Case No. 2009-CA-02000

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IN THE SUPREME COURT OF MISSISSIPPI

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BENNIE E. BRASWELL, JR.

Plaintiff/Appellant,

VS.

BETH STINNETT, D.D.S., Individually
and d/b/a FAMILY DENTISTRY Defendant/Appellee.

APPEAL FROM THE
CIRCUIT COURT OF MARSHALL COUNTY
THIRD CIRCUIT JUDICIAL DISTRICT
Case No. M2007-066

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The Honorable Henry L. Lackey
CIRCUIT JUDGE

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# BRIEF OF DEFENDANT/APPELLEE BETH STINNETT, D.D.S., Individually and d/b/a FAMILY DENTISTRY

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ORAL ARGUMENT REQUESTED

Certificate of Interested Persons

Case No. 2009-CA-02000

BENNIE E. BRASWELL, JR. VS. BETH STINNETT, D.D.S., Individually and d/b/a FAMILY DENTISTRY

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 the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

Bennie E. Braswell, Jr. - Plaintiff/Appellant

Beth Stinnett, D.D.S., Individually and d/b/a Family Dentistry - Defendant/Appellee

Shirley C. Byers, Byers Law Firm - Counsel for Plaintiff/Appellant

Darrell E. Baker, Jr. and M. Jason Martin, Baker & Whitt, PLLC - Counsel for Defendant/Appellee

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The Honorable Henry L. Lackey, Circuit Judge

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## Statement in Support of Oral Argument

This case involves issues of sufficient complexity that oral argument will assist the Court in making its determination.

## Statement of the Issue

There is only one issue on appeal. That is whether the trial court properly granted Defendant's Motion for a Directed Verdict when Plaintiff failed to provide adequate expert testimony establishing the relevant standard of care or how the standard of care was breached in this case.

## Statement of the Case

Plaintiff/Appellant Bennie E. Braswell, Jr. ("Mr. Braswell" or "Plaintiff") filed the Complaint in this case against Beth Stinnett, D.D.S., Individually and d/b/a Family Dentistry ("Dr. Stinnett" or "Defendant") on February 9, 2007 in the Circuit Court of Marshall County.[1] R. at 1–7. The Complaint alleged that Dr. Stinnett negligently injected Mr. Braswell with a local anesthetic during a "deep cleaning" procedure that she performed on Mr. Braswell on December 13, 2004. According to the Complaint, Mr. Braswell suffered injures as a result of Dr. Stinnett's alleged negligence, for which Mr. Braswell sought damages. Dr. Stinnett filed an Answer to the Complaint, denying that she was negligent in her care and treatment of Mr. Braswell and denying that Mr. Braswell suffered any consequence directly and proximately caused by any such deviation from the standard of care. R. at 10–14.

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[1] Consistent with the designations used by Mr. Braswell in his principal brief, citations to the technical record will be abbreviated as "R.," citations to the trial transcript will be abbreviated as "T.," and citations to the trial exhibits will be abbreviated as "Ex."

The trial in this case was held in the Circuit Court of Marshall County from October 27 to 29, 2009, the Honorable Henry L. Lackey, presiding. R. at 295. At the close of Plaintiff's proof, Dr. Stinnett moved for a directed verdict pursuant to Rule 50(a) of the Mississippi Rules of Civil Procedure, which the trial court granted. T. at 361–73. The basis of the motion was that Plaintiff failed to establish, though expert testimony, the standard of care required of Dr. Stinnett at the time of the treatment at issue, and failed to establish how Dr. Stinnett breached the standard of care. On November 12, 2009, the trial court entered a Final Judgment in this case, dismissing this action with prejudice. R. at 295–96. This appeal followed.

## Statement of Facts

Mr. Braswell first sought treatment from Dr. Stinnett on December 8, 2004. R. at 35–36, 39. He was suffering from moderate to advanced periodontal disease, and Dr. Stinnett recommended that he have his teeth cleaned. R. at 29. Because the calculus buildup on his teeth was extensive, he was scheduled for deep scaling under local anesthesia. R. at 29. On the date of treatment, December 13, 2004, Dr. Stinnett injected Mr. Braswell with local anesthesia. After the anesthesia was in place, the dental hygienist cleaned Mr. Braswell's teeth. R. at 29.

The following day, Mr. Braswell presented with swelling under his right

eye. R. at 39. Mr. Braswell stated that the swelling started the previous afternoon. He complained that his lip was numb, but his teeth were not hurting. R. at 39.

When he missed his follow up appointment two days later, someone from Dr. Stinnett's office called Mr. Braswell and spoke to his wife, who stated that Mr. Braswell's face was still swollen. R. at 39. Dr. Stinnett referred Mr. Braswell to an oral and maxillofacial surgeon in Oxford, Allen Ligon, D.D.S. ("Dr. Ligon"). R. at 39. Dr. Ligon saw Mr. Braswell on December 17, 2004, but Mr. Braswell did not show up for his follow up appointment on December 20. Ex. 5 - Plaintiff. Dr. Ligon testified favorably for Dr. Stinnett at the time of trial. T. at 252–66.

Nearly one year later, on November 9, 2005, Mr. Braswell sought treatment from Richard Meekins, D.D.S. ("Dr. Meekins"), an oral and maxillofacial surgeon in Memphis, Tennessee. Dr. Meekins diagnosed Mr. Braswell with right paraesthesia of the infraorbital nerve and referred him to an oral surgeon in Atlanta, Georgia specializing in nerve repair. T. at 352; Ex. 3 - Plaintiff. Dr. Meekins testified at trial favorably for Dr. Stinnett. T. at 349–60.

