IN THE SUPREME COURT OF MISSISSIPPI

NO. 2011-CA-01523

ETHEL L. BUCKLEY, APPELLANT

VS.

SINGING RIVER HOSPITAL, APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY, MISSISSIPPI
HONORABLE JUDGE KREBS, CIRCUIT JUDGE
CASE NO. 2005-00-143 (1)

REPLY BRIEF OF APPELLANT, ETHEL L. BUCKLEY

ORAL ARGUMENT REQUESTED

REPLY BRIEF OF APPELLANT

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ISSUES PRESENTED

1. Plaintiff/Appellant and Defendant/Appellee essentially agree on the underlying facts. The parties disagree as to whether the trial court abused its discretion in dismissing Plaintiff's action for failure to properly designate an expert witness. In support of her position, Plaintiff relies upon *Thompson v. Patino*, 784 So. 2d 220 (Miss. 2001). In support of its position, Defendant relies upon *Bowie v. Montfort Jones Memorial Hospital,* 861 So.2d 1037 (Miss. 2003). Thus, one of the questions before the Court is whether the facts in the underlying case are more analogous to those in *Thompson* or those in *Bowie.*
2. Whether Plaintiff's treating physician, Dr. Edward Schnitzer, had sufficient facts upon which to render a causation opinion after obtaining a history from the Plaintiff and after providing her significant treatment.

ARGUMENT

I. DEFENDANT'S RELIANCE ON *BOWIE* IS MISPLACED. *BOWIE* INVOLVED THE UNTIMELY SUPPLEMENTATION OF A HIRED EXPERT LIABILITY WITNESS IN A MEDICAL MALPRACTICE ACTION WITH NO PRIOR NOTICE TO THE DEFENDANT. HERE, PLAINTIFF TIMELY DESIGNATED HER "TREATING PHYSICIANS" TEN (10) MONTHS BEFORE THE SCHEDULING ORDER, AND DEFENSE COUNSEL CROSS-EXAMINED THE WITNESS IN DEPOSITION.

Defendant's reliance on *Bowie* is misplaced because *Bowie* clearly is distinguishable from the present case. *Bowie* involved an untimely supplementation of a hired liability expert in a medical malpractice action. In *Bowie*, no prior notice regarding this hired liability expert was given to defense counsel until after the discovery deadline. This Court held in *Bowie* that the trial court's entry of summary judgment against the plaintiffs for failure to designate an expert witness was not an unduly harsh sanction when considering these specific facts. *Id.*

The present case is distinguishable from *Bowie* because Dr. Schnitzer was Plaintiff's treating physician, not a hired liability expert and ample notice was given to the Defendant prior to the discovery deadline. Indeed, the Defendant clearly already knew about Dr. Schnitzer through interrogatory answers, medical records, deposition notices, letters and telephone calls. Any technical violation regarding the scheduling order was not unreasonable given that the Defendant knew of Dr. Schnitzer.

The facts in the present case more closely resemble those in *Thompson, supra*. Importantly, the facts in *Thompson* are much more egregious than the facts in the present case, yet this Court held that the trial court committed abuse of discretion in granting summary judgment, holding that "absolute and final Summary Judgment dismissal is too draconian a penalty for a discovery violation such as the one presented here." *Id.*

In *Thompson*, plaintiffs' counsel was seventy-five days late in filing her incomplete answers to interrogatories with regard to the designation of an expert witness. *Id.* at 221. Even after a motion to compel was granted by the trial court, it still took plaintiffs' counsel 69 days to submit her incomplete responses. *Id.* Furthermore, counsel had 19 months of discovery time in which to complete the designated expert affidavit and supplement the answers to her incomplete interrogatories. *Id.* at 221-22. Despite all of these facts, this Court found summary judgment dismissal to be inappropriate. *Id.* at 224.

