IN THE SUPREME COURT OF MISSISSIPPI

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

VS. — **CASE NO.: 2004-CA-02532**

DONALD C. GUILD, M.D. — **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. Candice Young, Daughter of Cherie S. Hancock and Personal Representative of the Wrongful Death Beneficiaries of Cherie S. Hancock. Candice Young lives in Yazoo County, Mississippi.

2. George Thomas Hancock, Husband of Cherie S. Hancock, Deceased. Mr. Hancock lives in Yazoo County, Mississippi.

3. Stirlin Hancock, Son of Cherie S. Hancock, Deceased. Stirlin lives in Yazoo County, Mississippi.

4. Garrett Hancock, Son of Cherie S. Hancock, Deceased. Garrett lives in Yazoo County, Mississippi.

5. Justin Hancock, Son of Cherie S. Hancock, Deceased. Justin lives in Yazoo County, Mississippi.

6. Donald C. Guild, M.D. Dr. Guild is a psychiatrist and lawyer who practices medicine in the Jackson, Mississippi area.

Respectfully submitted, this the 23rd day of ~~July~~ 2007.

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3. Whether it was reversible error for the trial court to admit into evidence unauthenticated copies of alleged suicide notes of Cherie S. Hancock.

4. Whether there were matters which in the cumulative constitute reversible error and warrant a reversal and new trial. These matters include

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   b. The admission of testimony from Donna Kerry Pigg as to conversations between Ms. Pigg and the Deceased, such conversations constituting hearsay and being highly prejudicial.

   c. Admission into evidence of certain statements by the Deceased made to Defendant which statements were not contained or documented within Dr. Guild's medical records.

STATEMENT OF THE CASE

This is a wrongful death action brought by the personal representative of the wrongful death beneficiaries of Cherie S. Hancock, Deceased. Cherie S. Hancock committed suicide on September 20, 1999, while under the care of Donald C. Guild, M.D. Plaintiff pled that the death of Cherie S. Hancock was the direct and proximate result of the negligence of Donald C. Guild, M.D. This matter was tried before a jury in the Circuit Court of Yazoo County, Mississippi with a verdict favoring Defendant Donald C. Guild, M.D. The trial court denied Plaintiff's motion for new trial resulting in this appeal.

The following facts are relevant to the issues presented for review.

1. The Deceased, Cherie S. Hancock, was referred to Defendant Donald C. Guild, M.D. by attorney Jim Herring for purposes of obtaining an expert opinion relative to divorce litigation. (RE 16; R 306)

2. From August 6, 1999 up to and including September 20, 1999, the Deceased, Cherie S. Hancock, was under the care and treatment of Defendant Donald C. Guild, M.D. From August 20, 1999 until September 17, 1999, Dr. Guild treated Cherie Hancock on an inpatient basis at the North Campus at St. Dominic's Hospital in Jackson, Mississippi. (RE 189; TE P-4)

3. On September 15, 1999, two days before Dr. Guild released Cherie Hancock from the hospital, Dr. Guild testified on behalf of Ms. Hancock before the Chancery Court of Yazoo County, Mississippi at a hearing arising out of a Complaint for Divorce filed by Ms. Hancock against her husband, George Thomas Hancock. The purpose of the hearing involved temporary custody of the house owned by Mrs. Hancock and Mr. Hancock pending the divorce proceedings. (RE 77-81; TR 234-236)

4. At the time of this September 15, 1999 testimony, Dr. Guild was still treating Mrs. Hancock on an inpatient basis at St. Dominic's. At this hearing, he gave the following statements and opinions under oath:

A. When asked if he had an opinion to what Mrs. Hancock's condition would be if she were not allowed to move back into the house Dr. Guild stated, "I really just don't want to think about that. I don't think it will be good at all. I hope she would make it but we have to find another place for her to live. It won't be permanent. It will be a temporary place. For anybody else, for most other people they could look ahead and see the fact that they are going to come out all right but I'm afraid she can't do that. With her depression and everything it is going to be clouded, she is going to be hopeless. I'm afraid she will take her life." (RE 77-78; R 232-233)

B. When asked at the hearing if he knew how much longer Mrs. Hancock would need to be hospitalized as his best estimate he replied, "I think I could put her back into the house in two days. I would feel comfortable doing that. If she goes some place else I just wouldn't estimate." (RE 79-80; TR 234-235)

C. At the hearing Dr. Guild was also asked how life threatening in his opinion would it be for Mrs. Hancock not to be allowed to go back to her house. He responded, "It would be – it would be. I can't put a figure on it. I can't put anything but I couldn't recommend it. I am here today because I am very fearful there is a good chance that if she doesn't have that situation she won't be here and need – and the need for divorce won't be before the Court." (RE 80-81; TR 235-236)

5. At the trial of this cause, Dr. Guild admitted that he wanted to impart to the Chancellor at the divorce hearing under oath his expert opinion that if Mrs. Hancock didn't get the house she would kill herself. (RE 82; TR 249)

6. The Chancellor did not award temporary possession of the house to Mrs. Hancock.

7. Prior to releasing Mrs. Hancock Dr. Guild was aware that three years previous in 1996, she had attempted suicide with a self-inflicted gunshot wound to her chest. (RE 76; TR 201; TE P-4)

8. a) Dr. Guild was also well aware that guns were kept in the house sought by Mrs. Hancock but occupied by her husband and sons. (TE P-4; Discharge Summary)

b) Cherie Hancock's mother lived next door to Donna Pigg, who lived right behind the Hancock family house, occupied by Ms. Hancock's husband and son. (RE 124-125; TR 485-486)

9. Three days after her release from St. Dominic's, Mrs. Hancock went unaccompanied and unsupervised to the Hancock house and took her life with the use of a firearm.

10. At trial Dr. Guild testified that although he did a suicide comprehensive risk assessment **he does not document it in the chart**. (RE 83; TR 268) (Emphasis added)

11. At trial Dr. Guild admitted that he had a duty to implement a discharge plan for Mrs. Hancock. (RE 84; TR 272)

12. Relative to the Discharge Plan, Dr. Guild testified:

Q: And the discharge plan – what was the discharge plan? Go ahead.

A: The discharge plan was for the patient to go home to her mother's and her stepfather's to live there. she was to be with someone at all times if possible. It's not completely possible that you stay with somebody all the time, but it was to be done as much as possible. If there was anything unusual, anything that turned to the thing, they were – they were to let me know. she was given my pager, she was given my office number.

Q: **Where is all that written down**?

A: **It's not**. (Emphasis added)

Q: So you're sitting here telling us that you – she was going to live with her mother, you gave her your pager, gave her your number, and that was the discharge plan, but you didn't document any of that.

A: Well –

Q: Is that not a violation of the standard of care, Dr. Guild?

A: That's not a violation of the standard of care. The social worker helped me implement the discharge planning, and most important, Jim Herring implemented that. She had absolute faith in Jim Herring. He was her attorney. She wouldn't – he was the only one that could tell her to do something and she would do it.

Q: So you delegated the implementation of the discharge plan to attorney Jim Herring?

A: At least a good bit of it, yes.

Q: Is it not a violation of the standard of care to delegate the implementation of the discharge plan?

A: No.

Q: Okay. You don't know if the mother was ever talk [sic] to or not, do you? Her mother?

A: Haven't finished the last one.

Q: Go ahead.

A: Okay. When you implement a discharge plan you make the best effort you can to communicate it to people. In some cases, unfortunately, the only thing you can do is leave a message on an answering machine. now, I think probably the reason I didn't get in touch with the mother was I couldn't catch her on the phone. I'm back and forth, and when I get in touch with Mr. Herring, I trust him to make sure that it got done. So as long as you leave a trusted individual, be it a friend or social worker, you're doing it. You can't do everything yourself.

Q: Right. But what I'm saying is you don't' know if you talked to the mother or not, do you?

A: Yes, I do.

Q: You know you did?

A: Well, I know Mr. Herring did.

