IN THE MISSISSIPPI SUPREME COURT
Case No. 2009-CA-00433

Pinecrest, LLC and Mastercare, Inc. — **Defendants/Appellants**

v.

Eula Jane Harris, Executrix of the Estate of Myrtle R. Callendar, for the use and benefit of the Estate of Myrtle R. Callendar, and for the use and benefit of the wrongful death beneficiaries of Myrtle Callendar — **Plaintiff/Appellee**

APPEAL FROM THE CIRCUIT COURT OF COPIAH COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
No. 2009-CA-00433

Pinecrest, LLC and Mastercare, Inc. **APPELLANTS**

vs.

Eula Jane Harris, Executrix of the Estate of Myrtle R. Callendar, for the use and benefit of the Estate of Myrtle R. Callendar, and for the use and benefit of the wrongful death beneficiaries of Myrtle R. Callendar **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

Circuit Court Judges:

Honorable David H. Strong, Jr., Copiah County Circuit Court

Honorable Lamar Pickard, Copiah County Circuit Court

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Respectfully submitted, this the
28th day of December, 2009.

A. Lance Reins (MS #[redacted])
Attorney for Plaintiff/ Appellee

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff requests that oral argument be granted. This case turns on a clear understanding of a lengthy record. A thorough discussion of the record with the Court will be beneficial in explaining Plaintiff's position on the important issues raised.

STATEMENT OF THE ISSUES

I. Whether the trial court's entry of an Order reinstating a jury verdict revives post-trial motions previously declared moot?

II. Whether a trial judge's authority to rule on an issue must be raised below to be preserved for appeal?

III. Whether a successor judge possesses authority to reinstate a jury verdict when the trial judge's grant of a new trial was based solely on legal error, the facts are uncontested, and credibility of witnesses played no part in the decision?

IV. Whether the trial court abused its discretion in reinstating the jury verdict?

V. Whether the amount of the jury award was contrary to the weight of the evidence?

STATEMENT OF THE CASE

Nature of the Case

This case is a nursing-home abuse-and-neglect case. In 2002, Plaintiff/Appellee, the Executrix of the Estate of Myrtle R. Callendar representing the estate and Ms. Callendar's wrongful-death beneficiaries, filed a complaint in the Circuit Court of Copiah County, Mississippi, seeking damages from Pinecrest, LLC and Mastercare, Inc. (Defendants)[1] for the injuries and wrongful death of Myrtle Callendar. R.14-41.[2]

On March 30, 2006, a Copiah County jury returned a unanimous verdict in favor of the Plaintiff for $750,000.00. The evidence at trial established that Defendants failed to follow their own policies and procedures regarding fall prevention, that Ms. Callendar was unsupervised and found on the floor by her own daughter with soiled undergarments, and that she fell as a result of Defendants' failures. Further, her treating physician testified, and Defendants stipulated at trial, that this fall and fractured hip contributed to Ms. Callendar's death. The jury needed fewer than twenty minutes to return its unanimous verdict for the Plaintiff, underscoring the simplicity of the issues at trial. R. Vol. 6, p. 844.

As succinctly recognized by the trial judge, Honorable Lamar Pickard, "[t]he question in this case is whether or not adequate supervision was being provided to Ms.

[1] Additional defendants were named in Plaintiff's original complaint, including the licensee and administrator of Pinecrest, and Pinecrest, Inc, the landlord of the facility. The licensee and administrator defendants were dismissed by the trial court on February 7, 2006, which dismissal was affirmed by this Court on May 15, 2007, in Case No. 2006-TS-0329. Pinecrest, Inc. was dismissed on directed verdict at trial. R. Vol. 2, p. 219.

[2] References to the record are denoted as R. Vol. ___, p. ___; References to the hearing transcripts included in the record are denoted as H.T. (date) p. ___. References to the trial transcript included in the record are denoted Tr. Trans. p. ___.

Callendar at the time she fell. That's all that's at issue in this lawsuit." Tr. Trans. p. 304, l. 17-20.

Statement of Facts

Myrtle Callendar was a petite lady, who stood around five feet tall and weighed around 100 pounds. Tr. Trans. p. 111, l. 13-21; p. 132, l. 17-23. Widowed at the age of 42, Ms. Callendar had three children, Eula Jane Harris, and Carl and James Callendar. Tr. Trans. p. 106, l. 16-19; p. 109, l. 1-9. Eula Harris describes her mother as a "loving person" who enjoyed flowers, people, and children. She often babysat for children in the community. Tr. Trans. p. 105, l. 25- p. 106, l- 6. Ms. Callendar's children all had a close relationship with their mother. She baby sat and cooked for them—"all a mother could possibly do." Tr. Trans. p. 111, l. 1-4; p. 308, l. 12-29.

For five years, Ms. Callendar's children took turns caring for their mother as she aged and her dementia took away her independence. Tr. Trans. p. 135, l. 2-4; p. 308, l. 2-11. Ms. Callendar's vision decreased, preventing her from seeing the numbers on the microwave. She couldn't feed herself. Tr. Trans. p. 307, l. 23-29. Eventually, it got to the point where her children could no longer care for her. Tr. Trans. p. 109, l. 13-15.

It was then, in May 2002, that Ms. Callendar was admitted to Pinecrest Guest Home. Tr. Trans. p. 110, l. 9-11. Although she had vision and mental issues, Ms. Callendar was not on a downward health spiral when she was admitted to Pinecrest Guest Home, as Defendants suggest. (Def. Brief at p. 28-29) Instead, she was forgetful, had short term memory loss and an unsteady gait. R. Vol. 1, p. 63-68; Tr. Trans. p. 109, l. 14-21; p. 310, l. 9-11. Ms. Callendar's children chose Pinecrest Guest Home because it was close to Ms. Harris and because they thought that the facility's staff was trained to care for the elderly. Tr. Trans. p. 182, l. 14-26.

Ms. Harris visited her mother at Pinecrest twice every day, a lot of days three times. Tr. Trans. p. 109, l. 12-21; 136, l. 3-4; p. 182, l. 19-26. She most often visited in the mornings and in the evenings, frequently after dinner and staying until Ms. Callendar fell asleep. Tr. Trans. p. 136, l. 9-18; p. 138, l. 5-20. Carl Callendar visited his mother on Sunday evenings. Tr. Trans. p. 152, l. 17-20; p. 309, l. 22-27. James Callendar typically visited his mother on Wednesdays and Sundays. Tr. Trans. p. 144, l. 5-10.

A. Ms. Callendar's Pattern of Unassisted Ambulation at Pinecrest.

Betty Dear, the quality assurance nurse at Pinecrest during Ms. Callendar's residency, testified that Pinecrest provides 24-hour skilled care, including RN coverage at least 8 hours a day, LPN coverage 24 hours a day and CNAs. Tr. Trans. p. 187, l. 16-18. Nurse Dear and Dr. Hankins, Ms. Callendar's attending physician, both testified that Ms. Callendar was at a high risk of falling when she was admitted to Pinecrest. Tr. Trans. p. 195, l. 11-13; p. 456, l. 25-27. A care plan was prepared to address her risk of falls. The care plan indicated that Ms. Callendar had an unsteady gait, osteoporosis and ongoing psychotropic drug use. R. Vol. 2, p. 155-60; Tr. Trans. p. 199, l. 10- p. 200, l. 4. To help reduce the risk of falls, the care plan notes that staff was to assist her with transfers and walking as needed, keep the room clean, put up side rails on one side for positioning, keep a call light within reach, notify the doctor and responsible party of any falls, and document that the doctor was notified of any falls. R. Vol. 2, p. 155; Tr. Trans. p. 201, l. 3- p. 203, l. 13.

Ms. Callendar's first documented fall occurred on June 29, 2002. Ms. Callendar was found sitting on the floor next to her bed at 9:10am. There were no eyewitnesses to the fall. Fortunately, Ms. Callendar had no apparent injuries from that fall. R. Vol. 2, p.

178-81; Tr. Trans. p. 145, l. 17-18; p. 203, l. 23-29. When asked, Ms. Callendar could not recall what had happened but reported that she was trying to go to the bathroom. The facility felt that the circumstances warranted the production of a fall review. As explained by Betty Dear, a fall review is a form completed after each fall that documents what the facility plans to do to prevent further falls. The June 29 report notes that side rails were present. The fall report did not reflect that Ms. Callendar was in a low bed or that a low bed was to be implemented. R. Vol. 2, p. 178-81; Tr. Trans. p. 177, l. 5-25; p. 207, l. 12-21; p. 208, l. 4-8; p. 209, l. 12-14. The nurses' notes reflect that Carl Callendar was notified of the incident, but there is no indication that the doctor was ever notified. R. Vol. 2, p. 179; Tr. Trans. p. 203, l. 29- p. 204, l. 22.

Susie Gilbert, Plaintiff's nurse expert, affirmed the facility's decision to treat this incident as a fall. Tr. Trans. p. 346, l. 3-19; p. 348, l. 1-9; p. 399, l. 9-17. However, Nurse Gilbert was critical of the facility's failure to notify Ms. Callendar's physician following this fall. That failure constituted a violation of the standard of care, a violation of state and federal regulations, and a violation of their policies and procedures. Tr. Trans. p. 348, l. 7-18; p. 399, l. 23- p. 400, l. 3. According to Nurse Gilbert, had the physician been notified, he could have evaluated what he believed needed to be done in response. Tr. Trans. p. 350, l. 26- p. 351, l. 19. For example, the fall review notes that a low bed, padded rails, and a bed alarm with a Velcro clip were alternative measures that could have been implemented. Tr. Trans. p. 178, l. 27- p. 129, l. 13.

Pinecrest's quality assurance nurse agreed that not calling the doctor about this fall violated the standard of care. Tr. Trans. p. 205, l. 19-26; p. 390, l. 22- p. 392, l. 22. She further agreed that, at least on June 29, 2002, Pinecrest was on notice that Ms. Callendar was at risk for attempting to get up to do things without waiting for

assistance, including going to the bathroom. Wendy Crater, the director of nursing at Pinecrest, agreed that Ms. Callendar was at a high risk of getting out of bed without assistance. Further, if she tried to get up unassisted from either a wheelchair or from bed, Pinecrest knew that there was a chance of injury. Tr. Trans. p. 210, l. 2-10; p. 211, l. 3-12; p. 222, l. 4- 8; p. 540, l. 19-26; p. 544, l. 23-26.

The next day, on June 30, 2002 at 10:00am, Ms. Callendar fell out of her wheelchair when she was trying to get up next to the nurse's station. She ambulated three feet before falling and sustained a bruise over her right eye and another bruise near her eye. Dr. Watson and Carl Callendar were notified of this fall. R. Vol. 2, p. 182-84; Tr. Trans. p. 217, l. 28- p. 219, l. 8. Following this fall, a lap buddy was implemented to try to keep Ms. Callendar in her wheelchair. R. Vol. 2, p. 167; Tr. Trans. p. 116, l. 16-28; p. 219, l. 1-6.

On July 1, 2002, the nurses' note reflects that Ms. Callendar was "attempting to get out of chair at frequent intervals... Requires constant monitoring related to trying to get up and noncompliance with the following safety instructions." Tr. Trans. p. 219, l. 10- 23. Pinecrest's quality assurance nurse testified that Ms. Callendar sustained three falls in three days. Tr. Trans. p. 220, l. 2. Despite this pattern of ambulating without assistance, only a lap buddy, a restraint, was discussed with the family as a solution for preventing further falls. No less restrictive alternatives were offered to the family despite the fact that policy dictates that less restrictive alternatives were to be attempted prior to the use of restraints. Tr. Trans. p. 220, l. 3-29.

