IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2010-CA-00791

UNIVERSITY OF MISSISSIPPI MEDICAL CENTER,
an unincorporated agency or entity of the State of
Mississippi **APPELLANT**

VS.

DONNIE FOSTER and SHIRLEY FOSTER,
LEGAL GUARDIANS OF THE MINOR CHILD,
MALIK R. CALDWELL, WRONGFUL DEATH
BENEFICIARY, AND ON BEHALF OF
ALL WRONGFUL DEATH BENEFICIARIES
OF TAMIKA LYNETTE FOSTER **APPELLEES**

BRIEF OF THE APPELLEES

Appealed from the Circuit Court of the First Judicial District
of Hinds County, Mississippi

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rules 28(a)(1) and 28(b) of the Mississippi Rules of Appellate Procedure, 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 Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

1. University of Mississippi Medical Center, *Appellant*

2. Donnie Foster and Shirley Foster, legal guardians of the minor child, Malik R. Caldwell, wrongful death beneficiary, and on behalf of all wrongful death beneficiaries of Tamika Lynette Foster, *Appellees*

3. Roy Bruce Day, Sr.

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7. Honorable Tomie T. Green
Hinds County Circuit Court
Trial Judge

Respectfully submitted,

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STATEMENT OF THE ISSUES

The trial court correctly entered judgment in favor of Donnie and Shirley Foster and the judgment against the University of Mississippi Medical Center ("UMMC") should be affirmed because:

I. UMMC failed to object at trial to the admission of the autopsy report into evidence and waived its opportunity to do so;

II. UMMC did not submit a proffer into the record of the testimony it claims was erroneously excluded, therefore, any alleged error was waived; and

III. The trial court relied on substantial, credible evidence to support its finding that UMMC physicians and staff violated the standard of care in treating Ms. Tamika Foster whether her true diagnosis was HELLP or TTP.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Court Below

Donnie Foster and Shirley Foster, legal guardians of the minor child, Malik R. Caldwell, wrongful death beneficiary, and on behalf of all wrongful death beneficiaries of Tamika Lynette Foster (hereinafter the "Fosters") filed their Complaint against the University of Mississippi Medical Center (hereinafter "UMMC") on February 13, 2007, for the negligence and medical malpractice committed by UMMC physicians that lead to the wrongful death of Ms. Tamika Foster (hereinafter "Ms. Foster"). [R. at 5]. An Amended Complaint was filed on September 8, 2008. [R. at 53]. The case proceeded to trial in the Circuit Court of Hinds County and a non-jury trial was held June 8-11, 2009. The trial court entered a judgment in favor of the Fosters and against UMMC awarding the Fosters a total of Five Hundred Thousand Dollars ($500,000.00). [R. at 252].

B. Statement of the Facts

At all relevant times, Ms. Foster was under the continuing pre-natal care of UMMC and was considered a high risk pregnancy. [R. at 54]. Throughout her pre-natal care, Ms. Foster was seen in various departments of UMMC including, but not limited to, the OB Receiving Unit, Labor and Delivery, and the OB High Risk Clinic. [R. at 54]. Ms. Foster presented for a check-up on January 25, 2005 and was noted to have a normal platelet count of 375,000. [R. at 54]. Again on February 25, 2005, a complete blood count showed a normal platelet count of 386,000. [R. at 54].

Ms. Foster presented on July 30, 2005 for a scheduled appointment; she was 33 weeks pregnant. [R. at 54-55]. At that time she complained of dizziness, blurred vision, and persistent headaches. [R. at 55]. The doctor suspected gestational diabetes and Ms. Foster was admitted to the hospital for observation and treatment. [R. at 54]. Ms. Foster's platelet count had dropped to 171,000, however, despite the reduced platelet count and neurological symptoms, she was discharged

on August 1, 2005, without further treatment or testing. [R. at 55]. She was scheduled to follow up with the UMMC OB High Risk Clinic one week later on August 8, 2005. [R. at 55].

When Ms. Foster returned on August 8, 2005, she had edema and an elevated protein in her urine; she was diagnosed with gestational thrombocytopenia. [R. at 55]. Despite her history, no platelet count was performed and she was sent home without further testing or treatment and was instructed to return to the UMMC OB High Risk Clinic in two weeks for evaluation and planning for a Caesarean Section. [R. at 55]. Only four days later, on August 12, 2005, Ms. Foster returned to the UMMC OB Receiving Unit. She complained of blurred vision and numbness and tingling in her fingers and toes and she had an abnormally low platelet count of 91,000. [R. at 55]. Despite her neurological symptoms and the dangerous reduction in her platelet count, Ms. Foster was again sent home and a follow up appointment was scheduled for a full-term delivery on August 22, 2005. [R. at 55].

