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**

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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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of records certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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Trial Judge:

1. Honorable Jeff Weill, Sr.
Hinds County Circuit Court Judge
Post Office Box 22711
Jackson, Mississippi 39225

SO CERTIFIED, this, the 15th day of August, 2011.

Jwon J. Nathaniel
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STATEMENT REGARDING ORAL ARGUMENT

Appellants do not believe that the facts and legal arguments encompassed in this appeal necessitate oral argument, but instead assert that this matter should be decided based on the briefs which have been submitted to the Court.

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STATEMENT OF THE ISSUES

Deborah Knapp and Harold Knapp, Plaintiffs/Appellants herein, being aggrieved by the judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi, as rendered in civil action number 251-08-966-CIV, hereby prosecute this, their Appeal, to the Supreme Court of Mississippi.

The Appellants respectfully submit the following issues for review by the Court:

ISSUE I. Whether 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 (hereinafter "St. Dominic").

ISSUE II. Whether 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).

ISSUE III. Whether 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.

STATEMENT OF THE CASE

A. Nature of the Case, the Course of the Proceedings, and its Disposition in the Court Below.

This is a medical malpractice/premises liability case filed by the Plaintiffs against St. Dominic. On March 23, 2010, the Circuit Court of the First Judicial District of Hinds County, Mississippi, Honorable W. Swan Yerger, presiding, ruled that Plaintiffs' expert witness, John A. Tilelli, M.D., was not qualified to render an expert opinion in the case, and thus granted Defendants' Motion to Strike Plaintiffs' Expert Witness. (R. 562-564, R.E. 16-18). The opinion and order, as written, was sort of ambiguous in that it was not exactly clear whether Plaintiffs' expert witness would still be allowed to testify regarding the standard of care in the intensive care unit at St. Dominic. It was Plaintiffs' opinion and belief and that the opinion and order still allowed Dr. Tilleli to testify regarding the standard of care in the intensive care unit at St. Dominic. As a result, Defendant filed a Motion to Clarify Court's Order Striking Plaintiffs' Expert Witness. (R. 659-666). Shortly thereafter, Plaintiffs filed their Response to Motion to Clarify Court's Order Striking Plaintiffs' Expert Witness. (R. 667-673). On July 30, 2010, Plaintiffs also filed a Motion to Extend the Discovery Deadline. (Supp. R. 4-18). On August 13, 2010, Defendant filed its Response to Plaintiffs' Motion to Extend Discovery Deadline. (Supp. R. 19-31). Eventually, the Motion to Clarify Court's Order Striking Expert Witness and the Motion to Extend the Discovery Deadline came on for hearing, and, following the hearing, the court took the motions under advisement. Based on statements made during the hearing, Plaintiffs filed a Supplemental Response to Plaintiffs' Motion to Extend the Discovery Deadline. (Supp. R. 38-53). On September 13, 2010, the trial court entered an Order as follows: (1) striking Dr. Tilelli as an expert witness because the court concluded that he was not qualified to render an expert opinion regarding the applicable standard of care in the intensive care unit at St. Dominic and (2) granting, in part, Plaintiffs' Motion to Extend the

Discovery Deadline with specific restrictions regarding any additional discovery. (Supp. R. 54-55, R.E. 14-15). Pursuant to the Mississippi Rules of Appellate Procedure, Plaintiffs/Appellants filed their Petition for Interlocutory Appeal and for Stay of Trial Court Action on October 4, 2010. On November 24, 2010, this Honorable Court granted Plaintiffs' Petition for Interlocutory Appeal and for Stay of Trial Court Action. (R. 699).

