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**

BRIEF OF APPELLANT

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

ORAL ARGUMENT REQUESTED

Prepared and submitted by:

L. CARL HAGWOOD
Mississippi Bar N[redacted]
CHRISTOPHER W. WINTER
Mississippi Bar N[redacted]
MARY FRANCES S. ENGLAND
Mississippi Bar No.[redacted]
Wilkins Tipton
Post Office Box 4537
Greenville, Mississippi 38704
Telephone (662) 335-5555
Facsimile (662) 335-5700

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CERTIFICATE OF INTERESTED PERSONS

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

1. Ora L. Patten, Plaintiff/Appellee/Grandmother
2. Bianca Patten, Plaintiff
3. Shadarryl Hardnett, Plaintiff
4. Mariah Patten, Plaintiff
5. Sheila Patten, Decedent
6. William C. Walker, Jr./Attorney for Plaintiff
7. L. Carl Hagwood/Attorney for Defendant/Appellant
8. Christopher W. Winter/Attorney for Defendant/Appellant
9. Mary Frances S. England/Attorney for Defendant/Appellant
10. Duke Goza/Attorney for Defendant/Appellant
11. Honorable Henry Lackey, Circuit Court Judge

KEVIN BERRY

L. CARL HAGWOOD, M[redacted]

MARY FRANCES S. ENGLAND, M[redacted]

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STATEMENT OF THE ISSUES

I. 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 that caused or contributed to Sheila Patten's death.

II. Jury instruction P-6A improperly instructed the jury as to the alleged standard of care in that it instructed the jury that they could find for the Plaintiff and against Kevin Berry by describing procedures not found in medicine, by describing procedures that are contrary to all known anesthesia protocols, by describing procedures not testified to by the expert witnesses who testified at trial, and was granted over strenuous objections of defense counsel; thus, the finding by the jury of causal relationship between the stated breaches of standard of care in Plaintiff's Jury Instruction P-6A and death is impermissible under our jurisprudence.

III. The only wrongful death beneficiaries were three children, and the trial court erred in denying the Defendant's Motion to Strike all damages for funeral expenses, medical expenses, and loss of the present net cash value of the decedent's life expectancy when heirship had not been determined, wrongful death beneficiaries had not been determined and guardianships for the minor children had not been established.

IV. The trial court erred when, after the jury had been empaneled, after the jury had heard evidence, and after one of the jurors became ill, it removed Juror 26, Bradley S. Knight, the first alternate juror, and inserted Juror 27, Sheila R. Tyson, when juror

Bradley S. Knight on *voir dire* stated he could be fair and impartial, Plaintiff's counsel did not move to strike Mr. Knight for cause or strike Mr. Knight using a peremptory challenge, and Plaintiffs had not used all of their peremptory challenges.

V. The trial court erred in denying Jury Instruction No. D-15, which correctly recited that Mississippi law does not permit recovery for damages for medical malpractice because of mere diminution of a patient's chance to recover when the Plaintiffs' standard of care and causation expert, Dr. James Futrell, stated in affidavit testimony prior to trial, which was reaffirmed at trial, "These deviations caused a missed opportunity to prevent and/or limit the occurrence of the aspiration that followed."

VI. The trial court erred in allowing the Plaintiffs to call, by way of deposition and to present as an expert witness, Dr. Richard Mackey, a staff anesthesiologist at Baptist Memorial Hospital, when he responded to questions regarding the use of an NG tube in non-gastric bypass patients, the questions were abstract in nature, and Dr. Mackey had not reviewed the medical records in this case so as to be able to give expert testimony based upon the facts of this case, thus allowing the jury to hear testimony concerning the use of NG tubes in patients who had not had gastric bypass surgery.

STATEMENT OF THE CASE

On April 17, 2002, Plaintiffs filed suit against Baptist Memorial Hospital, North Mississippi, Inc., Kevin Berry, Frederick D. Jones, M.D., and James Robert Barnes, M.D., alleging medical negligence. Sheila Patten had undergone gastric bypass surgery on April 17, 2000, without complications. However, on April 26, 2000, Ms. Patten presented to the emergency room complaining of abdominal pain and nausea and subsequently underwent surgery for a small bowel obstruction. In their Complaint, Plaintiffs alleged Sheila Patten aspirated when she underwent surgery to correct a bowel obstruction on April 26, 2000, and subsequently died on May 22, 2000. Plaintiff, Ora Patten, is Sheila Patten's mother and grandmother to the minor Plaintiffs, Bianca Patten, Shadarryl Hardnett and Mariah Patten. Thereafter, the Defendants filed their answers.

Prior to trial, Baptist Hospital and Dr. Barnes were dismissed from the suit. The trial proceeded against Kevin Berry, certified nurse anesthetist (CRNA), and Dr. Frederick D. Jones, anesthesiologist. On March 11, 2009, the jury found for the Plaintiffs against Defendant, Kevin Berry, only, and awarded damages of $1,150,000, and judgment was entered. Thereafter, Defendant, Berry, filed a Motion for Judgment Notwithstanding Verdict, Motion for a New Trial or, Alternatively, Motion for Remittitur, arguing that the jury's verdict was improper and erroneous as a matter of law and against the overwhelming weight of the evidence; that Jury Instruction P-6A did not conform to Mississippi law on negligence, in that the instruction used terms that do not exist in medicine and cannot be found in the record; that the trial court erred in allowing the jury to consider damages when heirship had not been determined; that the trial court erred in allowing the jury to consider damages for the minors when no guardian had been appointed; that the trial court erred in allowing the jury to consider damages for funeral expenses, net present cash value and survival

claims, as the Plaintiffs lacked capacity to claim these elements of damages; that the trial court erred in allowing the reading of Dr. Richard Mackey's deposition in its entirety; that the trial court erred in striking Juror 26, Bradley S. Knight, and inserting Juror 27, Sheila R. Tyson, in his place when Juror 19, Louann Hood became ill; that the trial court erred in denying Defendant's requested jury instruction, D-15, when Plaintiffs' expert witness, Dr. James Futrell, affirmed, "These deviations caused a missed opportunity to prevent and/or limit the occurrence of the aspiration that followed;" and the trial court erred in denying Defendant's Motion for a Directed Verdict with regard to both causation and damages. Thereafter the trial court denied Defendant's Motion, and Defendant appealed to this Court.

