

**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

BRIEF OF THE APPELLANT

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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
9th 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

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	2
TABLE OF CONTENTS	3
TABLE OF CASES	4
STATUTES AND OTHER AUTHORITIES	5
STATEMENT OF ISSUES	6
STATEMENT OF THE CASE	7-9
STATEMENT OF THE FACTS	10-13
SUMMARY OF THE ARGUMENTS	14-16
ARGUMENTS	17-31
CONCLUSION	32-33
CERTIFICATE OF SERVICE	34
CERTIFICATE OF MAILING	35

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

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)
- Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)
- Estate of Jones v. Phillips ex rel. Phillips, 992 So. 2d 1131, 1143 (Miss. 2008)
- Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985)
- Hubbard v. Wansley, 954 So. 2d 951, 957 (Miss. 2007)
- Jones v. State, 918 So. 2d 1220, 1223 (Miss. 2005)
- Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)
- Mississippi Transportation Commission v. McLemore, 863 So. 2d 31, 34 (Miss. 2003)
- Moore v. State, 914 So. 2d 185, 189 (Miss. Ct. App. 2005)
- 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. THE CIRCUIT COURT ERRED IN GRANTING APPELLEE'S MOTION FOR DIRECTED VERDICT BY STRIKING THE EXPERT TESTIMONY OF DR. PATRICIA G. BEARE, AFTER DR. BEARE WAS ACCEPTED AS AN EXPERT.
- B. THE CIRCUIT COURT ERRED IN ADMITTING EXPERT OPINION TESTIMONY FROM NURSE CHERYL WASHINGTON.
- C. THE CIRCUIT COURT ERRED IN EXCLUDING PROOF OF APPELLANT'S TOTAL MEDICAL BILLS FROM RIVER REGION MEDICAL CENTER.
- D. THE CIRCUIT COURT ERRED IN OVERRULING APPELLANT'S BATSON CHALLENGE.

STATEMENT OF THE CASE

On or about June 30, 2007, Appellant Virginia McGee¹ (hereinafter referred to as “Appellant” or “Virginia McGee”) was transported via ambulance to River Region Medical Center² for treatment related to her history of diabetes mellitus and high blood pressure. (RE. 341; 346)³. It was totally undisputed that Virginia McGee’s initial injury, an intravenous infiltration (hereinafter referred to as “IV infiltration”) to her left forearm, occurred during Virginia McGee’s treatment while at River Region Medical Center. (RE. 346-47). Virginia McGee also received second and third degree burns to her left forearm in an attempt to treat the IV infiltration when Nurse Cheryl Washington, without a physician’s orders, placed a hot compress upon the affected area of Appellant’s left arm. (RE. 341-42) (TR. 366-378). The primary issues at trial were (i) whether River Region was medically negligent in proximately causing and/or contributing to the IV infiltration, and (ii) whether River Region was medically negligent when a nurse, without orders from the treating or attending physician, placed a hot compress on the affected area of Virginia McGee’s left forearm. (RE. 340-355).

In an attempt to address both issues at trial, Appellant designated one (1) expert witness—Dr. Patricia G. Beare. (RE. 192-202). After voir dire of Dr. Beare was completed by River Region, the

¹ Due to Appellant’s age and advanced medical condition, Mr. Leroy Mitchell, Appellant’s son, was appointed by a court of competent jurisdiction to serve as Conservator over the Estate of Virginia McGee. (RE. 98-127; 113-16)

² Appellee has admitted that “River Region Medical Center” is a doing business as or d/b/a for the proper legal entity Vicksburg Healthcare, LLC. Appellant may use the term “River Region” throughout the brief interchangeably to mean Vicksburg Healthcare, LLC.

³ RE denotes “Record Excerpts.”

trial court correctly accepted her as an expert witness in the area of nursing. (TR. 564)⁴. Although the trial court **accepted** Dr. Beare as an expert witness in the area of nursing, the trial court erroneously **refused** to allow her to testify and provide an opinion before the jury on the issues of medical negligence and whether River Region's actions and/or inactions caused and/or contributed to Virginia McGee's injuries. (TR. 564; 568-603) (Bold for Emphasis). Appellant made a proffer on the record in order to preserve this issue on appeal as to what Dr. Beare's testimony and expert opinions would have been if allowed to testify at trial. (TR. 603-606).

At trial Appellant called Nurse Cheryl Washington (hereinafter referenced as "Washington") as an adverse witness. (TR. 407-431). To compound matters, the trial court allowed Washington, **a lay witness**, to testify and render medical expert opinions at trial. (TR. 431-478) (Bold for Emphasis). At all relevant times, Washington was employed by River Region, and was acting within the course and scope of her employment when Virginia McGee's injuries occurred. (RE. 347). This fact has never been disputed by River Region. (RE. 347). Appellant alleged that Washington was the employee who caused the IV infiltration to Virginia McGee's left arm. (TR. 603-606) (RE. 192-202). Appellant also alleged that Washington should have informed Virginia McGee's treating or attending physician(s) prior to applying a hot compress to her left arm. (RE. 192-202). Interestingly, Washington was never designated as an expert witness in this matter by any of the parties. (RE. 211-222). However, River Region continuously sought, and the trial court permitted, expert testimony from Washington throughout her direct examination which unfairly prejudiced Virginia McGee. (TR. 431-478).