After Mr. Braswell filed his Complaint, Dr. Stinnett propounded interrogatories seeking the identity and opinions of any expert witnesses that

Plaintiff expected to testify at trial. In Plaintiff's supplemental response to Dr. Stinnett's interrogatories, which was submitted in March 2008, Plaintiff identified only one expert witness, Martin H. Turk, D.M.D. ("Dr. Turk"), an oral and maxillofacial surgeon who was identified at the time as being an associate professor at the University of Alabama at Birmingham's School of Dentistry. Ex. 3 - Defendant. Dr. Turk's expert disclosure stated that it was his opinion that "during the administration of local anesthesia, the needle passed through an area of infection where virulent pathogens were transported and seeded in an uninfected area superior to the site of the infection." According to Dr. Turk's disclosure, his opinion was that Dr. Stinnett ignored an existing periodontal infection and negligently injected the local anesthesia into and beyond the infection site, which caused a serious infection of Mr. Braswell's right head and neck.

During Plaintiff's opening statement, however, it became clear that Plaintiff would be proceeding on a completely new theory, which had never been disclosed to Defendant. During her opening statement, Plaintiff's counsel stated that Mr. Braswell was injured when Dr. Stinnett punctured his infraorbital nerve. T. 98–100. This was the first time Defendant learned that Plaintiff would attempt to rely on a theory that Mr. Braswell's paraesthesia was the result of a mechanical "needle stick" injury to the nerve and not the

result of a negligent spread of infection. Defendant's counsel brought this issue to the attention of the trial court prior to Dr. Turk's testimony, requesting that Dr. Turk's testimony be limited to the theories expressed in his expert disclosure. T. at 228–37. The trial court, however, allowed Dr. Turk to testify to whatever he thought occurred. T. at 235–37.

Despite being allowed to change his theory of the case, Dr. Turk's testimony was not favorable for Plaintiff. During his testimony, Dr. Turk admitted that he did not have a license in any state. T. at 309. He testified that he used to practice in New Jersey, but he placed his New Jersey and New York licenses on inactive status prior to joining the faculty at the University of Alabama at Birmingham in 2003. T. at 238. Dr. Turk was never licensed in Alabama. T. at 325. He stated that he left UAB in approximately 2006 and he has not been licensed by any state as an oral and maxillofacial surgeon since that time. T. at 244.

Dr. Turk, however, apparently neglected to inform Plaintiff's counsel that he had not possessed a license to practice dentistry since 2003. T. at 286. Dr. Turk's omission so infuriated Plaintiff's counsel that after she completed her direct examination of Dr. Turk and tendered the witness, but before his cross-examination by Defendant's counsel, she and Dr. Turk had a closed-door meeting in a witness room in which Plaintiff's counsel confronted Dr.

Turk about his failure to inform her of his licensure status. T. at 281–86. On cross-examination, Defendant's counsel asked Dr. Turk about the meeting and he confirmed that he had been talking to Plaintiff's counsel about the case during the break. T. at 280. Dr. Turk was at that point questioned about the meeting in chambers. T. at 281. In response to questioning by Defendant's counsel seeking the content of the conversation, Dr. Turk did not mention the confrontation regarding the licensure issue; rather, he mentioned only that he told Plaintiff's counsel during their meeting that he thought about something regarding the chemical composition of the anesthetic that he forgot to mention during his direct examination. T. at 281–88. It was only when Plaintiff's counsel told the Court that she spoke to him about his failure to inform her that he was not licensed that the truth was revealed. T. at 286.

The Court was so troubled by the fact that the witness and Plaintiff's counsel had consulted after he had been sworn and tendered as a witness that the Court initially determined that the only recourse was to strike Dr. Turk's testimony. T. at 288–89. The Court only changed its mind regarding exclusion because the Court learned from the bailiff, who was present for part of the conversation, that Plaintiff's counsel was so upset about Dr. Turk not telling her that he was not licensed that she wanted to have him arrested for

deceiving her.[2] T. at 333.

The deception and misrepresentations did not end with the absence of a license. Dr. Turk also admitted that after he moved to Alabama, he was convicted in New Jersey of the felony of theft by deception. T. at 339. The record of the indictment and conviction state that Dr. Turk purchased a ring with a check, cancelled the check, and failed to return the ring. Ex. 10 - Defendant. Not surprisingly, he also failed to mention his conviction to Plaintiff's counsel. T. at 331, 340. It also became clear that at the time Plaintiff supplemented his response to Dr. Stinnett's interrogatories, identifying Dr. Turk as an expert witness, Dr. Turk had not been on the faculty at UAB for some time.[3] According to his testimony, he left UAB in approximately 2006, yet in 2008, he was represented in the interrogatory response as being a member of the faculty. T. at 244; Ex. 3 - Defendant. It is not clear when he told Plaintiff's counsel that he had been fired. T. at 340–42.

The remainder of Dr. Turk's testimony was no more favorable for Plaintiff. During Dr. Turk's direct examination, he was never asked what the standard of care required of Dr. Stinnett when she was anesthetizing Mr.

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[2] Plaintiff's counsel also serves as the Marshall County Prosecuting Attorney.

[3] Dr. Turk had been fired from the faculty at UAB after having an inappropriate sexual relationship with a student. T. at 341.

Braswell's teeth in preparation for the deep cleaning on December 13, 2004. Dr. Turk's only testimony even remotely on point occurred when he responded to a question where he was asked what it means when one has numbness in the face as Mr. Braswell does. T. at 268. During his rather lengthy response, Dr. Turk testified as follows: "Generally you deposit your anesthetic two or three millimeters above the tooth if that's the purpose of what was going to happen that day, the scaling and the root planing. All that is standard." T. at 273.

