

**IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI**

DOCKET NO. 2009-CA-01892

RAFAEL PEREZ

Plaintiff/Appellant

VERSUS

**UNIVERSITY OF MISSISSIPPI MEDICAL CENTER;
CARDINAL HEALTH, 109 INC.; PHARMACY MANAGEMENT
BUSINESS OF CARDINAL HEALTH
f/k/a OWEN HEALTH CARE, INC.**

Defendant/Appellees

HARTFORD ACCIDENT & INDEMNITY COMPANY

Intervenor

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

**BRIEF OF APPELLEE, CARDINAL HEALTH 109, INC.
(ORAL ARGUMENT NOT REQUESTED)**

DOVE & CHILL
Luke Dove, MSB No. [REDACTED]
1020 Highland Colony Parkway
Suite 412
Ridgeland, MS 39157
Telephone: 601.352.0999
Facsimile: 601.352.0990
Email: lukedove@dovechill.com

ATTORNEY FOR APPELLEE,
CARDINAL HEALTH 109, INC.

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APPELLANT

V.

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f/k/a/ OWEN HEALTH CARE, INC.

APPELLEES

HARTFORD ACCIDENT & INDEMNITY COMPANY

INTERVENOR

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.

Plaintiff/Appellant Rafael Perez¹

Wayne E. Ferrell, Jr., Esq
Post Office Box 24448
Jackson, MS 39225-4448
Counsel for Appellants Rafael Perez a/k/a Ray Perez

Defendant/Appellee University of Mississippi Medical Center

Walter T. Johnson, Esq.
Joseph G. Baladi, Esq.
Robert H. Pedersen, Esq.
Watkins & Eager PLLC
Post Office Box 650
Jackson, Mississippi 39205
(601) 965-1900
Counsel for Defendant/Appellee University of Mississippi Medical Center

¹ Appellant Perez's brief lists Kathy Perez as an appellant but she is not. The Complaint, the Amended Complaint and the Circuit Court Clerk's Docket do not name her as a party. (R.1; RE1; R.7, 40). For unknown reasons, Mr. Perez began showing her in the style of the case on August 22, 2008, (R. 204), but she was never made a party.

Defendant/Appellee Cardinal Health, 109 Inc.

Luke Dove, Esq.
Dove & Chill
1020 Highland Colony Park, Suite 412
Ridgeland, Mississippi 39157-8719
Counsel for Cardinal Health 109 Inc.

Intervenor Hartford Accident & Indemnity Company

W. Bienville Skipper, Esq.
Daniel, Coker, Horton & Bell, P.A.
Post Office Box 1084
Jackson, Mississippi 39215-1084
Counsel for Intervenor Hartford Accident & Indemnity Company

Respectfully submitted,

DOVE & CHILL

BY: _____


Luke Dove (MSB #6174)

STATEMENT REGARDING ORAL ARGUMENT

Appellee, Cardinal Health 109, Inc., does not request oral argument.

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STATEMENT OF THE ISSUES

The trial court granted Summary Judgment in favor of Appellees and dismissed Appellant's suit because he produced no probative evidence that an alleged negligent dispensing and application of Floxin Otic proximately caused his eye infection. The issue on appeal is whether the trial court erred in granting Defendants/Appellees' Motions for Summary Judgment.

STATEMENT OF THE CASE

Nature of the Case

This is a Mississippi Tort Claims Act claim to recover damages caused by the alleged negligent dispensing and application of a solution called Floxin Otic[®] to Appellant, Rafael Perez, after corneal transplant surgery.

According to the Amended Complaint¹, Dr. Robert A. Mallette on April 3, 2003, performed emergency corneal transplant surgery on Perez' left eye at the University of Mississippi Medical Center (UMMC). Dr. Mallette prescribed an eye drop solution called Ocuflux[®] for use after the surgery to help the eye heal. Perez alleges the employees who worked at the UMMC pharmacy under the control of Cardinal Health 109, Inc. (Cardinal Health) negligently dispensed a prescription solution for use in the ear called Floxin Otic[®] to Perez instead of Ocuflux[®]. Perez alleges that after he used Floxin Otic[®] for four days, his eye became infected. Perez charges UMMC and Cardinal with negligence because they allegedly breached their duty to dispense the correct prescription by dispensing Floxin Otic[®] instead of the prescribed Ocuflux[®]. Perez seeks to recover damages from UMMC and Cardinal Health for an alleged injury to his eye, for medical expenses and for the pain, suffering and emotional distress he experienced from the alleged negligent dispensing of Floxin Otic[®]. (R. 40-51).²

Statement of Facts

In the early 1990's hot molten steel came in contact with and injured Perez' left eye. The hot steel extensively damaged the cornea and other parts of the eye. Over the years, Perez had

¹The Complaint was filed only against UMMC. (R. 7-14). The Amended Complaint added Cardinal Health as a defendant. (R. 40-51).

