IN THE SUPREME COURT OF MISSISSIPPI

CITY OF JACKSON, MISSISSIPPI **APPELLANT**

VS. **CAUSE NO. 2008-TS-01997**

EMMA WOMACK, ET AL. **APPELLEE**

On Appeal From The Circuit Court
of Hinds County, Mississippi
Cause Number351-98-816CIV
Honorable Winston Kidd

Reply Brief

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

ARGUMENT

I. Dr. Hayne's was qualified as an expert in general medicine and forensic pathology, not as an expert in neurology and traumatic brain injury.

As an initial point, the City must address an erroneous argument contained within Womack's brief: the assertion that the City failed to make any objection to Dr. Hayne's testimony concerning neurological matters. Appellee Brief at 19. This simply is not true. In fact, the City objected to Dr. Hayne's designation in the area of general medicine and conducted a *vior dire* in the area of general medicine and neurology. S.T.T. 10 – 17. However, contrary to the City's objection that Dr. Hayne is completely inexperienced in the diagnosis of traumatic brain injuries in ***living*** people, the lower court accepted Dr. Hayne as an expert in general medicine and forensic pathology. S.T.T. at 17. The lower court's reliance on Dr. Hayne's testimony was in error because 1) Dr. Hayne is not familiar with the diagnosis of traumatic brain injury or neurology, and 2) Dr. Hayne's findings are completely inconsistent with the medical evidence and testimony presented at trial.

Mississippi has adopted the federal standard adopted in ***Daubert v. Merrell Dow Pharmaceuticals., Inc.***, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) as the standard for analyzing the admission of expert testimony. ***McLemore***, 863 So.2d at 39(23). The trial court has a basic gatekeeping responsibility to "ensure that any and all scientific testimony... is not only relevant, but reliable." ***Kumho Tire Co., Ltd. v. Carmichael***, 526 U.S.

137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (quoting ***Daubert***, 509 U.S. at 589, 113 S.Ct. 2786). Rule 702 of the Mississippi Rules of Evidence states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Expert testimony should only be admitted if it withstands the two-prong inquiry under Rule 702. ***McLemore***, 863 So.2d at 35(7) (Miss.2003) (citing M.R.E. 702). "First, the witness must be qualified by virtue of his or her knowledge, skill, experience or education. Second, the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue." ***Id***. (internal citations omitted).

The Plaintiff designated Dr. Hayne as her expert in the field of forensic pathology, not in the field of neurology or traumatic brain injury, which is central to the cast at bar. Appellee's Brief p. 4. Plaintiff claims that the fall caused a traumatic brain injury, yet Dr. Hayne admitted that he does not specialize in the field of neurology and has not diagnosed a traumatic brain injury in a living person in "quite a while," and that a neurosurgeon would be the proper specialist to determine a traumatic brain injury in a living person.[1] S.T.T. at 14 and 16. Dr.

[1] Shortly after the ***Stewart III*** trial, Dr. Hayne's credibility was attached by various medical and governmental organizations and questioned by this Court in ***Wilson v. State,*** ---So.3d---, 2009 WL 3031076 (September 24, 2009). Also, the question as to whether Dr. Hayne has

Hayne is a forensic pathologist who does not make diagnoses on living people. This limitation is crucial as Dr. Hayne was allowed to testify about a neurological diagnosis in a then living person. While it is true that Dr. Hayne has sufficient knowledge, skill, training, education, and experience to qualify him to testify as an expert in general medicine, Plaintiff offered no evidence that Dr. Hayne has the requisite experience and knowledge to testify concerning the diagnosis of a traumatic brain injury in a living person. In fact, there is nothing in Dr. Hayne's curriculum vitae alone which indicates that he is qualified to opine in the area of neurology or traumatic brain injury. T.E. 33. Additionally, there is nothing in Dr. Hayne's testimony that affirmatively demonstrates that he has extensive experience in the diagnosis of traumatic brain injuries.

As such, because Plaintiff had the burden of proof, it was Plaintiff who had to demonstrate that Dr. Hayne was appropriately qualified. As such, the trial court was in error when it accepted Dr. Hayne's testimony because 1) he is not qualified to testify in the field of neurology, and 2) the overwhelming weight of the evidence, via medical testimony and medical evidence, is contrary to Dr. Hayne's opinion. The trial court failed in its role as a gatekeeper by allowing unqualified "expert" testimony.

