

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO: 2015-CA-01644

**MARY CARNATHAN, AS WRONGFUL DEATH
BENEFICIARY OF JOE CARNATHAN, DECEASED**

APPELLANT

VS.

**DR. WILLIAM BRYAN ROGERS, DR. JOSEPH BAILEY III,
DR. WOODROW WILSON BRAND, SURGERY CLINIC OF AMORY,
GILMORE MEMORIAL HOSPITAL, INC.
D/B/A GILMORE MEMORIAL REGIONAL MEDICAL CENTER
AND JOHN DOES 1-5 AND ABC CORPORATIONS 6-10**

APPELLEES

**BRIEF OF APPELLEE DR. WILLIAM BRYAN ROGERS
ON APPEAL FROM THE CIRCUIT COURT OF MONROE COUNTY**

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that this Court may evaluate possible disqualification or recusal.

1. Mary Carnathan, Appellant (“Carnathan”);
2. James D. Moore, Counsel for Appellant;
3. Dr. William Bryan Rogers, Appellee (“Dr. Rogers”);
4. J. Gordon Flowers and Lauren Oaks Lawhorn, Counsel for Dr. Rogers;
5. Dr. Joseph Bailey III, Appellee;
6. David W. Upchurch and John Mark McIntosh, Counsel for Dr. Bailey;
7. Dr. Woodrow Wilson Brand, Appellee;
8. Surgery Clinic of Amory, Appellee;
9. John G. Wheeler, Counsel for Dr. Brand and Surgery Clinic of Amory;

10. Amory HMA, LLC d/b/a Gilmore Memorial Regional Medical Center, proposed Defendant;
11. Louis G. Baine, III, Counsel for Amory HMA, LLC d/b/a Gilmore Memorial Regional Medical Center;
12. Honorable James L. Roberts, Circuit Court Judge of Monroe County.

SO CERTIFIED, this the 20th day of May, 2016.

/s/ Lauren O. Lawhorn

Lauren O. Lawhorn

Counsel for Appellee Dr. William Bryan Rogers

STATEMENT REGARDING ORAL ARGUMENT

Given the overwhelming body of case law requiring medical experts in malpractice cases, and Carnathan's admitted failure to identify an expert here, oral argument is not necessary.

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U.C.C.C.R. 4.047

STATEMENT OF THE ISSUES

1. The Circuit Court properly granted Dr. Rogers' Motion for Summary Judgment because Carnathan failed to obtain a medical expert to support her medical malpractice claim.

STATEMENT OF THE CASE

I. Nature of the Case.

Monroe County Circuit Court Judge Roberts granted summary judgment in favor of Dr. Rogers and the other doctor defendants because Carnathan failed to obtain an expert to establish her medical malpractice claims as required by law, despite having two years after initiating her lawsuit to do so. Because Carnathan conceded that she had not obtained an expert, and because she had ample time and opportunity to obtain an expert, the trial court's summary judgment should be affirmed.

Carnathan made and continues to make the futile argument that because the court never granted her Motion to Amend to correctly name the hospital defendant, the trial court should not have granted the doctor defendants' Motions for Summary Judgment. However, Carnathan offers no legal support for her argument. Judge Roberts concluded that Carnathan's Motion to Amend as to the hospital was independent of her obligation to obtain expert testimony as to the doctors. He also found Carnathan had failed to pursue her amendment. Thus, her Motion to Amend was not a basis for denying the doctor defendants' Motions for Summary Judgment.

II. Course of Proceedings in the Court Below.

The following is a timeline of “undisputed material facts” that are dispositive of this case:

<u>Date</u>	<u>Action</u>
October 1, 2013	Carnathan sent a notice of claim letter. Appellant’s R.E. 14-16. ¹ The letter stated Carnathan’s counsel had spoken with medical experts who believed defendants breached the standard of care. Appellant’s R.E. 15. If true, why not identify the experts?
December 26, 2013	Carnathan filed a medical malpractice lawsuit against the defendants. Appellant’s R.E. 9-16. The complaint included a certificate of consultation. Appellant’s R.E. 13. The case was assigned to Judge Paul Funderburk. Appellant’s R.E. 9.
April 24, 2014	Dr. Rogers filed his Answer to the Complaint and propounded his First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions to Carnathan. C.P. 1:60-69. The discovery requests asked for expert information. C.P. 4:467-485. Specifically, the requests for admissions asked Carnathan to admit that she did not have an expert who would testify that Dr. Rogers was negligent. C.P. 4:483.
May 24, 2014	Dr. Rogers’ Requests for Admissions deemed admitted by Carnathan, who filed no response by the deadline, whatsoever.
May 27, 2014	Carnathan filed a Motion to Amend Complaint and Extend Time to Respond to Discovery. Appellant’s R.E. 22-24.