² Floxin Otic[®] and Ocuflux[®] are the registered names for the antibacterial solutions (R.335, 336; RE 43, 44) and are the names used in this brief to refer to the two solutions. In some pleadings Floxin Otic[®] is called Floxin (R. 231; RE 29) or Floxin Otic[®] .3% (R. 218; RE 37) and in some pleadings

several corneal transplants which failed because of the extensive damage to his eye. (R. 230-231; RE 28-29). In April, 2003, Perez' physicians attempted another corneal transplant at UMMC. (R. 42, 231; RE 29).

After the surgery, Perez' physician prescribed one drop four times a day of an antibiotic ophthalmic³ solution called Ocuflax[®]. Perez took the prescription to the UMMC pharmacy to have it filled. However, instead of giving Perez Ocuflax[®], the pharmacy gave him Floxin Otic[®] to be taken one drop, four times a day. (R.231; RE 29).⁴ The pharmacy was managed by Cardinal Health. (R. 46, 337). After the surgery, ulcers developed on Perez' eye and it became infected and was later removed. (R. 43, 381, 383, 385).

Course of Proceedings

UMMC and Cardinal Health responded to the Amended Complaint and denied Perez' substantive allegations and denied they were liable to Perez for the alleged negligent dispensing of Floxin Otic[®]. (R. 52-65, 83-88). Hartford Accident and Indemnity Company filed a Complaint for Intervention to recover the workers compensation benefits it paid as a result of Perez' eye injury that occurred while he was employed with Mississippi Steel, Division of BSC Steel. (R. 94-96).

Perez moved for partial summary judgment on the issue of liability. Perez asked the Circuit Court to enter a judgment that UMMC and Cardinal Health were negligent because they breached their duty by not giving him the medication prescribed by his physician. Perez argued that the undisputed facts showed that Floxin Otic[®] is an antibiotic used for treatment of ear

Ocuflax[®] is called Ocuflax[®] Ophthalmic (R. 231, 217; RE 29, 36) or Ocuflax[®] .3% (R. 218; RE 37).

³ Ophthalmic means "a person affected with ophthalmia", and ophthalmia means "severe inflammation of the eye or of the conjunctiva or deeper structures of the eye." Dorland's Illustrated Medical Dictionary 29th Edition at 1270 (2000).

⁴ Otic means "pertaining to the ear." Dorland's Illustrated Medical Dictionary 29th

infections, that Ocuflor[®] is an antibiotic used for treatment of eye infections. Perez alleges that the UMMC pharmacy personnel gave him Floxin Otic[®] instead of Ocuflor[®] as Dr. Mallette prescribed. Therefore, Perez contended he was entitled to a partial summary judgment on the issue of liability and that the amount of his damages was the only remaining issue in dispute. (R. 162-166).

UMMC and Cardinal Health opposed Perez' partial summary judgment motion and also filed separate motions for summary judgment seeking dismissal of Perez' claim. (R. 167-174, 175-176, 208-212, 216-223, 331-336, 337-342). UMMC and Cardinal Health argued that Perez was not entitled to partial summary judgment. Instead, UMMC and Cardinal Health argued that they were entitled to summary judgment because Perez could not prove the essential element of **causation** for his negligence claim. UMMC and Cardinal Health relied on three affidavits (R.216-223; RE 35-42) and the package inserts (R. 335-336; RE 43-44) to demonstrate that the **ingredients in Floxin Otic[®] and in Ocuflor[®] were identical and could be interchangeably used**. Because the ingredients were identical, UMMC and Cardinal Health argued that Perez could not show and had not shown that the alleged negligent dispensing of Floxin Otic[®] instead of the prescribed Ocuflor[®] proximately **caused** any harm or injury to Perez' eye.

Disposition in the Court Below

At the hearing on the motions, Perez argued that his expert, Dr. David M. Berry, concluded the two antibiotic solutions were different, but when the Circuit Court inquired of counsel where Dr. Berry gave the factual basis for his conclusion, Appellant could not do so. (Tr. 9; RE 16-17). During Perez' argument, the circuit court also noted that Dr. Berry's affidavit contained no fact-based reasons to explain Dr. Berry's conclusion that Floxin Otic[®] solution was

harmful if placed in the eye. Perez could not and did not point to any facts in the affidavit which supported Dr. Berry's conclusion. (Tr. 10; RE 17).

