

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-CA-01058-COA

**ABIGAIL REESE SMITH, A MINOR BY AND
THROUGH HER NATURAL PARENTS AND
NEXT FRIENDS, HANNA SMITH AND
DERRICK SMITH**

APPELLANTS

v.

**MISSISSIPPI COAST OB/GYN AND JOSEPH P.
VICE, M.D.**

APPELLEES

DATE OF JUDGMENT:	05/29/2019
TRIAL JUDGE:	HON. DALE HARKEY
COURT FROM WHICH APPEALED:	JACKSON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	KRISTOPHER W. CARTER DOUGLAS LAMONT TYNES JR. COURTNEY PARKER WILSON
ATTORNEYS FOR APPELLEES:	JOHN A. BANAHAN JESSICA B. McNEEL MICHAEL RILEY MOORE
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
DISPOSITION:	AFFIRMED - 06/29/2021
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE WILSON, P.J., LAWRENCE AND McCARTY, JJ.

WILSON, P.J., FOR THE COURT:

¶1. This appeal follows a jury verdict in favor of an OB/GYN on a claim of medical malpractice during a cesarean delivery. The plaintiffs argue (1) that the trial judge should have entered a default judgment or excluded expert testimony as a sanction for a violation of the court's amended scheduling order; (2) that a new trial is required because defense counsel asked a witness an improper question, although the trial judge sustained the

plaintiffs' objection to the question and the witness did not answer it; and (3) that the trial judge gave "impermissibly abstract" and "conflicting" jury instructions on negligence. We find no error and affirm.

PROCEDURAL HISTORY

¶2. In October 2013, Abigail Smith, through her parents Hanna and Derrick Smith, filed a medical malpractice lawsuit against Dr. Joseph Vice¹ in the Jackson County Circuit Court. The Smiths alleged that Vice had injured Abigail's neck and spinal cord during Abigail's cesarean birth. The Smiths alleged that Abigail was paralyzed from the chest down and suffered other related physical issues as a result of Vice's negligence.

¶3. In February 2016, the court entered a scheduling order and set the case for trial on November 7, 2016. The court amended the scheduling order twice, finally extending the discovery deadline to September 20, 2016, but the trial date remained unchanged.

¶4. In September 2016, the Smiths filed a motion to continue the trial date. At the hearing on the motion, the Smiths' attorney stated that he had been unable to get Vice's counsel to provide dates for depositions of Vice's experts. The trial court granted the motion for a continuance and entered a "Third and Final Scheduling Order." Trial was continued to February 27, 2017. The order also provided that the parties would identify all witnesses they wanted to depose by October 20, 2016; that deposition dates would be provided by October 27, 2016; and that discovery would be completed by January 6, 2017.

¹ The Smiths also sued Mississippi Coast OB/GYN, a professional corporation in which Vice was a shareholder, and Singing River Hospital. Singing River was later dismissed. For simplicity, we omit further reference to these other defendants.

¶5. On December 27, 2016, the Smiths filed a motion for sanctions under Rule 37 of the Mississippi Rules of Civil Procedure. The motion stated that Vice had violated the court’s scheduling order by failing to provide deposition dates for Vice’s experts. In addition, the motion stated that Vice had ignored the deposition dates that the Smiths had offered for their experts. The Smiths asked the court to sanction Vice by entering a default judgment in favor of the Smiths on the issues of liability and causation or, in the alternative, by excluding Vice’s expert witnesses.

¶6. In their response, Vice’s attorneys admitted that they had failed to provide deposition dates for their experts. They said the failure was an “oversight” and that counsel opposite never made a further request for deposition dates after the October 27 deadline. Vice’s attorneys also showed that on December 13, 2016, they realized their “oversight” and sent counsel opposite a letter offering fifteen deposition dates. Counsel for the Smiths never responded to the letter and instead filed their motion for sanctions two weeks later.

¶7. At a hearing on the motion, one of Vice’s attorneys admitted that they had “just dropped the ball” by failing to provide depositions dates. But he argued that when they realized their error and tried to remedy it, counsel opposite unjustifiably refused to communicate and cooperate in scheduling depositions. He also argued that the harsh sanctions sought by the Smiths were not appropriate for a negligent failure to meet a discovery deadline.

