IN THE SUPREME COURT OF STATE OF MISSISSIPPI

DONALD McKEOWN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE DECEDENT, JANICE McKEOWN, FOR AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES AND AS ADMINISTRATOR OF THE ESTATE OF JANICE McKEOWN, DECEASED **APPELLANT**

V. **CAUSE CASE NO. 2010-TS-00641**

ROBERT V. PITCOCK **APPELLEE**

[ON APPEAL FROM THE CIRCUIT COURT OF UNION COUNTY, MISSISSIPPI]

BRIEF OF THE APPELLEE

> *ORAL ARGUMENT IS NOT REQUESTED* <

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the persons listed below may have an interest in the outcome of this case. These representations are made in order that the members of this Court may evaluate possible disqualification or recusal.

1. Donald McKeown;

2. Wrongful Death Beneficiaries Crystal McKeown, Daniel McKeown, and David McKeown;

3. S. Ray Hill, III, Merrill King Nordstrom and Kenneth H. Coghlan, Attorneys for Donald McKeown;

4. Honorable Robert W. Elliott, Union County Circuit Court Judge;

5. Dr. Robert V. Pitcock, Defendant, practicing physician in the State of Mississippi;

6. Carl Hagwood, Diane Pradat and Michael Coleman, Attorneys for Robert V. Pitcock, M.D.

THIS, the 17th day of November, 2010.

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STATEMENT OF THE ISSUE

The trial court properly excluded the Cause of Death portion of the Death Certificate on the grounds that the death certificate was prepared by a person who lacked the education, training and experience to determine cause of death and who admitted that she was relying on hearsay to complete this portion of the document.

STATEMENT OF THE CASE

This medical malpractice case was filed by Donald McKeown ("Mr. McKeown"), alleging that Robert V. Pitcock ("Dr. Pitcock") was negligent in his treatment of the decedent, Janice McKeown ("Mrs. McKeown"). Dr. Pitcock treated Mrs. McKeown on one occasion when he saw her in the emergency room at Baptist Memorial Hospital - Union County on October 12, 2003.[1] Mrs. McKeown came to the emergency room because she was short of breath and Dr. Pitcock treated her with antibiotics, diagnosed her with bronchitis, and referred her to her local medical doctor for follow up. He also instructed Mrs. McKeown to return to the emergency room as needed. This was the only encounter between Mrs. McKeown and Dr. Pitcock, and none of these facts are contested.

Beginning October 14, 2003, Mrs. McKeown was seen by nurse practitioner, Carolyn Estes ("Nurse Estes"), several times for follow up. In fact, Nurse Estes saw Mrs. McKeown on October 14, 2003, October 21, 2003, November 3, 2003, and on November 10, 2003. Nurse Estes diagnosed underlying heart disease in Mrs. McKeown, and during the November 10, 2003 visit, Nurse Estes told Mrs. McKeown that she needed to have a cardiac stress test. Mrs. McKeown chose to put that test off until a later date. Again, none of these facts are contested.

On the evening of November 15, 2003, Mrs. McKeown died suddenly at her home. No autopsy was done to determine the cause of death. R. vol. II p. 15. The death certificate was filled out by Kimberly Arlene Bumpas, the deputy coroner, and she listed the probable cause of death as "cardiopulmonary failure due to congestive heart failure." Ms. Bumpas is an emergency medical technician, intermediate level. R. vol. II p. 11. In order to become the deputy coroner, she attended a one week school in Jackson, Mississippi. *Id.* Ms. Bumpas is not a medical doctor. *Id.* She is not even

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[1] Mr. McKeown also sued others making similar allegations of medical negligence. However, those Defendants and those claims are not relevant to this appeal.

a nurse. R. vol. II p. 12. She certainly is not a pathologist. *Id.* And she does not conduct autopsies. *Id.*

Ms. Bumpas prepared the death certificate based on her visual inspection of the body at the McKeown's home on the night of Mrs. McKeown's death and conversations with Mr. McKeown and Nurse Estes. R. vol. II p. 14-15. She did no further investigation. *Id.* Thus, her opinion as to the cause of Mrs. McKeown's death was based on nothing other than hearsay and a meaningless visual inspection.

Ms. Bumpas was called prior to trial to testify in conjunction with the motions *in limine* filed by the Defendants[2] seeking to exclude the death certificate. See R. vol. II p. 11-15. During that testimony, Ms. Bumpas admitted that though she listed the probable cause of death as "cardiopulmonary failure due to congestive heart failure," in the absence of an autopsy, she could not exclude several other causes of sudden death as the probable cause of Mrs. McKeown's death. R. vol. II p. 15. Thus, during the hearing on the Defendants' motion to exclude the death certificate, Ms. Bumpas testified not only that she is not qualified to determine cause of death in general, but also that she did not have enough evidence to determine Mrs. McKeown's probable cause of death.

