

**IN THE SUPREME COURT OF MISSISSIPPI  
CASE NO. 2008-WC-01840-COA**

**MISSISSIPPI INSURANCE GUARANTY  
ASSOCIATION**

**APPELLANT**

**VS.**

**BRIDGETTE BLAKENEY**

**APPELLEE**

**APPEAL FROM THE CIRCUIT COURT OF JONES COUNTY**

---

**REPLY BRIEF OF APPELLANT  
MISSISSIPPI INSURANCE GUARANTY ASSOCIATION**

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**ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

Bridgette Blakeney confuses this case with a subrogation claim under the worker's compensation statute, Miss. Code Ann. §71-3-71, for uninsured motorist insurance proceeds. Ms. Blakeney presents a mountain of facts outside the record in this appeal and argues that, under the Worker's Compensation Act and the *Cossitt v. Nationwide Mut. Ins. Co.* line of cases, MIGA cannot obtain a credit for uninsured motorist proceeds to set off against future worker's compensation benefits. The fundamental fallacy in the Appellee's reasoning is that the present case has nothing to do with the worker's compensation statute and has everything to do with the Mississippi Insurance Guaranty Association Law, Miss. Code Ann. § 83-23-123. Section 83-23-123 allows MIGA a credit for *any* solvent insurance – including uninsured motorist insurance – covering a claim for which MIGA may have statutory responsibility. The Court should therefore reverse the lower court and render judgment accordingly.

## REPLY TO APPELLEE'S ARGUMENTS

### ***1. Ms. Blakeney's Brief Is Filled with Facts Outside the Record, Which the Court Should Disregard.***

It goes without saying that this Court "is limited to consideration of the facts in the record, while reliance on facts only disclosed in the briefs is prohibited." *Greater Canton Ford Mercury, Inc. v. Ables*, 948 So.2d 417, 423 (Miss. 2007). Ms. Blakeney's counsel totally ignored this basic rule by including in their brief a whole host of "facts" not supported by any evidence in the record. First of all, much of the fact section of Appellee's brief is taken up with statements about the circumstances and considerations involved in Ms. Blakeney's alleged settlement with the UM solvent insurer, Coregis Insurance. Secondly, she argues that "it is apparent in a perfect world she [Ms. Blakeney] would have received recovery of several times this total amount in as much as her injuries are

extremely serious, disabling and painful.” Upon these foundations, Appellee attempts to build a so-called equitable argument. Yet, there are no affidavits, depositions, or documents in the record supporting the contentions about the settlement with Coregis, nor is there any evidence about the nature and severity of the claimant’s injuries. The Court should therefore ignore Ms. Blakeney’s unsupported “equitable” contentions.

**2. *Contrary to Appellee’s Assertions, MIGA Has Unique Rights Beyond Those of a Solvent Worker’s Compensation Carrier.***

Ms. Blakeney and the Commission would have the Court believe that MIGA’s rights are no different from those of any solvent worker’s compensation carrier. Appellee’s Brief at 8. The MIGA Law belies any such notion. The Mississippi Supreme Court has recognized that MIGA is *not* an insurance company, and its duties and responsibilities are strictly controlled by statute. *Nat’l Union Fire Ins. Co. v. Miss. Ins. Guar. Ass’n*, 990 So. 2d 174, 176 (Miss. 2008).

The MIGA Law on its face was never intended to fully replace insurance policies that have become insolvent. That is why the statute limits payment to \$300,000 in non-worker’s compensation claims, even when the insolvent policy has much higher limits and when the claimant has experienced much greater damages. Miss. Code Ann. § 83-23-115(1)(a)(iii). That is why the act only authorizes the payment of claims by Mississippi residents or pertaining to Mississippi property. Miss. Code Ann. § 83-23-109(f). That is why the statute immunizes MIGA from any obligation for punitive damages, even where they are covered by the policy. *Id.* That is why solvent insurers have no subrogation rights against MIGA, even though they might have had those rights against the insurer itself. *Id.*

That is also why all solvent insurance must be exhausted first, with a credit applied against MIGA’s obligation, even though the insolvent insurer did not have any such rights. Miss. Code Ann. §83-23-123. Consequently, MIGA is entitled to receive the §83-23-123 credit, even though the

insolvent worker's comp carrier had no similar right.

We ask the Court to bear in mind that the Legislature conferred a major benefit on policyholders and claimants by creating MIGA, because otherwise those persons would not have any source of payment available to them upon an insurer's insolvency. Not surprisingly, in conferring this benefit, the Legislature placed certain limitations on MIGA's exposure in order to conserve the Association's limited resources and to allow the MIGA funds to be used to pay those who are truly without any other source of payment. In this case, Ms. Blakeney has received \$200,000 in benefits from MIGA, as well as \$70,000 in solvent insurance proceeds. MIGA is entitled to relief under § 83-23-123 with regard to the policy limits of this solvent insurance.

**3. *Without Have Cross-Appealed on the Issue, Appellee Erroneously Argues That MIGA's Off Set Must Be Reduced by the Amount of Pain and Suffering Recovery Included in the Solvent Insurance Payments.***

The Commission held that the amount of any credit received by MIGA must be reduced by the collection costs incurred by Ms. Blakeney in obtaining the solvent insurance proceeds. The Commission did not award Ms. Blakeney a further reduction based on the portion of the solvent policy proceeds attributable to non-economic damages, such as pain and suffering. Ms. Blakeney did not challenge this decision on cross-appeal. Yet, she spends an entire section of her brief arguing for an additional reduction in the amount of the credit due to MIGA, based on any pain and suffering recovery built into the payment by the solvent insurer.

