

**COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

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NO. 2010-CA-01424-COA

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**MCCOMB NURSING AND  
REHABILITATION CENTER, LLC**

**APPELLANT**

**VS.**

**MASUMI LEE, INDIVIDUALLY, AND AS ON  
BEHALF OF THE WRONGFUL DEATH  
BENEFICIARIES OF ROBERT E. LEE,  
DECEASED**

**APPELLEE**

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On Appeal from the Circuit Court  
of Pike County, Mississippi  
(Civil Action No. 07-016-PCT)

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**APPEAL OF ORDER  
DENYING MOTION FOR DIRECTED VERDICT**

**REPLY BRIEF OF APPELLANT  
MCCOMB NURSING AND REHABILITATION CENTER, LLC**

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**ORAL ARGUMENT REQUESTED**

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## CERTIFICATE OF INTERESTED PERSONS

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 disqualification or recusal.

1. McComb Nursing and Rehabilitation Center, Appellant/Defendant;
2. W. Davis Frye, Bradley W. Smith, Barry W. Ford, and Ceejaye S. Peters of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., counsel of record for McComb Nursing and Rehabilitation Center;
3. Masumi Lee, Appellee/Plaintiff;
4. W. Eric Stracener and W. Andrew Neely of Hawkins, Stracener & Gibson, counsel of record for Appellee/Plaintiff;
5. Angela Spears of Marian S. Rosen & Associates, counsel of record for Appellee/Plaintiff; and
6. Honorable Michael M. Taylor, presiding Circuit Court Judge.

  
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CEEJAYE S. PETERS

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McComb Nursing & Rehabilitation Center, LLC (McComb) was entitled to a directed verdict in this medical negligence case because the Plaintiff failed to offer testimony from a physician expert that McComb's negligence proximately caused an injury to her deceased husband, Robert E. Lee. Under *Vaughn v. Miss. Baptist Med. Cntr.*, 20 So. 3d 645, 652 (Miss. 2009), such testimony is required. Contrary to the Plaintiff's argument, as a matter of law, she cannot substitute the required causation testimony of a physician expert with the testimony of a nurse. Moreover, even if the law permitted a nurse expert to testify as to causation, the Plaintiff's nurse expert did not testify that a breach of the applicable standard of care caused an injury to Mr. Lee.

**I. The Holding In *Vaughn* Is Applicable To This Medical Negligence Case.**

In *Vaughn*, this Court held that “nurses cannot testify as to medical causation” in a medical negligence case. 20 So. 3d at 652. Therefore, only a physician expert is qualified to give opinions as to causation. *Id.* Contrary to the Plaintiff's assertions, McComb is not seeking to extend the holding in *Vaughn*. Instead, the *Vaughn* opinion applies directly to the facts of this medical malpractice case. The Plaintiff alleged that Mr. Lee suffered injuries because of McComb's negligence. Thus, to establish a *prima facie* case of medical negligence, the Plaintiff was required to prove—by testimony from an expert physician—that Mr. Lee's injuries were proximately caused by a breach in the standard of care. *Vaughn*, 20 So. 3d at 650; *McDonald v. Memorial Hosp. at Gulfport*, 8 So.3d 175, 180 (Miss. 2009).

*Vaughn* requires testimony from a physician expert that McComb's negligence was the medical cause of Mr. Lee's alleged injuries. The Plaintiff failed to offer such testimony, and thus McComb was entitled to a directed verdict.

As the Plaintiff's brief acknowledges, her physician expert, Dr. Marcus Meeks,—the only expert qualified to offer medical causation testimony on the Plaintiff's behalf—did not testify

that Mr. Lee's alleged injuries were caused by McComb's negligence. Dr. Meeks was only called to testify that Mr. Lee fractured his leg when he fell, not that Mr. Lee fell as a result of McComb's negligence. Brief of Plaintiff/Appellee at 11. Dr. Meeks reviewed all of Mr. Lee's available medical records and concluded that, in his opinion, McComb did *not* breach the applicable standard of care when providing nursing home services to Mr. Lee. (T. 343:24-344:4; R.E. 0155-0156). Indeed, at the time of Mr. Lee's admission, McComb generated a plan of care that addressed his risk for falling. (T. 196:18-26; R.E. 0039). The nursing home monitored Mr. Lee and put his bed in its lowest position to prevent injury in the event of a fall. (T. 280:14-16; R.E. 0123). Because Dr. Meeks opined that McComb complied with the duty owed to Mr. Lee, he did not, and could not, testify that Mr. Lee's alleged injuries were somehow caused by McComb's negligence. Such testimony would have been contrary to Dr. Meeks' opinion that the nursing home satisfied the applicable standard of care. As a result, no physician expert testified at trial that the alleged negligence of McComb was the proximate cause of an injury to Mr. Lee.

## **II. The Testimony of a Nurse Expert Cannot Be Substituted for the Causation Testimony of a Physician Expert.**

The Plaintiff also offered the testimony of a nurse expert, Susan Lofton. But, Lofton was not competent to, nor did she, offer causation testimony. Lofton testified about the standard of care applicable to nursing homes in Mississippi and opined that McComb breached the standard of care when providing nursing home services to Mr. Lee. (T. 200-205; R.E. 0043-0048). In her opinion, the nursing home staff did not properly assess Mr. Lee for fall risks upon his admission to the facility. (T. 192:22-25; R.E. 0035). Lofton testified that Mr. Lee's care plan should have included measures to reduce the risk of falls such as a bed alarm and a padded mat on the floor by his bed. (T. 195:24-196:5; R.E. 0038-0039; 202:18-203:7; R.E. 0045-0046). The Plaintiff argues that Lofton, as a nurse expert, was qualified to testify to a causal connection in a breach in

the *nursing* standard of care at a nursing home and Mr. Lee's fall because she was not required to make a medical diagnosis like the nurse in *Vaughn*. Plaintiff/Appellee Brief at 8.

