

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-IA-00464-SCT

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

APPELLEES

**INTERLOCUTORY APPEAL
OF GRENADA COUNTY CIRCUIT COURT CASE NO. 2004-0292 CVL**

BRIEF FOR APPELLANT

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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 disqualifications or recusal.

1. Maliyah Ashunti Hubbard.....Appellant
2. Tiffany Hubbard.....Mother and Natural Guardian of Appellant
3. William C. Walker, Jr.....Attorney for Appellant
4. Frank H. Shaw.....Attorney for Appellant
5. Michael L. Retzer d/b/a McDonald's.....Appellee
6. Frank S. Thaxton, Jr.....Attorney for Appellee
7. Susan N. O'Neal.....Attorney for Appellee

This the 10th day of November, 2009.

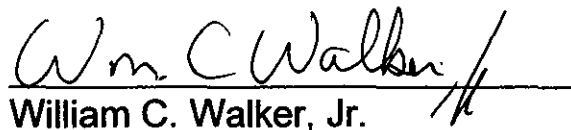

William C. Walker, Jr.
Attorney of record for Appellants

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STATEMENT OF ISSUE

1. Did the Trial Court's Daubert Ruling erroneously invade the fact-finding province of the jury?

STATEMENT OF THE CASE

i. Course of Proceedings Below

Defendants filed a Daubert Motion to strike the testimony of Anthony R. DeSalvo, M.D., Plaintiff's expert on the question of the causal connection between Tiffany Hubbard's fall at Defendants' facility and the premature delivery of her child, Maliyah Ashunti Hubbard, with resulting severe and permanent damage. Plaintiff filed her original and supplemental response which included incorporating the deposition of Dr. DeSalvo, previously filed by Defendants, the affidavit of Dr. DeSalvo, and various articles stated to be reliable in Dr. DeSalvo's affidavit. After a hearing upon this matter, the Trial Judge issued an Order granting Defendants' Motion. (RE-B; R Vol.2, pp.171-174) Plaintiff, being aggrieved by this Order, petitioned for interlocutory appeal which was granted. (RE-C; R Vol.2, p.175)

ii. Statement of Facts

The Trial judge stated as follows: "I'll run through a brief factual scenario that the proof shows..." (RE-D; R Vol.3, p.29) The Trial Judge then stated that for purposes of the motion he considered that Tiffany Hubbard suffered a fall while working at McDonald's on April 19, 2002. (RE-D ; R Vol.3, p.29) The Trial Judge then stated as findings of fact the following: Tiffany Hubbard presented herself to Grenada Lake Medical Center where she underwent a physical exam showing things to be normal with her pregnancy at that time, that she returned to Grenada Lake Medical Center on April 26 and reported that her water had broken on April 23, that a nitrazene test was performed which gave a negative result for the presence of any amniotic fluid, that "it was determined, however, at that time, that she suffered from Trichomonas, which was determined by the hospital to be the cause of the vaginal discharge of which she had complained," that her membranes were noted to be intact at various subsequent hospital visits and that she did not have a spontaneous rupture of the membranes until April 29 at 1:25 a.m. (RE-D ; R Vol.3, pp.29-31) The Court concluded as follows, "The problem with Dr. DeSalvo's opinion is that there is absolutely nothing in the medical records to support his opinion. Rather, he strings together a number of possibilities and offers them as fact. As far as the Court can see his entire opinion is based on speculation, guess work and conjecture. There is no medical or scientific basis for his opinion." (RE-D; R Vol.3, p.32) The Court went on to say, clearly contrary to the doctor's affidavit, "Additionally, Dr. DeSalvo failed to articulate the scientific methods that he used to reach his conclusions." (RE-D; R Vol.3, p.32) Most of the Trial Court's findings of fact are contradicted by the record, as will be made clear below.