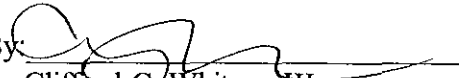

As the Court is well aware, a party cannot raise a new issue for the first time on appeal. *Crowe v. Smith*, 603 So. 2d 301, 305 (Miss. 1992). Therefore, the Court should reject Ms. Blakeney's effort to inject the non-economic damage issue at this time.

**CONCLUSION**

Ms. Blakeney's brief is rife with facts and legal contentions outside the record of this appeal,

which this Court should disregard. Her brief also attempts to blur the difference between the Worker's Compensation Act and the Mississippi Insurance Guaranty Association Law. MIGA's rights are governed by § 83-23-123 of the MIGA Law, and not §71-3-71 of the Worker's Compensation Act. The Court should apply § 83-23-123 to render a judgment in MIGA's favor for a \$100,000 credit against any further benefits due to Ms. Blakeney.

Respectfully submitted,  
MISSISSIPPI INSURANCE  
GUARANTY ASSOCIATION

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**CERTIFICATE OF SERVICE**

I, CLIFFORD C. WHITNEY III, Attorney for Mississippi Insurance Guaranty Association, do hereby certify that I have this day mailed, postage prepaid, by United States Mail, hand-delivered, or via facsimile, a true and correct copy of the above and foregoing document to the following counsel of record:

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Hon. Billy Joe Landrum  
Jones County Circuit Court Judge  
P.O. Box 685  
Laurel, MS 39441

THIS THE 5<sup>th</sup> DAY OF June, 2009.

  
\_\_\_\_\_  
CLIFFORD C. WHITNEY III





**IN THE SUPREME COURT OF MISSISSIPPI**

**MARGERY MCDANIEL, INDIVIDUALLY  
AND AS PERSONAL REPRESENTATIVE  
ON BEHALF OF THE ESTATE OF AND  
WRONGFUL DEATH BENEFICIARIES OF  
TERRELL J. MCDANIEL, DECEASED**

**PLAINTIFF/APPELLANTS**

**VS.**

**CAUSE NO.: 2008-TS-01550**

**MAGNOLIA REGIONAL HEALTH CENTER,  
DR. NANNI PIDIKITI, M.D., AND  
JOHN DOES 1 THRU 5**

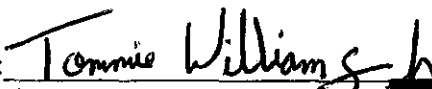

**DEFENDANTS/APPELLEE**

**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. Estate of Margery McDaniel, Plaintiff.
2. Dana J. Swan, Esquire, Clarksdale, Mississippi, counsel for Margery McDaniel, individually and as personal representative on behalf of the Estate of and Wrongful Death Beneficiaries of Terrell J. McDaniel, deceased.
3. Nanni Pidikiti, M.D., Defendant.
4. Tommie Williams, Esquire, Greenwood, Mississippi, Upshaw, Williams, Biggers, Beckham & Riddick, LLP, counsel for Nanni Pidikiti, M.D.
5. Tommie Williams, Jr., Esquire, Greenwood, Mississippi, Upshaw, Williams, Biggers, Beckham & Riddick, LLP, counsel for Nanni Pidikiti, M.D.
6. Magnolia Regional Health Center, Defendant.
7. John G. Wheeler, Esquire, Mitchell, McNutt, Threadgill, Smith & Sams, Tupelo, Mississippi, counsel for Magnolia Regional Health Center.
8. Beverly B. Buskirk, Esquire, Mitchell, McNutt, Threadgill, Smith & Sams, Tupelo, Mississippi, counsel for Magnolia Regional Health Center.
9. Honorable Thomas J. Gardner, III, Circuit Judge.

Respectfully submitted,

BY:   
TOMMIE G. WILLIAMS, JR.,   
Counsel to Appellee/Defendant  
Nanni Pidikiti, M.D.

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## **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 Nanni Pidikiti, M.D., waives oral argument regarding the present appeal.

## **STATEMENT OF ISSUES**

The issues presented in this appeal regard the trial court striking the testimony of the plaintiff's expert witness, Dr. James Shamblin, pursuant to M.R.E. Rule 702, the trial court denying the plaintiff's request for a twenty-one day extension to designate and file the reports of additional expert witnesses and the trial court granting summary judgment in Dr. Pidikiti's favor premised on the fact that the plaintiff had not designated a qualified expert witness that could establish the standards of care as they applied to Dr. Pidikiti, or any breach thereof.

## **STATEMENT OF THE CASE**

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

On February 9, 2001, Appellant Margery McDaniel, individually and as personal representative on behalf of the Estate of and Wrongful Death Beneficiaries of Terrell J. McDaniel, deceased ("McDaniel") filed a Complaint in the Circuit Court of Alcorn County, Mississippi, asserting claims for medical negligence and loss of consortium against Appellee Nanni Pidikiti, M.D., and Magnolia Regional Health Center, stemming from a February 16, 1999 procedure for "femoral angiograms" performed on Terrell J. McDaniel, deceased. CP: 192-194.

