JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, deceased,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	BALDWIN COUNTY, ALABAMA
-vs-	)	AT LAW
ROBERT BURKE RUSSELL,	)	NO. 9401
DEFENDANT.	)	

TO THE HONORABLE TELFAIR MASHBURN, JUDGE OF CIRCUIT COURT FOR BALDWIN COUNTY, ALABAMA.

STATEMENT OF THE CASE

This is a mal-practice case brought by the Plaintiff against the Defendant on the theories of negligence and wanton conduct of the Defendant in failing to exercise reasonable care, skill and diligence in and about the diagnosis and treatment of the Plaintiff's intestate, Howard J. Wilson. It is claimed by the Plaintiff that the Defendant accepted Mr. Wilson as a patient on or about September 10, 1969, at Foley, Alabama, and admitted him to the South Baldwin Hospital on that date. Certain diagnostic tests were conducted, one of which was a chest X-ray which revealed a certain abnormality in the patient's left lung. Upon recommendation of the radiologist, the Defendant ordered additional X-rays which were taken on September 12, 1969. The Defendant discharged the Plaintiff's husband from the hospital on that date advising him that he had something wrong with his lung, and that he should be X-rayed again in six months. The Defendant failed to look at the radiology report on the X-rays made on September 12, 1969, and failed to advise the Plaintiff's husband or the Plaintiff of the results of the second set of X-rays.

The pertinent portions of the radiology reports on the two sets of X-rays read as follows:

> X-rays - September 11, 1969. "Faint nodular density in the left upper lobe that measures about 18 millimeters in maximum dimensions and there is apparently associated small hilar mass. The hilar enlargement could conceivably be just a very prominent pulmonary artery. However, this patient should be further evaluated in regard to these findings. It is recommended that he have a repeat PA film of the chest, a PA bucky film of the chest, a shallow right anterior oblique view of the chest, and an apical lordotic view of the chest."

> X-rays - September 12, 1969. "These additional views confirm the previous finding of a nodule projected through the left second anterior rib measuring about one by two cm. These views demonstrate the nodule to lie anteriorly in the region of the anterior segment of the left upper lobe. The prominent left hilum is again noted along with a small nodule projecting superiorly from the prominent left hilum and it measures slightly over one centimeter in diameter, seen on all films but best seen on the apical lordotic view."

> "From the films at hand this patient should be considered as probable carcinoma of the lung until proven otherwise; this could be a primary carcinoma of the left hilum with a sattelite peripheral parenchymal nodule or a peripheral lesion with metastatic spread to the left hilum. Complete work-up along these lines to prove or disprove this working diagnosis should be carried out."

Mr. Wilson was subsequently seen by Dr. L. E. Rockwell of Daphne, Alabama, on December 12, 1969, February 13, 1970, February 14, 1970, and April 20, 1970. Dr. Rockwell admitted him to the Thomas Hospital, Fairhope, Alabama, on May 3, 1970, where he was X-rayed again. By virtue of the results of this X-ray examination, Dr. Rockwell referred the patient to Dr. Curtis Smith, a thoracic surgeon of Mobile, Alabama. Dr. Smith first saw Mr. Wilson on May 7, 1970, admitted him to the Doctors Hospital, Mobile, Alabama on May 8, 1970, and operated to remove his lung on May 18, 1970. Mr. Wilson subsequently died of cancer on August 10, 1970.

SUMMARY OF THE TESTIMONY OF THE TREATING PHYSICIANS

A) DR. ROBERT RUSSELL.

Dr. Russell states that he saw the patient initially September 10, 1969, when he was brought to his office with a principal complaint of abdominal cramps. (Dep. 7) He made a preliminary diagnosis of gastroenteritis with colitis and put him into the hospital at the South Baldwin Hospital for treatment. (Dep. 8) He made the X-rays referred to previously and received the initial report of the radiologist. (Dep. 11) He ordered the second X-rays referred to in that report. (Dep. 14) He stated that he never read the radiology report on the second X-rays until sometime in December of 1969 when Mrs. Wilson came by his office to pick up his records on Mr. Wilson to take them to Dr. Rockwell and to Dr. Smith. (Dep. 16) He said that when he opened up the chart, the second radiology report was right there staring him in the face, and that this was the first time he ever saw it. Furthermore, he testifies that he had a conversation with the patient when he discharged him in September 1970 and told him there was something wrong with his chest but that it was probably a prominent pulmonary artery. He told the patient to return in about three months for another X-ray. He did not recall whether he had told him he had not received the reports from the second X-rays. (Dep. 18)

He admitted that it would be the proper practice as a general practitioner to refer the patient to a lung specialist immediately, had he had the benefit of the second radiology report by reading it. (Dep. 18)

He stated that to be in compliance with the standard of care of a general practitioner in Baldwin County in September of 1969, had he suspected cancer in the patient, he should refer the patient to a lung specialist, but that he did not suspect cancer because he didn't have the benefit of the second films. (Dep. 24 and 25) He also said that at the time he did not feel it was his responsibility in treating the patient to follow up by getting the results of the second films, but that since then he does feel like such was his responsibility. (Dep. 25) He also said that in his interpretation of the second radiology report it would mean that the complete work-up referred to in the report should be done immediately and not in three months. (Dep. 27 & 28)

B) DR. L. E. ROCKWELL.

The substance of Dr. Rockwell's testimony is that he first saw Mr. Wilson following his September hospitalization on December 12, 1969, when he had an ulcer in his throat. He subsequently saw him on February 13 and 14, 1970 for an upper respiratory infection. He was next seen on April 20, 1970, with complaints of nausea and weight loss. (Dep. 6, 7, 8) He was seen next on May 3, 1970, with abdominal pains and admitted to the Thomas Hospital in Fairhope where X-rays were done. When the reports of the X-rays were read the patient was referred to Dr. Curtis Smith, the thoracic surgeon in Mobile, Alabama. (Dep. 9 & 10)

C) DR. CURTIS SMITH.

Dr. Smith testified that he first examined Mr. Wilson on May 7, 1970, and admitted him to the Doctors Hospital in Mobile, Alabama, on May 8, 1970, because he thought he had a

cancer of the left lung and needed treatment for this condition. (Dep. 8) Dr. Smith stated that diagnosis of chest lesions should be made as promptly as possible and that he considered cancer of the lung a very serious disease which needed prompt diagnosis and treatment. (Dep. 10 & 11) He said that good standard of care exercised in the Mobile community suggests that a cancer be diagnosed and treated as early as possible. (Dep. 12) He felt that in his opinion from looking at the September X-rays, that the tumor was present when they were taken. (Dep. 16) He said he conducted certain tests to determine whether or not the cancer had spread beyond the lesion in the lung, that is to the liver, brain, kidneys, or elsewhere in the body and he felt that from his examination there was no indication that it had spread, so he decided to treat the man by surgically removing his lung. (Dep. 17 & 18) With regard to the cause of death he stated on page 20 of his deposition as follows:

"Q What was the cause of his death, please?

A The cause of his death was metastatic disease from cancer of the lung."

Also significant is Dr. Smith's testimony that from the radiology report of September 12, 1969, the patient should be considered as a probable carcinoma. (Dep. 22) He has the opinion that the standard of care a doctor should follow, both in Mobile County and Baldwin County, after receiving the X-ray report of September 12, 1969, would be to have done sputum studies and things to try to determine what the thing was in his lung. (Dep. 22) He said that the radiology

reports of September 11 and 12, 1969, showed the lesion to be about one centimeter in size and that when he did his X-rays on May 8 and 9, 1970, the lesion had grown to a size sixty-four times greater than it was in September of 1969. (Dep. 25 & 26) With regard to the treatment of cancer he says that the earlier it is diagnosed and treated, the better chance of recovery and that this was true with the cancer which Plaintiff's husband had. Also, the earlier the diagnosis, the better chance there is of successfully surgically removing the cancer or at least prolonging the patient's life. (Dep. 27) He said his policy is to attempt a diagnosis of all lung lesions that he possibly can by as aggressive means as is necessary to do so. (Dep. 29) Finally the doctor stated with respect to treatment of lesions that the one visible in the September 1969 radiology reports was clearly visible and that there would be no question whether or not something was there and that immediate treatment should have been begun as the doctor had outlined previously. (Dep. 32 & 33) The doctor stated that Mr. Wilson had pain before his operation from the cancer, that this was one of his symptoms. (Dep. 46)

On a subsequent deposition Dr. Smith was asked whether he had an opinion based upon a hypothetical question. The hypothetical question was as follows:

> "Now, Doctor, based on your medical education, your medical training to include your specialized training in general and thoracic surgery, and based upon your familiarity with the standards governing the conduct of physicians and surgeons in Alabama during September 1969, including physicians and surgeons with the same general training and experience as the Defendant in this case, and based upon the radiology report rendered September 12, 1969, which you have just identified, and based

upon the statement made by the Defendant that he did not look at the X-rays or the radiology report on September 12, 1969, but instead discharged the patient on the same date stating to the patient that he should have additional X-rays made in three months, based on the fact that the Defendant did not in fact look at the X-rays or the radiology report until December 1969, please state whether or not you have an opinion as to whether the Defendant complied with and conformed to the standards governing the conduct of physicians and surgeons with the same general training and experience as the Defendant under the circumstances of this case."

Dr. Smith stated that he did not comply with the accepted standards of practice in that he should have pursued the X-rayed diagnosis further by doing appropriate studies on the man or referring him to someone to do appropriate studies on him. And that his failure to do so did not comply with what he would expect a physician or surgeon with the same general training as the Defendant to have done with this patient. (Dep. 13, 14 and 15) Dr. Smith reiterated his opinion on Page 17, two times when he stated that in his opinion Dr. Russell should have done something further, pursued the X-ray report regardless of distance involved and regardless of whether or not the patient-doctor relationship continued to exist between the two people involved.

He likewise reiterated that he was testifying as to what someone should have done with the training and experience of the Defendant in this case, not a thoracic surgeon. (Dep. 18) He stated that cancer cells keep on dividing every twenty (20) minutes and continue to grow steadily at a regular rate. (Dep. 18)

THE DUTY OF THE DEFENDANT

A) GENERAL.

The relation of physician and patient has its foundation on the theory that the former is learned, skilled, and

experienced in those subjects about which the latter ordinarily knows little or nothing, but which are of the most vital importance and interest to him, since upon them may depend the health or even life, of himself or family. Therefore, the patient must necessarily place great reliance, faith and confidence in the professional word, advice or acts of the physician. Hummel vs. State 210 Ark. 471, 196 SW 2nd 594; Adams vs. Ison (Ky.) 249 SW 2d 791; Anno. 132 ALR 379.

B) THE PHYSICIAN-PATIENT RELATIONSHIP.

When professional services of a physician are accepted by another person for the purposes of medical or surgical treatment the relationship of physician and patient is created, it is a relation where the patient knowingly seeks the assistance of the physician and the physician knowingly accepts him as a patient. Anno. 24 ALR 2d 841.

Once the relationship is established the physician impliedly agrees to attend the patient throughout the illness, and the physician must exercise reasonable and ordinary care and skill in determining when he may properly discontinue his treatment and as long as anything remains to be done to effect a cure, it cannot be said that the duty to render treatment has ceased. Anno. 57 ALR 2d 432, 439; 74 ALR 1312.

C) STANDARD OF CARE.

There is an implied contract between the patient and the physician requiring the latter to use that degree of skill and diligence ordinarily exercised by the average members of the medical profession in the same or similar localities with due consideration to the state of the profession at the time. The law imposes upon the physician who undertakes the care of

a patient the obligation of due care, the exercise of an amount of skill common to his profession without which he should not have taken the case, and the degree of care commensurate with his position. Anno. 132 ALR 379.

