

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

BRIEF OF APPELLANT

Oral Argument Requested

Appeal from Hancock County Circuit Court

Cause No. 98-0235

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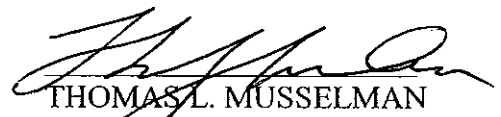
**NANCY NECAISE, Individually and on
behalf of the Wrongful Death Beneficiaries of
CHARLES FREEMAN, Deceased**

APPELLEES

CERTIFICATE OF INTERESTED PERSONS

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

1. Appellants, Matthew Sacks, M.D. and The Medical Oncology Group, P.A.
2. Appellees, Nancy Necaise and the Statutory Wrongful Death Beneficiaries of Charles Freeman, Deceased
3. Honorable Stephen Simpson, Circuit Court Judge for the Second District
4. Counsel for Appellant: Thomas L. Musselman, Esq.
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TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED

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STATEMENT OF THE ISSUES

- I. THE TRIAL COURT ERRED WHEN IT RULED THAT PLAINTIFF MET HER BURDEN OF PROOF ON ALL THE ELEMENTS OF A CLAIM OF MEDICAL NEGLIGENCE.
- II. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANTS' DAUBERT MOTION ON JENNER'S EXPERT STATUS.
- III. THE TRIAL COURT ERRED WHEN IT ALLOWED PLAINTIFF'S NURSING EXPERT TO TESTIFY ON ISSUES OF MEDICAL DIAGNOSIS AND TREATMENT OUTSIDE THE PRACTICE OF NURSING.
- IV. THE TRIAL COURT ERRED WHEN IT IMPUTED VICARIOUS LIABILITY TO DR. SACKS.
- V. THE TRIAL COURT ERRED WHEN IT ALLOWED THE PLAINTIFF TO SUBMIT MEDICAL BILLS FOR TREATMENT OF PRE-EXISTING CONDITIONS UNRELATED TO THE CLAIMS IN THE INSTANT MATTER.
- VI. THE JUDGMENT SHOULD BE REVERSED BECAUSE IT IS BASED UPON CLEARLY ERRONEOUS FINDINGS WHICH ARE NOT SUPPORTED BY ANY TESTIMONY OR EVIDENCE IN THE RECORD.

STATEMENT OF THE CASE

Nature of the Case and Disposition Below

This matter commenced upon the filing of a Complaint in the Circuit Court of Hancock County, Mississippi, on August 19, 1998, by Charles Freeman, deceased. Mr. Freeman alleged negligence on the part of Matthew Sacks, MD, and Jane Doe 1, for injuries he allegedly sustained while receiving chemotherapy treatment for lung cancer at the Medical Oncology Group. Dr. Sacks was an employee of the Medical Oncology Group at the time the Complaint was filed. On or about January 9, 1999, Charles Freeman died of lung cancer. By Order dated March 8, 1999, Mr. Freeman's daughter, Nancy Necaise was substituted as the Plaintiff in this matter. On or about September 30, 1999, the Plaintiff filed her Amended Complaint naming The Medical Oncology Group, P.A., as an additional Defendant in this case.

This case was tried before Circuit Court Judge Stephen B. Simpson on August 16 through 19, 2005. Judge Simpson issued his ruling against the Defendants on February 13, 2006. Final Judgment was entered on February 27, 2006. Defendants each filed their Motions to Reconsider (identified as Motion for New Trial, or in the Alternative, Motion for Judgment Notwithstanding the Verdict) on February 27, 2006. Judge Simpson overruled said Motions by Order dated June 2, 2006. Defendants timely filed their Notice of Appeal on June 27, 2006.

STATEMENT OF THE FACTS

Plaintiff, Charles Freeman, (hereafter “Mr. Freeman”), was diagnosed with non-small cell lung cancer on or about January 8, 1998. [RE-169; Exhibit P-1 at 103].¹ At the time of the diagnosis, Mr. Freeman was a 73 year old male who also suffered from diabetes, chronic obstructive pulmonary disease and hypertension. *Id.* Mr. Freeman began chemotherapy treatment at the Medical Oncology Group on January 22, 1998. [RE-171, 173; P-1 at 19, 126]. Dr. Matthew Sacks was his treating physician. Dr. Sacks prescribed treatment with the chemotherapeutic drugs, Carboplatin and Taxol. *Id.* Dr. Sacks also referred Mr. Freeman to Dr. Michael Moses for placement of a central line to facilitate the administration of the chemotherapy agents. *Id.* Mr. Freeman decided, on his own, not to have the central line, and instead opted for peripheral line administration. [RE-34; Tr-174]. Dr. Sacks testified that the best way to prevent an infiltration is to administer the drug through a central line. [RE-237; P-11 at 30]. On February 17, 1998, after the reaction to Taxol, Mr. Freeman, adhering to the original recommendation of Dr. Sacks, opted to have a central line placed. [RE-178; P-1 at 150].

Dr. Sacks does not administer chemotherapy. [RE-231-232; P-11 at 15-16]. It was Dr. Sacks’ and the Medical Oncology Group’s customary practice to meet with the patient first and prepare a treatment plan. *Id.* The treatment plan consists of the drugs the patient will receive and how they should be administered, along with pretreatment medication. *Id.* Dr. Sacks would then discuss the treatment plan and possible side effects, etc. with the patient. *Id.* The patient would come back at

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References to the Record Excerpt will be cited as “RE- ____.” References to the Trial Transcript will be cited as “Tr- ____.” The Exhibits will be referenced as either “P- ____” or “D- ____”

a later date to receive the treatment. *Id.* At that time, the treatment plan is given to the chemotherapy nurse, who administers the treatment. *Id.* Dr. Sacks does not remain in the treatment room while the chemotherapy is being administered. *Id.* Rather, while tending to other patients, he would “stick his head in and say hello,” or sometimes just walk by and take a look in the room. *Id.* It was the Medical Oncology Group’s custom and practice to have the chemotherapy nurse check on the patients roughly every 15 minutes. [RE-238; P-11 at 35]. A typical chemotherapy treatment lasts approximately 4 hours. *Id.* Dr. Sacks does not select which chemotherapy nurse will administer the treatment. This was the job of the office manager. [RE-233; P-11 at 17].

On January 28, 1998, Mr. Freeman received his first cycle of chemotherapy treatment with no apparent difficulty. [RE-172; P-1 at 121]. On February 12, 1998, Mr. Freeman received his second cycle of chemotherapy treatment. *Id.* After administration of the anti-nausea drug Kytril, it was noted that Mr. Freeman’s arm was swollen, but he did not complain of burning or stinging at the IV site. [RE-173, 234; P-1 at 126; P-11, at 24]. At that point in time, Dr. Sacks believed Mr. Freeman suffered an infiltration of Taxol. [RE-235, P-11 at 26]. Dr. Sacks ordered that Mr. Freeman’s arm be elevated and that ice be applied to the area. [RE-235-235; P-11 at 26-27]. Ultimately, Mr. Freeman suffered a cellulitis of his left arm. [RE-38; Tr-177]. Three weeks later, the cellulitis had completely healed. *Id.*

The trial record contains only one medical record in which Mr. Freeman’s chief complaint was swelling in the left arm. [RE-176; P-1 at 145]. This record is dated February 16, 1998, and states that the arm appears to be healing well without significant signs or complications or difficulty with movement of the hand. [RE-177; P-1 at 148]. On February 17, 1998, Mr. Freeman called the Medical Oncology Group complaining of water blisters on his left arm and coughing up blood. [RE-179; P-1 at 151]. On February 18, 1998, Mr. Freeman was admitted to Garden Park Hospital for

complaints of shortness of breath and fever. His current problems were noted to be increasing shortness of breath and fever suggesting possible pulmonary infection and perhaps leukopenia² secondary to his recent chemotherapy. [RE-181; P-1 at 157]. Mr. Freeman was discharged from acute care during this stay and admitted to the Extended Care Unit (ECU) for continued therapy for his cellulitis, including whirlpool treatments, medical management and antibiotic therapy. [RE-180, 182; P-1 at 154, 172]. He was discharged on March 9, 1998. *Id.* Dr. Sacks noted that Mr. Freeman's stay in ECU was complicated by an infectious exacerbation of his cardio obstructive pulmonary disease. *Id.* The medical bills submitted as Plaintiff's Exhibit P-7, confirm that Mr. Freeman did not undergo any bandaging, debridement or whirlpool treatment until February 24, 1998. This treatment only continued through March 9, 1998. The medical bills clearly show that, beginning on February 18, 1998, and continuing through March 17, 1998, Mr. Freeman received substantial treatment in the form of respiratory therapy, cardiology, radiology related to his pre-existing conditions of lung cancer, COPD and diabetes. [RE-199-229; P-7].

On March 12, 1998, Mr. Freeman was again admitted to Garden Park Hospital. [RE-183; P-1 at 176]. At this time, Dr. Sacks noted that Mr. Freeman has had a complete recovery of the function of his left arm and healing of the wound. *Id.* There was absolutely no medical testimony to relate this admission to Mr. Freeman's cellulitis, and in fact, a review of the medical bills shows that Mr. Freeman did not incur any charges for bandaging, debridement or whirlpool treatment during this hospital stay. [RE-199-229; P-7].

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Leukopenia is defined as an abnormal decrease in the number of white blood cells. *Dorland's Medical Dictionary* 380 (Franz J. Ingelfinger, M.D., ed., 25th ed., W.B. Saunders Company 1980)

On March 17, 1998, Mr. Freeman underwent a lung biopsy at Garden Park Hospital. [RE-186; P-1 at 186]. He was then transferred to Memorial Hospital at Gulfport, Mississippi, for evaluation for radiation therapy. [RE-184; P-1 at 181]. Subsequent to March 9, 1998, Mr. Freeman was admitted to either Garden Park Hospital or Memorial Hospital on at least 7 occasions to receive either radiation treatment or treatment for his uncontrolled diabetes mellitus and/or COPD. [RE-184-185, 187-198; P-1 at 181-182, 196, 198, 200, 202, 203, 212, 213-215, 242, 243, 244].

Dr. Sacks was designated as an expert by the Plaintiff. At trial, Dr. Sacks testified that he is a board certified medical oncologist who was employed by the Medical Oncology Group for approximately 4 years, from 1996 though 1998. [RE-30; Tr-142]. He testified that infiltrations are a known and accepted risk of IV therapy. [RE-37; Tr-174]. Dr. Sacks further testified that there was no breach of the standard of care with regard to Nurse Byrd's administration of chemotherapy. [RE-35, 37, 41, 43-44; Tr-171, 174, 196, 212-213]. Further, Dr. Sacks testified that there was no deviation from the standard of care with regard to his care and treatment of Mr. Freeman. [RE-44; Tr-213].

