

NO. 2010-CA-00641

IN THE MISSISSIPPI SUPREME COURT

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

BRIEF OF APPELLANT

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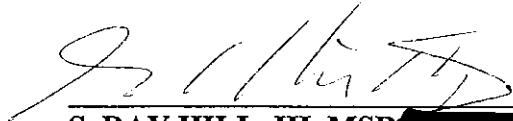
Attorney for Appellant

CERTIFICATE OF INTERESTED PERSONS

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 Court may evaluate possible disqualifications or recusal:

1. Donald McKeown, the Plaintiff and Appellant, individually and as a 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.
2. Wrongful Death Beneficiaries Crystal McKeown, Daniel McKeown, and David McKeown.
3. S. Ray Hill, III, Attorney for Donald McKeown.
4. Dr. Robert V. Pitcock, Defendant, practicing physician in the State of Mississippi.
5. Diane Pradat and L. Carl Hagwood, Attorneys for Robert V. Pitcock, M.D.

THIS, the 20th day of October, 2010.



S. RAY HILL, III, MSB
Attorney for Appellant

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STATEMENT REGARDING ORAL ARGUMENT

The Plaintiff respectfully asserts that oral argument would be beneficial in this case given the substantial effect the outcome of the appeal could have on future litigants' ability to introduce a certified copy of a death certificate at trial.

STATEMENT OF THE ISSUES

Whether the trial court erred in excluding the cause of death listed on the certified copy of the death certificate of the decedent, Janice McKeown.

STATEMENT OF THE CASE

This medical malpractice action arises out of the death of Janice McKeown. Donald McKeown, Janice's husband, filed a complaint in the Union County Circuit Court against Robert V. Pitcock, M.D., Baptist Memorial Hospital – Union County, Inc., Carolyn Estes, C.N.F.P., North Mississippi Medical Clinics, Inc. d/b/a New Albany Medical Clinic, and Dale Wing, M.D. The Complaint alleged that these medical providers breached the standard of care in failing to diagnose and treat Janice's serious heart condition and that said breach caused Janice's death. (R. 9-21)

Baptist Hospital and Dr. Dale Wing were voluntarily dismissed from the case. The remaining parties proceeded to trial. Prior to the start of *Voir Dire*, the Court held a hearing on all pending Motions in *Limine*, including the Defendants' motion to exclude the cause of death listed in the death certificate. After reviewing the briefs of the parties, hearing arguments of counsel, and considering the testimony of Union County Deputy Coroner Kim Bumpus, the trial court granted this motion. The basis for this decision was the trial court's opinion that Kim Bumpus, who filled out the death certificate, lacked the "education, training, and experience necessary to give an opinion regarding the cause of death." (R.E. 2, 3) (R. 96)

At the close of the trial, the jury found that Dr. Pitcock violated the standard of care in treating Janice McKeown. (R. 76). The jury, however, did not find that this breach of the standard of care caused Janice McKeown's death. (R.E. 4) (R. 77). The jury also found that Defendant, Nurse Carolyn Estes, did not violate the standard of care in her treatment of Janice McKeown. (R.E. 4) (R. 77).

Based on the jury verdict, the Court entered its Judgment in favor of the Defendants. (R.E. 4) (R. 76-77). The Plaintiff sought a new trial on the issues of causation and damages *only*

as to his claims against Dr. Pitcock based on the trial court's exclusion of the cause of death listed in the death certificate. (R. 79- 89). The trial court denied the request for a new trial (R.E. 2) (R. 96) and the Plaintiff perfected an appeal to this Court. (R. 98-99).

STATEMENT OF FACTS

Janice McKeown, age 40, first reported to the Baptist Memorial Hospital-Union County Emergency Room on October 12, 2003, where she was treated by emergency room doctor, Robert V. Pitcock, M.D. (Plaintiff's Exhibit 1, R. 5-18). Janice complained of having trouble breathing and chest pain. Dr. Pitcock ordered a chest x-ray. The findings showed that her heart was enlarged. The EKG performed at the hospital revealed that Janice had a left bundle branch block.¹ (P-1, R. 17). Shortness of breath, chest pain, an enlarged heart, and a left bundle branch block are signs of a serious heart condition and Janice should have received a complete cardiac evaluation. (Plaintiff's Exhibit 8- Evidentiary Deposition of Dr. Frank Westmeyer, pp 60-70). However, despite these obvious signs that Janice was having heart problems, Dr. Pitcock failed to admit her to the hospital or take any other steps to monitor her heart condition. He also failed to refer her to a heart specialist to perform the necessary catheterization. Instead, he diagnosed her with bronchitis and sent her home. (P-1, R. 12). These actions on the part of Dr. Pitcock violated the standard of care. (P-8, pp 60-70).

