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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2009

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Greg Groover and Melinda Groover, as parents and next friends of Lennon Groover, a minor

v.

William H. Johnston, Jr., M.D., and Birmingham Pediatric Associates, Inc.

Appeal from Jefferson Circuit Court
(CV-06-1917)

PER CURIAM.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(E), Ala. R. App. P.

Lyons, Woodall, Stuart, Bolin, and Parker, JJ., concur.

Smith, J., concurs specially.

Cobb, C.J., and Murdock, J., dissent.

SMITH, Justice. (concurring specially).

I concur in the Court's decision to affirm without opinion the summary judgment entered in favor of Dr. William H. Johnston, Jr., and Birmingham Pediatric Associates, Inc. ("Birmingham Pediatric")[1] in the action filed by Greg Groover and Melinda Groover, as parents and next friends of Lennon Groover, a minor. As discussed in Part I below, an opinion is not warranted in this case because of the Groovers' failure to comply with Rule 28(a), Ala. R. App. P. In light of the issues raised by Chief Justice Cobb's dissenting opinion, however, I write specially to explain why, even had the Groovers complied with Rule 28(a), a reversal of the summary judgment entered against them is not appropriate.

I.

The specific breaches of the standard of care alleged by the Groovers are (1) that Dr. Johnston negligently failed to recognize Lennon's developmental delays and to refer him to an appropriate specialist in a timely manner; and (2) that Dr. Johnston negligently failed to communicate with Dr. Holly Mussell "regarding Lennon's condition and their respective

[1]Collectively, Dr. Johnston and Birmingham Pediatric are referred to as "the Johnston defendants."

treatment." Groovers' brief, p. 26. The Groovers contend that those alleged breaches of the standard of care caused Lennon to suffer permanent brain injuries. As they did in the trial court, the Groovers on appeal rely exclusively upon the deposition testimony of Dr. Daniel Adler and the affidavit of Dr. Steven Shore, the Groovers' expert witnesses, to support those allegations.

The trial court found that the deposition testimony of Dr. Adler and the affidavit of Dr. Shore were not substantial evidence indicating that the alleged negligence of Dr. Johnston probably caused Lennon's injury--i.e., irreversible brain damage. The trial court's order granting the Johnston defendants' summary-judgment motion states:

"Dr. Shore avers the following in his affidavit:

> "'William H. Johnston, MD, breached the standard of care by failing to recognize Lennon Groover's developmental delays and refer the child out to qualified specialists in a timely manner.
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> "'Dr. William H. Johnston's delay in sending the child to a qualified hematologist or other specialist resulted in the child's macrocytic anemia being undiagnosed for at least an additional six (6) months. During that period the child did not receive the necessary medical

> treatment resulting in his condition further deteriorating.'

"The Court has reviewed the deposition testimony of Dr. Adler. However, it appears to the Court that Dr. Adler, a pediatric neurologist, was deposed in order to elicit testimony regarding the standard of care, and the breach of the standard of care in the treatment provided by Defendant Holly Mussell, the pediatric neurologist in this case. Dr. Adler offered no opinion with regard to the applicable standard of care to which a pediatrician, such as Dr. Johnston, is to comply, nor whether Dr. Johnston breached the standard of care in providing pediatric health services to Plaintiffs' minor, Lennon Groover. Dr. Adler, however, did offer testimony with regard to the element of causation. Specifically, he testified as follows:

> "'... I agreed that B-12 deficiency appearing after birth was a substantive cause of this boy's neurological disability, that the neurological disability was permanent, and that there was an opportunity to prevent the injury had the B-12 administration commenced earlier, considering the way the boy was being fed.'

"Dr. Adler testified that Plaintiffs' minor developed symptoms of B-12 deficiency between 9 to 12 months after his birth. He further testified that by mid-2001 it was clear that Lennon was not developing well and by the summer of 2001, he reached a level of B-12 deficiency to the point that he became brain injured from it. Dr. Adler stated that though Plaintiffs' minor was not B-12 deficient during pregnancy nor during the first year of his life, that the condition developed over time and the symptoms did not show suddenly, [but] through a process of poor developmental evolution of the child. Adler testified that Plaintiffs' minor had

irreversible brain damage for 4-6 weeks prior to September 7, 2001, the date on which Dr. Mussell became aware of the results of the MRI conducted in August of 2001. He testified that the brain injury occurred by mid-July to early August 2001. Dr. Adler testified that had Plaintiffs' minor been diagnosed and treated earlier than he actually was, that he would have had an opportunity 'to be better than he is[.'] [H]owever, when asked to quantify that opinion, Dr. Adler testified, 'I can't tell you how much better.'

"....

"The Court finds that Dr. Shore is a qualified similarly situated health care provider with Defendant Johnston. The Court further finds that Dr. Shore's affidavit is sufficient to create a genuine dispute of material fact with regard to the issues of the standard of care to which board certified pediatricians are held, and with regard to the issue of whether or not Defendant Johnston breached the said standard of care.

"However, on the issue of causation, for which expert testimony is required in order to create a genuine dispute of material fact, Dr. Shore's affidavit states that the delay in referring Plaintiffs' minor son to a specialist rendered his condition undiagnosed and untreated for an extended period of time 'resulting in his condition further deteriorating.'

"Dr. Adler's deposition testimony, cited hereinabove, expands on this statement in arriving at the same conclusion that the brain damage had commenced prior to the time that it should have been discovered by Defendant Johnston, and that the delay in treatment and diagnosis meant that Plaintiffs' minor son suffered a further, though unquantifiable, deterioration in his health as a result."

(Footnotes omitted.)

The trial court found this case to be controlled by McAfee v. Baptist Medical Center, 641 So. 2d 265, 267-68 (Ala. 1994), and the trial court's order quotes extensively from McAfee, including most of the following:

> "If, as the defendants suggest, the plaintiffs are in fact asking this Court to abandon Alabama's traditional rules of proximate cause and to recognize the 'loss of chance doctrine,' we decline to do so. Alabama law requires that a recovery not be based upon a mere possibility:
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> > "'The rule in Alabama in medical malpractice cases is that to find liability, there must be more than a mere possibility or one possibility among others that the negligence complained of caused the injury. There must be evidence that the negligence probably caused the injury. Pappa v. Bonner, 268 Ala. 185, 105 So. 2d 87 (1958).'
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> "Baker v. Chastain, 389 So. 2d 932, 934 (Ala. 1980).
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> "The plaintiffs cite us to Parker v. Collins, 605 So. 2d 824 (Ala. 1992), wherein we stated:
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> > "'This Court has previously held that the issue of causation in a malpractice case may properly be submitted to the jury where there is evidence that prompt diagnosis and treatment would have placed the patient in a better position than she was in as a result of inferior medical care. Waddell v. Jordan, 293 Ala. 256, 302 So. 2d 74 (1974); Murdoch v. Thomas, 404 So. 2d 580 (Ala. 1981). It is not necessary to

> establish that prompt care could have prevented the injury or death of the patient; rather, the plaintiff must produce evidence to show that her condition was adversely affected by the alleged negligence. Waddell; see also Annot. 54 A.L.R. 4th 10 § 3 (1987).'

"Id. at 827. We do not read Parker as abrogating the rule that the plaintiff must prove that the physician's negligence probably caused the injury. In Parker, we reversed a judgment based on a directed verdict for the defendant physician on the grounds that the 'medical testimony suggests that Mrs. Parker's condition worsened as a direct result of a diagnosis based upon a substandard X-ray,' stating, 'That evidence was sufficient to create a jury question as to proximate cause in this case....' 605 So. 2d at 827 (Emphasis added.) In Parker, a cancer specialist testified that he was 80% certain that the cancer had not spread into the lymph nodes at the time of the improper diagnosis. Thus, there was expert testimony from which the jury could infer that the physician's negligence probably caused her injury.

"We have carefully studied the record in each of the cases before us and in both cases we conclude that the defendants made a prima facie showing that they were entitled to a judgment as a matter of law on the issue of causation by producing evidence that their actions did not cause the patient's condition to worsen. In neither case did the plaintiffs submit substantial evidence that the patient's condition worsened as a direct result of the actions of the defendant physicians.

"In the first case, the baby, Martin McAfee, contracted meningitis from bacteria. He was treated by Dr. Rodney Dorand. Dr. Dorand, a board certified neonatologist, submitted an affidavit stating that he was familiar with the degree of care, skill, and

> diligence normally exercised by physicians practicing neonatology in 1990, and that, in his opinion, nothing he did or did not do in his care and treatment of Martin McAfee probably caused or contributed to cause any injury. The affidavit of the plaintiffs' expert, Dr. O. Carter Snead III, offered a conjectural observation that, generally, the sooner the onset of treatment, the better the expected result. There is no evidence that the actions of Dr. Dorand or those of Dr. Gillis Payne, who first saw the baby, probably caused the poor outcome. In the second case, the plaintiffs submitted affidavits stating, generally, that 'time is of the essence' in treating breast cancer, and that patients who receive earlier treatment obtain a better result. There was no expert testimony to rebut the testimony submitted by the defendants indicating that the metastasis to the lymph nodes probably occurred in the early stages before the cancer could be diagnosed. The affidavits of the plaintiffs' experts did not rise to the level of substantial evidence that the actions of the defendants probably caused Brenda Roberts's injuries.
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> "The summary judgment in each case is due to be affirmed on the authority of McKinnon v. Polk, 219 Ala. 167, 121 So. 539 (1929); Peden v. Ashmore, 554 So. 2d 1010 (Ala. 1989); Sasser v. Connery, 565 So. 2d 50 (Ala. 1990); Smith v. Medical Center East, 585 So. 2d 1325 (Ala. 1991); Parker v. Collins, 605 So. 2d 824 (Ala. 1992); and Levesque v. Regional Medical Center, 612 So. 2d 445 (Ala. 1993)."

McAfee, 641 So. 2d at 267-68 (footnotes omitted; some emphasis added).

The trial court concluded that the expert testimony offered in Dr. Shore's affidavit and Dr. Adler's deposition was

> "not sufficient to create a genuine dispute of material fact that the alleged breach of the standard of care probably caused the irreversible brain damage in [Lennon]. Parker v. Collins, [605 So. 2d 824 (Ala. 1992)], which could serve as authority for the proposition that the causation testimony before the Court is substantial evidence creating a genuine dispute of material fact, has not been so interpreted by the Alabama Supreme Court."

In their materials to this Court, the Groovers do not cite any authority to demonstrate that the trial court's analysis and conclusion as to causation are incorrect. Even though the trial court cited both McAfee and Parker v. Collins, 605 So. 2d 824 (Ala. 1992), in its order and the Johnston defendants discuss both McAfee and Parker in their brief to this Court, the Groovers in their briefs to this Court do not address either McAfee or Parker. The Groovers' entire argument regarding the issue of causation is as follows:

> "C. Causation
>
> "Dr. Adler testified that Lennon's B-12 deficiency most likely developed around 12 months of age (Adler dep. 64). Dr. Adler pointed out that Lennon could sit up at 9 months, but could not walk

until after 19 months (Adler dep. 64). Dr. Adler explained his timeline for Lennon's B-12 deficiency as follows:

> "'I think that this baby was born with adequate stores of B-12. He was normal at birth. All notes about him early in life were that he was thriving and doing well. I think that his nutritional deficiencies--and, again, speaking as a pediatric neurologist--were such that from the fact that he wasn't eating anything and he was only being breast-fed were not only vitamin B-12 deficiency, which, of course, we learned later, but much earlier we seemed to have iron deficiency that's described in the records. Iron supplementation is commenced. That's at about a year of age. So my feeling is that there was more likely than not a combination, and that the problems with B-12 that ultimately produced more, you know, significant problems began really after a few more months of continued vitamin B-12 deficiency.'

"(Adler dep. 65-66).

"Dr. Adler explained the progression of Lennon's injuries from the B-12 deficiency as follows:

> "'I think he had a degree of white matter injury based on the imaging abnormalities. That must have been at least four to six weeks old, because he's talking about a diminution in the volume of the white matter. So since B-12 is involved in myelin production, its absence leads to injury in myelin producing cells.
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> "'So first you get injury. You would see it on specific abnormalities. And then

whatever those cells are, since they can't survive metabolically--since they have a metabolic injury, they can't survive. Then they shrink after a while. And that takes time to develop.

"'....