There is no doubt that Dr. Sacks believed there was an infiltration of Taxol at the inception of the case. [RE-31, 257; P-11 at 30; Tr-158]. However, upon further review of the medical literature, he opined that he did not believe there was an extravasation³ of the Taxol into Mr. Freeman's forearm because extravasations are usually much more localized. [RE-32; Tr-159].

And, the way in which this injury to Mr. Freeman's arm appears, it looks as if this is following the circulation of that vein. It's hard for me to understand how you can have extravasation at the site that the needle is entering the vein, yet have drug travel

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Throughout the trial of this case, although medically imprecise, the term extravasation was used interchangeably with the term infiltration. [RE-50; Tr-226].

all the way up the arm. So it doesn't look like any type of extravasation that I've seen in the last 30 years.

Id.

With regard to potential vicarious liability, Dr. Sacks testified that Nurse Byrd was not under his direction and control. [RE-33; Tr-160]. In fact, he even testified in his deposition that the other two doctors have authority to go into the treatment room and give the nurse orders. [RE-239; P-11 at 48]. Even though Dr. Sacks had the authority to give Nurse Byrd orders, it is undisputed that Nurse Byrd was an employee of the Medical Oncology Group, not Dr. Sacks. [RE-34, 128; Tr-161, 365]. Both Dr. Sacks and Nurse Byrd were employees of the Medical Oncology Group. *Id.*

The Plaintiff offered Ms. Pamela Creel Jenner as an expert in the field of chemotherapy nursing. [RE-49; Tr-225]. The Defendants objected to Ms. Jenner's designation as an expert and filed a motion in limine to exclude her testimony. *Id.* Ms. Jenner is an attorney who practices in the State of Mississippi. [RE-45; Tr-219]. Prior to her legal career, Ms. Jenner obtained a nursing degree from Providence School of Nursing in Mobile, Alabama, in 1974. *Id.* She then worked at Providence Hospital for one year in the recovery room and on the medical surgical floor. [RE-45-46; Tr-219-220]. Ms. Jenner subsequently became employed with Charity Hospital in New Orleans, Louisiana, from 1975-1979. *Id.* While so employed, she worked in the leukemia unit for approximately one year and the cancer unit for approximately three years. *Id.* She testified that she received training from Charity Hospital with regard to chemotherapy. *Id.* Ms. Jenner testified that she administered chemotherapy to approximately several hundred patients from 1975 through 1979, or 1980. [RE-47; Tr-221].

Ms. Jenner has given deposition testimony as a nurse, "only a handful of times." [RE-48; Tr-223]. She has only been accepted as a nursing expert, in trial, on one occasion. *Id.* The case was

a medical malpractice case, but did not involve the administration of chemotherapy. *Id.* Ms. Jenner has never administered the chemotherapy drug Taxol. *Id.* Her knowledge of Taxol and its administration comes from what she read in articles she retrieved from the internet. *Id.* In addition, Ms. Jenner reviewed the depositions of Nurse Byrd, Dr. Sacks, Nurse Annette Dove and Pete Freeman. [RE-49; Tr-225]. Ms. Jenner also attended the deposition of Nurse Annette Dove.

Ms. Jenner presented two opinions regarding an alleged breach of the standard of care by Nurse Byrd. First, Ms. Jenner opined Nurse Byrd was negligent by failing to monitor the IV site. She also opined Nurse Byrd was negligent by failing to rotate the IV site from the site where Mr. Freeman received chemotherapy three weeks prior. [RE-79; Tr260].

Over the Defendant's objection, Ms. Jenner testified that it was her opinion Mr. Freeman suffered an extravasation of Taxol on February 12, 1998. [RE-51-52; Tr-227-228]. Ms. Jenner testified that Nurse Byrd was, "substandard in her nursing care and treatment of Mr. Freeman during the Taxol IV administration." *Id.* Ms. Jenner testified that, in her opinion, the standard of care requires the patient to be monitored extremely closely for the first hour by remaining in constant observation of the patient and of the IV and taking vital signs every 15 minutes. [RE-53; Tr-230]. Ms. Jenner defined "constant observation" as "being either in the room or nearby the room where you can watch the patient at all times and see the IV." [RE-57; Tr-234]. Ms. Jenner initially testified that, according to the medical record, she does not believe Nurse Byrd followed the standard of care. [RE-53-54; Tr-230-231]. The basis for her opinion is that she disputes Ms. Byrd's deposition testimony. However, she later testified that, if Ms. Byrd's testimony was taken as true, she did, in fact, take vital signs every 15 minutes. [RE-74; Tr-254]. In Ms. Jenner's opinion, Nurse Byrd documented poorly and failure to document is a breach of the standard of care. [RE-75; Tr-255].

Ms. Jenner further testified that Nurse Byrd breached the standard of care by failing to rotate

the IV site, and that she “thinks” the standard requires the nurse to rotate the extremities. [RE-58; Tr-235]. Ms. Jenner admitted that she did not research any medical literature nor have any written authority to support her opinion. [RE-79, 80; Tr-261, 262].

Ms. Jenner further opined that, according to nurse Byrd’s documentation, the Taxol infusion was complete at 12:20 p.m; that Dr. Sacks ordered Taxol to be administered over 3 hours; and that it is a breach of the standard of care to administer a medication in one hour when you have been ordered by the doctor to administer it over 3 hours. [RE-58-59; Tr-235-236].

Ms. Jenner opined that the standard of care also required Nurse Byrd to continue to monitor the patient and document his vital signs periodically and document the appearance of the IV site during the subsequent two hours of Taxol administration. [RE-61; Tr- 238]. The February 12, 1998, record clearly provides that no reaction was noted when Taxol was completed and that once the left arm was noted to be swollen, Mr. Freeman had no complaints of burning or stinging at the IV site. [RE-173; P-1 at 126]. Yet, Ms. Jenner testified that Nurse Byrd failed to monitor Mr. Freeman over the final 2 hours of Taxol infusion. [RE-61; Tr-238]. (She had just testified that Nurse Byrd infused all the Taxol in one hour rather than three hours).

Ms. Jenner also testified that her review of the medical literature revealed documented cases of severe tissue necrosis due to Taxol extravasation, such as occurred in this case. [RE-65; Tr-242]. Ms. Jenner was allowed to testify regarding her “internet” search of medical literature, despite the Defendant’s continued objection to her testifying as a medical expert. [RE-66-68; Tr-243-245].

Ms. Jenner testified that she has never seen an infiltration react the way this alleged infiltration did. [RE-72; Tr-251]. She did, however, testify that infiltrations are a known and accepted risk of IV therapy and that they can occur absent negligence. [RE-72, 79; Tr-251, 260]. In Ms. Jenner’s opinion, the reason there was nursing negligence in this case is because Nurse Byrd

failed to monitor the IV, which conclusion she reached because of “poor documentation.” [RE-53-54; Tr-230-231].

Ms. Jenner presented two theories of nursing negligence concerning the administration of Taxol. First, she theorized that Taxol was administered over one hour, rather than three hours as ordered by Dr. Sacks and that this violation of Dr. Sacks order was a breach of the standard of care. [RE-58-59; Tr-235-236]. She then changed her opinion and stated that she believed Nurse Byrd continued the Taxol infusion for the final two hours after the infiltration was discovered. [RE-77; Tr-258]. Even so, Ms. Jenner testified that Nurse Byrd acted as a prudent nurse by notifying Dr. Sacks when Mr. Freeman’s arm was found to be cool. [RE-7-78; Tr-258-259].

The Plaintiff offered the testimony of Mr. Freeman’s brother, Clarence Freeman, who is an 80 year old male. [RE-83; Tr-274]. Clarence Freeman, hereafter “Clarence,” brought Mr. Freeman to the Medical Oncology Group to receive his chemotherapy on January 22, 1998, and February 12, 1998. [RE-84; Tr-275]. Clarence testified on direct that, on February 12, 1998, he and Mr. Freeman arrived at the Medical Oncology Group at approximately 11:30 a.m.; that he went into the treatment room with Mr. Freeman for approximately 10 minutes prior to his therapy; and that he recalls the nurse had a difficult time finding a vein. [RE-85, 102; Tr-276, 302]. After the IV was inserted, Clarence testified that he went to the Waffle House on Highway 90 to get Mr. Freeman a sandwich. *Id.* While at the Waffle House, he ate breakfast and spoke to some fellows for a few minutes. [RE-86, 93; Tr-277, 291]. Clarence testified that he was gone no longer than an hour. [RE-87, 94; Tr-278, 292]. He testified that when he returned, Mr. Freeman’s arm was swollen and turning red, so he went to look for the nurse. [RE-85; Tr-276]. He also testified that when he returned, Mr. Freeman told him the nurse had not been back in the room to check on him. [RE-87; Tr-278]. Clarence testified that the nurse went into the treatment room and called Dr. Sacks and asked Clarence to go

to the waiting room. [RE-85; Tr-276]. Clarence thinks the nurse unhooked Mr. Freeman's IV when she arrived in the room. [RE-102; Tr-302]. Rather than wait in the waiting room, Clarence went to pick up his wife from work. [RE-88; Tr-280]. His wife's shift ended at 2:00 p.m. *Id.* She worked at Denny's in Biloxi at the time, and it only took him approximately 15 to 20 minutes to drive from the Medical Oncology Group to Denny's. [RE-96; Tr-293]. He recalls only having to wait for her for a few minutes prior to her shift ending. [RE-88. 97; Tr-280, 294]. He testified that when he returned to the Medical Oncology Group, he only had to wait in the waiting room for a few minutes before they wheeled Mr. Freeman out in a wheelchair with an ice pack on his arm. *Id.*

Clarence repeatedly testified that he could not recall certain events and that he was getting "too old to remember too much." [RE-89, 98-102; Tr-281, 295-296, 299, 300, 302]. He testified that from March 1998, the time the medical records indicate Mr. Freeman had a complete resolution of his cellulitis, until the summer of 1998, Mr. Freeman's arm was still "pretty bad." [RE-90; Tr-282]. Clarence testified that Mr. Freeman never regained use of his arm. [RE-91; Tr-283]. He also testified emphatically that when he found Mr. Freeman suffering from a swollen arm, he recalls Mr. Freeman saying that the nurse had not been back in the treatment room since Clarence left to get him a sandwich. [RE-92; Tr-285]. This testimony is less than credible because the medical record proves that Nurse Byrd was in the room at least four times after initiating treatment. [RE-173; P-1 at 126].