¶8. The judge stated that there was “no excuse” for the missed deadline. However, the judge then considered whether the violation was “due to bad faith or negligence,” whether

“lesser sanctions” would be a sufficient sanction and remedy, whether the Smiths had been prejudiced, whether the violation “was a result of confusion or misunderstanding,” and whether Vice bore personal responsibility for the violation. After considering those factors, the judge concluded that Vice’s violation of the scheduling order should not result in a default judgment or the exclusion of witnesses; however, the judge did award the Smiths attorney’s fees for having to bring the motion. The judge also continued the trial again.

¶9. Prior to trial, the Smiths filed a motion in limine to exclude any evidence related to a chromosomal abnormality that Abigail has. They argued that Abigail’s chromosomal abnormality was unrelated to the issues in the case and that any evidence of it would be “highly prejudicial” and would only “confuse or distract the jury from the relevant facts.” In response, Vice’s attorneys stated that they did not intend to link the chromosomal abnormality to Abigail’s paralysis. However, they argued that the motion in limine should be denied because components of Abigail’s life care plan and the Smiths’ claim for damages were related to the effects of the chromosomal abnormality, not her paralysis. Vice’s counsel told the judge that their experts would testify that Abigail’s paralysis was “congenital”—i.e., that it was not caused by anything that occurred during her birth—but would not “tie it to [Abigail’s] specific [chromosomal] abnormality.”

¶10. The trial judge later referred the Smiths’ motion in limine and other pretrial motions to a special master. At a subsequent hearing, the special master asked Vice’s counsel whether the chromosomal abnormality was part of an “alternative causation theory that the defense intend[ed] to present.” Vice’s counsel stated that it was not but again argued that the

abnormality was relevant because it had caused developmental delays that were covered by the life care plan for Abigail that the Smiths had produced.

¶11. In July 2018, the special master filed a report and recommendation concluding that the Smiths' motion in limine should be denied as "overbroad" because their "global damages model" included future needs and costs based on "congenital conditions and impairments not related to any alleged negligence" by Vice. The special master concluded that granting the motion in limine "would unduly restrict" Vice's ability to present his case. The Smiths did not file objections to the special master's recommendation regarding their motion in limine. *See* M.R.C.P. 53(g)(2). Prior to trial, the trial judge reviewed and adopted the special master's recommendation as the court's ruling on the motion.

FACTUAL BACKGROUND AND TRIAL

¶12. Abigail was born by cesarean delivery in July 2009. Her mother, Hanna, had originally been pregnant with twins, but the other twin miscarried around eleven weeks. Abigail's father, Derek, and Hanna both testified that the pregnancy was otherwise normal. They testified that they could feel Abigail moving in utero and that there were no complications between the miscarriage of Abigail's twin and Abigail's delivery.

¶13. When Hanna saw Vice around week thirty-seven of her pregnancy, she had symptoms of preeclampsia. Vice recommended that she be admitted to the hospital in order to deliver Abigail. Vice testified at trial that there is no "cure" for preeclampsia other than to deliver the baby. Recent scans had shown that Abigail was in a breech position—meaning her feet, rather than her head, were pointed toward the birth canal—and a decision was made that

Abigail would be delivered by c-section. Dr. David Lewis, who testified for Vice as an expert in obstetrics and gynecology with a subspecialty in maternal-fetal medicine, testified that when Abigail was born in 2009, the standard of care for a breech baby would have been to deliver by c-section. The c-section was not related to Hanna's preeclampsia.

¶14. Hanna and Derek both described Abigail's delivery as "rough." Subsequent to Abigail's birth, Hanna had another c-section to deliver twins, and she testified that Abigail's delivery was much rougher. Hanna said that she was afraid she would be pulled off the operating table during Abigail's delivery. A video of the delivery was played for the jury at trial.

¶15. Dr. Larry Griffin testified as the Smiths' expert in obstetrics and gynecology. He testified that there is a risk during a c-section that the baby's head could be extended improperly, so it is necessary to "artificially flex the baby's head so that the baby's head doesn't further extend during the course of the delivery." Griffin said that if the delivering doctor bent the head too far back, then he could compress the spinal cord or even break the spinal bones. Griffin testified that, based on his observation of the video, Vice did not "maintain flexion" on Abigail's face, which Griffin said was the only way to properly flex the baby's head. Griffin believed that Vice had hyperextended Abigail's neck during the delivery. He testified that Abigail's medical records indicated a lower spinal injury "exactly" where he would expect to see an injury arising from a hyperextension during a cesarean delivery. Griffin testified that Vice had breached the standard of care for a cesarean delivery by failing to properly support Abigail's head and thereby hyperextending her neck.

