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
HON. ISADORE W. PATRICK, CIRCUIT JUDGE

BRIEF OF APPELLANT / DEFENDANT, RIVER REGION MEDICAL CORPORATION

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Original

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In Re: BRIEF OF APPELLANT / DEFENDANT, RIVER REGION MEDICAL CORP.

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 /or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. **Thomas Patterson, Appellee / Plaintiff** - alleged husband and wrongful death beneficiary of Jennifer Nelson Nettles, deceased;

2. **River Regional Medical Corporation, Appellant / Defendant**;

3. **Paul Kelly Loyacono, Esq.** - Counsel for Appellee / Plaintiff;

4. **John Denver Fike, Esq.**, of Ferguson & Fike, Counsel for Appellee / Plaintiff;

5. **L. Carl Hagwood, Esq.**, of Wilkins, Stephens & Tipton, Counsel for Appellant / Defendant;

6. **Jason E. Dare, Esq.**, of Wilkins, Stephens & Tipton, Counsel for Appellant / Defendant;

7. **David M. Eaton, Esq.**, of Wilkins, Stephens & Tipton, Counsel for Appellant / Defendant; and

8. **Honorable Isadore W. Patrick**, Circuit Court Judge

SO CERTIFIED, this 22nd day of December, 2006.

JASON E. DARE

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STATEMENT OF THE CASE

This is a wrongful death claim arising out of the death of Jennifer Nettles while a patient at River Region Health System ("River Region") following an emergency Cesarean section and elective tubal ligation. Suit was filed on behalf of Jennifer's "husband," Thomas Patterson, and her two daughters, Hallie and Brandi. Thomas Patterson and Jennifer Nettles were married in September of 1995, and lived together for approximately one month. (CT 6:880, lines 18-21). Jennifer had a daughter at that time, Hallie, whose biological father was Brent Nettles. Jennifer filed for divorce from Mr. Patterson on December 19, 1995, and although the divorce was never finalized, the two never lived together after that time and Jennifer changed her last name from Patterson to Nettles. (CP 10:1458-1462; CT 6: 880, line 21). On December 26, 2001, Jennifer was admitted to River Region in Vicksburg, Mississippi to give birth to her second daughter, Brandi, and to have a postpartal tubal ligation for sterilization purposes. (*Defendant's Ex. 1*, RRHS 178-179). Her obstetrician was Norman Connell, M.D., who decided at or before 12:00 noon that Jennifer must undergo a Cesarean section. (*Id.* at RRHS 225). Proper consent was obtained and witnessed by nurse Patti Gilmore. (*Id.* at RRHS 230-231). At or around this time Jennifer expressed to Nurse Gilmore her concern about whether she would obtain pain relief from the medication she would be given prior to delivery because of her past drug abuse. (CT 2:248, line 25 - 249, line 11).

Surgery started at or around 12:34 p.m., with delivery occurring at or around 12:43 p.m. (*Defendant's Ex. 1*, RRHS 195). Jennifer stayed in recovery until 2:30 p.m., at which time she was transferred to a private room under the care of Nurse Gwendolyn Brown. (*Id.* at RRHS 205). Nurse Brown assessed Jennifer upon her arrival to the floor at 2:30 p.m., then reassessed her at 2:45 p.m., 3:15 p.m., 3:45 p.m., 4:15 p.m., 5:00 p.m., 5:30 p.m. and 5:45 p.m. (*Id.* at RRHS 206-207) At 5:45

p.m., Nurse Brown entered Jennifer's room to change her sanitary pad, and found Jennifer to be dusky in color and unresponsive to tactile stimuli. (*Id.* at RRHS 207). A code blue was called at 5:47 p.m., but despite best efforts, Jennifer was pronounced dead at 6:02 p.m. (*Id.* at RRHS 207-208).

On January 3, 2002, Jennifer's parents (Riley & Dorothy Nelson), siblings (Amy Armstrong, Rebecca Nelson and Riley Nelson, Jr.) and minor daughter's (Hallie and Brandi Nicole) filed suit against River Region and Dr. Connell for wrongful death. (CP 1:11-14). At or around the same time, Amy Armstrong and her husband, Mark Armstrong, began adoption proceedings for Brandi in the Warren County Chancery Court. Mark Davidson was determined therein to be the biological father of Brandi, and on February 13 and March 20 and 22, 2002, the chancery court heard testimony. (*Proffer-Chancery Court Transcript*). As part of the proof in support of Amy's adoption attempts, Jennifer's mother and Amy (Jennifer's sister) testified that Jennifer's family had no relationship with Jennifer for approximately four years prior to her death due to Jennifer's habitual drug and alcohol abuse. (*Id.* at 137, line 16 - 138, line 4). Amy also testified that while her and Jennifer lived together, Jennifer used illegal substances in front of Hallie and that (in Amy's opinion) Hallie developed pneumonia because of neglect by Jennifer. (*Id.* at 159, line 16-25; 160, line 23 - 161, line 13; 167, line 21 - 168, line 2, lines 10-13).

In the wrongful death action filed against it, River Region propounded discovery to Plaintiffs on February 15, 2002, and requested the names and opinions, including basis thereof, of all Plaintiffs' experts. (CP 4:525-532). Plaintiffs were granted leave to amend their suit on January 23, 2003, and the wrongful death claimants were limited to Hallie, Brandi, Thomas Patterson, and the Estate of Jennifer Nettles. (CP 2:203-206, 208). On December 1, 2003, the trial court entered an Agreed Scheduling Order mandating that Plaintiffs designate and disclose opinions for their experts

in compliance with MISS. R. CIV. P. 26(b)(4)(A)(i) on or before February 15, 2004. (CP 3:340-341). On or around February 10, 2004, Plaintiffs designated as a medical expert Dr. Michael E. Finan, but did not disclose opinions for him until 43 days after their expert designation deadline had expired (*i.e.* - on March 29, 2004). (CP 3:349-350); (CP 4:554-561); (CT 6:840, line 24 - 841, line 10). Defendant filed a Motion to Compel further disclosure on May 27, 2004, but withdrew the Motion once Plaintiffs represented that their expert's opinions were fully disclosed. (CP 5:679-699). On June 10, 2004, Plaintiffs filed their 4th Supplemental Responses to Defendant's expert witness Interrogatory, which disclosed new standard of care and causation opinions attributable to Dr. Finan. (CP 6:841-845). Defendant filed on June 15, 2004 a Motion to Strike Plaintiffs' Fourth Supplemental Responses to Discovery. (CP 6:807-887). At the hearing, Defendant moved *ore tenus*, in the alternative, to take the deposition of Dr. Finan. (CT 2:162, lines 26-29). Neither of the Motions were ruled upon by the trial court prior to trial.

Also prior to trial, the trial court on September 15, 2005 entered an Order granting Defendant's Motion for Partial Summary Judgment as to the Claim of the Estate of Jennifer Nettles, leaving as the only remaining claims the three Plaintiffs' individual claims for loss of society and companionship. (CP 10:1410-1411). In reliance on this ruling, Defendant moved the trial court for Special Interrogatories to the Jury (CP 10:1452-1469), asking that the Jury decide the damage amount, if any, proven by each Plaintiff. Contained in the Motion for Special Interrogatories was the issue of whether Thomas Patterson and/or Jennifer Nettles had abandoned their marriage, thereby precluding Mr. Patterson from being a wrongful death beneficiary. At the hearing on these Motions on November 2, 2005, the trial court held that the question of abandonment of the marriage was a matter of law, not a question of fact for the Jury. (CT 2:188, lines 25-28). The trial court thereafter

held that Mr. Patterson had not abandoned the marriage and that all three wrongful death beneficiaries must be granted equal damages should a Jury return a verdict in their favor. (CP 11: 1545-1546).

At trial, Plaintiffs' theory of the case was that during the tubal ligation, Dr. Connell inadvertently cut an artery in the branch of the uterine arteries below the section of fallopian tube that was to be removed and Jennifer slowly exsanguinated, with the most active bleeding occurring two to two and one-half hours post-surgery (*i.e.* - from approximately 2:45 p.m. to 3:15 p.m.) (CT 6:845, line 17 - 846, line 29; 853, line 22 - 854, line 25). It was uncontested that Jennifer's vital signs were stable when she left the recovery room at 2:30 p.m., but Plaintiffs contended that Nurse Brown failed to recognize Jennifer's slow bleed from 2:30 p.m. to 5:45 p.m. and that Jennifer could not complain of pain because she was over-medicated. (CT 6:827, line 21 - 829, line 11). Defendant's theory of the case was that during the tubal ligation, Dr. Connell appropriately performed the procedure by clamping off and cutting the fallopian tubes and arteries running along side them and that around 5:30 p.m., one of the clamps pulled away from the artery and exsanguination of Jennifer's entire blood volume occurred within minutes. (CT 8:1125, line 23 - 1126, line 21). All parties agreed that under Defendant's theory, there would be no breach of the standard of care. (CT 6:852, line 4 - 23); (CT 8:1127, line 3 - 1128, line 4).

