

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2003-CA-00009-COA**

**CODY BRUMFIELD, A MINOR, BY AND THROUGH  
HIS MOTHER AND NEXT FRIEND, JOAN  
BRUMFIELD**

**APPELLANT**

**v.**

**LEDON LANGSTON, M.D.**

**APPELLEE**

DATE OF TRIAL COURT JUDGMENT:	11/12/2002
TRIAL JUDGE:	HON. KEITH STARRETT
COURT FROM WHICH APPEALED:	PIKE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	CARROLL RHODES
ATTORNEYS FOR APPELLEE:	JIMMIE B. REYNOLDS MICHAEL VERDIER CORY
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
TRIAL COURT DISPOSITION:	JURY VERDICT IN FAVOR OF DEFENDANT, LEDON LANGSTON, M.D.
DISPOSITION:	AFFIRMED - 11/30/2004
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

**BEFORE BRIDGES, P.J., CHANDLER AND GRIFFIS, JJ.**

**BRIDGES, P.J., FOR THE COURT:**

¶1. On behalf of her son, Cody, Joan Brumfield sued Dr. LeDon Langston for medical malpractice.

A jury sitting before the Pike County Circuit Court returned a verdict for Dr. Langston. Cody filed a motion for JNOV or, alternatively, for new trial. The circuit court denied Cody's motions. Aggrieved, Cody appeals and asserts the following issues:

- I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PREVENTING THE PLAINTIFF FROM CROSS-EXAMINING THE DEFENDANT IN THE PRESENCE OF THE JURY ABOUT MID-FORCEPS DELIVERY AND ALTERED MEDICAL RECORDS.
- II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING CUMULATIVE TESTIMONY FROM EXPERT WITNESSES ON THE ISSUES OF LIABILITY, CAUSATION, AND INJURY OVER THE PLAINTIFF'S OBJECTIONS.
- III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL.

¶2. Finding no error, we affirm.

### FACTS

¶3. Cody Brumfield was born on May 19, 1989. Cody's mother, Joan, experienced labor complications during delivery. In particular, Cody's shoulders lodged behind Joan's pelvis. The medical community uses the term "shoulder dystocia" to describe that event.<sup>1</sup> Dr. LeDon Langston attended Cody's delivery. Dr. Langston dislodged Cody's shoulder from Joan's pelvis and Cody arrived into this world without further complication. However, Cody was born with a damaged right arm. At that time, it was unknown whether Cody's arm would develop normally. Time would reveal that Cody had a condition known as Erb's Palsy. Erb's Palsy occurs when the cervical nerves in an unborn baby's shoulder stretch, resulting in nerve damage. The condition manifests as an underdeveloped arm.

¶4. In May of 1997, Cody filed his complaint through Joan. In his complaint, Cody alleged that Dr. Langston negligently caused him to suffer Erb's Palsy. Dr. Langston denied that he was negligent. The matter proceeded to trial before the Pike County Circuit Court.

¶5. At trial, Cody presented three witnesses. Joan testified that when she gave birth to Cody, she had high blood pressure and diabetes. Further, Dr. Langston used forceps to pull Cody down but did not ask

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<sup>1</sup> In describing the events and arguments, this Court borrows heavily from the various witnesses' testimony.

her about a Cesarean delivery, commonly called a C-Section. Cody, a large baby, weighed nine pounds and fifteen ounces. Cody's shoulder was black and blue, limp, and "twisted in." Cody's arm never got better, but he was able to use it some.

¶6. Cody called Dr. Bernadette Sherman to testify as an expert witness. Dr. Sherman consulted Cody's medical records and opined on the process of Cody's delivery. Dr. Sherman noted that Joan was a large patient. The presence of diabetes and high blood pressure made Joan a high-risk patient. During labor, Cody "stayed high." That meant that Cody did not descend down the birth canal at the normal rate. Dr. Sherman testified that when a baby "stays high" a complication might result. Dr. Sherman went on to testify that shoulder dystocia is not common but there are indicators of that risk. According to Dr. Sherman, diabetics have large babies. That Joan was a diabetic is why Cody's shoulder stuck. Further, when a baby does not come down, a physician should perform a C-Section. Dr. Sherman concluded that Dr. Langston breached the standard of care when he performed a vaginal delivery instead of a C-Section.

