IN THE SUPREME COURT OF MISSISSIPPI

Nos. 2004-CA-02532

CANDICE YOUNG, Personal Representative of the Wrongful Death Beneficiaries of CHERIE S. HANCOCK, Deceased

Plaintiffs/Appellants

versus

DONALD C. GUILD, M.D.

Defendant/ Appellee

APPELLANT/CROSS-APPELLEE CANDICE YOUNG'S REPLY AND RESPONSE BRIEF TO APPELLEE/CROSS-APPELLANT DONALD C. GUILD, M.D.'S BRIEF

On Appeal from the Circuit Court of Yazoo County, Mississippi

ORAL ARGUMENT REQUESTED

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A. The trial court's failure to give an apportionment instruction is reversible error.

"The jury must be instructed on all material issues presented in evidence." Eckman v. Moore, 876 So.2d 975, 982 (Miss.2004). In this case, Dr. Guild, not the plaintiffs, presented and argued the question of the plaintiffs' contributory fault in this case and argued it to the jury. In a case where evidence or testimony indicates more than one contributing cause of injury, "[i]t is... erroneous to instruct the jury in such a manner as to make it appear to the jury that a single cause must be established as a proximate cause of the accident." Pevey v. Alexander Pool Co., 139 So.2d 847, 851 (Miss.1962). As stated in Peterson v. Ladner,[1] and more recently in Coho Resources, Inc. v. Chapman,[2] it is reversible error not to give an apportionment instruction where there is evidence or argument of contributory or comparative fault. Because the defendant in this case zealously argued the fault of the plaintiffs as a cause of the decedent's death, the trial court's failure to give an apportionment instruction was reversible error.

1. Dr. Guild pursued a defense of contributory or comparative fault before and during trial.

Given the vigor with which Dr. Guild's attorney pointed the finger at the plaintiffs during trial, it is most disingenuous for Dr. Guild now to suggest that the plaintiffs' request for an apportionment instruction resulted from an attempt to "apportion[] fault to themselves"[3] and that no instruction was warranted because "the Plaintiffs did not put on any proof of contributory

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[1] 785 So.2d 290 (Miss.App.2000)

[2] 913 So.2d 899 (Miss.2005).

[3] Appellee's Brief, p. 26.

negligence,"[4] as though it was the plaintiffs who were engaged in an effort to reduce the amount of their own recovery during trial. To see the origin of the comparative fault issue in this case, the Court need look no further than pre-trial order agreed to by the parties and entered by the trial judge. There, Dr. Guild poses the classic case of comparative fault between plaintiffs and the defendant by asserting that two contested issues of fact are:

> B. Whether Dr. Guild's care and treatment of Ms Hancock proximately caused her death; [or]
>
> D. Whether the Plaintiff's voluntary actions negligently caused Cherie Hancock's death[.]

RE-17.[5]

True to his part of the pre-trial order, Dr. Guild endeavored to carry his burden of showing how the plaintiffs' "voluntary actions negligently caused Cherie Hancock's death." At trial Dr. Guild's attorneys repeatedly read from notes taken by other doctors and nurses, to the effect that Mrs. Hancock's depression resulted from being mentally and physically abused by her family members, the plaintiffs, right up to the day of the divorce proceeding at which Dr. Guild voiced his concern about suicide. *See* Appellants' Initial Brief, pp. 31-32. In closing argument, one of Dr. Guild's attorneys summed up those records and told the jury that if they looked at them during deliberations "what you will be able to see is that the missing link in this picture is that Cherie felt like she was being mentally and emotionally abused, not just by her husband, but by her children as well." RE-179. The defendant's presentation also included reading a suicide note that specifically addressed Tommy Hancock, the decedent's husband, and suggesting to the jury later, in closing argument, that

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[4] *Id.* at 25.

[5] Throughout this brief, "RE" refers to the appellants' record excerpts.

"[n]obody will ever know" why she decided to kill herself "*[u]nless you want to look at the notes we put into evidence, and maybe this explains it.*" RE-187 (italics added). Another note, also addressed to Tommy Hancock and read to the jury, stated that "you killed me and in my eyes, that's right **you made me pull the trigger**." RE-198 (second emphasis added).

In his response brief, Dr. Guild does not address this fair and straightforward characterization of his own defense as one averring the Plaintiffs' comparative fault. Instead, he accuses the plaintiffs of taking a position contrary to their interrogatory response that none of them "attempted to make Mrs. Hancock's mental illness more severe or violent." SF Brief, p. 25. If anybody has taken a contrary position, and done so with unusual brazenness, it must be the defendant in claiming that he did not inject the plaintiffs' comparative fault into this case, the plaintiffs did. The defendant's answer,[6] the pre-trial order, the copious excerpts from the defense's opening and closing arguments and the testimony it adduced in trial all show who was arguing comparative fault and why. The plaintiffs respectfully submit that it greatly impeaches the credibility of Dr. Guild's argument against the necessity of an apportionment instruction for him to suggest otherwise.[7] Indeed, in light of the evidence he presented and the way it was argued to the jury to create an implication of fault against the plaintiffs, it does Dr. Guild little credit now to argue that no apportionment instruction was necessary because *the plaintiffs* did not put on any evidence of comparative fault.