SUMMARY OF THE ARGUMENT

The Plaintiffs failed to prove their case by a preponderance of the credible evidence as required by Mississippi law. The Plaintiffs did not prove that Defendant, Mr. Kevin Berry, breached any applicable standard of care and did not establish an issue on causation based on the decision in *Clayton v. Thompson*, 475 So. 2d 439 (Miss. 1985). In addition, Plaintiffs' Jury Instruction P-6A instructed the jury as to the alleged standard of care by using terms not found in the record or in medicine and thus not supported by the evidence. While the three minor plaintiffs apparently are the wrongful death beneficiaries, the trial court erred by 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 addition, the trial court erred in striking Juror 26, Bradley S. Knight, on its own motion, when Mr. Knight attested he could be fair and impartial, Plaintiffs' counsel did not move to strike Mr. Knight for cause or use a peremptory strike against him and did not use all their peremptory challenges. Mississippi law has consistently held that a 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. *Scott v. Ball*, 595 So. 2d 848, 859 (Miss. 1992). Also, the trial court erred in denying Jury Instruction D-15 on lack of recovery as set forth in Mississippi law, when Plaintiffs' expert, Dr. 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 Plaintiff to call, by way of deposition and to present as an expert witness, Dr. Richard Mackey, a staff anesthesiologist at Baptist Memorial Hospital, when he responded to questions regarding the use of an NG tube in non-gastric bypass patients, the questions were abstract in nature, and Dr. Mackey had not reviewed the medical records in this case so as to

be able to give expert testimony based upon the facts of this case; thus allowing the jury to hear testimony concerning the use of NG tubes in patients who had not had gastric bypass surgery was clear error. For these reasons, the jury verdict should be reversed.

ARGUMENT

I. FACTS

On April 17, 2000, Sheila Patten underwent gastric bypass surgery, performed by Dr. James Robert Barnes, at Baptist Memorial Hospital. D.E. 7 at BMH 239; R.E. 2.[1] At the time, Ms. Patten was five feet, three inches tall and weighed 264 pounds. D.E. 7 at BMH 237; R.E. 2. Gastric bypass surgery is a radical surgery wherein a portion of the stomach is removed, leaving a pouch the size of a golf ball. Tr. at 182-83; R.E. 3. Prior to the surgery in April 2000, Ms. Patten had undergone two other surgeries, both of which had used the same method of anesthesia, that were criticized by the Plaintiffs' expert at trial, i.e., general anesthesia with rapid sequence induction.[2] Tr. at 185-88; R.E. 3.

In administering general anesthesia with rapid sequence induction, there are two steps. First, the patient is sedated or put to sleep and administered a paralytic drug, a process referred to as induction. Tr. at 119; R.E. 3. Second, a tube is immediately placed in the patient's trachea to breathe for the patient, a process referred to as intubation. *Id.* The term "rapid sequence induction," refers to the giving of a sedative, followed by a paralytic drug, followed by cricoid pressure, followed by

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[1]The various abbreviations for the citations are as follows: D.E.–Defendants' Exhibits, Tr.–Trial Transcript, R.–Pleadings from the Record, R.E.–Record Excerpts as filed with the Court.

[2]Throughout this brief the terms, "induction" and "intubation" will be underlined since one of the fatal flaws at trial was Plaintiffs' Jury Instruction P-6A, which confused the terms and allowed the jury to find liability where none exist.

intubation. Tr. at 248; R. at 655; R.E. 3 and 4.

Following her gastric bypass surgery, without incident, Ms. Patten was discharged on April 24, 2000. D.E. 7 at BMH 236; R.E. 2. On April 25, 2000, Ms. Patten returned to Baptist Memorial Hospital emergency room. D.E.10 at BMH 490-91; R.E. 2. Dr. Barnes' partner, Dr. Mickey King evaluated Ms. Patten and admitted her to the hospital for a small bowel obstruction, a known complication of gastric bypass surgery. Tr. at 140-42, 145, 232; R.E. 3. Dr. King wrote a series of orders. None of those orders included nasogastric tube insertion to drain the stomach contents. *Id.* A nasogastric tube is a tube that is inserted through the nose, threaded down the back of the throat and into the stomach in an attempt to drain off some of the stomach contents prior to induction. Tr. at 120-21; R.E. 3. However, Dr. Barnes' standing orders provide that under no circumstances can a gastric bypass patient ever have a nasogastric (NG) tube. Tr. at 136, 181-82, 221-22; R.E.3. The reason a nasogastric tube is prohibited in gastric bypass patients is because the physician inserts the NG tube blindly, resulting in a significant risk that the NG tube will tear the fresh staples, causing the stomach pouch to rupture, spilling gastric contents into the peritoneal space and potentially causing death due to sepsis. Tr. at 181-83, 220, 223, 230-31; R.E. 3. The surgeons and anesthesiologists providing care at Baptist Memorial Hospital determined that inserting a nasogastric tube into a post gastric bypass patient caused more risk than proceeding without a nasogastric tube. *Id.*

The following morning, Dr. Barnes came on duty and determined that Ms. Patten would undergo an exploratory laparotomy. D.E. 10 at BMH 332 &490-91; R.E. 2. During this time at Baptist, six or seven nurse anesthetists were supervised by three anesthesiologists. Tr. at 238-39; R.E. 3. The anesthesiologists conducted the medical evaluations, determined the anesthesia plan of

care and supervised the nurse anesthetists, and the nurse anesthetists would perform the actual anesthesia induction and subsequent intubation. Tr. at 240-41, 246-47; R.E. 3. As for Ms. Patten's surgery, Dr. Roller, a board certified anesthesiologist, performed Ms. Patten's preanesthesia evaluation and developed the anesthesia care plan calling for general anesthesia with "rapid sequence induction." *Id.* Dr. Huggins and Dr. Jones were the other two anesthesiologists on duty that day and responded when Ms. Patten aspirated. Tr. at 248; R.E. 3. Dr. Huggins subsequently performed a pulmonary lavage to flush the lungs out with saline solution. Tr. at 194-95; R.E. 3. Ms. Patten began breathing again with the help of a ventilator, and Dr. Barnes performed the exploratory laparotomy to clear the small bowel obstruction. D.E. 10 at BMH 490-91; R.E. 2. However, Ms. Patten died several weeks later. D.E. 12 at NMMC 0005-6; R.E. 2.

Prior to trial, Defendants filed a Motion to Dismiss requesting that all claims for funeral expenses and medical expenses be dismissed because no estate had been opened; all claims for loss of the present net cash value be dismissed because no determination of wrongful death beneficiaries had been had; and that the Complaint be dismissed because Ora L. Patten had not obtained chancery court approval to proceed in this litigation of behalf of the minor Plaintiffs. R. at 212-19; R.E. 4. As to the minor children, the Defendants requested that the Plaintiffs be given ninety (90) days to cure and obtain chancery court approval to prosecute the claims and establish parentage and, if not, to dismiss the Complaint with prejudice. *Id.* Subsequently, the trial court denied Defendants' Motion. R. at 230; R.E. 4. At trial, Ms. Patten testified that she was Sheila Patten's mother and was grandmother to Bianca, Shadarryl and Mariah. Tr. at 72-73; R.E. 3. At the conclusion of Plaintiffs' evidence, defense counsel moved for a directed verdict against all claims of damages asserted by the Plaintiffs except for loss of society and companionship because Plaintiffs did not have the right to

bring claims for funeral and medical expenses, loss of present net cash value, and because a guardian had not been appointed for the minor Plaintiffs. Tr. at 203-04; R.E. 3. The court again denied Defendants' motion. *Id.*

