

IN THE SUPREME COURT OF MISSISSIPPI

CITY OF JACKSON, MISSISSIPPI

APPELLANT

V.

CAUSE NO: 2008-TS-01997

**THE ESTATE OF OTHA STEWART, DECEASED,
BY AND THROUGH ITS ADMINISTRATRIX,
EMMA WOMACK**

APPELLEE

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

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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I. STATEMENT OF THE ISSUES

- I. Whether the Findings of the Trial Court Were Supported by Substantial Evidence?
- II. Whether the Trial Court Applied An Erroneous Legal Standard?

II. STATEMENT OF THE CASE

This case was remanded to the Circuit Court with the following instructions: “we remand this case for a new trial on damages consistent with this opinion, with instructions to the trial court to limit any damage award against the City to \$250,000, and to exclude from its award any damages attributable to the stroke.” *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So.2d 703, 716 (Miss. 2005).

As instructed the Trial Court conducted a new trial on the issue of damages.

As instructed the Trial Court limited the damage award to \$250,000.00.

As instructed the Trial Court excluded from its award any damages attributable to a stroke.

During the new trial on damages, the parties agreed that “the testimony from the previous trial in addition to all exhibits ... shall remain and be incorporated as part of the transcript or record into this current proceeding.” New Trial Transcript at Page 6, Lines 2 - 10.

The incorporated transcript shows that Mrs. Otha Stewart was born on May 8, 1925. In 1978, she suffered a stroke. The stroke resulted in right side paralysis and limited her speech and general level of functioning. In the years following the 1978 stroke, Mrs. Stewart was able to walk using a cane. She was able to travel, eat normally, enjoyed helping prepare meals and sharing meals with her daughter and other family members, enjoyed interacting with her family and engaging in such activities as reading the newspaper and watching television.

In 1993, Mrs. Stewart began attending an adult day care center located in Jackson,

Mississippi and operated by the University of Mississippi Medical Center. Over time Mrs. Stewart's ability to ambulate on her own diminished and she remained ambulatory but was at risk for falls and needed supervision and assistance while walking with her cane.

On August 11, 1997, Mrs. Stewart was being transported to the adult daycare by the City of Jackson, Mississippi ("Jackson" or "City"). Doris Spiller, the van driver employed by Jackson, failed to provide sufficient supervision and assistance to Mrs. Stewart while in the parking lot of the adult daycare facility and Mrs. Stewart fell and struck her head on the pavement. Mrs. Stewart was taken by ambulance to an emergency room where she was treated for her head injury and released into the care of her daughter Emma Womack. Mrs. Womack was instructed to watch her mother for several days.

That night (August 11, 1997), Mrs. Stewart complained of head pain and displayed a decreased level of functioning below her normal level of functioning. For example, Mrs. Stewart became confused and unable to operate the remote control for her television and became lethargic. The next day Mrs. Stewart continued to complain of head pain and was slow to respond. She had trouble understanding her daughter Emma Womack and had trouble remaining awake. On August 13, 1997, Mrs. Stewart continued to complain of head pain and continued to have confusion and was lethargic. On August 14, 1997, Mrs. Stewart continued to have head pain and her daughter had difficulty rousing her from her sleep. However, Mrs. Stewart indicated that she wanted to return to the daycare center and she did so. The night of the 14th, Mrs. Stewart continued to experience head pain and had a decreased appetite. The next day she continued to experience head pain throughout the day but she attended the adult daycare. During this time Mrs. Stewart was not her normal self. She complained of head pain, was fatigued, lethargic and displayed a lower level of comprehension.

On August 16, 1997, just five (5) days after striking her head on the pavement, Mrs. Stewart

had difficulty waking up and eating, She could not communicate at all, was non-responsive, and could not stand. Mrs. Stewart was again taken to the hospital by ambulance but was not admitted overnight. She did not improve and was ultimately admitted to the hospital three (3) days later on August 19, 1997.

Within days of Mrs. Stewart striking her head on the pavement on August 11, 1997, she had three (3) trips to the hospital, one(1) hospital admission, she lost her ability to communicate, walk, to have meaningfully interactions with her family and eat and enjoy solid food. Her mental abilities deteriorated. She lost the ability to walk, travel, help prepare meals, attend the adult daycare, read the newspaper and control a television. Ultimately, Mrs. Stewart became bed and wheelchair bound and obtained her nourishment through a feeding tube. She experienced repeated instances of aspiration pneumonia related to her difficulty taking in nutrients. Despite the exceptional care provided by Mrs. Stewart's daughter she developed and endured painful bed sores.

