

**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**

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**BRIEF OF APPELLANT BARBARA DOTSON**

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*Oral Argument Requested*

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this Case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Richard A. Smith, Washington County Circuit Court Judge
2. Paul Jackson, M. D.
3. Attorneys for Paul Jackson, M. D., Clinton M. Guenther, at the law firm of Upshaw, Williams, Biggers, Beckham & Riddick, LLP.
4. Attorneys for Appellant, Isaac K. Byrd, and Suzanne Keys, at the law firm of Byrd and Associates, PLLC.
5. Plaintiff, Barbara Dotson

  
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SUZANNE KEYS  
*Attorney for Appellant*

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## **STATEMENT OF THE ISSUES**

The Plaintiff, Barbara Dotson, by counsel, pursuant to M.R.A.P. 28(a)(3), files her Statement of the Issues, as follows:

- I. Whether the trial court erred in granting summary judgment when the plaintiff produced evidence of the identity of an expert and what he would testify to?
- II. Whether the plaintiff made out a primie facie case for medical malpractice?
- III. Whether the facts in this case are such that the layman's exception in medical malpractice cases apply?

## **STATEMENT OF THE CASE**

On August 8, 2000, Defendant Dr. Paul Jackson performed laparoscopic surgery on Plaintiff Barbara Dotson at the King Daughter' Hospital ( R. 76-77, 82, 85). During the procedure Dr. Jackson lacerated the bladder of Ms. Dotson (R.165). Dr. Jackson contacted Dr. Robert Curry to repair Ms. Dotson's bladder (R. 76-77). Ms. Dotson's bladder did not function properly (R. 65). On November 13, 2000, Dr. A. Wee, a neurologist diagnosed Ms. Dotson with Meralgia Paretica as a result of her surgery (R. 62-63).

### **1. Nature of the Case**

This is a medical malpractice case arising from an allegation of negligence by Dr. Paul Jackson.

### **2. Course of the Proceedings**

On August 31, 2001 Ms. Dotson filed suit in the Circuit Court of Washington County,

Mississippi (R. 4). In February and March of 2002 discovery began. Notably, in March Plaintiff and Defendant both designated experts (R. 138-152). In October of 2002, Defendant filed for Motion for summary judgment. On October 25, 2002, plaintiff answered that Motion ( Supp. R. 4-27). On June 4, 2006, Byrd and Associates filed an affidavit by Attorney Suzanne Keys stating what the Plaintiff's previously designated expert would testify to. (Supp. R. 21-22). On June 5, 2006, the Circuit Court heard oral arguments on the Defendant's Motion for Summary Judgment. Plaintiff filed an affidavit by Dr. Norman Reiss prior to the entry of the summary judgment order (Supp. R.37)

### **3. Disposition in Circuit Court**

The order for summary judgment was entered on June 19, 2006 (R. 275). Plaintiff appealed (R. 3).

### **SUMMARY OF THE ARGUMENT**

This Court has made clear that summary judgment is an extreme sanction and should not be granted except under extreme circumstances. *McFadden v. State*, 580 So2d. 1210 (Miss. 1991). Plaintiff designated an expert and provided sufficient information to place defendant on notice of that expert's opinion. Moreover, Plaintiff filed an affidavit from her expert prior to the trial court's order granting summary judgment. The trial court erred in granting summary judgment in that the plaintiff had presented sufficient evidence and showed that there was an issue of material fact.

Additionally, this court has acknowledged a Layman's exception to the requirement for an expert opinion in a medical negligence case. This case where surgery on the plaintiff's reproductive system resulted in injury to plaintiff's bladder, is such a case. The damaging of plaintiff's bladder during a hysterectomy can be observed as a matter of common sense to have been medical

negligence and such negligence needs an expert opinion to be recognized as such.

## ARGUMENT

### I. SUMMARY JUDGMENT STANDARD

The trial court erred in granting summary judgment to the defendant. A motion for summary judgment should be overruled unless the trial court finds beyond a reasonable doubt, that the plaintiff any facts to support his claim. *McFadden v. State*, 580 So.2d 1210 (Miss 1991); *Busby v. Mazzeo* 929 So.2d 369, 373; *Erby v. North Mississippi Medical Center* 654 S0.2d 495. Summary judgment should not be liberally granted. *Id.* In the instant case, the trial court granted summary judgment because it found that no expert affidavit was timely filed. In doing so, the trial court erred.

Prior to the hearing on Defendant's motion for summary judgment, the Plaintiff served her response to motion for summary judgment, containing an affidavit signed by counsel Suzanne Keys which stated what the expert would testify (Supp. R. 37). Dr. Reiss, the plaintiff's expert, had previously been designated as an expert and the defendant was aware of the identity of the expert, what he would testify to and his qualifications for four years prior to the summary judgment ruling (R. 38). It is settled law that there is no magic form to which a plaintiff's supporting expert opinion must conform so long as it is apparent. *Palmer v. Anderson Infirmary Benevolent Association*, 564 So.2d 1346 (Miss. 1995); *Kelley v. Frederic*, 573 So.2d 1385, 1389.

