

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CA-01441**

KEVIN BERRY

DEFENDANT/APPELLANT

VS.

ORA L. PATTEN, et. al.

PLAINTIFF/APPELLEE

REPLY BRIEF OF APPELLANT

**Appeal from the Circuit Court of Lafayette County, Mississippi
Cause No. L-2002-138**

ORAL ARGUMENT REQUESTED

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ARGUMENT

- A. The Plaintiffs failed to prove their case by a preponderance of the credible evidence as required by Mississippi law, as Plaintiffs did not have any credible evidence that Defendant breached any applicable standard of care, as chance of recovery is not causation.**

In their brief, Plaintiffs argued that Dr. Futrell set forth the standards of care breached and proved proximate cause. Plaintiffs quote Dr. Futrell's testimony wherein he stated generally that Defendants breached the standard of care and that Mr. Berry breached the standard of care by not placing an NG tube into Ms. Patten prior to induction and reducing the risk of any stomach fluids contaminating the lungs; by not placing her in the Trendelenburg position prior to induction; by not placing her in the Trendelenburg position when he saw the beige fluid and suctioning prior to intubation, thus missing an opportunity to decrease the amount of fluid; by not requesting an anesthesiologist be present (he concedes this is not mandatory), and by not using awake fiberoptic intubation. *See Appellee Brief pg. 10-15; Tr. at 120-21; 124-25; 129; 162; R.E. 3.* Next Plaintiffs quote Dr. Futrell's testimony wherein he testified that the aspiration resulted in Ms. Patten's clinical course. *See Appellee Brief pg. 15.* The only testimony Dr. Futrell provides that the alleged breaches in the standard of care caused the aspiration is:

The pathological diagnosis, we know what the process was; and we know exactly when it began; and we've discussed already the circumstances that would have allowed us to prevent it.

See Appellee Brief pg. 16. At the end of cross-examination, Dr. Futrell re-affirmed his affidavit, which stated:

All of the above deviations...are accepted practice caused the patient to suffer complications associated with aspiration or (sic) fecal matter and fluids into her lungs after institution of anesthesia with paralytic drugs given by Mr. Berry in the absence of Dr. Jones' assistance and

supervision....

These deviations caused a missed opportunity to prevent and limit the occurrence of the aspiration that followed....

Tr. at 166-67; R.E. 3. Defense counsel followed up and asked:

Defense Counsel: But, just so we are clear, the sum and substance of everything you've said here today about what you say are the breaches of the standard of care, these deviations caused a missed opportunity to prevent and limit the occurrence of the aspiration that followed. Sir?

Dr. Futrell: Yes.

Id. Although Dr. Futrell testified that the aspiration caused Ms. Patten's clinical course and ultimate death, he never testified that the alleged breaches in the standard of care caused the aspiration, the proximate causation element he must prove in a medical malpractice case. *Cheeks v. Bio-Medical Applications, Inc.*, 908 So. 2d 117 (Miss. 2005) (citing *McCaffrey v. Puckett*, 784 So. 2d 197, 206 (Miss. 2001)). Dr. Futrell never testified that the alleged breaches in the standard of care caused Ms. Patten's aspiration, just that the alleged deviations caused a missed opportunity to prevent and limit the occurrence of the aspiration, and Mississippi law does not permit recovery of damages in medical malpractice because of a mere diminishment of a patient's chance of recovery, as it does not meet the requirements of causal connection. *Clayton v. Thompson*, 475 So. 2d 439, 445 (Miss. 1985).

Next, Plaintiffs argued that Dr. Brunson testified that the duty of care required that the patient be placed in the Trendelenburg position once the beige fluid was seen, followed by suctioning, followed by placement of the breathing tube. *See* Appellee Brief pf. 17. However, Dr. Brunson never testified as to causation.