Despite that fact, Mr. McKeown sought to introduce the death certificate into evidence, as prepared by Ms. Bumpas, including her opinion listing the probable cause of Mrs. McKeown's death as "cardiopulmonary failure due to congestive heart failure." The Defendants contended that this opinion evidence by Ms. Bumpas was unreliable, and that Ms. Bumpas was not qualified to give such an opinion. See R. vol. II p. 16-17. Thus, the Defendants contended that the death certificate should be excluded under MISS. R. EVID. 702 and *Miss. Transportation Commission v. McLemore*, 863 So.

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[2] Several motions *in limine* were filed by Nurse Estes and Dr. Pitcock, and each joined the other's motions. Nurse Estes is not a party to this appeal.

2d 31, 36 (Miss. 2003) (citing *Daubert v. Merrill Dowell Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)).

Mr. McKeown contended that the death certificate was wholly admissible by statute, regardless of Rule 702 or *McLemore*, and he cited two cases in support of that argument R. vol. II p. 18-20.

The trial court found that because Ms. Bumpas "clearly admitted on the stand" that she was not able to rule out other causes of death, the rebuttable presumption that the death certificate was admissible had been rebutted. R. vol. II p. 22-23. However, the trial court still did not exclude the death certificate in its entirety. Instead, the Court called for the redaction of the opinion testimony by Ms. Bumpas related to the "probable cause of death," and a cautionary instruction to the jury on that issue. R. vol. II p. 23.

Trial then commenced on January 25, 2010. Mr. McKeown was allowed to testify that Ms. Bumpas told him that Mrs. McKeown "died of a massive heart attack," and then the jury was cautioned that Ms. Bumpas did not have the experience or qualifications to determine cause of death. R. vol. II p. 122-123. Thus, albeit with a cautionary instruction, the jury was ultimately informed of Ms. Bumpas' opinion as to the cause of death.

Mr. McKeown also called two expert witnesses, who testified extensively that they believed Mrs. McKeown suffered from heart disease and died of myocardial infarction (i.e. heart attack). See, i.e., R. Exhibits vol. II p. 182-217 and R. vol. III p. 154-203. The primary expert called against Dr. Pitcock testified that Mrs. McKeown "died of coronary artery disease, probably a myocardial infarction, perhaps complicated by congestive heart failure." R. Exhibits vol. II p. 217. The expert called to testify against Nurse Estes also offered extensive opinion testimony that Mrs. McKeown suffered from heart disease and possible heart failure. R. vol. III p. 154-203. Thus, Mr. McKeown's theory that Mrs. McKeown died of heart failure was placed firmly before the jury.

After due deliberation, the jury found that Dr. Pitcock breached the standard of care in his treatment of McKeown, but that this breach was not the proximate cause of her death. R. vol. VI p. 602. The jury found that Nurse Estes did not breach the standard of care in her treatment of McKeown. *Id.* The Plaintiff then moved for a new trial asserting, as he does here, that the jury did not find that the actions of Dr. Pitcock were the proximate cause of Mrs. McKeown's death merely because the opinion of Ms. Bumpas as to the probable cause of death on the death certificate was excluded. R. vol. VI p. 605-610. That motion was denied, and this appeal followed.

SUMMARY OF THE ARGUMENT

Mr. McKeown contends that, because of the provisions of Miss. Code Ann. §41-57-9, a death certificate *must* be admitted into evidence at trial regardless of it's reliability and trustworthiness. This argument is simply wrong. There are many instances in which this Court has found that all, or part, of a death certificate was properly excluded, or should have been.

In the present case, the trial court properly excluded the opinion stated in the death certificate as to the probable cause of Mrs. McKeown's death. The person rendering that opinion was not qualified to render it, and she admitted on the witness stand just prior to trial that the opinion was unreliable in that she could not rule out a significant number of other possible causes of death. Thus, the trial court properly excluded the opinion related to the probable cause of death, as listed in the death certificate.

ARGUMENT

I. Standard of Review.

Mr. McKeown properly identified the standard of review in this case as an abuse-of-discretion. Likewise, "The standard of review for the admission or exclusion of expert testimony is the same as for other evidence, an abuse of discretion." *Burnwatt v. Ear, Nose & Throat Consultants of N. Miss.*, PLLC, 2010 Miss. LEXIS 476 (¶18)(Miss. Sept. 16, 2010) (citing *Poole ex rel. Wrongful Death Beneficiaries of Poole v. Avara*, 908 So. 2d 716, 721 (Miss. 2005) (citing *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003)). *See also Investor Res. Servs., Inc. v. Cato*, 15 So. 3d 412, 416 (Miss. 2009); *Adcock v. Miss. Transp. Comm'n*, 981 So. 2d 942, 946 (Miss. 2008).