Q: No, do you know – well, did you talk to her?

A: I don't know that I talked to her.

Q: You don't know that Mr. Herring talked to her, do you?

A: I know that.

Q: Well, you weren't there when he talked to her, were you?

A: No, I wasn't.

Q: Okay. so you don't know if he talked to her or not, do you?

A: I don't believe Mr. Herring would lie. It's possible, but very unlikely.

Q: What did Mr. Herring tell her?

A: He told her what we discussed.

Q: What was that?

A: The main thing was that she was to be with somebody as much of the time, if anything changed, let us know, and taker her medication, come to the appointments.

Q: And that was it?

A: There was probably a little bit more. There were probably some other –

Q: What was it if you're so sure you did it?

A: Well, as you pointed out, I don't write down every single word. For one thing, when I make a discharge plan I may not be at the hospital. I may not be at my office. I may have my cell phone and I may be in the car when I make contact with the person. And unfortunately, it [sic] just not feasible to write down everything at the moment you do it and put it in either the office chart or the hospital chart. The important thing is that you do it.

Q: But a discharge plan is crucial, is it not, Dr. Guild?

A: A discharge plan is absolutely crucial.

Q: And there is no documentation of this discharge plan, is there?

A: I think there is ample documentation of it.

Q: Where is it?

A: It's in the record. It's the social worker contacted her, it's in the discharge summary.

(RE 85-88; TR 273 - 276)

* * *

Q: Dr. guild, your duty – don't you have a duty to document a discharge plan, a written documentation of discharge plan for a suicidal patient?

* * *

Q: Do you have a duty under the standard of care to document a discharge plan for a patient that was admitted suicidal?

A: I do and I did.

Q: Where did you document it?

A: In the discharge summary, in the orders, in the last note.

Q: I just want to make sure that the discharge summary is where you're saying you discharged – is the documentation fo the discharge plan. Is that correct?

A: That is not what I said.

Q: Well, what did you say?

A: What I said is it's in the orders, it's in the progress notes, it's in the social workers notes, and it's in the discharge summary.

Q: Does the discharge – does the standard of care on the discharge – the implementation of a discharge plan require you to contact the mother?

A: No.

Q: It doesn't. Even though she's going to live with the mother. you had no duty to contact the mother?

A: No. I have a duty to see that I make all the efforts that I can to make sure that she's in a safe environment.

Q: Well, how can you do that if you're not going to contact the person that's in control fo the place where she's going to be?

A: I can get somebody else that's very reliable to do it, and that I can count on. And I do that all the time. I give an order for a shot and I expect the nurse to give it.

Q: Okay. **Who called her mother?**

A: **Candy Lowicki got in touch with her and –**

Q: **Who?**

A: **Candy Lowicki, the social worker.**

Q: **How do you know that**?

A: **She told me in passing in the ward.**

Q: **It's not written down, is it?**

A: **We passed in the ward, it's not written down.** (Emphasis added)

Q: Okay, well, if you had a documentation on a discharge plan, we would know that she was directed to contact her, wouldn't we?

A: You know that she was directed to contact –

* * *

Q: If it was written down then we would know that she was directed to contact her, wouldn't we, Dr. Guild?

A: We would not.

Q: Okay. Why?

A: We would know that I had written down she was directed to contact her. But we wouldn't if that was true, would we? [sic]

Q: Is it not your duty to see that's done?

A: It's my duty to take reasonable efforts to make certain that things are done. And if I don't trust a nurse or social worker, then I make certain it's done myself. Candy Lowicki has been there for years. I can depend on her.

Q: Well, I thought the attorney did the contacting of the mother?

A: He did too. It was double.

Q: What did they tell her? Do you know what they told her?

A: I didn't hear the conversation.

Q: Well, if you're charged with implementing the discharge plan, how are you going to know if conforms to the discharge plan if you don't know what they told her?

A: Max, you got to trust somebody.

Q: Does the standard of care require you to trust somebody to implement the discharge plan?

A: It absolutely does.

Q: So you're telling this court and this jury that the standard of care you utilized in the implementation of the discharge plan was to trust a social worker and Mr. Herring to contact and inform the mother of the things she needed to know?

A: Correct. That's why we have the team.

Q: Go ahead.

A: I don't –

Q: Did you know whether or not the mother – is not one of the things that the mother needs to be aware of what to look for as far as depression?

A: Correct.

Q: Do you know whether or not the mother was aware of what she is supposed to look for?

A: Yes.

Q: How do you know that?

A: Mr. Herring.

Q: Mr. Herring told you?

A: Yeah.

Q: So based on what Mr. Herring had to say, does the mother understand what the deal was?

A: Completely and was satisfied.

(RE 91-95; TR 293- 297)

13. The Discharge Summary was prepared September 29, 1999, 9 days after Mrs. Hancock's death. (RE 90; TR 292)

14. Dr. Guild testified that he did not want to discharge Mrs. Hancock on September 17th but wanted to keep her one or two more days. (RE 89; TR 284)

SUMMARY OF THE ARGUMENT

1. It was error for the Court to refuse to give Plaintiff's Instruction No. P-5 and P-6. Such refusal denied Plaintiff the right to place her theory of the case before the jury as the proposed instructions adequately described the law in Mississippi and the authority for each instruction was placed before the Court.

2. It was reversible error for the trial court to deny Plaintiff the opportunity to submit an apportionment instruction to the jury so as to allow the jury to apportion the fault of Cherie S. Hancock's death among Donald C. Guild, M.D. and any others including family members of Mrs. Hancock.

Defendant pled the benefit of MISS. CODE ANN. §85-5-7. Defendant tried his case in significant part by arguing that it was the acts of George Thomas Hancock and other family members that killed Cherie S. Hancock, not the negligence of Dr. Guild. When Defendant did not submit an apportionment instruction pursuant to MISS. CODE ANN. §85-5-7, Plaintiff asked the Court for leave to submit such an instruction but was denied the same. The jury was not instructed so as to consider the negligence of Dr. Guild and measure same against the negligence or fault of George Thomas Hancock or others through instructions from the Court. In effect the case was tried under the old contributory negligence standard where contributory negligence is a bar.

3. It is reversible error for the trial court to admit into evidence unauthenticated copies of the alleged suicide notes of Cherie Hancock. These copies of handwritten notes were never authenticated and identified pursuant to Rule 901 of the MISSISSIPPI RULES OF EVIDENCE as no evidence was offered as to where the alleged notes were found, when they were found, who allegedly found them. These alleged suicide notes cannot be authenticated under Rule 803(6) of the MISSISSIPPI RULES OF EVIDENCE as business documents. These notes do not constitute any memorandum, report, record or data compilation in any form of acts or events in the regular course of business of the Sheriff's Department of Yazoo County, Mississippi.

4. A reversal and new trial is warranted because of matters which in the cumulative constitute error. These matters include the following:

A. During his opening statement, counsel for Defendant inappropriately commented that the jury would not hear from attorney Jim Herring because Plaintiff had claimed attorney/client privilege and objected to him testifying. This comment was highly prejudicial and highly inappropriate inasmuch as during pretrial proceedings the Court had ruled that Defendant was not entitled to a negative inference because Plaintiff had claimed the privilege.

B. It was error to permit testimony from Donna Kerry Pigg over the objections of Plaintiff as to conversations between Ms. Pigg and the Deceased as such constituted hearsay and were highly prejudicial. These conversations did not relate to the existing mental, emotional or physical condition to the Deceased at the time of her suicide.

C. It was error for the Court to permit Dr. Guild to make references to statements made by the Deceased to him which were not contained within his medical records. It is a common axiom of the medical profession that "if you don't write it down it didn't happen." Hearsay statements that are written down obviously meet the trustworthy requirements of Rule 803(4). To permit Dr. Guild to testify and make references to alleged statements made by the Deceased which were not contained within the medical records gives Dr. Guild cart blanche hearsay authority.