¶16. Vice agreed with Griffin’s testimony that a baby’s neck must be manually flexed during a cesarean delivery. However, he disagreed with Griffin’s testimony that he failed to do so during Abigail’s delivery. He testified that Abigail’s neck could not have been hyperextended because it was “very clearly” straight and not bent back. He said that he had watched the video “dozens” of times and saw no evidence of hyperextension. Lewis agreed with Vice’s description of his actions during the delivery. Lewis saw nothing in the video to indicate that Vice had breached the standard of care.

¶17. Abigail’s APGAR scores following her birth were 8 and 9, indicating that she had tolerated the birth well and was in good physical condition. Vice explained that APGAR tests are traditionally used to determine whether a baby needs further medical intervention after birth based on observations of the baby’s breathing, movement, crying, and reflexes. Abigail did not need any supplemental oxygen, and no nurse or doctor noted any concern about Abigail immediately following her birth. While Hanna and Abigail were still in the hospital following the birth, doctors told Hanna and Derek that they needed to do a CT Scan on Abigail. Derek testified that they were not told why the scan was needed, but Hanna testified that she was told they needed to look at Abigail’s palate. There were some concerns about Down syndrome at that time, but the CT scans came back normal and the Smiths were discharged. No one noticed any issues with Abigail during those first days of her life.

¶18. Hanna and Derek testified that Abigail seemed normal at first. They noticed that Abigail would jerk her legs back when they tried to put socks on her feet. Hanna said that Abigail did not cry during her two-month immunizations, but the nurse assured her that was

normal. At her four-month immunizations, Abigail still did not react. The nurse told Hanna that babies usually cry during their four-month shots but that Abigail was “just tough.” Soon after this, Hanna tried to stand Abigail up to see if she would bear weight on her legs. Hanna testified that Abigail’s legs both started shaking and would not stop, so they took her to their pediatrician, Dr. Tara Mallett. Mallett ordered x-rays but saw no obvious problems, so she referred the Smiths to Dr. Richard Gorman, a neurologist.

¶19. Gorman told the Smiths that Abigail had “low muscle tone” in her legs, and he ordered an MRI. The MRI revealed a syrinx, an enlarged place on the spinal cord. Gorman referred the Smiths to Tulane Medical Center in New Orleans, where they saw Dr. Allison Conravey. Conravey testified at trial as an expert in pediatric neurology. She testified that a hyperextension of Abigail’s neck at birth would not have injured Abigail’s bones but could have injured the spinal column itself. Conravey testified that she was able to eliminate all possible causes of the syrinx on Abigail’s spinal cord except for trauma or spontaneous formation. Conravey believed that Abigail’s syrinx was caused by trauma due to some atrophy on the spinal cord. She believed that there must have been an injury to Abigail’s spinal cord “early in her life” and that if Abigail had no other history of trauma other than delivery, then the birth process must have caused the injury.

¶20. Conravey also ordered genetic testing on Abigail to ensure that there was not another cause for her paraplegia and hypotonia (decreased muscle tone), which Conravey described colloquially as “being floppy.” Abigail’s genetic test results revealed a nonspecific anomaly, a partial chromosomal duplication. Conravey testified that the chromosomal abnormality was

unrelated to her paralysis and did not cause her paralysis.

¶21. Conravey testified that she suggested that Hanna and Derek also undergo genetic testing, which would help to determine whether Abigail's chromosomal abnormality was causing her problems. Conravey explained that if either parent had the same chromosomal issue but was "normal," then doctors could assume that the chromosomal abnormality was not the cause of Abigail's problems.

¶22. Derek initially testified that he could not remember whether he and Hanna had undergone genetic testing, but later he acknowledged that they had. Counsel for Vice objected that Derek and Hanna's tests had not been disclosed in discovery, and the judge took up the issue outside the presence of the jury. Counsel argued that when the Smiths had been deposed four years earlier, Hanna and Derek testified that they had not undergone any genetic testing. In addition, the Smiths never supplemented their discovery responses to disclose that they had undergone genetic tests.

