# 2016-TS-01141

**IN THE COURT OF APPEALS THE STATE OF MISSISSIPPI**

**OTIS FIPPS** — **APPELLANT**

**VS.** — **CASE NO. 2016-TS-01141**

**GREENWOOD LEFLORE HOSPITAL** — **APPELLEE**

**ON APPEAL FROM THE CIRCUIT COURT OF**
**LEFLORE COUNTY, MISSISSIPPI**
**HONORABLE RICHARD A. SMITH, CIRCUIT JUDGE**

## BRIEF OF APPELLEE

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## ORAL ARGUMENT NOT REQUESTED

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OTIS FIPPS APPELLANT

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GREENWOOD LEFLORE HOSPITAL APPELLEE

**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 the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

a. Otis Fipps, Appellant;

b. Greenwood Leflore Hospital and Dr. Thomas Calvit, in his representative capacity as an employee of Greenwood Leflore Hospital, Appellee;

c. Carlos E. Moore, Esq., counsel for Appellant;

d. Tommie Williams, Esq., Tommie G. Williams, Jr., Esq., and Harris F. Powers, III, Esq. Upshaw, Williams, Biggers & Beckham, LLP, counsel for Appellee; and

e. The Honorable Richard A. Smith, Circuit Court Judge.

Dated this the 14th day of July, 2017.

s/ Harris F. Powers, III
Harris F. Powers, III

## STATEMENT REGARDING ORAL ARGUMENT

Appellee Greenwood Leflore Hospital ("GLH") does not request oral argument on the issues presented in this Brief. GLH submits that all points and authorities addressed herein are properly supported by existing and longstanding decisions of the Mississippi Appellate Courts, including, among others:

- West v. Sanders Clinic for Women, P.A., 661 So.2d 714 (Miss. 1995);
- Cheeks v. Bio-Medical Applications, Inc., 908 So.2d 117 (Miss. 2005);
- Hubbard v. Wansley, 954 So.2d 951 (Miss. 2007);
- Troupe v. McCauley, 955 So.2d 848 (Miss. 2007);
- McDonald v. Memorial Hosp. at Gulfport, 8 So.3d 175 (Miss. 2009)
- Paige v. Miss. Baptist Med. Ctr., 31 So.3d 175 (Miss. App. 2009)
- Figueroa v. Orleans, 42 So.3d 49 (Miss. App. 2010); and
- Cleveland v. Hamil, 155 So.3d 829 (Miss. App. 2013).

Based on the extensive line of cases from the Mississippi Appellate Courts fully supporting GLH's positions in this Appeal, GLH submits that oral argument in this case is unnecessary and an appropriate resolution of this Appeal can be made on the briefing.

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**BRIEF OF APPELLEE**

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## I. STATEMENT OF THE ISSUES

The following issues form the basis of the appeal in this case:

1. The Trial Court Properly Granted GLH's Motion to Limit/Exclude Evidence, and Properly Excluded the Proposed Expert Testimony of Dr. Myron Stokes, Due to His Lack of Qualification.

2. The Trial Court Properly Granted GLH's First Motion in Limine, and Properly Excluded the Proposed Expert Testimony of Dr. Myron Stokes, Due to His Lack of Qualification and Plaintiff's Failure to Disclose Dr. Stokes' Opinions Regarding "Informed Consent."

3. The Trial Court Properly Granted GLH's Second Motion in Limine, and Properly Excluded Dr. Stokes' Testimony Regarding the Status of His Medical Licensure.

## II. STATEMENT OF THE CASE

This Appeal arises out of three (3) eminently correct evidentiary rulings of the Circuit Court of Leflore County, Mississippi, excluding expert witness testimony from Plaintiff's expert, Dr. Myron Stokes, in this lawsuit alleging medical negligence against Greenwood Leflore Hospital ("GLH") and its employee, Dr. Thomas Calvit.

Plaintiff Otis Fipps filed his Complaint in the Circuit Court of Leflore County on August 12, 2013, alleging medical negligence against GLH and its employee, Dr. Thomas Calvit. R. 3-8. The lawsuit alleged that GLH and Dr. Calvit negligently performed an esophagogastroduodenoscopy (EGD) procedure on Otis Fipps on June 12, 2012, and alleged that as a result of the procedure, Fipps suffered complications which required additional treatment, and sought damages therefore. R. 04-05. GLH denied all allegations of negligence against it and against its employee, Dr. Thomas Calvit. R. 52.

As this lawsuit alleges medical negligence, Fipps was required to prove his case by expert testimony. See, generally, Knight v. Tyler Holmes Mem. Hosp., 201 So.3d 1088, 1093 (¶ 15) (Miss. App. 2016). This case alleges breaches of the standard of care owed to a patient by a gastroenterologist - Dr. Thomas Calvit - in performing an EGD procedure. Fipps designated Dr. Myron Stokes - a general surgeon who was not qualified to express expert opinions in the medical specialty of gastroenterology, the medical specialty held by Dr. Calvit - to express expert opinions in support of his claims.

The Trial Court properly excluded Dr. Stokes' proposed expert opinions on the basis that Stokes did not demonstrate sufficient familiarity with the medical specialty of gastroenterology, and therefore lacked the requisite qualification to express his opinions in accordance with M.R.E. 702 and the prevailing law applied in medical negligence cases. R.E. 4-13. As Fipps lacked expert

testimony to support his allegations of medical negligence, the trial court properly dismissed the action. See, Knight v. Tyler Holmes Mem. Hosp., supra, 201 So.3d at 1093-1094 (¶ 19).

A timeline of proceedings before the Trial Court forms the statement of facts relevant to the disposition of the issues raised in this Appeal, and are detailed below.

