IN THE SUPREME COURT OF MISSISSIPPI

JACKSON HMA, INC. d/b/a CENTRAL
MISSISSIPPI MEDICAL CENTER,
GEORGE T. SMITH-VANIZ, M.D.,
AND KEN E. CLEVELAND, M.D. APPELLANTS

VS. CASE NO. 2010-CA-01527

LANELL HAMIL, INDIVIDUALLY AND ON BEHALF
OF THE WRONGFUL DEATH BENEFICIARIES OF
EMMETT O. HAMIL, DECEASED APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI
HONORABLE WINSTON KIDD, CIRCUIT JUDGE

BRIEF OF APPELLANT KEN E. CLEVELAND, M.D.

ORAL ARGUMENT REQUESTED

PREPARED AND SUBMITTED BY:

Whitman B. Johnson III, MSB [redacted]
Lorraine W. Boykin, MSB [redacted]
CURRIE JOHNSON GRIFFIN GAINES & MYERS, P.A.
P.O. Box 750
Jackson, MS 39205-0750
Telephone: 601-969-1010
Facsimile: 601-969-5120
Attorneys for Appellant Ken E. Cleveland, M.D.

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CERTIFICATE OF INTERESTED PARTIES

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 judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Jackson HMA, Inc. d/b/a Central Mississippi Medical Center, Defendant/Appellant

2. Mark P. Caraway, Esq.
WISE CARTER CHILD & CARAWAY, P.A.
Post Office Box 651
Jackson, MS 39205-0651
Attorneys for Defendant/Appellant Central Mississippi Medical Center

3. George T. Smith-Vaniz, M.D., Defendant/Appellant

4. Stephen P. Kruger, Esq.
Jan Gadow, Esq.
PAGE, KRUGER & HOLLAND, P.A.
P.O. Box 1163
Jackson, MS 39215-1163
Attorneys for Defendant/Appellant George T. Smith-Vaniz, M.D.

5. . Ken E. Cleveland, M.D., Defendant/Appellant

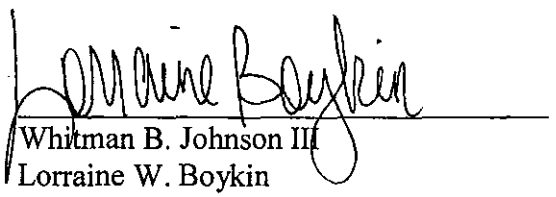
6. Whitman B. Johnson III, Esq.
Lorraine W. Boykin, Esq.
CURRIE JOHNSON GRIFFIN GAINES & MYERS, P.A.
P.O. Box 750
Jackson, MS 39205-0750
Attorneys for Defendant/Appellant Ken E. Cleveland, M.D.

7. Lanell Hamil, Individually, Plaintiff/Appellee

8. Lanell Hamil, On Behalf of the Wrongful Death Beneficiaries of Emmett O. Hamil, Deceased, Plaintiff/Appellee

9. Alton E. Peterson, Esq.
STAMPS & STAMPS
P.O. Box 2916
Jackson, MS 39207-2916
Attorney for Plaintiff/Appellee Lanell Hamil, Individually, and Lanell Hamil, On Behalf of the Wrongful Death Beneficiaries of Emmett O. Hamil, Deceased

10. Honorable Winston Kidd
Hinds County Circuit Judge
P.O. Box 327
Jackson, MS 39205



Whitman B. Johnson III
Lorraine W. Boykin
Attorneys for Defendant/Appellant
Ken E. Cleveland, M.D.

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STATEMENT OF THE ISSUES

Questions Presented for Review

Question:

1. Is a plaintiff entitled to retain a verdict obtained by offering an expert who (a) abandons all theories of negligence set forth in an affidavit filed to avoid summary judgment; (b) espouses new theories of negligence which were admittedly not contained in the affidavit because he did not come up with them until the night before his testimony; and (c) offers medically unreliable and factually unsupported testimony?

Answer:

No. Such a verdict must be reversed because to do otherwise would return the courtroom to a trial by ambush era. The purpose of expert witness discovery is to allow each party to know what the other party's expert is going to say, in order to both be prepared to meet it factually and to test its medical validity. Allowing an expert to effectively withdraw his prior sworn testimony and substitute an entirely new theory would condone expert witness chicanery to prevail over proper judicial procedure. This Court has recently recognized in the case of *Hyundai Motor America v. Applewhite*, 53 So. 3d 749 (Miss. 2011), that this will not be allowed.

Question:

2. May the trial court reject factually supported instructions offered by a defendant?

Answer:

No. A trial court which refuses to properly instruct the jury as to the defendant's theory of the case is in error. *See Eckman v. Moore*, 876 So. 2d 975 (Miss. 2004).

Question:

3. Does the mere fact that one of the venire men knew the brother of one of the defense attorneys subject that venire man to being struck for cause?

Answer:

No. The mere fact that a juror has prior contact with an attorney is not a *per se* basis for excusal for cause. *See Heaney v. Hewes*, 8 So. 3d 221, 226 (Miss. 2008). Given the fact that the potential juror acknowledged knowing the attorney's brother, but claimed to have had no contact with the attorney himself, there was no basis for a challenge for cause, and the venire man should not have been struck.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Lanell Hamil, on behalf of the wrongful death beneficiaries of Emmett O. Hamil, filed suit against Dr. Ken Cleveland and Dr. George Smith-Vaniz, as well as Jackson HMA d/b/a Central Mississippi Medical Center (hereinafter referred to as "CMMC"), in the Circuit Court of the First Judicial District of Hinds County on January 12, 2007. R. 8-17. The complaint alleged that the defendants were negligent in providing medical care and treatment to Mr. Hamil, and that such negligence resulted in Mr. Hamil's death on November 21, 2004.

Following discovery, defendant Dr. Cleveland filed a motion for summary judgment, seeking dismissal of the plaintiff's claims on the basis that the plaintiff had failed to provide sworn expert testimony in support of her allegations of medical negligence as required by Mississippi law. R. 46-73. As part of her response to this motion, Ms. Hamil produced an affidavit from her medical expert, Dr. Louis Silverman. R 96-99; App. 2. Dr. Silverman's affidavit was four pages and included specific opinions of Dr. Silverman as to the alleged breaches of the standard of care by the defendants. Due to specific opinions being provided through Dr. Silverman's affidavit, none of the defendants noticed Dr. Silverman's deposition.

A trial took place before Judge Winston Kidd the week of May 24, 2010. Prior to the commencement of the trial, a motion *in limine* had been filed requesting the court enter a ruling that all medical expert witnesses would only be allowed to offer testimony regarding opinions which were previously produced in discovery through designation or affidavit. R 105-108. The plaintiff's counsel did not oppose this motion, and he even stated his agreement to the court that his expert would not offer opinions outside of the affidavit produced to the defendants. T. p. 9, lines 24-28; App. 3.

However, during trial, Dr. Silverman was called as a witness by the plaintiff, offering numerous opinions which had not been disclosed to the defendants prior to trial, and in fact, opinions that were contrary to the opinions Dr. Silverman had provided in his affidavit. App. 4.

On May 27, 2010, the jury returned a verdict in favor of the plaintiff in the amount of $1,128,050.00. R. 188. Dr. Cleveland timely filed his Motion for JNOV, or alternatively, for a New Trial. R 193-222. A hearing took place before Judge Kidd on August 23, 2010, and an Order was entered denying these motions on August 25, 2010. R. 422-23. It is the denial of these motions that serve as the basis for this appeal.

B. FACTS

Emmett Hamil presented to the CMMC emergency department on November 10, 2004, with complaints of abdominal pain.[1] Dr. Smith-Vaniz was consulted, and diagnostic studies he ordered indicated that Mr. Hamil had free air in the abdominal cavity. Dr. Cleveland was then called in for a surgical consult to address a suspected perforated ulcer. Dr. Cleveland performed an exploratory laparotomy on November 11, 2004, and repaired the perforation with a wedge resection and oversewing of the stomach.

Mr. Hamil was hospitalized for approximately a week, during which time he was improving. His medications included anti-ulcer medications, Prevacid and later Carafate, in an attempt to prevent the development of another ulcer. Both medical records and testimony established that he was feeling better and was ready to go home. There was nothing about Mr. Hamil that indicated the existence of a second ulcer at this time, much less that he was bleeding internally from such ulcer.

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[1] Excerpts of Mr. Hamil's medical records have been included as Appendix 1. These medical records provide the basis for the factual background outlined above.

He was discharged home on November 19, 2004, with prescriptions for another anti-ulcer medication, Protonix, and pain medication.

Mr. Hamil returned to CMMC in the early hours of the morning on November 20, 2004, at which time he was taken to the operating room for surgery on a second ulcer that was determined to be present. This second ulcer had eroded through a large blood vessel, and Mr. Hamil died following surgery due to massive blood loss.

Dr. Silverman alleged in his affidavit that the defendants' alleged acts of negligence included their failure to place Mr. Hamil on anti-ulcer medication at the time of discharge and their failure to diagnose Mr. Hamil with a rare condition known as Zollinger-Ellison syndrome. R 98-99; App. 2. Dr. Silverman opined that Mr. Hamil remained asymptomatic while he was in the hospital. R 98; App. 2. Further, Dr. Silverman claimed that Mr. Hamil developed this second ulcer, which ultimately caused Mr. Hamil's death, after his discharge from the hospital. R 98; App. 2.

At trial, Dr. Silverman's testimony contradicted the statements he had made in his affidavit. App. 4. He acknowledged that the defendants had in fact placed Mr. Hamil on the appropriate medication, and he no longer claimed that Mr. Hamil likely had Zollinger-Ellison syndrome. Instead, Dr. Silverman's new theory of negligence was that Mr. Hamil had been *bleeding throughout his hospitalization* (which was contrary to his affidavit that Mr. Hamil had been asymptomatic in the hospital) from *a second ulcer which had formed prior to Mr. Hamil's discharge from the hospital* (which was contrary to his earlier position that the ulcer was not present until after discharge). Dr. Silverman's testimony was also contrary to the numerous references in the medical records that show Mr. Hamil was in fact *not* bleeding internally, as well as contrary to the medical literature on issues including hemodilution/equilibration, multiple blood draws, and hemolysis from multiple transfusions, such that it should have been ruled inadmissible as unreliable under *Daubert* standards.

SUMMARY OF THE ARGUMENT

Is a plaintiff permitted to present medically unreliable and never-previously-disclosed expert testimony at trial that contradicts the theory of the case that the plaintiff has taken throughout discovery, such that Mississippi has resorted back to a state where trials by ambush are encouraged and there are no gate-keeping responsibilities of the trial court to ensure that medical experts are held to *Daubert* standards? The answer is an emphatic "no" according to an abundance of Mississippi law, which shows the necessity of reversing the trial court's judgment entered against the defendants.

If the judgment against the defendants is not reversed, this state has resorted back to the days of trial by ambush when parties would appear for trial without any idea of the evidence that the other side would be presenting against them. Mississippi abolished these "surprise" tactics by implementing discovery rules and requiring parties to disclose information such as expert witnesses' opinions. However, allowing the judgment to stand against the defendants would move this state right back to where it was years ago where "anything goes" in the courtroom.

The plaintiff first provided a four-page sworn statement from Dr. Silverman as part of her response to defendant's motion for summary judgment, as her claims would have been dismissed without that affidavit for failure to have an expert witness to support her claims of negligence. *Cheeks v. Bio- Medical Applications, Inc.*, 908 So. 2d 117 (Miss. 2005); *Palmer v. Biloxi Regional Medical Ctr.*, 564 So. 2d 1346 (Miss. 1990); *see also Mallet v. Carter*, 803 So. 2d 504, 508 (Miss. App. 2002). The defendants had no reason to believe that the plaintiff would present any testimony contrary to the opinions expressed in Dr. Silverman's affidavit, as the jury instructions filed by the plaintiff prior to trial mirrored Dr. Silverman's opinions, and more importantly, Mississippi law would not allow her to change her position at trial. *See Kirk v. Pope*, 973 So. 2d 981 (Miss. 2007); *Dockins v. Allred*, 849 So. 2d 151, 155 (Miss. 2003); *Baines v. Thompson*, 352 So. 2d 812, 815

(Miss. 1977). Even so, Dr. Silverman took the witness stand on the second day of trial and tossed out entirely new theories of negligence by the defendants, abandoning - *and contradicting* - those theories expressed in his affidavit.

Mississippi has rules which govern disclosure of expert opinions to avoid trials by ambush in this state, and the law was not followed and Dr. Silverman's testimony that was presented should have been excluded. *See, e.g., Banks v. Hill*, 978 So. 2d 663 (Miss. 2008); *Prestridge v. City of Petal*, 841 So. 2d 1048 (Miss. 2003); *Haggerty v. Foster*, 838 So. 2d 948 (Miss. 2002); *Blanton v. Board of Supervisors of Copiah County*, 720 So. 2d 190 (Miss. 1998); *West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714 (Miss. 1995); *Boyd v. Lynch*, 493 So. 2d 1315 (Miss. 1986); *Huff v. Polk*, 408 So. 2d 1368 (Miss. 1982). Not only was Dr. Silverman's testimony impermissible surprise testimony that should have been prohibited, it was also testimony that was medically unreliable. The *Daubert* principles were not followed by the trial court, and testimony was erroneously presented to the jury which had no support from the medical records or medical literature. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (U.S. 1993); *UMMC v. Martin*, 994 So. 2d 740 (Miss. 2008); *Hubbard v. Wansley*, 954 So. 2d 951 (Miss. 2007).

Had the defendants been placed on notice that Dr. Silverman's testimony would change from theories of improper diagnosis of a rare condition (which Dr. Silverman agreed at trial that the patient did not have), failure to appropriately medicate the patient (which Dr. Silverman agreed at trial that the patient was actually placed on appropriate medication), and the development of a second ulcer post-discharge from the patient being asymptomatic in the hospital (which Dr. Silverman contradicted at trial, as he then testified that the ulcer was present during the hospitalization and that Mr. Hamil had an ongoing bleeding event during the hospitalization), then the defendants would have had the opportunity to prepare a defense to these new theories they would hear at trial,

including the ability to designate expert witnesses on those issues such as the hematologist and critical care experts who provided post-trial affidavits to show the medical inaccuracies of Dr. Silverman's new opinions. R. 353-58, 397-401.

Other errors took place during the trial, including the improper striking of a member of the venire and the refusal to give a requested jury instruction that addressed the defendants' theory of the case, and these errors justify the defendants being given a new trial.

By the conclusion of the trial, the plaintiff failed to present any *admissible* evidence to establish a breach of the standard of care by the defendants or any *admissible* evidence to establish any causal link between Mr. Hamil's death and the medical care provided by the defendants. Without such evidence, the defendants were entitled to have a verdict entered in their favor. Therefore, Dr. Cleveland respectfully requests that this Court set aside the judgment that was entered in favor of the plaintiff and enter judgment in favor of the defendants in accordance with Mississippi law, or alternatively, grant a new trial.

