IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

LATISHA NICKERSON, INDIVIDUALLY, AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF DILLION MALIK NICKERSON, DECEASED **PLAINTIFFS**

CIVIL ACTION NO.: 251-04-992 TTG

THE UNIVERSITY OF MISSISSIPPI MEDICAL CENTER AND JOHN DOES 1-10 **DEFENDANTS**

MEMORANDUM OPINIONS AND ORDER

This cause of action was tried before the Court without a jury pursuant to the Mississippi Tort Claims Act ("MTCA"), and pursuant to Miss. Code Ann. §11-7-13 (2001). The trial proceeded solely against The University of Mississippi Medical Center ("UMMC") for vicarious liability related to the alleged negligent acts and/or omissions of the doctors who treated the Plaintiff, Latisha Nickerson ("Nickerson"), and her deceased infant, Dillon Malik Nickerson ("Baby Nickerson/Dillion"), at UMMC.

Having heard the testimony of the witnesses, reviewed all admitted and relevant evidence produced at trial and being otherwise thoroughly advised in the premises, the Court FINDS as follows:

PRELIMINARY STIPULATIONS AND FINDINGS

The parties' stipulations and/or the evidence establish that this is a medical negligence case covered by the Mississippi Tort Claims Act, under which a statutory cap of $500,000.00 (five hundred thousand dollars) applies. There existed a physician-patient relationship at all times between Plaintiffs and the Defendant, UMMC, which gives rise to a duty of care owed by Defendant UMMC to Plaintiffs.

All physicians who treated Plaintiffs were acting in the scope and course of their employment with Defendant UMMC. Plaintiff Baby Nickerson was born on June 6, 2003 and died at UMMC on or

about June 8, 2003. Dillion's death certificate identified tricuspid atresia as the cause of death. His autopsy read: "*In utero,* his cardio malformations were not life-limiting. However, *ex utero,* cardiac malformations along with his hypoplastic lung could not support him and he died.

ADDITIONAL FINDINGS OF FACT

After becoming pregnant, Plaintiff Latisha Nickerson received prenatal care from her primary care physician, Dr. Thomas Carter (Kosciusko, MS), and her primary obstetrician-gynecologist, Dr. Thomas Peterson (Starkville, MS). Nickerson was eventually referred to Dr. Kenneth Perry (Jackson, MS), a maternal fetal specialist, for an echocardiogram on Nickerson's baby, *in utero.* Baby Dillion Nickerson was diagnosed *in utero* with a congenital heart disorder ("tricuspid atresia"). Tricuspid atresia is a serious, and often deadly, heart abnormality in newborns. The disorder is described as a defect in the tricuspid valve of the heart that prevents the valve from opening properly to support the continuous blood flow throughout a baby's body.

After the devastating diagnosis, Dr. Perry referred Nickerson to Dr. Jennifer Shores, a UMMC pediatric cardiologist, for additional prenatal care. Dr. Shores conducted numerous cardio tests and verified Baby Nickerson's tricuspid atresia diagnosis. Dr. Shores proposed a treatment plan to be executed at Baby Nickerson's birth at UMMC. The initial plan included the performance of a balloon atrial septostomy ("BAS") to open and close the tricuspid valve to facilitate Baby Nickerson's blood flow throughout the heart. Thereafter, Dr. Shores further proposed a transfer of Nickerson and her baby from UMMC to Children's Hospital of Philadelphia ("CHOP") for additional treatment of the child's tricuspid atresia.[1]

[1] It should be noted that Latisha Nickerson suffered from a condition called obligohydramnios while carrying her baby. This disorder often interferes with the proper development of the fetus' lungs. Consequently, the disorder manifested itself in Baby Dillion at birth as pulmonary hypoplasia, which is a lung disease with a high (79-95%) mortality rate.

On June 6, 2003, Latisha Nickerson delivered Baby Dillion Nickerson at UMMC. [2] However, in addition to his congenital heart disease (tricuspid atresia), Dillion was also diagnosed with pulmonary hypoplasia (lung disease), a premature low birth rate (972 grams), respiratory distress syndrome and fetal growth retardation. Because of the additional lung problem and difficulty breathing, Dillion was placed on a ventilator to increase his chances of survival. Nonetheless, he began suffering from apnea, tachypnea, and retractions, and was never successfully weaned off of the ventilator. UMMC pediatric cardiologist, Dr. Charles Gaymes, took the lead in Dillion's cardiac care, but never performed the balloon atria septostomy proposed by Dr. Jennifer Shores, reasoning along with other UMMC caregivers that Dillion was too small, too ill and his lungs were too unstable to survive, even if the proposed balloon atria septostomy had been performed. The evidence showed that shortly before his death, along with his heart problem, which was somewhat stabilized, Dillion developed bilateral pneumothorax as a result of his lung problems and he never recovered from these events and died during UMMC's attempts to resuscitate him.

The expert testimony presented by the parties was in conflict regarding the precise cause of Baby Nickerson's death. The UMMC physicians who treated Dillion Nickerson and UMMC's experts testified that Baby Nickerson had an abnormal, but relatively stable, heart condition. The treating physicians and UMMC's experts overwhelmingly agree that, while Dillion Nickerson ultimately died because his heart stopped beating, the most probable cause of his death was his pulmonary hypoplasia. The treating physicians and UMMC's experts were of the opinion that Baby Nickerson's lungs simply could not sustain his life.

It is undisputed that UMMC neonatologist, Dr. Billy Mink, signed Dillion's death certificate indicating that Dillion had died of tricuspid atresia, which was consistent with Dillion's diagnosis.

[2] No issues were raised during trial regarding the medical care provided to Latisha Nickerson's during or subsequent to delivery. Thus, no findings are made in this regard.