"'There was already a loss of volume in the brain that was caused by chronic vitamin B-12 deficiency, so that the imaging in August [2001] was abnormal. And I think even B-12 administration at that point would have still--would not have permitted this boy to be normal.

"'Q. He had permanent brain injuries by that point in time that were going to cause him to have developmental delays and other issues that occur from brain injury, correct?

"'A. True.

"'Q. And that condition had existed, in your opinion, at least four to six weeks by the time that MRI was performed, correct?

"'A. Correct.

"'Q. Which would point the injuries to these permanent injuries to Lennon occurring by mid-July to early August, correct?

"'A. True.'

"(Adler dep. 70-71).

"When asked if any other birth defects or problems contributed to Lennon's injuries, Dr. Adler

> testified, 'there's no other diagnosis in the records that I can see, other than B-12 deficiency.' (Adler dep. 80). Again, Dr. Adler states that Lennon's records show no other causes for his injuries other than the B-12 deficiency (Adler dep. 82-83). Dr. Adler dismissed Dr. Johnston's earlier reliance on an iron deficiency or iron anemia because the low iron would not cause the white brain matter decrease that the B-12 deficiency caused in Lennon (Adler dep. 83)."

(Groovers' brief, pp. 27-29.)

Thus, the portions of the Groovers' initial brief and reply brief addressing causation cite no legal authority whatsoever. Even though the trial court's summary-judgment order relied on Dr. Adler's testimony that he could not quantify "how much better" Lennon would have been if he had been diagnosed and treated earlier than he actually was, the Groovers do not address the effect of Dr. Adler's inability to quantify the degree of deterioration in Lennon's condition allocable to the delay in treatment allegedly caused by Dr. Johnston's breach of the standard of the care.

In a section of their brief that precedes the section addressing causation, the Groovers cite Looney v. Davis, 721 So. 2d 152, 157 (Ala. 1998), for its recitation of the elements of a medical-malpractice action and its statement that "[t]he plaintiff in a medical malpractice action

generally must establish the prima facie elements by introducing expert testimony." Groovers' brief, p. 25. The dissent concludes that that lone citation provides sufficient legal justification on which to reverse the summary judgment in this case. The dissent notes:

> "The Groovers' brief is certainly sufficient to apprise the Court of the Groovers' argument and to allow the Court to evaluate the legal merits of the Groovers' position. The Groovers clearly rely on the well recognized principle of law, also relied upon by the Johnston defendants, that causation is an element of a medical-malpractice action. The only issue before us is whether proof of causation exists; therefore, no further citation to legal authority is necessary. The Groovers also cite legal authority to the effect that causation is generally established by the testimony of a medical expert."

Goover v. Johnston, ___ So. 3d at ___ (Cobb, C.J., dissenting). I disagree.

In Horn v. Fadal Machining Centers, LLC, 972 So. 2d 63, 80 (Ala. 2007), this Court noted:

> "Horn cites no legal authority relevant to her negligent-maintenance theory.
>
> > "'Rule 28(a)(10), Ala. R. App. P., requires that arguments in an appellant's ... brief contain "citations to the cases, statutes, other authorities, and parts of the record relied on." The effect of a failure to comply with Rule 28(a)(10) is well established:

"'"It is settled that a failure to comply with the requirements of Rule 28(a)([10]) requiring citation of authority for arguments provides the Court with a basis for disregarding those arguments:

> "'"'When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research. Rule 28(a)([10]); Spradlin v. Birmingham Airport Authority, 613 So. 2d 347 (Ala. 1993).'
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> "'"City of Birmingham v. Business Realty Inv. Co., 722 So. 2d 747, 752 (Ala. 1998). See also McLemore v. Fleming, 604 So. 2d 353 (Ala. 1992); Stover v. Alabama Farm Bureau Ins. Co., 467 So. 2d 251 (Ala. 1985); and Ex parte Riley, 464 So. 2d 92 (Ala. 1985)."

"'Ex parte Showers, 812 So. 2d 277, 281 (Ala. 2001). "[W]e cannot create legal arguments for a party based on undelineated general propositions unsupported by authority or argument." Spradlin v. Spradlin, 601 So. 2d 76, 79 (Ala. 1992).'

> "University of South Alabama v. Progressive Ins. Co., 904 So. 2d 1242, 1247-48 (Ala. 2004).
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> "'Authority supporting only "general propositions of law" does not constitute a sufficient argument for reversal.' Beachcroft Props., LLP v. City of Alabaster, 901 So. 2d 703, 708 (Ala. 2004) (quoting Geisenhoff v. Geisenhoff, 693 So. 2d 489, 491 (Ala. Civ. App. 1997)). '"[W]here no legal authority is cited or argued, the effect is the same as if no argument had been made."' Steele v. Rosenfeld, LLC, 936 So. 2d 488, 493 (Ala. 2005) (quoting Bennett v. Bennett, 506 So. 2d 1021, 1023 (Ala. Civ. App. 1987) (emphasis in Steele)). Because Horn has cited no legal authority specific to her negligent-maintenance claim, she has not presented an argument sufficient for reversal of the judgment on that claim. The judgment in favor of Cardinal is, therefore, affirmed as to the negligent-maintenance claim."

Horn, 972 So. 2d at 80 (some emphasis added).

Under Horn, the effect of the Groovers' failure to cite any legal authority specific to their theory of causation "'is the same as if no argument had been made.'" Horn, 972 So. 2d at 80 (quoting Steele, 936 So. 2d at 493). Consequently, as to the issue of causation, the Groovers have "not presented an argument sufficient for reversal of the judgment." Horn, 972 So. 2d at 80.[2]

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[2]The dissent cites Ex parte Borden, [Ms. 1050042, Aug. 17, 2007] ___ So. 3d ___ (Ala. 2007), in support of the contention that the Groovers have presented sufficient argument regarding causation. In Ex parte Borden, the brief at issue "included 11 pages of argument regarding ineffective assistance of

II.

For the reasons stated in Part I, a reversal is not warranted in the present case. But even apart from the Groovers' failure to present sufficient legal argument to warrant a reversal, summary judgment in favor of the Johnston defendants nevertheless was proper on the merits. Among other things, the Johnston defendants cite McAfee, supra, to support their argument that the Groovers did not offer substantial evidence of causation and that they may not recover for any "loss of a chance" to obtain a better medical outcome.[3]

As noted, the trial court found this case to be controlled by McAfee and concluded that the expert testimony offered by the Groovers was "not sufficient to create a genuine dispute of material fact that the alleged breach of the standard of care probably caused the irreversible brain damage in [Lennon]." I agree.

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counsel, including some 25 citations to caselaw, along with explanations and quotations from the cited cases." ___ So. 3d at ___.

[3]The Johnston defendants' brief discusses the issue of causation at pages 41-51; that discussion includes citations to sufficient legal authority.

According to the Groovers' expert, Dr. Daniel Adler, a pediatric neurologist, a vitamin B-12 deficiency caused Lennon to suffer permanent, irreversible brain injuries by mid-July or early August 2001. The Groovers do not contend that any negligence by the Johnston defendants probably caused Lennon to suffer the B-12 deficiency. Rather, the Groovers' contention is that if Dr. Johnston had made a timely referral to an appropriate specialist, "further deterioration" of Lennon's condition could have been avoided or lessened.

Notably, however, Dr. Adler's testimony does not state that an earlier diagnosis of the B-12 deficiency or earlier referral by Dr. Johnston or anyone else would have resulted in a quantifiably different outcome for Lennon. Specifically, as the trial court noted, "Dr. Adler testified that had Plaintiffs' minor been diagnosed and treated earlier than he actually was, ... he would have had an opportunity 'to be better than he is[.'] [H]owever, when asked to quantify that opinion, Dr. Adler testified, 'I can't tell you how much better.'"

Dr. Adler admitted that the sole basis for his opinion in this case was the general medical premise that the earlier a

condition is treated, the better the outcome. Specifically, he testified:

> "Q. Do you agree that that opinion--that he would be better with an earlier diagnosis--knowing that it's already your opinion that he would have already had permanent neurological injuries by that time ... requires you to speculate?
>
> "A. I don't think it is speculation to say that when you have an ongoing process that produces injury to the brain or leads to injury to the brain and as it continues that the injury--or the effects of that injury worsens. But I'm not able to tell you how much worse it would be, just that he would be better.
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> "Q. Is that just based on some general concept of the sooner you treat a condition, the better the outcome, generally?
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> "A. I mean, that's a general and accepted rule in medicine.
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> "....
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> "A. I would say he would be better, but after that I don't have an opinion.
>
> "Q. You just say he would be better, but you can't quantify that in any way, correct?
>
> "A. Correct."

Thus, the basis for Dr. Adler's testimony--the general premise that the earlier a condition is treated, the better the outcome--is identical to that of the expert testimony held insufficient in McAfee.

In their reply brief, the Groovers assert that "Dr. Adler testified that Lennon's injuries could have been prevented if B-12 had been administered earlier." Presumably, the testimony to which the Groovers are referring is the following:

> "I agreed that B-12 deficiency appearing after birth was a substantive cause of this boy's neurological disability, that the neurological disability was permanent, and that there was an opportunity to prevent the injury had the B-12 administration commenced earlier, considering the way the boy was being fed."

Dr. Adler's testimony in that regard, however, was specifically addressed by the trial court's order. Again, that testimony is stated generically and does not assert with any specificity how much earlier the diagnosis needed to be made in order to result in a different outcome.[4] As the trial court noted and as I have noted above, when Dr. Adler was

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[4]According to the Johnston defendants, Dr. Adler was not qualified to testify specifically that a different outcome would have resulted if Dr. Johnston had diagnosed the B-12 deficiency earlier. The Johnston defendants point out that "Dr. Adler practices within the specialty of pediatric neurology. He is not qualified to render an opinion regarding the standard of care for a pediatrician such as Dr. Johnston, and agreed in his deposition that he was not offering any standard of care opinions regarding Dr. Johnston's care." The Johnston defendants' brief, p. 25. In their reply brief, the Groovers do not challenge this assertion of the Johnston defendants.

asked to "quantify his opinion" as to how much better Lennon would be if his B-12 deficiency had been diagnosed earlier than it was, Dr. Adler testified, "I can't tell you how much better."[5] Under McAfee, Dr. Adler's testimony is not sufficient to serve as substantial evidence of causation.

Dr. Adler's testimony that the already permanent brain injury worsened in an unquantifiable way after the "summer of 2001," as well as his testimony that an earlier diagnosis would have resulted in "an opportunity [for Lennon] 'to be better than he is,'" is conclusory, speculative, and without basis. This Court has held that "evidence which affords nothing more than speculation, conjecture, or guess" is not sufficient to warrant the submission of an issue to the jury, and if the "evidence is equally consistent with either the existence or nonexistence of negligence, the issue should not

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[5]Additionally, Dr. Adler was not specific in his testimony as to when Lennon's symptoms of B-12 deficiency had progressed to the point that they would have been recognized by an appropriate specialist. As the trial court noted: "Dr. Adler stated that though [Lennon] was not B-12 deficient during pregnancy nor during the first year of his life, that the condition developed over time and the symptoms did not show suddenly, [but] through a process of poor developmental evolution of the child."

be submitted to the jury." Watterson v. Conwell, 258 Ala. 180, 183, 61 So. 2d 690, 692 (1952).

In addition to Dr. Adler's testimony, the Groovers offered an affidavit from Dr. Steven Shore, a pediatrician. Regarding that affidavit, the dissent asserts that "Dr. Shore certainly did testify that Dr. Johnston's negligence 'result[ed] in [Lennon's] condition further deteriorating'--i.e., that Lennon's injuries were worse than they otherwise would have been in the absence of Dr. Johnston's negligence." ___ So. 3d at ___ (Cobb, C.J., dissenting). The dissent concludes that Dr. Shore's affidavit testimony makes this case sufficiently analogous to the following situation recognized in McAfee:

> "'This Court has previously held that the issue of causation in a malpractice case may properly be submitted to the jury where there is evidence that prompt diagnosis and treatment would have placed the patient in a better position than she was in as a result of inferior medical care. Waddell v. Jordan, 293 Ala. 256, 302 So. 2d 74 (1974); Murdoch v. Thomas, 404 So. 2d 580 (Ala. 1981). It is not necessary to establish that prompt care could have prevented the injury or death of the patient; rather, the plaintiff must produce evidence to show that her condition was adversely affected by the alleged negligence. Waddell; see also Annot. 54 A.L.R. 4th 10 § 3 (1987).'"

