

**IN THE COURT OF APPEALS 06/18/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00568 COA**

**RONALD EARL MACK, SR., AND CYNTHIA ANN DICKERSON MACK,  
INDIVIDUALLY AND AS CO-ADMINISTRATORS OF THE ESTATE OF ANGELA  
MACK, DECEASED**

**APPELLANTS**

**v.**

**SUSAN O'NEAL, M.D.**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HOWARD Q. DAVIS, JR.

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

CHARLES VICTOR MCTEER AND DONNA CUMMINGS

ATTORNEYS FOR APPELLEE:

L. CARL HAGWOOD AND VIKKI J. SPENCER

NATURE OF THE CASE: CIVIL-MEDICAL MALPRACTICE

TRIAL COURT DISPOSITION: DIRECTED VERDICT IN FAVOR OF THE DEFENDANT

BEFORE BRIDGES, P.J., DIAZ, AND SOUTHWICK, JJ.

BRIDGES, P. J., FOR THE COURT:

Ronald Earl Mack, Sr. and Cynthia Ann Dickerson Mack filed a complaint alleging negligence against Dr. Susan O'Neal in the death of their newborn infant. After both Appellants and the Appellee presented their evidence, the defense moved for a directed verdict. The trial judge granted the motion for a directed verdict. The Macks appeal to this Court claiming that the lower

court erred in granting the motion. Upon review, we find that the circuit court erred in granting the motion for a directed verdict in favor of the Appellee, and we reverse and remand this case for a new trial.

## FACTS

On the night of April 6, 1989, Angela Mack was born by cesarean section at King's Daughters Hospital in Greenville, Mississippi. Dr. O'Neal, the attending pediatrician who examined Angela immediately after birth, determined that Angela was born premature. The baby was a bluish color and was breathing faster than normal. Dr. O'Neal decided that since the infant had been delivered by cesarean section, the baby was having trouble breathing because the baby had fluid in her lungs which had not been expunged during a routine delivery. Dr. O'Neal took the baby to the nursery and placed her under an oxygen tent, administering sixty percent oxygen.

Dr. O'Neal ordered the nurses to gradually decrease the oxygen level in the tent from sixty percent to forty percent, depending on the baby's condition. However, when the oxygen level was decreased, the baby began to grunt, retract, and the baby's skin began to turn blue. The grunting and retracting are signs that the baby is having trouble breathing and is trying to expel the oxygen from its lungs. Dr. O'Neal then ordered the oxygen level to be increased to fifty percent.

Dr. O'Neal left the hospital that night to return home for the evening. At about 10:45 P.M., she called the hospital to check on her patients. She was told by the nurse on duty that Angela appeared to be in satisfactory condition except that the child continued to grunt.

Dr. O'Neal returned to the hospital around 9:00 A.M. the next morning, and found that baby Angela was still grunting. Angela was also breathing faster than normal. Dr. O'Neal performed a

blood gas test to determine the amount of carbon dioxide in the baby's bloodstream. The sample

contained deoxygenated blood and showed that the carbon dioxide level in the blood was very low. According to Dr. O'Neal's testimony, the low levels of carbon dioxide in the blood meant that the baby was exchanging gases well. Dr. O'Neal testified that she had no reason to be alarmed at this time and did not take any additional measures.

However, around 5:00 P.M., the baby's condition began to deteriorate. Dr. O'Neal decided to start the baby on an IV because the baby's breathing had increased. She also ordered that the infant be placed on a transpercutaneous monitor which would monitor the baby's oxygen intake. The baby's condition appeared satisfactory until 10:00 P.M. at which time she suddenly became jaundice colored. The nurses on duty summoned Dr. Marcelene, who was Dr. O'Neal's partner, and the doctor on call that night. However, Angela's condition failed to improve. Angela Mack stopped breathing first, and then her heart stopped. She was pronounced dead at 11:18 P.M. that same night. The next day an autopsy was performed by Dr. Patricia Payne. After examining the baby's heart, Dr.