In support of their theory of the case, Plaintiffs called two "retained experts:" Terry Siverly, RN and Eugene Michael Finan, M.D. Terry Siverly was a registered nurse from New Orleans, Louisiana, who started out his nursing career at Charity Hospital in 1986 working in an adult isolation unit. (CT 5:745, lines 15-22). He worked on this ward for two years, which was the extent of his hospital experience. (CT 5:741, lines 6-14; 745, line 23 – 746, line 6); (CT 6:754, lines 22-25).

He then worked four years at Charity Hospital in an Aids Clinic, caring again for infectious disease patients. (CT 5:746, lines 7-15). After leaving Charity, Mr. Siverly worked Home Health for six years, and thereafter has been employed by the Louisiana Department of Health, surveying nursing homes to ensure their compliance with federal regulatory standards. (CT 5:746, lines 16-21); (CT 6:755, lines 3-8; 756, lines 15-19). Mr. Siverly has never been a circulating nurse in an obstetrical unit or hospital unit nor has he ever worked in a labor and delivery unit. (CT 5:746, lines 22-27; 747, lines 6-19). Pursuant to MISS. R. EVID. 702, Defendant objected to Mr. Siverly being qualified as an expert to testify regarding nursing standards in surgery and/or labor and delivery due to his admitted lack of knowledge, training and background in this field of nursing. (CT 6:758, line 14 - 770, line 7). The trial court denied this Motion and allowed Mr. Siverly to state opinions on the nursing standard of care for obstetrical nurses. (CT 6:770, lines 8-10).

When Dr. Finan took the witness stand, he was allowed to testify that his opinion that the post-surgery bleed occurred in hours, not minutes, was based solely upon two blood counts taken on Jennifer Nettles, specifically her hematocrit levels on admission and at the time of resuscitation, despite the fact that these lab results were never referred to in his Affidavit, Supplemental Affidavit or Plaintiffs' 4th Supplemental Responses to Interrogatories. (CT 6:822, line 15 - 826, line 22; 853, lines 12-19). Also during trial, Plaintiffs were permitted, over objection, to put into evidence thirteen nude, post-mortem photographs of Jennifer Nettles by asserting their experts would make them relevant. (CT 4:539, line 25 - 541, line 2). The pictures, however, were never shown to Dr. Finan or Mr. Siverly, and were only shown to Dr. Hayne for identification purposes. The trial court never performed a MISS. R. EVID. 403 analysis of the pictures' probative value or potential for unfair prejudice. *See* (CT 4:540, lines 21-24). The trial court, alternatively, prohibited Defendant from

making any reference to Jennifer's habitual drug abuse, despite its probative value to the issues of the case and Plaintiffs "opening the door" for same by stating in closing, "[s]he would have been able to change herself. . . ." (CT 9:1243, lines 4-12).

At the end of Plaintiffs' case-in-chief, not one word had been spoken regarding Thomas Patterson's damages. Despite there being no evidence on his damage claim, the trial court denied Defendant's Motion for a Directed Verdict as to the claims of Thomas Patterson. (CT 6:869, line 16- 872, line 12). Defendant renewed its Motion for Directed Verdict after its case-in-chief (CP 11: 1605), but was again denied relief.

Following the conclusion of trial and a Jury verdict in favor of Plaintiff (CP 11:1610-1611), Defendant filed its Motion for Judgment Notwithstanding the Verdict on November 29, 2005 (CP 11:1623 - 1630), which was denied by the trial court on December 19, 2005. (CP 11: 1639). Aggrieved by multiple rulings made by the trial court, Defendant herein seeks relief through appeal.

SUMMARY OF THE ARGUMENT

Defendant brings forth nine claims of error by the trial court in six issues whereby it contends it is entitled to a reversal of the judgment against it. The first issue relates to Dr. Finan being allowed to testify that the basis of his opinions was blood counts taken on Jennifer Nettles prior to and after surgery, despite the fact that these opinions where never disclosed to Defendant. In *Palmer v. Volkswagen of Am., Inc.*, 904 So. 2d 1077 (Miss. 2005), the Court held that "parties who file appropriate interrogatories seeking expert information [do not] acquire the additional burden of filing a motion to compel, where they are provided an answer which promises supplementation." *Palmer*, 904 So. 2d at 1090 (¶ 55). Despite this lack of burden, Defendant moved to compel further discovery regarding Dr. Finan, but withdrew the Motion in reliance on Plaintiffs' assertion that his opinions were disclosed. Upon disclosure of additional opinions of Dr. Finan, Defendant moved to exclude or in the alternative to take his deposition, but the trial court did not rule on either Motion. If Defendant had the burden to compel further discovery from Plaintiffs despite filing appropriate Interrogatories, this burden was met. Defendant clearly was prejudiced by the erroneous admission of this testimony since Dr. Finan was Plaintiffs' only physician expert, and these blood tests were the sole basis for his opinions of negligence and causation. Premised on the admission of this testimony by Dr. Finan, Defendant requests that the judgment in favor of Plaintiffs be reversed and the case be remanded back to the trial court for a new trial on liability and damages.

Defendant also contends it was reversible error for the trial court to qualify Terry Siverly as an expert in nursing standard of care in post-delivery, post-surgical monitoring when he admitted to having no prior experience, training or background in these areas. 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 particular nursing topic in this suit related to the care and treatment of immediately post-surgical, post-delivery patients in a hospital setting, a topic Mr. Siverly admitted to having no specialized knowledge on. For this reason the trial court committed reversible error in qualifying him as a nursing expert and in allowing him to testify as to nursing standards in labor and delivery. Defendant, therefore, requests that the judgment against it be reversed and remanded for a trial on liability and damages.

The trial court also committed reversible error by allowing into evidence thirteen nude, post-mortem photographs of Jennifer Nettles that served no purpose but to inflame the Jury. Defendant moved to exclude these photographs pursuant to MISS. R. EVID. 403 on the ground that they were devoid of "any evidentiary purpose." *McNeal v. State*, 617 So. 2d 999, 1010-11 (Miss. 1993). Without analyzing the pictures' probative value or danger for unfair prejudice, the trial court allowed the photographs to be admitted into evidence. The trial court first abused its discretion by not conducting on the record a balancing of probative value versus prejudice. *Griffin v. McKenney*, 877 So. 2d 425, 438 (¶ 43) (Miss. App. 2003). The trial court likewise abused its discretion by allowing into evidence these photos that were nothing more than an attempt to "arouse the passion and prejudice of the jury." *McNeal*, 617 So. 2d at 1011. For these reasons, Defendant respectfully requests that the judgment against it be reversed and that this case be remanded for a new trial on liability and damages.

Premised upon Plaintiffs' first Motion *in limine*, the trial court precluded Defendant from making any reference to Jennifer's habitual use of illegal substances. This evidence was to be introduced to rebut Dr. Finan's opinion that Jennifer "lost the ability to complain [about pain]" due to two morphine shots given her while in the hospital. *See* (CT 6 : 828, line 29 - 830, line 3).

Jennifer stated to Nurse Gilmore that she received no benefit from the first of the two shots. The evidence of drug abuse was likewise probative to rebut any inference of loss of society and companionship claimed by Plaintiffs (*i.e.* - their only claim). Even assuming *arguendo* the trial court did not abuse its discretion it precluding evidence regarding Jennifer's habitual drug abuse, Plaintiffs opened the door by stating in closing arguments that "[s]he would have been able to change herself." *See Blake v. Clein*, 903 So. 2d 710, 726 (¶ 40) (Miss. 2005). Because the trial court erroneously precluded Defendant from introducing evidence of Jennifer's habitual drug abuse, Defendant requests that the judgment against it be reversed and the trial be remanded for a new trial on liability and damages.

Defendant's fifth issue relates to the claim of loss of society and companionship made by Plaintiff Thomas Patterson. Prior to trial, Defendant filed a Motion for Special Interrogatories to the Jury, so that the Jury could determine the amount of damages proven by each Plaintiff. Contained in this Motion was the issue of whether Thomas Patterson was entitled to be a wrongful death beneficiary. Because Jennifer filed for divorce three months after their marriage and six years prior to her death; she changed her name from Patterson to Nettles; the two did not live together for the six years between the filing for divorce and Jennifer's death; and Jennifer had another child (Brandi) by another man and Mr. Patterson fathered a child by another woman, Defendant asserts there was a clear intent by both to abandon the marriage. Where there is substantial evidence to show desertion or abandonment of the marriage, through marriage or divorce proceedings by either spouse, and not just a separation, a spouse can be prohibited from being classified as an heir-at-law. *Tillman v. Williams*, 403 So. 2d 880, 882 (Miss. 1981). Defendant asserts that the issue was a question of fact for the Jury to decide since it was a question of intent of the parties and the evidence pitted

Defendant's position of abandonment against Mr. Patterson's position of separation. *See Duplantis v. State*, 708 So. 2d 1327, 1341 (Miss. 1998) ("Intent" is "question of fact for the jury"); *Lift-All Co., Inc. v. Warner*, 2006 WL 2884533, at *4 (¶ 15) (Miss. Oct. 12, 2006) (Evidence that pits one party's claims against another's is question of fact for jury). Defendant, therefore, respectfully requests that the judgment against it as to the claims of Thomas Patterson be reversed and the case be remanded for a trial on the issue of abandonment. In the alternative, Defendant respectfully requests that this Court hold Jennifer Nettles and/or Thomas Patterson did abandon their marriage and the judgment against it in favor of Thomas Patterson be reversed, with judgment in Defendant's favor being rendered.