¶23. The court then entered an order directing Children's Hospital in New Orleans to produce any records related to genetic testing of Hanna, Derek, or Abigail. The records were finally received after the close of the evidence. The records indicated that Hanna was a carrier of the 8p12 chromosomal duplication that Abigail exhibited and that Hanna had a sister who had a history of developmental delays related to the chromosomal abnormality. Hanna denied knowledge of anyone in her family with a history of developmental delays. The records also indicated that hypotonia was a possible "feature" of the chromosomal abnormality.

¶24. Dr. Elias Chalhub testified for Vice as an expert in child neurology. He testified that there was no evidence that Abigail suffered a spinal cord injury at birth. He further testified that Abigail’s high APGAR scores indicated that she had not suffered an at-birth injury. He testified that spinal cord trauma occurring at birth was “extremely rare” and that in his forty years of practice, he had never seen a spinal cord injury caused by a c-section. Chalhub testified that an infant who suffered a spinal cord injury during birth would immediately show signs of that injury and that it was “absolutely ridiculous and nonsensible” to suggest that such an injury could lie dormant for four months.

¶25. Chalhub testified that he often treated children who had a “normal birth [and] normal development” but later experienced neurological issues. He said that these children were often born with a syrinx, and he believed that Abigail’s syrinx had developed in utero. On direct examination, Chalhub was also asked whether Abigail’s chromosomal abnormality “[c]ould be associated with [her] dysmorphic features . . . , as well as [her] central nervous system abnormality, [her] syrinx[.]” Counsel for the Smiths objected, Chalhub did not answer the question, and the judge excused the jury and took up the objection outside the presence of the jury. After hearing argument and a proffer of Chalhub’s testimony, the judge sustained the objection.

¶26. When the jury returned, Chalhub testified that Abigail’s syrinx was congenital and probably caused her paralysis. He explained that the problems did not surface until a few months after her birth because the syrinx “keeps pulsating and pulsating and eventually it gets big enough to cause neurological signs and symptoms.”

¶27. After the close of the evidence, the jury deliberated less than an hour before returning a unanimous verdict in favor of Vice. After judgment was entered on the jury’s verdict, the Smiths filed a notice of appeal. On appeal, they argue that the trial judge should have entered a default judgment in their favor or excluded Vice’s expert witnesses as a sanction for Vice’s violation of the court’s scheduling order. They also argue that a new trial is required because of defense counsel’s question to Chalhub regarding Abigail’s chromosomal abnormality. Finally, they argue that the trial judge erred by giving “abstract” and “conflicting” jury instructions regarding negligence. We address these issues in turn below.

ANALYSIS

I. The trial court did not err by denying the Smiths’ motion for Rule 37 sanctions.

¶28. As discussed above, the Smiths filed a motion for sanctions against Vice after Vice’s attorneys failed to provide deposition dates in accordance with the trial court’s amended scheduling order. The Smiths sought the harshest sanction available under Rule 37—the entry of a default judgment—or, in the alternative, the exclusion of Vice’s expert witnesses. The trial judge declined to impose those penalties but instead ordered Vice’s counsel to pay the attorney’s fees the Smiths incurred as a result of filing the sanctions motion. The Smiths argue that the trial judge erred by denying their motion because Vice committed a “flagrant” violation of the scheduling order.

¶29. The trial judge has “considerable discretion” regarding the conduct of discovery and the imposition of sanctions for discovery violations, and the judge’s “orders will not be disturbed in the absence of abuse of discretion.” *Kilpatrick v. Miss. Baptist Med. Ctr.*, 461

So. 2d 765, 767 (Miss. 1984). We “remain[] steadfastly cognizant that our trial courts must have the authority to issue appropriate sanctions to what the discovery transgression warrants.” *Eaton v. Frisby*, 133 So. 3d 735, 750 (¶56) (Miss. 2013).

¶30. In general, if counsel believes that the opposing party has failed to comply with its discovery obligations, counsel must first attempt to “confer[] in good faith with the opposing attorney in an effort to resolve the dispute.” U.R.C.C.C. 4.03(C). If the dispute cannot be resolved, the party may then file a motion for an order compelling discovery. M.R.C.P. 37(a). If the motion is granted, the court has discretion to order “the party . . . whose conduct necessitated the motion” and/or his attorney “to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney’s fees.” M.R.C.P. 37(a)(4).

