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IN THE COURT OF APPEALS
STATE OF GEORGIA

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CLERK COURT OF APPEALS OF GA

EHCA DUNWOODY, L.L.C., [d/b/a "EMORY DUNWOODY MEDICAL CENTER'], EHCA, L.L.C. and JEAN THOMPSON,

Appellants,

v.

BONNIE J. DANIEL,

Appellee.

CASE NO. A05A2141

BRIEF OF APPELLANTS

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Appellants,	)	
V.	)	
BONNIE J. DANIEL,	)	
Appellee.	)	

BRIEF OF APPELLANTS

PART I

STATEMENT OF THE PROCEEDINGS BELOW

On April 15,2002, Plaintiff-Appellee Bonnie Daniel ("Ms. Daniel") brought a medical malpractice suit against EHCA Dunwwoody, LLC, EHCA, LLC and Jean Thompson ("EHCA") EHCA alleging that ECHA's use **of** a latex Foley catheter during a surgical procedure she underwent caused her to develop a

condition called interstitial cystitis. (Compl.¶ 7, 8). At trial, the jury returned a compensatory damages verdict for $3.75 million, but it found that punitive damages were not warranted. EHCA moved for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial. Upon the trial court's denial of its motion, EHCA filed a timely Notice of Appeal on May 11, 2005. This appeal is from the Superior Court of Dekalb County's April 29, 2004 Final Judgment and the April 12, 2005 Order denying EHCA's Motion for Judgment Notwithstanding the Verdict or, in the alternative a New Trial.

On August 24,2000, Ms. Daniel was admitted to Emory Dunwoody Medical Center ("Emory") for a surgical procedure. (T-98). Although she had never tested positive for a latex allergy, Ms. Daniel told the staff at Emory that she was latex sensitive. (T-104). As a precaution during surgery, the hospital staff used a silicone catheter to remove urine from her bladder. (T-105). The following day, Ms. Daniel experienced an inability to urinate and reported being in extreme discomfort after the silicone catheter had been removed. (T-106). To relieve Ms. Daniel's pain and discomfort, Defendant-Appellant Ms. Thompson inserted a latex Foley catheter. (T-106). Ms. Daniel remained at the hospital for another day, and her hospital

records do not indicate any complaints about the catheter or any additional complaints about urinary retention. (T-107).

Three days after the surgery, on August 27, 2000, Ms. Daniel visited the emergency room of Georgia Baptist hospital complaining of an inability to urinate. (T-108). Dr. Clarence Carr treated her by using a catheter to remove urine from her bladder. (T-1 10). In September 2000, Ms. Daniel visited Dr. Robert Albee for a post-operation visit. (T-112). At that visit, Ms. Daniel reported that she was having sensitivity when she sat down. (T-112).

In January 2001, five months after the August 2000 surgery, Ms. Daniel began experiencing "a different pain." (T-113). She described it as a "stabbing-type pain in [her] bladder." (T-113). Ms. Daniel visited the emergency room at River Oaks Hospital in Jackson, Mississippi. (T-113). After this January 2001 visit, Ms. Daniel saw a number of doctors for various conditions including urinary infections, bladder spasms, and nocturia. (T-1 15 to 1 16).

In October 2001, more than a year after the surgery at Emory, Dr. Robert Harris diagnosed Ms. Daniel with interstitial cystitis. (T-118). Neither Dr. Harris nor any of the doctors who treated Ms. Daniel after surgery concluded that Ms. Daniel's interstitial cystitis was caused by the insertion of the latex catheter.

Ms. Daniel sued EHCA on a theory of medical negligence, asserting that EHCA had a duty to utilize latex-free precautions. Prior to trial, the trial court granted Ms. Daniel's motion for partial *summary* judgment on the issues of duty of care and breach, concluding that EHCA breached its duty to utilize latex-free precautions by inserting a latex Foley catheter into Ms. Daniel. As a result, causation and damages were the only issues remaining for trial.

The case proceeded to trial on April 26,2004. During the trial, the trial court admitted several medical narratives and certain medical records of Ms. Daniel's treating physicians over EHCA's objections. Specifically, the trial court admitted into evidence the medical narratives of Dr. Carr and Dr. Mark McLain, although these physicians did not testify at trial. (T-26, T-57). Additionally, the trial court admitted over objection the medical records of Dr. McLain (P-12; T-57), Dr. Robert Strong (P-13; T-60), and Dr. Gloria Martin (P-14; T-61), none of whom testified at trial. Other documents, including Ms. Daniel's employment records and a pamphlet given to Ms. Daniel by Dr. Robert Harris, were also admitted into evidence over objection. (T-126, T-129, T-92).

