

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2010-TS-01527

**KEN E. CLEVELAND, M.D., AND
GEORGE T. SMITH-VANIZ, M.D.
JACKSON HMA, INC., D/B/A
CENTRAL MISSISSIPPI MEDICAL CENTER**

APPELLANTS

VS.

LANELL HAMIL

APPELLEES

**APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

BRIEF OF GEORGE T. SMITH-VANIZ, M.D., APPELLANT

ORAL ARGUMENT REQUESTED

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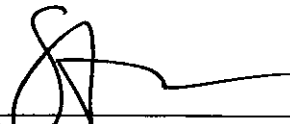
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CERTIFICATE OF INTERESTED PERSONS

In order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

- a. Jackson HMA, Inc., d/b/a Central Mississippi Medical Center, Appellant;
- b. Mark P. Caraway, Wise Carter Child & Caraway, P.A., Counsel for Jackson HMA, Inc., d/b/a Central Mississippi Medical Center;
- c. George T. Smith-Vaniz, M.D., Appellant;
- d. Stephen P. Kruger, Kristopher A. Graham, Jan F. Gadow, Page, Kruger & Holland, P.A., Counsel for George T. Smith-Vaniz, M.D.;
- e. Ken Cleveland, M.D., Appellant;
- f. Whitman B. Johnson, III, Lorraine Lorraine Walters Boykin, Currie Johnson Griffin Gaines & Myers, Counsel for Ken Cleveland, M.D.;
- g. Lanell Hamil Prisock, Individually and on Behalf of the Wrongful Death Beneficiaries of Emmitt O. Hamil, Deceased, Appellees;
- h. Larry Stamps, Alton E. Peterson, Stamps & Stamps, Counsel for Appellees;
- i. Honorable Winston L. Kidd, trial judge.

THIS, the 15 day of July, 2011.



Stephen P. Kruger
Jan F. Gadow
Kristopher A. Graham

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STATEMENT REGARDING ORAL ARGUMENT

Because of the unique set of facts presented in this appeal and the specific nature of the underlying civil action and its background, Appellants submit that this Court's decisional process will be significantly aided by oral argument. M.R.A.P. 34 (a)(3).

STATEMENT OF THE ISSUES

A. It was Error to Admit the Testimony of Hamil's Expert, Dr. Silverman, because:

- 1. This Testimony does not Meet the Standards for Admission under M.R.E. 702 and Daubert;***
- 2. Disclosure of Dr. Silverman's Opinions for the First Time, at Trial, Violates the Mississippi Rules of Civil Procedure, Well-Settled Precedent, and the Trial Court's Ruling on Dr. Smith-Vaniz's Motion in Limine, Resulting in Trial by Ambush; and***
- 3. Dr. Silverman's Expert Opinion Testimony is Inadmissible Pursuant to Judicial Estoppel.***

B. The Verdict is Against the Overwhelming Weight of the Evidence.

I. INTRODUCTION

Lanell Hamil-Prisock¹ ("Hamil") filed an action for medical negligence against George T. Smith-Vaniz, M.D., a Gastroenterologist ("Dr. Smith-Vaniz"), and others, relating to the care and treatment provided to Emmett O. Hamil ("Mr. Hamil") in November of 2004, for a perforated gastric ulcer. Specifically, Hamil claims Mr. Hamil's death could have been prevented if Dr. Smith-Vaniz and the other defendants had complied with the applicable standards of care. However, Hamil failed to provide any admissible medical expert opinion testimony concerning the standard of care applicable to Dr. Smith-Vaniz, his alleged breach thereof, or causation.

II. STATEMENT OF THE CASE

Hamil filed her Complaint against Dr. Smith-Vaniz, Dr. Ken Cleveland ("Dr. Cleveland") and Central Mississippi Medical Center ("CMMC") on January 12, 2007, seeking damages for the alleged wrongful death of her husband, Emmett O. Hamil. (C.P. 8) Dr. Smith-Vaniz filed his Answer in a timely fashion, denying the substance of Hamil's Complaint and asserting various affirmative defenses. (C.P. 18) A Motion for Summary Judgment was filed by Dr. Smith-Vaniz, which the trial court denied based upon the affidavit provided by Hamil's expert, Dr. Louis Silverman. (C.P. 74) Following presentation of the plaintiff's case at a jury trial in May 2010, and again at the conclusion of all evidence, the trial court denied Dr. Smith-Vaniz's Motions for Directed Verdict. (T. 277-79, 285, 432-33) The jury subsequently returned a verdict in favor of Hamil and the trial court entered a Final Judgment in accord, against Dr. Smith-Vaniz and another physician defendant, Dr. Cleveland. (C.P. 188, 189, 191) Dr. Smith-Vaniz filed a Motion for JNOV or, alternatively, for new trial, and also joined in Dr. Cleveland's Motion for JNOV/new trial. (C.P. 193, 418) The trial court

¹ Mrs. Hamil was remarried a few years before trial.

denied both Motions for JNOV and Drs. Smith-Vaniz and Cleveland filed their respective Notices of Appeal to this Court. (C.P. 422, 433, 435)

III. STATEMENT OF THE FACTS

On November 10, 2004, Lanell Hamil came home from work to find her husband, Emmitt Hamil, suffering severe stomach cramps and vomiting blood. The Hamils drove to CMMC for emergency medical help. (T. 256-58) Mr. Hamil was evaluated by the emergency room physician, whose initial impression was an upper GI bleed. He then consulted Dr. Smith-Vaniz, who was board certified in Internal Medicine and a Gastroenterologist with thirty years of experience. Dr. Smith-Vaniz was most concerned with Mr. Hamil's upper GI bleeding. (T. 115-121, 258-59) Before attempting to determine the cause of the bleeding and trying to stop it, Dr. Smith-Vaniz first needed to stabilize Mr. Hamil by getting his vital signs and blood pressure up to a normal, stable level. (T. 121-26) After blood transfusions were given, Dr. Smith-Vaniz believed Mr. Hamil was stable enough to undergo an endoscopy to determine the cause of the bleeding. (T. 133-36) However, x-rays were taken first to rule out complete perforation. When the x-rays showed free air in Mr. Hamil's abdomen, indicating perforation, the endoscopy became contraindicated and, instead, Dr. Smith-Vaniz called Dr. Cleveland for a surgical opinion. (T. 358, 362-63) While continuing to receive blood, Mr. Hamil was taken to surgery where Dr. Cleveland located a perforated ulcer in Mr. Hamil's stomach and successfully performed a wedge resection of it. (T. 360-62) Following this surgery, Mr. Hamil stayed in ICU three or four days before being moved into a regular room. (T. 260-61) Mr. Hamil's ulcer was likely caused by his use of Advil (an NSAID), and his pack and-a-half a day tobacco use². (T. 147-48, 271, 298-99, 321)

² The main causes of ulcers are H. Pylori infection, cancer, or use of nonsteroidals or NSAIDs, particularly in combination with nicotine. Mr. Hamil tested negative for H. Pylori and for cancer, but had a history of heavy tobacco and NSAID use. (T. 294, 297-99, 321, 363-64)

After the surgery, Dr. Smith-Vaniz was not only treating the incision in Mr. Hamil's stomach, but was also attempting to prevent future ulcers. He did this with anti-ulcer medication and by stopping Mr. Hamil's use of NSAIDs and tobacco. (T. 145-48, 298) Mr. Hamil was put on a proton pump inhibitor to reduce the amount of stomach acid and allow his stomach to heal from the surgery. (T. 373-74) Although neither Dr. Smith-Vaniz nor Dr. Cleveland thought Mr. Hamil had any additional ulcers following the wedge resection, checking for same via endoscope was not an option because, until the stomach had thoroughly healed from the surgery, an endoscopy could cause the stomach to burst like a balloon. (T. 149-50, 165, 300, 362-63) Dr. Smith-Vaniz's decision to pass on the endoscope after surgery and, instead, prescribe anti-ulcer medication and order cessation of NSAIDs and tobacco was the appropriate thing to do. In fact, it was the only thing that could have been done. (T. 299-300) Even Hamil's medical expert agreed that the medications prescribed for Mr. Hamil at the time of discharge were appropriate. (T. 207)

Although the pre-surgical blood transfusions effectively increased Mr. Hamil's hemoglobin and hematocrit levels, these levels decreased after surgery. However, the drop in these levels post-surgery was both normal and expected and did not indicate blood loss. (T. 141, 370) To determine whether a patient's decreasing hemoglobin and hematocrit levels indicate active bleeding, physicians examine the stool and stomach contents for blood. (T. 138) Following his surgery, there was no evidence of blood in Mr. Hamil's stool and no evidence of blood in his stomach based on the contents of his nasogastric ("NG") tube. (T. 138, 142-43, 303-04, 307, 336-37, 366-68, 372; EX D-9 blood summary) After removal of the NG tube (four days before discharge), all of Mr. Hamil's clinical signs - feeling better, increased appetite, ability to tolerate food, desire to go home, and his good spirits upon discharge - indicated he was not bleeding. (T. 342, 356, 371-73) Following surgery, Mr. Hamil steadily improved and when

Dr. Cleveland discharged him on November 19th he was “absolutely not suffering from any active bleeding”. (T. 261-62, 374-75) Dr. Cleveland testified that Mr. Hamil was not bleeding from after surgery until the day of discharge and, indeed, he had shown no evidence of bleeding anytime during his postoperative period. (T. 357)

Although Mr. Hamil initially did well upon returning home, including exhibiting an appetite, five or six hours later that evening he suffered a sudden onset of severe stomach pain, began vomiting blood, and collapsed after going to the restroom. (T. 264-65, 275-76) Mr. Hamil’s wife immediately began CPR in the home and Mr. Hamil was back at CMMC very quickly, but he could not be saved. Mr. Hamil had developed a second ulcer which, sometime after his discharge from CMMC, eroded into a major blood vessel. Massive bleeding can occur suddenly and without warning when such an ulcer erodes into that vessel. (T. 150, 268, 375, 380, 383)

IV. SUMMARY OF THE ARGUMENT

Hamil's expert, Dr. Silverman, is not qualified by education, training or experience to render standard of care opinions regarding inpatient gastroenterology practice, and he readily admitted it. He is not well versed in current gastroenterology practice, has no gastroenterology training, and had never managed a patient from a gastroenterology standpoint. Although the affidavit he "withdrew" at trial purported to define the standard of care applicable to Dr. Smith-Vaniz, there was no such definition given at trial. Dr. Silverman's opinion at trial was simply that Mr. Hamil should not have been discharged because he was actively bleeding. There was no argument that anything further should, or could, have been done while Mr. Hamil was in the hospital. In effect, Dr. Silverman admitted the treatment Mr. Hamil received at home was identical to the treatment he would have been receiving in the hospital, if he had not been discharged.

