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)

BRIEF OF APPELLANT, ETHEL L. BUCKLEY

ORAL ARGUMENT REQUESTED

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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

TRIAL COURT JUDGE:

Honorable Robert Krebs
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APPELLANT:

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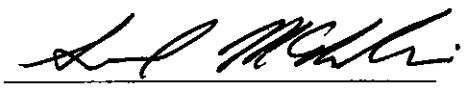


Counsel of Record for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Mississippi Rules

Cases

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument based on the following: (a) this appeal is not frivolous, (b) the dispositive issues raised in this appeal have not been recently and authoritatively decided, and (c) as described in the accompanying memorandum, the decisional process would be significantly aided by oral argument.

STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in determining that Plaintiff's Interrogatory Responses and subsequent correspondence with defense counsel failed to comply with the court's Scheduling Order where the Plaintiff, although failing to specifically identify Dr. Schnitzer, one of the Plaintiff's treating physicians, as an expert witness by way of formal Interrogatory Response, timely disclosed her "treating physicians" as expert witnesses by Interrogatory Response, noticed Dr. Schnitzer's deposition approximately ten (10) months before the Scheduling Order was entered, and deposed Dr. Schnitzer with Defense counsel attending and cross-examining the same.

2. Whether the trial court clearly erred in determining that Dr. Schnitzer, the Plaintiff's treating physician, lacked the requisite knowledge to testify even though Dr. Schnitzer obtained a history from the Plaintiff regarding her injuries.

STATEMENT OF THE CASE

A. Course of Proceedings

On June 28, 2005, the Plaintiff filed a Complaint against Singing River Hospital alleging that its negligence/wantonness caused the Plaintiff to slip and fall causing severe and permanent injury. R. 10-13. On August 1, 2005, the Defendant filed its Answer. R. 19-25.

On April 1, 2011, the Defendant filed a Motion for Summary Judgment, which the trial court Granted on April 20, 2011. R. 171-210, 303.

On April 28, 2011, the Plaintiff filed a Motion to Alter or Amend Judgment, which the trial court Denied on September 19, 2011. R. 323-341, 353.

On October 3, 2011, the Plaintiff timely filed a Notice of Appeal of the trial court's April 1 and September 19 Orders. R. 354.

B. Statement of the Facts

When stripping and waxing a floor, employees must follow fall-prevention procedures including locking and barricading elevators, placing wet floor signs in clear view and placing floor cones in clear view. R. 229, 232. On December 3, 2003, at approximately 6:30 p.m., Albert Hutchinson and Warren Thompson, employees of Singing River Hospital ("the Defendant"), were stripping and waxing the 1st floor corridor of the Defendant in front of service elevator number 4. R. 241-245. Two dietary employees asked to use the subject elevator. *Id.* Mr. Hutchinson and Mr. Thompson moved the wet floor sign, removed the chain barricade and unlocked the subject elevator. *Id.* Mr. Hutchinson and Mr. Thompson chose not to replace the sign, replace the chain barricade, or relock the subject elevator. *Id.* Several minutes later, Ethel L. Buckley ("the Plaintiff") and another woman exited the elevator and fell to the floor. *Id.* The Plaintiff suffered extensive damage to her back requiring surgery. *Id.*

On April 9, 2007, in response to Defendant's Interrogatory regarding disclosure of expert witnesses, Plaintiff responded as follows:

> It is anticipated that Plaintiff will call treating physicians to testify as to their diagnosis, prognosis, examination and treatment of her and the[ir] medical opinions thereof. Plaintiff will supplement, if necessary.

R. 293, 334. Initially, Plaintiff's counsel intended to disclose Plaintiff's surgeon, Dr. Longnecker, as her damages expert in this case. Plaintiff's counsel made Defense counsel aware of this in 2008. Upon the instigation of this action, Dr. Longnecker was, upon information and belief, still residing at the time in Mississippi. Communication efforts, however, revealed that Dr. Longnecker had retired and closed his office in Mississippi. Multiple attempts were made to locate Dr. Longnecker, who purportedly moved to Hawaii after his retirement. Plaintiff's counsel had no contact information, but continued to search for Dr. Longnecker in Hawaii, to no avail. Dr. Longnecker since has returned to Mississippi.

