IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2008-CA-01343

SHANIKA HILL, ET AL. **APPELLANTS**

V.

STEPHEN MILLS, M.D. **APPELLEE**

BRIEF OF APPELLEE

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ORAL ARGUMENT NOT REQUESTED

CERTIFICATE OF INTERESTED PARTIES

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 disqualifications or recusal.

1. Shanika Hill, Plaintiff.
2. Brian Thomas, Plaintiff.
3. Stephen Mills, M.D., Defendant.
4. Carroll H. Ingram, Jennifer Ingram Wilkinson, and the law firm of Ingram & Associates, PLLC and Ingram/Wilkinson, PLLC, counsel for the Plaintiffs.
5. John Hawkins, Andrew Neely, and the law firm of Hawkins, Stracener & Gibson, counsel for the Plaintiff.
6. J. Robert Ramsay and the law firm of Ramsay & Hammond, counsel for the Defendant.

SO CERTIFIED, this the 25th day of March, 2009.

J. ROBERT RAMSAY, COUNSEL
FOR THE APPELLEE

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2. Whether the trial Court committed error in granting the Defendant's Motion for Summary Judgment as to the Plaintiffs' wrongful death claim by Memorandum Opinion and Order dated April 9, 2008, and subsequent to the Plaintiffs' Motion for Clarification and/or for Reconsideration, whether the Court erred in entering a second Memorandum Opinion and Judgment which, while similar to the Defendant's submitted proposed Findings of Fact and Conclusions of Law, rendered the same ultimate determination as the Court had previously found/published in its April 9 Memorandum Opinion and Order.

3. Whether the trial Court abused its discretion in refusing to recuse itself pursuant to MISS. R. CIV. P. 16(A), Rule 1.15 of the Uniform Circuit and County Court Rules, and/or Cannon 3(E), when during the oral argument of the Defendant's *Daubert* Motion and for Summary Judgment on December 6, 2007, the Court voluntarily disclosed to all parties that the Court had just learned from his court administrator approximately an hour prior to the hearing that the court administrator (not the Judge nor members of his family) was a patient of the Defendant physician, and/or the fact that the trial Court's father had been a physician in medical practice in Brookhaven, Mississippi, and had been a member of the active medical staff at King's Daughters Medical Center (a Defendant previously dismissed by Agreed Order) but had retired from his medical practice not less than 10 years prior to the hearing.

II. STATEMENT OF THE CASE

A. Nature of the Case:

This is an alleged medical negligence wrongful death action filed on behalf of the Plaintiffs, Shanika Hill and Brian Thomas, against Stephen Mills, M.D. as a result of a spontaneous abortion of a 19 week pregnancy which the Plaintiffs contend was the result of Dr. Mills' negligence. (R.12–22, RE Tab 2). This Appeal arises from the trial Court's April 9, 2008 Memorandum Order and Judgment rendered subsequent to a *Daubert* hearing on December 6, 2007, in which the Court granted the Defendant's Motion to Exclude the expert testimony of the Plaintiffs' designated expert, Dr. Fuselier, and granted the Defendant's Motion for Summary Judgment. (R.749-751, RE Tab 8). Subsequent to the Plaintiffs' Motion for Clarifications and/or Reconsideration, on June 13, 2008, the Court entered a second Memorandum Order and Judgment which closely resembled the Defendant's proposed Memorandum Opinion but with the same ultimate findings and determination that the testimony of the Plaintiffs' expert, consistent with his pre-offered opinions, would be excluded as neither scientifically relevant nor reliable and entered Judgment dismissing the action. (R.825–836, RE Tab 12). Plaintiffs also suggest the Court abused its discretion in denying the Plaintiffs' Motion to Recuse. (R.733-738, RE Tab 6; Tr. 61–65, RE Tab 1).

B. Course of Proceedings and Disposition Below:

On September 6, 2002, the Plaintiffs initiated this action by the filing of a Complaint in the Circuit Court of Lincoln County, Mississippi naming King's Daughters Medical Center, Stephen Mills, M.D., Joseph White, M.D., Prentiss Smith, M.D., W. Richard Rushing, M.D. and J. Kim Sessums, M.D. as Defendants. (R.12-22, RE Tab 2). Thereafter, in February 2003, the Defendants, Joseph White, M.D., Prentiss Smith, M.D., W. Richard Rushing, M.D. and J. Kim

Sessums, M.D. were voluntarily dismissed by the Plaintiffs. (R.92–97). On February 8, 2007, an Agreed Scheduling Order and Trial Setting was signed by Judge David Strong and filed of record on February 12, 2007. (R. at 226). The Scheduling Order required that the Plaintiffs designate their experts by July 20, 2007, and further provided for a discovery deadline of October 5, 2007, and that the trial commence on November 27, 2007.

Subsequent to the deposition of the Plaintiffs' singular physician expert, Dr. Paul G. Fuselier, on November 8, 2007, Motion for Summary Judgment was filed on behalf of King's Daughters Medical Center and noticed for November 16, 2007. (R. at 324). The basis of the Motion for Summary Judgment was that Dr. Fuselier had rendered no criticism or opinions with regard to a deviation from the standard of care by any nursing personnel of King's Daughters Medical Center. Subsequently, Plaintiffs' counsel executed an Agreed Order of Dismissal on November 20, 2007 as to the Defendant King's Daughters Medical Center. (R.591, RE Tab 4).

On November 15, 2007, the sole remaining Defendant, Stephen Mills, M.D., filed his Motion to Exclude the Plaintiffs' Proposed Expert Testimony pursuant to *Daubert*. (R.337, RE Tab 3). Counsel for the Plaintiffs moved for a continuance of the trial setting in order to allow the Plaintiffs adequate time to file a response in opposition to this Defendant's *Daubert* Motion which would have otherwise been heard by the Court subsequent to *voir dire* and selection of the jury on Tuesday, November 27, 2007.

An Order of Continuance was subsequently entered without objection by this Defendant. (R. at 732). In that the trial had been delayed, this Defendant's *Daubert* Motion was reset for hearing on December 6, 2007. On November 26, 2007, the Defendant, Stephen Mills, M.D. filed his Amended Motion to Exclude Plaintiffs' Proposed Expert Testimony pursuant to *Daubert* and for Summary Judgment. (R.592, RE Tab 5).

On December 6, 2007, the hearing on the Defendant's Motion to Exclude Plaintiff's Proposed Expert Testimony and for Summary Judgment commenced. At the commencement of the hearing, Judge Strong disclosed to the parties that shortly prior to the hearing his Court Administrator had informed him that Stephen Mills, M.D. was her personal physician but that Judge Strong had never met and would not know Dr. Mills if he had seen him prior to the December 6th hearing. The Court gave Plaintiffs' counsel one week to determine whether they desired to file a formal Motion for Recusal. The Court thereafter proceeded to hear the sworn testimony of the Defendant's expert, Dr. John Morrison, former Chairman of the Department of Obstetrics & Gynecology at University Medical Center, and the arguments of counsel on the *Daubert* issue. (*Daubert* Hearing Transcript; Tr. 1–54, RE Tab 1).

The Plaintiffs subsequently filed a Motion for Recusal based upon the disclosure by the Court that the Court Administrator was a patient of Stephen Mills, M.D. and that Judge Strong's father was (had been) a practicing physician in the Brookhaven area and was (had been) a member of the active medical staff at King's Daughters Medical Center (a Defendant previously, voluntarily dismissed by the Plaintiffs). (R.733–736, RE Tab 6). On February 4, 2008, the Court heard oral argument with regard to the Plaintiffs' Motion for Recusal and rendered a bench decision that:

> "the Court did not know if his father, Dr. Strong knows Dr. Mills because the Court had never conversed with his father about this case or any other case on the docket; that Dr. Strong had retired in 1998 and that it had been at least 10 years since he had practiced medicine in the Brookhaven community; that the Court would not know Dr. Mills if he walked into the Court in that the only time the Court had ever seen Dr. Mills was at the *Daubert* hearing in Pike County on December 6, 2007; that the Court did not know Dr. Mills, had never met his family and, other than the fact that his Court Administrator advised him that Dr. Mills was her personal physician, had never conversed with the Court Administrator with regard to any scheduling in this case."

Accordingly, the Court denied the Plaintiffs' Recusal Motion. (Tr.64–65, RE Tab 1).

Following the bench ruling, the Court required the parties to submit proposed Findings of Fact and Conclusions of Law relative to the Defendant, Stephen Mills' Motion to Exclude the Plaintiffs' Expert and for Summary Judgment previously heard on December 6, 2007. (Tr. 65, RE Tab 1). The parties complied and submitted proposed Findings of Fact and Conclusions of Law; the Plaintiffs submitted their seven (7) page proposed Order and this Defendant submitted his proposed Memorandum Opinion and Order.

On April 9, 2008, the Court entered a three (3) page Memorandum Opinion and Order Granting the Defendant's Motion to Exclude the Plaintiffs' Expert and Granting the Defendant's Motion for Summary Judgment, (R.749–751, RE Tab 8) in which the Court found that:

> "the plaintiffs' expert has been unable to identify, produce or cite any scientific or peer review literature in support of his expert opinion. To the contrary, the testimony of Dr. John Morrison as well as the literature cited at the hearing totally refuted the proposed expert testimony of Dr. Fuselier. There is no evidence in the record of any medical treatise or journal which substantiates Dr. Fuselier's opinion. To the contrary, all the medical literature produced in this cause contradicts Dr. Fuselier's opinion."

On April 18, 2008, the Plaintiffs filed their Motions for Clarification and for Reconsideration of the April 9, 2008 Memorandum Opinion and Order, seeking reconsideration and/or clarification that only the Plaintiffs' wrongful death claims were summarily dismissed leaving as viable the Plaintiffs' "other claims" for medical negligence and personal injury. (R.775–782, RE Tab 10). In their Motions for Clarification and/or to Reconsider, the Plaintiffs set forth that the Defendant had failed to file an Itemization of Material Facts as to Which There Existed No Genuine Issue as required by Uniform Circuit Rule 4.03. The Defendant, Stephen Mills, M.D. filed his Response in Opposition to the Plaintiffs' Motion for Clarification and/or for Reconsideration in conjunction with an Itemization of Materials Facts as to Which There Exist No Genuine Issue. (R.775-806, RE Tab 10; R.807-810, RE Tab 11). On May 21, 2008, the Plaintiffs filed their Reply to the Defendant's Response in Opposition to the Motions for

Clarification and/or Reconsideration. (R.820-824). On May 23 2008, the Plaintiffs filed a Motion to Strike the Defendant's Itemization of Material Facts and/or in the alternative responded specifically to the Itemization of Material Facts as to Which the Defendant contended there was no genuine issue. (R.811–817). On June 13, 2008, the Court entered a second Memorandum Order and Judgment. (R.825–836, RE Tab 12). From the June 13, 2008 Memorandum Order and Judgment, the Plaintiffs have appealed to this Court.

