

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

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**CIVIL CAUSE NO.: NO. 2008-TS-00987**

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**PAULA LEE VAUGHN,  
APPELLANT**

**VS.**

**MISSISSIPPI BAPTIST MEDICAL CENTER,  
APPELLEE**

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**APPELLANT'S REPLY BRIEF IN SUPPORT OF APPEAL**

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**ORAL ARGUMENT REQUESTED**

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## **I. ARGUMENT**

### **1. Keller is Qualified to Testify as to the Nursing Standard of Care and Breach Thereof.**

#### **A. Proof Required Under Mississippi Law to Establish Causation.**

The Defendant has clouded the issues with the fact that the Plaintiff did not designate an expert doctor to render an opinion, however, the issue is actually whether or not the nursing staff at Mississippi Baptist Hospital met the standard of care in their care and treatment of Vaughn. Plaintiff's expert says that they did not. Defendant's expert do not really address the issue of the nursing standard of care, but rather try to focus on whether or not an infection was present at the time of her first discharge from Baptist.

Once a prima facie case is established by expert testimony, the plaintiff is entitled, not to judgment as a matter of law, but to go forward with his case and present the question of whether malpractice occurred to the jury. *McCaffrey v. Puckett, D.C.*, 784 So.2d 197, 206 (Miss. 2001).

There is no doubt that Crystal Keller is a nurse who is an expert who is qualified to testify concerning the appropriate nursing standard of care and the deviations from that standard. That is the holding in the very case that Baptist contends is the case that places Crystal Keller out of the realm of expert testimony period. What Baptist is really saying is that Crystal Keller is not qualified in any shape, form or manner to testify as an expert witness. That is to the contrary as set forth in *Richardson v. Methodist Hosp. of Hattiesburg, Inc.*, 807 So.2d 1244 (Miss. 2002). For example, in *Richardson*, the Court approved nurse's testimony that a breach of the standard of care was the proximate cause of a patient's pain and suffering.

Additionally, in Mississippi nurses "may certainly opine as to matters within the ambit of their practice area." *Wright v. Mariner Health Care, Inc.*, 2008 WL 2704034 (S.D. Miss. July 3,

2008).

Contrary to Defendant's arguments, is it not, and never has been, the law in Mississippi that proximate causation on every aspect of every claim against a health care provider for negligent treatment or care must be established through the testimony of expert witnesses who are medical doctors. In both *Richardson I* and *Sheffield v. Goodwin*, 740 So.2d 854 (Miss. 1999), the Mississippi Supreme Court held that testimony from a physician expert was not necessarily required to establish proximate causation even when the case was one against a physician. Rather, it is only when the issue of proximate causation involves complex medical questions beyond the knowledge and training of the nurse expert that a nurse is not qualified to provide the evidence establishing the proximate causation leg of a plaintiff's case. 807 So.2d 1244 at ¶¶ 14-19; 740 So.2d 854 at ¶¶ 7-11.

The Court in *Richardson* found that Keller could not testify regarding complex issues of medical causation. *Richardson* at 1248 ¶ 17. A stroke is considered to be a complex medical issue, however, an infection is something that is within a nurse's expertise as a nurse. (R. 565, 662; R.E.112, 207)

A nurse proffered as an expert on either the standard of care or proximate causation is not to be automatically disqualified. Instead, each nurse expert's knowledge, experience and qualifications is to be examined and compared to the issues in the specific case to determine if the expert possesses the necessary qualifications to testify on each issue. 740 So.2d 854 at ¶ 11.

The Mississippi Court of Appeals applied the standards and approach adopted by *Richardson I* and *Sheffield* in *Sacks v. Necaise*, 991 So.2d 615, (Miss.App. 2007). It found a nurse qualified as an expert under Rule 702 and *McLemore/Daubert* to offer opinions on the proximate cause of third degree burns in a case involving a prescribing physician's liability for negligent administration of

a chemotherapy drug by his nurse because the nurse expert had acquired sufficient medical knowledge to offer the opinion refuting the defendant physician's causation analysis by researching the physician's and the plaintiff's theories in the medical literature. It is important to note that the physician testified at trial that he did not know the cause of the third degree burns and the court allowed the nurse to testify as to the causation without this testimony from the doctor.

