IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PINECREST, LLC and MASTERCARE, INC.	**APPELLANTS**
V.	**NO. 2009-CA-00433-SCT**
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	**APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF COPIAH COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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SUMMARY OF THE REPLY ARGUMENT

Before addressing the misguided arguments of the Appellee ("Harris"), it should be reiterated that the successor judge, Honorable David Strong, erred in vacating the order granting a new trial of the presiding trial judge Honorable Lamar Pickard, as Pinecrest, LLC and Mastercare, Inc. (the "Pinecrest Parties") clearly set forth in their original Brief. First, Judge Strong, as a successor judge, did not have the authority to vacate Judge Pickard's grant of a new trial. Second, Harris did not meet her burden of establishing exceptional and compelling circumstances required to prevail under Rule 60(b)(6) of the Mississippi Rules of Civil Procedure. Third, the admission of the 2002 Mississippi Department of Health survey was reversible error and, as Judge Pickard acknowledged, resulted in unfair bias, passion, and prejudice of the jury. Lastly, and in the alternative, the Pinecrest Parties are entitled to a substantial remittitur as the verdict was excessive in that it was the result of bias, passion, and prejudice, and was contrary to the overwhelming weight of the credible evidence.

Harris incorrectly asserts in her Brief that the Pinecrest Parties' appeal is not timely. To the contrary, the Pinecrest Parties filed a notice of appeal within thirty (30) days of the entry of the order disposing of the last outstanding post-trial motion in accordance with Rule 4(b) of the Mississippi Rules of Appellate Procedure. Next, Harris incorrectly asserts that the Pinecrest Parties waived their argument regarding Judge Strong's lack of authority by not raising the issue in the Trial Court. The Pinecrest Parties did raise the issue in the Trial Court, and even if they had not, there is no authority that such an issue must be raised in the lower court to be preserved for appeal. Additionally, Harris incorrectly argues that Judge Strong properly reviewed Judge Pickard's order granting a new trial. Harris's argument is based on the misguided assertion that Judge Pickard's ruling involved purely legal issues. In fact, Judge Pickard's ruling was based primarily on his observations of the evidence

at trial, requiring Judge Strong, a successor judge, to give deference to that ruling. Even if Judge Strong had not abused his discretion in reviewing Judge Pickard's previous ruling, there were no exceptional and compelling circumstances warranting relief from Judge Pickard's order as asserted by Harris. Furthermore, contrary to Harris's argument, the admission of the 2002 Mississippi Department of Health survey was reversible error and, as Judge Pickard acknowledged, resulted in unfair bias, passion, and prejudice of the jury. Harris then argues that the jury's verdict was fair, reasonable and just. Conversely, the Pinecrest Parties submit that they are entitled to a substantial remittitur as the verdict was excessive in that it was the result of bias, passion, and prejudice, and was contrary to the overwhelming weight of the credible evidence.

ARGUMENT

I. THE PINECREST PARTIES' APPEAL IS TIMELY.

Contrary to Harris's argument, this appeal is timely. When Judge Pickard granted the Pinecrest Parties' motion for a new trial on May 3, 2007, the Pinecrest Parties' motion for remittitur was not ruled on since it was moot. R. vol. 3, 371. The request for remittitur was raised in the Pinecrest Parties' original Motion for J.N.O.V. or, Alternatively, for New Trial or, in the Further Alternative, for Remittitur on April 26, 2009, and reasserted in the Pinecrest Parties' Supplemental Motion for J.N.O.V. on October 20, 2006.[1] R. vol. 1, 54-57; R. vol. 2, 264-69. On September 30, 2008, Judge Strong vacated and set aside Judge Pickard's Order Granting New Trial and Setting Aside Judgment and reinstated the jury verdict in favor of Harris. R. vol. 6, 844-50. In that September 30, 2008 order, Judge Strong failed to rule on the Pinecrest Parties' motion for remittitur. R. vol. 6, 844-50. Consequently, the Pinecrest Parties' requested that Harris's counsel agree that the time for the running of the appeal would not start until the motion for remittitur had been ruled upon. R. vol. 6, 874-77. Harris's counsel refused to so agree, leaving the Pinecrest Parties no alternative but to seek the guidance of the Trial Court.

