IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2010-IA-01604-SCT

DEBORAH KNAPP AND HAROLD KNAPP — **PLAINTIFFS/APPELLANTS**

VS.

ST. DOMINIC-JACKSON MEMORIAL HOSPITAL, JOHN DOE PERSONS A-M, AND JOHN DOE ENTITIES N-Z — **DEFENDANTS/APPELLEES**

REPLY BRIEF OF APPELLANT

Interlocutory Appeal From the Circuit Court of the First Judicial District of Hinds County, Mississippi

Oral Argument Not Requested

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REPLY

A. The Trial Court Erred in Ruling that Plaintiffs' Expert Witness, John A. Tilleli, M.D., Was Not Qualified to Render an Expert Opinion Regarding the Standard of Care for the Treatment, Care, and Monitoring of Deborah Knapp While She Was a Patient in the Intensive Care Unit at St. Dominic-Jackson Memorial Hospital.

In their brief, the Appellee stated that "[p]laintiffs fail to point out Dr. Tilelli's experience that is relevant to Mrs. Knapp's treatment and care in the adult ICU for a psychiatric condition." (Brief of Appellee at 15). Throughout their brief, the Appellee have attempted to confuse the issues and make this Court believe that this is a case in which the applicable standard of care can only be established through expert testimony of a psychiatrist and/or psychologist. Nothing can be any further from the truth. Once again, the medical negligence at issue here does not center on the filed of psychiatry and/or psychology, especially Deborah Knapp's care and treatment in the intensive care unit. It is an unquestioned fact that Deborah Knapp was being treated in the intensive care unit for an intentional overdose of prescription medication. She was being treated and monitored in the intensive care unit by physicians and nurses, not by a psychiatrist and/or psychologist. There is no dispute that Mrs. Knapp suffers from bi-polar disorder, but that was not the condition for which she was admitted and received treatment for in the intensive care unit. Therefore, it bears repeating yet again that this is a failure to monitor case of medical negligence, and not one of a failure to properly treat and/or diagnosis a patient with a specific mental condition. Accordingly, any physician, specialist, and/or general practitioner who has training and/or experience in rendering emergency care and critical care in an intensive care based environment, should be qualified to render an expert opinion as to the standard of care required for the care and treatment of Deborah Knapp while a patient in the intensive care unit. It is absolutely essential that this Court recognize and understand this very clear distinction when deciding whether Dr. Tilleli is qualified to render an expert opinion

in this case.

Moreover, a literal reading of the Appellee's Brief as it relates to this particular issue would lead one to believe that Dr. Tilelli has absolutely no experience in treating adult patients and has only treated infants and very small children throughout his career. Again, nothing can be any further from the truth. In their brief, the Appellee conveniently neglects to acknowledge and address the fact that Dr. Tilelli testified in a sworn deposition that he has experience in treating intensive care unit patients, that he has worked as an emergency room physician, that he has worked full time as a critical care physician, and that he **practiced adult emergency medicine until 2001**. (R. 548, 553) (emphasis added). Appellee also makes it a point of emphasis that some of Dr. Tilelli's certifications are by pediatric boards and that "Dr. Tilelli practices pediatric critical care and works for Arnold Palmer Hospital for Children." (Brief of Appellee at 14). It is a widely known and accepted fact that pediatric medicine includes the care and treatment of children up to eighteen (18) years of age or, in some cases, up to twenty-one (21) years of age, depending on the medical practice and facility. Arnold Palmer Hospital for Children provides adolescent care and treatment for teens twelve (12) to twenty-one (21) years of age.[1] In addition to the fact that Dr. Tilllei practiced adult emergency medicine until 2001, he treats and/or has treated patients up to the age of eighteen (18) or twenty-one (21) in his current practice. It must be noted that such patients would be considered ***adults*** in most states. (Emphasis added). Also, it bears repeating yet again that Dr. Tilelli has served as the Medical Director for Pediatric Intensive Care at Arnold Palmer Hospital. (R. 548). Logic and common sense would dictate a person to conclude that a physician is not elected and/or appointed

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A review of Arnold Palmer Hospital for Children website on the internet states the following: "The Teen Health Center at Arnold Palmer Hospital provides teens 12 to 21 years of age with age-appropriate and accessible health care in an environment which acknowledges and supports their growing independence and maturity, promotes healthy lifestyle choices, and encourages teens to assume increasing responsibility for their health."

to such a position within a hospital if he did not possess the requisite knowledge, skill, experience, training, and/or education in the care and treatment of intensive care unit patients, including those admitted to the hospital due to an attempted suicide.

