

IN THE SUPREME COURT OF MISSISSIPPI

**RAFAEL PEREZ a/k/a RAY PEREZ
And KATHY PEREZ**

APPELLANTS

v.

Case No. 2009-CA-01892

**THE UNIVERSITY OF MISSISSIPPI
MEDICAL CENTER, EL AL**

APPELLEES

BRIEF OF THE APPELLANTS

ORAL ARGUMENT REQUESTED

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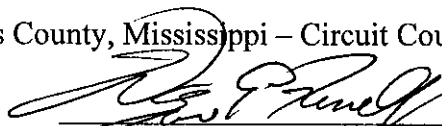

**THE UNIVERSITY OF MISSISSIPPI
MEDICAL CENTER, EL AL**

APPELLEES

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. Rafael ("Ray") Perez and Kathy Perez – Appellants
2. Wayne E. Ferrell, Jr. – Attorney for Appellants
3. The University of Mississippi Medical Center – Appellee
4. Cardinal Health 109, Inc. – Appellee
5. Joseph G. Baladi and Walter T. Johnson – Attorneys for Appellee University of Mississippi Medical Center
6. Luke Dove – Attorney for Appellee Cardinal Health 109, Inc.
7. W. Bienville Skipper – Attorney for The Hartford Accident and Indemnity Company
8. Hon. William Coleman of Hinds County, Mississippi – Trial Court Judge
9. Hon. Malcolm Harrison of Hinds County, Mississippi – Circuit Court Judge


Wayne E. Ferrell, Jr., MB 

Attorney for Appellants

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REQUEST FOR ORAL ARGUMENT

Plaintiffs request that this Court hear oral argument on the issue appealed in this case.

Due to the serious nature of the underlying facts and the legal issue to be decided, it is likely that the decisional process would be significantly aided by oral argument.

STATEMENT OF THE ISSUE

1. Whether the trial court erred in granting Defendants' Motions for Summary Judgment based upon the perceived failure of Plaintiff to prove causation through the affidavit of David M. Berry, M.D.

STATEMENT OF THE CASE

A. Nature of the Case

Rafael Perez ("Perez") was a patient at the University of Mississippi Medical Center ("UMC") after sustaining an eye injury. (T. 3).¹ While at UMC, Perez was prescribed Ocuflux Ophthalmic ("Ocuflux"). (R. 42; 224). However, the dispensing pharmacy, Cardinal Health 109, Inc. ("Cardinal Health"), which is located on the campus of UMC, filled the prescription with Floxin Otic instead ("Floxin"). (R. 42; 224; T. 5-6). Floxin is intended for use in the human ear. (R. 42). When the Floxin was administered to Perez' eye, his condition worsened to the extent that the affected eye was eventually removed. (R. 43; T. 13-14). Plaintiffs subsequently filed this action against UMC and Cardinal Health in the Circuit Court of the First Judicial District of Hinds County, Mississippi. (R. 7-12; 40-51).

B. Course of the Proceedings Below

On or about May 21, 2004, Plaintiffs filed suit in the Circuit Court of Hinds County, Mississippi against Defendants UMC and Cardinal Health. (R. 7-12). After receiving permission from the Court, an Amended Complaint was filed on April 6, 2005. (R. 40-51). During the course of discovery, Plaintiff filed a motion for partial summary judgment and

¹ Plaintiffs note that the transcript of the hearing on defendants' motions for summary judgment was designated as a part of the record (R. 431) and a copy of same was certified and paid for (R. 433). However, the transcript was not numbered in keeping with the rest of the record. For purposes of this brief, the August 21, 2009 hearing transcript will be referred to as "T. " followed by the appropriate page numbers as assigned in the original transcript.

rebuttal in support of same. (R. 162-66; 268-86). UMC and Cardinal Health responded in opposition to the Perez' motion. (R. 167-74; 175-76).

Defendants also filed their own motions for summary judgment claiming that Plaintiffs had failed to prove causation. (R. 208-12; 331-36; 337-42). Specifically, it was maintained that the affidavit of Plaintiffs' expert, David M. Berry, M.D., was insufficient pertaining to the issue of causation. *Id.* Plaintiffs filed objections and responses to these motions. (R. 343-80; 381-420; 421-22).

