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IN THE SUPREME COURT OF MISSISSIPPI
No. 2005-~~TS~~-02357
CA

RIVER REGION MEDICAL CORPORATION **APPELLANT / DEFENDANT**

VS.

THOMAS PATTERSON **APPELLEE / PLAINTIFF**

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

REPLY BRIEF OF APPELLANT / DEFENDANT, RIVER REGION MEDICAL CORPORATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

INTRODUCTION

Since the filing of Defendant's Appellant Brief, River Region Medical Corporation ("River Region") has settled the claims of Jennifer Nettles' two minor daughters (*i.e.* Hallie and Brandi), leaving only the claim of Thomas Patterson at issue herein. Contained in the Release of each minor was the certification by their attorney, Paul Kelly Loyacono, Esq., that the provisions and conditions of the settlement would be held confidential by him and all members of his firm and that the terms and conditions of the release would not be disclosed to any person whatsoever without the prior written consent of River Region. In filing the Appellee Brief herein, Mr. Loyacono not only breached his agreement contained in the Release, but also breached the terms of the agreement on behalf of the minor daughters, Hallie and Brandi. Defendant, therefore, incorporates herein by reference its Motion to Strike and for other relief.

In regard to the arguments made by Mr. Patterson in his Appellee Brief, River Region replies as follows:

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED EUGENE MICHAEL FINAN, M.D. TO EXPRESS OPINIONS AT TRIAL, OVER OBJECTION, THAT WERE NOT PREVIOUSLY DISCLOSED.

River Region incorporates herein by reference all facts stated in its Appellant Brief leading up to its Motion at trial to exclude opinions held by Eugene Michael Finan, M.D. The sum and substance of these facts are that on February 15, 2002, Defendant propounded expert interrogatories on Plaintiff in compliance with MISS. R. CIV. P. 26(b)(4)(A)(i). From that time through his testimony at trial, there was never a disclosure that the sole basis of Dr. Finan's opinions were two blood counts taken on Jennifer Nettles, specifically her hematocrit levels on admission and at the time of resuscitation. (CT 6:822, line 15 - 826, line 22). The trial court refused to strike any and/or

all of Dr Finan's testimony, to which Defendant has appealed.

In response to Defendant's arguments on appeal, Mr. Patterson contends that Dr. Finan's testimony was immaterial since Dr. Steven Hayne, "the State Pathologist for the State of Mississippi for 17-18 Years," "conclusively established" the cause of Jennifer Nettles death to be "a massive inter-abdominal hemorrhage or hemoperitoneum . . . due to small cut of a vessel crossing across the broad ligament." *Appellee Brief*, pages 9-11. It should first be noted that Dr. Hayne is not "the State Pathologist," presumably meant to refer to the State Medical Examiner as provided for in MISS. CODE ANN. § 41-61-53 *et seq*. The "State medical examiner" is a "***board certified*** forensic pathologist / physician appointed by the Commissioner of Public Safety to investigate and certify deaths which affect the public interest." MISS. CODE ANN. § 41-61-53(h). Contrary to Plaintiff's record cite of (CT 5 : page 681, lines 17-18), where he alleges Dr. Hayne stated he has been the State Pathologist for 17-18 years (which contains no reference to such information), Dr. Hayne could not qualify to hold that title with the State of Mississippi pursuant to his following testimony on voir dire:

Q. You testified a minute ago that for a period of time in 1986 for about 6 months you were the Acting Medical Examiner for the State?

A. Yes, sir, Counselor.

Q. And in 1986 you were Board Eligible in forensic pathology. Correct?

A. Yes, sir.

Q. And in 1986 you set for the Board examination in forensic pathology. Correct?

A. I believe so but I can't tell you the exact time frame.

Q. In that time frame?

A. Yeah.

Q. And when you set for that Board examination in forensic examination, you failed the examination. Didn't you?

A. As I remember, I walked out of that during the process of it.

Q. You walked out and you got a failing grade?

A. I did not pass because you have to complete it to pass.

Q. And since that time you have not tried to set for that examination, have you?

A. I don't believe so, sir.

Q. Okay, and because you failed the examination in 1986 you could no longer serve as the medical examiner, could you?

A. Well, the state law says that it has to be from the American Board of Pathology for that specific certification. Of course, that is in great dispute now with the federal government, Interstate Commerce Commission with restraint of trade.