McAfee, 641 So. 2d at 267 (quoting Parker v. Collins, 605 So. 2d 824, 827 (Ala. 1992)).

Dr. Shore's affidavit, however, does not state "that Lennon's injuries were worse than they otherwise would have been in the absence of Dr. Johnston's negligence." Dr. Shore's affidavit states specifically that:

> "4. William H. Johnston, M.D., breached the standard of care by failing to recognize Lennon Groover's developmental delays and refer the child out to qualified specialists in a timely manner.
>
> "5. Dr. William H. Johnston's delay in sending the child to a qualified hematologist or other specialist resulted in the child's macrocytic anemia being undiagnosed for at least an additional six (6) months. During that period the child did not receive the necessary medical treatment resulting in his condition further deteriorating."

Thus, Dr. Shore's affidavit asserts (1) that Dr. Johnston should have referred Lennon to a specialist earlier than he did and (2) that Lennon's failure to receive the necessary medical treatment resulted in his condition further deteriorating. However, Dr. Shore's affidavit does not provide a basis for inferring that (1) caused (2). In other words, Dr. Shore's affidavit provides no basis for inferring that if Dr. Johnston had made a timely referral to a specialist--i.e., if Dr. Johnston had not acted negligently--

Lennon probably would have received "the necessary medical treatment" to which Dr. Shore referred.

The dissent finds Dr. Shore's affidavit sufficient because, the dissent asserts, Dr. Shore "opines that the purportedly negligent delay in treatment actually 'result[ed] in' a real physical injury: 'the deterioration of [Lennon's] condition'" ___ So. 3d at ___ (Cobb, C.J., dissenting) (first emphasis added). However, as noted, it is undisputed that the B-12 deficiency was the cause of Lennon's injuries. Neither Dr. Shore nor Dr. Adler testified that Dr. Johnston had a duty to diagnose and treat the B-12 deficiency.[6] Rather, Dr. Shore asserted that Dr. Johnston "breached the standard of care by failing to recognize Lennon Groover's developmental delays and refer the child out to qualified specialists in a timely manner" (emphasis added).

Thus, for Dr. Johnston to comply with the standard of care set forth by Dr. Shore, Dr. Johnston needed to (1)

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[6]As the dissent points out in its recitation of the facts, Melinda Groover on several occasions indicated to Dr. Johnston that she thought Lennon had a B-12 deficiency. ___ So. 3d at ___ (Cobb, C.J., dissenting). However, there was no expert testimony indicating that, in view of that evidence, the appropriate standard of care required Dr. Johnston to diagnose Lennon's B-12 deficiency.

recognize Lennon's developmental delays (not recognize the B-12 deficiency) at an earlier time and (2) refer Lennon to "qualified specialists" (not treat the B-12 deficiency). If Dr. Johnston had done those two things, then there are two possibilities: (1) the "qualified specialists" would have diagnosed and treated the B-12 deficiency, thereby preventing or lessening any additional injury that Lennon sustained; or (2) the "qualified specialists" would not have diagnosed and treated the B-12 deficiency, and thus the B-12 deficiency would continue to injure Lennon. In other words, an earlier referral could have possibly resulted in an earlier diagnosis and treatment, which could have possibly prevented or reduced additional injury to Lennon. Without stating who the "qualified specialists" should have been or what the probable diagnosis, treatment, and result of any such referral would have been, Dr. Shore's opinion assumes that "qualified specialists" probably would have diagnosed and treated the B-12 deficiency and that the treatment would have prevented Lennon's condition from "further deteriorating." But there is nothing in Dr. Shore's affidavit to support that conclusion, and the Groovers do not cite any other evidence in the record

to support it.[7] Thus, Dr. Shore's assumption that an earlier referral to a "qualified specialist" would have prevented or lessened the "further deterioration" of Lennon's condition is conclusory, speculative, and without a proper evidentiary foundation and cannot create a genuine issue of material fact. See Bradley v. Miller, 878 So. 2d 262, 266 (Ala. 2003), in which this Court noted:

> "'To prove causation in a medical malpractice case, the plaintiff must prove, through expert medical testimony, that the alleged negligence probably caused, rather than only possibly caused, the plaintiff's injury.'
>
> "University of Alabama Health Servs. v. Bush, 638 So. 2d 794, 802 (Ala. 1994). '[T]he opinions of an expert may not rest on "mere speculation and conjecture." Townsend v. General Motors Corp., 642 So. 2d 411, 423 (Ala. 1994).' Dixon v. Board of Water & Sewer Comm'rs of Mobile, 865 So. 2d 1161, 1166 (Ala. 2003). '[A]s a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. See, e.g., Griffin Lumber Co. v. Harper, 247 Ala. 616, 25 So. 2d 505 (1946).' Alabama Power Co. v. Robinson, 447 So. 2d 148, 153-54 (Ala. 1983). An expert witness's opinion that is conclusory, speculative, and without

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[7]Indeed, the only other expert testimony was from Dr. Adler, a pediatric neurologist (and presumably a similarly situated "qualified specialist" like those to whom Dr. Shore referred). However, as I have noted, Dr. Adler's opinion that earlier treatment of the B-12 deficiency would have made Lennon "better" was insufficient under McAfee.

> a proper evidentiary foundation cannot create a genuine issue of material fact. Becton v. Rhone-Poulenc, Inc., 706 So. 2d 1134, 1141-42 (Ala. 1997)."

As noted, the dissent concludes that McAfee is inapposite and, presumably, that this case is more analogous to Parker, supra. This case is distinguishable from Parker, however.

Parker involved a claim that in January 1988 Dr. Wyatt E. Collins, a radiologist, "negligently performed a mammogram upon Mrs. Parker and that he then negligently interpreted the test results to be negative" for breast cancer. Parker was diagnosed with breast cancer in December 1988; by that time the cancer had spread to her lymph nodes. 605 So. 2d at 826.

The Parkers presented testimony from two experts indicating that the X-ray film used by Dr. Collins was "'grossly technically inadequate and suboptimal for interpretation' and that Dr. Collins violated the accepted standard of radiology care by basing his diagnosis upon it." 605 So. 2d at 826. In addition to that testimony about the failure to diagnose,

> "Dr. Nicholas Robert, a cancer specialist, testified ... as to the effect of the delay in diagnosing Mrs. Parker's condition. Based on the evidence regarding the size of the lump discovered by Mrs. Parker in January, as well as the medical evidence surrounding

> the subsequent growth of the lump, Dr. Robert said that he was 80% certain that the cancer had not spread into Mrs. Parker's lymph nodes as of January. Dr. Sanchez, Mrs. Parker's surgeon, then testified that Mrs. Parker's mastectomy and the course of chemotherapy and radiation treatments that followed were necessary, because the cancer had spread into her lymph nodes. He also testified that breast cancer has a higher rate of recurrence once it has spread into the lymph glands."

605 So. 2d at 826 (emphasis added).[8]

Thus, unlike Dr. Shore's opinion in this case regarding the effect of the alleged negligent failure of Dr. Johnston to timely refer Lennon to a qualified specialist, there was proper expert testimony in Parker as to the probable effect of the failure to diagnose: for example, the failure to diagnose probably caused Parker to undergo additional medical treatments--a mastectomy and the course of chemotherapy and

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[8]In view of that evidence, this Court in Parker concluded:

> "While the facts do not establish that Mrs. Parker's cancer could have been prevented altogether if Dr. Collins had rendered a prompt diagnosis based on a clearer X-ray, medical testimony suggests that Mrs. Parker's condition worsened as a direct result of a diagnosis based upon a substandard X-ray. That evidence was sufficient to create a jury question as to proximate cause in this case; accordingly, we reverse that portion of the judgment based on the directed verdict for Dr. Collins."

605 So. 2d at 827 (emphasis added).

radiation treatments--and caused her to suffer the additional injury of having a higher chance of reocurrence of breast cancer than she otherwise would have had. In other words, the plaintiffs in Parker presented testimony by a qualified expert with a proper evidentiary foundation indicating that if the defendant physician had not acted negligently, the patient probably would have had a better outcome.[9] Consequently, unlike the present case, there was substantial evidence of causation in Parker.

As noted, the Groovers' theory of causation in this case is that (1) if Dr. Johnston had recognized Lennon's developmental delays at an earlier stage and (2) if Dr. Johnston had referred Lennon to "qualified specialists," then (3) the "qualified specialists" would have properly diagnosed

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[9]Two recent decisions of this Court illustrating this principle include Mobile Infirmary Ass'n v. Tyler, 981 So. 2d 1077, 1102 (Ala. 2007) (finding substantial evidence of causation where expert testimony established that a nurse's negligent failure to adequately communicate the symptoms suffered by the patient prevented the patient "from receiving the medical care that probably would have prevented her death"); and Lawson v. Moore, [Ms. 1070634, Dec. 31, 2008] ___ So. 3d ___ (Ala. 2008) (finding substantial evidence of causation where expert testimony established that the defendant doctor "acted negligently and that his alleged negligence terminated a viable intrauterine pregnancy" (emphasis added)).

and treated Lennon's B-12 deficiency, and (4) Lennon's condition would not have "further deteriorated." For the reasons stated, the expert testimony offered by the Groovers in support of their theory of causation was insufficient to avoid being described as mere conjecture. Additionally, the Groovers have not cited legal authority suggesting that their theory of causation and the evidence offered in support of it are sufficient to warrant a reversal of the summary judgment.

III.

In light of the foregoing discussion about the Groovers' failure to offer substantial evidence of causation, it should be noted that the Groovers argue on appeal that "[t]he trial court erred by entering summary judgment before the Groovers completed discovery in compliance with the trial court's scheduling order." Groovers' brief, p. 15. The Groovers' argument in that regard includes two parts. First, the Groovers contend that they were not given enough time to depose their expert, Dr. Shore. Second, the Groovers argue that the issue of causation was not properly before the trial court on the Johnston defendants' motion for a summary judgment.

When the Groovers filed their complaint on March 31, 2006, they also filed a motion for the entry of a scheduling order, requesting, among other things, the following: (1) that all fact witnesses be deposed within 90 days of the date of filing of the last answer; (2) that all the Groovers' experts be identified within 90 days of the date of the last answer filed and that all of those experts would be made available for deposition within 120 days of the date of filing of the last answer; and (3) that the court hold a pretrial conference and set the case for trial within 200 days of the date the last answer was filed.

On September 1, 2006, the trial court entered a scheduling order. That order gave the Groovers until January 31, 2007, to identify experts; until March 30, 2007, to put those experts up for deposition; and until July 31, 2007, to complete all other depositions. The order set the case for trial on October 1, 2007. On January 31, 2007, the Groovers filed curriculum vitae of a number of purported experts, including Dr. Shore and Dr. Adler.

On February 22, 2007, the trial court amended its scheduling order to extend several deadlines, including

extending the deadline for deposing the Groovers' experts from March 30, 2007, until May 31, 2007. The defendants deposed Dr. Adler in New York on March 23, 2007.

On June 1, 2007, counsel for the Groovers moved to withdraw from representing the Groovers. The trial court granted the motion and allowed the Groovers until July 23, 2007, to secure new counsel. On July 13, 2007, the Johnston defendants moved for a summary judgment based on: (1) the affidavit of Dr. Johnston which asserts that Dr. Johnston met the standard of care in his treatment of Lennon and that no act or omission on his part "proximately caused harm to Lennon"; and (2) the fact that the May 31, 2007, deadline had passed without the Groovers' identifying and putting up for deposition any similarly situated expert to testify that Dr. Johnston breached the standard of care in his care of Lennon.

At a status conference on July 23, 2007, new counsel appeared for the Groovers and requested additional time to conduct discovery and to respond to the pending summary-judgment motion. The trial court entered an order granting the Groovers additional time--until October 1, 2007--to identify and submit affidavits from any expert witness needed

to respond to the pending summary-judgment motion. The order set the case for another status conference on October 1, 2007. The trial court entered an additional scheduling order on October 3, 2007, continuing the hearing on the pending summary-judgment motion until January 10, 2008. The court also gave the Johnston defendants until December 31, 2008, to file additional evidentiary submissions and gave the Groovers until January 8, 2008, to file additional evidentiary submissions.

The Groovers did not file additional evidentiary submissions by the January 8, 2008, deadline. On January 10, 2008, the Johnston defendants filed a supplemental brief stating that the Groovers had not submitted any further evidence by the January 8, 2008, deadline and that the Groovers had not submitted sufficient evidence of causation.