Even if the trial court properly held that Jennifer Nettles and/or Thomas Patterson did not abandon their marriage, the Jury should have been allowed to assess separate damages on each Plaintiffs' separate claims for loss of society an companionship. The trial court held that the "equally distributed" language of MISS. CODE ANN. § 11-7-13 required the Jury to return identical damage verdicts for all claims of loss of society and companionship for each of these Plaintiffs. Contrary to this ruling, in order for "damages" to be "distributed," they must first be "recovered." MISS. CODE ANN. § 11-7-13. Defendant thus respectfully requests that the judgment against it be reversed and the case be remanded for a trial on damages as to the claims of Thomas Patterson.

Thomas Patterson should have likewise been judicially estopped from asserting a claim for loss of society and companionship due to his counsel's assertion at his deposition that he had no claim for loss of consortium. (CP Supp. 2:195, line 13 - 196, line 6). A loss of consortium claim is limited to a spouse's "loss of society and companionship, interference with conjugal rights and providing previously unnecessary physical assistance." *Am. Nat. Ins. Co. v. Hogue*, 749 So. 2d 1254,

1262 (¶ 29) (Miss. App. 2000). Because Mr. Patterson's only claim at trial was his individual claim for loss of society and companionship, and because his counsel claimed he did not have that claim at his deposition in order to avoid discovery on the issue, this Plaintiff should have been judicially estopped from asserting this claim at trial. *Long v. McKinney*, 897 So. 2d 160, 169 (¶ 35) (Miss. 2005); *In Re Estate of Richardson*, 903 So. 2d 51, 56 (¶ 17) (Miss. 2005). For this reason, Defendant respectfully requests that the judgment in favor of Thomas Patterson be reversed and judgment in favor of Defendant based on this Plaintiff's claims be rendered.

Finally, not one word was spoken during Plaintiffs' case-in-chief regarding damages sustained by Thomas Patterson. Because Mr. Patterson bore the burden of proving his damages by a preponderance of the evidence and Mississippi does not recognize a "damages *per se*" standard in a wrongful death case, Defendant was entitled to a directed verdict as to Mr. Patterson's claims of loss of society and companionship. *TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So. 2d 991, 1016 (¶ 84) (Miss. 1997). Where loss of society and companionship was Mr. Patterson's only claim at trial, the trial court erred by not granted Defendant's Motion for a Directed Verdict. Defendant therefore respectfully requests that the judgment in favor of Thomas Patterson be reversed and judgment be rendered in favor of Defendant on his claim.

ARGUMENT

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.

Eugene Michael Finan, M.D. was Plaintiffs' only medical / physician expert at trial, and he was called to testify in support of Plaintiffs' theory that Jennifer died of a slow exsanguination and to make a causal connection between alleged breaches of the standard of care and Jennifer's death. *See Richardson v. Methodist Hosp. of Hattiesburg, Inc.*, 807 So. 2d 1244, 1248 (¶ 16) (Miss. 2002) (Nurse cannot testify to "causation in fact" of death). In order to acquire these opinions, Defendant propounded expert interrogatories to Plaintiffs on February 15, 2002, and therein requested (a) the identify of each expert witness Plaintiffs would call at trial, (b) the subject matter to which the expert witness would testify, (c) the substance of facts and opinions to which the expert would testify, and (d) a summary of the grounds for each opinion, including any material relied upon or reviewed by the expert in reaching his opinion. (CP 4:525-532). The trial court entered an Agreed Scheduling Order on December 1, 2003, mandating that Plaintiffs "designate and file with this Court and serve all counsel their Designation of Expert Witnesses encompassing that information required by [MISS. R. CIV. P.] 26(b)(4)(A)(i) on or before February 15, 2004." (CP 3 : 340-341). On or around February 10, 2004, Plaintiffs designated Dr. Finan as a medical expert, but only disclosed the opinion that "Jennifer Nettles' death was caused by her loss of blood precipitated by a laceration of a blood vessel in the Uterine Wall." (CP 3 : 349-350). That was not his opinion, as Defendant discovered at trial when Dr. Finan testified:

> Q. In the affidavits that you gave, Doctor, and was furnished to us to support your opinions in this case. In the first affidavit, you gave an affidavit saying that this was a bleed precipitated by the laceration of a blood vessel in the

uterine wall. Do you remember giving that affidavit?

A. No, I would have to read that. If it said that, its ***not*** my opinion.

(CT 6:840, line 24 - 841, line 2)(emphasis added). Plaintiffs did not disclose opinions for Dr. Finan in accordance with Rule 26(b)(4)(A)(i) until 43 days after their expert designation deadline had expired (*i.e.* - on March 29, 2004). (CP 4:560-561). The opinions in Dr. Finan's Affidavit were that (1) "based on [his] examination of [certain documents], . . . a laceration of a vessel identified in the area of surgery caused Jennifer Nettles to bleed during the post operative period," and (2) "the Cesarean Section was not indicated at the time it was performed and that death of Jennifer Nettles was caused by a loss of blood precipitated by a laceration of a blood vessel in the area of surgery which was not discovered by the physician." (CP 4:561). On April 29, 2004, a Supplemental Affidavit of Dr. Finan was filed, and contained his opinion that "the vital signs presented in Document 10010062 are not valid, and that the progress notes of Gwendolyn Brown in Document 10010061 are not reliable." (CP 6 : 848-849).

On May 26, 2004, Defendant's counsel faxed to Plaintiffs' counsel a good faith letter asking for complete expert interrogatory responses for Dr. Finan. (I.D. Defense Ex.- Hearing #1, Tab 11).[1] On May 27, 2004, Defendant filed a Motion to Compel disclosure of Dr. Finan's opinions, to which Plaintiffs responded on May 28, 2004 by asserting that Plaintiffs' responses "do meet the requirements of being reasonable and sufficient responses to discovery." (CP 5:679-699); (CP 5: 697-699). Plaintiffs thereafter on June 9, 2004 refused to make Dr. Finan available for deposition, taking the position that "[d]iscovery has closed according to the order of this Court." (I.D. Defense

[1] This exhibit was enclosed in a manila envelope and marked as I.D. only. This bound document as a whole was made part of the record and accepted as an exhibit by the trial court at the September 15, 2005 hearing. *See* (CT 2:167, line 11 - 168, line 4).

Ex.-Hearing #1, Tab 17). Pursuant to Plaintiffs' position that they had fully and completely identified the facts upon which their experts were to testify, the substance of their opinions and the grounds for their opinions, Defendant's counsel faxed a letter on June 9, 2004 to Plaintiffs' counsel stating that Defendant would withdraw its Motion to Compel. (CP 6:837-840). The very next day (*i.e.* - June 10, 2004), Plaintiffs filed their Fourth Supplemental Responses to Defendant's expert witness interrogatory. (CP 6:841-845). This document contained Dr. Finan's opinions that (1) the Cesarean Section "was not necessary pursuant to the Fetal Heart Monitor Strip for Ms. Nettles (sic) unborn child and the hospital records for Jennifer Nettles for December 26, 2004 (sic)," (2) "[t]he Standard of Care was also breached when during surgery, Dr. Connell lacerated a vessel in the area of surgery and that laceration caused Ms. Nettles to bleed slowly inside her abdomen until she died," (3) "[t]he Standard of Care for the hospital was breached when [it] failed to follow [its] own policies and procedures relative to the administration of Epidural or intrathecal medications relative to monitoring of the patients after the administration of said medications," and (4) [t]he Standard of Care for the hospital was further breached by Nurse Gwendolyn Brown when she failed to accurately record in the patients (sic) record her vital signs at the time of the Coding of Jennifer Nettles." *Id.*

Defendant filed on June 15, 2004 a Motion to Strike Plaintiffs' Fourth Supplemental Responses to Discovery. (CP 6:807-887). At the hearing on same, Defendant moved *ore tenus*, in the alternative, to take the deposition of Dr. Finan. (CT 2:162, lines 26-29). Neither of the Motions were ruled upon by the Court prior to trial.

At trial, Dr. Finan was allowed to testify that the basis of his 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). These opinions were never disclosed in discovery

or in the post-discovery supplementations objected to by Defendant but not ruled upon by the Court. Dr. Finan testified on more than one occasion that the sole basis for his opinions that there was a "slow bleed" and the causal connection between Defendant's action and omission, if any, and Jennifer's death were these lab values. *See* (CT 6:814, lines 8-10; 853, lines 16-19).