Q. And since 1986 until the year 2005 you have never challenged the state law which requires the medical examiner of the state of Mississippi to be Board Certified in Forensic Pathology by the American Board of Pathology, have you?

A. No, sir, because I had no interest in serving in that position. . .

Q. Then the other pathologist in this state who also has been designated by the Board of Medical Examiner to do forensic pathology work for the state, correct? You are not the only pathologist?

A. No, sir.

(CT 5 : page 684, line 3 - page 685, line 12, lines 25-29).

Additionally, the mere fact that Dr. Hayne says a fact is so does not mean that fact is "conclusively established." In *Edmonds v. State*, 2007 WL 14808 (Miss. Jan. 4, 2007), Dr. Hayne testified that by looking at a bullet wound, he could scientifically conclude that the trigger was pulled

by two people and not one. The *Edmunds* Court held that such testimony was "scientifically unfounded" and premised on nothing more than "speculation." *Edmunds*, 2007 WL 14808, at *2 (¶¶ 6-7). Dr. Hayne's testimony at the instant trial represents another example of his testifying to facts that are scientifically unfounded.

During cross examination, Dr. Hayne was asked to draw on a picture he took during the autopsy to show where certain anatomical features were. (CT 5 : page 726, line 20 - page 730, linc 3). Specifically, Dr. Hayne was asked to draw the fallopian tube on the picture marked as Defendant's Exhibit # 13, and did so by indicating a continuous line (*i.e.* - that the fallopian tube had not been cut), as evident by his following testimony:

> Q. When I asked you to draw the line, yes or no, did you draw one continuous line or not?
>
> A. I did.
>
> Q. That is because when I asked you to do it, you saw one continuous line from suture to suture. Correct?
>
> A. That's correct.

(CT 5 : page 729, line 26 - page 730, line 3). This was the picture from where Dr. Hayne derived his theory of the case. Contrary to Dr. Hayne's speculation, the surgical procedure performed on Jennifer Nettles was to clamp two sides of the fallopian tube and remove the middle section. *See* Defendant's Exhibit # 1 (RRHS 190) (Second page of the Operative Report, beginning with the sentence "Attention was turned to the patient's fallopian tubes."). The portion of the fallopian tube Dr. Hayne testified he visualized in the picture was actually maintained by the River Region surgical pathology department and could not have been in the autopsy photograph. *See* Defendant's Exhibit # 1 (RRHS 191-192). Similar to *Edmunds supra*, Dr. Hayne's testimony did not establish any

definitive facts at issue.

Dr. Hayne did not opine to a causal relationship between alleged actions or inactions of River Regions and the death of Jennifer Nettles. Only Dr. Finan was proffered to testify with regards to proximate cause. Moreover, Dr. Finan did not base his proximate cause opinions on the testimony of Dr. Hayne, but instead based his opinions on hematocrit levels acquired on admission and at the time of the resuscitation efforts. (CT 6 : page 822, line 15 - page 826, line 22). This is supported by the following excerpt from Dr. Finan's trial testimony:

> Q. Do you have an opinion as to the duration of the time that it took Jennifer Nettles to bleed to death?
>
> A. Yes, I have an opinion. And my opinion is that this did not occur over a short period of time; that her laboratory data does not reflect an acute bleeding episode like someone would see with a gun shot to a major vessel. This patient had bleed over several hours and during that time her blood just continued to build up in her abdomen and her vital signs - - her heart finally failed from the lack of oxygen. Her body failed from the lack of vascular volume to support her bodily functions.
>
> Q. ***And you base that on certain blood test you have told me about?***
>
> A. Yes.

(CT 6 : page 813, line 24 - page 814 line 10) (emphasis added).

The grounds upon which Dr. Finan based his proximate cause opinions were not disclosed to Defendant, despite a valid Rule 26 interrogatory requesting same. Rule 26 is designed to "prevent trial by ambush," especially in a medical malpractice case where duty, breach and causation are typically established by a medical professional's subjective opinions, not by objective rules or regulations. *See Nichols v. Tubb*, 609 So. 2d 377, 384 (Miss. 1992). In such cases, it is pertinent that "the substance of every fact and every opinion which supports or defends the party's claim or

defense must be disclosed and set forth in meaningful information which will enable the opposing side to meet it at trial." *Nichols*, 609 So. 2d at 384.

