IN THE SUPREME COURT OF MISSISSIPPI

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

V. **CASE NO. 200[redacted]-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 APPELLANT

ORAL ARGUMENT REQUESTED BY APPELLANT

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Dr. Causey respectfully requests oral argument. Pursuant to Rule 34 (b) of the Mississippi Rules of Appellate Procedure, Dr. Causey suggests that oral argument will assist the Court because of the complexity of medical testimony in this case, and because of the socially important issue of end of life care.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant certify that the following listed persons and entity 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 Sweet
2. Richard 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. William A. Causey, M.D.
12. The Honorable Tomie T. Green

Joseph Leray McNamara
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STATEMENT OF ISSUES

I. Whether the Court erred in allowing Appellee's unqualified experts to testify as to the standard of care applicable to Dr. Causey and to Hospice?

II. Whether the Court improperly limited the testimony of the defense experts?

III. Whether the Court committed reversible error in failing to allocate fault to the University of Mississippi Medical Center, a settling defendant, whom Appellee's expert opined to be negligent?

IV. Whether the Court erred in automatically submitting the issue of punitive damages to the jury simply because compensatory damages were awarded?

V. Whether the Court erred in denying Dr. Causey's Motion for Remittitur?

VI. Whether the Court erred in failing to instruct the jury as to Mississippi law regarding "chance of recovery"?

STATEMENT OF THE CASE

A. FACTS

This is a medical negligence/wrongful death action brought by the beneficiaries of decedent, Ersel Allen. Ms. Allen was admitted to the University of Mississippi Medical Center ("UMMC") on April 27, 2001, and was diagnosed with a tumor at the head of the pancreas and severe chronic obstructive pulmonary disease. Exhibit D-29, p. 623 (UMMC Discharge Summary). While at UMMC, Ms. Allen went through numerous procedures and was cachectic having lost twenty pounds over the preceding months prior to her admission to the hospital. *Id.* at 623. She was consulted with and treated by numerous physicians who finally determined that UMMC had nothing further to offer her. She underwent pain service and was discharged to Hospice Ministries, Inc., a non-profit faith-based ministry, a fact which the Court refused to allow the jury to hear. T.33[1] (ruling on Motion *in Limine*).

On June 12, 2001, Ersel Allen was discharged from UMMC and transferred to Hospice Ministries, Inc. Exhibit D-29, p. 623, Discharge Summary of UMMC. Although Ms. Allen was discharged with a diagnosis of tumor on the head of the pancreas and although cancer of that tumor had been suspected, this fact was never confirmed by tissue diagnosis. David Duddleston, M.D., an internist and physician at the University of Mississippi Medical Center testified at trial,[2] T.889-895, that Ms. Allen had an obstruction in the bile duct which was identified by UMMC physicians and surgery was considered, but after consultation with the family, surgery was deemed inadvisable.

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1 References to Trial Transcript will be cited as T.___; References to Trial Court Record will be cited as R.___; and References to Record Excerpts will be cited as R.E.___.

2 Dr. Duddleston's deposition was marked for identification as Exhibit D-60. *See also* exchange between the Court and Counsel for the Defense beginning at T.874.

T.897. Dr. Duddleston characterized Ms. Allen as cachectic, meaning she was "wasted, very, very malnourished; sunken cheeks, shrunken head, shriveled extremities, no fat anywhere. Very malnourished is another term for that. She was in pain . . . she looked much older than her stated age. She looked like she was eighty to me." T.888. The UMMC physicians decided that hospice care was the best course for her which would provide her with comfort and pain medication, and it was also determined by Dr. Duddleston that she had less than six months to live regardless of whether her pancreatic tumor was cancerous. T.914.

Upon her June 12, 2001, admission to Hospice, Ms. Allen was on Morphine. Exhibit P-4, p. 892. Her narrative summary on admission by Defendant, Dr. Causey, is Exhibit P-25. Diagnosis was "tumor at the head of the pancreas and severe COPD (chronic obstructive pulmonary disease). Dr. Causey commented that Exhibit P-25, p. 993, stated "patient has a rapidly growing tumor at the head of the pancreas that is inoperable. She has declined significantly during her hospital stay and her dependence on the staff has escalated precipitously. She has had the optimal therapy for illness and is now requiring palliative care." The discharge orders from UMMC, Exhibit P-27, refer to a tumor at the head of the pancreas, and to label her chart "do not resuscitate."

A physician determination of terminal illness, Exhibit P-26, signed by Dr. Causey and UMMC physician Dr. Duddleston, states that Ms. Allen had an expected life of six months. She and her family understood the scope of hospice, that it was to provide palliative care, and that it was not expected to rediagnose and cure her. The admission agreement to Hospice was signed by Reitha Sanders, her daughter, and the person who filed this lawsuit. Exhibit P-23. Among other things stated is that the illness was not curable and that attempts to control her disease continued, but that the primary goal of care for Ms. Allen was the comfort and relief of pain and suffering. *Id.*

Dr. Causey was, at the time of Ms. Allen's admission in Hospice a board certified internist and infectious disease specialist. *See* 30(b)(6) deposition testimony of Dr. Causey, read to the jury, Exhibit D-54 for identification, p. 9. He provided medical oversight to hospice care which is essentially and primarily nursing care. *Id.*, p. 12. Dr. Causey, based upon the documents provided to him, believed that the patient did have pancreatic cancer. *Id.*, p. 21-22. He testified that he understood that the autopsy report failed to reveal that she had pancreatic cancer, Exhibit D-54, p. 22, and that he believed regardless of whether she had a "diagnosis of pancreatic cancer, that she had a life expectancy of less than six months." *Id.* at 25. On July 6, Ms. Allen was changed from Morphine to hydromorphone (Dilaudid) because Dr. Causey and staff believed that her pain relief could be accomplished with fewer side effects. The principal factor in changing dosages of pain reliever was the degree of pain relief to achieve balanced against "excessive sedation or suppression of respiratory activity." *Id.* at p. 35.

While at Hospice, her Dilaudid dosages were increased under the direction of Dr. Causey. While there are recommended dosages for the use of Dilaudid, Morphine and other opiates in an acute-care setting such as a hospital, there is no upper limit on an amount that a person can take in the hospice pain-care situation. *Id.* at p. 35 and Testimony of Gerry Ann Houston, M.D., oncologist, internist and specialist in palliative care at T.563.

See Topics in Palliative Care, Exhibit D-39, R.E.11, referenced by Dr. Houston in her testimony at T.563-564, makes clear how dosages are determined. She noted that sometimes, as verified by the article, one patient may require fifty times the amount of pain medication as the other. Further, she explained that if a patient exhibits pain, the dosage should be increased, whereas sleepiness and respiratory depression would dictate a decrease in the dosage. T.565.

The nursing progress notes of Ms. Allen while at Hospice, Exhibit D-43, give a detailed course of her treatment and changes in medication. They reflect increases in pain medication throughout her stay. By July 20, 2001, her pain medication had been increased for the last time. Exhibit D-43, p. 942. A reading of the record of the last few hours of her life, during which time she was getting this dosage [which Plaintiff's experts refer to as "lethal" (18 milligrams per hour with a 4 milligram bolus of Dilaudid)] demonstrates that Ms. Allen was not overdosed. Rather, the records reveal that the balance was being maintained between pain relief and respiratory depression during this time, which is the standard of care for dosing in a hospice care setting. The medical record reflects Ms. Allen continued to have labored breathing, continued to talk, understood what was going on and was asking to die. In fact, on the evening before her death, shortly after midnight, her daughter was requesting a sleeping pill. Exhibit D-43, pp. 944-946. Thus, there was absolutely no evidence of overdosing.