Even assuming Dr. Silverman is qualified to give standard of care opinions on gastroenterology, and assuming there was a breach of that standard by Dr. Smith-Vaniz, Dr. Silverman failed to establish a sufficient causal connection between the alleged breach and Mr. Hamil's outcome. There is no testimony that established Mr. Hamil would have had a greater than fifty percent chance of survival if he had experienced the massive bleed in the hospital. To the contrary, the testimony established that Mr. Hamil collapsed and died immediately.

Dr. Silverman's opinions should have been excluded. Not only were the opinions made known for the first time at trial, after cross examination by the Defendants, but they actually contradict the sworn testimony of Dr. Silverman, upon which Dr. Smith-Vaniz's entire defense had been prepared. In this case, even if "trial by ambush" were allowed, judicial estoppel should have prevented Dr. Silverman's contradictory theories from being introduced.

Finally, if one ignores Hamil's complete disregard for well-settled procedural and evidentiary safeguards, and one does not question or examine the contradictory, sworn positions of Hamil's only expert, the total lack of support for Hamil's theory, combined with ample, unrefuted evidence to the contrary, justifies reversal based on the overwhelming weight of the evidence in favor of Dr. Smith-Vaniz. Dr. Silverman's sole reliance on a single set of lab values, while ignoring the trend of those values and others, his refusal to consider other, more likely explanations for those values, and his unwillingness to correlate all of those findings with the clinical picture of Mr. Hamil, yielded a verdict that is against the overwhelming weight of the evidence.

V. LEGAL ARGUMENT

A. It was Error to Admit the Testimony of Hamil's Expert, Dr. Silverman.

1. *This Testimony does not Meet the Standards for Admission under M.R.E. 702 and Daubert.*

At trial, Hamil presented her sole medical expert, Dr. Louis Silverman, a surgeon licensed in Texas. (T. 170-71) Pre-trial, Dr. Silverman's affidavit and Hamil's responses to interrogatories concerning expert witness testimony indicated that Dr. Silverman would offer expert opinion testimony to the effect that Dr. Smith-Vaniz and Dr. Cleveland were negligent because they failed to perform a "work up" to determine the cause of Mr. Hamil's first ulcer (treated with the wedge resection procedure) and failed to prescribe anti-ulcer medication to continue, post-discharge. (C.P. 69-70, 85-88, T. 209-10, 214) Likely because the invalidity of both of these opinions was indisputable³, Dr. Silverman provided wholly different opinion testimony at trial, to the effect that Dr. Smith-Vaniz and Dr. Cleveland were negligent by failing

³ Medical tests eliminated cancer and H. Pylori as the cause of Mr. Hamil's ulcer, endoscopic testing for ulcers/bleeding could have been catastrophic in the wake of Mr. Hamil's surgery, and he was, in fact, taking anti-ulcer medication following his surgery and that medication was continued post-discharge. (T. 145-48, 149-50, 165, 294, 297-99, 300, 321, 362-64)

to recognize that Mr. Hamil was actively bleeding post-surgery and by discharging Mr. Hamil while he was actively bleeding. (T. 210, 214, 217, 218) Contrary to all discovery, indicating Dr. Silverman thought Mr. Hamil was “asymptomatic” post-surgery, Silverman’s trial testimony was that Mr. Hamil died as a result of an entirely new gastric ulcer which began bleeding prior to discharge, and that the standard of care was breached when Mr. Hamil was prematurely discharged. (T. 218-19) According to Dr. Silverman’s new opinions, Dr. Smith-Vaniz and Dr. Cleveland should have recognized that Mr. Hamil was bleeding post-surgery, based on his hematocrit and hemoglobin levels, and should not have discharged Mr. Hamil. (T. 199, 206)

Dr. Silverman is not a gastroenterologist, has never had any gastroenterology training or continuing medical education, and has never held privileges, been hired, or consulted as a gastroenterologist. (T. 177) *Dr. Silverman admitted he does not consider himself an expert in gastroenterology and conceded he was not familiar with the standard of care applicable to a gastroenterologist.* (T. 183-87).

Dr. Smith-Vaniz objected to Dr. Silverman’s testimony regarding the standard of care of a gastroenterologist, arguing it should not be allowed because Dr. Silverman was not sufficiently familiar with the specialty of gastroenterology to render expert opinions on it. Although Dr. Silverman admitted he was not an expert in the field of gastroenterology, the trial court accepted Dr. Silverman. However, he was accepted as an expert *in the field of thoracic and cardiovascular surgery.* (T. 189-96) Dr. Smith-Vaniz then obtained a continuing objection to any testimony by Dr. Silverman that Dr. Smith-Vaniz had breached the standard of care applicable to a gastroenterologist because such testimony was not within Dr. Silverman’s area of expertise. (T. 197-98)

During his expert voir dire, Dr. Silverman admitted that he did not consider himself an expert in gastroenterology and further conceded he was not familiar with the standard of care

applicable to a gastroenterologist. (T. 183-87) He also stated that he would only be testifying about the overall care provided by a physician *other than* one utilizing gastroenterology skills. (T. 184) Then, on direct examination, Dr. Silverman testified that it was his opinion that Dr. Smith-Vaniz had failed to meet the standard of care. (T. 199, 206) The trial court abused its discretion in allowing Dr. Silverman's "expert" medical testimony regarding whether Dr. Smith-Vaniz, a gastroenterologist, satisfied the applicable standard of care.

This Court reviews admission or exclusion of evidence pursuant to an abuse of discretion standard. *Denham v. Holmes*, 60 So.3d 773, 783 (¶ 34) (Miss. 2011) (citing *Investor Res. Servs., Inc. v. Cato*, 15 So.3d 412, 416 (Miss. 2010) (citing *Adcock v. Miss. Transp. Comm'n*, 981 So.2d 942, 946 (Miss. 2008))). Likewise, this Court reviews the trial court's determination as to the qualifications of an expert witness for abuse of discretion. *McDonald v. Memorial Hospital*, 8 So.3d 175, 179 (¶ 8) (Miss. 2009) (citations therein omitted). When the trial court has abused its discretion in admitting evidence so as to prejudice a party, this Court will reverse. *Bullock v. Lott*, 964 So.2d 1119, 1128 (¶ 25) (Miss. 2007) (citations therein omitted); *Washington v. Kelsey*, 990 So.2d 242, 244 (¶ 2) (Miss. App. 2008).

Mississippi follows the federal *Daubert/Kumho* standard in analyzing the admissibility of such expert testimony: the expert opinion must be relevant (that is, it must assist the trier of fact) and it must be reliable. *Denham*, 60 So.3d at 783 (¶ 35) (citing M.R.E. 702, Comment); *Sanders v. Wiseman*, 29 So.3d 138, 141 (¶ 10) (Miss. App. 2010) (citations therein omitted). The criteria in M.R.E. 702 are examined in making this determination. *Sanders*, 29 So.3d at 141 (¶ 10) (citations therein omitted).

Mississippi Rule of Evidence 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Only if expert testimony withstands the two-pronged M.R.E. 702 inquiry should it be admitted: the witness must be qualified by virtue of his knowledge, skill, experience or education *and* his scientific or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue. *McDonald*, 8 So.3d at 181 (§ 15) (citations therein omitted). Beyond that, the expert's testimony must also be reliable. M.R.E. 702.

a. Dr. Silverman is not Qualified to Testify Against Dr. Smith-Vaniz.

There is a distinction between whether a witness is qualified to be accepted as an expert and whether a witness's expert opinion testimony as to a particular matter should be admitted. Admission of expert testimony depends on the expert's scope of knowledge and experience and requires a showing that the witness is familiar with the applicable standard of care. *Triplett v. River Region Medical Corp.*, 50 So.3d 1032, 1037 (§ 17) (Miss. App. 2010) (citation omitted); *Trapp v. Cayson*, 471 So.2d 375, 379-80 (Miss. 1985). Expert witnesses must demonstrate familiarity with a specialty rather than with a particular subject. *Triplett*, 50 So.3d at 1037 (§ 17) (citing *Hubbard v. Wansley*, 954 So.2d 951, 958 (§ 17) (Miss. 2007)). While there is no hard and fast rule that an expert may only testify regarding his own particular specialty, in order to provide expert testimony as to another specialty, he must be sufficiently familiar with that specialty and its applicable standard of care by knowledge, skill, experience, training, or education, as required by M.R.E. 702. *Figueroa v. Orleans*, 42 So.3d 49, 52-53 (§ 12)

(Miss. App. 2010) (citation therein omitted); **McDonald**, 8 So.3d at 181 (¶ 15) (citations therein omitted) **Troupe v. McAuley**, 955 So.2d 848, 856 (¶ 22)(Miss. 2007).

McDonald

In **McDonald**, the plaintiff sued Dr. Teran-Benitez, a gastroenterologist, for medical malpractice in performing an esophagogastroduodenoscopy (EGD) on McDonald's husband, allegedly resulting in his death. The trial court struck McDonald's medical experts, Dr. Galvez, a pathologist and psychiatrist, and Dr. Nichols, a pathologist, because there was no evidence that these experts had any familiarity with Dr. Teran-Benitez' specialty or with the standard of care applicable to him. **McDonald**, 8 So.3d at 181 (¶¶ 16-18). Dr. Galvez had never practiced gastroenterology, had not performed any gastroenterology procedures since medical school except for one colonoscopy more than thirty years prior, had never admitted a patient to an acute-care facility other than a psychiatric one, had not performed an EGD, had not intubated a patient in more than forty years, and had never been involved in a procedure with a DNR patient where family member consent was necessary to take life-saving action (which was the case with Mr. McDonald). Based on this testimony and on his CV, the trial court found Dr. Galvez was not familiar with the standard of care applicable to a gastroenterologist, and he had not exercised the same level of intellectual rigor that characterizes the practice of an expert in the field of gastroenterology. This Court agreed. **McDonald**, 8 So.3d at 181-82 (¶¶ 16-19).

