

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00377 COA

JASON MITCHELL

APPELLANT

v.

BRUCE MCCARTHY, M.D.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. RICHARD WAYNE MCKENZIE

COURT FROM WHICH APPEALED: FORREST COUNTY CIRCUIT COURT

FOR APPELLANT:

ANGELA E. DAVIS

FOR APPELLEE:

F.M. TURNER, III

JON MARK WEATHERS

SANDRA MOHLER

NATURE OF THE CASE: MEDICAL MALPRACTICE

TRIAL COURT DISPOSITION: JURY VERDICT RENDERED IN FAVOR OF DEFENDANT,  
BRUCE MCCARTHY, M.D.

MANDATE ISSUED: 6/24/97

EN BANC

McMILLIN, P.J., FOR THE COURT:

The case before the Court today involves a claim for medical malpractice. The matter was tried before a jury in the Circuit Court of Forrest County, and the jury returned a verdict in favor of the defendant doctor, Bruce McCarthy, M.D. The plaintiff, Jason Mitchell, now brings this appeal alleging six separate errors which he contends require the reversal of the present judgment. One issue was dealt with by the supreme court by order prior to referral of the case to this Court. We have concluded that the remaining five issues presented on appeal are without merit, and we affirm the trial court judgment.

## I.

### The Facts

Mitchell sustained a serious fracture to his leg while playing an informal game of football with friends. McCarthy was the treating physician for the fracture, and his course of treatment included the surgical insertion of a metal rod in the bone. By the time Mitchell's fracture completed the healing process, his injured leg had shortened by a length of approximately three inches.

Mitchell sued McCarthy, alleging that McCarthy violated the applicable standard of care in his treatment. He claimed that due to the nature and severity of the fracture, proper medical procedures indicated the use of a different type rod that would have locked the bone into position at its proper length. He claimed that the rod used, in effect, permitted the two injured ends of the bone to be pushed together in the healing process, thereby causing the bone to shorten. Alternatively, he alleged that even were it not malpractice to use that type rod, subsequent examination revealed that the injured leg was going through a shortening process and that there were procedures available to McCarthy that would have permitted this process to be halted at a time when the deviation between Mitchell's two legs was within clinically acceptable limits. The failure to take such remedial measures is asserted as an alternate basis for liability.

McCarthy presented evidence that tended to show that subsequent problems with Mitchell's injured leg were the result of his failure to follow medical advice to avoid any load-bearing on the leg while healing progressed. This evidence included indications that Mitchell was walking without the use of crutches as recommended by McCarthy, and had, in fact, reinjured his leg on several occasions under circumstances that would indicate a lack of concern for his own recovery. McCarthy testified to discussing with Mitchell several methods available to promote the proper healing of the injured leg and to avoid the comminution of the fracture, but said that Mitchell refused to follow any of his suggestions.

After a jury verdict in favor of McCarthy, Mitchell filed a post-trial motion for a JNOV or, alternatively, a new trial. The motion was denied, and this appeal followed. We will discuss the issues raised by Mitchell, though varying somewhat the order of consideration.

## II.

## The Failure to Permit the Introduction of the Deposition of Dr. Lindsey

During discovery, McCarthy disclosed Dr. Ronald Lindsey as a possible expert witness on his behalf. Dr. Lindsey was deposed by Mitchell prior to trial. As matters developed, Dr. Lindsey was not called by McCarthy to testify in his behalf.

After McCarthy rested his defense, Mitchell proposed to offer Dr. Lindsey's deposition as rebuttal evidence. McCarthy objected on several grounds, including the fact that Dr. Lindsey had not been properly voir dired in the deposition to establish his credentials as an expert in the relevant field or his knowledge concerning the facilities available to McCarthy at the time of Mitchell's injury. Additionally, McCarthy argued that the subject matter of the deposition, if admissible at all on behalf of Mitchell, was properly a part of the plaintiff's case in chief and not rebuttal evidence.

The trial court refused to allow the deposition to be admitted, apparently on the proposition that he had no basis to determine Dr. Lindsey's qualifications as an expert.