The Circuit Court stated that it was not comparing and weighing conflicting affidavit testimony from Perez' expert against the expert affidavit testimony offered by UMMC and Cardinal Health. Instead, the Circuit Court stated it based its ruling on "whether Dr. Berry's affidavit is sufficient in itself." (Tr. 15; RE 22). The Circuit Court found that Dr. Berry's affidavit was arguably sufficient to create an issue of material fact as to whether the standard of care was breached by the dispensing of Floxin Otic[®] instead of Ocuflox[®]. (Tr. 15; RE 22). However, as to the **causation** element of a negligence claim, the circuit court found Dr. Berry's affidavit did not create any factual dispute. The circuit court found that Dr. Berry never provided a factual foundation that explained with any certainty why he opined that the dispensing of Floxin Otic[®] instead of Ocuflox[®] would cause caustic damage to the eye. (Tr. 15-16; RE 22-23). Since probative evidence of **causation** had not been produced, the circuit court granted the motions for summary judgment filed by UMMC and Cardinal Health. (Tr. 16; RE 23; R. 423; RE 27).

SUMMARY OF ARGUMENT

UMMC and Cardinal Health met the summary judgment standard by demonstrating that Perez could not show that the dispensing of Floxin Otic[®] instead of Ocuflox[®] was the proximate cause of any harm to Perez' eye. They met their burden through expert opinion testimony which was supported by facts in the record.

The information in the package inserts for Floxin Otic[®] and Ocuflox[®] showed that each contains exactly the same active ingredient, the same solution and practically identical pH levels.

The affidavit testimony of UMMC's and Cardinal Health's three experts confirmed that the active ingredient in, and the solutions for, Floxin Otic[®] and Ocuflox[®] are medically and therapeutically identical. They explained that although Floxin Otic[®] is approved, manufactured and marketed for use in the ear, it can be and is used interchangeably for the ear and the eye. Finally, they opined that the damage to Perez' eye was not caused by his use of Floxin Otic[®], but instead, was the result of the hot molten steel that initially caused the injury.

Perez failed to meet his summary judgment burden because he did not produce significant probative evidence to show that Floxin Otic[®] proximately **caused** or contributed to the harm to his eye. Dr. Berry's unsubstantiated conclusions were not sufficient because he provided no facts to support them.

The circuit court appropriately disregarded Perez' expert's conclusory statements and entered summary judgment on Perez' negligence claim because he did not establish a dispute about facts that are material to the **causation** element of his negligence claim.

ARGUMENT

Standard of Review

¶6. The standard of review for the grant or denial of a motion for summary judgment is de novo. *Stringer v. Trapp*, 30 So. 3d 339, 341 (Miss. 2010). Summary judgment properly may be granted where "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 judgment as a matter of law." M.R.C.P. 56(c).

Gorton v. Rance, ____ So.3d ____, NO. 2009-IA-01111-SCT, 2011 Miss. LEXIS 62, *4-*5 (¶6) (Miss. Jan. 27, 2011).

UMMC's and Cardinal Health's Summary Judgment Motions

As the movants for summary judgment, UMMC and Cardinal Health had "the job of persuading the court, first, that there is no genuine issue of material fact and, second, that on the basis of the facts established, [they were] entitled to judgment as a matter of law." *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 198 (Miss. 1988). To satisfy this burden, UMMC and Cardinal Health showed Perez could not prove one of the essential elements of his negligence claim and, therefore, they were entitled to summary judgment because "[s]ummary judgment is mandated where the respondent has failed "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1214 (Miss. 1996), *citing*, *Galloway v. Travelers Insurance Co.*, 515 So. 2d 678, 683 (Miss. 1987), *quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)."

Causation was the tort claim element UMMC and Cardinal Health showed Perez could not prove. Proving **causation** is essential to his claim. *Palmer v. Biloxi Regional Medical Center*, 564 So.2d 1346, 1355 (Miss. 1990) ("[T]he conventional tort elements [are] duty, breach of duty, **proximate causation**, and injury (i.e., damages)."); *Burnham v. Tabb*, 508 So.2d 1072, 1074 (Miss. 1987)("Proximate cause is an essential element in an action of negligence . . .").

UMMC and Cardinal Health relied on the package inserts for Ocuflax[®] and Floxin Otic[®] and on three affidavits to produce facts which showed Perez' use of Floxin Otic[®] could not and did not "**cause**" injury or damage to his eye.

