IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-01116 COA

DWIGHT GRIFFIN, GREG COSGROVE, ALLEN COSGORVE, AND SUSAN COSGROVE AS NATURAL AUNT AND NEXT FRIEND OF BRAD COSGROVE AND JOEL COSGROVE — **APPELLANTS**

v.

THOMAS A. FEDUCCIA, M.D. AND OSCAR J. BRISENO, M.D. — **APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	07/20/95
TRIAL JUDGE:	HON. MARCUS D. GORDON
COURT FROM WHICH APPEALED:	NESHOBA COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	T. JACKSON LYONS
	EDWARD A. WILLIAMSON
ATTORNEYS FOR APPELLEES:	WALTER W. EPPES, JR.
	WILLIAM BENNETT CARTER
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
TRIAL COURT DISPOSITION:	JURY VERDICT IN FAVOR OF DEFENDANT/APPELLEES
DISPOSITION:	AFFIRMED - 9/23/97
MOTION FOR REHEARING FILED:	10/15/97
CERTIORARI FILED:	12/30/97
MANDATE ISSUED:	4/6/98

BEFORE THOMAS, P.J., DIAZ, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

On March 10, 1994, Dwight Griffin and his now deceased wife, Jeanette, originally filed a complaint sounding in negligence and loss of consortium against Thomas Feduccia, M.D., and a claim of negligence against Oscar Briseno, M.D. An amended complaint was filed a year later due to the death of Jeanette Griffin. Substituted as parties were Jeanette Griffin's wrongful death beneficiaries,

including her husband and children, who will be collectively referred to as "Griffin." A partial summary judgment was granted in favor of Dr. Briseno on July 17, 1995. After a jury trial, the jury returned verdicts in favor of both defendant physicians, and a final judgment was entered. Feeling aggrieved, Griffin appeals to this Court raising the following issues as error:

I. RESPECTING DR. BRISENO, WHETHER THE OVERWHELMING WEIGHT OF THE EVIDENCE INDICATED THAT HE KNEW OR SHOULD HAVE KNOWN OF A TECHNIQUE TO DEEP BIOPSY THE STOMACH AND HE SHOULD HAVE USED THE METHOD TO DIAGNOSE JEANETTE GRIFFIN'S CANCER AND NEGLIGENTLY FAILED TO CONSIDER AN UNCOMMON FORM OF CANCER IN USING HIS EXPERTISE AND EQUIPMENT, JUSTIFYING EITHER A DIRECTED VERDICT AS A MATTER OF LAW IN FAVOR OF THE PLAINTIFFS OR, ALTERNATIVELY, A NEW TRIAL.

II. WITH RESPECT TO APPELLEE OSCAR BRISENO, WHETHER A GRANT OF PARTIAL SUMMARY JUDGMENT FINDING THAT THE PLAINTIFFS HAD FAILED TO PRODUCE ADEQUATE PROOF OF HIS NEGLIGENT CAUSATION OF JEANETTE GRIFFIN'S DEATH WAS ERRONEOUS AS A MATTER OF LAW.

III. WITH RESPECT TO DR. FEDUCCIA, WHETHER JURY INSTRUCTIONS NUMBERED DI3, DI4, AND DI6 CONTAINED INCORRECT STATEMENTS OF THE LAW WHICH MISLED THE JURY.

IV. WHETHER THE TRIAL COURT ERRED, IN APPLYING RULE 32 AND THE RULES OF EVIDENCE INCORPORATED IN RULE 32, BY FAILING TO REDACT IRRELEVANT AND PREJUDICIAL DEPOSITION TESTIMONY REGARDING A MOTOR VEHICLE ACCIDENT INVOLVING JEANETTE GRIFFIN'S SON AND BY FAILING TO ALLOW USE OF MRS. GRIFFIN'S DEPOSITION TESTIMONY AT THE NATURAL AND PROPER TIME IN REBUTTAL.

V. WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE PLAINTIFF'S ATTORNEY TO EXPLORE THE PROFESSIONAL LIABILITY INSURANCE OF THE DEFENDANT'S EXPERT WITNESSES IN ORDER TO SHOW BIAS OR INFLUENCE BASED ON THE EXPERT PHYSICIANS' FINANCIAL SELF-INTEREST.