"[F]or a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party." *Palmer v. Volkswagen of Am., Inc.*, 904 So. 2d 1077, 1090 (¶ 55) (Miss. 2005)

In this Court's opinion of *Palmer v. Volkswagen*, the Court analyzed whether the trial court properly excluded the plaintiffs' expert ("Kruckenburg") from testifying at trial. During discovery, the plaintiffs' had provided Kruckenburg's name to defendants and provided generalized opinions, but never disclosed the ground upon which the opinions were based. When plaintiffs attempted to call Kruckenburg at trial, the trial court excluded her testimony on the basis it was outside the scope of her expert designation. The Court of Appeals held that the defendants, once they knew of the existence of Kruckenburg, had the "burden to request further discovery or file a motion to compel" further discovery responses. *Palmer v. Volkswagen of Am., Inc.*, 905 So. 2d 564, 587 (¶ 72) (Miss. App. 2003). In reversing the Court of Appeals, the Mississippi Supreme Court held that "parties who file appropriate interrogatories seeking expert information [do not] acquire the additional burden of filing a motion to compel, where they are provided an answer which promises supplementation." *Palmer*, 904 So. 2d at 1090 (¶ 55).

When Defendant detrimentally relied upon Plaintiffs' assertion that all of Dr. Finan's opinions had been produced, Plaintiffs should thereafter have been precluded from introducing any further opinions from Dr. Finan. Instead, the trial court not only allowed in the opinions contained

in the 4th Supplemental Responses, but also allowed testimony was never disclosed. Because Defendant propounded an appropriate Rule 26 interrogatory over 4 ½ years prior to trial and because Plaintiffs had not produced opinions for Dr. Finan relating to the basis of his opinions (*i.e.* - the two blood counts), Dr. Finan should have been precluded from giving these opinions. Had he been precluded from testifying to these undisclosed opinions, he would have had no basis for his opinions on proximate causation and Defendant would have been entitled to a directed verdict on all claims. By allowing Dr. Finan to testify to these opinions, Defendant was greatly prejudiced since it was not given an opportunity to prepare for a rebuttal of Dr. Finan on this key issue of the trial. Premised on the trial court's admission of Dr. Finan's foregoing testimony, Defendant respectfully requests this Court reverse the judgment in favor of Plaintiffs, and remand the case for a 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.

Terry Siverly moved to New Orleans, Louisiana in 1986 to work at Charity Hospital. (CT 5:745, lines 15-20). He worked there for six years, or until 1991. (CT 5:745, lines 21-22); (CT 6: 754, lines 22-25). This was his first and only hospital experience. (CT 5:741, lines 6-14); (CT 6:754, lines 22-25). For two of those six years, Mr. Siverly worked in 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). For his remaining four (4) years at Charity, he worked outside of the hospital in an Aids Clinic, caring again for infectious disease patients. (CT 5:746, lines 7-15). After leaving Charity, Mr. Siverly worked Home Health for six years, and has since been employed by the Louisiana Department of Health. (CT 5:746, lines 16-21). While working for the State of Louisiana, Mr. Siverly has done nothing but surveying nursing. (CT 6:755, lines 3-8; 756,

lines 15-19). Mr. Siverly has neither been a circulating nurse in an obstetrical unit or hospital unit nor has he ever worked in a labor and delivery unit. (CT 5:746, lines 22-27; 747, lines 6-19). Mr. Siverly likewise never read the Mississippi Nurse Practice Act to determine the score and breadth of practice for a registered nurse in Mississippi. (CT 5 : 747, line 21 – 748, line 2).

Despite this admitted lack of experience, training and background, Mr. Siverly was allowed to testify regarding the standard of care applicable to nurses caring for post surgical, post delivery patients. *See eg.* (CT 6:776, line 24 – 781, line 18). Specifically, Mr. Siverly was allowed to express opinions on how soon after a Cesarean Section a patient's vital signs should be checked and the proper monitoring intervals after the post-Cesarean Section, post-delivery mother has been released from recovery and has reached her private room on the floor. *Id.* During his trial testimony, Mr. Siverly again admitted to having a lack of training, experience and background in the area of post-delivery patients through the following except:

> Q. Okay. And then teaching - - so [Nurse Gwen Brown] taught the patient what she needed to and she documented that. But then you don't know what she taught because you have never done that to a postpartum patient, have you?
>
> A. No, sir.

(CT 6 : 786, lines 19-23).

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). In *Sheffield*, the trial court granted the defendant's motion for summary judgment premised on the plaintiff's lack of expert testimony. The plaintiff had designated a nurse practitioner to testify against a dentist. In affirming, the *Sheffield* Court held that even though the nurse practitioner had "medical experience," she did not "possess specialized knowledge in dentistry,

oral surgery, or in the treatment of dental infection" (*i.e.* – the area of medicine applicable to the case), and accordingly, was properly excluded. *Sheffield*, 740 So. 2d at 857 (¶ 11).

The standard of review for admission or exclusion of expert testimony is "abuse of discretion," where a trial judge is to properly "exclude expert opinions which are not helpful to the trier of fact and which state legal conclusions beyond the specialized knowledge of the expert." *City of Jackson v. Estate of Stewart*, 908 So. 2d 703, 716 (¶ 65) (Miss. 2005) ("[A]n expert may not 'offer so-called expert testimony in other areas in which he not even remotely meets the MISS. R. EVID. 702 criteria.'").

In the case of *Palmer v. Biloxi Reg'l Med. Cntr.*, 564 So. 2d 1346 (Miss. 1990), the trial court excluded the plaintiff, Marilyn Palmer, a registered nurse, from testifying regarding nursing care for a patient following an automobile accident in an I.C.U. setting, and specifically that standard of care applicable to an oral surgeon. *Palmer*, 564 So. 2d at 1349-50, 1360. Ms. Palmer admitted that prior to the hearing on her credentials in 1986, she had not worked in a hospital setting since 1966, and that in '66 she was employed as a "drug room nurse." *Id.* at 1354, 1360. Because Palmer "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," the *Palmer* Court held that she was properly disqualified from testifying at trial.

In the case of *Stanton v. Delta Reg'l Med. Cntr.*, 802 So. 2d 142 (Miss. App. 2001), the Court affirmed the trial court's determination that a nurse was not qualified as an expert where she had not worked for a hospital in an emergency room setting for over 20 years, "was currently self-employed as a consultant . . . [and] stated that the first time she heard the current standards for restraints was on the day she testified." *Stanton*, 802 So. 2d at 145 (¶ 5). The *Stanton* Court held that "[i]n order

to qualify as an expert, a person 'must possess some experience or expertise beyond that of the average, randomly selected adult.'" *Id.* at 144-45 (¶ 5).

Similar to *Palmer* and *Stanton supra*, Terry Siverly had not practiced in a hospital setting for approximately 17 years prior to trial. In *Stanton*, the nurse excluded had at least worked in the same ward of the hospital she was to testify regarding, albeit a great many years prior. Here, Mr. Siverly worked with adult patients who were isolated from the rest of the hospital for infectious disease purposes, not post-surgery or post-delivery patients. Moreover, this was his only employment in a hospital setting and it lasted for two years. He has never worked as a medical / surgical or Ob/Gyn nurse. He admitted to having no training or background in the area of nursing he was to testify. When it came to the standard of practice / care for nurses working with post-surgical, post-delivery patients Mr. Siverly clearly had no more experience or expertise beyond that of the average, randomly selected adult. He likewise was not relying on any literature, including but not limited to the Mississippi Nurse Practice Act, in support of his opinions, but instead asserted only that he was a nurse and had knowledge relevant to nurses. Because Mr. Siverly admitted that he had no experience, training, background and knowledge in post-delivery, post-surgery care of patients, the trial court erred in qualifying him as an expert, and Defendant respectfully requests that the judgment in favor of Plaintiffs be reversed, with the case being 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.

As Exhibit P-4, Plaintiffs' where allowed to put into evidence thirteen (13) post-mortem

photographs of the body of Jennifer Nettles. (CT 4:539, line 25 - 541, line 2).[2] In support of their contention that pictures 02 through 13 had any probative value, Plaintiffs asseted:

> BY MR. LOYACONO: I'm going to talk about the distended - - I'm going to talk about the volume and all the signs that go with our case and how it correlates correctly with the opinion of our experts and Dr. Haynes.

(CT 4:540, lines 8-12). The photographs were then published to the Jury. Contrary to this assertion, the only questions about pictures 02 through 13 was to Dr. Hayne, who identified the pictures as being taken at the post-mortem examination.

This Court's standard of review for the admission or suppression of evidence is abuse of discretion. *Thompson Mach. Commerce Corp. v. Wallace*, 687 So. 2d 149, 152 (Miss.1997).

MISS. R. EVID. 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." In the murder conviction appeal of *McNeal v. State*, 617 So. 2d 999 (Miss. 1993), this Court recognized that "gruesome" postmortem photographs have a "tendency to inflame and prejudice the jury." *McNeal*, 617 So. 2d at 1010. Where such photographs are not "necessary evidence" and are "devoid of 'any evidentiary purpose,'" the photographs should not be admitted into evidence. *Id.* at 1010-11.

Similar to the prosecutor in *McNeal*, the introduction of pictures 02 through 13 was nothing more than a ploy by Plaintiffs to "arouse the passion and prejudice of the jury." *Id.* at 1011. In pictures 06, 07, 08, 10, 11, 12 and 13, Ms. Nettles' abdomen is not even present. As to the remaining pictures, no question was asked of Plaintiffs' "experts," whether Ms. Nettles' abdomen in those pictures appeared distended, and then whether the distention was a result of a slow bleed,

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[2] Each picture contains a number sequence at the bottom, starting with 200200. The different pictures will be identified as 01 through 13 according to this number sequence.

a fast bleed or whether her abdomen was normal considering her recent Cesarean Section.