Ocuflox[®] Package Insert and Floxin Otic[®] Package Insert

The ingredient and formulations shown in the package inserts for Ocuflox[®] (R. 335; RE 43) and for Floxin Otic[®] (R.336; RE 44) are listed in this table. There is no material difference. They are for all practical purposes identical.

	Floxin Otic[®] (R.336; RE 44)	Ocuflox[®] (R.335; RE 43)
Active Ingredient	ofloxacin 0.3%	ofloxacin 0.3%
Ofloxacin Formula	C ₁₈ H ₂₀ FN ₃ O ₄	C ₁₈ H ₂₀ FN ₃ O ₄
Molecular weight	361.38	361.37
Ofloxacin chemical name	(±)-9-fluoro-2,3-dihydro-3-methyl-10-(4-methyl-1-piperazinyl)-7-oxo-7H-pyrido[1,2,3-de]-1,4benzoxazine-6-carboxylic acid.	(±)-9-Fluoro-2,3-dihydro-3-methyl-10-(4-methyl-1-piperazinyl)-7-oxo-7H-pyrido[1,2,3-de]-1,4benzoxazine-6-carboxylic acid.
pH	6.5 ± 0.5	6.4 (range 6.0 to 6.8)
Other Ingredients	Benzalkonium chloride, sodium chloride and water and hydrochloric acid and sodium hydroxide to adjust the pH	Benzalkonium chloride, sodium chloride and purified water and hydrochloric acid and/or sodium hydroxide to adjust pH.

Affidavit of Michael Todaro, Phar D.

Dr. Michael Todaro has been engaged in the clinical practice of pharmacy for 10 years and specializes in pharmacology and pharmacokinetics. (R. 216, 217; RE 35, 36). Pharmacy is “the branch of health sciences dealing with the preparation, dispensing, and proper utilization of drugs.”⁵ Pharmacology is “the science that deals with the origin, nature, chemistry, effects, and uses of drugs . . .”⁶ Pharmacokinetics is “that branch of pharmacology which deals with the

⁵ Dorland’s Illustrated Medical Dictionary 29th Edition at 1367(2000).

⁶ Dorland’s Illustrated Medical Dictionary 29th Edition at 1366(2000).

biological, biochemical, and economic features of natural drugs and their constituents.”⁷

Dr. Todaro stated that “Floxin Otic and Ocuflux Ophthalmic solutions contain identical ingredients [and] Floxin Otic can be, and is, used interchangeably for ears and eyes.” (R. 217; RE 36). Based on these factual findings and his education and experience, Dr. Todaro opined “to a reasonable degree of medical probability” that “whether Floxin Otic or Ocuflux Ophthalmic solution was dispensed **did not have an effect** on [Perez’] medical outcome . . . [and] the use of Floxin Otic rather than Ocuflux Ophthalmic **does not suggest [Perez’] medical outcome was caused** by Floxin Otic because they contain identical ingredients.” (R. 216, 217; RE 35, 36)(emphasis added).

Affidavit of Anthony J. Verlangieri, Ph.D.

Dr. Verlangieri is a toxicologist/pharmacologist and is employed in the Pharmacology Department at the University of Mississippi School of Pharmacy where he has been a full professor of toxicology and pharmacology since 1986. (R.218; RE 37). Toxicology is “the scientific study of poisons, their actions, their detection, and the treatment of the conditions produced by them.”⁸ Dr. Verlangieri stated that:

- ◆ Ocuflux[®] and Floxin Otic[®] contain the antibiotic Ofloxacin and Ofloxacin is in the same “sterile aqueous antibacterial solutions” in “identical pharmacological and chemical formulations”, and that Ocuflux[®] and Floxin Otic[®] “are active against the same organisms” and “are therapeutically equivalent”. (R.218, 219; RE 37, 38).
 - ◆ Ocuflux[®] is approved, manufactured and marketed for use in the eye. (R. 219; RE 38).
 - ◆ Floxin Otic[®] is approved, manufactured and marketed for use in the ear. (R. 219; RE 38).
- Based on these facts and based on his education and experience, to include his familiarity

⁷ Dorland’s Illustrated Medical Dictionary 29th Edition at 1367(2000).

with the drug formulations for Ocuflor[®] and Floxin Otic[®] and the pharmacological composition of their preparations, Dr. Verlangieri opined to a reasonable degree of pharmacological certainty “that the use of [Floxin Otic[®]] in the eye **could have no adverse effect**” and that “the use of Floxin Otic or Ocuflor would not have **caused or contributed** to [Perez’s] eye injury or the damages he alleges [in his lawsuit]”. (R. 219; RE 38)(emphasis added).

