

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-02125

WILLIAM SANDERS

APPELLANT

v.

BENJAMIN WISEMAN, M.D.

APPELLEE

**BRIEF OF APPELLEE,
BENJAMIN WISEMAN, M.D.**

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CERTIFICATE OF INTERESTED PERSONS

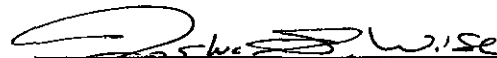
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Paul S. Funderburk, Lee County Circuit Court Judge;
2. William Sanders, Appellant;
3. D.L. Jones, Jr., Esq., Attorney for Appellant;
4. Benjamin Wiseman, M.D., Appellee;
5. Robert K. Upchurch, Attorney for Appellee;
6. Joshua S. Wise, Attorney for Appellee; and
7. Holland, Ray, Upchurch & Hillen, P.A., Attorneys for Appellee.

RESPECTFULLY SUBMITTED, this the 17th day of July, 2009.

HOLLAND, RAY, UPCHURCH & HILLEN, P.A.

By:



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STATEMENT REGARDING ORAL ARGUMENT

The issue presented can be resolved on the basis of the record and briefs of the parties.

Oral argument is not requested.

STATEMENT OF THE ISSUES

1. Whether the Circuit Court of Lee County properly granted Benjamin Wiseman, M.D.'s Motion to Strike the affidavit of Plaintiff's expert, Thomas West, M.D.
2. Whether the Circuit Court of Lee County property granted Benjamin Wiseman, M.D.'s Motion for Summary Judgment.

STATEMENT OF THE CASE

A. Statement of the Proceedings

On November 13, 2007, Plaintiff, William Sanders, filed a Complaint in the Circuit Court of Lee County alleging medical negligence against Benjamin Wiseman, M.D. ("Dr. Wiseman"). (Record Excerpts (hereinafter "R.E."); Tab 1, p. 4-6).

On February 12, 2008, Dr. Wiseman propounded his First Set of Requests for Admissions, Interrogatories, and Requests for Production of Documents to the Plaintiff. (Clerk's Papers, p. 33-34). Dr. Wiseman's Requests for Admissions requested the Plaintiff to admit that he did not have a qualified medical expert who is expected to testify at trial that Dr. Wiseman deviated from the applicable standard of care in a manner that proximately caused or contributed to his alleged injuries. (Clerk's Papers, p. 74-83). On March 10, 2008, the Plaintiff denied Dr. Wiseman's Requests for Admissions. (Clerk's Papers, p. 41-42).

Dr. Wiseman's expert witness interrogatory, Interrogatory No. 14, requested the name of each expert the Plaintiff expected to call as a witness at the trial of this case, a summary of his qualifications in the field which he is expected to testify, the subject matter on which he is expected to testify, and a summary of the grounds for each opinion. (Clerk's Papers, p. 78). On June 26, 2008, the Plaintiff responded to Dr. Wiseman's expert witness interrogatory stating that the Plaintiff had not determined the experts he would use at the trial of this case.

On August 18, 2008, Dr. Wiseman filed a Motion for Summary Judgment on the grounds that the Plaintiff had failed to create a genuine issue of material fact by not producing the expert opinions necessary to satisfy the required elements of his medical negligence claim. (R.E.; Tab 2, p. 91-108).

On August 26, 2008, Plaintiff responded to Dr. Wiseman's Motion for Summary Judgment and attached the affidavit of Thomas West, M.D. ("Dr. West"). (R.E.; Tab 3, p. 127-132).

On October 14, 2008, Dr. Wiseman filed his Reply to Plaintiff's Response to Motion for Summary Judgment and a Motion to Strike the Affidavit of Dr. West which placed the Plaintiff on notice that Dr. Wiseman considered the affidavit of Dr. West deficient. (R.E.; Tab 4, p. 147-154). The Plaintiff subsequently filed his supplemental answers to Dr. Wiseman's interrogatories on October 29, 2009, and identified Dr. West as the Plaintiff's expert and exhibited the affidavit of Dr. West which was attached to Plaintiff's Response to Dr. Wiseman's Motion for Summary Judgment. (Clerk's Papers, p. 171-172).