Any opinion related to the probable cause of death of Mrs. McKeown was expert opinion in that it called for "experience or expertise beyond that of the average, randomly selected adult." *See Crawford v. State*, 754 So. 2d 1211, 1215 (Miss. 2000) (citing *Puckett v. State*, 737 So. 2d 322, 342 (Miss. 1999). Thus, this Court should not reverse the trial court unless it concludes that the decision to exclude Ms. Bumpas' opinion as to the probable cause of Mrs. McKeown's death was arbitrary and clearly erroneous, amounted to an abuse of discretion, and the error adversely affected a substantial right of Mr. McKeown.

II. The Opinion Testimony in the Death Certificate was not Admissible.

Mississippi Rule of Evidence 702 governs the admissibility of expert testimony, providing:

> 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.

Thus, before an expert opinion is proffered to the jury, the witness must be qualified as an expert by knowledge, skill, experience, training or education. Ms. Bumpas was not qualified in this regard. She was an intermediate level EMT with a week's worth of training as a deputy coroner. Mr. McKeown argues, "In essence, the trial court had held that only medical doctors are qualified to list the cause of death in a death certificate." *Appellant's Brief* at p. 11. While Mr. McKeown argues that "this has never been the law in Mississippi," he fails to point out what the law is.

The truth of the matter is that the trial court did not hold that only doctors can list the cause of death in a death certificate. Instead, the trial court held that Ms. Bumpas could not do so. And, to pick up where Mr. McKeown left off, this Court has held that even nurses cannot testify as to medical causation or cause of death. *See Richardson v. Methodist Hospital of Hattiesburg, Inc.*, 807 So. 2d 1244 (¶14)(Miss. 2002) and *Vaughn v. Miss. Baptist Med. Ctr.*, 20 So. 3d 645, 652 (¶ 20)(Miss. 2009). Thus, Ms. Bumpas does not meet the threshold test of being qualified to offer an opinion as to the cause of Mrs. McKeown's death.

Ms. Bumpas' opinion in the death certificate as to the cause of death does not meet the reliability requirement either. Regarding that element, "the trial court has considerable leeway in deciding in a particular case how to go about determining whether particular expert evidence is

reliable." *McLemore*, 863 So. 2d at 37 (citations omitted). However, in order for the trial court to admit expert testimony, it must determine that "the reasoning or methodology underlying the testimony is scientifically valid," and the "reasoning and methodology properly can be applied to the facts in issue." *Id.* at 36. "When determining reliability, this Court has held that the expert testimony must demonstrate that his opinion 'is based upon scientific methods and procedures, not unsupported speculation.'" *Utz v. Running & Rolling Trucking, Inc.*, 32 So. 3d 450, 457-458 (¶10)(Miss. 2010) (quoting *Adcock v. Miss. Transp. Comm'n*, 981 So. 2d 942, 947 (Miss. 2008).

Ms. Bumpas admitted in the hearing on the Defendants' motions *in limine* that her "investigation" was nothing more than a superficial examination of Mrs. McKeown's body on the scene and conversations with Nurse Estes and Mr. McKeown. She also admitted that she could not rule out several other conditions and illnesses which could have been the cause of Mrs. McKeown's death. R. vol. II p. 15. In other words, Ms. Bumpas' "visual inspection" would have been the same even if Mrs. McKeown died of poisoning, a pulmonary embolus, or a stroke. The only basis she had for choosing a heart attack over any other cause of death was the hearsay from Mr. McKeown and Nurse Estes.

The trial court correctly noted Ms. Bumpas' inability to rule out other possible causes of death as the basis for excluding those portions of the death certificate related to probable cause of death. R. vol. II p. 22-23. The mere fact that Ms. Bumpas' unreliable and unqualified opinion appeared in a document which itself was otherwise admissible does not change the fact that the witness offering the opinion on cause of death was not qualified to give such an opinion, nor does it make an unreliable opinion from an unqualified witness admissible.