1) If a physician in the exercise of the professional skill and care required of him as such discovers or should know or discover, that the patient's ailment is beyond his knowledge or technical skill or ability to treat with reasonable success, it is his duty to disclose the true situation to the patient or advise him of the necessity to seek and obtain other treatment. Vigneault vs. Hewson Dental Company 300 Mass. 223, 15 NE 2d. 185, 129 ALR 95. This rule is especially applicable to general practitioners of medicine and to others whose practice is limited. Anno. 35 ALR 3d 349, 358, Sec. 5(A).

2) It is one of the fundamental duties of a physician to make a properly skillful and careful diagnosis of an ailment of a patient and if he fails to bring to that diagnosis the proper degree of skill or care and makes an incorrect diagnosis, he is liable to the patient for the damage resulting therefrom. This applicable principle of law has been applied many times in cancer cases. Anno. 58 ALR 2d 216, 220, Sec. 2.

3) It is also a well established and fundamental rule of law that a physician is under a duty to use reasonable care and skill by applying the standard diagnostic procedures in order to diagnose or identify the patient's problems. The failure of a physician to use X-rays in cases of doubt in order to diagnose the patient's condition is a breach of such duty

which will render the physician liable to the patient. It was held in the case of Kingston vs. McGrath 232 F.2d 495, (9th Cir. Idaho); 54 ALR 2d 267 where the attending physician failed to use all available diagnostic aids, including X-rays, to identify the patient's ailment.

In the instant case, the Defendant recognized the necessity of X-rays as a diagnostic aid in that he ordered additional films but instead of seeking the results of such X-rays, discharged the patient from the hospital without completing his diagnosis.

4) Another well recognized requirement of the law exacts of the general practitioner of medicine that if such a practitioner discovers, or should know or discover, that the patient's ailment is beyond his knowledge or technical skill or capacity to treat with reasonable success, he is under a duty to disclose the situation to the patient or to advise him of the necessity of seeking other treatment. See Section (1) above. This has been held to be particularly true in cases involving the treatment of cancer. Baldor vs. Rogers (Fla) 81 So. 2d 658 55 ALR 2d 453. See also 35 ALR 3d 349.

NEGLIGENCE

The testimony of Dr. Curtis Smith in answer to the hypothetical question hereinabove set out on Page 6 and 7 of this brief clearly establishes a breach of duty on the part of the Defendant, wherein Dr. Smith testified in substance that Defendant failed to comply with or conform to the standards governing the conduct of physicians and surgeons with the same general training and experience as the Defendant in failing to look at the X-rays or the radiology report of the X-rays taken on September 12, 1969.

WANTONNESS

In mal-practice cases the courts have followed the general definition of wanton conduct as opposed to willful acts stating that for an act to constitute wantonness, the party doing the act must be conscious of his conduct, and without having the intent to injure, must be conscious from his knowledge of existing circumstances and conditions that his conduct will naturally and probably result in injury. Eatley vs. Mayer 9 N.J. Misc. 918 158 Atl. 411. For example, the Alabama courts have defined wanton conduct as follows:

> (a) "Wantonness" is the conscious during of some act or omission of some duty under knowledge of existing conditions and conscious that from the doing of such act or the omission of such duty injury will likely and probably result. Lovell vs. Southern Railway Company 59 So. 2d 807 257 Al. 561.
>
> (b) To constitute "wantonness" it is not essential that the Defendant should be entertaining the specific design or intent to injure the Plaintiff or a willful or intentional act need not necessarily be involved. Mickle vs. Stripling 67 So. 2d 832 259 Al. 576.
>
> (c) "Wantonness" may consist of an inadvertent failure to act by a person with knowledge that someone will probably be imperiled. Mickle vs. Stripling, supra.

Some specific situations in mal-practice cases are as follows: In Gill v. Selling 125 Or. 587 267 P. 812, the court applying the standard of gross negligence said that this negligence is characterized by a person having a duty to perform to avoid inflicting an injury to another, evincing such utter disregard of consequences as to display reckless indifference to the consequences. In this case punitive damages were allowed where, through mistake of identity, a spine puncture test was administered to the wrong patient. Accordingly, in Pratt v. Davis 118 Ill. App. 161 79 NE 562, punitive damages were said to be proper in the case of an unauthorized removal of the patient's uterus.

In Los Alamos Medical Center v. Coe, 58 N.M. 686 275 P. 2d 175, the patient was assured by the doctor that she had no cause for alarm about becoming addicted to morphine but nevertheless became addicted. The court held that the patient's inquiry put the doctor on notice of the danger and the doctor's reassurance was sufficient evidence of reckless indifference to take the issue of punitive damages to the jury.

Likewise the failure to treat a patient for a known condition for which the patient was suffering justified submitting the issue of punitive damages to the jury, Rennewanz v. Dean 114 Or. 259 229 P. 372.

We respectfully submit to the court that Dr. Russell's conduct on September 12, 1969 falls within the accepted definition of wantonness and on the basis of his conduct then, the issue of wantonness ought to be submitted to the jury for its determination. For example, by the doctor's own testimony, he knew that the

patient had one of two conditions by virtue of the first X-ray report which he did read. He either had (1) an enlarged pulminary artery or (2) cancer of the lung. Knowing this, and recognizing the need for additional diagnostic tests to finalize the tentative diagnosis, he discharged the patient from the hospital without completing the diagnosis.

This action delayed further diagnosis and treatment at least three months until Dr. Russell, by his own testimony, first saw the second radiology report wherein the radiologist stated that the abnormality appearing in the patient's chest should be treated as cancer. Even then, in December of 1969 when he did see the second X-ray report, he took no action with respect to informing the patient or his wife of the contents of that report but instead, simply released his records to the patient's wife. As a consequence, further diagnosis and treatment was delayed an additional four or five months because the cancer was not discovered until the first part of May, 1970 when the patient was admitted to Thomas Hospital in Fairhope by Dr. Rockwell.

We submit that such conduct on the part of the Defendant was a clear omission of his duty under knowledge of existing conditions that such omission would likely and probably result in injury or damage to Mr. Wilson. Additionally, it clearly showed an utter disregard of the consequences and displayed a reckless indifference to the consequences.

PROXIMATE CAUSE

(A) Cancer treatment serves either of two functions. The physician first, of course, attempts to cure the patient. If

complete cure is impossible, however, he tries to prolong the patient's life and make it as comfortable and satisfying as possible. The latter procedure is termed palliative treatment. At the present time, there are basically only two ways of curing cancer. The most important is complete removal of the cancer by surgery. The other method is destruction of the malignancy with radiation from X-rays and the rays of radium and radioactive isotopes. Other forms of treatment, drugs primarily, are sometimes used in conjunction with surgery and/or radiation or for palliative treatment. Cameron, C.S.: The Truth About Cancer, Prentice-Hall, Englewood Cliffs, N.J., p. 102 (1956). Treatment by means of drugs, hormones, and most isotopes does not lead to cure, however. At present, these methods merely prolong life and make the advanced stages of cancer more bearable. Curative treatment is limited at the present time to surgical removal, radiotherapy, or a combination of these. Boyd, W.: An Introduction to the Study of Disease, 5th ed., Lea & Febiger, Philadelphia, p. 192 (1965).

(B) It would appear there would be no question that damages for physical pain and suffering by Mr. Wilson between September 12, 1969, the date of the alleged negligent act, up to the date the existence of the cancer was discovered on May 8, 1970, are recoverable. It is common knowledge there exists now and has existed for many years numerous medicines to lessen or eliminate physical pain caused by cancerous conditions.

(C) The same principal is true with respect to recovery for mental pain and anguish experienced by Mr. Wilson from

the time he learned of his cancer until the date of his death, being aware during said time that the Defendant had failed to disclose to him the contents of the radiology report dated September 12, 1969.

(D) The other damages claimed namely, damages for failure to receive prompt diagnosis and treatment of his ailment, for failure to promptly receive surgical treatment until eight months later, damages for allowing the cancer to increase in size 64 times greater than it was at the time of the negligent act, and damages for the loss of the opportunity to be cured, are likewise recoverable under the existing authorities.

(1) Whether the Plaintiff's injury is the proximate result of the Defendant's negligence is ordinarily a question for the jury and one guilty of negligence is held responsible for all consequences which a prudent and experienced man fully acquainted with all circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would at the time of the negligent act have thought reasonably possible to follow, if they had occurred to his mind. Alabama Power Co. vs. Irwin, 260 Ala. 673, 72 So. 2d. 300.

(2) As regards proximate cause, the courts look more for the possibility of a hazard of some form to some person than for the expectation of the particular chance that happened. Accordingly, it is not necessary to a Defendant's liability after his negligence has been established to show, in addition thereto, that the particular consequences of his negligence could have been foreseen by him; it is sufficient that the injuries are the natural, although not the necessary and inevitable, result

of the negligent fault - such injuries as are likely, in ordinary circumstances to ensue from the act or omission in question. 38 Am. Jur., Sec. 62, p. 714. Sullivan v. Alabama Power Co., 246 Ala. 262, 20 So. 2d. 224.

(3) Unless the evidence bearing upon the question of proximate cause is entirely free from doubt, that question must be submitted to the jury. Briggs v. Birmingham Light & Power, 188 Ala. 262, 66 So. 95.

(4) In Fortner vs. Koch 272 Mich. 273, 261 N.W. 762, the defendant improperly diagnosed a sore as cancer and treated it as such. The proper course would have been to take X-rays, blood tests and a biopsy. The case was properly submitted to the jury on negligence and proximate cause.

(5) In Bender vs. Dingwerth 425 Fed. 2d. 378 (5th Cir. 1970) the plaintiff alleged the defendant failed to properly diagnose a heart condition, failed to treat her as a heart patient, failed to consult a specialist about her condition and the court held that the district court erred in instructing that the plaintiff must establish that the defendant's act must be the sole proximate cause of the damages excluding other efficient causes. In its opinion the 5th Circuit stated:

> "In a mal-practice case, as in other negligence cases, the plaintiff need prove only that the negligent act of the defendant was a proximate cause of the injury sustained...
>
> We have not been cited to nor have we found a single case in which the Texas courts have held that the plaintiff has the negative burden of disproving every other possible contributing cause of the injury. In approaching this very question the Texas Court of Civil Appeals recently remarked in Rose v. Friddell, Tex. Civ. App. 1967, 423 S.W.2d 658, 664, writ ref'd n.r.e.

> "We recognize the rule which states that where there are two or more causes which might have produced the injury, for only one of which the defendant is responsible, and there is no evidence to show (sic) which cause the injury is actually attributable, a verdict should be directed for the defendant. Bowles v. Bourdon, supra. However, we do not believe the rule goes so far as to require the plaintiff to prove causation by direct and positive evidence which excludes every other reasonable hypothesis. It is generally held that evidence which shows reasonable probability that defendant's negligence or want of skill was the proximate cause is sufficient to raise an issue for the jury. 13 A.L.R.2d 28."

In Crowe vs. Provost 374 S.W. 2d 645, the defendant was alleged to have failed to properly treat the plaintiff's child by failing to make a proper diagnosis of a condition from which the child died from aspiration of his own vomitus. There was an absence of medical testimony against the doctor and the doctor, as well as other physicians testifying for the defendant, testified there was nothing that could have been done to have saved the life of the child had the defendant been in attendance. The experts testifying for the defendant likewise testified he used the standard professional skill used by doctors in that locality in his treatment and examination of the child. In affirming a judgment for the plaintiff the court stated as follows with respect to the issue of "proximate cause":

> "The rule that a verdict in a mal-practice action cannot be based on speculation or conjecture as to cause does not necessarily require that the plaintiff prove causation by direct and positive evidence, which excludes every other possible hypothesis as to the cause of the injuries, it generally being held that if a fair preponderance of the evidence discloses facts and circumstances proving a reasonable probability that the defendant's negligence or want of skill was the proximate cause of the injury, the plaintiff has

supported his burden of proof sufficiently to justify a verdict in his behalf." 13 A.L.R.2d Annotation, Proximate Cause, Malpractice Actions, Section 4, page 28; Johnson v. Ely, 30 Tenn. App. 294, 205 S.W.2d 759.