Unlike *Thompson*, Plaintiff's counsel in the present case timely and properly designated her experts in her first Interrogatory Response by naming all "treating physicians" as her designated experts. As the Plaintiff had produced all medical records, Plaintiff's counsel reasonably thought this designation would be sufficient. Further, Plaintiff's counsel specifically named Dr. Schnitzer through correspondence with the Defendant and **first noticed Dr. Schnitzer's deposition approximately ten (10) months before the discovery cutoff**. This provided sufficient notice to the Defendant, especially where it was involved in the scheduling issues that prolonged the taking of Dr. Schnitzer's deposition. Moreover, Defense counsel attended Dr. Schnitzer's deposition and cross-examined him. Simply put, the Plaintiff merely failed to formally supplement interrogatory responses to specifically name Dr. Schnitzer. Under the present facts, Defense counsel had sufficient notice of Dr. Schnitzer's designation and even designated his own rebuttal experts. Whereas under *Thompson*, Plaintiff first noticed her experts after the discovery deadline had passed, and yet this Court still **Reversed** the granting of summary judgment. Here, the trial court abused its discretion by granting summary judgment after the Plaintiff had disclosed Dr. Schnitzer as her expert treating physician and taken Dr. Schnitzer's deposition. Indeed, Defense counsel attended said deposition and cross-examined Dr. Schitzer.

Further, comparing the present case to *Thompson* regarding an alleged violation of a Scheduling Order, it is clear that *Thompson's* counsel was in violation. Even so, this Court held that absolute and final summary judgment dismissal under those circumstances was too draconian a penalty for a discovery violation. *Id.* at 223-24. *See also Hubbard v. Billy M. Wansley, M.D.*, 954 So. 2d 951 (Miss. 2007) (a trial court's exclusion of expert testimony as a sanction in response to a discovery violation is reversible, and is different than a trial court finding that a doctor is not qualified to testify in a medical malpractice case).

In the present case, Plaintiff's counsel was not in violation, only mistaken as to the sufficiency of her answers. Indeed, the Plaintiff timely disclosed "all treating physicians" as her experts, and timely disclosed Dr. Schnitzer specifically to defense counsel. As such, the trial court's granting of summary judgment clearly constitutes an abuse of discretion.

Lastly, the Defendant's trial preparation was not prejudiced. The Defendant named its own two medical experts to contradict Dr. Schnitzer's testimony, and did so without supplementing its interrogatories, without stating what the experts' proposed testimonies would be, and without providing their opinions. Importantly, Defense counsel chose to attend Dr. Schitzer's deposition and actively cross-examine Dr. Schnitzer.

In the present case, the Plaintiff was not trying underhandedly to sneak in an expert witness right before trial; Plaintiff was only mistaken in failing to designate such expert by way of a formal discovery response. The Plaintiff instead relied on direct correspondence and communications, including letters, emails and phone calls, and a deposition of the treating physician with Defense counsel present, beginning over ten (10) months before the discovery cutoff. No trial date was imminent, there was no attempt at "trial by ambush," and there was no prejudice caused to the Defendant. The Court in *Thompson* recognized the purpose of this rule in its holding, and this logic is also applicable under the present circumstances. *Id.* at 224. *See also Young v. Meacham*, 999 So.

2d 368 371-72 (MS2008) (while Rule 26(f)(1) of the Mississippi Rule of Civil Procedure requires that a party "seasonably supplement" a prior response to questions relating to expert witnesses, "the focus is to avoid unfair surprise and allow the other side enough time to prepare for trial.").

For the above reasons, the Plaintiff respectfully requests this Court to find that the trial court abused its discretion, and to Reverse and Remand for trial.

II. DEFENDANT'S RELIANCE ON *SCHULTZ* IS MISPLACED BECAUSE THE PHYSICIAN IN *SCHULTZ* DID NOT STATE HIS CAUSATION OPINION TO A REASONABLE DEGREE OF MEDICAL CERTAINTY, WHEREAS HERE, DR. SCHITZER STATED HIS CAUSATION OPINION TO A REASONABLE DEGREE OF MEDICAL CERTAINTY.

Dr. Schnitzer, the Plaintiff's treating physician, had sufficient factual knowledge through the history obtained by the Plaintiff to qualify him to testify as an expert witness. As such, the trial court abused its discretion by determining Dr. Schnitzer lacked the requisite factual knowledge to testify. Miss. R. Evid. 702 states:

> 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 on 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.

