CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following persons or entities have an interest in the outcome of this case. These representations are made in order that justices of this court may evaluate possible disqualification or recusal.

1. Appellee, Nancy Necaise the daughter and only heir of Chares Freeman, Deceased

2. Appellants, Matthew Sacks, M.D. and The Medical Oncology Group, P.A.

3. Honorable Stephen Simpson, Circuit Court Judge for the Second District

4. Counsel for Appellees; Robert W. Smith, Esq.
   George Estes, III, Esq,

5. Counsel for Appellants: Thomas L. Musselman, Esq.
   Stacie E. Zorn, Esq.
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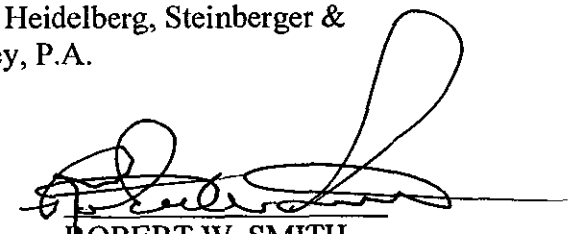

ROBERT W. SMITH
Counsel for Appellee

Brief of Appellee
2006-CA-01068-SCT

ORAL ARGUMENT NOT REQUESTED

This is a case in which the neglect of a chemotherapy nurse allowed a highly toxic drug to continue infiltrating into the patient's flesh rather than into the venous system resulting in severe chemical burns. The nine year old case was tried to the court without a jury by agreement.

The trial judge did an admirable job explaining his reasoning in finding for the Plaintiff. The facts were simple, not complex. Oral argument will not add anything of merit to the discussion.

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STATEMENT OF THE CASE

A. NATURE OF THE CASE AND DISPOSITION BELOW

This is a medical negligence case based on nursing neglect during the course of administering chemotherapy. As result of the nursing neglect, a chemotherapy drug called Taxol was allowed to continue infusing into decedent's arm despite the fact the I.V. had infiltrated. Though the patient ultimately died, this civil action is limited to his personal injuries and does not allege wrongful death.

The civil action commenced with the filing of a Complaint in Hancock County Circuit Court by Charles Freeman on August 19, 1998.[1] On January 9, 1999, Mr. Freeman died and his daughter, Nancy Necaise, was substituted as plaintiff.

The Defendants in the case are The Medical Oncology Group, P.A. – employer of the chemotherapy nurse, and Dr. Matthew Sacks – the oncologist who was supervising the nurse on the date the Taxol infiltration occurred.

The parties consented to a bench trial before Honorable Judge Stephen Simpson which was finally held August 16-19, 2005. Defendant The Medical Oncology Group chose not to participate in the trial and simply stipulated that it would be responsible for the nursing negligence, if any, attributable to its employee, Jean Byrd, R.N. (R-865)[2]

Nurse Byrd also did not participate in the trial as a live witness, but her deposition was taken by Plaintiff and used by agreement of the parties. (Exh. P-12). Mr. Charles Freeman did not participate in the trial because he was deceased.

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[1] The case is some nine (9) years old due to a tortured history of having been assigned to multiple circuit judges, having six continuances at Defendant's request, having one previous trip to the Supreme Court on a procedural issue and Hurricane Katrina.

[2] References to the clerk's record will be (R-_). References to Appellant's Record Excerpts will be (RE-_). References to Appellee's Record Excerpts will be (Appellee's RE-_). References to transcript will be (TR-_). References to Exhibits will be Exh. P-_, or Exh. D- _).

At the conclusion of trial on August 19, 2005, Judge Simpson stated he would take the case under advisement. On August 29, 2005, a small storm occurred which somewhat delayed a ruling. Judge Simpson filed his eleven (11) page Opinion and Judgment on February 13, 2006. (RE-7-17).

Judge Simpson found that Nurse Byrd did indeed render substandard care, that the substandard care resulted in substantial harm to Mr. Freeman, that The Medical Oncology Group was liable as result of the stipulation and its status as her employer, and that Dr. Sacks was vicariously liable as the negligent nurse was admittedly working under his specific direction and control at the time of her negligent acts. (RE 7-17). The court awarded personal injury damages of $217,334.36, and entered judgment against both Defendants. (RE-18).

Defendants' post trial motions were denied. Despite its stipulation that it would be responsible if the court determined the nurse was negligent, Defendant The Medical Oncology Group joined in this appeal with Dr. Sacks.

B. STATEMENT OF FACTS

The Appellants' statement of facts contains numerous inaccuracies, but in an attempt at brevity we will only mention those which are most salient to this court's decision. The court may perhaps best ascertain the facts by reading the trial judge's Opinion which is contained in Appellants' record excerpts at pages RE 7-17.

Decedent Charles Freeman received chemotherapy at the offices of Defendant The Medical Oncology Group on January 22, 1998 and February 12, 1998. By all accounts, the first visit was uneventful. On the second visit, there was an infiltration (also called

extravasation) of the chemotherapy agent, Taxol. (Byrd Deposition, Exh. P-12, Pgs 31, 41-42; Sacks Deposition, Exh. P-11, Pgs 51-52; Appellee's RE-84, 90, 100).

