NO. 2010-IA-00190-SCT

BERNICE CONNER — PLAINTIFF/APPELLEE

VS. — CAUSE NO.: 14-CI-07-0145

MID-SOUTH RETINA, LLC — DEFENDANT/APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or refusal.

1. The Honorable Thomas W. Allen
2. S. Kirk Milam, Esq.
3. S. Duke Goza, Esq.
4. J. Harland Webster, Esq.
5. Daniel M. Czamanske, Jr.
6. Ms. Bernice Conner
7. Dr. Brad Priester
8. Mid-South Retina, LLC

Respectfully Submitted, this the 9th day of February, 2011.

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STATEMENT OF POSITION REGARDING ORAL ARGUMENT

An oral argument would be beneficial to the Court in its decision process in this matter in that this medical malpractice case has been pending for a number of years and it may be a benefit for this Court to understand the procedural posture that it has taken throughout the years. The factual issues themselves are not complicated, but a number of the legal arguments are and therefore the Appellee would request an oral argument.

I.

STATEMENT OF ISSUE

Whether the trial court erred in denying the Appellant's Motion for Summary Judgment..

II.

STATEMENT OF THE CASE

A. Statement of the Facts:

On April 10, 2003, Appellee Conner was in the Appellant's office in Memphis to receive treatment for her macular degeneration. This treatment included an intravenous drug administration of a product called Visudyne. The Visudyne was administered by IV by Evelyn Hampton, a nurse employed specifically by Appellant for purposes of administering IV medication. Nurse Hampton herself testified that there was no special training that she received to administer this drug by IV, rather she relied on her general nursing experience to administer the drug. Visudyne is a caustic agent and as a result can damage a patient's tissue if it is not properly administered. There is a dispute as to how long the IV therapy took on April 10, 2003, but at some point during the IV administration of Visudyne, an infiltration occurred . The drug, instead of being administered to the vein, was administered into the tissue around the vein, particularly in the antecubital fossa, or side of the patient's elbow.

There is a question of fact as to whether Nurse Hampton was present monitoring the IV administration when the infiltration occurred. The medical records documenting the IV administration do not reflect the manner and method in which the IV was placed, nor do the records reflect that the nurse confirmed proper placement of the IV. Further, the records do not reflect how long the IV had been administered when the infiltration took place, nor do the records identify what the infiltration looked like or the size of the infiltration, or what was done to treat the infiltration when it occurred. There is a lack of specificity in the medical records regarding these things which should have been documented.

The Appellee's expert, a nursing professor who teaches other nurses how to administer IVs, testified by affidavit that based upon the fact that the medical records do not document the manner or method in which the IV was placed or the presence of proof of proper placement combined with the fact that there was an infiltration, would suggest that the IV was not properly placed and therefore below the standard of care. Appellee's expert further testified by affidavit that because the records do not indicate how long infiltration occurred, what actions were taken after it occurred, and based upon the severity of the infiltration itself, that the monitoring and post infiltration treatment of the patient was below the applicable standard of care.

After the infiltration and after discharge from the office Appellee Conner called the office indicating that she was having severe pain in the area of the infiltration. She was seen and treated by a dermatologist located in the same office building as the Appellant. She went back to her home in Clarksdale and received further treatment from a surgeon in her hometown. During this time, Dr. Priester himself made a house call to the Appellee's house in Clarksdale, Mississippi and treated her and gave her money.

With regard to the issue of causation, it is conceded by the Appellant that Appellee's injuries were the result of the IV needle failing to deliver the caustic medicine into the vein rather than into the tissue surrounding the vein. As noted in the Appellee's pleadings, Record on Appeal page 72, the Appellee did suffer an intravasation/infiltration during her treatment by the Appellant. It is also without dispute the physician at the clinic made a house call to check on Appellee's recovery from this this complication that occurred at Appellant's clinic. See Record on Appeal, page 73.

The only issue ever brought before the trial court with regard to causation was the incorrect assertion that the only breach of the standard of care was a failure to document, and that such a

failure to document cannot be the cause of an injury. See the January 13, 2009, transcript on appeal, page 4, lines 18-20, and the October 5, 2009, transcript on appeal, page 7 line 20. This fact is brought up by Appellee only because the Appellant is now, in its brief, raising an argument never before raised in the trial court and which neither party addressed - that is that a nurse cannot testify as to causation. Since this issue was never raised in the trial court and was, for all practical purposes an undisputed fact up until the time of briefing, the record below may lack a detailed discussion of this new issue.

B. Statement of the Proceedings

On April 12, 2004, the Appellee filed a complaint against the Appellant. Depositions were taken of the parties and witnesses thereafter and the Appellant attempted numerous times to dismiss the suit for lack of personal jurisdiction of the Defendants. This case was filed in County Court and numerous attempts to appeal were taken by the Appellant.