Finally, Plaintiffs argued that Dr. Jones testified that if Ms. Patten had been placed in the Trendelenburg position prior to induction, the fluid would not have gotten into her lungs, resulting in her death. See Appellee Brief pg. 20. However, as evidence by Dr. Jones' testimony quoted in Plaintiffs' brief, he testified by stating, "possibly" or "probably" or "we don't know." *Id.* On re-direct, Dr. Jones testified:

Counsel: Was the Trendelenburg position indicated in this case in your opinion?

Dr. Jones: No, it wasn't; and there's actually literature out there that existed prior to this case that says just the opposite; and that is by keeping the patient head up, you let the water stay down hill. You've got the others who say put the patient head soon (sic)(down) so the water flows downhill and out. You have people arguing on both sides of the fence.

Keeping the patient in a neutral position in my mind was perfectly acceptable; because, as I said, Trendelenburg is going to create a situation where all of those very same contents we keep talking about are coming at you; and now you can't see her airway.

Tr. at 261-62; R.E. 3.

Plaintiffs are missing a key element in proving a medical malpractice case—causation. *Cheeks v. Bio-Medical Applications, Inc.*, 908 So. 2d 117 (Miss. 2005) (citing *McCaffrey v. Puckett*, 784 So. 2d 197, 206 (Miss. 2001)). Mississippi law does not permit recovery of damages in medical malpractice because of a mere diminishment of a patient's chance of recovery, as it does not meet the requirements of causal connection. Recovery is allowed only when the physician's failure to render a required level of care results in a loss of reasonable probability of substantial improvement in the patient's condition. *Clayton v. Thompson*, 475 So. 2d 439, 445 (Miss. 1985). A missed

opportunity to prevent and limit the occurrence of the aspiration does not meet the preponderance of evidence standard. As to the standard of care, Jury Instruction P-6A, discussed below, instructed the jury on a standard of care that does not exist. Therefore, neither the standard of care nor causation were proven by a preponderance of the evidence, and the jury verdict should be reversed.

B. Jury instruction, P-6A, granted by the trial judge, was an improper instruction in that it instructed the jury on a standard of care that does not exist.

1. Use of an NG Tube.

In their brief, Plaintiffs argued that Dr. Futrell's testimony set forth the standards of care allegedly breached by Defendant. First, Plaintiffs argued that Dr. Futrell testified that an NG tube should have been used in this case, and it was not. *See* Appellee Brief pg. 26. However, Plaintiffs failed to point out that not only did Dr. James Futrell testify that the standard of care required Kevin Berry to use an NG tube to attempt to suction stomach contents in Sheila Patten, who was a post-gastric bypass patient with a small bowel obstruction, Dr. Futrell also testified concerning a different technique, that use of the NG tube should have been performed while Sheila Patten was awake, in an upright position, with a blind insertion of an NG tube and then suctioned. Tr. at 120-22; R.E. 3. In fact, Dr. Futrell testified that Dr. Barnes should have placed the NG tube in Ms. Patten at the bedside prior to induction of anesthesia. *Id.* Dr. Futrell then testified that the standard of care would have required the insertion of a fiberoptic scope while Sheila Patten remained in an upright position followed by the awake insertion of a breathing tube. Tr. at 130-31, 145-46; R.E. 3. The broad and generalized instruction stating:

“The Court instructs the jury that the applicable standard of care alleged by Plaintiff (is) as follows:
(1) Utilization of an NG tube;”

is not “supported by the evidence,” *Beverly Enters. v. Reed*, 961 So. 2d 40, 43-44 (Miss. 2007). Dr. Futrell testified to two different ways to use an NG tube, and also testified to the use of a fiberoptic scope. The instruction should have required the jury to find that the Plaintiffs had established the applicable standard of care, required the jury to find that the standard of care was breached by one or both of the Defendants, and that this breach caused or contributed to the death of Sheila Patten.