Consequently, on October 24, 2008, the Pinecrest Parties filed a Motion to Define Time for Running of Appeal Pending Ruling upon the Timely Filed Post Trial Motion regarding the still outstanding motion for remittitur. R. vol. 6, 874-77. Nevertheless, out of an abundance of caution, Pinecrest Parties filed a Notice of Appeal on October 29, 2009, appealing Judge Strong's Order vacating the order granting a new trial. R. vol. 7, 961. Then, on October 30, 2009, Judge Strong

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[1]The Pinecrest Parties were allowed to file the Supplemental Motion for J.N.O.V. because of the withdrawal of trial counsel and the substitution of new counsel, Shannon Law Firm and Jeffrey Varas, on August 8, 2006. R. vol. 2, 249.

entered an Order defining the running of the time for appeal, agreeing with Pinecrest Parties that the time for appeal would not run until the court had ruled on the still outstanding motion for remittitur. R. vol. 7, 968-69. In that order Judge Strong correctly held that "the motion for remittitur is still unresolved and remains for the Court to rule upon; hence, Rule 4 of the Mississippi Rules of Appellate Procedure would make any appeal prior to the Court's ruling on this motion for remittitur ineffective." R. vol. 7, 968-69. As a result, the Pinecrest Parties filed a Motion to Dismiss Appeal as Untimely Under M.R.A.P. 4 Due to Outstanding Post-Trial Motion Pending in Lower Court. R. vol 7, 970. This Court considered that motion, **agreed with the Pinecrest Parties**, and dismissed the pending appeal on December 5, 2008. R. vol. 7, 970.

On March 4, 2009, Judge Strong, having heard oral argument on the motion, entered an Order Denying Remittitur. R. vol. 7, 976. The Pinecrest Parties then filed a Notice of Appeal of the present appeal on March 17, 2009, well within thirty (30) days as required by Rule 4 of the Mississippi Rules of Appellate Procedure. That Harris would even raise the issue of the timeliness of this appeal is astounding, given the extreme caution and diligence exercised by the Pinecrest Parties in seeking the guidance and approval of both the Trial Court and this Court as to the time for the running of the appeal. Even so, the Pinecrest Parties will address Harris's arguments directly.

Harris claims that after Judge Strong reconsidered the Pinecrest Parties' motion for a new trial and denied it on September 30, 2008, that the Pinecrest Parties "were required to file a new motion for remittitur within 10 days after entry of the judgment." Appellee's Brief, p. 24. Harris claims that "[b]ecause [the Pinecrest Parties] failed to file [a new motion for remittitur], the trial court could not reconsider the issues raised in [the Pinecrest Parties'] original motion." Appellee's Brief, p. 24. Harris cites *Edwards v. Roberts*, 771 So. 2d 378, 381, 384 (Miss. Ct. App. 2000) for

this proposition, despite that *Edwards* stands for no such thing. *See* Appellee's Brief, p. 24. In *Edwards*, the trial judge entered an order denying a Rule 50 motion for judgment notwithstanding the verdict, then arbitrarily, and without further briefing or argument, entered an order granting the same motion for judgment notwithstanding the verdict a mere three days later. *Id.* at 380. The narrow issue before the Court of Appeals in the *Edwards* case was "whether once a motion under Rule 50 is filed by a litigant, then denied by the court, any window of opportunity opens for the trial judge to act on his own initiative to reconsider the denial." *Id.* at 384. While the Court of Appeals found that the trial court had no authority to reconsider the Rule 50 motion, the court found that the trial court's *sua sponte* reconsideration of the JNOV motion would be treated as a Rule 60 type review of the initial order. *Id.* at 386.

Here, Judge Strong did not reconsider a motion already heard, but ruled on the Pinecrest Parties' motion for remittitur that had not yet been ruled upon. *Edwards* is not only distinguishable from the present case, but wholly inapplicable. Additionally, the *Edwards* case had nothing at all to do with the timeliness of an appeal. *Id.* In short, *Edwards* offers nothing in the way of precedent for whether the Pinecrest Parties were required to re-file their motion for remittitur within 10 days of Judge Strong's denial of their motion for a new trial.

