

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

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**NO. 2008-CA-01642**

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**VICKI WORTHY AND FRED WORTHY,  
INDIVIDUALLY AND AS A WRONGFUL DEATH  
BENEFICIARIES OF MACKENZY WORTHY, DECEASED      PLAINTIFFS/APPELLANTS**

**V.      CAUSE NO.: 2008-CA-01642**

**ROBBYE D. MCNAIR, M.D. AND WOMEN'S CLINIC  
OF GREENWOOD, P.A. AND JOHN DOES 1-10      DEFENDANTS/APPELLEES**

**BRIEF OF APPELLEES**

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

**CIVIL ACTION NO.: 2002-0070-CICI**

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### **CERTIFICATE OF INTERESTED PARTIES**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. This representation is made in order that the Justices of the Supreme Court or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Fred Worthy and Vicki Worthy, Plaintiffs.
2. Ellis Turnage, Esquire, Cleveland, Mississippi, counsel for Fred Worthy and Vicki Worthy.
3. Robbye D. McNair, M.D., Defendant.
4. Women's Clinic of Greenwood, P.A., Defendant.
5. Tommie G. Williams, Esquire, Greenwood, Mississippi, Upshaw, Williams, Biggers, Beckham & Riddick, LLP, counsel for Robbye D. McNair, M.D. and Women's Clinic of Greenwood, P.A., Defendants.
6. Tommie G. Williams, Jr., Esquire, Greenwood, Mississippi, Upshaw, Williams, Biggers, Beckham & Riddick, LLP, counsel for Robbye D. McNair, M.D. and Women's Clinic of Greenwood, P.A., Defendants.
7. Honorable Richard A. Smith, Circuit Judge.

Respectfully submitted,

BY: Tommie Williams Jr.  
TOMMIE G. WILLIAMS, JR., MSB  
Counsel to Appellees/Defendants  
Robbie D. McNair, M.D. and Women's  
Clinic of Greenwood, P.A.

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## **STATEMENT REGARDING ORAL ARGUMENT**

Defendants Robbye McNair, M.D. and Women's Clinic of Greenwood, P.A., request oral argument.

## **STATEMENT OF ISSUES**

The issues presented in this appeal involve (1) the trial court striking the testimony of the plaintiff's expert witness, Dr. Bruce Halbridge, as to cause of death pursuant to M.R.E. Rule 702, Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993) and Mississippi Transportation Company v. McLemore, 863 So.2d 31 (Miss. 2003), and (2) the trial court granting summary judgment and directing a verdict in favor of Robbye McNair, M.D. and Women's Clinic of Greenwood, P.A. premised on the plaintiffs' failure to provide expert testimony causally connecting the care provided by the defendants and the death of MacKenzy Worthy.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case.<sup>1</sup>**

On May 23, 2002, Plaintiffs Fred Worthy and Vicki Worthy, individually and as wrongful death beneficiaries of MacKenzy Worthy, deceased, filed a complaint in the Circuit Court of Leflore County, Mississippi, asserting claims for medical negligence and wrongful death against Defendants Robbye McNair, M.D. and Women's Clinic of Greenwood, P.A., for care provided to Vicki Worthy during the course of her pregnancy. CP: 1-7.

On April 25, 2008, Dr. McNair and the Women's Clinic of Greenwood, P.A., moved the trial court to exclude the plaintiffs' obstetrical expert, Dr. Bruce L. Halbridge's, testimony as to cause of death. CP: 13-21.

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<sup>1</sup>

Record citations are in the following format: Materials from the Clerk's papers are denoted by the initials CP, followed by the page number ascribed by the Clerk. Materials contained in the Trial Transcript are denoted by the initials T, followed by the page number.

On April 29, 2008, the above-styled and the numbered cause came on for trial by jury before Honorable Richard A. Smith, Leflore County Circuit Court Judge. Both sides appeared and announced ready for trial and a jury of twelve (12) citizens from Leflore County and two (2) alternates was chosen. CP: 78. The court empaneled the jury selected for the above-styled cause and directed jurors not chosen to serve in this civil action to report to the next courtroom as a second circuit court action was set to be tried utilizing the same jury pool. T: 3. After the jury had been empaneled on April 29, 2008, the Court released the jury to return on April 30, 2008, at 8:30 a.m.. T: 76. After dismissing the jury, the Court heard the defendants' pending Motions in Limine, including the defendants' Motion to Exclude Dr. Bruce L. Halbridge's testimony as to cause of death. CP: 13. The Court recessed at approximately 5:30 p.m. on April 29, 2008. T: 117.

