

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2006-TS-00639

UNIVERSITY OF MISSISSIPPI MEDICAL
CENTER AND JOHN DOES ONE THROUGH TEN

APPELLANT

VS.

EARQUELLA WARD

APPELLEE

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

BRIEF OF PLAINTIFF/APPELLEE/CROSS-APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. Earquella Ward, appellee.
2. Gerald J. Diaz Jr., Patrick K. Williams, Gerald J. Diaz Jr. P.A. 125 South Congress St., Suite 1218, Jackson, MS, 39201, attorneys for appellee.
3. Edward Blackmon, Jr., Esq., Blackmon & Blackmon, PLLC, 907 West Peace Street, P.O. Box 105, Canton, MS 39406, attorneys for appellee.
4. The University of Mississippi Medical Center, appellant.
5. Senith Tipton, Esquire and Melanie H. Morano, Esquire, Wilkins, Stephens and Tipton, P.A., P.O. Box 13429, Jackson, MS 39236-3429, attorneys for appellant.

SO CERTIFIED, this the 9 day of February, 2007. -

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STATEMENT OF THE ISSUES

- I. THE TRIAL COURT DID NOT RELY UPON NON-EXISTENT TESTIMONY THAT DEFENDANT BREACHED THE STANDARD OF CARE.**
- II. THE TRIAL COURT DID NOT MATERIALLY MISCHARACTERIZE THE TESTIMONY OF DR. THOMAS AUSTIN.**
- III. THE TRIAL COURT PROPERLY FOUND THAT DR. DAVE DAVID WAS QUALIFIED AS AN EXPERT WITNESS AND THAT HIS TESTIMONY WAS RELEVANT AND RELIABLE.**
- IV. THE TRIAL COURT PROPERLY FOUND THAT THE TESTIMONY PROVED THAT DEFENDANT BREACHED THE STANDARD OF CARE, PROXIMATELY AND FORESEABLY CAUSING MS. WARD'S SEVERE INFECTION AND RESULTING HYSTERECTOMY.**
- V. THE TRIAL COURT DID NOT RELY UPON THE OB/GYN DEPARTMENT'S PRACTICE GUIDELINES AS THE STANDARD OF CARE IN THIS CASE.**
- VI. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A DIRECTED VERDICT.**

STATEMENT OF ISSUES ON CROSS-APPEAL

- I. THE TRIAL COURT FAILED TO ADEQUATELY COMPENSATE PLAINTIFF FOR HER INJURIES AND FAILED TO AWARD DAMAGES TO PLAINTIFF FOR FUTURE MENTAL PAIN AND SUFFERING, FUTURE PHYSICAL PAIN AND SUFFERING AND LOSS OF ENJOYMENT OF LIFE.**

STATEMENT OF THE CASE

Nature of the Case

This is a medical malpractice claim filed pursuant to Miss Code. Ann. §11-46 by Earquella Ward against the University of Mississippi Medical Center.

Course of Proceedings and Disposition Below

Earquella Ward filed her complaint against the University of Mississippi Medical Center on December 31, 2002, for the treatment she received at the University of Mississippi Medical Center which resulted in a serious infection and hysterectomy. (C.P. 7.) Trial of this matter proceeded on October 24, 2005. Judge Tomie Green presided over the bench trial as the trier of fact and law pursuant to the Mississippi Tort Claims Act. Judge Green issued her “Memorandum Opinion and Judgement” on March 15, 2006, with a finding that the physicians at University of Mississippi Medical Center breached the standard of care in their treatment of Earquella and that the breach proximately and foreseeably caused Earquella’s injuries. (C.P. 243) Judge Green awarded damages as follows:

\$52,039.31 for past medical expenses

\$50,000.00 for past physical pain and suffering

\$25,000.00 for past mental and emotional suffering

\$127,040.00 Total Damages awarded

(A.R.E. 6, pp. 9-10)

Statement of the Facts

On March 14, 2002, Earquella Ward was admitted to the University of Mississippi Medical Center (Wiser Hospital) for a scheduled C-Section. The surgery was performed by Dr. Tom Austin (a first year resident) and supervised by Dr. James Martin (attending). (A.R.E. 2, p. 7) On March 18, 2002, Ms. Ward was scheduled to be discharged from the hospital. However, on the morning of her discharge, Ms. Ward was found to have a fever of 102.8 and abdominal tenderness. (A.R.E. 2, pp. 13-14) Dr. Austin diagnosed Ms. Ward with Endometritis (EMM) and withheld her discharge. He then wrote his plan to perform the following tests, a CBC, blood culture and urinalysis as well as his plan to start her on the antibiotic unasyn. (A.R.E. 2, pp. 13-14) Pursuant to the University of Mississippi Medical Center's own practice guidelines, these were the proper laboratory tests to perform for a patient with Endometritis (EMM). Ms. Ward was placed on unasyn, however the CBC, blood culture and urinalysis were **not** performed in direct violation of the proper standard of care. (A.R.E. 2, pp. 16) On March 19, 2002, Ms. Ward's temperature was 100.0. However, the next morning, on March 20, 2002, Ms. Ward was discharged home after being on antibiotics for less than forty eight hours. This violated the standard of care on how to treat a patient with EMM. Ms Ward should have been left on antibiotics until she was symptom free for forty-eight hours. (T. 288-289)

On March 27, 2002, seven days after her discharge, Ms. Ward was seen by a home health nurse, Cantina Wilson R.N. (T. 41-59) Ms. Wilson did an assessment on Ms. Ward and found that she was running a fever of 100.4. (T. 48-52) In addition, Ms. Wilson recorded in her assessment that Ms. Ward had redness, swelling and brown purulent drainage from her incision site. (T. 50) Ms. Wilson also stated that there was an abscess (pus pocket) present and that the wound looked infected. (T. 50) Ms. Wilson instructed Ms. Ward to return to University Medical Center immediately. (T. 52)

Following her instructions, Ms. Ward presented to the OB Receiving unit at the University of Mississippi Medical Center (Wiser Hospital) with a fever of 101.1, and swelling at her incision. (A.R.E. 3, pp. 7) She was seen by Dr. Ty Robinson (a first resident) who was supervised by Dr. James Bofill (attending). Dr. Robinson examined Ms. Ward and noted the fever and swelling at the incision site. Contrary to the testimony of Cantina Wilson, Dr. Robinson testified that there was no purulent drainage from her incision. Dr. Robinson, however, admitted in his deposition testimony that if there had been purulent drainage on that day then he would have had to order a CBC and placed Ms. Ward on I.V. antibiotic therapy. (A.R.E. 3, pp. 10-11) It is an uncontested fact that neither were done in direct violation of the standard of care. Dr. Robinson stated in his deposition that he did not know that Ms. Ward had been diagnosed with an infection a week earlier and that she had been put on antibiotics. (A.R.E. 3, pp. 10) Dr. Robinson did not order a CBC, blood culture or wound culture. Dr. Robinson opened and drained the incision and discharged Ms. Ward on oral keflex, an antibiotic. (A.R.E. 3, pp. 12) Oral keflex was not the proper antibiotic or route for the type and severity of infection Ms. Ward was experiencing according to plaintiff expert, Dr. David. Ms. Ward went home and following the physician's advice, took her medication and cleaned her wound with peroxide and Q-tips. The wound closed over and Earquella continued with her wound care and dressing change.

