

IN THE SUPREME COURT OF MISSISSIPPI

No. 2005-TS-02357

RIVER REGION MEDICAL CORPORATION

APPELLANT / DEFENDANT

VS.

RILEY NELSON, ET AL

APPELLEES / PLAINTIFFS

**APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI
HONORABLE ISADORE W. PATRICK, CIRCUIT JUDGE**

BRIEF OF APPELLEE / PLAINTIFF THOMAS PATTERSON

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CERTIFICATE OF INTERESTED PERSONS

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

1. **Thomas Patterson**, Appellee / Plaintiff - Husband and wrongful death beneficiary of Jennifer Nelson Nettles, Decedent
2. **Paul Kelly Loyacono, Esq.** - Counsel for Appellee / Plaintiff
3. **William A. Hood, Esq.** - Counsel for Appellee / Plaintiff
4. **William A. Pyle, Esq.** - Counsel for Appellee / Plaintiff
5. **John D. Fike, Esq.** - Counsel for Appellee / Plaintiff
6. **L. Carl Hagwood, Esq.** of Wilkins, Stephens & Tipton- Counsel for Appellant / Defendant
7. **Jason E. Dare, Esq.** of Wilkins, Stephens & Tipton- Counsel for Appellant / Defendant
8. **David M. Eaton, Esq.** of Wilkins, Stephens & Tipton- Counsel for Appellant / Defendant
9. **Honorable Isadore W. Patrick**- Circuit Court Judge

SO CERTIFIED, this the 30 day of March, 2007.



PAUL KELLY LOYACONO

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STATEMENT OF THE ISSUES

- I. The trial court did not commit reversible error when it allowed Eugene Michael Finan, M.D. to express opinions at trial, over objection, because there had been adequate disclosure.
- II. The trial court did not commit reversible error when it allowed Terry Siverly, R. N., B.S.N. to testify as to nursing standards of care.
- III. The trial court did not commit reversible error by allowing post-mortem photographs of the body of Jennifer Nettles taken during the post - mortem examination to be put in evidence.
- IV. The trial court did not commit reversible error by prohibiting Defendant from putting into evidence Jennifer Nettles' alleged habitual abuse of illegal drugs.
- V. The trial court did not commit reversible error in instructing the jury that all damages must be equally divided between the three (3) wrongful death beneficiaries of the Decedent.
- VI. The trial court did not commit reversible error in denying the Defendant's Motion for Directed Verdict as to the claims of Thomas Patterson.

STATEMENT OF THE CASE

This brief is filed on behalf of the only appellant, Thomas Patterson, who was the lawful husband of the Decedent, Jennifer Nettles, at the time of her death. Thomas Patterson is asking this Court to affirm his right to 1/3 of the jury's verdict in this case. Affirming the jury's verdict for Thomas Patterson will not increase or decrease the recovery of any other wrongful death beneficiary of Jennifer Nettles.

This is a wrongful death claim arising from the death of Jennifer Nettles on December 26, 2001, while a patient at and under the care of River Region Medical Corporation ("River Region") in Vicksburg, Mississippi. Dr. Connell (the surgeon involved) and all other physicians, nurses and staff, were employees of River Region.

Suit was brought on behalf of all of the wrongful death beneficiaries of the Decedent, pursuant to the Mississippi Wrongful Death Statute, Miss. Code Ann. § 11-7-13 which states:

*....there shall be but one (1) suit for the same death which shall ensue
for the benefit of all parties concerned,*

It was stipulated by all parties that the wrongful death beneficiaries of the Decedent were Jennifer's two daughters, Hallie and Brandy, and Jennifer's lawful husband, Thomas Patterson. After a five-day trial of this matter the jury returned a single verdict for all three stipulated wrongful death beneficiaries in the amount of \$1,710,000.00. After the judgment became final, River Region settled with each of the Decedent's two daughters, Hallie and Brandy, paying each daughter \$570,000.00 plus interest, in the amount of \$12,800.00, to a combined total of \$582,800.00. As mandated by Miss. Code Ann. § 11-7-13, the share of each wrongful death beneficiary was one-third of the amount of the jury's verdict, plus interest.

River Region, therefore, is taking this appeal only as against the interest of the lawful husband of the Decedent, Thomas Patterson. In the Statement of Issues enumerated by River Region in this appeal and pursuant to the full settlement of the two daughters' claims, the jury's finding of River Region's negligence, which caused the death of Jennifer Nettles, is not and was not an issue. The amount of the verdict and the validity of the verdict are fully accepted by River Region. Since settlement has been concluded with the Decedent's two daughters, River Region is now only concerned with this Court finding that Thomas Patterson, the lawful husband of the Decedent, should not receive the statutorily mandated one- third share due to him. Thus, this appeal is a direct attack on the Wrongful Death Statute Miss Code Ann. §11-7-13. This Court has repeatedly stated that the Wrongful Death Statute must be strictly construed.

The Appellant, River Region, in its brief, as in all proceedings in the Circuit Court, has used nothing more than innuendo and prejudice to support its position. The trial court, for the most part, properly prevented this. River Region now complains of the trial court's denying River Region the right to bring before the jury an unsubstantiated comment, by an "unnamed deputy" relative to alleged drug use, in the past, by the Decedent. This comment was contained in the Coroner's Report relative to the death of the Decedent. Not one single witness, much less a witness with personal knowledge of this alleged drug use, was proffered by the Defendant to the Court, nor was the relevance of this allegation presented to the Court. This is the only mention of drug use in the entire case. The Coroner's Report only mentions that an unnamed "deputy" made mention that the Decedent may have used drugs in the past. Clearly this is not admissible. It is hearsay in its purest form. Please note that if this Honorable Court orders a remand, the testimony of the then Coroner, John Thomason, relative to the Coroner's Report, would have to stand on this issue, as Mr.

Thomason was killed in an automobile accident in 2006.

The autopsy report of Dr. Hayne (Plaintiff Exhibit 1) showed no illegal drugs or alcohol in Jennifer Nelson's body at the time of her death. River Region proffered no evidence of current or even recent drug use by Jennifer. Instead, River Region proffered only rank hearsay of alleged drug use by Jennifer in years prior to her death. For example, River Region, in its brief, references allegations by family members of drug use by Jennifer. However, River Region then admits that these family members [including her sister Amy who had allegedly lived with Jennifer for a short while] had no relationship with Jennifer for four years prior to Jennifer's death. These allegations are so removed in time that they are not relevant to this case.

More importantly, any alleged drug use was not relevant because all testifying physicians have clearly stated that no past action or failure of Jennifer Nettles had anything to do with her death. The issue of alleged prior drug use is moot, as River Region failed to proffer any evidence that the alleged prior drug use caused or contributed in any manner to the death of the Decedent. Thus, the attempted introduction of these allegations was and is sought by River Region solely for prejudicial value. The Trial Court properly excluded this proffer because (1) there was no evidence whatsoever that alleged drug use played any role in Jennifer's death [medical experts for both parties testified that Jennifer did nothing that contributed to her death]; (2) the proffered testimony was rank hearsay; and (3) the proffered testimony referenced a time period at least 4 years prior to Jennifer's death and, thus, had no relevance to any fact in issue in this case.

