IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-CA-01068

MATTHEW SACKS, M.D., and THE MEDICAL ONCOLOGY GROUP, P.A. — **APPELLANTS**

VERSUS

NANCY NECAISE, INDIVIDUALLY and on behalf of the WRONGFUL DEATH BENEFICIARIES OF CHARLES FREEMAN, DECEASED — **APPELLEE**

REPLY BRIEF OF APPELLANT

Appeal from Hancock County Circuit Court

Cause No. 98-0235

Thomas L. Musselman, MSB# [redacted]
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Plaintiff asserts that Defendant "seriously misquotes the holding" in *Richardson v. Methodist Hospital of Hattiesburg,* 807 So.2d 1244 (Miss. 2002.) Defendant's citation stated "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." *Appellant's Brief at p. 36.* The verbatim language from the opinion is as follows:

> The trial court ruled that Richardson's designated expert witness, Keller, was not "qualified by education or experience to render relevant testimony with regard to the mechanism of Ms. Wheeless's death and/or causal connection between these alleged deviations and Ms. Wheeless's multiple severe medical problems," and therefore "would not be allowed to render medical opinions as to the multiple medical diseases and/or conditions suffered by the Plaintiff during this lengthy hospitalization at Wesley or the cause of these conditions and/or the cause of her death."
>
> We agree with the circuit court that Keller lacks the requisite education and experience as an expert to testify concerning the causal link between Wheeless's death and the alleged deviations in nursing care and further that her proffered testimony does not specify such a link.

Richardson v. Methodist Hospital of Hattiesburg, 807 So.2d 1244, 1248 (Miss. 2002).

The Supreme Court stated in the opinion that a registered nurse may testify as to deviations from the nursing standard of care and whether the negligent care exacerbated plaintiff's condition and caused pain and suffering. However, the ruling was not limited solely to causation related to the proximate cause of the plaintiff's death and Appellee is incorrect in focusing merely upon one sentence in the Court's ruling. Nurse Keller was not allowed to testify as to the medical diagnosis of the plaintiff's condition or the proximate causation relating to any breach of the nursing standard of care and an alleged injury. The opinion is clear that a nursing expert is not qualified to render

opinions on issues of medical diagnosis and proximate causation.

In the instant matter, Ms. Jenner did not restrict her testimony to the issue of nursing negligence which led to an exacerbation of an existing condition and additional suffering. Instead, Ms. Jenner offered opinions as to the medical condition suffered by the Plaintiff and the medical causation of that condition. Her testimony was a medical diagnosis based upon her "internet research" as to the medical causation of the injury suffered by the Plaintiff. She also rendered a medical opinion as to the opinions of Dr. Sacks and Dr. Meshad. A registered nurse, even if she is also a licensed attorney, is not qualified to render a medical opinion as to the diagnosis or causation of a medical injury. Only a medical doctor is qualified to render a diagnosis and opinion on the medical causation of an injury. Appellant's Brief references a volume of statutory and case law authority which has not been refuted by the Appellee.

Appellee argues in her brief that "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." *Appellee's Brief at p. 23.* "Testimony stating the content of medical journal articles hardly constitutes the witness offering causation opinions on complex issues." *Id.* Ms. Jenner offered a medical opinion that a hypersensitive reaction does not cause tissue necrosis based upon "a medical literature search." This is clearly a medical causation opinion which is outside the scope of nursing practice. In addition, if a nursing expert merely needs to reference the content of a medical journal article to render an opinion on the effects of a medication, Mississippi evidentiary law will need to be drastically rewritten.

The trial court erred as a matter of law when it allowed Plaintiff's nursing expert to offer opinions outside the practice of nursing on issues related to medical diagnosis, medical treatment and proximate causation.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT ALLOWED PLAINTIFF'S NURSING WITNESS TO TESTIFY AS AN EXPERT WHEN SHE IS NOT CERTIFIED AS AN ONCOLOGICAL CHEMOTHERAPY NURSE AND LACKS THE EDUCATION, TRAINING AND EXPERIENCE TO TESTIFY CONCERNING THE USE OF THE DRUG TAXOL.

When Ms. Jenner practiced as a registered nurse over twenty years ago she was not required to obtain certification as a chemotherapy nurse. A registered nurse must now be specially certified to administer chemotherapy agents. An expert should at least meet the requirements to currently practice the specialty in which he or she is expected to render opinions. In this matter, Jenner lacks the requisite experience, knowledge and qualifications to render an opinion on the standard of care. She is not a certified chemotherapy registered nurse, has had absolutely no experience with the administration of the specific drugs administered to Mr. Freeman and has not practiced in the field in over twenty years.