2. Fiberoptic Induction.

In their brief, Plaintiffs conceded Plaintiffs’ counsel “misused” the term “induction” in jury instruction, P-6A. *See* Appellee Brief pg. 26 n. 2. Also, Plaintiffs attempted to minimize the extent of the error by using the terms “fibro-optic technique” and “awake fiberoptic procedure,” which is contrary to the evidence presented at trial. *See* Appellee Brief pgs. 5 & 6. The term “fiberoptic induction” does not exist in medicine and cannot be found in the record. At trial, there was no testimony to support the use of the term, “fiberoptic induction.” There is no such procedure as a “fiberoptic induction.” This is compounded by the fact that the only proof concerning **fiberoptic intubation** was in connection with an upright, awake use of a fiberoptic scope, then intubation. Tr. at 130-31,145-46; R.E. 3. The instruction was an unauthorized comment on the evidence and improperly allowed the jury to find that “fiberoptic induction” is the standard of care when there is no such medical procedure as “fiberoptic induction.” **Once the trial court gave this instruction, the jury was instructed by the trial court that Plaintiffs had provided sufficient evidence in the record to support this instruction when, in fact, there was no evidence in the record to support this instruction.** Thus, the jury had to find that the standard of care required Kevin Berry to perform a procedure that does not exist, that this standard of care (fiberoptic induction) was breached, and

the breach caused or contributed to the death of Sheila Patten. The trial court error cannot be cured by the Plaintiffs and their attorney conceding they “misused” the terminology or by attempting to minimize the error by using different terminology throughout the brief.

3. Presence of an Anesthesiologist in the OR at the Time of Induction.

As to Kevin Berry, CRNA, this alleged breach of the standard of care was not applicable, and this instruction is misleading, confusing and contrary to the evidence. The uncontradicted testimony at trial was that Dr. Roller developed the anesthesia care plan Kevin Berry followed. Tr. at 118, 160-61; R.E. 3. That anesthesia plan of care did not require the presence of an anesthesiologist in the OR at the time of induction.

In addition, Dr. Futrell, Plaintiffs’ expert, testified:

Counsel: Is there anything else about not having an anesthesiologist present at the time of induction? How would the presence of an anesthesiologist along with the CRNA make a difference?

Dr. Futrell: It would make a difference in this circumstance because knowing the condition of the patient and knowing about the possibility of the gastric contents getting into the lungs as we have already discussed, it’s important to have another set of hands, first of all, to be able to manage suction and intubation, putting the tube into the lungs at the same time.

This is very messy, and you don’t have a lot of time, and so in these circumstances where you can anticipate we commonly call another person in to help with the situation. It’s not absolutely mandatory that we do so, but prudent anesthesiologist do that.

(emphasis added) Tr. at 129-30; R.E. 3. Dr. Futrell testified that having an anesthesiologist in the OR at the time of induction is not mandatory; i.e., the standard of care. Therefore, the instruction

is contrary to the law, the facts in this case, and is not supported by the evidence. **Once again, in giving this instruction, the trial court instructed the jury that the Plaintiffs had sufficient evidence in the record so that this theory of the Plaintiffs' case could be decided by the jury.** Otherwise, this Defendant was entitled to a directed verdict. The Defendant's motion for directed verdict was denied.

4. Use of the Trendelenburg Position Before Induction.

As stated above, the Plaintiffs' standard of care expert, Dr. James Futrell, testified that the standard of care could be met through different techniques, awake placement of an NG tube or use of an NG tube after sedation. Tr. at 120-22; 130-31; 145-46; R.E. 3. Only placement of an NG tube after sedation would require the Trendelenburg position. In addition, Dr. James Futrell, testified that Kevin Berry should have placed the operating room table in the "Trendelenburg position" after the appearance of the beige fluid in the oral pharynx while he was attempting to do a rapid sequence induction with cricoid pressure. Tr. at 124-25; R.E. 3. Thus, for the trial court to instruct the jury:

"The Court instructs the jury that the applicable standard of care alleged by Plaintiff (is) as follows:

(4) Use of the Trendelenburg position before induction;"

is contrary to the evidence and is confusing. This reference is so confusing, so out of context, that the jury could not possibly have been properly instructed. A jury verdict based on this instruction that is contrary to the facts must be reversed. The trial court in giving this instruction to the jury that the Plaintiffs had sufficient evidence in the record to support a finding against the Defendant on this alleged breach of the standard of care **when there in no evidence** to support this instruction.