Mrs. Stewart's plight was described by her daughter Emma Womack as follows:

She's practically a total invalid. She can't feed herself, she can't take anything by mouth. She's fed by a peg tube. I cook her food and strain it and force it through her peg tube. She doesn't seem to have any pleasure. She never smiles, she never laughs. She doesn't sleep at night so we do the biggest sleeping in the daytime. She hollers all night. She just doesn't respond and she doesn't communicate in those one and two letter words anymore. She's totally incontinent. She can't walk, she can't stand. I use a hoyer to tote her around the house or I use the hoyer to get her from the bed to the geriatric chair, and I use the geriatric chair to push her around the house like in her wheelchair. She just – she's totally different. She doesn't do anything anymore. She has no interest in t.v., no interest in making conversation. She hollers when you try to make conversation with her. She like she's always afraid most of the time. Sometimes she know you, sometimes she doesn't. She's just different. She's totally different. She has no pleasures in life. I just do what I can to hold on to her.

Testimony of Womack at New Trial Transcript Pages 417 - 418, Appellee's Record Excerpt Tab No. 1.

Mrs. Stewart died on November 4, 2002.

During the new trial on damages the Trial Court received evidence from Dr. Steven Hayne, M.D. Without objection¹, Dr. Hayne was tendered and accepted by the Court as an expert in the field of forensic pathology.

Without objection, Dr. Hayne testified concerning the effects which resulted from Mrs. Stewart hitting her head on the pavement on the August 11, 1997:

- Q. Based upon your education, training, experience, your activities in this case and applying the established and widely accepted scientific principles you described, do you have an opinion within a reasonable degree of medical certainty as to what happened to Ms. Stewart as a result of her being allowed to strike her head on the pavement on August 11, 1997, as described in the trial transcript?
- A. Mrs. Stewart suffered a fall on a hard surface I believe injuring the central nervous system and it would be consistent with the diffuse axonal injury. She also suffered a superficial injury to the occipital area of the scalp, the back part of the scalp, that was variably described as two contusions and also two abrasions in different places in the record.

Ms. Stewart ultimately entered a downhill course over time. There are other medical issues that took place but her diminished intellectual capacity, diminished ability to avoid aspiration, her diminished physical condition ultimately caused the demise of this patient.... On several occasions she was readmitted. I believe there were six occasions for readmission in the year of 2001 suffering aspirations at some of those admissions and developed pneumonia, which I think is a product from the initial head injury suffered in the mid August period of 1997, and that ultimately lead to her demise as reported in the death certificate....

New Trial Transcript Page 23 lines 12 - 29 and Page 24 lines 1-29. Appellee's Record Excerpt Tab No. 2.

Without objection, Dr. Hayne testified concerning how the injury which Mrs. Stewart suffered on August 11, 1997, was similar to blunt force trauma to her head:

¹

"If no contemporaneous objection is made, the error, if any, is waived." *Dorrough v. Wilkes*, 817 So.2d 567, 577 (Miss.2002).

Q. How would blunt force trauma be similar to the injury that Ms. Stewart suffered on August 11, 1997?

A. The trauma to her head would be consistent with a blunt force strike to the head, in this case, a fall, and it would be producing injuries to the brain manifested clinically by deterioration of her sensory perception, intellect, physical abilities, the problems with dysphasia and the like, aspiration. That would indicate that there was a significant injury to her brain, not just to the scalp. And it would be consistent with an injury such as diffuse axonal injury, injury to the neurons themselves. And there was no significant amelioration of her condition. She ultimately went into a final common pathway, which is not uncommon that you see in patients that have been -- have suffered brain injury and are hospitalized for a period of time or in a health care facility, there are a milieu of organisms that can produce infections, and I think that that's what we saw in this particular case, a final common pathway secondary to blunt force trauma and specially is closed-head trauma. There was no fracture at the cranial vault or base of the skull. There was injury to the brain in my opinion.

New Trial Transcript Page 25 lines 6 - 29 and Page 26, lines 1 - 5. Appellee's Record Excerpt Tab No. 3.

Dr. Hayne was subjected to cross-examination concerning his conclusions and explained his conclusions and methodology:

Q. (By Mr. Teeuwissen) Okay. So then how are we left to conclude that she had a traumatic brain injury².

A. Clinical by exclusion, counselor. If you have excluded epidermal, subdural, subarachnoid hemorrhage. You have excluded extension of the stroke, you have excluded a new stroke, but you have a degenerative medical picture in

² See New Trial Transcript at Page 14, Lines 9 - 14:

Q. (By Mr. Teeuwissen) When was the last time that you were involved in the diagnosis or treatment of traumatic brain injury ?

A. Probably a week ago.

this individual after the fall, immediately after the fall. So, therefore, you have to explain does she have infection, does she have trauma, does she have some other disease, does she have trauma that one cannot see in the radiographic scans and the like. And I would argue that it is the trauma that you cannot see and would not expect to see on CT scans by exclusion of other diseased states and other traumatic injuries.