River Region totally failed to proffer any relevant and admissible evidence concerning any alleged drug use by the Decedent. River Region's claim of error on the issue of alleged drug use is, therefore, moot.

The jury had sufficient evidence, which had been properly admitted, upon which to base its findings that River Region was negligent and that Jennifer Nettles' death was caused by the culpable negligence of River Region.

River Region has paid two-thirds of that verdict to two of the wrongful death beneficiaries but now hopes to avoid having to pay the only remaining wrongful death beneficiary by asserting an argument solely founded on hearsay in its purest form.

SUMMARY OF THE ARGUMENT

The remaining Plaintiff, Appellee Thomas Patterson, the lawful husband of the Decedent, believes that the best way to consider the issues in this case is by an examination of the testimony of witnesses in this trial. These witnesses were evaluated by the jury, which under black letter law, *"...is the sole judge of both the credibility of a witness and the weight of his testimony."* *Weathersby Chevrolet Co. v. Redd Pest Control Co.*, 778 So.2d 130, 133 (Miss.2001).

The jury found for the plaintiffs and awarded damages of \$1,710,000.

The only Appellee here is Thomas Patterson, the lawful husband of the Decedent, Jennifer Nettles, at the time of her death. Pursuant to the express language of the Mississippi Wrongful Death Statute, Thomas Patterson is asking this Court to affirm his right to 1/3 of the jury's verdict in this case. Affirming the jury's verdict for Thomas Patterson will not increase or decrease the recovery of any other wrongful death beneficiary of Jennifer Nettles.

A reversal of Thomas Patterson's share of the judgment would not help the other wrongful death beneficiaries, the two daughters of Jennifer Nettles. These children, relying on the Wrongful Death Statute Miss. Code. Ann. §11-7-13 and prior decisions of this Court, on point settled their

cases under the dictates of this well settled law. Perhaps the children should have gotten a greater amount of the judgment than Thomas Patterson, but they, their attorneys and the trial court all relied on the well settled law relative to Mississippi's Wrongful Death Statute and Mississippi's laws of descent and distribution.

A reversal in this case would require this Court to find that Thomas Patterson was not married to Jennifer Nettles at the time of her death. That would require this Court to find that a marriage can be terminated by one spouse simply walking away from the other. A finding that a marriage can be terminated without obtaining a divorce would affect not only Thomas Patterson, but would directly and adversely impact and disrupt the well settled law of this state in areas including, but not limited to:

1. Real estate titles;
2. The Legislature's statutorily established statutes relative to descent and distribution in Mississippi, and the plethora of chancery and appellate court decisions based on those statutes;
3. The necessity of obtaining a divorce to terminate the rights and obligations of parties to a marriage, and numerous other long settled issues of family law;
4. Tax issues, including, but not limited to, the homestead exemption;
5. Insurance issues, e.g. how long would a spouse retain an insurable interest in the life of the other spouse; and
6. Numerous other areas of law which are relative to marital status and descent and distribution.

Allowing termination of a marriage without a divorce would contradict and overrule

the laws of Mississippi on marriage, as adopted by the Mississippi Legislature and would overturn judicial decisions rendered by this Court and the numerous decisions rendered by other state courts which were based on those Mississippi statutes.

ARGUMENT

STANDARD OF REVIEW

This Honorable Court has adhered to the following legal standard for review of a jury verdict:

[7] [8] [9] [10] ¶ 22. This Court applies the following standard to review an assertion that a jury's verdict is against the overwhelming weight of evidence and merits a new trial:

The grant or denial of a motion for new trial is and always has been a matter largely within the sound discretion of the trial judge. The credible evidence must be viewed in the light most favorable to the non-moving party. The credible evidence supporting the claims or defenses of the non-moving party should generally be taken as true. When the evidence is so viewed, the motion should be granted only when upon a review of the entire record the trial judge is left with a firm and definite conviction that the verdict, if allowed to stand, would work a miscarriage of justice. Our authority to reverse is limited to those cases wherein the trial judge has abused his discretion.

*Green v. Grant, 641 So.2d 1203, 1207-08 (Miss.1994) (citing *574 Anchor Coatings, Inc., v. Marine Indus. Residential Insulation, Inc., 490 So.2d 1210, 1215 (Miss.1989)). See also Roussel v. Robbins, 688 So.2d at 723-24 (abuse of discretion standard); C & C Trucking Co. v. Smith, 612 So.2d 1092, 1099 (Miss.1992)(abuse of discretion standard). When evidence is in conflict, the jury is the sole judge of both the credibility of a witness and the weight of his testimony.*

Weathersby Chevrolet Co. v. Redd Pest Control Co., 778 So.2d 130, 133 (Miss.2001). See also *Wilmoth v. Peaster Tractor Co. of Lexington, Inc.*, 544 So.2d 1384, 1386 (Miss.1989).

[Emphasis added]

Dorrough v. Wilkes 817 So.2d 567, *573 -574 (Miss. 2002)

I. The trial court did not commit reversible error when it allowed Eugene Michael Finan, M.D. to express an opinion at trial, over objection, because there had been more than adequate disclosure to the River Region.

It is undisputed that Jennifer Nettles, while under the care of River Region, died of a massive blood loss a few hours after the caesarean birth of a baby daughter, Brandy.

Over a year prior to trial, the Plaintiffs disclosed to River Region Dr. Michael Finan's expert medical opinion, which was based on Jennifer Nettles's medical records and other evidence, including Dr. Steven Hayne's autopsy report , "*...the bleeding which caused the Jennifer's death was caused by the laceration of a blood vessel in the area of the surgery that was not discovered by the physician....*"

Dr. Stephen Hayne, the State Pathologist, conducted an autopsy on Jennifer Nettles and testified as to the cause of death. Dr. Hayne served as the State Pathologist for the State of Mississippi for 17-18 Years. [CT 5: 681 lines 17-18] When asked about the number of cases he has testified in, Dr. Hayne testified:

BY MR. LOYACONO: Q. Alright, and approximately have many times have you been accepted in various courts as an expert during

your career as a forensic pathologist?

BY DR. HAYNE:

A. I don't keep an exact number, Counselor, but somewhere around 4,000 times.

[CT 5:682 lines 8-12]

Dr. Hayne's educational background is :

BY DR. HAYNE:

A. I graduated from medical school from Brown University in Providence, Rhode Island. And I did my pathology training at Letterman Army Medical Center in San Francisco, rotating in different institutions in the San Francisco Bay area including the University of California Moffett Hospital, the U. N. Memorial Blood Bank, the Medical Examiner's Office the City and County of San Francisco, Children's Hospital, and also Sixth Army Medical Laboratory, and the last 6 months I spent in nuclear medicine.