Another interesting point is Plaintiff's shifting diagnosis. In the first trial, ***Stewart II***, Plaintiff offered Dr. Calvin Ramsey with an opinion that Stewart

misrepresented his credentials has recently come under attack. See R. at 22. The City of Jackson respectfully requests that this Court take judicial notice of Dr. Hayne's discrepancies.

suffered another stroke as a result of the fall at issue. This puts Dr. Ramsey's testimony at odds with the facts of this case.[2] Upon re-trial, Plaintiffs now attempt to cure the Dr. Ramsey quandary by offering the testimony of Dr. Hayne. Dr. Hayne testified that there was no second stroke, as Dr. Ramsey opined, but rather there as a traumatic brain injury – despite such a diagnosis being outside his specialty and not supported by any contemporaneous record or objective test. If the gatekeeping function of a trial judge is to have any real meaning, it should mean that hired experts with a conclusory diagnosis are not sufficient evidence to support a judgment, such as the case *sub judice*.

II. The evidence in the record does not support Dr. Hayne's finding of a traumatic brain injury.

The issue before this Court is simple: whether the evidence in the record supports the conclusion that Mrs. Stewart suffered a mild scalp abrasion after the August 11, 1997 fall, or whether Stewart suffered a traumatic brain injury after said fall. The overwhelming weight of evidence contained in the record before this Court supports Dr. Thiel's conclusion that Stewart suffered a scalp abrasion as a result of the fall and suffered no serious injuries. T.T. at 206. The "evidence" relied upon by Plaintiff to support the assertion that Womack suffered a traumatic brain injury is the testimony of Emma Womack, Mrs. Stewart's daughter. This testimony is clearly not competent, reliable "evidence" of a

[2] Dr. Ramsey's testimony has since been discredited in other cases.

traumatic brain injury. More importantly, Womack's testimony is contradicted by the medical records and expert medical testimony.

In the Plaintiff's brief, it is asserted that "the City basically argues that the Trial Court committed error by believing that Mrs. Womack's description of Mrs. Stewart's level of functioning after striking her head on August 11, 1997, was more accurate than Dr. Thiel's second hand information alleged gleaned from the medial records . . . and in finding that the testimony of Dr. Hayne, a forensic pathologist, to be credible over the testimony of Dr. Thiel." Appellee's Brief. p. 18.

A cursory reading of that statement reveals Plaintiff's flawed argument. Plaintiff suggests that a ***lay person's testimony***, who is a ***party to the suit***, should be given more consideration than a board certified neurologist. Plaintiff further suggests that a forensic pathologist, who ***does not diagnose or treat traumatic brain injuries in living people***, should be given more credence than a neurologist familiar with treating head injuries and strokes in elderly patients, such as Mrs. Stewart. What Plaintiff fails to realize and articulate is that although Dr. Hayne and Mrs. Womack concluded that Mrs. Stewart suffered a traumatic brain injury, the overwhelming weight of the evidence before this Court does not support that conclusion. The issue is not whether the trial court was correct in believing one expert over another; the issue is whether the trial court awarded damages against the overwhelming weight of the evidence.

While the Plaintiff argues that the trial court's finding is supported by evidence, the record reveals the opposite. The most important pieces of evidence

before this Court that demonstrates Mrs. Stewart only suffered a mild scalp abrasion after the fall are the MRI's taken in 1996 and on August 19, 1997, a week after the fall. Dr. Thiel compared the two MRI's and testified that the MRI taken a week after the fall did not show any change in the brain from a previous MRI taken in 1996. T.T. at 209 - 210. Rather, the MRI 1997 showed old, chronic findings from the massive stroke she suffered in 1978, but did not reveal any recent bleeding or trauma to the brain. T.T. at 209. Dr. Thiel testified at trial that she did not find evidence of a new stroke, and these findings were based on her review of an MRI film that was taken in 1996 and comparing it to the MRI film taken on August 19, 1997. *Id.*

The evidence of previous brain injuries on the MRI goes hand in hand with the City's argument that Dr. Hayne's findings are flawed because of the failure to consider the previous falls Mrs. Stewart suffered, the massive stroke she suffered in 1978 or the fact that she previously suffered from many of the alleged symptoms that were part of the "final common pathway." Dr. Hayne found the fall on August 11, 1997 caused the decline in her health, notwithstanding the fact that she was 72 years old, suffered a major stroke in 1978 and had previous falls requiring hospitalization. He also found that the fall caused her declining health, even though Mrs. Stewart was paralyzed on one side of her body, had limited speech, limited mobility and was limited neurologically ***prior to*** the fall.

