IN THE SUPREME COURT OF MISSISSIPPI
CASE # 2008-CA-01343SCT

SHANKIA HILL, ET AL. **APPELLANTS**

V.

STEPHEN MILLS, M.D. **APPELLEES**

BRIEF OF APPELLANTS

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IN THE SUPREME COURT OF MISSISSIPPI

SHANIKA HILL and BRIAN THOMAS **APPELLANTS**

VS. **NO. 2008-CA-01343**

STEPHEN MILLS, M.D. **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible 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 firms 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 _____ day of December, 2008.

Jennifer Ingram Wilkinson
Counsel for Plaintiffs

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STATEMENT OF ISSUES

Issue No. 1: Whether the trial court erroneously excluded Plaintiffs' medical expert by applying a narrow and restrictive *Daubert* analysis based solely upon the lack of peer reviewed literature supportive of the physician's opinions, contrary to the specific ruling in *Poole v. Avara* in which the Mississippi Supreme Court held that peer review by publication remains only one factor of a non-exhaustive list of factors for admissibility under evidence rules with a liberal thrust, and that peer reviewed literature supportive of an expert's opinion is not mandatory for a doctor to meet the criteria set forth in *Daubert.*

Issue No. 2: Whether the trial court erroneously granted the Defendant's procedurally deficient Motion for Summary Judgment on the single issue of wrongful death, summarily disposing of not only the wrongful death claims, but all claims, including claims of medical negligence and personal injury that were not raised in any motion before the Court, by simply adopting *in toto* the Defendant's submitted Proposed Findings of Fact and Conclusions of Law and failing to acknowledge the authorities and arguments cited to the Court by the Plaintiffs or rule upon the Plaintiffs' Motion for Clarification and for Reconsideration or their Motion to Strike Defendant's Untimely Itemization of Material Facts.

Issue No. 3: Whether the trial court abused its discretion in failing to recuse himself pursuant to Mississippi Rule of Civil Procedure 16(A), Rule 1.15 of the Uniform Circuit and County Court Rules, and Canon 3(E), when during the oral argument of the Defendant's Motion to Strike the Plaintiffs' Expert pursuant to *Daubert* and for Summary Judgment the Court disclosed to all parties that his Court Administrator was a current patient of the Defendant physician, and when at the hearing of the Plaintiffs' Motion for Recusal the Court identified his close family ties to the medical community, specifically that his father practiced medicine at the former Defendant hospital where the events and circumstances of the instant civil action occurred.

STATEMENT OF THE CASE

Nature of the Case

This is a medical negligence and wrongful death case filed on behalf of the Plaintiffs, Shanika Hill and Brian Thomas against Stephen Mills, M.D. as a result of the injuries sustained and damages incurred by the Plaintiffs as a result of Dr. Mills' negligence. **[R12-R22]** This appeal arises from the trial court's June 13, 2008 Memorandum Order and Judgment striking the Plaintiffs' medical expert and summarily dismissing all claims brought by the Plaintiffs against the Defendant. **[R825-R836; RE Tab 2, pp8-19]** The Plaintiffs also appeal the trial court's February 4, 2008 bench ruling denying the Plaintiffs' Motion for Recusal. **[T55; T63-T65; RE Tab 15, pp.142-145]**

Course of Proceedings and Disposition Below

The Plaintiffs initiated this civil action by the filing of a Complaint in the Circuit Court of Lincoln County, Mississippi on September 6, 2002. The case was originally assigned to then Circuit Court Judge Keith Starrett, who reassigned the case upon his appointment to the Federal Bench to Judge Michael Taylor. Upon Plaintiffs' Motion for Trial Setting, Judge Taylor, on his own motion, recused himself due to a "previous business relationship with the Defendant" and reassigned the case to Judge Mike Smith. Judge Smith soon retired from the Bench and the case was transferred to Judge David Strong. As a result of the discovery process the Plaintiffs voluntarily dismissed all Defendants except for Stephen Mills, MD. The case was set for trial to begin November 27, 2007. The week before trial was set to begin the Defendant Stephen Mills filed a Motion to Exclude the Plaintiffs' medical expert pursuant to *Daubert.* The trial of the case was continued to facilitate the parties' adequate briefing of the issues raised in the Defendant's Motion. The Court heard oral argument for and against the Defendant's Motion on December 6, 2007. During the delivery of oral argument the Court disclosed to counsel for both

Plaintiff and Defendant that his Court Administrator just that morning had informed him that the Defendant physician was her personal physician. The Court gave Plaintiffs' counsel one week to confer with the Plaintiffs and consider whether a Motion for Recusal was appropriate under the circumstances. The Court proceeded to hear the argument of counsel on the *Daubert* issue. **[T4-T5; RE Tab 14, pp. 116-117]** The Plaintiffs considered the circumstances and decided that a Motion for Recusal was warranted based upon the Court's disclosure, and upon information learned by the Plaintiffs regarding the Court's close family ties to the local medical community, in particular, to the hospital (a former Defendant in the instant civil action) where the Plaintiffs' cause of action occurred and accrued. **[R733-R738]** The Court entertained oral argument on the Plaintiffs' recusal motion on February 4, 2008 and denied the Plaintiffs' motion by bench ruling. **[T63-T65; RE Tab 15, pp. 142-145]** No written order was entered by the Court.

Following the Court's bench ruling, the Court required the parties to submit on or before February 19, 2008, Proposed Findings of Fact and Conclusions of Law relative to the Defendant's motion to exclude the Plaintiffs' medical expert and the Defendant's motion for summary judgment previously argued on December 6, 2007. **[T65; RE Tab 15, p. 145]** The parties complied and submitted Proposed Findings of Fact and Conclusions of Law, the Plaintiffs submitting their seven (7) page Proposed Order, and the Defendant submitting his twelve-page Proposed Memorandum Opinion and Order. **[R792-R803; RE Tab 3, pp. 20-31]** On April 9, 2008, the Court entered a three-page Memorandum Opinion and Order granting the Defendant's motion to exclude the Plaintiffs' expert and granting the Defendant's motion for summary judgment. **[R749-R751; RE Tab 4, pp. 32-34]** The Court's Memorandum Opinion and Order reads in pertinent part as follows:

> [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 C. Morrison cites the *Management of Preterm Labor* from the ACOG Practice

> Bulletin, No. 43, May 2003, as well as Williams Obstetrics, 21st and 22nd Editions 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 medical literature produced in this cause contradicts Dr. Fuselier's opinion.

