

**IN THE COURT OF APPEALS 12/29/95**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00628 COA**

**EDDIE BROWN, AS ADMINISTRATOR OF THE ESTATE OF JAMES BROWN**

**APPELLANT**

**v.**

**STARKEY HUDSON, M.D., AND EMERGENCY MEDICAL SERVICES ASSOCIATES,  
INC.**

**APPELLEES**

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

TRIAL JUDGE: HON. ROBERT L. GOZA

COURT FROM WHICH APPEALED: MADISON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

MICHAEL V. WARD

JAMES M. CREWS

FERR SMITH

GEORGE C. NICHOLS

ATTORNEYS FOR APPELLEES:

JOSEPH L. MCCOY

SENITH C. TIPTON

BYRON P. HANSBORO

NATURE OF THE CASE: CIVIL-MEDICAL MALPRACTICE

TRIAL COURT DISPOSITION: JUDGMENT IN FAVOR OF DEFENDANTS

BEFORE FRAISER, C.J., BARBER, AND McMILLIN, JJ.

FRAISER, C.J., FOR THE COURT:

James Brown died on December 25, 1991, from injuries sustained in a car accident. His father, Eddie Brown, appellant, brought an action for medical malpractice in the Madison County Circuit Court against Dr. Hudson, Emergency Medical Services Associates, Inc. and Madison General Hospital. Madison General settled with Brown and is not involved in this appeal. Brown alleged that Dr. Hudson was negligent in (1) failing to obtain an adequate history of the mechanism of injury; (2) failing to conduct a proper examination for a motor vehicle accident victim with an altered mental state; (3) failing to keep the decedent at the hospital for an adequate period of observation to permit adequate evaluation of the patient, and (4) discharging the patient from Madison General Hospital on the night of the accident with massive and life-threatening intra-abdominal injuries suffered in a motor vehicle accident. Brown alleged that Emergency Medical was liable under the theory of respondeat superior. A jury returned a verdict in favor of Hudson and Emergency Medical. On appeal, Brown raises two issues:

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT REQUIRING THE DEFENDANTS TO CITE RACE NEUTRAL REASONS AND FURTHER IN NOT MAKING AN ON-THE-RECORD-DETERMINATION OF THE MERITS OF THE REASONS CITED BY THE DEFENDANTS FOR THEIR USE OF ALL PEREMPTORY CHALLENGES AGAINST BLACK JURORS.

II. THE VERDICT OF THE JURY AND JUDGMENT RENDERED WAS CONTRARY TO THE LAW AND AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

We affirm.

FACTS

On December 24, 1991, the decedent, James Brown, while unlawfully operating a vehicle under the influence of alcohol, was injured in a two car accident on Highway 16 West, near Interstate 55, in Madison County, Mississippi. He was transported to Madison General Hospital via Mobile Medic. Brown's blood alcohol level was later established to be .3 by the Mississippi Crime Lab. Dr. Hudson was the only physician on duty in the emergency room. According to Hudson, he did a triage, a brief examination of Brown to decide how serious his injuries were, and received a history of what had happened to Brown. Hudson determined that the patient he was currently working on was more

critical than Brown, and returned to that patient. About thirty minutes later, Hudson came back to Brown, who was being uncooperative and boisterous. Hudson examined Brown's chest and abdomen, inserted a nasal gastric tube in his stomach, and ordered abdominal, neck and lip x-rays. Hudson found the x-rays to be normal, and proceeded to stitch Brown's lip, which had been cut by a dislodged tooth. Hudson further examined Brown to determine if he was bleeding internally, and found that he was not. Additionally, Hudson examined Brown's ears, nose and eyes, and found everything to be normal. The results of Brown's blood tests came back normal, with no indication of internal injuries. Brown was discharged from the hospital and sat in the waiting room for several hours before a friend gave him a ride home. During that time, the nurses checked on him and testified that his condition was stable.

The following day, December 25, 1991, Brown returned to the hospital at 3:00 in the afternoon. He was complaining of severe abdominal pain and breathing very rapidly. Hudson was still on call at the hospital and attended Brown. Hudson ordered x-rays, determined the severity of the condition, and arranged for Brown to be transferred to Methodist Medical Center in Jackson. While awaiting transfer, Brown went into cardiac arrest. He died shortly after his arrival at Methodist Medical Center. The results of an autopsy performed December 26, 1990, by Dr. Stephen Hayne, show that the underlying causes of death were: peritonitis; transecting laceration of the small bowel; transecting laceration of the pancreas; laceration of the left renal artery; laceration of the left renal vein; and lacerations of the liver.