Finding no error, we affirm.

FACTS

Jeanette Griffin suffered vomiting, abdominal pain, and nausea beginning in late 1991. Jeanette was a registered nurse working for a home health firm. In December of 1991, Jeanette used the occasion of her required employment physical to consult Dr. Thomas Feduccia. During her appointment with Dr. Feduccia on December 11, 1991, Jeanette told him about her symptoms and that both her parents had died of cancer at relatively early ages. Dr. Feduccia performed a physical exam and found that Jeanette was alert and oriented and in no acute distress. Dr. Feduccia scheduled an upper G.I. series, which is a set of x-rays of the upper gastrointestinal tract, the esophagus and the stomach. Dr. Feduccia testified that he recommended to Jeanette that she have an endoscopic examination, which he claims that she refused. This fact was disputed by Griffin because Dr. Feduccia's records do not indicate that Jeanette refused his recommendation.

Several days later Jeanette ran into Dr. Feduccia in a hallway at the hospital and what exactly was said is in question. Jeanette testified by video deposition and stated that Dr. Feduccia took her back to a little room where he kept samples of drugs, and that Dr. Feduccia gave her a six-week supply of Zantac, an ulcer medication. His conduct led her to believe that she had peptic ulcer disease. Jeanette testified that Dr. Feduccia never discussed with her the need for further testing.

Dr. Feduccia stated that when Jeanette asked him about her results, he had not yet reviewed the report because he had just received it that morning. Dr. Feduccia stated that he then reviewed the report and advised Jeanette that based upon the results of the x-ray, she had a questionable small ulcer in her stomach. He testified that he told Jeanette to take the Zantac twice a day for six weeks and then to come back if she had more problems. Dr. Feduccia stated that he advised Jeanette that he still believed it was necessary that she have the endoscopic examination done when she returned.

Dr. Feduccia testified that Jeanette never returned or called him at all. However, in rebuttal, Griffin was able to show that in February of 1992, Dr. Feduccia called in, or had his staff call in, a prescription for a six-month supply of Zantac. Dr. Feduccia was unable to explain how he would have called in, or had someone call in, a prescription for a six-month supply of Zantac, if he had told Jeanette to return in six weeks, or if she had never called him back.

Jeanette stated that because she believed she had an ulcer, and based on Dr. Feduccia's treatment and the fact that the Zantac did give her temporary relief, she waited until May of 1992 to consult another physician. That physician, Hilton Fairchild, continued to prescribe Zantac and Tagamet.

On February 3, 1993, Jeanette was admitted to the Laird Hospital with complaints of abdominal pain, nausea, and vomiting. Dr. Oscar Briseno, a general surgeon at the hospital, consulted on Jeanette's case. After taking Jeanette's history and performing a physical on her, Dr. Briseno's first impression was that she might have a peptic ulcer. Dr. Briseno also considered a hiatal hernia and/or gallbladder disease as possible causes of her symptoms. Lastly, Dr. Briseno specifically considered cancer as a possibility and wrote that in Jeanette's chart.

Dr. Briseno ordered CT scans and an EGD, or endoscopic examination, on the surface of Jeanette's stomach. The CT scan enabled him to see the outside wall of the stomach, and the EGD enabled him to see the inside of the stomach. Dr. Briseno did not order that a deep tissue sample be taken from Jeanette's stomach. The findings from the surface endoscopy were inflamation and redness of her stomach. Dr. Briseno took a biopsy of a tissue sample, and the pathology report on the sample indicated a small hiatal hernia and superficial chronic gastritis, with no presence of malignant cells. Jeanette and Dr. Briseno agree that he told her she had an inflamed stomach, no ulcer, and no tumor. Dr. Briseno told her that he was concerned that her lifestyle was contributing to her symptoms and recommended that she reduce her consumption of cigarettes, alcohol, and caffeine. He further suggested that she eat a bland diet and take her medication. Dr. Briseno told Jeanette that if she was still having problems within a week, to call Dr. Fairchild.