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[6] *See* RE-13.

[7] The defendant is also mistaken in suggesting to the Court, without actually arguing it, that the plaintiff cannot assign error on this issue because no written, proposed instruction on apportionment was offered. The record shows that the plaintiffs' counsel verbally proposed an apportionment instruction, including its contents, while the parties were arguing jury instructions before the Court. RE-174; *see generally* RE-170 through 177. This attempt to cast doubt on whether the plaintiff preserved this issue for appeal is without merit.

2. This Court's precedent requires reversal for failure to give an apportionment instruction.

The remainder of Dr. Guild's argument about the proper application Mississippi's law of comparative fault is as fundamentally wrong as his argument that the plaintiffs wanted their recovery reduced is transparently false. Dr. Guild argues that the defense verdict rendered in his case moots the necessity of the requested instruction on apportionment. According to the case on which Dr. Guild relies the heaviest in his brief, a defense verdict is not an escape from the trial court's failure to instruct the jury on apportionment of fault. In Coho Resources, Inc. v. Chapman, the defendant argued that even with an apportionment instruction, "the result would not change because [the defendant] was included in the apportionment process and the jury allocated zero fault to him." Coho Resources, 913 So.2d at 912. The Court soundly rejected that argument. Instead, the Court prefaced and concluded its opinion by stating that

> **our primary reason for reversal here is the trial court's reversible error in refusing to instruct the jury to consider [a non-party's] negligence in apportioning fault between the participants.**

Coho Resources, 913 So.2d at 901, 913 (emphasis added). The Court should reach the same conclusion in this case.

The plaintiffs recognize that there is no way to discern after the trial what degree of fault the jury thought Dr. Guild really had in the death of Mrs. Hancock – and that is why it was reversible error not to instruct the jury that they must assign percentages of fault among the plaintiffs and defendant if they found that the "fault" for Mrs. Hancock's death was shared. The case law and statutes of this state that address contributory negligence and apportionment of fault have been enshrined to avoid uncertainty in a verdict about comparative or contributory fault where evidence of it is submitted at trial. *See* Coho Resources, 913 So.2d at 912 (noting that "the jury wanted to

include Sauls in the apportionment process"). That uncertainty is addressed, and hopefully eliminated, through a clear instruction on apportionment of the fault of all parties and non-parties alleged to have been participants in an event that resulted in injury. The Mississippi Legislature has declared it: "All questions of negligence and contributory negligence shall be for the jury to determine." Miss.Code Ann. § 11-7-17. And it is worth restating exactly what the apportionment statute has to say:

> As used in this section, **"fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons**, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent.

Miss.Code Ann. § 85-5-7(1)(emphasis added). Under this statute and the case law construing it, just because a jury was without the benefit of an apportionment instruction does not mean that the jury considered a participant to be without fault. As one of this Court's seminal cases on the allocation of fault under § 85-5-7 states, "*[f]ault* and *liability* are not synonyms." Mack Trucks, Inc. v. Tackett, 841 So.2d 1107, 1114 (Miss.2003). Indeed, given Dr. Guild's own comparative fault defense, the jury's express verdict, "We, the jury find for the defendant...."[8] does not necessarily equate to his self-serving restatement of the verdict that "the jury found that Dr. Guild was not liable for *any negligence at all*...." Appellee's Brief, p. 25 (italics added). Dr. Guild has no basis for making that leap other than his hope that that is what the jury meant. The jury may just as well have meant that Dr. Guild was not faultless but only less at fault than the plaintiffs. In such a case, the plaintiffs would be entitled to recover for that portion of the damage that Dr. Guild caused. But that possibility, mandated by Mississippi law, was not given to the jury. Instead, it is probable that Dr.

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[8] RE-53-54.

Guild shared some blame for Mrs. Hancock's death, but because of the instructions the jury received, he owes nothing for it. That construction of the verdict, which is entirely probable given the evidence presented by both sides,[9] is unsupportable as a matter of law.

When the defendant put on his evidence of alleged mental and physical abuse by the plaintiffs, he was not, as he now suggests, only trying to rebut the plaintiffs' evidence of Mrs. Hancock's loss of enjoyment of life and thus reduce the amount he would owe if the jury found against him. The plaintiffs do not dispute that might have been part of the defendant's purpose in presenting that evidence, but, again, the pre-trial order and the clear tenor of the argument about that evidence at trial impeach Dr. Guild's current position that he only meant to mitigate damages. The contested factual issue of the value of the plaintiff's loss of enjoyment of life sits in the pre-trial order right alongside the defendant's contested issue of "[w]hether the Plaintiff's voluntary actions negligently caused Cherie Hancock's death." RE-17. By his own formulation, then, the defendant's evidence that the decedent's family treated her poorly or abusively goes to *both* causation and damages.[10] His point in his response brief that he meant only to address damages is ill-considered and contradicted by the record.

Dr. Guild also argues that § 85-5-7 requires "actionable conduct" by the defendants to bring comparative fault and apportionment into play. Dr. Guild cites no authority for this proposition.