Q. And that would be supported by what scientific methodology?

A. That's a methodology of differential diagnosis.

New Trial Transcript Page 45 lines 28 - 29 and Page 46, lines 1 - 13. Appellee's Record Excerpt Tab No. 4.³

Dr. Hayne addressed the issue of causation as follows:

Q. Based upon your education, training and experience, your activities in this case including the review of medical records and applying the established and widely accepted scientific principles you described, do you have an opinion within a reasonable degree of medical certainty as to whether the conditions and treatment reflected by the medical records are causally related to Mrs. Stewart's striking her head on August 11, 1997?

A. In part, counselor, yes. Of course, there were other things in the medical record. The thyroid gland lesion and the cecal lesion there were not, but the preponderance of her findings are associated with deterioration commencing on the 11th of August 1995 [sic].

Q. And I know, Dr. Hayne, you've touched on some of these deteriorating events that are related to the fall. Could you just briefly summarize what those are

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Expounding on this point, Dr. Hayne testified as follows:

Q. Can you state whether the methodology you applied in making your analysis and drawing your conclusions are methodologies which are established and widely accepted scientific principles which allow you to identify injuries and their causes?

A. Yes, sir. Those are the techniques and standards that are commonly used and would be found in such textbooks as *Neetmus* book on forensic trauma of the central nervous system as well as other textbooks on this as well as numerous articles.

New Trial Transcript at Page 23, Lines 2 - 11.

that you saw in the medical records?

A. She suffered deterioration of her mental abilities, she had dysphasia, she also had problems with aspiration, her physical ability deteriorated, she was essentially bedridden, she developed decubitus ulcers, they had to place a feeding gastrostomy for feeding of this individual and eventually developed on admission in one case sepsis, other cases bronchial pneumonia, and subsequently succumbed.

Q. You mentioned I think the technical name for bed sore?

A. Decubitus ulcer.

Q. Okay. And so her loss of mobility or loss of her ability to feed herself, her decrease in her mental capacity all were causally related to this fall, correct?

A. Yes, sir. I think there is a significant deterioration commencing after the fall on the 11th of August 1995 [sic].

New Trial Transcript Page 27 lines 8 - 29 and Page 28, lines 1 - 16. Appellee's Record Excerpt Tab No. 5.

Dr. Hayne reviewed the damages reflected in the Medical Bill Summary and testified, without objection, that the summarized medical bills corresponded with the causally related medical treatment which he had been discussing and that the treatment was reasonable and necessary. New Trial Transcript Page 28 lines 17 - 29. Appellee's Record Excerpt Tab No. 6.

Dr. Hayne also testified that the injuries and damages which he had discussed were reasonably probable to occur when an elderly lady, such as Mrs. Stewart, is allowed to hit her head on pavement:

Q. (By Mr. Bobo) Doctor, at this point I'm just asking you if you have an opinion. If you can tell the court whether or not you have an opinion based upon your education, training, experience, your activities in this case in applying the established and widely accepted scientific principles you described, do you have an opinion within a reasonable degree of medical certainty as to whether the injuries and damages that you've just described to

the court as being causally connected to the head trauma Mrs. Otha Stewart suffered on August 11, 1997, whether those injuries and damages are reasonably probable to occur when an elderly lady is allowed to hit her head on the pavement?⁴

A. The injury sustained would produce a sequelae, and they're commonly seen in an individual who strikes their head no matter from what cause or even [when] struck in the head producing injuries to the brain that may be fairly subtle but also severe leading to final common pathway and death, counsel.

Q. (By Mr. Bobo) So the injuries and conditions that you saw in the medical records, you were not -they weren't surprising or unexpected given that she struck her head on the pavement?⁵

A. They weren't unexpected, counselor, in a person -- elderly person receiving such an injury, one commonly sees the deterioration of that person physically and mentally and subsequent ending in the demise of that individual.

Q. Okay. So it's fair to say that the things that you just described would be reasonably probable if an elderly person such as Ms. Stewart struck her head on pavement?⁶

A. Yes, counselor. We see that routinely in the medical examiner's office. It's not an unusual event

New Trial Transcript Page 29 lines 21 - 29, Page 30, Lines 1-5, Lines 16 - 21, Page 31, Line 1 - 7.

Appellee's Record Excerpt Tab No. 7.

Dr. Hayne also expressly addressed the issue of whether or not the injuries which he had described were causally related to any stroke suffered by Mrs. Stewart:

Q. All right. Based upon your education, training, experience and activities in the case in applying the established and widely accepted scientific principles

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"MR. TEEUWISSEN: Object to the form. There's no testimony that she was allowed to hit her head. The testimony is that she fell, there was an attempt to break her fall. But the phrase, of that question makes it sounds like it was intentionally. THE COURT: Okay. It's overruled. I'll let him answer it if he can." New Trial Transcript Page 29 lines 6 -13.

⁵ No objection was made.