Nurse Gilbert noted that the pattern of falls developing implicated the supervision being provided. Tr. Trans. p. 348, l. 19-25; p. 350, l. 4-6. According to Nurse Gilbert, Pinecrest had a problem with assisting Ms. Callendar. Tr. Trans. p. 359,

l. 14-24. Ms. Callendar was unsupervised on both occasions. Tr. Trans. p. 349, l. 13-23.

On July 2, 2002, at 9:25 am, Ms. Callendar was found up, ambulating around the unit without assistance. Her alarm was attached to her but was not functioning properly. She was assisted back to her bed with two side rails in place for safety. R. Vol. 2, p. 168; Tr. Trans. p. 224, l. 28- p. 225, l. 7. Despite the failure of the personal alarm on this occasion, Pinecrest continued to rely on the alarm as a safety precaution. Tr. Trans. p. 400, l. 4-13. Myrtle Callendar, fortunately, did not fall on July 2. However, the episode provided the facility with further knowledge of her propensity to ambulate and also provided the facility with notice that the personal alarm may not function properly. Still, there was no discussion of velcroing or securing the alarm to the bed, and neither a low bed nor a mattress on the floor were offered as interventions. Nurse Dear testified that she would expect the nursing home to address the pattern of Ms. Callendar's repeatedly getting up without assistance. Tr. Trans. p. 217, l. 5-14; Tr. Trans. p. 225, l. 8-26; p. 226, l. 2-19. Nurse Gilbert opined that Ms. Callendar was an appropriate candidate for interventions to reduce the risk of further falls. No interventions are discussed in the nurses' notes. No changes were made to her care plan. Tr. Trans. p. 361, l. 21-26; p. 364, l. 10-16.

On September 25, 2002, Ms. Callendar suffered her final fall. Again, alone. Again, trying to go to the bathroom. R. Vol. 2, p. 186-91; Tr. Trans. p. 222, l. 14-20. Ms. Harris reported arriving at the nursing home between 6:00 and 6:30pm. As she walked the length of the corridor, Ms. Harris did not see "any aides, any nurses or anybody." Tr. Trans. p. 117, l. 24- p. 118, l. 7. As she neared her mother's room, Ms. Harris recalled seeing a lady in a wheelchair sitting in the doorway of her mother's room, motioning. When Ms. Harris arrived at the door, she could hear her mother begging, "Help. Help."

Tr. Trans. p. 118, l. 8-17. Ms. Harris found her mother lying on the floor, face down, between the night stand and her bed. Her food tray was sitting on the night stand next to her.[3] Two bed rails were up.[4] Unable to lift her mother by herself, Ms. Harris went back into the hall to look for help. Tr. Trans. p. 118, l. 18-29; p. 161, l. 17-22; p. 163, l. 22-24. A nurse from the nurse's desk was summoned. She and an aide lifted Ms. Callendar back into her bed, causing Ms. Callendar to holler. Ms. Harris recalls that the nurse exclaimed, "My God, the alarm is still on her." Tr. Trans. p. 119, l. 3-13. Notably, Ms. Callendar's personal alarm did not sound as it should have. Tr. Trans. p. 227, l. 9-18. Ms. Callendar had stool in her undergarments, so the nurse and aide cleaned her up and changed her. Tr. Trans. p. 120, l. 1-9; p. 227, l. 3-6.

Upon assessment, Ms. Callendar was noted to have a skin tear to her right arm, a bluish area along the right eyebrow and lower forearm, and nausea. Ms. Callendar complained of right leg and right knee pain. Nurses notes indicate that range of motion was done "without any problems." R. Vol. 2, p. 187; Tr. Trans. p. 228, l. 26- p. 229, l. 5; p. 230, l. 14-17. Susie Gilbert, Plaintiff's nurse expert, opined that there was no way that

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[3] The placement of the meal tray next to Ms. Callendar's bed is significant because Ms. Callendar required assistance with feeding. Tr. Trans. p. 161, l. 13-16. Pinecrest's quality assurance nurse testified that if a resident cannot feed themselves, then someone will sit beside them and feed them. Tr. Trans. p. 188, l. 4-7. If a CNA or other staff member at Pinecrest begins feeding a resident, that person is supposed to stay with the resident until the meal is finished, except in the event of an emergency. Tr. Trans. p. 189, l. 20-26. Mr. Scipper, the administrator, testified that it would be inappropriate for the facility to not provide attention and supervision to residents in their rooms during meal time. Tr. Trans. p. 256, l. 5-9. Nevertheless, the testimony presented at trial was that Ms. Callendar was found on September 25, 2002, alone in her room, having fallen, with her meal tray bedside her bed, partially eaten. Tr. Trans. P. 472, l. 16-22. Defendants presented no testimony to explain why Ms. Callendar was left unattended at meal time. Don Scipper testified that "there should be adequate supervision of all the residents at the facility." Tr. Trans. p. 253, l. 23-24; p. 270, l. 6-15; p. 408, l. 4-7.

[4] Pinecrest's quality assurance nurse testified that having two side rails up increases the risk of injury if a resident falls. Tr. Trans. p. 228, l. 13-17. The director of nursing, Wendy Crater, agreed. Tr. Trans. p. 545, l. 6-8. Yet, no assessment was done of Ms. Callendar to determine whether she had the strength to climb over a side rail. Tr. Trans. p. 545, l. 2-5.

range of motion was done on Ms. Callendar's fractured shoulder, arm and hip. To have put those limbs through range of motion would have been "excruciating." Tr. Trans. p. 368, l. 3-11; p. 389, l. 17-23.

Despite documentation that Ms. Callendar's response to range of motion was unremarkable, Nurse Dear agreed that there were signs and symptoms that something was wrong. Tr. Trans. p. 231, l. 1- 3. As testified by Nurse Dear, fractured hips and shoulders are accompanied by pain. Still, Ms. Callendar was not given Tylenol or Demerol (both of which she had standing orders to receive PRN) the night of her fall or the next day. Tr. Trans. p. 231, l. 18-25; p. 232, l. 19-27; p. 233, l. 21- 28; p. 369, l. 10-18. Notwithstanding Ms. Callendar's regular use of a theragesic patch for her osteoporosis pain, Nurse Gilbert expressed criticism over the facility's failure to give Ms. Callendar pain medication for her acute injuries, identifying such failure a deviation from the standard of care and a violation of state and federal regulations. Tr. Trans. p. 370, l. 20-28; p. 450, l. 8- 17. Ron Guins, the owner of Pinecrest expressed that he "would be very disappointed" if Ms. Callendar was not given pain medication in response to her broken shoulder and hip. Indeed, he was "disappointed that it happened in the first place." Tr. Trans. p. 432, l. 20-28.

The next morning, Ms. Harris returned to her mother's room and encountered some nurses standing over her mother's bed, recounting things that should have been done—the alarm should have been fastened to the bed, something could have been put over the rails, something could have been placed on the floor, etc. Tr. Trans. p. 120, l. 27- p. 121, l. 8; p. 157, l. 7- p. 159, l. 8.[5] At 9:30am, Ms. Callendar was finally taken to

[5] Nurses' notes reflect that, after one unsuccessful attempt to reach a doctor following Ms. Callendar's fall, a doctor was reached at 9:20pm, nearly three hours after the fall. He told the nurses to watch her overnight and, if she continued to have problems, to send her to the hospital in the morning. R. Vol. 2, p. 187; Tr. Trans. p.235, l. 19-23. Nurse Gilbert testified that there is

Hazelhurst hospital, where she was x-rayed. The hospital records indicate that her right arm had a displaced, "obvious fracture proximally with swelling and bruising." Further, her right leg appeared visibly shorter and there was pain on both passive and active range of motion. Ms. Callendar was sent to St. Dominics for consultation with a surgeon, who declined to do surgery on her arm or hip due to her inability to participate in rehab. Tr. Trans. p. 121, l. 19- 27; p. 234, l. 25-26; p. 379, l. 19-27; p. 380, l. 11-25; p. 381, l. 15-26; p. 382, l. 2-14.

Contrary to Defendants' claim that Ms. Callendar experienced no more pain than usual, [6] the evidence at trial established that Ms. Callendar endured significant pain following this traumatic fall. She moaned and groaned. Ms. Harris and her husband stayed with her day and night for several days. Ms. Callendar jerked with pain. Several nights, Ms. Harris and her husband had to hold her on the bed because she would be "jumping so bad."

Ms. Harris recalls that the weeks following the fall were "horrible" having "to see somebody that you love have to suffer like that." "When you see somebody that's bruised and broken like my mama was, I hope that nobody would ever have to go through that." Tr. Trans. p. 122, l. 1- p. 124, l.14; p. 164, l. 21-29; p. 174, l. 6-11; p. 460, l. 11-12. Carl Callendar agreed that his mother "looked terrible." "She was all black and blue." Tr. Trans. p. 313, l. 17-25.

Dr. Hankins, Ms. Callendar's attending physician, did not see Ms. Callendar until a week to ten days after her fall, when she was readmitted to the hospital. Tr. Trans. p. 459, l. 22-28. In the hospital records, Dr. Hankins documented that she was in "very

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no indication in the records that the doctor was told about the fractured hip and shoulder or of the symptoms. Tr. Trans. p. 372, l. 12-26.

[6] Def. Brief at p. 31.

much pain and was being admitted for pain control." Tr. Trans. p. 462, l. 4-5. His physical examination of Ms. Callendar reports that she was "moaning with pain." "She required large amounts of narcotics, including morphine, for pain control." Tr. Trans. p. 462, l. 14-16, 21-22.

Pictures of Ms. Callendar's bruised body were admitted into evidence as P-2 and P-3 without objection. Tr. Trans. p. 123, l. 13- p. 124, l. 5. Susie Gilbert noted that Ms. Callendar was protracted in the pictures, indicating pain. Upon questioning by defense counsel, Ms. Harris identified the pictures of Ms. Callendar's bruising as having been taken 2-3 days after the fall. The bruises never went away. Neither did the pain. Ms. Callendar passed away October 16, 2002. R. Vol. 3, p. 306-07; Tr. Trans. p. 122, l. 1- p. 124, l.14; p. 164, l. 21-29; p. 174, l. 6-11; p. 382, l. 22-29; p. 384, l. 18-24; p. 385, l. 5-7 (she was in "very much pain"). The Coroner's report and death certificate, entered into evidence without objection as P-5 and P-6, identify the September 25 fall as the cause of Ms. Callendar's death. R. (Appeal 2006-TS-0329) Vol. 4, p. 471-73; Tr. Trans. p. 130, l. 23- p. 131, l. 3. Dr. Hankins agreed that the fall and resulting fractures ultimately contributed to her death. Tr. Trans. p. 463, l. 8-14. Defendants stipulated at trial that the death certificate accurately reflects her cause of death. Tr. Trans. p. 319, l. 6-8; p. 321, l. 15-25.

B. Pinecrest's Policies and Procedures Were Not Followed

Pinecrest has in place policies and procedures for interventions the facility is to take in the event a patient is at risk for falls. Such interventions are intended to help reduce the risk and occurrence of falls. The policies and procedures were admitted into evidence without objection as P-10. Tr. Trans. p. 242, l. 4-11; p. 261, l. 23-28. The policies provide that prior to the application of restraints, less restrictive measures are

to be attempted. Less restrictive measures include positioning devices, padded side rails, recliners, low beds, low chairs and increased monitoring supervision. It is the nursing home's obligation to attempt to reduce the risk of falling. Tr. Trans. p. 242, l. 12- p. 243, l. 5; p. 250, l. 18- p. 251, l. 14; p. 285, l. 21-26; p. 353, l. 22- p. 354, l. 3.

