IN THE SUPREME COURT OF MISSISSIPPI

SPOTLITE SKATING RINK, INC.

Appellant

v.

BIANCA ZWYACA BARNES BY AND THROUGH HER MOTHER AND NEXT FRIEND, VEARLY BARNES, ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES AND AS ADMINISTRATRIX OF THE ESTATE OF BIANCA ZWYACA BARNES

Appellees

Case No. 2006-CA-00289

Appeal from the Circuit Court of Washington County, Mississippi

Brief for Appellee

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following 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. Spotlite Skating Rink, Inc., Appellant
2. Vearly Barnes, Appellee
3. LeeAnn W. Nealey, Counsel for Appellant
4. Paul M. Ellis, Counsel for Appellant
5. Butler, Snow, O'Mara, Stephens and Cannada, PLLC, Counsel for Appellant
6. James Bullock, Trial Counsel for Appellant
7. Lamar Watts,Trial Counsel for Appellant
8. Shell Buford, Trial Counsel for Appellant
9. George F. Hollowell, Jr, Counsel for Appellee
10. Honorable Richard A. Smith, Trial Judge

George F. Hollowell, Jr.

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STATEMENT OF THE CASE

Vearley Barnes sued Spotlite Skating Rink (Spotlite) and other defendants after her daughter Bianca died on December 27, 2000 following a fall in which she hit her head at Spotlite's rink. The jury found Spotlite at fault awarding $600,000 in compensatory damages. Spotlite moved to set aside the verdict alleging: 1) insufficient evidence to support proximate cause; 2) a verdict based on sympathy, passion and prejudice; 3) the instructions failed to connect any act or omission of Spotlite to the result of such acts or omissions; 4) failure of the jury failed to follow instructions; 5) error in denying Spotlite's motion for directed verdict at the close of Plaintiffs' case, its renewed motion at the close of all evidence, and its request for a peremptory instruction; and 6) error in admitting an economist's testimony as speculative, unsupported and unreliable. Upon denial, Spotlite appealed. (R. Supp. Vol. 1, pp. 16-19; RE. at 26-29[1])

STATEMENT OF FACTS

Spotlite's brief fails to present the evidence in the light most favorable to Appellee as is required on this appeal. The evidence is far to voluminous to restate fully, but the following summary highlights some of the most important evidence supporting the verdict.[2]

On December 25, 2000, ten year old Bianca Barnes got roller skates for Christmas. She

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[1]R. refers to the record page numbers, T to the Transcript, RE to Appellant's Record Excerpts and ARE to Appellee's Record Excerpts.

[2]Because "the jury is the judge of the weight and credibility of testimony and is free to accept or reject all or some of the testimony given by each witness," *Graham v. State*, 812 So.2d 1150, ¶ 9 (Miss. App. 2002), *Meshell v. State*, 506 So. 2d 989, 992 (Miss. 1987), the jury was free to accept all the evidence and inferences supportive of the verdict and reject all the evidence recounted and inferences drawn by Spotlite in its brief inconsistent with the jury verdict.

went to her grandmother's house early that afternoon where she was playing and joking with her cousins, exhibiting no signs of a headache or feeling ill in any way. Her cousins and uncle, who saw her often, said she had not experienced headaches in the days before Christmas and had no history of severe headaches. Her mother confirmed Bianca did not complain of any headaches the week before Christmas. Bianca was excited that afternoon about going to a skating rink for the first time.[3] She was an experienced skater on Ruleville sidewalks, but this would be her first experience skating on wood at a rink. (T. 216-217, 235, 248-249, 251-2, 783, 807-809, 1094; ARE 7-8, 22, 31-33, 90, 102-104, 205))

Bianca and her cousins and friends boarded a bus near her grandmother's Ruleville home to go to Spotlite's rink in Greenville. At the rink, Bianca went out on the floor with smaller children, helping to hold up younger skaters as they skated. While on the floor in this early skating session, Bianca fell and hit her head. (T. 194, 204, 206, 217, 219-220, 234; ARE 1, 4-5, 8-10, 21)

The evidence is conflicting as to whether Bianca had skates on when she fell during a skating session. Some witnesses said she did not have skates on, but others said she did. (T. 206, 219, 1071; ARE 5, 9, 192) Marvin Miller, a Spotlite skate guard, testified he assisted Bianca onto the floor during an early session. He claimed he was told she did not know how to skate. He said she was scared and appeared unsteady and inexperienced, but she wanted to skate by herself, so he let her go. When she got about 10 to11 feet from the entrance opening in the rink wall, Miller saw Bianca fall backwards and hit her head. In response to a question about why he

[3]Spotlite is mistaken in saying she was excited about skating upon arriving home. It was before she left that she was excited.

let her go without staying near her given the situation he described, his reply was "[t]hat's why we have on the back wall of the skating rink skate at your own risk." (T. 220-221, 1068, 1072-1074, 1081-1082; ARE 10-11, 191, 193-195, 198-199)

After she fell, other skaters saw Bianca on the floor holding her head and crying. They saw no Spotlite employees or guards on the rink floor when Bianca fell. The guards are only on the floor during the dance period after the skating ended. Courtney Weatherspoon helped Bianca get up, walk to the front of the rink, and sit down at a table. Bianca continued to complain of her head hurting and laid her head down on the table. (T. 220- 221; ARE 10-11)

Valerie Graves came to Bianca at the table and asked what was wrong. Bianca had a drink and had her head down on the table. She said her head was hurting. When asked, Bianca told Valerie they gave the drink to her at the bar.[4] During the entire time Valerie stayed with Bianca, she kept her head down on the table. Spotlite employees were nearby but not at Bianca's table. They didn't ask about Bianca's mother or how to contact her. If they had, Valerie would have told them they could reach Mrs. Barnes at the Sheriff's Department. (T. 222, 237-239; ARE 12, 23-25)

Skate guard Miller's account differs somewhat from the skaters. He said after she fell, Bianca was crying, saying she had hit her head, and complaining her head hurt. He said he sat her down off the rink, took her hair down, and examined her head. When he didn't find any lumps or bleeding, he left Bianca with some other children, went to his locker, got a towel and then asked Freddie White-Johnson for some ice because a girl had fallen. Bianca repeatedly

[4]Although her testimony differs as to timing, Spotlite co-owner Freddie White-Johnson also testified to giving Bianca a free slush drink. (T. 1067; ARE 190)

asked for her mother after hitting her head. He got Bianca's home number from another child because he couldn't get a coherent response from Bianca. She just kept crying, saying her head hurt and asking for her mother. He said he tried the number but got no answer. He also decided not to inquire further about how to contact Bianca's mother. Even though he admitted he had no training in first aid, he made a decision not to contact a hospital without Bianca's mother's permission because he had seen a lot of kids fall. (T. 220-221, 1068, 1072-1074, 1081-1083; ARE 10-11, 191, 193-195, 198-200)

Miller admitted Bianca was so upset he couldn't get anything coherent out of her except she hit her head, her head hurt and she wanted her mother. So Miller knew Bianca felt her head was injured enough that she wanted her mother. Miller lives in Ruleville very near Mrs. Barnes. While he claimed he did not know which police department Mrs. Barnes worked for, he admitted he knew Mrs. Barnes was a local law enforcement officer. Other testimony indicated he actually knew she worked the 3 to 11 p.m shift at the Sheriff's office. When he got no answer at Bianca's home number, he admitted he made no attempt to learn Mrs. Barnes' work number or to locate her. Instead, he left Bianca on the sidelines complaining of her head hurting and asking for her mother and went back to watching the skating for several hours. (T. 220-221, 224, 241, 789-790, 796-798, 1064, 1068, 1072-1075, 1079, 1081-1085; ARE 10-11, 14, 26, 91-92, 98-100, 188, 191, 193-202) Bianca fell around 8:30 to 8:45 p.m. The Ruleville group stayed until closing several hours later. (T. 245, 1058; ARE 29, 184)

Miller and Spotlite's co-owner claimed Bianca returned to the floor during the dance session, but other testimony indicated Bianca stayed at the table during the later dance session. Miller admitted after the skate sessions were over, he saw Bianca off the floor. While she had

stopped crying, she didn't look right or normal. She looked agitated and again said she wanted her mother and wanted to go home. When the rink closed, Miller rode the bus back to Ruleville with Bianca. During the ride, he testified she was laying over with her head down. When the bus stopped at Bianca's grandmother's house, a short distance from both Bianca's home and Miller's home, others on the bus testified he didn't even get off and go with Bianca to the door. Bianca went into her grandmother's house with her cousins. (T. 220-221, 224, 230-231, 241-243, 1058, 1064, 1068, 1072-1075, 1079, 1081-1085; ARE 10-11, 14, 19-20, 26-28, 184, 188, 193-202)

