IN THE SUPREME COURT OF MISSISSIPPI

WILLIAM A. CAUSEY, M.D. — **APPELLANT**

V. — **CASE NO.: 2006-CA-01697**

REITHA SANDERS, Individually and on Behalf of all Wrongful Death Beneficiaries of Ersel Allen — **APPELLEE**

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

BRIEF OF APPELLEES

ORAL ARGUMENT REQUESTED

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Appellee respectfully requests oral argument.

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CERTIFICATE OF INTERESTED PARTIES

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

1. Dennis C. Sweet
2. Richard A. Freese
3. Reitha Sanders
4. Ben Martin
5. Warren Martin
6. Jo Carroll
7. Devon Allen
8. J. Leray McNamara
9. Stephanie Edgar
10. Copeland, Cook, Taylor & Bush, P.A.
11. Sweet & Associates, P.C
12. Freese & Goss, PLLC
13. William A. Causey, M.D.
14. The Honorable Tomie T. Green

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INTRODUCTION

This is a civil case involving the wrongful death of Ersel Allen, deceased, that was brought by her daughter, Reitha Sanders, individually and on behalf of all of the wrongful death beneficiaries of Ms. Allen ("Plaintiffs" or "Appellees" herein) against William A. Causey. R. 8. This is the same William A. Causey, who was convicted by a federal jury of the following three (3) counts: Coercion and Enticement of a minor male; Travel With Intent to Engage in Sexual Act with Juvenile; and Transportation of a Minor With Intent to Engage in Sexual Activity. Appellant was thereafter sentenced on the three (3) counts to twenty-five (25) years in prison. The conviction was upheld by the Fifth Circuit Court of Appeals on all counts. The United States Supreme Court denied certiorari. As a result of this conviction, Appellant no longer has a license to practice medicine in the State of Mississippi. At the time of the trial that is the subject of this appeal, Appellant was incarcerated at a federal prison in Forrest City, Arkansas. He chose not to appear at the trial of this matter, which commenced on June 13, 2006 in Hinds County, Mississippi Circuit Court. T. 10-11.

STATEMENT OF THE CASE

Ersel Allen, a 66 year old white female, presented to Neshoba County Hospital on April 24, 2001, with complaints of bronchitis, gastric pain and nausea. An abdominal ultrasound revealed gallstones as well as a dilated common bile duct, and there was believed to be a stone in the distal bile duct. It was contemplated that surgical intervention may be required to properly treat the obstruction of the common bile duct, and she was thereafter transferred to the University of Mississippi Medical Center in Jackson for these further procedures. Following her transfer to the University of Mississippi Medical Center ("UMMC") on April 27, 2001, Ms. Allen was advised by her doctors that she did not suffer from gallstones, but rather, she had terminal

pancreatic cancer. She and her family were told that she had less than six months to live. T. 387-388.

Notwithstanding this pronouncement, biopsies performed on May 7 and May 15 both failed to reveal any evidence of pancreatic carcinoma. T. 229-230. The UMMC physicians continued to advise Ms. Allen and her family that her condition was terminal cancer nonetheless, and that there was nothing further they could do for her. UMMC advised and instructed that Ms. Allen should be sent to a hospice facility, where she could be cared for until she died. T. 914. Relying upon this instruction, and the diagnosis of pancreatic cancer, on June 12, 2001, Ms. Allen and her family agreed that she would be transferred to Hospice Ministries, Inc. ("Hospice") T. 388.

An admission requirement of Hospice was that "all patients must meet Hospice criteria of six months terminal prognosis" T. 193. This criteria was deemed satisfied by Dr. Causey, the Medical Director of Hospice, when he executed an admission form certifying the terminal illness of Ms. Allen. T. 197-200. Based upon Dr. Causey's assessment and diagnosis, Ms. Allen was treated for pancreatic cancer by the medical staff at Hospice Ministries (according to its procedures). T. 829; 909-910. Because this diagnosis resulted in a course of treatment primarily concerned with pain management, Ms. Allen was continued on morphine, the pain medication prescribed by UMMC. This course continued until July 6, 2001, when Dr. Causey, changed her prescription to Dilaudid, an opioid for pain, with the potency six to seven times that of morphine that she was receiving. T. 312-313; 820. The dosages of Dilaudid administered to Ms. Allen increased, by Dr. Causey, three times over the next two (2) week period. Ex. D-43. Throughout these last two weeks of her life, Ms. Allen exhibited signs of respiratory depression, labored breathing, shortness of breath, increased sleep, and anxiety, all of which defendants and their

staffs admitted were textbook signs of adverse reactions to Dilaudid. T. 842-843. In addition, the prescription of Dilaudid was contraindicated in persons with underlying disease processes such as those suffered by Ms. Allen. The Medical Director and staff of Hospice Ministries ignored the clear signs of Dilaudid overdose, which ultimately lead to her death on July 20, 2001. T. 303-303. If a patient is pharmacokinetically tolerant, the dosage guidelines indicate that the patient may be given higher dosages. During the two weeks prior to her death, Dr. Causey increased Ms. Allen's Dilaudid intake from 6 milligrams per hour to 18 milligrams per hour. Even if Ms. Allen was tolerant to some degree, the recommended dosage would never have increased to this amount. T. 285-289.

After Ms. Allen's death, an autopsy was conducted by the Mississippi State Medical Examiner, Dr. Steven Hayne. T. 225. The cause of Ms. Allen's death was determined to be "a massive overdose" of Dilaudid. T. 226. The amount of Dilaudid in Ms. Allen's blood was so great that Dr. Hayne testified he had never seen anywhere near the amount of Dilaudid in a person in the many years of his professional career. T. 227. During the autopsy, Dr. Hayne found no evidence of cancer in Ms. Allen. T. 230.[1] It was clear to him, as the Medical Examiner, that Ms. Allen's cause of death was not related to any other underlying medical condition she may have had, but rather was clearly due to a massive Dilaudid overdose. T. 234.

Commencing on or about June 13, 2006, this Honorable Court presided over the nine (9) day trial of this action which resulted in a duly sworn jury returning a verdict for the Plaintiffs on the issues of liability and damages. T. 1012. The jury in this action awarded Plaintiffs $4,000,000.00 in compensatory damages and $500,000.00 in punitive damages. T. 1012; 1043.

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1 It should by noted that there was absolutely no evidence whatsoever in this case that Ms. Allen had <u>any</u> type of cancer in her body at the time of her death.

Prior to jury deliberation, Hospice settled with Plaintiffs for a confidential amount. In its judgment, the trial court properly reduced the judgment against Dr. Causey by virtue of that settlement. R. 493-494.

