IN THE SUPREME COURT OF MISSISSIPPI

NO. 2004-CA-02532

CANDICE YOUNG,
PERSONAL REPRESENTATIVE OF THE
WRONGFUL DEATH BENEFICIARIES OF
CHERIE S. HANCOCK, DECEASED — APPELLANT/ CROSS APPELLEE

V.

DONALD C. GUILD, M.D. — APPELLEE/ CROSS APPELLANT

ON APPEAL FROM
THE CIRCUIT COURT OF YAZOO COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEE / CROSS APPELLANT

(ORAL ARGUMENT REQUESTED)

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Honorable Jannie M. Lewis, Circuit Court Judge, Yazoo County, Mississippi, Post Office Box 149, Lexington, MS 39095.

2. Whitman B. Johnson, Esq., Currie Johnson Griffin Gaines & Myers, P.A., Attorney for the Appellee/Cross-Appellant, Post Office Box 750, Jackson, MS 39205-0750.

3. Denise Wesley, Esq., Currie Johnson Griffin Gaines & Myers, P.A., Attorney for the Appellee/Cross-Appellant, Post Office Box 750, Jackson, MS 39205-0750.

4. Ronald M. Kirk, Esq., Post Office Drawer N, Flora, MS 39071.

5. J. Max Kilpatrick, Esq., P.O. Box 520, Philadelphia, MS 39350 (Attorney Kilpatrick was one of the trial attorneys for the Plaintiff/Appellant/Cross-Appellee in this case, but is not longer an attorney of record).

6. Candice Young, Representative of the Wrongful Death Beneficiaries of Cherie S. Hancock, Deceased, Plaintiff/Appellant/Cross-Appellee; Candice Young resides in Yazoo County, MS.

7. George Thomas Hancock, husband of Cherie S. Hancock, Deceased, and wrongful death beneficiary, who resides in Yazoo County, MS.

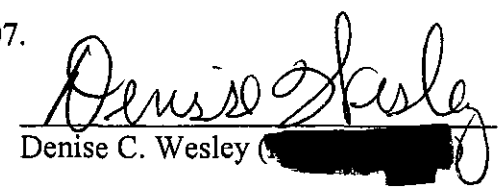
8. Justin Hancock, son of Cherie S. Hancock, Deceased, and wrongful death beneficiary, who resides in Yazoo County, MS.

9. Stirlin Hancock, son of Cherie S. Hancock, Deceased, and wrongful death beneficiary, who resides in Yazoo County, MS.

10. Garrett Hancock, son of Cherie S. Hancock, Deceased, and wrongful death beneficiary, who resides in Yazoo County, MS.

11. Donald C. Guild, M.D., Defendant/Appellee/Cross- Appellee; Dr. Guild practices psychiatry in Hinds County, MS.

SO CERTIFIED, this the 10th day of October, 2007.



Denise C. Wesley ([redacted])

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1. The trial court's denial of instructions P-5 and P-6 was proper because the jury instructions when read as a whole, expressed the applicable primary rules of law.

2. Plaintiffs' instructions P-5 and P-6 were not supported by the facts of the case, such that they were improper comments on the evidence which the trial court correctly refused.

B. THE TRIAL COURT PROPERLY DENIED THE PLAINTIFFS' REQUEST FOR A JURY INSTRUCTIONS APPORTIONING LIABILITY TO THE HANCOCKS

1. Because the jury returned a verdict for Dr. Guild, the issue of apportionment was never reached by the jury and any alleged error arising from failure to instruct the jury on that point is moot.

2. Additionally, the trial properly denied the Plaintiffs' apportionment instruction because the Plaintiffs' did not put on any proof of contributory negligence, and in fact, swore in interrogatory responses that family members did not do anything to exacerbate their mother's illness.

3. The Plaintiffs' request to apportion liability to themselves distorts the purpose of Miss. Code Ann. § 85-5-7.

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1. The Defendant was entitled to comment upon the absence of Attorney Jim Herring at the trial of this matter; alternative, any prejudice to the Plaintiff was cured by the court's limiting instruction.

2. The trial court properly admitted Donna Pigg's testimony of communications which occurred between herself and Cherie Hancock.

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STATEMENT OF THE CASE

A. NATURE OF THE CASE, AND DISPOSITION IN THE COURT BELOW

This case was brought before the Yazoo County Circuit Court as a wrongful death action filed by the decedent Cherie Hancock's daughter, Candice Young, against Ms. Hancock's psychiatrist, Donald Guild, M.D., who had provided medical care to Cherie Hancock in the last month of her life while she prepared for divorce proceedings against her husband, George Thomas "Tommy" Hancock. (RE 6-10, 15-21) Ms. Young filed suit on behalf of Cherie Hancock's wrongful death beneficiaries (hereinafter referenced as "Plaintiffs")[1], which included Candice Young herself; her brothers, Justin Hancock, Stirlin Hancock, and Garrett Hancock; and her father, Tommy Hancock, whom Cherie had not yet divorced at the time of her death. (RE 6-10, 15-21).

After the trial of this matter, the jury returned a unanimous verdict in favor of Dr. Guild, finding that he was not liable for any negligence in his care and treatment of Cherie Hancock. (RE 53, 379-380; TR p.794, line 13 - p. 795, line 24).

B. COURSE OF PROCEEDINGS AND STATEMENT OF RELEVANT FACTS

Donald Guild, M.D., provided psychiatric care to Cherie S. Hancock, deceased, from August 6, 1999, until September 20, 1999, when Cherie Hancock decided to take her own life while gathering belongings from the marital home that had been awarded to her husband Tommy Hancock. (RE 6-10, Appellant Brief at p. 2-4). Cherie temporarily lost residence in the home as the result of a preliminary divorce hearing on September 15, 1999, in which Dr. Guild testified on her behalf and Tommy Hancock and Cherie's seventeen-year-old son, Garrett, testified against her. (Record at 124

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[1] Although Candice Young is the only individually named Plaintiff in this action, since the suit has been brought on behalf of all wrongful death beneficiaries, this brief will use the collective term of "Plaintiffs" to refer to Candice Young and/or Ms. Hancock's wrongful death beneficiaries.

- 213). Dr. Guild's treatment of Cherie Hancock included outpatient clinic visits as well as inpatient care at St. Dominic's Memorial Hospital from August 20, 1999, until September 17, 1999, when she was discharged to live with her mother. (RE 189).

Ms. Hancock had a documented history of depression and anxiety which began years before she ever saw Dr. Guild in 1999. (RE 189 - 190). This history included a suicide attempt by self-inflicted gunshot wound in 1996, for which she was hospitalized at the University Medical Center as well as counseling visits and prescriptions for psychiatric medications from the Warren-Yazoo Mental Health Clinic. (Defense Exhibit 2, Plaintiffs' Exhibit 3, Plaintiffs' Exhibit 4; RE 249-262) Throughout Ms. Hancock's psychiatric treatment and psychotherapy records, numerous references are made to a stressful family situation, which appeared to play a large role in Ms. Hancock's depression and anxiety. (Appellant Brief p. 31 - 32 (citing RE 141 - 147; TR 535, 542, 551 - 52, 571 - 72; see also Defense Exhibit 2, Plaintiffs' Exhibit 3, and Plaintiffs' Exhibit 4; RE 249-262).

Ms. Hancock's daughter, Candice Young, filed suit against Dr. Guild on behalf of herself, her brothers, and her father, on September 14, 2001, in the Circuit Court of Yazoo County, MS. (RE 6). The Complaint alleged that Dr. Guild breached his duty owed to Ms. Hancock to provide her with "such reasonable diligent skill, competent and prudence as are practiced by [a] minimally competent psychiatrist." (RE 7). The Plaintiffs sought to recover damages allowable under Miss. Code Ann. § 11-7-13, including "[t]he loss of society, companionship, love and affection of a mother" and the present value of Ms. Hancock's "loss of future enjoyment of life." (RE 8-9). Dr. Guild filed his Answer to the Complaint on October 18, 2001, denying any negligence or liability. (RE 11-14).

During the discovery phase of this case, defense counsel sought to depose the Honorable Jim Herring, the divorce attorney who referred Ms. Hancock to Dr. Guild (Record at 24-42). Defense

counsel ultimately filed a Motion to Compel the scheduling of Jim Herring's deposition. (Record at 24-42). Although there is no transcript of the hearing on the Defendant's Motion to Compel, it has been stipulated that the Plaintiffs took the position that "the Defendant's Motion to Compel should be denied because of attorney-client privilege..." (RE 62-65).

At the same hearing, the trial court heard argument on the Defendant's Motion for Summary Judgment, which counsel for Dr. Guild filed on June 26, 2003. (RE 62-65; Record at 43-53). In the Motion for Summary Judgment, Dr. Guild sought dismissal of the Plaintiffs' claims on the basis that Ms. Hancock's suicide was a superceding cause of her death precluding a finding of any liability on the part of Dr. Guild due to Plaintiffs' inability to satisfy the Irresistible Impulse exception to the illegality bar. (RE 62-65, 227-237; Record at 43-53). The Court denied both the Defendant's Motion to Compel and the Motion for Summary Judgment (Record at 256-258; RE 238-240). The case proceeded to trial beginning on August 17, 2004, and on August 19, 2004, the jury returned a unanimous verdict in favor of Dr. Guild. (RE 53, 379-380)

The Plaintiffs moved for a new trial, and the motion was denied. (RE 56-61). The Plaintiffs subsequently appealed, seeking reversal and remand. (Record at 374 - 375; RE 244-245). Dr. Guild has cross appealed, raising various issues including his right to depose Mr. Herring, his right to an inference instruction based on the Plaintiffs' refusal to allow Mr. Herring to be deposed, and his right to judgment as a matter of law based on the Plaintiffs' failure to prove the elements necessary to recover for a suicide, specifically the irresistible impulse doctrine. (Record at 381 - 383; RE 246-248).

SUMMARY OF THE ARGUMENT

A. SUMMARY OF ARGUMENTS ON APPEAL

After three (3) days of trial testimony and documentary evidence on Dr. Guild's care and treatment of Ms. Hancock, the jury in this case returned a unanimous defense verdict. The Plaintiffs' are attempting to convince this Court to reverse and remand the jury's decision on the basis of alleged errors. However, established legal precedent refutes all of the Plaintiffs' arguments.

The Plaintiffs' first argument is that the trial court abused its discretion by denying their "theory of the case" instruction. This argument ignores the fact that under Mississippi case law, there is no unfettered right to a theory of the case instruction, but rather, such an instruction must be supported by the evidence presented at trial. Furthermore, the denial of a theory instruction does not constitute error when the remaining instructions actually given to the jury correctly articulate the primary applicable rules of law.