On or about February 9, 2005, Dr. Pidikiti moved the trial court to grant summary judgment in her favor stating that McDaniel had not designated an expert witness pursuant to Rule 26(b)(4)(A)(i) and

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<sup>1</sup>

Record citations are in the following format: Materials from the Clerk's papers are denoted by the initials CP, followed by the page number ascribed by the Clerk. Materials contained in the Record Excerpts are denoted by the initials RE, followed by the page number.

without an expert witness, McDaniel could not establish the standards of care as they applied in this particular case, or any breach thereof. CP: 242-266. On or about October 12, 2005, McDaniel filed her Response to Dr. Pidikiti's Motion for Summary Judgment. CP: 280-300. Contained within this response was the affidavit, curriculum vitae and expert opinions held by the plaintiff's expert, Dr. James A. Shamblin. CP: 280-300. On October 26, 2006, Dr. Pidikiti filed a Motion to Strike the Testimony of the Plaintiff's Expert Witness stating that Dr. Shamblin was not qualified by knowledge, education, training or experience to offer opinions as to the standard of care with regard to the proper medical technique, procedures and indications to proceed with a femoral angiogram as required by M.R.E. Rule 702. CP: 367-421. On December 29, 2006, McDaniel filed her response to Dr. Pidikiti's Motion to Strike. CP: 474-490. On December 20, 2007, the trial court entered an Order striking Dr. Shamblin's testimony and continuing the case until further Order. CP: 593.

On January 4, 2008, Dr. Pidikiti filed a Supplement to her Motion for Summary Judgment stating that McDaniel had not designated an expert to establish the standards of care as they applied in this particular case, or any breach thereof. CP: 595-632. On or about January 25, 2008, McDaniel filed a Motion to Hold Summary Judgment in Abeyance and For Additional time to Designate an Expert. CP: 633-634. On February 6, 2008, Dr. Pidikiti filed her Response to McDaniel's Motion to Hold Summary Judgment in Abeyance and For Additional Time to Designate an Expert. CP: 635-638. On February 21, 2008, the Court entered its Order Holding Dr. Pidikiti's Motion for Summary Judgment in Abeyance and allowing McDaniel an additional sixty (60) days to designate experts in this case. CP: 639. On May 1, 2008, Dr. Pidikiti filed a Motion to Reinstate her Motion for Summary Judgment. CP: 641-717. McDaniel failed to comply with the Court's Order dated February 21, 2008, and on April 30, 2008, the Court entered its Order dismissing the cause of action as to all defendants, including Dr. Pidikiti (This Order was not filed with the Circuit Clerk until May 5, 2008). CP: 718-719.

On or about May 12, 2008, McDaniel filed a Motion to Reconsider the Courts previous Order of Dismissal. CP: 725-731. On May 13, 2008, Dr. Pidikiti filed her response to McDaniel's Motion to Reconsider. CP: 721-724. By Order dated August 18, 2008, the Court denied in part and granted in part McDaniel's Motion to Reconsider. CP: 735-736. The trial court denied McDaniel's Motion to Reconsider with respect to Dr. Nanni Pidikiti and granted McDaniel's Motion to Reconsider with respect to Magnolia Regional Health Center. CP: 735-736. This Appeal followed. CP: 743.

**B. Statement of Facts**

On February 9, 2001, Appellant Margery McDaniel, individually and as personal representative on behalf of the Estate of and Wrongful Death Beneficiaries of Terrell J. McDaniel, deceased ("McDaniel") filed a Complaint in the Circuit Court of Alcorn County, Mississippi, asserting claims for medical negligence and loss of consortium against Appellee Nanni Pidikiti, M.D., and Magnolia Regional Health Center, stemming from a February 16, 1999 procedure for "femoral angiogram" performed on Terrell J. McDaniel, deceased. CP: 192-194.

On or about February 16, 2001, Dr. Pidikiti responded to the plaintiff's Complaint and denied any negligence therein. CP: 195-197. Discovery ensued and on March 10, 2003, the trial court entered an Order allowing the substitution of the Estate of Margery McDaniel, deceased, as the real party in interest in lieu of Margery McDaniel. CP: 202. On July 14, 2003, the trial court entered an Order effectively staying the proceedings for ninety days or until further Order of the Court due to Dr. Nanni Pidikiti's liability insurance company, Reciprocal of America, being forced into receivership for rehabilitation and liquidation by Order of the State Court of Virginia. CP: 238.

On or about February 9, 2005, Dr. Pidikiti moved the trial court to grant summary judgment in her favor stating that McDaniel had not designated an expert witness pursuant to Rule 26(b)(4)(A)(i) and without an expert witness, McDaniel could not establish the standards of care as they applied in this particular case, or any breach thereof. CP: 242-266. On or about October 12, 2005, McDaniel filed her

Response to Pidikiti's Motion for Summary Judgment. CP: 280-300. Contained within this response was the affidavit, curriculum vitae and expert opinions held by the plaintiff's expert, Dr. James A. Shamblin. CP: 280-300. The expert opinions of Dr. Shamblin effectively rendered Dr. Pidikiti's Motion for Summary Judgment moot. CP:280-300.