SUMMARY OF ARGUMENT

The Trial Court erroneously invaded the fact-finding province of the jury in granting Defendants' Daubert Motion, clearly contrary to Mississippi law. The Trial Court completely ignored Plaintiff's expert's sworn affidavit, including the fact that Plaintiff's expert's affidavit mirrored Defendants' expert's affidavit as to the scientific methods utilized by both and, indeed, all other medical doctors. The Trial Court confused credibility with reliability, clearly contrary to Mississippi law. Indeed, the Trial Court agreed with Defendants' argument that a negative nitrazene test conclusively established that no amniotic fluid leaked in spite of medical literature explaining the probable cause of the "false" negative. The Trial Court then failed to acknowledge the other numerous factual conflicts set forth in the medical records. The following objective facts of record are illustrative: the bulging bag of water; the history of leaking amniotic fluid (the fluid being clear rather than yellow, green, and frothy); an elevated blood count; and a placental pathology report showing some chronic inflammation. Since the Trial Court invaded the fact-finding province of the jury clearly contrary to Mississippi law, the "Daubert" dismissal should be overruled.

ARGUMENT

1. The Trial Court's Daubert Ruling erroneously invaded the fact-finding province of the jury.

Mississippi law makes abundantly clear that the fact-finding province of the jury may not be usurped by labeling the ruling as "Daubert":

This Court may not reject an expert's opinion simply because the opinion is based in part on a statement of fact which the Court does not find credible. This Court must not invade the fact-finder's province, and should not use the concepts of credibility and reliability interchangeably.

Treasure Bay Corp. v. Ricard, 967 So.2d 1235, 1239
(Miss.2007)(Emphasis added).

The fact-finding invasion occurred when the Trial Court ignored sworn facts of record in reaching the following factual conclusion, contrary to Dr. DeSalvo's sworn affidavit:

Additionally, Dr. DeSalvo failed to articulate the scientific methods that he used to reach his conclusions. (RE-D; R Vol.3, p.32)

Dr. DeSalvo's affidavit very clearly articulates his methodology as follows:

I have reviewed the records of Tiffany Hubbard from Grenada Lake Medical Center and from University Medical Center relating to the delivery of her premature infant in April of 2002.

I based my opinions on my review of those medical records and on my experience, training, and expertise. My opinions are stated to a reasonable degree of medical certainty.

...

The methodology that I used in reaching my conclusions is the very same methodology used by all board certified in the field of obstetrics and gynecology and, indeed, the same methodology used by all medical doctors. Dr. Rice uses the exact same methodology: "I based my opinions on my review of those medical records and on my experience, training and expertise." (Affidavit of Dr. Rice and my own affidavit.) (RE-E1; R Vol.1, pp.136-137)

Of course, reliance upon historical accounts does not constitute a deviation from accepted methodology:

Indeed, experts in many fields, including medicine,.....frequently rely upon the histories provided by patients and witnesses. Thus, it would be unsettling for this Court abruptly to reject all expert testimony which relies on an historical account of the facts. Of course, whether or not the facts relied upon are credible is a matter for cross-examination and collateral attack at trial. *Treasure Bay Corp. v. Ricard*, 967 So.2d 1235, 1240 (Miss.2007)(Emphasis added).

This fact-finding invasion also occurred when credibility was confused with reliability, clearly contrary to Mississippi law:

This Court may not reject an expert's opinion simply because the opinion is based in part on a statement of fact which the Court does not find credible. This Court must not invade the fact-finders province, and should not use the concepts of credibility and reliability interchangeably. *Treasure Bay Corp. v. Ricard*, 967 So.2d 1235, 1239 (Miss.2007)(Emphasis added).

The language of this new version of 702 focuses on the reliability of the expert's methods and data, but makes no mention of the credibility of a statement relied upon by experts who are following an accepted methodology. *Id.* at 1241. (Emphasis added).