In the case at hand, Jury Instruction No. 5, given to the jury, provided the jurors in this case with the primary applicable rules of law as well as direction regarding what action to take based upon the evidence presented at trial. Thus, under the recent case of Beckwith v. Shah, – – So.2d – –, 2007 WL 1599649 (Miss. 2007), there is no error at all, much less reversible error, caused by denial of the Plaintiffs' instructions P-5 and P-6.

Furthermore, instructions P-5 and P-6 were not supported by the evidence in this case, while the Court's denial of P-5 and P-6, coupled with the granting of Jury Instruction No. 5, still gave the Plaintiffs the latitude to present theories of the case which were not even included in the denied theory instructions. The Plaintiffs took full advantage of that opportunity in closing argument, arguing issues of contemporaneous documentation and premature discharge that were not even

included in their proposed instructions. Beckwith v. Shah controls the case and mandates affirmance.

The Plaintiffs next argued that the trial court's denial of an instruction for apportionment of liability among themselves and Dr. Guild were reversible error because Miss. Code Ann. §85-5-7 requires the jury to determine the percentage of fault for each party alleged to be at fault. The Plaintiffs then reasoned that because defense counsel commented extensively on Ms. Hancock's family situation, this amounted to allegations of fault and mandating an apportionment instruction to avoid the practical effect of operating under the old contributory negligence standard. However, this argument flies in the face of several legal precedents.

First of all, the argument is procedurally moot because the jury's defense verdict finding Dr. Guild not guilty of any negligence means that there were no damages to apportion. Patton v. Nelson, 51 So.2d 752 (Miss. 1951). Secondly, on close review of the trial transcript, the Plaintiffs were not requesting an instruction to apportion liability under Miss. Code Ann. §85-5-7, but rather an instruction to delineate how the damages would be apportioned among themselves; therefore, the issue on appeal was technically not raised at trial and should be barred from appeal. Thirdly, the trial court's denial of the Plaintiffs' request to apportion liability to themselves does not frustrate the judicially recognized purpose of the apportionment statute, especially since the family members' actions, whatever influence they may have had, do not constitute the type of legal fault contemplated by Section 85-5-7. Hunter v. General Motors Corp., 729 So.2d 1264, 1276 (Miss. 1999). Fourthly, in requesting apportionment of negligence to themselves, the Plaintiffs requested an instruction at variance with sworn interrogatory responses; and they are therefore not entitled to receive such an instruction. Coho Resources, Inc. v. McCarthy, 829 So.2d 1 (Miss. 2002). Given these factors, the lack of apportionment instruction was well warranted.

From a defense standpoint, evidence of Ms. Hancock's family situation was highly relevant to love, society, and companionship, as well as loss of enjoyment of life. In fact, in a case in which the plaintiff put on proof of less than $82,000.00 in economic loss, and requested 1.5 million dollars in compensation for society and companionship and 1.5 million dollars for loss of enjoyment of life, the defense counsel not only had a right to put on evidence of Ms. Hancock's interaction, but also had an ethical duty to highlight a true picture of the quality of Ms. Hancock's life, including the relationship with the family members seeking to recover these damages. To characterize Ms. Hancock's family relationships as "negligent" resulting in "fault" and "causation" further implies that there is some legal duty owed by Ms. Hancock's family members in their interaction with her. No such argument, legal support or instruction was offered by the Plaintiffs to support apportionment on this basis. For all these reasons, the Court rightfully denied the Plaintiffs' request to apportion liability to themselves.

The Plaintiffs third assignment of proposed reversible error concerns the admission of defense Exhibit 6, handwritten notes by Ms. Hancock, that were found during the sheriff's investigation of the suicide. The Plaintiffs allege that the notes were not properly authenticated and that they were therefore inadmissible. The Plaintiffs essentially support their argument with the observation that the notes in defense Exhibit 6 were not dated. However, the Mississippi Rules of Evidence governing authentication have no specific dating requirement. Instead, Rule 901 of the Mississippi Rules of Evidence **does** allow authentication by the trier of fact by comparison and by distinctive characteristics. Since the handwritten notes in defense Exhibit 6 contained information distinct to Ms. Hancock's family situation and could have been compared to Ms. Hancock's handwriting in eight (8) fully authenticated exemplars in evidence, Plaintiffs' argument must fail. Sewell v. State, 721 So.2d 129 (Miss. 1998). Furthermore, the notes were relevant to society and

companionship and enjoyment of life, and the notes were kept as part of the sheriff's investigation file transmitted to defense counsel in the regular course of business. There is no reason why the Plaintiffs should have been allowed to keep the jury from seeing these note. The trial court's decision to allow the notes into evidence was proper.

Lastly, the Plaintiffs allege three (3) different errors which they feel cumulatively warrant reversal of the jury verdict. The first alleged error is a single comment during the Defendant's opening statement referencing the absence of Jim Herring from the trial proceedings. However, the Plaintiffs themselves prevented the Defendant from deposing Jim Herring in pretrial discovery so he could learn of matters either not protected by privilege or as to which privilege was waived. Given this, defense counsel had a right to inform the jury of the Plaintiffs' objection. More to the point, any error was cured by the trial court's limiting instruction. Fox v. State, 756 So.2d 753, 761 (Miss. 2000); Curtis v. Bellwood Farms, Inc, 805 So.2d 541, 543 - 544 (Miss. App. 2000).

Next, the Plaintiffs argued that Donna Pigg should not have been allowed to testify to any conversations between herself and Ms. Hancock. However, in light of the fact that the Plaintiffs were allowed to put on their case in chief featuring conversations between Ms. Hancock and themselves over a standing hearsay objection from defense counsel (TR at p. 432, lines 5 - 19; RE 338), the Plaintiffs should not be allowed to seek a reversal on the basis of conversations attested to during the Defendant's case. The rule of the case adopted by the trial court in this matter allowed testimony regarding conversations with Cherie Hancock under the state of mind exception. (TR at p. 441, lines 4-11; RE 341). Considering the unavailability of Ms. Hancock and the seminal relevance of state of mind in this case, the ruling was correctly within the trial court's discretion.

The final alleged error can best be characterized as the Plaintiffs' attempt to add new requirements to the Mississippi Rules of Evidence by arguing that Dr. Guild should not have been

allowed to testify to any statements made by Ms. Hancock that were not written in his medical records. However, pursuant to the rule of this case allowing conversations with Ms. Hancock under *res gestae*, this allegation should be denied. Also, Rule 803(4) of the Mississippi Rules of Evidence specifically allows a patient's statements to treating physicians into evidence, as these statements have sufficient guarantees of trustworthiness. See Bridges v. Kitchings, 820 So.2d 42 (Miss. 2002). Thus, the trial court correctly allowed these statements into evidence under Miss. R. Evid. 803(4). Additionally, these statements are admissible because they form the basis of Dr. Guild's diagnosis and treatment of the patient. Plaintiffs obviously wanted to prevent the admission of the statements in order to try to prevent Dr. Guild from explaining the basis of the care he provided. Certainly, a doctor is allowed to explain why he made the decisions he made.

Obviously, the Plaintiffs' allegations on appeal are nothing more than futile attempts to avoid the rightful judgment entered in this case. A close look beneath the surface of the Plaintiffs' allegations reveal the absence of legal support for the concessions they have requested in this appeal.

B. SUMMARY OF ARGUMENTS ON CROSS APPEAL

The Plaintiffs should not be allowed to recover in this case because the circumstances of this case do not meet the elements of the Irresistible Impulse Doctrine. The Irresistible Impulse Doctrine begins with the premise that a plaintiff cannot recover damages for suicide because suicide is an illegal act that breaks the causal chain between the defendants negligent act and the plaintiff's injury/suicide. This doctrine exists as an exception to the common law rule designating suicide as a criminal act, which normally precludes recovery. Price v. Purdue Pharma Co., 920 So.2d 479 (Miss. 2006). A decedent's heirs are only allowed to recover, however, upon showing that (1) the defendant committed an intentional wrongful act against the plaintiff, and (2) the plaintiff committed suicide as the result of an irresistible impulse prompted by a mental illness, as opposed to a mental

condition such as depression.

In this case, because the Plaintiffs have never alleged that Dr. Guild committed any intentional tort against Ms. Hancock, the Irresistible Impulse Doctrine does not provide any gateway to recovery by the Plaintiffs. Likewise, the Plaintiffs' expert's testimony that Ms. Hancock was overcome by depression and succumbed to an irresistible impulse is almost the exact same testimony rejected by the Mississippi Court of Appeals in Collums v. Union Planters Bank, 832 So.2d 572 (Miss. at 2002). Under the doctrine, the illness must rise from some mental dysfunction where the decedent is not aware or in control of his/her own actions, not an instance in which the decedent chooses suicide due to depression or stressful situations. Collums, 832 So.2d at 578 (¶ 15 - 16). Therefore, not being excepted from the common law illegality rule, the Plaintiffs are not allowed to recover damages for Ms. Hancock's suicide and the verdict must be affirmed.

With respect to Jim Herring, the attorney who referred Ms. Hancock to Dr. Guild, the Defendant should have been allowed to depose Attorney Herring during the discovery phase of this case. The trial court's blanket denial barring the Defendant from conducting any pretrial discovery was in error, pursuant to Hewes v. Langston, 853 So.2d 1237 (Miss. 2003), in which this court exemplified an item-by-item approach to allowing discovery when attorney/client privilege is raised, as opposed to a blanket denial. Furthermore, once the pretrial discovery request had been denied on the basis of the Plaintiffs' raising of the attorney/client privilege, the Defendant should have been allowed to present an inference instruction to the jury. The trial court's denial of the requested instruction was therefore in error.

ARGUMENT IN RESPONSE TO APPELLANT'S BRIEF

A. The trial court properly denied the Plaintiffs' theory of the case instructions P-5 and P-6 because the theory presented in these instructions was not supported by the facts of the case. Further, any alleged error in the trial court's denial of instructions P-5 and P-6 was harmless because the jury instructions, when read together as a whole, expressed the applicable primary rules of law sufficient to allow the Plaintiffs to fully argue their case.

1. Standard of Review

The Plaintiffs argue on appeal that the trial court's refusal of Plaintiffs' instructions P-5 and P-6 constitute reversible error. However, under Mississippi law, the trial court has considerable discretion over the refusal of jury instructions, and the court's decision is not to be overturned unless the Plaintiffs prove an abuse of discretion on the part of the trial court. Coho Resources, Inc. v. McCarthy, 829 So.2d 1 (Miss. 2002). In Coho Resources, Inc., this court summarized Mississippi's law on jury instructions as follows:

> Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant [or any party] is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is fairly covered elsewhere in the instructions, or is without foundation in the evidence. We have also held a court's jury instructions will not warrant reversal if the jury was fully and fairly instructed by other instructions.

Coho Resources, 829 So.2d at 23.

Therefore, the trial court's denial of P-5 and P-6 was not erroneous if the jury was fairly instructed on applicable primary rules of law when the jury instructions are considered as a whole.