Affidavit of Maurice James, M.D.

Dr. James is a board certified ophthalmologist and has practiced and trained physicians for 30 years. (R. 221; RE 40). An ophthalmologist is “a physician who specializes in the diagnosis and medical and surgical treatment of diseases and defects of the eye and related structures.”⁹ Dr. James is familiar with corneal transplantation surgery and the applicable standard of care and he is familiar with the use of Ocuflor[®] and Floxin Otic[®]. (R. 221-222; RE 40–41). Based on his review of Perez’s medical records and medical literature and based on Dr. James’ education, training, and experience, Dr. James opined to a “reasonable degree of medical certainty” that

Mr. Perez had a prior industrial injury which created a medical condition that caused several corneal transplants to be attempted—all of which failed. The severity of his injury created an environment that made graft failure more probable than not regardless of whether Floxin Otic was administered. One cannot conclude, to a reasonable degree of medical probability, that Mr. Perez’s [sic] ultimate outcome was caused by Floxin Otic and to assert such is speculative and inconsistent with his disease state, previous surgical outcome and fund of knowledge currently existent.

To a reasonable degree of medical probability, the administration of

Floxin Otic to Mr. Perez **was not a cause** of his corneal failure.

(R.223; RE 42)(emphasis added).

⁸ Dorland’s Illustrated Medical Dictionary 29th Edition at 1855 (2000).

⁹ Dorland’s Illustrated Medical Dictionary 29th Edition at 1270(2000).

Summary Of UMMC's and Cardinal Health's Undisputed Facts

- The package inserts showed the two solutions were identical in every material way.
- According to Dr. Todaro, the clinical pharmacist, Ocuflox[®] and Floxin Otic[®] can be used in the eyes or ears with no adverse effect, and Perez' use of Floxin Otic[®] had no effect on his medical outcome.
- According to Dr. Verlangieri, the pharmacologist, Ofloxacin is used in Ocuflox[®] and in Floxin Otic[®] in the same pharmacological and chemical formulations and Ocuflox[®] and Floxin Otic[®] work against the same organism, and Ocuflox[®] is marketed for the eyes and Floxin Otic[®] is marketed for the ears, but Perez' use of Floxin Otic[®] had no adverse effect on his eye.
- According to Dr. James, the ophthalmologist, the severity of Perez' eye injury and the several prior unsuccessful corneal transplant attempts made this transplant surgery problematic, and the dispensing of Floxin Otic[®] was not the cause of the failure of Perez' corneal transplant surgery.

This factual and opinion evidence showed that Perez could not establish the **causation** element of his negligence claim.

The burden now shifted to Perez, and he “was required to rebut [UMMC's and Cardinal Health's summary judgment evidence] by producing *significant, probative* evidence establishing that [his eye injury] was proximately caused by [the negligent dispensing of Floxin Otic[®]]. . . . [and he] must . . . set forth by affidavit or other means specific facts showing that triable issues of fact exist [on causation].” *Palmer v. Biloxi Regional Medical Center*, 564 So.2d at 1356. (emphasis in original).

Perez' Opposition to Summary Judgment

Perez relied on Dr. Berry's affidavit to oppose the summary judgment motions. Dr. Berry is a medical doctor who did his residency in emergency medicine and currently operates a business he founded in 2007 that provides expert medical consultation and testimony. (R. 234; RE 32). Emergency medicine is "that speciality which deals with acutely ill or injured patients who require immediate medical treatment." ¹⁰

Dr. Berry acknowledges the active ingredient in Ocuflor[®] is the same as the active ingredient in Floxin Otic[®]:

- "Ocuflor and Floxin [Otic[®]] are the **same** family of antibiotics. . ."
- Ocuflor[®] and Floxin Otic[®] "have the **same** antimicrobial action in the manner in which they rid the body of certain types of microbes, mainly bacteria. . ."
- "The active ingredient [ofloxacin 0.3%] of these two medications falls under the class of fluoriquinolones . . . [and] [i]n this regard Ocuflor and Floxin [Otic[®]], for all practical purposes **are identical medications** in their antimicrobial effects."
- "[T]he antibiotic in the otic solution is **similar** to the antibiotic in the ophthalmic solution."

(R. 231-232; RE 29-30)(emphasis added).

Dr Berry never disagrees with the information in each package insert which shows the active ingredient in Ocuflor[®] and Floxin Otic[®] has the same formula (C₁₈H₂₀FN₃O₄), the same chemical name¹¹ and almost identical molecular weight (361.37/361.38). (R. 335, 336; RE 43, 44).

