

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-TS-1424-SCT

**MCCOMB NURSING AND
REHABILITATION CENTER**

APPELLANT

VS.

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

APPELLEE

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

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

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

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.



W. DAVIS FRYE

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STATEMENT OF THE ISSUE

Whether the trial court should have granted the defendant nursing home's motion for directed verdict in a medical negligence action in which the plaintiff failed to offer testimony from a physician expert that the defendant's alleged breach of the applicable standard of care proximately caused the alleged injury about which the plaintiff complained.

STATEMENT OF THE CASE

A. Background of the Case.

On January 16, 2007, Plaintiff/Appellee Masumi Lee ("Plaintiff") filed a medical negligence action in the Circuit Court of Pike County, Mississippi. According to the Plaintiff, Defendant/Appellant McComb Nursing and Rehabilitation Center, LLC ("McComb") breached the applicable standard of care when it provided nursing home services to her deceased husband, Robert E. Lee. Specifically, the Plaintiff alleged that McComb failed to implement appropriate interventions to prevent Mr. Lee from falling during his residency at the nursing home in January and February of 2005. The Plaintiff alleges that, because of McComb's negligence, Mr. Lee fell and fractured his hip on January 31, 2005.

This case was tried before a jury from June 29 to July 1, 2010. At the conclusion of the Plaintiff's case, McComb moved for a directed verdict because the Plaintiff failed to offer testimony from an expert physician establishing that McComb's negligence proximately caused Mr. Lee's broken hip. However, McComb's motion was denied. As a result, McComb renewed its motion for directed verdict at the conclusion of the proof. Again, the motion was denied, and the jury returned a verdict in favor of the Plaintiff. On July 27, 2010, the Court entered a judgment in favor of the Plaintiff. By this appeal, McComb requests that the Court reverse the ruling of the trial court and enter a judgment in favor of McComb because the Plaintiff failed to offer competent evidence on an essential element of her claim— proximate causation.

B. Statement of Relevant Facts.

On January 25, 2005, Robert E. Lee was admitted as a nursing home resident to McComb Nursing & Rehabilitation Center, LLC. (T. 191:6-8; R.E. 0034). At the time of his admission, McComb generated a plan of care that addressed Mr. Lee's 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). Notwithstanding its interventions, around midnight on January 31, 2005, Mr. Lee apparently fell from his bed and fractured his hip. (T. 270:24-29; R.E. 0113; T. 335:25-29; R.E. 0147).

In support of her medical negligence claim, the Plaintiff offered the testimony of two expert witnesses: (1) Susan Lofton, a nurse expert (T. 165-220; R.E. 0008-0063), and (2) Dr. Mark Meeks, a geriatric physician (T. 326-350; R.E. 0138-0162). Lofton testified about the standard of care applicable to nursing homes in Mississippi, and she opined that McComb breached the standard of care when providing nursing home services to Mr. Lee. (T. 200-205; R.E. 0043-0048). According to Lofton, the nursing home staff did not properly assess Mr. Lee upon his admission to the facility. (T. 192:22-25; R.E. 0035). Lofton further 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). Lofton testified that McComb's failure to implement such precautions violated the federal regulations applicable to nursing homes. (T. 218:13-219:1; R.E. 0061-0062).

On cross-examination, Lofton acknowledged that she was not a medical doctor and she was not qualified to make a medical diagnoses. (T. 262; R.E. 0105). Lofton conceded that only a doctor can make a medical diagnosis. *Id.* Indeed, although Lofton could testify about the standard of care applicable to McComb and the nursing home's alleged breach of the standard of

care, only a physician is qualified to opine as to medical causation and establish the necessary element of proximate cause.

Even so, the Plaintiffs physician expert, Dr. Marcus Meeks, did *not* testify that McComb's alleged negligence was the proximate cause of Mr. Lee's alleged-injuries. In fact, Dr. Meeks testified that, in his expert opinion, McComb did *not* breach the applicable standard of care. (T. 343:24-344:4; R.E. 0155-0156; 345:22-25; R.E. 0157). Specifically, Dr. Meeks testified as follows:

Q: . . . [Y]ou were asked to determine whether there were deviations of the standard of care applicable to McComb Nursing and Rehabilitation Center?

A: Yes.

Q: Okay. And in analyzing the available medical records, it's your opinion, Dr. Meeks, to a reasonable degree of medical certainty, that McComb Nursing and Rehab did not breach the standard of care?

A: That's correct. That's what I said in my deposition and still say that now.

(T: 343:24-344:4; R.E. 0155-0156). Dr. Meeks explained that he reviewed Mr. Lee's medical records to determine whether appropriate fall interventions were implemented by the nursing home. (T. 344:4-345:11; R.E. 0156-0157). According to Dr. Meeks, he "was not personally comfortable enough with the evidence to say that [there] was clearly a breach." (T. 345:12-21; R.E. 0157). Dr. Meeks further testified as follows:

Q: From your perspective, to a reasonable degree of medical certainty, you couldn't state with certainty that there was a breach of the standard of care?