However, it is also undisputed that UMMC's pathologists, Dr. Josephine Wyatt-Ashmead and Dr. Igor Kozlov, conducted a final autopsy and described Dillion's cause of death as follows: "In utero, his cardiac malformations were not life-limiting. However, ex-utero, his cardiac malformations along with his hypoplastic dysplastic lung could not support him and he died." The Court does not find that the cause of death on Dillion's death certificate and the cause of death described by the UMMC pathologists are not mutually exclusive. They appear to be consistent with the evidence that suggests multiple causes for Dillion's untimely death.

While Plaintiff's expert, Dr. Deane Waldman suggest an equally plausible cause of death which could have resulted in a more positive outcome, the Court is unconvinced by the opinion that UMMC's failure to perform a BAS, under the medical circumstances and conditions suffered by Dillion, fell below the standard of medical care and proximately caused Dillion's death. Nor does the evidence support Plaintiff's conclusion that any failure by UMMC to transport Latisha and Dillion to CHOP, fell below the standard of care and proximately caused Dillion death. Despite the disagreements by Plaintiff's and UMMC's expert, a preponderance of the evidence weighs heavily in favor of this Court's finding that Dillion Nickerson was very ill at birth, both as to two main organs necessary to sustain his life. While Dillion's abnormal heart appeared to be functioning sufficiently at birth, the emerging problems within Dillion's first three (3) days of life demanded that UMMC focus and treatment be geared toward the lungs, while they pondered any success of the balloon atria septostomy and the transport of Latisha and Dillion to the CHOP medical center in Pennsylvania.

The preponderance of the evidence, to include the testimony of both Plaintiff and Defendant UMMC's experts, Dr. Gil Wernovsky (a pediatric cardiologist) and Dr. David Wender (a neonatologist), concede that Dillion's pulmonary hypoplasia was the most medically probable cause of Dillion's death, rather than his cardiac problem. Moreover, Dr. Wernovsky and Dr. Wender refute Plaintiff's expert, Dr.

Waldman, in regards to his opinion that UMMC breached the standard of care owed to Dillion by failing to perform the balloon atria septostomy at a time when Dillon was experiencing severe, life threatening lung problems. The evidence supports the autopsy's finding that the pulmonary hypoplasia was a lethal congenital anomaly. Combined with the intrauterine growth retardation, Dillion's cardiac condition and lung problems, UMMC was presented with unfavorable odds for his survival.

APPLICABLE LAW

To present a prima facie case of medical negligence, a plaintiff:

> (1) After establishing the doctor-patient relationship and its attendant duty, is generally required to present expert testimony; (2) identifying and articulating the requisite standard of care; and (3) establishing that the defendant physician failed to conform to the standard of care. In addition, (4) the plaintiff must prove the physician's noncompliance with the standard of care caused the plaintiff's injury, as well as proving; and (5) the extent of the plaintiff's damages.

McCaffrey v. Puckett, 784 So.2d 197 (33) (Miss. 2001)(quoting *Ladner v. Campbell*, 515 So.2d 882, 887-88 (Miss. 1987)). "Mississippi case law demands that in a medical malpractice action, negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care." *Sheffield v. Goodwin*, 740 So.2d 854 (5) (Miss. 1999). As such, the credibility, medical probability and the consistency of the testimony of the experts offered by both the Plaintiffs and the Defendant UMMC, most assuredly necessary in order to resolve the ultimate of issue of liability in this medical negligence case.

"[G]iven the circumstances of each patient, each physician has a duty to . . . treat . . . each patient, with 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. . . ." *Estate of Northrop v. Hutto*, 9 So. 3d 381, 384 (Miss. 2009)(quoting *Palmer v. Biloxi Reg'l Med. Ctr.*, 564 So. 2d 1346, 1354 (citing *Hall v. Hilburn*, 466 So. 2d 856, 873 (Miss. 1985)). The Mississippi Supreme Court has held that the standard of care articulated must be objective, not subjective. *Id.*

(citing *Hall*, 466 So. 2d at 871. *See also*, *Maxwell v. Baptist Mem'l Hospital-DeSoto, Inc.*, 958 So. 2d 284, 290 (Miss. App. 2007), and *Patterson vs Tibbs,* 60 So. 3d 742, 757 (Miss. 2011).

CONCLUSION

Although the loss of human life at birth is shockingly tragic, Mississippi law has consistently held that healthcare providers are not guarantors or insurers of the success of the care and treatment rendered. *Hudson vs Taliff,* 546 So.2d 359 (Miss. 1989); *Walter vs Skiwski*, 529 So. 2d 184 (Miss. 1988); and *Day vs Morrison,* 657 So.2d 808 (Miss. 1995). Answers and causes of infant deaths are rarely apparent or readily discernible. However, our laws do not automatically impose liability for untoward results upon the shoulders of medical providers. Without the requisite showing that Defendant UMMC breached the applicable medical standard of care, and further proof that the breach proximately caused injuries/damages to the Plaintiffs, Latisha and Dillon cannot prevail in their case.

Applying the applicable law of the case to the facts, the Court finds and concludes that in their treatment of Dillion Nickerson at UMMC, Defendant UMMC used the ordinary skills possessed by minimally competent, reasonably prudent physicians practicing in the same field and under the same circumstances they faced during Dillion's brief and turbulent life.

IT IS THEREFORE ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of the Defendant University of Mississippi Medical Center. Further, the herein case is hereby dismissed with prejudice, with each side to bear their respective costs.

SO ORDERED AND ADJUDGED this the 18th day of August, 2017.

Tomie T. Green

TOMIE T. GREEN, CIRCUIT JUDGE