Further, Harris claims that there is "no authority to support the proposition that [the Pinecrest Parties'] April 26, 2006 remittitur motion was revived when the jury verdict was reinstated." Appellee's Brief, p. 25. Noticeably, and not surprisingly, Harris cited no authority to the contrary or that the Pinecrest Parties were required to re-file their motion for remittitur.

The simple fact is that the Pinecrest Parties' motion for remittitur was still pending after Judge Strong's reinstatement of the jury verdict on September 30, 2008. Pursuant to Rule 4 of the

Mississippi Rules of Appellate Procedure, "[i]f any party files a timely motion of a type specified immediately below [which includes a motion for remittitur under Rule 59(e)] the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding." Miss. R. App. P. 4(d). Despite the clarity of the situation, the Pinecrest Parties took all steps feasible to preserve their rights by filing a Notice of Appeal and seeking the guidance and approval of the Trial Court and this Court as to the time of the running of the appeal. Both the Trial Court and this Court agreed that the remittitur motion was still pending. After the Trial Court entered its order on the Pinecrest Parties' motion for remittitur, the last post-trial motion outstanding, the Pinecrest Parties timely filed a Notice of Appeal within thirty (30) days of the date thereof.

For all of the aforementioned reasons, it is clear that Harris's assertion that this appeal is untimely is baseless.

II. JUDGE STRONG REINSTATED THE VERDICT IN ERROR.

A. The Pinecrest Parties Did Not Waive the Issue of Judge Strong's Authority

Harris's argument that the issue of Judge Strong's authority was not preserved for appeal is unpersuasive. First of all, the Pinecrest Parties **did** raise the issue in the Trial Court in their response to Harris's motion for relief from judgment:

> **Plaintiff should not be allowed to use this Court and the newly appointed Honorable Judge to further her goal of attacking the Trial Court's Order granting a new trial.** Were the Plaintiff successful, this would result in the Plaintiff accomplishing by improper means what she could not accomplish otherwise. The Order Granting New Trial was granted pursuant to Rule 59(a) of the Mississippi Rules of Civil Procedure. **Where a Court denies a motion for J.N.O.V., but grants the motion for new trial, "the order, as is true of orders for a new trial generally, is not appealable and the new trial will proceed."** Miss. R. Civ. P. 50 cmt. . . . **The Plaintiff is asking the Court to undo a decision made by Judge Pickard who had the benefit of having listened to the entire trial of this matter,**

dealt with and presided over all motions and hearings thereon in this matter, and who made the actual ruling that he later and properly determined to have been in error, thus warranting a new trial.

R. vol. 6, 789. The Pinecrest Parties are not sure how they could have raised the issue any more clearly. Harris's suggestion that the Pinecrest Parties did not raise the issue of Judge Strong's authority in light of the arguments just quoted is **absurd**. The argument quoted above is exactly what the holding was in *Amiker v. Drugs for Less, Inc.*, 796 So. 2d 942 (Miss. 2000), the primary case relied upon by the Pinecrest Parties in their Brief on this issue. The fact that the Pinecrest Parties did not cite a particular case is of no consequence. The issue was clearly and unambiguously raised.

Nevertheless, Harris's reasoning is flawed. Harris string-cited several cases that are distinguishable and, therefore, offer no support for Harris's position. Appellee's Brief, p. 29. The Pinecrest Parties will address these cases one-by-one. *Graves v. Dudley Maples, L.P.*, 950 So. 2d 1017, 1021 (Miss. 2007) dealt with the failure to raise the issue of whether the trial court's finding was against the weight of the evidence. *Graves* had nothing to do with raising the issue of a judge's authority in the trial court. It does talk about the types of issues that can be lost if not raised in the trial court, but noticeably absent is the issue of a trial judge's authority. *Id.* Moreover, in *Graves*, this Court ended up considering the issue on the merits anyway, even though it had not been raised in the trial court. *Id.* at 1021-22.