Id. Other than a general statement that "for the foregoing reasons, as well as the considerable record in this case ....", the Court's April 9, 2008 Memorandum Opinion and Order gives no other explanation for the granting of the Defendant's motions, and did not specify which of the Plaintiffs' claims were summarily dismissed. Accordingly, on April 18, 2008 the Plaintiffs filed their Motion for Clarification and Motion for Reconsideration of the April 9, 2008 Memorandum Opinion and Order, seeking reconsideration of the Court's ruling and also seeking clarification that only the Plaintiffs' wrongful death claims were summarily dismissed, leaving as viable the Plaintiffs' other claims for medical negligence and personal injury. Disagreeing with the Court's finding that all medical literature contradicts the Plaintiffs' medical expert, the Plaintiffs also sought reconsideration of the Court's ruling. **[R752-R774; RE Tab 11, pp. 88-96]**

In the Motion for Clarification and Motion to Reconsider the Plaintiffs set forth the fact that the Defendant had failed to abide by the rules of civil procedure in the filing of the summary judgment, and that the summary judgment motion was deficient. In response, the Defendant filed an Itemization of Material Facts. The Plaintiffs then filed a Motion to Strike the untimely itemization. **[R811-819; RE Tab 12, pp. 97-105]** The itemization of material facts was first filed on April 24, 2008, after all briefing had been completed, the hearing had been held, and approximately fourteen days had passed since the trial court first ruled in favor of the Defendant on the deficient motion for summary judgment. **[R807-810]**

On June 13, 2008, without ruling on the Plaintiffs' Motion for Clarification and for Reconsideration and without ruling on the Plaintiffs' Motion to Strike, the Court entered its second Memorandum Order and Judgment, **[R825-R836; RE Tab 2, pp. 8-19]** this time though,

the Memorandum Order and Judgment that was entered was 12 pages, adopting *in toto* the Proposed Memorandum Order and Judgment submitted by the Defendant in February 2008, **[R792-R803; RE Tab 3, pp. 20-31]**. The Court's ruling wholly ignored the Plaintiffs' Motion for Clarification and for Reconsideration filed on April 18, 2008 **[R752-R774; RE Tab 11, pp. 88-96]** and Plaintiffs' Motion to Strike Defendant's Untimely Itemization of Material Facts, or in the Alternative, Plaintiffs' Response to Defendant's Itemization of Material Facts. **[R811-819; RE Tab 12, pp. 97-105]** From the June 13, 2008 Memorandum Order and Judgment the Plaintiffs appealed to this Court.

Statement of Facts Relevant to the Issues Presented for Review

On or about May 8, 2002, Plaintiff Shanika Hill was admitted to King's Daughters Medical Center under the attending physician, Dr. Rushing. **[R620; RE Tab 5, p. 41 (depo p. 25, lines 20-23)]**. At this time, Plaintiff Shanika Hill was twenty-three years old and was experiencing lower abdominal discomfort and vaginal bleeding. According to gestational history she was an estimated 15 weeks pregnant. Dr. Rushing appropriately treated Ms. Hill on this visit. **[R620, RE Tab 5, p. 41 (depo p. 25, lines 20-23); T23, RE Tab 14, p. 120, lines 12-28]** She was admitted to the hospital, observed overnight and an ultrasound was performed the next morning. The ultrasound revealed a viable single fetus and confirmed that the gestational age of the fetus was 15 weeks. After approximately twenty hours of observation Ms. Hill was appropriately discharged home with instructions for bed rest and pelvic rest. **[R620; RE Tab 5, p. 41 (depo p. 27, lines 3-8)]**

Two and one half weeks after her initial visit to Kings Daughters Medical Center, Ms. Hill returned to the emergency room at King's Daughters on Memorial Day, May 27, 2002. **[R654, RE Tab 8, p. 59 (depo p. 30 line 10 – p.31, line 25); R690, RE Tab 9, p. 67 (depo p. 49, lines 8-18)]** The Plaintiff complained of abdominal and pelvic cramping and vaginal

bleeding consisting of large clots. **[R620, RE Tab 5, p. 41 (depo p. 27, line 19 – p. 28, line 16); R654, RE Tab 8, p. 59 (depo p. 30, line 10 – p. 33, line 4]**. Without performing an ultrasound, without definitively being able to palpate Ms. Hill's uterus during a vaginal examination, and without examining the blood clots Ms. Hill brought to the hospital with her, the Defendant Dr. Mills misdiagnosed Ms. Hill as having had a complete abortion (commonly referred to as a miscarriage). **[R620-R622,RE Tab 5, pp.41-43 (depo p. 27, line 19 – depo p. 31, line 18); R640 -R641, RE Tab 6, pp. 52-53 (depo p. 59, lines 7-22 and depo p. 60, lines 3-17); R654-R655, RE Tab 8, p. 59 (depo p. 32, line 21-p. 33, line 6)]**. Defendant Mills, who suggested a treatment plan that consisted of a follow-up at the Health Department, discharged her home with instructions to return to the emergency room for increased bleeding and cramping. No instructions for bed and/or pelvic rest were given. No interventions were prescribed. In fact, the Plaintiff was told that she was no longer pregnant and therefore, she was given no precautionary instructions at all. Dr. Mills did not render appropriate treatment as Dr. Rushing had just two and one half weeks earlier. **[R620-R622; RE Tab 5, pp. 41-43 (depo p. 25, line 17 – p. 31, line 18]**

On or about June 8, 2002, Plaintiff Shanika Hill arrived at King's Daughters Medical Center for the third time with symptoms of abdominal and pelvic cramping, vaginal bleeding and reporting to the Emergency Room personnel that she had miscarried on May 27, 2002. As a result of this misinformation, Ms. Hill was not immediately transferred to labor and delivery where she could have received obstetrical treatment; rather she was kept in the Emergency Room department. **[R655-R656, RE Tab 8, pp. 60-61 (depo p. 36, line 23 – p. 39, line 18); R694, RE Tab 9, p. 71 (depo p. 63, lines 3-8); R719-R720, RE Tab 10, pp.83 – 84 (depo p. 40, line 19 – p. 42, line 14)]**. As recorded by Dr. White, one of the Plaintiff's attending physicians on June 8, 2002, while Ms. Hill was waiting in the Emergency Room, she delivered a fully formed 19-week

fetus onto the exam table. **[R717, RE Tab 10, p. 81 (depo p. 30, line 7 – p. 31, line 6)]**. Dr. White was notified of this unusual occurrence, came to attend to his patient, and cut the umbilical cord. A heartbeat was noted, and the fetus was placed in a sterile container, which was then sent to the laboratory. **[R717, RE Tab 10, p. 81 (depo p. 33, lines 15-23)]**. The nurse's notes from Ms. Hill's June 8, 2002 presentation to the Emergency Room detail that approximately ten minutes after the container was sent to the lab a call was made from the laboratory relaying that the fetal heart was still beating. **[R717, RE Tab 10, p. 81 (depo p. 33 lines 19-22]**. By the time the Nurse got to the lab to confirm the call, the heart had stopped beating. **[R716, RE Tab 10, p. 80 (depo p. 26, line 18 – p. 27, line 19]**. Ms. Hill was transferred from the Emergency Room on June 8, 2002 having delivered a fully formed 19-week fetus two weeks after she had been told that she had miscarried. **[R717, RE Tab 10, p. 81 (depo p. 31 line 5 – p. 33, line5]**.