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[9] It is worth noting that Dr. Guild does not argue that his summary judgment motion should have been granted for a lack of evidence on which a jury might find him at fault. It is undisputed that evidence supporting both ways was presented – a circumstance that mandates instructing the jury on apportionment of fault in Mississippi.

[10] During the debate over whether to include an apportionment instruction, Dr. Guild's own attorney argued that, if anything, causation and damages should be considered separately and that his purpose was to argue the former. "All I have to talk about is what pushed her over the edge, so to speak. And I think I'm certainly entitled to do that. And that doesn't have anything to do with damages." RE-172.

This lack of authority is most likely due to the broad definition of the statute that "'fault' means an act or omission of a person which is a proximate cause of injury or death to another person or persons... including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn." Miss.Code Ann.§ 85-5-7(1). The Legislature's definition of "fault" is more expansive than "actionable conduct." This distinction is seen in the Court's well-known holdings that immune parties – who, by definition, can have no "action" brought against them for their "conduct" – must be included in jury instructions on the apportionment of fault even though they cannot be held liable. "Immunity from liability does not prevent an immune party from acting or omitting to act." Mack Trucks, Inc. v. Tackett, 841 So.2d at 1114.

Furthermore, Dr. Guild's own characterization of the plaintiffs' conduct in the pre-trial order as "voluntary actions [that] negligently caused Cherie Hancock's death" falls squarely within the definition of "fault" in § 85-5-7. Under that statute, Dr. Guild had the right to prove the plaintiffs' alleged fault in his own defense, but, having availed himself of that right, he cannot now argue that there could be no comparative fault because no "actionable conduct" was ever alleged against them. That position is particularly untenable since he framed the question as one of "negligent caus[ation]" in the pre-trial order himself. Dr. Guild is obviously trying to have it both ways here, playing with the meanings of "fault" and "tort liability"[11] as though there is some ambiguity between them. There isn't: "*[f]ault* and *liability* are not synonyms,"[12] despite the defendant's attempt to equate them. As the Court in Mack Trucks stated, § 85-5-7 enshrines an "elementary difference between fault and liability" and requires only that the former be shown to require apportionment. *Id.* at 1114 n.1.

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[11] Appellee's Brief, p. 27.

[12] Mack Trucks, Inc. v. Tackett, 841 So.2d at 1114.

Finally, the plaintiffs recognize that it is unusual to have a plaintiff, not a defendant, argue that a fair trial was thwarted by the failure to instruct the jury about allocation of fault. It is unusual, but it does not affect the proper analysis of the issue, which, despite Dr. Guild's attempts to complicate it, remains fairly simple in this appeal. The fundamental considerations of procedural and substantive fairness to which this Court has spoken in its seminal opinions on the allocation of fault still obtain. In Estate of Hunter v. General Motors Corp,[13] this Court stated that "the [apportionment] statute serves to reduce the extent to which one defendant may be held liable for the negligence of another." Estate of Hunter, 729 So.2d at 1274. The reasoning in Hunter applies with as much force to a plaintiff's right to recover for the damage that the defendant caused as it does to a defendant's right to avoid paying for what it did not cause. In this case, the jury instructions did not ensure the plaintiffs' right to recover for the portion of damage they did not cause. Therefore the judgment below should be reversed and a new trial ordered.

B. The trial court's jury instructions were abstract as a whole.

Dr. Guild's response to the plaintiffs' argument that their fact-based theory of the case was omitted from the jury instructions – or, put another way, that the instructions were abstract – relies very heavily on the Mississippi Court of Appeals' recent opinion in Beckwith v. Shah.[14] Citing that case, Dr. Guild states that "*one of* the characteristics of an abstract instruction is the failure to instruct the jury to do anything." Appellees' Brief, p. 17 (italics added). However, that is not the only characteristic of an abstract instruction. As the dissent in Beckwith pointed out, the Mississippi Supreme Court has long held that

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[13] 729 So.2d 1264 (Miss.1999).

[14] 964 So.2d 552 (Miss.App.2007).

> [t]he test to determine whether or not an instruction is abstract is to determine whether or not the instruction relates to facts shown by the evidence on the issues involved in the case. 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 by the Court.

Beckwith, 964, So.2d at 560 (Chandler, J., dissenting)(quoting Freeze v. Taylor, 257 So.2d 509, 511 (Miss.1972)). **The jury instructions given in this case fail this test: they are devoid of any specificity that could "direct the jury's attention to the particular conduct which [the plaintiff] contended was negligent."** McWilliams v. City of Pascagoula, 657 So.2d 1110, 1112 (Miss.1995) (emphasis added); *see* Jury Instructions, RE-22 through 52. "Claims of negligence must be founded upon particular acts or omissions, rather than general assertions that the defendant failed to exercise ordinary care, and jury instructions must be crafted with equal specificity." McWilliams, 657 So.2d at 1111. Instructions such as these that merely recite the basic elements of a negligence claim but do not "direct the jury's attention to the particular conduct which [the plaintiff] contended was negligent"[15] constitute reversible error.