Steven Hayne, State Medical Examiner, performed the autopsy, and after sending off blood samples to a toxicology laboratory, concluded that she died of a Dilaudid overdose. His preliminary conclusion had been that she had died from coronary artery disease, hypertensive heart disease and emphysema. T. 244. Dr. Hayne testified that the 6,900 nanograms per milliliter was a toxic amount, and that he had never before seen that amount. T. 226-227. His report showed no evidence of the tumor on the head of the pancreas. T. 227.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The Plaintiff's Complaint, filed in the Circuit Court of the First Judicial District of Hinds County, Mississippi, named a number of Defendants, including UMMC, Hospice Ministries, Inc. and the Appellant, William A. Causey, M.D. First Amended Complaint; R.14-20. There were two

major thrusts to the Complaint, the first being that UMMC misdiagnosed Ms. Allen as having a malignant tumor of the pancreas; that UMMC erroneously determined that Allen had less than six months to live and that UMMC negligently recommended Allen's discharge to Hospice Ministries, Inc. "a care center for terminally ill patients." R.16-17. The second point raised in the Complaint was that "Hospice Ministries, Inc. through its employees, agents, doctors, nurses and/or medical staff, breached the standard of care (1) by administering Dilaudid to a non-terminally ill patient; (2) failing to properly monitor the amount of Dilaudid; and (3) giving an amount sufficient to cause Ms. Allen's death. R.18, ¶22. The Complaint sought actual and punitive damages against all Defendants.

UMMC treating physicians Drs. Williams and McClusky, and Hospice employee D. Daniel, R.N., were voluntarily dismissed, and UMMC was dismissed pursuant to a settlement agreement. R.4, R.13. The case proceeded to trial against only Hospice Ministries, Inc. and Dr. Causey, Medical Director of Hospice who was responsible for Ms. Allen's medical care while in Hospice. Dr. Causey was not present at trial. He was serving time in a federal facility for conviction on a charge unrelated to his medical practice. While the jury was deliberating, a settlement was reached as to Hospice. T.1026. The jury returned a verdict in favor of the Plaintiff in the amount of Four Million Dollars compensatory damages. Exhibit C-3 and R.493-494. The Court proceeded to automatically submit the matter to the jury on punitive damages as to Dr. Causey, and the jury returned a verdict for punitive damages in the sum of $500,000. Exhibit C-7 and R.493-494.

A final judgment on the jury verdict was entered setting forth the actual damages verdict of $4,000,000, the punitive damages verdict of $500,000, offset by amounts received in settlement from UMMC and Hospice. The judgment entered and appealed from is $3,485,000. R.493-494; R.E. 8.

Defendant, Dr. Causey, has perfected his appeal properly, and was denied relief on all of the following post-trial motions: Motion for Judgment Notwithstanding the Verdict, Motion for New Trial and Motion for Remittitur and/or to Strike Punitive Damages. R. 553, R.E.10.

SUMMARY OF THE ARGUMENT

The Court erred in allowing Drs. Garriott, a toxicologist with no clinical experience, and Hookman, a gastroenterologist only vaguely familiar with hospice care and not at all familiar with this particular Hospice, to testify as to the standard of care applicable to Dr. Causey and Hospice. Likewise, the Court erred in failing to recognize that the Appellee's evidence and testimony regarding cause of death were flawed under Miss. R. Evid. 702, adopted in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). These experts did not qualify by reason of education, training and experience to attest as to the standard of care for treating opioid habituated patients in the chronic pain management setting, and their testimony did nothing but confuse and mislead the jury. Their testimony was based on selective and rather casual medical reading, all of which wholly ignored literature on pain management.

The Court further erred in failing to instruct the jury regarding allocation of fault to a settling defendant, UMMC and in automatically submitting the issue of punitive damages to the jury simply because compensatory damages were awarded. Further, the trial court committed error in denying Dr. Causey's Motion for Remittitur of this $3,485,000.00 verdict. The Court committed reversible error in failing to instruct the jury as to Mississippi law regarding "chance of recovery" as the jury should have known that a plaintiff in this state cannot recover if there is no reasonable probability of substantial improvement in the decedent's condition.

ARGUMENT

I. Whether the Court Erred in Allowing Appellee's Unqualified Experts to Testify as to the Standard of Care Applicable to Dr. Causey?

The Plaintiff's experts testified that the amounts of Dilaudid given to Ms. Allen were in excess of the recommended dosages. Each of these witnesses utilized publications regarding dosing which has no application to a patient in a chronic pain setting such as in a hospice. *See* testimony of Dr. Hookman, D-41, pp. 105-106, testifying using the Vistas Innovative Hospice Care Ruler. Toxicologist James Garriott testified from the *Micromedix* on-line manual. T.281. These witnesses testified that two to four milligrams of the pain killer every four to six hours was a proper dosage which is in strong contrast to what Ms. Allen received.

On the other hand, Defendants' experts testified that the amounts given were proper, and that the dosages which the Plaintiff stated to be the standard would have been ineffective, and that the proper dose is, in effect, whatever amount eliminates the pain. Testimony of Gerry Ann Houston, T.563. Dr. Houston also testified that the amount recommended in the *Physicians' Desk Reference* and the other publications or slide rulers would not be used. T.568. Dr. Melvin Gitlin, a pain specialist from Tulane University, testified that the dosages recommended by the Plaintiff's experts of two to three milligrams every four to six hours would not have been within the standard of care. T.656-658. Dr. Gitlin testified that had the Appellee's recommended dosage of Dilaudid been given on July 6, 2001, the date when Dilaudid was first given, Ms. Allen would have been in severe pain and begun to experience withdrawals. T.656.

There is a great disparity between what the Plaintiff says is the standard and what the standard truly is in a hospice care setting. Hospice care and palliative medicine is a recognized

specialty. There is a standard of care unique to it, which was wholly ignored by the Court. Plaintiff's experts were, in truth, unfamiliar with the standard of care, unknowledgeable in the standard of care, and as such, should not have been allowed to testify. Not only had they no hospice experience, they had not even read on the subjects that deal with administering hydromorphone to chronically ill patients. Had the Court properly exercised its duties to act as a gatekeeper of expert testimony, a directed verdict would have been proper in favor of Dr. Causey.

Ersel Allen was a patient at UMMC from April 27 until June 12, 2001. In spite of an extensive course of treatment by numerous physicians at UMMC, her treating physicians determined that she had less than six months to live and that there was nothing further that could be done for her. *See* testimony of David Duddleston, M.D., T.908. Dr. Causey was Medical Director of the Hospice who accepted her for hospice treatment, relying upon the opinion of the referring physicians as to shortness of her life. Causey Dep., Exhibit D-54, p. 46.

Dr. Causey is an internist who is board certified in internal medicine and infectious disease. Causey has been with Hospice since 1990 and prior to that, he had treated hospice patients. Exhibit D-54, pp. 9-10. He was the physician who determined, with the assistance of Hospice nurses and its pharmacist, the amounts of pain medication to be administered to Ms. Allen, a terminal patient, during her time in Hospice. *Id.* Dr. Causey and other physicians and staff at Hospice were engaged in the practice of palliative medicine, a specialty which the Court refused to acknowledge with unfortunate consequences to Dr. Causey.