2. The trial court's denial of Instructions P-5 and P-6 was not erroneous because the remaining jury instructions, when read together as a whole, expressed the applicable primary rules of law.

Even assuming that the Plaintiffs' instructions were proper despite their lack of factual basis, the Plaintiffs are not entitled to a new trial because the jury was properly instructed even without the

two instructions at issue.

The Plaintiffs correctly state the primary applicable rule of law regarding a physician's standard of care as follows:

> [i]n Mississippi medical malpractice cases, the standard of care is objective and requires the physician to exercise the degree of care, diligence and skill ordinarily possessed and exercised by a minimally competent and reasonably diligent skillful, careful, and prudent physician in a particular field of practice.

(Appellant Brief at page 15 (citing Bickham v. Grant, 861 So.2d 299, 303 (Miss. 2003)). The Plaintiffs argue that because P-5 and P-6 meet the standard, they should not have been denied. However, whether P-5 and P-6 met the standard is irrelevant to whether the jury was properly instructed without P-5 and P-6. To paraphrase the rule from Coho Resources, if all of the given jury instructions read together as a whole accurately pronounce the primary applicable rules of law, then the jury was properly instructed and the case should be affirmed.

Upon reviewing the jury instructions given at trial (RE 22-31, 38-44), Jury Instruction No. 5 informs the jury of the primary applicable rule of law in this case, referencing Dr. Guild's duty to act as "a reasonably prudent minimally competent psychiatrist" under "the same or similar circumstances." (RE at 40). Contrary to the Plaintiffs' argument that "there was no instruction instructing the jury as to the circumstances under which they could return a verdict for the Plaintiffs," Jury Instruction No. 5 specifically addresses that issue:

> **Jury Instruction No. 5**
>
> The Court instructs the jury that the word "negligence" as used in these instructions with regard to Dr. Guild's actions means the doing of some act which is reasonably prudent, minimally competent psychiatrist treating a patient such as Ms. Hancock would not have done under the same or similar circumstances, or the failure to do some act which a reasonably prudent, minimally competent psychiatrist treating a patient such as Ms. Hancock would have done under the same or similar circumstances. Therefore, if you believe that, during his care and treatment of Ms. Hancock, Dr. Guild acted as a reasonably prudent, minimally competent psychiatrist would have acted when faced with the same or similar circumstances, it is your duty to return a verdict for the defendant, Dr. Guild.

If you believe that, during his care and treatment of Ms. Hancock, Dr. Guild failed to act as a reasonably prudent, minimally competent psychiatrist would have acted when faced with the same or similar circumstances, it is your duty to return a verdict for the plaintiffs.

(RE at 40)(emphasis added). Thus, the record reflects that the jury was correctly instructed on the primary applicable law in this case regarding the standard of care owed by Dr. Guild to Cherie Hancock, and the circumstances under which the jury should return a verdict for the Plaintiffs.

In fact, Plaintiffs were in no way hampered by these instructions with regard to communicating their factual theory to the jury. During oral argument, counsel for the Plaintiffs argued various theories of negligence against Dr. Guild. These included requirement of contemporaneous documentation (TR at page 750, lines 1 - 13; RE 368); negligent implementation of discharge plan (TR at page 756, lines 27 - page 757, line 28; RE 371-372); and premature discharge (TR. at page 758, lines 21 - 24; page 785, lines 1 - 10; RE 373, 376). Interestingly, Plaintiffs did not even request an instruction on some of these theories, thereby showing how unimportant they considered minutely detailed instructions to be. Simply put, the instructions were sufficient to allow Plaintiffs to pursue their theory of the case.

The Plaintiffs, nonetheless, contend that this instruction was not sufficient because it was an abstract statement of the law. However, such an argument has recently been rejected by the Mississippi Court of Appeals in a nearly identical setting in the case of Beckwith v. Shah, ____So.2d _____ 2007 WL 1599649(Miss. App. 2007)[2]. Beckwith involved a wrongful death claim arising from an intestinal perforation during a colonoscopy. The jury returned a verdict in favor of Dr. Shah, and the Plaintiffs appealed on the grounds that the trial court wrongfully refused two detailed

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Motion for rehearing in this case was denied on September 11, 2007. A mandate has been issued and there was no certiorari petition filed.

Plaintiffs' instructions and further wrongfully instructed the jury with abstract instructions from the court and defense counsel. These instructions were extremely similar to the ones offered in the case at bar since both attempted to specifically describe Plaintiffs' factual theories that were either hotly disputed or unsupported by the evidence. However, upon review, the appellate court found that these instructions were "confusing and peremptory in nature," and therefore properly denied by the trial court. Beckwith at¶ 8.

The Court also held there was no error arising from the so-called abstract instruction. The arguably abstract jury instruction[3] given to the jury in Beckwith read as follows:

Instruction C-7

> In this case the plaintiff has charged Dr. Nikhil S. Shah with medical negligence. A physician, such as Dr. Shah, is required to provide his patients with that same degree of care, skill and diligence which would be provided by a minimally competent, reasonably prudent physician in the same general field of practice, under the same or similar circumstances, and who has available to him the same general facilities, resources and options. Therefore, medical negligence or "malpractice" is defined as a physician's failure to provide a patient with that degree of care, skill and diligence which would be provided by a minimally competent, reasonably prudent physician in the same specialty when faced with the same or similar circumstances.
>
> If you find from a preponderance of the evidence in this case that Dr. Nikhil S. Shah, in the care and treatment of Mrs. Beckwith, compiled with the standards of care expected of a reasonably prudent, minimally competent physician under the circumstances, then you shall return your verdict for the defendant, Dr. Nikhil S. Shah.
>
> If you find from a preponderance of the evidence in this case that Dr. Nikhil S. Shah, in the care and treatment of Mrs. Beckwith, failed to comply with the standards of care expected of a reasonably prudent, minimally competent physician under the circumstances, then you shall return your verdict for the Beckwith family.

The appellate Court's review of the issue began with the following recitation of legal precedent:

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This instruction is extremely similar to Instruction 5 which was given to the jury in this case (R. 40).

> "If an instruction merely relates a principle of law without relating it to an issue in the case, it is an abstract instruction, and should not be given to the jury." McCarty v. Kellum, 667 So.2d 1277, 1288 (Miss. 1995). However, granting an abstract instruction is not always reversible error unless the instruction confuses and misleads the jury. Freeze v. Taylor, 257 So.2d 509, 511 (Miss. 1972). In T.K. Stanley, Inc. v. Cason, 614 So.2d 942, 952 (Miss. 1992), the supreme court found that an example of an abstract instruction included the definition of "air pollution" but failed to direct the jury to do anything.

Beckwith at *1 (¶3). Thus, one of the characteristics of an abstract instruction is the failure to instruct the jury to do anything. However, Instruction D-5 did instruct the jury to do something for the Plaintiffs — return a verdict for them if Dr. Guild failed to act as a reasonably prudent, minimally competent psychiatrist.

The appellate court also considered the fact that in McCarty v. Mladineo, 636 So.2d 377, 388 (Miss. 1994), this Court actually recommended a jury instruction similar to C-7 in the Beckwith case. Beckwith at *2 (¶ 5). The court reasoned that C-7 "correctly states the proper standard of care and instructs the jury to return a verdict for Beckwith or Shah depending on what the evidence showed." Id. (¶ 5). In addition to finding that C-7 did direct the jury to do something depending upon the evidence, the appellate court also found that the plaintiff's allegation of error was moot because neither C-7 nor D-4 were confusing or misleading, which would have been required for a finding of reversible error. Id. (¶ 5 and 6).

Similarly, in the case at hand brought by the Hancocks against Dr. Guild, Jury Instruction No. 5 provides the jury with the primary applicable standard of care while directing the jury what to do with the evidence they have seen. In fact, Jury Instruction No. 5 in the case *sub judice* is substantively identical to instruction C-7 in Beckwith, which was found to be an adequate and accurate standard of care instruction sufficient to support a jury verdict despite Plaintiff's claim of erroneously denied instructions.

Therefore, this Court, like the court in Beckwith should find that the jury's deliberation of Dr. Guild's treatment was adequately and accurately guided by jury instructions on the standard of care, even without P-5 and P-6. Furthermore, just as the Mississippi Court of Appeals found that no error was committed by the trial court's denial of the lengthy, misleading, and confusing jury instructions offered by the Plaintiffs in Beckwith, this Court should find that the Plaintiffs' proposed instructions P-5 and P-6 were properly refused, as they both contain at least one major unsupported fact, and, therefore do not even correctly state the theory they intend to set forth for consideration.

3. Plaintiffs' instructions P-5 and P-6 were not supported by the facts of the case, such that they were improper comments on the evidence which the trial court correctly refused.

As stated in the above citation to Coho Resources, Inc., any entitlement of the Plaintiffs to have their theory of the case presented to the jury in an instruction is limited by the requirement that the instruction be a correct statement of law and that the instruction has foundation in the evidence of the case.

Plaintiffs' instruction P-5 reads as follows:

If you find from a preponderance of the evidence in this case that:

1. Given the circumstance of Cherie S. Hancock's medical condition during the time the Defendant, Donald C. Guild, saw and treated her, a minimally competent physician and psychiatrist who had available the same general facilities, services, equipment and options as Donald C. Guild had during the time she was his patient **would not have discharged Mrs. Hancock on September 17, 1999, from St. Dominic Hospital without performing a comprehensive suicide assessment and preparing an adequate discharge plan that included taking reasonable steps to provide a supportive environment and support system to Mrs. Hancock upon discharge**; and

2. The Defendant, Donald C. Guild, failed to comply with this standard of care in his treatment of the Plaintiff; and

3. Such failure on the part of Donald C. Guild constituted a proximate cause or contributing proximate cause of the suicide death of Mrs. Hancock.

then you must return a verdict for the Plaintiffs against the Defendant, Donald C. Guild.

(Record at 323)(emphasis added).

Instruction P-6 reads as follows:

If you find from a preponderance of the evidence in this case that:

1. Cherie S. Hancock was a patient of Dr. Donald C. Guild; and

2. While a patient of Dr. Guild, Cherie S. Hancock was suffering from a mental and physical condition; and

3. Defendant, Donald C. Guild, should have reasonably been aware of Mrs. Hancock's condition and was aware that she had previously attempted to commit suicide in 1996; and

4. That on September 15, 1999, Defendant, Donald C. Guild testified in open court under oath in the presence of Cherie S. Hancock in a divorce preceding that in his opinion, if Cherie S. Hancock were not allowed to move back into the marital house that she would take her own life; and

5. That Donald C. Guild, knowing that Cherie S. Hancock, had not been allowed by the Court to return to the marital house, **discharged her from St. Dominic Hospital two (2) days later on September 17, 1999 without performing a comprehensive suicide assessment or otherwise preparing an adequate discharge plan that included taking reasonable steps to provide a supportive environment and support system for Mrs. Hancock upon discharge**; and

6. That Donald C. Guild failed to provide the care and attention that Cherie S. Hancock's condition reasonable required and which a reasonable prudent and minimally competent psychiatrist treating Mrs. Hancock would have provided; and

7. That Donald C. Guild's failure to provide such care and attention was the proximate cause or a proximate contributing cause of Cherie S. Hancock's self-inflicted death by firearms on September 20, 1999,

then your verdict should be for Plaintiffs.