Additionally, the trial court excluded proof of Virginia McGee's total medical bills in

⁴ TR denotes "Trial Record."

reference to her treatment from River Region in this matter. (TR. 1-36). Virginia McGee had total charges of \$70,937.00 in medical bills from Promise Hospital in Vicksburg, Mississippi in reference to her treatment for injuries sustained from this incident. (RE. 331-32). Virginia McGee also had total charges of \$40,158.86 in medical bills from River Region in reference to her treatment for injuries sustained from the IV infiltration. (RE. 302-315). Based upon River Region's motion in limine, the trial court erroneously reduced the River Region bill down by \$35,301.92; thus allowing Virginia McGee to claim only \$75,793.94 as total economic damages, instead of \$111,095.86 in total damages. (RE. 314-15) (TR. 1-36).

Lastly, the trial court overruled Appellant's Batson challenge, although River Region exercised all four (4) of its peremptory strikes on African-American jurors during voir dire (TR. 301-303). River Region attempted to provide race-neutral reasons for the strikes by asserting that the potential jurors all suffered from high blood pressure or hypertension. (TR. 301-303). However, as Appellant pointed out to the trial court, high blood pressure was nothing more than a pretext for the strikes, as high blood pressure was not a central issue to this case. (TR. 301-303). The trial court overruled the objection and allowed River Region to strike all four (4) African-American jurors from the panel. To this end, Virginia McGee contends that she was denied her right to a fair and impartial jury trial. (TR. 301-303).

Again, the trial court accepted Dr. Patricia Beare under Daubert standards which should have permitted her to testify. Thereafter, the trial court refused to allow Dr. Beare to testify and render an opinion. Afterwards, River Region moved for directed verdict which was ultimately granted by the trial court. (RE. 447-448). Appellant timely filed her Notice of Appeal before this Court. (RE. 449-450).

STATEMENT OF FACTS

On or about June 30, 2007, Virginia McGee, a 77 year-old woman, was taken via ambulance to the emergency room (hereinafter "ER") at River Region Medical Center (hereinafter "River Region") complaining of general weakness and confusion. (RE. 341). According to records from American Medical Response (hereinafter "AMR"), Virginia McGee was presented to the ER at approximately 2:16 a.m. (RE. 343). As she had a history of diabetes mellitus and struggled to control her blood sugars, the AMR technicians started an 18 gauge IV in Virginia McGee's left wrist in order to help build her sugars back up. (RE. 341-44). At the time Virginia McGee presented to the ER, her blood sugar level was 43. (RE. 341). While being treated at River Region, Mrs. McGee, through no fault of her own, suffered an intravenous or IV infiltration about her left arm. (RE. 341) (TR. 410). This fact was totally undisputed by River Region. (RE. 343-46) (TR. 410). The IV infiltration was proximately caused and/or contributed to by the medical negligence of Nurse Cheryl Washington, who was employed with River Region. (RE. 341; 347).

Pursuant to Miss. Code Ann. § 15-1-36(15), written notice of this incident was submitted to River Region through its hospital administrator, Philip Clendenin, on or about December 6, 2007. (RE. 342). The notice contained Virginia McGee's medical records from River Region, photographs of her left arm and resulting injuries. Also, a signed Certificate of Consultation was forwarded pursuant to Miss. Code Ann. § 11-1-58. (RE. 342). On August 17, 2009, this matter proceeded to trial in the Warren County Circuit Court with the Honorable Judge M. James Chaney, Jr.⁵ presiding. (TR. 1-5). The primary issues at trial were whether River Region was medically negligent in

⁵ This cause was originally assigned to Judge Frank Vollor, who retired from the bench prior to the resolution of this case. As a result, this action was assigned to Judge M. James Chaney. This case was the first jury trial Judge Chaney ever presided over.

proximately causing and/or contributing to the IV infiltration, and whether River Region was medically negligent when a nurse, without orders from the treating or attending physician, placed a hot compress on the affected area of Virginia McGee's left forearm. (RE. 340-355). One of the witnesses called during Appellant's case-in-chief was Nurse Cheryl Washington—the employee who caused these injuries. (TR. 407-31).

Washington, by her own testimony, first began treating Virginia McGee at approximately 3:30 p.m. on June 30, 2007 (TR. 410). By this time, the 18 gauge IV started by AMR had been in Mrs. McGee's left wrist for more than thirteen (13) hours without any edema, swelling, infiltration, or problems. (RE. 344-45) (TR. 407-86). At approximately 4:00 p.m. on June 30, 2007, Washington, pursuant to orders from Mrs. McGee's treating physicians, pushed a medicine called Lasix, 20 milligrams, through the IV in Mrs. McGee's left arm. (TR. 415). Washington never recorded the rate at which she pushed and administered the 4:00 p.m. Lasix, 20 milligrams, through the IV. (TR. 416). Washington also administered another dosage of Lasix at 10:00 p.m. on June 30, 2007. (TR. 417). Washington never recorded the rate at which she pushed and administered the 10:00 p.m. Lasix. (TR. 417). Pursuant to her own testimony, Washington first noted swelling and edema to Mrs. McGee's left wrist at approximately 10:20 p.m. on June 30, 2007—approximately 20 minutes after she administered the 10:00 p.m. dosage of Lasix. (TR. 418-19). At approximately 12:25 a.m., Washington applied a hot compress to Virginia McGee's left arm. (RE. 342) (TR. 424). Washington never told Mrs. McGee's treating physician of her condition. Moreover, Washington never obtained authorization to apply the hot compress which caused tremendous pain and suffering for Mrs. McGee. (TR. 421-24). No exact temperature for the compress was note by Washington before it was applied to Mrs. McGee's arm. (TR. 423). Boils and blisters—all of which resulted in second and three degree burns—began to develop on Mrs. McGee's arm only after Washington

applied the hot compress. (TR. 425-26). The subject boils and blisters were noted by Washington at approximately 4:00 a.m. the following day. (TR. 426). Washington concealed the fact that she negligently pushed the 10:00 p.m. Lasix at a high rate of speed which proximately caused and/or contributed to the IV infiltration that occurred at approximately 10:20 p.m. on June 30, 2007. (TR. 428; 603-06). She also concealed the fact that she negligently applied a hot compress, without orders from any doctor or physician. (TR. 428). The first person Washington told about these events was Nurse Julie Antley at approximately 4:00 a.m. on July 1, 2007--the next day. (TR. 428).