## III. STATEMENT OF FACTS AND PROCEEDINGS IN THE TRIAL COURT

1. This lawsuit arises out of an esophagogastroduodenoscopy (EGD) procedure performed on Plantiff Otis Fipps by Dr. Thomas C. Calvit at Greenwood Leflore Hospital (GLH) on June 12, 2012. R. 4.

2. On June 12, 2012, Dr. Thomas C. Calvit was a physician certified in the medical specialties of internal medicine and gastroenterology, employed by GLH. R. 30, R. 289.

3. Fipps filed a Complaint against GLH and Dr. Calvit on August 12, 2013, alleging that Dr. Calvit negligently performed the EGD with an esophageal dilatation procedure, causing a perforation of Fipps' esophagus, and which led to further medical complications. R. 4, ¶ 7. This lawsuit was filed pursuant to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1, et seq. R. 8, ¶ 15. GLH and Dr. Calvit denied all allegations of negligence against them. R. 52-58.

4. On or about October 20, 2013, Fipps' testifying expert, Dr. Myron Stokes, prepared an Affidavit of expert opinions. R. 73. Dr. Stokes characterized himself as a physician "practicing in the field of surgery, with extensive experience and knowledge of recognized practices in surgically treating patients with upper and lower GI problems." R. 73, ¶ 1. Dr. Stokes' curriculum vitae shows that while he is board certified in the field of surgery, Dr. Stokes is not board certified in the medical specialties of internal medicine or gastroenterology. R. 65-72. Dr. Stokes' curriculum vitae does not reflect any specific education, training, experience or research in the medical specialties of internal medicine or gastroenterology. R. 65-72.

5. On April 21, 2014, Fipps formally designated Dr. Stokes as his only testifying expert witness in this case, specifically tendering Dr. Stokes as "a surgical specialist and an expert in surgery regarding upper and lower gastrointestinal issues." R. 62. The Designation of Experts specifically provided that "Dr. Stokes' opinions are based on his specialized knowledge, skill, experience in surgery regarding upper and lower gastrointestinal issues." R. 63. Thus, to the extent Fipps designated Stokes in any medical specialty, that specialty is surgery. Again, it should be noted Dr. Calvit's specialities are internal medicine and gastroenterology (R. 289), while Dr. Stokes holds himself out as an expert in the specialty of surgery. (R. 62, 63, 73).

6. The Designation of Experts further stated that Dr. Stokes would testify that: (1) Dr. Calvit's actions exhibited a deviation from the standard of care expected in Dr. Calvit's profession and specialty, and (2) that an esophageal dilatation performed during the EGD procedure was the "initiating event that led to Plaintiff developing a fistula with resulting neck abscesses requiring two additional surgeries." R. 63.

7. Fipps' April 21, 2014 Designation of Experts included Dr. Stokes' curriculum vitae and attached Stokes' October 20, 2013 Affidavit of opinions discussed above. In Dr. Stokes' Affidavit, he offers the opinion that "the performance of esophageal dilatation [during Fipps' June 12, 2012 EGD procedure] was not proven to be indicated in any of Dr. Calvit's pre-operative or interoperative findings, thus constituting *a deviation from the standard of care expected of a physician in Dr. Calvit's profession and specialty.*" R. 74 (emphasis added). Again, Dr. Calvit's medical specialties are internal medicine and gastroenterology (R. 289), while Dr. Stokes holds himself out as an expert in the medical specialty of surgery (R. 62, 63, 73).

9. The second opinion expressed by Stokes in his Affidavit is that the esophageal "dilatation performed [during Fipps' June 12, 2012 EGD] was the initiating event that led to Mr.

Fipps developing a fistula with resultant neck abscess requiring two (2) additional surgeries." R. 74.

10. These are the only two (2) substantitive opinions contained in Stokes' Affidavit supporting Fipps' allegations of negligence against Dr. Calvit. Further, Stokes' Affidavit and Fipps' designation of experts contain no expert opinions on a medical issue of "informed consent."

11. GLH noticed Stokes' deposition, and Stokes' testimony was taken on September 5, 2014. In his testimony, Stokes testified that he completed a residency in general surgery, and an internship in general surgery. R. 112, 17:21-22, 18:18-23. Stokes testified that he is board certified in general surgery. R. 113, 21:05-22:16. However, Stokes expressly testified that he had received no training in internal medicine and was not board certified in the medical specialties of internal medicine or gastroenterology. R. 113, 23:01-24:10.

12. Stokes testified that he had no experience using a Maloney dilator, the medical device employed by Dr. Calvit, in connection with an EGD procedure. R. 127, 79:11-15; R. 106.

13. Stokes attested that he had never testified in any court as an expert, and for that matter, that he had never consulted in any cases involving an EGD with a dilatation procedure. R. 113, 23:01-03; R. 120, 49:21-49:25.

14. In the deposition, GLH's counsel established that Stokes' opinions were limited to the dilatation of Fipps' esophagus during the EGD procedure. R. 124, 67:22-68:04. And, during examination by GLH's counsel, Stokes confirmed that he was not offering any opinions on the medical issue of informed consent. R. 126, 76:01-24; R. 127, 80:16-22; R. 128, 81:02-07.

15. When tendered for cross-examination, however, Fipps' counsel immediately began questioning Stokes regarding the issue of informed consent. R. 128, 82:19. GLH immediately objected to any undisclosed and untimely opinions regarding informed consent. R. 128, 83:11-21; R. 130, 89:24-90:13. Stokes proceeded to express previously undisclosed opinions on the issue of

informed consent, nevertheless acknowledging that he had not formed those opinions until the day of his deposition. R. 132, 99:08-11.