B. Statement of the Facts Relevant to the Issues Presented for Review.

On October 10, 2006, Deborah Knapp slipped and fell due to a leaky toilet in her hospital room in the intensive care unit at St. Dominic. (R. 17). As a result of the fall, Deborah Knapp suffered sever, painful and permanent injuries to her body, including, but not limited to, her head and face. (R. 17). Following her slip and fall in the intensive care unit, Deborah Knapp was forcefully transferred to St. Dominic's Behavioral Health Unit. (R. 17). While waiting to use the telephone in the behavioral health unit, Deborah Knapp was brutally attacked by an unidentified behavioral unit patient. (R. 18). The patient used the telephone to violently, forcefully and repeatedly strike Deborah Knapp on the back of the head. (R. 18). The unprovoked attack caused Deborah Knapp to fall to the floor, where she once again sustained sever, painful and permanent injuries to her body (including her head and face). (R. 18). It is averred and believed that, as a result of this incident, Deborah Knapp suffered a fractured mandible. (R. 18). The subject St. Dominic Behavioral Unit patient also violently and forcefully kicked Deborah Knapp while she was helplessly lying on the floor. (R. 18).

SUMMARY OF THE ARGUMENT

The trial court erred in striking John A. Tilelli, M.D. as an expert witness. There was credible evidence presented to the trial court which clearly showed that Dr. Tilelli has prior knowledge, skill, experience, training, and education in treating intensive care unit patients. The primary basis for the trial court striking Dr. Tilelli as an expert witness is the fact that his practice has primarily focused on pediatric medicine since 2001. (R. 562-564). The Mississippi appellate courts have consistently held and established the 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. In short, Dr. Tilelli is more than 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, and the trial court's decision to strike him as an expert witness was arbitrary and clearly erroneous, amounting to an abuse of discretion.

Even if this Court agrees with the trial court's ruling that Dr. Tilelli is not qualified to render an expert opinion in the case *sub judice*, this Court should, at minimum, instruct the trial court that Plaintiffs are allowed to designate another expert in accordance with the dictates of Uniform Circuit and County Court Rule 4.04(A). Rule 4.04(A) of the Uniform Circuit and County Court Rules provides, in pertinent part, that "[a]bsent special circumstances the court will not allow testimony at trial of an expert who was not designated as an expert witness to all attorneys of record at least sixty days before trial." ***Id.*** To allow Plaintiffs to designate another expert witness at this time will not prejudice the Defendant because no trial date has been set. Furthermore, the trial court can

readily take away any possible prejudice that the Defendant may suffer from the designation of a new expert witness by continuing the case until Defendant 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 Defendant so desires.

The trial court also erred in ruling that the discovery deadline should be extended to a certain date so that Plaintiffs may depose necessary witnesses, with relevant first-hand knowledge, listed in connection with the maintenance records produced to Plaintiffs on the eve that certain depositions were to be taken in the case. To only extend the discovery deadline so that Plaintiffs can depose names listed on the maintenance records does not cure the prejudice that Plaintiffs will suffer by being denied an opportunity to completely develop their case for trial. For Plaintiffs to be able to completely develop their case, they must be allowed time to compel the production of other discovery which is in existence, but is presently being withheld from the Plaintiffs. Plaintiffs presented the trial court with sufficient, credible proof which tends the support their contention that the Defendant has failed to produce a maintenance record(s) for the date of Deborah Knapp's slip and fall or shortly thereafter, as well as an incident report generated by nurse Ken Cooley in regards to Deborah Knapp's slip and fall accident. Nevertheless, the trial court still refused to extend the discovery deadline so that Plaintiffs could gain access to these clearly discoverable and highly relevant documents. Such limitations on discovery is clearly an abuse of discretion by the trial court.

ARGUMENT

Standard of Review

"A trial court's admission or exclusion of expert testimony is reviewed for abuse of discretion." ***Miss. Transp. Comm'n v. Mcemore***, 863 So. 2d 31, 34 (Miss. 2003). "The trial court's decision will stand unless the reviewing court concludes that the decision was arbitrary and clearly erroneous, amounting to an abuse of discretion." ***McLemore***, 863 So. 2d at 34. Furthermore, "[m]atters of discovery are left to the sound discretion of the trial court, and discovery orders will not be disturbed unless there has been an abuse of discretion." ***Scoggins v. Baptist Mem'l Hosp.-Desoto***, 967 So. 2d 646, 648 (Miss. 2007).

