IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01857

LORA LOPEZ — APPELLANT

VERSUS

ROBERT D. MCCLELLAN — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT
CAUSE NO. A2402-2005-31

BRIEF OF APPELLEE

(ORAL ARGUMENT REQUESTED)

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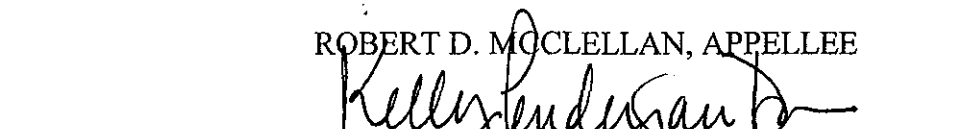
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Lora Lopez, Appellant
2. Russell S. Gill and RUSSELL S. GILL, P.L.L.C., Attorney for Appellant
3. Shannon Ladner and RUSSELL S. GILL, P.L.L.C., Attorney for Appellant
4. Robert D. McClellan, Appellee
5. Donald C. Dornan, Jr., and SPYRIDON, PALERMO & DORNAN, LLC, Attorney for Appellee
6. Kelly Pendergrass Dees and SPYRIDON, PALERMO & DORNAN, LLC, Attorney for Appellee.

Respectfully submitted, this the 15th day of July, 2009.

ROBERT D. MCCLELLAN, APPELLEE



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STATEMENT OF THE ISSUES

The Appellee, Robert D. McClellan, submits the following issues for the Court's consideration:

1. Whether the trial court erred in granting McClellan's *ore tenus* Motion for Summary Judgment.

2. Whether the trial court erred in excluding expert medical testimony of Dr. Charles Winters as to any causal relationship of Lora Lopez's injuries to the second impact with Robert D. McClellan's vehicle.

3. Whether the trial court erred in finding that no genuine issue of material fact existed on the issue of causation of Lora Lopez's injuries.

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings Below

This appeal arises from entry of summary judgment in favor of Robert D. McClellan by Judge Jerry O. Terry, Circuit Court Judge for the Second Circuit, on October 16, 2008, and the Court's subsequent entry of a Final Judgment in favor of McClellan pursuant to Miss. R. Civ. P. 56. This case was set for trial to commence on September 16, 2008. Pre-trial motions were heard by the Court, including McClellan's Motion to Strike No.1 (Winters). After taking the motion under advisement, the Court ruled on September 17, 2008, that Motion to Strike No. 1, seeking the exclusion of the opinions of Dr. Charles Winters, was well-taken and granted same. Thereafter, counsel for McClellan made an *ore tenus* motion to dismiss, for involuntary dismissal, for directed verdict, or for summary judgment based on the lack of medical testimony as to the causal relationship between the second impact occurring between the vehicle occupied by Lopez and McClellan's vehicle and the injuries sustained by Lopez. After hearing arguments of counsel for both parties, the Court entered summary judgment in favor of McClellan since no genuine issue of material fact existed absent medical testimony as to the cause of Lopez's injuries. An order granting McClellan's Motion for Summary Judgment and a Final Judgment in his favor were entered on October 17, 2008. Thereafter, on November 10, 2008, Lopez filed her Notice of Appeal.

II. Statement of the Facts

On February 13, 2004, the vehicle occupied by Lora Lopez and driven by her friend, Jaclyn Hughes, a 2000 GMC Sonoma pick-up truck, was traveling westbound on Old Hwy. 67 in Biloxi, Mississippi. [P-1]; [R.E. at 184, 187]. Robert D. McClellan was traveling immediately behind the vehicle occupied by Lopez also in a westerly direction. [P-1];[R.E. at 184, 189-90]. At the same time, a 1996 Jeep Grand Cherokee driven by Linda Nesline was traveling eastbound on Old Hwy. 67 in Biloxi, Mississippi. [P-1];[R.E. at 184-86]. As the vehicle occupied by Lopez and the vehicle driven by Nesline approached, the Nesline vehicle veered across the center-line into the westbound lane of traffic and struck Lopez's vehicle head-on. [P-1];[R.E. at 184]. As a result of the impact, the Hughes' vehicle in which Lopez was riding rotated clockwise resulting in the front of McClellan's vehicle coming in contact with the rear of that vehicle. [P-1];[R.E. at 184].