Similarly, Dr. Nichols testified that he had never treated a patient in Mr. McDonald's situation, had never been involved with DNR patients, and that he was offering standard of care testimony for a "plain M.D." rather than for a gastroenterologist. The trial court found that Dr. Nichols had offered no testimony that he was familiar with or competent to testify to the standard of care of a gastroenterologist and, again, this Court agreed. **McDonald**, 8 So.3d at 182 (¶¶ 18-19). See also **Dazet v. Bass**, 254 So.2d 183, 187 (Miss. 1971) (witness qualified as

medical expert at trial, but trial court dismissed him from stand and refused to admit his testimony because he had no knowledge of the applicable standard of care); *West v. Sanders Clinic for Women*, 661 So.2d 714, 719 (Miss. 1995) (deposition testimony of otherwise qualified expert excluded from evidence at trial because plaintiff failed to establish expert's familiarity with applicable standard of care); *Hubbard*, 954 So.2d 951, 957-58 (¶ 15-19) (Miss. 2007) (trial court properly refused to allow testimony of physician with knowledge, skill, training, education and experience that would qualify him to testify as expert, but for his lack of familiarity with the applicable standard of care).

Hamil's sole medical expert, Dr. Silverman, specializes in surgical care⁴, while Dr. Smith-Vaniz is a gastroenterologist who deals with continual care of patients. Dr. Silverman is not sufficiently familiar with the specialty of gastroenterology and the standard of care applicable to a gastroenterologist. M.R.E. 702; *Figueroa*, 42 So.3d at 52-53 (¶ 12); *McDonald*, 8 So.3d at 181 (¶ 15); *Troupe*, 955 So.2d at 856 (¶ 22). Dr. Silverman stated that he did not consider himself an expert in gastroenterology and conceded he was not familiar with the standard of care applicable to a gastroenterologist. (T. 183-87) Dr. Silverman testified that he had never had any gastroenterology training or continuing medical education and had never held privileges, been hired, or consulted as a gastroenterologist. (T. 177) Dr. Silverman even specifically stated during his expert *voir dire* that he would provide testimony only about the overall care provided by a physician *other than* one using gastroenterology skills. (T. 184) Even the opinion expressed in Dr. Silverman's affidavit states that Dr. Smith-Vaniz did not meet the standard of care applied to a reasonably prudent minimally competent "surgeon", further evidencing Dr. Silverman's lack of familiarity with gastroenterology and the appropriate standard of care applicable to Dr. Smith-Vaniz. (T. 224; C.P. 85)

⁴ Maintaining a website where he is known as the "Houston Vein Eraser". (T. 175)

As was the case with the medical experts in *McDonald*, Dr. Silverman had never practiced in the field of gastroenterology. (T. 177-80) Akin to Dr. Nichols in *McDonald*, Dr. Silverman's testimony was directed toward a "plain M.D." rather than toward a gastroenterologist. There is simply no evidence that Dr. Silverman had any familiarity with Dr. Smith-Vaniz's specialty or with the standard of care applicable to him. It follows that Dr. Silverman was not qualified to testify to the standard of care of a gastroenterologist. *McDonald*, 8 So.3d at 182 (§§ 18-19). Because Dr. Silverman is, by his own admission, lacking the requisite familiarity with the specialty of gastroenterology and with the standard of care applicable to a gastroenterologist, the trial court erred in admitting his expert opinion testimony concerning this specialty. *Dazet*, 254 So.2d at 187; *West*, 661 So.2d at 719; *Hubbard*, 954 So.2d at 957-58 (§ 15-19). This erroneous admission of unqualified expert testimony constitutes a prejudicial abuse of discretion; this Court must reverse. *Denham*, 60 So.3d at 783 (§ 34); *Bullock*, 964 So.2d at 1128 (§ 25). So while Dr. Silverman's qualifications as an expert in surgery are not at issue, he failed to show sufficient familiarity with Dr. Smith-Vaniz's specialty. Consequently, he had no way of knowing the applicable standard of care. *Triplett*, 50 So.3d at 1037 (§ 7); *Figueroa*, 42 So.3d at 52-53 (§ 12); *Troupe*, 955 So.2d at 856 (§ 22); *Trapp*, 471 So.2d at 379-80; M.R.E. 702. Particularly in light of Dr. Silverman's admission that he was not familiar with the standard of care applicable to a gastroenterologist, admission of his expert opinion testimony regarding that specialty is clearly erroneous, which constitutes an abuse of discretion. *Denham*, 60 So.3d at 783 (§ 34). The trial court's abuse of discretion in erroneously admitting Dr. Silverman's expert opinion testimony unquestionably prejudiced Dr. Smith-Vaniz because it is the only evidence to the effect that Dr. Smith-Vaniz breached his standard of care. It follows that this Court must reverse. *Bullock*, 964 So.2d at 1128 (§ 25).

Hubbard

There is an important distinction between familiarity with a *subject* and familiarity with a *specialty*. In **Hubbard**, this Court found that, although the plaintiff's proposed expert, Dr. Stringer, was knowledgeable in treating the subject medical problem, his familiarity was limited to treating said problem as a neurosurgeon. He did not know how an internist was trained to approach the problem. **Hubbard**, 954 So.2d at 958 (¶ 17). The proposed expert did not consider himself an expert in internal medicine, he was not familiar with the medical literature relied upon by those in the internal medicine field, he had never practiced primary care medicine, had never enjoyed staff privileges that would allow him to do so, and he had not recently read the relevant internal medicine treatises. **Hubbard**, 954 So.2d at 957-58 (¶ 16). Moreover, although this expert testified that he had treated patients with the subject medical problem, he did not indicate that he knew how an internal medicine doctor would treat such patients; his knowledge, skill, training, education and experience were in neurosurgery rather than internal medicine; and the plaintiff offered no evidence that his expert had any familiarity with the standard of care required of an internal medicine specialist in treating the subject condition. **Hubbard**, 954 So.2d at 958 (¶¶ 18-19). This Court found no abuse of discretion in the trial court's holding that this expert was not qualified to testify as to the standard of care applicable to the defendant, an internal medicine physician. **Hubbard**, 954 So.2d at 958 (¶ 19). Further, this Court explained: "Dr. Stringer's knowledge, skill, training, education, and experience are in the area of neurosurgery. While it is obvious that Dr. Stringer is an experienced and knowledgeable neurosurgeon and that he has experience in treating subarachnoid hemorrhages as a neurosurgeon, Hubbard has offered no evidence that Dr. Stringer has any familiarity with the standard of care that would be required of an internal medicine specialist in treating a subarachnoid hemorrhage." **Hubbard**, 954 So.2d at 958 (¶ 19).

Likewise, Dr. Silverman did not consider himself an expert in gastroenterology, he had never practiced gastroenterology, and had never enjoyed staff privileges that would have allowed him to do so. (T. 177, 183) As was the case in *Hubbard*, although Dr. Silverman testified that he had treated patients postoperatively, he did not indicate that he knew how a gastroenterologist would treat patients postoperatively to a wedge resection. His knowledge, skill, training, education and experience were in general and thoracic surgery rather than gastroenterology and Hamil offered no evidence that Dr. Silverman had any familiarity with the standard of care required of a gastroenterologist in treating patients postoperatively. (T. 170-72, 183-86, 187) Accordingly, Dr. Silverman was not qualified to provide expert opinion testimony as to the standard of care applicable to Dr. Smith-Vaniz, a gastroenterologist. *Hubbard*, 954 So.2d at 957-58 (¶¶ 16-19).

Troupe and Cheeks

To determine whether a proffered medical expert is qualified to offer expert opinion testimony in a specialty other than his own, this Court has looked at whether the physician is board certified in any specialty, including the one at issue, whether and when he has ever participated in the procedure under fire in the litigation, whether he has privileges at any hospital to conduct the subject procedure, whether he is qualified to conduct the subject procedure, whether and when he has treated a patient under the same circumstances as those presented in the litigation, whether he is currently practicing medicine, whether he has any specialized training or experience in the subject specialty, whether he holds himself out as an expert in the subject specialty, whether he has relied on a specialist in the defendant's field of specialty when treating patients, whether he thinks he is qualified to render opinions in the specialty area at issue, and whether he has read any literature or written any articles or given any presentations on the procedure or specialty at issue. *Troupe*, 955 So.2d at 857 (¶¶ 23-24) (citation therein omitted);

Cheeks v. Bio-Medical Applications, 908 So.2d 117, 120 (¶ 9) (Miss. 2005). These factors can establish whether a proffered expert exercises the same level of intellectual rigor that characterizes the practice of an expert in the relevant field or whether the expert has the requisite specialized knowledge to assist the trier of fact to understand the evidence and, therefore, whether he is qualified and his opinion testimony should be admitted. *Troupe*, 955 So.2d at 857-58 (¶¶ 25-26) (citation therein omitted); *Cheeks*, 908 So.2d at 120 (¶ 10).

Dr. Silverman is neither board certified nor board eligible in gastroenterology; he is not board certified in internal medicine (a *separate* specialty, of which gastroenterology is a *subspecialty*); he has never provided services of a gastroenterologist to a postoperative wedge resection patient and has no privileges at any hospital to practice gastroenterology; he does not perform gastroenterological procedures; he is not qualified to treat patients as a gastroenterologist; he is currently practicing medicine in a specialty other than gastroenterology; he has absolutely no training in gastroenterology, much less any specialized training or experience in gastroenterology; he does not hold himself out as an expert in gastroenterology; he has deferred to and relied on gastroenterologists when diagnosing gastroenterological issues; *he does not think he is qualified to render expert opinions in the area of gastroenterology, has admitted he is not an expert in gastroenterology, and has previously declined to give standard of care testimony against a gastroenterologist*; and he has not written any articles, conducted research, or given any presentations on gastroenterology. (T. 174-87) These factors establish that Dr. Silverman does not exercise the same level of intellectual rigor that characterizes the practice of an expert in gastroenterology and that he lacks the requisite specialized knowledge of gastroenterology to assist the trier of fact to understand the evidence concerning Dr. Smith-Vaniz; therefore, he is not qualified to provide expert opinion testimony. *Troupe*, 955 So.2d at 857-58 (¶¶ 25-26) (citation therein omitted); *Cheeks*, 908 So.2d at 120 (¶ 10). The trial court's

erroneous admission of unqualified expert testimony constitutes a prejudicial abuse of discretion and this Court must reverse. *Denham*, 60 So.3d at 783 (¶ 34); *Bullock*, 964 So.2d at 1128 (¶ 25).

b. Dr. Silverman's Testimony is not Relevant.

