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

APPELLANT'S REPLY TO BRIEF OF PLAINTIFF/APPELLEE AND RESPONSE TO CROSS-APPEAL

ORAL ARGUMENT IS NOT REQUESTED

Senith C. Tipton (MSB No. [redacted]
Melanie H. Morano (MSB No. [redacted]
Wilkins, Stephens & Tipton, P.A.
One LeFleur's Square, Suite 108
4735 Old Canton Road [39211]
P. O. Box 13429
Jackson, MS 39236-3429
Telephone: (601) 366-4343
Facsimile: (601) 981-7608 (fax)
E-Mail: stipton@wilkins-law.com

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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 disqualification or recusal.

1. Earquella Ward, appellee.

2. G. Joseph Diaz, Jr., Esq., Patrick K. Williams, Esq., Diaz Lewis & Williams, 115 South Congress Street, Suite 1218, P. O. Drawer 24268, Jackson, MS 39225-4268, attorneys for appellee.

3. Edward Blackmon, Jr., Esq., Blackmon & Blackmon, PLLC, 907 West Peace Street, P. O. Box 105, Canton, MS 39046, attorneys for appellee.

4. The University of Mississippi Medical Center, appellant.

5. Senith C. 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 12th day of April, 2007.

BY: Melanie H. Morano
Senith C. Tipton (MSB No. 8227)
Melanie H. Morano (MSB No. 100339)

Wilkins, Stephens & Tipton, P.A.
One LeFleur's Square, Suite 108
4735 Old Canton Road [39211]
P. O. Box 13429
Jackson, MS 39236-3429
Telephone: (601) 366-4343
Facsimile: (601) 981-7608 (fax)

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A. Reply to Plaintiff's Statement of the Facts

Following the Cesarean delivery of her second child at UMMC on March 14, 2002, Ms. Earquella Ward spiked a single elevated temperature of 102.8 on March 18, 2002, which promptly returned to normal. She also had a single finding of a tender uterus, which also

promptly returned to normal. Ms. Ward was diagnosed with presumed EMM (endometritis) based on her clinical symptoms and her post-delivery state, a diagnosis that Ms. Ward agrees is correct. EMM can be caused by an infection or inflammation such as from an IUD or a decidual cast (a blood clot with some retained products of conception after delivery.) (T. 143-144, 258-259.)

Dr. Thomas Austin, the resident physician who evaluated Ms. Ward's symptoms on March 18, first considered a plan in his progress notes to perform several diagnostic tests (a CBC, urinalysis, and blood cultures) listed in the laboratory section of the OB/GYN student practice guidelines. (R.E. 11, p. 2.) He also planned to prescribe IV Unasyn, one of the antibiotics recommended for EMM by the guidelines. (R.E. 11, p. 3.) An order for the laboratory tests does not appear in the medical records, possibly because the laboratory tests were deemed unnecessary where Dr. Austin and his supervisors felt that the diagnosis of presumed EMM was correct. (T. 530-539.) However, Dr. Austin did write an order for the IV Unasyn to be given every 6 hours, which Ms. Ward received for 42 hours (7 doses). The Unasyn was received approximately 48 hours after the decline of her fever (100.4 or greater) where her temperature fell prior to the first dose of Unasyn. Dr. Martin, one of the faculty creators of the guideline manual, testified the current practice in treatment for EMM is 24-48 hours of antibiotic therapy. (T. 531-532.) Ms. Ward's symptoms returned to normal and she was discharged on March 20. During her hospitalization, Ms. Ward's incision healed without drainage or other adverse symptoms.

Plaintiff/trial court asserted that the CBC, urinalysis, and blood cultures considered by Dr. Austin were the "proper" laboratory tests to diagnose EMM pursuant to UMMC's student guidelines, misleadingly asserting that the guidelines required the laboratory tests. Nonetheless, EMM was diagnosed and treated in keeping with the guidelines. (Brief of

Appellee, p. 4; R.E. 10, pp.1-2,10,13; R.E. 7, pp.1,2,6.) Plaintiff/trial court also asserted that UMMC should have performed a wound culture on Ms. Ward on March 18, ignoring that Ms. Ward had no adverse incision symptoms with no drainage from which to obtain the culture on March 18-20. (Brief of Appellee, p. 8; R.E. 2, p. 23; R.E. 7, p. 6; R.E. 10, pp. 10,13; T. 228, 427-428, 435, 538; T.E. D-1, 44-45, 124.) Finally, Dr. David asserted that UMMC should have continued the Unasyn for 48 hours (believing that she had only received it for 24 hours), and plaintiff/trial court added without expert support that she should have received the Unasyn until she had been free of symptoms for 48 hours. (Brief of Appellee, p. 4; R.E. 7, pp. 2,6; R.E. 10, pp. 2,10,13; T. 288-289.)

During a home visit on March 27, 2002, a health department nurse removed Ms. Ward's incision bandage. She documented that Ms. Ward's incision had a nodule abscess with slightly brownish purulent drainage on the skin surface with redness and swelling observed when she pulled the dressing off. (T.E. P-2, 31.) Noting Ms. Ward had developed a fever of 100.4, the nurse recommended that Ms. Ward go to the OB Receiving Unit at UMMC for a physician assessment of the wound, which Ms. Ward did later that day.

At UMMC, treating physician Dr. Ty Robinson had no knowledge of the observations of the home nurse, but examined Ms. Ward himself in detail. (R.E. 4, p. 5-6.). Dr. Robinson noted Ms. Ward's temperature as 101.1 at that time, and her incision had swelling but no redness. He physically drained the portion of Ms. Ward's incision displaying symptoms, finding only clear seroma drainage more indicative of inflammation than infection, with no finding of purulent drainage inside or outside the wound noted. After his evaluation, Dr. Robinson did not believe that Ms. Ward had an infected incision. However, the treatment Dr. Robinson provided was curative of an infection if there had been one - opening, cleaning, and draining the wound, instructions on continued wound care at home using hydrogen

peroxide and Q-tips, and a prescription for the oral antibiotic Keflex. After this treatment, Ms. Ward testified that her fever disappeared, she "felt okay", and she experienced no more problems similar to what she had before she went to the hospital. (T. 348.)

The plaintiff/trial court and Dr. David complained that Dr. Robinson should have performed a CBC, blood culture, and wound culture on March 27, based solely on the home nurse's observations of redness and purulent drainage, ignoring Dr. Robinson's detailed examination where he found no redness nor purulent drainage. (Brief of Appellee, p. 5; R.E. 3, p. 7-8; R.E. 4, pp. 5, 8-10, 12-15, 17,21-23; R.E. 7, pp. 1,3,6.; R.E. 10, pp. 2-3, 10,13; T. 271-277, 283-284.) Again based solely on the home nurse's observations, plaintiff/trial court and Dr. David asserted that an oral antibiotic was not the proper route for an alleged incision infection, and plaintiff/trial court again expanded his opinion without expert support, stating that Keflex was an improper antibiotic and Ms. Ward should have been hospitalized. (Brief of Appellee, p.5; R.E. 10, pp. 10,13; R.E. 7, p. 6; T. 284.)

Approximately nine days later on April 5, 2002, Ms. Ward developed the entirely new symptom of heavy vaginal bleeding and was taken by her father to the emergency department of Central Mississippi Medical Center (CMMC). She was examined by the emergency department physician who made no mention of potential infection. Ms. Ward's temperature was normal, the white blood count in her CBC was normal, and her vital signs were normal. (T. 437.) An ultrasound showed evolving hematomas (blood clots) in her abdomen.

Ms. Ward was then examined by the on-call OB/GYN physician, Dr. Walter Wolfe, who performed exploratory surgery that evening. (Brief of Appellee, 5; R.E. 10, p. 3; R.E. 7, p. 3,4.) Dr. Wolfe was concerned she might have necrotizing fasciitis, which is a rare but life threatening infection; however, this was quickly ruled out during surgery. (T. 444.)

Before surgery, Dr. Wolfe advised Ms. Ward that one of the possible outcomes may be a need to remove her uterus, whereupon she said this was okay with her as she did not desire additional children. (T. 145-147, 172, 174; T.E. D-2, 366.) No blood cultures were taken at CMMC, but three drainage cultures were taken during and after surgery. The one taken on the incision surface returned a late growth 3 days later of "few" MRSA bacteria (an organism resistant to many antibiotics), believed by Dr. Chapman (UMMC's infectious disease expert) to be a skin contaminant rather than an infection. (T. 448-451, 586-589, 591-592, 604; T. E. D-2, 435.) The interior incision culture grew many non-resistant Group B strep bacteria, a bacteria common in the GI tract, vagina and the skin of the perineal area. (T.450-451, 589-591, 596-597; T.E. D-2, p. 435.) The abdominal drainage culture returned a finding of no growth of bacteria. (T. 451-452, 590-591; T.E. D-2, 434.)

Dr. Wolfe's operative note dictated several days later indicated that he found an abdominal/uterine infection among other conditions. Dr. Wolfe stated that he decided to perform a hysterectomy for "the best post-operative outcome" and "the absolute best benefit." (T. 152-154, 172-174, 183-184, 445.) Contrary to Dr. Wolfe's observation, the pathology report indicated the uterus was intact without portions missing. Only after Dr. Wolfe's exploratory surgery did Ms. Ward experience for the first time symptoms of a severe infection, developing fever and a severely elevated white blood count, both of which continued for days despite antibiotic therapy. (T. 451-452, 515-516, 585-586; T.E. D-2, 416, 418, 424, 427.)

Although no physician is a warrantor of cures, plaintiff/trial court illogically asserted that UMMC must have failed to cure Ms. Ward of an alleged uterine and/or incision infection on March 18 and/or March 27, basing this assertion on the finding of an alleged uterine infection by Dr. Wolfe on or about April 5. *Hawkins v. Ozborn*, 383 F. Supp. 1389,

1396 (N.D. Miss. 1974). Plaintiff/trial court concluded that UMMC must therefore have caused or contributed to the alleged uterine infection found on or about April 5 because it provided care to Ms. Ward prior to that date, forgetting that "simply because one act precedes another does not make the first act cause the second." *Cuevas v. DuPont De Nemours and Company*, 956 F. Supp. 1306, 1311 (S.D. Miss. 1997.)

IV. REPLY TO PLAINTIFF'S SUMMARY OF THE ARGUMENT.

Plaintiff's responsive brief erroneously asserts that "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." (Brief of Appellee, p. 6.) In actuality, the assertion that Dr. David was unqualified and his testimony generally unreliable was but one of several appealable errors set forth by UMMC. At trial UMMC provided the testimony of numerous qualified experts that it met the standard of care in the care provided to Ms. Ward, and that no alleged breach of the standard of care by its physicians proximately and foreseeably without intervening event caused or contributed to Ms. Ward's alleged severe infection and hysterectomy on April 5. Plaintiff failed to prove otherwise by substantial and credible evidence.

However, this case is far more than a "battle of the experts." The trial court erroneously "found" that Dr. Wolfe and Dr. Austin testified in favor of the plaintiff, where said testimony was mischaracterized or never took place. Plaintiff/trial court improperly relied upon the UMMC student guidelines to establish the standard of care, faulting UMMC for its alleged non-compliance when in reality the diagnosis of EMM which plaintiff maintains is correct was made and the treatment provided Ms. Ward substantially complied with that set forth in the guidelines.