As a result of injuries sustained the accident, Lopez was transported via ambulance to Biloxi Regional Medical Center. [P-3, Ambu-003]; [R.E. at 134]. As a result of her injuries, Lopez was treated by various physicians, including Dr. Charles Winters, an orthopedic surgeon. Dr. Winters' treatment of Lopez included his performance of a lumbar laminectomy with fusion on December 16, 2004. [P-3, OSH-063]; [R.E. at 135].

On February 23, 2005, Lopez filed a lawsuit in the Circuit Court of Harrison County, Mississippi, First Judicial District, wherein she named Linda Nesline and Robert D. McClellan as defendants. [R. at 16-21]; [R.E. at 15-20]. In Count II of the Complaint, Lopez alleged that McClellan was guilty of negligence in the operation of his vehicle by allowing it to collide with the vehicle occupied by Lopez. [R. at 19]; [R.E. at 18]. Lopez's Complaint further alleged that as a result of the negligence of McClellan, Lopez sustained injuries and damages. [R. at 19-20]; [R.E. at 18-19]. The Complaint sought compensatory and punitive damages against Nesline and

McClellan. [R. at 20-21]; [R.E. at 19-20]. Prior to trial, Lopez settled her claim against Nesline and as a result, Nesline was dismissed from the lawsuit. [R. at 10]; [R.E. at 9].

On July 15, 2008, at the instance of the Plaintiff, the deposition of Dr. Charles Winters was taken. [P-6, 1-46]; [R.E. at 136-181]. During his deposition, Dr. Winters testified as to his treatment of Lopez. [Id.]. In addition, Dr. Winters offered his opinion as to causation of the injuries sustained by Lopez. [P-6, 18-19, 36-37]; [R.E. at 153-54, 171-72]. Dr. Winters offered his opinion that the injury suffered by Lopez was 50% apportionable to the impact with the McClellan's vehicle which occurred after the head-on collision with the vehicle operated by Nesline. [Id.]. Dr. Winters' deposition testimony correlated with a letter authored by him on May 12, 2006, wherein he also speculated that Lopez's injuries were apportionable at the rate of 50% to each of the two impacts.[R. at 75]; [R.E. at 74]. In that same letter, Dr. Winters also stated that it was impossible for him to state which of the two collisions was the direct cause of Lopez's injuries. [Id.]. Dr. Winters offered similar testimony in his deposition. [P-6, 18-19, 36-37]; [R.E. at 153-54, 171-72].

Thereafter, on July 16, 2008, Lopez filed her Designation of Experts whereby she designated Dr. Charles Winters as an expert in the field of orthopedics.[R. at 7, 43];[R.E. at 6, 42]. Lopez's Designation stated that Dr. Winters was expected to testify regarding his treatment of the Plaintiff, the extent of Plaintiff's injuries, and the Plaintiff's back surgery. [R. at 43];[R.E. at 42].

On August 22, 2008, McClellan filed his Motion to Strike No. 1 (Winters) seeking the exclusion of the testimony of Dr. Winters as to apportioned causation.[R. at 31-66];[R.E. at 30-65]. On September 16, 2008, the date of trial, counsel for McClellan argued the Motion to Strike. [Tr. at 2-5];[R.E. at 101-04]. On September 17, 2008, after taking the motion under advisement, the trial court granted McClellan's motion. [Tr. at 16, 20];[R.E. at 115, 119]. At that point, counsel for McClellan moved to dismiss, for involuntary dismissal, for directed verdict, or for summary

judgment, since in the absence of any testimony as to causation, there existed no genuine issue of material fact for trial. [Tr. at 28-30];[R.E. at 127-29]. After hearing from counsel for both parties, the Court entered summary judgment in favor of McClellan. [Tr. at 30-31];[R. at 77]; [R.E. at 76, 77, 129-30].

SUMMARY OF THE ARGUMENT

The trial court was correct in granting McClellan's *ore tenus* motion for summary judgment. Although it is undisputed that the motion was not filed ten days prior to the hearing, McClellan's *ore tenus* motion for summary judgment was properly considered by the trial court because Lopez waived any objection to the procedure used by the trial court by failing to object and also, by voluntarily stipulating to the procedure used by the trial court. As such, the trial court's consideration of McClellan's motion was undertaken by agreement of counsel. Therefore, the trial court was correct in considering and granting McClellan's motion for summary judgment.