Appellant then moved for a summary judgment on the basis that Appellee had not identified an expert. This was a three page motion simply to challenge Plaintiff's lack of an expert at that point. See Record on Appeal, pages 97-99. Appellee timely responded by designating an expert in IV administration and providing her CV together with her opinion in an affidavit form. The hearing was held on January 13, 2009, with regard to the Appellant's Motion for Summary Judgment. By agreement of the parties, Dr. Priester was dismissed from the suit. The remaining issue to be decided whether Appellant Mid-South Retina, through its nurse, was negligent in the treatment and follow up care of the Appellee. On August 10, 2009, the County Court granted the Appellant's Motion for Summary Judgment based primarily on the incorrect idea that Appellant's expert was not qualified to address the issue of IV administration. The trial court held as follows:

> This Court finds there is nothing contained in Nurse Northington's curriculum vitae or in her affidavit that provides proof that she has the education and experience to qualify in administering this type of intravenous treatment dealing with the photodynamic drug Visudyne or with the complications that could arise from the infiltration of a photodynamic drug. Furthermore the Court finds that there is nothing in her affidavit or curriculum vitae that provides any proof that she has familiarized herself with the drug or the process involved so as to be qualified to provide any opinion that the nursing staff of Mid-South Retina violated the standard of care to which they were required to adhere in administering this drug or in caring for a patient with an infiltration from this drug. Record on Appeal, 205.
>
> This Court further finds that there is nothing in her affidavit or curriculum vitae which provided the necessary proof that she has experience in the administering this specialty type of intravenous treatment. Record on Appeal, 205.
>
> For the above reasons, the Court finds that Nurse Northington is not a competent expert who can provide a competent affidavit. Record on Appeal, 205.
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> Again the Court finds that Nurse Northington did not testify in her affidavit that she had experience with administering the photodynamic drug Visudyne or in caring for a patient who had been treated with this drug. Record on Appeal, 206.
>
> The Court finds that Nurse Northington does not provide a plausible casual connection between the only standard of care violation, poor documentation and the alleged injury-a scarred arm. Record on Appeal, 206.

On August 20, 2009, the Appellee filed a Motion to Reconsider contesting the Court's finding that Nurse Northington was not qualified to offer an opinion on IV administration and further that Nurse Northington had identified conduct which was negligent other than the failure to document. The Motion to Reconsider noted that the original Motion for Summary Judgment did not raise the issues upon which the trial court granted the summary judgment as noted above, rather these were issues raised in a reply brief. More importantly, Appellee had identified an expert in IV

administration, and the Appellant did not carry its burden in proving that there was some other skill or expertise required due to the type of medication. The failure was pointed out to the trial court in Appellee's Motion to Reconsider.

On January 11, 2010, the County Court after hearing the arguments of counsel determined there were factual issues that needed to be determined and further that Appellee's expert Nurse Northington was qualified to offer an opinion on the administration of IV's. Record on Appeal 232. Upon reconsideration the Court decided to deny the Defendant's Motion for Summary Judgment. From this last order, Appellant sought an interlocutory appeal first to the Circuit Court and then to this Court.

III.

SUMMARY OF THE ARGUMENT

In this case there are material facts or issues that need to be determined by a jury and summary judgment is not appropriate. The trial court was correct in granting Appellee's Motion to Reconsider and ultimately denying the Appellant's Motion for Summary Judgment. Further, no Rule prohibits a judge from correcting an error while he/she has jurisdiction of the case.

Certain facts are not in dispute in this case. Appellee Conner was a patient at the Mid-South Retina Clinic when during an IV administration of a caustic drug called Visudyne, an infiltration occurred and injured her to the point of disfigurement. This injury was treated by numerous physicians, including a physician with the Appellant Mid-South Retina Clinic himself, Dr. Priester, who personally came from Memphis, Tennessee to Clarksdale, Mississippi to bandage the elbow of the Appellee, which had been injured during the IV treatment. There is no dispute but that the infiltration caused the injury to the inside of her elbow.

What is in dispute is whether the administration of the Visudyne drug was done properly and whether the patient was monitored properly during the drug administration. Further there is a question as to whether, once the infiltration occurred, the patient was properly treated.