Both parties have an interest in hearing the trial court give fact-specific instructions.[16] Where, as here, the jury instructions as a whole are devoid of any connection between fact and law to guide the jury, neither party has had its theory of the case fairly presented and the jury has been left to guess, or, as the instructions in this case state, to decide the case on the basis of what the jury "believes." *See* RE-40. With instructions like these, "[t]here is a danger that... the jury might grasp any act which it felt constituted a lack of reasonable care and adjudge the defendant guilty of

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[15] *Id.* at 1112.

[16] "Both parties have the right to embody their theories of the case in the jury instructions provided there is testimony to support it, but only 'if made conditional upon the jury's finding that such facts existed.'" Reese v. Summers, 792 So.2d 992, 994 (Miss.2001)(citations omitted).

negligence." Beckwith, 964, So.2d at 560 (Chandler, J., dissenting). Indeed, the trial court's instruction to this jury to decide the case for negligence on the basis of what it "believes" squarely meets the definition of an abstract instruction. "Jurors may not be left to guess or speculate as to which of the defendant's acts or omissions might have been negligent." McWilliams, 657 So.2d at 1111. Under this Court's precedent defining abstract instructions and the uncertainty they create, there should be a new trial with factually concrete instructions such as those submitted by the plaintiffs as Instructions P-5 and P-6. *See* RE-33 through 35.

In McCarty v. Kellum, 667 So.2d 1277 (Miss.1996), the Court gave an important caveat that an abstract instruction is not *per se* reversible *if* the instructions as a whole "provide the jury with appropriate facts and specific standards." Kellum, 667 So.2d at 1288. The "overarching concern is that the jury was fairly instructed and that each party's proof-grounded theory of the case was placed before it." Splain v. Hines, 609 So.2d 1234, 1239 (Miss.1992). Here, the total absence of either party's theory of the case distinguishes this case from the result in Kellum and, by extension, from the Beckwith majority opinion that relied on Kellum. In those cases, the instruction challenged was found to be abstract but as a whole the instructions were found to instruct the jury on the law adequately. The line of cases to which Reese and McWilliams, *supra*, belong make clear that instructions are "adequate" if somewhere in the instructions the jury receives guidance on the application of law to specific *facts* that are alleged as the basis of liability. That condition would have been met in this case if the plaintiffs' proposed instructions, or some version of them, had been accepted. Without them, however, the whole body of instructions is a vague outline of a negligence action against a doctor whose patient committed suicide. There is not a single sentence that "directs the jury's attention to the particular conduct which [the plaintiff] contended was negligent." McWilliams, 657 So.2d at 1112.

It is ironic, then, that the defendant objects to the plaintiffs' proposed instructions for being too fact specific. There is nothing to this argument: the factual assertions from the plaintiffs' proposed instructions that Dr. Guild attacks are just that – factual assertions for the jury to accept or decline. The pages of argument that Dr. Guild spends in trying to recast these factual assertions as "comments on the evidence" elide the fact that there was evidence supporting the theory of the case put forth in instructions P-5 and P-6. The plaintiffs' expert testified that under the reasonable standard of care, Dr. Guild did not make an adequate suicide risk assessment. *See* RE-99 through RE-103. The language of proposed instructions P-5 and P-6 reflect this evidence. The jury would decide for itself whether Dr. Guild's assessment was adequate or comprehensive enough to meet the standard of care. Likewise, it would decide whether the environment into which Mrs. Hancock was discharged was "supportive" enough to reduce the risk of the suicide that Dr. Guild had already foreseen when he testified at the Chancery Court hearing. Whether the defendant recognizes it or not, he is simply arguing against this evidence when he attacks these instructions – which is exactly what he would do at trial. The defendant's arguments against these assertions of fact in the instructions are of the character of cross-examination, or closing argument. The defendant, in his appellate brief, seems confident that he can reduce the credence that the plaintiffs' factual evidence holds for a jury. But his appellate brief is not the time for that. A new trial, which should be granted because the instructions are devoid of the factual specificity required under this Court's precedent, is the time for the defendant to argue the evidence.

C. The handwritten notes were never authenticated.

A couple of clarifications about the trial court's proceedings on the authenticity of the three handwritten notes of the decedent are in order. The main challenge to the notes' admissibility was their authenticity; likewise, the only arguments that the defense gave in response were based on

Miss. Rule of Evid. 901, the rule governing (and requiring) authentication of documentary evidence.[17] The defense did not, as it does now, argue the application of Rules 1003, 1004, 401, 402 or 801-804. Therefore the defendant's reference to those rules on appeal should be disregarded.

Relying on Rules 901(b)(3) and (b)(4), the defense argued that

> we've got internal characteristics, we have got handwriting here that the jury – we've got authenticated specimens that the jury can compare with this one to make a determination if Ms. Hancock wrote that.
>
> It is an issue of fact, authentication can be an issue of fact to the jury as long as there is evidence that would support a finding.