On January 3, 2006, the Court entered it's Order lifting the stay of proceedings that had been entered on July 14, 2003. CP: 301. On October 18, 2006, the Court entered it's Order consolidating Cause No. 2001-052-F-A into Cause No. 2000-138-G-A. CP: 356. The two above styled causes both were filed in the Circuit Court of Alcorn County and stemmed from the alleged wrongful death of Terrell J. McDaniel, deceased. M.C.A. §11-7-13 provides that there shall be only one cause of action for the wrongful death of any person.

On or about October 20, 2006, Dr. Pidikiti filed a Motion to Strike the Testimony of the Plaintiff's Expert Witness, Dr. James A. Shamblin, stating that he was not qualified by knowledge, education, training or experience to offer opinions as to the standard of care with regard to proper medical techniques, procedures and indications for the performance of a femoral angiogram and as to the cause of death of Terrell McDaniel. CP: 367-421. On or about December 27, 2006, McDaniel responded to Dr. Pidikiti's Motion to Strike the Testimony of Dr. James A. Shamblin. CP: 474-490. On January 4, 2007, the court heard oral arguments of counsel regarding Dr. Pidikiti's Motion to Strike the Testimony of plaintiff's expert, Dr. James A. Shamblin. CP: 427. Appendix "1." The Court took Dr. Pidikiti's Motion to Strike under advisement.

On June 26, 2007, the Court entered a Scheduling Order stating, among other things, that:

1. All discovery in this case shall be completed on or before October 1, 2007.
2. The plaintiff's expert witnesses shall be designated on or before July 2, 2007, and the designation shall include all information required by Rule 26(b)(4)(A)(i) of the *Mississippi Rules of Civil Procedure*.



3. The defendants' expert witnesses shall be designated on or before August 15, 2007, and the designation shall include all information required by Rule 26(b)(4)(A)(i) of the *Mississippi Rules of Civil Procedure*.

(CP: 513-514).

On July 31, 2007, the Court entered its Order Setting Trial by Jury Set to Commence on Monday, January 14, 2008, in the Alcorn County Courthouse. CP: 562.

On December 18, 2007, the Court entered its Order Granting Dr. Pidikiti's Motion to Strike the testimony offered by the plaintiff's expert Dr. James A. Shamblin. CP: 593. The Court ruled that Dr. Shamblin's training and expertise was in the field of general surgery and that he was not qualified by virtue of his knowledge, education, training or experience to render an expert opinion to the specialized areas of cardiology and vascular procedures pursuant to M.R.E. Rule 702. CP: 593. The Court continued the case until further Order. On January 4, 2008, Dr. Pidikiti filed a Supplement to her Motion for Summary Judgment. CP: 595-632. Dr. Pidikiti renewed her Motion for Summary Judgment based on the proposition that with the Court striking the testimony of the plaintiff's expert, Dr. James A. Shamblin, the plaintiffs did not have an expert to testify as to the standards of care as they applied in this particular case, or any breach thereof. Summary Judgment was once again proper.

On January 30, 2008, McDaniel filed her Motion to Hold Summary Judgment in Abeyance and For Additional time to Designate an Expert. CP: 633-634. On February 6, 2008, Dr. Pidikiti filed her Response to the Plaintiff's Motion to Hold Summary Judgment in Abeyance and For Additional Time to Designate an Expert. CP: 635-638. On February 21, 2008, the Court entered its Order Holding Dr. Pidikiti's Motion for Summary Judgment in Abeyance and allowing McDaniel an additional sixty (60) days to designate experts in this case. CP: 639. McDaniel failed to comply with the Court's Order regarding designating additional experts. On or about April 24, 2008, McDaniel filed a Motion for Additional Time to Designate Experts. CP: (This Motion is not contained in the clerks papers as ever

being filed.). This motion was filed two days after the period prescribed by the Court to designate experts had expired. The motion contained no designations, but merely the identity of two proposed experts with copies of their curriculum vitae. On or about April 28, 2008, Dr. Pidikiti filed a Motion to Reinstate her pending Motion for summary Judgment that had been held in abeyance by the Court's Order on February 21, 2008. CP: 641-717. On April 30, 2008, the Court entered its Order dismissing the cause of action as to all defendants, including Dr. Pidikiti. CP: 718-719. On or about May 12, 2008, McDaniel filed a Motion to Reconsider the Courts previous Order of Dismissal. CP: 725-731. On or about May 13, 2008, Dr. Pidikiti responded to McDaniel's Motion to Reconsider. CP: 721-724. By Order dated August 18, 2008, the Court denied in part and granted in part McDaniel's Motion to Reconsider. CP: 735-736. The trial court denied McDaniel's Motion to Reconsider with respect to Dr. Pidikiti and granted McDaniel's Motion to Reconsider with Respect to Magnolia Regional Health Center.

This Appeal followed. CP: 743.

### **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 Dr. James Shamblin was not qualified by virtue of his knowledge, experience, education or training to offer opinions as to the standard of care or any alleged breach thereof by Dr. Nanni Pidikiti pursuant to M.R.E. Rule 702. Further, the trial court properly held that the plaintiff failed to comply with the Order of the Court granting her an additional sixty (60) days to designate expert witnesses after the plaintiff's expert witness had been struck by Motion of Dr. Pidikiti. As such, the court correctly granted summary judgment in favor of Dr. Pidikiti pursuant to Troupe v. McAuley, 955 So. 2d 848, 858 (Miss. 2007), which held that in a medical malpractice action, negligence cannot be established without medical testimony from a properly qualified and competent expert who concludes that the defendant physician

failed to demonstrate ordinary skill and care. The plaintiff had no such expert and summary judgment was proper.