Under Rule 702 of the Mississippi Rules of Evidence, Ms. Jenner must be qualified by "knowledge, skill, experience, training or education," to testify as to an opinion. She possesses none of these qualifications as related to chemotherapy administration of drugs currently used in a field in which she has not practiced in over twenty years. Neither has she ever possessed the certification to administer the drugs in use in the instant matter. The mere fact that the standard of care has not changed in relation to the administration of chemotherapy does not instill in her the knowledge, experience and qualifications to render an opinion on matters she has never performed in her nursing experience and lacks the certification to currently practice.

Ms. Jenner's sole basis for "expertise" in the issues raised in the litigation is that over twenty years ago she performed some chemotherapy treatments. She has not been educated in the advances in the chemotherapy field, has not been trained in the use of the current chemotherapy medications

and has never treated an injury as was suffered by Mr. Freeman. Although she testified that an infiltration or extravasation is not necessarily a breach of the standard of care, she offers no evidence of a breach of the applicable standard of care applicable to the administration of chemotherapy to Mr. Freeman other than speculation.

Ms. Jenner did not provide the finder of fact with sufficient facts or data to prove a breach of the nursing standard of care. Instead she discounted the medical record, the testimony of Dr. Sacks, Nurse Byrd and Nurse Pearson to come to her conclusion. Her conclusions are contradictory in that she first opines that Nurse Byrd breached the standard of care by administering Taxol over one hour against the doctor's order and later opines that Nurse Byrd breached the standard of care by administering Taxol over three hours in spite of "notice" of an infiltration. Ms. Jenner's complete testimony is mere speculation and not based upon reliable principles and methods applied reliably to all of the facts in this matter. She ignores nearly all of the factual matters presented to come to her conclusion.

The trial court erred as a matter of law when it allowed Ms. Jenner to testify as an expert in a field in which she is not qualified to provide an opinion based upon her lack of certification, education, knowledge and training.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT ALLOWED PLAINTIFF'S NURSING EXPERT TO ADVOCATE BASED UPON WHOM SHE THOUGHT WAS "MORE CREDIBLE" AS A WITNESS AND PRESENT CONFLICTING THEORIES OF NEGLIGENCE.

Plaintiff's argument that the trial court found four breaches of the nurse's standard of care is contradictory and incorrect. Plaintiff argues that the trial court found that Nurse Byrd breached the standard of care by failing to follow Dr. Sacks' orders to infuse the Taxol over three hours. Plaintiff asserts that the Taxol was administered over a period of one hour which increased the

likelihood of infiltration or extravasation of the medication. Plaintiff ignores the medical records which refute this assertion.

Next, Plaintiff asserts that Nurse Byrd breached the standard of care by continuing to administer the Taxol over a three hour period, after discovering that the Taxol had infiltrated or extravasated within the first hour of treatment. Plaintiff fails to appreciate the absolute contradiction in these two assertions. Nurse Byrd could not have breached the standard by administering Taxol over one hour ***AND*** breached the standard of care by continuing to administer Taxol for the full three hour period. Plaintiff must pick one scenario or the other. The third possibility (and the one consistent with the medical records, the testimony of Nurse Byrd, the testimony of Nurse Pearson and the testimony of Dr. Sacks) is that the infiltration or extravasation occurred after the three hours administration of the Taxol was complete. Consistent with the testimony of every expert witness in this matter, including Plaintiff's nursing expert, an infiltration or extravasation is not, of itself, evidence of a breach of the standard of care. All the expert witnesses testified that an infiltration or extravasation can occur absent negligence.

Further, Freeman argues that Nurse Byrd failed to properly minotor Mr. Freeman during the first hour of the Taxol administration. The Plaintiff drastically misrepresents the content of the medical record authored by Nurse Byrd. Plaintiff's expert advocates that the record is a clear indication of the lack of monitoring during the first hour of Taxol administration. Contrary to Plaintiff's assertions, the record clearly indicates that a set of vital signs was taken prior to when Mr. Freeman's medication was begun. Next there are four sets of vital signs taken at fifteen minute intervals: 11:35, 11:50, 12:05 and 12:20. [RE-173; P-1, at 126]. This corresponds with Nurse Byrd's testimony that she monitored Mr. Freeman during the Taxol administration as required by the standard of care by checking his vital signs every fifteen minutes. After the first hour of Taxol

administration exact times are not recorded. No expert testified that exact times of the remaining events in the chemotherapy must be recorded to adhere to any nursing standard of care. In fact, the nursing standard of care requires patient care rather than record care.