In the same annotation, 13 A.L.R. 2d, Section 5, at page 34, it is said: "Although recognizing the rule that expert testimony is ordinarily necessary to establish causation in malpractice cases, several cases have held that under some circumstances where the negligence and harmful results are sufficiently obvious as to lie within common knowledge, a verdict may be supported without expert testimony."

"It is not necessary to prove beyond a shadow of a doubt that an injury was caused by negligence preceding it, but a showing of strong probability of the causal relation is sufficient. . . . Where negligence and injury are proved, a causal connection between them may be established by circumstantial evidence, by inferences from physical facts." Medical Jurisprudence by Dr. Herzog, Section 186, pages 161, 162.

"Questions capable of exact demonstration are rarely the subject of litigation. No such burden rested on the plaintiff. He was not bound to exclude all possible causes of death. He was required only to make it more probable than otherwise that the fact was as he claimed it." Boucher v. Larochelle, 74 N.H. 433, 68 A. 870, 15 L.R.A., N.S., 416.

"Any fact may be proved by direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. In civil cases facts are proved by a preponderance of the evidence. If unequal conflicting probabilities, or unequal inconsistent theories are shown by the evidence; or if the minds of reasonable men might differ from the proved facts as to whether the conflicting probabilities, or inconsistent theories, are equally supported by the evidence, the case must go to the jury." Phillips, et al v. Newport, et ux., 28 Tenn. App. 187, 187 S.W. 2d 965.

CONCLUSION

In accordance with the foregoing authorities, we submit under the evidence in this case the issues of negligence, wantonness and proximate cause are for the jury and that both compensatory and punitive damages are allowable.

CUNNINGHAM, BOUNDS & BYRD

By _____

JAMES R. OWEN

_____

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, Deceased,	)	
Plaintiff,	)	CIVIL ACTION NO. 9401
vs.	)	
ROBERT BURKE RUSSELL,	)	
Defendant.	)	

THE STATEMENT OF THE CASE:

The Statement of the Case in Plaintiff's brief is substantially correct, except the following matters are either not stated or erroneously stated:

(1) Howard J. Wilson was accepted by Dr. Russell as a patient for treatment of stomach pains involving either the gall bladder or kidney and had been free of pain for more than two days prior to his discharge from South Baldwin Hospital, Foley, Alabama.

(2) Defendant discharged Plaintiff's intestate at the insistence of Plaintiff's intestate, who found it inconvenient to be hospitalized in Foley, when his home was in Spanish Fort.

(3) Defendant called the attention of Plaintiff's intestate to the fact that he should re-x-ray his chest in three months and not six months.

(4) That the personal medical records of Plaintiff's intestate were delivered to Mrs. Wilson by the Defendant on May 6, 1970, and have never been seen again by Defendant to refresh his memory and that the personal records of the Defendant indicate that Defendant entered the following notation concerning Plaintiff's intestate: "Will see Dr. Rockwell for further medical care".

(5) That no demand for any information was made upon the Defendant until May 6, 1970, for any personal records or chest x-rays of Plaintiff's intestate.

(6) That the only x-rays requested in December, 1969, were x-rays of the kidneys which were procured directly from the South Baldwin Hospital by Dr. L. C. Hamilton, radiologist of Thomas Hospital, Fairhope, Alabama.

(7) That at the time of the discharge of Plaintiff's intestate from South Baldwin Hospital, the Defendant had not received the x-ray report of the x-ray dated September 12, 1969, because of the fact that the x-ray was sent to Pensacola, to be read by the radiologist.

(8) That Plaintiff's intestate suffered from the so-called "oat cell carcinoma" type of cancer, which is described by Dr. Curtis Smith in his deposition on page 44, as follows:

> "An oat cell carcinoma is a -- there are a number of different cancers that occur in the lung. The commonest one is the one that we call Schwann's cell or epidermoid, and it comprises probably about eighty-five percent of these tumors, and that is a tumor of a cell that is like the cells on the surface of your skin. The next most common type is a tumor that we call adenoid carcinoma; and, it comprises about ten percent of these tumors. And, it is a tumor of cells that look like the normal lining cells of the lung. The other tumors are much less common, and the oat cell is one of these. And, under the microscope, it looks like a small, uniform cell, it looks very much like an oat. And, it represents a tumor of an earlier phase in the development of the lung cell, or a more dedifferentiated -- I don't know exactly the term to use, but it is a cell that is going more nearly back towards earlier life than these other cells which are mature type cells normally present. There is no oat cell normally present in the lung, this is a type of tumor that arises that is a malignant cell that it just begins growing".

(9) That oat cell cancer is one of the deadliest types of cancer, according to Dr. Curtis Smith, who stated in his deposition on page 47 as follows:

> "Q. Now, is it your testimony that it is a medical certainty that if Mr. Wilson had received operative treatment in September of 1969, that he would have lived longer?
>
> A. No.
>
> Q. Would Dr. Rockwell's statement -- assuming that he made such a statement -- that the odds were great that Mr. Wilson was dead as soon as the oat cell carcinoma was discovered essentially correct?
>
> A. I think that is correct."

And, according to Dr. L. E. Rockwell, who stated in his deposition, on page 15 as follows:

> "No, I think any Doctor can look at somebody cancer sick and say he is going down hill - his weight loss - to a young man who apparently has been previously healthy - there are other things that cause it too, but carcinoma of the lung is a bad disease - and my fatality rate is 100% - from the time you find it, if it is big enough to see, the jig is up, my friend - that is it --I told his wife this: I told his wife this: I think he was dead from the word go - I don't know what you are going to try to prove--".

(10) That the outlook for a cancer patient is more directly related to type than size, according to Dr. Curtis Smith, who stated in his deposition as follows:

> "Q. Doctor, do you find that the prompt diagnosis and treatment of cancers of the lung give the patient a better future outlook and a longer life span?
>
> A. I wish I could answer that yes, but I really can't give you an unequivocal answer; it is much more related to the type of lung cancer, that is, than it is to the promptness of diagnosis and treatment. There is some lung cancers that are probably incurable from the first day they are ever seen and diagnosed; and, there is some that are more indolent in character and do not grow as progressively. The outlook for cancer of the lung is bleak at the very best, and I don't think that anybody could give you an unequivocal yes or no answer to that question -- at least I can't". (pages 11-12).
>
> "Q. What is the prognosis generally when an oat cell carcinoma is discovered?
>
> A. It is virtually a hundred percent bad -- this is a bad, bad tumor and I feel like probably few of any patients are going to be cured of this particular tumor by surgery". (page 15).
>
> "Q. In your experience as a chest surgeon and in operating on cancer, do you find that you have a better outlook, or does a patient have a better outlook for recover when the size of the cancer is one centimeter or when it is some sixty-four times as large when you start?
>
> A. Generally speaking, the outlook is better when it is smaller with a qualification I noted earlier, that the prognosis is more directly related to the cell type than it is to the size." (page 26).

(11) That insofar as pain and suffering are concerned, the Plaintiff's intestate was treated for kidney pains by Dr. Jerome in 1968, and 1969, and at the time of admission to Thomas Hospital

on May 3, 1970, his chief complaint was from a probable stomach ulcer causing stomach pains, none of the above having any connection with carcinoma, all shown by Hospital Medical Records and depositions; that the Medical Records dated May 12, 1970, of Doctors Hospital report as follows:

> "There has been no shortness of breath associated with present lesion, and no chest pain".

PLAINTIFF'S PROPOSITIONS OF LAW:

It would serve no useful purpose to review, item by item, the propositions of law set forth in Plaintiff's brief under Sections "B" and "C", involving the physician-patient relationship and standard of care. These consist primarily of annotations in A.L.R., and deal with cases and circumstances dissimilar to the facts in the instant case.

24 A.L.R. (2d) 841, deals generally with the exclusions from hospitals; 57 A.L.R. (2d) 432, deals generally with the question of abandonment by doctor of the patient; 35 A.L.R. (3d) 349, deals generally with those cases where physicians make improper diagnosis and follow with improper treatment; 58 A.L.R. (2d) 216, deals with the same type of case.

DEFENDANT'S PROPOSITIONS OF LAW:

Duty Owed by Defendant in Alabama:

(1) The duty owed by a physician to his patient is to exercise reasonable and ordinary care, skill and diligence such as those in the same general neighborhood, in the same general line of practice, ordinarily exercised in a like case.

> Shelton vs. Hacelip, 51 So. 937; 167 Ala. 217;
> Carraway vs. Graham, 118 So. 807; 218 Ala. 453;
> Ingram vs. Harris, 13 So. (2d) 48; 244 Ala. 246;
> Watterson vs. Conwell, 61 So. (2d) 690; 258 Ala. 180;
> Parrish vs. Spink, 224 So. (2d) 821; 284 Ala. 263;

(2) A Plaintiff, in a suit against a physician for malpractice, has the burden to prove that the physician was negligent in failing to use the degree of care and skill imposed upon him as a physician in the community and that the negligence proximately caused the plaintiff's injury for which recovery is sought.

McKinnon vs. Polk, 121 So. 539; 219 Ala. 167;
Torrance vs. Wells, 122 So. 322; 219 Ala. 384;

(3) Plaintiff suing a physician for malpractice has the burden of showing negligence in diagnosis or treatment and such burden does not shift on a showing that unfortunate results has followed from diagnosis or treatment.

Carraway vs. Graham, supra;

(4) The making of a diagnosis by a physician is a lawful act, and it is only when a lawful act is done negligently or improperly and thereby causes injury, that there arises a cause of action.

Sims vs. Callahan, 112 So. (2d) 776; 788; 269 Ala. 216;

(5) There is no requirement of law that a physician should have been infallible in a diagnosis or treatment of the plaintiff's trouble. A physician or surgeon undertakes to exercise at least ordinary diligence and skill in the treatment of his patient - such care and skill as physicians and surgeons in the same general neighborhood, pursuing the same general line of practice, ordinarily exercise in like cases. The physician cannot be held, in the absence of an express agreement, to have warranted a cure, and, if he exercises reasonable care and skill, he is not liable for an error of judgment in diagnosis or treatment, whether proper course is subject to reasonable doubt. A showing that an unfortunate result has followed does not shift the burden of proof. The complaining patient must still show negligence in diagnosis or treatment.

Carraway vs. Graham, supra;
Parrish vs. Spink, supra;

CONTINUATION AND TERMINATION OF RELATIONSHIP:

(1) It is the settled rule that one who engages a physician to treat his case impliedly engages him to attend throughout that illness, or until his services are dispensed with. In other words, the relation of physician and patient, once initiated, continues until it is ended by the consent of the parties or revoked by the dismissal of the physician, or until his services are no longer needed. The treatment of the particular case and the relation of physician and surgeon may both be brought to an end by any of these methods, even before it is safe to discontinue medical treatment. As a part of the correct treatment of the patient, however, the physician must exercise reasonable and ordinary care and skill in determining when he may properly discontinue his treatment; as long as anything remains to be done to effect a cure, it cannot be said that the treatment has ceased.

61 Am. Jur. (2d) Physicians & Surgeons, Sec. 97;

(2) Question of whether or not the doctor-patient relationship is terminated is a mixed question of fact and law and if any facts are shown which indicate a termination, such is for the jury.

Podvin vs. Raymond S. Van Harn, et al., 128 N.W. (2d) 523.(1964).

PROXIMATE CAUSE:

(1) To constitute actionable negligence in a malpractice case, there must be not only a casual connection between the negligence complained of and the injury suffered, but the connection must be by a natural and unbroken sequence, without intervening, efficient causes, so that but for the negligence of the defendant the injury would not have occurred; it must not only be a cause, but it must be the proximate cause; that is, the direct and immediate efficient cause of the injury.

