

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00691 COA

HELEN POWELS, ADMINISTRATRIX OF THE ESTATE OF KATHRYN M. RICH

APPELLANT

v.

JERRY W. ILES, M.D., AND JEFFERSON DAVIS MEMORIAL HOSPITAL

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. RICHARD T. WATSON

COURT FROM WHICH APPEALED: ADAMS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOSEPH E. ROBERTS

ATTORNEYS FOR APPELLEES:

JOSEPH LERAY MCNAMARA

ANN H. KELLY

MARK P. CARAWAY

NATURE OF THE CASE: MEDICAL MALPRACTICE

TRIAL COURT DISPOSITION: JURY VERDICT IN FAVOR OF DEFENDANTS JERRY W. ILES, M.D. AND JEFFERSON DAVIS MEMORIAL HOSPITAL

MOTION FOR REHEARING FILED: 7/1/97

MANDATE ISSUED: 9/16/97

EN BANC

MCMILLIN, P. J., FOR THE COURT:

The Court today is called upon to consider a medical malpractice case. The jury, in a trial held in the Circuit Court of Adams County, returned a verdict in favor of the defendant health care providers, and the estate of the patient, who died during the pendency of the action, has brought this appeal. This Court reverses and remands the judgment entered in favor of the treating doctor but affirms the judgment in favor of the hospital.

## I.

### Facts

This medical malpractice claim was brought against Dr. Jerry W. Iles and Jefferson Davis Memorial Hospital (hereafter "the hospital") by Kathryn Rich. Ms. Rich died during the pendency of the action, and the suit was revived by Helen Powels in her capacity as administratrix of the Rich estate. The claim asserts that Iles and the hospital's emergency room physician misdiagnosed a traumatic spinal injury suffered by Rich, and that this prevented her from receiving proper treatment until she had suffered irreversible partial paralysis.

Rich was severely injured in an automobile accident in late 1986. Dr. Iles was her treating physician at the time. After being released from the hospital in early 1987, she began to experience numbness in her legs. In mid-January, her legs collapsed while she was attempting to stand, and she fell. Over the following days, the numbness spread into her upper legs and back. There is conflict in the evidence as to how much of this information was communicated to Dr. Iles; however, there was testimony from which the jury could conclude that he had been consulted by family members regarding her deteriorating condition.

Rich was finally taken by her family to the hospital's emergency room where she was examined, and an x-ray of her back was performed. Dr. Iles was not present at the hospital at this time. The emergency room physician, Dr. Peter Generally, received a report on the x-ray from a radiologist that indicated no acute changes in the condition of Rich's spine since her automobile accident. Dr. Generally communicated this information by telephone to Dr. Iles. Based upon his knowledge of her condition, Dr. Iles attributed her numbness to her condition as a diabetic and

suggested she be discharged and sent home. At the further insistence of family members, however, Rich was admitted to the hospital.

Her problems with her lower extremities grew progressively worse. Dr. Iles then ordered a CAT scan, which disclosed a possible spinal compression fracture of more recent origin than the car accident. With that discovery, Dr. Iles enlisted the assistance of a specialist, and Rich was transferred to Mississippi Baptist Medical Center in Jackson where surgery was performed. Ultimately it was determined that Rich had suffered a complete severance of her spinal cord at the location of the recent spinal fracture. By the time the surgery was performed, Rich had lost all use of her lower extremities, was incontinent and unable to control her bowels. The surgeon was unable to reverse or

improve any of these conditions, and they persisted until her death several months later. There was expert testimony that, had her spinal injury been diagnosed earlier, surgery could have stabilized her condition before she suffered loss of her bodily functions and motor control of her legs.

The jury returned a verdict in favor of both the hospital and Dr. Iles, and Rich's estate perfected this appeal, raising three issues involving the manner in which the jury was instructed. In considering the issues, it is important to keep in mind that this case actually involved two separate tort claims. Dr. Iles was an independent practitioner having no contractual relationship with the hospital that would render the hospital liable for his actions.