INTRODUCTION TO ARGUMENT

The plaintiff's expert, Dr. Silverman, swore to his theories of negligence of the defendants in an affidavit he signed for the plaintiff to avoid a motion for summary judgment. At trial, Dr. Silverman withdrew or abandoned these theories altogether, presenting an entirely new theory that he admittedly developed the night before he testified at trial. T. 214, 223. A summary of these "before and after" theories is found below to assist the Court in better understanding why Dr. Cleveland and the other defendants are entitled to have the judgment reversed.[2]

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[2] Appendix 4 provides the actual language used in Dr. Silverman's affidavit and his trial testimony as further support to show the dramatic changes in his opinions.

SILVERMAN'S AFFIDAVIT	SILVERMAN'S TRIAL TESTIMONY
Defendants were negligent by failing to place Mr. Hamil on anti-ulcer medication at discharge (R. 99, ¶ 15; App. 2)	Silverman admitted this theory was wrong because Mr. Hamil was placed on Protonix (T. 207, lines 9-11; App. 3)
Defendants failed to appropriately work-up Mr. Hamil and diagnose Zollinger-Ellison syndome (R. 97-98, ¶ 7, 10, 12; App. 2).	Silverman admitted he did not know if Mr. Hamil had Zollinger-Ellison syndrome (T. 220, line 12; App. 3)
Defendants were negligent by not performing a total gastrectomy (R. 98, ¶ 13; App. 2)	Silverman abandoned this theory since it was not proven that Mr. Hamil had Zollinger-Ellison syndrome (T. 220, lines 19-20; App. 3)
—no other claims of negligence made—	Silverman testified that Mr. Hamil had an ongoing bleeding event which defendants failed to recognize and treat throughout his hospitalization (T. 206, lines 18-23; App. 3)

At the very least, defendants are entitled to have the case reversed and remanded for a new trial. However, as will be discussed in the brief, the verdict should be reversed and rendered because even the "new" theory presented by the plaintiff's expert at trial was not reliable enough from a medical standpoint to support a verdict against the defendants.

ARGUMENT

I. THE DEFENDANTS ARE ENTITLED TO HAVE THE JURY VERDICT SET ASIDE AND HAVE A JUDGMENT ENTERED IN THEIR FAVOR.

A. Standard of review

The standard of review for reviewing a trial court's denial of a motion for judgment notwithstanding the verdict is de novo. *Poole ex rel. Wrongful Death Beneficiaries of Poole v. Avara*, 908 So. 2d 716 (Miss. 2005); *Wilson v. Gen. Motors Acceptance Corp.*, 883 So. 2d 56 (Miss.

2004). The standard of review for reviewing a trial court's denial of a motion for new trial is abuse of discretion. *Shields v. Easterling*, 676 So. 2d 293 (Miss. 1996).

There were errors regarding evidentiary issues, primarily related to the admission of the testimony by Dr. Louis Silverman, expert witness for the plaintiff. "The standard of review for the admission or exclusion of evidence, such as expert testimony, is an abuse of discretion." *See Denham v. Holmes ex rel. Holmes*, 60 So. 3d 773, 783 (Miss. 2011); *Roberts v. Grafe Auto Co., Inc.*, 701 So. 2d 1093 (Miss. 1997). "A trial court's decision constitutes an abuse of discretion if the decision was arbitrary and clearly erroneous." *Hubbard ex rel. Hubbard v. McDonald's Corp.*, 41 So. 3d 670, 674 (Miss. 2010). Despite this discretion afforded to the trial court judge in determining the admissibility of an expert witness' testimony, the trial court's decision should be reversed if "we can safely say that the trial court abused its judicial discretion in allowing or disallowing evidence so as to prejudice a party in a civil case . . ." *Bullock v. Lott*, 964 So. 2d 1119, 1128 (Miss. 2007). The defendants were clearly prejudiced by the admission of the testimony by Dr. Silverman, as it was unreliable under *Daubert* standards and was surprise testimony at trial which contradicted the witness' prior sworn statement. Therefore, it was erroneous to allow his testimony to be admitted.

B. The plaintiff failed to present any admissible evidence of any breach of the standard of care by the defendants to support the jury's verdict in favor of the plaintiff.

1. Dr. Silverman's testimony should not have been allowed, as it violated the motion *in limine* agreed to by the parties and granted by the court.

A motion *in limine* was filed prior to the commencement of the trial that requested the court enter a ruling that all medical expert witnesses would only be allowed to offer testimony regarding opinions which were previously produced in discovery through designation or affidavit. R. 105-08.

The plaintiff's counsel did not oppose this motion, and he even stated his agreement to the court that his expert would not offer opinions outside of the affidavit produced to the defendants.

> Mr. Peterson: Your Honor, we will not be attempting to offer any opinions that have not been previously provided. . .

T. 9, lines 24-26 (emphasis added); App. 3. However, the plaintiff's expert, Dr. Louis Silverman, gave testimony that, as the witness acknowledged, went outside the affidavit provided. T. 217; App. 3 and 4.

It was error by the trial court to allow the testimony of Dr. Silverman, as it violated the agreement made by counsel and accepted by the court in granting the motion *in limine*. The plaintiff should therefore have been without expert testimony, which would have entitled the defendants to a directed verdict being entered in their favor.

2. The plaintiff was judicially estopped from changing her theories of negligence at trial, and thus the trial court erred by allowing the testimony of Dr. Silverman.

The plaintiff was judicially estopped from taking a position at trial that was contrary to the position asserted earlier in this same case. *See, e.g., Kirk v. Pope*, 973 So. 2d 981 (Miss. 2007) (discussing judicial estoppel); *Dockins v. Allred*, 849 So. 2d 151, 155 (Miss. 2003) (noting judicial estoppel bars subsequent contrary position to be taken by a party); *Baines v. Thompson*, 352 So. 2d 812, 815 (Miss. 1977) (acknowledging judicial estoppel as preventing change of position by party). Therefore, the trial court disregarded the principle of judicial estoppel as stated under Mississippi law and erred by allowing the plaintiff to take a contrary position at trial. *See Estate of Bellino v. Bellino*, 52 So. 3d 423, 425 (Miss. App. 2010) ("Under Mississippi law, judicial estoppel precludes a party from asserting a position, benefitting from that position, and then taking a contrary stand later in the same litigation.").

In response to the defendant's summary judgment motion filed approximately one year before the trial began, the plaintiff had produced an affidavit of Dr. Silverman which included the expert opinions he held as to the allegedly negligent conduct of the defendants. R 96-99; App. 2. These opinions were entirely abandoned at trial, and contrary theories were presented instead. App. 4.

"The doctrine of judicial estoppel should be applied to prevent a party from achieving unfair advantage by taking inconsistent positions in litigation." *Copiah County v. Oliver*, 51 So. 3d 205, 207 (Miss. 2011). However, an "unfair advantage" is precisely what the plaintiff gained by presenting a theory at trial which was wholly contradictory to the one she had previously adopted, thereby surprising the opposition and conducting a trial by ambush. Judicial estoppel prevents the plaintiff from producing an affidavit solely for the purposes of defeating a summary judgment motion and then presenting contradictory theories at trial.

The verdict entered against the defendants should be set aside as it was erroneous to allow the plaintiff to change her theories of negligence against the defendants at trial, taking a position that was wholly contrary to the one previously asserted in the sworn affidavit of her sole medical expert witness.

3. Dr. Silverman's testimony at trial contradicted the affidavit he had previously submitted, such that his testimony should have been excluded and judgment granted in favor of the defendants.

The trial court erred by allowing Dr. Silverman to present sworn testimony at trial that clearly contradicted the sworn statement he had previously given. Mississippi law is clear that subsequent sworn testimony which contradicts prior sworn testimony is not sufficient to allow a plaintiff to avoid judgment for the defendant. *See Callicutt v. Professional Services of Potts Camp, Inc.*, 974 So. 2d 216 (Miss. 2007); *Foldes v. Hancock Bank*, 554 So. 2d 319 (Miss. 1989); *see also Jamison*

v. Barnes, 8 So. 3d 238 (Miss. App. 2008) (recognizing that party may not avoid summary judgment with affidavit from witness which contradicts prior sworn testimony of that same witness).

There were numerous contradictions made between Dr. Silverman's opinions as stated in the affidavit versus his opinions as stated at trial, which are outlined in Appendix 4.[3] For example, in ¶ 12 of his affidavit, Dr. Silverman described Mr. Hamil as "asymptomatic" while in the hospital because of the anti-ulcer medication he was taking. R. 98; App. 2. However, at trial, over defendants' objections, Dr. Silverman testified that Mr. Hamil was bleeding into his stomach throughout his entire hospital admission. T. 201-02; App. 3. This alleged active bleeding that Dr. Silverman described served as the entire basis for the plaintiff's theory of negligence at trial, but is wholly contrary to the "asymptomatic" condition which actually existed and which Dr. Silverman originally described in his affidavit.

Another example is found in paragraph 14 of the affidavit, wherein Dr. Silverman describes a "prompt recurrence of a gastric ulcer post discharge" (emphasis added). R. 98; App. 2. However, Dr. Silverman contradicted this statement at trial when he offered testimony that Mr. Hamil had a bleeding ulcer prior to discharge such that he should not have been discharged. T. 218, line 21, page 219, lines 14-23; App. 3.

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[3]There were contradictions on other issues as well, which are outlined in Appendix 4. For example, Dr. Silverman stated in paragraph 12 of his affidavit that Mr. Hamil "should have remained on those [anti-ulcer] medications while in the hospital" and "as an outpatient" and that Dr. Cleveland "failed to prescribe these medications." However, on the witness stand, Dr. Silverman admitted that these statements were not correct and that the medical records did establish that Mr. Hamil was in fact on anti-ulcer medications in the hospital and sent home with a prescription for the same, and therefore Mr. Hamil had been appropriately medicated. Dr. Silverman then in paragraph 13 of his affidavit offers the opinion that Mr. Hamil would not have died from a GI bleed had a total gastrectomy been performed. However, Dr. Silverman abandoned this theory at trial and offered no testimony whatsoever about a gastrectomy being required, much less being the action needed to have saved Mr. Hamil's life.

It was improper for Dr. Silverman's testimony to be presented to the jury, given the specific contradictions between the affidavit of Dr. Silverman that the plaintiff provided to the defendants several months prior to trial and the testimony which formed the basis for the plaintiff's trial theory of the breach of the standard of care.[4] Dr. Silverman's testimony should have been excluded, and it was error by the trial court to allow it.

4. Dr. Silverman's surprise testimony should have been excluded, as it was not provided to defense counsel prior to trial.

The trial court erred by allowing the plaintiff to conduct a trial by ambush, contrary to an abundance of Mississippi caselaw which prohibits such surprise tactics at trial. *See Hyundai Motor America v. Applewhite*, 53 So. 3d 749, 759 (Miss. 2011) (noting that Mississippi courts "do not condone trial by ambush"); *Banks v. Hill*, 978 So. 2d 663, 666 (Miss. 2008) (rejecting "ambush tactics" when the plaintiff "failed to properly disclose her experts' opinions"); *Prestridge v. City of Petal*, 841 So. 2d 1048, 1061 (Miss. 2003) (affirming the trial court's exclusion of evidence that was not provided during discovery and noting that "[d]iscovery rules are designed to prevent trial by ambush"); *Haggerty v. Foster*, 838 So. 2d 948 (Miss. 2002) (upholding the trial court's exclusion of expert testimony regarding opinions not previously disclosed to opposing counsel); *Blanton v. Board of Supervisors of Copiah County*, 720 So. 2d 190 (Miss. 1998) (upholding the trial court's exclusion of expert's report not timely submitted to other party); *West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714 (Miss. 1995) (affirming the trial court's exclusion of expert testimony at trial that was not provided in discovery); *Harris v. Gen. Host Corp.*, 503 So. 2d 795 (Miss. 1986)

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[4] It is important to note that a medical expert witness does not have any repercussions for providing testimony at trial contrary to his previously disclosed sworn statement, as there is no private cause of action for perjury. *See Dowdle Butane Gas Co., Inc. v. Moore*, 831 So. 2d 1124 (Miss. 2002) (discussing that no separate claim for perjury exists under Mississippi law).

(discussing that Mississippi law does not allow surprise witnesses or trial by ambush); *Boyd v. Lynch*, 493 So. 2d 1315 (Miss. 1986) (finding that the trial court properly excluded expert testimony that was not timely identified and violative of discovery rules); *Huff v. Polk*, 408 So. 2d 1368 (Miss. 1982) (finding that a party's failure to disclose expert witnesses prior to trial violated discovery rules and could not be allowed); *see also Congleton v. Shellfish Culture, Inc.*, 807 So. 2d 492 (Miss. App. 2002) (evaluating whether a party had reasonable time to prepare for trial in determining whether there has been a trial by ambush).

The four page affidavit of Dr. Silverman provided specific details as to Dr. Silverman's theories of the allegedly negligent conduct by the defendants. R. 96-99; App. 2. Essentially, Dr. Silverman's sworn criticisms at the time of the summary judgment motion were that the physicians had failed to do an appropriate work-up to determine the cause of the ulcer Mr. Hamil had at the time he presented to CMMC on November 10, 2004 (with Zollinger-Ellison syndrome allegedly being the cause), and the physicians failed to prescribe medication at discharge which would prevent another ulcer from developing after discharge. Additionally, Dr. Silverman opined that the second ulcer which Mr. Hamil had occurred after he left the hospital and that a total gastrectomy (removal of Mr. Hamil's entire stomach) during Mr. Hamil's first hospitalization would have prevented Mr. Hamil's death and should have been performed before discharge.

However, these were <u>not</u> the opinions presented at trial. Dr. Silverman provided entirely <u>new</u> opinions at trial, with the overall new theory of the case being that Mr. Hamil allegedly had another separate bleeding ulcer present during the whole hospitalization:

> In my opinion Dr. Smith and Dr. Cleveland failed to meet the standard of care by failing to, I guess, recognize the <u>ongoing hemorrhage</u>, despite the laboratory tests that showed it, and failed to do anything to try to find out what was causing it, and had they found it, he would have been appropriately treated.

T. 206, lines 18-23 (emphasis added); App. 3. This opinion had never been disclosed prior to Dr. Silverman giving this opinion from the witness stand at trial, thereby completely surprising the defendants in the middle of the trial, which was an error that must be reversed by this Court. *See Estate of Bellino v. Bellino*, 52 So. 3d 423, 425 (Miss. App. 2010) (a party is not entitled to change positions in a case after having benefitted from a contrary, prior position asserted).