As a result of the negligent treatment and misdiagnosis she received at Kings Daughters Medical Center by Defendant Dr. Mills on May 27, 2002, and the resulting damages and injuries she sustained, Ms. Hill along with Mr. Brian Thomas, the father of the baby, filed the instant civil action seeking redress for the wrongful death of their unborn daughter and for personal injury. The trial court erroneously excluded the Plaintiffs' medical expert and granted summary judgment, dismissing all of the Plaintiffs' claims and denying the Plaintiffs' their day in court.

SUMMARY OF THE ARGUMENT

I. Standard of Review

For the first two issues presented the Court should utilize a *de novo* standard of review. It is well-settled that appellate courts review a trial court's granting of summary judgment *de novo.* Usually the standard of review for a trial court's exclusion of evidence, including expert witness testimony, is reviewed utilizing an abuse of discretion standard, however, under the particular

circumstances of this case, for at least two reasons the Court should employ a *de novo* standard of review relative to the trial court's excluding the Plaintiffs' medical expert. First, the trial court granted summary judgment only as a result of the trial court's decision to exclude the Plaintiffs' medical expert from testifying. Pursuant to *Morton v. City of Shelby,* 984 So.2d 323 (MS Ct. App. 2007) where the trial court's basis for granting summary judgment is the inclusion or exclusion of evidence, the appellate court should err on the side of caution and review the exclusion of the evidence *de novo.* Second, because the trial court adopted *in toto* the Defendant's proposed findings of fact and conclusions of law, the appellate court should review the trial court's ruling with heightened scrutiny. *Omnibank of Mantee v. United Southern Bank,* 607 So.2d 76 (Miss Sup. Ct. 1992); *Holden v. Holden,* 608 So.2d 795 (Miss. Sup. Ct. 1996); *MS Dept of Wildlife v. Brannon,* 943 So.2d 53 (Miss Ct. of App. 2006); and *MS Dept. of Transportation v. Johnson,* 873 So. 2d 108 (Miss Sup. Ct. 2004).

The standard of review for the trial court's denial of the Plaintiffs' motion for recusal is abuse of discretion. The case law is clear in this regard. *Miss. United Methodist Conference v. Brown,* 929 So.2d 907 (Miss. 2006), citing *Hathcock v Southern Farm Bureau Cas. Ins.,* 912 So.2d 844, 847 (Miss. 2005); and *Bredemeier v. Jackson,* 689 So.2d 770, 774 (Miss. 1997).

II. **The trial court erred in excluding the Plaintiffs' medical expert pursuant to *Daubert.***

The trial court utilized a restrictive analysis of *Daubert* in excluding the Plaintiffs' medical expert, Dr. Paul Fuselier, who has more than 25 years of experience in the active practice of Obstetrics and Gynecology, and who offered relevant and reliable opinions pursuant to Mississippi Rule of Evidence 702. The trial court found that, though Dr. Fuselier appeared to be qualified, because he could not cite to scientific, peer reviewed literature in support of his opinions related to basic obstetrical care, his opinions were not reliable. The trial court based its

ruling on this fact alone in direct contradiction to the Mississippi Supreme Court's 2005 ruling in *Richard J. Poole, On Behalf of Wrongful Death Beneficiaries of Linda Poole, Deceased v. William T. Avara, M.D. and South Mississippi Surgeons, P.A.*, 908 So.2d 716; (Miss. 2005), in which the Supreme Court specifically found that citation to scientific literature is not required for a medical expert to qualify as a relevant and reliable expert witness.

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III. The trial court erred in summarily dismissing all of Plaintiffs' claims, including claims that were not challenged by the Defendant.

The week prior to trial of this civil action pursuant to *Daubert* the Defendant filed a limited motion to exclude the testimony of the Plaintiffs' medical expert related to the expert's opinion that the defendant physician's actions caused and/or contributed to the failure of the Plaintiff Ms. Hill to maintain her pregnancy to a point of viability. The Defendant's initial motion did not seek summary judgment, nor did it seek to exclude the entirety of the expert's opinion. Prior to the Plaintiffs' response to the Defendant's *Daubert* motion, the Defendant filed an amended motion seeking summary judgment based solely upon the arguments set forth in the initial motion. The Defendant did not comply with the Uniform County and Circuit Court Rules requiring that an itemization of undisputed material facts be filed with all motions for summary judgment. The Defendant admitted at the hearing of the *Daubert* motion that the expert's opinion related to the Defendant's negligence in failing to perform an ultrasound to correctly diagnose a live, 17 ½ week pregnancy was a disputed issue and was not the subject of the Defendant's *Daubert* motion. The trial court granted the Defendant's *Daubert* motion on the limited scope presented, yet the trial court summarily dismissed all claims of the Plaintiffs, including those claims undisputedly not before the trial court. The Plaintiffs filed a motion for clarification of the trial court's order and a motion to reconsider, yet there is no evidence that the trial court considered these submissions of the Plaintiffs. The trial court simply adopted *in toto* the Defendant's proposed findings of fact and conclusions of law without reference to, or even a

mention of, the Plaintiffs' factual recitations or legal argument in their motions for clarification, reconsideration, or to strike the Defendant's untimely filed itemization of material facts.

IV. The trial court abused its discretion in denying Plaintiffs' Motion for Recusal.

During the oral argument on the Defendant's *Daubert* motion the trial court revealed to all parties that his Court Administrator was a current patient of the Defendant physician. This fact, coupled with the fact that the trial judge's father had practiced for years in the local medical community, and specifically at the former defendant hospital where the Plaintiffs' claims and causes of action occurred and accrued, led the Plaintiffs' to the conclusion that a Motion for Recusal was warranted. The Court entertained argument on the Plaintiffs' motion and acknowledged the facts submitted in the Plaintiffs' motion, and further added that his step-father was also a long-time physician in the community. The trial court denied the Plaintiffs' motion for recusal by bench ruling at the conclusion of the hearing. Following the hearing on the issue of recusal, the trial court proceeded to summarily dispose of all of the Plaintiffs' claims by simply adopting the Defendant's findings of fact and conclusions of law without reference to or consideration of the Plaintiffs' submissions to the court, lending credence to and contributing to the appearance of bias against the Plaintiffs in this civil action. The trial court abused its discretion in denying the Plaintiffs' motion for recusal.