As trial began, each side questioned the jury during *voir dire*. During *voir dire*, Plaintiff's attorney asked, "[a]nybody here or a close relative, like a husband or a wife, work for a lawyer? Nobody here works for a lawyer?" Tr. at 17; R.E. 3. Bradley Knight, juror number 26 answered that he worked for Hickman, Goza and Spraggins law firm.[3] *Id.* Plaintiff's attorney followed up with several questions answered by Mr. Knight:

> Q. Mr. Duke Goza is here, is he not?
>
> A. Yes, sir. I'm a file clerk and runner.
>
> Q. Have you heard anything about this case since Duke got involved?
>
> A. No, sir.
>
> Q. Would you feel uncomfortable facing Duke next week if we got $2,000,000 awarded by the jury in this case and you were on the jury? Look in your heart.
>
> A. I don't think so.
>
> Q. You wouldn't feel uncomfortable?
>
> A. I do get paid, but I believe I could present a rationale judgment.
>
> Q. You think you could set aside the fact that you get compensated from one of the lawyers who's going to get compensated maybe, and you could set that aside?
>
> A. Yes, sir.

[3]Mr. Duke Goza was retained as the personal attorney for Dr. Jones and Kevin Berry and was present in the courtroom.

Tr. at 17-18; R.E. 3. During jury selection, Plaintiffs' counsel did not move to strike Mr. Knight for cause or utilize a peremptory strike, nor did Plaintiffs' counsel utilize all his peremptory challenges, and Mr. Knight was accepted as juror number 13. Tr. at 40-41; R.E. 3. During trial when LouAnn Hood, juror number 19, became ill, Mr. Knight as the first alternate juror should have moved into her position as the twelfth juror. However, the trial court, at the conclusion of all proof, on its own motion and over the objection of defense counsel, struck Mr. Knight and inserted the second alternate, Sheila R. Tyson. Tr. at 345-47; R.E. 3. Sheila Tyson was one of the nine jurors who returned the nine to three verdict for the Plaintiffs. Tr. at 353;R.E. 3.

During trial, Plaintiffs called by deposition their first witness, Dr. Richard Mackey, and defense counsel 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. Tr. at 86-95; R.E. 3. After hearing arguments from both sides, the court noted that although Dr. Mackey was not technically tendered as an expert, he testified about his employment and training, which was sufficient to qualify him as an anesthesiologist. Tr. at 95; R.E. 3. The court also stated:

> Now, the part that is concerning me is where he says he has not reviewed any of the records of this Ms. Patten; but from my brief view of the deposition, Mr. Walker's questions appear to be touching upon the general standard of care for a person that presents with this lady's problem.
>
> I'm going to overrule the objection and allow the deposition to be read over the serious, strenuous objections of the defendants.

Tr. at 95; R.E. 3. Subsequently, Dr. Mackey's deposition was read into evidence. Tr. at 97; R.E. 3.

The Plaintiffs then called their retained expert witness, Dr. James W. Futrell, Jr. Tr. at 109; R.E. 3. Dr. Futrell testified he was an attending anesthesiologist in Los Angeles, California, and after reviewing Dr. Futrell's credentials and listing the records he reviewed, Plaintiffs' counsel tendered him as an expert. Tr. at 109-114; R.E. 3. Generally, Dr. Futrell testified that:

> [T]here were significant breaches of the standard of care in the management of anesthesiology, both insofar as the supervision by the anesthesiologist, Dr. Jones, and by the nurse anesthetist, Mr. Berry, in the management of this patient in the preoperative evaluation of this patient, which resulted in the serious consequences leading to very adverse clinical consequences ultimately the death of the patient.

Tr. at 117-18; R.E. 3. Specifically, Dr. Futrell criticized the lack of communication between the initial anesthesia evaluation physician, Dr. Roller, the anesthesiologist responsible for this patient during surgery, Dr. Jones, and the nurse anesthetist, Mr. Berry. Tr. at 118; R.E. 3. Dr. Futrell testified that:

> As a result of that lack of communication and as a result of the lack of preparation and as a result of the lack of supervision of this patient upon induction of anesthesia, there was a resulting release of gastric contents from the patient upon induction and paralysis due to the beginning of anesthesia that resulted in the contamination of this patient's lungs to a sever (sic) degree.

Tr. at 118; R.E. 3. Dr. Futrell also explained "induction," stating, "upon the induction of anesthesia we use commonly a paralytic drug; and we use this paralytic drug so that during the few minutes that this paralysis is taking place," and explained "intubation" as "pass(ing) a breathing tube through the vocal cords and breath(ing) for the patient." Tr. at 119; R.E. 3. Dr. Futrell also criticized the non-use of a nasogastric (NG) tube to suction the stomach content prior to induction to reduce the risk of any stomach fluids passing up the esophagus and into the trachea, contaminating the lungs. Tr. at 120-21; R.E. 3. Dr. Futrell explained the NG tube as follows:

> The use of the nasogastric tube, it is a tube that most commonly – it is a soft, plastic tube with a hollow opening. It can be attached to a suction device. We can pass it either by the mouth; or we can pass it through the nose; and that's why it's commonly called naso for the nose gastric, meaning stomach; so it's a nose-to-stomach tube.
>
> We pass the tube into the stomach and attach the end of the tube to suction; and we suck out all this fluid, this fluid that has been kept from passing along the regular bowel because of the obstruction.
>
> When you are preparing a patient for general anesthesia, you want to do this when you know that this is the situation so that when you have to give the paralytic drug, Anectine so that you can put the tube into the lungs. You will have a much less risk associated with any fluids passing up the esophagus and into the trachea contaminating the lungs as I spoke about. That is the reason why the placement of a nasogastric tube in a patient where you know you have an obstruction is so important.

Tr. at 120-21; R.E. 3. Dr. Futrell also testified that Dr. Barnes should have placed the NG tube at the bedside prior to induction of anesthesia. Tr. at 122; R.E. 3.

Further, Dr. Futrell also stated that Ms. Patten should have been placed in the Trendelenburg position prior to induction. Tr. at 124; R.E. 3. Dr. Futrell explained that the Trendelenburg position is when the patient and operating table are adjusted so that the patient's head is lower than her stomach. *Id.* When testifying as to the actual case, Dr. Futrell stated Mr. Berry should have placed Ms. Patten in the Trendelenburg position when he saw the beige fluid, stating:

> Mr. Berry relates that upon giving the paralytic drug he and the nurse noted that this mass of fluid and fecal contents were in the mouth and actually coming out of patient's nose; and so in that circumstances now with the transfer of all this bad material up to the mouth, around the lungs, and in the nose, Mr. Berry has to suction the patient out and attempt to intubate the patient, putting the breathing tube correctly in through the vocal cord so he can now breath for the patient.
>
> ...
>
> [T]]here was time to do it [Trendelenburg position] in my opinion;

> and it was not done; therefore, even as to the amount of fluid and bowel contents that were allowed to get into the lungs, **there was an opportunity missed there to decrease that amount of fluid**
>
> (emphasis added).