It was enough of an ambush for the plaintiff's expert witness to give this new theory regarding an alleged ongoing bleeding event which had never been disclosed, but more than that, the plaintiff's expert witness backed off entirely from the statements made in his affidavit - either by withdrawing them or offering testimony wholly contrary to them. In his affidavit, Dr. Silverman had claimed that the defendants had failed to place Mr. Hamil on appropriate medication (which the medical records clearly showed were ordered and even Dr. Silverman admitted that the medications ordered were appropriate) and that Mr. Hamil was asymptomatic while in the hospital (yet Dr. Silverman testified on the witness stand that Mr. Hamil was actively bleeding during his hospitalization and therefore was symptomatic). Dr. Silverman also generally abandoned other theories included in his affidavit (such as the Zollinger-Ellison theory about which Dr. Silverman did not offer testimony at trial as being the cause of the ulcer). Further, there was the new testimony from Dr. Silverman that the defendants were negligent by failing to recognize that Mr. Hamil's decreased hemoglobin and hematocrit levels prior to discharge from the hospital on November 19, 2004, were indicative of active bleeding. Not only did Dr. Silverman's affidavit fail to address either hemoglobin and hematocrit levels or bleeding at the time of discharge, but Dr. Silverman even admitted on the stand that his affidavit made no reference to these opinions. T. 218, line 17; App. 3.

Dr. Silverman testified at trial that Mr. Hamil's hemoglobin and hematocrit levels "trended steadily down." T. 204, line 8; App. 3. Further, Dr. Silverman testified "He had an ongoing episode of bleeding throughout the time he was in the hospital and before he had gone to surgery." T. 205, lines 19-21; App. 3. Despite the testimony from Dr. Silverman about Mr. Hamil actively bleeding, there was no reference to ongoing bleeding in his affidavit. Not only did the defendants inform the court that these opinions about bleeding were nowhere in Dr. Silverman's affidavit, but Dr. Silverman himself even acknowledged it. T. 215, lines 23-25; T. 218, lines 15-17, T. 223, lines 12-16; App. 3.

The defendants were "entitled to full and complete disclosure of the plaintiffs' expert testimony," which they absolutely did not get, as Dr. Silverman testified to opinions on the witness stand at trial that had never been disclosed and in fact contradicted his opinions as stated in the affidavit. *Applewhite*, 53 So. 3d at 759 (finding error with the trial court's ruling allowing the plaintiffs' expert witness to present testimony previously not disclosed to opposing counsel).

At no point in time were any materials ever provided to the defendants to indicate any change in Dr. Silverman's opinions, as the plaintiff was required to do in the event that his opinion did change. *West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714 (Miss. 1995) (noting that a supplementation is required if the original opinion of the expert disclosed changes); *Square D. v. Edwards*, 419 So. 2d 1327 (Miss. 1982) (finding reversible error in the trial court allowing expert testimony that had not been properly disclosed through discovery supplementation). In fact, the proposed jury instructions submitted by the plaintiff's counsel on the Friday before the trial began

were consistent with the opinions of Dr. Silverman as stated in his affidavit. R. 123-37.[5] Further, as discussed above, the court heard arguments on this very issue of expert witnesses being limited to offering testimony to only those opinions which had previously been disclosed. All counsel agreed that no additional opinions would be offered, and the court ruled that no additional opinions would be allowed.

This case is the epitome of a trial by ambush. "We have long been committed to the proposition that trial by ambush should be abolished . . ." *Harris*, 503 So. 2d at 796; *see also Klink v. Brewster*, 986 So. 2d 1060 (Miss. App. 2008) (discussing the proclamation in *Harris* warning against trials by ambush). Given the abundance of decisions from the Mississippi appellate courts that frown upon trial by ambush, it would seem that this statement in the *Harris* opinion is still the position of the Mississippi Supreme Court, and if that is indeed the case, then the judgment entered against the defendants must be reversed. The Mississippi Supreme Court has not tolerated expert witnesses first disclosing opinions on the witness stand at trial, and it was error to allow Dr. Silverman to do the same. *See* M.R.C.P. 26(f). Had Dr. Silverman been excluded, as required by previously cited Mississippi authorities, the plaintiff would have been left without any medical expert testimony and directed verdict would have been entered.

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[5] Dr. Silverman testified that he changed his opinion the night before he was on the stand and had talked with the plaintiff's attorney. T. 214, line 12; T. 223, lines 19-20; App. 3. However, the plaintiff's attorney failed to notify the defendants of any change in theory and called both defendant physicians adversely, cross-examining them prior to the defendants having any notice of the plaintiff's change in theories.

5. The trial court erred by allowing Dr. Silverman's testimony, as the testimony was unreliable and therefore inadmissible under *Daubert* standards.

The trial court should have excluded the testimony of Dr. Silverman as "scientifically unreliable" when the plaintiff failed to provide any scientific data to support Dr. Silverman's opinions. *Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 150 (Miss. 2008). The plaintiff's sole medical expert, Dr. Silverman, had no facts or other evidence to support his theory that the decreased hemoglobin and hematocrit levels were proof that Mr. Hamil was bleeding at the time he was discharged. *See Hubbard v. Wansley*, 954 So. 2d 951 (Miss. 2007) (affirming judgment in favor of defendants when the plaintiff's expert's sworn statement lacked specific facts or medical analysis to support his theory). Dr. Silverman's testimony that Mr. Hamil was actively bleeding on November 19, 2004, was inconsistent with the medical records and the testimony presented by five physicians and, further, was inconsistent with the medical literature such that his testimony was improperly allowed before the jury under *Daubert* standards. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (U.S. 1993); *UMMC v. Martin*, 994 So. 2d 740 (Miss. 2008) (acknowledging that *Daubert* requires a medical expert's testimony must be based on scientific data and not subjective beliefs).

Expert testimony "must be grounded in the methods and procedures of science, not merely a subjective belief of unsupported speculation." *Worthy v. McNair*, 37 So. 3d 609, 615 (Miss. 2010). In the *Worthy* opinion, the Supreme Court affirmed the trial court's exclusion of testimony by the plaintiff's medical expert as to the cause of death, finding that the physician's testimony was unreliable and therefore inadmissible pursuant to *Daubert* standards. *Id.* at 617. Dr. Silverman's opinions, like the opinions of the plaintiff's expert in *Worthy*, have no support in either medical literature or Mr. Hamil's medical records. Dr. Silverman's opinions are purely his unsubstantiated

opinions and should have been excluded. This Court continues to uphold the principles stated in *Daubert*, as shown by the exclusion of the offered medical expert testimony in the *Patterson* opinion. *Patterson v. Tibbs*, 60 So. 3d 742 (Miss. 2011). In *Patterson*, the defendants challenged the reliability of the plaintiff's expert witness' opinions, and the appellate court found no error with the trial court's ruling to exclude the expert's testimony when the plaintiff failed to show any evidentiary support existed for her expert's opinions.

Dr. Silverman's testimony relied entirely on Mr. Hamil's hemoglobin and hematocrit levels, which he testified were indicative of active bleeding. However, medical science provides a variety of reasons for the hemoglobin and hematocrit levels that Mr. Hamil had, including hemodilution/ equilibration, multiple blood draws, and hemolysis. Had these new opinions been disclosed by the plaintiff prior to trial, defendants would have designated experts in other medical fields to rebut these theories, to show that there is no medical validity to the opinions expressed by Dr. Silverman at trial and to get them struck as unreliable under *Daubert*. Since the opinions were not properly disclosed, the defendants were deprived of the opportunity to defend themselves at trial. *See, e.g., Worthy v. McNair*, 37 So. 3d 609 (Miss. 2010) (noting that another physician's testimony at trial contradicted the plaintiff's expert witness' opinion and that this contradictory testimony showed further support of the unreliable nature of the plaintiff's expert witness' testimony). Consequently, it was error for the testimony of Dr. Silverman to be presented to the jury, and the verdict entered against the defendants should be set aside.

C. The plaintiff failed to present any admissible evidence to establish causation, such that a directed verdict should have been granted in favor of the defendants.

Like other negligence claims, a plaintiff must provide evidence to prove causation to establish a prima facie case of medical negligence. *See Drummond v. Buckley*, 627 So. 2d 264

(Miss. 1993); *see also Vaughn v. Mississippi Baptist Medical Center*, 20 So. 3d 645 (Miss. 2009) (affirming judgment in favor of defendant for plaintiff's failure to provide evidence of causation in medical negligence case). In this case, this required the plaintiff to provide evidence to show that there was a causal connection between the defendants' alleged conduct and Mr. Hamil's death. *See Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So. 2d 1346 (Miss. 1990); *see also Boyd v. Lynch*, 493 So. 2d 1315, 1318 (Miss. 1986) (affirming directed verdict in favor of defendant physician and noting "absent in this record is any proof of causal connection between the alleged acts of negligence of the doctor and the cause of death of the [patient], an essential ingredient in a negligence case").

It is not enough to toss out possibilities to a jury that Mr. Hamil might have had a chance at survival had the defendants acted differently. Under Mississippi law, "[r]ecovery is allowed only when the failure of the physician to render the required level of care results in the loss of a reasonable probability of a substantial improvement of the plaintiff's condition." *Clayton v. Thompson*, 475 So. 2d 439, 445 (Miss. 1985). This does not mean that the patient had a chance at a better outcome, but instead that the patient would have had a *greater than 50% chance* of that better outcome (in this case, survival). *Ladner v. Campbell*, 515 So. 2d 882 (Miss. 1987).

The plaintiff's sole medical expert, Dr. Louis Silverman, testified that the patient's hemoglobin and hematocrit levels on the last few days of his hospitalization should have alerted the defendants that the patient was bleeding, and he opined that Mr. Hamil was in fact actively bleeding at the time he was discharged from the hospital. At no time did Dr. Silverman give any testimony as to what he believes the defendants should have done about the bleeding (assuming that the patient was bleeding, which the evidence did not support). Likewise, Dr. Silverman did not give any testimony that the failure to take such actions caused or contributed to Mr. Hamil's death. Simply

put, Dr. Silverman alleged that the defendants were negligent and that Mr. Hamil died from a bleeding ulcer, but Dr. Silverman's testimony was not sufficient to bridge the gap to explain any link between these theories. *See Harris v. Shields*, 568 So. 2d 269 (Miss. 1990) (affirming directed verdict when the plaintiff failed to provide evidence to support a causal connection between the care provider's conduct and the patient's death).

Without medical expert testimony to establish a causal connection, the plaintiff has failed to make a prima facie case of medical negligence and the defendants were entitled to a directed verdict.

D. Given the evidence that was presented to the jury, reasonable minds could not differ and judgment should have been entered in favor of the defendants.

A directed verdict should have been entered in favor of the defendants as the evidence was such that reasonable minds could have not differed in reaching a conclusion regarding the evidence, even assuming the admissibility of Dr. Silverman's testimony. *See, e.g., White v. Stewman*, 932 So. 2d 27, 36 (Miss. 2006) (discussing that a motion for JNOV should be granted when "the facts and inferences drawn from this evidence point so overwhelmingly in favor of the movant that reasonable jurors could not have arrived at a contrary result"); *Buskirk v. Elliott*, 856 So. 2d 255 (Miss. 2003) (acknowledging the need to reverse and render if the trial court denied a motion for JNOV despite the fact that reasonable men could not differ as to the evidence presented).

The evidence presented in this case was so overwhelmingly in favor of the defendants that it was truly a case where reasonable minds could not differ, and thus the jury verdict in favor of the plaintiff must be set aside. *White v. Yellow Freight System, Inc.*, 905 So. 2d 506 (Miss. 2004). This is not a case involving a genuine battle of the experts, but instead a case wherein the medical records fully support the testimony of the five physicians (three experts and two defendant physicians) who

explained that there was no negligence by the defendants, while the plaintiff's expert's testimony is medically incorrect because it ignores the undisputed clinical facts and record entries.

II. ALTERNATIVELY, THE DEFENDANTS ARE ENTITLED TO A NEW TRIAL.

The law supports this Court's decision to reverse and render a judgment in favor of the defendants, but in the alternative, a new trial is required given the errors which occurred in the trial conducted in May 2010. Mississippi law states that a new trial is warranted when a jury's verdict goes against the overwhelming weight of the evidence. *Blossman Gas, Inc. v. Shelter Mutual General Insurance Co.*, 920 So. 2d 422 (Miss. 2006) (affirming trial court's ruling granting a new trial for defendant when evidence did not support jury's verdict in favor of the plaintiff); *White v. Yellow Freight System, Inc.*, 905 So. 2d 506 (Miss. 2004) (affirming the trial court's decision to grant a request for a new trial following jury's verdict in favor of plaintiffs).

A. Certain legal errors were made, including errors related to jury selection, improper expert witness testimony, and jury instructions, which entitle the defendants to a new trial.

1. The jury selection was improper, as the court erroneously struck a member of the venire, such that a new trial should be conducted before a new jury.

During voir dire, the court asked the venire if anyone knew any of the attorneys involved in the case, with each attorney's name announced as the attorney stood before the venire. No member of the venire indicated that he or she knew Mark Caraway, counsel for defendant CMMC, although one white female later stated that she knew Mr. Caraway's brother. This individual was Juror 12 on Panel 5 (the first of four panels presented to the court).

The court struck this juror for her misrepresentation to the court, finding that the individual must have known Mr. Caraway if she knew his brother. There was no reasonable basis to make this

conclusion, and it is quite conceivable that an individual could know Mr. Caraway's brother without knowing Mr. Caraway himself, particularly when both Mark Caraway and his brother are attorneys in Jackson, and this female works as a paralegal at a law firm in Jackson. Further, the Mississippi Supreme Court has discussed that "jurors with prior contacts should not be per se summarily excused for cause." *Heaney v. Hewes*, 8 So. 3d 221, 226 (Miss. 2008). Therefore, it was erroneous to strike this member of the venire based on any contact she may have had with a brother of one of the defense attorneys.

2. The plaintiff's expert witness, Dr. Louis Silverman, testified at trial as to theories of negligence by the defendants which had not been previously disclosed to defense counsel, thereby enabling a trial by ambush, which is not allowed in Mississippi.

It was erroneous to allow Dr. Silverman to testify at trial with theories that had never been disclosed to the defendants prior to trial. The Mississippi Supreme Court consistently upholds the exclusion of expert testimony that was not properly disclosed to the opposing parties. *Prestridge v. City of Petal*, 841 So. 2d 1048, 1061 (Miss. 2003); *Haggerty v. Foster*, 838 So. 2d 948 (Miss. 2002); *Blanton v. Board of Supervisors of Copiah County*, 720 So. 2d 190 (Miss. 1998); *West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714 (Miss. 1995); *Boyd v. Lynch*, 493 So. 2d 1315 (Miss. 1986). It is therefore clear under Mississippi law that Dr. Silverman's testimony at trial should not have been allowed.