The record clearly indicates that the treatment commenced at 10:00 and was finished at 4:00. All of the chemotherapy drugs were administered during that time frame. Nurse Byrd complied with the orders as set forth by Dr. Sacks by closely monitoring Mr. Freeman during the first hour of Taxol administration. Plaintiff urges the Court to ignore the content of the medical record, the testimony of Nurse Byrd, the testimony of Nurse Pearson and the testimony of Dr. Sacks. Instead, Plaintiff wants the Court to abide by the questionable and unsubstantiated testimony of Mr. Clarence Freeman and the speculation advocated by Ms. Jenner.

Proof that Nurse Byrd monitored Mr. Freeman for the complete first hour of the Taxol administration is provided in her deposition testimony wherein she reviewed the medical record she created. Plaintiff entered her deposition testimony into the record at trial:

> Q. Moving down to the February 12th note, would you please read it verbatim, your entries.
>
> A. Okay. February 12th, 1998, blood pressure 148 over 76; pulse 120; temp. 97.4; Cycle 2. Denies any discomfort. IV started with a .22 gauge Jelco.

P-11, Depo. of Jean Byrd, R.N., p. 28.

Clearly, Nurse Byrd took initial vital statistics of Mr. Freeman prior to instituting the administration of any medication.

> Q. Go ahead, and go slowly for the court reporter.
>
> A. Okay. Tagamet, 300 milligrams in 50 CCs of normal saline over 15 minutes. Number 2, Decadron, 20 milligrams in 50 CCs of normal saline over 15 minutes 30 minutes before Taxol. 3, Benadryl, 50 milligrams IV push. 4, Taxol, 360 milligrams in 500 CCs of normal saline over three hours. Vital signs, 11:35: BP 164 over 82, pulse 122, respirations 20, no complaints.

11:50: BP 146 over 78, pulse 114, respirations 22, complained of feeling tightness in feet and tingling in feet. Dr. Sacks notified. Ativan one milligram given sublingual by verbal order per Dr. Sacks per Jean Byrd, RN. Ativan one milligram sublingual given. Patient feels better. At 12:05, BP –

* * *

A. 12:05: BP 158 over 86, pulse 100, respirations 20, no complaint. 12:20, BP 138 over 78, pulse 104, respirations 22, no complaint. Taxol infusion completed. No reaction noted. Number 5, Kytril one milligram in 50 CCs of normal saline over 15 minutes. Left arm swollen. No complaint of burning or stinging at IV site or around arm. Dr. Sacks notified. Applied ice and elevated left arm. Schedule patient to see me in a.m., verbal order Dr. Sacks per Jean Byrd, RN. IV restarted in right hand. Number 6, carboplaten (sic), 550 milligrams in 250 CCs of normal saline over one hour. 7, a normal saline plush (sic). Patient to see Dr. Sacks February 13th, 1998. Time in 10:00; time out 4:00 p.m.

P-11, Depo. of Jean Byrd, RN., pp. 29-30.

Plaintiff's expert advocates that this entire record along with the testimony of Nurse Byrd must be ignored due to the failure to document exact times for all of the medical treatment provided on February 12, 1998, to Mr. Freeman. It is clear from the record that a set of vital signs was taken prior to the administration of any medication to Mr. Freeman. It is also clear that Nurse Byrd documented her fifteen minute vital sign checks during the first hour of the administration of Taxol, 11:35, 11:50, 12:05 and 12:20.

Nurse Byrd testified that merely because the text "Taxol complete" appears on the same line as her 12:20 vital signs check does not mean that the medication was completed at 12:20. She testified that the Taxol was administered over the three hour period ordered by Dr. Sacks because the machine is set to deliver the medication at that rate. *P-11, Depo. Of Jean Byrd, R.N., infra.* Nurse Pearson testified that exact times of administration of each of the drugs were not noted on her chemotherapy charts either. However, she could testify that the drugs were given at the time rates specified by the doctor's orders. [Tr-375; 402; RE-135]. None of the expert witnesses testified that

the failure to document exact times when the medications were completely administered resulted in a breach of the standard of care.

Plaintiff questioned Nurse Byrd at her deposition very closely about the treatment she rendered to Mr. Freeman:

> A. I started the Taxol at 11:20 because I keep – you know, I do vital signs very 15 minutes.
>
> Q. Yes, ma'am. I understand that that's your routine, but am I correct that perhaps there's times in the past that you have not done the vital signs every 15 minutes?
>
> A. I always do vital signs every 15 minutes for Taxol.
>
> Q. You've never varied from that on any 15 minute occasion ever in your life giving chemotherapy?
>
> A. Not with Taxol, no, sir.