During Ms. Daniel's direct examination, she testified, over objection, to numerous statements made to her by her treating physicians. For instance, Ms.

Daniel testified that Dr. Carr, an emergency room physician, told her that she had an allergic reaction in her urethra that caused her urethra to completely close. (T-109 to T-1 10). Ms. Daniel also volunteered that the pamphlet on interstitial cystitis provided to her by Dr. Harris, her urologist, indicates "allergic reaction in the bladder" as a cause of interstitial cystitis. (T-118). Plaintiff further offered testimony regarding various statements made to her by Dr. Kemp, an allergist. (T-140 to T-142).

After the close of Plaintiffs case, Defendants moved for a directed verdict on the issue of causation and Plaintiffs punitive damages claim. The trial court denied both motions, but capped any potential recovery of punitive damages at the statutory limit of $250,000.00. (T-479).

After Defendants rested, and the Defendants' directed verdict motions were renewed and denied, the jury deliberated for approximately two hours and returned a verdict for $3.75 million. The jury also found that punitive damages were not warranted. Judgment on the verdict was entered on April 29,2004.

EHCA moved for a Judgment Notwithstanding the Verdict on the ground that Ms. Daniel failed to prove that the insertion of the latex catheter caused the interstitial cystitis. Alternatively, EHCA requested a New Trial on the ground that

the trial court erred in admitting hearsay evidence throughout the trial. The trial court denied **EHCA's** motion, and this appeal ensued.

PART II

ENUMERATION OF ERRORS

1. The trial court erred in denying **EHCA's** Motion for Judgment Notwithstanding the Verdict because Ms. Daniel failed to prove that **EHCA's** conduct was the proximate cause of her interstitial cystitis.

2. The trial court erred in denying **EHCA's** Motion for New Trial.

   a. The trial court abused its discretion in admitting the medical narratives of Dr. Carr and Dr. McLain.

   b. The trial court abused its discretion in admitting certain other hearsay medical records of Ms. Daniel.

   c. The trial court abused its discretion in allowing Ms. Daniel's testimony concerning statements made to her by treating physicians who did not testify at trial.

JURISDICTIONAL STATEMENT

This Court, rather than the Georgia Supreme Court, has jurisdiction of this appeal pursuant to the Georgia Constitution, Article VI, Section V, Paragraph **III** as an action in which jurisdiction is not reserved to the Supreme Court of Georgia pursuant to Article VI, Section **VI,** Paragraphs **II** and **III** of the Constitution of the State of Georgia.

PART III

STANDARD OF REVIEW

This Court reviews the denial of a motion for judgment notwithstanding the verdict and motion for new trial under the "any evidence" test. ***See Jordan v. Stephens,*** 221 Ga. App. 8, 9, 470 S.E.2d 733, 735 (1996); ***Signsation, Inc. v. Harper,*** 218 Ga. App. 141, 142,460 S.E.2d 854, 856 (1995). **A** decision to admit evidence is reviewed for abuse of discretion. ***See Dep't of Transp. v. Mendel,*** 237 Ga. App. 900, 902, 517 S.E.2d 365, **368** (1999); ***Am. Ass'n of Cab Cos., Inc. v. Olukoya,*** 233 Ga. App. 731,733,505 S.E.2d 761,764 (1998).

ARGUMENT AND CITATION OF AUTHORITY

I. THE TRIAL COURT ERRED IN DENYING EHCA'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE MS. DANIEL FAILED TO PROVIDE ANY EVIDENCE THAT EHCA'S CONDUCT WAS THE PROXIMATE CAUSE OF HER INJURY.

Judgment should be entered for EHCA because Ms. Daniel failed to provide any evidence that EHCA's conduct caused her to develop interstitial cystitis. Georgia law is clear—a plaintiff cannot recover for medical malpractice, even where there is evidence of negligence, without establishing by a preponderance of the evidence that her injuries were proximately caused by the defendant's negligence. ***Zwiren* v. *Thompson*,** 276 Ga. 498, 500, 578 S.E.2d 862, 864 (2003); ***Bowling v. Foster*,** 254 Ga. App. 374,378,566 S.E.2d 776 (2002). This proof must come in the form of expert evidence expressed with a reasonable degree of medical certainty. ***Zwiren*,** 276 Ga. at 503,578 S.E.2d at 866.