Neither the Trial Court nor the Defendants presented evidence that the Plaintiff's expert relied upon facts, data, or procedures that are not generally accepted in the scientific community. See, Id. at 1241-1242. Rather, the Trial Court, and, indeed, the Defendants, based their conclusions on their analysis of a nitrazene test. Since the nitrazene test was read as negative, both the Defendants and the Court erroneously reached the conclusion that this "negative" was infallible and that, therefore, Tiffany Hubbard could not have had any amniotic fluid leakage at or prior to that time. To the contrary, Dr. DeSalvo concluded, based upon the medical literature, that Tiffany Hubbard not only could have but probably did have leakage of amniotic fluid at or prior to the time of the nitrazene test and that a false negative, as described in the reliable medical literature, probably occurred. Dr. DeSalvo concluded that since the very same nitrazene test also erroneously gave a false negative on the presence of *Trichomonas*, the test was not performed accurately. In other words, according to reliable medical authority, the test in question only tests the presence of pH; a false negative can occur in testing for pH. "A normal pH rules out bacterial vaginosis or trichomoniasis." (Medical Literature attached as *Exhibit A* to Dr. DeSalvo's Affidavit.)(RE-E2;R Vol.1, p.140) "The reason for a false negative result may be produced by prolonged rupture

of membranes (longer than 24 hours) or when a small volume of fluid has leaked.” (Medical Literature attached as *Exhibit A* to Dr. DeSalvo’s Affidavit.)(RE-E2; R Vol.1, p.148) In short, scientific reasoning when applied to a negative pH as to trichomoniasis, which is subsequently proven wrong by a better test, demands only one logical conclusion: the nitrazene test in question was not performed properly resulting in the false negative as to pH. Since the nitrazene test failed to diagnose positive pH to prove the trichomoniasis, it also failed to diagnose the positive pH to prove the presence of amniotic fluid.

Significantly, in this case, the backup and more accurate fern test was not given and the result, according to the medical literature, is that if it had been positive “there is probable rupture of the membranes due to the fern test greater specificity”:

The nitrazene test is highly sensitive but not very specific. If the nitrazene and fern test are positive, probable membrane rupture has occurred. If the nitrazene is negative but the fern test is positive, there is probable rupture of the membranes due to the fern test greater specificity.
(RE-E2; R Vol.1, p.149)

The Trial Court’s conclusion of fact that on numerous vaginal examinations the membranes were reported to be intact ignores the fact that a view of the entire uterus from the vagina is not possible. The fact of medical record, however, that there was a bulging bag of water provides objective evidence that there was a high leakage. (R Vol.1, pp.112-113)

The fact-finding invasion also occurred when only portions of the record were considered.

Dr. DeSalvo’s deposition makes clear the following facts of record upon which he based his opinion, which facts of record were ignored by the Defendants and the Trial

Court:

The medical records establish that Tiffany Hubbard's abdomen was struck when she fell from a standing position:

- Q. The location of the pain is identified— well, back up. In terms of facts, factual information surrounding the patient being there, it says, "Slipped, and she was standing when she slipped." Did I read that correctly? "Slipped and standing." Did you see that?
- A. Yes.
- Q. Okay. That's part of the history upon which you relied?
- A. Yes.
- Q. And then it says here the location of the pain, it's got the letter "R," meaning "right struck," does it not?
- A. Yes.
- Q. Then "ABD," meaning "abdomen struck," does it not?
- A. Yes.
- (DeSalvo Deposition p.31, lines 21-25; p.32, lines 1-14)(R Vol.1, p.98)

The medical records make clear her water broke on April 23:

- A. ...on April 26, It reads, "Water broke since Tuesday," and that would be April 23, and that would be some four days after the fall that was recorded on April 19.
- Q. Okay.
- A. "Water broke since Tuesday. Started leaking. Running down leg Wednesday. Some cramping today," "today" being the 26th. So, from this history it seems that she has symptoms consistent with rupture of membranes beginning on the 23rd of April.
- (DeSalvo Deposition p.39, lines 8-21)(R Vol.1, p.100)

The medical records make clear the sequence:

- A. So, if you look at the history that is given during those times, all that history is consistent with continuing to leak amniotic fluid. In addition, the natural history of premature rupture of membranes is also consistent with the findings that happen here; namely, that with premature rupture of membranes you can have what we call a high leak where the amniotic fluid sac tears but not in front of the cervix and amniotic fluid will leak, but it leaks somewhat intermittently, can be somewhat difficult to diagnose, and can have a latency period that is a little bit more than average. But this seven-day latency period, or actually six-day latency period, is really all consistent with that.
- So, it is the chief complaint that she gave on the 26th. It's the

subsequent presentation on the 27th of the same complaint, and again on the 29th and presenting in labor. The fact that latency period of six days would be reasonable in a patient such as this with rupture of membranes of the type that I believe she had.