McKinnon vs. Polk, supra;
Pappa vs. Bonner, 105 So. (2d) 87; 268 Ala. 185;
Orange vs. Shannon, 224 So. (2d) 236; 284 Ala. 202;

(2) The scintilla rule is in effect in Alabama, in malpractice cases. However, in such case for the matter to go to the jury, there must be something more than a mere possibility or one possibility among others, that negligence complained of was the cause of injury; there must be some evidence that negligence probably caused the injury.

Orange vs. Shannon, supra;

WANTONESS:

(1) Wanton injury must be predicated on actual knowledge of another's peril and failure to take available preventive action, knowing that such failure will probably result in injury.

Copland vs. Central of Georgia Railroad Company, 105 So. 809; 213 Ala. 620;

(2) There can be no wanton injury without a knowledge of conditions making act causing it likely to result in injury, and a consciousness of danger, and wantoness does not result from mere negligence in the failure to have such knowledge and consciousness.

Buffalo Rock Company vs. Davis, 154 So. 556; 228 Ala. 603;

(3) Inherent in wanton negligence is the idea of moral fault arising from doing or failing to do an act with consciousness the act or omission would probably cause serious injury and with reckless indifference to the consequences.

Whittle vs. U. S., 328 Fed. Suppl. 1361;

(4) The general law of exemplary or punitive damages is discussed elsewhere, and the rules and principles there considered are applicable in malpractice actions against physicians and surgeons, as exemplified by the illustrative statements and authorities following. It is the general rule that one who has been injured by the negligence of a physician or surgeon in the

course of treatment or an operation is entitled to recover compensatory damages only. The law may, however, permit an award of punitive damages in such cases where the negligence is wanton or gross, as where the physician is shown to have been actuated by bad motives or intent to injure the patient, or where the treatment was given or the operation performed with utter indifference as to the effect upon the patient. The issue of punitive damages may be submitted to the jury in such a case if the court determines as a preliminary matter, that there is sufficient evidence to take that issue to the jury. The fact that a surgeon is merely negligent, in that through inadvertence and mistake he performs an unnecessary operation upon a patient, does not warrant assessment of punitive damages against him. And the partner of a physician who unnecessarily performs such operation cannot be held liable for punitive damages where the operation was performed without his knowledge or consent and he was not present or participating in any way in the operation. Exemplary damages cannot be recovered for the breach of a contract by a physician to attend a patient.

61 Am. Jur. (2d), Physicians & Surgeons, Sec. 218

DAMAGES:

(1) Nominal damages are proper for a breach of a legal duty without damages or where there is a failure of proof of damages.

Conner vs. Hamlin, 29 So. (2d) 570; 33 Ala. App. 54;

(2) Where proof offered by plaintiff where damages are concerned furnishes no data by which a jury can arrive at amount of plaintiff's damage, an inconsiderate or trifling sum may be awarded only.

Howard vs. Taylor, 13 So. 121; 99 Ala. 450;

(3) There must be evidence of existence and extent of damages and some data on which they can be computed and no substantial recovery may be based on mere guesswork or inference, and where there was evidence that damage was caused from various causes, as to a portion of which the defendant cannot be held responsible, and no evidence as to the portion of damages resulting from separate causes, the proof is too uncertain to permit a jury to arbitrarily apportion a part or all of the proved damages to the act for which defendant is responsible.

Kershaw Mining Co., vs. Lankford, 105 So. 896; 213 Ala. 650.

CONCLUSION:

Discarding sympathy, speculation and conjecture, the grim realities of the testimony concerning the facts in this case are, without contradiction, that even had Dr. Russell called Howard J. Wilson on September 14, 1969, and advised him of possible carcinoma of the lung, Wilson would have, nevertheless:

(1) Died with carcinoma of the lung;

(2) Incurred pain and suffering from September 1969, until his death, because of the removal of his left lung;

(3) Suffered mental anguish from the knowledge that he had carcinoma from September 1969, until his death, rather than from May 6, 1970, until his death;

(4) Would not, to medical certainty, lived a longer life.

It is respectfully submitted, that with reference to the law concerning proximate cause, the Defendant would be entitled to a directed verdict under the facts in this case, or at most, the Plaintiff could recover only nominal damages.

Respectfully submitted,

J. Connor Owens, Jr.

J. Connor Owens, Jr.,
Attorney for Defendant.

I, the undersigned, Attorney of Record for the Defendant in the foregoing cause, do hereby certify that I have caused a copy of the foregoing to be served on James R. Owen, one of the Attorneys of Record for the Plaintiff in said cause, by personal delivery this 22nd day of July, 1974.

James Owen, Jr.
Attorney for Defendant.

H. J. WILSON,	)	
Plaintiff,	)	IN THE CIRCUIT COURT OF
vs.	)	BALDWIN COUNTY, ALABAMA
ROBERT BURKE RUSSELL,	)	
Defendant.	)	AT LAW. NO. 9401

DEMURRER:

Comes now the Defendant, ROBERT BURKE RUSSELL, and demurs to the Plaintiff's Complaint herein, and to each count thereof, separately and severally, on the following separate and several grounds, to-wit:

1. Sufficient facts are not alleged therein to state a cause of action.

2. Sufficient facts are not alleged therein to state a claim upon which relief can be granted.

3. The allegations set forth therein are vague, uncertain and indefinite.

4. The allegations set forth therein are mere conclusions of the pleader unsupported by sufficient averments of fact.

5. For aught appearing therein, said Defendant owed no legal duty to the Plaintiff at the time and place complained of.

6. Sufficient facts are not alleged therein to show the existence of any legal duty owing from the Defendant to the Plaintiff at the time and place and with respect to the matters and things complained of therein.

7. For aught appearing therein, said Defendant did not breach any legal duty owed by said Defendant to the Plaintiff at the time and place complained of therein.

8. Sufficient facts are not alleged therein to show a sufficient causal connection between the Plaintiff's injuries and damages complained of therein and the breach of any legal duty owing by said Defendant to the Plaintiff at the time and place and with respect to the matters and things complained of therein.

9. Sufficient facts are not alleged therein to show as a matter of law that said Defendant breached a legal duty owing by said Defendant to the Plaintiff at the time and place complained of therein, in that the allegation that the Defendant negligently failed to diagnose Plaintiff's condition by failing to follow the proper method of diagnosis, is a conclusion of the pleader.

10. The allegations set forth therein charge said Defendant with a higher degree of care to the Plaintiff at the time and place and with respect to the matters and things complained of therein than is imposed upon said Defendant by law.

11. The quo modo of the alleged negligence on the part of the said Defendant charged therein is not sufficient to show as a matter of law that said Defendant was guilty of actionable negligence at the time and place and with respect to the matters and things complained of therein.

12. The quo modo of the alleged breach of legal duty on the part of said Defendant charged therein is not sufficient to show as a matter of law that said Defendant was guilty of the breach of any legal duty owed by said Defendant to the Plaintiff at the time and place and with respect to the matters and things complained of therein.

13. It does not sufficiently appear from the allegations set forth therein how and in what respect said Defendant breached any legal duty owing by said Defendant to the Plaintiff at the time and place complained of therein.

14. For aught appearing therein Plaintiff's injuries and damages complained of therein were proximately caused by an act for which said Defendant was in no way legally responsible or liable to the Plaintiff at the time and place complained of therein.

15. Sufficient facts are not alleged therein to show as a matter of law that the Plaintiff's injuries and damages complained of were proximately caused by an act for which said Defendant was legally responsible or liable to the Plaintiff at the time and place complained of therein.

16. For that wantonness therein alleged is a mere conclusion of the pleader.

17. For that said count does not affirmatively set forth a statement of fact showing wantonness; wantonness being alleged as a mere conclusion of the pleader.

18. For that it does not appear that said Defendant wantonly injured the Plaintiff.

19. For that no facts are set forth showing that said Defendant wantonly injured the Plaintiff.

20. For that it affirmatively appears that said Plaintiff was not wantonly injured or damaged.

21. The allegation that Defendant allowed the Plaintiff to go untreated for a malignancy, is a conclusion of the pleader.

22. The allegation that the Defendant had good cause to know the condition of the Plaintiff to be cancerous, is a conclusion of the pleader.

J. Connor Owens, Jr.

J. Connor Owens, Jr.,
Attorney for Defendant.

I, the undersigned, do hereby certify that I have caused a copy of the foregoing demurrer to be served on Wilson Hayes, the Attorney of Record for the Plaintiff in said cause, by placing the same in the United States Mail, properly addressed, with postage prepaid, this 21 day of August, 1970.

J. Connor Owens, Jr.

FILED

AUG 24 1970

ALICE J. DUCK CLERK REGISTER

VOL 72 PAGE 353

H. J. WILSON, Plaintiff,	)	IN THE CIRCUIT COURT OF
vs.	)	BALDWIN COUNTY, ALABAMA
ROBERT BURKE RUSSELL, Defendant.	)	AT LAW. NO. 9401.

NOTICE OF DEPOSITIONS:

TO MR. WILSON HAYES
ATTORNEY AT LAW
BAY MINETTE, ALABAMA 36507

You are hereby noticed that the Defendant, Robert Burke Russell, will take the deposition of Mrs. H. J. Wilson, at the Law Library, located in the Baldwin County Courthouse in Bay Minette, Alabama, on Wednesday May 5, 1971, at the hour of 1:00 o'clock P. M., and further, will take the deposition of Dr. L. E. Rockwell, located on Main Street in Daphne, Alabama, at the hour of 4:00 o'clock P. M. both said depositions to be taken before Mrs. Louise Dusenbury, or before some other officer authorized by law to take depositions. The depositions are to be taken in accordance with and pursuant to Act No. 375 of the Alabama Legislature of 1955, as amended, and will continue from day to day until the completion of the same, and you are invited to attend and examine the deponents.

DATED this 23rd day of April, 1971.

J. Connor Owens, Jr.
J. Connor Owens, Jr.,
Attorney for Defendant.

I, the undersigned, Attorney of Record for the Defendant in the foregoing cause, do hereby certify that I have caused a copy of the foregoing notice to be served on Wilson Hayes, the Attorney of Record for the Plaintiff in said cause, by depositing the same in the United States Mail, properly addressed, with postage prepaid this 23rd day of April, 1971.

J. Connor Owens, Jr.

FILED

APR 23 1971

EUNICE B. BLACKMON CIRCUIT CLERK

VOL 72 PAGE 354

JIMMIE WILSON AS EXECUTRIX OF THE ESTATE OF HOWARD J. WILSON, DECEASED,	X	IN THE CIRCUIT COURT OF
	X	BALDWIN COUNTY, ALABAMA
Plaintiff,	X	AT LAW
Vs.	X	
ROBERT BURKE RUSSELL,	X	NUMBER: 9401
Defendant.	X	

Comes now Plaintiff in the above styled cause and amends the Complaint heretofore filed in this cause to read as follows:

Plaintiff claims of Defendant the sum of Seven Hundred Fifty Thousand ($750,000.00) Dollars for that on to-wit the 11th day of September, 1969 while Defendant was acting as Plaintiff's physician as a medical doctor in Baldwin County, Alabama, Defendant so negligently failed to diagnose Plaintiff's condition by failing to follow the proper method of diagnosis as to allow Plaintiff to go untreated for a malignancy, to-wit, a cancer, of which Plaintiff was then suffering, and that as a proximate consequence of such negligence Plaintiff's condition was aggravated, his illness worsened, his life expectancy was shortened, his illness was spread to other organs of his body and he was caused to undergo excessive pain and suffering, hence this suit.

HAYES & BOGGS

Wilson Hayes

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 14 day of April, 1972, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States Mail, properly addressed, with first class postage prepaid.