Testimony was conflicting about what time the infiltration was discovered and by whom. Pete Freeman, Decedent's brother, testified that he was with Charles when the I.V. was started (approximately 11:20 to 11:30 a.m.), that he left to go get his brother a patty melt at Waffle House a few blocks away, and that he returned no more than 45 minutes later to find Charles' arm swollen and turning red. (TR-277-279; Appellee's RE-49-51). Pete further testified that Charles commented the nurse had not been in since Pete left. (TR-301; Appellee's RE-53). Pete went down the hall, found the nurse and admonished her for leaving his brother unattended. (TR-278; Appellee's RE-50). Pete rather colorfully referred to it as "chewing on her hiney." Pete unequivocally stated that if the nurse claimed she found the arm injury at 2:30, or 3:00, or 4:00 p.m., she was lying. (TR-285; Appellee's RE-52)

Nurse Byrd contended it was she, not Pete, who found the infiltration. Ms. Byrd claimed she discovered the arm was cool to her touch and she immediately called Dr. Sacks. (Exh. P-12, Pgs 36, 38; Appellee's RE-85-86). Ms. Byrd testified that Mr. Freeman received all 360 milligrams of the Taxol over three hours and none was discarded. (Exh. P-12, Pgs 39-41; Appellee's RE-87-89). She also confirmed that Mr. Freeman's left arm was swollen twice as big as his right arm. (P-12, Pgs 47-48; Appellee's RE-91-92).

No one, except maybe Defense counsel, disputes that the injury to Charles Freeman's arm was horrific. We include a copy of one photo of the arm on the page following to give the court a feel for the extent of injury. Multiple photos were admitted as exhibits at trial. (Exhs. P-8, P-9, P-10)

Following the infiltration of February 12, 1998, the arm continued to worsen. The swelling continued and the skin died (necrosis) and sloughed off. Mr. Freeman was hospitalized at Garden Park Hospital three times, being February 18, 1998, February 26, 1998, and March 12, 1998. As Mr. Freeman's white blood cells were destroyed by the chemotherapy, he was of course particularly susceptible to infection and septicemia. The raw and bleeding arm provided a perfect pathway for the introduction of bacteria. (TR-192; Appellee's RE-32).

Charles's daughter, Nancy Necaise, testified that even after her father was discharged from the hospital, the injury and disability to the arm continued for eleven months until his death in January 1999. During this eleven (11) months, the arm was continuously painful, the skin bled on contact with almost any object, and the arm had to be continuously bandaged. Ms. Necaise testified that she did the bandaging, bathed her father and helped him to get dressed. (TR-311-312; Appellee's RE-54-55).

When Dr. Sacks was deposed in 1999, he readily admitted that the Taxol caused the injury, that there was an infiltration, and that as a result Mr. Freeman developed cellulitis and skin breakdown necessitating his multiple hospitalizations. (Exh. P-11, Pgs 19-20, 26, 29, 50-51; Appellee's RE-95-98, 100).

At trial, when Dr. Sacks was coincidentally represented by his fifth or sixth different attorney, he changed his mind and decided this was not an infiltration. (TR-142; Appelle's RE-4). This changed testimony was of course met with rather extensive cross-examination. On cross, Dr. Sacks:

(1) Admitted he was present when his chemotherapy nurse, Jean Byrd, testified under oath that this was an infiltration. (TR-142-3; Appellee's RE-4-5);

(2) Admitted he dictated the hospital record which states, "He [Freeman] had an infiltration of Taxol yesterday." (TR-145; Appellee's RE-6);

(3) Admitted he dictated and signed a February 16, 1998 hospital record which states, "This is a gentleman who had an infiltration of Taxol." (TR-146; Appellee's RE-7);

(4) Admitted he dictated and signed a February 18, 1998 hospital record which states, "During his infusion of Taxol in the office, he had an infiltration into his left arm." (TR-146; Appellee's RE-7);

(5) Admitted his dictated impression was, "Cellulitis from infiltration of Taxol." (TR- 147; Appellee's RE-8);

(6) Admitted that in the hospital discharge summary he dictated on March 18, 1998, he stated, "Patient developed a cellulitis secondary to Taxol." (TR-148; Appellee's RE-9);

(7) Admitted that in the hospital discharge summary he dictated on March 9, 1998, he stated, "Mr. Freeman was admitted to ECU with a diagnosis of cellulitis involving the left upper extremity secondary to Taxol." (TR-148; Appellee's RE-9);

(8) Admitted that the March 13, 1998 emergency room record noted signs and symptoms of septicemia (TR-149), and that Mr. Freeman's skin condition was certainly a possible pathway for the introduction of bacteria. (TR-150; Appellee's RE-10);

(9) Admitted that his March 17, 1998 admitting history and physical states, "Taxol infiltration of drug into his left arm which resulted in cellulitis." (TR-151; Appellee's RE-11);

(10) Admitted that his March 18, 1998 dictation states, "Mr. Freeman is being discharged from acute care to be admitted to ECU (Extended Care Unit) for continued supportive medical management therapy for cellulitis involving left upper extremity." (TR-152; Appellee's RE-12);

(11) Admitted that on April 9, 1998 he dictated a medical record that states, "The patient's course has been complicated by several hospital admissions for chemotherapy related complications including cellulitis developing in the left arm secondary to infusion of Taxol." (TR-153; Appellee's RE-13);

(12) Admitted that on May 4, 1998, his dictation states, "His course has been complicated by an extravasation of Taxol in the left arm resulting in cellulitis." (TR-156; Appellee's RE-14);

(13) Admitted that on July 12, 1998, his dictation into the medical record stated, "The patient did suffer an extravasation of Taxol in the left arm at the time of the previous chemotherapy." (TR-157; Appellee's RE-15);

(14) Admitted that in his 1999 deposition, he testified under oath that there was an infiltration of Taxol. (TR-158; Appellee's RE-16);

(15) Admitted he told Charles Freeman's family that he (Sacks) was responsible, and to go ahead and do whatever they needed to do from a litigation standpoint. (TR-158-9; Appellee's RE-16-17).