Tr. at 124-25; R.E. 3.

Finally, Dr. Futrell testified that a fiberoptic light could have been utilized, while the patient was awake to help slide the breathing tube into the trachea and into the lungs. Tr. at 130-31; R.E. 3. Dr. Futrell explained:

> The other thing is that anesthesiologists, board certified anesthesiologists, know of and are regularly trained and have been so for 10 to 15 years about the technique of fiberoptic intubation[4]. This is a situation where when you know that there are existing dangers to giving a patient a paralyzing drug so that you only have seconds in order to find the proper connection to the lungs rather than do that, rather than to paralyze the patient and run that risk, what we do is simply use anesthetic agents, spray anesthetic agents to numb the mouth and a little bit of a sedative medication to sedate the patient just a little bit; but the patient is breathing on her own and has all of her reflexes and has muscular control (emphasis added).
>
> Under those circumstances using a fiberoptic light, which is a very thin device, much thinner than the wire to this microphone, that you can pass through and you actually move it and flex it, and you can pass this after anesthetizing the patient's nose and mouth into a breathing patient's mouth and pass it down into the breathing area into the trachea and slide the breathing tube over it and below the cuff up and have complete airway control even though the stomach is full.

Tr. at 130-31:R.E. 3.

On cross-examination, Dr. Futrell acknowledged that Ms. Patten received a card from her surgeon stating that, "Under no circumstances can this patient ever have a nasogastric tube placed."

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[4] As will be demonstrated subsequently, Plaintiffs' Jury Instruction P-6A confused fiberoptic intubation with fiberoptic induction and was clearly erroneous.

Tr. at 136; D.E. 17; R.E. 2 and 3. Dr. Futrell also acknowledged that Ms. Patten was seen by Dr. King, another surgeon and Dr. Barnes' partner, on April 25, when she presented to the hospital for her small bowel obstruction and that Dr. King did not order an NG tube. Tr. at 140-42, 145; R.E. 3. Dr. Futrell further acknowledged that Dr. Roller developed Ms. Patten's anesthesia plan of care which called for a general anesthesia with "rapid sequence induction," and Dr. Roller's plan of care did not call for the use of an NG tube in an attempt to evacuate stomach contents. Tr. at 156-61; R.E. 3. Dr. Futrell also acknowledged that Ms. Patten's surgeon, Dr. Barnes, evaluated her, discussed the procedure with her and obtained informed consent. Tr. at 146-47; R.E. 3. Like Dr. King, Dr. Barnes did not order an NG tube. *Id.* Dr. Futrell explains,

> Now, in this particular circumstance with wishes of the surgeon relative to the protection of his surgical incision inside the stomach appears to him to be more important than eliminating the gastric fluid from the stomach, which has the potential to kill the patient.

Tr. at 148; R.E. 3. Dr. Futrell agreed that if the plastic NG tube broke the suture line or punctured the stomach pouch, the same contents that can damage the lungs if aspirated would flow into the peritoneal cavity. Tr. at 150; R.E. 3. In addition, Dr. Futrell conceded that the NG tube could reduce the amount of fluid in the stomach, but not eliminate all the fluid. Tr. at 162; R.E. 3. However, Dr. Futrell testified that the anesthesiologist should have, "called the surgeon down and said, 'You place the NG tube,'" but then acknowledged that in this case Dr. Barnes was the surgeon who did not want the NG tube placed. Tr. at 153-54, 164-65; R.E. 3. 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 summed up Dr. Futrell's testimony 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.

Next, Plaintiffs called Dr. David Preston Huggins, anesthesiologist, who once belonged to the same group of anesthesiologists as Dr. Jones and Kevin Berry. Tr. at 173; R.E. 3. Dr. Huggins testified that according to state law, Dr. Jones did not have to be in the room with Mr. Berry when he performed Ms. Patten's "rapid sequence induction," and it was not a breach in the standard of care that Dr. Jones was not present when Mr. Berry intubated Ms. Patten. Tr. at 189; R.E. 3. Dr. Huggins also testified that there was a policy at Baptist Memorial Hospital at the time of Ms. Patten's procedure and at the time of trial, with regard to NG tubes in gastric bypass patients. Tr. at 181-82; R.E. 3. The policy was developed collaboratively between the surgeons and anesthesiologists and provided that no NG tube was to be placed in a gastric bypass patient. Tr. at 182; R.E. 3. Dr. Huggins explained the risk of rupturing the suture line and/or the stomach pouch with the NG tube by explaining that stomach contents leaking into the mediastinum, where the heart and great vessels exist, or into the peritoneal cavity can lead to severe infection or death. Tr. at 183-84; R.E. 3. In addition, Dr. Huggins explained that Ms. Patten's medical history, specifically her anesthetic history

was significant. Tr. at 185-88; R.E. 3. He reviewed her medical records and noted she had undergone three prior intubations without difficulty within three years prior to the one at issue in this case. *Id.*

At the conclusion of Plaintiffs' evidence, the Defendants moved for a directed verdict due to Plaintiffs' lack of causation. Tr. at 200; R.E. 3. Defendants argued that Dr. Futrell testified that the deviations from the standard of care caused a missed opportunity to prevent and limit the occurrence of aspiration but did not establish an issue on causation based on the decision in *Clayton v. Thompson*, 475 So. 2d 439 (Miss. 1985). *Id.* Defendants argued that recovery is allowed only when the failure of the physician to render the required level of care results in loss of reasonable probability of substantial improvement in the patient's condition. Tr. at 200-01; R.E. 3. Continuing, the Defendants argued that the Plaintiffs' entire causation theory that deviations from the standard of care caused a missed opportunity to prevent and limit the occurrence of aspiration that followed did not rise to the level of proof necessary for a verdict. *Id.* Following arguments from Plaintiffs' counsel, the trial court determined, "[i]t's a very close question," but denied Defendants' motion. Tr. at 203; R.E. 3.

