

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**ELIZABETH MARTIN**

**APPELLANT**

**VS.**

**NO. 2009-CA-01365**

**ST. DOMINIC-JACKSON MEMORIAL HOSPITAL**

**APPELLEE**

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**APPEAL FROM THE CIRCUIT COURT  
OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI**

**BRIEF OF APPELLEE**

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**ORAL ARGUMENT NOT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. 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. Elizabeth Martin, Appellant
2. St. Dominic-Jackson Memorial Hospital, Appellee
3. Honorable Swan Yerger, Circuit Court Judge
4. John E. Wade, Jr., Esq., Sharon F. Bridges, Esq., and Jonathan R. Werne, Esq., Brunini, Grantham, Grower & Hewes, PLLC, Counsel for St. Dominic-Jackson Memorial Hospital; and
5. Micah Dutro, Esq. and Ramel L. Cotton, Esq., Counsel for Elizabeth Martin



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## **STATEMENT OF THE ISSUES**

- I. Whether the Hinds County Circuit Court Properly Granted St. Dominic-Jackson Memorial Hospital's Motion for a Directed Verdict.

### **SUMMARY OF THE ARGUMENT**

Plaintiff Elizabeth Martin ("Martin") failed to establish that St. Dominic-Jackson Memorial Hospital ("St. Dominic") proximately caused her alleged knee injuries when she fell in one of the hospital's corridors. At trial, Martin presented the deposition testimony of one of her treating physicians, Dr. David Gandy. In his deposition, Dr. Gandy described his medical findings following Martin's x-rays and subsequent arthroscopic surgery. Dr. Gandy testified that Martin had internal derangement of both knees with primary arthritis and a meniscus tear on both the medial and lateral meniscus of the left knee (Deposition of Dr. Gandy, 11:18-25, 19:3-7, 20:24-25, 21:1-2). However, Dr. Gandy was never asked by Martin's counsel, nor did he ever testify, as to whether her fall at St. Dominic proximately caused her knee-related medical conditions. As a result of Martin's failure to establish medical causation of her alleged injuries, Martin failed to make a *prima facie* case for negligence, and St. Dominic's motion for a directed verdict was properly granted.

## ARGUMENT

### **I. STANDARD OF REVIEW**

“A motion for a directed verdict challenges the legal sufficiency of the evidence.” *Barfield v. State*, 22 So. 3d 1175, 1185 (Miss. 2009). The standard of review for directed verdicts is *de novo*. *Owens v. Miss. Farm Bureau Cas. Ins. Co.*, 910 So. 2d 1065, 1069 (Miss. 2005) (citing *Skrmetta v. Bayview Yacht Club, Inc.*, 806 So. 2d 1120, 1124 (Miss. 2002); *Morgan v. Greenwaldt*, 786 So. 2d 1037, 1041 (Miss. 2001)). “When deciding whether the granting of a motion for a directed verdict was proper by the lower court, this Court considers the evidence in the light most favorable to the non-moving party and gives that party the benefit of all favorable inferences that may be reasonably drawn from the evidence presented at trial.” *Gray v. BellSouth Telecomm., Inc.*, 11 So. 3d 1269, 1271 (Miss. Ct. App. 2009) (citing *Munford, Inc. v. Fleming*, 597 So. 2d 1282, 1284 (Miss. 1992)).

The Court, in its review of the circuit court’s grant of a motion for directed verdict, considers “whether the evidence, as applied to the elements of a party’s case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated.” *Hartel v. Pruett*, 998 So. 2d 979, 990 (Miss. 2008) (citing *Spotlite Skating Rink, Inc. v. Barnes*, 988 So. 2d 364, 368 (Miss. 2008) (quoting *White v. Stewman*, 932 So. 2d 27, 32 (Miss. 2006)). If the Court determines that the non-moving party’s evidence, and reasonable inferences drawn therefrom, create a question for the jury, a motion for directed verdict should not be granted. *Entrican v. Ming*, 962 So. 2d 28, 31 (Miss. 2007) (citing *Pace v. Fin. Sec. Life*, 608 So. 2d 1135, 1138 (Miss. 1992)). Nonetheless, “[a] trial court should submit an issue to the jury only if the evidence creates a question of fact concerning which reasonable jurors could disagree.” *Id.* (quoting *Vines v. Windham*, 606 So. 2d 128, 131 (Miss. 1992)).

**II. MARTIN FAILED TO PROVE ST. DOMINIC'S ALLEGED NEGLIGENCE PROXIMATELY CAUSED HER KNEE INJURIES; ACCORDINGLY, ST. DOMINIC IS ENTITLED TO A DIRECTED VERDICT.**

**A. *Martin Failed to Offer Expert Testimony on Medical Causation of Her Alleged Injuries.***

Appellant Elizabeth Martin argues that “the trial court erred in holding that Martin failed to produce sufficient evidence to establish the proximate cause of her injury” and that the proximate cause of Martin’s injury is a question of fact to be determined by the jury. (Appellant Br. at 9).

