

IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-CA-1137

**SHIRLEY BULLOCK, individually
and o/b/o all wrongful death beneficiaries of
LARRY BULLOCK**
APPELLANTS

V.

**DR. MICHAEL PATTERSON, SOUTHERN BONE &
JOINT SPECIALISTS, P.A., WESLEY MEDICAL
CENTER**
APPELLEES

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF CONTENTS	I
TABLE OF AUTHORITIES	ii
ARGUMENT.....	1
I. Trial Court Granted Summary Judgment on the Issue Of a Lack of Proof of Causation, Not Because it Held Plaintiff's Expert Unqualified to Give Opinions as to Negligence	1
II. If Court Examines the Proof of Negligence Against Wesley and Dr. Bruckmeier, Plaintiff's Expert Was Qualified and Did Articulate the Standard of Care That Was Breached	1
III. Plaintiff's Expert Was Clearly Qualified to Render Opinions Concerning the Negligence of Dr. Patterson	4
IV. There Is Sufficient Testimony That Mr. Bullock's Resumption of Plavix Caused the Expanding Hematoma and Death to Create a Jury Question	5
V. Appellees' Negligence as Proximate or Contributing Cause of Mr. Bullock's Death Despite the Subsequent Negligence of Others to Save Him Is Question for the Jury	6
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

Cases

<i>Blackmon v. Payne</i> 510 So. 3d 483 (Miss. 1987).....	8
<i>Carl Ronnie Daricek Living Trust v. Hancock County,</i> 34 So.2d 587 (Miss. 2010).....	1
<i>Cline v. Lund,</i> 31 Cal.App.3d 755, 107 Cal.Rptr. 629 (1973).....	2
<i>Eckman v. Moore,</i> 876 So.2d 975 (Miss.2004).....	7
<i>Entrican v. Ming,</i> 962 So.2d 38 (Miss. 2007).....	6
<i>Fitzmaurice v. Flynn,</i> 167 Conn. 609, 356 A.2d 887 (1975).....	2
<i>Holliday v. Pizza Inn,</i> 59 So.2d 860 (Miss. 2007).....	7
<i>Hoke v. W.L. Holcomb & Assoc., Inc.,</i> 186 So.2d 474 (Miss. 1966).....	7
<i>Hubbard v. Wansley,</i> 954 So.2d 951 (Miss.2007).....	2
<i>Mississippi City Lines, Inc. v. Bullock,</i> 194 Miss. 630, 13 So.2d 34 (1943).....	7
<i>Ms. Comp. Chice SIF v. Clark, Scott & Streetman,</i> 981 So.2d 955 (Miss. 2008).....	1
<i>Robison v. McDowell,</i> 247 So.2d 686,(Miss. 1971)	7
<i>West v. Sanders Clinic for Women, P.A.</i> 661 So.2d 714(Miss.1995).....	2, 3,4

ARGUMENT

- I. Trial Court granted summary judgment on issue of lack of proof of causation, not because it held Plaintiff's expert unqualified to give opinions as to negligence.**

The Trial Court denied Summary Judgment on the basis of lack of proof of causation, not on the basis of lack of proof of negligence. However, a large part of Dr. Patterson and Wesley's briefs deal with the challenges to the qualifications of Appellant's expert to articulate the standard of care for Dr. Patterson or Dr. Bruckmeier and consequently, any breaches thereof, as well as the lack of expert testimony concerning the negligence of the discharge nurse. These arguments should not be entertained by this Court when there was no ruling by the Trial Court concerning Appellant's proof of negligence. *Carl Ronnie Daricek Living Trust v. Hancock County*, 34 So.2d 587 (Miss. 2010) (issues not decided by lower court are not considered by the Supreme Court); *Ms. Comp. Chice SIF v. Clark, Scott & Streetman*, 981 So.2d 955 (Miss. 2008)(since trial court did not rule that this a particular ground for relief was not asserted in the complaint, Supreme Court would not address it).

