

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OTIS FIPPS

APPELLANT

V.

NO. 2016-TS-01141

GREENWOOD LEFLORE HOSPITAL

APPELLEE

PRINCIPAL BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

On Appeal from the Circuit Court of Leflore County, Mississippi
No. 2013-0055

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to *Mississippi Rules of Appellant Procedure 28(a)(1)*, the undersigned counsel of record certifies that the following listed persons have 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.

1. Otis Fipps, *Appellant*
2. Carlos E. Moore, Esquire, Tucker Moore Law Group, *Appellate and Trial Counsel for Appellant*
3. Greenwood Leflore Hospital, *Appellee*
4. Tommie G. Williams, Jr., Esquire, Upshaw, Williams, Biggers & Beckham, LLP, *Appellate and Trial Counsel for Appellee*
5. The Honorable Richard A. Smith, *Leflore County Circuit Court Judge*

So CERTIFIED, this the 18th day of April 2017.

Respectfully submitted,

/s/Carlos E. Moore

Carlos E. Moore, Esq.
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Statement of Issues Presented for Review

- I. Dr. Myron Stokes is qualified to offer expert testimony regarding the standard of care of a gastroenterologist and such testimony is admissible.
- II. Dr. Myron Stokes' opinion regarding informed consent was properly disclosed in accordance with the *Mississippi Rules of Civil Procedure* 26(b)(4)(A)(i).
- III. Dr. Myron Stokes' testimony regarding his medical licensure is admissible.

Statement of Case

On June 12, 2012, Otis Fipps ("Fipps") underwent an esophagogastroduodenoscopy ("EDG") and esophageal dilation conducted by Dr. Thomas Calvit ("Dr. Calvit") of Greenwood Leflore Hospital ("Greenwood Hospital"). Subsequently, Fipps developed a neck abscess and surgery was performed at the University of Mississippi ("UMMC") to incise and drain the abscess. During the incision and drainage surgery, physicians were unable to successfully intubate Fipps and an emergent tracheotomy was required. As a result of the medical negligence and medical malpractice of Dr. Calvit and Greenwood Hospital (collectively referred to as "Defendants"), Fipps accumulated medical bills and sustained physical and mental pain and suffering. Consequently, Fipps filed an action against Defendants for compensation for his injuries.

Dr. Myron Stokes ("Dr. Stokes") was designated as an expert in this matter to testify regarding Defendants' medical treatment of Fipps and liability for his injuries. Specifically, Dr. Stokes presented testimony asserting that (1) Dr. Calvit's actions exhibited a deviation from the standard of care expected in Dr. Calvit's profession; and (2) the dilation performed by Dr. Calvit was the initiating event that led to Fipps developing a fistula with resultant neck abscess requiring two additional surgeries. During the deposition of Dr. Stokes, he expounded on his testimony indicated in the expert designation and asserted that Dr. Calvit failed to obtain Fipps' informed consent to perform an esophageal dilation.

Defendants attempted to avoid liability in this matter and alleged that Dr. Stokes' testimony regarding the foregoing should be excluded as he is not qualified to offer opinions regarding the standards of care applicable to gastroenterologist; Dr. Stokes' opinions regarding informed consent was not indicated in Fipps' expert designation, affidavits or discovery in accordance with *Mississippi Rules of Civil Procedure* 26(b)(4)(A)(i); and the testimony of Dr. Stokes asserting that he is a licensed physician is inaccurate. These allegations are erroneous.

Dr. Stokes is qualified to offer an expert opinion in this matter, as he possesses the knowledge, skill, training, and experience. Further, he relied on the medical records of Fipps. Moreover, Dr. Stokes' expert opinion regarding informed consent would fall under the testimony indicated in the *Designation of Experts*; thus, the same was properly disclosed. Additionally, the deposition of Dr. Stokes was conducted prior to any allegations being presented against him requiring any disciplinary action by the Mississippi Licensure Board. Therefore, he was a licensed physician when his expert opinion was proffered. Notably, Dr. Stokes can provide expert testimony regardless of his licensure status.