16. **While Fipps' counsel did spend some time examining Stokes on his untimely and previously undisclosed informed consent opinions, Fipps' counsel never qualified Stokes as an expert in the fields of internal medicine or gastroenterology, and never tendered Stokes as an expert in any field of medicine or specialty.**

17. Stokes' deposition proved to be his trial testimony. At the pre-trial conference held on April 18, 2016, Fipps counsel represented that Stokes' deposition would be presented at trial. Tr. 04-05. Fipps' counsel confirmed this at trial on May 31, 2016. Tr. 10.

18. Because of issues raised in Stokes' deposition regarding his qualification and undisclosed opinions regarding informed consent, GLH filed three motions to exclude Stokes' testimony. On May 4, 2016, GLH filed its Motion to Limit Evidence, seeking to exclude Stokes' expert opinions and testimony in their entirety, on the basis that Stokes lacked the necessary qualifications to testify. R. 152. In addition, on May 4, 2016, GLH filed its First Motion in Limine, seeking to exclude Stokes informed consent opinions because they were untimely, and because Stokes lacked the qualification to express them. R. 87. Last, GLH filed its Second Motion in Limine on May 4, 2016, seeking to exclude Stokes' testimony regarding his medical licensure history. R. 146.

19. The Trial Court heard the motions prior to trial on May 31, 2016, and granted all three (3) motions. Tr. 36-37. The effect of the Court's ruling was to exclude the opinions and testimony of Stokes, Fipps' only witness, in their entirety. Accordingly, GLH moved for a directed verdict which was granted by the Trial Court. Tr. 43. On July 5, 2016, a detailed Order was entered by the Trial Court, containing findings of fact and conclusions of law supporting the Trial Court's rulings.

R. 257-266. Fipps filed his Notice of Appeal on August 3, 2016. R. 267.

## IV. SUMMARY OF THE ARGUMENT

This Appeal presents three (3) evidentiary issues for resolution by this Court. As this Court is aware, evidentiary rulings of the Trial Court are reviewed under an abuse of discretion standard. "When reviewing a trial court's decision to allow or disallow evidence, including expert testimony, we apply an abuse of discretion standard." Watts v. Radiator Specialty Co., 990 So.2d 143, 145-146 (¶ 7) (Miss. 2008). "Unless this Court concludes that a trial court's decision to admit or exclude evidence was arbitrary and clearly erroneous, that decision will stand." Id.; Emergency Medicine Assoc. of Jackson, PLLC v. Glover, 189 So.3d 1247, 1260 (¶ 60) (Miss. 2016) (applying same standard in medical negligence case).

The Trial Court properly excluded the proposed opinions and testimony of Plaintiff's expert, Dr. Myron Stokes, in their entirety, and did not abuse its discretion in granting GLH's Motion to Limit/Exclude Evidence regarding Dr. Stokes' opinions and testimony. In accordance with prevailing law, a Plaintiff in a lawsuit alleging medical negligence must prove all elements of the case by expert testimony; in addition, that expert must be sufficiently familiar with the medical specialty at issue to qualify as a testifying expert witness under M.R.E. 702. Cleveland v. Hamil, 155 So.3d 829, 834-835 (¶ 21-27) (Miss. App. 2013). Plaintiff failed to qualify Dr. Stokes as an expert familiar with the specialty of gastroenterology - the medical specialty possessed by Dr. Thomas Calvit. At best, Dr. Stokes may have been qualified in the field of general surgery. Dr. Stokes expressly testified that he was not a gastroenterologist, but a general surgeon. In addition, in Dr. Stokes' report, and in Plaintiff's Designation of Experts, Dr. Stokes was tendered as a surgical specialist, not a specialist in the field of gastroenterology, and as an expert in surgery regarding upper and lower gastrointestinal issues. Dr. Stokes possessed no training in gastroenterology or internal

medicine, a prerequisite to the specialty of gastroenterology. In Dr. Stokes' deposition, Plaintiff's counsel failed to tender Stokes as an expert in gastroenterology, or to qualify him as an expert familiar with the standard of care in the specialty of gastroenterology. Based on this Record, it cannot be argued that the Trial Court abused its discretion in excluding the testimony and opinions of Dr. Stokes, as he lacked the requisite qualification under M.R.E. 702 and the prevailing Mississippi law in medical negligence cases to express opinions. Accordingly, the Trial Court's ruling should be affirmed by this Court.

In addition to generally excluding all of Dr Stokes' opinions due to his lack of familiarity with the specialty of gastroenterology, the Trial Court properly excluded Dr Stokes' opinions on the issue of "informed consent" - a matter raised by GLH in its First Motion in Limine. Because Dr. Stokes is not qualified to express expert opinions in the medical specialty of gastroenterology, he cannot express expert opinions on "informed consent," as applied to a gastroenterologist. See, generally, Jamison v. Kilgore, 903 So.2d 45, 48-49 (¶ 7-15) (Miss. 2005). In order to express opinions on "informed consent" Dr. Stokes must be familiar with the standard of care owed by a gastroenterologist. Id. As set forth above, Stokes does not possess the qualifications to express opinions in the specialty of gastroenterology. Further, (1) Fipps did not plead a cause of action for "informed consent" in the Complaint; (2) Stokes' Affidavit of Opinions does not contain any opinion on the "informed consent" issue; (3) Fipps' Designation of Experts did not contain any indication either that "informed consent" was an issue in the case, or that Stokes would be tendered to express expert opinions on the issue of "informed consent"; and (4) Fipps' responses to GLH's contention Interrogatories failed to reveal any claim for "informed consent" in this lawsuit. For the first time, at his deposition, Dr. Stokes expressed opinions on "informed consent" under questioning by Fipps' counsel, and over objection by GLH's counsel. Stokes' deposition was offered at trial; Stokes was

not called to testify as a live witness. The Trial Court properly found that Stokes' informed consent opinions were untimely, and constituted a trial by ambush. The Trial Court properly excluded those opinions. West v. Sanders Clinic for Women, P.A., 61 So.2d 714, 719 (Miss. 1995). The Trial Court did not abuse its discretion in excluding any "informed consent" opinions from Stokes, and this Court should affirm the Trial Court's ruling.