On April 5, 2002, eight days after her wound check, Ms. Ward collapsed on the floor of her bathroom with vaginal bleeding. (T. 349-351) She was carried by her father to the car where she was rushed to Central Mississippi Medical Center emergency room. (T. 350-351) She was seen by Dr. Walter Wolfe who assessed her and recognized this as a life threatening infection. (T. 138-146) Dr. Wolfe diagnosed Ms. Ward with an abdominal and uterine abscess. Dr. Wolfe performed surgery

on Ms. Ward to clean out the infection but because of the severity of the infection he had to perform a hysterectomy.(T. 145)

As a direct and proximate cause of the negligence of the Defendant, Ms. Ward suffered a hysterectomy as well as severe physical and emotional pain and suffering. Ms. Ward also incurred \$52,039.31 in medical bills. Trial of this matter commenced on October 24, 2005. Following the conclusion of this matter, the Trial Court entered its judgement and found that the Defendant was 100% liable for the damages of Ms. Ward and awarded a judgement in the amount of \$127,040.

SUMMARY OF THE ARGUMENT

Defendant's main argument on appeal is that Plaintiff's expert, Dr. Dave David, was not qualified to testify as an expert, and that the defendant's expert testimony was more reliable. However, defendant's arguments are not supported by the facts or the law. Dr. David testified that he is a board certified physician in the field of Obstetrics and Gynecology. He graduated from the University of South Florida Medical School and did his internship at Harvard Medical School. He completed his residency in Obstetrics and Gynecology from Tufts University in 1982. As briefed fully below, Plaintiff's provided substantial and credible expert testimony that Defendant breached the standard of care and proximately caused Ms. Ward' injuries, including but not limited to a hysterectomy. In the battle of the experts, the trial court found that the plaintiff's prevailed. Therefore, the defendant's appeal should be denied.

Defendant also seek to change the standard of review for this appeal to one of de novo. This Court's standard of review of a trial judgement entered following a bench trial is well settled, "A circuit judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor," and his findings are safe on appeal where they are supported by

substantial, credible and reasonable evidence. City of Jackson v. Perry, 764 So. 2d 373, 376 (Miss. 2000) (citing Puckett v. Stuckey, 633 So. 2d 978, 982 (Miss. 1993).) Regardless of deference however, the trial court's findings with regard to expert witness Dr. Dave David are well supported by the facts and applicable law. The Defendant's make no credible argument and cite no applicable case law to support their contention that this verdict deserves a de novo review and should be overturned.

ARGUMENT

I. THE TRIAL COURT DID NOT RELY UPON NON-EXISTENT TESTIMONY THAT DEFENDANT BREACHED THE STANDARD OF CARE AND THE DEFENDANT WAS NOT "AMBUSHED" BY UNDISCLOSED TESTIMONY

The Defendant makes two contradictory arguments in their first issue for appeal. They argue that Judge Green relied on non-existent testimony to reach her conclusions in this case and then argue that Plaintiff "ambushed" Defendant with this non-existent testimony by not disclosing the testimony in her discovery responses. (Brief for Appellant pg. 14,16) It is apparent that if the testimony in which Defendants admit never occurred, then Plaintiff can not be alleged to have ambushed the Defendant. (Brief for Appellant p. 16) The trial transcript of Dr. Wolfe clearly shows that he did not testify about the treatment Ms. Ward received during her admission to University of Mississippi Medical Center. Dr. Wolfe did testify to the treatment he rendered to Ms. Ward, including but not limited the need to perform a hysterectomy in order to save Ms. Ward's life. (T. 145,150-152) Dr. Wolfe's opinion was given in full to Defendant prior to trial. Therefore Defendant's argument on this issue is without merit.

Defendants second issue is that Judge Green relied on non-existent testimony to reach her opinion. However, the record is clear that Judge Green was provided substantial and overwhelming evidence that Defendant breached the standard of care and caused Ms. Ward's injuries through their medical expert Dr. Dave David.

As with any negligence case "[r]ecovery in a negligence action requires proof by a preponderance of the evidence of the conventional tort elements: duty, breach of duty, proximate causation, and injury (i.e., damages)." *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So. 2d 1346, 1354 (Miss. 1990). In addition, the Supreme Court has also defined the standard of care to be met in a medical malpractice claim as follows: "given the circumstances of each patient, each physician has a duty to use his or her knowledge and therewith treat through maximum reasonable medical recovery, each patient, with such reasonable diligence, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States, who have available to them the same general facilities, services, equipment and options." *Hall v. Hillburn*, 466 So. 2d 866, 873 (Miss. 1985).

Dr. David testified that based on a reasonable degree of medical probability and certainty the physicians who treated Ms. Ward deviated from the standard of care and that said breach proximately and foreseeably caused damage to Ms. Ward, including but not limited to a hysterectomy. (T. 285, 287, 288, 289) Dr. David testified that the physicians caring for Ms. Ward breached the standard of care by not properly evaluating, diagnosing and treating her post-op infection. (T.261,262, 326, 327) Dr. David further testified that the physicians caring for Ms. Ward breached the standard of care by not performing a CBC, blood culture and wound culture on Ms. Ward after her fever on March 18, 2002, and on the March 27, 2002, visit to the OB Receiving unit

at Wiser Hospital.(T. 257, 258, 261, 262,262, 268, 269,270,274, 275) Dr. David also testified that the physicians caring for Ms. Ward breached the standard of care by not leaving Ms. Ward on the I.V. antibiotics until she was free of symptoms for forty eight hours, following her fever on March 18, 2002. (T.288, 289) Dr. David testified that the physicians caring for Ms.Ward breached the standard of care by not admitting Ms. Ward to the hospital on March 27, 2002 for I.V. antibiotic therapy. (274-277) Dr. David testified that Ms. Ward’s resulting hysterectomy and damages was proximately and foreseeably caused by Defendants negligence.(T 280, 282, 284, 285)

Based on the fact that Dr. David did testify to the negligent treatment Earquella received while at University of Mississippi Medical Center and on every issue alluded to in the Memorandum Opinion and Judgement of the Trial Court, it is apparent that the Trial Court made a typographical error when it asserted that Dr. Wolfe provided this testimony. The Trial Court had substantial and overwhelming expert testimony to support it’s verdict in this case and therefore the defendant’s appeal should be denied.

