IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-IA-00190-SCT

MID-SOUTH RETINA, LLC **APPELLANT**

v.

BERNICE CONNER **APPELLEE**

MID-SOUTH RETINA, LLC'S APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE COUNTY COURT OF
COAHOMA COUNTY, MISSISSIPPI CAUSE NO.: 14-CO-04-0116

ORAL ARGUMENT NOT REQUESTED

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Whether the lower court erred in reversing its award of summary judgment to the Defendant when Plaintiff's expert nurse could not legally opine about medical causation; when Plaintiff's expert's Affidavit lacked of any opinion providing a plausible causal link between Mid-South's nurses actions and the burns on Plaintiff's Arm; and when the lower court mistakenly considered the Plaintiff's supplemental affidavit on reconsideration.

VIII. ARGUMENT

A. Summary Judgment Was Warranted in Light of the Lack of Any Qualified, Substantial Opinion Sufficient to Make a Prima Facie Case of Medical Negligence.

Conner's first three arguments in sections A, B and C are in response to Mid-South's arguments A and B in the Appellant's Brief. Conner claims that there are issues of fact to be determined by a jury and that nurse northington is qualified to testify as to the standard of care and causation. Without a qualified, competent expert to testify to the standard of care to which Mid-South was to adhere; that Mid-South breached that standard and that the breach caused an injury to Mrs. Conner, there is no material issue of fact for a jury to consider and a judgment as a matter of law is warranted in favor of Mid-South.

Conner claims that Mid-South is putting forth a new argument by citing *Vaughn v. Mississippi Baptist Medical Center*, 20 So. 3d 645 (Miss. 2009). While Mid-South agrees that the case was not before the trial court as the opinion was yet to be written, the issue was most certainly before the trial court. Mid-South and then-defendant, Dr. Priester's Motion for Summary Judgment was based on the premise that summary judgment was warranted because Conner could not put forth a *prima facie* case of medical negligence through competent and qualified expert testimony as required. Mid-South's motion and the lower court's first opinion are based on the fact that Nurse Northington's affidavit does not establish that Mid-South's failure to document caused the injury or scarring to Conner's arm. It is clear that the issue of whether Nurse Northington could testify as to the issue of causation was before the trial court.

Conner argues that this case is far different from *Vaughn, supra.* in that the nurse in *Vaughn* was attempting to testify to the origin of a patient's staff infection which was clearly

outside the scope of the nurse's expertise. *Appellee's Brief*, p. 11. The cases are not dissimilar and the legal reasoning is identical. In *Vaughn*, the plaintiff argued that her nurse expert, Keller, was trained to recognize the signs and symptoms of infection and that Keller never opined as to anything above and beyond a nurse's area of practice. Keller maintained that Vaughn had signs and symptoms of infection during her first hospitalization at Baptist and that a breach in the standard of nursing care caused Vaughn's staph infection. *Id.* at 651. In this case, Conner has put forth nurse Northington who is alleged to be trained in administering IV's and other relevant medicine to testify that a breach in the standard of nursing care caused burns to Conner's arm. There is no factual difference. The Court should apply its reasoning in *Vaughn* that "since medical diagnosis is outside a nurse's scope of practice, logically it would follow that a nurse should not be permitted to testify as to his/her diagnostic impressions or as to the cause of a particular infectious disease or illness." *Id.* at 652. Following this reasoning would be in keeping with the majority rule that nursing experts cannot opine as to medical causation and are unable to establish the necessary element of proximate cause.

Conner's response to Mid-South's argument on Nurse Northington's opinions that the sole breaches of the standard of care were in failing to document misses the mark. Nurse Northington is not critical of Mid-South for allowing an infiltration to occur, only that Mid-South's nurse failed to document certain aspects of the IV treatment. Nurse Northington cannot be critical of the infiltration as it is a common risk when a person inserts a needle under the skin to inject a vein that cannot be seen by the naked eye. Therefore, the only breaches of the standard of care to which Nurse Northington provided are alleged failures to document.

Our law has never held a physician or surgeon liable for every untoward result which may

occur in medical malpractice. A physician is not an insurer of the success of his care and treatment. *Hudson v. Taleff*, 546 So.2d 359, 364 (Miss.1989). The same holds true for a nurse, hospital or medical clinic. Patients are warned of recognized complications and common risks because they are untoward events that occur even when every possible precaution has been taken. Nurse Northern is not critical of the occurrence of the infiltration only the documentation. The documentation did not cause any injury to Conner.