In an attempt to address the issue of medical negligence at trial, Appellant properly and timely designated one (1) expert witness--Dr. Patricia G. Beare. (RE. 192-202). Attorneys for both sides conducted voir dire of Dr. Patricia Beare at trial. (TR. 519-67). Following voir dire, the trial court correctly accepted Dr. Beare as an expert witness in the area of nursing. (TR. 564). Although the trial court accepted Dr. Beare as an expert witness in the area of nursing, the trial court erroneously refused to allow her to render an opinion in the case. (TR. 564; 568-603). Prior to this error, the trial court also allowed Washington, a lay witness, to render expert opinion testimony before the jury. (TR. 431-478). At all relevant times, Washington was employed by River Region, and was acting within the course and scope of her employment when these injuries occurred. (RE. 347). This fact has never been disputed by River Region. (RE. 347). As a result, Washington's testimony which went beyond her own personal knowledge was highly prejudicial and should have been excluded.

Additionally, the trial court erroneously excluded proof of Virginia McGee's medical bills in reference to her treatment from River Region Medical Center in this matter. (TR. 1-36). Virginia McGee had total charges of \$70,937.00 in medical bills from Promise Hospital in Vicksburg, Mississippi in reference to her treatment for injuries sustained from this incident and resulting

injuries. (RE. 331-32). Virginia McGee also had total charges of \$40,158.86 in medical bills from River Region. (RE. 302-15). The reductions in these bills only came because of Virginia McGee's status as a Medicare recipient. (RE. 302-15). Based upon River Region's motion in limine, the trial court erroneously reduced the River Region bill down by \$35,301.92; thus allowing Virginia McGee to claim only \$75,793.94 as total economic damages, instead of \$111,095.86 in total damages. (RE. 314-15) (TR. 1-36).

Lastly, the trial court erroneously overruled Appellant's Batson challenge, although River Region exercised all of its four (4) peremptory strikes on African-American jurors during voir dire (TR. 301-303). River Region attempted to provide race-neutral reasons for the strikes by asserting that the potential jurors all suffered from high blood pressure or hypertension. (TR. 301-303). However, as Appellant pointed out to the trial court, high blood pressure was nothing more than a pretext for the strikes, as high blood pressure was not a central issue to this case. (TR. 301-303). The trial court overruled the objection and allowed River Region to strike all four (4) African-American jurors from the panel which denied Virginia McGee, a 77-year-old woman, her right to a fair and impartial jury trial. (TR. 301-303).

After wrongfully striking Virginia McGee's expert witness (Dr. Patricia Beare), River Region moved for directed verdict which was ultimately granted by the trial court. (RE. 447-448). Virginia McGee timely filed her Notice of Appeal before this Court. (RE. 449-450).

SUMMARY OF THE ARGUMENT

The trial judge's decision to grant River Region's Motion for Directed Verdict, after striking Virginia McGee's liability 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.

To further complicate matters, the trial court, over objections from counsel, permitted a lay witness to testify and render expert medical opinions in a medical malpractice case. At trial, Appellant called Nurse Cheryl Washington as an adverse witness. Washington, at all times, was acting and operating within the course and scope of her employment with River Region when Mrs. McGee was injured. Mississippi law has routinely held that in order to prove a *prima facie* case of medical malpractice or medical negligence, expert testimony is essentially required—with few exceptions. As Virginia McGee has the burden of proving medical negligence with expert testimony, River Region can only obtain medical expert opinions in proving or supporting its defense from competent, designated expert witnesses. (Underlined for Emphasis). Additionally, although the trial court allowed Washington to render expert opinions, she was never designated as an expert

witness in this matter. (RE. 211-222). To allow Washington to testify about matters outside of her personal knowledge amounts to a trial by ambush. Without a Miss. R. Civ. P. 24(b)(4) designation, Appellant had no way of knowing what opinions Washington would testify about. Further, the spirit of Miss. R. Civ. P. 24(b)(4) is to essentially allow parties to discover the facts and opinions held by experts prior to trial. Considering that Washington was never designated by any party, any testimony beyond that of her personal knowledge, (a) violates Miss. R. Civ. P. 24(b)(4); (b) prejudices Virginia McGee's case; and (c) confuses the jury as to matters properly reserved under Daubert analysis. Essentially, the trial court's actions in this regard also constitute reversible error.

The trial court erroneously granted in part, River Region's motion in limine to exclude proof of medical bills which were reduced because of Virginia McGee's status as a Medicare recipient. (RE. 298-315) (TR. 7-34). This ruling clearly violates the Collateral Source Rule and other Mississippi authorities cited herein. Virginia McGee had total charges of \$70,937.00 in medical bills from Promise Hospital in Vicksburg, Mississippi relative to treatment received for the IV infiltration. (RE. 331-32). She also had total charges of \$40,158.86 in medical bills from River Region. (RE. 302-315). Based upon River Region's motion in limine, the trial court reduced the River Region bill down by \$35,301.92; thus allowing Virginia McGee to claim only \$75,793.94 as total economic damages, instead of \$111,095.86 in total damages. (RE. 314-15) (TR. 1-36). The trial court concluded the Collateral Source Rule was not violated so long as the reduction in bills came from the alleged tort-feasor. (TR. 1-36). However, the Collateral Source Rule was implicated because the reduction only came because Virginia McGee was a Medicare recipient at the time services were rendered. (RE. 302-15). Her relationship with a third party, a collateral source, gave way to the reduction, which invariably implicated the Collateral Source Rule. As a result, the ruling of the trial court must be reversed and the case remanded on this issue.

