical physicians—Drs. Paul Pierce, III and Donald H. Butts.

Secondly, River Region proceeds on the flawed assumption that Virginia McGee would not have been able to make a *prima facie* case to establish causation. However, Virginia McGee duly designated two (2) medical doctors to offer testimony at trial as to causation, injuries and damages—neither of which was challenged by River Region.

**B. APPELLANT DESIGNATED TWO (2) MEDICAL DOCTORS TO OFFER TRIAL TESTIMONY AS TO CAUSATION, INJURIES AND DAMAGES.**

The Mississippi Appellate Courts have clearly articulated what is required to make out a *prima facie* case of medical negligence in Mississippi. This Court recently held:

In order to establish a *prima facie* case of medical negligence, [a plaintiff] must prove that (i) the defendant had a duty to conform to specific standard of conduct for the protection of others against an unreasonable risk of injury; (ii) the defendant failed to conform to that required standard; (iii) the defendant's breach of duty was a proximate

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<sup>1</sup> This fact distinguishes the case at bar from the Court's ruling in Vaughn v. Mississippi Baptist Med. Ctr., 20 So.3d 645 (Miss. 2009). In Vaughn, it is undisputed that the nursing expert (Keller) was never admitted or accepted by the trial court. Further, after a Daubert challenge was lodged, the nursing expert in Vaughn was excluded prior to trial. Moreover, the record here reveals that River Region never made a Daubert challenge to Dr. Patricia Beare prior to trial. Further, once the challenge was made, the trial court overruled the challenge and admitted her to testify.

cause of the plaintiff's injury; and (iv) the plaintiff was injured as a result.

McDonald v. Memorial Hosp. at Gulfport, 8 So.3d 175, 180 (Miss. 2009)(quoting Delta Reg'l Med. Ctr. v. Venton, 964 So.2d 500, 504 (Miss. 2007)). The general rule in Mississippi is that "medical negligence may be established only by expert medical testimony, with an exception for instances where a layman can observe and understand the negligence as a matter of common sense and practical experience." Coleman v. Rice, 706 So.2d 696, 698 (Miss. 1997).

River Region contends that the trial court's exclusion of Dr. Patricia Beare, if erroneous, was harmless. See Vaughn v. Mississippi Baptist Med. Ctr., 20 So.3d 645 (Miss. 2009). However, unlike Vaughn, the case at bar presents a different set of facts which should yield a different result. In Vaughn, the trial court excluded the proposed testimony of the nursing expert, Keller. Vaughn, 20 So.2d at 650. As a result, the trial court granted the defendant's motion for summary judgment on the basis that plaintiffs were unable to make out a prima facie case of medical negligence. Id. This Court held that the plaintiffs' medical experts (physicians) were only able to testify as to their assessment and treatment of the plaintiff, but not causation. Id.

**However, in the case at bar, Virginia McGee duly designated two (2) medical doctors, both of whom opined that the medical negligence of River Region proximately caused the injuries and damages sustained by Virginia McGee. (Bold for Emphasis) R.E. 192-202. The record is clear, Virginia McGee, specifically designated Dr. Donald H. Butts, M.D., and Dr. Paul Pierce, III, M.D., as expert witnesses in this cause for that specific purpose. (Bold for Emphasis) R.E. 192-202. Dr. Donald H. Butts, M.D. opined the following:**

[B]ased upon a reasonable degree of medical and professional certainty that on or about June 30, 2007, Plaintiff Virginia McGee suffered an IV infiltration on or about her left arm while being treated at River Region Medical Center in Vicksburg, Mississippi. **Dr. Butts is also expected to testify and provide an**