ARGUMENT

I. STANDARD OF REVIEW

A. The standard of review for the trial court's exclusion of Plaintiffs' medical expert and the trial court's granting of Defendant's Motion for Summary Judgment is *de novo*.

The trial court excluded the Plaintiffs' medical expert and, as a result, granted the Defendant's motion for summary judgment. The applicable standard of review is well settled related to summary judgments. Appellate Courts review the grant or denial of summary judgment motions under a *de novo* standard. *Spann v. Diaz*, 987 So.2d 443 (Miss. 2008), citing

Rawson v. Jones, 816 So.2d 367 (Miss. 2001) and *Robinson v. Singing River Hosp. Sys.*, 732 So.2d 204, 207 (Miss. 1999).

While the exclusion of expert witnesses is typically reviewed under the "abuse of discretion" standard, in this case, as in the case of *Morton v. City of Shelby,* 984 So.2d 323 (MS Ct. App. 2007), the Plaintiffs' argument is grounded in the trial court's exclusion of testimony as the grounds for summary judgment and this Court should, therefore, employ a *de novo* review of the exclusion of the Plaintiffs' expert. This Court held in *Morton,* that because Morton's argument was grounded in the trial court's use of testimony as grounds for summary judgment, in light of the "unusual circumstances, and so as to err on the side of caution, [the court] will utilize a de novo standard of review for Morton's claim in this regard." *Morton, at p. 329.* There can be no credible argument in the instant case that had the trial court denied the Defendant's motion to exclude that there would have been any grounds for granting summary judgment. The two rulings are inextricably linked, and as was done in *Morton,* this Court should err on the side of caution and review the trial court's decision to exclude the Plaintiffs' medical expert *de novo.*

The Court has additional authority to review the exclusion of the Plaintiffs' expert by the trial court under the standard of *de novo* rather than the standard of abuse of discretion. 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. *Omnibank of Mantee v. United Southern Bank,* 607 So.2d 76 (Miss Sup. Ct. 1992); *Holden v. Holden,* 608 So.2d 795 (Miss. Sup. Ct. 1996); *MS Dept of Wildlife v. Brannon,* 943 So.2d 53 (Miss Ct. of App. 2006); and *MS Dept. of Transportation v. Johnson,* 873 So. 2d 108 (Miss Sup. Ct. 2004). The Mississippi appellate courts have stated in this regard:

> Ordinarily, this Court must affirm a finding of fact unless upon review of the record we be left with the firm and definite view that

> a mistake has been made. . . Today's are not ordinary findings. The [trial court] literally signed off on [the defendant's] proposed findings of fact and conclusions of law. Not one word has been changed. . . . our concern is we have been handed a twenty-three page document detailing numerous findings of evidentiary and ultimate fact with the law thereafter declared and applied, and nothing before us suggests any of this except in broad outline is the product of the Court's adjudicatory prowess. . . . we have no choice but to engage in much more careful analysis of adopting findings than in cases where the findings and conclusions have been authorized by the trial judge himself.

Omnibank of Mantee, at 82-83, all internal citations omitted.

> Where the [trial judge] has failed to make his own findings of fact and conclusions of law, this [appellate] Court will "review the record *de novo.*" Citing *Brooks v. Brooks*, 652 So.2d 1113, 1118 (Miss. 1995).

Holden, at p. 798.

> [We] have also stated that when the trial judge is sitting as the finder of fact, and chooses to adopt *in toto* a party's proposed findings of fact and conclusions of law, we will conduct a *de novo* review of the record. . . Here the proposed findings of fact and conclusions of law which [defendant's] lawyer mailed to the judge are identical to the findings of fact and conclusions of law which the judge signed on November 12, 2002. There can be no doubt that the trial judge adopted and entered verbatim Johnson's proposed findings of fact and conclusions of law.

MS Dept. of Transportation v. Johnson, at p. 111.

> Here, we have compared Mrs. Brannon's proposed findings of fact and conclusions of law and the trial judge's final judgment. We find that the circuit judge inserted a word or sentence at various points and deleted other words or sentences. However, we find that the final judgment is substantially verbatim to Mrs. Brannon's proposed findings of fact and conclusions of law. Accordingly, we 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." *In re Estate of Grubbs*, 755 So.2d 1043, 1046-47 (¶8) (Miss. 2000). "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." *Id.* (quoting *Rice Researchers, Inc.*, 512 So.2d at 1265).

MS Dept of Wildlife v. Brannon, at pp. 58-59. All of the above cited passages express the concern of the Courts when one party's version of the facts and application of the law is adopted to the total exclusion of the other party's submissions and argument to the court. In the instant case, the trial court adopted, word-for-word, space-for-space, and footnote-for-footnote the submission of the Defendant. The trial court did not reference, acknowledge or distinguish one fact, legal argument, or legal authority citation made by the Plaintiffs in their Motion to Reconsider, Motion for Clarification, or Motion to Strike the Defendant's Untimely filed Itemization of Undisputed Facts, all of which were filed ***after*** the Defendant submitted his Proposed Findings of Fact and Conclusions of Law on February 18, 2008 **[R792-803; RE Tab 3, pp. 20-31]** and ***after*** the Court entered its first three-page April 10, 2008 Memorandum Opinion and Order **[R749-751; RE Tab 4, pp. 32-34]**. There is no evidence that the trial court even considered the Plaintiffs' submissions. Under these extraordinary circumstances, this Court should very carefully scrutinize the trial court's ruling to exclude the Plaintiffs' medical expert by utilizing a *de novo* standard of review.

B. <u>The standard of review for the trial court's denial of the Plaintiffs' Motion for Recusal is "abuse of discretion".</u>

The law is clear that under the instant circumstances this Court should utilize an abuse of discretion standard of review in considering the trial court's denial of the Plaintiffs' Motion for Recusal. "We will not order recusal unless the decision of the trial judge is found to be an abuse of discretion. Thus, we will only reverse the trial court's ruling regarding the recusal if the trial court has abused its discretion in overruling such motion." *Miss. United Methodist Conference v. Brown,* 929 So.2d 907 (Miss. 2006), citing *Hathcock v Southern Farm Bureau Cas. Ins.,* 912 So.2d 844, 847 (Miss. 2005); and *Bredemeier v. Jackson,* 689 So.2d 770, 774 (Miss. 1997).

II. ISSUE ONE

THE TRIAL COURT ERRONEOUSLY EXCLUDED PLAINTIFFS' MEDICAL EXPERT BY APPLYING A NARROW AND RESTRICTIVE *DAUBERT* ANALYSIS.

A. Mississippi Rule of Evidence 702, *Daubert, and Kumho* guide the Court in determining reliability of proffered expert testimony, utilizing a flexible test.