On November 13, 2008, the Circuit Court heard Dr. Wiseman's Motion to Strike the Affidavit of Dr. West and Dr. Wiseman's Motion for Summary Judgment. (R.E.; Tab 5, p. 1-18). At the hearing, the Circuit Court granted Dr. Wiseman's Motion to Strike Dr. West's affidavit and entered summary judgment in favor of Dr. Wiseman. (R.E.; Tab 5, p. 15-17).

A Final Judgment in favor of Dr. Wiseman was filed on December 9, 2008. (R.E.; Tab 6, p. 173-175).

B. Statement of the Facts

This case arises out of Dr. Wiseman's removal of one of the leads on a spinal cord stimulator that had been implanted by Dr. Wiseman in an effort to assist in managing the Plaintiff's back pain. (Clerk's Papers, p. 4-6). Dr. Wiseman removed the lead on September 14, 2005. Plaintiff alleges that during the procedure one of the leads broke when Dr. Wiseman tried to remove it. (Clerk's Papers, p. 4-6).

The Plaintiff failed to satisfy his burden to prove that Dr. Wiseman failed to conform to the applicable standard of care by way of expert testimony. Prior to the November 13, 2008 hearing, the Plaintiff did not supplement or amend Dr. West's affidavit, and the only testimony before the Circuit Court was the affidavit of Dr. West. Dr. West's affidavit did not create a genuine issue of material fact, and the Circuit Court properly excluded it. As such, the Circuit Court properly granted summary judgment in favor of Dr. Wiseman.

SUMMARY OF THE ARGUMENT

To establish a medical negligence claim against Dr. Wiseman, the Plaintiff must prove: (1) the existence of a duty on part of Dr. Wiseman to conform to a standard of care; (2) a failure to conform to that standard of care; and (3) an injury to Plaintiff proximately caused by a breach of the standard of care. *McCaffrey v. Puckett*, 784 So.2d 197, 205 (Miss. 2001); *Drummond v. Buckley*, 627 So.2d 264, 268 (Miss. 1993).

Generally, a medical negligence action requires a qualified medical expert witness to establish the above elements. The only instance in which medical expert testimony is not required is when the subject matter of the complaint is within the common knowledge of laymen. *Gatlin v. Methodist Medical Center, Inc.*, 772 So.2d 1023, 1026 (Miss. 2000); *Phillips v. Hull*, 516 So.2d 488, 491 (Miss. 1987). The subject matter of the present case is whether Dr. Wiseman, an anesthesiologist and pain management specialist, met the applicable standard of care in attempting to remove the spinal cord stimulator lead from Mr. Sanders's spine on September 14, 2005. This is not a subject matter within the common knowledge of laymen; therefore, Plaintiff is required to produce medical expert testimony.

The only expert testimony produced by the Plaintiff to support her claim against Dr. Wiseman was the affidavit of Dr. West. Plaintiff argues that Dr. West's affidavit was sufficient to meet the Plaintiff's burden of proof in this case. Plaintiff's contention is incorrect.

The affidavit of Thomas West, M.D. states:

- "1. Affiant is a physician and general surgeon, licensed to practice medicine in the state of Tennessee.
2. I have reviewed the medical records of William Sanders, the Plaintiff in this action, in connection with the surgery to implant the spinal cord stimulator and the surgery to remove the spinal cord stimulator.
3. In the process of removing the spinal cord stimulator, the device broke.
4. Based upon my review of the case, it is my professional opinion that Dr. Benjamin Wiseman deviated from the standard of care in his removal of the spinal cord stimulator from William Sanders, and that the deviation from the standard of care proximately caused the injuries sustained by William Sanders." (Emphasis added).