Ms. Foster returned again to the UMMC OB Receiving Unit on August 18, 2005, complaining of nausea, vomiting, burning in the upper abdomen, epigastric pain, and intermittent headaches. [R. at 55]. Her platelet count was at 17,000, which is considered critically low. [R. at 55]. At that time, Ms. Foster was diagnosed with HELLP (hemolysis, elevated liver enzyme levels and low platelet count) syndrome and she was admitted to UMMC. [R. at 55]. She was transferred to Labor and Delivery and a Caesarean Section was performed to deliver her child. [R. at 56].She also received a platelet transfusion, but her condition continued to worsen and she died at UMMC on August 20, 2005. [R. at 56]. Ms. Foster's autopsy report, prepared by UMMC pathologists, opined that the cause of death was Myocardial Ischemia with arrhythmia, secondary to Thrombotic Thrombocytopenia Purpura (hereinafter "TTP"), with a history of HELLP syndrome. [R.E. at 102-105; Ex. P-4, Autopsy Report].

STANDARD OF REVIEW

The standard of review for a bench trial is manifest error. *UMMC v. Pounders*, 970 So. 2d 141, 145 (Miss. 2007) (citing *Miss. State Tax Comm'n v. Med. Devices,* 624 So. 2d 987, 989 (Miss. 1993)). When a trial judge sits without a jury, the judge's factual determinations will not be disturbed "where there is substantial evidence in the record to support those findings" and the trial judge's decision will be affirmed unless "based upon substantial evidence, the court must be manifestly wrong." *Jackson Public School Dist. v. Smith,* 875 So. 2d 1100, 1102 (Miss. App. 2004) (citing *Ezell v. Williams,* 724 So. 2d 396 (Miss. 1998)).

The standard of review for a trial court's admission of expert testimony is abuse of discretion. *Pounders*, 970 So. 2d at 145. "A trial judge's decision as to whether a witness is qualified to testify as an expert is given the widest possible discretion." *Id.* The reliability inquiry regarding the admission of expert testimony under the modified *Daubert* standard is flexible, "with the trial court having considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *UMMC v. Peacock*, 972 So. 2d 619, 624 (Miss. Ct. App. 2006) (internal citations omitted).

SUMMARY OF THE ARGUMENT

UMMC's appeal is limited to two alleged errors. First, UMMC erroneously contends that the trial judge relied solely on an allegedly invalid autopsy report in reaching her decision. UMMC failed to object to the admission into evidence of the autopsy report at trial and UMMC's attempt to raise this issue on appeal is improper. Further, there was ample evidence to conclude that the autopsy report was reliable as to the cause of death. UMMC claims that without the autopsy report the circuit court had no legal basis to support its conclusion that UMMC breached the standard of care with regard to Ms. Foster. This contention is erroneous because even without the autopsy report, the record contains sufficient other evidence to support the trial court's conclusion that the cause of death was TTP and that UMMC breached the applicable standard of care for treating HELLP or TTP. When the record contains "substantial evidence" to support the trial court's findings, the trial judge's decision should be affirmed. *Jackson Public School Dist.*, 875 So. 2d at 1102.

Second, UMMC contends that the trial judge erred in refusing to allow UMMC's expert and treating physician to comment about the contents of the autopsy report. No proffer was made into the record of the disputed testimony and, therefore, UMMC waived this issue because there is no evidence in the record on which to judge the effect of the excluded testimony. Further, "a trial judge's decision as to whether a witness is qualified to testify as an expert is given the widest possible discretion." *Pounders*, 970 So. 2d at 145. UMMC cannot show that the trial judge abused her discretion in refusing to allow comments on the autopsy report by individuals who did not prepare said report and who are not experts in the field of pathology.

ARGUMENT

The trial court's judgment in favor of the Fosters should be affirmed because the Fosters introduced credible and sufficient evidence to establish that the UMMC physicians were negligent and committed medical malpractice in caring for Ms. Foster and that such negligence and malpractice caused her death. The issue decided by the trial court was whether UMMC breached the standard of care owed to Ms. Foster, regardless of whether Ms. Foster had HELLP or TTP, and whether that breach resulted in her death. UMMC has tried to blur the issues on appeal by arguing that the autopsy report – prepared by UMMC's own physicians – was unreliable and that the finding of TTP in the autopsy report was erroneous.