On August 10, 1993, Jeanette made an appointment to see Dr. Paul Varella. During his examination, he detected an abdominal mass and immediately scheduled tests. He then diagnosed Jeanette with an advanced adenocarcinoma of the stomach known as linitis plastica. Thereafter, Jeanette received surgical and therapeutic treatment in New Orleans, Louisiana for the next four months. Jeanette died of the cancer on December 28, 1994.

ANALYSIS

I.

RESPECTING DR. BRISENO, WHETHER THE OVERWHELMING WEIGHT OF THE EVIDENCE INDICATED THAT HE KNEW OR SHOULD HAVE KNOWN OF A TECHNIQUE TO DEEP BIOPSY THE STOMACH AND HE SHOULD HAVE USED THE METHOD TO DIAGNOSE JEANETTE GRIFFIN'S CANCER AND NEGLIGENTLY FAILED TO CONSIDER AN UNCOMMON FORM OF CANCER IN USING HIS EXPERTISE AND EQUIPMENT, JUSTIFYING EITHER A DIRECTED VERDICT AS A MATTER OF LAW IN FAVOR OF THE PLAINTIFFS OR, ALTERNATIVELY, A NEW TRIAL.

Griffin argues that Dr. Briseno breached the standard of due care by failing to conduct a deep biopsy instead of the surface biopsy. Griffin contends that had Dr. Briseno done so, the evidence shows that he would have found Jeanette's cancer. Therefore, Griffin asserts that a directed verdict against Dr. Briseno should have been granted. Alternatively, Griffin argues that the verdict in favor of Dr. Briseno was against the weight of the evidence and that the substantial weight of the evidence shows that the trial court abused its discretion by failing to order a new trial. Dr. Briseno counters and argues that the evidence presented to the jury confirms that his treatment of Jeanette was within the applicable standard of care. Also, Dr. Briseno argues that the trial court did not err by denying Griffin's request for a directed verdict and motion for new trial.

At the close of the evidence, Griffin proposed two peremptory instructions against both Dr. Briseno and Dr. Feduccia. The trial judge denied both instructions. Griffin now asserts that the trial judge erred by denying the instruction as to Dr. Briseno. When Griffin offered the peremptory instructions, he was making the "functional equivalent" of a motion for a directed verdict. *Herrington v. Spell*, 692

So. 2d 93, 97 (Miss. 1997). The standard of review for a peremptory instruction is the same as a directed verdict:

The trial court must consider the evidence in the light most favorable to the plaintiff, giving the plaintiff the benefit of all reasonable inferences that may be drawn therefrom; unless the plaintiff's evidence is so lacking that reasonable jurors could not reach a verdict for the plaintiff, the [instruction] should be [given].

Id. (quoting *Wilner v. Miss. Export R.. Co.*, 546 So. 2d 678, 681 (Miss. 1989)). Also, "a trial court should submit an issue to the jury only if the evidence creates a question of fact concerning which reasonable jurors could disagree." *Herrington*, 692 So. 2d at 97 (citing *Vines v. Windham*, 606 So. 2d 128, 131 (Miss. 1992)). This applies to lay testimony as well as expert testimony. "Once a witness is qualified as an expert to render expert testimony, then it is within the province of the trier of fact to give weight and credibility to the testimony." *Palmer v. Anderson Infirmary Benev. Ass'n*, 656 So. 2d 790, 796 (Miss. 1995).

In the case at hand, it is clear that there was a factual question to be determined. Griffin's main argument is that a competent endoscopist, faced with the facts in this case, would have taken a deep tissue biopsy sample from Jeanette's stomach, instead of only taking a surface tissue sample. Plaintiff's expert, Dr. Philip Bentlif, testified that if deep biopsies had been performed in December of 1991, that Jeanette would have been a good candidate for a surgical cure with a 90% chance of living a normal life span. Dr. Bentlif stated that Dr. Briseno did not use the medical judgment which one would expect of a consultant who is responsible for performing endoscopies and handling the problems which the endoscopies discovered. Also, Dr. Bentlif testified that the cancer was diagnosable in February of 1993. However, on cross, Dr. Bentlif did state that there was nothing substandard in the way Dr. Briseno carried out his examination of Jeanette. He stated that the examination was performed professionally and appropriately. The plaintiff's second expert, Dr. Marvin Romsdahl, did not offer an expert opinion on the EGD or the biopsy as these topics were not within his area of expertise. Both plaintiff's experts opined that Dr. Briseno did not follow-up with Jeanette in a proper way.