II. THE TRIAL COURT DID NOT MATERIALLY MISCHARACTERIZE THE TESTIMONY OF DR. THOMAS AUSTIN.

Defendant argues that the trial court mischaracterized the testimony of Dr. Austin by stating that the tests he ordered but failed to carry out, were necessary and would have ensured that Ms. Ward receive proper treatment. Defendant’s entire argument that the Trial Court’s verdict should be reversed is based on the Court’s paraphrasing of the testimony of Dr. Austin by use of the words “necessary to confirm his diagnosis”. (A.R.E. 6, p. 5, Appellant Brief p. 17) Dr. Thomas Austin was a resident physician who performed Ms. Ward’s caesarean section and examined her following her

temperature spike on March 18, 2002. It is an undisputed fact that Dr. Austin wrote orders for a CBC, urinalysis and blood cultures. It also undisputed that these tests were never carried out. Dr. Austin's deposition was taken on March 29, 2005, and was introduced as evidence in this trial. In that deposition, Dr. Austin confirmed that he did write the orders but they were never done:

Q. Let me take you to - - this is Bates-stamped 44. And at the bottom of the page it says, "additional notes 3/18/02." Is that your signature at the bottom of the page?

A. Yes, sir.

Q. Okay. Can you read for me your note there?

A. Okay. I said "her maximum temperature was 102.8 at 7 a.m. Her lungs were clear to auscultation bilaterally. Her incision was clean dry, and intact. Her abdomen was soft. She had moderate fundal tenderness to palpation." that means the top part of the uterus was tender. And then I said "will check CBC"--which is a complete blood count--"urinalysis, blood culture, and start Unasyn for endomyometritis, EMM."

(A.R.E. 2, pp.13-14)

Q. Okay do you know if they were done?

A. From my review of the records, they were not.

Q. Do you know why?

A. No, sir.

Q. Did you ever ask any of the staff why the CBC and blood culture was not done?

A. That would be speculation on my part. I don't remember asking anyone.

(A.R.E. 2, p.16)

Dr. Austin also testified that he thought the blood cultures were important because if the organism you are treating is not sensitive to the antibiotic you are giving then you might need to change it.

Q. Okay. Why did you order a blood culture?

A. Sometimes if the antibiotics are not working, you can look at the blood culture and try to get more information.

Q. Can you explain that? What information are you looking for?

A. If you culture someone's blood and the antibiotics that you are

using—excuse me. Let me start over. If you culture someone's blood and they have an organism which is not sensitive to the antibiotic you're giving them, you might need to change it.

Q. Okay. So blood culture could grow an organism that might be treated by a different antibiotic than you prescribed?

A. Right.

Q. Did you deem those tests medically necessary?

Ms. Tipton: Objection—excuse me. Go ahead.

Q. Is that why you ordered them?

Ms. Tipton: Object to the form of the question. You can answer it if you understand it.

A. I thought, at the time, that they would be helpful.

(A.R.E 2, pp.15-16)

This is a very important admission by Dr. Austin. As explained by plaintiff's expert Dr.

David:

Q. And is that important to make a determination what type infection or culture you're dealing with?

A. The cultures?

Q. Yes.

A. Oh, yes, they're essential.

Q. And does that give you useful information to make a determination what type culture you're dealing with?

A. Oh, yes. I mean that's the only way you can tell but you won't know until you get a culture.

Q. Did Dr. Robinson do that at the Wiser Clinic?"

A. I don't believe so.

Q. Are you critical of his procedure?

A. Of not getting the cultures?

Q. Yes.

A. Yes, I am.

Q. Do you think he should have done anything else?

(T. pg. 276)

- A. Well definitely the cultures, definitely opening up the wound significantly, irrigating it out, washing it out, start on IV antibiotics, get complete good count so you have a baseline in case it's -- to see if she's getting better or worse.
- Q. Do you think that would have arrested the infection?
- A. Well, certainly cleaning it out. didn't completely arrest it, you may need the good antibiotics with that at that point.
- Q. And do you think his conduct fell below the standard of care?
- A. Yes, I do.
- Q. Do you have an opinion based on a reasonable degree of medical probability as to whether or not this conduct breached the standard of care?
- A. Yes, I do.
- Q. And what is that opinion?
- A. **It did breach the standard of care.**
(T. 277) [emphasis added]

He also later testified:

- Q. When Ms. Ward was at the University Medical Center if they had performed a CBC and a wound culture and started her on the right antibiotic, would it have avoided and cured this condition that she later suffered with?
- A. More likely than not it would have.
- Q. And is that your opinion based on a reasonable degree of medical probability?
- A. Yes, it is
(T. 282)

It is an uncontested fact that Dr. Austin wrote down his plan to perform a CBC, blood culture and urinalysis and that he felt these testes were necessary. Based on the testimony by Dr. David that this failure fell below the standard of care and proximately caused Earquella's injuries, the Trial Court's verdict should be upheld.

III. THE TRIAL COURT PROPERLY FOUND THAT DR. DAVE DAVID WAS QUALIFIED AS AN EXPERT WITNESS AND THAT HIS TESTIMONY WAS RELEVANT AND RELIABLE.