Payne found that there was virtually a complete absence of a septum resulting in a common atrium. In other words, there was almost nothing separating the right chamber of the baby's heart from the left chamber. Specifically, the autopsy report stated "A large atrial septal defect is noted with virtually complete absence of any portion of the septum. Functionally, this probably represents a common atrium." The autopsy report also set forth a diagnoses which stated:

Diagnoses:

(a) Premature infant with clinical respiratory distress syndrome manifested by hyaline membrane formation microscopically.

(b) Large atrial septal defect.

Angela Mack's parents sued Dr. O'Neal for malpractice. The complaint alleged that Dr.

O'Neal failed to properly diagnose or treat the hyaline membrane disease which caused the infant's death, and failed to transfer the infant to an appropriate neonatal facility. The testimony and proceedings at trial will be discussed below.

#### TRIAL

During their case in chief, the Appellants called one expert, Dr. Lerer, to testify. On voir dire Dr. Lerer testified that he had practiced pediatric medicine for twenty-one (21) years, and that he currently practiced in Fairfield, Ohio. He also stated that he had been called to testify in numerous states in medical malpractice cases. He stated that he earned approximately \$80,000.00 per year in expert fees.

After being qualified as an expert, Dr. Lerer testified as to his opinion surrounding the baby's death. Dr. Lerer testified that the autopsy report indicated that, with the exception of the hole in the heart, the baby's heart seemed normal. He stated that the diagnoses usually lists the primary cause of death first. Based on this interpretation of the autopsy report, it was his understanding that the baby's lungs were abnormal and that the primary cause of death was the hyaline membrane disease. Dr. Lerer went on to explain the condition of Angela Mack's heart. He said that Angela did not have a common atrium but merely a hole in her heart, which was a treatable and survivable condition. He said that Angela's heart defect was so mild that most doctors do not even become aware of the condition until the baby becomes much older. He also stated that many children live for long periods of time despite the hole in their heart. It was his opinion that since the infant probably would have survived despite the hole in her heart, the baby most likely died of hyaline membrane disease.

Dr. Lerer also testified as to how Dr. O'Neal breached the standard of care. His testimony was that Dr. O'Neal breached the standard of care on behalf of Angela by failing to diagnose and

treat the baby for hyaline membrane disease. He stated that Angela died as a result of hyaline membrane disease and not congenital heart problems. He stated that Dr. O'Neal did not comply with the applicable standard of care because she had failed to timely monitor the baby's blood gas levels, and as a result failed to diagnose the hyaline membrane formation. He stated that the grunting, retracting, and bluish tint of the baby's skin were all symptoms of hyaline membrane disease. He

stated that since the hospital charts and records indicated that the baby manifested the symptoms of grunting and retracting, Dr. O'Neal should have been alerted to the possibility of hyaline membrane disease in the infant. Furthermore, Dr. Lerer testified that the x-rays taken of the baby's heart showed that the heart was normal, but that the lungs were abnormal. In addition, Dr. Lerer stated that the initial history and the physical exam performed on the baby immediately after birth indicated that the baby had abnormal lungs. He also testified that the laboratory reports showed that there was too much acid build up in the baby's blood. He stated that the baby's blood should have been tested repeatedly for this symptom instead of just once. Dr. Lerer stated that the baby's blood should have been tested about twenty or more times over a one hour period once the baby began to show signs of instability. In his opinion, in order to keep from having to stick the baby repeatedly, Dr. O'Neal should have used an umbilical catheter. It was his view that since the baby's blood gases were only checked once, Dr. O'Neal must have been ordering the baby's oxygen levels to be increased or decreased arbitrarily based solely on the infant's appearance.

According to Dr. Lerer, in a situation similar to Angela's the appropriate treatment would have been to give the baby bicarbonate, immediately place the baby on an oxygen monitor, and to place the baby on a ventilator. He stated that the hospital had the equipment to monitor the baby's

blood oxygen level, but Dr. O'Neal failed to use the equipment until the infant became incurably ill.