Neither was Dr. Turk asked how Dr. Stinnett breached the standard of care in this case. Again, the closest that Dr. Turk got to addressing this issue came directly after the testimony quoted above where he stated as follows:

> To injure the nerve that's up here one of two things has to happen. Either the dentist lost her orientation or she wasn't watching what she was doing. There is no other way the needle could have been up there because that is not the standard of care. That is how the nerve was injured.[4]

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[4] Dr. Turk's testimony hints at the doctrine of *res ipsa loquitur*. *Res ipsa loquitur*, however, does not apply in this case because the administration of injections of local anesthesia is not a matter within the common knowledge of a lay person. *Brown v. Baptist Mem'l Hosp.-DeSoto, Inc.*, 806 So. 2d 1131, 1135 (Miss. 2002) (noting that the doctrine of *res ipsa loquitur* requires that "the matter must be within the common knowledge of laymen" (citing *Coleman v. Rice*, 706 So. 2d 696, 698 (Miss. 1997))). Also, the issue is waived because Plaintiff never asked the trial court to apply the doctrine in this case, nor did Plaintiff raise the issue on appeal. *A-1 Pallet Co. v. City of Jackson*, 40 So. 3d 563, 570 (Miss. 2010) ("This Court repeatedly has held that an issue not raised before the lower court is deemed waived and is procedurally barred." (quoting *Brown v. Miss. Dep't of Employment Sec.*, 29 So. 3d 766, 771 (Miss.2010))); *Randolph v. State*,

T. at 273. Dr. Turk's opinion was not stated in terms of reasonable probability. Dr. Turk was asked by Plaintiff's counsel whether he formed an opinion as to whether Dr. Stinnett breached the standard of care. In response, Dr. Turk testified that he had formed an opinion. He stated, "My opinion is she deviated from good dental practice." T. at 278. This conclusory opinion was not stated in terms of reasonable probability.

On cross-examination, Dr. Turk's testimony established that his "opinion" that Dr. Stinnett breached the standard of care was nothing more than speculation. The following exchange occurred between Defendant's counsel and Dr. Turk:

> Q. There is no opinion in that disclosure that you are looking at that talks about Dr. Stinnett becoming disoriented when she was giving the local injection; isn't that correct?
> A. I never said she was disoriented.
> Q. Thank you, Doctor. There's not one word in that disclosure nor in your report that Dr. Stinnett was not paying attention carefully when she gave these local injections; isn't that correct?
> A. That's correct.

T. at 294. Having just testified that Dr. Stinnett could have become disoriented, the witness clarified whether he was reasonably certain that this had occurred by saying that he never said that she was disoriented in making

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852 So. 2d 547, 558 (Miss. 2002) (noting that "an issue not argued in brief is considered abandoned and waived" (citing *Sumrall v. State*, 758 So. 2d 1091, 1094 (Miss. Ct. App. 2000))).

her injections. A statement of possibilities is simply insufficient to sustain Plaintiff's case.

Dr. Turk went even further to demonstrate that his "opinion" lacked any certainty when he was asked about the technique that Dr. Stinnett used.

> Q. Dr. Turk, what technique did Dr. Stinnett use to anesthetize this patient's teeth?
> A. The standard I would assume. I wasn't there, so I can't tell you exactly. I can tell you the standard technique.

T. at 312. Finally, Dr. Turk admitted that he had no idea where Dr. Stinnett made the injections.

> Q. Where did Dr. Stinnett put the needle?
> A. She indicated that she used either four or six injections, and I can't tell you exactly where she put the needle.
> Q. It would be hard for you to know where at the [sic] put the needle, right?
> A. I have no clue.

T. at 318.

Plaintiff's only expert witness failed to express his opinions relating to the standard of care applicable to Dr. Stinnett in terms of reasonable medical certainty or an equivalent, and failed to establish how Dr. Stinnett allegedly breached the applicable standard of care. Therefore, Defendant moved for a directed verdict at the close of Plaintiff's proof. T. at 361–71. The Court granted Defendant's motion, stating in part as follows:

> We don't know whether he knew what the standard of care was at that time. We can assume that he did, but we're not to

> assume. We don't know what this was based upon. We don't know what his understanding of the standard of care was and how he reached that opinion, and we don't know whether he is of the opinion that Dr. Stinnett breached the standard of care to a reasonable degree of medical certainty or probability.
>
> And I want everybody to have their day in court, but I have no other choice but to sustain the motion for a directed verdict.

T. at 372–73. The Court explained the decision to the jury and the trial concluded. T. at 373–75.

## Summary of the Argument

The Circuit Court correctly granted Defendant's Motion for a Directed Verdict at the close of Plaintiff's proof on the basis that Plaintiff's only expert witness failed to establish the standard of care applicable to Dr. Stinnett when she administered the injections of local anesthetic to Mr. Braswell on December 13, 2004, and failed to establish how Dr. Stinnett allegedly breached the applicable standard of care.

The only testimony of Plaintiff's expert that could be construed as a statement regarding the standard of care was woefully insufficient. He did not state with the requisite specificity what was required of Dr. Stinnett; he did not state the opinion to a reasonable degree of medical certainty; and he did not state where or when that was the standard.

Neither did Plaintiff's expert establish how Dr. Stinnett breached the insufficiently expressed standard. A plaintiff is required to identify specifically

what the doctor did that constituted a deviation from the standard of care. Plaintiff's expert, however, had nothing to offer but conclusory allegations. Although he testified that Dr. Stinnett "deviated from good dental practice," he admitted that he did not know what technique Dr. Stinnett used or where Dr. Stinnett made the injections, rendering it impossible for him to express an opinion with any certainty that Dr. Stinnett's treatment did not conform to the applicable standard of care.

Because Plaintiff's expert failed to establish the standard of care or how Dr. Stinnett allegedly breached that standard, Plaintiff did not make out a prima facie case of medical malpractice. Therefore, the trial court appropriately granted Defendant's Motion for a Directed Verdict.

## ARGUMENT

### I. Standard of Review

A motion for a directed verdict challenges the legal sufficiency of the evidence. *Canadian Nat'l/Ill. Cent. R.R. Co. v. Hall*, 953 So. 2d 1084, 1090 (Miss. 2007); Miss. R. Civ. P. 50(a). It is the functional equivalent of a motion for summary judgment made at the close of the evidence. *Spann v. Diaz*, 987 So. 2d 443, 446 (Miss. 2008). When considering a trial court's grant of a motion for a directed verdict, this Court engages in a *de novo* review. *Troupe v. McAuley*, 955 So. 2d 848, 856 (Miss. 2007). When evaluating the trial

court's decision, a reviewing court must determine whether the facts, along with any reasonable inferences, considered in the light most favorable to the nonmoving party, demonstrate that no reasonable juror could have found in his favor. *Solanki v. Ervin*, 21 So. 3d 552, 556 (Miss. 2009). Put another way, "[t]his Court considers 'whether the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated.' " *Id.* (quoting *Spotlite Skating Rink, Inc. v. Barnes*, 988 So. 2d 364, 368 (Miss. 2008)).