Moreover, no determination was ever made by the trial court on the pictures' probative value. The trial court's ruling was as follows:

> BY THE COURT: Now, I'm not going to spend an hour on something that could have been done pretrial. Now if it was in the report . . . .

(CT 4 : 540, lines 21-24); *see Griffin v. McKenney*, 877 So. 2d 425, 438 (¶ 43) (Miss. App. 2003) ("[T]rial court must conduct on the record balancing of probative value and prejudice."). The trial court abused its discretion by not conducting a Rule 403 analysis and, had it done so, should have found that admitting nude, post-mortem photographs of the decedent had no probative value to the issues of the case. Because this unfairly prejudicial evidence was admitted over objection, Defendant respectfully requests that the judgment in favor of Plaintiffs be reversed, and the case be remanded for a 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 their first Motion *in Limine*, Plaintiffs moved to exclude evidence of Jennifer Nettles long standing abuse of illegal drugs. (CT 2:246, line 21 - 260, line 12). Such information came directly from the trial testimony of Jennifer Nettles' mother, Dorothy Nelson, and her sister, Amy Armstrong, in Amy's petition to adopt Brandi in chancery court. The testimony was as follows:

By Dorothy Nelson:

A. Prior to her death, the last time I spoke with Jennifer was three, maybe four years ago.

Q. So, you had been estranged from her for quite some time?

A. Yes.

Q. And why is that?

A. My daughter, Jennifer, had chosen a life of drugs and alcohol. . . . She was allowing her child, Haley Nicole Nettles, to be placed in dangerous situations and environments.

(*Proffer - Chancery Court Transcript*, 137, line 18 - 138, line 4).

Q. And there was a problem at that time about her using drugs in your home, too, wasn't it?

A. Yes, it was. Yes. And I asked Jennifer repeatedly not to do that. I had a much younger child, Rebecca. And of course Amy and Riley Wayne were older, but I didn't want it around them either. I didn't want to be around it.

(*Proffer - Chancery Court Transcript*, 150, line 12 - 18).

By Amy Armstrong:

Q. So you hadn't seen her in four years?

A. I had not seen her. I had not spoken with her. . . .

Q. Was that because she refused to talk to you?. . . .

A. I'd have to say it was mutual, because when we first starting living together in '97, Jennifer had told me and demonstrated she was no longer going to do drugs. She was going to concentrate on taking care of her child. After we had been living together for about a month, then Mr. Davidson and other people, these convicted felons, these drug users, began coming over to the apartment. Mr. Davidson, my sister, other people were doing drugs in front of Haley. I asked my sister to stop the behavior. I didn't think it was good, obviously for her or obviously for Haley. It didn't come to an end. I had to leave the apartment. That's when I moved out. So I'd say it was mutual.

(*Proffer - Chancery Court Transcript*, 159, line 16-18, lines 21-22; 160, line 23 - 161, line13).

Q. By your definition, you think that drug users and people like your sister should not have a child?

A. Well, my parents had - - after Haley was admitted to the hospital because she had double pneumonia in both her lungs due to neglect by my sister, that's when - - . . .

> Due to neglect. Then my parents stepped in and attempted to obtain custody of Haley at that point, to make sure that she was going to be safe and taken care of.

(*Proffer - Chancery Court Transcript*, 167, line 21 - 168, line 2, lines 10-13).

There was also to be testimony by Jennifer Nettles' treating nurse, Pattie Gilmore, that Jennifer was very anxious about whether she was going to obtain any pain relief from the medication that she would be given prior to delivery because of her past drug use. Moreover, when Nurse Gilmore gave Jennifer Stadol (sic), she received no benefit from the medication. (CT 2:248, line 25 - 249, line 11).

There are three (3) reasons why Jennifer Nettles' past drug abuse has probative value to the issues of this case. First, Plaintiffs spent a great deal of time with their medical expert, Dr. Finan, on the issue of "over-medication." For example, see the following:

> Q. Now, in your opinion, what was the role of over medication, if any in causing the death of Jennifer by failure to discovery (sic) this internal bleeding over the hours that you've talked about?
>
> A. Well, when she comes out of the recovery room, she is still not recovered all the feelings in her legs according to the nurses report. She, her vital signs were initially stable. She has been given morphine, 10 milligrams and then followed by some Finigin (sic), which also tends to help you not remember. It has an amnestic effect and prolongs the effect of the morphine. And then there is a second dose of morphine. And what that does is it decreases her ability to protect herself. She loses the ability to complain. She is not, doesn't have the senses that she needs to tell people what is wrong with her. She is over medicated.
>
> So being over medicated and then being in this constant state of blood loss over these hours it leaves her without an (sic) defense mechanism. She didn't have her own and the nurses didn't treat her properly.

(CT 6:829, line 12 - 830, line 3). Contrary to Dr. Finan's speculation, Jennifer was able to communicate and did inform Nurse Gilmore that she received no benefit from the medication.

Jennifer even questioned prior to surgery whether she would receive any benefit from her pain medications because of her drug abuse. These are areas Nurse Gilmore could have testified to at trial because they are admissions against interest, and directly rebut Dr. Finan's opinions.

Second, the habitual drug abuse by Jennifer Nettles goes directly to the claim for loss of society and companionship brought by the parties. Amy Armstrong testified at the chancery court proceeding that Jennifer neglected her child, Hallie, as a result of her drug abuse, and that she believed Jennifer's drug abuse was not "good" for Hallie. To this end, Jennifer's mother, Dorothy Nelson, attempted to obtain custody over Hallie due to Jennifer's drug abuse. The trial court ruled that "[t]here are drug users that are great parents to their children" and held that this would only be an inference that she was a bad mother, but reserved ruling on the issue until Amy Armstrong testified. (CT 2:253, lines 15-22; 259, lines 25-28). When Amy Armstrong got on the witness stand, she testified as follows:

> Q. Was there any specific conduct that lead you in relationship to Jennifer's conduct, with Hallie being present, that lead you [to] leave the living arrangement? Yes or no. That is all I'm asking.
>
> A. If there was any conduct - - he conduct with Hallie?
>
> Q. Yes, ma'am. Involving what was going on in the apartment that lead you to leave while Hallie was present?
>
> A. No, that I recall.

(CT 7:1007, lines 19-28). The trial court ruled that no interrogation of the witness on the issue of drug abuse would be allowed, not even for impeachment purposes pursuant to MISS. R. EVID. 613(b).

In *Griffin v. McKenney supra*, the Court of Appeals affirmed a trial court's determination that a physician's "alcoholism, subsequent rehabilitation and attempts to treat patients while under the

influence of alcohol was more prejudicial than probative" in regards to the issue of the physician drinking while treating the plaintiff. *Griffin*, 877 So. 2d at 438 (¶ 44). The Court did, however, "admit all of the direct evidence that Dr. McKenney was drinking during Michael's treatment." *Id.*

In the case at bar, the sworn testimony of Amy Armstrong is that Jennifer consumed and sold drugs in front of Hallie. (*Proffer - Chancery Court Transcript*, 160, line 23 - 161, line13). Even though the trial court opined that "there are drug users that are great parents," this position was not held by Jennifer's sister or mother, and was a fact question that had to be determined by the Jury. The fact that Jennifer abused and sold drugs around her children is clearly probative to the issue of loss of society and companionship. "Unfair prejudice" is "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Abrams v. Marlin Firearms Co.*, 838 So. 2d 975, 981 (¶ 22) (Miss. 2003). There would be no "***unfair*** prejudice" to Plaintiffs had this evidence been allowed in, since the only claim made by the wrongful death beneficiaries was loss of society and companionship, and Jennifer's conduct during her life directly related to this claim. If habitual drug and alcohol abuse by a mother in the presence of her infant daughter is not relevant to the issue of the value of the child's loss of society and companionship, then neither should proof that a deceased parent was a loving, caring, church-going person. In wrongful death cases, plaintiffs traditionally put on proof that a deceased parent loved, cared for, nurtured, and took their children to church, picnics, T-ball games and the like. If evidence of love and affection is relevant and admissible, then so is evidence by Jennifer's sister and mother that they severed all ties with Jennifer due to her habitual drug and alcohol abuse in the presence of her infant daughter, Hallie.

In addition, Plaintiffs opened the door for admission of this evidence when in closing

arguments, the attorney for the Plaintiffs stated:

> The testimony or the stipulations from the statistical information, statistically Jennifer would have lived 51.2 more years. Okay. That means for a long time, over 50 years, Jennifer would have been able to have a relationship with her children. ***She would have been able to change herself*** to grow with her children, to help her children, just to be Mom.