¶7. On cross-examination, Dr. Sherman agreed that shoulder dystocia is always dangerous and cannot be predicted. Further, she admitted that a C-Section strategy is not a good way to prevent shoulder dystocia. Finally, Dr. Sherman stated that she had no criticism of how Dr. Langston used forceps. Rather, her criticism is that they were used when a C-Section was appropriate.

¶8. Cody ended his case-in-chief after he testified on his own behalf. Dr. Langston presented a motion for directed verdict, but the circuit court denied that motion. Dr. Langston then argued his case-in-chief. He testified on his own behalf and followed up with an expert witness.

¶9. Dr. Langston testified as an expert witness. He testified that there are three types of vaginal delivery: (1) spontaneous delivery in which the mother needs no assistance; (2) vacuum delivery in which

suction aids the baby's descent through the birth canal; and (3) forceps delivery. When a forceps delivery is necessary, the forceps are applied to the baby's head so that the mother does not have to push for long periods.

¶10. In Joan's case, Dr. Langston testified that a C-Section was never necessary but he did use forceps to reduce the second stage of labor. Once Cody's head delivered, Dr. Langston removed the forceps. Although a baby usually delivers easily at that point, Cody's shoulders were larger than his head and Cody's shoulders lodged behind Joan's pelvis. Dr. Langston said that many complications can result once that happens. To free a baby who experiences this, a physician first applies pressure to the mother's pubic bone. When Dr. Langston did, Cody did not dislodge. A physician's second option is to increase the size of the birth canal. Likewise, that did not free Cody. Finally, a physician should apply the "McRobert's procedure" by which the physician pushes the mother's knees towards her chest. When Dr. Langston performed the McRobert's procedure, Cody dislodged and delivered. Dr. Langston testified that C-Section is a last resort. Especially in Joan's case, due to Joan's having signed documents by which she detailed that her faith as a Jehovah's witness forbid the possibility of her receiving a blood transfusion under any circumstance, even if necessary to save her life.

¶11. During cross-examination, Cody's counsel attempted to question Dr. Langston about some of Joan's medical records in which Dr. Langston altered an entry detailing a "mid-forceps" delivery. Dr. Langston crossed out "mid-forceps" and wrote "low-forceps" instead. When Cody's counsel attempted to ask Dr. Langston about the alteration, Dr. Langston's attorney objected and the trial court excused the jury. After some debate, the court determined that according to Cody's case-in-chief, the issue was whether Dr. Langston was negligent in performing a vaginal delivery instead of a C-Section.

¶12. Dr. Langston's attorney argued that the line of questioning at issue inferred that Dr. Langston used forceps to attempt to pull Cody free after Cody's shoulders became trapped. Further, the facts did not suggest that set of events. Rather, Dr. Langston pulled Cody down the birth canal and stopped after Cody's head delivered. It was at that point that Cody's shoulders lodged behind Joan's pelvis. The circuit court concluded that because Cody had presented his case-in-chief and failed to assert that Dr. Langston was negligent in the manner he applied the forceps, it was improper to assert that such was the case during Dr. Langston's case-in-chief.

¶13. After Dr. Langston concluded his testimony, he called Dr. James Martin as an expert witness. Dr. Martin testified that it was appropriate to deliver Cody vaginally. At that point, Cody's counsel objected and argued that Dr. Martin's testimony was cumulative and, accordingly, improper. The circuit court overruled the objection.

¶14. Dr. Martin went on to testify that predicting shoulder dystocia is impossible. However, he opined that Dr. Langston managed it appropriately and was not negligent. Finally, Dr. Martin testified that under the circumstances a C-Section would have been improper.

