IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LISA POSEY — APPELLANT

V. — NO. 2011-CA-00423

NANCY W. BURROW, M.D. — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI

BRIEF OF NANCY W. BURROW, M.D., APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

a. Lisa Posey, Appellant;

b. Brandon I. Dorsey, Counsel for Appellant;

c. Nancy W. Burrow, M.D., Appellee;

d. Stephen P. Kruger, Jan F. Gadow, Page, Kruger & Holland, P.A., Counsel for Appellee;

d. Honorable William E. Chapman, III, trial judge.

THIS, the 19th day of December, 2011.

Jan F. Gadow

Stephen P. Kruger
Jan F. Gadow

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STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that oral argument is not necessary to a resolution of the issue on appeal. The issue presented involves application of clear, well settled law to undisputed facts; the parties' positions and the record are clear. The facts and legal arguments are adequately presented in the briefs and appellate record and the decisional process of this Court would not be significantly aided by oral argument. M.R.A.P. 34 (a)(3).

STATEMENT OF THE ISSUE

The Trial Court properly granted summary judgment in favor of Dr. Burrow because Lisa Posey failed to establish a *prima facie* case of medical negligence via sworn expert testimony.

I. INTRODUCTION

This is a medical malpractice action against Dr. Nancy Burrow, a radiologist. Dr. Burrow was granted a summary judgment and the plaintiff, Lisa Posey, appeals. Ms. Posey claims that on June 7, 2004, Dr. Burrow failed to properly interpret Ms. Posey's brain MRI films and diagnose a cavernous malformation, which allegedly led to a seizure and related injuries. But without sworn expert proof of each essential element of her claim, including deviation from the standard of care and causation, Posey has failed to establish even a *prima facie* case of medical negligence.

II. STATEMENT OF THE CASE

This case has its genesis with Lisa Posey's December 2007 complaint against Dr. Nancy Burrow, alleging medical negligence. (C.P. 7-11) A first amended complaint followed in April 2008, after which Dr. Burrow was served with process. (C.P. 14-20, 23-25) Dr. Burrow answered, asserted affirmative defenses, and concurrently served Posey with written discovery. (C.P. 26-34) Posey responded to this discovery and thereafter designated expert witnesses. (C.P. 35-36, 40-45) Additionally, both Posey and Dr. Burrow provided deposition testimony. (C.P. 46-49) Dr. Burrow then filed a motion for summary judgment (C.P. 50-52), which the trial court granted over Posey's opposition. (C.P. 60-63) The trial court entered Final Judgment in favor of Dr. Burrow, dismissing Posey's complaint with prejudice, in February 2011. (C.P. 73) Posey timely appealed from this Final Judgment. (C.P. 74)

III. THE FACTS

Dr. Thomas Ellingson ordered an MRI for Lisa Posey in June 2004, to investigate possible pituitary abnormalities including a pituitary tumor. On June 7, 2004, Dr. Burrow

interpreted Posey's MRI at Rankin Medical Center, focusing on the area around the pituitary gland. (C.P. 16, 30, 67, 70, 72) Dr. Burrow's noted impression was dictated as "essentially normal MRI of the brain. Specifically, no evidence of pituitary abnormalities". (C.P. 30)

Almost a year and a half later, in October 2005, Posey suffered a seizure and fell, sustaining injuries. She presented to the UMC emergency room, where she underwent a brain CT scan and an MRI brain scan, which revealed the presence of a cavernous malformation in her right temporal area. (C.P. 15-16) A cavernous malformation is a relatively benign condition that remains intentionally untreated in numerous people, many of whom never experience any symptoms. No treatment is necessary until symptoms develop and it is undisputed that Posey never exhibited or experienced any symptoms until her first seizure in October 2005. After the seizure, Dr. John Lancon, a neurosurgeon, removed Posey's cavernous malformation and her other injuries were treated.

Posey subsequently sued Dr. Burrow, alleging that she (*inter alia)* failed to properly interpret the 2004 brain scan in not diagnosing the cavernous malformation and that, consequently, Posey did not receive the medical treatment which would have prevented her October 2005 seizure and resultant personal injuries. (C.P. 18-19)

IV. SUMMARY OF THE ARGUMENT

In this medical malpractice case, Posey has failed to offer any sworn, expert testimony establishing the essential elements of her case. Unsworn letters from a treating physician have no value and do not create issues of fact. The lack of an affidavit from an expert to establish either a deviation from the applicable standard of care or causation is fatal. Consequently, summary judgment in favor of Dr. Burrow is proper and the trial

court's order to that effect should be affirmed.

V. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DR. BURROW BECAUSE LISA POSEY FAILED TO ESTABLISH A *PRIMA FACIE* CASE OF MEDICAL NEGLIGENCE VIA SWORN EXPERT TESTIMONY.

