IN THE SUPREME COURT OF MISSISSIPPI

No. 2006-CA-00289

SPOTLITE SKATING RINK, INC.

Appellant

vs.

BIANCA ZWYACA BARNES BY AND THROUGH MOTHER AND NEXT FRIEND, VEARLY BARNES, ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES AND AS ADMINISTRATRIX OF THE ESTATE OF BIANCA ZWYACA BARNES

Appellee

Appeal of the Jury Verdict and Judgment and Order on Post-Trial Motions of the Washington County Circuit Court, Honorable Richard A. Smith, Circuit Judge in Barnes v. Spotlite Skating Rink, Inc. *et. al*, Cause No. CI2002-128

BRIEF OF APPELLANT SPOTLITE SKATING RINK, INC.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case.

1. Spotlite Skating Rink, Inc., Appellant
2. Vearly Barnes, Appellee
3. LeAnn W. Nealey, Counsel for Appellant
4. Paul M. Ellis, Counsel for Appellant
5. BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, Counsel for Appellant
6. James Bullock, Trial Counsel for Appellant
7. Lamar Watts, Trial Counsel for Appellant
8. SHELL BUFORD, Trial Counsel for Appellant
9. George F. Hollowell, Jr., Counsel for Appellee
10. Honorable Richard A. Smith

LeAnn W. Nealey
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STATEMENT OF ISSUES

I. Under Mississippi law, a plaintiff may only recover damages if her injury is the type that is a reasonably foreseeable consequence of the defendant's alleged negligence. Plaintiff's daughter, Bianca Barnes, fell and hit her head on the skate floor at Defendant Spotlite's skating rink. The fall dislodged a rare tumor in Bianca's head which clogged a ventricle resulting in the build-up of intracranial pressure that eventually caused her death. Plaintiff sued Spotlite for negligent supervision and care. Is Bianca's injury the type that is a reasonably foreseeable consequence of Spotlite's alleged negligence?

II. Under Mississippi law, skating rink personnel are required to assist a skater, or to remove her from the skate floor, when they know or should know that a skater is totally unable to skate and that the skater is exposed to a likelihood of some serious injury due to such inability. While Spotlite's skateguard was watching Bianca learn to skate, Bianca fell one time. Appellant picked her up and immediately took her off the skate floor. Based on this legal standard and the circumstances detailed below, was Spotlite negligent in its supervision of Bianca?

III. Under Mississippi law, a business must use reasonable care to see that one injured on its premises receives proper care; but it is only required to provide such care as is reasonable in light of what it can anticipate. Based on this legal standard and the circumstances set forth below, was Spotlite's care of Bianca reasonable in light of what it could anticipate?

IV. Under Mississippi law regarding proximate cause, an actor need not anticipate that "which would include an unusual, improbable, or extraordinary occurrence, although such happening is within the range of possibilities." Under the circumstances here, was any action or inaction on Spotlite's part the proximate cause of Bianca's death?

V. Plaintiff's economist was allowed to give expert testimony relating to Bianca's lost wages, lost entitlements and lost fringe benefits, but he did not consider the requisite "facts and data" necessary to allow his opinion to be presented to the jury. Was it reversible error under *Daubert* and Rule 702 of the Mississippi Rules of Evidence to allow this expert testimony to be presented to the jury?

STATEMENT OF THE CASE

A. Nature of the Case, Course of the Proceedings and its Disposition Below.

The deceased, Bianca Barnes ("Bianca"), was a 10 year old girl with an undiagnosed, very rare medical condition - - a congenital colloid cyst in her brain. *See, e.g.,* Tr. 378:11-23; 545:10-25; 558:17-20; 663:11-15; 758:12-15.[1] On December 25, 2000, while roller skating at Spotlite Skating Rink, Inc. ("Spotlite") (Appellant herein), Bianca fell one time. Tr. 1072:2-4. She told the Spotlite skateguard "she was alright" (Tr. 1075:16; *see also* 1064:12-15) and was seen back out on the rink. Tr. 1058:18-20; 1061:21-29. She arrived home from Spotlite around midnight (Tr. 1096:14-17) and her mother testified that when she picked her up that evening, Bianca was walking normally and had no apparent injury (Tr. 813:12-17) and Bianca did not mention that she had fallen at Spotlite. Tr. 814:23-26. She simply went to bed. Tr. 814:16-21.

Bianca awoke around 4:00 am on December 26, 2000, vomiting green fluid. Tr. 789:3-11. Her mother ultimately called a nurse practitioner that afternoon, an ambulance was sent to their home and Bianca was taken to North Sunflower County Hospital. R. 6-14. Bianca was then transferred to Delta Regional Medical Facility (R. 9), and then to University Medical Center in Jackson, Mississippi. R. 12. She was pronounced dead early on December 27, 2000. R. 13. The medical testimony showed Bianca's death was caused by an undiagnosed colloid cyst blocking the flow of spinal fluid from her brain, resulting in hydrocephalus (backup of fluid on the brain), causing intracranial pressure and ultimately, herniation of her brain stem and death. *See e.g.,* Tr. 545-48.

