

IN THE SUPREME COURT OF MISSISSIPPI

Case # 2006-CA-01275

BARBARA DOTSON, *Plaintiff, Appellant*

vs.

PAUL JACKSON, M.D., *Defendant, Appellee*

In Appeal from the Circuit Court of Hinds County, Mississippi

REPLY BRIEF OF APPELLANT BARBARA DOTSON

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ARGUMENT

I. PLAINTIFF SUBMITTED AN AFFIDAVIT FROM A QUALIFIED EXPERT THAT ESTABLISHED A PRIMA FACIE CASE

Defendant/Appellee, Paul D. Jackson, M.D., has filed his response brief with this Court and argued that Plaintiff/Appellant Barbara Dotson failed to present a prima facie case of medical malpractice to the trial court. Defendant accurately described Plaintiff's burden. Plaintiff must present expert testimony to establish the standard of care, how Defendant breached the standard of care and how the Defendant's breach of the standard of care proximately caused or contributed to Plaintiff's injuries. (Response Brief at 10, citing *Barner v. Gorman*, 605 So.2d 805 (Miss. 1992), *Boyd v. Lynch*, 493 So.2d 1315 (Miss. 1986), *Palmer v. Anderson Benevolent Association*, 656 So.2d 790 (Miss. 1995), and *McCaffrey v. Puckett*, 784 So.2d 197 (Miss. 2001)). Moreover, Defendant pointed out that except in cases where the layman's exception applies, plaintiffs must offer evidence of these elements through the introduction of testimony by an expert qualified through experience and training to provide such testimony.

Plaintiff submitted an affidavit executed by Dr. Norman Reiss to satisfy this burden of proof. (Supp.R. at 37). Plaintiff was not able to submit this affidavit to the trial court before the hearing on Defendant Jackson's Motion for Summary Judgment because Dr. Reiss had retired and did not have access to a fax machine. (Supp.R. at 21 and 37). Counsel for Plaintiff was able to reach Dr. Reiss by telephone prior to the hearing, however. (Supp.R. at 21). In her conversation with Dr. Reiss, Plaintiff's counsel was able to confirm that Dr. Reiss's opinion was that Defendant Jackson had breached the applicable standard of care in his surgical treatment of Plaintiff. *Id.* Dr. Reiss authorized plaintiff's counsel to submit an affidavit confirming that it was Dr. Reiss's expert opinion that

1. the acts and omissions of Defendant Jackson were the proximate cause of and contributed to Plaintiff's injuries;
2. Defendant Jackson failed to adhere to the applicable standard of care;
3. Defendant Jackson failed to anticipate and ascertain whether the pelvic structures in Ms. Dotson were movable prior to the surgical procedure.
4. Dr. Jackson failed to properly anticipate the necessity for a urology consult before he lacerated the bladder of Ms. Dotson.
5. The urologist was not consulted, nor considered based on the medical records, as part of the preoperative teaching, but only after the emergency arose, in order to repair Ms. Dotson's lacerated bladder.

(R. 223)(Supp.R. 21)

All of these allegations were presented in Plaintiff's Designation of Expert. (R. at 223). All of these allegations were drawn from a letter written on March 24, 2002, to Plaintiff's counsel by Dr. Reiss. (Supp.R. 23). This letter was attached to the affidavit submitted by Plaintiff's counsel to the trial court during the hearing on Defendant Jackson's Motion for Summary Judgment. (Supp.R. 21). In this letter, Dr. Reiss stated his opinion that it was significant that a urologist was not consulted prior to the surgical procedure. (Supp.R. 24). Dr. Reiss also states his opinion that it "is against the Standard of Care to injure the bladder {laceration of bladder} during the performance of a vaginal and or abdominal hysterectomy". (Supp.R. 23).

Defendant Jackson accurately pointed out that the trial court did not grant Defendant Jackson's Motion to Strike the affidavit submitted by Plaintiff. (Respondent's Brief at 20). Thus, this Court must determine the sufficiency of that affidavit under the applicable standard for medical

malpractice. In that affidavit, Dr. Reiss testified that it was his “opinion, to a reasonable degree of medical certainty, that Dr. Paul Jackson breached the acceptable standard of care when, during his laparoscopic hysterectomy on Ms. Dotson, he cut her bladder”. (Supp.R. 37). Moreover, Dr. Reiss testified that this breach of the standard of care caused her injury. (Supp.R. 37). Dr. Reiss went on in his affidavit to detail the actions required under the applicable standard of care. Id. He testified that “the operating surgeon should anticipate possible bladder injury . . . and should take the time to properly examine a patient before he or she is brought into the operating room.” Id. Dr. Reiss specifically provided testimony through his affidavit about Dr. Jackson’s failure to “conduct a proper examination of Ms. Dotson.” Id.