¹ Carnathan’s Record Excerpts are cited as “Appellant’s R.E. [page].” In addition to Carnathan’s Record Excerpts, Dr. Rogers files his own Record Excerpts, cited as “Rogers’ R.E. [page].” The Clerk’s Papers are cited as “C.P. [vol.]:[page].”

The proposed amendment and need for more time to respond to discovery solely related to amending the complaint to correctly name the hospital. Appellant's R.E. 22-23. *See also* Appellant's Br. at 12 ("Appellant filed a motion to amend the complaint to reflect the proper name of the hospital . . . and for additional time to respond to discovery **due to the need to properly name the hospital**") (emphasis added).

Carnathan did not ask Dr. Rogers to agree to an amendment.

No defendant filed an objection to Carnathan's Motion to Amend.

Carnathan failed to seek a hearing or obtain an order on the Motion to Amend.

September 19, 2014

Dr. Bailey filed his Motion for Summary Judgment. C.P. 1:105-151.

Dr. Bailey argued that Carnathan's claims should be dismissed because she had failed to identify an expert whose testimony would support her claims as required by Mississippi jurisprudence. C.P. 1:107-111.

December 19, 2014

Carnathan sent a proposed order to Judge Funderburk regarding her Motion to Amend.²

Defendants were not requested to agree, but no defendant objected to its entry.

As noted later in this chronology, Judge Funderburk recused himself. It was then incumbent on Carnathan to pursue her Motion to Amend before Judge Roberts, including resending her proposed order.

December 22, 2014

Carnathan filed her response to Dr. Bailey's Motion for Summary Judgment. C.P. 2:156-158.

² Based on counsel for Dr. Rogers' review, Carnathan's letter is absent from the record on appeal.

Carnathan did not identify an expert. C.P. 2:157-158.

February 5, 2015

Dr. Rogers sent a good faith letter regarding Carnathan's failure to respond to his discovery requests. Rogers' R.E. 1-21.

Carnathan's discovery responses were 257 days overdue.

February 18, 2015

Dr. Rogers filed his Motion for Summary Judgment. Rogers' R.E. 22-82.

Dr. Rogers argued that Carnathan's claims should be dismissed because she had failed to identify an expert whose testimony would support her claims as required by Mississippi jurisprudence. Rogers' R.E. 22-24.

February 19, 2015

Judge Funderburk entered an order, *sua sponte*, recusing himself. C.P. 2:227-228.

The case was randomly reassigned to Judge Roberts.

February 23, 2015

Carnathan served her responses to Dr. Rogers' discovery requests. Rogers' R.E. 83-95.

Carnathan **admitted** she had not obtained an expert to support her claims. Rogers' R.E. 90. (“**Plaintiff admits that at this time she has not retained any medical expert to testify at the trial of this cause concerning the standard of care. . . . Plaintiff admits that at this time she has not retained any medical expert to testify at the trial of this cause concerning causation and damages**”) (emphasis added).

March 2, 2015

Carnathan filed her response to Dr. Rogers' Motion for Summary Judgment. Rogers' R.E. 96-99.

Carnathan did not identify an expert. Rogers' R.E. 97.

March 4, 2015

Dr. Rogers filed his reply in support of his Motion for Summary Judgment. Rogers' R.E. 100-118.

March 6, 2015

Dr. Rogers filed his Renewed and Amended Motion for Summary Judgment. Rogers' R.E. 119-160.

The reason for the Renewed and Amended Motion for Summary Judgment was to point out that Carnathan had by then **expressly acknowledged** that she had no expert.

March 23, 2015

Dr. Brand and the Surgery Clinic of Amory filed their Motion for Summary Judgment. C.P. 3:337-351.

These defendants' argument was also based on Carnathan's failure to obtain an expert. C.P. 3:338-341.