Statement Regarding Oral Argument

Pursuant to *Mississippi Rules of Appellant Procedure* 34(b), an oral argument would assist the Court in resolving this case. An oral argument will clarify that the trial court abused its discretion in striking the expert testimony of Dr. Myron Stokes as Dr. Stokes is a qualified expert in this matter and his testimony is admissible, accurate, and credible.

Relevant Facts

On June 12, 2012, Otis Fipps, who was seventy-four (74) years old at the time, underwent an esophagogastroduodenoscopy and esophageal dilation performed by Dr. Thomas Calvit at Greenwood Gastroenterology Center ("Greenwood Center"). *R. at 4, 74*. Notably, Greenwood Center is owned and operated by Greenwood Leflore Hospital. *R. at 15*. Further, Dr.

Calvit is employed with Greenwood Hospital. *R. at 26.* In Dr. Calvit's operative note, Dr. Calvit states/documents in his summary, "Normal hypopharynx. Normal entire esophagus and GE junction. A hiatus hernia was found in the cardia." *R. at 74.* Further, Dr. Calvit states in his dictation in the description of the procedure that "the gastroscope was passed through the mouth under direct visualization and was advanced with ease to the second portion of the duodenum." *Id.* He also states in his procedure note that during the dilatation with a 60 French Maloney dilator "mild force was required" to pass the dilator. *Id.*

On June 19, 2012, Fipps developed a neck abscess and surgery was performed at the University of Mississippi Medical Center to incise and drain the abscess. *R. at 4-5.* During the incision and drainage surgery, physicians at UMMC were unable to successfully intubate Fipps and an emergent tracheotomy was required. *R. at 5.* On June 25, 2012, Fipps was discharged from UMMC. *Id.* Thereafter, Fipps received three months of home health services for management of IV antibiotics and continues to have gastrointestinal problems. *Id.*

As a result of the foregoing, Fipps filed a *Complaint* against Dr. Calvit, Greenwood Center, and Greenwood Hospital for medical negligence and medical malpractice in the Circuit Court of Leflore County, Mississippi. *R. at 3-8.* Further, Fipps indicated that a result of the aforementioned, he accumulated medical bills (past, present and future), and sustained physical and mental pain and suffering (past, present, and future). *R. at 6.*

Course of Proceedings and Disposition in the Court Below

On August 12, 2013, Otis Fipps filed a *Complaint* against Dr. Thomas Calvit, Greenwood Gastroenterology Center, and Greenwood Leflore Hospital for medical negligence and medical malpractice in the Circuit Court of Leflore County, Mississippi. *R. at 3-8.* On December 6, 2013, the Court entered an *Agreed Order* indicating that Dr. Calvit is an employee of Greenwood Hospital and immune from this suit in his personal capacity and dismissing Greenwood Center

from the cause of action, without prejudice. *R. at 49-50*. On December 30, 2013, Greenwood Hospital filed its *Answer and Defenses* denying liability for any damages. *R. at 52-58*.

On April 22, 2014, Fipps filed his *Designation of Experts* designating Dr. Myron C. Stokes, a surgical specialist and an expert in surgery regarding upper and lower gastrointestinal issues. *R. at 62*. Further, the designation indicated that Dr. Stokes would testify that Dr. Calvit's actions exhibited a deviation from the standard of care exhibited in Dr. Calvit's profession and specialty and the dilation performed by Dr. Calvit was the initiating event that led to Plaintiff developing a fistula with resultant neck abscess requiring two additional surgeries. *Id.*

Particularly, Dr. Stokes indicated, in his affidavit, that the performance of esophageal dilatation was not proven to be medically indicated or necessary in any of Dr. Calvit's pre-operative or intraoperative findings, thus constituting a deviation from the standard of care. *R. at 74*. Furthermore, Dr. Stokes indicated there were no structural abnormalities that would necessitate a dilatation. *Id.* On April 18, 2016, a pretrial conference was held and Fipps' counsel announced to the Court that Plaintiff might possibly present the testimony of Dr. Stokes by means of Dr. Stokes' deposition. *R. at 259*. On September 5, 2014, Defendants' conducted the deposition of Dr. Stokes. *R. at 218-244*.