The first expert to testify on behalf of Dr. Briseno was Dr. Tate Thigpen. Dr. Thigpen's opinion was that Dr. Briseno followed the standard of care in his dealings with Jeanette. Dr. Thigpen stated that in his opinion Jeanette was not suffering from cancer when Dr. Briseno first saw her in February of 1993. The last expert to testify was Dr. James Achord. Dr. Achord stated that in his opinion Dr. Briseno complied with the standard of care in his treatment of Jeanette, including the performance of the EGD examination.

Based on the above testimony, the evidence is sufficient to deny the granting of a peremptory instruction in favor of Griffin. Griffin's experts opined that Dr. Briseno did not follow-up with Jeanette in a proper way, and Dr. Briseno's experts opined that Dr. Briseno complied with the standard of care in his treatment of Jeanette. Because of the conflicting testimony from both parties, it becomes a question of fact for the jury to decide. *Herrington*, 692 So. 2d at 98. Therefore, denying the peremptory instruction was not error.

Next, Griffin contends that the jury verdict in favor of Dr. Briseno was against the weight of the

evidence and that the trial court erred by not granting a new trial. Griffin asserts that the question was whether or not Dr. Briseno should have diagnosed the cancer in February of 1993. "In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Herrington*, 692 So. 2d at 103. The jury is the ultimate judge of the weight of the evidence and the credibility of the witnesses. *Jackson v. Griffin*, 390 So. 2d 287, 289 (Miss. 1980). Because of the jury verdict in favor of the appellee, this Court will resolve all evidentiary conflicts in the appellee's favor and will draw all reasonable inferences which flow from the testimony given in favor of the appellee. *Southwest Miss. Reg'l Medical Ctr. v. Lawrence*, 684 So. 2d 1257, 1267 (Miss. 1996) (citing *Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Assoc*., 560 So. 2d 129, 131 (Miss. 1989)). We will not set aside the jury's verdict unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herrington*, 692 So. 2d at 104.

In the case at hand, we cannot say that the verdict of the jury was clearly erroneous. This was a very lengthy trial in which both sides put on numerous witnesses, including expert witnesses. The questions presented and argued during trial about whether Jeanette had cancer when she first saw Dr. Briseno as a patient in February of 1993 and whether Dr. Briseno properly followed-up Jeanette's treatment were both issues for the determination of the jury. The jury, being the ultimate fact finder, by its verdict necessarily found that Dr. Briseno was not able to diagnose Jeanette's cancer in February of 1993, and that Dr. Briseno did properly follow-up his treatment on Jeanette. Therefore, we cannot say that the jury verdict was against the weight of the evidence, and the trial court did not err in failing to award a new trial to Griffin.

II.

WITH RESPECT TO APPELLEE OSCAR BRISENO, WHETHER A GRANT OF PARTIAL SUMMARY JUDGMENT FINDING THAT THE PLAINTIFFS HAD FAILED TO PRODUCE ADEQUATE PROOF OF HIS NEGLIGENT CAUSATION OF JEANETTE GRIFFIN'S DEATH WAS ERRONEOUS AS A MATTER OF LAW.

Griffin argues that the partial summary judgment rendered for Dr. Briseno should be set aside because public policy should not allow a physician to evade liability where his acts or omissions increase the risk of harm to his patient. Griffin asserts that this should apply even to patients with life-threatening illnesses. Dr. Briseno argues that Mississippi case law does not recognize the loss of chance of recovery as a compensable claim.