In order to be admissible, reliable opinion testimony from a qualified expert must also be relevant, *i.e.*, it must assist the trier of fact. *Denham*, 60 So.3d at 783 (¶ 35); M.R.E. 702; *Sanders*, 29 So.3d at 141 (¶ 10). M.R.E. 402 requires that all evidence must be relevant to be admissible while M.R.E. 401 defines relevant evidence as that having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." When expert testimony is sufficiently tied to the facts of a case so that it will assist the trier of fact to understand evidence or determine a fact at issue, it is relevant. *Hubbard*, 41 So.3d at 675 (citations therein omitted).

In order for Dr. Silverman's opinion regarding breach to be relevant, Dr. Silverman must have tied that breach to Hamil's damages. In this case, that required him to find, to a reasonable degree of medical certainty, that Mr. Hamil would have had a reasonable probability of substantial improvement (or greater than 50% chance of survival) if he had not been discharged. He did not. To the contrary, the evidence at trial established Mr. Hamil collapsed and died immediately and that he was unlikely to have survived, even if he had been in a hospital when it happened.

Irrelevant evidence is not admissible, whether expert opinion or otherwise. M.R.E. 402; M.R.E. 702. The trial court's erroneous admission of unqualified and irrelevant expert testimony constitutes a prejudicial abuse of discretion and this Court must reverse. *Denham*, 60 So.3d at 783 (¶ 34); *Bullock*, 964 So.2d at 1128 (¶ 25).

c. Dr. Silverman's Testimony is not Reliable.

Pursuant to M.R.E. 702, a witness qualified as an expert may provide [relevant] opinion testimony “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” Assuming without conceding that Dr. Silverman is qualified to offer expert opinion testimony concerning gastroenterology, his testimony must also be reliable in order to be admissible. For expert testimony to be considered reliable, it must be grounded in methods and procedures of science and not merely reflect a subjective belief or an unsupported speculation. *Worthy v. McNair*, 37 So.2d 609, 615 (¶ 16) (Miss. 2010) (citation therein omitted). In deciding whether the expert's opinion is based upon scientific methods and procedures, that is, whether it is reliable, in addition to referencing the M.R.E. 702 factors, this Court has previously “embraced” the five factors announced in *Daubert*, while recognizing they are not exclusive. *Hyundai Motor Co. v. Applewhite*, 53 So.3d 749, 753-54 (¶13) (Miss. 2011) (citations therein omitted). Those factors are: whether the expert's theory can be or has been tested; whether the theory has been subjected to peer review and publication; the known or potential rate of error of a technique or theory when applied; the existence and maintenance of standards and control; and the degree to which the technique or theory has been generally accepted in the scientific community. *Hyundai*, 53 So.3d at 753-54 (¶13) (citations therein omitted); *Sanders*, 29 So.3d at 141 (¶ 11) (citations therein omitted).

Further, an expert's opinion must be supported by good grounds, based on what is known, and the facts upon which the opinion is based must permit reasonably accurate conclusions rather than conjecture. *Sanders*, 29 So.3d at 141 (¶ 13) (citations therein omitted). Expert testimony that is speculative and based on insufficient data should not be admitted. “[N]othing in . . . *Daubert* . . . requires a . . . court to admit opinion evidence which is connected

to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *Denham*, 60 So.3d at 788 (¶53) (quoting *Watts v. Radiator Specialty Co.*, 990 So.2d 143, 149 (Miss. 2008)). See also *Bullock v. Lott*, 964 So.2d 1119, 1332-33 (¶ 35) (Miss. 2007) (trial court did not abuse its discretion in accepting physician as expert, but did abuse its discretion in allowing him to testify outside the boundaries of his expert qualification as to matters not based on sufficient facts or data).

Dr. Silverman testified that Dr. Smith-Vaniz failed to meet the applicable standard of care by failing to recognize that Mr. Hamil had an ongoing hemorrhage post-surgery and by erroneously, and prematurely, discharging Mr. Hamil home⁵. (T. 199, 206) Dr. Silverman’s opinion that Mr. Hamil was suffering from a bleeding event postoperatively is based on Mr. Hamil’s hemoglobin and hematocrit levels during his hospitalization. According to Dr. Silverman, these levels indicated active bleeding in Hamil’s GI tract, from a source other than the ulcer that was appropriately treated with the wedge resection surgery. (T. 204)

First, Dr. Silverman’s testimony is not based upon sufficient facts or data and he failed to apply the principles and methods reliably to the facts. M.R.E. 702. Dr. Silverman broadly opined that Mr. Hamil was suffering from a bleed postoperatively and at the time of discharge because his hemoglobin and hematocrit levels decreased postoperatively. In fact, Mr. Hamil’s hemoglobin on the date of his admission to CMMC was 5.2; nine days later, upon discharge, his hemoglobin was 8.4. Mr. Hamil’s hematocrit on the date of admission was 16.1; upon discharge, his hematocrit was 25. (T. 203, 141) Following surgery and transfusion, decreasing levels are normal and expected, due to diluting of the blood from other fluids Mr. Hamil was receiving

⁵ Dr. Smith-Vaniz did not discharge Mr. Hamil and was not even present upon Mr. Hamil’s discharge.

intravenously, to equilibrating and stabilizing, to natural destruction of the transfused red blood cells, to the shortened lifespan of old blood used in transfusions, and to repeated drawing of blood for medical purposes while Mr. Hamil was hospitalized. (T. 137-38, 141, 144, 163-64, 165-66, 221, 307, 308, 354, 369-71) Dr. Silverman points to the low levels as evidence of bleeding, but ignores the fact that the levels were stable, which proves there was no bleeding.

Dr. Silverman ignored many other salient facts and data which actually exclude the possibility that Mr. Hamil was bleeding postoperatively, including that Mr. Hamil's BUN levels indicate the bleeding had stopped post-surgery (T. 334, 340-41, 389-94); Mr. Hamil's medical records reflect no active bleeding postoperatively (T. 342, 356); Mr. Hamil's clinical progression leading to discharge (good spirits and appetite) further indicates no active bleeding (T. 342, 356, 371-73); and all of Mr. Hamil's medical records reflect no sign of blood in his NG tube and no blood in his stool postoperatively. (T. 142-43, 303-04, 307, 336-37, 357, 366-67, 372, 374-75, 389-94) To arrive at his new opinions, Dr. Silverman also contradicted his own affidavit, which stated Hamil was "asymptomatic," post-surgery. Dr. Silverman's expert opinion testimony is not grounded in the methods and procedures of science and does not satisfy M.R.E. 702's reliability factors. *Worthy*, 37 So.2d at 615.

As to the *Daubert* factors, Dr. Silverman's theory that Mr. Hamil's blood levels reflected an ongoing bleed has clearly not been generally accepted in the medical community, evidenced by the testimony of Dr. Smith-Vaniz, Dr. Cleveland, Dr. Reeves-Darby, Dr. Nelson-Garrett, and Dr. Minor, as well as by Silverman's total lack of support in literature or text.⁶ *Hyundai*, 53 So.3d at 753-54 (§ 13); *Sanders*, 29 So.3d at 141 (§ 11). Dr. Silverman's plan was simply to take a true statement, elicited from Defendants - "Bleeding can cause hemoglobin and hematocrit

⁶ Due to hearing Dr. Silverman's opinions for the first time at trial, Dr. Smith-Vaniz was prevented from cross examining him with any literature.

levels to drop,” and use it to assert the logically unsupported argument that “Since hemoglobin and hematocrit levels dropped, Mr. Hamil was bleeding.” Dr. Silverman’s opinion is not supported by good grounds, or any literature, and is not based on all known facts. *Sanders*, 29 So.3d at 141 (¶ 13) (citations therein omitted). Instead, his opinion ignores vast swaths of the medical record, to the point that Defendants’ explanations of the lab values went unchallenged, even on closing arguments. Dr. Silverman’s testimony regarding an ongoing bleed evidenced by Mr. Hamil’s hemoglobin and hematocrit levels is, therefore, unreliable and inadmissible under *Daubert* and its Mississippi analogs. *Denham*, 60 So.3d at 788 (¶53) (quoting *Watts*, 990 So.2d at 149; *Bullock*, 964 So.2d at 1332-33 (¶ 35). The trial court erred in admitting unqualified and unreliable expert testimony, which constitutes a prejudicial abuse of discretion. *Denham*, 60 So.3d at 783 (¶ 34); *Bullock*, 964 So.2d at 1128 (¶ 25).

2. Disclosure of Dr. Silverman’s Opinions for the First Time, at Trial, Violates the Mississippi Rules of Civil Procedure, Well-Settled Precedent, and the Trial Court’s Ruling on Dr. Smith-Vaniz’s Motion in Limine, Resulting in Trial by Ambush.

Dr. Smith-Vaniz was entitled to “full and complete disclosure of the plaintiffs’ expert testimony” via “formal and timely supplementation.” *Hyundai*, 53 So.3d at 759 (¶ 36). Both Mississippi appellate courts have explained that M.R.C.P. 26 (b)(4)(A)(i) requires a party responding to interrogatories about expert witnesses to supply the identity of their experts, the subject matter of their opinions, their opinions, the facts on which they base their opinions, and a summary of those opinions. *Moore v. Delta Regional Medical Center*, 23 So.3d 541, 545 (¶ 12) (Miss. App. 2009) (citing *Thompson v. Patino*, 784 So.2d 220, 223 (¶ 22) (Miss. 2001)). Parties must seasonably supplement their responses with respect to questions concerning the identity of persons expected to be called as experts at trial, the subject matter of said experts’ testimony, and the substance of that testimony. *Coltharp v. Carnesale*, 733 So.2d 780, 785 n.6 (Miss. 1999)

(citing M.R.C.P. 26 (f)(1)(B)). Additionally, parties are under a duty to amend prior responses when they obtain information upon the basis of which they know the response was incorrect when made or they know that a response, though correct when made, is no longer true and the failure to amend would constitute a knowing concealment. M.R.C.P. 26 (f)(2)(A) and (B). “If a witness changes his testimony in a manner that conflicts with prior discovery responses, the sponsoring party⁷ has a duty under Rule 26 (f) seasonably and formally to amend or supplement the response.” *Hyundai*, 53 So.3d at 758 (¶ 34) (citing *Choctaw Maid Farms, Inc. v. Hailey*, 822 So.2d 911, 916 (Miss. 2002)). To avoid unfair surprise, strict compliance with M.R.C.P. 26 is required. *Moore*, 23 So.3d at 545 (P¶ 12) (citing *Thompson*, 784 So.2d at 223 (¶ 22)).