UMMC limited its appeal to two issues. UMMC claims that the trial court erred in relying on the autopsy report in reaching her decision and that the trial court erred in excluding the testimony of UMMC's expert and physician as to the validity of the autopsy report. Both issues raised by UMMC are improper. UMMC did not object to the admission of the autopsy report at trial and raising that issue on appeal is in error. As to the expert testimony UMMC claims was excluded, UMMC did not offer a proffer of the disputed testimony at trial, therefore, UMMC waived the issue because there is no evidence in the record on which to evaluate the effect of the allegedly excluded testimony. Because UMMC failed to properly preserve these issues for appeal, this response brief could simply end here. However, because the Fosters believe that UMMC may attempt to further misconstrue the issues in its reply brief, the Fosters will provide a recap of the issues decided on appeal and the supporting evidence in section III of this brief.

I. UMMC failed to object at trial to the admission of the autopsy report into evidence and waived its opportunity to do so.

UMMC has argued on appeal that the trial judge relied exclusively on the autopsy report in

argue at trial that Ms. Foster did not have TTP. This is contrary to all prior evidence and statements by UMMC. The autopsy report of UMMC physicians Dr. Bret C. Allen and Dr. LaFerra Young set forth this conclusion and the autopsy report has never been amended, despite UMMC's change of opinion. [R.E. at 102-105; Ex. P-4]. The autopsy report is no less than an admission of a party opponent that the cause of death was TTP. MISS. R. EVID. 801(d)(2). Dr. James N. Martin, Jr., one of Ms. Foster's treating physicians at UMMC, wrote an article specifically about Ms. Foster and the misdiagnosis of HELLP instead of TTP, and that article has never been revised. [R.E. at 106-111; Ex. P-5, James N. Martin, Jr., M.D., *et al*, *TTP Masquerading as HELLP Syndrome in Late Pregnancy*]. The article also constitutes an admission by UMMC that the cause of death was TTP. MISS. R. EVID. 801(d)(2).

The Fosters' Amended Complaint states that Ms. Foster's "autopsy report lists the cause of death as being Myocardial Ischemia with arrhythmia, secondary to TTP (thrombotic thrombocytopenia purpura), with a history of HELLP syndrome." [R. at 56]. To which UMMC responded only, "the autopsy report and death certificate speak for themselves." [R. at 71]. UMMC did not deny the finding of TTP or object to the accuracy of the autopsy report in its Answer to the Amended Complaint. Further, in UMMC's original Designation of Expert Witnesses, UMMC provided the following judicial admission, "It is believed that Tamika may have suffered from pregnancy induced TTP..." [R. at 37].

In furtherance of UMMC's attempt to change its position right before trial and argue that Ms. Foster never had TTP, UMMC alleges on appeal that the autopsy is conclusively unreliable. UMMC failed to present sufficient evidence at trial to support that allegation in the face of the Fosters' evidence to the contrary. Further, the autopsy report was not the only evidence of TTP, as will be discussed *infra*, although UMMC breached the standard of care regardless of whether Ms. Foster had

TTP or HELLP. Finally, and most importantly, UMMC failed to object to the admission of the autopsy report into evidence and waived its objection and did not preserve that issue for appeal. As such, UMMC's claim that the trial court committed error by relying on the autopsy report – prepared by UMMC physicians – which it now claims is unreliable, is without merit and should be denied.

II. UMMC did not submit a proffer into the record of the testimony it claims was erroneously excluded, therefore, any alleged error was waived.

The trial judge did not err in determining that Dr. James N. Martin, Jr. and Dr. Baha M. Sibai were not qualified to testify regarding the content of the autopsy report. Whether an expert is qualified to testify is within the sound discretion of the trial judge and the trial judge's decision "is given the widest possible discretion." *Pounders*, 970 So. 2d at 145; MISS. R. EVID. 702. The decision of the trial judge as to admission of expert testimony "will stand unless the discretion he used is found to be arbitrary and clearly erroneous." *Sacks v. Necaise*, 991 So. 2d 615, 622 (Miss. Ct. App. 2007) (quoting *Poole v. Avara,* 908 So. 2d 716, 721 (Miss. 2005)).

Counsel for UMMC attempted to have Dr. Sibai comment on the autopsy report as part as of his testimony. The trial judge determined that Dr. Sibai could not testify to the pathology report because he was not a pathologist and pathology was outside of his expertise. [R.E. at 95; Trial Tr. at 658]. Dr. Sibai argued that he was not talking about pathology, rather he was talking about the condition of women with HELLP and TTP at the time he operated on them. [R.E. at 97; Trial Tr. at 660]. That testimony was not refused, however, the judge determined that Dr. Sibai's expertise was dealing with these women when they are alive, not in preparing autopsy reports after they are deceased. *Id.* The court limited the testimony of Dr. Martin in regard to the autopsy report as well. [R.E. at 101; Trial Tr. at 733]. Both Dr. Sibai and Dr. Martin were allowed to talk extensively about the condition of living women with HELLP and/or TTP, they were simply limited in discussing the

results of the autopsy, which was outside their areas of expertise.[2]