## II. Dr. Stinnett is Entitled to a Directed Verdict Because Plaintiff Failed to Make Out a Prima Facie Case of Medical Malpractice

This Court has explained the burden of a plaintiff in a medical malpractice case as follows:

> 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.

*Troupe*, 955 So. 2d at 856 (quoting *Cheeks v. Bio-Medical Applications, Inc.*, 908 So. 2d 117 (Miss. 2005)).[5] A plaintiff generally must prove the elements

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[5] Although the defendant in this case is a dentist, the same standards apply to this case as they would if the defendant were a physician. *See Sheffield v. Goodwin*, 740 So. 2d 854, 855–56 (Miss. 1999).

of a medical malpractice claim by expert testimony. *Kuiper v. Tarnabine*, 20 So. 3d 658, 661 (Miss. 2009) (quoting *Estate of Northrop v. Hutto*, 9 So. 3d 381, 384 (Miss. 2009)). Expert testimony is not necessary, however, "where a layman can observe and understand the negligence as a matter of common sense and practical experience." *Hubbard v. Wansley*, 954 So. 2d 951, 960–61 (Miss. 2007) (quoting *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 795 (Miss. 1995)). Here, there is no doubt that what constitutes appropriate administration of injections of local anesthesia is not within the common understanding of a lay person and Plaintiff makes no such argument. Therefore, expert testimony was required for Plaintiff to make out a prima facie case of medical malpractice in this case.

"The success of a plaintiff in establishing a case of medical malpractice rests heavily on the shoulders of the plaintiff's selected medical expert." *Estate of Northrop*, 9 So. 3d at 384. When a plaintiff fails to make out a prima facie case of medical malpractice, it is appropriate for a trial court to grant a defendant's motion for a directed verdict. *See Troupe v. McAuley*, 955 So. 2d 848, 858 (Miss. 2007); *see also Hans v. Mem'l Hosp. at Gulfport*, 40 So. 3d 1270, 1278 (Miss. Ct. App. 2010) (affirming a trial court's grant of summary judgment when the plaintiff failed to make out a prima facie case of medical

malpractice). Here, Plaintiff failed to make out a prima facie case of medical malpractice because he did not prove, by expert testimony, the applicable standard of care or how Dr. Stinnett allegedly deviated from that standard. Therefore, the trial court properly granted Dr. Stinnett's Motion for a Directed Verdict.

A. Plaintiff's Expert Failed to Establish the Standard of Care

A plaintiff in a medical malpractice case must establish the applicable standard of care by expert testimony. *See Troupe*, 955 So. 2d at 856. "Our body of law requires medical experts to articulate a specific, objectively-determined standard of care." *Estate of Northrop*, 9 So. 3d at 382.

Dr. Turk's only testimony that came even remotely close to describing the standard of care was as follows: "Generally you deposit your anesthetic two or three millimeters above the tooth if that's the purpose of what was going to happen that day, the scaling and the root planing. All that is standard." T. at 273.

He never expressed an opinion that this was the standard of care to a reasonable degree of medical certainty nor did he say that using any other technique is below the standard. Although, as Plaintiff has pointed out, use of the words "reasonable degree of medical certainty" is not dispositive, it is a guide to understanding the certainty with which the expert witness is

expressing his opinion. *Catchings v. State*, 684 So. 2d 591, 597 (Miss. 1996). While addressing the specificity with which an expert must express his opinion to survive a motion for summary judgment, the Court of Appeals has noted:

> [W]hen an expert's opinion is not based on *a reasonable degree of medical certainty*, or the opinion is articulated in a way that does not make the opinion probable, the jury cannot use that information to make a decision. Failure to properly qualify an expert opinion typically occurs in testimony that is speculative, using phrases such as "probability," "possibility," or even "strong possibility." It is the intent of the law "that if a physician cannot form an opinion with *sufficient certainty* so as to make a medical judgment, neither can a jury use that information to reach a decision."

*Hans*, 40 So. 3d at 1279 (quoting *Kidd v. McRae's Stores P'ship*, 951 So. 2d 622, 626 (Miss. Ct. App. 2007) (Internal citations omitted) (emphasis added)).

In this case, the absence of any language indicating the certainty of Dr. Turk's opinions is significant. Dr. Turk stated that "generally" the anesthesia is placed two to three millimeters above the tooth. Dr. Turk, however, did not explain what he meant by "generally." His use of the word "generally" indicates that the standard of care does not mandate the use of this technique and that other techniques may be used. In fact, during Dr. Turk's cross-examination, the jury was shown a video entitled "Maxillary Anesthesia," which demonstrated several techniques that could be utilized to anesthetize

a patient's teeth for a procedure such as the deep cleaning performed on Mr. Braswell. T. at 319–20; Ex. 8 - Defendant. The video appeared on Dr. Turk's curriculum vitae and was represented by Dr. Turk as being a reasonable authority.[6] T. at 314–15. Dr. Turk also described an "extra oral technique" of administering anesthesia.[7] T. at 320. However, he did not testify that the use of these other techniques would have been inappropriate in this case. Dr. Turk's statement about what is "generally" done regarding the placement of anesthesia is a far cry from the "specific, objectively-determined standard of care" that a plaintiff must prove as part of his prima facie case.