[CT 5:677 line 21 - 678 line 3]

As the State Pathologist, Dr. Hayne conclusively established the cause of Jennifer Nettles

death:

BY MR. LOYACONO: *Q. Now, and this is what we have here. With regard to your autopsy that you performed on Jennifer Nettles, did you arrive at the cause of her death?*

BY DR. HAYNE: *A. I did, sir.*

BY MR. LOYACONO: *Q. And tell the jury what that was.*

BY DR. HAYNE: *A. She died from a massive inter-abdominal hemorrhage or hemoperitoneum.*

BY MR. LOYACONO: *Q. And what --go ahead.*

BY DR. HAYNE: *A. Due to small cut of a vessel crossing across the broad ligament.*

BY MR. LOYACONO: *Q. Okay, and that would be the underlying cause of death?*

BY DR. HAYNE: *A. That is, sir.*

BY MR. LOYACONO: *Q. And that phrase, laceration of the vessel adjacent to the right fallopian tube. Could you explain to the jury what that is?*

BY DR. HAYNE: *A. It is a small defect in the wall of the vessel. The vessel is small. A little bit bigger than a paper clip and twice that diameter. And cause a massive blood loss in the abdominal cavity.*

[CT 5: 700 lines 1-20]

AND:

BY MR. LOYACONO: *Q. Now, in your opinion and to a*

reasonable medical probability, was the site of the bleeding, the sutures, the site of the sutures, or the site what you called the laceration vessel?

BY DR. HAYNE:

A. It was the vessel, Counselor. I didn't see bleeding specific to the suture. There was bleeding in the adjacent areas.

BY MR. LOYACONO:

Q. Now, how far removed from the area shown in Exhibit 16 was this vessel that you said was lacerated?

BY DR. HAYNE:

A. It was right adjacent to it, Counselor.

.....

[CT 5:704 lines 2-11]

AND:

BY MR. LOYACONO:

Q. Okay. Now, as the official pathologist in this case, is there any doubt in your mind as to the cause of her death being a laceration of that vessel?

BY DR. HAYNE:

A. No, sir.

[CT 5:704 lines 26-29]

River Region's complains about Dr. Finan's "slow bleed" testimony; however, River Region was told a year before trial that Dr. Finan's opinion was that bleeding came from a vessel lacerated during surgery and Jennifer died several hours after surgery. River Region was well aware that this

meant a slow bleed. In fact, River Region was the first to inject the slow bleed issue into the trial of this case. Mr. Hagwood, in his opening statement to the jury said:

Hagwood Opening Statement: *She [Jennifer] stayed in recovery for one hour. Now, the Plaintiff's theory of this case, listening to Mr. Loyacono, is that she was bleeding at this point and time. Has to, it's a slow bleed. She has to be bleeding. She is either bleeding at the time that Dr. Connell sewed her up or she isn't.* [Emphasis added]

[CT 4:511 lines 22-28]

Dr. Finan simply gave his opinion that Jennifer had a “slow bleed” and referenced the medical records which had already been placed in evidence by River Region.

The taking of Dr. Finan’s deposition was agreed to by the Plaintiff on two occasions, but the lead defense attorney, at that time, decided not to take the deposition of Dr. Finan and simply allowed the discovery period set by the Circuit Court to expire.

Dr. Finan was also rebutting issues raised by River Region’s cross-examination of Dr. Hayne. Dr. Finan, as an expert, had been present in the Courtroom during the cross-examination of Dr. Hayne. As an expert, Dr. Finan was entitled to rebut issues raised by River Region in the cross examination of Dr. Hayne.

Dr. Finan’s testimony followed the testimony of Dr. Hayne, and one of the points on cross examination focused on by Mr. Hagwood was Dr. Hayne’s testimony that Jennifer suffered a slow bleed out rather than the rapid bleed-out asserted by River Region. Dr. Hayne, the State Medical

Examiner, during this testimony showed the pictures from the autopsy, described the procedure, identified the lacerated blood vessel, and rendered his opinion relative to the amount of time that Jennifer Nettles was allowed to bleed to death. As was well known to River Region, this was a central issue in the testimony of Dr. Hayne, Dr. Finan, Dr. Morrison, and in the case in general.

After the testimony of Dr. Hayne, various references to the medical records, and the autopsy, Dr. Finan, rebutting River Region's cross examination of Dr. Hayne, pointed out that the medical records, including lab reports of hematocrit levels in the medical record [which had been previously introduced by River Region] showed that Jennifer had suffered a slow, rather than a fast, bleed-out.

Dr. Finan further testified that the C-section was not a necessary procedure in this case and that it was patently negligent for River Region to allow Jennifer Nettles to bleed to death.

Dr. Finan also observed the testimony of nurse Gwendolyn Brown. In rebuttal to the testimony of nurse Brown, an employee of River Region, Dr. Finan testified that the falsification of records by Gwendolyn Brown, a fact that she had denied in her testimony, was proven not only by the death of Jennifer Nettles, but also by the medical records, including reported changes in hematocrit levels.

Thus, the testimony of Dr. Finan concerning the hematocrit levels is simply an impeachment, not only of Nurse Brown, an employee of River Region, but also of Dr. Morrison, the Appellant's medical expert.

Dr. Connell, an employee of River Region and the Decedent's attending surgeon, did not testify.

River Region has not been prejudiced by the testimony of Dr. Finan. The Defendant's expert, Dr. Morrison, testified several days after Dr. Finan. River Region had every opportunity to fully

respond to the issues raised by Dr. Finan and Dr. Hayne. Nothing was presented to the Court that would show that River Region was prejudiced in any manner by the alleged lack of disclosure.

¶ 20. *The standard of review for the admission or exclusion of testimony is abuse of discretion. Whitten, 799 So.2d at 13. "The admission of expert testimony is addressed to the sound discretion of the trial judge. Unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion, that decision will stand." Roberts v. Grafe Auto Co., 701 So.2d 1093, 1098 (Miss.1997).*

Crane Co. v. Kitzinger 860 So.2d 1196, *1201 (Miss.2003)

The Jury had the testimony of expert witnesses for both sides. *"When evidence is in conflict, the jury is the sole judge of both the credibility of a witness and the weight of his testimony."* *Weathersby Chevrolet Co. v. Redd Pest Control Co., 778 So.2d 130, 133 (Miss.2001).*

II. The trial court did not commit reversible error when it allowed Terry Siverly, R.N., B.S.N. to testify as to nursing standards of care.

There was no prejudice to River Region as this same testimony was given by Dr. Finan.

See for example:

BY MR. LOYACONO: *Q. Now, are you familiar, and I think we asked this first, you are familiar with the standard of care that is to exercised by both nurses, and hospitals, and doctors, in these areas that we have been talking about?*

BY DR. FINAN:

A. Yes, I am.

BY MR. LOYACONO:

Q. Okay. The evidence that you have heard and the material that you have read, have you arrived at an opinion to a reasonable, medical, probability as to whether or not the hospital, through its nurses and its doctors, met the standard of care that was due to Jennifer Nettles, deceased?