(Record at 324 - 325)(emphasis added).

These instructions indicate the alleged act of negligence was the failure to perform a comprehensive suicide assessment prior to discharging a patient plus failure to discharge the patient

into a supportive environment. However, both of these allegedly negligent acts conflict with the Plaintiffs' own statements of fact and argument as well as other facts presented at trial.

In their Appellant Brief, the Plaintiffs state as follows regarding Dr. Guild's performance of a suicide assessment at the divorce hearing on September 15, 1999:

> . . . He [Dr. Patterson] further testified that in his poinion the only place where there is a reasoned suicide assessment by Dr. Guild is in the court transcript of the September 15, 1999, Chancery Court hearing. (RE 98-99; R 339-340).

(Appellant Brief at 16).[4] Conceding at trial that Dr. Guild performed a suicide assessment at the divorce hearing on September 15, 1999, the Plaintiffs' attorney stated during closing argument that he agreed with the Defendant's expert, Dr. Holly:

> . . . Now his expert, Dr. Holly says that that [hearing testimony] is a suicide risk assessment. **I'll agree. That's a suicide risk assessment**. . .

(TR p.754, lines 1-4; RE 369). Thus, the Plaintiffs acknowledge that on September 15, 1999, Dr. Guild performed a suicide assessment of Ms. Hancock that was, in Dr. Patterson's words, "on target." (TR p. 346, lines 2-4; RE 330). This assessment was performed two days before Ms. Hancock's discharge.

Therefore, the instructions are factually incorrect because they assume that Dr. Guild "discharged Mrs. Hancock on September 17, 1999, from St. Dominic Hospital without performing a comprehensive suicide assessment." This statement has no evidentiary basis because in addition

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It should be mentioned that Dr. Patterson's actual testimony cited by the Plaintiffs at TR339-340 was ". . . the only place where there is what I would consider close to a reasoned suicide assessment is found in the court transcript." The Defendant brings this to the court's attention in the event that on reply the Plaintiffs may retract their own interpretation of Dr. Patterson's testimony. The Defendants would further show unto the court that the Plaintiffs correctly surmised that Dr. Patterson recognized a suicide assessment had been performed on September 15, 1999, because he later credits Dr. Guild with making an accurate conclusion of Ms. Hancock's mental state as relating to her suicide, certainly this testimony implies, as the Plaintiffs have conceded, that Dr. Guild had to perform a suicide assessment on September 15, 1999, in order to testify about Ms. Hancock's suicide risk. (p. 344, line 7 - p. 346, line 8; p. 346, lines 2 - 5; RE 328-330).

to the aforementioned testimony of Dr. Patterson and the closing argument explaining Dr. Patterson's testimony, Dr. Guild testified without contradiction that he performed an adequate suicide assessment **every day he saw Cherie Hancock.**

Additionally, the record is clear that Ms. Hancock **was** being placed in a supportive environment - she was discharged to live with her parents. (TR 272-274; RE 323-325) Additionally, Ms. Hancock's best friend, Donna Pigg, lived next door to her parents. (TR 486; RE 349)Donna had been informed of the discharge plans and visited Ms. Hancock daily from discharge until the day of the suicide. (TR p. 499; RE 356a) The Plaintiffs' attorney in closing argument even acknowledged that the discharge environment **was** supportive:

> . . . It's not a question of saying, well, you don't want her with her mother, don't want her with Donna Pigg. That's not true. That's the support system. Agree with that.

(TR p. 785, lines 10-14; RE 376). The Plaintiffs themselves in closing argument recognized that the reference in their refused instructions to Dr. Guild's failure to prepare an "adequate discharge plan that included taking reasonable steps to provide a supportive environment and support system" was in total conflict with the evidence presented. There was no greater supportive environment available for Ms. Hancock regardless of when she was discharged. Given this, there can be no way that the instructions were warranted.

Perhaps the Plaintiffs intended to instruct the jury on the area of whether Ms. Hancock should have been discharged at all. That theory, however, was not the theory the Plaintiffs chose for their instructions.[5] What **was** submitted by the Plaintiffs were two jury instructions which were not actually supported by any evidence. Furthermore, the focus of Dr. Patterson's expert testimony for

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Although the Plaintiffs did not request an instruction on a premature discharge theory, that was certainly an element of their argument to the jury. (TR. at page 785, lines 2 - 14). As will be discussed in a subsequent section of the brief, the instruction to the jury were broad enough (and accurate enough) so the Plaintiffs could fairly argue **all** their theories.

the Plaintiffs was his opinion that Ms. Hancock should not have been discharged at all, and that Dr. Guild should have had her committed if need be, against her will. (TR at page 343, line 19 - page 344, line 6; page 350, line 4 - page 352, line 22; RE 327-328; 331). However, the proposed instructions make no specific mention of premature discharge or duty to commit. This is probably because it is incongruous to argue on the one hand that the record does not contain enough information to make an adequate suicide risk assessment,[6] while claiming on the other hand that the record contains enough information to justify a doctor to seek, and a court to order, involuntary forced commitment of Ms. Hancock. (TR at page 370, line 23 - page 371 line 10; RE 334-335).

Regardless of why the Plaintiffs are arguing that reversible error has resulted from the trial court's denial of instructions which conflicted with the testimony of their own expert, other testimonial evidence, and even their own closing argument on those facts, the fact that the lack of evidentiary support is sufficient grounds under Coho Resources to affirm the trial court's denial of Instructions P-5 and P-6.

Lastly, in support of the position that P-5 and P-6 are correct statements of law, the Plaintiffs first argue that P-5 "came out of" the Mississippi Model Jury Instructions as set forth by the Mississippi Judicial College. However, the fact that an instruction is purportedly drafted after a model jury instruction does not necessarily indicate that the instruction is a correct statement of law or fact, and such instructions may be refused by the trial court in exercising its discretion. Deas v. Andrews, 411 So.2d 1286 (Miss. 1983). Also, even if adherence to the model jury instructions did

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The Plaintiffs' theory on suicide risk assessment seemed to be centered on lack of documentation, because Dr. Guild testified he assessed Ms. Hancock daily regarding the possibility of suicide. (TR. at page 750, lines 1 - 13). However, record keeping deficiencies are not in and of themselves a recoverable breach of the standard of care. Reikes v. Martin, 471 So.2d 385, 390 (Miss. 1985). While a jury may consider record deficiencies in determining what care actually occurred, it is the care as shown by all evidence taken together that is at issue, not just the completeness of the record.

provide some assurance of propriety, the Plaintiffs missed the mark with P-5 as it omits the entire final paragraph of the Model Jury Instruction Section 14.2. Furthermore, Model Jury Instruction § 14.2 is constructed to require a positively phrased statement of what minimally competent physician would have done, not a negatively phrased statement of what a minimally competent physician would not have done.[7]

4. Summary.

The Plaintiffs' alleged error regarding instructions is unfounded. Their proposed overly detailed instructions were unsupported by the proof, confusing, and a comment on the evidence. The jury was properly instructed on the law when the instructions were read as a whole. In fact, the Plaintiffs had full opportunity to argue their theories of the case, even including theories outside those delineated in their refused instructions. The instructions granted by the trial court satisfied the rules established by this Court for instructing juries. In fact, the trial court's rulings have been shown to be correct by the Court of Appeals decision in Beckwith v. Shah. For these reasons the lower court's ruling on jury instructions P-5 and P-6 should be affirmed.

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Framing an instruction based on one found in the Mississippi Model Jury Instructions is not a guarantee that the instruction is correct, as one of the undersigned attorneys has previously learned. In McCarty v. Mladineo,636 So.2d 377 (Miss. 1994), a verdict for the defendant was reversed based in part on an instruction that had been lifted almost verbatim from the model instructions. In McCarty v. Mladineo, the Supreme Court recommended how future instructions should be worded. The Defendant's instructions in this case were worded as McCarty v. Mladineo recommended, unlike the Plaintiffs' instructions, which left out the very language ('reasonably prudent") required by the Court in that case.

B. THE TRIAL COURT PROPERLY DENIED THE PLAINTIFFS' REQUEST FOR A JURY INSTRUCTION APPORTIONING FAULT AMONG THEMSELVES AND DR. GUILD.[8]

1. Standard of review

Under the standard of review for the denial of jury instructions, the instructions are deemed proper as long as the instructions as a whole fairly announce the applicable primary rules of law. Coho Resources, 829 So.2d at 23 (¶ 69).

2. Because the jury returned a verdict for Dr. Guild, the issue of apportionment was never reached by the jury and any alleged error arising from failure to instruct the jury on that point is moot.

The Plaintiffs in their brief contend that the court erred in not instructing the jury on an apportionment theory. Setting aside for a moment both the procedural and substantive defects in this theory, the lack of an apportionment instruction can in no way constitute a basis for reversal because the jury **returned a verdict for Dr. Guild effectively finding he was not guilty of negligence**. Since Dr. Guild was not negligent according to the jury, the apportionment issue is irrelevant and moot.

In the case of Patton v. Nelson, 51 So.2d 752 (Miss. 1951), this Court reviewed the issue of whether the trial court's failure to grant a comparative negligence instruction constituted error. This Court found that "since the jury by its verdict found that the defendant was guilty of no negligence," there was no error in denying the comparative negligence instruction because the jury "did not reach

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This issue is somewhat puzzling because the Plaintiffs never actually offered an apportionment instruction for the court's review. Confusion also arose from the fact that the Plaintiffs appear to have actually been requesting an instruction apportioning damages, as opposed to liability (TR 734, Lines 17 - 25, TR 736, Lines 24 - 737, Line 14). However, during argument over instructions, there were mentioned concerns of causation and the application of Miss. Code Ann. 85-5-7. With the assumption that this issue is properly before the court, the Defendant has responded to the question of whether the Plaintiffs should have been allowed to apportion liability to themselves.

the point of comparing any contributory negligence of the plaintiffs with the alleged negligence of the defendants."

Even in Peterson v. Ladner, 785 So.2d 290 (Miss. App. 2000), which is cited by the Plaintiff in support of her position that apportionment is mandated by Miss. Code Ann. §85-5-7, the Court of Appeals observes that "[u]ntil it [liability] is decided, there is no reason to determine damages." Id. at 295 (¶ 16).

Therefore, Mississippi case law both before and after the passage of Miss. Code Ann. §85-5-7 recognizes that in cases where the jury has returned a defense verdict, there are no damages to apportion. It follows that in this case, because the jury found that Dr. Guild was not liable for any negligence at all, the court's refusal to allow the Plaintiffs to apportion damages among themselves and Dr. Guild is not erroneous and cannot be the basis for a new trial.