Bianca's mother (on behalf of Bianca's estate and the wrongful death beneficiaries) sued the hospitals involved for malpractice. R. 6-14. In a separate lawsuit, plaintiff sued several

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[1] All cited pages from the trial transcript are included in the Appellant's Record Excerpts, Tab 5 (R.E. 32–142)

physicians, individually, for malpractice, as well as raising a wrongful death negligence claim against Spotlite. R. 221-29.[2] These two lawsuits were subsequently consolidated and tried together.

Prior to trial defendants moved to exclude the testimony of plaintiff's economist, Dr. George Carter, as inadmissible under *Daubert* and Miss. R. Evid. 702. R. 458-639. During trial the court addressed the admissibility of Dr. Carter's opinions. The trial court excluded some opinions, but over defendants' (including Spotlite's) continuing objection (Tr. 917:23-26), the trial court allowed Dr. Carter to testify regarding Bianca's lost wages, lost entitlements and lost fringe benefits. Tr. 898:20-29; 912:13-19; 916:16-28. *See generally*, Tr. 898-917.

At the close of plaintiff's evidence, Spotlite moved for a directed verdict because (1) Bianca's injuries were unforeseeable, thus plaintiff could not recover damages as a matter of law; (2) plaintiff failed to show any breach of duty owed Bianca; and (3) plaintiff failed to show any alleged negligence by Spotlite was the proximate cause of Bianca's death. Tr. 969-72. Spotlite's motion was denied. Tr. 994:2-5. The case proceeded against Spotlite[3] and, by the requisite unanimous verdict, the jury awarded $600,000 to plaintiff (R. 899-900; R.E. 5-6) for "loss of companionship, pain and suffering and present net cash value of the life of Bianca Barnes." *Id.* Spotlite timely filed its Motion To Set Aside The Jury Verdict And Enter Verdict For Defendant Or In The Alternative, For A New Trial, Or In The Further Alternative For A Remittitur. R. 901-11; R. 931-35 (reply). The trial court denied Spotlite's motion on January 5, 2006 (R.E. 26-29)

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[2] Plaintiff's claims against Spotlite were based on its alleged negligent supervision at the rink and negligent care of Bianca after she fell.

[3] Plaintiff's malpractice claims against the hospitals and doctors were dismissed on directed verdict after the close of plaintiff's evidence. Tr. 993:9-29, 994:1.

(Tab 4)[4] and Spotlite timely appealed. R. 968-69.

B. Statement of the Facts Relevant for the Issues on Review.

As noted above, Bianca had an undiagnosed, very rare medical condition - - a congenital colloid cyst in her brain. Tr. 378:11-23; 545:10-25; 558:17-20; 663:11-15; 758:12-15. On Christmas Day, December 25, 2000, her uncle gave her permission to go roller skating with her cousins at Spotlite (Tr. 809:22-26), and she took a bus from her home in Ruleville, Mississippi to Greenwood (approximately an hour away), where Spotlite is located. Tr. 217:10-23, 218:14-15, 234:29, 235:1-6. The children arrived at Spotlite and headed to the rink to skate. Though Bianca's mother testified at trial that Bianca was a "very, very good skater" (Tr. 786:10-11), one of the Spotlite skateguards on duty, Marvin Miller ("Miller") testified that he was told that Bianca did not know how to skate. Tr. 1071:14-20, 28. That being the case, Miller helped Bianca onto the rink floor, and explained that once she was out there she was "persistent in [that] she wanted to do it by herself." Tr. 1071:27-29, 1072:1.

Miller watched Bianca skate, and saw her fall when she got about ten or eleven feet from the partition wall. Tr. 1072:2-4. There is no evidence in the record that Bianca was bumped, stumbled on anything, or was tripped. Miller immediately went to Bianca and picked her up. Tr. 1072:6-8. Bianca was crying and said that she had hit her head. Tr. 1072:13-14. He took her to the sitting area and examined her head. Tr. 1072:16-17. Miller did not see any bumps, or cuts or bleeding. Tr. 1072:23-27. He got a towel from his locker, put some ice in it, and put it on Bianca's head. Tr. 1073:2-12. He then tried to call Bianca's mom several times at home, but could not reach her. Tr. 1073:17-19, 23-26. Bianca told him that she was "alright." Tr. 1075:16.

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[4] A review of the record showed Appellant's Certification of Examination and Supplementation of Record for Appeal (with exhibits) (sent for filing March 15, 2007) had been omitted from the record, as well as the trial court's January 5, 2006 Order. The January 5, 2006 Order was entered and these items were added by the parties' stipulation filed July 10, 2007. R.E. 7-31. The parties' Stipulation was granted per the Notice entered July 12, 2007.