In order to recover damages in a negligence action, a plaintiff is required to establish that the damage was proximately caused by the negligent act of the defendant. *City of Jackson v. Spann*, 4 So. 3d 1029, 1033 (Miss. 2009) (citing *Glover v. Jackson State Univ.*, 968 So. 2d 1267, 1277 (Miss. 2007)). Proximate cause necessitates a finding that the alleged negligence was both the cause in fact and the legal cause of the damage. *Id.* (citing *Glover*, 968 So. 2d at 1277) (internal citations omitted)). The plaintiff establishes “cause in fact” by showing that, but for the defendant’s negligence, the injury would not have occurred. *Id.* (citing *Glover*, 968 So. 2d at 1277). After cause in fact is established, legal cause will also be established, provided that the damage is within the type of damage the negligent defendant should have foreseen to result from his negligence. *Id.* (citing *Glover*, 968 So. 2d at 1277) (internal citations omitted).

Martin alleged that on September 27, 2005, she slipped and fell on one of the hospital’s waxed floors, causing her to suffer knee injuries. Prior to her fall at St. Dominic, Martin suffered from, and was treated being treated for, osteoarthritis. (Trial Tr. 71:28-29, 72:1-2, 112:21-28). Martin’s previous medical records indicated problems with her left knee “giving out.” (Trial Tr. 113:24-29; 114:1). In fact, when her knee began to swell following her discharge from St. Dominic, she assumed it was due to her arthritis. (Trial Tr. 71:18-19, 28-29, 72:1-2). Martin testified that Dr. Gandy told her that she had torn ligaments in her left knee and needed



arthroscopic surgery. (Trial Tr. 72:19-23). After a review of her medical records, she also acknowledged Dr. Gandy's impression of her injuries in November 2005 to be "internal derangement [of] both knees with probably arthritic primarily." (Trial Tr. 117:21-29, 118:1-8). Dr. Gandy's post-operative diagnosis was "No. 1 medial and lateral meniscus tear, left knee. No. 2, arthritis, left knee." (Trial Tr. 119:25-29, 120:1-12).

Martin offered no expert testimony to prove causation of these knee injuries which she attributed to her fall at St. Dominic and concluded her case-in-chief after calling Dr. Gandy to testify as to her medical treatment at his clinic. The Court of Appeals has previously recognized the importance of expert testimony in establishing medical causation. In *Hosey v. Mediamolle*, the plaintiff, alleging injuries due to exposure to toxic mold, appealed the trial court's grant of summary judgment to the real estate defendants. 963 So. 2d 1267, 1268 (Miss. Ct. App. 2007). In spite of the plaintiff's arguments for more time to designate an expert witness, the Court of Appeals determined that the plaintiff allowed thirty-eight months to pass without identifying an expert and failed to present any affidavits or facts to justify her failure to designate an expert. *Id.* at 1269-1270. "Without an expert, [the plaintiff] was unable to prove the elements of the case." Accordingly, the Court of Appeals recognized this error as fatal to the plaintiff's claim and found the trial court's dismissal by summary judgment proper. *Id.* at 1270.

Similarly, in *Moffett v. Jones County*, a recent suit in the Southern District of Mississippi, the court determined that summary judgment should be granted where the plaintiffs failed to establish a causal connection between the alleged act or omission of the defendants and the personal injuries claimed by plaintiffs. No. 2:08cv21 KS-MTP, 2009 WL 1515119, at \*2 (S.D. Miss. Jun. 1, 2009). Plaintiffs, a mother and her minor son, contended that they experienced physical and psychological injuries related to the school's negligence in developing an Individualized Education Plan for the son and an incident at the school where a teacher burned

edges of a poster with a match, allegedly causing asthmatic and psychological trauma issues for the child. *Id.* at \*1-2. The mother allegedly suffered an increased rate of seizures and was required to limit her job duties as a result of the defendants' conduct. *Id.* at \*6. Upon consideration of the defendants' motion for summary judgment, the court called attention to the plaintiffs' failure to designate any medical experts who could offer testimony that the minor son's psychological problems were causally related to the match incident. *Id.* at \*7. The son's medical records, though inadmissible due to a lack of certification, indicated that he received counseling prior to and after the match incident for various psychological and behavioral issues. *Id.* Among other legal deficiencies, the child's mother also failed to show any causal connection between her alleged emotional injuries and the match incident. *Id.* at \*8. With no expert witnesses designated to "link any emotional or physical problem" allegedly suffered by the mother, "her negligence claim against the defendants must fail as well." *Id.*

Here, Martin failed to designate an expert witness that would testify as to the causation of her injuries. Rather, she relied on Dr. Gandy, one of her treating physicians, for testimony related to her knee conditions. As a result of Martin's failure to designate an expert witness to testify to medical causation, Martin cannot establish proximate cause, and thus, the trial court properly granted St. Dominic's motion for a directed verdict.