RE-160. The authentication by comparison that the defendant advocated at trial and now on appeal is unreviewable because it never happened. It is patently false for the defendant to state that "Cherie Hancock's written notes were properly authenticated through comparison by the trier of fact as well as the distinctive characteristics of the notes." Appellee's Brief, p. 29. That *could* have happened if the trial court had ordered it. But nobody – not the judge or the jury – made a finding as to the authenticity of the contested notes. Instead, the judge made a *sua sponte* finding that the notes were from "a file that was kept in the regular course of the sheriff's department that related to the suicide of Cherie Hancock." RE-161. This ruling is an invocation of the hearsay exception of Miss.Rule of Evid. 803(6), an exception that is still subject to the authentication requirement of Rule 901. Whether that requirement was met in these three notes was argued but never decided. The defense asked the court to avail itself of the jury's assistance on the question of authenticity, but the court declined and sent the notes to the jury as though their authenticity had been secured.

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[17] In their initial brief, the plaintiffs erroneously credited the defendant with arguing that the notes should be admitted under Miss.Rule of Evid. 803(6). *See* Appellants' Brief, p. 38. The record discussed in this section shows that the trial court fashioned that reasoning *sua sponte*. The defendant never argued it.

"The discretion of the trial court must be exercised within the boundaries of the Mississippi Rules of Evidence. Under M.R.E. 901, authentication and identification are conditions precedent to admissibility." McDonald v. State, 881 So.2d 895, 902 (Miss.App.2004). By admitting unauthenticated documents into evidence, the trial court abused its discretion. This resulted in prejudice to the plaintiffs, inasmuch as the notes were argued by the defense as evidence of at least one plaintiffs' contributory fault in the death of the decedent. Therefore the court's error was reversible, not harmless, and a new trial should be granted.

D. The trial court committed cumulative errors that warrant reversal.

Even if the errors discussed at pages 40-43 of the plaintiffs' initial brief are found to be harmless, their presence with the reversible errors discussed above creates a cumulative effect that makes a new trial necessary. *See* Estate of Hunter, 729 So.2d at 1279-80. The plaintiffs were deprived of their right to have the jury informed of its duty to apportion comparative fault. They were deprived of their right to have the jury informed of their theory of the case and the proper application of specific facts to law. And they were prejudiced by the admission of unauthenticated notes that the defendant used to blame the plaintiffs for the decedent's death – an error made worse by the failure to instruct the jury on apportionment of comparative fault. This case was riddled with errors, which taken together deprived the plaintiffs of a fair trial. Therefore the judgment against them should be reversed and a new trial ordered.

PLAINTIFFS' RESPONSE TO THE DEFENDANT'S CROSS-APPEAL

A. A cause of action for malpractice against a treating physician for the suicide of a patient should be recognized as viable in Mississippi.

The defendant's argument that summary judgment should have been granted because of the plaintiffs' failure to meet the "irresistible impulse" doctrine invites this Court to rule that, as a matter

of law, a psychiatrist or psychologist cannot be held liable in a claim for malpractice or negligence for a patient's suicide, regardless of the facts. This position goes against the modern trend of recognizing the duty owed by medical professionals to provide appropriate treatment, including reasonable preventative measures, to patients who present a foreseeable risk of doing themselves harm. *See* 81 A.L.R. 5th 167 (2000)(collecting and analyzing "cases in which the courts have discussed the liability of a doctor, psychiatrist, or psychologist for the failure to take steps to prevent a patient's suicide"). The Mississippi cases on which Dr. Guild relies are not medical malpractice cases. Therefore there is no authority in Mississippi for transforming the irresistible impulse doctrine into a special immunity for psychiatrists of a kind not enjoyed by other medical professionals. The Court should decline Dr. Guild's invitation to take that path. Instead, the Court should take this opportunity to make clear that a treating psychiatrist who, under the relevant standards of his profession, knew or reasonably should have known of a patient's risk of suicide and whose failure to render adequate care and treatment proximately caused the patient's suicide may have a claim of medical malpractice brought against him. *See, e.g.,* Foster v. Charter Med. Corp., 601 So.2d 435 (Ala.1992); Edwards v. Tardiff, 692 A.2d 1266 (Conn.1997).

1. Mississippi case law is postured to agree with other states that have recognized a physician's liability for a patient's suicide.

Dr. Guild's reliance on the irresistible impulse doctrine conflates the important difference between laymen and physicians under Mississippi's negligence regime. Those who have no professional training in psychiatric care do not owe a duty to protect others from committing suicide; they only incur liability for themselves if they act intentionally toward the suicidal party in a way that results in an irresistible impulse to commit suicide. But medical professionals in the psychiatric field who, by their skill, training and close proximity to a particular patient, have reason to believe that

the patient is at risk of suicide have a duty to give care and treatment to that patient that will lower the risk. There is nothing innovative or startling about this proposition: it is simply the basic medical malpractice standard articulated in the context of contemporary psychiatric treatment. Nor is it completely new to Mississippi. In Mississippi State Hospital v. Wood,[18] the Court of Appeals upheld a wrongful death verdict against the Mississippi State Hospital (MSH) for the suicide of one of its patients. At trial, the Wood plaintiff presented expert testimony by a practicing psychiatrist that established the elements necessary to prove any claim for medical malpractice. The expert opined that "the course of treatment undertaken by MSH **violated the standard of care** for a patient presenting the psychological symptoms of April Wood. [The expert] further offered his expert opinion that **this violation of the standard of care was a proximate contributing cause** to April Wood's ultimate suicide while a patient at the hospital." Wood, 823 So.2d at 600 (emphasis added). Although the viability of a malpractice claim for a patient's suicide appears not to have been challenged on appeal, the Court of Appeal's affirmation of the result accepted the elements necessary to state such a claim.