The attendant at the concession stand, Ms. Freddie White-Johnson ("Ms. Freddie"), also came by to check on Bianca. Tr. 1057:7-12. She gave her a wet paper towel and told her to wipe her face and clean her nose. Tr. 1058:4-6. Ms. Freddie asked Bianca if she was feeling any pain, but Bianca just said that she was hot. Tr. 1060:28-29, 1061:1-3. She brought Bianca a bag of ice to rub on her forehead and around her neck. Tr. 1058:7-10. Bianca told her that she was "okay." Tr. 1064:12-15. Ms. Freddie said "if you need me, call me, and I'll come back." Tr. 1058:17-18. When she went to check on Bianca twenty or thirty minutes later, she had gone back to the floor.[5] Tr. 1058:18-20, 1061:21-29.[6]

When Bianca left Spotlite and got back on the bus to Ruleville she looked "normal" to the driver. Tr. 1096:9-11. She did not cry or complain about any physical problems on the bus ride home. Tr. 209:13-14. The van arrived in Ruleville around midnight and the driver dropped Bianca and her cousins off at the cousins' house. Tr. 1096:14-17, 223:26-27, 224:2-8, 24-25.

When Bianca's mother picked her up that evening, she said that Bianca was walking normally and had no apparent injury. Tr. 813:12-17. Bianca did not mention that she had fallen at Spotlite. Tr. 814:23-26. When she got home, Bianca did not complain about any physical problems; instead, she told her uncle how excited she was about having gone on the skating trip. Tr. 252:11-17. Bianca went to bed. Tr. 814:16-21.

Around four o'clock in the morning, Bianca started throwing up "greenish-bluish looking stuff." Tr. 789:3-11. Her mom gave her some Benadryl and sent Bianca back to bed. Tr. 790:16-18. When Bianca woke up, she "staggered from her room to the living room and just lay on the couch." Tr. 790:21-25. Her mother called a nurse practitioner at approximate 12:30 pm (R. 7)

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[5] The skate session at Spotlite changes to a dance session later in the evening. Tr. 1061.

[6] *See also* Tr. 1075:4-17 (Miller saw her on the skate floor during the dance session).

and an ambulance arrived at approximately 2:30 pm that afternoon. *Id.* Bianca was taken to North Sunflower County Hospital (R. 6-14); then transferred to Delta Regional Medical Facility (R. 9), then to University Medical Center in Jackson, Mississippi. R. 12. She was pronounced dead early on December 27, 2000. R. 13. The medical testimony showed Bianca's death was caused by an undiagnosed colloid cyst blocking the flow of spinal fluid from her brain, resulting in hydrocephalus (backup of fluid on the brain), causing intracranial pressure and ultimately, herniation of her brain stem and death. Tr. 545-48; Tr. 771:19-27, 663:11.

SUMMARY OF THE ARGUMENT

The jury in this case awarded damages in the amount of $600,000 against Spotlite based on Bianca's death due to her colloid cyst. The verdict and judgment cannot stand, however, because all evidence in this case shows Bianca's death from the colloid cyst was not a foreseeable consequence of her fall. Accordingly, the damages assessed against Spotlite for her death (**all** damages in this case) are not recoverable as a matter of law. *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So. 2d 703, 715 (Miss. 2005). On this basis alone, the jury verdict and judgment of the trial court should be reversed and judgment rendered that plaintiff take nothing and her claims against Spotlite be dismissed with prejudice.

On a more fundamental level, plaintiff cannot recover for her alleged negligent supervision and care claims against Spotlite because Spotlite breached no duty owed to Bianca in this case. When analyzed under the applicable legal standard, the record contains no evidence supporting a finding that Spotlite failed to meet its duty of supervision in this case; nor does it contain any evidence that Spotlite failed to meet its duty of providing appropriate medical attention.

In any event, even if plaintiff could show Spotlite breached any duty owed Bianca, there is no evidence that any action or inaction on Spotlite's part was the requisite proximate cause of

Bianca's death. Under long-standing Mississippi law, an "actor is not bound to a prevision or anticipation which would include an unusual, improbable, or extraordinary occurrence, although such happening is within the range of possibilities." *Mauney v. Gulf Refining Co.*, 9 So. 2d 780, 781 (Miss. 1942) (citation omitted). The rationale behind this rule is that it would "impose too heavy a responsibility for negligence to hold the tortfeasor accountable for what was unusual and unlikely to happen, or for what was only remotely and slightly probable." *Id.* That Bianca fell one time and subsequently died when her undiagnosed colloid cyst dislodged is surely an unusual, improbable, or extraordinary occurrence. Holding Spotlite liable for her death here would "impose too heavy a responsibility for negligence" - - an impermissible result under Mississippi law. In short, the proximate cause of Bianca's death was an undiagnosed, pre-existing medical condition—not any action or inaction by Spotlite.

Finally, if this Court should decline to reverse and render judgment in favor of Spotlite, the judgment should be reversed and remanded because it was an abuse of discretion to allow the plaintiff's economist to testify regarding Bianca's lost wages, lost entitlements and lost fringe benefits. Plaintiff's economist failed to consider the requisite "facts and data" necessary to allow his opinion on these matters to be presented to the jury; accordingly, his testimony should have been excluded under *Daubert* and Rule 702 of the Mississippi Rules of Evidence.