Dr. West's affidavit is totally deficient in that it does not provide the Court the "field" in which Dr. West is expected to testify and does not establish that Dr. West, a general surgeon, knows the applicable standard of care applicable to Dr. Wiseman, an anesthesiologist and pain management specialist, in the removal of a spinal cord stimulator lead. The affidavit of Dr. West does not establish that he is competent or qualified by training, education, or experience to render an opinion in this case, or that he has specialized knowledge in the field of anesthesiology or pain management. Dr. West's affidavit does not define the applicable standard of care nor state that Dr. West knows the standard of care applicable to Dr. Wiseman. Dr. West's affidavit simply consists of conclusory statements.

In this case, the Plaintiff failed to meet his burden of proof, through expert testimony, to demonstrate that Dr. Wiseman breached the applicable standard of care. As such, the Circuit Court properly held that Dr. West's affidavit was insufficient to establish a *prima facie* case against Dr. Wiseman and properly excluded it. In light of the fact that the affidavit of the Plaintiff's expert witness was correctly found to be insufficient as a matter of law, and the Plaintiff offered no other expert testimony to support his claim, the Circuit Court properly granted summary judgment to Dr. Wiseman.

ARGUMENT

Standard of Review

The standard of review for the admission or exclusion of testimony, including expert testimony, is abuse of discretion. *City of Jackson v. Estate of Stewart*, 908 So.2d 703, 708 (Miss. 2005). The trial court's decision should be affirmed unless the trial court committed a clear error in its excluding Dr. West's affidavit. *Plaxico v. Michael*, 735 So.2d 1036, 1039 (Miss. 1999) (citing *Cooper v. State Farm Fire & Cas. Co.*, 568 So.2d 687, 692 (Miss. 1990)).

In reviewing a trial court's grant of summary judgment, this Court employs a *de novo* standard of review. *Anglado v. Leaf River Forest Prods.*, 716 So.2d 543, 547 (Miss. 1998). Summary judgment "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." MISSISSIPPI RULE OF CIVIL PROCEDURE 56(c). The party opposing the motion for summary judgment "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." MISSISSIPPI RULE OF CIVIL PROCEDURE 56(e).

The entry of summary judgment is mandated if the non-movant “fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law.” *Estate of Deiorio v. Pensacola Health Trust, Inc.*, 990 So.2d 804 (Miss. Ct. App. 2008) (citing *Galloway v. Travelers Ins. Co.*, 515 So.2d 678, 684 (Miss. 1987)).

I. PLAINTIFF’S ARGUMENT REGARDING THE SUFFICIENCY OF DR. WEST’S AFFIDAVIT IS PROCEDURALLY BARRED FROM REVIEW

Plaintiff offers no substantive argument to refute the Court’s findings with regard to the sufficiency of Dr. West’s affidavit. Plaintiff does not argue that the Court misapplied the legal requirements for an expert affidavit in medical negligence cases, nor does he argue that the Court’s assessment of the affidavit was incomplete or incorrect. Instead, Plaintiff broadly argues that Dr. West’s affidavit was sufficient to create a genuine issue of material fact and, therefore, sufficient to survive summary judgment. However, Plaintiff cites no authority for his position.

This Court is not required to consider an argument which is not supported by legal authority. *Webb v. DeSoto County*, 843 So.2d 682, 685 (Miss. 2003) (finding that failure to cite legal authority in support of argument is a procedural bar on appeal); *Dowdle Butane Gas Co., Inc. v. Moore*, 831 So.2d 1124, 1136 (Miss. 2002); *Shavers v. Shavers*, 982 So.2d 397, 401 (Miss. 2008). In the absence of meaningful argument and citations of authority, this Court will not consider the assignment of error. *Govan v. State*, 591 So.2d 428, 431 (Miss. 1991); *Stidham v. State*, 750 So.2d 1238, 1243 (Miss. 1999) (the appellant has a duty to show by plausible argument with supporting authority how the lower court erred).

Based upon the absence of supporting authority for Plaintiff’s assignment of error, this Court should decline to consider Plaintiff’s appeal and hold that it is procedurally barred from review.