5. Use of the Trendelenburg Position After the Beige Fluid was Seen and Before Intubation.

Plaintiffs argued that Dr. Brunson, Defendant's expert, stated that he taught CRNA's to put the patient in the Trendelenburg position immediately upon seeing the beige fluid and before intubation. *See* Appellee Brief pg. 27. However, Dr. Brunson testified that, "Yeah, that would be something to think about is putting her in Trendelenburg." *See* Appellee Brief pg. 17. Dr. Brunson continued, "Yes. I said if you are going to use Trendelenburg, then that would be the time to use Trendelenburg, suction it out, and then you can intubate." *Id.* at 20. The uncontradicted proof in this case was that Dr. Roller conducted a pre-anesthesia evaluation, which provided for general anesthesia with "rapid sequence induction." Tr. at 118; 156-60; R.E. 3. "Rapid sequence induction" requires the patient to be placed in a supine position, sedated, administered a paralytic drug, cricoid pressure applied, and intubated. Tr. at 248; R.E. 3. In this case, it was uncontradicted that Sheila Patten was placed in a supine position on the operating table, was sedated, had cricoid pressure applied, and was induced followed by the appearance of beige fluid in the oral pharynx. Tr. at 160-62, 248; R.E. 3. The language in the jury instruction did not conform to the evidence and did not require the jury to find from a preponderance of the evidence that the standard of care required that Sheila Patten be placed in the Trendelenburg position when the beige fluid appeared in the oral pharynx, followed by suction, (which was the Plaintiffs' proof as to what should have occurred), followed by intubation, suction and then ventilation. The jury should have been instructed that if they find that the standard of care required these maneuvers, that the standard of care was breached, and that the breach of that standard of care caused or contributed to the death of Sheila Patten. In the form presented to the jury, this portion of Jury Instruction P-6A is fatal as a matter of law.

6. Suctioning Immediately After Intubation Rather Than Beginning Ventilation.

This language is misleading, confusing and contrary to the evidence. This subpart, once

again, confuses “intubation” with “induction.” The erroneous nature of this instruction was admitted when Plaintiffs’ counsel in open court in closing arguments acknowledged that he was “an idiot” by improperly using this language. Tr. at 342; R.E. 3. Also, in their brief, Plaintiffs stated, “Appellee’s attorney readily admitted and cured the confusion that he was the idiot who put ‘induction’ in that section when in fact ‘intubation’ was the word that should have been used.” See Appellee Brief pg. 8. Once again, according to the Plaintiffs’ expert, Dr. James Futrell, the breach in the standard of care was that Sheila Patten was placed in a supine position, sedated, given a paralytic drug, at which time beige fluid appeared prior to intubation, that the patient should have then been placed in the Trendelenburg position, then suctioned, then intubated with a breathing tube, suctioned followed by ventilation. Tr. at 124-25, 160-62; R.E. 3. This instruction did not require that the jury find that “suctioning immediately after intubation rather than beginning ventilation” was the standard of care from a preponderance of the evidence, and could not so find because the instruction clearly confused “intubation” with “induction.” Thus, as a matter of law, this instruction is faulty. The words “induction” and “intubation” are terms with defined meanings. As used in this instruction, the term “intubation” is misused. The jury was instructed improperly and the improper jury instruction, which was taken by the jury to the jury room for their deliberation and presumably read by them, cannot be cured by Plaintiffs’ counsel calling himself an “idiot” in his closing argument for confusing the terms. Plaintiffs cited the other jury instructions granted; however, Jury Instruction P-6A so misstated the testimony, the other jury instructions cannot cure the error committed. The Mississippi Supreme Court, “will not hesitate to reverse if the instructions, when analyzed in the aggregate, do not fairly and adequately instruct the jury. *Beverly Enterprises, Inc. v. Reed*, 961 So. 2d 40, 43 (Miss. 2007), citing *Richardson v. Norfolk & Southern Ry.*, 923 So. 2d 1002, 1010 (Miss. 2006). Kevin Berry is a highly trained medical professional. He was charged with medical