## II.

### Jury Instruction D-6

Dr. Iles requested, and the trial court granted, Instruction D-6 in the following form:

The Court instructs the jury that you may not return a verdict against Dr. Iles for the mere exercise of bona fide medical judgment which you may determine with the benefit of hindsight:

1. to have been mistaken; or
2. to have been contrary to what other expert witnesses have stated in the exercise of their medical judgment they would have done, if you find by a preponderance of the evidence that Dr. Iles diagnosis, examination, treatment or follow-up care met the standard of care of a minimally competent family practitioner.

The estate now claims that the trial court committed reversible error by granting this instruction. The estate argues that the instruction could only leave the jury hopelessly confused on the issue of the standard of care expected of Dr. Iles.

The Mississippi Supreme Court, in the case of *Day v. Morrison*, has condemned instructions of this nature. *See Day v. Morrison*, 657 So. 2d 808 (Miss. 1995). In *Day*, the court considered an instruction that said, in part, that "liability may never be imposed upon a physician for the mere exercise of a bona fide medical judgment which turns out, with the benefit of hindsight, to have been mistaken . . . ." *Day*, 657 So. 2d at 811. The court, after a wide-ranging discussion of decisions from other jurisdictions considering similar instructions, concluded with this unequivocal language:

This Court now holds that the phrases "a competent physician is not liable per se for a mere error of judgment" and "good faith error in judgment or honest error in judgment" instructions should not be given in medical negligence cases because of their potential for confusing the jury.

*Day*, 657 So. 2d at 815.

Whether this pronouncement in *Day* is an overly broad reaction to poorly-drafted or overly-zealous attempts by defense counsel to make a legitimate point would appear to be a point for discussion. Certainly, in cases involving claims based upon failure to properly diagnose, there are many instances where a patient may, particularly in the early stages of the onset of medical problems, present

symptoms that are consistent with more than one diagnosis. In that situation, early diagnosis may involve, to some extent, a weighing of the probabilities. When later facts establish that, against the probabilities, the patient actually was suffering from a rarer malady, the 'misdiagnosis' does not necessarily rise to the level of the negligent practice of medicine. That proposition seems, upon reflection, to be self-evident, but may not be readily apparent to a juror in the face of proof that a physician unquestionably failed to treat a patient for his or her true problem. It is difficult to see how a properly-worded instruction designed to make sure the jury took such a possibility into account in the course of its deliberations could have the potential for confusing them.

Nevertheless, this Court is not free to disregard existing precedent. A comparison of the instruction condemned in *Day* with the one given in this case leaves little doubt that the present instruction violates the principle announced by the *Day* court. With that conclusion in mind, this Court cannot affirm the verdict in favor of Dr. Iles unless we conclude that the evidence in favor of Dr. Iles was so overwhelming that he was entitled to a directed verdict at the conclusion of the proof. In such a case, any errors in the instructions given to the jury would be irrelevant. Dr. Iles, in fact, argues that any error in giving the instruction was harmless because of the paucity of proof of negligence on his part. However, since there was evidence presented that suggested Dr. Iles should have responded more aggressively to the telephone reports of Rich's deteriorating condition, we cannot conclude with any degree of certainty that the erroneous instruction was harmless. This instruction was erroneous, and the verdict in favor of Dr. Iles must be reversed.