This Court need not reach the last issue, addressed by the Trial Court in granting GLH's Second Motion in Limine, regarding testimony on Stokes' medical licensure status. In his 2014 deposition, Stokes testified he had never been disciplined by any state's medical licensure board. By the time of the 2016 trial, this fact was no longer true; at the time of trial, Stokes' medical license had been suspended by the Mississippi State Board of Medical Licensure effective January 6, 2016. Thus, Stokes' prior testimony at issue was not factually accurate at the time of trial. Nevertheless, Fipps can claim no prejudice as to the exclusion of this testimony, inasmuch as the Circuit Court Judge was sitting as the trier of fact on all issues, and the Circuit Court Judge did not use Stokes' medical licensure issue as a basis to exclude his testimony. Thus, this issue is also meritless, and this Court should affirm the Trial Court's ruling.

East of these issues is addressed more fully below, following a discussion of the standard of review to be employed by this Court in resolution of the issues raised in this Appeal.

## V. ARGUMENT

As stated above, this Appeal addresses three (3) rulings of the Trial Court excluding the opinions and testimony of Fipps' expert witness, Dr. Myron Stokes, and all issues raised in this Appeal are evidentiary in nature. GLH will address each of the three (3) evidentiary issues below, against this Court's standard of review.

### 1. Standard of Review.

The burden of showing the admissibility of evidence is on Fipps, the proponent of the evidence. Harveston v. State, 798 So.2d 638, 641 (¶ 9) (Miss. 2001). The proponent of expert testimony bears the burden of proving the admissibility of such expert testimony by a preponderance of the evidence. Corrothers v. State, 148 So. 3d 278, 328 (¶ 146) (Miss. 2014); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592, n. 10 (1993). In this case, the Trial Court applied the appropriate evidentiary standards and found that Fipps failed to meet his burden of proof establishing the admissibility of Dr. Stokes' opinions under M.R.E. 702.

When reviewing a trial court's decision to allow or disallow evidence, including expert testimony, this Court applies an abuse of discretion standard. Watts v. Radiator Specialty Co., 990 So.2d 143, 145-146 (¶ 7) (Miss. 2008). This Court will affirm a trial court's ruling, unless it concludes that the trial court's decision to admit or exclude evidence was arbitrary and clearly erroneous. Id.

Based on the foregoing standards, and the facts before this Court in the Record, as set forth more fully below, the Trial Court properly applied the correct legal standards against the facts presented to it in resolving the evidentiary issues, and the Trial Court was eminently correct in excluding the expert testimony and opinions of Dr. Myron Stokes. Based on the facts contained in this Record and the applicable law, this Court should be constrained to affirm the Trial Court's

rulings.

**2. The Trial Court properly granted GLH's Motion to Limit/Exclude Evidence, and properly excluded the proposed expert testimony of Dr. Myron Stokes, due to his lack of qualification.**

In a lawsuit alleging medical negligence against a physician, a plaintiff must establish the following elements in order to make a prima facie case: (1) the requisite standard of care; (2) the physician's failure to conform to the standard of care; (3) that the physician's non-compliance with the standard of care caused the plaintiff's injury; and (4) the nature and extent of the plaintiff's damages. See McCaffrey v. Puckett, 784 So.2d 197, 206 (¶ 33) (Miss. 2001). In a medical negligence case, a plaintiff must establish the elements of his case by expert's testimony. Hubbard v. Wansley, 954 So.2d 951, 957 (¶ 12) (Miss. 2007). Expert testimony is required to identify and articulate the requisite standard of care that was not complied with, and to establish that the breach of the standard of care was the proximate cause or the proximate contributing cause of the patient's injuries. Id.

Mississippi Rule of Evidence 702 governs the admission of expert testimony, and requires that any testifying expert must be qualified "by knowledge, skill, experience, training, or education" in order to provide an expert witness opinion in a lawsuit. As Rule 702 is applied in a medical negligence case, a testifying expert must show "satisfactory familiarity with the specialty" of the defendant physician in order to testify regarding the appropriate standard of care owed by the defendant physician to his patient. McDonald v. Memorial Hosp. at Gulfport, 8 So.3d 175, 181 (¶ 15)(Miss. 2009). Even though a testifying expert is not required to be of the same specialty as the defendant physician, the testifying expert must nevertheless be qualified as possessing knowledge of the specialty of the defendant physician. Id. This Court has recognized that "is illogical to allow a proposed expert to testify as to the standard of care of a specialty with which he has demonstrated

no familiarity." McDonald, 8 So.3d at 182 (¶ 18).

In this case, it is undisputed that Dr. Calvit is board certified in the medical specialties of internal medicine and gastroenterology. It is likewise undisputed that Dr. Stokes is board certified only in the field of general surgery, and has had no training in the specialties of internal medicine or gastroenterology. Fipps failed to qualify, or tender, Stokes as an expert in the specialties of internal medicine and gastroenterology. Accordingly, the Trial Court properly excluded Stokes' testimony.

In a line of cases stating back at least to 1995, this Court has required a testifying expert to demonstrate familiarity with the specialty of the treating physician who is a defendant in a medical malpractice. See West v. Sanders Clinic for Women, P.A., 661 So.2d 714 (Miss. 1995). In that case, the trial court excluded - and this Court affirmed the exclusion of - expert witness testimony from an oncologist, who was testifying as to the standard of care owed by a gastroenterologist, who was treating a patient with colon cancer. Id. at 719. This Court stated that, "the Wests did not establish that as an oncologist, Dr. Taylor was familiar with the standard of care of a gastroenterologist. Therefore, certain parts of Taylor's deposition testimony were properly excluded. While Dr. Taylor testified in his deposition that he had treated patients with recognized clinical signs of colon carcinoma, he did not intimate that he knew how a gastroenterologist would treat such a patient." Id.