C. Statement of Facts Relevant to the Issues Present for Review:

The Plaintiff, Shanika Hill, a 23 year old, Gravida 4 (4th Pregnancy), Para 3 (3 live births/children), presented to King's Daughters Medical Center:

> On May 8, 2002 with complaints of vaginal bleeding for the past 1 – 1 ½ weeks, with heavy bleeding and then spotting, and with complaints of lower abdominal discomfort and unsure of her last menstrual period. At that time she was seen by Dr. Richard Rushing, admitted to the hospital overnight, and an ultrasound obtained demonstrating an **estimated gestational age of the pregnancy to be 15 weeks gestation** with the observation of a subchorionic placental hematoma. During this overnight hospitalization, the cervix remained closed and unchanged. She was discharged to follow up in one week at the Health Department.
>
> On May 16, 2002, Ms. Hill was seen at the Health Department at which time she reflected that she was still spotting with heavier bleeding on some days.
>
> On May 27, 2002, Ms. Hill again presented to the Emergency Department at King's Daughters Medical Center, in the company of her mother, a registered nurse, with the primary complaint of abdominal cramping and passing of large clots and one specimen that appeared to be products of conception. At the time of this presentation, Ms. Hill's **pregnancy was 17 3/7 weeks gestation**. At that time, Ms. Hill was seen by Dr. Stephen Mills; the bleeding and cramping had markedly decreased; on physical examination Dr. Mills found the **cervix to be *closed with no active bleeding***. Furthermore, auscultation by nursing did not determine the existence of fetal heart tones. It was Dr. Mills' impression that Ms. Hill had probably had a complete abortion or miscarriage. Ms. Hill was discharged but instructed that she should return if there was any reoccurrence of abdominal cramping or vaginal bleeding.
>
> On June 8, 2002, Ms. Hill again presented to King's Daughters Medical Center with complaints of severe abdominal pain and cramping, and heavy vaginal bleeding since the early morning hours of that day. Shortly after presentation,

> Ms. Hill expelled products of conception including a fetus of **19 weeks gestation** and **a fetal weight according to pathology of only 205 grams**.

(R.339, RE Tab 3).

Thereafter, on September 6, 2002, the Plaintiffs filed their Complaint for the wrongful death of their 19 week gestation unborn and for Shanika Hill's alleged past, present and future pain and suffering and emotional distress as a result of the wrongful death of her prematurely delivered child. (R.12–22, RE Tab 2).

III. SUMMARY OF THE ARGUMENT

The trial court was imminently correct and did not abuse its discretion in excluding the proposed opinions of Dr. Fuselier, the Plaintiffs' expert, regarding causation. The court below found that the testimony of the Plaintiff's expert was neither relevant nor reliable. The *Daubert* factors were correctly applied, and in the face of their expert's opinions being overwhelmingly contradicted by the medical literature, the Plaintiffs were unable to come forward with any evidence of reliability other than Dr. Fuselier's years of experience in medicine. The medical expert's "experience" simply does not outweigh the weight of authority in the medical literature that directly contradicts the expert's opinions. Therefore, the trial court appropriately excluded the expert's testimony. Such an evidentiary determination is subject to an abuse of discretion standard, and nothing in this case should subject the trial court's determination to a more stringent standard of review.

The trial court's grant of summary judgment in favor of the Defendant was proper. The exclusion of the Plaintiffs' medical expert testimony defeats key elements of the Plaintiffs medical negligence claims, as the Plaintiffs would be unable to meet their burden of proof. As the medical malpractice claims fail, so too must fail all claims asserted by the Plaintiffs. Without admissible evidence of causation, no claims asserted by the Plaintiffs are sustainable against the Defendant. Thus, entry of summary judgment on all claims was appropriate.

The trial court's refusal to grant the Plaintiffs Motion for Reconsideration was not error. The Plaintiffs were simply regurgitating previously submitted arguments, and failed to submit anything that should rightfully be considered on a Motion for Reconsideration. Furthermore, the trial court did not abuse its discretion in denying the Plaintiffs Motion for Recusal. None of the concerns articulated by the Plaintiffs would cause a reasonable person to doubt the trial court's impartiality under the totality of the circumstances. Thus, recusal was not warranted.

IV. ARGUMENT

A. The trial court's *Daubert* determination excluding Plaintiffs' medical expert's causal opinions/theories was not an abuse of discretion and was consistent with the consensus of the evidence based scientific literature

The trial Court correctly excluded the proposed testimony of Plaintiffs' medical expert pursuant to a reasonable *Daubert* analysis. In 2003, this Supreme Court revised Mississippi Rule of Evidence 702 to mirror Federal Rule of Evidence 702:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence 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.*"

MISS. R. EVID. 702 (amended, effective May 29, 2003) (emphasis added).

In amending MISS. R. EVID. 702, this Supreme Court adopted the standard announced by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, (1993) and *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167 (1999). However, MISS. R. EVID. 702 provided three additional requirements (itemized above) after both *Daubert* and *Kumho Tire.*

i. The opinions and theories of Plaintiffs' medical expert were unsupported and contradicted by the medical literature

As the Court stated in *Kumho Tire*, the factors that will bear on the *Daubert* inquiry depends upon the particular circumstances of the particular case at issue and that there may be circumstances where a claim made by scientific witness has never been the subject of peer review. *Id.* at 151. In *Poole, Wrongful Death Beneficiaries of Poole v. Avara, M.D.*, 908 So.2d 716 (Miss. 2005), cited by the Appellants on page 15 of their brief, this Court again emphasized

that **scientific knowledge means something more** than **unsupported speculation** or **subjective belief** that is grounded in methods and procedures of science, citing *Kumho Tire* at 590, 113 S.Ct. 2786. In *Poole*, this Court stated that:

> Though the *Daubert* factors are meant to be helpful, the application of those factors "depends on the nature of the issue, the expert's particular expertise, and the subject of the testimony,"...Peer review by publication remains only one factor on a non-exhaustive list of factors for admissibility under evidence rules with a liberal thrust. **Though helpful when present,** publication and peer review are not absolutely required; **their absence does not constitute automatic inadmissibility...**

Id. at ¶ 17 (**emphasis added**).

However, *Poole* is totally distinguishable. There this Court found that the fact that the opinion of the physician expert that CPR (chest compressions causing varying pressure in the thoracic/abdominal cavity) could result in bursting of an anastomotic seam in the deceased's colon, had not specifically been the subject matter of publication did not automatically render this testimony to be unreliable. The *Poole* Court stated "simply because no author had written specifically on the theory of bursting an anastomosis seam through CPR does not mean it is truly ground breaking medical history". *Id.* at ¶ 17. Contrarily, the trial Court in the case sub judice was imminently correct and certainly did not abuse his discretion in finding in its Memorandum Opinion and Order dated April 9, 2008[1] that:

> "The Plaintiffs' expert has been unable to identify, produce or cite any scientific or peer reviewed literature in support of his expert opinion. To the contrary, the testimony of Dr. John C. Morrison cites the management of preterm labor from ACOG Practice Bulletin No. 43, May 2003, as well as Williams Obstetrics, 21st and 22nd Edition, which contradict the expert testimony of Dr. Fuselier. **There is no evidence in the record of any medical treatise or journal which substantiates Dr. Fuselier's opinion. To the contrary, all the medical literature produced in this cause contradicts Dr. Fuselier's opinion."** (R.749–751, RE Tab 8).

[1] Of note, the Court's Memorandum Opinion and Order dated April 9, 2008, cites case law not reflected in this Defendant's proposed Findings of Fact & Conclusions of Law and bears little resemblance to the form of the Defendant's proposed findings. (R.749–751, RE Tab 8).

Prior to rendering its initial three page Memorandum Opinion and Order dated April 9, 2008, the trial Court had before it the following:

(1) Sworn deposition of the Plaintiffs' medical expert, Dr. Paul Fuselier; the notice of which required Dr. Fuselier provide "all published or unpublished articles or any other materials relied upon by Dr. Fuselier or otherwise supporting his opinions. At his deposition, Dr. Fuselier neither produced nor could he cite any scientific or peer reviewed literature in support of his opinions that tocolytics, terbutaline, magnesium sulfate or hormones such as progesterone and/or prostaglandins are effective in preventing the termination of a 17 3/7 weeks gestational pregnancy not just for a short period of time but for long periods of time; that bed rest, hydration or pelvic rest probably would prevent spontaneous termination of a 17 3/7 weeks gestational pregnancy; and/or that maintenance treatment with tocolytic medications and/or repeated acute tocolysis would meaningly prolong the 17 3/7 week pregnancy..

(2) Affidavit and sworn testimony at the hearing by Dr. John Morrison, Maternal/Fetal Specialist and previous Chairman of the Department of Obstetrics & Gynecology at University Medical Center, with citations to the peer reviewed literature including Dr. Morrison's testimony that there does not exist any scientifically reliable literature support for Dr. Fuselier's proposed opinions that bed rest, hydration, pelvic rest or tocolytic therapy has any efficacy in materially prolonging a 17 3/7 weeks gestation in the face of threatened abortion or miscarriage.

(3) The literature cited by the Defendant at the *Daubert* hearing and attached to his *Daubert* Motion which reflected that there are no effective therapies for threatened abortion (pregnancies spontaneously terminated prior to 20 weeks gestation or a fetus of less than 500 gram birth weight); and that the consensus in the scientific literature for the last 20 – 30 years, including the American College of Obstetricians and Gynecology, is that even after 20 weeks and before 34 weeks, the effectiveness, if any, of tocolytics, hydration, bed rest, is at best "uncertain".