**opinion based upon a reasonable degree of medical certainty that the subject IV infiltration that occurred on or about the left arm of Plaintiff Virginia McGee proximately caused severe and painful burns, swelling, blistering, boils, and irritation. Dr. Butts is also expected to testify and provide an opinion that based upon a reasonable degree of medical and professional certainty, Plaintiff Virginia McGee's injuries on or about June 30, 2007 resulted in permanent nerve damage to the left arm, and body as a whole, of Plaintiff Virginia McGee. Dr. Butts is also expected to testify and provide an opinion that based upon a reasonable degree of medical and professional certainty, Plaintiff Virginia McGee's injuries on or about June 30, 2007 left Plaintiff with nerve damage, scarring, skin discoloration, and decreased range of motion of her left arm. Dr. Butts is also expected to explain to the jury the meaning and definition of the medical term "nerve damage" and/or "nerve injury," and what generally causes this particular medical condition to occur. Dr. Butts is also expected to testify and provide an opinion based upon a reasonable degree of medical and professional certainty as to the factor and/or factors which caused Plaintiff Virginia McGee to develop "nerve damage" and/or "nerve injuries" to her left arm. Dr. Butts is also expected to testify and provide an opinion that based upon a reasonable degree of medical and professional certainty, Plaintiff Virginia McGee's nerve injuries were proximately caused and/or contributed to by the IV infiltration that occurred to her left arm on or about June 30, 2007 while in the custody and care of River Region Medical Center in Vicksburg, Mississippi. Dr. Butts is also expected to testify and provide an opinion that based upon a reasonable degree of medical and professional certainty, Plaintiff Virginia McGee's nerve injuries have also proximately caused and/or contributed to other injuries to her left arm due to the decreased range of motion, and/or lack of feeling and sensitivity to her left arm as a whole. Dr. Butts is expected to testify and provide an opinion that based upon a reasonable degree of medical and professional certainty, Plaintiff Virginia McGee's additional injuries to her left arm were proximately caused and/or contributed to by the nerve injuries described herein, which was proximately caused by the IV infiltration that occurred on or about June 30, 2007.**

R.E. 192-202 (Bold for Emphasis). Dr. Paul Pierce, III, M.D. also offered the following testimony and opinions:

**[B]ased upon a reasonable degree of medical and professional certainty that on or about June 30, 2007, Plaintiff Virginia McGee suffered an IV infiltration on or about her left arm while being treated at River Region Medical Center in Vicksburg, Mississippi. Dr. Pierce is also expected to testify and provide an opinion based upon a reasonable degree of medical and professional certainty that the subject IV infiltration that occurred on or about the left arm of Plaintiff Virginia McGee proximately caused severe and painful 2<sup>nd</sup> degree burns, swelling, blistering, boils, and irritation. Dr. Pierce is also**

**expected to testify and provide an opinion that based upon a reasonable degree of medical and professional certainty, Plaintiff Virginia McGee's injuries on or about June 30, 2007 were proximately caused and/or contributed to by an IV infiltration that occurred when one of the nurses negligently inserted the IV into Plaintiff Virginia McGee's left arm. Dr. Pierce is also expected to testify and provide an opinion that based upon a reasonable degree of medical and professional certainty, Plaintiff Virginia McGee's injuries on or about June 30, 2007 left Plaintiff with nerve injuries, scarring, skin discoloration, and decreased range of motion of her left arm. Dr. Pierce is also expected to explain to the jury the meaning and definition of the medical term "IV infiltration" as identified and used in his medical records and discharge summary. Dr. Pierce is also expected to factually testify that he never ordered any warm compress to be applied to Plaintiff Virginia McGee's left arm shortly after the IV infiltration occurred. Moreover, he is also expected to testify and explain to the jury, based upon a reasonable degree of medical certainty, exactly what causes an "IV infiltration" in general. Dr. Pierce may also testify and provide an opinion as to exactly what caused and/or contributed to the "IV infiltration" that occurred on or about the left arm of Plaintiff Virginia McGee on or about June 30, 2007 at River Region Medical Center in Vicksburg, Mississippi.**

R.E. 192-202 (Bold for Emphasis). Both, Drs. Butts and Pierce were designated approximately six (6) months prior to the trial of this case. Interestingly, River Region never requested to depose neither Dr. Pierce nor Dr. Butts prior to the trial of this matter. In fact, their opinions had been promulgated well in advance of trial. River Region never lodged any Daubert challenges to the qualifications or testimony of either physician. To this end, a rebuttal presumption arises that their testimony would have been admissible and sufficient to make out a prima facie case of medical negligence as mandated by the Court in McDonald and Delta Regional.