II. THE CIRCUIT COURT PROPERLY EXCLUDED THE EXPERT WITNESS AFFIDAVIT OF DR. WEST

In considering a summary judgment motion opposed by an expert affidavit, the affidavit should not contain mere conclusions of facts but should contain allegations of specific facts. *Reynolds v. Amerada Hess Corp.*, 778 So.2d 759 (Miss. 2000) (holding that grant of summary judgment was appropriate where the plaintiffs offered no specific material facts as being in dispute but addressed only the legal significance of undisputed facts). If affidavits are submitted in opposition to a motion for summary judgment, they must show that the affiant has first-hand knowledge of the factual matters asserted in the affidavit, that the facts set forth in the affidavit would be admissible, and that the affiant would be competent to testify at trial. MISSISSIPPI RULE OF CIVIL PROCEDURE 56(e). To have power to generate a genuine issue of material fact to overcome summary judgment, the non-movant's affidavit must: (1) be sworn; (2) be made upon personal knowledge; and (3) show that the party providing the factual evidence is competent to testify. *Watson v. Johnson*, 848 So.2d 873 (Miss. Ct. App. 2002) (Emphasis added).

The Circuit Court, in analyzing the affidavit of Dr. West, included in its bench opinion the following comments:

“[T]he purported expert affidavit of Dr. West is insufficient under Mississippi Rules of Evidence 702(1) for several reasons.

It does not provide the field in which Dr. West is expected to testify. It fails to establish that Dr. West knows the applicable standard of care applicable to Dr. Wiseman in this case, an anesthesiologist, in the removal of a spinal cord stimulator. The affidavit does not establish or define the applicable standard of care, but only the conclusory statement that Dr. Wiseman breached the standard of care.

The opinion of Dr. West in his affidavit is totally conclusory and fails to state facts to back it up. Moreover, the affidavit of Dr. West does not establish that he is qualified by his education,

training, or experience, or that he has specialized knowledge to render an opinion in this particular case.

Therefore, the Motion of Dr. Wiseman to Strike the Affidavit of Dr. West shall be and the same is hereby granted, and the Motion for Summary Judgment of Dr. Wiseman is hereby granted.” (R.E.; Tab 5, p. 16-17).

The Circuit Court found that Dr. West’s affidavit was insufficient to create a genuine issue of material fact and was insufficient as a matter of law.

The issues in the case *sub judice* are analogous to those addressed in *Hubbard v. Wansley*, 954 So.2d 951 (Miss. 2007). *Hubbard* involved a wrongful death claim sounding in medical negligence in which the trial court granted summary judgment to the defendant, Dr. Wansley. *Hubbard*, 954 So.2d at 964. One of the issues raised on appeal was whether the affidavit of the plaintiff’s expert, Dr. Lynn Stringer, was sufficient to create a genuine issue of material fact. *Id.* Dr. Stringer, a board-certified neurosurgeon, averred in his affidavit that “it is my opinion that had Ruby Hubbard [the plaintiff’s decedent] been treated properly by Dr. Wansley, or if Dr. Wansley had notified appropriate personnel, it is my opinion that Ruby Hubbard would have had a greater than 50% chance of reduced neurological injury”. *Id.* at 965. In analyzing the plaintiff’s expert testimony, the Mississippi Supreme Court agreed with the trial Court’s ruling that the affidavit was “almost wholly conclusory on the issue of causation and gives very little in the way of specific facts and medical analysis to substantiate the claim that Hubbard had a greater than 50% chance of substantial recovery”. *Id.* at 966. (Emphasis added). The Supreme Court went on to comment that Dr. Stringer’s assertion that Ms. Hubbard would have had a 50% greater chance of recovery was given with “no real facts to back it up” and that “this Court has shown its disapproval of such affidavits in the past”. *Id.* at 965. The *Hubbard*

Court held the trial judge properly excluded Dr. Stringer's testimony in rendering summary judgment for the defendant.