ARGUMENT

1. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO REFUSE TO GIVE PLAINTIFF'S INSTRUCTIONS P-5 AND P-6.

It was error for the Court to refuse to give Plaintiff's Instruction Nos. P-5 and P-6. Such refusal denied Plaintiff the right to place her theory of the case before the jury. Each of the two proposed instructions adequately described the law in Mississippi. The denied instructions are as follows:

JURY INSTRUCTION NO.__

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

> 1. Given the circumstances 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 Plaintiff against the defendant, Donald C. Guild.

P-5

(RE EE; TR 323)

JURY INSTRUCTION NO.

If you find [sic] 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 [sic] 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 plaintiff.

P-6

(RE 34-35; TR 324-325)

Proposed Jury Instruction P-5 came out of the Mississippi Judicial College Mississippi Model Jury Instructions Civil Database under Chapter 14 Medical Malpractice §14.2. Physicians–General negligence instructions. The instruction in the database appears as follows:

IN THE _____ COURT OF _____ COUNTY, MISSISSIPPI

_____ JUDICIAL DISTRICT

_____*[Plaintiff]*

VERSUS NO. _____

_____*[Defendant]*

INSTRUCTION NO. _____

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

1.

Given the circumstances of the plaintiff at the time the defendant physician saw and treated the plaintiff, a minimally competent physician in the same field of practice and who had available th same general facilities, services, equipment and options as the defendant had during the time the plaintiff was his patient would have:

_____ _____ *[Here set forth the acts of commission and/or the omissions claimed]*; and

2.

The defendant physician failed to comply with that standard of care in his treatment of the plaintiff; and

3.

Such failure on the part of the defendant physician constituted a proximate cause or contributing proximate cause of _____*[the* _____*(injuries or death)]*;

then you must return a verdict for the plaintiff against the defendant physician.

However, if you believe from the evidence that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant physician.

Plaintiff is entitled to an instruction which presents her side of the case assuming such instruction correctly states the law. *Bickham v. Grant*, 861 So.2d 299, 301 (Miss. 2003). In 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. *Id.*, at p. 303. *See also, Ladner v. Campbell*, 515 So.2d 882 (Miss. 1987). Proposed Instructions P-5 and P-6 meet this standard.

The trial court granted a total of 12 jury instructions. Two of the instructions, Nos. 11 and 12 (RE 30, 44; TR 320, 334) had to do with the form of the verdict. Seven of the instructions (No. 1 (RE 22; R 312), No. 1-A (RE 26; R 316), No. 2 (RE 38; R 328), No. 3 (RE 27; R 317), No. 4 (RE 39; R 329), No. 8 (RE 41; R 331) and No. 9 (RE 31; R 321) were general instructions. Three of the instructions (No. 5 (RE 40; R 337), No. 6 (RE 43; R 333), and No. 7 (R 332), instructed that the jury that under certain circumstances it was their duty to return a verdict for the Defendant, Dr. Guild. Jury Instruction No. 10 (RE 28; R 318) was a damage instruction. Because Plaintiff's Proposed Instructions P-5 and P-6 were denied, there was no jury instruction instructing the jury as to the

circumstances under which they could return a verdict for Plaintiff. Accordingly, the instructions issued as a whole do not fairly and adequately advise the jury as to the law concerning the issues at trial and they constituted faulty instructions. Under these circumstances, the failure of the Court to grant Plaintiff's Proposed Instructions P-5 and/or P-6 constitutes reversible error.

This case, like any medical malpractice case, presented a battle of experts. Plaintiff presented in support of her case Dr. Raymond Patterson, who is Board certified in general psychiatry and forensic psychiatry. (RE 97; TR 332) Dr. Patterson testified that before forming his opinions he reviewed the Complaint, Interrogatories, medical records of St. Dominic's, Warren-Yazoo Medical Health Clinic and University Medical Center, as well as the depositions of Dr. Guild, Dr. Holly, the Defendant's expert, family members and individuals who knew her and the transcript of the September 15, 1999 Chancery Court hearing. (RE 97; TR 332) Dr. Patterson testified that in his opinion Dr. Guild did not satisfy the standard of care for an appropriate, proper suicide risk assessment throughout the medical records in Cherie S. Hancock's hospitalization. (RE 98; R 339) He further testified that in his opinion 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) Dr. Patterson testified that the medical notes prepared by Dr. Guild of September 15, 1999, September 16, 1999, and the notes on the date of discharge of September 17, 1999, do not constitute an adequate suicide risk assessment of Cherie Hancock at the time of her discharge. (RE 99; TR 340)

Relative to the importance of documentation, Dr. Patterson testified:

> A: The importance of the documentation is not just for something like this. It's for the treating staff, who are treating Ms. Hancock or any patient at that time. It's for the next treater. The next treater might be Dr. Guild, it might be somebody else. Whoever get that patient next deserves to have the doctor's reasons assessment of the status of

the patient at that time. If you don't write it down, how are you going – if I'm receiving the patient next, I want to know what the last doctor thought and did and what that doctor's assessment was. I can't just make it up. I can't call the doctor and say, well, do you remember her if the doctor has X number of patients.

I need to see what the doctor thought. So that factors into my thinking. If the doctor thought she was a no risk then or a high risk then, I want to know what that compares to with what I see in front of me today. Because I know with Ms. Hancock in 1996, she shot herself in the chest. That raises the bar. This is not somebody that went to a drug store, got ten Tylenol and took them and called 911. This is someone who shot herself in the chest. That's a lethal, highly lethal method of attempting to kill yourself. That raises the bar. I want to know what was she like for every doctor that saw her or what their plan was to try to reduce the risk.

(RE 99-100; TR 340-341)

Dr. Patterson testified that in his opinion the discharge of Cherie Hancock from the hospital was premature (RE 102; TR 343) and that Dr. Guild violated the standard of care in the manner in which he discharged Cherie Hancock from the hospital.

Q: Is it a violation of the standard of care in the manner in which she was discharged?

A: In my opinion, yes, it is.

Q: Dr. Patterson, you heard the testimony of Dr. Guild yesterday.

A: I did.

Q: And Dr. Guild testified that on the 17th, in his own opinion, treating his own patient, whom he described as a diagnostic challenge, that he wanted to keep her another day or two. Were the medical records that you reviewed, do they substantiate that opinion?

A: No, they don't. The medical records I reviewed don't make reference to keeping her a day or two, or keeping her any longer than the 17th.

(RE 105; TR 346)

A: The duty of the physician is to treat his patient and protect his patient from harm. The Hippocratic oath which you mentioned yesterday, and which was discussed, starts with first do no harm. So you don't harm your patient. The patient wants to leave, which again is not documented in the record anywhere that I can see, then you have to work with the patient. Assuming that you've established a therapeutic alliance, you talk to the patient. The patient has been in the hospital since August 20th. It's now September 17th. It's almost a month.

You sit down with the patient, you say, you know what, I don't think you're ready yet. I think you need to stay. And a day or two, particularly if you're not going to be in the hospital on Saturday, Sunday, it should be longer than that. You're going to certainly have your staff monitor the patient over the weekend, but you're going to sit down with the treatment team on Monday, and we're going to talk about what has happened since the 15th and how that changes our treatment and affects her discharge plan. that's what we're going to do. But in order to do that, the patient's got to still be in the hospital.

So you sit down and you talk to the patient. In my own experience in treating patients, most of the time, they're going to go with what the doctor says. Doctors say, you know, you're not really ready, and the patient has heard on the 15th her doctor say I believe she's going to become hopeless and she's going to kill herself. Doctors and patients in a therapeutic relationship have a special relationship.

You go to your own doctor, your doctor says, you know what, I think you really ought to have this test. You might not want the test, you might not want to take off work. If the test is an invasive test you might not want to do it. But if your doctor says I think you really need to get this test, most of the time, you're going to go with your doctor. Might go and get a second opinion, but most of the time you go with your doctor.