No one from Spotlite, including White-Johnson or Miller, tried to reach Bianca's mother by any means other than calling the number another child gave as Bianca's home number. Nor did anyone from Spotlite make arrangements to make sure an adult learned of the fall when Bianca returned home. Although there was testimony many on the bus and at the rink, including Miller and White-Johnson, knew where Mrs. Barnes worked and on what shift, Miller didn't try to contact her at work or even make sure an adult knew of Bianca's fall and head injury. When asked to explain why he didn't try to tell Mrs. Barnes about Bianca's fall after returning to Ruleville with Bianca on the bus, Miller said he wouldn't tell a child's mother she had fallen and hit her head, even f the child was crying, asking for her mother and complaining her head hurt, because if he told every parent whose child had fallen he would never get done. Freddie White-Johnson, who talked to Bianca after her fall, knew Bianca's mother worked the 3 - 11 p.m. shift at the Sheriff's Office as a result of regular daycare arrangements for Bianca while her mother worked. Freddie admitted Bianca was crying after falling, but she also made no attempt to contact Bianca's mother. She did not ask Miller to make sure Mrs. Barnes knew of Bianca's fall

even though she knew Miller would be returning to Ruleville with Bianca on the bus. She also admitted when she talked to Bianca shortly before Bianca left the rink, she did not tell Bianca to tell her mother about the fall and hitting her head. (T. 198-9, 211, 222, 226-229, 241-242, 789-790, 796-798, 1057-1060, 1063-1065, 1067, 1087-1088; ARE 2-3, 6, 12, 15-18, 26-27, 91-92, 98-100, 183-190, 203-204) No one even told the older skaters to make sure an adult knew Bianca had fallen and hit her head that night. (T. 228-9; 242, 798-799; ARE 17-18, 27, 100-101)

Someone called Bianca's mother to come pick her up from her grandmother's house when the bus dropped the children off shortly after midnight. Contrary to Spotlite's brief, Bianca did not appear to be excited when returning from skating. There was no testimony that Bianca said she had a good a time at the rink. Rather, her mother said she spoke briefly to Bianca who responded even more briefly on the way home. Bianca seemed tired and quiet but otherwise alright. At home, Bianca went straight to bed speaking only briefly to her uncle. She told her mother nothing about a fall, hitting her head or events at the rink. (T. 811-814; ARE 105-108)

Around 4:00 am Bianca woke up vomiting. She went back to bed and woke up again about 3 hours later vomiting, complaining of a headache and light hurting her eyes. She went back to bed. Later that morning, she staggered out of her room, lay down on the couch and complained her head was hurting. Her mother called the Ruleville Clinic operated by the North Sunflower Hospital. She said nothing about Bianca falling and hitting her head because she didn't know about it. She was told Bianca probably had a sinus infection and should come to the clinic later that day. While getting ready to go to the clinic, Bianca got much worse. Her mother called the clinic back, told the nurse practitioner Bianca's left eye had rolled back and she had a

rattled sound to her breathing and it was something more serious than sinusitis. The nurse practitioner sent an ambulance to transport Bianca to the hospital. (T. 789-796, 815, 818-819; ARE 91-98, 109-111)

Bianca was taken first to North Sunflower Hospital and then to Delta Regional Medical Center to be treated by a neurosurgeon. The DRMC emergency room physician did not discover or diagnose any swelling in her brain or the colloid cyst from the first CT scan done at DRMC. Several hours later, Bianca was transferred to University Medical Center where a second CT scan was done and the colloid cyst was found at that time blocking the flow of spinal fluid causing hydrocephalus (brain swelling) and brain stem herniation. She was pronounced dead as a result of brain swelling causing brain stem herniation on December 27.

Dr. Leonard Lucenko testified as a recreational facilities, safety and risk management expert for the Plaintiffs. He supported his opinions as to the standards applicable to the roller skating industry with references of publications of roller skating industry associations, textbooks and other publications on public and private recreational facilities. For example, a manual for roller skating businesses states the industry standard requires cleaning and maintenance of all floors including drying, dust mopping, and removal of debris and other hazards before and after each session.(T. 284-287, 303-306; ARE 34-38, 46-49)

The evidence Dr. Lucenko reviewed demonstrated after Bianca fell, someone called the skate guard who came over and attempted to pacify Bianca who was crying, complaining her head hurt and asking for her mother. After calming Bianca down, the skate guard called the co-owner of the rink, who came and spoke with Bianca briefly. Bianca gave them her home phone number when asked, and they left. The skate guard tried Bianca's home number twice and got

no answer. Neither the skate guard nor the co-owner asked Bianca if she knew where her mother was, if her mother was working or for her mother's work phone. Despite knowing Bianca's mother worked the 3-11 p.m. shift at the Sheriff's Department, they just left Bianca sitting with her head down while the co-owner went back to the snack bar and the guard went back to the floor. (T. 300, 1058, 1060, 1063-1064; ARE 45, 184, 186-188)

Lucenko pointed out skating rinks have to inspect their facilities to make sure they are safe and properly maintained on a daily basis, including the floor and the skates. They have to provide enough supervision when children are present to be aware of what's happening in all areas, including the refreshment areas and the floor. In regard to activities on the floor, they must have sufficient supervision to be aware of how people are skating and whether anyone is skating in a manner that could result in injuries. When a mix of adults and children are skating, the rink must have a sufficient number of properly trained skate guards to control the situation so it is safe for the young children. (T. 289, 304-5; ARE 38, 47-48)

He said industry standards require rink operators to have someone present whenever it is open with the proper training to deal with injuries. That person should have first aid and C.P.R. training at a minimum. The facility must also have an emergency plan so all employees know what procedures to follow when someone is injured. The person with first aid training should evaluate the injured patron and call for an ambulance or medical assistance immediately for appropriate injuries. Injured children should not be escorted off the floor to a table and left there for lengthy periods of time until their group is ready to go home. Moreover, the facility should have records documenting the number of patrons using the facility, injuries and accidents, procedures, training and inspections. There should be an incident report on each injury.(T. 290;

ARE 39)

Dr. Lucenko testified based on the discovery testimony and materials he had reviewed, Spotlite's rink was in the same condition on the night Bianca fell as when he inspected it and took photographs. Although Spotlite had rules posted at its entrance, it was clear those rules were not enforced. It was also clear industry standards on floor maintenance, inspection and cleaning, daily and before and after each session, were not followed. For example, although the sign said chewing gum was not permitted in the facility, he found large amounts of gum all over the floor creating fall hazards. The facility in general, and the floor in particular, was not properly maintained or inspected as there were many spots of gum and other fall hazards present that should not have been there. The floor had ruts or separations between sections, also creating fall hazards. Some were clearly wide enough to catch either a skate or a foot. (T. 291-293, 295-6, 306, 310-11; ARE 40-44, 49, 53-54)

Dr. Lucenko testified Spotlite provided inadequate supervision for children when Bianca fell as there were no guards in the area and one had to be summoned. He said if, as some of the testimony indicated, Bianca was not wearing skates but was walking on the floor, the skate guard should have been monitoring and prevented her from walking onto the rink during a skating session without skates. (T. 307; ARE 50) Spotlite's owner confirmed no one without skates should have been allowed to enter the skate floor during a skating session. He also acknowledged there was no sign, chain or anything at the skate floor entrance stating skates were required during the skating period. He admitted skate guards and security guards should be monitoring the floor to make sure noone entered without skates during a skating session. (T. 1048-1049; ARE 180-181)

Lucenko said it is particularly dangerous for a child to be on the floor without skates when others were skating because if contact occurs between two people on skates, the skates naturally cause them to bounce off and roll away. If a person on skates bumps one not on skates, the one without skates will have her feet knocked from under her and will fall in a way causing her head to hit the floor. So a skate guard should have been there and stopped a child without skates from entering the floor during a skating session. (T. 314; ARE 57)

Moreover, Spotlite fell below the industry standard of care in that 1) the staff present that Christmas evening were not properly trained to supervise children using a rink, 2) staff present that evening were not properly trained in first aid, 3) there was no effective plan or policy for supervising children using the rink, 4) there was no plan prompting employees to ask for information such as telephone numbers to reach parents of children using the rink, 5) no efforts were made to find out where Bianca's mother was and how to reach her when she didn't answer the home number given, 6) there was no medical action plan or in-service training to teach staff the seriousness of injuries from falls or hitting a head, or procedures to follow in medical emergencies, 7) employees had not been trained in the dangers of children falling and striking their heads on the floor, and 8) no efforts were made to send word back with Bianca to a parent or responsible adult that she had fallen, hit her head and complained of a headache (T. 312-313; ARE 55-56)

Lucenko testified the combination of Bianca complaining of her head hurting and keeping her head down the table after hitting it in a fall was such that anyone with proper first aid training should have recognized the potential for serious head injury and a need for immediate evaluation by trained medical personnel. When such a fall occurs in a recreational

facility, it has a duty to make sure the next level of medical evaluation and care is immediately provided. Staff cannot leave the child without medical attention until her group goes home. (T. 312-313, 324; ARE 55-56, 59)

Lucenko testified Spotlite breached the standard of care by not having proper emergency procedures and training for employees on preparation for, and handling, injuries. For young children skating without a parent, Lucenko said Spotlite should have required parental consent forms with basic contact information on how to reach a parent in case of a problem. Spotlite should also have had emergency plans, including always having someone present with first aid and CPR training, which it did not have. And Spotlite failed to have guards on the floor close to Bianca when she fell as it should have as there was testimony one had to be summoned after skaters noticed Bianca's fall. (T. 307-309, 311; ARE 50-52, 54)

Cross examination of Spotlite's owner confirmed Spotlite had no specific procedures on injuries or rendering aid to injured patrons of the rink. The rink did no training of its employees on emergencies, injuries, first aid or obtaining aid for injuries. The only person connected with the rink with any medical or first aid training was the owner who was not present when Bianca fell and hit her head. He was not even told by the skate guard or his co-owner wife, who were aware of Bianca's fall, that Bianca had fallen and hit her head. Moreover, although he had first aid training in the military, it was not kept current. Defense witnesses also confirmed no one at the rink summoned any medical assistance, or even reached Bianca's mother by phone or sent home a note with Bianca to alert her mother Bianca had hit her head and might need medical attention. (T. 1036, 1039-1040, 1043-1044, 1050; ARE 175-179, 182)