¹⁰ Dorland's Illustrated Medical Dictionary 29th Edition at 1070(2000).

¹¹ "(±)-9-fluoro-2,3-dihydro-3-methyl-10-(4-methyl-1-piperazinyl)-7-oxo-7H-pyrido [1,2,3-de]-1,4-benzoxazine-6-carboxylic acid."

Nonetheless, Dr. Berry contends the “solution” for Floxin Otic[®] is different from the “solution” for Ocuflox[®] but the only difference he identifies is that the former is used for the ear and the latter is used for the eye. (R.231, 232; RE 29, 30). Otherwise, Dr. Berry never identifies or describes how the “solutions” differ.

Dr. Berry does not address the other ingredients in Floxin Otic[®] and Ocuflox[®]. However, if he did, he would have to concede they are identical. Both package inserts show the solution ingredients in both to be Benzalkonium chloride, sodium chloride, water, hydrochloric acid and sodium hydroxide to adjust the pH. (R. 335, ; RE 43-44).

Dr. Berry does not comment on the pH for each solution. The average pH for Ocuflox[®] is “6.4” and the average pH for Floxin Otic[®] is “6.5”. (R. 335, 336; RE 43, 44). The slight difference could not cause the eye injury because the average pH for Ocuflox[®] is slightly more acidic than the average pH for Floxin Otic[®].¹²

Lacking any factual foundation, Dr. Berry, nonetheless concludes: “[I]f an otic solution of antibiotics is used in the eye it can and more probably than not will cause caustic damage to the eye.” (R. 232; RE 30). Dr. Berry never gives any reason(s) to support his conclusion. Floxin Otic[®] (pH 6.4) is slightly less acidic than Ocuflox[®] (pH 6.5). Dr. Berry gives no reason why Floxin Otic’s[®] allegedly corrosive action would cause “caustic damage” but using the slightly more acidic Ocuflox[®] would not.

¹²pH is “is the symbol relating the hydrogen ion (H⁺) concentration or activity of a solution to that of a given standard solution. Numerically the pH is approximately equal to the negative logarithm of H⁺ concentration expressed in molarity. pH 7 is neutral; above it alkalinity increases and below it acidity increases.” Dorland’s Illustrated Medical Dictionary 29th Edition at 1364(2000). If pH readings are displayed on a vertical scale with the neutral reading (pH 7) in the center of the scale, as you go up the scale from neutral, the pH readings is alkaline and the readings increase from 7.1 to 7.2 and so on. As you go down the scale from neutral, the pH reading is acidic and the numbers decrease from 6.9 to 6.8 and so on. Therefore, if you have two readings below the pH 7 neutral reading, the reading farthest away from neutral is the more acidic reading of the two. Thus, the pH of 6.4 for Ocuflox[®] is more acidic than the pH reading of 6.5 for Floxin Otic[®] because the 6.4 pH reading is farther away from pH 7 (neutral)

Dr. Berry admits the “extensive damage” caused by the hot molten steel to Perez’ eye “makes it **extremely difficult** to determine if any further damage was caused by the use of Floxin Otic”. (R. 232; RE 30)(emphasis added). Nonetheless, Dr. Berry concludes “it would not be unreasonable to expect him to have damage to his eye as a result of the use of the Floxin Otic solution.” (R.232; RE 30). Nowhere does Dr. Berry identify the facts that enabled him to overcome this “difficulty” to reach his conclusion.

The circuit court found Dr. Berry’s affidavit was insufficient to create a dispute with the factual foundation presented by UMMC and Cardinal Health because Dr. Berry never identified **how** the two solutions differed and never explained **how** and **why** using Floxin Otic[®] instead of Ocuflux[®] could harm Perez’ eye. (Tr. 9-10; RE16-17).

An affidavit “without foundation in fact as to **how, when, and why**” is “conclusory” *Dalton v. Cellular South, Inc.*, 20 So.3d 1227, 1234 (¶ 16)(Miss. 2009)(emphasis added)(“CSI’s conclusory affidavit was offered without foundation in fact as to **how, when and why** CSI determined that continuation of the contract as detrimental to its well-being, reputation, and goodwill.”), *cited in, Sweet v. TCI Ms. Inc.*, 47 So.3d 89, 93-94 (¶¶20,21) (Miss. 2010)((Finding affidavit by TCI’s president to be conclusory and self-serving because it “does not show **when or how** TCI attempted to obtain financing, or **why** TCI’s available options were unsatisfactory.”). See Black’s Law Dictionary 284 (7th Edition 1999)(Defining conclusory as “[e]xpressing a factual inference without stating the underlying facts on which the inference is based.”).