Pursuant to Rule 702 of the Mississippi Rules of Evidence, as amended in May of 2003 adopting *Daubert*, the trial court must determine whether an expert's testimony is both relevant and reliable. "Relevance of expert testimony means it will, according to the Rule, assist the trier of fact." *Daubert v Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, at 591 (1993). The relevance of the Plaintiffs' expert's testimony was not raised; rather, the Defendant argued to the trial court that the Plaintiffs' expert's testimony was unreliable. Other case law is helpful in guiding the Court in making the determination of reliability. The reliability test is explained in the United States Supreme Court decision of *Kumho Tire Company, Ltd. V. Patrick Carmichael*, 526 U.S. 137; 119 S.Ct. 1167 (1999). In determining the reliability of testimony, a trial court may consider one or more of the more specific factors that *Daubert* mentioned *when doing so will help determine that testimony's reliability.* But, the test of reliability is "flexible" and *Daubert's* list of specific factors neither necessarily, nor exclusively, applies to all experts in every case. Whether *Daubert's* specific factors are reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. *Kumho*, 526 U.S. 137. The *Daubert* factors do not constitute a definitive checklist or test, and the gatekeeping inquiry must be tied to the particular facts of each case. *Id.* So, contrary to the Defendant's assertion and the trial court's ruling that the gatekeeper **must** utilize the five-factor checklist, the law simply does not impose such a requirement on the court.

B. Scientific, peer reviewed literature is not a requirement for medical experts to meet the flexible test of *Daubert* and the liberal thrust of the Mississippi Rules of Evidence.

The trial court erroneously excluded the Plaintiffs' medical expert by applying a narrow and restrictive *Daubert* analysis in direct contradiction to *Richard J. Poole, On Behalf of Wrongful Death Beneficiaries of Linda Poole, Deceased v. William T. Avara, M.D. and South Mississippi Surgeons, P.A.*, 908 So.2d 716; (Miss. 2005). The lack of scientific literature in support of Dr. Fuselier's opinions is the only stated basis for the Court's ruling. The Mississippi Supreme Court, *Poole* sets forth the standard for determining the admissibility of expert testimony in a medical negligence case such as the one at bar. In discussing the *Daubert* factors and ruling that the trial court had not erred in allowing the testimony of a medical doctor that could not substantiate his opinions with scientific literature, the *Poole* Court states:

> Of significant import is the fact that the list provided in *Daubert* is not exhaustive. . . .Reliability, as we have seen, is part of an inquiry under *Rule 702*, which is unquestionably flexible. . . The question goes partly to the Rule's wording, "scientific . . . knowledge." Scientific knowledge means something more than unsupported speculation of subjective belief that is grounded in methods and procedures of science. Certainly the witnesses' testimony here is not mere conjecture akin to astrology or something of the sort; the testimony is a medical opinion on what caused the suture to tear open. Whether CPR actually tore open the suture is not entirely certain. Requiring the subject of expert testimony to be known to a certainty is not necessary either, however, because, as the *Daubert* Court pointed out, "there are no certainties in science." 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. . . . "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." The testimony was based on scientific knowledge which would assist the trier of fact to understand or determine a fact at issue. It was the jury's role to take both sides of the

> testimony, give each its appropriate weight, and decide the case after hearing all of the evidence. When considering the liberal thrust of the rules of evidence and the qualifications of the witnesses, we cannot find that the trial judge abused his gatekeeping discretion by allowing the jury to hear the expert testimony, even concerning a theory which currently enjoys no peer review.

Poole, at 723 and 724 (internal citations omitted). The lack of supportive literature for the medical expert's opinions simply is not a reason under Mississippi law to exclude an otherwise qualified expert.

C. The opinions of the Plaintiffs' medical expert are relevant and reliable and should not have been excluded by the trial court.

The opinion of Dr. Fuselier that was excluded by the trial court is his opinion that had the standard and available care been rendered to Ms. Hill and her unborn daughter, more likely than not her pregnancy could have been maintained for a sufficient period of time to allow sufficient maturation of the unborn child so that delivery of the child would have resulted in a live birth. **[R627, RE Tab 5, p. 48 (depo p. 54, line 13 – p. 56, line 16]** Dr. Fuselier opines that the interventions of bed rest (in or out of the hospital setting), pelvic rest, abstinence from sexual intercourse, and the administration of available drug therapies, called tocalytics, are the standard of care when a patient such as Ms. Hill presents with the symptoms of bleeding and cramping in the second trimester. There is hardly anything out of the ordinary or scientifically complex about Dr. Fuselier's opinions. He is not offering any novel theory. He is rendering opinions about basic obstetrical care that is rendered everyday, hundreds of times over in Mississippi to women who experience vaginal bleeding and cramping during the second trimester of pregnancy.

The trial court ruled that because Dr. Fuselier's opinions are not specified in the recognized scientific-based literature his opinions are unreliable. The literature cited by the Defendant to the trial court references numerous times that the interventions referenced in Dr. Fuselier's opinions are common in circumstances such as the ones at hand, and affirms the

reason that expert testimony is necessary in situations like this. One specific example is found in the ACOG Practice Bulletin provided to the Court entitled: "*Management of Preterm Labor,*" ACOG Practice Bulletin, No. 43, May 2003. **[R644, RE Tab 7, p. 57]** On the first page of the Practice Bulletin the Court will find the following:

> Despite the numerous management methods proposed, the incidence of preterm birth has changed little over the past 40 years. Uncertainty persists about the best strategies for managing preterm labor.
>
> .....
>
> Historically, nonpharmacologic treatments to prevent preterm births in women who have symptoms of preterm labor have included bed rest, abstention from intercourse and orgasm, and hydration, either orally or parenterally. The effectiveness of these interventions is *uncertain.*

"Uncertainty" regarding the effectiveness does not translate into *ineffectiveness*. Indeed, the Mississippi Supreme Court recognizes that speculation in medical matters is allowable and necessary. *Poole, at 723 and 724; 66 Federal Credit Union v. Tucker,* 853 So.2d 104, at 113 (Miss. 2003).

This same literature also acknowledges that the statements contained in the literature are "not to be construed as dictating an exclusive course of treatment or procedure. Variations in practice may be warranted based on the needs of the individual patient, resources, and limitation unique to the institution or type of practice." **[R644; RE Tab 7, p. 57]** In addition, the literature relied upon by the Court and the Defendant is not considered authoritative by the Defendant himself. When asked: "Would you consider William's Obstetrics [textbook] to be an authoritative source?" Dr. Mills responded as follows: "There is no authoritative source as far as I can tell. Medicine changes all of the time." **[R645; RE Tab 6, p. 56, lines 6 – 16]** Because there is no authoritative source, and because the literature is not to be construed as dictating an exclusive course of treatment or procedure, the courts must rely upon expert testimony to

determine what the appropriate medical standards are in each case. If the printed word in medical textbooks and resource manuals were the end-all, be-all of medical information there would be no need for live medical witnesses at all.