Not only did Ms. Daniel fail to prove causation by a preponderance of the evidence, she failed to provide any legally sufficient evidence to support the verdict below. Ms. Daniel's only expert witness who testified on the issue of causation conceded that no one knows what causes interstitial cystitis. (T-197). Additionally, Ms. Daniel was unable to offer evidence that her particular case of interstitial cystitis was caused by an allergic reaction to latex. In the absence **of**

evidence linking EHCA's conduct with Ms. Daniel's subsequent development of interstitial cystitis, **EHCA** cannot be held liable for Ms. Daniel's injuries.

A. Ms. Daniel failed to provide expert evidence on causation expressed with a reasonable degree of medical probability.

Because of the specialized knowledge typically required to determine issues of causation in the medical malpractice context, Georgia courts require plaintiffs to proffer expert testimony to satisfy their burden of proving causation. *Zwiren,* 276 Ga. at 500-01, 578 S.E.2d at 865. The expert's role is to "present to the jury a realistic assessment of the likelihood that the defendant's negligence caused the plaintiff's injury.'' *Id.* Unsubstantiated expert testimony is insufficient to carry the burden of proving causation. Rather, the expert witness must show some basis for "both the confidence with which his conclusion is formed, and the probability that his conclusion is accurate." *Id.*

As a matter of law, a plaintiff cannot recover for medical malpractice if her expert witness does not make a showing to a reasonable degree of medical probability or certainty that the plaintiff's injury was caused by the defendant's conduct. *Zwiren,* 276 Ga. at 503, 578 S.E.2d at 866-67. This showing requires more than mere speculation or a possibility that the alleged negligence caused the injury. *Id.* Where an expert witness cannot form an opinion that is sufficiently

certain, a jury lacks sufficient information to make a legal judgment. *Zwiren*, 276 Ga. at 501,578 S.E.2d at 865.

Ms. Daniel failed to make the requisite showing of causation necessary to sustain a medical malpractice action. First, Ms. Daniel was unable to show general causation—that interstitial cystitis could be caused by the insertion of a latex catheter in a latex-sensitive patient. Ms. Daniel also failed to show that her specific case of interstitial cystitis was caused by the latex catheter.

1. General Causation.

The only expert witness that testified at trial to opine on the issue of causation was Dr. Mickey Karram. (*See* T-189 to T-257). Dr. Karram was unable to conclude with a reasonable degree of medical probability that interstitial cystitis can be caused by an allergic reaction to latex.

Dr. Karram's testimony was clear—the causes of interstitial cystitis are unknown in the medical field. During his direct examination, Dr. Karram stated, "It's a condition that . . . is really still what we would call an 'enigma,' in our field, because **we don't know what causes it."** (T-198) (emphasis added). He also conceded that there is not a single medical article or study linking interstitial cystitis with an allergic reaction to latex. (T-193). Indeed, Dr. Karram conceded

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that it is not generally accepted in the medical community that an allergic reaction to latex can cause interstitial cystitis. (T-231). Such uncertainty in his conclusions rendered his opinion an insufficient basis on which the jury could form a legal conclusion. *See Zwiren*, 276 Ga. at 501, 578 S.E.2d at 865.

This Court has consistently found that such uncertainty as to the cause of a plaintiff's injury is insufficient to render a medical provider liable. *See, e.g.* *Cannon v. Jeffries*, 250 Ga. App. 371, 551, S.E.2d 777 (2001); *Abdul-Majeed v. Emory Univ. Hosp.*, 225 Ga. App. 608, 484 S.E.2d 257 (1997), *overruled on other grounds by*, *Ezor v. Thompson*, 241 Ga. App. 276, 526 S.E.2d 609 (2000); *Anthony v. Chambless*, 231 Ga. App. 657, 500 S.E.2d 402 (1998). In *Cannon v. Jeffries*, the plaintiff sued her doctors, alleging that the doctors' failure to test her for Chlamydia contributed to the death of her infant son. 250 Ga. App. 371, 372, 551 S.E.2d 777, 778 (2001). The trial court granted summary judgment in favor of the doctors, concluding that the plaintiff failed to prove causation on the issue of Chlamydia testing. *Id.* The Court of Appeals affirmed, holding that the expert evidence was insufficient to show causation. *Id.*