Further, Dr. Turk did not testify where this ill-defined technique is the standard of care. He did not specify if this standard was specific to where he practiced in New Jersey, or if this was the standard of care in Alabama where he was an associate professor but where he never held a license to practice. He certainly did not testify that this was the national standard of care, which is the standard against which doctors in Mississippi are to be judged. *See*

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6 Interestingly, although Dr. Turk listed this video on his CV and listed himself as "served editor," Dr. Turk admitted that he was not involved in the production of the video. T. at 316–17. Dr. Turk's explanation was that he used some of the material from this video when he produced his own video (which did not appear on his CV), and he "wanted to give[] credit where credit is due." T. at 316, 323. It had nothing to do with attempting to make his CV look better. T. at 323.

7 Dr. Turk apparently believed that the "extra oral technique" was described on the video. He was incorrect. T. at 320; Ex. 8 - Defendant.

*Estate of Northrop v. Hutto*, 9 So. 3d 381, 384 (Miss. 2009) (noting that "[a] physician is under a duty to meet the national standard of care").

Finally, he did not establish when the described "general" technique was the standard of care. The applicable standard of care is that prevailing at the time of the treatment at issue. *See Barton v. Estate of Buckley*, 867 So. 2d 271, 274 (Miss. Ct. App. 2004). The standard of care is not static; rather, it evolves with developments in science and technology and reflects the changing understanding of what constitutes appropriate care at a point in time. In this case, the relevant time was December 13, 2004. The trial of this case occurred in October 2009, nearly five years after the treatment at issue. Therefore, Dr. Stinnett's treatment of Mr. Braswell must be compared with the prevailing standard at the time of treatment, not with any subsequent changes in the standard of care that may have occurred between the time of treatment and the time of trial. Dr. Turk, however, did not specify when his purported "standard" was the prevailing standard of care to enable the jury to properly judge Dr. Stinnett's treatment in this case.

Plaintiff argues that the trial court erred by ruling that Dr. Turk was required to testify as to the local standard of care, i.e., the standard of care in Holly Springs, Mississippi on December 13, 2004. Plaintiff states that a national standard of care was adopted by this Court in *Hall v. Hilbun*, 466 So.

So. 3d 138, 143–45 (Miss. Ct. App. 2010); *Estate of Deiorio v. Pensacola Health Trust, Inc.*, 990 So. 2d 804, 807 (Miss. Ct. App. 2008).

Although Dr. Turk said at one point that Dr. Stinnett must have lost her orientation or was not paying attention, he did not express these opinions to a reasonable degree of medical certainty or use any other language indicating the level of certainty that he had in his expressed opinions. An expert witness is not required to use specific language when testifying "as long as the import of the testimony is apparent." *Vanlandingham v. Patton*, 35 So. 3d 1242, 1249 (Miss. Ct. App. 2010) (quoting *West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714, 720 (Miss. 1995)). In this case, looking at Dr. Turk's testimony as a whole, what is apparent is that Dr. Turk had no idea what actually happened in this case.

Dr. Turk demonstrated the lack of certainty that he had in his previously expressed opinions when he testified on cross-examination, "I never said she was disoriented," demonstrating that his testimony on direct examination was nothing more than a description of possibilities. He could not say that she was disoriented because he admitted that he did not know where Dr. Stinnett made the injections. Without knowing what happened, he cannot establish that Dr. Stinnett deviated from the standard of care because he cannot explain

what she did that was inconsistent with the standard.[8] Without knowing where Dr. Stinnett made the injections, Dr. Turk's statement that Dr. Stinnett was negligent is nothing more than a conclusory allegation, which is insufficient to make out a prima facie case of medical malpractice.

In his brief, Plaintiff argues that Dr. Turk never speculated in his testimony. Rather, according to Plaintiff, Dr. Turk definitively stated that Dr. Stinnett breached the standard of care. The verbal adamance with which Dr. Turk stated that Dr. Stinnett breached the standard of care, however, is of no consequence. Further, Dr. Turk's testimony on cross-examination, in which he stated, "I never said she was disoriented," is good evidence that his testimony on direct examination that she "lost her orientation" lacks any degree of certainty.

Plaintiff seems to imply that because the trial court accepted Dr. Turk as an expert, his opinions were necessarily sufficiently certain to survive a motion for a directed verdict. Such is not the case. Whether an expert's testimony is sufficient to make out a prima facie case of medical malpractice for the purposes of surviving a motion for directed verdict is a different issue

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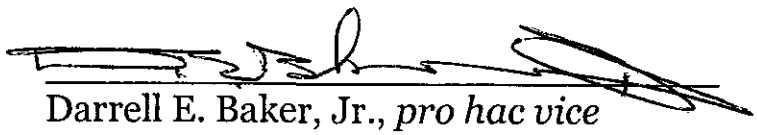
8 The Tennessee Court of Appeals has noted that "[i]f one cannot determine what occurred, one cannot adequately opine that any standard of care was breached or that such a breach proximately caused injury." *Maine v. Wellmont Health Sys.*, No. E1999-00389-COA-R3-CV, 2000 WL 472867, at *6 (Tenn. Ct. App. April 24, 2000). A copy is attached hereto as Exhibit "A."

than whether the witness is qualified to testify as an expert. *See Hans v. Mem'l Hosp. at Gulfport*, 40 So. 3d 1270, 1277–79 (Miss. Ct. App. 2010) (affirming the trial court's grant of summary judgment to a defendant in a medical malpractice case where the trial court did not find the plaintiff's expert unqualified to testify but rather found the testimony of the expert insufficient to make out a prima facie case of medical malpractice). In this case, the trial court, admittedly being lenient, accepted Dr. Turk as an expert, but Dr. Turk was still required to establish what the standard of care required of Dr. Stinnett and explain how she deviated from that standard. He simply did not do that during his testimony, making the directed verdict appropriate.

## Conclusion

As discussed above, Plaintiff did not make out a prima facie case of medical malpractice against Dr. Stinnett because his expert failed to establish the applicable standard of care or how Dr. Stinnett deviated from the standard of care. Therefore, the trial court's grant of Defendant's Motion for a Directed Verdict should be affirmed.