ARGUMENT AND AUTHORITIES

A. Standard of Review.

The plaintiff bears the burden of proving every element of her negligence claim, and a trial court errs by denying a defendant's motion for directed verdict if the plaintiff has failed to present "substantial evidence fairly tending to establish every element of the plaintiff's causes of action." *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So. 2d 1077, 1083 (Miss. 2000). The standard of review for the denial of a motion for directed verdict and on a motion

for judgment notwithstanding the verdict is identical. *Id.* Though this Court will consider the evidence in the light most favorable to the appellee (*id.*); if the facts are so overwhelmingly in favor of the appellant that reasonable jurors could not have arrived at a contrary verdict, this Court must reverse and render. *Id.*

The standard of review for the admission or suppression of evidence in Mississippi is abuse of discretion. *Miss. Transp. Comm'n v. McLemore,* 863 So.2d 31, 34 (Miss. 2003). The trial judge has the sound discretion to admit or refuse expert testimony; an abuse of discretion standard means the judge's decision will stand unless the discretion he used is found to be arbitrary and clearly erroneous. *Id.*

B. The Judgment Should Be Reversed and Judgment Rendered for Spotlite Because Bianca's Death Was Not a Foreseeable Consequence of Any Alleged Negligence On Its Part.

Plaintiff sued Spotlite for its alleged negligent supervision of Bianca and care for Bianca after her fall, seeking damages based on testimony that Bianca's fall at the rink was the "precipitating cause" of Bianca's colloid cyst dislodging and causing the obstruction which ultimately resulted in her death. Tr. 770-71; *see also* Tr. 408. The jury awarded damages in the amount of $600,000 against Spotlite based on Bianca's death due to the colloid cyst. R. 899-900; R.E. 5-6.

The verdict and judgment cannot stand, however, because all evidence shows Bianca's death was not a foreseeable consequence of her fall. *See* Tr. 378:11-23; 545:10-25; 558:17-20; 663:11-15; 758:12-15. Accordingly, the damages assessed for her death (**all** damages in this case) are not recoverable in this case as a matter of law. *City of Jackson v. Estate of Stewart ex rel. Womack,* 908 So. 2d 703, 715 (Miss. 2005).

In *Womack*, an elderly day care participant, Mrs. Stewart,[7] fell when exiting a van the City operated. 908 So. 2d at 707. Within days of her fall, Mrs. Stewart suffered a massive stroke. *Id.* She sued the City (and others) for her injuries, seeking damages for her fall and including compensation for her stroke. *Id.* at 713. The City appealed the ensuing damage award against it, raising as one issue: "Whether a stroke is a type of damage which is a reasonably foreseeable consequence of the [defendant's] alleged negligence." *Id.* at 708.

This Court held Mrs. Stewart's estate should not have been awarded damages based on her stroke, beginning by establishing the applicable standard: "the Estate claims that Mrs. Stewart's fall on August 11, 1997, resulted in a stroke. . . . In order to recover damages related to the stroke, however, the Estate must show more than negligent conduct which resulted in damages." *Id.* at 712. Specifically, the plaintiff "must show not only that the stroke resulted from the fall and that the fall resulted from a defendant's negligence, **but also that a stroke is a reasonably foreseeable consequence of the alleged negligent act.**" *Id.* (emphasis added). "[F]oreseeability presents the question of whether a stroke is the type of damage which reasonably should be **anticipated** (or foreseen before the fact) as a result of negligently allowing an elderly person to fall in a parking lot." *Id.* at 713. (Emphasis in original).

Examining the expert medical testimony, the Court found that the only medical testimony on this issue was that it was "extremely uncommon, almost unheard of for a minor fall to cause a stroke" (*id.* at 715), and thus held: "Because the unchallenged expert testimony at trial established that stroke is not a foreseeable consequence of the alleged negligence which led to Mrs. Stewart's fall, we hold that the Estate may not recover damages related to the stroke, **whether or not it was caused by the fall.**" *Id.* (emphasis added).

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[7] Mrs. Stewart was subsequently put in a conservatorship and the case was continued by her conservator.

These very circumstances are present in this case. Even taking as true the testimony that the fall was the "precipitating cause" of the colloid cyst being dislodged (*see, e.g.*, Tr. 770:25-29, 771:1-13), there is no evidence that this event is a "foreseeable consequence" of Bianca's fall. On the contrary, the unchallenged expert testimony shows the cyst was a very rare congenital problem that no one knew Bianca had. Indeed, plaintiff's medical expert, Dr. Brogdon, testified that: "colloid cysts are fairly rare. . . . It's an unusual tumor. It's about one percent or less of all the brain tumors that occur . . . ." Tr. 394:18-19, 378:11-23. In fact, Dr. Brogdon stated that he had only seen a "handful" of colloid cysts in his 53 years of practice. 395:2, 468:7-12. Given that colloid cysts are extremely uncommon, it logically follows that it is extremely uncommon that a fall would dislodge a colloid cyst and cause the death of a person. *See also* Tr. 545:28-29 (colloid cysts are not normally caused by trauma but rather "are a congenital problem"); Tr. 550:14-23 (fall had "nothing to do" with development of colloid cyst); Tr. 558:15-20 ("nothing that could have been done or was omitted would have made any difference. Bianca Barnes is an unfortunate child who has a congenital problem that was undiagnosed. . . . . We simply cannot reverse that process."); Tr. 663:11-12 ("colloid cyst is a very rare condition"); Tr. 702:14-29, 703:1-14 (fall unrelated to colloid cyst or symptoms (of the cyst blocking the flow of fluid) had already started, causing the fall); Tr. 758:13-15 ("[Bianca] had something that nobody knew she had, which was a colloid cyst of the third ventricle, and nobody knew that.").