A. The standard of review in this case is not “de novo” or heightened scrutiny as the Defendant argues.

Beginning on page 3 of defendant’s brief, they argue this court should enlarge the standard of review applicable to the factual findings of a trial court beyond this Court’s pronouncements in *City of Greenville v. Jones*, 925 So.2d 106 (Miss. 2006) and prior cases. In *City of Greenville, Id.* at ¶ 21 this Court stated:

It is hardly uncommon and **certainly altogether appropriate** for our overworked and understaffed trial judges to make a request similar to the one made by the trial judge in this case-request that each party's attorney send a proposed findings of fact and conclusions of law (FOFCOL) to facilitate the trial judge's ultimate entry of an opinion and order/judgment. Certainly, with today's computer technology, disks can also be sent (as was requested by the trial judge in this case). Upon receipt of these disks with the proposed FOFCOL, a trial judge and the judge's law clerk/staff attorney can then "cut and paste" into an opinion which is indeed the original work product of the trial judge, albeit containing perhaps verbatim portions of the proposed FOFCOL submitted by the respective attorneys. The only caveat we have issued to our trial judges when utilizing this method of generating an opinion is that if it appears to this Court on appeal that a trial judge has **adopted verbatim** the proposed FOFCOL submitted by one of the parties, by and through counsel, we will stray from our deferential treatment of a trial judge's findings of fact and instead apply a heightened scrutiny or de novo review. [emphasis added].

Defendants argument should be rejected first because they cite no authority for enlarging the standard. Defendants also make no valid factual or logical argument for changing the law with regard to the standard of review. In this case Defendants concede that the Trial Court’s findings were not “verbatim” of any submission by plaintiff’s counsel. Defendants only argue that the trial court’s findings in this case were “**almost**” verbatim of a counsel’s submission. (See page 20 of Defendant’s brief) In the case cited by Defendant, *Rice Researches, Inc. v. Hiter*, 512 So. 2d 1259,

1265 (Miss. 1987), the Court stated that it would not review the case de novo based on the fact that the trial judge adopted “**almost verbatim**” the Defendant’s proposed findings of fact. The Court wrote:

“Still, we cannot and will not review this case de novo. Obviously, the Chancery Court was of the view that over all Defendants Williams, et al., had the better of the battle. That determination is entitled to deference, though sensibly not as much as in the ordinary case” Rice Researches, Inc. v. Hiter, 512 So. 2d 1259, 1265 (Miss. 1987)

As the Defendants readily admits, the Trial Court’s opinion was not verbatim and therefore the higher standard should not be applied. Defendants essentially ask this court to become a trial court in every case where a trial judge utilizes the winning digital submissions of a party to save the court time. Such a precedent would do violence to the hierarchy of our judiciary and should be rejected.

B. Dr. David was properly found to be an expert witness.

This Court’s standard of review of a trial judgement entered following a bench trial is well settled, “A circuit judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor,” and his findings are safe on appeal where they are supported by substantial, credible and reasonable evidence. *City of Jackson v. Perry*, 764 So. 2d 373, 376 (Miss. 2000) (citing *Puckett v. Stuckey*, 633 So. 2d 978, 982 (Miss. 1993).) Regardless of deference however, the trial court’s findings with regard to expert witness Dr. Dave David are well supported by the facts and applicable law.

During the course of the trial Dr. Dave David testified extensively to his qualifications as an expert in the field of Obstetrics and Gynecology. Dr. David graduated in 1974 from the University of Florida with honors in the field of chemistry and zoology.(A.R.E.1, pp. 1-3, T. 237-241) He then

went on to the University of South Florida Medical School in Tampa, Florida. There he graduated in three years and was president of his class. (A.R.E.1, pp. 1-3, T. 237-241) Dr. David continued his study with an internship in a combined program through Tufts University and Harvard University in Boston. (A.R.E.1, pp.1-3, T. 237-241) He finished his internship in 1979. He then completed a three year residency program and began a private medical practice in 1982. (T. 239) He testified that during the course of his practice that he had performed thousands of cesarean sections. (T. 243) He is currently licensed to practice medicine in the Commonwealth of Massachusetts and formerly California. (A.R.E. 1, pp.1-3, T. 237-241) He is a member of the America Medical Association, the Norfolk County Medical Society and the New England Obstetrical Society. (A.R.E.1, pp.1-3, T. 237-241) He was also a member of the American College of Obstetrics and Gynecology. (A.R.E. 1, pp.1-3, T. 237-241) He testified that he was board certified in Obstetrics and Gynecology and was recertified in 1996. (A.R.E.1, pp. 1-3, T. 237-241)

Following Dr. David's testimony regarding his qualifications, he was tendered to the Court as an expert in the field of Obstetrics and Gynecology. After Defendant's counsel was given an opportunity to voir dire the witness on his qualification, the Court found the witness was qualified to testify as an expert in the field of Obstetrics and Gynecology based on his ample education, training, and experience. (T. 256) In addition, Defendants cite no authority for their argument that Dr. David is not an expert in the field of Obstetrics and Gynecology. Therefore the Trial Court's finding that Dr. David was an expert in the field of Obstetrics and Gynecology should be upheld.

C. Dr. David's testimony against UMMC was relevant and reliable.

As previously discussed above, Dr. David was qualified as an expert and gave substantial and credible testimony to the fact that UMMC breached the standard of care. The Defendant's

alleged evidence of inconsistencies in Dr. David's testimony, in reality only show that Defendant's disagreed with his opinion.

Defendants points to eight areas where they claim Dr. David based his opinion on incorrect facts. (Defendant's brief p 25-25) Each issue is rebutted as follows:

1. Dr. David testified that it was a breach of the standard of care not to leave Ms. Ward on antibiotics for 48 hours. It is an uncontested fact that she was on Unasyn for only 42 hours.(T. 288-289)
2. Dr. David did not confuse the presentation of March 18-20 with her presentation of March 27. A careful reading of his testimony shows correctly that Ms. Ward should have been worked up for Endometriosis by performing a CBC and cultures. Defendants argument is a mischaracterization of Dr. David's testimony. (T. 285-287)
3. Dr. David properly pointed out that Ms. Ward was eventually diagnosed with an ileus and for that reason a proper diagnosis and treatment during her March 18-20 admission would have shown this fact. (T. 286-287, 313-314)
4. Dr. David testified that he reviewed the medical records of the March 27 admission and therefore was aware of the treatment rendered by Dr. Robinson. (T. 256) Dr. David was specifically asked about the observations of Cantina Wilson and therefore his answer reflects that. (T. 270-277)
5. Dr. David did not state in any of testimony cited by the Defendant that Dr. Robinson did not open the wound. Dr. David did state that it should have been done but only in conjunction with a wound culture and proper antibiotic treatment.(T. 274-277)
6. Dr. David testified correctly that the wound did contain purulent drainage on March 27, based on the testimony of Cantina Wilson and Earquella Ward. (T. 50, 344).
7. Dr. David's testimony on (T. 322) was regarding Ms. Ward's WBC at CMMC, after the alleged negligence had occurred at UMMC. Dr. David went on to testify correctly that Ms. Ward's entire CBC was not within normal limits based on the WBC and platelet count.(T.322-325)
8. Dr. David's correctly stated that Ms. Ward did not have fever when the history and physical were taken. (T. 325) In addition, her April 5, presentation to the CMMC was after any negligence committed by the Defendant Physicians. Therefore, the testimony did not involve any element of negligence that Dr. David testified to.