In addition to these numerous admissions concerning the etiology of the injury, Dr. Sacks agreed Nurse Byrd was working under his direction and control at the time she administered the chemotherapy. (P-12, Pgs 31, 48; TR-161-2; Appellee's RE-97, 99, 18-19). He further agreed he had the right to and/or did give Nurse Byrd specific orders and directions on how to administer the drug, how to monitor the chemotherapy treatment, and what sequence to give the drugs in. He acknowledged he certainly had the authority to order his nurse to use constant observation the first hour and she probably would have followed his order. (TR-162-3; Appellee's RE-19-20) Additionally, Dr. Sacks was personally in and out of the room while the Taxol was infusing. Dr. Sacks testified that if the nurse gave all

the Taxol over 45 to 50 minutes, that it would be a direct violation of his order to give it over three hours, and a breach of the nursing standard of care. (TR-167; Appellee's RE-21) Dr. Sacks also agreed it would be a breach of the nursing standard of care if the nurse continued to give the Taxol after being informed the patient's arm was swollen. (TR-169; Appellee's RE-22) He stated that if Pete Freeman told Nurse Byrd around 12:20 that the arm was swollen, she should have stopped the Taxol infusion at that time. (TR-169, 218; Appellee's RE-22, 34)

Dr. Sacks also acknowledged that he told his partners, Dr. Pande and Dr. Davidson, and the patient, and the patient's family that there was a Taxol infiltration. (TR-172-3; Appellee's RE-23-24)

In addition to Dr. Sacks' live and deposition testimony, Pam Jenner, R.N., a nurse and attorney with several years training and experience specifically in chemotherapy, who has administered chemotherapy to several hundred cancer patients testified for the Plaintiff.

Nurse Jenner opined:

(1) That Mr. Freeman most certainly suffered an infiltration of Taxol. (TR-227; Appellee's RE-38);

(2) That Nurse Byrd rendered substandard care in administering and monitoring the Taxol infusion. (TR-229; Appellee's RE-39);

(3) That according to her medical chart, Byrd infused the Taxol in just under an hour, directly contrary to Dr. Sacks' order to infuse over three hours. (TR-230; Appellee's RE-40);

(4) That considering both the medical record and her testimony, Byrd's monitoring of the infusion was inadequate. (TR-230; Appellee's RE-40);

(5) That a chemotherapy nurse should use constant observation which is being in the room or where you can physically see the patient – not down the hall – and this is especially important in the first 30 minutes to an hour. (TR-234; Appellee's RE-41);

(6) That the standard of care requires the nurse to rotate the extremities and Byrd should have used the right arm since the left arm had been the sight of the first chemotherapy treatment. (TR-235; Appellee's RE-42);

(7) That it would be substandard care for a nurse to administer Taxol over one hour when the doctor's order directed three hours. (TR-236; Appellee's RE-43);

(8) That the standard of care required the I.V. to be turned off immediately if a swollen arm were discovered. (TR-236; Appellee's RE-43);

(9) That if Ms. Byrd was told around 12:20 of Freeman's swollen arm, it was substandard care to have let the I.V. run for three hours as Byrd swore she did. (TR-237; Appellee's RE-44);

(10) That if Nurse Byrd did not keep Freeman in constant observation for the first hour, it was insufficient monitoring and a breach of the standard of care. (TR-238; Appellee's RE-45);

(11) That there is no indication in the medical chart that Byrd ever discontinued the Taxol, or discarded any unused Taxol. (TR-240; Appellee's RE-46);

(12) That she had thoroughly researched the applicable medical literature and there is no medical authority whatsoever for a theory that a hypersensitive reaction to Taxol causes tissue necrosis. (TR-241; Appellee's RE-47);

(13) That the applicable medical literature lists Taxol as a vesicant which by definition means it causes severe necrosis and tissue destruction when outside the vein. (TR-247; Appellee's RE-48).

The nurse expert for Defendant was Annette Dove. Ms. Dove testified:

(1) That she was never given and had not read Pete Freeman's deposition and was therefore unaware of his testimony. (TR-416; Appellee's RE-59);

(2) That she had no idea how the Defense attorneys could have filed a designation of her opinions in March 2000 when she neither received nor reviewed records until April or May 2000. (TR-419; Appellee's RE-60);

(3) That she had testified in her deposition that Mr. Freeman did in fact have an extravasation (TR-421), but at trial she professed, "I don't know." (TR-420; Appellee's RE-61);

(4) That the nursing standard of care is to use continuous observation during the first hour of chemotherapy infusion, and that continuous observation means you have to be where you can observe the patient visibly. (TR-426; Appellee's RE-62);

(5) That it would not be substandard care for a nurse to violate a doctor's order and give Taxol in one hour even if the doctor ordered three hours. (TR-428; Appellee's RE-64); NOTE: The word "not" is not a typographical error – she really said this.

(6) That if a nurse has occasion to think an infiltration has occurred, the standard of care is to stop the I.V., call the doctor and document the amount of drug discarded. (TR-430; Appellee's RE-65);

(7) That it is a breach of the standard of care to infuse a vesicant through a peripheral line (i.e., arm or extremities). (TR-432-3; Appellee's RE-66-67);

(8) That there is no written documentation in Nurse Byrd's notes that she monitored the patient after 12:20. (TR-435; Appellee's RE-68);

(9) That she testified in her deposition that she was receiving $200 per hour for her testimony, but at trial she claimed she was only receiving $50 per hour. (TR-435-6; Appellee's RE-68-69);

(10) Ms. Dove also testified in her deposition that the nursing standard of care for monitoring chemotherapy agents has not changed since 1977. (R 853-4; Appellee's RE-102);

Defendants also called an oncologist, Dr. Meshad, who testified – over vehement objection – "My presumption is it [Freeman's cellulitis] has to be some type of local allergic phenomenon or hypersensitive reaction" (TR-449). Dr. Meshad confirmed:

(1) He was never given Pete Freeman's deposition. (TR-452; Appellee's RE-71);

(2) He thought Charles Freeman only received Taxol twice (TR-453; Appellee's RE-72) and did not know Freeman received it numerous times thereafter without any allergic or hypersensitive reaction. (TR 454-455; Appellee's RE-73-74);

(3) That in his opinion an infiltration did occur to Mr. Freeman. (TR-456-7; Appellee's RE-75);

(4) That there is no medical literature which says a hypersensitive reaction to Taxol can cause damages like Charles Freeman had. (TR-459-60; Appellee's RE-77-78);

(5) That Taxol is listed in authoritative medical literature as a vesicant, but he disagrees with that. (TR-462-3; Appellee's RE-79-80).