SUMMARY OF THE ARGUMENT

At the trial of this matter, Plaintiffs proffered the testimony of three (3) expert witnesses, all of whom testified that Ersel Allen died as a result of a Dilaudid overdose. Appellant argues in his brief that two of those experts, Dr. Perry Hookman, M.D. and Dr. James Garriott, Ph.D, were not qualified to render opinions in this case. However, both of the experts tendered by the Plaintiff are highly credentialed and knowledgeable concerning appropriate dosages of Dilaudid in patients such as Ms. Allen. Both were eminently qualified to testify regarding the standard of care at issue in this case, and the trial court did not comment error in allowing their testimony at trial. Moreover, the standard of care as enunciated by every defense expert who testified for Appellant, agreed with Plaintiffs' experts on the main issue of the case: that it would have been a violation of the standard of care to kill Ms. Allen with an overdose of Dilaudid.

As the gatekeeper, the trial court properly curtailed the testimony of defense experts insofar as their opinions related to dosages that were not consistent with those rendered to Ms. Allen in this case. There was no error and the trial court did not abuse her discretion in making such rulings.

Appellant's third issue on appeal is also without merit. Because there was no evidence at the trial of this matter that Ersel Allen's death was caused by UMMC, the Court did not err in declining to allocate fault to the University of Mississippi Medical Center. While Plaintiff was able to show at trial that UMMC misdiagnosed Ms. Allen as having pancreatic cancer, this misdiagnosis did not cause Ms. Allen to receive lethal doses of Dilaudid. That was done solely at Appellant's hands.

Likewise, the trial court did not commit error by submitting the issue of punitive damages to the jury. The trial court followed the proper procedure set out by the Mississippi Supreme

Court for conducting a bificurated trial in a case involving punitive damages claims. Appellant's fifth argument on appeal is unsubstantiated and the trial court is due to be affirmed on this issue.

In this case, the jury's award is amply supported by the evidence in the case, and the trial court did not commit error by denying Dr. Causey's Motion for Remittitur. Appellant has failed to establish the grounds necessary for such relief and as such, the trial court's ruling should be affirmed.

Finally, there was no error committed by the trial court by declining to instruct the jury regarding "chance of recovery". This is not a hindered recovery case, rather, it is a case based upon Appellant's acts in causing the death of the decedent, Ersel Allen by Dilaudid overdose. The trial court in this case properly instructed the jury on causation, and the jury clearly based its verdict on that instruction, and upon the evidence that established that Dr. Causey's negligence was the proximate cause of Ersel Allen's death.

ARGUMENT

A. The Trial Court Acted Within Its Discretion In Qualifying Plaintiffs' Experts to Testify at Trial as to Dr. Causey's Breach of the Applicable Standard of Care.

During the trial of this case, Plaintiffs offered expert testimony of three witnesses: (I) Dr. Steven Hayne, M.D., State Medical Examiner for the State of Mississippi; (ii) Dr. Perry Hookman, M.D., gastro-internist and (iii) Dr. James C. Garriott, Ph.D., a toxicologist; (iv) Carmen McIntire. Each of these witnesses testified that Ms. Allen died of an overdose of Dialudid, that was administered by Appellant. Appellant's main contention in this portion of his appeal is that there is a special standard of care that applies to a physician who renders care and treatment in a hospice setting, which differs from the standard of care a physician outside of that setting owes to his patients. [Appellant's Br. § 1] He argues that because Plaintiffs' experts were not specialists in the field of hospice care, they were not qualified to render expert testimony in this case. [See, e.g., Appellant's Br. 15-16] Appellant does not, however, cite to any legal authority in Mississippi, or any other jurisdiction for that matter, that recognizes and supports his contention. Indeed, in Mississippi, there is no recognized "special" standard of care as proposed by Appellant herein.

The appropriate standard of care for this medical malpractice case is as follows:

> Mississippi physicians are bound by nationally-recognized standards of care; they have a duty to employ 'reasonable and ordinary care' in their treatment of patients...[G]iven the circumstances of each patient, each physician has a duty to use his or her knowledge and therewith treat through maximum reasonable medical recovery, each patient, with such reasonable diligence, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States, who have available to them the same general facilities, services, equipment and options.

McAllister v. Franklin County Memorial Hosp., 910 So.2d 1205, ¶ 15 (Miss. Ct. App. 2005),

citing, *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So.2d 1346, 1354 (Miss.1990); *Hall v. Hilbun*, 466 So.2d 856, 873 (Miss.1985). In light of this Court's position regarding the standard of care for medical professionals, Appellant s have transmogrified this well recognized standard into a fictitious, phantom "Hospice" standard of care. Essentially, Appellant erroneously argues that Plaintiffs failed to make their *prima facie* case because their expert witnesses were never medical directors of a hospice, nor associated with the hospice facilities. [Appellants' Br. p. 18]. Again, no legal argument is offered to support Appellant's position as to the applicability of this alternate standard of care, nor is it supported by the record in this case.

On the subject of an expert's qualifications, the trial court has the discretion to determine whether a witness is sufficiently knowledgeable to be considered an expert. *Nunnally v. R.J. Reynolds Tobacco Co.*, 869 So.2d 373, 384 (Miss. 2004) (citations omitted). The standard of review for the admission or suppression of evidence in Mississippi is abuse of discretion. *Id.*, citing, *Troupe v. McAuley*, 955 So.2d 848, 855(Miss. 2007). The trial judge has the sound discretion to admit or refuse expert testimony; an abuse of discretion standard means the judge's decision will stand unless the discretion she used is found to be arbitrary and clearly erroneous. *Id.*

In *Troupe*, supra, this Court recently held that, "[t]he rule is that the expert must exercise the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Troupe*, 955 So.2d at 858. (citations omitted) The Mississippi Court of Appeals, in *Bass*, supra, applied the *Troupe* holding, and further explained,

> The plain language of Mississippi Rule of Evidence 702 considers a witness "qualified as an expert by knowledge, skill, experience, training, or education" and allows the witness to testify and offer opinions if his "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." M.R.E. 702. The framework employed in

> determining whether particular proffered expert testimony meets the requirements of Mississippi Rule of Evidence 702 necessarily involves the trial court's first determination of whether the expert testimony is relevant...If the trial court finds that the proffered testimony is relevant, then the court next considers whether the proffered testimony is reliable. Each determination by a trial court regarding the admissibility and reliability of expert testimony is a fact intensive one, and requires immersion in the subject matter of the case.

Bass, supra, citing, *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31, 40 (Miss. 2003)(adopting federal framework of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

The mere fact that Plaintiffs' experts were never medical directors of a Hospice facility, nor were they specifically acquainted with the general facilities, services, equipment and options available at the Hospice facility at the time of Ms. Allen's death, does not invalidate their testimony of the care, breach and causation regarding the claim against Appellant. Appellants hallow effort is a transparent red herring.. The question is not whether Plaintiffs' experts were an Hospice internist, Hospice toxicologist, or some other Hospice specialist, but rather, the question is whether they possessed the knowledge, skill, training, and experience to possess that "peculiar knowledge" requisite to offer expert opinion regarding the claims against Appellant. *See Partin v. North Mississippi Med. Center, Inc.,* 929 So.2d 924 (Miss. App. 2005). Clearly they did.