On May 4, 2016, Greenwood Hospital filed its *First Motion in Limine* requesting the Court to strike and exclude any and all testimony from Dr. Stokes, regarding informed consent in this case and/or any deviations from the applicable standards of care related thereto. *R. at 87*. Greenwood Hospital alleged that Dr. Stokes is not qualified to offer opinions regarding the standards of care applicable to gastroenterologist and any opinions that Dr. Stokes might offer regarding Dr. Calvit would fall short of meeting the standards addressed in *Daubert*. *R. at 88*. Further, Greenwood Hospital alleged that Dr. Stokes' opinion regarding Dr. Calvit failing to obtain informed consent to perform a esophageal dilation was not indicated in Fipps' expert

designation, affidavits or discovery. *R. at 91*. As a result, all reference to informed consent by Dr. Stokes contained in the trial deposition should be stricken and excluded. *R. at 92*.

Subsequently, Greenwood Hospital filed its *Second Motion in Limine* requesting the Court to strike and exclude the deposition testimony of Dr. Stokes concerning his medical licensure alleging that such information is inaccurate. *R. at 147*. Particularly, Dr. Stokes' deposition testimony indicating that he is licensed to practice medicine in Mississippi and a medical licensure board has never disciplined him. *Id.* Thereafter, Greenwood Hospital filed its *Motion to Limit Evidence* requesting the Court to exclude the testimony of Dr. Stokes alleging that he is not qualified to offer an opinion regarding Dr. Calvit's medical treatment of Fipps. *R. at 157*.

On May 19, 2016, Fipps filed *Plaintiff's Motion to Substitute Expert and Continue Trial* indicating that the medical licensure board did not prohibit Dr. Stokes from practicing medicine in the State of Mississippi until January 6, 2016, which is after Dr. Stokes' opinions were offered. *R. at 200*. Further, Fipps requested the Court to allow substitution of Dr. Stokes' expert opinion. *Id.* On May 20, 2016, Fipps filed *Plaintiff's Response in Opposition to Defendants' First Motion in Limine* indicating that Dr. Stokes is qualified to offer opinions regarding the standards of care applicable to gastroenterologist as he is a practicing board certified surgeon with extensive training in performing endoscopies and he relied upon the review of the medical records. *R. at 205*. Further, Dr. Stokes' opinion regarding informed consent would fall under the testimony indicated in the *Designation of Experts*. *R. at 204*. When the opinion occurred regarding informed consent is matter of preference rather than substance. *Id.*

Subsequently, Fipps filed *Plaintiff's Response in Opposition to Defendants' Second Motion in Limine* indicating that the deposition of Dr. Stokes was conducted on September 4, 2014, which is prior to any allegations being presented against him requiring any disciplinary

action by the Mississippi Licensure Board. *R. at 215*. Therefore, the assertions made by Dr. Stokes in his deposition were factual and honest and should not be excluded. *Id.* Further, Fipps requested additional time to secure a new expert as striking the testimony of Dr. Stokes is problematic and prejudicial. *R. at 216*.

Thereafter, Fipps filed *Plaintiff's Response in Opposition to Defendants' Motion to Limit Evidence* indicating Dr. Stokes is a qualified expert as he has performed the procedure at issue in the lawsuit and is quite knowledgeable concerning industry standards. *R. at 248*. Further, Dr. Stokes relied on his own personal practice and training which he received throughout various jurisdictions. *R. at 248-249*. Also, Dr. Stokes relied upon the review of medical records detailing the events of Fipps' surgery as well as his post-operative complications in determining a breach in the standard of care. *R. at 249*.

On May 26, 2016, Greenwood Hospital filed its *Response in Opposition to Plaintiff's Motion to Substitute Expert and Continue Trial* alleging the Dr. Stokes' expert testimony should be excluded as his licensure revocation goes to the heart of his credibility, not admissibility. Further, Dr. Stokes' opinions are not admissible because he is not qualified to offer opinions as to the standard of care of a gastroenterologist pursuant to *Mississippi Rules of Evidence 702* and *Daubert*. *R. at 253*. On May 3, 2016, the parties appeared for trial on all *Motions*. On July 5, 2016, the Court entered an *Order Granting the Defendants' Motion to Limit/Exclude Evidence; First Motion in Limine, Second Motion in Limine; Denial of Plaintiff's Motion for Continuance; Grant of Defendants' Rule 41(b) Motion for Dismissal*. *R. at 259*.