A. Whether 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.

Our reviewing courts have long held that the admission of expert testimony is addressed to the *sound discretion of the trial judge* and will stand unless the discretion was arbitrary and clearly erroneous, amounting to an abuse in discretion. ***Coho Resources, Inc. v. McCarthy***, 829 So. 2d 1 (Miss. 2002); ***McLemore***, 863 So. 2d at 31; ***Woodridge v. Woodridge***, 856 So. 2d 446 (Miss. Ct. App. 2003). Further, the trial judge's "determination as to whether a witness is qualified to testify as an expert is given the widest possible discretion and that decision will only be disturbed when there has been a clear abuse of discretion." ***Miss. Power & Light Co. v. Cook***, 832 So. 2d 474 (Miss. 2002).

In consideration of whether Plaintiffs' experts should be accepted as expert witnesses by the Court, the trial court is governed by Mississippi Rules of Evidence 702, which provides the standard for admitting testimony by experts:

> 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.

According to the trial court, it is illogical to allow Dr. Tilelli to render an expert opinion in this case because he "has never practiced in the filed of psychiatry, and he has never treated a patient in the same situation as the Plaintiff." (R. 563, R.E.17). The trial court further states that "[t]he Plaintiffs' response to the instant motion (Motion to Strike Plaintiffs' Expert Witness) wholly lacks any support for the argument that Dr. Tilelli is satisfactorily familiar with the speciality of psychiatry to testify regarding the applicable standard of care." (R. 563, R.E. 17). It is readily apparent from the aforementioned statements that the trial court was of the belief that ***only*** someone specifically trained in the speciality of psychiatry could testify regarding the applicable standard of care at issue in this case.

However, Plaintiffs would argue that the trial court has wholly failed to see that the medical negligence at issue here does not center on the filed of psychiatry, especially Deborah Knapp's care and treatment in the Intensive Care Unit. The fact that Plaintiff suffers from bi-polar disorder and was admitted to St. Dominic due to an attempted suicide does not make this a case in which the applicable standard of care can only be established through expert testimony of a psychiatrist. Deborah Knapp was being treated in the intensive care unit for an intentional overdose of prescription medication. This is a very important factor that this Court must carefully consider when deciding whether a witness is qualified to render an expert opinion regarding the applicable standard of care. Simply put, the medical negligence at issue here is the failure of St. Dominic and/or its physicians, nursing staff and/or medical personnel to properly monitor Plaintiff in accordance with general hospital procedures for intensive care patients. In short, 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, general practitioner or otherwise, 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 or any other area of a hospital as it pertains to issue(s) of failure to monitor.

In ***Troupe v. McAuley***, 955 So. 2d 848 (Miss. 2007), this Court ruled that there was no per se rule that doctor had to be a neuro-otolaryngologist in order to be qualified to testify as an expert in patient's medical malpractice action against neuro-otolaryngologist, but the doctor did have to demonstrate that he was sufficiently familiar with the standards of neuro-otolaryngology by knowledge, skill, experience, training, or education in accordance with rule governing expert testimony. ***Id.*** at 856-57.

In ***West v. Sanders Clinic for Women, P.A.***, 661 So. 2d 714 (Miss. 1995), this Court addressed the issue of whether the testimony of a specialist in a particular branch within a profession will be required to establish the standard of care. The ***West*** court looked to its holding in ***Hall v. Hillbun***, 466 So. 2d 856 (Miss. 1985). The ***West*** court found that in ***Hall***, it "charges each physician with possessing or having reasonable access to such medical knowledge as is commonly possessed or reasonably available to minimally competent physicians in the same specialty or general field of practice throughout the United States." ***West***, 661 So. 2d at 718. In ***West***, the Mississippi Supreme Court stated:

> In this case, to meet the standard of care, the physician was required to utilize information from an accepted diagnostic procedure. The procedure is one that could be used in a **specialized or a generalized practice**. *The Sanders urge that the standard of care is that which is expected of a general practitioner using the procedure, not of a specialist. Therefore, any licensed practitioner could testify that the defendants violated the standard of care, not as specialists, but as general*