The treatment of terminal patients in the hospice setting bears no resemblance to the treatment of a patient in an acute care hospital, who is receiving an initial dosage of an opioid. Plaintiff convinced the Court and the jury to the contrary. For example, see the Court's ruling, T.

555, regarding the testimony of a defense expert, Dr. Gerry Ann Houston, board certified in "Hospice and Palliative Medicine." Exhibit D-52. When tendered as an expert in, among other things, "the care of terminal patients," the Court noted that it did not consider the treatment of terminal patients as a separate specialty, but that it was encompassed within oncology. T. 557. The Court's pronouncement would no doubt come as a surprise to the governing bodies and members of the American Board of Hospice and Palliative Medicine and the American College of Pain Medicine. Exhibits D-52, D-53. Dr. Melvin Gitlin of Tulane University Medical Center, a defense expert, was likewise tendered as an expert "in the field of pain management of terminal patients," and although he was Board Certified in Pain Management and Pain Medicine, the Court stated that it would qualify him in the area of anesthesiology which covers "the aspects I believe of pain management." T.635. Dr. Gitlin has taught and published extensively on the use of opioids in the treatment of chronic pain. Exhibit D-53. He is a Fellow of the American College of Pain Medicine, a Diplomate of the American Board of Pain Medicine, and holds a sub-specialty recertification in pain medicine from the American Board of Anesthesiology. *Id.*

Dr. Gitlin testified as follows regarding the difference between a hospice and a hospital: "Whereas a traditional hospital is set up to treat illness, a hospice is set up to provide end-of-life care which would otherwise be very difficult for people to obtain in other circumstances thereabout making . . ." T.641. An objection was made about Dr. Gitlin testifying as to the difficulties of obtaining similar treatment elsewhere which was sustained by the Court which stated: ". . . <u>because it doesn't make any difference whether it's a hospital or a hospice</u>." T.643 (emphasis added).

Dr. Michael Byers, Co-Medical Director of Hospice, an infectious disease specialist and internist, was also offered as a defense expert witness "in the care of patients in a hospice setting and

as an infectious disease specialist and internist." The Court qualified him "as an expert in the area of internal medicine and infectious disease to include within that his treatment of terminally ill patients, but went on to say, "in terms of the area of an expert in a hospice, the Court finds that it is not a part of his expertise even though it is a job that he now holds." T.797. The Court again refused to recognize that treatment of a terminal patient in a hospice setting is a unique branch of the practice of medicine.

Three physicians, Drs. Houston, Byers, and Gitlin, all experts in pain management and palliative care, testified that there was no limit on Morphine or Dilaudid in the treatment of a terminal patient. Dr. Houston testified at T.563 that the proper dose is whatever it takes to get rid of the pain. Later, she cited from *Topics In Palliative Care*, Exhibit D-39, stating that, "[T]here is no maximum safe dose of Morphine and other pure immuantagonist opioids." T.564, R.E.11. After noting that Dilaudid, the drug in question, was one of those opioids, she again quoted from the exhibit *Topics*: "Inner patient variance of up to fifty fold has been reported for the dose of Morphine required to provide relief, and noted that the same would be true as to Dilaudid." She also stated that Exhibit D-40, *The Management of Cancer Pain* supported her testimony. R.E.27. This source stated, "A minimum effective analgesic dose, ceiling dose, or toxic dose for any individual patient with cancer pain is unknown." T.567. Dr. Gitlin likewise testified that there is no literature which reflects that there are ceiling doses or toxic dosages of Dilaudid for terminal patients. T.658. Michael Byers testified that the principal factor one looks at in treating a terminal patient is achieving pain control, and that there was nothing unusual about the amounts of medication given to Ms. Allen in this setting. By contrast, the expert witness for the Plaintiff, Dr. Perry Hookman, a gastroenterologist, based his opinions upon reference to the *Physician's Desk Reference* and to a

chart which he produced, neither of which provides guidelines for treating terminal patients habituated to opioids.

Dr. Causey understands and appreciates that a jury is free to choose between the opinions of experts, but those experts must be qualified. Plaintiff's experts were not. Their experience should be weighed against experts offered by Dr. Causey. Dr. Hookman, who testified by deposition, Exhibit D-41 for identification, had no experience in the hospice setting, no experience treating patients in chronic pain management setting, and he used data, publications and information related to patients with acute pain. In other words, he opined that a hospice patient should be treated no differently than a patient in a hospital.

The issue here is the standard of care which applied to a physician treating terminal patients in hospice; the mission of hospice is to provide pain management and palliative care for the dying. Dr. Hookman, while a nicely credentialed gastroenterologist, admitted that he is on the staff of one hospital which is not a hospice, Hookman Depo., Exhibit D-41, p. 13, line 9; that he's never been a medical director of a hospice, D-41, p. 75, line 23; that he has never been to the Hospice at issue, and that he was not aware of the general facilities, services, equipment, and options available to Hospice when Ersel Allen was treated there. D-41, p. 76, line 4.

When asked to explain his current practice, Dr. Hookman said that he sees patients in hospitals and the gastroenterology clinic, but never treats patients in a hospice setting. D-41, p. 11, line 6-13. When asked about his experience with hospice patients, he said he had "worked with hospice patients" meaning that "before they die to check in on them to see how they are doing." D-41, p. 30, lines 23-25. When asked if he was familiar with the standard of care as it relates to the acts of Dr. Causey, Dr. Hookman, at page 23, line 23, testified that, "Yes. Dr. Causey is certified

. . . board certified internist, as I am, and had special duties to his patients so that I know *approximately* what the standard of care is for him." D-41, p. 24, lines 3 to 7. *See Cheeks v. Bio-Medical Applications, Inc.*, 908 So.2d 117 (Miss. 2005) ("physician must be sufficiently familiar with the standards . . ." ¶¶ 8-12). By Dr. Hookman's own admission, he is not *sufficiently* knowledgeable of the standard and should never have been allowed to testify. He certainly is not qualified to be a hospice physician. Not only did he testify that Dr. Causey breached the standard of care, and that the Hospice breached the standard of care, but he testified that Dr. Causey and Hospice should have second-guessed the determinations of UMMC as to the terminal nature of Ms. Allen, D-41, p. 80.

The error of allowing Dr. Hookman to testify as to the standard of care in a hospice setting is sufficient alone to require setting aside the judgment. However, even more egregious is the Court's permitting James Garriott, a toxicologist to be called as a witness for Appellee, to testify as to the standard of care. Garriott, a Ph.D., not an M.D., began his testimony discussing deaths from Dilaudid which he had read about in an article. Then, he began testifying as to a *Micromedix* publication, which he found on the Internet, and which sets forth recommended painkiller dosages for *acute* patients. T.274-278. Garriott was asked by counsel for the Plaintiff if he had an opinion "to reasonable medical and scientific certainty" as to the cause of death of Ersel Allen. T.302. Following an objection as to the term "*medical* probability," Garriott was allowed to plow ahead and state his opinion to a "reasonable professional certainty." In spite of the change in semantics, Garriot was clearly expressing a medical opinion. The following questions by counsel for the Plaintiff at T.316 reveal this toxicologist's lack of qualifications:

> . . . Do hospices – have you read enough literature on Dilaudid to make yourself familiar with if a hospice has a different standard of dosage? I'm not talking about standard of care, but if they have different things they read to tell how much to give a patient than what you've testified today?