A: Correct.

(T: 345:22-25; R.E. 0157).

At no time during the trial did Dr. Meeks opine that Mr. Lee sustained an injury as a result of McComb's medical negligence. In fact, Dr. Meeks testified that he was only retained to

opine whether Mr. Lee fell and suffered a broken hip. (T. 348:26-349:12; R.E. 0160-0161). He never testified that Mr. Lee's injuries were caused by McComb. As a result, the Plaintiff failed to offer any expert testimony that McComb's alleged breach of the applicable standard of care proximately caused Mr. Lee's alleged injuries.

Following the conclusion of the Plaintiff's case, McComb moved for a directed verdict pursuant to Rule 50 of the Mississippi Rules of Civil Procedure. (T. 370:22-373:6; R.E. 0163-0166). McComb asked the trial court to dismiss the lawsuit because the Plaintiff failed to offer evidence of medical causation. No qualified expert testified that McComb's alleged breach of duty was a proximate cause of Mr. Lee's injuries. (T. 372:2-373:6; R.E. 0165-0166). Citing *Vaughn v. Miss. Baptist Med. Cntr.*, 20 So. 3d 645, 652 (Miss. 2009), McComb argued that the Plaintiff's nurse expert was not qualified to testify as to proximate cause. (T. 371:16-19; R.E. 0164). Instead, Lofton was only able to testify about the standard of care and the alleged breach of the standard of care. (T. 371:11-19; R.E. 0164). Furthermore, because the Plaintiff's physician expert opined that McComb did *not* breach the standard of care (T. 371:20-372:11; R.E. 0164-0165; 372:26-373:6; R.E. 0165-0166), the Plaintiff could not (and did not) establish through Dr. Meeks' testimony that McComb's alleged breach proximately caused Mr. Lee's injury. (T. 372-373:6; R.E. 0165-0166).

The trial court denied McComb's motion, holding that there was sufficient evidence about the standard of care and about the alleged breach of the standard of care from which an inference could somehow be drawn to satisfy the Plaintiff's burden of proof. (T. 377:15-378:3; R.E. 0170-0171). McComb therefore renewed its motion for directed verdict at the conclusion of the evidence, but the trial court again denied McComb's request and allowed the issue to go to the jury. (T. 543:28-544:6; R.E. 0172-0173). On July 1, 2010, the jury returned a verdict in favor of the Plaintiff. (T. 591:24-592:16; R.E. 0174-0175). Thereafter, on July 27, 2010, the Court

entered judgment in favor of the Plaintiff. (R. 33; R.E. 0007). It is from this judgment that McComb appeals.

SUMMARY OF THE ARGUMENT

At no time during the trial of this matter did the Plaintiff offer expert testimony that the Plaintiff's damages were caused by McComb's alleged negligence. The Plaintiff offered Susan Lofton, a nurse expert, to establish the applicable standard of care and McComb's alleged breach of the standard of care. The Plaintiff offered Dr. Mark Meeks, a physician expert, to establish that Mr. Lee fell and fractured his hip during his residency at the nursing home. However, neither Dr. Meeks (because he did not believe McComb breached the standard of care) nor Ms. Lofton (because she was not qualified to testify about medical causation) opined that McComb's alleged negligence proximately caused Mr. Lee's fall and resulting injury. As a matter of law, the Plaintiff failed to establish a *prima facie* case of medical negligence because she did not present testimony from a medical doctor that the alleged negligent acts of McComb proximately caused Mr. Lee's broken hip. This lack of proof is fatal to the Plaintiff's negligence claim and should have resulted in the dismissal of this lawsuit on McComb's motion for directed verdict.

ARGUMENT

A. Standard of Review.

As determined by the Mississippi Supreme Court, when reviewing a trial court's denial of a motion for directed verdict, the appellate court will

consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required. The above standards of review, however, are predicated on the fact that the trial judge applied the

correct law.

Berry v. Ora L. Patten, et al., 51 So. 3d 934, 938 (Miss. 2010) (citing *Twin County Elec. Power Ass'n v. McKenzie*, 823 So. 3d 464, 468 (Miss. 2002); *Alpha Gulf Coast, Inc. v. Jackson*, 801 So. 2d 709, 720 (Miss. 2001)).

When the Court applies this standard to the present lawsuit, it is clear that the trial court should have directed a verdict in favor of McComb. The Plaintiff failed to offer competent expert testimony concerning the proximate cause of Mr. Lee's alleged damages. As a result, this Court should reverse the trial court and enter a judgment in favor of McComb.

B. McComb's Motion for Directed Verdict Should Have Been Granted Because the Plaintiff Did Not Establish a Necessary Element of Her Claim.

