

**ALABAMA MEDICAL MALPRACTICE REFORMULATED:
HOW *EX PARTE HEALTHSOUTH* AFFECTS OUR PRACTICE**

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I. INTRODUCTION

For the past few years I have been fortunate enough to focus my practice exclusively on the area of long-term care litigation. Having practiced in this area of medical liability throughout the southeast, I can safely say from experience that Alabama's law in the area of long-term care litigation, and in medical liability litigation in general, ranks among the most confusing and complex areas of law in the region. Indeed, Alabama's amalgam of both statutory and common law in the area of medical liability litigation create a quagmire in which an unsuspecting practitioner can easily become entrenched.¹

Part of the complexity of practicing long-term care litigation in Alabama arises out of the fact that, from a legal perspective, long-term care litigation cases are treated identically to cases involving traditional medical malpractice (e.g., negligence or wrongful death cases brought against doctors). Indeed, the progenitors of Alabama's most recent version of the Medical Liability Act have specifically extended the protections afforded medical providers under this act to include nursing homes. *Alabama Code* §§ 6-5-548 to 549.1 (1996). Section 6-5-481 (7) specifically provides that the Medical Liability Act is applicable to "hospitals." This section defines "hospital" as

¹ It should be noted that neither I nor any member of my firm actively participates in litigation involving doctors, hospitals or other health care providers. Our participation in the medical malpractice arena is strictly limited to long-

“[s]uch institutions as are defined under (sic) § 22-21-20 as hospitals.” *Alabama Code* § 6-5-481 (7) (1975).²

Section 22-21-20 goes on to define, in pertinent part, hospitals to include “long-term healthcare facilities such as, but not limited to, skilled nursing facilities, intermediate care facilities, homes for the aged, domiciliary care facilities and related healthcare institutions where such institution is primarily engaged in offering room, board, laundry and personal assistance with activities of daily living and incidental thereto.” *Alabama Code* § 22-21-20 (1) (1975).³

Based upon the language of § 6-5-481 (7) and § 22-21-20 (1), our Alabama Supreme Court has held that the Medical Liability Act covers and includes nursing homes. More specifically, *Ex parte Northport Health Services, Inc.*, 682 So. 2d 52, 55 (Ala. 1996), held that, “A nursing home, based upon § 6-5-481, is considered to be a ‘hospital’ and thus, also covered by the provisions of the Medical Liability Act.” The *Northport* case noted that if the injuries alleged by the plaintiff flowed from the treatment or mistreatment of a patient in the nursing home, this was to be considered a medical malpractice claim and the Medical Liability Act was to apply. *Id.* at 55.

The Medical Liability Act has also been held by our Supreme Court to govern actions against “healthcare providers” regardless of the form of the action. In *Ex parte Golden*, 628 So. 2d 496, 498 (Ala. 1993), our Court held that “[t]he substance of an

term care cases. Nevertheless, to broaden the scope of applicability for this paper, both long-term care and traditional medical malpractice litigation will be discussed and reviewed.

² Alabama Code § 6-5-481 (7) mistakenly refers the reader to § 22-21-21 of the Code for the definition of a hospital. In fact, the correct code section reference which contains the definition of hospital is Alabama Code § 22-21-20.

³ A 2001 amendment to this section, which became effective on March 1, 2002, substituted words “assisted living facilities, and specialty care assisted living facilities rising to the level of immediate care” for the verbiage “homes for the aged, domiciliary care facilities and related healthcare institutions when such institution is primarily engaged in offering room, board, laundry and personal assistance with activities of daily living and incidental thereto.” *Alabama Code* § 22-21-20 (2001). However, such a syntactical alteration has no practical effect as assisted living facilities were generally assumed to fall within the definition of a “hospital” prior to the amendment to this section.

action, rather than its form determines whether an action is a medical malpractice action and, therefore, controlled by the Alabama Medical Liability Act.” *Citing Benefield v. F. Hood Craddock Clinic*, 456 So. 2d 52 (Ala. 1984); *but cf.*, *Collins v. Ashurst*, 821 So. 2d 173 (Ala. 2001) (wherein the Court noted that the mere fact that the Medical Liability Act may govern causes of action in addition to traditional “medical malpractice claims” does not prevent a plaintiff from maintaining causes of action separate and apart from a “medical malpractice claim.” Accordingly, the Court held that the trial court erred by determining that the Medical Liability Act only allows for one cause of action and further erred by striking the plaintiff’s assault and battery and trespass claims that were brought in addition to her medical malpractice claim).