### III.

#### Jury Instructions D-4, D-6 and J-17

The estate claims the trial court committed reversible error when it granted Instructions D-4, D-6, and J-17 for the reason that they improperly focussed on the area of specialty of the doctor in each instruction, rather than on the symptoms that the doctor was purporting to treat. Instructions D-4 and D-6 instructed that Dr. Iles was charged to act with the skill of "a minimally competent family practitioner under similar circumstances." Instruction J-17 charged that Dr. Generally must perform with the skill of "a minimally competent emergency room physician." The law is that a physician is held only to possess the skills of a minimally competent physician 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." *Drummond v. Buckley*, 627 So. 2d 264, 268 (Miss. 1993) (quoting *Palmer v. Biloxi Regional Medical Ctr.*, 564 So. 2d 1346, 1354 (Miss. 1990)). It would seem proper to apprise the jury of this notion through the instructions, and the substitution of the particular field of practice for each doctor, rather than instructing generally as to the broad concept, is not misleading. Had the facts established that either Dr. Iles or Dr. Generally, by special circumstance, had been possessed of a degree of skill or expertise outside his regular area of practice, the jury could have been so instructed. Absent such a showing, we do not find the form of these instructions to be confusing or designed to misdirect the proper inquiry of the jury. This issue is without merit.

### IV.

## The Issue of the Hospital's Liability

Rich's estate uses the trial court's decision to deny certain instructions concerning the hospital's liability as a vehicle to present the last issue on appeal. The issue presented is not a dispute over the contents of these instructions. Rather, it is a question of whether the trial court improperly prevented the estate from presenting an alternate theory of liability on the part of the hospital that was not alleged prior to the commencement of the trial.

The purpose of the pleadings is to properly frame the issues to be tried. *Setser v. Piazza*, 644 So. 2d 1211, 1217 (Miss. 1994). However, with the advent of notice pleading, a complaint is often inadequate, standing alone, to inform the defendant of the nature of the claim made against him in sufficient detail that he can prepare a meaningful defense. "The purpose of Rule 8 [of the Mississippi Rules of Civil Procedure] is to give notice, not to state facts and narrow the issues as was the purpose of pleadings in prior Mississippi practice." M.R.C.P. 8 cmt. The plaintiff took full advantage of this change in the purpose of the complaint. The complaint makes no allegation of any particular act of negligence committed by any named agent of the hospital. It only charges that, "Jefferson Davis Memorial Hospital, by and through its employees, [was] guilty of negligence and failed to adhere to the requisite standard of care during their examination, treatment and care of Plaintiff."

The discovery rules are available to assist an essentially-uninformed defendant in these circumstances. "Rules of discovery are to prevent trial by ambush." *Nichols v. Tubb*, 609 So. 2d 377, 384 (Miss. 1992). The *Nichols* opinion, which also involved a medical malpractice claim, makes it plain that evidence not disclosed in discovery is not admissible at trial.

This means that the *substance of every* fact and *every* opinion which supports or defends the party's claim or defense must be disclosed and set forth in meaningful information which will enable the opposing side to meet it at trial.

*Nichols*, 609 So. 2d at 384.

*Nichols* actually dealt with the reverse of the situation that we face here. In that case, the plaintiff was attempting to prevent the defendants from offering into evidence facts and opinions not disclosed during discovery. Nevertheless, the overriding principle regarding the admissibility of evidence not disclosed in discovery is the same. In dealing with vague discovery responses by defendant doctors in *Nichols*, the court said that, had the doctors not subsequently amended their originally uninformative responses, "the circuit judge would have been acting well within his discretion in excluding all the specific facts and opinions which Dr. Smith and Dr. McDonald expressed." *Id.* at 385.

In the present case, the estate's claim against the hospital depended upon the doctrine of *respondeat superior*. Thus, it was vital for the hospital to be informed as to what acts performed by which of its agents the plaintiff relied upon to support her claim of negligence. In an attempt to obtain such information, the hospital posed the following interrogatory:

Describe in detail each and every act of negligence which you allege was committed by this Defendant, and for each act of negligence alleged, state the following:

(a) The facts on which said allegation is based, including a description of what the Plaintiff contends

should have been done but was not done by the Defendants.

(b) The name, occupation, residence and business address of all persons having knowledge of the facts on which that allegation is based; and

(c) The identity and location of any and all documents which support the facts on which that allegation is based.

