
IN THE COURT OF APPEALS OF THE 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

Plaintiff-Appellant

V.

ROBERT V. PITCOCK, M.D.

Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT
OF UNION COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

>oral argument requested<

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ARGUMENT

The Plaintiff's position on appeal is that the trial court's decision to exclude the cause of death listed in the certified copy of Janice McKeown's death certificate was an abuse of discretion and denied the Plaintiff his substantial right to introduce his key piece of causation evidence.

The Defendant's Appellee Brief urges this Court to affirm the trial court's decision on two grounds: 1) the cause of death listed in the death certificate should have been excluded pursuant to *Mississippi Rule of Evidence 702* and Daubert v. Merrill Dowell Pharmaceuticals, Inc., 509 U.S. 579 (1993); and 2) even if the trial court erred in excluding this portion of the death certificate, this error was "harmless" since the Plaintiff was able to elicit causation testimony from three sources at trial: Doctor Frank Westmeyer, M.D., Nurse Julie Davey, and the Plaintiff himself.

The Defendant's positions are not well taken. First and foremost, the Defendant cites to no cases in his brief which apply the requirements of MRE 702 or Daubert to the admission of death certificates. In fact, the Defendant fails to point to any cases that even characterize a death certificate as "opinion testimony." This Court should therefore refrain from making new law and simply follow Miss. Code Ann. § 41-57-9 and MRE 803 (9) which provides that death certificates are admissible at trial.

Furthermore, the trial court's decision to strike the cause of death listed in the death certificate was not harmless error. Contrary to the Defendant's assertions, the record does not reflect that the Plaintiff was able to elicit causation testimony from three different sources at trial. The Plaintiff's only evidence of causation was the testimony of his expert emergency room doctor, Dr. Frank Westmeyer. The Plaintiff needed the death certificate to bolster Dr.

Westmeyer's testimony regarding causation. Excluding the Plaintiff's key piece of causation testimony in a case where causation was the most hotly disputed issue, simply does not meet the definition of harmless error.

A. ***Mississippi Rule of Evidence 702 and Daubert do not govern the admissibility of death certificates.***

The Defendant asks this Court to make new law and hold for the first time that MRE 702 and the United States Supreme Court's decision in Daubert v. Merrill Dowell Pharmaceuticals, Inc. govern the admissibility of death certificates. This has never been the law in Mississippi. On the contrary, the admissibility of death certificates is governed by Miss. Code Ann. §41-57-9, Certified Copies of Evidence, which states as follows:

Any copy of the records of birth, sickness or death, when properly certified to by the state registrar of vital statistics, to be a true copy thereof, ***shall be prima facie evidence in all courts and places of the facts therein stated.*** A facsimile signature of the registrar shall be sufficient for certification when the certificate shall have impressed hereon the seal of the Mississippi Department of Public Health.

(Miss. Code Ann. § 41-57-9, emphasis added). There is no dispute that the certified copy of the death certificate of Janice McKeown which the Plaintiff sought to introduce at trial complies with Miss. Code Ann. § 41-57-9 in all respects.

Death Certificates are also admissible as an exception to the hearsay rule under *Mississippi Rule of Evidence* 803 (9). The comment to this rule expressly recognizes the admission of death certificates pursuant to Miss. Code Ann. § 41-57-9. It is undisputed that the certified copy of the death certificate of Janice McKeown satisfies the requirements of *Mississippi Rule of Evidence* 803 (9)

The Defendant asserts, however, that the death certificate must also overcome an additional evidentiary hurdle: MRE 702 and Daubert. In support of this position the Defendant

cites to two Mississippi Supreme Court cases: Birkhead v. State, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009) and Jones v. State, 918 So. 2d 926, 933 (Miss. 2005). Neither of these cases, however, dealt with Rule 702 or Daubert. Neither of these cases excluded portions of the death certificate because the individual who filled out the death certificate was unqualified to do so. On the contrary, in these cases the issue was whether or not portions of the death certificates were admissible pursuant to Rule 803 (8). Rule 803 (8) states:

Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

As a practical matter, the Plaintiff did not seek to admit the cause of death listed in the death certificate pursuant to Rule 803 (8). The Plaintiff sought to introduce the death certificate pursuant to Rule 803 (9), which does not contain the cautionary language “unless the sources of information or other circumstances indicate a lack of trustworthiness.” To be sure, a document only needs to satisfy one of the hearsay exceptions for it to be admissible.

In any event, even if this Court were to determine that a death certificate must satisfy the requirements of 803 (8), the record does not indicate that the sources of information that Kim Bumpas relied upon to complete the death certificate lacked trustworthiness. The record reveals that Bumpas performed an investigation into the death just as any coroner would have done under the circumstances. She examined the body, spoke with the family, cataloged the congestive heart failure medication that Janice McKeown was taking, and spoke to Janice McKeown’s family medical provider, Nurse Practitioner Carolyn Estes. There is nothing about

this process that indicates that the death certificate somehow contains “untrustworthy” information.

