

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-01834

**SHAWN LEE DUNCAN AND
APRIL DUNCAN**

PLAINTIFFS/APPELLANTS

VS.

CAUSE NO.: 2008-CA-01834

SATISH VERMA, M. D.

DEFENDANT/APPELLEE

BRIEF OF APPELLEE

**APPEALED FROM THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI
CIVIL ACTION NO.: CV 2001-0170**

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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. Shawn Lee Duncan and April Duncan, Plaintiffs.
2. Dana J. Swan, Esquire, Clarksdale, Mississippi, counsel for Shawn Lee Duncan and April Duncan.
3. Satish Verma M.D., Defendant.
4. Tommie G. Williams, Esquire, Greenwood, Mississippi, Upshaw, Williams, Biggers, Beckham & Riddick, LLP, counsel for Satish Verma, M.D.
5. Tommie G. Williams, Jr., Esquire, Greenwood, Mississippi, Upshaw, Williams, Biggers, Beckham & Riddick, LLP, counsel for Satish Verma, M.D.
6. Honorable Robert P. Chamberlin, Circuit Judge.

Respectfully Submitted,

BY: Tommie Williams, Jr.
TOMMIE G. WILLIAMS, JR.,
Counsel to Appellee/Defendant
Satish Verma, M.D.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT REGARDING ORAL ARGUMENT	1
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
A. Nature of the Case	1
B. Statement of Facts	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
A. Standard of Review	5
B. The circuit court properly applied its discretion in granting summary judgment in favor of Dr. Satish Verma and finding that the plaintiffs failed to produce expert testimony as to the duty owed to Arthur Eugene Duncan by Dr. Verma after a neonatologist had been consulted and began treating Arthur Eugene Duncan.	5
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

CASES

- Dotson v. Jackson, 2008 WL 4712084 (Miss.App. 2008) 5
- Hall v. Hilbun, 466 So.2d 856 (Miss. 1985) 6, 8
- Maxwell v. Baptist Memorial Hospital - DeSoto, 2008 WL2170726, ¶ 17
(Miss. App. 2008) 4
- McAllister v. Franklin County Memorial Hospital, 910 So.2d 1205, ¶ 15
(Miss. App. 2005). 6, 8
- McMillan v. Rodriguez, 823 So.2d 1173, ¶9 (Miss. 2002) 5
- Palmer v. Boloxi Regional Medical Center, 564 So.2d 1346, 1355 (Miss. 1990). 6

AUTHORITIES

- Mississippi Rule of Civil Procedure Rule 56(b) 5
- Mississippi Rule of Civil Procedure Rule 56(c) 5

STATEMENT REGARDING ORAL ARGUMENT

The facts relevant to the issues raised on appeal are straightforward and the legal authorities which control the arguments asserted are firmly established. Accordingly, Appellee Satish Verma, M.D., waives oral argument.

STATEMENT OF THE ISSUES

The sole issue presented in this appeal involves the trial court's grant of summary judgment in favor of Satish Verma, M.D., based on the fact that no material issue of fact existed because the plaintiffs' failed to offer expert testimony regarding the duty owed by Dr. Verma to Arthur Eugene Duncan after a neonatologist¹ had been consulted, began actively treating the infant and assumed the responsibility for the care of the infant. The plaintiffs' expert, Dr. Shane Bennoch, admitted that he was not familiar with the agreements in place between the pediatricians at Baptist-DeSoto and the neonatologists in July, 1999. Dr. Verma produced sworn affidavits of Dr. Desh Sidhu and Dr. Manoj Narayanan which stated that they were personally familiar with the agreements in place between the pediatricians at Baptist-DeSoto and the neonatologists in July, 1999 and that Dr. Verma complied with all standards of care and was not guilty of medical malpractice or negligence in his treatment of Arthur Eugene Duncan.

STATEMENT OF THE CASE

A. Nature of the Case²

On July 12, 2001, Appellants Shawn Lee Duncan and April Marie Duncan, individually and as personal representatives and wrongful death beneficiaries of Arthur Eugene Duncan, deceased, filed a

¹

A neonatologist is a physician practicing neonatology. Neonatology is a sub-specialty of pediatrics that consists of the medical care of newborn infants, especially the ill or premature newborn infant.

²

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.

Complaint in the Circuit Court of DeSoto County, Mississippi, asserting claims for medical negligence against Appellee Satish Verma, M.D., for care provided to Arthur Eugene Duncan, deceased between July 16, 1999 and July 18, 1999. CP: 9-14.