Lastly, the trial court erroneously overruled Virginia McGee's Batson challenge, although River Region exercised all four (4) of its peremptory strikes on African-American jurors during voir dire (TR. 301-303). River Region attempted to provide race-neutral reasons for the strikes by asserting the potential jurors all suffered from high blood pressure or hypertension. (TR. 301-303). However, high blood pressure was nothing more than a pretext for the strikes, as high blood pressure was not a central issue to this case. (TR. 301-303). The trial court overruled the objection and allowed River Region to strike all four (4) African-American jurors from the panel which denied Virginia McGee's right to a fair and impartial jury trial. (TR. 301-303).

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

The appropriate standard of review when a trial court grants a defendant's motion for directed verdict at trial is de novo. Spotlite Skating Rink, Inc. v. Barnes, et al, 988 So. 2d 364, 368 (Miss. 2008) (citing Alabama Great Southern Railroad Co. v. Lee, 826 So. 2d 1232, 1235 (Miss. 2002)). "This Court will consider the evidence in the light most favorable to the appellee." Alabama Great S. Railroad Co. v. Lee, 826 So. 2d at 1235. This Court must also consider whether the evidence presented at the trial of this matter was so indisputable or so deficient as to eliminate the need for a jury. White v. Stewman, 932 So. 2d 27, 32 (Miss. 2006).

The proper standard of review in determining whether the trial court committed error in either admitting or excluding evidence at trial is an abuse-of-discretion standard. Vaughn v. Mississippi Baptist Medical Center, 20 So. 3d 645, 654 (Miss. 2009); Mississippi Transportation Commission v. McLemore, 863 So. 2d 31, 34 (Miss. 2003). Specifically in the area of expert testimony, the trial court serves as "gate keeper" in determining whether to admit or exclude expert opinion testimony at trial. Id. at 654 (citing Webb v. Braswell, 930 So. 2d 387, 397 (Miss. 2006)). The trial court shall be reversed and a new trial rendered when it is determined that the lower court abused its discretion in excluding or admitting evidentiary testimony, and such action unfairly prejudiced the party at trial. Id. (citing Jones v. State, 918 So. 2d 1220, 1223 (Miss. 2005)).

This Court's standard of review in analyzing Batson challenges is clearly erroneous or against the overwhelming weight of the evidence standard. Moore v. State, 914 So. 2d 185, 189 (Miss. Ct. App. 2005). Although trial courts are afforded great deference as to their rulings regarding Batson challenges, a trial court may be reversed if the court's ruling was clearly erroneous or against the overwhelming weight of the evidence. Id.

A. THE CIRCUIT COURT ERRED IN GRANTING APPELLEE'S MOTION FOR DIRECTED VERDICT BY STRIKING THE EXPERT OPINION TESTIMONY OF DR. PATRICIA G. BEARE.

The Circuit Court erred in granting River Region's Motion for Directed Verdict by striking the expert opinion testimony of Dr. Patricia G. Beare, after the Court first accepted her as an expert witness in the field of nursing. 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). In Brown, defendants moved for summary judgment on the basis that Brown's expert witnesses were unfamiliar with the standard of care in Mississippi. Id. at 1095-96. "[O]n that basis alone, the trial court sustained the motions for summary judgment." Id. at 1096. Although Brown stands for the principle of moving away from the locality rule to a national standard as cited by Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985), Brown also stands for the resounding principle, that **once expert witnesses are accepted by the trial courts, then their testimonies and opinions should only be weighed by the jury.** Id. at 1096 (Bold for Emphasis). "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.

As the trial court serves as the "gatekeeper" for expert witnesses and expert testimony, the trial judges have discretion in allowing expert witnesses to be admitted as such, and to testify in open court. Webb v. Braswell, 930 So. 2d 387, 397 (Miss. 2006). Our appellate Courts have adopted the standards as articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), which was later modified in Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), for determining the admissibility of expert

witnesses. Mississippi Transportation Commission v. McLemore, 863 So. 2d at 31. The two (2) prong test for admissibility is the testimony must be relevant and reliable. Id. at 38. To be relevant and reliable, the testimony must be scientifically valid and capable of being applied to the facts at issue. Id. at 36 (citing Poole ex rel. Poole v. Avara, 908 So. 2d 716, 721-25 (Miss. 2005)). As read into the trial record in the case *sub judice*⁶, Rule 702 of the Mississippi Rules of Evidence should also be analyzed by the trial court when making the determination of whether to admit or strike an expert witness at trial. See Rule 702 of the Mississippi Rules of Civil Procedure.

In this matter, the only objection waged by River Region was that Dr. Patricia Beare was not knowledgeable of the standard of care for nurses in the State of Mississippi. However, the trial court heard the voir dire of Dr. Beare. Thereafter, the trial court ruled that she was qualified as an expert witness in the area of nursing. It is extremely important to note in this matter that the trial court accepted Dr. Beare as an expert witness in the area of nursing. See Trial Transcript Page 564, Lines 25-29. Amid the numerous questions posed to Dr. Beare by Appellant's counsel during voir dire, it is clear based upon the following exchange that Dr. Beare's testimony was scientifically valid and capable of being applied to the facts of the case:

Q: And, Dr. Beare, from your knowledge, training, education and experiences, are you familiar with the standards of care for nurses regarding the facts involved in this case?

A: Yes, I am.