⁶ No objection was made.

you described, do you have an opinion as to whether or not those injuries you described are causally related to any stroke suffered by Ms. Stewart?

A. I do, sir.

Q. What is that opinion?

A. I don't believe that they were, counselor. And that the precipitating event leading to this final common pathway was the injury suffered on 11 August. It was not an exacerbation or extension of a stroke. And I think I agree with some of the other experts that have testified in this case to that fact, sir.

New Trial Transcript Page 32 lines 3 - 17. Appellee's Record Excerpt Tab No. 8.⁷

Having heard and considered the evidence⁸, the Circuit Court made the following findings:

Dr. Steven Haynes was received as an expert in forensic pathology and general medicine. He testified that based on his education, training, experience, and his review of this case that it was his opinion within a reasonable degree of medical certainty that the condition and treatment reflected by the medical records of Mrs. Stewart, were causally related to the plaintiff hitting her head on pavement when she fell on August 11, 1997. He also testified that the plaintiff's striking her head injured her brain and led to the continuous decline of her cognitive and physical abilities until her death on November 4, 2002. In addition, he stated that the medical bill summary in evidence reflected charges which corresponded to the medical records that he reviewed and that the charges were for reasonable and necessary medical treatment casually connected to her injury on August 11, 1997. **The Court finds Dr. Haynes' testimony credible on the issue of liability and damages.** The Court also finds that plaintiff suffered an enormous amount of pain, suffering and mental anguish as a result of the City of Jackson's breach of its duty. Therefore, the Court

⁷ See the testimony of Dr. Thiel:

Q. Do you have an opinion as to whether Ms. Stewart suffered a stroke or an extension of an old stroke on or after August 11, 1997 ?

A. My opinion is that ... she did not have a new stroke or an extension of an old stroke.

Original Trial Transcript Page 212 lines 14 - 19. Dr. Thiel never examined or treated Mrs. Stewart and based her opinion wholly on records supplied by UMMC's attorneys. Original Trial Transcript at Page 225, Lines 17 - 19 and Page 227, Lines 1 - 19.

⁸

The City of Jackson chose to not put on any new evidence. New Trial Transcript Page 55, line 29 and Page 56, lines 1-2.

finds that Plaintiff shall be awarded \$250,000.00 from the City of Jackson for the breach of its duty of care to Plaintiff.

Opinion And Order Dated May 14, 2008. Appellee's Record Excerpt Tab No. 9. (Emphasis added).

III. SUMMARY OF THE ARGUMENT

The Trial Court did just as the Court instructed. As instructed the Trial Court conducted a new trial on the issue of damages. As instructed the Trial Court limited the damage award to \$250,000.00. As instructed the Trial Court excluded from its award any damages attributable to a stroke. On all of these points the Trial Court faithfully performed as instructed by the Court.

Dr. Hayne testified that he agreed with Dr. Thiel that no stroke occurred as the result of the August 11, 1997, head injury. Dr. Hayne differed with Dr. Thiel on the issue of whether a significant brain injury had occurred on August 11, 1997, and the sequela and damages which followed from the August 11, 1997, head injury.

The Trial Court expressly found Dr. Hayne to be credible. *See City of Jackson v. Lipsey*, 834 So.2d 687, 691 (Miss.2003) (in a bench trial, the judge, as the trier of fact, solely determines the credibility of the witnesses.). Credibility of witnesses and the decision to rely upon their testimony is clearly within the discretion of the Trial Court. *University of Mississippi Medical Center v. Pounders*, 970 So.2d 141, 147 (Miss. 2007).⁹ Moreover the Trial Court can reject or ignore and even fail to acknowledge conflicting testimony from other "experts" and place whatever weight he or she chooses on expert testimony. *Id.* at 147 - 148.

It was primarily the province of the Trial Court, as finder of fact, to determine causation.

⁹

The City unfairly seeks to attack Dr. Hayne by going outside of the record and asking the Court to take judicial notice of alleged "discrepancies." City's Brief at 16 n. 3. "This Court will not consider any matter outside of the record." *Reining v. State*, 606 So.2d 1098, 1102 (Miss. 1992). Furthermore the City's request violates M.R.E. 201.

Qualcomm Inc. v. American Wireless License Group, LLC, 980 So.2d 261, 274 (Miss. 2007). The province of the Trial Court, as finder of fact, also extended to cause in fact and legal cause of the damage. *Spann v. Shuqualak Lumber Co., Inc.*, 990 So.2d 186, 190 (Miss. 2008). Likewise the province of the Trial Court, as finder of fact, extended to the determination of the amount of damages to be awarded. *Estate of Jones v. Phillips ex rel. Phillips*, 992 So.2d 1131, 1150 (Miss. 2008).