The trial court held the scheduled hearing on the summary-judgment motion on January 10, 2008. At that hearing, the Groovers requested and were granted an additional 10 days in which to file a reply brief in response to the Johnston defendants' supplemental brief filed on January 10, 2008. Following the hearing, the Groovers filed a motion to strike

the Johnston defendants' supplemental brief. The Johnston defendants responded in a written brief, arguing that the supplemental brief could not have been submitted until after the January 8 deadline passed with no further evidentiary submissions from the Groovers. The Johnston defendants also argued that causation was not a new issue because, they contended, it had been raised in Dr. Johnston's affidavit filed along with the Johnston defendants' original summary-judgment motion.

On January 29, 2008, the trial court denied the Groovers' motion to strike the supplemental brief, and the court granted the Johnston defendants' motion for a summary judgment. The court's order specifically stated that the Groovers had not offered substantial evidence indicating that the alleged breach of care by Dr. Johnston was the proximate cause of Lennon's injuries.

As to their argument to this Court that they were not given enough time to depose their expert, Dr. Shore, the Groovers did not raise this argument below; they did not inform the trial court that they needed additional time to depose their expert, Dr. Shore. The Johnston defendants point

out that after the filing of their summary-judgment motion in July 2007, the Groovers were given an additional six months--until January 8, 2008--in which to file evidentiary submissions in support of their claims. The Johnston defendants also assert that the Groovers "certainly did not need to depose Dr. Shore to place his opinions before the trial court since they had direct access to their own expert and could obtain an affidavit from him setting forth his opinions in whatever amount of detail they deemed appropriate." The Johnston defendants' brief, pp. 37-38. Thus, the Groovers' argument that they were not allowed sufficient time to depose Dr. Shore is without merit.

Regarding the Groovers' argument that the issue of causation was not properly before the trial court, the trial court's order addressed that argument and held that the Johnston defendants' July 2007 summary-judgment motion, which was accompanied by Dr. Johnston's affidavit asserting that nothing he did or did not do "proximately caused harm to Lennon Groover," shifted the burden of proof to the Groovers on the issue of causation. Thus, contrary to the Groovers' contention, the Johnston defendants did not wait until January

2008 to raise the issue of causation for the first time. Indeed, the Groovers' argument that the July 2007 summary-judgment motion did not raise the issue of causation is contradicted by the Groovers' response to that motion, filed September 28, 2007, in which the Groovers asserted that they "have been in contact with other experts who they expect to identify. These experts will offer additional evidence regarding the cause and extent of the child's injuries" (emphasis added). Consequently, the Groovers' argument that the Johnston defendants' July 2007 summary-judgment motion did not raise the issue of causation is without merit.

Finally, the Groovers' argument that the trial court erred in permitting the Johnston defendants to file a supplemental brief is also without merit. Although the Johnston defendants' supplemental brief filed on January 10, 2008, argued that Groovers had failed to offer substantial evidence of causation by the January 8, 2008, deadline for the Groovers to submit evidence in opposition to the Johnston defendants' summary-judgment motion, the Groovers were provided 10 additional days to respond to that supplemental brief, and the Groovers in fact filed a reply.

COBB, Chief Justice (dissenting).

I respectfully dissent from the majority's decision to affirm the summary judgment in this case.

Facts[10]

Greg and Melinda Groover have three children, the youngest of whom, Lennon, was born on October 29, 1999.[11] Although he was developmentally normal at birth, his subsequent development soon began to concern his mother. According to Lennon's mother, she had planned to breast-feed Lennon exclusively until he was six months old, then breast-feed him until he was 18 months old while supplementing his diet with solid food, as she had done with her two older children. However, when Melinda attempted to supplement his diet with solid food, he was unable to swallow it.

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[10]In setting forth these facts, I understand that, in reviewing a trial court's ruling on a summary-judgment motion, "'[t]he court must accept the tendencies of the evidence most favorable to the nonmoving party and must resolve all reasonable doubts [regarding the facts] in favor of the nonmoving party.'" Richardson v. Terry, 893 So. 2d 277, 281 (Ala. 2004) (quoting Bruce v. Cole, 854 So. 2d 47, 54 (Ala. 2003)).

[11]The Groovers are vegetarians. Dr. Johnston, a pediatrician who practices with Birmingham Pediatric Associates, Inc., had been the Groover family pediatrician for 20 years and was very aware that the Groovers are vegetarians.

By the time Lennon was nine months old, he was still unable to swallow solid food; he was not able to sit up without support or to crawl, and he did not say any words. At this time, Lennon's mother took him to Dr. Johnston for a routine appointment. Lennon's mother asked Dr. Johnston if she should introduce formula into Lennon's diet, but Dr. Johnston advised her that it was not a good idea to introduce formula and that breast-feeding provides "complete nutrition" for a child up to the age of 18 months. Dr. Johnston further informed Lennon's mother that Lennon had difficulty swallowing solid food because he had a birth defect in his tongue commonly known as being "tongue-tied." Dr. Johnston informed Lennon's mother that, when Lennon reached the age of 18 months, Lennon would need to undergo a procedure to correct the defect and at that point he would be able to swallow solid food. After this appointment, based on Dr. Johnston's advice, Lennon's mother did not introduce formula but continued to breast-feed Lennon exclusively. She also attempted to feed Lennon "solid" food (such as mashed potatoes and apple sauce) in addition to breast milk, but she was unsuccessful because Lennon could not swallow the food.

In October 2000, at the age of 12 months, Lennon still had not begun to crawl. He rarely turned over on his own. He could walk only if an adult assisted him by holding both his hands. Lennon's mother again took him to Dr. Johnston. Dr. Johnston drew blood to test Lennon for microcytic anemia (iron deficiency) and set up an appointment for Lennon to return two weeks later for follow-up on the results of the test.

At the follow-up appointment in November 2000, Dr. Johnston informed Lennon's mother than Lennon had an iron deficiency. At this time, Lennon's mother asked if Lennon could have a B-12 deficiency. Dr. Johnston replied that Lennon could not have a B-12 deficiency, and that the anemia test revealed that Lennon had small blood cells, which were indicative of an iron deficiency.

In February 2001, when Lennon was about 15 months, his mother noticed that he was pulling on his fingers and touching his lips. In reading about iron deficiency following Lennon's diagnosis, she had discovered literature indicating that a B-12 deficiency causes tingling in the fingers. She took Lennon to Dr. Johnston for another appointment, and she informed Dr. Johnston about Lennon's habit of pulling on his fingers and

touching his lips. She expressed concern that perhaps Lennon's fingers were tingling and asked if Lennon might have a B-12 deficiency that was causing him to pull on his fingers and touch his lips. Dr. Johnston replied, "Well, he's not doing it now." He told Lennon's mother that Lennon did not have a B-12 deficiency and that the test results indicated that Lennon's blood cells were larger than before, which, Dr. Johnston informed the mother, indicated that Lennon was recovering from the iron deficiency.

At the time of Lennon's checkup at the age of 15 months, Dr. Johnston was still unconcerned about Lennon's developmental delays. He explained that Lennon was a big baby and that he was still weak from the iron deficiency. Lennon's mother asked that he be referred to a physical therapist, but Dr. Johnston told her that Lennon did not need physical therapy. However, he gave Lennon's mother some exercises to do with Lennon, which she did.

In August 2001, when Lennon was 21 months old, his mother again took him to Dr. Johnston. Referring to Lennon's continued developmental delays, she said to Dr. Johnston, "It's got to be B-12 anemia." Dr. Johnston responded, "Nobody

gets B-12 anemia. Lennon is getting enough B-12 from your breast milk." Dr. Johnston put Lennon on Poly-Vi-Sol, a vitamin supplement, which provided some iron, folic acid, and B-12. He then referred Lennon to Dr. Holly Mussell for further evaluation of Lennon's muscular weakness.

In November 2001, Lennon's mother obtained Lennon's medical records from Dr. Johnston. When she looked at the medical record, Lennon's mother noticed that Lennon had not had normal blood-test results since he was 12 months old. She requested that Dr. Mussell schedule a B-12 test, and Dr. Mussell ordered the test.

In December 2001, the mother took Lennon to Dr. Johnston's office to have blood drawn for the B-12 test because Lennon's blood was so thick that technicians at Children's Hospital in Birmingham were unable to obtain a sample. Lennon's blood was so thick and clotted so quickly that the medical technicians at Dr. Johnston's office were unable after five attempts to obtain a sample for testing. Dr. Johnston took a "smear" of Lennon's blood to a hematologist to consult with him about the test. The hematologist confirmed that Lennon had a B-12 deficiency. Dr.

Johnston quickly began treating Lennon with B-12 shots. After Lennon began taking B-12 shots, according to Lennon's mother, Lennon's condition began to improve "right away." Dr. Johnson noted improvement when he treated Lennon at his next office on February 1, 2002.

It is undisputed that Lennon suffered permanent brain damage as a result of the prolonged B-12 deficiency. According to Dr. Steven Shore, the Groovers' expert witnesses, who is a pediatrician, Dr. Johnston breached the standard of care by failing to recognize the significance of Lennon's developmental delays and to timely refer him to a qualified hematologist or other specialist. Dr. Shore testified by affidavit that, because of Dr. Johnston's delay in sending Lennon to a qualified hematologist or other specialist, Lennon's macrocytic anemia (i.e., B-12 deficiency) was undiagnosed for at least an additional six months. Dr. Shore opined that, during those six months, Lennon did not receive the necessary medical treatment, which resulted in the further deterioration of his condition.

Lennon could not walk until he was two and one-half years old, and when he could walk then only with the

assistance of a walker. At the time Lennon's mother's deposition was taken in this case, Lennon was in the first grade. At that time, Lennon had selective mutism, was in special-education and occupational-therapy classes at school, and could not speak well or write well. The results of an IQ test indicate that Lennon has an IQ of 60.

The Groovers sued Dr. Johnston, Birmingham Pediatric Associates, Inc., and others. The trial court entered a summary judgment in favor of Dr. Johnston and Birmingham Pediatric Associates, Inc., and the Groovers appealed.

Analysis

I. The Merits

As evidence that Dr. Johnston's alleged failure to timely refer Lennon to a hematologist or other specialist proximately and probably caused injury to Lennon, the Groovers rely on an affidavit from one of their expert witnesses, Dr. Shore, a pediatrician. Dr. Shore testified in that affidavit as follows:

> "William H. Johnston, M.D., did not comply with the applicable standard of care for a board certified pediatrician with respect to the care and treatment rendered to Lennon Groover.

> "William H. Johnston, M.D., breached the standard of care by failing to recognize Lennon Groover[']s developmental delays and refer the child out to qualified specialists in a timely manner.
>
> "Dr. William H. Johnston's delay in sending the child to a qualified hematologist or other specialist resulted in the child's macrocytic anemia [i.e., B-12 deficiency] being undiagnosed for at least an additional six (6) months. During that period the child did not receive the necessary medical treatment resulting in his condition further deteriorating."

The trial court relied on McAfee v. Baptist Medical Center, 641 So. 2d 265 (Ala. 1994), to hold that Dr. Shore's affidavit was insufficient to create a genuine issue of material fact as to whether Dr. Johnston negligently caused a delay in Lennon's diagnosis and treatment, which, in turn, caused Lennon's condition to deteriorate. Finding no evidence of causation in light of McAfee, the trial court entered a summary judgment for Dr. Johnston and Birmingham Pediatric Associates, Inc.[12]

The fundamental flaw in the trial court's logic is that, in entering the summary judgment, the trial court incorrectly characterized the Groovers' reliance on Dr. Shore's affidavit as an attempt to rely on the "loss-of-chance" doctrine, which

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[12]A summary judgement had earlier been entered for the other defendants on another ground.

this Court expressly and soundly rejected in McAfee. The loss-of-chance doctrine is the proposition that "the loss-of-chance (to achieve a better medical outcome)" is a compensable injury in a medical-malpractice case. McAfee, 641 So. 2d at 267 n.2. Thus, in accordance with the rejection of the loss-of-chance doctrine in McAfee, Alabama evidence indicating that a delay in medical treatment could have caused a patient's condition to worsen is not sufficient to sustain an action based on medical negligence absent evidence that the patient's condition probably did in fact worsen as a probable and proximate result of the delay. See generally McAfee; see also Crutcher v. Williams, 12 So. 3d 631 (Ala. 2009) (relying on McAfee to hold that evidence indicating that delayed treatment merely caused loss of chance to prevent further injury did not satisfy the plaintiff's burden to prove that she actually incurred an injury that was probably and proximately caused by the delay in treatment).[13] This is because evidence that an

[13]I authored Crutcher, which applied McAfee to overturn a jury verdict for a plaintiff in a medical-malpractice case. In Crutcher, the plaintiff, Iola Williams, presented evidence at trial that an emergency-room doctor's failure to treat her dangerous brain condition or to transfer her to University of Alabama at Birmingham Hospital by emergency vehicle caused a delay in treatment and a lack of emergency care when it was needed. Williams's medical expert testified that, generally,

injury could have occurred as alleged is not sufficient to warrant the conclusion that it probably did so occur. McAfee, 641 So. 2d at 267. Put another way, under McAfee, mere evidence that "generally, the sooner the onset of treatment, the better the expected result," McAfee, 641 So. 2d at 268 (emphasis added), is not sufficient to prove that a delay in treatment of a particular patient caused a worsening of that patient's condition. See McAfee, 641 So. 2d at 267 (holding that the plaintiffs failed to "submit substantial evidence that [the plaintiffs'] conditions worsened as a direct result" of the delay in treatment in their particular cases).

