

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

**DOCKET NO. 2010-CA-00791**

**UNIVERSITY OF MISSISSIPPI MEDICAL CENTER,**

**Defendant/Appellant**

**VERSUS**

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

**Plaintiffs/Appellees**

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

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**REPLY BRIEF OF APPELLANT  
UNIVERSITY OF MISSISSIPPI MEDICAL CENTER  
(ORAL ARGUMENT REQUESTED)**

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UMMC will address Plaintiff's arguments in the order presented in the Brief of Appellees. UMMC uses its Record Excerpts page numbers.

**I. Admission of the Autopsy Report does not constitute a waiver of UMMC's right to challenge its sufficiency.**

When Plaintiff argues that UMMC is precluded from challenging the sufficiency of the Autopsy Report simply because it did not object to its admissibility, Plaintiff mistakenly equates the **admissibility** of the Autopsy Report with the **sufficiency** of the Autopsy Report's content to support the Circuit Court's finding that Ms. Foster had TTP and died from TTP. Many years ago the Supreme Court noted the difference: "The **competency** and **admissibility** of testimony is a different consideration altogether from its **value**, or **sufficiency** to sustain the issue." *Claiborne v. Holmes*, 51 Miss. 146, 152-153 (1875)(emphasis added). Simply because the Autopsy Report was admitted into evidence does not preclude UMMC from producing other evidence which shows the Autopsy Report does not substantially and credibly support the Circuit Court's ruling.

This time-line will be used to reply to Plaintiff's arguments:

**August 20, 2005:** Ms. Foster dies at 4:12 a.m. (Ex. P-4 at page 1; RE 21)

**August 20, 2005:** The autopsy was performed at 2:00 p.m. (Ex. P-4 at page 1; RE 21)

**August 23, 2005:** The "assay" of ADAMTS13 "activity" was performed using postmortem blood. (Ex. P-4 at page 2; RE 22)

**September 9, 2005:** An autopsy conference was conducted at UMMC and was attended by Dr. James N. Martin. (Ex. P-4 at page 1; RE 21)

**November 30, 2005:** The Report of Autopsy was published. (Ex. P-4 at page 1; RE 21)

- 2006:** Dr. James N. Martin, one of Ms. Foster's treating physicians, and others published an abstract about Ms. Foster's case in Obstetrics & Gynecology. (Ex. P-5)
- February 27, 2009:** Several persons with the Department of Pathology at the University of California Davis Medical Center in Sacramento, California published an article in Journal of Clinical Apheresis which concluded: "Postmortem ADAMTS13 "activity" levels may not be valid in establishing a diagnosis of TTP ....". (Ex. D-28; RE 19)
- April 29, 2009:** Dr. Joel Lawrence Moake testified that postmortem blood is not reliable for analysis of ADAMTS13 "activity" and testified about the study published by the University of California Davis Medical Center. (Ex. D-34(b) at deposition page 11)
- May 27, 2009:** UMMC supplemented its expert witness designation and stated that Ms. Foster did not have TTP but was properly diagnosed with HELLP Syndrome and stated that the claim that Ms. Foster had TTP is based on unreliable medical evidence. (R. 77-83)
- June 8-11, 2009:** The trial was held in Circuit Court. (Tr. 1)

The Autopsy Report based its finding that Ms. Foster died from TTP on an "assay" of ADAMTS13. "ADAMTS13 is a metalloprotease that cleaves large multimers of Von Willebrand's factor." (Ex. P-4 at page 1; RE 21; Ex. P-44 at page 590). An "assay" or test of a postmortem blood sample was conducted to measure the "activity" and "inhibitor level" of ADAMTS13 for Ms. Foster. (Ex. P-4 at pages 1-2; RE 21-22; Ex. D-34(b) at deposition page

11). Normal ADAMTS13 “activity” is greater than 66% and normal “inhibitor level” is less than .5. (Ex. P-4 at page 1; RE 21). An “activity of less than 5% is a “severe deficiency and appears to be a specific finding in thrombotic microangiopathy patients with a clinical diagnoses of TTP ...”(Ex. P-4 at page 1; RE 21). The postmortem blood sample from Ms. Foster showed an ADAMTS13 “activity” of less than 4% and an “inhibitor level” of 2.4. (Ex. P-4 at page 2; RE 22).