Thereafter, Defendant, Dr. Jones, testified for the Defendants. Dr. Jones testified that neither he nor Mr. Berry breached the standard of care when Mr. Berry intubated Ms. Patten without an anesthesiologist present. Tr. at 212; R.E. 3. He explained the extreme shortage of anesthesiologists nationwide and especially in Mississippi, and that in Mississippi, state law does not require an anesthesiologist to be present when a nurse anesthetist is working. Tr. at 212-13; R.E. 3. Dr. Jones also explained gastric bypass surgery, noting that the intestine and stomach pouch are stapled and sutured to keep the stomach contents from leaking. Tr. at 218-19; R.E. 3. When discussing the risks

of using an NG tube in a gastric bypass patient, Dr. Jones explained that the NG tube is made of polyvinyl fluoride, much like PVC pipe, with a tapered end. Tr. at 219-20; R.E. 3. Because of the risk of rupturing the suture line, which would have allowed stomach fluid to leak into the peritoneal cavity, Dr. Barnes and Dr. King had communicated to the anesthesia staff that an NG tube could never be placed in one of their gastric bypass patients. Tr. at 221; R.E. 3. Dr. Jones explained that this had been communicated to him personally by Drs. Barnes and King and the other anesthesiologists, and that even during his training, he had not been trained to use an NG tube in a gastric bypass patient. Tr. at 221-22; R.E. 3. Dr. Jones explained other risks, such as bleeding, because many blood vessels run through a person's nose, where the NG tube in threaded. Tr. at 223; R.E. 3. In addition, if a person is already nauseous and vomiting, like Ms. Patten, passing a three-foot tube down the back of the throat would cause additional vomiting. Tr. at 223-24; R.E. 3. Also, the NG tube could accidently pass into the lungs rather than into the stomach because the opening to the stomach and the opening to the lungs are beside each other. *Id.* If an NG tube is placed in a patient whose stomach is already opened, like Dr. Huggins suggested, the patient has already been anesthetized and is using a breathing tube or ventilator, thus — there is no need for the NG tube at that point. Tr. at 225; R.E. 3. In addition to being trained not to use an NG tube in a gastric bypass patient and Drs. Barnes and King advising against the use of an NG tube in a gastric bypass patient, Dr. Jones used his independent judgment to determine he would not use an NG tube in a gastric bypass patient. Tr. at 229; R.E. 3. On direct examination, Dr. Jones testified that neither Dr. King, Dr. Roller nor Dr. Barnes, who all evaluated and submitted orders for Ms. Patten prior to her surgery, ordered an NG tube. Tr. at 232-38; R.E. 3.

Dr. Jones then explained the roles and working relationships between anesthesiologists and

nurse anesthetists at Baptist Memorial Hospital at the time of Ms. Patten's surgery. Tr. at 238-39; R.E. 3. He testified that the hospital usually ran seven operating rooms, and on the day of Ms. Patten's surgery, three anesthesiologists were working with six or seven nurse anesthetists. *Id.* Dr. Jones testified that the standard of care requires an anesthesiologist to be immediately available to the nurse anesthetists, but the anesthesiologist does not have to be physically present when a patient is induced. Tr. at 240; R.E. 3. As to Ms. Patten, Dr. Jones explained that another anesthesiologist, Dr. Roller, performed the anesthesia evaluation on Ms. Patten and related the plan to Mr. Berry, who then carried out the plan of general anesthesia with "rapid sequence induction." Tr. at 246-47; R.E. 3. Dr. Jones testified that the nurse anesthetists would be in the room with the patient one hundred percent of the time. Tr. at 241; R.E. 3. Dr. Jones testified that he would not have done anything differently. Tr. at 247-48; R.E. 3.

On cross-examination, Dr. Jones testified that fiberoptic intubation carried its own risks because the patient would be awake when the fiberoptic light and breathing tube were threaded down the patient's throat, causing a gagging reflex. Tr. at 255, 262; R.E. 3. Also, plaintiff's counsel questioned Dr. Jones concerning the Trendelenburg position, but Dr. Jones could not testify that if Ms. Patten had been in the Trendelenburg position, she would not have aspirated. Tr. at 258-62; R.E. 3.

Next, Defendants called Dr. Claude D. Brunson, anesthesiology professor and chairman of the Department of Anesthesiology at University of Mississippi Medical Center. Tr. at 266; R.E. 3. Dr. Brunson testified that neither Mr. Berry nor Dr. Jones breached the standard of care in this case. Tr. at 270, 276, 298; R.E. 3. Dr. Brunson testified that the standard of care did not require the use of an NG tube in Ms. Patten. Tr. at 268-69; R.E. 3. Explaining his testimony, Dr. Brunson stated

that rupturing the suture line, causing stomach contents to empty into the stomach, would be a risk. *Id.* Such spillage could lead to peritonitis or mediastinitis, infections, which can lead to death. *Id.* As far as using fiberoptic intubation, Dr. Brunson explained that fiberoptic intubation requires an awake patient. Tr. at 270; R.E. 3. In addition, the patient's throat would have to be anesthetized in an attempt to prevent the gagging reflex, the reflex that would keep any stomach contents from traveling into the lungs. Tr. at 270-71; R.E. 3. Therefore, Dr. Brunson explained that fiberoptic intubation would not be the technique to use on a patient like Ms. Patten, who had a full stomach. *Id.*

Dr. Brunson also testified that Mr. Berry and Dr. Jones did not breach the standard of care when an anesthesiologist was not in the room with Mr. Berry at the time of the incident. Tr. at 272-73; R.E. 3. Dr. Brunson explained:

> The way that CRNAs are supervised is by an anesthesiologist; or if there's not an anesthesiologist, then the physician, surgeon is responsible for the supervision; and one of the reasons for that is the lack of health care providers. The reason we started nurse anesthetist school is to try and meet the demand for nurse anesthetists that the state requires and for anesthesiologists that the state requires. That's one of our missions at the university is to assess the health care needs in Mississippi and the state and provide those.
>
> So we practice here in this state in what we call a patient care team model. That's where anesthesiologists may be – if you have an anesthesiologist facility, then he or she can be supervising up to four nurse anesthetists. That allows us to provide the anesthesia services that we need to provide in the state.
>
> Once we are doing that and practicing in that kind of a model, the anesthesiologists will make an assessment of the patient and write an anesthetic plan; and the nurse anesthetist will carry that out if they are working with a nurse anesthetist.

Id.

When addressing the Trendelenburg position, Dr. Brunson testified that the patient's feet would be up, and her head down, promoting gravity to force the fluids from the stomach into the oropharynx and possibly into the trachea and lungs; therefore, he trains students to leave the patient in the supine position. Tr. at 273; R.E. 3. He stated that if fluid does come up, the anesthesiologist or CRNA could use suction and place the patient in the Trendelenburg position at that time. *Id.* He further explained that he trains students to use suction and intubate, thus protecting the airway, if fluid does come up from the stomach. Tr. at 274; R.E. 3.

At the jury instruction conference, the trial court granted jury instruction P-6A, which read:

> This Court instructs the jury that the applicable standards of care alleged by Plaintiff are as follows:
> (1) Utilization of an NG tube;
> (2) Fiberoptic induction;
> (3) Presence of an anaesthesiologist in the OR at the time of induction;
> (4) Use of the Trendelenburg position before induction;
> (5) Use of the Trendelenburg position after the beige fluid was seen and before intubation;
> (6) Suctioning immediately after intubation rather than beginning ventilation.
>
> Therefore, if you find the standard of care to be any of the above and you further find that such standard of care, if any, was breached and that such breach proximately caused Sheila Patten's death, then you must find for Plaintiff and against any Defendant who you find breached the standard of care.