It should be obvious then that any practitioner in the State of Alabama, whether he or she intends to practice solely long-term care litigation, solely medical malpractice litigation, or some combination of the two, must be an expert not only in his or her own field, but also in reference to the Medical Liability Act. This is true because the Medical Liability Act governs every aspect of a long-term care and medical malpractice case brought in this state from pleading requirements to the applicable standard of care to who is qualified to testify concerning the standard of care. Thus, while this article is intended to focus on the effect of *Ex parte Healthsouth Corp.*, 851 So. 2d 33 (Ala. 2002), a necessary prerequisite for a thorough understanding of that case is a review of some of the basic attributes and elements of the Medical Liability Act that are affected by the *Healthsouth* decision.

II. THE BASICS

A. Standard Of Care Applicable To Medical Liability Cases

The elements and proof of a medical malpractice cause of action are well established under Alabama law. “To recover damages in a medical malpractice action, the plaintiff must establish the traditional elements of negligence. The plaintiff must present expert evidence regarding the [healthcare provider’s] standard of care and the [healthcare provider’s] breach of that standard. Furthermore, the plaintiff must show a causal connection between an injury suffered by the [healthcare provider’s] actions.” *East Alabama Behavioral Medicine, P.C. v. Chancey*, ____ So. 2d ____, 2003 WL 22320951 (Ala. 2003) (citing *Arthur v. Stringer*, 835 So. 2d 987, 988 (Ala. 2002); and *McAfee v. Baptist Med. Ctr.*, 641 So. 2d 265, 269 (Ala. 1994)). “To prove causation in a medical malpractice case, the plaintiff must prove, through expert medical testimony, that the alleged negligence probably caused, rather than only possibly caused, the plaintiff’s injury.” *Bradley v. Miller*, ____ So. 2d ____, 2003 WL 22221253 (Ala. 2003) (citing *University of Alabama Health Servs. v. Bush*, 638 So. 2d 794, 802 (Ala. 1994); see also, *Alabama Code* § 6-5-549 (1975) (requiring that the jury “shall be reasonably satisfied by substantial evidence that the healthcare provider failed to comply with the standard of care and that such failure probably caused the injury or death in question.”)).

The Medical Liability Act also places the burden on the plaintiff to prove by substantial evidence that the “healthcare provider failed to exercise such reasonable care, skill, and diligence as other similarly situated healthcare providers in the same general line of practice ordinarily have and exercise in a like case.” *Alabama Code* § 6-5-548 (a) (1975). Thus, expert testimony from a “similarly situated healthcare provider” is

generally required to prove a breach of the applicable standard of care in either a long-term care case or a traditional medical malpractice case. However, what constitutes a “similarly situated healthcare provider” will differ between a long-term care case and a traditional medical malpractice case.

B. Experts In A Long-Term Care Case

The specific type of expert that will be required for the plaintiff to substantiate his or her case will, obviously, depend upon the specifics of the claim the plaintiff is pursuing. The standard generally requires the testimony of registered nurse who “must have practiced hands-on nursing and worked in the supervision of nursing at a nursing facility during the year preceding the date of the alleged act or omission.” *Crown Investments, Inc. v. Reid*, 740 So. 2d 400, 406 (Ala. 1999). It should be noted that this facially constraining standard was ameliorated to some extent by the Court in *Crown Investments* when it held that the standard merely requires the expert witness to “be employed in that discipline some time during the year preceding the alleged breach.” *Id.* at 407. Thus, the expert does not have to be employed in the same discipline for the entire period of a year preceding the alleged breach. All that is required is that the expert witness have been employed in the same discipline for “some time” during the year preceding the alleged breach.