When asked whether she could determine what caused the mother's preterm labor, the expert witness in *Cannon* indicated that she could identify "the two

things that I think may have. Can I tell you exactly, nobody can." *Id.* She also testified that the largest category of preterm labor, which the Chlamydia allegedly caused, is "a condition for which there is no known cause." *Id.* The court concluded that the expert's testimony was insufficient to establish causation. *Id.* at 373, 551 S.E.2d at 779. In affirming summary judgment in favor of the defendant doctors, this Court found it significant that the expert's testimony demonstrated that neither she nor anyone else could determine the cause of the plaintiffs injuries to a reasonable degree of medical certainty. *Id.* This Court also noted that the expert was only able to state that she ***"thought*** two possibilities ***may have contributed"*** and that there was no identifiable cause. *Id.*

Similarly, the testimony of Ms. Daniel's expert witness on causation demonstrated that no one can identify the cause of interstitial cystitis. Dr. Karram expressly stated, "we don't know what causes it.'' (T-198). Additionally, in attempting to draw a correlation between interstitial cystitis and allergic reactions, Dr. Karram explained, "it still is theoretical in that fact, but it's . . . it's a process that . . . we ***think*** occurs.'' (T-228) (emphasis added). This testimony is exactly the type of conjecture and speculation that this Court has consistently found insufficient to establish causation.

2. Specific Causation.

Ms. Daniel was also unable to show that her specific case of interstitial cystitis was caused by the insertion of the latex catheter. Ms. Daniel failed to present testimony from any of her treating physicians that her interstitial cystitis was caused by an allergic reaction to latex. Dr. Winn Walcott, the only medical doctor who testified at trial who had actually treated Ms. Daniel, testified that determining whether exposure to latex caused Ms. Daniel to develop interstitial cystitis was outside the scope of his expertise. (Depo. of Dr. Winn Walcott at 35). He also testified that he would defer to Ms. Daniels' treating physicians as to the cause of her urinary retention. (Walcott Depo. at 39).

Ms. Daniel offered only two items of evidence to prove that her interstitial cystitis resulted from her visit to Emory: (1) a conclusory, four-sentence medical narrative of Clarence Carr, and (2) the testimony of Dr. Karram. As discussed below, Dr. Carr's medical narrative was improperly admitted into evidence, and it does not opine that the insertion of the latex catheter caused her interstitial cystitis. (P-32). And, for the reasons just discussed, Dr. Karram's testimony regarding specific causation also was legally insufficient to establish causation. As a result,

Ms. Daniel failed to offer any expert evidence showing that her interstitial cystitis was caused by exposure to latex.

B. Dr. Karram's testimony was based solely on a temporal relationship, and was thus insufficient to establish causation.

The other problem with Dr. Karram's testimony was its reliance on a temporal relationship to show causation. Dr. Karram offered only "temporal" testimony, i.e. (1) that Ms. Daniel did not suffer from interstitial cystitis prior to her admission at Emory; (2) Ms. Daniel began to suffer from interstitial cystitis after the admission; and (3) therefore, her interstitial cystitis was caused during her admission at Emory. Dr. Karram's opinion, based on the temporal relationship between the August 2000 surgery and the development of interstitial cystitis over one year later, was legally insufficient to establish the element of causation. Under Georgia law, the fact that one event chronologically follows another is insufficient to establish a causal relation between the two. ***Akins* v. *Federated Mut.*** *Implement & Hardware Ins. Co.,* 108 Ga. App. 872, 134 S.E.2d 854 (1964) (holding that the fact that the two events happened closely together did not suggest that eating the meal caused the spontaneous rupture of his esophagus); *Payne v. Chandler,* 41 Ga. App. 385, 153 S.E.2d **96** (1930) (holding that the fact that a woman experienced heart problems shortly after swallowing a hypodermic liquid at the dentist's office

was legally insufficient to show that the swallowing of the liquid caused her heart problems); *Cherokee County Hosp. Auth. v. Beaver,* 179 Ga. App. 200,345 S.E.2d 904 (1986) (stating that evidence that an injection was closely followed in time by the occurrence of pain was insufficient to authorize an inference that the injection was the proximate cause of the pain).

Dr. Karram's opinion was insufficient to establish a causal link between the insertion of the latex catheter and Ms. Daniel's interstitial cystitis because the sole basis of his opinion was the temporal relationship between the two events. During his testimony, Dr. Karram was clear that he based his opinion on the fact that the development of symptoms closely followed the surgery:

> Q: **As** I understand it, your entire opinion in this case, that **. . .** latex exposure **. . .** caused the interstitial cystitis, is based on the fact that there're symptoms after and none before.
>
> A: That's **. . .** a significant portion of it yes.

(T-235). Later in his testimony, Dr. Karram confirmed that the temporal relationship was the basis of his opinion:

Q: In sum, Doctor, your opinion . . . as I understand it, was based on the temporal relationship between the onset of symptoms . . . and the . . . latex exposure. Correct?