P-11, Depo. of Jean Byrd, RN., pp. 32-33.

Plaintiff's expert, Ms. Jenner, advocates that Nurse Byrd failed to perform the fifteen minute vital sign checks based upon Clarence Freeman's statement that his brother told him the nurse had not been in to check on him. There is no other evidence that the medical chart and Nurse Byrd's testimony is incorrect. There is no proof that Nurse Byrd failed to perform the required vital sign checks. There is abundant proof by documentation and testimony that Nurse Byrd performed the checks as required.

Plaintiff also argues that Nurse Byrd failed to monitor her patient:

> Q. Were you in the room when he asked to go to the bathroom, or does he holler at you and you're in an area that he can hear you but not in the room?
>
> A. I was sitting at my desk, and all he has to do is ask me. I can hear it. I can see from where he was sitting from my desk.
>
> Q. And your desk is out of the room?

A. Yes.

Q. And is it in a hall or another room?

A. It's down a small hallway.

Q. But you could see Mr. Freeman?

A. Yes, sir.

P-11, Depo. of Jean Byrd, RN., p. 37.

Once again, Plaintiff's expert advocates that Nurse Byrd's testimony must not be believed solely upon speculation. Ms. Jenner offers no proof that Nurse Byrd did not monitor Mr. Freeman other than her own speculation. Nurse Byrd testified under oath that she monitored Mr. Freeman while the Taxol was being administered which is corroborated by the medical record.

Plaintiff's assertion that Nurse Byrd administered Taxol over a one hour period rather than the three hour period ordered by Dr. Sacks is equally as tenuous. There is no evidence provided by the Plaintiff other than the rank speculation of his nursing expert. Nurse Byrd testified:

Q. I take it, at 2:35, approximately, you must have come into the room and discontinued the Taxol?

A. Yes.

Q. How would you know to do that, Ms. Byrd?

A. *The machine beeps* and lets us know that the Taxol infusion is completed.

P-11, Depo. of Jean Byrd, RN., p. 39 (emphasis supplied).

In order for the Plaintiff to prevail in his theory that Nurse Byrd administered Taxol over one hour contrary to Dr. Sacks' order he must produce some evidence that Nurse Byrd incorrectly set the machine to a faster rate than was ordered. In addition, the Plaintiff must produce some evidence that Nurse Byrd committed perjury in her deposition testimony when she testified that she administered

the Taxol over the three hour period ordered. Further, the Plaintiff must produce some evidence that the corroborating testimony of Nurse Pearson was perjured as well. Plaintiff has produced no such testimony or evidence.

Nurse Pearson testified that no incident as described by Clarence Freeman occurred on February 12, 1998. She also testified that she recalled that it was in the afternoon when the infiltration or extravasation was noted. [RE-137-138; Tr-377-378]. Nurse Pearson testified that the infusion pump is preprogramed to deliver Taxol at the proper rate over three hours. [Tr-382; 402; RE-141]. Nurse Pearson testified that the infusion pump has an alarm which activates when pressure builds around an infusion site. She testified that the alarms were working properly and they did not sound during Mr. Freeman's infusion on February 12, 1998. [RE-142; Tr-383]. Plaintiff's expert witness, Ms. Jenner, offered nothing but her own speculation that these witnesses' testimony was incorrect.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND DR. SACKS GUILTY OF NEGLIGENCE WITHOUT TESTIMONY FROM A MEDICAL DOCTOR AS REQUIRED BY STATUTE.

Plaintiff argues that she merely needs to prove a deviation from the standard of care by a nurse in order to hold a medical doctor vicariously liable. As cited in Appellant's Brief, Section 11-1-61 of the Mississippi Code requires physician testimony to establish physician negligence and thus precludes Plaintiff's assertion. *Appellant's Brief at p. 21*. Even if the finder of fact determined that Nurse Byrd deviated from the standard of care which proximately caused Mr. Freeman's medical condition, a medical doctor is required to prove that Dr. Sacks deviated from the standard of care in failing to train, educate or monitor the nurse. Testimony by a registered nurse, even if she is also an attorney, is not sufficient under the aforementioned statute to prove vicarious liability on the part of

the physician. Plaintiff wholly failed to produce such evidence. The trial court erred as a matter of law when it found Dr. Sacks vicariously liable without the requisite medical testimony by a qualified expert witness.

V. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT PLAINTIFF PROVED THE ISSUE OF PROXIMATE CAUSATION WITHOUT THE REQUISITE EXPERT TESTIMONY.

Plaintiff takes exception to the testimony of Dr. Meshad, the sole qualified independent oncology expert at trial. Plaintiff makes several attacks on Dr. Meshad's testimony. The sole issue which requires a response is that Dr. Meshad produced "no medical literature which says a hypersensitive reaction to Taxol can cause damages like Charles Freeman had." *Appellee's Brief at p. 12.* Contrary to Plaintiff's assertion, Dr. Meshad offered an authoritative source of medical information on the possible complications associated with Taxol, the package insert from the manufacturer. Dr. Meshad testified that the package insert, Defendant's Exhibit 3, warns "that the administration of Taxol can result in hypersensitive reactions and in rare occasions severe hypersensitive reactions." [RE-164; Tr-446]. There is no more qualified authoritative source for information concerning a drug than the package insert produced by the manufacturer of the medication.

Dr. Meshad was the sole independent expert witness at trial qualified in the field of oncology. Dr. Meshad testified that the reaction was severe and that he had never seen such a complication in the use of Taxol in his years of experience with the drug. He testified that Dr. Sacks did not breach the standard of care in his treatment of Mr. Freeman. He testified that Nurse Byrd did not breach the standard of care in her treatment of Mr. Freeman. [RE-166; Tr-449]. Plaintiff failed to refute the testimony of Dr. Meshad by any qualified medical doctor. The mere fact that an infiltration may have

occurred is not proof of a breach of the applicable standard of care. Plaintiff failed to prove that any alleged breach of an applicable standard of care proximately caused Mr. Freeman's injury.

VI. THE TRIAL COURT COMMITTED MANIFEST ERROR IN RELYING UPON MEDICAL BILLS INCURRED FOR TREATMENT OF PRE-EXISTING CONDITIONS WHEN AWARDING DAMAGES.

The Plaintiff incorrectly states that Dr. Sacks testified Mr. Freeman's three hospitalizations were related to his cellulitis. At trial, Dr. Sacks testified as follows:

> Q. Do you know how many hospitalizations he experienced as a result of this infiltration?
>
> A. I don't recall for sure, but that would depend upon how many - - I think it would correspond to his hospitalization for whirlpool treatment. I think he had a lot of other reasons for hospitalization at that time, including his lung cancer and diabetes and so on.
>
> But I think if I were to attribute in my opinion which hospitalizations were due to the infiltration, or alleged infiltration, it would be the ones that required physical therapy and whirlpool treatments for his arm. But there were other reasons for hospitalizing him.
>
> Q. And that covers the Garden Park admissions, the three Garden Park admissions?
>
> A. I don't now if all three were necessarily for that. I think once he stopped receiving the care of Dr. Wyble, who was the wound team physician, that the other admissions that followed were related to other medical problems.
>
> Q. Do you agree that at least the two Garden Park - - the first two Garden Park admissions were related?
>
> A. I'm not certain about anything other than one admission which required the intervention of the wound team. If the second admission, Bob, required wound team intervention, then I would agree.

[RE-38-39; Tr-177-178].

Plaintiff and the trial judge failed to recognize that Mr. Freeman was initially hospitalized

on February 18, 1998, for shortness shortness of breath and fever secondary to his underlying conditions of COPD and lung cancer. It was only after Mr. Freeman was hospitalized for those medical conditions that he began receiving inpatient care for his cellulitis. This is confirmed by Dr. Sacks' record dated February 18, 1998, which reads:

> Mr. Freeman is a[n] elderly gentleman being admitted from my office today for complaints of shortness of breath and fever
> ...
>
> The patient's current problems are increasing shortness of breath and fever suggesting possible pulmonary infection and perhaps leukopenia secondary to his recent chemotherapy...

[RE-181; P-1 at 157].