Displaying an unacceptable lack of knowledge or consideration of the actual events of this case, Dr. David's opinion relied upon incorrect facts and was filled with inconsistencies and contradictions, including where in Dr. David's own personal practice he diagnosed his patients based on their clinical presentation rather than laboratory testing, as UMMC did in this case. Filling in the gaps left by Dr. David's inconclusive testimony, the trial court copied verbatim key sections of the plaintiff's trial brief and simply rearranged the language but adopted the content of numerous other portions of the plaintiff's trial brief, inaccuracies and all. (R.E. 7; R.E. 10.) UMMC appeals to this Honorable Court to review the trial court's erroneous findings *de novo* or with heightened scrutiny and to reverse the unsupported ruling of the trial court and dismiss UMMC from this action.

V. REPLY TO APPELLEE'S ARGUMENT

A. The Trial Court Erred in Relying Upon Non-existent and Otherwise Inadmissible Testimony by Treating Physician Dr. Walter Wolfe.

The trial court "found" in her Memorandum Opinion and Judgment that treating physician Dr. Walter Wolfe testified that UMMC breached the standard of care, proximately causing her injuries. No such testimony was given by Dr. Wolfe. Unlike other judicial findings which were adopted directly from plaintiff's trial brief, this "finding" originated with the trial court. (R.E. 7, p.4). Plaintiff admits that "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." (Brief of Appellee, p.7.)

Plaintiff generously suggests that the trial court made a "typographical error when it asserted that Dr. Wolfe provided this testimony" and notes that Dr. David offered similar testimony as that inaccurately attributed to Dr. Wolfe. (Brief of Appellee, pp. 8-9.) While the trial court may or may not have believed the testimony really occurred, it strains credibility

to suggest the 142 words and numbers attributing the stated opinion to Dr. Wolfe was a mere "typographical error." Inclusion of a finding in the court's Memorandum Opinion and Judgment raises a presumption that the trial court relied on the findings stated in said memorandum. UMMC was prejudiced by a mistaken "finding" that Dr. Wolfe testified similar to Dr. David, when in reality he did not. The mistaken impression that several experts testified similar to Dr. David at trial would obviously and unfairly weigh in favor of plaintiff's credibility.

Plaintiff asserts that "[i]t 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 Appellee, p. 7.) Plaintiff obviously misread the plain language of UMMC's appeal brief on this issue, where UMMC actually stated "the trial court would have erred in admitting and relying on an opinion by Dr. Wolfe as to the care provided by UMMC (if it had been offered) as "trial by ambush" which is disallowed under Mississippi law." (Brief of Appellant, p. 16.) (Emphasis added.) Plaintiff's designation of experts did not disclose that Dr. Wolfe had an opinion regarding the care rendered by UMMC, nor was there evidence that Dr. Wolfe had even reviewed the relevant records and depositions to form the basis of such an opinion. Under Mississippi law, allowing expert opinion at trial that had not been disclosed in discovery constitutes "trial by ambush." *Buskirk v. Elliott*, 856 So. 2d 255, 264 (Miss. 2003.) Therefore, even if the subject testimony had taken place, it would have been improper for the trial court to admit it as evidence and consider it in her decision as "trial by ambush."

Of a singular mind, plaintiff/trial court maintain that Dr. Wolfe testified "a hysterectomy was needed in order to save Ms. Ward's life." (Brief of Appellee, p. 7; R.E.10, p. 9; R.E.7, p. 4.) However, Dr. Wolfe never made this assertion at trial, actually testifying

that he removed Ms. Ward's uterus "for the best post-operative outcome" and "the absolute best benefit." (T. 152-154, 172-174, 183-184, 126-189.) Again, plaintiff improperly fashioned trial testimony to suit her cause and the trial court embraced plaintiff's assertion, even though it was without factual or testimonial basis.

Thus material testimony that did not take place was "found" and/or adopted by the trial court. Regardless of whether the trial court intentionally created, mistakenly believed, or blindly trusted that the non-existent testimonies occurred, these "findings" are unsupported by substantial, credible evidence, and were an abuse of discretion by the trial court.

B. The Trial Court Erred by Materially Mischaracterizing the Testimony of Dr. Thomas Austin.

The findings in the plaintiff's trial brief and the trial court's memorandum regarding Dr. Austin, treating physician at UMMC on the morning of March 18, closely followed one another. On page 5 of plaintiff's trial brief and likewise page 5 of the trial court's memorandum, both conclude with the following identically worded erroneous"finding":

> It is clear from Dr. Austin's testimony that he diagnosed Ms. Ward with EMM, a uterine infection on March 18, 2002. It is also clear from the testimony that Dr. Austin failed to perform the tests that he deemed necessary to confirm his diagnosis and insure that Ms. Ward would have received the proper antibiotic therapy and follow-up treatment.

(Brief of Appellee, p. 12; R.E. 7, p. 5; R.E. 10, p. 5.)

The plaintiff/trial court improperly uses the words "plan" and "order" interchangeably, despite their significantly different meanings. (Brief of Appellee, pp. 9, 10, 12; R.E. 10, pp. 1, 4, 15; R.E. 7, pp. 1, 2, 5.) Dr. Austin, who had no personal memory of the events, mentioned the tests as a plan in his notes. (R.E. 2, pp. 13-14.) However, no orders for a CBC, urinalysis, or blood culture appear in the medical records, where Dr.

Austin clearly wrote an order for IV Unasyn on the physician's order sheet. (R.E. 2, pp.13-14, 22, 23, 28-29; T. 535-539.) Thus, plaintiff's misleading assertion in her responsive brief that "it is undisputed that Dr. Austin wrote orders for a CBC, urinalysis and blood cultures," is simply unsupported by the evidence. (Brief of Appellee, pp. 9-10.) (Emphasis added.)

Plaintiff also conveniently but improperly mischaracterized Dr. Austin's testimony in her responsive brief to suggest that "he thought the blood cultures were important." (Brief of Appellee, p. 10.) Plaintiff's interchangeable use of the very different words "helpful", "necessary", and "important" is misleading. Dr. Austin testified that while he initially thought the diagnostic tests may have been "helpful', he never testified the tests were "necessary" or "important." (Brief of Appellee, pp. , 12.) Dr. Austin actually testified that he "thought, at the time, that they would be helpful" and that "it could have added a little bit more information, but we basically had the diagnosis from the clinical picture. They did not change her management at all." (R.E. 2, pp. 15-16.) Dr. Austin further testified the tests "would have just given us additional information to support our diagnosis of infection. But I don't think they changed - having them or not having them changed her management at all" (R.E. 2, pp. 14-16, 28.)

Dr. Austin did not suggest that Ms. Ward had a resistant organism (such as MRSA) on March 18 as was subtly implied by plaintiff in her responsive brief. (Brief of Appellee, p. 11.) Dr. Austin actually testified only generally that if a patient's antibiotics are not working and if a blood culture shows them to have an organism which is not sensitive to the antibiotic being used, you might need to change it. Dr. Austin clearly testified that the antibiotic given to Ms. Ward was appropriate, her condition improved, and she was properly discharged on March 20. (R.E. 2, pp. 15-16, 18.)

Plaintiff also incorrectly asserted that Dr. Austin made a "very important admission" that blood cultures may have been helpful as explained by Dr. David. (Brief of Appellee, pp. 11-12 T. 275-277.) However, the testimony of Dr. David quoted by plaintiff did not "explain" Dr. Austin's testimony at all, but rather it discussed the care provided later by Dr. Robinson. Thus plaintiff's assertion is irrelevant and a misuse of Dr. David's testimony.

If simply changing a plan is evidence of negligence, then many would be found daily liable. Yet the plaintiff and the trial court presume that because Dr. Austin initially planned for a diagnostic CBC, urinalysis, and blood culture, the standard of care was breached when this plan was changed. Dr. Austin, who initially planned but never ordered the tests, testified that these tests would not have made a difference in the care Ms. Ward received, and therefore it is irrelevant to this action whether they were performed or not. The plaintiff/trial court's mischaracterization that he testified in favor of plaintiff's cause is unsupported by substantial evidence, and was thus an abuse of discretion by the trial court.

C. The Trial Court Erred in Finding That Dr. Dave David Was Qualified as an Expert Witness in this Case and That His Testimony Was Relevant and Reliable.

Ms. Ward argues that UMMC is trying to "enlarge the standard of review" beyond that of *City of Greenville v. Jones*, 925 So. 2d 106 (Miss. 2006) without authority and that *de novo* or heightened scrutiny review is not correct. (Brief of Appellee, p. 13.) To the contrary, UMMC asks this Honorable Court to apply the appropriate standard of review. Mississippi law is well-settled that where the findings of a trial judge in a bench trial are not supported by substantial, credible and reasonable evidence or when said trial judge applies an incorrect legal standard, *de novo* review on appeal is appropriate. *Mississippi Department of Transportation v. Johnson*, 873 So. 2d 108, 111 (Miss. 2004)."The existence of a duty is

entirely a question of law and it must be determined by the court." *Foster v. Bass*, 575 So. 2d 967, (Miss. 1991). The standard of review on questions of law is *de novo*. *Johnson* at 111.

Further, when the trial judge adopts "substantially verbatim" findings and conclusions found in the winning party's trial brief, the appellate court "must view the challenged findings and the record as a whole with a more critical eye to ensure that the trial court has adequately performed its judicial function." *Mississippi Department of Wildlife Fisheries and Parks v. Brannon*, 943 So. 2d 53 ¶¶ 14-16, 18 (Miss. Ct. App. 2006). Under these circumstances, the Appellate Court "must keep a keen eye for gratuitous slants." *Omnibank of Mantee v. United Southern Bank*, 607 So. 2d 76, 83 (Miss. 1992). Where the judge substantially adopted one parties' language, the Supreme Court "must analyze the findings with greater care, and the evidence is subject to heightened scrutiny." *Mississippi Department of Wildlife Fisheries and Parks* at ¶ 18. "This Court has explained that such findings are not the same as findings independently made by the trial judge after impartially and judiciously sifting through the conflicts and nuances of the trial testimony and exhibits." *Estate of Grubbs v. Woods*, 753 So. 2d 1043, 1046 (Miss. 2000).

De novo review is the correct standard of review on appeal in this case. The trial court's opinion, as a whole, was not supported by substantial, credible, and reasonable evidence. Specifically, the "finding' of testimony by Dr. Wolfe that did not take place was not supported by substantial, credible, and reasonable evidence. Also, the plaintiff/trial court's mischaracterization of the testimony of Dr. Austin was also not supported by substantial, credible, and reasonable evidence. Finally, the trial court's often verbatim adoption of plaintiff's trial brief, factual and testimonial inaccuracies included, was not supported by substantial, credible and reasonable evidence. Thus *de novo* review is appropriate under Mississippi law. *Mississippi Department of Wildlife Fisheries and Parks*

v. Brannon, 943 So. 2d 53 ¶ 16 (Miss. Ct. App. 2006); *Donaldson v. Covington County*, 846 So. 2d 219, 222 (Miss. 2003); *Mississippi Department of Transportation v. Trosclair*, 851 So. 2d 408, 413 (Miss. Ct. App. 2003); *Rice Researchers, Inc. v. Hiter*, 512 So. 2d 1259, 1264 (Miss. 1987).