## 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 judgement 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 judgement 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 striking the testimony of Dr. James Shamblin, the plaintiff’s expert, because he was not qualified by virtue of his knowledge, experience, training or education to offer opinions regarding the standards of care as they applied in this particular case and any breach thereof.**

Testimony by an expert witness is required in a medical malpractice action to establish the applicable standard of care, breach of that standard of care, and a causal connection between the injury and the alleged acts or omissions of the defendant, unless the matter lies within the common knowledge of lay persons. Proper medical techniques, procedures and standards of care with regard to the indication for and performance of a femoral angiogram are not matters which lie within the common knowledge of lay persons and therefore, expert medical testimony is required. A medical expert must be qualified by experience, knowledge, training and education and familiar with the standards of care of a medical specialty in order to render opinions as to the standard of care of the applicable medical specialty.

In the case *sub judice*, the plaintiff's expert witness, Dr. James R. Shamblin, a general surgeon by training, was not qualified to render opinions in the medical specialty of cardiology, and in particular, as that specialty relates to the performance of a procedure such as a femoral angiogram, based on Dr. Shamblin's training, education, experience or knowledge.

Mississippi law requires expert testimony in a medical malpractice action unless a matter is in the common knowledge of laymen. Palmer v. Biloxi Regional Medical Center, 564 So.2d 1346, 1355 (Miss. 1990). (See also Erby v. North Mississippi Medical Center, 654 So.2d 495, 500 (Miss. 1995)). The Court has further stated that "[I]t is our general rule that in a medical malpractice action, negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care." Brooks v. Roberts, 882 So.2d 229, 32 (Miss. 2004).

Rule 702 M.R.E. was amended on May 29, 2003, to state:

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand or to determine a fact in issue, the 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."

The Mississippi Supreme Court has recognized that admission of expert testimony under Rule 702 is governed by the modified Daubert standard. In Mississippi Transportation Commission v. McLemore, 863 So.2d 31, ¶ 7 (Miss. 2003), the trial court stated that:

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

In adopting Daubert, the Mississippi Supreme Court emphasized the “gatekeeping responsibility of the trial court to determine whether expert testimony is relevant and reliable.” See comment to M.R.E 702. The objective of a trial court’s gatekeeping role is to “make certain that an expert. . .employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).

In Cheeks v. Bio - Medical Applications, Inc., 908 So.2d 117 (Miss. 2005), the Mississippi Supreme Court held that a family practitioner was not competent to offer expert testimony as to the standards of care of dialysis clinics, the appropriate monitoring of a dialysis process, or the appropriate procedures in inserting and maintaining dialysis grafts. The court held that the family practitioner did not maintain the specialized knowledge, experience, education or training to assist the trier of fact to understand the evidence concerning the dialysis procedure. Id. at ¶ 12. In Hubbard v. Wansley, 954 So.2d 951 (Miss. 2007), the Mississippi Supreme Court held that a neurosurgeon was not qualified to give expert testimony as to the standard of care applicable to a physician practicing internal medicine. The court held that the practitioner did not have the specialized knowledge, experience, education or training to assist the trier of fact to understand the evidence in the case before it. Id. at ¶ 19. In Troupe v. McAuley, 955 So.2d 848 (Miss. 2007), the Mississippi Supreme Court held that a neurosurgeon was not qualified to testify as an expert witness in a medical malpractice action against a neuro-otolaryngologist. The

court held that the neurologist did not have the specialized knowledge, experience, education or training to assist the trier of fact to understand the evidence concerning the neuro-otolaryngologic procedure. Id.

In the case *sub judice*, the plaintiff's expert witness likewise lacks the education, training, experience and knowledge to assist the trier of fact in understanding the evidence and to offer opinions as to the standard of care with regard to the proper medical technique, procedures and indications for the performance of a femoral angiogram and the cause of death of Terrell McDaniel. Dr. James Shamblin is a general surgeon by training, completing a surgical residency in 1963. Deposition of Dr. Shamblin, page 7, lines 9-12. CP: 98. For the past twenty (20) years prior to his retirement in 2000, Dr. Shamblin's practice consisted primarily of bariatric surgery (weight reduction surgery). Id. at 43, lines 9-14. CP: 107. Dr. Shamblin's only vascular experience is a six (6) month rotation in vascular surgery during his training from 1959-1963. Id. at 39, lines 6-14. CP: 106.

Dr. Shamblin did not hold himself out to be qualified as an expert in internal medicine, Id. at 48, lines 13-19, CP: 108, and did not contend to offer himself to the court as an expert witness with regard to the field on internal medicine. Id. at 50, lines 11-15. CP: 109. Internal medicine is a prerequisite to obtaining a sub-specialty in cardiology. Dr. Shamblin has not completed a residency in cardiology, Id. at 39, lines 15-17, CP: 106, and also did not intend to hold himself out to the court as an expert in cardiology or interventional cardiology. Id. at 51, lines 1-6. CP: 109.

Dr. Shamblin has never performed a femoral angiogram, Id. at 40, lines 6-7, 46; lines 11-14, CP: 106, and it has been 15-20 years since he has performed a femoral artery puncture. Id. at 50, lines 8-12, CP: 106. Dr. Shamblin does not have sub-specialty training in vascular surgery, Id. at 40, lines 21-23, CP: 106, and he has never performed a peripheral vascular surgical procedure, such as was performed on Terrell McDaniel. Id. at 46. CP: 108.