The testimony of Dr. Fuselier, the Plaintiff's expert, in his deposition was that Dr. Mills deviated from the standard of care in not obtaining an ultrasound on May 27, 2002 in order to confirm pregnancy termination and that if he had performed an ultrasound, Dr. Mills would have known that the pregnancy was still intact, in which event he should have ordered hospitalization, pelvic rest, bed rest, and the administration of medications (tocolytics) to prolong the pregnancy. Dr. Fuselier testified that in his experience these interventions could have prolonged the pregnancy for 8 – 9 additional weeks or longer. At the *Daubert* hearing, the Defendant reflected that the issue of whether the standard of care required that an ultrasound be performed on May

27, 2002, was an issue in dispute albeit the Defendant's expert, Dr. Morrison, was firmly of the opinion and opined that under these circumstances, the standard of care did not require that Dr. Mills obtain an ultrasound especially where the vaginal bleeding had subsided, the cervical os was closed, and no fetal heart tones could be determined on auscultation, etc.

The "opinions" of Dr. Fuselier with regard to the issue of causation, i.e. that there was any intervention which would have materially prolonged this 17 3/7 weeks pregnancy was the subject of the *Daubert* Motion. Dr. Fuselier, in his deposition, conceded that

> A: ...let's say that from 8 to 13 weeks or 8 to 14 weeks or whatever, those patients who -- and most patients who have spotting and bleeding do not have a miscarriage, but some do. Is it of value to recommend bed rest and pelvic rest and no intercourse? And -- probably not. Most of us would do that, and it's appropriate in my opinion because if you go home and have intercourse and the next day you have a miscarriage, intercourse really didn't cause it. But there's these feelings –
>
> Q: There's a temporal relationship in the patient's mind.
>
> A: And you feel like you're doing something -- or the patient feels like, I'm doing something to try and help the pregnancy.

(Deposition of Dr. Fuselier p. 32, lines 12-25; 33, lines 1-2; **R. at 549, RE Tab 3; *Daubert* Hearing Tr. 7–8, RE Tab 1**). However, Dr. Fuselier tried to hedge with regard to the pregnancy period from 14 – 20 weeks, and mischaracterize the events of May 27, 2002 with regard to this 17 3/7 weeks pregnancy as "premature labor", for which bed rest, pelvic rest, and medicines (tocolytics) would have prolonged the pregnancy, not just for a short period, but for 8 – 10 weeks; or even longer.[2] (Deposition of Dr. Fuselier, pp. 34 – 56; R. at 551–573, RE Tab 3).

Before the Court at the *Daubert* hearing, the undisputed facts were that when Shanika Hill presented on May 27, at which time she was seen by Dr. Mills, the gestational age of her

[2] On page 20 of Appellants' brief, they mischaracterize Dr. Mills' deposition testimony that had his impression on May 27, 2002 been that there had been no abortion but simply a threatened abortion, he would have advised pelvic rest; in the same breath Dr. Mills testified that bed rest or pelvic rest nor any other intervention helps prevent an early second trimester miscarriage. (Deposition of Dr. Mills, pp. 61 – 62; R. 642 – 643).

pregnancy was only 17 3/7 weeks and upon physical examination, the cervical os was *closed*. At the time of the inevitable (spontaneous) abortion on June 8, 2002, the gestation of the pregnancy was only 19 weeks and, the weight of the fetus was only 205 grams. These facts are undisputed!

The distinction between "threatened abortion" and "preterm labor" is not just a matter of semantics; there exists a clear medical distinction between these two terms. The peer reviewed literature consistently reflects the following:

(1) **Abortus**. A fetus or embryo removed or expelled from the uterus during the first half of gestation (20 weeks or less) weighing less than 500 grams.[3]

(2) **Abortion** is the termination of pregnancy either spontaneously or intentionally, before the fetus develops sufficiently to survive. By convention, abortion is usually defined as pregnancy termination *prior to 20 weeks gestation or less than 500 gram birth weight*.[4]

(3) **Threatened abortion**. The clinical diagnosis of threatened abortion is presumed when a bloody vaginal discharge or bleeding appears through a closed cervical os during the first half (20 weeks) of pregnancy.[5]

(4) **There are no effective therapies** for threatened abortion. Bedrest, although often prescribed, does not alter the course of threatened abortion.[6]

(5) **Inevitable Abortion**. Gross rupture of the membranes, evidenced by leaking amniotic fluid, in the presence of cervical dilation signals almost certain abortion. ... Rarely a gush of fluid from the uterus during the first half of pregnancy is without serious consequence ... if, however, the gush of fluid is accompanied or followed by bleeding, pain or fever, abortion should be considered inevitable and the uterus empty.[7]

At the time of Ms. Shanika Hill's presentation on May 27, she was not in "preterm labor", *i.e.* regular contractions with cervical change (the cervical os was closed) in the perinatal period. On May 27, Ms. Hill's pregnancy was not even in the perinatal period (greater than 20 weeks).

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[3] Williams Obstetrics, 21st Edition, Chapter 1, p. 5 (2001); (R.442, RE Tab 3).
[4] Williams Obstetrics, 22nd Edition, Chapter 9, p. 232 (2005); (R.497, RE Tab 3).
[5] *Id* at p. 239; (R.504, RE Tab 3).
[6] *Id* at p. 240; (R.505, RE Tab 3).
[7] *Id* at p. 240; (R.505, RE Tab 3).

However, the peer reviewed literature with regard to "preterm labor" again is consistent and instructive:

(1) **Perinatal period**. This includes all births weighing 500 grams or more and ends at 28 complete days after birth. When perinatal rates are based on gestational age rather than birth weight, it is recommended that the perinatal period be defined *to commence* at 20 weeks.[8]

(2) **A preterm delivery**, as defined by the World Health Organization is one that occurs at less than 37 *and more than 20 weeks gestational age*.[9]

(3) **Preterm labor** is usually defined as regular contractions accompanied by cervical change occurring at less than 37 weeks gestation (and greater than 20 weeks).[10]

(4) (With regard to "preterm labor", i.e., regular contractions accompanied by cervical change occurring in pregnancies of more than 20 weeks gestational age and less than 37 weeks gestational age), the evidence based medicine...[reveals]...those things for which there is no evidence of efficacy,...[which]...include hydration, sedation, bedrest, home uterine activity monitoring, tocolytics without the concomitant use of corticosteroid.[11]

The American College of Obstetrics & Gynecology published its Practice Bulletin for Management of Preterm Labor in 2003 which (while not applicable to a 17 3/7 weeks pregnancy and a fetal weight of less than 500 grams) encapsulates the consensus of the scientific literature regarding preterm labor, *i.e.*, regular contractions with cervical change (occurring in the perinatal period, *i.e.*, greater than 20 weeks and less than 37 weeks gestation):

(1) **Tocolytic drugs** may prolong gestation for 2-7 days which can provide time for administration of steroids...the benefits for prolonging pregnancy for 2-7 days are otherwise unclear.[12]

(2) With regard to ***preterm* labor** (i.e., a pregnancy of a gestational age of greater than 20 weeks, with regular contractions and cervical change), "[a]lthough bedrest, pelvic rest and hydration are commonly recommended to women with symptoms of preterm labor to prevent preterm delivery, the effectiveness of these

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[8] Williams Obstetrics, 21st Edition, Chapter 1, p. 5 (2001); (R.442, RE Tab 3).
[9] *The Management of Preterm Labor*, Goldenberg, R.I.; Obstetrics and Gynecology, Volume 100, No. 5, Part I, p. 1020 (2002); (R.478; RE Tab 3).
[10] *Id* at 1021; (R.478A, RE Tab 3).
[11] *Id* at 1034; (R.491, RE Tab 3).
[12] *Management of Preterm Labor*, ACOG Practice Bulletin, No. 43, p. 535, May 2003; (R.433, RE Tab 3).

measures is not known and their potential harms...should not be underestimated.[13]

(3) Studies of maintenance tocolytic therapy on women who present with symptoms of *preterm labor* and receive tocolysis acutely show no differences in effectiveness between treatment and control groups. Meta-analysis likewise fails to demonstrate any benefit of maintenance tocolysis in terms of gestational age at birth, pregnancy prolongation or birth weight. Prolonged oral subcutaneous or intravenous tocolytic treatment is not effective.[14]

(4) Summary of Recommendations. Neither maintenance treatment with tocolytic drugs nor repeated acute tocolysis improve perinatal outcomes: neither should be undertaken as a general practice.[15]

(5) Bedrest, hydration and pelvic rest do not appear to improve the rate of preterm birth and should not be routinely recommended.[16]

At the *Daubert* hearing, Dr. Morrison testified that the peer reviewed literature, scientific textbooks, etc., for the last twenty – thirty years consistently reflects the consensus of the evidence based medicine as reflected above. Dr. Morrison testified as follows:

Q: For the last thirty years is the definition of spontaneous miscarriage or abortion versus preterm labor, has that changed?

A: No, sir. The term was first coined in 1909. It hasn't changed in over a century.

Q: Tell the court...by definition what is a spontaneous miscarriage or abortion and what is the distinction between it and preterm labor?

A: Well, basically, ...if the pregnancy is less than twenty weeks, fetus weighing less than 500 grams, and the fetus aborts or is miscarried, and it does so spontaneously. Mother Nature recognizes this as an abnormal placenta or abnormal baby and it is expelled. That's spontaneous. And that's cramping, bleeding and heavier the bleeding, the more likely they are to spontaneously abort before twenty weeks, and it's with a closed cervix. The cervix doesn't open up until the baby comes out."

(*Daubert* Hearing Testimony of Dr. Morrison; **Tr. 11 – 12, RE Tab 1**).

As Dr. Morrison further testified at the *Daubert* hearing:

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[13] *Id* at p. 536; (R.434, RE Tab 3).
[14] *Id* at p. 536; (R.434, RE Tab 3).
[15] *Id* at p. 537; (R.435, RE Tab 3).
[16] *Id* at p. 537; (R.435, RE Tab 3).