Further, the trial court was correct in excluding the expert medical opinions of Dr. Charles Winters as to apportioned causation. Dr. Winters' opinions constituted expert medical testimony. As expert testimony, to be admissible Dr. Winters' opinions must meet the test of reliability and relevance set forth in Miss. R. Evid. 702. Dr. Winters' testimony as to apportioned causation was wholly unreliable in that it was admittedly based on mere speculation with no scientific basis. Therefore, the trial court properly granted McClellan's Motion to Strike No. 1 (Winters) and the trial court's decision should be affirmed.

Finally, as a result of the exclusion of Dr. Winters' opinions, the trial court was correct in finding that no genuine issue of material fact existed. Absent any evidence of a causal relationship between the impact with McClellan's vehicle and the injuries to Lopez, no genuine issue of material fact existed as to Lopez's claim of negligence against McClellan. As such, McClellan was entitled

to summary judgment and the trial court properly granted his motion for same. The trial court's grant of summary judgment in favor of McClellan should be affirmed.

ARGUMENT

I. The Trial Court Correctly Granted McClellan's *Ore Tenus* Motion for Summary Judgment

The standard of review of a trial court's grant or denial of a motion for summary judgment is **de novo**. Moore v. Delta Regional Medical Center, – So.3d –, 2009 WL 1668492, *2 (Miss. Ct. App. 2009)(citing Heigle v. Heigle, 771 So.2d 341 (Miss. 2000)). The appellate court must view the evidence in the light most favorable to the non-movant and the moving party bears the burden of demonstrating the absence of a genuine issue of material fact. Id. The appellate court will look at all evidence in the record, "including admissions in pleadings, answers to interrogatories, depositions, affidavits, etc." Id. (citing Harrison v. Chandler-Sampson, Inc., 891 So.2d 224,228 (Miss. 2005)).

Following the trial court's pronouncement of its ruling granting McClellan's Motion to Strike No. 1 (Winters), counsel for McClellan moved *ore tenus* for a dismissal, involuntary dismissal, directed verdict, or summary judgment, stating:

> I'm really not sure what the procedural device is at this point. But I think simply the defendant at this time moves to dismiss, or for an involuntary dismissal, or for a directed verdict or summary judgment, whatever the proper procedural device is at this point on the grounds that in the absence of those medical opinions which are required in order to establish any causal relationship between the second impact with the defendant and any injuries and damages claimed, those cases must fail, those claims must fail... There is no jury-submissible issue, there is no genuine issue of material fact based on the record now as made and as ruled on by the court that would create any jury issue on causation of injuries. And so we would move to dismiss the plaintiff's case at this point on that basis. [Tr. at 29]; [R.E. at 128].

After hearing argument by McClellan's counsel and being advised that Lopez opposed the motion, the trial court granted McClellan's ore tenus motion. In its opinion, the trial court noted that there was some question as to exact nature of the relief requested by McClellan:

> In some instances there's always an issue as to whether a motion should be granted or whether a motion should be denied, and so it's either granted or denied, and also whether it should be dismissed as a directed verdict or whether it should be on a summary judgment, both being somewhat of the same effect. And at this stage with these proceedings, I would think that the motion for the granting of a directed verdict is not the term that should be used, but more so that the matter is dismissed based upon summary judgment based upon my ruling on the medical itself, and the medical only. That there's no genuine issue of fact to be submitted to the jury on the causation as to the results of impact number one and the results of impact number two. So I'll call it summary judgment, all right? [Tr. at 30-31]; [R.E. at 129-30].

Thereafter, counsel for Lopez responded advising that Lopez did not contest that McClellan's motion was, in fact, a motion for summary judgment. [Tr. at 31]; [R.E. at 30].

Mississippi Rule of Civil Procedure 56(c) outlines the procedure for a trial court's handling of motions for summary judgment. Specifically, Rule 56(c) provides that a motion for summary judgment "shall be served at least ten days before the time fixed for the hearing." Miss. R. Civ. P. 56(c). Rule 56 also provides that the trial court may allow the non-movant additional time by continuing the matter to permit affidavits to be obtained, depositions to be taken or further discovery be had. Miss. R. Civ. P. 56(f). Generally, if a trial court entertains a motion for summary judgment, including a motion which has been converted from a Rule 12 motion, which was not filed at least ten days prior to the hearing, it is reversible error. Cowan v. Mississippi Bureau of Narcotics, 2 So.3d 759 (Miss. Ct. App. 759); Palmer v. Biloxi Regional Medical Center, 649 So.2d 179 (Miss. 1994); Pope v. Schroeder, 512 S0.2d 905 (Miss. 1987).