On April 30, 2008, the Circuit Court granted the defendants' Motion to Exclude Dr. Bruce Halbridge's Testimony as to cause of death. T: 118. At this time, a discussion was held between counsel and Honorable Richard A. Smith as to the procedural vehicle to rely on in entering the Court's Order of Dismissal. T: 138-140. Ultimately, the Court entered its order granting summary judgment and directing a verdict in favor of Robbye McNair, M.D. and Women's Clinic of Greenwood, P.A. premised on the plaintiffs' failure to produce expert testimony causally connecting any alleged breach of the standard of care by the defendants and the death of Mackenzy Worthy. CP: 78-80.

This appeal followed. CP: 115.

**B. Statement of Facts**

**1. The Women's Clinic of Greenwood and Greenwood Leflore Hospital Charts.**

The plaintiffs' lengthy recitation of the facts concerning Vicki Worthy's medical care provided by the Women's Clinic of Greenwood and Greenwood Leflore Hospital is nothing more than an attempt to confuse the issue and hide the fatal flaw in the plaintiffs' case. The facts cited between pages 3 and 8 of the plaintiffs' brief are not relevant to this appeal and they are incorporated merely for the purposes

of obscuring the vital issue - the plaintiffs' failure to causally connect the medical care provided by Dr. Robbye McNair and the Women's Clinic of Greenwood, P.A. to MacKenzy Worthy's death.

**2. The Autopsy Report.**

The plaintiffs rely on the discussion section of the autopsy report to advance their position. The plaintiffs' reliance is misplaced. The autopsy report does not state that placental insufficiency was **probably** the cause of death. The discussion section of the autopsy report speaks in possibilities and not probabilities. The plaintiffs rely on the statement: "The features of fetoplacental insufficiency in the placenta **could certainly have** contributed fetal placental insufficiency which in turn has a host of etiologies." The plaintiffs' reliance is once again based on mere possibilities and not probabilities. Exhibit P-1, pages 56-57. (Emphasis added).

**3. Dr. Robbye D. McNair's Deposition.**

Once again, the plaintiffs' recitation of facts concerning the medical treatment provided by Dr. Robbye McNair and the Women's Clinic of Greenwood, P.A. to Vicki Worthy is nothing more than an attempt to draw the Court's attention away from the issue at hand - medical causation.

The plaintiffs' reliance on portions of Dr. McNair's deposition do not bolster their position. At Dr. McNair's deposition, she was merely responding to questions from Plaintiffs' counsel regarding placental insufficiency. Dr. McNair never stated that she made a diagnosis of placental insufficiency in this case. No diagnosis of placental insufficiency was made by any of the designated experts other than the unsupported opinion of Dr. Bruce Halbridge which the trial court correctly excluded.

**4. Dr. Bruce L. Halbridge's Deposition.**

Dr. Halbridge is Board certified in obstetrics and gynecology, and was tendered to the court as an expert in the areas of "high risk" obstetrics. Obstetrics is the branch of medicine that concerns the management of women during pregnancy, childbirth, and puerperium (mother's recuperative period following delivery). Taber's Cyclopedic Medical Dictionary, 18<sup>th</sup> Ed. (1997). Dr. Halbridge was not

tendered to the court as an expert in the field of Fetal/Placental Pathology. Fetal/Placental Pathology is a field of medicine which deals with the study of the cause of death of a fetus.

**5. Dr. Carole Vogler's Deposition.**

Once again, the plaintiffs' references to the medical records are nothing more than an attempt to obscure and confuse the issue. Dr. Vogler, the plaintiffs' expert, is Board certified in anatomic, clinical and pediatric pathology. She has been in the practice of pediatric pathology for over twenty-four (24) years and has published over one hundred (100) articles relating to the field of pediatric pathology. Dr. Vogler testified that she has been performing autopsies on stillborns and babies since 1984. Exhibit P-4, pages 9-13.

Incredibly, the plaintiffs cite to page 56 of Dr. Vogler's deposition regarding placental insufficiency. Dr. Vogler was merely defining placental insufficiency in response to a question asked by Plaintiffs' counsel. Exhibit P-4, page 56. Dr. Vogler was asked the following questions at her evidentiary deposition on April 22, 2008:

Q: Ok. Cause of death, we don't really know. We're in a position where we know that death occurred as a result of a condition known as hydrops, but we don't know what caused the hydrops?