A: ...the perinatal period is – well, let's start with zero to twenty weeks, anything below that is an abortus. That could be spontaneous. It could be termination, therapeutic abortion. But that's an abortus. Now, over twenty weeks or (fetal weight) 500 grams, and ending through after the birth of the baby for one month, twenty-eight days, four weeks, that's called the perinatal period. It's named that way because it's after, certainly after twenty weeks – and most people think like after twenty-five weeks when the baby would be viable – there would be a chance to do something for the baby, depending on what the problem is. Is it high blood pressure, diabetes, abnormal placenta, preterm labor, whatever it is, but all those things are more than twenty weeks. And that's why we make those distinctions, and they've been around for decades.

Q: Less than twenty weeks is there any intervention that is felt to be effective in any way in prolonging the pregnancy?

A: No, sir. And believe me, medical science has tried everything, from bed rest to hydration, to hormones like progesterone, to cervical cerclage, that is putting a stitch in the mouth of the womb to make it shut, resealing the membranes if they've ruptured, blood transfusions, antibiotics, and absolutely none of them have worked on spontaneous miscarriages like Ms. Hill had. It's not possible for the doctor to do anything to prolong that pregnancy ever.

(*Daubert* Hearing Testimony of Dr. Morrison; **Tr. 12 – 13, RE Tab 1**).

Q: Doctor, you have testified and I think on cross, that prior to twenty weeks, there is no effective therapy for threatened abortion?

A: None.

Q: Which would include Ms. Hill and her seventeen and three-sevenths weeks gestational pregnancy when she presented on May 27?

A: That's correct.

Q: And here again, is that not exactly in black letters what Williams Obstetrics says?

A: It is. And you could have picked any one of twenty or thirty or how many ever textbooks and it would say the same thing.

(*Daubert* Hearing Testimony of Dr. Morrison; **Tr. 33 – 34, RE Tab 1**).

The essence of Dr. Fuselier's opinions was that on May 27, 2002, Shanika Hill was having "preterm labor" (he referred to it as "premature labor") and that Dr. Mills should have

admitted her to the hospital, had her at strict bedrest, had her monitored and also the use of tocolytic medication (medication that purportedly diminish or cease contractions) and that had these steps been performed, the pregnancy could have been continued for not just a short period of time but several weeks, 9-10 weeks or more, and there would have been a viable delivery. Dr. Fuselier's opinions/theories are not supported anywhere in the evidence based medicine or the scientific literature. Dr. Fuselier has yet to cite (nor Appellant's counsel) any single piece of evidence based literature to support these proposed theories. Instead, the only articulated support for Dr. Fuselier's opinions is based on his 25 years of experience and that's it!

These theories of Dr. Fuselier are totally contradicted and refuted by the peer reviewed evidence based medicine. Neither on December 6th at the *Daubert* hearing, the recusal hearing on February 4, 2008, or at any time thereafter in the Plaintiffs' Motion for Clarification and for Reconsideration have Plaintiffs been able to provide the Court even a single outlier publication supporting Dr. Fuselier's theories. It remains the burden of the party sponsoring an expert's testimony to demonstrate that the scientific basis for the expert's opinions is reliable. *Flores v. Johnson*, 210 F.3d 456, 458 (5th Cir. 2000); *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998).

ii. The trial court's analysis to determine the admissibility of the Plaintiffs' medical expert testimony was proper

The Plaintiffs argue that the trial court committed error by applying a "narrow" and "restrictive" *Daubert* analysis. The trial court applied the factors set forth in *Daubert* to the facts of the instant case and determined that the proffered testimony by the Plaintiffs' expert was not relevant or reliable. However, contrary to the assertions of the Plaintiffs, the trial court did recognize in both its April 9, 2008 Memorandum Opinion and Order, as well as the June 10,

2008 Memorandum Order and Judgment, that the factors set forth in *Daubert* were non-exclusive.[17] There was nothing impermissibly narrow or restrictive about the trial court's analysis; the Plaintiffs were simply unwilling or unable to come forward with any factors or evidence which could outweigh the factors set forth by *Daubert*. In *Kumho*, the U.S. Supreme Court noted that the trial court evaluated the proffered expert testimony, and found:

> (1) that 'none' of the *Daubert* factors, including that of 'general acceptance' in the relevant expert community, indicated that the [expert's] testimony was reliable, (2) that its own analysis 'revealed no countervailing factors operating in favor of admissibility which could outweigh those identified in *Daubert*,' and (3) that the 'parties identified no such factors in their briefs,'[and] [f]or these three reasons taken together, it concluded that [the expert's] testimony was unreliable.
>
> *Kumho*, 526 U.S. at 156.

In the instant case, the trial court essentially undertook the same framework of analysis that the U.S. Supreme Court endorsed in *Kumho*. Notably, the trial here evaluated the *Daubert* factors and was unable to identify any additional factors supporting reliability. Ultimately, the trial court determined that the sole support offered by the Plaintiffs to evidence reliability (the expert's years of experience) failed to outweigh the significant contradictions to the expert's opinion found in the medical literature. If the Plaintiffs felt that other factors should be considered, *Kumho* makes clear that such alternate factors should be brought to the attention of the court. The Plaintiffs' disappointment with the ultimate result of the trial court's evaluation of relevant factors is an insufficient basis to attack the court's analysis, especially when the trial court utilized the appropriate framework for consideration of reliability as set forth by the U.S. Supreme Court and this Court. Accordingly, the court's determination certainly does not rise to an abuse of discretion.

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[17] The Court noted, "In deciding whether or not such testimony will be heard, the Court must consider five non-exclusive factors...." (R.750, RE Tab 8). The Court again stated, "[T]he trial court must apply five non-exclusive factors." (R.830, RE Tab 12).

iii. The trial Court's evidentiary determination concerning the admissibility of expert testimony is subject to an abuse of discretion standard

The Plaintiffs argue that the trial Court's analysis and determination that the proffered testimony of the Plaintiffs' expert was neither scientifically relevant nor reliable should be reviewed *de novo*. [18] This argument of the Plaintiff is based solely upon the fact that the trial court adopted the proposed order submitted by the Defendant.[19] The issue before this court is whether the trial court abused its discretion by excluding the testimony of the Plaintiffs' expert, and a *de novo* review is not appropriate. Clearly, the trial court did not abuse its discretion.

This Court should apply an abuse-of-discretion standard of review when reviewing the trial court's decision to allow or disallow evidence, including expert testimony. *Webb v. Braswell*, 930 So. 2d 387, 396-97 (Miss. 2006) (citing *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003)). A trial court's decision to allow expert testimony will be affirmed "[u]nless we can safely say that the trial court abused its judicial discretion in allowing or disallowing evidence so as to prejudice a party in a civil case, or the accused in a criminal case." *Jones v. State*, 918 So. 2d 1220, 1223 (Miss. 2005) (citing *McGowen v. State*, 859 So. 2d 320, 328 (Miss. 2003)).

The Plaintiffs rely upon limited authorities to argue that a heightened standard of review in the instant case is appropriate. The Plaintiffs' argument is without merit. The authorities cited by the Plaintiffs are each clearly distinguishable from the circumstances and procedural posture

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[18] The Plaintiffs' brief argues: "Where, as here, the trial court adopts *in toto* the findings of fact and conclusions of law as submitted by the Defendant, the appellate Court should utilize a *de novo* standard of review without the usual deference given to the trial court's findings." Brief of Appellant, P. 11. .

[19] The Plaintiffs ignore the fact that on April 9, 2008, the trial Court entered a three-page Memorandum Opinion and Order which excluded the testimony of the Plaintiffs' expert and granted the Defendant's Motion for Summary Judgment. (R. 749-751, RE Tab 8). This Order was not proposed to the Court or otherwise drafted by the Defendant or counsel, and reaches the same ultimate conclusion as the Court's later June 10, 2008 Memorandum Order and Judgment from which the Plaintiff appeals. (R. 825-836, RE Tab 12). The June 10, 2008 Order (which was proposed by the Defendant) was entered in response to the Plaintiffs' Motion for Clarification and Motion for Reconsideration. (R. 752-759, RE Tab 10).

of the instant case. Each of the authorities cited by the Plaintiffs for their argument requesting a heightened standard of review are either cases rising from Chancery Court or cases where the Circuit Court was the trier of fact as opposed to a jury. The Plaintiffs cite as authority: *Omnibank of Mantee v United Southern Bank*, 607 So.2d 76 (Miss. 1992)(Chancery Court); *Holden v Holden*, 680 So.2d 795 (Miss. Sup Ct. 1996)(Chancery Court); *MS Dept of Wildlife v Brannon*, 943 So.2d 53 (Miss Ct. App. 2006) (Bench trial under Miss. Tort Claims Act); and *MS Dept of Transportation v Johnson*, 873 So.2d 108 (Miss Sup. Ct. 2004)(Bench Trial).

In *Omnibank*, the Supreme Court, when addressing a twenty-three page Memorandum Opinion of the Chancellor, articulated that findings of fact when adopted by the by the trial court are only viewed "with a more critical eye". *Omnibank*, 607 So.2d at 83. Nothing in *Omnibank* suggests that such findings are entitled to *de novo* review. *Id.* In *Holden*, this Court affirmed the Chancellor's judgment, but a *de novo* review of the record was required because the Chancellor failed to make *any* findings of fact in the proceedings (as opposed to adopting the findings proposed by a party). *Holden*, 680 So.2d at 799. In *Brannon*, the Mississippi Court of Appeals clearly held that *de novo* review was not warranted even when the trial court adopts the proposed findings of a party. *Brannon*, 943 So.2d at 57 ("Nevertheless, we reject the Department's claim that a *de novo* review is appropriate."). The court in Brannon articulated the standard:

> "[W]e conclude that the appropriate standard of review requires that the appellate court 'analyzes such findings with greater care, and the evidence is subject to heightened scrutiny.'"..."This Court must view the challenged findings and the record as a whole 'with a more critical eye to ensure that the trial court has adequately performed its judicial function,'"

943 So.2d at 59.

While the Mississippi Supreme Court did apply a *de novo* standard to the trial court's findings in *Johnson*, 873 So.2d 108, the Mississippi Court of Appeals subsequent distinguishment of the authorities upon which the *Johnson* court relied, as well as the subsequent

decision of the Mississippi Supreme Court in *Phillips v. Miss. Dep't of Pub. Safety*, 978 So. 2d 656 (Miss. 2008) (finding *de novo* review inapplicable) clearly provide that *de novo* review in the instant case is not warranted.[20]

As applied to the instant case, the trial court's evidentiary findings are still entitled to an abuse of discretion standard. Even a heightened intermediate scrutiny involving "a critical eye" still supports the trial court's findings. The facts relied upon by the trial court were essentially undisputed. The Plaintiffs' expert could not produce any medical literature supporting his opinion on causation, and the relevant medical literature in the field directly contradicted the opinions of Plaintiffs' proffered expert. Therefore, the findings of the trial court, after accepting briefs on the relevant facts and issues, conducting an evidentiary hearing with testimony of the parties' experts, and the request of proposed findings from both parties, clearly evidences the trial court's adequate performance of its judicial function. Therefore, the trial court's determination that the Plaintiffs' proffered expert was excluded from testifying is not subject to *de novo* review.