The following points Defendant claims show inconsistencies in Dr. David's testimony.

(Defendant's Brief Pg. 25- 26) Each issue is rebutted as follows:

1. Defendant is again saying Dr. David's testimony is inconsistent because their experts disagree with his opinion. Dr. David properly and correctly testified that these tests were needed in order to properly diagnose and treat Ms. Ward. (T. 262-267, 287, 315-316)
2. Dr. David's testimony must be read in context with the questions that were asked of him. Dr. David testified that unasyn was proper on March 18 "**depending on the specific organism**"(T. 283) His later testimony that Unasyn was not proper was based on the fact that MRSA was found to be the organism causing Ms. Ward's infection and that unasyn would not treat this particular bacteria. (T. 269-270, 282))
3. Again, a careful reading of Dr. David's testimony shows that he testified that once MRSA was diagnosed, Unasyn would not be the proper antibiotic .(T. 283)
4. Dr. David did not testify at any time that Dr. Austin breached the standard of care by not diagnosing EMM but that they **did** breach the standard of care in the diagnosing and treatment of the particular type of infection that she had and not using the appropriate antibiotic to cure her.(T. 283-288)
5. Dr. David correctly testified that not doing a urinalysis breached the standard of care. (T. 258, 262-263, 266-270, 319)
6. Dr. David's testimony is not inconsistent. A CBC should have been done to comply with the standard of care so that the appropriate antibiotics could have been given and the seriousness of her infection been diagnosed.(T. 258, 262-263, 266-270, 282)
7. Defendants categorically mischaracterized Dr. David's testimony. Dr. David properly testified that elevated WBC indicates infection but he clarified that in addition to an elevated WBC count the physician must also look at the platelet count.(T. 322-325)
8. Dr. David's testimony is not contradictory. He clearly testified that in order to properly diagnosis and treat Ms. Ward for EMM that both blood cultures and uterine cultures should have performed. It is an uncontested fact that neither were done.(T. 262-263, 266-270, 282-283)
9. Dr. David correctly testified that Ms. Ward had fever of 102.8 on March 18.(A.R.E 2, 13-14, T. 257, 267, 318)

10. Defendants again mischaracterizes Dr. David's opinion. Dr. David testified that cultures were required to identify the particular organism you are dealing with so that the appropriate antibiotic regimen can be started. (T. 282-285)
11. As previously discussed, Dr. David correctly testified that the primary reason cultures were so important were to diagnose what type of organism you were dealing with and give the appropriate antibiotic.(T. 282-285)
12. Dr. David clearly states that Ms. Ward did have an MRSA infection and that the proper antibiotic was vancomycin. (T. 282-284) Dr. Walter Wolfe also agreed with this opinion. (T. 160-162)
13. Dr. David testified that Defendant breached the standard of care based on is experience, knowledge, and training as a physician in Obstetrics and Gynecology.

The Plaintiff produced substantial and credible evidence that Defendants breached the standard of care and caused Ms. Ward' injuries. The Defendants can produce no alleged mistake, inconsistency, or contradiction that rises to the level of reversible error in this case. Therefore, substantial evidence exists to support the verdict in this case.

IV. THE TRIAL COURT PROPERLY FOUND THAT THE TESTIMONY PRODUCED, PROVED THAT DEFENDANT BREACHED THE STANDARD OF CARE, PROXIMATELY AND FORESEEABLY CAUSING MS. WARD'S SEVERE INFECTION AND RESULTING HYSTERECTOMY ON APRIL 5, 2004.

A. Dr David did establish by expert testimony that the physicians at UMMC breached the standard of care on March 18-20, 2004, and March 27, 2004.

During her admission to UMMC on March 14-20, Earquella Ward developed a post-op infection. It is an uncontested fact that Dr. Austin wrote orders for a CBC, urinalyses and blood cultures. (A.R.E. 2, p.16) It is also an uncontested fact that these tests were never carried out. (A.R.E. 2, p.16) Dr. David testified clearly that these tests were necessary to meet the standard of care in

order to determine the seriousness of Ms. Ward's infection and determine the type of organism that was causing her infection. (T. 261-270,274,275 326,327) Dr. Austin skipped directly to the treatment of the infection with the I.V. antibiotic unasyn without knowing what type of infection he was dealing with. In addition, the physicians at UMMC only left her on the antibiotics for 42 hours which Dr. David testified was not long enough to adequately treat her infection even if the proper antibiotic was used.(T. 288,289) Dr. David testified that I.V. antibiotics should continue for 48 hours in order to meet the standard of care. (T. 288,289) Ms. Ward was sent home with her infection still present.

That is why seven days later, on March 27, she returned to UMMC with a fever and purulent discharge from her incision.(T. 41-59) The physicians had a second chance to properly treat Ms. Ward. However, the Doctors at UMMC **again failed to perform** the most basic tests to properly diagnose her infection. They performed **no CBC, no blood culture and no wound culture.**(A.R.E. p.12) Therefore, they had no idea what type of infection they were dealing with and what type of antibiotics should be used. They sent her home on the oral antibiotic keflex. (A.R.E. 3, p. 12) This antibiotic, according to Dr. David was woefully inadequate to treat the seriousness of Ms. Ward's infection. (T. 274-277) In addition, Dr. Walter Wolfe, the physician who performed the hysterectomy on Ms. Ward, testified that oral keflex would not be the drug of choice to treat Ms. Ward's infection. (T. 162) Not surprisingly, one week later, Ms. Ward collapsed on the floor of her bathroom with severe vaginal bleeding. She was rushed to Central Mississippi Medical Center where she was seen by Dr. Walter Wolfe. Dr. Wolfe **did** run the proper testes to diagnose Ms. Ward. Dr. Wolfe **did perform a CBC, he did perform a blood culture and he did perform a wound culture.**(T.138-146, 160) All of the things that the physicians should have done at UMMC. Dr. Wolfe diagnosed Ms. Ward with a severe abdominal/uterine infection. But by this time it was too late to save her

uterus. Her infection had become so severe that parts of her uterus had actually collapsed. (T. 150-152) Dr. Wolfe testified that he had to remove clumps of dead and necrotic tissue from her abdomen.(T. 150-152) He had to perform a hysterectomy in order to save Ms. Ward's life. (T. 145) Due to the negligent and careless treatment Ms. Ward received at UMMC, she had to undergo a painful and serious abdominal hysterectomy and will never be able to have children at the age of twenty. (T. 157)

The medical record and testimony plaintiff submitted as at trial provided ample and credible evidence that the Defendant's breached the standard of care, proximately and foreseeably causing Ms. Ward's severe infection and resulting hysterectomy. Therefore the Trial Court's verdict should be upheld.