BY DR. FINAN:

A. Yes, I do have an opinion.

BY MR. LOYACONO:

Q. And what is that opinion?

BY DR. FINAN:

A. My opinion is that the standard of care was not met in her care through her hospital stay.

BY MR. LOYACONO:

Q. And I need to ask you next then to illustrate or list those areas that you feel the hospital, through its employees, failed to meet the standard of care that was due to Jennifer Nettles?

BY DR. FINAN:

A. Well, initially, she was admitted to the hospital as a young lady having her second baby. And during the course of her evaluation it was decided that she needed Cesarean section. And I believe that, that that her being taken to the operating room was not necessary and was below the standard of care to have done that.

And in the process of doing the Cesarean section --and then the tubular ligation, the doctor failed to discover at the end of the case, or after he had finished the tubular ligation that she continued to have bleeding. Then she was taken to the recovery room where she had an uneventful recovery. But once she reached the floor, both through medical errors and failure to monitor the patient was essentially ignored, and during that time she exsanguinated from, or bleed to death from a bleeding from this site that was left untended at the time of surgery. And that lead to her cardiopulmonary arrest and subsequent; death on the afternoon of December 26th.

[CT 6:812 line 2 - 813 line 11]

AND

BY MR. LOYACONO: *Q. Now, once we had the bleeding problem, in terms of reasonable medical probability, are there backups? Are there standards that require some other safety net down the road?*

BY DR. FINAN: *A. Well, the biggest safety net is the*

nursing. think all physicians have had the opportunity, unfortunately, to go back in and repair a problem post operatively. And we rely on the nursing staff to monitor the patients over the hours after surgery. There are two areas, the immediate recovery which can identify bleeding problems occasionally. Most of those are bleeding problems that are obvious, coming from the operative site, like through the abdominal wound or through the vagina. And it is to recover from anesthesia. In this case, it was an inter abdominal bleeding problem and that would not be immediately identifiable just by inspection. Then we rely on the nurses on the floor to monitor vital signs and which include pulse, respiration, temperature, and urinary output, and to assess the patient. To assess their mental status, their condition of the abdomen, you know how they respond to you. We expect that to be done on a regular basis. And to ascertain the well being of the patient. In this case, the patient went to the recovery room and was stable during that time. Once

she got to the floor, it is my opinion that she did not receive the care that was necessary in two areas. One is her vital signs weren't taken as they should have been and the other is that she was over medicated. In the first area with the vital signs, after reading the policies and procedures and being aware of how the patients are taken care of, I think the patient's vital signs should have been taken on the floor in the hour, and in the second hour after she arrived to the floor. If they had been taken, this problem would have been discovered. The other is, as according to medications, the patient was over medicated.

In this case, the patient went to the recovery room and was stable during that time. Once she got to the floor, it is my opinion that she did not receive the care that was necessary in two areas. One is her vital signs weren't taken as they should have been and the other is that she was over medicated. In the first area with the vital signs, after reading the policies and procedures and being aware of how the patients are taken care of, I

think the patient's vital signs should have been taken on the floor in the hour, and in the second hour after she arrived to the floor. If they had been taken, this problem would have been discovered.

The other is, as according to medications, the patient was over medicated.

[CT 6:827 line 21 - 829 line 1]

Nurse Terry Siverly, in addition to being a Registered Nurse, holds a Bachelor of Science Degree in Nursing and possesses all the qualifications necessary to qualify him as an expert on the standard of care and nursing practices and procedures. Mr. Siverly has been and currently is employed by the State of Louisiana to enforce nursing practices and the related medical standard of care. Please note that these standards are not different from state to state but are uniform and based on national standards.

River Region received Nurse Siverly's curriculum vita from the Plaintiffs in 2002. In 2003, the Plaintiffs provided to River Region, Nurse Siverly's written expert report and opinions. At no time prior to the trial of this case did River Region take any action to depose or to strike Nurse Terry Siverly as an expert witness.

Allowing a witness to testify is within the discretion of the trial judge, and there has been no showing of an abuse of that discretion or prejudice, by allowing Nurse Siverly to testify. River Region extensively cross examined Nurse Siverly on his qualifications. River Region presented expert testimony in response to Nurse Siverly. Thus the jury was fully informed of Nurse Siverly's

qualifications and the response of River Region to the opinions offered by Nurse Siverly. The well settled rule consistently stated by this Court is that when there is conflicting testimony, the jury is to determine the weight and credibility of the witnesses.

Despite any discrepancies in the witnesses' testimony, the jury was left with the responsibility to weigh the credibility of these witnesses' testimony at trial. As this Court has repeatedly held, the jury is the final arbiter of a witness's credibility. Morgan v. State, 681 So.2d 82, 93 (Miss.1996); see also Spicer v. State, 921 So.2d 292, 312 (Miss.2006). In Spicer v. State, 921 So.2d at 311 (quoting Franklin v. State, 676 So.2d 287, 288 (Miss.1996)), this Court stated:

Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. [This Court] may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Ivy v. State 2007 WL 529305, *5 (Miss. 2007)

and

....At trial, the jury may decide to discredit Dr. Holzhauer's opinions, or the court, upon voir dire and tender of Dr. Holzhauer as an expert, may limit the matters to which he may testify, but as the record before us stands, it is clear that Dr. Holzhauer was qualified to give an expert opinion sufficient to create a fact issue that would preclude summary judgment as to NMMC.

Therefore, we disagree with NMMC's argument that Dr. Holzhauer was not qualified to provide expert medical evidence, as required in medical malpractice cases in Mississippi. We agree with Partin's argument that Dr. Holzhauer was qualified as an expert and that the weight and credibility to be given to his testimony are matters left to the jury. Palmer v. Biloxi Regional Medical Center, Inc., 564 So.2d 1346, 1355 (Miss.1990).

Partin v. North Mississippi Medical Center, Inc. 929 So.2d 924, *931

(Miss.App.,2005)

See also *Palmer v. Biloxi Regional Medical Center, Inc.* 564 So.2d 1346, *1355 (Miss. 1990) (“Once a witness is determined to be qualified to render expert testimony, questions of weight and credibility of the testimony are determined by the trier of fact. See, e.g., *Brown v. McQuinn*, 501 So.2d 1093 [Miss.1986].”)

River Region again now screams prejudice on this issue, but yet it settled with the Decedent’s daughters for two-thirds of the value of the jury’s verdict plus interest.

III. The trial court did not commit reversible error by allowing post-mortem photographs of the body of Jennifer Nettles taken at the post-mortem examination to be put in evidence.

The photographs were necessary and helpful to the jury to validate the findings and procedures of the autopsy of the State Medical Examiner, Dr. Stephen Hayne, which were being attacked, along with the opinion of Dr. Hayne, who performed the autopsy and made the photographs and testified as to his opinion that it was a slow bleed from a lacerated vessel.

The photographs allowed the jury to more easily understand and appreciate the detailed nature of Dr. Hayne’s autopsy. The photographs placed the jury in a better position to judge the weight and credibility of the autopsy evidence. The photographs were listed in the agreed-to Pre-Trial Order, and had been produced by the Plaintiffs to River Region in the beginning of this case and were never the subject of a Motion to Strike or otherwise objected to until trial.