Dr. Shamblin offers his opinions without having reviewed the entire medical records of Terrell McDaniel at Magnolia Regional Health Center. Id. at 38, lines 16-21. CP: 106. Further,

Dr. Shamblin offered testimony as to Terrell McDaniel's cause of death without completely reviewing the medical records from Magnolia Regional Health Center and North Mississippi Medical Center. *Id.* at 37-38. CP: 106. Finally, Dr. Shamblin based his conclusion as to the cause of death of Terrell McDaniel on the death certificate. *Id.* at 38, lines 10-12. CP: 106.

The opinions offered by Dr. Shamblin are no more than criticisms and alternative courses of treatment and would not benefit the trier of fact in addressing the issue of proper medical techniques, procedures and the standard of care with regard to the indication for and performance of a femoral angiogram, which were the issues presented to the court *sub judice*. Dr. Shamblin does not have the necessary training, knowledge, education or experience to offer expert testimony regarding any issue in this case.

The Appellant contends that Dr. Pidikiti moved to strike the testimony of Dr. James Shamblin because he was not a practicing cardiologist. This is not the case. Appendix "1", pages 4-5. Dr. Pidikiti moved to strike Dr. James Shamblin's testimony because he was not qualified by knowledge, education, training, or experience to offer opinions as to the standard of care with regard to the proper medical techniques, procedures and indications for the performance of a femoral angiogram or the cause of death of Terrell McDaniel. CP: 367-420. The trial court did not strike Dr. Shamblin from testifying because he was not a cardiologist. CP.: 593. The trial court held that Dr. James Shamblin's training and expertise was in the field of general surgery. CP: 593. Pursuant to M.R.E. 702, Dr. Shamblin did not possess the specialized knowledge, experience, education or training to render an expert opinion in this case. The trial court did not abuse its discretion in striking the testimony of Dr. James Shamblin, the plaintiff's expert witness.

**C. The circuit court properly applied its discretion in granting summary judgment in favor of Dr. Nanni Pidikiti and finding that the plaintiff failed to produce expert**

**testimony as to the standards of care as they applied in this particular case or any breach thereof and dismissing the Complaint against Dr. Nanni Pidikiti.**

The Court entered its Order on December 18, 2007, striking the testimony of Dr. James Shamblin, the plaintiff's expert witness. CP: 593. Contained within this Order striking Dr. Shamblin, the Court continued the trial setting of January 14, 2008, until further Order.

Dr. Pidikiti renewed her Motion for Summary Judgment on January 4, 2008, premised on the fact that McDaniel had no qualified expert witness to testify against her as to the standard of care or any alleged breach thereof. CP: 595-632. In Troupe v. McCauley, 955 So.2d 848, 858 (Miss. 2007), the Mississippi Supreme Court held that in a medical negligence or a medical malpractice action, negligence cannot be established without medical testimony from a properly qualified and competent expert who concludes that the defendant physician failed to use ordinary skill and care. With the striking of Dr. James Shamblin's testimony, summary judgment was once again proper. The plaintiff had no expert witness to testify as to the standard of care or any breach thereof by Dr. Pidikiti.

On January 30, 2008, McDaniel filed a Motion to Hold Summary Judgment in Abeyance and Motion for Additional Time to Designate Experts. CP: 633-634. The Court entered its Order on February 21, 2008, granting McDaniel's Motion to Hold Summary Judgment in Abeyance and Motion for Additional Time to Designate Experts. CP: 639. The Court allowed McDaniel an additional sixty (60) days from February 21, 2008, in which to designate experts in the case *sub judice*. McDaniel's additional time to designate experts was set to expire on April 22, 2008. On April 24, 2008, two days after the expiration of the sixty (60) day extension previously granted to designate expert witnesses, McDaniel provided only the names and curriculum vitae of expert witnesses she proposed to designate in an attempt to gain additional time.

On April 30, 2008, the Court entered its Order Denying McDaniel's Motion for Additional Time within which to designate expert witnesses and granting Dr. Pidikiti's Motion for Summary Judgment.



CP: 718. The trial court correctly ruled that without an expert witness to testify as to the standards of care and any alleged breach thereof, no genuine issue of material fact existed and summary judgment was appropriate in favor of Dr. Pidikiti.

The trial court granted Dr. Pidikiti's Motion to Strike the Plaintiff's Expert Witness on December 18, 2007. This Order was filed with the Circuit Clerk on December 20, 2007. CP: 593. The plaintiff had over one hundred twenty (120) days until April 22, 2008, to file additional expert opinions with the trial court. During this four (4) month period, the plaintiff failed to designate additional expert witnesses. On April 24, 2008, two (2) days after the expiration of the sixty (60) day extension to designate expert witnesses previously granted by the Court, McDaniel merely filed the names and curriculum vitae of proposed expert witnesses with the Court. Contained within this filing was a request for an additional twenty one (21) days to obtain opinions of these proposed expert witnesses. McDaniel failed to designate expert witnesses within the sixty (60) day extension of time granted by the Court and summary judgment was appropriate.