A: That's correct.

Q: Alright. So in effect, the cause of the baby's death is unknown at this point?

A: I don't know the cause, that's correct.

Exhibit P-4, page 60, lines 8-15.

Q: Ok. So based on, more or less, using Dr. Montes as your eyes and viewing the placenta through his word, and in addition to that taking his microscopic slides or copies of them and actually looking at the tissue under the microscope, having undertaken both of those studies, you would agree that you don't find any evidence to support a diagnosis of placental insufficiency?

A: I do not.

Exhibit P-4, page 78, lines 19-25; page 79, line 1.



Q: Ok. And the last thing was that you told us that you found no evidence of placental insufficiency in this case?

A: That's correct.

Q: Ok. What - - you're saying there was no evidence of fetal - - of placental insufficiency?

A: Placental insufficiency, yes.

Q: Cause of death, hydrops?

A: Yes.

Q: But cause of hydrops unknown?

A: That's correct.

Q: And no evidence of placental insufficiency?

A: That's correct.

Exhibit P-4, page 79, lines 24-25; page 80, lines 1, 2, 7-9, 22-25; page 81, lines 1-2.

Realizing the conflict between his obstetrical expert and his pathological expert regarding cause of death, counsel for the plaintiffs asked the following question on re-direct:

Q: Dr. Vogler, do the microscopic slides and the autopsy report allow you to rule out - - I mean, deficit - - definitely placenta insufficiency?

A: I see no morphologic evidence of it.

Exhibit P-4, page 81, lines 7-12.

Dr. Carole Vogler testified repeatedly that in her expert opinion as a fetal/placental pathologist, there was no evidence of placental insufficiency in this case.

#### **6. Dr. Carolyn Salafia's Deposition.**

Dr. Carolyn Salafia's testimony was not before the court at the time Judge Smith entered his Order in favor of Dr. Robbye McNair and the Women's Clinic of Greenwood, P.A.. Dr. Salafia, the defendants' expert, is a sub-specialist in the field of placental pathology. Judge Smith allowed Plaintiffs'

counsel to offer his exhibits to the trial court for identification only. T: 127. Judge Smith did not consider Dr. Salafia's deposition in rendering his opinion in favor of the defendants.

Dr. Salafia never stated that placental insufficiency was present in this case. The plaintiffs' reliance on the statement, "This was a placental and umbilical cord cause of death" does not equate to placental insufficiency. Exhibit P-8, page 96. Dr. Salafia goes on to testify in response to counsel's question as follows:

Q: So you are saying that your findings on microscopic review of slide A2, that that's a basis of why you say the cause of death was placental umbilical cord?

A: Two reasons. One, it is that there is no evidence of a primary disease in this baby. Babies don't just die on their own. Two, I have two findings, one is an abnormal cord insertion, two, evidence of bleeding combined with a description that is summarized as "hydrops." Hydrops is clearly one of the features a baby who has had a fetal maternal hemorrhage. That's not a primary fetal disorder. That's a disorder caused by the placental disease.

Exhibit P-8, page 104, lines 20-25 and page 105, lines 1-10.

Q: You also noted to some degree of placental insufficiency; right?

A: Where is placental insufficiency?

Mr. Williams: Is there some particular reference you have?

Q: I thought you had talked about it?

Mr. Williams: She talked about immaturity.

Q: So placental immaturity is different than insufficiency?

A: Correct. Insufficiency tends to give you not an unusually big baby. If the placenta is insufficient, you transfer oxygen and nutrients across the same surface. It doesn't give you enough food so you tend not to be an unusually big baby.

Exhibit P-8, page 132, lines 19-25 and page 133, lines 1-15.

Dr. Salafia never expressed an opinion regarding fetal placental insufficiency.

**7. Dr. John Morrison's Deposition.**

Dr. John Morrison's testimony was not before the court when Judge Smith entered his Order dismissing Dr. Robbye McNair and the Women's Clinic of Greenwood, P.A.. Dr. Morrison, the defendants' expert, is a maternal-fetal medicine specialist with an emphasis in high risk obstetrics. Judge Smith allowed plaintiffs' counsel to offer Dr. Morrison's deposition for identification purposes so he could complete his record. T: 127. Dr. Morrison testified to a reasonable degree of medical certainty that fetal hydrops was the cause of the baby's death. Further, Dr. Morrison testified that there are three (3) causes of hydrops. One is CMV (virus), two is membranous insertion of the umbilical cord and the third cause is unknown. It could be congenital or chromosomal. Exhibit P-8, page 90, lines 7-20. Dr. Morrison never opined that placental insufficiency was the cause of death.