Both *Richardson I* and *Sacks* also held a nurse was qualified to testify that deviations from the nursing standard of care were the proximate cause of an injury, other than death, where the particular proximate causation issue was within the nurse expert's knowledge either through experience, training or research. 807 So.2d 1244 ¶ 14; 991 So.2d 615 at ¶¶ 26-29.

In *Richardson*, the only expert was a registered nurse. The nurse expert's report concluded the hospital nursing staff committed numerous breaches of the standard of care including many instances in the medical records of information not reported to the physician and concluded the deviations from the nursing standard of care led to the patient's suffering and subsequent death. The Court reversed summary judgment on the issue of the survival claim for pain and suffering. The Court reasoned:

We find the trial court's ruling was overly restrictive in not allowing Keller to testify concerning the appropriate standard of nursing care and the deviations from that standard. There is sufficient proffered evidence from Keller for a jury to consider whether the inadequate nursing care resulted in worsening Wheelless' physical pain and suffering.

*Id* at ¶ 8.

In *Drummond v. Buckley*, 627 So.2d 264 (Miss. 1993), ... the plaintiff did not have an expert witness to show proximate causation; however, we ruled summary judgment was precluded. ... We noted that *Clayton v. Thompson*, 475 So.2d 439, 445 (miss. 1985), stated "proximate cause arises when omission of a duty contributes to cause an injury." *Drummond*, 627 So.2d at 270. Here there is substantial evidence

documenting deficient nursing care that may have contributed the Wheelless's suffering.

*Id* at ¶ 10.

The fact that Keller is not a physician does not bar her right to testify concerning the standard of care for the nursing staff, but more appropriately may affect the weight of her testimony, which is an issue for the trier of fact. ....

*Id* at ¶ 11.

*Richardson* clearly shows that physician expert testimony is not required in every case to establish causation.

*Sacks v. Necaise*, 991 So.2d 615, (Miss. App. 2007) explicitly holds a nurse expert may testify on proximate causation as long as she has acquired the requisite knowledge of the causation issues by any of the means listed in Rule 702 including researching the medical literature for a particular case. The appellate court held the nurse qualified on both issues under both Mississippi substantive law and M.R.E. 702 and *McLemore/Daubert*.

Thus, Crystal Keller may provide the necessary evidence of the appropriate standard of nursing care and the deviations from that standard as outlined in Appellant's Brief.

That said, it was a gross miscarriage of justice for the lower court to dismiss the entire case on summary judgment. There are clearly genuine issues of material facts regarding the deviations in the standard of care and the failure to meet the nursing standard of care which must be decided by a jury.

There are genuine issues of fact concerning Vaughn's pain, suffering and injuries, established through the expert testimony of Vaughn's expert witnesses, as well as the lay testimony of Vaughn's witnesses.

It is the function of the jury as the traditional factfinder to weigh conflicting evidence and inferences and determine credibility of witnesses, not the court. *Clark v. Illinois Central R. Co.*, 794 So.2d 191 (Miss. 2001).

Summary judgment was inappropriately granted and the Court should reverse the lower court's grant of summary judgment.

**B. Mississippi's Nursing Practice Law, Miss. Code Ann. § 73-15-5(2).**

Contrary to Baptist's arguments, Mississippi's Nursing Practice Law, Miss. Code Ann. § 73-15-5(2), does not restrict the subjects on which a nurse may testify. The definition of the practice of nursing in Miss. Code Ann. § 73-15-5(2) does not prohibit a nurse from testifying on any issue. In *Sheffield v. Goodwin*, 740 So.2d 854 (Miss. 1999), the court referred to this definition when evaluating the qualifications of a proffered nurse expert. However, it is clear from the court's discussion the definition was used only as a starting point for determining what knowledge a proffered expert could be assumed to have based solely on qualification for licensure as a registered nurse. The court made it clear the qualifications of each nurse expert as to be judged on the knowledge possessed by that expert and the issues of the case. It is explicitly held there is to be no blanket disqualification of nurse experts.