(Trial Transcript 525)

Q: Dr. Beare, from your training, knowledge, education and experiences, are you generally familiar with the standards of care for nurses regarding the facts of this case?

A: Yes, I am.

⁶ See Trial Transcript 592-593.

(Trial Transcript 526)⁷

Q: Okay. And have you ever been offered as an expert in the field of nursing specifically in the State of Mississippi?

A: Yes.

Q: And when was the last time you were offered as an expert to testify regarding a nursing issue in Mississippi?

A: In May of this year.

Q: May of 2009, right?

A: 2009 in Jackson, Mississippi.

Q: Okay. And the Court accepted your testimony as an expert witness?

A: Yes, they did.

Q: Dr. Beare, have you ever been refused as an expert witness?

A: No, I have not.

Q: Okay. Have you ever been restricted or limited in your testifying in a Mississippi court?

A: No, I have not.

(Trial Transcript 526-27)

Q: Dr. Beare, the testimony you're about to give, is it based upon sufficient facts and data?

A: It's—It's based upon the facts presented to me in the clinical records, as well as the deposition of the nurse involved in the case, as well as sources from the literature.

Q: And is your testimony the product of reliable principles and methods?

A: Yes, it is.

Q: Have you applied the principles and methods reliably to the facts of this case?

⁷ It is also extremely important to note that the trial court overruled the objection made by counsel for Appellee. The objection was: "Your Honor. It's an improper standard under Mississippi law."

A: Yes, I have.

(Trial Transcript 528-29; see also 599-602)

The above exchanges clearly reveal that Dr. Patricia Beare was qualified under Daubert principles and Rule 702 of the Mississippi Rules of Evidence. Even during the voir dire conducted by counsel for River Region, Dr. Beare testified that she had been accepted as an expert witness in the area of nursing practices and procedures in the following states: Florida, New York, Louisiana, Kansas, South Carolina, Georgia, Texas, Alabama, Wisconsin, Oklahoma, and Mississippi. (TR. 537-38). Based upon her testimony during voir dire and some 40 years of experience in the area of nursing practices and procedures, the trial court accepted her as an expert witness—with only one (1) limitation.

The Court: There's no need for that. I'm ready to rule on that. **It's going to be the ruling of the Court that Ms. Beare will be allowed to testify as a nursing expert.** She will not be allowed to testify as to any causation for nerve damage. That's the ruling of the Court, and the jury can give whatever weight they deem appropriate to this witness...

(Trial Transcript 564-65). [Emphasis added.]

Although she was accepted, the trial court arbitrarily refused to allow her to testify and render an opinion before the jury. The trial court determined that the proper predicate or foundation was not established for Dr. Beare to provide opinion testimony. However, these issues were never raised by River Region prior to the trial court's acceptance of her as an expert witness. Once the trial court accepted her as an expert witness in the field of nursing practices and procedures, the acceptance by the trial court allowed her to testify and form an opinion before the jury. And after the trial court erroneously struck her testimony, Dr. Beare still held fast to the applicable standards as recognized by this Court in both Brown and McLemore which should have permitted her to testify and form an opinion before the jury:

Q: Okay. And based upon your review of all of the documentation you've indicated for the Court, can you render an opinion in this Court as to the proper standard of nursing care and whether that—whether that standard was complied with?

Mr. Harmon: Same objection. Lack of predicate.

The Court: Overruled.

A. Yes, sir.

(Trial Transcript 601)

Q: What is your knowledge regarding the standard of care for IV therapy, IV treatment?

A: The standard of care for IV therapy in the State of Mississippi would be determined by the Nurse Practice Act in the state and also by the national standard, by the IV Therapy Association, which is the IV Nursing Society.

(Trial Transcript 602). [Emphasis added.]

The trial court satisfied itself that Dr. Beare passed the Daubert threshold as indicated above in order to declare that she was qualified to testify as an expert. If allowed to testify, Dr. Beare would have opined that Washington was negligent as to the rate of speed in which she administered the Lasix medication to Virginia McGee at 10:00 p.m. on June 30, 2007. (TR. 603-606). Dr. Beare would have also opined that Washington was negligent in failing to check the patency of the IV line, to make sure there was a blood flow return before the 10:00 p.m. Lasix was administered. (TR. 603-606). She would have also opined that the IV infiltration was proximately caused and/or contributed to by Washington as edema and swelling to Virginia McGee's left arm were first noted some thirty (30) minutes after Washington administered the 10:00 p.m. Lasix. (TR. 603-606). Dr. Beare would have also opined that Washington was negligent in not seeking orders from the attending physician or treating physician on how to best treat Virginia McGee's injuries from the IV infiltration. (TR. 603-606). She would have also opined that Washington negligently heated up a compress which proximately caused and/or contributed to Virginia McGee's second and third degree burns about her

left arm. (TR. 603-606) (TR. 366-378). Dr. Beare would have also opined that the proper standard of care required a cool or cold compress to be applied to the affected area. (TR. 603-606)⁸. All of these issues should have proceeded to the jury, as they spoke only to credibility--not admissibility. It was absolutely reversible error and an abuse of the trial court's discretion in refusing to allow Dr. Beare to render an opinion in this matter. As a result, the trial court's ruling must be reversed and the case remanded for a new trial.

B. THE CIRCUIT COURT ERRED IN ADMITTING EXPERT OPINION TESTIMONY FROM NURSE CHERYL WASHINGTON.

The trial court erred in admitting into evidence expert opinion testimony offered from Nurse Cheryl Washington, a lay witness who was employed by River Region, at the trial of this matter. According to Mississippi law, in order to prove a prima facie case of medical malpractice, expert testimony is essential. Hubbard v. Wansley, 954 So. 2d 951, 957 (Miss. 2007). The same rules and abuse of discretion standard cited above apply to this section. Rule 702 of the Mississippi Rules of Evidence also governs the admission of expert witness testimony. Id.

