Defending the Future of Mississippi
ESTABLISHED IN 1965

THE Quarterly

A PUBLICATION OF THE MISSISSIPPI DEFENSE LAWYERS ASSOCIATION

VOLUME 44 • NUMBER 2 SUMMER 2020

MDLA Announces 2020 Scholarship Award Recipients

Elbert Belk
Mississippi College

Melanie Mitchell
Mississippi College

Caleb Pracht
University of Mississippi

Conner Whitten
University of Mississippi

Mississippi College School of Law Faculty Award Winner Angela Kupenda

In This Issue:

MDLA Announces 2020 Award Recipients

The MDLA has selected four second-year students for the prestigious Reginald A. Gray Scholarships. The award recipients were selected by the MDLA's Scholarship Committee and its Chairman and distinguished member, Lucius B. Dabney, Jr. The scholarships were awarded to Mississippi College School of Law students Elbert M. Belk, IV and Melanie B. Mitchell and to University of Mississippi School of Law students Caleb A. Pracht and Conner Whitten.

Mississippi College School of Law

Elbert Belk received his Bachelor of Accountancy from the University of Mississippi in 2018. He is currently earning a 3.60 GPA and is ranked twelfth in his class. Mr. Belk is a full Merit Scholarship recipient and is the recipient of numerous American Jurisprudence Awards. During the summer of 2019, he was a Research Assistant for the Mississippi Supreme Court Advisory Board and also clerked for Davidson Bowie, PLLC, in Madison, Mississippi, where he helped with case preparation, document review and deposition summaries. Elbert also served as the President of the MC School of Law Student Chapter for MDLA.

Melanie Mitchell graduated from The University of Southern Mississippi with a Bachelor of Science in Political Science with a minor in History in 2017. With a 3.90 GPA, she is ranked first in her class. Ms. Mitchell is a member of the MC School of Law Moot Court Board and is a Hearin Scholarship Recipient. During the summer of 2019, she served as a Summer Associate for Balch & Bingham in Gulfport, Mississippi, where she researched and wrote legal memorandum for a variety of different legal issues. Melanie also served as Vice President of the MC School of Law Student Chapter for MDLA.

The MDLA also congratulates Mississippi College School of Law **Professor Angela M. Kupenda** as recipient of the 2020 MC School of Law Faculty Award. Professor Kupenda is a 1991 graduate of Mississippi College School of Law. She was a Hearin-Hess Law Scholarship recipient and also received numerous American Jurisprudence Awards. She currently teaches Constitutional Law, Civil Rights and First Amendment, among others. Professor Kupenda was a Visiting Professor of Law at Notre Dame Law School, teaching Constitutional Law and Race & the Law in Fall 2001-Spring 2002. Professor Kupenda has been a faculty member at Mississippi College School of Law since 1995.

University of Mississippi School of Law

Caleb Pracht graduated from the University of Mississippi in 2018 with a Bachelor of Arts degree in Public Policy, scored 165 on the LSAT, and is currently earning a GPA of 3.33, standing in the top third of his class. During the summer of 2019, he served as a Summer Law Clerk at the Mississippi Secretary of State's Office and the Mississippi Attorney General's Office in Jackson, Mississippi. Caleb is an Eastland Scholarship recipient and a member of the Delta Theta Phi fraternity.

Conner Whitten entered Ole Miss School of Law as a 2017 graduate from Mississippi State University with a Bachelor degree in Business Administration. With an LSAT score of 145 and a GPA of 3.96, he ranks third in his class. Mr. Whitten is a Moot Court Board Member and a Negotiation Board Member. Recently, Conner worked for Balch & Bingham where he drafted analysis for proper implementation of drug testing policies in conjunction with Mississippi statues. Conner is currently serving as Vice President of the Student Bar Association.

The MDLA is proud to honor these award recipients. Many thanks to Mr. Lucius B. Dabney, Jr. for his faithful service to the MDLA Scholarship Committee since 1996.

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In This Issue:

Jessica Dilmore

Mallory Bland

Co-Editors

A Message from our President

This year is not what any of us expected. At home or the office, our lives have changed in ways none of us imagined. We've learned to work from home, have conference calls with our barking dogs, share internet bandwidth with children who are attending class in the next room on their computers. We've now held oral arguments wearing masks, Zoom meetings and depositions, and front-porch client conferences.

The COVID-19 pandemic has and will continue to jolt our lives and alter how we practice law. It is through these changes, however, that I believe our legal system persists and proves itself.

As we've been reminded in recent weeks, The Spanish Flu killed 675,000 American souls. So, this is not the first-time lawyers and our legal system have faced a pandemic and related challenges. Echoing the words of Dr. Fauci in recent weeks, Surgeon General Rupert Blue warned a Senate Committee in 1918, "Until we get a vaccine we have to rely upon careful treatment of the sick, keep away from crowds, and cover up the mouth and nose so they will not spread the disease." As a result, schools, churches, movie theaters and other sizeable gathering places were closed.

Then, as today, lawyers and judges adapted to ensure the public's legal needs. During the Spanish Flu pandemic judges moved hearings and trials to the front lawns of courthouses hoping the fresh air limited the spread. Cities and towns across America mandated the wearing of masks at all times. San Francisco residents received $5 fines if caught in public without masks. The charge — disturbing the peace. After officials in Globe, Arizona closed public venues due to the flu, the local school district sought to stop the law's enforcement so children could return to class. The Arizona Supreme Court found that such was reasonable to secure the public health. Not too far away, Tucson, Arizona convened a special court to handle the sudden rise in mask-related violations. Our case books are full of issues surrounding inability to perform contracts due to the Spanish Flu and a host of insurance disputes arising after unfortunate deaths. And the lawbooks are full of cases surrounding avian flu, swine flu and other similar diseases and demonstrate how our profession has continued to adapt and service.

And I am proud of how I've seen our courts, judges and particularly our fellow MDLA members as we've waded into these troubled waters again. Many of us have adopted wholly new methods to protect our clients' interest. Whether that's been holding mediations, depositions or hearings through Zoom or having "drive-by" signings through car windows, when your clients have called, we have continued to answer. And for the first time, I included "pandemic and epidemic" as a possible excuse for nonperformance in a service contract.

MDLA is also looking at how it can continue its mission to support and assist the civil defense bar during these times. Particularly can we safely host our regular seminars. We intend to have our annual Joint Seminar of Mississippi Claims Association and MDLA. We are looking at options for live remote attendance. We postponed the Deposition Academy but are considering options for that to be rescheduled this year. And, we are hoping to host our popular technology in the courtroom CLE again this year. Again, we are exploring options to host these events through a live internet link. ■

Jonathan S. Masters
2020 MDLA President
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A Message from our Diversity Committee Chair

As the Diversity Committee Chair, it is my role to keep our members informed of interesting articles and opinions relating to diversity and inclusion issues within our legal community. I recently read a thought-provoking article in the Mississippi Business Journal by Orlando R. Richmond Sr. In this column, Mr. Richmond offers his perspective as an African American attorney on how to retain diversity and inclusion within our law firms. In doing so, Mr. Richmond uses his background and experience in firm management at a local large majority law firm, which coincidently allowed him to work with attorneys of every background imaginable throughout the nation. Based on these experiences, Mr. Richmond has garnered invaluable knowledge on how law firms should put emphasis on diversity and inclusion.

In his article, Mr. Richmond begins with discussion about the retention problem and provides statistical data about law firm diversity. Thereafter, he delves into recommendations for law firms to follow on how to retain diverse lawyers. He initiates this discussion by focusing on the "importance of diversity and inclusion being a priority at every level of firm leadership." He explains that "achieving greater diversity and inclusion has to be intentional and focused, and perhaps the best way to do so is by having a dedicated committee or person who will stay abreast of the latest developments regarding diversity and inclusion and the specific issues in the firm."

Mr. Richmond suggests a very practical recommendation that I believe all law firms within our organization should consider, and that is to "assign mentors whose mission is to get to know the diverse lawyer and help young lawyers with navigating the system." Likewise, as we mentor these lawyers, it is crucial that as they advance in their careers, we must promote diverse lawyers to administrative duties and other positions within the firm management to provide an opportunity to promote inclusivity.

I have discussed in some of my past articles of how clients are now holding law firms accountable for failing to diversify their law firms. In Mr. Richmond's column, he addresses this issue head-on. He puts emphasis on how "clients should request hard data related to inclusion, and should assure themselves that diverse lawyers are billing meaningful hours on their files, and are getting an opportunity for client contact as soon as is practical given the complexity of the matter."

Mr. Richmond concludes his article by discussing a vital component that plays a major role in the retention problem with diverse lawyers, and that is compensation. He suggests a "fair system of compensation that is clearly understood and that provides progression for all is an absolute must."

I encourage each and every member of our organization to read Mr. Richmond's article and any others that promote and provide informative discussions on diversity and inclusion, so that we can continue to move in the right direction and acknowledge the importance of diversification within our law firms. ■

MDLA is pleased to provide Mr. Richmond's article for you in this issue beginning on page 19.

Casey D. Younger
MDLA Diversity Committee Chair
cyounger@wilkinspatterson.com

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[1] Orlando R. Richmond Sr., *Why I Resist Casual Friday and Other Thoughts on Diversity and Inclusion: A Black Partner's Perspective*, Mississippi Business Journal (June 9, 2020) <https://msbusiness.com/2020/06/orlando-r-richmond-why-i-resist-casual-friday-and-other-thoughts-on-diversity-and-inclusion-a-black-partners-perspective/>

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

Snap Removal and the Fifth Circuit Decision in Texas Brine*: A Salty Soup for Civil Litigants*

By L. Clark Hicks, Jr.

L. Clark Hicks, Jr. is the managing partner of Hicks Law Firm, PLLC, a civil litigation firm in Hattiesburg, Mississippi, where his practice is focused on civil litigation defense. He is a graduate of Mississippi College where he earned his BA Degree in History, special distinction with highest honors. He received his JD, cum laude, from the University of Mississippi School of Law where he served as Research Editor on the Law Journal.

Plaintiffs' lawyers often say the most important decision in litigation is where to file a lawsuit. Plaintiffs are the masters of their complaints, and forum shopping is a perfectly legal strategy for litigants. Often, plaintiffs prefer to litigate in state court, viewing a local venue as an advantage, particularly against out-of-state defendants. With some exceptions, defense attorneys for out-of-state defendants prefer federal court, and removal is a common litigation maneuver to avoid the prospect of facing a rural jury, elected judge, and plaintiffs who have been lifelong residents of the county in which they filed suit.

Until recently, in-state defendants, known as forum defendants, were limited in their ability to remove a case to federal court if complete diversity of citizenship existed between the plaintiffs and defendants. To avoid state court, defendants would need to be able to successfully claim that the in-state defendant was named for the sole purpose of defeating diversity of citizenship and that no colorable claim existed against him. The jurisprudence on this procedural tactic, known as fraudulent (or improper) joinder, is well established throughout the country, including the Fifth Circuit Court of Appeals. See, e.g., *Smallwood v. Illinois Central R.R. Co.*, 385 F. 3d 568, 573 (5th Cir. 2004)(*en banc*)(fraudulent joinder shown through actual fraud in pleading jurisdictional facts or inability of plaintiff to establish a cause of action against the non-diverse defendant).

As quick as the snap of a finger, defendants gained another tactic for removal in 2020 when the Fifth Circuit rendered its decision in *Texas Brine Company v. American Arbitration Association, Inc.,* 955 F. 3d 482 (5th Cir. 2020). In the *Texas Brine* case, authored by Judge Leslie Southwick, the court approved "snap removal" in the Fifth Circuit jurisdiction, which encompasses all federal district courts in Mississippi, Louisiana, and Texas.

Under removal law, a defendant may remove a civil case brought in state court to the federal district court in which the case could have been brought. 28 U.S.C. § 1441(a). The federal statute, however, limits removal of diversity cases with named forum defendants, providing that a case "may not be removed if any of the parties in interest properly joined and served as defendants are citizens of the State in which such action is brought." 28 U.S.C. § 1441(a)(2). This part of the statute has been called the forum defendant rule. *Texas Brine*, 955 F. 3d at 485.

Historically, out-of-state defendants did not remove cases to federal court if there existed a properly joined resident defendant, though not yet served in the case. In recent years, some defense practitioners, seizing upon the literal language of the statute, removed cases with a properly joined resident defendant, provided defendant had not been served with the lawsuit. As noted in the *Texas Brine* decision, two other circuits have authorized "snap removal," also given the monikers "wrinkle removal" and "pre-service removal." See *Gibbons v. Bristol-Myers Squibb Company*, 919 F. 3d 699 (2nd Cir. 2019); *Encompass Insurance Company v. Stone Mansion Restaurant, Inc.*, 902 F. 3d 147 (3rd Cir. 2018). The Sixth Circuit, in a footnote, has interpreted the removal statute to allow snap removal. *McCall v. Scott*, 239 F. 3d 808, 813 *2 (6th Cir. 2001).

The *Texas Brine* decision focused on the plain language of the removal statute, which prohibits removal only if a properly joined resident defendant has been "served." 28 U.S.C. § 1441(a)(2). The forum defendant rule is a procedural rule, not a jurisdictional one, as noted by the *Texas Brine* court. If each defendant is diverse from each plaintiff, a federal district court has subject matter jurisdiction, provided the amount in controversy exceeds $75,000.00, exclusive of interest and costs. The plaintiff in *Texas Brine* was a citizen of Texas, while the defendants were citizens of Louisiana and New York, sued in Louisiana state court. Though there was complete diversity of citizenship and no jurisdictional defect under 28 U.S.C. § 1332(a), plaintiff argued that the forum defendant rule prevented removal because some of the defendants had been sued in their home state. The Fifth Circuit recognized that Congress provided the procedural mechanism for removal to protect out-of-state defendants from in-state prejudices. *Texas Brine*, 955 F. 3d at 487 (citing *J.A. Olson Co. v. City of Winona*, 818 F. 2d 401, 404 (5th. Cir. 1987)). Nevertheless, the Fifth Circuit seized on the statutory language prohibiting removal if the forum defendant is not "properly joined and served." *Id.* The court, agreeing with the Second Circuit decision in *Gibbons*, determined that the legislative text triggered a prohibition against removal only when the home state defendant had been properly served. *Id.*

The plaintiff in the *Texas Brine* case argued that a literal interpretation of the statute would produce an absurd result

and contravene the intent of Congress. *Id.* If a plaintiff joins a proper resident defendant and has every intent to litigate against that defendant, the plaintiff should not be punished for the order in which process is served on the defendants. Rejecting the plaintiff's absurdity argument, the Fifth Circuit found that the literal interpretation of the language was "at least rational" and that an ordinary reading of the statute reflected legislative intent that removal be denied only if a properly joined resident defendant had been served with process in accordance with state law. *Id*. The Fifth Circuit determined that any other interpretation of the statute would re-write the express language of Congress, which is not within the purview of the court. *Id.* Moreover, even though removal statutes are strictly construed favoring remand, the plain language of the text was deemed unambiguous. *Id.* Accordingly, the Fifth Circuit held:

A non-forum defendant may remove an otherwise removable case even when a named defendant who has yet to be "properly joined and served" is a citizen of the forum state. *Id.* at 487.

The Fifth Circuit decision was not unexpected. A distinct trend has developed around the country authorizing snap removal, not just in the Second, Third, and Sixth Circuits, but in many district courts, including district courts from the Fourth and Ninth Circuits. See *Blakenship v. Napolitano*, 2019 WL 3226909 (S.D.W.Va. July 17, 2019); *Loewen v. McDonnell*, 2019 WL 2364413 (N.D.Cal. June 5, 2019).

While snap removal is accepted in many federal courts, questions remain.

Under what circumstances is a resident defendant deemed properly served? No service at all is self-evident. But what if suit is served upon a resident unmarried infant in accordance with M.R.C.P. Rule 4(d)(2)(A) with a copy of the summons and complaint served upon the minor's mother, but not the minor who is 12 years of age? May a defendant argue that as long as there is some defect on service as to the forum resident defendant that a case may be removed?

Another unanswered question concerns when and how a case is properly removed to federal court. What if a defendant removes a case to federal court, filing the notice of removal, but the resident defendant is then served with the summons and complaint before the defendant files a copy of the notice with the clerk of the state court from which the case was removed in accordance with 28 U.S.C. § 1446(d)? That very question was answered in the case of *Brown v. Teva Pharmaceuticals, Inc.*, 414 F. Supp.3d 738 (E.D.Penn. 2019). In the *Teva Pharmaceuticals* case, the out-of-state defendants filed the notice of removal in federal court but did not file a copy in the state court until after service on the resident defendant. Because removal had not been completely effectuated, the federal court remanded the case to state court stating: "[t]iming was everything, and plaintiff has won the race." *Id.* *3. See also *Doe v. Valley Forge Military Academy and College*, 2019 WL 3208178 (E.D.Penn. 2019). In the *Valley Forge Military Academy* case, the court held that to properly effectuate removal, the defendant must accomplish three steps, which include filing the notice in federal court; giving written notice to all adverse parties; and filing a copy of the notice with the clerk of the state court. If the plaintiff achieves service of the summons on the resident defendant before completion of all three steps, removal is improper. *Id.* *5. For another interesting case, see *Hardman v. Bristol-Myers Squibb Company*, 2019 WL 1714600 (S.D.N.Y. 2019) (requiring remand where defendant timely removed the case, but plaintiffs managed to serve summons on the resident defendant less than two hours before the defendant filed the notice with the state court).

The snap removal technique is now commonly used throughout the country, and electronic filing systems make the landscape even more perilous for plaintiffs. Defense lawyers routinely monitor electronic court dockets and, once made aware of a filing, remove cases to federal court with properly joined resident defendants before any defendant is served. Many learned jurists argue that Congress never intended to allow for a snap removal "loophole," not having contemplated electronic filings, and that cases with proper resident defendants should not be removed to federal court. Forum defendants sued in their home state, some argue, are not prejudiced when sued by out-of-state plaintiffs. See Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 U.Cin.L.Rev. 541 (2018).

The snap removal procedure is not limited to cases involving forum and non-forum defendants. The Third Circuit in *Encompass* permitted pre-service removal by a lone forum defendant when sued by an out-of-state plaintiff. 902 F. 3d 147. Many federal courts have agreed, permitting removal when the single defendant is a resident defendant of the state in which the suit is brought. See, e.g., *Global Industrial Investment Limited v. Chung*, 2020 WL 2027374 (N.D.Ca. 2020)(finding that the "joined and served" language of the removal statute permits pre-service removal by a lone in-state defendant provided diversity of citizenship exists).

Not all courts agree with the concept of snap removal, and there are some district courts that adhere to prior law, stating that a case should not be removed when a resident defendant has been sued, until the plaintiff has had a reasonable opportunity to serve the forum defendant. See, e.g., *Wood v. Dr. Pepper Snapple Group, Inc.*, 2020 WL 917284, *5 (W.D.Okla. 2020); *Flandro v. Chevron Pipe Line Co.*, 2019 WL 1574811, *5-7 (D.Utah 2019); *Lone Mountain Ranch, LLC v. Sante Fe Gold Corp., 988 F. Supp.2d 1263, 1266-67 (D.New Mex. 2013).*

The *Texas Brine* court expressly rejected a "reasonable time for service" argument stating as follows:

> We will not insert a new exception into Section 1441(b)(2), such as requiring a reasonable opportunity to serve a forum defendant.

Id. at 487.

There are many unanswered questions with the snap removal tactic, but the seeming avalanche of judicial approval for the technique has caught the attention of Congress. On November 14, 2019, the House Judiciary Committee held a hearing on "Examining the Use of Snap Removals to Circumvent the Forum Defendant Rule." Vigorous debate occurred at the hearing regarding attempts by defendants to remove cases with the use of modern technology before a properly joined resident defendant has been served. No legislation has materialized, and it appears as though snap removal will remain the law of the day unless or Congress makes an amendment to the removal statute.

