

**IN THE COURT OF APPEALS 10/03/95**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00379 COA**

**RUBY C. MCCALOP**

**APPELLANT**

**v.**

**DR. JOHN A. MARASCALCO**

**APPELLEE**

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

TRIAL JUDGE: HON. GRAY EVANS

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ROBERT J. DAMBRINO, III

ATTORNEY FOR APPELLEE:

CLINTON M. GUENTHER

NATURE OF THE CASE: MEDICAL MALPRACTICE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR DEFENDANT

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

DIAZ, J., FOR THE COURT:

James G. McCalop and Ruby C. McCalop (McCalop) filed a complaint alleging negligence against

Dr. John A. Marascalco (Dr. Marascalco). James McCalop has since died leaving Ruby McCalop as the sole plaintiff. The parties conducted preliminary discovery after which, Dr. Marascalco filed a motion for summary judgment. The Honorable Gray Evans granted this motion. McCalop appeals asserting the following issues: (1) The circuit court erred in deciding a motion for summary judgment without notice or opportunity of hearing; (2) The circuit court erred in granting summary judgment in favor of Dr. Marascalco. Upon review we find that the circuit court should not have granted summary judgment on the issue of informed consent.

## THE FACTS

Dr. Marascalco is a dermatologist who had treated James G. McCalop over many years for various skin maladies including cancerous skin lesions. Mr. McCalop had four lesions on his face all of which were removed by Dr. Marascalco except one on his right cheek. Dr. Marascalco obtained a biopsy of the lesion on the right cheek and sent the biopsy to the pathology lab at Greenville Medical Center. The biopsy consisted of squamous cell carcinoma of the acantholytic pattern. Dr. Marascalco subsequently removed the lesion from the right cheek. Apparently, one of Mr. McCalop's facial nerves was damaged as a result of the procedure thereby resulting in right facial paralysis. McCalop asserts that Dr. Marascalco failed to obtain a microscopic analysis without which, he would not be able to tell if the procedure removed all of the cancer. Over the next year, the cancer metastasized. Ultimately, Mr. McCalop died of the cancer on October 29, 1993.

McCalop filed a complaint in Washington County Circuit Court on March 19, 1993. On April 20, 1993, Dr. Marascalco filed his first set of interrogatories and request for production of documents. In one of the interrogatories, Dr. Marascalco sought the identity and opinions of McCalop's expert witnesses. On October 22, 1993, McCalop provided her responses to the interrogatories. Her response to the expert witness question was, "Unknown at this time, but will be seasonably updated as discovery is still ongoing."

On February 10, 1994, Dr. Marascalco filed a motion for summary judgment based on McCalop's failure to identify any expert opinions. Dr. Marascalco attached two expert affidavits addressing the standard of care issue. By letter dated February 23, 1994, McCalop was informed by defendant of a possible hearing date on the motion for summary judgment. On March 15, 1994, Circuit Judge Gray Evans granted Marascalco's motion for summary judgment.

## DISCUSSION

### I. SUMMARY JUDGMENT WITHOUT NOTICE

On appeal, McCalop argues that the circuit court granted summary judgment against her without notice or a hearing. She contends that in essence, the court substituted a summary judgment motion for a trial by jury, and adjudicated the case without full development of the facts. Dr. Marascalco asserts that McCalop was given ample opportunity to submit expert affidavits in support of her position. Appellant had not submitted any expert affidavits when summary judgment was granted a year after the initial complaint was filed. Rule 56 (c) of the Mississippi Rules of Civil Procedure allows the adverse party to serve affidavits prior to the day before the hearing of the motion. McCalop complains that since she was not advised of the impending ruling of the circuit court, she was abruptly prevented from submitting supporting affidavits.

The Mississippi Supreme Court has held that failure to comply with Rule 56(c) is reversible error. *Hurst v. Southwest Miss. Legal Serv.*, 610 So. 2d 374, 385 (Miss. 1992). Rule 56(c) requires ten day advance notice for summary judgment hearings. In the *Hurst* case, the trial court never fixed a date for hearing the summary judgment motion prior to the day it was granted. The court stated that the ten-day notice requirement is to be strictly enforced, and failure to provide such notice constituted reversible error. *Id.* (citing *Pope v. Schroeder*, 512 So. 2d 905, 908 (Miss. 1987)). In *Hurst*, the lower court granted oral arguments on the motion for summary judgment for which the plaintiffs never received notice. The plaintiffs went to the courthouse that day prepared to try the case, not to argue the motion for summary judgment. *Id.* at 385. In *Pope*, the movant neither filed a motion for summary judgment, nor was notice given of the hearing. *Pope*, 512 So. 2d at 908. A similar situation was also presented in *Palmer v. Biloxi Regional Medical Center, Inc.*, 649 So. 2d 179 (Miss. 1994), where summary judgment was reversed where the trial court sua sponte converted defendant's Rule 12(b)(6) motion to one for summary judgment without giving the plaintiffs the ten-day notice required by the rule. The present case is distinguishable from *Hurst*, *Pope* and *Palmer*. In the present case, there were no oral arguments. Dr. Marascalco filed a motion for summary judgment and provided proper notice by both certificate of service, and formal notice of motion to the plaintiffs. McCalop responded in a timely manner, and the trial court did not rule on the motion until about three weeks after McCalop's response to the motion. Under these circumstances, we find that the appellants received proper notice of the summary judgment.