The plaintiff's response to that interrogatory was as follows:

Although discovery has not been completed in this regard, it is Plaintiff's contention that the employees of Defendant were negligent in their failure to timely diagnose Plaintiff's condition, failure to timely make proper consultations and referrals, and failure to properly and timely conduct diagnostic testing. In addition, Dr. Williams McDonald was negligent in failing to take an x-ray of thoracic area of Plaintiff's back upon her admission to Defendant's hospital on December 9, 1986. *Additionally, Defendant's employees were negligent in failing to perform an immediate CT-scan upon Plaintiff's emergency room admission on January 20, 1987, and failed to make a timely consultation or referral of Plaintiff to a neurologist or neurosurgeon.* Discovery is continuing in this regard and Plaintiff is [in] need of taking certain depositions including those of Dr. Generally and Dr. Walter T. Colbert in this regard. (emphasis supplied).

Dr. Colbert's deposition was never taken. Neither was this interrogatory response supplemented by the estate at any time before trial to allege either Dr. Colbert's status as an agent of the hospital or any act of negligence committed by Dr. Colbert in an agency capacity.

The estate was, as the foregoing response discloses, relying on the theory that the hospital's liability was based upon the negligence of its emergency room physician, Dr. Generally, for his failure to have Rich's failing medical condition treated more aggressively at an earlier point. The hospital's defense to this claim was that Dr. Generally had performed all the tests that were reasonably indicated and that nothing in the test results communicated to him suggested that Rich had suffered a recent spinal fracture. Dr. Generally had, in accordance with protocol, sent Rich's x-ray to the hospital's contract radiologist, Dr. Wayne Colbert. The hospital emergency room records showed that Dr. Colbert's assessment relayed to Dr. Generally was that any spinal problems shown on the x-ray were chronic and not acute, which would tend to discount those problems as the source of Rich's distress.

However, hospital records furnished to the plaintiff in discovery indicated that Dr. Colbert, in a later more detailed report, had concluded that the anomaly in the x-ray showed a marked change from Rich's earlier accident records that could be suggestive of a recent acute spinal injury. The proof is uncontradicted, however, that this information was not transmitted to Dr. Generally on the day Rich was admitted. Dr. Iles confirmed that, had Dr. Generally known of the possibility of a more recent acute spinal injury and told Iles about it, he (Iles) would have embarked on a substantially different course of treatment.

Armed with this information, the estate, in rebuttal, sought to introduce evidence that Dr. Colbert was the hospital's agent. The estate also sought to have the jury instructed that Dr. Colbert's act of passing apparently incorrect information to Dr. Generally was a separate act of negligence chargeable to the hospital. The trial court refused to permit this proof and instructed the jury only on the

question of Dr. Generally's negligence. The court refused four instructions requested by the plaintiff regarding the alleged negligent acts of Dr. Colbert and his status as an agent of the hospital. It is the denial of these instructions that the estate now claims to be reversible error.

A party using the discovery process to determine what proof it might anticipate at trial should not, ordinarily, be made to answer for matters not revealed in discovery. The hospital properly sought to discover Rich's theory of its negligence. As the Court has already observed, there is nothing in the estate's discovery responses that would even hint at the proposition that Dr. Colbert's activities formed the basis of the estate's claim of negligence against the hospital.

The estate attempts to explain its failure in this regard by claiming that such facts first surfaced at trial during Dr. Iles's testimony, and that his testimony was different from his deposition testimony. In essence, the estate claims that it was surprised by this change in Dr. Iles's testimony. Proof of Dr. Colbert's alleged negligence did not depend for its vitality on the testimony of Dr. Iles. The proof was available elsewhere. In fact, evidence of Dr. Colbert's apparently conflicting evaluations was furnished by the hospital as a part of its discovery response, since his later report was a part of the hospital's medical file on the patient. That the plaintiff was unable to appreciate the significance of the evidence furnished and that the plaintiff failed to follow through on its stated intention to depose Dr. Colbert are two facts that cannot be laid at the hospital's door. An opposing party's duty in litigation is to respond fully and accurately to all discovery requests. There is no duty to also provide an explanation of the significance of the material furnished or to suggest possible incidents of negligence revealed in the material.

