Jawbones v. Sawbones: Litigating Medical Malpractice Cases in Mississippi

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Medical Malpractice Case Screening – Plaintiff's Perspective

MEDICAL MALPRACTICE CASES ARE VERY DIFFICULT TO WIN AND VERY EXPENSIVE TO LITIGATE!

- Approximately 300 cases reviewed per year
- Half of those cases are declined over the phone without ever reviewing a record
  - These include cases where there is clearly no negligence, or no causation or insufficient damages
- The remaining half of the cases require further review:
  - medical record review – usually results in the declination of another 100-125 cases, leaving 25-50 remaining
  - expert consultation – usually results in the declination of all but 10-15 cases per year
- Not all of the remaining 10-15 cases get filed. Many are declined based on venue considerations, client issues, and case load considerations

Initial Case Screening and Handling: Defendant's Perspective

- Initial interview:
  - develop mutual trust and candor
  - assess defendant as a witness
  - explain process, timetable, and cooperation requirements
  - review of initial records of defendant and obtain defendant's interpretation of events
  - emphasize confidentiality of communication and appropriate channels for exchange
  - answer questions
  - obtain background information on defendant, witnesses, facts not evident in records
  - assess threshold defenses, service of process statute of limitation, defects in pre-suit requirements, venue
  - psychological assessment and assistance

Initial Case Screening and Handling: Defendant

- Investigation:
  - pre-suit notice of claim or retained after suit filed, difference in materials available
  - begin process of obtaining all relevant records (lengthy ongoing process)
  - interview witnesses, determine location of physical evidence and information
  - obtain authorization for medical records, employment records, other information
  - lab, imaging, pathology and other physical evidence beyond medical records in chart
  - background check on plaintiff, witnesses where appropriate, including social media
- Determining standard of care applicable, deep medical literature and text review
- Causation issues evaluated, including general or specific causation issues where appropriate
- Co-defendants, absent parties, comparative fault, apportionment of fault issues
- Assessment and investigation of available affirmative defenses
- Consulting expert review (non-testifying) and role of the non-testifying consultant(s)
- Claims committee or other evaluations

Venue – Plaintiff's Perspective

Miss. Code. Ann. § 11-11-3 (2004)

(1)(a)(i) Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides, or, if a corporation, in the county of its principal place of business, or in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred.

* * *

(3) Notwithstanding subsection (1) of this section, any action against a licensed physician, . . . , nurse, . . . , or . . . hospital . . . , for malpractice, negligence, . . . , or breach of standard of care . . . shall be brought only in the county in which the alleged act or omission occurred.

This statute was amended in the "tort reform" push to eliminate the county where an action "accrued" as a county of proper venue. *Crenshaw v. Roman*, 942 So. 2d 806 n. 5 (Miss. 2006).

Rule 82. Jurisdiction and Venue

* * *

(b) Venue of Actions. Except as provided by this rule, venue of all actions shall be as provided by statute.

(c) Venue Where Claim or Parties Joined. Where several claims or parties have been properly joined, the suit may be brought in any county in which any one of the claims could properly have been brought….

Rule 1. Scope of Rules

- . . . These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.
- Advisory Committee Note
  - These rules are to be applied as liberally to civil actions as is judicially feasible . . . . The salient provision of Rule 1 is the statement that 'These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.' There probably is no provision in these rules more important than this mandate; it reflects the spirit in which the rules were conceived and written and in which they should be interpreted.

