

SUPREME COURT OF MISSISSIPPI

Ken E. Cleveland, George T. Smith-Vaniz, M.D., and Jackson HMA,
Inc. d/b/a Central Mississippi Medical Center v. Lanell Hamil,
Individually and on Behalf of the Wrongful Death Beneficiaries of
Emmett O. Hamil, Deceased, Who Are Entitled to Recover Under the
Wrongful Death and Survival Statute

Cleveland v. Hamil · No. 2010-CT-01527-SCT · Decided June 7, 2010

SUMMARY

The Mississippi Supreme Court held that the plaintiff’s medical-negligence expert improperly introduced an undisclosed theory of malpractice at trial. Because exclusion of that testimony left the plaintiff without admissible expert evidence establishing the applicable standard of care or breach, the court concluded that judgment notwithstanding the verdict was required rather than a new trial. The court affirmed in part and reversed in part the Court of Appeals and reversed and rendered judgment for all defendants.

CASE DETAILS

COURT	Supreme Court of Mississippi
WRITING FOR THE COURT	Dickinson, Presiding Justice, for the Court; Waller, C.J.; Randolph, P.J.; Lamar, J.; Kitchens, J.; Chandler, J.; Pierce, J.; King, J.; Coleman, J.
JURISDICTION	Mississippi
DECIDED	June 7, 2010
DOCKET	2010-CT-01527-SCT
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	On writ of certiorari to review the Mississippi Court of Appeals' decision reversing the judgment against the defendants, rendering judgment for Dr. Smith-Vaniz and Jackson HMA, and remanding for a new trial against Dr. Cleveland.
STANDARD OF REVIEW	The Court reviewed whether the Court of Appeals erred in remanding for a new trial rather than rendering judgment for Dr. Cleveland, applying the JNOV standard to determine whether the plaintiff

	presented sufficient admissible evidence to establish a prima facie medical-malpractice case.
PRECEDENTIAL VALUE	binding
PARTIES	Ken E. Cleveland, George T. Smith-Vaniz, M.D., Jackson HMA, Inc. d/b/a Central Mississippi Medical Center v. Lanell Hamil, individually and on behalf of the wrongful death beneficiaries of Emmett O. Hamil, deceased

TOPICS

medical malpractice

expert testimony

wrongful death

motion for directed verdict

discovery dispute

PRACTICE AREAS

medical malpractice

wrongful death

evidence

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by remanding for a new trial against Dr. Cleveland rather than rendering judgment in his favor after determining that the plaintiff's only expert testimony concerning his alleged breach was an undisclosed and inadmissible new theory.
2. Whether a plaintiff in a medical-malpractice action may establish the standard of care or breach through inadmissible expert testimony.
3. Whether JNOV is appropriate when, after exclusion of improperly admitted expert testimony, the plaintiff lacks admissible evidence establishing a prima facie medical-malpractice case.

HOLDINGS

1. A plaintiff may not use inadmissible expert testimony to establish the applicable medical standard of care or a medical provider's breach of that standard.
2. JNOV was proper because, after exclusion of the undisclosed expert opinion, the plaintiff failed to present admissible evidence establishing a prima facie case of medical malpractice against Dr. Cleveland.
3. The judgments of the Court of Appeals and the Hinds County Circuit Court were reversed in part, and judgment was rendered for all defendants.

KEY QUOTATIONS

“But the failure to produce a competent medical expert prohibits the plaintiff from bringing the case to trial.” (§14)

“To be clear, a plaintiff may not use inadmissible evidence to establish the standard of care, or that a medical provider failed to comply with that standard of care.” (§15)

“And because the plaintiff failed to establish a prima facie case with admissible evidence, the trial judge erred in failing to grant Dr. Cleveland judgment notwithstanding the verdict.” (¶16)

FACTUAL BACKGROUND

Emmett Hamil was hospitalized for severe abdominal pain and gastrointestinal bleeding, underwent surgery to repair an ulcer, and was discharged after approximately one week. He returned the next morning with additional pain and bleeding, and surgery revealed a second ulcer that had eroded a large blood vessel and caused his death. During discovery, Hamil's expert attributed the alleged malpractice to failure to prescribe anti-ulcer medication, but at trial the expert abandoned that theory after learning that medication had been prescribed and offered a new, undisclosed theory that the second ulcer should have been detected before discharge.