The court allowed Dr. Meshad to testify, but expressed serious reservations about whether such testimony without supporting medical literature would be admitted in a jury trial. (RE-16; Appellee's RE-2; TR113). The trial court issued its ruling on February 13, 2006. (RE-7-17). This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court, sitting without a jury, found that Plaintiff presented substantial credible evidence that substandard nursing care caused serious personal injury to Charles Freeman. Failing to follow a doctor's order, failing to keep the patient under constant observation during the first hour of chemotherapy, failing to discontinue an I.V. after being made aware of arm swelling, and failing to adequately monitor a chemotherapy patient are all breaches of the nursing standard of care.

These failures greatly increased the risk and likelihood of infiltration and most certainly allowed increased amounts of a highly toxic substance to go into Charles Freeman's arm rather than the venous system which, according to Dr. Sacks, caused tissue necrosis and cellulitis and a pathway for bacterial infection.

Plaintiff's chemotherapy nurse, Pam Jenner, was eminently qualified to testify as to the standard of care, breaches thereof as well as pertaining to her medical literature search on chemotherapy and Taxol. Defendants' chemotherapy nurse expert, Annette Dove, testified that the nursing standard of care on monitoring chemotherapy was unchanged since 1977, and she confirmed many of the standards espoused by Nurse Jenner, including the necessity of continuous observation the first hour. Dr. Sacks' deposition testimony, as well as the numerous entries in the medical records, provided the causal connection linking the substandard care to the harm caused. The fact that Dr. Sacks changed his testimony at trial is of little consequence as the trial judge was the sole finder of fact and entitled to make credibility determinations. Moreover, Dr. Sacks' new opinion that there was no infiltration was contradicted by his own expert oncologist witness, Nurse Byrd, and by every medical record.

The trial judge is also the trier of fact as to the amount of damages and did not abuse his discretion in considering what portions of itemized hospital bills were causally related to determine the amount of damages. If Defendant disagrees with a damages calculation, it is incumbent on him to furnish an accountant's certification pursuant to Rule 14, Miss. R. of App. P. which has not been done. There is no evidence to support a conclusion the judge was manifestly wrong in his conclusions.

STANDARD OF REVIEW

Appellant has correctly stated the standard of review.

ARGUMENT

I. WHETHER THE TRIAL JUDGE ABUSED HIS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS OR APPLIED AN ERRONEOUS STANDARD IN FINDING PLAINTIFF PROVED ALLTHE ELEMENTS OF HER MEDICAL NEGLIGENCE CLAIM.

The trial court carefully delineated the elements that a Plaintiff must prove in a medical negligence case in its opinion at RE-12-13. Defendants argue apparently that the court was manifestly wrong in finding facts which constitute proof of breach of care, causation and damages.

A. BREACH BY DR. SACKS

Defendant spends much time and effort pointing to the absence of physician testimony that Dr. Sacks individually breached the standard of care. Such argument totally misses the point. Plaintiff proved and the court found Dr. Sacks liable on the theory of vicarious liability for nursing negligence. Indeed the court could hardly do otherwise given Dr. Sacks' admission that Nurse Byrd was working under his direction and control in administering the drug and that he was responsible for the patient. (Sacks Deposition, P-11,

Pgs 31, 48; Appellee's RE-97, 99; Court's Opinion RE-9) See, *Hunnicutt v. Wright,* 986 F.2d 119 (5th Cir. 1993) (physician may be responsible for operating room nurses but not for technicians in a back room washing surgical instruments). Nurse Byrd likewise admitted without qualification that she worked under the direction and control of Dr. Sacks while administering the Taxol. (P-12, Pg 50; Appellee's RE-93)

The court's opinion here stated, "As result of vicarious liability, Defendant Sacks and The Medical Oncology Group are responsible for damages caused by this substandard nursing care." (RE-14). "Aside from vicarious liability for the nursing negligence of a nurse working under his direction and control, Dr. Sacks has a non-delegable duty to assure medication is given as he ordered. If Dr. Sacks chooses to do this through a nurse, he must of course take responsibility when the duty is breached. *Boyd v. Lynch,* 439 So.2d 1315 (Miss. 1986); *Hall v. Hilbun,* 466 So.2d 856 (Miss. 1985)." (RE-15).

There was no attempt by Plaintiff to introduce physician testimony delineating a physician's independent standard of care and the Defendant's argument is tilting at windmills. This is a case of vicarious liability for nursing neglect. Defendant introduced no testimony whatsoever to establish lack of direction and control and both Dr. Sacks and the nurse readily acknowledged there was direction and control. (P-11; P-12).

B. BREACH BY NURSE BYRD

Defendant next spends nine pages of argument taking issue with the fact that the trial judge gave more credence to the testimony of Pam Jenner, Plaintiff's chemotherapy nurse expert rather than that of Annette Dove, Defendant's chemotherapy nursing expert.

Deciding which expert to believe is precisely what a fact finder is supposed to do. The weight and credibility of a witness, primarily experts, is solely for the jury [or judge].