Spotlite's owner confirmed if a child returned to the floor after a fall, or hitting its head

or any other type of injury, Spotlite would assume the child was okay and there was no need to notify a parent of the incident. But he acknowledged if a child continued to cry or complain, he or his wife, the two co-owners, should call an ambulance or take the child to a doctor or hospital. In the past, there had been other similar incidents where they had called an ambulance or taken the child to a doctor or hospital because the child continued to cry or complain or otherwise not return to participating in activities. He also testified that employees, including Miller, should have made "all attempts" to notify a parent if a child fell and then complained of a headache and acted ill, lying her head down. (T. 1039, 1050; ARE 176, 182)

Lucenko testified Bianca's tragic fall and death could, and should have, been avoided by Spotlite with proper supervision. Spotlite should have supervised and monitored the floor, preventing any child from entering the floor without skates during a skating session, monitored the ability of children to skate, and provided properly trained guards to be close by any children appearing to have difficulty maintaining their balance. Once Bianca fell and hit her head, Spotlite should have had personnel trained in first aid present who would have recognized the immediate need for examination by medical personnel with more training based on her complaints of headache after hitting her head and the way she kept her head down on the table. Spotlite should also have had procedures in place so employees would have information on how to reach parents and guardians quickly so important medical decisions could be made quickly. Had Spotlite developed, established and implemented appropriate procedures, effective supervision, and an effective inspection and maintenance program, Bianca's injury would probably have been prevented or at least she would have been properly assessed and have received life saving medical attention much more quickly. (T. 314-315; ARE 57-58)

Plaintiff's diagnostic radiology expert, Dr. Brogdon, was experienced in diagnosing brain conditions through radiology procedures. In addition to diagnosing causes a patient's symptoms, radiologists also assist in evaluating the success or progress of treatments through radiology procedures. Through this process he has acquired considerable knowledge and experience of the nervous system, spine, brain and brain stem and their diseases and treatment. He explained hydrocephalus occurs when fluid builds up in the brain and can't get out. It puts pressure on brain tissue compressing it against the skull. After enough time and pressure, hydrocephalus can herniate the brain stem. (T. 357-361, 366-367, 380-381; ARE 60-68)

Colloid cysts are covered in all neuroradiological texts and a lot of radiology texts. Dr. Brogdon has seen a number of them in practice, and even presented a paper on a patient who survived one. He has worked as part of the team with neurologists treating such patients. (394-396) He testified it was likely to a reasonable degree of medical probability that when Bianca fell and hit her head at Spotlite it caused a preexisting colloid cyst that might otherwise have remained asymptomatic to shift somewhat resulting in a sudden onset of increased pressure or hydrocephalus (water on the brain) that resulted in her death. (T. 394-397, 408; ARE 69-73)

Plaintiff called Dr. Anthony Segal, initially designated by Spotlite as a neurology expert, as an adverse witness during the case in chief. Segal testified aside from a note in the medical records of unspecified headaches a week or two before the fall, there was nothing in the medical records to support an assumption that Bianca had hydrocephalus prior to her trip to Spotlite. Although experts for other defendants claimed notes in the medical records of possible headaches and light sensitivity three or four days before Bianca's death indicated the colloid cyst had already begun to block her spinal fluid and cause hydrocephalus before December 25th, Dr.

Segal explained if she actually had prior headaches and if they were a symptom of hydrocephalus from blockage by the colloid cyst, any prior blockage had cleared before Bianca's trip to the skating rink. He pointed out she obviously felt well enough to go skating which would not have been the case if a prior blockage had existed and had not cleared. She did not have the signs and symptoms of chronic hydrocephalus prior to her fall at the skating rink. Moreover, he testified according to the medical records, Bianca was a 10 year old child "in her normal state of health" until shortly before she was taken to the emergency room. (T. 726-727, 730, 739, 744; ARE 79-81, 84-85)

Dr. Segal testified Bianca's death was not actually caused by the colloid cyst itself, but rather by hydrocephalus and increased cranial pressure. He testified to the chain of causation to a reasonable degree of medical probability, saying, based on reported cases in the literature, the hydrocephalus and increased cranial pressure resulted from the colloid cyst being dislodged by the trauma to Bianca's head in the fall at the skating rink. Hydrocephalus and increased cranial pressure then herniated her brain stem causing death. (T. 734, 770-771; ARE 83, 88-89) While colloid cysts are unusual, Dr. Segal testified they can be successfully removed by surgery. (T. 733-734; ARE 82-83) He also testified falling and hitting one's head can cause head injuries which can result in brain swelling, even without a colloid cyst and even if the trauma to the head is slight. (T. 756-757; ARE 86) Both plaintiff and defense medical experts testified it is not rare for a fall or other impact to the head, such as in an auto accident, to result in brain or spinal injury leading to increased swelling and pressure on the brain and then death. Increased swelling and pressure in the brain are a major risk of concern in a patient who has experienced a head injury and will lead to brain stem herniation and death if unrelieved. (T. 424, 469-470, 547-8;

ARE 74-76)

Plaintiff offered the testimony of Dr. George H. Carver, III, a forensic economist, as an economic expert on calculating the net present cash value of Bianca's life as an element of economic damages. Defendants did not question his qualifications as a forensic economist. They did challenge the admission of his testimony based on the methods he used in both a pretrial motion in limine and again during trial. (T 898-922; ARE 112-136)

Because Bianca died as a child before she could establish adult work life history, Dr. Carter based his testimony on the national average income. He used data from federal government documents, like Department of Labor statistics, and professional literature, like the Journal of Legal Economics and the Journal of Forensic Economics. He used life expectancy tables from the Journal of Legal Economics to determine the most probable life expectancy, census data to determine the typical age of marriage, and U.S. Department of Labor and U.S. Department of Commerce data on average income reprinted by standard economic texts. He used Mississippi and federal tax documents to calculate deductions for taxes. He used data on consumption rates from the Journal of Forensic Economic to calculate consumption deductions. He used information from the Economic Report of the President for data on inflation and interest rates and other information necessary to make the calculations to discount other figures to their current net present value. He used data from the University of Southern Mississippi and the U.S. Department of Education to calculate the present value of the cost of a college education. And he used data from the Social Security Administration reported in the Statistical Abstract of the United States to calculate the fringe benefit discount. (T. 923-924; ARE 137-138)

In this case, Carter used the discussion of economic damages in *Greyhound Lines, Inc. v.*

Sutton, 765 So. 2d 1269, 1277 (Miss. 2000) to define how economic damages were to be calculated. That discussion told him as an economist to calculate damages for a person who has not yet established an income, he should use the national average, as established by the U.S. Department of Labor. Department of Labor statistics put the national average income at $36,214 per year. That figure corresponds to the average annual income for a person with a 4 year college degree. Using Bianca Barnes' date of birth, date of death, race and sex, an average income of $36,214 a year, the four year college degree it would take to earn that income, and the data obtained from the sources described above, he calculated the net present cash value of Bianca Barnes' life. Based on the discussion in *Sutton* which said national averages should be used where an income history had not been established[5], he assumed Bianca would have lived the typical national life expectancy, would have worked for the typical national work life expectancy, would have obtained a typical education, and married at a typical age to a spouse who also had a typical education. Using these assumptions, and the data referred to above, he was able to calculate the necessary consumption allowance and tax deductions.[6] (T. 924-931, 960-961; ARE 138-145, 168-169)

He assumed she would not start earning the $36,214 a year until age 22 when she had graduated from college. Prior to age 22, he assumed she would have no income. Next, using life

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[5]The use of national average incomes also comports with the practice of forensic economists in the field because they, like the *Sutton* court, assume modern labor markets are highly mobile making the use of local markets unjustified unless there is a specific reason to use local markets only. (T. 961; ARE 169)

[6]The assumptions about marriage and the average spouse's education and income were only used for purposes of calculating deductions for the personal consumption allowance and taxes. No part of the average spouse's income is included in the income part of the calculation of the present net economic value of Bianca's life. (T. 962; ARE 170)

expectancy tables which give a 10 year old black female an average life expectancy of 66 years and a college educated woman a work life expectancy of 33 years, he assumed she would have retired at age 55 even though we know people work longer than that. The lower age accounts for the periods of time during their lives when women can be expected not to work for various reasons. These figures are based on U.S. Department of Labor and Commerce statistics and are routinely republished in forensic economics literature and widely used by forensic economists in estimating economic value of lives lost as well as being widely used in other disciplines. These figures, without any deductions or adjustments for interest and inflation would yield lost wages over Bianca's life of $1,209,548. (T. at 931-935; ARE 91-93)

He then reduced that figure by state and federal taxes and a personal consumption allowance which left $518,000. The personal consumption figure used of $513,699 was taken from standard published tables based on federal government surveys of the national average for a college educated woman. That figure was then reduced again to reach its net present value using standard formulas and data. This resulted in a lost wage figure of $401,000. But he did not stop the reductions there. In accordance with the methods and practices regularly used by forensic economists, he subtracted out the cost of obtaining the college education that would be needed to generate the national average income. The net present value of the cost of a Mississippi four year college education was $33,000. He did not make adjustments for the fact that a high percentage of Mississippi college students work to help pay for the costs of their education, but then he did not include any wages at all prior to graduation at age 22 in his income calculations. In calculating that amount, he started with current figures and applied the higher inflation rates for education and then the standard interest rates to arrive at a more accurate figure for the cost

of college than if he had used the standard inflation rate for all items. So that reduced the $401,000 to a total of $367,305. (T. 935-936, 943-944, 951-952, 962-963; ARE 149-150, 155-156, 161-162, 170-171)