B. Dr. David did establish that the Defendant's breached the standard of care and that these breaches proximately and foreseeably caused Ms. Ward's hysterectomy.

As previously discussed, Dr. David provided ample and credible testimony that the Defendant's breached the standard of care, proximately and foreseeably causing Ms. Ward's severe infection and resulting hysterectomy. Dr. David testified as follows:

Q. When Ms. Ward was at the University Medical Center if they had performed a CBC and a wound culture and started her on the right antibiotic, would it have avoided and cured this condition that she later suffered with?

A. More likely than not it would have.

Q. And is that your opinion based on a reasonable degree of medical probability?

A. Yes, it is.

- Q. Now, the wound culture actually grew an organism called staphylococcus aureus, MRSA?
- A. Correct.
- Q. And underneath this we have the antibiotics?
- A. Yes.
- Q. And I see one on there is Vancomycin?
- A. Right .
- Q. Is Vancomycin the right appropriate antibiotic to treat her condition?
- A. Right. I mean there could have been others that it was also sensitive to, but Vancomycin is usually great for staph.
- Q. How about Unasyn, would it have treated this MRSA?
- A. A lot of times it will. But depending on the specific organism, it won't. And that's why you get the sensitivities and find out whether it will. It certainly wasn't a bad choice to start off with at that time. I have no quarrel with him, you know, using Unasyn at the point, but you've got to follow-up. I mean a human *body* is different and every organism is different.
- Q. Well, knowing what we know now that this is MRSA after she did a wound culture -
- A. I'm sorry, sir?
- Q. Knowing that it is MRSA, would Unasyn be effective against that type infection?
- A. Usually not.
- Q. And why not?
- A. Well, Unasyn is a combination between

Ampicillin which most people have heard of and something called Sulbactam which is another -- sort of another derivative of an antibiotic which is supposedly effective in getting staph and other organisms. But over the years it's been used a lot. And oftentimes it doesn't really cover the staph that it was hoped to cover.

Q. Okay. And Dr. Robinson when he released her from the clinic, he prescribed Keflex. Is Keflex an appropriate treatment for an MRSA?

A. No, it's not.

Q. And why not?

A. Well put it this way, depending on what kind of an infection you're treating. If you're treating a urinary tract infection or staph and the pimples in the face, Keflex could be fine because it does cover staph very often. It's not so much Keflex versus another antibiotic. It's the fact that Keflex is only PO or by mouth. It's only pills or capsules, and that doesn't hack it when you're treating a wound infection. It's worthless. So it's not so much Keflex versus another pill. It's a pill versus parenteral which means intramuscular injections or IV antibiotics. The pills won't do you any good with a wound infection. You have to say either she's got a wound infection and she needs to be treated, or she's got nothing and I don't treat her at all. But you don't hedge and just say here are some pills.

Q. And this is 4/21. On the final diagnosis, and this is a surgical pathology report, it states that she has exuberant chronic endometritis. That's

Dr. Wolfe's -- I'm sorry, the pathology report -

A. Yes it is.

Q. -- from the hospital?

A. Yes, sir.

Q. Do you have an opinion based on a reasonable degree of medical probability as to whether or not that condition existed when Ms. Ward was in the hospital at the University of Mississippi Medical Center?

A. Yes, I do.

Q. And what is your opinion?

A. It existed. I don't think there's any question about that.

Q. And do you have an opinion based on a reasonable degree of medical probability as to whether or not the University of Mississippi breached the standard of care when they failed to treat her endometritis appropriately?

A. Yes.

Q. And what is your opinion?

A. **They breached the standard of care.**

Q. And they breached it by -- how did they breach it?

A. By not recognizing that she had it or could have had the condition working it up like we talked about earlier with cultures and so forth and treating it and starting the antibiotics subsequent to taking cultures.(T.282-285) (emphasis added)

He concluded his testimony as follows:

REDIRECT EXAMINATION

BY MR. DIAZ

Q. Doctor, do you have an opinion based on a reasonable degree of medical probability that the failure to perform the CBC, a urinalysis, and a blood culture and subsequently failure to diagnose the source and origin of Ms. Ward's medical condition and subsequent failure to properly treat her infection fell below the standard of care? And that the failure to properly treat proximately caused Ms. Ward's need for surgery and a hysterectomy?

A. Yes, I do have an opinion.

MR. STEPHENSON: Your Honor, I object.

THE COURT: What's your objection?

MR. STEPHENSON: It was about seven questions, but all seven of them were asked -- I mean but they've all been asked and answered.

THE COURT: Sustained.

Q. Do you have an opinion whether or not Ms. Ward's condition was -- subsequent treatment was proximately caused by the negligence of the University Medical Center?

MR. STEPHENSON: Same objection.

THE COURT: Objection overruled. I'll allow him to ask that one more time, Mr. Dial, no more.

Q. And what is your opinion?

A. Well, if you insert the words "lack of treatment ", my answer is yes, **I do have an opinion and that the opinion -- or the opinion is that the treatment or lack thereof fell below the standard of care, and that this -- a deficiency below the standard of care was a direct and proximate cause of the problems suffered by Ms. Ward including that need for the hysterectomy.** (T. 285-287) (emphasis added)

The medical records and expert testimony plaintiff submitted at trial provided overwhelming and credible evidence that the Defendants breached the standard of care, proximately and foreseeably causing Ms. Ward's severe infection and resulting hysterectomy. Therefore the Trial Court's verdict should be upheld.

