

**2006-CT-00025-SCT**

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**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

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**HARRIETT CANTRELL**

**APPELLANT**

**VS.**

**CASE NO. 2006-CT-00025-SCT**

**JAMES R. GREEN, JR., M.D. and  
MERIDIAN ORTHOPEDIC CLINIC**

**APPELLEES**

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**ON APPEAL FROM THE CIRCUIT COURT OF  
LAUDERDALE COUNTY, MISSISSIPPI  
HONORABLE ROBERT W. BAILEY, CIRCUIT JUDGE**

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**SUPPLEMENTAL BRIEF OF APPELLEES  
ON GRANT OF CERTIORARI**

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The Appellees, James R. Green, Jr., M.D. ("Dr. Green") and Meridian Orthopedic Clinic ("Clinic"), through counsel, pursuant to Rule 17(h), M.R.A.P., submit this supplemental brief in support of their position that this Court should reverse the decision of the Court of Appeals and reinstate the trial court's Final Judgment on Directed Verdict.

**I. INTRODUCTION**

The Court of Appeals failed to apply the appropriate standard of appellate review in reaching its decision in this case. The Court of Appeals failed to note, much less give any credence to the deference allowed Mississippi trial courts when determining whether a jury issue is present. Moreover, Dr. Green and the Clinic submit that the Court of Appeals ignored, overlooked or misunderstood several points of fact which when properly considered demonstrate that the trial court properly directed a verdict at the close of plaintiff's case. Specifically, the Court of Appeals misunderstood the meaning of "fixed" in the phrase "fixed abduction contracture" ("FAC")<sup>1</sup> as used

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<sup>1</sup>

The dissenting Judges demonstrated a clear understanding that a fixed abduction contracture means that the hip would be stuck and immovable. *Cantrell v. Green*, \_\_\_\_ So.2d \_\_\_\_, 2007 WL 2473221, \*5, fn. 3 (Miss. App. 2008).

by the testifying physicians. The Court of Appeals also ignored or misunderstood that the testimony of Ms. Cantrell's only expert, Dr. Roger Dee, was based on an **assumption** -- wholly unsupported by any credible evidence -- that Ms. Cantrell suffered from an FAC on June 20, 2000, the last time she saw Dr. Green.<sup>2</sup>

## **II. ARGUMENT AND AUTHORITY**

### **A. The Court of Appeals Failed to Apply the Appropriate Standard of Appellate Review.**

While the Court conducts a *de novo* review of a motion for directed verdict, *Morgan v. Greenwaldt*, 786 So.2d 1037, 1041 (Miss. 2001), it has long recognized that the observations and conclusions of the trial court play an integral role when deciding whether the grant or denial of a motion for directed verdict was proper. The trial court's determination is afforded "great respect". *James v. Mabus*, 574 So.2d 596, 600 (Miss. 1990) ("This Court gives the trial court's determination whether a jury issue was presented by the evidence great respect."); *see also, Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1177 (Miss. 1990); *Coca Cola Bottling Co., Inc. v. Reeves*, 486 So.2d 374, 380 (Miss. 1986); *Clayton v. Thompson*, 475 So.2d 439, 443 (Miss. 1985); *City of Jackson v. Locklar*, 431 So.2d 475, 479 (Miss. 1983).<sup>3</sup>

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<sup>2</sup>

Dr. Dee testified, without reservation, that he would not criticize Dr. Green's postoperative care if no FAC was present when Dr. Green last saw Ms. Cantrell on June 20, 2000. A.R.E. 4-5, Ex. 31, pages 66-67.

<sup>3</sup>

In briefing before the Court of Appeals, Ms. Cantrell argued that the trial court was not entitled to receive the deference described in these cases because it granted a directed verdict rather than a JNOV. That argument is unpersuasive. *See Clayton*, 475 So.2d at 443 (in deciding propriety of granting or denying directed verdict, "trial judge's determination... is entitled to great respect on appeal.") *See also, White v. Stewman*, 932 So.2d 27, 32 (Miss. 2006) (standard of review for directed verdict, peremptory instruction and JNOV are the same).