Next, he recognized in today's economy, wages do not represent an employee's entire compensation package. Fringe benefits and entitlements such as insurance, unemployment and worker's compensation coverage, and social security retirement and medicare benefits paid on behalf of an employee by an employer add significantly to an employee's total compensation. He considered the employee's contribution to these programs as any other personal expenditure. However, the parts paid by the employer which did not come out of the employee's wages were considered to be additional compensation. Nevertheless, he did not include the employer's contribution to social security as additional compensation over the course of Bianca's life because in the models used by forensic economists, it is assumed that the entirety of social security benefits will be consumed by the personal consumption allowance during retirement. So it is a net wash. However, in the standard models used by forensic economists, medicare is not treated as a wash but more like employer provided health insurance, so he included the part of medicare contributions paid by the employer. He did not include the part paid by the employee. The 1.45% a year paid the employer amounts to $17,535 over the course of a 33 year work life expectancy, but when that figured is discounted to net present cash value, it is reduced to $13,709. (935-939; ARE 149-153)

Pension benefits are treated the same as social security in the standard forensic economic models. They are considered a wash with the consumption allowance, so Carter did not include them in his calculations. But insurance and the federal mandated worker's compensation and

unemployment compensation premiums paid by an employer on behalf of an employee are not treated as a wash in the models used by forensic economists. Using the national averages for these figures, their value is equivalent to $4,686 a year, or $156,512 over a 33 year work life. Their discounted net present value is $122,365. Adding this figure and the medicare/insurance figure to the base wage net present cash value yielded a total of $503,379. (T. 939-940, 955-956; ARE 153-154, 164-165)

Dr. Carter did not consider anything else in arriving at his figures. He did not attempt to predict how any physical or mental characteristics might make Bianca different from the national average (or typical person). He repeatedly stated he was not medically qualified to determine the effect of any medical condition she might have had on her life expectancy and work life expectancy. He made no judgments as to the evidence or facts on such issues, but rather simply stated that if such reductions were proven they should result in reductions of his figures. (T. 940, 942, 954, 956) He did consider the likely age of a first marriage because there is reliable data to use on that point. He did not make adjustments for divorce or for remarriage because the data suggests that the probability is that there would be a wash because of the high rates of remarriage. However to counter any possible increase in the personal consumption deduction that might come from periods when she was not married, he did not add back in the possible decreases in the personal consumption allowance that are associated with having children. Instead, he considered these two factors would offset each other. (T. 945-948, 958-959; ARE 157-158, 166-167)

The court excluded Dr. Carter's calculations of the value of household services as part of the economic value of Bianca's life, but allowed Plaintiff to submit Dr. Carter's report and

deposition testimony as a proffer to demonstrate what the testimony would have been. The court also allowed a proffer as to Dr. Carter's testimony on the meaning of hedonic damages without calculations as to an any specif value for Bianca's hedonic damages. (T. 964-965, 967; ARE 172-174)

SUMMARY OF ARGUMENT

When the evidence is viewed in the light required following a unanimous jury verdict, and it is recognized that the jury is free to reject evidence which does not support the verdict, it is clear that there was sufficient evidence to support the jury verdict in this case. While there was evidence that could have supported a different verdict, the evidence was not such that no reasonable juror could have arrived at the verdict rendered in this case, especially if it is remembered that the jury was not required to believe the evidence which Spotlite relies upon. It was not unreasonable for the jury to believe the expert Spotlite chose in the first place, who after researching the issue in the published literature, testified to a well reasoned chain of causation to a reasonable degree of medical probability that supported the verdict.

Likewise, there was no error in the trial court admitting Dr. Carter's testimony on the net present value of the economic aspects of Bianca's life. He used assumptions based on legal presumptions approved by our courts. Moreover, Spotlite's attacks on his testimony were attacks on his assumptions, not his methodology, providing grounds for vigorous cross examination, but not exclusion of his testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, ¶ 17 (Miss 2001).

ARGUMENT

I. Standard of Review

The posture of this case is important to the standard of review. Spotlite chose to go forward and present evidence of its own, when its motion for directed verdict was denied at the close of Plaintiff's case. By presenting its own evidence at that point, Spotlite waived any right to appeal the denial of the directed verdict motion based on the sufficiency of the evidence at the close of Plaintiff's case. It retained the right to challenge the sufficiency of the total evidence at the close of trial to support the verdict. On review of the trial court's refusal to grant Spotlite's renewed motion for directed verdict, motion for peremptory instruction and motion for j.n.o.v., the entirety of the evidence must now be considered in the light most favorable to the Plaintiff. The Plaintiff must also be given the benefit of all favorable inferences that may reasonably be drawn from any of the evidence. When the evidence is viewed in this light, the jury verdict must stand unless the evidence is so overwhelmingly in favor of Spotlite that reasonable men could not have arrived at the verdict rendered by the jury. *James M. Burns Lumber Co. v. Dilworth*, 676 So. 2d 892, 892 (Miss. 1996) citing *Clements v. Young*, 481 So. 2d 263, 268 (Miss. 1985); *James W. Sessums Timber Co. v. McDaniel*, 635 So. 2d 875, 882 (Miss. 1994).

The deference due the jury's verdict in this stance is summarized in *Rials v. Duckworth*, 822 So. 2d 283, 288-289, ¶¶ 27-28 (Miss. 2002).

> Once the jury has returned a verdict in a civil case, the reviewing court is not at liberty to direct that judgment be entered contrary to that verdict short of a conclusion that given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found. Starcher v. Byrne, 687 So. 2d 737, 739 (Miss. 1997). The weight and credibility of witnesses, primarily experts, is for the jury. BFGoodrich, Inc. v. Taylor, 509 So. 2d 895, 903 (Miss. 1987).
>
> Here, the jury was free to accept or reject any part of [any lay or expert witness's] testimony. Apparently, the jury chose to reject [the testimony relied upon by Spotlite].

II. Spotlite Breached the Duties It Owed to Bianca Barnes

A. The Duty to Supervise

A private person operating a place of public amusement is under an affirmative duty to make it reasonably safe for his patrons. This obligation includes a duty of supervision and control of others on the premises whose actions may cause injury, at least where the defendant has actual or constructive knowledge of the activities involved. *Diker v. St. Louis Park*, 268 Minn. 461, 130 N.W.2d 113 (1964). *Diker* observed a number of jurisdictions have applied this principle to skating rinks. Mississippi and Delaware are among those jurisdictions.

In *Blizzard v. Fitzsimmons*, 193 Miss. 484, 10 So. 2d 343 (1942), the court held a "proprietor engaged in the business of providing public recreation or amusement must exercise a reasonable degree of watchfulness to guard against injuries likely to happen in view of the character of the amusement." *Blizzard* then went on to hold once the skating rink employees are aware a skater is not sufficiently experienced to skate uninjured without aid, the rink has a duty to take the skater from the floor or provide such assistance as is necessary to prevent falls. *Id.* Similarly, in *Derricotte v. United Skates of Am.*, 350 N.J. Super. 227, 794 A.2d 867 (N.J. Super. Ct. App. Div. 2002), a breach of this duty was found where a skating rink employee who knew the child was inexperienced allowed a child to skate unaided.

Spotlite's guard, Marvin Miller testified he had been told Bianca did not know how to skate. He said she was scared and appeared unsteady and inexperienced, but she wanted to skate by herself, so he left her to skate on her own. In response to a question about why he let her go without staying near her given the situation he described, his reply was "[t]hat's why we have on the back wall of the skating rink skate at your own risk." He reiterated his comment applied to

all skaters no matter how young or how inexperienced. (T. 1071: 25 to 1072:4; 1081:3-25; ARE 192-193, 198) This testimony alone is sufficient to support a finding of breach by Spotlite of the duties recognized in *Blizzard* and *Derricotte*. But it does not stand alone. Plaintiff's recreational facilities expert, Dr. Lucenko testified Spotlite provided inadequate supervision for children at the time Bianca fell as there were no guards in the area and one had to be summoned. (T. 307; ARE 150)

Alternatively, the jury could have believed the testimony of other witnesses present on the floor at the time of Bianca's fall who testified Bianca was on the floor without skates, helping younger skaters to stay up at the time she fell. (T. 206, 219; ARE 5, 9) Dr. Lucenko testified if Bianca was not wearing skates, the skate guard should have been monitoring and should not have permitted her to walk out onto the rink during a skating session without skates. He described the safety reasons why a skate guard should have been there and stopped a child without skates from going onto the floor during a skating session. (T. 307, 314; ARE 50, 57)

Spotlite's owner also confirmed noone without skates should have been allowed to enter the skate floor during a skating session. He acknowledged there was no sign, chain or anything at the entrance to the skate floor indicating no one was allowed on the floor without skates during the skating period. He admitted skate guards and security guards should be monitoring the floor to make sure noone entered without skates during a skating session. (T. 1048-1049; ARE 181-182) This testimony supports an alternative basis on which the evidence could support a conclusion by a reasonable juror that Spotlite breached its duty to properly supervise the children at the rink on Christmas evening, 2000.

Spotlite claims under *Holley v. Funtime Skateland South, Inc.*, 392 So. 2d 1135 (Miss.

