

IN THE SUPREME COURT OF MISSISSIPPI

**MALIYAH ASHUNTI HUBBARD,
MINOR, BY AND THROUGH
TIFFANY HUBBARD, HER MOTHER
AND NATURAL GUARDIAN**

APPELLANT

v.

CASE NO. 2009-1A-00464-SCT

E

**McDONALD'S CORPORATION;
MICHAEL L. RETZER D/B/A/
McDONALD'S ; AND
JOHN DOE DEFENDANTS A-D**

APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

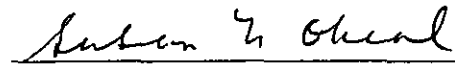
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TABLE OF CONTENTS

Certificate of Interested Persons.....	i
Table of Contents.....	iii
Table of Cases and Authorities.....	iv

BRIEF OF APPELLEES

Statement of the Issue.....	1
Statement of the Case.....	2
Statement of Facts.....	3
Summary of the Argument.....	5
Argument.....	7
1. Standard of Review.....	7
2. Dr. DeSalvo's testimony is based on speculation and conjecture and was properly excluded by the trial court as unreliable under M.R.E. 702.....	7
Conclusion.....	15
Certificate of Service.....	16

TABLE OF CASES AND AUTHORITIES

CASES:

1. Tunica County v. Matthews, 926 So.2d 209 Miss. (2006)6,7,9
2. Mississippi Transp. Com'n v. McLemore,
863 So.2d 31 Miss.(2003).....6,7,9
3. Puckett v. State, 737 So.2d 322 Miss. (1999)7
4. Watts v. Radiator Specialty, Co., 990 So.2d 143 Miss. (2008)7
5. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S.
579 (1993)8
6. Treasure Bay Corp. v. Ricard, 967 So.2d 1235 Miss. (2007)9,10
7. General Electric Co. v. Joiner, 522 U.S. 136 (1997)10
8. Kumho Tire Ltd. V. Carmichael, 526 U.S. 137 (1999)10
9. Bullock v. Lott, 964 So.2d 1119 Miss. (2007)10,11
- 10.Cuevas v. E. I. Dupoint de Nemours and Co.,
956 F.Supp. 1306 (1997).....13
12. Johnson v. Ferguson, 435 So.2d 1191 Miss. (1983)13

STATUTES AND OTHER AUTHORITIES:

M.R.E. 702*passim*

STATEMENT OF THE ISSUE

The trial court did not abuse its discretion by excluding Dr. Anthony DeSalvo's expert witness testimony as speculative, unreliable and therefore inadmissible under M.R.E. 702, where the basis for the expert testimony was contradicted by the medical facts in evidence.

STATEMENT OF THE CASE

1. Course of Proceedings Below

Plaintiff Tiffany Hubbard ("Hubbard") alleges that she fell at her workplace, McDonald's in Grenada, and that the fall caused the premature birth of her infant ten days later.¹ In 2004, she brought suit against McDonald's and Michael Retzer d/b/a McDonald's ("Retzer"). No action for medical malpractice was brought in this case.

Hubbard designated Dr. Anthony DeSalvo of Warren, Ohio, as an expert in the field of obstetrics and gynecology. Retzer designated Paul M. Rice, M.D. of Jackson, Mississippi as an expert in that field.

Following deposition testimony of Dr. DeSalvo, Retzer filed a motion to strike Dr. DeSalvo's testimony on the grounds that his testimony as to causation was speculative and unreliable as defined by M.R.E. 702, and *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993) and its progeny.

¹ Disputed issues of fact surround the fall itself, but the trial court assumed that the fall occurred for the purposes of its ruling. RE 103; CP 171.

The trial court held a *Daubert* hearing on January 12, 2009. After hearing arguments of counsel, the trial court ruled that Dr. DeSalvo's testimony was not based on sufficient facts and data, but was speculative, unreliable and therefore inadmissible under M.R.E. 702. RE 103-106; CP 171-174. Plaintiff Hubbard subsequently filed this interlocutory appeal of the trial court's ruling.

2. Statement of Facts

Hubbard, an employee of McDonald's Restaurant in Grenada, Mississippi, slipped and fell while at work on April 19, 2002. At the time, she was twenty-three weeks pregnant.

On the afternoon of the fall, Hubbard was examined at Grenada Lake Medical Center ("GLMC"). She gave a history of having fallen to her right side and complained of right-sided abdominal pain. Her physical exam was normal and she was admitted to labor and delivery for a four-hour period of evaluation. During that time, there was no onset of labor and no premature rupture of membranes. Her obstetrician discharged her with instructions to return for a checkup in three weeks. RE 33-40; CP 36-45.