Experts in the long-term care arena may also come from the field of academia. For example, if a potential expert witness is a teacher of nurses they will more than likely be able to testify as an expert witness even if they did not provide hands-on care for some period of time during the year preceding the act or omission. *Dowdy v. Lewis*, 612 So. 2d 1149 (Ala. 1992). This would seem to be a reasonable extension of the general rule

governing experts due to the fact that experts who teach others how to perform healthcare related activities or otherwise educate healthcare providers concerning the applicable standards that relate to their provision of care, should be able to testify about the standard of care governing such allegedly negligent healthcare providers. Indeed, the teacher should always be able to grade the pupil.

C. Experts In A Traditional Medical Malpractice Case

In determining who is a “similarly situated healthcare provider” in a traditional medical malpractice case, the first step is to determine whether the healthcare provider who is alleged to have breached the standard of care is a “specialist.” *Alabama Code* § 6-5-548 (b) governs situations in which the defendant healthcare provider is not a specialist. This section provides a multi-step process for determining whether a potential expert is a “similarly situated healthcare provider” such that he or she may testify against the defendant non-specialist healthcare provider. This section provides that if a defendant healthcare provider:

[I]s not certified by an appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself or herself out as a specialist, a ‘similarly situated healthcare provider’ is one who meets all of the following qualifications: (1) is licensed by the appropriate regulatory board or agency of this or some other state; (2) is trained and experienced in the same discipline or school of practice; [and] (3) has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred.

Alabama Code § 6-5-548 (b) (1975).

Thus, if the defendant healthcare provider is deemed not to be a specialist, then any potential expert that meets all of the above three qualifications will be deemed to be a “similarly situated healthcare provider” such that he or she can testify.

If, however, the healthcare provider who was alleged to have breached the standard of care is a specialist, then § 6-5-548 (c) defines who constitutes a “similarly situated healthcare provider” competent to testify against the defendant specialist. This section provides that if a healthcare provider:

[I]s certified by an appropriate American board as a specialist, is trained and experienced in a medical specialty, and holds himself or herself out as a specialist, a ‘similarly situated healthcare provider’ is one who meets all of the following requirements: (1) is licensed by the appropriate regulatory board or agency of this or some other state; (2) is trained and experienced in the same specialty; (3) is certified by an appropriate American board in the same specialty; [and] (4) has practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred.

Alabama Code § 6-5-548 (c) (1975).

If the proffered expert meets all of the above four qualifications he or she will be a “similarly situated healthcare provider” such that he or she can testify against the allegedly negligent healthcare provider.

It should be noted that the recent case of *Ronderos v. Rowell*, ____ So. 2d ____, 2003 WL 21297350 (Ala. 2003), makes it clear that the date on which the allegedly negligent healthcare provider received his or her certification as a specialist is dispositive of who may or may not constitute a similarly situated healthcare provider. In *Ronderos*, at the time that the plaintiff underwent surgery, Dr. Ronderos was not a board-certified

neurosurgeon; however, he became board-certified in neurosurgery three months after the plaintiff's surgery. Thus, although Dr. Ronderos was not board-certified when he performed the surgery on the plaintiff, he was board-certified when the lawsuit was filed.

The Court in examining this situation held that, "We conclude that, under § 6-5-548 (c), it is the defendant's credentials on the date of the alleged breach that must be considered in determining who may testify against the defendant as a similarly situated health-care provider." *Ronderos*, ____ So. 2d _____. For the Court to have held otherwise would have been "patently unfair" as it would have allowed at trial the application of a standard of care based on circumstances occurring after the alleged malpractice rather than a standard of care based on circumstances existing on the date of the alleged malpractice. This would be fair to neither the plaintiff nor the defendant.⁴

III. STANDARD OF CARE EVIDENCE "REFORMULATED"

We have reviewed the rules generally governing the requirement of standard of care testimony and who is qualified, under both common law and statutory law, to provide such testimony. However, there are exceptions to the general rule that expert testimony is always required to establish both the standard of care and a breach thereof. Alabama, until recently, had a well-established rule governing the limited circumstances under which the exception to the expert testimony rule would obtain.

