

IN THE SUPREME COURT OF MISSISSIPPI

**THE UNIVERSITY OF MISSISSIPPI MEDICAL
CENTER**

APPELLANT

V.

CASE NO. 2007-TS-00114

**JOHN HENRY MARTIN, INDIVIDUALLY AND
ON BEHALF OF WRONGFUL DEATH BENEFICIARIES
OF MARTHA MARTIN, YASHICA GOOD, INDIVIDUALLY**

APPELLEES

**APPEAL FROM THE
CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI**

BRIEF OF THE APPELLEES

ORAL ARGUMENT REQUESTED BY APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss.R.App. 28(a)(1), 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. University of Mississippi Medical Center, Appellant
2. John Henry Martin, Appellee
3. Martha Martin, deceased, Appellee
4. Yashica Good, Appellee
5. John D'Waine Martin
6. Renette Veal
7. Valerie Grace
8. Vicky Taylor
9. Tenisha Martin
10. Dennis C. Sweet, III, Counsel for Appellees
11. Richard A. Freese, Counsel for Appellees
12. Warren L. Martin, Jr., Counsel for Appellees
13. Omar L. Nelson, Trial Counsel for Appellees
14. J. Leray McNamara, Counsel for Appellant
15. Stephanie C. Edgar, Counsel for Appellant
16. Copeland, Cook, Taylor & Bush, P.A.
17. Frederick Barnett Carlton, Jr., M.D.
18. Lisa DeFord Anderson, M.D.
19. Winston L. Kidd, Circuit Court Judge for the Seventh Circuit Court District in Hinds County, Mississippi.

SO CERTIFIED this 19th day of February, 2008.

Respectfully submitted,

JOHN HENRY MARTIN, INDIVIDUALLY AND
ON BEHALF OF WRONGFUL DEATH
BENEFICIARIES OF MARTHA MARTIN,
YASHICA GOOD, INDIVIDUALLY

By:

Dennis Sweet, III by [signature]
DENNIS C. SWEET, III, MSB # [REDACTED]

Counsel for Appellees

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STATEMENT OF THE ISSUES

- I. Whether the trial court was correct in accepting and relying upon the expert testimony of Dr. William Truly, which was both scientifically reliable and demonstrated his expertise in the field of emergency medicine?

STATEMENT OF THE CASE

I. Nature of the Case

The instant action involves the wrongful death of Mrs. Martha Martin. John Henry Martin, (hereinafter referenced as “Appellees”) brought a claim for medical malpractice on behalf of Mrs. Martin against the Appellant, The University of Mississippi Medical Center (hereinafter referenced as “UMMC”). This appeal arises from an order of the Circuit Court of Hinds County where Judge Winston L. Kidd granted a judgment in favor of the Appellees in the amount of \$500,000. R. at 172. Contrary to the trial court’s conclusion, Appellant contends that the trial judge erred in accepting the expert testimony of Dr. William Truly, and that the judgment should be reversed. The Appellees assert that the trial judge was correct in relying on Dr. Truly’s testimony, and that the judgment should be affirmed.

II. Course of Proceedings and Disposition in the Court Below

Appellees filed a complaint alleging *inter alia*, wrongful death and medical malpractice against the Appellant on or about September 24, 2002. R. at 6. Appellees then filed an amended complaint on or about May 15, 2003. R. at 27. Appellant then filed answers and defenses on or about October 18, 2002. R. at 36. Discovery commenced on or about November 4, 2002 and lasted for a couple of years. R. at 75 *et. seq.* Prior to the conclusion of discovery, the Appellant filed a Motion for Summary Judgment, and the Court, by its August 24, 2004 Order, denied the Appellant’s motion. R. at 50. On or about April 11, 2005, the Appellees filed a Motion of Limine and the Appellant responded on April 12, 2005. R. at 137. On or about October 13, 2006, the trial judge entered a final judgment in favor of the Appellees and assessed damages at the statutory cap of \$500,000. R. at 166-173. The Appellant then filed a Motion to Alter and Amend the Court’s Judgment on October 18, 2006. R. at 174. The Court then by its January 9,

2007 Order denied Appellant's motion. R. at 313. The Appellant then filed a Notice of Appeal on January 17, 2007. R. at 314. The Appellees ask this Court to affirm the Circuit Court's judgment in favor of the Appellees.