The plaintiff/trial court's reliance upon the OB/GYN student guidelines to establish UMMC's duty was a clear error of law. Admission of alleged testimony by Dr. Wolfe (if it had taken place) which was undisclosed in plaintiff's expert designation was also a clear error of law. Likewise, the trial court's finding of a legal duty to verify the correct diagnoses of presumed EMM and possible incision infection where the patient was provided treatment curative of these conditions just in case said verification would provide helpful information was a clear error of law. Similarly, finding UMMC had a duty to perform tests that were irrelevant to plaintiff's claimed injury and finding UMMC liable for not performing them is an error of law. Finally, the trial court's finding that the inaccurate foundational facts upon which plaintiff's expert Dr. David based his opinion were sufficient to permit reasonably accurate conclusions was likewise an error of law; thus *de novo* review is appropriate. *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, ¶ 135 (Miss. 2004.); *Mississippi Department of Transportation v. Johnson*, 873 So. 2d 108, 111 (Miss. 2004); *Estate of Grubbs v. Woods*, 753 So. 2d 1043, 1047 (Miss. 2000); *Brooks v. Brooks*, 652 So. 2d 1113, 1118 (Miss. 1995); *Foster v. Bass*, 575 So. 2d 967, (Miss. 1991), *Holden v. Frasher-Holden*, 680 So. 2d 795, 799 (Miss. 1996).

De novo or heightened scrutiny review is the correct standard of review where the trial court's findings of fact were copied substantially verbatim from plaintiff's trial brief regarding the crucial opinions of Dr. David and Dr. Austin, including the factual and testimonial inaccuracies therein. Other instances as described herein where the trial judge

copied critical portions of the plaintiff's trial brief substantially verbatim, including factual and testimonial inaccuracies, is likewise appropriate for *de novo* or heightened scrutiny review. *City of Greenville v. Jones*, 925 So. 2d 106, ¶¶ 21-24 (Miss. 2006); *Mississippi Department of Wildlife Fisheries and Parks v. Brannon*, 943 So. 2d 53 ¶ 14-18 (Miss. Ct. App. 2006); *Smith v. Orman*, 822 So. 2d 975 ¶ 7-8 (Miss. Ct. App. 2002); *Estate of Grubbs v. Woods*, 753 So. 2d 1043, 1046-1047 (Miss. 2000); *Brooks v. Brooks,* 652 So. 2d 1113,1117-1118 (Miss. 1995); *Omnibank of Mantee v. United Southern Bank*, 607 So. 2d 76, 83 (Miss. 1992); *Rice Researchers, Inc. v. Hiter*, 512 So. 2d 1259, 1264-1265 (Miss. 1987). UMMC respectfully requests this Honorable Court to apply the above described standards of review in this case as appropriate under Mississippi law.

Whether an expert is qualified to testify at trial and on what matters is within the trial court's discretion. *Partin v. North Mississippi Medical Center*, 929 So. 2d 924, ¶21 (Miss. Ct. App. (2005). "An expert witness must possess that skill, knowledge or experience in the field in which he purports to render expert testimony to make it appear that his opinion or inference will probably aid the trier in its search for truth." *Beckham v. General Motors Corporation*, 933 So. 2d 1022, ¶ 7 (Miss. Ct. App. 2006).

The plaintiff/trial court emphasized that because Dr. David had been certified in OB/GYN almost nine years prior, he was qualified to testify as an expert in this case. (T. 239, 249, 255-256.) (Brief of Appellee, p.14.) The trial court improperly discounted Dr. David's lack of experience in the care of post- Cesarean infections on or near the year 2002 and his lack of updated knowledge, skill, experience, training or education in the subject area of the treatment of post-Cesarean infections, mistakenly finding him to have expertise based on his nearly expired certification in OB/GYN. The trial court additionally ignored the bias created where Dr. David's essential livelihood was testifying for plaintiffs (even advertising

in plaintiff's literature that he was "jury friendly") and where his veracity was highly suspect. More important, the trial court ignored the evidence that Dr. David had not provided post-Cesarean care for approximately 9 years according to his testimony, and 12 years according to bankruptcy documents signed as to their truthfulness by Dr. David (also suggesting a lack of veracity). *Mississippi Transportation Commission v. McLemore*, 863 So. 2d 31¶ 6 (Miss. 2003); *Miss. R. Evid.* 702.

Regardless, Dr. David's testimony against UMMC was neither relevant nor reliable. (Brief of Appellee, p.15.) "The trial court is vested with a gatekeeping responsibility." *Mississippi Transportation Commission v. McLemore*, 863 So. 2d 31, ¶ 11 (Miss. 2003). "For expert testimony to admissible, it must be both relevant and reliable." *Tunica v. Matthews*, 926 So. 2d 209, 213 (Miss. 2006); citing *Mississippi Transportation Comm'n v. McLemore*, 863 So. 2d 31, 39 (Miss. 2003); see also *Miss. R. Evid.* 702. "The trial judge determines whether the testimony rests on a reliable foundation and is relevant in a particular case." *McLemore* at ¶ 11. "The party offering the testimony must show that the expert based his opinion not on opinions or speculation, but rather on scientific methods and procedures." *Tunica* at 213. "To be relevant and reliable, the testimony must be scientifically valid and capable of being applied to the facts at issue." *Tunica* at 213.

"The facts upon which the expert bases his opinion or conclusion must permit reasonably accurate conclusions as distinguished from mere guess or conjecture." *Hickox v. Holleman*, 502 So. 2d 626, 638 Miss. 1987.) "The sufficiency of foundational facts or evidence on which to base an opinion is a question of law," and the reliability of expert opinion is subject to appellate review. *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, ¶ 135 (Miss. 2004.) The plaintiff/trial court ignored that Dr. David's testimony contained numerous factual inaccuracies and contradictions, passing these crucial deficiencies off as

mere differences of opinion. (Brief of Appellee, p. 16.) Dr. David's opinion properly should have been disallowed at trial because it was based on misinformation and his testimony was highly speculative and contradictory.

UMMC delineated the incorrect facts relied on by Dr. David in its Brief of Appellant. (See Brief of Appellant, pp.24-25.) Plaintiff unsuccessfully attempted to justify or deflect from the incorrect facts, to which defendant replies as follows: (Brief of Appellee, p. 16-18.)

1. **Dr. David did not know that Ms. Ward was given Unasyn for 42 hours on March 18-20, mistakenly believing that she received only 24 hours of the Unasyn therapy. (T. 288-289; T.E. D-1, pp. 110, 114.)**

Dr. David never testified that the 42 hours of Unasyn Ms. Ward received (approximately 48 hours after decline of her temperature spike) was insufficient and that a single additional dose of Unasyn would have cured Ms. Ward and spared her uterus.

2. **Dr. David confused Ms. Ward's clinical presentation on March 18-20 with her presentation on March 27, mistakenly believing that Ms. Ward had signs of a possible infection in her incision on March 18-20. (T. 285-287; T.E. D-1, pp. 44, 124.)**

Dr. David stated that in addition to starting Ms. Ward on Unasyn on March 18, Dr. Austin "should have cultured the wound," "should have definitely cultured the wound," and "the wound [should have been] opened up." (T. 285-286.) As she did not manifest wound symptoms until March 27, Dr. David obviously confused Ms. Ward's clinical presentation on March 18-20 with her presentation on March 27. (T. 285-287; T.E. D-1, pp. 44, 124.)

3. **Dr. David confused Ms. Ward's clinical presentation on March 18 with the clinical presentation she developed while at CMMC, believing in error that she had abdominal pain, distension, and an ileus while at UMMC. (T. 286-287, 313-314; T.E. D-1, pp. 44-45; T.E. D-2, pp. 366-368.)**

Dr. David again confused Ms. Ward's clinical presentation on March 18 with the clinical presentation she developed while at CMMC. He inaccurately testified that she experienced generalized abdominal pain, distension, and an ileus (a bowel condition where the intestines don't move) while at UMMC, despite that no UMMC medical records document these symptoms. (T. 286-287, 313-314.) In fact, Ms. Ward is clearly documented in the nurses' notes as having had four bowel movements between March 18 and March 20 at UMMC. (T. 426 ;T.E. D-1, pp. 44-45,124,128,141,132.) However, generalized abdominal tenderness and a partial bowel obstruction was documented in the medical records of CMMC, although abdominal distention was never documented at any time, where her abdomen was specifically found to be as soft and flat. (T. 138-139; T.E. D-2, pp. 366, 368.) Plaintiff's assertion in her responsive brief 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" is nonsensical, where she suggests that UMMC diagnose a bowel condition before it existed by working Ms. Ward up for an entirely different condition - an infection/inflammation of the uterine lining (EMM).

4. **Dr. David did not acknowledge Dr. Robinson's examination, findings, and treatment on March 27, basing his entire opinion on the home nurse's preliminary notes. (T. 270-277; T.E. D-1, pp. 191.)**

Plaintiff's response that "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" was a misstatement of Dr. David's testimony. (Brief of Appellee, p. 16.) At trial Dr. David agreed only that he reviewed "the records from the University of Mississippi Medical Center where a Cesarean was performed on Ms. Ward," in particular the summary sheet for that admission. (T. 256.) The medical records "where a cesarean was performed" documented the March 14-20 admission, not the March 27 clinic visit for incision symptoms that

developed after her discharge. There is no testimony that Dr. David reviewed the records from the March 27 clinic admission, nor the relevant depositions for either admission.

5. **Dr. David did not know that Dr. Robinson had opened, drained and cleaned the wound on March 27, and faulted him for not doing so. (T. 274-277, 281; T.E. D-1, pp. 191.)**

Dr. David did not at any time indicate a knowledge of what Dr. Robinson did or did not do, what he found, nor what treatment he rendered on March 27. (T. 274-277.) (Plaintiff counsel, not Dr. David, later asserted that Dr. Robinson prescribed the antibiotic Keflex.) (T. 283-284.) Regardless, Dr. David agreed with plaintiff counsel that a breach of the standard of care took place without indicating a knowledge of what care actually took place. (T. 276-277.)

6. **Dr. David believed incorrectly that the wound pocket contained purulent drainage on March 27. (T. 270-271, 275-276; T.E. D-1, p. 191.)**

It is true that nurse Wilson testified she observed the skin surface, saw what she described as purulent drainage on March 27 and thus she sent Ms. Ward to UMMC for physician evaluation.(T. 50-51.) However, she did not observe below the skin surface to the internal contents of the wound pocket. Later that day, Dr. Robinson examined the wound, finding no purulent drainage on the skin surface nor inside the wound when he opened, drained and cleaned it. Plaintiff's embrace of the observations of the skin surface made by the home nurse and her complete disregard of the contrary findings of the licensed physician who personally opened the wound is misplaced.

7. **Dr. David did not know that Ms. Ward's WBC on April 5 was within the normal laboratory range. (T. 322-325; T.E. D-2, pp. 427.)**

As Ms. Ward's WBC was normal on April 5, then plaintiff/trial court offers only speculation that her WBC would have been abnormal on March 18 and March 27 before she

became allegedly seriously ill. Dr. David never offered an opinion that a WBC would have been abnormal if taken on March 18 and 27, just that it should have been done.