For plaintiffs' lawyers, the solution is not so easy. Upon filing suit and joining a resident defendant, a plaintiff should immediately serve him. This timely action does not prevent a crafty defense lawyer from monitoring the electronic docket and removing the case to federal court before service on a forum defendant. Thus, it will be incumbent on the plaintiffs' attorneys not only to serve the forum defendant quickly, but also to make sure that service is proper in accordance with the Mississippi Rules of Civil Procedure. This careful approach will necessitate good documentation of the form and method of service to counteract any "snap removal" argument.

Another strategy for plaintiffs' counsel may be to sue a resident defendant, serve the defendant, file the return, and then later amend the complaint to name the out-of-state defendant. By rule, a complaint may be amended without leave of court to add a non-resident defendant, provided the resident defendant has not served a responsive pleading. M.R.C.P. 15(a).

For the defense, receipt of a new claim or lawsuit should include close scrutiny of the potential for a snap removal in the event the resident defendant or defendants have not been properly served in accordance with the Mississippi Rules of Civil Procedure. Regular examination of electronic court systems would be wise.

The new snap removal technique is a land mine for plaintiffs' practitioners and a gold mine for the defense bar. From all appearances, snap removal is here to stay. Out-of-state defendants generally want to avoid "home cooking" in state court, if legally possible to do so, and they will often travel to federal court for safe refuge. Forum defendants may want to leave their state court home and go to federal court when there is complete diversity of citizenship, and until properly served in accordance with state law, will consider snapping the case away from plaintiff's forum of choice. The *Texas Brine* court determined that while the result of snap removal may be odd and contrary to legislative intent, any potential flaw in the statute's wording is a problem for Congress to fix, not the courts. ■

The Loss of Chance Doctrine

By Stephen G. Peresich and Mary W. Van Slyke

Stephen G. Peresich is a senior partner with Page, Mannino, Peresich & McDermott, PLLC, with offices in Biloxi and Jackson. He has practiced law for 39 years primarily in the areas of medical malpractice defense, hospital law, insurance defense and corporate litigation. He graduated in 1981 from the University of Mississippi School of Law.

Mary W. Van Slyke is a partner with Page, Mannino, Peresich & McDermott, PLLC, where she has successfully practiced law since 2003. Mary graduated from the University of Mississippi School of Law in 1998 and is licensed in both Mississippi and Tennessee and is currently a member of the MDLA Board of Directors. Mary primarily practices medical negligence defense, hospital law, and insurance defense of all types.

Beginning with the *Clayton v. Thompson*, 475 So. 2d 439 (Miss. 1985) decision, the Mississippi Supreme Court has repeatedly held that Mississippi law does not permit recovery of damages in a medical negligence lawsuit because of mere diminishment of the "chance of recovery". In other words, when the alleged injury is "loss of chance," to satisfy the causation element the plaintiff, through his expert, must prove that "but for" the physician's negligence, he would have had a reasonable probability of a substantial improvement. Stated another way, to prove medical causation, the plaintiff must prove that proper treatment would have provided the patient with a greater than fifty (50%) percent chance of a better result than was in fact obtained. As the cases discussing the "loss of chance" doctrine indicate, meeting this causation standard is highly dependent on expert witness opinion testimony, which must be based on sufficient facts and data and on reliable principles and methods. Thus, when defense counsel is presented with a "loss of chance" case, he or she should be cognizant of the plaintiff's burden of proof and be prepared to challenge any deficiencies in meeting this standard, including being ready to articulate why plaintiff's expert's opinion testimony does not meet the "loss of chance" standard.

1. Case Establishing Mississippi's Loss of Chance Causation Standard - *Clayton v. Thompson*, 475 So. 2d 439 (Miss. 1985*)*

The Mississippi Supreme Court first addressed the "loss of chance" theory of causation in *Clayton v. Thompson*, 475 So. 2d 439 (Miss. 1985). Thompson injured his thumb playing softball and went to Dr. Boyd, who referred him to Southwest Regional for x-rays. The x-rays were interpreted by radiologist Dr. Clayton, who found no evidence of fracture or dislocation. *Clayton v. Thompson,* 475 So. 2d 439, 441 (Miss. 1985). Relying on his examination and Dr. Clayton's findings, Dr. Boyd diagnosed Thompson with a sprained thumb. *Id.* at 441. However, Thompson returned to Dr. Boyd four months later, complaining of continued problems with his thumb. *Id.* Dr. Boyd again referred Thompson to Southwest Regional for x-rays. *Id.* This time, Dr. Clayton found the x-rays indicated a fracture of the metacarpal phalangeal joint. *Id.* Thompson then had surgery by Dr. Meyer to repair the torn ligament, but very little mobility was recovered in the joint. *Id.* Dr. Meyer then performed a second surgery to fuse the joint of Thompson's thumb. *Id.* at 442.

Thompson sued Dr. Clayton, and at trial, Dr. Meyer testified that the chance of a more reasonable function of the thumb would have definitely been better if he had seen Thompson in July 1979 rather than November 1979. *Id.* Defendants' experts testified that there was no fracture on the July x-rays. *Id.* A jury verdict was returned in favor of Thompson.

On appeal, Dr. Clayton argued that a peremptory instruction should have been granted because Thompson's case rested entirely upon the theory that an earlier referral to an orthopedic surgeon would have resulted in a greater chance for more flexibility of the thumb. *Id.* at 444. Dr. Clayton argued that a "chance" of a better result is not a sufficient causal connection to justify imposition of liability in a medical malpractice case. *Id.* Dr. Clayton also argued that it was error for the trial court to permit the following jury instruction:

> The Court instructs the jury that if you find by a preponderance of the evidence that defendant Dr. R.S. Clayton made an incorrect finding on the July 9, 1979 x-ray film of Plaintiff Michael B. Thompson, and you further find from the preponderance of the evidence that such an incorrect finding, if any, by Defendant, Dr. R.S. Clayton was a result of negligence under all the circumstances of this case and that Dr. John Wood Boyd used reasonable care in relying upon Dr. R.S. Clayton's report did not refer the plaintiff to the immediate attention of an orthopedic surgeon ***and if you further find from the preponderance of the evidence that immediate attention by an orthopedic surgeon would probably have given Michael B. Thompson a good chance to recover greater flexibility of his left thumb***, then you must find for Plaintiff Michael B. Thompson.

Id. (emphasis added).

Addressing the "loss-of-chance" theory for the first time, the Mississippi Supreme Court held:

> This theory of recovery has been termed the "loss of a chance" or "value of a chance." Our Court has not addressed the theory before. The appellant raises the question here and asserts that the theory should not be accepted into our law because it falls short of requiring a causal connection between malpractice on the part of the physician and injury to the patient....Appellant particularly challenges the instruction in two aspects, (1) absence of the requisite casual connection, and (2) inadequacy of guideline in jury's deliberation as to the measure of the injury....
>
> Addressing now the adequacy of guidelines of this instruction, the language contained within the instructions which channels the jury's consideration of the measure of the injury says "a good chance" of "greater recovery." Other jurisdictions that have addressed this theory of recovery have permitted recovery for loss of a "reasonable possibility" (citations omitted) or "probability that an operation would have saved decedent's life". (citations omitted).
>
> This Court recognizes that the plaintiff is rarely able to prove to an absolute certainty what would have happened if early treatment, referral or surgery had happened. "The law does not ... require the plaintiff to show to a certainty that the patient would have lived had she been hospitalized and operated on promptly." (citations omitted). ***Having in mind this reality, our approach to the requirement of causation in medical malpractice cases necessarily differs from that employed in most other tort contexts***.
>
> ***This Court concludes that the language of this instruction invited impermissible speculation and conjecture by the jury. The jury's deliberation should have been channeled to consider a substantial probability, rather than a "good chance," to recover substantially greater flexibility of his thumb***.
>
> ***This Court concludes, therefore, that Mississippi law does not permit recovery of damages because of mere diminishment of the "chance of recovery". Recovery is allowed only when the failure of the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition***. This instruction, therefore, must fail for its failure to properly guide the jury.

For this reason, this Court concludes that the jury verdict must be reversed and the case remanded for new trial under proper instruction.

Id. At 445.

2. Later Cases Addressing Loss of Chance

***Ladner v. Campbell, M.D.,* 515 So. 2d 882 (Miss. 1987):** Ladner sued Dr. Campbell alleging failure to timely diagnose and treat her breast cancer. *Id.* at 883. The trial court granted a directed verdict in favor of Dr. Campbell after excluding Ladner's expert, Dr. Brower. *Id.* Dr. Brower's testimony was proffered at trial, in which he testified:

> [Dr.] Campbell failed to diagnose a diagnosable lesion in Ladner's breast in June, 1981; that within a reasonable medical probability, a mammography on that day would have detected the lesion; and that the failure to diagnose probably caused her long time survival to be significantly decreased. Dr. Brower also testified that prognostication about a cancer patient's chances is difficult for any physician, especially as to breast cancer. On June 10, a poor prognosis was signaled by (1) her status as an estrogen receptor negative (making hormonal therapy unlikely to succeed) and possibly (2) her age. Nevertheless, a good prognosis was indicated by (1) the malignancy of the tumor being in the most common classification (moderate metastasis), (2) the small size of the tumor, giving her an even chance of not having metastasized to the armpits, and (3) the fact that she probably had fewer than four axilla lymph nodes involved (based on the involvement of four nodes at the time of the mastectomy), giving her a five year survival chance of 62 percent on June 10, as opposed to 32 percent at the time of her surgery. Brower stated that the delay in chemotherapy was extremely important. In Dr. Brower's opinion, there was significant difference in her having been treated in the Fall versus four months earlier, and the difference was a substantial contributing cause of death.

Id. at 887.

Ladner appealed and the Mississippi Supreme Court found the exclusion of Lander's expert, Dr. Brower, was reversible error. In addressing the "loss-of-chance" theory, the Court held:

> This Court has concluded "that Mississippi law does not permit recovery of damages because of mere diminishment of the 'chance of recovery'. **Recovery is allowed only when the failure of the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition.**" *Clayton v. Thompson*, 475 So. 2d 439, 445 (Miss.1985).
>
> Many other courts have adopted the same rule, often enunciated as follows: '[A]dequate proof of proximate cause in a medical malpractice action of this type requires evidence that in the absence of the alleged malpractice, a better result was probable, or

more likely than not.' *54 A.L.R. 4th 10 § 4*. Some courts have held that the plaintiff has to supply evidence that proper treatment would have provided the patient 'with a greater than fifty (50) percent chance of a better result than was in fact obtained.' *54 A.L.R.4th 10 § 2[a]*. **The *Clayton* decision clearly placed the Mississippi rule in alignment with these jurisdictions, and rejected the notion that a mere 'better result absent malpractice' would meet the requirements of causal connection.**

[T]he court was in error in directing a verdict for the defendant because the improperly excluded testimony of Dr. Brower would have been sufficient for a jury to find the existence of proximate cause. Dr. Brower pointed out the difficulty of prognostication for any physician. Furthermore, Dr. Brower did use the pathology reports in staging the disease, taking into consideration his estimate of the number of lymph nodes involved in June, 1981 (which the oncologists could only estimate) and the size of the tumor. The fact that an expert is not a specialist in the particular area of medicine involved in the case affects the weight of his testimony, but does not destroy its probative force. *32 C.J.S. Evidence § 569(3) (1964)*.

It is this Court's opinion that the exclusion of Brower's testimony was error, and was not harmless, and it would have precluded a directed verdict. While expressing no opinion as to the weight of the evidence, this Court would again point out that a motion for directed verdict should be overruled even though a verdict in favor of the plaintiff would be contrary to the overwhelming weight of the evidence. *Evans v. Journeay*, 488 So. 2d 797, 799 (Miss.1986).

Id. at 888-89. (emphasis added).

***Hubbard v. Wansley*, 954 So. 2d 951 (Miss. 2007)**: The Mississippi Supreme Court–in upholding the trial court's grant of summary judgment–found that the plaintiff did not present evidence sufficient to create a genuine issue of material fact as to medical causation. In granting summary judgment, the trial court found that the plaintiff's proposed causal link between the defendant's actions and plaintiff's injuries amounted to nothing more than a claim for diminishment of the chance of recovery. The Mississippi Supreme Court affirmed the trial court's grant of summary judgment, concluding that Mississippi law does not permit recovery of damages because of mere diminishment of a chance of recovery: "**[r]ecovery is allowed only when the failure of the physician to render the required level of care results in the loss of the reasonable probability of substantial improvement of the plaintiff's condition.**" *Id*. at 964. **The Court noted that Mississippi was in line with those jurisdictions that require that a plaintiff show that proper treatment would have provided the patient with a greater than fifty (50) percent chance of a better result than was in fact obtained**. *Id*.

In *Hubbard*, the plaintiff's medical expert, Dr. Stringer, spoke to the issue of causation in two separate affidavits, concluding that the failure to properly test, examine, treat, or seek proper treatment by the attending physicians, nurses, and hospital personnel that were involved in the care of the plaintiff caused, contributed to the cause, or was a substantial factor in causing the Plaintiff to have severe neurological complications. Dr. Stringer specifically stated, "*[i]n my opinion, Ms. Hubbard was deprived the opportunity of full recovery after her fall because of lack of treatment*." *Hubbard*, 954 So. 2d at 964. Dr. Stringer also gave a third affidavit which, as the Court noted, contained the "magical" language: "*[I]t is my opinion that had Ruby Hubbard been treated properly by Dr. Wansley, or if Dr. Wansley had notified the appropriate personnel, it is my opinion that Ruby Hubbard would have had a greater than fifty percent chance of reduced neurological injury." Id*. at 965.

The Mississippi Supreme Court, in upholding summary judgment in *Hubbard*, held:

The party opposing the motion [for summary judgment] must by affidavit or otherwise, set forth ***specific* facts** showing that there are indeed issues for trial. (*Drummond v. Buckley*, 627 So. 2d 264, 267 (Miss. 1993)(quoting *Palmer v. Biloxi Reg'l Med. Ctr.*, 564, So. 2d 1346, 1356 (Miss. 1990)) (emphasis added). **The language of Dr. Stringer's affidavit is almost wholly conclusory on the issue of causation and gives very little in the way of specific facts and medical analysis to substantiate the claim that Hubbard had a greater than fifty percent chance of substantial recovery** if she had received the "optimal care" of which Dr. Springer spoke. **This Court has shown its disapproval of such affidavits in the past**. (*citing Walker v. Skiwski*, 529 So.2d 184, 187 (Miss. 1989)) (stating that affidavits which are "almost wholly conclusory" are "less than satisfactory").

Id. at 965-966 (emphasis added).

***King v. Singing River Health Sys.*, 158 So. 3d 318, 324 (Miss. Ct. App. 2014)**: King was transferred via ambulance to Singing River after falling off the couch and losing consciousness. *Id.* at 321. King was diagnosed with acute encephalopathy with depressed mental status and a history of and evidence of benzodiazepine overdose. *Id.* It was later discovered that King had suffered from a rare type of stroke referred to as a BAO (basilar artery occlusion). *Id.* The BAO left King severely incapacitated, and she died three years later. *Id.* Prior to her death, King sued both the treating doctors and Singing River.

King's expert, Dr. Gebel, opined that Tissue Plasminogen Activator, or tPA (medicine that dissolves blood clots), should have been administered. *Id.* at 325. "According to Dr. Gebel, if King had gotten tPA, she would have had 'a very high degree

of probability that she would have recanalized her vessel,' leading to an eighty percent chance of a good outcome and only a twenty percent chance of becoming severely disabled or dying." *Id.* at 325. "He stated that in his experience, for persons with symptomatic BAOs, 'the overwhelming majority are not left with death or a permanent very severe disability like Miss King ... if they get treated with either [intravenous] tPA, the mechanical procedures or the combination of both.'" *Id.* Dr. Gebel stated his opinion regarding tPA was based in part on personal experience and also on the Helinski papers. Dr. Gebel's opinion that the use of the Merci Retrieval or Penumbra devices (mechanical devices) would have significantly improved King's outcome was based only on his personal experience. *Id.*

The trial court ruled that Dr. Gebel's opinion lacked a reliable basis because it lacked support in the relevant medical literature. *Id.* The court noted that Dr. Gebel's opinion was not supported by two major studies: the NINDS study (finding only a twelve percent to fourteen percent chance of improvement with the administration of tPA) and the ECASS III study (finding only a seven percent chance of improvement with the administration of tPA), and further, the Helinski papers did not support Dr. Gebel's opinions. *Id.* at 324-25. The trial court therefore granted summary judgment after excluding Dr. Gebel, finding Dr. Gebel was not qualified to testify as to standard of care of the defendant-doctors, and the expert's opinion that the plaintiff had more than a fifty percent chance of a better recovery lacked support in the medical literature. *Id.* at 320. The Mississippi Court of Appeals then reiterated that:

> "[o]n the critical causation question, '[**r]ecovery is allowed only when the failure of** the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition.' (quoting *Ladner v. Campbell,* 515 So. 2d 882, 888 (Miss. 1987) (quoting *Clayton v. Thompson,* 475 So. 2d 439, 445 (Miss. 1985). **There must be proof of a greater than fifty (50) percent chance of a better result than was in fact obtained**. *Id.* at 889 (citation omitted). **This 'greater than fifty percent' opinion must be backed up by specific facts.**" *Hubbard,* 954 So. 2d at 965-66.

Id. at 324.

3. Most Recent Loss of Chance Cases and Plaintiffs' Attempts to Adopt a More Lenient Standard

In ***Norman v. Anderson Regional Medical Center*, 262 So. 3d 520 (Miss. 2019),** the Plaintiff urged the Mississippi Supreme Court to abandon the "loss of chance" theory. In *Norman*, Charles Norman, Sr. underwent a cardiac catheterization with stent placement. At some point in the two days following surgery, Norman suffered an ischemic stroke. *Id.* Norman's wife complained to nursing staff that she observed symptoms of a stroke, which the nurses documented. *Id.* Neither Dr. Purvis nor any other medical doctor was notified of the stroke until much later. Once notified of the symptoms, Dr. Purvis consulted Dr. Jimmy Wolfe, a neurologist, who performed a CT scan that confirmed Norman had suffered a stroke. *Id.* By the time the doctors became aware of the stroke (at least seven and a half hours after Norman's wife first complained to the nursing staff), the time frame within which tissue plasminogen activator (tPA) – a "clotbuster" drug used to restore blood flow to a stroke victim's brain – is to be effectively administered had passed. *Id.*

Norman (who died one year after the lawsuit was filed) sued Anderson Regional Hospital. *Id.* Anderson Regional stipulated that its nurses breached the applicable standard of care by not recognizing and reporting Norman's stroke symptoms to a physician earlier. *Id.* Anderson Regional further conceded that the nursing staff's delay in reporting Norman's stroke prevented the possible administration of tPA. *Id.* Anderson Regional, however, denied that Norman was ever a candidate for tPA administration, noting that Norman was a "75-year-old, brittle diabetic with a relevant medical history that was positive for atrial fibrillation, hypertension, low ejection fraction, and coronary artery disease." *Id.*

Anderson Regional filed motions to strike and/or exclude Norman's expert, who opined that Norman would have had a greater than 50 percent chance of a better outcome had Anderson Regional complied with the applicable standard of care and administered tPA in a timely fashion. *Id.* at 523. Anderson Regional moved for summary judgment based on the premise that Norman failed to establish causation because his expert's testimony should be excluded. *Id.* The trial court granted summary judgment, concluding that Norman's experts' opinions were neither based on nor supported by reliable data (*i.e.*, the medical literature) regarding the probability tPA would have been effective even if it had been timely administered. *Id.* As a result, the trial court concluded that Norman failed to prove by a preponderance of the evidence that he would have had a greater than 50 percent probability of a substantially better outcome had his stroke been timely diagnosed and had tPA been timely administered. *Id.*

Norman appealed. The Mississippi Supreme Court first explained the "loss of chance causation standard" as follows:

> Mississippi law does not require a plaintiff to prove causation with certainty. *Clayton v. Thompson*, 475 So. 2d 439, 445 (Miss. 1985). **Mississippi law requires proof of causation to a degree of reasonable medical probability that 'absent the alleged malpractice' a significantly better result was probable, or more likely than not (i.e., a greater than 50 percent chance of a substantially better outcome than was in fact obtained)**. *Id.*; *Ladner v. Campbell*, 515 So. 2d 882, 889 (Miss. 1987). In Mississippi, the threshold of

proof required for recovery has been termed the "loss of chance." *Clayton*, 475 So. 2d at 444.