3. Additionally, the trial court properly denied the Plaintiffs' apportionment instruction because the Plaintiffs did not put on any proof of contributory negligence, and in fact, swore in interrogatory responses that family members did not do anything to exacerbate their mother's mental illness.

In Coho Resources, Inc. v. McCarthy, 829 So.2d 1 (Miss. 2002), this Court held that a defendant who does not identify in its interrogatory responses any other party to have caused the subject accident of the case has waived the right to apportion fault to another tortfeasor. Coho Resources, 829 So.2d 1, 24 (¶ 75). Therefore, it stands to reason that a party who has sworn to one position in a case cannot request a jury instruction contradictory to that party's sworn statement.

Similarly, in this case, by impliedly requesting a jury instruction apportioning fault to themselves, the Hancocks have taken a position contrary to the response to Interrogatory No. 16 filed on their behalf:

> Interrogatory No. 16: Describe everything any of Ms. Hancock's heirs-at-law did which exacerbated any mental illness she had.

Answer: No one attempted to make Mrs. Hancock's mental illness more severe or violent.

(Record at 244). It would be improper to allow the Plaintiffs to deny any exacerbation of Cherie Hancock's mental illness, while at the same time granting them a jury instruction apportioning fault to themselves under the theory that their treatment of Cherie Hancock exacerbated her mental health condition and therefore contributed to her suicide.

4. The Plaintiffs' request to apportion liability to themselves distorts the purpose of Miss. Code Ann. § 85-5-7.

Furthermore, the Plaintiffs' request to apportion liability to themselves distorts the judicially recognized purpose of Miss. Code Ann. §85-5-7 as stated by this court in Hunter v. General Motors Corp., 729 So.2d 1264 (Miss. 1999). The Plaintiffs cite Hunter for the proposition that "Mississippi courts have required the jury to consider the negligence of all parties involved in an incident that gives rise to an action. . ." (Appellate Brief at 22). However, the Plaintiffs neglect to mention that in Hunter, this Court conducted a detailed inquiry into the purpose of Miss. Code Ann. §85-5-7, and while describing the statute's purpose at various points in the Hunter opinion, this Court also stated that "the statute serves to reduce the extent to which one defendant may be held liable for the negligence of another." Hunter, 729 So.2d 1264, 1274 (¶ 35). The Court also cited with approval reasoning from a Florida case regarding the purpose of apportionment statutes, which was "an intent to prevent one defendant from being held unfairly liable for the negligence of another." Hunter at 1276 (emphasis added).

In their brief, the Plaintiffs quote extensively from the closing arguments of defense counsel in support of their position that defense counsel "attempted to deflect the fault for Mrs. Hancock's suicide away from Dr. Guild and onto Mrs. Hancock's family." (Appellant Brief at 25). The Plaintiffs also provided the court with a long list of facts attested to by Donna Pigg regarding Cherie

Hancock's family life. (Appellant Brief at 29 - 31). Likewise, the Plaintiffs list evidence in Cherie Hancock's medical records about Mrs. Hancock's abusive family situation. (Appellant Brief at 31 - 32). The Plaintiffs allege that all of these facts constitute the Defendant's attribution of fault for Cherie Hancock's suicide onto her family members.

However, in making this argument, the Plaintiffs seems to forget that almost their entire claim for damages arises from "the value of the decedent's loss of enjoyment of life," and "[t]he loss of society and companionship of the decedent sustained by each of her children. . ." (Record at 319).[9] Therefore, in order to rebut the Plaintiffs' argument and evidence that Cherie Hancock lived a happy life with a close knit relationship with her children, the Defendant had to put on evidence of Cherie Hancock's actual quality of life and the truth about the amount of "society and companionship" that actually existed between Cherie Hancock and her children. The fact that Cherie Hancock's family relationships were repeatedly documented in her medical records as a stress factor contributing to her mental illness, including anxiety and depression, was used to shed light on the value of the damages the Plaintiffs were claiming.

Further, the judicial purpose of the apportionment statute is to apportion fault to tortfeasors or other negligent actors. Whatever influence the family's actions may have had on Ms. Hancock, there was simply no actionable conduct which would have brought Section 85-5-7 into play. Being a bad husband or child is simply not the basis for tort liability, nor is failing to provide a loving environment a cause of action. Consequently, there is nothing to which apportionment could legally

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Plaintiffs ultimately requested from the jury 1.5 million dollars for the loss of love, society and companionship (TR 789, Lines 1 - 7), and 1.5 million dollars for loss of enjoyment of life (TR 790, Lines 9 - 12). The economic damages for lost income and funeral bills totaled less than $82,000.00. (TR. at page 415, lines 10 0 16; page 760, lines 2 - 21). Consequently, over 97% of Plaintiffs' claims were for damages directly affected by evidence related to Ms. Hancock's relationship with her family and how they treated her.

apply.

In total, the apportionment issue does not present any error on the part of the trial court because the jury's defense verdict leaves no fault to be apportioned between the Defendant and the Plaintiffs. Furthermore, under Mississippi case law as set forth in Coho Resources, the Plaintiffs cannot be allowed to request apportionment of fault to the Hancocks for causing Cherie Hancock's death through exacerbation of her mental illness, when they have sworn to interrogatory responses denying their role in any exacerbation of her illness. Lastly, there was no testimonial evidence from any expert attributing Cherie Hancock's death to her family's actions. The extensive details regarding Cherie Hancock's family situation were necessary and relevant evidence on the issue of Cherie Hancock's enjoyment of life and the value of the society and companionship that the family allegedly lost as a result of her suicide. For all these reasons, the trial court properly denied the Plaintiffs' request to apportion fault among the Hancocks and Dr. Guild.

5. Summary on the apportionment issue.

The Plaintiffs have raised as an alleged error an issue on which they offered no instruction and which they denied existed in sworn interrogatory answers. Procedurally, the Plaintiffs should be barred from even raising this as an issue. However, their claim is substantively unsupported as well. The fact that the jury returned a verdict for Dr. Guild establishes there was no negligence to be apportioned as to him, such that the refusal to instruct the jury on apportionment is irrelevant. Patton v. Nelson, 51 So.2d 752 (Miss. 1951). Finally, Defendant was entitled (if not ethically required) to address the Plaintiffs' treatment of Ms. Hancock given the Hancocks' claim for $3 million in damages arising from the family's alleged loss of love, society and companionship and Ms. Hancock's alleged loss of enjoyment of life.

C. THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE AUTHENTICATED COPIES OF CHERIE HANCOCK'S HANDWRITTEN NOTES

1. Standard of Review

When a party complains on appeal of documents erroneously admitted into evidence at trial, the trial court's decision is reviewed for an abuse of discretion. Bower v. Bower, 758 So.2d 405 (Miss. 2000).

2. Cherie Hancock's handwritten notes were properly authenticated through comparison by the trier of fact as well as the distinctive characteristics of the notes.

The Plaintiffs' allegations of error regarding Ms. Hancock's handwritten notes in Defense Exhibit 6 actually constitute a two-pronged attack on both the authenticity and the admissibility of the notes. In the Mississippi Rules of Evidence, authenticity is governed by Rules 901 - 903. Admissibility of duplicates is discussed in Rules 1003 and 1004. Admissibility also involves consideration of relevance and guarantees of trust worthiness, as addressed in Rules 401 - 402 and Rules 801 - 804 of the Mississippi Rules of Evidence. Turning first to the issue of authentication, analysis of Miss. R. Evid. 901 establishes that Ms. Hancock's handwritten notes were permissibly authenticated by comparison and by distinctive characteristics.

Mississippi Rule of Evidence 901 reads in pertinent part as follows:

> "Rule 901. Requirement of Authentication or Identification
> (a) General Provision. The requirement of authentication or identification as a condition president to a admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule: . . . (3) *Comparison by Trier or Expert Witness.* Comparison by the trier of fact or by expert witness with specimens which have been authenticated. (4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.

The official comments to MRE 901(b)(3) and (4), are as follows:

> (3) *Comparison by Trier or Expert Witness.* Under Rule 901(3) it is not necessary for the judge to rule first that the exemplars are genuine before the expert compares them. . .
>
> (4) *Distinctive Characteristics and the Like.* The possibilities under this Rule are myriad. Letters or phone conversations disclosing knowledge peculiar to an individual may qualify as well as distinctive language patterns.

In addition to authentication through comparison of trier of fact and/or distinctive characteristics, the Mississippi Rules of Evidence also address circumstances under which duplicates are admissible. Rule 1003 of the Mississippi Rules of Evidence provides that "a duplicate is admissible to the same extent as an original unless (1) a genuine issue is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Also, Rule 1004 provides that the original document is not required in the instance in which originals "are lost or have been destroyed." As to admissibility, Cherie Hancock's handwritten notes constituted relevant evidence of her enjoyment of life, the presence and/or absence of society and companionship between herself and her family, as perceived by her own state of mind, and as such, were properly admitted into evidence by the trial court. See Miss. R. Evid. 401, 402, 803, 804.

In the case of Sewell v. State, 721 So.2d 129 (Miss. 1998), a criminal action involving forgery of absentee ballots, this Court extensively reviewed authentication requirements under Rule 901 of the Mississippi Rules of Evidence. In this case, it was alleged that Sandra Sewell knowingly notarized forged absentee ballots. Sandra Sewell, in turn, took the position that she had not signed her attesting signature to the absentee ballots. Id. at 132 (¶ 6). For this reason, the State in prosecution of Ms. Sewell hired a handwriting expert to provide an opinion as to whether the signatures of Sandra Sewell on the ballots in question were authentic. Id. at 132 (¶ 9). The

handwriting expert compared Ms. Sewell's signatures on the ballots to other samples, or exemplars, of Sewell's handwriting. Id. at 139 (¶ 54-56). Mississippi Supreme Court stated as follows regarding the authentication requirements for evidence:

> Miss. R. Evid. 901 governs the authentication requirements for evidence. "The requirement for authentication is . . . satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Miss. R. Evid. 901(a). Additionally, "[c]omparison by the trier of fact or by expert witness with specimens which have been authenticated" is permitted for authentication. Miss.R. Evid. 901(b)(3). "A person's handwriting may be authenticated by a handwriting expert or by a lay witness with prior familiarity with that person's handwriting." Hentz v. State, 542 So.2d 914, 917 (Miss. 1989).
>
> . . . , the Miss.R. Evid. permits the trier of fact, in this case, the jury, to compare specimens with authenticated specimens for determination of authenticity. See United States v. Fields, 923 F.2d 358 (5th Cir. 991), overruled on other grounds by United States v. Lambert, 984 F.2d 658 (5th Cir. 1993). Here, the writings. . . were admitted for the jury to compare with the questioned signatures. Beyond those writings, Sewell's signature appears on her "application for Notary Public Commission," and these documents was available for the jurors' comparison as Exhibit S-17.
>
> Third, the state cites a liberal preference for admission of evidence as the approach for authentication and identification under 901(a) on the federal level, after which our rule is patterned. "[T]here need be only a *prima facie* showing to the court, of authenticity, not a full argument on admissibility. Once a *prima facie* case is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence, not the court. The only requirement is that there has been substantial evidence from which they could infer that the document was authentic." (United States v. McGlory, 968 F.2d 309, 328 - 329 (3rd Cir. 1992)(quoting, Link v. Mercedes Benz of N. Am., 788 F.2d 918, 928 (3rd Cir. 1986)).