A. Standard of Review

This Court reviews a circuit court's grant of summary judgment *de novo.* ***Kimbrough v. Keenum,*** 68 So.3d 738, 739-40 (¶ 9) (Miss.App. 2011) (citations therein omitted); ***Hynes v. Ambling Management,*** 66 So.3d 712, 714 (¶ 5) (Miss.App. 2011) (citation therein omitted). If the evidence, viewed in the light most favorable to the non-movant, reveals no genuine issue of material fact and the moving party is entitled to judgment in his favor, summary judgment is appropriate. ***Kimbrough,*** 68 So.3d at 740 (¶ 9). The evidence conside red includes all pleadings, depositions, answers to interrogatories and admissions, and any affidavits. ***Hynes,*** 66 So.3d at 714 (¶ 5).

The non-movant may not rest on the pleadings, but must set forth specific facts showing there is a genuine issue for trial. ***Kimbrough,*** 68 So.3d at 740 (¶ 9). The non-movant's rebuttal must be supported by significant, probative evidence on each element of his claim, which requires more than a "'mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict.'" ***Hynes,*** 66 So.3d at 716 (¶ 10) (quoting ***Lott v. Purvis,*** 2 So.3d 789, 792 (¶ 11) (Miss. App. 2009)); ***Kendrick v. Quin,*** 49 So.3d 645, 648 (¶ 7) (Miss. App. 2010) (citation therein omitted). Bare assertions are insufficient to avoid summary judgment. ***Hynes,*** 66 So.3d at 716 (¶ 10) (citations therein omitted). If the non-movant fails to sufficiently establish any essential element of his claim, summary judgment is mandated. ***Patterson v. Tibbs,*** 60 So.3d 742, 753 (¶ 41) (Miss. 2011) (citing ***Buckel v. Chaney,*** 47 So.3d 148, 153 (Miss. 2010)); ***Albert***

v. Scott's Truck Plaza, 978 So.2d 1264, 1266 (¶ 6) (Miss. 2008) (citations therein omitted).

B. Applicable Medical Negligence Law

A plaintiff in a medical malpractice action must provide expert testimony to prove the existence of a duty, the particular duty owed[1], deviation therefrom, and proximate cause based upon a reasonable degree of medical probability. ***Northrop v. Hutto,*** 9 So.3d 381, 384 (¶ 9) (Miss. 2009); ***Hubbard v. Wansley,*** 954 So.2d 951, 956-57 (¶ 12) (Miss. 2007) (citations therein omitted); ***Walker v. Skiwski,*** 529 So.2d 184, 185-86 (Miss. 1988); ***Boyd v. Lynch,*** 493 So.2d 1315, 1318 (Miss. 1986); ***Pittman v. Hodges,*** 462 So.2d 330, 333-34 (Miss. 1984). "The success of a plaintiff in establishing a case of medical malpractice rests heavily on the shoulders of the plaintiff's selected medical expert." ***Northrop,*** 9 So.3d at 384 (¶ 10). In order for a plaintiff to make a *prima facie* case of medical malpractice, expert testimony is vital to establish the applicable standard of care exercised by minimally competent healthcare providers in the same field, under like or similar circumstances, and the defendant physician's breach of same, as well as proximate cause and damages. ***Patterson,*** 60 So.3d at 757 (¶ 48) (citations therein omitted); ***Northrop,*** 9 So.3d at 384 (¶ 9); ***Cheeks v. Bio-MedicalApplications, Inc.,*** 908 So.2d 117, 120 (¶ 8) (Miss. 2005) (citations therein omitted); ***Palmer v. Biloxi Regional Medical Center,*** 564 So.2d 1346, 1357 (Miss. 1994) (citations therein omitted); ***Walker,*** 529 So.2d at 185-86; ***Hall v. Hilbun,*** 466 So.2d 856, 872-73 (Miss. 1985). *See also* ***McDonald v. Memorial Hospital at Gulfport,*** 8 So.3d 175, 180 (Miss. 2009). In order to survive a motion for summary judgment, a plaintiff must offer *sworn*, competent expert testimony on each of these

1 Applicable standard of care.

elements. ***Barner v. Gorman,*** 605 So.2d 805, 808-09 (Miss. 1992) (citations therein omitted); ***Walker,*** 529 So.2d at 187.