PROCEDURAL HISTORY

Lanell Hamil brought a medical-negligence wrongful-death action against Drs. Smith-Vaniz and Cleveland and Jackson HMA. The circuit court denied Dr. Smith-Vaniz's motion for a directed verdict, granted Jackson HMA a partial directed verdict, and entered a jury verdict for Hamil against all three defendants while denying their JNOV motions. The Court of Appeals rendered judgment for Dr. Smith-Vaniz and Jackson HMA but remanded for a new trial against Dr. Cleveland based on the admission of an undisclosed expert theory. The Mississippi Supreme Court granted Dr. Cleveland's petition for certiorari and held that judgment should instead be rendered for all defendants.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

No remand was ordered by the Mississippi Supreme Court; it rendered judgment for all defendants. The Court of Appeals judgment was affirmed in part and reversed in part, and the Hinds County Circuit Court judgment was reversed and rendered.

CASES CITED

- Cleveland v. Hamil, 2013 WL 936217, *9 (Miss. Ct. App. March 12, 2013)
- University of Mississippi Medical Center v. Lanier, 97 So. 3d 1197, 1203 (Miss. 2012)
- Bailey Lumber & Supply Co. v. Robinson, 98 So. 3d 986, 998 (Miss. 2012)
- Hyundai Motor America v. Applewhite, 53 So. 3d 749, 759 (Miss. 2011)
- T.K. Stanley, Inc. v. Cason, 614 So. 2d 942, 950-51 (Miss. 1992)
- Jones v. Hatchett, 504 So. 2d 198, 202 (Miss. 1987)
- Square D Co. v. Edwards, 419 So. 2d 1327, 1329 (Miss. 1982)
- Hubbard v. Wansley, 954 So. 2d 951, 956-57 (Miss. 2007)
- Drummond v. Buckley, 627 So. 2d 264, 268 (Miss. 1993)
- Burnham v. Tabb, 508 So. 2d 1072, 1074 (Miss. 1987)

- Barner v. Gorman, 605 So. 2d 805, 809 (Miss. 1992)
- Latham v. Hayes, 495 So. 2d 453 (Miss. 1986)
- McDonald v. Memorial Hospital at Gulfport, 8 So. 3d 175, 182 (Miss. 2009)
- Troupe v. McAuley, 955 So. 2d 848, 858 (Miss. 2007)
- 3M Co. v. Johnson, 895 So. 2d 151, 167 (Miss. 2005)
- Wilson v. General Motors Acceptance Corp., 883 So. 2d 56, 63 (Miss. 2004)
- Harrison v. McMillan, 828 So. 2d 756, 763 (Miss. 2002)

OPINION

PER CURIAM.

IN THE SUPREME COURT OF MISSISSIPPI NO. 2010-CT-01527-SCT KEN E. CLEVELAND, GEORGE T. SMITH- VANIZ, M.D., AND JACKSON HMA, INC., d/b/a CENTRAL MISSISSIPPI MEDICAL CENTER v. LANELL HAMIL, INDIVIDUALLY AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF EMMETT O. HAMIL, DECEASED, WHO ARE ENTITLED TO RECOVER UNDER THE WRONGFUL DEATH AND SURVIVAL STATUTE ON WRIT OF CERTIORARI DATE OF JUDGMENT: 06/07/2010 TRIAL JUDGE: HON. WINSTON L. KIDD COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT ATTORNEYS FOR APPELLANT: WHITMAN B. JOHNSON, III MICHAEL F. MYERS LORRAINE WALTERS BOYKIN STEPHEN P. KRUGER JAN F. GADOW KRISTOPHER ALAN GRAHAM MARK P. CARAWAY CORY LOUIS RADICIONI ATTORNEYS FOR APPELLEE: ALTON EARL PETERSON LARRY STAMPS ANITA M. STAMPS NATURE OF THE CASE: CIVIL - WRONGFUL DEATH DISPOSITION: THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED IN PART AND REVERSED IN PART.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND RENDERED - 08/08/2013 MOTION FOR REHEARING FILED: MANDATE ISSUED: EN BANC. DICKINSON, PRESIDING JUSTICE, FOR THE COURT: ¶1. At trial in this medical-negligence case, the plaintiff's only expert abandoned his pretrial opinion and – over the objection of the defendant – testified to a new opinion that was never disclosed in discovery.

The Court of Appeals reversed and remanded for a new trial. But because the trial court should have granted a judgment notwithstanding the verdict, we reverse in part and render judgment in favor of the defendant. FACTS AND PROCEDURAL HISTORY ¶2. Emmett Hamil was admitted to Central Mississippi Medical Center, complaining of severe abdominal pain. Dr. George T. Smith-Vaniz, a gastroenterologist, treated Hamil for gastrointestinal bleeding, and Dr. Ken E. Cleveland, a cardiovascular surgeon, surgically repaired his ulcer.