Despite the Defendant's admission of an obvious misdiagnosis of the Plaintiff which led to different treatment than he would have rendered had he made the correct diagnosis, the trial court excluded Dr. Fuselier's opinions because Dr. Fuselier could not point to specific literature that supports his opinions that the proper care and diagnosis would have resulted in maintaining the pregnancy to a viable point. The trial court adopted the Defendant's assertion that because the scientific medical literature doesn't conclusively establish that the interventions identified above prevent second trimester miscarriages, the Defendant's neglect of Ms. Hill and his absolute failure to provide even the most basic medical care to her when she presented to Kings Daughters Medical Center on May 27, 2002 should be excused.

Dr. Fuselier, while not ignoring the existence of the literature, has rendered his opinions based upon approximately twenty-five (25) years of active practice of Ob-Gyn. His experience, his education and his training (which includes continuing medical education and review of scientific literature), form the bases of his opinions.**[R627, RE Tab 5, p. 48 (depo p. 55, line 6 – p. 56, line 16]** Nowhere in the Rules of Evidence is the Plaintiff required to cite to specific scientific literature. Mississippi Rule of Evidence 702 states that an expert qualified 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. Mississippi Rule of Evidence 703 states simply that the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied

upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible. Further, in handing down the *Poole* decision in 2005, the Mississippi Supreme Court specifically held that citations to medical literature simply are not required.

The practice of medicine is an art and not a scientific certainty. The Defendant even testified to such in his deposition. **[R645, RE Tab 6, p. 56]** An Ob-Gyn such as Dr. Fuselier who has spent his life's efforts in treating pregnant women and their unborn children knows the basic standards of care expected of Ob-Gyn's. Because his opinions are not cited in scientific literature does not render his opinions unreliable. Dr. Fuselier agrees that the literature doesn't definitively state the effectiveness or ineffectiveness of the treatment required for a physician to meet the minimal standard of care. He testifies as follows: "I think what you would read in the literature is that there are no studies to conclude without a doubt that bed rest is of value. It doesn't say that it is of no value." **[R626; RE Tab 5, p. 47 (depo p. 50, lines 11-14)]** Further, Dr. Fuselier opines: "Double blind studies in pregnant patients are very, very difficult in cases where you would use a placebo and the medication to determine a life. So these studies are very difficult to come about." **[R626; RE Tab 5, p. 47 (depo p. 52, lines 15-20)]** Dr. Fuselier also testified that he would disagree with any literature that contends that bed rest, hydration, and pelvic rest do not appear to improve the term of preterm birth and should not be routinely recommended. In fact, when asked the specific question, Dr. Fuselier said: "I would disagree with that in a big way." **[R626, RE Tab 5, p. 47 (depo p. 50, lines 8-19)]** The "uncertainty" in the literature makes expert opinions all the more necessary in this case. The Plaintiffs' medical expert has over twenty-five years of practice experience, upon which he relied in reaching his conclusion that the failure to properly diagnose and treat accordingly more probably than not was at least a contributing factor to the premature delivery and ultimate death of the Plaintiffs' child.

The Defendant and his medical expert would have this court believe (and the trial court simply adopted the premise) that the scientific, peer reviewed medical literature supports the Defendant's position that because there is no absolutely proven prevention of miscarriage or abortion in the first half of a pregnancy that it is within the standard of care to render no precautionary measures and treatment to a 17 ½ weeks pregnant patient complaining of cramping and bleeding. **[T21-33; RE Tab 14, pp. 118-130].**

However, both Dr. Fuselier and the Defendant Dr. Mills have testified in this civil action that it is routine and standard to implement the precautions listed in the ACOG Bulletin, i.e. bed rest, pelvic rest and hydration. Dr. Mills admitted in his deposition that he misdiagnosed the Plaintiffs' pregnancy as a complete abortion, and that had he correctly diagnosed a live, 17 ½ week pregnancy on the date in question he would have implemented the very precautions he is critical of the Plaintiffs' expert for espousing. **[R641-642; RE Tab 6, pp. 53-54 (depo p. 60, line 8 – p. 61, line 19)]** His testimony reveals that his course of treatment would have been different had he made the proper diagnosis. No one will ever know with certainty how the Plaintiffs' outcome would have differed had the Defendant made the correct diagnosis on May 27, 2002, and the law of Mississippi does not require certainty in these circumstances. *66 Federal Credit Union*, 853 So.2d at 113.

It is of no surprise that Dr. Mills' and his expert's opinions differ from the opinions of Dr. Fuselier. But differing opinions between experts should be presented to the jury for the jury to determine the credibility and weight of the evidence from both sides. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. These conventional devices, rather than wholesale exclusion under an uncompromising 'general acceptance' test, are the appropriate safeguards where the basis of scientific testimony meets the

standards of Rule 702. *Kumho at 596.* In proving reliability of an expert's opinions, "the proponent need not prove to the judge that the expert's testimony is correct, but she must prove by a preponderance of evidence that the testimony is reliable." *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269, 276 (5th Cir. 1998). Disagreement among experts does not disqualify one or the other. When qualified experts disagree it is up to the jury to determine which expert gives the most credible opinions.

Court's Ruling

The trial court, in his first Memorandum Opinion entered on April 10, 2008, stated: "On the surface, Dr. Paul Fuselier appears to be a competent and qualified expert witness who practiced obstetrics and/or gynecology for a number of years." **[R749, RE Tab 4, p. 32]** The trial court then continued his ruling with a narrow and restrictive interpretation of *Daubert,* stating "in deciding whether or not such testimony will be heard, the Court must consider five non-exclusive factors . . ." **[R750, RE Tab 4, p. 33]** and holds that because the Plaintiffs' expert could not comply with one of the listed factors (whether the theory has been subjected to peer review and publications) the expert is not qualified to testify pursuant to *Daubert.* After the Plaintiffs filed their Motion for Clarification and Motion to Reconsider, the trial court entered the June 13, 2008 Memorandum Order and Judgment from which the Plaintiffs appealed, utilizing the same restrictive *Daubert* analysis and simply adopting the Defendants' proposed Order and Judgment as his own. Though the trial court believed that Dr. Fuselier appeared to be competent and qualified, based on one single factor, the trial court excluded his testimony. In neither the April 2008 Opinion nor the June 2008 Judgment does the trial court give any reason unrelated to peer reviewed scientific literature for Dr. Fuselier's exclusion.