> This Court first addressed Mississippi's loss-of-chance standard in *Clayton*, in which we concluded that "Mississippi law does not permit the recovery of damages because of mere diminishment of the 'chance of recovery.'" *Id.* at 445. *Clayton* clearly placed Mississippi in line with those jurisdictions that require a plaintiff to show that "proper treatment would have provided the patient 'with a greater than 50 percent chance of a better result than was in fact obtained,'" and *Ladner* reaffirmed the notion first established in *Clayton* that a mere "better result absent malpractice" fails to meet the requirements of causal connection. *Ladner*, 515 So. 2d at 889. This Court has since applied Mississippi's loss-of-chance standard consistently in cases such as *Hubbard* and *White*, adhering to our current and long-standing precedent that "[p]ossibilities will not sustain a verdict." *Kramer Serv., Inc. v. Wilkins*, 184 Miss. 483, 497, 186 So. 625, 627 (1939) (quoting *Ill. Cent. R.R. v. Cathy*, 70 Miss. 332, 338, 12 So. 253 (1893)); *Griffith v. Entergy Miss., Inc.*, 203 So. 3d 579, 589 (Miss. 2016) ("[V]erdicts are to be founded upon probabilities ... and not upon possibilities[.]").

Id. at 523-524.

The Mississippi Supreme Court then addressed whether the trial court had correctly determined that Norman's expert had failed to demonstrate the required "greater than 50 percent chance of substantially better outcome." The Court first pointed out that once an expert's opinion is attacked as unsupported in the medical community, the party offering the expert's opinion must, at a minimum, present the trial court with some evidence indicating that the offered opinion has some degree of acceptance in the scientific community. *Id.* at 525 (citing *King v. Singing River Health System,* 158 So. 3d 318, 326 (Miss. Ct. App. 2014) ("[W]here a theory has been studied in the medical literature and an expert's opinion is challenged for being contrary to the medical literature, there must be some support in the medical literature for a medical expert's opinion or some basis for believing that the medical literature is wrong.")). The Mississippi Supreme Court noted that Norman's expert had failed to present such evidence, and instead, repeatedly acknowledged in his deposition that no support exists in the relevant medical literature for his opinion that tPA would have provided Norman with a greater than 50 percent chance of a better outcome. *Id.* at 525. The Mississippi Supreme Court then noted that the undisputed medical evidence in the case demonstrated, and all the experts in the case agreed, that the effective rate of timely administered tPA is between 8 and 12 percent, and thus, by Norman's expert's own concessions, Norman's loss-of-chance claim failed as a matter of law. *Id.* In affirming summary judgment, the Mississippi Supreme Court held:

> Here, Norman failed to prove by a preponderance of the evidence that he would have experienced a greater than 50 percent chance of a substantially better outcome had Anderson Regional timely recognized and reported his stroke and administered tPA. Norman put forth no evidence that Anderson Regional proximately caused or contributed to his eventual death - even had his stroke been timely recognized and reported. Thus, because Norman's expert testimony is not based on reliable data as required by Rule 702, and because it fails to satisfy this Court's loss-of-chance causation standard, no genuine issues of material fact exist. Summary judgment was proper, and we affirm.

Id. at 527.

Finally, the Mississippi Supreme Court addressed Norman's argument that Mississippi should overrule the "loss-of-chance standard" and adopt the "reduced-likelihood approach," which Norman contended more accurately reflects the principles of Mississippi's pure comparative-negligence framework. *Id.* at 528. The Court explained the "reduced-likelihood approach" as follows:

> Under the reduced-likelihood approach, compensation is available for negligence even if a patient's chance of improvement is below 50 percent. *(citations omitted).* If the patient's chance of improvement is less than 50 percent, the decrease in improvement probability is calculated and then multiplied by the full value of damages, so the award is proportional to the incremental decrease in chance...Thus, the reduced-likelihood approach "classifies the lost chance as the injury itself," rather than as a standard of causation. *Matthew Wurdeman, Comment, Loss-of-Chance Doctrine in Washington: From Herskovits to Mohr and the Need for Clarification*, 89 Wash. L. Rev. 603, 607 (2014).

Id. at 529. The Mississippi Supreme Court noted that Norman advocates for the "reduced likelihood" approach because, "it is the defendant's negligence that has made it impossible to determine whether a more favorable outcome would have been realized had the patient received the care required by the applicable standard of care." *Id.* Norman also argued the loss-of-chance standard immunizes medical-care providers from any negligence associated with the administration of or failure to administer tPA and allows them to hide "behind the all-or-nothing rule." *Id.* In rejecting overruling the "loss-of-chance" theory, the Mississippi Supreme Court then stated:

> In contrast, Anderson Regional points out that "[c]omparative fault does not focus on establishing the third element of the tort – causation." We agree. Mississippi's comparative-negligence statute provides that "*damages* shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured[.]" *See* Miss. Code Ann. § 11-7-15 (Rev. 2004)

(emphasis added). As such, in order to recover damages under this statute, a plaintiff would first have to prove by a preponderance of the evidence that a defendant's negligent conduct was both the cause-in-fact and the proximate cause of the resulting injuries. Norman has failed to meet his burden of proof.

Once the threshold has been met for recovery, comparative negligence would be applied with regard to all factors that may have contributed to the injury. Consequently, we find that "consistency and definiteness in the law are the major objectives of the legal system," and "[a] former decision of this [C]ourt should not be departed from, unless the rule therein announced is not only manifestly wrong, but mischievous." *Hye v. State*, 162 So. 3d 750, 755 (Miss. 2015); *Caves v. Yarbrough*, 991 So. 2d 142, 151 (Miss. 2008) (citation omitted). Here, the law at issue is neither manifestly wrong nor is it mischievous. Rather, this Court's loss-of-chance jurisprudence is consistent with Mississippi's pure comparative-negligence framework, and, for this reason, this Court declines to overturn Mississippi's longstanding causation standard.

Id. at 529-30.

Following *Norman,* the Mississippi Supreme Court handed down its decision in ***Hyde v. Martin,* 264 So. 3d 730 (Miss. 2019)**, where the Court found that the Plaintiff's expert did meet the "loss-of-chance" threshold. This case also dealt with the administration of tPA. Specifically, in *Hyde*, the Hydes brought a medical-negligence case asserting that the treating physician's and hospital's failures to properly test for and timely diagnose Edward Hyde's stroke resulted in his not receiving treatment – namely, an injection of Tissue Plasminogen Activator, or "tPA," which they claimed would have led to a better stroke recovery. *Id.* at 731-732.

The trial court dismissed the Hydes' claim on summary judgment. *Id.* at 732. The trial court found that both of the Hydes' experts' opinions on causation did not comport with the medical literature. *Id* at 732-33. Consequently, the court found the Hydes had presented "no actual evidence that [Edward] would have a greater than 50% chance of a better result than was obtained[,] which is the standard under Mississippi negligence law." *Id.* Thus, the court ruled there was no genuine issue of material fact about causation, entitling Dr. Martin and the hospital to judgment as a matter of law. *Id*.

On appeal, the Hydes asked the Court to abandon the "long-standing precedent on loss of chance." The Hydes argued that the Court allow them to recover for a "reduced likelihood of a recovery." Again, the Mississippi Supreme Court reiterated:

> But this Court has been clear "that **Mississippi law does not permit recovery of damages because of mere diminishment of the 'chance of recovery.**'" *Clayton v. Thompson*, 475 So. 2d 439, 445 (Miss. 1985). Instead, "**[r]ecovery is allowed only when the failure of the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition.**" *Id.*

Id. at 732. (emphasis added). While not abandoning the "loss-of-chance" theory, the Mississippi Supreme Court found that the grant of summary judgment had been in error, as, the Hydes had "presented expert medical testimony that the majority of stroke patients who timely receive tPA experience substantial improvement. Because their expert supported his opinion with medical literature, we find the trial judge abused his discretion by excluding this testimony." In reaching its decision, the Mississippi Supreme Court stated:

> ...the Hydes cast our approach to loss-of-chance claims as "all or nothing" and contrary to our law on comparative negligence. But we find our current law is neither.
>
> First, contrary to the law-journal articles and non-Mississippi case law the Hydes cite, our approach is not "all or nothing." It is balanced.
>
> In *Clayton*, this Court "recognize[d] that the plaintiff is rarely able to prove to an absolute certainty what would have happened if early treatment, referral or surgery had happened." *Id.* at 445. So, our "law does not require the plaintiff to show to a *certainty*" that treatment would have been 100 percent effective. *Id.* (emphasis in original) (citation omitted). But neither does our law permit recovery based on the mere possibility of a better outcome. *See Id.* (holding that the jury-instruction's "good chance" of a "greater recovery" language "invited impermissible speculation and conjecture by the jury").
>
> Between certainty and mere possibility lies *reasonable probability*, which is exactly what our approach requires. As our precedent dictates, to recover under the loss-of-chance theory, "the plaintiff must prove that, but for the physician's negligence, he or she had a reasonable probability of a substantial improvement." *White*, 170 So. 3d at 508 (citing *Clayton*, 475 So.2d at 445). "Stated another way, the plaintiff must offer proof of 'a greater than fifty (50) percent chance of a better result than was in fact obtained.'" *Id.* at 509 (quoting *Hubbard v. Wansley*, 954 So. 2d 951, 964 (Miss. 2007)).
>
> Second, our approach by no means creates an exception to the comparative-negligence doctrine. Under comparative negligence, the fact that the plaintiff's own negligence may have contributed to his injuries does not itself bar recovery. *See* Miss. Code Ann. § 11-7-15 (Rev. 2004). And this Court has never barred loss-of-chanceof-recovery claims based solely

on the fact the patient may have negligently caused the injury or disease that led him to seek medical care in the first place.

Importantly, in this case, the alleged injury is not the stroke itself. Rather, it is the loss of the ability to recover from or halt the impact of the stroke based on the failure to timely administer tPA. Under our clear precedent, to recover damages, a plaintiff does not have "to prove to an absolute certainty" that administering tPA would have led to a full recovery. *Clayton*, 475 So. 2d at 445. But neither may a plaintiff recover damages merely based on the possible "chance" tPA may have led to a better outcome. *See Id.* Instead, the plaintiff must show "the failure of the physician to render the required level of care result[ed] in the loss of a reasonable probability of substantial improvement of the plaintiff's condition." *Id.*

Id. at 734-735.

Thereafter, in analyzing the Hydes' experts' opinions, the Court noted that the Hydes' expert, Dr. Kamal testified that Edward (1) was a good candidate for tPA, and (2) for patients who timely receive tPA, the overall odds of their outcome are 75% better.... than those who didn't receive the drug. The Court also noted that Dr. Kamal supported his "experienced-based opinion" with medical literature, (Emberson study), which Dr. Kamal testified showed that "when one does not look for *perfect* recovery, '[t]he vast majority of those [patients who] get tPA see a substantial improvement in their symptoms.'" *Id.* at 735. The Mississippi Supreme Court then held:

The "50% threshold," as the trial court dubbed our loss-of-chance standard, does not require a perfect result. ***Again, our law permits recovery based on a "reasonable probability of substantial improvement," which we have defined as "a greater than fifty (50) percent chance of a better result than was in fact obtained."*** *White*, 170 So. 3d at 508-09 (emphasis added). Thus, we find the trial court abused its discretion by applying to the Hydes' expert testimony a higher standard than our law requires. To the extent Dr. Martin and the hospital challenge Dr. Kamal's opinion on the reasonable probability that those who receive tPA substantially improve, we find this sets up a classic battle of the experts for the fact-finder to resolve, not a barrier to Dr. Kamal's testimony. *See White*, at 509... Because Dr. Kamal sufficiently supported his expert opinion with medical literature, his testimony should not have been excluded.

...

The elements essential to a medical-negligence claim are (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. *White*, 170 So. 3d at 508. "To prove these elements in a medical malpractice suit, expert testimony must be used, and the expert must articulate and identify the standard of care that was breached and establish that the breach was the proximate cause, or proximate contributing cause, of the alleged injuries." *Id.* (citations omitted). ***And, as already discussed, when the alleged injury is loss of chance, to satisfy the causation element, the plaintiff, through his expert, must prove, "but for the physician's negligence, he ... had a reasonable probability of a substantial improvement.***" Id.

Id. at 736-737.

As articulated in the "loss of chance" cases discussed above, expert opinion testimony is critical in meeting the causation element, and defense counsel and their experts should be well prepared to challenge the sufficiency of plaintiffs' experts' opinions. These cases show that a challenge to a plaintiff's expert's opinion testimony can be successfully challenged, but also, that a detailed record of the challenged testimony should be made as appellate review on the issue will be a case-by-case, fact specific analysis. ■

Boost Your Immunity! How General Contractors Can Avoid Tort Liability by Mandating Workers' Compensation Coverage

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In the midst of the coronavirus, the quest for immunity has reached, dare I say, a fever pitch (derp!). But long after the Covid-19 pandemic is gone, the desire to avoid potential tort liabilities for injured workers will remain. As discussed herein, sage contractors can protect themselves from liability by securing workers' compensation coverage for the men and women who toil on the job site, even without incurring the expense of workers' compensation premiums. While it may be rare that the "right thing to do" intersects with the "smart thing to do," Mississippi's workers' compensation law provides just such an occasion.

Legal Authorities

A. Statutory Overview

One of the bedrock principles of workers' compensation law is the "exclusive remedy" doctrine. Statutorily, such is codified by Miss. Code Ann. § 71-3-9, which provides, in relevant part, as follows:

> ***The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee,*** his legal representative, husband or wife, parents, dependents, next-of-kin, and anyone otherwise entitled to recover damages at common law or otherwise from such employer on account of such injury or death, ***except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law for damages on account of such injury or death***.

Miss. Code Ann. § 71-3-9 (emphasis added).

While workers' compensation coverage is the "exclusive remedy" for an injured employee against his employer, such immunity does not extend to "any other party," who remains subject to suit. Miss. Code Ann. § 71-3-71 ("The acceptance of compensation benefits from or the making of a claim for compensation against an employer or insurer for the injury or death of an employee ***shall not affect the right of the employee or his dependents to sue any other party at law for such injury or death*** … ."). Put another way, if you're not the employer (or an employer's officer, agent, or co-employee), you can be subject to liability for a workplace injury.[1]

Like all good rules, there is somewhat of an exception the doctrine laid out in Section 71-3-71, and that exception works to benefit contractors. That's because the statutory scheme governing Mississippi workers' compensation law imposes an added requirement upon them. In particular, § 71-3-7(6) provides as follows:

> ***In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor, unless the subcontractor has secured such payment***.

Miss. Code Ann. § 71-3-7(6) (emphasis added).

B. Case Law Holding General Contractor's Immune

Based on the preceding statutory scheme (and its predecessor statutes), the Mississippi Supreme Court has historically recognized that a "prime" and/or "general" contractor may be entitled to immunity for claims asserted by an injured employee of a subcontractor. One of the first cases to hold that a general contractor enjoys statutory immunity from suit is *Mosley v. Jones*, 224 Miss. 725, 80 So. 2d 819 (1955). In *Mosley*, the employee of a subcontractor filed suit against the principal contractor for injuries sustained when scaffolding constructed by the principal contractor fell, injuring the subcontractor's worker. *Mosley*, 224 Miss. at 730, 80 So. 2d at 820. Significantly, the subcontractor employing the injured employee had failed to secure workers' compensation coverage for its employees. *Id*. at 736, 80 So. 2d at 823. After a verdict for the injured employee against the

[1] The immunity afforded by Mississippi Workers' Compensation statutes extends not only to employers, but also to employees and officers or agents acting in the course and scope of their employment. *Brown v. Estess,* 374 So. 2d 241, 242- 43 (Miss. 1979) ("It is this Court's opinion that the purpose, spirit and philosophy of the Workmen's Compensation Act is to make compensation the exclusive remedy of the employee where he is injured by the employer or any of its employees during the course of his employment."); see also *Powe v. Roy Anderson Const. Co.*, 910 So. 2d 1197 (Miss. 2005).

general contractor, the Supreme Court reversed, offering the following relevant discussion:

> Under these statute's immunity from common law suits by the employee is granted to the employer. In accordance with these statutes and the great weight of authority elsewhere, we think that this immunity to suit is extended to statutory employers who come within the provisions of [the workers' compensation statutes]. … Forty-one states now have 'statutory-employer' or 'contractor-under' statutes -- i.e., statutes which provide that the general contractor shall be liable for compensation to the employee of an uninsured subcontractor under him, doing work which is part of the business, trade or occupation of the principal contractor. ***Since the general contractor is thereby, in effect, made the employer for the purposes of the compensation statute, it is obvious that he should enjoy the regular immunity of an employer from third-party suit when the facts are such that he could be made liable for compensation; and the great majority of cases have so held***.
>
> * * *
>
> For these reasons, we think that the appellants Mosley and Bowers were entitled to their requested peremptory instruction, ***that appellee's sole and exclusive remedy as to them is under their workmen's compensation policy, and that Mosley and Bowers are not 'third parties' within the meaning of Section 6998–36, permitting injured employees to sue in tort a negligent third party***.

Mosley, 224 Miss. at 732, 80 So. 2d at 821 (emphasis added) (internal quotations omitted).

The applicability of tort immunity for the general contractor in *Mosley* was fairly straightforward. Because the injured employee's immediate employer had failed to secure workers' compensation coverage, the general contractor was statutorily required to do so, and was thus entitled to immunity. The question left unanswered by *Mosley* -- whether a general contractor might claim immunity where the subcontractor *did* furnish its employees with workers' compensation coverage -- was subsequently answered in *Doubleday v. Boyd Const. Co.*, 418 So. 2d 823 (Miss. 1982). In *Doubleday*, the Court held that the prime/general contractor was entitled to tort immunity from a suit filed by its subcontractor's injured employee, even though the subcontractor furnished its employee with workers' compensation coverage, because the general contractor had required the subcontractor to have such coverage in place. *Doubleday*, 418 So. 2d at 823. In so ruling, the Court reasoned as follows:

> With these rules in mind, we must ascertain the legislative intent of Miss. Code Ann. § 71-3-7. As stated, the obvious purpose of the statute is for the protection of employees of subcontractors who do not carry workers' compensation insurance. ***It would be paradoxical however, in our opinion, to hold as the appellant entreats that a general contractor risk personal injury judgments in common law suits if he complies with the statute by contractually securing compensation insurance by his subcontractor, but if he lets work to subcontractors who do not comply with the act, then his liability is limited to the sums provided by the act. We do not think the legislature intended such an improbable result.***
>
> * * *
>
> ***It is our opinion the legislature did not intend to subject a general contractor to common law liability if he complied with § 71-3-7 by requiring the subcontractor to have workmen's compensation insurance. It would defeat the purpose of the statute, we think, if such an improbable result followed***.

Doubleday, 418 So. 2d at 826 (emphasis added).