The Plaintiff, Nancy Necaise, testified that when her father arrived home on February 12, 1998, his arm was swollen and red. [RE-103; Tr-309]. Plaintiff testified that she personally bandaged Mr. Freeman's arm with bandages she purchased at Wal-Mart. [RE-104; Tr-310]. Plaintiff testified that she continued to bandage Mr. Freeman's arm until he died. [RE-105-106; Tr-311-312].

Plaintiff offered Exhibit P-7, which she testified were the medical bills Mr. Freeman incurred as a result of his arm injury from February 13, 1998, through March 17, 1998. [RE-107; Tr-315].

The bills totaled \$42,334.36, and were admitted despite the Defendant's objection that they were not authenticated and that there was absolutely no medical testimony to establish that the medical bills were reasonably related to Mr. Freeman's alleged injury. [RE-107-114; Tr-315-322]. The trial judge allowed the Exhibit into evidence subject to his reviewing them in conjunction with the admission reports to determine if any bills should be excluded. *Id.*

On cross-examination, Plaintiff acknowledged that the medical record of February 18, 1998, states that Mr. Freeman was being admitted to the hospital for complaints of shortness of breath and fever, not for cellulitis of the arm. [RE-115; Tr-323]. Plaintiff agreed that Mr. Freeman was being treated for conditions other than his cellulitis during his hospitalizations. [RE-116; Tr-336]. She agreed and disagreed with Dr. Sacks progress note of March 12, 1998, which provides that Mr. Freeman had a complete recovery of the function of the left arm and healing of the wound. [RE-119; Tr-340]. She also testified that his weakness was related to his severe COPD and lung cancer. *Id.* Plaintiff testified that on March 17, 1998, Mr. Freeman was transferred to a nursing facility for a while because he required round the clock care related to his lung cancer and that she could not provide the requisite care for him. [RE-120; Tr-341]. Plaintiff confirmed that when Mr. Freeman was in a nursing home when he died. [RE-121; Tr-342]. Plaintiff also confirmed that Clarence Freeman's memory is failing. [RE-115; Tr-323]. Plaintiff further confirmed that Mr. Freeman decided, on his own, not to have the central line placed to administer chemotherapy. [RE-117-118; Tr-328-329].

Plaintiff offered the deposition testimony of Jean Byrd. Ms. Byrd testified that the standard has always been to stay with the patient for the first 15 minutes of administering Taxol, then to take vitals every 15 minutes thereafter for the first hour. [RE-241; P-12, *Deposition of Jean Byrd*, at 25]. Nurse Byrd testified that she administered Taxol over three hours, and that the infusion of Taxol was

complete at approximately 2:35 p.m. [RE-242, 243; P-12 at 31, 34]. She testified that she noticed Mr. Freeman's arm was cool while assisting him to the restroom after the Taxol had been infused and while Kytril was being administered. [Re-244; P-12 at 38]. At this time, she stopped the IV and notified Dr. Sacks who told her to stop the IV, apply ice, elevate the arm and schedule the patient to see him the next morning. [RE-245; P-12 at 42].

The Defendant's offered the testimony of Dr. Edwin Davidson as an expert in the field of medical oncology. [RE-122; Tr-354]. Dr. Davidson is a partner at the Medical Oncology Group. Dr. Davidson testified that the nurses at the Medical Oncology Group are certified in the administration of chemotherapy. [RE-123; Tr-355]. This allows them to administer the drugs, and in some cases to mix the drugs. *Id.* Dr. Davidson testified that the Medical Oncology Group is an incorporated entity of which he, Dr. Sacks, and Nurse Byrd were employees on February 12, 1998. [RE-124; Tr-356]. Dr. Davidson testified that it was the practice of the Group in 1998, to have the nurses check on the patients every 10 to 15 minutes. [RE-125; Tr-357]. He further testified that it was customary for the nurses to check on each other's patients, which would not necessarily be documented in the patient's chart. [RE-125-126; Tr-357-358]. Dr. Davidson testified that the treatment regimen ordered by Dr. Sacks is a normal regimen and that Taxol can be administered over one hour versus three hours. [RE-126-127; Tr-358-359].

The Defendants offered the testimony of Joanne Pearson, R.N., a certified oncology nurse who was employed with the Medical Oncology Group on February 12, 1998. [RE-129-130; Tr-366-367]. Ms. Pearson administered chemotherapy to Mr. Freeman on January 22, 1998. *Id.* Ms. Pearson testified that the regimen prescribed to Mr. Freeman was a six hour treatment, which consisted of premedications given 30 minutes prior to Taxol - Tagament, which is given over 15 minutes; Decadron, which is given over 10-15 minutes; and Benadryl - in addition to a 30 minute

break between the premedications and the Taxol. [RE-131-132; Tr-369-370]. Ms. Pearson testified that the standard required the nurse to take vital signs every 15 minutes for the first hour during Taxol administration. Then they would check on the patient approximately every 15 minutes thereafter. [RE-133; Tr-372]. Ms. Pearson testified that she would check on other nurses patients and would not document that she did so. [RE-133-134; Tr-372-373].

Ms. Pearson had an independent recollection of being present on February 12, 1998, during Mr. Freeman's treatment, and recalled that he received Taxol over three hours. [RE-135; Tr-375]. Further, Ms. Pearson recalled personally checking on Mr. Freeman on February 12, 1998. She additionally recalled Nurse Byrd checking on Mr. Freeman on February 12, 1998. *Id.* Ms. Pearson recalled that Mr. Freeman was wheelchair-bound on February 12, 1998, and that it was the practice of the Group to place wheelchair-bound patients in the chair at the doorway so the nurse would have easy access to and clear and constant of view them. [RE-136; Tr-376]. Ms. Pearson testified that the testimony of Clarence Freeman was not consistent with her recollection of the events of February 12, 1998. *Id.* Ms. Pearson, acting on her independent recollection of the events of February 12, 1998, testified that she recalls helping Nurse Byrd assist Mr. Freeman to the restroom when Nurse Byrd discovered that his arm was cool. Nurse Byrd asked Ms. Pearson to come into the room, at which time she personally observed the arm and found it to be cool. At that point, the IV was turned off and Dr. Sacks was notified. [RE-137-139, 144-146; Tr-377-379, 387, 397-398]. Ms. Pearson testified that this occurred after the Taxol had been administered and during the administration of Kytril. [RE-140; Tr-380]. Ms. Pearson does not recall Mr. Freeman complaining about pain or swelling of his arm. [RE-141; Tr-382].

Ms. Pearson is not aware of any standard which requires a nurse to rotate the IV site. *Id.* Ms. Pearson testified that the Taxol was infused through a Plum XL infusion pump, which allows the

nurse to pre-program a specific flow rate. These machines are equipped with an alarm which sounds when there is pressure build up around the IV site. The alarm did not sound on February 12, 1998, during Mr. Freeman's treatment. [RE-141-142; Tr-382-383].

Ms. Pearson further testified that Nurse Byrd's note proves that she monitored Mr. Freeman after 12:20 p.m. because it clearly states, "Taxol infusion was completed, no reaction noted." [RE-143; Tr-386].

The Defendants presented the expert testimony of Annette Dove, R.N., who has a master's degree in nursing and is an advanced oncology certified nurse through the Oncology Nursing Society. Ms. Dove has been working as an oncology nurse since 1977 and received her certification as a chemotherapy nurse in approximately 1985. Ms. Dove has administered Taxol and Carboplatin. [RE-147-149; Tr-403-405]. Ms. Dove testified that the standard for administration of Taxol requires that the nurse check the vital signs every 15 minutes for the first hour and then as needed afterwards, and to monitor the patient every 15 to 30 minutes afterwards. [RE-150; Tr-407]. From Ms. Dove's review of the February 12, 1998, record, Nurse Byrd complied with that standard. *Id.* Ms. Dove testified that her clinic administers Taxol over a one-two hour period which requires an increased flow rate and that she has not seen an increase in the incidences of infiltrations with an increased flow rate. [RE-151; Tr-408].

Ms. Dove testified that lack of documenting every time a patient is checked is not a deviation from the standard of care. [RE-153; Tr-410]. Ms. Dove would much prefer to see the nurses taking care of the patients and feels that if they document every single thing that occurs during the course of therapy, they would not have time to take care of the patients. [RE-152; Tr-409]. Ms. Dove testified that it is customary for nurses to check on each other's patients and that the standard of care does not require a nurse to document when she check's on another nurse's patient. *Id.*

Ms. Dove disagreed with the Plaintiff's expert, Ms. Jenner's opinion that failure to rotate the IV site constituted a breach of the standard of care. *Id.* Further, Ms. Dove opined that, as a nurse, you look for the best possible vein to administer the drug, and that may not be in the opposite arm. *Id.* Ms. Dove testified that infiltrations are a known and accepted risk of IV therapy and that they can occur absent negligence, as did Plaintiff's expert. [RE-154; Tr-411]. Ms. Dove confirmed that the Plum XL infusion pumps are equipped with alarms that sound in the event of an infiltration. [RE-155; Tr-412]. In all of Ms. Dove's years as a nurse, she has never seen a reaction to Taxol such as that suffered by Mr. Freeman. Finally, Ms. Dove testified that Nurse Byrd did not deviate from the standard of care with regard to her treatment of Mr. Freeman. [RE-156; Tr-413].

The Defendants offered the expert testimony of Dr. Michael Meshad, a board certified oncologist. [RE-159-161; Tr-439-441]. Dr. Meshad testified that the treatment plan prescribed by Dr. Sacks was an appropriate treatment plan for lung cancer. [RE-161; Tr-441]. Dr. Meshad testified that it is acceptable to administer Taxol anywhere from one hour to 24-hours; that Carboplatin can be administered from 30 minutes to one hour; and that Kytril can be administered either before or after Taxol. *Id.* Dr. Meshad testified that the first hour of Taxol administration is the most critical and requires the nurse to monitor the patient's vital signs every 15 minutes, then to check on them every 15 to 30 minutes thereafter. [RE-162; Tr-443]. Dr. Meshad testified that Nurse Byrd complied with the standard of care in her treatment of Mr. Freeman. *Id.*

Dr. Meshad testified that infiltrations are a known and accepted risk of IV therapy and can occur absent medical negligence. [RE-163; Tr-445]. Further, Dr. Meshad testified that the standard of care does not require a nurse to rotate the IV site. *Id.*

Dr. Meshad has never seen a reaction to Taxol such as the reaction suffered by Mr. Freeman. [RE-164; Tr-446]. He believes Mr. Freeman suffered some type of local allergic phenomenon or

hypersensitivity reaction. [RE-165-166; Tr-448-449]. Dr. Meshad testified that the package insert for Taxol notes such a reaction was possible. Dr. Meshad testified that neither Dr. Sacks, nor any employee of the Medical Oncology Group deviated from the standard of care in regard to the treatment rendered to Mr. Freeman. *Id.*

After the defense rested, the trial judge indicated again that he was going to compare the medical records with the medical bills and make an independent determination, despite the objection raised by the Defendants of the lack of medical testimony, as to which bills were related to Mr. Freeman's arm injury. [RE-167; Tr-468].