More recently, and squarely within the setting of this case, in Cleveland v. Hamil, 155 So.3d 829 (Miss. App. 2013), the Court held that a general surgeon was not properly qualified to give expert opinions in the specialty of gastroenterology, where the Plaintiff failed to establish the general surgeon's sufficient knowledge of the specialty of gastroenterology. Cleveland v. Hamil, 155 So.3d at 833-835 (¶ 21-26).

In this case, Dr. Stokes' curriculum vitae shows that he is familiar with the standards applicable to a general surgeon, as he is board certified in the field of surgery. Fipps' Designation of Experts, as well as Stokes' own Affidavit of opinions, reflect that Stokes holds himself out as an expert in the field of surgery as a surgical specialist in upper and lower gastrointestinal issues. Stokes admitted that he is not board certified in the specialties of internal medicine and gastroenterology. He testified that he considers himself to be an expert in "matters pertaining to *my general surgery training and my practice."* R. 120, 50:15-18. He described his surgical practice as *bread and butter general surgery is my practice and a lot of endoscopies."* R. 120, 50:19-23. While Stokes may be a "bread and butter general surgeon" who performs " a lot of endoscopies", he unequivocally testified that he has never used a Maloney dilator in connection with an EGD procedure, as Dr. Calvit did with Fipps. R. 127, 79:11-15. Stokes testified that he is "not a gastroenterologist but just a general surgeon that does a lot of gastroenterology. So, I mean, we have to be well versed in internal medicine." R. 120, 51:03-06. While this may be how Stokes characterizes himself, he readily admitted that he has no special training in the specialties possessed by Dr. Calvit: internal medicine and gastroenterology. R. 113, 23:01-24:10.

**Further, this Court is reminded that the deposition testimony of Dr. Stokes was submitted as his trial testimony. Nowhere in Stokes' deposition testimony did Fipps' counsel qualify Stokes as an expert familiar with the standards of care in gastroenterology, nor did Fipps' counsel tender Fipps as an expert familiar with the standards of care in gastroenterology. The Trial Court properly recognized these facts. R. E. 7-8, ¶ 18-23. On these facts, it cannot be argued that the Trial Court was in error, and this Court should affirm the Trial Court's rulings based on Cleveland v. Hamil, supra.**

It should be noted that Cleveland v. Hamil, supra, is not an outlier case. This Court has

consistently excluded testimony from testifying physicians in medical negligence cases, where the testifying expert was not sufficiently familiar with the medical specialty at issue. In Figueroa v. Orleans, 42 So.3d 49 (Miss. App. 2010), the Court of Appeals affirmed the trial court's exclusion of expert opinions from a gastroenterologist, who did not demonstrate sufficient familiarity with the standard of care owed by a general surgeon. Figueroa v. Orleans, 42 So.3d at 53 (¶ 13). Likewise, in Paige v. Mississippi Baptist Med. Ctr., 31 So.3d 637 (Miss. App. 2009), the Court of Appeals affirmed the trial court's exclusion of an internal medicine primary care specialist offered to express expert opinions on the standard of care owed by a thoracic surgeon. Paige v. Mississippi Baptist Med. Ctr., 31 So.3d at 641-642 (¶ 19-25).

This Court has held that the opinions of a board-certified pathologist and psychologist should be excluded in a medical negligence case, where those witnesses were not shown to have sufficient familiarity with the standard of care to which a gastroenterologist is held. McDonald v. Mem. Hosp. at Gulfport, 8 So.3d 175, 181-182 (¶ 16-19) (Miss. 2009). Also, this Court has refused to accept the expert opinions and testimony of a neurosurgeon, where the expert has not shown familiarity in the specialty of neuro-otolaryngology. Troupe v. McAuley, 955 So.2d 848 (Miss. 2007). Similarly, this Court has held that a neurosurgeon cannot testify regarding the standard of care owed by a physician practicing internal medicine. Hubbard v. Wansley, 954 So.2d 951 (Miss. 2007). In addition, this Court has held that a family physician is not competent to offer expert opinion testimony regarding the standard of care owed to patients of dialysis clinics. Cheeks v. Bio-Medical Applications, Inc., 908 So.2d 117 (Miss. 2005).

GLH is not asking this Court to do anything other than to follow these long-standing precedents. The Trial Court properly applied each of these decisions in arriving at its rulings excluding the opinions and testimony of Fipps' expert, Dr. Stokes. The Circuit Court correctly

applied the prevailing law, and certainly did not abuse its discretion, in granting GLH's Motion to Limit Evidence, and GLH submits that this Court should affirm the Trial Court's rulings.

### 3. The Trial Court properly granted GLH's First Motion in Limine, and properly excluded the proposed expert testimony of Dr. Myron Stokes, due to his lack of qualification and Plaintiff's failure to disclose Dr. Stokes' opinions regarding "informed consent".

GLH's argument on this issue contains two (2) components. First, Dr. Stokes lacks the requisite qualification to express any expert opinion on the issue of "informed consent" as applied to a gastroenterologist - the medical specialty possessed by Dr. Calvit; thus, GLH restates and reincorporates by reference all arguments contained in § 2, supra. Second, GLH submits that the Trial Court properly excluded all of Dr. Stokes' proposed opinions on the issue of "informed consent" because those opinions were disclosed untimely, for the first time at Dr. Stokes' trial deposition, and as such, constituted a "trial by ambush." For both of these reasons, this Court should affirm the Trial Court's rulings excluding Dr. Stokes' proposed opinions on the issue of "informed consent."

