**IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI**
**FIRST JUDICIAL DISTRICT**

**KATHY GASAWAY** **PLAINTIFF**

**VS.** **CAUSE NO. A2401-14-62**

**MEMORIAL HOSPITAL AT GULFPORT**
**AND KRISTINE CARTER, M.D.** **DEFENDANTS**

# JUDGMENT

On December 8, 9, 10, and 11, 2015, a bench trial was held in this matter pursuant to the Mississippi Tort Claims Act, and the Court, having heard the testimony of the witnesses, reviewed the exhibits, and considered the arguments of counsel, finds for the Defendant, Memorial Hospital at Gulfport.

## Findings of Fact

On March 20, 2013, Dr. Kristine Carter was to perform a laparoscopic umbilical hernia repair on the Plaintiff Kathy Gasaway. The surgery was to be performed at Memorial Hospital at Gulfport, employer of Dr. Carter. On that date, Dr. Carter made three separate attempts to insufflate the patient's peritoneum in order to perform the laparoscopic umbilical hernia repair. However, each time Dr. Carter inserted the Veress needle into the right upper quadrant the monitor read "occluded". During her third attempt, the patient became hypotensive and asystolic, the needle was removed, and the procedure was aborted. Chest compressions were initiated. A transeschemic echocardiogram was performed which indicated a $CO_2$ emboli, air within the left and right ventricles of the heart. The patient was placed in the left decubitis position, her blood was aspirated, and labs were drawn. Dr. Carter performed an emergency laparotomy to assure the abdomen was completely desufflated. Following resuscitation, the

patient underwent hypberbaric and hypothermic therapy and a lengthy hospitalization and rehabilitation.

## I. Testimony of Dr. Kristine Carter

Dr. Kristine Carter was called as an adverse witness by the Plaintiff. She is a Fellow of the American College of Surgeons and Board Certified in genera surgery. During cross-examination, Dr. Carter admitted that a $CO_2$ embolis with a Veress needle is a very rare complication in surgery, and "people often die" due to this complication. However, the risks of surgery, including possible $CO_2$ emboluus, were explained to Ms. Gasaway. Dr. Carter admitted that there are risks that are present no matter where you place the needle, but needle occlusion is an inherent risk of the procedure. Dr. Carter's post surgical report was admitted into evidence as a part of the Memorial Hospital records. She admitted on cross-examination that she inserted the needle using a blind approach, as opposed to an open approach. As shown by the report, the needle was immediately withdrawn upon reading "occluded". After reinsertion of the needle at different angles, there were two (2) more readings of "occluded". The angle of the needle insertion was determined by Dr. Carter due to Gasaway's obesity. Gasaway's obesity required a ninety (90) degree insertion, as opposed to the customary forty-five (45) degree angle.

There was a thirty (30) minute gap from Gasaway becoming hypotensive and asystolic that Dr. Carter placed Gasaway in the left decubitis position. This delay was incurred due to the need to perform the ACLS protocol, including chest compressions, and performance of a transeschemic echocardiogram, which indicated air within the left and right ventricles of the heart. Per Dr. Carter's trial testimony, placement in the decubitis position was necessary to avoid any $CO_2$ embolis from moving out of the heart and

**II. Testimony of Dr. Moshe Schein**

The Plaintiff offered the testimony of her only expert, Dr. Moshe Schein. Dr. Shein is not board certified in any fields, including laparascopic surgery, because he did not perform his residency in the United States. Dr. Schein admitted that he has not used the laparoscopic Veress needle approach to hernia repair in the past 20 years. He uses other surgical methods for hernia repair. Dr. Schein's license was limited for some months due to the Wisconsin Medical Board finding that his conduct was unprofessional in a surgical case.

Dr. Schein testified that the Palmer point should be used instead as the insertion point instead of the right upper quadrant. Per Dr. Schein, the Palmer Point would be the safest point of insertion. Dr. Schein further testified that the blind insertion into the right upper quadrant was a breach of the standard of care. He also testified that it was improper of Dr. Carter to not go to another point of insertion after the first "occluded" reading. Otherwise, one of three tests should be used prior to insufflation. Dr. Schein discussed two (2) of the three (3) tests, specifically insertion of saline into the peritoneal space and the saline drop test. Dr. Schein testified that failure to use one of these tests was a breach of the standard of care. Additionally, the delay in moving Gasaway to the left decubitis position caused additional damage to her brain, specifically hypoxia.

On cross-examination, Dr. Schein admitted that the first insertion into the upper right quadrant was not a breach of the standard of care. He also admitted that the air emboli was a rare complication. Dr. Schein also admitted that it has been over 20 years since he used a Veress needle, and he does not perform laparascopic hernia repair. Dr. Schein's limited experience with laparascopic hernia repair and use of Veress needle diminishes his credibility as an expert in this

case. Further, he failed to objectively articulate the standard of care to which a general surgeon performing an umbilical laparascopic hernia repair by Veress needle is held. Additionally, Dr. Schein failed to causally connect any purported breach of the standard of care to a particular injury that Ms. Gasaway received.

### III. Dr. B. Todd Heniford

Dr. Heniford speaks as an expert on use of the Veress needle, laparoscopy, and general surgery. He is a board certified general surgeon. Dr. Heniford has a clinical practice at Carolinas Medical Center in Charlotte, North Carolina, where he specializes in Gastrointestinal and minimally invasive surgery, also know as laparaoscopy. He is a Professor of Surgery and Chief of the Division of Gastrointestinal and Minimally Invasive Surgery, and Course Director of the Advanced Laparoscopic Surgery Workshops. Dr. Heniford is a member of the Southern Surgical Association, Association for Academic Surgery, Society of American Gastorintestinal and Endoscopic Surgeons, and a Fellow of the American College of Surgeons.