On January 24, 2003, Dr. Verma moved the trial court to grant summary judgment in his favor stating that the plaintiffs had offered no evidence suggesting that he owed a duty to Arthur Eugene Duncan after a neonatologist at Baptist-East had been consulted and began treating of the child. CP: 101-120. Dr. Verma filed a Memorandum Brief in Support of His Motion for Summary Judgment and incorporated it by reference. CP: 95-100. On May 3, 2004, the plaintiffs filed their response to Dr. Verma's Motion for Summary Judgment. CP: 188-195. On July 14, 2008, Dr. Verma filed a supplement to his Motion for Summary Judgment incorporating the Affidavit of Desh Sidhu, M.D.. CP: 387-417.

On September 19, 2008, the Court heard oral arguments of counsel regarding Dr. Verma's Motion for Summary Judgment. CP: 418; CP: Volume 5 (MSJ Transcript). The Court took Dr. Verma's Motion for Summary Judgment under advisement. On October 2, 2008, the Court entered its Order Granting Summary Judgment in favor of Dr. Verma and dismissing any and all allegations of negligence. CP: 427-431. On or about October 3, 2008, Dr. Verma filed his second supplement to his Motion for Summary Judgment. Contained within this supplement were medical records, documents and the deposition transcript of Dr. Manoj Narayanan which were referred to by counsel at the September 19, 2008 hearing on Dr. Verma's Motion for Summary Judgment. CP: 432-555.

This Appeal followed. CP: 556.

B. Statement of Facts

On July 12, 2001, Appellants Shawn Lee Duncan and April Marie Duncan, individually and as personal representatives and wrongful death beneficiaries of Arthur Eugene Duncan, Deceased, filed a complaint in the Circuit Court of DeSoto County, Mississippi, asserting claims for medical negligence

against Appellee Satish Verma, M.D., for care provided to Arthur Eugene Duncan between July 16, 1999 and July 18, 1999. CP: 9-14.

On July 27, 2001, Dr. Verma responded to the plaintiffs' complaint and denied any negligence therein. CP: 15-18. Discovery ensued and on January 24, 2003, Dr. Verma moved the trial court to grant summary judgment in his favor stating that the plaintiffs had failed to put forth any evidence that he owed a duty to Arthur Eugene Duncan after a neonatologist at Baptist-East had been consulted and began treating the child. CP: 101-120. Dr. Verma filed a Memorandum Brief in support of his Motion for Summary Judgment and incorporated it by reference. CP: 95-100. On May 3, 2004, the plaintiffs filed their response to Dr. Verma's Motion for Summary Judgment. CP: 188-195. Contained within this response was the affidavit, curriculum vitae and expert opinions held by the plaintiffs' expert, Dr. Shane Bennoch. CP: 188-195. On December 29, 2005, counsel for Dr. Verma took the deposition of plaintiffs' expert, Dr. Shane Bennoch. CP: 197-198.

On February 15, 2006, Dr. Verma propounded Requests for Admissions regarding the Neonatology Services Agreement to the plaintiffs. CP: 244. The Neonatology Services Agreement is a contract entered into between Baptist Memorial Hospital - DeSoto and East Memphis Neonatology Associates whereby the neonatologists that practiced at Baptist-East would provide neonatal services at Baptist-Desoto by utilizing their certified neonatal nurse practitioners.

On November 8, 2007, Dr. Verma filed his Motion to Deem Requests for Admissions Admitted that had previously been propounded to the plaintiffs on February 15, 2006. CP: 324-353. On January 2, 2008, the trial court entered its Order Deeming Dr. Verma's Requests for Admissions admitted. CP: 554-555. On July 14, 2008, Dr. Verma filed a supplement to his Motion for Summary Judgment incorporating the Affidavit of Desh Sidhu, M.D.. CP: 387-417.

On September 19, 2008, the trial court heard arguments of counsel regarding Dr. Verma's Motion for Summary Judgment. CP: 418; CP: Volume 5 (MSJ Transcript). The Court took Dr. Verma's

Motion for Summary Judgment under advisement. On October 2, 2008, the Court entered its Order Granting Summary Judgment in favor of Dr. Verma. CP: 427-431. The Court ruled that the plaintiffs failed to put forth any evidence to support any duty owed by Dr. Verma to Arthur Eugene Duncan, taking into account the Neonatology Services Agreement entered into between Baptist-DeSoto and the East Memphis Neonatology Associates Associates. CP: 427-431. On or about October 3, 2008, Dr. Verma filed a Second Supplement to his Motion for Summary Judgment. Contained within this supplement were medical records, documents and the deposition transcript of Dr. Manoj Narayanan which were referred to by counsel at the September 19, 2008, hearing on Dr. Verma's Motion for Summary Judgment. CP: 432-555.

This Appeal followed. CP: 556.