UMMC first learned that using postmortem blood for the “assay” of ADAMTS13 “activity” produces invalid results when Plaintiff deposed Dr. Moake at the end of April, 2009. Dr. Moake was involved in the discovery that ADAMTS13 could be used to diagnose TTP, (Tr. 209-210, 272-273)<sup>1</sup>, and he testified: “I’ve been running a lab for 20 years that assays ADAMTS13 and we don’t accept postmortem samples because they’re not reliable.” (Ex. 34(b) at deposition page 11). When Plaintiff asked Dr. Moake for peer-tested literature that supported his position on postmortem blood samples, Dr. Moake identified the report published by the authors

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<sup>1</sup> Dr. Greenberg, Plaintiff’s expert, testified:

Q. Do you know who discovered [ADAMS13]?

A. .... There’s been some arguments as to who discovered it. There is some Japanese group at one point claimed it, and then there’s the U.S. claim they really cloned it and expressed it first. So I mean I’m familiar with the idea that Moake and others, your expert, really has devoted – really devoted a big part of his life to it. I mean a major part of it.

Q. .... [w]e talked about ADAMTS13, and you told me that Dr. Moake was one of the physicians who had discovered ADAMST13; is that correct?

A. Yes, he’s one of the ones that worked on the pathobiology of the cause of the disease.

(Tr. 209-210, 273).

at the University of California Davis Medical Center. (Ex. 34(b) at deposition page 12).

After Dr. Moake testified that postmortem blood samples produce invalid results for ADAMTS13 “activity,” UMMC supplemented its expert witness designation. UMMC amended the designation for Drs. Martin and Sibai and stated they would testify that “recent medical knowledge” supported their opinions that Ms. Foster did not have TTP and did have and was properly diagnosed with HELLP Syndrome. (R. 78, 80). UMMC amended its designation for Dr. Moake by adding that he would opine that any claim that Ms. Foster had TTP was “not based on reliable medical evidence.” (R. 82).

During *voir dire* of Dr. Greenberg, Plaintiff’s expert, UMMC accepted Dr. Greenberg as an expert in the area of hematology but reserved the right to move to exclude any unreliable testimony. (Tr. 211). After Plaintiff rested, UMMC moved for a directed verdict.<sup>2</sup> (Tr. 606). UMMC argued that no reliable evidence showed that Ms. Foster had TTP because the use of postmortem blood to test ADAMTS13 “activity” produced unreliable results, and UMMC moved to strike Plaintiff’s experts because, *inter alia*, they relied upon the Autopsy Report’s finding that was based on the invalid test of ADAMTS13 “activity”. (R. 133-134, 135-136, 150, 171).

In summary, since UMMC learned that the use of a postmortem blood sample produces an invalid assay of ADAMTS13 “activity”, UMMC has consistently challenged the Autopsy Report’s finding that Ms. Foster’s death was caused by or related to TTP. UMMC has never waived that contention.

Plaintiff argues that the Autopsy Report constitutes an admission of a party opponent

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<sup>2</sup> The trial court denied the motion but told UMMC to include its argument in the pleadings to be filed at the conclusion of the case. (R. 606-607). The trial court considered UMMC as having renewed its motion at the close of the case. (R. 775-776).

under M.R.E. 801(d)(2). Assuming that is the case, an admission under M.R.E. 801(d)(2) does not preclude UMMC from showing the Autopsy Report's finding rests on an invalid assay of ADAMTS13 "activity". If the Autopsy Report is an admission under M.R.E. 801(d)(2), that simply means that the Autopsy Report is not hearsay.<sup>3</sup> Nothing in Rule 801(d)(2) states that UMMC is thereby precluded from showing that the Autopsy Report is based upon an invalid test. An admission under M.R.E. 801(d)(2) is classified as an evidentiary admission or a quasi admission. An evidentiary admission "is not conclusive but is always subject to contradiction or explanation." 2 McCormick on Evidence §254 at 142 (4th Ed. 1992); IV Wigmore on Evidence §1059 at 27 (1972) ("A quasi admission . . . being nothing but an item of evidence, is therefore *not in any sense final or conclusive.*" (italics in original)).<sup>4</sup> 5 Weinstein's Federal Evidence (2011 2d Ed.), in dealing with the identical federal rule, notes that "the party [whose statement is considered an admission] is present in court to **explain, deny or rebut** the offered statement." Id. at § 801.30[1] at 801-47 (emphasis added). For example, in *State Farm Mutual Auto*