> In this appeal, MSH, other than arguing for the credibility and persuasive power of its own witnesses, points to nothing of note in the record that would suggest that the trial court was manifestly in error in its decision to accept the view of Dr. Hiatt as to (a) the standard of care reasonably to be expected from an organization providing in-patient psychiatric care to a person in the situation in which April Wood found herself and (b) his view, expressed in direct testimony and persistently defended during cross-examination, that MSH had **violated that standard of care in this case in a manner that substantially increased the likelihood that April Wood would have both the opportunity and a compelling psychological impulse to do harm to herself**.

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[18] 823 So.2d 598 (Miss.App.2002).

> . . . **[W]e find that there is, beyond question, substantial evidence in the record to support the trial court's factual determination establishing both the standard of care and its violation by MSH.** In that circumstance, it is the duty of this Court to affirm the judgment of the trial court.

Id. at 601-02(emphasis added).

The elements of the plaintiff's claim in Wood and the evidence she presented to meet them fit the framework that other courts have articulated in recognizing a claim for medical malpractice or negligence in causing a patient's suicide.[19] In Keebler v. Winfield Carraway Hosp.,[20] the Alabama Supreme Court addressed the issue by first canvassing some of the case law and secondary authority recognizing physicians' liability for suicide that existed at the time of its opinion.[21] Then the Alabama court cast the question in terms of its own decisions on medical malpractice and

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[19] *See, e.g.,* Meier v. Ross General Hosp., 69 Cal.2d 420, 427, 445 P.2d 519, 71 Cal.Rptr. 903 (1968)("those charged with the care and treatment of a patient, who know of facts from which it might reasonably be concluded that a patient would be likely to harm himself in the absence of preclusive measures, must use reasonable care to prevent such harm"); Summit Bank v. Panos, 570 N.E.2d 960, 969 (Ind.App.1991)(reversing summary judgment in favor of defendant because, "[g]iven [the decedent's] history, and [the defendant's] own testimony of his awareness of her emotional problems, there is a genuine issue of fact whether it was foreseeable that [the decedent] might abuse the drugs which he prescribed for her"); Fernandez v. Baruch, 52 N.J. 127, 132, 244 A.2d 109 (1968)("[t]he controlling factor in determining whether there may be a recovery for a failure to prevent a suicide is whether the defendants reasonably should have anticipated the danger that the deceased would attempt to harm himself"); Champagne v. U.S., 513 N.W.2d 75, 76-77 (N.D.1994)("[i]f the patient's act of suicide is a foreseeable result of the medical provider's breach of duty to treat the patient, the patient's act of suicide cannot be deemed a superseding cause of the patient's death that breaks the chain of causation between the medical provider and the patient, which absolves the medical provider of liability"). These cases are collected in the Connecticut Supreme Court's opinion in Edwards v. Tardiff, 692 A.2d 1266, 1270 (Conn.1997). discussed *infra*.

[20] 531 So.2d 841 (Ala.1988).

[21] *See* Keebler, 531 So.2d at 844 (noting that "the California appellate courts have addressed this issue and have explicitly held that a doctor or a hospital has a duty to take preventive measures when they have knowledge of facts from which to reasonably infer that a patient may be likely to attempt suicide"). The Alabama court also cited the New Jersey Supreme Court's decision in Fernandez v. Baruch, 244 A.2d 109 (N.J.1968), which in turn relied on the annotation "Civil Liability for Suicide" in 11 A.L.R.2d 751 (1950). *Id.* at 844-45.

negligence generally. *See* Keebler, 531 So.2d at 845. The Alabama court ultimately found that the plaintiff in that case had not presented evidence sufficient to recover for the decedent's suicide, but it did so in terms that fit the basic legal definition of a medical malpractice claim: "[the plaintiff] had the burden to show through expert testimony that [the physician] breached his duty to exercise such reasonable care, diligence and skill as reasonably competent physicians in the national medical community ordinarily would in the same or similar circumstances." *Id.*

Similar reasoning was employed in Edwards v. Tardiff,[22] a highly instructive case from the Connecticut Supreme Court. There, the court's inquiry focused on whether suicide was an act that broke the chain of causation. The court recognized "the general rule" that negligence will not lie because suicide is considered a deliberate, intentional and intervening act that supercedes the defendant's liability. The court rejected applying this rule in the context of a physician's liability, however, because "**suicide will not break the chain of causation if it was a foreseeable result of the defendant's tortious act.**" Edwards, 692 A.2d at 617 (emphasis added). The court then cast the issue in terms of an ordinary malpractice claim:

> Physicians have a duty to exercise the degree of care that physicians in that particular field would exercise in similar circumstances. If the physician's treatment of a patient falls below the relevant standard of care, liability may be imposed if it is reasonably foreseeable that suicide will result if such care is not taken. Accordingly, we hold that a physician may be liable for a patient's suicide when the physician knew or reasonably should have known of the risk of suicide and the physician's failure to render adequate care and treatment proximately causes the patient's suicide.