Dr. Hayne further acknowledged that the medical records demonstrate that Mrs. Stewart had impaired thinking, confusion and disorientation, short term memory loss, anxiety and impatience, impaired socialization due to her

dysphasia, hypertension and gall bladder problems ***prior to*** the August 11, 1997 fall. S.T.T. at 41 – 42. Yet, Dr. Hayne still somehow concluded that the August 11, 1997 fall caused Mrs. Stewart to enter the "final common pathway" of her declining health. The Mississippi Supreme Court has held that "[t]estimony which ignores conclusive evidence cannot act as basis for recovery." ***Johnson v. City of Pass Christian***, 475 So.2d 428, 431-32 (Miss.1985). Such is the exact situation in the case *sub judice*. Dr. Hayne completely ignored conclusive medical testimony and medical evidence and made a finding that is contrary to all of the evidence before the Court.

The only argument submitted by the Plaintiff that attempts to demonstrate that the record supports the lower court's findings is the testimony of Mrs. Stewart's daughter. This testimony is not objective and does nothing to support the argument that Mrs. Stewart suffered a traumatic brain injury. Plaintiff submits that because Dr. Hayne's testimony is substantiated by Mrs. Womack, that the trial court was correct in awarding damages to the Plaintiff. However, because Mrs. Womack simply testified as to Mrs. Stewart's conditions after the fall does not prove that Stewart suffered a traumatic brain injury and does not create sufficient evidence to support the lower court's award of $250,000 to the Plaintiff. Further, because Dr. Hayne based his expert opinion on this inadequate testimony, rather than the conclusive medical evidence, the trial court should have given this testimony less consideration. The Mississippi Supreme Court has held that "when an expert's opinion is based upon an inadequate or incomplete examination, that opinion does not carry as much weight and has little or no

probative value when compared to the opinion of an expert that has made a thorough and adequate examination." ***Johnson v. Ferguson***, 435 So.2d 1191, 1195 (Miss. 1983).

Conversely, the medical testimony of Dr. Thiel, in which she relied upon medical records and MRI's, demonstrates that the overwhelming weight of the evidence proves that Mrs. Stewart did not suffer a traumatic brain injury or any other neurological defect as a result of the August 11, 1997 fall. Rather, she suffered a "minor head injury," which is demonstrated in the medical records from St. Dominic's Hospital and MRI's that were taken before and after the fall. T.T. at 207. Simply stated, the record is void of any credible evidence that Mrs. Stewart's health issues and declining health were proximately caused by her fall. It is the Plaintiff's burden to demonstrate that the injuries were proximately caused by the fall on the curb, and the Plaintiff failed to meet this burden. Therefore, the City respectfully requests that this court reverse the lower court's ruling and render appropriate damages of $25,000.[3]

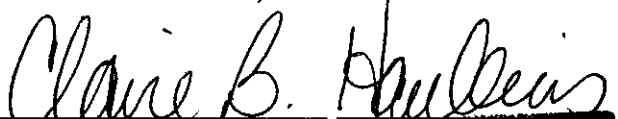
[3] At the second trial in this matter, the City estimated that Mrs. Stewart is entitled to $25,000 in damages for the injuries suffered from the fall on the curb on August 11, 1997.

CONCLUSION

For the above reasons, the City of Jackson requests that this reverse the lower court's ruling and render appropriate damages to the Plaintiff in the amount of $25,000. The overwhelming weight of the evidence demonstrates that Mrs. Stewart did not suffer a traumatic brain injury when she fell on the curb. This injury did not lead to her declining health. As such, the amount of $250,000 is unreasonable and against the overwhelming weight of the evidence. And the City of Jackson prays for such other relief as this Court deems appropriate.

Respectfully submitted this the 18th day of March, 2010.

THE CITY OF JACKSON, MISSISSIPPI

By: 

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CERTIFICATE OF SERVICE

The undersigned does certify that he has this date mailed, via United States mail, postage pre-paid, and a true and correct copy of the above and foregoing Appellant's Reply Brief to the following:

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So certified, this the 18th day of March, 2010.

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