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<sup>3</sup> M.R.E. 801(d)(2) reads:

**(d) Statements Which Are Not Hearsay.** A statement is **not hearsay** if:

....  
(2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy,. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E). (emphasis added).

<sup>4</sup> The non-conclusive quality of an "evidentiary" or "quasi" admission differentiates it from the "Judicial" admission which is conclusive. IV Wigmore on Evidence §§ 1058, 1059 at 26-31 (1972).



*Insurance Co. v. Grimes*, 722 So.2d 637 (Miss. 1998), the Mississippi Supreme Court held that a repair cost estimate procured by State Farm constituted an admission under M.R.E. 801(d)(2), but noted that State Farm still was allowed to challenge the content of the estimate by calling the estimator to testify that the estimate “might have been ‘a little high’”. *State Farm Mutual Insurance Co. v. Grimes*, 722 So.2d 637, 643 (¶25). See *Motors Insurance Corp. v. Stanley*, 115 So.2d 678, 682 (Miss. 1959)(recognizing the non-conclusive probative value of an extra judicial admission). Therefore, assuming the Autopsy Report is an admission under M.R.E. 801(d)(2), the Autopsy Report is not conclusive and UMMC was not precluded from showing that at the time of Ms. Foster’s death and at the time the Autopsy Report was prepared, UMMC believed an assay of ADAMST13 “activity” based on a postmortem blood sample was valid, but later, UMMC discovered that it was not.

Plaintiff also argues that Dr. Martin's article constitutes an admission under M.R.E. 801(d)(2). As the time-line shows, Dr. Martin prepared the article shortly after Ms. Foster's death and more than two years before UMMC discovered an ADAMTS13 activity test is invalid when a postmortem blood sample is used for the test. Plaintiff does not identify any statement in the article where Dr. Martin explicitly admits Ms. Foster died from TTP because there is no such admission, but even if such a statement can be inferred, Dr. Martin’s article is an evidentiary admission. The legal authorities cited above show an evidentiary admission is not conclusive. See pages 5-6, *supra*. Therefore, UMMC is not precluded by Dr. Martin's article from proving that the Autopsy Report was based upon an invalid plasma ADAMTS13 test.

Plaintiff argues that UMMC's Answer and its original expert witness designation are “judicial admissions”. Pleadings “are used as judicial and not as evidentiary admissions, and for these purposes, they are conclusive until withdrawn or amended.” 2 McCormick on Evidence

§257 at 147-48 (1992 4th Ed.) However, pleadings that are later amended cannot be used as “judicial admissions.” 2 McCormick on Evidence §257 at 148 (1992 4th Ed.)(“Amended, withdrawn, or superseded pleadings in the case are no longer judicial admissions, but may be used as evidentiary admissions”)

UMMC’s response in its Answer that the Autopsy Report “speaks for itself” is not an expressed admission about the validity of an ADAMTS13 “activity” test. At best, the Answer’s response is ambiguous. Because of the ambiguous nature of UMMC’s response, the response is not a judicial admissions and can only be used as an evidentiary admission. *Rudmann v. Truck Insurance Exchange*, 660 So.2d 975, 977 (Miss. 1995)(Statement in Complaint was ambiguous and, therefore, was “at most an evidentiary admission to be considered along with the other evidence.”).

The Pretrial Order amended UMMC's Answer to conform to the Pretrial Order. (R.128). The factual summary, contested issues of fact and law and admissions UMMC made in the Pretrial Order do not expressly or implicitly admit the accuracy of the Autopsy Report's finding that Ms. Foster died from TTP. Instead, UMMC affirmatively states in the Pretrial Order that Ms. Foster was properly diagnosed and treated for HELLP Syndrome. (R. 121-123). Therefore, the Answer has been superceded by the Pretrial Order and is not a judicial admission.