> *practitioners.* ***We find no fault with this.*** As we pointed out in ***Brown v. Mladineo***, "*[i]t was not our intent [in* ***Hall v. Hilbun****] to adopt a uniquely restrictive standard by holding that only a specialist can testify about the standards of his own specialty.*" ***Brown***, 504 So. 2d at 1203. ***Likewise, we did not intend to restrict a specialist from offering his opinion as to what standards a general practitioner should adhere to.***

Id. at 719 (emphases added). The ***West*** court stated that "[t]he general rule in medical malpractice actions is that 'a specialist in a particular branch within a profession will not be required.'" ***Id.*** (citations omitted). The ***West*** court went on to explain:

> Most courts allow a doctor to testify if they are satisfied of [sic] his familiarity with the standards of the specialty, though he might not practice the specialty himself. One court explained that 'it is the scope of the witness' knowledge and not the artificial classification by title that should govern the threshold question of admissibility.

Id. at 718-19 (citations omitted).

In ***Hubbard v. Wansley***, 954 So. 2d 951 (Miss. 2007), the Mississippi Supreme Court further stated:

> It is generally not required that an expert testifying in a medical malpractice case be of the same specialty as the doctor about whom the expert is testifying. "'It is the scope of the witness' knowledge and not the artificial classification by title that should govern the threshold question of admissibility.'" ***West v. Sanders Clinic for Women, P.A.***, 661 So. 2d 714, 719 (Miss. 1995). Satisfactory familiarity with the specialty of the defendant doctor is, however, required in order for an expert to testify as to the standard of care owed to the plaintiff patient. ***Id.*** at 718-19.

Id. at 957. As long as the expert witness possesses, in several different areas, that peculiar knowledge not likely to be possessed by a layman, the witness may be qualified to testify as an expert in those different areas. ***Partin v. North Miss. Med. Ctr., Inc.***, 929 So. 2d 924, 930 (Miss. Ct. App. 2005) (citing ***Nunnally v. R.J. Reynolds Tobacco Co.***, 869 So. 2d 373, 384 (Miss. 2004)).

In its Opinion and Order, the Court also states that "the evidence submitted, including the curriculum vitae of Dr. Tilleli, reflects no experience, on the part of Dr. Tilleli, related to any knowledge of the standard of care required of a hospital, regarding the Adult Intensive Care Unit or

the Behavioral Health Unit, under similar circumstances." (R. 563, R.E.17). This statement is clearly erroneous. Dr.Tilelli is board certified in Emergency Medicine and Critical Care, among other board certifications. (R. 547). Moreover, Dr. Tilelli has experience in treating intensive care unit patients. (R. 548, 553). Dr. Tilelli has also worked as an emergency physician in the emergency room at Tampa General Hospital in Tampa, Florida. (R. 548, 553). He has also worked full time as a critical care physician. (R. 553). Finally, Dr. Tilelli practiced adult emergency medicine until 2001. (R. 553). Moreover, a careful review of Dr. Tilelli's Curriculum Vitae reveals that he has served as the Director of Quality Management for Acute Care Services at Arnold Palmer Hospital, as the Medical Director for Arnold Palmer Hospital Urgent Care Center, as the Chairman for the Arnold Palmer Hospital Division of Critical Care, and as the Medical Director for Pediatric Intensive Care at Arnold Palmer Hospital. (R. 548). It must also be pointed out to the Court that the Arnold Palmer Hospital treats women (i.e., Adults), as well as children. I t must further be noted that the aforementioned areas in which Dr. Tilelli has served as either director or chairman are, by their nature, bound to deal with the care and treatment of a patient admitted to the hospital in the same or similar situation as the Plaintiff. Surely, Dr. Tilelli had to possess sufficient knowledge, skill, experience, training, and/or education in order for him to be appointed and/or elected director and/or chairman of these various divisions within Arnold Palmer Hospital. Therefore, Plaintiffs fail to see how a physician who holds the board certifications of Dr. Tilelli and who has served as the director/chairman for the acute care services, urgent care center, division of critical care, and pediatric intensive care at a major hospital is not qualified to render an expert opinion in the case *sub judice*. Dr. Tilelli is board certified in critical care. This clearly qualifies him to testify as an expert regarding the standard of care in an adult intensive care unit.