Hubbard did not seek any further medical care until April 26th, one week later. At that time, she returned to the GLMC Emergency Room stating her chief complaint as "water broke since Tuesday, started leaking, running down leg Wednesday some cramping Tuesday." RE 43; CP 46. The

Tuesday prior to April 26th was April 23rd. Elsewhere her chief complaint was stated as "vaginal discharge ? water broke." RE 50; CP 50.

In order to determine whether her membranes had ruptured, GLMC staff performed a nitrazene test on Hubbard's vaginal secretions. The nitrazene test was negative, showing no presence of amniotic fluid, and therefore no evidence of premature rupture of membranes. RE 43; CP 46. However, she was found to have a vaginal discharge that was determined on microscopic examination to be due to a Trichomonas infection. RE 43, 48; CP 46, 51.

The following day, April 27th, Hubbard returned to the GLMC ER complaining of cramping in the hips, buttocks, abdomen and back. She was again sent to the Labor and Delivery suite for evaluation, where her membranes were noted to be intact. She had no evidence of labor and was sent home with the diagnosis of pressure pain and Trichomonas infection. RE 52-54; CP 55-57.

At 11:48 p.m. on April 28th Hubbard returned to GLMC ER complaining of "lower abdominal pain and low back pain" and was admitted in premature labor. There was no bleeding or history of ruptured membranes. RE 11; CP 14. Her physician, Dr. Bondurant, performed a vaginal exam and observed that her membranes were intact. He did not describe the membranes as bulging. RE 14-15; CP 17-18.

At 1:25 a.m. on April 29th Hubbard's membranes ruptured, as observed and documented by the Labor and Delivery nurses and Dr.

Bondurant. RE 26, 28; CP 29, 31. At that time, delivery was determined to be imminent, and she was transferred to University of Mississippi Medical Center in Jackson ("UMMC"). RE 12, 28, 32; CP 15, 31, 35. Later that day, she delivered a premature infant. Prior to delivery, and after her membranes had been observed to spontaneously rupture at GLMC, the obstetrician noted her membranes to be "bulging." RE 98; CP 112. The infant, Maliyah, had multiple complications of prematurity during a prolonged stay at UMMC.

By affidavit, Dr. Rice testified that Hubbard's fall on April 19th could not have caused the spontaneous rupture of her membranes ten days later.

Dr. Rice's testimony in this regard is unrefuted. RE 101-102; CP 2, 118, 119.

Dr. DeSalvo does not dispute that Hubbard's fall could not have resulted in a spontaneous rupture of her membranes after a period of ten days. However, Dr. DeSalvo opined that, contrary to the findings and facts in the medical record, he believed that Ms. Hubbard's membranes had actually ruptured, not as documented on April 29th, but "around April 23rd". RE 91; CP 100.

The trial court found that Dr. DeSalvo's testimony was not based on sufficient facts and data. Stating that Dr. DeSalvo's opinion merely "strings together a number of possibilities and offers them as fact." RE 105; CP 173. As a result, the court excluded Dr. DeSalvo's testimony as unreliable under M.R.E. 702.

SUMMARY OF THE ARGUMENT

The facts as documented in Hubbard's medical records are straightforward. Hubbard was examined at GLMC after she reported a fall at work. On that date, she was monitored in the labor and delivery suite, found to have no adverse effects from the fall, and discharged to return to her private physician three weeks later. One week later, she presented with a vaginal discharge and was diagnosed with a trichomonas infection. Although she was concerned that her water had possibly broken, a nitrozene test determined no leaking of amniotic fluid. Subsequent examinations noted her membranes to be intact. Several days after beginning treatment for the infection, she went into labor, and was admitted to GLMC. A pelvic examination again showed her membranes to be intact. Ultimately, ten days after her fall, she had a spontaneous rupture of membranes witnessed by the GLMC Labor and Delivery staff.

It is not disputed that Hubbard's fall could not have caused spontaneous rupture of her membranes ten days later.

Hubbard's expert, Dr. Anthony DeSalvo, does not dispute that a rupture of membranes ten days after the fall could not be attributed to that fall. However, he testified to his theory that Hubbard's membranes had actually ruptured earlier than diagnosed by the medical professionals who repeatedly examined her. To support his theory, he offers the following testimony: the initial Nitrazene test was performed incorrectly; if it had

been performed correctly, it would have shown that her membranes had ruptured; and the fact that subsequent examiners were not able to see that her membranes were ruptured is explained by the possibility that she had a “high leak” that sealed itself off by the time she was examined on each of her visits.