8. **Dr. David did not know that Ms. Ward was free of fever on April 5. (T. 325; T.E. D-2; pp. 385-387.)**

Again, this fact is important as it demonstrates that Ms. Ward's symptom of fever had disappeared after the care provided by UMMC weeks earlier with a new fever appearing when she developed the infection following her exploratory surgery at CMMC in April.

Appellant's initial brief also listed the following inconsistencies and contradictions on pp.25-27. Defendant's rebuttal to plaintiff's response to these inconsistencies and contradictions is set out below. (Brief of Appellee, pp. 17-18.):

1. **Confusing Ms. Ward's clinical presentation, Dr. David testified at various times that on March 18, Dr. Austin should have taken blood cultures (T. 262- 263, 266-267), an endometrial or cervical culture (T. 287, 315-316), and a wound culture on that date. (T. 285-286.)**

Ms. Ward had no wound symptoms or drainage to culture on March 18-20, a fact that Dr. David did not seem to know. In spite of a series of inconsistent opinions about the various culture types, at no time did Dr. David testify what blood, endometrial/cervical, or wound cultures would have revealed if taken on March 18, nor did he testify how the simple performance of these tests would have cured Ms. Ward and spared her uterus.

2. **Dr. David testified that Unasyn was the appropriate antibiotic for Ms. Ward on March 18. (T. 283, 285, 288-289, 317-318.) Covering his bases, he also testified that Unasyn was not the appropriate antibiotic. (T. 269-270, 282.)**

Dr. David testified that Unasyn prescribed by Dr. Austin was the appropriate antibiotic for Ms. Ward on March 18 and was a good starting point, to be changed if needed after watching her closely. (Ms. Ward's condition improved and Dr. David never testified that a change in antibiotic was actually needed in her case.) (T. 283, 285, 317-318.) He

testified that cultures should be taken, but if no cultures were taken, 24 hours of Unasyn was insufficient and 48 hours of Unasyn should be given . (T.288-289.)

Covering his bases, he gave the reverse testimony that Unasyn was not the appropriate antibiotic. (T. 269-270, 282.) He agreed with plaintiff counsel's vague statement that the "improper course of antibiotic" prescribed by Dr. Austin breached the standard of care. (T. 269-270.) He later agreed with plaintiff counsel's equally ambiguous statement that if UMMC "had performed a CBC and a wound culture and started her on the right antibiotic", her unspecified condition would have been cured. (T. 282.) (Neither plaintiff counsel nor Dr. David indicated which date of treatment they had in mind with this statement.)

Plaintiff's response brief took improper liberties with Dr. David's testimony when she stated that "[h]is 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." The only mention of Ms. Ward having MRSA found in Dr. David's testimony was made by plaintiff counsel and referenced one of the two wound cultures performed on April 5 at CMMC as follows:

Q. Now, the wound culture actually grew an organism called staphylococcus aureus, MRSA?
A. Correct.
(T. 282.)

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 of infection?
A. Usually not.
(T. 283.)

Indeed a "few" MRSA bacteria were found on the surface of Ms. Ward's incision at CMMC (likely a contaminant), and "many" Group B strep bacteria were found on the inner portion of the incision, a finding plaintiff ignores. Dr. David never testified that Ms. Ward had an MRSA infection on March 18 and/or 27, and the assumption or suggestion by plaintiff counsel that he so testified is improper. (T. 238-327.)

3. **Dr. David offered his opinion that Unasyn would treat MRSA, but when plaintiff counsel immediately asked him again he reversed his testimony, saying that Unasyn would not treat MRSA. (T. 283.)**

Referring to the culture taken at CMMC, plaintiff counsel asked Dr. David:

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...

Later on the same page, plaintiff counsel asked the same question again:

Q. Knowing that it is MRSA, would Unasyn be effective against that type of infection?
A. Usually not...

(T. 283.)

Based on this conflicting testimony, the listener/reader cannot discern whether Dr. David is of the opinion that Unasyn will usually treat MRSA or not. Plaintiff counsel's assertion that Dr. David testified "once MRSA was diagnosed, Unasyn would not be the proper antibiotic" is not supported by the language of his testimony.

4. **Dr. David noted that Dr. Austin diagnosed Ms. Ward with EMM on March 18. (T. 258.) In contradiction, he also opined that Dr. Austin did not diagnose Ms. Ward with EMM on March 18, but should have. (T. 284-288.)**

Plaintiff's response mistakenly asserts that "Dr. David did not testify at any time that Dr. Austin breached the standard of care by not diagnosing EMM . . . ." Admittedly Dr. David clearly noted that Dr. Austin diagnosed Ms. Ward with EMM on March 18 and his general testimony was often ambiguous. (T. 258.) However, Dr. David later admonished

that UMMC breached the standard of care by "not recognizing" that Ms. Ward had endometritis (T. 285), Ms. Ward "should have been worked up for endometritis" (T. 285-287), an endometrial culture should have been performed "to see if there is also endometritis going on" (T. 287), and that UMMC would want to "rule out" endometritis after a C-section (T.288). Thus, Dr. David both admitted that EMM was diagnosed and also faulted that it should have been diagnosed on March 18.

5. **Dr. David testified that a urinalysis was required by the standard of care on March 18. (T. 258, 262-263, 266-267, 269-270, 319.) However, he explained that the urinalysis would not diagnose EMM, but was to rule out a urinary tract infection and was just for "completeness", as a urinary tract infection was not at issue. (T. 261, 319.)**

Plaintiff forgets that for an alleged breach of duty to be relevant at trial, said breach of duty must have proximately caused or contributed to plaintiff's injury. As a urinary tract infection was not at issue in this case, Dr. David's testimony and the plaintiff/trial court's finding that a urinalysis was required by the standard of care was irrelevant and served only to confuse the trier of fact and disparage the relevant care provided by UMMC.

6. **Dr. David testified that a CBC was required by the standard of care and the lack of a CBC proximately caused Ms. Ward's hysterectomy. (T. 258,261-263, 266-267, 270, 282.) However, he also testified that the CBC was only "a baseline in case its – to see if she's getting better or worse." (T. 277.)**

Plaintiff responded that "[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." (Brief of Appellee, p. 17.) However, no expert testified that a CBC was required so that the "appropriate antibiotic" can be selected. (T. 133-134, 199-200, 218-219, 230, 258, 261-263, 266-267, 270, 277, 282, 316-317, 423-424, 466, 489, 536-537, 561-562, 575-577, 579-580, 593, 602; R.E. 2, pp. 14-16; R.E. 3, p. 16; R.E. 4, pp. 22-23.)

Further, Dr. David did not opine that a CBC taken on March 18 and/or 27 would have been abnormal and how this would have indicated a "serious" infection on that date.

7. **Dr. David was clear that the portion of the CBC potentially indicative of an infection is an elevated white blood count (WBC). (T. 260-261, 316-317, 323.) He also admitted that you can get an elevated WBC "in everything." (T. 317.) However, when informed that Ms. Ward's WBC was within the normal range on April 5, he promptly changed his opinion, testifying that it is the platelet count that you look at in a CBC to indicate infection. (T. 324-325.)**

The inconsistency here is Dr. David's suspiciously abrupt change of opinion when informed that Ms. Ward's WBC was normal on April 5. Prior to this change of opinion, Dr. David had clearly explained that a WBC was the important measurement in assessing a potential infection:

> Q. All right. And is that where the CBC, the urinalysis, and the blood cultures come into play?
> A. That's correct. A CBC is a complete blood count. You're looking at the hemoglobin, make sure the patient is not anemic. But in cases like this, more importantly you're looking at the white blood count, make sure its not either elevated or severely depressed. And you look at the differential, meaning what kind of white blood cells may be in abnormal proportions in the blood."

(T. 260-261.) (Emphasis added.)

Dr. Wolfe expressed similar opinions, testifying:

> Q. What would you look for to determine whether or not a person has an infection in a CBC?
> A. Well, you look for a white blood count to be elevated.

(T. 133-134.) (Emphasis added.)

Dr. David and the other experts agreed that the WBC is the pertinent part of a CBC in assessing potential infection, and Dr. David alone changed his opinion to state that an elevated platelet count was pertinent in assessing potential infection. (T. 133-134, 200-201, 218-219, 260-261, 316-317, 438, 586; R.E. 2, pp 14.) What Dr. David did not explain is how Ms. Ward's post-operative infection at CMMC caused her fever and WBC to soar, but at the same time her platelet count dropped precipitously after several blood transfusions. (T. E.

D-2, pp. 423, 424, 427, 437, 440.) This was consistent with UMMC's experts' testimony that the elevated platelet count had indicated Ms. Ward's body's attempt to correct the blood loss from delivery, her hematomas, and her heavy vaginal bleeding on April 5. (T. 438, 483-485, 505, 583-584.)

8. **Dr. David testified that blood cultures are critical and required. (T. 262-263, 266-267, 270, 314-315.) In contradiction, he later testified that blood cultures indicate bacteria in the blood and won't diagnose an infection in the uterus, except suggestively if the bacteria involved is one of the usual culprits for uterine infections. (T. 314-315.) He also testified that MRSA is usually found on the skin, not in the uterus. (T. 264-266.)**

Plaintiff's responsive brief attempted to deflect attention from the blood culture inconsistency and discuss endometrial/cervical (uterine) cultures. However, Dr. Austin did not plan to perform endometrial/cervical cultures, the trial court did not find them to be required, and no expert testified that failure to perform endometrial/cervical cultures proximately caused or contributed to plaintiff's alleged serious infection and hysterectomy.

9. **Dr. David testified that a fever was defined as a temperature of 100.4 or above and that when Ms. Ward had a temperature spike on March 18, she was "running a fever". (T. 257, 267, 318.) Although he testified that after the temperature spike he was not clear what her temperature was, he nevertheless implied that she had a continued fever, stating that it didn't come all the way down the next day. (T. 267, 318.)**

Plaintiff's response did not contest this inconsistency.

10. **Dr. David testified that various cultures were required by the standard of care and were needed in case the initial therapy hadn't worked and the patient continued to get sicker. (T. 261-262, 268-269.) Ms. Ward's signs and symptoms improved and she did not get sicker, a fact that Dr. David ignored.**

Plaintiff's response brief did not address the fatal gap in Dr. David's opinion regarding antibiotic therapy when the patient's symptoms improved. Plaintiff's response brief merely asserts that "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.)" However, the pages referenced by plaintiff do not support this assertion.

11. Dr. David testified that the antibiotic Keflex, prescribed to Ms. Ward on March 27, both would and would not treat MRSA. (T. 284.)

Again, plaintiff's response avoids the conflicting testimony given by Dr. David stated in #11.

Dr. David testified:

Q. Is Keflex an appropriate treatment for an MRSA?
A. No it's not.

(T. 284, lines 1-3.) (Emphasis added.)

Conversely, he further testified:

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....

(T. 284.) (Emphasis added.) Thus he testified that Keflex both would and would not treat MRSA.

12. Although plaintiff counsel implied (without specifically stating) that Ms. Ward had an MRSA infection on March 18 and/or 27, Dr. David did not express this opinion. (T. 263-266, 282-284.)