Dr. Iles's testimony at trial did not reveal for the first time potential evidence of Dr. Colbert's negligence that was, until then, unavailable. His testimony only served to demonstrate the adverse impact that Dr. Colbert's alleged mistake had on Rich's well-being. The failure to appreciate the significance of this evidence and to allege this alternate theory of liability until it was too late to give the hospital reasonable opportunity to prepare to meet it was not the fault of the hospital, nor does it demonstrate any lack of veracity by Dr. Iles in the discovery process.

This alternate theory of liability was asserted too late, and it was not error to exclude it from jury consideration. Therefore, we affirm the jury verdict in favor of Jefferson Davis Memorial Hospital.

**THE JUDGMENT OF THE ADAMS COUNTY CIRCUIT COURT IN FAVOR OF JERRY ILES, M.D. IS REVERSED AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. THE JUDGMENT OF THE ADAMS COUNTY CIRCUIT COURT IN FAVOR OF JEFFERSON DAVIS MEMORIAL HOSPITAL IS AFFIRMED. COSTS OF THIS APPEAL ARE DIVIDED EQUALLY BETWEEN THE APPELLANT, HELEN POWELS, ADMINISTRATRIX OF THE ESTATE OF KATHRYN M. RICH, AND THE APPELLEE, JERRY ILES, M.D.**

**THOMAS, P.J., HERRING, KING, AND SOUTHWICK, JJ., CONCUR. DIAZ, J., CONCURS IN PART AND DISSENTS IN PART, JOINED BY BRIDGES, C.J., COLEMAN AND PAYNE, JJ. HINKEBEIN, J., NOT PARTICIPATING.**

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DAVIS MEMORIAL HOSPITAL APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
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DIAZ, J., CONCURRING IN PART AND DISSENTING IN PART:

I concur with the majority opinion on all issues except that of the hospital's liability. The trial court denied proposed jury instructions P-17, P-18, P-19 and P-20. The denial of these instructions precluded the jury from considering the acts of Dr. Colbert or other agents of the hospital who may have been at fault. Refusing proposed jury instructions P-17, P-18, P-19 and P-20 was an error on the part of the lower court. For this reason, I would reverse the verdict in favor of the hospital.

The majority reasons that the instructions were properly denied because the issue of the hospital's liability was not properly presented in the original complaint, that is, the hospital was not given adequate notice in the complaint as to the nature of the claim against it. Specifically, the majority states that the complaint did not state that any of Dr. Colbert's acts may be formed as a basis for Rich's claim of negligence against the hospital. Therefore, any proposed jury instructions that would allow the jury to find the hospital negligent based on the negligence of Dr. Colbert, or any of its agents were denied by the lower court. The majority opines, "There is nothing in the estate's discovery responses that would even hint at the proposition that Dr. Colbert's activities formed the basis of the estate's claim of negligence against the hospital." I disagree.

Citing to *Nichols v. Tubb*, the majority states that the rules of discovery are to prevent trial by ambush. *Nichols*, 609 So. 2d 377, 384 (Miss. 1992). While I agree with this statement of law, I find that in the present case, that the hospital had notice of assertions by the estate that alleged alternate theories of liability for the hospital. For example, the complaint specifically charged:

Jefferson Davis Memorial Hospital, by and through its employees, was guilty of negligence and failed

to adhere to the requisite standard of care during their examination, treatment and care of Plaintiff.