B. Conner's Supplemental Affidavit Should Not Have Been Considered upon Reconsideration.

Conner argues that the trial court correctly reconsidered its judgment in favor of Mid-South and that the rules allow for this "enlargement of discretion." *Appellee Brief,* pp. 12-14. Conner relies on two cases, *J.M. ex. rel. V.M. v. Bailey*, 42 So. 3d 618 (Miss. App. 2010) and *Brasel v. Hair Co.*, 976 So. 2d 390 (Miss. App. 2008). Both cases are wholly distinguishable for sole reason that the trial court in each of the cases denied summary judgment prior to reconsideration. This distinction is important because Rule 59 is not implemented without a judgment. Neither of the aggrieved parties was seeking reconsideration of a judgment and Rule 59 was not an issue. Therefore, the cases are inapplicable.

Additionally, neither case involved a supplemental affidavit that corrected the flaws of the initial affidavit as in this case. MISS. R. CIV. P. 56 (c) states "The adverse party prior to the day of the hearing may serve opposing affidavits." Conner submitted Nurse Northington's initial Affidavit 25 days after receiving the Motion. Mid-South's Rebuttal Memorandum filed on December 4, 2008 clearly sets forth its argument that Nurse Northington's opinions contained in her affidavit do not provide a plausible causal connection between the violation of the standard

of care and the injury sufficient to make a prima facie case of medical negligence. (R. 175, R.E. 3). Conner had over one month to submit an amended affidavit prior to the hearing on January 13, 2009 but failed to file any supplemental proof. The rules of civil procedure are not mere suggestions and compliance with the rules is a requirement toward the end of securing the just, speedy and inexpensive determination of every action. *Illinois Central Railroad Co. V. Moore*, 994 So. 2d 723 (Miss. 2008).

Once the lower court ruled against Conner, she had Nurse Northington execute another affidavit correcting the deficiencies of the original affidavit filed months prior. There was no newly discovered evidence that prompted a change in Nurse Northington's opinions, much less newly discovered evidence that could not have been discovered using due diligence. Further, Conner did not provide the Court with any evidence to show that Nurse Northington's opinions could not have been rendered prior to the entry of judgment against her. The lower court should not have reversed its initial grant of summary judgment on rehearing.

IX. CONCLUSION

The lower court erred when it reversed it initial grant of summary judgment in favor of Mid-South Retina, LLC. The lower court initially made the correct finding that Conner failed to make a prima facie case of medical negligence. Nurse Northington is not legally qualified by her training to render an opinion on medical causation. Regardless of the law, Nurse Northington's opinions did not provide a causal link between the breach of the standard of care and the injuries sustained by Mrs. Conner. The lower court should never have allowed Conner the opportunity to correct Nurse Northington's initial affidavit by providing a supplemental affidavit addressing the lack of opinion the lower court initially based its ruling upon. Conner had sufficient time to

rebut Mid-South's Motion with complete affidavits. To allow a respondent to supplement the proof without a showing that such proof could not have been discovered prior to the judgment would serve to continue litigation ad infinitum. The lower court's denial of Mid-South's Motion for Summary Judgment on reconsideration should be reversed and a judgment in favor of Mid-South rendered thereby concluding this litigation.

RESPECTFULLY SUBMITTED, this the 28th day of February, 2011.

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X. CERTIFICATE OF SERVICE

I, S. Kirk Milam, of Hickman, Goza & Spragins, Attorneys at Law, Madison, Mississippi, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above foregoing to:

Daniel M. Czamanske, Jr., Esq.
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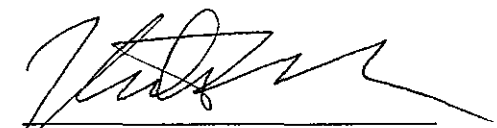
The Honorable Tommy W. Allen
Coahoma County Court Judge
P. O. Box 756
Clarksdale, MS 38614-0756

This, the 28th day of February, 2011.



S. KIRK MILAM

X. CERTIFICATE OF FILING

I, S. Kirk Milam, of Hickman, Goza & Spragins, Attorneys at Law, Madison, Mississippi, do hereby certify that I have this day filed the original and three (3) copies of Appellant's Brief along with a CD-ROM containing a copy of the brief in PDF format.

This, the 28th day of February, 2011.

S. KIRK MILAM