Plaintiff's response to #12 toys with the language of defendant's statement, misconstruing the meaning. Plaintiff responds "Dr. David clearly states that Ms. Ward did have an MRSA infection [cleverly omitting the dates March 18 and/or 27] and that the proper antibiotic was Vancomycin. (T. 282-284.)" (Brief of Appellee, p. 18.) However, the point is that Dr. David never testified Ms. Ward had an MRSA infection on March 18 and/or 27. He agreed with plaintiff counsel that the wound culture taken at CMMC on April 5 grew MRSA (ignoring that there were three cultures, only one growing "few" MRSA.) (T. 282-283.) He stated that the Vancomycin prescribed for Ms. Ward at CMMC was "usually great

for staph." (T. 283.) He did not say that Ms. Ward had an MRSA infection at UMMC on March 18 and/or 27 and Vancomycin should have been prescribed at UMMC, and plaintiff counsel's implication that he said this is misleading to the court. (T. 282-285.)

13. **Dr. David appeared to rely on the OB/GYN student practice guidelines as the standard of care. (T.266-267, 270.) However, he only generally followed the guidelines of the American College of Obstetricians and Gynecologists, testifying that they were "guidelines, not regulations, but they're guidelines." (T. 293.)**

Plaintiff's response brief totally failed to address the substance of the foregoing inconsistency. Rather, plaintiff points out that Dr. David's testimony is based on his experience, knowledge and training. This response in itself fully illuminated one of the most important inconsistencies in Dr. David's testimony, assertions that laboratory tests were required to diagnose patients in this case, where in his personal practice Dr. David usually diagnosed patients on the basis of their clinical presentation, as was done by the UMMC physicians with Ms. Ward. (Brief of Appellant, p. 27-28; T. 260, 314-317, 320-321.) The sum of Dr. David's testimony is so without factual basis, vague, contradictory, inconsistent and speculative as to be without value in offering qualified, relevant, and reliable assistance to the trier of fact.

D. The Trial Court Erred in Finding That Plaintiff Expert Dr. Dave David Proved that UMMC Breached the Standard of Care, Proximately and Foreseeably Causing Ms. Ward's Hysterectomy on April 5, 2002.

To establish a *prima facie* case of medical negligence, a plaintiff must prove duty, breach, causation, and injury. *Vede v. Delta Regional Medical Center*, 933 So. 2d 310, ¶ 5 (Miss. Ct. App. 2006). "Because a plaintiff must prove each of the above elements in order to prevail, the failure to prove a single element is fatal to the claim." *Vede* at ¶ 5. The existence of a duty is a question of law. *Foster v. Bass*, 575 So. 2d 967, 973 (Miss. 1991). "A duty does not exist if the defendant could not reasonably foresee any injury as the result

of his acts, or if his conduct was reasonable in the light of what he could anticipate." *Foster* at 975. The point of view in determining foreseeability is an external one, "from the point of view of the actor prior to occurrence." *Foster* at 975. "Foreseeability of harm . . . must depend on knowledge." *Foster* at 976.

Dr. David testified that UMMC breached the standard of care in failing to perform diagnostic tests (CBC, urinalysis, blood cultures, and/or wound culture) on March 18 and 27, in not giving Ms. Ward a longer course of Unasyn on March 18-20 , and for not giving her an unnamed IV or intramuscular antibiotic on March 27. His testimony is offered in hindsight rather than from the perspective of the physicians providing the care, as he seemed conveniently oblivious to Ms. Ward's actual signs and symptoms while at UMMC. (T. 282.)

"Accuracy of statement is one of the first elements of truth; inaccuracy is a near kin to falsehood." *The New Dictionary of Thoughts, A Cyclopedia of Quotations*, Standard Book Company, New York, 1944, p. 3. Ms. Ward's arguments are seasoned liberally with factual and testimonial inaccuracies necessary to make her story palatable. In particular, plaintiff's response to this section is tiresomely packed with inaccuracies, and her inexact use of terms and phrases is frustrating to the reader seeking accuracy. (Brief of Appellee, pp. 18-20.)

She continued to refer to the CBC, urinalysis and blood cultures as sometimes planned and sometimes ordered by Dr. Austin, where in reality they were simply plans, and never ordered. (Brief of Appellee, pp. 4,18) (T. 262-263.) Again, Dr. Austin never testified the tests were necessary, as plaintiff continues to falsely assert. (Brief of Appellee, p. 18.) Responses to further incorrect statements in plaintiff's responsive brief are detailed below.

1. **"Dr. Austin skipped directly to the treatment of the infection with the IV antibiotic Unasyn without knowing what type of infection he was dealing with." (Brief of Appellee, p. 19.)**

The reader must guess whether plaintiff is referring to EMM (endometritis) or a bacterial organism with her broad references to "the infection" and "type of infection." Her point is moot, since she asserts that Ms. Ward needed more Unasyn to treat her "infection".

2. **"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. Dr David testified that IV antibiotics should continue for 48 hours in order to meet the standard of care." (Brief of Appellee, p. 19.)**

Although Dr. David testified that "you want to leave them on 48 hours [8 doses] of antibiotics," (believing that she received only 24 hours of Unasyn) he never discussed whether 42 hours of Unasyn (7 doses instead of 8), received approximately 48 hours after the decline of her fever, was sufficient or not to cure Ms. Ward and spare her uterus. (T. 288.)

3. **"Ms Ward was sent home with her infection still present." (Brief of Appellee, p. 19.)**

This statement is based entirely on hindsight and plaintiff's unfounded trial supposition that Ms. Ward had the same "infection" on March 18, 27, and April 5 that UMMC allegedly failed to cure. UMMC's infectious disease expert, Dr. Stanley Chapman, testified that MRSA has a short incubation period of a day or two and was likely a contaminant on Ms. Ward's skin surface; thus if an MRSA infection was found at CMMC it was in scientific probability contracted after her care at UMMC. (T. 448-451, 586-589, 591-592, 604.) This testimony was undisputed. Dr. Chapman likewise testified that the typical rapid progression of a Group B strep infection made it unlikely that Ms. Ward had a Group B strep infection more than a couple of hours to a couple of days before its discovery at CMMC; thus, it also more likely than not began at some point after Ms. Ward's last visit to UMMC. (T. 592, 604, 608-609.) This testimony was likewise undisputed. Thus, according to the undisputed testimony of an infectious disease expert, any MRSA or Group

B strep Ms. Ward experienced at CMMC more likely than not developed after her last visit to UMMC, a fact that went unheeded by plaintiff/trial court.

4. **"That is why seven days later, on March 27, she returned to UMMC with a fever and purulent discharge from her incision. The physicians had a second chance to properly treat Ms. Ward." (Brief of Appellee, p. 19.)**

Plaintiff's insistence that Ms. Ward "returned to UMMC with... purulent discharge from her incision" and that she had one continuous "infection" is completely inaccurate, and her tedious insistence upon skewing reality in her favor hinders the search for truth. Dr. Robinson was not apprised of the home nurse's observations, but he examined Ms. Ward and did not observe purulent drainage on her skin surface. More importantly, he proved indisputably that Ms. Ward did not have purulent drainage inside her incision at UMMC when he opened and drained the incision pocket, observing the contents personally.

5. **"However, the Doctors at UMMC again failed to perform the most basic tests to properly diagnose her infection [referring to March 27]. They performed no CBC, no blood culture and no wound culture. Therefore they had no idea what type of infection they were dealing with and what type of antibiotics should be used." (Emphasis omitted.) (Brief of Appellee, p. 19.)**

Again plaintiff engages in word-play with the general terms "infection" and "type of infection,"and "type of antibiotic". Dr. Robinson thoroughly examined Ms. Ward on March 27 and determined that she did not have an infected incision based on her presentation at the time of his examination; nonetheless he provided treatment curative of a wound infection if she had one, after which Ms. Ward's fever disappeared and her other symptoms cleared.

A CBC could not identify a particular "type of infection" nor identify what "type of antibiotic"should be used, regardless of the use of the terms. A blood culture could rule out a bacterial infection in the bloodstream, but bacteria in the bloodstream was not at issue in

this case. There was no purulent drainage to culture from the wound site on March 27, but if a wound culture had been taken the results would not have returned for 1-3 days, by which time Ms. Ward's symptoms had disappeared with the curative opening, draining and cleaning of the wound, continued home wound care, and the oral antibiotic Keflex. No expert testified that an antibiotic needed to be changed if the patient got better on the initial treatment. As described by Dr. David, in his own practice diagnosis is usually made on the basis of clinical symptoms, and in this case Ms. Ward was examined for a wound infection, treated for a wound infection, her condition improved, and she did not return to UMMC.

6. **"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." (Brief of Appellee, p. 19.)**

The "infection" Dr. Wolfe obviously referenced was Ms. Ward's medical condition at CMMC, since Dr. Wolfe offered no opinion as to the events and treatment at UMMC. Plaintiff improperly attempted to use Dr. Wolfe's testimony concerning treatment for Ms. Ward's medical condition at CMMC to establish the appropriate treatment earlier at UMMC where Ms. Ward presented with very different symptoms, to which UMMC objects as improper and inadmissible. Plaintiff's subliminal suggestion that Ms. Ward had MRSA while at UMMC on March 18 and 27 is an unsupported assertion.

7. **"Dr. Wolfe did run the proper tests to diagnose Ms. Ward. Dr. Wolfe did perform a CBC, he did perform a blood culture and he did perform a wound culture. All of the things that the physicians should have done at UMMC." (Brief of Appellee, p. 19.)**

UMMC again strenuously objects to this inappropriate attempt to create expert testimony that UMMC breached the standard of care through Dr. Wolfe. He did not testify that, based on his review of records and depositions and Ms. Ward's symptoms at UMMC on March 18 and/or 27, that a CBC, blood culture and wound culture was required on those

dates or would have avoided the outcome, nor would it have been admissible if he had so testified.

Nonetheless, the April 5 WBC at CMMC was within the normal limits. The wound cultures performed in surgery were of the incision area and did not indicate what, if any, organism infected Ms. Ward's uterus. Finally, Dr. Wolfe never ordered blood cultures and plaintiff's assertion otherwise is simply mistaken. (T. 142-143, 584-585.) Thus, any suggestion that a WBC at UMMC would have been abnormal, or that blood or incision cultures would have revealed bacteria in Ms. Ward's uterus is completely unfounded.

8. "He had to perform a hysterectomy in order to save Ms. Ward's life." (Brief of Appellee, p. 20.)

Dr. Wolfe testified that he ruled out a rare but often fatal condition called "necrotizing fasciitis" during surgery, but at no time did he offer an opinion that a hysterectomy was needed to save Ms. Ward's life as plaintiff improperly asserts. In reality, he testified that he performed the hysterectomy "for the best post-operative outcome" and "the absolute best benefit"(T. 145, 152-154, 172-174, 183-184, 126-189.)

9. "Ms. Ward . . . will never be able to have children at the age of twenty."(Brief of Appellee, p. 20.)

This statement is materially misleading, as plaintiff forgets that Ms. Ward is already the mother of two healthy, active sons. When Dr. Wolfe informed Ms. Ward that one of the possible risks of surgery was a hysterectomy, Ms. Ward responded that she did not want any more children and did not have a problem with a hysterectomy on that basis. (T. 145, 173; R.E. 7, p. 9.)