The trial court granted a partial summary judgment on the issue of whether the alleged omissions on Dr. Briseno's part to adequately examine or ensure follow up care proximately contributed to Jeanette's death. The trial court found that:

The Plaintiffs have failed to provide sworn, competent expert testimony that Dr. Briseno's failure to diagnose Jeanette Griffin's cancer caused or contributed to her death, in terms of reasonable medical probability. The uncontradicted testimony, from the Plaintiff's own expert, is that had Dr. Briseno diagnosed the cancer, she would have had only a 30% to 40% chance of survival. Accordingly, the key element of proximate causation is missing such that there is no genuine issue of material fact and Dr.

Briseno is entitled to Judgment as a matter of law.

"Rule 56(c) of the Mississippi Rules of Civil Procedure allows summary judgment where there are no genuine issues of material fact such that the moving part[y] is entitled to judgment as a matter of law." *Richmond v. Benchmark Const. Corp.*, 692 So. 2d 60, 61 (Miss. 1997). To prevent the granting of a summary judgment, the non-moving party must establish a genuine issue of material fact by means allowable under the Rule. *Id.* (citing *Lyle v. Mladinich*, 584 So. 2d 397, 398 (Miss. 1991)). We employ a *de novo* standard of review in reviewing a lower court's granting of summary judgment. *Richmond*, 692 So. 2d at 61 (citing *Short v. Columbus Rubber & Gasket Co., Inc.*, 535 So. 2d 61, 63 (Miss. 1988)). "Evidentiary matters are viewed in the light most favorable to the non-moving party." *Richmond*, 692 So. 2d at 61 (citing *Palmer v. Biloxi Reg'l Medical Ctr., Inc.*, 564 So. 2d 1346, 1354 (Miss. 1990)). If a triable issue of fact exists, the lower court's decision to grant the summary judgment will be reversed. Otherwise, the decision to grant summary judgment is affirmed. *Richmond*, 692 So. 2d at 61 (citing *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 362 (Miss. 1984)).

The trial court's granting of summary judgment follows the law announced in *Clayton v. Thompson*, 475 So. 2d 439, 445 (Miss. 1985), in which the Mississippi Supreme Court stated, "Mississippi law does not permit recovery of damages because of mere diminishment of the 'chance of recovery'." Further, the court held that "[r]ecovery is allowed only when the failure of the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition." *Id.* The *Clayton* decision rejected the notion that a mere "better result absent malpractice" would meet the requirements of causal connection. *Ladner v. Campbell*, 515 So. 2d 882, 889 (Miss. 1987). The language in *Clayton* and *Ladner* was reemphasized in the Mississippi Supreme Court decision of *Drummond v. Buckley*, 627 So. 2d 264, 270 (Miss. 1993). Griffin now asks us to reform the Mississippi law on this point. However, we are duty bound to follow clear precedent.

Based on the expert testimony presented on behalf of Griffin, had Jeanette's cancer been diagnosed in February of 1993, she would have only had a 30% to 40% chance of a normal life expectancy. There existed no chance for a "substantial improvement" in Jeanette's condition. *Clayton*, 475 So. 2d at 445. Therefore, the trial judge did not err by granting partial summary judgment to Dr. Briseno.

III.

WITH RESPECT TO DR. FEDUCCIA, WHETHER JURY INSTRUCTIONS NUMBERED DI3, DI4, AND DI6 CONTAINED INCORRECT STATEMENTS OF THE LAW WHICH MISLED THE JURY.

Griffin contends that the instructions given on behalf of Dr. Feduccia permitted the jury to assume facts which were not in evidence, contained incorrect statements of law, and most egregiously, instructed the jury that it should presume Dr. Feduccia had acted with ordinary and due

care. Dr. Feduccia argues that the jury instructions were supported by the law and the evidence, and

were properly granted by the trial court.

The standard in which we review jury instructions is as follows:

On appeal, this Court does not review jury instructions in isolation; rather, they are read as a whole to determine if the jury was properly instructed. Accordingly, defects in specific instructions do not require reversal "where all instructions taken as a whole fairly--although not perfectly--announce the applicable primary rules of law." However, if those instructions do not fairly or accurately instruct the jury, this Court can and will reverse.