#### a. <u>Dr. Stokes lacks the proper qualification to express opinions regarding "informed consent" as applied to a gastroenterologist.</u>

In order for Dr. Stokes to be able to express opinions on the issue of "informed consent" as applied to a gastroenterologist, he must be sufficiently familiar with the medical specialty of gastroenterology to express the opinion; as set forth above, Stokes does not possess the qualification under M.R.E. 702 to express opinions in the field of gastroenterology. An analysis of the prevailing law on the doctrine of "informed consent" makes this clear.

When an individual claims that a physician has breached the duty to obtain "informed consent" from his patient's for a procedure, the following standards of law apply. This Court has stated:

> The doctrine of informed consent represents the application to medical practice of principles of tort law. Thus, when a lack of informed consent is claimed, the Plaintiff has the burden to prove by a preponderance of evidence each element of the prima facie case: duty, breach of duty, proximate causation, and injury. Regarding duty, this Court has stated that when a physician-patient relationship exists, the physician owes the patient a duty to inform and obtain consent with regard to the proposed treatment. But no doctor could comply with a requirement to disclose every possible risk to every procedure. Therefore, the physician must disclose only material known risks. A known risk is one which would be known to a careful, skillful, diligent and prudent practitioner or specialist. Once the known risks are enumerated, they can then be evaluated as to which are material. The physician may not be required to inform the patient of unexpected or immaterial risks. Among the many factors which could weigh on the question of materiality are the frequency of occurrence, potential severity or danger associated with the risk, and the cost and availability of an alternative procedure. ***These factors cannot be established absent expert testimony. If a known risk is found to be material, and was not disclosed to the patient, then the question of causation must be addressed.***

Dunn v. Yager, 58 So.3d 1171, 1200-1201 (¶ 73) (Miss. 2011) (internal citations and quotations omitted, emphasis added).

Further, this Court has held:

> When a physician-patient relationship exists, the physician owes the patient a duty to inform and obtain consent with regard to the proposed treatment. Proving breach of duty requires more than mere allegation that the physician did not obtain informed consent. . . Once proof of duty and breach of that duty is provided, the Plaintiff is required to produce evidence of two sub-elements of causation. First, the Plaintiff must show that a reasonable patient would have withheld consent had she been properly informed of the risks, alternatives, and so forth. And second, the Plaintiff must show that the treatment was the proximate cause of the worsened condition (ie., injury). That is, the Plaintiff must show that she would not have been injured had the appropriate standard of care been exercised. ***Generally, proof of the latter sub-element requires expert testimony that the defendant's conduct - not the patient's original illness or injury - led to the worsened condition.***

Palmer v. Biloxi Reg'l Med. Ctr., Inc., 564 So.2d 1346, 1363-1364 (Miss. 1990) (emphasis

added).

As such, Fipps was required to establish all elements of an informed consent case by expert testimony; and, again, in order to be qualified to testify about all elements of an informed consent case, Dr. Stokes is required to be familiar with the standards applicable to gastroenterology - the specialty possessed by Dr. Calvit. Dunn v. Yager, 587 So.3d at 1202 (¶ 77); Palmer, supra, 564 So.2d at 364.

As set forth above, Fipps failed to establish that Dr. Stokes was qualified to express expert opinions and testimony in the fields of gastroenterology, and the Trial Court properly excluded those opinions. Based on the foregoing law as applied in informed consent cases, the same conclusion must be reached here: because Dr. Stokes is not qualified to express standard of care opinions in the field of gastroenterology - the specialty held by Dr. Calvit - he cannot express any opinions on negligence in the performance of the EGD procedure, and he cannot express any opinions regarding an informed consent claim.

For this reason, and this reason alone, this Court should affirm the Trial Court's ruling precluding Dr. Stokes from expressing any expert opinions or testimony on the informed consent issue. However, there is an additional basis to exclude any opinions and testimony on an informed consent claim: the fact that the informed consent claim was never pleaded, and the fact that Fipps never disclosed that Dr. Stokes, or any other witness for that matter, would express an opinion on any informed consent claim. The Trial Court properly found that Stokes' untimely opinions regarding informed consent constituted a "trial by ambush." This second basis for exclusion of Stokes' informed consent opinion is addressed below.

**b. Dr. Stokes' undisclosed informed consent opinions are untimely and constitute "trial by ambush."**

The Complaint in this lawsuit was filed on August 12, 2013. R. 3-8. The Complaint alleges specific allegations of negligence against Dr. Calvit and GLH (R. 5-6, ¶ 9,11) and alleges more general allegations of negligence against the Defendants in failing to "prevent the injury to Otis Fipps' esophagus and failing to anticipate surgical complications including perforation of the esophagus and development of infection therefrom, and to provide such other care as is consistent with the national standards of care" ( R. 7, ¶ 13). No cause of action for informed consent is pleaded anywhere in the Complaint.

Fipps retained Dr. Myron Stokes as a testifying expert, apparently at some point prior to November 20, 2013. Dr. Stokes executed an Affidavit of expert opinions on November 20, 2013. R. 73-75. In that Affidavit, Stokes expressed two opinions: (1) that the dilatation procedure performed by Dr. Calvit during the June 12, 2012 EGD was not proven to be indicated by pre-operative or intraoperative findings, and (2) that the dilatation procedure performed by Dr. Calvit was the initiating event that led to Fipps' subsequent medical complications. R. 74, ¶ 4. The Affidavit of opinions does not contain any statement of opinions regarding informed consent. While Stokes reserved the right to supplement his report, he never did; the only Affidavit of opinions ever submitted by Stokes was the November 20, 2013 report.