SUMMARY OF THE ARGUMENT

The trial court properly considered the substantial evidence before it, including the papers and pleadings on file with the trial court and the arguments of counsel, and determined that the plaintiffs failed to offer any evidence regarding the duty owed by Dr. Verma to Arthur Eugene Duncan pursuant to Maxwell v. Baptist Memorial Hospital - DeSoto, 2008 WL2170726 ¶ 17 (Miss. App. 2008), which held that a *prima facie* for medical malpractice may be made by proving the following elements: (1) the existence of a duty by the defendant to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) the failure to conform with the required standard; and (3) an injury approximately caused by the breach of such duty. The plaintiffs failed to offer any expert testimony regarding the duty owed by Dr. Verma to Arthur Eugene Duncan once a neonatologist had been consulted and began treating Arthur Eugene Duncan. As such, the trial court correctly ruled that no genuine issue of material fact existed and granted summary judgment in favor of Dr. Verma.

ARGUMENT

A. Standard of Review.

Mississippi Rule of Civil Procedure Rule 56(b) states that a party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. Mississippi Rule of Civil Procedure Rule 56(c) sets forth the motion and proceeding practice regarding Motions for Summary Judgment. Rule 56(c) provides in pertinent part as follows:

“...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...”

In Dotson v. Jackson, 2008 WL 4712084 (Miss.App. 2008), the Court of Appeals for the State of Mississippi recently held that the standard of review of a motion for summary judgment is well settled:

“Our appellate standard for reviewing the grant or denial of summary judgment is the same standard as that of the trial court under Rule 56(c) of the Mississippi Rule of Civil Procedure. This court employs a de novo standard of review of a lower court’s grant or denial of a summary judgment and examines all the evidentiary matters before it - admissions in pleadings, answers to interrogatories, depositions, affidavits, etc.. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied.”

Citing McMillan v. Rodriguez, 823 So.2d 1173, ¶9 (Miss. 2002).

B. The circuit court properly applied its discretion in granting summary judgment in favor of Dr. Satish Verma and finding that the plaintiffs failed to produce expert testimony as to the duty owed to Arthur Eugene Duncan by Dr. Verma after a neonatologist had been consulted and began treating Arthur Eugene Duncan.

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 of law is within the knowledge of lay persons. Medical techniques, procedures and standards of care with regard to the treatment of newborns presenting as did Arthur Eugene Duncan, are not matters which lie within the common knowledge of lay persons and, therefore, expert medical testimony is required.

Mississippi law requires expert testimony in a medical malpractice action unless a matter is in the common knowledge of laymen. Palmer v. Boloxi Regional Medical Center, 564 So.2d 1346, 1355 (Miss. 1990). In Hall v. Hilbun, 466 So.2d 856 (Miss. 1985), the Mississippi Supreme Court defined the standard of care in cases of medical malpractice:

“[G]iven the circumstances of each patient, each physician has a duty to use his or her knowledge and therewith treat through maximum reasonable medical recovery, each patient, with such reasonable diligence, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States, **who have available to them the same general facilities, services, equipment and options.**”

McAllister v. Franklin County Memorial Hospital, 910 So.2d 1205, ¶ 15 (Miss. App. 2005).

(Emphasis Added).

In July, 1999, Baptist-DeSoto could not obtain the services of a neonatologist at their Southaven facility. Due to the definite need for neonatal services at this facility, Baptist-DeSoto had previously (October, 1996) entered into the Neonatology Services Agreement (“Agreement”) with East Memphis Neonatology Associates (“Group”), whereby the Group would treat sick newborns at Baptist-DeSoto by utilizing the services of their certified neonatal nurse practitioners. Under this Agreement, the Group had the exclusive right and responsibility for providing the sick newborn services at Baptist-Desoto. CP: 337, ¶8. In addition, the Group provided all control, direction and supervision to the certified neonatal nurse practitioners. Working through their certified neonatal nurse practitioners, the Group, which had sole responsibility for sick newborn care, performed all decision making activities including whether to treat sick newborns at Baptist-Desoto or transfer the infants to Baptist-East.

The plaintiffs have admitted, through Requests for Admissions, that the document entitled Neonatology Services Agreement was in force and effect in July, 1999, at Baptist-DeSoto. CP: 554-555. The Neonatology Services Agreement entered into between Baptist-DeSoto and East Memphis Neonatology Associates states that:

“Group shall provide licensed, competent, qualified and credentialed nurse practitioners, who shall at all times have appropriate allied health professional privileges at hospital and be acceptable to hospital, to perform and provide appropriate onsite and on-call coverage, as hereinafter described, and to perform and provide appropriate neonatal nurse practitioner services during the term of this agreement. Group shall also serve as sponsors of such nurse practitioners as required by the medical staff bylaws of hospital and **shall provide all control, direction and supervision of such nurse practitioners** as required by applicable laws, rules and regulations, hospital policies and procedures, medical staff bylaws, applicable accrediting agency standards, and applicable standards of care and practice.”

CP: 329. (Emphases added.)