Following an objection, Garriott answers only by stating cryptically, "Well, I guess the answer would be or at least I would think I would have to answer yes. I have read." Then, he is questioned as to whether there were different dosage charts for hospices. This toxicologist testified that the documents which he reviewed did take into account cancer patients and tolerant patients, and then he asked himself a question: "And so how can hospices treating cancer patients or dying patients, how can they have many different guidelines?" He then answers and disqualifies himself as follows:

> I never worked in a hospice and I never, you know, I've not seen literature from hospices, but I can't think – if they are medical facilities, I can't see how they would be exempt from any of the standard medical guidelines.

T.318. Thus, the jury heard this damning standard of care testimony from someone who is neither a physician nor familiar with a physician's care in hospice. On cross-examination, Garriot said that he had not studied hospice care as a separate field. T.324. He was then questioned about exhibit for identification number D-39, *Topics In Palliative Care*, and Exhibit D-40 for identification, *Management of Cancer Pain*, T.325, and asked if he agreed or disagreed with any expert who said, "That in a hospice setting, that is in the treating of a dying patient that there was no such thing as a maximum safe dose." T.325-326; R.E.11 and RE.27. Garriott's response was that "as a toxicologist" he could not agree with such a statement. Therefore, a toxicologist with only a Ph.D. and absolutely no experience in a hospice or the treatment of patients, dying or otherwise, was allowed to testify that the amount of Dilaudid given to Ms. Allen was in excess of the standard dosages and was the cause of this patient's death.

In order to testify as an expert, the tendered expert must be familiar with the standard of care applicable to a specific specialty. *Cheeks*, 908 So.2d 117 (Miss. 2005). In *Cheeks*, this Court examined the issue of what expert is qualified to testify against whom. This Court stated that Plaintiffs' expert, a family physician, was required to be familiar with the standard of care to which a dialysis clinic, nephrologist and radiologist would be held, citing *McCaffrey v. Puckett*, 784 So.2d 197, 203 (Miss. 2001). The *Cheeks* Court reviewed the failings of the proffered expert in that case who was seeking to testify as to the standards of care which existed in a dialysis laboratory.

Dr. Hookman has similar deficiencies discussed above; that is, he has not worked in a hospice, has not been a medical director of hospice, has not rendered care in the field of pain management or palliative care, and testified simply that the standards should be no different than in other situations. D-41, p. 31, lines 15-18. Hookman said he "had been around people who work in hospices . . .", *Id.* at lines 7-8, and, therefore, claimed to be familiar with the standards of care, which he said should be no different than in an acute care facility. *Id.* at lines 15-18. Note that in *Cheeks*, the Court stated that the physician who is "sufficiently 'familiar with the standards of [a medical] speciality and [may testify as an expert, even] though he [does] not practice the specialty himself.'" The addition of the word "sufficiently" is significant. It is not enough for an expert to testify he is merely "familiar" with the standard of care, but he must demonstrate he is "sufficiently familiar" with the standard of care so that the testimony will assist the jurors rather than mislead or confuse them. *Cheeks*, 908 So.2d at ¶¶ 8-12. Mislead or confuse is exactly what happened by the testimony of Dr. Hookman. The request to limit or exclude his testimony was made pretrial and denied. It was beyond doubt when this trial started that this testimony would be severely prejudicial to Dr. Causey. *See* Motion to Strike or Limit Expert Testimony. R.442.

In *Bowman v. CSX Transp.*, the Mississippi Court of Appeals echoed the rationale established by *Cheeks*, holding, "a witness may testify as an expert if 'qualified by virtue of his or her knowledge, skill, experience or education,' but only if 'the witness's scientific, technical or other specialized knowledge [will] assist the trier of fact in understanding or deciding a fact in issue.'" 931 So.2d 644, ¶ 35 (Miss. App. 2006), *quoting* Miss.R.Evid. 702. The *Bowman* Court also held "the trial judge has the gatekeeper function of determining 'the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge.'" *Id.* (*quoting* Miss.R.Evid. 702, comment). The most recent opinion of our Mississippi Supreme Court on expert qualifications is *Troupe v. McAuley*, which closely follows *Cheeks*, and affirms the trial judge's refusal to allow a neurosurgeon to testify against a neuro-otolaryngologist. 955 So.2d 848 (Miss. 2007). *Troupe* discussed the fact that the tendered expert witness was not actively practicing medicine, which of course, is not applicable here. The neurosurgeon, who was not permitted to testify, had no special training or experience in the field of otolaryngology or neuro-otolaryngology, had never conducted the type of surgery in question, was not qualified to conduct the type of surgery and had not written any articles or done any presentations relating to sub-specialty fields of otolaryngology or neuro-otolaryngology. Dr. Hookman is, likewise, not qualified to critique Dr. Causey. Without properly qualified expert testimony, the case against Dr. Causey should have been dismissed when Plaintiff rested. *See, e.g.* T.409 (Argument of Defense Counsel on Motion for Directed Verdict).

II. Whether the Court Improperly Limited the Testimony of Defense Experts?

While the Court allowed Plaintiff's unqualified experts to discuss at great length dosages for acute patients, the Court would not allow the defense experts to discuss standard dosages for chronic patients. Plaintiff's experts discussed dosages which were recommended in the *Physician's Desk*

Reference or other publications and which were inapplicable to chronic patients such as Ms. Allen. *See* argument of counsel before the Court pretrial at T.33-37. The Plaintiff sought to prevent the Defendant from arguing that patients other than Ms. Allen had been administered similar or higher dosages of Dilaudid without dying. T.33, argument of counsel for Plaintiff. The Court ruled consistently that such testimony had to be limited to another patient who had the exact same condition as Ms. Allen and, in fact, said "no expert needs to be talking about higher dosages for someone who did have cancer if the proof in this case is that she doesn't." T.36. There was a dispute as to whether or not Ms. Allen had cancer. *See* testimony of Gerry Ann Houston, T.560. Dr. Houston stated that she felt that the patient did have pancreatic carcinoma.

The jury heard from numerous experts on behalf of the Plaintiff that a proper dosage was that of two to four milligrams every four to six hours.[3] Testimony of James Garriott, toxicologist who testified for Plaintiff. T.296. Garriott testified that he got his information on dosages from "*Micromedix Healthcare Series,*" an on-line manual used by physicians. From that publication, which he does not use inasmuch as he does not treat patients, he was permitted to testify as to the proper dosages. T.281-282. The Court repeatedly heard what was the "optimum dosage," without regard to the person's condition, chronic or otherwise.

Ronnie Bagwell, the pharmacist who testified on behalf of Hospice, testified that he was a member of the Interdisciplinary Team (IDT) which made decisions for patients, including, specifically, the decedent, Ersel Allen. T.426. The Court, consistent with its rulings of refusing to recognize the uniqueness of hospice care, sustained an objection of Plaintiff that Mr. Bagwell be

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3 See p. 11 of Appellant's Brief regarding Dr. Gitlin's opinion as to what that dose would accomplish.

recognized as a specialist in hospice pharmacy. Mr. Bagwell testified in detail regarding the administration of drugs to Ms. Allen, and he testified as to the appropriateness of dosages given to her throughout her Hospice stay. He testified that he disagreed with the statements of Plaintiff's experts that the dosages which were given would be "lethal." T.455. When asked if he was involved in consultation regarding a patient's condition similar to Ms. Allen, Bagwell stated that he had, but despite this, the Court refused to allow him to testify that other patients were getting similar dosages. T.456.