In addition to the precedent of *Hubbard*, MISSISSIPPI RULE OF EVIDENCE 702(1) requires an expert's opinion to be "based upon sufficient facts or data." (Emphasis added). Dr. West's affidavit is based upon neither. Dr. West's affidavit has no "facts" or "data" to support it, and is entirely subjective and speculative. *Davis v. Christian Brotherhood Homes of Jackson, Miss., Inc.*, 957 So.2d 390, 409 (Miss. Ct. App. 2007). Opinions of an expert cannot be based upon a bare assertion resting on the authority of an individual. *Id.* Dr. West makes a bare assertion that Dr. Wiseman "deviated from the standard of care in his removal of the spinal cord stimulator". Testimony based upon assumptions without a factual foundation is inadmissible and should be stricken. *Apac-Miss., Inc. v. Goodman*, 803 So. 2d 1177, 1184-85 (Miss. 2002), see also *Watkins v. U-Haul Int'l, Inc.*, 770 So.2d 970 (Miss. Ct. App. 2000); *Hubbard v. Wansley*, 954 So.2d 951 (Miss. 2007); *Sellars v. Walgreen Co.*, 2008 WL 73536 (Miss. Ct. App. 2008). Pursuant to the holding in *Hubbard* and requirements of Rule 702, the Circuit Court properly excluded Dr. West's affidavit.

Dr. West's affidavit makes no specific criticism of Dr. Wiseman. Mere allegations which do not reveal detail and precise facts will not prevent the award of summary judgment. *Ellis v. Powe*, 645 So.2d 947, 952 (Miss. 1994). An affidavit relied upon in an attempt to survive summary judgment must do more than make general assertions and legal conclusions which do not give rise to a genuine issue of material fact. *Reynolds v. Amerada Hess Corp.*, 778 So.2d 759, 765 (Miss. 2000). Dr. West's affidavit does not articulate the applicable standards of care and how these standards of care were breached. *Estate of Deiorio v. Pensacola Health Trust, Inc.*, 2008 WL 4212446 (Miss. Ct. App. 2008) (holding plaintiff's expert affidavit was

insufficient as a matter of law to defeat summary judgment). Dr. West's affidavit does not indicate the appropriate care Mr. Sanders should have received and does not causally connect any purported breach to a particular injury. *Id.* Like *Hubbard*, the Plaintiff failed to produce qualified expert testimony establishing a genuine issue of material fact.

The ruling in *Davis v. Christian Brotherhood Homes of Jackson, Miss., Inc.*, 957 So.2d 390 (Miss. Ct. App. 2007) is also relevant to the issue presented by the Plaintiff's appeal. It involved a wrongful death claim sounding in premises liability that arose out of the shooting death of Lucias Davis at the defendant apartment complex. The trial Court granted summary judgment in favor of the defendants. One of the issues raised on appeal was whether the affidavit of the plaintiff's expert, Tyrone Lewis, was sufficient to create a genuine issue of material fact on proximate cause. *Id.* at 408. Mr. Lewis, a Jackson Police Department officer, was identified by the plaintiff as an expert in the fields of security and law enforcement and averred in his affidavit that "the cause of the death of Lucias Davis was the defendant's failure to have any security guards or other security measures. The security guards would have stopped ... [the] fight with Lucias Davis in the parking lot which preceded Lucias Davis's death". Mr. Lewis further averred the lighting on the defendant property was poor and that it was "well known in my field of expertise that inadequate lighting increases the chance of criminal activity, and the inadequate lighting at [the defendant property] on February 4, 2003, contributed to the death of Lucias Davis". *Id.* In analyzing the officer's testimony, the appeals court agreed with the trial Court's analysis that the affidavit was "nothing more than just a compilation of conclusory statements [and] provides no factual basis". *Id.* (Emphasis added). The *Davis* court held: "The trial judge did not abuse his discretion as gatekeeper in ruling that the opinions contained in Commander Lewis's affidavit were merely 'conclusory' and had no 'factual basis'".