¶15. Following closing arguments, the jury deliberated for twenty-eight minutes and returned a verdict for Dr. Langston. Cody filed post-trial motions for JNOV, for new trial, and to amend the judgment. The circuit court overruled Cody's motions. Cody brings his appeal before this Court and seeks resolution of three issues.

## ANALYSIS

- I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY PREVENTING THE PLAINTIFF FROM CROSS-EXAMINING THE DEFENDANT IN THE PRESENCE OF THE JURY ABOUT MID-FORCEPS DELIVERY AND ALTERED MEDICAL RECORDS?

¶16. “The standard of review regarding the admission or exclusion of evidence is abuse of discretion.” *Thompson Machinery Commerce Corp. v. Wallace*, 687 So.2d 149, 152 (Miss. 1997). In his first assignment of error, Cody argues that the trial court abused its discretion to admit or exclude evidence by preventing him from cross-examining Dr. Langston in the jury’s presence regarding mid-forceps delivery and altered medical records. The theory of Cody’s argument is that Dr. Langston used forceps to deliver a large baby that had not sufficiently reached a proper point in descending the birth canal. Further, because Cody was still “high” at delivery, Dr. Langston negligently used a mid-forceps procedure to deliver Cody. Cody maintains that the trial court should have allowed cross-examination on these matters in the jury’s presence. Cody also argues that although he attempted to impeach Dr. Langston’s testimony by way of altered hospital records, the trial court chose not to allow it.

¶17. The trial court correctly recognized that the line of questioning was irrelevant. It was irrelevant because Cody’s argument, according to the expert testimony of Dr. Sherman, was whether Dr. Langston should have delivered Cody by C-Section rather than some variation of vaginal delivery. The trial court correctly recognized that Dr. Sherman specifically testified that she had no criticism of the techniques used during delivery, including the application of forceps.

¶18. Even if the excluded testimony was admitted the testimony would not have changed the outcome of the trial. The excluded testimony involved a correction of Dr. Langston’s transcript of his dictated delivery notes. The correction was to indicate that the delivery was low-forceps rather than mid-forceps. Moreover, during Cody’s case-in-chief, no one testified that it was improper or fraudulent for Dr. Langston to correct the medical record. No one testified that delivery was by any other means than low-forceps. Even if the jury was to somehow conclude that the delivery was mid-forceps, no one testified that such delivery was a breach of the standard of care. Accordingly, this assignment of error is without merit.

II. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY ALLOWING CUMULATIVE TESTIMONY FROM EXPERT WITNESSES ON THE ISSUES OF LIABILITY, CAUSATION, AND INJURY OVER THE PLAINTIFF'S OBJECTIONS?

¶19. Cody's theory behind this assignment of error is that because Dr. Langston testified, as an expert witness, that he was not negligent, Dr. Martin's expert testimony to the same effect should be excluded as cumulative. He cites the proposition that "[r]elevant evidence may be excluded if its probative value is substantially outweighed by the . . . needless presentation of cumulative evidence." M.R.E. 403; *Evans v. State*, 725 So.2d 613 (¶233) (Miss. 1997).

¶20. A trial judge has a great deal of discretion as to the relevancy and admissibility of evidence. *Id.* at (¶232). Unless the trial judge abused his discretion and caused Cody prejudice, this Court will not reverse the judge's ruling. *Id.* (quoting *Fisher v. State*, 690 So.2d 268, 274 (Miss. 1996)).

¶21. Rule 403 allows a trial judge to use his discretion to exclude evidence if the evidence causes *needless* presentation of cumulative evidence. The subject testimony did not result in the needless presentation of cumulative evidence. Without question, Dr. Langston had the right to testify in his defense. The fact that he is able to testify as an occurrence witness does not change the fact that he is also qualified to testify as an expert witness. When counsel tendered Dr. Langston as an expert, Cody did not object. If Cody wanted to limit Dr. Langston to occurrence testimony, the proper method would have been to object to Dr. Langston offering expert testimony. The fact that a defendant who is able to testify as an expert offers the same testimony as his separate expert witness does not render the testimonial evidence needlessly cumulative. The jury needed to determine whether Dr. Langston was negligent. If they thought that Dr. Langston was biased in his testimony, Dr. Martin's testimony would aid in the jury's resolution of the issue. If Cody wanted to prevent two experts from testifying that Dr. Langston was not negligent, an

objection based on cumulative evidence was not the way to accomplish that goal. Accordingly, this issue lacks merit.