Here, the Defendant does not dispute that Dr. Schmitzer treated the plaintiff and otherwise is medically qualified to testify. The Defendant solely argues that Dr. Schnitzer lacked sufficient facts or data to qualify him to testify. The Defendant reasons that "[Dr. Schnitzer's] knowledge comes over five and a half years after the alleged injury, he reviewed no records from the myriad of other medical professionals that treated Ms. Buckley between December of 2003 and August of 2009 and his sole source of the history of the facts of this case come solely from a discussion with the Plaintiff. Dr. Schnitzer fails to meet the requirements to be allowed to provide opinion testimony in this matter." R. 186-187.

Defendant relies on *John Morrell & Co. v. Schultz,* 208 So.2d 906 (Miss. 1968) to support its position that Dr. Schnitzer was not qualified to provide expert causation opinions. In *Schultz*, the plaintiff was diagnosed with acute gastroenteritis. The plaintiff had explained to her doctor that she previously had eaten some grey meat from a can. The plaintiff sued the meat manufacturer attempting to claim there was a defect in the meat that caused her disease. In deposition, the plaintiff's doctor testified that the meat "could possibly" be a cause, but he could not state to a reasonable degree of medical certainty that the meat caused the plaintiff's disease. *Id.* This Court held the doctor's testimony to be too speculative for the plaintiff to meet her causation burden. *Id.*

Here, as distinguished from *Schultz*, Dr. Schnitzer's specifically stated his causation testimony to a reasonable degree of medical certainty. Dr. Schnitzer testified regarding causation as follows:

> Q: And based on the history that Mrs. Buckley gave to you, would it be your opinion to a reasonable degree of medical certainty that this fall caused her back problems for which she had surgery?
> **A: It appears that that's the case, yes.**

R. 187. At the very least, when viewing this evidence in the light most favorable to the Plaintiff, this testimony creates a genuine issue of material fact. As such, the trial court incorrectly granted the Defendant's summary judgment motion.

Defendant further argues, without any legal support, that Dr. Schnitzer did not review other medical records and treated Plaintiff several years after her injuries, and therefore he is not allowed to testify as to causation. There is no legal support for this self-serving conclusion. In fact, Mississippi law has consistently held that such a doctor is allowed to testify as to causation. This Court specifically addressed this issue in *Biloxi Regional Med. Ctr. v. David*, 555 So. 2d 53, 54-55 (Miss. 1989). The relevant portion of this opinion is as follows:

DID THE COURT ERR IN ALLOWING DR. WANSLEY TO RENDER AN OPINION AS AN EXPERT TO ESTABLISH A CAUSAL CONNECTION BETWEEN MRS. DAVID'S ACCIDENT AT BILOXI REGIONAL MEDICAL CENTER AND HER TREATMENT AT OSCHNER HOSPITAL?

In its first assignment of error the center claims that it was error to allow Dr. Wansley to give testimony in the form of an opinion as to the causal connection between Mrs. David's injury and her treatment at the Oschner Hospital as well as her bills from Oschner. Dr. Wansley answered two questions relating to the causal connection between the injury and the treatment at Oschner Hospital: (1) Was Mrs. David's stay at Oschner Hospital the result of her injury sustained at the center; and (2) were the bills incurred by Mrs. David at Oschner Hospital the result of her injury sustained at the center?

With regard to the first question, Dr. Wansley was asked why an X-ray taken at Oschner on May 18, showed a fracture that did not show up on the X-ray taken at the center on May 9, 1982. ***Although Wansley had not seen the Oschner x-ray nor read the radiologists report he was allowed to render an opinion over objection.*** His opinion was that possible inflammation obscured the fracture or that since the fracture was a compound fracture it might not have been seen until calcification outlined the fracture. He stated that the Oschner x-ray was probably showing the injury Mrs. David received at the center. During direct examination Dr. Wansley was asked whether the treatment at Oschner was a result of Mrs. David's injury at the center. ***Again over objection he was allowed to testify that Mrs. David's treatment at Oschner was related to the accident which Mrs. David testified occurred at the center.*** The center relies on Mississippi Rules of Evidence 702, 703 and 705, for its objection, which state:

RULE 702. 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.