III. Statement of the Facts

On or about September 29, 2001, Martha Martin and her daughter, Yashica Good, were involved in a traumatic car accident when returning to Jackson, Mississippi from a trip to Vicksburg. Mrs. Martin was driving a Toyota 4-Runner, and Yashica was the front seat passenger. As she was driving east along I-20, she attempted to maneuver around a blown tire from an 18-wheeler truck. R. at 167. In this attempt, her vehicle left the roadway causing her to lose control and roll over several times. *Id.*

Mrs. Martin sustained contusions to the chest wall, pain in her upper extremities, abrasions, and shortness of breath from the impact of the airbag deployment. *Id.* Mrs. Martin was then transported to the Emergency Room at UMMC, in Jackson for treatment. Upon her arrival, she complained to her family and the UMMC medical staff of shortness of breath throughout her stay at UMMC. *Id.*

Dr. Rick Carlton, the attending physician, and Dr. Lisa DeFord, a resident, were assigned to provide care to Mrs. Martin. They negligently failed to test Mrs. Martin for pulmonary embolus, despite the fact that she was having chest pains and breathing problems. They were also negligent in that they failed to realize that Mrs. Martin had several symptoms of pulmonary embolism, and failed to use preventive measures to stop the blood clots from developing. Instead, they discharged Mrs. Martin at 4:00 am on September 30, 2001 without properly examining her.

As a result of UMMC's negligence, on October 1, 2001, within 36 hours of her discharge, Mrs. Martin arrived at the Emergency Department by ambulance in full cardiac arrest. R. at 168. The hospital staff was unable to revive Mrs. Martin and she was pronounced dead at 1:43 am. *Id.* Her autopsy determined that the immediate cause of her death was pulmonary emboli, saddle subtype. *Id.*

STANDARD OF REVIEW

“The admission of expert testimony is addressed to the sound discretion the trial judge.” *Roberts v. Grafe Auto Co.*, 701 So.2d 1093, 1098 (Miss.1997). Therefore, the decision of a trial judge will stand unless the Court concludes “that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion.” *Id.* (citing *Seal v. Miller*, 605 So.2d 240, 243 (Miss.1992); *Hooten v. State*, 492 So.2d 948, 950-51 (Miss.1986)).

SUMMARY OF THE ARGUMENT

The trial court's ruling should be affirmed. The trial court was correct in determining that Dr. Truly was qualified as an expert witness. Dr. Truly's testimony was relevant and reliable, and met the required standards set forth in *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2003). Dr. Truly's testimony illustrated that he had the experience, skill, training, and knowledge in the field of emergency medicine. His testimony also demonstrated that he had treated patients with pulmonary embolus before, and was also very experienced in detecting and treating this disease. Additionally, his theory that UMMC negligently failed to test Mrs. Martin for pulmonary embolus also met the standards set forth in *Dalbert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

The trial court also has the sole discretion in determining whether an expert witness is qualified. One of the major safeguards articulated in *Dalbert* is that the scientific knowledge and experience of an expert must assist the trier of fact in understanding or deciding a fact in issue. However, since the case at bar was a bench trial, without a jury, these safeguards are not as vital. The trial judge is given the widest possible discretion in designating if a witness is an expert, and cannot be overruled unless there is a clear abuse of discretion. Because in the case at bar there is no abuse of discretion by the trial judge, the trial court's ruling should be affirmed.

ARGUMENT

II. Whether the Trial Court was Correct in Accepting and Relying upon the Expert Testimony of Dr. William Truly, Which was Both Scientifically Reliable and Demonstrated his Expertise in the Field of Emergency Medicine?

A. Dr. Truly's Testimony was Scientific and Reliable, thus Satisfying *McLemore*

The trial court was correct in designating Dr. William Truly as an expert witness. This Court has specifically stated that a trial judge has sole discretion to qualify an expert witness, and permit his testimony. *Roberts*, 701 So.2d at 1093. Additionally, the Court has held that the trial court is vested with "the gatekeeping responsibility" to review the scientific evidence presented by an expert witness to determine admissibility. *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993). Since in this case Dr. Truly's testimony was scientifically reliable, the trial court's ruling should stand.

The analysis to determine the admissibility of an expert witness is stated in *Mississippi Rules of Evidence, Rule 702*. This rule states:

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.

M.R.E. 702.