Rials v. Duckworth, 822 So. 2d 283 (Miss. 2002); *B.F. Goodrich v. Taylor,* 509 So.2d 895 (Miss. 1987) (A jury is free to accept the testimony of some witnesses and reject that of others, in whole or in part.) *Montana v. State,* 822 So.2d 954 (Miss. 2002) (circuit court sitting without a jury is accorded the same deference on appeal with regard to his findings as a chancellor.) *Wilson v. Greyhound Bus Lines, Inc.,* 830 So.2d 1151 (Miss. 2002). These fact findings are the equivalent of a jury verdict upon conflicting evidence. *Moeller v. American Guaranty and Liability,* 707 So.2d 1062 (Miss. 1996). In a bench trial, the judge is the sole authority to determine the credibility of witnesses. *Bodne v. King,* 835 So.2d 52 (Miss. 2003).

Given this heavy legal burden, there simply should be no serious quarrel that the circuit judge had substantial evidence to find that Nurse Byrd violated applicable nursing standards of care. Byrd testified that she gave the Taxol over three hours. (P-12, Pg 31; Appellee's RE-84). Pete Freeman testified he found his brother's swollen arm and notified Byrd in the first hour and notified the nurse. (TR-278; Appellee's RE-50) Every witness, including all nurses and Dr. Sacks, testified the standard of care was to discontinue an I.V. immediately if the arm is found swollen. Byrd swore she administered all 360 milligrams of the Taxol and discarded none. (P-12, Pgs 39, 41; Appellee's RE-87, 89).

Both nursing experts, Jenner and Dove, testified that continuous, constant observation in the first hour was standard of care for chemotherapy nurses. (TR-234, 238, 426; Appellee's RE-41, 45, 62). Byrd never testified that she stayed with Freeman the first hour, and her chart certainly does not remotely suggest she did. (P-3) Pete Freeman testified he found her down the hall approximately 45 minutes into the chemotherapy, and that Charles stated she had not been in since Pete left to go get the patty melt. (TR-285; Appellee's RE-52).

Moreover, Defendants' suggestion that the trial judge based his opinion solely on lack of charting is simply not accurate. The court's opinion did cite testimony of two defense witnesses who "professed to adhere to the principal of if it was not charted, it was not done." (RE-5). These Defense witnesses further agreed that there was no documentation here of continuous observation, nor every fifteen minutes observation. In addition, the court read and considered Nurse Byrd's deposition testimony as to her activities quite aside from her documentation. (P-12).

Defendants argue at Page 30 of its brief, "Plaintiff's assertions of negligence on the part of Nurse Byrd are mere assumptions and conclusory arguments." We respectfully disagree as did the trial court. Nurse Byrd's negligence was proven out of her mouth, out of the mouths of witnesses, and in the medical records.

Perhaps if Defense counsel had bothered to give Pete Freeman's deposition to their experts, the Defendants' experts may have come to the same conclusion as the court and Plaintiff's expert. Defense counsel chose as a matter of trial strategy to not disclose Pete Freeman's important testimony to the Defendant's experts. This strategy backfired. Ms. Byrd simply failed to monitor this patient during the administration of a highly toxic drug and she failed to discontinue the drug when notified of signs and symptoms of infiltration. The numerous violations of specific nursing criteria provide ample support for the court's finding of substandard nursing care.

C. PROXIMATE CAUSE

Defendants next contend that Dr. Sacks' testimony and the medical records do not provide a causal link between the substandard care and the injury.

As cited above in Plaintiff's statement of facts, Dr. Sacks repeatedly stated in the medical records and in his deposition testimony that Freeman's injuries were the result of infiltration of Taxol. (See Pgs 5-7 above and Exh. P-11) The court made a finding amply supported by the evidence, common sense, and reasonable inferences that "continuation of the Taxol over an additional two hours as Ms. Byrd testified she did was a breach of the standard of care and would obviously allow significant additional amounts of Taxol to infiltrate the soft tissue of the arm." (RE-15).

Infiltration of an I.V. is benign if the substance being infused is benign. If the substance being infused is toxic as in chemotherapy, the quantity of infiltration is a big deal. The whole idea of the standard of care requiring that an I.V. be discontinued immediately on the first sign of infiltration is to halt the infusion of a toxic substance into the skin.

Nurse Byrd's neglect by failing to monitor clearly either caused and/or contributed to the extent of the infiltration which – according to Dr. Sacks – caused significant harm. A somewhat analogous case is *Hammond v. Grissom,* 470 So.2d 1049 (Miss. 1985). In *Hammond,* emergency room personnel noted bleeding from ears and nose of a head injury patient, but failed to monitor her thereafter. The *Hammond* court noted judicial analysis is understandably different in cases of non-feasance rather than malfeasance. Absence of any meaningful medical attention or monitoring in an emergency room setting on a patient in serious condition was held to be a prima facie case just based on medical records and even without expert testimony. Similarly in *Richardson v. Methodist Hospital of Hattiesburg,* 807 So.2d 1244 (Miss. 2002), the court held a nurse's testimony to be sufficient to establish causation that the patient had more suffering and incurred more medical expense due to unreported bleeding. Likewise, in *Partin v. N. Miss. Medical Center,* 929 So.2d 924 (Miss.

2005) a twenty hour delay in diagnosing a urinary tract infection established a causal connection to the harm.

The trial court herein had substantial evidence in medical records and expert testimony to conclude that this unmonitored infiltration resulted in substantial amounts of a toxic chemical flowing into the patient's flesh causing necrosis and cellulitis.