B. The trial court's entry of Summary Judgment in favor of the Defendant was proper

i. The standard applied to the Motion for Summary Judgment

The Defendant's Motion for Summary Judgment (R.592, RE Tab 5) was properly granted by the trial court. In reviewing a trial court's grant or denial of summary judgment, the well-established standard of review is de novo. *Hubbard v. Wansley*, 954 So. 2d 951, 956 (Miss. 2007); *Brooks v. Roberts*, 882 So.2d 229, 231-232 (Miss. 2004); *Bowie v. Montfort*, 861 So.2d

[20] Again, it should be reinforced that in the instant case, the trial court originally entered an Order of its own production as set-forth in *supra* note 1. Thus, the record before this Court clearly evidences the trial court's independent analysis as to the legal authorities, facts and circumstances relevant to the *Daubert* inquiry.

1037, 1040 (Miss. 2003). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). "A summary judgment motion is only properly granted when no genuine issue of material fact exists." *Jackson Clinic for Women, P.A. v. Henley*, 965 So. 2d 643, 649 (Miss. 2007). "After viewing the evidence in a light most favorable to the nonmoving party, this Court will only reverse the decision of the trial court if triable issues of fact exist. *Bowie*, 861 So.2d at 1041; see also *Brooks*, 882 So.2d at 232 ("We will only reverse the decision of the trial court if there are indeed triable issues of fact."). The proponent of a summary judgment motion bears the burden of showing that there are no genuine issues of material fact such that he is entitled to judgment as a matter of law. *Bowie*, 861 So.2d at 1040; *Brooks*, 882 So.2d at 231-232. "The motion may not be defeated merely by responding with general allegations, but must set forth specific facts showing that issues exist which necessitate a trial." *Bowie*, 861 so.2d at 1040-1041; see also *Brooks*, 882 So.2d at 232 ("More then [sic] general allegations are needed to defeat a motion for summary judgment; there must be specific facts showing that material issues of fact exist.").

ii. The exclusion of the Plaintiffs' medical expert testimony defeats key elements of the Plaintiffs' medical negligence claims

Due to the trial court's determination that the Plaintiffs' proffered expert medical testimony was neither scientifically relevant nor reliable, the Plaintiffs are unable to meet the required elements of a medical malpractice claim. All claims of Plaintiffs and all damages asserted by the Plaintiffs are derivative to the medical malpractice claim. As the Plaintiffs are unable to meet their burden on any claim of medical negligence, summary judgment in favor of the Defendant is appropriate as to all claims.

This Court has repeatedly held, "it is our general rule that in a medical malpractice action negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care." *Troupe v. McAuley*, 955 So.2d 848, 856 (Miss. 2007)(citing *Brooks v Roberts*, 882 So.2d 229, 232 (Miss. 2004)).

It is well settled that:

> "To present a prima facie case of medical malpractice, a plaintiff, (1) after establishing the doctor-patient relationship and its attended duty is general required to present expert testimony (2) identifying and articulating the requisite standard of care; and (3) establishing that the defendant physician failed to conform the standard of care. In addition, (4) the plaintiff must prove the physicians noncompliance with the standard of care caused the plaintiff's injury as well as proving (5) the extent of the plaintiff's damages."
>
> *Troupe*, 955 So.2d at 856.

As a result of the exclusion of the Plaintiffs' medical expert testimony, the Plaintiffs are unable to meet the essential burden of any claim for medical malpractice and summary judgment is appropriate. *Troupe*, 955 So.2d at 858 (affirmed directed verdict in favor of the defendant physician and holding, "The practical effect of [the trial court's] ruling as to [the Plaintiff's medical expert] was that [the Plaintiff] was undeniably left with the inability to meet her burden of proof in this medical negligence case.").

iii. All claims of the Plaintiffs are defeated by the exclusion of their medical expert testimony

Due to the Plaintiff's inability to present any evidence on key elements of their claims for medical negligence, summary judgment is proper as to all claims. A review of the Plaintiffs Complaint[21] reveals the following with regard to damages claimed:

COUNT I – MEDICAL MALPRACTICE

[21] (R.12-22, RE Tab 2). It should be noted, Plaintiffs' Complaint is styled "Complaint for Medical Malpractice".

27. As a result of the medical malpractice and negligent acts and/or omissions by the Defendants, Plaintiffs have suffered from the trauma of premature delivery and the loss of their child, for which they are entitled to recover actual damages in an amount sufficient for compensation.

(R.16-17, RE Tab 2).

COUNT II – WRONGFUL DEATH

30. As a direct and proximate result of the negligent acts of the Defendants, Plaintiffs lost their prematurely delivered child. For the wrongful death of their child, the Plaintiffs are entitled to recover all damages . . . which include, but are not limited to, the following:

A. Loss of love and affection;
B. Loss of support and wage earning capacity;
C. Loss of the value of the life of the deceased child;
D. Medical expenses;
E. Loss of enjoyment of life and the loss of life's achievement and happiness;
F. *Pain and suffering*;
G. *Emotional distress*;

(R.17, RE Tab 2).

COUNT III – NEGLIGENCE

39. As a result of the negligent and wrongful acts and/or omissions of the Defendants, Plaintiffs have suffered from the trauma of premature delivery and the loss of their child, constituting substantial damage for which they are entitled to recover actual damages in an amount sufficient for compensation.

(R.19, RE Tab 2)

COUNT IV – PERSONAL INJURY

42. As a direct and proximate result of the negligent acts of the Defendants, Plaintiff Shanika Hill is entitled to recover damages from the Defendants, which include, but are not limited to, the following:

A. Medical, hospital, physician, ambulance and other treatment and expenses incurred during the dates

complained of herein (there was no ambulance involved at any time);

B. Future medical, hospital, physician, and other treatment expenses which she will incur as a result of her injuries;
C. Economic loss resulting from her premature injury;
D. Loss of enjoyment of life and the loss of life's achievement and happiness;
E. Pain and suffering as a result of the traumatic injury to her body and resulting treatment;
F. Past, present and future pain and suffering *which resulted from the wrongful death of her prematurely delivered child*;
G. Emotional and psychological distress and suffering *which resulted from the wrongful death of her prematurely delivered child.*

(R.19-20, RE Tab 2). (Emphasis added).

Consequently, the trial court's disposition of the *Daubert* Motion and the exclusion of Dr. Fuselier's unreliable opinion with regard to causation, effectively disposes of the entire action.

Plaintiffs continue to argue that additional claims remain despite the trial court's exclusion of the only testimony which could support a medical negligence cause of action. Essentially, the Plaintiffs argue that because there was a misdiagnosis of complete abortion prior to the actual abortion, the Plaintiffs suffered actionable "trauma" and "emotional distress" when the actual miscarriage inevitably occurred.[22]

This argument is disingenuous and contrary to the trial Court's Memorandum Opinion and Order excluding the Plaintiff's medical expert testimony. First, the fact that the Defendant's impression on May 27, 2002, that Shanika Hill had had a spontaneous abortion, which with the

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[22] The Plaintiffs' Brief argues:

> [T]he Defendant's misdiagnosis of the individual Plaintiff Shanika Hill when he incorrectly and negligently diagnosed a live, 17 ½ -week pregnancy as a complete abortion...resulted in unnecessary trauma and psychological distress when she actually delivered a 19 week fetus two weeks after she had been told she was no longer pregnant.... As a result of the misdiagnosis of a complete abortion on May 27, 2002, both [Plaintiffs] suffered enormous and unnecessary trauma when Plaintiff Shanika Hill delivered a live, moving, 19-week fetus.... This particular trauma and psychological distress would not have occurred had the appropriate and correct diagnosis been made.

Brief of Appellant, P.22-23.

benefit of retrospection turned out to be mistaken, is not in and of itself proof of any negligence. The fact that a physician's impression and diagnosis turns out with the benefit of 20/20 hindsight to have been an error is, in and of itself, not evidence of negligence. *Estate of Perry ex rel. Rayburn v. Mariner Health Care, Inc.*, 927 So.2d 762 ¶ 10 (Miss. App. 2006); *Binkham v. Grant*, 861 So.2d 299 ¶ 35 (Miss. 2003); *Daughtry v. Kuiper*, 852 So.2d 675 ¶ 26 (Miss. App. 2003).

Secondly and more importantly, to suggest that if the Defendant's assessment on May 27, 2002, had been correct, *i.e.*, that the Plaintiff had a "threatened abortion" (with the benefit of hindsight, the accurate diagnosis) – what does the Plaintiff contend would have occurred? Consistent with the scientific literature and the trial court's Memorandum Opinion, Shanika Hill would still have presented to King's Daughters Medical Center on June 8, 2002, with complaints of severe abdominal pain and cramping, heavy vaginal bleeding, and – shortly after presentation, expelled products of conception including a fetus of 19 weeks gestation! A review of the Complaint and the damages claimed, without *prima facia* proof of the element of *causation* (consistent with the Court's evidentiary determination), gains the Plaintiff nothing. The "trauma and psychological distress" alleged in this action was as a result of the spontaneous abortion (the alleged wrongful death) itself. Assuming *arguendo* as Plaintiff contends, that Defendant's impression on May 27, 2002, was that in fact Ms. Hill had experienced a "threatened abortion" but was still "pregnant", the same alleged "trauma and psychological distress" would have ensued on June 8, 2002, when Shanika Hill incurred a *spontaneous abortion*!