The photographs were not used in a manner to incite bias or prejudice, but to illustrate how Dr. Hayne derived his opinion and findings. River Region directly attacked Dr. Hayne’s expertise in performing this autopsy.

River Region waived any objection to the use of the photographs by using the very same photographs they are now objecting to, in order to bolster the testimony of River Region’s witness, Dr. Morrison [CT 8: 1139 line 23 - 1146 line 10], a fact that River Region fails to present to this

Court in its appeal of one-third of the value of the jury's verdict plus interest.

In fact, at page 1146 of the record, counsel for River Region, after securing the Court's approval, passed the photographs to the jury to review:

*BY MR. HAGWOOD : If the Court please, at this time I would
like to pass the photographs to the jury for examination.*

(PHOTOGRAPHS PASSED TO JURY FOR EXAMINATION.)

[CT 8: 1146 lines 6-10]

River Region again cries prejudice over the use of these photographs, but yet they settled with the Decedent's daughters for two thirds of the value of the jury's verdict plus interest.

IV. The trial court did not commit reversible error by prohibiting River Region from putting into evidence Jennifer Nettles' alleged habitual abuse of illegal drugs.

All of the physicians involved in this case, including Dr. Connell in his deposition, Dr. Hayne, Dr. Finan, and River Region's expert, Dr. Morrison, stated unequivocally at trial that nothing that Jennifer Nettles had done caused or contributed to her death.

The Court dealt clearly with River Region's attempt to make an issue of the Decedent's past unsubstantiated alleged drug use by addressing the relevancy of this matter to the case in point and clearly determined that there was no testimony to be offered that any alleged drug use was the cause of death of Jennifer. Jennifer was only 30 years old at the time of her death.

Dr. Finan, an expert witness for the Plaintiffs, testified:

*BY MR. LOYACONO: Q. Do you agree or disagree that
Jennifer Nettles was predestined to die
when she got pregnant?*

BY DR. FINAN:

A. No, she was not predestined to die.

Dr. Morrison, an expert witness offered by the Defendant testified :

BY MR. LOYACONO

Q. Right, and then you did say that she was predestined to die, given those opinions, when she got pregnant?

BY DR. MORRISON:

A. I think that was your word. What I said, is that this is a tragic case. Its un-preventable and unpredictable, although tragic. I think you asked the question, was it predestined.

BY MR. LOYACONO

Q. And what did you answer?

BY DR. MORRISON:

A. I said, yes, and I went on to explain. That was your word. And then I went on to explain that it was un-preventable and unpredictable, although tragic.

[CT 8:1183 lines 5-15]

It is important to note, as pointed out to this Court earlier in this brief, that the alleged issue of the Decedent's possible use of drugs in her past arose only pursuant to an unsubstantiated comment made to the Coroner by a third party. The Coroner made such a note in the Coroner's Report, which is hearsay in its purest form. There was no evidence proffered by River Region on this issue. The Court correctly excluded such testimony, which could have been used only for the purpose of attempting to prejudice the jurors against the Decedent.

River Region again grasps at straws to claim prejudice yet River Region settled with the Decedent's two daughters for two thirds of the value of the jury's verdict plus interest.

V. The trial court did not commit reversible error in instructing the jury that all damages must be equally divided between the three (3) wrongful death beneficiaries of the Decedent.

River Region cites three points to support its claim that the trial court was in error in holding that the damages awarded to the wrongful death beneficiaries of Jennifer Nettles must be divided equally between the three wrongful death beneficiaries. River Region claims that: (1) Thomas Patterson was not legally married to Jennifer Nelson at the time of Jennifer's death; (2) If Thomas Patterson was a wrongful death beneficiary, he should not have been entitled to the same damages as the other wrongful death beneficiaries; and (3) Thomas Patterson should have been judicially estopped from asserting a claim for loss of consortium.

None of River Region's contentions have merit: (1) Thomas Patterson was never divorced from Jennifer Nelson. He was the legal spouse of the Decedent at the time of her death; (2) the Wrongful Death Statute SPECIFICALLY REQUIRES that the recovery be EQUALLY divided among the wrongful death beneficiaries; and (3) the nature of Thomas Patterson's claim is irrelevant because the Wrongful Death Statute does not require EACH wrongful death beneficiary to prove specific damages. These arguments are developed further in the following paragraphs.

1. Thomas Patterson was the legal husband of Jennifer Nettles at the time of her death

The Wrongful Death Statute, Miss. Code Ann. § 11-7-13, expressly directs that: "...damages for the injury and death of a married woman shall be equally distributed to the husband and

children....”

- A. **River Region is estopped from attacking the legality of the marriage because River Region stipulated on the record that, at the time of Jennifer Nettles’ death, she was legally married to Thomas Patterson.**

River Region now contends that the trial court committed reversible error in holding that Thomas Patterson was entitled to an equal share of damages because Thomas Patterson was not the lawful husband of the Decedent at the time of her death.

River Region is estopped from challenging the validity of the marriage because River Region made the following stipulation on the record:

BY MR. HAGWOOD: The parties have stipulated in this case that Thomas Patterson, one of the wrongful death beneficiaries, if called to testify, would testify that he and Jennifer Nettles were married in September of 1995; that they separated in October of 1995 and did not thereafter live as husband and wife. That it was over a year after her death before he was informed that she dies; and that he is currently serving a 5-year term at the Mississippi Department of Corrections for grand larceny.

BY MR. LOYACONO: Did you put the part in there that they were still legally married?

BY MR. HAGWOOD: Oh, and that at the time of her death that they were still legally married.

(CT 6:880, line 14 - 881, line 2) [emphasis added]

River Region has misleadingly stated that “the trial court ordered the parties to stipulate...” This is not true. When River Region made that statement at the hearing on its motion for a new trial, the trial judge emphatically reminded counsel that the Record clearly showed otherwise:

BY MR. EATON : Okay. Also on the new trial, the Defendants part of the

motion is the issue of Thomas Patterson, and while there was a stipulation, I think we made out objections that we had intended on reading the deposition transcript and because —

BY THE COURT: *Exactly and I hat [have] to cut you off again. You say in your motion that I directed you to put on a stipulation evidence. That is a direct untruth Mr. Eaton.*

I said why put on that if there can be — I said that there could be a deposition — I said, is there any objection by the Plaintiffs as to what Mr. Patterson was going to say. I said that it would save time if that there could be a stipulation. I did not direct you not to put on that testimony. That is a direct untruth. But you put it in this motion that I directed you to agree to a stipulation.

In my 16 years of being on this bench I have never directed anyone to agree to a stipulation. That is not a stipulation if I directed you to do it. A stipulation is where you have agreed with Counsel that certain evidence doesn't have to come into court and be testified to.