**B. *Dr. Gandy's Testimony Regarding Martin's Alleged Injuries was Not to a Reasonable Degree of Certainty and Did Not Establish Proximate Cause.***

In an action for negligence, the plaintiff must establish the elements of breach and proximate cause with supporting evidence. *Todd v. First Baptist Church of West Point*, 993 So. 2d 827, 829 (Miss. 2008). If an expert's opinion is not based on a reasonable degree of certainty, or the expert's opinion is not probable, the jury may not consider the opinion in making a decision. *Hans v. Mem'l Hosp. at Gulfport*, No. 2008-CA-01617-COA, 2010 WL 918327, at \*7 (Miss. Ct. App. Mar. 16, 2010) (quoting *Kidd v. McRae's Stores P'ship*, 951 So. 2d 622, 626

(Miss. Ct. App. 2007)). “It is the intent of the law ‘that if a physician cannot form an opinion with *sufficient certainty* as to make a medical judgment, neither can a jury use that information to reach a decision.’” *Id.* (quoting *Kidd*, 951 So. 2d at 626).

Although Martin suggests that the trial court incorrectly applied the *Kidd* case and contends that it merely relates to the admissibility of an expert witness’s statements, the Court of Appeals applied *Kidd* in the same context as the trial court. In *Hans*, the Court recognized the *Kidd* court’s determination:

[W]hen an expert’s opinion is not based on a reasonable degree of medical certainty, or the opinion is articulated in a way that does not make the opinion probable, the jury cannot use that information to make a decision. Failure to properly qualify an expert opinion typically occurs in testimony that is speculative, using phrases such as “probability,” “possibility,” or even “strong possibility.” It is the intent of the law “that if a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision.”

2010 WL 918327 at \*7. Agreeing with the defendants, the Court found that the plaintiff’s expert witness could not make “sweeping allegations” and sufficiently articulate the standard of care. *Id.* The expert opined that delays in service and treatment were negligent but failed to identify the parties responsible for the delays or provide any certainty as to causation. *Id.*

In *Ryals v. Bertucci*, the Court of Appeals considered whether the patient plaintiff’s expert witness testified with medical certainty that the defendants’ alleged medical malpractice proximately caused his loss of vision. 26 So. 3d 1090, 1093 (Miss. Ct. App. 2009). The physician expert witness failed to affirmatively state whether the alleged injuries (macular scarring) related to the loss of vision were caused by any negligent acts of the defendants or whether the patient’s outcome would have been different if the defendants had instead rendered medically appropriate treatment. *Id.* at 1097. As a result of the expert witness’s failure to establish that the defendants’ actions proximately caused the injuries complained of, the Court of Appeals held that the trial court did not err in directing a verdict in favor of the defendants. *Id.*

Similarly, in *Day v. Ocean Springs Hosp. Sys.*, the Court of Appeals considered the plaintiff's appeal after the trial court found that she had failed to prove negligence by the hospital. 923 So. 2d 246, 247 (Miss. Ct. App. 2006). The plaintiff, mother of a patient at Ocean Springs Hospital, slipped and fell in water in the patient's room, injuring her wrist. *Id.* Though one of the plaintiff's treating physicians opined that the plaintiff's wrist condition was the result of her fall, the physician also stated that his opinion was solely based on the patient history provided by the plaintiff. *Id.* at 248. Consequently, the trial court held that the plaintiff failed to establish the negligence elements of breach and causation. *Id.* at 249. The Court of Appeals affirmed the trial court's decision, noting that, aside from having no eyewitnesses to the fall, the plaintiff also failed to provide any medical evidence of proximate cause. *Id.* at 250. "No physician opined that [the plaintiff]'s injury only could have been caused as alleged by [the plaintiff]." *Id.* at 252.

In *Harris v. Int'l Truck and Engine Corp.*, a products liability action, the plaintiff's experts provided different conclusions regarding the product's defects. 912 So. 2d 1101, 1106 (Miss. Ct. App. 2005). The plaintiff argued that, in spite of his experts' inability to reach a conclusion as to the product's defect, the evidence was sufficient to go to a jury. *Id.* However, the Court of Appeals held that a plaintiff must base the theory of his case on more than speculation as juries are required to base their verdicts on more than "mere speculation or possibilities." *Id.* (citing *Denman v. Denman*, 134 So. 2d 457, 460-61 (Miss. 1961)). The plaintiff's evidence regarding the product's defective was speculative as was his theory as to the causation of his injuries. *Id.* As a result, the Court affirmed the grant of summary judgment to defendants. *Id.* at 1107.