V. THE TRIAL COURT DID NOT RELY UPON THE OB/GYN DEPARTMENT'S PRACTICE GUIDELINES AS THE STANDARD OF CARE IN THIS CASE.

The Trial Court properly relied on the testimony of Plaintiff's expert Dr. Dave David in rendering the conclusion that Defendant breached the standard of care. The Defendant can point to no testimony and no conclusion that the Trial Court relied on the Practice Guidelines to state what the standard of care was in this case. The Trial Court specifically stated in the Memorandum Opinion and Judgement what the legal standard was as follows:

"Under Mississippi law, the plaintiff must prove, through qualified experts, medical negligence or failure of the standard of care. Further, plaintiff must prove the negligent care proximately caused or contributed to plaintiff's

subsequent injuries Palmer vs. Anderson Infirmary Benevolent Association, 656 So. 2d 7790, 795 (Miss. 1995).” (A.R.E. 6, p.8)

As previously discussed, it was the testimony of plaintiff’s expert Dr. David, who established what the standard of care was and that this standard was breached by the Defendant. Dr. David was critical of the Defendant’s for not following the practice guidelines precisely because it was a breach of the standard of care not to do so. Based on the reasoning of the Trial Court that the standard of care was established by the testimony of Dr. David, the verdict should be upheld.

VI. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION FOR A DIRECTED VERDICT.

Defendant argues that the Trial Court erred in failing to grant defendant’s motion for directed verdict at the close of Plaintiff’s case. Defendant admits in its brief (Brief for Appellant page 46) that Defendant incorrectly entitled its motion as one for directed verdict rather than one for dismissal under MRCP 41(b). In *Partlow v. McDonald*, 877 So.2d 414 (Miss. Ct. App.2003), the Court ignored the same technical and procedural error by correctly re-characterizing same as a motion to dismiss. The Supreme Court has held that if a Defendant proceeds with its case after a denial of a motion to dismiss then Defendant waives its appeal of this issue. *Century 21 Deep South Properties, Ltd. v. Corson*, 612 So.2d 359 (Miss. 1992). In *Corson* the Court held:

“Although the defendant retains the right to challenge the weight or sufficiency of the evidence to sustain the judgment against him, appeal of the denial of a motion to dismiss made at the conclusion of the plaintiff’s case will be waived if the defendant proceeds with his case.”

Defendant further highlights its error by arguing as support the Trial Court's ruling at the close of Plaintiff's case-in-chief. Prior to the defendant presenting their evidence the trial court did state:

"There has been raised an issue of the breach of the standard of care with reference to the treatment of Ms. Earquella Ward. And the Court finds that the plaintiffs have met their burden and have proved a prima facie case. And the burden now is for the defendant to bring forth its proof in order for the fact finder to make its determination."(T. 377)

However Defendant cannot be heard to complain of this ruling because it proceeded with its defense.

While the Defendant had every right to renew its motion to dismiss at the conclusion of their case, the Court applied the correct standard at the close of Defendant's evidence. The Court stated in it's

Memorandum Opinion and Judgement:

"After viewing the evidence and applying the applicable law to the facts in this case, the court is of the opinion that the scales of justice tips decidedly in plaintiff's favor. The court finds that plaintiff has proven, by a preponderance of the evidence, that the defendant failed to provide the appropriate standard of care and treatment to Ms. Earquella Ward at the University of Mississippi Medical Center during her hospitalization from March 14-20, 2002, and at the OB receiving unit March 27, 2002. Additionally, in the battle of experts testimony, the court finds that plaintiff prevails on the issue of negligence and on the issue of proximate cause. As such, the court further finds that defendant's failure proximate caused or contributed to Ms. Ward subsequent injuries."(A.R.E. 6, p. 9)

The Trial Court therefore did consider the evidence fairly when making it's final judgement. The correct standard of review on appeal of this issue is substantial evidence/manifest error. As discussed earlier, Plaintiff provided substantial and credible evidence, through expert testimony that Defendant breached the standard of care and proximately caused Ms. Ward' injuries. Therefore the Trial Court's verdict should be upheld.

CONCLUSION

The Trial Court which sat in judgement of fact and law in this case properly found that the Defendant breached the standard of care in their treatment of Earquella Ward and that this breach proximately caused the resulting damages including but not limited to a hysterectomy. Dr. David was properly found to be an expert in the field of Obstetrics and Gynecology and his testimony was credible and reliable. The proper standard of review for this appeal is not de novo but should be deference to the Trial Court's verdict. Since the Trial Court had substantial, credible and reasonable evidence to support its findings this verdict should be upheld.

CROSS-APPEAL

I. THE TRIAL COURT FAILED TO ADEQUATELY COMPENSATE PLAINTIFF FOR HER INJURIES AND FAILED TO AWARD DAMAGES TO PLAINTIFF FOR FUTURE MENTAL PAIN AND SUFFERING, FUTURE PHYSICAL PAIN AND SUFFERING AND LOSS OF ENJOYMENT OF LIFE.

In the Memorandum Opinion and Judgement issued on March 15, 2006, Judge Green found the Defendant 100% liable for the injuries Earquella suffered as a result of the medical negligence of the Defendant. Ms. Ward was awarded \$52,039.31 for medical expenses she had incurred as a result of her illness. The Trial Court awarded \$25,000 for past mental anguish and emotional distress and \$50,000 in past physical pain and suffering. The total award was \$127,040. The Trial Court awarded no compensation for future mental anguish, future physical pain and suffering and loss of enjoyment of life. Based on the overwhelming evidence plaintiff presented at trial relating to Ms. Ward's injuries, this award is grossly inadequate to compensate Ms. Ward for her injuries and therefore we request an additur to the judgement be made.

LEGAL STANDARD AND CASELAW HISTORY

The legal authority for granting an additur is set out in Miss. Code Ann. Sec. 11-1-55 (2005):

The Supreme Court or any other court of record in a case in which money damages were awarded may overrule a motion for a new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of facts was influenced by bias, prejudice, or passion, **or that the damages awarded were contrary to the overwhelming weight of the credible evidence.** If such additur or remittitur be not accepted then the court may direct a new trial on damages only...(emphasis added)

In *Pham v. Welter*, 542 So. 2d 884 (Miss 1989) the Supreme Court granted an additur to plaintiff who was severely injured in a car accident that was awarded only \$1,300.00 for pain and suffering. The Court held that the jury's award of \$30,000.00 for plaintiff who proved special damages of \$28,682.00 were so inadequate as to 'shock the conscience'.