So if you sit down and you say to the patient, you know, a lot happened two days ago. Maybe if things had worked out differently, but they didn't. So based on what happened two days ago and what my nurses are documenting, what my nurses are saying. One of my nurses wrote down she prayed with you last night. Well, maybe we better think about this a little longer. Why don't you stay in the hospital a little longer? That's the first thing you do.

If the patient says, no, I'm leaving. I'm not staying here. You say, well, you're going to have to sign out against medical advice, but

based on what I know about you, based on what I just told the court two days ago, based on what I said under oath, I'm not letting you leave. I have a duty. It's just not an authority, it a [sic] to protect you. And I said I think you're going to get hopeless, you've been getting worse, I think there is a substantial risk that you're going to kill yourself. I'm going to commit you if I have to. I don't want to but I will if I have to.

And then if the patient says, well, you know Doc, I don't want you to be my doctor anymore, I'm firing you. Okay, that's fine, but you're alive. If you have to get another doctor, okay. You start working with that doctor, that's time, but you're alive. You don't adhere to the patient's wish simply because the patient is your patient.

(RE 107-109; TR 348-350)

Dr. Patterson stated it was his opinion that Dr. Guild violated the standard of care and that he performed an inadequate suicide risk assessment of Cherie S. Hancock on the date of discharge.

A: What was presented in the records and testified to yesterday here in court does not constitute a suicide risk assessment. There isn't one. There are some comments about talking with her and she is, I think, mildly optimistic, I think is the term. The word suicide or risk is not even given in that note. There is no estimate of risk, and it's not, it's not a default. If you don't write it it doesn't mean it doesn't exist. If you don't write it it doesn't mean it's zero. You have to write it's zero. You have to write there is no risk. You have to write I've considered what I said two days ago and something has caused me to change that opinion. It's not in there that I can find.

(RE 113; TR 354)

Dr. Patterson testified that Dr. Guild failed to meet the standard of care in the planning and implementation of an adequate discharge plan in that the plan made no reference to guns or to Ms. Hancock's availability to guns in the environment and it nowhere referenced the factors that the people that Ms. Hancock was going to be staying with should look for in determining whether or not she was becoming depressed and the risk of suicide increasing. (RE 115-116; TR 356-357)

A: The discharge plan is developed by the treatment team, but clearly is endorsed by the psychiatrist. And the psychiatrist has a responsibility

to do as much as they can to ensure that it's being implemented. The issue of having contact with the mother and talking with her about environment, I'm not quite sure what that exactly means, but there should be documentation that the mother indeed was talked with. If this is an alternative placement, if the plaintiff was hoping to go back to her home up until two days before that and now an alternative placement has been developed, you get the person, the family member, the mother, and probably the stepfather to come into the hospital and talk with you and the patient about what we're doing here. You don't discharge that to somebody else, and say, okay you go do it, and I trust you.

You bring the mother and the stepfather, you don't know what the stepfather is thinking about this. You don't know what guns are in the house. You know what the stepfather's going to say, well, my wife can't walk wherever this lady goes. She can't watch her daughter all the time, she's got stuff she's got to do with me. you've got to bring them in and find out what you're thinking about doing is actually practical. Is it doable? Are they going to do this? Are they willing to do this?

If they see her like the nurses recorded with a blunted affect, anybody know what a blunted affect was that walked in this courtroom who is not a psychiatrist, before this case? Probably not. So you explain to the family, if she's sitting there and kind of pulling into herself and she's not really relating to you very much, you better get her back to me or take her to the hospital or call me or something. But you don't just ignore it, and say, oh well, she's having a bad day. That's the kind of education that is necessary in implementing a discharge plan.

Q: Was there any documentation throughout these records that Dr. Guild in fact documented the implementation of the discharge plan?

A: Not that I saw, no.

Q: Now, do you have an opinion as to a reasonable degree of medical probability as to whether or not Dr. Guild violated the standard of care again in failing to implement the discharge plan?

A: In my opinion, yes, he did.

(RE 117-118; TR 358-359)

Dr. Patterson testified that the suicide of Cherie Hancock was foreseeable (RE 120; TR 316) and that Dr. Guild exacerbated Ms. Hancock's state when he testified in front of her in open court at the Chancery Court hearing that he was afraid she would become hopeless and take her life. (RE 119-120; TR 360-361)

The testimony of Dr. Patterson was more than adequate to place before the jury for its consideration the factual circumstances described in Proposed Jury Instructions P-5 and P-6. The trial court's refusal to grant these jury instructions constitute reversible error.

2. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY PLAINTIFF THE OPPORTUNITY TO SUBMIT AN APPORTIONMENT INSTRUCTION TO THE JURY SO AS TO ALLOW THE JURY TO APPORTION FAULT AMONG DONALD C . GUILD, M.D. AND OTHER PERSONS.

MISS. CODE ANN. §85-5-7 became effective in Mississippi on July 1, 1989. This statute governs the apportionment of joint and several liability and changed the manner in which the issue of fault is presented to juries in Mississippi. As effective on September 20, 1999, this statute provided in pertinent part as follows:

> (1) 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. . . .
>
> * * *
>
> (7) In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault.

The language of MISS. CODE ANN. §85-5-7 is mandatory. This statute requires that a factfinder determine on a percentage basis the fault of all whose actions otherwise contributed to proximately cause injury to death to another person including those who are not joined as defendants in the suit. *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264 (Miss. 1999). When read together the apportionment statute (MISS. CODE ANN. §85-5-7) and Mississippi's comparative

negligence statute (MISS. CODE ANN. §11-7-15) reveal a clear legislative intent that a factfinder consider all conduct which in any way contributes to cause an injury or death in determining liability. MISS. CODE ANN. §11-7-15 as effective on September 20, 1999 reads as follows:

> In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

In construing the mandate of MISS. CODE ANN. §85-5-7(7) Mississippi courts have required the jury to consider the negligence of all participants involved in an incident that give rise to an action whether or not they are parties to the particular action. *See, Estate of Hunter v. General Motors Corp.*, p. 1271-1276, including a settling defendant's negligence; *see, Id.* at p. 1271, and including a party which is immune from liability such as an employer by virtue of Mississippi's workers compensation laws. *Mac Trucks, Inc. v. Tackett*, 841 So.2nd 1007 (Miss. 2003). In deciding *Mac Trucks v. Tackett* the Mississippi Supreme Court distinguished between fault and liability indicating that they are not synonymous terms and that there is nothing logically or legally inconsistent about allocating fault but shielding immune parties from liability for that fault. *Id.* at p. 1114.

In *Peterson v. Ladner*, 785 So.2d 290 (Miss. App. 2000), the Court of Appeals construed MISS. CODE ANN. §85-5-7 to find that a non-exempt contributor to an injury must have fault allocated if that is requested by a party to the litigation. It further held:

> . . . **it was reversible error** to refuse to instruct the jury to apportion liability among Ladner, Gregory and Peterson for Peterson's injuries. We reverse and remand for a new trial on the issue of apportionment of fault. (Emphasis added)

Id. at p. 293.

Counsel for Plaintiff sought and the Court denied an apportionment instruction.

MR. KILPATRICK: Your Honor, before we leave that, earlier the defendant had asserted he said affirmative pleadings –

THE COURT: Is this something that has to do with the instructions?

MR. KILPATRICK: Yes, ma'am. Had asserted a portion of it, and I was of the position that comparative or contributory negligence would have to be – would have to be alleged affirmatively. The court, I believe, took the position that the apportionment of damages was one in the same as comparative or contributory. But now the defendant has submitted no comparative or contributed no apportionment instruction. And I'm concerned is he going to be able to argue apportionment without an apportionment instruction, or how is the argument going to go? Because I feel that if he's going to be arguing apportionment or that one of the wrongful death beneficiaries caused her death, then I should have an apportionment instruction to let the jury, should they return a verdict, to apportion those damages between the wrongful death beneficiaries.

MR. JOHNSON: I think the plaintiff has the burden to prove causation, and I think I'm entitled to argue what the cause was. And I don't have to say if they did anything wrong. 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.