Dr. Hankins testified that he expected the facility to follow its policies and procedures. Further, he expressed an expectation that they should follow the standard of care to prevent Ms. Callendar from falling. Tr. Trans. p. 455, l. 21-23; p. 456, l. 7-10. Likewise, Don Scipper, the administrator at the time of Ms. Callendar's September 25 fall, testified that it is realistic for the families of residents to expect the facility to follow their policies and procedures. Further, not attempting the preventative measures outlined in the policies when a resident continues to fall "probably could constitute" neglect. Tr. Trans. p. 251, l. 28- p. 252, l. 1; p. 278, l. 26-29; p.; 283, l. 28- p. 284, l. 2. Mr. Scipper declared that he "would be critical of myself if I didn't do everything I could to try and reduce the risk." Tr. Trans. p. 286, l. 2-4.

Yet, Pinecrest's quality assurance nurse admitted that the appropriate measures identified in Pinecrest's policies and procedures were not tried on Ms. Callendar. Tr. Trans. p. 242, l. 12- p. 243, 1- 5. Nurse Gilbert agreed, "[i]n this particular case, you have a resident where... appropriate interventions based on their own policies and procedures, state and federal guidelines are just not being put into place to help prevent falls in the resident... after she came back to the facility, they did add more interventions after the third fall, but the damage is done then." Tr. Trans. p. 378, l. 1-14 According to Plaintiff's nurse expert, the failure to implement any of these measures constituted a deviation from the standard of care and a violation of Pinecrest's own policies and procedures. Tr. Trans. p. 354, l. 4-13; p. 377, l. 20-28.

Carl Callendar testified that the nursing home never discussed with him their plan for fall prevention and never contacted him about utilizing restraints for his mother while she was in bed. Tr. Trans. p. 308, l. 25-28; p. 312, l. 22-27. Susie Gilbert described this as a breakdown in the nursing process. Tr. Trans. p. 378, l. 15-25.

Susie Gilbert further testified that Pinecrest's failure to follow its policies and procedures culminated in Ms. Callendar's fall on September 25, 2002. Tr. Trans. p.342, l. 19-29. According to Nurse Gilbert, interventions such as a mattress on the floor, padding, and a low bed[7] are all interventions noted in the facility's policies and procedures, any of which could have been implemented by Pinecrest to prevent the injuries that occurred. Yet they were not implemented. This was a deviation from the standard of care and a violation of their own policies and procedures. Tr. Trans. p. 344, l. 1-19; p. 358, l. 20- p. 359, l. 8. Wendy Crater, the director of nursing, agreed that any violation of the policies and procedures would be a deviation from the standard of care. Tr. Trans. p. 545, l. 19-28.

Side rails were put on Ms. Callendar's bed so that she would not try to get up by herself. However, Ms. Callendar continued to try to get up. Tr. Trans. p. 113, l. 24- p. 114, l. 27. Nurse Dear testified that having two rails on a bed, as Ms. Callendar did, can cause a greater risk of injury because a resident would have to climb the rails to get out of bed and would be farther from the floor. Tr. Trans. p. 211, l. 13-23; p. 228, l. 13-17.

[7] Low beds are different from hospital beds which have been lowered. Low beds are closer to the floor than regular beds. Tr. Trans. p. 210, l. 15-26. Ms. Callendar's family asked that their mother be placed in a low bed. However, the facility told them that the hospital bed she was in was as low as it would go and, although Nurse Dear testified that the facility did have low beds, Ms. Harris was told that they did not have anything any lower. Tr. Trans. p. 156, l. 18-24; p. 178, l. 11-20; p. 210, l. 17-26. Putting a bed in a low position is not identified as a fall precaution in Defendants' policies and procedures. Tr. Trans. p. 367, l. 8-18.

According to Nurse Gilbert, a low bed can be implemented by simply making a call to the physician and asking for one. Dr. Hankins testified that he has never denied a request for a low bed. Tr. Trans. p. 357, l. 9-16; p. 457, l. 23-25. Still, he was not called regarding a low bed for Ms. Callendar. Tr. Trans. p.457, l. 20-22.

Nurse Gilbert agreed that side rails increase the risk of injury—"with Ms. Callendar, she's going to get up, and those side rails can become a detriment to her. She's going to try to climb over them, and she did on her last fall." Tr. Trans. p. 358, l. 22- 25. No assessment was done of Ms. Callendar to determine whether she had the strength to climb over a side rail. Tr. Trans. p. 545, l. 2-5.

Ms. Callendar was given a bed alarm. However, Ms. Harris testified that it was just laid on the bed, not fastened to the bed in any way. If not fastened to the bed, the alarm is rendered useless. No alert will sound when the resident gets out of bed. Tr. Trans. p. 115, l. 11- p. 116, l. 5; p. 150, l. 15-23. Because Ms. Callendar's alarm was never fastened appropriately, the alarm did not sound at the time of Ms. Callendar's September 25 fall, nor on July 2, when Ms. Callendar was seen ambulating on the unit.

According to Susie Gilbert, had Pinecrest followed its own policies and procedures and protocols regarding fall intervention, the September 25 fall would not have occurred. Tr. Trans. p. 343, l. 1-13; p. 386, l. 25-29. Further, in allowing that fall to happen, Pinecrest violated the standard of care. Tr. Trans. p. 343, l. 14-22. Ron Guins, the owner of the facility "agreed that there are things that could be done different and [I] have agreed that I am very sorry about it." Tr. Trans. p. 426, l. 29- p. 427, l. 2.

C. Admission of the February 8, 2002 Survey

To further establish that Defendants had notice and knowledge of inadequate supervision issues at Pinecrest, Plaintiff sought to introduce a Mississippi Department of Health survey from February 2002. Tr. Trans. p. 291, l. 3- 20. This document involved a prior incident in which the facility was cited for failure to provide adequate supervision and assistance to a resident who eloped from the facility. Tr. Trans. p. 292, l. 1-2. When the trial court inquired about the nature of the document, counsel for the

Plaintiff reminded the court of the long-established rule in Mississippi that prior accidents may be introduced to show,

> the defendant's notice or knowledge of such dangerous condition. I am using this evidence to show in February, before she even got there, they had notice and knowledge of a dangerous condition of folks not being adequately supervised. And it absolutely goes to the very heart of our case of why this lady fell, because she had inadequate supervision at meal time of all times. So any objection as to the survey goes to the weight, not the admissibility.

Tr. Trans. p. 293, l. 1-10. Defense counsel objected, and counsel for both parties presented argument to the court. Tr. Trans. p. 293-296.

Ultimately, the trial court allowed the redacted survey for the "sole purpose of showing that the Defendants were put on notice and possessed knowledge of ***allegations*** of residents not being provided adequate supervision and assistive devices to prevent accidents." Tr. Trans. p. 336, l. 29- p.337, l. 4 (emphasis added). The trial court acknowledged, however, the need for a cautionary instruction and instructed the parties to craft such an instruction to inform the jury that whatever the company had done in the past or in the future was not relevant. Tr. Trans. p.298, l. 3- 27. Further, the court ordered that the document be redacted, stating:

> Secondly, my suggestion is rather than putting the entire document in, because there's some things in that document that I think may be misleading and maybe also overly prejudicial, that have no probative value; in other words, this lady walking down the street. That is prejudicial and has no probative value. **The key is there was inadequate supervision reported to the company. The only thing you want to prove is that Pine Crest had knowledge of that. I think a question asking had they been warned by the state would cover that.**

Tr. Trans. p. 298, l. 3-27 (emphasis added).

Notwithstanding the cautionary instruction and limited presentation, Defense counsel stated that if the document got in, he wanted to point out factual differences,

thereby admitting the entire document. The trial court responded,

> That's up to you, counsel. That's up to you. I'm just cautioning the plaintiff as the one that wants to put this evidence in. **And I think for the purpose of showing that they had notice of inadequate supervision or at least somebody's opinion that they were inadequate in providing supervision, I think that may be relevant to some extent in this situation.** And I think that fact and that fact alone may outweigh any prejudicial effect, the relevance may.

Tr. Trans. p.299, l. 9-18 (emphasis added). The court continued:

> Oh, I understand your objection. I also understand that in most situations facts and evidence of another situation has nothing to do with this. For example, a car wreck. The fact somebody ran stop signs 100 times last year and then all of a sudden they run one this year and had a wreck, those other 100 don't count. It's this one that counts. And I understand that is the key. **However, when you're dealing with a situation of – in this situation the entire allegation is lack of adequate supervision, and it appears to the Court that supervision is necessarily a situation that involves notice because obviously if a company feels that it is adequately supervised and has no notice of an inadequacy, then it would not be negligent if something happened or a jury could not determine that, but I think the fact that they may have been warned that at least somebody thought there was inadequate supervision may be enough to imply at least notice to Pine Crest, so I'll admit that one part of that.** Then if you want to admit it all, [Defense] counsel, you can.
>
> ***
>
> [M]y ruling is I do see relevance in this situation of the fact that a governing agency who examined this nursing home sometime prior to this occasion informed Pine Crest that they thought it was inadequate supervision, that and that alone. That is all I will allow in.

Tr. Trans. p.300, l. 6-27 (emphasis added), p. 303, l. 25- p. 304, l. 1; see also, p. 320, l. 13- p. 321, l. 12.

Recognizing that notice was important to Plaintiff's allegations of inadequate supervision, the trial court ruled that "I don't think it's unduly prejudicial and I don't think the prejudicial effect outweighs the probative effect because **I think notice in**

this situation would be of paramount relevance." Tr. Trans. p. 304, l. 17-20; p. 318, l. 10-21 (emphasis added).

Ron Guins, the owner of Pinecrest Guest Home, testified as to his knowledge of the survey process, commenting, "It's supposed to be a helping process," for which he expressed appreciation. Tr. Trans. p. 322, l. 5-7; p. 335, l. 22- p. 336, l. 6; Tr. Trans. p. 336, l. 8-11. Plaintiff's counsel then asked, "Do you recall if this facility was cited in February 8th, 2002 for failure to ensure that residents receive adequate supervision and assistive devices to prevent accidents?" Mr. Guins replied, "yes." Tr. Trans. p. 336, l. 17-21. At that point, the court issued a cautionary instruction to the jury that the February 8, 2002 survey was being admitted,

> for the sole purpose of showing that the defendants were put on notice and possess knowledge of allegations of residents not being provided adequate supervision and assistive devices to prevent accidents. The evidence is not to be used for any other purpose. You may not consider this allegation which has not been proven as evidence that the defendants were negligent in supervising Myrtle Callendar over seven months or so later. You may publish that to the jury with that cautionary instruction.

Tr. Trans. p. 336, l. 29- p. 337, l. 10. All jurors indicated to the court that they would follow the court's instruction. Tr. Trans. p. 337, l. 10-18. Plaintiff's Exhibit 30 was then published without further questions. R. Vol. 5, p. 704.

Despite the narrow question posed by Plaintiff's counsel and the limiting instruction stated by the Court, Defense counsel then questioned Mr. Guins about the specific survey findings, thereby opening the door to the survey in its entirety. R. Vol. 5, p. 705-07; Tr. Trans. p. 414, l. 20- p. 416, l. 15; p. 418, l. 19- p. 419, l. 5.

When Plaintiff rested, Defendants moved for directed verdict. The trial court denied Defendants' motion finding that "plaintiff has made a prima facie case of negligence." Tr. Trans. p. 401, l. 19- p. 402, l. 25. At the close of all the evidence, the jury

returned a unanimous verdict in favor of the Plaintiff for $750,000.00. Tr. Trans. p. 569, l. 20- 29. Final judgment was entered on April 18, 2006. R. Vol. 1, p. 23.