**III. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL?**

¶22. In reviewing a trial court's decision whether to grant a motion for new trial, this Court must accept as true the evidence that supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. *Watson v. State*, 848 So.2d 203 (¶34) (Miss.Ct.App.2003). The jury verdict should stand unless the evidence, as a whole, shows that no reasonable hypothetical juror could have found that Dr. Langston was not negligent. *Starcher v. Byrne*, 687 So.2d 737, 739 (Miss. 1997). This Court must resolve all conflicts of evidence and determine all reasonable inferences from the testimony in Dr. Langston's favor. *Thompson*, 687 So.2d at 151-52.

¶23. Dr. Langston's testimony, as well as Dr. Martin's was that Dr. Langston was not negligent. Moreover, portions of Dr. Sherman's testimony suggested that Dr. Langston was not negligent in delivering Cody. Accordingly, a reasonable hypothetical juror heard sufficient evidence to determine that Dr. Langston was not negligent. As such, the trial court did not err by denying Cody's motion for new trial.

**¶24. THE JUDGMENT OF THE CIRCUIT COURT OF PIKE COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**LEE, P.J., MYERS, CHANDLER, GRIFFIS, BARNES AND ISHEE, JJ., CONCUR. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, C.J.**

**IRVING, J., DISSENTING:**

¶25. The majority finds that the trial court did not err in not allowing Cody Bromfield's attorney to cross-examine Dr. Ledon Langston concerning Dr. Langston's use of forceps during the delivery of Cody, and



concerning the change or correction by Dr. Langston of his delivery notes. The phrase "mid-forceps" delivery was stricken or lined through, and the phrase "lower forceps" delivery was inserted in its place. The majority finds no error because in the view of the majority, "the line of questioning [concerning use of the forceps] was irrelevant" since the issue was "whether Dr. Langston should have delivered Cody by C-section rather than some variation of vaginal delivery." The majority also finds that no error occurred in not allowing cross-examination on the change and/or correction of Dr. Langston's delivery notes because no one testified that delivery was by any means other than lower forceps delivery.

¶26. While it is true that Cody's expert testified that Dr. Langston should have performed a C-section rather than allowing a vaginal delivery, Cody's expert also testified that Dr. Langston should not have used forceps, as the use of the forceps to pull the baby down could cause Erb Palsy when shoulder dystocia occurs during delivery. Therefore, I respectfully dissent.

¶27. To properly understand why it was prejudicial error not to allow cross-examination of Dr. Langston on his use of forceps and the correction and/or change in his delivery notes, it is necessary that I quote extensively from the record, beginning with a portion of the testimony of Cody's expert, Dr. Bernadette Sherman. Dr. Sherman testified as follows:

Q. Could you tell the jury how shoulder dystocia could occur.

A. When the baby descends into the pelvis and it takes time, like it took over three hours with the baby being high, but it takes time, then as the baby comes down to the vaginal floor the head will come out, and it can be a natural delivery, even though when we talk about shoulder dystocia it's always -- not always, but usually, sometimes an instrument delivery where the doctors uses forceps or vacuum suction, it's an increased risk of shoulder dystocia. So, the head comes out and then one of the shoulders is impacted against the anterior frontal pelvic bone. So, if the doctor keeps pulling down then the nerve will be damaged. Some Erb's Palsies resolve, but if it's a bad damage then the nerve will be permanently damaged just from pulling the head trying to get the baby delivered, and then you realize that the baby is not coming because the shoulder is impacted and then you

do the McRobert's procedure, super pubic pressure. There is even a procedure where you can push the baby's head back in the vagina and then do a C-Section.