The Court ruled that (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 Plaintiff; (2) *Defendants' Motion to Limit Evidence* is granted as Dr. Stokes does not meet the qualifications to opine as to the standard of care of a gastroenterologist; (3)

Defendants' *First Motion in Limine* is granted as the issue of "informed consent" was not properly plead in the Complaint, that no discovery has been supplemented by Plaintiff to disclose Dr. Stokes' opinion as to informed consent first learned at the deposition, that the deposition of Dr. Stokes is the trial testimony of Dr. Stokes and as such to allow the issue of informed consent at this date would be a "trial by ambush"; and (4) *Defendants' Second Motion in Limine* is granted and 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. at 259-260.*

This trial Court dismissed Fipps' action holding that he failed to meet his burden of proof to show his claim of medical negligence by competent qualified expert testimony as the testimony of Fipps only expert was excluded. *R. at 266.* On August 3, 2016, Fipps filed a *Notice of Appeal* asserting that the Court erred in its decision. *R. at 267-269.*

Summary of Argument

For three core reasons, the trial court's ruling in this matter should be reversed and remanded and the expert opinion of Dr. Myron Stokes should be admissible. First, Dr. Stokes is qualified to offer opinions regarding the standards of care applicable to gastroenterologist as he possesses the knowledge, skill, experience, training, and education to be a proper expert. Further, he relied upon the review of the medical records for his testimony.

Second, Dr. Stokes' opinion regarding informed consent would fall under the testimony indicated in the *Designation of Experts*; thus was properly disclosed in accordance with *Mississippi Rules of Civil Procedure 26(b)(4)(A)(i).*

Third, the deposition of Dr. Stokes was conducted prior to any allegations being presented against Dr. Stokes requiring any disciplinary action by the Mississippi Licensure

Board; consequently, the assertions made by Dr. Stokes in his deposition were factual and honest and should not be excluded.

STANDARD OF REVIEW

The case presents three main issues-the first is whether Dr. Myron Stokes is qualified to offer opinions regarding the standard of care of a gastroenterologist. Secondly, whether Dr. Stokes opinion regarding informed consent was properly disclosed in accordance with *Mississippi Rules of Civil Procedure* 26(b)(4)(A)(i). And, lastly, whether Dr. Stokes testimony regarding his medical licensure should be admissible.

Standard of review for a trial court's admission or exclusion of evidence is abuse of discretion. *Terrain Enterprises v. Mockbee*, 654 So. 2d 1122, 1131 (Miss. 1995). "The admission or exclusion of expert testimony is controlled by the trial court's discretion and an appellate court will not disturb the trial court's decision unless the trial court clearly abused that discretion." *Chapin v. State*, 812 So. 2d 246, 247 (Miss. App. 2002). In assessing the lower court's exercise of discretion, the Court must first determine whether the lower court applied the correct legal standard. *Pierce v. Heritage Properties, Inc.*, 688 So. 2d 1385, 1388 (Miss. 1997). If so, the lower court must be affirmed unless there is a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors." *Id.* Thus, the court will affirm if the lower court's decision was "one of several reasonable ones which could have been made." *Id.*

ARGUMENT

I. Dr. Myron Stokes is qualified to offer expert testimony regarding the standard of care of a gastroenterologist and such testimony is admissible.

This Court should determine that Dr. Myron Stokes is a qualified and competent expert witness and thus, his expert testimony is admissible. Moreover, the Court should determine that

the trial court abused its discretion in its determination to the contrary and its holding should be reversed and remanded.

To present a prima facie case of medical malpractice: (1) a plaintiff, after establishing the doctor-patient relationship and its attendant duty, is generally required to present expert testimony; (2) identifying and articulating the requisite standard of care; and (3) establishing that the defendant physician failed to conform to the standard of care. In addition, (4) the plaintiff must prove the physician's noncompliance with the standard of care caused the plaintiff's injury, as well as proving (5) the extent of the plaintiff's damages.