The defendants were absolutely ambushed by the testimony given by Dr. Silverman at trial, as he gave opinions that had never been disclosed to the defendants, thereby preventing them from being able to properly defend themselves. *See Huff v. Polk*, 408 So. 2d 1368 (Miss. 1982) (recognizing the duty of seasonable supplementation insofar as expert witnesses are concerned and finding the exclusion of expert testimony appropriate when the information was not provided in a

timely manner according to the rules of discovery). Further, although the plaintiff was aware of the change in opinions, no seasonable supplementation was given to the defendants. Since the previously undisclosed opinion testimony of Dr. Silverman was incorrectly allowed to be presented to the jury, the defendants were prejudiced, and a new trial is required.

3. The jury was not properly instructed since the court only gave general instructions to the jury and refused all specific instructions that were offered.

"It is well-established law that a defendant is entitled to have the jury instructed on his theory of the case." *Eckman v. Moore*, 876 So. 2d 975, 979 (Miss. 2004); *Coho Resources, Inc. v. McCarthy*, 829 So. 2d 1 (Miss. 2002). Despite this principle, the court rejected an instruction offered by the defendants[6] through Dr. Smith-Vaniz's counsel that read as follows:

> If you find from a preponderance of the evidence that Mr. Hamil was not actively bleeding when he was discharged from CMMC, then you shall find in favor of the Defendants.

The theory of negligence alleged by the plaintiff's expert can be stated very simply: Mr. Hamil had an ulcer which was bleeding at the time he was discharged from the hospital on November 19, 2004, and that bleeding ulcer was the ultimate cause of Mr. Hamil's death. The defendants' response[7] to this theory is that the medical records and testimony from the witnesses all supported a finding that Mr. Hamil was not bleeding at the time he was discharged from the hospital.

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[6] Since the question of whether Mr. Hamil was bleeding at the time of discharge was not an issue until Dr. Silverman changed his theories of negligence on the witness stand during the trial, this instruction was not submitted with the requested jury instructions prior to the beginning of trial. Instead, this instruction was offered to the court at the close of the evidence in light of the new theories presented by the plaintiff.

[7] Defendants could have been able to have had more specific responses, including expert witnesses from other medical fields had the plaintiff disclosed her new theory of negligence prior to trial.

Therefore, the defendants should have been allowed to have an instruction read to the jury regarding Mr. Hamil not bleeding at the time of discharge. According to *Eckman*, it was reversible error for the court to refuse to allow this instruction to be given to the jury.

There were no instructions that clearly stated the defendants' position that were allowed by the court. In *Eckman*, the Supreme Court found the trial court erred by refusing to "properly instruct the jury as to [the defendant's] theory of the case" despite two other instructions having been given on similar issues. *Eckman*, 876 So. 2d at 981. Further, the *Eckman* Court acknowledged that the rejected instruction was actually a proper instruction which should have been given in light of the plaintiff's own expert witness, who made that issue a point of contention during his testimony. *Id.* at 980. Similarly, testimony from Dr. Silverman, the plaintiff's expert witness, raised the question of "bleeding or not bleeding" and placed it as the critical outcome-determinative issue to be decided by the jury. The defendants were denied the right to have the jury properly instructed on their position insofar as their defense to the plaintiff's theory of negligence against them, and the court's refusal to give this instruction constitutes reversible error.

B. A new trial is warranted because the jury's verdict is against the overwhelming weight of the evidence and the result of bias, passion and prejudice.

The evidence in this case overwhelmingly supported a finding that the defendants were not negligent in regards to the treatment of Mr. Hamil. Five physicians offered testimony to this effect, showing support for their opinions throughout the medical records introduced into evidence. The only evidence that the plaintiff had to support her theory was the testimony of Dr. Silverman, which, interestingly enough, did not address any of the multiple reasons cited by the defense witnesses that Mr. Hamil was not actively bleeding at the hospital and that his death could not have been prevented by the defendants.

In *Blossman Gas*, the trial court found that the jury verdict in favor of Blossman Gas against the insurance company was against the weight of the evidence and awarded a new trial. In affirming this decision, the Supreme Court stated:

> The case at bar is fact driven, and the totality of the evidence is overwhelmingly in Shelter's favor. This is not a case where the evidence presented at trial was in dispute and differing conclusions could be reached.

920 So. 2d at 426. Similar to the events at trial in the case at bar, Blossman Gas relied primarily on their expert's testimony, yet Shelter defended the case on the factual evidence that was presented to the jury. The trial court judge opined that "I can't draw any conclusion other than that this verdict is against the overwhelming weight of the evidence and shows bias prejudice and passion on the part of the jury." *Id.* at 425-26. The Supreme Court agreed and found that a new trial was necessary.

As the Court discussed in *Blossman Gas*, this too is a case that is fact-driven and not one that could result in reasonable minds reaching different conclusions. The evidence overwhelmingly favored the defendants in this case, and there is truly no explanation for the verdict reached by the jury in favor of the plaintiff, such that a new trial is required.

CONCLUSION

Discovery rules exist for a reason - yet allowing this judgment to stand tosses out the rules of discovery and places Mississippi back in the days of trial by ambush. By allowing the defendants to be surprised by these new theories of medical negligence first presented on the second day of trial by the plaintiff's sole expert witness, the trial court moved Mississippi right back to the days of courtroom surprises and no one having any advance knowledge of the evidence the other side would present.

The decision to allow the testimony of Dr. Silverman is especially troublesome given that it was wholly unreliable under *Daubert* standards. The trial court has an important task in evaluating

whether expert testimony is reliable and therefore admissible under *Daubert*, and that gate-keeping responsibility was not carried out as Dr. Silverman was allowed to present testimony that has no support by the medical community (whether by medical literature or the seven physicians who rebutted his theories - five witnesses at trial and two witnesses by post-trial affidavits) and no support by the facts of this case as shown in the medical records.

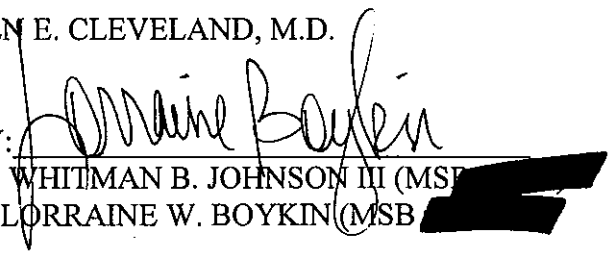
Although the plaintiff endured a tragic loss with the sudden and unexpected death of her husband, she did not have sufficient evidence at trial to support the verdict that was entered in her favor. The facts contained in the medical records and the overwhelming weight of the evidence supported a finding that the care provided by and through the defendants did not cause or contribute to Mr. Hamil's death. The sole medical expert presented by the plaintiff to testify in support of her allegations of negligence provided unreliable, never previously disclosed testimony that was contrary to an affidavit he had given to defeat the defendant's summary judgment motion in the previous year, such that it was erroneous to allow his testimony. Without testimony from a medical expert to establish a breach of the standard of care by the defendants and to establish a causal connection between the defendants' care and Mr. Hamil's death, the plaintiff's claims against the defendants are deficient under Mississippi law.

Errors were made from the commencement of the trial until the jury left for deliberation, and justice requires that these errors be remedied by this Court, whether setting aside the judgment and entering a judgment in favor of the defendants, or at the very least, remanding this matter for a new trial. From the error in jury selection, through the trial by ambush and erroneous testimony allowed to be given, through the error in jury instructions, Mississippi law does not support the judgment entered in favor of the plaintiff.

Defendant Dr. Cleveland therefore respectfully requests this Court reverse the trial court's decision to deny the defendant's motion for a JNOV and enter a judgment in favor of the defendants, or alternatively, remand this matter for a new trial to be held.

Respectfully submitted,

KEN E. CLEVELAND, M.D.

BY: 
WHITMAN B. JOHNSON III (MSB
LORRAINE W. BOYKIN (MSB

OF COUNSEL:

CURRIE JOHNSON GRIFFIN GAINES & MYERS, P.A.
1044 RIVER OAKS DR., JACKSON, MS 39232
P.O. BOX 750
JACKSON, MS 39205-0750
TELEPHONE: 601.969.1010
FACSIMILE: 601.969.5120

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

Hon. Winston Kidd
Hinds County Circuit Court Judge
P.O. Box 327
Jackson, MS 39205

Stephen P. Kruger, Esq.
Page, Kruger & Holland
P.O. Box 1163
Jackson, MS 39215-1163

Alton E. Peterson, Esq.
Stamps & Stamps
P.O. Box 2916
Jackson, MS 39207-2916

Mark P. Caraway, Esq.
Wise Carter Child & Caraway
P.O. Box 651
Jackson, MS 39205

This the 15th day of July, 2011.

WHITMAN B. JOHNSON III
LORRAINE W. BOYKIN

12

Central Mississippi Medical Center
1850 CHADWICK DRIVE
JACKSON, MS 39204
TELEPHONE: 601-376-1000

ADMISSION RECORD

ACCOUNT NO.	MEDICAL RECORDS NO.
2433772	0000250915

PATIENT

ADMIT DATE / TIME	ROOM NO.	PT	FC	AGE	DATE OF BIRTH	SEX	RA	MS	LOCATION	PROGRAM
11/10/2004 17:06	0000	E	C	42	02/11/1962	M	1	S		

PATIENT NAME & ADDRESS	HAMIL, EMMETT O 136 ELMS COURT CIRLCE JACKSON MS 39204 US
SS NUMBER	425-13-5897
PHONE NUMBER	(601)372-8537
PATIENT EMPLOYER	FOUNTAIN CONSTRUCTION
EMPLOYER PHONE NO.	(601)373-4162
COUNTY	25HINDS

GUARANTOR

RESPONSIBLE PARTY & ADDRESS	HAMIL, EMMETT O 136 ELMS COURT CIRLCE JACKSON MS 39204 US
SS NUMBER	425-13-5897
PHONE NUMBER	(601)372-8537
RESPONSIBLE PARTY EMPLOYER	FOUNTAIN CONSTRUCTION
EMPLOYER PHONE	(601)373-4162
RELATIONSHIP TO PATIENT	PATIENT IS G

EMERGENCY CONTACT NAME	EMERGENCY CONTACT PHONE	EMERGENCY CONTACT RELATIONSHIP TO PATIENT
HAMIL, DOROTHY	(601)372-8537	MOTHER

COMMENTS	MSP	MED. KEY	PRIVACY	NPP	ADMIT. BY
BER	☐Y ☒N	☐Y ☒N		Y	BER

PRIVACY

INSURANCE

	PAYER	PLAN	POLICY NUMBER	DATE OF BIRTH
1	950	001	425135897	02/11/1962

INSURANCE CO. NAME & ADDRESS	MS SHEET METAL WORKERS P O BOX 23908 JACKSON MS 39225 (800)688-1834
INSURED'S NAME	HAMIL, EMMETT O
GROUP NUMBER	NONE
GROUP NAME	
AUTHORIZATION	

	PAYER	PLAN	POLICY NUMBER	DATE OF BIRTH
2				/ /

INSURANCE CO. NAME & ADDRESS — INSURED'S NAME — GROUP NUMBER — GROUP NAME — AUTHORIZATION

	PAYER	PLAN	POLICY NUMBER	DATE OF BIRTH
3				/ /

INSURANCE CO. NAME & ADDRESS — INSURED'S NAME — GROUP NUMBER — GROUP NAME — AUTHORIZATION

MISC

DR. ATTENDING / ADMITTING	BRANTLEY, TERRY K
DR. FAMILY / PRIMARY CARE	
DIAGNOSIS / SIGNS & SYMPTOMS	BLOOD IN VOMITUS
ACCIDENT	
ACCIDENT DATE	

PRINCIPAL DIAGNOSIS (The condition established after study to be chiefly responsible for occasioning the admission of the patient to the HOSPITAL for care).

Ulc Bleed
perforated gastric ulcer

DISCHARGE DATE/TIME 11/19/04

CODED

COMPLICATIONS

Sxl lap c wedge resect 11/11/2004 closed

COMORBIDITY(IES)

[illegible]

PRINCIPAL PROCEDURE

APPENDIX I

11/19/2004

Hamil
WCCC/CMMC/00153

AD001A 2433772

MEDICAL RECORDS COPY

CENTRAL MISSISSIPPI MEDICAL CENTER
JACKSON, MISSISSIPPI

Patient Name: HAMIL, EMMETT O
MR Number: 0000250915
Account Number: 2433772
Admission Date: 11/10/2004
Room Number: 1008 ICU
Attending Physician: PARVESH GOEL, MD

CONSULTATION REPORT

CONSULTANT: George T. Smith-Vaniz, M.D.
DATE OF CONSULTATION: 11/11/2004

HISTORY OF PRESENT ILLNESS: Mr. Hamil is a 42-year-old white male who has been having vague epigastric pain for about two weeks. He is a sheet metal hanger and has had some vague pain in his upper ribs which he felt was due to lifting heavy metal. He says he has felt weak for about one week. He did not look at his stools when he has a bowel movement, so he has not been aware of any bleeding. Today he developed dry heaves and after vomiting several times, he vomited bright red blood. He came to the emergency room, where he was evaluated and found to have a hematocrit of 15. He has slight tachycardia with a pulse of 112 to 120. Blood pressure 110/72. He was initially seen by Dr. Dunbar and admitted to Dr. Thomas.

PAST MEDICAL HISTORY: Previous surgery: None except for pneumothorax left lung.

HABITS: No alcohol except occasionally on holidays. He does smoke a pack to a pack and a half of cigarettes per day.

MEDICATIONS: None.

FAMILY HISTORY: Positive for heart disease, no history of diabetes or cancer.

SOCIAL HISTORY: Married. One child.

REVIEW OF SYSTEMS: HEENT: Denies headache or dizziness. No sore throat. CARDIOVASCULAR: He is a smoker. He had a pneumothorax once. He denies hypertension. No chest pain. GASTROINTESTINAL: See present illness. There is a family history of ulcer disease. GU: Unremarkable. MUSCULOSKELETAL: No joint pain. NEUROPSYCHIATRIC: No history of stroke or nervous disorder.

PHYSICAL EXAMINATION: GENERAL: This is a thin, alert, 42-year-old male.

VITAL SIGNS: As noted above.

HEENT: Extra ocular muscles are intact. He has dentures. His posterior pharynx is okay.

NECK: Supple.

CARDIAC: Sinus tachycardia. Breath sounds are decreased.

ABDOMEN: Slight tenderness in the epigastrium. Bowel sounds are present.

RECTAL: Not done.

EXTREMITIES: Good pulses, no edema.

LABORATORY DATA: Normal liver profile, normal urinalysis. INR 1.34, white count 19,000, hemoglobin 5.2, hematocrit 36.1. CMP is normal

IMPRESSION:
1. Upper gastrointestinal bleed.
2. Severe anemia (MCV 83).
3. Must consider peptic ulcer disease, gastritis or a Mallory-Weiss. I doubt that he actually bleed down to a hematocrit of 15 today.

The patient had been advised of the risk of transfusion i.e. hepatitis or acquired immunodeficiency syndrome 1:100,000. He will be transfused, put on proton pump inhibitor, monitored closely. NG-tube is down. When hemoglobin and hematocrit is up we will plan on upper endoscopy.

