

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**

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED BY APPELLANT

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REPLY

I. Introduction.

Rule 702 of the Mississippi Rules of Evidence provides that expert testimony is permitted only if the witness is “qualified by virtue of his or her knowledge, skill, experience, or education.” *Mississippi Transportation Comm’n v. McLemore*, 863 So.2d 31, 35 (Miss. 2003). Also, the witness’ knowledge “must assist the trier of fact in understanding or deciding a fact in issue.” *Id.* Dr. Truly fell short on both of these elements and for these reasons, should not have been qualified by the trial court as an expert. Further, the trial court should not have relied solely upon the opinions of Dr. Truly.

II. Dr. Truly Was Not Qualified by Knowledge, Skill, Experience and Education to Render an Expert Opinion in This Case.

Dr. Truly did not lay a proper foundation for familiarity with the standard of care in a modern emergency department in a large teaching hospital such as UMMC during the year 2001 because he has not exercised the same level of intellectual rigor that characterizes the practice of an expert in the field of emergency medicine. Dr. Truly’s lack of qualification to offer testimony against an emergency room physician became abundantly clear both prior to and during the trial of this matter. Dr. Truly did not participate in an emergency medicine residency and, in fact, did not do a residency in any type of medicine. T. at 25. Appellees have erroneously suggested that UMMC’s sole issue with Dr. Truly’s testimony is the fact that he was not board certified in emergency medicine. However, far more important than Dr. Truly’s lack of board certification in emergency medicine is the fact that he had not worked in an emergency room since approximately 1998. T. at 28, 29. In fact, he could not clearly remember when he last worked in an emergency room and testified “the

last time when I was a full emergency room physician was I think, if I recall correctly, in the late 90s, maybe '98, '99, in which I was really on schedule doing a lot of emergency medicine.” T. at 28. Dr. Truly is a family practitioner who attempted to qualify himself as an emergency room expert apparently by a theory of osmosis because he testified that he practiced near an emergency room. As explained in UMMC’s original brief, Dr. Truly testified that he was familiar with the 2001 standard of care in emergency rooms because he “observe[s] the operation of the emergency department everyday. My office is in the juxtaposition to the emergency room department at Madison County Medical Center.” T. at 31.

This Court must “limit an expert’s testimony to matters within his demonstrated area of expertise.” *General Motors Acceptance Company v. Baymon*, 732 So. 2d 262, ¶ 49 (Miss. 1999)(citing *Seal v. Miller*, 605 So. 2d 240, 247 (Miss. 1992). Also, in order for any medical expert to testify, they must exhibit a familiarity with the relevant standard of care. *Cheeks v. Bio-Medical Applications, Inc.*, 908 So.2d 117, ¶ 9 (Miss. 2005). Further, as was the case in *Troupe v. McAuley*, 955 So.2d 848 (Miss. 2007), Dr. Truly was wholly unqualified because he had no board certification in emergency medicine, last worked in an emergency room in 1998 and was only actively practicing as a family physician. It is elementary that trial courts are expected, “to act as a gatekeeper, ensuring that expert testimony is both relevant and reliable.” *Poole ex rel. Poole v. Avara*, 908 So.2d 716, ¶ 15 (Miss. 2005). By relying solely upon Dr. Truly’s opinions, rather than all other experts who testified contrary to Dr. Truly’s opinion at trial, the trial court erred in this regard.

III. Dr. Truly’s Opinion Was Unreliable and Based on Scientific Impossibility.

Appellees’ analysis of the *Daubert* factors and Dr. Truly’s opinion is akin to putting a square peg into a round hole. Dr. Truly was the Appellees’ sole expert on the issues of the standard of care,

breach of the standard of care, and proximate cause; however, his opinions were not reliable and actually revealed a scientific impossibility. Under Mississippi law, “[t]o be relevant and reliable, the testimony must be scientifically valid and capable of being applied to the facts at issue.” *Moss v. Batesville Casket Co., Inc.*, 935 So.2d 393, ¶ 34 (Miss. 2006)(citing *Mississippi Transportation Comm’n v. McLemore*, 863 So.2d 31, 36 (Miss. 2003)). See also *Poole*, 908 So.2d at 721-25 (Miss. 2005). Even a cursory review of Dr. Truly’s testimony reveals that his testimony at best, was simple conjecture. At worst, his testimony was pure fantasy.