## II. SUMMARY JUDGMENT

McCalop asserts that the circuit court erred when it granted summary judgment against her. She argues that there was an issue of material fact because (1) Marascalco failed to obtain a microscopic analysis to determine if all the cancer was removed, and (2) McCalop was not fully advised to give informed consent.

We employ a de novo standard of review when reviewing a lower court's grant of summary judgment. *Seymour v. Brunswick Corp.*, 655 So. 2d 892, 894 (Miss. 1995) (citing *Short v. Columbus Rubber & Gasket Co.*, 535 So. 2d 61, 63 (Miss. 1988)). The evidence must be viewed in the light most favorable to the nonmoving party who is to be given the benefit of every reasonable doubt. *Seymour*, 655 So. 2d at 895 (citations omitted). If the court finds the moving party is entitled to a judgment as a matter of law, summary judgment should be entered in his favor. *Morgan v. City of Ruleville*, 627 So. 2d 275, 277 (Miss. 1993) (citing *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 362 (Miss. 1983)). Otherwise, the court should deny summary judgment. *Id.*

## MEDICAL NEGLIGENCE

Summary judgment was properly granted on the issue of medical malpractice. To prove a prima facie case of medical malpractice, a plaintiff must prove the existence of a duty on the part of a physician to conform to the specific standard of conduct, the applicable standard of care, the failure to perform to that standard, that breach of duty by the physician was the proximate cause of plaintiffs' injury, and that damages to plaintiff have resulted. *Barner v. Gorman*, 605 So. 2d 805, 808 (Miss. 1992); *Burnham v. Tabb*, 508 So. 2d 1072, 1074 (Miss. 1987). When proving these elements in a medical malpractice suit, expert testimony must be used. *Barner*, 605 So. 2d at 809. Not only must this expert identify and articulate the requisite standard that was not complied with, the expert must also

establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries. *Id.* McCalop failed to submit any expert evidence to establish a claim of negligence. In the absence of such evidence, we must conclude that summary judgment is appropriate on the issue of medical negligence.

### INFORMED CONSENT

McCalop argues on appeal that Dr. Marascalco failed to inform Mr. McCalop of the nature and character of the cancer, or the risks associated with the procedure. In Mississippi, the rule regarding informed consent is that a physician must disclose those known risks which would be material to a prudent patient in determining whether or not to undergo suggested treatment. *Barner*, 605 So. 2d at 807; *Hudson v. Parvin*, 582 So. 2d 403, 410 (Miss. 1991) (quoting *Phillips v. Hull*, 516 So. 2d 488, 493 (Miss. 1987)). In *Barner*, the Mississippi Supreme Court affirmed summary judgment on the issue of medical negligence, but reversed summary judgment on the issue of informed consent because a genuine dispute of material fact remained. In *Barner*, the patient sued the plastic surgeon who treated a scar on her neck. Instead of the original scar getting smaller after the treatment, she had a massive keloid scar along the length of the front of her neck. The doctor in the *Barner* case argued that he had warned the patient of the risks of recurrent keloid scarring, and that she gave informed consent when she signed the CONSENT TO OPERATION, ANESTHETIC AND OTHER MEDICAL SERVICES FORM. The court felt that this did not sufficiently establish informed consent. *Barner*, 605 So. 2d at 808. It held that disclosure to a patient should be specific to that patient's treatment. *Id.* Where there is an ongoing doctor-patient relationship including office visits and a review of alternative procedures or treatments, the patient is entitled to disclosure by the doctor with specific information amounting to more than protective boilerplate. *Id.* In the absence of any documentary or verbal evidence substantiating the physician's claim of having obtained his patient's "informed" consent for the operation, this Court cannot find that the physician is entitled to summary judgment as a matter of law. *Id.*