Janice's symptoms, however, persisted so she followed up with a local nurse practitioner, Nurse Carolyn Estes. Janice saw Nurse Estes on four occasions. (Plaintiff's Exhibit 2, R. 19-51). On the final visit, Nurse Estes diagnosed Janice with "early congestive heart failure." (P-2, R. 36).

On the evening of November 15, 2003, five (5) days after her last visit to Nurse Estes, Janice McKeown told her husband, Donald, that she felt tired and went upstairs to lay down (Trial Transcript, Testimony of Donald McKeown, pp. 119-121) Donald and his twelve year old

¹ A left bundle branch block is a cardiac conduction abnormality where activation of the left ventricle is delayed. (P-8, pp. 60-61)

son, David, remained in the dining room where they were putting together a model truck. Id. Prior to going to bed, David went to the bedroom to see about his mother. Id. He came back and told his father that he could not find his mother anywhere. Id. Donald then went to the bedroom. After noticing that Janice was not in the bedroom, he saw that a light was on in the master bathroom. Donald knocked on the door but there was no response. Id. When he opened the door to the bathroom, he saw his wife, Janice, lying on the floor. Id. He immediately called 911. Unfortunately, by the time the paramedics made it to the home, Janice had died. Id. (Plaintiff's Exhibit 3- Ambulance Report, R. 52).

The paramedics contacted the Union County Coroner's office. The Coroner, Mark Golding, was out of town. For this reason, the Deputy Coroner, Kim Bumpus, came to the McKeown home. (Trial Transcript, Testimony of Kim Bumpus, pp. 10-15). After making an examination of the body and its surroundings, she asked Donald McKeown if he wanted an autopsy performed. When Donald McKeown asked her what he should do, she recommended not performing one since it appeared to her that Janice had died of a massive heart attack. Based on this recommendation, Donald chose not to have an autopsy performed. (Trial Transcript, Testimony of Donald McKeown, p. 122)

Kim Bumpus then continued her standard investigation into the death. She took a medical history, took note of the medications Janice was taking, and spoke with Nurse Estes about the medications she had prescribed to Janice for her heart condition. (Trial Transcript, Testimony of Kim Bumpus, pp. 10-15) After completing her investigation, she filled out and signed the death certificate listing the cause of death as follows: **Immediate Cause: Cardiopulmonary Failure; Due to or a Consequence of: Congestive Heart Failure** (Plaintiff's Exhibit 10- ID only, R. 61)

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in excluding the cause of death listed in the certified copy of the death certificate. This decision denied the Plaintiff his substantial right to present his key piece of causation evidence.

Miss Code Ann. § 41-57-9, Certified Copies of Evidence, 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)

Furthermore, a death certificate is an exception to the hearsay rule pursuant to *Mississippi Rule of Evidence* 803 (9). A death certificate is also self-authenticating pursuant to *Mississippi Rule of Evidence* 902 (4). The Mississippi Supreme Court has also held that a death certificate may be used as evidence in a medical malpractice trial as *prima facie* evidence of the cause of death. Erby v. North Mississippi Medical Center, 654 So.2d 495 (Miss. 1995). *See also* Massachusetts Protective Association v. Cranford, 102 So. 171 (1924) (holding that death certificate is *prima facie* proof of the primary physical cause of death.).

Consequently, the decision to exclude the cause of death listed in the death certificate was without legal basis and denied the Plaintiff his substantial right to present his key piece of evidence regarding causation. Without a doubt, causation was the most hotly contested issue at the trial due to the fact that no autopsy was performed. The Defendants went to great lengths in this case to argue that the cause of Janice's death was unknown. They repeatedly pointed to a lack of an autopsy and suggested that Janice could have died from a multitude of causes. The cause of death listed in the death certificate, which is an official record of the State of Mississippi

and was completed by an impartial Deputy Coroner, was a crucial piece of evidence that the Plaintiff desperately needed to fill the “void of uncertainty” left by the lack of an autopsy. The failure to allow him to introduce said evidence was extremely prejudicial as evidenced by the fact that even though a jury found that Dr. Pitcock violated the standard of care, it still found that this breach did not cause Janice McKeown’s death.