At trial, once Dr. Beare was excluded, the trial court made an inquiry as to whether Virginia McGee could continue and make out a prima facie case:

MR. MARTIN: Judge, it's a fact question for the jury to decide whether or not an injury, in fact, occurred to Virginia McGee's left arm on June 30, 2007. I believe the evidence is clear. The medical records and the documents together still present a fact question for the jury to resolve as to whether or not an injury occurred and whether or not the hospital is responsible for that injury.

THE COURT: Mr. Martin, have you got any witnesses or testimony that are going to relate to the standard of care that you can present to the Court and put on?

MR. MARTIN: Aside from Dr. Beare?

THE COURT: Right.

**MR. MARTIN: We anticipate calling Dr. Paul Pierce and also Dr. Butts, Dr. Donald Butts.**

T.R. 608-609.

The trial court, merely assuming that neither Dr. Pierce nor Dr. Butts would address causation, admitted that he was unfamiliar with what either would testify or opine to.<sup>2</sup> Without more, it is wholly problematic for the trial court to summarily grant a motion for directed verdict when two (2) causation experts were never allowed to testify. It is impossible for the trial court to assume to know the opinions of these two (2) causation experts without first analyzing their proposed testimony. Based upon these assignments of error, the judgment of the Warren County Circuit Court must be reversed and the case remanded for the reasons stated herein.

#### CONCLUSION

Virginia McGee is appealing to this Court in order to address injuries that occurred to her through no fault of her own. River Region has caused an injury, for which it must be held both accountable and responsible. Virginia McGee is seeking help from this Court, in order to undue the wrongs and injustices suffered by her and her family. Now, Virginia McGee is seeking help from this Court, not to conceal a medical mistake caused by River Region, but to expose the truth. Now, Virginia McGee is seeking help from this Court, as all injured parties are entitled not to a large sum of money, but at a minimum, a fair day in court. Although suffering from constant pain, diabetes,

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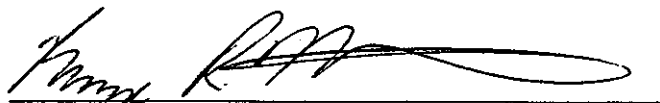
<sup>2</sup> See Trial Record at 609.

high blood pressure, and other medical conditions, Mrs. McGee has waited patiently since June 30, 2007 for truth, fairness, justice, and equality—principles due her in this case. She is resolved to continue to wait a little while longer on a ruling from this Court. Based upon the collective assignments of error as indicated herein, the final judgment of the Circuit Court of Warren County must be reversed in this matter, and a new trial granted to Appellate Virginia McGee.

CERTIFICATE OF SERVICE

I, Kenya R. Martin, attorney for Appellant, VIRGINIA MCGEE, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Brief For Appellant to Honorable M. James Chaney, Jr., Circuit Court Judge, Ninth Judicial District, Post Office Box 351, Vicksburg, Mississippi 39181-0351; Attorney Stuart B. Harmon, Heidelberg Harmon, PLLC, 795 Woodlands Parkway, Suite 220, Ridgeland, Mississippi 39157; and Mrs. Virginia McGee, 308 Old Vicksburg Street, Edwards, Mississippi 39066.

Dated this the 7<sup>th</sup> day of June, 2010.

  
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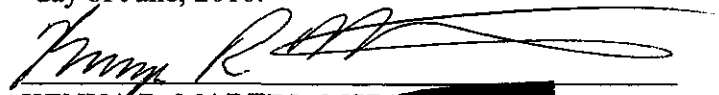
**CERTIFICATE OF MAILING**

I, Kenya R. Martin, attorney for Appellant, VIRGINIA MCGEE, do hereby certify that I have this day mailed, by United States mail, proper postage prepaid, the following documents:

1. Original of the Reply Brief of Appellant, VIRGINIA MCGEE; and
2. Three (3) copies of the Reply Brief of Appellant, VIRGINIA MCGEE to:

Kathy Gillis  
Supreme Court Clerk  
Post Office Box 249  
Jackson, Mississippi 39205-0249

Respectfully submitted on this the 7<sup>TH</sup> day of June, 2010.

  
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