Sewell v. State, 721 So.2d 129, 139 - 140 (¶ 57 - 60).

In the present case, there were a number of exemplars of the Ms. Hancock's handwriting that were authenticated by friends and/or family members. Plaintiffs' Exhibits 7 -13 were authenticated through the testimony of the Plaintiff's daughter Candice Young. (TR. at page 442, lines 22 - page 446, line 20; page 447, lines 11 - 17; RE 342-347). Defense Exhibit 1, was a handwritten letter from Cherie Hancock to Donna Pigg which was authenticated through the testimony of Donna Pigg. (TR.

at page 496, line 29 - page 498, line1; RE 354-356). Therefore, the jury had a total of eight (8) handwritten letters from the Plaintiff upon which to make a comparison of the notes admitted as Defense Exhibit 6. The Mississippi Rules of Evidence allow and, in fact, liberally encourage such authentication by the trier of fact. In closing argument, the notes were simply described by the defense counsel as "notes that we put into evidence," and the defense counsel further referred to one of the notes as "one of the notes that the police found, law enforcement found when they were investigating." (TR 778, lines 21 - 29; RE 375). Thus, all that the notes were purported to be were notes from Cherie Hancock that were found during the sheriff's office investigation.

The Plaintiffs attempt to argue in brief that because no one testified as to where the notes were found or, who found them, or identified the alleged handwriting on the notes, the notes were not properly authenticated. However, these requirements imposed by the Plaintiffs for authentication are above and beyond what is required by the actual rules of evidence. As mentioned in the Sewell case, it is perfectly permissible to allow jurors to compare the purported writing to the other authenticated letters in evidence, to make their own judgment as to authenticity. Furthermore, the Rule provides that the contents of the notes themselves may be used to authenticate the notes as being written by Cherie Hancock. In this case, the admitted notes, contain details from which the jury could have concluded that they were authentic.

Moving to the issue of admissibility, the notes were relevant to the issue of Cherie Hancock's love, society, and companionship with her family as well as her enjoyment of life. In the case of Jackson v. State, 527 So.2d 654 (Miss. 1988), this court held that a note written some two (2) months prior to the victim's death containing a list of things the victim intended to do was nevertheless relevant and admissible on the issue of the state of mind of the victim. Id. at 656 - 657. In support of admissibility, the court observed that "where the fact that a particular statement was made is of

itself a relevant fact, regardless of the truth or falsity of such statement, the statement is admissible in evidence as an independently relevant fact." Id. at 656 (citing Tolbert v. State, 407 So.2d 815, 821 (Miss. 1981)). The trial court in Jackson affirmed the admissibility of the note, as evidence of the victim's state of mind.

In this case, Cherie's state of mind was relevant in general to establish the issue of her ongoing mental illness and the stressors that contributed to that illness. Furthermore, regardless of when the notes were written, they provide evidence relevant to Cherie Hancock's enjoyment of life and the society and companionship that existed between Cherie Hancock and her family members. Furthermore, references in the notes to Tommy having the "children, grandchildren and house," and Stirlin and "G.W." being able to draw Ms. Hancock's social security while they are in school, gives some temporal context for the notes as well as distinctive characteristics for authentication purposes.

Also, as a matter of fairness, Dr. Guild should not have been penalized for the fact that the original handwritten notes were lost by the Yazoo County Sheriff's Office. Besides being supported by Rule 1004 of the Mississippi Rules of Evidence, this case is similar to Carothers v. Love, 169 Miss. 250, 153 So. 389 (Miss. 1934), in which the attorney for a bank made a probate claim against the estate of Mrs. Alice Whitesides, and delivered the claim to the Chancery Clerk, who marked the probate on the docket of the estate. Id. at 390. However, the bank's claim was not actually placed by the clerk into the estate file, and therefore, the original was lost, and a carbon copy was introduced into the record. Id. It was argued by attorney for the Whitesides, that the bank's claim against the Whiteside Estate was void because the original probate claim was not included in the court's estate file. Id. In response to this argument, this court stated as follows:

> To sustain this contention would be to place it within the power of a chancery clerk to deprive a party probating a claim of its rights, should the clerk, through negligence or otherwise, fail to place the papers among the files. We do not think parties probating claims should suffer from the failure of clerks to place probated claims in

the files and keep them there.

Id. Likewise, in this case, Dr. Guild's right to present relevant evidence on Cherie Hancock's state of mind, enjoyment of life, and society and companionship with her family members should not be barred by the sheriff's office's failure to locate the original notes. To do so, when copies of the original notes have been made available, would work an injustice upon the Defendant.

According to the objection made by the Plaintiffs' counsel at the pretrial conference of the case, his objection was primarily based on the fact that he did not know when the suicide notes were written, and he did not know where they were found. (Pretrial TR at p. 39, line 18 - p. 42, line 23; TR at p. 622, line 27 - p. 624, line 11; RE 319-322, 362-364). However, the sheriff's report indicates that the notes were written by the victim, that the notes were found both at Ms. Hancock's mother's house and the marital home, and that the notes were seized by the investigating officer. (Defense Exhibits 4 and 5; RE 266-305). The Plaintiffs' attorney also explained to the court that he had spoken to Mr. Woods, and that the investigating officer did in fact find the notes in the these two places. (Pretrial TR at p. 39, line 18 - p. 42, line 23; RE 319-322). The handwritten report of Investigator Woods, submitted for the court's review and marked as identification only, corroborates that the notes were found in two places as part of the investigation. (Defense Exhibits 4 and 5; RE 266-305). The testimony from Ms. Willie Bell Hood, who worked at the sheriff's office, provided that the notes were in the file in the sheriff's office, and that she copied the notes, as well as the other documents in the file, and provided them to defense counsel. (TR at p. 616, line 11 - p. 617, line 13; RE 359-360). Ms. Hood indicated that it was a normal course of business for the sheriff's office to keep a file of its investigation, and that she was responsible for responding to requests for the file, and that in this case she did in fact copy and fax all of the information that she found in the file (TR 614, Lines 6 - page 617, Line 13; page 621, Lines 17 - 24; RE 358-360).

All this information together was a sufficient basis on which the trial court could decide that the notes were authentic and admissible. Therefore, the trial court did not abuse its discretion in admitting the notes into evidence at the trial of this matter.

D. THE TRIAL COURT PROPERLY DENIED THE PLAINTIFFS' MOTION FOR A NEW TRIAL, AS THE CUMULATIVE MATTERS ALLEGED WERE PROPERLY ADMITTED AND/OR CURED BY THE TRIAL COURT.

The errors actually complained of by the Plaintiffs are not supported by any case law, and furthermore, the propriety of the court's evidentiary rulings on these issues did not constitute an abuse of discretion.

1. The Defendant was entitled to comment upon the absence of Attorney Jim Herring at the trial of this matter; alternatively, any prejudice to the Plaintiffs was cured by the court's limiting instruction.

The Plaintiffs contend that the following comment made by defense counsel during opening statement was inappropriate:

> As Dr. Guild will tell you, we had talked to her, her lawyer and I. Mr. Herring was actively involved in the care of this lady because he was close to her. He had gotten close to her. Now we are not going to be able to have his testimony because the Plaintiffs have objected.

(RE 75; TR 171)(Appellant Brief at page 40). However, in the case of Fox v. State, 756 So.2d 753 (Miss. 2000), this Court explained when a witness is actually equally available to both parties as to make comment on the failure to call improper:

> In the 1946 Brown case, this court held that the Rule barring comment did not apply where a witness, while technically assessable to both parties, stood more available to the complaining party. In Brown, the court approvingly cited the Supreme Court of Missouri, in which that court reasoned that the mere fact that both parties could subpoena a witness did not make the witness equally available to them. Where a defendant fails to call a witness more available to him and presumptively in a closer relationship with him, the state is fully entitled to comment on the parties failure to call the witness. Ross, 603 So.2d 865 (citations omitted)(quoting Brown v. State, 200 Miss. 881, 27 So.2d 838, 841 (1946))

Fox v. State, 756 So.2d 753, 761 (¶ 30)(quoting Ross v. State, 603 So.2d 857 (Miss. 1992). The court further stated in Fox that "[t]he party that wishes to make a comment about a witness that was not called has the burden of persuasion to prove that the witness was not equally available." Fox v. State, 756 So.2d 753, 762 (¶ 32).

In this case, Dr. Guild actually attempted to depose Jim Herring, and the Plaintiffs in response to Dr. Guild's motion to compel the deposition, raised an objection on the basis of attorney/client privilege. (R.E. 62 - 65). Because Jim Herring was Cherie Hancock's attorney, it was not possible for the Defendant to depose Mr. Herring without the permission of the Plaintiffs. Obviously, Mr. Herring was much more available to the Plaintiffs as holders of Cherie Hancock's attorney/client privilege, then he was to the Defendant. Therefore, because Jim Herring's absence was caused by the Plaintiffs, it was not improper for defense counsel to comment upon his absence at trial. See also Bynum v. Swiss American of Mississippi, Inc., 367 So.2d 906, 908 - 909 (Miss. 1979)(discussing Brown v. State, 200 Miss. 881, 27 So.2d 838 (1946)); Jackson v. Brumfield, 458 So.2d 736, 738 (Miss. 1984).

Also, any possible prejudice to the Plaintiffs was cured when the court gave the jury a limiting instruction on the comments of defense counsel. In the case of Curtis v. Bellwood Farms, Inc., 805 So.2d 541, 543 - 544 (Miss. at 2000), the Mississippi Court of Appeals observed that "[b]ecause this court presumes that jurors will follow a trial court's instructions, we generally find that a trial court's admonishment to the jury to disregard an improper question and answer sufficient to cure any taint." Id. at page 543 (¶ 9). Regarding another statement of Defense counsel objected to by the Plaintiffs' attorney in Curtis, the trial court sustained the Plaintiffs' objection, and instructed the jury to disregard the statement. Id. at 544 (¶ 11). As to that comment, the court opined that "[i]t has long been held that sustaining an objection and instructing the jury to disregard the

statement is sufficient to preclude reversal for any improper question." Id. The court in Curtis decided that the trial court did everything possible to avoid any unfair prejudice resulting from improper statements; and therefore, the trial court did not abuse its discretion in refusing a new trial based upon the allegedly improper statements. Id.