Furthermore, it is undisputed that Kim Bumpas was in fact a deputy coroner who had undergone the necessary training to perform death investigations and to complete death certificates. In other words, while she is not a medical doctor, she is still qualified to perform death investigations pursuant to Mississippi law.

Perhaps recognizing that Birkhead and Jones provide no support for applying MRE 702 and Daubert to the admissibility of death certificates, the Defendant seeks to blur the distinction between a death certificate that lacks trustworthiness under 803 (8) and is therefore inadmissible hearsay, and expert “opinion testimony” subject to Rule 702. These are two entirely separate issues.

The Plaintiff did not seek to call Bumpas as an expert witness to opine regarding cause of death. For this reason, MRE 702 and Daubert have no application to this case. The Plaintiff simply sought to admit a death certificate into evidence, which is clearly allowed by Miss. Code Ann. § 41-57-9 and MRE 803 (9). The Defendant was well within his right to rebut this *prima facie* evidence. However, for the trial court to simply label the death certificate as opinion testimony and exclude it all together as a matter of law was without precedent and clear legal error.

B. The decision to exclude the cause of death listed in the death certificate was not “harmless error”

The exclusion of the cause of death in the death certificate was not harmless error since it denied the Plaintiff his substantial right to present his key piece of evidence regarding cause of death. While it is true that Dr. Westmeyer was allowed to testify as to cause of death, the

Plaintiff did not elicit causation testimony from his expert nurse practitioner, Julie Davey. Nurses such as Davie are not qualified to testify as to cause of death¹ and she was therefore never allowed to give her opinion regarding cause of death.

Along these same lines, while the Plaintiff was allowed to tell the jury that Bumpas had advised against an autopsy given the fact that the cause of death was obvious, the Court gave a cautionary instruction and expressly told the jury that Kim Bumpas was not qualified to give an opinion regarding cause of death. Consequently, the idea that three different sources were allowed to inform the jury of the Plaintiff's position regarding cause of death is simply incorrect. Only Dr. Westmeyer was allowed to give his opinion regarding cause of death.

To be sure, causation was the major issue in the trial due to the lack of an autopsy. The Plaintiff pointed out in his original Appellant Brief the great lengths the Defendants went to at trial to point out to the Jury the lack of an autopsy and to argue that Janice McKeown could have died of any number of reasons.

The cause of death listed in the death certificate was the only truly "impartial" evidence that the Plaintiff had regarding causation. The death certificate, which is an official record of the State of Mississippi, would have bolstered Dr. Westmeyer testimony and greatly diminished the ability of the Defendants to successfully argue that Janice McKeown could have died from any number of reasons.

In order to assess the gravity of the causation issue, this Court need look no further than the jury verdict. The Plaintiff was able to convince the jury that Dr. Pitcock indeed violated the standard of care in his treatment of Janice McKeown. Remarkably, the jury refused to find that this violation of the standard of care caused Janice McKeown's death. The reason the Plaintiff

¹ Vaughn v. Miss. Baptist Medical Center, 20 So. 3d 645, 652 (Miss. 2009).

was unable to meet his burden in regard to the causation issue is because the trial court excluded his key piece of causation testimony. As indicated in the Plaintiff's original Appellant Brief, to deny a party the right to introduce a key piece of evidence on the most crucial issue in the case substantially prejudices that party and denies him the right to fair trial. Mullins v. Wroten, 85 So. 2d 457, 458 (Miss. 1956). For these reasons, it cannot be said that the exclusion of the cause of death in the death certificate was "harmless error."

CONCLUSION

MRE 702 and Daubert do not govern the admissibility of a death certificate. Miss. Code Ann. § 41-57-9 and MRE 803 (9) state in no uncertain terms that a death certificate is admissible. The Plaintiff would respectfully request that this Court refrain from making new law on this subject and simply apply the statute and evidentiary rule as written.

Along these same line, the trial court's decision to disregard Miss. Code Ann. § 41-57-9 and MRE 803 (9) was an abuse of discretion and denied the Plaintiff his substantial right to introduce his key piece of causation evidence. Given the fact that causation was the major point of contention in the entire case, excluding the cause of death in the death certificate was in no way harmless. For these reasons, the Plaintiff requests that this Court reverse the decision of the trial court, and remand the case for a new trial on the issues of causation and damages.

THIS, the 5th day of January, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. Ray Hill, III', written over a horizontal line.

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CERTIFICATE OF SERVICE

I, S. Ray Hill, III, of Clayton O'Donnell, PLLC, do hereby certify that I have caused this day to be mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to:

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Honorable Robert W. Elliott
Union County Circuit Court
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THIS, the 5th day of January, 2011.



S. RAY HILL, III, MSB 