(CT 9:1243, lines 4-12)(emphasis added). When counsel for Defendant attempted to address the statement, the trial court excluded any comments to rebut this claim. *See* (CT 9:1263, line 2 - 1264, line 10). In the case of *Blake v. Clein*, 903 So. 2d 710 (Miss. 2005), the patient, Clein, believe that his mother used "witchcraft [to place] a curse on him, which resulted in his amputation and condition." *Blake*, 903 So. 2d at 726, (¶ 39). The trial court excluded from reference at trial the words "witchcraft" and "curse," but the plaintiff "opened the door" to the inclusion of the evidence by the introduction of un-redacted medical records with the terms on them. *Id.* "Evidence, even if otherwise inadmissible, can be properly presented where a party has 'opened the door.'" *Id.* (¶ 40). The trial court's refusal to allow counsel for Defendant to respond to Plaintiffs' assertion that Jennifer "would have been able to change herself" is clear error meriting a new trial.

For each these foregoing reasons, the trial court improperly barred Defendant from introducing evidence regarding Jennifer Nettles' drug abuse, and Defendant respectfully requests that the judgment in favor of Plaintiffs be reversed, with the case being remanded 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 fifth issue on appeal is on the trial court's order holding that, as a matter of law, neither Jennifer Nettles nor Thomas Patterson abandoned their marriage and that Thomas Patterson was

entitled to damages equal to those of Hallie and Brandi. (CP 11:1545-1546).

In September of 1995, Jennifer and Thomas Patterson were married. (CT 6:880, line 18-19). One month later they parted ways and three months later Jennifer filed for divorce. (CP 10:1458-1462) (CT 6:880, lines 19-20). Jennifer changed her name back to Nettles, from her previous marriage with Brent Nettles, and began relationships with three other men, and had a child (*i.e.* - Brandi) with Mark Davidson. (*Proffer - Chancery Court Transcript*, 165, line 25 - 166, line 6). Mr. Patterson also had a child, from another woman, after Jennifer filed for divorce, but Defendant was not allowed to get relevant information on that issue from him at his deposition. (CP 10:1476-1477). Mr. Patterson was also instructed not to answer questions at his deposition about whether he remarried after Jennifer filed for divorce. *Id.*

On September 15, 2005, the trial court entered an Order granting Defendant's Motion for Partial Summary Judgment as to the Claim of the Estate of Jennifer Nelson Nettles. (CP 10 : 1410-1411). Therefore, the only claims before the Jury at trial were those separate claims for loss of society and companionship by Mr. Patterson, Hallie and Brandi. Premised upon this ruling, Defendant moved the trial court for Special Interrogatories to the Jury (CP 10:1452-1469). At the hearing on this Motion on November 2, 2005, the trial court held that the question of abandonment of the marriage was a matter of law to be decided by the court, not the Jury. (CT 2:188, lines 25-28). The trial court thereafter held as a matter of law that Mr. Patterson had not abandoned the marriage and that all three wrongful death beneficiaries must be granted equal damages should a Jury return a verdict in their favor. (CP 11:1545-1546).

At trial, Defendant was not allowed to call Mr. Patterson by deposition, but instead the trial court ordered the parties to stipulate to the following:

> 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 died; 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). What is missing from the trial court ordered stipulation is the fact that Thomas Patterson did not know about Jennifer's death until a year after she died, that he had fathered a child during this period, that he was unaware Jennifer was pregnant with Brandi and that he had no contact with Jennifer for almost six years prior to her death.

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

This issue is two-fold, containing both the questions of whether the trial court erred in ruling on the issue and not submitting it to the Jury and whether the trial court erroneously held that neither Thomas Patterson nor Jennifer Nettles abandoned their marriage. In the case of *Tillman v. Williams*, 403 So. 2d 880 (Miss. 1981), the Court recognized that "desertion or abandonment is held to estop a spouse from inheriting from the other." *Tillman*, 403 So. 2d at 881 (quoting *In Re Marshall's Will*, 138 So. 2d 482 (Miss. 1962); *Walker v. Matthews*, 3 So. 2d 820 (Miss. 1941)). The *Tillman* Court went on to clarify *In Re Marshall's Will* and *Walker* to hold that it is insufficient to prove merely a separation by the spouses, but instead an abandonment or desertion must be proven. *Id.* at 882. The facts in *Tillman* were as follows:

> [A]ppellant 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 the appellant moved his abode to an adjoining county. . . . Although living apart all those years, neither party secured a divorce and were still man and wife at the time of the wife's death. There was no evidence of any attempted remarriage or disclaimer of the marriage by either party during the years of separation. ***There was no evidence that either party attempted to secure a divorce.*** The only thing we find that appellant did after moving to the adjoining county was to haul pulpwood and drink whiskey.

Id. at 880-81 (emphasis added). The wife died testate and left all of her worldly belongings to three different people, but left nothing for her husband. *Id.* at 880. The husband filed a petition with the Chancery Court of Hancock County to be declared a rightful heir and a one-half owner of his wife's real and personal property. *Id.* The chancery court held that the husband had deserted and/or abandoned the marriage and was therefore prohibited from being an heir-at-law. *Id.* In reversing, the *Tillman* Court held that there "was not any substantial evidence to show a desertion or abandonment. . . . There was no marriage or divorce proceeding by either party, and their place of living alone was in adjoining counties. . . . [Therefore], at most, just a separation proven. *Id.* at 882.

Between Thomas Patterson and Jennifer Nettles, there was a disclaimer of the marriage. Jennifer filed for divorce and changed her last name back to Nettles. It was uncontested that they lived together for only one month and that the divorce proceeding was initiated by Jennifer just three months after their wedding. It was also uncontested that they had nothing to do with each other after this time, and that he was not even aware she had died until over a year after her death. (CP 10:1477, lines 14-17); (CT 2:197, lines 24-28); (CT 6:880, line 14 - 881, line 2).

Despite credible evidence tending to prove it was Jennifer Nettles' and/or Thomas Patterson's intent to abandon their marriage, the trial court denied Defendant's Motion for Special Interrogatories and ruled as a matter of law that the marriage was not abandoned. (CP 11:1545-1546). Whether Jennifer Nettles or Thomas Patterson abandoned their marriage is a question

relating to their intent, as seen through their actions, from the time she filed for divorce in December of 1995 through her death in December of 2000. The question of "intent" is a "question of fact for the jury," with the jury making its "determination based on the facts shown in each case." *Duplantis v. State*, 708 So. 2d 1327, 1341 (Miss.1998). "Unless one expresses [his or her] intent, the only method by which intent may be proven is by showing the acts of the person involved at the time in question, and by showing the circumstances surrounding the incident." *Id.* at 1342. Moreover, the evidence presented to the trial court pitted Defendant's contention that the marriage had been abandoned versus Mr. Patterson's contention that this was a mere separation. Such evidence creates a question of fact for the Jury to decide. *See Lift-All Co., Inc. v. Warner*, 2006 WL 2884533, at *4 (¶ 15) (Miss. Oct. 12, 2006) ("Whether the sling broke, as [Appellee] says, or whether the sling was cut, as [Appellant] says" is "a classic jury question.") (citing *Jones v. U.S. Fid. & Guar. Co.*, 822 So. 2d 946, 948 (Miss.2002) ("[E]vidence which pitted one parties' claims against the other created a question of fact for jury so peremptory instruction was improper."). Because the evidence created a triable issue of fact on whether it was Jennifer Nettles' and/or Thomas Patterson's intent to abandon the marriage or whether it was merely their intent to separate, the trial court erred in taking the question away from the Jury and ruling as a matter of law that the marriage had not been abandoned. Defendant therefore respectfully requests that the ruling that the marriage between Thomas Patterson and Jennifer Nettles was not abandoned be reversed, and that the issue be properly placed before a Jury for determination.

In the alternative, the trial court should have held that the marriage had been abandoned. Unlike *Tillman supra*, there was evidence before the trial court that Jennifer Nettles did abandon her marriage with Thomas Patterson. There was evidence that Jennifer Nettles tried to secure a divorce

by filing a bill for divorce in chancery court. Jennifer changed her name back to Nettles and had nothing to do with Thomas Patterson through the time of her death. She conceived a child through another man, and Mr. Patterson likewise fathered a child after divorce was filed. Both Jennifer and Thomas Patterson acted as if they were divorced. The abandonment of marriage is clear through the foregoing evidence and Defendant respectfully requests that the ruling that the marriage between Thomas Patterson and Jennifer Nettles was not abandoned be reversed, and that the Jury verdict in favor of Thomas Patterson be reversed, with judgment being rendered in favor of this Defendant.

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.

The three alternatives for bringing a wrongful death suit are "(1) by the personal representative on behalf of the estate and all other persons entitled to recover; (2) by one of the wrongful death beneficiaries on behalf of all persons entitled to recover; or (3) by 'all interested parties.'" *Long v. McKinney*, 897 So. 2d 160, 168 (¶ 28) (Miss. 2005). In the case *sub judice*, the parties chose the third option and each brought "their own ***individual*** claim for loss of society and companionship." *Long*, 897 So. 2d at 169 (¶ 35) (emphasis added). The trial court misinterpreted the Wrongful Death Statute and held that the Jury must return an equal damage amount for all wrongful death beneficiaries. Its ruling was based on this portion of MISS. CODE ANN. § 11-7-13:

> 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). The trial court erroneously interpreted this section to mean that each wrongful death beneficiaries' claim for loss of society and companionship are identical. This, however, is not the case.