McDaniel's motion for additional time to designate experts provided the Court with nothing more than the names and curriculum vitae of "anticipated" expert witnesses. Rule 56(f) of the Mississippi Rules of Civil Procedure states in pertinent part, as follows:

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justifying his position, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just."

McDaniel had over one hundred twenty (120) days to procure expert affidavits or the report of expert witnesses in opposition to Dr. Pidikiti's Motion for Summary Judgment. McDaniel failed to procure these expert opinions within the time prescribed by the court and summary judgment was proper. McDaniel was given a "fair opportunity" to oppose Dr. Pidikiti's Motion for Summary Judgment. Over sixty (60) days had lapsed between the time the trial court struck Dr. Shamblin's testimony and the time

when the trial court entered its Order Staying Dr. Pidikiti's Motion for Summary Judgment and Granting McDaniel an Additional Sixty (60) days to Designate Expert Witnesses.

McDaniel's reliance on Young v. Meacham, 999 So.2d 368, 372 (Miss. 2009) is misplaced. In Young, the Mississippi Supreme Court held that the trial court erred by not allowing the plaintiff to respond to a Motion for Summary Judgment with a supplemental affidavit pursuant to M.R.C.P. Rule 26(f). In the Young decision, the plaintiff had previously designated an expert witness, and was merely supplementing his expert opinions in response to the defendant's Motion for Summary Judgment. In the case *sub judice*, McDaniel had over one hundred twenty (120) days to designate additional expert witnesses either through reports or affidavit testimony in opposition to Dr. Pidikiti's Motion for Summary Judgment. McDaniel failed to designate expert witnesses in the time prescribed by the trial court and summary judgment was appropriate. As previously demonstrated, McDaniel had over one hundred twenty (120) days to oppose Dr. Pidikiti's Motion for Summary Judgment after Dr. Pidikiti's Motion to Strike the Plaintiff's Expert Witness was granted. In order to avoid entry of summary judgment, a party must be diligent and not rest upon allegations or denials in the pleadings. M.R.C.P. Rule 56(e). McDaniel was not diligent in obtaining additional expert witnesses' opinions to defeat Dr. Pidikiti's Motion for Summary Judgment.

McDaniel contends that the Circuit Court erred by failing to conduct a hearing on Dr. Pidikiti's Motion for Summary Judgment. In Adams v. Cinemark USA, Inc., 832 So.2d 1156, ¶ 26 (Miss. 2002), the Mississippi Supreme Court addressed the granting of summary judgment in the absence of a hearing. The Court applied the harmless error test and found that the trial court's grant of a summary judgment two (2) days early, or eight (8) days after filing, was harmless error. The court went on to state that the plaintiff had ample time for discovery prior to the entry of summary judgment. Id.

M.R.C.P. Rule 56(c) is identical to Fed. R. Civ. P. Rule 56(c), and federal courts have ruled that the decision to grant a summary judgment hearing lies with the trial judge:

“The word ‘hearing’ within the meaning of Rule 56 has been held to refer to the final submission of summary judgment motion papers, rather than implying a requirement that a full-fledged hearing with receipt of oral evidence take place with every motion. Frequently, the pleadings and other materials submitted with the summary judgment motion are considered sufficient material to satisfy the Rule 56(c) hearing requirement. Citing 11 James Wm. Moore, et al, Moore’s Federal Practice, subsection 56.15[1][a] at 56-200.1(3d Ed. 2002).” Adams at ¶ 30.

Courts generally recognize the advisability of allowing oral argument on summary judgment motions, but, even the Fifth Circuit, now agrees that the court has the power to order summary judgment without a hearing if it feels that sufficient information is available in the pleadings and the papers in support of and in opposition to the motion so that a hearing would be of no utility. Id. Citing 10a Charles Allen Wright, Arthur or Miller and Mary Kay Kane, Federal Practice and Procedure: Civil subsection 2720.1, at 357 (3d Ed. 1998) (footnotes omitted).

In Partin v. North Mississippi Medical Center, Inc., 929 So.2d 924, ¶ 38 (Miss. App. 2005), the Mississippi Court of Appeals recognizes that the error in granting a summary judgment motion without a hearing may be harmless error if there are, indeed, no triable issues of fact. Adams, specifically, declared that a summary judgment motion may be decided upon written briefs, if it appears that there are no genuine issues of material fact. Id. Thus, while our law in general requires adherence to the notice and hearing requirements of M.R.C.P. Rule 56 and while our case law declares that granting a summary judgment motion without a hearing is error, we have made some allowance for harmless error in cases in which there are clearly no genuine issues of material fact. Id.

In Strange v. Itawamba County School District, 2009 WL1121667, ¶26 (Miss. App. 2009), the Mississippi Court of Appeals recently held that the circuit court did not commit reversible error by granting summary judgment in the absence of a hearing. The court stated that Rule 78 of the Mississippi Rules of Civil Procedure provides that, “[e]ach court shall establish procedures for the prompt dispatch of business ... [and][t]o expedite its business, the court may make provisions by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons

in support and opposition.” Id. at ¶22. The First Circuit Court District of Mississippi, which includes the Circuit Court of Alcorn County, has established Rule 4(f), ratified by the Supreme Court in May 2006, which states that “[a]ll motions shall be decided by the Court without a hearing or oral argument unless otherwise ordered by the Court on its own motion, or, in its discretion, upon written motion made by either counsel.” Id. The Mississippi Supreme Court has held that there is no explicit or implicit right to a hearing under Rule 56(c). Id. at ¶23. Citing Croke v. Southgate Sewer District, 857 So.2d 774, ¶10 (Miss. 2003).