Mitchell advances the argument that by designating Dr. Lindsey as a potential expert witness, McCarthy had, in effect, stipulated this witness's credentials. He further argued that, since he was also willing to accept Dr. Lindsey as qualified to give expert testimony, there was no contested issue regarding the introduction into evidence of Dr. Lindsey's opinion testimony. Though we find the facts in this case somewhat unusual, we cannot agree with Mitchell that simply by designating a particular individual as a possible expert witness, a party loses any right in the future to challenge the admission of that individual's opinion testimony. It would not be unusual, for instance, for a party to learn subsequent facts about a witness that would call into question an earlier determination that the witness was sufficiently knowledgeable to give probative evidence on a particular issue. In such instance, a party could properly elect not to call that witness and should not be prevented from challenging that witness's qualifications if presented by the opposing side.

We find no reason to require the defendant doctor in this case to waive any available objection to the receipt of evidence presented against him. The primary thrust of the objection appears to be, not particularly that Dr. Lindsey was generally unqualified by training and experience to offer relevant expert testimony, but that in the course of the deposition, Mitchell had failed to develop information to show that Dr. Lindsey was possessed of the necessary relevant information concerning the particular facts surrounding Mitchell's injury and the ensuing treatment in order to properly determine the applicable standard of care. This standard has been said to be:

[G]iven 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.*

*Hall v. Hilbun*, 466 So. 2d 856, 873 (Miss. 1985) (emphasis supplied). Since consideration of these various factors must be an integral part of an expert's opinion on any deviation from the standard of care, we cannot conclude that the trial court was manifestly wrong in refusing to admit the deposition.

We also find disturbing the plaintiff's inability or unwillingness in his brief to point out to this Court what relevant rebuttal evidence was contained in the deposition. An important part of this Court's review of a claim that pertinent evidence was improperly excluded by the trial court is a determination of the effect the court's ruling had on the aggrieved party's case. "Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected . . . ." M.R.E. 103(a). If we are to conclude that Mitchell has been substantially prejudiced by the trial court's ruling, we ought to be made aware of what evidence was presented during the defense's presentation that required rebuttal and what particular aspects of the deposition would have tended to rebut this evidence. Mitchell provides us with no such information, and it does not appear evident from our review of the record. Thus, even were we convinced that the deposition was improperly excluded, we would not be in position to conclude that the exclusion constituted reversible error.

An appellate court is required to give great deference to the rulings of the trial court on the admission or exclusion of evidence. This rule applies to questions of the qualifications of expert witnesses. *See West v. Sanders Clinic for Women*, 661 So. 2d 714, 720 (Miss. 1995). It applies equally to the matter of the admissibility of proposed rebuttal evidence of every nature. *See Clark v. City of Pascagoula*, 507 So. 2d 70, 75 (Miss. 1987); *Crawford v. City of Meridian*, 186 So. 2d 250, 253 (Miss. 1966). We can find no manifest abuse of the broad discretion granted to the trial court in matters such as this that would require us to intervene in this case.

### III.

#### Use of Learned Treatises

Mitchell claims the trial court committed reversible error when it unduly limited his presentation of evidence through the use of certain articles appearing in *The Journal of Bone and Joint Surgery*. During cross-examination of McCarthy, Mitchell's counsel questioned McCarthy about a number of articles appearing in that journal reporting the findings of a four-year study regarding leg fractures treated at the Shock Trauma Center of the Maryland Institute for Emergency Medical Services System. The articles dealt with an apparently-evolving idea that using a locking-type rod in repairing certain leg fractures was useful in preventing comminution of the bone during healing and that the rod, by holding the two ends of the injured bone apart to some extent, did not impede the healing process as significantly as had been previously thought. The thrust of the examination seems to have been to suggest that McCarthy was behind the curve of advances in his specialty when he failed to use the locking-type rod in treating Mitchell's fracture.

During the course of this examination, there was a prolonged and often confusing exchange of questions by Mitchell's counsel, objections from McCarthy's counsel, prolonged discussion of the proper use of learned treatises, and finally a ruling by the trial court. At one point, the trial court concluded that Mitchell's counsel would not be permitted simply to read portions of the articles into the record since there was no indication that McCarthy had relied upon the information in the articles in his treatment of Mitchell. Yet, after this ruling, the trial court permitted a lengthy cross-examination that included repeated reading of excerpts from the journal article.