The standard of review for interpretation of a statute (*i.e.* - a question of law) is de novo. *Miss. Dept. of Transp. v. Allred*, 928 So. 2d 152, 154 (¶ 10) (Miss. 2006).

Defendant does not contest nor dispute this outcome where one wrongful death beneficiary, as representative of all wrongful death beneficiaries, recovers in a wrongful death claim and there is no issue raised about significant differences as to the relationship between the deceased and the wrongful death beneficiaries. In this instance, the singular amount recovered should be equally "distributed." Defendants do not dispute that where a survival claim is brought on behalf of the estate, the amount recovered should be equally distributed to those entitled to receive distribution under the decedent's will or intestate succession. Defendant does not contest that where there is a settlement, the proceeds should be equally distributed to those entitled to receive under § 11-7-13. However in this case, there was no survival claim at trial, and the three individual "beneficiaries" each brought a claim in one suit for loss of society and companionship.

When suit was initially filed, it was brought on behalf of Jennifer's parents, siblings and children. (CP 1:11-14). Plaintiffs then filed a Motion to Amend the Complaint on the grounds that:

> 1. That after investigation into this matter, the undersigned would show that the within-named Plaintiffs, Hallie Nettles, an infant; Brandi Nicole Nettles, an infant; and Thomas Patterson are the only proper Plaintiffs under Mississippi law.
>
> 2. That the named Plaintiffs are all of the persons having a right to bring an action under [MISS. CODE ANN. §] 11-7-13.
>
> 4. That Thomas Patterson, the husband of the Deceased, Jennifer Nettles, joins in this Amended Complaint on his own behalf only. The actions of the minors are separate from the cause of action of the Plaintiff, Thomas Patterson. . . .

(CP 2:200-201). Subsequently, the trial court granted summary judgment on any claim by the Estate. (CP 10:1410-1411). In response to these orders, Defendant moved for Special Interrogatories to the

Jury, and the trial court entered an order denying the Motion based upon the finding that as a matter of law, these three Plaintiffs, although standing in different relationships to the deceased, should receive an equal distribution of any wrongful death verdict.

In a wrongful death suit, "the damages are intended to compensate the statutory wrongful death heirs for their losses resulting from the death." *In Re Estate of England*, 846 So. 2d 1060, 1066 (¶ 17) (Miss. App. 2003). Damages for loss of society and companionship are not awardable, however, without proof. In the case of *McGowan v. Estate of Wright*, 524 So. 2d 308 (Miss. 1988), a jury returned a verdict in favor of the widow of a deceased driver in an automobile accident, and awarded damages representing the present net cash value of the decedent's life expectancy at the time of death, medical bills and funeral and burial expenses. *McGowan*, 524 So. 2d at 311. The jury refused, however, to award the widow any damages for loss of society and companionship. *Id.* The *McGowan* Court analyzed that "[t]he jury had all of the facts before it on the question of damages for the loss of society and companionship and saw and heard [widow] testify as to that element of damages," including the facts that the decedent "never visited [widow] . . . [and they] had only spoken over the telephone for the last eleven (11) years of his life." *Id.* at 310-11. In affirming the jury verdict, the Court held that "[t]he jury obviously concluded that [the widow] had no loss of society and companionship and, therefore, suffered no damage," which was not in error. If the issue of abandonment of marriage is not a jury question, then the *McGowan* Court should have reversed the verdict and ordered a new trial.

The trial court's ruling concentrates on one sentence of the wrongful death statute, but fails to incorporate the preceding paragraph, which as a whole, reads as follows:

> . . . Any amount, but only such an amount, as may be recovered for property damage,

> funeral, medical or other related expenses shall be subject only to the payment of the debts or liabilities of the deceased for property damages, funeral, medical or other related expenses. *All other damages* ***recovered*** *under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided, and such damages shall be distributed as follows:*
>
> 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). In this case, we have three wrongful death beneficiaries whose sole claim was for "loss of society and companionship." The relationship each Plaintiff had with the decedent is materially different from the relationship of the other two. Hallie lived with her mother prior to Jennifer's death and according to her aunt and grandmother, was subjected to Jennifer's habitual drug and alcohol abuse, Jennifer's engagements with habitual alcohol and drug abusers, and Jennifer's illegal sale of drugs. (*Proffer - Chancery Court Transcript*, 137, line 16 - 138, line 4; 150, line 12 - 18; 159, line 16 - 25; 160, line 23 - 161, line13). The Jury had a right to consider the value to be placed on Hallie's claim for loss of society and companionship, but Defendant, as cited in § IV *supra*, was precluded from offering evidence of Jennifer's habitual drug and alcohol abuse and the effect it would have on Hallie's claim. Brandi never had a relationship with her mother, except in the womb, and the same evidence which Defendant was precluded from putting into evidence regarding Jennifer's habitual abuse of drugs and alcohol is likewise relevant to Brandi's claim of loss of society and companionship. Then there is Thomas Patterson, a convicted felon who is serving a five-year term in Parchman, who lived with Jennifer for only one month after their marriage, whom Jennifer attempted to divorce and dropped his last name and who fathered a child by another woman after his relationship with Jennifer. He had not lived with Jennifer for five years preceding her death and did not even know of her death until one year after the fact. Assuming

arguendo each Plaintiff had a claim for loss of society and companionship, each claim was materially different from the other claims and the Jury had a right to hear all evidence regarding each claim and to consider each claim separately.

If the "equally distributed" language where to mean that a jury must return identical verdicts for all separate claims of loss of society and companionship, the entire premise of a negligence cause of action would be altered. "Recovery in a negligence action requires proof by a preponderance of the evidence of the conventional tort elements: duty, breach of duty, proximate causation, and injury (i.e., damages)." *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So. 2d 1346, 1354 (Miss. 1990). Instead of each wrongful death beneficiary being charged with proving their individual claim for loss of society and companionship, the trial court's interpretation of "equally distributed" would allow for only one beneficiary to prove his or her claim for loss of society and companionship, and all other beneficiaries would have no burden of proof. In order for a thing to be "distributed," that thing must be in existence. In the case of damages, in order for them to be "distributed," they must be "recovered." The legislature's intent in the wrongful death statute is clear and unambiguous - - "equally distributed" refers to "recovered damages." For this reason, Defendant respectfully requests that the Jury verdict in favor of Thomas Patterson be reversed, and this case be rendered 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.

At Thomas Patterson's deposition on October 4, 2005, this Plaintiff was repeatedly instructed not to answer various background questions regarding his previous marriages and children. The trial court was contacted and the telephonic hearing on whether the information was discoverable is

contained in (CP Supp. 2 : 186-197). In this hearing, Plaintiffs' counsel asserted:

> MR. LOYACONO: . . . This is a claim under the wrongful death statute. Loss of consortium is a derivative suit off another case. This is not a derivative suit.
>
> MR. FIKE: Never was pled.
>
> MR LOYACONO: It never was pled. This is a direct wrongful death claim, Jason. A derivative suit is different.
>
> MR. DARE: Your Honor, and I can, I guess, make it easy, if Mr. Loyacono is stating that he is withdrawing a loss of consortium claim on behalf of Mr. Patterson then I won't get into this line of questioning.
>
> THE COURT: He just said it wasn't a loss of consortium claim. I thought I just heard him say that.
>
> MR. DARE: If this is not a loss of consortium claim based on or brought by Mr. Patterson then I won't get into that line of questioning. Thank you, your Honor.

(CP Supp. 2 : 195, line 13 - 196, line 6).

A spouse's claim for "loss of consortium" "is limited to loss of society and companionship, interference with conjugal rights and providing previously unnecessary physical assistance." *Am. Nat. Ins. Co. v. Hogue*, 749 So. 2d 1254, 1262 (¶ 29) (Miss. App. 2000) (citing *Tribble v. Gregory*, 288 So. 2d 13, 17 (Miss.1974)). In a wrongful death action, all wrongful death beneficiaries have "their own individual claim for loss of society and companionship." *Long*, 897 So. 2d at 169 (¶ 35). The surviving spouse, however, "may have a claim for loss of consortium." *Id.* According to Black's Law Dictionary, the term "spousal consortium" means "a spouse's society, affection, and companionship given to the other spouse." BLACK'S LAW DICTIONARY 248 (Abr. 7th Ed. 2000). Therefore, if Thomas Patterson had no claim for loss of consortium, as his counsel represented in the hearing on October 4, 2005, he therefore has no claim for loss of society and companionship, which was his only claim at trial.