Applying this standard to the case at bar, Dr. Marascalco was required to provide disclosure to McCalop of the risks involved with the removal of the lesions. According to Dr. Marascalco's experts, the damage to Mr. McCalop suffered to his facial nerve would have been just as likely, if not more likely a result of either alternative methods of treatment, or the natural result of the cancer. Appellant argues that James McCalop would have never consented to the procedure had he been advised on the consequences. Dr. Marascalco denies in his answers to the complaint that he did not inform Mr. Marascalco of the possible risks of the treatment. The informed consent theory of recovery in this case is different from the medical negligence theory. No medical expert testimony is needed to prove what communications transpired between doctor and the patient. *Phillips v. Hull*, 516 So. 2d 488, 494 (Miss. 1987). In *Phillips*, the court refused to grant summary judgment on the issue of informed consent where the affidavits of the patient and the doctor were in direct contradiction. *Phillips*, 516 So. 2d at 494. We find contradictory assertions about whether Dr. Marascalco disclosed the risks to McCalop and whether McCalop consented to the procedure, thus, a genuine issue of material fact exists which must be resolved. Based on the foregoing, the lower court should not have granted summary judgment on the issue of informed consent.

### III. SUBSTITUTION OF PARTIES

Upon review, there seems to be a procedural problem on the face of the record that both parties seem to have overlooked. This case was originally filed jointly by Mr. McCalop and Mrs. McCalop, both in their individual capacity. Mr. McCalop died before the order for summary judgment was entered. There is nothing in the record that would indicate that, after Mr. McCalop's death, the cause was revived as to his individual claims by his estate. None of the claims asserted by him individually survive to his wife. The claims that do survive his death are properly assertable by his legal representative on behalf of his estate; however, neither party has made a suggestion of death as required under Rule 25 of the Mississippi Rules of Civil Procedure. Since it would seem that Mrs. McCalop, in her individual capacity, would have the authority to continue to pursue those claims that were personal to Mr. McCalop, we suggest that counsel address this procedural oversight on remand.

#### CONCLUSION

Because we find that an issue of material fact remains as whether McCalop provided informed consent, we reverse the summary judgment granted by the lower court on the issue of informed consent and remand this case for further proceedings not inconsistent with this opinion.

**THE WASHINGTON COUNTY CIRCUIT COURT JUDGMENT OF SUMMARY JUDGMENT FOR DR. JOHN A. MARASCALCO IS AFFIRMED ON THE ISSUE OF MEDICAL NEGLIGENCE AND REVERSED AND REMANDED ON THE ISSUE OF INFORMED CONSENT. COSTS ARE TAXED TO THE APPELLEE.**

**BRIDGES AND THOMAS, P.JJ., BARBER AND COLEMAN, JJ. CONCUR.**

**MCMILLIN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., PAYNE AND SOUTHWICK, JJ.**

**KING, J., NOT PARTICIPATING.**

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McMILLIN, J., CONCURRING IN PART, DISSENTING IN PART:

I agree with the majority that summary judgment against the plaintiffs on the claim that Dr. Marascalco negligently performed the cryosurgery was proper. I must respectfully dissent from the part of the majority's opinion that finds reversible error in the grant of summary judgment against the plaintiffs on the issue of lack of informed consent to the procedure.

The failure of a treating physician to obtain a patient's informed consent to a medical procedure has been recognized as an independent cause of action sounding in tort. *Reikes v. Martin*, 471 So. 2d 385, 392 (Miss. 1985). Therefore, general principles of tort law apply, requiring the plaintiff to prove (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) proximately causing an injury, and (4) resulting damages. *Carpenter v. Mobile*, 620 So. 2d 961 So. 2d 961, 964 (Miss. 1993). It is not sufficient to simply allege, or even to prove, a lack of informed consent in order to create a jury issue on this theory of recovery. There must be evidence that would support a finding that the breach of this duty to fully inform proximately led to the patient's injury and resulting damage. *Phillips ex rel Phillips v. Hull*, 516 So. 2d 488, 492 (Miss. 1987).

In the context of this summary judgment proceeding, Dr. Marascalco's obligation, as the moving defendant, was "to present *some* evidence showing that proof of one or more of the elements of [lack of informed consent was] absent or insufficient." *Palmer v. Biloxi Regional Medical Center*, 564 So. 2d 1346, 1354 (Miss. 1990). If it can be said that such a burden was met, the plaintiff "was required to rebut by producing *significant, probative* evidence" establishing that Mr. McCalop's injuries were "proximately caused" by Dr. Marascalco's failure to obtain informed consent to the procedure. *Id.* at 1354.

It is against this standard that the trial court, and this Court on review, must assess each of the elements of the asserted tort claim. If the plaintiff has failed to satisfactorily establish a jury issue as to each of these elements, then summary judgment was proper and we should affirm.