The Court, ignoring Bagwell's role on the Interdisciplinary Team, stated that this witness could not determine whether a person was similarly situated or not. T.462. The most that was allowed was that Bagwell was permitted to state that based upon his experience, the amounts which were given to Ms. Allen were normal; that is, "not outside the normal realm for somebody who has been on narcotics that length of time and was experiencing that level of pain." T.468. Bagwell was also allowed to testify that Ms. Allen received a non-toxic level. However, Bagwell was restricted from stating that there was a patient presently in Hospice on dosages at the level Ms. Allen had received. T.456. *See* discussion which followed by the Court which expresses doubt of this witness' ability to discuss "the treatment of similar patients because he's a pharmacist and not a physician." T.459-460.

This restriction is in sharp contrast to Plaintiff's witnesses being allowed to testify as to the one dose fits all theory which was espoused and freely allowed by the Court. Bagwell, as the pharmacist for Hospice, is the person in the best position to be able to testify that the dosages were not unusual and were, in fact, routine. *See* testimony of Gerry Ann Houston, T.568-569, where she stated that the dosages were within the standard of care, and that she would prescribe those same

amounts. Similarly, Dr. Melvin Gitlin, an expert in anesthesiology and pain medicine from Tulane University, was prohibited from testifying that he would prescribe similar amounts for patients "in same or similar conditions as Ms. Allen." T.658. The objection made was that the witness had not produced records presumably to show that the other patient was similar.

The Court injected its belief that the patient did not have pancreatic cancer, and was "not actually dying initially." T.457. Further, the Court injected its theory that it did not make any difference whether the standard of care was in a hospital or hospice, T.643, and that the only issue in the case was whether there was an overdose, T.962-965. Although the Court and Plaintiff's experts all assumed that an overdose was the only explanation for this patient's death, James Lauridson, M.D., Chief Medical Examiner for the Alabama Department of Forensic Sciences, testified that her cause of death was severe lung disease coupled with pneumonia and pre-existing heart disease, T.721. Dr. Lauridson also explained that Ms. Allen's medical records were not consistent with a finding that she had been overdosed. T.743. The rulings of the Court restricting Dr. Causey's experts would, in and of themselves, warrant reversal, but those rulings, coupled with the gate being held wide open for Plaintiff's experts, amount to extreme prejudice, an further buttress Dr. Causey's arguments to reverse and render in his favor.

III. Whether the Court Committed Reversible Error in Failing to Allocate Fault to the University of Mississippi Medical Center?

UMMC was named as a defendant in this lawsuit and reached a settlement with the Plaintiff prior to trial. R.13. The Plaintiff's Complaint alleged that UMMC misdiagnosed Ms. Allen as having pancreatic cancer; that UMMC erroneously determined that Ms. Allen had a life span of only six months and that UMMC negligently recommended Ms. Allen's transfer to Hospice Ministries,

Inc. R.16-17. In other words, from the very outset of this litigation, the Plaintiff has argued that UMMC misdiagnosed Ms. Allen with cancer, which set in motion her eventual transfer to Hospice.

During the trial of this matter, the jury heard countless references to UMMC's alleged negligence by the Plaintiff and her experts. For example, Plaintiff's expert, Dr. Perry Hookman, testified by deposition that UMMC's negligence was egregious, and that by sending Ms. Allen to Hospice, where there would be no further curative care, UMMC had given Ms. Allen a "death sentence." D-41, Page 110. Dr. Hookman further explained in reference to UMMC as follows:

> I don't want to denigrate the University of Mississippi in any way. They are world class, the people there are allegedly up to standards on everything . . . If this woman was sent to a hospice to die in less than six months, when there was no need to do this, it's like being buried alive.

Id. at pp. 111-112. Dr. Hookman, when asked the specific question of whether he believed UMMC was negligent in their care and treatment of Ms. Allen, stated, "[I]'m saying, if negligence is defined as putting somebody in a hospice to die, then this was negligent, when it was not necessary." *Id.* at p. 109. In addition, volunteered, "Now, I said before, you don't have to be a rocket scientist to tell you -- you who treated her at the University of Mississippi, did, indeed, breach the standard of care." *Id.* at 110. A reading of Dr. Hookman's testimony reveal that he seemed unaware that UMMC had been dismissed from this lawsuit.

Therefore, if the Plaintiff's version of events be accepted as true, the trial court was bound to instruct the jury on the issue of fault allocation to UMMC, an alleged tort-feasor. Despite such an obligation, no instruction was given, and the trial court even ruled that it made no difference whether Ms. Allen was misdiagnosed by UMMC and that the only issue for the jury was whether Ms. Allen was overdosed by Dr. Causey.

In addition to Dr. Hookman's inflammatory statements above, he also explained in great detail that UMMC ran the wrong tests on Ms. Allen during her hospital admission and that had the proper tests been run, she could have been cured. *Id.* at p. 36. Dr. Hookman's precise statement was as follows:

> They [UMMC] did an evaluation on her and came up with the misdiagnosis of pancreatic cancer, in which they were of the mind that she only had six months to live, and then suggested to her at an early time, about May 16th or so, to enter a hospice. That's basically what happened here. There was basically a misdiagnosis. Un-appropriate tests were done; appropriate tests were not done, and the appropriate surgical action was not done, so, basically, this patient died in a hospice of what the pathologist calls Dilaudid toxicity, where she could have been alive right now, had she been treated well.

Id. Further, Dr. Hookman indicated, "[T]hey [UMMC] misinterpreted the imaging; they misinterpreted the X-Ray Department's analysis." *Id.* at p. 91. Also, as is evidenced from Dr. Hookman's foregoing statements, the Plaintiff imputed negligence to Dr. Causey for relying upon UMMC's diagnosis, yet, the jury was not instructed as to UMMC's alleged fault for making this diagnosis in the first place. *Id.* at p. 80.

Mississippi Code Annotated § 85-5-7 (Rev. 2002) provides that the trier of fact should allocate fault to each party alleged to be at fault. *Beverly Enterprises, Inc. v. Reed*, 961 So.2d 40, ¶ 12 (Miss. 2007) (citing *Mack Trucks, Inc. v. Tackett*, 841 So.2d 1107 (Miss 2003)). "In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tort-feasor is immune from damages." Miss. Code Ann. § 85-5-7 (5) (Rev. 2002). Further, this Court has previously explained that "the term 'party' as used . . ." in this statute "refers to **any participant to an occurrence which gives rise to**

a lawsuit, and not merely the parties to a particular lawsuit or trial." *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264, ¶ 44 (Miss. 1999), Emphasis added.

The circumstances involved in *Blailock ex rel. Blailock v. Hubbs* save for the fact that the trier of fact was actually permitted to consider the fault of Southwest Mississippi Regional Medical Center, are identical to those involved in the case at bar. 919 So.2d 126 (Miss. 2005). In *Blailock*, a case alleging medical malpractice in the delivery of an infant with cerebral palsy and other permanent injuries, the plaintiffs originally sued not only the hospital but also the physicians involved in the mother's care. Before trial, the hospital was dismissed by the trial court. During the trial against the remaining doctor-defendants, the plaintiffs' expert testified that the hospital nurses deviated from the standard of care. Despite this, the plaintiffs argued against any mention of apportionment of fault to the hospital. This Court, however, ruled that such a position was "contrary to the apportionment statute and the case law interpreting it." This Court further explained that "[U]nder Miss. Code Ann. § 85-5-7(7), absent tortfeasors who contributed to a plaintiff's injuries 'must be considered by the jury when apportioning fault.'" *Id.*, citing *Smith v. Payne*, 839 So.2d 482, 486 (Miss. 2002) (citing *Estate of Hunter*, 729 So.2d 1264 (Miss. 1999)).