Thus, McAfee simply applied the long-standing rule in Alabama that, to prevail on a medical-malpractice claim based

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a delay in treatment of a patient with a condition like Williams's could cause the patient's condition to further deteriorate. Cf. McAfee (holding that evidence that "generally ... 'time is of the essence' in treat[ment]" or that "generally, the sooner the ... treatment, the better the expected result," 641 So. 2d at 268, was not sufficient to establish causation in a particular case). However, viewing the evidence in the light most favorable to Williams, the Court found no evidence of a probability that any legally cognizable injury to Williams actually resulted from the emergency-room doctor's alleged negligence in placing Williams at risk that an injury could occur. See Crutcher, 12 So. 3d at 648. Therefore, we reversed the judgment for Williams and rendered a judgment for the emergency-room doctor. Id.

on a delay in providing medical treatment, the plaintiff must prove that a breach of the standard of care, i.e., the delay in treatment, proximately and probably caused actual injury to the plaintiff. See McAfee 641 So. 2d at 267 ("'[T]here must be more than a mere possibility or one possibility among others that the negligence complained of caused the injury. There must be evidence that the negligence probably caused the injury.'" (quoting Baker v. Chastain, 389 So. 2d 932, 934 (Ala. 1980))). "This has been the standard in Alabama for decades." 641 So. 2d at 267.[14]

However, the McAfee court went to considerable effort to make it abundantly clear that it was not holding that a summary judgment for the defendant was appropriate when the plaintiff presented evidence indicating that the plaintiff's condition probably worsened as a direct result of delay in diagnosis and treatment. See McAfee, 641 So. 2d at 267-68

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[14]Because causation is an essential element of a medical-malpractice action, I have not shied from upholding summary judgments in medical-malpractice cases when the plaintiff's evidence was not sufficient to create a genuine issue of material fact as to whether a physician's breach of the standard of care actually caused damage to the plaintiff. See, e.g., Giles v. Brookwood Health Servs., Inc., 5 So. 3d 533 (Ala. 2008); cf. Crutcher v. Williams, 12 So. 3d 631 (Ala. 2009) (relying on McAfee). However, this is not such a case.

(discussing this point at length and reaffirming the validity of Parker v. Collins, 605 So. 2d 824 (Ala. 1992)).

Unlike the plaintiffs in McAfee, the Groovers do not take the position that they should be compensated for the mere loss of a chance to prevent further brain damage to Lennon. Rather, they are seeking damages for an actual, physical injury: the further deterioration of Lennon's brain injury, which, they allege, was caused by Dr. Johnston's failure to refer Lennon to a hematologist or other qualified specialist. Dr. Shore's affidavit goes beyond suggesting mere loss of a "chance" to prevent or reduce further deterioration of Lennon's condition. He opines that the purportedly negligent delay in treatment actually "result[ed] in" a real physical injury: "the deterioration of [Lennon's] condition." Cf. McAfee, 641 So. 2d at 267 (reaffirming the principle that evidence that a plaintiff's condition "'worsened as a direct result'" of a delay in treatment is sufficient to create a jury question as to probable cause (quoting Parker, 605 So. 2d at 827 (emphasis omitted))). This is simply not a loss-of-chance case, and McAfee is therefore inapposite.

Moreover, under the plain language of McAfee, it was not necessary for Dr. Shore to testify that Lennon would not have suffered irreversible brain injury if he had received prompt care. There can be different degrees of irreversible brain damage. Under McAfee, it is sufficient that Dr. Shore's testimony shows that Lennon's permanent brain injury was worse than it otherwise would be as a probable result of Dr. Johnston's negligence. Although Dr. Shore's affidavit certainly does not exclude the possibility that Lennon would have had irreversible brain damage even had Dr. Johnston acted sooner, Dr. Shore certainly did testify that Dr. Johnston's negligence "result[ed] in [Lennon's] condition further deteriorating" -- i.e., that Lennon's injuries were worse than they otherwise would have been[15] in the absence of Dr. Johnston's negligence. Thus, Dr. Shore's affidavit does exclude the possibility that the extent of that Lennon's brain damage would have been the same absent a dely in the diagnosis and treatment of his disease. Under McAfee, this is clearly sufficient. This Court stated in McAfee:

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[15]I respectfully disagree with Justice Smith's suggestion that causing Lennon's condition to deteriorate further is not the same thing as causing Lennon's condition to be worse that it otherwise would have been.

> "'[T]he issue of causation in a malpractice case may properly be submitted to the jury where there is evidence that prompt diagnosis and treatment would have placed the patient in a better position than she was in as a result of inferior medical care. Waddell v. Jordan, 293 Ala. 256, 302 So. 2d 74 (1974); Murdoch v. Thomas, 404 So. 2d 580 (Ala. 1981). It is not necessary to establish that prompt care could have prevented the injury or death of the patient; rather, the plaintiff must produce evidence to show that her condition was adversely affected by the alleged negligence. Waddell; see also Annot. 54 A.L.R.4th 10 § 3 (1987)."

McAfee, 641 So. 2d at 227 (quoting Parker, 605 So. 2d at 827 (emphasis added)).

In fact, the trial court itself appeared to have had no trouble finding that the Groovers had submitted evidence from which one could reasonably conclude that, as a result of a delay in treatment caused by Dr. Johnston's negligence, Lennon's condition was worse than it otherwise would have been. (See, e.g., the trial court's finding that the Groovers' expert medical witnesses testified, in essence, that "Lennon's brain damage had commenced prior to the time that it should have been discovered by [Dr. Johnston], and that the delay in treatment and diagnosis meant that [Lennon] suffered a further, though unquantifiable,[16] deterioration of his

[16]The lack of commentary in Dr. Shore's affidavit quantifying the probable extent to which Dr. Johnston's

health.") Logically, this finding amounts to a finding of causation, and it ought to lead to a reversal of the summary judgment on the Groovers' claim that Dr. Johnston negligently caused Lennon's condition to further deteriorate.

The Groovers did not discuss McAfee in their arguments before this Court. However, their failure to address McAfee does not make their case a loss-of-chance case. Because it is apparent from the plain language of McAfee that it is inapposite where, as here, there is evidence indicating that a delay in treatment proximately caused injury to the plaintiff, I cannot conclude that the Groovers' failure to address McAfee necessarily means we must approve of or facilitate its misapplication in this case at Dr. Johnston and Birmingham Pediatric Associates, Inc.'s urging.

In conclusion, I have never more strongly disagreed with a decision of this Court than I do with its decision in this

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alleged breach of the standard of care contributed to Lennon's brain injury over and above what he otherwise would have sustained would be relevant to the extent of Lennon's damages attributable to Dr. Johnston, but it does not negate the existence of evidence indicating that Dr. Johnston probably caused Lennon actual damage (further deterioration of his condition) by breaching the standard of care. The lack of commentary as to the extent rather than the cause of Lennon's damage is not the basis upon which the trial court entered the summary judgment now at issue.

case. By its own express and careful language, McAfee could not be more clear or explicit that it applies in cases where there is no evidence that the loss of a chance to prevent injury ever actually or probably resulted in an injury to the plaintiff, but that it does not bar recovery where there is evidence indicating that a plaintiff's condition worsened as a direct result of a delay in treatment. By its own findings, the trial court recognizes that Dr. Shore's affidavit is sufficient evidence to create a genuine issue as to whether some portion of Lennon's brain damage was caused by a delay in treatment caused by negligence on the part of Dr. Johnston. Therefore, this is not a mere loss-of-chance case, and McAfee is simply inapposite. Accordingly, the trial court erred by entering a summary judgment for the defendants in reliance on McAfee.

II. Dr. Shore's Affidavit

I respectfully disagree with Justice Smith's assertions in her special writing that Dr. Shore's affidavit leaves open the possibility that timely referral to the appropriate specialists might not have led to an earlier diagnosis of Lennon's condition. Dr. Shore stated in his affidavit: "Dr.

William H. Johnston[']s delay in sending the child to a qualified hematologist or other specialist resulted in the child's macrocytic anemia [i.e., B-12 deficiency] being undiagnosed for at least an additional six (6) months." It is hard to imagine how Dr. Shore could have more clearly indicated (1) that Dr. Johnston's negligent delay in referral caused ("resulted in") (2) a six-month delay in diagnosis of Lennon's B-12 deficiency.

Admittedly, Dr. Shore did not in so many words state that (1) the six-month delay in diagnosis of Lennon's B-12 deficiency, "caused" (2) Lennon not to receive the necessary medical treatment for a B-12 deficiency during that period. Instead, Dr. Shore stated:

> "Dr. William H. Johnston[']s delay in sending the child to a qualified hematologist or other specialist resulted in the child's macrocytic anemia [i.e., B-12 deficiency] being undiagnosed for at least an additional six (6) months. During that period the child did not receive the necessary medical treatment resulting in his condition further deteriorating."

As Justice Smith suggests, Dr. Shore's wording technically leaves open a remote theoretical possibility that Dr. Johnston or some other physician might have negligently failed to provide "the necessary medical treatment" for

Lennon's B-12 deficiency even if Lennon's condition had been timely diagnosed. As McAfee makes clear, however, courts are not concerned with what is "possible," only with what is "probable," i.e., more likely than not to occur in a given set of circumstances. Even without further medical testimony, a juror could reasonably infer that a timely diagnosis of Lennon's condition would probably have led to Lennon timely receiving "the necessary medical treatment" for that condition. See West v. Founders Life Assurance Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989) ("[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.").

Additionally, Dr. Shore concluded: "During that period [the six-month delay in diagnosing Lennon's B-12 deficiency caused by Dr. Johnston's negligence] the child did not receive the necessary medical treatment resulting in his condition further deteriorating." If the delay in treatment "resulted in" Lennon's condition "further deteriorating," then it necessarily caused Lennon's condition to be worse than it otherwise would have been.

Thus, a reasonable person could fairly conclude from Dr. Shore's affidavit that, in Dr. Shore's opinion, the delay in treatment (caused by a delay in diagnosis resulting from Dr. Johnston's negligence) proximately caused Lennon's condition to be worse that it otherwise would have been. Therefore, Dr. Shore's affidavit is sufficient to establish a genuine factual issue as to probable cause. One can conclude otherwise only by taking an overly technical view of the affidavit and by failing to draw from it those reasonable inferences that fairly support the Groovers' causation theory. See Rule 56, Ala. R. Civ. P. (Committee Comments on 1973 Adoption) (quoting Whitaker v. Coleman, 115 F. 2d 305, 307 (5th Cir. 1940)) ("'Summary judgment procedure is not a catch-penny contrivance to take unwary litigants into its toils and deprive them of trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."); Ex parte Wood, 852 So. 2d 705, 708 (Ala. 2002) (noting that, in reviewing a

summary judgment, the appellate court "must view the record in the light most favorable to the nonmoving party, accord the nonmoving party all reasonable favorable inferences from the evidence, and resolve all reasonable doubts against the moving party"); Swendsen v. Gross, 530 So. 2d 764 (Ala. 1988).