Dr. DeSalvo’s testimony is simply speculation upon speculation, and the trial court correctly ruled it inadmissible under M.R.E. 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), and *Mississippi Transp. Com’n v. McLemore*, 863 So.2d 31 (Miss. 2003) and its progeny.

Under M.R.E. 702, the trial court has a “solemn” gate-keeping duty to exclude speculative expert testimony and insure that such testimony is grounded on “sufficient facts and data.” *Bullock v. Lott*, 964 So.2d 1119, 1129 (Miss. 2007).

Expert opinion testimony is not admissible where it is based on the expert’s “opinions or speculation.” *Tunica County v. Matthews*, 926 So.2d 209, 213 (Miss. 2006). To the contrary, an expert may not base his testimony on an assumption of facts not supported by the record. *Treasure Bay Corp. v. Ricard*, 967 So.2d 1235, 1242 (Miss. 2007).

In this case, Dr. DeSalvo disregards the medical findings and evidence and creates a string of “possibilities” in order to put forward an alternative theory of Hubbard’s medical course. Dr. DeSalvo’s testimony is not based on sufficient facts and data, and is not reliable. As such, the trial court

properly fulfilled its gatekeeping role under M.R.E. 702 and ruled Dr. DeSalvo's testimony inadmissible. In doing so, the trial court did not abuse its discretion, and its ruling should be affirmed.

ARGUMENT

1. Standard of review

The admission or exclusion of expert testimony is reviewed for abuse of discretion, with "great deference" given to the trial court's decision. *Tunica County v. Matthews*, 926 So.2d 209, 212 -13 (Miss. 2006). Under this standard, unless the court's ruling was "arbitrary and clearly erroneous, amounting to an abuse of discretion, that decision will stand." *Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31, 34 (Miss. 2003) (citing *Puckett v. State*, 737 So.2d 322, 342 (Miss.1999); *Watts v. Radiator Specialty Co.* 990 So.2d 143, 146 -47 (Miss. 2008)).

As shown below, the trial court acted within its discretion in excluding the speculative testimony of Dr. Anthony DeSalvo.

2. Dr. DeSalvo's testimony is based on speculation and conjecture and was properly excluded by the trial court as unreliable under M.R.E. 702.

On April 19, 2002, Hubbard reported a fall while at work at McDonald's in Grenada, Mississippi. On April 29, 2002, Hubbard had the spontaneous premature rupture of membranes and followed by the onset of premature labor. RE 26, 28; CP 29, 31.

It is undisputed that Hubbard's fall could not have caused a spontaneous rupture of membranes ten days later. Regardless of the facts, however, Hubbard's expert, Dr. Anthony DeSalvo, attempts to link the fall to the onset of labor by theorizing that the findings of the medical professionals treating Hubbard were wrong, and that her membranes had actually ruptured earlier.

The trial court correctly determined that Dr. DeSalvo's conclusions were based, not on facts in the record, but on "speculation, guesswork and conjecture." RE 105; CP 173.

Rule 702 of the Mississippi Rules of Evidence requires that the trial court act as gatekeeper and exclude expert testimony that is not reliable. M.R.E. 702 cmt. The trial court has the responsibility to determine that the facts that form the basis of the expert's opinion allow "reasonably accurate conclusions as distinguished from mere guess or conjecture." *Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31, 35 (Miss. 2003).

Under M.R.E. 702, an expert witness may not base his or her opinion on "subjective beliefs or unsupported speculation." *Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31, 36 (Miss. 2003)(citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590, 113 S.Ct. 2786, 2795 (1993)).

In order for expert testimony to be relevant and reliable in *Daubert* terms, "the testimony must be scientifically valid and capable of being applied to the facts at issue" and is not admissible where it is based on the

expert's "opinions or speculation." *Tunica County v. Matthews*, 926 So.2d 209, 213 (Miss. 2006).

In *Treasure Bay Corp. v. Ricard*, 967 So.2d 1235 (Miss. 2007), the Mississippi Supreme Court discussed issues of credibility and reliability of expert testimony.

Ricard was a Dram Shop Act case in which a driver, Dillmon, drank at two casinos before fatally injuring a pedestrian. The plaintiff alleged that both casinos violated the Act by serving alcohol to Dillmon while he was visibly intoxicated. *Ricard*, 967 So.2d at 1240-42.