This testimony, standing alone, presented the trial court with a genuine issue of material fact, concerning whether Dr. Jackson’s preparatory examinations were sufficient under the applicable standard of care and whether Dr. Jackson breached that standard of care in actually cutting Plaintiff’s bladder during her hysterectomy.

Defendant Jackson, despite having pointed out that the trial court did not grant his Motion to Strike, failed to acknowledge or address the fact that he submitted no countervailing affidavit to oppose the affidavit executed by Dr. Reiss and submitted by Plaintiff. Thus, this Court must determine the sufficiency of the unopposed testimony presented by Dr. Reiss. Defendant Jackson vehemently opposed Plaintiff’s position that even without Dr. Reiss’s testimony, this case falls under the “Layman’s Exception.” Ironically, while arguing this, Dr. Jackson also presented arguments unsupported by medical testimony that concern Dr. Reiss’s opinions. In his Response, Defendant Jackson argued that the term “possible complication” negates the possibility that medical negligence occurred. (Response Brief at 16). Defendant offered no qualified medical opinion to support this

argument.

Under Mississippi Rule of Civil Procedure 56, a trial court views all evidence in a light favorable to the non-movant. *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss.1993). In making a determination as the propriety of a Defendant's motion for summary judgment, the court "should presume that all evidence in the non-movant's favor is true." *Id.* Here, Plaintiff presented unopposed testimony that Defendant "Jackson failed to conduct a proper examination of Ms. Dotson[,] and that Defendant Jackson "breached the acceptable standard of care when, during his laparoscopic hysterectomy on Ms. Dotson, he cut her bladder." (Supp.R. 37). This unopposed testimony established the standard of care, i.e. to perform a proper examination to determine if the structures within the pelvis are non-moveable and to not cut the patient's bladder. *Busby v. Mazzeo*, 929 So.2d 369, 372 (Miss.App. 2006). Dr. Reiss also made clear through his affidavit that it was his expert opinion that Defendant Jackson failed to properly conduct such an examination. (Supp.R. 37). The affidavit clearly established Dr. Reiss's opinion that Defendant Jackson's negligent actions resulted in injury to Plaintiff. *Id.* ("it was still a breach of the standard of care for him to have cut her bladder in the first place, causing her injury"). *Barner v. Gorman*, 605 So. 2d 805, 808-809 (Miss. 1992).

This Court reviews the record de novo to determine whether a motion for summary judgment was properly granted. *Lowery v. Guaranty Bank and Trust Co.*, 592 So.2d 79, 81 (Miss.1991). Here, Plaintiff presented an unopposed affidavit in support of her allegations concerning the applicable standard of care, the actions and inactions of Defendant Jackson that violated that standard of care and that those actions and inactions led to her injuries. (Supp.R. at 37).




CONCLUSION

Plaintiff respectfully requests that this Court find that the trial court erred in finding that Plaintiff failed to sustain her burden in opposing Defendant's Motion for Summary Judgment and find that the unopposed affidavit sworn to by Dr. Norman Reiss established that genuine issue of material fact exist in this case. Plaintiff further requests that this Court reverse the trial court's order granting summary judgment and remand this matter to the trial court for trial on the merits.

Respectfully submitted, this the 31st day of March, 2008.

**BARBARA DOTSON
APPELLANT**

By: 
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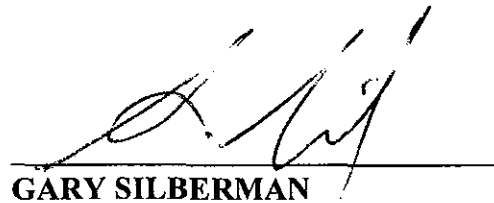
CERTIFICATE OF SERVICE

I, **Gary Silberman**, hereby certify that I have this day mailed via U. S. Mail, postage pre-paid, a true and correct copy of the foregoing , **Reply Brief of Appellant** to the following persons:

**Hon. Richard A. Smith
Circuit Court Judge
P. O. Box 1953
Greenwood, MS 38935-1953**

**Clinton M. Guenther, Esq.
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This 31st day of March, 2008.


GARY SILBERMAN