C. Disposition in the Court Below

On August 21, 2009, the trial court granted summary judgment for Defendants University of Mississippi Medical Center and Cardinal Health 109, Inc., on the basis that Plaintiffs did not show proof of causation of Mr. Perez' injuries. (Tr. 10; 15-16). The lower court entered a final judgment for Defendants on the same date. (R. 423). Plaintiffs timely appealed the lower court's grant of summary judgment on September 17, 2009 (R. 424).

D. Statement of Facts

On or about April 7, 2003, Ray Perez was admitted to UMC as a patient for treatment pertaining to an emergency cornea transplant. (R. 58).² It is undisputed that after surgery, Perez was prescribed Ocuflax, but Floxin was dispensed. (R. 186; 262). Ocuflax has been approved for treatment of the eye. (R. 191). Floxin has been approved for treatment of the ear. (R. 191; 240). The Floxin was then administered to Perez' eye four times a day for three or four days. (R. 42). Subsequent to the use of Floxin, the Plaintiff experienced heart palpitations and intense eye pain. (R. 43). Mr. Perez' entire cornea became ulcerated and multiple infections ensued. *Id.* The Plaintiff became unable to open his eye due to infection and medication had to be

² The transplant had become necessary after extensive damage was caused when molten steel entered the Plaintiff's left eye. (R. 186).

administered via an incision in the eye area. (R. 43). Eventually, Perez' eye condition worsened to the extent that the affected eye was removed. (T. 13-14).

At all relevant times, Defendants represented to the Perez family that it was necessary for Mr. Perez to undergo an emergency cornea transplant and that proper medication would be provided to him. (R. 44). Despite the fact that the wrong medication was administered to Mr. Perez by Defendants and the fact that Mr. Perez sustained severe injuries subsequent to receiving the wrong medication, Defendant deny any liability to the Plaintiffs. (R. 52-65; 83-88).

SUMMARY OF THE ARGUMENT

The trial court erred in finding that there was no genuine issue of material fact precluding the entry of a judgment as a matter of law for Defendants. There exists an issue of material fact as to whether the erroneous dispensing of Floxin caused injury to Mr. Perez. The competing expert testimony should have precluded the entry of summary judgment and been submitted to a jury as to Cardinal Health and to the Court as to UMC.

ARGUMENT

I. STANDARD OF REVIEW

This Court employs a *de novo* standard of review of the lower court's grant of summary judgment. *Saucier v. Biloxi Reg'l Med. Ctr.*, 708 So.2d 1351, 1354 (Miss. 1998) (citing *Townsend v Estate of Gilbert*, 616 So.2d 333,335 (Miss. 1993)). Motions for summary judgment are not favored and summary judgment is not appropriate unless the pleadings, depositions, answers to interrogatories, admissions on file, together with affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Miss. R.Civ.P. 56(c). The Comment to Rule 56 provides that "summary judgment is *not* a substitute for the trial of *disputed fact issues*. Accordingly, the court cannot try

issues of fact on a Rule 56 motion; *it may only determine whether there are issues to be tried. . . .*

[I]t cannot be used to deprive a litigant of a full trial of genuine fact issues." (Emphasis added).

Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. In other words, the non-movant should be given the benefit of the doubt.

Mantachie Natural Gas District v. Mississippi Valley Gas Company, 594 So.2d 1170, 1172

(Miss. 1992). A motion for summary judgment should be overruled unless the trial court finds, beyond any reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim. *McFadden v. State*, 580 So.2d 1210, 1214 (Miss. 1991).

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT BASED UPON THE PERCEIVED FAILURE OF PLAINTIFF TO PROVE CAUSATION THROUGH THE AFFIDAVIT OF DAVID M. BERRY, M.D.

In the case *sub judice*, the Defendants made no motion to strike the affidavit of Dr. Berry and the trial court judge considered the affidavit as a whole before determining it to be insufficient regarding the issue of causation. The trial court erred in finding that there was no genuine issue of material fact precluding the entry of a judgment as a matter of law for Defendants. There exists an issue of material fact as to whether the erroneous dispensing of Floxin by the Defendants caused injury to Mr. Perez. The competing facts presented through expert testimony should have precluded the entry of summary judgment and been submitted to a jury as to Cardinal Health and to the Court as to UMC.