ARGUMENT

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.

A. Standard of Review

This Court's standard of review when considering the denial of a post-trial motion based on the exclusion of evidence is one of abuse of discretion. Pierce v. Cook, 992 So. 2d 612, 620 (Miss. 2008). This Court has stated: "Where error involves the admission or exclusion of evidence, this Court 'will not reverse unless the error adversely affects a substantial right of a party.'" Id. at 221 (quoting Floyd v. City of Crystal Springs, 749 So. 2d 110, 113 (Miss. 1999)). *See also* In re Estate of Mask, 703 So. 2d 852, 859 (Miss. 1997); Terrain Enters., Inc. v. Mockbee, 654 So. 2d 1122, 1131 (Miss. 1995). White v. Yellow Freight System, Inc., 905 So. 2d 506, 510-11 (Miss. 2004)).

B. The trial court abused its discretion in excluding the cause of death listed in the certified copy of Janice McKeown's death certificate

Miss Code Ann. § 41-57-9, Certified Copies of Evidence, 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)

Furthermore, a death certificate is an exception to the hearsay rule pursuant to *Mississippi Rule of Evidence* 803 (9). A death certificate is also self-authenticating pursuant to *Mississippi Rule of Evidence* 902 (4). The Mississippi Supreme Court has also held in no uncertain terms

that a death certificate may be used as evidence in a medical malpractice trial as *prima facie* evidence of the cause of death. In Erby v. North Mississippi Medical Center, 654 So.2d 495 (Miss. 1995), the Mississippi Supreme Court ruled that the trial court erroneously granted summary judgment in a medical malpractice case when the Plaintiff provided evidence of a death certificate and expert testimony which satisfied his burden of producing a causal connection between the theory of negligence and the death of the plaintiff's decedent. 654 So. 2d at 501-502. See also Massachusetts Protective Association v. Cranford, 102 So. 171 (1924) (holding that death certificate is *prima facie* proof of the primary physical cause of death.); Flowers v. State, 243 So. 2d 564, 565 (Miss. 1971).

In the case at bar, the trial court excluded the cause of death listed in the death certificate because it was of the opinion that Deputy Coroner Kim Bumpas was not qualified to give an opinion regarding cause of death. The qualifications of Kim Bumpas, however, are not the issue. The Plaintiff was not seeking to call Kim Bumpas as an expert to testify regarding cause of death. The Plaintiff was simply seeking to admit into evidence a complete, certified copy of a death certificate. The issue is solely whether or not the death certificate is admissible. Mississippi law is clear that a certified copy of a death certificate is *prima facie* evidence in all courts of the facts stated therein. Miss. Code Ann. § 41-57-9.

Prima facie evidence, by its very definition, should not be excluded. While *prima facie* evidence can be rebutted, a trial court is simply not allowed to determine that *prima facie* evidence can be rebutted as a matter of law. Erby, 654 So.2d at 501-502. See also Public Service Corporation v. Watts, 150 So. 192, 194 (Miss. 1933). This is precisely what the trial court did in the case at bar. This decision invaded the province of the jury and was an abuse of discretion.

If such a ruling were allowed to stand it could have far reaching implications on a variety of criminal and civil cases. In essence, the trial court had held that only medical doctors are qualified to list the cause of death in a death certificate. This has never been the law in Mississippi. Affirming this decision would also directly invade the province of the legislature, which adopted Miss Code Ann. § 41-57-9. Clearly, to affirm the decision of the trial court would be to disregard this statute in its entirety.

The better practice would be to simply follow the statute and the *Mississippi Rules of Evidence*, allow the cause of death in the death certificate into evidence, allow the Defendants the opportunity to rebut this *prima facie* evidence, and ultimately allow the jury to decide the issue of causation. Instead, the trial court took this issue out of the hands of the jury. This was an abuse of discretion.

C. The trial court's error denied the Plaintiff his substantial right to present his key piece of causation testimony.

The exclusion of the cause of death in the death certificate denied the Plaintiff his substantial right to present his key piece of evidence regarding cause of death. To be sure, causation was the most hotly contested issue in the trial due to the lack of an autopsy. As proof of this fact, this Court need only consider the length the Defendants went to in this case to point out to the Jury the lack of an autopsy and to argue that Janice could have died of any number of reasons.