Plaintiff would have the Court believe that on February 18, 1998, Mr. Freeman's cellulitis was so severe as to require his hospitalization. That is not true and is completely refuted by all evidence in the record. The Defendants do not deny that Mr. Freeman was ultimately discharged from acute care for his underlying conditions of lung cancer and COPD and then admitted to the Extended Care Unit (ECU) for continued therapy for his cellulitis, including whirlpool treatments, medical management and antiobiotic therapy six days after his initial admission. [RE-180-182; P-1 at 154, 172]. The Defendants contend that the trial judge committed manifest error by finding that all medical expenses incurred by Mr. Freeman during the three Garden Park Community Hospital stays were related to his cellulitis. In her brief, Plaintiff states, "Defendants' argument here suggests that if Mr. Freeman received a $10 aspirin for headache while he was hospitalized for him arm injury, the cost of aspirin is not damages." *Appellee's Brief at p. 19.* While the Plaintiff's argument may have merit were Mr. Freeman initially admitted to the hospital for his cellulits then incurred additional medical bills for his pre-existing conditions while so admitted, the opposite is true. Mr. Freeman was initially admitted for his pre-existing conditions and consequently incurred bills for

other treatment, to the point where he was placed in ECU for treatment of the cellulitis. While Section 41-9-119 of the Mississippi Code of 1972, as amended, provides that medical bills paid or incurred because of any illness, disease or injury are prima facie evidence that such bills were reasonable and necessary, the majority of Mr. Freeman's bills were incurred for treatment of lung cancer, COPD, and diabetes, bills which he would have incurred had he not also had to receive treatment for his cellulitis. As set forth in the Defendants' Brief, Mr. Freeman did not undergo any "bandaging, debridement or whirlpool treatment" until February 24, 1998, six days after he was initially admitted to the hospital for shortness of breath and fever. [*Appellant's Brief*, p. 4-5; RE-199-229; P-7]. The only medical testimony at trial to relate Mr. Freeman's medical treatment for cellulitis to his hospital stays is that testimony of Dr. Sacks set forth above, which established that the only hospitalizations related to Mr. Freeman's cellulitis were those where he received whirlpool treatment to his arm. The trial judge committed manifest error by failing to review the medical records in conjunction with the medical bills and finding that Mr. Freeman incurred $42,334.36 in medical bills as a result of his cellulitis. As such, the Judgment of the trial court should be reversed.

VII. THE DEFENDANTS DID NOT ARGUE THAT THE TRIAL JUDGE'S DAMAGES CALCULATION WAS INCORRECT AND THEREFORE NEED NOT COMPLY WITH RULE 14(C) OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE

The Plaintiff asserts that Defendants failed to comply with Rule 14 of the Mississippi Rules of Appellate Procedure by not presenting a true calculation of damages. Rule 14(c), Mississippi Rules of Appellate Procedure provides:

> When a party relies on an error in the calculation of interest or damages as a reason for altering a judgment, a true calculation shall be presented to the appellate court, in writing and figures, with a certificate by a certified public accountant not interested in the cause, that the calculation is correct; and no such error will be noticed unless so presented to the Supreme Court or the Court of Appeals.

The Defendants do not argue that the trial judge incorrectly calculated damages. Rather, the

issues are (1) whether the judge committed manifest error by considering medical bills incurred for the treatment of pre-existing conditions when making his damage award; and (2) whether all medical bills were incurred as a result of cellulitis or as a result of other medical conditions which would have necessitated inpatient care had Mr. Freeman not also been treated for cellulitis. The trial judge clearly relied upon bills incurred for treatment of preexisting conditions when awarding damages. "The damages here are substantial. Plaintiff introduced medical bills totaling $42,334.36." [*Judgment*, R-876; RE-17]. The error is the judge's reliance on the bills, period, not whether he correctly tallied the bills he thought were incurred as a result of cellulitis. As such, the Defendants were not required to comply with Rule 14(c).

VIII. THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING DR. SACKS VICARIOUSLY LIABLE FOR THE ALLEGED NEGLIGENCE OF NURSE BYRD WHEN THERE WAS NO COMPETENT TESTIMONY TO ESTABLISH THAT NURSE BYRD WAS NEGLIGENT AND WHEN SUCH FINDING OF LIABILITY IMPOSES AN IMPOSSIBLE BURDEN UPON PHYSICIANS WHO SHOULD BE ABLE TO RELY UPON A TRAINED NURSE TO ADMINISTER MEDICATIONS AS ORDERED.

Fist, the Plaintiff offered no competent medical testimony to establish that Nurse Byrd was negligent. Therefore, Dr. Sacks should not have been found vicariously liable for her negligence when the fact of negligence was not proven at trial.

Second, although the Plaintiff makes a very eloquent argument with regard to vicarious liability, perhaps the Defendants' argument would be best received by reviewing Judge McMillan's dissent in *Dailey v. Methodist Medical Center*, 790 So.2d 903, 920 (Miss.App. 2001), wherein he commented on whether a physician should be liable when a nurse administers a drug different from that directed by his orders.