Mississippi Rule of Evidence 803(18) permits the introduction into evidence of "statements contained

in published treatises, periodicals, or pamphlets on a subject of . . . medicine . . . established as a reliable authority by the testimony or admission of the witness . . ." M.R.E. 803(18). The comment to the rule notes this "differs significantly from pre-rule Mississippi practice. It allows statements in learned treatises to be admitted as substantive evidence. This is a departure from Mississippi law which only provided for impeachment use of treatises." M.R.E. 803(18) cmt. However, even under this rule, "the treatise may not be used substantively unless the witness relied upon it in his testimony on direct examination or the witness was questioned about it on cross-examination." M.R.E. 803(18) cmt.

Certainly, at the time Mitchell's counsel attempted to read lengthy portions of the articles into the record, no proper predicate had been laid. He was, at the time, still conducting his cross-examination of McCarthy, a necessary preliminary step toward the introduction of any part of the articles for substantive purposes. Thus, the judge's ruling denying permission to simply read from the article to the jury was not improper at the time it was made. The offer to read portions of the articles to the jury was not renewed after completing McCarthy's cross-examination. This constitutes a waiver of this issue. This Court will not put a trial court in error for a matter that was not presented to it for proper resolution. *See Cossitt v. Federated Guar. Mut. Ins. Co.*, 541 So. 2d 436, 446 (Miss. 1989).

In all events, this Court is satisfied that the trial court permitted Mitchell's counsel sufficient latitude in his cross-examination of McCarthy about the contents of the articles to make the appropriate point with the jury. It was clearly Mitchell's position that the articles indicated the need for a locking rod. McCarthy, on the other hand, during cross-examination, explained that he felt Mitchell's counsel was giving an over-broad reading to the articles, and that his decision as to the proper treatment of Mitchell's injury was not necessarily at variance with the recommendations of the cited study. The matter was explored at some length, and the jury heard pertinent excerpts from the journal as a part of the cross-examination. Mitchell does not seem to have been deprived of whatever benefit he felt he could draw from these articles. We conclude that there was no reversible error in the handling of this evidentiary issue.

#### IV.

##### The Use of a Medical Illustration as an Exhibit

Mitchell complains that the trial court refused to let his expert witness, Dr. Jay Nathan, testify from a medical illustration purported to have been made from the x-rays of Mitchell's leg. The trial court held that the illustration was not properly authenticated. The control of evidence is vested in the sound discretion of the trial court, and we will not reverse for an evidentiary ruling unless convinced that a manifest injustice has occurred. *See General Motors Corp. v. Jackson*, 636 So. 2d 310, 314 (Miss. 1992). In this instance, the doctor was permitted to testify using the x-rays themselves to illustrate his point. Mitchell offers no compelling reason why he was prejudiced by this ruling to the extent that would require reversal of the jury verdict, and we are unconvinced that any such prejudice occurred.

#### V.

## The Preamble to the Defendant's Instructions

In drafting most of his proposed jury instructions, McCarthy began them with the phrase, "It is the law of the State of Mississippi that . . ." Mitchell complains on appeal that this phrase gave undue weight to the defendant's instructions. He cites no authority that this is an improper form of instruction.

In his rebuttal brief, Mitchell admits his inability to find such authority, but bases his argument solely upon principles of logic. This Court is not convinced that this device, merely invoking the name of the state where the case is being tried, puts improper emphasis on the instruction. The trial court is required to instruct the jury, not on the law of the county or of the particular circuit court district, but on the law as it exists in the State of Mississippi. To explicitly declare the source of authority for the court's instructions on the law does not seem improper. Had Mitchell been convinced that this distinction between these defense instructions and his own proposed plaintiff's instructions was improperly emphasizing the defendant's instructions, it was within his power to redraft his proposed instructions to contain the same introductory phrase and make them essentially indistinguishable from any other. We have no reason to doubt that the trial court would have permitted this modification since, beyond the instruction numbering system of letter prefixes identifying plaintiff's instructions with a "P" and defendant's instructions with a "D," the rules provide that "[i]nstructions shall not otherwise be identified with a party." M.R.C.P. 51(b)(2). Mitchell did not propose to redraft his own instructions after his objection to the form of the defendant's instructions was overruled, and we decline to find reversible error on this issue.