The Appellee identified an expert, Nurse Northington, and by affidavit she testified that she was familiar with the appropriate standard of nursing care with regard to IV placement and complications such as infiltrations. Record on Appeal, 156. Nurse Northington reviewed the medical records of Mid-South Retina Associates, as well as the depositions of Dr. Priester, Appellee Conner and Nurse Hampton, who was in charge of administering the IV at the time of the incident in question. Based upon her education, experience and review of these items, expert Northington

testified that it was her opinion that Mid-South Retina Associates were negligent in the care and follow-up treatment provided to Apellee Conner on April 10, 2003. Record on Appeal, 156. Nurse Northington testified that such negligence was a violation of the applicable standard of care with regard to IV treatment and followup. Nurse Northington goes on to note that the records should have included and did not include, information documenting the manner and method of the IV placement, proof of proper placement, together with length of time between onset of infiltration and the infusion. There is nothing in the record to document the appearance of the site of the infiltration or actions taken post infiltration. Further, there is no documentation in the records to indicate that the area of the infiltration was bandaged to prevent any incidental exposure to sunlight.

IV.

ARGUMENT

A. Are there issues of fact which need to be determined by a jury, such that summary judgment is not proper?

When the facts are viewed in a light most favorable to the Appellee, and as demonstrated by the affidavit of Nurse Northington, the Appellant was negligent in the administration of the IV to the patient. They were negligent in the monitoring of the IV administration to the patient, and they were negligent in the follow-up care and treatment (more accurately lack thereof) with regard to the patient. This conduct fell below the applicable standard of care and caused or contributed to cause the injury and scarring to patient Bernice Conner. Therefore, there are material issues of fact in this matter that need to be determined by a jury.

B. Is Nurse Northington qualified to express such an opinion?

As noted by the trial court, Nurse Northington has an impressive curriculum vitae. In addition to her resume, she testified that she is familiar with the appropriate standard of care with regard to IV placement and complications such as infiltration. Nobody has questioned this testimony or her qualifications. She teaches nurses how to place IVs and she teaches nurses how to deal with such complications. She is an associate professor at the University of Mississippi School of Nursing. She has been providing nursing care to patients at the University of Mississippi Medical Center in Jackson, Mississippi since 1979. There can be no question but that she has the proper qualifications and experience to address this very issue. Further, in addition to her training, experience and skills, she reviewed the medical records of the Appellant and the depositions of the parties and Nurse Hampton. She is qualified to express, therefore, an opinion as to whether or not the IV placement,

monitoring and followup care was at or below the applicable standard of care.

C. Can Nurse Northington offer an opinion as to causation?

1. Causation in General

The Appellant argues that a nurse may never testify as to causation. This is a new and original argument that was never brought before the trial court, probably because the case which is cited to support this position is a very recent case, Vaughn v. Mississippi Baptist Medical Center, 20 So.3d 645 (Miss. 2009). The argument before the trial court with regard to causation had to do with the affidavit of Nurse Northington and the errant suggestion that the *only* negligent acts alleged were a failure to document, and that a failure to document cannot in fact be the cause of an injury. That will be discussed further below.

With regard to causation in general, this argument was never made to the trial court, specifically that nurses can not offer an opinion with regard to causation. The significance of not making this argument to the trial court is that, had it been made, Appellee would have been afforded the opportunity to develop the record on what was essential an undisputed issue. Everyone admitted that Appellant had an infiltration and it required extensive treatment, some of which was provided by the Appellee's own physician. The bottom line is, the trial court cannot err on an issue that was never presented to it. This new argument should therefore be deemed to have been waived and not properly preserved for appeal as it was never previously raised or addressed by the parties, and more importantly the trial court.

With regard to the holding in Vaughn, the Supreme Court stated, "Since medical diagnosis is outside a nurses's scope of practice, logically it would follow that a nurse should not be permitted to testify as to his or her diagnostic impressions or as to the cause of a particular infectious disease

or illness." The expert nurse in Vaughn was attempting to testify as to the origin of a patient's staff infection, in a patient who had been to more than one facility and in which there was a dispute among the physicians as to when the staff infection occurred. Such a diagnosis is clearly outside the scope of a nurses expertise, especially considering the physicians couldn't agree as to the timing of the infection. The case sub judice is far different from Vaughn, In the case sub judice a nurse with experience in administering IVs and attending the complications thereof, is testifying not as to diagnosis, but as to the administration and undisputed complication of Appellee's IV administration. These issues are withing a nurse's expertise and therefore different from the issue presented in Vaughn.

2. Lack of Documentation

Much has been made about the original affidavit of Expert Northington, Record on Appeal, 156. Because Nurse Northington testified that it was below the applicable standard of care not to document the manner of placement, the method of placement, and whether there was proof of proper placement of the IV, it had been argued both at the trial court level and now at the appellate level that the lack of documentation can not be a cause of someone's injury. It has never been the contention at anytime by Appellee that the lack of documentation itself caused any injury. It is disingenuous to suggest that is the Appellee's position. Rather, as stated in the affidavit and in every response to this issue, it is the Appellee's contention based on all the evidence, the depositions, the records, and the lack of the information contained in the records, the Appellant was negligent in administering the IV, monitoring the IV, and then in the followup care with regard to the IV complication.