Furthermore, Appellee's argument that the Plaintiffs have produced no evidence to support their argument that Dr. Tilelli is a qualified expert is completely without merit. In fact, it is the Appellee who has failed to present the trial court, as well as this Honorable Court, with any ***applicable*** legal authority, affidavit(s), expert opinion(s), etc. to support their position that Dr, Tilelli is not qualified to render an expert opinion. (emphasis added). The Appellee has presented the trial court and this Honorable Court with mere conclusory statements regarding the admission of expert testimony. The Appellee has failed to explain differences in the care and treatment utilized in an adult intensive care unit as opposed to a pediatric intensive care unit which would make Dr. Tilleli not qualified as an expert witness. The Appellee has failed to expound and explain the difference in training, education, skill and/or experience of physicians who practice in an adult intensive care unit as opposed to a pediatric intensive care unit which would make Dr. Tillelli not qualified to render an expert opinion. Finally, the Appellee has failed to articulate any differences in monitoring, restraint, and supervision measures employed in an adult intensive care unit as opposed to those employed in a pediatric intensive care unit.

Basically, the Appellee is requesting that this Honorable Court affirm the trial court's decision to strike Dr. Tilelli as an expert witness because he practices pediatric intensive care medicine, as opposed to adult intensive care medicine. That is the Appellee's argument—plain and simple. However, such a ruling would go against the established general rule that in medical malpractice actions, "a specialist in a particular branch within a profession will not be required." Therefore, to strike Dr. Tilelli as an expert witness because he practices pediatric intensive care

medicine, as opposed to adult intensive care medicine, goes against this general rule and stands in total opposition to prior rulings handed down by this Honorable Court and the Mississippi Court of Appeals. Thus, it is Dr. Tilelli's experience in treating intensive care patients and his training in and knowledge of emergency medicine and critical care that are relevant to the inquiry of whether he is qualified to render an expert opinion in this case, not the fact that he primarily treats pediatric intensive care patients as opposed to adult intensive care patients. The trial court's decision to strike Dr. Tilelli as an expert witness was arbitrary and clearly erroneous, and, for that reason alone, it cannot stand.

B. The Trial Court Erred in Not Allowing Plaintiffs to Designate an Expert Witness in Accordance With the Dictates of Uniform Circuit and County Court Rule 4.04(A).

The Appellee has cited the case of *Venton v. Beckham*, 845 So. 2d 676 (Miss. 2003)in support of their contention that Plaintiffs should not be allowed to designate another expert in accordance with the dictates of Uniform Circuit and County Court Rule 4.04(A). However, Plaintiffs must point out some significant facts which distinguishes that case from the case *sub judice*. In *Venton*, the Plaintiffs sought to designate another expert in a totally different field following the deadline for designation of expert witnesses. *Id.* at 682. Here, Plaintiffs timely designated an expert witness within the time allotted for designation of expert witness. After the trial court erroneously struck Plaintiffs' expert witness, Plaintiffs immediately sought to designate another expert witness within the same field of expertise. In *Venton*, this Court noted that "[n]o extension of the deadline for discovery or designation of an expert witness was requested by the Ventons." *Id.* at 684. In the present case, Plaintiffs made several requests for an extension of both the deadline for discovery and designation of an expert witness to no avail. Finally, and most importantly, in *Venton*, there was a trial date set. *Id.* at 682. In the case *sub judice*, there is no trial date set.