Purvis v. Barnes, 791 So. 2d 199, 203 (Miss. 2001) concerned the failure to raise the issue of appropriateness of punitive damages in the absence of compensatory damages. *Purvis* had nothing to do with the issue of a trial judge's authority.

Ballais v. Bellais, 931 So. 2d 665 (Miss. Ct. App. 2006) involved the failure to raise the issue

of recusal or disqualification of a judge in the trial court. Whether a judge would abuse his discretion by considering a particular matter, as here, is totally different than whether a judge should be recused or disqualified for ethical reasons, as in *Ballais*. For that reason, *Ballais* is clearly distinguishable.

Conley v. State, 790 So. 2d 773, 790 (Miss. 2000) dealt with a defendant in a criminal case who raised certain constitutional issues for the first time on appeal. Furthermore, this Court considered the issues on the merits anyway. *Id.* at 790-91. Obviously, *Conley* has no bearing on the issue in the present case.

Wilkerson v. Wilkerson, 955 So. 2d 903, 909 (Miss. Ct. App. 2007), while at first blush may seem to be similar to the situation in this case, did not actually involve the authority of a judge to consider certain matters. Rather, a closer reading of *Wilkerson* reveals that the issues not raised in the trial court were whether the trial court incorrectly applied the law. *Id.* at 909-10. That's not the same as the issue of whether the trial court had the authority to consider the matter in the first place. At any rate, this Court considered the issues on the merits anyway. *Id.*

Finally, *O'Neill v. O'Neill*, 420 So. 2d 261, 263 (Ala. Ct. App. 1982), aside from being an Alabama case having no precedential value to the Mississippi Supreme Court, is distinguishable. The case concerns the failure to raise the issue of "authority" of the judge with "authority" referring to the judge's qualifications to serve as the judge in that court. *Id.* The attack on the judge's "authority" in *O'Neill* was based on a frivolous argument centered around an obvious scrivener's error. *Id.* The judgment that was issued by the district court judge from the trial in the district court had mistakenly contained "circuit court" in the caption of the judgment. *Id.* It was argued that the district court judge had no authority to render a decision in the circuit court. *Id.* Clearly, *O'Neill* is

the admission of the survey actually resulted in bias, passion and prejudice on the part of the jury. Yes, Judge Pickard ruled that the admission of the survey was in legal error, but the crux of his decision to grant the new trial was based on the actual prejudice that resulted from its admission.

It is possible that Harris is confusing the act of attempting to determine **possible prejudice** with the observation of **actual prejudice** that resulted. It is one thing for a judge to perform a legal analysis in determining possible prejudice that could result. It is wholly another for a judge to experience, through personal observation, bias, passion and prejudice that actually resulted. The former may be a legal issue, whereas the latter, certainly, is not. Judge Pickard presided over the trial and personally observed the negative effects that resulted from his decision to allow the survey document into evidence and noted so in his Order Granting New Trial and Setting Aside Judgment: "evidence, including but not limited to a Mississippi Department of Health Survey conducted during February 2002, was admitted in error and resulted in unfair bias, passion and prejudice on the part of the jury." R. vol. 3, 376. Judge Pickard clearly explained how his observations of the effects of the admission of the survey played into his ruling at the hearing on the matter: "**I feel like the court erred in introducing that document. I also feel that the court – that the introduction of that document not only could, but did lead to bias, passion and prejudice on the part of the jury**." R. vol. 3, 345:6-11. That Judge Pickard's ruling was not as to purely legal issues, as clearly evidenced by his comments, the flaw in Harris's argument as to this issue is glaringly obvious.

Harris urges this Court to ignore *Amiker*, and to rely instead on *Holland v. Peoples Bank & Trust Co.*, 3 So. 3d 94 (Miss. 2008). Harris's reliance on *Holland* is misplaced. *Holland*, other than citing the general rule that a successor judge can review a predecessor judge's non-final legal decisions, is totally off-base with regard to this case. *Id.* at 104. *Holland* involved the successor

judge's review of the predecessor's ruling on a motion for summary judgement, a purely legal decision. *Id. Holland* spoke nothing to whether a successor judge had the authority to review the predecessor's decisions which involved the predecessor judge's observations of the evidence at trial. *Id.* As a result, *Holland* is not particularly instructive in this matter.