April 17, 2015

Court ordered Carnathan to respond to Dr. Rogers' Renewed and Amended Motion for Summary Judgment and Dr. Brand and the Surgery Clinic of Amory's Motion for Summary Judgment. C.P. 3:355-357.

By doing so, the court clearly brought the need for an expert to the attention of Carnathan.

April 30, 2015

Carnathan filed her response to Dr. Rogers' Renewed and Amended Motion for Summary Judgment and Dr. Brand and the Surgery Clinic of Amory's Motion for Summary Judgment. Rogers' R.E. 161-164.

Carnathan again **admitted** she had not obtained an expert to support her claims. Rogers' R.E. 163 ("**That the Plaintiff has admitted that at this time she has not retained an expert to testify at trial**") (emphasis added).

June 19, 2015

Hearing on the defendant doctors' Motions for Summary Judgment. Rogers' R.E. 165-192.

During the hearing, through counsel, Carnathan again **admitted** that she had not obtained an expert to support her claims and failed to give an adequate reason why she had not done so. Rogers' R.E. 179.

Instead, Carnathan argued that she was waiting to obtain an expert until after her Motion to Amend to correct the name of the hospital defendant had been granted, despite the fact that she had filed the Motion to Amend over one year prior and failed to pursue a hearing or obtain an order on it even though the Motion was unopposed. Rogers' R.E. 182.

September 29, 2015

Final Judgment dismissing claims against Dr. Rogers with prejudice is filed. Appellant's R.E. 5-6.

October 2, 2015

Order granting defendant doctors' Motions for Summary Judgment is filed. Appellant's R.E. 1-4.

III. Statement of Facts.

Joe Carnathan was admitted to the hospital for pain management until he could see a colorectal surgeon in Birmingham. During his admission, he was treated by Drs. Rogers, Bailey, and Brand. Mr. Carnathan was discharged from the hospital, taken to a hospital in Birmingham and died shortly thereafter. Almost two years later, his widow filed the lawsuit that is the basis for this appeal.

SUMMARY OF THE ARGUMENT

Carnathan was obligated to support her claims with a medical expert. She failed to identify any expert against any defendant during two years of litigation. Her case was dismissed as a result. The dismissal should be affirmed.

ARGUMENT

I. The Trial Court Properly Granted Summary Judgment for Dr. Rogers Because Carnathan Failed to Identify an Expert to Support her Medical Malpractice Claims.

There is no principal of law more firmly established than the requirement that a plaintiff have expert testimony to establish breach of duty and causation in a medical malpractice case. Carnathan admittedly failed to fulfill that obligation.

Many cases confirm that summary judgment is appropriate absent an expert. *See, e.g.*, *Crosthwait v. S. Healthcorp of Houston*, 94 So. 3d 1070 (Miss. 2012); *Langley v. Miles*, 956 So. 2d 970 (Miss. Ct. App. 2006); *Vaughn v. Miss. Baptist Med. Ctr.*, 20 So. 3d 645 (Miss. 2009); *Travis v. Stewart*, 680 So. 2d 214 (Miss. 1996); *Stallworth v. Stanford*, 921 So. 2d 340 (Miss. 2006); *Mallett v. Carter*, 803 So. 2d 504 (Miss. Ct. App. 2002); *Maxwell v. Baptist Mem'l Hosp.-DeSoto, Inc.*, 15 So. 3d 427 (Miss. Ct. Ap. 2008); *Hubbard v. Wansley*, 954 So. 2d 951 (Miss. 2007); *Moore v. Delta Reg'l Med. Ctr.*, 23 So. 3d 541 (Miss. Ct. App. 2009); *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So. 2d 1037 (Miss. 2003); *Barner v. Gorman*, 605 So. 2d 805 (Miss. 1992); *Smith v. Gilmore Mem'l Hosp., Inc.*, 952 So. 2d 177 (Miss. 2007); *Scales v. Lackey Mem'l Hosp.*, 988 So. 2d 426 (Miss. Ct. App. 2008); *McDonald v. Mem'l Hosp. at Gulfport*, 8 So. 3d 175 (Miss. 2009); *Sheffield v. Goodwin*, 740 So. 2d 854 (Miss. 1999); *McMichael v. Howell*, 919 So. 2d 18 (Miss. 2005); *Johnson v. Lee*, 17 So. 3d 1140 (Miss. Ct. App. 2009); *Estate of Deiorio v. Pensacola Health Trust, Inc.*, 990 So. 2d 804 (Miss. Ct. App. 2008); *Cate v. Woods*, 169 So. 3d 902 (Miss. Ct. App. 2014).