Due to the fact that no trial date is set for the case, Appellee's argument regarding the prejudice that they will suffer if Plaintiffs are allowed to designate another expert witness at this stage of litigation is without merit.[2] From the outset of this case, Appellee was aware that Plaintiffs were pursuing a medical malpractice cause of action against St. Dominic, and any new expert witness will offer similar, if not the same, opinions as those espoused by Dr. Tilelli. Moreover, Appellee previously designated expert witness that they intended to utilize in rebutting the expert opinions articulated by Dr. Tilelli. Furthermore, the trial court can readily take away any possible prejudice that the Appellee contends they will suffer from the designation of a new expert witness by not setting the case for trial until Appellee has had sufficient time to properly examine the opinions and curriculum vitae of the expert witness, as well as to depose the expert witness if the Appellee so desires.

C. The Trial Court Erred in Denying Plaintiffs' Motion to Extend the Discovery Deadline, Especially When considering the Fact that the Plaintiffs had Presented the Trial Court With Credible Proof Which Showed that the Defendants had Previously Withheld, and May Currently Still be, Withholding Clearly Discoverable Evidence Which Plaintiffs are Entitled to Under the Rules Governing Discovery.

Appellee's argument regarding Plaintiffs failure to properly file and adhere to all the procedure requirements for a motion to compel is yet another disingenuous attempt to confuse and cloud the real issues at play here. The entire argument is illogical because Plaintiffs should not be prejudiced due to failure to file a motion to compel when they had no valid reasons to believe that discoverable evidence was being withheld. Why would the Plaintiffs file a motion to compel when the Defendants repeatedly responded to propounded discovery by saying that no maintenance records

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In their brief, the Appellee appears to insinuate that the reason that a trial date has not been set is due to some type of dilatory action(s) on part of the Plaintiffs. That was not the case as both the Plaintiffs and Defendants, as well as the trial court, had conflicts with the proposed trial dates.

existed for the bathroom in question and that no incident reports were generated as a result of Mrs. Knapp's slip and fall? Moreover, the trial court refused to allow Plaintiffs to depose Jerry Farr, St. Dominic Risk Safety Manager. Mr. Farr conducted an investigation surrounding the incident, and he assisted defense counsel in responding to Plaintiffs' propounded discovery. Therefore, Plaintiffs should not suffer any adverse consequences for a failure to file a motion to compel when they had no reasons to believe that the Defendants were not being completely forthright in their discovery responses and when they were denied the opportunity to depose the one person who could have shed light on the truthfulness and accuracy of the discovery responses.

Nevertheless, the trial court was presented with sufficient and credible proof which showed that discoverable information was being withheld from the Plaintiffs, but still declined to extend the discovery deadline. It bears repeating yet again that Ken Cooley, the intensive care unit nurse who was assigned to Deborah Knapp on the date that she slipped and fell, testified during his deposition that he verbally told a member of the hospitals' staff to call maintenance so that someone could come and repair a problem with the bathroom on the morning of Deborah Knapp's slip and fall. (Supp. R. 47-53).[3] The statements by Mr. Cooley would indicate that maintenance was, or at the very least, should have been notified about the problems associated with the bathroom in Deborah Knapp's hospital room. In turn, one can logically conclude that a maintenance record should exist for the date of Deborah Knapp's slip and fall or shortly thereafter. Yet, to date, no such record has been produced by the Appellee. Furthermore, Ken Cooley testified during his deposition that he generated

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Appellee is incorrect in stating that the documents which were included in the Supplemental Record "are not properly before the Court and thus, should not be referred to by Appellants." The trial court omitted documents that were material to the Plaintiffs by error or accident. As a result, the trial court caused a supplemental record to be filed after the record had been transmitted to the Supreme Court. The supplemental record was properly filed with the Supreme Court Clerk's office. Therefore, the documents included in the supplemental record are properly before this Court.

a report regarding the incident. (Supp. R. 52-53). Again, Plaintiffs propounded discovery which clearly requested any and all incident and/or investigation reports generated in relation to the incident in question, but none were ever provided and/or produced as part of Appellee's discovery responses. In fact, Plaintiffs were not even aware that such an incident report even existed until Ken Cooley made reference to it during his deposition.