1981) and *Blizzard v. Fitzsimmons,* 193 Miss. 484, 491, 10 So.2d 343 (1942), it is relieved of liability because Bianca fell only once and she assumed the risk of falling when she entered the floor to skate. Neither decision requires that the jury verdict in this case be overturned. *Holley* quotes the most important language from *Blizzard*, saying

> On the opening question of liability, there is brought into view two well established rules. One is that a person who participates in the diversion afforded by an amusement or recreational device accepts, and assumes the risk of, the dangers that adhere in it *so far as they are obvious and necessary.* 4 Shearman & Redfield on Negligence, Revised 1941 Ed., § 647, p. 1566. And the other is that the proprietor engaged in the business of providing public recreation or amusement *must exercise a reasonable degree of watchfulness to guard against injuries likely to happen in view of the character of the amusement.* Meridian Amusement Concession Company v. Roberson, 188 Miss. 136, 193 So. 335.

392 So. 2d at 1137 quoting 193 Miss. at 491.

Both decisions then focus on a particular lack of knowledge by the skating rink operator that relieved the rink of liability. *Blizzard* specifically pointed out that no one at the rink had any knowledge of the boy's inexperience at skating. In *Holley*, the plaintiff had been skating for over 40 years. She knew the skates were not operating properly from the beginning, but she did not tell anyone and continued to skate until they caused her to fall. The court specifically pointed out the absence of any evidence the rink knew or should have known the skates were defective.

In the present case, Marvin Miller testified he was told Bianca did not know how to skate. Based Miller's observations, she was scared, unsteady, and inexperienced confirming what he had been told. That key piece of testimony clearly distinguishes *Holley* and its results. It also clearly moves up the time at which the duty of watchfulness attaches under *Blizzard* so that a series of falls are not necessary for liability.

Even more important, however, is the fact that the law does not stand still. The part of

Blizzard and *Holley* which Spotlite relies upon is based on the assumption of risk defense. Subsequent to *Holley* and *Blizzard*, our law on the assumption of risk defense changed. In *Churchill v. Pearl River Basin Dev. Dist.*, 757 So. 2d 940 (Miss. 1999), the court pointed out the gradual shift in our law and clearly ruled the assumption of risk defense is now subsumed into the doctrine of comparative negligence.

> We take this opportunity to hold once again that the assumption of risk doctrine is subsumed into comparative negligence. Any actions which might constitute an assumption of risk should be dealt with only in the context of the comparative negligence doctrine. A jury is always free to decide that an act which constitutes an assumption of risk was the sole proximate cause of a plaintiff's injuries. We see no reason why acts which might constitute an assumption of risk should, as a matter of law, create a complete bar to recovery. The comparative negligence doctrine gives juries great flexibility in reaching a verdict. Any fault on the part of the plaintiff should be considered only in the context of comparative negligence.

757 So.2d at 943-944.

Thus, the assumption of risk parts of *Blizzard* and *Holley* have now been modified and subsumed into comparative negligence. The doctrine of comparative negligence compares the negligence of a defendant to the contributing negligence of the injured plaintiff. In regard to the capacity of children for contributory negligence, *Skelton v. Twin County Rural Electric Ass'n*, 611 So. 2d 931, 937-938 (Miss. 1992) points out contributory negligence subsumes the question of a child's capacity to perceive danger. It is presumed a child of tender years cannot exercise judgment and discretion. The presumption can be rebutted by proving "exceptional capacity" and a capability of exercising judgment and discretion in children between ages of 7 and 14. *Id.*

There was no evidence Bianca Barnes perceived the danger of falling on Spotlite's floor and hitting her head. Nor was there any evidence Bianca had exceptional capacity and capability to exercise judgment. Even more important, Spotlite did not request a comparative negligence

instruction. Thus, Spotlite cannot now avoid liability through an assumption of risk defense.

Furthermore, given the posture of this case, Spotlite cannot rely on Miller's testimony to support its argument Miller did everything he should have done by watching Bianca and immediately coming to her aid after she fell. There was other testimony that there were no Spotlite employees or guards on the skating rink floor when Bianca fell, that guards were only on the floor during the dance period after the skating ended, and that it was Bianca's 13 year old cousin, Courtney Weatherspoon, not Miller, who went over to Bianca and helped her get up, walk to the front of the rink, and sit down at one of the tables before any rink personnel came to Bianca's aid. (T. 220- 221; ARE 10-11)

B. The Duty to Render Aid

As a matter of basic tort law, a business proprietor whose employees are reasonably on notice a customer is in distress and in need of medical attention has a legal duty to come to the assistance of that customer. At the very least, the proprietor and its employees have a legal duty to summon medical assistance within a reasonable time, especially where the employees have no medical training themselves. *Baker v. Fenneman & Brown Props., L.L.C.*, 793 N.E.2d 1203 (Ind. Ct. App. 2003); *Breaux v. Gino's Inc.*, 153 Cal. App. 3d 379, 382, 200 Cal. Rptr. 260 (1984). Courts have consistently required a business proprietor in such circumstances to take reasonable steps to summon medical aid and take other reasonable action to ameliorate the injury. *Lundy v. Adamar of New Jersey*, 34 F.3d 1173 (3d Cir. 1994) citing *Applebaum v. Nemon*, 678 S.W.2d 533, 535-37 (Tex. Ct. App. 1984) (common law duty to administer whatever initial aid he reasonably can and knows how to do, and to take reasonable steps to place the injured person in the hands of a competent physician); *Baca v. Baca*, 81 N.M. 734, 472

P.2d 997, 1001-02 (Ct. App. 1970) (bar turning an injured customer over to the police's custody as a drunk without informing them of his injuries breached its "duty to take reasonable care of him")

The Restatement 2d of Torts, § 314A[7] states an owner of land who holds it open to the public is under a duty to give those members of the public first aid after the owner knows or has reason to know that they are ill or injured. It also states such a proprietor had a duty to care for injured patrons until they can be cared for by others. The illustrations and comments make it clear if a proprietor does not summon medical aid after he knows a patron is injured and the patron suffers greater injuries that might have been avoided if medical aid had been promptly summoned, the proprietor is liable for those injuries.

Mississippi follows these principles. *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So. 2d 413 (Miss. 1988). In *Grisham*, the court held "[w]e are of the opinion that the V.F.W. officials had an affirmative duty to aid Mabeline once they learned that she had been injured on V.F.W. premises." The court held a defendant breaching that duty would be liable for any aggravation of injuries caused by its failure to render aid even if it were not responsible for the initial injuries. 519 So. 2d at 417

Thomas v. Studio Amusements, Inc., 50 Cal. App. 2d 538, 123 P.2d 552 (Cal. App. 1942) applied this principle to an injured skater at a rink. In *Thomas*, after the skater fell, she was

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[7]Plaintiffs are aware *Estate of White v. Rainbow Casino-Vicksburg P'ship*, 910 So. 2d 713 (Miss. App. 2005) and *Cooper v. Missey*, 881 So. 2d 889 (Miss. App. 2004) state Mississippi has not adopted § 314A. However, this is inaccurate. *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So. 2d 413 (Miss. 1988) adopts the same legal standard for rending aid as is set forth in § 314A of the Restatement. Apparently *Grisham* was not brought to the Court of Appeals attention in either *White* or *Cooper* as it is not mentioned in either case.

taken by an employee to a first aid room where she was examined. The employee decided she was not injured and did not summon medical assistance. In fact, her hip was broken. The court sustained a jury verdict against the rink, on the theory of breach of the duty to promptly secure medical attention could have led to an aggravation of her injuries.

Like the employee in *Thomas*, Spotlite's guard had reason to believe Bianca was injured. He saw her fall and hit her head. He admitted she was crying, complaining her head hurt, and asking for her mother. Yet he left her sitting on the side without summoning aid. Sometime later when he again observed her in distress, he still failed to summon aid. Hours later, when she rode home lying over with her head down, he still did not summon aid or do anything to inform a responsible adult she had hit her head and might need medical attention. This led to a delay of many hours in obtaining medical attention.

Moreover, Spotlite's owner acknowledged if a child continued to cry or complain, one of the owners should call an ambulance or take the child to a doctor or hospital. In the past, they had called an ambulance or taken the child to a doctor or hospital in similar incidents because the child continued to cry or complain or did not return to participating in activities. (T. 1039, 1050; ARE 176, 182)

In its statement of facts, Spotlite appears to be arguing or at least implying that a ten year old child should be making the decision as to whether she was hurt enough to need medical attention. For example, they acknowledge Bianca was crying and said she had hit her head. But they emphasize later in the evening, she told employees she was "alright" or "okay."(Appellant's brief at pp. 4-5) This completely ignores other testimony by Miller that later in the evening, Bianca still did not look normal or alright and she repeated again she wanted her mother and

wanted to go home even though she had stopped crying. It also ignores Miller's testimony that on the way back to Ruleville, Bianca continued to keep her head down, laying her head on the lap of another child. (T. 1079, 1085; ARE 197, 202)