Put another way, the misdiagnosis of a spontaneous abortion on May 27, 2002 was not the proximate cause of the trauma and emotional distress which the Plaintiffs suffered.[23]

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[23] For a particular damage to be recoverable in a negligence action, the plaintiff must show that the damage was proximately caused by the negligence. *Glover v. Jackson State Univ.*, 968 So.2d 1267, 1277 (Miss. 2007). In order for an act of negligence to proximately cause the damage, the fact finder must find that the negligence was both the cause in fact and legal cause of the damage. *Id.* A defendant's negligence is the cause in fact of a plaintiff's damage where the fact finder concludes that, but for the defendant's negligence, the injury would not have occurred. *Glover*,

Pursuant to the trial court's determination that the medical testimony of the Plaintiffs' expert was not scientifically relevant or reliable (and therefore excluded), the misdiagnosis of May 27 cannot be the "but for" cause of Plaintiff Hill's subsequent miscarriage, as the subsequent miscarriage and resulting emotional trauma and distress would have occurred anyway (even without the action of the Defendant). Simply, whether or not the threatened abortion was accurately diagnosed on May 27, 2002 would not have changed the ultimate result that a spontaneous abortion occurred on June 8, 2002. Any other finding would be inconsistent with the trial court's determination that there was not scientifically relevant and reliable evidence supporting the causation element of the wrongful death claim (*i.e.*, whether any actions could have prevented the ultimate result of spontaneous abortion). Thus, the Plaintiffs' argument that any alleged causes of action were not disposed of by the trial court's evidentiary determination is without merit. Summary Judgment in favor of the Defendant was appropriately granted as to all claims in this case.

iv. Summary Judgment in favor of the Defendant was proper despite the Defendant's itemization of facts not genuinely disputed being filed after the Motion for Summary Judgment

The Plaintiffs argue to this Court that the Defendant's Motion for Summary Judgment is procedurally deficient because at the time the Motion for Summary Judgment was filed by the Defendant, no separate itemization of the facts relied upon and not genuinely disputed was not simultaneously filed. The Plaintiffs' argument that the Trial Court committed error by granting the Defendant's Motion for Summary Judgment, even though the itemization of undisputed facts was not filed contemporaneously with the motion, is without merit. The Defendant, in an effort to correct the alleged procedural deficiency at the trial court, did submit an itemization of

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968 So.2d at 1277. Stated differently, the cause in fact of an injury is that cause which, in natural and continuous sequence unbroken by any efficient intervening cause, produces the injury and without which the injury would not have occurred. *Id.*

material facts as to which there exists no genuine issue, although this filing was some time after the Motion for summary judgment was filed. (R.807, RE Tab 11). However, even if the Defendant had failed entirely to submit a separate document resembling an itemization, the trial court's entry of summary judgment in favor of the Defendant would still be appropriate.

In the case of *Otts v. Lynn*, the Mississippi Court of Appeals faced this precise issue. 955 So.2d 934, 942 (Miss. 2007). In *Otts*, the Trial Court granted summary judgment in favor of the Defendant, despite the fact that the Defendant failed to comply with the mandatory requirement of the Uniform Rules of Circuit and County Court Rule 4.03, which requires the movant for a summary judgment to itemize the facts alleged to be undisputed. Id. at 942-943. The Court of Appeals affirmed the summary judgment award in favor of the Defendant despite the failure to file the itemization. *Id.* The Court recognized that:

> While the summary judgment motion itself did not specifically itemize undisputed facts, we find from the record that the movant did attach relevant excerpts from the pleadings, discovery, and depositions, which described undisputed facts. In addition, [the Defendant] filed a memorandum brief to support her Motion for Summary Judgment on the same day as the Motion for Summary Judgment was filed. In the brief, [the Defendant] describes several facts which she claims are not in dispute....

Id.

Thus, the Court found the record in the case, including the excerpts attached as exhibits to the motion, as well as the Defendant's Memorandum in Support of the Motion for Summary Judgment, all taken together, sufficiently identified facts to which there was no genuine issue. See *Id.* In *Otts*, the Court of Appeals affirmed the Trial Court's summary judgment in favor of the Defendant, and held that the Plaintiff's argument that the Defendant's Motion for Summary Judgment should be reversed because it was procedurally deficient simply due to an itemization of undisputed facts was without merit. *Otts*, 955 So.2d at 942-943; *see also Dresser Industries*

Inc. v. Pyrrhus Handels AG, 936 F. 2d 921, 927 (7th Cir. 1991) (where the court rejected the Plaintiff's argument that the District Court's grant of summary judgment to the Defendant was improper due to the Defendant's failure to file and serve a statement of un-controverted facts and issues pursuant to the Court's local rules, holding that when a statement of uncontested facts and issues would not affect the entry of summary judgment, the failure to file the statement does not mandate reversal).

In the instant case, on November 29, 2007, the Defendant filed his Amended Motion to Exclude Plaintiffs' proposed expert testimony and for Summary Judgment. (R.592, RE Tab 5). This amended Motion to Exclude and Motion for Summary Judgment incorporates by reference the Defendant's prior Motion to Exclude (R.337, RE Tab 3) *in toto* as previously filed on November 15, 2007. (R.592, RE Tab 5); *see also* Miss. R. Civ. P. 10(c). The Defendant's Motion to Exclude filed on November 15, 2007, as incorporated into the Defendant's Motion for Summary Judgment, included five exhibits representing excerpts from the discovery record of this case. These excerpts included an affidavit of the Defendant's medical expert (R.347, RE Tab 3), the C.V. of the Defendant's medical expert (R.351, RE Tab 3), a bibliography and copies of the materials cited in the Defendant's Motion to Exclude (R.429, RE Tab 3), the expert opinions and deposition transcript of the Plaintiff's medical expert (R.517, RE Tab 3), and the C.V. of the Plaintiffs' expert (R.585, RE Tab 3). Additionally, the trial court convened a hearing on the Defendant's Motion to Exclude where it accepted arguments of counsel and heard testimony from the Defendant's medical expert. (Tr.1-54, RE Tab 1). As the Defendant's Motion for Summary Judgment incorporated the Defendant's Motion to Exclude and all evidentiary support cited in favor thereof, the trial court's hearing on the Motion to Exclude necessarily functions as additional support for the Motion for Summary Judgment. (Tr.1-54, RE Tab 1; R.592, RE Tab 5). Further, the Motion to Exclude (R. 337, RE Tab 3) as incorporated into the

Defendant's Motion for Summary Judgment (R. 592, RE Tab 5) provides a significant discussion of material facts not genuinely disputed. These facts include information concerning the Plaintiff's medical history, the testimony of the Plaintiff's medical expert, and the status of medical literature. (R. 337-346, RE Tab 3).

The Plaintiffs' argument that the Trial Court was in error by granting the Defendant's Motion for Summary Judgment because an itemization of undisputed facts was not filed at the same time as the Motion for Summary Judgment, should fail. As the record indicates, the Defendant's motion itself, as incorporated from the Motion to Exclude, identifies material facts which were not in dispute. Further, the relevant excerpts from discovery and depositions attached to the Motion to Exclude as exhibits identified additional material facts not in dispute, and the Court's receipt of live testimony also highlighted material facts not in dispute. Therefore, a sufficient description of undisputed material facts was, in fact, presented to the Trial Court for consideration on the Motion for Summary Judgment. Pursuant to the Court of Appeals' holding in *Otts*, the Plaintiff's argument that the award of summary judgment was in error is without merit. 955 So.2d at 942-943. Additionally, due to the significant record provided to the Trial Court by the incorporation of the Motion to Exclude, as well as the descriptions of the undisputed facts contained within the pleadings, arguments and testimony presented to the Court, a formal itemization of undisputed facts would not have affected the entry of summary judgment and, therefore, the failure to file such itemization with the motion does not mandate reversal. *See Dresser*, 936 F. 2D at 927 n. 2.

C. The trial court did not abuse its discretion by denying the Plaintiffs' Motion for Reconsideration

A Trial Court's denial of a Motion for Reconsideration is reviewed for abuse of discretion. *Point South Land Trust v. Gutierrez*, No. 2006-CA-01127-COA (Miss. Ct. App.,

December 16, 2008). It is well settled that reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly. *Id.* (quoting *Templet v. Hydrochem, Inc.*, 367 F. 3d 473, 479 (5th Cir. 2004). *See also LeClerc v. Webb*, 419 F. 3d 405, 412 n. 13 (5th Cir. 2005). In order to prevail on a Motion for Reconsideration: The movement must show: (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) [the] need to correct a clear error of the law or to prevent manifest injustice. *Point South Land Trust*, at P.24 (citing *Brooks v. Roberts*, 882 So.2d 229, 233 (Miss. 2004). Further, the United States Court of Appeals for the Fifth Circuit has stated that, "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly. A Motion for Reconsideration may not be used to rehash rejected arguments or introduce new arguments." *LeClerc*, 419 F. 3d at 412. Additionally, a Motion for Reconsideration may not be used "to resolve issues which could have been raised during the prior proceedings." *Point South Land Trust*, P.24 (citing *Westbrook v. Commissioner*, 68 F. 3D 868, 879 (5th Cir. 1995).

The Plaintiffs' Motion for Reconsideration (R.752, RE Tab 9) fails to satisfy the Plaintiffs' burden for such a Motion. As the Defendant's Response in Opposition to such Motion (R.775, RE Tab 10) recognized, the testimony of the Plaintiffs' sole medical expert witness was properly excluded, and summary judgment on all claims was proper. Nothing presented in the Plaintiffs Motion presents sufficient evidence or authorities to change such determinations. In fact, the Plaintiffs' arguments in the Motion for Reconsideration are essentially a regurgitation of prior rejected arguments. Thus, this assignment of error by the Plaintiffs' is without merit.