## VI.

### Other Issues Regarding Instructions

Mitchell complains that one of McCarthy's instructions, in defining the standard of care McCarthy owed to Mitchell, included the phrase "surgeons . . . who had available to them the same general facilities, services, equipment and options as were reasonably available to Dr. McCarthy in October, 1990, and thereafter." Mitchell says that there was no contested issue regarding the quality of the facilities and equipment available to McCarthy. While it is true that McCarthy did not base his defense on the unavailability of any particular treatment procedure that might have been available elsewhere, nevertheless, the instruction is an accurate statement of the standard of care as adopted by the Mississippi Supreme Court. *See, e.g., Starcher v. Byrne*, 687 So. 2d 737, 740 (Miss. 1997); *Drummond v. Buckley*, 627 So. 2d 264, 268 (Miss. 1993); *Palmer v. Biloxi Regional Medical Ctr.*, 564 So. 2d 1346, 1354-55 (Miss. 1990). We find nothing prejudicial or confusing in informing the jury of a doctor's duty in such general terms as a preamble to instructing as to what specific acts are claimed to violate that standard. Mitchell is unable to suggest in his brief how he was prejudiced by this language, and we conclude that no such prejudice occurred.

Mitchell also complains that Instruction D-13, cautioning the jury against basing any damage award on speculation or conjecture, was improper in that it unduly limited the jury's ability to assess damages in an area of the law where precise calculation of damages is essentially impossible. Mitchell cites no authority in support of this proposition. The instruction is a correct recitation of the law.

*See, e.g., CIBA-Geigy Corporation v. Murphree*, 653 So. 2d 857, 869 (Miss. 1995). The jury was instructed on the elements it could consider in assessing damages, including such nebulous areas as pain and suffering. When considering all the instructions as a whole, we find that the jury was properly instructed in this case, and that Instruction D-13 did not improperly limit the jury in its deliberations. *See Starcher v. Byrne*, 687 So. 2d at 742-43.

## VII.

### The Weight of the Evidence

Mitchell argues on appeal that the verdict in favor of McCarthy is against the overwhelming weight of the evidence. He claims entitlement to a JNOV, but appears to couch his argument in terms that would suggest the need to reverse and remand for a new trial. He bases this argument primarily on an excerpt from one of his expert witnesses that McCarthy did, in fact, violate the standard of care in his treatment of Mitchell's injury. He further notes that McCarthy presented no expert witness in his own behalf beyond his own testimony. While this is true, we have reviewed McCarthy's testimony concerning his treatment of Mitchell and the facts of Mitchell's post-injury behavior. We conclude that there were legitimate contested issues of fact concerning the cause of Mitchell's leg problems to be resolved by a jury. McCarthy was competent, in his own right, to give expert testimony regarding the proper treatment of Mitchell and the actual cause of his shortened leg. At no time during trial did Mitchell offer any objection to McCarthy's testimony on the basis of his lack of qualification. There is no rule that prohibits a party from giving expert testimony in his own case.

The jury was not obligated, in the opinion of this Court, to accept the expert opinion of plaintiff's witness. In reviewing a jury verdict, this Court is obligated to view the evidence in the light most favorable to sustaining the verdict. *See Luther McGill, Inc. v. Bradley*, 674 So. 2d 11, 14 (Miss. 1996); *see also Turner v. Temple*, 602 So. 2d 817, 821 (Miss. 1992). On that standard of review, we cannot determine that a manifest injustice has occurred in this case. There is, thus, no basis to disturb the judgment.

**THE JUDGMENT OF THE FORREST COUNTY CIRCUIT COURT IS AFFIRMED.  
COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT, JASON MITCHELL.**

**BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING,  
PAYNE, AND SOUTHWICK, JJ., CONCUR.**