THE COURT: Okay. So you're saying you want an apportion instruction?

MR. KILPATRICK: I'm saying that I would like to have an apportionment, and I had expected Whit to come in this morning with an apportionment instruction, because he's going to argue causation, saying that the husband and the two boys, or at least one boy caused, or pushed her over the edge, so to speak, as far as he's concerned. Well, the law is –

THE COURT: Wait. What are you arguing?

MR. JOHNSON: I think –

THE COURT: Are you arguing what he's saying you're going to argue?

MR. JOHNSON: No, ma'am. I think –

THE COURT: Well, if you're not going to argue that, then we don't need to go through this, do we?

MR. JOHNSON: Well, I think – I think there is going to be argument about what led up to her hospitalization.

THE COURT: But are you going to argue that the husband or the child, the son, caused the death as opposed to Dr. Guild?

MR. JOHNSON: I think I'm –

THE COURT: Or the problem with the family?

MR. JOHNSON: The problem with the family was – and again, it's not negligence. The fact that there is a family problem is not negligence, but it doesn't mean my guy is negligent. If, for example, somebody does something, whether intentionally or innocently, they've still got to prove what the cause is. And if the cause of her suicide, and if you look at the suicide notes you'll see, I think, that this was an act, I think of – she was striking out at her family. And I think that's an issue that is certainly for the jury.

MR. KILPATRICK: And what I'm saying, Your Honor –

THE COURT: How would you – I mean, for an apportionment instruction here, I mean, what are you proposing?

MR. KILPATRICK: I'm proposing to say that, you know, we the jury find for the plaintiff and assess the damages, so you may apportion those damages as follows, and list the wrongful death beneficiaries, each one of them, and let the jury say – for instance, Your Honor, he's going to argue that the house – that the home, the fact that the husband and the minor son, the part about cutting the phone line off and getting the divorce3. I've got two wrongful death beneficiaries that weren't even living at home, had been gone four years. Any apportion of damages as to causation by the husband or the smallest son cannot be imputed to the other two.

MR. JOHNSON: Yes, it is.

MR. KILPATRICK: No, it's not. I have a case on it.

MR. JOHNSON: Well, but I'm not going to argue – my argument is going to be purely a causation. It's not that they did anything wrong, it's that whatever happened is not my client's responsibility. When she left – when she left the hospital, everything looked good. Anything that happened subsequently, that may have happened when you look at those notes, I think it goes, again, to her state of mind and her desire to do this to herself.

THE COURT: Okay. I'm going to deny the apportionment instruction.

(RE 170-175' TR 733, l. 27 - 738, l. 2)

Dr. Guild listed on the Pretrial Order as a contested issue of fact:

D. Whether Plaintiff's voluntary actions negligently caused Cherie Hancock's death.

(RE 17; R 307)

Beginning four sentences into opening argument continuing throughout the trial to closing argument, counsel for Defendant attempted to deflect the fault for Mrs. Hancock's suicide away from Dr. Guild and onto Mrs. Hancock's family, particularly her husband, George Thomas Hancock. At opening argument counsel for Defendant advised the jury:

> MR. JOHNSON: Ladies and gentlemen, my name is Whit Johnson. I' going go be representing Dr. Guild, along with Ms. Wesley in this case. And the story you're going to hear over the next four days is th story of a man, Dr. Don Guild, a psychiatrist in Jackson, who tried to relieve the pain and suffering of the mental illness that was being suffered by Cherie Hancock. It was a mental illness that was **due in large part to many years of a bad family situation, in which she was treated very poorly by the people that – who should have loved her and who are now here asking for money damages for her death.**
>
> Now, you heard that Mrs. Hancock killed herself on September 20 of 1999, and the family blames Dr. Guild for that. But the story that you're going to hear is that during the last six weeks of her life, from approximately August 6th up until she died on September 20th, the people that were closest to her, the people that – the people that were providing her support, that were trying to help, **were not her family members who should have been doing it**, but were instead a friend by the name of Donna Pigg, or Donna Carey Pigg, her lawyer, Mr. Jim Herring, and Dr. Guild.
>
> Each of them was doing what they could in their own little way. Ms. Pigg was getting her to the doctor, carried her, I think to Dr. Guild, came to visit her at the hospital at St. Dominic's, I think every other day, but certainly a lot. Mr. Herring was trying to get her out of this bad family situation in connection with the divorce, and was doing his best to try to get her a place to stay, get her in this house.
>
> And then Dr. Guild, who was doing what he could to help cure her, help get her over the depression she was going through. And he was doing this by medication, by counseling, by therapy. And perhaps most importantly by letting her be involved in her care. Because the story you're going to hear, and the story that's going to come out of the records, that are records that are being generated by medical

care providers, whether they're psychologists, psychiatrists, or other doctors. **They're going to be reporting statements directly from Ms. Hancock, telling her story about how she was being treated by the family members.**

And what you're going to hear is, and as much as I hate to do it, you're going to hear and see testimony and records of the way she was treated. And what Dr. Guild did was he accepted her for who she was, he treated her, he tried to let her be involved in her care, when in the past **she had been suffering pretty significant rejection and bad treatment by the people that should have been closest to her.** (Emphasis added)

(RE 69-71; TR 165, l. 2 - 167, l. 14)

* * *

What Dr. Guild was able to do, **what her family had been unable to do, or unwilling to do, I don't know which**. (Emphasis added)

(RE 72; TR 168, l. 12-14)

* * *

. . . Dr. Guild will tell you, we had talked with 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're not going to be able to have his testimony because the plaintiffs have objected.

MR. KILPATRICK: Judge, I'm going to object to that as improper opening.

THE COURT: Objection is sustained.

MR. KILPATRICK: I'm going to ask that the jury be instructed to disregard it, Your Honor.

THE COURT: Disregard that comment about the lawyer.

MR. KILPATRICK: I would move for a mistrial.

THE COURT: Overruled.

(RE 75; TR 171, l. 4-22)

At closing argument two separate counsel argued on behalf of Dr. Guild. Both hammered away at the family. Ms. Wesley argued as follows:

. . . Also, I guess when the case first stated out, I think this was an excellent example of this whole trial of how there are definitely two sides to every story. **I think when we started out, we hard from one of the sons and we heard from the daughter. And we heard about how – we heard about how they couldn't get in touch with their mother because they didn't know where she was. And they called the grandmother, and the grandmother wouldn't tell them. And they called their mother's best friend, Donna Pigg, and Donna Pigg wouldn't tell them. And it took them days, days to get some information. And even more than a week to get a – to get an exact location on their mother.**

And I think that – I think that once we start looking at the medical records, the full picture starts to make sense. Medical records provided by Dr. Guild and the treatment staff that he worked with, as well as the full picture from the Warren-Yazoo medical records, which you will be able to take back and look at. And 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.**

And we have the letter that she wrote Donna Pigg. You can have a look at it, you will get a chance to take this back, this is Defendant's Exhibit 1. And it's handwritten. And it says right here, take care, because all I'm doing here is killing time, which let's you know that she was looking past this time period, you know. And someone – she was someone who was ready to move on, even at the early time that she wrote this letter. **And she said, of course, my family won't know it. They will think that I'm here just because I'm crazy. And she did put quotes around family, which I think tells you the way she felt about how they treated her.**

And like I said, once we start putting this together it really makes sense, **that she was being mentally abused** and Dr. Guild had to step in to really a lot of problems that were going on in Cherie's life.

* * *

Lastly, I want to talk a little bit about justice. We've heard a lot of about justice here, and that's what her family members say that they want. But I submit to you that there are – that testimony of Donna Carey Pigg who has stepped forward today, is the testimony of someone who is seeking justice. I want you to think about it. She lives in the same town – she lives next door to them. Mr. Hancock is the mayor of the town. What reason would she have to step forward and tell you what she did unless she wanted you to know the truth about what was going on with her friend?