The Findings of Fact and Order made by the Trial Court in this case, were within his province and are supported by substantial evidence. Likewise it can not be said that the Findings of Fact and Order of the Trial Court are “manifestly wrong.” *Yarbrough v. Camphor*, 645 So.2d 867, 869 (Miss.1994). Nor can it be said that the Trial Court “abused his discretion, was ... clearly erroneous, or an erroneous legal standard was applied.” *Holloman v. Holloman*, 691 So.2d 897, 898 (Miss.1996).¹⁰

IV. THE ARGUMENT

A. STANDARD OF REVIEW

In bench trials, “a circuit judge's findings are subject to the same standard of review as those of a chancellor.” *Univ. of Miss. Med. Ctr. v. Pounders*, 970 So.2d 141, 145 (Miss.2007) (citing *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So.2d 1355, 1358 (Miss.1989)). “Our familiar standard of review requires that when a trial judge sits without a jury, this Court will not disturb his factual

¹⁰

The City incorrectly asserts that the “law of the case” doctrine some how operates to prevent the Trial Court from conducting a new trial as ordered by the Court. City Brief at 12. The citation submitted by the City clearly states that the doctrine “relates entirely to questions of law.” *Id.* The issues in dispute here are factual. Moreover, as *Moeller v. American Guarantee and Liability Ins. Co.*, 812 So.2d 953, 960 -961 (Miss. 2002) points out the rule ceases to apply if there have been a “material changes in evidence, pleadings or findings.”

determinations where there is substantial evidence¹¹ in the record to support those findings.” *Ezell v. Williams*, 724 So.2d 396, 397 (Miss.1998) (citing *Yarbrough v. Camphor*, 645 So.2d 867, 869 (Miss.1994); *Omnibank of Mantee v. United S. Bank*, 607 So.2d 76, 82 (Miss.1992)). Thus, the scope of review affords deferential treatment to the trial judge's findings. *City of Greenville v. Jones*, 925 So.2d 106, 109 (Miss.2006). “[T]his Court ought and generally will affirm a trial court sitting without a jury on a question of fact unless, based upon substantial evidence, the court must be manifestly wrong.” *Yarbrough*, 645 So.2d at 869 (citations omitted). “The word ‘manifest,’ as defined in this context, means ‘unmistakable, clear, plain, or indisputable.’ ” *Singley v. Singley*, 846 So.2d 1004, 1007 (Miss.2002) (quoting *Magee v. Magee*, 661 So.2d 1117, 1122 (Miss.1995)).

B. THE TRIAL COURT’S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE NOT MANIFESTLY WRONG

Both Dr. Thiel and Dr. Hayne agree that Mrs. Stewart did not suffer a stroke on or after August 11, 1997. However, Dr. Theil opined that Mrs. Stewart suffered no serious injury as the result of striking her head on the pavement. Dr. Thiel reached this opinion despite the fact that she did not know the severity of the fall. Original Trial Transcript at Page 226, lines 27 - 29. Moreover she never obtained information from Mrs. Stewart’s family. Original Trial Transcript at Page 226 lines 27 - 29. And more importantly she assumed that Mrs. Stewart’s level of functioning on the 11th and 12th of August, 1997, were the same as her level of functioning prior to Mrs. Stewart striking her head on the pavement.¹²

¹¹

This evidence is “more than a ‘mere scintilla’” and should be characterized as “such relevant evidence as reasonable minds might accept as adequate to support a conclusion.” *Delta CMI v. Speck*, 586 So.2d 768, 773 (Miss.1991).

¹²

According to Dr. Thiel, “[Mrs. Stewart] returned to her normal activity which I think is the strongest piece of evidence....” Original Transcript at Page 211, lines 8-13. This simply was not the

To her credit, Dr. Thiel admitted that her opinion would be unreliable if her assumptions about Mrs. Stewart's functioning on the 11th and 12th were wrong:

Q. And then if her level of alertness was not as you have assumed on the 11th and 12th, that would affect your opinion as to causation?

A. Certainly, all of that would change opinions, but it would depend on what she looked like and what the time frame was, but it could change the opinion, yes.

Original Trial Transcript at Page 243 lines 7 - 13.

Unlike Dr. Hayne¹³, Dr. Theil did not have the benefit of hearing and considering the trial testimony of Mrs. Stewart's daughter Emma Womack. Original Trial Transcript at Page 198, Lines 7 - 13.¹⁴ Mrs. Womack testified as follows:

Q. [T]ell the Judge about your mother. Tell him about a normal day, things that she liked to do, didn't like to do, things such as this [prior to August 11, 1997].