The trial court made it a point of emphasis that Dr. Tilleli's practice has been exclusively

confined to pediatrics since 2001. (R. 563, R.E. 17). However, in ***McDonald v. Memorial Hosp. at Gulfport***, 8 So. 3d, 175, 181 (Miss. 2009) (citing ***Hubbard v. Wansley***, 954 So. 2d 951, 957 (Miss. 2007)), the Mississippi Supreme Court Stated that "***[i]t is the scope of the witness' knowledge and not the artificial classification by title that should govern the threshold question of admissibility***." (emphasis added). In ***Ducker v. Moore***, 680 So. 2d 808, 811 (Miss. 1996), the Mississippi Supreme Court ruled that a retired surgeon was qualified to testify as expert on behalf of physician in a medical malpractice action since he was familiar with procedure at issue albeit he was not certified in orthopedics. Moreover, in ***Brown v. Mladineo***, 504 So. 2d 1201 (Miss. 1987), the Mississippi Supreme Court ruled that a general surgeon, who was familiar with standards of gynecological surgery was qualified to testify as to standards of that specialty albeit he did not practice that specialty himself. In accordance with the legal precedence established by our appellate courts, there is no requirement that Dr. Tilelli practice adult intensive care medicine in order to render an expert opinion as to the standard of care required for Deborah Knapp while she was a patient in the Intensive Care Unit at St. Dominic. All that is required for the admissibility of Dr. Tilelli's testimony is the requisite showing that he possesses sufficient knowledge regarding the care and treatment of intensive care patients. There was credible evidence presented to the trial court which clearly showed that Dr. Tilelli has prior knowledge, skill, experience, training, and education in treating intensive care unit patients. It bears repeating yet again that Dr. Tilelli has served as the Medical Director for Pediatric Intensive Care at Arnold Palmer Hospital. Clearly, Dr. Tilelli is more than qualified, and to strike him as an expert witness based on an artificial classification (i.e., pediatric medicine) would stand in stark contradiction to establish Mississippi Law regarding expert testimony.

Furthermore, the trial court failed to expound on its reasoning behind striking Dr. Tilelli as

an expert witness. The Defendants presented the trial court with no ***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). What Defendants did present to the trial court was conclusory statements regarding the admission of expert testimony. In fact, there was far more credible evidence produced to the trial court that would tend to support the fact that Dr. Tilelli was more than qualified to render an expert opinion in this case as opposed to him not being qualified. In addition to Dr. Tilelli's curriculum vitae, Plaintiffs produced medical literature which supported their arguments that doctors similarly situated as Dr. Tilelli are more than 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. (R. 692-694).

Moreover, the standard by which the trial court utilized in striking Dr. Tilelli as an expert witness is clearly an abuse of discretion. The primary basis for the trial court striking Dr. Tilelli is the fact that his practice has primarily focused on pediatric medicine since 2001. (R. 562-564, R.E.16-18). The Mississippi appellate courts have consistently held and established the 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. 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.

The trial court's ruling also stands in stark contradiction to other rulings handed down by this Court on the issue of the admissibility of expert testimony. In ***Univ. of Miss. Med. Ctr. v. Pounders***, 970 So. 2d 141, 146 (Miss. 2007), this Court found that a neurologist who was knowledgeable in the

relevant area and who had treated patients similar to the Plaintiff was qualified to offer opinions regarding the diagnosis and causes of Plaintiff's pneumonia, even though he was not a pulmonologist. In ***Bullock v. Lott***, 964 So. 2d 1119, 1127-29 (Miss. 2007), this Court found that the testimony of a family-practice physician was reliable as to the standard of care, breach, and causation, despite the Defendant's vigorous attack of the family-practice physician's qualifications during voir dire and cross-examination, and despite the contrary testimony of other expert witnesses. This Court rejected the Defendant's assertion that the family-practice physician "was not qualified to render opinions solely within the purview of a neurosurgeon, radiologist or pathologist...." In ***McCaffrey v. Puckett***, 784 So. 2d 197, 203 (Miss. 2001), this Court, in finding that the testimony of a chiropractor as to causes of the Plaintiff's injuries were reliable, explained: "The fact that a medical doctor may be better qualified to render the same opinion does not preclude the chiropractor from testifying as an expert witness." 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. For this and all of the other above stated reasons, the trial court's decision to strike Dr. Tilelli as an expert witness was arbitrary and clearly erroneous, amounting to an abuse of discretion.