Plaintiff/trial court exceeded the minimum standard of care by requiring UMMC not only to correctly diagnose, but to "confirm" or "substantiate" the correct diagnoses of EMM on March 18 and incision infection on March 27 and to "verify" or "insure" that the medical

treatment provided to Ms. Ward was "appropriate." (R.E. 7, p. 5; R.E. 10, p. 5 and 8.) Fatal to the plaintiff/trial court's lofty expectations, no expert testified that if the laboratory tests had been performed, they would have revealed results indicating that, more likely than not, the treatment provided for Ms. Ward's EMM and potential incision infection was not appropriate.

Even more pronounced than Dr. David's ambiguous testimony as to breach of duty, Dr. David did not establish that any of the alleged breaches by UMMC proximately and foreseeably caused Ms. Ward's hysterectomy on April 5, 2004. (Brief of Appellee, p. 20.) "The plaintiff bears the burden of presenting significant probative evidence" of proximate cause in a negligence action. *Mississippi Department of Transportation v. Cargile*, 847 So. 2d 258, 262 ¶ 11 (Miss. 2003). In a medical malpractice action, the elements of negligence generally must be proven by expert testimony. *Young v. University of Mississippi Medical Center*, 914 So. 2d 1272, ¶ 15 (Miss. Ct. App. 2005). "Not only must this expert testimony identify and articulate the requisite standard that was not complied with, the expert testimony must also establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries. *Young* at ¶ 15. In order to prevail in a medical malpractice action, a plaintiff must "show, by expert testimony, that the physician deviated from the appropriate standard of care and that deviation was the proximate cause of the injury of which the plaintiff complains." *Mitchell v. University Hospitals and Clinics- Holmes County*, 942 So. 2d 301 ¶8 (Miss. Ct. App. 2006). "An act which merely furnishes the condition or occasion upon which injuries are received, but which does not put in motion the agency by or through which the injuries are inflicted, does not constitute the proximate cause of the harm." *Foster v. Bass*, 575 So. 2d 967, 982 (Miss. 1991). For a claim of negligence to stand, the injury must have been foreseeable from the point of view of the actor prior to the occurrence and must

not be the result of an intervening cause. *Foster* at 975, 982. "Certainly no court has ever held that a physician is a warrantor of cures." *Hawkins v. Ozborn*, 383 F. Supp. 1389, 1396 (N.D. Miss. 1974.).

Plaintiff's response on the element of proximate cause is a several page recitation of irrelevant testimony regarding standard of care. (Brief of Appellee, pp. 20-25.) However, testimony as to an alleged breach of the standard of care, even if credible, does not prove proximate causation, a separate element that must be proved to establish negligence.

Dr. David's first statement addressing proximate cause is 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 [unnamed] right antibiotic, would it have avoided and cured this [unspecified] 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. 280-282.)

Here Dr. David's testimony was limited to agreement with plaintiff counsel's vaguely worded statement. From the ambiguous language of this statement, it is impossible for the listener/reader to know which date (March 18-20 or March 27) the laboratory tests should have been performed and the antibiotic administered, which antibiotic was the "right antibiotic", and what "condition" he agreed would have been "avoided and cured" (EMM, incision infection, MRSA, Group B Strep, hysterectomy, etc.). The listener/reader is further left pondering how exactly a "condition" can be both "avoided" and "cured".

Further, this testimony states that Ms. Ward's "condition" would have been both "avoided and cured" if only two tests had been performed (CBC and wound culture) and the "right antibiotic" given. As blood cultures, urinalysis, and continued Unasyn were not

identified, the listener/reader must conclude by this statement that Dr. David does not believe their omission at UMMC caused or contributed to plaintiff's "condition". This ambiguous agreement falls far short of proving to a reasonable probability that a specific breach of the standard of care at UMMC proximately caused or contributed to Ms. Ward's later alleged severe infection and hysterectomy.

The second statement is as follows:

> **Q. Do you have an opinion whether or not Ms. Ward's [unnamed] condition was-subsequent [unspecific] treatment was proximately caused by the [unidentified] negligence of the University Medical Center?**
> **(Objection and objection overruled)**
> **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 [unidentified] treatment or [unspecified] lack thereof fell below the standard of care, and that this - a [unnamed] deficiency below the standard of care was a direct and proximate cause of the [unspecified] problems suffered by Ms. Ward including that need for the hysterectomy.**
> (T. 327.)

The listener/reader is again left to fill in the gaps of what Dr. David may have meant in this global, conclusory statement where he avoided the scrutiny possible with a clear and specific opinion. No reasonable explanation as to how one or more of the alleged breaches proximately caused Ms. Ward's hysterectomy was offered by any expert at trial. The trial court's finding of proximate cause was based entirely upon Dr. David's non-testimony and was expressed in the following conclusory statement copied directly from plaintiff's trial brief: "Dr. David testified that Ms. Ward's resulting hysterectomy was proximately and foreseeably caused by defendant's negligence." (R.E. 7, p. 6; R.E. 10, p. 10.) Satisfied with unintelligible assertions of a breach of the standard of care and evidence of injury, the trial court made no attempt to discern which of the multiple alleged breaches of the standard of care proximately and foreseeably caused Ms. Ward's hysterectomy, nor how this was

accomplished. Contrary to Mississippi law, the trial court did not require substantial, credible proof of this necessary element in finding for the plaintiff.

The trial court copied verbatim from plaintiff's trial brief the section allegedly setting forth Dr. David's opinion *in toto*, including his alleged opinion as to the breaches of the standard of care. (R.E. 7, p. 6; R.E. 10, p. 10 and 13.) These alleged breaches of the standard of care are enumerated below. Each one can be refuted as lacking in testimonial support, relevance and/or reliability. It is important to remember that, even if one or more of the following assertions qualified as a breach of the standard of care (which defendant denies), this does not rescue plaintiff's lack of proximate cause testimony.

1. **A CBC on March 18, a CBC on March 27** - A CBC is a diagnostic test and a baseline measurement, not a treatment therapy. Her WBC on April 5 was within the normal range, and Dr. David never opined that a CBC would have returned abnormal results if taken earlier on March 18 or 27, nor how the performance of this diagnostic test would, more likely than not, have led to a cure for Ms. Ward.

2. **A urinalysis on March 18** - A urinalysis is a diagnostic test to rule out a urinary tract infection. It is not a treatment therapy, nor did Dr. David explain how performance of a urinalysis would cure Ms. Ward's "problems". Further, a urinalysis was omitted as proximately causing plaintiff's "condition" in Dr. David's previous agreement.

3. **A blood culture on March 18, a blood culture on March 27** - A blood culture is not a treatment therapy, but is a diagnostic test to rule out bacteria in the bloodstream. Lack of a blood culture was not identified as a cause of plaintiff's "condition" in Dr. David's previous agreement. There was never any evidence that Ms. Ward had bacteria in her bloodstream, nor was bacteria in Ms. Ward's bloodstream at issue in this case. Dr. David never opined how testing for bacteria in Ms. Ward's bloodstream would have cured Ms. Ward's uterus.

4. **A wound culture on March 18** - A wound culture is a diagnostic test, not a treatment therapy. Dr. David did not explain how or why UMMC should have cultured Ms. Ward's incision on March 18 given her complete lack of incision drainage or other symptoms on that date. Dr. David testified that if a culture was not done, 48 hours of antibiotic therapy should be given, unaware that this antibiotic alternative was substantially met. (T. 288.) **A wound culture on March 27** - This opinion was based on Dr. David's

incorrect assumption that there was purulent drainage to culture when Ms. Ward was examined at UMMC on March 27. Dr. David never opined what a wound culture would have revealed if taken on March 18 and 27, and he never testified how the mere performance of a wound culture test would have cured Ms. Ward. Further, Dr. Wolfe did not describe an incision infection as the reason he removed Ms. Ward's uterus.

5. **(An endometrial/cervical culture on March 18)** - An endometrial/cervical culture is a diagnostic test, not a treatment therapy. This test was not planned by Dr. Austin and was not found by the trial court to be required. The medical records reveal no evidence of a resistant organism in Ms. Ward's uterus. Dr. David never opined what the results of an endometrial/cervical culture would have shown, nor how the mere performance of this diagnostic test would have cured Ms. Ward.)

6. **Forty-eight hours of IV Unasyn therapy on March 18-20** - Dr. David asserted that 48 hours (8 doses) of Unasyn therapy was required in response to his mistaken belief that Ms. Ward had received only 24 hours of Unasyn therapy. Dr. David did not know that Ms. Ward actually received 42 hours of Unasyn therapy (7 doses), continued for approximately 48 hours after the decline of Ms. Ward's fever. Dr. David never testified that the single additional dose of Unasyn would have cured Ms. Ward and avoided her hysterectomy weeks later. (Plaintiff/trial court enhanced Dr. David's opinion by requiring that the IV therapy continue for 48 hours after she was free of symptoms in reliance on the student guidelines.)

7. **Unspecified IV or intramuscular antibiotic therapy on March 27** - Dr. David asserted that IV or intramuscular antibiotic therapy should have been prescribed on March 27 based on his inaccurate assumption that purulent drainage was present when Ms. Ward was examined at UMMC. Nonetheless, Dr. David never explained how receipt of an unspecified IV or intramuscular antibiotic on March 27 in treatment for an alleged incision infection would have spared Ms. Ward's uterus later at CMMC. (Plaintiff/trial court again enhanced Dr. David's opinion by requiring that Ms. Ward be admitted to the hospital on March 27.)

Plaintiff also failed to prove that Ms. Ward's hysterectomy on April 5 at CMMC was a foreseeable consequence of the care received on March 18-20 and 27 at UMMC. Based on the principles as set forth in *City of Jackson v. Estate of Stewart*, 908 So. 2d 703 ¶¶ 43-49 (Miss. 2005), to meet her burden of proof plaintiff would have had to establish that her hysterectomy at CMMC weeks after her care at UMMC was the "type of damage that is reasonably probable to occur from the alleged breaches of the standard of care set forth." Dr.

David's limited testimony as to foreseeability was a blanket speculation that "if you don't treat endometritis," you can get various ailments. (T. 279-280.) This general testimony is moot and inapplicable to this case where Ms. Ward substantially received the amount of Unasyn Dr. David recommended in treatment of her EMM (endometritis).

Plaintiff also ignores the intervening, superceding events that occurred between March 27 and the hysterectomy on April 5 which were outside the control of UMMC: (a) Ms. Ward's symptoms cleared and she sought no further care from UMMC; (b) the undisputed likelihood that any alleged MRSA or Group B Strep infection occurred after March 27 due to the short incubation period of MRSA bacteria and the typical rapid progression of Group B Strep bacteria; (c) and the discretionary decision by Dr. Wolfe to remove Ms. Ward's uterus "for the best post-operative outcome" and "the absolute best benefit" during exploratory surgery. (T. 152-154,172-174,183-184.) Even a finding of contribution rather than proximate causation must be supported by reliable expert testimony, which cannot be found in this case.