Under Rule 702, expert testimony is admitted only if it satisfies a two prong test stated in *Mississippi Transportation Comm'n v. McLemore*, 863 So. 2d 31, 35 (Miss. 2003). First, the witness must be "qualified by virtue of his or her knowledge, skill, experience, or education". *Id.* Second, the witness's "scientific, technical or other specialized knowledge must assist the trier of

fact in understanding or deciding a fact in issue.” *Id.* Both of these prongs are satisfied in this case, and Dr. Truly’s testimony was correctly admitted.

1. Dr. Truly was Qualified through his Knowledge, Skill, Experience and Education to Render an Opinion

The first prong states that a witness must be qualified through their “knowledge, skill, experience, or education”. *Id.* Dr. Truly was unquestionably qualified to testify as an expert witness in the case *sub judice*. Dr. Truly was a medical school graduate who specialized in family medicine and also emergency medicine. He testified that he was a member of the Jackson Medical Society of Mississippi, Surgical and Pharmaceutical Society, and the National Medical Association. T.R. at 26. Dr. Truly also has over thirty-four (34) years of experience in emergency medicine. T.R. at 34. He testified that his practice in emergency medicine has continued by treating seizure patients, patients who are hypoxic from COPD, and, similar to this case, patients with pulmonary emboli. T.R. at 29.

Dr. Truly has experience in treating patients with pulmonary embolus, and is therefore was qualified to testify in this case. He in fact testified about his experience with a patient with pulmonary embolus. This patient, like Mrs. Martin, had chest pain and shortness in breath. T.R. at 35. Dr. Truly testified that he decided to work the patient up by performing “impedance phlethymography” in order to determine if she had pulmonary embolus, which in that case the patient did. *Id.* After determining that the patient had pulmonary embolus, he was able to treat him by using Heparin, which stops the organization of blood clots. *Id.* Unlike Dr. Truly, Dr. Carlton negligently failed to perform impedance phlethymography to determine if Mrs. Martin had pulmonary embolus, which resulted in her unfortunate death.

Dr. Truly also presented several risk factors of pulmonary embolus. These factors include shortness of breath, chest pain, obesity and age. T.R. at 39. Dr. Truly testified that when Mrs.

Martin was treated at UMMC on September 30, 2001, these risk factors were present. Being involved in the vehicular accident, Mrs. Martin experienced a shortness of breath, and also had chest pain. She weighed about 290 pounds, which, according to the basal metabolic index, illustrated that she was considered morbidly obese. T.R. at 49. Finally, because she was 59 years old, this put her at a higher risk of obtaining pulmonary embolus.

The defendants contend that because Dr. Truly was not board certified, the trial court erred in designating him as an expert witness. This Court has stated that if a physician who is sufficiently familiar with the standards of a medical specialty, then he may testify as an expert even though he may not practice the specialty himself. *West v. Sanders Clinic for Women, P.A.*, 661 So.2d 714, 718-19 (Miss. 1995). Although Dr. Truly was not board certified, he was sufficiently familiar with the standards of emergency room medicine, which allowed him to testify as an expert witness.

Additionally, the facts of the case at bar are similar to those involved in the recent opinion of *Mississippi Dept. of Mental Health v. Hall*, 936 So. 2d 917 (Miss. 2006). In *Hall*, East Mississippi Hospital objected to expert witness Dr. Hiatt's testimony to the plaintiff's physical injuries and what medical expenses she might incur in the future. *Id.* at 927. East Mississippi argued that Dr. Hiatt, who had practiced family medicine in the past, "was not an expert in orthopedics, infectious disease, vascular medicine, pain management or neurology." *Id.*

However, this Court pointed out that East Mississippi failed to point out that Dr. Hiatt "served as a general medical officer in the U.S. Air Force, had served as a flight surgeon for the Mississippi Air National Guard, and had performed or assisted in numerous orthopedic surgeries. He was familiar with the use of antibiotics and how they treat infections." *Id.* This Court held that Dr. Hiatt's testimony was admissible because of his lengthy experience as a physician, and

that his testimony was relevant and reliable. *Id.* at 928. Similar to the case at bar, Dr. Truly had lengthy experience as an emergency room physician and was familiar with emergency room medicine. He has treated patients with pulmonary embolus in the past, and was experienced in detecting and treating this disease. Therefore, the trial court was correct in admitting Dr. Truly as an expert witness.