While our surrounding states all generally require the presentation of expert testimony on both the standard of care and breach of that standard, our sister states have

⁴ Although it would be difficult to include in the body of this paper, the recent case of *Middleton v. Lightfoot*, ____ So. 2d ____, 2003 WL 22418824 (Ala. 2003), is worth noting. In this case the Alabama Supreme Court held that the fact that a plaintiff's expert had been a medical malpractice defendant had no tendency to prove bias in favor of the patient's estate. The Court further held that the alleged malpractice was not remotely similar to the claim alleged in the subject case and, thus, the evidence had no tendency to show that the expert witness was applying two unique standards of care. What is of note is that this case specifically addresses a plaintiff's expert. It does not address a similar situation involving a defendant's expert wherein prior medical malpractice actions may be probative to prove bias.

recognized what I will call a “common sense exception.” This exception is limited in nature, but arises whenever the healthcare provider’s care was so obviously negligent that non-expert, laypersons exercising common sense would realize that the defendant healthcare provider had been negligent. Alabama’s Supreme Court in the case of *Ex parte Healthsouth Corp*, 851 So. 2d 33 (Ala. 2002), has now adopted this common sense approach while also maintaining those areas of exceptions that are well established under Alabama law. *But see infra, Breaux v. Thurston*, ____ So. 2d ____, 2003 WL 23028331 (Ala. 2003).

A. Ex parte Healthsouth

In this very important case the Alabama Supreme Court reformulated the rule in long-term care and medical malpractice cases regarding the use of expert testimony. In sum, the court held that no expert testimony is needed in instances where the breach of the applicable standard of care can be ascertained by common knowledge and experience.

In this case, the plaintiff had been admitted to the Healthsouth facility for back surgery. After surgery was performed, she was transferred to a rehabilitation section of the facility and given pain medication. She was inappropriately given a second dosage of painkiller prior to the time when such medication should have been given. The plaintiff testified that after receiving the second, inappropriate dosage of painkiller she needed to use the bathroom. She rang her call button to summon the nurse and waited anywhere from thirty minutes to an hour without any response. The plaintiff testified that although she knew the doctor instructed her not to get up from the bed without the assistance of a nurse, she was unable to wait any longer and began to climb out of the bed by herself. When she exited the bed, her left foot collapsed and she broke her left hip.

During the litigation, Healthsouth moved for summary judgment supported by the affidavit of a registered nurse. The plaintiff responded to the summary judgment with the affidavit of her own registered nurse. However, Healthsouth moved to strike the plaintiff's expert's affidavit saying that she was not a qualified expert pursuant to the Medical Liability Act. The trial court agreed and struck the plaintiff's expert's affidavit and testimony.

On appeal, the plaintiff argued that an expert was not necessary in this case to establish the applicable standard of care and the breach of that standard. The Court of Civil Appeals concurred with the plaintiff's assertion in *Health v. Healthsouth Medical Center*, 851 So. 2d 24 (Ala. Civ. App. 2002), and this matter was then appealed to the Alabama Supreme Court. The Court, in analyzing the situation, held that:

Evidence of medical malpractice generally must be proven by expert testimony. A narrow exception to this rule exists in the case where want of skill or lack of care is so apparent . . . as to be understood by a layman and requires only common knowledge and experience to understand it. In *Anderson*, this court illustrated this exception by listing the following examples: (1) where a foreign object, such as a sponge, remains in a patient's body after surgery; (2) where the injury is unrelated to the condition for which the plaintiff sought treatment; (3) where the plaintiff relies on an authoritative medical treatise to prove what is or is not proper; and (4) where the plaintiff himself or herself is a medical expert. A review of those examples reveals that only the first and second examples relate to that category of cases where want of skill or lack of care is so apparent as to be understood by a layperson, and requires only common knowledge and experience to understand it. Examples (3) and (4) have nothing to do with evidence within the common knowledge of the jury and therefore do not illustrate that category of cases. For this reason alone, reformulation of the statement of the exception to the general rule

requiring expert testimony is warranted.