DICTATION ENDED AT THIS POINT

GTS/47753/1981505
Date Dict: 11/11/2004 00:02:41
Date Trans: 11/11/2004 03:39:08

GEORGE T. SMITH-VANIZ, M.D.

cc: Cassandra F. Thomas, M.D.

CENTRAL MISSISSIPPI MEDICAL CENTER
JACKSON, MISSISSIPPI

Patient Name:	HAMIL, EMMETT O
MR Number:	0000250915
Account Number:	2433772
Admission Date:	11/10/2004
Room Number:	1008
Attending Physician:	PARVESH GOEL, MD

CONSULTATION REPORT

CONSULTANT: Ken E. Cleveland, M.D.
DATE OF CONSULTATION: 11/11/2004

REASON FOR CONSULTATION: Acute abdomen.

HISTORY OF PRESENT ILLNESS: Mr. Hamil is a 42-year-old white male who has been having gastric pain for approximately 2 weeks. Last night, he began vomiting blood. He came to the emergency room where he was admitted and transfused and taken to the intensive care unit. Workup has demonstrated free air within the abdominal cavity.

PAST MEDICAL HISTORY:
1. Spontaneous pneumothorax of the left lung.
2. Tobacco abuse.

ALLERGIES: No known drug allergies.

PHYSICAL EXAMINATION: GENERAL: Well-nourished, well-developed, white male in acute distress.
HEENT: Normocephalic, atraumatic. Pupils are equal, round, and reactive to light.
NECK: Supple, full range of motion.
CARDIOVASCULAR: Tachycardic.
LUNGS: Clear to auscultation bilaterally.
ABDOMEN: Diffusely tender with guarding.
EXTREMITIES: Without clubbing, cyanosis, or edema.

LABORATORY DATA: Laboratory data and x-rays are reviewed and as documented in the chart.

ASSESSMENT: Acute abdomen.

PLAN: To OR for exploratory laparotomy. This has been discussed with the patient and his family. They understand and wish to proceed.

KEC/2592/1920851
Date Dict: 11/11/2004 13:54:12
Date Trans: 11/12/2004 07:13:53

KEN E. CLEVELAND, M.D.

cc: George T. Smith-Vaniz, M.D.

CENTRAL MISSISSIPPI MEDICAL CENTER
JACKSON, MISSISSIPPI

Patient Name:	HAMIL, EMMETT O
MR Number:	0000250915
Account Number:	2433772
Admission Date:	11/10/2004
Room Number:	1008
Attending Physician:	PARVESH GOEL, MD

OPERATIVE REPORT

PREOPERATIVE DIAGNOSIS: Acute abdomen.

POSTOPERATIVE DIAGNOSIS: Anterior perforation of gastric ulcer.

PROCEDURE: Exploratory laparotomy with wedge resection of gastric ulcer and oversewing of gastrotomy.

SURGEON: Ken E. Cleveland, M.D.

ANESTHESIA: General endotracheal.

INDICATION FOR OPERATION: Mr. Emmett Hamil is a 42-year-old white male who presented to the hospital last night with gastric bleeding. Workup demonstrated free air within the abdominal cavity. Exam demonstrated acute abdomen. Risks, benefits and options of operation were discussed with the patient and his family. They understood and wished to proceed. Both verbal and written consent were obtained prior to proceeding to the operating room.

OPERATION IN DETAIL: After the patient was transferred into the operating room and appropriate monitoring equipment was attached, general endotracheal anesthesia was obtained. The patient's abdomen was prepped and draped in the usual sterile fashion. A #10 knife blade was used to make a midline incision carried down to just below the umbilicus. Electrocautery was used to open the abdominal cavity which was noted to be filled with ascetic fluid as well as a lot of edema within the tissues. The area of perforation was very obvious on the anterior wall of the stomach. Exploration of the duodenum and the rest of the small bowel did not demonstrate any other perforations. Electrocautery was used to wedge out the perforated ulcer. 2-0 Vicryl sutures were used to reapproximate the edges. 2-0 Vicryl sutures were then used in a Lembert fashion to oversew the suture line. The abdominal cavity was copiously irrigated. #1 loop PDS was used to reapproximate the fascia layer. Metallic skin clips were used to reapproximate the skin edges. Sterile edges were applied. The patient was awakened and transferred to the recovery room in stable condition.

KEC/2557/1995035
Date Dict: 11/11/2004 13:52:14
Date Trans: 11/12/2004 08:52:02

KEN E. CLEVELAND, M.D.

cc: George Smith-Vaniz
Parvesh Goel, M.D.

1437

M.A.R. VERIFIED

M.A.R. VERIFIED 3772 11/10/2004

NAME: HAMIL, EMMETT O PATIENT I.D.# _____ HOSPITAL # _____

0000230915

ALLERGIES: 042 02/11/1962 NKDA PCU: _____ ROOM # _____

SMITH-VANIZ, GE _____ ADMIT DATE: _____

DIAGNOSIS: _____ _____ HGT: _____

SEX:

PHYSICIAN: _____ AGE: _____ WGT: _____

COMMENTS: _____ SCHEDULED

ADMINISTRATION PERIOD 11/12/04 THRU 11/12/04

MEDICATION	START	STOP	SHIFT 1 23:15 - 07:14	SHIFT 2 07:15 - 15:14	SHIFT 3 15:15 - 23:14
D 5½ NSC 20 meq KCL @ 125 cc/hr	11/12				
Prevacid 30 mg IV q 24°	11/12				2100 CW
Unasyn 3gm IV q 8°	11/12		0100	0900	1700 done on 10w
morphine 1mg/1cc, 2mg q 10 min, max 10 mg/hr.	11/12				2200 4mg DD
Tylenol 650 mg PO/PR q 4° prn	11/12				2230 CW T 100
Phenergan 25 mg IV q 6° prn n/v	11/12				
Chloraseptic Spray, prn	11/12				

RESPONSE	MEDS NOT GIVEN		INJECTION SITES		Initials	PRINT NAME	SIGNATURE
O.–Relief in 30 Minutes	A. NPO Drug	H. See Nursing Notes	1. Right Deltoid Area	6. Left Abdomen	CW	CWolter RN	
R–Relief in 60 Minutes	B. NPO Surgery	I. Patient Asleep	2. Left Deltoid Area	7. Right Thigh			
S.–No Relief	C. Pt. Refused	J. Off of Unit	3. Right Gluteal Area	8. Left Thigh			
	D. Nausea	K. NPO/Studies	4. Left Gluteal Area	9. Right Ventrogluteal			
	E. Hold Dose	L. NPO/Surgery	5. Right Abdomen	10. Left Ventrogluteal			
	F. Absent from Dept.						
	G. Drug not Avail.						

1437

IMPRINTER

3772 11/10/2004
HAMIL, EMMETT O
PT# 0000230915
M 042 02/11/1962
SMITH-VANIZ, GE

0712-1151-0801-P

CENTRAL MISSISSIPPI MEDICAL CENTER

M.A.R. VERIFIED

Hamil

WCCC/CMMC/00198

MEDICATION ADMINISTRATION RECORD

SITE CODES:
1 ABDOMEN
2 RIGHT UPPER OUTER QUADRANT BUTTOCK
3 LEFT UPPER OUTER QUADRANT BUTTOCK
4 RIGHT UPPER ARM
5 LEFT UPPER ARM
6 RIGHT ANTERIOR THIGH
7 LEFT ANTERIOR THIGH

NAME OF PATIENT	BED NO	AGE	DOB	WEIGHT	B S A	TIME PERIOD
HAMIL, EMMETT O	4NE 1437-A	042Y	2/11/62	54.43KG	1.71	11/12/04-11/13/04

MEDICAL RECORD NO	ACCOUNT NO	DOCTOR	DIAGNOSIS
250915	2433772	SMITH-VANIZ, GEORGE T	BLOOD IN VOMITUS

ALLERGIES: NO KNOWN DRUG ALLERG

			MEDICATION ADMINISTRATION TIMES								
			2315-0714			0715-1514			1515-2314		
			TIME	SITE	INITIAL	TIME	SITE	INITIAL	TIME	SITE	INITIAL
PREVACID	30MG	IV							2100	IV	ND
SODIUM CHLORIDE 0.9%	100ML	EVERY NITE AT 9									
START:11/11/04 21:00		P/B# 1									
PCA PUMP CHARGE	1EA=1EA	IV				900		CJ			
*		ONCE DAILY									
START:11/12/04 9:00		P/B# 5									
UNASYN	3GM	INJ	~~600~~ 0100	IV	DP	~~1400~~ 0900			~~2200~~ 1900		
SODIUM CHLORIDE 0.9%	100ML	EVERY 8 HOURS				1400	IV	CP	2200	IV	ND
START:11/12/04 14:00		P/B# 6									

DATE & TIME	STAT or ONE TIME ORDERS	DATE & TIME	OMISSIONS/RESPONSE TO MEDS/ADVERSE EFFECTS/ETC.

Nurses Signature/Int Nurses Signature Int Nurses Signature Int

PATIENT NAME	BED NO
HAMIL, EMMETT O 11/12/04-11/13/04	4NE 1437-A

Continued for Patient Hamil 2433772

SITE CODES:
1 ABDOMEN
2 RIGHT UPPER OUTER QUADRANT BUTTOCK
3 LEFT UPPER OUTER QUADRANT BUTTOCK
4 RIGHT UPPER ARM
5 LEFT UPPER ARM
6 RIGHT ANTERIOR THIGH
7 LEFT ANTERIOR THIGH

MEDICATION ADMINISTRATION RECORD

NAME OF PATIENT	BED NO	AGE	DOB	WEIGHT	BSA	TIME PERIOD
HAMIL, EMMETT O	4NE 1437-A	042Y	2/11/62	54.43KG	1.71	11/13/04-11/14/04

MEDICAL RECORD NO	ACCOUNT NO	DOCTOR	DIAGNOSIS
250915	2433772	SMITH-VANIZ, GEORGE T	BLOOD IN VOMITUS

ALLERGIES: NO KNOWN DRUG ALLERG

Medication	2315-0714 TIME	SITE	INITIAL	0715-1514 TIME	SITE	INITIAL	1515-2314 TIME	SITE	INITIAL
PREVACID 30MG IV SODIUM CHLORIDE 0.9% 100ML EVERY NITE AT 9 START:11/11/04 21:00 P/B# 1							2100 11/15/04 2430		
PCA PUMP CHARGE 1EA=1EA IV * ONCE DAILY START:11/12/04 9:00 P/B# 5				900		CW			
UNASYN 3GM INJ SODIUM CHLORIDE 0.9% 100ML EVERY 8 HOURS START:11/12/04 14:00 P/B# 6	600	IV	DO	1400	IV		~~2200~~ 1900 2309		

DATE & TIME	STAT or ONE TIME ORDERS	DATE & TIME	OMISSIONS/RESPONSE TO MEDS/ADVERSE EFFECTS/ETC.

Nurses Signature Int Nurses Signature Int Nurses Signature Int

(DO) ( ) CWalters RN ( ) RN ( )

PATIENT NAME	BED NO
HAMIL, EMMETT O 11/13/04-11/14/04	4NE 1437-A

Continued for Patient Hamil 2433772

MEDICATION ADMINISTRATION RECORD

SITE CODES:
1 ABDOMEN
2 RIGHT UPPER [illegible] QUADRANT BUTTOCK
3 LEFT UPPER OUTER QUADRANT BUTTOCK
4 RIGHT UPPER ARM
5 LEFT UPPER ARM
6 RIGHT ANTERIOR THIGH
7 LEFT ANTERIOR THIGH

NAME OF PATIENT	BED NO	AGE	DOB	WEIGHT	B S A	TIME PERIOD
HAMIL, EMMETT O	4NE 1437-A	042Y	2/11/62	54.43KG	1.71	11/14/04-11/15/04

MEDICAL RECORD NO	ACCOUNT NO	DOCTOR	DIAGNOSIS
250915	2433772	SMITH-VANIZ, GEORGE T	BLOOD IN VOMITUS

ALLERGIES	2315-0714			0715-1514			1515-2314		
	TIME	SITE	INITIAL	TIME	SITE	INITIAL	TIME	SITE	INITIAL
NO KNOWN DRUG ALLERG									
PREVACID 30MG IV SODIUM CHLORIDE 0.9% 100ML EVERY NITE AT 9 START:11/11/04 21:00 MH P/B# 1							2100	IV	MH
PCA PUMP CHARGE 1EA=1EA IV * START:11/12/04 9:00 MH P/B# 5				900					
UNASYN 3GM INJ SODIUM CHLORIDE 0.9% 100ML EVERY 8 HOURS START:11/12/04 14:00 MH P/B# 6	600	IV	MH	1400	IV	[illegible]	2200	IV	MH
CLEOCIN PHOSPHATE 900MG=6ML INJ DEXTROSE 5% 50ML EVERY 8 HOURS START:11/14/04 14:00 MH P/B# 8	600	IV	MH	1400	IV	[illegible]	2200	IV	MH

DATE & TIME	STAT or ONE TIME ORDERS	DATE & TIME	OMISSIONS/RESPONSE TO MEDS/ADVERSE EFFECTS/ETC.

Hamil
WCCC/CMMC/00208

Nurses Signature Int Nurses Signature Int Nurses Signature Int

PATIENT NAME	BED NO
HAMIL, EMMETT O 11/14/04-11/15/04	4NE 1437-A

Continued for Patient

MEDICATION ADMINISTRATION RECORD

SITE CODES:
1 ABDOMEN
2 RIGHT UPPER QUADRANT BUTTOCK
3 LEFT UPPER OUTER QUADRANT BUTTOCK
4 RIGHT UPPER ARM
5 LEFT UPPER ARM
6 RIGHT ANTERIOR THIGH
7 LEFT ANTERIOR THIGH

NAME OF PATIENT	BED NO	AGE	DOB	WEIGHT	B S A	TIME PERIOD
HAMIL, EMMETT O	4NE 1437-A	042Y	2/11/62	54.43KG	1.71	11/15/04-11/16/04

MEDICAL RECORD NO	ACCOUNT NO	DOCTOR	DIAGNOSIS
250915	2433772	SMITH-VANIZ, GEORGE T	BLOOD IN VOMITUS

ALLERGIES: NO KNOWN DRUG ALLERG

MEDICATION ADMINISTRATION TIMES

				2315-0714			0715-1514			1515-2314		
				TIME	SITE	INITIAL	TIME	SITE	INITIAL	TIME	SITE	INITIAL
PREVACID	30MG		IV				0900	IV	S	2100	IV	mp
SODIUM CHLORIDE 0.9%	100ML	EVERY NITE AT 9										
START:11/11/04 21:00			P/B# 1									
PCA PUMP CHARGE	1EA=1EA		IV				900					
*		ONCE DAILY										
START:11/12/04 9:00			P/B# 5									
UNASYN	3GM		INJ	600	IV	mp	1400	IV	S	2200	IV	mp
SODIUM CHLORIDE 0.9%	100ML	EVERY 8 HOURS										
START:11/12/04 14:00			P/B# 6									
CLEOCIN PHOSPHATE	900MG=6ML		INJ	600	IV	mp	1400	IV	S	2200	IV	mp
DEXTROSE 5%	50ML	EVERY 8 HOURS										
START:11/14/04 14:00			P/B# 8									

DATE & TIME	STAT or ONE TIME ORDERS	DATE & TIME	OMISSIONS/RESPONSE TO MEDS/ADVERSE EFFECTS/ETC.