FILED

APR 17 1972

EUNICE B. BLACKMON CIRCUIT CLERK

JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, Deceased,	)	IN THE CIRCUIT COURT OF
Plaintiff,	)	BALDWIN COUNTY, ALABAMA
vs.	)	AT LAW. NO. 9401.
ROBERT BURKE RUSSELL,	)	
Defendant.	)	

DEMURRER TO AMENDED COMPLAINT:

Now comes the Defendant, ROBERT BURKE RUSSELL, and files his demurrer to the Plaintiff's complaint as last amended, and to each count thereof, separately and severally, assigns the following separate and several grounds, to-wit:

1. Sufficient facts are not alleged therein to state a cause of action.

2. Sufficient facts are not alleged therein to state a claim upon which relief can be granted.

3. The allegations set forth therein are vague, uncertain and indefinite.

4. The allegations set forth therein are mere conclusions of the pleader, unsupported by sufficient averments of fact.

5. For aught appearing therein, said Defendant owed no legal duty to the Plaintiff's testator at the time and place complained of.

6. Sufficient facts are not alleged therein to show the existence of any legal duty owing from the Defendant to the Plaintiff's testator at the time and place and with respect to the matters and things complained of therein.

7. For aught appearing therein, said Defendant did not breach any legal duty owed by said Defendant to the Plaintiff's testator at the time and place complained of therein.

8. Sufficient facts are not alleged therein to show a sufficient casual connection between the injuries and damages complained of therein and the breach of any legal duty owing by said Defendant to the Plaintiff's testator at the time and place and with respect to the matters and things complained of therein.

9. Sufficient facts are not alleged therein to show as a matter of law that said Defendant breached a legal duty owing by said Defendant to the Plaintiff's testator at the time and place complained of therein, in that the allegation that the Defendant negligently failed to diagnose the condition of Plaintiff's testator, by failing to follow the proper method of diagnosis, is a conclusion of the pleader.

10. The allegations set forth therein charge said Defendant with a higher degree of care to the Plaintiff's testator at the time and place and with respect to the matters and things complained of therein than is imposed upon said Defendant by law.

11. The quo modo of the alleged negligence on the part of said Defendant charged therein is not sufficient to show as a matter of law that said Defendant was guilty of actionable negligence at the time and place and with respect to the matters and things complained of therein.

12. The quo modo of the alleged breach of legal duty on the part of said Defendant charged therein is not sufficient to show as a matter of law that said Defendant was guilty of the breach of any legal duty owed by said Defendant to the Plaintiff's testator at the time and place and with respect to the matters and things complained of therein.

13. It does not sufficiently appear from the allegations set forth therein, how and in what respect said Defendant breached any legal duty owing by said Defendant to the Plaintiff's testator at the time and place complained of therein.

14. For aught appearing therein, the injuries and damages complained of were proximately caused by an act for which said Defendant was in no way legally responsible or liable to the Plaintiff's testator at the time and place complained of therein.

15. Sufficient facts are not alleged therein to show as a matter of law that the injuries and damages complained of were proximately caused by an act for which said Defendant was legally responsible or liable to the Plaintiff's testator at the time and place complained of therein.

16. The allegation that Defendant allowed the Plaintiff's testator to go untreated for a malignancy, is a conclusion of the pleader.

17. For aught appears, the relationship or doctor-patient was for a limited or special treatment involving illness other than cancer.

18. For that the count does not show on its face that the injuries complained of by the patient were those caused by cancer.

19. For that it does not appear that the undertaking of the Defendant was to treat the Plaintiff's testator for cancer.

20. For that it does not appear that any facts were alleged which would support an allegation that the Defendant permitted Plaintiff's testator to "allow him to go untreated".

21. The allegations that Defendant did not use proper method of diagnosis, are not sufficient to charge Defendant with negligence.

22. Said count does not allege that Defendant, in making said diagnosis, lacked the requisite care and skill.

23. Said count does not allege that the Defendant, in making said diagnosis, failed to exercise reasonable and ordinary care with respect to the duty so assumed, being such care and skill as physicians and surgeons in the same general neighborhood pursuing the same general practice would have ordinarily employed and exercised in a like case.

J. Connor Owens, Jr.

J. Connor Owens, Jr.,
Attorney for Defendant.

I, the undersigned Attorney of Record for the Defendant in the foregoing cause, do hereby certify that I have caused a copy of the foregoing demurrer to be served on Wilson Hayes, the Attorney of Record for Plaintiff, by placing the same in the United States Mail, properly addressed, with postage prepaid, this 18th day of April, 1972.

J. Connor Owens, Jr.

FILED

APR 19 1972

EUNICE B. BLACKMON CIRCUIT CLERK

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JIMMIE WILSON as Executrix of the Estate of Howard J. Wilson, Deceased,	)	IN THE CIRCUIT COURT OF
Plaintiff,	)	BALDWIN COUNTY, ALABAMA
vs.	)	AT LAW. NO. 9401.
ROBERT BURKE RUSSELL,	)	
Defendant.	)	

AMENDED DEMURRER:

Now comes the Defendant, ROBERT BURKE RUSSELL, and amends the demurrer heretofore filed and demurs to the Plaintiff's amended complaint herein and to each count thereof, separately and severally, on the following separate and several grounds, to-wit:

1. Sufficient facts are not alleged therein to state a cause of action.

2. Sufficient facts are not alleged therein to state a claim upon which relief can be granted.

3. The allegations set forth therein are vague, uncertain and indefinite.

4. The allegations set forth therein are mere conclusions of the pleader unsupported by sufficient averments of fact.

5. For aught appearing therein, said Defendant owed no legal duty to the Plaintiff at the time and place complained of.

6. Sufficient facts are not alleged therein to show the existence of any legal duty owing from the Defendant to the Plaintiff at the time and place and with respect to the matters and things complained of therein.

7. For aught appearing therein, said Defendant did not breach any legal duty owed by said Defendant to the Plaintiff at the time and place complained of therein.

8. Sufficient facts are not alleged therein to show a sufficient casual connection between the Plaintiff's injuries and damages complained of therein and the breach of any legal duty owing by said Defendant to the Plaintiff at the time and place and with respect to the matters and things complained of therein.

9. Sufficient facts are not alleged therein to show as a matter of law that said Defendant breached a legal duty owing by said Defendant to the Plaintiff at the time and place complained of therein, in that the allegation that the Defendant negligently failed to diagnose plaintiff's condition by failing to follow the proper method of diagnosis, is a conclusion of the pleader.

10. The allegations set forth therein charge said Defendant with a higher degree of care to the Plaintiff at the time and place and with respect to the matters and things complained of therein than is imposed upon said Defendant by law.

11. The quo modo of the alleged negligence on the part of the said Defendant charged therein is not sufficient to show as a matter of law that said Defendant was guilty of actionable negligence at the time and place and with respect to the matters and things complained of therein.

12. The quo modo of the alleged breach of legal duty on the part of said Defendant charged therein is not sufficient to show as a matter of law that said Defendant was guilty of the breach of any legal duty owed by said Defendant to the Plaintiff at the time and place and with respect to the matters and things complained of therein.

13. It does not sufficiently appear from the allegations set forth therein how and in what respect said Defendant breached any legal duty owing by said Defendant to the Plaintiff at the time and place complained of therein.

14. For aught appearing therein Plaintiff's injuries and damages complained of therein were proximately caused by an act for which said Defendant was in no way legally responsible or liable to the Plaintiff at the time and place complained of therein.

15. Sufficient facts are not alleged therein to show as a matter of law that the Plaintiff's injuries and damages complained of were proximately caused by an act for which said Defendant was legally responsible or liable to the Plaintiff at the time and place complained of therein.

16. For that wantonness therein alleged is a mere conclusion of the pleader.

17. For that said count does not affirmatively set forth a statement of fact showing wantonness; wantonness being alleged as a mere conclusion of the pleader.

18. For that it does not appear that said Defendant wantonly injured the Plaintiff.

19. For that no facts are set forth showing that said Defendant wantonly injured the Plaintiff.

20. For that it affirmatively appears that said Plaintiff was not wantonly injured or damaged.

21. The allegation that Defendant allowed the Plaintiff to go untreated for a malignancy, is a conclusion of the pleader.

22. The allegation that the Defendant had good cause to know the condition of the Plaintiff to be cancerous, is a conclusion of the pleader.

23. The allegation that a doctor-patient relationship existed is a conclusion of the pleader and is not supported by sufficient facts.

24. For aught appears, the relationship of doctor-patient was for a limited or special treatment involving illness other than cancer.

25. For that the count does not show on its face that the injuries complained of by the patient were those caused by cancer.

26. For that it does not appear that the undertaking of the Defendant was to treat the Plaintiff's intestate for cancer.

27. For that it does not appear that any facts are alleged which would support an allegation that the Defendant permitted Plaintiff's intestate to "allow him to go untreated".

28. Said count does not allege the duration of said doctor-patient relationship.

29. For it does not appear as a matter of law that there was a duty by the Defendant to inform Plaintiff's intestate in the absence of an allegation of treatment.

30. The allegations that Defendant did not use proper method of diagnosis are not sufficient to charge Defendant with negligence.

31. Said count does not allege that Defendant, in making said diagnosis, lacked the requisite care and skill.

32. Said count does not allege that the Defendant, in making said diagnosis, failed to exercise reasonable and ordinary care with respect to the duty so assumed, being such care and skill as physicians and surgeons in the same general neighborhood pursuing the same general practice would have ordinarily employed and exercised in a like case.

33. The allegation that the Defendant had good cause to know that the Plaintiff's intestate had cancer is insufficient to charge the Defendant with wantonness.

J. Connor Owens, Jr.,
Attorney for Defendant.

I, the undersigned, Attorney of Record for the Defendant in the foregoing cause, do hereby certify that I have caused a copy of the foregoing amended demurrer to be served on Wilson Hayes, the Attorney of Record for the Plaintiff in said cause, by placing the same in the United States Mail, properly addressed, with postage prepaid, this 2 day of June, 1971.

J. Connor Owens, Jr.

FILED

JUN 3 1971

EUNICE B. BLACKMON CIRCUIT CLERK

JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, Deceased,	)	IN THE CIRCUIT COURT OF
Plaintiff,	)	BALDWIN COUNTY, ALABAMA
vs.	)	AT LAW. NO. 9401
ROBERT BURKE RUSSELL,	)	
Defendant.	)	

MOTION:

Now comes the Defendant in the above styled cause, by and through his Attorney of Record, and shows unto this Court as follows:

1. That on May 5, 1971, the Defendant in this cause took the deposition of Jimmie Lou Wilson, pursuant to Act 375, in the Law Library of the Baldwin County Courthouse, Bay Minette, Alabama.

2. That Defendant caused a subpoena decus tecum to be issued to the Plaintiff in this cause, requiring the production of certain records and correspondence in connection with this cause.

3. That upon deposition, the following took place:

> "MR. HAYES: Witness has received a letter from Doctor Russell which apparently was dated October 14, 1970, which arose after the time of this action and counsel refuses to produce the document unless ordered by the Court".

WHEREFORE, Defendant moves that the Plaintiff in this cause be required to produce for the inspection of the Defendant, the letter referred to in said deposition.

J. Connor Owens, Jr.,
Attorney for Defendant.

I, the undersigned, Attorney of Record for the Defendant in the foregoing cause, do hereby certify that I have caused a copy of the foregoing motion to be served on the Attorney of Record for the Plaintiff, Wilson Hayes, by placing the same in the United States Mail, properly addressed, with postage prepaid, this 19th day of September, 1972.

J. Connor Owens, Jr.

FILED
SEP 19 1972
EUNICE B. BLACKMON CIRCUIT CLERK

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JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, Deceased, PLAINTIFF, -vs- ROBERT BURKE RUSSELL, DEFENDANT.	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA AT LAW NO. 9401

Comes now CUNNINGHAM, BOUNDS & BYRD and appears in association with JAMES R. OWEN as attorneys for the Plaintiff in the above cause.