negligence that resulted in the death of his patient. The standards of care that Mr. Berry allegedly breached by which he was to be judged were not written in any book; it is so beyond the understanding of lay jurors that “experts” were needed to explain what allegedly should have been done. The jury was instructed to standards of care that do not exist, and the Plaintiffs’ attorney thinks that these misstatements of the testimony of the experts can be cured by his admitting in closing argument that he made a mistake and called himself an “idiot.” Justice requires more than this. Instruction P-6A is not supported by the evidence presented at trial and does not instruct the jury on the evidence presented at trial; therefore, the jury verdict must be reversed.

C. The trial court erred in allowing the jury to consider damages when heirship had not been determined, wrongful death beneficiaries had not been determined, and guardianship of the minors had not been determined.

In their brief, Plaintiffs argue that the trial court followed clear and unquestioned Mississippi statutory and decisional law in refusing to fragment this wrongful death suit, or otherwise complicate it procedurally. However, Defendants are not arguing that the suit should be fragmented, but that precedent be followed and that under the pleadings in this case the Plaintiffs should not have been allowed to recover medical, funeral, net cash value damages, which they did. When the Defendants filed their Motion to Dismiss, the Plaintiffs had a choice, proceed with the case without these damages or cure. R. at 212-19; R.E.4. The Plaintiffs proceeded and received damages that under the law they are not entitled to. The Mississippi Supreme Court in *Long v. McKinney*, 897 So. 2d 160, 174 (Miss. 2004), held that “in wrongful death litigation, all claims shall be joined in one suit.” In addition, the Court identified three classes of potential claimants in a wrongful death suit: (1) the heirs, (2) the estate and (3) the statutory wrongful death beneficiaries. *Id.* at 169. The Court noted that if the litigants wanted to pursue a claim on behalf of the decedent’s estate, the estate must be opened and administered through the chancery court. *Id.* at 174; *see also Burley v. Douglas*, 26 So.

3d 1013 (Miss. 2009). In addition, chancery approval is required for the appointment of a personal representative of the estate. *Id.* The Court also held that in wrongful death litigation involving a minor, the representation of the minor's interest and any agreement for the payment of attorneys fees from the minor's share of the proceeds must be approved by the chancery court. *Id.* at 175. Finally, the Court held that chancery courts may determine wrongful death beneficiaries and noted that litigants bringing the wrongful death action, together with their counsel, have a duty to identify the beneficiaries, and encouraged the litigants to do so early in the proceeding. *Id.* at 175-76.

In the Complaint and at trial, Ora L. Patten, who had not obtained chancery court approval to prosecute this action on behalf of the minors, sought wrongful death damages for loss of society and companionship, funeral expenses, medical expenses and the present net cash value of the future earnings of the deceased, Sheila Patten. In accordance with the mandate in *Long v. McKinney*, only the estate is entitled to recover funeral costs and final medical expenses, the beneficiaries are entitled to recover for their respective claims for loss of society and companionship, and only wrongful death beneficiaries are entitled to recover the net cash value of the decedent's continued existence. *Id.* at 169.