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

> RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION
>
> The expert may testify in terms of opinion or inferences and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.
>
> The center is not questioning the validity of Rule 703 or 705 but the validity of the underlying facts used by Dr. Wansley in forming his opinion.
>
> In examining the underlying facts Dr. Wansley used it should be remembered that Dr. Wansley treated Mrs. David after her injury at the Biloxi Regional Medical Center and also referred Mrs. David to Oschner Hospital when she failed to respond to treatment. He heard her state that she "stubbed" her toe in the center's parking lot and he hospitalized her because of pain and swelling of her foot. ***Since Dr. Wansley was not at the scene of the accident, he must rely on Mrs. David's account for his history. Knowing how Mrs. David injured her foot and that she went to Oschner's for treatment of that injury, Dr. Wansley had sufficient underlying facts for the purpose of Rules 703 and 705, Mississippi Rules of Evidence.***

Biloxi, 555 So. 2d at 54-55 (emphasis added). Thus, this Court has held that a treating physician who has knowledge, through a patient history, of how an incident occurred, has sufficient knowledge of the underlying facts from which to base an opinion, regardless of records review.

Here, Dr. Schnitzer testified that he obtained a history from the Plaintiff that was consistent with her injury and then treated the Plaintiff for that very injury. R. 186-187. Under the Court's reasoning in *Biloxi,* Dr. Schnitzer possessed the requisite factual knowledge to testify as an expert witness. The Defense basically persuaded the trial court to deem the Plaintiff's history as false without ever even seeing her testify!

Further, this Court has given leeway in allowing the use of subsequent treating physicians (even those that may have never even examined a plaintiff), and offers guidance on such, rather than just summarily dismissing a case out of hand. *See, e.g., McCaffrey v. Puckett*, 784 So. 2d 197, 203 (Miss. 2001) ("the fact that the expert witness did not examine the plaintiff goes to the

weight to be given to physician's testimony, not its admissibility"); *Biloxi Regional Med. Ctr. v. David*, 555 So. 2d 53, 54-55 (Miss. 1989) (there was sufficient proof of causation where plaintiff's treating physician relied on plaintiff's account for his history and related the injuries, even though he had not seen prior x-rays or read the radiologist's report); *Hubbard*, 41 So. 3d at 675-76 (an expert's testimony is presumptively admissible when relevant and reliable), *citing Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 39 (Miss. 2003).

A physician's testimony should not be excluded altogether with the assumption that plaintiff cannot otherwise prove causation in her case. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking... admissible evidence." *McLemore*, 863 So. 2d at 36. *See also Hubbard*, 41 So. 3d at 678 (a qualified medical expert is permitted to extrapolate causation testimony from the patient's clinical picture even where medical records contain no objective medical evidence establishing causation).

At the very least, when viewing this evidence in the light most favorable to the Plaintiff, this testimony creates a genuine issue of material fact. As such, the trial court incorrectly granted the Defendant's summary judgment motion.

For the above reasons, the Plaintiff respectfully requests this Court to find that the trial court's Order was clear error, and to Reverse and Remand for trial.

CONCLUSION

For the abovementioned reasons, the Plaintiff/Appellant respectfully requests this Court to hold that the trial court abused its discretion and/or was clearly erroneous, and to Reverse and Remand for trial.

CERTIFICATE OF SERVICE

This is to certify that on this 13th day of March, 2012, a true and correct copy of the foregoing was served on counsel of record by depositing a copy of same in the United States Mail, postage prepaid, properly addressed to:

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OF COUNSEL

CERTIFICATE OF FILING

I, Samuel McClurkin, certify that on March 13th 2012, I deposited a true and correct copy of the foregoing Certificate of Service in the United States Mail, first-class, postage prepaid, properly addressed to:

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