The Court in *Doubleday* also cited with approval a legal treatise that observed that immunity should be extended to general contractors as a "reward" for encouraging its subcontractors to secure workers' compensation coverage:

> The object of the "contractor-under" statutes is to give the general contractor an incentive to require subcontractors to carry insurance. ***But if the general contractor does conscientiously insist on this insurance, his reward, under these cases, is loss of exemption from third-party suit. A sounder result would seem to be the holding that the overall responsibility of the general contractor for getting subcontractors insured, and his latent liability for compensation if he does not, should be sufficient to remove him from the category of "third party."*** He is under a continuing potential liability; he has thus assumed a burden in exchange for which he might well be entitled to immunity from damage suits, regardless of whether on the facts of a particular case actual liability exists....

Doubleday, 418 So. 2d at 826 (quoting *Larson, Workers' Compensation Law*, § 72.31(b) (1982)) (emphasis added).

C. Limitations on Immunity

While the Court in *Doubleday* embraced the premise that, because a general contractor is subject to the requirements imposed under Mississippi's workers'compensation statutes, it should be rewarded with tort immunity, it subsequently limited the scope of entities entitled to such immunity in *Nash v. Damson Oil Corp.*, 480 So. 2d 1095 (Miss. 1985). There, the Court held that the operating lessee of an oil and gas lease could not claim tort immunity in a suit filed by the injured employee of an independent contractor, finding that the lessee did not qualify as a "contractor" within the meaning and

contemplation of Miss. Code. Ann. § 71-3-7, despite the fact that the lessee's agreement with the independent contractor expressly required it to maintain workers' compensation insurance. *Damson Oil Corp.*, 480 So. 2d 1100. In so ruling, the Court reasoned as follows:

> Because of the operative language employed in Section 71-3-7, counsel seek to lead us into a linguistic bog surely attendant upon any effort to define with precision such terms as "contractor" and "subcontractor" and "independent contractor." Regrettably, these terms have not been statutorily defined in a way that is helpful here. Damson correctly notes that every subcontractor is an independent contractor but an independent contractor may or may not be a subcontractor. … The point, however, does not carry us far. Without question Damson is a contractor in a generic sense. Damson has a contractual relationship with the owners of the land imposing various duties and obligations upon each. Damson is also a contractor in the sense that it has a contract with Trigger imposing obligations and duties upon each. ***The operative point is that Damson's interest, use and activities with respect to the premises are wholly different in nature from those of one ordinarily considered a general or prime contractor-the sort of contractor we believe contemplated by Doubleday … Damson lies outside the common understanding of such terms as "prime contractor" or "general contractor". Therefore, Damson is not the sort of "contractor" within the meaning and contemplation of Section 71-3-7***.

Nash, 480 So. 2d 1100 (emphasis added).

D. Establishing General Contractor/Subcontractor Status

The Court's decision in *Nash* makes it clear that, in order to claim immunity, a contractor must establish that it is, in fact, a "prime" or "general" contractor within the meaning of workers' compensation statutes. In *Castillo v. M.E.K. Const., Inc.*, 741 So. 2d 332 (Miss. Ct. App. 1999), the Court of Appeals offered a lengthy discussion of the types of entities that rightfully may be considered statutory contractors entitled to immunity:

> Castillo argues in this case that Carmel Construction was akin to Damson Oil in *Nash* in that Carmel Construction's contractual duties were not of the type that persons of common understanding would classify as those of a general or prime contractor. We disagree. In fact, the record supports the opposite conclusion. ***Carmel Construction performed duties very much in the realm of what general contractors do. The company was established for the very function of operating as a general contractor. Randy Bryant, the president of Carmel Construction, was the general contractor. He traveled to Mississippi and hired all those necessary to erect and complete the construction of Plantation Apartments, a project owned by Gulf Coast. Bryant spent a couple of weeks on the project in Mississippi at its beginning, and he intermittently flew in from Colorado as needed to tend to the needs of the project. Bryant testified that Carmel Construction subcontracted out all of the work on the building of Plantation Apartments and that Carmel Construction did not perform any of the work itself on the project other than to occasionally employ general laborers for clean-up services. He further testified that other than the payments made to the general laborers, he was the only employee on the payroll of Carmel Construction. While some prime contractors have their own crews that do much if not all the construction on a given project, other prime contractors are made up of a single person overseeing a number of sub and sub-subcontractors on a construction site***. We conclude that Carmel Construction was more like Boyd Construction in *Doubleday* … Carmel had no ownership interest in Plantation Apartments, but its activities in relation to the construction of the apartment units were of the kind that persons of common understanding would classify as those of a general or prime contractor.

Castillo, 741 So. 2d at 339 (emphasis added).

In addition to the need to establish general contractor status within the meaning of Miss. Code. Ann. § 71-3-7, it will also be beneficial to demonstrate that Timothy Stewart's employer, Mid MS Heating & AC, LLC, was its subcontractor. In this regard, the Supreme Court's decision in *Crowe v. Brasfield & Gorrie Gen. Contractor, Inc.*, 688 So. 2d 752 (Miss. 1996), is relevant. There, the Court offered the following relevant authorities and analysis:

> We have defined a "subcontractor" as "***one who has entered into a contract express or implied, for the performance of an act, with a person who has already contracted for its performance***." *O'Neal Steel Company v. Leon C. Miles, Inc.,* 187 So. 2d 19, 25 (Miss.1966) (quoting *Holt & Bugbee Co. v. City of Melrose,* 311 Mass. 424, 41 N.E. 2d 562, 563 (1942)). … Model, Crowe's employer, contracted with FaBarc to complete portions of the steel work on the Turtle Creek Mall. FaBarc had previously contracted with Brasfield to do the structural steel work on the mall. Model entered into an express contract with FaBarc for the performance of an act (the completion of portions of the steel work) which FaBarc had already contracted to complete. ***Thus, under our case law, Model satisfied the definition of a subcontractor. Accordingly, it is the opinion of this Court that both Brasfield and FaBarc are protected by the exclusive remedy provision of the Workers' Compensation Act found at Miss. Code Ann. § 71-3-9 (1972)***.

Crowe, 688 So. 2d at 754-55.

E. "Securing" Workers' Compensation Coverage

As referenced in *Crowe*, a contractor/subcontractor relationship may be established by either an "express or implied" contractual agreement. While a written contract specifying that the subcontractor is obligated to furnish workers' compensation coverage is the easiest way for a general contractor to establish a right to immunity, the Supreme Court has recognized that such a right may be established through extrinsic evidence, as well. *Salyer v. Mason Technologies, Inc.*, 690 So. 2d 1183 (Miss. 1997). In *Salyer*, the Court upheld a finding that a general contractor was immune from liability, despite the absence of any evidence that the general contractor contractually required its subcontractors to provide their employees with workers' compensation coverage. *Salyer*, 690 So. 2d at 1185. In so ruling, the Court reasoned as follows:

> [I]t would be equally paradoxical to hold that a general contractor limits his liability by hiring subcontractors who do *not* comply with the act, but that he risks common law personal injury judgments if he hires subcontractors who in fact *do* comply with the act. This is exactly the ruling which Salyer seeks in this appeal.
>
> ***Although there is no evidence in the record that Mason contractually required its subcontractors to provide compensation coverage for their employees, we see no reason to draw a distinction between prime contractors who contractually require subcontractors to provide compensation coverage on one hand, and prime contractors who hire subcontractors who already provide compensation coverage on the other hand***. We believe the legislative intent of the workers' compensation statutes would not be effectuated based upon such a superficial, technical distinction. … We find that hiring subcontractors who comply with the act by providing compensation coverage to its employees satisfies this "overall responsibility."

Salyer, 690 So. 2d at 1185 (emphasis added).

The absence of a written agreement was also addressed in *Richmond v. Benchmark Const. Corp.*, 692 So. 2d 60 (Miss. 1997), where the Court extended tort immunity to a general contractor, despite the fact that "Benchmark had no written agreement requiring UPS to maintain workers' compensation coverage," and that "UPS's insurance agent never issued a 'Certificate of Insurance' to Benchmark." *Richmond*, 692 So. 2d at 61. In so ruling, the Court noted that affidavits and/or sworn testimony by the contracting parties attesting to the existence of an agreement may be sufficient to establish the contractor/subcontractor relationship:

> Initially, Richmond argues that a general oral agreement between Benchmark and UPS is insufficient for the Court to hold Benchmark "secured" payment. ***We find that such oral agreement is satisfactory under the facts of this case. Had the Legislature sought to require a "written" agreement, it could have so required***. Richmond also argues that the agreement was merely alleged. However, Richmond provides the Court with no authority requiring Benchmark to have entered into a job specific written agreement with UPS in order to maintain a defense of exclusivity/statutory employer.
>
> ***We note that the oral agreement is supported by the undisputed affidavit of Eddie Conger, President of UPS, and the deposition and affidavit of Joseph David Marsh III, President of Benchmark. No proof opposing these facts was offered by the plaintiff***.

Richmond, 692 So. 2d at 62. (emphasis added).

The Court's decision in *Richmond* is also significant, in that the Court rejected the invitation to overrule its prior holding in *Doubleday*, that a general contractor enjoys immunity even where workers' compensation coverage is provided by the subcontractor. Specifically, the Court offered the following relevant discussion:

> The language in *Doubleday* unfortunately focuses on the verb "secure." The statute in fact reads, "In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor, *unless* the subcontractor has secured such payment." ***The emphasis should not be on the verb "secure" but on the relationship between the parties. The statute does not require the contractor to put a condition in a contract. The statute makes the contractor stand in the place of the subcontractor, if the subcontractor fails to obtain workers' compensation coverage***.
>
> ***As a practical matter, the prime contractor will want (and require) the subcontractor to have coverage, and the wise contractor will have in place coverage which protects him from the failure of the subcontractor to so do. The statute accomplishes the important purpose of creating a duty in the contractor to fulfill the subcontractor's duties, should the subcontractor fail to fulfill its part of the historical bargain created by the workers' compensation statutes. If a contractor-subcontractor relationship exists, the employee of a subcontractor covered by workers' compensation insurance is prohibited from making a common law claim for negligence or gross negligence against the contractor***.
>
> We decline to overrule *Doubleday* and continue to follow its longstanding precedent.

Richmond, 692 So. 2d at 63. (emphasis added).

As acknowledged in *Richmond*, the effect of Mississippi's workers' compensation statutory scheme is that a general contractor will be obligated to provide coverage if the subcontractor fails to do so, and it is because of this obligation that the benefit of immunity applies, regardless of whether the subcontractor furnishes coverage directly. This holding further reflects the notion that immunity does not hinge on whether the contractor directly "secured" coverage for the injured employee by requiring the subcontractor to carry such coverage, but rather, turns simply on the question of whether the entity is, in fact, a "general contractor" within the meaning of the statute, whose obligations to provide coverage exist as a matter of law. Thus, a compelling argument exists that the right to immunity arises where a defendant holds the status of a general contractor within the meaning of the statute.

The idea that the status of general contractor is sufficient to trigger tort immunity was afforded further support by the Court of Appeal's decision in *Lamar v. Thomas Fowler Trucking*, 956 So. 2d 911 (Miss. Ct. App. 2006). In *Lamar*, the Court acknowledged that "the general contractor in *Richmond* did not receive immunity because of an oral agreement with the subcontractor, which 'secured' coverage for the subcontractor's employees, ***but rather because of the relationship between general contractor and subcontractor which is created by section 71–3–7***." *Lamar*, 956 So. 2d at 918 (emphasis added). After granting certiorari, however, the Supreme Court seemed to take a dimmer view of the notion that status alone is determinative, noting that "that the immunity enjoyed by general contractors is not a gift from this Court, nor is it an extra-statutory concept, but rather is granted by the Legislature under certain statutorily-defined circumstances." *Id.* at 883. Significantly, the Court then held that the defendant trucking company had, in fact, secured workers' compensation benefits -- and was therefore entitled to immunity -- citing the fact that "the record contains a Certificate of Liability Insurance which names Golden Timber as the insured and Fowler as an additional insured." *Id*. at 884.

Conclusion

As set forth above, there are several reported decisions indicating that a general contractor's status alone is sufficient to establish a right to tort immunity. That said, the language of Section 71-3-9 -- which states that the employee may pursue "an action at law for damages" where "an employer fails to secure payment of compensation" -- is such that general contractors would be well-advised to contractually define themselves as the "general" or "prime" contractor via a written agreement, while likewise defining their sub-contractors as such. Likewise, while an express contractual provision requiring the sub-contractor to secure workers' compensation coverage for its employees does not preclude a right of immunity, such would seem the most practical way to insure such immunity in the event of a workplace injury. A general contractor would also be wise to insist that its subcontractors furnish Certificates of Insurance confirming that the subcontractor, in fact, has workers' compensation coverage in place. ■

Why I Resist Casual Friday and Other Thoughts on Diversity and Inclusion: A Black Partner's Perspective

By Orlando R. Richmond, Sr.

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I knew that I was going to be pulled over and that part of the encounter was entirely appropriate. I was speeding early one morning on a two-lane highway near my home when a highway patrolman passed me in a curve traveling in the opposite direction. He quickly disappeared over a hill and had not activated his blue lights. Just the same, I steered my late model luxury car onto the side of the highway, put it in park, retrieved my driver's license and the registration, and waited. Soon, the law enforcement officer reappeared and pulled his cruiser in behind my car. I had already lowered my driver's window as he approached.

He dispensed with the pleasantries: "Whose car is this?" I'm sure that I sighed and shook my head ever so slightly. I then said, "It's mine." I stretched out my arm and said, "And here are my license and registration." He left me hanging. He asked, "What's the make and model?" A lump formed in my throat, and I hesitated momentarily while trying to process what was happening. Then, even though I didn't want to, I described my car to him. Since my arm was still resting on the windowsill, I again said, "Here are my license and registration." This time he took them and returned to his cruiser. He issued a ticket and told me to have a good day.

At the time of that stop, I was on my way to a case management conference in federal court. I was wearing a starched white shirt, dark suit pants and a silk tie. My suit coat was in plain view in the back seat of the car. So too was a case file. And, sitting atop the file was a copy of the federal rules of civil procedure. When I responded to the patrolman's questions, I did so through very recent and relatively expensive dental work.

Upon arriving at the conference, I told counsel opposite, who is white, about the stop. He was incredulous. He told me that he was certain that if he had been stopped and was wearing jeans and a T-shirt, he would not have been asked those questions. So, I was not delusional, and my feelings weren't misplaced. Despite the indicators that I was employed as a lawyer (or perhaps a judge), the patrolman, who was also employed in the legal system and had surely interacted with lawyers, only saw a person of color. For him, that fact was enough to ignore objective indicia related to my profession and, instead, caused him to default to a negative assessment.

I won't recount all the thoughts and emotions I have had about that incident. But it was clearer to me than ever before that what might be acceptable for white lawyers to do, or not do, and still be accorded due recognition and respect as a professional, does not apply to me. Women and lawyers of color face the constant specter of being minimized, as more fully discussed below. I believe that for the diverse lawyer, this situation requires strict adherence to professionalism in every meaning of the word. While it may not seem like much, I resist casual Friday. And for law firms, every effort must be made to promote a welcoming environment of opportunity and inclusivity.

This year marks my 30th year in the practice of law. My experience includes a judicial clerkship, service as a Marine Corps Judge Advocate, criminal cases as a prosecutor and defense attorney, civil law practice representing defendants and plaintiffs, working for a small black-owned firm, being a partner in a small plaintiffs' practice and, for most of my career, being a partner in a top 150 law firm.

It was 25 years ago that another black lawyer and I became the first black lawyers at my firm, which was, at the time, solely based in Mississippi. We were part of the first real push for diversity in large majority practices. Soon, I was the only black lawyer at the firm. I, too, left but ultimately returned and have been back for more than a decade. The firm now has offices nationwide and internationally. The number of black lawyers is 7% today. I am optimistic regarding the progress and am determined that we will do much better.

My practice is complex litigation, which is national in scope. This affords me the opportunity to work closely with lawyers of every conceivable background from large majority law firms. Moreover, here at Butler Snow, I have been elected to firm management, held administrative positions and been involved in the hiring process. These experiences have left me with certain impressions regarding the development of diversity and inclusion initiatives and, in particular, the retention and advancement of black lawyers. The comments below address three issues from among the many that I believe contribute to a law firm environment where diverse lawyers are minimized and their ultimate departure is inevitable. Additionally, I offer some suggestions regarding steps to retain diverse lawyers and increase the numbers of those admitted to equity ownership.

The Retention Problem

A. Diverse Lawyers Do Not Enjoy a Presumption of Competence Like Others Do

The numbers are generally well known. According to the most recent data from the Vault/Minority Corporate Counsel Association Law Firm Diversity Survey, just 2.1% of law firm partners are black and only 1.87% are equity partners. These

numbers have been largely consistent over the last decade. The report notes that more people of color are joining law firms, but there is a problem retaining them, especially associates. In fact, the 2018 Vault/MCCA Survey states that, "Progress for African-American lawyers has been the most elusive, as their hiring remains below pre-recession levels and they continue to leave their firms at a higher rate than other groups." The survey reveals that departures of lawyers of color from law firms is at an 11-year high, exceeding the numbers that existed during the peak of the recession when minorities were more adversely affected by layoffs.

While many of these departures are for reasons other than the effects of bias, it is now largely undisputed that implicit or unconscious bias is a hindrance to the success of lawyers of color. Despite thoughtful diversity initiatives and aggressive recruitment efforts, many lawyers of color find themselves in an environment that does not see them in the same way as it does other lawyers. In particular, much like the patrolman who stopped me on the side of the highway years ago, some of those responsible for evaluating young associates of color only see what they want to see and don't see what they don't want to see. This phenomenon is a type of unconscious bias known as confirmation bias.

This particular species of bias has been described as a mental shortcut that makes one actively seek information, interpretation and memory only to acknowledge that which affirms established beliefs, while missing data that contradicts established beliefs. A recent study, "Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills" by lead researcher Dr. Arin N. Reeves, reported that partners were provided an identical research memorandum, in which 22 errors of grammar, substance and analysis were embedded. The partners who were selected to evaluate the paper were told that the author was a male graduate of NYU Law School. Some partners were told that the author of the memorandum was white and other partners were told that the author was black. The result of the research was that significantly more errors were found and ascribed to the black author. Additionally, the overall rating of the paper was far worse for the black author than the white author. Moreover, the comments on the paper were more harshly critical of the black writer. For example, the white writer was described as someone who "has potential" and a "generally good writer but needs to work on …" The black writer had such comments as "average at best" and "can't believe he went to NYU."

The potential effects of confirmation bias are obvious. Ultimately, it morphs into a reputation that is less stellar for the lawyer of color than other lawyers. That flawed assessment of the lawyer of color feeds on itself until it is common knowledge. Everybody knows it. Assignments find their way to other lawyers and fewer meaningful opportunities find their way to the lawyer of color. Even worse, confirmation bias leads to a suggestion of incompetence for lawyers of color and a presumption of competence for others. Evaluations can reflect this objectively inaccurate assessment. Eventually, the handwriting is on the wall and a departure may be the most reasonable response by the lawyer of color.

B. The Offensive Notion That Any Woman or Lawyer of Color Will Do

It can hardly be disputed that the business community has been pivotal in assisting, if not outright pushing, law firms to embrace diversity and inclusion. That influence is growing. In fact, in January of this year, a letter signed by the General Counsels of some 170 companies makes it clear that they will not be inclined to retain firms that do not demonstrate a real commitment to diversity and inclusion. This concept is commonly viewed as the business case for diversity.

Most recognize a need for diversity, but clearly we do not all have the same understanding of what the need is and how to address it. Merely staffing a file to include a diverse attorney to secure business fails to properly address the need. Instead, it amounts to a highly offensive elevation of optics over reality.