D. MEDICAL BILLS

Defendants' contention that the trial court abused his discretion by admitting and using itemized hospital medical bills as a guideline to measure damages is without merit. Dr. Sacks, in his deposition combined with his trial testimony, testified that three hospitalizations were causally related to the arm injury. (P-11, Page 51; TR-185-193; Appellee's RE-25-33, 100) Defendants' argument here suggests that if Mr. Freeman received a $10 aspirin for headache while he was hospitalized for his arm injury, the cost of the aspirin is not damages. Defendant begins with a false premise unsupported by any testimony whatsoever that medical bills for Mr. Freeman's injuries should only include costs of "bandaging, whirlpool treatment and physical therapy." (See, Page 33 Appellants' Brief) An appellate court does not consider matters which are outside the record and must confine itself to what does appear in the record. *Acker v. State,* 797 So.2d 966 (Miss. 2001). Unless this court wants to establish an audit department to review itemized hospital bills, we think the law and better policy is to allow the trier of fact to make such factual determinations based on the medical records and testimony. The court here studied the itemized medical bills to make a determination of what, if any, portions thereof were necessitated by Mr. Freeman's hospitalizations for his arm injury. (TR-322; 368; Appellee's RE-56, 57). His factual finding is supported by substantial credible evidence in the testimony and hospital

records. (P-4; P-5; P-6). This finding should not be disturbed absent manifest error. "Manifest" error means, "unmistakable, clear, plain or indisputable." *Sumrall v. Munguia,* 757 So.2d 279 (Miss. 2000).

Section 41-9-119, Miss. Code Ann. (1972) states that medical bills paid or incurred because of any illness, disease or injury are prima facie evidence such bills were reasonable and necessary. A plaintiff does not lose his right to recover damages because he is unable to prove with absolute certainty the mathematical value of his injury. If the cause of the injury is reasonably probable, the finder of fact may reasonably estimate damages. Mississippi Model Jury Instructions 20.01; *Amiker v. Brakefield,* 473 So.2d 939 (Miss. 1985). Additionally, if a party disagrees with the court's damages calculation, it is incumbent on him to furnish an accountant's certificate attesting to the proper amount. Defendant has furnished no such certificate. Rule 14, Miss. R. App. P.

An appellate court is required to examine the entire record and must accept that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn there from and which favor the lower court's findings of fact. *Vice v. Hinton,* 811 So.2d 335 (Miss. App. 2001). This assignment of error cannot be sustained on this record.

II. WHETHER THE TRIAL JUDGE ABUSED HIS DISCRETION IN ALLOWING EXPERT TESTIMONY OF PAM JENNER

Pam Jenner, a licensed registered nurse and an attorney, testified as Plaintiff's expert in the field of nursing. Impeachment of Ms. Jenner was particularly difficult as she had previously worked as both an attorney and a nursing expert witness for both defense firms herein as well as numerous other law firms. (TR 222-3; Appellee's RE-36-37)

Ms. Jenner is a licensed nurse in the State of Mississippi and had five years experience from 1975-1980 specifically as a chemotherapy nurse. (TR-221; Appellee's RE-35) She testified that she has administered chemotherapy to several hundred patients. (TR-221; Appellee's RE-35) She read every medical record, every deposition, personally attended the deposition of Defendants' nursing expert, attended trial and heard Dr. Sacks' testimony and did an extensive medical literature search on Defendants' new found trial theory of "hypersensitive reaction" as well as on Taxol. (TR-218-248) We wish all our medical expert witnesses were as thorough and prepared as Ms. Jenner.

Defendants' main contentions seem to be that passage of time between her chemotherapy nursing experience and trial should somehow disqualify her as an expert or alternatively that only certified chemotherapy nurses may testify. Neither contention holds water. Annette Dove, Defendants' nursing expert, acknowledged the nursing standard of care for monitoring chemotherapy has not changed since 1977. (R-853-4; Appellee's RE-101-102) Moreover, an expert sufficiently familiar with the standards of a medical specialty may testify even if he or she does not practice the specialty. *Cheeks v. Bio-Medical Applications, Inc.*, 908 So.2d 117 (Miss. 2005) (specialist in one area may have knowledge and expertise in another area sufficient to testify.) *Partin v. N. Miss. Medical Center, Inc.*, 929 So.2d 924 (Miss. 2005) (OB/GYN may testify as to general hospital procedures and nursing standards even though he has never practiced as a nurse.)
Thompson v. Carter, 518 So.2d 609 (Miss. 1987) (Pharmacist may testify as to causation on effect of a drug as well as on standard of care of a urologist prescribing the drug – expert is only required to have medical knowledge, not medical degree.)

We think it also important that Defendants have not assigned as error the fact that Circuit Court Judge Robert Walker also ruled herein on August 20, 2001, just before one of

the previous trial settings on Defendants' motion *in limine* that Ms. Jenner was qualified to testify. (TR-55; R-851; Appellee's RE-1) Though Judge Walker's ruling was based on a *Frye* standard and Judge Simpson's ruling on a *Daubert* standard, both decisions were firmly rooted in evidence of her qualifications and expertise and most certainly not an abuse of discretion. The absence of any argument or mention in Defendants' brief as to Judge Walker's ruling is telling. The fact that two circuit judges exercised their considerable discretion to allow Ms. Jenner to testify is strong evidence that her qualifications past muster.

Lastly, we take note of the Fifth Circuit Court of Appeals' statement in *Gibbs v. General American Life Ins. Co.,* 210 F.3d 491 (5th Cir. 2001) that, "*Daubert* safeguards are not as essential in a case where the district court sits as trier of fact in place of jury." Whether an expert witness is qualified to testify is within the court's discretion. The test is whether a witness possesses peculiar knowledge or information regarding the relevant subject matter which is not likely to be possessed by a layman. *Nunnally v. R. J. Reynolds Tobacco Co.,* 869 So.2d 373 (Miss. 2004) cited in *Partin, supra.* The trial judge's decision here was well within his discretion.

III. WHETHER PLAINTIFF'S NURSING EXPERT'S TESTIMONY THAT SHE HAD CONDUCTED A MEDICAL LITERATURE SEARCH WAS OUTSIDE THE SCOPE OF NURSING PRACTICE.