The trial judge properly disregarded this evidence in rendering summary judgment for [the defendants]”. *Id.* at 410. In support of its holding the court noted “the proponent of an expert’s testimony must demonstrate that the testimony is not based “merely [on] his subjective beliefs and unsupported speculation”. *Id.* at 409 (citing *Miss. Transp. Comm’n v. McLemore*, 863 So.2d 31 (¶11) (Miss. 2003); *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 590, 113 Sup. Ct. 2786 (1993)). The Plaintiff has not and cannot satisfy that burden with Dr. West’s affidavit. Dr. West makes a bare assertion that Dr. Wiseman negligently removed the spinal cord stimulator from the Plaintiff, William Sanders, and the only authority or basis for this bare assertion is Dr. West. Expert testimony based upon assumptions without a factual foundation is inadmissible and not sufficient to survive summary judgment. *Apac-Miss., Inc. v. Goodman*, 803 So.2d 1177, 1184-85 (Miss. 2002).

Dr. Wiseman also relies on the recent decision of *Estate of Deiorio v. Pensacola Health Trust, Inc.*, 990 So.2d 804 (Miss. Ct. App. 2008). In *Deiorio*, plaintiff brought suit against a nursing home on claims of negligence, medical malpractice, gross negligence and fraud. *Id.* at 805. The defendant nursing home moved for summary judgment on the grounds that the plaintiff failed to establish a *prima facie* case of medical malpractice. *Id.* In response to the nursing home’s motion for summary judgment, the plaintiff attached the affidavit of his expert, Dr. Jeffrey Karp, in an effort to create a genuine issue of material fact. *Id.* The trial court held that Dr. Karp’s affidavit was legally insufficient and granted summary judgment in favor of the nursing home. *Id.* An issue raised on appeal was whether Dr. Karp’s affidavit was sufficient to establish a *prima facie* case of medical negligence. *Id.* The *Deiorio* Court held that the affidavit presented by Dr. Karp was “insufficient as a matter of law to defeat summary judgment.” *Id.* at

806. In affirming summary judgment in favor of the nursing home, the *Deiorio* Court commented:

“In his affidavit, Dr. Karp fails to state any of his opinions to a reasonable medical probability or certainty. The affidavit does not articulate the applicable standards of care and how these standards of care were breached. Dr. Karp fails to indicate the appropriate care Ms. Deiorio should have received. Dr. Karp has not causally connected any purported breach to a particular injury Ms. Deiorio received. Dr. Karp’s affidavit simply consists of several conclusory statements.” *Id.* at 807.

Like the expert affidavit in *Deiorio*, Dr. West’s affidavit is conclusory. He states an opinion that the standard of care was breached but gives no facts or specifics to support the opinion. In his medical malpractice action, the Plaintiff has the burden of establishing the content and details of the standard of care to which Dr. Wiseman is held. *Walker v. Skiwski*, 529 So.2d 184, 185-186 (Miss. 1988). The Plaintiff also has the burden of proving that Dr. Wiseman failed to conform to that standard. *Id.* at 186. Dr. West’s affidavit does not state that he is familiar with the standard of medical care and treatment with respect to the removal of a spinal cord stimulator but only provides a “sweeping conclusion” that Dr. Wiseman “deviated from the standard of care in his removal of the spinal cord stimulator.” Dr. West’s affidavit does not articulate how Dr. Wiseman deviated from the required standard of care nor does it establish what that standard of care might have been.

According to the Mississippi Supreme Court, “the facts upon which the expert bases his opinion or conclusion must permit reasonably accurate conclusions as distinguished from mere guess or conjecture.” *Miss. Transp. Comm’n v. McClemore*, 863 So.2d 31, 36 (Miss. 2003) (quoting *Hickox v. Holleman*, 502 So.2d 626, 638 (Miss. 1987)). The proponent of the expert’s testimony must demonstrate that such testimony is not based “merely [on] his subjective beliefs or unsupported speculation.” *Id.* An expert’s opinion “must be supported by appropriate