And we know from the letter that Cherie gave her access to see her at the hospital, even when she didn't give it to her own children. Donna Pigg went to treatment with Cherie, she went and took her to the – she went and took her to the

hospital. We see that in Dr. Guild's notes. He walked with Donna Pigg also in the Warren-Yazoo. Donna Pigg came with Cherie. And we also – and we also know that at this time, **Cherie was going through so much with the children. She felt like she was rejected.**

Some of the little bit of what we are able to know of what was doing on in her life is that she was in a bad situation. She felt like – she felt like they didn't talk to her. They told her that she needed to go find some kind of what to pay for her own medication, the husband the son told her that. And if she wanted to talk on the phone, they would yell at her and tell her to get off the phone. If she wanted to clean up, one of them would tell her to stay out of the room. And this is just a little bit that we know.

When Cherie tried to assert herself and get out of that position and move on to a position that was better for her, the children, from what we know, sided with the father. They pushed her away at the end of the divorce hearing, and this is what she was dealing with. But the people who stepped up to bat for her at that time, two people in this courtroom, Donna Pigg and Dr. Guild.

And the other – the other children, and they are her children, but I want you to understand that this time the youngest child was two weeks from being 18. **Two of them had homes of their own, and nobody said, mama, I want you to come live with me. Or knowing that their mother had a history of trying to shoot herself, so much depression in the past, nobody said, daddy, why don't we just let her have the house for now. Why don't we just do that, you know, we can get an apartment because we care. But that's not what happened in this case.** (Emphasis added)

(RE 178-182; TR 767, l. 14 - 771, l. 20)

Mr. Johnson continued the argument holding the alleged suicide notes before the jury:

MR. JOHNSON: Ladies and gentlemen of the jury, when we started the other day I told y'all that you were going to hear a story about a man who tried to solve the problems of the patient who came to him for help. **And that what you were also going to hear was that the people that should have been giving this lady the love and support that she needed to get through this tough time were not there for her when it counted.** That instead, she had to rely on her physician, her best friend and her lawyer, who did step up, who did take care of her.

And I think that that is exactly what the evidence has shown you in this case. That the people who cared most about this lady, who tried to do the right thing for Ms. Hancock included Dr. Guild, and also Ms. Pigg and Mr. Herring. (Emphasis added)

(RE 183; TR 772, l. 9-29)

* * *

And to me the really ironic thing about all of this is that the family is in here now saying, oh, you know, you're at fault because you discharged her and you knew this was going to happen. Well, what his testimony was, I'm afraid she might kill herself. You know, that's something we always have to consider. I can't hold her forever. I've got to get her out in the world. (Emphasis added)

(RE 184-185; TR 775, l. 23 - 776, l. 3)

* * *

. . . When she dropped that, she must have already made her mind up to kill herself. Why? We don't know. Nobody will ever know.

Unless you want to look at the notes that we put into evidence, and maybe this explains it. Tommy, you win it all. I hope you're happy. You've got my children, grandchildren and house. And I have nothing. Love, CJ. that's one of the notes that the policy found, law enforcement found when they were investigating.

This was an act of anger by Ms. Hancock directed at her husband, and there is nothing anybody could do that was going to prevent that. There is nothing anybody would do. (Emphasis added)

(RE 187-188; TR 778, l. 17 - 779, l. 5)

At trial Defendant called Donna Pigg who was Cherie Hancock's friend and neighbor and THROUGH Ms. Pigg, Dr. Guild continued his attack on the Hancock family. Ms. Pigg testified as follows:

1. The Hancock family house was right behind Donna Pigg's house which was next door to Cherie Hancock's mother's house. (RE 125; TR 486)

2. Beginning in 1996 Cherie Hancock and her husband, Thomas Hancock, began having many problems and the relationship started to deteriorate. (Re 126-127; TR 487-488)

3. Cherie Hancock and her children did not appear to be very close. There was a real tense atmosphere in the house. They did not talk or get along. They just lived together. (RE 127; TR 488)

4. Cherie Hancock told Ms. Pigg that her children were very mean to her; that they would laugh at her; tell her that she was crazy; call her names and make faces at her. (RE 128; TR 489)

5. Cherie Hancock told Ms. Pigg that her children made her feel like they didn't love her, that they would put notes on the food saying do not touch or do not eat and they had notes on their door saying do not enter and things of that nature. (RE 128; TR 490)

6. Ms. Pigg testified that Cherie Hancock told her that Mr. Hancock told her he wanted a divorce and that he was leaving for a few days and that he wanted Cherie to be gone when he came back, and that's when Cherie decided she needed to go ahead and file for divorce. (RE 130; TR 493)

7. Ms. Pigg testified that after the Chancery Court hearing relative to custody of the house, Cherie walked over to try to speak to her kids but none of them would speak to her. (RE 131; TR 499)

8. Ms. Pigg testified that about two weeks after Cherie Hancock was admitted to St. Dominic's that Ms. Pigg got a call from Candice Young wanting to know if she knew where her mother was. Ms. Pigg told her that she did not know because she had been instructed not to tell the family where Cherie was. (RE 135; TR 508)

9. Ms. Pigg testified that Cherie told her that Candice only called because her husband Thomas wanted to know where Cherie was. (RE 136-137; TR 509-510)

10. Ms. Pigg testified that prior to releasing Cherie Hancock Dr. Guild called her and told her that he was going to release Cherie from the hospital, that she was going to her mother's house

and that if Ms. Pigg or Cherie's mother needed him for any reason that they knew how to get in touch with him and that was everything Dr. Guild said. (RE 138-139; TR 511-512)

11. Ms. Pigg testified that Dr. Guild did not mention anything to her about guns or keeping Cherie away from guns. (RE 139; TR 512)

Through the direct testimony of Dr. Guild, Defendant attempted to place the fault for Cherie Hancock's problems on her family.

1. Dr. Guild read into evidence notes from a June 16, 1999 consultation between Ms. Hancock and Dr. Parveen Kumar: "Today she presents stating that she is going through a bad marriage and trying to get a divorce from her husband. She reports mental abuse by her husband and children quote 'everybody at my house puts me down, ignores me, they steal things, take things away from me and they ask me to leave the house. They call me crazy.' (RE 141; TR 535)

2. Continuing Dr. Guild read further from Dr. Kumar's notes of June 16, 1999: "The patient's opening statement was quote I have hell at home closed quote. She was the wife of the mayor or Bentonia. She thinks her husband is seeing someone else, believes he wants a divorce. She states that her husband and her children have called her a maid for the past ten years." (RE 141; TR 535)

3. Reading from a June 23rd note from Dr. Kumar, Dr. Guild stated, "She reports that she has met with her attorney and has started legal proceedings to stop the mental abuse by her family." (RE 142; TR 536)

4. Reading from a July 7, 1999 report in the records of Dr. Kumar, Dr. Guild testified, "Cherie is being emotionally and mentally abused by her husband . . . in her words Cherie's husband can put up a front in public but is mean at home." (RE 143; TR 542)

5. Dr. Guild read from a July 14, 1999 note from Dr. Kumar as follows, "She reports being nervous and anxious and being emotionally abused at home by her children and her husband. Her 19 year old son had thrown the birthday card away that she had given him. He had hidden the keys to the lawnmower and threatened to cut the phone line." (RE 144-145; TR 551-552)

6. Dr. Guild testified that at the hearing of September 15, 1999 relative to possession of the house that the 19 year old son testified and admitted that he threatened to cut the phone line. (RE 145; TR 552)

7. Dr. Guild testified by reading from a July 21st note from Dr. Kumar stating, "She states that her parents and her friend, along with the patient with the help of her lawyer are trying to expedite the process of stopping the mental abuse at home." (RE 145; TR 552)

8. Dr. Guild testified by reading from a September 13, 1999 nurse's note from St. Dominic, "Patient voices concerns about court Wednesday, states she hopes to get a restraining order against her husband and her son who she says has been physically abusive." (RE 146; TR 571)