In addition, Dr. Lerer testified that the child would have survived if the baby had been transferred to an appropriate neonatal facility, specifically a Level II facility. He also stated that even if Dr. O'Neal did fail to transfer the infant, she should have personally monitored the infant more carefully. In the end, Dr. Lerer testified that Dr. O'Neal breached the standard of care and her breach was the proximate cause of Angela Mack's death.

During the presentation of evidence by the defense, testimony was elicited through various witnesses including Dr. O'Neal herself, and two other experts that the child's cause of death was most likely the congenital heart defect.

The first witness to testify was Dr. O'Neal who testified that the baby was in fact blue and breathing fast when she first took the infant into the nursery. She stated that the reason that Angela Mack was grunting and retracting was because of the fluid in her lungs which had not been expunged by a normal delivery. Dr. O'Neal testified that when she took the baby's blood sample, there was a low level of carbon dioxide in the blood which indicated that the lungs were exchanging gases well. She also testified that she placed the baby on an oximeter which monitored the child's blood gases, and that the oximeter showed that the baby had plenty of oxygen. She also said that a catheter had not been used because the use of the catheter could cause severe complications for the infant. When asked about the autopsy report, Dr. O'Neal testified that her interpretation of the autopsy report was that the cause of death in the infant was the congenital heart defect which in turn caused the respiratory problems, and hyaline membrane formations. She admitted that the baby had a mild form of hyaline membrane disease which was caused by the infant's heart problems, and that

some of the baby's symptoms such as the grunting, retracting, limpness of the muscles, and the bluish tint of the baby's skin were also symptoms of hyaline membrane disease.

Dr. Christina Glick, who was qualified as an expert in the field of pediatrics, testified that it was very unlikely that the baby died of hyaline membrane disease. She stated that although there were hyaline membrane formations found in the lungs, there were not enough formations for the baby to die of lung problems.

Dr. Glick also testified as to how she interpreted the autopsy report. She stated that when an autopsy report makes reference to a major defect, most doctors would assume that the major defect was the cause of death. Since, the autopsy report in this case, listed the heart problem as the major defect, the heart defect would probably be the primary cause of death.

Dr. Glick further testified that babies with hyaline membrane disease have rising levels of carbon dioxide in their blood and falling levels of oxygen. She stated that the hospital records revealed that the infant's carbon dioxide level was low which meant that the child probably did not have hyaline membrane disease. Furthermore, Dr. Glick stated that Dr. O'Neal did not breach a duty to Angela Mack by failing to transfer Angela to a Level II facility. It was her understanding that King's Daughters Hospital was viewed as Level II facility considering the sophistication of their equipment and the expertise of their staff.

In addition to Dr. Glick's testimony, the defense placed on the stand another expert to testify as to Dr. O'Neal's adherence to the standard of care, as well as, two nurses who were in charge of monitoring Angela's condition before her death. Their testimony corroborated the testimony of Dr. O'Neal and Dr. Glick, but added nothing new which would be of help in adjudicating this case.

At the conclusion of the presentation of evidence by both sides, the defense made a motion

for a directed verdict. The circuit court judge granted the motion, and made the following finding:

The Court has determined that as a matter of law that the only testimony in this case concerning negligence on part of Dr. O'Neal was the testimony of Dr. Lerer and that Dr. Lerer's testimony is based in part on the assumption that King's Daughter Hospital was a Level I hospital; that all the fact testimony in this case is that King's Daughter Hospital was in 1989 a Level II hospital; that Dr. Lerer's opinion was that if this death were caused by heart problems that there was not liability; that Dr. Lerer's interpretation of the autopsy report was that there was only a hole in the heart.

The Court has found that as a matter of law that the Plaintiffs have failed by a

preponderance of the evidence to prove liability; therefore, we don't get to the issue of damages and I have directed a verdict in favor of the Defendant, Dr. O'Neal in this case.