Dillmon told the police that he had left the first casino, Treasure Bay, after drinking four or five beers, and traveled to the second, Adventures, where he drank another three beers. Dillmon stated that he did not drink any alcohol after leaving Adventures. *Id.* at 1237-38.

Testifying for the plaintiff, Dr. Steven Hayne opined that Dillmon would have been visibly intoxicated not only when he was served alcohol at Adventures, but when he was served alcohol earlier at Treasure Bay. *Id.* In forming his opinion, Dr. Hayne accepted Dillmon's statement that he stopped drinking alcohol after leaving the second casino, Adventures, but rejected Dillmon's assertion that he had only consumed seven or eight beers during the entire drinking episode. *Id.* at 1238.

The Mississippi Supreme Court noted that M.R.E. 702 and *Daubert* required that the trial court analyze the reasoning behind an expert's opinion in order to determine its reliability. *Ricard*, 967 So. 2d at

1241(citing *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); *Kumho Tire Ltd. V. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)).

The Court held that Dr. Hayne could accept Dillmon's statement that he did not drink after leaving the second casino, Adventures, in order to draw the conclusion that he must have been visibly intoxicated while there. *Ricard* 967 So.2d at 1242. However, Dr. Hayne's testimony as to Treasure Bay was unsupported by the record, and therefore inadmissible. The Court stated: "[w]hile Dr. Hayne may accept as true parts of Dillmon's statement and reject others, he may not assume facts not supported by the record." *Id.*

The Court distinguished opinions based on disputed facts which turn on issues of credibility, from opinions offered without factual basis. The Court ruled that the expert testimony offered to implicate Treasure Bay in *Ricard* was not based on sufficient facts and data, and therefore was not reliable and was inadmissible under M.R.E. 702. *Id.* Likewise, Dr. DeSalvo's testimony is not supported by the facts in the record, and is inherently unreliable.

Dr. DeSalvo's testimony reflects the same flaws examined by the Mississippi Supreme Court in *Bullock v. Lott*, 964 So.2d 1119 (Miss. 2007). In *Bullock*, the defendant doctor diagnosed a patient with sinusitis. Three days later, the patient died. A postmortem examination revealed an abscess within the ventricular system of the patient's brain. *Bullock*, 964

So.2d at 1122. The plaintiff's expert testified that the doctor should have performed a CT scan; moreover, the expert testified that the CT, if performed, would have shown signs of a midline shift of the brain structures, thus leading to a diagnosis of infection. *Id.* at 1129.

The Court noted that the expert testimony consisted of "opinions based on facts not in evidence." In particular, the testimony contradicted the evidence, as the post-mortem examination did not reveal signs of a midline shift. *Id.* at 1132.

The Court ruled that the expert's speculative testimony should have been excluded, and emphasized that the trial court has the duty to determine whether expert testimony is reliable, stating:

We thus take this opportunity to remind our trial judges of their solemn gate-keeping responsibilities consistent with *Daubert*, our amended Rule 702, and *McLemore* and its progeny, whether it be assuring that an expert is confined to offering opinions within his/her areas of expertise *or assuring that an expert's testimony is based upon sufficient facts and data, is the product of reliable principles and methods, and is based on the principles and methods having been applied reliably to the facts of the case.*

Bullock, 964 So.2d at 1129 (emphasis added).

Thus, the Court held that the trial court had abused its discretion when it allowed the expert to testify to "matters which were not based on sufficient facts or data." *Id.*

Similarly, in this case, Dr. DeSalvo bases his opinions on speculation that the nitrazine test was not performed correctly and that if that test and

others had been performed correctly, it would have shown Hubbard's membranes to have ruptured.

Dr. DeSalvo testified that a patient's chief complaint that her water may have broken does not constitute a *finding* that her membranes had indeed ruptured. RE 95; CP 107; Dep. of Dr. DeSalvo, p. 67, l. 13-19.

Further, Dr. DeSalvo admitted that the nitrazene test performed on April 26th, is highly sensitive to the presence of amniotic fluid and that it would be very uncommon to have a false negative result if done properly. RE 99; CP 115; Deposition of Dr. DeSalvo, p. 99, l. 13-25; p. 100, l. 1-3. However, he opined that the test must have been done incorrectly, although he admitted that he did not know how it was performed. RE 93-94; CP 104-105; Deposition of Dr. DeSalvo, p. 57, l. 7-25; p. 58, l. 1-14.