The trial judge issued his ruling against the Defendants on February 13, 2006. He found that Nurse Byrd rendered substandard nursing care to Mr. Freeman, which was the proximate result of his injuries. He found that Dr. Sacks and the Medical Oncology Group were vicariously liable for the damages and awarded the Plaintiff a Judgment in the amount of \$217,334.36. [*Judgment*, R-866-876; RE-7-17]. After post-trial motions were denied, the Defendants perfected the instant appeal.

SUMMARY OF THE ARGUMENT

Plaintiff produced no qualified expert testimony that a breach of any standard of care proximately caused an injury to the Plaintiff. Defendants produced the only testifying medical doctor who testified that there was no breach of the standard of care by the Defendants. Defendant's experts and Plaintiff's nursing expert testified that an infiltration or extravasation at an IV site is a recognized and accepted risk of IV therapy and is not of itself evidence of negligence.

Plaintiff failed to produce qualified expert testimony as required by Mississippi law to prevail on a claim of medical negligence. Plaintiff's nursing expert fails to meet the *Daubert* standard as an expert witness in the field of chemotherapy administration. Plaintiff's nursing expert has never been qualified as a certified oncology nurse, never administered the chemotherapy drugs at issue in this matter and never qualified as an expert in any court in the field of oncology nursing.

The trial court erred when it allowed Plaintiff's nursing expert to render opinions on medical causation. Plaintiff's nursing expert lacks the qualifications to provide medical diagnoses and treatment based upon an "internet search" of medical literature.

The trial court erred when it applied an erroneous standard to impute vicarious liability to Defendant, Dr. Sacks.

The trial court erred when it allowed medical bills unrelated to the claim for medical negligence into evidence. The trial court erred when it miscalculated the damages based upon medical bills that were not properly authenticated without testimony that they were medically reasonable and necessary.

ARGUMENT

Standard of Review

When an appellate court reviews the factual determinations made by a trial judge sitting as the sole trier of fact in a bench trial, the appellate court applies the “substantial evidence standard.” *Stanton v. Delta Regional Medical Center*, 802 So.2d 142, 145 (Miss. App. 2001)(citing *Covington County v. G.W.*, 767 So.2d 187, 189 (Miss. 2000)). The findings of the trial judge will not be disturbed unless the judge “abused his discretion, was manifestly wrong, clearly erroneous or an erroneous standard was applied.” *Id.*

An abuse of discretion standard is applied to the trial court’s allowance of an expert witness. Unless an abuse of discretion is evident, a trial judge's determination on the qualification of an expert will not be disturbed on appeal. *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So.2d 1346, 1357 (Miss.1990).

I. THE TRIAL COURT ERRED WHEN IT RULED THAT PLAINTIFF MET HER BURDEN OF PROOF ON ALL THE ELEMENTS OF A CLAIM OF MEDICAL NEGLIGENCE.

In a medical negligence case, the plaintiff has the burden to prove conventional tort elements by a preponderance of the evidence. To present a prima facie case of medical malpractice, a plaintiff, (1) after establishing the doctor-patient relationship and its attendant duty, is generally required to present expert testimony (2) identifying and articulating the requisite standard of care and (3) establishing that the defendant physician failed to conform to the standard of care. In addition, (4) the plaintiff must prove the physician's noncompliance with the standard of care caused the plaintiff's injury, as well as proving (5) the extent of the plaintiff's damages. *McCaffrey v. Puckett*,

784 So.2d 197, 206 (Miss. 2001) (*citing Ladner v. Campbell*, 515 So.2d 882, 887-88 (Miss.1987)).

Allegations of medical negligence must be proven by expert testimony. There are issues to which a medical expert in the appropriate field of expertise must testify, namely the standards of care. *Ekorner-Duncan v. Rankin Medical Center*, 808 So.2d 955, 958 (Miss. 2002)(*citing Sheffield v. Goodwin*, 740 So.2d 854, 856 (Miss. 1999)). Medical negligence cases generally require expert testimony to establish these elements by a preponderance of the evidence. “Mississippi case law demands that ‘in a medical malpractice action, negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care’.” *Sheffield v. Goodwin*, 740 So.2d 854, 856 (Miss. 1999)(*quoting Travis v. Stewart*, 680 So.2d 214, 218 (Miss. 1996)).

Negligence is not presumed, rather it is presumed ordinary care has been used. The person charging negligence must show that the other party, by his act or omission, has violated some duty incumbent upon him and thereby caused the injury complained of. *Magnolia Hospital v. Moore*, 320 So.2d 793, 800 (Miss. 1975)(*citing DeLaughter v. Womack*, 164 So.2d 762, 769)(Miss. 1964)). Unless an abuse of discretion is evident, a trial judge's determination on the qualification of an expert will not be disturbed on appeal. *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So.2d 1346, 1357 (Miss.1990).

In the instant matter, there was absolutely no testimony by a medical doctor identifying the standard of care applicable to the Defendants in the treatment of Mr. Freeman. There was no testimony by any medically qualified expert witness that stated the Defendants failed to adhere to the required standard of care. In addition, there was no qualified expert who testified that any alleged injury suffered by Mr. Freeman was proximately caused by a breach of the standard of care by the Defendants. Further, there was no expert testimony upon which the fact finder could award damages due to an injury proximately caused by any alleged breach of the applicable standard of care by the Defendants. Without expert testimony on each of these issues the Plaintiff fails in proving her

case of medical negligence against the Defendants.

A. The Plaintiff Failed to Prove that Dr. Sacks
Breached the Standard of Care

Dr. Sacks was named in his individual capacity in the Complaint. [*Amended Complaint*, R-7-8; RE-114-115]. Plaintiff asserts that Dr. Sacks breached the standard of care in several different areas defined by the allegations listed in the Complaint. These areas are:

- i. Failed to formulate and implement appropriate safety procedures to prevent an infiltration of chemotherapy into his patients;
- ii. Failed to properly monitor the infusion of chemotherapy into the Plaintiff's body;
- iii. Failed to properly supervise his nurse in the performance of her duties.

Id.

The same claims are raised against the Defendant, The Medical Oncology Group. *Id.* Plaintiff elicited testimony from a former nurse in an effort to prove that Dr. Sacks breached the standard of care applicable to him in his care and treatment of the plaintiff. A nursing expert is not qualified to give testimony concerning the standard of care applicable to a medical doctor.

The language of Miss. Code Ann. § 11-1-61 clearly prohibits a registered nurse from testifying as a medical expert against a physician in a medical negligence case:

In any action for injury or death against a physician, whether in contract or in tort, arising out of the provision of or failure to provide health care services, a person may qualify as an expert witness on the issue of the appropriate medical standard of care if the witness is licensed in this state, or some other state, as a doctor of medicine.

Clearly, Mr. Freeman has raised a claim of medical negligence against Dr. Sacks. There was no qualified medical expert who articulated any requisite standard of care to which Dr. Sacks must comply in his care and treatment of Mr. Freeman. Further, no qualified medical expert testified that

Dr. Sacks deviated from any applicable standard of care in the care and treatment of Mr. Freeman.

There was no testimony concerning what safety procedures Dr. Sacks failed to formulate and implement to “prevent an infiltration.” In fact, Plaintiff’s nursing expert testified that infiltrations can occur absent negligence. [RE-79; Tr-260]. She never identified any safety procedure which Dr. Sacks failed to formulate or implement to prevent infiltrations. Additionally, there was no testimony by a qualified medical expert who set forth the standard of care applicable to Dr. Sacks in monitoring the infusion of chemotherapy into the Plaintiff’s body, or, more importantly, that Dr. Sacks deviated from that standard or care. Finally, the sole testimony on supervision of Nurse Byrd came not from a qualified medical doctor but from a registered nurse. Pursuant to the statute set forth above, a registered nurse is not qualified to testify as to the standard of care applicable to a medical doctor or that the medical doctor deviated from that standard of care.

Pursuant to the case law set out above, the Plaintiff must provide medical testimony by an expert witness qualified in an appropriate field of expertise on the issue of the standard of care applicable to Dr. Sacks in the instant matter. Pursuant to the statute set forth above, the medical expert must be a doctor of medicine to qualify as a suitable expert witness in an action against a medical doctor for alleged injuries arising out of the provision of health care services. Plaintiff offered no such expert in the instant matter. Without such testimony, Plaintiff cannot prevail on her claims against Dr. Sacks. The trial court erred when it found Dr. Sacks was negligent and was liable for any amount of damages when there was no testimony by a qualified doctor of medicine on the issue of the appropriate medical standard of care applicable to Dr. Sacks. [*Judgment*, R-871-876; RE-12-17]. The trial court erred when it found Dr. Sacks was negligent and was liable for any amount of damages when there was no testimony by a qualified doctor of medicine that Dr. Sacks deviated from the applicable medical standard of care in his treatment of the Plaintiff. *Id.*

B. The Plaintiff Failed to Prove that Nurse Byrd
Breached the Standard of Care.

Plaintiff claimed that Dr. Sacks was vicariously liable for an alleged breach of the standard of care by a nurse in his employ. Testimony at trial showed that both Dr. Sacks and Nurse Byrd were employees of The Medical Oncology Group. [RE-30, 124; Tr-142, 356]. A stipulation was entered by the parties prior to trial that Defendant, The Medical Oncology Group, was responsible for any damages proximately caused by any negligence attributable to Nurse Byrd. [*Stipulation*, R-865; RE-23]. However, that stipulation did not absolve the Plaintiff from proving the elements of the claim of medical negligence raised against the Defendants.

The Plaintiff asserted the following allegations against Nurse Byrd, as an employee of The Medical Oncology Group:

- i. Failing to select an appropriate IV site;
- ii. Failing to appropriately monitor the IV site;
- iii. Failing to protect the IV from infiltrating;
- iv. Failing to administer the chemotherapy as ordered by the physician;
- v. In administering additional medication through an infiltrated site;
- vi. Failing to timely notice the infiltration and discontinue the IV.

[*Judgment*, R-872; RE-13].