In their brief Plaintiffs claim that "there is no dispute that the suit is being brought on behalf of minors who are the sole heirs and wrongful death beneficiaries," but the proper heirs and wrongful death beneficiaries have never been determined, and the only proof provided was the grandmother's testimony that the grandchildren were the sole heirs and wrongful death beneficiaries. There were no birth certificates in evidence, and as a result, we do not know who the Plaintiffs are. Plaintiffs failure to determine the proper heirs and wrongful death is the basis for Defendant's argument that all claims for funeral expenses and medical expenses should have been barred since there was no estate; all claims for loss of the present net cash value should have been barred since there had been

no determination of who the wrongful death beneficiaries were; and the Complaint should have been dismissed because Ora L. Patten had not obtained chancery court approval to proceed in this litigation on behalf of the minor Plaintiffs.

- D. The trial court erred in striking Juror 26, Bradley S. Knight and inserting Juror 27, Sheila R. Tyson, on its own motion when Mr. Knight attested he could be fair and impartial, Plaintiff's counsel did not move to strike Mr. Knight for cause or use a peremptory challenge against Mr. Knight when Plaintiff had not used all his peremptory challenges.**

By not moving to strike Mr. Knight for cause or using a peremptory challenge against Mr. Knight, Plaintiffs invited error and takes advantage of that error on appeal. In their brief, Plaintiffs concede, "However, it was Plaintiff's attorney's error that resulted in this scenario in question." *See* Appellee Brief pg. 40. The Mississippi Supreme Court has consistently held that the trial court has not committed reversible error when the trial court denies a party's challenge for cause when that party has not used all his peremptory challenges. *Id.* at 851. To hold otherwise would allow a party to invite error and take advantage of it on appeal. *Capler v. City of Greenville*, 207 So. 2d 339, 341 (Miss. 1968). In the case *sub judice*, Plaintiffs used neither a challenge for cause nor a peremptory challenge against juror, Bradley Knight. Plaintiffs' attorney conceded he intended to challenge Mr. Knight for cause but forgot. *See* Appellee Brief pg. 39. Despite his intentions, Plaintiffs' counsel did not challenge Mr. Knight for cause nor did he use a peremptory strike against Mr. Knight. The trial court could not have committed reversible error by allowing Mr. Knight to remain on the jury when the Plaintiffs did not use their challenges. Otherwise, Plaintiffs would have invited error and taken advantage of that error on appeal. Instead, the trial court committed reversible error when it struck Mr. Knight even though Mr. Knight stated he could be fair and impartial, the Plaintiffs did not challenge Mr. Knight for cause or use a peremptory challenge on Mr. Knight, and Defense counsel objected.

- E. The trial court erred in denying Jury Instruction No. D-15 when Plaintiff's expert, Dr. James Futrell, provided an affidavit and affirmed, "These deviations caused a missed opportunity to prevent and/or limit the occurrence of the aspiration that followed," and affirmed that testimony at trial.**

In their brief, Plaintiffs argued that Dr. Jones admitted that aspiration is what caused Ms. Patten's death. *See* Appellee Brief pg. 38. However, Plaintiffs miss the point; they must prove that the alleged breaches in the standard of care caused Ms. Patten's death. The only testimony regarding whether the alleged breaches in the standard of care caused Ms. Patten's death was Dr. Futrell's re-affirmation of his affidavit, which stated:

All of the above deviations...are accepted practice caused the patient to suffer complications associated with aspiration or (sic) fecal matter and fluids into her lungs after institution of anesthesia with paralytic drugs given by Mr. Berry in the absence of Dr. Jones' assistance and supervision....

These deviations caused a missed opportunity to prevent and limit the occurrence of the aspiration that followed....

Tr. at 166-67; R.E. 3. Defense counsel followed up and asked:

Defense Counsel: But, just so we are clear, the sum and substance of everything you've said here today about what you say are the breaches of the standard of care, these deviations caused a missed opportunity to prevent and limit the occurrence of the aspiration that followed. Sir?

Dr. Futrell: Yes.

Id. Therefore, the trial court erred in refusing Instruction D-15, as Dr. Futrell's expert testimony was allowed into evidence, but Mississippi law does not permit recovery of damages for medical malpractice because of the mere diminishment of a patient's chance of recovery, which is what Dr. Futrell testified to.