In *Sheffield*, the Supreme Court affirmed summary judgment because the registered nurse/nurse practitioner was not qualified to provide an opinion on the negligence of a dentist based on her particular education and experience. The discussion in *Sheffield* clearly shows that under Mississippi law, the Nursing Practice Law's definition of nursing practice does not the outer limits of the subjects on which nurse experts are qualified to testify. Instead that definition is a starting point for the broad level of knowledge a nurse expert may be assumed to have acquired through



training and qualifying for licensure. The analysis then moves on to the experience, education, training and other means by which the particular nurse has gained additional knowledge and the extent of that knowledge.

Furthermore, upon a closer look and a more careful examination of the Mississippi Nursing Practice Law and the regulations it authorizes demonstrates it does not apply to qualifications for expert testimony or indicate in any way that the definition of the practice of nursing is a limitation on the level of knowledge a particular nurse has to support expert opinions as to the likely outcome of, or causation of injuries likely resulting from, failures to meet nursing standards of care. While the statute and regulations generally define the making of a medical diagnosis as outside the practice of nursing, they include other forms of diagnosis, specifically nursing diagnosis, as within the practice of nursing. They even contain a specific exception allowing nurses to make medical diagnosis where authorized by the regulation. Miss. Code Ann. § 73-15-5(2). Chapter 3, Section 1.2 of the Rules on Nursing referred to in Miss. Code Ann. § 73-15-5(2) defines the functions of a registered nurse. Section 1.2(f) states: 1.2 The RN shall be held accountable for the quality of nursing care given to patients. This includes: ...f. Assessing the patient's needs, formulating a nursing diagnosis, planning for, implementing and evaluating the nursing care in the promotion and the maintenance of health of each patient for whom responsibility has been accepted....

According to the *Encyclopedia of Nursing and Allied Health*, a nursing diagnosis is:

a clinical judgment about individual, family, or community responses to actual or potential health problems/life processes. Nursing diagnoses provide the basis for selection of nursing interventions to achieve outcomes for which the nurse is accountable.

A nursing diagnosis is designed to identify risk of potential problems for purposes of

preventative patient care. *Id.* A nursing diagnostic statement has three components: the problem, the etiology (cause), and the signs and symptoms. *Id.*

While Miss. Code Ann. § 73-15-5(2) states the practice of nursing does not include actually making a medical diagnosis except when authorized by the regulations, it clearly states the practice of nursing requires specialized knowledge related to the bases for assessment, *diagnosis* and evaluation of the results of interventions for the promotion and maintenance of health and the management of an individual's response to illness, injury or infirmity. The regulations clearly state making nursing diagnoses (which would include identification of problems, identification of risk for development of problems, the cause or potential cause, of the problem, and its signs and symptoms) is one of the functions of a registered nurse. A nursing diagnosis clearly includes evaluating patient response to stimuli, such as nursing care, and the effectiveness, or lack thereof, of nursing care, evaluating the results proximately caused by nursing care or a failure to render care in accordance with the nursing standard of care.

Just because a particular education or profession does not provide sufficient knowledge to make a complex medical diagnosis of a disease, does not mean that it does not include sufficient knowledge to make a judgment as to whether a breach of the profession's standards caused an injury simply because it occurred as a result of negligence by a nurse or other medical provider. Nursing diagnosis speaks of responses to injury and infirmity in addition to illness. Nothing in the nursing practice and nursing diagnosis definitions preclude a nurse from having the knowledge to make the causal connection between breaches of the nursing standard of care and legally cognizable and compensable injuries. These definitions state a registered nurse would have the specialized knowledge to evaluate the cause and effect relationship between breaches of the nursing standard

of care and a patient's injuries because one of a nurse's roles is to evaluate the effectiveness, or lack thereof, of the nursing plan of treatment and the nursing care as carried out. That is the job of a registered nurse.

Therefore, the Nursing Practice Law does not preclude Crystal Keller from having specialized knowledge under Rule 702 to qualify as an expert on the issue of proximately caused by breaches of the nursing standard of care. Nothing in the law indicates that it sets standards or limits on the knowledge or expertise of registered nurses or on the substantive elements for establishing the elements of a tort case against a health care provider.