With her barrage of factually incorrect and irrelevant assertions of breach of duty, plaintiff tempts the listener/reader to conclude that surely one of her many assertions was an actual breach which could have *post hoc ergo propter hoc* led to her hysterectomy. *Cuevas v. DuPont DeNemours and Company*, 956 F. Supp. 1306, 1311 (S. D. Miss. 1997.) "It is the universal rule in tort actions that mere proof of injury complained of raises no presumption of negligence." *City of Jackson v. Estate of Stewart* 908 So. 2d 703,¶ 45 Miss. 2005.) Simply because Ms. Ward developed a condition that led her treating physician at CMMC to perform a hysterectomy does not mean that her earlier care at UMMC caused that condition. A fair analysis of the evidence must conclude that no alleged breach of the

standard of care proximately and foreseeably without intervening, superceding event, caused or contributed to Ms. Ward's later alleged severe infection and /or hysterectomy.

E. The Trial Court Erred in Any Reliance upon the OB/GYN Department's Student Practice Guidelines as the Standard of Care in this Case.

The UMMC guidelines were a list of possible diagnostic and treatment options created for student learning by the faculty of the OB/GYN department and used in conjunction with faculty supervision with the intent that they would be modified to fit the individual patient circumstance, and were never intended to represent the standard of care. (T. 203-206, 533-536, 593-595, 602; R.E. 11, p. 4.) Use of this student learning tool in a court of law, denying its very creators the right to modify their own tool used in their educational practice, discourages the creation of such valuable learning tools in general. (The guidelines were specifically for the treatment of EMM and not applicable to the incision symptoms on March 27.) (R.E. 4, pp. 8-10, 16-17.) Despite the evidence, plaintiff's response asserts that Dr. David and the trial court did not rely on the student guidelines to establish the standard of care. (Brief of Appellee, pp. 25-26.) In clear contradiction, plaintiff asserted that:

> 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.

(Brief of Appellee, p. 4.)

Dr. David relied upon the student guidelines as the standard of care for March 18, criticizing the physicians "for not following these guidelines." (T. 266-267, 269-270.) (Emphasis added.) In her Memorandum Opinion and Judgment, the trial court found that "Dr. Austin's plan for treatment of Ms. Ward's condition was consistent with UMMC's

practices, procedures, and guidelines." (R.E. 7, p. 2.) (Emphasis added.) She also "found," without expert support, that "the evidence supports Plaintiff's contention that UMMC's guidelines for treatment and release of a patient who has been diagnosed with EMM required that Ms. Ward remain on antibiotics until she was symptom free of infection for 48 hours." (R.E. 7, p. 2.) (Emphasis added.) At trial the court stated an opinion that:

> There were follow-up tests that were consistent with the guidelines of the University Medical Center. That Dr. Austin appears to have followed those guidelines in terms of future assessment. But there's nothing in the record to indicate that there were any tests done to determine – I believe it was the reason for the elevated temperature, no blood culture, no urine analysis. I can't remember the others, but the record will speak for itself."

(T. 376-377.)

Notwithstanding, the physicians at UMMC correctly diagnosed Ms. Ward's presumed EMM and substantially complied with the treatment guidelines in the Unasyn therapy provided. The trial court's reliance upon the student guidelines to establish a duty for UMMC was a clear error of law and should be reversed.

F. The Trial Court Erred in Denying UMMC's Motion for Directed Verdict (Involuntary Dismissal).

Defendant's motion for directed verdict was in actuality a motion for dismissal under *Miss. R. Civ. P.* 41(b). Plaintiff points out that if a defendant proceeds with his case after a denial of the 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). The language of Rule 41(b) clearly states that defendant does not waive his right to offer evidence in the event the motion is not granted. Although defendant continued with the offering of its evidence after the trial court denied its motion as the only practical course to follow, it renewed its motion at the close of defendant's case, which the trial court likewise denied. (T. 372-377, 611.)

Defendant again asserts that, after a fair consideration of the evidence, the record is clear that plaintiff failed to prove each of the four elements of negligence at trial, and thus dismissal was proper. *Partlow v. McDonald*, 877 So. 2d 414, 416 ¶ 7 (Miss. Ct. App. 2003).

VI. CONCLUSION

UMMC offered numerous qualified experts who testified that it met or exceeded the standard of care in the treatment Ms. Ward received on March 18 and 27, after which her symptoms disappeared. UMMC's experts further testified that no allegedly negligent omission by UMMC proximately caused or contributed to Ms. Ward's later alleged infection and hysterectomy at CMMC. Plaintiff offered no credible, reliable, and relevant testimony to prove otherwise.

The fabric of plaintiff's trial story was woven of fragile lace, filled with spaces where the facts, evidence and expert testimony at trial did not support her story. Plaintiff/trial court improperly filled the gaps with a patchwork of innuendo, forgotten or ignored facts, and enhanced testimony. The trial court abused its discretion in so doing, and reversal of her judgment in favor of the plaintiff is warranted based on the actual facts and testimony. Therefore, UMMC respectfully requests this Honorable Court to reverse the ruling of the trial court and dismiss UMMC from this action, with prejudice.

VII. RESPONSE TO CROSS-APPEAL

A. Plaintiff inappropriately requested an additur for non-economic damages.

Without waiver of defendant's position that the trial court erred by ruling in favor of the plaintiff, defendant requests this Honorable Court to deny plaintiff's request to increase her award for damages. At trial, the court awarded $127,040.00 to the plaintiff, including $52,040.00 in compensation for medical bills with the explicit finding that "[n]o evidence was presented of future medical or lost wages." (R.E. 7, p. 9.) The trial court then awarded

Ms. Ward $25,000 for past mental anguish and emotional distress associated with her injuries and $50,000 in past pain and suffering, again with the explicit finding that "no evidence of future mental anguish, future pain and suffering nor permanent disfigurement was evidenced at trial." (R.E. 7, pp. 9-10.) As the trial court noted in her Memorandum Opinion and Judgment, "... the evidence indicates that Ms. Ward indicated to Dr. Wolfe that she no longer desired to have more children before her surgery at CMMC," thus the trial court expressly declined to award damages for this alleged injury. (R.E. 7, p. 9; T. 145-147, 172-176; T.E. D-2, 366, 415.) Although the trial court made no specific mention of damages for loss of enjoyment of life, it is noted that plaintiff did not expressly request damages for loss of enjoyment of life in her complaint nor her trial brief of the plaintiff. (R.E. 10, pp. 14-15.)

In her cross-appeal, plaintiff now requests the Supreme Court to amend the findings of the trial court, adding amounts for past and future pain and suffering, past and future mental and emotional suffering, and loss of enjoyment of life, totaling a damage award of $652,039.31, an amount greater than the $500,000 statutory limit. Plaintiff filed no motion requesting an additur with the trial court as is the procedure for additur under *Miss. Code Ann.* § 11-1-55; therefore no denial of additur by the trial court is at issue. Matters not presented to the trial court are improperly presented to the Supreme Court for review on procedural grounds, and defendant therefore requests the Court to deny plaintiff's request for additur. *Pittman v. Pittman*, 909 So. 2d 148 ¶ 13 (Miss. Ct. App. 2005).

However, if plaintiff's request for additional damages is considered by the Supreme Court, the plaintiff (as the party seeking the additional damages) must actually prove her injuries and damages. *Harvey v. Wall*, 649 So. 2d 184, 187 (Miss. 1995). "The burden of proving injury and other damages falls to the party seeking the additur." *Doe v. North Panola*

School District, 906 So. 2d 57, ¶ 9 (Miss. Ct. App. 2004). Review of a trial court's grant or denial of an additur is limited to an abuse of discretion. *Maddox v. Muirhead*, 738 So. 2d 742, ¶ 5 (Miss. 1999). Evidence is reviewed in the light most favorable to the defendant. *Maddox* at ¶ 5. Additurs "should never be employed without great caution." *Maddox* at ¶ 5. An additur may only be granted if the court finds that the jury was influenced by bias, prejudice or passion or if the damages were contrary to the overwhelming weight of credible evidence. *Pham v. Welter*, 542 So. 2d 884, 888 (Miss. 1989).

B. An award for additional damages or additur is unsupported by case law.

Plaintiff asserts UMMC was found "100% liable," although nowhere did the trial court state this opinion. (Brief of Appellee, pp. 29, 31, 32; R.E. 7, p. 9.) In reality, the trial court wavered that "defendant's failure proximately caused or contributed to Ms. Ward subsequent injuries." (R.E. 7, p. 9.) (Emphasis added.)

Plaintiff relies incorrectly on *Copeland v. City of Jackson*, 548 So. 2d 970 (Miss. 1989) for her contention that an additional award for pain and suffering and mental pain and suffering are justified in her case. In *Copeland* the plaintiff, who was in his 20's, suffered two fractured vertebrae as a result of an automobile accident, requiring three surgical procedures with insertion of acrylic rods, decreased physical activity, and interference with his educational plans. *Copeland* at 971-974. He also experienced a reduced sense of pain, a lack of sensation in certain portions of his body with fatigue, problems sleeping, and daily suffering of pain. *Copeland* at 971-974. The unfortunate plaintiff also provided testimony of physician diagnosed depression and his dramatically decreased sexual urges due to reduced sensitivity from the chest level down. *Copeland* at 971-974.

Unlike Ms. Ward, the Court in *Copeland* specifically noted that plaintiff had put on extensive testimony regarding the plaintiff's "prior good health, medical expenses, pain and

suffering and permanent physical impairment," including testimony from the plaintiff, witnesses, and an expert as to the future psychological effect of the injury. *Copeland* at 974. Based on the extensive evidence presented, the Supreme Court affirmed the trial court's grant of plaintiff's motion for additur, granting the plaintiff $350,000. The Court explicitly based its ruling of the extensive amount of testimony presented. *Copeland* at 974.

Plaintiff also relied on *Pham v. Welter*, 542 So. 2d 884 (Miss. 1989) in support of her request for additional damages for pain and suffering. This reliance was also misplaced as, again unlike Ms. Ward, the plaintiff in *Pham* put on substantial proof of past and expected severe pain and suffering. *Pham* at 888- 889. In *Pham*, the plaintiff was involved in a head on collision where he suffered considerable injuries and was taken to the hospital where he responded only to painful stimuli. He had a severe head injury, swelling of the right jaw, non-reactive pupil of the right eye, a large bruise on his cheek and abdomen, and fracture and swelling of the right femur. *Pham* at 888. Pham showed that as a result of the accident, he had internal bleeding, and underwent exploratory surgery, where a lacerated kidney and torn liver and spleen were found. *Pham* at 888. He then had another surgical procedure to repair his leg injured in the accident where a metal nail was inserted. Unlike Ms. Ward, Pham put on proof at trial of future injury where he would require further surgery to remove the nail. *Pham* at 888. In addition to several other hospital procedures, Pham was in the ICU for 12 days and spent approximately six weeks total in the hospital. *Pham* at 888. Following his hospitalization, Pham proved that he had to use crutches for several more weeks, after which he walked with a limp and complained of pain in his leg, neck and tenderness in his thigh area. *Pham* at 888. He further proved that the ordeal resulted in a slight deformity to his leg, and the metal in his leg caused him continued pain. *Pham* at 888-889.