Despite Miss. Code Ann. §41-57-9, a death certificate is still subject to the Mississippi Rules of Evidence. *See Birkhead v. State,* 2009 Miss. LEXIS 73 (¶34-36)(Miss. Feb. 19, 2009) (citing *Jones*

v. State, 918 So. 2d 1220, 1233 (Miss. 2005). In *Birkhead*, this Court held that the trial court erred by admitting portions of a death certificate which lacked trustworthiness because the opinion as to time of death relied on hearsay. *Id.* In addition to § 41-57-9, Mr. McKeown relies on Mississippi Rule of Evidence 803(9), and contends that Rule 803(9) specifically contemplates the admissibility of death certificates. However, nothing in Rule 803(9) provides that unreliable death certificates must be admitted. *McLemore* and Rule 702 still apply.

As pointed out in *Birkhead*, the comment to Rule 803 states, in pertinent part:

> The experience in other jurisdictions which have adopted an identical rule has been that judges are exercising great caution in admitting these reports. Often they are being excluded if based on hearsay or the opinions of those not involved in the preparation of the report. The rule expressly gives judges the discretion to exclude such reports.

Miss. R. Evid. 803(8) cmt. Likewise, this Court has held, "Reading our Rule 803(8) and its comment together, trial judges should cautiously exercise their discretion in ruling on the admissibility of similar reports which are based on hearsay and/or contain opinions of persons not involved in the actual preparation of the report." *Jones v. State*, 918 So. 2d 1220, 1233 (¶ 32)(Miss. 2005). *Jones* involved a death certificate prepared by Bart J. Cowart, the duly-elected Tunica County coroner. *Id.* at ¶22. This Court held that because the death certificate in *Jones* lack trustworthiness, "the trial court did not err in excluding the coroner's report, in whole or in part."

Similarly, in the present case, Mr. McKeown attempted to rely on a death certificate prepared by a deputy coroner with no medical training qualifying her to determine the cause of a person's death, and which relied on hearsay to select the cause of death. While *Jones* and *Birkhead* deal with Rule 803(8), rather than 803(9), both cases still illustrate the fact that trial judges have the discretion to exclude all or part of a death certificate, regardless of § 41-57-9.

In other words, even though a death certificate may be otherwise admissible, our trial judges must still act as gatekeepers and exclude unreliable and untrustworthy evidence and testimony. There are very few reported cases which address § 41-57-9, but no case supports Mr. McKeown's argument that all portions of a death certificate are admissible regardless of their foundation and reliability. To the contrary, § 41-57-9 merely provides that the certificate itself is *prima facie* evidence of its contents. It does not provide that a death certificate must be admitted into evidence, regardless of the trustworthiness or reliability of its contents.

Mr. McKeown relies heavily on *Erby v. North Mississippi Medical Ctr.*, 654 So. 2d 495, 501 (Miss. 1995) and *Massachusetts Protective Association v. Cranford*, 102 So. 171 (Miss. 1924). However, *Erby* did not address the admissibility of an admittedly unreliable opinion expressed in a death certificate. The issue in *Erby* was whether a plaintiff submitted sufficient *summary judgment evidence* on the issue of causation to create a jury question. *Erby*, 654 So. 2d at 496-497. As the court in *Erby* noted, "Erby's Supplemental Response exhibited the death certificate and the medical records of Cannon, which showed cause of death as cerebral vascular accident due to, or as a consequence of, diabetes." *Id.* at 497. In *Erby*, there was no evidence that the cause of death listed in the death certificate was unreliable. To the contrary, the medical records supported the death certificate. *Id.* Thus, *Erby* is of no benefit to Mr. McKeown here.

Likewise, *Cranford* is a 1924 insurance case dealing with an exclusion for suicide. *Cranford*, 172 So. at 896. The court in that case actually held that the death certificate at issue was *not* admissible because the "certificate undertakes to do more than the law authorizes it." Explaining more fully, the court held:

> Coming now, lastly, to appellant's contention that the lower court ought to have permitted it to introduce the certificate of the bureau of vital statistics under section 4872, Hemingway's Code, as an aid in establishing the fact that the insured committed

> suicide, as the certificate itself stated the death was "suicidal," we do not think the statute was intended to authorize certificates to be introduced as prima-facie evidence except as to the prime physical cause of death; and we do not now decide whether such certificates are ever admissible in such cases, because it is unnecessary to pass on it. This certificate attempts to state the cause of the cause of death, that is, it attempts to state how, why, and by whom the wound was inflicted that caused the death. Its authorized purpose under the act was no more than to state the cause of the death, viz., by a gunshot wound, as in this case, and not whether the wound was inflicted by any certain person, by assassination, by accident, or by intentional self-destruction. This certificate undertakes to do more than the law authorizes, its statement of fact goes beyond the purview of the law authorizing it, and was properly excluded by the lower court.

Id. at 173-174.