* * *

Accordingly, we reformulate the exception to the rule . . . to recognize first, a class of cases where want of skill or lack of care is so apparent . . . as to be understood by a layman, and requires only common knowledge and experience to understand it, such as when a sponge is left in, where, for example, the wrong leg is amputated on, or as here, where a call for assistance is completely ignored for an unreasonable period of time. A second exception to the rule requiring expert testimony applies when a plaintiff relies on a recognized standard or authoritative medical text or treatise, or is himself or herself a qualified medical expert.

Id. at 38-39.⁵

B. Application And Usage Of The New Standard

I believe this to be one of the most significant alterations or changes in Alabama Medical Malpractice law in recent memory. With the many amendments to the Medical Liability Act that have occurred within the past twenty years and the ever increasing protections that each new version of the Act have afforded healthcare providers, the *Healthsouth* case is perhaps the only patient friendly development in this area of law in many years.

Perhaps more importantly, this “reformulation” of the exception to the general rule requiring expert testimony makes sense. This new rule allows the jury to utilize their common sense in analyzing a limited area of medical liability cases. Indeed, in the cases to which this exception would apply, I truly believe that expert testimony would be of little or no benefit to the jury. The jurors would no doubt substitute their own common

⁵ *Healthsouth* is also discussed in *Alabama Law of Damages*, § 36:44 Medical Malpractice (2003) and in *American Law of Medical Malpractice*, § 14:1 Introduction (2003).

sense and life experiences in cases involving facts similar to those in the *Healthsouth* case. A jury does not need the assistance of an expert to determine whether or not it is negligent to allow a postoperative patient's calls for assistance to go unanswered for thirty minutes to an hour. Expert testimony in such a situation would be nothing more than a waste of both parties' valuable resources and the time of an already overburdened judiciary. There can be little doubt that usage of this newly reformulated rule will streamline the process of presenting evidence of healthcare provider malpractice to the jury.

I do want to point out that this "reformulation" of the general rule is perhaps not as limited as it initially appears. Even in my specific area of practice (i.e., long-term care litigation) the scope of potential applicability for this reformulated rule is vast. For example, I would submit that the reformulated exception may potentially be useful in cases involving falls, assaults, dehydration, malnutrition, elopement, drops, rape or sexual assault, medication administration errors, misuse of chemical and/or physical restraints, etc. Obviously, the specific facts of any particular case are going to govern whether or not the reformulated exception will have applicability. I do encourage practitioners, however, to keep this exception fresh on their mind so as to avoid the economic drain of obtaining an expert in each potential case. One should always perform the mental gymnastics of whether or not this reformulated exception would have potential applicability in your case.

There is one caveat, however. There is a paucity of cases interpreting this fairly recent decision and whenever a practitioner decides to become a pioneer in a particular area of law there are always risks associated with such strategies. Specifically, the

practitioner runs the potentiality of having his or her case dismissed for lack of expert support if his or her initial calculation concerning the need for an expert proves incorrect. Thus, the cases that are on record as interpreting the *Healthsouth* decision, including the *Healthsouth* decision itself, usually involve the plaintiff's attorney attempting to perpetuate his or her case on appeal by usage of this exception, rather than a conscious decision by the attorney at the outset of the case to proceed in this manner.

C. Pleading Requirements Under The Medical Liability Act

One piece of advice I might offer the practitioner making a conscious decision to proceed with his or her case while utilizing the reformulated exception would be to take extraordinary care in drafting the initial pleadings. The impetus for this suggestion is attributable to both the Draconian pleading requirements imposed by the Medical Liability Act as well as the need to properly support your usage of the reformulated exception through your pleadings. The pleading requirements of any action subject to the Medical Liability Act are governed by the provisions of *Alabama Code* § 6-5-551, which was amended in 2000 and now reads, in pertinent part:

. . . the plaintiff shall include in the complaint filed in the action a detailed specification and factual description of each act and omission alleged by plaintiff to render the healthcare provider liable to plaintiff and shall include when feasible and ascertainable the date, time, and place of the act or acts. . . . any complaint which fails to include such detailed specification and factual description of each act and omission shall be subject to dismissal for failure to state a claim upon which relief may be granted. . . .