**SUMMARY OF THE ARGUMENT**

The trial court properly considered the evidence, including the papers and pleadings on file with the trial court and the arguments of counsel, and determined that Dr. Halbridge's opinion as to cause of death, though relevant, was not reliable and did not meet the criteria required by Rule 702 M.R.E. or by Daubert v. Merrill Dow Pharmaceuticals, Inc..

The plaintiffs offered Dr. Bruce Halbridge as an expert in the field of managing high risk obstetrical patients. Exhibit P-5, page 11, line 9-12. The plaintiffs did not tender Dr. Halbridge as an expert in regards to the determination of the cause of fetal demise via autopsy. Dr. Halbridge admits that he does not perform autopsies. Exhibit P-5, page 13, line 4-7. Further, Dr. Halbridge admitted that he does not routinely perform pathologic examinations of placentas. He merely receives the reports prepared by the placental pathologist. Exhibit P-5, page 13, line 8-16. Dr. Halbridge admitted that he does not practice placental pathology and is not Board certified as a pathologist. Finally, he admitted that he does not study tissue specimens or slides, rather he reads the reports of doctors who prepared the slides. Exhibit P-5, page 15, lines 2-9.

The plaintiffs offered Dr. Carole Vogler as an expert to render opinions in the field of pediatric pathology. Dr. Vogler has been practicing pathology since 1984. She is Board certified in anatomic, clinical and pediatric pathology. Exhibit P-4, page 10, lines 18-23.

Dr. Halbridge's opinion regarding cause of death is not reliable and not based on sufficient facts or data. Further, he is not qualified to state such opinions. Dr. Halbridge testified that the proximate cause of death of the baby was placental insufficiency. Exhibit P-5, page 38, line 17-18. However, the plaintiffs' own Board certified pediatric pathologist, Dr. Carole Vogler, directly contradicted the testimony offered by Dr. Halbridge. She repeatedly testified that there was no evidence of placental insufficiency. Exhibit P-4, page 80, line 14-25; page 82, line 1-3.

Dr. Halbridge offered no facts or data to support his opinions as to cause of death of the fetus. The plaintiff's own expert, Dr. Carole Vogler, a highly qualified pediatric pathologist, refuted Dr. Halbridge's testimony, stating that there was no evidence of placental insufficiency.

The trial court correctly applied Rule 702 M.R.E. and Daubert v. Merrill Dow Pharmaceuticals, Inc., and determined that Dr. Bruce Halbridge's testimony as to cause of death, while relevant, was not reliable and thus, not admissible. With the exclusion of Dr. Halbridge's opinion regarding cause of death, the plaintiffs were left with no expert to testify that an alleged breach of the standard of care by the defendants proximately caused the death of MacKenzy Worthy. With no expert testimony to link any alleged breach of the standard of care by the defendants to the death of MacKenzy Worthy, the plaintiffs failed to prove any causal connection between any alleged breach of the standard of care and the fetal demise. Thus, the Trial court was correct in granting summary judgment and directing a verdict in favor of Dr. Robbye McNair and the Women's Clinic of Greenwood, P.A..

## ARGUMENT

### **A. Standard of Review.**

On May 29, 2003, the Mississippi Supreme Court revised Mississippi Rule of Evidence 702 to state:

“If scientific, technical or other specialized knowledge will assist the trier of fact to understand or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of 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.” (emphasis added).

In amending Rule 702, the Mississippi Supreme Court abandoned the prior “general acceptance” standard for the admission of expert testimony embodied by Frye v. United States, 293 F.103, 104 (D.C. Cir. 1923), in favor of the more stringent standard announced by the United States Supreme Court in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

In Mississippi Transportation Commission v. McLemore, 863 So.2d 31, ¶ 7 (Miss. 2003), the Court stated that:

“Under Rule 702, expert testimony should be admitted only if it withstands a two-prong inquiry. First, the witness be qualified by virtue of his or her knowledge, skill, experience, or education. Second, the witnesses scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue.”