These discovery rules “are clear, concise, plain and could not possibly be misinterpreted. If rules are going to be promulgated, they cannot apply to different cases in a different manner.” *Coltharp*, 733 So.2d at 786 (¶ 23) (quoting *Huff v. Polk*, 408 So.2d 1368, 1371 (Miss. 1982)). Failure to seasonably supplement or amend discovery responses is a violation that may result in the sanction of exclusion of evidence. *Hyundai*, 53 So.3d at 758 (¶ 33) (citations therein omitted); *Canadian National/Illinois Central v. Hall*, 953 So.2d 1084, 1096 (¶ 42) (Miss. 2007).

To determine whether exclusion of evidence is an appropriate sanction for a discovery transgression, Mississippi’s appellate courts apply a four-factor test. *Moore*, 23 So.3d at 546 (¶ 17) (citing *Mississippi Power & Light Co. v. Lumpkin*, 725 So.2d 721, 733-34 (¶ 60) (Miss. 1998)). The factors to consider are the explanation for the transgression,⁸ the importance of the testimony,⁹ the need for time to prepare to meet the testimony, and the possibility of a

⁷ This is the responsibility of the sponsoring party, not the witness. *Hyundai*, 53 So.3d at 758 (¶ 34).

⁸ Which involves a determination of whether the failure was deliberate, seriously negligent, or an excusable oversight. *Moore*, 23 So.3d at 546 (¶ 17) (quoting *Murphy v. Magnolia Elec. Power Ass’n*, 639 F.2d 232, 235 (5th Cir. 1981)).

⁹ Which involves an assessment of harm to the proponent of the testimony. *Moore*, 23 So.3d at 546 (¶ 17) (quoting *Murphy v. Magnolia Elec. Power Ass’n*, 639 F.2d 232, 235 (5th Cir. 1981)).

continuance.¹⁰ *Moore*, 23 So.3d at 546 (¶ 17) (citing *Lumpkin*, 725 So.2d at 733-34 (¶ 60) (citing *Murphy v. Magnolia Elec. Power Ass'n*, 639 F.2d 232, 235 (5th Cir. 1981))). The explanation for failure to comply is not sufficiently satisfied by blaming the *expert's* tardiness. Instead, the parties' *attorneys* are charged with both obtaining experts and with timely providing them the necessary information to receive expert opinions by the designation of expert deadline. *Moore*, 23 So.3d at 547 (¶ 20).

The importance of the expert testimony alone cannot override all other factors, even when striking the plaintiff's expert would leave him unable to prove his case. *Moore*, 23 So.3d at 547-48 (¶¶ 22) (quoting *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 381 (5th Cir. 1996)). The possibility of a continuance is of no advantage when the plaintiff makes no effort to demonstrate that a continuance would deter future dilatory behavior rather than simply create further delay and added expense for the defendant.¹¹ *Moore*, 23 So.3d at 549 (¶ 28) (citation therein omitted).

Refusal to allow an expert to testify is appropriate, and this Court will affirm such a decision, when a party fails to provide the information required by M.R.C.P. 26. *Moore*, 23 So.3d at 546 (¶ 14) (citing *Palmer v. Volkswagen of America, Inc.*, 904 So.2d 1077, 1089-90 (¶¶ 53-55) (Miss. 2005)). This Court has found exclusion of expert testimony is a proper response to the discovery violation committed when experts testify to a subject matter different from the subject matter contained in discovery responses. *Hall*, 953 So.2d at 1097 (¶ 44). “[A]n expert should not be allowed to testify concerning a subject matter which is not included

¹⁰ Both of these last two factors involve an assessment of the prejudice to the opponent of the evidence, the possibility of alternatives to cure that harm, and the effect on the orderly proceedings of the court. *Moore*, 23 So.3d at 546 (¶ 17) (quoting *Murphy v. Magnolia Elec. Power Ass'n*, 639 F.2d 232, 235 (5th Cir. 1981)).

¹¹ Defendants spent many years, and tens of thousands of dollars, preparing for a trial that never happened, centered around Dr. Silverman's affidavit.

in the response to the interrogatory,' and allowance of such would be reversible error." *Hall*, 953 So.2d at 1097 (¶ 43) (quoting *Buskirk v. Elliott*, 856 So.2d 255, 264 (Miss. 2003)).

In accord with M.R.C.P. 26, Dr. Smith-Vaniz's First Set of Interrogatories to Hamil included an interrogatory which asked for the identity of Hamil's experts, the subject matter of their opinions, their opinions, the facts on which they base their opinions, and a summary of those opinions. (C.P. 81) Dr. Smith-Vaniz was entitled to full and complete disclosure of this information via formal and timely supplementation. *Hyundai*, 53 So.3d at 759 (¶ 36); *Coltharp*, 733 So.2d at 785 n.6 (citing M.R.C.P. 26 (f)(1)(B)). Hamil's only response and supplementation to this expert interrogatory are his first responses to interrogatories, which identified Dr. Silverman as his expert, and Dr. Silverman's affidavit which was subsequently submitted in response to Dr. Smith-Vaniz's Motion for Summary Judgment. (C.P. 81, 82, 85-88) Dr. Silverman's affidavit provides specifics as to his theories of negligence, to wit: his opinion that Dr. Smith-Vaniz failed to do an appropriate work-up to determine the cause of Mr. Hamil's diagnosed and surgically removed ulcer and failed to appropriately medicate Mr. Hamil to prevent the formation of future ulcers. This affidavit makes no reference to Mr. Hamil experiencing ongoing postoperative bleeding prior to discharge and, further, does not mention any sign of blood loss during Mr. Hamil's hospitalization. (C.P. 85-88, T. 218) In fact, this affidavit describes Mr. Hamil as "asymptomatic" postoperatively until discharge. (C.P. 87, T. 218, 219) The affidavit does not even contain the words "hemoglobin" or "hematocrit". (C.P. 85-88, T. 215)

Before the trial of this matter, Dr. Smith-Vaniz presented various matters *in limine*, including the request that Dr. Silverman's expert testimony be limited to the opinions previously disclosed in Hamil's expert designation and in Dr. Silverman's affidavit. (T. 9) Hamil's counsel affirmatively stated on the record that he would not attempt to offer any opinions not previously

disclosed¹². (T. 9) Further, following Dr. Silverman's expert *voir dire*, in response to the court's question about whether Dr. Silverman's opinions had been disclosed to the defendants, Hamil's counsel informed the court that Dr. Silverman's opinion, in the form of affidavit, had been "submitted in response to a motion for summary judgment." (T. 197) On the heels of assuring the court not once, but twice, that Dr. Silverman's expert testimony would be limited to the opinions previously disclosed in his affidavit, Hamil then proceeded to elicit from Dr. Silverman testimony far beyond the scope of the opinions provided in that affidavit, testimony that provided entirely new theories of negligence which are not included in the affidavit, and testimony that contradicts Dr. Silverman's prior sworn statement. (T. 200-08) Specifically, Dr. Silverman's trial testimony includes his opinion that: Mr. Hamil was actively bleeding during his entire hospitalization; Mr. Hamil had an evolving gastric ulcer pre-discharge; the separate active bleed was evidenced by declining hemoglobin and hematocrit during the period of hospitalization; Dr. Smith-Vaniz failed to recognize an ongoing hemorrhage and failed to do anything to find out what was causing the bleed, and prematurely discharged Hamil, resulting in his death.¹³ (T. 201, 206-07, 218-19)

Along with the contemporaneous objections lodged by Dr. Cleveland (T. 200, 202), Dr. Smith-Vaniz had already obtained a continuing objection to Dr. Silverman's testimony regarding any expert opinion concerning Dr. Smith-Vaniz and, specifically, his alleged breach of the applicable standard of care. (T. 197-98) Nonetheless, the trial court overruled those objections, allowed Dr. Silverman's never before disclosed expert opinion testimony, and did not

¹² In addition to all other reasons set forth and argued in this brief, Dr. Smith-Vaniz submits that Hamil's violation of the motion *in limine*, with which he agreed to comply, warrants reversal. *See Stanley v. Cason*, 614 So.2d 942, 952 (Miss. 1992) (violation of a *limine* order may constitute reversible error).

¹³ As discussed previously, Dr. Silverman did not say what could have been done to determine the source of this alleged bleed. Presumably this is because there are no tests one can run to determine the source of a non-existent bleed.

allow the defendants to make a record on the contemporaneous objections until after Hamil had tendered Dr. Silverman. (T. 208-09) Dr. Cleveland then articulated his objection to Dr. Silverman's testimony as being outside the scope of Hamil's expert designation, outside the scope of her expert interrogatory response, and outside the scope of Dr. Silverman's affidavit, none of which mentioned blood counts or evidence of active bleeding at the time Mr. Hamil was discharged. (C.P. 85-88, T. 209-10; Ex. D-2, D-3) Dr. Smith-Vaniz joined in this objection and expanded the basis. Not only did Dr. Smith-Vaniz object because Dr. Silverman's testimony was outside the scope of his previously disclosed opinions, but also because his testimony represented a substantial change in the allegations of the lawsuit. Where Dr. Silverman's previously disclosed opinion was that Dr. Smith-Vaniz was negligent in failing to determine the cause of Mr. Hamil's ulcer and prescribe the appropriate medication, his trial testimony is that Dr. Smith-Vaniz was negligent in failing to recognize active bleeding post-surgery and in discharging Mr. Hamil with that active bleeding. (T. 210)

Dr. Silverman's testimony went beyond the scope of the opinions provided in his affidavit, provides entirely new theories of negligence that were not included in the affidavit, and contradicts his prior sworn statement. Dr. Smith-Vaniz had no reason to anticipate that Hamil would offer expert testimony concerning ongoing blood loss postoperatively because no such opinions had been disclosed prior to trial. Dr. Silverman himself admitted that the opinions he offered at trial had not been previously disclosed, but the trial court allowed such testimony over objections. (T. 213-14, 217-18)

