

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2017-CA-01169-SCT**

***MARY THOMAS***

**v.**

***ADAM LEWIS, M.D., JACKSON  
NEUROSURGERY CLINIC, PLLC AND JACKSON  
HMA, LLC d/b/a CENTRAL MISSISSIPPI  
MEDICAL CENTER***

DATE OF JUDGMENT:	07/19/2017
TRIAL JUDGE:	HON. WILLIAM A. GOWAN JR.
TRIAL COURT ATTORNEYS:	WILLIAM WES FULGHAM J. MICHAEL COLEMAN LOUIS G. BAINE III
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	WILLIAM WES FULGHAM
ATTORNEYS FOR APPELLEES:	J. MICHAEL COLEMAN CARL HAGWOOD STEPHEN P. KRUGER LOUIS G. BAINE III T. L. "SMITH" BOYKIN III
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
DISPOSITION:	AFFIRMED - 12/05/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**BEFORE KING, P.J., COLEMAN AND BEAM, JJ.**

**COLEMAN, JUSTICE, FOR THE COURT:**

¶1. Mary Thomas awoke, paralyzed, from surgery. She filed a medical malpractice suit against Dr. Adam Lewis, who performed the surgery. Thomas claims that her injuries stem

from two neurosurgeries performed by Dr. Lewis. Thomas also filed suit against Jackson Neurosurgery Clinic and Central Mississippi Medical Center based on vicarious liability.

¶2. Thomas's medical malpractice claims are based on an alleged failure of Dr. Lewis to manage Thomas's mean arterial blood pressure during the first surgery and Dr. Lewis's decision to perform the second surgery. However, the issue on appeal involves the reliability of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Thomas's expert, neurosurgeon Dr. Neil Wright, claimed that Dr. Lewis had failed to provide the proper standard of care and, in turn, caused Thomas's injuries. However, Dr. Lewis argues that Dr. Wright's opinions were not reliable because they were inconsistent with medical literature.

¶3. At trial, Dr. Lewis conducted a *voir dire* of Dr. Wright and questioned his expert opinion regarding the surgeries. Dr. Lewis challenged Dr. Wright's opinions as unreliable under *Daubert*. The trial court agreed, struck Dr. Wright's opinions, and granted partial summary judgment in favor of Dr. Lewis with regard to the first surgery. The trial court also ruled that Dr. Wright could testify to negligence regarding the second surgery.

¶4. The trial court allowed Thomas to proceed on claims related to the second surgery. Dr. Wright admitted that the decision to perform the second surgery was a judgment call and that he failed to testify that making the decision to proceed with a second surgery was a breach of the standard of care. The trial court considered the evidence and found that Mary Thomas had failed to offer admissible proof from which a reasonable juror could find that Dr. Lewis deviated from a professional standard of care. The trial court directed a verdict

in favor of Dr. Lewis, Jackson Neurosurgery Clinic, and Central Mississippi Medical Center, and Thomas appealed. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

¶5. On July 14, 2011, Mary Thomas went to the emergency room at Central Mississippi Medical Center with complaints of extreme pain. She received a diagnosis of a severe cord compression in her spine. Neurosurgeon Adam Lewis, who was the on-call doctor, met with Thomas on July 16, 2011. He told Thomas that he was from St. Dominic-Jackson Memorial Hospital. Dr. Lewis found that Thomas's condition was deteriorating, and he recommended surgery the next morning. Thomas agreed with his recommendation. Dr. Lewis performed a fusion of Thomas's cervical vertebrae, and she awoke suffering from quadriparesis. She alleged that a drop in her blood pressure during surgery caused the injury. Dr. Lewis performed a second surgery, hoping to help Thomas, but the second surgery did not fully resolve her difficulties.

¶6. Thomas filed a medical negligence action against Dr. Lewis, Jackson Neurosurgery Clinic, and Central Mississippi Medical Center. Thomas alleged that Dr. Lewis committed medical negligence when caring for her at Central Mississippi Medical Center. She also alleged that Jackson Neurosurgery Clinic and Central Mississippi Medical Center are vicariously liable for Dr. Lewis's negligence. The case proceeded to trial on June 26, 2017. Thomas claimed that Dr. Lewis had failed to properly manage Thomas's mean arterial blood pressure. In addition, Thomas claimed that Dr. Lewis was negligent in his decision to conduct a second surgery after the first surgery had left Thomas paralyzed.