¶31. “If a party . . . fails to obey *an order* to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just” M.R.C.P. 37(b)(2) (emphasis added). The rule further provides that as a remedy or sanction for such a failure, the court may, inter alia, “require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney’s fees, caused by the failure”; “prohibit[] [the party] from introducing designated matters in evidence” at trial; or even “render[] a judgment by default against the disobedient party.” *Id.* However, as the rule states, sanctions under Rule 37(b)(2) are available only for a violation of a prior court “order to provide or permit discovery.” *Id.*; see *Caracci v. Int’l Paper Co.*, 699 So. 2d 546, 557 (¶19) (Miss. 1997).²

² See also 1 Jeffrey Jackson et al., *Mississippi Civil Procedure* § 15:8, at 882 (2021 ed.) (“[S]anctions cannot be ordered under Rule 37(b) unless: (1) the discovering party has

¶32. In the present case, the parties disagree as to whether Rule 37(b) even applies. The Smiths argue that the order granting their motion for a continuance and establishing a new scheduling order was “an order to provide or permit discovery.” M.R.C.P. 37(b)(2). They then argue that Vice was subject to sanctions under Rule 37(b) because he failed to obey the court’s order to provide deposition dates for his experts. Vice, in contrast, argues that he never objected to expert depositions and that the scheduling order merely set a deadline for exchanging deposition dates. He argues that the Smiths improperly sought remedies under Rule 37(b)(2) without first attempting to resolve the dispute in good faith, U.R.C.C.C. 4.03(C), or seeking an order compelling discovery, M.R.C.P. 37(a).

¶33. Ultimately, however, it is not necessary to resolve this threshold issue because even assuming that Rule 37(b) applies, the trial judge’s ruling was not an abuse of discretion. Although Rule 37(b)(2)(B) authorizes a court to exclude evidence as a sanction, the “[e]xclusion of evidence is a last resort. Every reasonable alternative means of assuring the elimination of any prejudice to the moving party and a proper sanction against the offending party should be explored before ordering exclusion.” *TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So. 2d 991, 1013 (¶66) (Miss. 1997) (quoting *McCollum v. Franklin*, 608 So. 2d 692, 694 (Miss. 1992)). In addition, a court should enter a default judgment “for failure to comply with discovery only under the most extreme circumstances.” *Pierce v. Heritage Props. Inc.*, 688 So. 2d 1385, 1388 (Miss. 1997); *Hapgood v. Biloxi Reg’l Med.*

procured an order compelling discovery; and (2) the responding party has violated the discovery order. Once the order is procured and violated, the discovering party may bring a motion for sanctions for failure of the responding party to comply with the discovery order.” (footnotes omitted)).

Ctr., 540 So. 2d 630, 634 (Miss. 1989). A default judgment is also considered a “remedy of the last resort.” *Hapgood*, 540 So. 2d at 634.

¶34. Here, Vice’s attorneys admitted that they had “dropped the ball” and failed to meet the scheduling order’s deadline for providing expert deposition dates. Nonetheless, even before the Smiths filed their motion for sanctions, Vice did offer dates for depositions and attempt to schedule the depositions. In addition, even after the missed deadline, there remained time for the Smiths to schedule depositions of Vice’s experts, yet the Smiths never sought the simple and available remedy of taking depositions³—only the drastic sanctions of a default judgment or the wholesale exclusion of evidence. Under these circumstances, the trial judge did not abuse his discretion by awarding expenses and attorney’s fees rather than more drastic sanctions.

II. A new trial is not required because of an unanswered question regarding Abigail’s chromosomal abnormality.

¶35. On appeal, the Smiths argue that “the trial court erred in allowing the admission of evidence regarding Abigail’s chromosomal abnormality.” (Capitalization omitted). However, they do not argue that the trial judge erred by denying their motion in limine on the subject. Indeed, they waived any such argument by not objecting to the special master’s report and recommendation. *See Delta Housing Dev. Corp. v. Johnson*, 48 So. 3d 573, 580 (¶21) (Miss. Ct. App. 2010). Moreover, they do not contend that any specific ruling by the trial judge was erroneous. They simply contend that a question regarding Abigail’s

³ Indeed, in a report and recommendation filed a year-and-a-half after the court’s ruling on the Smiths’ motion for sanctions, the special master suggested that the court might still allow the parties to conduct discovery depositions of the opposing parties’ experts.

chromosomal abnormality requires a new trial—even though their attorney objected to the question, the witness did not answer it, and the judge sustained their objection. However, we conclude that the trial judge committed no error or abuse of discretion in his handling of this issue.