Furthermore, when asked to detail every act of alleged negligence committed by the hospital in an interrogatory, the estate responded in relevant part:

Although discovery has not been completed in this regard, it is the Plaintiff's contention that the employees of Defendant were negligent in their failure to timely diagnose Plaintiff's condition, failure to make timely proper consultations and referrals, and failure to properly and timely conduct diagnostic testing . . . Additionally, Defendant's employees were negligent in failing to perform an immediate CT-scan upon Plaintiff's emergency room admission on January 20, 1987, and failed to make a timely consultation or referral of Plaintiff to a neurologist or neurosurgeon.

This Court has stated that a hospital's liability under the doctrine of respondeat superior is as follows:

Where a hospital holds itself out to the public as providing service, in this instance, emergency services, and where the hospital enters into a contractual arrangement with one or more physicians to direct and provide the service, and where the patient engages the services of the hospital without regard to the identity of a particular physician and where as a matter of fact the patient is relying upon the hospital to deliver the desired health care and treatment, the doctrine of respondeat superior applies and the hospital is vicariously liable for damages proximately resulting from the neglect, if any of such physicians.

*Hardy v. Brantley*, 471 So. 2d 358, 371 (Miss. 1985). On December 20, 1987, Mrs. Rich was admitted to the emergency room, with just such expectations. In fact, Dr. Stoddard, who testified on behalf of the hospital conceded on cross-examination that this is such a situation:

Q: Dr. Stoddard, when Mrs. Rich came to the hospital, she didn't go see Dr. Generally, did she? She just went to the hospital, as far as you know, right? Isn't that usually how it happens?

A: Well, nobody ever comes to the emergency room to see the emergency room doctor; they come to the emergency room because they feel like they have a problem, and we're available.

Q: And the hospital then will assemble a team to treat or diagnose and examine and assess the patient, right?

A: To make the initial evaluation as I discussed earlier, yes.

Q: Yes, sir, and that's the hospital's decision; is it not? I mean, I don't come to the emergency room saying-- on a regular basis saying, "I want to see so and so as my emergency room physician." People present themselves, and the hospital gives them a team of people to treat them, right? Isn't that how it happens?

A: I would agree that, no, that you don't go to the emergency room saying you want to see your physician; and yes, I would agree that the hospital who has an emergency room department will provide in some manner--sometimes it's not the hospital directly but a contract service to provide medical doctors to be there to assess the patients that present themselves for treatment.

Q: And it is their obligation and duty once a person has presented themselves to make a proper

assessment of that patient, right?

A: Yes.

Mrs. Rich was taken to the emergency room on December 20, 1987 after complaining of numbness in her lower extremities for several days. Mrs. Rich was examined by the emergency room physician on duty, Dr. Generally, and an x-ray was taken by the chief radiologist of Jefferson Davis Hospital, Dr. Colbert. The x-ray results conveyed to Dr. Generally that there was a chronic T-8 compression with no acute changes from x-rays taken six weeks earlier. This information was relayed to Dr. Iles, Mrs. Rich's physician. Contrary to the emergency room records however, the x-ray report states in part:

Multiple views of the thoracic spine demonstrates the definite apparent recent compression changes in the region of the 8th thoracic segment, these changes apparently having appeared since the earlier studies dating back to December 9th through the 16th, 1986. It is possible that these changes could be important to this patient's current chronicle pattern . . . The rather suspicious changes in the T8 area dominate the thoracic spine study. They could be related to this patient's current clinical pattern. The CAT scan exam is suggested as an adjunctive diagnostic procedure.

It is apparent that Dr. Generally's record of Dr. Colbert's findings in the emergency room is different from Dr. Colbert's dictated x-ray records, and that the information in the x-ray records was not conveyed to Dr. Generally on the day that Mrs. Rich was admitted. Clearly, the jury should have been allowed to consider whether any negligence of Dr. Colbert, or any other agent of the hospital could have been imputed to the hospital in this instance.

For these reasons, I respectfully dissent.

**BRIDGES, C.J., COLEMAN AND PAYNE, JJ., JOIN THIS SEPARATE OPINION.**