(DeSalvo Deposition p.41, lines 16-25; p.42, lines 1-20)
(R Vol.1, p.100)

The medical records make clear where her water broke:

A. In addition, the fact that the physicians caring for her further confirm rupture of membranes but they also note a BBOW, which means "bulging bag of water."

So, if you think about it, if you have a hole in the amniotic sac in front of the cervix, you usually don't get a bulging bag of water because the water will come through and leak out. If you have a leak somewhere else, that's when you often do— can still get a bulging bag of water because the amniotic fluid is leaking at a different point.

(DeSalvo Deposition p.42, lines 22-25; p.43, lines 1-11)
(R Vol.1, p.101)

A. And this approximately 5:00 in the morning, and she arrives giving a history of having ruptured membranes at approximately 1:05 a.m. with clear fluid. So, here we are some four hours later and she's still with a bulging bag of water; however, ruptured membranes at that time is confirmed.

(DeSalvo Deposition p.44, lines 18-25; p.45, line 1)(R Vol.1, p.101)

The medical records support the opinion of premature rupture caused by the fall:

Q. So, your opinion about the fall causing the premature rupture of membranes is caused by her reports of having fallen, in these records, as well as her reports of leaking from her vagina?

A. Yes.

Q. Okay.

A. And physical findings subsequent on the 29th.

Q. The ones that you refer to in the hospital in Jackson?

A. And the natural history of ruptured membranes and spontaneous labor, and the placental pathology findings of chronic inflammation.

(DeSalvo Deposition p.45, lines 8-23)(R Vol.1, p.101)

The Nitrazene test did not reveal an elevated pH:

Q. And the Nitrazene test was negative at the time. That is, it did not reveal that whatever was running down her leg was amniotic fluid. Right?

A. No. It reveals that it doesn't have an elevated pH.

...
It does not test for the presence of amniotic fluid. All it is is pH paper.

(DeSalvo Deposition p.48, lines 9-14; lines 21-23)(R Vol.1, p.102)

The negative Nitrazene test does not rule out ruptured membranes:

A. So, you can have a rupture of membranes without amniotic fluid in the vagina? The answer is "Yes."

Q. Okay.

A. Have I ever examined a patient, tested for the presence of amniotic fluid and had a negative test, and you retest them an hour or two later and the test is positive? The answer is "Yes."

Q. Okay.

A. So, a negative test does not exclude the possibility of rupture of membranes. It is only one test, which is why we use additional tests, such as a brown paper bag test, such as the Fern test...

(DeSalvo Deposition p.49, lines 17-25; p.50, lines 1-7)

(R Vol.1, p.103)

The negative Nitrazene test did not rule out Trichomonas:

A. Another cause of an elevated pH in the vagina is Trichomonas. So, I would have expected the Nitrazene paper to actually be blue in this case, but it was not.

(DeSalvo Deposition p.52, lines 9-13)(R Vol.1, p.103)

The medical record of clear discharge is NOT consistent with Trichomonas:

Q. Is a vaginal discharge caused by Trichomonas; is it usually clear?

A. The discharge caused by Trichomonas is usually not clear.

Q. But it can be clear?

A. It's usually yellow. I guess a patient could interpret it as clear, but it usually contains a significant amount of white blood cells, and it is usually purulent. It can also be green and frothy-like. So, the colors, when I see vaginal discharge and think about Trichomonas infections, are green, yellow, and frothy.