While the Nursing Practice Law may be useful in establishing a minimum base level of knowledge possessed by an expert based on credentials as a registered nurse, it cannot be used to establish an outside limit of a particular nurse expert's knowledge and qualification to testify under Rule 702. Rule 702 states an experts may qualify by knowledge, skill, experience, training, or education to offer opinions on a particular subject. The statute cannot change or limit the subjects which Rule 702 permits an individual expert to testify on based on her particular knowledge, skill, experience, training, education and the issues of the specific case.

### **C. Law of Other Jurisdictions Regarding Nurse Experts.**

While Baptist contends that the cases cited in Appellant's Brief from other jurisdictions are not persuasive, Appellant offers a few more in support of her argument.

There are a number of cases in addition to those in Mississippi holding nurse experts may qualify to offer opinions on proximate causation in regard to some injuries resulting from breaches of the nursing standard of care. *Gaines v. Comanche County Med. Hosp.*, 143 P.3d 203 (Okla. 2006) held a nurse certified in wound care with extensive experience in the care of the critically ill and

elderly was qualified to testify that breaches of the nursing standard of care were a proximate cause contributing to the development of decubitus ulcers. The court in *Gaines* pointed out the reason for their decision was the growing number of jurisdictions recognizing that registered nurse experts do possess the qualifications to testify in regard to common injuries proximately caused by breaches of nursing duties in areas of care largely committed to nurses. The court also pointed out that allowing nurses to testify as experts on injuries caused by breaches of the nursing standard of care in areas where nurses are primarily responsible for prevention and treatment and have wide experience is consistent with Rule 702's directive that witnesses may qualify as experts "by knowledge, skill, experience, training or education."

*Burks v. Christus Health Monroe*, 899 So.2d 775 (La. App. 2d Cir. 2005) holds no medical testimony is necessary to establish a nursing home's breaches in the standard of care by leaving a resident to lie in her own waste for extended periods of time without changing her adult diapers and her bed linens proximately causes a compensable injury in the form of loss of dignity.

*Tranter v. Mercy Franciscan Hosp. W. Hills*, 2007 Ohio 5132 (Ohio App. 2007) held that a nurse expert who reviewed the hospital records was qualified to offer the opinion that the nurses had breached the applicable standard of care and that the breach had caused the patient's fall. The court further held that once the nurse expert had expressed the opinion that the nurses' negligence had caused the fall, no additional expert testimony was required to support the allegation that the fall had caused injuries.

*Maloney v. Wake Hosp. Sys.*, 45 N.C. App. 172, 262 S.E.2d 680 (N.C. App. 1980), like *Sheffield*, holds that a proffered expert's qualification to testify, including a nurse expert offering testimony on medical causation, is not limited by the licenses or degree she holds or whether that

license or degree permits her to make medical diagnosis when treating patients. Instead, like all experts, a nurse expert's qualifications to testify on causation as well as other issues, must be evaluated according to each expert's education, knowledge, information, skill, and experience, regardless of how acquired.

Clearly, a nursing expert is more qualified to testify as to the standards of nursing care and breaches thereof rather than a medical doctor. Plaintiff's expert opined as to the nurses duty to record acute infection and to report such to the physician. As evidenced by the Patient Teaching record (R.567, R.E.114), the nurses teach their patients the signs and symptoms of infection, therefore a doctor is not needed to establish an infection. The patients are to notify or come back to the hospital if they develop these signs and symptoms. (R.567, R.E.114) Patient Teaching, October 27, 2005 #10 "Incision care: Report redness, swelling, small amount of dark or clear drainage normal; report any infected drainage or temp over 101° to MD." This is evidence that if a nurse is teaching a patient about infection, and a patient is supposed to know all the signs and symptoms of infection, then obviously a nurse knows what an infection is. This record shows that this is Baptist's teaching standard.

Baptist relies on the testimony of Dr. Martin McMullen, the surgeon who performed Vaughn's surgery that she did not have an infection at any time prior to her first discharge at Baptist Hospital. Baptist asserts that Dr. McMullen is the all knowing only one who can diagnose Vaughn's infection and that Dr. McMullen is the supreme being who studied her leg wounds and looked at them every time he visited her which is contradicted by his own testimony.