The Plaintiff, meanwhile, had been unable to afford medical treatment due to financial constraints and her inability to work as a result of the subject injury. In 2009, the Plaintiff finally found a means to pay for pain management treatment through Dr. Edward Schnitzer, M.D.

On November 23, 2009, Plaintiff wrote to Defense counsel, Mr. Tom Musselman, regarding expert witnesses and stated as follows:

> Dear Tom:
>
> I am writing to follow up to our previous discussions regarding plaintiff's experts. In addition to calling Mrs. Buckley's treating physicians, who will testify as to the diagnosis, prognosis, and causation of her injuries, we intend to call Dr. Robert Hebert, an economist, and Catherine Brock, a life care planner. We have previously forwarded you a report from Dr. Hebert. His opinions are contained in his report. Additionally, I anticipate receiving Catherine Brock's report this week and will forward said report under separate cover. Please be advised that her opinions will be contained in her report.

R. 335. A fax confirmation subsequently was received. R. 336. Subsequently, on January 28, 2010, Plaintiff noticed the deposition of Dr. Schnitzer to take place on March 11, 2010. R.

337. Plaintiff's counsel faxed this notice to Defense counsel and received the fax confirmation sheet. R. 338. Although this deposition ultimately was postponed until March 3, 2011, the Defendant had been given sufficient notice of the Plaintiff's intent to call this expert.

On October 5, 2010, the trial court entered an amended scheduling order stating:

> Plaintiff shall designate all of her expert witnesses on or before November 1, 2010, providing such information as specified by the Mississippi Rules of Civil Procedure.

R. 340. Because Plaintiff already had disclosed her treating physicians as expert witnesses, provided medical records, and already had disclosed Dr. Schnitzer to Defense counsel over nine (9) months earlier and noticed the deposition of the same (attempting to schedule the deposition for almost a year), Plaintiff's counsel reasonably believed they had adequately complied with the Court's Order.

On March 3, 2011, Dr. Schnitzer was deposed. Dr. Schnitzer related Plaintiff's injuries to her fall, stated that the treatment she has received was reasonable and necessary, and gave her a prognosis. Importantly, 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. Defense counsel was present and cross-examined Dr. Schnitzer.

On April 1, 2011, the Defendant filed a Motion for Summary Judgment, alleging that Plaintiff "wholly failed to properly designate any expert witness ***nor was any information about experts divulged*** pursuant to the dictates of Rule 26(b)(4)," Miss. R. Civ. P. R. 173 (emphasis added). R. 173. "Further, ... Plaintiff has failed to identify any medical expert who will testify as to medical injuries and damages proximately caused by any alleged breach of a duty owed to

Ms. Buckley. Without expert testimony of the issues on the ... injuries proximately caused by a breach of any duty and damages resulting from the injury, Plaintiff cannot prevail on her claim for recovery." *Id.*

The Defendant's Motion further stated: "Dr. Schnitzer fails to meet the requirement that an expert witness provide testimony based upon sufficient facts or data. . . His 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.

On April 14, 2011, the Defendant's Motion for Summary Judgment was argued. Transcript Excerpt 7. Ruling from the bench, Honorable Robert Krebs granted the Defendant's Motion, stating:

> The Plaintiff has failed to identify those expert witnesses to meet the test on the issues of duty, breach, proximate causation, injury and damages, and therefore, the Motion for Summary Judgment by Defendant, Singing River Hospital Systems, is hereby sustained, efen if, based on what I have read, the experts as designated would not have met the criteria as set out by the Mississippi Supreme Court. In addition, I have had this problem with out-of-town lawyers, not specifically with you folks, but I would appreciate it if you would share with your brother and sister lawyers and the Alabama Bar that when Judge Krebs signs an Order, it is an Order, it is not an advisory opinion, and it will be followed with specificity. Because you're new to the case, counselor, that's why there are no sanctions today . . . The Mississippi Rules of Civil Procedure are not advisory, and this Court's Orders are not advisory.

Transcript Excerpt 34-35.