Medical expert witnesses must articulate a specific and objectively determined standard of care, attendant breach, and resulting injury proximately caused by the breach. ***Northrop,*** 9 So.3d at 382 (¶ 1). The plaintiff has the burden of establishing the content and details of the standard of care to which a health care provider is held. ***Boyd***, 493 So.2d at 1318; ***Marshall v. The Clinic for Women, P.A.***, 490 So.2d 861, 863-64 (Miss. 1986); ***Hammond v. Grissom***, 470 So.2d 1049, 1053 (Miss. 1985); ***Ross v. Hodges***, 234 So.2d 905, 909 (Miss. 1970). This requires sworn expert testimony as to what, specifically, the defendant should have done to comply with that standard. ***Triplett v. River Region Medical Corp.,*** 50 So.3d 1032, 1037-38 (¶ 18) (Miss. App. 2010) (plaintiff failed to establish specific standard of care when his expert witness provided only vague and conclusory statements, asserting defendant should have conducted further testing, but did not advise court of specific testing or procedures defendant should have conducted). To establish proximate cause in a lost chance of recovery case, the plaintiff must prove that if the standard of care had not been breached, it is more probable or more likely than not that the outcome would have been substantially better. ***Griffin v. North Mississippi Medical Center,*** 66 So.3d 670, 673 (¶ 9) (Miss. App. 2011) (citing ***Hubbard,*** 954 So.2d at 964 (¶ 42). Mississippi law allows recovery in a lost chance of recovery case only when a physician's failure to render the required standard of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition. ***Hubbard,*** 954 So.2d at 964 (¶ 42) (citing ***Ladner v. Campbell,*** 515 So.2d 882, 888-89 (Miss. 1987) (citing ***Clayton v. Thompson,*** 475 So.2d 439, 445 (Miss. 1985))). In other words, the

plaintiff must establish a causal link between his injuries and the defendant's alleged negligence. ***Hubbard,*** 954 So.2d at 964 (¶ 42). The "magic" language is that appropriate medical care would have resulted in a greater than fifty percent chance of substantial recovery or a substantially better result; however, such an opinion must be supported by specific facts and medical analysis. ***Griffin,*** 66 So.3d at 673 (¶ 9); ***Hubbard,*** 954 So.2d at 965-66 (¶¶ 47-48).

Moreover, the sworn expert testimony must indicate what specific tests or treatment would have resulted in a reasonable probability of a substantially better outcome. ***Hubbard,*** 954 So.2d at 964 (¶ 42) (citing ***Ladner,*** 515 So.2d at 888-89 (citing ***Clayton,*** 475 So.2d at 445)). The Mississippi Supreme Court has repeatedly and clearly mandated that a plaintiff must prove proximate cause in terms of reasonable medical probability, through the use of expert testimony. ***66 Federal Credit Union v. Tucker,*** 853 So.2d 104, 113 (¶ 28) (Miss. 2003) (citing ***Brandon HMA, Inc. v. Bradshaw,*** 809 So.2d 611, 617 (Miss. 2001) (citing ***Pittman,*** 462 So.2d at 334); ***Barner,*** 605 So.2d at 808-09 (citations therein omitted); ***Stratton v. Webb,*** 513 So.2d 587, 590 (Miss. 1987). If a plaintiff fails in this respect, a judgment in favor of the defendant is proper.

C. Additional Facts Pertinent to Legal Argument

The crux of Posey's complaint is that Dr. Burrow failed to properly interpret Posey's brain MRI films and identify a cavernous malformation, which allegedly caused her to suffer a seizure and resulting injuries. However, because Posey offered no sworn, competent proof to establish either a deviation from the applicable standard of care or causation, Dr. Burrow moved for summary judgment. (C.P. 50-52) While it is not Dr. Burrow's burden to produce evidence in support of her motion for summary judgment on any matters other

than those where she would bear the burden of proof at trial[2], she nonetheless provided an affidavit which establishes, via sworn expert testimony, that in terms of reasonable medical probabilities she complied with the applicable standard of care in her treatment of Posey and in no way caused or contributed to Posey's injuries. (C.P. 54-55)

In her response, Posey declared that because Dr. Burrow failed to properly diagnose the malformation, Posey did not receive any treatment and as a result suffered a seizure and other injuries. (C.P. 62) In support of her response in opposition to summary judgment, Posey submitted two *unsworn* letters from Dr. Lancon, whom she had previously designated as an expert in the area of neurosurgery, specifically with respect to the diagnosis and treatment of cavernous malformations. (C.P. 40) Dr. Lancon's letters state that Posey's cavernous malformation was present on the 2004 radiologic images, that a reasonably competent radiologist should be capable of identifying a probably cavernous brain malformation, and that it is "reasonably possible" that Posey's malformation caused her October 2005 seizure. (C.P. 64-66) According to Dr. Lancon, there is no set standard for the "optimum management" of a cavernous malformation discovered *without having caused a seizur*e, as Posey's allegedly should have been discovered and reported; instead, Dr. Lancon's letter states that optimum management with diagnosis at that juncture is controversial and any treatment must be individualized to each patient. (C.P. 64-66)

Posey also offered Dr. Burrow's deposition testimony that Posey's 2004 MRI revealed a pea-sized hemangioma or vascular benign tumor AB malformation (cavernous malformation), which Dr. Burrow did not include in her dictated report in 2004 because she