McCaffrey v. Puckett, 784 So. 2d 197, 199 (Miss. 2001) (citing *Ladner v. Campbell*, 515 So. 2d 882, 887-88 (Miss. 1987)). Therefore, in a medical malpractice action, “negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care.” *Brooks v. Roberts*, 882 So. 2d 229, 232 (Miss. 2004) (citing *Sheffield v. Goodwin*, 740 So. 2d 854, 858 (Miss. 1999)). Further, an expert’s testimony is always subject to the *Mississippi Rule of Evidence* 702. *Puckett v. State*, 737 So. 2d 322, 342 (Miss. 1999). *Mississippi Rule of Evidence* 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In essence, two criteria must be satisfied for an expert opinion to be admissible under this rule. *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 35 (Miss. 2003) (citing *Kansas City S. Ry. v. Johnson*, 798 So. 2d 374, 382 (Miss. 2001)). “First, the witness must be qualified by virtue of his or her knowledge, skill, experience or education.” *Id.* “Second, the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue.” *Id.* Moreover, for an expert testimony to be admissible, it must be both relevant and reliable; the party offering the testimony must show that the expert based his/her opinion not

on opinions or speculation, but rather on scientific methods and procedures, and the trial judge assumes the critical role as a gatekeeper in assessing the value of the testimony. *Webb v. Braswell*, 930 So. 2d 387 (Miss. 2006).

A. Dr. Myron Stokes is qualified to offer expert testimony regarding the standard of care of a gastroenterologist.

By virtue of his knowledge, skill, experience and education, Dr. Stokes is qualified to offer testimony regarding the standard of care of a gastroenterologist. “For a witness to give a *Mississippi Rule of Evidence* 702 opinion, the witness must have experience of expertise beyond that of an average adult.” *Puckett v. State*, 737 So. 2d 322, 342 (Miss. 1999).

In 2001, Dr. Stokes received his medical degree from the University of Iowa College of Medicine. In 2002, Dr. Stokes completed his surgical internship in general surgery and in 2005, he completed his junior residency. In 2006, Dr. Stokes completed his chief surgical residency. In 2010, Dr. Stokes became certified in the fundamentals of laparoscopic surgery. In 2011, Dr. Stokes completed his minimally invasive surgery fellowship with a focus in advanced laparoscopy, endoscopy, and ultrasound. Subsequently, Dr. Stokes became board certified in general surgery.

Fundamentally, Dr. Stokes is a practicing board certified surgeon with extensive training in performing endoscopies since 2010. Notably, Dr. Stokes was performing approximately 8 to 10 endoscopies per month. Moreover, Dr. Stokes is an expert in surgery regarding upper and lower gastrointestinal issues. With approximately 15 years of experience and education, Dr. Stokes is clearly a qualified expert in accordance with *Mississippi Rules of Evidence* 702.

Though Dr. Stokes does not specialize in gastroenterology, he is still qualified to offer an opinion regarding the standards of care. Defendants rely on the fact that Dr. Stokes does not specialize in gastroenterology to preclude Dr. Stokes’ qualification to testify. The defendant in *Brown v. Mladineo*, made this exact argument- that the only expert who can testify against a

specialist is a doctor practicing the same specialty-which the Mississippi Supreme Court rejected. *Brown v. Mladineo*, 504 So. 2d 1201, 1202 (Miss. 1987). The Court stated in *Brown*, “It is not our intent to adopt a uniquely restrictive standard by holding that only a specialist can testify about the standards of his own specialty.” *Id.* at 1201-1203.

Mississippi courts, like most courts, will allow a doctor to testify as an expert if he is familiar with the standards of the specialty “even though he might not practice the specialty himself.” *West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714, 718-719 (Miss. 1995). Thus, it is not required that an expert, in a medical malpractice case, be of the same specialty as the doctor about whom the expert is testifying. *Hubbard v. Wansley*, 954 So. 2d 951, 954 (Miss. 2007). “It is the scope of the witness’ knowledge and not the artificial classification by title that should govern the threshold question of admissibility.” *Id.* (quoting *West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714, 719 (Miss. 1995)). However, the expert still must show satisfactory familiarity with the specialty of the defendant doctor in order to testify as to the standard of care owed to patient. *Id.* at 718-19.