The Court of Appeals afforded little respect, if any, to Judge Bailey's determination that there was no issue to present for jury resolution. At the close of plaintiff's evidence, the trial court explained that based in part on his observation of plaintiff at trial -- an observation unavailable to the Court of Appeals or this Court -- there was no evidence that the purported FAC existed on June 20, 2000 or even at the time of trial, and, thus, that there was no factual issue to be decided by a jury. The Court of Appeals failed to even consider the trial judge's observations, much less give it the deference that the law allows.

This case is unique in the sense that the trial court was able to see evidence that the cold paper record does not adequately preserve. The trial judge saw the plaintiff's expert, Dr. Dee, demonstrate the appearance of a hip stuck as a result of an FAC.<sup>4</sup> The trial judge also twice observed Ms. Cantrell demonstrate her ability to move her hips, leg and pelvis. Unfortunately, these demonstrations, on which the trial court relied, are not recorded videographically in the record. As noted by the dissenting Judges of the Court of Appeals, "this appeal presents a particularly relevant situation in which the trial judge's determination of whether an issue of fact remains for the jury should be afforded great deference." 2007 WL 2473221 at \*5, ¶ 19.

**B. The Trial Court Correctly Determined That There was No Issue of Fact to be Resolved by a Jury.**

In an earlier case, the Court of Appeals described a trial court's responsibility in assessing whether a medical malpractice case should be submitted to a jury or dismissed on directed verdict.

And, ultimately, as the last step before the submission of a malpractice case to the jury, it is within the trial court's realm of responsibility to review the evidence and, upon reaching the

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<sup>4</sup>

Fortunately, this video demonstration is available for review by this Court. See Exs. 31 and 32.

conclusion that the plaintiff has failed to present competent expert testimony relating to the applicable standard of care and the manner in which it was breached, to direct a verdict for the defendant.

*Nichols v. Moses*, 859 So.2d 1042, 1045 (Miss. App. 2003). That is exactly what the trial court did here. This Court has repeatedly affirmed the grant of a directed verdict where, as here, the plaintiff “failed to present competent expert testimony” that established the standard of care and the breach thereof. *Id.* See *Whittington v. Mason*, 905 So.2d 1261 (Miss. 2005); *Latham v. Hayes*, 495 So.2d 453 (Miss. 1986); *Boyd v. Lynch*, 493 So.2d 1315 (Miss. 1986).

Ms. Cantrell’s only expert witness did not testify that Dr. Green deviated from the standard of care in the performance of Ms. Cantrell’s hip replacement surgery.<sup>5</sup> Ex. 31, page 68. Moreover, Dr. Dee testified that he would have no valid criticism of Dr. Green’s postoperative care if there was no FAC present when Dr. Green last saw Ms. Cantrell on June 20, 2000. A.R.E. 4-5, Ex. 31, pages 66-67. See also A.R.E. 6-7, Ex. 31, pages 142-43. The Court of Appeals’ holding -- that whether the FAC existed on June 20, 2000 must be decided by the jury through a “battle of experts” -- demonstrates a fundamental misunderstanding of the facts and the opinion testimony concerning the “fixed” nature of the alleged deformity<sup>6</sup> and the complete lack of a factual basis for Dr. Dee’s opinions.

Dr. Green testified that a patient with an FAC would have no range of motion. Tr. 245, 252.

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<sup>5</sup>

Unfortunately, however, Ms. Cantrell’s appellate counsel, in briefing before the Court of Appeals, tried to re-interject the outcome of the surgical procedure into this case by referring repeatedly to the leg length discrepancy (LLD) as if it were the same thing as the purported FAC.

<sup>6</sup>

In the context of this case, “fixed” is not a medical term of art. The testimony of both Dr. Green and Dr. Dee make it clear that the word “fixed” as used in “fixed abduction contracture” has its common, ordinary dictionary definition -- fixed means stuck; i.e., the hip joint is frozen and will not move either way.

Dr. Dee -- Cantrell's expert -- testified that when he saw Ms. Cantrell in 2003, three years post-surgery, "her leg was stuck out 30 degrees." Ex. 31, page 110, 111-112. He testified that the leg and hip joint would not move back to the midline of her body. *Id.* at page 111. Yet, Dr. Green did not observe an FAC in June, 2000. Dr. Terral did not observe an FAC in 2000, 2001 and 2002. Ex. 6. In fact, when Dr. Terral saw Ms. Cantrell on October 20, 2000, she had "excellent range of motion" in her operated hip. Ex. 6 [Capital 1]. She continued to have excellent range of motion in that hip in January, 2002. Ex. 6 [Capital 6]. Moreover, the Sta Home registered nurses [Ex. 5], the Sta Home physical therapists [*Id.*] and the physical evidence (x-rays -- Exs. 25-30) all indicate that there was no FAC present after Ms. Cantrell last saw Dr. Green.