The plaintiffs' expert, Dr. Shane Bennoch, did not address any policies or procedures, such as the Neonatology Services Agreement, that were in effect in July, 1999 at Baptist-DeSoto. Dr. Bennoch was asked the following questions at his deposition in December, 2005:

Q: What information do you have, Doctor, as you sit here today regarding the practice at Baptist - DeSoto and the agreements that were in place between the neonatologists and the pediatric staff at the hospital, regarding care of sick newborns? What information do you have about that?

A: I do not. I mean, I think if the information is written down that as soon as the pediatrician consults the neonatologist, it becomes the neonatologist's patient, and that is transferred at the hospital there under the neonatologist care, then that would be one thing. But if that was the case, then in my opinion, the neonatologist needs to come and see the patient at some point.

Deposition Transcript Dr. Shane Bennoch, Page 91, Lines 7-20 (Dec. 29, 2005).

Dr. Bennoch admitted that he was not familiar with the agreements that were in place between neonatologists and the pediatric staff at Baptist-DeSoto in July, 1999.

In support of his Motion for Summary Judgment, Dr. Verma submitted the affidavits of Dr. Manoj Narayanan, Dr. Joe Phillips and Dr. Desh Sidhu which proved that he did not violate any standard of care in the treatment he provided to Arthur Eugene Duncan. Dr. Sidhu and Dr. Narayanan

testified that they both were personally familiar with the manner in which the neonatologists practiced with regard to patients admitted to the nursery at Baptist-DeSoto in July, 1999. Dr. Sidhu and Dr. Narayanan testified that once the neonatologist was consulted regarding Arthur Eugene Duncan and began actively treating the child, with the assistance of his certified neonatal nurse practitioners, he was considered the primary physician for the infant. CP: 401-403, 410-412. At his deposition, Dr. Bennoch candidly admitted that he was not aware of any agreements between Baptist-DeSoto and East Memphis Neonatology Associates regarding the care provided to sick newborns in July, 1999. Dr. Verma offered affidavits of competent physicians stating that they were both personally familiar with the agreements in place in July, 1999 and that Dr. Verma did violate any standards of care in treating Arthur Eugene Duncan.

Arthur Eugene Duncan was born on July 16, 1999, at Baptist Memorial Hospital - DeSoto. Shortly after birth, Arthur Eugene Duncan began experiencing respiratory distress and Dr. Verma, the on-call pediatrician, was notified of the infant's condition. Dr. Verma immediately recognized that Arthur Eugene Duncan was experiencing respiratory distress and asked the nurses in the nursery to obtain a neonatology consult, thus obtaining a higher level of care for the infant. Approximately thirty (30) minutes later, a certified neonatal nurse practitioner (employee of the neonatologist at Baptist-East) was at Arthur Eugene Duncan's bedside. From this point on, the neonatology team assumed care of Arthur Eugene Duncan and executed all orders for the infant. Dr. Verma gave no further orders regarding the treatment of Arthur Eugene Duncan. Once the neonatology team accepted the consult, began actively treating Arthur Eugene Duncan and assumed responsibility for the care of the patient, Dr. Verma no longer owed any duty to Arthur Eugene Duncan. Dr. Verma treated Arthur Eugene Duncan with the facilities, services, equipment, and options that were available to him in July, 1999, as required by Hall v. Hilbun and McAllister v. Franklin Memorial Hospital.

The plaintiffs failed to produce any expert testimony to support any duty owed by Dr. Verma to Arthur Eugene Duncan based on the agreements in place in July, 1999 between Baptist-Desoto and East Memphis Neonatology Associates. The plaintiffs' expert candidly admitted that he was not aware of any agreements that were in place between the pediatric staff at Baptist-DeSoto and the neonatologists at Baptist-East. Dr. Desh Sidhu and Dr. Manoj Narayanan testified that they were personally familiar with the agreements in place between the pediatric staff at Baptist-DeSoto and the neonatologists at Baptist-East in July, 1999 and that Dr. Verma complied with all standards of care. With no expert testimony to support any duty owed by Dr. Verma to Arthur Eugene Duncan in light of the agreements in place in July, 1999, the trial court correctly ruled that no genuine issue of material fact existed and summary judgment in favor of Dr. Verma was proper.

CONCLUSION

The plaintiffs failed to put forth any evidence regarding the duty owed by Dr. Verma to Arthur Eugene Duncan based upon the Neonatology Services Agreement between Baptist Memorial Hospital - Desoto and East Memphis Neonatology Associates which was in effect in July, 1999. As such, the trial court correctly determined that no genuine issue of material fact existed and granted summary judgment in favor of Dr. Verma.

RESPECTFULLY SUBMITTED, this the 26 day of June, 2009.

UPSHAW, WILLIAMS, BIGGERS,
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CERTIFICATE OF SERVICE

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

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Circuit Judge of DeSoto County
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SO CERTIFIED this the 26 day of June, 2009.



TOMMIE G. WILLIAMS, JR.