> I would affirm the grant of summary judgment in favor of Dr. Newcomb. There is no indication that he played any direct part in the administration of a drug different from that directed by his orders. I would not think that a treating physician's standard of care extends to physically checking behind his orders to ensure that the

> proper drug is being given. That would appear unreasonably burdensome and, in such instances as when drugs are ordered from remote locations, an impossible standard to meet. Certainly, if Dr. Newcomb's duty to assure that his patient was in fact receiving the correct drug was the standard of care, it was the plaintiff's duty to establish that standard by expert testimony since it is not capable of being determined by laymen unfamiliar with hospital processes.

790 So.2d 903, 920 (Miss.App. 2001). The pertinent issue in *Dailey* was whether summary judgment should have been granted in favor of Dr. Newcomb when a nurse erroneously installed Pitocin, a labor inducing drug, into a male patient's IV, thereby resulting in damages, after being ordered by Dr. Newcomb to administer a completely different drug. It is important to note a substantial difference between the facts in *Dailey* and the facts in the present case. In *Dailey*, there was evidence of direct negligence on the part of Dr. Newcomb because, having come into the patient's room to respond to a complaint, he ordered an additional drug without checking to see what drug was being administered or at what rate. *Id.* at 915. There is no evidence of direct negligence on the part of Dr. Sacks in the present case. Despite the differences in fact scenarios, the Court of Appeals decision is noteworthy. In reversing the trial court's grant of summary judgment, the majority stated:

> Dr. Newcomb does have non-delegable duties, including diagnosis, course of treatment, prescription of medicine, continuing care, etc. Although the administration of the wrong medicine by a nurse may not have been included in those duties, in this case it does not matter that a nurse actually delivered the Pitocin into Ron's IV because the fact scenario indicates that Dr. Newcomb came into Ron's room, saw that he was swollen, and ordered Lasix to counter-act the swelling, without checking to see what drug was being administered or at what rate.

Id. Although not specifically stated by the majority, this comment, coupled with the comment by Judge McMillan in dissent, appears to show the Court of Appeals view that a physician cannot be held responsible for the negligence of a nurse who incorrectly administers a drug after receiving proper instructions from a physician. Such a view fully comports with the Fifth Circuit's limitation

of its holding in *Hunnicut v. Wright*, that a physician is not liable for routine acts of treatment which an attending physician may reasonably assume may be performed in his absence by nurses of a modern hospital as part of their usual and customary duties. 986 F.2d 119, 123 (5th Cir. 1993). The extent of Dr. Sacks involvement in the process of administering of chemotherapy was nothing more than "sticking his head in to say hello," and "walking by to see what's going on." [P-12 at p. 16]. Dr. Sacks involvement hardly rises to the level of Dr. Newcomb's involvement in *Dailey*. Regardless, the Plaintiff presented absolutely no expert testimony that the standard of care requires a physician to inspect the IV site to determine whether a nurse has properly administered the drug ordered by the physician.[1] Therefore, the trial judge committed manifest error when imputing vicarious liability upon Dr. Sacks.

IX. THE TRIAL JUDGE MADE NUMEROUS ERRONEOUS FINDINGS OF FACT WHICH CONTRADICT ALL EVIDENCE AND TESTIMONY IN THE RECORD.

A. Byrd's Testimony of the Standard of Care for the First Hour of Taxol Administration.

The Plaintiff incorrectly states that Defendants did not file a motion for new trial. Defendants did, in fact, each file a motion for new trial setting forth the errors complained of in its brief. [R-878-885; R-888-894].

The Plaintiff incorrectly cited Nurse Byrd's deposition testimony in an effort to imply to the Court that the nursing standard of care is greater than that testified to by each nurse who testified in the case. Upon continued examination, Nurse Byrd testified that:

> A. We check on the patient. We stay in the room for the first 15 minutes while the patient is doing Taxol, and then we're in the room every 15 minutes after

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1 In *Dailey*, the Plaintiff presented an issue of fact to survive summary judgment by presenting the Affidavits of two physician on the issue of causation.

that doing vital signs and checking on the patient.

Q. When did you change the procedure from staying with the patient constantly the first hour to the different method where you can check with the patient every 15 minutes even though they're on Taxol?

A. We never stay with the - - we stay with - - as far as the Taxol, we always check the vital signs 15 minutes for the first hour. We stay in the room for the first 15 minutes, and then we're in there every 15 minutes for the first hour with the patient. We don't stay in the room for that whole hour with the patient.