**Thus, Dr. Dee could only *assume* that the FAC he purportedly observed in 2003 was present when Dr. Green saw Ms. Cantrell for the last time on June 20, 2000.** His assumption, however, is wholly unsupported by the evidence in the record.

As assumption, supported only by the *ipse dixit* of an expert, cannot create an issue of fact that must be resolved by the jury. *See, generally, Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31 (Miss. 2003); *Davis v. Christian Broth. Homes of Jackson, MS, Inc.*, 957 So.2d 390 (Miss. App. 2007); *Brooks v. Stone Architecture, P.A.*, 934 So.2d 350 (Miss. App. 2006).

The Court of Appeals' misapprehension of the facts is perhaps best demonstrated by its failure to acknowledge the unequivocal testimony of Ms. Cantrell.<sup>7</sup> Ms. Cantrell testified, in

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The only reference to Ms. Cantrell's testimony in the opinion of the Court of Appeals is found in paragraph 4 wherein the Court attributes testimony to Ms. Cantrell that Dr. Green "stated that the LLD was caused by pelvis obliquity or tilt caused by the tightening of the abductor muscles as a result of compensating for the LLD and that it would resolve itself over time through full weight-bearing exercise." 2007 WL 2473221 at \*1, ¶ 4. A review of the record does not reveal this testimony from Ms. Cantrell.



significant detail, about the post-operative exercises she did during physical therapy visits and by herself, including exercises designed to “work the abductor muscles”. Tr. 322, 364-68, 380-85, Ex. 33. She testified that from post-surgery through the time of trial, she never lost her ability to abduct her right hip. Tr. 385.

Finally, the opinion of the Court of Appeals refers to Ms. Cantrell’s demonstration at trial to support its holding that there was a triable fact issue about whether Ms. Cantrell suffered FAC which continued to the time of trial. 2007 WL 2473221 at \*3, ¶ 11. This reference misses the point. The trial court, who witnessed the demonstration, recognized that the demonstration established only that Ms. Cantrell had a leg length discrepancy -- a fact that was not in dispute and for which there was no criticism of Dr. Green. What the trial court saw -- and the Court of Appeals ignored -- was that Ms. Cantrell “was able to stand and lift her right leg away from her midline.” R.E. Tab 3, Tr. 433. The trial court saw that Ms. Cantrell was able to move her operated hip and leg both in (adduction) and out (abduction) from the midline of her body. In other words, her hip was not “stuck out 30 degrees”.

Ms. Cantrell’s entire case was built around her claim that her hip was stuck in a fixed position as a result of some failure by Dr. Green in his postoperative care. Her only expert, Dr. Dee, testified that if her hip was not stuck, on June 20, 2000, he would have no valid criticism of Dr. Green. The evidence -- disputed only by conjecture -- showed that Ms. Cantrell’s operated hip was not frozen in place on June 20, 2000 or at the time of trial.

### **III. CONCLUSION**

At the conclusion of plaintiff’s case, the trial court properly assessed plaintiff’s evidence, including her in-court demonstrations and that of her expert witness. The trial court, cognizant of

the standard by which a directed verdict is considered, R.E. Tab 3, Tr. 431, then concluded that Ms. Cantrell had not made out a fact issue which required jury resolution. The trial court did not make a finding of disputed fact or a medical diagnosis, as previously argued by Ms. Cantrell. Rather, the trial court did what trial judges do -- reviewed the nature and extent of plaintiff's evidence and determined that she had not made out a case for jury resolution.

The Court of Appeals missed the point -- both as to the standard of review and the nature of the evidence. For all of the foregoing reasons and those set out in prior appellate briefing, this Court should reverse the decision of the Court of Appeals and affirm the Judgment on Directed Verdict entered by the trial court.

Respectfully submitted, this the 2<sup>nd</sup> day of June, 2008.

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**CERTIFICATE OF SERVICE**

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