Likewise, in this case, the court sustained the Plaintiffs' attorney's objection and instructed the jury to disregard the comment of defense counsel:

> As Dr. Guild will tell you, we had talked to her, her lawyer and I. Mr. Herring was actively involved in the care of this lady because he was close to her. He had gotten close to her. Now we are not going to be able to have his testimony because the Plaintiffss have objected.
>
> Mr. Kilpatrick: Judge, I'm going to object to that as improper opening.
>
> Court: Objection is sustained.
>
> Mr. Kilpatrick: I'm going to ask that the jury be instructed to disregard it, Your Honor.
>
> Court: Disregard that comment about the lawyer.
>
> Mr. Kilpatrick: I would move for a mistrial.
>
> Court: Overruled.

(TR 171, Lines 4 - 22).

The Plaintiffs have accused defense counsel of making the above comment despite prior instructions from the trial court to refrain from such comments before the jury. It is adamantly denied that the trial court ever made such an instruction, and there is no support anywhere in the record for Plaintiffs' claim that defense counsel ignored the trial judge's rulings. In fact, if such an instruction had been given as Plaintiffs claim, then one would have expected the Plaintiffs to make such an argument immediately at the time of the objection. Further, if such an instruction had been given, the trial judge certainly would have admonished defense counsel for disregarding her rulings.

The fact that neither of these things occurred should establish beyond any question that there was no outstanding order or instruction prohibiting the allegedly objectionable comment. As discussed in a subsequent portion of this brief in connection with the cross-appeal, the comment that was made was warranted given the Plaintiffs' successful opposition to Mr. Herring's deposition.

2. The trial court properly admitted Donna Pigg's testimony of communications which occurred between herself and Cherie Hancock.

The Plaintiffs allege that the conversations did not relate to Mrs. Hancock's "existing mental, emotional or physical conditions," and that the conversations were irrelevant to the issue of the Defendant's malpractice, and were therefore unfairly prejudicial, confusing, and misleading to the jury.

However, the Plaintiffs do not state which conversations this error is aimed at. On close review of the transcript, the Plaintiffs' attorney elicited, and the trial court allowed, over the Defendant's continuing objection, testimony from Cherie Hancock's daughter, Candice Young, regarding multiple conversations which occurred between Cherie Hancock and Candice Young (TR 429, lines 2-28; TR 432, line 1-29; TR 440, lines 4-441, line 27; RE 337-338, 340-341).[10]

During Candice Young's testimony, defense counsel made a continuing objection to hearsay of the conversations which occurred between Cherie Hancock and Candice Young. (TR at p. 429, lines 1 - 29; p. 432, lines 1-19; RE 337-338). The Plaintiffs' attorney took advantage of the court's allowance of conversations between Candice Young and Cherie Hancock as relevant to Cherie Hancock's state of mind. (TR at p. 439, line 25 - p.441, line 11; RE 339-341). Therefore, it is quite disingenuous for the Plaintiffs' attorney to contend that the hearsay exception for state of mind is not

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The Plaintiffs' attorney referred to conversation with Donna Pigg; however, it should be noted that at the point in time that the Plaintiffs' attorney made this objection, Donna Pigg had not testified in this case. Ms. Piggs testimony is found at TR485 - 523; some 40 pages after the Plaintiffs' attorney mentions the Pigg conversation at trial as a basis for allowing his own client to testify to conversations under the state of mind hearsay objection. (TR 440-441).

relevant to the conversations between the decedent and Donna Pigg, who actually saw the decedent every other day throughout her hospitalization at St. Dominic Hospital (TR p. 496, lines 5-10; RE 354), but, that this exception is applicable to the Ms. Hancock's daughter, whom Ms. Hancock only allowed to visit once. (TR p. 460, lines 5-22; RE 348).

Similarly, in the case of May v. State, 524 So.2d 957 (Miss. 1988), this court reviewed a case in which Elizabeth May was accused of shooting her husband James L. May to death in their home. Id. at 960. In making the decision that Mr. May's death was not a suicide, the law enforcement authorities considered testimony from at least one individual that she heard Mrs. May say that she tried to kill her husband. Id. at 964 -965. The court ruled that the statement was admissible to show intent, and the court further found that other testimony regarding similar statements made as far prior to the event as ten (10) months before Mr. May's death, were admissible because no contemporaneousness is required to show intent. Id.

In this case, Donna Pigg's testimony was relevant to the issue of enjoyment of life and society and companionship, which, like intent, does not have a strict requirement of contemporaneousness in order to be relevant. Furthermore, the only conversation between Cherie Hancock and Donna Pigg to which the Plaintiffs' attorney actually objected to at trial was the conversation in which Cherie told Donna that Tommy Hancock said that he wanted a divorce. (TR 492, lines 7 - 493, line 5; RE 350-351). As to Cherie Hancock's statement to Donna Pigg, the conversation is admissible to show Cherie Hancock's state of mind. M.R.E. 803(3). Furthermore, this conversation set in motion Cherie Hancock's meeting with Jim Herring and subsequent referral to Dr. Guild. (TR 493 - 495; RE 351-353). Therefore, under 803(3), this conversation was not only admissible to show Cherie Hancock's emotional state and mental condition, but also admissible to show the beginning of the plan, design, and feelings which resulted in her referral to see Dr. Guild. For these reasons,

the court properly admitted testimonial evidence of conversations between Cherie Hancock and Donna Pigg.

In the alternative, because many of Donna Pigg's statements regarding her conversations with Cherie Hancock and the difficulties Cherie experienced with her family were already included in medical records that had been discussed before the jury and/or admitted into evidence, any error in admitting the conversation was harmless, and does not constitute an abuse of discretion on the part of the trial court. Therefore, the trial court rightfully denied the Plaintiffs' motion for a new trial.

3. The trial court properly allowed Dr. Guild to testify to statements made by Cherie Hancock to him during the context of her treatment.

Lastly, the Plaintiffs argue that the trial court erroneously allowed Dr. Guild to reference statements made by Cherie Hancock to him which were not documented in her medical records. Interestingly, the Plaintiffs make this argument while acknowledging that Rule 803(4) of the Mississippi Rules of Evidence provides a hearsay exception for statements made for the purposes of medical diagnosis or treatment. See Bridges v. Kitchings, 820 So.2d 42 (Miss. 2002). While the Plaintiffs would like to limit the applicability of M.R.E. 803(4) to statements documented in a patient's medical records, the hearsay exception contains no such requirement or limitation. Furthermore, there is no case law to support the Plaintiffs' position on this issue. Rather, the absence of written documentation of Cherie Hancock's statements to Dr. Guild are a matter of the weight of evidence, not the admissibility of the evidence. It is the proper province of a jury to determine the weight of evidence. Furthermore, as mentioned in the previous argument relating to Donna Pigg's conversations, the trial court had already ruled that conversations with the decedent were admissible, and the trial court did not require documentation of those conversations with anyone, as the conversations were deemed admissible under M.R.E. 803(3) exception for state of mind.

Lastly, Ms. Hancock's statements made to Dr. Guild were part of his evaluation of her mental

state. The information he received from conversations with Ms. Hancock played a large part in his treatment of her mental state. Thus, it would have been improper to deny Dr. Guild the opportunity to explain the basis of his decision-making process while in a suit arising from the Plaintiffs' disagreement with that process.

Therefore, the trial court did not abuse its discretion in allowing Dr. Guild to testify to statements made by Cherie Hancock for the purpose of medical diagnosis and treatment. Furthermore, Dr. Guild's conversations with Cherie Hancock were relevant to describing her state of mind which was evidence of the upmost importance in this suicide wrongful death case.

CROSS APPEAL OF APPELLEE[11]

A. THE PLAINTIFFS' SUIT AGAINST DR. GUILD SHOULD HAVE BEEN DISMISSED, AS THE FACTS OF THIS CASE DO NOT SATISFY THE ELEMENTS OF THE IRRESISTIBLE IMPULSE DOCTRINE.

1. Standard of Review

When reviewing a trial court's decision to deny a motion for summary judgment, the appellate court must conduct a de novo review of the case. Spradlin v. Atlanta Casualty Co., 650 So.2d 1389 (Miss. 1995). Although the evidence must be reviewed in the light most favorable to the non-moving party, summary judgment should be granted if the court finds the movant is entitled to judgment as a matter of law. Spradlin v. State Farm Mutual Automobile Ins. Co., 150 So.2d 1383, 1385 (Miss. 1995)(citing Brown v. Credit Center, Inc., 444 So.2d 358, 362 (Miss. 1983)). Rule 56 of the Miss. R. Civ. Proc. provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits,

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While Dr. Guild strongly believes that the jury's decision should be affirmed, the court should alternatively affirm judgment in favor of Dr. Guild based on issues raised in his summary judgment motion before and at directed verdict. The other issues in the cross-appeal are raised only in the event the court determines that a new trial should be granted.

if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

2. The Plaintiffs' claims against Dr. Guild are barred under the Irresistible Impulse Doctrine.

In Shamburger v. Grand Casino of Mississippi, Inc./Biloxi, 84 F.Supp.2d 794, 798, the United States District Court for the Southern District of Mississippi considered a case in which James Shamburger committed suicide in his Louisiana apartment and his widow sued the Grand Casino alleging that the casino caused her husband's death. The court began responding to this argument by pointing out that suicide is generally a superseding cause precluding liability. Id. The court also observed that suicide is a common law crime in Mississippi. Id. (citing Nicholson on Behalf of Gollott v. State, 672 So.2d 744, 753 (Miss. 1996). The court then quoted the following language from the Fifth Circuit summarizing the American rule regarding compensation for suicide:

> [U]nder the American rule where the resulting insanity following an injury is such as to cause suicide through a voluntary willful choice determined by a moderately intelligent mental power which knows the purpose and physical effect of the suicidal act, even though the choice is dominated by a disordered mind, there is a new and independent agency which breaks the chain of causation arising from the injury, and no compensation can be had." Shamburger at 798 (quoting Voris v. Texas Emp Ins. Assn., 190 F.2d 929, 932-33 (5th Cir. 1951) (emphasis added), cert. denied, 342 U.S. 932, 72 S. Ct. 376, 96 L.Ed. 694 (1952)).

Acknowledging exceptions to the common law rule, the district court recognized that Mississippi does allow recovery "if, at the time of suicide, the decedent was acting under an irresistible impulse proximately caused by the intentional wrongful conduct of the defendant." Shamburger at 798. Based on this Irresistible Impulse Doctrine as announced by the Mississippi Supreme Court in Richardson v. Edgeworth, 214 So.2d 579 (Miss. 1968), the Shamburger court concluded that the plaintiffs could not recover under the Irresistible Impulse Doctrine because they did not produce expert testimony establishing that the decedent committed suicide as a result of an irresistible impulse. Shamburger at 799. The plaintiff's expert testified that "the threat of going to

jail caused an irresistible impulse to arise in Mr. Shamburger due to mental stress," but the expert's testimony also indicated that Shamburger ultimately understood the consequences of his actions. Id. at 800. The court applied the following distinction to the facts and opinions presented in Shamburger's case:

> ... the legally dispositive distinction to be made by the Court is that between a mental "condition", **such as depression**, and a mental "illness". Actions caused by a mere mental condition are deemed volitional and therefore sever the causal chain linking suicide to wrongful conduct. [emphasis added]. Id. at 799.