Respectfully submitted,



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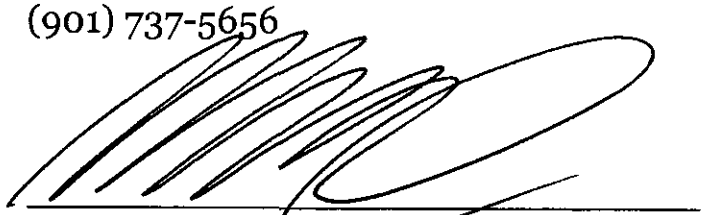

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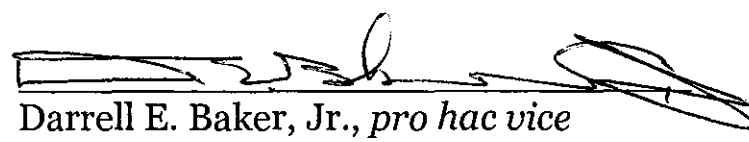
## Certificate of Service

I, Darrell E. Baker, Jr., attorney for appellee Beth Stinnett, D.D.S., Individually and d/b/a Family Dentistry certify that I have this day served a copy of the foregoing by United States mail with postage prepaid on the following persons at these addresses:

The Honorable Henry L. Lackey
Circuit Judge
Third Circuit Judicial District
P.O. Drawer T
Calhoun City, Mississippi 38916

Shirley C. Byers
Byers Law Firm
P.O. Box 5008
Holly Springs, Mississippi 38634-5008

This the 22nd day of October, 2010.



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**C**
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Lacey A. MAINE,
v.
WELLMONT HEALTH SYSTEM d/b/a Bristol Regional Medical Center, et al.
**No. E1999-00389-COA-R3-CV.**

April 24, 2000.

Direct Appeal from the Law Court for Sullivan County, No. C10222(M); John S. McLellan, III, Judge.
Thomas C. Jessee, Johnson City, TN, for appellant, Lacey A. Maine.

William T. Gamble and Russell W. Adkins, Kingsport, TN, for appellees Michael D. Rowell, M.D., D. Nelson Gwaltney, M.D., and Bristol Surgical Associates, P.C.

Charles T." Chip" Herndon IV, Johnson City, TN, for appellees Stefan J. Grenvik, M.D., Richard M. Penny, M.D., and Bristol Anesthesia Services, P.C.

Jimmie C. Miller, Kingsport, TN, for appellees Wellmont Health System, d/b/a Bristol Regional Medical Center, Jerry Bullard, CRNA and Bob Herndon, CRNA.

SUSANO, J., delivered the opinion of the court, in which GODDARD, P.J., and FRANKS, J., joined.

OPINION

SUSANO.

***1** In this medical malpractice action arising out of the plaintiff's surgery, the trial court granted the defendants summary judgment. The plaintiff appeals, contending that there are disputed material facts that make summary judgment inappropriate. We affirm.

I. *Background*

The complaint named 11 health care providers as defendants. By agreement of the parties, two of the original defendants, radiologist William H. Johnstone, M.D. and his professional corporation, Radiology Associates-Bristol, P.C., were dismissed with prejudice from the litigation; therefore, their alleged liability will not be further noticed in this opinion. The following remaining defendants are charged with negligence in connection with the plaintiff's surgery: (1) general surgeons, Michael D. Rowell, M.D., and D. Nelson Gwaltney, M.D., and their professional corporation, Bristol Surgical Associates, P.C. ("Bristol Surgical Associates") (collectively "the Surgical Defendants"); (2) anesthesiologists Stefan J. Grenvik, M.D. and Richard M. Penny, M.D. and their professional corporation, Bristol Anesthesia Services, P.C. (collectively "the Anesthesiology Defendants"); and (3) nurse anesthetists Jerry Bullard and Bob Herndon and their employer, Wellmont Health System d/b/a Bristol Regional Medical Center ("Bristol Regional") (collectively "the Nurse Anesthetist Defendants").

The trial court granted the remaining defendants summary judgment. The plaintiff raises as his sole issue on this appeal whether the trial court erred in finding that there are no genuine issues of material fact and in finding that the defendants are entitled to judgment as a matter of law.

II. *Facts*

On February 17, 1996, Maine experienced severe pain in both legs after a vigorous three-hour workout on an exercise bicycle. He visited the emergency room at Bristol Regional and was ex-

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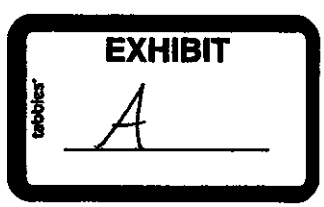

amined by Dr. Gwaltney, the emergency room physician on call. Maine, a very obese man, related to Dr. Gwaltney a history of diabetes and the fact that he smoked at least one pack of cigarettes a day. Dr. Gwaltney admitted Maine to the hospital and treated him for an obstruction of blood flow to his left leg.

Maine was referred to radiologist Dr. Johnstone for the performance of diagnostic tests. Based upon the results of these tests, an angioplasty was performed in an attempt to clear the obstruction. Dr. Johnstone testified by affidavit that the procedure was terminated when a follow-up test showed re-obstruction at the same location.

Dr. Rowell first became involved in Maine's care on February 22, 1996. He reviewed Maine's medical records and noted that Maine was experiencing some pain even at rest. Dr. Rowell discussed continued conservative management and the associated risks, including the possibility of limb loss, with Maine, his wife, and his brother, Dr. Charles Maine. All three agreed to proceed with surgery on Maine's left leg.

Maine underwent surgery at Bristol Regional on February 23, 1996. Anesthesiologist Dr. Grenvik, with the assistance of nurse anesthetist Bullard, initiated the anesthesia. During the surgery, Dr. Grenvik was relieved by fellow anesthesiologist Dr. Penny, and Bullard was relieved by fellow nurse anesthetist Herndon.