Alabama Code § 6-5-551 (2000).⁶

⁶ The 2000 amendment to § 6-5-551 did not affect the pleadings specificity requirements contained in this section, but was intended to address issues concerning the discovery of other acts and omissions evidence. *Ex parte Ridgeview Health Care Center, Inc.*, 786 So. 2d 1112 (Ala. 2000); and *Ex parte McCollough*, 747 So. 2d 887 (Ala. 1999).

The specificity requirements under this section of the Medical Liability Act are analogous to those applicable to a fraud complaint.⁷ I encourage any attorney representing the plaintiff in such a case to be overly specific in his or her complaint. For example, the complaints generated by my firm are generally in the range of fifty (50) pages in length.

The reason I encourage the inclusion of significant details in the drafting of a complaint lies in the final sentence of the above quote. This language gives § 6-5-551 its “bite” in that it justifies the dismissal of any complaint “which fails to include such detailed specification and factual description of each act and omission” Such an ultimate sanction should be assiduously avoided by the author of any medical liability related complaint.

From a practical perspective, any attorney wishing to utilize the “reformulated exception” governing standard of care testimony instituted by the *Healthsouth* case will wish to detail the facts surrounding the incident giving rise to the cause of action in nauseating detail. In the majority of the cases pursued under the new *Healthsouth* rationale, the complaint will be the only fortification and defense against the obligatory motion to dismiss and/or motion for summary judgment from the healthcare provider. Thus, the complaint should specify not only the facts surrounding the subject incident, but also should provide support for the judge to conclude that your case is not “outside the ken of the average lay person” such that expert testimony would be required. *Golden v. Stein*, 670 So. 2d 904, 908 (Ala. 1995). Build your arguments and defenses into the

⁷ Rule 9(b), ARCP, requires that, when alleging a claim of fraud, the plaintiff must state the circumstances constituting fraud with particularity. These circumstances include the time, the place, and the contents or substance of the misrepresentations, the facts misrepresented, and an identification of what has been obtained. Thus, while Rule 9(b) does not require that every element be stated with particularity, the plaintiff must use more than generalized or

complaint at this point in time as you will not have the benefit of your expert's affidavit or deposition to buttress your opposition to the defense's inevitable dispositive motions.

D. Cases Interpreting The Reformulated Exception

Interestingly, the first and most authoritative case to interpret the reformulated exception outlined in *Healthsouth* was the case of *Tuck v. Health Care Authority of City of Huntsville*, 851 So. 2d 498 (Ala. 2002), which was issued on November 27, 2002 (i.e., the same day that *Healthsouth* was issued). *Tuck* involved a hallucinating hospital patient that was placed in a belt restraint in order to protect her from injury. The patient was later found sitting on the floor at the foot of her bed with a broken hip. The patient's family sued the hospital for medical malpractice alleging that the hospital negligently restrained the patient. The plaintiff's nursing expert was excluded from testifying at trial based upon a finding by the trial court that she was not a similarly situated expert. The plaintiff's attorney thereafter attempted to utilize the testimony of one of the hospital's own employees to establish a breach of the standard of care. However, the trial court excluded this testimony, as the hospital employee had not been disclosed via expert interrogatory answers.

On appeal, the plaintiff's attorney argued first that his expert and the hospital's employee were inappropriately disqualified. Our Supreme Court disagreed. The plaintiff's attorney then argued, pursuant to *Walker v. Southeast Alabama Medical Center*, 545 So. 2d 769 (Ala. 1989), that expert testimony was not necessary. In *Walker*, the Alabama Supreme Court stated that expert testimony is not required where "the want

conclusory statements in setting out the alleged fraud. *Applin v. Consumers Life Ins.*, 623 So. 2d 1094 (Ala. 1993), overruled on other grounds, *Boswell v. Liberty Nat'l Life Ins. Co.*, 643 So. 2d 580 (Ala. 1994).

of skill or lack of care is so apparent as to be understood by a layman, and only common knowledge and experience are required to understand it.” *Walker*, 545 So. 2d at 771.