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2 ***Paepka v. North Mississippi Medical Center,***744 So.2d 809, 812-13 (¶¶ 13-14) (Miss.App.

was focusing on Dr. Ellingson's reason for ordering the MRE - ruling out a pituitary tumor. (C.P. 67-72)

The cavernous malformation represented a purely incidental finding, in that Ms. Posey had never had any symptoms associated with such pathology and the MRI was not ordered to explore that area of the brain. The cavernous malformation was located in a different area of the brain than where Dr. Burrow was focusing to rule out pituitary abnormalities, in accord with Dr. Ellingson's purpose for ordering the test. (C.P. 68, 70-71)

The trial court granted Dr. Burrow's motion and specifically found that Posey failed to provide sworn, competent expert testimony to establish proximate cause and further failed to establish that had the cavernous malformation been disclosed to Posey in 2004, the applicable standard of care would have required treatment that would have prevented Posey's initial seizure and other damages claimed. (C.P. 73)

1. Posey has offered no sworn expert opinion establishing a deviation from the standard of care, an essential element of her claim.

In order to establish a *prima facie* case and survive a motion for summary judgment, Posey was required to provide sworn, competent, expert testimony to prove not only the existence of a duty and the particular duty owed, but also a deviation therefrom[3]. ***Patterson,*** 60 So.3d at 757 (¶ 48); ***Northrop,*** 9 So.3d at 384 (¶ 9); ***McDonald,*** 8 So.3d at 180; ***Hubbard,*** 954 So.2d at 956-57 (¶ 12) (citations therein omitted); ***Cheeks,*** 908 So.2d at 120 (¶ 8); ***Barner,*** 605 So.2d at 808-09 (citations therein omitted); ***Palmer,*** 564 So.2d at 1357 (Miss. 1994) (citations therein omitted); ***Walker,*** 529 So.2d at 185-87; ***Boyd,*** 493 So.2d at 1318; ***Hall,*** 466 So.2d at 872-73; ***Pittman,*** 462 So.2d at 333-34. Medical

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1999).

malpractice plaintiffs in Mississippi know from the moment they file suit that an expert witness is required to survive summary judgment. ***Scales v. Lackey Memorial Hospital,*** 988 So.2d 426, 436 (¶ 23) (Miss.App. 2008) (citing ***Brooks v. Roberts,*** 882 So.2d 229, 232 (¶ 10) (Miss. 2004)). Indeed, in the context of summary judgment, "where the nonmoving party will bear the burden of proof at trial, the moving party may meet its summary judgment burden by exhibiting to the trial court that the nonmoving party has failed to produce the sworn affidavit of a medical expert supporting his or her negligence claim." ***Scales,*** 988 So.2d at 431 (¶ 12). Restated, Dr. Burrow, the defendant in this medical malpractice action, may (and did) meet her summary judgment burden by pointing out that Posey failed to produce sworn expert testimony supporting her allegations. ***Scales,*** 988 So.2d at 433 (¶ 17).

Scales involves a fact situation virtually identical to that presented by the case at bar. Sherry Scales sued Lackey Memorial Hospital, alleging negligence in failing to diagnose a heart attack in progress. In response to Lackey Memorial's interrogatories, Scales provided the names of two doctors as potential expert witnesses; however, Scales never provided the substance of the facts and opinions to which these physicians would testify. Lackey Memorial eventually filed a motion for summary judgment, based on Scales' failure to provide any expert testimony establishing the essential elements of her medical malpractice claim. ***Scales,*** 988 So.2d at 429 (¶¶ 2-3). Scales responded to this motion and also filed a supplement to her expert interrogatory answer. This supplement, signed only by Scales' attorney, again named the same two physicians as experts and stated that one would testify that Scales had suffered a massive heart attack requiring

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3 As well as proximate cause, which will be addressed subsequently herein.

surgery and resulting in total disability. This supplement also named another physician for the first time and stated that he would testify that Lackey Memorial had breached the applicable standard of care in treating Scales. ***Scales,*** 988 So.2d at 429-30 (¶ 4). At the hearing on the motion for summary judgment, Scales argued that one physician designated as an expert would testify that Lackey Memorial had breached the standard of care; Lackey Memorial argued summary judgment was proper because Sales had failed to produce any sworn expert testimony. ***Scales,*** 988 So.2d at 430 (¶ 5). The trial court found that Scales' unsworn supplemental interrogatory responses were insufficient to create a genuine issue of material fact and granted summary judgment based on Scales' failure to produce sworn expert testimony supporting her claim. ***Scales,*** 988 So.2d at 430 (¶ 6).