1. Dr. Hookman Was Qualified to Testify as an Expert on Behalf of Plaintiffs.

Applying the above-cited law to the instant case, and in light of Dr. Hookman's knowledge, skill, training and experience, the trial court properly qualified him as an expert in this case, and there was no abuse of discretion in so doing. Perry Hookman, M.D., P.A. is Board Certified in both Gastroenterology and Internal Medicine. He was proffered as an expert concerning the standard of care of another internist, Dr. Causey, Appellant herein. Dr. Hookman holds a Masters Degree in Health Administration and is Board Certified in Medical Management,

is faculty at John's Hopkins University and has authored/coauthored approximately 50 publications. Dr. Hookman has been in private practice for more than 25 years and is a member of a Medical School Faculty. He is a teacher to other physicians, interns, and residents in internal medicine and gastroenterology. Based upon the trial court's review of Dr. Hookman's qualifications, it is clear that Dr. Hookman was eminently qualified to testify concerning the issues presented in this case.

2. Dr. Garriott Was Qualified to Testify as an Expert on Behalf of Plaintiffs.

Likewise, Dr. James C. Garriott was properly qualified as expert in this case. His long and impressive resume reflects his knowledge, skill and training in the field of pharmacology and toxicology. T. 264- 274. Specifically, Dr. Garriott is an adjunct professor at the University of Texas Health Science Center. Prior to becoming a professor, he was Chief Toxicologist for the Bexar County Medical Examiner's Office in San Antonio, Texas. He has approximately thirty-five (35) years employment as a professional toxicologist. Dr. Garriott has a long history of professorships and teaching in the department of pathology and pharmacology, and is Board Certified as a Forensic Toxicologist. He has written on the topic of Dilaudid, beginning with a Forensic Toxicology Research Study on Dilaudid in 1978. Based upon the forgoing credentials, as well as those set forth in his curriculum vitae, it is abundantly clear that the trial court was well within her discretion in qualifying Dr. Garriott as an expert in the fields of pharmacology and toxicology.

Inasmuch as the death certificate of Plaintiffs' deceased, Ersel Allen, indicated the cause of death to be "Dilaudid overdose," an expert in the field of pharmacological overdose was certainly relevant. After the trial court determined that Dr. Garriott's proposed expert testimony was both relevant and reliable, it was well within her discretion to allow the introduction of this

evidence. T. 280. Importantly, at trial, counsel for Appellant did not object to Dr. Garriott's qualification as an expert. T. 274. Appellants fail to demonstrate how the trial court's allowance of this evidence was arbitrary and clearly erroneous, and thus no error should be found.

All three (3) experts offered by Plaintiffs possessed the knowledge, skill, training, experience and "peculiar knowledge" requisite to offer expert opinion to assist the trier of fact determine the issues presented in this case. Likewise, all three (3) experts reached the same conclusion regarding the cause of Ersel Allen's death. The testimony of Dr. Perry Hookman revealed that it is certainly likely that Ersel Allen could have survived another six (6) or seven (7) years but for the Dilaudid overdose administered by the Defendants. Ex. D-41. Further, Hookman revealed that he had never seen levels of Dilaudid in any living creature as high as those observed in Ersel Allen. Ex. D-41.

Dr. Steven Hayne, Medical Examiner for the State of Mississippi, testified that Ersel Allen's death was proximately caused as a result of the Dilaudid overdose. Dr. Hayne testified that having performed over 30,000 autopsies in his career, he had never observed levels of Dilaudid as has as those in the body of Ersel Allen. T. 227. He illustrated the impact of the massive Dilaudid dosage on Ms. Allen:

> It was a massive Dilaudid overdose. It was the equivalent of a person walking down the street with heart disease, some pancreatic disease, some lung disease and getting shot in the head with a shotgun. In this case the shotgun was the medication. It was Dilaudid. It was not...lead from a shotgun, but it was overwhelming. T234-235.

Dr. James Garriott's testimony certainly supported the conclusion reached by Dr. Hayne and Dr. Hookman in that he opined Ersel Allen was administered a lethal dose of Dilaudid, and that she died as a result of an overdose of the opioid. T 303.

Not only did Plaintiffs' experts testify regarding the excessive amounts of Dilaudid that

were found in Ms. Allen's body after her death, a forensic toxicologist for the Mississippi Crime Laboratory, Carmen McIntire, testified regarding her involvement in this case. T. 251. Ms. McIntire was requested by the Medical Examiner's office to perform a forensic toxicological analysis on July 23, 2001, on biological specimens that were submitted on Ersel Allen. T. 256. This was done in the course and scope of her normal job operation at the Crime Lab. T. 257. Ms. McIntyre was responsible for sending the samples to National Medical Services ("NMS"), a reference laboratory that is utilized by the State of Mississippi to do testing for legal proceedings. T. 258. The NMS laboratory detected Hydromorphone (Dilaudid) in the biological specimen of Ersel Allen at a concentration of 6,900 nanograms per milliliter. T. 259. According to Ms. McIntire, an independent witness, during the 15 years that she has worked as a forensic toxicologist at the Crime Lab, she had never seen lab results concerning that high of an amount of Hydromorphone (Dilaudid). T. 260.

In this case, Appellant argues that his physician experts all testified that there was no limit on Morphine or Dilaudid in the treatment of terminal patients. [Appellant's Br. p. 14] He compares his experts' "experience" with that of Plaintiffs' experts, and without any legal support, states that the trial court should have weighed the competing experts' "experience" to determine whether or not Plaintiffs' experts should have been qualified by the to render their opinions in the case. [Appellant's Br. p. 15] Of course no such requirement is imposed on the trial court. Rather, the law, as set forth above, requires the trial court to make the determination as to the relevancy and reliability of each expert, on his or her own merit, as was done in this case. See, e.g., T. 280.

Importantly, while Appellant contends that Plaintiff's experts were not qualified to testify as to the standard of care in a hospice situation, claiming that a different standard applied, Plaintiffs satisfied a standard of care in such a setting through testimony of Appellant's own

expert witnesses. **Appellant's own expert witnesses testified as to the standard of care in a hospice setting, and that it would be a breach of the standard of care for Dr. Causey or Hospice if Dr. Causey or Hospice in any way hastened Ms. Allen's death or gave her a dose of Dilaudid that led to her death.**

As stated earlier, Appellant stated in his brief that Drs. Houston, Byers and Gitlin were qualified experts in pain management and palliative care and that there was "...no limit on Morphine or Dilaudid in the treatment of a terminal patient." Of course, the standard would not apply if Ms. Allen did not have terminal cancer. However, even if one is to assume that Ms. Allen was in fact terminal (which she was not), Appellant's own experts' testimony bolstered the Appellee's argument.