Tr. at 319-24; R. at 261; R.E. 3 and 4. The trial court granted this instruction over the strenuous objections of defense counsel. *Id.*

In addition, the trial court refused Jury Instruction D-15, which stated:

> Mississippi law does not permit recovery of damages for medical malpractice because of the mere diminishment of a patient's chance to recover. In order to award damages in this case, you must first

> determine that Dr. Frederick Jones and Kevin Berry, CRNA failed to provide Sheila Patten with the required level of care as that level of care as described in the Court's instruction.
>
> In addition, the Plaintiffs must prove by a preponderance of the evidence that such failure to provide the required level of care, if any you find, resulted in the loss of a reasonable probability that Sheila Patten would not have died due to her aspiration.
>
> In other words, if you determine from a preponderance of the evidence in this case, that Plaintiffs failed to prove that Sheila Patten would have survived had additional medical treatment been provided, then you are instructed that Plaintiffs have failed to meet their burden of proof in this case and you must return a verdict in favor of Dr. Frederick Dr. (Sic) Jones and Kevin Berry, CRNA.

Tr. at 310; R. at 277; R.E. 3 and 4.

After deliberations, the jury returned a verdict for the Plaintiffs against Kevin Berry, only, in the amount of $1,150,000. Tr. at 351; R. at 82; R.E. 3 and 4. Subsequently, Mr. Berry filed a Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial or, Alternatively, Motion for Remittitur, which was denied. R. at 285-315;R.E. 4. Kevin Berry then appealed the Final Judgment entered in this case on April 6, 2009, and the denial of the Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial by Order entered on August 26, 2009. R. at 316-17; R.E. 4.

II. CASE LAW

A. Standard of Review

The standard of review for motions for judgment notwithstanding the verdict is the same standard as for motions for directed verdict. *River Region Med. Corp. v. Patterson*, 975 So. 2d 205, 207 (Miss. 2007), *citing Twin County Elec. Power Assoc. v. McKenzie*, 823 So. 2d 464, 468 (Miss. 2002). Under this standard, the appellate court,

> [W]ill consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required. The above standards of review, however, are predicated on the fact that the trial judge applied the correct law.

Id.

B. 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 medical malpractice cases, the Mississippi Supreme Court has stated:

> To present a prima facie case of medical malpractice, a plaintiff, (1) after establishing the doctor-patient relationship and its attendant duty, is generally required to present expert testimony (2) identifying and articulating the requisite standard of care; and (3) establishing that the defendant physician failed to conform to the standard of care. In addition, (4) the plaintiff must prove the physician's noncompliance with the standard of care caused the plaintiff's injury, as well as proving (5) the extent of the plaintiff's damages.

Cheeks v. Bio-Medical Applications, Inc., 908 So.2d 117 (Miss. 2005) (citing *McCaffrey v. Puckett*, 784 So.2d 197, 206 (Miss. 2001). In a medical malpractice case, the expert must identify and articulate the standard of care that was not complied with and establish that the failure was the proximate cause or proximate contributing cause of the alleged injuries. *Hubbard v. Wansley*, 954 So. 2d 951, 957 (Miss. 2007) *citing Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992). In *Clayton v. Thompson*, 475 So. 2d 439, 445 (Miss. 1985), the Mississippi Supreme Court held that

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. *Id.* A missed opportunity to prevent and limit the occurrence of the aspiration does not meet the preponderance of evidence standard.

As to causation, Plaintiffs' expert, 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 summed up Dr. Futrell's testimony 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. Because Plaintiffs' expert failed to establish causation, and the jury's verdict is against the overwhelming weight of the evidence, the verdict should be reversed.

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.

C. 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.

Jury instructions are:

> [T]o be read together as a whole, with no one instruction to be read alone or taken out of context. A [party] is entitled to have jury instructions given which present his theory of the case. However, the trial judge may also properly refuse the instructions if he finds them to incorrectly state the law or to repeat a theory fairly covered in another instruction or **to be without proper foundation in the evidence of the case.**

Nunnally v. R.J. Reynolds Tobacco Co., 869 So. 2d 373, 378 (Miss. 2004) (emphasis added). The appellate court's primary concern is that "the jury was fairly instructed and that each party's proof-grounded theory of the case was placed before it." *Young v. Guild*, 7 So. 3d 251, 259 (Miss. 2009), *citing Splain v. Hines*, 609 So. 2d 1234, 1239 (Miss. 1992). On appeal, the Court must ask whether the instruction at issue contained a correct statement of law and **was warranted by the evidence**. *Id., citing Beverly Enters. v. Reed*, 961 So. 2d 40, 43-44 (Miss. 2007)(emphasis added). In *Reed*, the Court stated, "[a] party is entitled to an instruction regarding a genuine issue of material fact **when it is supported by the evidence**." *Beverly Enters. v. Reed*, 961 So. 2d 40, 43-44 (Miss. 2007), *citing DeLaughter v. Lawrence County Hosp.*, 601 So. 2d 818, 824 (Miss. 1992)(emphasis added). Jury instruction P6-A was an improper instruction in that it instructed the jury as to a standard of care that does not exist in medicine and "which was not supported by the evidence." Jury instruction P6-A read:

> This Court instructs the jury that the applicable standards of care alleged by Plaintiff are as follows:
> (1) Utilization of an NG tube;
> (2) Fiberoptic induction;

(3) Presence of an anaesthesiologist in the OR at the time of induction;
(4) Use of the Trendelenburg position before induction;
(5) Use of the Trendelenburg position after the beige fluid was seen and before intubation;
(6) Suctioning immediately after intubation rather than beginning ventilation.

Therefore, if you find the standard of care to be any of the above and you further find that such standard of care, if any, was breached and that such breach proximately caused Sheila Patten's death, then you must find for Plaintiff and against any Defendant who you find breached the standard of care.

Tr. at 319-24; R. at 261; R.E. 3 and 4.