Justice Smith finds it significant that Dr. Shore did not "quantify" in his affidavit the degree to which the deterioration of Lennon's condition was attributable to Dr. Johnston's negligence. Under the circumstances, I respectfully disagree. The affidavit provides clear, unambiguous expert opinion testimony that Dr. Johnston's negligence proximately caused a delay in diagnosis in treatment, which, in turn, proximately caused damage to Lennon. The absence of more detailed language "quantifying" the amount of damage resulting from the delay in diagnosis does not make the affidavit "speculative" as to the issue of probable cause.[17]

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[17]An absence of proof of the extent or amount of damage attributable to the delay in diagnosis and treatment does not reasonably appear to be the basis of the motion for summary judgment. That issue also was not the basis of the trial court's ruling or the issue on appeal. Under the circumstances, it would be error to affirm the judgment on grounds that the Groovers did not submit evidence as to the quantity of their damages.

I recognize that Dr. Shore's affidavit is not elaborate. "An expert witness's opinion that is conclusory, speculative, and without a proper evidentiary foundation cannot create a genuine issue of material fact." Bradley v. Miller, 878 So. 2d 262, 266 (Ala. 2003) (citing Becton v. Rhone-Poulenc, Inc., 706 So. 2d 1134, 1141-42 (Ala. 1997) (emphasis added)). However, even if Dr. Shore's testimony could be characterized as "conclusory" merely because it is simple and direct, it is

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I recognize that "we will affirm a summary judgment if that judgment is proper for any reason supported by the record, even if the basis for our affirmance was not the basis of the decision below and even if the basis for our affirmance was not argued below." DeFriece v. McCorquodale, 998 So. 2d 465, 470 (Ala. 2008) (emphasis added) (citing Smith v. Equifax Servs., Inc., 537 So. 2d 463, 465 (Ala. 1988)). However, it is never appropriate to affirm a summary judgment on an issue not argued below when (as here) affirmance would prejudicially deprive the nonmovant of notice and an opportunity to supply the record with evidence on that issue. Cf. Giles v. Brookwood Health Servs., Inc., 5 So. 3d 533, 555 (Ala. 2008) (discussing the limitations on a trial court's ability to sua sponte enter a summary judgment). The motion for a summary judgment does not reasonably appear to be based on the contention that the extent of damages resulting from Dr. Johnston's negligence was speculative. Thus, the Groovers were not reasonably placed on notice that, to overcome the summary-judgment motion, they were required to present evidence that their damages were "quantifiable." Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038 (Ala. 2004) ("Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact." (emphasis added)).

not "speculative" or "without proper evidentiary foundation" as to the issue of causation upon which the trial court based its summary judgment. It is clear from Dr. Shore's affidavit that his conclusions are based on his knowledge, experience, and training as a pediatrician, his examination of Lennon, his review of Dr. Johnston's medical records, and his expert familiarity with the standard of care applicable to Dr. Johnston. The fact that Dr. Shore did not go into great detail in his affidavit about the reasons underlying his opinions does not mean they are "speculative."[18]

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[18]I note that Dr. Johnston's affidavit was no more detailed than is Dr. Shore's. Dr. Johnston's affidavit was the sole evidence presented in support of the summary-judgment motion. In his affidavit, Dr. Johnston stated his opinion as follows:

> "I complied with the applicable standard of care for a board certified pediatrician with respect to all of the care and treatment I rendered to Lennon Groover at all times. Nothing done by me, or not done by me, constituted a breach of the applicable standard of care which proximately caused harm to Lennon Groover."

If Dr. Johnston's affidavit was sufficient to support the motion for a summary judgment, then Dr. Shore's affidavit was sufficient to overcome it. Cf. Swendsen, 530 So. 2d at 769 ("[W]hile the defendants' conclusory affidavits shifted the burden of proof to the plaintiff to produce counter expert evidence, the standard by which the two sides are to be judged remains the same.... We hold, therefore, that, for summary judgment purposes, [the plaintiff's expert's] affidavit, when

Finally, although I do not rely for my conclusion that the summary judgment is improper on the testimony of Dr. Daniel Adler, I respectfully disagree with Justice Smith's inference that Dr. Adler's testimony was based solely on the general premise that "the earlier a condition is treated, the better the outcome." Dr. Adler agreed that the premise was a "general and accepted rule in medicine," but he did not agree that it was the sole basis of his opinion.[19]

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judged by the same standard as that by which [the defendant physician's] affidavit is judged, raises triable issues of fact as to both the plaintiff's allegations of [medical] negligence and her claims of proximate cause; thus, we reverse the summary judgments appealed from and remand the cause for trial." (emphasis added)); cf. also Giles v. Brookwood Health Servs., Inc., 5 So. 3d at 549 (noting the sufficiency of a defendant physician's affidavit similar to Dr. Johnston's).

[19]The relevant portion of Dr. Adler's testimony is as follows:

> "Q. Could you state with a reasonable degree of medical certainty that Lennon's condition today would be any different if Dr. Mussell and Dr. Johnston had spoken and the diagnosis was made earlier?
>
> "A. Well, I think he would have been treated months earlier and he would be better, but I don't think he would be normal. I think I said that earlier.
>
> "Q. Do you agree that that opinion, that he would be better with an earlier diagnosis, knowing that it's already your opinion that he would have already had permanent neurological injuries by that time, do you

agree that this opinion that you have about additional neurological -- permanent neurological injury occurring after Dr. Mussell became involved requires you to speculate?

"A. I don't think it's speculation to say that when you have an ongoing process that produces injury to the brain or leads to injury to the brain and as it continues that the injury -- or the effects of that injury worsens. But I'm not able to tell you how much worse it would be, just that he would be better.

"Q. Is that just based on some general concept of the sooner you treat a condition, the better the outcome, generally?

"A. I mean, that's a general and accepted rule in medicine.

"Q. And do you apply that to Lennon's condition in supporting your opinion that if Lennon had been diagnosed in September or October he would be better than he is today?

"A. Yes. I mean, I think it's a cumulative injury. I think the B-12 deficiency begins, the neurological disability begins, the neurological injury reaches the point of no return, so to speak, and it continues to increase until treatment is initiated.

"Q. You can't say in any way how Lennon would be different today if he had been diagnosed in the middle of September or early October, can you?

"A. I would say he would be better, but after that I don't have an opinion.

"Q. You just say he would be better, but you can't quantify that in any way, correct?

Moreover, Dr. Adler's testimony, speculative or not, did not form the basis of Dr. Shore's testimony.

III. The Inapplicability of Rule 28, Ala. R. App. P.

It would be error to affirm the summary judgment on the basis of Rule 28, Ala. R. App. P. (requiring that an appellant's brief must include "[a]n argument containing the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on"); see also Ex parte Borden, [Ms. 1050042, August 17, 2007] __ So. 3d __, __ (Ala. 2007) ("The purpose of Rule 28, Ala. R. App. P., outlining the requirements for appellate briefs, is to conserve the time and energy of the appellate court and to advise the opposing party of the points he or she is obligated to make.").

Affirmance of a summary judgment for failure to cite legal authority as required by Rule 28 "'has been limited to those cases where there is no argument presented in the brief and there are few, if any, citations to relevant legal authority, resulting in an argument consisting of undelineated general propositions.'" Roberts v. NASCO Equip. Co., 986 So.

"A. Correct."

2d 379, 382-83 (Ala. 2007) (quoting Borden, ___ So. 3d at ___). This Court does not affirm a summary judgment on Rule 28 grounds where (as here), although a party's brief does not cite an abundance of legal authority, the brief does contain sufficient citations to caselaw to adequately frame the issues, and the brief is sufficient to adequately apprise the Court of a party's contentions with regard to an argument. 986 So. 2d at 383; Borden, __ So. 3d at __.

The Groovers' brief is certainly sufficient to apprise the Court of the Groovers' argument and to allow the Court to evaluate the legal merits of the Groovers' position. The Groovers clearly rely on the well recognized principle of law, also relied upon by the Johnston defendants, that causation is an element of a medical-malpractice action. The only issue before us is whether proof of causation exists; therefore, no further citation to legal authority is necessary. The Groovers also cite legal authority to the effect that causation is generally established by the testimony of a medical expert.

It is quite clear from the Groovers' brief that they contend that, to satisfy the element of causation, they have submitted evidence from a medical expert to the effect that

Dr. Johnston's negligence "resulted in" the further deterioration of Lennon's condition. I fail to see how any further citation to legal authority is necessary before this Court can evaluate (and recognize) the legal merits of this rather simple contention.

True, had the Groovers' cited McAfee or Parker, it would have supported their arguments, but I do not think their failure to cite either McAfee or Parker negates our responsibility to analyze the merits of their position: that causation is satisfied by expert testimony that a defendant doctor's negligence contributed to the plaintiff's damages.

In addition, the fact that McAfee and Parker were brought to our attention by the trial court's order and by the Johnston defendants does not preclude us from considering them, even though they support the Groovers' position.

In support of my position regarding the inapplicability of Rule 28, I have attached a copy of the Groovers' brief as an appendix to my dissent.

Conclusion

For the reasons stated above, I respectfully dissent from the majority's decision to affirm summary judgment in this case.

Murdock, J., concurs.

APPENDIX TO CHIEF JUSTICE COBB'S DISSENT

SUPREME COURT OF ALABAMA

1071143

GREG GROOVER, ET AL.

APPELLANTS

V.

WILLIAM H. JOHNSTON, JR., MD, ET AL.

APPELLEES

APPEAL FROM JEFFERSON CIRCUIT COURT

(CV-06-1917)

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STATEMENT OF JURISDICTION

This Court has jurisdiction for this appeal pursuant to Ala. Code 1975, § 12-2-7. The damages sought exceed the jurisdictional amount for the Court of Civil Appeals. *See* Ala. Code 1975, § 12-3-10 (providing jurisdiction for civil cases where the damages sought does not exceed $50,000).

TABLE OF AUTHORITIES

Cases

Statutes and Court Rules

STATEMENT OF THE CASE

Greg Groover and Melinda Groover, individually and as the parents of Lennon Groover, sued William H. Johnston, Jr., MD, Birmingham Pediatric Associates, Inc., Holly Mussell, MD, Multispecialty Pediatrics, PC, Joycelyn A. Atchison, MD, and University of Alabama Health Services Foundation, PC (C.35-38). The Groover's alleged that the defendants committed medical malpractice in the diagnosis and treatment of their son, Lennon (C.39). All the defendants filed motions to dismiss; the trial court granted them as the parent's individual claims, but denied them as to the parent's claims representing Lennon (C.250).

Dr. Atchison and the UAHSF filed a summary judgment motion in February 2007 (C.697). The trial court granted their summary judgment motion (C.760). Dr. Mussell and Multispecialty Pediatrics filed their summary judgment motion in June 2007 (C.886). The Groover's stipulated to Dr. Mussell and Multispecialty Pediatrics's dismissal in September 2007 (C.946). Dr. Johnston and BPA filed their summary judgment in July 2007 (C.933).

The Groover's filed a motion pursuant to Rule 56(f), Ala. R. Civ. P., to extend the time to conduct discovery (C.942-45). The trial court granted the Groover's until October 1, 2007, to (1) submit affidavits of expert witnesses; and (2) to submit the affidavit required by Rule 56(f) (C.). The Groover's satisfied the trial court's requests and submitted the affidavits of two experts, Dr. Shore and Dr. Adler (C.949-63). However, the trial court entered summary judgment for Dr. Johnston and BPA (C.1040-49). The Groover's appealed to this court.

STATEMENT OF THE ISSUES

I. The trial court erred by entering summary judgment before the Groover's completed discovery in compliance with the trial court's scheduling order

II. The trial court erred by entering summary judgment because the Groover's presented substantial evidence for each required elements in this medical malpractice action

STATEMENT OF THE FACTS

Lennon Groover was born October 29, 1999 (C.38). Lennon is in the 1st grade at Shades Mountain Elementary School in Hoover, Alabama (Melinda dep. 16). Melinda and Greg Groover have three children, ages 25, 15, and 7 (Melinda dep. 16-17). Melinda Groover is a lacto-ovo vegetarian, someone who eats dairy and eggs in addition to vegetables and fruits (Melinda dep. 26). She has been a vegetarian for 32 years (Melinda dep. 27). She testified that Greg, her husband and Lennon's father, is a vegetarian also (Melinda dep. 29). She prepares a vegetarian diet for her two children who live at home, but they can have meat outside the home (Melinda dep. 30-31). Their oldest daughter who lives in Little Rock, Arkansas is also a vegetarian (Melinda dep. 31, 16). Lennon currently takes a B-12 supplement, Poly-Vi-Sol (Melinda dep. 32).