In adopting Daubert, the Mississippi Supreme Court emphasized the “gate keeping responsibility of the Trial court to determine whether expert testimony is relevant and **reliable**.” See comment to M.R.E. 702. The objective of a trial court’s gate keeping role is to “make certain that an expert. . .employs in the court room the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999). The court in Daubert, adopted a non-exhaustive, illustrative list of reliability factors for determining the admissibility of expert witness testimony. The focus of this analysis “must be solely on principles and methodology, not on conclusions they generate.” McLemore at ¶ 7. These factors include: Whether

the theory or technique can and has been tested; whether it has been subjected to peer review and publication; whether, in respect to the particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operations; and whether the theory and technique enjoys general acceptance within a relevant scientific community. *Id.* at ¶ 13. The applicability of these factors depends on the nature of the issue, the expert's particular expertise, and the subject of the testimony. *Id.*

Under Daubert "the Trial court must determine whether the evidence [being offered] is genuinely scientific, as distinct from being **unscientific speculation** offered by a genuine scientist." Moore v. Ashland Chemical, Inc., 151 F.3d 269, 276 (5<sup>th</sup> Cir. 1998). When determining admissibility of expert testimony, the courts must consider whether the expert opinion is based on scientific knowledge (reliability) and whether the expert opinion will assist the trier of fact to understand or determine a fact in issue (relevance). McLemore at 38. The courts are **not required** to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert, because self-proclaimed accuracy by an expert is an insufficient measure of reliability. Brooks v. Stone Architectural, P.A., 934 So.2d 350, ¶ 13 (Miss. 2006).

- B. **The Circuit Court properly applied its discretion in striking the testimony of the plaintiff's expert witness, Dr. Bruce Halbridge, as to cause of death pursuant to M.R.E. Rule 702, *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Mississippi Transportation Company v. McLemore*, 863 So.2d 31 (Miss. 2003).**

The plaintiffs offered Dr. Bruce L. Halbridge to the court as an expert in the areas of high risk obstetrics. Obstetrics is the branch of medicine that deals with the care of women during pregnancy, child birth and the mother's recuperative period following delivery. Dr. Halbridge was not tendered to the court as an expert in Fetal/Placental Pathology. Fetal/Placental Pathology is the field of medicine which deals with the study of the cause of death of a fetus.

The plaintiffs also offered Dr. Carole Vogler to the court as an expert in the field of Fetal/Placental Pathology. Dr. Vogler is board certified in anatomic, clinical and pediatric pathology. She has been in the practice of pediatric pathology for over twenty-four (24) years and has published over one hundred (100) articles relating to the field of pediatric pathology.

The defendants filed a Daubert motion to exclude Dr. Halbridge's testimony as to cause of death. Dr. Halbridge testified that the final proximate cause of the death of the baby was placental insufficiency. Exhibit P-5, page 38, lines 17-18. Dr. Halbridge's opinion regarding cause of death is not reliable and not based on sufficient facts for data. He is not qualified to state such opinions.

Dr. Halbridge stated in his testimony that his medical specialty is obstetrics and gynecology. Exhibit P-5, page 8, lines 10-12. He describes the medical specialty of obstetrics and gynecology as:

"Obstetrics and gynecology involves the care of women. It involves the care of pregnant women, both normally pregnant and women with complications of pregnancy, such as medical complications of pregnancy. It involves taking care of normal women in the office who come for yearly pap smears and breast exams. It involves taking care of women who need pelvic or gynecologic surgery and women who have hormonal or other problems related to their reproductive system."  
(Exhibit P-5, page 8, lines 13-23).

Dr. Halbridge did not offer any testimony regarding his expertise in determining cause of death via autopsy.

Dr. Halbridge was not tendered to the Court as an expert in regards to the determination of the cause of fetal demise via autopsy. He admits that he does not perform autopsies. Exhibit P-5, page 13, lines 4-7. Further, he admits that he does not routinely perform pathologic examinations of placentas. He merely receives the reports prepared by the placental pathologist. Exhibit P-5, page 13, lines 8-16. He admits that he does not practice placental pathology and is not Board certified as a pathologist. Exhibit P-5, page 14, lines 8-9. He admits that his interaction with pathologists, for the most part, consists of him reviewing the reports that have been prepared by the pathologists based upon their study

of the tissues. Exhibit P-5, page 14, lines 10-16. Finally, he admits that he does not study tissue specimens or slides, rather he reads the reports of the doctors who prepared the slides. Exhibit P-5, page 15, lines 2-9.