The short answer to Defendants' contention that Ms. Jenner's testimony "exceeded the scope of her expertise" is that it did not. Moreover, Defendants' citation of *Richardson v. Methodist Hospital of Hattiesburg,* 807 So.2d 1244 (Miss. 2002) seriously misquotes the holding in that case. Defendants state the holding as "registered nurse not qualified to render relevant testimony with regard to causal connection between alleged deviations from

the requisite standard of care for nursing and plaintiff's multiple severe medical problems or the cause of those conditions." (Defendants' Brief at Page 36) That is not the holding in *Richardson.* The actual holding was that the nurse was qualified to testify as to standard of care and causation of more suffering and more medical bills due to lack of monitoring, but could not offer an opinion on complex medical issue as to cause of death.

Ms. Jenner's testimony herein was that she conducted a medical literature search which confirmed both that Taxol is listed as a vesicant and that hypersensitive reactions do not cause tissue necrosis. The fourteen medical journal articles she relied upon were furnished to the court and opposing counsel. (TR-241-242; Appellee's RE-47-48) Testimony stating the content of medical journal articles hardly constitutes the witness offering causation opinions on complex issues. A nurse expert who is also an attorney certainly has the ability of assisting the trier of fact by referencing authoritative medical literature.

IV. VICARIOUS LIABILITY OF DR. SACKS

Defendants acknowledge that the unrefuted testimony of both Dr. Sacks and Nurse Byrd was that she was working under his direction and control when administering the Taxol. Such testimony squarely places the evidence under the ruling of *Hunnicutt v. Wright,* 986 F.2d 119 (5th Cir. 1993) (physician is liable for nurses working under his direction and control but not responsible for technicians in back room washing surgical instruments)

Defendants then try to force a round peg in a square hole by arguing that administering chemotherapy is a "routine act" and "a ministerial act" for which the supervising physician can have no vicarious liability. This argument is directly contrary to Defendants' previous argument in their brief that only certified chemotherapy nurse experts

should be allowed to even address the subject of chemotherapy in a courtroom. If only chemotherapy nurses should be allowed to testify, how can the nurse's acts be reduced to routine and ministerial?

Section 73-15-5, Miss. Code Ann. (1972) has a lengthy definition of the practice of nursing which specifically includes "administration of medications." In other words, one has to have a license to do it. No one in this trial ever described the administration of Taxol as "merely a ministerial act" as characterized by Defense counsel. The administration of chemotherapy requires highly specialized knowledge, a nursing license, and is in no way comparable to technicians washing surgical tools in a back room. The *Hunnicutt* court was correct in its ruling about operating technicians in a back room and Judge Simpson was correct herein in his ruling concerning a chemotherapy nurse working under the direct control and right to control of an oncologist.

We have neither the time nor space to quote the entirety of Prosser – Imputed Negligence. A master cannot escape liability merely by ordering his servant to act carefully. The whole premise of vicarious liability is that liability is imputed to the master for the negligence of the servant even though the master has done nothing wrong and indeed did everything he could to prevent it. Prosser, 4th Ed. § 69; Wigmore, Responsibility for Tortious Acts: Its History, 1894, 7 Harv. L. Rev. 315. Professor Prosser is much more eloquent than the author of this brief and certainly worth rereading once in a while.

The record here is uncontradicted with evidence of actual control, right to control, Dr. Sacks being in and out during the Taxol administration and specific admission by both the doctor and the nurse that Ms. Byrd was acting under Dr. Sacks' direction and control. (P-11, P-12; Appellee's RE-93, 97, 99) The court had substantial, unrefuted evidence with which to make its decision on vicarious liability and there is simply no way to hold the trial

judge manifestly wrong on this record. Defendant introduced no evidence whatsoever to refute Dr. Sacks' and Ms. Byrd's admissions in their depositions of direction, control and right to control.

V. MEDICAL BILLS

Defendants contend again that the medical bills contain items which relate to treatment of pre-existing conditions which should not be compensable and that the judge's calculation of damages is therefore wrong. First there is no proof that the court granted Plaintiff the entirety of the $42,334.36 itemized medical bills introduced into evidence. The court merely used the itemized bills as a measurement and guideline of Plaintiff's damages as indicted by the judge's statement, "While it is arguable, some of the medical care while hospitalized was rendered due to Mr. Freeman's pre-existing condition of cancer, the vast majority of the treatment and need for three hospitalizations was due to cellulitis and the overall condition of his arm." (RE-16-17).

When the court admitted the bills, it stated, "I'm going to admit them in evidence subject to reviewing them with the admission reports which may cause me to exclude portions of them," (TR-322; Appellee's RE-56). Again at the close of trial the court stated, "Gentlemen, as the trier of fact, I need to compare some of the medical records with the medical bills that were given to me, as I indicated earlier. . . ." (TR-468; Appellee's RE-81).

Defendant did not request by post trial motion that the judge make amended or additional findings. Indeed, Defendant Sacks did not even file a motion requesting a new trial.

If there are no specific findings of fact, the appellate court will assume the trial court has made determinations of fact sufficient to support its judgment. *Buford v. Logue,* 832

So.2d 594 (Miss. App. 2002); *Par Industries v. Target Container Co.*, 708 So.2d 44 (Miss. 1998) (where findings of fact are implicit in trial court's ruling, the appellate court will credit them and grant them deference.) *Bessant v. State,* 808 So.2d 979 (Miss. App. 2001) (the appellate court does not set aside findings of fact unless they are manifestly wrong.) *Wilson v. Greyhound Bus Lines, Inc.,* 830 So.2d 1151 (Miss. 2002). The trial judges rulings are presumed correct and this presumption prevails unless the record shows manifest error. *Hardy v. Brock,* 826 So.2d 71 (Miss. 2002).