Lovett v. Bradford, 676 So. 2d 893, 896-97 (Miss. 1996) (quoting *Peoples Bank and Trust Co. v. Cermack*, 658 So. 2d 1352, 1356 (Miss. 1995)).

Griffin complains of three separate instructions, specifically:

INSTRUCTION DI3

You are instructed that if you find from the evidence that in December, 1991, the cancer in Mrs. Griffin's body actually did not exist or alternatively if you find that the cancer did exist in December, 1991, but that at that time it was in such a preliminary stage that it could not be detected by a family medical practitioner using due care and performing appropriate tests and procedures, then in either of these events, Dr. Feduccia is not responsible for failing to diagnose a cancer in Mrs. Griffin.

INSTRUCTION DI4

You are instructed that it is the duty of a patient to follow reasonable instructions given to her by her physician with respect to undergoing additional medical tests from a specialist. If you find from the evidence that on December 11, 1991, Dr. Feduccia advised Mrs. Jeanette Griffin to have an endoscope and that she refused to do so, and if you further find that later Dr. Feduccia again recommended that she have an endoscope and a repeat x-ray and that she failed to do so and if you find that the discovery of her condition was reasonably probably the result of any failure on her part to comply with Dr. Feduccia's recommendation, then your verdict should be for the defendant, Dr. Feduccia.

INSTRUCTION DI6

You are instructed that the charge made against Dr. Feduccia in this case is one of negligence or medical malpractice. Negligence or malpractice on the part of a physician practicing in the field of family medicine such as Dr. Feduccia is the failure, if any, of the physician to possess and exercise that degree of care, diligence and skill as is ordinarily possessed and exercised by other minimally competent and reasonably diligent, skillful, careful and prudent physicians in that field of medicine practicing throughout the United States, who have available to them the same general facilities, services, equipment and options as were available to Dr. Feduccia in December, 1991.

Negligence or malpractice on the part of a physician is never presumed and it must be established by a preponderance of the evidence. On the contrary, ordinary and due care on the part of Dr. Feduccia is presumed. You may not infer that Dr. Feduccia was negligent in this case just because Mrs. Griffin ultimately expired from cancer.

Dr. Feduccia cannot be held guilty of negligence or malpractice in this case unless you find from a preponderance or the greater weight of the credible evidence that he failed to exercise such reasonable and ordinary care, skill and diligence in performing his duties as another physician practicing in the field of family medicine would have done under the same or similar circumstances and that any such failure proximately caused or contributed to harm to Mrs. Griffin. A mere possibility only that Dr. Feduccia violated any of the duties described above is insufficient proof for you to return a verdict against him.

The following instructions were also given by the trial court:

INSTRUCTION P-7A(TF)

You are instructed that every physician in America has a duty to treat his or her patient with such medical knowledge as is commonly possessed by or reasonably available to minimally competent physicians in the same specialty of practice throughout the United States of America.

Each physician in America is required to have a realistic understanding of the limitations on his or her knowledge or competence and, in general, to exercise reasonable medical judgment.

Further, each physician in America has a duty to have a practical working knowledge of the facilities, equipment, resources and options available to him or her, including what specialized services or facilities may be available in larger communities in the United States of America. The failure of a physician in the United States of America to utilize such knowledge in the treatment of a patient violated the duty owed to that patient by the physician and is negligence.

Therefore, if you find from a preponderance of the credible evidence presented to you that the Defendant, Thomas A. Feduccia, M.D. failed to use such medical knowledge as was commonly possessed by or reasonably available to reasonable physicians practicing the specialty of family medicine in the Untied States of America, then the Defendant has violated his duty to his patient.

INSTRUCTION 8-1B(TF)

The Court instructs the jury that if you find from a preponderance of the credible evidence in this case

that during his care and treatment of Jeanette Griffin, Thomas A. Feduccia, M.D., failed to treat Jeanette Griffin with that degree of care, skill and diligence which should have been provided by a reasonably prudent and minimally competent physician performing a physical examination, ordering and responding to radiographic diagnostic studies and communicating to his patient regarding the report of those studies practicing in the field of family practice in the United States of America under the same or similar circumstances and that such failure was the sole proximate cause or a proximate contributing cause of Jeanette Griffin's death and damages, if any, then you shall return a verdict for the Plaintiffs.