C. Breach of Duty

Plaintiff's expert on the standard of care for skating rinks testified Spotlite breached the industry standard of care in several respects including: 1) failing to have a sufficient number of properly trained skate guards on the floor a) in a mixed session of adults and children to control the situation so it is safe for the young children; b) to be aware of what's happening in all areas, including the refreshment areas and the floor, when children are present; c) to be aware of how people are skating and whether anyone is skating in a manner that could result in injuries; d) to prevent anyone, including Bianca, from entering the skate floor during a skating session without skates ; 2) failing to have someone with proper training, being first aid and CPR training at a minimum, present whenever it is open to deal with injuries; 3) failing to provide training for staff on the potential for serious injury from a child hitting its head on a hard surface such as the skate floor in a fall, 4) failing to have a plan or procedures in place informing all employees of what procedures to follow when someone is injured; 5) in escorting Bianca off the floor and leaving her at a table for lengthy periods of time without medical evaluation after she fell, hit her head, complained her head was hurting and was crying and asking for her mother; 6) failing to summon medical assistance for Bianca, 7) failing to have a plan in place for acquiring sufficient information on contacting parents of children using the rink to reach them quickly if an incident occurred so medical decisions could be made quickly; and 8) failing to take any other steps to locate, reach or communicate with Bianca's mother or another responsible adult concerning

Bianca falling, hitting her head and complaining that her head hurt and asking for her mother after receiving no answer at a home phone number provided by a child especially in light of knowledge of or readily available to Spotlite employees and owners concerning available means of contacting Mrs. Barnes . (T. 289-290, 304-305, 307, 312-314; ARE 38-39, 47-48, 50, 55-57)

Spotlite's owner confirmed several of these standards and breaches, testifying no one without skates should have been allowed to enter the skate floor during a skating session but there was no sign, chain or anything at the skate floor entrance stating skates were required during the skating period, and admitting skate guards and security guards should be monitoring the floor to make sure noone entered without skates during a skating session. (T. 1048-1049; ARE 180-181) He also acknowledged the need to take a child in Bianca's situation to a doctor or hospital or to call an ambulance, which he acknowledged Spotlite had done in the past in similar incidents. (T. 1039, 1050; ARE 176, 182)

III. The Breach of Spotlite's Duties Was a Proximate Contributing Cause of Bianca's Death

Spotlite Skating Rink appears to argue it was conclusively established at trial that the sole cause of Bianca Barnes' death was an undiagnosed colloid cyst blocking the third ventricle. However, the neurosurgeon Spotlite designated as its own medical expert, was of a different opinion after researching the matter. He was called as an adverse witness in the Plaintiff's case in chief. Dr. Segal testified Bianca's death was not actually caused by the colloid cyst itself, but rather by hydrocephalus and increased cranial pressure. He testified to the chain of causation to a reasonable degree of medical probability, saying, based on his research of the published literature, the hydrocephalus and increased cranial pressure resulted from the colloid cyst being dislodged by the trauma to Bianca's head in the fall at the skating rink. Hydrocephalus and

increased cranial pressure then herniated her brain stem causing death. (T. 734, 770-771; ARE 83, 88-89) While colloid cysts are unusual, Dr. Segal testified they can be successfully removed by surgery. (T. 733-734; 82-83)

Dr. Segal also explained why he ruled out the theory of the medical defendants' experts that the blockage of Bianca's third ventricle by the colloid cyst had begun weeks earlier and progressed to a total blockage unrelated to the fall at Spotlite. He explained a single note in the medical records of unspecified headaches a week or two before the fall was insufficient to support that theory. Even if she actually had prior headaches and if they were actually a symptom of hydrocephalus from blockage by the colloid cyst, any prior blockage had cleared before Bianca's trip to the skating rink as she obviously felt well enough to go skating which would not have been the case if a prior blockage had existed and had not cleared. She simply did not have the signs and symptoms of chronic hydrocephalus prior to her fall at the skating rink. Moreover, he said the medical records established Bianca was a 10 year old child "in her normal state of health" until shortly before she was taken to the emergency room. (T. 726-727, 730, 739, 744; ARE 79-81, 84-85)

Lucenko's testimony sufficiently established the causal connection between Spotlite's negligence and Dr. Segal's medical testimony concerning causation of Bianca's death. He testified Bianca's tragic fall and death could, and should, have been avoided by Spotlite with proper supervision. Either Spotlite's guards should have prevented Bianca from entering the skate floor without skates during a skating session if she had no skates on when she fell or having been told that Bianca was inexperienced and did not know how to skate and having personally observed her instability, Spotlite's guard should have been on the floor with her

instead of so far off the floor that he had to be summoned when she fell as was testified to by some of the skaters. In either event, if Spotlite had met the standard of care in regard to supervision of children using the rink, Bianca's hitting of her head on the floor could and should have been prevented. Had Spotlite developed, established and implemented appropriate procedures, effective supervision, and effective procedures for assessing and responding to injuries, Bianca's injury would probably have been prevented or at least she would have been properly assessed and have received life saving medical attention much more quickly. (T. 314-315; ARE 57-58)

While the trial court ruled that Plaintiff's radiology expert, Dr. Brogden, did not have the expertise in neurology to establish causation on his own, his testimony that was within his knowledge based on his training and experience was certainly supportive of the causation testimony offered by neurologist Dr. Segal and the recreational facilities expert, Dr. Lucenko. (T. 357-361, 366-367, 380-381, 394-397, 408; ARE 60-73) Because of the delay in summoning medical assistance or even notifying Bianca's mother or another responsible adult Bianca had fallen and hit her head, Bianca sat on the sidelines at the rink for hours and then went to bed for several more hours without receiving any medical attention. She went from being conscious with her head hurting and feeling distressed to waking up vomiting and then to her eyes rolling back in her head, followed by respiratory arrest, unconsciousness and death. Together, the testimony of Dr. Segal, Dr. Lucenko, and Dr. Brogden was sufficient, if it were believed over the other conflicting expert testimony, to support the conclusion that Spotlite's negligence was a proximate contributing cause of Bianca's death.

Contrary to Spotlite's arguments, the overwhelming weight of the evidence did not

establish that Bianca Barnes' pre-existing condition was the sole proximate cause of her death. Moreover, the jury was not required to believe or accept as credible that part of the evidence which might have suggested a pre-existing condition was the sole cause of Bianca Barnes' death. *Graham v. State*, 812 So.2d 1150, ¶ 9 (Miss. App. 2002), *Meshell v. State*, 506 So. 2d 989, 992 (Miss. 1987). Moreover, it is not necessary for Spotlite's negligence to be the sole proximate cause of Bianca's death. It is sufficient to support liability as long as it was at least one of the contributing proximate causes. *Kiddy v. Lipscomb*, 628 So. 2d 1355, 1358 (Miss. 1993).

IV. The Flaws in Spotlite's Foreseeability Argument

There are several major flaws in Spotlite's lack of foreseeability arguments. First, Spotlite views what must be foreseeable far too narrowly. It is not necessary for the tortfeasor to be able to foresee and anticipate exactly what transpired or the particular injury resulting from his negligence. "It is sufficient if he could have foreseen that some injury would likely result from his negligent conduct." *Howard Bros. of Phenix City, Inc. v. Penley*, 492 So. 2d 965, 968 (Miss. 1986); *Mathews v. Thompson*, 231 Miss. 258, 95 So. 2d 438 (1957); *Robley v. Blue Cross/Blue Shield*, 935 So. 2d 990, ¶ 21 (Miss. 2006) In this case, for the foreseeability requirement to be met, Spotlite only had to be able to foresee that children inexperienced at skating were likely to fall and hit their heads and hitting a child's head in such a fall could cause serious injury.

Second, Spotlite's argument completely ignores the eggshell plaintiff doctrine. In more than one modern case, the Mississippi Supreme Court has specifically addressed liability of a tortfeasor for damages to a plaintiff with preexisting medical conditions and has adopted what is frequently referred to as the eggshell plaintiff doctrine. In *Deas v. Andrews*, 411 So. 2d 1286

(Miss. 1982), the Mississippi Supreme Court approved as a correct statement of the law a jury instruction stating a tortfeasor takes his victims as he finds them including preexisting conditions. If the fault of a tortfeasor aggravates a preexisting condition or contributes along with a preexisting condition to a more serious injury than would otherwise have occurred, the tortfeasor is liable for the totality of all the injuries which ensue in an unbroken sequence set in motion by the tortfeasor's conduct. *Id.*

Deas involved a situation where an impact with a truck contributed to or set off a clot or blockage of an artery related to pre-existing atherosclerosis in the leg requiring amputation of the leg. Had the victim been healthy and not had the preexisting condition, his leg would not have had to be amputated because of the collision with the truck. But because the tortfeasor takes his victim as he finds him and the amputation flowed from an unbroken sequence set in motion by the collision, the tortfeasor was liable for the amputation.

In this case, substitute the preexisting colloid cyst for the pre-existing atherosclerosis and death for the amputation and you have the same circumstances that existed in *Deas.* If Bianca had not had a colloid cyst, she might not have died as a result of falling and hitting her head at the rink and the rink not summoning medical attention[8]. But just as pre-existing atherosclerosis made the *Deas* plaintiff more likely to lose his circulation when hit by the truck, the preexisting cyst made it more likely Bianca would die when she hit her head and medical attention was not summoned promptly.

Ten years after *Deas*, in *Brake v. Speed*, 605 So. 2d 28 (Miss. 1992), there were two

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[8]But, she might have died even without the cyst as falling and hitting one's head can cause head injuries resulting in brain swelling even with slight head trauma. (T. 756-757)

vehicle collisions less than six months apart and the defendant was only liable for the first. The *Brake* court said:

> We distinguish the instant factual scenario from the situation where one suffers from a pre-existing condition. In the latter case, one who injures another suffering from a pre-existing condition is liable for the entire damage when no apportionment can be made between the pre-existing condition and the damage caused by the defendant - thus the defendant must take his victim as he finds her. It is quite another thing to say that a tort-feasor is liable, not only for the damage which he caused but also for injuries subsequently suffered by the injured person.