In passing, Plaintiff alleges that the undisclosed testimony was to rebut "issues raised by River Region in the cross examination of Dr. Hayne" and/or to impeach the future testimony of Defendant's medical expert, Dr. John Morrison. *Appellee Brief*, pages 13-14. At the time of Dr. Finan's testimony, Dr. Morrison had not testified. Accordingly, Plaintiff cannot now allege that the testimony of Dr. Finan was to impeach the testimony of Dr. Morrison. *See Balfour v. State*, 598 So. 2d 731, 749-750 (Miss. 1992) ("It is fundamental that before there can be impeachment, there must be testimony which is impeachable.").

Moreover, the testimony of Dr. Finan cannot now be said to be offered solely for rebuttal purposes since Plaintiff knew he must present it in his case-in-chief to meet his burden of proving causation by a preponderance of the evidence. Plaintiff's counsel also knew that Dr. Finan held these opinions, as his question to Dr. Finan was "you base that on certain blood test ***you have told me about***." (CT 6 : page 814, lines 8-9). "There is nothing in our rules of procedure that authorizes a party to withhold the names of likely expert witnesses on . . . grounds [they are rebuttal witnesses], except only for the circumstance where the party had no reasonable means of anticipating in advance of trial the need for calling the witness." *Emil v. The Mississippi Bar*, 690 So. 2d 301, 318 (Miss. 1997) (citing *Harris v. General Host Corp.*, 503 So. 2d 795, 797 (Miss. 1986)). This is true in civil and criminal cases, and is equally as applicable to expert witnesses as to expert witness testimony. *See Emil*, 690 So. 2d at 318. Plaintiff knew about the grounds for Dr. Finan's proximate cause opinions prior to trial and failed to disclose the opinions to Defendant, despite a valid Rule 26 interrogatory requesting same.

Based on the foregoing and all authority and arguments in Defendant's Appellant Brief, River Region prays this Court reverse the judgment in favor of Plaintiff, and remand the case for a new trial on liability.

II. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO APPLY MISS. R. EVID. 702 AND ALLOWED TERRY SIVERLY TO TESTIFY AS TO NURSING STANDARDS OF CARE OUTSIDE HIS KNOWLEDGE, SKILL, EXPERIENCE, AND TRAINING.

At trial, Defendant moved the trial court pursuant to MISS. R. EVID. 702 to preclude Terry Siverly from testifying as an expert in this cause since he possessed no specialized knowledge, skill, experience and /or training in the area of postpartum, post-surgical recovery. Mr. Siverly worked in a hospital setting for only two years, from 1986 to 1988, and this was on an adult isolation unit where he cared for patients who were isolated from the remainder of the hospital for infectious disease purposes. (CT 5:745, line 23 – 746, line 6). Since 1996, he has worked for the State of Louisiana in the capacity of surveying nursing homes. (CT 6:755, lines 3-8; 756, lines 15-19).

In his Appellee Brief, Mr. Patterson contends that there is conflicting testimony and that Defendant's arguments in its Appellant Brief go to the "weight and credibility" of Mr. Siverly's testimony. Mr. Patterson, however, fails to provide any record cites that are in conflict with those cited by Defendant, and only cite the Court to the testimony of Dr. Finan.

A witness may be accepted as an expert only when "the witness possesses scientific, technical, or specialized knowledge on a particular topic." *Sheffield v. Goodwin*, 740 So. 2d 854, 857 (¶ 10) (Miss. 1999). The nursing care rendered to Jennifer Nettles fell within a specialized area of a hospital, namely postpartum, post-surgical care. Mr. Siverly admitted he had no experience or training in this area and admitted to not reading the Mississippi Nurse Practice Act to determine the scope of a nurse's license in Mississippi. Where an expert possesses no specialized knowledge to

assist the trier of fact to understand the evidence concerning postpartum, post-surgical care of a patient from a nursing perspective, that expert's proffered testimony should be stricken. *See Cheeks v. Bio-Medical Applications, Inc.*, 908 So. 2d 117, 121 (¶ 11) (Miss. 2005) (citing *West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714, 719 (Miss. 1995); *see also Palmer v. Biloxi Reg'l Med. Cntr.*, 564 So. 2d 1346 (Miss. 1990) (Nurse properly disqualified where she "did not explain how she may have acquired-through her limited nursing experiences-the 'knowledge, skill, expertise, training or education' necessary to qualify her as an expert on the conduct of an oral surgeon."); *Stanton v. Delta Reg'l Med. Cntr.*, 802 So. 2d 142,144-45 (¶ 5) (Miss. App. 2001) (Nurse properly excluded where she possessed no "experience or expertise beyond that of the average, randomly selected adult" regarding issues of case.).