Likewise, Harris string-cited several other cases distinguishable from the present case. *United States Gypsum Co. v. Schiavo Bros., Inc.*, 668 F.2d 172 (3rd Cir. 1981) involved a successor judge's review of **purely legal issues**, not issues involving the predecessor judge's observations of the evidence at trial. *Plunkett v. Emergency Medical Service of New York City*, 651 N.Y.S.2d 462 (1st Dep't 1996) also dealt with the successor judge's decisions regarding **purely legal issues**, not issues involving the predecessor judge's observations of the evidence at trial. Moreover, in *Plunkett*, the predecessor judge had not even made a determination, so it was not even a case where the successor judge was reviewing a predecessor's decision. *Id.* at 464. *Coleman v. Sopher*, 499 S.E.2d 592 (W. Va. 1997), besides being a West Virginia case and stating several rules of law that conflict with clearly recognized Mississippi law, is distinguishable, as it too involved the successor judge's review of issues that were **purely legal**. Because Judge Pickard's ruling was based primarily on his observations at trial of the prejudicial effect of the survey, **not purely legal issues**, Harris's argument easily fails.

Additionally, Harris seems to suggest that the *Amiker* holding is limited to situations involving the predecessor judge's assessment of the credibility of witnesses and should not be applied to Judge Pickard's observations of the bias, passion and prejudice that resulted from the admission of the survey. Several passages from *Amiker* express an intent contrary to such a limitation:

> It has long been recognized that the trial judge is in the best position to view the trial. "The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire." *Gavin v. State*, 473 So. 2d 952, 955 (Miss. 1985).
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> With respect to a prior order granting a new trial, based, at least in part, **on observations made during trial**, however, **deference should be given to the judge who observed the evidence as it was presented**.

Amiker, 796 So. 2d at 947. As the passages suggest, it is not only assessing the credibility of the witnesses that the trial judge is in a better position to evaluate, but also other intangible "feelings" of the trial, such as weighing the fairness of a jury or witnessing the prejudicial effects of the introduction of certain evidence, evaluations that can just not be made by a successor judge that was not there to experience such things firsthand. Indeed, this Court has recognized the deference that should be given to trial judges in determining whether prejudice resulted. *Jones v. State*, 841 So. 2d 115, 140 (Miss. 2003) ("As the trial judge was in the best position to determine the level of prejudice, if any, that resulted from [the introduction of certain evidence], **this Court will defer to his finding**."); *see also Garrett v. State*, 956 So. 2d 229, 233 (Miss. Ct. App. 2006).

As it is clear that Judge Pickard's ruling was not based on purely legal issues as suggested by Harris, but primarily on his observations of the trial (which are entitled to deference), the holding in *Amiker* is controlling. Not only is *Amiker* controlling, but rarely is one case so similar to another as *Amiker* is to the present case. Involving virtually the exact same set of legal and factual circumstances, so as to be almost a mirror image, undoubtedly this case should be decided the same as *Amiker*. Judge Pickard, presiding over the trial and with the benefit of observing evidence and smelling "the smoke of the battle," was in a superior position to determine whether bias, passion and

prejudice actually resulted from the introduction of the survey. Neither Judge Strong's or anyone else's judgment should be substituted for Judge Pickard's personal observations on this issue.

C. No Exceptional and Compelling Circumstances Existed Warranting Judge Strong's Reinstatement of the Verdict.

Harris argues exceptional and compelling circumstances warranted Judge Strong's reinstating the verdict. However, the argument is a blatant attempt to mislead this Court and distort the mechanics of the Rules of Civil Procedure. Trial courts should only grant Rule 60(b)(6) motions in extraordinary and compelling circumstances. Rule 60(b)(6) is not an escape hatch for litigants who fail to take advantage of procedural opportunities under the rules. *State ex rel. Mississippi Bureau of Narcotics v. One Chevrolet Nova Auto.*, 573 So. 2d 787 (Miss. 1990). When considering the grant or denial of a motion for relief from judgment based on "any other reason justifying relief from the judgment," appellate courts will reverse the ruling if convinced that the trial court has abused its discretion. *Porter v. Porter*, 23 So. 3d 438 (Miss. 2009).