After approximately one week, Hamil was discharged. The next morning, Hamil returned to the hospital complaining of further stomach pain and bleeding. Surgery revealed a second ulcer, which had eroded a large blood vessel and precipitated Hamil's death. ¶3. Lanell Hamil filed suit, alleging that the medical malpractice of Dr. Smith-Vaniz, Dr. Cleveland, and Jackson HMA caused the wrongful death of her husband.

During discovery, Lanell Hamil's expert, Dr. Louis Silverman, opined that Hamil's doctors deviated from the standard of care by failing to prescribe anti-ulcer medication at Hamil's discharge and allowing the second ulcer to develop post-discharge. ¶4. At trial, Dr. Silverman admitted he later became aware that the doctors had prescribed such medication. But he had developed a new theory of the doctors' malpractice, opining over objection that, because the second ulcer was developing while Hamil was in the hospital, the doctors should have discovered it prior to Hamil's discharge.

The plaintiff presented no additional expert testimony. ¶5. At the close of the plaintiff's case-in-chief, the circuit court denied a motion for a directed verdict by Dr. Smith-Vaniz, but granted a directed verdict in favor of Jackson HMA except for any vicarious liability it had through Dr. Smith-Vaniz.

The jury returned a verdict in favor of the plaintiff against all three defendants, and the circuit court denied their motions for judgment notwithstanding the verdict (JNOV). ¶6. The Court of Appeals reversed the judgment against all three defendants.¹ The court rendered judgment for Dr. Smith-Vaniz because it found Dr. Silverman – a thoracic and cardiovascular surgeon – unqualified to render an opinion as to the standard of care for a gastroenterologist.² Because Dr. Silverman was the plaintiff's sole expert and he was unqualified to testify against Dr. Smith-Vaniz, the court found that the plaintiff could not establish a prima facie case of medical malpractice and rendered judgment in favor of Dr. Smith-Vaniz.³ Further, because Jackson HMA was only vicariously liable for any negligence of Dr. Smith-Vaniz, the court rendered judgment in its favor.⁴ ¶7.

The Court of Appeals found that Dr. Silverman was qualified as an expert to testify to the standard of care for Dr. Cleveland, but the court found that the circuit court had abused ¹ Cleveland v. Hamil, ___ So. 3d ___, 2013 WL 936217, *9 (Miss. Ct. App. March 12, 2013). ² Id. ³ Id. ⁴ Id. ⁵ The court held that Dr. Silverman's new theory of Dr. Cleveland's malpractice constituted trial by ambush and remanded the case for a new trial against Dr. Cleveland.⁶ ¶8.

Following Dr. Cleveland's motion for rehearing, the Court of Appeals modified its original opinion to explain why it had remanded the case for a new trial against Dr. Cleveland, stating that "where a plaintiff fails to offer qualified expert testimony -- and, thus, fails to present a prima facie case -- the supreme court and this court have held that the defendant is entitled to judgment in his favor." ⁷ But the court stated that "where the prevailing party blindsides the other party with

surprise expert testimony, the supreme court has consistently remedied the unfairness by remanding for a new trial.” 8 Therefore, the court found it proper to render judgment for Dr. Smith-Vaniz and Jackson HMA, while remanding for a new trial against Dr. Cleveland. ¶9.

Dr. Cleveland petitioned this Court for a writ of certiorari, and we granted certiorari. ANALYSIS ¶10. The single issue before us is whether the Court of Appeals erred by remanding for a new trial against Dr. Cleveland, rather than rendering a judgment in his favor.

We hold that the Court of Appeals erred by remanding for a new trial. 5 Id. 6 Id. 7 Id. at *8 (citing Univ. of Miss. Med. Ctr. v. Lanier, 97 So. 3d 1197, 1203 (Miss. 2012)). 8 Id. (citing Bailey Lumber & Supply Co. v. Robinson, 98 So. 3d 986, 998 (Miss. 2012); Hyundai Motor Am. v. Applewhite, 53 So. 3d 749, 759 (Miss. 2011); T.K. Stanley, Inc. v. Cason, 614 So.

2d 942, 950-51 (Miss. 1992); Jones v. Hatchett, 504 So. 2d 198, 202 (Miss. 1987); Square D Co. v. Edwards, 419 So. 2d 1327, 1329 (Miss. 1982)). 4 In order to establish a prima facie case of medical malpractice, a plaintiff must prove “(1) the existence of a duty by the defendant to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) a failure to conform to the required standard; and (3) an injury to the plaintiff proximately caused by the breach of such duty by the defendant.” 9 ¶11.

And to establish the second and third prongs – that the defendant breached the applicable standard of care, and that the breach proximately caused plaintiff’s injuries – the plaintiff must provide expert testimony.¹⁰ ¶12.