If, for example, proof of proper placement should be noted in the records as it often is, and it is not noted in the particular record on the particular instance where an infiltration occurs, there

are two possibilities.: Either the person administering the drug did not confirm proper placement of the IV needle or they did confirm proper placement but failed to document it. When you combine the evidence together with the results and complications that occurred, one inference becomes more reasonable than the others. That is the significance in failing to document something that should be documented. If it is not documented and a complication arises which is consistent with the failure to do that thing which should be documented, then it is a fair inference that it was not documented because it was not done. In this case everyone agrees that it was critically important to prevent the infiltration site from being exposed to light, especially sunlight. However, there is no documentation in the records to suggest that the area was bandaged to prevent exposure. This is exactly what is stated in the affidavit of LaDonna Northington, "further there is no documentation or testimony to indicate that the area was bandaged to prevent any incidental exposure to sunlight." Record on Appeal, 156.

The significance of failing to document that which, under the appropriate standard of care, should be documented is not that it causes the injury, but that it provides a reasonable basis for an expert to opine that such care and treatment was in fact not performed. It is the failure to perform that which should be documented, that is negligent and causative, not the lack of documentation itself.

D. Was it err for the trial court to reconsider its ruling on the motion for summary judgment?

No standard of care was ever addressed by the Appellant in its brief. Because the ultimate issue sought to be reviewed is the trial court's denial of Appellant's Motion for Summary Judgment, the proper standard of review would be a de novo review of trial court's decision, viewing the

underlying evidence is a light most favorable to Appellee. See Brasel v. Hair Co., 976 So.2d 390, 392 (Miss. App. 2008). However, to the extent Appellant is arguing that procedurally, the trial court cannot reconsider its decision to grant a summary judgment, the standard of review for such a decision would be abuse of discretion. See Medical Assur. Co. of Mississippi v. Meyers, 956 So.2d 213, 215 (Miss. 2007).

As noted previously, there are material issues that need to be tried in front of a jury and the trial court agrees. The question then becomes whether the trial court can send this case to a jury after it admittedly mistakenly grants a summary judgment on a motion that is filed within ten days of the granting of that summary judgment. Certainly there is no suggestion that the motion to reconsider was untimely. Therefore, the only question is whether there is some procedural bar that would prevent a case in which there are material issues in dispute from being tried. Can a trial court, if it believes it has made a mistake like it did in this case, correct itself? Should the trial court not be permitted, if it perceives an error, to ultimately do what it considers to be the right thing? There is no rule that prevents the trial court from correcting mistakes, and no rule should ever prevent a trial court from doing what it believes to be correct under the law. In Anderson v. R & D Foods, Inc., 913 So.2d 394, 399 (Miss. App. 2005) the Appellate Court found such arguments to be "untenable" with regard to a trial court's granting of a motion to reconsider. The Appellate Court noted that the motion to reconsider was an application to the court for an order pursuant to Rule 7(b)(1). Id.

There are a number of case in which the trial court reconsiders its ruling on a summary judgment motion and the Appellate Court reviews the underlying decision. In J.M. ex. rel. V.M. v. Bailey, 42 So.3d 618 (Miss. App. 2010) the trial judge granted a motion to reconsider with regard to a summary judgment motion and the Appellate Court reviewed the summary judgment motion

for error. Also in Brasel v. Hair Co., 976 So.2d 390 (Miss. App. 2008) the trial court granted a motion to reconsider with regard to a summary judgment motion and the Appellate Court reviewed the decision on the motion for summary judgment for error. A motion to reconsider is nothing new or unique, it is the inherent power of the trial court to handle cases properly before them in manner that best serves justice. In the case sub judice, the trial court timely reconsidered its holding and held that there were material issues of fact for a jury to decide in this case. That decision should not be disturbed and drug out by one of the many appeals sought by this Appellant. Any error by the trial court can be addressed on a proper and timely appeal at the conclusion of this matter.

The Appellant argues the trial court may not reconsider a ruling or correct itself, unless and only under the circumstances in which there was newly discovered evidence which was not previously available. Appellant's brief at page 18. As authority, Appellant cites to Rule 59, but even this rule confirms the trial court's authority to do the right thing. It provides specifically that , " the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." This is not a rule of restriction, but of rule of enlargement or discretion.

V.

CONCLUSION

There are questions of fact that need to be resolved by the jury, this is recognized by the trial court and this matter should be remanded for trial.

RESPECTFULLY SUBMITTED, this the 9th day of February, 2011.

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CERTIFICATE OF SERVICE

I, Daniel M. Czamanske, Jr., do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to:

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