Dr. Heniford does not believe Dr. Carter breached the standard of care. All opinions he expressed were to reasonable degree of medical certainty based upon his own expertise in use of the Veress needle, laparoscopy, and general surgery. As testified to by Dr. Heniford, the SAGE manual indicates that insertion of the Veress needle in either the right or left upper quadrant is appropriate. Dr. Heniford testified that Ms. Gasaway was not high risk for use of a Varess needle or laparascopic hernia repair. In fact, he testified that open surgical repair as suggested by Plaintiff's expert would have a higher risk of complications. Per Dr. Heniford, Dr. Carter's response to the patient becoming asystolic by performing chest compressions is appropriate; moving the left side first as alleged by Plaintiff is not appropriate. He additionally testified that

there is no data to show that the saline drop test or aspiration are appropriate tests to show that the Veress needle was in the appropriate place. Additionally, Dr. Heniford testified that the surgeons he has trained with, practices with, and currently trains in the fellowship program do not typically perform these tests. Dr. Heniford stated that he would attempt three times for insertion of the Veress needle prior to attempting another insertion location.

Dr. Heniford testified that, had Dr. Carter followed the recommendation of Dr. Schein when the Plaintiff became asystolic, Gasaway would have died due to the $CO_2$ embolis. He testified that all procedures followed by Dr. Carter upon Plaintiff becoming asystolic were within the standard of care. Dr. Heniford testified that he has never known of chest compressions to be performed in a lateral position, as suggested by Plaintiff's expert. He testified that what happened to Ms. Gasaway was a rare occurrence and complication. Dr. Heniford testified that the efforts of Dr. Carter and others were extraordinary, and Ms. Gasaway received outstanding care.

**Conclusions of Law**

Pursuant to *Miss. Code Ann. § 11-46-5(1)*, a governmental entity can be liable for the misconduct of its employee if that misconduct occurred while the employee was "acting within the course and scope of employment." At trial, the parties agreed to a stipulation admitting that Dr. Carter was an employee of Memorial Hospital acting within the course and scope of employment.

The Plaintiff bears the burden of proving, by a preponderance of the evidence that the Defendant was liable in a medical malpractice action. *Lander v. Singing River Hospital System,*

933 So. 2d 1043, 1046 (Miss. 2006). To establish a prima facie case of medical negligence a plaintiff must prove that

> (1) the defendant has a duty to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) the defendant failed to conform to that required standard; (3) the defendant's breach of his duty was a proximate cause of the plaintiff's injury, and; (4) the plaintiff was injured as a result. *Lyons v. Biloxi H.M.A., Inc.*, 925 So.2d 151, 154(Miss.Ct.App.2006) (citing *Burnham v. Tabb*, 508 So.2d 1072, 1074 (Miss.1987)). Generally, these elements must be proven by expert testimony. *Young v. Univ. of Miss. Med. Ctr.*, 914 So.2d 1272, 1276 (Miss.Ct.App.2005). Because a plaintiff must prove each of the above elements in order to prevail, the failure to prove a single element is fatal to the claim.

*Vede v. Delta Regional Medical Center,* 933 So. 2d 310, 311-12 (Miss. App. Ct. 2006). The trial judge, sitting in a bench trial as the trier of fact, has the sole authority for determining the credibility of the witnesses." *City of Jackson v. Lipsey*, 834 So.2d 687, 691 (Miss.2003) (citing *Rice Researchers, Inc. v. Hiter*, 512 So.2d 1259, 1265 (Miss.1987)). Therefore, it is the trial judge's prerogative to give weight or credibility to one witnesses testimony versus another. *University Medical Center v. Johnson,* 977 So. 2d 1145, 1150 (Miss. App. Ct. 2007).

The Plaintiff has failed to establish negligence by a preponderance of the evidence. As stated above, Plaintiff's expert Dr. Schein admitted that the first insertion into the upper right quadrant was not a breach of the standard of care. He also admitted that the air emboli was a rare complication, that could not readily be anticipated. Dr. Schein also admitted that it has been over 20 years since he used a Veress needle, and he does not perform laparascopic hernia repair. On the other hand, Defendant's expert Dr. Heniford practices regularly with the Varess needle, and teaches others how to use it in the context of laparascopic surger.

Dr. Schein's limited experience with laparascopic hernia repair and use of Veress needle diminishes his credibility as an expert in this case. Further, he failed to objectively articulate the standard of care to which a general surgeon performing an umbilical laparascopic would be held in this type of situation. Additionally, Dr. Schein failed to causally connect any breach to a particular injury that Ms. Gasaway received. The Defendant's expert had the greater training, experience, and credibility, and, barring any other evidence, the Plaintiff's expert failed to provide sufficient expert testimony to support Ms. Gasaway's case. It is therefore,

ORDERED AND ADJUDGED that Memorial Hospital at Gulfport was not negligent, and Dr. Kristine Carter did not breach the standard of care.

SO ORDERED AND ADJUDGED this the 11th day of July 2016.

FILED
JUL 12 2016
CONNIE LADNER
CIRCUIT CLERK
BY: D.C.

LAWRENCE P. BOURGEOIS, JR.
CIRCUIT COURT JUDGE