¶7. The trial court directed a verdict in favor of Dr. Lewis. Dr. Wright was Thomas’s sole standard of care and causation expert, but the trial court found Dr. Wright’s testimony unreliable and struck it. The trial court found that Thomas failed to offer admissible proof from which a reasonable juror could find that Dr. Lewis had deviated from an objective standard of care.

### STANDARD OF REVIEW

¶8. “The standard of review for the admission or exclusion of expert testimony is abuse of discretion.” *Patterson v. Tibbs*, 60 So. 3d 742, 748 (¶ 19) (Miss. 2011) (citing *Utz v. Running & Rolling Trucking, Inc.*, 32 So. 3d 450, 457 (¶ 8) (Miss. 2010)). “This Court should find error in the [circuit] court’s decision to exclude expert testimony only if the decision was arbitrary or clearly erroneous.” *Id.* (citing *Franklin Corp. v. Tedford*, 18 So. 3d 215, 237 (Miss. 2009)).

¶9. After determining whether the trial court abused its discretion in limiting Dr. Wright’s testimony, the court will apply a *de novo* standard of review to the trial court’s decision to grant a directed verdict. *Hyde v. Martin*, 264 So. 3d 730, 734 (¶ 14) (Miss. 2019) (abuse of discretion standard applied to trial court’s exclusion of expert testimony, but *de novo* standard applied to award of summary judgment); *Barrow v. May*, 107 So. 3d 1029, 1038 (¶21) (Miss. Ct. App. 2012) (Court of Appeals affirmed directed verdict after finding trial court did not abuse its discretion by excluding expert’s opinions).

### DISCUSSION

¶10. The main issue on appeal is whether the trial court committed reversible error by striking Dr. Wright’s testimony. In addressing *Daubert* challenges, our analysis is guided by Mississippi Rule of Evidence Rule 702. Rule 702 addresses the admissibility of expert testimony as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Miss. R. Evid. 702.

In cases involving claims of medical malpractice . . . the plaintiff must prove the following elements in order to establish a prima facie case: (1) a duty existed requiring 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 the required standard occurred; and (3) such breach of duty by the defendant proximately caused an injury to the plaintiff.

*Miss. Baptist Med. Ctr., Inc. v. Phelps*, 254 So. 3d 843, 845 (¶ 6) (Miss. 2018) (citing *Crosthwait v. S. Health Corp. of Houston*, 94 So. 3d 1070, 1073 (¶ 11) (Miss. 2012)).

¶11. “Expert testimony is essential in medical malpractice cases ‘because the expert testimony demonstrates how the required standard of care was disregarded, and the testimony certifies that the defendant’s ‘failure was the proximate cause, or proximate contributing cause’ of the injury.’” *Id.* at 845 (¶ 7) (quoting *Vicksburg Healthcare, LLC v. Dees*, 152 So. 3d 1171, 1174 (¶ 10) (Miss. 2014)). Expert testimony is required to establish all three elements. *Hubbard v. Wansley*, 954 So. 2d 951, 956-57 (¶ 12) (Miss. 2007). The expert’s testimony must “‘identify and articulate the requisite standard that was not complied with,

[and] the expert must also establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries.” *Id.* at 957 (¶ 12) (quoting *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992)).

¶12. Defense counsel conducted a *voir dire* of Dr. Wright; after the *voir dire*, the trial court found Dr. Wright’s testimony unreliable and, therefore, inadmissible. The trial court further found that Thomas had failed to state an objective, professional standard of care, as was required to establish the *prima facie* case of medical negligence.

**I. Whether the trial court erred by allowing a *voir dire* of Dr. Wright’s expert testimony.**

¶13. Thomas contends that the *voir dire* examination of Dr. Wright constituted an impermissible trial by ambush. Trial by ambush occurs when a surprise witness or surprise testimony is introduced. *Haggerty v. Foster*, 838 So. 2d 948, 959 (¶ 30) (Miss. 2002). “The purpose of the discovery rules . . . is that parties might ‘avoid trial by ambush’ and have ‘a reasonable time to prepare for trial.’” *APAC Miss., Inc. v. Johnson*, 15 So. 3d 465, 473 (¶ 17) (Miss. Ct. App. 2009) (quoting *Congleton v. Shellfish Culture, Inc.*, 807 So. 2d 492, 496 (¶ 12) (Miss. Ct. App. 2002)). In discovery, all experts are supposed to be identified. *Id.* Thomas fails to demonstrate that the *voir dire* examination of her expert here falls within the definition of a trial by ambush.