Dr. McMullen only saw Vaughn a limit number of times while she was in the hospital after her surgery and he did not assess her leg wounds on his visits. Dr. McMullen did not take her

bandages off to examine her leg wounds. Therefore, he cannot have knowledge of the appearance or condition of the wounds.

The facts revealed by Vaughn and her children have explicitly explained the gross appearance of the wounds resulting from contamination of the wounds from urine and feces, among other things, allowed by inadequate nursing care and resulting in gross changes in the appearance of the wounds, including discoloration, swelling, discharge and odorous material. Rising above that which a nursing staff member should have known and responded to is the testimony of Vaughn and her daughter, who was attending her bedside, that they repeatedly requested attention to the contaminated wounds and failed to receive treatment.

Additionally, Vaughn's adult children witnessed the deviations in the standard of care of the nursing staff of Baptist Hospital in their care and treatment of the Plaintiff generally.

In fact, Dr. McMullen testified that layman are accustomed to seeing pus as well as nurses. (R.666-667; R.E.211-212).

Even though Vaughn had underlying health conditions, Baptist's staff should have been aware of Vaughn's underlying health conditions and the associated risks therewith. By so knowing, Baptist was under a duty to watch Vaughn carefully for this type of infection injury, and yet Baptist did not attempt to prevent it. Regardless of other health conditions of Vaughn, Baptist was under a duty to prevent this type of infection injury to the Vaughn. Secondly, and thereafter, they were obligated to administer care and treatment of the infected wounds so as to minimize and/or cure the infection and ensuing complications, all of which they failed to do. Dr. McMullen also testified that a diabetic is more prone to infection, thus alerting the physicians and nurses to be more careful with a wound. (R. 665, R.E. 210). Therefore, the nursing staff should have been more aware and taken

more precautions to prevent an infection in Vaughn's leg wounds. The failure of the nursing staff to adequately care and treat Vaughn encompasses far more than the infection in her bilateral leg wounds as outlined in the Appellant's Brief.

Contrary to Baptist's experts assertions, Vaughn developed an infection in her leg wounds during her first hospitalization at Baptist Hospital from October 24, 2005 to November 2, 2005 as is obvious by Vaughn's medical records and the below cited testimony from lay witnesses and Vaughn's expert nurse.

Notwithstanding the causation factor, there was an infection and she had all of the signs of an infection regardless of Dr. McMullen's testimony.

Sherry Blaine testified in her deposition that Dr. McMullen told her that her mother's leg wounds were infected. (R. 592, R.E. 139). Dr. McMullen testified that layman are accustomed to seeing pus as well as nurses. (R.666-667, R.E.211-212).

Susan Vaughn Rone testified that the lack of care was the nursing staff not taking care of Vaughn, not cleaning her, not bathing her, not keeping her room clean, not keeping it clean enough to where she would not develop staph infection and that development of staph infection is common knowledge. Uncleanliness leads to infection. (R. 630-631, R.E. 177-178). Sherry Blaine also testified that her mother's leg wounds appeared swollen and red and had stuff coming out of it like pus. (R. 588-589, R.E. 135-136). Sherry Blaine testified that her mother's leg wounds began to get red after she urinated on herself the third day and that one of the nurses said that they were red. (R. 594, R.E.141). Sherry Blaine testified that the morning she was discharged to Brandon, she looked at the leg wounds and they were much worse than they had been before. (R. 596, R.E. 143).

The testimony of the lay witnesses who were present at the hospital with Vaughn is very

compelling. They were very much aware of the change in the Vaughn's leg wounds, including the redness, swelling, inflammation and infection. Although, Dr. McMullen testified that antibiotics were given to Vaughn as a precautionary matter, he also testified that the reason for giving the Levaquin was to hopefully create a situation where there was less opportunity for organisms to proliferate. (R.668, R.E. 213). Thus, slowing the infection process down.

The depositions of witnesses who were constantly at Vaughn's bedside confirmed gross negligence of the nursing staff in failing to cleanse and change the dressings on her wounds and bandages soaked with feces and urine, among other things fully outlined in Appellant's Brief.