Generally, medical negligence may only be established through the testimony of an expert witness. Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So. 2d 790, 795 (Miss. 1995) (citing Walker v. Skiwski, 529 So. 2d 184, 187 (Miss. 1988)). In some instances where the negligence is so clear and easy to understand, our appellate Courts have allowed a "layman exception." Id. "The layman's exception applies to situations of obvious negligence." Hubbard v. Wansley, 954 So. 2d at 961. Our Courts have also held that when nurses are required to make judgment calls which may result in a claim for medical negligence, the laymen exception is inoperable and expert testimony

⁸ The position that a cool or cold compress should be applied when patients suffer an IV infiltration was taken by Nurse Julie Antley, Washington's supervisor. Nurse Julie Antley applied a cool compress to Virginia McGee's arm the day following the IV infiltration. (TR. 378)

is required. Smith v. Gilmore Memorial Hospital, 952 So. 2d 177, 181 (Miss. 2007) (holding in part that since the nurse's actions involved a judgment call, **and not something "purely factual in nature,"** expert testimony was required.) Summary judgment was appropriate in Smith as plaintiffs failed to properly and timely designate expert witnesses in the context of a medical malpractice case. Smith v. Gilmore Memorial Hospital, 952 So. 2d at 181-82.

Cheryl Washington was called as an adverse witness at the trial of this matter. It is totally undisputed that no party designated Washington as an expert witness in this matter, at all. Further, it is also undisputed that River Region never tendered a summation of her proposed opinions to be offered at trial as required by Rule 26(b)(4) of the Mississippi Rules of Civil Procedure. Without such, allowing Washington to testify as an expert at trial amounts to trial by ambush. However, during direct examination, counsel for River Region consistently solicited, and Washington consistently provided, expert testimony over the noted objections of Appellant.

Q: Will you please tell this jury, when someone has an IV, what are the risks that go along with IV therapy?

Mr. Martin: Same objection, Your honor. (It requires expert testimony.)

The Court: That's overruled.

A: The risks would be infiltration and infection. They're the main two things you're going to look for. With infiltration from an IV you're going to start looking at—when the fluids—they get any kind of fluids or anything, you're going to keep checking to make sure there is no redness, no swelling, anything like that regarding the IV...

(Trial Transcript 435) (Emphasis Added).

Over Appellant's objection, the trial court allowed Washington to assemble a plastic pipe and component parts to attempt to simulate how a needle is inserted into a person's vein. However, Washington never inserted a needle into the wrist of Virginia McGee prior to the IV infiltration; she negligently pushed Lasix through a port from the IV line. Per the pre-trial order, counsel for River

Region was required to list any and all demonstrative aids he sought to use. (RE. 353). However, the plastic pipe and component parts were never produced to counsel for Virginia McGee at any time prior to trial. During his examination, counsel for River Region asked the following question:

Q: Thank you. Okay. Now, how is it, once all this is in place, that two hours later or 20 hours later somehow it infiltrates? Can you explain how it infiltrates?

Mr. Martin: I'm going to object to the form of the question. Calls for expert testimony.

The Court: If she knows, I'm going to let her—

Mr. Harmon: Would you like me to lay a predicate, Your Honor?

The Court: No. Just go ahead. You may answer.

The Witness: Explain?

The Court: You may answer the question.

A: Okay. It's in her wrist. So the tip of the catheter can move if she moves her arm a lot, or it can come from just using her arm in general and it just may move. Or it could come from just a vein weeping into the tissue itself.

(Trial Transcript 443-44) (Emphasis Added).

The two central issues involved in this matter are (i) whether Washington caused and/or contributed to the IV infiltration and (ii) whether Washington needed orders from a physician before applying a hot compress—both required medical, expert opinions. See Smith v. Gilmore Memorial Hospital, 952 So. 2d at 181-82. However, the trial court allowed Washington to testify above and beyond factual and personal knowledge matters, even delving into causation and/or proximate cause. At a point during his examination, counsel for River Region admitted that he was seeking Washington's opinion:

Q: Based on your **judgment** as a nurse and the fact that you were there taking care of Ms. McGee, **did the compress cause the blisters that you found?**

Mr. Martin: I'm going to object to the question, Your Honor. It calls for expert testimony.

Mr. Harmon: She's a nurse, and I'm asking her within her field as a nurse what her **opinion is**, Your Honor.

The Court: I think the question is going to be limited to whatever she thinks as a nurse. We'll allow that.

Q: As a nurse, in your opinion, no more than a nurse, but as a nurse, **did the compress cause these blisters we've heard so much about?**

A: No, it did not...

(Trail Transcript 474) [Emphasis added.]

Q: **Did you do anything to cause the infiltration?**

A: Of course not.

Mr. Martin: Objection, Your Honor.

Mr. Harmon: I'll lay the same predicate if I need to.

Mr. Martin: It calls for expert testimony. She can't testify as to whether she caused the infiltration or not. That requires an expert to say that, Judge, a doctor.

The Court: If you can rephrase your question, Mr. Harmon.

Mr. Harmon: I'll do this in the interest of time. If he's going to stipulate that not his nursing expert is going to say what caused it either and that nurses can't say, I'll withdraw the question and we won't ask it.

Mr. Martin: Judge, I designated an expert. She's going—

Mr. Harmon: He just said nurses can't say, and now he's going to call a nurse—

Mr. Martin: Judge, in all due respect, Ms. Washington was called as a fact witness. I properly designated an expert who is going to say that.