There can be no doubt that the Plaintiff made UMMC a participant to the occurrence which gave rise to this lawsuit as defined by *Estate of Hunter*. While Dr. Causey does not agree with the Plaintiff's assertion of UMMC's negligence, nevertheless, the Plaintiff made this a continuing issue at the trial of this matter as was done by the *Blailock* plaintiffs, and as a result, the fault of UMMC should have been given consideration. By contrast, the trial court refused proposed jury instruction D-8 which was as follows:

IV. Whether the Court Erred in Automatically Submitting the Issue of Punitive Damages to the Jury Simply Because Compensatory Damages Were Awarded?

The jury in this action awarded $4,000,000.00 in compensatory damages and $500,000.00 in punitive damages. R.493-94 and Exhibits C-3, C-7. The Separate Defendant, Hospice Ministries, Inc., settled for $1,000,000.00 prior to the verdict, and the parties agreed that Dr. Causey, as the remaining Defendant, would be entitled to a credit in the amount of Hospice's settlement. R.493-94. Likewise, the parties agreed that Dr. Causey should receive a credit in the amount of $15,000.00 for the previous settlement of UMMC. *Id.* Therefore, the judgment entered against Dr. Causey was in the amount of $3,485,000.00. R.493-94, R.E.8.

After the jury returned its verdict in the compensatory stage of this trial, the Court announced without hearing further argument or proof, that there was "a general (sic) issue of material fact on the issue of punitive damages." T.1014. However, even prior to *voir dire*, the Court had stated its intent in this regard: "I always submit punitive damages to the jury." T.41. Thus, the Court essentially determined that the jury should be allowed to consider awarding punitive damages based on the proof presented in the Plaintiff's case-in-chief. The Plaintiff did not offer and indeed was not required by the Court to offer additional proof or argument demonstrating why this case justified punitive damages. This was clearly error.

In making this ruling, the Court relied on the seminal case of *Bradfield v. Schwartz* and stated that based on this case, "if a compensatory decision is found, it [the issue of punitive damages] would automatically go to the jury without consideration by the Court." T.1014. This statement, however, illustrates a complete misreading of the *Bradfield* case, and indeed, Mississippi's law on punitive damages. The *Bradfield* Court was simply mandating that trial courts follow the procedure

laid out in Miss. Code Ann. § 11-1-65 (Rev. 2002). *See Bradfield*, ¶ 19-24. Under the statutory scheme approved in *Bradfield*, there should always be an evidentiary hearing at the close of the compensatory stage of trial in which evidence related to the conduct of the defendant is presented. *See Bradfield* at ¶ 24. "The totality of the circumstances and the aggregate conduct of the defendant must be examined before punitive damages are appropriate." *Bradfield* at ¶ 17. And, "'In order to warrant the recovery of punitive damages, there must enter into the injury some element of aggression or some coloring of insult, malice or gross negligence, evincing ruthless disregard for the rights of others, so as to take the case out of the ordinary rule.'" *Id.* (quoting *Paracelsus Health Care Corp. v. Willard*, 754 So.2d 437, 442 (Miss.1999)).

Further, "at the close of this second hearing, via an appropriate motion for a directed verdict, the judge, as gatekeeper, then ultimately decides whether the issue of punitive damages should be submitted to the trier-of-fact (jury)." *Bradfield* at ¶ 22. In summary then, *Bradfield* says exactly what § 11-1-65 says, and that is, if compensatory damages are awarded, there should be an evidentiary hearing in which the plaintiff puts on evidence related to the defendant's conduct. In addition, this Court recently stated this maxim even more strongly by holding, "[T]he failure to conduct an evidentiary hearing on punitive damages, where the plaintiff has sought such damages and the jury has awarded compensatory damages, constitutes reversible error." *Mariner v. Health Care, Inc. v. Estate of Edwards ex rel. Turner*, __ So.2d __, ¶ 23, 2007 WL 2670308 (Miss. Sept. 13, 2007). Finally, *Bradfield* clearly explains that if during the evidentiary hearing the defendant's conduct is shown to be so egregious that it takes the case out of the ordinary rule and shows that the defendant acted in reckless disregard for the rights of the plaintiff, then the trial judge can submit the case to the jury for consideration of awarding punitive damages.

In the case at bar, the Court, however, disregarded the framework espoused by *Bradfield* and its progeny. Rather, the Court determined based on a misunderstanding of Mississippi's law on punitive damages, that such damages automatically became an issue for the jury once compensatory damages were awarded. In other words, no evidentiary hearing was held at which Dr. Causey's conduct was scrutinized. When the jury was brought back in to consider the issue of punitive damages, no witnesses were called, and no evidence was presented. T.1037-1041. In fact, the Court, in instructing the jury regarding punitive damages, made the following statement:

> Ladies and gentlemen, there is one other issue of fact that you must decide in this case. The plaintiffs have also alleged a claim or made a claim for punitive damages against the defendant Causey and the defendant Hospice. ***The Court would then instruct you that you are to consider all of the evidence in this case that has previously been presented to you in the compensatory phase just as if it were re-filed again for this particular phase of the trial.***

T.1037, Emphasis added. Thus, no separate evidentiary hearing was held on the sole issue of punitive damages, and the jury was instructed to base their decision on whether punitive damages were appropriate upon only evidence presented in the compensatory damages phase of this trial.

Counsel for the Plaintiff simply argued that Dr. Causey had $5,000,000.00 in available assets, and that a message should be sent to Dr. Causey and other doctors that overdosing patients will not be tolerated. No proof was placed before the jury on whether Dr. Causey acted with malice, gross negligence, or with willful and wanton disregard for Ms. Allen's safety during the punitive damages stage of trial. T.1037-1041. Again, the jury was simply told that Dr. Causey had $5,000,000.00 in available assets, and that a message should be sent to Dr. Causey and other doctors that overdosing patients will not be tolerated. The jury then awarded $500,000.00 in punitive damages. T.1043. Notably, the United States Supreme Court has held that net worth of a defendant, the sole factor

considered in the case at bar in awarding punitive damages, bears "no relation to the award's reasonableness or proportionality to the harm." *State Farm Mutual Auto. Insurance Co. v. Campbell*, 538 U.S. 408, 427 (2003).

Dr. Causey was treating Ms. Allen in the hospice setting under the well-founded belief that she had less than six months to live and with the knowledge that she was in terrible pain. She was asking for increases in pain medication, and her family was giving her extra boluses of pain medicine daily to control her pain. There was no proof in the Plaintiff's case-in-chief that Dr. Causey was doing anything other than trying to relieve Ms. Allen's pain, and Defendant presented expert testimony that he did not even breach the standard of care. *See, e.g.*, T. 560, lines 22-27 (Testimony of Gerry Ann Houston, M.D.); T.647, lines 21-29 and 648, lines 1-2 (Testimony of Melvin Gitlin, M.D.); and T.801, lines 18-28 (Testimony of Michael Byers, M.D.). In other words, there was substantial evidence in the record that Dr. Causey was not even negligent at all, much less grossly negligent. There certainly was no evidence of malicious intent on his part. The family even testified that until they found out UMMC mis-diagnosed Ms. Allen as having cancer, they thought Ms. Allen received good care at Hospice, and that everyone there was very attentive to Ms. Allen's needs. *See, e.g.*, T.376, lines 10-19 (Testimony of Jo Carroll, Granddaughter of Decedent); and T.393, lines 23 to 29, 394, lines 1-8 (Testimony of Reitha Sanders, Daughter of Decedent). This hardly shows conduct worthy of punitive damages. As such, the award of punitive damages should be struck as improper.