Even if the trial court or this Honorable Court tends to believe that the Defendants have produced any and all maintenance records for the bathroom in question, there is no denying the fact that the Defendants have failed to produce the incident report in question. It must be noted that the Defendants do not attempt to refute the accuracy of Ken Cooley's statement and have not denied the existence of an incident report in their brief to this Court. Instead they decided to employ the diversionary tactics of confusing and deflecting attention from the real problems associated with the trial court's ruling by making a frivolous argument regarding a motion to compel. The key flaw in the trial court's ruling regarding extension of the discovery deadline is that the ruling does not even address the issue(s) surrounding the failure to produce the incident report. The trial court's ruling does not even allow the Plaintiffs an opportunity to gain access to an incident report that Plaintiffs did not know even existed until Ken Cooley made reference to it during his deposition. Clearly, the Defendants have no intentions of voluntarily producing the incident report in question because if they did, they would have done so by now.

The maintenance record and incident report are absolutely essential in helping Plaintiffs to prove their causes of actions against the Defendant, and, in their absence, Plaintiffs will surely suffer prejudice in their attempts to adequately prepare and develop their case for trial. Therefore, this Court must disturb the discovery order because there has been an abuse of discretion.

CONCLUSION

Clearly, Dr. Tilelli is more than qualified to render an expert opinion in this case based off his knowledge, skill, experience, training, and/or education. Plaintiffs produced credible evidence which showed that Dr. Tilleli has experience in treating patients who are similarly situated as the Plaintiff in this case (i.e., intensive care patients). And for the trial court to strike Dr. Tilleli as an expert witness because currently he treats primarily pediatric intensive care patients as opposed to adult intensive care patients, stands in total opposition to the rulings handed down and precedent establish by this Court in prior cases dealing with the admissibility of expert testimony.

Although Plaintiffs' stand by their contention that Dr. Tilelli is qualified to render an expert opinion, they will argue that the trial court further erred when it refused to allow Plaintiffs to designate another expert witness, in accordance with dictates of Uniform Circuit and County Court Rule 4.04(A), after the court struck Dr. Tilelli as an expert witness. The rule allows for the designation of an expert witness so long as the witness has been designated to all attorneys of record at least sixty days before trial. Here, no trial date has been set. Due to the fact that no trial date has been scheduled, Defendant will be hard pressed to show any prejudice that it might suffer due to Plaintiffs being allowed to designate another expert witness.

Plaintiffs' causes of action against St. Dominic are based on medical negligence (malpractice) and premises liability. The maintenance record(s) and incident report(s) mentioned herein are vital pieces of discoverable evidence which go to the heart of Plaintiffs' claims against the Defendant. Plaintiffs showed the trial court credible evidence which tends to support Plaintiffs' contention that the maintenance record(s) and incident report(s) in question are currently being withheld or knowingly being concealed by the Defendant. Yet, the trial court's order regarding the extension of the discovery deadline does not allow Plaintiffs the opportunity to gain access to clearly

discoverable information that Plaintiffs did not know existed until well after the expiration of the discovery deadline.

For the reasons stated herein, this Court should reverse the ruling of the Circuit Court of the First Judicial District of Hinds County, Mississippi, wherein the court struck John A. Tielli, M.D. as an expert witness. If this Court is so inclined to agree with the ruling of the trial court regarding the admissibility of Dr. Tilelli as an expert witness, then Plaintiffs are respectfully requesting that this Court order the trial court to allow Plaintiffs to designate another expert witness pursuant to Uniform Circuit and County Court Rule 4.04(A). Plaintiffs are also respectfully requesting that this Honorable Court reverse the ruling of the trial court regarding the extension of the discovery deadline so that Plaintiffs will not have any restrictions and/or limitations placed on them as they attempt to gain access to discoverable information that is being withheld or knowingly concealed by the Defendant.

RESPECTFULLY SUBMITTED, this the 2nd day of November, 2011.

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CERTIFICATE OF SERVICE

I, Jwon T. Nathaniel, Attorney for Appellants, do hereby certify that I have this day caused a true and correct copy of the above and foregoing Brief of Appellant to be served by United States Mail, postage-prepaid, to the following:

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