The trial judge later felt compelled to expound on the judgment in a supplemental ruling. The judge stated in his supplemental ruling that Dr. Lerer's testimony must be discounted "because his opinions are based primarily on two errors of fact." The judge took issue with Dr. Lerer's statement that Angela Mack should have been transferred to a Level II or Level III facility. The trial judge decided that since this statement was in direct contradiction to Dr. Glick's testimony that King's Daughters Hospital was in fact a Level II facility, Dr. Lerer's testimony as to the standard of care given to Angela should be disregarded. The judge also took issue with the testimony of Dr. Lerer concerning the cause of the baby's death as listed in the autopsy report. The judge ruled that Dr. Lerer was ignoring the findings on the autopsy report by stating that the child had died of hyaline membrane disease and not a congenital heart defect. Finally, the trial judge stated that there was no proof to substantiate Dr. Lerer's statement that the baby would have had a ninety-five percent chance of survival had the hyaline membrane disease been diagnosed.

#### STANDARD OF REVIEW

The Mississippi Supreme Court has held that when reviewing a motion for a directed verdict, all the evidence in favor of the party against whom the motion is made must be considered as true, and any evidence in which is contradictory must not be considered. *Boyd v. Lynch*, 493 So. 2d 1315, 1317 (Miss. 1986). The nonmovant must be given the benefit of all reasonable inferences which may be drawn from the evidence. *Guerdon Indus., Inc. v. Gentry*, 531 So. 2d 1202, 1204 (Miss. 1988). Only if the inferences weigh so heavily in favor of the movant that reasonable men and women could not have found in favor of the nonmovant, may the directed verdict be granted. *Id.*

The party requesting the directed verdict has a heavy burden. If substantial evidence exists in opposition to the motion which would allow reasonable and fair-minded men and women to reach differing conclusions, then the motion must be denied. *Id.* This is also the standard which this Court must apply in reviewing the actions of a trial court. *Boyd*, 493 So. 2d at 1317.

#### ARGUMENT AND DISCUSSION OF LAW

First, we must undertake a brief discussion of what is required by the plaintiffs to make out a prima facie case in a medical malpractice suit. A plaintiff in a medical malpractice case is required to present expert medical testimony which first articulates the standard of care in a certain situation, and then demonstrates how the attending physician deviated from that standard of care. *Boyd*, 493 So. 2d at 1317 (citations omitted). The supreme court has set forth the requirements that must be met in order to prove a prima facie case for medical malpractice.

- (1) The existence of a duty on the part of the defendant to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury;
- (2) A failure to conform to such standard required of the defendant;
- (3) The breach of such duty by the defendant was a proximate cause of the plaintiff's injury;
- (4) Injury resulting to the plaintiff's person.

*Burnham v. Tabb*, 508 So. 2d 1072, 1074 (Miss. 1987). Physicians are expected to exercise reasonable and ordinary care in treating their patients. Ordinary care can best be described as follows:

Given the circumstances of each patient, each physician has a duty to use his or her knowledge and therewith treat through maximum reasonable medical recovery, each patient with such reasonable diligence, patience, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States, who have available to them the same general facilities, services, equipment and options.

*Drummond v. Buckley*, 627 So. 2d 264, 268 (Miss. 1993) (citations omitted). When proving these elements in a medical malpractice suit, expert testimony must be used. *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992). Not only must the expert identify and articulate the requisite standard that of which was not complied, the expert must also establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries. *Id.*

In this case, Dr. Lerer testified as to all of the above elements. He testified that Dr. O'Neal breached the standard of care by failing to diagnose the hyaline membrane disease. He further testified that Dr. O'Neal did not monitor the child's blood gas levels properly, and that she did not use the necessary equipment which was available to the staff at the hospital. He also stated that if the hyaline membrane disease had been treated, Angela Mack would have survived despite the hole in her heart.