¶14. A trial court is under a continuing duty to act as the gatekeeper against unreliable or inadmissible testimony. *Hyundai Motor Am. v. Applewhite*, 53 So. 3d 749, 754 (¶ 16) (Miss. 2011). The United States Supreme Court has held, “The trial court must have the same kind of latitude in deciding *how* to test an expert’s reliability, and to decide whether or

when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert’s relevant testimony is reliable.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

¶15. Thomas cites but one case in support of her argument, *Hyundai Motor America v. Applewhite*, 53 So. 3d 749 (Miss. 2011). But, the issue in *Hyundai* involved a party’s failure to disclose expert opinions before trial, not an attempt to *voir dire* the opposing party’s expert witness. *Hyundai*, 53 So. 3d at 759 (¶ 35). Legion are our reported cases—not to mention cases from the Mississippi Court of Appeals—that acknowledge the *voir dire* examination of opposing experts, yet Thomas cites no case in which we held a trial judge in error for allowing *voir dire*. In short, Thomas fails to demonstrate that the trial court erred by allowing *voir dire* examination of her expert witness, Dr. Wright.

**II. Whether the trial court erred by applying the objective standard of care requirement and striking Dr. Wright’s opinion about the first surgery.**

¶16. After the *voir dire* of Dr. Wright’s expert opinions related to the first surgery, the trial court struck Dr. Wright’s testimony as unreliable under *Daubert*, leaving Dr. Wright unable to testify about the standard of care applicable to the first surgery. Thomas argues that the trial court abused its discretion by striking the expert opinion of Dr. Wright and directing a verdict on that basis.

¶17. Thomas argues that the trial court improperly turned the *Daubert* analysis into a determination of the weight and credibility of the expert’s testimony. A qualified expert’s testimony is “presumptively admissible when relevant and reliable.” *Hubbard v.*

*McDonald's Corp.*, 41 So. 3d 670, 675 (¶ 19) (Miss. 2010) (quoting *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 39 (¶ 21) (Miss. 2003)). “The weight and credibility of expert testimony are matters for determination by the trier of fact.” *Id.* (quoting *Univ. Med. Ctr. v. Martin*, 994 So. 2d 740, 745 (Miss. 2008)). However, as stated above, *Daubert* analysis involves a two-prong inquiry to determine whether an expert witness’s testimony is admissible: “(1) whether the expert opinion is relevant in that it must ‘assist the trier of fact’ and (2) whether the proffered opinion is reliable.” *Rhodes v. Rhodes*, 52 So. 3d 430, 445 (¶ 63) (Miss. Ct. App. 2011) (citing *McLemore*, 863 So. 2d at 38 (¶ 16) (Miss. 2003)).

¶18. The plaintiff must establish through expert testimony the acceptable standard of care in medical malpractice cases. *Abdrabbo v. Johnson*, 220 So. 3d 952, 956 (¶ 28) (Miss. 2017) (citing *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So. 2d 1346, 1355 (Miss. 1990)). The success of a plaintiff’s claim often rests on the testimony of their expert, who must articulate an objective standard of care. *Estate of Northrop v. Hutto*, 9 So. 3d 381, 384 (¶ 10) (Miss. 2009). When an expert offers an opinion that is challenged by the opposing party using published and peer reviewed data, the expert must support their opinion with some evidence that the opinion is accepted in the scientific community. *Patterson*, 60 So. 3d at 751 (¶ 31).

¶19. Dr. Lewis argued that Dr. Wright’s opinions were inconsistent with the medical literature and that Dr. Wright himself had provided the authority supporting Dr. Lewis’s argument. Dr. Wright primarily relied on an article entitled *Prevention, Identification,*

*and Treatment of Perioperative Spinal Cord Injury* by Henry Ahn and Michael Fehlings, which was published in the journal *Neurosurgery Focus* in 2008. The article, however, indicates that further studies are necessary. The article further suggests that no standard of care has been established for managing mean arterial pressure during neurosurgery: “No ideal MABP has been determined.” Additionally, Dr. Lewis provided several articles refuting Dr. Wright’s opinion. The articles indicated that there is no set standard of care for a preferred range for mean arterial pressure during spinal surgery. Dr. Wright argues that these articles are not relevant, because they pertain to situations where the spinal cord was already injured; however, the articles cover a broad range of surgeries.