Appellant points out that his expert, Dr. Houston, testified at T. 563; 564; 567, that the proper dose is whatever it takes to get rid of the pain, that there is no maximum safe dose of Morphine or Dilaudid, and the ceiling or toxic dose would be unknown. However, on cross-examination, Dr. Houston admitted that she did not determine whether Ms. Allen received a lethal dose of Dilaudid, T. 574, and that it would be a direct violation of the Hospice guidelines to hasten a patient's death and that such an action would be a violation of Hospice's standard of care. T. 574-75. Dr. Houston testified that she would assume that if a jury concluded that Dilaudid caused a person's death, there would be a toxic dose of Dilaudid given. T. 589.

Dr. Houston also testified that if a hospice titrates medication – adding doses until getting to the proper level of pain relief – and such titration leads to a person's death, that action would be a breach in the standard of care in a hospice setting. T. 594. Dr. Houston also testified as to the standard of care for a hospice situation in nurse monitoring of the patient's condition, identifying symptoms of possible adverse reactions, and reporting it to someone in authority. T.

597-98. Dr. Houston testified that the nurses' notes contained notations of symptoms of potential adverse reaction to Dilaudid, T. 595-96, and that she did not recall reading any nurses' notes for Hospice wherein the nurses identified such symptoms and reported them to a doctor or someone else in authority. T. 598-99.

Appellant noted that Dr. Melvin Gitlin testified that there is no literature which reflects a ceiling or toxic dose of Dilaudid for terminal patients. [Appellant Brief, p. 14]. Again, setting aside the fact that Ms. Allen did not have terminal cancer, Dr. Gitlin's testimony as the standard of care for hospice patients was put in front of the jury. Dr. Gitlin testified on cross-examination that there is such a thing as overdosing on opiods, T. 686, and clarified the definition of there being "no ceiling". He testified that "no ceiling" simply means that there is not a level where giving a person more would not have more of an effect. T. 686-87. Therefore, Dr. Gitlin's expert testimony was that "no ceiling" meant that you could give more and more and more and expect to see decreased pain levels, but that there definitely is an amount that will kill a person and there is an amount that is "too much". T. 687. "No ceiling" does not mean that a medical provider will always be within the standard of care no matter how much Dilaudid they give a patient.

Appellant cited the testimony of his expert, Dr. Byers, who stated on direct examination that there was nothing unusual about the amount of medication Ms. Allen was given **in this setting**. [Appellant Brief, p. 14] (emphasis added). However, on cross-examination, Dr. Byers testified that if a medical provider titrated someone to death, the provider was not properly titrating someone. T .808. He also testified that if Hospice gave Ms. Allen a dose of Dilaudid that was enough to kill her, Dr. Causey and the Hospice fell below the standard of care. T. 808.

Plaintiff elicited testimony from their own experts as to the standard of care in a medical and hospice setting. Appellant's own experts testified as to what the standard of care in a hospice setting would be, and if certain actions occurred, there would be breaches in the standard of care by Dr. Causey and Hospice. Appellant's experts, who were put on the stand and were claimed to be qualified as experts in hospice care, testified that it would be a breach in the standard of care to: 1) hasten a patient's death; 2) use a titration method that hastened a patient's death; 3) have nurses fail to report potential symptoms of adverse reactions to Dilaudid; 4) give a patient "too much" Dilaudid; 5) and give a patient a dose of Dilaudid that was enough to kill her. The jury was informed of the appropriate standard of care in a medical setting, which would include hospice care. If a separate standard exists for medical care in a hospice setting, the jury was informed of the appropriate standards of care in such a setting and what actions or omissions would be seen to be a deviation in that standard of care. Therefore, Appellant's objections as to the jury not having the proper standards before them are without merit.

Once qualified as an expert "by knowledge, skill, experience, training, or education," and allowed to testify, the credibility of the parties' experts are left to the jury. The crux of Appellant's argument is that the jury should have believed the statements and opinions offered at trial by his experts rather than give any weight to the testimony of Plaintiffs' experts. However, which witnesses to believe is properly resolved by the jury not by an appeals court. *Richardson ex rel. Richardson v. DeRouen,* 920 So.2d 1044, 1048-49 (Miss.Ct.App. 2006), citing, *McNeal v. State*, 617 So.2d 999, 1009 (Miss. 1993). Mississippi has a long standing policy of trusting the jury's verdict. *Id.*, citing, *Waterman v. State*, 822 So.2d 1030, 1033(Miss.Ct.App. 2002). Jurors decide the credibility of the evidence and the witnesses' testimony, the court has no say with regard to this matter. *Id.* Following a trial of this magnitude and all of the evidence which was

presented to the jury, there is no good or sufficient reason to second guess the will of the jurors or the sound discretion of the trial court. The record is saturated with ample evidence sufficient to support the jury's verdict and award, as well as the evidentiary rulings by the trial court. Appellant has failed to prove that the trial court abused her discretion, and thus no error was committed.

B. The Trial Court Did Not Err By Limiting the Testimony Proffered By Defense Experts.

In Section II of his brief Appellant claims that the lower court improperly limited the testimony of defense experts by not allowing "the defense experts to discuss standard dosages for chronic patients." Specifically, Appellant objects that pharmacist Ronnie Bagwell was not allowed to testify that other patients were getting similar dosages as Ms. Allen and Dr. Melvin Gitlin was not allowed to testify that he would prescribe similar amounts for patients in the same or similar conditions as Ms. Allen. Appellant then makes general complaints that Plaintiffs' experts were not restricted in the same manner, causing some sort of imbalance.

This Court should not entertain the argument put forth in this section of his brief, as Appellant fails to cite any legal authority for the proposition that the lower court committed error by restricting the testimony of their witnesses. "Mississippi follows the rule that if an assignment of error is made without any legal authority to support it, this Court will not consider the issue on appeal." *In re Estate of Taylor*, 755 So.2d 1284, 1288 (Miss. Ct. App. 2000) (citing *Grey v. Grey*, 638 So.2d 488, 491 (Miss.1994); *Hunter v. State*, 489 So.2d 1086, 1090 (Miss.1986); *Ramseur v. State,* 368 So.2d 842 (Miss.1979); *Dozier v. State*, 247 Miss. 850, 157 So.2d 798 (1963)) (emphasis added).

Alternatively, should the Court examine the issue, Appellant's argument would still fail. The standard of review regarding the admission or exclusion of evidence is abuse of discretion. *Richardson v. Derouen*, 920 So.2d 1044, 1048 (Miss. Ct. App. 2006). Additionally, our courts have stated:

> Rule 403 of the Mississippi Rules of Evidence provides that evidence, though relevant, may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This Court will not "engage anew in the 403 balancing process," rather its scope is limited to determining "whether the trial court abused its discretion in weighing the factors and admitting or excluding the evidence."