A. Well, she's always been a hyper type of person. My mother loves to talk and laugh. And although she didn't have her speech, she had favorite words that she used like when she was excited. She liked to read the paper. As far as the t.v., she could turn the remote to anything she wanted to watch. She liked to help me cook in the kitchen so I would help her go in the kitchen and sit her down and we make cornbread and different things like that. She has sisters. She's from a family of eight brothers and sisters, and each summer we made it a priority, we went to St. Louis so she could stay a couple of weeks with her sister. So we don't get to do that anymore, though. But she's always been a pretty spunky type of person although she had her limits. She's always been a pretty spunky person.

strongest piece of evidence...." Original Transcript at Page 211, lines 8-13. This simply was not the case and completely undermines Thiel's opinion.

¹³

In contrast to Dr. Thiel, Dr. Hayne reviewed the trial testimony of Emma Womack. New Trial Transcript Page 22, Lines 12 - 24.

¹⁴ Dr. Thiel was called "out of turn" during the Plaintiff's case in chief. Id.

No. 10.

The opinion of Dr. Hayne and the Findings of the Trial Court are substantiated by the following first hand (and unrefuted) account of Mrs. Stewart's level of functioning on August 11, 1997, after she left the hospital:

Q. And will you relate to the Judge from August 11th through when you got her home, would you tell the Judge how she was?

A. Okay. When we left the hospital, August the 11th, that evening, I got my mother home and got her, you know, situated and everything, and she was - she seemed kind of -- she sat there and watched TV for a while. And I asked her did she want some coffee. I fixed her some coffee, and she seemed kind of tired and I kept asking her, you know, Mama, what's wrong, are you all right. She was telling me she was hurting. She just said hurt, you know, she would say one and two words, she would say hurt. I said, you're hurting, your head hurting, your leg hurting, and she would say yes.

A. Oh, I'm so sorry. Okay. I fixed her some coffee and I asked her, you know, did she want to watch the Heat of the Night, it was coming on that evening. And I gave her the remote control and it was so strange she couldn't work it. And I asked her, I said, Mama, what's wrong. And I said, well, you know how to turn the remote, you know. Turn to what you want to watch. She couldn't figure out how to -- I knew something was going on, I just didn't know what was going on. She couldn't work the remote control. And for some reason, periodically, she would just fall asleep where she was sitting. You know, I'd wake her up and she would fall back to sleep.

New Trial Transcript Page 384, Lines 19 - 29, Page 385, Lines 1-4, 11- 23. Appellee's Record Excerpt Tab No. 11.

The opinion of Dr. Hayne and the Findings of the Trial Court are substantiated by the following first hand (and unrefuted) account of Mrs. Stewart's level of functioning on August 12, 1997 and the following day (August 13th):

Q. Okay. And tell me about the 12th. How was she on the 12th?

A. She was that same way. She was complaining about hurting, and I was steady giving her Tylenol, extra strength Tylenol, to kind of help with the pain, and she would fall asleep off and on. I went on and got her out the bed. And I couldn't put her in the tub because, you know, her leg was hurting her so bad and I couldn't put her in the way I normally put her in. So I put her on the chair and I bathed her on the chair and I drug the chair to the dinning room so she could eat. And after I got her In the dining room, before I could fix her plate and put it in front of her, she kind of dosed -- her head was hanging, she just kind of -- excuse me. Okay. Okay. Her head was hanging and it frightened -- oh, Jesus. It frightened me.¹⁵ I asked her what was wrong. She was sleep. She woke up. I woke her up. So I said, Mama, you want to lay down. So I took her -- she said, yes, and I went and took her and I laid her down. And I called my brother and I told him something wasn't right with her. So he came over that evening and we sat there with her. And she woke up.

Q. And what day are you talking now?

A. This was the 12th.

Q. Okay.

A. I got her up and she seemed kind of -- she really seemed kind of slow in her actions. I could say something to her and it was -- it got so she wouldn't answer me right away. She would keep saying, huh. I say, Mama, don't you hear me talking to you. She would say, huh. It was really like she didn't quite understand what I was saying, and then finally she would come around and she would respond. So that next morning --

So I keep her at home on the 13th. I didn't let her go to the center. And that day was pretty much like the 12th, but when I knew I could wake her up I was fine. So I sit her up in the chair in front of the t.v. and I turned the remote for her, she sit -- she sit there and kind of watched t.v. but she wasn't really watching t.v. she was looking at the t.v., but she wasn't really -- she wasn't into it like she normally, you know, like she's normally into her programs. So the 13th we stayed at home and I fixed her food. She didn't want to eat that day. I said, well, Mama, you know you got to eat. You've taken all those

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It is impossible to reconcile these frightening events with the "return to normal" assumptions of Dr. Thiel.

Tylenols, you're going to be sick. So I finally coached her to kind of eat something. She didn't eat as much as she would normally eat because my mother is a big eater. She was a big eater. So that day went on, I put her to bed and she sleep kind of hard that night....

New Trial Transcript Page 385, Lines 24 - 29, Page 386, Lines 1- 29, Page 387, Lines 16 - 29, Page 388, Lines 1 - 4. Appellee's Record Excerpt Tab No. 12.