¶20. Dr. Wright argues that Dr. Lewis’s argument is refuted by the testimony of Dr. Jack Moriarity, one of Thomas’s treating physicians. Dr. Moriarity stated, “[a]nd if the tissue is under pressure like a cervical disc herniation with stenosis or you have high intracranial pressure, you need a little bit more blood pressure to get into that confined space.” However, this was improper expert opinion testimony. “[A] physician cannot testify about the significance of a patient’s condition or industry standards without first being accepted as an expert.” *Chaupette v. State*, 136 So. 3d 1041, 1046 (¶ 8) (Miss. 2014). Dr. Moriarity was never admitted as an expert; thus his deposition testimony was improper expert testimony.

¶21. During the *voir dire*, Dr. Wright failed to adequately support his expert opinion related to the first surgery. Dr. Wright admitted that “my opinion does not establish the standard of care.” Based on the deferential abuse-of-discretion standard of review and Dr. Wright’s inability to articulate a specific standard of care, the trial court did not abuse its discretion

by striking the testimony of Dr. Wright and properly granted a directed verdict in favor of Dr. Lewis with regard to the first surgery. Because Thomas failed to make a *prima facie* showing of negligence against Dr. Lewis, Jackson Neurosurgery Clinic and Central Mississippi Medical Center cannot be liable under a theory of vicarious liability. *Pontillo v. Warehouse Bar & Grill, L.L.C.*, 19 So. 3d 797, 799 (¶ 9) (Miss. Ct. App. 2009) (citing *Commercial Bank v. Hearn*, 923 So. 2d 202, 204 (¶ 6) (Miss. 2006)).

**III. Whether the trial court erred by granting a directed verdict based on Dr. Wright's expert testimony regarding the second surgery.**

¶22. After the ruling on the first surgery, Thomas was allowed to try her claims related to the second surgery. However, Dr. Wright admitted that the decision to perform the second surgery was really just a judgment call and that other neurosurgeons could have different opinions. He did not testify that the decision to perform the second surgery was a breach of the standard of care. Thus, the trial court directed a verdict in favor of Dr. Lewis with regard to the second surgery.

¶23. Thomas argues that the trial court again improperly turned the *Daubert* analysis into a determination of the weight and credibility of the expert's testimony. Essentially, Thomas asserts the same argument that she raised with regard to the first surgery: that the trial court abused its discretion by striking Dr. Wright's expert opinion and by granting a directed verdict.

¶24. Dr. Lewis responds that the second surgery was necessary. Dr. Wright admitted that the second surgery was a judgment call and that other neurosurgeons may have differing opinions. While Dr. Wright did testify that he felt the surgery was unnecessary, he admitted

that his opinion did not establish the standard of care. The law will not hold a physician liable for every bad result; some evidence of a violation of an objective standard of care must be shown. See *Dazet v. Bass*, 254 So. 2d 183, 187 (Miss. 1971).

¶25. Thomas failed to articulate that the objective standard of care was breached with respect to the second surgery, thus failing to establish her *prima facie* case. The trial court did not abuse its discretion in striking the testimony of Dr. Wright and properly granted a directed verdict in favor of Dr. Lewis with regard to the second surgery. Because Thomas failed to make a *prima facie* showing of negligence against Dr. Lewis, Jackson Neurosurgery Clinic and Central Mississippi Medical Center cannot be liable under a theory of vicarious liability. *Pontillo v. Warehouse Bar & Grill, L.L.C.*, 19 So. 3d 797, 799 (¶ 9) (Miss. Ct. App. 2009) (citing *Commercial Bank v. Hearn*, 923 So. 2d 202, 204 (¶ 6) (Miss. 2006)).

### CONCLUSION

¶26. Because Thomas failed to offer admissible proof that Dr. Lewis deviated from an objective, professional standard of care, obviating Dr. Lewis's liability and Jackson Neurosurgery Clinic and Central Mississippi Medical Center's vicarious liability, we affirm the judgment of the trial court.

¶27. **AFFIRMED.**

**RANDOLPH, C.J., KITCHENS AND KING, P.JJ., MAXWELL, BEAM,  
CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.**