In *Hall v. Hilbun*, 466 So. 2d 856, 873 (Miss. 1985), the supreme court stated that:

the physician's non-delegable duty of care is this: given the circumstances of each patient, each physician has a duty to use his or her knowledge and therewith treat through maximum reasonable medical recovery, each patient, with such reasonable diligence, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States, who have available to them the same general facilities, services, equipment and options.

The *Hall* court also stated that:

In the care and treatment of each patient, each physician has a non-delegable duty to render professional services consistent with that objectively ascertained minimally acceptable level of competence he may be expected to apply given the qualifications and level of expertise he holds himself out as possessing and given the circumstances of the particular case.

Hall, 466 So. 2d at 871.

Viewing the instructions as a whole, we are of the opinion that the instructions were adequate to inform the jury, and hold that the jury was fairly and properly instructed. *Starcher v. Byrne*, 687 So. 2d 737, 742-43 (Miss. 1997).

IV.

WHETHER THE TRIAL COURT ERRED, IN APPLYING RULE 32 AND THE RULES OF EVIDENCE INCORPORATED IN RULE 32, BY FAILING TO REDACT IRRELEVANT AND PREJUDICIAL DEPOSITION TESTIMONY REGARDING A MOTOR VEHICLE ACCIDENT INVOLVING JEANETTE GRIFFIN'S SON AND BY FAILING TO ALLOW

USE OF MRS. GRIFFIN'S DEPOSITION TESTIMONY AT THE NATURAL AND PROPER TIME IN REBUTTAL.

Griffin argues that the trial court erred in failing to exclude a portion of Jeanette's deposition testimony concerning her hospitalization in June of 1993. During her videotaped deposition, Jeanette stated that her hospitalization in June of 1993 was not only caused by her prior symptoms, but also by her anxiety and depression relating to her son's divorce, drinking habits, and a DUI automobile

accident in which her son was involved. Griffin sought to preclude this portion of Jeanette's testimony by a motion in limine. The motion was denied by the trial court, and the jury heard during Jeanette's videotaped direct testimony that one of the reasons for her hospitalization in June of 1993 was her family problems.

Rule 32 of the Mississippi Rules of Civil Procedure covers depositions, and states in pertinent parts:

(a) Use of Depositions. At the trial or upon the hearing of a motion of an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Griffin asserts that the information about Jeanette's son's problems is irrelevant under Rule 401 of the Mississippi Rules of Evidence. Rule 401 states:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Griffin contends that the evidence of Jeanette's son's automobile accident has no connection to the activities of either Dr. Briseno or Dr. Feduccia, and that Jeanette's son's accident cannot be relevant to what the physicians knew or considered in their treatment or diagnosis rendered. Drs. Briseno and Feduccia contend that Griffin "opened the door" to the reasons behind Jeanette's hospitalization by stating during its opening arguments that Jeanette went to the hospital in June because of some personal problems, and by offering the medical records from the June 1993 admission into evidence. We are of the opinion that Rule 32 of the Mississippi Rules of Civil Procedure allows the testimony, and that the testimony was relevant as to why Jeanette was hospitalized. This was a matter within the discretion of the trial judge. "The admission or suppression of evidence is within the discretion of the trial judge and will not be reversed absent an abuse of that discretion." *Sumrall v. Mississippi Power Co.*, 693 So. 2d 359, 365 (Miss. 1997). *See also Mississippi Transp. Comm'n v. Fires*, 693 So. 2d 917, 920 (Miss. 1997). Griffin has cited no case authority to support his position, and Griffin has not shown this Court how he has been prejudiced by the introduction of Jeanette's testimony regarding her son's automobile accident. Therefore, this contention has no merit.