We have affirmed grants of summary judgment and directed verdicts in favor of defendants in medical-malpractice actions where the plaintiffs failed to produce a qualified expert.¹¹ Likewise, we have reversed a trial court’s denial of a defendant’s motion for directed verdict and rendered judgment in favor of the defendant where the plaintiff’s qualified expert failed to testify to a reasonable degree of medical certainty.¹² Relying on this authority, the Court of Appeals properly rendered judgment in favor of Dr. Smith-Vaniz and Jackson HMA. ¶13.

We find, however, that the Court of Appeals also erred by not rendering judgment in favor of Dr. Cleveland. While Dr. Silverman was qualified as an expert in cardiovascular surgery, his testimony concerning Dr. Cleveland’s breach of the standard of care consisted 9 Hubbard v. Wansley, 954 So. 2d 951, 956-57 (Miss. 2007) (citing Drummond v. Buckley, 627 So. 2d 264, 268 (Miss.

1993) (citing Burnham v. Tabb, 508 So. 2d 1072, 1074 (Miss. 1987))). 10 Id. at 957 (quoting Barner v. Gorman, 605 So. 2d 805, 809 (Miss. 1992) (citing Latham v. Hayes, 495 So. 2d 453 (Miss. 1986))). 11 See, e.g. McDonald v. Mem’l Hosp. at Gulfport, 8 So. 3d 175, 182 (Miss. 2009); Hubbard, 954 So. 2d at 966 (Miss. 2007); Troupe v. McAuley, 955 So. 2d 848, 858 (Miss.

2007). 12 Lanier, 97 So. 3d at 1203. 5 entirely of a new theory that the plaintiff did not disclose.¹³ Had the trial judge excluded this testimony – as he should have – the plaintiff would have been without any expert testimony to establish that Dr. Cleveland breached the standard of care. ¶14. Medical negligence cases are different from cases that do not call into question the standard of care of a medical provider.

While expert testimony may be helpful in non- medical negligence cases, it is not required. But the failure to produce a competent medical expert prohibits the plaintiff from bringing the case to trial.¹⁴ Indeed, in every kind of case, a judgment notwithstanding the verdict is generally appropriate where the plaintiff has failed to produce sufficient admissible evidence to establish a prima facie case,¹⁵ and the fact that a trial judge erroneously allows inadmissible evidence into the record – whether expert testimony or otherwise – does not abrogate that rule. ¶15.

In explaining why it remanded for a new trial against Dr. Cleveland, the Court of Appeals cited several cases, none of which related to medical negligence.¹⁶ To be clear, a plaintiff may not use inadmissible evidence to establish the standard of care, or that a medical 13 During discovery, Dr. Silverman opined that the second ulcer developed after Emmitt Hamil left the hospital because his doctors did not prescribe anti-ulcer medication.

At trial, he testified that the doctors did prescribe anti-ulcer medication, but that the second ulcer was developing and should have been detected while Hamil was still in the hospital. 14 Hubbard, 954 So. 2d at 957. 15 3M Co. v. Johnson, 895 So. 2d 151, 167 (Miss. 2005); Wilson v. General Motors Acceptance Corp., 883 So. 2d 56, 63 (Miss. 2004); Harrison v. McMillan, 828 So.

2d 756, 763 (Miss. 2002). 16 Hyundai Motor Am., 53 So. 3d at 749 (products liability); Bailey Lumber & Supply Co., 98 So. 3d at 986 (premises liability); T.K. Stanley, Inc., 614 So. 2d at 942 (environmental pollution); Jones, 504 So. 2d at 198 (negligent operation of a motor vehicle); Square D Co., 419 So. 2d at 1327 (products liability). 6 provider failed to comply with that standard of care.

Here, the plaintiff's only evidence of Dr. Cleveland's standard of care or breach thereof was inadmissible. Accordingly, it is clear that Dr. Cleveland was entitled to judgment notwithstanding the verdict. CONCLUSION ¶16.

The trial judge erred in allowing Dr. Silverman to testify to undisclosed opinions. And because the plaintiff failed to establish a prima facie case with admissible evidence, the trial judge erred in failing to grant Dr. Cleveland judgment notwithstanding the verdict.

Accordingly, we reverse the judgment of the Court of Appeals in part and reverse the judgment of the Hinds County Circuit Court, rendering judgment for all defendants. ¶17. THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED IN PART AND REVERSED IN PART. THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND RENDERED.

WALLER, C.J., RANDOLPH, P.J., LAMAR, KITCHENS, CHANDLER, PIERCE, KING AND
COLEMAN, JJ., CONCUR.

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