The Court, noting that the *Healthsouth* decision had been issued on the same day, analyzed the facts of the *Tuck* case pursuant to the reformulated exception outlined in *Healthsouth*. The Court in *Tuck* held that “the facts of this case are not analogous to those in *Healthsouth* and do not fit into this exception, even as reformulated.” *Tuck*, 851 So. 2d at 506. Moreover, the Court did not agree with the contention that the standard of care in the *Tuck* case would be comprehensible to a layperson without expert testimony.

The Court stated that:

The issue here is whether [the nurses] breached the standard of care in using, applying, and maintaining the belt restraint on Virginia Tuck . . . in addition, the use of restraints on patients in Virginia Tuck’s condition is not a practice that is considered part of the routine custodial care of a patient. Compare *Healthsouth* where the issue was a thirty-minute to one-hour delay in responding to a call for assistance activity that can be classified as a part of routine custodial care. We hold that expertise was required in implementing the restraint protocol used by [the nurses] and that expertise was necessary to determine the applicable standard of care.

Tuck at 506-507.

The next case to, at least tangentially, discuss *Healthsouth* was *Osorio v. K & D Erectors, Inc.*, ____ So. 2d ____, 2003 WL 22111101 (Ala. Civ. App. 2003). In *Osorio* Judge Yates, in a dissenting opinion to the overruling of an application for rehearing, came to a very different conclusion than did the court in *Tuck*. *Osorio* involved a workers compensation case where Mr. Osorio had suffered terrible injuries after falling from a roof while at work. One of the issues in the case was the failure by *Osorio* to

establish by expert testimony that the attendant care he was receiving from family members was reasonably necessary medical treatment or attention. Mr. Osorio was seeking compensation for his family members for providing this attendant care (including toileting, feeding, bathing, etc.). However, no authorized treating physician ever testified that such attendant care was reasonably necessary medical treatment or attention.

Judge Yates found that there was no need for such expert medical testimony. Judge Yates stated, “An analogy could be made between this case and those cases in which the courts have recognized an exception to the general rule that requires expert medical testimony in medical malpractice cases. Our Supreme Court has recognized that certain circumstances exist that make the requirement of expert medical testimony unnecessary (i.e., when a sponge is left in a body following surgery, when a surgeon operates on the wrong limb, or when a call for assistance is completely ignored for an unreasonable period of time).” *Osorio*, ____ So. 2d _____. In citing *Healthsouth*, Judge Yates stated that, “The circumstances of this case indicate that testimony from an authorized treating physician that attendant care for Osorio was reasonably necessary medical treatment or attention is unnecessary; it is clear from the evidence that such care is necessary.” *Osorio*, ____ So. 2d _____.

The *Healthsouth* case was next discussed in the case of *Cain v. Howorth*, ____ So. 2d _____, 2003 WL 22160723 (Ala. 2003). *Cain* involved a detailed and lengthy fact pattern that can essentially be distilled down to the allegation that the defendant doctor performed a different form of hip surgery than was allegedly represented to the plaintiff. The plaintiff contended that this different form of hip surgery resulted in complications, including pain and subsequent hip surgeries.

The plaintiff made numerous and varied claims in her lawsuit. The Court utilized the *Healthsouth* reformulated exception in analyzing the plaintiff's lack of consent claim. The Court cited *Healthsouth* and stated that, "There exists an exception to that requirement where the cause and effect relationship between the breach of the standard of care and the subsequent complication or injury is so readily understood that a layperson can reliably determine the issue of causation without expert testimony to assist in that determination." *Cain*, ____ So. 2d _____. In analyzing the facts of this particular case, the *Cain* court held that, "Even more so, in a case of surgery to which the patient has not consented . . . proximate cause may be shown through lay testimony." *Cain*, ____ So. 2d _____. It should be noted that *Cain's* applicability may be limited somewhat due to the fact that it was the review of a summary judgment motion. However, the Court in *Cain* used strong language in supporting their ruling.