¶36. On direct examination, Dr. Chalhub testified as follows:

Q. [W]as Abigail determined . . . to have a chromosomal abnormality?

A. She was.

Q. Could that be associated with the dysmorphic features you described, as well as the central nervous system abnormality that you've described, a syrinx?

The Smiths' counsel immediately objected to the second question, Chalhub did not answer it, and the judge excused the jury before addressing the issue. The Smiths argued that the question was improper because it was outside the scope of Chalhub's designation and was contrary to Vice's prior representations that he would not link Abigail's chromosomal abnormality to her paralysis. In response, Vice argued that the question was proper. The court then directed Vice's counsel to proffer Chalhub's testimony on the subject. The judge ultimately sustained the Smiths' objection, and Chalhub did not answer the question.

¶37. On appeal, the Smiths argue that they are entitled to a new trial because even though the question was not answered, “[t]he proverbial bell cannot be unring.” However, the Smiths did not make a contemporaneous motion for a mistrial. After the proffer of Chalhub's testimony, defense counsel stated that he would withdraw his question regarding the chromosomal abnormality and that he would not “go there.” The following discussion

then occurred among the trial judge, counsel for the Smiths (Mr. Tynes), and counsel for Vice (Mr. Banahan):

Mr. Tynes: But the cat's already out of the bag. You know, he's already testified some in front of the jury that there's a link between the chromosomal duplication and the paralysis and the syrinx.

The Court: I don't think he has.

Mr. Banahan: I don't think so either.

The Court: It hasn't gotten that far, not that far. He's talking about a congenital syrinx, not the chromosomal duplication was the cause of it.

Mr. Tynes: Can we have the actual question read back, the actual question before we broke?

Mr. Banahan: More importantly, did he answer it, I guess. I can't remember.

Mr. Tynes: *If the cat's out of the bag*, Judge, I'm going to have to ask for a mistrial, or in the alternative, a jury instruction.

.....

Court Reporter: (Whereupon the last question was read back.) Then I have Mr. Tynes's objection. I don't have an answer.

The Court: I thought you were pretty quick on that one.

Mr. Tynes: And the question right before that had to do with chromosomal duplication, her chromosomal abnormality and he's trying to link all those together and confuse everything.

The Court: Well, I've just got to take the objections as they come and the jury will be instructed not to speculate as to possible answers to questions I didn't require to be answered. That's about as much as you can do on that.

. . . [T]hat's the purpose of the instruction.^[4] I'm sustaining your objection

(Emphasis added). Thus, after the court reporter confirmed that Chalhub had not answered the question, the Smiths did not move for a mistrial, nor did they request any special jury instruction. The jury then returned to the courtroom, and Chalhub completed his testimony without linking Abigail's chromosomal abnormality to her paralysis.

¶38. When, as in this case, the trial judge *sustains* an objection, the objecting party must follow up with a motion for a mistrial or else the issue is waived. *Hyde v. O'Neal*, 234 Miss. 112, 121-22, 105 So. 2d 553, 557 (1958). “The reasons for the rule are that we cannot put the trial judge in error on a question not passed upon by him, and also that a litigant cannot wait, without objection, and take chances on a jury verdict, and when the verdict is against him, then take advantage of a motion he should have made at the proper time.” *Id.* at 122, 105 So. 2d at 557. Here, the Smiths' counsel indicated that he would ask for a mistrial “[i]f the cat [was] out of the bag” (emphasis added), but the court reporter then confirmed that Chalhub had not answered the objected-to question. At that point, if counsel still thought a mistrial was necessary, a motion for a mistrial was required. Because no motion was made, the issue was not presented to the trial judge, and counsel instead took his “chances on a jury verdict.” *Id.* Accordingly, the issue of a mistrial is waived on appeal.