General Motors Corp. v. Jackson, 636 So.2d 310, 314 (Miss. 1992) (citing *Williams v. State*, 543 So.2d 665, 667 (Miss. 1989), quoting *Foster v. State*, 508 So.2d 1111, 1118 (Miss. 1987)) (emphasis added).

M.R.E. 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) their testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The lower court has the authority to restrict expert testimony to situations analogous to the one at issue in the trial, and the lower court did not abuse its discretion in limiting such testimony in this case. This Court has made the trial court judges of our state gatekeepers as to the admission of technical evidence; *Miss. Trans. Comm'n v. McLemore*, 863 So.2d 31, 40 (Miss.2003) (adopting *Daubert, supra)* Therefore, it becomes imperative that the judge allow expert testimony if such principles and methods have been applied to the facts of this case.

The Appellant complained that the judge restricted the testimony of defense experts that would testify that other patients received the same dose. *See* T. 33-36. At trial, Plaintiff's counsel correctly pointed out that the admission of other patients who did not die from the same dosage amounts was irrelevant to the propriety of such a dose for Ms. Allen, and would necessitate a mini-trial on each patient as to the propriety of those dosage amounts. T.33-34. The trial court properly noted that such testimony concerning other patients who did not have the same illnesses as Ms. Allen was improper and that a proper foundation would have to be established to show that the person was similarly situated T.35 ; T.37. As a result, in spite of Appellant's protestations, he was afforded the opportunity to lay a proper foundation for the admission of this evidence if he so desired. In addition, he was able to elicit testimony from his experts as to the amount of the dosage that was given. For example, his consulting pharmacist witness Bagwell testified that he would, "...disagree in a patient that has been on previous narcotic therapy that that would be a lethal dose of narcotic." T.455. So Bagwell was able to testify that he thought that Ms. Allen was not administered a lethal dose, and the Court let that opinion go to the jury.

However, the trial judge correctly ruled that he could not, as a consulting pharmacist witness, testify as to what other patients were given because he was neither a medical doctor, nor was he treating those patients. T.459-460. The trial judge did instruct the Defendant that he could bring in experts who regularly prescribed medications to patients similarly situated, but Mr. Bagwell routinely filled prescriptions, and in this case did not even fill the prescriptions of the individuals the Appellant wanted him to testify about. T.462. The judge correctly fulfilled her gatekeeper role, and her decision to limit his testimony was not an abuse of discretion. Appellant even admits in his brief that his consulting pharmacist witness Bagwell was allowed to

testify that the amounts given to Ms. Allen were "normal." [Appellant's Br., p. 21] T.468. He just was not allowed to go into detail and specifics about other patients who received the same dosage and didn't die. If the court allowed testimony from the expert that the amount that Ms. Allen was given was "normal", then the jury did in fact hear evidence that others were given like amounts. A legal definition of the word "normal" is "according to a regular pattern". BLACKS LAW DICTIONARY (7th ed. 1999). Therefore, the witness was allowed to imply that the same dosage Ms. Allen was given was also given to others in the same facility, and Appellant's claim of error is without merit. Appellant also complains on page 22 of his brief that Dr. Melvin Gitlin was not allowed to testify "...that he would prescribe similar amounts for patients 'in same or similar conditions as Ms. Allen'. T.658." Again, no legal authority is cited for this contention of error, and it should not be considered on appeal. If considered, this argument also fails.

Reviewing the actual question posed to Dr. Gitlin, it was not as to what he would prescribe for patients in same or similar conditions; rather, he was asked *whether he had prescribed* for patients in same or similar circumstance. T.657. Plaintiff counsel correctly raised an objection, sustained by the court on the same basis as set out above, that such testimony about what dosages he had prescribed to individual patients in the past was not admissible unless he had records to back up the claim that the patients were in the same or similar circumstances. The expert witness was allowed to testify he did not believe there was a ceiling or toxic doses for the prescription of Dilaudid and that the Appellant performed within the standard of care and Hospice did nothing to contribute to her death. T.658-659. The trial judge was properly performing her gatekeeper function, and the decision to exclude a portion of this testimony was not an abuse of discretion.

In addition, Appellant is seemingly making the argument that his experts had a differing opinion as to Ms. Allen's cause of death, and that the lower court somehow granted wider latitude for Plaintiff's experts. Again, no legal authority is used to back up this argument, and this Court should not consider it on appeal. If considered, Appellant's argument would fail as the rulings by the bench are not comparable. Plaintiffs sought to prove, through experts, that Ms. Allen was prescribed a fatal dose of Dilaudid, and this dose killed her. Defendant sought to counter that others had been given the same dose and did not die, but the Court restricted the evidence of that unless it could be shown that the individual patients were in the same or similar circumstances as the decedent, Ms. Allen.

Appellant's main problem is that he failed to put on the proper experts who could show that the individual patients were in the same or similar condition as Ms. Allen, even though the Court invited them to do so. What we are left with is a duel between the experts. In *Chisolm v. Eakes*, 573 So.2d 764, 767 (Miss. 1990), this Court stated a "jury may consider the expert testimony for what they feel that it is worth, and may discard it entirely. (citing Jackson v. Jackson, 253 Ga. 576, 322 S.E.2d 725 (1984); see also *Schoppe v. Applied Chemicals Div.*, 418 So.2d 833 (Miss.1982) (expert opinions are to be weighed and judged in view of all testimony and are to be given such consideration as jury believes is deserved). The jury in this case was presented with expert opinion by both sides which properly laid out their respective theories of the case, and weighed such testimony accordingly. Appellant complains that the trial court restricted his ability to present expert evidence, but the trial court was only acting as a gatekeeper to make sure that the evidence was properly applied to the facts of the case. The trial court did not abuse her discretion in her decisions set forth as error in Section II of Appellant's brief, and

the decision of the jury as to the weighing of the expert opinion presented should be respected and upheld.

C. The Trial Court Did Not Err By Declining to Allocate Fault to the University of Mississippi Medical Center.

In his third issue, Appellant complains that the trial court erred by not instructing the jury to apportion the fault of UMMC. [Appellant's Br. pp. 22-26]. Appellant argues that UMMC's negligent misdiagnosis of Ersel Allen as terminally ill "set in motion" her transfer to hospice care. [Appellant's Br. p. 23]. Yet, even if limited evidence was presented that UMMC's misdiagnosis was negligent, absolutely no evidence was presented that Ersel Allen *died* from UMMC's misdiagnosis. That is, there was no evidence that UMMC's actions were the proximate cause of Ms. Allen's death. Because Dr. Causey and UMMC were not joint tortfeasors, and because there was no evidence from which the jury could have properly found UMMC liable for Ms. Allen's death, the trial court did not err by refusing to give an instruction that was not warranted by the facts or evidence in this case.

1. The Trial Court did not err by refusing to give a comparative fault instruction that was not warranted by the evidence.