Thus there is ample unrefuted evidence in the record to support and substantiate the Trial Court's decision to reject Dr. Thiel's determination that Mrs. Stewart "returned to her normal activity." In fact the evidence establishes that Dr. Thiel was completely wrong on this point. Far from returning to her normal activity, Mrs. Stewart's functioning level was so diminished that it frightened her daughter and instead of going to the daycare as she normally did she was kept home and began a downward spiral. When she did return to the daycare, she was found on the ground which was not normal and by the 19th she was hospitalized. Three (3) trips to the emergency room was not normal for Mrs. Stewart.

Likewise there is ample evidence in the record to support the Trial Court's decision that the damages which Mrs. Stewart suffered as the result of her brain injury on August 11, 1997, included the charges on the Medical Bill Summary.¹⁶ Dr. Hayne testified that the charges corresponded to the

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The City criticizes Dr. Hayne for his alleged failure to consider previous falls, her 1978 stroke, and her pre-existing neurological status. City Brief at Pages 9, 17 - 18. Contrary to the City's allegations Dr. Hayne did not testify that he did not take her prior history, including falls, the 1978 stroke or pre-existing neurological status, into account. On cross-examination, Dr. Hayne stated that he was not surprised that she had experienced falls prior to August 11, 1997, but that given that she had a relatively steady period following the 1978 stroke, and no evidence in the records that such prior falls contributed to any traumatic brain injury, that "clinically that would indicate that the significant change was due to the fall on the 11th of August, not some prior [fall]." New Trial Transcript at Page 37, Lines 22 - 29. In fact Dr. Hayne offered to go through, with the City's counsel, the mass of records he reviewed if counsel wanted "specific information as to specific dates and findings." New Trial Transcript at Page 40, Lines 15 - 29 and Page 41, Lines 1 - 9. Counsel for the City chose not

treatment which he linked causally to the August 11, 1997, brain injury and that the charges were reasonable and necessary. New Trial Transcript Page 28 lines 17 - 29. Appellee's Record Excerpt Tab No. 13. The Medical Bill Summary reflects that as of the date of the initial trial on September 25, 2002, Mrs. Stewart had incurred medical expenses of \$416,491.40.

The Trial Court also did not ignore the substantial evidence concerning Mrs. Stewart's "enormous amount of pain, suffering and mental anguish as a result of the City of Jackson's breach of its duty." Prior to hitting her head on August 11, 1997, Mrs. Stewart was an energetic person, a "big eater," who enjoyed travel, a level of mobility and communication, laughing and interacting with her family, reading, watching television and limited cooking. By the time of the original trial she had been reduced to a confused frighten invalid, unable to eat solid food and largely only able to shriek incomprehensibly and wait for death. Dr. Hayne's opinions were based upon facts in the medical records and the trial transcript. Dr. Hayne gave reasonable opinions based upon these facts. Dr. Hayne's testimony and Mrs. Womack's testimony substantiates the Trial Court's determination that this destruction of Mrs. Stewart's quality of life was the direct legal result of the City's breach of duty on August 11, 1997.

The significant and dramatic adverse impact the City's breach of duty had on Mrs. Stewart warrants the amount of damages awarded by the Trial Court. The amount awarded does not even exceed the special damages incurred by Mrs. Stewart. *See Estate of Jones v. Phillips ex rel. Phillips*, 992 So.2d 1131, 1151 (Miss. 2008) (citing *Edwards v. Ellis*, 478 So.2d 282 (Miss.1985) (upheld verdict forty times the amount of medical expenses)).

to go through the records with Dr. Hayne.

The record does not support the conclusion that the Trial Court's Findings and Order were manifestly wrong or clearly erroneous.¹⁷ The City basically argues that the Trial Court committed error by believing that Mrs. Womack's description of Mrs. Stewart's level of functioning after striking her head on August 11, 1997, was more accurate than Dr. Thiel's second hand information alleged gleaned from the medical records, see *supra* notes 7, 12 and 13, and in finding that the testimony of Dr. Hayne, a forensic pathologist, to be credible over the testimony of Dr. Thiel. These are the identical arguments which were rejected by this Court in *University of Mississippi Medical Center v. Pounders*, 970 So.2d 141, 146 (Miss. 2007).

In *Pounders*, UMMC's attack on the testimony of Pounder's expert was based upon the contrary opinion of UMMC's own expert. The Court recognized that cases often come down to a disagreement among experts¹⁸ and expressly held that the Trial Court was allowed to determine what testimony he considered persuasive and what testimony he considered unpersuasive. *Id.* The Court in *Pounders* noted that "[b]ecause the trial judge is the sole judge of the credibility of witnesses and may place whatever weight he feels appropriate on testimony, the trial court did not abuse its discretion by relying on [one expert's] testimony." *Id.* In the present case the Trial Court had the exact same latitude as he weighed the conflicting opinion testimony of experts whose testimony he personally witnessed at trial.