Q. I misunderstood you then. Okay.

[RE-241; P-12, pp. 24-25]

This testimony proves the trial judge committed error in his findings of fact because, had he read an additional three pages of Nurse Byrd's deposition, he would have realized that Nurse Byrd testified the standard of care required the nurse to remain with the patient for the first 15 minutes of Taxol administration, not for the first hour.

B. Sacks' Testimony Regarding Continued Taxol Administration.

The Defendant admits that Dr. Sacks testified in his *deposition* that Mr. Freeman was never given Taxol after February 12, 1998. That was a mistake, which was more than cleared up during trial where there was an abundance of testimony and a multitude of medical records admitted into evidence which showed that Mr. Freeman was, in fact, given Taxol on several occasions after February 12, 1998. The fact that the trial judge even made a finding of fact regarding Dr. Sacks mistaken deposition testimony shows that he ignored the trial testimony and made an erroneous finding of fact.

C. Pearson's and Dove's Testimony.

The Plaintiff is completely incorrect in her assertion that, "it was an absolute fact that Byrd did not chart continuous observation for one hour and vital signs were not charted every fifteen

minutes." (Plaintiff's brief, at p. 28). The medical record speaks for itself and cannot be more clear regarding continuous observation by Nurse Byrd for the first hour and charting of vital signs every 15 minutes for the first hour. There are four time entries subsequent to the time Taxol administration began: 11:35; 11:50; 12:05; and 12:20. [RE-173; P-1 at 126]. These time entries occur every fifteen minutes and prove that Nurse Byrd adhered to the standard of care by continuously monitoring Mr. Freeman during the first hour of Taxol administration. Any assertion to the contrary is erroneous.

D. Nurse Dove's Testimony.

The Plaintiff would have the Court believe that Nurse Dove testified it was not a breach of the standard of care for a nurse to disobey a physician's order and give Taxol over one hour when ordered to give it over three hours. Nurse Dove actually testified that Taxol can be and is routinely administered over one hour. Therefore it is not a breach of the standard of care to administer Taxol over one hour. Nurse Dove went on to clarify, "However, if the physician orders it over three hours, then it should be administered over three hours." [RE-157; Tr-427]. This is another example of the Plaintiff picking and choosing one to two favorable lines of testimony which, taken out of context, provide a finding in her favor. The mere fact that the Plaintiff and the trial judge did not consider all of the testimony shows that the trial judge made erroneous findings of fact.

CONCLUSION

The trial judge committed manifest errors of law in finding negligence in this case because the Plaintiff failed did prove that any breach of the applicable standard of care proximately cause Mr. Freeman's injury.

The trial judge committed manifest errors of law by allowing the expert testimony of Plaintiff's nursing expert Pam Jenner when Ms. Jenner was not qualified by experience, knowledge, or otherwise to render an opinion on the nursing standard of care with regard to the administration

of the chemotherapuetic agent, Taxol; by allowing Ms. Jenner to testify outside the realm of nursing and provide opinions with regard to medical diagnosis, medical treatment and proximate causation; and by accepting the testimony of Ms. Jenner, an unqualified expert, over the expert testimony of that presented by the Defendants when Ms. Jenner merely presented alternate theories of negligence.

The trial judge committed a manifest error of law by finding Dr. Sacks guilty of negligence without the benefit of medical expert testimony to establish his negligence. The trial judge committed additional manifest errors of law by finding Dr. Sacks vicariously liable for the alleged negligence of Nurse Byrd in administering Taxol when there was no expert testimony provided to establish that Dr. Sacks breached the standard of care owed to Mr. Freeman. In addition, imposing vicarious liability upon Dr. Sacks for nursing negligence in the administration of a drug when there was no negligence on the part of Dr. Sacks in ordering the drug would impose an impossible burden upon physicians who should be able to rely upon a nurse certified in IV therapy to properly carry out his orders.

The trial judge committed manifest errors of law and fact by awarding damages based upon a group of medical bills incurred by Mr. Freeman for three hospitalizations when there was no testimony to establish that all three hospitalizations were related to Mr. Freeman's cellulitis.

Finally, the trial judge made such erroneous findings of fact that his judgment was manifestly wrong and constituted an abuse of his discretion.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

I, the undersigned attorney, of the firm of Williams, Heidelberg, Steinberger & McElhaney, P.A., do hereby certify that I have served by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing **Appellant's Brief** to:

Robert W. Smith, Esquire
918 Porter Avenue
Ocean Springs, MS 39564

Honorable Stephen Simpson
Circuit Court Judge
Post Office Drawer 1570
Gulfport, MS 39502-1570

THIS, the 5th day of April, 2007.

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