Yet, whoever wrote that motion, put in there that I directed you to agree to a stipulation. Now, you know, again, when attorneys put something in a motion — when you put something in a motion, you be sure that what you saying is what the Court did, rather than put it out there. If the Supreme Court is reading your motion, I were sitting on the Supreme Court and read that, I would say, a Court directed a party to agree to a stipulation, and I would say, well, that Court is in err already.

And in the transcript, and I went back and looked at that, and it does not support that Mr. Eaton. Yet you put it in a motion, throw it out there. I'll just say it. I don't know. I think it might have been said somewhere but before I accuse the Court of something like that, I had better read the transcript. You didn't do that. You just put it in a motion.

BY MR. EATON: *I didn't write it.*

BY THE COURT: *But are you telling me that I did do that. Did I direct you—you were here. Did I direct you to agree to a stipulation? If you felt*

that way, say it. But I want you to show me in the deposition where I said it though.

BY MR. EATON: *I haven't had a chance to be sure with a transcript, Your Honor, but as I recall, we thought that we could have the deposition read and I know that there was an agreement on a stipulation.*

BY THE COURT: *Right, but I mean, your motion says that I directed you to do a stipulation rather than put on the testimony. I merely suggested, and I said, why are we having to put on a deposition and we are at the end of the day. I said, why do that if all parties can agree to what Mr. Patterson is going to say. There was no objection to it. It didn't matter to me whether or not – it was at the end of the day but to say that I directed you to agree to a stipulation. That is not a stipulation, that is an adherence to the order of the Court. You are not stipulating with Counsel*

BY MR. EATON: *Your Honor, I apologize and I will make a not(sic) of that and keep that in mind.*

(CT 9:1298, line 15 -1301, line 16)

River Region not only agreed to the stipulation– the language of the stipulation is River Region's language. Counsel for River Region stated the stipulation and Counsel for the Plaintiffs simply agreed to River Region's statement of the stipulation. That stipulation is binding on River Region and River Region is now estopped from taking, in this case, a position contrary to its stipulation.

C.J.S. Stipulations §17 (1953) states in pertinent part:

In the absence of ground which will authorize a party to a stipulation to rescind or withdraw from it, discussed infra § 30, or the court, to set it aside, infra § 35, the court, both trial and appellate, and official referees to whom the cases are referred, are bound by stipulations in respect of matters which may validly be made the subject matter of stipulations.

Id. (emphasis added)

This concept is well established in Mississippi jurisprudence. In addressing this topic, the Mississippi Supreme Court has stated that “[a] *stipulated fact is one which both parties agree is true. Where the parties file and gain court approval of a formal stipulation agreement....the factual issues address in the agreement are forever settled and excluded from controversy. Neither party can later change positions.*” *Wilbourn v. Hobson*, 608 So. 2d 184 (Miss. 1992) (citing *Johnston v. Stinson*, 434 So. 2d 715 (Miss. 1983); *Vance v. Vance*, 216 Miss. 816, 63 So. 2d 214 (1953); *Stone v. Reichman-Crosby Co.*, 43 So. 2d 184 (Miss. 1949).

River Region is now attempting to raise multiple issues with regard to the award received by Thomas Patterson as the lawful husband, and, therefore, a wrongful death beneficiary of Jennifer Nettles, by essentially “re-litigating” before this Court the issue of the validity of the marriage between Thomas Patterson and Jennifer Nettles. River Region indicated by letter that it was their intention to have Thomas Patterson present at the trial of this matter. River Region then decided against having Thomas Patterson present and proposed a stipulation as to what Thomas Patterson would have testified to if he had been called. Counsel for the Plaintiffs and the Court agreed to accept River Region’s stipulation. River Region’s stipulation included the fact that at the time of Jennifer Nettles’ death she and Thomas Patterson “...were still legally married.” River Region is now trying to litigate this matter before this Court, rather than at the trial level. River Region is estopped from advancing arguments which contradict its stipulation.

B. The marriage between Thomas Patterson and Jennifer Nettles remained a valid marriage at the time of Jennifer's death because NO definitive legal action had occurred to terminate the marriage.

Thomas Patterson, who was legally married to Jennifer at the time of her death, was clearly a wrongful death beneficiary of Jennifer under the Wrongful Death Statute Miss Code Ann. §11-7-13.

....there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits. Except as otherwise provided in Section 11-1-69, in such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit....

....damages for the injury and death of a married woman shall be equally distributed to the husband and children,....

The brief and argument of River Region in its appeal constantly refers to the “abandonment of the marriage” by Thomas Patterson as absolute proof that the marriage was ended and that he was not the spouse of Jennifer Nettles. There is well settled law that the only way to end a marriage, other than death, is by divorce or annulment. That is required. That simply never happened in this case.

Most states follow the rule that it requires a definitive legal act to terminate the marital relationship and terminate the rights of a surviving spouse. In this day, when the institution of marriage is under siege, it is against public policy to announce that a marriage can be ended simply by walking away from it. Further, if simply walking away from a spouse terminates marriage RIGHTS, then it follows that walking away also terminates marital OBLIGATIONS. If you can terminate a marriage simply by walking away from it, why would anyone want to go through a divorce and face the time, the expense and the labyrinth of other issues dealt with in Mississippi family law proceedings?

In *Tillman v. Williams*, 403 So. 2d 880 (Miss 1981) a Chancellor had wrongly held that a separation of 20 years constituted an abandonment of a marriage. This Honorable Court reversed the Chancellor and found that even 20 years of living apart showed “...at most, just a separation....” In the present case, this couple was estranged for only six years.

The husband in *Tillman* was asserting his rights under Miss. Code Ann. § 91-5-27 to renounce his wife’s will and claim one-half of her estate. In its opinion in *Tillman*, this Court noted the following:

...appellant [the husband] and his wife parted company from fifteen to twenty years prior to the wife'[s] death in 1977. The only certainty appears to be that appellant moved his abode to an adjoining county.....The only thing we find that appellant did after moving to the adjoining county was to haul pulpwood and drink whiskey....

It is probable that the lower court was misled

by the statements of this Court in Walker v. Matthews, 191 Miss. 489, 3 So.2d 820 (1941), and In Re Marshall's Will, 243 Miss. 472, 138 So. 2d 482 (1962), where there appears a sentence indicating that "desertion or abandonment is held to estop a spouse from inheriting from the other." This point needs clarifying.

*In Walker, supra, it mentions that the "desertion or abandonment theory" was a "majority rule." Research reveals that the majority constituted seven states, all of which have statutes clarifying this issue where abandonment is shown. **Our Legislature has not seen fit to enact any legislation on the abandonment question. It is, therefore, obvious that the statute has to be strictly construed unless there is clear desertion and abandonment that sets up the estoppel....***

...The statute in question [§ 91-5-27 MCA] can not have any meaning if the surviving spouse is disinherited under the clear language of the statute solely because of a long separation.

403 So.2d 880 at 880, 881 and 882 [Emphasis added]

In the 25 years since this Court's decision in *Tillman*, the Mississippi Legislature has still not seen fit to enact any legislation to change Mississippi law on the abandonment question. There is no statutory authority whatsoever which

authorized a court to disinherit a surviving spouse. The language of the Wrongful Death Statute says that the recovery “**shall**” be equally distributed between Thomas Patterson and the Decedent’s two daughters.