On appeal, the Mississippi Court of Appeals affirmed, finding that Lackey Memorial met its burden as the movant for summary judgment by pointing out that Scales had not produced any sworn expert testimony establishing the essential elements of her medical negligence claim. At that point, the burden shifted to Scales to provide sworn expert testimony that her doctors deviated from the applicable standard of care – a burden Scales failed to meet. "Her unsworn answers to Lackey Memorial's expert interrogatories were not sufficient to create a genuine issue of material fact." ***Scales,*** 988 So.2d at 433 (¶ 18). The Court of Appeals then referred to ***Walker v. Skiwski***, where the Mississippi Supreme Court found that listing expert witnesses in interrogatory responses without providing any sworn testimony of these experts was fatal to a medical malpractice plaintiff opposing a motion for summary judgment. ***Scales,*** 988 So.2d at 433 (¶ 18) (citing ***Walker,*** 529 So.2d at 187). The ***Scales*** Court quoted ***Walker*** :

> If the Walkers had supplied the Circuit Court with an affidavit from even one of these five experts which, after the proper predicate, articulated the content

> of the standard of care and offered an opinion that in the performance of the circumcision on young Walker, Skiwski deviated from that standard of care and that this deviation caused in whole or in part young Walker's injuries, the Circuit Court would have been bound to deny the motion for summary judgment.

Scales, 988 So.2d at 433-34 (¶ 18) (quoting ***Walker,*** 529 So.2d at 187).

Posey was charged with the knowledge from the moment she filed suit, as is every other medical malpractice plaintiff in Mississippi, that an expert witness is required to survive summary judgment. ***Scales,*** 988 So.2d at 436 (¶ 23) (citing ***Brooks,*** 882 So.2d at 232 (¶ 10)). Posey actually designated seven physicians as expert witnesses, all of whom were also her treating physicians. (C.P. 40-45) However, in response to Dr. Burrow's motion for summary judgment, Posey did not provide sworn testimony of any of these experts[4]. Dr. Burrow met her summary judgment burden by pointing out that Posey had failed to produce sworn expert testimony supporting her allegations, but Posey did not respond appropriately when the burden shifted to her. ***Scales,*** 988 So.2d at 433 (¶¶ 17-18). In response to the motion for summary judgment, Posey provided two unsworn letters from Dr. Lancon and a portion of Dr. Burrow's deposition testimony. Like Scales' unsworn interrogatory answer, Dr. Lancon's unsworn letters are insufficient to create a genuine issue of material fact. ***Scales,*** 988 So.2d at 433 (¶ 18). Dr. Burrow's deposition testimony avails Posey nothing at all in the way of the content and details of the standard of care or deviation therefrom. (C.P. 67-72)

While Dr. Burrow admits that she didn't reference the incidental malformation in her

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4 Dr. Lancon's letters are dated September 20, 2007 and March 16, 2008. (C.P. 6465) Posey designated her experts on March 13, 2009. (C.P. 40) Dr. Burrow's motion for summary judgment was filed on November 30, 2010 and arguments of counsel were heard on February 7, 2011. (C.P. 50, 58) Yet in all of this time, Posey still did not secure any*sworn* expert testimony by affidavit or deposition from either Dr. Lancon or any of her other designated experts.

radiology report, there is absolutely no testimony before the Court that this represents a deviation from the standard of care. Just as in ***Walker,*** Posey's failure to supply the trial court with an expert affidavit which laid a proper predicate establishing that Dr. Burrow deviated from the applicable standard of care in her treatment of Ms. Posey is fatal to her summary judgment opposition. ***Scales,*** 988 So.2d at 433-34 (¶ 18) (quoting ***Walker,*** 529 So.2d at 187). Instead, the only sworn expert testimony in the record which speaks to this essential element of Posey's claim is Dr. Burrow's affidavit, which states that she complied with the standard of care in her treatment of Ms. Posey[5]. (C.P. 54-55)

Also similar to the case at bar, ***Maxwell v. Baptist MemorialHospital-Desoto,*** 15 So.3d 427 (Miss.App. 2009), involved summary judgment in favor of the hospital in a medical negligence claim, which was affirmed on appeal because the plaintiff lacked any sworn expert opinions. The Maxwells filed a medical negligence action against Baptist for the death of their father. Despite that Baptist asked for the Maxwells' experts four different times during discovery, the Maxwells never responded until eleven months after the discovery deadline set by the trial court's scheduling order[6], at which time (in answers to interrogatories) they identified three experts, provided their training and education, and stated that these experts would testify to a reasonable degree of certainty that Baptist had deviated from the standard of care and that these deviations caused or contributed to the death of decedent. Baptist then moved for summary judgment. The day before Baptist's summary judgment motion was set for hearing, the Maxwells filed a response, finally

5 As an aside, Posey unequivocally suffered no pituitary issues, which is what Dr. Burrow had been looking for, pursuant to Dr. Ellingson's order, when she read Posey's MRI in 2004.
6 Nor did the Maxwells ever request an extension.