COURSE OF POST-TRIAL PROCEEDINGS BELOW

On April 26, 2006, Defendants, through trial counsel, filed a motion requesting a judgment notwithstanding the verdict pursuant to Rule 50 of the Mississippi Rules of Civil Procedure, or in the alternative, a new trial pursuant to Rule 59, or in the further alternative, for remittitur pursuant to Mississippi Code Annotated Section 11-1-55. R. Vol. 1, p. 25.

Sometime after the Motion for New Trial was filed, Defendants obtained new counsel, James D. Shannon and Jeffrey A. Varas, who sought and obtained a continuance of the hearing on Defendants' motion in order for the new counsel to have adequate time to prepare. R. Vol. 1, p. 249, 253. When the hearing was subsequently held on September 18, 2006, Defendants' new counsel requested that Judge Pickard grant them another opportunity to brief their position before the trial court. Notwithstanding the fact that the ten-day limit in Rule 59(b) is jurisdictional and mandatory, Judge Pickard allowed additional briefing by Defendants, granting Defendants until October 20 to file a supplemental motion and memorandum of authorities in support. *See* Miss. R. Civ P. 6(b), 50(b), 59(b), and Miss. R. Civ. P. 59 cmt. ("The ten-day period cannot be enlarged."); *see also Telford v. Aloway*, 530 So. 2d 179 (Miss. 1988). Defendants' supplemental brief was ultimately filed on October 23, 2006, well beyond the generous deadline provided by the trial court. R. Vol. 1, p. 264.

On March 5, 2007, nearly a year after the conclusion of the trial, Judge Pickard indicated that he would be granting Defendants' motion for new trial. R. Vol. 3, p. 343. Judge Pickard explained that he had become aware of a "subsequent document" finding

no fault on the part of the facility that related to the Mississippi Department of Health survey admitted at trial. Further, this "subsequent document," allegedly finding no fault on the part of the Defendants, was the sole reason for granting a new trial. R. Vol. 3, p. 345, l. 20-26 ("I was not aware that this document was subsequently found by the same investigating agency, first of all, the problem had been rectified and the nursing home had nothing to do with the problem. And I feel like that is a serious error committed by this court, and **because of that, I will grant a new trial.**") (emphasis added). See also, R. Vol. 3, p. 343, l. 9-17 (discussing that his law clerk had found other errors, "I am not sure that is correct." "However, there's **one issue** [admission of the survey due to a subsequent document]. . ..")(emphasis added).

Surprised by the trial court's reliance on an unidentified "subsequent document," Plaintiff made a diligent inquiry into the existence of such document, only to determine that a subsequent document did not exist. In order to inform the court of this error, Plaintiff obtained the affidavit of Ms. Ranessa Maberry, the current Division Director for the Complaint Unit of the Mississippi Department of Health, the State agency responsible for facility surveys, who, upon reviewing the survey at issue, affirmed that, in February 2002, **Pine Crest Guest Home failed to provide adequate supervision to one of its residents;** that violation constituted immediate jeopardy and placed the resident at risk of harm; as part of their corrective measures, the facility was to evaluate residents who are at similar risk for suffering negative outcome from inadequate supervision; **and upon revisit, if a resident was found to have fallen as a result of inadequate supervision or assistance, the surveyor would take the February 8, 2002 survey into consideration, in order to determine if lack of supervision or assistance was the triggering event for the fall.** R. Vol.

3, p. 349-53 (emphasis added).

Plaintiff's counsel requested a second hearing to inform the trial court that the purported subsequent document relied on by the court did not exist. R. Vol. 3, p. 354. At the hearing held April 2, 2007, Judge Pickard admitted that he was mistaken regarding the subsequent document. R. Vol. 3, p. 404, l. 21-29. However, he changed his position entirely regarding the relevance of notice to Plaintiff's claims. While Judge Pickard recognized that negligent supervision was an issue in Plaintiff's case and that the survey documents went directly to this issue, he stated, "I don't believe notice and knowledge had anything to do with this case." R. Vol. 3, p. 414-16. The court compared this case to an auto case in which an individual had prior accidents due to running a stop sign and expressed a belief that notice is only relevant in latent defect situations. R. Vol. 3. p.415, l. 5-9; p. 416; p. 421, l. 8-19. These statements were contradictory both to Judge Pickard's prior statements made at trial as well as to Mississippi authority provided to the court. Tr. Trans. at p. 299, l. 12-18 ("I think for the purpose of showing that they had notice of inadequate supervision or at least somebody's opinion that they were inadequate in providing supervision, I think that may be relevant to some extent in this situation."); p. 300, l. 14-26 ("in this situation, the entire allegation is lack of adequate supervision, and it appears to the court that supervision is necessarily a situation that involves notice...").

Further, at the April 2 hearing, Judge Pickard indicated *for the first time* that his decision was *sua sponte*, not based on the Defendants' motion, and that other reasons could form his basis for granting a new trial. R. Vol. 3, p. 417, l. 18- 28 ("In reflecting over that document during the trial—this is something that came up—frankly didn't come up during your motion for a new trial, and I think there was another lawyer in the

motion for a new trial. This is something that occurred to the court during the trial itself."); p. 418, l. 9-22 ("That is one of the things that I base it on"). When Plaintiff inquired about any additional reasons warranting a new trial, the court indicated that they were specified in the Order. *Id.* When informed that no Order had been filed, the court indicated that the reasons would be specified in the Order when it was entered. *Id.* An Order setting aside the judgment against Pinecrest, LLC and Mastercare, Inc. was entered May 3, 2007. R. Vol. 3, p. 371.

On August 28, 2007, nearly a year and a half after the jury returned a verdict in favor of the Plaintiff, Judge Pickard entered an Order denying Defendants' request for judgment notwithstanding the verdict, granting Defendants' request for a new trial, and rendering the request for remittitur moot. The only reason given for granting a new trial was "evidence including but not necessarily limited to a Mississippi Department of Health Survey conducted in February 2002, was admitted in error and resulted in unfair bias, passion, and prejudice on the part of the jury." R. Vol. 3, p. 376. Importantly, however, the trial court did not determine that the error caused a legally incorrect or unjust verdict to be rendered. Instead, Judge Pickard declared that "after hearing this trial from beginning to end, if there is any question about whether or not there is exposure in this particular case, I can answer that for you. There is exposure in this case. There's no question there's exposure." R. Vol. 3, p. 423.

Plaintiff filed two petitions for interlocutory appeal, one before and one after the court's August 27 Order was entered. Without reviewing the case on the merits on either occasion, the Mississippi Supreme Court denied both petitions. R. Vol. 3, p. 374; Vol. 4, p. 533. Plaintiff then moved to recuse Judge Pickard in light of the circumstances surrounding the timing and inconsistent theories announced as the basis for granting a

new trial in this matter. R. Vol. 3, p. 378. On January 30, 2008, Judge Pickard entered an Order granting Plaintiff's motion and recusing himself from this matter. R. Vol. 4, p. 534. Although Judge Pickard stated in the Order that Plaintiff's motion was ostensibly without merit, he granted the motion, indicating that Plaintiff's motion was not only reasonable, but necessary. R. Vol. 4, p. 534.

On February 4, 2008, the Mississippi Supreme Court appointed a new judge, Honorable David H. Strong, to preside over the matter. R. Vol. 4, p. 535-37. On April 2, 2008, Plaintiff filed a motion pursuant to Rule 60(b) requesting that the court grant Plaintiff relief from the prior order granting new trial. R. Vol. 4, p. 538-18. In support of Plaintiff's motion, Plaintiff asserted that the trial court did not provide a valid reason for granting a new trial. Instead, the court, on more than one occasion, changed its position and belief regarding the applicability of notice to Plaintiff's claims and the resulting admissibility of one document—the February 8, 2002 survey. *Id.* Judge Strong held a hearing on Plaintiff's Motion on May 12, 2008. At the hearing, Judge Strong correctly, narrowly defined the issue in front of him as being, "whether I think Judge Pickard was right or wrong to admit this survey. And I think all the other stuff, while it's fine to sit here and argue it... that doesn't have anything to do with my decision... So the issue is what it is." HT (May 12, 2008), p. 25, l. 11-20. On September 30, 2008, Judge Strong entered an order granting Plaintiff's motion for relief and reinstating the jury verdict without condition. R. Vol. 6, p. 844. In so ruling, the court found that "exceptional and compelling circumstances have been established" justifying his order. R. Vol. 6, p. 850.

No post-judgment motions were filed following the entry of the September 30, 2008 Order. Instead, Defendants filed a Notice of Appeal on October 29, 2008, which

established Case No. 2008-TS-01806. R. Vol. 7, 961. Just prior to filing the Notice of Appeal, on October 24, 2008, Defendants filed a Motion to Define the Time for Running of Appeal, seeking guidance from the trial court on whether their alternative request for remittitur, previously declared moot by the trial court in 2007, was, in fact, still pending. R. Vol. 6, p. 874. Indeed, Defendants presumed that entry of the Order reinstating the verdict "revived" their previously filed, alternative request for remittitur. R. Vol. 1, p. 54; Vol. 3, p. 376; Vol. 7, p. 962.

By Order dated October 31, 2008, the trial court agreed that the issue of remittitur was unresolved notwithstanding the trial court's prior grant of a new trial. R. Vol. 7, p. 968. Defendants thereafter moved to dismiss their appeal in Case No. 2008-TS-01806, representing to the Supreme Court that there was a post-judgment motion still outstanding. The Supreme Court granted Defendants' motion to dismiss, and a mandate on the dismissal was issued on December 29, 2008. R. Vol. 7, p. 970-71.

On February 23, 2009, the trial court held a hearing on the purported request for remittitur. On March 4, 2009, the trial court entered an Order denying the request for remittitur and declaring the time to commence appeal as running from the date of that Order. R. Vol. 7, p. 976. A new notice of appeal was filed by Defendants on March 17, 2009. Vol. 7, p. 977. On appeal, Defendants challenge the trial court's Order setting aside the grant of new trial, as well as the denial of their request for remittitur. R. Vol. 7, p. 977.

SUMMARY OF THE ARGUMENT

On March 30, 2006, a Copiah County jury returned a unanimous $750,000 verdict in this nursing home negligence and abuse case. The evidence at trial established that Defendants failed to follow their own policies and procedures regarding

fall prevention, that Ms. Callendar was unsupervised and found on the floor by her own daughter with soiled undergarments, and that she fell as a result of Defendants' failures. Further, her treating physician testified, and Defendants stipulated, that this fall and fractured hip contributed to Ms. Callendar's death.

On April 26, 2006, Defendants timely filed a motion requesting a judgment notwithstanding the verdict pursuant to Rule 50 of the Mississippi Rules of Civil Procedure, or in the alternative, a new trial pursuant to Rule 59, or in the further alternative, for remittitur pursuant to Mississippi Code Annotated Section 11-1-55. Thereafter, Defendants employed new counsel, who supplemented the original motion.

On August 28, 2007, Honorable Lamar Pickard granted Defendants' request for a new trial, reversing his prior rulings and declaring that notice was not relevant to Plaintiff's claims of negligent supervision.[8] Judge Pickard later recused from the case, and Honorable David H. Strong was appointed by the Supreme Court.