Moreover, in the case of *University of Mississippi Medical Center v. Pounders*, UMC contended that because expert witness Dr. Pande was not a pulmonologist, he should have not been allowed to testify on matters concerning aspiration pneumonia. 970 So.2d 141, 146 (Miss. 2007). However, this Court recognized that “a witness need not be a specialist in any particular profession to testify as an expert”. *Hubbard v. Wansley*, 954 So.2d 951, 957 (Miss.2007). This Court also pointed out that although Dr. Pande was a neurologist, and not a pulmonologist, he was qualified as a neurologist because he had treated patients similar to the plaintiff. *Pounders*, 970 So. 2d at 146. Again, similar to the case at bar, Dr. Truly was an expert in the field of family medicine, and was qualified as an expert in emergency room medicine since he had treated patients in this field.

2. The Trial Judge Sat as the Trier of Fact in Place of a Jury

The second prong that was stated in *McLemore* was “the witness’s scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue.” 863 So. 2d at 35. In the case at bar, the trial judge sat as the trier of fact in place of the jury. In *Gibbs v. Gibbs*, the court stated that “most of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury”. 210 F.3d 491, 500 (5th Cir. 2000). The Court held in this case that the expert witness

testimony was scientifically valid, and because this was a bench trial, the testimony was correctly admitted. *Id.*

Trial judges have a “gatekeeping” responsibility to ensure that a witness is qualified to testify as an expert. *Daubert*, 509 U.S. at 579. This responsibility makes certain that jurors are given proper expert testimony. In *Edmonds v. State*, this Court explained the significant impact that expert witnesses can have on jurors. It explained that “juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. An expert witness has more experience and knowledge in a certain area than the average person.” *Edmonds v. State*, 955 So.2d 787, 792 (Miss. 2007). However, in the case at bar, because there was no jury but only a presiding trial judge, the trial judge is given the sole discretion to admit an expert witness. *Roberts*, 701 So.2d at 1093

Additionally, “[a] trial judge’s determination as to whether a witness is qualified to testify as an expert is given the widest possible discretion and that decision will only be disturbed when there has been a clear abuse of discretion.” *Smith v. State*, 925 So.2d 825, 834 (Miss. 2006) (quoting *Sheffield v. Goodwin*, 740 So.2d 854, 856 (Miss.1999)). Moreover, “the trial court has the sole authority in determining credibility of witnesses when sitting as a trier of fact in a bench trial”. *Pounders*, 970 So. 2d at 146. (see also *Pride Oil Co. v. Tommy Brooks Oil Co.*, 761 So.2d 187, 193 (Miss.2000)). This authority therefore means that a trial judge has the prerogative to place whatever authority on the testimony of an expert. *Id.*

In the present case, the trial judge had the sole discretion to admit Dr. Truly. The trial judge did not abuse this discretion because Dr. Truly was a qualified expert witness. As stated before, his testimony was relevant and reliable, in that he had both the qualifications and

experience in emergency medicine. Nonetheless, the trial judge did not err in his decision of allowing Dr. Truly to testify as an expert witness.

B. Dr. Truly's Theory of Mrs. Martin's Death Satisfies the *Dalbert* Factors

In *Dalbert*, there are four factors to determine the admissibility of an expert witness. These factors include: (1) whether the theory can be, and has been, tested; (2) whether the theory has been published or subjected to peer review; (3) any known rate of error; and (4) the general acceptance that the theory has garnered in the relevant expert community. 509 U.S. at 593-94. Dr. Truly theory of Mrs. Martin's death satisfies all four of these factors, which illustrates that the trial court was correct in admitting him as an expert witness.

The first factor in *Daubert* is whether the theory has been tested. *Id.* Dr. Truly's theory was that if the emergency room physician would have tested Mrs. Martin for pulmonary embolus, it would have been detected and treated. He also believed that if UMMC would have paid attention to Mrs. Martin's risk factors and signs of pulmonary embolus, this disease would have been noticed. Dr. Truly testified that he tested his theory on several of his patients. He testified that he used a test called "impedance phlethymography" to detect if one of his patients had pulmonary embolus. T.R. at 35. This test helped to determine that the patient did indeed have pulmonary embolus, which enabled Dr. Truly was able to treat it. *Id.* Because Dr. Truly theory has been tested, this therefore satisfies the first factor of *Daubert*.