When UMMC attempted to elicit testimony regarding the autopsy report from these individuals and the trial judge limited their testimony, UMMC failed to properly preserve this argument for appeal because a proffer of the testimony they sought to elicit was not offered to the court on the record. "[T]o preserve an evidentiary exclusion for appeal, a proffer must be made as to what the content of the evidence or testimony would be." *Redhead v. Entergy Mississippi, Inc.*, 828 So. 2d 801, 813 (Miss. Ct. App. 2001). This Court has held that in the absence of a meaningful proffer the lower court cannot be placed in error. *Knotts by Knotts v. Hassell*, 659 So. 2d 886, 891 (Miss. 1995). UMMC offered no evidence of the substance of the proposed testimony from Dr. Sibai and Dr. Martin and, therefore, UMMC failed to properly preserve this issue for appeal.

The trial court has discretion to determine whether an expert is qualified to testify at trial and the trial court did not err in determining that Dr. Sibai and Dr. Martin were not qualified to testify in the field of pathology. Further, UMMC did not provide a proffer of the testimony that it sought from Dr. Sibai and Dr. Martin; therefore, this appellate court has no testimony from which it can evaluate the alleged error. As such, this issue was not properly preserved for appeal and UMMC's argument on this issue should be rejected.

III. The trial court relied on substantial, credible evidence to support its finding that UMMC physicians and staff violated the standard of care in treating Ms. Foster whether her true diagnosis was HELLP or TTP.

Because UMMC failed to properly preserve its two issues for appeal, this brief is technically complete with the two preceding sections. However, because this is the only opportunity the Fosters have to speak on appeal, and due to the possibility that UMMC will attempt to raise additional issues

[2] UMMC did not offer any expert competent to discuss the findings of UMMC's autopsy report; neither the physicians who prepared the report nor independent pathologist were called to testify. UMMC's autopsy report stands unchallenged by competent testimony.

in its reply, the Fosters set forth the following explanation of what was decided by the trial court and the evidence supporting the trial court's findings.

A. Substantial evidence supported that the autopsy report was reliable, and, regardless, substantial evidence supported the trial court's finding that Ms. Foster died of TTP, with or without the autopsy report.

UMMC claims that the autopsy is invalid because it includes the results of an ADAMTS13 test. (Appellant Brief at 9). UMMC presented an article at trial indicating that the ADAMTS13 test *may* not be valid when performed postmortem. [*See* Ex. D-28, Denis M. Dwyre, *et al, Value of ADAMTS13 activity and inhibitor in the postmortem diagnosis of TTP*]. This article is clearly not conclusive. It provides, "Postmortem ADAMTS13 activity levels *may* not be valid in establishing a diagnosis of TTP, and high inhibitor levels in this setting *may* be related to elevated PFH. *Caution* must be used in the interpretation of ADAMTS13 testing in the presence of hemolysis." [Ex. D-28 (emphasis added)]. This article does not state that a postmortem ADAMTS13 test is invalid. It simply states that caution should be used when interpreting the test.

Dr. Martin ordered an ADAMTS13 test after Ms. Foster's death because he suspected TTP. At trial, he stated that since that time he has learned "that it's invalid if it's drawn after the patient has died because of the normal body changes that occur it sort of makes the value not accurate..." [R.E. at 98; Trial Tr. at 719]. However, Dr. Martin has not personally investigated the reliability of the test. [R.E. at 100; Trial Tr. at 721]. Counsel for UMMC never asked Dr. Martin where he got this information or why he was so sure the test was unreliable. Additionally, Dr. Martin's credibility was in issue since he was ultimately in charge of the care, or lack of care, resulting in the death of Ms. Foster.

UMMC suggests that all of the experts and physicians testifying at trial concluded that the ADAMTS13 is unreliable postmortem, but that is simply far from the truth. The deposition

testimony of Dr. Joel Moake cited by UMMC is inconclusive at best. (Appellant Brief at 10). Dr. Moake stated that his laboratory does not accept postmortem samples. [R.E. at 151-154; Ex. D-34(b), Depo. of Dr. Moake at 11]. He did not know of any studies concluding that postmortem samples are unreliable, but that has simply always been the practice in his lab. *Id.* Dr. Moake knew of recent article on this topic, but no further discussion was had regarding the article or documentation to support the opinion that postmortem samples were unreliable. *Id.*