On Plaintiff's motion, Judge Strong correctly exercised his authority reinstating the jury verdict, finding that notice was relevant to Plaintiff's claim of negligent supervision and that the admission of the redacted version of the February 2002 survey at trial was correct. The court further found that Defendants had, in any event, waived their objection by opening the door to the admission of the entire survey. An Order reinstating the verdict was entered on September 30, 2008.

Although no post-trial motions were filed following the Court's September 30, 2008 Order, the trial court considered Defendants' original, April 26, 2006, request for remittitur. That motion was correctly denied on February 23, 2009, as the evidence at trial supported the jury's award.

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[8] In that Order, Judge Pickard also denied Defendants' request for judgment notwithstanding the verdict and declared Defendants' request for remittitur to be moot.

ARGUMENT

Many of Defendants' arguments can be disposed of with little discussion because the facts set forth above demonstrate their error. Indeed, not all of Defendants' arguments are preserved for appeal. Those that are have no merit. Each will be discussed below.

I. Defendants' Appeal Is Not Timely.

On September 30, 2008, Judge Strong entered an Order reinstating the jury verdict. R. Vol. 6, p. 844. No post-judgment motions were filed. Instead, by motion filed October 24, 2008, Defendants sought confirmation that their alternative request for remittitur filed April 26, 2006, following the original entry of the judgment, was "revived" when the trial court reinstated the verdict. R. Vol. 1, p. 54; Vol. 3, p. 376; Vol. 7, p. 962.

Rule 59 provides that a motion for new trial "shall be filed no later than ten days after the entry of judgment." A remittitur is a conditional order for a new trial. *Stewart v. Gulf Guar. Life Ins. Co.*, 846 So.2d 192, 199 (Miss. 2002). Once the trial court denied Defendants' motion for new trial on September 30, 2008, without condition, Defendants were required to file a new motion for remittitur within 10 days after entry of the judgment. Because Defendants failed to file such a motion, the trial court could not reconsider the issues raised in Defendants' original motion. See *Edwards v. Roberts*, 771 So.2d 378, 381, 384 (Miss.Ct.App. 2000).[9] Post-judgment time limits

[9] Although Plaintiff agreed to attend a hearing on Defendant's purported motion, Plaintiff did not take a position on the timeliness of Defendants' appeal. R. Vol. 6, p. 881. Plaintiff disputes that the remittitur issue could have remained following entry of the September 30 Order in any event. Pursuant to *Dedeaux v. Pellerin Laundry, Inc.*, 947 So.2d 900 (Miss. 2007), "if all the parties do not agree to an additur or remittitur, then each party shall have the right to either demand a new trial on damages, or appeal the order asserting an abuse of discretion on the part of trial judge." Because the trial court denied Defendants' motion for new trial outright, it would

pursuant to the rules of procedure are both mandatory and jurisdictional. *Telford v. Aloway,* 530 So.2d 179, 181 (Miss.1988).

Plaintiff respectfully submits that, contrary to Defendants' belief and the trial court's rulings regarding the time to commence an appeal, there is no authority to support the proposition that Defendants' April 26, 2006 remittitur motion was revived when the jury verdict was reinstated. Instead, Defendants were required to either file a new motion or to file a notice of appeal within thirty days of entry of the September 30, 2008 Order. Defendants did file a Notice of Appeal on October 29, 2008. R. Vol. 7, 961. However, Defendants thereafter dismissed the appeal based on the mistaken belief that there remained outstanding post-trial motions. R. Vol. 7, p. 970. A mandate on that dismissal was issued on December 29, 2008. R. Vol. 7, p. 971.

Because the instant appeal was filed March 17, 2009, more than thirty days after the trial court's September 30, 2008 Order reinstating the verdict, and no post-judgment motions were timely filed, this Court lacks jurisdiction to hear this appeal. "Where an appeal is not perfected within the statutory time constraints no jurisdiction is conferred on the appellate court; and the untimely action should be dismissed." *Green v. Cleary Water, Sewer & Fire Dist.,* 17 So.3d 559, 566 -567 (Miss. 2009)(quoting *Bowen v. DeSoto County Bd. of Supervisors,* 852 So.2d 21, 23 (Miss.2003); *Moore v. Wilson,* 966 So.2d 853, 853 (Miss.App. 2007).

II. Judge Strong Correctly Exercised His Authority Reinstating the Verdict.

Rule 60(b)(6) of the Mississippi Rules of Civil Procedure states, "On motion and upon such terms as are just, the court may relieve a party or his legal representative

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not make sense to, by granting a remittitur, give Defendants the opportunity to reject it and take the new trial they sought in the first place.

from a final judgment, order, or proceeding for . . . any other reason justifying relief from the judgment." Rule 60(b)(6) been described as the "grand reservoir of equitable power to do justice in a particular case." *M.A.S. v. Miss. Dep't of Human Servs.*, 842 So. 2d 527, 530 (Miss. 2003) (quoting *Briney v. U.S. Fid. & Guar. Co.*, 714 So. 2d 962, 966 (Miss. 1998)). There is no specific time limit for bringing a motion under Rule 60(b), although it must be brought within a "reasonable time." Miss. R. Civ. P. 60(b).

A key issue in the trial of this matter was that of inadequate supervision. It was undisputed that Myrtle Callendar was found on the floor unsupervised at mealtime by her daughter, Eula Jane Harris. In order to establish that Defendants had notice and knowledge of inadequate supervision issues at Pinecrest Guest Home, Plaintiff sought to introduce a Mississippi Department of Health survey from February 2002. *See* Tr. Trans. p. 290-91. This document involved a prior incident in which the facility was found to have "failed to provide adequate supervision to prevent [a resident] from leaving the facility grounds." R. Vol. 5, p. 705.

Judge Pickard thoroughly examined the issue of notice and knowledge at trial, indicating that the February 8, 2002 survey regarding supervision of residents was admissible for this limited purpose. Tr. Trans. p. 293-294, 298, 299, 300, 301, 304, 318, and 319. Following extensive discussions with trial counsel, the trial court allowed a redacted version of the survey to be admitted into evidence for the "sole purpose of showing that the Defendants were put on notice and possessed knowledge of ***allegations*** of residents not being provided adequate supervision and assistive devices to prevent accidents." Tr. Trans. p. 336-37(emphasis added). The court further instructed the jury that they "may not consider this allegation which has not been proven as evidence that the Defendants were negligent in supervising Myrtle Callendar

over seven months or so later." *Id.*

Despite being warned by the court, Defense counsel subsequently questioned the licensee of the nursing home, Mr. Ron Guins, about the specific survey findings, thereby opening the door to the complete survey, and it was admitted in its entirety. Tr. Trans. p. 414, l. 20- p. 416, l. 15. The un-redacted version of the survey clearly states that Defendants' nursing facility was noncompliant with the federal regulation requiring appropriate supervision of its residents. R. Vol. 5, p. 705-07.

Nearly a year after the conclusion of the trial, following the replacement of Defendants' trial counsel, Judge Pickard announced at a hearing held March 5, 2007, that he had become aware of a "subsequent document" finding no fault on the part of the facility in connection with the Mississippi Department of Health survey admitted at trial. The court stated that this "subsequent document" allegedly finding no fault on the part of the Defendants was the sole reason for granting a new trial. HT (March 5, 2007), p. 4, l. 16-26.

At a later hearing held April 2, 2007, Judge Pickard admitted that he was mistaken regarding the subsequent document. HT (April 2, 2007), p. 6. However, the court changed its position entirely regarding the relevance of notice, stating, "I don't believe notice and knowledge had anything to do with this case." HT (April 2, 2007), p. 16-17. Judge Pickard's comments regarding notice were contradictory both to prior statements he made at trial as well as to Mississippi authority provided to the court. *Id.*; *see also* HT (March 5, 2007), p. 3; p. 4, lines 16-26.

On August 28, 2007, nearly five months later, and a year and a half after the jury returned its verdict in Plaintiff's favor, the trial court entered an Order that specified as its basis "evidence including but not necessarily limited to a Mississippi Department of

Health Survey conducted in February 2002, was admitted in error and resulted in unfair bias, passion, and prejudice on the part of the jury." R. Vol. 3, p. 376. The trial court did not acknowledge the proper standard in granting a motion for new trial, i.e. a trial court must determine that an error within the trial mechanism itself has caused a legally incorrect or unjust verdict to be rendered. Instead, the trial court admitted that "after hearing this trial from beginning to end, if there is any question about whether or not there is exposure in this particular case, I can answer that for you. There is exposure in this case. There's no question there's exposure." HT (April 2, 2007), p. 24. Following the trial court's entry of the Order granting a new trial, Plaintiff moved for the disqualification of Judge Pickard. R. Vol. 3, p. 378.

Judge Pickard entered an Order of Recusal in January 2008. On February 4, 2008, the Supreme Court assigned this matter to Honorable David Strong, and a copy of the record was forwarded to Judge Strong shortly thereafter. A conference call was held regarding the status and scheduling issues, during which the court was informed of Plaintiff's intent to file a motion to reinstate the verdict. Plaintiff's motion was filed on April 2, 2008, a "reasonable time" as contemplated by Rule 60. R. Vol. 4, p. 538.

A. The Issue of Judge Strong's Authority Was Not Preserved for Appeal.

In response to Plaintiff's motion to reinstate the verdict, Defendants argued the merits of Plaintiff's motion, primarily that exceptional circumstances did not exist to vacate Judge Pickard's ruling. R. Vol. 6, p. 787. At no time did Defendants argue that Judge Strong lacked authority to reconsider that ruling. Instead, Defendants invoked Judge Strong's authority in seeking his determination of their remittitur motion, which Judge Pickard had previously ruled was moot. R. Vol. 6, p. 874.

This Court has "repeatedly held that a trial judge will not be found in error on a

matter not presented to the trial court for a decision." *Graves v. Dudley Maples, L.P.*, 950 So.2d 1017, 1021 (Miss. 2007)(quoting *Purvis v. Barnes*, 791 So.2d 199, 203 (Miss.2001)). Because Defendants did not question Judge Strong's authority below, they cannot argue his lack of authority on appeal. See *Bellais v. Bellais*, 931 So.2d 665, (Miss. App. 2006)("We will not find error or make a suggestion to trial courts on matters of recusal or disqualification of judges which are not presented to the trial court for decision."); *Conley v. State*, 790 So.2d 773, 790 (Miss. 2001)("It is well-settled that a trial court will not be found in error on an issue upon which it was never requested to rule."); *Wilkerson v. Wilkerson*, 955 So.2d 903, 909 (Miss.App. 2007)(where Dennis never argued the chancellor's authority below, he was procedurally barred from raising these arguments on appeal."); see also, *O'Neill v. O'Neill*, 420 So.2d 261, 263 (Ala. Ct. App. 1982)("The lack of authority of the judge to preside over the trial and to render the judgment cannot be raised for the first time upon this appeal."). Accordingly, Defendants' argument on this issue should not be considered by this Court.

B. Judge Strong Acted Within His Authority.

Even if Defendants had properly preserved this issue for appeal, Plaintiff submits that Judge Strong was acting within his authority. He was appointed by the Mississippi Supreme Court "to preside and conduct proceedings" in this matter. R. Vol. 4, p. 537. Rule 63(b) of the Mississippi Rules of Civil Procedure provides:

> If for any reason the judge before whom an action has been tried is unable to perform the duties to be performed by the court after a verdict is returned ... then any other judge regularly sitting in or assigned under law to the court in which the action was tried may perform those duties....

Notwithstanding this express grant of authority, Defendants cite *Amiker v. Drugs for Less, Inc.*, 796 So. 2d 942 (Miss. 2000) for the proposition that Judge Strong's authority did not extend to reconsidering Judge Pickard's grant of a new trial.