Dr. Truly repeatedly opined that Mrs. Martin developed the embolus before her arrival at UMMC, and that it was present and diagnosable while she was in the UMMC Emergency Department. T. at 55-58, 151. No other expert believed this to be true, not even Dr. Steven Hayne, Plaintiffs’ expert who performed the post-mortem examination on the decedent and who diagnosed her cause of death. T. at 139-140. In fact, according to the testimony of the other trial experts, this opinion was not scientifically possible because Mrs. Martin’s vital signs, especially her oxygen saturation, remained normal while she was at UMC. T. at 138-140. Dr. Truly was the only expert who claimed that a patient’s vital signs and oxygen saturation can be normal when they are experiencing shortness of breath and chest pain stemming from a saddle-type pulmonary embolus. T. at 161-162. Conversely, every other expert, including Dr. Hayne, testified that the patient’s blood pressure and oxygen levels would be extremely low. T. at 138-140, 208-210, 273-274, 276, 299, 304-306.

Also, aside from Dr. Truly, all other experts testified that if Mrs. Martin’s symptoms were being caused by a saddle-type pulmonary embolus, she would have died within thirty minutes to two hours of the onset of these symptoms. T. at 140, 240, 291, 299, 317. By contrast, Mrs. Martin

lived almost thirty-six hours after she was discharged from UMMC. Ex. 3. It is a nationally known medical fact that saddle-type pulmonary emboli are catastrophic, immediate events. T. at 139, 208, 299, 317. Yet, Dr. Truly ignored this and maintained that the embolus which killed Mrs. Martin was present while she was a patient of UMMC. Dr. Truly's opinions were unreliable because they were patently scientifically invalid, and the science upon which he relied was not applied reliably to the facts of this particular set of circumstances.

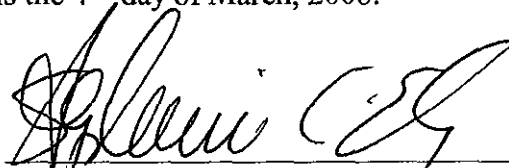
IV. The Trial Judge Abused His Discretion.

In *Bowman v. CSX Transp.*, the Mississippi Court of Appeals held, "a witness may testify as an expert if 'qualified by virtue of his or her knowledge, skill, experience or education,' but only if 'the witness's scientific, technical or other specialized knowledge [will] assist the trier of fact in understanding or deciding a fact in issue.'" 931 So.2d 644, ¶ 35 (Miss. App. 2006), *quoting* Miss.R.Evid. 702. The *Bowman* Court also held "the trial judge has the gatekeeper function of determining 'the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge.'" *Id.* (*quoting* Miss.R.Evid. 702, comment). Even a cursory review of record in this case reveals that the trial court utterly failed in its job as gatekeeper. The trial court erred in allowing Dr. Truly, unqualified in the area of emergency medicine, to testify as to the standard of care for an emergency room physician. Not only did the trial court allow such testimony, but it based its ultimate decision in this case entirely upon the testimony of Dr. Truly and simultaneously ignored the testimony of Dr. Frederick "Rick" Carlton, Dr. Lisa DeFord Anderson, Dr. Sara Broom, Dr. James Jefferson and Dr. Steven Hayne.

CONCLUSION

The Appellees have failed to sufficiently rebut UMMC's arguments. Dr. Truly was not adequately familiar with the relevant standard of care to testify against UMMC in this case, which rendered his opinions scientifically impossible. Because it is clear that the sole expert upon whom the Appellees relied to establish three of the elements of their *prima facie* case was not reliable and was not properly qualified, UMMC respectfully submits that the trial court's Opinion and Order and Final Judgment are not supported by substantial, credible or reasonable evidence and as such, the trial court's findings were manifestly wrong and clearly erroneous. UMMC respectfully requests that this Court reverse and render judgment in its favor, and UMMC further requests any additional relief this Court deems appropriate.

RESPECTFULLY SUBMITTED, this the 4TH day of March, 2008.



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CERTIFICATE OF SERVICE

I, Stephanie C. Edgar, do hereby certify that I have this day caused to be mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

Honorable Winston Kidd
Hinds County Circuit Court Judge
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This the 4TH day of March, 2008.


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