Hamil
WCCC/CMMC/00212

Nurses Signature Int | Nurses Signature Int | Nurses Signature Int

PATIENT NAME	BED NO
HAMIL, EMMETT O 11/15/04-11/16/04	4NE 1437-A

Continued for Patient 2433772

MEDICATION ADMINISTRATION RECORD

SITE CODES:
1 ABDOMEN
2 RIGHT UPPER OUTER QUADRANT BUTTOCK
3 LEFT UPPER OUTER QUADRANT BUTTOCK
4 RIGHT UPPER ARM
5 LEFT UPPER ARM
6 RIGHT ANTERIOR THIGH
7 LEFT ANTERIOR THIGH

NAME OF PATIENT	BED NO	AGE	DOB	WEIGHT	BSA	TIME PERIOD
HAMIL, EMMETT O	4NE 1437-A	042Y	2/11/62	54.43KG	1.71	11/16/04-11/17/04

MEDICAL RECORD NO	ACCOUNT NO	DOCTOR	DIAGNOSIS
250915	2433772	SMITH-VANIZ, GEORGE T	BLOOD IN VOMITUS

ALLERGIES: NO KNOWN DRUG ALLERG

Medication	2315-0714 TIME	SITE	INITIAL	0715-1514 TIME	SITE	INITIAL	1515-2314 TIME	SITE	INITIAL
✓ PREVACID 30MG IV SODIUM CHLORIDE 0.9% 100ML EVERY NITE AT 9 START:11/11/04 21:00 P/B# 1							2100		U
✓ PCA PUMP CHARGE 1EA=1EA IV * ONCE DAILY START:11/12/04 9:00 D/C 11/17/04 P/B# 5				~~900~~					
✓ UNASYN 3GM INJ SODIUM CHLORIDE 0.9% 100ML EVERY 8 HOURS START:11/12/04 14:00 P/B# 6	600	IV	mp	1400		G	2200		U
✓ CLEOCIN PHOSPHATE 900MG=6ML INJ DEXTROSE 5% 50ML EVERY 8 HOURS START:11/14/04 14:00 P/B# 8	600	IV	mp	1400		8	2200		U
Dulcolax 10mg pr now 11/17/04									
Carafate 1 PO before meals + @ HS			0730	1100			2100 (circled) 1600		

DATE & TIME	STAT or ONE TIME ORDERS	DATE & TIME	OMISSIONS/RESPONSE TO MEDS/ADVERSE EFFECTS/ETC.

Hamil
WCCC/CMMC/00216

PATIENT NAME	BED NO	Nurses Signature	Int	Nurses Signature	Int	Nurses Signature	Int
HAMIL, EMMETT O 11/16/04-11/17/04	4NE 1437-A	MPowe-RN	(mp)		( )	L. Hame RN	(U)

Continued for Patient 2433772

MEDICATION ADMINISTRATION RECORD

SITE CODES:
1 ABDOMEN
2 RIGHT UPPER ...ER QUADRANT BUTTOCK
3 LEFT UPPER OUTER QUADRANT BUTTOCK
4 RIGHT UPPER ARM
5 LEFT UPPER ARM
6 RIGHT ANTERIOR THIGH
7 LEFT ANTERIOR THIGH

NAME OF PATIENT	BED NO	AGE	DOB	WEIGHT	B S A	TIME PERIOD
HAMIL, EMMETT O	4NE 1437-A	042Y	2/11/62	54.43KG	1.71	11/17/04-11/18/04

MEDICAL RECORD NO	ACCOUNT NO	DOCTOR	DIAGNOSIS
250915	2433772	SMITH-VANIZ, GEORGE T	BLOOD IN VOMITUS

ALLERGIES: NO KNOWN DRUG ALLERG

MEDICATION ADMINISTRATION TIMES

	2315-0714			0715-1514			1515-2314		
	TIME	SITE	INITIAL	TIME	SITE	INITIAL	TIME	SITE	INITIAL
HABITROL 21MG/24HR PATCH, NICOTINE 21MG/ FLSTK 21MG=1EA ONCE DAILY TRANSDERM. START:11/13/04 9:04 MED# 35				900	@ shoulder	JP			
ZELNORM, TEGASEROD MALEA 6MG=1EA TWICE DAILY ORAL START:11/17/04 12:20 MED# 39				900	PO	JP	2100	PO	
BISACODYL FLSTK 10MG=1EA NOW RECTAL START:11/17/04 14:36 STOP:11/18/04 14:35 MED# 41	600								
CARAFATE, SUCRALFATE 1GM=10ML QID AC & HS ORAL START:11/17/04 16:00 MED# 42	700			1100	PO	JP	1600 2100		

DATE & TIME	STAT or ONE TIME ORDERS	DATE & TIME	OMISSIONS/RESPONSE TO MEDS/ADVERSE EFFECTS/ETC.

Hamil
WCCC/CMMC/00219

Nurses Signature Int Nurses Signature Int Nurses Signature Int

PATIENT NAME	BED NO
HAMIL, EMMETT O 11/17/04-11/18/04	4NE 1437-A

Continued for Patient

MEDICATION ADMINISTRATION RECORD

SITE CODES:
1 ABDOMEN
2 RIGHT UPPER ... R QUADRANT BUTTOCK
3 LEFT UPPER OUTER QUADRANT BUTTOCK
4 RIGHT UPPER ARM
5 LEFT UPPER ARM
6 RIGHT ANTERIOR THIGH
7 LEFT ANTERIOR THIGH

NAME OF PATIENT	BED NO	AGE	DOB	WEIGHT	B S A	TIME PERIOD
HAMIL, EMMETT O	4NE 1437-A	042Y	2/11/62	54.43KG	1.71	11/18/04-11/19/04

MEDICAL RECORD NO	ACCOUNT NO	DOCTOR	DIAGNOSIS
250915	2433772	SMITH-VANIZ, GEORGE T	BLOOD IN VOMITUS

ALLERGIES: NO KNOWN DRUG ALLERG

	2315-0714			0715-1514			1515-2314		
	TIME	SITE	INITIAL	TIME	SITE	INITIAL	TIME	SITE	INITIAL
HABITROL 21MG/24HR PATCH, NICOTINE 21MG/ FLSTK 21MG=1EA ONCE DAILY TRANSDERM. START:11/13/04 9:04 MED# 35				900		CW			
ZELNORM, TEGASEROD MALEA 6MG=1EA TWICE DAILY ORAL START:11/17/04 12:20 MED# 39				900	po	CW	2100		
CARAFATE, SUCRALFATE 1GM=10ML QID AC & HS. ORAL START:11/17/04 16:00 MED# 42	700			1100	po	CW	1600 2100		

DATE & TIME	STAT or ONE TIME ORDERS	DATE & TIME	OMISSIONS/RESPONSE TO MEDS/ADVERSE EFFECTS/ETC.

Hamil
WCCC/CMMC/00223

Nurses Signature Int Nurses Signature Int Nurses Signature Int

PATIENT NAME	BED NO
HAMIL, EMMETT O 11/18/04-11/19/04	4NE 1437-A

Continued for Patient

Discharge to: S Home __Nursing Home _____Other
DATE: 11-19-04 Time of Discharge: _____
VIA: S Private Care __Ambulance _____Other
Per: S W/C __Stretcher _____Other
Relative/Friend Present at Discharge: S Yes ____No
Valuables Returned: ____Yes _____No
Contents Verified: NA Yes _____No

HEALTH STATUS UPON DISCHARGE

SKIN: Describe: Intact Abd. incision

BOWELS: Date of last bowel movement
S Controlled _____Uncontrolled
BLADDER: S Voiding w/o Difficulty __External Catheter
S Controlled _____Indwelling Catheter
____Uncontrolled ___Date Catheter Changed: _____
Catheter Removed _____Yes ____No ___N/A
WOUND / DRESSING: Describe Appearance:
Abd. incision

IMPAIRMENT:

Patient screened for Influenza Vaccination S Yes ___No
Influenza Vaccine Given ___Yes ___No S N/A
Patient screened for Pneumonia Vaccination S Yes ___No
Pneumonia Vaccine Given: ___Yes ___No S N/A
IV ACCESS / MONITOR S / OTHER: _____
REMOVED: ___Yes S No ___N/A
SPECIAL EQUIPMENT NEEDED FOR HOME:
___Cane ___Walker ___Crutches
___Bed ___Oxygen _____Other
Arrangements Made: ___Yes ___No S N/A

IV/PICC for home use ____Yes S No

VITAL SIGNS: T_____ P_____ R_____ BP_____
COMMENTS:
NO lifting or pulling or strenuous activity.
Call MD for problem
Temp > 101 or Pain Not relieved by pain med or drainage at site

SIGNATURE / TITLE	INITIALS	DATE	TIME
Arlyn Lee RN	S	11/19/04	1600

DISCHARGE INSTRUCTIONS

PHYSICAL CONDITION: Well nourished
White

MEDICATIONS: New Rx Protonix
Lorcet plus X [redacted]

PATIENT INSTRUCTED ON FOOD / DRUG INTERACTION FOR

Coumadin	___Yes	___No	S N/A
Theophylline	___Yes	___No	S N/A
Dilantin	___Yes	___No	S N/A
Lithium	___Yes	___No	S N/A
Isoniazid	___Yes	___No	S N/A
MAO-Inhibitor	___Yes	___No	S N/A

Other: _____
TREATMENT / INCISION CARE/ CATHETER CARE

DIET: Regular Diet
ACTIVITY LIMITATIONS:
Self care as tolerated

FOLLOW-UP INSTRUCTIONS: Call for Dr Cleveland office 949-7811 for 2 wk. appt.
REFERRAL MADE: Follow-up with MD _____

___Home Care ___Case Management/Social Service ___Other
List Referrals Made: Company Phone No: _____

I understand the information / instructions reviewed with me Regarding my healthcare needs.

Patient Date

Emmett O Hamil

AUTHORIZED PERSON RELATIONSHIP

Hamil
WCCC/CMMC/00279

1437

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2433772 11/10/2004
HAMIL, ENNETT O
NR 0000250915
M 042 02/11/1962
SMITH-VANIZ, GE

0600-1047-0701-P Page 1 of 1
WHITE – Medical Record / YELLOW – Patient

CENTRAL MISSISSIPPI MEDICAL CENTER

NURSING DISCHARGE SUMMARY

CENTRAL MISSISSIPPI MEDICAL CENTER
JACKSON, MISSISSIPPI

Patient Name:	HAMIL, EMMETT
MR Number:	0000250915
Account Number:	2433772
Admission Date:	11/10/2004
Discharge Date:	11/19/2004
Room Number:	
Attending Physician:	GEORGE T SMITH-VANIZ, MD

DISCHARGE SUMMARY

DISCHARGE DIAGNOSES:
1. Upper gastrointestinal bleed.
2. Perforated gastric ulcer.
3. Anemia.

CONSULTANT: Dr. Cleveland, general surgery.

PROCEDURE: Exploratory laparotomy with wedge resection of perforated gastric ulcer on 11/11/2204 by Dr. Cleveland.

HOSPITAL COURSE: Mr. Hamil is a 42-year-old male who presented to the emergency room with history of vague epigastric pain for 2 weeks. He had previously attributed this to lifting heavy objects at work. He had been weak for approximately 1 week prior to admission. On the day of admission, he vomited bright red blood and came to the emergency room. His hematocrit was 15. He had a tachycardia and blood pressure of 110/70. He was initially seen by Dr. Dunbar and admitted to Dr. Thomas, and I saw him after he had already arrived in the intensive care unit, having initially been attended by Dr. Dunbar.

There is a past history of pneumothorax but no previous surgery. He did give history of smoking 1-1/2 packs of cigarettes per day. He had had no previous surgery. He was on no regular medications except for Advil he was taking for his vague rib and abdominal pain.

My initial impression was that he had probable peptic ulcer disease and possibly a Mallory-Weiss. He had tenderness in his epigastrium. Bowel sounds were present. His breath sounds were decreased. Initial white count was 19,000. His admission hemoglobin was 5.2 with hematocrit of 16.

My initial concern was that he would continue to bleed and go into shock. However, I felt with that blood count first priority was to change this and get his blood count up before he could be safely sedated and gastroscoped. Blood was crossed and matched,

and after the transfusion was started he spiked a fever and I was concerned that he was having a transfusion reaction. Blood was appropriately evaluated with PT, PTT, and fibrinogen. At that point, his hemoglobin was 5.7, hematocrit 20.8, and white count 12,000. He was still hurting. The radiologist called stating that there was a question of air under the diaphragm. At that point surgery was consulted. He was seen by Dr. Cleveland, and on the basis of the finding it was felt that he should be taken to the operating room.

In the operating room, Mr. Hamil was found to have a perforated gastric ulcer. This was resected. He was continued on antibiotics and proton pump inhibitors. The pathology report revealed a benign ulcer with no Helicobacter being seen. It was felt that the ulcer was probably due to the Advil he had taken. He remained febrile for 3 days and then on the 15th became afebrile. At that point, his abdomen was soft. The nasogastric tube was discontinued. Hemoglobin was 9 with a hematocrit of 27 and the white count 12,000. By the 16th, his abdomen was soft. He had bowel sounds. On the 17th, his diet was advanced to full liquids.

On the 18th, he was tolerating his diet. His abdomen was soft. Dr. Cleveland felt that he could be discharged if he tolerated the diet. His blood count was essentially stable for 3 days, being 8.9 and 26.8 on the 16th, 8.8 and 26.2 on the 18th. On the 19th, the patient was seen by Dr. Cleveland who discharged him after removing his staples, Steri-Stripping his incision, and making an appointment to see him and follow up in 2 weeks. He was discharged before I made rounds that day.

GTS/26077/1356275
Date Dict: 02/24/2005 08:31:43
Date Trans: 02/24/2005 09:50:45

GEORGE T. SMITH-VANIZ, M.D.

cc: Ken E. Cleveland, M.D.