In short, Bianca's death due to the dislodged colloid cyst was not a reasonably foreseeable consequence of Spotlite's alleged negligence. For this reason and because all damages recovered by plaintiff are for Bianca's death from the colloid cyst (R. 899-900; R.E. 5-6), this Court should reverse the jury verdict and judgment of the trial court; and render judgment that plaintiff take nothing and her claims against Spotlite be dismissed with prejudice.

C. Spotlite Met its Duty of Supervision in This Case.

When analyzed under the applicable legal standard, the record contains no evidence that supports a finding that Spotlite failed to meet its duty of supervision in this case. As an initial matter, Bianca's mother testified that Bianca's uncle gave Bianca permission to go skating. Tr. 809:22-26. In the skating context under Mississippi law, "a person who participates in the diversion afforded by an amusement or recreational device accepts, and assumes the risk of, the dangers that adhere in it so far as they are obvious and necessary." *Blizzard v. Fitzsimmons*, 10 So. 2d 343, 344 (Miss. 1942); *see Holley v. Funtime Skateland South, Inc.*, 392 So. 2d 1135, 1137 (Miss. 1981).

With respect to Spotlite's duty to its patrons, roller rinks owe "invitees a duty to keep the premises in a reasonably safe condition but are not insurers of invitees' safety." *Sullivan v. Skate Zone, Inc.*, 946 So. 2d 828, 831 (Miss. Ct. App. 2007). The *Blizzard* Court articulated the standard pertaining to supervision: "Defendant is liable for the consequences of the series of falls which occurred after the time when a reasonable degree of watchfulness would have disclosed the total inability of the boy to skate **and the likelihood of some serious injury on account thereof.**" 10 So. 2d at 344-45 (emphasis added).

Though Marvin Miller (the Spotlite skateguard) testified that he was told Bianca did not know how to skate (Tr. 1071:28-29), there is no evidence whatsoever that Miller could have reasonably known of the "likelihood of some serious injury on account" of Bianca falling **one** time. *Cf Blizzard*, 10 So. 2d at 345 (boy falling some forty to fifty times while skating enough to provide reasonable notice of likelihood of serious injury). Spotlite had no way of knowing that a minor fall—or any fall—might dislodge a colloid cyst in Bianca's head and cause her death. In fact, no one knew this might happen because the colloid cyst was an undiagnosed medical condition. Tr. 558:15-20.

Indeed, there is no evidence Bianca was bumped, or stumbled on the floor, or was tripped. All testimony shows she simply fell. Under these circumstances, the testimony of plaintiff's skate expert regarding breach of standard of care as to maintenance or supervision (*see* Tr. 310-12) fails to show any breach of duty owed by Spotlite under the actual facts and applicable law in this case. The fact that a beginning skater falls down one time does not mean that a skating rink is liable for negligent supervision. "The basis of liability is negligence and not injury. Proof merely of the occurrence of a fall on a floor within business premises is insufficient to show negligence on the part of the proprietor." *Sullivan* 946 So. 2d at 831. If the law were otherwise, then every skating rink in the country would be liable for negligent supervision. Falling down is not only an inherent risk in skating, but it is an inescapable part of the learning process.

Finally, even if Spotlite knew or should have known that allowing Bianca would expose her to a likelihood of serious injury, Spotlite did exactly what is required of it under *Blizzard.* Spotlite's skateguard was watching Bianca the entire time she skated. Tr. 1071:27-29, 1072:1-8. He guided her onto the skate floor, but let her skate unaided after she "persisted in [that] she wanted to do it by herself." Tr. 1071:27-29, 1072:1. As soon as she fell, he rushed to her aid, picked her up, and took her off of the skate floor. Tr. 1072:6-8. Such actions are completely reasonable and are consistent with what is required of a skating rink under Supreme Court precedent.