The cases relied upon by Mr. McKeown do not support his argument, and the trial judge in the present case did nothing more than exercise his discretion to exclude an unreliable and inadmissible opinion from an otherwise admissible document. Mr. McKeown argues on page 10 of his brief, that he was not seeking to call Ms. Bumpas as an expert. However, that is precisely what he was doing. By submitting the death certificate as prepared by Ms. Bumpas as evidence, Mr. McKeown was attempting to place an unreliable opinion from an unqualified expert before the jury. The trial court realized this, and struck the opinion. This was not an abuse of discretion, it was not arbitrary and clearly erroneous, and as will be even more clearly established below, it did not adversely affect a substantial right of Mr. McKeown.

III. If the Trial Court Erred by Excluding the Opinion Testimony as to Cause of Death in the Death Certificate, that Error was Harmless Given the Fact that this Evidence was Given to the Jury by Mr. McKeown and his Expert Witnesses.

As noted above, the portion of the death certificate at issue is Ms. Bumpas' opinion that the cause of Mrs. McKeown's death was "cardiopulmonary failure due to congestive heart failure." Even though this portion of the death certificate was redacted, the opinion that Mrs. McKeown died of heart failure was placed squarely before the jury in a number of ways. First, Mr. McKeown was allowed to

testify that Ms. Bumpas told him that Mrs. McKeown "died of a massive heart attack." The jury was then cautioned that Ms. Bumpas did not have the experience or qualifications to determine cause of death. R. vol. II p. 122-123. However, through this testimony, the jury was ultimately informed of Ms. Bumpas' opinion as to the cause of death.

Secondly, Mr. McKeown called two expert witnesses, one to testify against Dr. Pitcock and one to testify against Nurse Estes. Both of these experts testified extensively that they believed Mrs. McKeown suffered from heart disease and died of myocardial infarction (i.e. heart attack). *See*, i.e., R. Exhibits vol. II p. 182-217 and R. vol. III p. 154-203. The primary expert called against Dr. Pitcock testified that Mrs. McKeown "died of coronary artery disease, probably a myocardial infarction, perhaps complicated by congestive heart failure." R. Exhibits vol. II p. 217. The expert called to testify against Nurse Estes also offered extensive opinion testimony that Mrs. McKeown suffered from heart disease and possible heart failure. R. vol. III p. 154-203.

As Mr. McKeown points out, the standard of review in this case calls for a reversal only when the error adversely affects a substantial right of a party. *See Appellant's Brief* at p. 9, and *Dehenre v. State*, 43 So. 3d 407 (¶ 21) (Miss. 2010)(citing *Ladnier v. State*, 878 So. 2d 926, 933 (Miss. 2004) (citing *Whitten v. Cox*, 799 So. 2d 1, 13 (Miss. 2000) (citations and internal quotation marks omitted). No substantial right is affected when a trial court's decision to exclude evidence or testimony is cured by subsequent testimony. *See Simmons v. State*, 805 So. 2d 452, 498 (¶126)(Miss. 2001). Such error is, "thus harmless." *Id.*

No error was committed by the trial court in the case in question. However, even if redacting the unreliable opinion evidence from Mrs. McKeown's death certificate was error, it was cured when Mr. McKeown and his two experts provided subsequent testimony which more than adequately

informed the jury about Mr. McKeown's theory as to the cause of death. Thus, there was no "void of uncertainty," as alleged by Mr. McKeown in his brief. *See Appellant's Brief* at p. 8.

Three witnesses testified that they believed Mrs. McKeown died of heart failure. Two of those witnesses were experts who provided even more detail about the alleged cause of death than Ms. Bumpas did in the death certificate. Therefore, Mr. McKeown's theory of the case regarding the cause of Mrs. McKeown's death was more than adequately placed before the jury, and the jury rejected it.

CONCLUSION

While, in general, death certificates are admissible and constitute *prima facie* evidence of the facts stated in them, death certificates are still subject to the Rules of Evidence, *McLemore*, and its progeny. The person who prepared the death certificate at issue here admitted that she was not qualified to determine the cause of death and that her opinion in that regard was unreliable. As such, the trial court correctly excluded the opinion as to the probable cause of death in the death certificate from the evidence in this case. No prejudice resulted to Mr. McKeown due to the exclusion of this evidence because he and two expert witnesses testified as to Mr. McKeown's theory on the cause of death. Thus, even if the trial court erred, and there is no authority supporting the notion that it did, that error was harmless. Therefore, the trial court should be affirmed.

Respectfully submitted, this the 17th day of November, 2010.

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CERTIFICATE OF SERVICE

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