The court should particularly note that statements in Defendants' brief arguing which items in itemized medical bills are related and which items are not, are purely Defense counsel's assertions not supported by citation to any testimony of record. Moreover, Defense counsel predicates his assertions on a grossly false hypothesis that the only items recoverable related to the arm are "bandaging, whirlpool treatment and physical therapy." (Defendants' Brief, Page 33) An appellate court simply refuses to review any allegation of error which is unsupported by the record. *Blackwell v. Board of Animal Health,* 784 So.2d 996 (Miss. App. 2001). The hypothesis is wrong and counsel's conclusions are wrong and unsupported by any testimony. Lastly, Defendants have utterly failed to comply with Rule 14, Miss. R. App. P. which requires a certificate of a public accountant if a party asserts a court's calculation of damages is wrong.

VI. WHETHER THE TRIAL JUDGE ABUSED HIS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS OR APPLIED AN ERRONEOUS LEGAL STANDARD IN COMMENTING ON THE SEVEN SUBJECTS CITED BY APPELLANTS.

Before we briefly address the laundry list of alleged "erroneous findings of fact" in Defendants' brief, we note Defendant neither argued nor suggested that such alleged errors

affected a substantial right of a party. As such, none of the alleged errors constitute reversible error. (See, Rule 103, Miss. R. of Evid.) Additionally, Dr. Sams did not file a motion for new trial and many of these points should be procedurally barred as to him. (See, Rule 59, Miss. R. Civ. P.; *Concannon v. Reynolds,* 878 So.2d 107 (Miss. Ct. App. 2003)).

A. TIMING OF TAXOL INFUSION

The court's opinion correctly cited the medical record which states "Taxol complete" on the same line as the time "12:20." This reference in no way indicates the judge gave no weight to oral testimony on the timing issue.

B. BYRD'S TESTIMONY ON THE STANDARD OF CARE FOR THE FIRST HOUR.

The court's opinion stated, "Ms. Byrd testified that standard nursing care required the nurse to stay with the patient during the first hour while he is getting Taxol." (RE 8).

Ms. Byrd's precise testimony was "we stay with the patient for the first hour while he's getting Taxol." (P-12, Pg 21, Ln 21; Appellee's RE-83)

We do not understand Defense counsel's assertion of manifest error because the transcript says what the judge said in his opinion.

C. DR. SACKS TESTIFIED THAT FREEMAN WAS NEVER GIVEN TAXOL AFTER THE FEBRUARY 12, 1998 TREATMENT.

The exact question to Dr. Sacks was, "Did you continue to give him Taxol after this occasion?" His answer was, "Not at all. . . . Never got it again." (P-11, Page 40; Appellee's RE-98) We do not understand counsel's contention that this is erroneous as Dr. Sacks' testimony is almost verbatim with the court's finding.

D. PEARSON AND DOVE AGREED THERE WAS NO DOCUMENTATION OF CONTINUOUS OBSERVATION FOR THE FIRST HOUR AND EVERY FIFTEEN MINUTES THEREAFTER.

Dove testified, "There is no written documentation in the notes that says how many times she [Byrd] monitored the patient after twelve o'clock." (TR-435; Appellee's RE-68)

Pearson testified, "There was no documentation of vital signs after 12:20." (TR-392; Appellee's RE-58)

Regardless of what these two witnesses' testimony was, it is an absolute fact that Byrd did not chart continuous observation for one hour and vital signs were not charted every fifteen minutes. (See, P-3)

E. DOVE TESTIFIED IT WAS NOT A BREACH OF THE STANDARD OF CARE IF A NURSE GIVES TAXOL OVER ONE HOUR EVEN IF PHYSICIAN ORDERED IT GIVEN OVER THREE HOURS.

Defendants call this finding clearly erroneous. Dover testified, "No sir, it would not be a breach of the standard of care because it can be given over one hour." (TR-427; Appellee's RE-63). Defense counsel's assertion is clearly erroneous.

F. GARDEN PARK HOSPITAL RECORDS.

Defendant raises Rule 901 lack of authentication of hospital records for the first time in this case. The records were admitted by agreement at trial. (TR-117; Appellee's RE-3) Errors not raised at trial are not reviewable. *Hogan v. State,* 741 So.2d 296 (Miss. 2001)

G. DAMAGES WERE SUBSTANTIAL

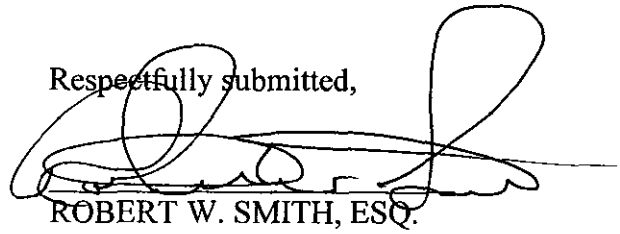
Defense counsel again faults the trial judge for making the judgment that, "damages were substantial." Defense counsel is the only person who makes the allegation that damages were insubstantial – certainly no witness made this assertion. Mr. Freeman had his

arm virtually burned off by a toxic chemical and counsel's assertions that such injuries were minor are quite unbelievable.

CONCLUSION

There was substantial credible evidence to support the court's judgment. The trial judge did not abuse his considerable discretion, was not manifestly in error and used appropriate legal standards. This nine year old case should be affirmed and Charles Freeman allowed to rest in peace.

Respectfully submitted,



ROBERT W. SMITH, ESQ.

CERTIFICATE OF SERVICE

I, ROBERT W. SMITH, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Appellee's Brief to Thomas L. Musselman, Esq., P. O. Box 1407, Pascagoula, MS 39568 and Honorable Stephen Simpson, Circuit Court Judge, P. O. Drawer 1570, Gulfport, MS 39502.

SO CERTIFIED, this the 21 day of March, 2007.

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