UMMC amended and supplemented its initial expert designation after Dr. Moake’s deposition. (R. 77-83). UMMC removed the statement that Ms. Foster may have suffered from TTP and inserted a provision that Ms. Foster did not suffer from TTP, and UMMC added a provision stating that allegations and findings that she had TTP were based upon unreliable medical evidence. (R. 78, 80, 82). Therefore, the original expert witness designation is not a judicial admission.

In summary, the admission of the Autopsy Report does not prevent UMMC from challenging the sufficiency of the Autopsy Report's content to support the Circuit Court's finding that Ms. Foster died from TTP. The Autopsy Report and Dr. Martin's article and UMMC's Answer and its original expert witness designation are not conclusive and binding on UMMC and do not preclude UMMC from challenging the validity of the test for ADAMTS13 "activity" and the Autopsy Report's cause of death finding for Ms. Foster.

**II. The Court erred when it excluded testimony by Dr. Sibai and by Dr. Martin about the Autopsy Report and UMMC made an adequate proffer.**

M.R.E. 103(a)(2) requires that a party make an "offer of proof" when the trial court sustains an objection.

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

M.R.E. 103(a)(2).

"The reasons for this rule are that the courts must be able to see from the record itself whether the offered testimony would be material and of benefit to the merits of the case, and whether its exclusion was actually harmful and prejudicial to the offer." *Dazut v. Bass*, 254 So.2d 183, 188 (Miss. 1971).

When UMMC asked Dr. Sibai to review the content of the Autopsy Report and to identify any findings that were normally seen in TTP, Plaintiff objected and the Court sustained the objection simply because Dr. Sibai was not a pathologist. The Court did not base its findings on Dr. Sibai's lack of experience, education or training to testify about the signs and symptoms in

patients he treated who had TTP and compare them with the signs and symptoms recorded in the Autopsy Report. (Tr. 658-659).

The Circuit Court applied the same ruling to Dr. Martin and held he could not testify about the Autopsy Report because he was not a pathologist. (Tr. 733). The Circuit Court did not consider the fact that the pathologist invited Dr. Martin to attend the autopsy conference, which he did, on September 9, 2005, thereby indicating that the pathologist thought Dr. Martin's education, training and experience in treatment of TTP might be helpful to the pathologist's investigation of the cause of death for Ms. Foster. (Ex. P-4 at page 1; Tr. 733).

This Court has consistently and continuously held that it is the knowledge, experience and training of a person, and not his title or classification or certification that governs admissibility of expert opinion testimony. *University of Mississippi Medical Center v. Pounders*, 970 So.2d 141, 146 (¶19)(Miss. 2007). The Court abused its discretion because it based its decision simply on the fact that Dr. Sibai and Dr. Martin were not pathologists.

The record contains an offer of proof from Dr. Sibai. Immediately prior to Plaintiff's objection, Dr. Sibai had compared the contents in the Autopsy Report to observations he had made when treating patients with HELLP Syndrome. He testified the petechia hemorrhages on Ms. Foster's liver as described in the Autopsy Report was the same as he observed in patients he treated for HELLP Syndrome. (Tr. 657).

However, when he was asked to compare these same findings about Ms. Foster's liver with patients he treats for TTP, the Circuit Court sustained Plaintiff's objection and ruled he could not do so because he was not a pathologist. On the record, Dr. Sibai explained to the Circuit Court that he observes the symptoms and signs of TTP in his treating and that he would testify about those signs and symptoms recorded in the Autopsy Report and not about the actual

autopsy itself. He explained that he was “not talking about the pathology. I’m talking about what I see at time of cesarean section in women who have HELLP Syndrome and TTP when I look at their liver. This [is] what I’m commenting on, so I have looked at the liver of these patients when I operate on them.”

Both the context of the questions asked of Dr. Sibai and Dr. Sibai’s explanation of what he would cover if allowed to testify satisfy M.R.E. 103(a)(2) because they explained to the Circuit Court “the substance of the evidence” about which Dr. Sibai and Dr. Martin would have testified. Obviously, the excluded testimony would have supported UMMC’s defense that Ms. Foster had HELLP Syndrome and not TTP and that she did not die from TTP.