Important Venue Cases

Rose v. Bologna, 942 So. 2d 1287 (Miss. 2006)

- Wrongful death suit against 3 doctors whose negligence allegedly combined to cause decedent's death
- Suit brought in county where 1 of the doctor's committed negligence
- Other 2 defendants sought change of venue
- SCT held that wrongful death statute, §11-7-13, allowed only 1 suit for the same death, claim could not be split and venue proper in county where suit filed

Important Venue Cases

***Adams v. Baptist Memorial Hospital-DeSoto*, 965 So. 2d 652 (Miss. 2007)**

- Wrongful death suit brought against casino (Tunica) and healthcare providers (DeSoto) in Tunica County
- Healthcare providers sought transfer of venue to DeSoto County
- Trial court severed action, transferring claim against healthcare providers to DeSoto, but keeping claim against casino in Tunica
- SCT held that because wrongful death claim it could not be split, transferred entire action to DeSoto
  - Court cited §85-5-7 and possibility of "inconsistent verdicts by separate juries" as part of its rationale for its holding

Important Venue Cases

***Dye v. Mallett, et al.*, No. 2013-IA-02068-SCT (May 21, 2015)**

- Medical malpractice case brought against 4 physicians, a clinic and hospital
- Suit filed in the First Judicial District of Harrison County (Gulfport) where 2 physicians and the hospital were alleged to have been negligent
- Other 2 physicians and the clinic were alleged to have committed negligence in the Second Judicial District of Harrison County (Biloxi)
- Biloxi defendants sought severance and transfer of the claims against them to the Second Judicial District
- Trial court denied request for severance and transfer of venue
- SCT in a 4-4 decision (Waller not participating) left in place the trial court decision

Quotes from Mallett's Brief

- "The Medical Malpractice Tort Reform Act of 2002 was enacted by the Mississippi Legislature in response to a perceived medical liability crisis and public health risk which included an exodus of physicians and three medical malpractice carriers from our state."
- "This venue statute was created by the Mississippi Legislature as part of a general tort reform prompted by its concern for the public health of the citizens of this State, the impact of physicians leaving the state and the decreasing availability of certain specialties."
- "This venue statute was created by the Mississippi Legislature as part of a general tort reform prompted by its concern for the public health of the citizens of this State, the impact of physicians leaving the state and the decreasing availability of certain specialties."
- The 2004 amendment [to the venue statute] is an attempt by the Legislature to even the playing field between health care providers and those who sue them. It allows the physician to defend himself in the venue where his practice is located and eliminates the potential for the physician to have to leave his practice for extended periods of time and travel to other locations for his defense. It further eliminates the potential of a doctor being judged by a jury completely unfamiliar with his name and practice.

Practical Ramifications of Defendants' Interpretation

- Plaintiff required to try 2 medical malpractice cases
- Twice the time and expense
- Guaranteed empty chair in BOTH cases
- Likelihood of inconsistent judicial rulings and verdicts
- Results in the opposite of "just, speedy and inexpensive determination" of the action

Venue - Defendant's Perspective

- Medical malpractice statutory venue – venue proper only where the particular defendant provided treatment
- Venue is statutory: Article 4, § 90(c) of the Mississippi Constitution vests this power in the legislature.
- Separation of powers and statutory construction issues
- Use of mandatory "shall"and exclusive "only" in statute
- Courts cannot rewrite statutes or add exceptions not there
- Rule 82(b) trumps 82(c) when a statute exists – *Adams* case
- Public policy issues considered by the Legislature
- Multiple defendants in more than one judicial district, each asserting statutory venue right – most common scenario
- Venue objection must be raised initially, transfer or severance sought, and preserved or there will be waiver
- Unanswered questions:
  - Severance and separate trials?
  - Single trial at one "proper" venue or must venue be "proper" for each defendant per legislative intent?
  - Who gets choice of venue if no single venue is proper for all defendants?
- Pending case before Miss. S. Ct. in *Moody v. Harkins*, 2016-M-00398 SCT and prior 4-4 "non-decision" in *Dye v. Mallett*
- Forum non-conveniens transfer now available in statute