On April 28, 2011, the Plaintiff filed a Motion to Alter or Amend Judgment, which the trial court denied on September 19, 2011. R. 323-341, 353. At the hearing, the trial court indicated that, even if it was admitted, Dr. Schnitzer lacked the requisite factual knowledge to testify as an expert witness. Transcript Excerpt 47. Plaintiff appeals the trial court's Orders.

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THAT PLAINTIFF'S INTERROGATORY RESPONSES AND SUBSEQUENT CORRESPONDENCE WITH DEFENSE COUNSEL FAILED TO COMPLY WITH THE COURT'S SCHEDULING ORDER IN IDENTIFYING DR. SCHNITZER, ONE OF PLAINTIFF'S TREATING PHYSICIANS, AS AN EXPERT WITNESS BY WAY OF FORMAL INTERROGATORY RESPONSE, WHERE PLAINTIFF TIMELY DISCLOSED HER "TREATING PHYSICIANS" AS EXPERT WITNESSES, NOTICED DR. SCHNITZER'S DEPOSITION APPROXIMATELY TEN (10) MONTHS BEFORE THE SCHEDULING ORDER WAS ENTERED, AND WHERE DEFENSE COUNSEL ATTENDED DR. SCHNITZER'S DEPOSITION AND CROSS-EXAMINED THE SAME.

II. BECAUSE DR. SCHNITZER, THE PLAINTIFF'S TREATING PHYSICIAN, OBTAINED A HISTORY FROM THE PLAINTIFF REGARDING HER INJURIES, DR. SCHITZER POSSESSED THE REQUISITE FACTUAL KNOWLEDGE TO TESTIFY AS AN EXPERT WITNESS; AS SUCH, THE TRIAL COURT'S DETERMINATION THAT DR. SCHNITZER LACKED THE REQUISITE KNOWLEDGE TO TESTIFY CONSTITUTED CLEAR ERROR.

ARGUMENT

I. **THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THAT PLAINTIFF'S INTERROGATORY RESPONSES AND SUBSEQUENT CORRESPONDENCE WITH DEFENSE COUNSEL FAILED TO COMPLY WITH THE COURT'S SCHEDULING ORDER IN IDENTIFYING DR. SCHNITZER, ONE OF PLAINTIFF'S TREATING PHYSICIANS, AS AN EXPERT WITNESS BY WAY OF FORMAL INTERROGATORY RESPONSE, WHERE PLAINTIFF TIMELY DISCLOSED HER "TREATING PHYSICIANS" AS EXPERT WITNESSES, NOTICED DR. SCHNITZER'S DEPOSITION APPROXIMATELY TEN (10) MONTHS BEFORE THE SCHEDULING ORDER WAS ENTERED, AND WHERE DEFENSE COUNSEL ATTENDED DR. SCHNITZER'S DEPOSITION AND CROSS-EXAMINED THE SAME.**

STANDARD OF REVIEW

This Court reviews a trial court's grant of summary judgment de novo. *Eckman v. Moore,* 876 So.2d 975, 988(43) (Miss. 2004). Summary judgment shall be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c). The evidence is viewed in the light most favorable to the non-moving party, in whose favor all reasonable favorable inferences are drawn. *Brown v. Credit Ctr., Inc.,* 444 So.2d 358, 362 (Miss. 1983). Summary judgment is improper where sufficient evidence exists for a reasonable jury to find for the plaintiff. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also Strantz ex rel. Minga v. Pinion,* 652 So.2d 738, 741 (Miss. 1995).

Further, trial courts have considerable discretion in discovery matters, and their decisions will not be overturned unless there is an abuse of discretion. *Robert v. Colson,* 729 So.2d 1243, 1245 (Miss. 1999).

ARGUMENT

The trial court's determination that the Plaintiff failed to comply with the court's Scheduling Order was clearly erroneous and constitutes an abuse of discretion. This Court looks to the following factors to determine if a dismissal with prejudice is the proper remedy for discovery violations: (1) whether the discovery violation resulted from willfulness or an inability to comply; (2) whether the deterrent value of Rule 37 could not have been achieved through lesser sanctions; (3) whether the other party's trial preparation has been prejudiced; (4) whether the failure to comply is attributable to the party itself, or their attorney; and (5) whether the failure to comply was a consequence of simple confusion or a misunderstanding of the trial court's order. *Pierce v. Heritage Props. Inc.*, 688 So.2d 1385, 1389 (Miss. 1997). The Supreme Court reverses if it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors. *Caracci v. Int'l Paper Co.*, 699 So.2d 546, 556 (Miss. 1997).