The Court: **She is the treating nurse for this particular patient, and I'm going to let her give her opinion for what it's worth.**

Q: Ms. Washington, all I want is a nursing **opinion**. I'll back up a question. Did Ms. McGee cause this?

A: No, she did not.

Q: Did you cause this?

A: No, I did not.

(Trial Transcript 475-76.) [Emphasis added.]

River Region cannot genuinely dispute the fact that counsel solicited the opinions of a lay witness, a witness who was obviously biased, as she was employed with River Region even on the day she testified at the trial of this matter. Washington was never designated as an expert witness; however, the trial court allowed her to testify as one. Just as Mississippi law requires Virginia McGee to prove her medical malpractice claim with expert testimony, River Region must also use expert testimony, at least when trying to put opinion testimony before a jury, in attempting to prove its defenses.

By allowing Washington to testify about matters outside of her personal knowledge was improper and amounted to a trial by ambush. Without a Miss. R. Civ. P. 24(b)(4) designation, Appellant had no way of knowing what opinions Washington would testify about at trial. Further, the spirit of Miss. R. Civ. P. 24(b)(4) is to essentially allow parties to discover the facts and opinions held by experts prior to trial. Considering that Washington was never designated by any party, any testimony beyond that of her personal knowledge, (a) violates Miss. R. Civ. P. 24(b)(4); (b) prejudices Virginia McGee's case; and (c) confuses the jury as to matters properly reserved under Daubert analysis. Essentially, the trial court's actions in this regard also constitute reversible error.

C. THE CIRCUIT COURT ERRED IN EXCLUDING PROOF OF APPELLANT'S MEDICAL BILLS FROM RIVER REGION MEDICAL CENTER.

The circuit court erred in excluding from admissible evidence proof of Virginia McGee's total medical bills from River Region. This exact issue has been addressed and previously resolved by the Mississippi Supreme Court in Purdon v. Locke, 807 So. 2d 373, 378-79 (Miss. 2002). In Locke, the Court ruled that all medical bills, even the portion which may have been reduced or

written off, was still proof of damages pursuant to Miss. Code. Ann. § 41-9-119, so long as plaintiff could prove that the bills were “...so paid or incurred...” Id. at 378. Plaintiff brought a medical malpractice claim against his cardiologist, and obtained a judgement at trial. Id. at 376. One of the issues raised on appeal was whether the trial court erred in allowing plaintiff to admit into evidence certain medical bills. Id. at 378. “Purdon contends that since Locke had not paid the bills, they were not properly damages sustained by him. In addition, a portion of the bills (\$29,971.29) were written off by Baptist, which Purdon believes makes them inappropriate as an item of damages.” Id. The trial court ruled, “[t]here is no doubt that demands for payment were delivered to Locke and thus, incurred by him. Thus, the jury was properly allowed to hear them.” Id.

Also, River Region points to Miss. Code Ann. § 11-1-60 as the basis for why the reduced portion of the River Region bill should be excluded. However, the reasoning for its argument is misplaced. Miss. Code Ann. § 11-1-60 was enacted as a specific measure of tort reform. The statute merely draws a distinction between “economic” versus “non-economic” damages, and places limits on recoveries in medical malpractice actions. See Miss. Code Ann. § 11-1-60. The statute in no way changes or seeks to change a plaintiff’s requirement under Miss. Code Ann. § 41-9-119 (2001). The statute governing the reasonableness of medical bills is, and continues to be, Miss. Code Ann. § 41-9-119 (2001). It holds in pertinent part, “[p]roof that medical, hospital, and doctor bills were paid **or incurred** because of any illness, disease, or injury shall be prima facie evidence that such bills so paid **or incurred** were necessary and reasonable.” Miss. Code Ann. § 41-9-119 [Emphasis added.]; see also Purdon v. Locke, 807 So. 2d at 378.

Additionally, the Collateral Source Rule is also implicated in this case. Mississippi law unequivocally holds that evidence of collateral source payments—when made by those wholly independent of the tort-feasors (such as insurance companies and third party providers) may not be

introduced as evidence in order to mitigate defendants' damages or liability exposure. Burr v. Mississippi Baptist Medical Center, 909 So. 2d 721, 728-29 (Miss. 2005). The Collateral Source Rule stands for the proposition that tort-feasors should not be allowed to use payments or benefits derived from an independent, collateral source in attempting to reduce their own liability or damage exposure. Id.

It is obvious, after a careful examination of the River Region bill, that River Region billed Mrs. McGee \$40,158.86 on or about July 9, 2007 for services rendered on June 30, 2007. (RE. 314). It is also clear that because Mrs. McGee was a Medicare recipient, a reduction in the amount of \$35,301.92 was granted. (RE. 315). As in Locke, the jury should have been allowed to consider the full extent of the River Region bill for at least two (2) reasons: (i) the bill was prepared and a demand was made on Virginia McGee, through her agent, Medicare, for payment (RE. 302-314); and (ii) the reduction was only procured due to Mrs. McGee's relationship with a collateral source—Medicare. (RE. 314). Aside from this relationship with a collateral source, the reduction would have never been granted. As this exact issue has been previously addressed and resolved in Locke, it is clear that the trial court erred in its ruling to exclude the total amount of the medical bills billed to Virginia McGee (through Medicare) by River Region. As the Court pointed out in Locke, Virginia McGee only had to prove that the bills were **incurred** in order to meet the threshold required under Miss. Code. Ann. § 41-9-119. Purdon v. Locke, 807 So. 2d at 378. The burden would have then shifted to River Region to show, through proper evidence, that the bills were not reasonable. Id. River Region's anticipated arguments that Miss. Code Ann. § 11-1-60 somehow replaces or changes the purpose of Miss. Code Ann. § 41-9-119 is totally unfounded and is a misstatement of current Mississippi law. As a result, the trial court must be reversed and the case remanded for a new trial on this issue.