- II. If Court examines the proof of negligence against Wesley and Dr. Bruckmeier, Plaintiff's expert was qualified and did articulate the standard of care that was breached.**

A. The standard of care for Dr. Bruckmeier and breach.

Dr. Vance, a medical doctor and surgeon, who deals with post operative care and discharge of surgical patients, stated that the standard for physician's approving post operative medications for patients they have not treated, is to consult with the treating physician and review the medical chart. This is found in Dr. Vance's designation, and he was asked at the start

of his deposition whether his written designated opinions were in fact those he held and he confirmed this. That the Defendants did not ask anything further is irrelevant to the fact that under oath, Dr. Vance adopted and confirmed all of his opinions in his designation.

The record is clear that Dr. Bruckmeier failed to consult with anyone or even review Mr. Bullock's chart prior to discharging him. His breach of the standard of care, then, was evident from the medical records and his own testimony.

B. Dr. Vance was qualified to articulate the standard of care for Dr. Bruckmeier.

Wesley contends that, because Dr. Vance is not an internist nor a cardiologist, he was not qualified to articulate the standard of care for physicians ordering discharge medications. While it may appear at first blush that because Dr. Bruckmeier was an internist, only an internist could testify to his standard of care in this case. However, the general rule in medical malpractice actions is that a specialist in a particular branch within a profession will not be required. *West v. Sanders Clinic for Women, P.A.*, 661 So.2d 714, 719 (Miss.1995). Thus, an expert in a medical-malpractice case does not have to be of the same specialty as the doctor about whom the expert is testifying. *Hubbard v. Wansley*, 954 So.2d 951, 957 (Miss.2007).[[] Rather "it is the scope of the witness' knowledge and not the artificial classification by title that should govern the threshold question of admissibility." *Id.* (quoting *West v. Sanders Clinic for Women, P.A.*, 661 So.2d 714, 719 (Miss.1995) ; *Fitzmaurice v. Flynn*, 167 Conn. 609, 356 A.2d 887, 892 (1975). See also, *Cline v. Lund*, 31 Cal.App.3d 755, 107 Cal.Rptr. 629, 637-38 (1973) (pathologist may testify as to ob/gyn surgical standards).

Dr. Vance is an orthopedic surgeon practicing for over twenty-five years. He has admitted numerous patients to the hospital, performed surgery and discharged them. He is obviously familiar with the standards of care for discharging physicians when it comes to

authorizing the resumption of a patient's medications. Discharging patients and the resumption of medications is not a practice unique to an internist; rather as in *West v. Sanders, ibid*, "the procedure is one that could be used in a specialized or a generalized practice." The standard of care is that which is expected of a general practitioner, surgeon, or any medical doctor discharging patients, not of a specialist. As the Court held in *West*:

"any licensed practitioner could testify that the defendants violated the standard of care, not as specialists, but as general practitioners. We find no fault with this." As was pointed out in *Brown v. Mladineo*, "[i]t was not our intent [in *Hall v. Hilbun*] to adopt a uniquely restrictive standard by holding that only a specialist can testify about the standards of his own specialty." *Brown*, 504 So.2d at 1203.

West at 719

Wesley argues that Dr. Vance admitted he did not know when it would be safe to resume the Plavix; therefore he cannot say that Dr. Bruckmeier was negligent in allowing the immediate resumption. Again, this misstates Plaintiff's claim of Dr. Bruckmeier's negligence which is his failure to consult with anyone or check the chart. Had he spoken to Dr. Patterson who had told Mr. Bullock to refrain from resuming Plavix for two days, Dr. Bruckmeier would have learned that Mr. Bullock had not been weaned prior to surgery and had to be given Platelets prior to the surgery being done. At least there would have been more in depth discussions as to what course of resumption to take concerning the resumption of the Plavix. Instead; Dr. Bruckmeier merely circled the items on the chart, without any other solid factual information about Mr. Bullock. This negligence does not depend on what time was the right time to resume; this negligence is the failure to have sufficient information to make any decision at all. Dr. Vance, as a discharging doctor and surgeon, is well qualified to discuss this negligence, even without knowing the exact right time to resume it in Mr. Bullock's case.