Central Mississippi Medical Center

1850 CHADWICK DRIVE
JACKSON, MS 39204
TELEPHONE: 601-376-1000

DOB 2/11/1962

ADMISSION RECORD

ACCOUNT NO.: 2436150
MEDICAL RECORDS NO.: 0000583360

PATIENT

ADMIT DATE / TIME	ROOM NO.	PT	FC	AGE	DATE OF BIRTH	SEX	RA	MS	LOCATION	PROGRAM
11/20/2004 02:44	7000 A	I1	P	~~42~~	~~11/20/1972~~	M	1	S		IPS

PATIENT NAME & ADDRESS: HAMIL, EMMETT O
136 ELMS COURT
JACKSON MS 39204
US

SS NUMBER: 425-13-5897
PHONE NUMBER: (601)372-8537
PATIENT EMPLOYER: FOUNTAIN CONSTRUCTION
EMPLOYER PHONE NO: (601)373-4162
COUNTY: 25HINDS

GUAR

RESPONSIBLE PARTY & ADDRESS: HAMIL, EMMETT O
136 ELMS COURT
JACKSON MS 39204
US

SS NUMBER: 425-13-5897
PHONE NUMBER: (601)372-8537
RESPONSIBLE PARTY EMPLOYER: FOUNTAIN CONSTRUCTION
EMPLOYER PHONE: (601)373-4162
RELATIONSHIP TO PATIENT: PATIENT IS G

EMERGENCY CONTACT NAME: HAMIL, DOROTHY
EMERGENCY CONTACT PHONE: (601)372-8537
EMERGENCY CONTACT RELATIONSHIP TO PATIENT: MOTHER

COMMENTS: MIW/MIW
MSP: ☐Y ☒N
MED. KEY: ☐Y ☒N
PRIVACY:
NPP: Y
ADMIT BY: MIW

PRIVACY

INSURANCE

	PAYER	PLAN	POLICY NUMBER	DATE OF BIRTH
1	000			00/00/0000

INSURANCE CO. NAME & ADDRESS:
INSURED'S NAME:
GROUP NUMBER: GROUP NAME:
AUTHORIZATION:

	PAYER	PLAN	POLICY NUMBER	DATE OF BIRTH
2				/ /

INSURANCE CO. NAME & ADDRESS:
INSURED'S NAME:
GROUP NUMBER: GROUP NAME:
AUTHORIZATION:

	PAYER	PLAN	POLICY NUMBER	DATE OF BIRTH
3				/ /

INSURANCE CO. NAME & ADDRESS:
INSURED'S NAME:
GROUP NUMBER: GROUP NAME:
AUTHORIZATION:

MISC

DR. ATTENDING / ADMITTING: CLEVELAND, KEN
DR. FAMILY / PRIMARY CARE:
DIAGNOSIS / SIGNS & SYMPTOMS: GI BLEED
ACCIDENT:
ACCIDENT DATE:

PRINCIPAL DIAGNOSIS (The condition established after study to be chiefly responsible for occasioning the admission of the patient to the HOSPITAL for care)

DISCHARGE DATE/TIME:

CODED

COMPLICATIONS

COMORBIDITY(IES)

PRINCIPAL PROCEDURE

CENTRAL MISSISSIPPI MED CENTER
Discharge Summary

Report Status: Signed

Pat Nbr: 2436150 HAMIL, EMMETT O
Req By: CLEVELAND, KEN
Med. Rec: 0000250915 Pat. Type: I1
Type: MED Dict.: 11/21/2004 01:30 81129899
Physician: ROOKS, J RUSSELL

Admit: 11/20/2004 02:44
Discharge: 11/21/2004 04:14
Location:
Transcribed: 11/22/2004 09:14

CENTRAL MISSISSIPPI MEDICAL CENTER
JACKSON, MISSISSIPPI

Patient Name: HAMIL, EMMETT O
MR Number: 0000583360
Account Number: 2436150
Admission Date: 11/20/2004
Discharge Date: 11/20/2004
Room Number: 1012
Attending Physician: KEN CLEVELAND, MD

DISCHARGE SUMMARY

HOSPITAL COURSE: Mr. Hamil was admitted yesterday in the early hours of the morning to the emergency room with a massive upper GI bleed. He arrived to the emergency room in full cardiac arrest and resuscitation was begun by the emergency room.

After resuscitation, he was markedly unstable, but due to massive upper GI bleed was taken to the operating room. The operative note is on the chart at the time of this dictation. He was hemodynamically unstable throughout the day and required massive amounts of blood and blood products, and fluid resuscitation. Despite efforts throughout the day, aggressive resuscitative techniques, including the above mentioned measures, the use of vasopressors, bicarbonate drip, he remained persistently acidotic, was unable to maintain a sustained blood pressure above 70 mmHg. He developed progressive multisystem organ failure throughout the day and a diffuse uncontrollable coagulopathy. After discussions with his wife, the decision was made to proceed no further with attempts at resuscitation and he expired at 1:20 a.m., at which time he was asystolic and had no ventilatory effort.

CENTRAL MISSISSIPPI MED CENTER
Discharge Summary

Report Status: Signed

Pat Nbr: 2436150 HAMIL, EMMETT O
Req By: CLEVELAND, KEN
Med. Rec: 0000250915 Pat. Type: I1
Type: MED Dict.: 11/21/2004 01:30 81129899
Physician: ROOKS, J RUSSELL

Admit: 11/20/2004 02:44
Discharge: 11/21/2004 04:14
Location:
Transcribed: 11/22/2004 09:14

CAUSE OF DEATH: Massive upper GI hemorrhage with exsanguination at home and subsequent progressive acidosis and heart failure, and multisystem failure secondary to this.

JRR/22470/1885439
Date Dict: 11/21/2004 01:30:37
Date Trans: 11/22/2004 09:14:55

J. RUSSELL ROOKS, M.D.

SIGNED ELECTRONICALLY
Dictated by 1073 - ROOKS, J RUSSELL MD
Electronically signed by 1073 - ROOKS, J RUSSELL MD
On: 12/02/2004 08:10:03

AFFIDAVIT OF LOUIS F. SILVERMAN, M.D.

STATE OF TEXAS

COUNTY OF _____

1. My name is Louis F. Silverman, M.D. I am a physician licensed in the State of Texas. I have knowledge of the opinions set forth in this Affidavit and am competent to provide testimony in that regard.

2. I have reviewed the medical records which detailed the care given to Mr. Emmett D. Hamil at Central Mississippi Medical Center by Dr. George T. Smith-Vaniz, Dr. James R. Rooks and Dr. Ken E. Cleveland.

3. I am a Board Certified General and Thoracic Surgeon in active practice in Houston, Texas. I treat patients with upper G.I. Hemorrhage, such as that suffered by Mr. Hamil. I am qualified by education, training and experience to assess the quality of care given such patients and render an expert opinion regarding the quality of such care.

4. It is my opinion that Mr. Hamil was not treated appropriately and that Drs. Cleveland and Smith-Vaniz did not meet the standard of care as applied to reasonably prudent, minimally competent surgeons providing care to patients such as Mr. Hamil.

5. I reviewed the care provided to a patient named Emmett O. Hamil, specifically with regard to the surgical care, diagnosis, and treatment he received from Drs. George T. Smith-Vaniz and Ken E. Cleveland. I reviewed the hospital records from the admission at Central Mississippi Medical Center beginning on November 10, 2004, and the admission of Central Mississippi Medical Center beginning on November 20, 2004.

6. The records reflect Mr. Emmett Hamil was a 42 year old male when he presented to

APPENDIX 2

EXHIBIT tabbies A

the emergency room with an upper G.I. bleed. Laboratory findings were consistent with severe blood loss. X-ray examinations demonstrated the presence of free air within the abdominal cavity, a finding consistent with a perforated viscus. He was seen in G.I. consultation by Dr. George T. Smith-Vaniz, who noted that he was taking no medications.

7. Dr. Ken E. Cleveland then saw Mr. Hamil in surgical consultation. He recommended Laparotomy and that operation revealed anterior perforated gastric ulcer. Wedge excision of that ulcer was performed with primary closure of the stomach. No procedure was done to treat Mr. Hamil's ulcer disease, to prevent recurrent bleeding. No "workup" was ordered to determine the cause of Mr. Hamil's ulcer during the course of his hospital stay either by surgeon Cleveland or gastroenterologist Smith-Vaniz.

8. Mr. Hamil was discharged from Central Mississippi Medical Center on November 19, 2004, the eighth post operation day by Dr. Cleveland. The following day, November 20, 2004, Mr. Hamil suffered a massive upper G.I. re-bleed. He arrived at Central Mississippi Medical Center in full cardiac arrest. Resuscitation was accomplished. He was brought to the operating room by Dr. James R. Rooks. Laparotomy and Gastronomy revealed a posterior gastric ulcer containing a large bleeding vessel. Dr. Rooks was able to control this hemorrhage by over-sewing the ulcer. Unfortunately, multiple system failure and coagulopathy developed to which Mr. Hamil succumbed on November 20, 2004.

9. Dr. Cleveland, in the history and physical, dictated on November 20, 2004 that "the ulcer was thought second to massive non-steroidal anti-inflammatory drug use by Mr. Hamil."

10. An alternative diagnosis was clearly considered by another treating physician who

prescribed Sandostatin, a drug used to treat ulcerogenic vasoactive factors such as associated with the Zollinger-Ellison syndrome, ulcerogenic tumor of the pancreas. Dr. Cleveland cancelled that order after a single dose without any attempt to rule out that diagnosis either by himself or Dr. Smith-Vaniz. The cause of Mr. Hamil's gastric ulcer was unproven. The assumption that non-steroidal anti-inflammatory agent was causative was just that, an assumption.

11. Standard of care requires that an appropriate workup be done to maximize the likelihood of a diagnosis. There was no reason not to perform that workup, and failure to perform that workup was substandard.

12. Mr. Hamil was maintained on anti-ulcer medications while in the hospital and remained asymptomatic on that regime. He should have remained on those medications as an outpatient. Dr. Cleveland, the discharging physician, failed to prescribe these medications. Mr. Hamil's treating physicians, gastroenterologist Smith-Vaniz and surgeon Cleveland, failed to order a diagnostic workup to determine the cause of Mr. Hamil's gastric ulcer. The presence of non-steroidal anti-inflammatory agents could have been determined by blood tests; if significantly elevated blood levels of these NSAIDS was not present, then workup for other ulcerogenic agents, such as the Zollinger-Ellison syndrome, should have been pursued.

13. A blood test for serum gastrin levels and CT examinations of the abdomen to identify pancreatic, duodenal or paraduodenal tumors could have been carried out during Mr. Hamil's recovery from this initial surgery. Had that diagnosis been established, curative total gastrectomy would have prevented Mr. Hamil's fatal re-bleed.

14. Mr. Hamil received no NSAIDs during his 8-day hospitalization or after his discharge. The prompt recurrence of a gastric ulcer post discharge both supports the probability of

an ulcerogenic process other than NSAIDs and the need for ongoing anti-ulcer therapy.

15. In summary, Dr. Cleveland's failure to order outpatient continuation of Mr. Hamil's anti-ulcer medication was substandard. Drs. Cleveland and Smith-Vaniz's failure to determine the etiology of Mr. Hamil's ulcer, thereby preventing curative therapy, was substandard. This substandard care, in all reasonable medical probability, was the proximate cause of Mr. Hamil's final re-bleed.

16. Dr. Smith-Vaniz shares responsibility with Dr. Cleveland for the necessity of ordering an appropriate "work up" to determine the etiology of Mr. Hamil's gastric ulcer. That failure allowed the recurrent bleeding ulcer development that resulted in Mr. Hamil's death.

17. The failure to meet the standard of care by Mr. Hamil's treating physicians resulted in Mr. Hamil's development of the posterior bleeding ulcer which resulted in the demise of this 42 year old patient. Diagnoses and appropriate treatment, in all reasonable medical probability would have averted this patient's death.

18. The foregoing statements are based on reasonable medical probability. I reserve the right to modify this opinion should further information become available.

LOUIS F. SILVERMAN, M.D.

SWORN TO AND SUBSCRIBED BEFORE ME, on this the ___ day of _____, 2009.

NOTARY PUBLIC

MY COMMISSION EXPIRES: _____

LAINE A. FLETCHER
MY COMMISSION EXPIRES
April 19, 2012

and kind of a repeat of what I said. The man came in with an acute, severe bleeding episode, and he was treated correctly for that. They found where the problem was in his stomach, the correct operation was done, and then because he had a bleeding problem, you want to make sure that you solve the problem, so what you do is you follow the blood count and that was done. It was ordered every day. And when you look at the numbers, every day in general you see a steady decline. And by the time that he was ready for discharge from the hospital, his count had dropped significantly. One of the things that we measure is called the hematocrit and that's kind of the percentage of red blood cells to the total amount of fluid in the given amount of blood and that had reached a high, if I remember correctly, of somewhere around 35.6. And on the 19th when he was discharged home it had dropped down to 25. Well, one of the problems that you have when you're dealing with a problem with bleeding in the stomach is to find out what's causing it. One of the things that the people thought might have caused it here was taking what they call a nonsteroidal -- it's a muscle relaxant. Advil is the commonest one that's used -- and it has been known to cause bleeding within the stomach. In my own experience, and I've seen several cases, it usually causes what's called a diffuse gastritis, which means they kind of bleed all over the inside of the stomach, but it is true that it can also cause ulcers. But nothing was done to prove that that was the cause, and from the time of the operation going forward, he didn't get any more of that

APPENDIX 3

medicine, and yet he continued to bleed. There are other much less common causes of bleeding within the stomach. And one of those causes, and I think you heard the attorneys mention the name Zollinger-Ellison, that's a name of two doctors, and they describe the syndrome where there are some tumors most commonly in the pancreas that can secrete a hormone that makes the stomach secrete more acid. That's one of the possible causes. It's not easy to diagnose, but it is a possibility, and there are tests that can be done to make that diagnosis. There are also -- and this is really important -- when you have a patient who shows signs of continuous bleeding, there are tests that you can do to tell you where the bleeding is located, and the way that's done is you inject a radioisotope into the circulation --

MR. JOHNSON: Judge --

THE COURT: Hold on just a minute, Doctor.

THE WITNESS: I'm sorry?

MR. JOHNSON: I understand your ruling, but this is way outside.

THE COURT: That's sustained. You can ask another question, Mr. Peterson.

Q. (MR. PETERSON): Dr. Silverman, you testified regarding hematocrit and hemoglobin level?

A. Yes, sir.

Q. Now, do you have an opinion -- well, first of all, do you recall as you sit here today Mr. Hamil's hematocrit and hemoglobin levels upon his discharge from Central Mississippi Medical Center?

Q. Dr. Silverman, what is a normal hematocrit and hemoglobin for a 42-year-old male such as Mr. Hamil?

A. You'd like to have a hemoglobin somewhere around 14, 13, 14, and hematocrit would be close to 40 percent.

Q. Between Mr. Hamil's transfusion and his discharge from Central Mississippi Medical Center, what happened to his hemoglobin and hematocrit level?