Because the trial court improperly allowed Terry Siverly to testify as an expert in this case, despite his admitted lack of knowledge, skill, experience and /or training on the issues presented, Defendant prays the judgement against it be reversed and that Mr. Patterson's cause of action against it be remanded for trial on liability.

III. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING HIGHLY INFLAMMATORY POST-MORTEM PHOTOGRAPHS OF THE BODY OF JENNIFER NETTLES TAKEN AT THE POST MORTEM EXAMINATION TO BE PUT IN EVIDENCE.

In response to this issue, Plaintiff cites to no authority regarding the trial court's failure to conduct on the record a balancing of probative value versus prejudice. *See Griffin v. McKenney*, 877 So. 2d 425, 438 (¶ 43) (Miss. App. 2003). Plaintiff only states that Defendant waived any objection to the photographs since they were used "to bolster the testimony of River Region's witness, Dr. Morrison." *Appellee Brief*, page 22. The pictures published to the jury on (CT 8 : page 1146, lines 6-10) were Defendant's Exhibit # 13 and Defendant's Exhibit # 16, not the 13 nude photographs

contained in Plaintiff's Exhibit P-4 and at issue herein. *See* (CT 8 : page 1144, lines 23-29).

Based on the foregoing and all authority and arguments in Defendant's Appellant Brief, River Region prays this Court reverse the judgment in favor of Plaintiff, and remand the case for a new trial on liability.

IV. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PROHIBITING DEFENDANT FROM PUTTING INTO EVIDENCE JENNIFER NETTLES' HABITUAL ABUSE OF ILLEGAL DRUGS.

In response to the issue of Jennifer Nettles' habitual drug abuse raised in the Appellant Brief, Plaintiff cites to no case law authority and cites this Court only to those portions of the record where his counsel asked Drs. Finan and Morrison whether Jennifer was predestined to die. The issue of Jennifer's drug abuse arose from a Chancery Court hearing regarding Jennifer's sister's, Amy Armstrong, attempt to adopt Brandi. *See e.g. In re B.N.N.*, 928 So. 2d 197 (Miss. App. 2006). The statements also arose pursuant to comments from Jennifer's nurse at River Region, Patti Gilmore, regarding whether Jennifer was going to obtain any pain relief from the medication that she would be given prior to delivery because of her past drug use and at the time Jennifer was given pain medication, she stated she received no benefit from the medication. (CT 2 : page 248, line 25 - page 249, line 11). The Plaintiff's only argument on appeal is that "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. There was no evidence proffered by River Region on this issue." *Appellee Brief*, page 24.

Contrary to Plaintiff's blanket assertion, the Chancery Court transcript was proffered to the trial court at (CT 2 : page 260, lines 4-8) and the testimony of Patti Gilmore was proffered to the trial court at (CT 2 : page 248, line 25 - page 249, line 11).

Plaintiff makes no arguments regarding the three issues brought out on appeal by Defendant,

namely (1) that the drug-abuse and statements by Patti Gilmore countered the "over-medication" issue opined to by Dr. Finan, (2) Jennifer's past drug abuse was probative to the issue of Plaintiff's claim for loss of consortium, and (3) Plaintiff opened the door for the admissibility of the evidence by stating in closing arguments "[s]he would have been able to change herself." (CT 9 : page 1243, lines 4-12). For those reasons stated in Defendant's Appellant Brief and unopposed by Plaintiff, River Region prays this Court reverse the judgment in favor of Plaintiff and remand this cause for a new trial on liability and/or damages.

V. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN INSTRUCTING THE JURY THAT ALL DAMAGES MUST BE EQUALLY DIVIDED BETWEEN THE THREE (3) PLAINTIFFS.

The instant action was not similar to a boiler-plate wrongful death action. On a typical basis, one wrongful death beneficiary will bring a cause of action under MISS. CODE ANN. § 11-7-13 on behalf of the class of wrongful death beneficiaries and on behalf of the estate of the decedent. Here, there were three alleged wrongful death beneficiaries, represented by separate counsel, who brought their own individual claims for loss of society and companionship or loss of consortium, and there was no cause of action on behalf of the Estate of Jennifer Nettles at trial.[1] This issue relates solely to the individual claim brought by Thomas Patterson.