The decision in Tillman is in accord with this Court’s holding in *Frank v. Frank*, 193 Miss. 605, 10 So. 2d 839 (Miss. 1942), which held that a second marriage of a wife was void where there was no divorce and the missing spouse returned after an absence of over seven years. This Court held that even the presumption of death after an unexplained absence of seven years did not terminate the first marriage.

[2] Under its express provision as at common law, the presumption of one's death arising from seven years of absence without being heard from disappears when proof is “made that he was alive within that time.” According to 38 C.J. 1296, and note to Harper v. Fears, 93 A.L.R. 345, “At common law (and therefore under this statute) a husband or wife who has been absent and unheard of for seven years is presumed to be dead, and the remaining spouse is permitted to contract a valid marriage; but where the presumption is rebutted by facts, showing that the absentee is alive, the intended marriage is rendered void ab initio, and leaves the parties as before, although the offending party may be protected from criminal punishment.” This Court has twice so said. Gibson v. State, 38 Miss. 313, and Watson v. Watson, 177 Miss. 767, 171 So. 701.

Frank v. Frank 10 So.2d 839, *840 (Miss. 1942), cited and discussed, *Hill v. United Timber & Lumber*

Co., 68 So.2d 420 (Miss. 1953)

The view that anything other than a **definitive legal act** bars the rights of the surviving spouse is the minority view. For example, the Uniform Probate Code rejects this view and requires some... "definitive legal act to bar the surviving spouse." Unif. Probate Code § 2-802 cmt. (West 10th ed. 1992). The full Uniform Probate Code comment is as follows:

Although some existing statutes bar the surviving spouse for desertion or adultery, the present section [Uniform Probate Code § 2-802] requires some definitive legal act to bar the surviving spouse. Normally this is divorce. 8 Uniform Law Annotated [West 1998] pp 457-458.[Emphasis added]

This provision of the Uniform Probate Code has been adopted by the National Conference of Commissioners on Uniform State Laws, approved by the American Bar Association, has been adopted in its entirety by sixteen (16) states, and numerous other states have adopted the language of Uniform Probate Code §2-802.

River Region would have this Court ignore *Tillman*, the Uniform Probate Code and the experience of the vast number of states which uniformly hold that the marital rights of a surviving spouse are not terminated unless some **definitive legal act** has occurred to terminate the marriage. River Region's attempts to distinguish *Tillman* are only differences without distinction. River Region cites the divorce proceeding initiated by Jennifer Nettles. However, Jennifer voluntarily elected not to pursue that divorce. Note that Jennifer had legal counsel in the divorce proceeding. That she had the advice of counsel shows that Jennifer knew that her marriage to

Thomas Patterson could only be terminated by a divorce, but she elected not to continue with the divorce proceeding.

Finally, River Region asks this Court to hold that the jury should have been allowed to rule on whether or not a couple was legally married. This is the province of the Chancery Court and is not, and should not be, the province of a Circuit Court jury.

There is no statutory authority authorizing a court to disinherit Thomas Patterson. It is admitted that he was legally married to Jennifer Nettles at the time of her death. Under the provisions of the Wrongful Death Act, Thomas Patterson is a wrongful death beneficiary of Jennifer Nettles.

2. **The Mississippi Wrongful Death Statute SPECIFICALLY REQUIRES that the recovery be EQUALLY divided among the wrongful death beneficiaries.**

The Court was absolutely correct in following the express language of the Wrongful Death Statute, Miss. § Code Ann. 11-7-13, in which the Mississippi Legislature directs:

....there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits., in such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.

AND

....damages for the injury and death of a married woman

shall be equally distributed to the husband and children,...

[Emphasis added]

Miss. Code Ann. § 11-7-13

This argument is obviously invalid and moot in that, as this Honorable Court knows, River Region has now settled with the daughters of the Decedent, two minors, who were Plaintiffs in this case. It is informative to know that each minor child received one-third of the total judgment amount, as required by the Mississippi Wrongful Death Statute plus interest.

River Region, contrary to statute, moved by means of special interrogatories to have the jurors allocate individual amounts of damages to Hallie, Brandy and Thomas. The Trial Court correctly ruled that such interrogatories, or the allocation of individual amounts of damages clearly violated the express provisions of the Wrongful Death Statute.

River region is directly attacking the long-standing controlling law regarding the wrongful death actions and this Court's prior decisions stating how wrongful death judgments must be divided. In *Pannell v. Guess* 671 So.2d 1310 (Miss. 1996) one of the parties argued that half siblings were not entitled to share equally in the proceeds of the wrongful death action or that "*...the lower court should have held a hearing and required Shelly's half-siblings to prove their losses suffered as a result of Shelly's death....*" The Mississippi Supreme Court disagreed and unambiguously stated the applicable law as follows:

*...On appellate review, we **strictly construe** Mississippi's wrongful death statute. Smith v. Garrett, 287 So.2d 258, 260 (Miss. 1973).*

.....
Contrary to Appellants' argument, the wrongful death statute does not provide that the lower court may conduct a hearing to determine how to divide the proceeds. In fact, the statute provides that the funds "shall be equally distributed" (emphasis added [by the Court]). A basic tenet of statutory construction is that "shall" is mandatory and "may" is discretionary. Planters Bank & Trust Co. v. Sklar, 555 So.2d 1024, 1027 (Miss. 1990), Murphy v. State, 253 Miss. 644, 649, 178 So.2d 692 (1965)

Pannell v Guess, 671 So.2d 1310 (Miss. 1996), at 1313 and 1314 [Emphasis added]

River Region is making the extreme request that this Court exceed its role of interpreting the law and assume the activist role of rewriting the Wrongful Death Statute. The terms of the Wrongful Death Statute are clear. It has always been the position of this Honorable Court that the Wrongful Death Statute must be strictly construed and that the use of the term "shall" in the statute mandates that any recovery must be equally divided among the wrongful death beneficiaries.

3. Judicial estoppel does not apply in this case to bar recovery by Thomas Patterson.

River Region writes at length about the differences and/or similarities of claims for loss of consortium and claims for loss of society and companionship and asserts that, without such a claim, Thomas Patterson had no other claim in the case. That argument is directly contrary to the language of the Wrongful Death Statute. Thomas Patterson, as a spouse, is in that class which is a required beneficiary of a wrongful death judgment. There can be only one suit, and there can be only one verdict. The jury award is required by that statutory act to be divided equally among all of the beneficiaries.

River Region seeks to require that each wrongful death beneficiary individually prove that each beneficiary sustained damages and the amount thereof, as a result of the death of the Decedent. That is not and has never been the law in Mississippi or in any other

jurisdiction. The express language of the Wrongful Death Statute states that this is an action for the damages **the Decedent** would have been entitled to recover against the tortfeasors if the Decedent had survived the negligent act:

Whenever the death of any person or of any unborn quick child shall be caused by any real, wrongful or negligent act or omission.....as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof...