D. The Trial Court did not abuse its discretion in denying the Plaintiffs' Motion for Recusal.

The Plaintiffs have submitted to this Court that the trial court committed error by its denial of the Plaintiffs' Motion for Recusal. Recusal is not warranted in this case, and no error committed by the trial court.

i. Standard of Review for Denial of Motion for Recusal of Trial Court

The appropriate standard of review for such an inquiry is whether the Trial Court's denial of the Motion for Recusal amounts to a "manifest abuse of discretion." *Copeland v. Copeland*, 904 So.2d 1066, 1072 (Miss. 2004); *Collins v. Joshi*, 611 So.2d 898, 901 (Miss. 1992). This Court has held that, "The decision to recuse or not to recuse is one left to the sound discretion of the Trial Judge, so long as he applies the correct legal standards and is consistent in the application." *Collins*, 611 So.2d at 902.

ii. Constitutional Requirements, Statutory Obligations and mandates of The Code of Judicial Conduct for Recusal of the trial court

The legal standards governing judicial conduct in the context of recusal find their genesis primarily from three sources. As a preliminary matter, The Mississippi Constitution requires:

> No Judge of any Court shall preside on the trial of any cause, where the parties or either or them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the Judge and of the parties.

Miss. Const. Art. 6 Section 165 (1890).

The Statutes of the State of Mississippi also regulate judicial conduct and provide an additional instance which requires a Judge to disqualify him or herself from presiding over a case. Pursuant to Miss. Code Ann. Section 9-1-11 (1972), a Judge is required to recuse himself in the event he may have been "of counsel" in the cause. Essentially mirroring the constitutional

provision, with the notable addition of the "of counsel" requirement, Miss. Code Ann. Section 9-1-11 provides:

> The Judge of a Court shall not preside on the trial of any cause, where the parties, or either or them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, or wherein he may have been of counsel, except by the consent of the Judge and of the parties.

Providing further authority, the Code of Judicial Conduct, Cannon 3, Subdivision E, sets forth an additional paradigm for the appropriate considerations by a Judge related to the necessity of recusal. Specifically, the Code of Judicial Conduct, Cannon 3 (E) provides:

> (1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct, or otherwise as provided by law, including but not limited to instances where:
>
> (a) The Judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) The Judge served as lawyer in the matter in controversy, or a lawyer with whom the Judge previously practiced law served during such association as a lawyer concerning the matter, or the Judge or such lawyer has been a material witness concerning it;
>
> (c) The Judge knows that the Judge, individually or as a fiduciary, or the Judge's spouse or member of the Judge's family residing in the Judge's household, has a financial interest in the subject matter in controversy, or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (d) The Judge or the Judge's spouse, or a person within the third degree of relationship to either or them, or the spouse of such person: (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the Judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) is to the Judge's knowledge likely to be a material witness in the proceeding.

iii. The Applicable Legal Standards for Recusal of a Trial Court

The test for determining whether the recusal of a Judge is required is set forth as follows, "Would a reasonable person, knowing all of the circumstances, harbor doubts about the Judge's impartiality?" *Copeland*, 904 So.2d at 1071 (citing *Bredemeier v. Jackson*, 689 So.2d 770, 774 (Miss. 1997). It is well settled that Judges are presumed to be qualified and unbiased. *Copeland*, 904 So.2d at 1071 (citing *Farmer v. State*, 770 So.2d 953, 956 (Miss. 2000). The Mississippi Supreme Court has held repeatedly that the "evidence presented must produce a reasonable doubt as to a Judge's impartiality." *Copeland*, 904 So.2d at 1071 (citing *Dodson v. Singing River Hosp. Sys.*, 839 So.2d 530, 533 (Miss. 2003). Impartiality is viewed under the "totality of the circumstances" analysis using an objective reasonable person, not a lawyer or Judge," standard. *Copeland*, 904 So.2d at 1071; *Dodson*, 839 So.2d at 534 (citing *Collins v. Joshi*, 611 So.2d 898, 903 (Miss. 1992) ("If a reasonable person, knowing all these circumstances, would doubt the Judge's impartiality, the Judge is required to recuse him or herself from the case.").

iv. The Plaintiffs fail to satisfy their burden of persuasion as to the impartiality of the Trial Court

Essentially, the Plaintiffs assert that the trial court presented two potential appearances of impropriety. Specifically, in this medical malpractice action, the trial court's father is a physician who was previously associated with the hospital which was formerly a Defendant in this case. The Plaintiffs also assert that an appearance of impropriety exists because the trial Judge's Court Administrator has been treated as a patient by the Defendant physician. At a hearing convened on December 6, 2007 in this matter for the purposes of the Court entertaining the oral arguments of counsel on *Daubert* motions, the Court announced:

> I apologize for interrupting you, but there is something that I've just got to disclose. I discovered about an hour ago that Dr. Mills is, in fact, my Court

> Administrator's personal physician, her OB. While I don't think that *per se*, excludes me from hearing this case, I do think it's something that needs to be told to both parties so that both parties can be made aware of. If there is a motion to recuse myself, I would certainly consider that. Quite frankly, I will let you make your argument today if the Plaintiff feels compelled to file a motion for me to recuse myself, then I will take that up as appropriate.
> (Tr. 4, RE Tab 1).

Upon the conclusion of the December 6, 2007 *Daubert* hearing, the Court granted leave to the parties of several weeks to make a determination as to whether they would request recusal of the Trial Court. On December 13, 2007, the Plaintiffs filed their Motion for Recusal of the Trial Court. (R.733, RE Tab 6). The Plaintiffs asserted that under Cannon 3(E) of the Code of Judicial Conduct and Miss. U.C.C.C.R. 1.15, that the Court should recuse the itself from this case because its Court Administrator was treated as a patient by the Defendant physician, and Trial Court's father was a practicing physician in the Brookhaven area, and practiced medicine at King's Daughters Medical Center, which is a former Defendant in this action. (R. 733, RE Tab 6). Counsel for the Plaintiffs attached an affidavit to the Motion for Recusal setting forth their perceived factual basis in support of the motion, their statement that the motion was filed in good faith and that the affiant believes that the grounds stated therein to be true. (R.737, RE Tab 6).

The Defendant responded to Plaintiff's Motion for Recusal with a Response in Opposition, and asserted that recusal was not necessary due to the fact that the Court Administrator does not have any material input into the Court's judicial decisions, and as such, her contact with the Defendant physician as a patient should not be a basis for recusal of the trial court. (R.744-748, RE Tab 7). Additionally, the Defendant points out that the trial judge's father had not been practicing medicine on the active medical staff of King's Daughters Medical Center since 1994 or 1995, at least 12 years prior to the hearing of the instant proceedings, and that in any event, King's Daughters Medical Center had previously been dismissed from this action and

was therefore no longer a party. (R.744-748, RE Tab 7). King's Daughters Medical Center was dismissed from this action by agreed order entered on November 20, 2007. (R.591, RE Tab 4).

On February 4, 2008, the Court convened a hearing on the matter of the Plaintiffs' Motion for Recusal. The Plaintiff's reiterated their argument that recusal was required due to the Court Administrator's medical history with the Defendant, and the Judge's father having previously been a practicing physician with privileges at the former Defendant hospital. (TR.58-61, RE Tab 1). The Trial Court found that these circumstances did not provide a sufficient basis for recusal in this case. (Tr.64, RE Tab 1) (The trial court held, "So based on the law, I do not think that recusal is proper in this case...."). The Court discussed the circumstances of the Motion for Recusal and stated:

> I don't know if my father knows Dr. Mills because I've never talked to my father about this case or, quite frankly, any other case that's on my docket. I thought he had retired in 1998. It's been at least ten years since he's practiced medicine in this community, and I don't think that my father having once been a physician in the community requires recusal. Again, I don't know that I would know Dr. Mills if he walked through those doors right there because the only time I've ever seen Dr. Mills was when we had the motion hearing in Pike County a couple of months ago. I don't know his family; never met his family. And for the record, other than Ms. Brill telling me that Dr. Mills was her doctor, we had never more had a conversation in which Dr. Mills name came up, except with regard to scheduling in this case, and quite frankly, will never have a conversation in that regard.
>
> (Tr. 64, RE Tab 1).

The trial court noted that, "[I]t is presumed that a Judge who has been sworn to administer impartial justice is unbiased and qualified to hear a case." (Tr. 63, RE Tab 1). Having found that recusal was not necessary, the court denied the Plaintiffs' Motion for Recusal. (Tr.64-65, RE Tab 1).

The Plaintiffs' rely upon *Dodson v. Singing River Hosp. Sys.* for support of their argument that recusal is appropriate in this case. 839 So.2d 530 (Miss. 2003). While *Dodson*

provides a useful discussion of the relevant standards and analysis associated with a Motion for Recusal, the facts of *Dodson* are highly distinguishable from the instant case. In *Dodson*, the Plaintiff sought recusal of the Trial Court after learning that counsel for the Defendants had (1) served as the Judge's campaign treasurer, (2) that counsel for the Defendant's had previously served as Attorney of Record for the Judge's mother's estate proceeding, (3) that counsel for the Defendants had previously represented the Judge in a construction litigation case for a period of four years without charging any attorneys fees, and (4) that counsel for the Defendants made comments in the presence of the trial court judge concerning future campaign contributions by attorneys. *Dodson*, 839 So.2d at 534.

In *Dodson*, the Mississippi Supreme Court noted that "it is... clear that Judges are presumed to be qualified and unbiased... and that to overcome the presumption, the evidence must produce a 'reasonable doubt' about the validity of the presumption." *Id.* at 533. The Court continued, stating "The proper standard is that recusal is required when the evidence produces a reasonable doubt as to the Judge's impartiality." *Id.* The Mississippi Supreme Court held in *Dodson* that "a reasonable person knowing all the circumstances here would have a reasonable doubt regarding [the trial court judge's] impartiality in this case." *Id.* The Court reasoned that under a totality of the circumstances analysis, a reasonable person might have reasonable doubts as to the trial court's impartiality, based upon the circumstances of the case.[24]

The facts of the instant case are far and away dissimilar from those at issue in *Dodson*. At issue in the instant case, there is no allegation that the Trial Court was previously represented by any attorneys in this matter, or that the Trial Court has any personal relationship with any of

[24] The totality of the circumstances relied upon in *Dodson* included the numerous concerns related to counsel for the Defendants and other members of their law firm participating in the trial judge's campaign, their representation of the trial judge's mother's estate proceeding, their representation of the judge and his wife in a construction case that spanned four years in which no attorneys fees were charged, and along with remarks made in the presence of the judge by the defendants' attorneys concerning future campaign contributions. *Id.* at 534.

the attorney's or parties in this case. The sole arguments for recusal are that the Court Administrator has previously been a patient of the Defendant, and that the Judge's father had previously practiced medicine at a hospital which is a former Defendant in this case. These facts simply do not rise to the level required to obtain recusal under a totality of the circumstances analysis. The Mississippi Supreme Court in *Dodson* recognized that it was the multiple circumstances working in conjunction that led to the requirement of recusal, rather than any one factor operating alone. *Dodson*, 839 So.2d at 534 (citing *Collins v. Joshi*, 611 So.2d 898, 903 (Miss. 1992) (J. Banks concurring, "In my view, while none of the factors standing alone would necessarily dictate recusal in the instant case, in combination they create reasonable doubt as to impartiality....."). Simply, the totality of the circumstances in this case fail to necessitate recusal of the Trial Court.