***2** Dr. Rowell performed the surgery. He performed (1) a left above-the-knee popliteal[FN1] artery to below-the-knee popliteal artery bypass, and (2) a left below-the-knee popliteal artery embolectomy.[FN2]

FN1. "Popliteal" refers to the posterior surface of the knee.

FN2. An "embolectomy" is the surgical removal of a clot or other plug from a blood vessel.

The surgery lasted over seven and a half hours. The surgery was technically challenging due to the size of Maine's left leg and the need to do certain intra-operative procedures.

After the surgery, Dr. Rowell met with Maine's wife at about 10:30 P.M. to discuss the surgery with her. When Mrs. Maine saw her husband at 11:00 P.M., she discovered that he had a moderate speech impediment-"stuttering"-and a knot on his head. Dr. Rowell ordered a CT scan on February 29, 1996, which was performed on the same day. The scan revealed no evidence of trauma.

On February 21, 1997, Maine filed a *pro se*[FN3] complaint against the various defendants alleging medical malpractice. The complaint charges that the defendants breached their respective standards of care and that his injuries-mental dysfunction, speech impediment, modified personality, inability to work, and permanent injury to his left leg-ordinarily do not occur in the absence of negligence. In addition, the complaint alleges that the defendants did not warn him that injuries of this type were risks of the surgical procedure. All of the defendants filed motions and the trial court considered the various affidavits filed by both sides as well as the deposition of Dr. Rowell. The court found that all of the defendants are entitled to summary judgment.

FN3. At a subsequent time, the plaintiff retained counsel to represent him at the trial level.

III. *Medical Malpractice Law*

Medical malpractice actions in Tennessee are governed by T.C.A. § 29-26-115 (1980), which provides, in pertinent part, as follows:

(a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):

(1) The recognized standard of acceptable profes-

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sional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which he practices or in a similar community at the time the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

(b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a) unless he was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make his expert testimony relevant to the issues in the case and had practiced this profession or specialty in one of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection when it determines that the appropriate witnesses otherwise would not be available.

*3 (c) In a malpractice action as described in subsection (a) of this section there shall be no presumption of negligence on the part of the defendant. Provided, however, there shall be a rebuttable presumption that the defendant was negligent where it is shown by the proof that the instrumentality causing injury was in the defendant's (or defendants') exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence.

With respect to a complaint alleging lack of informed consent, T.C.A. § 29-26-118 (1980) provides that

[i]n a malpractice action, the plaintiff shall prove by evidence as required by § 29-26-115(b) that the defendant did not supply appropriate information to the patient in obtaining his informed consent (to the procedure out of which plaintiff's claim allegedly arose) in accordance with the recognized standard of acceptable professional practice in the profession and in the specialty, if any, that the defendant practices in the community in which he practices and in similar communities.

In an informed consent case, a plaintiff must establish, by expert testimony, that "the information provided to the patient deviated from the usual and customary information given to patients to procure consent in similar situations." *Blanchard v. Kellum,* 975 S.W.2d 522, 524 (Tenn.1998). "The inquiry focuses on whether the doctor provided *any* or *adequate* information to allow a patient to formulate an intelligent and informed decision when authorizing or consenting to a procedure." *Id.* (emphasis in *Blanchard* ).

IV. *Summary Judgment*

We now turn our attention to the subject of summary judgment. In deciding whether a grant of summary judgment is appropriate, courts are to determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56.04, Tenn.R.Civ.P. Courts "must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." *Byrd v. Hall,* 847 S.W.2d 208, 210-211 (Tenn.1993).

The party seeking summary judgment has the burden of demonstrating that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. *Id.* at 215. Generally, a defend-

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and had an opportunity to address the nature and risks of his surgery. It follows that she does not know, and therefore cannot establish by her own affidavit, what he was told in her absence. Hence, her affidavit does not establish a genuine issue of material fact as to whether the defendants conveyed the necessary information to Maine with respect to the nature of, and the risks attendant to, the anesthesia and his surgery.

Mrs. Maine's assertion that "a nurse" informed her that Maine woke up during surgery is likewise inadmissible because, among other things, it is hearsay. It is true that the hearsay rule does not apply to "a statement by an agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship under circumstances qualifying the statement as one against the declarant's interest regardless of declarant's availability...." Tenn.R.Evid. 803(1.2)(D). However, in order to qualify under this exception, "the statement (1) must concern a matter within the scope of the declarant's agency or employment; (2) must have been made while the agency or employment relationship existed; and (3) must be against the declarant's interest when made." *Dailey v. Bateman,* 937 S.W.2d 927, 930 (Tenn.Ct.App.1996). Here, in addition to the nurse's identity being unknown, there is nothing in the record to indicate the source of the nurse's information and nothing to indicate that the nurse's statement was against his or her personal interest. We do not know from the affidavit whether the "nurse" was in the operating room during the surgery or otherwise a part of Maine's care. Therefore, the information supplied by "a nurse" is inadmissible to prove that Maine woke up during surgery, *see id.* at 930-31, and cannot be considered by us on summary judgment.

The remaining statements in Mrs. Maine's affidavit concerning Dr. Rowell's attempts to explain Maine's stuttering and the bump on his head are speculative statements of the physician and do not establish anything other than that Dr. Rowell did not have an explanation for these conditions. Finally, the fact that Maine's medical records contain nothing indicating that he woke up during surgery or that he was hit in the head during surgery work against Maine because they tend to establish that nothing of this nature occurred.

Dr. Maine's affidavit does no better. Initially, it is unclear whether he would qualify under T.C.A. § 29-26-115(b) as an expert regarding the various specialties of the defendants. Even assuming *arguendo* that his testimony would be admissible as to the issues in this litigation, his statements do not make out a case against the defendants. He states that not explaining the risks associated with general anesthesia is a violation of the standard of care, but, as we have just noted, Maine has not established that the defendants neglected to explain the risks to him. Similarly, neglecting to note in the medical records that Maine woke up during surgery cannot be a breach of the standard of care if Maine did not, in fact, wake up during surgery. As previously noted, there is no admissible evidence before us to the effect that he did wake up while the surgery was ongoing. The most damaging statement to the plaintiff in Dr. Maine's affidavit is that "without additional information from all persons present, a medical expert is incapable of determining what exactly occurred." If one cannot determine what occurred, one cannot adequately opine that any standard of care was breached or that such a breach proximately caused injury.