In *Pounders*, UMMC argued that Pounders' expert could not offer opinion testimony on

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"The word 'manifest,' as defined in this context, means 'unmistakable, clear, plain, or indisputable.'" *Singley v. Singley*, 846 So.2d 1004, 1007 (Miss.2002) (quoting *Magee v. Magee*, 661 So.2d 1117, 1122 (Miss.1995)).

¹⁸

"Because there was conflicting [expert] testimony and evidence regarding the cause of Pounders's pneumonia, the trial judge's findings of fact will not be overruled, because they were not clearly erroneous." *Pounders*, 970 So.2d 141, 147 - 148.

matters claimed to be outside his professional specialty. *Id.* In the present case, the City argues, for the first time on appeal¹⁹, that Dr. Hayne could not address neurological matters as a forensic pathologist. City's Brief at 18. Despite the City's failure to make any objection to Dr. Hayne's testimony concerning neurological matters, Dr. Hayne established that the scope of his knowledge and experience warranted admission of his expert opinion testimony. See New Trial Transcript at Page 9, Lines 17 - 29 and Page 10, Lines 1 - 10. Dr. Hayne expressly testified that his activities, review of the pertinent medical records and the trial transcript, were "sufficient to allow [him] to draw conclusions and reach opinions [to a reasonable medical certainty] within [his] area of expertise." New Trial Transcript at Page 22, Lines 28 - 29.²⁰

C. THE TRIAL COURT APPLIED THE APPROPRIATE LEGAL STANDARDS

The City does not point to any erroneous legal standard supposedly misapplied by the Trial Court. However, the City does argue that the Trial Court included damages attributable to stroke in the damage award granted after the new trial on damages. This contention is not supported by the record. Dr. Hayne clearly testified that based upon his education, training, experience and activities in the case and in applying the established and widely accepted scientific principles, that Mrs.

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"This Court has 'been consistent in holding that we need not consider matters raised for the first time on appeal, which practice would have the practical effect of depriving the trial court of the opportunity to first rule on the issue, so that we can then review such trial court ruling under the appropriate standard of review.'" *Anglin v. Gulf Guar. Life Ins. Co.*, 956 So.2d 853, 864 (Miss. 2007) (citing *Alexander v. Daniel*, 904 So.2d 172, 183 (Miss.2005)).

²⁰

The City also appears to criticize Dr. Hayne because no autopsy was performed and he was not a treating physician of a live patient. This Court has never held that only examining or treating physicians are allowed to testify. *See e.g., Mississippi Dept. of Mental Health v. Hall*, 936 So.2d 917, 927 (Miss. 2006). It should also be noted that Dr. Thiel never examined Mrs. Stewart and was not one of her treating physicians. Dr. Thiel did not have any autopsy findings in reaching her opinions. Autopsies are not even "required by law in a murder case in this state." *Russell v. State*, 849 So.2d 95, 117 (Miss. 2003).

Stewart's injuries were not causally related to any stroke suffered by Mrs. Stewart. New Trial Transcript Page 32 lines 3 - 17. Appellee's Record Excerpt Tab No. 8. This opinion by Dr. Hayne is in full agreement with the opinion of Dr. Thiel on the point that Mrs. Stewart did not suffer a stroke as the result of hitting her head on the pavement on August 11, 1997 or at any time thereafter. See *supra* n. 6. If, as these two doctors concluded, Mrs. Stewart did not suffer a stroke on or after August 11, 1997, then her subsequent condition and treatment could not be caused by or related to the non-existent stroke. Therefore, the Trial Court justifiably relied upon the testimony of Dr. Hayne that the injuries which Dr. Hayne attributed to the brain injury were not injuries attributable to a stroke.


V. CONCLUSION

The Trial Court was directed to conduct a new trial on the issue of damages. The Trial Court was told that any damage award could not exceed \$250,000.00 and that the damage award could not contain damages resulting from a stroke.

The Trial Court conducted the trial as directed. The Trial Court heard and received testimony largely without objection. The City chose to not put on any new testimony. The Trial Court weighed the competing testimony and made credibility determinations. The Trial Court remained within its province and issued well reasoned Findings of Fact and an Order based upon those Findings. The Findings of Fact and Order are based upon substantial evidence and are not manifestly wrong or clearly erroneous. The Trial Court applied the appropriate legal standards. The Trial Court's Decision should be upheld and affirmed on appeal.

Respectfully submitted,

Estate of Otha Stewart

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CERTIFICATE OF SERVICE

I, James A. Bobo, one of the attorneys for Appellee, do hereby certify that I have this day, mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing document to:

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This the 27th day of January, 2010.



James A. Bobo