While the ten day requirement of Rule 56 is the rule, there is an exception to the rule. Under Mississippi law, a party may waive the procedural requirements of Rule 56 by failing to object to the procedure used by the trial court. Courts have repeatedly held that "procedural defects may be waived by a party's failure to object to the procedure employed." Ammons v. Cordova Floors, Inc., 904 So.2d 185, 189 (Miss. Ct. App. 2005); Koestler v. Mississippi College, 749 So.2d 1122, 1125

(Miss. Ct. App. 1999). It is well-settled that issues which are not brought before the trial court are deemed waived and cannot be raised for the first time on appeal. Cowan, 2 So.3d at 766.

Further, in the context of Rule 56, Mississippi law is clear that a litigant that desires to avail himself of the right to present additional evidentiary materials pursuant to Rule 56(f) has "an affirmative duty to timely raise the issue with the trial court or be deemed to have waived objection to the court proceeding on the motion." Koestler, 749 So.2d at 1125; *see also*, MST, Inc. v. Mississippi Chemical Corp., 610 So.2d 299, 305 (Miss. 1992). Rule 56(f) is not designed to protect lazy or dilatory litigants. Hariel v. Biloxi HMA, Inc., 964 So.2d 600, 609 (Miss. Ct. App. 2007)(citing Stallworth v. Sanford, 921 So.2d 340, ¶11 (Miss. 2006)). Further, the language of Rule 56(f) is not self-executing. Instead, the rule places an affirmative duty to act on the litigant seeking to avail himself of the right granted thereunder. Champulver v. Beck, 909 So.2d 1061, 1064 (Miss. 2004); Russell v. Williford, M.D., 907 So.2d 362 (Miss. Ct. App. 2005).

In this case, it is undisputed that McClellan moved *ore tenus* for summary judgment without having first filed a written motion. It is also undisputed that the trial court considered the motion without the requisite ten days notice required by Miss. R. Civ. P. 56(c). However, the trial court did not *sua sponte* grant summary judgment in favor of McClellan. Rather, the trial court ruled on an *ore tenus* motion which was argued by the agreement of the parties. Specifically, counsel for Lopez stated as follows regarding the procedure used by the trial court:

> MR. GILL: As we discussed in chambers, Your Honor, both sides have more or less stipulated that instead of trying this case for two days and having the Court grant a directed verdict, we would submit this on the record, have the court issue a ruling and preserve that record for appeal if necessary. [Tr. at 22-23]; [R.E. at 121-22].

Further, as the hearing progressed, counsel for Lopez never raised any objection to the procedure used by the trial court in entertaining McClellan's motion. To the contrary, counsel for McClellan

explicitly consented to the procedure used by the trial court. Lopez has waived this issue for appeal by: 1) failing to object during the hearing, and, 2) by voluntarily agreeing to argue the motion before the trial court.

The trial court's consideration of the *ore tenus* motion for summary judgment made by McClellan, after the stipulation of the parties, was proper. Based on Lopez's on the record waiver of any objection and in fact, her stated consent to the procedure used by the trial court, there was no error by the trial court. Under the unusual circumstances of this case, the court was correct in its grant of summary judgment in McClellan's favor and its ruling should be affirmed.

II. The Trial Court Correctly Excluded the Expert Medical Testimony of Dr. Charles Winters as to Any Causal Relationship of Lora Lopez's Injuries to the Impact with Robert D. Mcclellan's Vehicle.

The trial court correctly excluded the expert medical testimony of Lopez's expert, Dr. Charles Winters, as to any causal relationship between Lopez's injuries and the impact with McClellan's vehicle. The expert testimony of Dr. Winters was inadmissible under Mississippi Rules of Evidence 702 and 703, in that it was unreliable and not based on the type of data reasonably relied on by experts in the field. As such, it was properly excluded by the trial court.