Dr. Berry’s affidavit is certainly conclusory because he never gives any facts to explain **how or why** Floxin Otic[®] **caused** any harm or damage to Perez’ eye.

The Court dealt with the question of whether an affidavit was sufficient to establish **causation** in *Hubbard v. Wansley*, 954 So.2d 951 (Miss. 2007) where the circuit court granted summary judgment to Dr. Wansley on the ground that plaintiff “Hubbard had failed to establish a **causal** link between her injuries and Dr. Wansley’s alleged negligence.” *Id.* at 964 (¶42) (emphasis added). Plaintiff Hubbard relied on affidavits by her expert, Dr. Lynn Stringer. *Id.* at 955, 964 (¶¶ 6,45). Dr. Stringer’s affidavit testimony

contained the “magical” language: “[I]t is my opinion that had Ruby Hubbard been treated properly by Dr. Wansely, or if Dr. Wansley had notified appropriate personnel, it is my opinion that Ruby Hubbard would have had a greater than fifty percent chance of reduced neurological injury.”

Id. at 965 (¶ 47).

The Court found that Dr. Stringer’s opinion testimony was not sufficient because it lacked a factual foundation.

Dr. Stringer’s assertion that Hubbard would have had a fifty percent greater chance of recovery is given with no real facts to back it up. . . . The language of Dr. Stringer’s affidavit is 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 fifty percent change of substantial recovery if she had received the “optimal care” of which Dr. Stringer spoke. This Court has shown its disapproval of such affidavits in the past. *Walker [v. Skiowski]*, 529 So.2d 184, 187 n.2 (Miss. 1988)].

Id. at 965-966 (¶ 48). The Court affirmed the grant of summary judgment to Dr. Wansely

because “Hubbard did not present evidence sufficient to create a genuine issue of material fact as to **causation**.” *Id.* at 966 (¶ 50)(emphasis added).

Dr. Berry says the solutions differ but offers no facts to show how they differ. He says Floxin Otic[®] is harmful if placed in the eye but presents no facts to explain why it is harmful. He states Floxin Otic[®] caused “caustic damage” to Perez’ eye but provides no facts to explain how and why it damaged Perez’ eye. The absence of a factual foundation renders Dr. Berry’s affidavit testimony speculative conjecture which cannot defeat summary judgment. *E.g., Rogers v. Barlow Eddy Jenkins, P.A.*, 22 So. 3d 1219, 1225 (¶ 21)(Miss. Ct. App. 2009)(“Summary judgment may not be defeated through expert opinions that are not based on facts but instead are based on a guess, speculation, or conjecture.”).

Perez presented no other evidence to oppose the summary judgment motion. The evidence from the package inserts and the affidavits of Drs. Todaro, Verlangieri and James is undisputed. This evidence shows Perez cannot prove the **causation** element for his negligence claim because Floxin Otic[®] did not cause any harm to his eye. Because Perez created no genuine issue of fact as to **causation**, the circuit court properly granted summary judgment to UMMC and Cardinal Health. *E.g., Powell v. Methodist Healthcare-Jackson Hospitals*, 876 So.2d 347, 349 (¶9) (Miss. 2004)(*en banc*)(Summary judgment granted on Powell’s claims because, *inter alia*, Powell “made no showing of a causal connection between her injuries and Methodist’s acts or conduct....”); *Lott v. Harris D. Purvis & BRJ, Inc.*, 2 So.3d 789, 793 (¶ 16)(Miss. Ct. App. 2009)(Summary Judgment affirmed where “Lott presented no evidence of **causation** aside from her own allegations [so] there was no genuine issue of material fact as to the **causation** element of negligence”).

Perez argues the circuit court erred because “[t]he competing facts presented through expert testimony should have precluded the entry of summary judgment. . .” (Perez’ brief at 5). But Perez, like Dr. Berry, does not set forth the “competing facts”. Without these facts, Dr. Berry’s affidavit and Perez’ Brief contain nothing more than a list of conclusory speculative statements. The circuit court properly disregarded Dr. Berry’s affidavit because it contains no “competing facts.” See, *Rogers v. Barlow Eddy Jenkins, P.A.*, 22 So. 3d at 1226, 1227 (§§ 24, 29)(It was appropriate to disregard experts’ factually unsupported opinion testimony and to grant defendant summary judgment where plaintiff’s expert failed to establish **causation**); *Davis v. Christian Brotherhood Homes of Jackson, Mississippi*, 957 So.2d 390, 409-410 (§47)(Miss. App. Ct. 2007)(The trial judge “properly disregarded” plaintiff’s security expert’s factually unsupported opinion testimony in rendering summary judgment for the defendant for plaintiff’s failure to establish proximate cause.).