D. Spotlite Met its Duty to Provide Reasonable Aid to Bianca.

Similarly, when analyzed under the applicable legal standard, the record contains no evidence that Spotlite failed to meet its duty of providing appropriate medical attention. The appropriate standard of care with respect to medical attention is that Spotlite "use reasonable care to see that one injured on the premises and by the operation of its business receives prompt and

proper care and treatment to the end that his injuries . . . may not be aggravated by unnecessary and avoidable delay or inattention." *Meador v. Hotel Grover*, 9 So. 2d 782, 785 (Miss. 1942). Particularly relevant here is that Spotlite has breached no duty of care if its "conduct was reasonable in light of what it could anticipate." *Foster by Foster v. Bass*, 575 So. 2d 967, 975 (Miss. 1990).[8]

In *Foster by Foster,* this Court affirmed summary judgment in favor of an adoption agency, Catholic Charities, which was sued by the adoptive parents for failure to test the adoptive baby for PKU. Noting "the rarity of the disease," the fact that "it does not manifest itself in the natural parents" and that a baby shows no symptoms of the disease when born, the Court found that Catholic Charities "had no reason to know . . . or experience giving it cause to inquire about a test for the disease." *Id.* at 975-76. Accordingly, the Court held that the adoption agency was not liable for the illness because "Catholic Charities reasonably could not have foreseen the injury." *Id.* at 981.

Like Catholic Charities in *Foster by Foster*, Spotlite had no reason to know that Bianca had a colloid cyst because of the rarity of the affliction and because she showed no symptoms of serious injury. As such, Spotlite provided Bianca with reasonable medical care in light of what it could have anticipated - - as shown by the record proof.

After Bianca had fallen, the skateguard rushed to her aid, picked her up, and took her off of the skate floor. Tr. 1072:6-8. He took her to the sitting area and examined her head. Tr. 1072:16-17. The guard did not see any cuts, or bumps or bleeding. Tr. 1072:23-27, 1084:21-24. He got a towel from his locker, put some ice in it, and put it on Bianca's head. Tr. 1073:2-12.

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[8] The standard for determining whether the actor should have foreseen the probability of harm from his conduct is "an external one, from the point of view of the actor prior to [the] occurrence." *Id.*

He then tried to call Bianca's mom several times at home, but could not reach her. Tr. 1073:17-19, 23-26. Bianca told him that she was "alright." Tr.1075:16.

The attendant at the concession stand also came by to check on Bianca. Tr.1057:7-12. She asked Bianca if she was feeling any pain, but Bianca just said that she was hot. Tr. 1060:28-29, 1061:1-3. The attendant got Bianca a bag of ice to rub on her forehead and around her neck. Tr. 1058:7-10. Bianca told the attendant that she was "okay." Tr. 1064:12-15. The attendant said "if you need me, call me, and I'll come back." Tr. 1058:17-18. When the attendant went to check on Bianca twenty or thirty minutes later, she had gone back to the rink (the skate session had been converted to a dance session). Tr. 1058:18-20, 1061:21-29.

Not only did Bianca say that she was "okay," but everyone thought that she was okay—including the skateguard (Tr.1075:16), the concession stand attendant (Tr. 1064:13-15), her cousins (Tr. 222:3-5, 239:1-3), the van driver (Tr. 1096:9-11), the chaperone on the van (Tr. 1099:28-29, 1100:1-4, 14-21), even her mother (Tr. 813:12-17) and her uncle. Tr. 252:11-17. This is because Bianca showed no signs of serious injury.

Bianca had a minor fall on the skating rink floor—she did not black out, her head was not bleeding, she did not have a headache, she had no cuts or bumps or bruising. Tr. 1065:18-20, 1066:5-6, 1072:21-27, 1084:21-24. Shortly after she fell, Bianca went back to play with her friends. Tr. 1058:18-20, 1061:21-29, 1067:4-5. Later on that evening, she drank a Slushi at the concession stand. Tr. 1067:3-4. When she got on the van to go back home, the driver said that she looked "normal." Tr. 1096:9-11. Bianca did not cry or complain on the way to Ruleville. Tr. 209:13-14. When her mother picked her up at her cousin's house, she said that Bianca had no apparent injury. Tr. 813:12-17. Bianca did not tell her mother that she had fallen. Tr. 814:23-26. Before she went to bed that night, Bianca did not complain about any physical problems to her mother or her uncle. Tr. 252:11-17. It was not until four o'clock in the morning that she started

to show signs that something was seriously wrong with her. Tr. 789:3-11. Her problems were the result of an undiagnosed tumor which had dislodged in her head. Tr. 771:19-27, 663:11.

The only medical testimony that was presented on this issue at trial shows that Spotlite reasonably cared for Bianca. Dr. Segal, an expert in the field of neurosurgery, explained:

> Q. Do you agree that a 10-year-old child that had fallen and hit her head should be evaluated by a physician?
>
> A. No, not necessarily.
>
> Q. Not necessarily, all right, why not?
>
> A. Because there may be no great problem. If every 10-year-old who today falls and bangs their head has to be evaluated by a physician, every emergency room in the country would be overrun with probably very healthy children.
>
> Q. Should Bianca have been evaluated by a physician that evening when she hit her head?
>
> A. No, she was not knocked out. She had no great bruising. There was no evidence of bleeding or fracture. She was fine after a few minutes according to the records I have.
>
> No, if she were my child, I would have said, "How are you feeling, you're okay, I know it hurts, stop crying," and I would have carried on normally because it's not the severity of the accident which, in this case, would have made people want to treat her.
>
> **The only thing that makes you want to treat her is the fact that she had something that nobody knew she had, which was a colloid cyst of the third ventricle, and nobody knew that.**

Tr. 757:22-29, 758:1-15 (emphasis added).