On cross-examination, Dr. Silverman testified that the night before his testimony he had received a page of Mr. Hamil's medical records (from Hamil's counsel) which contained information that changed the opinions set forth in his affidavit. (T. 213-14, 217, 223) Dr. Silverman admitted that his affidavit contained an incorrect standard of care as to

Dr. Smith-Vaniz and that proper post op medications were prescribed. (T. 224) Dr. Silverman also admitted that the opinion testimony he provided at trial had not previously been disclosed. (T. 217, 223) According to Dr. Silverman, he did not tell Hamil's attorney about his change of opinion until the night before he testified.¹⁴ (T. 223)

In sum, Dr. Silverman received some sort of "new" medical record the night before he testified, which rendered his theory of the case, as to the drug treatments given to Mr. Hamil, invalid.¹⁵ Even more egregious are Dr. Silverman's opinions on hemoglobin and hematocrit. He offered no explanation for his failure to disclose those opinions. When questioned, he simply stated he intentionally left his affidavit "broad enough" to add things, implying that the Defendants had a duty to take his deposition if they wanted to know his opinions. (T. 214-217) Although he admitted his affidavit left out allegations he was currently making, he stated he did not know Defendants were entitled to the information, saying "I'm no lawyer."¹⁶ (T. 216-17) Accordingly, Hamil was under a duty to amend the previous opinions. Failure to amend constitutes a knowing concealment. M.R.C.P. 26 (f)(2)(A) and (B). Dr. Silverman's expert opinions changed so that his trial testimony is in conflict with the prior discovery responses concerning his opinions, therefore Hamil's counsel was duty bound to seasonably and formally amend or supplement those discovery responses. M.R.C.P. 26 (f); *Hyundai*, 53 So.3d at 758 (¶ 34) (citing *Choctaw Maid Farms*, 822 So.2d at 916). Hamil failed to comply with Rule 26,

¹⁴ The next morning, Hamil's counsel questioned the Defendants extensively regarding hemoglobin and hematocrit levels. (T. 123-145, 162-167) Hamil's counsel chose not to inform the Defendants about Dr. Silverman's change of opinion prior to questioning the Defendants.

¹⁵ Obviously, no new records had been generated since Mr. Hamil's death in 2004. Dr. Silverman did not identify the "mystery record" nor its contents, but stated it was only one page. (T. 214) Information regarding the drug regimen prescribed to Hamil existed in multiple places, including Hamil's own deposition (which Dr. Silverman claimed to have read). (T. 215) One would also note that Hamil's counsel made absolutely no mention in his opening statement of the post-surgical medications Mr. Hamil was prescribed. (T. 93-96) He did, however, allude to falling hemoglobin and hematocrit at discharge (T. 95)

¹⁶ At the time of trial, Dr. Silverman had *decades* of experience as an expert witness, making as much as \$300,000 a year from testifying. (T. 188-89)

strictly or otherwise, yielding unfair surprise to Dr. Smith-Vaniz. *Moore*, 23 So.3d at 545 (¶ 12) (citing *Thompson*, 784 So.2d at 223 (¶ 22)).

Hamil's failure to seasonably supplement or amend discovery responses concerning his expert's opinions warrants the sanction of exclusion of evidence. *Hyundai*, 53 So.3d at 758 (¶ 33) (citations therein omitted); *Hall*, 953 So.2d at 1096 (¶ 42); *Moore*, 23 So.3d at 546 (¶ 14) (citing *Palmer*, 904 So.2d at 1089-90 (¶¶ 53-55)). Application of the four-factor test to the facts presented confirms that exclusion of Dr. Silverman's testimony is the appropriate sanction for Hamil's egregious discovery violation. *Moore*, 23 So.3d at 546 (¶ 17) (citing *Lumpkin*, 725 So.2d at 733-34 (¶ 60)). Hamil has provided no explanation for his failure to seasonably and formally supplement as required by Rule 26. Despite that, according to Dr. Silverman, he knew the night before his testimony that his opinion had changed because that is when Hamil provided him with missing medical records¹⁷. Hamil made no attempt to advise either Dr. Smith-Vaniz or the court of Dr. Silverman's change of opinion. Rather, Hamil's attorney specifically misrepresented to the court that Dr. Silverman's opinion testimony would be limited to the opinions contained in his affidavit. (T. 9, 197) Obviously, Hamil's failure to amend was intentional and deliberate. *Moore*, 23 So.3d at 546 (¶ 17) (citing *Lumpkin*, 725 So.2d at 733-34 (¶ 60) (citing *Murphy*, 639 F.2d at 235)).

Dr. Silverman's surprise testimony deprived Dr. Smith-Vaniz of the opportunity to prepare to meet this testimony. Restated, this testimony effected trial by ambush. *Moore*, 23 So.3d at 546 (¶ 17) (citing *Lumpkin*, 725 So.2d at 733-34 (¶ 60) (citing *Murphy*, 639 F.2d at 235)). If Hamil had seasonably supplemented her discovery responses, Dr. Smith-Vaniz would have been on notice that Dr. Silverman's opinion testimony would involve blood loss and active

¹⁷ It is the attorneys who are charged with providing their experts with the necessary information to provide timely opinions. *Moore*, 23 So.3d at 547 (¶ 20).

bleeding. With that knowledge, Dr. Smith-Vaniz could have requested a continuance and/or prepared for appropriate cross-examination on that topic and/or designated a hematologist as an expert witness to challenge the admissibility of Dr. Silverman's opinion as medically unreliable. Dr. Cleveland provided examples of such expert testimony in the form of exhibits to his Reply to Hamil's Response to Motion for JNOV or, alternatively, for New Trial, in which Dr. Smith-Vaniz joined. (C.P. 353-417, 418) As these physicians' affidavits reflect, Dr. Silverman's testimony regarding blood loss and active bleeding are medical fiction and his opinion ignores the objective clinical findings included in Mr. Hamil's medical records. Had Dr. Smith-Vaniz been provided the opportunity of time to prepare to meet Dr. Silverman's changed opinion testimony, such testimony would likely have been excluded on a *Daubert* motion. At the very least, Dr. Smith-Vaniz could have properly prepared for cross-examination and could have provided expert opinion testimony or medical literature explaining why Dr. Silverman's testimony was unreliable. Certainly a continuance would have been appropriate and a real possibility. But Hamil's discovery violation prevented any and all of these remedies. *Moore*, 23 So.3d at 546 (§ 17) (citing *Lumpkin*, 725 So.2d at 733-34 (§ 60) (citing *Murphy*, 639 F.2d at 235)).

The sanction of exclusion of expert testimony is appropriate in this case. Hamil's discovery violation resulted in Dr. Silverman testifying to a subject matter not only different from the subject matter contained in previous discovery responses, but *contradictory to it*. *Hall*, 953 So.2d at 1097 (§ 44). Dr. Smith-Vaniz would actually have been better off *if Hamil had not provided any opinions in discovery*. The trial court committed reversible error by allowing Dr. Silverman to testify concerning signs of active bleeding when the expert interrogatory response and affidavit failed to include any mention of that subject matter. *Hall*, 953 So.2d at 1097 (§ 43) (quoting *Buskirk*, 856 So.2d at 264). In *Coltharp*, the trial court committed reversible error by

admitting expert testimony supporting an additional theory of injury that was not revealed during discovery. *Coltharp*, 733 So.2d at 786 (¶ 27). Here the error was more egregious, as Dr. Silverman's opinions represent a complete departure and contradiction to his previously provided opinion. This reversible error constitutes a clear abuse of discretion. *Denham*, 60 So.3d at 783 (¶ 34) (citations therein omitted). Because the trial court abused its discretion, this Court must reverse. *Hyundai*, 53 So.3d at 753 (¶ 10) (citations therein omitted); *Bullock*, 964 So.2d at 1128 (¶ 25) (citations therein omitted).

3. Dr. Silverman's Expert Opinion Testimony is Inadmissible Pursuant to Judicial Estoppel.

Judicial estoppel prevents a party from obtaining an unfair advantage by intentionally taking inconsistent positions in litigation. *Copiah County v. Oliver*, 51 So.3d 205, 207 (¶ 9) (Miss. 2011). When a party asserts a position clearly inconsistent with a previous position, the court has already accepted the previous position to the party's benefit, and assertion of the inconsistent position or nondisclosure of the inconsistent position is not inadvertent, judicial estoppel will apply. *Oliver*, 51 So.3d at 207 (¶ 9) (citing *Kirk v. Pope*, 973 So.2d 981, 991 (Miss. 2007)); *Beene v. Ferguson Automotive*, 37 So.3d 695, 701 (¶ 16) (Miss. App. 2010) (citation therein omitted).

When Dr. Smith-Vaniz filed his motion for summary judgment, Hamil had not yet provided any sworn expert testimony in support of her claims. (C.P. 74) In response to this motion for summary judgment, Hamil provided Dr. Silverman's affidavit. (C.P. 79-88) Only by virtue of this affidavit did Hamil thwart summary judgment. Restated, the trial court accepted the expert testimony set forth in Dr. Silverman's affidavit, to Hamil's great benefit. *Oliver*, 51 So.3d at 207 (¶ 9) (citing *Kirk*, 973 So.2d at 991); *Beene*, 37 So.3d at 701 (¶ 16).