Women and lawyers of color are dismayed at having their pictures emblazoned on glossy responses to RFPs or being asked to dutifully participate in pitch meetings, only to be omitted later from any meaningful participation on the file. The only sin worse than not being considered is not being utilized.

This misguided approach to diversity can have effects beyond the law firm environment and the issue of retention. Unbelievably, there is a practice of adding a diverse lawyer to a trial team solely for optics. However, we now have more and more judges who are women and people of color, and juries are certainly filled with every demographic. It is outrageous, in my view, to assign a diverse lawyer to a trial team when that lawyer's only expected contribution is their immutable characteristic. This transparent act will not go unnoticed by judges nor jurors, and it is clients who may suffer the consequences. Any assignment of lawyers should be substantive and meaningful. There are plenty of talented, diverse trial lawyers who can add real value to a trial team.

Bluntly, no one wants to be "used" as that term is understood in the negative sense. The notion that "any woman or lawyer of color will do" demeans us as professionals. Yet, it remains all too common and is a factor in lawyers leaving firms.

C. Relegated to Last and Least

There is a particularly disturbing practice that women and lawyers of color take note of that I am convinced some others have never noticed. It is a practice that not only those with whom we practice engage but clients, business prospects and others do it as well. It is the practice of routinely putting women or lawyers of color last, no matter their seniority or status in the firm or responsibility on a file. This slight includes everything from email chains to in-person introductions.

I recall being at a professional meeting and standing with a group of six or seven colleagues from various firms. All of us worked on a particular mass tort together. I was the only lawyer of color in the group and clearly the oldest. Another lawyer who knew some but not all of the others walked up and engaged in small talk. Introductions were made, and hands were shaken. He had been involved with some of the early proceedings in the matter and sought an update. When he finally got to me, he asked, "What do you do? Are you on the discovery team?"

I replied, "No. I'm national lead trial counsel." He said, "Oh, you're Rod Richmond. Pleased to meet you. I've been reading your work." Of course, that was the second time we had been introduced in a matter of minutes. Even though he was familiar with my name and my role, upon seeing me, he had assigned a different responsibility to me in his mind.

Repeatedly, inside firms or outside firms, women and lawyers of color are routinely introduced or approached last. On numerous occasions and in different settings over my career, someone initiates a conversation with a white male who is with me, only to be told that I am the person they should talk to or who knows the subject matter. I have seen it happen with others as well.

While it is likely not intentional, nor even conscious, it is some evidence of the reality that exists in some law firms despite the stated objectives of inclusivity. Every unwarranted instance of relegating someone to last or least and every time it seems as if a woman or lawyer of color is virtually an afterthought serves as yet another suggestion that we are viewed differently. It is another weighty straw that can push a diverse lawyer in the direction of other employment.

Some Potential Solutions to Retain Diverse Lawyers

My experience here at Butler Snow and the success stories of women and other lawyers of color around the country (to include in-house counsel) make clear that there are effective approaches that can and should be employed to combat bias and retain diverse lawyers. What follows are some potential steps that law firms should take:

- **Firm Leadership Must Be Fully Committed –** The importance of diversity and inclusion must be a priority at every level of firm leadership. The unequivocal message to the firm and every partner and employee of the firm must be in terms of a demand. Moreover, one aspect of the evaluation of firm leadership should be their commitment to and progress regarding diversity and inclusion. What gets measured gets done.
- **Diversity and Inclusion Committee or Officer –** Achieving greater diversity and inclusion has to be intentional and focused. Perhaps the best way to do so is by having a dedicated committee or person who will stay abreast of the latest developments regarding diversity and inclusion and the specific issues in the firm. This committee or person should report directly to firm management.
- **Mentors and Sponsors –** Navigating the law firm environment can be difficult for any lawyer, especially new associates. The journey may be complicated by cultural differences that inhibit the kind of easy interaction that leads to developing good working relationships. The lawyers of color may not attend the same churches as other lawyers. They may not be members of the same fraternal organizations or social clubs. As a result, assign mentors whose mission is to get to know the diverse lawyer and help young lawyers with navigating the system. Mentors help groom the lawyer professionally and help integrate the diverse lawyer into the firm culture. On the other hand, a sponsor is a person of influence within the firm who speaks to issues on another lawyer's behalf. There is a need for onboarding regimens that include sponsors who serve as advocates for the young lawyer or diverse lawyer.
- **Appointment to Administrative and Practice Responsibilities –** At many firms, firm involvement is one of the metrics for advancement. Careful attention must be paid to appointment of diverse lawyers to administrative duties and other positions within the firm to provide an opportunity to meet this important metric. For those roles that are elected, consideration should be given to an alternative appointment process, if necessary, that is designed to make sure there is participation in firm governance by diverse lawyers. It is important that younger diverse lawyers have someone who is like them in key leadership roles to inspire and encourage them. So, there should be diversity at all levels and positions of responsibility in the firm.
- **Clients Should Go Beyond the Head Count –** Clients should request hard data related to inclusion. Clients should assure themselves that diverse lawyers are billing meaningful hours on their files and are getting an opportunity for client contact as soon as is practical given the complexity of the matter. Moreover, there should be a clear pattern that work is being transitioned to diverse lawyers as well as to other lawyers. Clients should also make crystal clear that the woeful and static percentage of diverse attorneys in the partnership ranks is unacceptable. Clients should inquire about a law firm's initiatives or efforts that are designed to make sure that the path to ownership for women or lawyers of color is not made more difficult as a result of bias.
- **Compensation Must Be Constantly Evaluated –** A fair system of compensation that is clearly understood and that provides for progression for all is an absolute must.

Conclusion

A white law partner, whom I also consider a friend, once attributed my success to being able to "move easily between both worlds." While I suppose he meant it as a compliment, the notion that there are characteristics and behaviors that are specific to whites and absent in blacks (or present in men and absent in women), and that lend themselves to success, is just wrong. That idea is no different than that highway patrolman making a negative assessment of me because of my color.

This legal community of ours has to be large enough to accommodate and embrace our wonderful diversity. By doing so, our clients are provided meaningful perspective as to their legal issues. Those with whom we practice enjoy collaboration and a more positive business relationship. And, like all other lawyers, women and lawyers of color can rely on being evaluated on their skill, ability and potential. This is an issue that goes far beyond the business case for diversity. It is the right thing to do. ■

Supremely Speaking

Recent Decisions from the Mississippi Appellate Courts

NOTE: *The following decisions are provided to our readers as quickly as possible and some may not have been released for publication in the permanent records. These summaries were prepared by individuals noted at the end of each summary.*

Certified Question on Subrogation

***Liberty Mut. Fire Ins. Co. v. Fowlkes Plumbing, L.L.C.*, 290 So. 3d 1257 (Miss. Mar. 9, 2020).**

In May 2015, the Chickasaw County School District contracted with Sullivan Enterprises, Inc. for window restoration work on the Houlka Attendance Center. Two months later, while construction was ongoing, the attendance center was destroyed by a fire. Chickasaw County School District was insured by Liberty Mutual, which paid the school district $4.3 million for the damage to the attendance center.

Liberty Mutual then filed a subrogation suit against Sullivan Enterprises, Fowlkes Plumbing, LLC, and Quality Heat & Air, Inc. The contract between the school district and Sullivan Enterprises included the following form language (from American Institute of Architects form A201-2007):

> Subparagraph 11.3.7: The Owner and Contractor waive all rights against … each other and any of their subcontractors … for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary.
>
> Subparagraph 11.3.5: If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, … the Owner shall waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance.

The United States District Court for the Northern District of Mississippi found that the waiver of subrogation did not apply to damages to the "non-Work" property, thus Liberty Mutual could proceed in litigation as to "non-Work" property damages. The Fifth Circuit allowed an interlocutory appeal and certified the question of whether the subrogation waiver applies to "non-Work" property.

The Mississippi Supreme Court recognized that there is a divergence of authority on this question, leading to two opposite approaches. After determining that the language of the contract is unambiguous, the court then held that Subparagraph 11.3.7 means that the owner, contractor, and subcontractors have waived all rights against each other for damages caused by fire to the extent the property is covered by insurance "obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work." In adopting the majority view, the Court held that the phrase "applicable to the work" means any insurance that insures the work, which is not a limit on recovery for only damages to work property. Answering the certified question, the Court held that the waiver of subrogation applies to work and non-work property. *(Summary prepared by Rebecca S. Blunden – Copeland Cook Taylor & Bush, PA, Ridgeland, MS.)*

Conspiracy to Seize Funds

***Charles Bradley Carson v. Kimberly (Carson) Linley and Jay Howard Hurdle,* No. 2019-IA-00170-SCT (Miss. Mar. 12, 2020).**

Following Carson and Linley's divorce, the Chancery Court of Oktibbeha County entered a money judgment against Carson. Carson appealed the judgment to the Mississippi Supreme Court and filed an appeal bond. While the appeal was pending, Linley's attorney, Hurdle, executed the money judgment and had writs of garnishment issued by the Circuit Court of Oktibbeha County. Once issued, Linley served the writs in Scott County, on Carson's employer and bank. Carson then sued his ex-wife, Linley, and her attorney, Hurdle, in Circuit Court of Scott County, alleging they conspired to seize his funds. They moved to transfer venue to Oktibbeha County. The Scott County Circuit Court transferred venue to the Circuit Court of Oktibbeha County. Carson filed an interlocutory appeal, arguing the Scott County Circuit Court had abused its discretion by transferring venue. The Mississippi Supreme Court reversed, holding the transfer was an abuse of discretion, and remanded the matter to the Scott County Circuit Court.

The Court began its venue analysis with Mississippi Code §11-11-3:

> Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides, or, if a corporation, in the county of its principal place of business, or in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred.

Miss. Code Ann. § 11-11-3(1)(a)(i) (Rev. 2019). The Court further noted that, among the four venue options, Plaintiff's choice of forum should not be disturbed. In this case, the Court needed only to consider whether Scott County was the "county where a substantial act or omissions occurred or where a substantial event that caused the injury occurred." Miss. Code Ann. §11-11-3(1)(a)(i). In transferring the case, the Circuit Court of Scott County

determined the alleged conspiracy could have only occurred in Oktibbeha County and that no alleged act or omission of the defendants occurred in Scott County. On appeal, Carson argued that the service of writs of garnishment in Scott County made Scott County an appropriate venue. He cited *Flight Line, Inc. v. Tanksley,* in which the court said "[a] cause of action accrues when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested. This may well mean the moment injury is inflicted, that point in space and time when the last legally significant fact is found." 608 So. 2d 1149, 1156 (Miss 1992). Carson further argued that the last legally significant fact was the garnishment of his paycheck and bank account, without which there would be no actionable cause based upon abuse of process. The court took issue with this argument, relying on *Wilkerson v. Goss,* 113 So. 3d 544, 547-48 (Miss. 2013), in which case the court explained venue is proper where the substantial acts or events causing the injury *occurred*, not where they *accrued*, per the Mississippi Legislature's amendments to Section 11-11-3 in 2004. The Court, therefore, did not address whether venue was property in Scott County because the cause of action accrued there. Instead, because Carson also alleged the cause of action *occurred* in Scott County, the Court looked to determine if a substantial alleged act or omission or a substantial injury-causing event occurred in Scott County.

The basis of Plaintiff's complaint is conspiracy. He alleged venue was proper in Scott County because "substantial acts complained of herein as well as substantial events that caused the injury occurred in Scott County, Mississippi." Importantly, Linley and Hurdle served two writs of garnishment in Scott County, Mississippi for the purpose of taking Carson's funds. Because Carson alleged a conspiracy to wrongfully seize his money, a substantial act allegedly occurred in Scott County, namely service of the writs of garnishment there. Even if the act or omission did not cause injury in Scott County, the Court held that Linley and Hurdle's service of the writs in Scott County was a substantial and alleged act done in furtherance of the alleged conspiracy to wrongfully seize Carson's funds. *(Summary prepared by Jennifer M. Young – Galloway Johnson Tompkins Burr & Smith, Gulfport, MS.)*

Real Property / Attorney's Fees

***Cronier v. ALR Partners L.P.,* No. 2018-CA-01551-COA Consolidated with No. 2016-CT-00521-COA (Miss. March 10, 2020).**

Allen Cronier purchased a parcel of land in Jackson County in July 2012, at which time he believed to be comprised of eighty acres. Cronier did not have the property surveyed before he purchased the property to verify that understanding. Following the purchase however, Cronier had the property surveyed, the results of which revealed that the parcel he purchased was only about seventy acres and that there was a boundary issue with the adjoining property owned by the Rainwaterses. The survey also indicated that the property corners and boundaries were marked with posts, the remains of old fences, and yellow paint blazes on trees. At a post-survey meeting between Cronier and the Rainwaterses, before Cronier abruptly left, Cronier announced that "he had paid for eighty acres and said, 'by God I'm going to get eighty acres . . . . I know what I've got to do.'" Following this meeting, the Rainwaterses went to inspect the property and found that certain old boundary markers were missing. In March 2013, Cronier informed the Rainwaterses that he had conveyed the disputed property to his minor granddaughter. The Rainwaterses visited the property again and discovered that more boundary markers had been removed or defaced. Cronier thereafter built a fence and gate around the perimeter of the property, including the disputed ten-acre parcel.

This litigation ensued. The Rainwaterses asserted claims against Cronier for trespassing, compensatory and punitive damages, and attorney's fees. In March 2016, the chancellor ruled in favor of the Rainwaterses on their claim of adverse possession of the 9.57 acres at issue, and the court entered a final judgment to this effect in April 2016. On December 12, 2017, the Mississippi Court of Appeals affirmed the court's judgment regarding adverse possession, but reversed and remanded in part "for clarification of whether punitive damages were awarded in the form of attorney fees." *Cronier,* 248 So. 3d 865 (Miss. Ct. App. 2017)(citing *Pursue Energy Corp. v. Abernathy*, 77 So. 3d 1094, 1102 (¶26) (Miss. 2011); *AquaCulture Tech. Ltd. v. Holly*, 677 So. 2d 171, 184 (Miss. 1996)).

On January 29, 2018, before the Court of Appeals issued its mandate, the chancery court entered a final judgment on remand, finding that "Cronier acted with actual malice" and ordering Cronier to "pay the Rainwaters[es'] attorney's fees in the amount of $10,790.00 in lieu of punitive damages." Cronier filed a motion to set the judgment aside based on the chancery court's lack of jurisdiction pending the final disposition of his appeal. On February 14, 2018, the chancery court entered an agreed order setting aside its January 29, 2018 final judgment.

On October 1, 2018, after the appeal was final, the chancery court entered its final judgment. In it, the chancellor adopted and incorporated the findings contained in the January 29, 2018 final judgment. Specifically, the chancellor found that Cronier had "acted with actual malice, and [Cronier] shall pay the Rainwaters[es'] attorney's fees in the amount of $10,790.00 in lieu of punitive damages." Relying on *Pursue Energy* and *Holly*, the chancellor clarified that attorney's fees were awarded in lieu of punitive damages "due to [Cronier's] actions, which included erecting a fence around the property in clear disregard of the Rainwaters[es'] rights and conveying property to his minor granddaughter when he knew there was a serious claim for the subject property." Cronier appealed the judgment.

In the second appeal, Cronier argued that the chancellor erred in awarding attorney's fees in lieu of punitive damages, and that the evidence was insufficient to support the judge's findings. Judge Greenlee wrote for the 9-1 court:

> On appeal, Cronier contends that the chancellor erred in awarding attorney's fees in lieu of punitive damages. Specifically, he contends that the evidence is insufficient to support the chancellor's finding that he acted with "actual malice," such that the award of attorney's fees in lieu of punitive damages was improper.

"Mississippi follows the general rule that, in the absence of a contractual agreement or statutory authority, attorney's fees may not be awarded except in cases in which punitive damages are proper." *Tunica County v. Town of Tunica*, 227 So. 3d 1007, 1027 (¶49) (Miss. 2017) (citing *Grisham v. Hinton*, 490 So. 2d 1201, 1205-06 (Miss. 1986)). Generally, punitive damages may only be awarded when a plaintiff proves "by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." Miss. Code Ann. § 11-1-65(1)(a) (Rev 2014); see also *Wise v. Valley Bank*, 861 So. 2d 1029, 1034 (¶15) (Miss. 2003) ("[T]he plaintiff must demonstrate a willful or malicious wrong, or the gross, reckless disregard for the rights of others."). "[A]n actual award of punitive damages is not a prerequisite for an award of attorney's fees; rather, attorney's fees are warranted where 'the awarding of punitive damages would have been justified,' even if punitive damages are not awarded." *Tunica County*, 227 So. 3d at 1029 (¶54) (quoting *Holly*, 677 So. 2d at 185). Thus, "attorney fees may be awarded instead of punitive damages." *Cronier*, 248 So. 3d at 871 (¶39).

On remand, the chancellor found that Cronier acted with actual malice based on Cronier's actions, "which included erecting a fence around the property in clear disregard of the Rainwaters[es'] rights and conveying property to his minor granddaughter when he knew there was a serious claim for the subject property." Cronier responds that attorney's fees are not proper and that the "conduct or conditions" required to award punitive damages are not present in this case. After reviewing the record, the Court of Appeals concluded that the chancellor's findings that Cronier acted with "actual malice" and in "clear disregard of the Rainwaters[es']rights" was supported by substantial evidence, and the chancellor did not err in awarding attorney's fees in lieu of punitive damages. *(Summary prepared by Matthew M. Williams – Galloway Johnson Tompkins Burr & Smith, Gulfport, MS.)*

Summary Judgment / Discrimination / Breach of Contract

***Leal v. Univ. of S. Miss. And Bd. Of Trustees of State Institutions of Higher Learning*, No. 2018-CA-00408-SCT (Miss. Apr. 2, 2020).**

Dr. Sandra Leal was a junior faculty member at USM. She applied for tenure and promotion in 2012. At the recommendation of faculty members, she deferred her application a year, and in September of 2013 she resubmitted her application and materials. On October 4, 2013, Leal's department voted not to recommend her application and notified Leal of this decision on October 7, 2013.

The chair of the department, the College Advisory Committee, the Dean of the college, and the University Advisory Council all reviewed her application and similarly found it deficient. Each reviewing body provided Leal with a notice of its review and findings of deficiency. Each review cited an insufficient number of publications as the primary reason for not recommending Leal's application.

In March of 2014 following the reviews, Leal wrote the provost, Denis Wiesenburg, claiming she suffered from rheumatoid arthritis during her time at USM and, for the first time, claimed it as a disability. She requested an additional year to remedy her insufficient publications. The provost and USM's president denied the request, and Leal sought review of her application with the IHL. The IHL also denied her application.

Leal filed two suits against USM and the IHL in Forrest County, MS, alleging breach of contract and disability discrimination and retaliation under the Rehabilitation Act. The suits were consolidated into one suit. USM and the IHL moved for summary judgment, which the Court granted. Leal appealed.

The appeal presented three issues: 1) were material facts disputed regarding Leal's claims under the Rehabilitation Act and, if not, were the IHL and USM entitled to judgment as a matter of law on her disability-related claims; 2) were material facts disputed regarding Leal's claim that her employment contracts were breached and, if not, were the IHL and USM entitled to judgment as a matter of law on her contractual claims; and 3) were material facts disputed regarding Leal's claims that she was equitably entitled to employment and promotion and, if not, are the IHL and USM entitled to judgment as a matter of law on her contractual claims?

As to the first issue, the Supreme Court found that in order to survive summary judgment, Leal would have to have proffered sufficient evidence to demonstrate a prima facie case of a violation of the Rehabilitation Act. To make a prima facie case of discrimination, Leal needed to establish facts showing that: (1) she had a disability; (2) other than the disability she was qualified for the position she sought; (3) she worked for a program receiving federal financial assistance; and (4) she was discriminated against solely because of her disability. The Court found that Leal failed to present any evidence to support her claim of a disability and thus failed to make a prima facie case under the Rehabilitation Act.