Respectfully, *Amiker* is distinguishable. In *Amiker,* the Supreme Court recognized that trial judges are in the best position to view a trial. Further, it held that "[w]here the presiding trial judge grants a new trial, **not specifically and solely based on a particular legal error such that we can say that the judge's view of the credibility of the witnesses played no part in the decision,** a successor judge is in no position to review and change that order. To do so would be an abuse of the discretion granted the successor judge under M.R.C.P. 63." *Amiker v. Drugs For Less, Inc.,* 796 So.2d 942, 947-48 (Miss. 2000)(emphasis added); But see, *Holland v. Peoples Bank & Trust Co.,* 3 So.3d 94, 104 (Miss. 2008) (successor judge may correct errors of law made by the predecessor judge and revise the predecessor judge's order or judgment on its merits where the predecessor judge's order or judgment is not of a final character).

Plaintiff submits that there is no abuse of discretion in Judge Strong's vacatur of Judge Pickard's Order granting a new trial. As Judge Strong correctly noted, the sole issue before him was whether Judge Pickard's admission of the survey was legal error. No determination or assessment of the credibility of witnesses was necessary to make this determination. There was no need for the trial judge to act as a "thirteenth juror" on this issue, as this Court held in *Amiker.*

By its terms, *Amiker* does not control this scenario. Instead, *Holland v. Peoples Bank & Trust Co.,* 3 So.3d 94, 104 (Miss. 2008), which broadly recognizes a successor judge's authority to correct legal errors made in non-final orders by a predecessor judge, is instructive. The order that Judge Strong reconsidered was an order granting a new trial. An order granting a new trial is interlocutory in nature and is, generally, not appealable. See *Fitch v. Valentine,* 959 So.2d 1012, 1040 (Miss. 2007). Under the

analysis set forth in *Holland,* Judge Strong could clearly reconsider the order granting new trial because it was a non-final order. Still, the limitations enunciated in *Amiker* cannot be disregarded.

Instead, when one considers the limiting language of *Amiker* with the broad recognition of authority in *Holland,* it becomes clear that, so long as the issues presented for reconsideration are purely legal issues not requiring assessment of the credibility of witnesses, a new trial order is an order that a successor judge can reconsider. Such recognition of authority is consistent with other jurisdictions that expressly recognize the authority in a successor judge to reconsider issues of legal error. See, *United States Gypsum Co. v Schiavo Bros., Inc.*, 668 F2d 172 (3rd Cir. 1981)(cert den. 456 US 961)(where a successor judge is asked by timely and proper motion to reconsider the legal conclusions of a predecessor, he is empowered to reconsider those issues to the same extent that his predecessor could have); *Plunkett v. Emergency Medical Service of New York City*, 651 N.Y.S.2d 462 (1st Dep't 1996)(consideration of motion to set aside jury verdict by successor judge after trial judge died during pendency of motion was not error; purely legal questions were involved, all discussion was recorded in the minutes, and successor judge was not called upon to weigh conflicting testimony or assess credibility); *Coleman v. Sopher*, 499 S.E.2d 592 (W.Va. 1997)(successor judge had authority to reconsider original judge's grant of new trial on damages, as original judge would have had same authority had he seen fit to do so).; *Schlesinger v. Chemical Bank,* 707 So. 2d 868 (Fla. Dist. Ct. App. 4th Dist. 1998)(successor judge could consider motion to vacate final judgment entered on some claims by prior judge who had later recused himself, where proceedings were still ongoing, and it did not appear that anyone would be prejudiced other than by additional

legal expenses and some delay). Because Judge Pickard's Order was limited to the relevance of notice to Plaintiff's claims and the resulting admissibility of the February 2002 survey, Judge Strong possessed authority to reconsider the legal error in the Order granting new trial. Defendants' appeal on this issue is without merit.

C. Exceptional and Compelling Circumstances Warranted Reinstating the Verdict.

Plaintiff's cause of action alleges negligence involving inadequate supervision. As the trial court correctly found at trial, given Plaintiff's theory of the case, "notice in this situation would be of paramount relevance." Tr. Trans. p. 318, l. 14-21. Notwithstanding the trial court's recognition of the relevance of notice at trial, and the allowance of a redacted survey for the "sole purpose of showing that the Defendants were put on notice and possessed knowledge of ***allegations*** of residents not being provided adequate supervision and assistive devices to prevent accidents," on April 2, 2007, over a year later, the trial court changed its reasoning regarding the propriety of the admission of the survey document at issue. Tr. Trans. p. 336-37(emphasis added); HT (April 2, 2007), p. 19. Indeed, the court concluded that "notice and knowledge" were not relevant to Plaintiff's claims, although the court admitted that the survey document went directly to that issue. *Id.* at p. 17. In response, Plaintiff correctly pointed the trial court to Mississippi precedent indicating that the surveys were, in fact, admissible in order to show evidence of notice or knowledge:

> Your Honor, the one thing that I would be remiss not to bring this up to the Court and brief it on appeal, I think that would be unfair, but, you know, I have a long list of auto cases. May I approach? And I'm not going to take long. I just want to give it to the Court, but a long list of auto cases. Specifically, the Supreme Court -- this *Richardson v. Norfolk Southern Railway Company,* on page 9 of the opinion, Your Honor, or 10 of 16, the upright corner, they state, "The rule has long been established in Mississippi that evidence of prior accidents may be introduced at trial to show two things: the existence of a dangerous condition and defendant's

notice or knowledge of a dangerous condition." This is an auto case.

HT (April 2, 2007), p. 22-23 (citing *Richardson v. Norfolk Southern Ry. Co.*, 923 So. 2d 1002, 1009-10 (Miss. 2006)). Rejecting the position it took at trial regarding notice and knowledge, the trial court stated, "Notice and knowledge obviously sometimes – in other words, a person has to know about it to correct it. We're talking about a latent defect. That's not what we're talking about here." *Id.* at 23.

Judge Strong's reconsideration of the trial judge's change of heart about the relevance of notice and knowledge to Plaintiff's claims was warranted because longstanding Mississippi court rules and precedent support the admission of evidence indicating notice and knowledge.

Rule 404(b) states that this type of evidence may be admitted to show knowledge:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Miss. R. Evid. 404(b) (emphasis added).

In *S.H. Kress & Co. v. Markline*, 77 So. 858 (Miss. 1918), the plaintiff brought suit against a store for the wrongful death of a customer who fell down an elevator shaft, the door of which had been negligently left open for approximately two years. *Id.* The court determined that testimony of collateral facts or issues may be admissible for two purposes: (1) "to show that the defect or manner of operation has continued for such a length of time that the master has knowledge or is charged with notice of the defect or negligent manner of operation" and (2) "to show the dangerous character or nature of the place." *Id.* at 862. *See also Noel's Auto Elec. Serv., Inc. v. Jones*, 516 So. 2d 503,

504 (Miss. 1987) (holding that witnesses' descriptions of a door would have been admissible to prove that the owner had notice of the condition of the door) (citing *Parmes v. Illinois Cent. Gulf R.R.*, 440 So. 2d 261, 264-66 (Miss. 1983); *Illinois Cent. Gulf R.R. v. Williams*, 242 Miss. 586, 605-06 (Miss. 1961)).

More recently, in *McMillan v. Rodriguez*, 823 So. 2d 1173 (Miss. 2002), the Supreme Court upheld a trial court's decision to admit evidence of a bull's prior escape from a pasture as evidence of notice of the existence of a dangerous condition and defendants' negligence in failing to take any measures to remedy the situation. *Id.* at 1179. Finally, in *Richardson v. Norfolk Southern Ry. Co.*, 923 So. 2d 1002 (Miss. 2006), the Court stated that the "rule has been long established in Mississippi that evidence of prior accidents may be introduced at trial to show two things: (1) the existence of a dangerous condition; and, (2) the defendant's notice or knowledge of such dangerous condition. *Id.* at 1009-10 (citing *Yoste v. Wal-Mart Stores, Inc.*, 822 So. 2d 935, 936 (Miss. 2002); Miss. R. Evid. 404(b). Although the Mississippi appellate courts have not addressed the relevance of state nursing home inspection reports, numerous courts from other jurisdictions have expressly held that state nursing home inspection reports are relevant and admissible in civil actions against nursing homes. *See Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346(Ark. 2003)(*cert. denied sub nom, Sauer v. Advocat, Inc.*, 540 U.S. 1004, *and cert. denied*, 540 U.S. 1012 (2003); *Rose Care, Inc. v. Ross*, 91 Ark. App. 187, 209 S.W.3d 393 (2005); see also, *Horizon CMS Healthcare v. Auld*, 985 S.W.2d 216 (Tex. Ct. App. – Fort Worth 1999)(aff'd in part, rev'd on other grounds, 34 S.W.3d 887 (2000)); *Montgomery Health Facility, Inc. v. Ballard*, 565 So. 2d 221 (Ala. 1990); and *Flint City Nursing Home, Inc. v. Depreast*, 406 So. 2d 356 (Ala. 1981). The trial court's incorrect

assessment of the relevance of notice to Plaintiff's claims in its grant of new trial constituted an exceptional circumstance warranting reconsideration of the Order.

Reconsideration was further warranted because the trial court did not follow the correct standard for granting a new trial in Mississippi. The Supreme Court has held that "[I]n contrast to judgments as a matter of law, the motion for a new trial exists for an entirely different purpose." *White v. Stewman*, 932 So. 2d 27, 33 (Miss. 2006). This Court continued:

> Accordingly, a new trial becomes appropriate when a trial court determines that error within the trial mechanism itself has caused **a legally incorrect or unjust verdict** to be rendered. . .. In *Beard v. Williams,* 172 Miss. 880, 161 So. 750 (1935), we held: We are conscious of the fact that the verdict of a jury is to be given great weight, and is the best means, when fair, of settling disputed questions of fact. Nevertheless, throughout the entire history of jury trials, the courts . . . have granted new trials whenever convinced, from the evidence, that the **jury has been partial or prejudiced, or has not responded to reason upon the evidence produced.**

White, 932 So.2d at 33 (citations omitted)(emphasis added). A verdict should be set aside only when the verdict is contrary to the substantial weight of the evidence, "but if the jury verdict is supported by the substantial weight of evidence, it should not be set aside." *Canadian National/Illinois Cent. R. Co. v. Hall,* 953 So.2d 1084 (Miss. 2007) (citing *White,* 932 So. 2d at 33); see also, *Roussel v. Robbins,* 688 So.2d 714, 723-24 (Miss. 1996). Further, in considering a motion for a new trial, the trial court must view all credible evidence in the light most favorable to the non-moving party. *Estate of Carter v. Phillips & Phillips Const. Co., Inc.,* 860 So. 2d 332, 336 (Miss. 2003) ("All evidence supporting the claims or defenses of the non-moving party should be taken as true. Only where, upon review, allowing the verdict to stand would result in a miscarriage of justice should the motion be granted.")

It is clear from the trial court's own statements in hearings and at the trial in this

matter that the above standard was not properly applied. The trial court never stated that the verdict in this case was contrary to the substantial weight of the evidence. To the contrary, the court stated at trial that Plaintiff had made a prima facie case of negligence. Then, at the April 2, 2007 hearing at which the trial court announced the judgment would be set aside, the court conceded, "after hearing this trial from beginning to end, if there is any question about whether or not there is exposure in this particular case, I can answer that for you. There is exposure in this case. There's no question there's exposure." HT (April 2, 2007), p. 24.