Dr. Charles Greenburg testified regarding the article and concluded that it did not necessarily relate to the case at hand because the article documented only four cases and it "doesn't relate to a case where there is documented hemolysis and documented changes [in the patient]." [R.E. at 78; Trial Tr. at 343]. UMMC misrepresented Dr. Greenburg's testimony in its brief by stating that Dr. Greenburg did not know of the reliability of the ADAMTS13 test. (Appellant Brief at 11).[3] UMMC cited an excerpt of Dr. Greenburg's testimony related to the error rate of the ADAMTS13 test without reference to the substantial testimony of Dr. Greenburg prior to that point. Dr. Greenburg actually testified that using the ADAMTS13 "is an accepted way to confirm and diagnose TTP in the postmortem period with somebody who has clinical manifestations of TTP and laboratory findings and autopsy findings of TTP." [R.E. at 80; Trial Tr. at 345].

Dr. Greenburg stated that the 2009 article simply raised caution, it did not invalidate the autopsy at issue. [R.E. at 82; Trial Tr. at 347]. Dr. Greenburg disagreed with the assertion that the ADAMTS13 test is unreliable postmortem.

> So in this case though, the diagnosis was made, blood collected several hours after death in which case the enzyme activity in the blood for von Willebrand factor was low. Moake says that he thought it might be unreliable because it's inactivity. I respectfully disagree; that it may be a little bit lower.

[3] The excerpt of testimony provided on page 11 of UMMC's Brief, being testimony from page 350 of the transcript, is incorrectly assigned to Dr. Stern. This was actually Dr. Greenburg's testimony.

But the real cincher, and this is the fact that she had an antibody. Antibodies I can tell you from working in labs, we lay them out on the - - I mean they sit at room temperature. And antibody was present in her blood stream that destroyed von Willebrand factor cleaving enzyme. She had an autoimmune disease that was directed against this von Willebrand factor protein. She had antibody in her bloodstream that they were able to measure, a postmortem sample. And that's essentially the diagnosis [TTP]. It was supported by the pathology, too. So, I don't think we have - - I just can't - - I mean I can't understand their argument any other way.

[R.E. at 51-52; Trial Tr. at 230-231]. Dr. Greenburg further testified that his determination that Ms. Foster died of TTP was not based solely on the ADAMTS13 result:

Q: Your opinion that she died of TTP as you just said was based on the lab test deficiency in ADAMTS13; is that correct?

A: Both a deficiency in the activity and the presence of an inhibitory antibody activity.

...

A: The antibody is basically an antibody that inhibits the activity.

Q: What's the name of it?

A: It's just an auto antibody to ADAMTS13. It's basically the presence of an inhibitor. In the plasma it's measured as units. In this case it was 2.5 units and I think upper limits was .5 as I recall from the record.

Q: Okay. Let me as you this. Are you talking about looking for deficiency in the ADAMTS13 activity or something separate?

A: No. I am giving you what the pathobiology is of TTP. TTP is congenital. You are born without the protein so it has no activity. There's no activity for the von Williebrand's [sic] factor cleaving enzyme. If you inquire [sic - acquire] the disease you produce an antibody that inhibits the activity. So ISA's are performed both by how much activity or von Williebrand's [sic] factor cleaving activities in the blood and how much activity is there when you take the patient's plasma and mix it with a known amount of the enzyme and ask can it inhibit a known amount of the von Williebrand's [sic] factor cleaving enzyme. She had low activity, and then was able to basically in her plasma inhibit von Williebrand's [sic] factor cleaving activity. There are two parts of the report.

[R.E. at 65-66; Trial Tr. at 277-278]. The ADAMTS13 test was not the only evidence that Ms. Foster

died of TTP and Dr. Greenburg was not the only one to reach this conclusion.

Dr. Bret C. Allen and Dr. LaFerra Young, both UMMC physicians, also reached this conclusion as set forth in the autopsy report. [R.E. at 102-105; Ex. P-4]. The autopsy report was never revised after the physicians allegedly learned that an ADAMTS13 test performed postmortem may be invalid. This was confirmed by the court during the testimony of Dr. James Bofill, a maternal fetal medicine physician at UMMC. [R.E. at 91-93; Trial Tr. at 584-586]. This is further proof that the results of the test have not been invalidated. If the pathologist who prepared the report could no longer stand behind the results, the report should have been revised, but this was never done. From an evidentiary perspective, the autopsy report by UMMC is an admission by UMMC that Ms. Foster died from TTP. MISS. R. EVID. 801(d)(2).