¶39. Waiver notwithstanding, this issue is also without merit. In this case, “no prejudice

⁴ The jury was instructed, “You should not speculate as to possible answers to questions which the Court does not require to be answered, nor should you draw any inference from the content of those questions. You are to disregard all evidence which was excluded by the Court from consideration during the course of trial.”

sufficient to require a mistrial was manifested by the mere asking of the question.” *Kouvarakis v. Hawver*, 208 Miss. 697, 704, 45 So. 2d 278, 280 (1950) (holding that the mere asking of a potentially prejudicial question was not grounds for a mistrial when the court sustained an objection and instructed the jury to disregard the question). The Smiths’ objection was sustained, Chalhub did not answer the question, and the court instructed the jury not to infer anything from the content of such an unanswered question. *See supra* n.4. “Generally speaking, our law presumes that jurors follow the trial judge’s instructions, as upon their oaths they are obliged to do.” *Young v. Guild*, 7 So. 3d 251, 263 (¶39) (Miss. 2009) (quoting *Parker v. Jones Cnty. Cmty. Hosp.*, 549 So. 2d 443, 445 (Miss. 1989)). Therefore, we presume that the jurors followed the court’s instruction and did not base their verdict on the unanswered question.⁵

III. The Smiths’ objections to the jury instructions are waived and without merit.

¶40. “[W]e do not review jury instructions in isolation; rather, they are read as whole to determine if the jury was properly instructed.” *Fred’s Stores of Miss. Inc. v. M&H Drugs Inc.*, 725 So. 2d 902, 917 (¶59) (Miss. 1998) (quoting *Wallace v. Thornton*, 672 So. 2d 724, 729 (Miss. 1996)). “Therefore, defects in specific instructions do not require reversal where

⁵ The Smiths also argue that Vice’s question to Chalhub “violated express stipulations and on-the-record representations by defense counsel,” although the parties never entered into any formal stipulation. Vice also argues that the Smiths “opened the door” to the question through their questioning of Dr. Conravey and other witnesses regarding Abigail’s chromosomal abnormality. In addition, Vice argues that we should not entertain the Smiths’ complaint about the question because the Smiths failed to disclose evidence that suggested a possible link between the chromosomal abnormality and Abigail’s hypotonia. *See supra* ¶¶22-23. Because we find no error for the reasons stated in the text, we need not address these additional arguments.

all instructions taken as a whole fairly—although not perfectly—announce the applicable primary rules of law.” *Id.* (quoting *Wallace*, 672 So. 2d at 729 (quotation marks omitted)). “The test to determine whether or not an instruction is abstract is to determine whether or not the instruction relates to facts shown by the evidence on the issues involved in the case. If an instruction merely relates a principle of law without relating it to an issue in the case, it is an abstract instruction and should not be given by the court.” *Id.* at 918 (¶59).

¶41. Because “we instruct our juries that all instructions must be considered as a whole, we do not consider abstractness as much of a vice, though we still do not regard it a virtue.” *Id.* (quoting *Splain v. Hines*, 609 So. 2d 1234, 1241 (Miss. 1992)). “[A]n abstract instruction is not ordinarily considered to be a reversible error unless it tends to confuse and mislead the jury.” *Id.* (quoting *Freeze v. Taylor*, 257 So. 2d 509, 511 (Miss. 1972)). The failure to object to a jury instruction at trial waives the issue on appeal. M.R.C.P. 51(b)(3); *Shields v. Easterling*, 676 So. 2d 293, 296 (Miss. 1996) (stating that the trial judge must be given an “opportunity to rule on” objections to jury instructions). Moreover, in order to preserve the issue, an objection must be on the record and must identify “distinctly the matter to which objection is made and the grounds therefor.” M.R.C.P. 51(b)(3); *Shields*, 676 So. 2d at 296 (holding that an objection to a jury instruction was waived because it was not raised at trial “in any specific meaningful manner”).

¶42. The Smiths argue that Jury Instructions 3 and 12 were abstract and did not relate the facts of the case to the instruction. They argue that they made a “specific objection” to the language used, seeking clarity on the standard of care. They also argue that Jury Instructions

3 and 12 are confusing when read together because they conflict.

¶43. Jury Instruction 3 stated that in order to prove their claim, the Smiths had to prove the following by a preponderance of the evidence:

1. Joseph P. Vice, M.D. gave medical services or treatment to Abigail Reese Smith;
2. Joseph P. Vice, M.D. was negligent by performing a breech cesarean delivery in a manner that breached the standard of care;
3. Abigail Reese Smith suffered damages as a result of the negligent performance of a breach caesarean delivery because she suffered a spinal cord injury, a brachial plexus injury, or Horner's Syndrome; and
4. Joseph P. Vice, M.D.'s medical negligence was a substantial factor in causing Abigail Smith's damages.