In addition this Court has found that age of the injured plaintiff is also a factor in assessing the sufficiency of a damage award. In *Copeland v. City of Jackson*, 548 So.2d 970 (Miss. 1989), plaintiff received an additur from \$40,000 to \$350,000. In that case, a young man in his 20's suffered fractures of his spinal vertebrae and put on evidence of pain and suffering and loss of social interaction. He introduced evidence at trial of \$20,000 in actual damages but the jury only awarded \$40,000 as a total award. The trial judge granted an additur, finding the nominal amount of damages awarded, which was double the actual damages was so insufficient as to shock the conscious. The Supreme Court agreed, finding that the verdict was so clearly against the overwhelming weight of the evidence, looking at the medical expenses, pain and suffering, the **youthful age** of the plaintiff and permanent physical impairment and upheld the \$350,00 verdict. *Copeland*, 548 So. 2d, at 974.

Grounds for supporting an additur in the case sub judice are equal to if not greater than the cases cited above. Earquella was only twenty years old at the time of this incident. As a result of the negligence of the Defendants, Ms. Ward had to undergo a hysterectomy, a major surgery, in which her uterus had to be removed. It was an uncontested fact during the trial that as a result of the operation, Ms. Ward would never be able to bear children, which she testified was her intention. (T. 355) Earquella testified about how losing her uterus at such a young age has devastated her emotional well being, energy level and her ability to maintain relationships. (T 359) An award of

\$25,000 for past emotional pain and suffering as consequence of having a hysterectomy at the age of twenty is also grossly insufficient.

An award of \$50,000 for past pain and suffering for the serious abdominal surgery which plaintiff had to endure is also grossly insufficient. Dr. Wolf testified to the seriousness of the surgery and that it could be fatal. (T. 145) The records reflect that Earquella had to stay in the hospital for eight days. Earquella also testified that she continued to have yeast infections as a result of the surgery. (T. 358) Therefore an additur to her award for past pain and suffering should be awarded.

Fortunately, in contrast to the cases cited above (even though additurs were ordered), the Memorandum Opinion and Judgement in the case sub judice leaves no room for speculation or guess-work relative to the absence of any award for future pain and suffering, future emotional distress and loss of enjoyment of life. Ms. Ward was awarded nothing for these losses.

Plaintiff put forward credible evidence, that due to the infection and subsequent hysterectomy, Ms. Ward will have future pain and suffering related to her injuries, for the rest of her life. Despite the uncontradicted evidence, and a finding of 100% liability on the Defendant, the trial judge returned nothing for Ms. Ward's future pain and suffering. Mississippi case law, previously cited, is clear that awards which do not allow any damages for future pain and suffering after a finding of damages is improper, especially in cases with sever and permanent injuries to a young victim. Any verdict which does not adequately compensate Ms. Ward for her future pain and suffering would be contrary to the overwhelming weight of credible evidence. This Court must now put on its "fact finder" hat and make a reasonable award for future pain and suffering where the trial

judge failed. Plaintiff suggests that an award of \$100,000 for future pain and suffering is more than fair to given the nature of Ms. Ward's injuries.

Plaintiff put forward credible evidence, that due to the infection and subsequent hysterectomy, Ms. Ward will have mental and emotional suffering related to her injuries, for the rest of her life. Ms. Ward testified that her hysterectomy had greatly effected her emotional well being, energy level, and relationships with other people. (T. 359) In addition, Ms. Ward will have to live the rest of her life with the fact that at a very young age she will never be able to have children. Despite the uncontradicted evidence, and a finding of 100% liability on the Defendant, the Trial Court returned nothing for Ms. Ward's future mental and emotional suffering. Any verdict which does not adequately compensate Ms. Ward for her future mental and emotional suffering would be contrary to the overwhelming weight of credible evidence. This Court must now put on its "fact finder" hat and make a reasonable award for future pain and suffering where the trial judge failed. Plaintiff suggests that an award of \$100,000 for future pain and suffering is more than fair to given the nature of Ms. Ward's injuries.

Plaintiff put forward credible evidence, that due to the infection and subsequent hysterectomy, Ms. Ward will have loss of enjoyment of life related to her injuries, for the rest of her life. Despite the uncontradicted evidence, and a finding of 100% liability on the Defendant, the trial judge returned nothing for Ms. Ward's loss of enjoyment of life. Ms. Ward will never know again the joy of being pregnant or giving birth, and maintaining normal relationships. (T-359) Mississippi case law, previously cited, is clear that awards which do not allow any damages for loss of enjoyment of life after a finding of damages, is improper, especially in cases with sever and permanent injuries

to a child. Any verdict which does not adequately compensate Ms. Ward for her loss of enjoyment of life would be contrary to the overwhelming weight of credible evidence. This Court must now put on its "fact finder" that and make a reasonable award for loss of enjoyment of life where the trial judge failed. Plaintiff suggests that an award of \$200,000 for loss of enjoyment of life is more than fair given the nature of Ms. Ward's injuries.

CONCLUSION

Mississippi case law is clear, if a Defendant is found liable (as was the University of Mississippi Medical Center), and if a plaintiff has suffered severe injuries (as has Ms. Ward), then the Court must award the plaintiff adequate damages for non-economic injuries such as pain and suffering, emotional distress, and loss of enjoyment of life. Applying the long standing case precedent to the uncontradicted facts of the case sub judice plaintiff requests that the Court correct the Judgement and order an additur to reflect a total damage award as follows:

\$52,039.31 for past medical expenses

\$100,000 for past pain and suffering

\$100,000 for past mental and emotional suffering

\$100,000 for future past pain and suffering

\$100,000 for future mental and emotional suffering

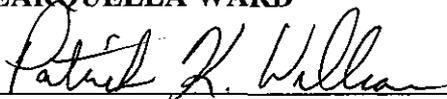
\$200,000 for loss of enjoyment of life

Pursuant to Miss Code. Ann. §11-46-15, which places a Statutory cap on damage awards for a Tort Claims case, we ask that the Court to award the statutory limit of \$500,000 for Earquella Ward's damages.

This the 9 day of February, 2007.

Respectfully submitted,

EARQUELLA WARD



PATRICK K. WILLIAMS

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CERTIFICATE OF SERVICE

I do hereby certify that I have this caused to be hand delivered a true and correct copy of the above and foregoing **Appellee's Record Excerpts** to the following:

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This the 9 day of February, 2007.



Patrick Williams (MSB # )