Id. at 618.

Mississippi's precedent on general principles of causation in a negligence action is consonant

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[22] 692 A.2d 1266 (Conn.1997).

with those that guided the Edwards opinion. In Southland Management Co. v. Brown,[23] this Court adopted the definition of a superceding cause from the Restatement (Second) of Torts: "[a] superceding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Southland Management, 730 So.2d at 46. The Court also stated that "under principles of foreseeability, a defendant may be held liable for his failure to anticipate an easily predicted intervening cause and to properly guard against it." *Id.* Likewise, Edwards implicitly recognizes that a defense of intervening or superceding cause is unavailable to physicians who treat mentally ill patients because those physicians are trained and have an affirmative duty to foresee possible risk of suicide in their patients. If, by the standard of care that applies to a competent physician in that field, a physician should foresee that suicide will result if such care is not taken, the foreseeable act of suicide cannot fairly be construed an intervening or superceding cause that will break the chain of proximate causation necessary for liability. To the contrary, it is precisely the injury that a physician who met the standard of care would have foreseen and taken steps to prevent.

2. Irresistible impulse is inapposite in the context of a claim for medical malpractice.

The defendant's argument that "Mississippi only permits recovery for suicide if the elements of the Irresistible Impulse Doctrine are implicated"[24] would impose a more rigid bar to recovery than a defense of intervening or superceding cause because the irresistible impulse doctrine requires the plaintiff to allege that the defendant acted intentionally. This requirement would make a claim medical malpractice, as a species of negligence, *per se* unavailable where the injury is a patient's

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[23] 730 So.2d 43 (Miss.1999).

[24] Appellee's Brief, p. 44.

suicide. Such a bar would lean directly against the contemporary trend seen in Edwards, Keebler and the host of other cases cited above. It would also contradict the general principles of causation and foreseeability recognized in Southland Management. This Court's precedent on the irresistible impulse doctrine does not stand for that result, and this case need not lead to it. Instead, this Court should hold that medical malpractice for a patient's suicide is a viable cause of action in Mississippi.

None of the cases cited in support of the defendant's irresistible impulse argument involved claims against a physician, a hospital or other medical provider. Instead, they all concerned claims that placed culpability for a person's suicide in the hands of a party that did not have the special skill and proximity to a mentally ill patient that gives rise to a doctor's duty to treat that patient with reasonable care. The opinion in Edwards is again instructive on this score. The Edwards court addressed the defendant's argument that judgment against him should be reversed because the plaintiff had failed to produce evidence supporting a claim under the irresistible impulse doctrine (referred to in that opinion as "uncontrollable impulse"). The court concluded that because the plaintiff had also pled – and proved – his claim for medical negligence, it was inapposite to argue that no irresistible impulse, an intentional tort, had been shown. *See* Edwards, 691 A.2d at 620-22.

Here, no claim of irresistible impulse has been pled, but the rationale underpinning the Edwards decision should be adopted. This Court should keep medical malpractice claims for a person's suicide separate from claims against non-medical parties for a person's suicide. The Court need not abrogate or abandon the irresistible impulse doctrine; it need only clarify what the Mississippi Court of Appeals implicitly recognized in Wood – that claims for medical malpractice are defined and adjudicated no differently from any other malpractice claim where the injury is suicide. All of the elements of duty, breach, foreseeability and proximate cause that obtain in a

traditional medical malpractice case must apply to the facts of a given case in order for a plaintiff to prevail.

3. The evidence supports a malpractice claim for Mrs. Hancock's suicide.

In this case, the facts support having a trial on the merits of the plaintiffs' medical malpractice claim against Dr. Guild. Mrs. Hancock had been under his care for several weeks, so he owed her the duty to exercise reasonable care in rendering that treatment. Her potential for committing suicide was, by his own testimony before the Chancery Court in Yazoo County, highly foreseeable. Asked during the divorce proceeding what the consequences of losing the marital house would be for Mrs. Hancock, Dr. Guild testified that "for most other people, they could look ahead and see the fact that they're going to come out all right. But I'm afraid she can't do that. With her depression and everything, it's going to be clouded, she's going to be hopeless. I'm afraid she will take her life." RE-77 through 78. Dr. Guild was aware that three years prior to his treatment of her, Mrs. Hancock had attempted to take her life. RE-76. As the Alabama Supreme Court put it, "[f]oreseeability of a decedent's suicide is legally sufficient ... if the deceased had a history of suicidal proclivities, or manifested suicidal proclivities in the presence of the defendant, or was admitted to the facility of the defendant because of a suicide attempt." Foster, 601 So.2d at 440. Mrs. Hancock's case met the first two of these "legally sufficient" conditions.

Two days after the event that most concerned Dr. Guild – the chancellor's refusal to award temporary possession of the marital home to Mrs. Hancock –he discharged her from in-patient care. The plaintiffs' expert testified that under the circumstances, this was a premature discharge and that "there is no, in my opinion, clinical justification for discharging Cherie Hancock on September 17th."