Melinda testified that she told all three doctors who treated Lennon that she was a vegetarian (Melinda dep. 36). In fact, Dr. Johnston had been her all three children's pediatrician and knew for 20 years that she was a vegetarian (Melinda dep. 369-70). She testified

that her B-12 range was in the low-normal range as tested by her obstetrician, Dr. Davidson (Melinda dep. 37). She testified that she first learned that B-12 deficiency was a risk to breast feeding vegetarian mothers from Dr. Howard (Melinda dep. 54-55). Once she was under the care of her obstetrician, Melinda Groover took folic acid and iron every day as directed by Dr. Davidson. In addition she took a Centrum multivitamin every few days (Melinda dep. 78-79). After Lennon was born, Melinda Groover took folate and iron supplement in addition to Centrum sporadically (Melinda Dep. 81-82).

The Groover's had no concerns about Lennon's health until he was 9 months old (Melinda dep. 197). She testified that he had trouble eating solid food and would gag on the food (Melinda dep. 196-97). Dr. Johnston advised them that they should wait to have Lennon's tongue clipped at 18 months to help him manipulate table food (Melinda dep. 202). She asked Dr. Johnston, Lennon's pediatrician, if she could give him formula in addition to breast feeding, and he advised her not to do so; that breast feeding provided

complete nutrition and to give him formula would be developmentally inappropriate (Melinda dep. 197-98). She testified that Dr. Johnston was comfortable with exclusive breast feeding until 18 months (Melinda dep. 201). She further testified that she did not originally plan to exclusively breast feed Lennon for 18 months (Melinda dep. 208). She testified that Dr. Atchison was not concerned with the exclusive breast feeding (Melinda dep. 207). She had breast fed her two older children exclusively for 6 months and that was more in line with what she originally planned to do with Lennon (Melinda dep. 209).

Melinda Groover testified that Lennon's growth and behavior were normal after birth (Melinda dep. 381-84). Starting at 9 months, the Groover's noticed development delays (Melinda dep. 218). Lennon did not crawl, he did not turn over (Melinda dep. 218-21). At 15 months, Melinda Groover asked Dr. Johnston about a possible B-12 deficiency, but Dr. Johnston said no that Lennon only had low iron (Melinda dep. 225, 278). Dr. Johnston told them it was normal for Lennon not to walk at 15 months (Melinda dep. 255). Melinda Groover

testified that she questioned Dr. Johnston 3 times about a B-12 deficiency as a problem; at the 12, 15, and 21 month check-ups--each time he rejected that as a possibility (Melinda dep. 319).

Lennon did not walk until he was 2 ½ with a walker Hand In Hand gave the Groover's (Melinda dep. 346). He potty trained at 4 ½ (Melinda dep. 346). He has a limited diet due to continued sensory issues (Melinda dep. 346). He has selective mutism (Melinda dep. 347). Lennon is in special education, cannot write well, cannot talk well, and has occupational therapy classes at school (Melinda dep. 355). Melinda testified that Dr. Bowles evaluated Lennon's IQ and it is 60, below normal range (Melinda dep. 355-56).

The Groover's took Lennon to Dr. Mussell in August 2001 (Melinda dep. 232). Dr. Mussell was first concerned with Muscular Dystrophy, and other muscle diseases, and referred Lennon to Early Intervention (Melinda dep. 271). Lennon was weak and not talking (Melinda dep. 272). Dr. Mussell was convinced he had a muscopolysaccharide diseases and did a skin biopsy (Melinda dep. 301).

The Groover's next referral was to Dr. Atchison (Melinda dep. 302). Melinda Groover obtained Lennon's medical records from Dr. Johnston in November 2001 (Melinda dep. 321-22). After she read the records she noticed he had not had normal blood work after 12 months and she asked Dr. Mussell to test for B-12 (Melinda dep. 332). Dr. Johnston performed the blood test and informed them in December 2001 that Lennon did have a B-12 deficiency (Melinda dep. 333-36). Dr. Mussell told the Groover's she has had other patients like Lennon and did not test these children either for B-12 deficiency, as she believed they had an unidentified syndrome (Melinda dep. 343-44).

The Groover's first attorney's referred them to Dr. Shore in Atlanta. Dr. Shore stated that Lennon's brain damage is caused by a B-12 deficiency that Dr. Johnston, Dr. Mussell, and Dr. Atchison failed to diagnosis and treat (Melinda dep. 353-356).

Dr. Mussell testified that the MRI abnormalities were caused by a B-12 deficiency (Mussell dep. 33). Dr. Mussell also admitted to not recording conversations she had with the Groover's (Mussell dep.

69-71). Dr. Mussell testified that nutrition issues were referred to Dr. Johnston as the pediatrician (Mussell dep. 65). Dr. Mussell testified that she recognized the potential for medical malpractice in the treatment of Lennon in August 2002 (Mussell dep. 69-70). Dr. Mussell testified that any board certified pediatrician, such as Dr. Johnston should be well-versed in child nutrition issues (Mussell dep. 194). Dr. Mussell was aware that Melinda Groover was a vegetarian while she was treating Lennon (Mussell dep. 205). Her referral letter to Dr. Atchison relates Melinda Groover as a vegetarian.

STATEMENT OF THE STANDARD OF REVIEW

I. Summary Judgment

A summary judgment is proper only if no issue of fact exists on each of the elements of the claims asserted. Rule 56(c)(3), Ala. R. Civ. P. A summary judgment is proper only where the nonmovant fails to present substantial evidence for each element of each claim asserted. Rule 56(e), Ala. R. Civ. P. This Court reviews a summary judgment *de novo*, and no presumption of correctness attaches to the trial court's decision. *Crowe v. Interstate Safety Systems, Inc.* 835 So. 2d 255 (Ala. Civ. App. 2002). Whether to affirm or reverse a summary judgment is an issue of law. *Id.*

II. Medical Malpractice Elements

The well-established standard of review for medical malpractice cases is:

> To prove liability in a medical malpractice case, the plaintiff must prove (1) the appropriate standard of care, (2) the doctor's deviation from that standard, and (3) a proximate causal connection between the doctor's act or omission constituting the breach and the injury sustained by the plaintiff. *Complete Family Care v. Sprinkle,* 638 So.2d 774 (Ala.1994); *Bradford v. McGee,* 534 So.2d 1076 (Ala.1988); § 6-5-484, Ala.Code 1975. The plaintiff in a medical malpractice action generally must establish the prima

facie elements by introducing expert testimony. *Bradford,* supra.

Looney v. Davis, 721 So. 2d 152, 158 (Ala. 1998).

III. Medical Malpractice Expert Witness

Ala. Code 1975, § 6-5-548, and Rule 702, Ala. R. Evid., govern the requirements for an expert witness in a medical malpractice action. See *Martin v. Dyas,* 896 So. 2d 436 (Ala. 2004). Section 6-5-548 states:

> (a) In any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case.
>
> (b) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, if the health care provider whose breach of the standard of care is claimed to have created the cause of action is not certified by an appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself or herself out as a specialist, a "similarly situated health care provider" is one who meets all of the following qualifications:
>
> (1) Is licensed by the appropriate regulatory board or agency of this or some other state.

(2) Is trained and experienced in the same discipline or school of practice.

(3) Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred.

(c) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, if the health care provider whose breach of the standard of care is claimed to have created the cause of action is certified by an appropriate American board as a specialist, is trained and experienced in a medical specialty, and holds himself or herself out as a specialist, a "similarly situated health care provider" is one who meets all of the following requirements:

(1) Is licensed by the appropriate regulatory board or agency of this or some other state.

(2) Is trained and experienced in the same specialty.

(3) Is certified by an appropriate American board in the same specialty.

(4) Has practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred.

(d) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, no evidence shall be admitted or received, whether of a substantive nature or for impeachment purposes, concerning the medical liability insurance, or medical insurance carrier, or any interest in an insurer that insures medical or other professional liability, of any witness presenting testimony

as a "similarly situated health care provider" under the provisions of this section or of any defendant. The limits of liability insurance coverage available to a health care provider shall not be discoverable in any action for injury or damages or wrongful death, whether in contract or tort, against a health care provider for an alleged breach of the standard of care.

(e) The purpose of this section is to establish a relative standard of care for health care providers. A health care provider may testify as an expert witness in any action for injury or damages against another health care provider based on a breach of the standard of care only if he or she is a "similarly situated health care provider" as defined above. It is the intent of the Legislature that in the event the defendant health care provider is certified by an appropriate American board or in a particular specialty and is practicing that specialty at the time of the alleged breach of the standard of care, a health care provider may testify as an expert witness with respect to an alleged breach of the standard of care in any action for injury, damages, or wrongful death against another health care provider only if he or she is certified by the same American board in the same specialty.

Rule 702, Ala. R. Evid., states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The decision to admit expert testimony is within the discretion of the trial court; however, the trial court should admit medical expert testimony that satisfies § 6-5-548 if the "proposed testimony was within the scope of [the] expertise and was clearly relevant to the issue in dispute." *Martin,* 896 So. 2d at 441.

SUMMARY OF THE ARGUMENT

I. The trial court erred by entering summary judgment before the Groover's completed discovery in compliance with the trial court's scheduling order

The trial court erred by entering summary judgment before the Groover's completed discovery in compliance with the trial court's order. It is undisputed that the Groover's satisfied the requirements of Rule 56(f); yet, the trial court hastily entered summary judgment for Dr. Johnston before the Groover's completed a deposition of their expert Dr. Shore. The Groover's demonstrated that Dr. Shore's evidence is crucial to their case; it establishes the Dr. Johnston's breach of the standard of care and that the breach caused Lennon's injuries. The issue of causation is not properly on appeal because Dr. Johnston untimely raised that issue in a supplemental brief that did not comply with the trial court's scheduling order.

II. The trial court erred by entering summary judgment because the Groover's presented substantial evidence for each required elements in this medical malpractice action

The Groover's submitted substantial evidence for each element of the medical malpractice claim. The

Groover's presented qualified expert testimony as to the standard of care, the breach of the standard of care, and that the breach caused injuries to Lennon. The fact that Melinda Groover is a vegetarian does not support a conclusion that contributory negligence caused Lennon's injury; Dr. Johnston has not raised that issue in his summary judgment motion and any evidence related to her diet as a cause of Lennon's injuries is conflicting. Therefore, the trial court erred by entering summary judgment.

ARGUMENT

I. The trial court erred by entering summary judgment before the Groover's completed discovery in compliance with the trial court's scheduling order

The Groover's filed this lawsuit in March 2006 (C.35). Their original attorneys withdrew from the case in June 2007 (C.928-30). In July 2007, Jonathan Gathings entered appearance as counsel for the Groover's (C.942). The trial court entered an order on July 26, 2007, that stated that Gathings filed a Rule 56(f), Ala. R. Civ. P., motion, requesting additional time to perform discovery to respond to Dr. Johnston's summary judgment motion filed in July 2007, shortly after the Groover's original attorneys withdrew (C.933-41).

The trial court's July 26, 2007, order provided that the Groover's have until October 1, 2007, to identify and submit affidavits of expert witnesses to support their response to Dr. Johnston's summary judgment motion. If the Groover's did not satisfy the requirements of the July 26, 2007, order, then the trial court would take Dr. Johnston's July 2007 summary judgment motion under submission. On September 28,

2007, the Groover's filed a response to Dr. Johnston's summary judgment motion (C.949-63). That motion included the affidavit of Dr. Shore and the deposition of Dr. Adler.

On October 3, 2007, the trial court issued an order that stated that the Groover's satisfied the requirements of the July 26, 2007, order (C.965-66). The trial court then entered a new schedule. The trial court set a hearing on the summary judgment motion on January 10, 2008. Dr. Johnston's deadline to file his motion was December 31, 2007 (10 days before the hearing). The Groover's deadline to file a response was January 8, 2008, two days before the hearing.

On January 10, 2008, the day of the summary judgment hearing, Dr. Johnston filed a supplemental brief in support of his motion for summary judgment (C.967), despite the fact that the trial court had given Dr. Johnston a December 31, 2007, deadline to file his summary judgment motion (C.965).