9. Dr. Guild testified by reading another nurse's note from September 15, 1999, written after the Chancery Court hearing, "Client stated that she lost her house and further voiced that her son pushed her away when she approached him." (RE 1460147; TR 571-572)

Through pleadings, argument and testimony, Defendant emphasized through his case that the death of Cherie Hancock was caused not by the negligence of Dr. Guild but by the acts of Cherie Hancock's husband, Thomas Hancock, and other members of the family. Through out the trial Defendant spent considerable time pointing the finger of fault at Thomas Hancock and the Hancock family. The mandate of MISS. CODE ANN. §85-5-7 specifies that the jury should be allowed to apportion fault to all who are blamed and further requires that it shall determine the percentage of fault of each such person. Because Plaintiff was not allowed to submit an apportionment instruction

to the jury to permit the jury to determine or consider that Dr. Guild and Thomas Hancock or other family members each may bear a responsibility in the death of Cherie Hancock, Plaintiff was denied the benefit of MISS. CODE ANN. §85-5-7 and such constitutes reversible error. *Peterson v. Ladner*, p. 293. The jury was not allowed to consider the fault of Dr. Guild and measure same against the fault of Thomas Hancock or other Hancock family members through instructions from the Court concerning apportionment of fault. In effect, this case was tried under the old contributory negligence standard where contributory negligence was a bar. Such is no longer the law in Mississippi and it is reversible error to deny an apportionment instruction so as to deny any party the benefit of the mandate of MISS. CODE ANN. §85-5-7.

3. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO ADMIT INTO EVIDENCE UNAUTHENTICATED COPIES OF ALLEGED SUICIDE NOTES OF CHERIE HANCOCK.

During his closing argument, counsel for Defendant waved before the jury the alleged suicide notes of Cherie Hancock and in effect argued that her death was caused by her husband, Thomas Hancock and her family, not by the negligence of Dr. Guild. The admission into evidence of these alleged writings constitutes reversible error.

First, these handwritten notes were never authenticated and identified as required by M.R.E. 901. M.R.E. 901 provides in pertinent part:

> (a) General Provision. The requirement of authentication or identification as a condition precedent to 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:
>
> > (1) *Testimony of Witnesses With Knowledge.* Testimony that a matter is what it is claimed to be.

> (2) *Nonexpert Opinion on Handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
>
> (3) *Comparison by Trier or Expert Witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

These alleged writings were admitted over the objection of Plaintiff as Defendant offered no evidence as to their authenticity or identification. No one testified as to where the alleged notes were found or who allegedly found them. No one testified or identified the alleged handwriting of the notes and tied said handwriting to that of the Deceased, Cherie Hancock. No expert or nonexpert opinion evidence was proffered as to the genuineness of the handwriting based on familiarity as required under Rule 901. No evidence was offered as to the time-frame within which the alleged notes were written so as to connect the alleged notes to the suicide of the Deceased. These notes could well have been written days, weeks, months or years earlier. In fact, the original of the alleged notes were not offered for admission; only copies.

> MR. KILPATRICK: Thank you, Your Honor. the last objection I have, Your Honor, is the handwritten notes by Cherie Hancock from the Yazoo County Sheriff's Office Investigative Report. I have not seen the originals. the copies I have that there is a, there is no date on the notes. I don't have any knowledge about where they were found. There's some notations on there that they were found in some certain places, like in the mother's home, but there is no dates on them and no indication -- uh --
>
> THE COURT: Have you not seen the originals?
>
> MR. KILPATRICK: I have not seen the originals.
>
> THE COURT: Do you have the originals?
>
> MR. JOHNSON: No, ma'am, they're in the sheriff's office. I mean I don't have them. We can subpoena them to be here. I mean they're just – where's the sheriff's office?
>
> THE COURT: Downstairs.

MR. KILPATRICK: Your Honor, they were subpoenaed by Denise.

THE COURT: Is that your only objection, the fact that you have not seen the originals?

MR. KILPATRICK: No, ma'am. My objection is the copies that I have is clear that they are not dated, they haven't been authenticated as being, you know, I don't know where they were found. I don't know anything.

THE COURT: Who found them?

MR. KILPATRICK: The sheriff's department.

THE COURT: Have you talked with the sheriff's department as to where they were found?

MR. KILPATRICK: I talked to Ed – uh – I talked to Mr. Woods. And he told me that the notes, that he's no longer with the sheriff's department, and from his recollection, he says that some of the notes were found under the mattress in the bedroom where the deceased was, in fact, found, that the had committed suicide.

He also told me, to the best of his recollection, a couple of notes were found over in the mother's house where she was living at the time of her suicide. But he also told me that they were not dated, and that he didn't know when they were written.

THE COURT: Okay.

MR. JOHNSON: It still goes to her state of mind, Judge, which is the sole issue in this case.

(RE 66-68; TR 39-41)

THE COURT: Okay. Objection is overruled.

(RE 68A; TR 42)

The Comment to M.R.E. 901 states:

> The authentication and identification aspects of evidence are central to the concept of relevancy unless it be satisfactorily shown that an item of evidence is "genuine." The item is irrelevant and should be excluded.

Defendants called none of the investigating officers from the Sheriff's Department to either identify or authenticate the alleged writings. They called Willie Bell Hood, a deputy clerk of the Sheriff's Office. Ms. Hood stated that she gave counsel for Dr. Guild a copy of the Sheriff's file but she could not swear that the documents she was being asked to identify were among the documents she gave counsel because she "didn't read any of the papers." (RE 151; TR 617) Ms. Hood simply made copies and put the file back where it was. Ms. Hood stated:

Q: Ms. Hood, how long have you worked at the sheriff's department?

A: Since February 1, 1990.

Q: Now, you don't know as you said, you couldn't swear under oath as to all the documents that you faxed down there, could you?

A: No, sir, because I did not read the file. I just made the copies, put the file back where it was.

Q: Do you know how those records got in that file?

A: No, sir.

Q: Ma'am?

A: No, sir. The investigators do that, I don't put them in the file.

Q: And you don't know – you don't know who put them in there, do you?

A: Whoever the investigator was at the time.

Q: But you don't know that of your own knowledge, do you?

A: No, I do not.

Q: And you don't know that the records that were in that file were put in there by more than one person or one person, do you?

A: No, sir.

Q: And you don't know anything about those documents in there, do you? You don't know where they were found, do you?

A: No, sir. I'm not part of the investigative team.

Q: And do you know who wrote them?

A: Well, I don't even remember at the time who was the investigator, who was there at the time.

Q: And so you don't know on those letters in there, you don't know whether they were dated or whether they weren't, do you?

A: No, sir, I didn't read the paging in the file.

Q: And so you don't know where they were found?

A: No, sir.

Q: Okay. And you don't know who found them?

A: No, sir.

Q: All you know is they were in a file in the sheriff's office?

A: That was the file.

Q: All right. And as far as you know there could have – anybody could have put in there that worked for the sheriff's department/

A: They could have.

(RE 153-155; TR 619- 621)

There was NO testimony indicating that Ms. Hood was the custodian of records for the Sheriff. The failure to properly authenticate the writings is fatal to their admissibility. *Davis v. Miss. Depart. of Human Services*, 938 So.2d 912 (Miss. App. 2006).

Admission of these notes and their consideration by the jury were the capstone of Defendant's efforts to shift fault away from Dr. Guild and onto Thomas Hancock and the Hancock

family relative to the death of Mrs. Hancock. Three of the notes purported to be addressed to Tommy (assumed to be Mr. Hancock) in pertinent part stated:

> Tommy, you win it all. I hope you're happy. You've got my children, my grandchildren and house and I have nothing. Love CJ

(RE 195; TE D-6)

> Tommy, I believe with all my heart this is what you want so I hope you are real happy. I hope you live in hell the rest of your life because that's certainly where you made me live mine. I hope I can wait until your birthday because I sure don't want you to forget the day that you killed me and in my eyes, that's right you made me pull the trigger. I will see you in hell.