To establish a prima facie case of retaliation, Leal had to adduce evidence demonstrating that (1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) a causal connection existed between the protected act and the adverse action. Leal failed to provide a causal connection between her request for accommodation and the denial of her application for tenure as the denial predated her request for accommodation. Therefore, the Court affirmed the trial court's grant of summary judgment in favor of USM and the IHL on Leal's retaliation claims.

As to the second issue, Leal alleged the IHL and USM breached her employment contract by discriminating against her, retaliating against her, and denying her application for promotion and tenure. To prove a breach-of-contract claim, Leal would have had to prove by a preponderance of the evidence that (1) a valid and binding contract existed and (2) that the IHL and/or USM has broken it or breached it without regard to the remedy sought or the actual damage sustained. USM never entered into an employment contract with Leal, but the IHL entered into several one-page contracts with Leal over 7 years. None of the contracts mentioned guarantees of promotion, tenure, disability accommodation, or

nonretaliation for requests for accommodation. Additionally, the employee handbook included express disclaimers against guarantee of any contractual right associated with promotion in academic rank, tenure, or employment in general in the handbooks. While her employment contract provided a guarantee against discrimination as defined in the Rehabilitation Act, Leal failed to present any evidence supporting her contention that her condition was a disability under the Rehabilitation Act. Therefore, she failed to offer evidence to support the second prong of her breach of contract claim. The IHL was entitled to judgment as a matter of law.

On Leal's last issues, she argued that the IHL and USM were estopped from denying her tenure and from firing her. Equitable estoppel requires (1) proof of a belief, (2) reliance on some representation, (3) a change of position as a result of the representation, and (4) detriment or prejudice caused by the change of position. The Court held that Leal failed to provide any evidence of a representation that she would receive promotion or that tenure was automatic or guaranteed, and, therefore, she failed to articulate any change in her position based on this nebulous belief. Similarly, Leal also alleged a promissory-estoppel claim, but she failed to identify a promise. As such, the trial court's grant of summary judgment on these claims was affirmed. (*Summary prepared by Kye C. Handy – Balch & Bingham, LLP, Jackson, MS*.)

Insurance / Contract / Offer and Acceptance

***Mutual of Omaha Ins. Co. v. Driskell*, No. 2019-IA-00252-SCT (Miss. Apr. 2, 2020).**

Theresa Driskell applied for a life insurance policy and a disability income rider with the help of an insurance agency. The insurance company discovered Driskell was ineligible for the disability rider and sent her a policy without disability income. Driskell received the policy, reviewed it, and began paying on the premium. Nearly three years after receiving the policy, Driskell made a claim with her insurer for disability income. Because the policy did not include a disability income rider, the insurer denied her claim.

Driskell sued the insurer, citing her expectation of a disability income rider. The insurer moved for summary judgment, which was denied. The Supreme Court granted the insurer's interlocutory appeal.

In Mississippi, when an insurance company tenders a policy at variance with the application, the tender constitutes a counteroffer. At that point, the applicant must accept or reject the policy issued according to the terms of the insurer. If the applicant accepts a policy that varied from her application, the varied policy becomes a contract between the parties. Driskell's insurance policy did not provide monthly disability income, so the coverage did not exist. Driskell sent in an application for insurance, which is considered an offer to contract. The insurer sent Driskell a policy without the requested disability income rider. Driskell did not reject or return the policy. Instead she began to make payments in acceptance of the policy. As such, Driskell was not entitled to disability income benefits.

Because the policy Driskell accepted did not provide for monthly disability income benefits, none existed and the insurer was entitled to summary judgment. The Supreme Court reversed and rendered judgment. (*Summary prepared by Kye C. Handy – Balch & Bingham, LLP, Jackson, MS*.)

Sovereign Immunity / *Ex Parte Young* Exception

***Williams, et al. v. Reeves, et al.*, No. 19-60069 (5th Cir. Apr. 2, 2020).**

The 1868 Mississippi Constitution, ratified in 1869, included a series of provisions related to education and the establishment and maintenance of schools in the state. This newly adopted constitution came in response to Congress' Mississippi Readmission Act following the Civil War. As a part of Mississippi's readmission to Congress, Mississippi could not amend or change its constitution in a way which would deprive any citizen or class of citizens of the United States of the school rights and privileged secured by the State's constitution.

Since 1868, the Mississippi Constitution's education clause has been amended four times. The current education clause is codified in Section 201 of Article 8 of the Mississippi Constitution. Plaintiffs argue that Section 201 violates the school rights and privileges condition of the Mississippi Readmission Act. They note that the 1868 version required the Legislature to establish "a uniform system of free public schools" while the 1987 version only mandates the establishment of free public schools. Plaintiffs argue the removal of the uniformity provision has caused significant disparities in the educational resources, opportunities, and outcomes afforded to children in Mississippi based on their race and the race of their classmates. Plaintiffs point to the disparities between predominantly black schools like Raines Elementary and Webster Street Elementary and predominantly white schools in Madison County, DeSoto County, and Gulfport. Plaintiffs claim Mississippi's removal of the word "uniform" has resulted in a violation of the Mississippi Readmission Act.

Plaintiffs filed their first complaint in 2017. Defendants moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The district court granted dismissal under 12(b)(1), holding that sovereign immunity barred Plaintiffs' complaint. The district court further held that Plaintiffs' claim for declaratory relief was not covered by the *Ex parte Young* exception to the Eleventh Amendment as it sought to rectify prior violations of the Mississippi Readmission Act rather than prospectively dictate future conduct.

Plaintiffs timely moved for reconsideration. The district court denied the motion on the merits but amended the judgment to reflect that dismissal was without prejudice. On appeal, Plaintiffs did not rely on their initial complaint, but relied on a proposed amended complaint attached to their motion for reconsideration. In the amended complaint, Plaintiffs requested a prospective declaratory judgment that makes two distinct findings: first, that Section 201 of the Mississippi Constitution violates the Readmission Act, and second, that the requirements of Article VIII, Section 1 of the Constitution of 1868 remain legally binding on the Defendants, their employees, their agents, and their successors.

On appeal, the state officials defended the district court's judgment while also making several alternative arguments in support of affirmance, contending that plaintiffs lack standing, the suit is barred by the political question doctrine, and there is no private right of action under the Mississippi Readmission Act. These arguments were raised in Defendants' briefing before the district court, but they were not addressed in the district court's order. As such, the 5th Circuit declined to review these issues so late in the litigation process.

As a sovereign entity, a state may not be sued without its consent. The Eleventh Amendment, which protects the states' sovereign immunity, deprives a federal court of jurisdiction to hear a suit against a state. Under *Ex parte Young*, 209 U.S. 123, 167–68 (1908), a litigant may sue a state official in his official capacity if the suit seeks prospective relief to redress an ongoing violation of federal law.

Relying on *Papasan v. Allain*, 478 U.S. 265 (1986), the Fifth Circuit found the Plaintiffs' allegations to be sufficiently forward looking and, as such, permissible. They seek relief for what they allege to be Defendants' ongoing violation of federal law—the enforcement of a state constitutional provision that conflicts with the federal Readmission Act. This is allowable under *Ex parte Young*. The Fifth Circuit therefore held that the first part of Plaintiffs' two-part requested relief—a declaration that Section 201 of the Mississippi Constitution conflicts with the Readmission Act—may be pursued under *Ex parte Young*, and reversed the district court's Eleventh Amendment-only dismissal as to the first request.

Plaintiffs' second request asks the Court to identify which state law is binding upon state officials, making a judicial declaration that a state law enacted over 150 years ago remains valid and enforceable, despite many years of amendments and alterations. This is an invalid basis for an *Ex parte Young* suit. Therefore, the Fifth Circuit upheld the district court's ruling regarding Plaintiffs' second request for declaratory judgment. The judgment of the district court was affirmed in part and vacated and remanded in part. (*Summary prepared by Kye C. Handy – Balch & Bingham, LLP, Jackson, MS.*)

Diversity Jurisdiction / Snap Removal

***Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n*, No. 18-31184 (5th Cir. Apr. 7, 2020).**

As a matter of first impression, the Fifth Circuit held a non-forum defendant may remove a diversity action in which home-state defendants are also present, so long as the home-state defendants have not yet been served. In doing so, the Fifth Circuit joins the Second and Third Circuits holding the same and finding it does not violate 28 U.S.C. Section 1441(b)(2). Removal from state to federal court by a non-forum defendant prior to the plaintiff perfecting process upon the home-state defendant(s) is referred to as "snap removal."

In 1975, Texas Brine Company contracted with Vulcan Material to supply brine. In 2000, the contract was amended to include an arbitration clause. The arbitration clause stated arbitration would be conducted under the American Arbitration Association ("AAA") and would be governed by the Federal Arbitration Act. Vulcan's rights were eventually assigned to Occidental Chemical Corporation.

In 2014, the arbitration clause was invoked and three arbitrators were chosen. Two arbitrators failed to disclose conflicts of interest. Upon learning of the conflicts in 2018, Texas Brine moved to have the two arbitrators removed, but the AAA initially refused. Eventually, the AAA removed one arbitrator and the other resigned. Texas Brine then filed an action in Louisiana state court to vacate the panel's awards and to recoup fees and expenses it incurred prior to the panel's disbandment. The state court vacated the panel's rulings. Neither party appealed the vacatur.

A month after the state court vacated the panel's orders, Texas Brine filed a separate Louisiana state court action against the AAA and the two arbitrators. The two arbitrators were Louisiana residents. Approximately five days after suit was filed, and prior to the arbitrators being served, the AAA removed the suit to federal court. The district court refused to remand the case to state court, "holding that the plain language of the removal statute did not bar snap removal." The district court then dismissed the action finding the earlier vacatur was the only remedy allowed under the Federal Arbitration Act.

The Fifth Circuit affirmed. As to the removal issue, Section 1441(b)(2) provides a civil action which is removable solely on diversity grounds "may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." The Fifth Circuit agreed with the Second Circuit that: "By its text [] Section 1441(b)(2) is inapplicable until a home-state defendant has been served in accordance with state law; until then, a state court lawsuit is removable under Section 1441(a)." The Court then quoted the Second Circuit's reasoning as to why snap removal should be allowed. Snap removal establishes a "bright-line rule keyed on service" which limits gamesmanship and is easier "than a fact-specific inquiry into plaintiff's intent or opportunity to actually serve a home-state defendant."

As to arbitration, the Court found the second suit was an impermissible collateral attack on the arbitration orders and thus affirmed dismissal. The only remedy Texas Brine had was the first suit in which it was able to obtain vacatur. Texas Brine could not seek reimbursement of costs and fees as damages in court because Section 10 of the FAA, which provides for vacatur, provides the exclusive remedy. (*Summary prepared by Anna M. Livingston - Steen Dalehite & Pace, LLP, Jackson, MS.*)

Medical Malpractice / Summary Judgment

***Webb v. Forrest General Hospital, et al.*, No. 2018-CA-01301-COA (Miss. Ct. App. Apr. 7, 2020).**

In 2015, Jerry Don Webb presented to Forrest General Hospital's emergency room with atrial fibrillation and was admitted after medication failed to regulate his heartbeat. Dr. Thad Waites, a physician-employee of Hattiesburg Clinic and not the hospital, recommended a transesophageal echocardiogram (TEE) which involves insertion of a probe down into the esophagus to

obtain sonic images of the heart. There were difficulties during the procedure. Dr. Waites made "multiple attempts to advance the probe" and eventually withdrew the probe entirely before he resumed the procedure and successfully obtained images.

Exactly what happened during the procedure and shortly thereafter was contested. The medical records indicate during the TEE Mr. Webb suffered a "traumatic pyriform sinus perforation," a known but rare complication of TEE, which caused bleeding and resulted in a pharyngeal vessel being torn off the external carotid. Due to this complication, Mr. Webb was required to spend eight days on life-support systems so that the perforation could heal.

The Webbs filed a complaint in January 2017 against Forrest General, Dr. Waites, and Hattiesburg Clinic. Hattiesburg Clinic conceded Dr. Waites was its employee, and thus it was vicariously liable for any negligence he committed. No specific allegations were made against the hospital as to the TEE procedure itself, but the plaintiffs asserted the hospital committed negligence in "administrative functions" such as delayed triage.

Written discovery was exchanged until September 2017 when the trial court entered a scheduling order. During the allowed discovery period, the only depositions taken were of the Webbs and Dr. Waites.

On March 30, 2018, the plaintiffs designated Dr. James Rellas, a cardiologist, who opined that, although the TEE was appropriate, the combination of a difficult entry into the esophagus and the presence of blood was "worrisome." He further opined Dr. Waites should have obtained an ENT consult before proceeding and that said consult "may have decreased" Mr. Webb's hospital stay. No nursing or administrative experts were designated, and Dr. Rellas did not criticize the hospital.

On May 3, 2018, Dr. Waites and the Clinic designated Dr. Michael Main. Dr. Main, a cardiologist, opined Dr. Waites did not breach the standard of care during the TEE procedure and the difficulty experienced by Mr. Webb was not unusual for patients his age. Dr. Main opined Mr. Webb's injury was not "predictable," but was a known but rare complication of TEE. On May 9, 2018, Forrest General also designated Dr. Main.

On May 11, 2018, Dr. Waites and the Clinic moved for summary judgment arguing Dr. Rellas' opinion was deficient as to causation. A week later Forrest General filed a summary judgment motion arguing it could not be vicariously liable for any negligence of Dr. Waites as he was not a hospital employee. Forrest General, however, did not directly assert its sovereign-immunity under the Mississippi Tort Claims Act as a basis for summary judgment.

In response to the summary judgment motions, the Webbs filed a motion to extend the discovery deadline and noticed several depositions. A majority of the motions and discovery, including an attempted 30(b)(6) deposition, was directed towards Forrest General. The Webbs finally responded to the summary judgment motions in July 2018. As to Forrest General, they argued the hospital was avoiding discovery and refused to produce its policies and procedures, and, thus, they "could not determine the extent of Forrest General's liability."

The circuit court heard arguments on the summary judgment motions and the Webbs' motion to extend the discovery deadline. During the hearing, plaintiffs' counsel admitted Dr. Rellas failed to address any breach of the standard of care by the hospital and only "specifically define[d] the liability of Dr. Waites." Plaintiff's counsel argued "he did not want his expert to comment on the hospital's liability until he received the appropriate hospital policies." At the hearing, the circuit court noted the expert designation deadline had passed, and Dr. Rellas did not "say that Forrest General Hospital did anything." Further, no depositions were noticed as to Forrest General until after the summary judgment motions were filed.

On August 8, 2018, the circuit court entered three separate orders granting the summary judgment motions and denying the plaintiffs' motion regarding discovery. As to Dr. Waites and the Clinic, the circuit court found the plaintiffs failed to establish causation by distinguishing between medical possibilities and medical probabilities and requiring language indicative of the latter. Dr. Rellas used words such as "may have," which speaks to a medical possibility and not probability. As to Forrest General, the court correctly found under precedent that the "administrative negligence claims" were in reality medical malpractice claims and thus required a medical expert. Again, Dr. Rellas had failed to specifically address any breach committed by Forrest General, and the plaintiffs failed to file "a formal Rule 56(f) request for additional discovery." Further, the Webbs failed to "state[] the reasons why they could not present facts essential to justify their opposition."

The Webbs appealed, arguing they met their burden of proof regarding causation and that the trial court erred in denying their request for continuance.

The Court of Appeals affirmed the circuit court. It recognized that the failure to file a Rule 56(f) affidavit is not necessarily fatal if the plaintiff has been diligent and can show he has taken action to discover necessary information. However, in this matter, not only were the plaintiffs dilatory, but they failed to show how the information they sought, after the summary judgment motions were filed, would affect the case's outcome. The claims the plaintiffs characterized as "administrative negligence" were actually medical malpractice claims as they "[arose] out of the course of medical, surgical or 'other professional services' and as such required a medical expert to establish causation. The expert designation deadline had passed, and the plaintiffs' expert had "no opinions directed at negligence by employees of Forrest General."

As to Dr. Waites and the Hattiesburg Clinic, the Court of Appeals found Dr. Rellas' opinion insufficient because "[t]he expert opinion of a doctor as to causation must be expressed in terms of medical probabilities as opposed to possibilities." Again, the Court of Appeals highlighted the expert's use of wording such as "may have."

In summary, the evidence sought by the plaintiffs could have been obtained prior to the discovery deadline. The plaintiffs waited until after the discovery deadline, faced with losing summary judgment, to request information. Because the plaintiffs had no reason as to why they did not seek the needed information during discovery, and because Dr. Rellas' opinion was insufficient as to causation, the trial court correctly enforced its scheduling order and granted summary judgment to all defendants. (*Summary*

prepared by Anna M. Livingston - Steen Dalehite & Pace, LLP, Jackson, MS.)

Civil Rights / Summary Judgment / Deliberate Indifference

***Kathy Dryer; Robert Dryer, Individually and as Representative of the Estate of Graham Dryer v. Richard Houston*, *et al.*, No. 19-10280 (5th Cir. April 9, 2020).**

Graham Dryer died after smashing his own head against the inside of a City of Mesquite, Texas patrol car while being transported to jail. His parents brought a Section 1983 claim against the paramedics who examined Dryer, the transporting officers, and against the City of Mesquite. On appeal, the Fifth Circuit addressed the plaintiffs' deliberate indifference claims against the paramedics and police officers.

Regarding the paramedics, the Court accepted the allegations of the complaint as true, and the paramedics were dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The paramedics came to the scene and were advised that Dryer had consumed LSD. He was observed to have a serious head injury. The paramedics saw that Dryer was incoherent and screaming and in a drug-induced psychosis. Both paramedics examined Dryer, after which he was walked to the police car without incident. Based on these facts, the plaintiffs alleged that Dryer's Fourteenth Amendment rights were violated due to deliberate indifference to his medical needs, because the paramedics did not make recommendations for further treatment, sedation, or transport of Dryer.

Regarding the police officers, the facts were gleaned from the summary judgment record where the officers were granted qualified immunity. During transport, Dryer was handcuffed and placed in leg restraints. However, his seatbelt was not buckled. Dryer screamed, thrashed violently, and slammed his head numerous times against the interior of the patrol car. The transporting officer told Dryer to stop and even pulled over to try to stop Dryer from injuring himself. This was observed by another officer who was following behind. An investigation revealed that Dryer slammed his head against the metal cage, side window, and seat at least 19 times prior to the officer pulling over.

Once at the jail, Dryer continued to kick and scream. As a result, he was placed in a restraint chair and moved to a padded cell. The officers never reported to jail personnel that Dryer had bashed his head multiple times. Hours later, Dryer died as a result of blunt force trauma to the head.

The Fifth Circuit noted that "[t]he qualified immunity defense has two prongs: (1) whether an official's conduct violated a statutory or constitutional right; and (2) whether the right was clearly established at the time of the violation."

The Court found that plaintiffs failed to allege facts in the complaint that "plausibly showed[ed] that the paramedics acted with deliberate indifference." Deliberate indifference requires a plaintiff to show that the alleged offender was "'aware of facts from which the inference could be drawn that a substantial risk of harm exists,' and (2) the official actually drew that inference." The Court noted that this is an extremely high standard.

Based upon this standard, the Court found that, although the paramedics may have been negligent, or even committed malpractice, the deliberate indifference standard was not met.

Regarding the police officers, the Fifth Circuit addressed prong one of the two-part qualified immunity test and found there were genuine disputes of material fact as to whether the officers were aware of facts from which an inference could be drawn that there was a substantial risk of serious harm.