For example, in her opening statement, Defense counsel for Dr. Pitcock contended that “nobody knows what [Janice McKeown] died of” and that she could have died from a brain aneurysm, a heart arrhythmia, a pharmacological problem, or any number of other reasons. (Trial Transcript, p. 97). Ms. Pradat went on to state that it was Donald McKeown who chose not to

have an autopsy that would have explained the cause of death. (Trial transcript, p. 97).

In his opening argument, counsel for Nurse Estes likewise stated that had Janice had an autopsy “we would know” whether she had heart disease. He further stated that there can be no evidence of heart disease without an autopsy. (Trial Transcript, p. 103).

During his trial testimony, Dr. Pitcock refused to state that Janice died of a heart attack, stating that she could have died of a pulmonary embolism, subarachnoid hemorrhage, Triple AAA, heart attack, or pharmacological overdose. (Trial Transcript, p. 386 Dr. Pitcock stated that without an autopsy, Janice could have died from a pulmonary embolus. (Trial Transcript, p. 393)

Nurse Estes also testified that without an autopsy, there could have been many possible causes of death. (Trial Transcript, p. 424) Estes stated that an autopsy would have established whether or not McKeown had heart disease. (Trial Transcript, p. 472) Estes stated that if an autopsy was performed, a pathologist could look at her coronary vessels and cross-section them to determine the plaque or stenosis present. (Trial Transcript, p. 472)

Both Defense experts, Dr. Michael Stoddard and Dr. William Loper, testified that Janice could have died from any number of reasons. (Trial Transcript, p. 512-515). Dr. Loper testified that only an autopsy would establish with certainty the cause of death. (Trial Transcript, p. 562-563).

And finally, in his closing argument, counsel for Dr. Pitcock again hammered home the lack of an autopsy in an effort to convince the jury that Janice could have died from a variety of causes other than heart disease. (Trial Transcript, p. 584).

As this Court can see, the Defendants were successful in creating a “void of uncertainty” regarding the cause of death. The cause of death listed in the death certificate, which is an official record of the State of Mississippi and was completed by an impartial Deputy Coroner,

was the Plaintiff's best chance to fill that void.

The Defendant will undoubtedly argue that the trial court's decision to exclude the cause of death listed in the death certificate was harmless error given the fact that the Plaintiff was allowed to present causation testimony through his expert witness, Dr. Frank Westmeyer. While it is true that Dr. Westmeyer's testimony was enough for the Plaintiff to survive a directed verdict on the issue of causation, it was certainly not the Plaintiff's key piece of causation evidence. In fact, the Plaintiff desperately needed the death certificate to bolster the testimony of Dr. Westmeyer, who was of the opinion that the Plaintiff died as a result of a heart attack brought on by congestive heart failure. Dr. Westmeyer's testimony, coupled with the official cause of death listed in death certificate, was a powerful and compelling argument regarding causation. Without the cause of death in the death certificate, Dr. Westmeyer's testimony was less persuasive and more easily rebutted by the Defendants.

Clearly, 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. *See e.g. Mullins v. Wroten*, 85 So. 2d 457, 458 (Miss. 1956) (holding that exclusion of *prima facie* evidence over key issue of boundary dispute warranted grant of new trial). For these reasons, the trial court's decision should be reversed, and this case remanded for a new trial on the issues of causation and damages.

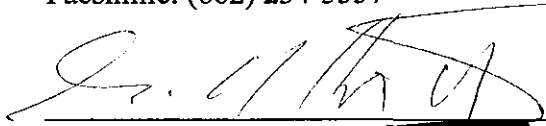
CONCLUSION

The trial court abused its discretion in excluding the cause of death listed in the death certificate. This error denied the Plaintiff his substantial right to present his key piece of causation evidence. For this reason, the Plaintiff is entitled to a new trial. Since the jury determined that Dr. Pitcock breached the standard of care, but that this breach did not cause the death of Janice McKeown, the Plaintiff respectfully requests that this Court remand this case for a new trial only on the issues of causation and damages.

THIS, the 20th day of October, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

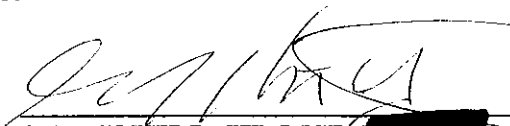
I, S. Ray Hill, III, of Clayton O'Donnell, PLLC, do hereby certify that I have caused this day to be mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

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THIS, the 20th day of October, 2010.


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