Dr. Martin also reached the conclusion that Ms. Foster died of TTP as evidence by the article written about her, which has never been withdrawn, revised, or amended. [R.E. at 106-111; Ex. P-5]. In Dr. Martin's article, he specifically stated that the ADAMTS13 result was not the only indicator of TTP in Ms. Foster. The fact that she did not respond to the high-dose of corticosteroids is consistent with TTP, not HELLP, and that was one factor indicating TTP. *Id.* Second, although Ms. Foster's lab values fit within the parameters of HELLP, "the relative proportions of the laboratory values appear, in our experience, to be somewhat atypical compared with what is usually recorded in a patient with HELLP syndrome." *Id.*

Further, the pathology report showed microthrombi, which is associated with TTP according to UMMC physicians. [R.E. at 106-111; Ex. P-5]. Also, Dr. Robert Stern testified that a patient's condition could not be diagnosed as gestational thrombocytopenia when the patient has shown objective neurological signs and symptoms. [R.E. at 19-20, 27-29, 44-45; Trial Tr. at 90-91, 98-100; 174-175] [*See also* R.E. at 192-218; Ex. P-46, Steven G. Gabbe, *et al*, Obstetrics: Normal and

Problem Pregnancies, Chapter 34, *Hematologic Complications of Pregnancy* (neurologic changes and abnormalities are characteristics of TTP)]. The ADAMTS13 test result was clearly not the only indicator of TTP in Ms. Foster, which was even admitted by UMMC's physicians in Dr. Martin's article.

Finally, UMMC argues that Dr. Stern's only linkage to TTP is from the autopsy report. UMMC provides excerpts from Dr. Stern's testimony wherein he is unwilling to make a diagnosis of Ms. Foster based on her symptoms as set forth in the medical records. Again, UMMC omits pertinent portions of his testimony clarifying that he is talking about occasions prior to her final admission to UMMC. For instance, UMMC cites page 157 of the hearing transcript where Dr. Stern states, "We don't know what's wrong with her on 8/12, but we know she is getting sick." [R.E. at 37; Trial Tr. at 157]. Immediately following that statement, but omitted by UMMC, Dr. Stern provided that there were several possibilities of what it might have been, including HELLP or TTP. [R.E. at 38-39; Trial Tr. at 158-59]. This is just one example of Dr. Stern's link to TTP based on Ms. Foster's symptoms, and this clearly did not come from the autopsy report. UMMC cites Dr. Stern's statement that the autopsy report revealed TTP as if that was Dr. Stern's conclusion and related to his opinion. However, that was simply Dr. Stern's response to the question "What did the final autopsy reveal?" by counsel for UMMC. [R.E. at 20; Trial Tr. at 91].

The result of the ADAMTS13 test was not the only evidence of TTP, as indicated by the testimony of Dr. Stern, Dr. Greenburg, and the article by Dr. Martin. Further, UMMC presented only disputed evidence that the ADAMTS13 test is invalid postmortem. UMMC relied on one article, which discussed only four patients and advised that caution should be used when performing an ADAMTS13 postmortem, but Dr. Greenburg testified that this is still an acceptable practice and that the article did not necessarily apply to the case at hand. UMMC failed to show that the autopsy was

show that the autopsy was invalid and the trial court's reliance on the autopsy, among other evidence, was not in error. Substantial evidence was presented supporting the finding that TTP was the diagnosis. The trial judge did not commit manifest error.

Substantial evidence was presented at trial showing not only that Ms. Foster died from TTP, but also showing that the standard of care for treating unrelenting HELLP and TTP was the same and that said standard of care was breached in Ms. Foster's case. The finding of TTP in the autopsy report is simply one piece of evidence to support that decision. With or without the autopsy report, substantial evidence exists in the record to support a conclusion that the disease involved was TTP, the standard of care required for treating HELLP or TTP, that UMMC breached the standard of care owed to Ms. Foster, and that she died as a proximate result.

B. Substantial, credible evidence was presented on which the trial court based its finding that UMMC physicians and staff violated the standard of care in treating Ms. Foster whether for HELLP or TTP.

UMMC erroneously claims that the trial court's decision was based solely on the autopsy report finding of TTP and that there was no other evidence to support to the trial court's ruling. UMMC argues that the court's determination that Ms. Foster had TTP was erroneous because the autopsy report was invalid. First, the trial judge did not rely exclusive on the autopsy report in reaching her decision. Substantial evidence was presented at trial supporting a diagnosis of TTP and thereafter setting forth the applicable standard of care for TTP or HELLP and showing a breach of that standard by UMMC physicians and staff. Second, UMMC misrepresents the issue in this case. The issue was that UMMC breached the standard of care owed to Ms. Foster whether she had HELLP or TTP. The trial judge fully understood the issues presented in this case and ruled accordingly based on the substantial evidence presented. [R.E. at 67-73; Trial Tr. at 293-299]. The trial judge relied on expert testimony, medical literature, and Ms. Foster's medical records in

reaching her decision that UMMC breached the standard of care in treating Ms. Foster, resulting in her death. [R.E. at 6-7].