The Plaintiffs' expert, Dr. Fuselier, is qualified to render opinions in this case and the trial court should not have excluded him. Based upon the above referenced facts, legal argument, and the Mississippi Supreme Court's ruling in the *Poole* case, it was error for the trial

court to strictly and narrowly apply the *Daubert* factors resulting in striking the Plaintiffs' medical expert due solely to his lack of citation to scientific literature.

III. ISSUE TWO

THE TRIAL COURT ERRONEOUSLY GRANTED THE DEFENDANT'S PROCEDURALLY DEFICIENT MOTION FOR SUMMARY JUDGMENT ON THE SINGLE ISSUE OF WRONGFUL DEATH, SUMMARILY DISPOSING OF NOT ONLY THE WRONGFUL DEATH CLAIMS, BUT ALL CLAIMS BY THE PLAINTIFFS.

A. The trial court erroneously summarily dismissed claims that were not challenged by the Defendant nor briefed by the parties.

The June 13, 2008 Memorandum Order and Judgment of the trial court **[R825-836; RE Tab 2, pp. 8-19]** grants the Defendant's motions to exclude the expert testimony of Dr. Paul Fuselier and for summary judgment. The motions that were granted address only the issue of the expert's opinions related to causation for the Plaintiffs' Wrongful Death claim, and do not address the additional, remaining claims as set forth in the Plaintiffs' Complaint. **[R12-22]** The Plaintiffs brought their Complaint as individuals and as wrongful death beneficiaries of their deceased child. In addition to claims of Wrongful Death, the Plaintiffs alleged medical malpractice, negligence, and personal injury in their individual capacities for the 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,* which 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. None of these claims were challenged by the Defendant in his motion for summary judgment.

The Defendant's motions addressed only Dr. Fuselier's opinions as to whether the outcome of the pregnancy would have been different had the correct diagnosis been made and standard precautions prescribed. In other words, the only opinion challenged was that standard precautions would have, to a degree of medical probability, resulted in the pregnancy

progressing so that the pregnancy resulted in a live birth. These opinions speak only to the wrongful death claims of the Plaintiffs. The Defendant's motions do not address the medical negligence claims of the Plaintiffs that because of the misdiagnosis the Plaintiffs, in their individual capacities, suffered psychological distress and trauma. As a result of the misdiagnosis of a complete abortion on May 27, 2002, both Shanika Hill and Brian Thomas suffered enormous and unnecessary trauma when Plaintiff Shanika Hill delivered a live, moving, 19-week fetus with a heartbeat on an emergency room table 2 weeks after they had been told they had miscarried and were no longer pregnant. This particular trauma and psychological distress would not have occurred had the appropriate and correct diagnosis been made.

The Plaintiffs' expert, Dr. Fuselier, has rendered an opinion that the misdiagnosis and failure to perform an ultrasound in diagnosing the *complete abortion* was a "clear deviation from the standard of care." **[R634-636]** The Defendant testified that a fetus at 17 ½ weeks gestation would be approximately six (6) inches long, and would have identifiable hands, feet and facial features. **[R640, RE52, lines 11-20]** The Defendant also testified that had he performed an ultrasound on May 27, 2002 he would have been able to definitively and accurately diagnose pregnancy. **[R 641, RE Tab 6, p. 53, lines 8-17].** The Defendant's expert testified that the cost of an ultrasound is approximately $150.00. **[T29; RE Tab 14, p. 126, lines 19-20]** There simply is no reason why an attentive physician would not perform a simple, quick, inexpensive, definitive test to determine whether a complete abortion had in fact occurred, or whether the patient was 17 ½ weeks pregnant. The Defendant did not challenge this opinion of Dr. Fuselier, and specifically represented to the Court that the issue of the failure to perform an ultrasound was not the subject of the Defendant's *Daubert* motion. At the hearing on the Defendant's motion defense counsel stated:

> Now, it is contended that on that occasion Dr. Mills, even though he performed a pelvic exam, he should have performed an

> ultrasound. That is not before the Court today. That is a matter in dispute and while certainly it will be our position and our expert's testimony that that was not a deviation from the standard of care, that does come under rival opinions of experts and is not subject of a *Daubert* motion.

[T3; RE Tab 14, p. 115, lines20-28] The trial court, in adopting the Defendant's proposed findings of fact and conclusions of law as his own, acknowledged that Dr. Fuselier's opinion regarding the ultrasound was a matter in dispute, yet the trial court granted summary judgment anyway. The disputed opinions related to the issue of the ultrasound have not been briefed by the parties and have therefore not been considered by the trial court. Dr. Fuselier's opinions regarding the ultrasound were not challenged by the Defendant and were erroneously stricken by the trial court. A fair reading of the Plaintiffs' Complaint and the other pleadings in this civil action evidence that claims and causes of action of the Plaintiffs in their individual capacities were never challenged by the Defendant, were never briefed by the parties, were never considered by the trial court, and should not have been summarily dismissed by the trial court.

B. The trial court erred in granting the Defendant's procedurally deficient Motion for Summary Judgment and the trial court erred in failing to acknowledge and consider this issue raised in the Plaintiffs' motions for clarification, reconsideration, and to strike the Defendant's untimely itemization of material facts.

The Defendant's original motion before the Court was a limited *Daubert* motion challenging one portion of the Plaintiffs' expert's testimony. **[R337-346]** However, the Defendant, in violation of the mandate of Uniform Rule of Circuit and County Court Practice 4.03 requiring an itemization of undisputed facts to accompany any motion for summary judgment, by way of an Amended Motion **[R592-593]** simply bootstrapped a summary judgment motion to the limited *Daubert* motion and failed to submit an Itemization of Material Facts. Therefore, the motion for summary judgment is, and always has been, deficient because of the Defendant's failure to follow URCCP 4.03. In their Motion for Clarification **[R752-760; RE Tab 11, pp. 88-96]** regarding the trial court's first order granting the Defendant's Motion for

Summary Judgment **[R749-751; RE Tab 4, pp. 32-34]** the Plaintiffs raised this deficiency before the trial court. For that reason, the Plaintiffs urged that the Motion for Summary Judgment was deficient.

In response to the Plaintiffs' Motion for Clarification, the Defendant, for the first time, on or about April 24, 2008, (after all briefing was complete and the Court had ruled on the Summary Judgment motion) submitted to the Court what is entitled "Defendant's Itemization of Material Facts As To Which There Exists no Genuine Issue." **[R807-810]** The late submission cannot cure the fundamental deficiency of the Defendant's original filing. Rule 4.03 specifically requires: "Movants for summary judgment *shall* file with the clerk *as a part of the motion* an itemization of the facts relied upon and not genuinely disputed and the respondent shall indicate either agreement or specific reasons for disagreement that such facts are undisputed and material." Rule 4.03 is a directive, not a suggestion. Clearly the late filing of the Itemization of Facts cannot cure the defect, as the itemization was not a part of the motion, and the Plaintiffs had no opportunity to respond to the purported undisputed material facts in response to the motion for summary judgment.