The majority of Plaintiff's nursing expert's testimony concentrated on her dispute of Nurse Byrd's factual statements in her deposition testimony. [RE-49, 58, 60, 82; Tr-225, 235, 237, 268]. Plaintiff's nursing expert focused primarily on criticisms of the documenting of events in the medical record by Nurse Byrd. [RE-53-58, 60, 62-63, 73-74, 76; Tr-230-233, 234, 235, 237, 239, 240, 252, 254, 256]. Plaintiff's nursing expert relied solely upon the statement made by Clarence Freeman,

Plaintiff's brother, that he notified Nurse Byrd of a problem with his brother's arm around noon. [RE-77, Tr-258]. Nurse Byrd, Nurse Pearson and Dr. Sacks all testified to the contrary and definitively stated that Mr. Freeman made no such allegation at noon on the date the Plaintiff alleges the negligence occurred. Plaintiff's nursing expert merely discounted all testimony that did not conform to her opinion that Nurse Byrd breached the standard of care.

Plaintiff alleged that Nurse Byrd failed to select an appropriate IV site. Plaintiff's nursing expert was questioned concerning her opinion that the IV infusing Taxol was located in Mr. Freeman's left forearm, the area of the tissue degeneration, rather than in the dorsum of the hand as documented in the record. [RE-70-72; Tr-249-251]. Plaintiff's expert could not point to a single document or page of deposition testimony which supported her factual assertion. *Id.* Neither Dr. Sacks nor Nurse Byrd testified that the IV was in the left forearm and there are no notations in the medical record which state the IV was located in the left forearm. Plaintiff's nursing expert made rash assumptions that the IV was located in the left forearm with no basis for that assertion of fact. *Id.*

Plaintiff's nursing expert opined that the IV was located in the left forearm and in the same position as the chemotherapy administration of three weeks prior. However, Plaintiff's nursing expert admitted that she could not state where in the upper left extremity the IV was placed either on the date in question or the administration of the chemotherapy drugs three weeks prior. [RE-79-80; Tr-260-261]. Plaintiff's nursing expert merely assumed that if the IV was located in the left upper extremity it must have been in the same vein. There is no basis for such an assumption and no proof in the record to validate Plaintiff's nursing expert's assumption.

Plaintiff's nursing expert testified, "I think that the standard of care requires you to rotate the extremities" on subsequent administration of the drugs. [RE-57-58; Tr-234-35]. When asked for

authority that supported her opinion that one “cannot place an IV in the left extremity within three weeks” of the last treatment, Plaintiff’s nursing expert responded, “I haven’t researched that, to be honest with you.” [RE-80; Tr-261]. She was also questioned on her opinion that three weeks was insufficient time to utilize the same extremity for IV infusion but six weeks was sufficient time:

Q. What medical literature supports your opinion that three weeks was not appropriate but six weeks is appropriate?

A. I haven’t researched that.

Q. Would you defer to the nurse that’s there looking at the vein to determine whether or not it’s a palpable vein proper for administration of chemotherapy?

A. Not necessarily.

[RE-81, Tr-262].

Plaintiff also failed to produce testimony that an infiltration is a breach of the standard of care applicable to nurses. Thus, the mere fact that an infiltration occurred is not proof of a breach of the standard of care. Plaintiff provided no testimony that infiltrations only occur due to nursing negligence. In fact, Plaintiff’s nursing expert testified that she agreed that “IVs sometimes infiltrate absent medical negligence.” [RE-79; Tr-260]. Plaintiff must produce some evidence of negligence which resulted in an infiltration. Plaintiff failed to provide any such evidence.

Plaintiff’s nursing expert opined that Nurse Byrd failed to properly monitor Mr. Freeman based solely upon the assertions that the medical record was improperly noted as to assessments during the chemotherapy administration. Plaintiff’s nursing expert relied upon her assertion that “not charted, not done” proves that Nurse Byrd provided substandard care. [RE-75; Tr-255]. There is no support in the law for such an argument. *Lander v. Singing River Hospital*, 933 So.2d 1043, 1046-47 (Miss. App. 2006).

The trial court noted in its Judgment that “[t]he record contains no evidence that the patient was monitored during the Taxol infusion after 12:20 p.m.” [*Judgment*, R-873; RE-14]. Nurse Byrd’s deposition testimony, Nurse Pearson’s trial testimony and Dr. Sacks’ trial testimony that each monitored the patient during the chemotherapy is clear and uncontradicted evidence contained in the record that directly refutes the trial court’s finding. [RE-42, 135, 136; Tr-208; 375; 376]. Defense nursing expert, Annette Dove, testified that nursing care is more important than charting and often everything may not be documented. [RE-152; Tr-409]. She further testified that mere omissions in the medical chart is not a deviation in the standard of care. [RE-153; Tr-410]. The trial court erred as a matter of law by finding that the Plaintiff’s argument of “not charted, not done” is proof of negligence on the part of the Defendants.

Plaintiff’s nursing expert opined that it was a breach of the standard of care to fail to obtain a baseline set of vital statistics prior to Taxol administration. [RE-74-76; Tr-254-256]. Even when she was shown an entry of vital signs in the medical record prior to the Taxol administration, Plaintiff’s nursing expert merely stated, “I don’t think they were the baseline vital signs.” [RE-76; Tr-256]. Defense nursing expert, Annette Dove, testified that the entries were baseline vital signs. [RE-149; Tr-405].

Plaintiff’s nursing expert opined that Nurse Byrd deviated from the standard of care by administering Taxol over a period of one hour rather than the three hour period ordered by Dr. Sacks. Plaintiff’s nursing expert opined that based upon her interpretation that the medical record reflected that the Taxol administration was completed at 12: 20 p.m.:

Q. Ms. Jenner, does the records you reflect indicate what time the Taxol was completed?

A. According to nurse Byrd’s documentation, the Taxol was completed at 12:20.

- Q. What did Dr. Sacks order as far as the time for administration of the Taxol?
- A. His treatment order stated that Taxol was to be administered over a three-hour period.
- Q. Is it a breach of the standard of the nursing standard of care to administer a medication in one hour after you've been ordered by a doctor to administer it over three hours?
- A. Yes, it is. Not administering a medication pursuant to the doctor's order, especially chemotherapeutic medication, could result in serious harm, injury, or death to the patient and could result in discipline of the nurse.

[RE-58-60; Tr-235-36].

Nurse Byrd testified in her deposition that she administered the Taxol over a period of three hours as ordered. [RE-242, 243; P-12 at 31, 34]. There is no basis in the record that the Taxol administration was done in one hour.

Plaintiff's nursing expert also opined that Nurse Byrd failed to cease the administration of the chemotherapy drug after being told by the Plaintiff's brother that the drug has infiltrated within forty-five minutes to an hour after the administration commenced. [RE-77; Tr-258]. Nurse Byrd testified that the chemotherapy drug, Taxol, was administered over a three hour time period as ordered by Dr. Sacks. [RE-242, 243; P-12 at 31, 34]. Nurse Byrd testified that the infiltration occurred after the Taxol administration was completed. [RE-244; P-12 at 38]. Curiously, the nursing expert merely said she found the Plaintiff's brother's testimony as to the time more credible than Nurse Byrd's even though she had not attended either deposition. [RE-49, 77; Tr-225, 258].

Plaintiff's nursing expert opined that Nurse Byrd continued to administer the Taxol after signs of extravasation were apparent. When asked for the basis of her opinion, Plaintiff's expert testified:

A. Based upon the report of Mr. (Clarence) Freeman to her that the patient's (Charles Freeman) arm was swollen and based upon her own testimony that she infused the drug over a three-hour period. I believe Mr. Freeman's testimony was that he summoned her into the room within the first 45 minutes to an hour of the infusion. Nurse Byrd testified she completed the three-hour infusion. So if she did so, she continued an IV infusion of Taxol through an extravasated IV site.

Q. Well, you're just taking Mr. Freeman's word over Mrs. Byrd's word is what it amounts to. Is that a fair statement?

A. Well, I found his testimony more credible, yes.

Q. Were you present at his testimony?

A. No.

Q. Okay. And you know now that Mrs. Byrd testified that she discovered the infiltration around 2:45 and DC'd the IV at that time. We know that from her deposition testimony.

A. That's what she testified to.

Q. She got Dr. Sacks, notified Dr. Sacks of the infiltration, correct?

A. That's what she testified to.

[RE-77-78; Tr-258-259].

Plaintiff's nursing expert provided absolutely no rational reason to discount the testimony of Nurse Byrd, Nurse Pearson and Dr. Sacks other than she found Mr. Clarence Freeman's testimony "more credible."

Plaintiff's nursing expert opined in testimony noted above that Nurse Byrd committed negligence by administering the Taxol in one hour instead of the three hours ordered by Dr. Sacks. Here she states that Nurse Byrd administered the Taxol in three hours through an infiltrated IV site based upon the testimony of Clarence Freeman. Either Nurse Byrd administered the Taxol in three hours or one hour, it cannot be both. Plaintiff's nursing expert's opinions are contradictory and

cannot be maintained based upon the medical record and the totality of testimony by the witnesses. The transcript is replete with instances where Plaintiff's nursing expert made bold assertions of fact without any basis of support upon which she based her opinions. The trial court erred as a matter of law when it accepted these assumptions made by the Plaintiff's nursing expert as proof of negligence on the part of Nurse Byrd.

Contrary to the testimony provided by Plaintiff's nursing expert, Defendants' nursing expert testified that there was no deviation from the standard of care by the nurses treating Mr. Freeman. Defendants' nursing expert, Annette Dove, testified that she, unlike Plaintiff's nursing expert, is an advanced oncology certified nurse. Nurse Dove has been certified as an advanced oncology certified nurse since 1985 or 1986. [RE-147; Tr-403]. She has been continuously involved in the administration of chemotherapy agents since 1977. *Id.* Nurse Dove has personally administered Taxol, Carboplatin and Kytril, the agents administered to Mr. Freeman. [RE-147-149; Tr-403-405]. Plaintiff's nursing expert, Ms. Jenner, has no such experience with the specific agents administered to Mr. Freeman, has never been certified as an advanced oncology certified nurse and has had no experience in nursing at all since 1985 and no experience with chemotherapy agents since 1979 or 1980. [RE-46-47; Tr-220-221].

Nurse Dove disputes Ms. Jenner's factual assumptions regarding Nurse Byrd's entries in Mr. Freeman's medical record. Nurse Dove disputes that Ms. Jenner can assume that Nurse Byrd failed to monitor Mr. Freeman's vital signs every fifteen minutes for the first hour of the Taxol administration based upon the entries in the medical record charted by Nurse Byrd. [RE-150; Tr-407]. Nurse Dove disputes Ms. Jenner's allegation that the standard of care requires that successive administrations of chemotherapy agents be given through alternating extremities. [RE-153-154; Tr-410-411]. Nurse Dove testified, as did Plaintiff's nursing expert, that an infiltration can occur absent

negligence. *Id.* Finally, Nurse Dove testified that in her opinion as a certified oncology nurse there was no deviation from the standard of care by Nurse Byrd in the care and treatment of Mr. Freeman. [RE-156; Tr-413].