### *1. Duty and Breach of Duty.*

For purposes of analysis, we must begin by acknowledging the recognized duty of a treating physician to fully inform his patient of all known material risks associated with the suggested procedure, which duty is the foundation of this tort. In our analysis we must also accept the proposition that Dr. Marascalco did not fully inform Mr. McCalop that the proposed procedure might result in nerve damage and resulting facial paralysis since there is nothing in the record to substantiate a claim to the contrary.

The existence of a factual issue for jury consideration as to the first two elements of a claim appears, therefore, to be satisfactorily established. While this conclusion would seem to militate against summary judgment, it does not end the analysis, since there must be an issue for jury consideration as to all of the elements of the claim. *Palmer v. Biloxi Regional Medical Center*, 564 So. 2d at 1354

### *2. Causation.*

If this breach of duty is to be actionable, it must be shown to have caused Mr. McCalop some injury. Preliminarily, it seems to me that it must be conceded that the nerve damage claim and a possible technical claim for battery discussed below are all that potentially arise from the uninformed consent claim. All other damages claimed by the plaintiffs arose out of the alleged negligence of Dr. Marascalco in performing the procedure itself, and these claims are now foreclosed by the portion of summary judgment that the majority would affirm.

Even as to those limited injuries that potentially arise under the informed consent claim, logic compels a conclusion that, in order to establish causation on this theory, the plaintiffs must prove that, having been fully informed, Mr. McCalop would have declined the proposed treatment, and thereby avoided injury. This consideration is as vital as the issue of breach of duty, since the failure to fully inform, even if established, must be the proximate cause of the resulting injury, otherwise, the claim fails on the issue of causation. In considering this aspect of the case, we are directed by previous Mississippi Supreme Court decisions to apply an objective test to determine "whether or not a reasonably prudent patient, fully advised of the material known risks, would have consented to the suggested treatment." *Phillips ex rel. Phillips v. Hull*, 516 So. 2d at 493; *Reikes v. Martin*, 471 So. 2d 385, 392 (Miss. 1985).

It is at this point that, in my opinion, Mr. McCalop's claim based upon lack of informed consent must fail as a matter of law. The uncontradicted affidavits of experts filed by Dr. Marascalco establish that only two other possible procedures were available to treat Mr. McCalop, both involving essentially the same risk of damage to the facial nerve as the procedure used. It is, therefore, presently uncontradicted that the risks involved in the available treatments were such that it was impossible for a fully advised prudent patient to have selected an alternate procedure that would have decreased the likelihood of the unfortunate complication. In fact, the affidavits support the proposition that it is just as likely that the facial nerve damage occurred as a result of the natural progression of the cancerous lesion and was not due to the cryosurgery. If the risk of nerve damage was essentially the same no matter what procedure was employed and was just as likely to occur even if no procedure was undertaken, it is logically impossible to say that Mr. McCalop's alleged lack of informed consent led to a nerve injury that could have been avoided by the receipt of more information.

I will concede that there was a fourth alternative not directly discussed in the affidavits filed by Dr. Marascalco in support of his motion. Mr. McCalop could have declined to undergo any invasive medical procedure at all. If this can be said to be a reasonable alternative, Mr. McCalop may have preserved a claim for damages that would, of necessity, be limited to the battery to his person occasioned by the procedure itself. *Phillips ex rel Phillips*, 516 So. 2d at 492. Nevertheless, I believe it was within the province of the trial court to conclude, on the available evidence, that no fully informed, reasonably prudent patient similarly situated would decline any further treatment for a life-threatening cancerous lesion out of anticipation that the procedure might result in some degree of facial paralysis. If a reasonably prudent patient would not have seen a rejection of all treatment as a viable alternative, then no choice remained except one of the three available courses mentioned in the affidavits. All these procedures involved essentially the same risks, and all required an invasion of the patient's body that, if performed without consent, would constitute a battery. Yet, under the objective test of informed consent compelled by *Reikes* and *Phillips*, a reasonably prudent patient would, without question, have accepted one of the three procedures, and thereby willingly suffered the invasion of his person. I would, on that basis, conclude that there is no actionable battery for the procedure itself. There is, then, nothing in the record to support the proposition that Mr. McCalop suffered any injury due to his alleged lack of informed consent.

Since the uncontroverted facts establish that no injury was proximately caused by the alleged failure of Dr. Marascalco to fully inform Mr. McCalop of the risks associated with the proposed procedure, it seems to me that it would be proper to affirm the summary judgment in all particulars, and I think it error to do otherwise.

**FRAISER, C.J., PAYNE AND SOUTHWICK, JJ., JOIN THIS OPINION.**