The Groover's filed a motion to strike the supplemental brief on January 22, 2008 (C.997). The Groover's argued in the motion to strike that the

supplemental brief was filed late (the day of the hearing, rather than the December 31, 2007, deadline), and that it raised the issue of causation for the first time. The trial court denied the motion to strike, did allow the Groover's to reply to the supplemental brief, but eventually entered summary judgment for Dr. Johnston.

The Groover's reassert on appeal that the trial court erred by accepting the late supplemental brief. Rule 56(c)(2) requires that a movant file his motion 10 days before the hearing, which is what the trial court required in this case. The trial court violated Rule 56(c)(2) and its own order by allowing the supplemental brief. The trial court's order clearly stated that "Movant shall file his motion, brief, and evidentiary submissions, or any supplementations thereto, by no later than December 31, 2007." The trial court clearly erred by allowing the supplemental brief.

Dr. Johnston's motion for summary judgment filed in July 2007, argued that the Groover's did not present substantial evidence that Dr. Johnston breached the standard of care because they had not presented that

evidence from an expert. The trial court July 27, 2007, order allowed the Groover's extra time to present expert affidavits, which they did. Both Dr. Shore's affidavit and Dr. Adler's deposition (Dr. Adler had been retained for some time before this and Dr. Shore was retained after the July 27, 2007, order).

The Groover's response addressed the standard of care issue in response to Dr. Johnston's original summary judgment motion. Dr. Johnston's original summary judgment motion did not address the issue of causation. As stated above, the trial court erred by allowing Dr. Johnston to raise this new issue on the date of the summary judgment hearing.

In *Moore v. GAB Robins North America, Inc.*, 840 So. 2d 882 (Ala. 2002), this Court held that the trial court committed reversible error by not allowing the non-movant plaintiff an opportunity to respond to the defedant's motion for summary judgment. This Court stated that "to cut off Moore's opportunity to make a showing of disputed facts to the trial court is to prevent him from having his day in court." *Id.* at 884.

Similarly, in this case, allowing the supplemental motion prevented the Groover's from their "day in court."

The trial court should have disallowed the supplemental motion because it raised a new issue that had not been raised in the original motion - the issue of causation. The original motion argued that summary judgment should be entered because the Groover's had not provided testimony through a qualified expert that Dr. Johnston breached the standard of care. The original motion did not argue that the summary judgment was supported by a lack of causation evidence, another element of a medical malpractice action. See *Looney v. Davis*, 721 So. 2d 152, 158 (Ala. 1998).

A nonmovant has the burden to produce substantial evidence of an issue of fact as to each legal issue argued by the movant. Rule 56. Logically then, the nonmovant has no burden to produce substantial evidence to issues not raised by the movant. See *Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C.*, 881 So. 2d 1013, 1020 (Ala.2003); and *Choice Builders, Inc. v. Complete Landscape Service,*

Inc., 955 So. 2d 437 (Ala. Civ. App. 2006). Because the supplemental motion was not properly before the trial court and therefore, the issue of causation had not been properly raised, then the Groover's had no burden to respond to the issue of causation and the trial court erred by entering summary judgment on this issue.

Even if the issue of causation were properly before the trial court, the trial court also erred by entering summary judgment because the Groover's had not been given the opportunity to complete discovery on the issue of causation. Rule 56(f) states:

> Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the court may deny the motion for summary judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

As stated above, the Groover's satisfied the requirements of Rule 56(f) as stated in the trial court's October 3, 2007, order (C.965). The Groover's submitted the affidavit of Dr. Shore, a board certified pediatrician (C.952-54). The Groover's had already

completed the deposition of Dr. Adler, a board certified pediatrics, pediatric neurology, and electrodiagnostic medicine (Adler dep. 26). Before any depositions of Dr. Shore had been made, the trial court entered summary judgment. The trial court should have waited until Dr. Shore's deposition was completed before taking the summary judgment for decision. If the trial court was satisfied with the Groover's Rule 56(f) showing in October, why only 3 months later did the trial court enter summary judgment without allowing the deposition of Dr. Shore?

This Court has held that it is error for a trial court to enter summary judgment when the nonmovant files a Rule 56(f) affidavit and the evidence sought is "crucial to [the] claims and defenses." *Tell v. Terex Corp.*, 962 So. 2d 174, 183 (Ala. 2007). Clearly in this case, Dr. Shore's deposition testimony is "crucial" to the Groover's malpractice claim. As stated in Dr. Shore's affidavit, he is prepared to testify that Dr. Johnston did not meet the standard of care for pediatrics (C.953). He also stated that Dr. Johnston's delay in treating Lennon's B-12 deficiency

contributed to Lennon's injuries (C.953). Clearly, Dr. Shore's testimony was "crucial" to the Groover's case, and the trial court committed reversible error by entering summary judgment for Dr. Johnston before allowing Dr. Shore's deposition to be completed.

II. The trial court erred by entering summary judgment because the Groover's presented substantial evidence for each required element in this medical malpractice action

Without waiving the above argument that the trial court's summary judgment violated its own order, Rule 56(c)(2) and Rule 56(f), the Groover's also argue that they presented substantial evidence on each element of the medical malpractice claims.

A summary judgment is proper only if no issue of fact exists on each of the elements of the claims asserted. Rule 56(c)(3), Ala. R. Civ. P. A summary judgment is proper only where the nonmovant fails to present substantial evidence for each element of each claim asserted. Rule 56(e), Ala. R. Civ. P. This Court reviews a summary judgment *de novo*, and no presumption of correctness attaches to the trial court's decision.

Crowe v. Interstate Safety Systems, Inc. 835 So. 2d 255 (Ala. Civ. App. 2002). Whether to affirm or reverse a summary judgment is an issue of law. *Id.*

> To prove liability in a medical malpractice case, the plaintiff must prove (1) the appropriate standard of care, (2) the doctor's deviation from that standard, and (3) a proximate causal connection between the doctor's act or omission constituting the breach and the injury sustained by the plaintiff. *Complete Family Care v. Sprinkle,* 638 So.2d 774 (Ala.1994); *Bradford v. McGee,* 534 So.2d 1076 (Ala.1988); § 6-5-484, Ala.Code 1975. The plaintiff in a medical malpractice action generally must establish the prima facie elements by introducing expert testimony. *Bradford,* supra.

Looney v. Davis, 721 So. 2d 152, 158 (Ala. 1998).

Dr. Johnston concedes that Dr. Adler and Dr. Shore are qualified experts; therefore, their status as experts qualified to give testimony regarding the standard of care, the breach of that standard, and causation is undisputed. Dr. Johnston does assert in his motion for summary judgment that Dr. Adler and Dr. Shore's evidence is not substantial evidence of these elements. The Groover's argue that the testimony is substantial evidence, and the trial court erred by entering summary judgment for Dr. Johnston.

A. Standard of Care

The Groover's presented substantial evidence, through expert testimony that Dr. Johnston breached the standard of care of a pediatrician. Dr. Shore is a board certified pediatrician. He stated that Dr. Johnston did not comply with the standard of care in his treatment of Lennon. Dr. Shore stated that Dr. Johnston's breached the standard of care by his delay to recognize Lennon's developmental delays and his delay to refer Lennon to appropriate specialists. Dr. Shore further stated that Dr. Johnston's actions (failure to diagnose for 6 months) caused Lennon's health to deteriorate further (C.952-53).

B. Deviation from Standard of Care

Dr. Adler, who was deposed, before the trial court improperly entered summary judgment, testified that Dr. Mussell breached the applicable standard of care by failing to diagnose Lennon's B-12 deficiency for several months (Adler dep. 43). Dr. Adler also testified that Dr. Mussell and Dr. Johnston failed to communicate regarding Lennon's condition and their respective treatment, which also breached the standard of care (Adler dep. 43). Dr. Mussell admitted that she

did not read Lennon's medical records when Dr. Johnston referred Lennon to her (Mussell dep. 147). Dr. Adler pointed out that Dr. Mussell admitted in her deposition that she believed Lennon's MRI abnormalities were related to B-12 deficiency (Mussell dep. 33, Adler dep. 45).

C. Causation

Dr. Adler testified that Lennon's B-12 deficiency most likely developed around 12 months of age (Adler dep. 64). Dr. Adler pointed out that Lennon could sit up at 9 months, but could not walk until after 19 months (Adler dep. 64). Dr. Adler explained his timeline for Lennon's B-12 deficiency as follows:

> I think that this baby was born with adequate stores of B-12. He was normal at birth. All notes about him early in life were that he was thriving and doing well. I think that his nutritional deficiencies -- and, again, speaking as a pediatric neurologist -- were such that from the fact that he wasn't eating anything and he was only being breast-fed were not only vitamin B-12 deficiency, which, of course, we learned later, but much earlier we seemed to have iron deficiency that's described in the records. Iron supplementation is commenced. That's at about a year of age. So my feeling is that there was more likely than not a combination, and that the problems with B-12 that ultimately produced more, you know, significant problems began really after a few

more months of continued vitamin B-12 deficiency.

(Adler dep. 65-66).

Dr. Adler explained the progression of Lennon's injuries from the B-12 deficiency as follows:

> I think he had a degree of white matter injury based on the imaging abnormalities. That must have been at least four to six weeks old, because he's talking about a diminution in the volume of the white matter. So since B-12 is involved in myelin production, its absence leads to injury in myelin producing cells.
>
> So first you get injury. You would see it on specific abnormalities. And then whatever those cells are, since they can't survive metabolically -- since they have a metabolic injury, they can't survive. Then they shrink after a while. And that takes time to develop.
> ....
>
> There was already a loss of volume in the brain that was caused by chronic vitamin B-12 deficiency, so that the imaging in August [2001] was abnormal. And I think even B-12 administration at that point would have still -- would not have permitted this boy to be normal.
> ....
>
> Q. He had permanent brain injuries by that point in time that were going to cause him to have developmental delays and other issues that occur from brain injury, correct?
>
> A. True.

Q. And that condition had existed, in your opinion, at least four to six weeks by the time that MRI was performed, correct?

A. Correct.

Q. Which would point the injuries to these permanent injuries to Lennon occurring by mid-July to early August, correct?

A. True.

(Adler dep. 70-71).

When asked if any other birth defects or problems contributed to Lennon's injuries, Dr. Adler testified, "there's no other diagnosis in the records that I can see, other than B-12 deficiency." (Adler dep. 80). Again, Dr. Adler states that Lennon's records show no other causes for his injuries other than the B-12 deficiency (Adler dep. 82-83). Dr. Adler dismissed Dr. Johnston's earlier reliance on an iron deficiency or iron anemia because the low iron would not cause the white brain matter decrease that the B-12 deficiency caused in Lennon (Adler dep. 83).

D. Evidence of Contributory Negligence

The questions Dr. Johnston posed to Melinda Groover during her deposition indicate that Dr. Johnston may argue that Melinda Groover's decision to be a vegetarian caused Lennon's injury. This argument

cannot support the summary judgment because the causal relationship between Melinda Groover's vegetarian diet and Lennon's injuries is disputed. As stated above, the Groover's presented evidence that Dr. Johnston had known of Melinda Groover's vegetarian diet for the 25 years he treated her 3 children, and that Dr. Mussell and Dr. Atchison also knew of Melinda Groover's vegetarian diet. Furthermore, Dr. Johnston has not argued in his summary judgment motion that Melinda Groover's vegetarian diet is contributory negligence; therefore, he cannot argue that on appeal as a ground to support the summary judgment. *See Burge v. Parker,* 510 So. 2d 538 (Ala. 1987) (holding that contributory negligence must be raised as a defense in the trial court).

CONCLUSION

The trial court erred by entering summary judgment. The trial court violated Rule 56(f) and its own scheduling order by entering summary judgment before the Groover's had completed crucial discovery to support their claim. Also, the trial court erred by allowing Dr. Johnston to file a supplemental brief after the deadline the trial court set for Dr. Johnston. The trial court further erred by allowing Dr. Johnston to raise the issue of causation for the first time in the untimely supplemental brief.

Despite the procedural errors made by the trial court, the Groover's presented substantial evidence that Dr. Johnston, Dr. Mussell, and Dr. Atchison committed malpractice. The Groover's submitted evidence from qualified medical experts as to the standard of care, the breach of the standard of care, and damages to Lennon. Therefore, the trial court erred by entering summary judgment for the Groover's and the trial court's judgment should be reversed for this case to proceed to a jury trial.

Respectfully submitted,

/s/ Elbert S. Allen

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above brief of appellant has been served on counsel of record, by placing same in the United States mail, first-class postage prepaid, and addressed to:

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