Clearly, the trial court felt that a reasonable juror could have ruled and, if a new trial was held, could rule again, in favor of the Plaintiff and against the Defendants. To grant a new trial under these circumstances is contrary to Supreme Court precedent stating that a motion for new trial should be granted only when, upon a review of the entire record, viewing credible evidence in the light most favorable to non-moving party, and generally taking credible evidence supporting claims or defenses of non-moving party as true, a trial judge is left with a firm and definite conviction that the verdict, if allowed to stand, would work a miscarriage of justice. *See Dorrough v. Wilkes,* 817 So. 2d 567 (Miss. 2002); *Anchor Coatings, Inc. v. Marine Indus. Residential Insulation, Inc.,* 490 So. 2d 1210, 1215 (Miss. 1986). No such finding was made here. The trial court's application of the wrong standard of review in granting a new trial constituted an exceptional and compelling circumstance warranting reinstating the jury verdict.

Finally, as noted by Judge Strong in his Order, Defendants' request for new trial and Judge Pickard's stated basis for granting a new trial, were contingent on a finding that the admission of the February 2002 survey was unduly prejudicial. Yet, after the trial court went to great lengths to caution the jury and to require only a redacted

version of the survey be presented by Plaintiff, Defense counsel questioned the licensee of the nursing home, Mr. Ron Guins, about the specific survey findings, thereby opening the door to the survey in its entirety. Any prejudice that may have resulted from Defendants' election to open the door to the entire survey is not a basis for new trial. Although Defendants had the right under Rule of Evidence 106 to introduce the complete survey, in so proceeding, Defendants waived any right to argue the prejudicial effect of the redacted survey. R. Vol. 6, p. 848; see generally, *Brown v. State,* 2009 WL 4800597, *5 (Miss. App. 2009)(prejudice resulting from admission of challenged evidence may be waived by a party's voluntarily admission of the same evidence). Judge Pickard's grant of a new trial on an issue waived by Defendants at trial was an additional, exceptional circumstance justifying reinstatement of the verdict by Judge Strong. Judge Strong acted within his authority in reinstating the jury's verdict.

III. The Redacted February 2002 Survey Was Properly Admitted With a Cautionary Instruction.

A key issue at trial was that of inadequate supervision. It was undisputed that Myrtle Callendar was found on the floor unsupervised at mealtime by her daughter, Eula Jane Harris. In order to support Plaintiff's claim that Defendants had notice and knowledge of inadequate supervision issues at Pinecrest, Plaintiff sought to introduce a Mississippi Department of Health survey from February 2002. Tr. Trans. p. 290-91. This document involved a prior incident in which the facility was found to have "failed to provide adequate supervision to prevent a resident from leaving the grounds." *Id.* When the trial court inquired about the nature of the document, counsel for the Plaintiff informed the court that it established that Defendants "had notice and knowledge of a dangerous condition of folks not being adequately supervised." *Id.* at 293. Defense counsel objected, and counsel for both parties presented argument to the court. *Id.* at

293-296.

Responding to the argument of the parties, the trial court recognized the need for a cautionary instruction and instructed the parties to craft such an instruction to inform the jury that whatever the company had done in the past or in the future was not relevant. *Id.* at 298. Further, the court ordered that the document be redacted, stating:

> Secondly, my suggestion is rather than putting the entire document in, because there's some things in that document that I think may be misleading and maybe also overly prejudicial, that have no probative value; in other words, this lady walking down the street. That is prejudicial and has no probative value. **The key is there was inadequate supervision reported to the company. The only thing you want to prove is that Pine Crest had knowledge of that.**

Id. at 298 (emphasis added).

Defense counsel declared that if any portion of the document was admitted, he wanted to point out factual differences, thereby admitting the entire document. The trial court responded by stating:

> That's up to you, counsel. That's up to you. I'm just cautioning the plaintiff as the one that wants to put this evidence in. **And I think for the purpose of showing that they had notice of inadequate supervision or at least somebody's opinion that they were inadequate in providing supervision, I think that may be relevant to some extent in this situation.** And I think that fact and that fact alone may outweigh any prejudicial effect, the relevance may.

Id. at 299(emphasis added). The court continued:

> Oh, I understand your objection. I also understand that in most situations facts and evidence of another situation has nothing to do with this. For example, a car wreck. The fact somebody ran stop signs 100 times last year and then all of a sudden they run one this year and had a wreck, those other 100 don't count. It's this one that counts. And I understand that is the key. **However, when you're dealing with a situation of – in this situation the entire allegation is lack of adequate supervision, and it appears to the Court that supervision is necessarily a situation that involves notice because obviously if a company feels that it is adequately supervised and has no notice of an inadequacy, then it would not be negligent if**

> **something happened or a jury could not determine that, but I think the fact that they may have been warned that at least somebody thought there was inadequate supervision may be enough to imply at least notice to Pine Crest, so I'll admit that one part of that.** Then if you want to admit it all, [Defense] counsel, you can.
>
> ***
>
> [M]y ruling is I do see relevance in this situation of the fact that a governing agency who examined this nursing home sometime prior to this occasion informed Pine Crest that they thought it was inadequate supervision, that and that alone. That is all I will allow in.

Id. at 300, 303, emphasis added.

The redacted version of the survey was admitted into evidence following Plaintiff's counsel asking Ron Guins, the owner of Pinecrest, if the "facility was cited in February 8, 2002, for failure to ensure that residents receive adequate supervision and assistive devices to prevent accidents," to which Mr. Guins responded in the affirmative. *Id.* at 336. Upon this exchange, the court instructed the jury that the survey was being admitted for the "sole purpose of showing that the Defendants were put on notice and possessed knowledge of ***allegations*** of residents not being provided adequate supervision and assistive devices to prevent accidents." *Id.* at 336-37 (emphasis added). The court further instructed the jury that they "may not consider this allegation which has not been proven as evidence that the Defendants were negligent in supervising Myrtle Callendar over seven months or so later." *Id.* at 337. Defendants agreed to this instruction at trial and do not challenge it on appeal. Following the trial court's instruction to the jury, Defense counsel questioned Mr. Guins about the specific survey findings, thereby opening the door to the survey in its entirety. *Id.* at 418-19.[10]

Evidence of prior incidents is admissible when the prior incident involves

[10] Any prejudice resulting from the survey's admission was elicited by Defense counsel when he opened the door to the entire survey.

substantially similar circumstances as the incident complained of. See *McMillan v. Rodriguez*, 823 So. 2d 1173, 1180 (Miss. 2002). On appeal, Defendants argue that the circumstances surrounding the February 2002 survey were not substantially similar to the incident involving Ms. Callendar. (Def. Brief at 24). Admittedly, the outcome of Defendants' inadequate supervision in February 2002 differed from the outcome in this instance. In February, Defendants' failure to adequately supervise a resident led to her elopement from the building. She was found two-tenths of a mile off of the property. Tr. Trans. at 294-95. Defendants' failure in this instance resulted in Ms. Callendar's falling at mealtime, trying to ambulate to the bathroom.

Although the outcomes of Defendants' neglect differed, the supervision implicated was substantially similar in nature. The lack of supervision that allowed someone to leave the building was the same lack of supervision that allowed Ms. Callendar to fall out of the bed at mealtime. Further, the State has acknowledged that if they were to learn of a subsequent fall, such as Ms. Callendar's, "the surveyor would take the February 8, 2002 survey into consideration in order to determine if lack of supervision or assistance was the triggering event for the fall." R. Vol. 3, p. 351-53. Just as the February citation was critical of Defendants' underlying failure to provide adequate supervision, the very heart of Plaintiff's case of why Ms. Callendar fell was that Defendants provided inadequate supervision. Tr. Trans. p. 293, l. 1-10.

In fact, even when the trial court reversed itself by determining that the redacted survey was inadmissible, it still recognized that the issues addressed in the survey document were sufficiently similar to those raised in the instant matter. Yet, the trial court incorrectly found this to be a problem with the survey rather than a reason supporting its admission,

> [I]f you'll look at the proof of character reference, things like that under the rules, the closer a situation is to the wrong that's alleged at the trial, in other words, past conduct—whenever you're talking about admitting past conduct, the closer it is to the current situation that you're trying, in the current trial that means much more heavily against admission of that information. . . . [If] you were going to show some type of prior bad act that didn't have anything to do with the act that's alleged in the lawusuit that you're trying, the Supreme Court takes a much lesser prejudicial view than it would if the evidence being introduced was very similar to the conduct that was alleged. . . . **In the particular situation that you were trying, the issue was negligent supervision. That is directly what the document went to.**

HT (April 2, 2007), p. 17-18 (emphasis added).

The incident in the February survey occurred just seven months prior to the fall that Defendants concede caused and contributed to Ms. Callendar's death. Thus, the proximity in time adds to the probative value and weighs against any prejudicial effect. The Mississippi Supreme Court has made it clear that when evidence of other accidents is introduced, it may not be too remote in time from the accident in issue. *Illinois Cent. R.R. v. Williams,* 242 Miss. 586, 135 So. 2d 831, 839 (1961). In *Williams*, the Supreme Court held that the "other accident" evidence occurring within nine months of the subject of the dispute was not too remote in time for the evidence to be inadmissible. *Id.* The Court has also found "other accident" evidence occurring over time periods less than one year close enough in time to be admissible. *Barrett v. Parker,* 757 So. 2d 182, 188-89 (Miss. 2000) (one year).

The trial court did not abuse its discretion in admitting the survey at trial. See *Troupe v. McAuley,* 955 So.2d 848, 855 -856 (Miss. 2007)("The standard of review for the admission or suppression of evidence in Mississippi is abuse of discretion... an abuse of discretion standard means the judge's decision will stand unless the discretion he used is found to be arbitrary and clearly erroneous.") Defendants' appeal of this issue is without merit.

IV. The Jury's Award Was Fair, Reasonable, and Just.

Mississippi Code Annotated Section 11-1-55 governs remittitur or additur of damages awarded by a jury, stating in part:

> The supreme court or any other court of record in a case in which money damages were awarded may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence. If such additur or remittitur be not accepted then the court may direct a new trial on damages only.

Miss. Code Ann. §11-1-55. There are no fixed standards governing when an additur or remittitur is proper. *Leach v. Leach,* 597 So. 2d 1295, 1297 (Miss. 1992). The Court must therefore proceed on a case-by-case basis in determining whether a particular jury award is excessive. *Entergy Miss., Inc. v. Bolden,* 854 So. 2d 1051, 1058 (Miss. 2003). The Mississippi Supreme Court in *Entergy* stated that a jury award of damages should not be interfered with unless the size of the award "shocks the conscience of the Court." *Id.*

"[I]t is primarily the province of the jury to determine the amount of damages to be awarded. [T]he award will normally not be 'set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous.'" *Foster v. Noel,* 715 So.2d 174, 183 (Miss. 1998)(quoting *Harvey v. Wall,* 649 So.2d 184, 187 (Miss. 1995)). The evidence must be viewed in the light most favorable to the verdict. *Mississippi Dept. of Public Safety v. Durn,* 861 So.2d 990, 998 (Miss. 2003). A remittitur is appropriate only when either (1) the jury or trier of fact was influenced by bias, prejudice, or passion, or (2) the damages were contrary to the overwhelming weight of the evidence. *Rodgers v. Pascagoula Pub. Sch. Dist.,* 611 So. 2d942, 944 (Miss. 1992). "[E]vidence of corruption, passion, prejudice or

bias on the part of the jury (if any) is an inference ... to be drawn from contrasting the amount of the verdict with the amount of the damages." *Id.* at 944-45.