(DeSalvo Deposition p.64, lines 2-16)(R Vol.1, p.106)

The medical records support the opinion that the fall caused the premature rupture which started with a high, intermittent leak:

A. The baby lives in a bag of water. And I'm going to consider a balloon, but a balloon— a balloon is a good analogy, but consider

maybe a stronger balloon than a thin latex balloon. Maybe make it a few mils thicker.

You fill up the balloon with water, you tie it off and you hold it by its tie. If you put a needle in the bottom, that's the head of the baby where the cervix is now, water is going to come out quickly, and in front of the head of the baby you're not going to have a bulging bag. Traditionally that's where membranes rupture.

If you have a leak in the amniotic fluid someplace else, such as from doing amniocentesis, or such as what I think happened in this case from a trauma, say a high leak up inside the uterus in the interface between the membranes and the wall of the uterus, you're holding the bag now and you put the needle up high, what happens is the water will trickle out, but the water at the bottom will still bulge.

So, the question is, how do you explain rupture of membranes which they have confirmed on the 29th at 1:30 a.m. and the bulging bag of water some four hours later? The answer is that the rupture of membranes did not occur in front of the cervix. It occurred at a different place, high. So, we call this in obstetrics a "high leak."

So, if she had a high leak, that would explain the difficulty in diagnosing it because you have to catch it at the right time.

There's not a tremendous amount of fluid present, and it's consistent with her history which is where she continues to leak but yet when we examine her we're not really finding it.

Q. And the objective evidence of the high leak is what?

A. The physical finding of the bulging bag of water.

(DeSalvo Deposition p.90, lines 20-25; p.91, lines 1-25; p.92, lines 1-21)
(R Vol.1, p.113)

Only one conclusion can be reached based on the whole picture contained in the medical records— her membranes ruptured on or around four days after her fall, proving the membrane rupture and resulting premature delivery were caused by the fall:

A. ...if you take a look at the whole picture; which is a bulging bag of water, and confirmed amniotic fluid rupture, you have an elevated white blood cell count. You have had a prodromal phase of labor over the previous several days. You have had a complaint of over the past seven to ten days of intermittent leaking of fluid. You have a placental pathology report showing some chronic inflammation. What's the one thing that will ascribe all of this is that she ruptured her membranes at an earlier point in time on or around the 23rd.

(DeSalvo Deposition p.93, lines 4-19)(R Vol.1, p.113)

CONCLUSION

Dr. DeSalvo's opinion is based upon the method, including history, and procedures of medical science and not merely his subjective beliefs or unsupported speculation. See, Mississippi Transportation Commission v. McLemore, 863 So.2d 31, 36 (Miss.2003). His methodology is that of all other board certified obstetricians. Both Defendants' expert and Plaintiff's expert rely upon the same methodology utilized by medical doctors: they both rely upon experience, training, and expertise. Defendants' expert and argument chooses to ignore the history of leaking clear fluid not purulent, frothy, yellow or green fluid. Defendants' argument also chooses to ignore the fact of record that, if the nitrazene test was not flawed, it would have revealed an increased pH because trichomoniasis was subsequently diagnosed with a different test. Defendants' argument chooses to ignore the medical record of a bulging bag of water as evidence of a high intermittent leak. Unfortunately, the Trial Judge relied upon these and other previously set forth factual arguments by Defendants and found as facts matters which were, at a minimum, in factual dispute. In doing so, the Trial Court invaded the fact-finding province of the jury clearly contrary to Mississippi law. For this reason, the "Daubert" dismissal should be overruled.

RESPECTFULLY SUBMITTED, this the 10th day of November, 2009.

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

BY: Wm. C. Walker, Jr.
WILLIAM C. WALKER, JR.

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CERTIFICATE OF SERVICE

I, WILLIAM C. WALKER, JR. , do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing to the following counsel of record and to the Trial Judge:

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Honorable Joseph H. Loper, Jr.
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This the 10th day of November, 2009.


WILLIAM C. WALKER, JR.