Rather than attempting to show compelling circumstances existed to warrant Rule 60(b)(6) relief, Harris focuses on rules of evidence pertaining to admission of evidence indicating notice and knowledge. Harris failed in the Trial Court to establish compelling circumstances and has yet to meet the threshold. A review of the record and the pleadings demonstrates that Judge Pickard did not abuse its discretion in granting the new trial. However, Judge Strong, did err in granting Harris 60(b)(6) relief without a showing of exceptional and compelling circumstances. Harris continues to argue that the Trial Court's assessment of relevance of notice to Harris's claims in its grant of a new trial constituted the exceptional circumstances warranting reconsideration of the order. Rule 60 is not a mechanism by which to circumvent the other rules of court, including the Rules of

Evidence, nor is it a mechanism by which to circumvent unfavorable rulings.

Further, Harris tries to persuade this Court that Rule 60 is the appropriate vehicle to challenge whether or not the appropriate legal standard was applied in the Trial Court. Harris urges that the Trial Court's application of the incorrect standard of review in granting a new trial constituted an exceptional and compelling circumstance. However, Harris waived oral argument as to the motion for new trial. R. vol. 3, 400:7-402:29. Therefore, any argument contained herein as to the proper standard for granting a new trial is untimely and moot. Harris is attempting to use Rule 60 as an escape hatch for its failure to take advantage of procedural opportunities under the rules, which is forbidden by well-established Mississippi case law.

Further, in addition to requiring a showing of exceptional and compelling circumstances, this Court has recognized and applied several factors to be analyzed before granting relief under Rule 60(b)(6):

> (1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether-if the judgment was rendered after a trial on the merits-the movant had a fair opportunity to present his claim or defense; (6) whether there are intervening equities that would make it inequitable to grant relief; and (7) any other factors relevant to the justice of the judgment under attack.

Briney v. U. S. Fidelity & Guar. Co., 714 So. 2d 962, 968 (Miss. 1998); *Page v. Siemens Energy and Automation, Inc.*, 728 So. 2d 1075, 1079-80 (Miss. 1998). Harris filed her Motion for Relief from Order Granting New Trial as a blatant attempt to circumvent the inability to appeal the Trial Court's Order Granting a New Trial. A cursory glance at the record is evidence of the misuse of the Rules. Notwithstanding the fact Judge Strong did not have the authority to vacate Judge Pickard's Order, the litigants had full opportunity to litigate the issue and present any defenses thereto. As previously

mentioned, Harris waived oral argument, the issues were fully brief and argument was heard. Therefore, the basis for the relief was completely unwarranted and unsupported. Although Harris maintains she was warranted relief from the Order Granting a New Trial, the Trial Court lawfully exercised discretion and granted a new trial. Relief under Rule 60(b)(6) is reserved for extraordinary circumstances. "As a general rule, the 'extraordinary relief' provided for by Rule 60(b), will be granted 'only upon an adequate showing of exceptional circumstances,' and gross negligence, ignorance of the rules, ignorance of the law, or carelessness on the part of the attorney will not provide sufficient grounds for relief." *Accredited Surety & Cas. Co. v. Bolles*, 535 So. 2d 56, 58 (Miss. 1988). As a result, the Pinecrest Parties seek reversal of Judge Strong's Order Vacating Judge Pickard's Order Granting New Trial due to the lack of exceptional and/or compelling circumstances.

III. THE ADMISSION OF THE 2002 MISSISSIPPI DEPARTMENT OF HEALTH SURVEY WAS REVERSIBLE ERROR

At the trial of this matter, the 2002 Mississippi Department of Health survey was admitted, over defense counsel's objection. R. vol. 5, 633-36 (Trial Transcr., 290:29-301, 303:16-305:5 (March 29, 2006)). The survey had very little, if any, probative value to the case at hand as the survey involved a different patient and was totally unrelated to these parties and the allegations contained in the Complaint. As a result, the document was inadmissible pursuant to Rule 403 and Rule 404(b) of the Rules of Evidence and Mississippi case law.