providing affidavits from expert witnesses[7]. The trial court struck this response and struck the affidavits as untimely and granted summary judgment in favor of Baptist. ***Maxwell,*** 15 So.3d at 429, 431 (¶¶ 2, 7-8). The Maxwells appealed, urging that they had produced sufficient evidence to survive summary judgment. ***Maxwell,*** 15 So.3d at 429 (¶ 3). The Court of Appeals agreed that the trial court properly struck the Maxwell's experts' affidavits as untimely and found that without these affidavits, the only expert opinions before the trial court were those contained in the Maxwells' answers to interrogatories. However, these opinions were unsworn, therefore did not sufficiently establish the elements of a *prima facie* case of medical malpractice. ***Maxwell,*** 15 So.3d at 434-36 (¶¶ 18-22).

"In order to create an [sic] genuine issue of material fact, there must be presented, by affidavit or otherwise, a sworn statement made upon personal knowledge that shows that the party providing the evidence is competent to testify." ***Hubbard,*** 954 So.2d at 966 (¶ 49). The only expert opinions Posey provided the trial court are Dr. Lancon's two letters, neither of which is sworn, and Dr. Burrow's deposition testimony. The opinions contained in Dr. Lancon's unsworn letters cannot establish any element of a *prima facie* case of medical malpractice. ***Maxwell,*** 15 So.3d at 434-36 (¶¶ 18-22). Dr. Burrow's deposition testimony is to the effect that Posey's 2004 MRI revealed a cavernous malformation, an incidental finding which Dr. Burrow did not include in her radiology report because she was focusing on another area of the brain to rule out pituitary abnormalities, pursuant to Dr. Ellingson's order. Although sworn, this testimony also fails to establish any element of a *prima facie* case of medical malpractice. In sum, Posey has offered no sworn, competent testimony from an expert that failure to note a finding incidental to the purpose of the tests

7 Which Posey never did.

ordered is a breach of the applicable standard of care. Neither Dr. Lancon's unsworn letters nor Dr. Burrow's deposition testimony affords Posey anything in the way of establishing the content and details of the duty owed by Dr. Burrow, much less her deviation therefrom. ***Boyd***, 493 So.2d at 1318; ***Marshall***, 490 So.2d at 863-64; ***Hammond***, 470 So.2d at 1053; ***Ross***, 234 So.2d at 909; ***Triplett,*** 50 So.3d at 1037-38 (¶ 18). Without sworn, competent expert testimony on this essential element of her claim, Posey cannot survive summary judgment. ***Patterson,*** 60 So.3d at 753 (¶ 41) (citing ***Buckel,*** 47 So.3d at 153); ***Albert,*** 978 So.2d at 1266 (¶ 6) (citations therein omitted); ***Barner,*** 605 So.2d at 808-09 (citations therein omitted); ***Walker,*** 529 So.2d at 187.

2. Posey has offered no sworn expert opinion establishing a causal link between her injuries and Dr. Burrow's alleged negligence, which is also an essential element of her claim.

In order to establish a *prima facie* case and survive a motion for summary judgment, Posey was required to provide sworn, competent, expert testimony to prove proximate cause[8]. ***Patterson,*** 60 So.3d at 757 (¶ 48); ***Northrop,*** 9 So.3d at 384 (¶ 9); ***McDonald,*** 8 So.3d at 180; ***Hubbard,*** 954 So.2d at 956-57 (¶ 12) (citations therein omitted); ***Cheeks,*** 908 So.2d at 120 (¶ 8); ***Barner,*** 605 So.2d at 808-09 (citations therein omitted); ***Palmer,*** 564 So.2d at 1357 (Miss. 1994) (citations therein omitted); ***Walker,*** 529 So.2d at 185-87; ***Boyd,*** 493 So.2d at 1318; ***Hall,*** 466 So.2d at 872-73; ***Pittman,*** 462 So.2d at 333-34. Posey, however, has failed to establish causation. She offered no expert testimony that Dr. Burrow caused her injuries. She has no proof that but for Dr. Burrow's actions, she would not have had a seizure or other injuries. In other words, she cannot prove that had Dr. Burrow included the incidental finding in her report in 2004, any treatment would have

8 As well as other essential elements of her claim, including deviation from the standard of care

been instituted to treat the cavernous malformation and any such treatment would have prevented Posey's 2005 seizure.