In amending Rule 702, the Supreme Court clarified the gatekeeping responsibilities of the trial court in evaluating the admissibility of expert testimony. In Mississippi Transportation Commission v. McLemore, 863 So. 2d 31 (Miss. 2004), the Supreme Court adopted a modified Daubert[1] standard for the admissibility of expert testimony. This heightened threshold was deemed necessary because, as noted in Daubert, "expert evidence can be both powerful and quite misleading because of the difficulty of evaluating it." Daubert, 509 U.S. at 595.

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[1] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993).

Under the modified Daubert standard, the proponent of expert testimony must establish that the proffered opinions are reliable. Thus, the party offering the expert witness must demonstrate that the proffered testimony is "based upon sufficient facts or data," is "the product of reliable principles or methods," and that "the witness has applied the principles and methods reliably to the facts of the case." Miss. R. Evid. 702. Testimony that is not based on reliable data or methods is inadmissible. McLemore, 863 So. 2d at 35. Under Rule 702, a purported expert "may not present the jury with rank speculation." Fowler v. State, 566 So. 2d 1194, 1200 (Miss. 1990); *see also* McLemore, 863 So. 2d at 39. An expert's testimony must be based upon the application of a reliable scientific method to the facts of the case rather than upon the expert's subjective interpretation of particular evidence. McLemore, 863 So. 2d at 37.

Daubert provides an illustrative, non-exclusive list of factors to be taken into consideration by a court in determining whether expert testimony is reliable. The court should consider, among other things, (1) whether the witness's theory or technique "can be and has been tested;" (2) whether it "has been subjected to peer review and publication;" (3) "the known or potential rate of error;" and (4) whether the theory or technique has gained general acceptance in the relevant scientific field. *See* Miss. R. Evid. 702, Comment. Application of these factors to Dr. Winters' proffered testimony demonstrates that his opinions were unreliable.

During his deposition, Dr. Winters offered his opinion that the injury suffered by Lopez was 50% apportionable to the impact with McClellan's vehicle which occurred after a horrific head on collision with a vehicle operated by Linda Nesline.[P-6, 18-19, 36-37]; [R.E. at 153-54, 171-72]. However, Dr. Winters failed to articulate any indicia of the reliability of this opinion. In fact, when questioned regarding the underlying basis of his opinion, Dr. Winters stated that he could not apportion causation between the two impacts to a reasonable degree of medical probability. Dr.

Winters offered the following testimony on direct examination:

Q. Doctor, I'd asked you through earlier correspondence if you could apportion the causal connection for the surgery to the two impacts related to this --

A. Uh-huh (indicating yes).

Q. -- collision. And in that letter, you replied to me. Can you tell the jury what your opinion is about the apportionment of the causal connection?

A. **I said I couldn't really accurately do that. And I would as a best estimate apportion fifty percent to each.**

Q. So then it would be fair to say that your opinion is that fifty percent of the need for the surgery would be attributed to the front collision and fifty percent to the rear collision?

A. You know, it's hard for me to -- like I said, it's impossible for me to really separate that. I think you have to take the motor vehicle as a whole --

Q. Uh-huh (indicating yes).

A. -- that -- that the accident in itself is the -- the causation and that since there were essentially two accidents at the same time -- you know, there is no way for me to really accurately say seventy-five percent came from one and twenty-five percent came from the other. I think they're both the cause.

A. And you split the -- the cost equally.

Q. Well, that's the reason for my question, Doctor. The case that we're here on today involves the rear collision. So could you tell the jury -- and, again, your opinions need to be to a reasonable medical probability -- what contribution the rear collision caused to the need for the surgery?

A. Fifty percent.[P-6, 18-19]; [R.E. at 153-54].(Emphasis added).

Further, Dr. Winters failed to demonstrate that his opinion regarding apportioned causation was based on "scientific knowledge," meaning *derived by the scientific method or something more than unsupported speculation or subjective belief that is grounded in methods and procedures of science*. Daubert, 509 U.S. at 590. Dr. Winters made no effort to show that his opinion was based upon the scientific method or that it amounted to more than mere conjecture. Instead, Dr. Winters

testified that his opinions were simply his own "speculation." [P-6, 37]; [R.E. at 172]. Surprisingly, Dr. Winters testified that he could provide no basis for his opinions regarding causation and that his assessment was "not scientific in any way." [P-6, 36-37]; [R.E. at 171-72]. Dr. Winters further testified regarding apportionment on cross-examination as follows :

Q. All right. Doctor in your correspondence to Mr. Gill on April 12th, 2006, you gave an opinion that you -- wherein you apportioned fifty percent of the causation for Ms. Lopez's medical condition to each of the impacts?