A. Whether the trial court erred in ruling that the marriage was not abandoned.

Prior to the commencement of trial, the trial court ruled that (1) the question of abandonment

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[1] The original Complaint was filed by Paul Kelly Loyacono, Esq. on behalf of those individuals incorrectly identified as the wrongful death beneficiaries of Jennifer Nettles. Once Thomas Patterson discovered suit had been filed and came forward represented by separate counsel, John D. Fike, Esq., Plaintiffs amended their suit to include Mr. Patterson and to exclude Jennifer's parents and siblings. At the time of trial, Mr. Loyacono, William Hood, Esq. and William Pyle Esq. represented Mr. Patterson and the minor daughters. Mr. Fike represented only Mr. Patterson.

of the marriage was a matter of law to be decided by the court, not the jury (CT 2 : page 188, lines 25-28); (2) as a matter of law, Mr. Patterson had not abandoned the marriage; and (3) all three wrongful death beneficiaries must be granted equal damages should a Jury return a verdict in their favor. (CP 11:1545-1546). Defendant has appealed these three rulings. Plaintiff argues that the second issue was waived through the arguments and a stipulation entered (CT 6 : page 873, line 28 - page 878, line 19), including the following portion from the trial court:

> BY THE COURT: To be fair, the last part is that they are still legally married, or they were still legally married at the time of her death.

(CT 6 : page 878, lines 14-17). This is an issue that had previously been ruled upon by the trial court and could not be reargued until the time for appeal. The issue at trial and surrounding the stipulation was not whether the trial court ordered Defendant to stipulate to the fact that Thomas Patterson was married to Jennifer Nettles. Again, this issue was ruled upon by the trial court prior to trial. The issue at trial was whether or not Defendant would put on evidence regarding Thomas Patterson via deposition or via stipulation.

Plaintiff does not argue in his Appellee Brief the issue of whether abandonment of the marriage was properly ruled upon by the trial court, or whether the issue should have been decided by the jury. Instead, he argues that the majority of jurisdictions "follow the rule that it requires a definitive **legal** act to terminate the marital relationship." *Appellee Brief*, page 31. Plaintiff, however, misstates the issue. The issue is not whether Jennifer Nettles may be granted a divorce from Thomas Patterson *nunc pro tunc*, but instead whether desertion or abandonment of the marriage will estop Thomas Patterson from being a wrongful death beneficiary of Jennifer Nettles. *See Tillman v. Williams*, 403 So. 2d 880 (Miss. 1981).

The facts before the trial court when it ruled that Thomas Patterson was a wrongful death beneficiary were that (1) Jennifer Nettles filed for divorce from Thomas Patterson, (2) changed her name back to Nettles from her previous marriage to Brent Nettles, (3) that the couple lived together for only one month as husband and wife, (4) that the divorce proceeding was initiated by Jennifer just three months after their wedding, (5) that they had nothing to do with each other after the divorce was filed, (6) Jennifer conceived a child through another man, (7) Mr. Patterson fathered a child with another woman after divorce was filed, and (8) Mr. Patterson was not even aware Jennifer had died until over a year after her death. (CP 10:1452-1469); (CT 2:197, lines 24-28); (CT 6:880, line 14 - 881, line 2). Whether these facts were sufficient to prove an abandonment of the marriage, or whether a mere separation was proven, was for the jury to decide.

In the alternative, Defendant prays this Court reverse the ruling of the trial court holding that a mere separation occurred, and hold instead that an abandonment of the marriage was proven and that Thomas Patterson was estopped from being a wrongful death beneficiary of Jennifer Nettles.

B. Assuming *arguendo* Thomas Patterson is a wrongful death beneficiary, whether the trial court erred in holding he was *per se* entitled to the same damages as the other wrongful death beneficiaries.

At the trial of this cause, there were three claims: (1) Hallie Nettles' individual claim for loss of society and companionship, (2) Brandi Nicole Nettles' individual claim for loss of society and companionship and (3) Thomas Patterson's individual claim for loss of consortium. *See Long v. McKinney*, 897 So. 2d 160, 169 (¶ 35) (Miss. 2004) ("Each beneficiary must consider whether to bring their own ***individual claim*** for loss of society and companionship. A spouse ***may*** have a claim for loss of consortium.") (emphasis added). Defendant had been previously granted summary judgment as to all claims of the estate of Jennifer Nettles (CP 10:1410-1411) and Plaintiff stipulated

as follows with regards to all economic damages:

> BY MR. HAGWOOD: . . . The only claim that the Plaintiffs have is a claim of loss of society and companionship. They have put on no proof of funeral expense. They have put on no proof of any economic damages whatsoever.
>
> BY MR. LOYACONO: And we stipulate that we ask for neither.