\* \* \* \*

Q. Dr. Sherman, you agree, don't you, that once the shoulder dystocia occurred in this case, once this complication was identified, it was appropriately managed by Dr. Langston?

A. Yes, it was.

Q. And the procedures Dr. Langston used during this vaginal delivery were all appropriately performed?

A. *Exactly, except with the forceps.*

Q. And your criticism of the forceps is that they were used; not that he didn't use them correctly?

A. Exactly.

Q. And you used, I believe, in your shoulder dystocia case that you were sued on, you used the vacuum, you didn't use forceps, and you still had ---

A. --- I used forceps and the vacuum.

Q. So you used both?

A. Right.

Q. And you still had problems?

A. Exactly. Should have been a C-Section.

¶28. During the presentation of his defense, the following exchange occurred between Dr. Langston and

his attorney:

Q. Doctor, in your opinion, was your use of forceps in this case, in this delivery, appropriate?

A. Yes, it was.

Q. In your opinion did you do anything inappropriately or negligently that caused this child's problems?

A. No, I did not.

¶29. During cross-examination of Dr. Langston by Cody's attorney, the following occurred:

Q. Okay. Now, you were asked to read from Williams' Obstetrics, the learned treatise.

A. Yes.

Q. And I have some pages from the 18th Edition of William's Obstetrics, and I want you to read these.

A. Okay.

Q. The 18th Edition starting on Page 427, they're talking about pre-requisites for application of forceps. What is the first pre-requisite that they list?

A. The head must be engaged, preferably deeply engaged.

Q. Okay. What does the William's textbook say about delivery by use of high forceps?

A. Says it should not be done.

Q. What about even after engagement?

A. Even after engagement the higher the station of the baby, the fetal head, the more difficult —

Q. — Okay. So high forces delivery shouldn't be done?

A. Correct.

Q. What – could you read this highlighted portion right here for me.

A. Therefore, forceps should not be used until the station of the head is low enough to ensure a non-traumatic operative procedure. The same generalization applies to forceps for the fetal distress when the head is not close to the perineal floor. Granted that the fetal heart rate in such a case may suggest that the baby is in jeopardy, it may still be judicious to allow more time for the head to distend rather

than super-impose a trauma of a difficult mid-force delivery operation on an already depressed infant.

Q. So, instead of performing the mid-forceps you ought to give more time to allow the baby's head to come down?

A. That's possible, yes.

Q. According to William's?

A. Yes.

Q. Now, on Exhibit —

A. — We're talking about mid-force delivery.

Q. I know.

A. Okay.

Q. Exhibit P-2 talks about mid-forceps delivery. Page 16, which is your notes.

A. Correct.

Q. What date did you dictate those notes?

BY MR. CORY: May we approach the bench, Your Honor.

BY THE COURT: Yes, sir.

¶30. After the bench conference, and further testimony outside the presence of the jury, Cody's attorney was not allowed to question Dr. Langston further about Dr. Langston's use of forceps or the change in Dr. Langston's delivery notes to reflect that "lower forceps" delivery as opposed to "mid-forceps" was utilized.

¶31. Even after denying Cody's counsel the right to cross-examine Dr. Langston about Dr. Langston's use of forceps, the court allowed the testimony of Dr. Langston's expert, Dr. James Martin, who testified as follows:

Q. Do you have an opinion in this case about whether the use of forceps by Dr. Langston was appropriate?

A. It was completely appropriate. If he had chosen to use vacuum instead of forceps it would have also been appropriate, given the circumstances that she was in, where she had descended well during the second stage, she brought the baby's head well down. . . .

¶32. On these facts, I believe the trial court clearly abused its discretion in not allowing Cody's counsel to cross-examine Dr. Langston about Dr. Langston's use of forceps and the change made in Dr. Langston's delivery notes. Such error resulted in prejudice to Cody.