The second factor in *Daubert* is whether the theory has been published or subject to peer review. 509 U.S. at 593. Dr. Truly's theory about Mrs. Martin's signs of potential risk factors of pulmonary embolus has been published. Dr. Truly testified that he relied upon the medical article "Perioperative Use of Anticoagulants and Thrombolytics" in his practice. T.R. at 48. This well-known published document listed the risk factors of pulmonary embolus. The risk factors

included major trauma, obesity, hypertension, and heavy cigarette smoking. T.R. at 49. Dr. Truly's theory was that if UMMC would have seen that Mrs. Martin did show signs of these risk factors, then they should have tested her for pulmonary embolus. Because Dr. Truly's theory has been published, this therefore satisfies the second factor in *Daubert*.

The third factor in *Daubert* is if the theory has any known rate of error. 509 U.S. at 594. During Dr. Truly's testimony, he was asked to read from a medical article called "Pulmonary Embolism". T. R. at 59 In this article, he read the mortality rate of patients who receive appropriate treatment for pulmonary embolus. T.R. at 60. The mortality rate is only 8 percent to 10 percent for those patients who are diagnosed and treated for pulmonary embolus. *Id.* If UMMC would have followed Dr. Truly's theory of testing Mrs. Martin for pulmonary embolus, her chances of dying would have decreased. Since Dr. Truly theory has a low rate of error, this therefore satisfies the third factor in *Daubert*.

The final factor in *Daubert* is whether there has been a general acceptance of the theory in the relevant expert community. 509 U.S. at 594. Throughout Dr. Truly's testimony, he read from several well known medical articles that demonstrated that his theory has been accepted in the expert community. Because of this alone, this factor is satisfied as well.

Dr. Truly's theory meets all of the four factors mentioned in *Daubert*. His theory has been tested, published, has a low rate of error, and also generally accepted in the expert community. Because Dr. Truly theory satisfies all four of these requirements, then therefore the trial court's decision of admitting Dr. Truly as an expert witness was correct.

C. Judge Kidd, as the Trier of Fact, Sufficiently Determined What Weight to Give to the Testimony of Dr. Truly

The trial judge, which in this case was Judge Kidd, had the role as a trier of fact to determine the weight and credibility of Dr. Truly's testimony. This Court has held that "it is

enough to say that the [trial judge sitting without a jury], and not the reviewing court, judges the credibility of the witnesses as well as the weight and worth of their conflicting testimony.” *Scott Addison Construction, Inc. v. Lauderdale County School System*, 789 So. 2d 771, 773 (Miss. 2001) (quoting *Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993)).

In the case at bar, there is no way for UMMC to know how much credibility and/or weight Judge Kidd gave to Dr. Truly’s testimony in reaching his judgment. Dr. Truly’s testimony was only one piece of evidence which the trial court heard and considered. Like any trial judge sitting without a jury, the role of the judge is to assess each piece of evidence, including testimony, and to give each piece of evidence and testimony the weight which he/she feels it deserves. It is only after weighing all of the evidence as a whole does the trial court renders its judgment. Nonetheless, since the trial judge had the discretion to determine what weight to give to Dr. Truly’s testimony, the trial court’s ruling should stand.

CONCLUSION

The trial court was correct in designating Dr. William Truly as an expert witness. Dr. Truly’s testimony was both relevant and reliable and satisfied the two-prong test invoked in *McLemore*. Dr. Truly was qualified as an expert witness because of his experience, skill, and knowledge in emergency medicine. Additionally, Dr. Truly’s theory of the development of pulmonary embolus satisfies the four requirements in *Daubert*, which deems Dr. Truly as a qualified expert witness.

Furthermore, the trial judge had the sole discretion to determine if Dr. Truly was qualified as an expert. Since in this case there was no jury, but instead a bench trial, the safeguards imposed in *Daubert* was not as vital. The trial judge is given the widest possible discretion in admitting an expert witness which cannot be challenged unless there is a clear abuse

of discretion. There is no abuse of discretion in case at bar. Dr. Truly was a qualified expert witness, and the trial judge was correct in designating him as an expert. Therefore, the trial court's ruling should be affirmed.

Respectfully submitted, this the 19th day of February, 2008.

JOHN HENRY MARTIN, INDIVIDUALLY AND
ON BEHALF OF WRONGFUL DEATH
BENEFICIARIES OF MARTHA MARTIN,
YASHICA GOOD, INDIVIDUALLY

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CERTIFICATE OF SERVICE

I, Dennis C. Sweet, III, one of the attorneys of record for the Appellees does hereby
certify that I have this day mailed a true and correct copy of the foregoing to the following:

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So certified, this the 19th day of February, 2008.


DENNIS C. SWEET, III