(CT 6 : page 870, lines 16-22). Despite these facts, the trial court held that the following provision of the Wrongful Death Statute (MISS. CODE ANN. § 11-7-13) mandated that all claims asserted in this suit were equal in value:

> Damages for the injury and death of a married man shall be ***equally distributed*** to his wife and children. . . .

MISS. CODE ANN. § 11-7-13 (emphasis added).

Mississippi case law is clear that where damages are liquidated, such as in the form of a settlement or verdict rendered, the beneficiaries cannot then ask for a proportionate share of the proceeds. At this point, the damages must be "equally distributed." Such was the case in *Pannell v. Guess*, 671 So. 2d 1310 (Miss. 1996), which was the only case cited by Mr. Patterson in support of the trial court's ruling. In *Pannell*, the decedent's father retained John Long, Esq. to pursue a wrongful death action related to an automobile accident, and Long was able to secure a $150,000 settlement from the defendant. *Pannell*, 671 So. 2d at 1312. At the hearing to determine wrongful death beneficiaries before the Lee County Chancery Court, the parents of the decedent took the position that the decedent's half-siblings were not entitled to any of the proceeds. *Id.* The half-siblings disagreed and retained separate counsel. At the hearing, the chancellor held that all proceeds were to distributed equally pursuant to the terms of § 11-7-13. *Id.* In affirming the trial court, the Mississippi Supreme Court held as follows:

> All of Shelly's [*i.e.* - decedent] beneficiaries agreed that they would settle all claims against Griffin [*i.e.* - the defendant] for $150,00.00. The lower court approved this settlement, and neither Shelly's parents nor her half-siblings ever had to prove damages for loss of companionship or pain and suffering. *See Jones v. Shaffer*, 573 So. 2d 740, 743 (Miss. 1990).

Id. at 1313.

> Contrary to Appellant's 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).

Id. at 1314.

In *Jones v. Shaffer*, one brother and one sister of the decedent testified to the closeness of the decedent to the remainder of his brothers and sisters. *Jones*, 573 So. 2d at 743. The Mississippi Supreme Court held that "[a]lthough each member of the family should have been available as a witness and could have, or should have, testified to the loss of companionship and society, this element of the damages is undisputed." *Id.*

Where there have been no funds "recovered" in a wrongful death suit, the "equally distributed" language of § 11-7-13 is inapplicable. MISS. CODE ANN. § 11-7-13. In a case such as the one at bar, where three beneficiaries bring their individual claims for loss of society and companionship, and those claims are materially different from one another, there cannot be only one verdict. Instead, the jury should have been allowed to determine damages for loss of companionship sustained by each individual beneficiary, and could only do so through special interrogatories. It is clear that the wrongful death statute is to be "strictly construe[d]" on appeal. *Franklin v. Franklin ex rel. Phillips*, 858 So. 2d 110, 115 (¶ 14) (Miss. 2003) (citing *Smith v. Garrett*, 287 So. 2d 258, 260 (Miss.1973)). It is likewise clear and unambiguous that the legislature intended "equally

distributed" in the wrongful death statute to refers to "recovered damages." For this reason, Defendant prays that the Jury verdict in favor of Thomas Patterson be reversed, and this case be remanded to the trial court for a Jury determination of his damages for loss of society and companionship, if any.

C. Whether Thomas Patterson should have been judicially estopped from asserting a claim for loss of consortium.

Defendant asserted in its Appellant Brief that Thomas Patterson should be judicially estopped from asserting a claim for loss of consortium because of his and his counsel's position taken at Mr. Patterson's deposition that he never pled a loss of consortium claim. (CP Supp. 2 : page 195, line 13 - page 196, line 6). Plaintiff's only argument in response is that "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. . . ." *Appellee Brief*, page 38. Defendant would simply respond to this assertion by restating that it was granted summary judgment on the claims of "the Decedent" (*i.e.* - the Estate of Jennifer Nettles), and Mr. Patterson's counsel conceded at trial that his only claim was for loss of society and companionship.