One of Dr. Lancon's unsworn letters reflects that the standard of care for a cavernous malformation which is discovered incidentally without having caused a seizure is controversial and must be individualized to each patient. (C.P. 66) There is absolutely no evidence in the record, sworn or otherwise, that any failure to notify Posey or Dr. Ellingson of the incidental finding of a cavernous malformation in any way caused the October 2005 seizure. As stated by the learned trial court judge in his Final Judgment, Posey "lacks the requisite testimony establishing that had the cavernous malformation been disclosed to the Plaintiff, or her physician, the standard of care would have required treatement that would have prevented her initial seizure and damages claimed in this matter." (C.P. 73) Without sworn, competent expert evidence on this essential element of causation, summary judgment in favor of Dr. Burrow is mandated. ***Patterson,*** 60 So.3d at 753 (¶ 41) (citing ***Buckel,*** 47 So.3d at 153); ***Albert,*** 978 So.2d at 1266 (¶ 6) (citations therein omitted); ***Barner,*** 605 So.2d at 808-09; ***Walker,*** 529 So.2d at 187.

Consider ***Griffin v. North Mississippi Medical Center,*** 66 So.3d 670 (Miss. App. 2011). Griffin filed a wrongful death complaint for her mother's death, alleging that the medical center was vicariously liable for the negligence of a nurse who caused her mother's death. Griffin's theory was that the nurse, Crenshaw, negligently failed to timely recognize the signs of Griffin's mother's blood loss and negligently failed to timely warn any surgeon of this blood loss and this negligence resulted in a fatal delay of surgical intervention that would have stopped the bleeding and saved her mother's life. ***Griffin,*** 66

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as addressed previously herein.

So.3d at 672 (¶ 6). "To establish her prima facie case, Griffin had to offer expert testimony to establish that had Crenshaw timely recognized the blood loss and timely warned a surgeon, the surgeon would have intervened, and that intervention would have, more likely than not, saved her mother's life." ***Griffin,*** 66 So.3d at 673 (¶ 11). Griffin's medical expert, Dr. Truly, testified that the hospital's negligence proximately caused Griffin's mother's death by failing to recognize the signs of blood loss. Dr. Truly did not testify as to what a surgeon would have done had he been advised of the blood loss nor what the odds of success would have been had a surgeon timely intervened. Consequently, Griffin did not offer sufficient evidence to support proximate cause – an essential element of her *prima facie* case. ***Griffin,*** 66 So.3d at 673-74 (¶ 13).

In order to establish a *prima facie* case, Posey had to offer sworn expert testimony to establish that had Dr. Burrow timely advised Dr. Ellingson of the cavernous malformation, Dr. Ellingson would have intervened and such intervention would have, more likely than not, prevented Posey's seizure. ***Griffin,*** 66 So.3d at 673 (¶ 11). Dr. Burrow's affidavit clearly states that she in no way caused or contributed to Posey's injuries. (C.P. 54-55) Dr. Lancon did not provide sworn evidence of any sort. His unsworn letters merely state that the optimum management of a cavernous malformation that has not yet caused a seizure is controversial and must be individualized to the patient. (C.P. 66) Dr. Lancon did not opine as to what a physician would have done had he been advised of Posey's cavernous malformation nor what the odds of preventing a seizure would have been had a physician intervened in 2004. Consequently, even if Dr. Lancon's letters had been under oath, Posey still has not offered sufficient evidence to support the essential element of proximate

cause in her *prima facie* case. ***Griffin,*** 66 So.3d at 673-74 (¶ 13).

The Mississippi Court of Appeals also affirmed the trial court's finding that the plaintiff failed to prove proximate cause in ***Young v. University of Mississippi Medical Center,*** 914 So.2d 1272 (Miss.App. 2005). Young underwent breast reduction surgery at UMMC, experienced leg cramps later that evening, and was examined and released the next morning. One day later, Young collapsed at home, was rushed to UMC, and pronounced dead minutes after she arrived. An autopsy revealed that a massive pulmonary embolus (blood clot) caused her death. ***Young,*** 914 So.2d at 1274 (¶¶ 3-4). Young's surviving daughter sued UMC, alleging that their failure to use anti-embolic stockings before surgery was a breach of the standard of care and proximately caused Young's death. ***Young,*** 914 So.2d at 1274 (¶ 5). Relying on the evidence produced at a bench trial, the trial court found that the standard of care required the use of anti-embolic stockings during Young's surgery and that UMC had breached this standard of care. However, the trial court found insufficient evidence that this breach was the proximate cause of Young's death. ***Young,*** 914 So.2d at 1276 (¶ 16).

The Court of Appeals noted that while there was sworn medical evidence to support a conclusion that Young's fatal pulmonary embolus was causally related to her breast reduction surgery[9], this was insufficient to allow recovery. Instead, Young needed to provide sworn medical evidence that UMC's failure to use the stockings proximately caused the pulmonary embolus; more specifically, that but for UMC's failure to use the stockings, Young had a greater than fifty percent chance of a substantially better result than was obtained. ***Young,*** 914 So.2d at 1277 (¶ 18) (citing ***Harris v. Shields,*** 568 So.2d

9 Because there was sworn medical evidence that any surgery with general anesthesia for more

269, 274 (Miss. 1990) (quoting ***Ladner,*** 515 So.2d at 889). "No medical expert testified that it was more probable than not that UMC's failure to use the stockings caused [Young's] fatal pulmonary embolus. While there was testimony that anti-embolic stockings can help prevent the formation of blood clots during surgery, there was no expert testimony that the stockings more likely than not would have prevented [Young's] fatal pulmonary embolus. Therefore, the evidence that UMC's breach of the standard of care proximately caused the fatal pulmonary embolus was purely speculative." ***Young,*** 914 So.2d at 1277 (¶ 18).