Regarding prong two of the test, the Fifth Circuit disagreed with the District Court's finding that the officers did not violate a clearly established right of Dryer. The Court found that reasonable jurors could find the officers were aware that Dryer had struck his head multiple times yet sought no medical attention for him and failed to advise jail personnel of Dryer's condition. Accordingly, the Fifth Circuit reversed the grant of summary judgment to the officers and remanded the case to the District Court for further proceedings. (*Summary prepared by Trace D. McRaney – Dukes, Dukes, Keating & Faneca, Gulfport, MS.*)

Mississippi Tort Claims Act / Police Protection Exemption

***City of Vicksburg v. Williams*, No. 2019-CA-00209-SCT (Miss. April 9, 2020).**

In this case brought under the Mississippi Tort Claims Act, codified at Mississippi Code Annotated § 11-46-1, *et. seq.* ("MTCA"), Herbert Williams sued the City of Vicksburg for injuries he alleged he suffered as a result of his arrest by the Vicksburg Police Department.

On February 7, 2013, Williams called 911 after he discharged a firearm at the ground toward his neighbor's dog to prevent being attacked by the dog. Upon arrival, the officers noticed that the offending dog was "small and scared." After concluding their investigation, the officers arrested Williams for unnecessarily discharging a firearm within the City, handcuffed him, and transported him to the police station. Williams made bail two hours later. There is no mention in the case as to the disposition of the charges against Williams.

Williams filed his complaint alleging that the officers "grossly and negligently arrested plaintiff for no good cause, causing plaintiff damages physically and psychologically." In response to the complaint, the City moved to dismiss pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure, asserting sovereign immunity under the MTCA. The trial court denied the motion, from which the City filed a petition for interlocutory appeal. The Supreme Court granted the City's petition in May of 2016, affirmed the trial court's ruling, and remanded the matter for a bench trial. After the bench trial, the circuit judge entered a judgment in Williams' favor for $150,000.00, from which the City appealed.

On appeal, the Supreme Court first noted that after a bench trial, a circuit judge's findings of fact will be upheld if they are supported by "sustainable, credible, and reliable evidence." Next, the Court stated that when addressing the application of the MTCA, a *de novo* review is the standard.

The applicable provision of the MTCA is the police-protection

exemption from the waiver of traditional sovereign immunity, set forth in Mississippi Code Annotated § 11-49-9(1)(c). Under this exemption, the City cannot be liable unless police officers act with "reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of the injury[.]" Williams' argument for reckless disregard was couched under a wrongful arrest theory.

No evidence was presented in the bench trial that Williams suffered from excessive force or verbal abuse. One of the officers testified as to standard police procedures after an arrest with respect to shackles and handcuffs, which were followed in Williams' arrest and detention of two hours at the police station.

Based upon these facts, the circuit judge found that the officers acted with "reckless disregard" when arresting Williams, who was the only eyewitness to the alleged crime, because there was no probable cause. Although the trial court found that Williams presented no proof of physical injury, he presented proof of mental and emotional injuries as a result of being arrested, handcuffed, transported on the public streets, shackled, and processed at the Vicksburg jail.

The Supreme Court reversed and rendered the circuit judge's finding that there was no substantial credible evidence to support a finding of reckless disregard.

Justice Kitchens concurred in result only. Justice Kitchens stated that there was no authority to arrest Williams without a warrant because the officers did not witness the alleged crime; however, he found nothing about the arrest met the reckless disregard standard. (*Summary prepared by Trace D. McRaney – Dukes, Dukes, Keating & Faneca, Gulfport, MS.*)

Contract / Arbitration

***Virgil, et al. v. Southwest Mississippi Electric Power Association*, No. 2018-CA-01133-SCT (Miss. Apr. 9, 2020).**

Members of Southwest Mississippi Electric Power Association ("Southwest"), a rural cooperative electric company, sued Southwest alleging that Southwest failed to provide refunds to its members for excess revenues. In response, Southwest filed a motion to compel arbitration, which the chancery court granted. The plaintiffs appealed from the chancellor's order.

In order to become a member of Southwest, an application must be signed which provides: "[t]he applicant will comply with and be bound by the provisions of the charter and bylaws of the Association and such rules and regulations as may, from time to time, be adopted by the Association." Southwest's bylaws provide that a person may become a member by agreeing to comply with Southwest's Certificate of Incorporation and all bylaws and amendments. Southwest's amended bylaws contained an arbitration clause which was set forth in the bylaws in bold, all capital letters.

On appeal, the members argued that they did not agree to the arbitration clause because the only document they signed was the application for electricity, which made no mention of arbitration. The plaintiffs also argued that the original bylaws and amended bylaws were ambiguous and that Southwest owed a heightened duty to its members to disclose the arbitration provision. The plaintiffs further argued that the application was unconscionable.

In addressing the enforceability of the arbitration clause, the Supreme Court first noted that factual findings are reviewed for abuse of discretion, while legal conclusions are subject to a *de novo* review. The Court further stated that it was the burden of the members to prove a defense to arbitration.

The Court began by setting forth the Federal Arbitration Act's two-prong test: "(1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the agreement." Regarding the second prong, the question is "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims." The legal defenses available under state law include fraud, duress, and unconscionability.

Relying on precedent, the Supreme Court found that, upon execution of the membership application, the members were bound to Southwest's bylaws and subsequent amendments of which they were provided notice at every annual meeting and by publication in the local newspaper. The Court, therefore, ruled that Southwest's amendment adding the arbitration clause to the bylaws was legal and proper.

The Court next addressed whether the dispute in question fell within the scope of the arbitration clause. The members argued that because their claims were not brought under any breach of contract theory under the bylaws, the arbitration clause had no effect. The Court held that the bylaws' scope was wide enough to cover any claim relating to patronage capital.

The Court further held that the arbitration clause was not unconscionable and that the members' attempt to isolate the unconscionability argument to the arbitration clause was not sound. The Court held that if it agreed with the members, the entire bylaws would necessarily have to be unconscionable.

Finally, the Supreme Court held that, reading the bylaws and all amendments as a whole, the contract was not ambiguous. As a result, the Supreme Court affirmed the order of the chancellor compelling arbitration.

In a dissent, Presiding Justice King stated that the members had no ability to bargain with respect to arbitration. As such, he would have found that the arbitration clause created a contract of adhesion which was procedurally unconscionable. (*Summary prepared by Trace D. McRaney – Dukes, Dukes, Keating & Faneca, Gulfport, MS.*)

Medical Malpractice / Expert Testimony

***Estate of Roy Sumrall and Estate of Della Sumrall vs. Singing River Health System*, No. 2018-CA-01260-COA (Miss. Ct. App. Apr. 14, 2020).**

Roy and Della Sumrall ("the Sumralls") filed this medical malpractice action against Singing River Health System ("Singing River") alleging that Della Sumrall sustained severe injuries as a result of Singing River's negligent removal of a central venous catheter in February 2012. The Court of Appeals affirmed the circuit court's judgment in favor of Singing River.

By way of background, sixty-eight-year-old Della Sumrall was admitted on February 23, 2012, to a Singing River owned and operated facility with severe inflammation of her gallbladder and

a pancreatic pseudocyst. Ms. Sumrall's health upon admission was quite complex as she suffered from an array of co-morbidities including diabetes, a renal artery stent, coronary artery bypass grafting, coronary artery disease, a partially collapsed lung, COPD, and numerous other severe health conditions. As a result of the severe inflammation in her gallbladder, the attending physician ordered removal of the gallbladder and placement of a central line in her external jugular vein due to the likely prolonged recovery and hospital stay.

On February 29, 2012, Ms. Sumrall was ordered to be discharged, requiring the removal of the central line. Singing River's Nurse Steele, proceeded with the removal based on her training and experience, and the particular characteristics of the patient, Della Sumrall. Specifically, because Ms. Sumrall had previously suffered from a partially collapsed lung, COPD, and pneumonia, she required constant oxygen. Additionally, Ms. Sumrall had complained during the course of her stay that she was unable to breath when lying flat, so she remained in a sitting position in her bed during her hospitalization. Upon removal of the central line, Nurse Steele reclined the patient somewhere between 30 and 45 degrees. She instructed the patient to take a breath and bear down while she removed the line. Nurse Steele applied pressure to the site for approximately one minute. After a one-minute ran, Ms. Sumrall gasped for breath, became unresponsive, and required emergent care. The respiratory arrest she experienced resulted in an anoxic brain injury with some permanent impairment. On May 18, 2012, the Sumralls filed this medical malpractice action against Singing River.

As outlined above, the first bench trial resulted in judgment for Singing River, and the Sumralls appealed. The Mississippi Court of appeals reversed and remanded the matter, holding that the lower court erred in allowing defense expert Dr. Corder to testify outside the scope of his pre-trial expert designation. The court further held that the circuit court's ruling that there was no standard of care regarding the proper position to place a patient during removal of such a catheter was against the overwhelming weight of the evidence.

On May 1, 2017, a second bench trial was held in Jackson County Circuit Court, which again resulted in judgment for Singing River, The Sumralls again appealed. This second appeal serves as the basis for the April 2020 opinion summarized here.

During the second bench trial, defense expert Dr. Corder, tendered in the fields of internal medicine and anesthesiology, was again permitted to testify as to the standard of care for removing a central line. Plaintiffs likewise tendered two medical experts, Dr. Lidgia Vives and Nurse Crystal Kellar, regarding the applicable standard of care. Plaintiffs argued that removal of such line required strict adherence to a five-step process in order to avoid injury to the patient. Central to the issue before the court was the step regarding placement of the patient during removal. As outlined above, Ms. Sumrall was placed at a 30-45 degree angle due to her pulmonary issues. Plaintiffs' experts argued that standard of care during removal required that she be placed in the Trendelenburg position, placing her flat on her back on a 15-30 degree angle with her feet elevated above her head. Plaintiffs' negligence argument rested on the fact that Nurse Steele admitted that she did not utilize the Trendelenburg position during removal and, thus, she breached the applicable standard of care.

Defense expert Dr. Corder testified that he routinely placed and removed central lines during the course of his practice and that he disagreed with Plaintiffs' experts, opining that Ms. Sumrall did not suffer from an air embolus. Plaintiffs objected and the circuit court sustained the objection based on the fact that such opinion had not been disclosed pre-trial. Dr. Corder additionally opined that Ms. Sumrall's position at the time of removal of the central line was appropriate based on her condition at the time of removal. Plaintiffs' counsel did not cross- examine Dr. Corder at the second trial. Singing River also called Ms. Sumrall's treating physician at the time of removal, Dr. Dvorak. Dr. Dvorak testified that Ms. Sumrall may very well have suffered from sudden cardiac arrest or a strike when the central line was removed as opposed to an air embolus.

On July 26, 2017, the Circuit Court held in its second bench trial that Singing River did not breach the standard of care when removing the line. The court rationalized that while placing a patient in the Trendelenburg position upon removal is the standard of care, utilizing a different placement is acceptable. The court rationalized, "even though Trendelenb[u]rg is the standard, the intolerance of the patient to that position would allow for deviation from the standard without violation of the standard." The court further held that "[t]he facts and evidence also showed the Trendelenb[u]rg method allowed for variations....depending on the patient's tolerance."

The issues central to the Sumerall's second appeal were claims that: (1) Dr. Corder was not qualified to testify as to the standard of care; (2) Dr. Corder's findings were inconsistent with his expert designation; (3) the circuit court's findings of fact and conclusions of law were against the overwhelming weight of the evidence; (4) the circuit court failed to follow the directives of *Sumrall I*; and (5) there was cumulative error.

The Court of Appeals upheld the Circuit Court's judgment in favor of Singing River, holding that the findings of fact and conclusions of law were consistent with the evidence presented at trial. Specifically, the court noted that Nurse Steele testified that during her care of Ms. Sumrall, prior to removal of the central line, Ms. Sumrall had trouble ambulating, breathing, and required oxygen. Nurse Steele further testified that Ms. Sumrall had difficulty lying flat on the day of the line removal. Accordingly, the record was replete with testimony and other evidence supporting the Circuit Court's decision that Ms. Sumrall could not tolerate the Trendelenburg position.

With regard to the qualifications and designation of Dr. Corder, the appeals court held that Dr. Corder demonstrated "satisfactory familiarity" with the procedure required to remove the central line, and that such holding by the circuit court was not an abuse of discretion. Likewise, the court held Dr. Corder testified in accordance with his pre-trial designation, opining that Nurse Steele did not breach the standard of care.

Regarding compliance with directives upon remand, the court held that Dr. Corder was properly permitted to testify upon remand, and that Plaintiffs' counsel failed to cross-examine him. Accordingly, sufficient testimony was offered by Singing River in compliance with the remand directives and consistent with Dr. Corder's expert designation.

Finally, the court held there was no cumulative error whatsoever. Consequently, the circuit court's holding in *Sumrall II* in favor of Singing River was affirmed. (*Summary prepared by Ashley Nader - Horne, LLP in Ridgeland, MS.*)

Statutory Interpretation / Medicaid Act

***Baptist Memorial Hospital-Golden Triangle, Inc., et. al. v. Azar, et. al.*, No. 18-60592 (5th Cir. Apr. 20, 2020).**

This Fifth Circuit opinion arises out of an appeal from the United States District Court for the Southern District of Mississippi regarding the validity of the Secretary of the United States Department of Health and Human Services' 2017 Rule further defining reimbursable "costs incurred" by hospitals serving a disproportionate number of indigent patients. The Medicaid Act specifically provides a fixed pool of funds to supplement payment paid by these hospitals when serving indigent patients. The Medicaid Act states that these discretionary funds are limited to "cost incurred" in caring for indigent patients. The Act further defined these limits as "the costs incurred during the year furnishing hospital services by the hospital to individuals who either are eligible for medical assistance under the State plan or have no health insurance for servicing provided during the year."

Until the Secretary's 2017 Rule, the hospitals were given broad discretion when defining "costs incurred." In 2017, however, the Secretary issued a final rule (the "2017 Rule") stating that these "costs incurred" include payments from third parties, such as Medicare and private insurers, for serving indigent patients. This issue arises when a patient is covered by Medicaid and a third-party insurer or Medicare. Under these circumstances, the third-party insurer typically only pays the hospital. Under the 2017 Rule, the "costs incurred" include the net of third-party payments and, thus, are not eligible to be reimbursed through the fixed pool of funds provided by the Act.

Eight Mississippi hospitals sued the Secretary, challenging the 2017 Rule by alleging the Secretary exceeded his authority in promulgating the Rule. The District Court agreed with the hospitals and awarded summary judgment. The District Court relied heavily on *Children's Hospital Association of Texas v. Azar*, 300 F. Supp. 3d 190 (D.D.C. 2018), which invalidated the 2017 Rule. *Children's Hospital* was overturned by the D.C. Circuit following the Secretary's appeal, and the 2017 Rule was upheld, making it highly unlikely that the District Court would invalidate the Rule today.

On appeal, the Hospitals argued that the Secretary only has the authority to determine the calculation of gross costs and, thus, the 2017 Rule was beyond the scope of his authority under the Medicaid Act. The Fifth Circuit considered the Hospitals' arguments in support of this position and rejected each and every one, holding the Rule was well within the Secretary's authority and the Rule was a reasonable reading of the Medicaid Act.

The Fifth Circuit rationalized that "courts have repeatedly upheld the Secretary's authority to account for offsetting payments when construing 'costs' or 'costs incurred.'" The Court further rejected the Hospitals' argument that the Secretary is merely allowed to calculate gross costs and not permitted to subtract payments from those costs, holding "this argument flies in the teeth of the statutory text." Finally, the court held that the 2017 Rule "safeguard[s] against states paying hospitals for costs that have already been reimbursed by a third party. It ensures that DSH payments will go to hospitals that have been compensated least and are thus most in need." Accordingly, the Fifth Circuit reversed and remanded the matter, upholding the 2017 Rule as valid under the Medicaid Act. (*Summary prepared by Ashley Nader - Horne, LLP in Ridgeland, MS.*)

Conservatorship / Confidential Relationship

***Ward v. Estate of Cook*, No. 2019-CA-00097-COA (Miss. Ct. App. Apr. 21, 2020).**

After Mary Cook's three children were appointed as conservators of her person and estate, they filed a petition alleging that her former business partner, John Ward, improperly obtained residential real property and money from Cook while she was incompetent. The chancery court found Ward had abused his confidential relationship with Cook and used undue influence to obtain the property and to take or spend a total of $95,537.86 from Cook's bank accounts. Therefore, the court voided the deed conveying the property to Ward and ordered Ward to repay Cook's estate for the full amount of the funds he improperly took or spent. Ward appealed. The judgment of the Chancery Court was affirmed.

The first issue considered was the confidential relationship. Ward argued the chancellor erred by finding that he exercised undue influence over Cook because the conservators did not plead this issue in their petition and because there was insufficient evidence of a confidential relationship between him and Cook. It is true the conservators did not expressly allege a confidential relationship or undue influence in their petition to recover assets from Ward. However, under M.R.C.P. 15(b), an issue may be tried by implied consent if during trial, both parties were able to detect a new issue was being litigated. At two points during the trial, the chancellor clearly stated the issue of undue influence was being tried. After the chancellor's extended discussion of the law of confidential relationships and undue influence, Ward did not object that the issues had not been pled.

Further, there was sufficient evidence to support the chancellor's finding of a confidential relationship between Ward and Cook. A confidential relationship is "a relationship between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, or through trust." The chancellor's findings were consistent with the conservators' testimony regarding their mother's significant physical and mental decline following surgery in 2012, the evidence of Cook's close relationship with Ward and her reliance on him, and the access Ward had to Cook's bank accounts. Ward chose not to testify at trial, so there was no direct evidence in the record to support Ward's claim that Cook acted of her own free will.

Ward also argued the chancellor erred by considering hearsay testimony regarding what a bank teller told Cook's son. However,

Ward failed to object to the testimony at trial. The failure to object to hearsay operates as a waiver of the issue on appeal. Additionally, it appeared Ward was complaining about testimony that his own attorney elicited.

As to Cooks' competency, Ward argued the chancellor erred by finding Cook was not competent to sign the deed to the real property. Although the chancellor did state Cook lacked capacity to sign the deed, the chancellor's primary finding of undue influence was not dependent on any finding that Cook was totally incompetent. There was substantial evidence to support the chancellor's finding of undue influence, which was the primary basis on which she set aside the deed, and that finding was, by itself, sufficient to sustain the judgment in favor of the conservators.

Ward also challenged the conservatorship itself, filing a motion mid-trial to set aside the conservatorship, alleging Cook did not receive five days' notice of the hearing on the conservatorship petition as required by Miss. Code Ann. § 93-13-253. The chancellor denied the motion and ruled that Ward was a "stranger" to Cook's conservatorship and lacked standing to challenge it. A person has both standing and a right to petition for the removal of a conservator if that person has a legitimate interest present or prospective in the ward's estate, or some personal responsibility as regards the estate or the care or welfare of the ward. In this case, the estate's claim that Ward had wrongfully taken money and property from Cook did not give Ward a legitimate interest in Cook's estate. Therefore, Ward was a mere "stranger" to the estate.

Ward also argued the chancellor erred by allowing Cook's daughter to testify about the meaning of Cook's Hemoglobin A1c test results. Any error in allowing the daughter to testify about the test results was harmless. The chancellor's opinion mentioned the test results only briefly, and there was nothing to indicate the issue impacted the chancellor's decision.