A. Right.

Q. Is that correct?

A. Yes.

Q. Can you give me -- can you give the jury the basis for that opinion?

A. There is no -- no basis for that opinion.

Q. Okay.

A. That is -- that is an estimate. Because in my -- in my opinion, the accident kind of basically acts as a whole. There is no way for me to sort that out. But if I -- if I'm asked to try to apportion it, the only thing I can do is to apportion it equally. Because I view the accident as a whole. It all happened at the same time. There is no way for me to know which -- which one is which percentage. So if I'm -- if I have to give a percentage, I just give a fifty/fifty.

Q. Okay. So would you agree with me that the fifty/fifty assessment is your speculation?

A. It is.

MR. GILL: I'm –

A. It's not scientific in any way.

MR. GILL: I'm going to object to that. But go ahead.

A. ***It's not scientific. It's just an estimation.***

BY MS. DEES:

Q. Okay. Can you make that fifty/fifty assessment to a reasonable degree of medical probability?

A. No. [P-6, 36-37]; [R.E. at 171-72].

By his own admission, Dr. Winters' opinions as to apportionment of causation between the two distinct impacts had no scientific support, were nothing more than pure speculation, and were "not scientific in any way." [P-6, 37]; [R.E. at 172]. This is precisely the type of unreliable opinion that was envisioned for exclusion when the Supreme Court amended Rule 702.

In addition, Dr. Winters never established the reliability of his opinions by demonstrating:

(1) That his theories can or have been tested;
(2) That his theories have been the subject of peer review and publication;
(3) The known or potential rate of error; and
(4) That his opinions enjoy general acceptance in the field of orthopedic surgery.

To the contrary, Dr. Winters testified that there was no scientific support for his opinions as to apportionment of causation in this case. Dr. Winters' own testimony demonstrates that his opinions are unreliable:

Q. Are you aware of any treatises or any publications that support the apportionment in the manner that you did, fifty/fifty to the two impacts?

A. No, I am not.

Q. So that's strictly your best guess, an estimate?

A. That's an estimate based on the fact that --that I'm being asked to try to divide up which accident caused this problem when really the two accidents occurred at the same time.

Q. Okay. Are you aware of any scientific data which supports an assessment in that regard?

A. No.

Q. Okay.

A. ***There is no scientific data.*** [P-6, 36-38]; [R.E. at 171-73].

Dr. Winters' opinions failed to meet the criteria for admissibility set forth in Miss. R. Evid. 702. Dr. Winters has provided no reliable indicia that his opinions were grounded in scientific principles or methods, which would render them reliable under Rule 702. In the absence of the required proof of reliability, Dr. Winters' opinions regarding apportionment of causation between the two separate impacts and Lopez's injury did not withstand the gatekeeping analysis required by Rule 702. His theory and methodology failed when measured against any of the factors enunciated in Daubert. Proposed expert testimony which fails this analysis is unreliable as a matter of law. As such, Dr. Winters' testimony was properly excluded.

Lopez relies on Jannsen Pharmaceutica, Inc. v. Bailey, 878 So.2d 21 (Miss. 2004), a case that Lopez points out was handed down after McLemore, in support of the admissibilty of Dr. Winters' testimony. Specifically, Lopez points to the following portion of the Jannsen opinion:

> This court has continually insisted that it must be "scientifically established that due investigation and study in conformity with techniques and practices generally accepted in the field will produce a valid opinion" before an opinion based on those "techniques and practices" will be considered for admission in a Mississippi Court.

Jannsen, 878 So.2d at 60 (quoting T.K. Stanley, Inc. v. Cason, 614 So.2d 942, 951 (Miss. 1992)). However, what is overlooked by Lopez is the very next sentence of the Jannsen opinion:

> Therefore, if a particular expert's methods ignore or conflict with the "techniques and practices generally accepted within the field," that expert's opinions should not be considered valid or competent for admission in court.