D. THE CIRCUIT COURT ERRED IN OVERRULING VIRGINIA MCGEE'S BATSON CHALLENGE.

The trial court erred in allowing River Region, over Appellant's objections, to exercise all four (4) of its peremptory strikes on African-American jurors. This Court's standard of review in analyzing Batson challenges is clearly erroneous or against the overwhelming weight of the evidence standard. Moore v. State, 914 So. 2d 185, 189 (Miss. Ct. App. 2005). Although trial courts are afforded great deference as to their rulings regarding Batson challenges, a trial court may be reversed if the court's ruling was clearly erroneous or against the overwhelming weight of the evidence. Id. The complaining party, in order to establish a prima facie case for a Batson challenge, must show purposeful discrimination on the part of the party exercising the peremptory strikes. Estate of Jones v. Phillips ex rel. Phillips, 992 So. 2d 1131, 1143 (Miss. 2008).

At trial, River Region exercised all four (4) of its peremptory strikes on African-American jurors. (TR. 301-303). Although counsel for River Region attempted to provide a race-neutral reason for the strikes, the reasoning was nothing more than a pretext to cover up purposeful discrimination. (TR. 301-305). River Region struck jurors #6, #34, #42, and #54—all African-Americans. (TR. 301-305). River Region then suggested that the strikes were because some of these jurors may have suffered from high blood pressure or hypertension, a condition to which Mrs. McGee also suffered from. (TR. 301). However, hypertension was not a central issue to this matter; IV infiltration was. (TR. 302). Moreover, the trial court admitted that it was not sure on this point:

The Court: Well, we've talked about it plenty today, hypertension, high blood pressure.
I'm not sure.

(Trial Transcript 302). [Emphasis added.]

Counsel for River Region further provided that juror #42 was struck because he was "obese. He's got hypertension..." (TR. 302). Counsel also stated that juror #54 was struck because he "didn't pay

attention...” (TR. 302). The trial court never responded to Virginia McGee’s claim of discrimination:

Mr. Martin: I don’t think he (juror #42) ever responded to any questions whatsoever. All of them are African-Americans. I mean, there are other—other folks on the venire who had high blood pressure that weren’t struck either, Judge. **High blood pressure is not a central issue to the case. The diabetes is because it—they’re claiming that that diabetic neuropathy and the nerve damage are one in the same.** High blood pressure is not a—it’s a tangential issue at best.

(Trial Transcript 302). [Emphasis added.]

The Court: Okay. I’ll deny that motion.

(Trial Transcript 303).

Due to the fact that all four (4) strikes were exercised on potential African-American jurors, and the lack of reasoning articulated by counsel for River Region, discriminatory intent must be inferred in River Region’s action. As a result, the trial court must be reversed on this issue, and the case must be remanded for a new trial.

CONCLUSION

Virginia McGee, a 77 year-old woman, was transported to River Region on June 30, 2007 for complications regarding her sugar diabetes. While there, through no fault of her own, she suffered a tremendous and catastrophic injury which kept her hospitalized and away from her family for almost one (1) month. The true tragedy behind this entire case is the people Virginia McGee should have been able to rely upon--the nurses and medical professionals at River Region--were the ones who caused and concealed this unnecessary injury. Even sadder is the fact that Nurse Cheryl Washington did not tell anyone that she caused this injury until the following day. In concealing her mistake, she attempted to treat an injury without seeking insight and consent from Virginia McGee's treating or attending physician, which resulted in painful boils and blisters, second and third degree burns, and nerve injuries.

Mrs. McGee, through the help of her son and attorney, properly complied with all legal requirements in order to effectively prosecute a legal malpractice action in the Circuit Court of Warren County, Mississippi. In attempting to have her day in court and these issues addressed by a jury, the trial court wrongfully excluded the expert testimony of her one (1) expert witness--Dr. Patricia Beare, only after the trial court accepted her as an expert witness in the area of nursing. To further handicap Mrs. McGee, the trial court allowed one of River Region's current employees--the nurse responsible for Mrs. McGee's injuries--to render medical expert opinions at trial. It is totally undisputed that no one designated or recognized Cheryl Washington as an expert witness at the trial of this matter. However, counsel for River Region consistently solicited, and Washington consistently provided, such testimony.

The trial court also wrongfully excluded from admissible evidence proof of Virginia McGee's total medical bills from River Region. The only reason any reduction was recognized was

because of Mrs. McGee's relationship with a collateral source—Medicare. As such the Collateral Source Rule was violated by the trial court.

Lastly, the trial court erred in allowing River Region, over Appellant's objections, to exercise all four (4) of its peremptory strikes on African-American jurors. Such action violated Virginia McGee's right to a fair and impartial jury.

Now, 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, 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 19th day of February, 2010.


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**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

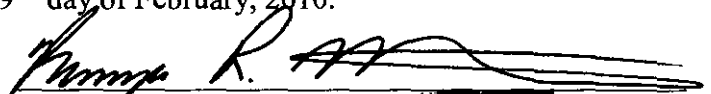
CERTIFICATE OF MAILING

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 Brief of Appellant, VIRGINIA MCGEE;
2. Three (3) copies of the Brief of Appellant, VIRGINIA MCGEE;
3. Four (4) copies of the Record Excerpts for Appellant, VIRGINIA MCGEE

to: Kathy Gillis
Supreme Court Clerk
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Respectfully submitted on this the 19TH day of February, 2010.


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