Dr. DeSalvo admitted that no objective evidence of ruptured membranes existed when Ms. Hubbard was examined on April 27th and 28th. RE 95-96; CP 107, 108. Dr. DeSalvo also acknowledged that, as of April 29th at 12:05 a.m., a vaginal exam showed Ms. Hubbard's membranes to be intact, that is, not ruptured, and that at 1:30 a.m. on April 29th, the nurse's notes record that SROM, or "spontaneous rupture of membranes," had occurred. RE 96-97; CP 108-109; Deposition of Dr. DeSalvo at p. 72-75.²

² As the Court has observed:

An apt analogy might run like this. The trier of the facts is charged to determine how many teeth are in a particular horse's mouth. One expert horse dentist says it's 36. Yet he acknowledges that he has not

In fact, Hubbard's discharge was found to be due to trichomonas, and Hubbard's treating healthcare providers *repeatedly* diagnosed her as having intact membranes on four occasions up to and including Dr. Bondurant's pelvic examination nine days after the fall.

Simply put, the medical records show that Ms. Hubbard's membranes were intact until April 29th, ten days after she fell at work. Dr. DeSalvo merely refutes the medical record based upon his alternate, speculative theory of Ms. Hubbard's medical condition.³

In spite of Dr. DeSalvo's logical contortions, the facts are straightforward and well documented. After she reported a fall at work, Hubbard was examined at GLMC and found to have had no adverse effects to her pregnancy. One week later, she presented with a vaginal discharge

opened the horse's mouth to make an accurate count. He opines that the horse is suffering from severe neurosis and would suffer a psychological setback if subjected to the in-mouth count. Another horse dentist, however, perseveres in the face of the horse's neurosis, opens the mouth and counts only 32 teeth. A finding of fact that the horse had 36 teeth in its mouth would not be supported by substantial evidence. *Johnson v. Ferguson*, 435 So.2d 1191, 1196 (Miss.1983).

³ Dr. DeSalvo testified that his opinion was also based on the fact that Hubbard did, in fact, go into labor on April 29th. RE 91-92; CP 100-101; Deposition of Dr. DeSalvo at p. 41. This attempt to link Hubbard's fall to her premature labor is an example of *post hoc ergo propter hoc* reasoning, which cannot be used to prove causation and is inadmissible under *Daubert*. *Western Geophysical Co. v. Martin*, 253 Miss. 14, 174 So.2d 706, 716 (Miss. 1965); *Cuevas v. E.I. DuPont de Nemours and Co.*, 956 F.Supp. 1306, 1311 (S.D.Miss. 1997).

In addition, Hubbard's attempt to rely on the UMMC observation of "bulging membranes" prior to delivery is misplaced. RE 92; CP 101. It is beyond dispute that, before her transfer to UMMC, she had a witnessed rupture of membranes at GLMC. Dr. DeSalvo ignores the fact that her membranes had just ruptured and attempts to connect the bulging nature of the membranes to a previous undiagnosed rupture – pure speculation yet again.

that was diagnosed as a trichomonas infection. Several days after beginning treatment for the infection, she went into labor and experienced a spontaneous rupture of membranes witnessed by the GLMC Labor and Delivery staff.

The basis for Dr. DeSalvo's opinion – that she had an undiagnosed rupture of membranes – rests on his unsupported assumptions that the GLMC incorrectly performed the nitrazene test on April 26; that a “correctly” performed test would have been positive for amniotic fluid; and that subsequent examinations did not reveal the rupture because her “leak” was high and sealed up so that her examiners couldn't see it.

Dr. DeSalvo's testimony attempts to spin causation from speculation. He invites the jury to conclude draw conclusions, not from the medical evidence before it, but from an alternative scenario predicated on his own opinion and conjecture that GLMC physicians and nurses repeatedly misdiagnosed Hubbard's condition.

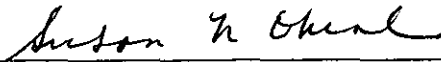
The trial court correctly found that Dr. DeSalvo's testimony was not reliable, as he did not rely on sufficient facts and data, but merely strung together “a number of possibilities” offered as fact. RE 105; CP 173. As a result, the trial court did not abuse its discretion in excluding Dr. DeSalvo's testimony as unreliable under M.R.E. 702.

CONCLUSION

For the foregoing reasons, the order of the trial court excluding the testimony of Dr. Anthony DeSavo should be affirmed.

RESPECTFULLY submitted this the 12th day of January, 2010.

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CERTIFICATE OF SERVICE

I, Susan N. O'Neal, Attorney for Appellees do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing instrument to the following:

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This the 12th day of January, 2010.



SUSAN N. O'NEAL