A: Absolutely.

(T-249). Dr. Karram was unable to provide any other support, let alone evidence to a reasonable degree of medical probability, for his opinion that an allergic reaction to latex caused Ms. Daniel's condition. As this Court has made clear, this type of speculation and reliance on mere possibility is wholly inadequate to support an inference that EHCA's conduct caused Ms. Daniel's injury.

Aware of the flaws in Dr. Karram's testimony, Ms. Daniel made sure Dr. Karram used the "magic words" "reasonable degree of medical certainty" when giving his opinion. This Court has acknowledged that the mere invocation of the "magic words" does not help a plaintiff survive a dispositive motion. ***See Abdul-Majeed* v.** *Emory Univ. Hosp.,* 225 Ga. App. 608,609,484 S.E.2d257, 259 (1997), overruled, Ezor **v.** Thompson, 241 Ga. App. 275,526 S.E.2d 609 (1999).

The application of Georgia law on causation to this case leads to the inescapable conclusion that Ms. Daniel failed to satisfy her burden of proving that **EHCA's** conduct was the proximate cause of her injuries. Because Plaintiff failed

to prove to a reasonable degree of medical probability that EHCA's conduct caused Ms. Daniel's injuries, the trial court erred in refusing to grant EHCA's Motion for Judgment Notwithstanding the Verdict, and judgment should be entered in favor of EHCA.

II. THE TRIAL COURT ERRED IN DENYING EHCA'S MOTION FOR NEW TRIAL BECAUSE IT ADMITTED HEARSAY EVIDENCE THAT DID NOT FALL UNDER ANY EXCEPTION TO THE HEARSAY RULE.

In Georgia, hearsay evidence is not only inadmissible, it is entirely void of probative value. *Day* **v.** *State,* 235 Ga. App. 771,772,510 S.E.2d 579,580 (1998); *In re Burton,* 271 Ga. 491,494,521 S.E.2d 568,571 (1999). Hearsay evidence is that which "does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons." O.C.G.A. § 24-3-1; DI *Uniform Sews., Inc.* **v.** *United Water Unlimited Atlanta, LLC,* 254 Ga. App. 317, 324,562 S.E.2d 260,266 (2002). Any statement made out of court and offered to prove the truth of the matter asserted is, by definition, hearsay evidence, and inadmissible. *DI Uniform,* 254 Ga. App. at 317,562 S.E.2d at 262.

Georgia courts have repeatedly and consistently excluded medical reports as hearsay where the author of the report does not testify at trial. *See, e.g. Dep't. of Human Res.* ***v. Corbin***, 202 Ga. App. 10,413 S.E.2d 484 (1991); ***Am.*** *Assoc.* of

Cab Cos., Inc. v. *Olukoya,* 233 Ga. App. 731,505 S.E.2d 761 (1998); *In re C.D.E.,* 248 Ga. App. 756,546 S.E.2d 837 (2001). Additionally, testimony of one medical provider is deemed hearsay where the witness is simply restating the opinions or diagnoses of another medical provider. *See **Tompkins*** v. *West,* 123 Ga. App. 459, 461, 181 S.E.2d 549,550 (1971); *Mallard v. Colonial Life &Accident Ins. Co.,* 173 Ga. App. 276,276,326 S.E.2d 6,7 (1985). The law is clear—"evaluations, opinions, diagnoses, conclusions and statements of third parties not before the court are inadmissible." *Moody* v. *State,* 244 Ga. 247,249,260 S.E.2d 11, 14 (1979).

A patient's testimony about what her physician told her is also clearly hearsay. *Foist* v. *Atlanta Big Boy Mgmt., Inc.,* 166 Ga. App. 304,305,304 S.E.2d 111,112 (1983). While a patient can testify about treatment received, testimony regarding what doctors stated about the diagnosis and the cause of the plaintiffs condition is hearsay and inadmissible. *Lancaster* v. *USAA Cas. Ins. Co.,* 232 Ga. App. 805,807,502 S.E.2d 752,754 (1998).