First, any arguable discovery violation did not result from willfulness or an inability to comply. 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.

Second, the deterrent value of Rule 37 could have been achieved through lesser sanctions. The Mississippi Supreme Court has held that absolute and final Summary Judgment dismissal is too draconian a penalty for a discovery violation such as the one presented here. *Thompson v. Patino*, 784 So. 2d 220 (Miss. 2001). Indeed, Summary Judgment is too excessive a sanction for a discovery violation. *Id.*

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. *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 sixty-nine days to submit her incomplete responses. *Id.* Furthermore, counsel had nineteen 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 was afforded the opportunity to cross-examine Dr. Schnitzer. 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 at that time.

Third, the alleged failure to comply was a consequence of simple confusion or a misunderstanding of the Trial Court's Order. 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.

Fourth, the Defendant's trial preparation has not been 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.

Some recognition must also be given to the fact that the Uniform Circuit and County Court Rules call for completion of discovery within ninety-days after service of an answer by the defendant, absent a different time limit imposed by the Court. *See* U.C.C.C.R. 4.04(A). However, the clear thrust of the rule centered around designation of an expert anticipates situations where one party attempts to designate an expert too close to the trial date, and the other party will be prejudiced by that designation. To this end, the rule states that "[a]bsent special circumstances the

court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty-days before trial." *Id.*

We are not dealing in the instant case with the situation anticipated by this rule. We are dealing with circumstances and facts illustrating that the Plaintiff was not trying underhandedly to sneak in an expert witness right before trial; but rather 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. BECAUSE DR. SCHNITZER, THE PLAINTIFF'S TREATING PHYSICIAN, OBTAINED A HISTORY FROM THE PLAINTIFF REGARDING HER INJURIES, DR. SCHITZER POSSESSED THE REQUISITE FACTUAL KNOWLEDGE TO TESTIFY AS AN EXPERT WITNESS; AS SUCH, THE TRIAL COURT'S DETERMINATION THAT DR. SCHNITZER LACKED THE REQUISITE KNOWLEDGE TO TESTIFY CONSTITUTED CLEAR ERROR.

STANDARD OF REVIEW

"The standard of review for the admission or suppression of evidence in Mississippi is abuse of discretion." *Poole v. Avara,* 908 So.2d 716, 721 (Miss.2005) (citing *Miss. Trans. Comm'n*

v. McLemore, 863 So.2d 31, 34 (Miss.2003)). "The trial judge has the sound discretion to admit or refuse expert testimony; an abuse of discretion standard means the judge's decision will stand unless the discretion he used is found to be arbitrary and clearly erroneous." *Id.*

ARGUMENT

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. Schitzer treated the plaintiff and otherwise is medically qualified to testify. The Defendant solely argues that Dr. Schnitzer did not meet the first prong of Rule 702 test: 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.

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 the patient, 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. Schitzer possessed the requisite factual knowledge to testify as an expert witness.

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 offer 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).

Here, Dr. Schnitzer's testimony unquestionably established causation. 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.

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

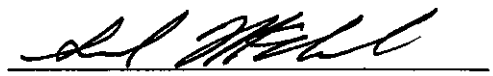
This is to certify that on this 21ST day of February, 2012, a true and correct copy of the foregoing was served on counsel of record by depositing a copy of same in the United States Mail, postage prepaid, properly addressed to.

OF COUNSEL

CERTIFICATE OF FILING

I, Samuel P. McClurkin, IV, certify that on February 21st, 2012, I deposited a true and correct copy of the foregoing Appellant's Brief and three copies of the same as well as Appellant's Mandatory Record Excerpts and three copies of the same in the United States Mail, first-class, postage prepaid, properly addressed to:

Clerk, Mississippi Supreme Court
P.O. Box 249
Jackson, MS 39205



CERTIFICATE OF SERVICE

This is to certify that on this 21st day of February, 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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