No proof was offered by the Plaintiff to contradict the sworn testimony of Nurse Byrd, Nurse Pearson and Dr. Sacks. Plaintiff's assertions of negligence on the part of Nurse Byrd are mere assumptions and conclusory arguments. The testimony of Defendants' expert, Annette Dove, is based upon her years of experience as a certified oncology nurse and her review of the records in the instant matter. There are no assumptions made by Nurse Dove in coming to her conclusion that there was no deviation from the standard of care by Nurse Byrd. The law of the State of Mississippi states that negligence is not presumed, rather it is presumed ordinary care has been used. Plaintiff's nursing expert presumed negligence as shown above. The trial court erred as a matter of law when it found that Nurse Byrd breached an applicable standard of care in the treatment of Mr. Freeman.

C. Plaintiff Produced No Testimony by a Qualified Medical Expert Witness
to Prove the Element of Proximate Causation.

Even if Dr. Sacks is deemed to be vicariously responsible for the actions of the nurse, there must still be some testimony educed from a qualified expert witness that a breach of the standard of care proximately caused an injury to the plaintiff. Likewise, Plaintiff must prove proximate causation to recover from The Medical Oncology Group on a claim of negligence raised against Nurse Byrd. A nursing expert is not qualified to give opinions on proximate causation relating to the care and treatment provided by a medical doctor. A nursing expert is not qualified to give opinions on the medical causation of tissue damages allegedly caused by an infiltration.

The trial court allowed Plaintiff's nursing expert to testify concerning "internet research" she

had performed on the chemotherapy drugs involved and the damages which it might cause to human tissue. Further, the nursing expert was allowed to offer opinion testimony on the medical literature relating to “hypersensitive or hyperallergic reactions which causes injuries similar to what we are looking at here.” [RE-64; Tr-241, Ln. 13-29]. Clearly, these issues are well outside the realm of knowledge and expertise possessed by a registered nurse. These issues are the sole province of the expertise of a medical doctor. Plaintiff provided no testimony from a qualified expert witness on these issues.

The trial court in its judgment relied heavily upon the deposition testimony of Dr. Sacks wherein he stated that the infiltration of Taxol caused the cellulitis suffered by Mr. Freeman. [*Judgment*, R-874; RE-15]. Dr. Sacks testified that he could only state that Mr. Freeman’s cellulitis was “related to the Taxol.” [RE-40; Tr-195]. Dr. Sacks clearly testified that Mr. Freeman’s complications were not proximately caused by any negligence or deviation from the standard of care by Nurse Byrd or by himself. [RE-41, 44-45; Tr-196, 212-213].

Defendants provided the sole testimony from a medical doctor qualified to render opinions on the issue of proximate causation. Dr. Meshad is board certified in internal medicine and medical oncology. He has very frequently administered both Taxol and Carboplatin. [RE-160; Tr-440]. Dr. Meshad agreed with both Plaintiff’s nursing expert and Defendants’ nursing expert that infiltrations can occur absent negligence. [RE-163; Tr-445]. He also agreed with Defendants’ nursing expert and contrary to the testimony of Plaintiff’s nursing expert that the standard of care does not require alternating extremities when administering chemotherapy agents. [RE-163-164; Tr-445-446].

Dr. Meshad opined that the cellulitis Mr. Freeman acquired in his left arm was caused by “some type of local allergic phenomenon or hypersensitivity reaction.” [RE-165-166; Tr-448-449]. Dr. Meshad further opined that neither Dr. Sacks nor any employee of The Medical Oncology Group

deviated from the applicable standard of care. [RE-166; Tr-449]. Dr. Meshad was the sole qualified medical expert to testify on the issue of proximate causation and the standard of care issues relating to Dr. Sacks and The Medical Oncology Group.

The sole testimony in the record pertaining to the element of proximate cause is from the Defendants. Plaintiff offered no qualified medical expert who opined that Mr. Freeman suffered an injury proximately caused by the negligence of any employee of the Defendants. In its Judgment, the trial court ruled that “there was no medical literature whatsoever to support a theory that a hypersensitive reaction causes extensive tissue necrosis” as testified by the defense expert, Dr. Meshad. [*Judgment*, R-875; RE-16]. This ruling is refuted by testimony given by Dr. Meshad that the Taxol package insert states that “the administration of Taxol can result in hypersensitive reactions and in rare occasions severe hypersensitive reactions.” [RE-164; Tr-446]. Regardless, a mere lack of literature is insufficient to discount the testimony of a qualified medical expert witness. *Poole v. Avara, et al.*, 908 So.2d 716, 724 (Miss. 2005.) The trial court erred as a matter of law when it found that the Plaintiff suffered an injury proximately caused by the medical negligence of the Defendants.

D. Plaintiff Failed to Prove Damages Attributable to an Injury
Proximately Caused by a Breach of the Standard of Care by the Defendants.

Proof that medical, hospital and doctor bills were paid or incurred because of any illness, disease or injury shall be *prima facie* evidence that such bills were necessary and reasonable. § 41-9-119, *Mississippi Code of 1972*. “Recoverable damages must be reasonably certain in respect to the efficient cause from which they proceed, and the burden is on the claimant to show by a preponderance of the evidence that the person charged was the wrongful author of that cause.”

Cassibry v. Schlautman, 816 So.2d 398 (Miss. App. 2001)(internal citations omitted). When an injury is apportionable so that part may be traced to one cause and another part to another cause, the damages must be apportioned accordingly. *Brake v. Speed*, 605 So.2d 28, 32 (Miss. 1992)(citing *Blizzard v. Fitzsimmons*, 193 Miss. 484, 10 So.2d 343 (Miss. 1942)).

Even if Dr. Sacks was found to have breached the applicable standard of care and was found to have proximately caused the alleged injury to Mr. Freeman's arm, Plaintiff failed to prove the extent of Plaintiff's alleged damages proximately related to the injury. Plaintiff merely submitted the entire set of Mr. Freeman's medical bills from February 12, 1998, the date of the Taxol treatment, through March 17, 1998. [RE-199-229; P-7]. The testimony, medical records and medical bills show that Mr. Freeman was a very sick man who suffered from cancer, COPD and diabetes. The majority of Mr. Freeman's health care costs were associated not with the injury associated with the Taxol administration but the multitude of medical problems he suffered. A glance at the content of the medical bills submitted to the trial court bears out the fact that the vast majority of his health care costs were due to medical issues unrelated to the alleged Taxol injury.

Further, no medical expert ever testified that the bills were medically reasonable and necessary for treatment of the alleged injury. The statute and case law cited above only provides a presumption when there is proof that the medical bills are reasonable and necessary treatment "in respect to the efficient cause from which they proceed." There is no blanket coverage for all medical costs incurred in the general time frame of the Plaintiff's claim.

Plaintiff included the costs of heart and lung treatment, cancer treatment, congestive obstructive pulmonary disease treatment and various other medical costs in the damage assessment. Mr. Freeman's bills relating to his arm were solely limited to bandaging, whirlpool treatment and physical therapy. Yet, Plaintiff submitted hospital bills blanketing his inpatient stays for his various

other ailments. No medical testimony was provided to the trial court to allow the admission of these unrelated medical bills to the claim for the alleged arm injury. None of the unrelated costs improperly allowed into evidence by the trial court should have been included in any damages awarded by the fact finder. [RE-107-114; Tr-315-322]. The trial court erred when it allowed the unrelated bills into evidence over the Defendants' objections without the necessary foundation.

II. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANTS' DAUBERT MOTION ON JENNER'S EXPERT STATUS.

Although a trial court is given wide discretion in determining if an expert witness is qualified to provide testimony in a given case, it is not unbridled. Mississippi Rules of Evidence provide that "a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise" *Rule 702, Miss.R.Evid. (in pertinent part.)* A nursing expert may qualify to testify to the realm of duties and responsibilities applicable to the practice of nursing as defined in the laws of the State of Mississippi. However, areas outside of the practice of nursing are outside the area of expertise of a registered nurse expert witness. The practice of nursing "shall not be deemed to include acts of medical diagnosis or prescriptions of medical, therapeutic or corrective measures" *Miss. Code Ann. § 73-15-5(2) (Rev. 2004)(in pertinent part.)* Thus, even if qualified to testify in an area encompassed within the practice of nursing, a nursing expert is not qualified to testify to those areas exclusively in the realm of a medical doctor, i.e., medical diagnosis and treatment.

In the instant matter, Plaintiff's nursing expert is not qualified to testify in the area of chemotherapy administration of Taxol. She has not practiced any form of nursing in over twenty years, has never administered the chemotherapy medications at issue, lacks the education, training and experience to be certified as an advanced oncology certified nurse and has never been accepted

by any other court as an expert in the field in which she seeks to testify, nursing chemotherapy administration. [RE-24-29; Tr-69-74]. Plaintiff's nursing expert testified that her experience administering chemotherapy drugs to patients occurred between the years of "1975 through the end of '79 or early '80" which is over twenty-five years ago. [RE-47; Tr-221]. Plaintiff's nursing expert acknowledged she had no first hand experience or knowledge of the use of Taxol, the chemotherapy drug used to treat Mr. Freeman. [RE-48; Tr-223]. Plaintiff's nursing expert witness stated that the basis for her knowledge of Taxol was a review of "medical literature." *Id.*

Plaintiff's nursing expert was not qualified by experience, training or knowledge to render opinions in the instant matter. "The rule is that the expert must exercise the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Poole v. Avara, et al.*, 908 So.2d 716, 724 (Miss. 2005)(citing *McLemore*, 863 So.2d 31 at 37-38.) Plaintiff's nursing expert fails to meet the requirements to be classified an expert in the field of certified chemotherapy oncology nursing. Plaintiff's nursing expert has had no experience in the field in over twenty years, is not and has never been certified in the applicable field of oncology nursing, has never administered the drugs utilized in Mr. Freeman's treatment and provided no support for her opinions relating to the standard of care applicable to the facts of the instant matter. The trial court erred when it allowed Plaintiff's retained nursing expert to testify as an expert in the field of chemotherapy administration.

III. THE TRIAL COURT ERRED WHEN IT ALLOWED PLAINTIFF'S NURSING EXPERT TO TESTIFY ON ISSUES OF MEDICAL DIAGNOSIS AND TREATMENT OUTSIDE THE PRACTICE OF NURSING.

In addition to her lack of qualifications in the area of Taxol administration, Plaintiff's nursing expert testified as to the medical diagnosis of Mr. Freeman's arm and to the treatment to be provided for the arm injury. These areas are outside the practice of nursing as defined under Mississippi laws.