**I. THE TRAIL COURT COMMITTED REVERSIBLE ERROR IN NOT REQUIRING THE DEFENDANTS TO CITE RACE NEUTRAL REASONS AND FURTHER IN NOT MAKING AN ON THE RECORD FACTUAL DETERMINATION OF THE MERITS OF THE REASONS CITED BY THE DEFENDANTS FOR THEIR USE OF ALL PEREMPTORY CHALLENGES AGAINST BLACK JURORS.**

At the beginning of the trial, the court initiated voir dire of the potential jurors. After the initial voir dire by the court, the attorneys voir dired the veniremen. The jury selection conference was held in the judge's chambers without a court reporter. In the absence of a transcript, the trial judge drafted an order supplementing and modifying the record of the jury selection. Both parties agreed that the order accurately reflected the sequence of events surrounding the selection of the twelve jurors and one alternate. The panel was tendered to Brown, who exercised all of his peremptory strikes. Hudson, in turn, exhausted all of his peremptory strikes. After the jury and alternate had been selected, Brown commented that Hudson had used all of his strikes against black veniremen. Hudson replied that Brown had used all of his strikes against white veniremen, and volunteered to state reasons for his strikes. The trial judge stated that he observed sufficient race neutral reasons during voir dire for each side's challenges. He informed the parties that they could make an on-the-record objection in the presence of the court reporter. When the trial judge, jury and parties were reconvened in the court room with the court reporter, neither party made any objection to the jury, which was seated and sworn to the case.

Brown appeals, arguing that the judge's response to his off-the-record objection to Hudson's peremptory strikes was reversible error. He insists that the judge should have required Hudson to

give race neutral reasons for all of his peremptory strikes. However, it is clear from the supplemental order that Brown never objected to Hudson's strikes. Brown simply commented that Hudson had struck only black veniremen; he never specifically objected to the individual strikes. Brown also failed to object to the strikes on the record when given the chance. What should have occurred at the trial level is that Brown should have objected to the challenges specifically, and on each occasion attempted to make out a prima facie case of racial discrimination. If the trial court found an inference of purposeful discrimination at that point, the burden would have shifted to Hudson to offer valid, race neutral reasons for the trial judge to rule upon. The trial judge would have already found a prima facie case of discrimination and would then make a determination on the race neutral reasons. Instead, Brown merely commented on the strikes, instead of objecting and making out a prima facie case of racial discrimination. There was never an explicit finding of prima facie discrimination for Hudson to refute. Because Brown failed to object to Hudson's use of his peremptory strikes, he has waived the issue on appeal. "[A] post-trial challenge to the composition of the jury is untimely and therefore barred." *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 210 (5th Cir. 1992); see *United States v. Erwin*, 793 F.2d 656, 667 (5th Cir. 1986) (*Batson* challenges should be made before the release of unselected veniremen), cert. denied, 479 U. S. 991 (1986); see also *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628-29 (1991) (Supreme Court extended the protection of *Batson* to jurors in civil actions).

II. THE VERDICT OF THE JURY AND JUDGMENT RENDERED  
THEREIN WAS CONTRARY TO THE LAW AND AGAINST THE  
OVERWHELMING WEIGHT OF THE EVIDENCE.

Brown is essentially challenging the trial judge's decision to overrule his motion for new trial. Such a motion may only be granted when the verdict is contrary to the overwhelming weight of the evidence. "The discretion vested in a trial judge with respect to a motion for a new trial is quite broad. This Court's authority to reverse is limited to those cases wherein the trial judge has abused his discretion." *Burnham v. Tabb*, 508 So. 2d 1072, 1075 (Miss. 1987) (citations omitted). Under this standard, this Court will review the evidence in the light most favorable to the non-moving party. See *Anchor Coatings, Inc. v. Marine Indus. Residential Insulation, Inc.*, 490 So. 2d 1210, 1215 (Miss. 1986) ("The credible evidence supporting the claims or defenses of the non-moving party should generally be taken as true.").

The Mississippi Supreme Court stated the elements needed to establish a prima facie case of medical malpractice in *Burnham v. Tabb*:

As in all claims for negligence, in order to establish a prima facie case of medical malpractice, the following elements must be proven:

- (1) The existence of a duty on the part of the defendant to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury;
- (2) A failure to conform to such standard required of the defendant;
- (3) The breach of such duty by the defendant was proximate cause of the plaintiff's injury;

(4) Injury resulting to the plaintiff's person.

*Burnham v. Tabb*, 508 So. 2d 1072, 1074 (Miss. 1987) (citation omitted). Brown alleged that Hudson failed to conform to the required standard of care in that he (1) failed to obtain an adequate history of the mechanism of injury; (2) failed to conduct a proper examination for a motor vehicle accident victim with an altered mental state; (3) failed to keep the decedent at the hospital for an adequate period of observation to permit adequate evaluation of the patient, and (4) discharged the patient from Madison General Hospital on the night of the accident with massive and life-threatening intra-abdominal injuries suffered in a motor vehicle accident. The jury heard expert testimony from both parties, as well as testimony from Hudson and the two nurses on duty the night of the decedent's accident.