Dr. Silverman's affidavit states that Dr. Smith-Vaniz breached the standard of care by failing to do an appropriate work-up to determine the cause of Mr. Hamil's diagnosed and surgically removed ulcer and by failing to appropriately medicate Mr. Hamil post-discharge to prevent the formation of future ulcers. The affidavit describes Mr. Hamil as "asymptomatic" postoperatively until discharge. (C.P. 85-87, T. 218, 219) This affidavit makes no reference to Mr. Hamil experiencing ongoing postoperative bleeding prior to discharge and, further, does not mention any sign of blood loss during Mr. Hamil's hospitalization. (C.P. 85-55, T. 218) The affidavit does not contain the words "hemoglobin" or "hematocrit". (C.P. 85-88, T. 215) Yet Dr. Silverman's theory at trial, contrary to his affidavit, was that Mr. Hamil experienced active postoperative bleeding prior to discharge that should have been detected based on Mr. Hamil's hemoglobin and hematocrit levels. (T. 201, 206-07, 218-19)

By virtue of Dr. Silverman's trial testimony, Hamil asserted a position clearly inconsistent with the previously asserted position contained in Dr. Silverman's affidavit. *Oliver*, 51 So.3d at 207 (¶ 9). It cannot be argued that Hamil's assertion of the inconsistent position at trial was inadvertent. Therefore, judicial estoppel should have prevented admission of Dr. Silverman's inconsistent trial testimony. *Oliver*, 51 So.3d at 207 (¶ 9) (citing *Kirk*, 973 So.2d at 991); *Beene*, 37 So.3d at 701 (¶ 16). The trial court's erroneous admission of Dr. Silverman's expert opinion testimony constitutes an abuse of discretion. *Denham*, 60 So.3d at 783 (¶ 34). Because the trial court abused its discretion by admitting evidence that prejudiced Dr. Smith-Vaniz, this Court must reverse. *Bullock*, 964 So.2d at 1128 (¶ 25) (citations therein omitted).

De Novo Review Based on Application of Correct Law

The trial court should have found Dr. Silverman was not qualified to give standard of care testimony applicable to a gastroenterologist pursuant to M.R.E. 702 and *Daubert* and should

have excluded Dr. Silverman's expert medical testimony as a sanction for Hamil's discovery violation or pursuant to judicial estoppel. Accordingly, a *de novo* review *premised on the trial court having applied the correct law* reveals that Hamil would have been left without any expert testimony, therefore unable to establish a *prima facie* case of medical malpractice. **Berry v. Patten**, 51 So.3d 934, 938 (¶ 14) (Miss. 2010); **Stroud Const., Inc. v. Walsh**, 51 So.3d 991, 993 (¶ 8) (Miss. App. 2010); **Solanki v. Ervin**, 21 So.3d 552, 557 (¶ 10) (Miss. 2009) (citation therein omitted) The trial court should have granted Dr. Smith-Vaniz's motions for directed verdict, request for peremptory instruction, or motion for JNOV. **McGee v. River Region Medical Center**, 59 So.3d 575, 578 (¶ 8) (Miss. 2011) (citations therein omitted); **Hyundai**, 53 So.3d at 753 (¶ 9) (citations therein omitted); **Solanki**, 21 So.3d at 556 (¶ 8) (citations therein omitted). Because reasonable men could not have arrived at a verdict contrary to Dr. Smith-Vaniz, this Court must reverse and render. **Berry**, 51 So.3d at 938 (¶ 14); **Stroud**, 51 So.3d at 993 (¶ 8).

Under **Daubert** and the Mississippi Rules of Evidence, under the Mississippi Rules of Civil Procedure, and under the well settled, widely known case law of this state (and every other state), Dr. Silverman's testimony should not have been allowed. Had Dr. Silverman's testimony been properly excluded, Hamil would not have been able to state a *prima facie* case.

Alternative De Novo Review, Presuming Dr. Silverman's Testimony Properly Admitted

When he first moved for directed verdict, Dr. Smith-Vaniz alternatively argued that even if the Court admitted Dr. Silverman's testimony, it was insufficient to establish the elements of a medical negligence claim against him. (T. 278) The sum of Dr. Silverman's expert testimony at trial was that Mr. Hamil was actively bleeding post-surgery and at discharge and that Dr. Smith-Vaniz should have discovered the bleeding and not ordered discharge. Dr. Silverman did not explain what tests Dr. Smith-Vaniz should have performed to discover the cause of the

bleeding or what treatment Dr. Smith-Vaniz should have rendered to address the bleeding.¹⁸ Dr. Silverman also failed to opine that there was a reasonable probability that Mr. Hamil would have lived had he not been discharged. (T. 278-79) Dr. Cleveland's alternative argument, with which Dr. Smith-Vaniz joined, is that even with Dr. Silverman's testimony, Hamil failed to establish a causative connection or to establish a reasonable probability of a substantially better outcome, *i.e.*, that Hamil would have had a *greater than fifty percent chance* of survival if his massive bleed had occurred in the hospital. (T. 280-81)

Assuming *arguendo* that Dr. Silverman's testimony was properly admitted, this testimony, even taken as true and considering all reasonable favorable inferences, is still legally insufficient to establish a *prima facie* case. Regarding the applicable standard of care, Dr. Silverman's testimony fails to inform the court what, specifically, Dr. Smith-Vaniz should have done to comply with the alleged/presumed standard of care. (T. 198-208) Dr. Silverman's vague and conclusory statements that Dr. Smith-Vaniz should have conducted further testing and should have provided appropriate treatment, while not actually advising what specific testing or treatment should have been performed, is legally insufficient. *Triplett*, 50 So.3d 1037-38 (§ 1). *See also Hans v. Memorial Hospital at Gulfport*, 40 So.3d 1270, 1278-79 (§§ 19-24) (Miss. App. 2010) (affidavit of doctor proffered as expert failed to establish *prima facie* case of medical negligence because his opinion lacked the necessary degree of specificity to demonstrate what the standard of care required and what action or inaction was or should have been taken).

Moreover, neither Dr. Silverman's testimony nor any other evidence in the record indicates that any specific tests or treatment would have resulted in a reasonable probability of a substantially better outcome, *i.e.*, Mr. Hamil's survival. *Hubbard*, 954 So.2d at 964 (§ 42)

¹⁸ Again, this is because no other tests were available and Mr. Hamil was already on the proper post-surgical drug regimen.

(citing *Ladner v. Campbell*, 515 So.2d 882, 888-89 (Miss. 1987) (citing *Clayton v. Thompson*, 475 So.2d 439, 445 (Miss. 1985))). Accordingly, Dr. Smith-Vaniz's Motion for Directed Verdict should have been granted and this Court must reverse and render. *McGee*, 59 So.3d at 578 (¶ 8); *Hyundai*, 53 So.3d at 753 (¶ 9); *Solanki*, 21 So.3d at 556 (¶ 8); *Berry*, 51 So.3d at 938 (¶ 14); *Stroud*, 51 So.3d at 993 (¶ 8).

B. The Verdict is Against the Overwhelming Weight of the Evidence.

This Court will set aside a jury's verdict and order a new trial when convinced that the verdict is contrary to the substantial weight of the evidence so that justice requires a new trial. *Bullock*, 964 So.2d at 1132-33 (¶ 35) (quoting *Poole v. Avara*, 908 So.2d 716, 727 (Miss. 2005)). In making this determination, this Court accepts as true all evidence supporting the verdict. *Richardson v. DeRouen*, 920 So.2d 1044, 1047-48 (¶ 7) (Miss. App. 2006) (citation therein omitted). When allowing the jury's verdict to stand would sanction an unconscionable injustice because so contrary to the weight of the evidence, a new trial can and must be granted. *Bullock*, 964 So.2d at 1132-33 (¶ 35) (citations therein omitted).

The only evidence supporting a verdict finding that Dr. Smith-Vaniz breached the applicable standard of care in his treatment of Mr. Hamil is Dr. Silverman's expert opinion testimony. As previously addressed, the trial court abused its discretion by admitting this testimony. Regardless, presuming this evidence was properly admitted and accepting it as true, Dr. Silverman's testimony on this point was so completely contrary to the other three properly qualified medical experts' opinions, to the two defendant physicians' testimony, and even to Dr. Silverman's own affidavit, that the substantial weight of the evidence is contrary to the jury's verdict.

On behalf of Dr. Smith-Vaniz, Dr. Vonda Reeves-Darby testified as a properly qualified and accepted expert in gastroenterology. (T. 287-92) Contrary to Dr. Silverman,

Dr. Reeves-Darby testified that she *was* familiar with the standard of care applicable to a gastroenterologist such as Dr. Smith-Vaniz in his care and treatment of a patient such as Mr. Hamil and, further, that Dr. Smith-Vaniz had complied with that standard of care. (T. 295-98) According to Dr. Reeves-Darby, Dr. Smith-Vaniz's decision not to use an endoscope following surgery was proper because use of an endoscope to inflate and view the stomach is contraindicated in a post-surgical stomach that has just been stitched up. Dr. Smith-Vaniz's decision to, instead, prescribe anti-ulcer medication and order cessation of NSAIDs and tobacco, was appropriate and within the standard of care. (T. 299-302)

Dr. Reeves-Darby also expressed her expert opinion that Mr. Hamil's blood levels did not indicate that he was bleeding post-surgery, pre-discharge. (T. 287-92, 302, 307) Mr. Hamil's second bleeding episode and death were simply unforeseeable and occurred despite proper medical care. (T. 309) With a massive GI bleed like the fatal one Mr. Hamil suffered, the patient immediately exhibits symptoms, which means Mr. Hamil was not experiencing this bleed pre-discharge. (T. 325) It was Dr. Reeves-Darby's expert opinion that there was nothing Dr. Smith-Vaniz could have done differently to save Mr. Hamil's life. (T. 323, 328) Even if Mr. Hamil had still been in the hospital when the fatal bleed occurred, with immediate access to medical care, there was no way to say Mr. Hamil would have survived. (T. 327)

Dr. Nina Nelson-Garrett also qualified and was accepted as an expert in gastroenterology. (T. 330-32) In addition to other signs of an active upper GI bleed already addressed by other witnesses (blood in the stool, in the NG tube, etc.), Dr. Nelson-Garrett testified that BUN¹⁹ levels are elevated when a patient suffers an active bleed. (T. 334) Conversely, normal or low BUN levels indicate no active bleeding. (T. 334) Referring to Mr. Hamil's labs, Dr. Nelson-Garrett explained that on November 12th, Mr. Hamil's BUN was 22, evidencing the bleed he was

¹⁹ Blood, urea and nitrogen. (T. 341)

suffering at the time of admission. (T. 341) But Mr. Hamil's BUN levels for November 15, 16, 17, 18, and 19th were 8, 9, 6, 5, and 4, respectively, which indicate the bleeding had stopped after surgery corrected the problem. (T. 340-41) Dr. Nelson-Garrett further opined that Mr. Hamil's blood levels were stable and did not indicate bleeding post-surgery. (T. 330-32, 339, 352) Dr. Nelson-Garrett found no signs of bleeding documented in the remainder of Mr. Hamil's medical records. (T. 342, 356) Her expert opinion is that Mr. Hamil was not bleeding when he was discharged on November 19th, 2004. (T. 342) Dr. Nelson-Garrett further testified Dr. Smith-Vaniz complied with the standard of care expected of a reasonably prudent, minimally competent physician following a patient postoperatively with regard to the possibility of bleeding and, in fact, that he could not have done anything that would have changed the outcome for Mr. Hamil. (T. 343)