A. The medical narratives of Dr. Clarence Carr and Dr. Mark McLain should have been excluded as hearsay.

Before the medical report of a doctor is admissible in narrative form, the offering party must provide the report and notice of intention to introduce the

report at least 60 days before trial. O.C.G.A. § 24-3-18(a). This exception to the hearsay rule enables a party to present a medical report in narrative form without the necessity of producing the report's author at trial. ***Bell v. Austin,*** 278 Ga. 844, 845,607 S.E.2d 569, (2005). Medical reports in narrative form are only admissible if the proponent: (1) provides the report to the opposing party at least 60 days prior to trial, and (2) provides **notice of intention to introduce** the report into evidence at least 60 days prior to trial. ***See*** O.C.G.A. § 24-3-18(a). A party attempting to admit **a** medical narrative at trial pursuant to this statute must satisfy both requirements. In **an** effort to protect the rights of the opposing party, the statute expressly provides the right to object to the admissibility of any portion of the report and the right to cross-examine the report's author. O.C.G.A. $24-3-18(a); ***Bell,*** 278 Ga. at 845,607 S.E.2d at 572.

1. Ms. Daniel failed to give any notice of her intention to offer into evidence the medical narratives of Dr. Carr and Dr. McLain.

It is undisputed that Ms. Daniel failed to comply with the second prong of this mandatory requirement by offering the medical narrative of Dr. Carr on the first day of trial without providing any notice of her intention to do so, let alone the required 60-day notice. (*See* T-25). Despite this failure, Ms. Daniel's counsel was allowed to present Dr. Carr's narrative to the jury during his opening statement and she introduced it into evidence. (T-77 to 78). Knowing that **EHCA** would not have the opportunity to cross-examine Dr. Carr, Plaintiffs counsel proceeded to quote from a conversation Dr. Carr allegedly held with Ms. Daniel. The trial court abused its discretion in admitting Dr. Carr's medical narrative over defense counsel's objection. (T-26).

Similarly, Ms. Daniel offered Dr. McLain's medical narrative the first day of the trial without providing notice to EHCA. (T-61). Ms. Daniel, on direct examination, testified about the contents of Dr. McLain's narrative. (T-123). The trial court also abused its discretion in admitting this evidence.

This error was particularly harmful with Dr. Carr, as Ms. Daniel used his report to attempt to cure the deficiencies in Dr. Karram's testimony. But Dr.

Carr's report is entirely conclusory. It is only four lines long. No basis for the opinion is stated. He is an emergency room doctor not a urologist. He could have easily been cross-examined very effectively had EHCA been given notice his report would be used at trial.

2. EHCA was deprived of its fundamental right to cross-examination.

It is a hallmark of American jurisprudence that a party is entitled to cross examine witnesses. *See, e.g. Alford* v. *United States,* 282 **U.S.** 687 (1931); *Resurrection Gold Mining Co.* v. *Fortune Gold Mining Co.,* 129 F. 668 (8th Cir. 1904). The cross-examination of witnesses is one of the essential "safeguards to accuracy and truthfulness." *Hungate* v. *Hudson,* 185 S.W.2d 646,649 (Mo. 1945). This Court has declared that cross-examination is "a substantial right, essential to the proper administration of justice." *Roylston v. Conway*, 251 Ga. App. 648, 651, 555 S.E.2d 28, 31 (2001). Indeed, "[w]hen facts not properly in evidence are considered, the other party's rights cannot be protected fully since the privilege of cross-examination is denied." ***Id.***

By admitting the medical narratives of Dr. Carr and Dr. McLain without requiring Ms. Daniel to satisfy the requirements of O.C.G.A. $24-3-18, the trial court robbed EHCA of its right to cross-examination. The statute requires 60-day's

notice for the purpose of giving the opposing party an opportunity to decide whether to depose the witness who authored the report. Notice on the first day of the tial deprived EHCA of the opportunity to make this strategic decision.

In response, Ms. Daniel argues that EHCA had these reports for many months before trial and could have deposed these doctors if it had wanted to do so. Ms. Daniel's production of the narratives 19 months before the trial is irrelevant to issue of admissibility, however. The statute requires notice of intention to offer the narratives into evidence. Upon receiving the narratives through pre-trial discovery procedures, but without notice of intent to use, EHCA was faced with a strategic decision — whether to depose the authors of the reports or not. EHCA's counsel opted not to take the depositions as there was no indication that Dr. Carr's and Dr. McLain's reports would be offered at trial. If Ms. Daniel had complied with the statute by providing notice of her intention to introduce the reports into evidence at trial, EHCA's counsel would have been able to appropriately adjust its strategy.