III. Plaintiff's expert was clearly qualified to render opinions concerning the negligence of Dr. Patterson

Dr. Vance is an orthopedic surgeon as is Dr. Patterson. Both do surgery on patients, admitting them to and discharging them from hospitals. That Dr. Patterson specializes in a doing surgery on a different part of the anatomy than Dr. Vance is irrelevant to Dr. Vance's qualifications to determine whether Dr. Patterson breached the standard of care in doing surgery on Mr. Bullock prior to weaning him from Plavix. Just as argued above, admitting patients who may be on Plavix is not a practice unique to an spinal surgeon; rather as in *West v. Sanders* 661 So.2d 714, 719 (Miss.1995), it is something that any surgeon would have the experience and qualifications to testify about. In this case, the standard of care for patients on Plavix is to wean them prior to surgery, unless it is an emergency. While Dr. Patterson had told the Bullocks that Mr. Bullock's surgery could lead to paralysis, in his deposition, he back off from calling the surgery "emergency" surgery, commenting that Mr. Bullock could have even forgone the surgery altogether.

Moreover, the record shows that Dr. Patterson made no pre-surgical assessment of what to do about Mr. Bullock's Plavix regimen. His office notes are silent on the plan for discontinuing the Plavix or plans for ordering countermeasures. Indeed, Dr. Patterson scheduled the surgery for the next day, saying nothing to Mr. Bullock about stopping his Plavix. Indeed, it was only when the anesthesiologist learned that Mr. Bullock had not been weaned, that countermeasures were ordered.

With respect to the resumption of the Plavix, Dr. Patterson argues (as did Wesley) that Dr. Vance was not qualified to give any opinions since he admitted he was not an expert on when the Plavix should be resumed. Again, the negligence is not exactly when the Plavix should

have been resumed, but that Dr. Patterson had no discussion with Dr. Bruckmeier about Mr. Bullock. Dr. Patterson did not check the chart, but allowed Mr. Bullock to be released with an order that he could immediately resume the Plavix. Even Dr. Patterson said that he told the Bullocks to wait two days (which Dr. Patterson would argue is the correct time for resumption though he too is not a cardiologist). However, he had no discussion with Dr. Bruckmeier about this.

IV. There is sufficient testimony that Mr. Bullock's resumption of Plavix caused the expanding hematoma and death to create a jury question.

Appellees argue that there was no sworn testimony that the resumption of the Plavix proximately caused or contributed to Mr. Bullock's death from, *inter alia*, an expanding hematoma in his neck. It is important to frame the issue of causation correctly here. The issue is not whether Plavix caused Mr. Bullock's bleeding because Plavix does not cause bleeding; it only inhibits the blood from clotting which allows the bleed to continue creating an expanding hematoma that Mr. Bullock definitely did have. Thus the issue is whether the resumption of Plavix proximately caused or contributed to Mr. Bullock's expanding hematoma or edema and consequently death. Plaintiff's other expert, Dr. Richard Zane indicated in his opinion that the fact that Mr. Bullock was on the Plavix did contribute to his death.

Dr. Zane testified as follows:

A. I think more likely than not he was bleeding from the site of surgery, and the swelling was likely to be a hematoma or a collection of blood.

Q. Okay

A. Which is a hematoma.

Q. ...Tell me factually what you base the conclusion that he had an expanding hematoma?

A. The fact that he was recently postoperative; **that he was on an anticoagulant**, and that he had rather precipitous onset of the swelling make me believe that he

had post operative hemorrhage as the cause of the airway obstruction.
(Dr. Zane, R.141, RE 131)

Again, at R.188, RE139, Dr. Zane states:

“The differential diagnosis for neck swelling post-operatively is broad. The most likely cause in the context of the precipitousness of the onset in the context of taking anticoagulant is some type of bleeding, most likely leading to a hematoma which causes swelling”.

Therefore, Dr. Zane testified clearly that the Plavix was involved in causing the hematoma that expanded and compromised Mr. Bullock’s airway. There would have been no hematoma had there been no surgery; and given he was on Plavix with its anticoagulant effects, it was Dr. Zane’s opinion that there would have been no expanding hematoma. The fact that Appellees have another doctor, Dr. Taylor, to testify contrarily, does not negate this testimony. It merely shows that there are differing opinions among the experts, creating an issue for the jury to decide and precluding summary judgment.