validation, i.e., ‘good grounds’, based on what is known.” *Davis v. Christian Brotherhood Homes of Jackson, Miss., Inc.*, 957 So.2d 390, 409-410 (Miss. Ct. App. 2007). In the instant case, the “good grounds” standard cannot be met with respect to Dr. West’s affidavit. See *Davis v. Christian Brotherhood Homes of Jackson, Miss., Inc.*, 957 So.2d 390, 409-410 (Miss. Ct. App. 2007) (“From our review of the record, we cannot discern the ‘good grounds’ upon which [the plaintiffs’ expert] based his opinions, and his opinions do not appear to be based upon sufficient facts or data”). As such, the Circuit Court did not abuse its discretion as gatekeeper in ruling that the opinions contained in Dr. West’s affidavit were merely “conclusory” and had no “factual basis”. *Id.*

In *Matthews v. Horseshoe Casino*, 919 So.2d 278 (Miss. Ct. App. 2005), plaintiffs filed an action against Horseshoe Casino alleging multiple damages as a result of injuries sustained while working on an electrical device which was owned by Horseshoe. *Id.* at 279. Horseshoe filed a motion for summary judgment arguing that the plaintiffs failed to meet their burden of proof that Horseshoe maintained control over the work project that gave rise to their injuries. *Id.* at 280. In response to the defendant’s motion for summary judgment, the plaintiffs produced the affidavit of their expert witness, Damon Wall. *Id.* The trial judge found that Wall’s affidavit was insufficient as a matter of law and rendered summary judgment in favor of Horseshoe. *Id.* The issue raised on appeal was whether Wall’s affidavit was sufficient to create a genuine issue of fact for jury consideration. *Id.* at 281. Wall’s affidavit states:

“My name is Damon Wall. I am the associate professor emeritus of electrical engineering at the University of Mississippi. I am familiar with the switchgear fire in Tunica, Mississippi, at Horseshoe Casino that happened in July, 2000. I have read the relevant materials in regards to said fire and examined the switchgear involved in said fire. It is my professional opinion that failure lies in allowing installation of equipment under live (“hot”) electrical conditions.” *Id.* at 280.

The *Matthews* Court found that Wall's affidavit "failed to meet the requirements set forth in Rule 56(e) of MISSISSIPPI RULES OF CIVIL PROCEDURE." *Id.* The Court noted that "Wall's affidavit was wholly insufficient to create a genuine issue of fact for consideration by the jury. Therefore, the affidavit was properly stricken by the trial court." *Id.* at 281. Accordingly, the Court affirmed the trial court's grant of summary judgment in favor of Horseshoe. *Id.* at 282.

As in *Matthews*, the affidavit of Dr. West fails to set forth "specific facts" and certainly does not provide more than "a mere scintilla of colorable evidence." See *Luvane v. Waldrup*, 903 So.2d 745, 748 (Miss. 2005) ("The non-moving party's claim must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict"). Dr. West's affidavit provides no basis for his broad conclusion that Dr. Wiseman's alleged negligence was the cause of Mr. Sanders's alleged injuries. Dr. West's affidavit is simply an attempted broad summarization of the required elements for a medical malpractice claim. Because Dr. West's affidavit fails to present any evidence sufficient to create a genuine issue of material fact, the Circuit Court did not abuse its discretion in excluding it. *Mallet v. Carter*, 803 So.2d 504 (Miss. Ct. App. 2002); *Jenkins v. Miss. Dept. of Transp.*, 904 So.2d 1207 (Miss. 2004); *Luvane v. Waldrup*, 903 So.2d 745, 748 (Miss. 2005); *Matthews v. Horseshoe Casino*, 919 So.2d 278 (Miss. Ct. App. 2005); *Estate of Deiorio v. Pensacola Health Trust, Inc.*, 990 So.2d 804 (Miss. Ct. App. 2008); *Alqasim v. Capitol City Hotel Investors, LLC*, 989 So.2d 488 (Miss. Ct. App. 2008); *Smith v. Clement*, 983 So.2d 285 (Miss. 2008).

III. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DR. WISEMAN

To establish a *prima facie* case of medical negligence against Dr. Wiseman, the Plaintiff must present competent expert testimony as to the applicable standard of care, breach thereof, and

proximate causation. *Travis v. Stewart*, 680 So.2d 214, 218-19 (Miss. 1996); *Palmer v. Biloxi Regional Medical Ctr., Inc.*, 564 So.2d 1346, 1355 (Miss. 1990); *Burnham v. Tabb*, 508 So.2d 1072, 1074 (Miss. 1987); *Phillips v. Hull*, 516 So.2d 484, 491 (Miss. 1987); *Hammond v. Grishom*, 470 So.2d 1049, 1053 (Miss. 1985). Expert testimony is required to “identify and articulate the requisite standard that was not complied with, and the expert must also establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries.” *Barner v. Gorman*, 605 So.2d 805, 809 (Miss. 1992). In order to prove medical malpractice, an expert is needed. *Barner v. Gorman*, 605 So.2d 805, 809 (Miss. 1992) (“When proving the elements in a medical malpractice suit, expert testimony must be used”); see also *Latham v. Hayes*, 495 So.2d 453, 459-460 (Miss. 1986).

Plaintiff filed suit against Dr. Wiseman alleging medical malpractice. Therefore, Plaintiff was required to produce competent expert testimony to establish a *prima facie* case of medical negligence against Dr. Wiseman. The affidavit of the Plaintiff’s sole expert witness, Dr. West, was insufficient to satisfy his burden to prove that Dr. Wiseman failed to conform to the applicable standard of care. Absent medical expert testimony which (a) articulates the standard of care Dr. Wiseman owed to the Plaintiff, and (b) identifies how Dr. Wiseman breached the standard of care in a manner that caused or contributed to the Plaintiff’s alleged injuries, the Plaintiff cannot meet his burden of proof. *Phillips v. Hull*, 516 So.2d 488, 491 (Miss. 1987). In light of the fact that Dr. West’s affidavit failed to create a genuine issue of material fact and the Plaintiff having offered no other expert testimony to support his medical negligence claim, the Circuit Court properly granted summary judgment to Dr. Wiseman. *Key Constructors, Inc. v. H & M Gas Co.*, 537 So.2d 1318, 1323 (Miss. 1989); *Bourn v. Tomlinson Interest, Inc.*, 456 So.2d

747, 749 (Miss. 1984) ("The time must arrive in every case where the party must demonstrate that there is a genuine issue for trial or have summary judgment entered against him").

CONCLUSION

The Circuit Court did not abuse its discretion as gatekeeper in striking the affidavit of Dr. West. As such, the Circuit Court properly granted summary judgment in favor of Dr. Wiseman. For the above and foregoing reasons, the judgment of the Lee County Circuit Court should be affirmed.

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CERTIFICATE OF SERVICE

I, Joshua S. Wise, attorney for Appellee, Benjamin Wiseman, M.D., do hereby certify that I have this day mailed via United States mail, proper postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee, Benjamin Wiseman, M.D., to the following:

Honorable Paul S. Funderburk
Lee County Circuit Court Judge
P.O. Drawer 1100
Tupelo, MS 38802-1100

D.L. Jones, Jr., Esq.
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Jackson, MS 39202-3442

DATED, this the 17th day of July, 2009.


JOSHUA S. WISE, 

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-02125

WILLIAM SANDERS

APPELLANT

v.

BENJAMIN WISEMAN, M.D.

APPELLEE

CERTIFICATE OF FILING

I, Joshua S. Wise, one of the attorneys for the Defendant/Appellee, Benjamin Wiseman, M.D., do hereby certify that I have this day mailed the original and three (3) copies and an electronic disk of the Brief of Appellee, Benjamin Wiseman, M.D., by U.S. mail, postage prepaid, to Betty W. Sephton, Mississippi Supreme Court Clerk, P.O. Box 249, Jackson, Mississippi 39205-0249.

RESPECTFULLY SUBMITTED, this the 17th day of July, 2009,

HOLLAND, RAY, UPCHURCH & HILLEN, P.A.

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