### **III. UMMC’s response to Plaintiff’s argument that the trial court’s ruling is supported by substantial credible evidence.**

Plaintiff argues the study performed by the University of California Davis Medical Center (Ex. D-28; RE 19) is not conclusive because the study uses the word “may” to report its finding that the test is invalid. (Brief of Appellees at 11). Plaintiff emphasizes the language used to describe the study’s results and overlooks the results themselves. The study took postmortem blood samples from one person known to have TTP and from four persons who did not have TTP. The blood sample from the person known to have TTP showed ADAMTS13 activity of less than 4% and an inhibitor level of 1. (Ex. D-28; RE 19). Thus, the “activity” level and the “inhibitor” level for the postmortem blood sample taken from the person known to have TTP indicated that the person had TTP, just as Ms. Foster’s blood sample indicated that she had TTP. Ms. Foster’s activity was less than 4% and her inhibitor level was 2.4. (Ex. P-4; RE 21).

Three of the four postmortem blood samples taken from persons who did not have TTP had “activity” levels less than or equal to 26%, which is much less than the normal activity level

of greater than 66%. (Ex. D-28; RE 19). Thus, the “activity” level in these three persons falsely indicated they had TTP. Two of the four persons had “inhibitor levels” falsely indicating that they had TTP. (Ex. D-28; RE 19).

In summary, the “activity level” results showed 75% of the non-TTP patients indicated they had TTP and 50% of the non-TTP samples showed “inhibitor levels” indicating the presence of TTP. This may not be conclusive in the eyes of Plaintiff but it was strong and compelling enough for the study’s authors to conclude that “postmortem ADAMTS13 activity and evidence of inhibitor can occur in decedents without clinical or histological evidence of TTP.” (Ex. D-28; RE 19).

Plaintiff argues Dr. Martin never explained his testimony that the testing of ADAMTS13 activity with postmortem blood produces invalid results. (Brief of Appellees at 11). Plaintiff apparently has forgotten the testimony Dr. Martin gave when he was being cross-examined by Plaintiff:

A. No. I’m referring -- my knowledge is coming from the literature about ADAMTS13. And as I was writing the article about 166 cases, I was consuming everything I could on TTP and pregnancy, and that has continued so that I became aware somewhere in there of the ADAMTS13 lack of validity postmortem and also lack of comparison with actual clinical courses in patients.

(Tr. 754-55).

Plaintiff next contends the Circuit Court properly ignored Dr. Moake’s testimony because he had never done any studies. (Brief of Appellee at 11-12). Dr. Moake was one of the hematologists who developed the assay used to measure ADAMTS13 activity. (Ex. D-34(b) at deposition pages 11-12). Dr. Moake had 20 years of experience in operating a lab that measures ADAMTS13 activity. Dr. Moake has been involved in the study and treatment of TTP since

1981 and has personally treated 400 to 600 patients having TTP. (Ex. D-34(A) at deposition pages 8-9). He has published approximately 100 to 125 articles on TTP, ADAMTS13, Von Willebrand Factor and other aspects of TTP. (Ex. D-34(A) at deposition pages 8-10). That work and experience supports his testimony that postmortem blood samples produce invalid and unreliable results of ADAMTS13 activity.

Plaintiff next argues that Dr. Greenberg's trial testimony provides an independent basis for the Circuit Court's finding that Ms. Foster had TTP and died from TTP. (Brief of Appellees at 12-13). The record shows any testimony by Dr. Greenberg that implies that Ms. Foster had TTP and died from TTP is based exclusively upon the Autopsy Report.

Dr. Greenberg has never conducted any research on ADAMTS13, he has never published any articles on ADAMTS13, he has never conducted research on TTP and never published any articles on TTP. (Tr. 208, 209).<sup>5</sup>

Plaintiff's extensive quotations from Dr. Greenberg's trial testimony (Brief of Appellees at 12-13) apparently is for the purpose of convincing the Court that Dr. Greenberg independently

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<sup>5</sup> Q. You've never in the deposition transcripts testified that HELLP or TTP were research interests?