The plaintiffs have offered Dr. Carole Vogler as an expert in pediatric pathology, a highly special branch of general pathology. Dr. Vogler has been practicing pediatric pathology since 1984. Exhibit P-4, page 10, lines 15-17. Dr. Vogler graduated from medical school in 1978 and went on to complete a residency in anatomic and clinical pathology at the University of Texas Medical School in Houston. Upon completion of her residency in anatomic and clinical pathology in 1982, Dr. Vogler completed a fellowship/residency in pediatric pathology at the Children's Hospital in Cincinnati. Exhibit P-4, page 8, lines 18-25 and page 9, lines 1-23. Dr. Vogler is Board certified in anatomic, clinical and pediatric pathology. Exhibit P-4, page 10, lines 18-23. She has been performing autopsies on stillborns and babies since 1984. Exhibit P-4, page 12, lines 20-25 and page 13, lines 1-2. Currently, she is serving as Interim Chairman of the Department of Pathology at St. Louis University and also the Director of the Residency Training Program. Exhibit P-4, page 15, lines 5-8.

Dr. Vogler, the plaintiffs' pediatric pathologist, directly contradicted the testimony of Dr. Halbridge as to cause of death by stating that after a pathological review, her medical specialty, no evidence of placental insufficiency existed. She testified as follows:

A: That's correct. Based upon my review of the gross description from Dr. Montes and the microscopic findings, I don't see any morphologic evidence that would indicate placental insufficiency.

Q: Ok. And so then to wrap it up, from the pathologist standpoint, time of death twenty-four (24) to forty eight (48) hours prior to delivery?

A: Yes.

Q: Cause of death, hydrops?

A: Yes.



Q: But cause of hydrops unknown?

A: That's correct.

Q: And no evidence of placental insufficiency?

A: That's correct.

(Exhibit P-4, page 80, lines 14-25 and page 82, lines 1-3.)

Q: Dr. Vogler, do the microscopic slides and the autopsy report allow you to rule out - - I mean, deficit - - definitely placenta insufficiency?

A I see no morphologic evidence of it.

Q: (By Mr. Turnage) Ok. When you say morphologically, you're meaning what?

A: When I see the gross examination of the placenta, I see the histology, there's nothing in this - in the pathology of this case that would allow me to make the diagnosis of placental insufficiency.

(Exhibit P-4, page 81, lines 6-18 (objection redacted)).

The plaintiffs' own expert, Dr. Carole Vogler, a highly qualified sub-specialist and pediatric pathologist directly contradicted Dr. Halbridge's opinion as to cause of death. Dr. Halbridge's opinions are not supported by any facts or data and they are directly refuted by Dr. Carole Vogler, the plaintiffs' pediatric pathology expert. The plaintiffs' argument that the defendants failed to offer any expert evidence to attack the scientific basis of Dr. Halbridge's opinions is a misstatement of fact. Dr. Carole Vogler's opinions were properly before the Court and she had been offered to the Court as an expert in pediatric pathology by the plaintiffs, to which the defendants did not object. Dr. Vogler is a highly qualified Fetal/Placental Pathologist. To the contrary, Dr. Halbridge's opinions were not based on scientific facts or data and the trial court correctly struck his opinion as to cause of death.

C. **The Circuit Court properly applied its discretion in granting summary judgment and directing a verdict in favor of Robbye McNair, M.D. and Women's Clinic of Greenwood, P.A. premised on the plaintiff's failure to produce expert testimony causally connecting the care provided by the defendants and the death of Mackenzy Worthy.**

On April 29, 2008, the above-styled and numbered cause came on for trial by jury before Honorable Richard A. Smith, Leflore County Circuit Court Judge. Both sides appeared and announced ready for trial and a jury of twelve (12) citizens from Leflore County and two (2) alternates was chosen. CP: 78. The Court empaneled the jury selected for the above-styled cause and directed the jurors not chosen to serve in this civil action to report to the next court room as a second circuit court action was set to be tried utilizing the same jury pool. T: 3. After the jury had been empaneled on April 29, 2008, the Court released the jury to return on April 30, 2008, at 8:30 a.m. T: 76. The jury was empaneled, but never heard opening arguments of counsel for either the plaintiffs or the defendants. After dismissing the jury, the Court heard the defendants' pending Motion to Exclude Dr. Bruce L. Halbridge's Testimony as to cause of death. CP: 13. After hearing the arguments of counsel and taking evidence on said motion, the Court recessed at approximately 5:30 p.m. on April 29, 2008. T: 117.