"To establish a *prima facie* case of medical negligence, [a plaintiff] must prove that (1) the defendant had a duty to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) the defendant failed to conform to that required standard; (3) the defendant's breach of duty was a proximate cause of the plaintiff's injury, and (4) the plaintiff was injured as a result." *Vaughn v. Miss. Baptist Med. Cntr.*, 20 So. 3d 645, 650 (Miss. 2009) (quoting *McDonald v. Memorial Hosp. at Gulfport*, 8 So.3d 175, 180 (Miss. 2009)). "The general rule in Mississippi is that 'medical negligence may be established only by expert medical testimony.'" *Id.* (quoting *Coleman v. Rice*, 706 So. 2d 696, 698 (Miss. 1997)). "Not only must this expert identify and articulate the requisite standard that was not complied with, the expert must also establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries." *Hubbard v. Wansley*, 954 So. 2d 951, 957 (Miss. 2007) (quoting *Barner v. Gorman*, 605 So.2d 805, 809 (Miss.1992)).

In the present lawsuit, the Plaintiff failed to present evidence of proximate causation at trial. Therefore, a judgment should be entered in favor of McComb.

1. Only a Physician May Offer Causation Testimony in a Medical Negligence Case.

In *Vaughn*, the Mississippi Supreme Court held that the testimony of a nurse expert cannot establish that a breach of the standard of care proximately caused a plaintiff's alleged injuries. 20 So. 3d at 652. The *Vaughn* court specifically held that "nurses cannot testify as to medical causation" in a medical negligence case. *Id.* "[N]urses are not qualified to make medical diagnoses or attest to the causes of illnesses." *Id.* Therefore, under *Vaughn*, only a physician expert is qualified to give opinions as to causation in a medical negligence case. *Id.*

2. In the Present Case, the Plaintiff's Expert Physician Did Not Testify that McComb's Alleged Negligence Proximately Caused an Injury to Mr. Lee.

The Plaintiff's expert physician, Dr. Mark 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). Likewise, because he opined that McComb complied with the duty owed to Mr. Lee, Dr. Meeks 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 medical expert testified at trial that the alleged negligence of McComb was the proximate cause of an injury to Mr. Lee.

3. The Testimony of the Plaintiff's Nurse Expert Cannot Establish Proximate Cause in this Medical Negligence Case.

In opposition to McComb's motion for directed verdict, the Plaintiff argued that the testimony of her nurse expert, Susan Lofton, could be used to establish proximate cause. (T. 375:6-12; R.E. 0168). However, Lofton did *not* testify that McComb's alleged breach of the standard of care *caused* Mr. Lee's broken hip. Instead, Lofton testified that McComb breached

of the standard of care when it failed to complete a Fall Risk Assessment at the time of Mr. Lee's admission to the nursing home. (T. 191:4-192:25; R.E. 0034-0035). Lofton also testified that the information in the nursing home's plan of care for Mr. Lee was not sufficiently specific to meet the standard of care. (T. 200:10-201:19; R.E. 0043-0044; 201:25-202:15; R.E. 0044-0045). She further testified about the preventative measures that she believed McComb should have implemented in compliance with the applicable standard. (T. 202:23-204:23; R.E. 0045-0047). 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.

More importantly, however, under Mississippi Supreme Court precedent, a nurse like Susan Lofton cannot offer an opinion as to proximate causation because "nurses are not qualified to make medical diagnoses or attest to the causes of illnesses." *Vaughn*, 20 So. 3d at 652. Although a nurse may be qualified to testify about duty and breach in a medical malpractice action, only a physician is qualified to give opinions as to causation. *Id.* As a matter of law, the opinion of the Plaintiff's nurse expert cannot serve as a substitute for the necessary opinion of a physician expert.

In this case, the Plaintiff's only physician expert opined that McComb was not negligent. According to Dr. Meeks, McComb satisfied the applicable standard of care when providing nursing home services to Mr. Lee. Dr. Meeks never testified that an alleged breach of McComb's duty somehow cause Mr. Lee to fall and break his hip. As a result, the Plaintiff failed to establish a necessary element of her negligence claim, and a judgment should be entered in favor of McComb.

CONCLUSION

In this lawsuit, the Plaintiff cannot maintain a cause of action against McComb for medical negligence because she failed to offer testimony from a physician expert to establish that

McComb's alleged breach of the applicable duty proximately caused Mr. Lee's injuries. As a matter of law, the Plaintiff failed to prove all of the necessary elements of her claim. Therefore, McComb's motion for directed verdict should have been granted by the trial court. For these reasons, McComb respectfully requests that this Court reverse the decision of the trial court and enter a judgment in favor of the Defendant, McComb Nursing & Rehabilitation Center, LLC.

This 10th day of March, 2011.

Respectfully submitted,

McCOMB NURSING AND
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CERTIFICATE OF SERVICE

I, W. Davis Frye, 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
W. Eric Stracener
W. Andrew Neely
Hawkins, Stracener & Gibson. PLLC
628 N. State Street
Jackson, MS 39202

SO CERTIFIED, this 10th day of March, 2011.



W. DAVIS FRYE