*7 We recognize that T.C.A. § 29-26-115(c) allows a plaintiff to utilize *res ipsa loquitur* to establish a rebuttable presumption of a defendant's negligence in certain circumstances. *See, e.g., Seavers v. Methodist Med. Ctr. of Oak Ridge,* 9 S.W.3d 86, 96 (Tenn .1999). In order to establish such a presumption, however, a plaintiff must "demonstrate that he or she was injured by an instrumentality that was within the defendant's exclusive control and that the injury would not ordinarily have occurred in the absence of negligence." *Id.* at 91. In medical malpractice cases, the second prong of this test must be es-

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tablished by expert testimony unless the alleged malpractice lies within the common knowledge of lay persons. *Id.* at 92.

We find and hold that Maine has not established the first prong of the *res ipsa loquitur* test, *i.e.*, that he was injured by an instrumentality under the exclusive control of the defendants. Two of our prior cases are particularly instructive on this point. In *Meadows v. Patterson,* 109 S.W.2d 417 (Tenn.Ct.App.1937), the plaintiff's eye was alleged to have been injured while he was under the influence of anesthesia for an appendectomy. *Id.* at 418. After the surgery, the plaintiff, still unconscious, was taken to a private room in the hospital and was left in the care of a nurse for the night. *Id.* at 419. We held in that case that the plaintiff failed to establish the prerequisite to the application of *res ipsa loquitur, i.e.,* that the injury occurred while the plaintiff was under the defendant surgeon's control. *Id.* at 420. We stated that submitting the case to a jury under such facts "would have permitted the jury to speculate as to whether the injury occurred in the operating room where, as we have seen, plaintiff was under the control of defendant, whether it occurred in transit from the operating room to plaintiff's private room, or occurred after he was left in the custody of the nurse." *Id.* at 420.

We held similarly in *Jones v. Golden,* C/A No. 03A01-9108-CV-269, 1991 WL 238275 (Tenn.Ct.App. E.S., filed November 18, 1991). In *Jones,* the plaintiff underwent surgery for removal of a cyst on his left wrist. *Id.* at *1. Though the surgery was performed without incident, the plaintiff discovered, sometime after the surgery and while in his hospital room, that he had a small blister just above his elbow on the inner side of his left arm. *Id.* The trial court granted summary judgment for the defendants, finding that "[t]here is no proof as to whether the injury occurred during surgery, in the recovery room, or elsewhere." *Id.* at *2. We affirmed "because the record support[ed] the findings of the trial court." *Id.*

The facts of the instant case are strikingly similar to the facts in *Meadows* and *Jones.* Dr. Rowell states in his affidavit that the surgery was completed at 8:20 P.M. Mrs. Maine states that Dr. Rowell discussed the surgery with her at some unspecified location at 10:30 P.M. and that she then saw her husband at approximately 11:00 P.M. Thus, Maine's surgery was completed at least thirty minutes, possibly as long as two hours and forty minutes, before Mrs. Maine saw him and noticed his condition. There is nothing in Mrs. Maine's affidavit indicating whether she saw her husband in a recovery room, thus indicating that Maine was still under the control of some or all of the defendants, or whether he was in a private room, or exactly where he was. There is nothing in the record to indicate when Maine regained consciousness after the surgery. A reasonable inference to be drawn from the fact that he was stuttering at 11:00 P.M. is that he was conscious at that time. He may have been conscious in his own private room for a period of time after the surgery but prior to seeing his wife at 11:00 P.M. Thus, we cannot say that the evidence shows that Maine sustained the bump on his head while he was within the exclusive control of the defendants or any one of them.

***8** In any event, it is important to recognize that the bump on Maine's head is not the real injury of which he complains. In fact, the bump is not even mentioned in his complaint. As we understand the plaintiff's complaint, he is not seeking damages for a bump on the head. Rather, his complaint seeks compensatory damages based on a number of other alleged injuries and conditions. According to the complaint, Maine "is now totally unable to provide income for his family, has a permanent injury to his leg, has a speech impediment, limited concentration, and [a] changed personality." He is concerned with the bump on his head only as it serves as circumstantial evidence that his real injuries, or some of them, are attributable to the defendants' negligence.

Even if the affidavits filed by Maine made out a case of negligence as to the bump on his head under

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the theory of *res ipsa loquitur,* his evidence would still be deficient as to his apparent theory that some of his injuries are related to that bump. It goes without saying that a causal relationship between a bump on the head and stuttering or a changed personality is not something that is within the common knowledge of lay persons. This causal connection requires expert testimony. *See Coyle v. Prieto,* 822 S.W.2d 596, 598 (Tenn.Ct.App.1991). The only expert testimony offered by Maine is in the form of his brother's affidavit, which in no way asserts that Maine's current injuries are a result of being hit in the head or that they are otherwise associated with the bump. Therefore, even if Maine had established that he was hit in the head while under the exclusive control of the defendants-and we have held that he did not-there is no showing of a nexus between the cause of the bump and his real injuries. In the final analysis, we find that the record before us does not contain *any* evidence that the injuries and conditions alleged in the complaint were proximately caused by the negligence of any of the defendants. In the absence of such proof, the defendants' affidavits-denying that anything they did or failed to do caused Maine's injuries-carry the day. Consequently, the defendants are entitled to summary judgment.

VI. *Conclusion*

The judgment of the trial court is affirmed. This case is remanded to the trial court for collection of costs assessed there, pursuant to applicable law. Costs on appeal are taxed to the appellant.

Tenn.Ct.App.,2000.
Maine v. Wellmont Health System
Not Reported in S.W.3d, 2000 WL 472867 (Tenn.Ct.App.)

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