On April 30, 2008, the Circuit Court granted Dr. McNair's Motion to Exclude Dr. Bruce L. Halbridge's Testimony as to cause of death. T: 118. At this time, a discussion was held between counsel for the plaintiffs, counsel for the defendants and Honorable Richard A. Smith on which procedural vehicle to rely on in entering the Court's Order of Dismissal. T: 138-140. Ultimately, the Court entered its Order Granting Summary Judgment and directing a verdict in favor of Robbye McNair, M.D. and the Women's Clinic of Greenwood, P.A. premised on the unique circumstances surrounding this specific case. CP: 78-80.

The plaintiffs are now asking this Court on appeal to overturn the Court's grant of summary judgment directing a verdict in favor of the defendants because a jury had been empaneled prior to hearing the defendants' pending Motion to Exclude Dr. Bruce L. Halbridge's Testimony as to cause of death pursuant to Daubert. As previously stated, the case *sub judice* presented the Court with a very unique set of facts and circumstances. Essentially, the Circuit Court had all of the plaintiffs' medical

expert testimony before it when it ruled on the defendants' Motion to Exclude Dr. Bruce L. Halbridge's Testimony. The plaintiffs chose to take the evidentiary video depositions of both Dr. Bruce Halbridge and Dr. Carole Vogler prior to trial. Dr. Halbridge's evidentiary deposition was taken on April 19, 2008, in Houston, Texas. Dr. Carole Vogler's evidentiary deposition was taken on April 22, 2008, in St. Louis, Missouri.

The Circuit Court had the benefit of reviewing all of the plaintiffs' medical expert testimony prior to ruling on the defendants' Motion to Exclude Dr. Bruce Halbridge's Testimony as to cause of death. With all of the plaintiffs' medical expert testimony before it, the Court correctly granted the defendants' Motion to Exclude Dr. Bruce Halbridge's Testimony as to cause of death pursuant to Daubert. The trial court correctly ruled that without an expert witness to causally connect the alleged breaches of the standard of care with the death of MacKenzy Worthy, the plaintiffs' case fails. The plaintiffs were left with no expert witness to testify as to causation. T: 123, 136-137.

Mississippi law requires expert testimony in a medical malpractice action unless a matter is within the common knowledge of layman. Palmer v. Biloxi Regional Medical Center, 564 So.2d 1346, 1355 (Miss. 1990). (See also Erby v. North Mississippi Medical Center, 654 So.2d 495, 500 (Miss. 1995). The Court has further stated that "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." Brooks v. Roberts, 882 So.2d 229, 32 (Miss. 2004).

Testimony by an expert witness is required in a medical malpractice action to establish the applicable standard of care, breach of that standard of care, and a causal connection between the injury and the alleged acts or omissions of the defendant, unless the matter lies within the common knowledge of lay persons. A *prima facie* case for medical malpractice or medical negligence against these defendants could only be made by proving the following elements: (1) The existence of a duty by the defendants to conform to a specific standard of conduct for the protection of others against an

unreasonable risk of injury; (2) A failure to conform to the required standard; and (3) An injury proximately caused by the breach of such duty. Maxwell v. Baptist Memorial Hospital-DeSoto, ¶ 17, 2008 WL2170726 (Miss. App. 2008), citing Hubbard v. Wansley, 954 So.2d 951, 956-57 (Miss. 2007). Expert testimony is required to establish these elements. Id. Not only must this expert identify and articulate the requisite standard that was not complied with, the expert must also establish that the failure was the proximate cause or proximate contributing cause, of the alleged injuries. Id. (quoting Barner v. Gorman, 605 So.2d 805, 809 (Miss. 1992)).

After the trial court struck Dr. Bruce Halbridge's opinions as to cause of death, the plaintiffs were left with no expert witness to testify as to causation or proximate cause against the defendants. With the testimony that was before the Court, there is no conceivable way the plaintiffs' case could have been submitted to the jury, because they lacked a causation expert. Whether the Court styled the Order of Dismissal as a summary judgment order, or as a directed verdict, is of no effect because the Court reached the correct conclusion as no genuine issue of material fact was left for the jury to consider when the Court excluded Dr. Bruce Halbridge's opinions as to cause of death pursuant to Daubert.

Rule 1 M.R.C.P. states in pertinent part as follows:

"These rules govern procedure in the Circuit Courts, Chancery Courts, and County Courts in all suits of a civil nature. . . These rules shall be construed to secure the just, speedy, and inexpensive determination of every action."