V. Appellees’ negligence as proximate or contributing cause of Mr. Bullock’s death despite the subsequent negligence of others to save him is question for the jury.

Appellees argue that their actions were not a proximate or contributing cause of Mr. Bullock’s death because they argue that the emergency room doctor and ambulance service’s negligent treatment was a subsequent, intervening, independent cause. They argue that because such negligence was not foreseeable to Dr. Patterson and Wesley, they are not liable for their own negligence. They cite *Entrican v. Ming*, 962 So.2d 38 (Miss. 2007) as applicable to this case. However, it is not. In *Entrican*, the decedent’s estate sued an ambulance company who transported the decedent from an accident site to an emergency room, and the emergency room staff for negligently treating her. There was no proof that the ambulance had treated the

decedent improperly; rather it was the ER staff's failure to give the decedent blood to treat the decedent's hypovolemic shock. The Court found that even if the ambulance service were somehow negligent, "negligence which merely furnished the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof." *Robison v. McDowell*, 247 So.2d 686, 688 (Miss. 1971) (quoting *Hoke v. W.L. Holcomb & Assoc., Inc.*, 186 So.2d 474 (Miss. 1966); *Mississippi City Lines, Inc. v. Bullock*, 194 Miss. 630, 13 So.2d 34 (1943)). Thus, *Entrican* makes it clear that those who put into motion the chain of events through which the injury occurs are still liable. In *Entrican*, the ambulance service merely brought an injured person to the ER; no one in the ambulance treated the decedent or contributed to her injuries per se.

In the case at hand, Dr. Patterson operated on Mr. Bullock unnecessarily, cutting on him; Wesley allowed him to resume his Plavix, an anticoagulant; from which Mr. Bullock developed an expanding hematoma from which he died. Dr. Patterson set this whole set of cascading events into motion by doing unnecessary surgery. Dr. Bruckmeier contributed to this series of events by creating a condition for uncontrollable bleeding. That others were not able to save Mr. Bullock is a question for the jury to sort out. The case cited by Wesley, *Holliday v. Pizza Inn*, 59 So.2d 860 (Miss. 2007) to support the Court's taking this issue from the jury by granting summary judgment is inapplicable. There *Holliday* was stabbed by a reveler at an after hours party that Pizza Hut employees were having. Clearly, Pizza Hut never sanctioned the party and the assault by a third party under such circumstances was an independent cause. More applicable to this case is that of *Eckman v. Moore*, 876 So.2d 975 (Miss. 2004) which involved the negligence of nurses and doctors. At page 982, the Court noted "if an *antecedent negligent act puts in motion* an agency which continues in operation until an injury occurs it would appear

to be more like a second proximate cause than a remote and unactionable cause *Blackmon v. Payne*, 510 So.2d 483, 487 (Miss.1987) (emphasis added). Here the negligence of Dr. Patterson and Wesley Medical staff put into motion a condition which resulted in Mr. Bullock's needing subsequent care and he died. In the least, a jury should decide this question.

Conclusion

Appellants have shown that there is sufficient expert testimony in the record for the issue of causation and the negligence of Dr. Patterson and Dr. Bruckmeier (Wesley Medical Center) to have gone to the jury. Appellants' experts were qualified to testify on the issues before them. Moreover, it is the jury's province to determine whether the facts of this case constitute a succession of events so linked together as to make a natural whole or was there some new and independent cause intervening between the alleged wrongs of Dr. Patterson and Dr. Bruckmeier and Mr. Bullock's death. Thus, the Trial Court's ruling on summary judgment should be reversed.

RESPECTFULLY SUBMITTED, this the 27th day of March, 2011.

**SHIRLEY BULLOCK, et. al.
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CERTIFICATE OF SERVICE

I, **Suzanne Keys**, Attorney for Appellant, do hereby certify that I have this day served a copy of this Reply Brief of Appellant by United States mail, postage pre-paid, and to the Trial Court and the following counsel of record:

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