Jannsen, 878 So.2d at 60. Clearly, even the precedent cited by Lopez reiterates that in order to be admissible, opinions offered by experts must be based on techniques and practices that are generally accepted within the field of expertise in which the expert intends to offer his opinion.

In this case, Dr. Winters failed to demonstrate that his opinions regarding apportioned

causation were based on techniques and practices which were generally accepted in the field of orthopedic surgery. Inapposite, the only testimony offered by Winters in regard to the basis of his opinion as to causation was that it was strictly an "estimation." [P-6, 36-37]; [R.E. at 171-72]. The testimony of Dr. Winters and his opinion regarding apportioned causation is simply lacking requisite reliability to be admissible in a Mississippi court.

Finally, Lopez's reliance on Hughes v. Great American Indemnity Company, 236 F.2d 71 (5th Cir. 1956), to support admission of Dr. Winters' testimony is simply incorrect. Hughes is a federal case in which the Fifth Circuit applied Louisiana law to make its determination. The Fifth Circuit did not address or consider how a Mississippi court would decide the issues presented by the particular set of facts in that case. Finally, the Hughes decision does not address the admissibility of expert testimony, but addresses submission of negligence issues to the jury. Based on the foregoing, Hughes has absolutely no application to the case *sub judice*.

The trial court properly excluded the testimony of Dr. Charles Winters regarding apportionment of causation between the two impacts since his testimony failed to meet the admissibility requirements of Mississippi law. The trial court's decision should be affirmed.

III. The Trial Court Was Correct in Finding That No Genuine Issue of Material Fact Existed on the Issue of Causation of Lora Lopez's Injuries.

In order to recover on a claim of negligence, the Plaintiff bears the burden of proving each of the elements of a negligence claim: duty, breach, proximate causation and injury. Prewitt v. Vance, — So.2d —, 2009 WL 26839 (Miss. Ct. App. 2009). If the Plaintiff fails to make a sufficient showing of any essential element of her claim for negligence, on motion of the defendant, entry of summary judgment in favor of the defendant is proper. Watson Quality Ford, Inc. v. Casanova, 999 So.2d 830, 833 (Miss. 2008)(citing Bullard v. Guardian Life Ins. Co., 941 So.2d 812, 814 (Miss.

2006)). When moving for summary judgment, the burden of demonstrating the absence of any genuine issue of material fact falls upon the moving party. Id. (citing Johnson v. Chatelain, 943 So.2d 684, 686 (Miss. 2006)).

In this case, the trial court was correct in finding that no genuine issue of material fact existed and entering summary judgment in favor of McClellan. In making its decision, the Court relied heavily on the Court's decision in Blizzard v. Fitzsimmons, 193 Miss. 484, 10 So.2d 343 (Miss. 1942). [Tr. at 21]; [R.E. at 120]. In Blizzard, a nine year old boy was injured as a result of repeated falls at a skating rink owned by the Defendant. Id. at 344. The boy had never skated before. However, he did not advise the Defendant's agents of this, nor did they inquire. Id. Unfortunately, the boy did not know how to skate and therefore, as he attempted to, he fell repeatedly. Id. After having fallen forty to fifty times, the boy began to cry, at which time the Defendant's agents became aware of his distress and came to his aid. Id. As a result of the injuries sustained from the falls, the boy was severely injured. Id.

On appeal, the Supreme Court held that the Defendant could only be held liable for those injuries sustained by the boy which occurred after a reasonable degree of watchfulness would have disclosed the inability of the boy to skate and the likelihood of his receiving injury as a result thereof. Id. at 345. Having answered that inquiry, the Court was confronted with the issue of severability of the injury sustained by the boy. Id. In so doing, the Court reiterated that "recoverable damages must be reasonably certain in respect to the efficient cause from which they proceed, and that the burden is on the claimant to show by a preponderance of the evidence that the person charged was the wrongful author of that cause." Recognizing that it was faced with a "single and indivisible result- an injury not apportionable so that a party may be traced to one cause and another part to another cause," the Court reaffirmed Mississippi law that "a defendant cannot be held liable for the whole

of a series of consecutive, and not concurrent, happenings when he is liable, if at all, only for a part." Id. at 345. In Blizzard, the Court, having been presented with no expert testimony allocating the portion of injuries attributable to the actions of the Defendant, held that the Plaintiff could not recover against the Defendant. To do otherwise, the Court stated:

> ...we would have to travel on guess or conjecture or surmise, and as to this, we have repeatedly held that however adequate surmise may be deemed as sufficient to actuate people when the life, liberty or property of other persons is not involved, no judgment in a court of law may be sustained when resort to conjecture or surmise is necessary in order to arrive at the conclusions embraced in the judgment. It is our opinion, therefore, that the injury of which plaintiff complains has not been traced with requisite certainty to an efficient cause for which the defendant is responsible, and that the peremptory charge requested by defendant should have been given.