Venue – More Quotes from Mallett Brief

- Section 11-11-3(3) is an unambiguous statute that expresses its clear intent through the use of the mandatory word "shall" and the exclusive word "only," and which creates a special venue for medical provider defendants, i.e., only the county in which the physician's alleged negligent medical treatment was provided. The language is all-inclusive and without exception.
- The *Adams* Court opined that Rule 82(c) is trumped by Rule 82(b), which states, "Except as provided by this rule, venue of all actions shall be as provided by statute." *Id*. at 657. Finally, the *Adams* Court concluded:
- Therefore, a determination as to where the action could properly have been brought circuitously leads us to the venue statute, Miss. Code Ann. Sect. 11-11-3 (Rev. 2004). *The presence of medical providers in this action renders subsection (1) inapplicable, as the "notwithstanding" language of subsection (3) negates the language of subsection (1). Therefore, as subsection (3) is applicable, the only proper venue for this action is DeSoto County.* Adams's claim that M.R.C.P. 82(c) is in conflict with the venue statute is unfounded.
- *Id*. at 657- 58. (Emphasis added).

Selecting, Retaining and Preparing Experts – Plaintiff's Perspective

Experts are generally required by law

- §11-1-58 Miss Code requires certification by Plaintiff's counsel that expert has been consulted and that there is reasonable basis for commencement of action.
- The negligence of a physician may be established only by expert testimony. *Cole v. Wiggins*, 487 So. 2d 203, 206 (Miss. 1986).
- An expert is necessary to establish causation. *Phillips v. Hull*, 516 So. 2d 488, 491 (Miss. 1987).

FORGET THE EXCEPTIONS!

- Retained foreign objects
  - *Coleman v. Rice*, 706 So. 2d 696 (Miss. 1997)
  - *Long v. Sledge*, 209 So. 2d 814 (Miss. 1968)
- Administration of incorrect medicine
  - *Dailey v. Methodist Medical Center*, 790 So. 2d 903 (Miss. 2001)

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What type of expert should I retain?

- Same specialty as defendant
- Currently in private practice or academia
- Geographical considerations
- Try to stay away from referral services

Preparing Your Experts

- Provide them with all of the records and radiology studies
- Give them all depositions
- Obtain any relevant medical literature
- Give them the Defendant's expert disclosures
- Cross examine them

Expert Witnesses – Defendant

- Identification of specialties and qualifications of expert(s)
- Standard of care vs. causation vs. damages
- Must be effective communicator to jurors
- Background check on your own experts
- Supplying materials to experts, initially, and as available
- Communications with experts
- The defendant as expert
- Availability of work product or other privileges to shield communications with experts
- Avoid waiver of privileges
- Whether to obtain written report or verbal
- Drafting the expert disclosures – detail required, consequences for under disclosing
- How much to disclose? *All* opinions, *all* facts, *all* grounds (Nichols v. Tubbs) summary of substance versus writing a book
- Depose expert or rely upon disclosure?
- Preparing an expert for deposition or trial and deposing opposing experts

Daubert – Plaintiff's Perspective Is medical literature required or not?

- NO! - *Memorial Hospital at Gulfport v. White*, 170 So. 3d 506 (Miss. 2015)

- "medical experts are not required to support their opinions with medical literature"
  - YES! - *King v. Singing River Health Sys.*, 158 So. 3d 318, 328 (Miss. Ct. App. 2014)
- "There must be some support for the expert's opinion in the medical literature."
  - YES! - *Hill v. Mills*, 26 So. 3d 322, 332-33 (Miss. 2010)
- "We restate for emphasis that, when the reliability of an expert's opinion is attacked with credible evidence that the opinion is not accepted within the scientific community, the proponent of the opinion under attack should provide at least a minimal defense supporting the reliability of the opinion. The proponent of the expert cannot sit on the side lines and assume the trial court will ignore the unrebutted evidence and find the expert's opinion reliable."
  - NO! - *Poole v. Avara*, 908 So. 2d 716 (Miss. 2005)
- "publication and peer review are not absolutely required; their absence does not constitute automatic inadmissibility"

Who decides what the medical literature means anyway?