Plaintiff's nursing expert should not have been allowed to testify to areas outside the practice of nursing and exclusively within the realm of the practice of medicine. *See Sheffield v Goodwin*, 740 So.2d 854, 857 (Miss. 1999)(Nurse practitioner disqualified as expert witness as to treatment of dental infection, although nurse practitioner had medical experience she did not possess specialized knowledge in area of medicine at issue.) *See also, Richardson v. Methodist Hospital of Hattiesburg, Inc.*, 807 So.2d 1244, 1247-48 (Miss. 2002)(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.)

Plaintiff's nursing expert offered opinions on hypersensitivity or hyperallergic reaction to Taxol:

BY MR. SMITH:

Q. Ms. Jenner, have you, at my request, also researched the medical literature attempting to find any medical support for a theory of a hypersensitive or hyperallergic reaction which causes injuries similar to what we are looking at here?

A. I did.

Q. Were you able to find any medical support for that theory at all?

A. No. Hypersensitivity reaction has more to do with symptoms that you see right within the first 15 to 20 minutes of administration of the drugs.

MR. WILLIAMS: Same objection. I hate to keep interrupting, Your Honor, but we're giving causation answers again, Your Honor, I object.

THE COURT: Overruled as to that question.

A. And I don't think - - hypersensitivity deals with a patient's systemic reaction to the drug. There will be palpitation, shortness of breath, things like that. This is documented in the literature. A local injection reaction is just that, it's a reaction of the medication right there at the IV site and - -

MR. WILLIAMS: Could I have a continuing objection?

THE COURT: Just a minute.

MR. WILLIAMS: This is clearly medical testimony, Your Honor, from a doctor, hypersensitive reactions. If I could just have a continuing objection to these questions. I think it ought to be stricken, but if I could have a continuing objection.

THE COURT: All right. You have your objection.

BY MR. SMITH:

Q. Ms. Jenner, have you also researched the medical literature to find out whether there has been documented cases of severe tissue necrosis due to Taxol extravasation?

A. I have seen some articles, yes.

* * *

THE COURT: Just a second. Just a second. Let me see her designation. Was there any designation she testified as to these matters, Mr. Williams?

MR. WILLIAMS: It's not only the designation, Your Honor. It's because she did internet research and came up with an article, I don't know if it was written by a doctor or whom, about hypersensitive reactions. You can't back-door the opinion by referring to an article that she found on the internet. That requires medical testimony.

* * *

THE COURT: Based upon the designation that's been provided to defense counsel, the previous ruling of the Court based upon the *Daubert* hearing and motion *in limine*, I'm allowing the questions. And you may cross-examine her as to her basis of those opinions. Proceed, Mr. Smith.

[RE-64-69; Tr-241-246].

Plaintiff's nursing expert went on to testify about the properties and classification of Taxol,

quoting an article she found in *Pharmacotherapy*. There was no foundation laid to establish that this witness had the knowledge, training, background and experience to testify concerning the medical issues relating to the properties, characteristics and classification of the chemotherapy drug Taxol or how the mechanisms of hypersensitive or hyperallergic reactions occur and affect the human body. There was no foundation laid to explain why the cited article was relevant to the medical issues raised in the Plaintiff's claim or that the content of the article was based upon reliable principles and methods. The trial court erred when it allowed the Plaintiff's nursing expert to testify outside of the practice of nursing on issues related to medical diagnosis and medical treatment.

IV. THE TRIAL COURT ERRED WHEN IT IMPUTED VICARIOUS LIABILITY TO DR. SACKS.

The trial judge applied an erroneous legal standard when imputing vicarious liability to Dr. Sacks. The parties entered into a Stipulation that if nursing negligence was found in this case, the Medical Oncology Group, P.A., would be liable for damages. [*Stipulation*, R-865; RE-23]. Despite the parties stipulation, the trial judge found that Dr. Sacks was vicariously liable. In so doing, the trial judge applied an erroneous legal standard. Citing *Hunnicut v. Wright*, 986 F.2d 119, 123 (5th Cir. 1993), the Court found that, "under Mississippi law, a physician is liable for the acts and omissions of a nurse working under his direction and control." While this is a true statement of the holding of *Hunnicut*, trial judge ignored the fact that the Court limited its holding as follows:

the 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, and execution of which does not require specialized medical knowledge, are merely administrative acts for which negligence in their performance is imputable to the hospital.

Id.

Were it not for the fact that IV administration is a “merely administrative act,” performed by the chemotherapy certified nurses at the Medical Oncology Group, the parties would not have stipulated that in the event Nurse Byrd was found to be negligent, the Medical Oncology Group is the party legally responsible for any and all damages, if any, proximately resulting from said substandard care.

If Dr. Sacks were found responsible for any negligence resulting from Nurse Byrd’s administrative act, an unreasonably burdensome and impossible standard would be imposed on physicians, such as Dr. Sacks, which would ultimately require them to be present at all times during IV administration of any drug in order to ensure that the task is being completed properly. *See Dailey v. Methodist Medical Center*, 790 So.2d 903, 920 (Miss.App. 2001) (McMillin, C.J., concurring in part, dissenting in part). This conclusion is further solidified by the fact that Dr. Sacks prescribed treatment that complied with the standard of care for treating lung cancer as suffered by Mr. Freeman. The only conceivable way Dr. Sacks could have been liable in this case was if his treatment plan breached the standard of care, such breach proximately caused Mr. Freeman’s injury, and Nurse Byrd’s negligence was found to be a result of some act she took at Dr. Sacks direction.

No such theory of the case or offer of proof of same was ever presented by the Plaintiff. In fact, the overwhelming, substantial weight of the medical testimony was that Dr. Sacks’ treatment plan complied with the standard of care. As such, the trial judge erred as a matter of fact and as a matter of law by imputing vicarious liability upon Dr. Sacks.

**V. THE TRIAL COURT ERRED WHEN IT ALLOWED THE PLAINTIFF TO SUBMIT
MEDICAL BILLS FOR TREATMENT OF PRE-EXISTING CONDITIONS
UNRELATED TO THE CLAIMS IN THE INSTANT MATTER.**

The trial judge incorrectly accepted \$42,334.36 in medical bills as the measure of the

Plaintiff's damages, finding:

The damages here are substantial. Plaintiff introduced medical bills totaling \$42,334.36. (Exhibit P-7). While it is arguable that 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 the arm.

[*Judgment*, R-876, RE-17].

This finding is clearly erroneous. As stated above, there is no indication in the medical records or in the medical bills that Mr. Freeman began to receive bandaging, debridement and whirlpool treatments for his cellulitis until February 24, 1998. [RE-199-229; P-7]. It is therefore, more than "arguable" that some of the medical care while hospitalized was rendered to his pre-existing conditions.

The majority of the treatment was related to his pre-existing conditions. Dr. Sacks testified that the only hospitalizations related to his cellulitis were those where he received physical therapy and whirlpool treatments for the arm. [RE-39; Tr-178]. Such treatments only occurred from February 24, 1998, through March 9, 1998, after he was initially hospitalized for shortness of breath and fever related to his pre-existing conditions of lung cancer, COPD and diabetes. [RE-181; P-1 at 157).

"Proof that medical, hospital and doctor bills were paid or incurred because of any illness, disease, or injury shall be prima facie evidence that such bills so paid or incurred were necessary and reasonable." Miss. Code Ann. § 41-9-19 (Rev.2001). This statute creates a rebuttable presumption that medical bills incurred were reasonable and necessary. In order to rebut the presumption, "more than speculation and credibility attacks must be offered." *Kent v. Baptist Memorial Hospital North MS, Inc.*, 853 So.2d 873, 880 (Miss.App. 2003). Such damages can be rebutted by evidence tending to negate the necessity and reasonableness of the expenses. *Id.*

The Defendant has presented competent proof that most of the medical bills incurred by Mr. Freeman were incurred as a result of his pre-existing conditions of lung cancer, COPD and diabetes. Specifically, Mr. Freeman was admitted to the hospital on February 18, 1998, for complaints of shortness of breath and fever. [RE-181; P-1 at 157]. He remained in acute care for this condition until approximately February 24, 1998, at which time he was admitted to the ECU for treatment of his cellulitis. [RE-180; P-1 at 154]. The medical bills prove that Mr. Freeman did not begin to receive treatment for the cellulitis of his arm until February 24, 1998. [RE-199-229; P-7]. He continued to receive treatment for his cellulitis until he was discharged on March 9, 1998. *Id.* Although he was subsequently hospitalized due to his pre-existing conditions, the medical bills do not show where he incurred any charges related to treatment for his cellulitis. *Id.*

This case is analogous to the *Kent* case, wherein the Plaintiff filed a suit against Baptist Memorial Hospital and Dr. Keith Mansel alleging that an intubation tube used by Dr. Mansel on the Plaintiff's daughter was too large and caused damage to her vocal cords. *Kent*, 853 So.2d at 876-877. The Plaintiff attempted to present evidence of medical bills incurred by her daughter which were not reasonably related to the alleged injuries she suffered as a result of Dr. Kent's alleged negligence. This Court stated:

In this case, Candice was a diabetic, and she came to Baptist as a result of complications from her diabetes. Every doctor who was a witness at this trial testified that because of Candice's diabetic seizure and resulting coma, hospitalization was the only option for her care. The record indicates that Candice received treatment for a variety of other medical conditions at Vanderbilt unrelated to the alleged negligent intubation, including (1) diabetic renal failure, (2) diagnosis and treatment of a subsequent diabetic seizure at Vanderbilt, and (3) other treatment and management of her diabetic condition and related medical complications. The evidence shows that Candice would have incurred medical bills regardless of the injury to her throat. Dr. Mansel did not cause her diabetes, her seizure or the complications that resulted therefrom. Accordingly, Candice's only recoverable damages were those which resulted because of or due to Dr. Mansel's alleged negligence. Any medical expenses relating to her other treatment were inadmissible.

and non-recoverable.

Id., at 881.

The present case presents a situation wherein Mr. Freeman had pre-existing conditions of lung cancer, COPD and diabetes. He was initially admitted to the hospital due to his shortness of breath and fever related to those conditions. [RE-181; P-1 at 157]. During this stay, he received treatment for his cellulitis. His treatment for cellulitis was complicated by an exacerbation of his COPD. [RE-182; P-1 at 172].