On May 23, 2008 the Plaintiffs moved the trial court for an order striking the Defendant's untimely submission, and in the alternative requested that the trial court consider the Plaintiffs' responses to the specific itemizations the Defendant submitted. **[R811-819; RE Tab 12, pp. 97-105]** However, the trial court did not rule on the Plaintiffs' motion for clarification, motion for reconsideration, or motion to strike. Instead, the trial court entered it's June 13, 2008 Memorandum Order and Judgment, which is simply a signed copy of the proposed findings of fact and conclusions of law submitted by the Defendant in February 2008, granting the Defendant's motion to exclude and for summary judgment in its entirety, with absolutely no reference to or consideration of the Plaintiffs' filings in April and May 2008.

IV. ISSUE THREE

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO RECUSE HIMSELF PURSUANT TO MISSISSIPPI RULE OF CIVIL PROCEDURE 16(A), RULE 1.15 OF THE UNIFORM CIRCUIT AND COUNTY COURT RULES, AND CANON 3(E).

This civil action was the subject of an in-person hearing in Magnolia, Mississippi, December 6, 2007. During the course of this hearing the Court disclosed to all counsel and others present that his Court Administrator had within an hour of the hearing notified him that she is a patient of the Defendant physician in this case. The Court indicated that if the Plaintiffs desired to file a Motion for Recusal he would consider the motion. The Court then proceeded with the hearing, having given Plaintiffs' counsel one week to confer with the Plaintiffs and decide whether to file a Motion for Recusal. **[T4-5; RE Tab 14, p. 4, line7 – p. 5, line 4]**

Plaintiffs' counsel conferred with the Plaintiff Ms. Hill and the decision was made to file a motion for recusal. Plaintiffs' counsel was informed that in addition to the disclosure made by the court there may be another connection of trial judge to this case: that the trial judge's father is or was a practicing physician in the Brookhaven, Mississippi area and practices or practiced medicine at the Kings Daughters Medical Center in Brookhaven, Mississippi, a former Defendant in this civil action. The facts and circumstances giving rise to this civil action took place at the Kings Daughters Medical Center in Brookhaven, Mississippi.

As required by UCCCR 1.15, counsel for Plaintiff submitted an affidavit in support of the motion for recusal, setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion was filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true. **[R733-738; RE Tab 13, pp. 106-111]**. The Defendant filed a response in opposition to the Plaintiffs' motion. **[R744-748]**

On February 4, 2008 the trial court entertained oral argument on the Plaintiffs' motion. At the conclusion of the argument the Court rendered his ruling denying the Plaintiffs' motion.

[T63-65; RE Tab 15, pp. 142-145] The trial court, in his ruling acknowledged that his father was on staff at former Defendant King's Daughters Hospital, and further disclosed that his step-father is a physician in the District (McComb). **[T55-66; RE Tab 15, pp. 142-145]**

Canon 3(E) of the Code of Judicial Conduct states in pertinent part: "Judges *should* disqualify themselves in proceedings in which their impartiality *might* be questioned by a reasonable person knowing all the circumstances." Canon 3(E)(1) (emphasis added). "Under this rule, a judge should disqualify himself or herself whenever the judge's impartiality might be questioned by a reasonable person knowing all the circumstances, regardless whether any of the specific rules in Section 3(E)(1) apply. *See official Comment to Cannon 3(E)(1).* The Mississippi Supreme Court has instructed that Canon 3 "enjoys the status of law such that we enforce it rigorously . . ." *Collins v. Dixie Transport, Inc.*, 543 So.2d 160, 166 (Miss. 1989). The Supreme Court has further instructed that "we must be forever mindful of our duty to guard jealously the public's confidence in the judicial process [and] must be vigilant to avoid the *appearance* of impropriety in any and all of our proceedings as judges." *Dodson v. Singing River Hospital System,* 839 So. 2d 530, 534 (¶16-17) (Miss. 2003).

The trial court abused its discretion in failing to recuse himself under the circumstances presented: his Court Administrator is a personal patient of the physician, his father practiced medicine at the former Defendant Kings Daughters Hospital, and his step-father is an active practicing physician in the District. His close, personal ties to the medical community at issue in this civil action give the appearance of potential bias and possible impropriety.

Certainly now that the trial court has ruled in favor of the Defendant and against the Plaintiffs in such a sweeping fashion, the appearance of bias and impropriety is justified. Plaintiffs' counsel warned of this at the hearing on the motion to recuse:

> I think that if the Court just projects down the road in these proceedings and when and if the Court rules on the dispositive

> motion of summary judgment and the disqualification of the Plaintiffs' physician in this case as an expert witness, then if the Court rules in an adverse condition, then the cloud and the perception of prejudice or bias hangs over the proceedings, hangs over the judicial system. If you go further in the proceedings to any dispositive ruling that the Court may make in this case, whether it's directed verdict or whether or not it's motions at the end of the case or whatever those dispositive motions may be, if they're adverse to the Plaintiff in this instance, then we have the cloud and the perception of bias and prejudice in this case.

[T59, line 19 – T60, line 4]. The trial court not only ruled adversely to the Plaintiffs, the trial court adopted each and every fact, each and every legal argument, and each and every application of law to fact submitted by the Defendant and absolutely failed to acknowledge, reference or rule upon the Plaintiffs' submissions to the court. The court erred in failing to recuse himself from the proceedings of this civil action.

CONCLUSION

Considering all of the above and foregoing, the Appellants hereby respectfully request that this Court enter the appropriate order reversing the trial court's memorandum opinion and order striking the Plaintiffs' medical expert and granting summary judgment, reversing the trial court's denial of the Plaintiffs' Motion for Recusal, and further respectfully request that this Court remand this civil action to the Circuit Court of Lincoln County, Mississippi for a trial on the merits of this civil action.

This, the _____ day of December, 2008.

Respectfully submitted,
PLAINTIFFS

By: _____
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CERTIFICATE OF SERVICE

I, John F. Hawkins, do hereby certify that I have this day served via First Class U.S. Mail, a true and correct copy of the above and foregoing Appellant's Brief to all counsel of record at the following address:

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I, John F. Hawkins, do also hereby certify that I have this day served via First Class U.S. Mail, a true and correct copy of the above and foregoing Appellant's Brief to Lincoln County Circuit Court Judge who presided over this matter at the trial level as follows:

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

THIS, the 17th day of December, 2008.

John F. Hawkins