The admission or exclusion of expert testimony is reviewed for abuse of discretion.

Franklin v. Tedford, 18 So.3d 215, 233 (Miss. 2009). A trial court's decision constitutes an abuse of discretion if the decision was arbitrary and clearly erroneous. *Kilhullen v. Kansas City*

So. Ry., 8 So.3d 168, 172 (Miss. 2009) (quoting *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (Miss. 2003)).

At no time did the trial court hold Dr. Berry's affidavit to be inadmissible. In this instance, the lower court, upon review of the affidavit and after hearing arguments pertaining to same, specifically found that Dr. Berry's testimony as to causation was speculative and "indefinite." (T. 15-16). In *Poole v. Avara*, 908 So.2d 716, 722 (Miss. 2005), this Court addressed the purported speculative nature of an expert's opinion as to causation. Poole's beneficiaries argued that Dr. Avara's testimony pertaining to causation was insufficient or speculative because "the only certain fact [was] that the suture burst, not what the cause of the burst was." *Id.* On appeal, this Court found that Dr. Avara's testimony as to the cause of the tear was valid, because it constituted a medical opinion based on the experience, training, and expertise of a qualified medical expert. *Id.* at 724. The Court stated that "[r]equiring that the subject of expert testimony be known to a certainty is not necessary either, however, because, as the *Daubert* Court pointed out, 'there are no certainties in science.'" *Id.* at 723-24 (quoting *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786). "Unlike an ordinary witness . . . an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Id.* at 724 (quoting *Daubert*, 509 U.S. at 592, 113 S.Ct. 2786). As was the case in *Poole*, Dr. Berry's affidavit clearly indicates that he reviewed all relevant medical records prior to making a decision based upon his knowledge and experience. (R. 231-232). While Dr. Berry's opinion as to causation may not have been as straight forward as the trial court wished, the trial judge noted at the hearing that a medical expert is not required to express his opinions "to a reasonable degree of medical certainty." (T. 7).

In the current situation, simply stated, Plaintiffs' expert opines that the Floxin probably

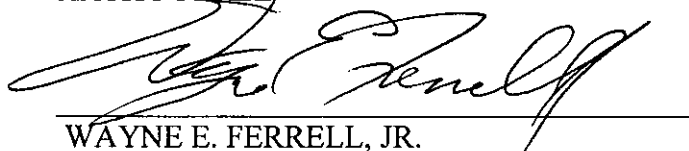
caused Mr. Perez' injuries, which Defendants' experts argue that the Floxin could not have caused the injuries. The disagreement, or battle of the experts, is one that should be decided by a jury. *See Hills v. Mills*, 26 So.3d 322, 330 (Miss. 2010); *Bickham v. Grant*, 861 So.2d 299, 307 (Miss. 2003). *See also Brownlee v. State*, 2009-KA-00372-COA (¶ 4) (Miss.App. 2009) (holding that any conflicts in witness testimony are the province of the jury). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *McLemore*, 863 So.2d at 36 (quoting *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596, 113 S.Ct. 2786 (1993)). Thus, the trial court invaded the province of the jury as to Cardinal Health and to the Court as to UMC in determining Dr. Berry's testimony to be speculative and finding in favor of Defendants on their motions for summary judgment.

CONCLUSION

There exists an issue of material fact as to whether the erroneous administration of Floxin by the Defendants caused injury to Mr. Perez. Plaintiffs respectfully request that the Court reverse the trial court's ordering granting summary judgment for Defendants. The Court should remand this case and the issue of causation should be presented to a jury as to Cardinal Health and to the Court as to UMC at the trial of this matter.

Respectfully submitted, this the 2nd day of November, 2010.

RAFAEL PEREZ a/k/a RAY PEREZ and
KATHY PEREZ



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CERTIFICATE OF SERVICE

I, Wayne E. Ferrell, Jr., counsel for Plaintiffs/Appellants do hereby certify that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

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Honorable Malcolm O. Harrison
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Jackson, MS 39205

This, the 27th day of November, 2010.



WAYNE E. FERRELL, JR.