Dr. Thomas Calvit is a gastroenterologist who performed an unauthorized esophageal dilatation on Fipps. As aforementioned, Dr. Stokes is a surgeon with extensive training in performing endoscopies since 2010 and an expert in surgery regarding upper and lower gastrointestinal issues. Further, Dr. Stokes is board certified in general surgery. “General Surgery is a discipline of surgery having a central core of knowledge embracing anatomy, physiology, metabolism, immunology, nutrition, pathology, wound healing, shock and resuscitation, intensive care, and neoplasia, which is common to all surgical specialties. After completing residency, general surgeons become qualified to manage a wide variety of ailments, from gastrointestinal problems to endocrine surgery...” Gary L. Timmerman, MD, FACS, *General*

surgery, (March 22, 2017), <https://www.facs.org/education/resources/residency-search/specialties/general>.

In accordance with the foregoing, Dr. Stokes is more than qualified to offer an expert opinion regarding Dr. Calvit's medical treatment of Fipps as Dr. Stokes has the experience, training, and education. Further, though Dr. Stokes is not a gastroenterologist, the law supports the assertion that Dr. Stokes' title does not preclude his testimony.

B. Dr. Myron Stokes' expert testimony is admissible.

According to the standards of *Miss. Transport. Comm'n v. McLemore*, 863 So. 2d 31, 37 (Miss. 2003), "there must be a valid scientific connection to the pertinent inquiry as a precondition to admissibility. The party offering the expert's testimony must show that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation." Based upon this, Dr. Stokes complied with the standards when he offered his professional opinions regarding Dr. Calvit's medical treatment of Fipps.

Upon the review of Fipps' medical records and Dr. Calvit's operative notes, Dr. Stokes determined that "the performance of esophageal dilatation was not proven to be indicated in any of Dr. Calvit's preoperative or intraoperative findings, thus constituting a deviation from the standard of care expected of a physician in Dr. Calvit's specialty and profession." Additionally, Dr. Stokes' expert testimony was based on his own personal practice, as Dr. Stokes has performed the procedure at issue in the lawsuit and is quite knowledgeable about industry standards, and training, which he received throughout various jurisdictions including Tennessee, Virginia, Indiana, Pennsylvania, and Mississippi. Therefore, Dr. Stokes expert testimony is admissible to support Fipps assertions of medical negligence and medical malpractice.

II. Dr. Myron Stokes' opinion regarding informed consent was properly disclosed in accordance with *Mississippi Rules of Civil Procedure* 26(b)(4)(A)(i).

Mississippi Rule of Civil Procedure 26(b)(A)(i) provides that

[a] party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, state the subject matter on which the expert is expected to testify, and state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds of each opinion.

The *Designation of Expert* provided by Fipps complied with this requirement. The expert designation indicated that Dr. Myron Stokes would offer testimony regarding his evaluation of the treatment rendered to Fipps by Dr. Calvit on June 12, 2012. Specifically, Dr. Stokes would testify that Dr. Calvit's action exhibited a deviation from the standard of care expected in Dr. Calvit's profession; and the dilation performed by Dr. Calvit was the initiating event that led to Fipps developing a fistula with resultant neck abscess requiring two additional surgeries.

Furthermore, the designation goes on to further quote it is anticipated that Dr. Stokes will respond to any opinions offered by any of the Defendants' experts, designated or not, or the testimony of any witness called at trial, by any party, or deposed during discovery, whether called to testify at trial or not, within the area and field of his expertise. As aforementioned, Dr. Stokes opinion was based on his specialized knowledge, skill, experiences in surgery regarding upper and lower gastrointestinal issues, in addition to, Fipps' medical records.