Apportionment is an affirmative defense that must be pled and proven. "It is fundamental that the burden of proof of affirmative defenses rests squarely on the shoulders of the one who expects to avoid liability by that defense." *Marshall Durbin Cos. v. Warren,* 633 So.2d 1006, 1009 (Miss.1994); *Pearl Public School District v. Groner,* 784 So.2d 911, 916 (Miss.2001). Here, that person was Dr. Causey. As the party seeking to avoid liability based on the apportionment statute, it fell upon Dr. Causey to prove the negligence of UMMC. Dr. Causey failed to carry that burden. Indeed, Defendants did not even attempt to proffer any evidence of

UMMC's negligence, but rather, they offered the testimony of UMMC physician David Duddleston, M.D. in their defense. [*See* ARGUMENT *supra* at III.C.]

A party is only entitled to an instruction when the instruction is supported by the evidence. Therefore, a trial court acts properly by refusing to give a jury instruction which "is without foundation in the evidence." *Coho Resources, Inc. v. McCarthy*, 829 So.2d 1, 23 (Miss.2002); *Ladnier v. State,* 878 So.2d 926, 931-32 (Miss.2004). In determining which instructions or issues should be presented to the jury, the trial court must decide "whether there is evidence which, if believed by the jury, could result in resolution of the issue in favor of the party requesting the instruction." *Gill v. State,* 924 So.2d 554, 556(¶ 4) (Miss. Ct. App.2005). Here, the trial court did not err by refusing to submit an instruction or issue regarding UMMC's comparative fault where there was no evidence establishing UMMC's liability for Ersel Allen's death by Dilaudid overdose.

2. The Trial Court did not err by refusing to give a comparative fault instruction where the actors at issue were not joint tortfeasors.

Mississippi law provides that: "in actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault" MISS. CODE ANN s 85-5-7(7). In order to be "joint tortfeasors, " UMMC and Dr. Causey must have either: (1) acted in concert with regard to their tortious conduct, or (2) committed independent tortious acts which united in causing a single injury. BLACKS LAW DICTIONARY (7th ed. 1999). Neither test is satisfied in this case.

Neither party contends, and no evidence shows, that UMMC and Dr. Causey were working together to cause Ms. Allen's death. Moreover, the trial evidence fails to raise any fact issue regarding UMMC's indisputably separate conduct contributing to Ms. Allen's death by

overdose. In truth, what the evidence shows is that Ms. Allen was the victim of two *independent* incidents of negligence: UMMC's negligence in misdiagnosing her as having a terminal cancer she did not have, and Dr. Causey's gross negligence in administering a lethal overdose of Dilaudid. Importantly, the mere fact that two separate incidence of medical negligence occurred does not make them "joint." As the trial court correctly recognized, UMMC's misdiagnosis had "no affect whatsoever" on the issue of whether Ms. Allen was overdosed. Put another way, although UMC was negligent in making a misdiagnosis, Ms. Allen did not die of that misdiagnosis. She died of Dr. Causey's *separate* act of overdosing her with Dilaudid. Thus, UMC and Dr. Causey are not joint tortfeasors eligible to have their liability apportioned under Section 85-5-7.

3. The Trial Court did not err by refusing to give a comparative fault instruction where there is no evidence that Ersel Allen's death was caused by UMC.

Even if Dr. Causey and UMC were joint tortfeasors (which they are not), the trial court still properly refused to instruct the jury regarding UMMC's comparative fault because no evidence was presented at trial from which a jury could reasonably conclude that Ersel Allen's death was proximately caused by UMC.

Appellant, understandably, desires to divide his liability with another actor. Yet, the injury at issue, Ms. Allen's death, was caused by Dr. Causey alone. UMMC's misdiagnosis of Ms. Allen, while negligent, was not fatal. Indeed, had she not been overdosed by Dr. Causey, evidence offered at trial indicated that Ersel Allen would be alive today – regardless of UMMC's misdiagnosis. As the party seeking to establish the affirmative defense of apportionment, Dr. Causey bore the burden of proving that Ms. Allen's death was caused by UMC. *Marshal Durbin Cos.*, 633 So.2d at 1009. Dr. Causey failed in that burden. There simply is no evidence that

UMMC's misdiagnosis is causally connected to the fatal overdosing of Ms. Allen. Absent such evidence, no fact issue exists on UMMC's liability. The trial court did not abuse its discretion by failing to submit an issue that was unsupported by the evidence.

Appellant's own cited authority demonstrates the necessity of establishing each element of liability in order to warrant a comparative fault instruction. Appellant cites *Blailock ex rel. Blailock v. Hubbs* in support of its claim that UMMC's proportionate fault should have been submitted. [Appellant's Br. p. 25]. In actuality, the issues and language in *Blailock* demonstrate why a comparative fault submission was *not* appropriate in the case at bar. At issue in *Blailock* was whether the defendant-doctors presented adequate expert testimony that the absent hospital breached the standard of care to warrant submission of the hospital's comparative fault. *Blailock ex rel. Blailock v. Hubbs,* 919 So.2d 126, (Miss. 2005). While the court in *Blailock* ruled that the evidence was sufficient, the obvious implication is that submission of comparative fault instruction would not be proper in the face of inadequate proof of duty, breach and causation by the absent actor.

The record in this case does not raise a fact issue as to whether Ms. Allen's death by Dilaudid overdose was caused by her misdiagnosis. For tactical reasons known only to Causey and his counsel, this Defendant never sought to establish proximate cause --- now, he is trying to have it both ways – trying to prove negligence of UMMC by misdiagnosis, without taking the next step to prove that the misdiagnosis caused Ms. Allen's death. As a result, the trial court rightfully concluded that submitting the comparative fault of UMMC was unwarranted.

D. The Trial Court Did Not Err by Submitting the Issue of Punitive Damages to the Jury.

Appellant claims error by the trial court in submitting the punitive damages issue to the jury without requiring separate and additional proof of Dr. Causey's wrongful conduct, above and beyond that which was presented in the liability phase of the trial. Appellant's position reflects a misunderstanding of the bifurcated trial procedure and objective. The punitive damage phase is not conducted separately from the liability/compensatory damage phase in order to *require* additional proof; rather, the punitive damage phase is conducted separately in order to *permit* the introduction of additional proof without tainting the earlier proceeding. Plaintiff's decision to stand on the liability evidence presented in her case-in-chief as the proof of Dr. Causey's gross negligence is wholly permissible under Mississippi law. The trial court did not err by submitting the punitive damage issue on the basis of such evidence.

1. The Trial Court followed the proper procedure for conducting a bifurcated trial in a case involving punitive damage claims.

The procedure for conducting a bifurcated trial in cases involving punitive damage claims, has been clearly laid out by statute and interpreting case law. MISS. CODE ANN. § 11-1-65(1)(b) provides:

> In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.

That the trial court correctly reserved all issues relating to punitive damages until after receipt of a compensatory damage verdict is not disputed by Appellant. MISS. CODE ANN. § 11-1-65(c) then states:

> If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered.