Jury Instruction 12—the form of the verdict—stated in Question No. 1: “Was Joseph P. Vice, M.D. negligent in performing the delivery of Abigail Smith by cesarean section? Write YES or NO in the following blank”

¶44. During the charge conference, the Smiths' counsel offered instructions that differed slightly from Jury Instructions 3 and 12. The Smiths' proposed instructions would have instructed the jury to determine whether Vice “was medically negligent by incorrectly performing a breech cesarean delivery.” During discussion on what would become Jury Instruction 3, the Smiths' counsel argued that the jury instructions should use adverb “incorrectly” rather than the adverbial phrase “in a manner that breached the standard of care.” However, counsel for Vice responded that “‘incorrectly’ is not [the] standard of care.” The trial judge ultimately ruled,

The allegations are that there was a hyperextension of the neck that breached

the . . . standard of care. That’s what we’re talking about, just not [“]incorrect.[”] That’s just too nebulous for me, too ambiguous. It’s too open-ended. It needs to refer to y’all’s theory and not just [“]incorrect.[”] I mean, [the jury] could think anything. . . .

¶45. On appeal, the Smiths argue that Jury Instructions 3 and 12 were too abstract because they did not define the standard of care or how Vice breached it. But at trial, their only specific objection was that those instructions incorporated the “standard of care” rather than just charging the jury to determine whether Vice performed the delivery “incorrectly.” The trial judge properly overruled this objection. In a medical malpractice case, the plaintiff’s burden is not to just to show that the defendant physician performed a procedure or did something “incorrectly.” Rather, the plaintiff must prove that the doctor failed to meet the applicable “standard of care,” which is defined as “such reasonable diligence, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States.” *Est. of Northrop v. Hutto*, 9 So. 3d 381, 384 (¶9) (Miss. 2009) (quoting *Palmer v. Biloxi Reg’l Med. Ctr., Inc.*, 564 So. 2d 1346, 1354 (Miss. 1990)).⁶ The trial judge did not abuse his discretion by giving instructions that tracked the law rather than instructions that incorporated the Smiths’ less precise phrasing.

¶46. On appeal, the Smiths also seem to argue that the instructions should have specifically referenced the alleged hyperextension of Abigail’s neck during delivery. But the Smiths did not make this objection at trial, nor did they offer any proposed instruction that referenced

⁶ The jury in this case was also appropriately instructed on the definition of the standard of care.

this specific allegation. Because the Smiths “did not put this objection to the trial court in any specific meaningful manner,” “the trial judge had no opportunity to rule on it,” and “this Court is barred from reviewing this issue” on appeal. *Shields*, 676 So. 2d at 296.

¶47. Moreover, the instructions as a whole fairly announced the applicable rules of law. *Id.* Witnesses for both sides testified about the standard of care for a cesarean delivery and the extrication of the child from the mother’s womb. The applicable standard of care was made clear to the jury based on the testimony and the instructions. *See Todd v. Turnbull*, 469 So. 2d 71, 76 (Miss. 1985) (affirming the trial court where the appellant did not preserve his specific objections to jury instructions and both parties’ witnesses “testified at length about the facts establishing a standard of care”).

¶48. The Smiths also argue that Jury Instructions 3 and 12 were conflicting. They note that Jury Instruction 3 required them to show that the manner in which Vice performed the delivery was negligent and breached the standard of care. They then argue that Jury Instruction 12 implied that the alleged negligence was the *decision* to perform a cesarean delivery. This argument is also waived without merit. It is procedurally barred because the Smiths did not raise the issue at trial. It is without merit because the instructions as a whole, read in conjunction with the testimony at trial, fairly stated the law and the applicable standard of care.

CONCLUSION

¶49. The trial judge did not abuse his discretion by denying the Smiths’ request for drastic sanctions for Vice’s violation of the scheduling order. Nor did the judge commit any abuse

of discretion in his handling of the Smiths' objection to a question regarding Abigail's chromosomal abnormality. Furthermore, the mere asking of that question is not grounds for a new trial. Finally, the Smiths' objections to the jury instructions are waived and without merit. Read as a whole, the jury instructions fairly stated the applicable law and standard of care.

¶50. **AFFIRMED.**

BARNES, C.J., CARLTON, P.J., GREENLEE, WESTBROOKS, McDONALD, LAWRENCE, McCARTY, SMITH AND EMFINGER, JJ., CONCUR.