Although Dr. Lerer testified as to the required elements of medical malpractice, the trial judge chose to discount Dr. Lerer's testimony. The lower court in both its order granting the directed verdict, and its supplemental ruling made reference to Dr. Lerer's misapplication of the facts contained in the autopsy report. At the outset, we must note that Dr. Lerer gave testimony as to his *interpretation* of the autopsy report. He stated that it was the custom in the medical community to list the primary cause of death as the first item under the section headed "Diagnosis." In this case, hyaline membrane formations were listed first under the diagnosis section of the autopsy report. Here, the autopsy report lists the hyaline membrane formations as the first diagnosis and the heart defect as the second diagnosis. Therefore, it was Dr. Lerer's opinion that the pathologist found hyaline membrane disease to be the primary cause of death.

The trial judge in discounting Dr. Lerer's testimony appeared to be relying on the testimony of Dr. Glick who testified as to what she believed was the proper interpretation of the autopsy report. Her

testimony contradicted Dr. Lerer's testimony. Dr. Glick testified that, in her opinion, the autopsy report should be interpreted to mean that the primary cause of death was the congenital heart defect. She stated that in her experience, when a pathologist refers to a major defect in an autopsy report, that the pathologist means that this defect is the primary cause of death. In this situation, the major defect listed in the autopsy report was the congenital heart defect. Therefore, Dr. Glick believed that the heart defect, not the hyaline membrane disease, must have been the primary cause of death in the infant.

We believe that the jury should have been able to decide for itself what it believed the proper interpretation of the autopsy report was. Here there was conflicting testimony as to the proper interpretation of the autopsy report. The pathologist who conducted the autopsy did not testify. Furthermore, it appears from Dr. Lerer's testimony, as well as the testimony of the other experts, that no one witness is absolutely certain what the pathologist believed to be the primary cause of Angela Mack's death.

Moreover, our supreme court has stated that the expert may testify about facts of which he is not absolutely certain. The expert is only required to base his conclusion on a reasonably accurate basis. *Gulf Ins. Co. v. Provine*, 321 So. 2d 311, 314 (Miss. 1975). The supreme court has also stated:

A medical heart specialist is not required to operate on a patient before he can testify that in his opinion the patient died of congestive heart failure, and this is true although a pathologist may later perform an autopsy and testify that the patient died as the result of a cerebral hemorrhage caused by trauma.

*Id.* According to our supreme court, even if the pathologist in this case had testified that Angela Mack had died of a heart defect instead of hyaline membrane disease, the trial judge would still be in error by disregarding Dr. Lerer's testimony. For these reasons, we believe that the trial judge acted erroneously when he decided to disregard Dr. Lerer's testimony as to his interpretation of the findings in the autopsy report.

Furthermore, we believe that the second reason given by the trial court judge in choosing to disregard Dr. Lerer's testimony is also not valid. The trial court held that Dr. Lerer's testimony should be discounted because he based his testimony on the erroneous assumption that King's Daughters Hospital is a Level II facility. Once again, the trial judge appears to be relying on the testimony of Dr. Glick who testified that King's Daughters Hospital was a Level II facility.

We believe that it does not matter whether King's Daughter's Hospital is a Level I or a Level II facility. Dr. Lerer did say that Dr. O'Neal failed to transfer Angela to a Level II facility. However, he also stated that even if Dr. O'Neal did not transfer Angela, Dr. O'Neal had still failed to treat Angela with the appropriate level of care. He stated that since Dr. O'Neal chose to keep Angela at King's Daughters Hospital, Dr. O'Neal should have closely monitored the infant. The thrust of his testimony as to breach of standard of care was not the fact that Dr. O'Neal failed to transfer Angela, but that she had failed to monitor the child's blood gases and keep watch over the child in an appropriate manner. Moreover, he also said that although Dr. O'Neal had the proper equipment to monitor Angela's symptoms, she failed to use that equipment in a timely manner. He further opined that if Dr.



O'Neal had used the equipment which was available to her, Angela Mack would still be alive.