Brown's expert, Dr. Anderson, testified that Hudson fell below the applicable standard of care in that the records did not reflect an adequate history, exam or observation of the decedent. Brown's only proof that Hudson failed to determine the mechanism of injury is that it is not written down on the emergency room record. Hudson testified that he did receive a full history of Brown's mechanism of injury within minutes of Brown's arrival in the emergency room:

Q. Now, before you began the examination, did you seek to find out what had happened to him?

A. Well, I was aware of what had happened to him. When he came in I was told what happened.

Q. The word history has been mentioned. What does that mean to you?

A. It is a history of what happened, it is the history of the events that led to him coming to the hospital.

Q. And what history did you get on James Brown?

A. The ambulance attendants told me he was in an automobile accident and had struck the vehicle of the other patient that I was treating that night. They said it was a severe impact.

Q. Now, in regard to mechanism of injury, did you obtain or learn what mechanism of injury that could have injured him?

A. I was aware that it was a rear end collision.

Q. Did you feel like you obtained sufficient history of the mechanism of injury?

A. Yes. A rear end collision, we assume there is the tendency for him to move forward.

Dr. Mike Stoddard, an emergency room expert that testified at trial stated his opinion that "I feel that Doctor Hudson did obtain an adequate history of the mechanism of injury of this patient." The

evidence supports the finding that Hudson met the applicable standard of care in obtaining the patient's history of mechanism of injury.

Both Hudson and the nurses on duty with him testified that his examination of Brown was proper under the applicable standard of care. Although Brown's alcohol content could not be tested at the hospital, it was later determined that his blood alcohol level was .3. However, Hudson was able to smell the alcohol on Brown's breath, and could determine from Brown's boisterous and uncooperative behavior that he was intoxicated. He took Brown's altered mental state into consideration during his examination. Hudson examined Brown, first listening to his chest and heart. Then he examined his abdomen because Brown was complaining of discomfort and an inability to urinate. Hudson heard active bowel sounds that indicated there was no serious injury. Hudson testified, "if you have active bowel sounds, that is normal." In addition to hands-on examination, Hudson x-rayed Brown's abdomen and inserted a nasal gastric tube into his stomach. The nasal gastric tube was inserted to detect the presence of internal bleeding, because while Hudson was stitching up Brown's lip, Brown spit out some blood. The results of both the x-ray and the nasal gastric test indicated nothing out of the ordinary. Brown's lip and neck were x-rayed, and Hudson subsequently removed a broken tooth from Brown's lip and sutured it. Hudson also examined Brown's head and pupils to check for possible head trauma, but found none.

When Brown complained about his inability to urinate, Hudson inserted a foley catheter to relieve the pressure on his bladder. The resulting fluid was clear and did not indicate any internal problem. In addition, Hudson ordered a complete blood count on Brown to determine the existence of internal bleeding or infection. Brown's results all came back normal. When asked whether he conducted a proper examination on Brown that night, taking into consideration his altered mental state, Hudson stated that he did. Dr. Stoddard also stated that in his expert opinion, Hudson "did conduct an appropriate physical examination of a patient who had been involved in a motor vehicle accident with an altered mental state."

Brown was brought into the emergency room of Madison General around 11:30 p.m. He was discharged at 4:30 a.m. the next morning, but stayed in the waiting room until 7:30 in the morning when a friend gave him a ride home. The nurses had tried unsuccessfully to reach Brown's family at the numbers he provided. During that entire time, the nurses checked on Brown periodically and testified that he was doing fine. Doctor Stoddard testified, "[i]n my opinion Doctor Hudson's care, evaluation and treatment of Mr. Brown, both on the night of December 24, 1991, and the early morning hours of December 25, and on his return visit, were well within the standard of medical care for this patient. I feel that his care was appropriate and reasonable."

"It is the province of the jury to determine the weight and worth of testimony and credibility of the witnesses at trial. And this Court must assume that the jury drew every possible inference from all evidence offered in favor of " Dr. Hudson. *Burnham*, 508 So. 2d at 1077. Viewing the evidence in a light most favorable to the verdict, we cannot say that the jury's determination was not rationally based upon the evidence adduced at trial. The trial judge did not abuse his discretion in overruling Brown's motion for new trial.

**THE JUDGMENT OF THE MADISON COUNTY CIRCUIT COURT IN FAVOR OF STARKEY HUDSON, M.D. AND EMERGENCY MEDICAL SERVICES ASSOCIATES,**

**INC. IS AFFIRMED. COSTS ARE TAXED TO APPELLANT.**

**BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN,  
PAYNE, AND SOUTHWICK, JJ., CONCUR.**