It is again undisputed that, upon receipt of the jury's compensatory damage verdict, the trial court "automatically proceeded to the punitive damages phase of the trial" as it was instructed to do under Mississippi law. *Bradfield v. Schwartz,* 936 So.2d 931, 936 (Miss. 2006). Indeed, Appellant acknowledges that the Court made the requisite finding that a question of material fact existed on the issue of punitive damages. [Appellants' Br. p. 27].

In short, the trial court did precisely what Mississippi Supreme Court precedent instructed it to do. The only thing the trial court did not do to Appellant's satisfaction is require the repetition of previously-presented proof. Yet, Mississippi law does not require the duplicative procedure Appellant urges. The trial court considered the totality of the circumstances and evidence which had been presented. It then made the discretionary decision that a question of fact existed as to whether Dr. Causey's conduct was willful and wanton. No procedural error was made by the trial court in conducting the bifurcated trial.

2. Where the evidence presented to establish liability also raises a question of fact regarding gross negligence, a Trial Court does not abuse its discretion by submitting the issue of punitive damages to the jury.

Appellant's true complaint in Issue No. 4 is that Plaintiff was permitted to stand on her liability evidence as the proof that Dr. Causey was also grossly negligent. Yet, Mississippi courts have expressly acknowledged the common-sense reality that the very same facts often apply to the determinations of both liability and punitive damages. *Bradfield,* 936 So.2d at 939, fn.9 ("We readily acknowledge that it is hardly uncommon for cases to involve 'mixed facts' which would be relevant on both the issues of liability and punitive damages"). Such was the case in this proceeding.

During the liability phase of the trial, Plaintiff offered substantial evidence of Dr. Causey's negligence. More specifically, Plaintiff proved facts that established Dr. Causey's

gross negligence and wantonly. This same evidence was also relevant to, and raised a fact issue with regard to, Dr. Causey's liability for punitive damages.

Appellant contends that evidence which was already presented to the jury during Plaintiff's case in chief, must be re-presented or elaborated upon, following return of the compensatory damage verdict, in order to warrant a punitive damage submission. Mississippi law requires no such thing. If the law truly were as Appellant's suggests, juries would be routinely forced to endure the repetitious presentation of the same evidence they heard during the liability phase of trial. Even worse, plaintiffs would be put to the choice whether to present the most egregious facts in support of liability or hold them back in order to have "additional" evidence of punitive damages. Obviously, Mississippi law does not require either such a result.

Instead, what is required is (1) that potentially confusing and prejudicial facts relevant only to punitive damages be withheld from the jury until a compensatory verdict is received, (2) that a punitive damage proceeding before the same jury commence promptly after the return of a compensatory damage verdict, and (3) that the trial court make a determination that "a reasonable hypothetical trier of fact could find either malice or gross neglect / reckless disregard" before submitting the punitive damage issue to the jury. *Bradfield*, 936 So.2d at 935. The trial court did all of these things. Consequently, the trial court did not abuse its discretion by submitting the issue of punitive damages to the jury. *Bradfield,* 936 So.2d at 936 (A trial court's decision as to whether or not a case warrants the submission of punitive damages is to be reviewed under an abuse of discretion standard).

E. The Trial Court Did Not Err by Denying Dr. Causey's Motion for Remittitur.

It is primarily the providence of the jury to determine the amount of damages to be awarded. Mississippi law clearly provides that a court may not alter a jury's damage award unless the court finds that:

> the damages are excessive or inadequate for the reason that the jury ... was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence.

MISSISSIPPI CODE SECTION 11-1-55 (Rev.2002). Thus, remittitur is only available when the court finds evidence of jury bias, prejudice, or passion, or where the award is against the overwhelming weight of evidence. *Id.; Teasley v. Buford,* 876 So.2d 1070, 1077 (Miss. Ct. App.2004) (jury award will not be set aside unless it is outrageous and unreasonable). In other words, a damage award will normally not be set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous. *Harvey v. Wall,* 649 So.2d 184, 187 (Miss. 1995).

In deciding if the burden has been met, the appellate court must look at the evidence in the light most favorable to the party in whose favor the jury decided, granting that party any favorable inferences that may reasonably be drawn therefrom. *Id.* Here, the evidence demonstrates that the trial court acted within its discretion in refusing Appellant's motion for remittitur. The standard of review for the denial of a motion for remittitur is abuse of discretion. *Burge v. Spiers,* 856 So.2d 577, 580 (Miss. Ct. App.2003), *Entergy Ms. Inc. v. Bolden,* 854 So.2d 1051, 1058 (Mis.. 2003).

1. The jury's damage award is supported by the evidence.

Appellant erroneously implies that the jury's award of $4,000,000 was solely to compensate the family for $6,300 in funeral expenses. [Appellant's Br. p. 33]. The record

demonstrates otherwise. Compensation in a wrongful death action is not limited to actual damages and lost wages, but extends to the pain and suffering of the deceased, as well as the loss of companionship and society. *Delta Regional Medical Center v. Venton,* 964 So.2d 500 (Miss.,2007.).

Members of Ersel Allen's family testified as to the relationships they had with their mother, grandmother and sister. T. 365; 370-372; 377-378; 381-383. Simply stated, substantial evidence was offered at trial that Ms. Allen's premature death deprived her family of the love, society, companionship and affection they would have otherwise enjoyed with Ms. Allen.

Appellant attempts to downplay the family's loss by arguing that Ms. Allen had as little as six months to live. [Appellants' Br. p. 34]. While the defense did present opinion testimony that Ms. Allen had less than a six month life expectancy, it was the expert opinion of Dr. Perry Hookman that Ms. Allen would have lived an additional seven years but for the Dilaudid overdose.[2] Ex. D-41. For purposes of reviewing the trial court's denial of remittitur, evidence of Ms. Allen's life expectancy must be viewed in the light most favorable to the Plaintiffs. *Harvey,* 649 So.2d at 187. Thus, this Court must presume that the jury's damage award contemplates seven years of lost society for Ms. Allen's family.

Moreover, Appellant is mistaken in focusing on the ratio of the funeral expenses to the total compensatory damage award. The Mississippi Supreme Court has held that "there is no mathematical formula by which [wrongful death] damages can be ascertained. Each case must stand and depend upon its own facts." *Illinois Central Railroad Co. v. Nelson,* 245 Miss. 395,

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2 Appellant acknowledges that the expert testimony offered at trial indicated that Ms. Allen could have lived as much as seven years longer. [Appellant's Br. p. 32].

146 So.2d 69, 73, 148 So.2d 712 (4 A.L.R.3d 1217) (1962). "The matter of damages in each case must be reviewed on the basis of the particular facts involved." *Id.*

The law has placed the task of assessing damages in the hands of the jury. Where (as here) ample evidence exists to support the jury award, this Court should decline to substitute its judgment for that of the jury.