This point is not merely theoretical. Many practitioners intentionally decide not to take depositions of witnesses whom they believe may not testify at trial, especially if the witness may give adverse testimony. Here, a decision was made not to depose Drs. Carr or McLain because, had EHCA done so, defense counsel

would have created admissible evidence Ms. Daniel could use at trial under O.C.G.A § 9-11-31. So, the fact that Defendants had been aware of the reports is immaterial to their admissibility. Until notice of intent to offer is given, most lawyers will not take the depositions of the report's author so as to avoid creating admissible evidence for the adversary.

3. The admission of the narratives was harmful error because they were the only evidence linking the development of Ms. Daniel's urinary retention and exacerbation of her psychiatric symptoms with exposure to latex.

In his narrative, Dr. Carr opined that an allergic reaction to the latex catheter caused Ms. Daniel to develop urinary retention. This was the only proffered evidence that suggested a link between Ms. Daniel's urinary retention and her exposure to latex. The only other witness who even remotely discussed the issue did not make an independent assessment of the cause of Ms. Daniel's urinary retention:

> Q: Would you defer to Ms. Daniel's treating surgeon as to the cause of her urinary retention?
>
> **A:** Yes.

(Video Deposition of D. Winn Walcott at 39, P-2).

In his narrative, Dr. McLain related the exacerbation of Ms. Daniel's psychiatric condition to .interstitialcystitis. (P-30). This was the only evidence on the record of this alleged linkage. The record is devoid of any other evidence that Ms. Daniel's psychiatric disorders are related to her interstitial cystitis.

The medical narratives of Dr. Carr and Dr. McLain were essential to Ms. Daniel's case. Because Ms. Daniel failed to give proper notice pursuant to O.C.G.A. §24-3-18, EHCA was deprived of its right to the cross-examination of these important witnesses. The trial court clearly erred in admitting these narratives over EHCA's objection. Consequently, EHCA is entitled to a new trial.

4. The Narratives should not have gone to the Jury Room.

O.C.G.A. § 24-3-18(b) also states that medical reports shall not go out with the jury. The trial court, however, allowed these reports to go to the jury room. This was flat error.

B. The medical records of Dr. McLain, Dr. Strong, and Dr. Martin should have been excluded as hearsay.

Medical records containing diagnostic opinions and conclusions cannot be admitted into evidence unless the person who entered the information is qualified as an expert and he or she relates the facts upon which the conclusions are based. *Dunn v. McIntyre*, 146 Ga. App. 362,363,246 S.E.2d 398,399 (1978); *In re*

C.D.E., 248 Ga. App. 756,764,546 S.E.2d 837, 844 (2001) (holding that "records which contain the diagnostic opinions of third parties who are not available for cross-examination are generally inadmissible").

This Court has consistently reversed decisions admitting the medical records of doctors who did not testify at trial. ***See, e.g., Giles* v. *Taylor,*** 166 Ga. App. 563, 305 S.E.2d 154 (1983); *In **re** C.D.E.,* 248 Ga. App. 756,546 S.E.2d 837 (2001). In *In **re** C.D.E.,* the trial court admitted the report of a psychologist who did not testify at trial. 248 Ga. App. at 764,546 S.E.2d at 844. The trial court relied on the report to conclude that the patient was "a walking time bomb." *Id.* The Court of Appeals concluded that the trial court erred in admitting and relying on the psychologist's report. *Id.* The Court acknowledged that the report was admitted without objection, but stated that "hearsay evidence has no probative value even when it is admitted without objection." *Id.*

The trial court admitted the medical records of Drs. Mark McLain, Robert Strong, and Gloria Martin over EHCA's hearsay objections. (T-57, T-60, T-61). These records consisted of detailed analyses of **Ms.** Daniel's condition and the opinions, evaluations, and diagnoses of medical providers who did not testify at trial. The admission of these records without the doctors present at trial deprived

EHCA of the opportunity and right to cross-examine these witnesses concerning their opinions and was error.

C. Ms. Daniel's testimony concerning statements made to her by her treating physicians should have been excluded as hearsay.

It is impermissible for a patient to testify about conversations with her physicians, as such conversations are clearly hearsay. *Foist v. Atlanta Big Boy Mgmt, Inc.,* 166 Ga. App. 304, 305, 304 S.E.2d 111, 112 (1983). As hearsay, courts should exclude testimony from a plaintiff concerning what a doctor told her about the diagnosis and causation of her condition. *Lancaster v. USAA Cas. Ins. Co.,* 232 Ga. App. 805, 808, 502 S.E.2d 752, 754 (1998) (excluding as hearsay the plaintiff's testimony concerning statements made by her doctor).