- The Plaintiff or his experts?
- The Defendant or her experts?
- The Court?

Mississippi's courts have not yet answered this question, but other courts have done so.

***Cox v. St. Josephs Hosp.*, 71 So. 3d 795, 796 (Fla. 2011)**

- Stroke case where it was alleged that tPA should have been administered to the patient and that had it been given the patient would have had a substantially better outcome.
- Both Plaintiff and Defendant cited the same study – NINDS
  - Plaintiff said the study supported his expert's opinions
  - Defendant said it did not
- Trial court accepted Defendant's interpretation and dismissed case following jury verdict for the Plaintiff.
- Florida Supreme Court reversed saying "the jury was presented with conflicted testimony as to the significance of statistics from the NINDS study" and the trial court "impermissibly reweighed the evidence and substituted its own evaluation of the evidence in place of the jury."

Daubert Defendant's Perspective

- MRE 702 – Mississippi variation of Daubert – multifactorial test – *Miss. Dept. Trans. v. McLemore*, 863 So. 2d 31 (Miss. 2003).
- Separate qualification and reliability prongs
- Developing the challenge or protecting against it
  - Qualifications:
    - Standard of care: knowledge of the standard of care of defendant's specialty
    - Causation: qualifications by education, training and experience
      - general and specific causation issues
      - Bradford-Hill criteria for causation studies commonly employed by federal courts under Rule 702
  - Adequate factual basis for opinions
  - Methodology employed to access facts and apply them to reach a conclusion
  - Reliability assessed by traditional Daubert factors and other appropriate ones
  - Use of technical, medical, scientific and epidemiological peer-reviewed materials

Daubert - Defendant's Perspective

- The Daubert hearing – MRE 104 proceeding
  - Written submissions and live witnesses or both
  - Evidence to consider including affidavits, depositions, medical literature and studies
  - Role of literature and studies – Causation: *Watts v. Radiator Specialty*, 990 So.2d 143 (Miss. 2008); Standard of Care: *Hill v. Mills*, 26 So. 3d 322 (Miss. 2010).
- Do expert witness disclosure requirement apply when bringing a Daubert challenge under MRE 104 to test reliability?
- Difference between MRE 104 hearing to determine *admissibility* of evidence and *use* of admissible evidence at trial
- Battle of the experts or question of qualifications or reliability
- Is there an "analytical gap" with too great a leap of faith between facts and the conclusion? *Watts*, citing *General Electric v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).*
- Judicial gatekeeping function – preventing "junk science" in the courtroom, assuring qualified experts with reliable opinions
- It is not so just because a seemingly qualified "expert" says it is so
- Difficulty convincing the judge to rule that a witness is not qualified or an opinion is not reliable

Rule 803(18) Materials

- Statements in Learned Treatises, Pamphlets or Pamphlets - Hearsay exception
- Limited use exception to hearsay rule - contrary to live testimony preference
- Requires advance disclosure if used in case-in-chief
- Some witness must state the material is a "reliable authority", and usually requires testimony context
- Reliable for one purpose, not for another
- Can be read or visually depicted in the courtroom, but does not go to the jury
- Marked as an exhibit "for I.D. only"
- Not required for expert opinion, but sometimes fatal without it
- Useful literature case trilogy: *Hill v. Mills*; *Patterson v. Tibbs*, 60 So. 3d 742 (Miss. 2012); *King v. SRHS*, 158 So. 3d 318 (Miss. Ct. App. 2014) (*cert den*. 2015)

Rule 803(18) Materials

- Consequences if one side has expert using literature and other side does not
- Abuse or misuse of literature. Exercise great care. Use sparingly.
- Standard of care literature must not have been published after treatment
- Causation literature should be as current as possible
- Assessing the quality and strength of the literature
- Difficulties arising from conflicting publications
- Impeachment or discrediting a witness with literature
- Opening the door