Additionally, the Plaintiffs rely upon *Collins v. Dixie Transport, Inc.*, for further support of their arguments that the trial court should have recused himself from this preceding. *Collins v. Dixie Transport, Inc.*, 543 So.2d 160, 166 (Miss.1989). Again, while the considerations and principles concerning recusal are valuably presented by the Court in *Dixie Transport*, the facts and circumstances of that case are highly distinguishable from the instant case now before this Court. In that case, where the trial court entered an order enforcing a settlement agreement, a key issue developed as to whether the plaintiff had in fact authorized his attorney to accept a settlement offer. *Id.* The trial judge was allegedly present during some or all of the plaintiff's conferences with his attorneys (this issue was disputed by the parties and the court), and the trial judge determined he had personal knowledge concerning the events that transpired at the time when the settlement agreement was allegedly entered into. *Id.* The trial judge attempted to testify in the proceedings concerning the credibility of a witness on issues related to the

enforceability of a settlement agreement and the judge was testifying as to his personal knowledge. 543 So.2d at 161. The trial judge stated on the record:

> I want to reiterate in this record what my recollection of this entire scenario was. And in light of that fact, I want to be placed under oath in order to do that and also to avail any of the attorney's present an opportunity to "cross examine" anything I have to say.

Dixie Transport, 543SO.2D at 164-165.

The trial court's testimony drew an objection from the plaintiff, and the plaintiff requested that if the court intended to testify in the case, that the court should recuse himself from the proceedings. *Id.* at 165. The Mississippi Supreme Court held, "[T]he trial judge assumed the role of a fact witness-on the critical credibility issue..., when this situation arose, the trial judge had no alternative but to recuse himself from further participation in the case." *Dixie Transport*, 543 So.2d at 161. The court reasoned, "[T]he ancient first principle of justice" required that "[n]o man may serve as judge of his own cause..." and that "[t]he principle's power extends beyond the case of the judge-litigant to that of the judge-witness, to the case where the judge judges his own credibility as a player in the events whose truth is sought." *Id.* at 166. The court held, "[T]he trial judge was both a witness to and adjudicator of fact issues with respect to which he was obliged to have played but one role...."[25] The *Dixie Transport* case was remanded with an order to the trial court to recuse himself from further participation in the case in the role of judge. *Id.* at 167. Crucial to the court's holding was, "the fact that the trial judge possessed knowledge of the (non)occurrence of events critical to the credibility of [the plaintiff's] witnesses and ultimately to divining the truth of those events." *Id.*

Clearly, the *Dixie Transport* case is highly distinguishable from the facts of the instant case. In the case presently before this Court, there are no allegations that the trial judge is or was

[25] The Mississippi Supreme Court noted that an objective standard was utilized on issues of recusal, and that, "The case law requires that a judge disqualify himself 'if a reasonable person, knowing all circumstances, would harbor doubts about his impartiality.'" *Id.* at 166.

attempting to participate in the proceeding as a witness or that the trial judge had any extraneous or extra judicial information that would in any way relate to, or otherwise impact the proceeding. As the court administrator has no relevant or determinative authority concerning the legal or factual issues before the court, and the trial judge's father previous affiliation with a dismissed defendant, simply do not rise to the level which a reasonable person would question the impartiality of the trial court.[26] Thus, the Plaintiffs' arguments suggesting that the trial judge's refusal to recuse was in error must fail.

Similarly, the facts of the instant proceeding are highly distinguishable from other cases in which this Court has ordered recusal of the trial court. *See, e.g., In Re: Moffett*, 556 So.2d 723, 724 (Miss.1990) (where the court ordered recusal of the trial judge in a medical malpractice action when the brother of the trial judge was a senior partner in the law firm which was representing the defendant hospital, finding the close family relationship between the trial judge and the senior partner of the hospital's defense counsel coupled with the defense counsel's law firm was highly involved in the affairs of the defendant's business, would lead a reasonable person to question whether the judge presiding over such a case was proper); *Mississippi United Methodist Conference v. Brown*, 929 So.2d 907, 911 (Miss. 2006) (where this court found that a reasonable person knowing all of the circumstances would conclude that the trial court judge could not sit as an impartial administrator of justice when, it was apparent to the Supreme Court that the trial judge feels slighted by the defendant's contentions in this matter, the trial judge opines that the defendant was untruthful and has misrepresented the facts to the Supreme Court, the trial judge's statement indicate she had already determined that fault lies with the defendants,

[26] A reasonable person knowing all of the circumstances should question the impartiality of a trial judge who attempts to interject his own sworn testimony concerning the credibility of a witness into a proceeding. However, there exists no sufficient reason for the same reasonable person to question the impartiality of a trial judge who's only tenuous relationships relate to his father's affiliation with a now dismissed defendant which ended years prior to the court's consideration of this case, and the trial court's administrator having been treated as a patient of the Defendant.

and it appears clearly to the Supreme Court that the trial court judge assumed the position of advocate for the plaintiff). *see also Sullivan v. Baptist Memorial Hospital – Golden Triangle, Inc.*, 722 So. 2D 675, 678 n.8 (Miss. 1998) (where the Mississippi Supreme Court noted the trial court's voluntary recusal upon disclosure and subsequent motion by the defendants when the trial judge and his family members had been treated by the plaintiff doctors); c.f., *Bredemeier v. Jackson*, 689 So.2d 770, 774 (Miss. 1995) (where the court affirmed the trial judge's denial of a recusal motion when the trial judge admitted he was friend's with both attorneys in the case and had frequently used a party's expert witness as a court appointed expert in other cases). The facts of the instant case fail to even come close to the other circumstances where this Court has reversed a trial court's decision to deny a motion for recusal. The Plaintiffs' argument for recusal is simply not supported by Mississippi law.

Furthermore, other relevant precedent directly supports the trial court's determination that recusal was simply not warranted in the instant case. *See e.g., Tarver v. State*, No. 2006-KA-01260-COA, at P.53-55 (Miss. Ct. App., January 27, 2009) (where the Mississippi Court of Appeals affirmed the trial court's refusal to recuse when the defendant alleged his counsel had prior disagreements with the court administrator, finding that there was no evidence presented that suggests the circuit judge was biased or not qualified); *Jackson v. McGehee*, 732 So.2d 916, 924 (Miss.1999) (where the Mississippi Supreme Court noted that the trial judge's clerk "had no influence in the case" and affirmed the trial court's denial of a motion to recuse based upon *inter alia* that the judge's clerk was previously employed by counsel opposite). The facts and circumstances of the instant case simply do not warrant recusal of the trial court judge.[27] Therefore, the Plaintiffs' assignment of error as to the Motion for Recusal is without merit.

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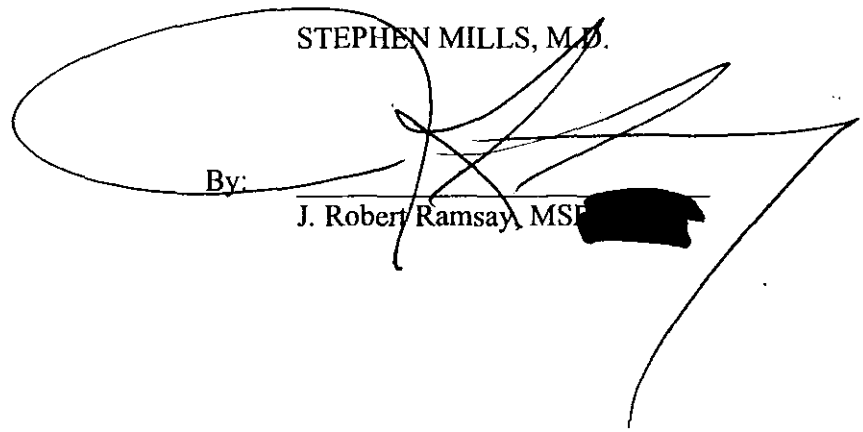
[27] Additionally, courts of other jurisdictions have found that recusal of the trial court is not necessary when faced with similar circumstances to those of the instant case. *See e.g., Rose v. Cookeville Regional Medical Center*, No. M2007-02368-COA-R3-CV, 2008 Tenn. App. LEXIS 286 (Tenn. Ct. App., May 14, 2008) (where the court found

CONCLUSION

As the foregoing demonstrates, the evidentiary determinations of the trial court that the Plaintiffs' medical expert testimony was not reliable, and thus properly excluded, was not error. As a result of the Plaintiffs inability to provide reliable proof of requisite elements of their asserted claims, the trial court properly granted summary judgment in favor of the Defendant. The Plaintiffs' Motion for Reconsideration and Motion for Recusal were without merit, and it was not error for the trial court to deny those motions. Therefore, the trial court's determinations should be Affirmed.

Respectfully submitted,

STEPHEN MILLS, M.D.



By: _____

J. Robert Ramsay, MSB [redacted]

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that the trial judge's son being a co-owner of a business with the defendant physician is not sufficient to require recusal); *Wallace v. Temple University Hospital*, No. 4740, 27 Phila. 613, 1994 Phila. Cty. Rptr. LEXIS 54 (March 28, 1994) (holding that the trial judge's position teaching one course a year at Temple's Law School is so far remote from a law suit against a doctor and the Temple Medical School, that it does not come close to requiring recusal).

CERTIFICATE OF SERVICE

I, J. Robert Ramsay, do hereby certify that I have this day served via First Class U.S. Mail, a true and correct of the above and foregoing pleading to all counsel of record at the following address:

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Honorable David H. Strong
Lincoln County Circuit Court Judge
119 N. Broadway
McComb, Mississippi 39648

This the 25th day of March, 2009.

COUNSEL