In the trial court proceedings, Ms. Daniel impermissibly testified about conversations between her and two of her doctors, Dr. Carr and Dr. Kemp. *(See* T-109 to T-1 11; T-138 to T-142). Specifically, Ms. Daniel testified that Dr. Carr indicated to her that she experienced an allergic reaction causing her urethra to close. (T-109). The trial court admitted this testimony over EHCA's hearsay objection. (T-109). **As** to Dr. Kemp, Ms. Daniel testified that he told her that the results of a latex allergy test were inconclusive, but that they did not mean that she

was not allergic to latex. (T-140). This testimony was also admitted over EHCA's hearsay objection. (T-138 to T-139).

Recognizing that the statements constitute impermissible hearsay, Ms. Daniel initially claimed that she was offering the testimony concerning Dr. **Carr's** and Dr. Kemp's statements under O.C.G.A. $24-3-4, an exception to the hearsay rule that allows evidence of "statements made for purposes of medical diagnosis or treatment." (T-109 and T-139)'. Ms. Daniel also purported to offer testimony concerning Dr. Kemp's statements under O.C.G.A. § 24-3-2 allegedly to explain subsequent conduct. (T-139). The trial court admitted the testimony in both instances under the subsequent conduct exception to the hearsay rule (T-545), although he also indicated that the testimony was admissible as statements made in the course of treatment. (T-335 to T-334).

The trial **court** erred in admitting the hearsay testimony under O.C.G.A. §24-3-4. This exception to the hearsay rule applies only **to** statements made by the

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[1] After making this argument, Ms. Daniel's counsel realized it was wrong under Georgia law and withdrew it. (T-374-75).

patient to the medical provider, but not vice versa. *Dunn* v. *McIntyre*, 146 Ga. App. 362, 363, 246 S.E.2d 398, 400 (1978).

The trial court similarly erred in admitting the hearsay testimony under O.C.G.A. 24-3-2, the subsequent conduct exception to the hearsay rule. Hearsay evidence can only be used to explain subsequent conduct if the subsequent conduct is relevant to the issues in the case. *Bryant* v. *Carver State Bank,* 207 Ga. App. 659, 660, 428 S.E.2d 621, 623 (1993); *Bantz* v. *Allstate Ins. Co.,* 263 Ga. App. 855, 857, 589 S.E.2d 621, 624 (2003). Ms. Daniel's hearsay testimony did not explain any subsequent conduct that was disputed and at issue in this case. In fact, Plaintiff's counsel informed the trial court that Ms. Daniel did not take any action subsequent to her visit to Dr. Kemp:

THE COURT: Let me just ask: Did your client take any action subsequent to this examination and her visit with this particular doctor?

MR. SIMMONS: No. No, Your Honor.

(T-139). Ms. Daniel's counsel concocted a makeshift rationale only after the trial court suggested the subsequent conduct exception:

THE COURT: Hearsay can be admissible to explain subsequent conduct of a party.

MR. SIMMONS: Your Honor . . . there was . . . Dr. Kemp provided her with something that she . . . he instructed her to use with regard to her latex allergy; so there was a . . . an instruction given to her, that she still follows, today.

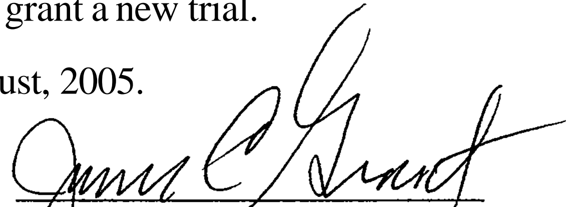
(T-139).

Ms. Daniel failed to show how this hearsay testimony fit into the subsequent conduct hearsay exception or its relevance to any legal issue in the case. Even if Ms. Daniel took some action following her visits with Dr. Carr and Dr. Kemp, that action was not at issue in this case. For example, whether Ms. Daniel followed Dr. Kemp's instructions is not relevant to the issues in this case, namely, whether Ms. Daniel was in fact allergic to latex, and whether an allergic reaction caused her condition. The burden is on Ms. Daniel to explain why the testimony falls under the subsequent conduct hearsay exception. *See Volkswagen of Am. v. Gentry,* 254 Ga. App. 888,894,564 S.E.2d 733,740 (2002). Because Ms. Daniel failed to satisfy this burden, the trial court should have excluded her testimony.

CONCLUSION

For the reasons set forth above, EHCA respectfully requests that this **Court** vacate the judgment and reverse the trial court's denial of its Motion for Judgment Notwithstanding the Verdict or, in the alternative, grant a new trial.

Respectfully submitted this 1st day of August, 2005.



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