The comments to Rule 1 M.R.C.P. read as follows:

"It is intended that these rules be applied as liberally to civil actions as is judicially feasible. . . The salient provision of Rule 1 is the statement that 'these rules shall be construed to secure a just, speedy and inexpensive determination of every action.' . . the primary purpose of procedural rules should be to promote the ends of justice. . . **Properly utilized, the rules will attempt to discourage battles over mere form** and to sweep away needless procedure controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies. The mandate in the final sentence of Rule 1 is only one of a number of similar admonitions scattered throughout the rules **directing that the rules be interpreted liberally in order that the procedural framework in which litigation is conducted promotes the end of justice**

**and facilitates decisions on the merits rather than determinations on technicalities.”**  
(emphasis added).

Rule 61 M.R.C.P. states in pertinent part as follows:

“...No error in any ruling or order in anything done or omitted by the Court or by any of the parties is grounds for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”

The Trial court correctly considered the evidence before it and granted the defendants’ Motion to Exclude the Testimony of Dr. Bruce Halbridge as to cause of death pursuant to Daubert. With no medical expert to causally connect any alleged breach of the standard of care by the defendants and the death of MacKenzy Worthy, the plaintiffs case fails as a matter of law and an Order of Dismissal was appropriate. Whether the Order of Dismissal was styled as an Order Granting Summary Judgment or an Order Granting a Directed Verdict in favor of the defendants, should not be allowed to change the ultimate outcome of the case. As the Comment to Rule 1 M.R.C.P. clearly states, “... Properly utilized, the rules will attempt to discourage battles over mere form”. The plaintiffs assertion that the case *sub judice* should be remanded to the Trial court is exactly what Rule 1 what was adopted to prevent - battles over mere form. The trial court made the correct ruling and found that the plaintiffs’ case failed as a matter of law.

The case *sub judice* presented a unique set of circumstances for the trial court in that all of the plaintiffs’ medical expert testimony was before the Court at the time it granted the defendants’ Motion to Exclude the Testimony of Dr. Bruce Halbridge as to cause of death. Once the Court had determined that the plaintiffs’ expert could not testify as to cause of death or proximate cause, the plaintiffs’ case failed as a matter of law and an Order of Dismissal was appropriate whether it be a Directed Verdict or an Order Granting Summary Judgment. Due to the unique circumstances of the case *sub judice*, Honorable Richard A. Smith carefully considered and prepared his Order of Dismissal pursuant to


Rule 56(b) and Rule 50(a) M.R.C.P. granting summary judgment and directing a verdict in favor of Robbye D. McNair, M.D. and Women's Clinic of Greenwood, P.A. CP: 78-80. By granting summary judgment and directing a verdict at this juncture, the trial court saved all parties, witnesses and the jury panel unnecessary additional time and expense because the plaintiffs' claims clearly failed as a matter of law.

### CONCLUSION

The trial court properly considered the substantial evidence before it and determined that the plaintiffs' expert, Dr. Bruce L. Halbridge's opinions as to cause of death, though relevant, were not reliable and did not meet the criteria required by Rule 702 M..R.E. or by Daubert. As such, the trial court correctly struck Dr. Bruce Halbridge's opinions as to cause of death and the plaintiffs were left with no medical expert testimony to causally connect any alleged breach of the standard of care by the defendants to the death of MacKenzy Worthy. Without expert testimony causally connecting any alleged breach of the standard of care by the defendants to the death of MacKenzy Worthy, the plaintiffs' case failed as a matter of law and an Order of Dismissal was proper. The trial court correctly granted summary judgment and directed a verdict in favor of Robbye D. McNair, M.D. and the Women's Clinic of Greenwood, P.A. as a matter of law.

RESPECTFULLY SUBMITTED, this the 19 day of August, 2009.

UPSHAW, WILLIAMS, BIGGERS,  
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**CERTIFICATE OF SERVICE**

I, Tommie G. Williams, Jr., of counsel to Defendants/Appellees, certify that I have this day mailed, with postage prepaid, a true and correct copy of the above and foregoing document unto:

Ellis Turnage, Esquire  
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P. O. Box 216  
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Honorable Richard A. Smith  
Circuit Court Judge  
P. O. Box 1953  
Greenwood, MS 38935-1953

SO CERTIFIED this the 19 day of August, 2009.

  
TOMMIE G. WILLIAMS, JR.