A. No. I'm not here to - - no, I'm not claiming a researcher in those areas. No, not at all.

Q. And you've never published on HELLP or TTP?

A. No, I haven't. I thought I was here for causation and education about what the cause - -

(Tr. 208)

Q. You have never conducted any research on ADAMTS13?

A. No.

Q. You've never published on ADAMTS13?

A. No, never.

(Tr. 209)

determined the test for ADAMTS13 activity is valid even when a postmortem blood sample is used. His own testimony contradicts that implication. The testimony Plaintiff quotes at the bottom of page 12 and the top of page 13 of his brief comes from Dr. Greenberg's testimony where he states: "I think this is where I can get to teach about what is TTP, okay." (Tr. 229-230). The testimony upon which Plaintiff relies on pages 12 and 13 of the brief deals with TTP, not with ADAMTS13. Dr. Greenberg is simply describing his view about TTP and does not relate it to the Autopsy Report at all.

The quoted responses by Dr. Greenberg to the several questions quoted on page 13 of Plaintiff's brief show in several places that Dr. Greenberg's testimony is based upon the Autopsy Report. The first quoted question specifically refers to the "lab test" shown in the Autopsy Report. Dr. Greenberg testimony about "activity" and "inhibitor" refer to the two measuring markers used for ADAMTS13 that is quoted in the Autopsy Report. (Ex. P-4 at page 2). Dr. Greenberg's last answer at the bottom of page 13 of Plaintiff's brief is an explanation of the "activity" and the "inhibitor" findings in the lab report quoted in the Autopsy Report as is made clear when Dr. Greenberg concluded his testimony with this statement: "There are two parts of the report." Dr. Greenberg is specifically referring to the Autopsy Report.

In summary, Dr. Greenberg has conducted no research and written nothing about ADAMTS13. He describes no independent lab work that he has done on ADAMTS13. Although he disagrees with the study performed by the University of California Davis Medical Center, he cites no studies or articles that support his view. In the final analysis, Dr. Greenberg's statement that the assay of ADAMTS13 activity and inhibitor levels are valid when the assay is based upon a postmortem blood sample is not supported by his education, training, background or any other material. He is simply asserting his conclusion with no factual support in the record.



Such unsupported conclusions do not satisfy M.R.E. 702. *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31, 37 (¶ 13)(Miss. 2003).

Plaintiff's argues that because the pathologists, Dr. Bret C. Allen and Dr. LaFerra Young, concluded that Ms. Foster died from TTP, their conclusion somehow proves the ADAMTS13 test is valid. However, the uncontradicted testimony shows they did not know a postmortem blood sample produces an invalid ADAMTS13 result when they published the Autopsy Report. (Tr. 585). This is simply another version of Plaintiff's earlier argument that the Autopsy Report constitutes an admission by a party opponent under M.R.E. 801(d)(2). UMMC has already shown that an admission under this rule is an evidentiary admission and does not preclude UMMC from showing the invalidity of the ADAMTS13 "activity" and "inhibitor level" results when a postmortem blood sample is used for the test.

In the middle of page 14 of the Plaintiff's brief, Plaintiff again argues that Dr. Martin's article contains admissions that conclusively show that Ms. Foster died from TTP. Plaintiff fails to recognize that Dr. Martin's article, at best, is only an evidentiary admission and is not conclusive. It does not preclude UMMC from showing that the ADAMTS13 "activity" and "inhibitor level" findings were invalid because they were based upon a postmortem blood sample.

Plaintiff attempts to expand the basis for the Circuit Court's Memorandum Opinion and Order by arguing that UMMC breached the standard of care for TTP **or for HELLP Syndrome**. The Circuit Court's Memorandum Opinion and Order is based upon a finding that UMMC breached the standard of care by failing to diagnose Ms. Foster with TTP and by failing to treat her for TTP and as a result thereof she died from TTP. One has to ignore these clear findings and imply and infer the Circuit Court meant to concluded that UMMC breached the standard of care

by failing to diagnose Ms. Foster with HELLP Syndrome and by failing to treat her for HELLP Syndrome and as a result thereof she died from HELLP Syndrome.