Griffin next argues that the trial court erred by not allowing part of Jeanette's deposition testimony to be used in rebuttal. Jeanette gave two depositions. The first deposition told her version of the events, and the second deposition rebutted the deposition testimony of Drs. Briseno and Feduccia. Jeanette died about two months after her second deposition. Griffin sought to use Jeanette's second deposition during trial to rebut the testimony of Drs. Briseno and Feduccia. The trial court ruled the testimony

admissible; however, he ruled that he did not want to take the testimony out of the context which it appeared within the deposition and also concluded that it could be confusing to the jury. The subject portion of the deposition testimony was admitted to the jury during Griffin's case-in-chief. Griffin complains that the testimony was not admitted at the "natural time of trial."

The trial court enjoys wide discretion in the admission of rebuttal evidence. *Clark v. City of Pascagoula*, 507 So. 2d 70, 76 (Miss. 1987) (citing *White v. Weitz*, 169 Miss. 102, 152 So. 484 (1934)). The trial court's actions will not be held to be erroneous to the extent of requiring a reversal unless the discretion was exercised to the prejudice of the opposing party. *Crawford v. City of Meridian*, 186 So. 2d 250, 253 (Miss. 1966). Further,

[t]he order of judicial investigation, including the time and manner of introducing evidence, is, and of necessity must be, committed to the sound discretion of the trial judge; and appellate courts should not interfere to reverse the exercise of this discretion by a trial court unless such exercise appears to have been had arbitrarily, capriciously or unjustly.

Deas v. Andrews, 411 So. 2d 1286, 1291 (Miss. 1982).

In the case at hand, the testimony was presented to the jury, just not in the order preferable to Griffin. For clarity sake, the trial court ruled that he did not want the testimony to be taken out of context for fear of confusing the jury. We agree with the trial court's decision not to dissect Jeanette's deposition, and therefore, hold that the trial court neither erred nor abused its discretion by denying Griffin the use of Jeanette's deposition testimony in rebuttal.

V.

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE PLAINTIFF'S ATTORNEY TO EXPLORE THE PROFESSIONAL LIABILITY INSURANCE OF THE DEFENDANT'S EXPERT WITNESSES IN ORDER TO SHOW BIAS OR INFLUENCE BASED ON THE EXPERT PHYSICIANS' FINANCIAL SELF-INTEREST.

The trial court denied Griffin in his attempt to explore the fact of liability insurance or insurance carriers for the expert witnesses of Drs. Briseno and Feduccia. Griffin argues that Rule 411 permits a party to inquire about a witness's insurance coverage to explore bias and prejudice. Griffin contends that the trial court erroneously failed to allow Griffin to inquire into this area.

Rule 411 of the Mississippi Rules of Evidence states:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof or agency, ownership, or control, or bias or prejudice of a witness.

During the deposition of defense expert Dr. Thigpen, Griffin's counsel cross-examined Dr. Thigpen and determined that his liability coverage was with Medical Assurance Company of Mississippi. Dr. Briseno was also a Medical Assurance policy holder. Dr. Thigpen stated that he did not know Dr. Briseno was a policy holder of Medical Assurance. Also, counsel for Dr. Feduccia made record of the fact that his client had a different liability insurance carrier than that of Dr. Thigpen. At trial, Griffin sought to question Dr. Thigpen regarding the financial consequences he would face if a fellow insured with the same carrier received an adverse judgment. The trial court would not allow the testimony.

We fail to see how the testimony of Dr. Thigpen was biased when Dr. Thigpen did not know the identity of the insurance carrier of Dr. Briseno, and Dr. Thigpen had a different insurance carrier than that of Dr. Feduccia. We are of the opinion that Griffin was attempting to put before the jury the fact that Drs. Briseno and Feduccia were in "good hands." This is improper under Rule 411 of the Mississippi Rules of Evidence and the established case law in this state. *See Royal Oil Co. Inc. v. Wells*, 500 So. 2d 439, 448 (Miss. 1986); *Mid-Continent Aircraft Corp. v. Whitehead*, 357 So. 2d 122, 124 (Miss. 1978). Therefore, we find that the trial court did not err by denying the introduction of the evidence.

THE JUDGMENT OF THE NESHOBA COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

COLEMAN, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. DIAZ, J., CONCURS IN RESULT ONLY. BRIDGES, C.J. AND McMILLIN, P.J., NOT PARTICIPATING.