A. It trended steadily down.

Q. Do you have an opinion based upon a reasonable degree of medical certainty as to what would cause that?

A. Yes, sir, I have such an opinion.

Q. Can you tell the jury what opinion is?

A. I think he was continuing to lose. He was losing blood.

Q. He was losing blood. And, Dr. Silverman, what are some of the -- well, do you have an opinion based upon a reasonable degree of medical certainty and based upon your review of the decedent's records in this case as to why he was losing blood?

A. I think that there was clearly another source of blood, of bleeding other than the one ulcer that was treated.

Q. Dr. Silverman, did you have an occasion to review the decedent's records after his -- upon his second admission to the hospital?

A. I did.

Q. And do you have those records?

A. I do.

MR. PETERSON: I ask the court's

indulgence. May I approach, Your Honor?

THE COURT: You may.

Q. (MR. PETERSON): I'd like you to take a look at Plaintiff's P1. Dr. Silverman, based upon your review of the decedent's records, what was the return to the hospital on November 20th, 2004?

A. Well, in the words of Dr. Cleveland himself, massive upper gastric intestinal hemorrhage with a exsanguination, which is bleeding out, at home.

Q. Can you tell the jury in layman's terms what that means?

A. Basically, he had a massive hemorrhage from his stomach enough so that he essentially bled out.

Q. Dr. Cleveland -- I apologize. Dr. Silverman, do you have an opinion based upon a reasonable degree of medical certainty as to whether that ulcer was present upon his discharge from Central Mississippi Medical Center?

A. It probably was. He had an ongoing episode of bleeding throughout the time he was in the hospital and before he had gone to surgery. And when he was operated on, with his second hemorrhage, after they got him back, they found a bleeding artery in the back part of his stomach, and I think that in all probability there was maybe a smaller vessel that was losing. It's hard to tell exactly what vessel was bleeding at that time.

Q. Dr. Silverman, do you have an opinion based upon a reasonable degree of medical certainty as to whether or not there was any indication of that contained within the

decedent's medical records?

A. I'm sorry, sir.

Q. Let me rephrase. Do you have an opinion based upon a reasonable degree of medical certainty as to whether there was an indication contained within the decedent's medical records that he was suffering any type of blood loss?

A. Yes, sir, there was such a finding.

Q. And what was that indication, Dr. Silverman?

A. The decreasing blood count throughout his hospitalization including through surgery.

Q. Dr. Silverman, do you have an opinion based upon a reasonable degree of medical certainty as to whether or not Dr. Cleveland and Dr. Smith-Vaniz met the standard of care for treating the decedent?

A. Yes, sir, I have such an opinion.

Q. Can you tell the jury what that opinion is?

A. In my opinion Dr. Smith and Dr. Cleveland failed to meet the standard of care by failing to, I guess, recognize the ongoing hemorrhage, despite the laboratory tests that showed it, and failed to do anything to try to find out what was causing it, and had they found it he would have been appropriately treated.

Q. And, Dr. Silverman, do you have an opinion based upon a reasonable degree of medical certainty as to whether or not this failure had any causal relation to the decedent's death?

A. I do.

Q. Can you tell the jury what that opinion is?

A. In my opinion, Mr. Hamil bled to death, literally, and had the source of the bleeding been noted and corrected he would not have bled to death.

Q. Now, Dr. Silverman, do you have any opinion as to -- that related to the medications that were provided to the decedent upon his discharge?

A. Yes.

Q. Can you tell the jury what those opinions are?

A. I think that, in fact, he was given medicines that would be appropriate, you know, to treat an ulcer problem.

Q. Dr. Silverman, does that -- is that the same opinion that you've always maintained?

A. I'm sorry, sir.

Q. Is that the same opinion that you've always maintained?

MR. JOHNSON: Object to the leading.

THE COURT: That's sustained. Don't lead him.

Q. (MR. PETERSON): Dr. Silverman, have you offered another opinion previously in regard to the medicines that the decedent was discharged with?

A. Yes, sir, I had.

Q. Can you tell us what that opinion was?

A. Sure. When I went through the records, I didn't find any statement of the medication that he was given when he went home. Mr. Peterson, just hadn't shown me a sheet a paper that documented that he was, in fact, prescribed medication to treat ulcers, anyway, so my

Q. So until you got here last night you were prepared to get on the stand and testify that Dr. Cleveland had breached the standard of care by not providing prescription for ulcer medication on discharge?

A. That was a breach of care, yes, sir.

Q. But it was just incorrect?

A. It is incorrect.

Q. So all this time -- and of course, y'all never told us until today when we heard it for the first time on the stand that you were changing that part of your affidavit?

A. I didn't know about it until last night.

Q. Okay. And you had all the records, didn't you?

A. Well, there was one page that I didn't have.

Q. Well, you didn't get the records from us, you got them from the plaintiff's attorney, didn't you?

A. I beg your pardon, sir?

Q. I said you didn't get the records from us. The plaintiff's attorney provided it?

A. That's correct.

Q. And the medicine that Dr. Cleveland prescribed on discharge that was the appropriate medication for ulcers?

A. Sure.

Q. And is this the page right here that's in the record that's numbered 279 is that the page we're talking about up there where it says -- prescription for --

A. Yes, sir, I did not have that page in my records.

Q. Had you read the depositions of the parties?
A. Sure.
Q. Did you read the deposition of Dr. Cleveland where he said he discharged the patient with prescriptions?
A. Yes, sir, I saw that.
Q. But you didn't bother checking in to it to see where the record of that was?
A. On the contrary, I went through the record in detail, the record that I had and that page just wasn't there.
Q. Well, these pages are numbered. Did you look and see the pages weren't all there?
A. No.
Q. Did you call the plaintiff's attorney and say, wait a minute, you know, I read this deposition where he says he gave it; is there any record that shows he gave it?
A. No, sir, I did not.
Q. Not until last night?
A. Until I saw the page.
Q. All right. Now, do I understand you now to be saying that -- well, first off, in this affidavit, do you see the words "hemoglobin or hematocrit"?
A. No, sir, I don't think I used such words.
Q. And you say that when you give sworn testimony you tell the people you're not going to quit thinking because you may want to add something later?
A. Sure.

Q. I didn't ask you that. Did you bother to find out that we as the defendants, my complaint Dr. Cleveland, was entitled to know the specifics of your opinion?

A. Normally those opinions are delivered in deposition. I always consider something like this to be a very preliminary form, and there was no deposition in this case.

Q. No. Because we had an affidavit that said specifically this is what the doctor did wrong. Do you agree that there are specific allegations in this affidavit?

A. There are some specific allegations. Sure.

Q. One of which is incorrect?

A. Correct.

Q. But now you're telling us there are other specific allegations that aren't in here?

A. That's also true.

Q. Now, do I understand you to be telling us now that the blood count fall in the hemoglobin and hematocrit that that was a symptom of blood loss?

A. Yes, sir.

Q. Do you believe that he was showing symptoms of blood loss while he was in the hospital?

A. I didn't say that. I said there's laboratory evidence of blood loss.

Q. Well, I asked you is blood loss is a symptom?

A. No, blood loss is not a symptom.

Q. Well, didn't you tell us in your affidavit that Mr. -- when you were saying that it was a breach in the

standard care for Dr. Cleveland to send him home without ulcer medication, didn't you say in your affidavit that while he was on that ulcer medication he was asymptomatic?

A. Sure.

Q. But now you're telling us that blood loss is a symptom of an ulcer and that he had that symptom?

A. No, sir, I did not say that blood loss is a symptom. I said blood loss is a result. A symptom is something that is clinical.

Q. Because you've already told us that you didn't tell us in your affidavit that your opinion was that there was blood loss occurring during the hospitalization?

A. No, sir. I said that his management was correct.

Q. But you didn't tell us there were signs of a blood loss in your affidavit, yes or no?

A. No, I did not.

Q. Now, is it your opinion that Mr. Hamil suffered a recurrence pre -- of a gastric ulcer pre or post discharge?

A. I think he had an evolving gastric ulcer predischarge.

Q. So it didn't recur post discharge. It was already there?

A. No, I think that it was evolving.

Q. Well, is it there or not there?

A. No, it's not like that. It's not like being pregnant or a little bit pregnant. You can have area of abrasion that enlarges with an ulcer until finally it gets

big enough to erode into a major artery, which is what I believe happened in this case.

Q. Well, it was your testimony that there was ongoing blood loss throughout the hospitalization; is that correct?

A. That is correct.

Q. But yet in your affidavit you say he was asymptomatic; correct?

A. Sure.

Q. And you also say that this gastric ulcer recurred post discharge, don't you?

A. He had the massive ulcer and bleed post discharged.

Q. Look at paragraph 14.

A. Yes, sir.

Q. The prompt recurrence of a gastric ulcer post discharge; isn't that what you say?

A. Sure.

Q. Does it say he would have one that was evolving, yes or no?

A. No.

Q. It says it recurred post discharge?

A. Yes, sir.

Q. Now, am I also correct in saying that in your opinion you said these doctors breached the standard of care by not -- strike that.

That these doctors breached the standard of care by not determining why he had the first ulcer, and if they had determined it, that they would have taken him back to

surgery and done a total gastrostomy?

A. If they had proven -- I think this is where we're at. If they had proven that he had a Zollinger-Ellison Syndrome, if they had documented an elevated gastrin level and done the appropriate test, yes.

Q. My question is this: Do you believe he had Zollinger-Ellison Syndrome?

A. I'm sorry?

Q. Is it your opinion to a reasonable degree of medical probability that he had Zollinger-Ellison Syndrome?

A. I honestly don't know.

Q. So you can't tell us why this other ulcer occurred?

A. I don't know.

Q. But in your opinion, doesn't your affidavit say, doesn't it suggest that a curative total gastrostomy was warranted?

A. That's procedure that you do if you prove it's a Zollinger-Ellison.

Q. Well, actually it's not, because isn't the treatment for Zollinger-Ellison now medication?

A. Actually, that's a moot point. You can try with medication, but I've had the occasion myself to do a total gastrostomy for that problem.

Q. But would you agree with me that the textbooks say that given the advent of proton bump inhibitors total gastrostomy is no longer warranted?

A. Yes, that is in the literature, but you will

Q. Well, the NSAIDs affect the lining and it takes a while for the lining to heal, doesn't it?

A. Of course it does.

Q. And of course, he's also in the hospital and having had a stressful situation. So you've got the stress and ulcer situation?

A. I guess.

Q. And just to be sure I understand, you acknowledge that there are opinions in your affidavit that were provided to us that you now say are incorrect?

A. Yes.

Q. And that they are opinions you've given today that were nowhere disclosed specifically in your affidavit?

A. I did not make specific statements in the affidavit. That is true.

Q. When did you tell the plaintiff's attorney that was going to be your opinion?

A. I really haven't spoken with him until last night.

MR. JOHNSON: Judge, can I have just a moment?

THE COURT: You can.

MR. JOHNSON: Judge, I don't have anything further.

THE COURT: All right. Mr. caraway or Mr. Kruger?

CROSS-EXAMINATION cont'd

BY MR. KRUGER:

CHANGES BY DR. SILVERMAN
FROM HIS SWORN AFFIDAVIT TO HIS TRIAL TESTIMONY

Affidavit ¶ 13

"Drs. Cleveland and Smith-Vaniz's failure to determine the eiology of Mr. Hamil's ulcer, thereby preventing curative therapy, was substandard."

Affidavit ¶ 12

"[W]orkup for other ulcerogenic agents, such as the Zollinger-Ellison syndrome, should have been pursued."

– changed to –

Trial testimony page 220, lines 9-12

Q: Is it your opinion to a reasonable degree of medical probability that he had Zollinger-Ellison syndrome?

A: I honestly don't know.

Affidavit ¶ 13

"[C]urative total gastrectomy would have prevented Mr. Hamil's fatal re-bleed."

– changed to –

Trial testimony page 220, lines 19-20

Q: [D]oesn't your affidavit say, doesn't it suggest that a curative total gastrostomy was warranted?

A: That's the procedure that you do if you prove it's a Zollinger-Ellison.

(which Dr. Silverman could not testify that Mr. Hamil had)

Affidavit ¶ 15

"In summary, Dr. Cleveland's failure to order outpatient continuation of Mr. Hamil's anti-ulcer medication was substandard."

– changed to –

Trial testimony page 207, lines 9-11

A: I think that, in fact, he was given medicines that would be appropriate, you know, to treat an ulcer problem.

APPENDIX 4

Affidavit ¶ 12

"Mr. Hamil was maintained on anti-ulcer medications while in the hospital and remained asymptomatic . . ."

– changed to –

Trial testimony page 217, lines 18-21, page 218, lines 2-4

Q: Now, do I understand you to be telling us now that the blood count fall in the hemoglobin and hematocrit that that was a symptom of blood loss?

A: Yes, sir.

. . .

Q: . . . [D]idn't you say in your affidavit that while he was on that ulcer medication he was asymptomatic?

A: Sure.

Affidavit ¶ 14 (Emphasis added)

"The prompt recurrence of a gastric ulcer post discharge . . ."

– changed to –

Trial testimony page 218, line 21, page 219, lines 14-23 (Emphasis added)

A: I think he had an evolving gastric ulcer predischarge.

. . .

Q: Look at paragraph 14 [in the affidavit].

A: Yes, sir.

Q: The prompt recurrence of a gastric ulcer post discharge; isn't that what you say?

A: Sure.

Q: Does it say he would have one that was evolving, yes or no?

A: No.

Q: It says it recurred post discharge?

A: Yes, sir.

New opinion at trial:

Trial testimony page 206, lines 18-23 (emphasis added)

> In my opinion Dr. Smith and Dr. Cleveland failed to meet the standard of care by failing to, I guess, recognize the ongoing hemorrhage, despite the laboratory tests that showed it, and failed to do anything to try to find out what was causing it, and had they found it, he would have been appropriately treated.

Acknowledgment that nothing about bleeding was included in Affidavit:

Trial testimony page 215, lines 23-25

Q: . . . [I]n this affidavit, do you see the words "hemoglobin or hematocrit"?

A: No, sir, I don't think I used such words.

Trial testimony page 218, lines 15-17

Q: But you didn't tell us there were signs of a blood loss in your affidavit, yes or no?

A: No, I did not.

Admission that affidavit was inaccurate:

Trial testimony page 223, lines 8-11

Q: And just to be sure I understand, you acknowledge that there are opinions in your affidavit that were provided to us that you now say are incorrect?

A: Yes.

Admission that new opinions were given not previously disclosed:

Trial testimony page 223, lines 12-16

Q: And that the[re] are opinions you've given today that were nowhere disclosed specifically in your affidavit?

A: I did not make specific statements in the affidavit. That is true.

Admission that new opinions were developed the night before his trial testimony:

Trial testimony page 214, line 12

A: I didn't know about it until last night.

Trial testimony page 223, lines 17-20

Q: When did you tell the plaintiff's attorney that was going to be your opinion?
A: I really haven't spoken with him until last night.