Id. at 345-46. Therefore, the Supreme Court reversed and rendered the trial court's decision and entered judgment in favor of the Defendant. Id. at 346.

In her brief, Lopez correctly points out that after its decision in Blizzard, the Supreme Court handed down Hinds-Rankin Metropolitan Water & Sewer Ass'n. v. Reid, 256 So.2d 373 (Miss. 1971). However, the Court in Hinds-Rankin did not overrule the decision of the Court in Blizzard. To the contrary, the Court in Hinds-Rankin explained that the holding of Blizzard was not applicable to that case based on the underlying facts of Hinds-Rankin. Id. at 379. The Court pointed out that in Blizzard, the evidence failed to show which of several possible causes led to the injury. Id. That was not the case in Hinds-Rankin. Instead, the evidence was "overwhelming that the contents of the sewage lagoons was not a mere possible cause of the plaintiffs' injury, but was probably the only substantial source of contamination that caused the damage...." Id. Because in Hinds-Rankin there was traceable, probable cause of injury, the Court held that the Blizzard case was inapplicable. Id.

In the case *sub judice*, the trial court correctly granted summary judgment in favor of McClellan. Lopez bore the burden to establish each of the essential elements of her claim of

negligence against McClellan. Even if Lopez would have been able to prove the elements of duty, breach and injury, the fact that she could not prove a causal relationship between the impact with McClellan and her injury was fatal to her negligence claim. Without credible evidence of causation between the impact and injury, there exists no genuine issue of material fact. Smith v. Clement, 983 So.2d 285 (Miss. 2008). In this case, Lopez could offer no credible evidence of the needed causal relationship. In the absence of admissible evidence of a causal relationship, the trial court was correct in finding that no genuine issue of material fact existed and that summary judgment was proper in favor of McClellan.

The trial court was correct and its decision should be affirmed.

CONCLUSION

The trial court was correct in granting the *ore tenus* Motion for Summary Judgment of Robert D. McClellan. The trial court was also correct in granting Motion to Strike No. 1 (Winters) and thereby excluding the opinions of Dr. Charles Winters as to the allocation of causation between the two impacts and the injuries sustained by Lopez. Finally, based on the Court's exclusion of the testimony of Dr. Winters, the trial court was correct in finding that no genuine issue of material fact existed on the issue of causation and that summary judgment in favor of McClellan was proper.

Based on the foregoing, the Appellee, Robert D. McClellan, respectfully requests that this Court affirm the rulings of the Circuit Court of Harrison County, Mississippi.

Respectfully submitted, this the 14th day of July, 2009.

ROBERT D. MCCLELLAN, APPELLEE

DONALD C. DORNAN, JR. (MSB[redacted]
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CERTIFICATE OF SERVICE

Pursuant to Miss. R. App. P. 31(c), I hereby certify that I have this day delivered, via United States first class mail, postage pre-paid, the original and three (3) true and correct copies of the above and foregoing Brief of Appellee to Betty Sephton, Clerk, Mississippi Supreme Court, Post Office Box 249, Jackson, MS 39205-0249. I further certify that I have delivered via United States first class mail, postage pre-paid, a true and correct copy of Brief of the Appellee to the following:

Russell S. Gill, Esq.
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Biloxi, MS 39530

Honorable John Garigiulo, Circuit Court Judge
Harrison County Circuit Court
1801 23rd Ave.
Gulfport, MS 39501.

Pursuant to Miss. R. App. P. 28 (m), I certify that I have also mailed an electronic copy of the foregoing Brief of Appellee on an electronic disk and state that this brief was authored in WordPerfect format.

SO CERTIFIED, this the 15th day of July, 2009.

ROBERT D. MCCLELLAN, APPELLEE

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