The judge referred to the testimony of the Fosters' hematologist and UMMC's experts who said that a hematology consult was preferable on August 8, 2005, but crucial on August 12 and August 18, 2005. [R.E. at 8; R. at 249]. The judge determined that UMMC's failure to obtain a hematological consult resulted in Ms. Foster's "loss of chance to survive TTP." *Id.* The judge determined that UMMC removed Ms. Foster from ICU too soon after delivery because 72-hours of intensive monitoring is the standard of care for someone with HELLP symptoms. [R.E. at 6; R. at 247]. Further, and most importantly, the judge held that "all experts agree that plasma exchange therapy was the appropriate standard of care for the treatment of TTP and unrelenting HELLP patients ..." [R.E. at 8; R. at 249 (emphasis in original)]. The judge clearly understood the issues and considered both HELLP and TTP when determining that UMMC's conduct in the treatment of Ms. Foster was "a fatal failure of the standard of care." [R.E. at 9; R. at 250].

In order to prevail in a medical malpractice action, one must establish, by expert testimony, the existence of a duty on the part of the physician, the standard of acceptable professional practice, that the physicians deviated from that standard, and that the deviation from the standard of acceptable professional practice was the proximate cause of the injury. *Maxwell v. Baptist Memorial Hospital-Desoto, Inc.*, 958 So. 2d 284 (Miss. Ct. App. 2007); *Young vs. University of Mississippi Medical Center*, 914 So. 2d 1272 (Miss. Ct. App. 2005). The Fosters were successful in proving those elements by a preponderance of the evidence at trial.

A doctor-patient relationship clearly existed between UMMC, its physicians and medical staff, and Ms. Foster while she was under their care on August 12, 2005, and again August 18-20, 2005. Medical expert testimony as to the requisite standard of care to which Ms. Foster was entitled

was presented at trial through Dr. Stern, Dr. Greenberg, and Dr. Griffin, along with the learned authoritative treatises in evidence. The standard of care of reasonably prudent, minimally competent obstetricians required the following of the UMMC physicians:

1. Once Ms. Foster was finally admitted to UMMC on August 18, 2005, conditions other than HELLP syndrome, such as TTP and other serious and deadly diseases within the potential differential diagnosis that have overlapping symptoms, should have been considered and further evaluation and testing was required. [R.E. at 15-20, 28-29, 40-43, 46, 76-77, 86-88; Trial Tr. at 86-91, 99-100, 170-173, 219, 321-322, 417-419]. [R.E. at 112-132; Ex. D-18, ACOG Practice Bulletin, *Thrombocytopenia in Pregnancy*]. [R.E. at 139-150; Ex. D-33, Baha M. Sibai, M.D., *A practical plan to detect and manage HELLP syndrome*]. [R.E. at 155-191; Ex. P-45, James N. Martin, Jr., M.D., et al, *TTP in 166 Pregnancies*].[4]

2. Before diagnosing a patient with HELLP, the standard of care requires that more serious diagnoses (such as TTP) be ruled out and if an accurate diagnosis cannot be made, then the patient should be treated for the most serious of the possible diagnoses and a hematological consult is needed. [R.E. at 30-36, 47-50, 84-85, 89-90, 91; Trial Tr. at 106-112, 226-229, 404-405, 427-428, 584]. [R.E. at 112-132; Ex. D-18]. [R.E. at 192-218; Ex. P-46].

3. Ms. Foster should have remained in ICU for a minimum of 72-hours following the delivery of her child. Intensive treatment and monitoring for 72-hours is the standard of care for someone with HELLP symptoms. [R.E. at 94; Trial Tr. at 645] [R.E. at 139-150; Ex. D-33].

4. After Ms. Foster's Caesarean Section, when her condition did not improve by mid-day August 19, 2005 – and certainly when her condition became critical that evening – a hematological consult was essential and plasma exchange therapy should have taken place, according to the applicable standard of care, for the prudent and life-saving treatment of HELLP or TTP. [R.E. at 53-60, 61-64, 74-75; Trial Tr. at 239-246, 254-257; 314-315]. [R.E. at 106-111; Ex. P-5]. [R.E. at 133-138; Ex. D-21, James N. George, *et al, Evaluation of Women With Clinically Suspected TTP-HUS During Pregnancy*].[5]

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[4] The Fosters presented sufficient evidence to support the opinions rendered by their experts, meeting the standard set by this Court for supporting expert testimony that has been challenged. *See Hill v. Mills*, 26 So. 3d 322, 330-31 (Miss. 2010); *Patterson v. Tibbs*, 2011 WL 909359, *6-7 (Miss. 2011). The medical literature in the record, some of which was authored by UMMC physicians, clearly shows that the opinions of the Fosters' experts are accepted and supported within the scientific community.