Pursuant to the authority and analysis in this Defendant's Appellant Brief, River Region prays this Court reverse and the Jury verdict as to Plaintiff Thomas Patterson and render judgment in favor of Defendant on Mr. Patterson's claims pursuant to the doctrine of judicial estoppel.

VI. WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AS TO THE CLAIMS OF THOMAS PATTERSON.

During Plaintiff's cause-in-chief, there was no testimony from any family member regarding loss of society and companionship. Moreover, Thomas Patterson did not testify. Defendant moved for a directed verdict on the ground that no evidence of damages had been put forth by Plaintiffs,

including but not limited to Thomas Patterson. The trial court's ruling on Defendant's motion for directed verdict was as follows:

> BY THE COURT: Of course, that is on damages and right now in the motion of whether or not there is any liability is in. I will read your case, though, in terms of - - when we get to the issue of damages and in instructing the jury, I will read the cases you just cited to me.
>
> That being the case, the Court finds, that taking the evidence on liability as present by the Plaintiff and the Court must take that evidence as true on a motion for directed verdict, therefore, the motion for directed verdict - - I didn't hear one on liability, so the court finds that it should go forward at this time.

(CT 6 : page 871, line 24 - page 872, line 9).

Mr. Patterson's Appellee Brief likewise appears to assume that a jury is duty bound to award damages should they find liability. Such is not the law of this State. A spouse who seeks "compensation for loss of consortium must show that he or she suffered damages arising out of the other's injuries." *Coho Resources, Inc. v. McCarthy*, 829 So. 2d 1, 22 (¶ 66) (Miss. 2002). In *Coho Resources*, there was no testimony from either spouse "as to how [the husband's] injury . . . adversely affected his relationship with [his wife]." *Coho Resources*, 829 So. 2d at 23 (¶ 67). The Mississippi Supreme Court held therein that:

> ¶ 68. Because the evidence offered was insufficient to even draw inferences to support Patti Stroo's personal claim for loss of consortium, the trial court's judgment of $10,000 for loss of consortium is reversed and rendered.

Id.

In *McGowan v. Estate of Wright*, 524 So. 2d 308 (Miss. 1988), John McGowan died January 20, 1982, and had lived apart from his wife, Lucille, since "February or March, 1946." *Id.* at 309-10. Lucille visited John in 1950, 1955, 1958, and 1971. *Id.* at 310. John never visited her. *Id.* The Mississippi Supreme Court affirmed a jury verdict awarding damages for funeral expenses and

ambulance fees to the estate of the deceased, but refused to award damages to the widow, holding that "the evidence was uncontradicted and undisputed that there were no damages for loss of companionship." *Jones*, 573 So. 2d 743; *McGowan*, 524 So. 2d at 311.

At the instant trial, not one word was spoken as to Thomas Patterson's claim for loss of society and companionship (*i.e.* - loss of consortium). Similar to *Coho Resources supra*, there was insufficient evidence offered by Thomas Patterson to even raise an inference of damages in this matter, and accordingly, River Region prays that the judgment against it for the claim of Thomas Patterson be reversed and rendered.

CONCLUSION

Pursuant to each of the foregoing sections and all authority and analysis in this Defendant's Appellant Brief, River Region Medical Corporation prays this Court reverse the judgment against it, and render or send back to the trial court for a new trial on either liability or damages, where appropriate.

RESPECTFULLY SUBMITTED, this 15th day of May, 2007.

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CERTIFICATE OF SERVICE

I, JASON E. DARE, one of the attorneys for River Region, certify that I have this day delivered via U.S. Mail, postage prepaid, a true and correct copy of the foregoing document to the following:

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

John D. Fike, Esq.
FERGUSON & FIKE
PO Drawer 89
Raymond, MS 39154

P. Kelly Loyacono, Esq.
William A. Hood, Esq.
William A. Pyle, Esq.
PO Box 1150
Vicksburg, MS 39183

THIS, the 15th day of May, 2007.

JASON E. DARE

CERTIFICATE OF FILING

I, JASON E. DARE, certify that I have this day delivered via U.S. Mail, postage pre-paid, the original and three copies of, and a floppy disc containing, Reply Brief of Appellant / Defendant River Region Medical Corp. d/b/a Parkview Regional Medical Center, on May 15, 2007, to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi, 39201.

JASON E. DARE