GLH propounded Interrogatories to Fipps, and Fipps' responses were served on January 31, 2014. R. 135-145. In those Interrogatory responses, Fipps disclosed the identity of Dr. Stokes as a testifying expert witness, and disclosed a brief statement of expert opinions; however, Fipps did not disclose an expert opinion from Stokes or anyone else

regarding informed consent. R. 135, Interrogatory No. 1.

GLH submitted contention Interrogatories on Fipps' allegations of negligence in the lawsuit. In response to the Interrogatories designed to elicit contentions of negligence against GLH, Fipps did not raise any issue with respect to informed consent. R. 140-141, Interrogatory Nos. 19, 22. Likewise, when requested to identify all acts of negligence against Dr. Calvit, Fipps did not address any breach of the standard of care to support an informed consent claim. R. 140-141, Interrogatory Nos. 20, 23.

The Scheduling Order required Fipps to designate his experts by April 30, 2014. R. 60. On April 22, 2014, Fipps designated Stokes as his only expert, and served GLH with Stokes' November 20, 2013 Affidavit discussed above. R. 62. Fipps did not designate Stokes, or any other expert, to testify regarding the issue of informed consent. Again, Fipps represented that Stokes reserved the right to supplement his opinions; however, Stokes never supplemented the opinions contained in his November 20, 2013 affidavit, and Fipps never amended the April 22, 2014 Designation of Experts.

In summary: a claim for informed consent was not pleaded in the Complaint; Fipps' contention Interrogatory responses did not disclose any informed consent issue; Stokes' November 2013 Affidavit of opinions does not contain any opinions with respect to informed consent; Fipps' Designation of Experts did not designate any expert, or any opinion, regarding informed consent; Fipps never supplemented any expert Interrogatory or disclosure to address an informed consent issue; and, in fact, no mention of "informed consent" appears anywhere in Plaintiff's pleadings prior to Stokes' September 5, 2014 deposition.

On September 5, 2014 GLH's counsel examined Stokes on his opinions. Under

examination by GLH's counsel, Stokes confirmed that he prepared his Affidavit of opinions, and his Affidavit of opinions did not require any correction. R. 121, 54:04-54:19. Stokes further testified that he was not asked to express any opinion on informed consent, and that he had no reason to express, any opinion on informed consent R. 126, 76:08 - 76:24. Stokes confirmed to GLH's counsel that the only opinions he intended to express were contained in his Affidavit as explained in his deposition. R. 127-128, 80:16-81:07.

Nevertheless, on cross-examination Fipps' counsel immediately began questioning Stokes regarding previously disclaimed, previously undisclosed, and untimely opinions on informed consent. GLH's counsel immediately objected to any informed consent opinions on the basis that they were undesignated, and untimely. R. 128, 83:11-83:21. Undeterred, Fipps' counsel proceeded to elicit undisclosed opinions from Stokes on the issue of informed consent, despite the fact that informed consent had not been placed in issue by any pleading, or by Fipps' Designation of Experts. In fact, Stokes even admitted that prior to his deposition, he was not asked to render any opinions concerning informed consent. R. 132, 99:08-99:11.

The September 5, 2014 deposition was, in essence, the trial testimony of Dr. Stokes. At the pretrial conference, Fipps' counsel advised that Dr. Stokes would not be called to testify as a live witness, but that Stokes' deposition would be submitted as his trial testimony. Tr. 5. Accordingly, Greenwood Leflore Hospital filed its First Motion in Limine seeking to exclude Stokes' undisclosed opinions on informed consent. R. 87-92.

At trial on May 31, 2016, Fipps' counsel again confirmed that Stokes would not be called live to testify, but that his opinions would be presented by deposition. Tr. 10. The Trial Court heard GLH's First Motion in Limine, and excluded Stokes' previously

undisclosed informed consent opinions. R. 259, 261, 266; Tr. 36-37. The Trial Court's ruling was proper, consistent with Mississippi law, and should be affirmed by this Court.

Mississippi Rule of Civil Procedure 26 requires a party to identify each person whom they expect to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts an opinions to which the expert is expected to testify and a summary of the grounds for each opinions. See M.R.C.P. 26(b)(4)(A)(i). This Court has stated that "the substance of every fact and every opinion which supports or defends the party's claim or defense must be disclosed and set forth in meaningful information which will enable the opposing side to meet it at trial." Bailey Lumber & Supply Co. v. Robinson, 98 So.3d 986, 997(¶ 30) (Miss. 2012) (internal citations omitted). "[E]xpert testimony is subject to special discovery rules to 'allow the opposing party ample opportunity to challenge the witness' qualifications to render such opinion before the question soliciting opinion is posed in front of the jury.'" Griffin v. McKenney, 877 So.2d 425, 438 (¶ 46) (Miss. App. 2003). The very purpose of disclosing expert opinions before trial is "to prevent trials from being tainted with surprise and "unfair advantage, and to prevent "trial by ambush"." Griffin v. McKenney, 877 So.2d at 441 (¶ 54); Haggerty v. Foster, 838 So.2d 948, 960 (¶ 35) (Miss. 2002).

At no point in time in the life of this lawsuit prior to Dr. Stokes' trial deposition did Fipps raise the issue of informed consent. The Trial Court properly excluded these undisclosed opinions. See Robinson v. Corr, 188 So.3d 560 (Miss. 2016) (affirming Trial Court's exclusions of previously undisclosed expert medical testimony, received for the first time at trial). It does not avail Fipps that he reserved the right to supplement expert opinions in his Designation of Experts and in Stokes' Affidavit. "M.R.C.P. 26(f)(2) provides that a

party is under a duty to reasonably amend a prior response if he obtains information which rendered the initial response inadequate or where a failure to amend the response is in substance a knowing concealment. Seasonably does not mean several months later. It means immediately." West v. Sanders Clinic for Women, P.A., 661 So.2d 714, 721 (Miss. 1995). A supplementation at trial is not a seasonable supplementation. Id.