Dr. Claude Minor, Jr., accepted as an expert in general surgery²⁰, testified that he was familiar with the standard of care for a reasonably prudent, minimally competent surgeon operating on and following a post-operative gastric ulcer patient. (T. 386-87) Dr. Minor testified Mr. Hamil was stable and there was no evidence that he was bleeding post-operatively. (T. 388, 394, 396, 397-98) In addition to an absence of blood in Mr. Hamil's nasogastric (NG) tube, an absence of blood in his stool, and stable hematocrit and hemoglobin counts for four days after NG tube removal, Mr. Hamil's BUN count indicated no active bleeding. (T. 389-94) Further, Dr. Minor testified Hamil was not bleeding until he suffered the sudden bleeding event at home and that neither Dr. Smith-Vaniz nor Dr. Cleveland could have done anything to predict or prevent its occurrence. (T. 400-01) The massive bleeding was a result of the location of the ulcer formation - directly over a large blood vessel. (T. 402) According to Dr. Minor, the ulcer medication and proton pump inhibitor given to Mr. Hamil were reasonable and represented the

²⁰ Dr. Cleveland's specialty.

best measures available following his wedge resection. (T. 401-02) Based on his years of experience and training, Dr. Minor was certain nothing Dr. Smith-Vaniz or Dr. Cleveland could have done would have predicted or prevented the occurrence of Mr. Hamil's fatal bleed and that, unfortunately, people routinely die from such bleeds even if they occur in the hospital with immediate access to medical care. (T. 403)

The testimony of these experts and of the defendant physicians is overwhelming when compared to the weak, unqualified testimony of Dr. Silverman, Hamil's sole proponent. Although the parties were deep into trial before Dr. Silverman revealed what his *real* opinions were, the Defendants did their best to address his assertions "on the fly." Defendants explained that there were several things going on with Mr. Hamil that would cause a drop in hemoglobin and hematocrit. First, it is well known and expected that hemoglobin and hematocrit drop following a blood transfusion.²¹ As predicted, the levels fell immediately post-transfusion from 35.6 and 11.6, respectively, on the day of transfusion, to 26.8 and 8.9, respectively, five days later.²² However, from there until the day of discharge, the levels were stable. If someone is actively bleeding, hemoglobin and hematocrit continue to fall. This is basic, first year medical school knowledge and it was not disputed, or even addressed, by Hamil. Mr. Hamil's hemoglobin and hematocrit levels, while lower than normal, do not prove he was actively bleeding. In fact, they indisputably prove that he was not bleeding prior to discharge.

Hamil also refused to address the well-known fact that hemodilution causes hemoglobin and hematocrit levels to fall. Anyone who has made Koolaid is familiar with this process. As

²¹ The reason for this is blood cells, which are constantly destroyed and replenished by one's body, have a shorter shelf life when they are taken from the body and stored in blood banks. They are still present, and give an immediate "bump" to hemoglobin and hematocrit levels after transfusion, but they die off more quickly than cells made within the body. Hence, one sees a drop immediately post transfusion.

²² For the sake of comparison, Mr. Hamil's hemoglobin and hematocrit, on the day of admission, were 16.1 and 5.2. See chart, page 5; T. 203, 142, 338, 141.

water is added to a mixture of Koolaid, the concentration of Koolaid decreases. If one measures the Koolaid "levels" as water is added, a decrease will be seen. However, the decreasing levels do not mean Koolaid is being lost, *i.e.*, through bleeding. It is just being diluted. Similarly, Mr. Hamil's hemoglobin and hematocrit levels decreased not due to loss, but due to dilution. Add in the multiple blood draws a patient undergoes when being monitored as closely as Mr. Hamil was, and the natural drop of hemoglobin and hematocrit in post-surgical patients, and there are many explanations for the initial fall of Mr. Hamil's hemoglobin and hematocrit levels, as well as their later stabilization. Dr. Silverman chose to ignore all of these facts in rendering his opinion that, since hemoglobin and hematocrit fell (at some point), Mr. Hamil was bleeding at discharge. The logical fallacy in that statement has been pointed out. But his willing ignorance did not end there.

The reason doctors do not simply take a patient's temperature and begin treating is because taking only one measurement provides an incomplete picture. Like the parable of the blind men feeling different parts of an elephant and all coming up with different interpretations of the animal's identity, one does not treat or diagnose a patient with only one piece of the puzzle. Multiple labs are taken, multiple studies are done, and then these are all correlated with the clinical picture of the patient. Dr. Silverman's refusal to consider the complete picture reveals just how biased he was.

Had Dr. Silverman removed his self-imposed blinders and considered the patient as a whole, he would have had to admit Mr. Hamil was not bleeding prior to discharge. Blood in the stomach is an irritant and the body tries to expel it one way or another. The vessel which perforated, causing Mr. Hamil's massive bleed, was in his stomach. Therefore, if he had been bleeding from it in the hospital, prior to discharge, he would have been nauseated and vomiting blood. He was not nauseated and he did not vomit. Alternatively, he would have had bloody

diarrhea or stool. He had neither. To the contrary, Mr. Hamil had normal bowel movements. Perhaps most importantly, during the time period when Mr. Hamil's hemoglobin and hematocrit declined the most (supposedly proof of his bleeding), his NG tube was completely clear of blood.²³ If, as Dr. Silverman asserted, Hamil was bleeding into his stomach, his body would have expelled the blood from his GI tract. One way or another, the blood would have come out; there are no other options. Instead, there was absolutely no sign of blood.

Another important piece of the puzzle Hamil chose not to address were Mr. Hamil's BUN levels. When a patient bleeds into his stomach, these levels rise. Conversely, normal or low levels indicate there is no bleeding. This is perfectly illustrated by Mr. Hamil's BUN levels. On admission, when everyone agrees Mr. Hamil was actively bleeding, his BUN was 22; however, for the five days prior to discharge, his levels trended downward, from 8 to 4. During this period, Mr. Hamil's concomitant clinical picture further reinforced a conclusion that he was not bleeding. After surgery, as expected, he had no appetite and felt ill. By the time of discharge, he had his appetite back, looked well, and was eager to go home. As discussed previously, someone who is actively bleeding does not make this kind of improvement.

A lab value, standing alone, is worthless. It shows one piece of a puzzle at a particular snapshot in time. A lab value that shows measurements over time, such that a *trend* is revealed, is much more helpful. Multiple lab values, showing multiple trends, are some of the most valuable diagnostic indicators a practitioner has. All of these indicators, correlated with the patient's symptoms, complaints, appearance, demeanor and clinical picture (again, over time), coupled with thirty years of training and experience as a gastroenterologist, yield the completed

²³ The nasogastric or "NG" tube is a slender tube that runs from a patient's nose, down into their stomach. Gentle suction is applied to the tube in order to keep the stomach clear and empty of fluids. Mr. Hamil had an NG tube from the time of his transfusion, 11/11/04, until 11/16/04. During this period, his hemoglobin and hematocrit went from 35.6 and 11.6, to 26.8 and 8.9. There was no blood in the stomach.

puzzle. Dr. Silverman's opinion is based on one lab value at discharge. Three gastroenterologists and two surgeons were not afraid to look at the complete picture and to consider all of the evidence, and all five of them came to a different conclusion than did Dr. Silverman. Consequently, the jury's verdict is contrary to the overwhelming weight of the evidence. Should this Court decline to reverse and render based on the erroneous admission on Dr. Silverman's "expert" opinion testimony, at a minimum this Court must set aside the jury's verdict and order a new trial. *Bullock*, 964 So.2d at 1332-33 (§ 35) (quoting *Poole*, 908 So.2d at 727).

VI. JOINDER

Dr. Smith-Vaniz joins in and adopts the arguments and authorities submitted by Appellant Dr. Ken Cleveland.

VII. CONCLUSION

Hamil failed to meet her burden of proving, through competent expert testimony, that Dr. Smith-Vaniz violated the standard of care applicable to a reasonably prudent minimally competent gastroenterologist in his care and treatment of Mr. Hamil, which caused or contributed to his death. Dr. Silverman is not qualified to offer opinions against Dr. Smith-Vaniz, his testimony should not have been allowed, and Dr. Smith-Vaniz was entitled to a directed verdict.

It is clearly established, *supra*, that Dr. Silverman's testimony is neither relevant, nor reliable. Further, at trial, and for the first time, Dr. Silverman was allowed to espouse an opinion that Mr. Hamil was experiencing an ongoing bleed which was not diagnosed or treated properly by Dr. Smith-Vaniz. This opinion was never expressed in response to interrogatories or in his affidavit offered to defeat summary judgment. It apparently was a theory developed the night prior to trial and involved nothing more than trial by ambush, as Dr. Smith-Vaniz had no

opportunity to secure expert witnesses in hematology or other specialties to more pointedly address the issue. It was error to allow Dr. Silverman to offer those opinions under those circumstances.

In considering the testimony of the Defendant physicians and their three primary experts, compared with the weak testimony of Dr. Silverman, Hamil's sole proponent, it is clear that the verdict is against the overwhelming weight of the evidence.

Under the circumstances, Dr. Smith-Vaniz asks this Court to reverse the lower court and render a judgment in his favor, dismissing him, with prejudice.

Respectfully submitted, this the 15 day of July, 2011.

Respectfully submitted,

DR. GEORGE T. SMITH-VANIZ, APPELLANT

BY:


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CERTIFICATE OF SERVICE

I, Stephen P. Kruger/Jan F. Gadow/Kris Graham, do hereby certify that I have this day forwarded, via U.S. mail, postage prepaid, a true and correct copy of the foregoing to:

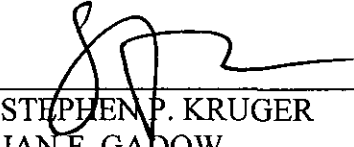
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HINDS COUNTY CIRCUIT JUDGE
407 E. Pascagoula Street
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THIS, the 15 day of July, 2011.



STEPHEN P. KRUGER
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KRISTOPHER A. GRAHAM