Finally, Ward argued the chancellor erred by excluding an expert witness. Ward's argument included no citations to the record or relevant legal authority. Therefore, the argument was procedurally barred. In addition, the issue was without merit. Ward attempted to designate a new expert witness, a psychologist, just before the second day of trial. Uniform Chancery Court Rule 1.10(a) provides, "Absent 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." Ward clearly violated this rule. Thus, there was no error. (*Summary prepared by April McDonald, Heidelberg Steinberger, P.A., Pascagoula, MS.*)

Workers' Compensation / Statutory Interpretation

***Young v. Air Masters Mechanical Inc.*, No. 2018-CT-00401-SCT (Miss. Apr. 30, 2020).**

Daniel Tewksbury and Bobbie Young were previously married and were the parents of two minor children, Lane and Emma. They divorced in May 2006, and Daniel was ordered to pay child support. Daniel stopped making child support payments in 2008. Bobbie later married Gerald Young, Jr., who adopted Lane and Emma. In the adoption, Daniel's parental rights were terminated. As of the termination of his parental rights, Daniel owed Bobbie $34,759 for child support.

On April 5, 2015, Daniel died in an automobile accident which occurred while he was in the course and scope of his employment with Air Masters. Bobbie filed a petition with the Workers' Compensation Commission on behalf of Lane and Emma. The administrative judge determined the question was whether the child-support lien should be paid from Daniel's death-benefit proceeds due under the workers' compensation statute. The administrative judge held the child support lien of $34,759 was valid and payable under Miss Code Ann. § 71-3-129. Air Masters filed a petition for review with the Commission. The Commission concluded Lane and Emma were not entitled to Daniel's death benefits because they were not his statutory dependents under section 71-3-25 and dismissed Bobbie's petition.

On appeal, the Court of Appeals reversed the Commission's decision, concluding the child support lien was valid under section 71-3-129. The Court reasoned the child support payments were vested and the adoption did not preclude Bobbie's ability to execute on the lien. The Supreme Court granted certiorari.

Pursuant to section 71-3-25, death benefits are payable only to specified persons, such as a surviving spouse, child or children, and other persons dependent on the deceased employee at the time of the injury that resulted in death. At the time of the injury that resulted in his death, Daniel had no dependents. Therefore, other than funeral expenses, no death benefits were payable. An employee's natural child is no longer considered a dependent of the employee entitled to receive death benefits under the Workers' Compensation Act once the child has been adopted and the employee's parental rights and obligations to that natural child have been terminated. If there are no statutory death benefits to be paid, there are no benefits to which the $34,759 child support lien can attach.

The claimants argued the child support should be paid under the authority of section 71-3-129. Section 71-3-129(1) provides that the lien only applies to benefits "payable to an obligor delinquent in child support ...." Thus, the lien cannot apply to death benefits because death benefits are not payable to the employee. As a result, the child support lien could not be paid from Daniel's death benefits.

Accordingly, the Court of Appeals was reversed and the judgment of the Mississippi Workers' Compensation Commission was reinstated and affirmed. There was a dissent by Presiding Justice Kitchens joined by Presiding Justice King. (*Summary prepared by April McDonald, Heidelberg Steinberger, P.A., Pascagoula, MS.*)

Appellate Jurisdiction / Finality

***Williams v. Taylor Seidenbach, Inc.*, No 18-31159 (5th Cir. May 4, 2020).**

In *Williams v. Taylor Seidenbach, Inc.*, we have the perfect example of a Catch-22—a decision that is both final and not final, depending on geography. How, you ask? Let me explain.

This is the second visit that the case has made to the hallowed

halls of the John Minor Wisdom Courthouse. And the outcome was the same as the first: no jurisdiction could be found. Twelve years ago, the plaintiff filed suit and alleged he contracted mesothelioma from asbestos while working at NASA. As is the typical approach in such cases, he included numerous defendants. In 2014, the Multidistrict Litigation court awarded summary judgment to several defendants, including the two involved in the appeal, and remanded the case to the Eastern District of Louisiana.

In 2016, the plaintiff moved to voluntarily dismiss the four remaining defendants but made a critical error. He dismissed only one with prejudice and did not specify as to the other three if it was with prejudice or not. The plaintiff then appealed. But the appellate court dismissed for lack of jurisdiction, determining that the dismissal of the three defendants by the district court was without prejudice and, ergo, not final.

So, as you might expect, the plaintiff tried to rectify the error. He went across the courtyard from the JMW Courthouse (where the Fifth Circuit is) to the Hale Boggs Federal Building (where the district court is). He moved under Rule 54(b) that the defendants who had been dismissed without prejudice be dismissed with prejudice. The district court complied.

The plaintiff then returned across the courtyard to try again. Here is where geography comes into play. The Fifth Circuit held that the Rule 54(b) judgment had no effect because the three defendants "had already been voluntarily dismissed under Rule 41(a)" and the case was no longer pending in the district court. So, the Rule 54(b) judgment did not work to magically transform the without-prejudice dismissals into with-prejudice dismissals. And jurisdiction remained lacking. In sum, the case was final in front of the district court on one side of the courtyard but was not final in front of the Fifth Circuit on the other side.

This procedural posture actually has a name—the "finality trap." And the concurrence summed up the problem beautifully. "[E]ither the district court decision is final, or it is not." Here it is both and "ghostly magic" transforms it depending on which side of the courtyard the case is located. (*Summary prepared by Kari Sutherland—Butler Snow LLP, Oxford, MS.*)

Negligence / Premises Liability

***Nancy G. Lefler v. Tommie L. Wasson*, No. 2019-CA-00393-COA (Miss. Ct. App. May 5, 2020).**

Tommie Wasson purchased a historic property in Attala County, Mississippi. The purchase seems to have followed all normal procedures, with Wasson having inspected the property as part of the purchase. As part of that inspection, Wasson learned that a brick on a path on the property was out of place and had it repaired. Wasson then entered into a lease agreement with Nancy Lefler, with Lefler agreeing to pay rent to reside at the property. Prior to signing the lease agreement, Lefler, her husband, and Wasson inspected the property. Mere days after signing the lease and after having used the brick path on several occasions, Lefler tripped and fell on a brick on the path leaving the property, breaking her ankle.

Lefler sued Wasson for negligence. She argued that Wasson had failed to keep the premises in proper order. After discovery, Wasson moved for summary judgment on the basis that the property was reasonably safe and lack of notice of a potential brick loosening on the stairs. The trial court agreed and granted summary judgment, from which Plaintiff appealed.

The parties agreed that Lefler was an invitee on the property, which resolved the classification issue. The Court then recited established premises liability principles for establishing liability against the owner of property. The case turned, however, on the Court's determination that "[t]he brick stairs and path in this case fall within the 'normally encountered dangers' that do not give rise to liability." Lefler's argument hinged on the fact that Wasson had to replace one singular brick after she initially inspected the property and that, according to Lefler, should have put Wasson on notice that the stairs and path were defective. The Court disagreed, finding that "[t]his does not lead to the inference that *all* the bricks on the path would potentially be loose." Accordingly, the Court held that Lefler produced no proof that the path and stairs in question posed any unreasonable danger and, as such, affirmed the lower court's grant of summary judgment. (*Summary prepared by Hal S. "Hank" Spragins, Jr. – Hickman, Goza, & Spragins, PLLC, Memphis, TN.*)

Insurance / Summary Judgment

***Rudd v. State Farm Fire & Cas. Co.*, No. 2018-CA-01390-COA (Miss. Ct. App. May 5, 2020).**

On July 27, 2010, Deanna Rudd was involved in a rear-end motor vehicle accident with Chrisma Houston, an uninsured/underinsured motorist. Both vehicles were traveling between 25 and 30 miles per hour, and, on scene, Rudd complained of back and neck pain.

Three days after the accident, Rudd told State Farm she would "handle everything" herself through Houston's carrier—Allstate. For the following year, State Farm stayed in contact with Allstate, and on November 5, 2012, Allstate informed State Farm "Rudd had at least $42,000 in medical bills." In December 2012, a State Farm claim representative began reviewing Rudd's medical records "to determine how much UM/UIM exposure was present."

Given Rudd's pre-existing conditions and the fact that after the initial two months of treatment there was a seven-month gap in which no treatment was sought, State Farm determined only $13,531.50 of the $42,000 in medical was attributable to the accident. Thus, Rudd was not entitled to any UM benefits as: (1) Allstate tendered its $25,000 in liability limits and (2) State Farm had already tendered its $10,000 in medical pay coverage ("Med Pay"). State Farm informed Rudd of its decision on January 31, 2013.

Rudd did not contact State Farm again until May 2013, approximately two months before the expiration of the statute of limitations, at which point the claim representative offered to contact Allstate to retrieve additional medical records. However, Rudd stated she would retrieve the records herself. In June 2013, the claim representative informed Rudd she had not had time to review the records but would do so. The following month

Rudd informed the claim representative of yet more medical records. The claim representative stressed to Rudd that the new medical records would not be received and reviewed prior to the passage of the statute of limitations on July 27, 2013. The claim representative wrote a follow up letter again stressing the importance of the statute of limitations.

Rudd filed a *pro se* suit on July 26, 2013, seeking UM benefits. State Farm called the circuit clerk's office and was informed there was no record indicating State Farm had been served. Therefore, the claim representative called Rudd to inform her she needed to have an attorney serve State Farm. Rudd filed an amended complaint on November 4, 2013, asserting a bad faith claim against State Farm.

The circuit court granted partial summary judgment to State Farm as to the bad faith claim finding no issue of material fact existed. The Court of Appeals affirmed noting that, to prove bad faith, a plaintiff must prove the carrier acted with malice, gross negligence, or reckless disregard. Further, a carrier's "only obligation is to perform a prompt and adequate investigation of the claim and to deal with the claimant in good faith." After a review of the record, the Court found: (1) State Farm's activity log indicated a "prompt and adequate investigation," (2) State Farm stayed in contact with Rudd and (3) State Farm "repeatedly notified [her] of the impending statute of limitations." Given State Farm's activity, "there was no genuine issue of material fact that State Farm acted maliciously, was grossly negligent, or acted in reckless disregard in handling her claim." This was a legitimate "pocketbook" dispute, which "cannot support a claim for bad faith." There was no dissent. *(Summary prepared by Anna M. Livingston - Steen Dalehite & Pace, LLP, Jackson, MS.)*

Workers' Compensation / Substantial Evidence

***Jones v. Miss. Baptist Health Sys., Inc. & Miss. Baptist Health Servs.*, No. 2018-CT-00930-SCT (May 7, 2020).**

If you did not have whiplash before this summary, you shortly may. In this case, the *en banc* Mississippi Supreme Court reversed the Mississippi Court of Appeals, which had reversed the decision of the Mississippi Workers' Compensation Commission ("WCC"), which had reversed the decision of the Workers' Compensation Commission administrative judge ("AJ"). The outcome is that Ms. Jones, a registered nurse who claimed a compensable back injury, but who did not report a work-related injury to her employer for seven months and who did not report an injury to her healthcare providers, did not sustain a compensable work-related injury.

Ms. Jones worked for Baptist Hospital for fourteen years as a RN. In March 2015, she said she felt a "pop" in her low back while pushing a medicine cart. Her supervisor was working nearby and noticed that Ms. Jones appeared to be in pain afterwards, but she declined medical attention and finished her day. At the time, Baptist required employees to report injuries via its risk management system – a system on which Ms. Jones had been trained—but Ms. Jones did not report an injury.

From March through October 2015, Ms. Jones saw numerous treaters but never once claimed injury from an on-the-job incident. More than once, she denied a direct injury, or at best, put a question mark when asked on patient questionnaires if the visit was injury-related. Indeed, a number of treaters noted that Ms. Jones said her pain had been progressive for years and had no precipitating event. Instead, she was counseled on weight loss and regular exercise. One treater noted her pain as "multifactorial[,] with disc disease, obesity, [and] deconditioning" as contributing. Tellingly, none of her treaters related her condition to a work injury.

Ms. Jones first notified Baptist of the March 2015 medicine cart incident on October 21, 2015. Jones filed a petition and an administrative judge held a hearing in June 2017. Based on some facts not in the record (nor perhaps in existence), the AJ found a work-related injury. Baptist appealed to the WCC, which, in turn, reversed. Ms. Jones appealed to the Court of Appeals, which also reversed. In dissent, Presiding Judge Wilson clairvoyantly noted that the appellate court had based its opinion on a "clear misstatement of current law."

The Supreme Court began by noting two truths. First, it reviewed the WCC decision – not the AJ nor the appellate court's decisions. Second, it would abide by the WCC decision if "supported by substantial evidence" – even if the Court would have decided differently if it was the fact finder. Under that standard of review, the Court easily found substantial evidence that: (1) Ms. Jones' treating physicians did not relate her condition to an injury; (2) Ms. Jones herself did not relate her condition to a work-related injury in multiple doctor visits and in multiple communications over months with her employer; (3) Ms. Jones admitted to pre-existing conditions that were "progressive for years"; and (4) Ms. Jones was a RN who plausibly should have known if the March 2015 "pop" was an injury. Accordingly, the WCC did not clearly err.

In concluding its opinion, the Supreme Court admonished the Court of Appeals for its "serious error" of law. The appellate court had included in its review standard that (1) the Act was to be "construed liberally in favor of the claimants," and that (2) the WCC errs when it does not "carry out the beneficent intent and purpose" of the Act. As noted by Presiding Judge Wilson in dissent and by the Supreme Court, the Legislature specifically amended the Act in 2012 to abolish those principles. (*Summary prepared by Kari Sutherland—Butler Snow LLP, Oxford, MS.*) ■

Get Published!!

The Editorial Board invites you to submit your ideas and topics for consideration to be published in *The Quarterly*. This publication reaches the desks of judges and attorneys who help shape Mississippi practice, bringing significant attention to the topics that affect the defense bar and the attorneys who write about them. If you have an idea or topic that you believe will benefit our membership, please submit them to either Jessica Dilmore (jessica@simmonsdallas.com) or Jane Brown (office@msdefenselaw.org).

Mississippi Defense Lawyers Association

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Application for Membership

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Business Telephone _____ Fax _____

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Date of Birth _____ Date Entered Practice _____

MS Bar #_____ DRI Member (circle) YES NO

Please indicate your primary area of practice:

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- ☐ Drug and Medical Device
- ☐ Employment and Labor Law
- ☐ Governmental Liability
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In compliance with the MDLA Bylaws, I hereby declare that my representation in the handling of litigated cases is primarily for the defense and I meet the requirements as listed on the reverse side of this application.

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MISSISSIPPI DEFENSE LAWYERS ASSOCIATION

Application for Membership

I desire to become a member of the Mississippi Defense Lawyers Association, and if approved by the Membership Committee and Board of Directors, agree to abide by the association's bylaws. Further, I certify that I meet the requirements of the class of membership for which I apply, in accordance with Article III of the bylaws.

My check covering initiation fee and annual dues is enclosed.

Class of membership for which you are applying:

[ ] **GENERAL** (In Practice for Seven or More Years)

Requirements: (1) Member in good standing of the Mississippi State Bar; (2) In private practice and engaged, primarily for the defense and/or on behalf of management in handling and conducting litigation involving, by way of example and not in limitation, tort actions of all types, so-called Title VII and similar actions of labor, anti-trust and other commercial actions, or if not in private practice, then engaged in supervising or otherwise administratively dealing with such litigation for insurance carriers, utilities, railroads, manufacturers, and other industrial and commercial entities; (3) Continuously engaged in the activities described in (2) for seven consecutive years immediately prior to acceptance for general membership; and (4) Manifested a genuine interest in, or sympathy with, the purposes of this association as expressed in Article II of the bylaws.

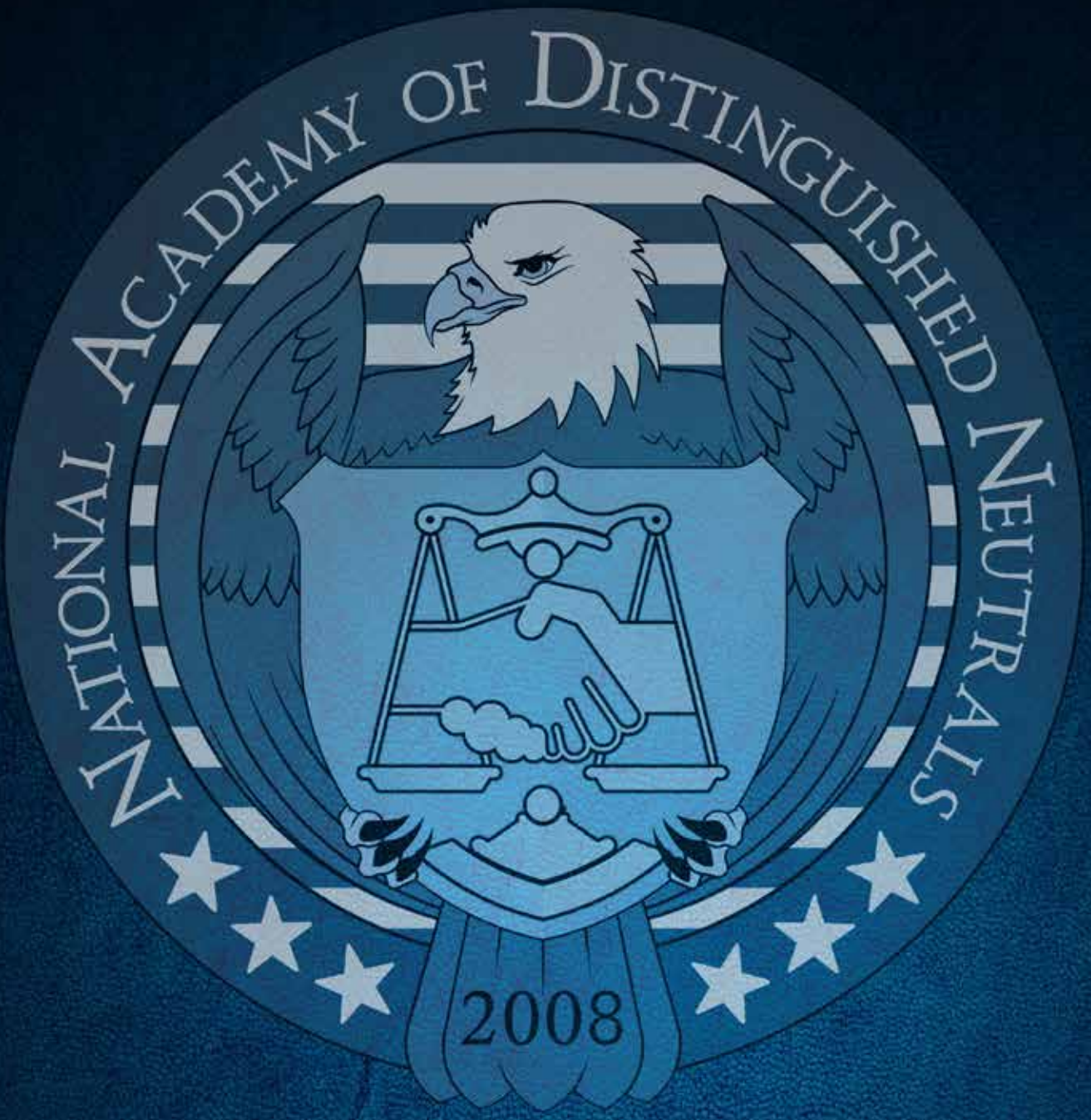
Initiation Fee:	$ 30.00
Annual Dues:	200.00
Total Due:	$230.00

[ ] **ASSOCIATE** (In Practice for Less Than Seven Years)

Requirements: All of the requirements for general membership above except have practiced for less than seven years; and officially sponsored by a general member in good standing who is charged with the responsibility of notifying the association's executive director if the associate member ceases to meet the qualifications for membership described herein.

Associate members shall be entitled to full benefits of membership except they shall not be eligible to vote or to hold office.

Initiation Fee:	$15.00
Annual Dues:	0.00 First year waived (subsequent annual dues of $125.00)
Total Due:	$15.00



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Calendar of Events

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DRI Annual Meeting
Virtual
October 21-23, 2020

Joint Seminar of MS Claims Association and MDLA
Virtual
October 15, 2020

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