F. The Trial Court Did Not Err By Declining to Instruct the Jury Regarding "Chance of Recovery."

The "loss of chance" theory of recovery is an alternative approach to causation. The "loss of chance" theory comes into play where a medical provider's negligence does not *cause* a patient's injury or death but does hinder the patient from achieving reasonably probable and substantial recovery from the injury. That circumstance is not presented by this case. Dr. Causey is not alleged to have hindered Ersel Allen's recovery. He is alleged to have affirmatively *caused* her death by administering a fatal overdose of Dilaudid. Traditional causation principles applied and were proven to the satisfaction of the jury and trial court. Appellant cannot find error in the trial court's refusal to instruct the jury on a lesser, inapplicable "loss of chance" causation standard, where the jury was properly instructed on the more rigorous traditional causation rule.

1. About the loss of "chance" theory of causation.

The loss of chance doctrine permits recovery of damages for the reduction of prospects for achieving a more favorable outcome. It most often arises in failure to diagnose cases; but it has also been applied in similar instances where a patient who is already ill or injured claims medical malpractice prevented him from achieving a better recovery. The effect of the doctrine is that it alters the traditional "more likely than not" burden of proof. Under loss of chance, a patient that has a less than fifty percent chance of survival can still obtain recovery for malpractice that deprives him

of a better outcome - despite the fact that the underlying disease, and not the malpractice, is "more likely than not" the cause of their condition or death.

Mississippi has adopted a restrictive version of the loss of chance doctrine. While refusing to compensate all diminished opportunities for recovery, Mississippi law permits the recovery of damages "when the failure of the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition." *Ladner v. Campbell,* 515 So.2d 882, 888-89 (Miss.1987), *citing, Clayton v. Thompson,* 475 So.2d 439, 445 (Miss.1985)). In other words, plaintiffs must show that "proper treatment would have provided the patient 'with a greater than fifty (50) percent chance of a better result than was in fact obtained.' " *Ladner,* 515 So.2d at 889 (citing 54 A.L.R.4th 10 § 2[a]). Many other courts have adopted the same rule, often enunciated as follows: "[A]dequate proof of proximate cause in a medical malpractice action of this type requires evidence that in the absence of the alleged malpractice, a better result was probable, or more likely than not." 54 A.L.R. 4th 10 § 4.

2. This is not a hindered recovery case – it is a caused death case.

The obvious flaw in Appellant's argument is that Dr. Causey is not alleged to be liable for hindering Ersel Allen's recovery. Indeed, Appellant concedes that Plaintiff "presented no evidence at trial regarding Ms. Allen's chance of recovery [other than evidence of life expectancy]." [Appellant's Brief p. 37]. Instead, Dr. Causey was argued to be liable for administering to Ms. Allen an excessive dose of Dilaudid that exceeded that resulted in her death. Dr. Causey did not merely diminish Ms. Allen's chance of recovery, he *caused* her death.

Throughout the trial of this cause, Plaintiffs focused upon the overdose of Ersel Allen. It was Appellant who repeatedly attempted to muddy the waters and confuse the jury with regard to proximate cause by constantly spotlighting the misdiagnosis by UMMC. It was Plaintiffs' position

throughout the trial, that while UMMC may have misdiagnosed Ms. Allen, she did not die from the misdiagnosis. At the most, the misdiagnosis is relevant because it lead to Ersel Allen's being placed in Dr. Causey's care as a hospice patient. But the point remains that Dr. Causey's administration of a fatal dose of Dilaudid was alleged, and proved, to be the proximate cause of Ms. Allen's death. The overdose did not hinder Ms. Allen's recovery. It caused her death. Thus, the trial court correctly recognized that the doctrine of "lost chance of recovery" has no application in this case.

3. The Trial Court properly instructed the jury on causation.

Because it permits recovery even where the wrongful act is not the cause-in-fact of a plaintiff's death, "loss of chance" is a less-onerous theory of causation. Traditional causation, on the other hand, requires proof that the death would not have occurred "but for" the wrongful act. The trial court correctly instructed and charged the jury regarding traditional causation. Thus, even if it were applicable (which it is not) there could be no harmful error in the submission of a greater-than-necessary causation standard.

The trial court charged the jury with the following non-exclusive instructions concerning "causation" in this case:

> In order to be a proximate cause, the negligence of the defendant must be a substantial factor in producing plaintiff's injury. If the plaintiff would have been injured even if the defendant had not been negligent, then the defendant's negligence is not a substantial factor and not a proximate cause.
>
> ***
>
> You are instructed that the burden is on the plaintiff to prove through expert testimony that that the commission or omission of some act or treatment of Ersel Allen by Dr. Causey was negligent. And that said negligence was the sole proximate cause or contributing proximate cause of the death of Ersel Allen and other damages, if any, which may have been suffered by Ersel Allen and the plaintiffs.

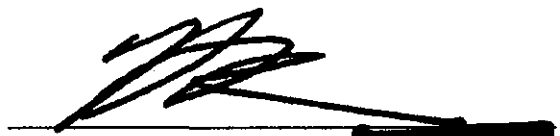
T. 987; 988.

Clearly, the trial court provided the jury with the appropriate law in this State with regard to proof of a prima facie case of negligence, and Appellant makes no argument to the contrary. The jury ultimately found that Plaintiffs satisfied the burden that was imposed upon them in this case. They proved that Ersel Allen's death would not have occurred when it did "but for" the wrongful acts of Dr. Causey. Once again, it is abundantly clear that the jury chose to believe Plaintiffs' experts when they testified that although Ms. Allen suffered from other medical conditions, it was the overdose of Dilaudid that killed – not cancer, not coronary artery disease, nothing else buy the Dilaudid that was administered to her by Appellant herein. This is not a case where Plaintiffs sought to prove that Dr. Causey's malpractice was due to the fact that he simply got a bad result relating to his treatment of Ms. Allen. Plaintiffs proved, through multiple, credible and highly credentialed experts, that Appellant breached the standard of care he owed to Ersel Allen, and that the breach was the proximate cause of Ersel Allens' death. Appellant's argument in this last section of the brief reiterates his unfounded position that his experts were more believable and that their testimony should have been given greater weight by the jury. As set forth herein above, this argument is without merit. Appellant failed to establish that the trial court committed error with respect to the instructions it gave to the jury in this case.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the appeal of William A. Causey, M.D., is due to be denied.

RESPECTFULLY SUBMITTED, this the 14th day of January, 2008.



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CERTIFICATE OF SERVICE

I, Richard A. Freese, certify that I have this day served a copy of this Brief of Appellee, by United States mail with postage prepaid on the following persons at these addresses:

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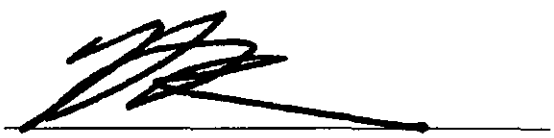
This the 14th day of January, 2008.



Richard A. Freese