- F. The trial court erred in allowing Dr. Richard Mackey's deposition to be read in its entirety, when the portions regarding the use of an NG tube in a non-gastric bypass patient had no factual predicate, and Dr. Mackey was allowed to provide expert testimony when he had not reviewed the medical records in this case.**

In their brief, Plaintiffs argued that Defendant failed to inform the trial court as to what they were objecting to and should have looked at each question he objected to during the deposition and taken that objection up with the trial judge during trial. *See* Appellee Brief pg. 36-37. However, Plaintiffs failed to realize that Defendant objected to the reading of Dr. Mackey's entire deposition into evidence because Dr. Mackey was not qualified or tendered in his deposition as an expert witness and had never reviewed Sheila Patten's chart, based on a Daubert, evidentiary argument. Tr. at 87-89; R.E. 3. The trial court erred in allowing Dr. Mackey's deposition testimony to be read into evidence as Dr. Mackey was not qualified and had not been tendered as an expert during his deposition, and Dr. Mackey had not reviewed Ms. Patten's medical records. Dr. Mackey's testimony was not based on any facts of this case, as he had not reviewed Ms. Patten's chart. Therefore, the trial court erred in allowing Dr. Mackey's testimony to be read into evidence.

CONCLUSION

The jury's verdict was against the overwhelming weight of evidence. The Plaintiffs failed to prove medical negligence, as the standard of care they set forth in their jury instruction P-6A does not exist and cannot be found in the evidence, and their medical expert did not prove causation. Once the trial court gave instruction P-6A, over the Defendant's objection, the jury was instructed by the trial court that the Plaintiffs had created an issue of each of the alleged standards of care set forth in instruction P-6A. However, the Plaintiffs had not created an issue of each of the alleged standards of care, as there is no evidence to support each of the sub-parts found in instruction P-6A.

For this reason alone, the case must be reversed. In addition, the trial court erred in allowing the jury to consider damages when heirship and wrongful death beneficiaries had not been determined, and guardianship of the minors had not been determined. Also, the trial court erred in striking Juror 26, Bradley S. Knight on its own motion when he attested he could be fair and impartial, Plaintiffs' counsel did not move to strike him for cause or use a peremptory strike against him, nor did Plaintiffs' counsel utilize all his peremptory challenges. The trial court also erred when it denied Jury Instruction D-15 on lack of recovery when Plaintiffs' expert, Dr. James Futrell affirmed, "These deviations caused a missed opportunity to prevent and/or limit the occurrence of the aspiration that followed." Finally, the trial court erred in allowing Dr. Richard Mackey's deposition to be read in its entirety, when the portions regarding the use of an NG tube in a non-gastric bypass patient had no factual predicate, and Dr. Mackey was allowed to provide expert testimony when he had not reviewed the medical records in this case. For these reasons, the jury verdict should be reversed.

RESPECTFULLY SUBMITTED, this, the 29 day of March, 2010.

BY:



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BY:



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CERTIFICATE OF SERVICE

I, MARY FRANCES S. ENGLAND, one of the attorneys for Kevin Berry, certify that I have this day delivered via U.S. Mail, postage prepaid, a true and correct copy of the foregoing document to the following:

William C. Walker, Jr., J.D.
P.O. Box 1115
Oxford, MS 38655-1115

Honorable Henry L. Lackey
Circuit Court Judge
P.O. Box T
Calhoun City, MS 38916

THIS, the 29 day of March, 2010.



L. CARL HAGWOOD



MARY FRANCES S. ENGLAND

CERTIFICATE OF FILING

I, MARY FRANCES S. ENGLAND, certify that I have this day delivered via United States First Class mail, Defendant/Appellant Kevin Berry's Appellant Brief, on March 29, 2010, to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, P. O. Box 249, Jackson, MS 39205-0249.



MARY FRANCES S. ENGLAND