(RE 198; TE D-6)

> Tommy, how do you expect me to work half the night with mom and all day and stay up the other half of the night and do the housework. I am not superwoman. Why don't you stay up half the night and get another job and give up everything else like you want me to. Stirlin and GW should both be able to draw my Social Security as long as they are in school.

(RE 199; TE D-6)

The time-frame of the third above quoted notes is questionable inasmuch as there is no evidence that Mrs. Hancock was working half the night with her mom and all day and staying the other half the night doing housework for Tommy prior to her death and were inadmissible for consideration by the jury.

Defendant obviously recognized that he failed to authenticate the documents and attempted to claim that they constituted a hearsay exception, under Rule 803(6) of the MISSISSIPPI RULES OF EVIDENCE. Such is simply not the case. Rule 803(6) reads as follows:

> **(6) Records of Regularly Conducted Activity**. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, **if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, records, or data compilation, all as shown by the testimony of the**

> **custodian or other qualified witness or self-authenticated pursuant to Rule 902(11),** unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every hind, whether or not conducted for profit. (Emphasis added)

These alleged notes do not constitute any memorandum, report, record or data compilation in any form of acts or events in the regular course of business by the sheriff's department of Yazoo County, Mississippi. They were not prepared by any person, employee or agent of the sheriff's department and do not constitute business records of the sheriff's department. The Comment to Rule 803 states: "The records must be those of a regularly conducted business activity." The Comment further states:

> However, the source of the material must be an informant with knowledge who is acting in the course of the regularly conducted activity. This is exemplified by the leading case of *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930) which is still the applicable law today under the rule. That case held that a police report which contained information obtained from a bystander was inadmissible; the officer qualified as one acting in the regular course of business, but the informant did not.

Comments (6) to Rule 803 of *Mississippi Rules of Evidence.*

The mere fact that these notes were contained within the evidentiary records of the Yazoo County Sheriff's Department does not make them admissible into evidence in a civil trial. Notes prepared by the deceased cannot constitute business records of the sheriff's department. If Defendants' Rule 803(b) basis for admitting these documents into evidence is correct, then no document ever needed to be authenticated or identified, but simply placed into the file of the local sheriff or police department in order to make it admissible in a civil trial as a "business record" of said department. The Yazoo County Sheriff's Department did not create these records, it merely had them in its possession. The admission into evidence of these documents and their use by counsel for Defendant was highly prejudicial to Plaintiff and constitute clear reversible error.

4. **REVERSAL AND NEW TRIAL ARE WARRANTED BECAUSE OF MATTERS WHICH IN THE CUMULATIVE CONSTITUTE ERROR.**

A. During his opening statement counsel for Defendant inappropriately commented that the jury would not hear from attorney Jim Herring who had been representing Cherie Hancock in the divorce proceeding because Plaintiff had claimed the attorney/client privilege and objected to him testifying. Mr. Johnson stated as follows:

> 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)

This comment was highly prejudicial and highly inappropriate particularly in light of the fact that the issue had been before the Court previously on Defendant's motion to compel the deposition of Jim Herring, the divorce lawyer who referred Cherie Hancock to Dr. Guild, the Defendant in this case. His motion to compel was heard on September 16, 2003. However, since the appeal of this case numerous attempts were made to locate the recording or transcription of this hearing making it necessary for the parties to this appeal to submit an Agreed Statement as to Record on Appeal. (R 388) As set forth in this Agreed Statement, "It is disputed whether Judge Lewis also addressed the issue of whether defense counsel would be permitted to make any mention to the jury of Plaintiff's objections to Jim Herring's provision of evidence, oral or documentary, to defense counsel. The Plaintiff contends that she ruled no mention could be made to the jury and the defense contends there was no ruling." (RE 64; TR 390)

Defendant claims the jury is entitled to know why Jim Herring would not be presented as a witness at trial though he would be mentioned throughout the proceedings and his name was contained in admitted trial exhibits. In fact, there is no reason why Jim Herring could not be

presented as a witness at trial and there was no reason why Defendant could not have called him as a witness and ordered to testify to certain events that happened relative to this cause. Plaintiff's claim of the attorney/client privilege would only restrict certain testimony from Mr. Herring, not all testimony. It would only restrict that certain comments between the Deceased and Mr. Herring and would have in no way restricted testimony concerning Mr. Herring's relationship with the Defendant and the circumstances under which the Deceased became a patient of the Defendant and conversations between the Defendant and Jim Herring. The Defendant chose not to call Jim Herring as a witness. Plaintiff's invoking of the attorney/client privilege would only restrict a portion of the testimony that could give. Instead of calling Mr. Herring as a witness and obtaining relevant testimony that would be admissible. Counsel for Defendant chose to make inappropriate comments to the jury which had the effect of prejudicing Plaintiff and that it left the jury to consider that Mr. Herring's testimony would have been detrimental to the Plaintiff thus the invocation of the attorney/client privilege. This act of counsel, when taken with other acts hereinafter enumerated, constitutes error which in the cumulative warrant a reversal and a new trial.

B. Throughout the direct examination of Ms. Pigg, Defendant pursued a line of testimony that involved communications between Ms. Pigg and the Deceased. These conversations did not relate to the existing mental, emotional or physical conditions of the Deceased at the time of her suicide and did not constitute excited utterances or present impressions near the time of related to her suicide. Further, these conversations were irrelevant to the issue of Defendant's malpractice and were unfairly prejudicial, confusing and misleading to the jury.

Defendant argues that these conversations are admissible as they relate to Ms. Hancock's state of mind. However, these conversations are not the exceptions contained within M.R.E. 803(2)

relating to either excited utterances or existing mental, emotional or physical condition. M.R.E. 803 states in relevant part as follows:

> **(2) Excited Utterance**. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
>
> **(3) Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotional, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health) but not including a statement of memory or belief to prove the fact remembered or believed until it relates to the execution, revocation, identification or terms of declarant's will.

Ms. Pigg's description of her conversations with the Deceased and the statements made to her by the Deceased do not meet the standard of M.R.E. 803. This evidence was offered to further poison the jury and to deflect attention from Dr. Guild onto Ms. Hancock's husband, Thomas Hancock, and other family members. Such evidence was inadmissible and outside the scope of M.R.E. 803 and constituted in the cumulative with other errors sufficient reason to grant a new trial.

C. Plaintiff acknowledges that M.R.E. 803(4) provides her an exception to the hear say rule for certain statements for the purposes of medical diagnosis or treatment. M.R.E. 803(4) provides as follows:

> **(4) Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trustworthiness. For purposes of this rule, the term "medical" refers to emotional and mental health as well as physical health.

However, consistently throughout his testimony, the Court permitted Dr. Guild to make references to statements made by the Deceased to him which were not contained, acknowledged or

noted within his medical records. Hearsay statements that are written down obviously meet the trustworthiness requirements of Rule 803(4). However, to permit Dr. Guild to consistently testify and make reference to alleged statements made by the Deceased which are not contained within the medical records gave Defendant *carte blanche* hearsay authority and this error when considered in the cumulative with other errors constitutes and warrants a reversal and new trial.

CONCLUSION

It was error for the trial court to:

(1) deny Plaintiff's Proposed Jury Instructions P-5 and P-6 thereby denying the jury the opportunity to find for Plaintiff;

(2) deny Plaintiff an apportionment instruction so as to allow the jury to apportion fault;

(3) admit into evidence unauthenticated and unidentified alleged writings of the Deceased which were inflammatory; and

(4) permit Dr. Guild to relate alleged statements of the Deceased not documented in his notes, and permit Ms. Pigg to relate conversations with the Deceased all of which constituted hearsay.

Because these constitute reversible error Plaintiff is entitled to a reversal and a new trial.

Respectfully submitted, this the 23rd day of July 2007.

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CERTIFICATE OF SERVICE

I, RONALD M. KIRK, 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 the 23rd day of July 2007.

Ronald M. Kirk
RONALD M. KIRK