(1) **"Utilization of an NG tube":** The Plaintiffs' theory of the case as articulated by their expert witness, Dr. James Futrell, was 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. Tr. at 120-22; R.E. 3. 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 122; R.E.3. In fact, Dr. Futrell testified that Dr. Barnes should have placed the NG tube 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 proof was uncontradicted that Sheila Patten's surgeon, Dr. James Barnes, instructed the anesthesiologists and CRNAs to "never" use an NG tube in his post-gastric bypass patients. Tr. at 136; D.E. 17; R.E. 2 and 3. The proof further was that an NG tube could have been used in Sheila Patten after she was sedated in a supine position prior to "rapid sequence induction" with cricoid pressure as ordered by

Dr. Roller. Tr. at 152-54,160-62; R.E. 3. Thus, the instruction is defective in that it does not distinguish between an awake blind insertion of an NG tube in an upright patient, or the blind insertion of an NG tube after sedation in the supine position. Further, the instruction is defective in that the jury was left to speculate as to what "utilization of an NG tube" refers to and did not require the jury to find from a preponderance of the evidence that the Plaintiffs had established what the standard of care was, *i.e.*, (1) blind insertion of an NG tube awake in an upright position followed by insertion of a fiberoptic scope, followed by insertion of the breathing tube or (2) blind insertion of an NG tube in the supine position after sedation and prior to "rapid sequence induction." Further, as to Kevin Berry, the uncontradicted evidence showed that Mr. Berry's supervising anesthesiologist, Dr. Roller, developed the anesthesia care plan, and that Dr. Roller instructed Mr. Berry to follow this plan of care. Tr. at 160-61; R.E. 3. Unless these facts were set out in an instruction, which required the jury to find from a preponderance of the evidence that the Plaintiffs had established the standard of care which Kevin Berry was to have followed, then the jury instruction is defective as a matter of law, for the jury instruction read:

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

This jury instruction is misleading, confusing and contrary to all of the evidence at trial. In short, it was "not supported by the evidence" *Beverly Enters. v. Reed*, 961 So. 2d 40, 43-44 (Miss. 2007). 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":** The term "fiberoptic induction" does not exist in

medicine and cannot be found in the record. "Induction" refers to the administration of a paralytic drug; "intubation," refers to the insertion of a breathing tube to protect the airway. The term, "rapid sequence induction" is a term which refers to the giving of a sedative, followed by a paralytic drug, followed by cricoid pressure, followed by intubation. Tr. at 248; R.E. 3. Therefore, the jury was improperly instructed. A search of STEADMAN'S MEDICAL DICTIONARY[5], Google or Bing will establish that there is no procedure called "fiberoptic induction." 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 Court improperly instructed the jury as follows:

> "The Court instructs the jury that the applicable standard of care alleged by Plaintiff (is) as follows:
> (2) Fiberoptic induction;"

This instruction is misleading, confusing, and contrary to the evidence and the law. 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." 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.

(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

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[5]STEADMAN'S MEDICAL DICTIONARY (27th ed. 2000).

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. Thus, the only proper instruction as to Kevin Berry would have required the trial court to instruct the jury that the jury would have to have found from a preponderance of the evidence that the standard of care required Kevin Berry to have requested that an anesthesiologist be present at the time of induction, that the failure to do so was a breach of the standard of care, and that this breach caused or contributed to the death of Sheila Patten. This instruction is contrary to the law, the facts in this case, and is not supported by the evidence.

(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 fact, the only proof at trial concerning the "Trendelenburg position" occurred when the Plaintiffs' standard of care witness, 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. The "Trendelenburg position" is a reference to tilting the operating table so that the head is below the feet so that any stomach contents that are regurgitated can be suctioned on the belief that this position will prevent the stomach contents from being aspirated. *Id.* 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.

(5) **"Use of the Trendelenburg position after the beige fluid was seen and before intubation"**: This language is confusing, misleading and contrary to the evidence. 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 chricoid 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. 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[6], 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.

Jury instruction P-6A did not contain a correct statement of law and was not supported by the evidence; therefore, the trial court committed reversible error in granting this instruction. 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). Even if read in context with the other jury instructions, Jury Instruction P-6A so misstated the law and facts, the other jury instructions could not have cured such an erroneous instruction. Because of this erroneous instruction, for which Plaintiffs' counsel called himself an "idiot" for requesting, the jury verdict should be reversed.

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[6]Intubation refers to the placement of endotracheal tube.

D. 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.

On April 17, 2002, Plaintiffs filed suit against Defendants alleging medical malpractice, which ultimately led to Sheila K. Patten's death on May 22, 2000. R. at 1-4 R.E. 4. The Complaint describes Plaintiff, Ora L. Patten, as the mother of Sheila K. Patten and the grandmother of Sheila K. Patten's minor children, Bianca Patten, Shadarryl Hardnett and Mariah Patten. *Id.* Plaintiff, Ora L. Patten, has not obtained chancery court approval authorizing her to prosecute a wrongful death claim on behalf of the minor Plaintiffs; nor has Ora L. Patten petitioned the chancery court for a determination of heirship; nor, after diligent search and inquiry, has an estate been opened for Sheila Patten, Deceased. Prior to trial, Defendants filed a Motion to Dismiss requesting that all claims for funeral expenses and medical expenses be dismissed because no estate had been opened; all claims for loss of the present net cash value be dismissed because no determination of wrongful death beneficiaries had been had; and that the Complaint be dismissed because Ora L. Patten had not obtained chancery court approval to proceed in this litigation of behalf of the minor Plaintiffs. R. at 212-19; R.E. 4. As to the minor children, the Defendants requested that the Plaintiffs be given ninety (90) days to cure and obtain chancery court approval to prosecute the claims and establish parentage and, if not, to dismiss the Complaint with prejudice. *Id.* Subsequently, the trial court denied Defendants' Motion. R. at 230; R.E. 4. At the conclusion of Plaintiffs' evidence, defense counsel renewed Defendants' Motion, but the court again denied Defendants' motion. Tr. at 203-04; R.E. 3.

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. 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 discussing *Long*, the Court noted that, "Chancery court approval is necessary for representation of a minor's interest, for attorney's fees awarded from a minor's proceeds, for fees awarded from proceeds of an estate, and for determination of wrongful death beneficiaries." *Willing v. Estate of Benz*, 958 So. 2d 1240, 1257 n. 16 (Miss. 2007), *citing Long v. McKinney*, 897 So. 2d 160, 174-76 (Miss. 2004). Unless otherwise specified, the decisions of the Mississippi Supreme Court are presumed to have a retroactive effect. *Mississippi Transportation Comm'n v. Ronald Adam Contractors, Inc.*, 753 So. 2d 1077, 1093 (Miss. 2000). A ruling with a retroactive effect is applied to all cases pending when the change in the law occurred. *Thompson v. City of Vicksburg*, 813 So. 2d 717, 721 (Miss. 2002). This case was pending when the mandate in *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004), was issued.

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.

Thus, 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 be dismissed because Ora L. Patten had not obtained chancery court approval to proceed in this litigation on behalf of the minor Plaintiffs.

All claims for funeral expenses and medical expenses should have been barred by the applicable statute of limitations since no estate was opened, and only the estate can prosecute these claims; likewise, all survival claims are held by the estate, not the wrongful death beneficiaries, and these claims are likewise barred by the applicable statute of limitations. *See, Johnson v. Med. Express Ambulance Service, Inc.*, 565 F.Supp. 2d 699 (S.D.Miss. 2008); *Methodist Hospital of Hattiesburg, Inc. v. Richardson*, 909 So. 2d 1066 (Miss. 2005). In addition, all claims for loss of present net cash value should have been barred since there was no estate, and there had been no determination of wrongful death beneficiaries. *See, Long v. McKinney*, 897 So. 2d 160 (Miss. 2005). Therefore the trial court erred in denying Defendants' Motions.