Further, the Plaintiff failed to request any information related to Dr. Causey's net worth during discovery in this action. As such, the Plaintiff had no proof on this issue at trial. Since Dr. Causey was not seeking punitive damages, Dr. Causey did not have the burden of proof on this issue

and did not bring any of this information to trial. Therefore, the Plaintiff had no way at trial to prove Dr. Causey's net worth. The only document the Plaintiff could produce which demonstrated an asset of Dr. Causey's was the declarations page of Dr. Causey's insurance policy, which showed policy limits of $5,000,000.00. T.1031-32. The defense, rather than allow the existence of insurance to be injected into this trial, agreed that the jury could be informed that Dr. Causey had $5,000,000.00 in assets available to satisfy a punitive damages award. T.1033. However, Dr. Causey's insurance limits do not reflect his net worth for this purpose, and the Court misinformed the jury as to Dr. Causey's net worth. Such misinformation allowed the jury to award punitive damages with improper information as to Dr. Causey's net worth and no evidentiary hearing on the separate issue of punitive conduct. T.1038.

Finally, while the framework for gauging the need for punitive damages was clearly explained by this Court in *Bradfield*, public policy dictates that there is apparently a need for a clearer explanation based on the trial court's misunderstanding of same. If, in fact, the trial court's interpretation of a compensatory damages award automatically triggers a punitive damages consideration is correct, defense counsel will always be at a disadvantage in evaluating the value of a lawsuit. In other words, the trial court's rationale is essentially that a finding of negligence is equivalent to one of gross negligence, which is not an accurate reflection of Mississippi law on punitive damages.

V. Whether the Trial Court Erred in Failing to Grant Dr. Causey's Motion for Remittitur?

Again, the jury in this action awarded $4,000,000.00 in compensatory damages and $500,000.00 in punitive damages. R.493-94 and Exhibits C-3, C-7. Hospice Ministries, Inc., a

separate trial defendant, agreed to settle prior to the verdict for $1,000,000.00. T.1026. Thereafter, the parties agreed that Dr. Causey, as the only remaining defendant when the case was submitted to the jury on the issue of compensatory damages, would be entitled to a credit for the amount of Hospice's settlement. R. 493-94. The parties similarly agreed that Dr. Causey should receive a settlement credit for the amount of a previous settlement with UMMC in the amount of $15,000.00. *Id.* Thus, the final judgment entered against Dr. Causey was in the amount of $3,485,00.00. *Id.* and R.E.8.

Following trial, Dr. Causey timely moved for a remittitur, which was denied by the trial court. R.495-502, 553 and R.E.10. This Court has previously held as follows:

> We will not interfere with a jury's award of damages unless the size of the award, in comparison with the actual amount of damage, shocks the conscience of the Court. If there is insufficient proof to support the award of damages, a remittitur is appropriate. It is elementary that the plaintiff has the burden of proving her damages by a preponderance of the evidence.

Community Bank, Ellisville, Mississippi v. Courtney, 884 So.2d 767, ¶ 31 (Miss. 2004), Emphasis added (citing *Entergy Mississippi., Inc. v. Bolden*, 854 So.2d 1051, 1058 (Miss. 2003)). The size of this jury's verdict in comparison to the actual damages proven at trial is so disproportionate that it shocks the conscience, and evinces that the jury was motivated by bias, prejudice or passion. Additionally, an award of damages in this amount was contrary to the overwhelming weight of the evidence.

At trial, the evidence related to Ms. Allen's life expectancy was speculative at best. The expert witnesses testified that, had Ms. Allen not died when she did, she could have lived anywhere from an additional six weeks to seven years. The testimony on this issue by the Plaintiff's experts was extremely limited, and was not supported by any scientific literature. In fact, Dr. Hookman

made a mere guess that Ms. Allen might have lived for a period of three to four more years. D-41, p. 96, lines 21-23. Other than this statement on the part of Dr. Hookman, the Plaintiff put on little evidence related to her damages. For instance, the Plaintiff put on no evidence of future lost wages. Further, there was no evidence of lost contribution to family household services or loss of any monetary gain by the family members. There was no evidence that Dr. Causey, or anyone at Hospice, caused Ms. Allen any pain or suffering. Indeed, such evidence would not have been logical in that the Plaintiff alleged that too much pain medication was administered to Ms. Allen. Consequently, no damages could have been awarded to the Plaintiff for Ms. Allen's pain and suffering.

Therefore, the only evidence related to actual damages put on at trial surfaced during the Plaintiff's testimony when she explained that her mother's funeral expenses were $6,300.00. T.392. Also, there was testimony that Ms. Allen's family missed her. T.372 (Testimony of Jo Carroll). As such, the jury's $4,000,000.00 was awarded in an effort to compensate the Plaintiff for the $6,300.00 in funeral expenses and the loss of society and companionship of Ms. Allen. While damages are not required to be proven with an absolute certainty, damages "may be recovered only where and to the extent that the evidence removes their quantum from the realm of speculation and conjecture and transports it through the twilight zone and into the daylight of reasonable certainty." *Christian Methodist Episcopal Church v. S&S Construction Co., Inc.*, 615 So.2d 568, 574 (Miss. 1993), quoting *Wall v. Swilley*, 562 So.2d 1252, 1256 (Miss. 1990). Even a cursory review of the record reveals that the appellee presented hardly enough evidence to warrant any damage award much less one of this amount.

The testimony at trial by the defense experts established that Ms. Allen was chronically ill, and that she had been certified by her treating physicians as having less than six months to live. D-54, pp. 23-25 (Deposition Testimony of Dr. Causey); T.888-889 (Testimony of David Duddleston, M.D.). UMMC physicians had placed a stent in her side so that bile could drain from her non-functioning biliary system; however, this stent would only last for a period of six months, at which time, the bile would begin to back up again into Ms. Allen's body. T.897-898. Dr. Hookman, who never treated, examined or even laid eyes upon Ms. Allen, testified that he believed she might have lived another four years at a maximum. D-41, p. 96, lines 21-23. However, those who were familiar with Ms. Allen's condition due to hands-on analysis, had predicted that she had less than six months to live. T.888-889 (Testimony of David Duddleston, M.D.). Therefore, subtracting the actual damages of $6,300.00 from the jury's verdict, the jury awarded $3,993,700.00 in damages solely for the loss of Ms. Allen's society and affection when she would have died in a period of anywhere from six months to four years, regardless of any alleged act or omission of Dr. Causey. In fact, even the Plaintiff's own expert recognized that Ms. Allen's life-expectancy was undoubtedly very short.

Again, the only actual damages submitted at the trial of this case were the funeral expenses of approximately $6,300.00. The ratio of actual damages to the amount of the jury's verdict in this case is approximately 634 to 1. In other words, $3,993,700.00 is 634 times the amount of the Plaintiff's actual damages, and such a verdict must shock the conscience. In fact, a review of other cases which have been affirmed by appellate courts in Mississippi reveals no ratio even approaching this proportion.