Here, Martin contends that her treating physician, Dr. Gandy, established her fall at St. Dominic as the cause of her injuries. In his deposition testimony which was presented at trial,

Dr. David Gandy recalled the patient's history as retold to him by Martin. *See* Dr. Gandy Dep. 12:17-20, May 5, 2009. She complained of having had pain in her left knee for two years and recent pain in the right knee as well as the fall (about two months before her visit) with a direct blow to the right leg. *See* Dr. Gandy Dep. 10:17-22. He also testified that, after follow-up x-rays on Martin, his impression was "internal derangement of both knees with primary arthritis." Dr. Gandy Dep. 11:18-23. Dr. Gandy performed arthroscopic surgery on Martin to diagnose the source of her knee pain and treat the symptoms she was experiencing, or to deal with the arthritis and the meniscus tear. *See* Dr. Gandy Dep. 14:20-22, 15:22-25, 18:17-24, 26:6-9. After performing the surgery, Dr. Gandy concluded that Martin had a "medial and a lateral meniscus tear left knee and arthritis left knee." Dr. Gandy Dep. 20:24-25, 21:1-2.

Upon examination by St. Dominic's counsel, Dr. Gandy testified that he explained to Martin that meniscus tears "could come from wear and tear or from an acute injury" and that this was still his opinion as of May 5, 2009. Dr. Gandy Dep. 27:12-20. He further noted that Martin complained of pain on her last follow-up appointment with Dr. Gandy but that he expected her to experience some pain from the arthritis. Dr. Gandy Dep. 27:21-25, 28:1-6.

Dr. Gandy's testimony failed to establish that Martin's injuries were proximately caused by the fall. Dr. Gandy simply diagnosed her knee conditions as arthritis and meniscus tears and then testified that meniscus tears can be caused by "wear and tear *or* from an acute injury." *See* Dr. Gandy Dep. 27:12-20 (emphasis added). Dr. Gandy was never asked, nor did he testify as to whether Martin's injuries were caused by the fall.

Clearly, Dr. Gandy's testimony as Martin's treating physicians fails to establish with a reasonable degree of certainty that her knee conditions are related to her fall at St. Dominic. Even Martin's counsel admitted that "Dr. Gandy's testimony – of course, he's giving all options. There – in any diagnosis, there are a number of reasons why someone could develop this kind of

a situation.” Trial Tr. 130:22-26. The trial court noted the uncertainties of the causation of Martin’s injuries:

[T]his Court made a specific inquiry of the plaintiff during the argument on the motion for directed verdict at the end of the plaintiff’s case what specific medical testimony there was of proximate causation by a medical doctor relating to this accident and this particular injury. And the Court never did receive, in its opinion, a sufficient answer to that particular question.

Trial Tr. 240:4-13. Martin called two witnesses during the trial – herself and her treating physician, Dr. Gandy. Martin, alone, testified that her fall at St. Dominic proximately caused her injuries. As the Court of Appeals held in *Day*, the plaintiff’s testimony is insufficient to establish medical causation. Because Dr. Gandy cannot establish with sufficient certainty that Martin’s injuries were caused by her fall, the jury should not be allowed to consider the issue. Accordingly, the trial court properly granted St. Dominic’s motion for directed verdict.

### III. CONCLUSION

This Court should affirm the trial court’s decision to grant St. Dominic-Jackson Memorial Hospital’s Motion for Directed Verdict. Based on the testimony presented during the trial, Martin failed to show that St. Dominic was negligent and proximately caused the injuries she alleged. For these reasons, the Court should affirm the trial court’s decision to grant St. Dominic’s Motion for Directed Verdict.

Respectfully Submitted, this the 11th day of August, 2010.

ST. DOMINIC-JACKSON MEMORIAL HOSPITAL

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**CERTIFICATE OF SERVICE**

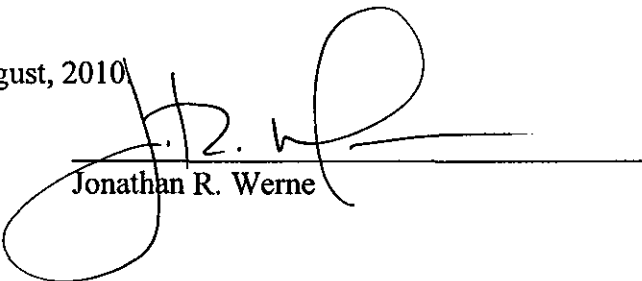
I hereby certify that I have this day, via United States mail, first class postage prepaid,  
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This the 11th day of August, 2010

  
Jonathan R. Werne