605 So. 2d at 33. What happened to Bianca is like what happened in *Deas* rather than what happened in *Brake*.

Spotlite's reliance on *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So.2d 703 (Miss. 2005) is also flawed. *Womack* does not involve a pre-existing medical condition making a plaintiff more susceptible to serious injury from the defendant's negligence than a healthy plaintiff would have been. It involved no exacerbation of an existing condition. Nor did it involve an unusual characteristic or quality of ultimate harm from the kind of injury that can generally be expected from the defendant's negligence.[9] Rather it is concerned with whether an entirely new and unpredictable or unforeseeable condition developing after the alleged negligence was a foreseeable consequence of the defendant's negligence.

Contrary to Spotlite's arguments based on *Womack*, the unusual nature of the colloid cyst and its role in Bianca's particular injury does not relieve Spotlite from liability for exacerbating her condition. A year after *Womack*, the Mississippi Supreme Court decided *Robley v. Blue*

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[9]It should be indisputable brain injury is a foreseeable result of falling and hitting a child's head on a hard surface like a floor. See *Purzycki v. Town of Fairfield*, 244 Conn. 101, 708 A.2d 937 (1998) (child sustaining injury from falling and hitting head while insufficiently supervised foreseeable)

Cross/Blue Shield, 935 So. 2d 990 (Miss. 2006), where it reversed a trial court's ruling the evidence was insufficient to establish the required connection between the defendant's negligence and the plaintiff's injury. In rejecting a similar argument, the Court said:

> Robley's expert medical witness, Dr. Richard Strub, testified to a reasonable degree of medical certainty that this disclosure could have caused Robley increased levels of stress and anxiety. Such an increase, in his opinion, "aggravated" her preexisting migraine headache condition. ... *While it is clear that the injuries alleged by Robley are unusual, their unique nature does not defeat her action.* It is well established in this State, that in order for one to be liable in a negligence action the test is not whether they were able to foresee the particular type of injury suffered, but whether they could foresee an injury would result from their actions. M & M Pipe & Pressure Vessel Fabrications, Inc. v. Roberts, 531 So.2d 615, 618 (Miss. 1988). One could foresee an injury might arise from the unnecessary and unreasonable disclosure of confidential medical records. Therefore, the uniqueness of the injuries claimed by Robley will not defeat her claim.

935 So.2d at 996-997.

State ex rel Richardson v. Edgeworth, 214 So. 2d 579 (Miss. 1968) says the

> pertinent rule is well stated in Prosser, The Law of Torts § 42, at 250-251 (3d ed. 1964):
>
> > Certain results, by their very nature, are obviously incapable of any logical, reasonable, or practical division. Death is such a result, and so is a broken leg or any single wound, the destruction of a house by fire, or the sinking of a barge. No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm. Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it. Here again the typical case is that of two vehicles which collide and injure a third person. The duties which are owed to the plaintiff by the defendants are separate, and may not be identical in character or scope, but entire liability rests upon the obvious fact that each has contributed to the single result, and that no rational division can be made.
> >
> > Such entire liability is imposed both where some of the causes are innocent ... and where two or more of the causes are culpable. It is imposed where either cause would have been sufficient in itself to bring about the result ... and also where both

> were essential to the injury. ... It is not necessary that the misconduct of two defendants be simultaneous. One defendant may create a situation upon which the other may act later to cause the damage. One may leave combustible material, and the other set it afire; one may leave a hole in the street, and the other drive into it. Liability in such a case is not a matter of causation, but of the effect of the intervening agency upon culpability.

214 So. 2d at 588.

The quoted language from *Edgeworth* is clearly applicable to the present case where the ultimate injury is death. As long as Spotlite's failure to provide reasonable supervision failed to prevent a fall that should have been prevented or its failure to summon medical aid when it knew Bianca was injured set in motion or contributed to a series of events leading to her death, it does not matter that the existence of an innocent colloid cyst also contributed to her death. For that matter, even if Spotlite had no duty to prevent the fall, as long as it breached its duty to summon prompt medical aid and the delay in obtaining the proper medical treatment either contributed to her death or the extent of her brain injuries, under *Edgeworth*, Spotlite is responsible for the damages resulting from Bianca's death even though her death cannot be apportioned between Spotlite's conduct and the innocent cyst.

V. The Admission of Expert Testimony on Damages Was Not an Abuse of Discretion

Spotlite's arguments concerning Dr. Carter's economic loss testimony are based on a seriously flawed interpretation of what the holding was in *Greyhound Lines, Inc. v. Sutton*, 765 So. 2d 1269, 1277 (Miss. 2000). *Sutton* is not a ruling on what constitutes sufficiently reliable expert testimony to be admissible under either *Frye* or *Daubert*. It isn't even really an evidentiary ruling at all. It is a substantive legal ruling on what the proper measure of damages is for the loss of the life of a child with no prior work history under our wrongful death statute.

Miss. Code Ann. § 11-7-13 states in a wrongful death action, the wrongful death beneficiaries may recover "all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit." Numerous cases have held "the damages of every kind to the decedent" includes the "the present net cash value of the life expectancy of the deceased." *Estate of Jones v. Howell*, 687 So. 2d 1171, 1178 (Miss. 1996); *McGowan v. Estate of Wright*, 524 So. 2d 308, 311 (Miss. 1988) The element of present net cash value of life expectancy is "the amount that the deceased might have been entitled to as the present net value of his own life expectancy." *Sheffield v. Sheffield*, 405 So. 2d 1314, 1318 (1981); *Dickey v. Parham*, 295 So.2d 284, 285 (Miss. 1974). It is not just the value of services and support the deceased might have provided to his family, for that is a separate element of damages in a wrongful death suit. *Dickey v. Parham*, 295 So.2d 284, 285 (Miss. 1974).

Numerous cases over the years have discussed how the present net value of a decedent's life expectancy is to be measured as a matter of substantive law. It is to be measured by an estimate of projected annual future income of the deceased multiplied by the deceased's estimated work life expectancy less a personal consumption factor for the deceased's personal living expenses and then discounted to a present cash value. *Greyhound Lines, Inc. v. Sutton*, 765 So. 2d 1269, 1275 (Miss. 2000) citing *Sheffield v. Sheffield*, 405 So. 2d 1314, 1318, (Miss. 1981); *Jones v. Shaffer*, 573 So. 2d 740, 742 (Miss. 1990)

The purpose of our wrongful death statute is to advance the public and social policy of this state in protecting life. That policy should not be thwarted merely because there are difficulties in accurately assigning a specific amount to damages. *Federal Credit Union v. Tucker*, 853 So.2d 104, ¶ 29 (Miss. 2003) Thus, *Tucker* allowed wrongful death damages for an

unborn fetus. To hold otherwise would allow tortfeasors a windfall by allowing those who kill children who haven't begun the major earning years of their life to avoid paying for the lost future productive life of those they kill. That is clearly not the policy of the State of Mississippi.

To avoid a possible windfall to tortfeasors based on the difficulties of proving a child's projected annual future income in the absence of past income, *Sutton* created a rebuttable substantive presumptive for valuing the life of a child.

> [W]e hold that in cases brought for the wrongful death of a child where there is no past income upon which to base a calculation of projected future income, there is a rebuttable presumption that the deceased child's income would have been the equivalent of the national average as set forth by the United States Department of Labor.

765 So.2d at 1277. In selecting the national average for all workers without regard to educational level, the *Sutton* court specifically rejected some of Spotlite's arguments that factors relating to specific characteristics of a child or his community should be considered to reduce the child's projected future income. The court's reasoning was that

> [t]oday's society is much more mobile than in the past. Additionally, there are many more educational and job-training opportunities available for children as a whole today. We must not assume that individuals forever remain shackled by the bounds of community or class.

Id. The average selected by the *Sutton* court includes people who graduated from college and probably comes up with a figure that is usually earned by someone who graduated from college, but the actual number is achieved by averaging in people who did not obtain a college education as well as those who obtained post-graduate and professional educations and command much higher salaries. It is a presumption that disregards educational level.

Sutton made the presumption rebuttable and listed the types of factors that may be used to rebut the presumption. It can be rebutted or modified by

> testimony regarding the child's age, life expectancy, precocity, mental and physical health, intellectual development, and relevant family circumstances. This evidence will allow the litigants to tailor their proof to the aptitudes and talents of the individual's life being measured.

Id at 1277. The rebutting testimony is specific to the individual decedent. The presumption evidence is not specific to any one individual but rather is a national average using figures regularly compiled by the U.S. Department of Labor – a figure for a hypothetical individual.

This presumption is the same type of rule that creates a presumption of undue influence in confidential relationship inter vivos gift cases and shifts the burden of proof to the proponent of the gift to overcome the presumption of undue influence once the confidential relationship is proved. The opponent of the gift makes out a prima facie case to void the gift by proving the confidential relationship. The opponent then gets the benefit of the presumption against the validity of the gift and the burden shifts to the proponent to present evidence of good faith, knowledge and deliberation and independent consent and action to overcome the presumption. See *Whitworth v. Kines*, 604 So. 2d 225 (Miss 1992); *Cupit v. Pluskat (In re Estate of Reid)*, 825 So. 2d 1, 5-6 (Miss. 2002). Under *Sutton*, once a plaintiff presents evidence of the average national wage without regard to education, he has made out a prima facie case for damages and gets the benefit of the presumption. Unless he wishes to argue for a higher number, he need produce no further evidence under *Sutton*. The presumption that the child's projected annual future income is equivalent to the national average for all workers is no more affected by *Daubert* than the presumption of undue influence upon proof of a confidential relationship is affected by *Daubert*.