Spotlite could not have reasonably anticipated that a minor fall—or any fall—would cause a colloid cyst to dislodge in Bianca's head, clog a ventricle, and cause her to be brain dead within a matter of hours. The medical attention that Spotlite provided Bianca was reasonable under the circumstances. Spotlite provided care commensurate with the injury—a minor fall causing no apparent harm.

E. No Action or Inaction by Spotlite Was the Proximate Cause of Bianca's Death.

Even if plaintiff had shown Spotlite breached any duty owed Bianca, there is no evidence that any action or inaction on Spotlite's part caused Bianca's death. To impose liability on one "who does a particular act which results in injury to another . . . the act must be of such character, and done in such a situation, that the person doing it should reasonably have anticipated that some injury to another will probably result therefrom." *Mauney v. Gulf Refining Co.*, 9 So.2d 780, 780-81 (Miss. 1942) (citation omitted). Particularly relevant here, an "actor is **not bound to a prevision or anticipation which would include an unusual, improbable, or extraordinary occurrence, although such happening is within the range of possibilities."** *Id.* at 781 (emphasis added).[9] The rationale behind this rule is that it would "impose too heavy a responsibility for negligence to hold the tortfeasor accountable for what was unusual and unlikely to happen, or for what was only remotely and slightly probable." *Id.*

Under this standard, nothing Spotlite did, or did not do, was the proximate cause of Bianca's death. Bianca died when a colloid cyst dislodged in her head and clogged a ventricle, resulting in the build-up of intracranial pressure that eventually caused her brain death. Tr. 379:22-29, 380:1-29, 381:1-12. The proximate cause of her death was an undiagnosed, pre-existing medical condition. As explained at trial by Dr. Chalhub, a neurologist: "[N]othing that could have been done or was omitted would have made any difference. Bianca Barnes is an

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[9] *See Donald v. Amoco Prod. Co.*, 735 So. 2d 161, 175 (Miss. 1999) ("A defendant is obligated solely to safeguard against reasonable probabilities and is not charged with foreseeing all occurrences, even though such occurrences are within the range of possibility."); *Gulf Refining Co. v. Williams,* 185 So. 234, 235 (Miss. 1938) (One is "liable for all such harm as a reasonably prudent person would or should have anticipated as the natural and probable consequences of his act."); *see also Smith v. U.S.*, 284 F. Supp. 259, 262 (D.C. Miss. 1967) ("A person charged with negligence in that he should have anticipated the probability of injury from an act done by him is not bound to a prevision or anticipation which would include an unusual, improbable or extraordinary occurrence, although such happening is within range of possibilities.") (citing Mississippi cases).

unfortunate child who [had] a congenital problem that was undiagnosed . . . . We simply can not reverse that process." Tr. 558:15-20. That Bianca's cyst dislodged and clogged a ventricle resulting in her death is surely an "unusual, improbable, or extraordinary occurrence." Holding Spotlite liable for her death here would "impose too heavy a responsibility for negligence" - - an impermissible result under Mississippi law.

F. The Trial Court Erred in Allowing Plaintiff's Economist to Testify Regarding Bianca's Lost Wages, Lost Entitlements and Lost Fringe Benefits.

Over Spotlite's continuing objection (Tr. 917:23-26),[10] the trial court allowed plaintiff's economist, Dr. George Carter, to testify regarding Bianca's lost wages, lost entitlements and lost fringe benefits. Tr. 898:20-29; 912:13-19; 916:16-28. *See generally*, Tr. 898-917. Dr. Carter's testimony and calculations on these issues totaled $503.379.00. Tr. 989-99; 915-16. It was an abuse of discretion to allow Dr. Carter's testimony on these issues because it did not meet the "reliability" standard under *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993) and Miss. R. Evid. 702. Dr. Carter failed to consider the requisite "facts and data" necessary to allow his opinion to be presented to the jury. His opinion on these subjects should have been excluded.

The admission of expert testimony is governed by Miss. R. Evid. 702, as amended on May 29, 2003:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Miss. R. Evid. 702; *Mississippi Transp. Comm'n v. McLemore,* 863 So. 2d 31, 35 (Miss. 2003). In applying the modified *Daubert* rule, a trial court's basic "gatekeeping responsibility" is to be

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[10] In addition to his continuing objection, trial counsel for Spotlite also joined in the *Daubert* arguments of counsel for the other defendants. Tr. 912:3-12.

taken seriously: "[T]he *Daubert* test has effectively tightened, not loosened, the allowance of expert testimony." *McLemore*, 863 So.2d at 38; *see* Comment, Miss. R. Evid. 702 ("By the 2003 amendment . . . the Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable.").