E. 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.

A potential juror is not incompetent as a juror merely because he knows, or is a neighbor, or an intimate acquaintance or, on friendly relations with, one of the parties, a member of the parties' family... *Harding v. Harding*, 185 So. 2d 452, 456 (Miss. 1966), *citing* 50 C.J.S. Juries 228, 975 (1947). In addition, "jurors take their oaths and responsibilities seriously, and when a prospective juror assures the court that, despite the circumstance that raises some question as to his qualification, this will not affect his verdict, this promise is entitled to considerable deference." *Scott v. Ball*, 595 So. 2d 848, 859 (Miss. 1992). 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).

During *voir dire*, Plaintiff's attorney asked, "[a]nybody here or a close relative, like a husband or a wife, work for a lawyer? Nobody here works for a lawyer?" Tr. at 17; R.E. 3. Bradley Knight, juror number 26 answered that he worked for Hickman, Goza and Spraggins law firm, and Duke Goza[7] was one of the defense attorneys. *Id.* Plaintiff's attorney followed up with several questions addressed and answered by Mr. Knight:

Q. Mr. Duke Goza is here, is he not?

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[7] Duke Goza, immediately prior to trial, was retained as the personal attorney for Kevin Berry and Dr. Frederick Jones due to potential excess.

A. Yes, sir. I'm a file clerk and runner.

Q. Have you heard anything about this case since Duke got involved?

A. No, sir.

Q. Would you feel uncomfortable facing Duke next week if we got $2,000,000 awarded by the jury in this case and you were on the jury? Look in your heart.

A. I don't think so.

Q. You wouldn't feel uncomfortable?

A. I do get paid, but I believe I could present a rationale judgment.

Q. You think you could set aside the fact that you get compensated from one of the lawyers who's going to get compensated maybe, and you could set that aside?

A. Yes, sir.

Tr. at 17-18; R.E. 3. During jury selection, Plaintiff's counsel did not move to strike Mr. Knight for cause or utilize a peremptory strike against Mr. Knight nor did Plaintiff's counsel utilize all his peremptory challenges. Nonetheless, Mr. Knight was accepted as juror number 13. Tr. at 40-41; R.E. 3. When LouAnn Hood, juror number 19, became ill, Mr. Knight as the first alternate juror should have moved into her position as the twelfth juror. However, at the conclusion of proof, the trial court, on its own motion and over the objection of defense counsel, struck Mr. Knight and inserted the second alternate, Sheila R. Tyson. Tr. at 315-16; R.E. 3. The trial judge erred in striking Mr. Knight, as Mr. Knight stated he could be fair and impartial, and Plaintiffs did not challenge Mr. Knight for cause or use a peremptory challenge on Mr. Knight. Over the objections of Defense counsel, the trial court struck Mr. Knight. The Mississippi Supreme Court has held that

a trial court does not commit error by refusing to excuse jurors challenged for cause when the complaining party has not exhausted all his peremptory challenges; therefore, the trial court erred in striking Mr. Knight. *Scott v. Ball*, 595 So. 2d 848, 851 (Miss. 1992).

F. 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 *Clayton v. Thompson*, 475 So. 2d 439, 445 (Miss. 1985), the Mississippi Supreme Court held that Mississippi law does not permit recovery of damages in medical malpractice because of a mere diminishment of a patient's chance of recovery. 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. *Id.* At trial, Dr. Futrell, Plaintiffs' expert, 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 summed up Dr. Futrell's testimony 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.

The trial court refused Jury Instruction D-15, which stated:

> Mississippi law does not permit recovery of damages for medical malpractice because of the mere diminishment of a patient's chance to recover. In order to award damages in this case, you must first determine that Dr. Frederick Jones and Kevin Berry, CRNA failed to provide Sheila Patten with the required level of care as that level of care as described in the Court's instruction.
>
> In addition, the Plaintiffs must prove by a preponderance of the evidence that such failure to provide the required level of care, if any you find, resulted in the loss of a reasonable probability that Sheila Patten would not have died due to her aspiration.
>
> In other words, if you determine from a preponderance of the evidence in this case, that Plaintiffs failed to prove that Sheila Patten would have survived had additional medical treatment been provided, then you are instructed that Plaintiffs have failed to meet their burden of proof in this case and you must return a verdict in favor of Dr. Frederick Dr. (Sic) Jones and Kevin Berry, CRNA.

Tr. at 310; R. at 277; R.E. 3 and 4. 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.

G. 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.

Mississippi Rule of Evidence 702 provides a basis for the admission of expert testimony and the restrictions on expert testimony in Mississippi. Trial courts are guided by Rule 702 which provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

> training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MISS. R. EVID. 702 (amended May 29, 2003). The Mississippi Supreme Court, by adopting Rule 702, requires this Court to act as the gatekeeper of all expert testimony. *Miss. Transportation Commission v. McLemore*, 863 So. 2d 31, 36 (Miss. 2003) (citing *Daubert v. Merrill Dowell Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)). In addition to recognizing the trial court as the gatekeeper of testimony, the Mississippi Supreme Court adopted the *Daubert* standard that expert testimony should only be allowed if "the trial judge determines that the testimony rests on a reliable foundation and is relevant in a particular case." *McLemore*, 863 So. 2d at 36. As to the reliability requirement, "the trial court has considerable leeway in deciding in a particular case how to go about determining whether particular expert evidence is reliable" (internal quotations omitted). *Id.* at 37.

During trial, Plaintiffs called by deposition their first witness, Dr. Richard Mackey, and defense counsel 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. Tr. at 87-89; R.E. 3. After hearing arguments from both sides, the trial court noted that although Dr. Mackey was not technically tendered as an expert, he testified about his employment and training, which was sufficient to qualify him as an anesthesiologist. Tr. at 95; R.E. 3. The court also stated:

> Now, the part that is concerning me is where he says he has not reviewed any of the records of this Ms. Patten; but from my brief view of the deposition, Mr. Walker's questions appear to be touching upon the general standard of care for a person that presents with this lady's problem.

> I'm going to overrule the objection and allow the deposition to be read over the serious, strenuous objections of the defendants.

Tr. at 95; R.E. 3. Subsequently, Dr. Mackey's deposition was read into evidence.

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. 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 24 day of February, 2010.

BY: _____
L. CARL HAGWOOD, MB[redacted]

BY: _____
MARY FRANCES S. ENGLAND, MB[redacted]

Attorneys for Defendant/Appellant, Kevin Berry

OF COUNSEL:

WILKINS TIPTON
540 Main Street, Suite 403
Post Office Box 4537
Greenville, Mississippi 38704-4537
Telephone: (662) 335-5555
Facsimile: (662) 335-5700

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 24 day of February, 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 February 24, 2010, to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, P. O. Box 249, Jackson, MS 39205-0249.

MARY FRANCES S. ENGLAND