CUNNINGHAM, BOUNDS & BYRD

BY: Richard Bounds
RICHARD BOUNDS

CERTIFICATE OF SERVICE

I do hereby certify that I on this 19 day of April, 19 73 served a copy of the foregoing pleading as counsel for all parties to this cause by mailing the same by United States mail, properly addressed, and first class postage prepaid.

Richard Bounds

FILED

APR 23 1973

EUNICE B. BLACKMON CIRCUIT CLERK

9401

JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, deceased, PLAINTIFF, -vs- ROBERT BURKE RUSSELL, DEFENDANT.	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA AT LAW NO. 9401

Comes now the Plaintiff in the above cause and pursuant to Rule 15D of the Alabama Rules of Civil Procedure, and moves the Court for an order allowing the Plaintiff to file an amended or supplemental complaint in said cause, a copy of which complaint is attached hereto marked Exhibit "A".

CUNNINGHAM, BOUNDS & BYRD
ATTORNEYS FOR PLAINTIFF

BY: Richard Bounds
RICHARD BOUNDS

James R. Owen
JAMES R. OWEN

I hereby certify that I have served a copy of the above motion and supplemental amended complaint on J. Connor Owens, Jr., attorney for the Defendant in this cause by mailing a copy of the same, postage prepaid, to his office on this the 12 day of July, 1973.

Richard Bounds

FILED

JUL 13 1973

EUNICE B. BLACKMON CIRCUIT CLERK

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EXHIBIT "A"

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, deceased,	)	
PLAINTIFF,	)	CIVIL ACTION
-vs-	)	NO. 9401
ROBERT BURKE RUSSELL,	)	
DEFENDANT.	)	

Comes the Plaintiff in the above cause and amends his complaint as heretofore filed to read as follows:

PLAINTIFF'S FIRST CAUSE OF ACTION

1. On or about to-wit, September 10, 1969, the Defendant, a practicing physician in Baldwin County, Alabama, undertook for a reward to diagnose and treat the Plaintiff's intestate for a possible kidney stone or other abnormal medical condition from which he was then suffering and it was the Defendant's duty to exercise reasonable care, skill and diligence in and about the said diagnosis and treatment of the Plaintiff's intestate.

2. Plaintiff alleges that the Defendant negligently failed to use in and about the said diagnosis and treatment of Plaintiff's intestate, reasonable care, skill and diligence and as a direct and proximate result thereof, on August 1, 1970, the Plaintiff's intestate died.

WHEREFORE, the Plaintiff claims of the Defendant the sum of THREE HUNDRED THOUSAND ($300,000.00) DOLLARS, damages.

PLAINTIFF'S SECOND CAUSE OF ACTION

1. Plaintiff adopts and incorporates herein all of the allegations contained in paragraph one of Plaintiff's first cause of action.

2. Plaintiff alleges that the Defendant negligently failed to use in and about the said diagnosis and treatment of Plaintiff's intestate, reasonable care, skill and diligence and as a direct and proximate result thereof, a pre-existing condition from which the Plaintiff's intestate was suffering was greatly aggravated or activated; he was caused to suffer severe mental and physical pain and anguish; he was prevented from receiving medical care and attention which was then reasonably necessary to treat a condition from which he was suffering; he was prevented from receiving further diagnostic care to diagnose the existence and extent of a probable cancerous condition; and he was caused to be disabled, permanently injured or damaged.

WHEREFORE, Plaintiff claims of the Defendant the sum of THREE HUNDRED THOUSAND ($300,000.00) DOLLARS.

CUNNINGHAM, BOUNDS & BYRD
ATTORNEYS FOR PLAINTIFF

BY: Richard Bounds
RICHARD BOUNDS

James R. Owen
JAMES R. OWEN

FILED
JUL 13 1973
EUNICE B. BLACKMON CIRCUIT CLERK

VOL 72 PAGE 367

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, Deceased,	)	
Plaintiff,	)	CIVIL ACTION NO. 9401.
vs.	)	
ROBERT BURKE RUSSELL,	)	
Defendant.	)	

ORDER:

This action came on motion of the Plaintiff in this cause, pursuant to Rule 15D of Alabama Rules of Civil Procedure, which motion filed by the Plaintiff moved that this Court issue an order allowing the Plaintiff to file an amended or supplemental complaint in said cause, a copy of which complaint was attached to the motion and marked Exhibit "A"; and further came Plaintiff in this cause and submitted a brief to this Court in support of such a motion and the Defendant, who also submitted a written brief in connection with said motion; and the Court having considered the said motion, written briefs submitted by both parties, it is, therefore,

ORDERED AND ADJUDGED by the Court that the Plaintiff be, and is hereby permitted to amend the complaint filed in this cause as set forth in the PLAINTIFF'S SECOND CAUSE OF ACTION, as set forth in Exhibit "A";

It is further ORDERED AND ADJUDGED by the Court that the Plaintiff's motion to amend, as set forth in the PLAINTIFF'S FIRST CAUSE OF ACTION, be, and is hereby denied.

DONE this 2nd day of January, 1974, at Bay Minette, Baldwin County, Alabama.

D. Hoyt A. Maddox
Circuit Judge.

FILED

JAN 2 1974

EUNICE B. BLACKMON CIRCUIT CLERK

BY VOL 72 PAGE 368

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, Deceased,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 9401
ROBERT BURKE RUSSELL,	)	
Defendant.	)	

NOTICE OF TAKING OF ORAL DEPOSITION

Please take notice that on Thursday, February 14, 1974, in the office of DR. CURTIS SMITH, 1729 Springhill Avenue, Mobile, Alabama, the Plaintiff in the above cause will take the deposition of DR. CURTIS SMITH at 1:00 p.m., upon oral examination, before a Notary Public or some other officer authorized by law to administer oaths, at such time and place and thereafter from day to day as the taking of the deposition may be adjourned. You are notified to appear and take such part in the examination as you may deem advisable and as shall be fit and proper.

Dated this the 6th day of February, 1974.

CUNNINGHAM, BOUNDS & BYRD
ATTORNEYS FOR PLAINTIFF

BY Richard Bounds
RICHARD BOUNDS

FILED

FEB 7 1974

EUNICE B. BLACKMON CIRCUIT CLERK

CERTIFICATE OF SERVICE

I do hereby certify that I on this 6 day of Feb, 1974 served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

Richard Bounds

VOL 72 PAGE 359

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, deceased,)

Plaintiff,)

vs.) CIVIL ACTION NO. 9401

ROBERT BURKE RUSSELL,)

Defendant.)

Notice of Deposition

TO: Mr. J. Conner Owens, Jr.
Attorney at Law
P.O. Box 729
Bay Minette, Alabama

Please take notice that on the 27th day of June, 1974, in the office of Dr. Curtis Smith, 1729 Springhill Avenue, Mobile, Alabama, the Plaintiff in the above cause will take the deposition of DR. CURTIS SMITH, at 2:00 p.m., upon oral examination, before a Notary Public or some other officer authorized by law to administer oaths, at such time and place and thereafter from day to day as the taking of the deposition may be adjourned. You are notified to appear and take such part in the examination as you may deem advisable and as shall be fit and proper.

Dated this the 11th day of June, 1974.

CUNNINGHAM, BOUNDS & BYRD
ATTORNEYS FOR PLAINTIFF

BY Richard Bounds
RICHARD BOUNDS

FILED
JUN 12 1974
EUNICE B. BLACKMON CIRCUIT CLERK

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 10 day of June, 1974 served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

Richard Bounds

VOL 72 PAGE 370

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

JIMMIE WILSON, as Executrix, of the Estate of Howard J. Wilson, deceased,)

Plaintiff,) CIVIL ACTION NO. 9401

vs.)

ROBERT BURKE RUSSELL,)

Defendant,)

MOTION FOR LEAVE TO AMEND

Comes the Plaintiff, JIMMIE WILSON, in the above styled cause and moves the Court to grant leave to amend her complaint heretofore filed in this cause, said amended complaint attached as Exhibit "A".

CUNNINGHAM, BOUNDS & BYRD
ATTORNEYS FOR PLAINTIFF

BY Richard Bounds
RICHARD BOUNDS

CERTIFICATE OF SERVICE

I do hereby certify that I on this 28 day of June 1974 served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail properly addressed, and first class postage prepaid.

Richard Bounds

FILED

JUL 2 1974

EUNICE B. BLACKMON CIRCUIT CLERK

VOL 72 PAGE 371

Exhibit "A"

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, deceased,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION 9401
ROBERT BURKE RUSSELL,	)	
Defendant.	)	

AMENDED COMPLAINT

Comes the Plaintiff in the above cause and amends her complaint by adding thereto the following cause of action:

PLAINTIFF'S THIRD CAUSE OF ACTION

1) Plaintiff adopts and incorporates herein all of the allegations of Paragraph 1 of Plaintiff's first cause of action.

2) Plaintiff alleges that the Defendant wantonly failed to use in and about the care, diagnosis and treatment of Plaintiff's intestate reasonable care, skill and diligence, and as a proximate result of said wanton conduct, a pre-existing condition from which the Plaintiff's intestate was suffering was greatly aggravated or activated; he was caused to suffer severe mental and physical pain and anguish; he was prevented from receiving medical care and attention which was then reasonably necessary to treat a condition from which he was suffering; he was prevented from receiving further diagnostic care to diagnose the existence and extent of a probable cancerous condition; and he was caused to be disabled, permanently injured or damaged.

WHEREFORE, Plaintiff claims of the Defendant the sum of THREE HUNDRED THOUSAND ($300,000.00) DOLLARS.

CUNNINGHAM, BOUNDS & BYRD
ATTORNEYS FOR PLAINTIFF

RICHARD BOUNDS

JAMES R. OWEN

CERTIFICATE OF SERVICE

I do hereby certify that I on this 28 day of June, 1974, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

FILED

JUL 2 1974

EUNICE B. BLACKMON CIRCUIT CLERK

STATE OF ALABAMA

BALDWIN COUNTY

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You are hereby commanded to summon Robert Burke Russell to appear and plead, answer or demur, within thirty days from the service hereof, to the complaint of H. J. Wilson.

Witness my hand this 28 day of July, 1970.

Alice Dilweck

Clerk

H. J. WILSON	X	IN THE CIRCUIT COURT
PLAINTIFF	X	BALDWIN COUNTY, ALABAMA
VS	X	AT LAW
ROBERT BURKE RUSSELL	X	NUMBER: 9401
DEFENDANT	X	

I

Plaintiff claims of Defendant the sum of Seven Hundred Fifty Thousand ($750,000.00) Dollars for that on to-wit the 11th day of September, 1969 while Defendant was acting as Plaintiff's physician as a medical doctor in Baldwin County, Alabama, Defendant so negligently failed to diagnose Plaintiff's condition by failing to follow the proper method of diagnosis as to allow Plaintiff to go untreated for a malignancy, to-wit, a cancer, of which Plaintiff was then suffering, and that as a proximate consequence of such negligence Plaintiff's condition was aggravated, his illness worsened, his life expectancy was shortened, his illness was spread to other organs of his body and he was caused to undergo excessive pain and suffering, hence this suit.

II

Plaintiff claims of Defendant the sum of Seven Hundred Fifty Thousand ($750,000.00) Dollars for that on to-wit the 11th day of September, 1969 while Defendant was acting as Plaintiff's physician as a medical doctor in Baldwin County, Alabama, Defendant so negligently failed to inform Plaintiff of his condition, which condition Defendant then knew or had good cause to know to be cancerous, as to cause or allow Plaintiff to go for a long period without treatment or other diagnosis of his illness and that as a proximate result of such negligence Plaintiff's condition was aggravated, his illness worsened, his life expectancy was shortened, his illness was spread to other organs of his body and was caused to undergo excessive pain and suffering, hence this suit.