We believe that the trial judge erred in discounting Dr. Lerer's testimony. Dr. Lerer's testimony was not solely based on Dr. O'Neal's failure to transfer Angela Mack to another facility. He testified that Dr. O'Neal's decision not to transfer Angela, and Dr. O'Neal's subsequent decision not to monitor Angela's oxygen level with the appropriate machinery, were both the proximate cause of Angela Mack's death. Dr. Lerer believed that if Angela Mack had been transferred to a higher level facility then she would have been monitored more closely. Dr. Lerer stated that Dr. O'Neal should have transferred the baby if she was not prepared to monitor the baby as closely as was necessary in view of the baby's condition. The issue here is not what level of sophistication King's Daughter Hospital merits, but whether Angela Mack was given the appropriate care in light of the situation.

In this case, the directed verdict was improperly granted. The lower court should not have discounted Dr. Lerer's testimony concerning the breach of the standard of care and the findings in the autopsy report. His testimony would assist the trier of fact and the exclusion of the testimony was not harmless error. Here, the trial judge weighed contradictory evidence and completely disregarded portions of Dr. Lerer's testimony even when there was no other evidence put forth by the defense to contradict Dr. Lerer's testimony.

The Mississippi Supreme Court has held that when reviewing a motion for a directed verdict, all the evidence in favor of the party against whom the motion is made must be considered as true, and any evidence which is contradictory must not be considered. *Boyd*, 493 So. 2d at 1317. Taking all evidence put forth by the Appellants as true, and not considering any contradictory evidence, we believe that the Appellants made out more than a prima facie case of medical malpractice. Even if the trial judge felt that a verdict in favor of the Appellants would be contrary to the overwhelming weight of the evidence, he still should have overruled the motion for a directed verdict. *Ladner v. Campbell*, 515 So. 2d 882, 889 (Miss. 1987).

Furthermore, our supreme court has repeatedly cautioned against granting directed verdicts in doubtful cases. The supreme court has said:

This Court has repeatedly urged trial judges, faced with a motion for a directed verdict or a peremptory instruction, in doubtful cases, to go ahead and submit all issues to the jury, reserving the prerogative of "correcting" any jury verdict later on a motion for judgment notwithstanding the verdict. *See, e.g., Astleford v. Milner Enterprises, Inc.*, 233 So. 2d 524, 526 (Miss. 1970); *Claiborne v. Greer*, 354 So. 2d 1109, 1111 (Miss. 1978). This, we say, saves needless retrials if on appeal we disagree with the trial judge and hold that a jury issue was made out.

*Ladner v. Campbell*, 515 So. 2d 882, 890 (Miss. 1987) (citing *Reserve Life Ins. Co. v. McGee*, 444 So. 2d 803, 818 (Miss. 1983)).

After examining the lengthy testimony of Dr. Lerer contained in the record, we find that the Appellants successfully made, at the very least, a prima facie case of medical malpractice. Dr. Lerer set out the standard of care. He testified that an infant with a respiratory disorder should have been

monitored more carefully, been given bicarbonate, and placed on a ventilator. He testified as to how Dr. O'Neal failed to administer the appropriate care to Angela Mack in view of her symptoms.

The judge in the lower court decided that Dr. Lerer's testimony should have been discounted because it was based on errors of fact. We reiterate that a directed verdict cannot stand where testimony is discounted because it has merely been contradicted or because the trial judge does not believe the testimony to be credible. Our supreme court has held:

Credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

*Benjamin v. Hooper Elec. Supply Co.*, 568 So. 2d 1182, 1187 (Miss. 1990). For these reasons, this Court holds that the trial court erred in granting the Appellee's motion for a directed verdict, and we reverse and remand this case for a new trial.

#### CONCLUSION

It is the decision of this Court that because the trial court judge improperly disregarded the testimony of Dr. Lerer in granting the Appellee's motion for a directed verdict, this case should be reversed and remanded for a new trial consistent with this opinion.

**THE JUDGMENT OF THE WASHINGTON COUNTY CIRCUIT COURT IS REVERSED AND REMANDED FOR A NEW TRIAL. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

**FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**