RE-103. The expert characterized this as a breach of the standard of care that "directly contribute[d] to her suicide." RE-105.

Dr. Guild acknowledged his duty to implement a discharge plan that would help secure his patient's safety, but he admitted as well that it was never recorded until nine days after her death. RE-90. The plaintiffs' expert testified that "[w]hat was presented in the records and testified to yesterday here in court does not constitute a suicide risk assessment. There isn't one." RE-113. The plaintiffs' expert testified extensively that, to the extent an unwritten discharge plan was implemented, it was inadequate to protect against the patient's risk by placing her in close proximity to the marital home where guns were available; doing so only two days after the patient had learned that the marital home was no longer open to her; and not ensuring that all participants – such as her mother and step-father, with whom she would be living after her discharge – were well apprised of the particulars of the plan and were willing and able to help carry it out. RE-113 through 119. The expert then did what any medical expert should do after stating that the standard of care was breached: he testified what measures should have been taken to prevent the suicide. RE-122 through 123.

These facts support all of the elements of medical malpractice – duty, breach, proximate cause – for a patient's suicide. The Court should affirm that such a cause of action is viable in Mississippi, and it should uphold the trial court's denial of summary judgment.

B. The trial court's denial of the motion to compel the deposition of Jim Herring and the negative inference instruction were neither relevant to the case nor prejudicial to the defendant.

The defendant assigns as error the trial court's denial of its motion to compel the deposition of Jim Herring, the decedent's attorney. The denial of a motion to compel discovery is reviewed for

abuse of discretion. Warren v. Sandoz Pharmaceuticals Corp., 783 So.2d 735, 738 (Miss.2000). The defendant has not shown an abuse of discretion here, as he makes no showing of relevance of the testimony sought, nor does he make any showing of prejudice in the denial of his motion.

1. The defendant makes no showing of relevance or prejudice in the denial of the motion to compel.

The only modicum of specificity in the defendant's argument is his claim that he "should have been allowed to question Jim Herring regarding his observations of Ms. Hancock's behavior and the behavior of her family towards her." Appellee's Brief, p. 46. But by the terms of the defendant's own opposition to the apportionment instruction, that subject matter cannot be relevant -- unless, of course, a defense of comparative fault such as the one suggested in the defendant's answer, the pre-trial order and the defense's opening and closing arguments was in fact being pursued. There is no factual specificity at all in the defendant's argument that "there may have been unprivileged documents of which Jim Herring was aware that the Defendant should have been allowed to review." *Id.* If the defendant in fact harbored that belief while this case was in Circuit Court, he did not act on it in the only way available to him under the rules – *i.e.,* the service of a subpoena duces tecum on Mr. Herring. At that point, some specificity would have been required from the defendant about the kinds of documents that the defendant wanted to see. Then, had that subpoena ultimately been quashed, there might be something on record for this Court to review. But the motion to compel that the defendant filed seeks only Mr. Herring's deposition, not his production of unprivileged documents, whatever those may be. *See* Appellee's Record Excerpts, RE-210.

As for the "unfair prejudice"[25] that the defendant alleges in his brief, it is alleged only conclusorily, without any connection to the facts of the case, the importance of the deposition to his defense or explanation as to how, in a trial that the defendant won, that prejudice eventually accrued.

2. The defendant makes no showing of relevance or prejudice in the denial of the negative inference instruction.

Likewise, the defendant's point of error that a negative inference instruction should have been given has no substance without some explanation as to the subject matter of the testimony that the defendant claims was deprived him. The defendant claims that the jury was owed some comment about Mr. Henning's absence, as though it is a matter of course that the jury on a medical malpractice case will be wondering where the decedent's personal attorney has been during the presentation of evidence and testimony. The defendant reasons that the invocation of the attorney-client privilege justifies giving a negative inference instruction, but he gives no authority for that proposition.

Where neither relevance nor prejudice is shown, an abuse of discretion can be nowhere near. Therefore these points of error regarding the absence of Jim Herring's testimony from this case and the lack of a negative inference instruction are without merit.

CONCLUSION

For all the reasons discussed herein and in the Plaintiffs' initial brief, judgment should be reversed and a new trial ordered. The Court should also affirm the denial of summary judgment and recognize that a cause of action for medical malpractice for a patient's suicide is viable in Mississippi.

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[25] Appellee's Brief, p. 46.

Respectfully submitted, this the 19th day of December 2007.

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CERTIFICATE OF SERVICE

I, B. HUMPHREYS McGEE, III, Attorney for Plaintiff/Appellant, certify that I have this day served a copy of the above and foregoing by placing same in the United States Mail, postage prepaid, on the following:

Honorable Jannie M. Lewis
Circuit Court Judge
P.O. Box 149
Lexington, MS 39095-0419

Honorable Denise Wesley
Currie, Johnson, Griffin, Gaines & Myer
P.O. Box 750
Jackson, MS 39205-0750

This the19th of December 2007.

B. HUMPHREYS McGEE, III