III

Plaintiff claims of Defendant the sum of Seven Hundred Fifty Thousand ($750,000.00) Dollars for that on to-wit the 11th day of September, 1969 while Defendant was acting as Plaintiff's physician as a medical doctor in Baldwin County, Alabama, Defendant so wantonly failed to diagnose Plaintiff's condition by failing to follow the proper method of diagnosis as to allow Plaintiff to go untreated for a malignancy, to-wit, cancer, of which Plaintiff was then suffering, and that as a proximate consequence of such wanton misconduct Plaintiff's condition was aggravated, his illness worsened, his life expectancy was shortened, his illness was spread to other organs of his body and he was caused to undergo excessive pain and suffering, hence this suit.

IV

Plaintiff claims of Defendant the sum of Seven Hundred Fifty Thousand ($750,000.00) Dollars for tha on to-wit the 11th day of September, 1969 while Defendant was acting as Plaintiff's physician as a medical doctor in Baldwin County, Alabama, Defendant so wantonly failed to inform Plaintiff of his condition, which condition Defendant then knew or had good cause to know to be cancerous, as to cause or allow Plaintiff to go for a long period without treatment or other diagnosis of his illness and that as a proximate result of such wanton misconduct Plaintiff's condition was aggravated, his illness worsened, his life expectancy was shortened, his illness was spread to other organs of his body and he was caused to undergo excessive pain and suffering, hence this suit.

HAYES & BOGGS
Attorneys for Plaintiff

Wilson Hayes

Plaintiff demands trial by jury.

FILED

JUL 28 1970

ALICE J. BUCK CLERK REGISTER

VOL 72 PAGE 318

Ex 8-7-70

9401

H. J. Wilson
Pltf

vs.
Dr.
Robert Burke Russell
Deft.

FILED
JUL 28 1970
ALICE J. DUCK CLERK REGISTER

Foley.
W. Hayes- Attu

Received 28 day of July 1970
and on 1 day of Aug 1970
I served a copy of the within S & C
on Dr. Robt. Russell

By service on

TAYLOR WILKINS, Sheriff
By Carlisle [illegible] D. S.

Sheriff claims 12 miles at Ten Cents per mile $ 1.20
TAYLOR WILKINS, Sheriff
By C. Wilkins
DEPUTY SHERIFF

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, Deceased,	)	
Plaintiff,	)	CIVIL ACTION NO. 9401.
vs.	)	
ROBERT BURKE RUSSELL,	)	
Defendant.	)	

MOTION FOR VOIR DIRE EXAMINATION OF THE VENIRE:

Comes now the Defendant in the above styled cause, ROBERT BURKE RUSSELL, separately and severally, and moves the Court to qualify the jury venire by propounding to each of them the following questions, separately and severally, or in the alternative, and if the Court should itself decline to propound such questions to the venire, then said Defendant moves the Court to allow his attorney of record in this cause to propound each of the following questions, separately and severally, to said venire:

(1) Has any juror or any member of any juror's family been in the past, or is now, an officer, director, employee, stockholder or policy holder of ST. Paul Insurance Companies, or of any agent, or general agent of said company, or of any adjusting or investigating company?

(2) Is any juror or any member of his or her family living in the same household, or any parent, child, brother or sister of any juror at this time, a plaintiff claiming damages in a lawsuit, or is any juror or any such member of his or her household or family, now making a claim for damages against anyone, even though he or she has not yet filed suit?

(3) Has any juror or any member of his or her family living in the same household, or any parent, child, brother or sister of any juror, in the past been a plaintiff in a lawsuit claiming damages, or has he or she in the past made a claim for damages against anyone even though he or she did not actually file a lawsuit?

(4) Is any juror a friend, relative or acquaintance of Jimmie Lou Wilson?

(5) Is any juror a friend, relative or business associate of Howard J. Wilson, Deceased?

(6) Is any member of the jury a client at the present time, or has any member of the jury been a client at any time in the past, of James R. Owen, E. E. Ball, or the firm of Cunningham, Bounds & Byrd?

(7) Is any member of the jury now, or any member of their immediate family, or has any member of the jury or any member of their immediate family in the past, been patients of Dr. Curtis Smith of Mobile, Alabama?

(8) Ladies and Gentlemen of the jury, this case involves a suit for malpractice by Jimmie Lou Wilson, as Executrix of the Estate of Howard J. Wilson, Deceased, against Robert Burke Russell. It is unfortunate, but true, that many of our experiences with physicians involve pain, sickness, sadness and death, and it is completely understandable therefore, that these experiences could leave a person with such deep feelings, either for or against physicians, that it would not be fair to either side of this lawsuit or to the person who feels that way to be a juror in this case. Have any of you ladies and gentlemen had such an experience in this life which would make it difficult for you to sit as a completely impartial juror in this case? If so, would you please raise your hand?

J. Connor Owens, Jr.

J. Connor Owens, Jr.,
Attorney for Defendant.

I, the undersigned, Attorney of Record for the Defendant in the foregoing cause, do hereby certify that I have caused a copy of the foregoing motion to be served on Richard Bounds, one of the Attorneys of Record for the Plaintiff, by personal delivery on this the 24 day of July, 1974.

J. Connor Owens, Jr.

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, Deceased,

Plaintiff,

vs.

ROBERT BURKE RUSSELL,

Defendant.

CIVIL ACTION NO. 9401.

DEFENSE TO PLAINTIFF'S SECOND CAUSE OF ACTION AS AMENDED:

Defendant denies the allegations contained in paragraphs 1 and 2.

DEFENSE TO PLAINTIFF'S THIRD CAUSE OF ACTION AS AMENDED:

Defendant denies the allegations contained in paragraphs 1 and 2.

J. Connor Owens, Jr.
Attorney for Defendant.

I, the undersigned Attorney of Record for the Defendant in the foregoing cause do hereby certify that I have caused a copy of the foregoing to be served on the firm of Cunningham, Bounds & Byrd, the Attorneys of Record for the Plaintiff, by placing the same in the United States Mail, properly addressed with postage prepaid, this 22 day of July, 1974.

J. Connor Owens, Jr.

FILED

JUL 23 1974

EUNICE B. BLACKMON CIRCUIT CLERK

VOL 72 PAGE 357

H. J. WILSON,	)	IN THE CIRCUIT COURT OF
Plaintiff,	)	BALDWIN COUNTY, ALABAMA
Vs.	)	AT LAW
ROBERT BURKE RUSSELL,	)	
Defendant.	)	NUMBER: 9401

Comes now Jimmie Wilson, as Executrix of the Estate of Howard J. Wilson a/k/a H. J. Wilson, and amends the Complaint heretofore filed in this cause and moves the Court to revive the action in the name of her, as Executrix of the Estate of the Plaintiff and that the said cause shall read as follows:

JIMMIE WILSON AS EXECUTRIX OF THE ESTATE OF HOWARD J. WILSON, DECEASED,	)	IN THE CIRCUIT COURT OF
	)	BALDWIN COUNTY, ALABAMA
Plaintiff,	)	AT LAW
Vs.	)	
ROBERT BURKE RUSSELL,	)	
Defendant.	)	NUMBER: 9401

I

Plaintiff claims of Defendant the sum of Seven Hundred Fifty Thousand ($750,000.00) Dollars for that on to-wit the 11th day of September, 1969 while Defendant was acting as Plaintiff's physician as a medical doctor in Baldwin County, Alabama, Defendant so negligently failed to diagnose Plaintiff's condition by failing to follow the proper method of diagnosis as to allow Plaintiff to go untreated for a malignancy, to-wit, a cancer, of which Plaintiff was then suffering, and that as a proximate consequence of such negligence Plaintiff's condition was aggravated, his illness worsened, his life expectancy was shortened, his illness was spread to other organs of his body and he was caused to undergo excessive pain and suffering, hence this suit.

II

Plaintiff claims of Defendant the sum of Seven Hundred Fifty Thousand ($750,000.00) Dollars for that on to-wit the 11th

day of September, 1969 while Defendant was acting as Plaintiff's physician as a medical doctor in Baldwin County, Alabama, Defendant so negligently failed to inform Plaintiff of his condition, which condition Defendant then knew or had good cause to know to be cancerous, as to cause or allow Plaintiff to go for a long period without treatment or other diagnosis of his illness and that as a proximate result of such negligence Plaintiff's condition was aggravated, his illness worsened, his life expectancy was shortened, his illness was spread to other organs of his body and was caused to undergo excessive pain and suffering, hence this suit.

III

Plaintiff claims of Defendant the sum of Seven Hundred Fifty Thousand ($750,000.00) Dollars for that on to-wit the 11th day of September, 1969 while Defendant was acting as Plaintiff's physician as a medical doctor in Baldwin County, Alabama, Defendant so wantonly failed to diagnose Plaintiff's condition by failing to follow the proper method of diagnosis as to allow Plaintiff to go untreated for a malignancy, to-wit, cancer, of which Plaintiff was then suffering, and that as a proximate consequence of such wanton misconduct Plaintiff's condition was aggravated, his illness worsened, his life expectancy was shortened, his illness was spread to other organs of his body and he was caused to undergo excessive pain and suffering, hence this suit.

IV

Plaintiff claims of Defendant the sum of Seven Hundred Fifty Thousand ($750,000.00) Dollars for that on to-wit the 11th day of September, 1969 while Defendant was acting as Plaintiff's physician as a medical doctor in Baldwin County, Alabama, Defendant so wantonly failed to inform Plaintiff of his condition, which condition Defendant then knew or had good cause to know to be cancerous, as to cause or allow Plaintiff to go for a long period without treatment or other diagnosis of his illness and that as a proximate result of such wanton misconduct Plaintiff's condition was aggravated, his illness worsened, his life expectancy was

shortened, his illness was spread to other organs of his body and he was caused to undergo excessive pain and suffering, hence this suit.

HAYES & BOGGS

Wilson Hayes

Plaintiff demands trial by Jury.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 20th day of Nov, 1970, served a copy of the foregoing pleading on counsel for all Parties to this proceeding by mailing the same by United States Mail, properly addressed, with first class postage prepaid.

FILED

NOV 20 1970

ALICE J. BUCK CLERK REGISTER

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, deceased,)

Plaintiff,)

vs.)

ROBERT BURKE RUSSELL,)

Defendant.)

CIVIL ACTION NO. 9401

COMES the Plaintiff in the above cause and moves the Court for a directed verdict to Plaintiff's second cause of action and as grounds therefore states as follows:

1. There is no evidence in the case upon which the jury could find for the Defendant under Plaintiff's second cause of action of simple negligence.

OWEN AND BALL

By: _____
JAMES R. OWEN
Attorneys for Plaintiff
410 Courthouse Square
Bay Minette, Alabama 36507

7-25-74 motion Granted.
Jefair G. Madsburn
Judge

VOL 72 PAGE 380

H. J. WILSON,	)	IN THE CIRCUIT COURT OF
Plaintiff,	)	BALDWIN COUNTY, ALABAMA
Vs.	)	AT LAW
ROBERT BURKE RUSSELL,	)	
Defendant.	)	NUMBER: 9401

Comes now Plaintiff by his Counsel and suggests upon the record the death of Plaintiff on to-wit the 10th day of August, 1970.

Respectfully submitted.

Wilson Hayes
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 20th day of Nov, 1970, served a copy of the foregoing pleading on counsel for all Parties to this proceeding by mailing the same by United States Mail, properly addressed, with first class postage prepaid.

FILED
NOV 20 1970
ALICE J. BUCK CLERK REGISTER

WILSON HAYES
LAWYER
P. O. BOX 300
BAY MINETTE, ALABAMA
36507

TELEPHONE 937-5506

April 14, 1972

Mrs. Eunice B. Blackmon, Clerk
Circuit Court, Baldwin County
BAy Minette, Alabama 36507

Re: Wilson v Russell
Case #9401

Dear Mrs. Blackmon:

Please file the enclosed amendment to the complaint in the above noted case.