¶33. As previously noted, while Cody did contend that Dr. Langston was negligent for not delivering him by C-section, that position does not in any way make irrelevant Cody's counsel's cross-examination questions regarding Dr. Langston's use of forceps during the vaginal delivery. First, Dr. Langston himself testified during direct examination that his use of forceps was appropriate. If for no other reason, Cody's attorney should have been allowed thorough cross-examination to challenge that assertion by Dr. Langston. Second, Cody's expert clearly testified that forceps should not have been used because there should have been a C-section rather than a vaginal delivery. Third, Dr. Langston's own counsel questioned Dr. Langston regarding information contained in the same treatise that Cody's counsel was using when Dr. Langston's counsel objected that the line of questions was irrelevant.

¶34. My reading of the record indicates that Cody's theory of the case was that Dr. Langston was negligent in not opting for a C-section in the very beginning of the delivery process and that by not doing so resulted in his having later to use forceps to assist in extricating Cody. Cody's expert testified that, because Joan Brumfield, Cody's mother, was a diabetic and extremely large, Dr. Langston was on notice that she was likely to have a large baby. The expert also testified that Cody's failure to properly descend down the birth canal was indicative of something being wrong. The expert testified that Cody stayed at the

minus one station over three hours when "the standard of care is they have to come down within an hour and a half."

¶35. On these facts, clearly Cody's counsel was entitled to cross-examine Dr. Langston about Dr. Langston's use of forceps during a vaginal delivery that, according to Cody's proof, should never have been. If forceps should not have been used because a C-section was warranted, using them when the C-section was not done does not, by any means, make their use appropriate. And if forceps are used, as was the case here, that moves the justification for their use to the fore for cross-examination purposes. Since Dr. Langston contended that his use of forceps was proper, directly contradicting Cody's contention that they never should have been used, I fail to see how cross-examination about their use was irrelevant.

¶36. Additionally, I find that the trial court also committed prejudicial error in not allowing Cody's counsel to question Dr. Langston about Dr. Langston's lining through the word "mid-forceps" delivery and inserting the phrase "lower forceps" delivery in its place. While Dr. Langston's testimony that the wording "mid-forceps" was a typographical error or one occurring between the dictation and the translation, Cody should have been allowed to vigorously cross-examine him on that point because the location of the baby in the birth canal drives the decision as to whether and when forceps can be properly used. The term "mid-forceps" delivery indicates that forceps were used when the baby was at a point further up the birth canal whereas the term "lower forceps" delivery indicates that forceps were used when the baby had descended to a point further down the birth canal. The risks of injury to the baby are commensurate with the baby's location when the forceps are used, that is, the higher the baby, the greater the risks, the lower the baby, the lower the risks. Whether the lining through of the word "mid-forceps" was a typographical, dictation-

to- translation error as Dr. Langston contended, or an attempt to recast the facts in a light more favorable to the doctor, was a proper inquiry on cross-examination.

¶37. The majority finds no merit in Cody's argument that his attorney should have been allowed to cross-examine Dr. Langston about the change in Dr. Langston's delivery notes because, according to the majority, no one testified that delivery was by any other means than lower forceps. It seems to me that the majority fails to appreciate the significance of what occurred. Even in the absence of any testimony that delivery was by mid-forceps, the fact Dr. Langston's notes initially indicated mid-forceps delivery is reason enough to allow vigorous cross-examination on that point. But more importantly, since the notes were changed in a way that supported Dr. Langston's contention at trial — that his use of the forceps was appropriate — the reason for the change became a proper area to explore on cross-examination. Having said this, I am in no way suggesting that Dr. Langston's explanation was anything less than truthful. I just believe that cross-examination of the explanation was proper.

¶38. For the reasons presented, I respectfully dissent. I would reverse and remand for a new trial with instructions to allow full and complete cross-examination on the subject of Dr. Langston's use of forceps and the change or correction of his delivery notes. I do not believe that the failure of the trial court to allow such examination on these issues can be dismissed as harmless error.

**KING, C.J., JOIN THIS SEPARATE OPINION.**