The strongest language used by the Circuit Court that Ms. Foster had TTP and died as a result of UMMC's failure to diagnose TTP is found on page 7 of the Memorandum Opinion and Order where the Court, relying exclusively upon the Autopsy Report, states:

The Court finds the autopsy report of Defendant UMMC's pathologists to be credible and reliable. Despite Defendant's challenge of the methods and tests used by the UMMC pathologists, the pathologist have stood firm regarding their **objective finding of TTP** as the cause of Tamika's death **rather than HELLP**. [fn 5] Thus, the autopsy findings lean heavily in favor of Plaintiff's claim that Defendant UMMC's physicians **failed to timely diagnose TTP** and that said failure proximately cause Tameka's untimely death. This is especially so in light of the testimony of Plaintiff's expert that Defendant UMMC should have consulted a hematologist and aggressively **tested and treated Tamika for TTP** on or about August 12, 2005. Moreover, Plaintiffs' experts argue that Defendant UMMC had a second **opportunity to properly diagnose TTP** on August 18 or 19, 2005 and initiate life saving plasmapheresis or plasma exchange therapy within the first 12 - 24 hours after Tamika delivered her son. Plaintiffs' expert testified that after Tamika's emergency caesarian section Defendant UMMC's transfer of Tamika from ICU to the Labor and Delivery ward proximately contributed to her downward plunge to death, and her lost [sic] of any chance she had of **surviving TTP**.

(R. 248; RE 15)(emphasis added).<sup>6</sup>

The Circuit Court connects UMMC's alleged failure to consult a hematologist with Ms. Foster's death from TTP: "The evidence also supports Plaintiffs' contention that the absence of

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<sup>6</sup> The Circuit Court 's footnote 5 states that an unidentified UMMC physician unsuccessfully tried to persuade the pathologists to change the Autopsy Report's cause of death finding. The time-line shows that could not have occurred. Dr. Martin, who the pathologists invited to the autopsy conference, did not learn that postmortem blood produces an invalid ADAMTS13 test until long after the autopsy conference and after the Autopsy Report was published.

a hematology consult resulted in Tamika's loss of chance to **survive TTP.**" (R. 249; RE 16)(emphasis added). The Circuit Court finds that UMMC did not monitor and treat Ms. Foster correctly because they mistakenly believed she had HELLP Syndrome. (R. 249; RE 16).

The language used by the Circuit Court in its Memorandum Opinion and Order supports only one conclusion: the Circuit Court found UMMC breached the standard of care by failing to diagnose Ms. Foster with TTP and by failing to treat her for TTP and as a result thereof she died from TTP. The only specific evidence upon which the Circuit Court based that finding was the Autopsy Report. None of Plaintiff's experts produced any independent basis for their contention that Ms. Foster had TTP. Both of the experts relied on the Autopsy Report's finding.

The substantial evidence in this record shows the Autopsy Report's finding that Ms. Foster died from TTP is based upon an invalid ADAMTS13 "activity" test because postmortem blood was used for that test. The substantial evidence that supports a finding that the ADAMTS13 activity level test is invalid consists of the following:

- (1) Dr. Moake, who was one of the developers for the ADAMTS13 activity level test and who has 20 years of experience operating a lab conducting such tests, testified that the use of postmortem blood samples produces unreliable results.
- (2) The University of California Davis Medical Center study supports the finding that the use of postmortem blood samples produces invalid results when measuring ADAMTS13 activity and inhibitor levels.
- (3) Dr. James Martin testified that based upon his independent research and studies, he concluded the test was invalid when postmortem blood was used.
- (4) Dr. Meredith Kirk Griffin testified that the test is invalid when postmortem blood samples are used. Plaintiff never challenged this testimony.

- (5) Dr. James Bofill testified the ADAMTS13 test is not valid when the blood is drawn after the patient dies. Plaintiff did not challenge this testimony.

In opposition to this strong substantial evidence, Plaintiff relies upon evidentiary rules that have no conclusive effect. First, Plaintiff argues the Autopsy Report and Dr. Martin's article are admissions under M.R.E. 801(d)(2). Both of these documents were prepared before the authors knew the ADAMTS13 activity test was invalid when postmortem blood samples are used. However, even if both documents constitute an admission under M.R.E. 801(d)(2), they are not conclusive and binding on UMMC and do not preclude UMMC from proving the Autopsy Report is based upon an invalid test.