It was vital for Posey to provide sworn medical evidence that Dr. Burrow's failure to identify and report the cavernous malformation proximately caused Posey's seizure; more specifically, that but for Dr. Burrow's failure to identify and report the cavernous malformation, Posey had a greater than fifty percent chance of not suffering a seizure. ***Young,*** 914 So.2d at 1277 (¶ 18) (citing ***Harris,*** 568 So.2d at 274 (quoting ***Ladner,*** 515 So.2d at 889)). No medical expert, including Dr. Lancon, testified that it was more probable than not that Dr. Burrow's failure to report the cavernous malformation caused Posey's seizure. Consequently, any claim that Dr. Burrow's breach of the asserted standard of care proximately caused Posey's seizure is purely speculative and unsupported by any competent, admissible evidence. ***Young,*** 914 So.2d at 1277 (¶ 18). Without expert testimony on proximate cause, Posey cannot avoid summary judgment. ***Patterson,*** 60 So.3d at 753 (¶ 41) (citing ***Buckel,*** 47 So.3d at 153); ***Albert,*** 978 So.2d at 1266 (¶ 6) (citations therein omitted); ***Tucker,*** 853 So.2d at 113 (¶ 28) (citing ***Brandon HMA,*** 809 So.2d at 617 (citing ***Pittman,*** 462 So.2d at 334)); ***Barner,*** 605 So.2d at 808-09

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than thirty minutes increases the risk of a pulmonary embolus.

(citations therein omitted); ***Stratton,*** 513 So.2d at 590.

VI. CONCLUSION

Posey's cavernous malformation was an incidental finding that Dr. Burrow saw, but didn't report. Nowhere in the record is there any sworn testimony that this constitutes a deviation from the standard of care. Posey has further failed to provide any sworn expert proof establishing causation: that had Dr. Burrow reported the cavernous malformation, the standard of care would have required treatment which would have prevented Posey's subsequent seizure and resulting damages.

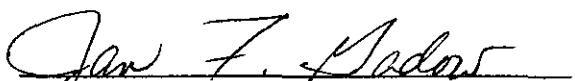
Dr. Burrow's sworn deposition testimony and affidavit establish neither duty, breach, nor proximate causation. In fact, Dr. Burrow's affidavit affirmatively establishes that she acted in compliance with the applicable standard of care in her treatment of Posey and neither caused nor contributed to Posey's injuries. This leaves Posey dependent upon Dr. Lancon's opinions as set forth in his two letters. These unsworn opinions are not competent evidence for the trial court or this Court to consider, they do not create any issue of fact, and they are insufficient to prevent summary judgment.

A *de novo* review, viewing the record evidence in the light most favorable to Posey, reveals no genuine issue of material fact and that Dr. Burrow is entitled to judgment in her favor. ***Kimbrough,*** 68 So.3d at 739-40 (¶ 9); ***Hynes,*** 66 So.3d at 714 (¶ 5). Posey's response to Dr. Burrow's motion for summary judgment fails to set forth significant, probative evidence on each element of her claim. ***Hynes,*** 66 So.3d at 716 (¶ 9) (quoting ***Lott,*** 2 So.3d at 792 (¶ 11)); ***Kendrick,*** 49 So.3d at 648 (¶ 7) (citation therein omitted). Moreover, Posey has offered no *sworn* expert testimony, which is required to prevent summary judgment in a case of medical negligence. ***Barner,*** 605 So.2d 808-09; ***Walker,***

529 So.2d at 187. Posey has failed to produce *any* sworn expert testimony establishing the applicable standard of care, deviation therefrom, or causation. Accordingly, Nancy W. Burrow, M.D., is entitled to judgment as a matter of law. ***Patterson,*** 60 So.3d at 753 (¶ 41) (citing ***Buckel,*** 47 So.3d at 153); ***Northrop,*** 9 So.3d at 384 (¶9); ***Albert,*** 978 So.2d at 1266 (¶ 6); ***Walker,*** 529 So.2d at 185-87. This Court must affirm the trial court's grant of summary judgment.

Respectfully submitted, this the 19th day of December, 2011.

NANCY W. BURROW, M.D., APPELLEE

BY: 
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CERTIFICATE OF SERVICE

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

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THIS, the 19th day of December, 2011.

Jan F. Gadow

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