The doctrine of judicial estoppel "precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation." *In Re Estate of Richardson*, 903 So. 2d 51, 56 (¶ 17) (Miss. 2005). In the instant action, counsel for Thomas Patterson clearly and unequivocally stated to the trial court that Mr. Patterson had no loss of consortium claim. This was done in order to bar Defendant from discovering information regarding Mr. Patterson's relationships before, after and during his marriage to Jennifer Nettles. At trial, however, Mr. Patterson took the position that his only claim was one for loss of society and companionship, a claim clearly contained within a loss of consortium claim. *See Hogue & Tribble supra*; *see also* Jury Instruction P-6a (Plaintiffs "entitled to monetary damages for the loss of companionship and society resulting from the death of Jennifer Nettles."). Mr. Patterson benefitted from his counsels assertion that he had no loss of consortium claim to the detriment of Defendant in that he was allowed to hold secret discoverable information going directly to a loss of consortium claim. The doctrine of judicial estoppel precludes Mr. Patterson from asserting he has no loss of consortium claim, benefitting from that position, and then, when it becomes convenient or profitable, asserting as his sole claim for damages loss of society and companionship, contained within a loss of consortium claim. *See Estate of Richardson supra.* For this reason, Defendant respectfully requests that this Court reverse the Jury verdict as to Plaintiff Thomas Patterson and hold that, pursuant to the doctrine of judicial estoppel, and render judgment in favor of the Defendant on Mr. Patterson's claims.

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

In their case-in-chief, Plaintiff put on six witnesses: (1) John Thomason, the Warren County

coroner, (2) Jeanine Griffith, a River Region nurse, (3) Gwendolyn Brown, a River Region nurse, (4) Stephen Haynes, M.D., pathology witness, (5) Terry Siverly, nursing witness, and (6) Eugene Michael Finan, M.D., obstetrical witness. (CT 4:529 - CT 6 : 869). 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.

A Motion for Directed Verdict is governed by MISS. R. CIV. P. 50(a), and allows for questions to be "removed from the jury's consideration when there exists no factual question for it to resolve." *Entergy Miss., Inc. v. Bolden*, 854 So. 2d 1051, 1055 (¶ 8) (Miss. 2003); *see also Patton-Tully Transp. Co. v. Douglas*, 761 So. 2d 835, 843 (Miss. 2000) ("[M]otion for a directed verdict at the conclusion of the plaintiff's case tests the legal sufficiency of the evidence to support the verdict for the plaintiff."). Because a directed verdict challenges the legal sufficiency of the evidence, an appellate court must review "the trial court's finding regarding the sufficiency of the evidence at the time the motion for a directed verdict . . . is overruled." *Sanders v. State*, 2006 WL 2730411, at *2 (¶ 4) (Miss. Sept. 26, 2006). Specifically, an appellate court must:

> consider the evidence in the light most favorable to the[non-moving party], giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the [moving party] that reasonable [jurors] could not have arrived at a contrary verdict, [we are] required to reverse and render.

Gilbert v. Ireland, 2006 WL 2474290, at *5 (¶ 14) (Miss. App. Aug. 29, 2006) (quoting *3M Co. v. Johnson*, 895 So. 2d 151, 160 (Miss. 2005)).

"Under Mississippi law, plaintiffs bear the burden of going forward with sufficient evidence to prove their damages by a preponderance of the evidence." *TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So. 2d 991, 1016 (¶ 84) (Miss. 1997). "Where it is reasonably certain that damage

has resulted, mere uncertainty as to the amount will not preclude the right of recovery or prevent a jury decision awarding damages." *Grossnickle*, 716 So. 2d at 1016 (¶ 80). Dependant on the circumstance, "all that can be required is that the evidence-with such certainty as the nature of the particular case may permit-lay a foundation which will enable the trier of facts to make a fair and reasonable estimate of the amount of damage. The plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss." *Id.*

In this cause, Plaintiff Thomas Patterson put on no evidence of loss of society and companionship. Therefore, the only way for the trial court to deny Defendant's Motion for a Directed Verdict as to his claim would be to infer a husband is *per se* entitled to loss of society and companionship damages in a wrongful death claim. Upon diligent inquiry, counsel for Defendant has been unable to unearth where any such presumption, or damages *per se*, have been recognized by this Court or enacted by the Legislature. To the contrary, in the case of *Eckman v. Moore*, 876 So. 2d 975 (Miss. 2004), the Court recognized that a patient's widow is "required to prove damages, in this case loss of consortium," but held that the trial court erred in admitting cumulative photographs that were more prejudicial than probative. *Eckman*, 876 So. 2d at 986 (¶ 37). In the case of *McGowan surpa*, the Court recognized that despite evidence for and against, a jury can rightfully find a defendant liable and award damages for the present net cash value of the decedent's life expectancy at the time of death, medical bills and funeral and burial expenses, but refuse to award the widow any damages for loss of society and companionship. *McGowan*, 524 So. 2d at 311.

During Plaintiffs' case-in-chief, there was no evidence regarding Thomas Patterson's loss of society and companionship. Where there is no evidence submitted, it is impossible for the trial

court to test the legal sufficiency of the claim. *See Sanders supra.* Mr. Patterson had a burden to prove by a preponderance of the evidence his claim for damages (*i.e.* lay a foundation which would enable the jury to make a fair and reasonable estimate of the amount of damage). *See Grossnickle supra.* Without putting forth even a scintilla of evidence, Mr. Patterson could not have met his burden. Defendant was therefore entitled to a directed verdict on the claim made by Thomas Patterson, and respectfully requests that the trial court's order denying same be reversed and judgment being rendered in favor of this Defendant on Mr. Patterson's claims.

CONCLUSION

The issues placed before this Court on appeal are as follows.

1) **Issue I** - The sole basis for Plaintiffs' obstetrical expert's opinions at trial were detailed lab values that were not disclosed to Defendant prior to trial. Because Defendant made every reasonable attempt to obtain these opinions prior to trial and Plaintiffs refused to disclose them, the trial court committed reversible error in allowing this expert to testify to these opinions and Defendant prays this Court reverse the judgment against it and remand the case for a trial on liability and damages.

2) **Issue II** - Even though he admitted to having no experience, training, background or knowledge regarding the standard of care for nurses in a post-surgery, post-delivery hospital setting, the trial court qualified Terry Siverly as an expert in nursing at trial and allowed him to give expert opinions over Defendant's MISS. R. EVID. 702 objection. For this reason, Defendant prays this Court reverse the judgment against it and remand the case for a new trial on liability and damages.

3) **Issue III** - The trial court admitted into evidence, without any MISS. R. EVID. 403 analysis, thirteen nude, post-mortem photographs of Jennifer Nettles, which were not made relevant through expert testimony and had no probative value to the case. Because the trial court abused its discretion

in admitting these pictures into evidence, Defendant prays this Court reverse the judgment against it and remand the case for a new trial on liability and damages.

4) **Issue IV** - The trial court precluded Defendant from introducing evidence of Jennifer Nettles' habitual abuse of illegal drugs pursuant to Plaintiffs' Rule 403 objection. The evidence had clear probative value to rebut opinions expressed by Plaintiffs' obstetrical expert and went directly to Plaintiffs' claims for loss of society and companionship. Moreover, Plaintiffs opened the door for introduction of this evidence in closing arguments. Because the trial court abused its discretion in precluding Defendant from introducing evidence of Jennifer's habitual drug abuse, Defendant prays this Court reverse the judgment against it and remand the case for a trial on liability and damages.

5) **Issue V** - This Issue relates to the loss of society and companionship claim of Thomas Patterson, and contained the following subissues:

a) Jennifer Nettles filed for divorce from Thomas Patterson six years prior to her death, changed her name from Patterson to Nettles, conceived a child with Mark Davidson and had nothing to do with Mr. Patterson from the time she filed for divorce to the time of her death. The issue of whether their marriage was abandoned and whether Mr. Patterson could be a wrongful death beneficiary was a question of fact for the Jury. Because the trial court erred in ruling on the issue of abandonment, Defendant prays this Court reverse the judgment against it and remand the case for a new trial on Thomas Patterson's damages.

b) In the alternative, the trial court erred in ruling that the marriage was not abandoned and Defendant prays this Court reverse the judgment against it as to the claim of Thomas Patterson and rendered judgment in its favor on said claim.

c) The trial court likewise erred in holding that MISS. CODE ANN. § 11-7-13 required

the Jury award identical damages to all Plaintiffs for their loss of society and companionship, and therefore, Defendant prays this Court reverse the judgment against it and remand the case for trial on the damage claim of Thomas Patterson.

d) Thomas Patterson should have been judicially estopped from asserting a claim for loss of society and companionship since his counsel asserted in his deposition that he had no such claim, benefitted from said assertion by barring Defendant from discovering evidence related to such claim, then asserting loss of society and companionship as his sole claim at trial. For these reasons, Defendant prays this Court reverse the judgment against it and render judgment in its favor on the claim of Thomas Patterson.

6) **Issue VI** - Thomas Patterson put forth no evidence during Plaintiffs' case-in-chief regarding his damages. Because Mississippi does not recognize damages *per se* in a wrongful death suit, the trial court erred in denying Defendant's Motion for a Direct Verdict on the claim of Thomas Patterson. Defendant, therefore, prays this Court reverse the judgment against it and render judgment in its favor on the claims of Thomas Patterson.

RESPECTFULLY SUBMITTED, this 22nd day of December, 2006.

L. CARL HAGWOOD, MBN [redacted]
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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
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THIS, 22nd day of December, 2006.

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, Brief of Appellant / Defendant River Region Medical Corp. d/b/a Parkview Regional Medical Center, on December 22, 2006, to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi, 39201.

JASON E. DARE