Plaintiff also argues that two of UMMC's pleadings constitute judicial admissions that the Autopsy Report is valid. As shown above, the response in UMMC's Answer is ambiguous at best and, therefore, does not constitute a judicial admission. Additionally, the Answer was amended by the Pretrial Order and UMMC's original expert witness designation was amended after Dr. Moake's deposition so neither pleading constitute judicial admissions.

Finally, both of Plaintiff's experts provided no independent evidence to support a diagnosis of TTP. Dr. Stern never concluded that Ms. Foster should have been diagnosed with TTP prior to her death. Dr. Greenberg's testimony is linked to and based only on the Autopsy Report.

In summary, UMMC has shown that the Autopsy Report is not reliable because it is based upon an invalid ADAMTS13 "activity" test. Additionally, the record contains no other substantial evidence to support the Circuit Court's finding that UMMC breached the standard of care because it failed to diagnose Ms. Foster with TTP and failed to treat her for TTP and as a result thereof she died from TTP.

## CONCLUSION

The admission of the Autopsy Report does not constitute a waiver of UMMC's right to show that the Autopsy Report is based upon an invalid ADAMTS13 activity report.

The Circuit Court erred when it sustained Plaintiff's objection to expert witness testimony by Dr. Sibai and by Dr. Martin. The Circuit Court based its ruling on the fact that the experts were not pathologists and completely ignored the education, training and experience both experts had. The experts' training, education and experience provided a substantial foundation for both of them to compare their observations in treating TTP patients with certain recorded information on the Autopsy Report and testifying that the information in the Autopsy Report did or did not support a diagnosis of HELLP Syndrome or of TTP.

The Circuit Court's Memorandum Opinion and Order is based upon a finding that UMMC breached a standard of care because it failed to diagnose Ms. Foster with TTP and failed to treat her for TTP. Plaintiff's desire to extend that ruling to HELLP Syndrome is not supported by the Circuit Court's Memorandum Opinion and Order. We deal with the Memorandum Opinion and Order as it was issued by the Circuit Court, not as how the Plaintiff desires the order to be read.

An objective reading of the Circuit Court's Memorandum Opinion and Order produces one conclusion: the Circuit Court based its ruling on its finding that Ms. Foster had TTP. No expert opined that Ms. Foster should have been diagnosed with TTP. All of the evidence is based upon the cause of death finding in the Autopsy Report. UMMC has shown that cause of death finding is invalid because it is based upon an invalid ADAMTS13 activity test.

For the foregoing reasons, UMMC asks the Court to reverse the verdict and render a judgment in its favor. Alternatively, UMMC asks the Court to reverse the verdict and remand

the case for a new trial with instructions that Dr. Sibai and Dr. Martin be permitted to testify about their observations and comments on the contents of the Autopsy Report based upon their personal experience, education and training in treating patients with HELLP Syndrome and TTP.

Respectfully submitted,

**UNIVERSITY OF MISSISSIPPI  
MEDICAL CENTER**

**BY: WATKINS & EAGER PLLC**

  
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**CERTIFICATE OF SERVICE**

I, Robert H. Pedersen, attorney for Appellant University of Mississippi Medical Center, certify that I have this day served by United States Mail, postage prepaid, a true and correct copy of this Reply Brief of Appellant on the following persons at these addresses:

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*Attorney for Appellees 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*

Honorable Tomie T. Green  
Circuit Court of Hinds County  
407 E. Pascagoula Street  
Jackson, MS 39205-0327

THIS the 18th day of April, 2011.

  
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ROBERT H. PEDERSEN

**CERTIFICATE OF MAILING**

I, Robert H. Pedersen, do hereby certify that I have this day hand-delivered to the Clerk an original and three copies (3) copies of the Reply Brief of Appellant, University of Mississippi Medical Center, in Docket No. 2010-CA-00791, on the 18th day of April, 2011.

DATED this the 18th day of April, 2011.

  
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ROBERT H. PEDERSEN