Further, simply reserving the right to supplement a response does not entitle a supplementation at trial. If a party states that it will supplement an expert witness interrogatory, it is incumbent upon that party to actually supplement their response; a Trial Court will not be put in error for failing to admit evidence when a supplementation was promised, but not delivered until the day of trial. Palmer v. Volkswagen of America, Inc., 904 So.2d 1077, 1090 (¶ 55) (Miss. 2005).

Stokes' informed consent opinions were never disclosed until the date of his trial deposition. The Trial Court, following prevailing Mississippi law, excluded the informed consent opinions. This ruling was correct, and should be affirmed on appeal by this Court.

**4. The Trial Court properly granted GLH's Second Motion in Limine, and properly excluded Dr. Stokes' testimony regarding the status of his medical licensure.**

In his September 5, 2014 deposition, Dr. Stokes testified that he had never been disciplined by any state's medical licensure board. R. 111, 14:21-23. However, on January 6, 2016 - prior to the May 31, 2016 trial setting - Dr. Stokes was the subject of an *Order of Prohibition* from the Mississippi State Board of Medical Licensure, which required that Stokes "be immediately prohibited from practicing medicine until such time as he fully complies with all the terms of his monitoring agreement and is deemed to be able to practice medicine with reasonable skill and safety, including any further re-evaluation deemed

necessary and appropriate under the circumstances." R.149-151. Accordingly, as Stokes' prior deposition testimony had been proven to be untrue and inaccurate, GLH filed its Second Motion in Limine seeking to preclude any deposition testimony which was inconsistent with the truth as disclosed by the Mississippi Board of Medical Licensure *Order of Prohibition*. R. 146.

In response, on May 18, 2016, Fipps filed a Motion to Substitute Expert and Continue Trial due to the discovery of the *Order of Prohibition* against Dr. Stokes entered by the Mississippi Board of Medical Licensure. R. 200-201.

The Trial Court denied Plaintiff's Motion for Continuance, stating: (1) "Plaintiff's Motion for Continuance is denied as Dr. Stokes may testify whether licensed or not and as this was a bench trial, no irreparable 'undue' prejudice will come to the Plaintiff" (R.259); and (2) "Plaintiff's Motion for Continuance is denied as Dr. Stokes' not being licensed in Mississippi would not prevent his testifying if qualified and would not unduly prejudice the Plaintiff" (R. 266). Notably, the denial of the Motion to Substitute Expert and Continue trial is not before this Court on appeal.

The Trial Court further granted GLH's Second Motion in Limine, stating that, "Dr. Stokes will not be allowed to testify that he is licensed to practice medicine in the State of Mississippi or that he has never been disciplined by any medical licensure board." R. 260. Fipps does appeal this portion of the Trial Court's ruling, although the issue is meritless.

This Court is reminded that this lawsuit arises under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1, et seq. R. 8, 49. Thus, the case preceded to trial as a bench trial, with the Circuit Court Judge sitting as the trier of fact. It is undisputed that Dr. Stokes' 2014 deposition testimony, while arguably true at the time of the deposition, was no longer

true at the time of trial. A trial court is not required to accept false testimony. Hill v. United Timber & Lumber Co., 68 So.2d 420, 426 (Miss. 1953). As the testimony was false, the Trial Court was not bound to accept the testimony, and properly excluded it.

Where error involves the admission or exclusion of evidence, this Court "will not reverse unless the error adversely affects a substantial right of a party." In Re: Estate of Mask, 703 So.2d 852, 859 (¶ 35) (Miss. 1997). As correctly pointed out by the Trial Court, there was no unfair prejudice to Fipps by the ruling: the case was a bench trial, and the Trial Court was aware of the falsity of the testimony, yet did not rely on that fact alone to exclude any of Dr. Stokes' substantive opinions. The Trial Court properly noted that Stokes' medical licensure issue was not, of itself, grounds to exclude his testimony *if he was otherwise qualified;* based on the analysis contained in §2 above, the Trial Court properly found that Stokes was not otherwise qualified, and his medical licensure issue played no part in that finding.

Accordingly, this assignment of error is without merit, and the Trial Court's ruling should be affirmed.

## VI. CONCLUSION

GLH has shown that the Trial Court's rulings in this case excluding the expert opinions and testimony of Fipps' expert, Dr. Myron Stokes, are correct, consistent with controlling Mississippi law, and should be affirmed by this Court.

Fipps failed to establish that Dr. Stokes, a general surgeon, is sufficiently familiar with the prevailing standards of care owed by a physician practicing the medical specialty of gastroenterology, the specialty possessed by Dr. Calvit.

The Trial Court correctly found that Stokes' opinions on the issue of informed

consent were untimely and not properly designated, when they were disclosed for the first time in Stokes' trial testimony.

Last, the Trial Court committed no error in excluding Stokes' testimony regarding his medical licensure status, when that testimony was proven to be false, and the exclusion of such testimony did not unfairly prejudice Fipps.

Accordingly, GLH respectfully requests this Court to affirm the evidentiary rulings of the Trial Court, and to affirm the directed verdict entered by the Trial Court in favor of GLH and Dr. Calvit.

This the 14th day of July, 2017.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Tommie G. Williams, Jr., counsel for the Appellee, do hereby certify that I have this day electronically filed the foregoing Brief of Appellee with the Clerk of the Court using the MEC system which sent notification of said filing to the following:

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This the 14th day of July, 2017.

s/ Harris F. Powers, III
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