By March 12, 1998, Dr. Sacks noted that Mr. Freeman had a complete recovery of the function of his left arm and healing of the wound. [RE-183; P-1 at 176]. There is absolutely nothing in the record to indicate that Mr. Freeman incurred any medical expenses related to his cellulitis after March 9, 1998. Furthermore, his treatment for cellulitis did not begin until February 24, 1998. [RE-199-229; P-7]. Dr. Sacks did not cause his lung cancer, his diabetes or his COPD. Dr. Sacks did not cause his shortness of breath and fever on February 18, 1998, which required his hospitalization. If the Plaintiff is found to be entitled to any damages, she should only be entitled to recover those expenses reasonably related to Mr. Freeman's treatment for cellulitis. Any expenses related to Mr. Freeman's other treatment are inadmissible and non-recoverable. *Kent*, 853 So.2d at 881. By allowing recovery for all of Mr. Freeman's medical expenses incurred from February 12, 1998, through March 17, 1998, the trial judge committed manifest error.

Furthermore, "Recoverable damages must be reasonably certain in respect to the efficient cause from which they proceed, and ... the burden is on the claimant to show by a preponderance of the evidence that the person charged was the wrongful author of that cause." *Id.* The Plaintiff wholly failed to meet her burden of proving by a preponderance of the evidence that the \$42,334.36 in medical bills incurred by Mr. Freeman from February 12, 1998, through March 17, 1998. As

such, the trial judge's measure and award of damages in this was clearly erroneous and should be reversed.

**VI. THE JUDGMENT SHOULD BE REVERSED BECAUSE IT IS BASED
UPON CLEARLY ERRONEOUS FINDINGS WHICH ARE NOT SUPPORTED
BY ANY TESTIMONY OR EVIDENCE IN THE RECORD.**

The Judgment should be reversed because the trial judge abused his discretion, was manifestly wrong, the findings of fact were clearly erroneous and an erroneous legal standard was applied in finding liability in this case. The trial judge relied upon the following erroneous findings of fact in rendering his Judgment:

- 1. Taxol administration was begun sometime prior to 11:35 a.m. and that the record states "Taxol complete," at 12:20 p.m.**

[*Judgment*, R-867; RE-8].

The record clearly shows that the last vital sign was taken at 12:20 p.m., and on the same line is a notation that the Taxol administration was completed. [RE-173; P-1 at 126]. This finding proves that the trial judge rendered his Judgment solely upon the entries in the medical record of February 12, 1998. He gave no weight to the testimony of Nurse Byrd, Joanne Pearson and Dr. Sacks that the Taxol infusion lasted three hours and was completed at approximately 2:35 p.m. [RE-135, 242, 243; Tr-375; P-12 at 31, 34].

- 2. Nurse Byrd testified that the standard nursing care required the nurse to stay with the patient during the first hour while he is getting Taxol and then check back every 15 minutes.**

[*Judgment*, R-867; RE-8].

This finding of fact is manifestly wrong because neither Nurse Byrd, nor any other witness testified that the standard requires the nurse to stay with the patient during the first hour while he is

getting Taxol. Nurse Byrd specifically testified that, “we check vital signs every 15 minutes for the first hour. We stay for the first 15 minutes doing Taxol.” [RE-241; P-12 at 25]. In addition, Nurse Byrd, Ms. Jenner and Ms. Dove all testified that the standard requires the nurse to take vital signs every 15 minutes for the first hour. [RE-53, 150; Tr-230, 407; P-12 at 25]. The trial judge completely disregarded the testimony of the witnesses and made an erroneous finding not supported by the record.

3. Dr. Sacks testified Mr. Freeman was never given Taxol again after the February 12, 1998, treatment.

[*Judgment*, R-868; RE-9].

This finding is manifestly wrong. Dr. Sacks testimony, and the voluminous medical records submitted as Plaintiff’s Exhibit P-1 show that Mr. Freeman subsequently had a central line placed and underwent at least two additional rounds of chemotherapy with Taxol. [RE-36-37; Tr-173-174].

4. Joanne Pearson and Annette Dove agreed there was no documentation of continuous observation.

[*Judgment*, R-870; RE-11].

This finding is manifestly wrong. The testimony of Joanne Pearson and Annette Dove was quite the opposite. Ms. Pearson testified that Nurse Byrd’s note proves that she monitored Mr. Freeman after 12:20 p.m. because it clearly states, “Taxol infusion completed, no reaction noted.” [RE-143; Tr-386]. Ms. Dove testified that Nurse Byrd complied with the standard of care which requires the nurse to take vital signs every 15 minutes for the first hour and then as needed afterwards, monitor the patient every 15 to 30 minutes afterwards.” [RE-150; Tr-407]. “Continuous observation” is a phrase used by Plaintiff’s attorney with regard to the frequency of observation the nurse should employ during the first hour of Taxol administration. Plaintiff’s expert, Ms. Jenner, defined “constant observation” as being in the room or nearby the room where you can watch the

patient at all times and see the IV. [RE-57; Tr-234].

5. **Annette Dove testified that it would not be substandard nursing care to administer Taxol over one hour if a doctor ordered it to be given over three hours.**

[*Judgment*, R-870; RE-11].

This finding is manifestly wrong. Ms. Dove actually testified that, according to the national oncology guidelines, Taxol can be given over one hour, but that if a doctor orders it to be given over three hours, it should be administered pursuant to the doctor's order. [RE-157-158; Tr-427-428].

6. **The Garden Park Hospital records for three hospitalizations of February 18-26, 1998, February 26-March 9, 1998, and March 12-17, 1998, are replete with documentation of medical care for the arm injury including whirlpool treatments, antibiotics, skilled nursing and physician care and evidence of extensive pain and suffering.**

[*Judgment*, R-871; RE-12].

This finding is clearly erroneous. Although the records reference his cellulitis, the medical bills clearly show that Mr. Freeman did not begin to receive bandaging, debridement or whirlpool treatment until February 24, 1998, and that this only continued through March 9, 1998. [RE-199-229; P-7]. The records for the three hospitalizations are replete with documentation of medical care for Mr. Freeman's other ailments. *Id.* This is evident from a simple review of the medical bills. Plaintiff submitted no expert medical testimony to show that the hospitalizations and all the treatments were reasonably related to Mr. Freeman's cellulitis. The trial judge relied upon an exhibit, which was not authenticated pursuant to the Mississippi Rules of Evidence, but rather through the testimony of the Plaintiff, which purported to be the medical bills incurred as a result of Mr. Freeman's cellulitis. As such, the trial judge not only made an erroneous finding of fact, but he applied an erroneous legal standard in allowing the exhibit to be entered into evidence. *Rule 901, Miss.R.Evid.*

7. **The damages here are substantial...While it is arguable that 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 his cellulitis and overall condition of the arm. Mr. Freeman's daughter and brother testified as to his extensive pain and suffering and disability which continued until his death in January 1999, a period of some eleven months. The photographs introduced into evidence are particularly graphic and show substantial swelling, redness, deteriorated, sloughing skin conditions and necrosis.**

[*Judgment*, R875-876; RE-16-17]

This finding of fact is against the overwhelming weight of the evidence and is not supported by any testimony or evidence in the record. The finding that the vast majority of the treatment and need for hospitalizations was due to his cellulitis is completely contradictory to the testimony of Dr. Sacks and to the medical records and bills submitted into evidence. As has been set forth above, the "vast majority" of Mr. Freeman's treatment was related to his pre-existing conditions. In fact, the precipitating condition which necessitated Mr. Freeman's admittance into hospital on February 18, 1998, was shortness of breath and fever related to his underlying condition of cancer. To find otherwise is manifestly wrong.

Furthermore, the trial judge abused his discretion in awarding \$217,334.36 to the Plaintiff. There is no basis in law or in fact to support such an award. There was no medical testimony presented to show that the costs were related to Mr. Freeman's cellulitis. Neither was there any medical testimony presented of Mr. Freeman's pain suffering. Mr. Freeman was a very sick man who suffered from a multitude of conditions which could have caused his pain and suffering. The fact that there are graphic photos in the record does not automatically impute negligence to the Defendant's and support such a substantial award of damages. The trial judge's decision to relate every condition to his cellulitis was manifestly wrong and an abuse of the judge's discretion.

In addition to the foregoing, the trial judge found Clarence Freeman's testimony to be

detailed and specific, and gave more weight to his credibility than that of Nurse Byrd, Joanne Pearson and Dr. Sacks, despite the fact that both he and the Plaintiff testified that his memory is failing. [RE-89, 98-102, 115; Tr-281, 295-296, 299, 300, 302, 323]. His lack of credibility is illustrated by the fact that he testified that upon his return from the Waffle House, Mr. Freeman told him the nurse had not been back in to check on him, even though the medical record of February 12, 1998, clearly shows that Nurse Byrd checked on Mr. Freeman no less than four times after Clarence Freeman left. [*Judgment*, R-868; P-1 at 126; RE-9, 173]. The trial judge's reliance on the testimony of Clarence Freeman was, therefore unfounded and contrary to the overwhelming weight of the evidence.

The trial judge made substantial erroneous findings of fact, which were manifestly wrong and contrary to the overwhelming weight of the evidence. He abused his discretion by rendering Judgment based upon these erroneous findings of fact. As such, the Judgment should be reversed.

CONCLUSION

Mere proof of an infiltration without proof that a negligent act of the Defendant proximately caused the injury and subsequent damages is insufficient to prove liability. Plaintiff failed to prove by a preponderance of the evidence that the Defendants committed a negligent act or omission which proximately caused an injury. The trial court erred when it allowed a nurse without the proper qualifications to testify to the standard of care relating to chemotherapy administration. The trial court erred when it allowed a nurse to testify to medical causation. The trial court erred when it allowed unauthenticated medical bills to be admitted into evidence. The trial court erred when it used an erroneous legal standard to determine vicarious liability.

A circuit court judge sitting without a jury is accorded deference with regard to his findings

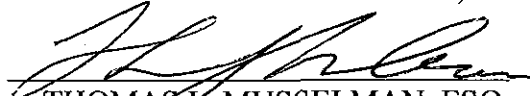
on appeal as long as his findings are supported by substantial, credible, and reasonable evidence. The trial court heard testimony from Plaintiff's nursing expert and Defendants' nursing expert and medical doctor expert that an infiltration is a known and accepted risk of intravenous therapy which can occur without negligence. The trial court heard evidence from Plaintiff's nursing expert that was mere assumptions and opinion without factual or medically reliable basis. The trial court determined damages which were not properly admitted or proven to be necessary and reasonably related to the Plaintiff's medical negligence claim. The trial court's findings of fact are not supported by substantial, credible, and reasonable evidence.

The Plaintiff failed to produce such evidence that proves any of the elements of a claim for medical negligence. As the Plaintiff has produced no qualified medical testimony on the required elements of her claim of medical negligence the trial court's ruling must be reversed and rendered.

Respectfully submitted,

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

BY:


THOMAS L. MUSSELMAN, ESQ.
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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 17 day of January, 2007.


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