Perez relies on selected quotations from *Poole v. Avara*, 908 So.2d 716 (Miss. 2005). (Perez’ Brief at 6). That case involved an appeal from a defense jury verdict in a medical malpractice claim. Summary judgment was not granted. The sufficiency of an expert’s affidavit was not involved. The quotations from *Poole v. Avara* relate to Plaintiff Poole’s appeal argument that the trial court erred when it overruled her *Daubert/McLemore* objection under MRE 702 to the defendant’s expert testimony. The quotations are relevant to that appeal issue but the quotations do not support Perez’ appeal argument. Nothing in MRE 702 prohibits a trial court from disregarding an insufficiently supported expert affidavit when the trial court considers a summary judgment motion. In fact, the requirement in MRE 702(1) that an expert’s opinion be “based upon sufficient facts or data” applies to an expert’s affidavit in the summary judgment

context and supports a trial judge's decision to disregard any conclusions in an expert affidavit that do not have a factual basis. *Davis v. Christian Brotherhood Homes of Jackson, Mississippi*, 957 So.2d at 409 (§44)([T]he court's ruling that there was no 'factual basis' for [the expert's] conclusions implicates Rule 702(1)"). Since Dr. Berry's affidavit had no facts to support his conclusions, the circuit court complied with the language and intent of MRE 702 when it found Dr. Berry's affidavit testimony was not factually sufficient to create a genuine issue of fact on **causation**.

Finally, Perez argues that since Dr. Berry concluded Floxin Otic[®] harmed Perez' eye and since UMMC's and Cardinal Health's experts opined Floxin Otic[®] did not, the circuit court was confronted with a "battle of the experts" which a jury must decide. (Perez' Brief at 6-7). Perez incorrectly frames the issue. "[W]e are not faced with two battling experts. . . . Rather, our inquiry here turns on whether [Dr. Berry's] affidavit is insufficient because it is unsubstantiated and conclusory." *Sanders v. Wiseman*, 29 So.3d 138,142 (§15)(Miss. Ct. App. 2010).

The circuit court did not view the issue as a "battle" between the experts. (Tr. 15;RE 22). Instead, the circuit court found Dr. Berry's conclusions were insufficient to create a genuine issue of material fact as to **causation** because he provided no facts to explain how or why Floxin Otic[®] harmed or damaged Perez' eye. (Tr. 15; RE 22). The circuit court's ruling is correct. Perez has shown no reversible error. Therefore UMMC asks this Court to affirm the circuit court's grant of summary judgment.

CONCLUSION

Perez has not shown any genuine issue of material fact existed about his inability to establish the **causation** element of his tort claim against UMMC and Cardinal Health. Since,

causation is essential to his claim, the circuit court properly granted summary judgment to UMMC and Cardinal Health. Therefore, UMMC asks the Court to affirm the circuit court's ruling and dismiss Perez' appeal.

DATED this the 16th day of February, 2011.

Respectfully submitted,

CARDINAL HEALTH 109 INC., DEFENDANT

By: Luke Dove
LUKE DOVE, MSB No. [REDACTED]

Of Counsel:
DOVE & CHILL
Luke Dove
1020 Highland Colony Parkway
Suite 412
Ridgeland, MS 39157
Telephone: 601.352.0999
Facsimile: 601.352.0990
Email: lukedove@dovechill.com

CERTIFICATE OF SERVICE

I, Luke Dove, attorney for Cardinal Health 109, Inc., do hereby certify that I have this date served, via First Class United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

Wayne E. Ferrell, Jr., Esq.
P O Box 24448
Jackson, MS 39225-4448

Walter Johnson, Esq.
Watkins & Eager
P O Box 650
Jackson, MS 395205

W. Bienville Skipper, Esq.
Daniel Coker Horton & Bell
P O Box 1084
Jackson, MS 39215-1084

Honorable William Coleman
Hinds County Circuit Court Judge
P O Box 327
Jackson, MS 39201

Honorable Malcolm O. Harrison
Hinds County Circuit Court
P O Box 327
Jackson, MS 39201

This the 16 day of February, 2011.



LUKE DOVE

CERTIFICATE OF MAILING

I, Luke Dove, do hereby certify that I have this day hand-delivered to the Clerk an original and three copies (3) copies of the Brief of Appellee, Cardinal Health 109, Inc., in Docket No.2009-CA-01892, on the 16 day of February, 2011.


LUKE DOVE