With kind regards, I am

Yours very truly,

Wilson Hayes

mm
Enc.

WILSON HAYES
LAWYER
P. O. BOX 300
BAY MINETTE, ALABAMA
36507

TELEPHONE 937-5506

November 20, 1970

Clerk, Circuit Court
Baldwin County
Bay Minette, Alabama 36507

Re: H. J. Wilson Vs. Robert Burke
Russell, Case #9401

Dear Mrs. Duck:

Please file the enclosed information and amended complaint.

With kind regards, I am

Yours very truly,

Wilson Hayes

WH/ms
Encs.

J. CONNOR OWENS, JR.
ATTORNEY AT LAW
DAHLBERG BUILDING
P. O. BOX 729
BAY MINETTE, ALABAMA 36507

December 11, 1973

TELEPHONE 937-9473

Mrs. Eunice B. Blackmon, Clerk
Circuit Court of Baldwin County
Bay Minette, Alabama

Subject: Jimmie Wilson, as Executrix of the Estate of Howard J. Wilson, Deceased, vs. Robert Burke Russell, Civil Action No. 9401.

Dear Eunice:

I believe the next motion day will be Wednesday, December 19th and I would appreciate it very much if you would please place the motion to amend filed by the plaintiff in this cause on the motion docket for this date.

Thank you very much for your aid and consideration in this matter.

Sincerely yours,

J. Connor Owens, Jr.

JCO:am

GENERAL STENOGRAPIHC REPORTING
WALTER W. WISE & ASSOCIATES
P. O. BOX 1156
MOBILE, ALABAMA 36601
433-7474

February 28, 1974

TO: Robert L. Byrd, Jr., Esq.
Messrs. Cunningham, Bounds & Byrd
1601 Dauphin Street
Mobile, Alabama

RE: WILSON v RUSSELL

P-74-031		Deposition of DR. CURTIS A. SMITH		
		PER DIEM - Medical		$ 20.00
		TRANSCRIPT 49-pp ORIG. & 1 COPY		83.30
		EXHIBIT REPRODUCTION		4.20
				$107.50
		Original to be filed.		

Pd 3-18-74
Ck. # 1597

LAW OFFICES

Cunningham, Bounds and Byrd

1601 DAUPHIN STREET

P. O. BOX 4486

MOBILE, ALABAMA 36604

ROBERT T. CUNNINGHAM
RICHARD BOUNDS
ROBERT L. BYRD, JR.
JAMES A. YANCE

AREA CODE 205
TELEPHONE 471-6191

April 11, 1974

Clerk of Circuit Court
Baldwin County Courthouse
Bay Minette, Alabama

Re: Wilson v. Russell
Case No. 9401

Dear Sir:

Please file the enclosed invoice with the Court for the above case and have it included as part of the Court costs.

Very truly yours,

CUNNINGHAM, BOUNDS & BYRD

RICHARD BOUNDS

RB:pb

Enc.

Wilson vs Russell #7401

JURY LIST - JULY SESSION CIVIL TERM 1974 - JULY 22, 1974

1. ~~Gilheart, Russell; Carpenter, 451 Magnolia, Fairhope~~ P1
2. ~~Green, Harold Keo; Forester, 1200 Hand Ave., Bay Minette~~
3. Spears, Vernon M.; Mgr. Doxol Gas of FAirhope, 606 Johnson Ave., Fairhope
4. ~~Yarbrough, Jacqueline B.; Teller Bald. Co. Bk, 805 Moog Ave., Bay Minette~~ D1
5. ~~Griffin, W. Max; Self Emp. Union 76 Co., Drawer 428, Foley~~ P2
6. ~~Fairley, Sam; Bald Oil Mills, Oak St., Foley~~ P5
7. Moorer, Lee Ella; Housewife, 412 Old Hurricane Rd., Bay Minette
8. ~~Ellis, George E.; Mech Pensacola NAS, 512 Grand Av., Fairhope, Pensacola~~ D6
9. ~~Busch, Thomas N.; Forester Int. Paper Co., 1217 Lovett La., Daphne~~
10. Plovanich, George M.; Mach. Opr. Standard Furn., Perdido, Bay Minette
11. ~~Stanford, John N.; Insurance Salesman, 1001 Marks Ave., Bay Minette~~ D2
12. Allen, Leslie, Jr.; U. S. Post Office, 56 Daphmont Dr., Daphne
13. Bell, Nellie; Housewife, 619 Hilton Ave., Bay Minette
14. Lipscomb, Robert; Mgr. Table Division, Standard Furniture, Star Route Box 6A, Bay Minette
15. ~~Booth, James D.; Salesman, Fish River RFD, Fairhope, Mobile~~ D5
16. ~~Brewton, Andy Ray; Cutter--Scott Paper, Robertsdale, Mobile~~ P6
17. ~~Cooper, James; International Paper, Route 2 Box 269-A-a, Bay Minette~~
18. ~~Cooper, Sharon; Clerk TAx Assessor, Route 2 Box 269-A2, Bay Minette~~ D3
19. ~~Vines, June K.; Housewife, 1600 Mooge Ave., Bay Minette~~ D7
20. ~~Phelps, Rufus; Owner Phelps Supply, N. McKenzie, Foley~~
21. ~~Hunt, Sandra; Housewife, Forrest Park Ave., Bay Minette~~
22. ~~Owens, John; Clerk Ruffles Co., 208 Magnolia Ave., Fairhope~~
23. ~~Jeffery, Wm. A.; Asst Cashier Merch. Natl Bk, 607 Spanish Main St., Spanish Fort, Mobile~~
24. ~~Hall, David E.; Elect. Scott Paper Co., 12 Fels Ave., Fairhope, Mobile~~
25. Johnson, Doretha B.; South Bald. Mills, 407 White Ave., Fairhope, Robertsdale
26. ~~King, Eugene; Laborer, Kennedy's, Gen. Del., Summerdale~~
27. ~~Koehler, Evelyn Mrs.; Housewife, Box 218, Elberta~~
28. ~~Hall, Rita M.; Housewife, 12 Fels Av., Fairhope~~ P4
29. ~~Turner, Mrs. Juanita; Housewife, 107A E. 6th St., Bay Minette~~
30. ~~Horton, Lowell C.; Horton Concrete Pipe, 518 Genl Gibson Dr., Spanish Fort~~
31. Cummins, Charles B., Jr.; Gun Smith, 201 Young St., Fairhope
32. ~~Cassebaum, Otto C.; Mechanic Foley Imp., Elberta, Foley~~
33. ~~Stowe, Horace L.; Pres Stowe's Jwlrs, 408 Myrtle Av., Fairhope~~
34. Davis, Ella Mae; House Maid Beasley's Rest Home, 563 Middle St., Fairhope
35. Howard, Charles; Laborer, Star Route A., Stockton
36. ~~Richerson, La Welle J.; Controller Int. Paper Co., 125 Fairway Dr., Daphne, Mobile~~
37. ~~Roley, Sue; Housewife, 1711 Auburn Av., Bay Minette~~
38. ~~Schreck, Paul C.; Boat Works, Route, Lillian~~
39. ~~McKissick, James D.; Mut of Omaha Ins., 1201 McMillan, Bay Minette~~
40. Crosby, John D., Jr.; Sawmill, 602 E 6th St., Bay Minette
41. ~~Moore, Byrd L.; Design Eng. Ala Dry Dock, 15 Blue Island, Fairhope, Mobile~~ P3
42. ~~Childre, L. J., Jr.; Fishing Poles, P. O. Box 63, Foley, Ala.~~
43. Horn, Lois; Clerk, Rt., 1, Box 483- Bay Minette-
44. ~~Mathew, Charles H., Furniture, 207 N. White Ave., Bay Minette~~ P7
45. ~~Rabon, Robert M., Chief Clerk - Probate Off., Bay Minette~~ D4

45 − 19 = 26; 12; 3 / 14 (2) 7 — 45 − 18 = 27; 12; 3 / 15 (2) 8

– P XXXXX XX

D XXXXX XX

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

JIMMIE WILSON, as Executrix of the Estate of Howard J. Wilson, Deceased,	)	
Plaintiff,	)	CIVIL ACTION NO. 9401.
vs.	)	
ROBERT BURKE RUSSELL,	)	
Defendant.	)	

PRE-TRIAL ORDER:

This matter having come before the Court in pretrial conference held July 9, 1974, pursuant to Rule 16 of Alabama Rules of Civil Procedure, and Richard Bounds and James R. Owen, having appeared as counsel for the Plaintiff, and J. Connor Owens, Jr., having appeared as counsel for the Defendant, the following action was taken:

I.

General Nature of Claims of Parties:

1. Plaintiff claims that on or about September 10, 1969, the Defendant undertook to diagnose and treat Howard J. Wilson for a possible kidney stone or other abnormal condition from which he was then suffering and that it was Defendant's duty to exercise reasonable care, skill and diligence in and about the treatment of the said Howard J. Wilson;

Plaintiff further claims that Defendant both negligently and wantonly failed to use reasonable care, skill and diligence in and about the treatment of Howard J. Wilson, and as a proximate result thereof, the following damages were suffered by the said Joward J. Wilson:

(a) An existing condition was severely aggravated or activated;

(b) He was caused to suffer great mental and physical pain and anguish;

(c) He was prevented from receiving medical care and attention which was then reasonably necessary to treat a condition

from which he was suffering;

(d) He was prevented from receiving further diagnostic care to diagnose the existence and extent of a probable cancerous condition;

(e) He was caused to be disabled, permanently injured and damaged.

2. The Defendant denies all of the allegations of the foregoing.

II.

Exhibits:

It was agreed between the parties that the following items would be admissible in evidence, without objections:

(a) Those certain office medical records belonging to the Defendant, which are in the possession of the Plaintiff and which were agreed to be produced at trial by the Plaintiff;

(b) The medical records of the South Baldwin Hospital, Foley, Alabama, involving Howard J. Wilson, for the period beginning September 10, 1969, through September 12, 1969;

(c) The medical records of Thomas Hospital, Fairhope, Alabama, involving Howard J. Wilson for the period beginning May 3, 1970, through May 6, 1970;

(d) The medical records of Doctors Hospital of Mobile, Alabama, involving Howard J. Wilson, for the period beginning May 8, 1970, through May 28, 1970;

(e) The medical records of Doctors Hospital of Mobile, Alabama, involving Howard J. Wilson, for the period beginning July 16, 1970, through July 19, 1970.

III.

Uncontested Facts:

There are no uncontested facts with reference to negligence, wantoness, or proximate cause and damages.

IV.

Contested Issues of Law:

There are contested issues of law with reference to negligence, wantoness, proximate cause and damages.

Circuit Judge.

DATED:

July 22, 1974

Approved as to form and substance:

Attorney for Plaintiff.

Attorney for Defendant.

FILED

JUL 22 1974

EUNICE B. BLACKMON CIRCUIT CLERK

CASE NO. 9401

FILE NO.

MOBILE, ALABAMA June 11, 1974

RECEIVED OF:

CUNNINGHAM, BOUNDS & BYRD, ATTORNEYS

Wilson, etc.

-VS-

Russell

Notice of Deposition

(Dr. Curtis Smith)

CASE NO. 9401

FILE NO.

MOBILE, ALABAMA June 28, 1974

RECEIVED OF:

CUNNINGHAM, BOUNDS & BYRD, ATTORNEYS

FILED

JUL 2 1974

EUNICE B. BLACKMON CIRCUIT CLERK

Wilson, etc.

-VS-

Russell

Motion for Leave to Amend and Amended Complaint

1. We the jury find in favor of the Plaintiff Mrs. E. Wilson and against the Defendant Dr. R. B. Russell and assess the amount ~~of his~~ of her damages at $ 150.00.

Forman J. O. Crosby