Sutton also addressed the two other major objections raised by Spotlite to Dr. Carter's assumptions – the consumption rate and the use of hypothetical families. *Sutton* held it is proper

to use hypothetical spouses in calculating adjustments to the average gross income calculated by the Department of Labor. Specifically, the court held that there was no error in reducing the personal consumption rate based on the assumption that a child would have married a hypothetical spouse and that according to government figures the personal consumption rate for a married person is less than for a single person because shared living expenses are lower. The *Sutton* court specifically upheld the use of a personal consumption rate of 30% for a married person based on studies by economist Earl Cheit. Moreover, the court held that the consumption rate was simply another factor which could be argued by the parties for purposes of increasing or decreasing the presumption that the deceased child's income would have been equivalent to the national average. 765 So. 2d 1269 at ¶¶ 24-27

Sutton is not a one time decision or an aberration in the law. In *Classic Coach, Inc. v. Johnson*, 823 So. 2d 517 (Miss. 2002), the Mississippi Supreme Court reiterated its holding that the presumptions of national averages apply when a decedent dies before completing his education and establishing an adult permanent wage base. It also reaffirmed the validity of using a 30% personal consumption rate for someone who had not yet married based on the assumption that the person would either marry or share living expenses with a roommate.

Theoretically, since the figures used under *Sutton* come from federal government publications, a plaintiff could meet the burden of proof on damages without an expert by introducing the government publications containing the charts of average income and personal consumption and requesting a jury instruction giving the formula for figuring out projected future inflation and discounting to present value and giving the jury a calculator. However, since most jurors are not in the habit of doing inflation and present value calculations on a regular

basis and many would be confused by the formulas, expert evidence which takes those numbers and formulas and does the calculations is of assistance to the jury and therefore admissible under M.R.E. 702.

Daubert doesn't change this substantive law. Nor does it make the methodology used by Dr. Carter in following *Sutton* inadmissible. It is true that Mississippi courts have held that, based on Mississippi federal court decisions, the adoption of *Daubert* will tighten somewhat the admissibility of expert testimony. *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, ¶ 17 (Miss 2001) But *Daubert* does not work a sea of change on the law. *U.S. v. 14.38 Acres of Land, Sit. in Leflore Cty. Ms*, 80 F.3d 1074, 1078 (5th Cir. 1996) And it most certainly does not throw out substantive presumptions adopted by our courts on what the proper measure of damages is. *Daubert* addresses reliability of expert evidence. It has no effect on burdens of proof while the *Sutton* presumption clearly has an effect on burdens of proof.

In *Walker v. Yellow Freight Sys.*, NO. 98-3565, 1999 U.S. Dist. LEXIS 15012 (E.D. La. Sept. 23, 1999), the court applied *Daubert* to a motion in limine to exclude the testimony of an economic expert on the value of economic losses under Louisiana's wrongful death statute. The plaintiff offered the testimony of an economic expert to calculate the "the present cash value of decedent's economic loss." Using information supplied by Plaintiff's counsel, the United States Bureau of the Census, and the United States Chamber of Commerce, the expert projected the present value of the decedent's future income. He estimated the value of decedent's household services based on a study by Janice Peskin, Ph.D. published in 1982 by Family Economic Review. He then estimated a personal consumption allowance based on the study "Injury and Recovery in the Course of Employment" by Earl Cheit published in 1961.

The defendant argued this methodology could not survive *Daubert* because the studies and assumptions used by the plaintiff's expert did not "fit" the facts of the case. The arguments made by the *Yellow Freight* defendant about the plaintiff's economic expert's assumptions were remarkably similar to the defendant's objections in the present case.

> Yellow Freight argues that Mr. Johnson's proposed testimony is unreliable because it is based on "rank" speculation. Specifically, Yellow Freight contends that Johnson should not have based his calculations on the assumption that decedent would attend and complete a four year college because no evidence supports it. Yellow Freight further contends that Johnson should not have calculated the potential economic loss through 2029, as there is no support for the assumption that decedent would have lived at home for twenty years. Yellow Freight refers to the Affidavit of Dr. Boudreaux, who states that available data indicate that it is typical for children to leave their parents' home either at first marriage or when becoming economically independent.

Id at *23-24

The court recognized that there was room to attack the validity of some of the expert's assumptions. Nevertheless, the court held that while such attacks could be weighed by the jury in deciding what weight to give to the expert's testimony, they were not grounds for excluding the testimony under *Daubert*.

> Nevertheless, this potential shortcoming in the expert testimony does not justify its exclusion. In Daubert, the Supreme Court stressed that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the . . . appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596. The Fifth Circuit recently underscored this point when it wrote that the trial court's role as gatekeeper "is not intended to serve as a replacement for the adversary system". United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078 (5th Cir. 1996) (per curiam). Rather, the "perceived flaws" in an expert's testimony often should be treated as "matters properly to be tested in the crucible of the adversarial system", not as "the basis for truncating that process". Id. at 1079. Thus, Yellow Freight's arguments that Mr. Johnson's assumptions are ill-founded should be saved for trial.

Id at *25. See also *Ferrarelli v. United States*, 1992 U.S. Dist. LEXIS 22702 (E.D.N.Y. 1992)

(The method used and the studies relied upon were such that the court found the testimony of both economic experts using methodology similar to Dr. Carter's admissible. It was then up to the trier of fact to assess how much weight to be given to each based on the trier of facts assessment of the assumptions used by each economist.); *Lee v. United States Taekwondo Union*, 2006 U.S. Dist. LEXIS 25559 (D. Haw. Jan. 26, 2006) (claims of unreliability attacking the underlying assumptions made by expert economist, rather than his methodology go to the weight rather than its admissibility of such testimony; holding methodology very similar to Dr. Carter's is admissible under *Daubert* with the alleged speculative nature of the assumption being grounds for rigorous cross-examination rather than exclusion)

Furthermore, even post *Daubert* decisions which reject valuation of hedonic damages testimony as too unreliable under *Daubert* have accepted that expert economic loss valuation testimony based on assumptions using reported statistics for "average persons" are reliable enough to be admissible under *Daubert*. They have found the method itself to be reliable and that the use of average person statistics is also reliable because it is possible using historical data to demonstrate that historic average person data can be validated in retrospect. See *Hein v. Merck & Co.*, 868 F. Supp. 230, 232 (M.D. Tenn. 1994)

The approach used by *Walker v. Yellow Freight Sys, Ferrarelli v. United States, Lee v. United States Taekwondo Union*, and *Hein v. Merck & Co* which following *Daubert* allows an economic expert to testify based on certain assumptions, including average persons and hypothetical spouses and families and average household services hours, and then allows the opposing side to present its evidence arguing the weaknesses of those assumptions, with the trier of fact then deciding the weight to give to the expert's testimony based on its assessment of the

validity of the assumptions in light of all the evidence dove tails nicely with the approach adopted by the Mississippi Supreme Court in *Sutton* and *Classic Coach*. This is further support for the conclusion that the adoption of *Daubert* does not in any way weaken the holdings of *Sutton* or *Classic Coach* or the admissibility of Dr. Carter's economic loss valuation testimony.

Dr. Carter testified that he read *Sutton* and as instructed by Plaintiffs' counsel, he sought out statistics that matched as closely as he possibly could the averages that *Sutton* said applied to the presumption for children without a work history. He did not make assumptions about educational status and then find wage figures to match those levels. He started with the national average wage for all workers regardless of education as instructed by *Sutton*. Then in order to make other adjustments which needed an educational level, such as the deduction of college expenses, he figured out what educational level would most probably correlate to the average wage regardless of education. This actually favored defendants because it resulted in the deduction of four years from Bianca's working life and the deduction of college expenses. (T. 923-940, 943-948, 951-952, 955-956, 958-963)

Dr. Carter was not required to make these deductions under *Sutton* which reduce the presumptive value of Bianca's life. It is Defendants' burden under *Sutton*, and not Plaintiffs', to come up with evidence of factors that would lower the presumptive value and to produce their own expert evidence to show how those factors would reduce Bianca's projected future income. They cannot simply wish the presumption away by questioning the assumptions the presumption is based on and trying to force Dr. Carter to defend the assumptions used in the presumption. There certainly was no abuse of discretion in the trial court's admission of Dr. Carter's testimony on economic damages.

CONCLUSION

Spotlite presents the evidence in this case in the light most favorable to it. While that might be appropriate if the jury had ruled in its favor and it were the Appellee, that approach wholly fails to demonstrate that the jury verdict in this case should be overturned and the trial court's rulings reversed. The rulings and the outcome in this case were entirely within the discretion and province of the trial court and the jury. Accordingly, the judgment below should be affirmed.

THIS, the 10th day of September, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to M.R.A.P. Rule 25(a), I hereby certify that I have mailed the original and three (3) true and correct copies of the above and foregoing Brief of Appellee via First Class U.S. Mail to:

Hon. Betty W. Sephton, Clerk
Supreme Court of Mississippi
P.O. Box 249
Jackson, Mississippi 39205-0249

I further certify that I have mailed a true and correct copy of the above and foregoing Brief of Appellee via First Class U.S. Mail to:

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I further certify that pursuant to M.R.A.P. 28(m), that I have also mailed an electronic copy of the above and foregoing on an electronic disk and state that this brief was written in Wordperfect format.

SO CERTIFIED, this the 10th day of September, 2007.

GEORGE F. HOLLOWELL, JR.