The Plaintiff is incorrect. This case, like *Vaughn*, is a medical negligence case requiring testimony from a physician expert to establish medical causation. As noted above, Dr. Meeks reviewed Mr. Lee's available medical records, which included Mr. Lee's various diagnoses and medical conditions existing at the time of his admission to McComb. Based on Mr. Lee's medical conditions, Dr. Meeks concluded that McComb generated a plan of care that addressed Mr. Lee's risk for falling, monitored Mr. Lee, and put his bed in its lowest position to prevent injury in the event of a fall. Thus, Dr. Meeks did not testify that McComb's negligence was the medical cause of Mr. Lee's fall resulting in a fractured hip.

Under *Vaughn*, only a physician is qualified to opine as to medical causation and establish the necessary element of proximate cause in a medical negligence case like this one. The Plaintiff failed to offer testimony from a physician expert establishing that McComb's negligence proximately caused Mr. Lee to fall and fracture his hip. In fact, not only did the Plaintiff's physician expert fail to offer causation testimony, he offered testimony contradicting the opinion of the Plaintiff's nurse expert that McComb breach the standard of care. Without causation testimony from a physician expert, McComb was entitled to a directed verdict.

### **III. The Plaintiff's Nurse Expert Did Not Offer Causation Testimony.**

The Plaintiff acknowledges that Dr. Meek's testimony contradicted Lofton's opinion regarding a breach in the standard of care and thus argues that Dr. Meek's opinion should be ignored because Lofton provided the necessary causation testimony. However, even if a nurse expert was competent to testify as to medical causation, Lofton did not testify that McComb's alleged breach of the standard of care *caused* Mr. Lee's broken hip.

The Plaintiff contends that Lofton articulated a causal connection between Mr. Lee's confusion, the lack of a bed alarm, and his fall and that the "import" of Lofton's testimony was sufficient to establish causation. In support of this argument, the Plaintiff relies on *Vanlandingham v. Patton*, 35 So. 3d 1242, 1249 (Miss. Ct. App. 2010), for the proposition that an expert is not required to use "magical language" if the "import of his testimony is apparent." *Id.* (citing *West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714, 720 (Miss. 1995)). In *Vanlandingham*, the Court of Appeals held that the import of a physician expert's causation testimony was apparent and sufficient even though he "did not always use the magic words 'with a reasonable degree of medical certainty or probability'" because at the very beginning of his testimony, he said that he "would state his medical opinion based on a reasonable degree of medical certainty or probability." Lofton's purported testimony, even if it was permissible under *Vaughn* and even if she was not required to use magical words, does not amount to testimony that McComb's alleged negligence *caused* Mr. Lee to fall and fracture his hip.

Lofton opined that McComb breached the standard of care by failing to adequately complete a Fall Risk Assessment at the time of Mr. Lee's admission to the nursing home and because the information in the nursing home's plan of care for Mr. Lee was not sufficiently specific. She also testified about the preventative measures that she believed McComb should have implemented. However, Lofton did *not* testify that the failure to complete documentation or implement certain preventive measures (like a bed alarm) proximately caused Mr. Lee to fall and fracture his hip.

## CONCLUSION

While the Plaintiff's nurse expert could testify about the standard of care and her opinion about a breach of the standard of care, she had to stop there. Because the Plaintiff's physician expert did not find a breach, he could only say that Mr. Lee's fall caused a fracture. The middle



"link" between their opinions is missing (i.e. based on the breach of the standard of care, Mr. Lee was injured). The Plaintiff presented inconsistent expert testimony resulting in her being unable to meet her burden of proof and establish causation. The Plaintiff cannot maintain a cause of action against McComb for medical negligence without testimony from a physician expert to establish that McComb's alleged breach of the standard of care proximately caused Mr. Lee to suffer an injury. The Plaintiff failed to offer such testimony. Therefore, McComb requests that the Court reverse the ruling of the trial court and enter a judgment in its favor because, as a matter of law, the Plaintiff failed to prove all of the necessary elements of her claim.

This 26th day of July, 2011.

Respectfully submitted,

McCOMB NURSING AND  
REHABILITATION CENTER, LLC

By Its Attorneys,

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## CERTIFICATE OF SERVICE

I, Ceejaye S. Peters, one of the attorneys of record for the Appellant, hereby certify that I have this day caused to be served a true and correct copy of the foregoing instrument, in the manner described below, upon each of the following:

### **TRIAL COURT JUDGE:**

**Via United States Mail**  
Honorable Michael M. Taylor  
Pike County Circuit Judge  
P.O. Box 1350  
Brookhaven, MS 39602

### **ATTORNEY FOR PLAINTIFF:**

**Via Hand Delivery**  
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W. Andrew Neely  
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628 N. State Street  
Jackson, MS 39202

SO CERTIFIED, this 26th day of July, 2011.

  
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CEEJAYE S. PETERS