The plaintiff has the burden of proving her damages by a preponderance of the evidence. *TXG Intrastate Pipeline Co. v. Grossnickle,* 716 So.2d 991, 1016 (Miss. 1997). Plaintiff submits that she met her burden in proving that Myrtle Callendar suffered grievous injuries at the hands of Defendants. Twelve jurors agreed unanimously on the amount of damages to award the Plaintiff, and Defendants have failed to show that bias, prejudice, or passion affected the jurors or that the damages were contrary to the overwhelming weight of the evidence.

Defendants have requested that this Court remit the damages set by the jury by attempting to show that Ms. Callendar's life was worth very little, and that the loss suffered by her wrongful death beneficiaries was minimal. Defendants seek a windfall from the doctor's decision not to perform surgery on Ms. Callendar's frail body. They seek to benefit from the fact that, because surgery was not performed, Ms. Callendar's medical expenses were limited to $10,000. (Def. Brief at 29) Plaintiff submits that Ms. Callendar's injuries were far greater than the extent of the bills she incurred. The doctors admitted as much in refusing to perform surgery on her. Moreover, the grief and loss of her children are additional factors to be considered.

It was within the jury's purview and right to set the value and damages suffered by the Plaintiff in this matter. See *Odom v. Roberts,* 606 So. 2d 114, 121 (Miss. 1992)(an order for remittitur impinges on the right to trial by jury). Viewing the evidence in a light most favorable to the verdict, Defendants have failed to demonstrate that the trial court erred in denying their request for remittitur.

Plaintiff presented substantial evidence of the pain, suffering, and pure agony

Ms. Callendar endured in the final twenty-two (22) days of her life. The jury was presented with overwhelming evidence in the form of medical records and notes of Ms. Callendar's pain and suffering, as well as photographs of her injuries.[11] Numerous medical records were admitted that support the verdict in this matter. For example, at the ER, it was noted that Ms. Callendar said she "hurt all over." After returning to the nursing home, she said that she "hurt so bad." Dr. Hankins testified that she was in very much pain. The physical examination at Hardy Wilson revealed that she was "moaning with pain." Tr. Trans. p. 462, l. 14-16. Ms. Callendar's discharge death summary stated that she "required large amounts of narcotics for pain control." Hospital notes stated that she "continues to groan and is restless"; "patient crying, groaning, restless"; "awake and groaning"; "yells 'I'm hurting'"; "moaning, facial grimacing"; "awake, moaning and restless"; "states, 'I hurt last night bad.'" Tr. Trans. p. 385, l. 5-7; p. 461, l. 20- p. 462, l. 28; p. 554, l. 8-28, referencing Plaintiff's Exhibit No. 15, Bates Nos. 574-76. Ms. Callendar continued to be in pain despite taking morphine, a potent narcotic prescription pain medication. The last note in her chart on the last day of her life described her as "crying and moaning." In short, Ms. Callendar suffered a miserable fate. *Id.*

More importantly, however, the damages at issue were not just for Ms. Callendar's pain and suffering, but also for the pain, suffering, and mental anguish suffered by her children. Eula Jane Harris testified, not only about Ms. Callendar's pain and having to have the help of her husband to hold her down to the bed due to her

[11] Defendants argue on appeal that the photos of Ms. Callendar's "frail and bruised body" were unduly prejudicial. However, Defendants did not renew their objection when the photos were introduced into evidence. Further, as recognized by the trial court, the pictures were relevant to Plaintiff's claims of pain and suffering. Tr. Trans. p. 92, l. 6-10; p. 123, l. 23- p. 124, l. 5. The trial court did not abuse its discretion in allowing the photographs to be admitted. See *Troupe v. McAuley*, 955 So.2d 848, 855 -856 (Miss. 2007). Defendants' arguments in this regard are without merit.

moaning and groaning, but also about her own suffering. Tr. Trans. p. 122. Ms. Harris testified that the last few weeks of her mother's life were "horrible" for her, having to watch someone she loved suffering like Ms. Callendar did. Tr. Trans. p. 122. Ms. Harris testified that she would not want someone else to have to go through what she and her family went through, seeing "somebody that's bruised and broken like my mama was, I hope that nobody would ever have to go through that." Tr. Trans. p. 124. Ms. Harris also testified that the memories of her mother's suffering still haunt her to this very day. Tr. Trans. p. 159. Similarly, Ms. Callendar's son, Carl Callendar, testified that he lived close to his mother all of his life, until she entered Pinecrest. Tr. Trans. p. 307. Mr. Callender described how his mom looked after her fall as "terrible" and all "black and blue." Tr. Trans. p. 313. Both of Ms. Callendar's children provided emotional testimony that, although completely ignored by the Defendants, established pain, suffering, and mental anguish for which the jury rightfully chose to compensate them. The evidence of their own grief, as well as the agony endured by Ms. Callendar, justifies damages far in excess of the $10,000 in medical bills produced at trial. See Plaintiff's Exhibits 24 and 25.

Twelve jurors listened to the evidence above as well as additional evidence of Ms. Callendar and her family's suffering and agreed unanimously on the amount of damages to award to the Plaintiff. Tr. Trans. p. 569, l. 21-29. Defendants have failed to show that bias, prejudice, or passion affected the jurors or that the damages were contrary to the overwhelming weight of the evidence. Instead, Defendants have requested that this Court remit the damages set by the jury by arguing that Ms. Callendar's life was worth very little, and that the loss suffered by her wrongful death beneficiaries was minimal. (Def. Brief at 28-29)

Yet, when compared with other verdicts in similar cases involving nursing homes in this State, the jury's verdict in this matter is well within reasonable bounds. *See e.g., Johnson v. Magnolia Healthcare, Inc.*, Civ. No. 2001-0139CICI (Miss. Cir. Ct.- Leflore County November 25, 2002) (verdict awarding **compensatory damages of $3 million** and punitive damages of $4 million against all Defendants); s*ee also Crook v. Mariner Health Care, et al.*, Hinds County Circuit Court, First District No. 251-01-1368CIV (judgment entered for **compensatory damages of $2 million** and punitive damages of $8 million against all Defendants); *Bradley v. Grancare, Inc., et al.*, Sunflower County Circuit Court, No. 2002-0696 (judgment entered for **compensatory damages of $1.5 million** and punitive damages of $10.5 million against all Defendants).

The evidence presented at trial supports the jury's verdict and award of damages in favor of the Plaintiff. Indeed, "[t]he Court has no authority to vacate a damage award merely because it thinks the jury erred or because, if the Court had been the finder of the fact, it would have awarded a greater or lesser sum." *Flightline, Inc. v. Tanksley*, 608 So. 2d 1149, 1159, 1160-61 (Miss. 1992) (citing *Odom By And Through Odom v. Parker*, 547 So. 2d 1155, 1157 (Miss. 1989); *State Highway Commission of Mississippi v. Hayes*, 541 So. 2d 1023, 1025 (Miss. 1989); *Holmes County Bank & Trust Co. v. Staple Cotton Co-op. Ass'n*, 495 So. 2d 447, 451 (Miss. 1986)).

If anything, the verdict in this case is conservative. Who among us would endure, or would be willing to watch a parent endure, a slow, agonizing death in a broken, bruised body in order that we might recover damages in this amount? The damage caused by Defendants' negligence in this matter was horrendous. The verdict is supported by ample evidence. It was within the jury's purview and right to set the value

and damages suffered by the Plaintiff in this matter. Accordingly, the decision of the trial court should be affirmed.

V. Substantial, Credible Evidence Exists Upon Which the Jury Found Defendants Liable.

As with most of their arguments, Defendants' argument here simply misstates the evidence. The basis of their argument is twofold. First, they contend that the jury was influenced by juror bias. Yet, there is no *competent evidence* of juror bias in this case. Second, Defendants argue that the evidence presented by Plaintiff was not credible.

"All conflicts in evidence, credibility of witnesses, and questions of impeachment of witnesses, are within the province of the jury in the trial court." *C. & R. Stores v. Scarborough*, 196 So. 650, 651 (Miss. 1940). Indeed, "[t]he proper function of the jury is to decide the outcome . . . and the court should not substitute its own view of the evidence for that of the jury's." *Harris v. Lewis,* 755 So.2d 1199, 1204 (Miss. Ct. App. 1999). The Court in *Harris* went even further stating:

> Once the jury has returned a verdict in a civil case, we are not at liberty to direct that a judgment be entered contrary to that verdict short of a conclusion on our part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found.

Id. at 1203 (citing *Starcher v. Byrne,* 687 So.2d 737, 739 (Miss. 1997)).

This matter was tried over a three-day period, after which a jury determined that Defendants were liable for the injuries suffered by Myrtle Callendar during her residency at Pinecrest. The verdict in this matter is in no way contrary to the evidence presented at trial. The jury heard all of the evidence and determined that the Defendants should be held liable and that the Plaintiff should be compensated in the amount of $750,000.00. They were able to base this determination upon the evidence

and the observations made during trial. In light of the facts, the jury rendered a verdict in favor of Plaintiff and that verdict was fair, reasonable, and just.

The substantial, credible evidence presented at trial was sufficient for a reasonable jury to find Defendants' liable for the injuries suffered by Ms. Callendar. There was ample testimony that Ms. Callendar was at high risk for falling. Plaintiff's Nurse Expert, Susan Gilbert and Betty Dear, the Quality Assurance Nurse at Pinecrest, both provided testimony that Defendants failed to follow their own policies and procedures regarding fall prevention thereby increasing the likelihood of suffering from a fatal fall. Further, there was ample testimony that Ms. Callendar was not supervised at the time of her fall and that she was found on the floor by her daughter. Defendants stipulated that the September 25 fall resulted in a fractured hip that caused and contributed to Ms. Callendar's death. The overwhelming evidence indicated that Ms. Callendar's death, which occurred as a result of this fall, was preventable had Defendants followed their own policies and procedures.

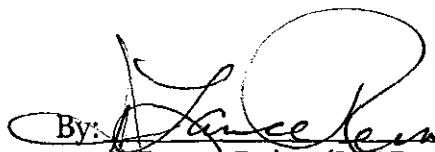
This evidence was far from "weak and improbable" as Defendants have suggested. (Def. Brief at 37) Defendants assert that the evidence was presented by documents containing "known errors" and by "interested witnesses whose credibility was impeached." *Id.* However, Defendants cannot interject their opinion in place of the jury's. "It is for the jury to say whether the witness testifying, whose testimony of itself is not unreasonable, has told the truth about the matter, although there may be evidence that such witness is unworthy of belief." *C. & R. Stores v. Scarborough*, 196 So. 650, 651 (Miss. 1940). Here, the jury heard all of the evidence presented by both sides and returned a verdict for the Plaintiff. Viewing the evidence in the light most favorable to the Plaintiff, as required by Mississippi law, this judgment must be affirmed.

CONCLUSION

Myrtle Callendar's children helplessly watched as their mother spent the last 22 days of her life in agonizing pain. Her death was not the result of old age, but a consequence of Defendants' negligent supervision. Judge Strong's decision reinstating the verdict for the Plaintiff must be affirmed.

Respectfully submitted,

Eula Jane Harris, Executrix of the Estate of Myrtle R. Callendar, for the use and benefit of the Estate of Myrtle R. Callendar, and for the use and benefit of the wrongful death beneficiaries of Myrtle R. Callendar

By: 

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CERTIFICATE OF FILING

I hereby certify that I, A. Lance Reins, counsel for the Appellee, on this 28th day of December, 2009, deposited with Federal Express for overnight delivery to the Mississippi Supreme Court Clerk's Office, the following original documents and copies:

The original and five (5) copies of the above Appellee's Brief.

This certificate of filing is made pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure.

Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by United States Mail, postage prepaid, to the following on this the 28th day of December, 2009:

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