[5] *See also* Ex. P-38, James N. Martin, Jr., M.D., *et al, Plasma exchange for preeclampsia*; Ex. P-39, James N. Martin, Jr., M.D., *et al, The natural history of HELLP syndrome: Patterns of disease progression and regression*; Ex. P-42, James N. Martin, Jr., M.D., *et al, Postpartum plasma exchange for preeclampsia-eclampsia as HELLP syndrome*; Ex. P-43, James N. Martin, Jr., M.D., *et al, High-dose dexamethasone: a promising therapeutic option for HELLP.*

UMMC, its physicians, and medical staff breached the standards of care set forth above, which would be expected from reasonably prudent, minimally competent OB physicians, in their treatment of Ms. Foster. That failure to conform to the requisite standard of care resulted in Ms. Foster's death. Dr. Stern and Dr. Greenberg testified that Ms. Foster would not have died had her thrombocytopenic condition been followed closely and repeat CBC's done in 12-24 hour intervals following the August 12, 2005 visit. [R.E. at 23-24, 47-50; Trial Tr. at 94-95, 226-229]. Specifically, her declining condition – whether it was HELLP or TTP – likely would have been discovered much sooner, her baby would have been delivered, if her condition did not improve appropriate therapy would have been initiated much sooner, and Ms. Foster likely would have survived. [R.E. at 49-50, 60, 62, 64; Trial Tr. at 228-229, 246, 255, 257].

The credible proof also shows that had plasma exchange therapy been initiated on August 19, 2005, when Ms. Foster's condition did not improve after the baby was delivered, she likely would have survived either condition – HELLP or TTP – as plasma exchange therapy was the standard of care for either non-responsive HELLP or TTP. [R.E. at 49-50, 60, 62, 64; Trial Tr. at 228-229, 246, 255, 257]. Accordingly, the Fosters established by a preponderance of the evidence a medical negligence and wrongful death case against UMMC. *Delta Regional Medical Center v. Venton*, 964 So. 2d 500 (Miss. 2007); *Cheeks v. Bio-Medical Applications, Inc.*, 908 So. 2d 117 (Miss. 2005); *Troupe v. McAuley*, 955 So. 2d 848 (Miss. 2007). Certainly, the trial court's ruling is supported by substantial credible evidence, and therefore, cannot be considered manifestly erroneous.

CONCLUSION

For the reasons set forth above, the trial court's Final Judgment should be affirmed. UMMC's appeal is based on two very limited issues: (1) its erroneous contention that the trial judge relied

solely on the allegedly invalid autopsy report to support her decision and (2) that the judge erred in limiting the testimony of Dr. Sibai and Dr. Martin in regard to the autopsy. UMMC failed to properly object to the admission of the autopsy report at trial. Further, substantial credible evidence exists to support the finding that the autopsy report, prepared by UMMC, was valid. Its existence in evidence is sufficient to support the trial court's reliance on it. Nevertheless, the judge clearly relied on substantial other evidence in reaching her decision. Further, the judge did not abuse her discretion in limiting the testimony of Dr. Sibai and Dr. Martin to areas in which they were qualified to testify. The court's Memorandum Opinion and Order is correct in all respects and the judgment against UMMC is fully supported by substantial, credible evidence. The issue presented and decided in the underlying matter was that UMMC breached the standard of care in treating Ms. Foster for HELLP or TTP and that Ms. Foster died as a result. Accordingly, the Fosters respectfully request that this Court affirm the trial court's decision.

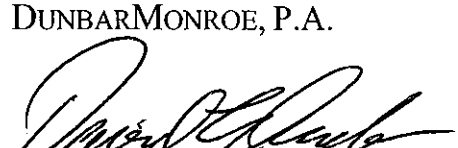
This the 30 day of March, 2011.

Respectfully submitted,

DONNIE FOSTER and SHIRLEY FOSTER,
legal guardians of the minor child,
MALIK R. CALDWELL, wrongful death
beneficiary, and on behalf of all wrongful death
beneficiaries of TAMIKA LYNETTE FOSTER

By Their Attorneys,

DUNBARMONROE, P.A.



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CERTIFICATE OF SERVICE

I, David C. Dunbar, attorney for Appellees, do hereby certify that I have this day delivered a true and correct copy of the above and foregoing instrument via U.S. Mail, postage prepaid, to the following:

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Judge Tomie T. Green
Circuit Court of Hinds County
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This the 30 day of March, 2011.

David C. Dunbar