In the case *sub judice*, the Circuit Court of Alcorn County was following its own rule by not conducting a hearing on Dr. Pidikiti’s Motion for Summary Judgment. No hearing was requested by either party and the court did not determine, in its own discretion, that a hearing was necessary. The trial court determined that no genuine issues of material fact existed and a hearing on Dr. Pidikiti’s Motion for Summary Judgment would be an exercise in futility. McDaniel had no expert witness to testify as to the standard of care and any alleged breach thereof; and thus, no genuine issues of material fact existed.

M.R.C.P. Rule 56(b) states in pertinent part as follows:

“A party against whom a claim, counter-claim, 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.”

M.R.C.P. Rule 56(e) states in pertinent part as follows:

“...When a motion for summary judgment is made and supported as provided in this rule, an adverse party 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. If he does not so respond, summary judgment, if appropriate, shall be entered against him.”

McDaniel failed to file any expert affidavits or expert opinions to create a genuine issue of material fact regarding the alleged breach of the standard of care by Dr. Pidikiti. McDaniel provided the court with no evidence to rebut Dr. Pidikiti’s Motion for Summary Judgment. Dr. Pidikiti filed her Motion

for Summary Judgment in compliance with Rule 56(b) M.R.C.P. and McDaniel failed to produce any evidence that would create a genuine issue of material fact to survive summary judgment. Summary judgment was granted appropriately in favor of Dr. Pidikiti.

In Neely v. North Mississippi Medical Center, No. 2007-CA-00852-SCT, ¶ 13 (Miss. 2008), the Mississippi Supreme Court stated that:

“It is elementary that the plaintiff bears the burden of proving his claim and cannot simply rely on his or her pleadings when responding to a motion for summary judgment. M.R.C.P. 56(e) (‘An adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this re [p]ly (sic), must set forth specific facts. . .’). Our case law is clear that in medical malpractice cases, the ‘negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care.’ Travis v. Stewart, 680 So.2d 214, 218 (Miss. 1996) (quoting Phillips v. Hull, 516 So.2d 488, 491 (Miss. 1997)). Failure to produce this evidence dictates that there is no genuine issue of material facts, and therefore, summary judgment was appropriate.”

In Langley v. Miles, 956 So.2d 970, ¶ 17 (Miss. App. 2006), the Mississippi Court of Appeals held that “a party is entitled to summary judgment if the evidentiary matters before the court, such as pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, demonstrate that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.” The moving party bears the burden of persuading the court that there is no genuine issue of material fact to be tried. Citing Shaw v. Burchfield 481 So2d 247, 252 (Miss. 1985). The party with the burden of proof of a claim or defense trial carries the burden of production. Id. Citing Palmer v. Biloxi Medical Regional Medical Center, Inc., 564 So.2d 1346, 1355 (Miss. 1990). In a medical malpractice action, the plaintiff carries the burden of proof at trial and thus, the burden of production on summary judgment. Unless the matter is within the common knowledge of lay persons, to establish a *prima facie* case of medical negligence against a physician, a plaintiff must present competent expert testimony as to the applicable standard of care, breach, and proximate causation. Id. Citing Philipps at 491.

In Scales v. Lackey Memorial Hospital, 988 So.2d 426 , ¶ 10 (Miss. App. 2008), the Mississippi Court of Appeals held that to withstand summary judgment, the party opposing the motion must present sufficient proof to establish each element of each claim. Citing Galloway v. Travelers Insurance Co., 515 So.2d 678, 684 (Miss. 1997). Specifically, the plaintiff may not rest solely upon the allegations in the pleadings or arguments and assertions in briefs or legal memoranda. Id. When a party, opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential of a claim or defense, then all other facts are immaterial, and the party moving is entitled to judgment as a matter of law. Id. Citing Galloway at 684. In a medical malpractice action, negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care. Scales at ¶ 11. Citing Travis at 218. “Indeed, in the absence of a recognized exception, expert testimony is generally required to survive summary judgment.” Id.

McDaniel failed to file any expert affidavits or expert opinions to create a genuine issue of material fact regarding the alleged breach of the standard of care by Dr. Pidikiti. McDaniel provided the court with no evidence to rebut Dr. Pidikiti’s Motion for Summary Judgment and thus, summary judgment was appropriately granted in Dr. Pidikiti’s favor. The court *sub judice*, did not abuse it’s discretion in granting summary judgment in favor of Dr. Pidikiti.

### **CONCLUSION**

The trial court properly considered the substantial evidence before it and determined that Dr. James Shamblin was not qualified by virtue of his knowledge, experience, education or training to offer opinions as to the standard of care and any alleged breach thereof by Dr. Nanni Pidikiti. Further, the trial court properly held that the plaintiff failed to comply with the Order of the court granting her an additional sixty (60) days to designate expert witnesses after the plaintiff’s expert witness had been struck by motion of Dr. Pidikiti. As such, the trial court correctly granted summary judgment in favor

of Dr. Pidikiti. The plaintiff had no expert to testify against Dr. Pidikiti, and summary judgment was proper.

RESPECTFULLY SUBMITTED, this the 1 day of June, 2009.

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**CERTIFICATE OF SERVICE**

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

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