Unlike the testimony offered by Ms. Ward, Pham offered proof of past and future medical expenses as well as proof of lost wages and future disability related to his leg injury. *Pham* at 889. The jury granted Pham $30,000 in damages which calculated to $1,327.30 for pain and suffering (before reduction for his 60 percent negligence). The Supreme Court overruled the trial court's denial of Pham's motion for additur because, unlike Ms. Ward, Pham offered substantial proof of his past and future pain and suffering and disability at trial, granting him a total of $60,000 in damages and permanent partial disability (again before reduction for his 60 percent negligence). *Pham* at 887-889.

The case law offered by the plaintiff does not assist her position that she should be granted an additur where, unlike Ms. Ward, the plaintiffs in both *Copeland* and *Pham* presented extensive proof to the jury of their past and future pain and suffering. Thus, plaintiff's request for additur is ill-conceived and unsupported by the evidence at trial. More applicable to this case, defendant offers the following authority that adequate proof of a plaintiff's pain and suffering must be presented at trial to support her claim for damages before an award can be granted.

In a bench trial where the plaintiff had requested the trial court to grant an additur for additional damages for pain and suffering, the Supreme Court affirmed the denial of the additur in *DePriest v. Barber*, 798 So. 2d 456, (Miss. 2001.) The plaintiff in *DePriest* suffered damages in an automobile accident which caused her vehicle to flip, where she suffered both personal injuries and property damages in the collision. *DePriest* at ¶ 2. The plaintiff underwent testing at the hospital and sustained injuries to her neck, back and wrist, experienced headaches, and was eventually diagnosed as having muscle spasms and sprains to the back and neck with testimony that this caused her pain and suffering for at least six months. *DePriest* at ¶ 3. Her out-of-pocket expenses and lost wages were awarded by the

trial court totaling $8,730.95, and she was also awarded $3,269.05 in pain and suffering by the trial court. *DePriest* at ¶ 11. The Supreme Court affirmed the trial court's denial of an additur, finding that "[o]ver a fourth of the total damages was allocated for pain and suffering, which is more than adequate compensation given the facts of the case." *DePriest* at ¶ 11.

When damages for pain and suffering are claimed, the plaintiff must put on sufficient proof to support that said pain and suffering occurred. *Doe v. North Panola School District*, 906 So. 2d 57, ¶¶ 11-16, 20-21. In affirming the trial court's denial of an additur for pain and suffering damages where no award for pain and suffering had been granted, the trial court in *Doe* found that the plaintiff (a retarded child) had put on no proof that she had experienced pain and suffering after experiencing repeated sexual assaults. The Supreme Court affirmed the trial court's denial of an additur where, similar to Ms. Ward's case, there was a lack of evidence presented at trial, thus no award was added for the plaintiff's claim of pain and suffering. *Doe* at ¶¶ 11-16, 20-21.

C. The evidence presented at trial does not support an additional award for damages nor the current award of damages.

In her cross-appeal as with her case-in-chief, Ms. Ward misleadingly enhanced the scant testimony presented at trial regarding her alleged pain and suffering and mental damages. Specifically, plaintiff misrepresented the facts in following material statements:

1. "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. (Brief of Appellee, p. 30.)

Plaintiff forgets that her hysterectomy was performed as part of an exploratory surgery to assess the cause of her alleged symptoms. UMMC should not be liable for those

portions of Ms. Ward's stay at CMMC not proven at trial to have been caused by the alleged negligence of UMMC.

2. "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." (Brief of Appellee, p. 30.)

As plaintiff dismisses that Ms. Ward has already borne two healthy sons, it is a misleading characterization to say that she "would never be able to bear children." (T. 360; R.E. 7, p. 9.) The trial court found that as Ms. Ward had expressed to Dr. Wolfe before surgery that she did not want additional children, no award for damages for this issue was warranted. (R.E. 7, p. 9.) Further, as Ms Ward's ovaries were left intact, Dr. Wolfe testified there is the potential for additional children as an egg donor. (T. 183-184.)

3. "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." (Brief of Appellee, p. 30.)

This statement is an exaggeration of Ms. Ward's extremely limited and potentially self-serving testimony as to how the hysterectomy allegedly affected her emotional well-being, testimony uncorroborated by any medical evidence nor the testimony of witnesses. Ms. Ward described herself as having less energy, and her current emotional state as "a wreck" where she is angry and argues a lot, coming across as "mean." (T. 359.) However, there was no testimony establishing that she was not tired, angry, or argumentative prior to the hysterectomy. Further, there are other obvious factors in play that would likely affect the average person's energy level, relationships, and disposition, such as Ms. Ward's weighty responsibilities as an unemployed, single parent of two active young children in her early twenties. (T. 330, 360-363.) Notwithstanding plaintiff's claim of alleged emotional devastation and a compromised ability to maintain relationships, Ms. Ward has moved on with her life and was engaged to be married at the time of the trial. (T. 328-329, 355, 361.)

4. **"Dr. Wolf testified to the seriousness of the surgery and that it could be fatal" (Brief of Appellee, p. 30.)**

This statement misrepresents Dr. Wolfe's testimony. Dr. Wolfe thought that Ms. Ward may have had necrotizing fasciitis, a potentially fatal condition of the abdominal fascia, which was immediately ruled out during surgery. He never testified that the exploratory surgery itself nor the hysterectomy were possibly fatal beyond normal risks of surgery. (T. 145, 152, 154, 172, 183-184.)

5. **"Earquella also testified that she continued to have yeast infections as a result of the surgery." (Brief of Appellee, p. 31.)**

Although Ms. Ward testified that she has yeast infections and has been to see an unnamed physician, she is not professionally qualified to testify that her yeast infections were caused by the surgery, particularly as her testimony was confusing as to whether she had similar vaginal infections prior to the surgery also. (T. 358.)

6. **This case involves "severe and permanent injuries to a child." (Brief of Appellee, pp. 32-33.)**

Ms. Ward was 20 years old at the time of the incident in 2002 and 23 years old at the time of trial. She was the mother of two children with some college education, had her own address and was engaged to be married. To describe her as a "child" in 2002 or 2005 is an obviously inaccurate description and self-serving characterization.

Further, no expert testimony was offered at trial that Ms. Ward had suffered "severe and permanent injuries." No expert testified regarding the expected present and future mental and/or physical effects of removal of the uterus (apart from the inability to physically give birth to another child, which was specifically addressed by the trial court). Dr. Wolfe testified at trial regarding Ms. Ward's post surgical office visits and recovery, where he described a normal vaginal examination with a return to sexual activity. (T. 177-170.)

During the weeks following surgery, Dr. Wolfe described where he drained a small pus pocket near her incision and was "fussing" at her for failing to take the oral antibiotics he had prescribed for her. (T. 180-182.) (As the exploratory laparotomy was performed in the same incision previously used for the Cesarean section, there was no new incision or scar.) (T. 146.) Dr. Wolfe also chastised Ms. Ward for wearing her jeans extremely tight over her healing incision, cutting off the blood flow, slowing the healing process and potentially trapping infectious material in the incision area. (T. 182-183.) Dr. Wolfe then testified regarding his notation in the medical records where Ms. Ward informed him that she thought, unless he had done something wrong, she would not have an infection. (T. 177-184, D-14, pp. 621-625.) Ms. Ward healed from her surgery, and there is no medical testimony beyond that point.

Ms. Ward testified that she has never been told by a physician that she could not work and has been employed at least once since the surgery. Her decision not to return to school was a personal choice.(T. 330-331, 362 - 363.) She testified that no physician has talked with her about the need for hormone medication, either now or in the future. (T. 359-360.) There was no testimony at trial that her ability to care for her two "very healthy", "pretty energetic and smart" sons has been compromised. (T. 360.)

7. **"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." (Brief of the Appellee, p. 31.)**

As found by the trial court, Ms. Ward put on no proof of future mental anguish, future pain and suffering, nor was a new surgical incision made at CMMC. (R.E. 7, p. 9-10.) She left proof of her past and future pain and suffering, past and future mental pain and

suffering, and loss of enjoyment of life to the imagination of the court, relying on supposition and innuendo.

Even more disturbing, to support the award of damages at trial for pain and suffering, the trial court "found" that "Ms. Ward stated that as a result of her infection and subsequent hysterectomy, she has experienced severe depression and hormonal mood swings," again copying verbatim a sentence from the Trial Brief of the Plaintiff. (R.E. 7, p. 9; R.E.10, p. 8.) Notwithstanding this "finding", Ms. Ward never testified that she experienced depression, nor did any witness or expert testify that she experienced depression, and the trial court abused her discretion with this finding. (T. 328- 371.) As to the "finding" of "hormonal mood swings," Ms. Ward actually testified that no physician had spoken with her about the need for hormone medication, despite her testimony that she has to "constantly go to the doctor" for her alleged yeast infections. (T. 359-360.) As expert opinion was required to establish that Ms. Ward (whose ovaries were left intact) was experiencing mood swings caused by a hormone imbalance related to the hysterectomy, the trial court erred in awarding damages on this basis. Thus the trial court's award of $25,000 in past mental anguish and emotional distress and $50,000 in past pain and suffering was unsupported by the evidence presented to the trial court and should, at a minimum, be decreased.

Should this Honorable Court decline to overrule the trial court as to liability as requested and if this Honorable Court considers the propriety of the damage award pursuant to plaintiff's cross-appeal, UMMC respectfully requests this Honorable Court to recognize that the trial court erred in awarding damages of $25,000 for past mental anguish and emotional distress and $50,000 in past pain and suffering as unsupported by the scant, self-serving testimony of Ms. Ward at trial, with no corroborating witnesses or evidence nor expert support. Therefore, defendant respectfully requests this Honorable Court to deny

plaintiff's request for additional damages as completely without proof at trial, and also to decrease the current award of damages to that amount credibly supported by the extremely limited evidence presented at trial. Foremost, however, defendant respectfully requests this Honorable Court to reverse the trial court's unsupported finding of liability against UMMC, and dismiss it from this action with prejudice.

Dated this the 12th day of April, 2007.

Respectfully submitted,

UNIVERSITY OF MISSISSIPPI MEDICAL CENTER

WILKINS, STEPHENS & TIPTON, P.A.

BY: Melanie H. Morano
Senith C. Tipton (MSB No. [redacted])
Melanie H. Morano (MSB No. [redacted])

WILKINS, STEPHENS & TIPTON, P.A.
One LeFleur's Square
P. O. Box 13429
Jackson, MS 39236-3429
(601) 366-4343
Fax: (601) 718-0156

CERTIFICATE OF SERVICE

I do hereby certify that I have this day caused to be hand delivered a true and correct copy of the above and foregoing **Appellant's Reply to Brief of Plaintiff/Appellee and Response to Cross-Appeal** to the following:

Hon. Tomie T. Green
Circuit Judge
Hinds County Courthouse
P. O. Box 327
Jackson, MS 39205

G. Joseph Diaz, Jr., Esq.
Patrick K. Williams, Esq.
Diaz Lewis & Williams
115 South Congress Street, Suite 1218
P. O. Drawer 24268
Jackson, MS 39225-4268

(Via United States mail, postage prepaid)
Edward Blackmon, Jr., Esq.
Blackmon & Blackmon, PLLC
907 West Peace Street
P. O. Box 105
Canton, MS 39046
Attorneys for Plaintiffs

This the 12th day of April, 2007.

Melanie H. Morano

Senith C. Tipton (MSB No. [redacted])
Melanie H. Morano (MSB No. [redacted])

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