Defendants and the trial court allege that Dr. Stokes testimony regarding informed consent offered during his deposition was analogous to a "trial by ambush" and was not properly asserted in the expert designation, affidavits or discovery; however, Dr. Stokes' stance regarding informed consent would be applicable under industry standards and an elaboration of the testimony indicated in the *Designation of Expert*. Whether the opinion occurred prior to review of the deposition is a matter of preference rather than substance, the fact remains that Dr. Stokes contends that proper consent was not obtained prior to the procedure in question.

The trial Court dismissed this action due Dr. Stokes expert testimony being excluded; however, the Mississippi Supreme Court has reversed and remanded a trial court's dismissal of the plaintiff's action based on the striking of the plaintiff's expert witness due to a discovery violation as the sanction was too severe. *Thompson v. Patino*, 784 So. 2d 220 (Miss. 2001). The supreme court found that "Thompson pursued her case not perfectly, but fairly diligently from filing until dismissal," and it reversed and remanded, proposing "a less severe sanction. *Id.* at 226.

Assuming arguendo, that Fipps did not disclose Dr. Stokes' testimony regarding informed consent at the proper time before his deposition, this Court should not strike such testimony as Fipps pursued his case diligently and any violation of *Mississippi Rule of Civil Procedure* 26(b)(A)(i) was merely excusable neglect as Fipps deemed "informed consent" testimony coincided with the testimony regarding standard of care. Accordingly, this court should reverse and remand the decision of the trial court and hold that Dr. Stokes testimony regarding informed consent is admissible.

III. Dr. Myron Stokes' testimony regarding his medical licensure is admissible.

The deposition of Dr. Stokes was conducted on September 4, 2014. The medical licensure board did not prohibit Dr. Stokes from practicing medicine in the State of Mississippi until January 6, 2016, which is after Dr. Stokes' opinions were offered. Moreover, any allegations of misconduct and investigations by the Mississippi Licensure Board, by Defendants' own admission, did not commence until after the deposition was conducted. Therefore, Dr. Stokes deposition testimony asserting that he is a licensed physician that has not be disciplined is accurate, credible, and admissible.

Assuming arguendo, that Dr. Stokes was not considered to be licensed and thus, can not offer an expert opinion, the Mississippi Supreme Court has consistently held that a witness may be

qualified to provide expert testimony regardless of his or her professional licensure status. *Investor Res. Servs. v. Cato*, 15 So. 3d 412, 417-18 (Miss. 2009); *Blake v. Clein*, 903 So. 2d 710, 727-28 (Miss. 2005); *Watts v. Lawrence*, 703 So. 2d 236, 238-39 (Miss. 1997). Thus, the decision of the trial court in contrary to the aforementioned should be reversed and remanded.

CONCLUSION

This Court should reverse and remand the decision of the trial court as exclusion of the expert testimony of Dr. Myron Stokes was an abuse of discretion. Dr. Stokes is qualified to offer opinions regarding the standards of care applicable to gastroenterologist as he possesses the knowledge, skill, experience, training, and education to be a proper expert. Further, he relied upon the review of the medical records for his testimony.

Next, Dr. Stokes' opinion regarding informed consent would fall under the testimony indicated in the *Designation of Experts*; thus was properly disclosed in accordance with *Mississippi Rules of Civil Procedure* 26(b)(4)(A)(i).

And lastly, the deposition of Dr. Stokes was conducted prior to any allegations being presented against Dr. Stokes requiring any disciplinary action by the Mississippi Licensure Board; consequently, the assertions made by Dr. Stokes in his deposition were factual and honest and should not be excluded. Thus, the decision of the Circuit Court of Leflore County, Mississippi should be reversed and remanded.

CERTIFICATE OF SERVICE

I, Carlos E. Moore, certify that I have served a copy of the above and foregoing documents to the following via filing with the MEC electronic filing system:

The Honorable Muriel B. Ellis
Mississippi Supreme Court

Tommie G. Williams, Jr., Esquire
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Appellate and Trial Counsel for Appellee

The Honorable Richard A. Smith
Leflore County Circuit Court Judge

So CERTIFIED, this the 18th day of April, 2017.

Respectfully submitted,

/s/Carlos E. Moore
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