B. Whether 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).

Even if the trial court was correct in ruling that Dr. Tilelli was not qualified to render an expert opinion in the case, Plaintiffs still should have been allowed to designate another expert witness. Rule 4.04(A) of the Uniform Circuit and County Court Rules provides, in pertinent part, that "[a]bsent special circumstances the court will not allow testimony at trial of an expert who was

not designated as an expert witness to all attorneys of record at least sixty days before trial." ***Id.*** In their Motion for Reconsideration, Plaintiffs brought to the trial court's attention the fact that no trial date had been set for the case. (R. 686, R.E.20). Therefore, Plaintiffs had sufficient time to designate an expert witness within the time allowed by Rule 4.04(A).

The Plaintiffs designated an expert witness within the deadline established by the agreed scheduling order. (R. 502-503, 538-545). However, Plaintiffs were overwhelmingly surprised when the trial court ruled that Dr. Tilelli, a physician board certified in critical care and emergency medicine with many years of work experience in intensive care units was not qualified to provide expert testimony concerning the standard of care related to monitoring issues involving nurses, physicians and the hospital staff at St. Dominic (including in the intensive care unit). Nevertheless, notwithstanding the trial court's ruling, Plaintiffs should be entitled to designate another expert, especially when considering the fact that Rule 4.04(A) of the Uniform Circuit and County Court Rules allow a party to designate an expert witness at least sixty days prior to trial. To allow Plaintiffs to designate another expert witness at this time will not prejudice the Defendant because, as previously stated, no trial date has been set.

Moreover, Plaintiffs' new expert witness will not be stating any facts, opinions and/or theories of liability which will vary greatly from those already stated by Dr. Tilelli. From the outset, Defendant was aware that Plaintiffs were pursuing a medical malpractice cause of action against St. Dominic, and any new expert witness will offer his/her opinions regarding the medical negligence of St. Dominic and its employees, agents, and/or staff. Accordingly, Defendant will not need much, if any, additional time to prepared a defense to the opinions articulated by Plaintiffs' new expert witness. Furthermore, the trial court can readily take away any possible prejudice that the Defendant may suffer from the designation of a new expert witness by continuing the case until Defendant 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 Defendant so desires.

In short, even if this Court agrees with the trial court's ruling that Dr. Tilelli is not qualified to render an expert opinion in this cause of action, the Court should, at minimum, instruct the trial court that Plaintiffs are allowed to designate another expert in accordance with the dictates of Uniform Circuit and County Court Rule 4.04(A) so long as the designate is made to "all attorneys of record at least sixty days before trial."

C. Whether 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.

Plaintiffs respectfully requested that the trial court extend the discovery deadline because late on the eve before certain depositions were to be taken in the case, newly produced and highly relevant documentation was made available to Plaintiffs by defense counsel. (Supp. R. 12). More specifically, the documentation produced was maintenance records regarding the bathroom in which Deborah Knapp slipped and fell during her stay in the intensive care unit at St. Dominic. It must be noted that throughout the course of discovery, Defendant told Plaintiffs under oath, via interrogatory responses, that no such records exists. (Supp. R. 8-11).

Robb Bonner, maintenance supervisor for St. Dominic, testified during his deposition that he has been the maintenance supervisor for the hospital since January 2008. Mr. Bonner further testified that other than when asked a couple of days before his scheduled deposition, nobody came to him and asked him about the existence of maintenance records for the bathroom in question. (Supp. R. 44-46). Moreover, Jerry Farr, St. Dominic risk safety manager whom the trial court has refused to allow the Plaintiffs to depose, conducted an investigation surrounding the incident, but

apparently he too failed to discover the existence of the maintenance records for the bathroom in question. It must also be noted that Jerry Farr also assisted in helping defense counsel respond to Plaintiffs propounded discovery. The failure to produce these highly relevant maintenance records cannot and should not be viewed by this Court as a mere oversight on the part of the Defendant.