In *Entergy Mississippi., Inc. v. Bolden,* the Mississippi Supreme Court concluded that an award of 12.9 times the actual damages shocked the conscience and granted a remittitur of

$300,000.00, making the ratio 5.6 times the amount of actual damages. 854 So.2d 1051, ¶ 21 (Miss. 2003). Furthermore, the *Bolden* dissent, in arguing against remittitur, cited a long list of examples where larger ratios had been approved. *Id.* at ¶ 38. However, even in those examples, the largest ratio previously affirmed by our appellate courts was fifty-one times the amount of actual damages. In the case at bar, the jury's verdict was 634 times the amount of actual damages. Clearly, this ratio shocks the conscience and is against the overwhelming weight of the evidence. The Court, thus, should have granted Dr. Causey's Motion for Remittitur and erred in failing to do so.

VI. Whether the Court Erred in Failing to Instruct the Jury as to Mississippi Law Regarding "Chance of Recovery"?

"In a medical malpractice case, as in all claims for negligence, causation must be proven in order to establish a *prima facie* case." *Drummond v. Buckley*, 627 So.2d 264, 268 (Miss. 1993). Further, the Mississippi Supreme Court has concluded "that Mississippi law does not permit recovery of damages because of mere diminishment of the 'chance of recovery.'" *Hubbard v. Wansley*, 954 So.2d 951, ¶ 42 (Miss. 2007). Rather, "[R]ecovery is allowed only 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." *Id.*, quoting *Ladner v. Campbell*, 515 So.2d 882, 888-89 (Miss.1987).

Appellant's jury instruction 7, dealing with "chance of recovery" should have been given by the Court. Instruction D-7 provided:

> The Court instructs you that Mississippi law does not permit recovery of damages because of mere diminishment of the "chance of recovery." Recovery is allowed only when the negligence of the medical provider results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition. Therefore, if you find that there was no reasonable probability that Ms. Allen's condition would

> substantially improve, even in the absence of any negligence by the Defendants, then you must return a verdict for the Defendants.

Exhibit C-1. This proposed instruction accurately addresses the chance of recovery doctrine as it was adopted in 1985 by the Mississippi Supreme Court in *Clayton v. Thompson*, 475 So.2d 439, 445 (Miss. 1985). By contrast, the Mississippi Supreme Court has "rejected the notion that a mere 'better result absent malpractice' would meet the requirements of causal connection." *Ladner*, 515 So.2d at 889 (Miss.1987).

At trial, testimony was elicited which clearly established that even if Ms. Allen did not have pancreatic cancer, she was chronically ill. In fact, as previously stated, Dr. Hookman, Plaintiff's expert witness, indicated that had Ms. Allen not died when she did, she could have lived anywhere from an additional six months to four years. Also, UMMC physicians certified her as having less than six months to live. T.888-889 (Testimony of David Duddleston, M.D.). As was explained above, UMMC physicians placed a stent in her side so that bile could drain from her non-functioning biliary system; however, this stent would only last for a period of six months, at which time, the bile would begin to back up again into Ms. Allen's body. T.897-898.

Also, prior to Ms. Allen's admission to Hospice, she had been a patient of UMMC for over one month. Even prior to this hospital admission, however, she had lost twenty pounds and was characterized by Dr. Duddleston, a UMMC physician, as looking "much older than her stated age. She looked like she was eighty to me." T.888. Dr. Duddleston further testified that he determined that Ms. Allen had a life-expectancy of less than six months due to the following:

> It was the total of the patient's medical condition. She had severe, very severe emphysema, and that was one problem. The other problem was her malnutrition and cachexia as I mentioned before; the signs of malnutrition and her inability to eat. So

she was starving and continued to starve while she was in the hospital because she was unable to eat.

T. 899. Moreover, Dr. Causey indicated that Ms. Allen's COPD "was quite severe. She had been on home oxygen for at least a year before she was admitted to University Hospital. . ." D-54, p. 23. At the time Ms. Allen was admitted to UMMC, she had the following symptoms: abdominal pain, jaundice, rapid weight loss and evidence of common bile duct and pancreatic duct obstruction. D-54, p. 31. After a five to six week hospital admission, Ms. Allen was, with her family's consent, admitted to Hospice. At the time of her Hospice admission, she weighed approximately ninety pounds; required the use of oxygen; had a long-term diagnosis of severe COPD and an arguable diagnosis of pancreatic cancer. Dr. Causey unequivocally stated that Ms. Allen "showed no sign of improvement. She showed a steady downhill course while she was under our care." *Id.* at p. 50.

On the other hand, the Appellee presented no evidence at trial regarding Ms. Allen's chance of recovery other than Dr. Hookman's speculative conjecture about Ms. Allen's life expectancy. Despite the disparity of evidence on this issue offered by both parties, the Court refused to allow Dr. Causey's jury instruction regarding chance of recovery, stating simply, "I see what you're saying. But that's like well she died, and that's what we were told she was going to do. So, it doesn't matter how she died." T.971-72. The jury should have been instructed on the chance of recovery doctrine, and it was erroneous for the Court to refuse such an instruction.

CONCLUSION

It is well-settled that "[N]o trial is perfect, all that is guaranteed is a fair trial." *Davis v. Singing River Elec. Power Ass'n*, 501 So.2d 128, 1131 (Miss. 1987) (citing *Parmes v. Illinois Cent. Gulf R.R.*, 440 So.2d 261 (Miss. 1983)). The errors committed by the trial court in the case at bar

had a combined effect of patent unfairness to Dr. Causey. The Court freely allowed unqualified experts to testify for the Appellee and failed to allow Dr. Causey's experts, whom were qualified, to testify. Had these errors not been committed by the lower Court, Dr. Causey would have clearly prevailed on his motion for directed verdict and/or his post-trial Motion for Judgment Notwithstanding the Verdict. Because "the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, [then the Court is] required to reverse and render." *American Fire Protection, Inc. v. Lewis*, 653 So.2d 1387, 1390-91 (Miss. 1995).

Further, despite the fact that UMMC's alleged negligence was a continuing theme of Appellee's case, the Court refused to instruct the jury on the issue of allocation of fault. Moreover, the Court misinterpreted Mississippi law on punitive damages and automatically submitted the issue of punitive damages to the jury without a separate evidentiary hearing on whether Dr. Causey's actions or inactions were such that punitive damages were even warranted. In fact, the record reveals that before any evidence was presented or any testimony given, the Court had determined that the jury would be given the opportunity to decide the issue of punitive damages. The Court also erred in denying Dr. Causey's Motion for Remittitur in light of the fact that the ratio of actual damages to the amount of the jury's verdict in this case is approximately 634 to 1. "When there is no basis in evidence or for the amount of damages awarded, this Court can adjust the amount of damages awarded to correspond to the evidence and render such judgment." *Christian Methodist Episcopal Church*, 615 So.2d 568, 574 (Miss. 1993), citing *Boyington v. State*, 389 So.2d 485 (Miss. 1980); *Caskey v. Treadwell*, 299 So.2d 691 (Miss. 1974); Miss. Code Ann. § 11-3-7 (1972). When compared to the scant evidence presented regarding damages, the verdict shocks the conscience, and

evinces that this jury was motivated by bias, prejudice or passion. Finally, the Court failed to instruct the jury as to Mississippi law on chance of recovery.

For the foregoing reasons, Dr. Causey respectfully requests that this Court reverse and render in favor of Dr. Causey. Dr. Causey further requests any additional relief this Court deems appropriate.

RESPECTFULLY SUBMITTED, this the 8th day of October, 2007.

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CERTIFICATE OF SERVICE

I, Joseph Leray McNamara, certify that I have this day served a copy of this *Brief of Appellant*, by United States mail with postage prepaid on the following persons at these addresses:

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