Defendant had notice concerning who the expert was and to what he would testify. Thus, there was a genuine issue of material fact as to whether or not the cutting of the bladder was a negligent act. The spirit of the rule requiring an expert affidavit is to ensure that Plaintiffs do not bring frivolous cases that cannot be supported by a qualified expert. Defendants have not challenged the professional competency of Dr. Reiss, only that a technical requirement has not been met. It

would be unfair to the plaintiff to dismiss her case on a technical basis, when the plaintiff complied with spirit and essence of the law.

The affidavit was filed prior to the summary judgment ruling (Supp. R. 37). The Defendant would not have been prejudiced in any way had the trial court allowed Plaintiff additional time to resubmit an affidavit. Additionally, the identification of the expert and what he would testify to together is sufficient to show that there was a genuine issue of material fact.

In *Maxwell v. Baptist Memorial Hospital- Desoto Inc.* 2007 So.2d (2005-CA-01518-COA), the Court of Appeals reversed the trial court's decision granting summary judgment. As in the instant case, the Plaintiff designated experts and informed the other side as to what those experts would testify. The defendants in that case moved for summary judgment, citing that the plaintiff failed to make out a *prima facie* case of negligence.

The Court of Appeals in *Maxwell* considered the *totality of the pleadings, including the answers to interrogatories*. in finding that the trial court erred in not permitting the plaintiff the opportunity to have a continuance. *Maxwell, Supra*. In the instant case, the trial court should have given more weight to the pleadings, the qualifications of the expert, and the fact that the expert had given an opinion contradicting the opinion of the defendant's expert. The trial court committed reversible error in failing to find that there was a genuine issue of material fact.

If the trial court found that the proffered affidavit was insufficient or needed supplementation then a continuance should have been granted pursuant to rule 56 (f) of the Mississippi Rules of Civil Procedure. A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. *Id.* Accordingly, the court cannot try issues of fact on a summary judgment motion; it may only determine whether there are

issues to be tried. The court should examine all evidence introduced on a summary judgment motion simply to determine whether a litigious issue exists, rather than for the purpose of resolving that issue. *Id.* A summary judgment procedure cannot be used to deprive a litigant of a full trial of genuine fact issues. *Id.*

Unless the trial court is reversed, then the plaintiff will lose her constitutional right to have her case heard.

## **II. THE STANDARD IN MEDICAL MALPRACTICE CASES**

In order to prevail in a suit based on negligence in a medical malpractice action the plaintiff must meet the following four elements. (1) The plaintiff must show that the defendant had a duty to act in accordance with a standard of reasonable care so as to prevent injury to a foreseeable plaintiff. (2) The plaintiff must show that the defendant failed to meet that standard. (3) The plaintiff must show that the defendant's failure to meet the standard was the proximate cause of the plaintiff's injury, and (4) The plaintiff must prove damages as a result of the defendant's conduct. See *Palmer* at 1355; *Erby v. North Mississippi Medical Center*, 654 So.2d 454, 499.

The plaintiff via the entire pleadings has shown that she can meet her case (R. 165-167). The facts are that Dr. Jackson had a duty to remove the uterus of Ms. Dotson in a safe manner. *Id.* He failed to accomplish that when he cut the bladder. His cutting the bladder caused the defendant to endure a surgery within a surgery causing her additional unanticipated pain and caused her bodily functions not to work properly. *Id.* The trial court granting summary judgment has circumvented the fact finding process, thus robbing the plaintiff of her right to be heard.

## **III. LAYMEN'S EXCEPTION**

In limited circumstances the elements of negligence may be met without expert testimony.

*Smith Ex Rel. Smith v. Gilmore Memorial Hospital*, 925 So.2s 177, 181 (Miss. 2007); *Sheffield v. Goodwin*, 740 So.2d 854 (Miss 1999). The negligence of a physician may be established in an instance where a layman can observe and understand the negligence as a matter of common sense and practical experience. *Id.* A fact finder could conclude as a matter of common sense that Dr. Jackson was negligent based on the fact that after cutting the bladder he had an unauthorized surgeon to repair it. It does not take a doctor to figure out that if cutting the bladder was a regular part of the surgery, then there would be no need to have another surgeon to repair it.

Additionally, the bladder is not a part of the female organs that is removed during a hysterectomy. A ninth grade biology student knows that the bladder is not a part of the reproductive system.

Should the Court hold that the plaintiff failed to present enough evidence to survive a summary judgment motion because the affidavit was untimely or unacceptable, then the Court should hold that the nature of the injury and facts of the case are such that a layman could conclude that Dr. Jackson's actions were negligent. The question for a fact finder to decide is simply should the bladder be cut in a hysterectomy.

### **CONCLUSION**

This matter should be reversed and remanded to the lower court with instructions to allow the plaintiff to present an expert affidavit or the court should accept the submitted affidavit and other evidence as being sufficient to survive a summary judgment motion.

Respectfully submitted, this the 11<sup>th</sup> day of January, 2008.

**BARBARA DOTSON**  
**Appellant**

By: Suzanne Keys  
**SUZANNE KEYS**  
**OF COUNSEL FOR APPELLANT**

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**Of Counsel for Appellants**

**CERTIFICATE OF SERVICE**

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

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

**Hon. Clinton M. Guenther**  
**Upshaw, Williams, Biggers, Beckam, & Riddick,LLP**  
**Post Office Drawer 9230**  
**Greenwood, MS 38935-8230**

This 11<sup>th</sup> day of January, 2008.

  
\_\_\_\_\_  
SUZANNE KEYS