As stated in Appellant's Brief, nurses are to be the eyes and ears for physicians who are not continually around the patient. Physicians rely on nursing staff to report changes in patients' status and adequately note and document acute and/or recurring problems. A doctor only gives a fractional part of the picture, as the nurses are the primary care givers and are in constant contact with the patients. This entails performing ongoing reviews of patient's charts and consulting with other healthcare team members in reassessing, implementing and reevaluating the course of the patient's progress throughout their hospitalization. Nurses are more knowledgeable of hospital policies and inside events than doctors.

Nurses make up nurses' notes, which become an integral part of the official medical records and upon which the physicians rely. Records created by nurses and technical staff are by far the majority of all records. From this the Court must conclude that timely and complete notes are required to inform and alert the treating physicians as to sudden changes in the obvious condition of these two massive open wounds.

The simple fact of the matter is that Baptist Hospital owed Ms. Vaughn a duty to provide



treatment and care of her as a whole, including her bilateral leg wounds, and infections. This care was to be provided through the nursing staff at Baptist. The problem as well as the cure was caused by negligent nursing care which was not observed by the nurses or reported to the physician.

There are genuine issues of material fact to be presented to a jury concerning the nursing standard of care and whether or not Baptist nurses fell below the applicable standard.

## **II. CONCLUSION**

Crystal Keller is an expert witness who is well qualified to testify regarding the nursing standard of care and the leg wounds infections as a result of the negligence of the nursing staff at Baptist Hospital.

Vaughn charged that the nursing staff at Baptist was negligent and did not follow the standard of care in their care and treatment of her as a whole and her surgical wounds on both legs. Crystal Keller has established the applicable standard of care for nurses and the breach of that standard by the nursing staff at Baptist. Summary judgment was inappropriately granted. Keller's testimony and the medical records along with the testimony of the Plaintiff and her adult children create numerous genuine issues of material facts.

Baptist Hospital's nursing staff failed to exercise that degree of skill, care, competence, and prudence, and was, therefore, negligent in the following respects and deviated from the standard of care as follows: (1) failure to adequately assess and reassess; (2) failure to notify the physician of the change in the patient's status; (3) failure to properly document the changes/progression of the wounds; (4) failure to recognize signs and symptoms of infection; (5) failure to follow physician's orders; (6) failure to change dressings as ordered; (7) failure to properly clean wounds; (8) failure to prevent contamination of wounds; (9) failure to provide adequate nursing care; (10) failure to

provide adequate wound care; (11) failure to timely request wound care evaluation and consultations; (12) failure to follow facility's own policies and procedures; (13) failure to adequately document; (14) failure to follow the nursing process; all of which will be confirmed by the testimony of Crystal Keller.

It was error for the lower court to grant summary judgment in its entirety as to Crystal Keller's testimony concerning the standard of care and breach of those standards by the nursing staff of Baptist Hospital. There are genuine issues of material facts which must be considered by the jury and not dismissed on summary judgment. Summary judgment was inappropriately granted and the Court should reverse and remand this case for a trial on the merits.

Keller should still be allowed to testify concerning the appropriate standard of nursing care and the deviations from that standard. The Court should find that the lower court herein was overly restrictive in not allowing Keller to testify as there is sufficient proffered evidence from Keller for a jury to consider whether the inadequate nursing care resulted in worsening Vaughn's physical pain and suffering. *Richardson* at 1247.



The only evidence offered by Defendant to support its Motion for Summary Judgment was that of the treating physician, who is not a nurse and whose post surgical care and/or observation of the Plaintiff was very sparse, probably 1% compared with 99% by the nursing staff. Even taking his testimony verbatim favoring Defendant, there remains significant issues of material facts for the jury to decide. The jury is responsible for judging the credibility of witnesses and the weight that should be attached to their testimony. Therefore, summary judgment was not appropriate.

Appellant respectfully requests that the Court reverse the lower court's decision and remand the case for a trial on the merits.

RESPECTFULLY SUBMITTED, this the 8th day of April, 2009.

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**CERTIFICATE OF SERVICE**

I, Bill Waller, Sr., the undersigned attorney of record for the Appellant, Paula Vaughn, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing document via United States mail, postage prepaid, to the following counsel of record:

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So Certified this 8th of April, 2009.

  
BILL WALLER, SR.