Relevant here is the *Daubert* requirement that the expert's opinions are "reliable." Specifically, the *McLemore* court adopted the federal standard set forth in *Daubert*, as modified by *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), for assessing the "reliability" of expert testimony. That standard requires a party offering expert testimony to first establish that the testimony is relevant, and, second, that it is "reliable" - - i.e., based on "sufficient facts and data" as Rule 702 requires. *See Dedeaux Utility Co., Inc. v. City of Gulfport,* 938 So. 2d 838, 843 (Miss. 2006); *Webb v. Braswell,* 930 So. 2d 387, 398 (Miss. 2006); *Brooks v. Stone Architecture, P.A.* 934 So. 2d 350, 354 (Miss. Ct. App. 2006); *Fresenius Medical Care and Continental Cas. Co. v. Woolfolk ex rel. Woolfolk,* 920 So. 2d 1024, 1032 (Miss. Ct. App. 2005). The modified *Daubert* rule is not limited to scientific expert testimony--rather, the rule applies equally to all types of expert testimony. *Kumho Tire*, 526 U.S. at 147.

It is the burden of the party advancing expert testimony to prove, and not the opposing party's job to disprove, "that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation." *McLemore,* 863 So. 2d at 36; *see Dedeaux Utility Co., Inc.,* 938 So. 2d at 843. Plaintiff failed to do so in this case. Accordingly, because Dr. Carter failed to consider the requisite "facts and data," his testimony regarding lost wages, future benefits and future entitlements should have been excluded as unreliable.

Specifically, in assessing values for Bianca's lost wages, Dr. Carter's figures are based on the typical college-educated female in the United States, married to a college educated male,

with the further assumption that Bianca would continue to work throughout her entire theoretical work life. Tr. 942-44. These assumptions are not reliable under *Daubert* because, in making these assumptions, Dr. Carter ignored key factors that undoubtedly would affect Bianca's wage earning capacity.

Specifically, Dr. Carter admittedly did not take into consideration Bianca's congenital colloid cyst (Tr. 942:22-24) which could (and did) shorten her lifespan; nor did he account for any specific personal characteristics;[11] or Bianca's home and community environment, economic status and other environmental predictors.[12] These are all factors considered relevant by this Court in *Greyhound Lines, Inc. v. Sutton, 765 So. 2d 1269, 1277 (Miss. 2000)*. Though the *Greyhound* court allowed these factors to be addressed on cross-examination, that case was decided before this Court adopted the "tightened" gate-keeping responsibility of the trial court under Miss. R. Evid. 702 and *Daubert*. *See McLemore,* 863 So. 2d at 35 (recognizing adoption of Daubert standard under Miss. R. Evid. 702, as amended May 29, 2003). In keeping with *Daubert's* reliability requirement, these factors should have been accounted for in forming Dr. Carter's opinions. Because Dr. Carter considered none of these factors, his opinion on lost wages should have been excluded.

Similarly, Dr. Carter's calculations with respect to future benefits and entitlements are patently speculative: He attempts to attach a monetary value to future benefits such as Medicare and Social Security which may not even be recognized. *See* Tr. 936:14-23. As to other fringe benefits he assesses, such as unemployment compensation and workers' compensation (*id.*), the

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[11] *See* Tr. 942:19-28 (admitting his calculations based on "typical" person, without taking into account what type of student Bianca was or her mentality).

[12] *See* Tr. 944:6-14 (assumed typical college-educated female in the United States, rather than the Mississippi Delta).

relevant point is that Dr. Carter assumed full-time employment over the course of Bianca's life. Tr. 942:14-15. There is no basis whatsoever for an assessment of benefits such as workers' compensation or unemployment compensation under that assumption. Though Dr. Carter separately assessed these items, they are, in fact, an inherent part of the wages earned over one's life and covered by the recovery of lost wages.

Exclusion of Dr. Carter's testimony on these issues is particularly important in the expert context, given the potential that a jury may give added weight to his opinions in light of Dr. Carter's "expert" status. *See Daubert*, 509 U.S. at 595 (acknowledging "powerful" nature of expert evidence requires judge to exercise thorough analysis of admissibility under Rule 403), quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991). This concept is particularly relevant here - - the jury's verdict of $600,000.00 is very close to the $503,379.00 amount provided by Dr. Carter in his testimony. It was the trial court's duty to exclude such testimony and its failure to do so was an abuse of discretion.

CONCLUSION

For the foregoing reasons, Spotlite respectfully requests that this Court reverse the jury verdict and decision of the trial court and render a judgment in favor of Spotlite that it is not liable for the death of Bianca and that plaintiff may not recover any damages against it. Alternatively, Spotlite respectfully requests that this Court reverse and remand for a new trial because it was reversible error to allow the testimony of plaintiff's economist on lost wages, lost entitlements and lost fringe benefits to be presented to the jury.

THIS, the 13th day of July, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing Brief of Appellant Spotlite Skating Rink, Inc. to be delivered by United States mail, postage prepaid, to the following:

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SO CERTIFIED, this the 13th day of July, 2007.

LeAnn W. Nealey

CERTIFICATE OF FILING

I, LeAnn Nealey, certify that I have had hand-delivered the original and three copies of the Brief of Appellant Spotlite Skating Rink, Inc. and an electronic diskette containing same on July 13, 2007, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

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