....the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the Decedent person or unborn quick child for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife,

....in such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit....

Miss. Code Ann. § 11-7-13 (Emphasis Added)

The Wrongful Death Statute then provides that the beneficiaries can, in addition, claim “...all damages of every kind to any and all parties interested in the suit...”

Thomas Patterson is entitled to an equal share of the recovery for the damages the Decedent would have been entitled to recover and all other damages considered by the jury

in reaching its verdict.

VI. The trial court did not commit reversible error in denying the River Region's Motion for Directed Verdict as to the claims of Thomas Patterson.

River Region contends that the trial court erred in denying its motion for directed verdict on the claims of Thomas Patterson. In support of this contention, River Region argues that: *"Mr. Patterson's only claim for damages was through his wrongful death claim for loss of society and companionship and not a single witness spoke to this issue. In essence, there was no evidence in any form on damages."* (Brief of the Appellant, page 39)

This argument has been responded to above. The express language of the Wrongful Death Statute states that this is an action for the damages **the Decedent** would have been entitled to recover against the tortfeasors if the Decedent had survived the negligent act. Thomas Patterson is entitled to an equal share of the recovery for the damages the Decedent would have been entitled to recover and all other damages considered by the jury in reaching its verdict.

River Region's reliance on *In Re Estate of England*, 846 So. 2d 1060, 1066 (¶ 17) (Miss. App. 2003) ("In a wrongful death suit, 'the damages are intended to compensate the statutory wrongful death heirs for their losses resulting from the death.') is misplaced. River Region claims the case requires that each wrongful death heir must prove damages. However, the clear language of the Wrongful Death Statute shows that England refers to the provision that the beneficiaries can, **in addition**, claim *"...all damages of every kind to any and all parties interested in the suit...."*

The trial court properly overruled River Region's motion for a directed verdict.

CONCLUSION

ISSUE 1 EXPERT DISCLOSURE

Dr. Finan's testimony was fully and properly disclosed to River Region and River Region was offered, but declined, the opportunity to depose Dr. Finan. The defendant hospital was fully aware that Dr. Finan believed that Jennifer Nettles died from a slow blood loss and based his opinion on medical records which were thoroughly reviewed by all parties. River Region had over two years to prepare its response. At trial, River Region thoroughly cross examined the Plaintiff's experts on this issue and River Region's expert, Dr. Morrison, had ample time to respond to Dr. Finan's testimony.

The disclosure of Dr. Finan was full, complete and fair. Its admission at trial did not unfairly prejudice River Region.

The jury heard the opinions of the experts for both parties and examined the medical records and other evidence. The jury found for the Plaintiffs. That verdict should be respected and upheld.

ISSUE 2 ALLOWING TESTIMONY OF TERRY SIVERLY, R.N., B.S.N.

Allowing a witness to testify is within the discretion of the trial judge, and there has been no showing of an abuse of that discretion or prejudice, by allowing Nurse Siverly to testify. A nursing expert witness, Rita Wray, was presented by River Region in response to Nurse Siverly. The well-settled rule consistently stated by this Court is that when there is conflicting testimony, the jury is to determine the weight and credibility of the witnesses

ISSUE 3 ADMISSION OF PHOTOGRAPHS

The photographs were used as exhibits to show the jury how the autopsy was done. The photographs were not used in a manner

to incite bias or prejudice, but to illustrate how Dr. Hayne arrived at his opinions and findings. River Region directly attacked Dr. Hayne's expertise in performing this autopsy.

Moreover, River Region waived any objection to the use of the photographs by using the very same photographs they are now objecting to, in order to bolster the testimony of River Region's expert witness, Dr. Morrison [CT 8: 1139 line 23 - 1146 line 10].

ISSUE 4 BARRING TESTIMONY OF DECEDENT'S ALLEGED DRUG ABUSE

This information was not relevant to the jury to determine any fact in issue in this case. All medical experts who testified in this case agreed that nothing Jennifer Nettles did caused or contributed in any manner to her death. No testimony linking drug use to Jennifer Nettles' death was proffered by River Region. River Region proffered only hearsay regarding allegations of drug use some years prior to Jennifer Nettles' death. This testimony was proffered by River Region solely in an effort to prejudice the jury and it had no probative value that warranted its admission into evidence. The testimony was properly excluded by the trial judge.

ISSUE 5 THOMAS PATTERSON WAS LEGALLY MARRIED TO THE DECEDENT AT THE TIME OF THE DEATH OF THE DECEDENT

There is no statutory authority authorizing a court to disinherit Thomas Patterson. It has been stipulated to and admitted by River Region that Thomas Patterson was legally married to and the lawful husband of Jennifer Nettles at the time of her death. Under the provisions of the Wrongful Death Act, Thomas Patterson is a wrongful death beneficiary of Jennifer Nettles.

ISSUE 6 THOMAS PATTERSON'S DAMAGES

The express language of the Wrongful Death Statute states

that this is an action for the damages **the Decedent** would have been entitled to recover against the tortfeasors if the Decedent had survived the negligent act. Thomas Patterson is entitled to an equal share of the recovery for the damages the Decedent would have been entitled to recover and all other damages considered by the jury in reaching its verdict, plus interest at the maximum legal rate.

RESPECTFULLY SUBMITTED, this ____ day of March, 2007.

PAUL KELLY LOYACONO
WILLIAM A. HOOD
WILLIAM A. PYLE
ATTORNEYS FOR THOMAS PATTERSON,
APPELLEE / PLAINTIFF

BY: *Kelly Loyacono*
PAUL KELLY LOYACONO

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Counsel for Appellee / Plaintiff Thomas Patterson

CERTIFICATE OF SERVICE

I, the undersigned counsel of record for Thomas Patterson, Appellee / Plaintiff, do hereby certify that I have on this date served a true and correct copy of this document on the following by mailing the same to them, via U. S. Mail, postage prepaid:

Honorable Isadore W. Patrick
Warren County Circuit Court Judge
Post Office Box 351
Vicksburg, MS 39181

L. Carl Hagwood, Esq.
David M. Eaton, Esq.
Jason E. Dare
Wilkins, Stephens & Tipton, P.A.,
1477 Trailwood Drive, Suite C
Post Office Box 4537
Greenville, Mississippi 38704-4537

THIS, the 30 day of March, 2007.

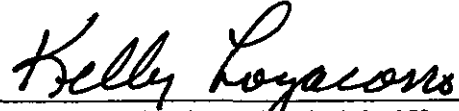


Paul Kelly Loyacono

CERTIFICATE OF FILING

I, the undersigned counsel of record for Thomas Patterson, Appellee / Plaintiff, do hereby certify that I have this day delivered via U.S. Mail, postage pre-paid, the original, three copies, and a floppy disk of the Brief of the Appellee / Plaintiff Thomas Patterson to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

This, the 30 day of March, 2007.



Attorney for the Appellee / Plaintiff,
Thomas Patterson