Only one other case, *Wilson v. Manning*, ____ So. 2d ____, 2003 WL 22418424 (Ala. 2003), specifically references the *Healthsouth* decision. However, this case provides no insight as to the scope of the *Healthsouth* decision as this rationale was ultimately not utilized by the Court in reaching its decision. This relative lack of cases interpreting *Healthsouth* provides us with little concrete input into when the Court will (or will not) allow this reformulated exception to be utilized.

Before concluding I would like to mention a very recent case that was released on December 30, 2003. In the case of *Breaux v. Thurston*, ____ So. 2d ____, 2003 WL 23028331 (Ala. 2003), the Court did not specifically address or reference the *Healthsouth* decision, but this potentially seminal case did reformulate the standard in retention cases (i.e., retained surgical instrument cases). The *Breaux* case involved the retention of a

Babcock clamp in the abdominal cavity of an obese gastric-bypass surgery patient. The plaintiff in that case proceeded under the long line of cases indicating that expert testimony from the plaintiff is not necessary to establish a breach of the standard of care in retention cases. The plaintiff ultimately won the case after two separate trials, but the defense appealed the case based upon the jury instructions provided by the trial court.

The Court analyzed a long line of retention cases and decided to “summarize” and “harmonize” the precedent in this area. In sum, our Court held that the “harmonized” standard to be followed in retention cases is as follows:

[P]roof of a retained surgical instrument, in the absence of expert medical testimony presented by the plaintiff, constitutes only *prima facie* evidence of negligence on the part of the surgeon. The effect of such *prima facie* evidence is to shift to the surgeon the burden of going forward with the evidence, to the end that the surgeon has the opportunity to overcome the *prima facie* evidence by establishing, through expert medical testimony, the elements of the applicable medical standard of care, and that he satisfied all of them. If no contradictory expert medical testimony is introduced, however, that *prima facie* evidence is sufficient to sustain a verdict against the surgeon.

Breaux, ____ So. 2d at ____.

If, however, “the standard of care is clearly established by expert testimony [presented by the defense] and there is substantial evidence indicating that the surgeon complied with all components of that standard of care, a jury question is presented as to whether the surgeon was in fact negligent.” *Breaux*, ____ So. 2d at ____ . This last sentence is perhaps the most important in the case in that it erodes prior case law, which seemed to say that leaving a sponge or surgical instrument in a patient constituted

negligence per se. See e.g., *Ravi v. Williams*, 536 So. 2d 1374 (Ala. 1988); and *Powell v. Mullins*, 479 So. 2d 1119 (Ala. 1985).

While the *Breaux* case does seem to alter and, admittedly to some extent bring into accord prior precedent, it must be remembered that the *Breaux* case does not stand for the proposition that a plaintiff must present expert standard of care testimony in their retention case. The *Breaux* case merely stands for the proposition that if the defense presents expert testimony concerning the standard of care and that the standard of care was met, “a jury question is presented as to whether the [healthcare provider] was in fact negligent.” *Breaux*, ____ So. 2d at _____. Thus, the practical effect of this case is perhaps not as detrimental or helpful, depending upon your viewpoint, as initially thought.

IV. CONCLUSION

I suspect that none but the most aggressive of attorneys will intentionally decide to proceed with their cases without the assistance of experts and instead utilize the reformulated *Healthsouth* exception. For those adventuresome few who do decide to proceed with their case in such a fashion, I would advise them to be absolutely sure at the initiation of their litigation that both the trial court and the appellate court, which will no doubt hear the matter, will allow the case to proceed under the reformulated exception. This is no doubt a calculated gamble as the practitioner who miscalculates his or her chance of success will no doubt suffer the ultimate sanction of dismissal of his or her lawsuit. Thus, it may be sometime before additional interpretive cases are issued further illuminating the breadth and scope of the reformulated exception.