Carnathan seeks to reverse the summary judgment by arguing that she was not obligated to identify an expert because there was no scheduling order mandating disclosure, nor trial date implicating Rule 4.04 of the Uniform Circuit and County Court Rules. This notion was dispelled by Judge Roberts, who ordered a response to Dr. Rogers' Renewed and Amended Motion for Summary Judgment. Despite this clear signal from the trial court, Carnathan made no attempt either during the summary judgment proceedings or during the three months following the hearing to identify an expert or to explain why she could not do so. Carnathan's failure leads to the inevitable conclusion that no credible expert could be located.

Moreover, Carnathan’s argument is in direct contradiction to the Mississippi Supreme Court’s opinion in *Johnson v. Pace*. 122 So. 3d 66 (Miss. 2013) (holding that summary judgment for physician was not premature even though the deadline for patient to designate expert had not passed).

Carnathan has presented no reason for the Court to disregard its well-established precedent. Thus, the Court should affirm the trial court’s summary judgment dismissing Carnathan’s claims against Dr. Rogers with prejudice.

II. The Trial Court Properly Held that Appellant’s Motion to Amend was Irrelevant to her Obligation to Obtain an Expert.

The Motion to Amend is irrelevant to Carnathan’s obligation to obtain expert testimony. She makes the bare assertions that “in the interest of judicial economy” she “**desired** to have all parties actively participating” in discovery and for the trial court to enter “a scheduling order with discovery deadlines,” Appellant’s Br. at 12 (emphasis added), and that “it would not only be prudent but practically necessary for any retained expert to consider the potential liability of all parties to the litigation, one of which (the hospital) was not participating.” *Id.* Carnathan cites no authority in support of her assertions.

Noticeably, Carnathan does not cite the record for the proposition that she “has tried and tried again to amend her pleadings to gain the participation of a necessary party and to reflect its proper identity and have the case put on a scheduling order so that all parties can participate in the discovery and litigation process.” Appellant’s Br. at 13. The truth is, the record reflects no such pursuits by Carnathan. Thus, the trial court did not “fail[] to allow” or otherwise prevent Carnathan from amending her complaint, nor did anyone else. Appellant’s Br. at 10. Instead, the Motion to Amend was not granted because of Carnathan’s failure to fulfill her duty to pursue

the Motion to Amend to hearing and decision by the court. *See* U.C.C.C.R. 2.04. *See also* *Zimmerman v. Three Rivers Planning and Dev. Dist.*, 747 So. 2d 853, 859 (Miss. 2016) (“where there is nothing in the record to indicate that [the appellant] pursued the motion, it is deemed abandoned and the circuit court cannot be said to have abused its discretion for not holding a hearing on or deciding the motion”).

Irrespective of whether she had properly named all the potential defendants, Carnathan was obligated to support her claims against Dr. Rogers with expert testimony or give a sufficient reason as to why she could not do so pursuant to Miss. R. Civ. P. 56(f). *See, e.g., Vicksburg Healthcare, LLC v. Dees*, 152 So. 3d 1171, 1175 (Miss. 2014). Carnathan’s failure to invoke Rule 56(f) and admission that she did not have an expert to support her claims merits affirmation of the trial court’s decision.

CONCLUSION

For the foregoing reasons, the summary judgment dismissing Carnathan’s claims against Dr. Rogers with prejudice should be affirmed.

Submitted this the 20th day May, 2016.

DR. WILLIAM BRYAN ROGERS

By: /s/ Lauren O. Lawhorn
One of His Attorneys

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CERTIFICATE OF SERVICE

I, Lauren O. Lawhorn, one of the attorneys for Appellee Dr. William Bryan Rogers, do hereby certify that I have this day, electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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Further, I hereby certify that I have mailed the foregoing document by U.S. Mail to the Honorable James L. Roberts, Circuit Court of Monroe County, Mississippi, P.O. Drawer 1100, Tupelo, Mississippi 38802-1100.

This the 20th day of May, 2016.

/s/ Lauren O. Lawhorn
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