The court then concluded that because "stress" was more akin to a mental condition as opposed to a mental illness, Shamburger's actions did not fit within the meaning of "irresistible impulse." Id. at 800.

The Mississippi Court of Appeals followed the Shamburger decision in Collums v. Union Planters Bank, 832 So.2d 572 (Miss. App. 2002). In Collums, the widow of Curtis Collums filed a wrongful death suit against Union Planters Bank for causing or contributing to her husband's suicide. Id. at 575 (¶ 1). Union Planters Bank had agreed to finance Flex One, a health club owned and operated by Curtis Collums and his wife. Id. (¶ 2). A few years after opening the club, Flex One began having financial difficulties as early as April of 1996, and the bank ultimately started foreclosure proceedings in February of 1998. Id. (¶ 3-4). A few days prior to committing suicide, Curtis Collums faxed two copies of his life insurance policies to Jim McNeely, an employee of Union Planters. Id. (¶ 5). Curtis Collums told McNeely the life insurance policies documented an "insurance settlement" that would enable Collums to comply with McNeely's ultimatum that the loan be brought current. Id. When McNeely asked Collums about the settlement, Collums told McNeely, "You don't want to know the details." Id. Curtis Collums took his own life on March 6, 1998. Id. at 576 (¶ 6).

The plaintiff asserted numerous tort claims against Union Planters based on the bank's

closing the Flex One account and taking funds. Id. at (¶ 8-9). The plaintiffs argued that these alleged tortious acts proximately caused Curtis Collums' wrongful death. Id. at (¶ 8). In addition to finding against the plaintiff on the alleged torts, the court in Collums applied the Irresistible Impulse Doctrine and found that the plaintiffs did not have any right of action against the bank because (1) no irresistible impulse forced the decedent to commit suicide and (2) the bank was not guilty of any intentional acts to harm the decedent. Id. at 578 (¶ 16-17). The plaintiffs presented an affidavit from a clinical psychologist in Memphis stating that after interviewing Curtis' wife and daughter, he was of the opinion that (1) Curtis was severely depressed during the two months prior to his suicide, (2) his level of depression is generally recognized as a mental illness in the area of clinical psychology, and (3) Curtis took his own life due to an irresistible impulse to commit suicide caused by the mental illness of depression. Id. at 578 (¶ 15). However, the Court of Appeals, again following Shamburger, defined irresistible impulse as "a failure to control the body and not be able to understand the consequences of certain actions." Id. at (¶ 16). Finding that the actions of Curtis Collums did not conform to this definition, summary judgment was granted in favor of Union Planters Bank. Id. at 579 (¶ 19).

According to Shamburger and Collums, Mississippi only permits recovery for suicide if the elements of the Irresistible Impulse Doctrine are implicated in the case. In a nutshell, the Irresistible Impulse Doctrine allows compensation in a wrongful death action based upon the decedent's suicide if the suicide is the result of (1) an irresistible impulse (2) caused by the defendant's intentional tortious act. In the present case, no intentional wrong on the part of Dr. Guild is even alleged in the Complaint of the wrongful death beneficiaries. Therefore, the facts pled by Cherie Hancock's wrongful death beneficiaries do not place Cherie's suicide within the Irresistible Impulse Doctrine, and the Plaintiffs' claims should have been dismissed when Defendant moved for summary

judgment or at motion for directed verdict.

Further, Cherie Hancock's suicide was not the result of an "irresistible impulse"as defined by Shamburger and Collums. Shamburger specifically excludes from the definition of "irresistible impulse" suicide attributable to depression because in a legal sense, depression is a "mental condition" and not a "mental illness." Since Cherie was suffering from depression, her suicide, much like that of James Shamburger, was a volitional act. Also, Plaintiffs' Exhibit 14, a check mailed by Ms. Hancock **on the date of her suicide,** establishes that her suicide was a deliberate act of which she was well aware of the consequences. (TR p. 447, lines 3-17; RE 347). Thus, Ms. Hancock's self-inflicted gunshot wound does not fall within the Irresistible Impulse Doctrine and her suicide severs the causal chain from any action or inaction on the part of Dr. Guild. The trial court should therefore have granted summary judgment or directed verdict dismissing the Plaintiffs' claims.

B. THE TRIAL COURT ERRED IN DENYING DR. GUILD'S REQUEST TO DEPOSE THE DECEDENT'S DIVORCE ATTORNEY, JIM HERRING, WHO HAD IN FACT REFERRED CHERIE HANCOCK TO DR. GUILD.

During the pretrial discovery in this case, the Defendant attempted to depose the Honorable Jim Herring, the attorney handling Ms. Hancock's divorce. (RE 62-65). It is undisputed that Attorney Herring was the individual responsible for referring Cherie Hancock to Dr. Guild in the first place. (RE 16; Record at 306). Jim Herring was also involved in implementing the discharge plan for Ms. Hancock. Thus, because Jim Herring was personally involved in initiating the treatment sued upon by the Plaintiff and further responsible for performing part of the discharge plan which the Plaintiffs alleged Dr. Guild not to have implemented, Jim Herring's testimony was highly relevant in this case.

When the Defendant moved during pretrial discovery to compel the deposition of Jim

Herring, the Plaintiffs successfully raised the attorney/client privilege to prohibit the deposition. (RE 62-65). Because of the court's ruling disallowing the deposition of Jim Herring, the Defendant was completely barred from questioning and receiving relevant documents from a key witness in this case. (Record at 256 - 257; RE 238-239). Under this Court's ruling in Hewes v. Langston, 853 So.2d 1237 (Miss. 2003), the trial court's blanket order against the deposition of Jim Herring was improper.

In Hewes, the Court required "a *de novo* review of the documents at issue to determine whether they [were] protected or not." Id. at 1247 (¶ 39). Instead of espousing a blanket denial barring production of all attorney's documents, this court determined that the better alternative was to review privileged items on an item-by-item basis. Id.

This is the approach that the trial court should have taken with respect to Dr. Guild's request to depose Jim Herring. The Defendant should have been allowed to at least question Jim Herring on unprivileged communications, communications between himself and Dr. Guild and/or Ms. Hancock's parents, and communications between Mr. Herring and Ms. Hancock which also involved Dr. Guild's presence. The Defendant should also have been allowed to questions Jim Herring regarding his observations of Ms. Hancock's behavior and the behavior of her family towards her. Furthermore, there may have been unprivileged documents within Jim Herring's possession or unprivileged documents of which Jim Herring was aware that the Defendant should have been allowed to review. Therefore, the trial court's decision to deny the Defendant any access whatsoever to question Jim Herring resulted in unfair prejudice to Dr. Guild and should be reversed by this court on appeal, in the event that judgment for the Defendant is not allowed to stand.

C. THE TRIAL COURT ERRED IN DENYING JURY INSTRUCTIONS WHICH WOULD HAVE INSTRUCTED THE JURY TO INFER THAT JIM HERRING'S TESTIMONY WOULD HAVE BEEN UNFAVORABLE TO THE PLAINTIFFS' CASE.

Having succeeded in precluding the Defendant from obtaining any pretrial discovery from Jim Herring, the Plaintiffs' objection to Instruction D-9 (RE 49) should have been denied by the trial court. Because the Plaintiffs held and exercised the right to disallow discovery from Jim Herring on the basis of attorney/client privilege (RE 62-65), the jury should have been informed of this fact and allowed to infer that Jim Herring's testimony would have been unfavorable to the Plaintiffs. The Plaintiffs' decision to wait until the trial of the case to finally lift the attorney/client privilege and allow the Defendant to question Jim Herring came too late to allow the Defendant any meaningful opportunity to incorporate Jim Herring's knowledge and/or relevant documents into the defense of Dr. Guild. Thus, at the very least, having been barred from pretrial discovery, the Defendant was entitled to an inference instruction. This Court reached such a conclusion in the case of Jackson v. Brumfield, 458 So.2d 736, (Miss. 1984).

In Jackson v. Brumfield, the court found that in a personal injury case where a plaintiff during pretrial discovery has expressly refused to waive the physician/patient privilege, it is not necessary for the Defendant to subpoena the same physician before the trial court may grant an instruction inferring that the physician would have given unfavorable testimony. In support of this ruling, this court wrote that:

> It would be vain an unnecessary burdensome, as noted by the trial judge, to require a party to subpoena physicians to court when the plaintiff has already invoked the physician-patient privilege.

Jackson v. Brumfield, 458 So.2d 736, 738.

Likewise, in this case, counsel for Dr. Guild was entitled to either an inference instruction or the opportunity to make some comment to the jury regarding Jim Herring's absence at the trial

of this case, because the Plaintiffs had prohibited the deposition of Jim Herring during pretrial discovery by raising the attorney/client privilege. The trial court's denial of an inference instruction was erroneous, but need be corrected only if a new trial is ordered.

CONCLUSION

The jury verdict in this case was a definitive, rightful conclusion to a suit which should never have been brought. The logical and legal inconsistencies in the Plaintiffs' case is best exemplified by the fact that the same attorney and two wrongful death beneficiaries successfully convinced the chancellor in a divorce hearing that Dr. Guild's concerns for Ms. Hancock's mental health were unfounded, and then turned around and sued Dr. Guild for allegedly causing Ms. Hancock's suicide by failing to treat Ms. Hancock for a threat of suicide that they themselves either did not recognize or recognized and discarded, which is what they want to accuse Dr. Guild of doing.

The jury sifted through all of the testimony and documents in this case and reached a decision in favor of the Defendant. This decision should not be disturbed, and the Plaintiffs' appeal should be denied because Dr. Guild committed no negligence in this case.

Respectfully submitted,

DONALD C. GUILD, M.D., DEFENDANT

BY: _____

WHITMAN B. JOHNSON III, M[redacted]

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CERTIFICATE OF SERVICE

I, Denise C. Wesley, the attorney for the Defendant/Appellee/Cross-Appellant, Donald C. Guild, M.D., do hereby certify that I have this day delivered, properly addressed and postage prepaid, by United States mail, a true and correct copy of the above and foregoing Brief of Appellee to the following:

Honorable Jannie M. Lewis
Yazoo County Circuit Court Judge
Post Office Box 149
Lexington, MS 39095

Ronald M. Kirk, Esq.
Post Office Drawer N
Flora, MS 39071

SO CERTIFIED, this the 16th day of October, 2007.

Denise C. Wesley

DENISE C. WESLEY