In fact, Plaintiffs have sufficient reasons to believe that additional discovery may lead to the existence of additional maintenance record(s) for the bathroom in question during and or around the time that Deborah Knapp was a patient in the intensive care unit at St. Dominic. 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). 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 Defendant.

Furthermore, Ken Cooley testified during his deposition that he generated a report regarding the incident. (Supp. R. 52-53). 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 Defendant'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. The report is yet another example of why the trial court should have extended the discovery deadline in this case.

The trial court granted, in part, Plaintiffs' Motion to Extend the Discovery Deadline. More

specifically, the court ruled that "[t]he discovery deadline will be extended until October 15, 2010, so that Plaintiffs may depose necessary witnesses, with relevant first-hand knowledge, listed in connection with the newly produced maintenance records." (Supp. R. 54-55, R.E. 14-15). However, it is Plaintiffs' position that the granting of an additional number of witnesses that may be deposed and additional time in which to take those depositions is not the solution to the discovery violation(s) in this case. This limitation on discovery will only result in Plaintiffs having to file other motions with the trial court if, during the course of these additional depositions, there are even more people identified who have relevant first-hand knowledge about the bathroom in question or there are references made to additional documents regarding this matter that have not been produced to Plaintiffs during discovery.

Plaintiffs would argue that they should not be limited by the trial court to only pursuing discovery solely related to the belatedly produced maintenance records, but rather they should be allowed to conduct any and all discovery which in any way relate to the bathroom in question, Deborah Knapp's slip and fall accident in the intensive care unit and/or related to any injuries incurred during her treatment at St. Dominic Hospital. In other words, to only extend the discovery deadline so that Plaintiffs can depose names listed on the maintenance records does not cure the prejudice that Plaintiffs will suffer by being denied an opportunity to completely develop their case for trial. For Plaintiffs to be able to completely develop their case, they must be allowed time to compel the production of other discovery which is in existence, but is presently being withheld from the Plaintiffs.

Plaintiffs have shown the trial court sufficient, credible proof which would suggest that a maintenance record should exist for the date of Deborah Knapp's slip and fall or shortly thereafter, but, to date, no such record has been produced by the Defendant. Moreover, Plaintiffs have also

made the trial court aware of the fact that the nurse, Ken Cooley, who was assigned to take of Deborah Knapp during the date of her slip and fall, stated during his sworn deposition that he generated an incident report regarding Deborah Knapp's slip and fall in the intensive care unit. (Supp. R. 52-53). However, the trial court still refused to extend the discovery deadline so that Plaintiffs could gain access to these clearly discoverable and highly relevant documents. The trial court's ruling regarding extension of the discovery deadline does not even allow the Plaintiffs to compel the production of an incident report that Plaintiffs did not know even existed until Ken Cooley made reference to it during his deposition. Such limitations on discovery is clearly an abuse of discretion by the trial court.

It is anticipated that Defendant will argue that the Plaintiffs had ample time to file the proper motion to compel within the time frame designated for discovery in the agreed scheduling order. However, this argument is without merit when considering the fact that Plaintiffs had no reason(s) to believe that Defendant was not being completely forthright in its interrogatory responses and the fact that Plaintiffs had no knowledge of the existence of the documents mentioned herein. Moreover, Mississippi Rule of Civil Procedure 26(f)(2) requires the following:

> A party is under a duty seasonably to amend a prior response if that party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) ***the party knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.***

Miss. R. Civ. P. 26(f)(2) (emphasis added). Therefore, Defendant had a duty to supplement its discovery responses regardless of whether Plaintiffs filed a motion to compel the production of certain documents and irrespective of the expiration of the discovery deadline. Defendant cannot and should not be allowed to circumvent the rule by arguing that the discovery deadline has passed. Clearly, that is not the intent of the rule.

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, 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 15th day of August, 2011.

DEBORAH KNAPP and HAROLD KNAPP

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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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