Harris argues that the document was admissible to show notice and knowledge regardless of the lack of similarity of the circumstances. The Pinecrest Parties do not take issue with Harris's contention that, in general, evidence of prior accidents is admissible to show notice and knowledge of a dangerous condition. However, the admissibility is determined by more than just the existence

of a prior accident and proof that the accident actually happened. Admissibility of evidence of prior accidents for the purpose of showing a dangerous condition and notice thereof is limited to conditions of permanency and the evidence must show that former accidents happened under substantially the same circumstances as those existing at the time of the accident. *Barrett v. Parker*, 757 So. 2d 182, 188 (Miss. 2000).

For example in *Barrett*, the trial court excluded evidence of prior incidents more than one (1) year from the incident at issue. *Id.* The court's reasoning was the conditions would be different which would negatively weigh on the probative value of the evidence of said accidents. Much like in *Barrett*, the circumstances surrounding the situation contained in the survey were not even remotely similar. The only similarity is that Pinecrest was involved, and the incident occurred on Pinecrest's premises. As previously pointed out by the Pinecrest Parties, the survey addressed an alleged incident involving an unruly patient and his attempts to escape from the facility, while the decedent Myrtle Callendar was an elderly lady who suffered from dementia and allegedly fell out of her bed. The lack of similarity is obvious, and Harris does not even attempt to establish the relevant factors to argue the document was properly admitted.

Further, all evidence is reviewed pursuant to the balancing test of Rule 403 which weighs probative value versus prejudice. Rule 403 demands the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Miss. R. Evid. 403. Judge Pickard did admit the redacted survey with a limiting instruction, but soon realized that the introduction of the document not only could, but did lead to bias, passion, and prejudice on part of the jury. R. vol. 3, 345:8-15.

As pointed out by Harris, there is no binding authority that addresses the relevance of nursing

home inspection reports. As it stands, Rules 403 and 404 dictate the admissibility of such evidence. Harris failed to demonstrate the survey was admissible under Mississippi law. Judge Pickard properly determined that the admission of the document was reversible error due to the bias, passion, and prejudice that resulted. Therefore, the Pinecrest Parties respectfully request that this Court rule as Judge Pickard originally did that the admission of the 2002 Department of Health survey was reversible error and remand this matter for a new trial.

IV. THE VERDICT WAS EXCESSIVE AS A RESULT OF BIAS, PASSION AND PREJUDICE AND WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE CREDIBLE EVIDENCE.

The jury award in this matter was so excessive that it is obvious that the jury was influenced by bias, passion and prejudice, and the damages awarded were contrary to the overwhelming weight of the credible evidence, entitling Pinecrest Parties to a substantial remittitur. The verdict was so excessive given the credible evidence presented that it meets this Court's high standard, as the verdict in this case are "flagrantly outrageous and extravagant, where they have no standard by which to ascertain the excess." *Purdon v. Locke*, 807 So. 2d 373, 376 (Miss. 2001) (quoting *Detroit Marine Eng' v. McRee*, 510 So. 2d 462, 471 (Miss. 1987)).

Here, where the total verdict was $750,000, the only special damages "proven" at trial were medical expenses of approximately $10,000.[2] This means that$740,000 of the $750,000 verdict was for pain and suffering, which amounts to **74 times** the amount of special damages "proven" at trial, extremely excessive.

This Court has upheld awards that were 40 times the amount of medical damages, *Edwards*

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[5]Medical expenses were stipulated to be $10,953.00 as per the medical summary.

v. Ellis, 478 So. 2d 282 (Miss. 1985), 14 times the amount of special damages, *Purdon*, 807 So. 2d 373, and 38 times the amount of special damages, *Gatewood v. Sampson*, 812 So. 2d 212 (Miss. 2002). However, such cases have involved situations with much more extensive injuries, "lingering effects," permanent disability, long life-expectancy, long future work expectancy or other extenuating circumstances not present here. *See Ellis*, 478 So. 2d at 289; *Purdon*, 807 So. 2d at 375-76; *City of Jackson v. Perry*, 764 So. 2d 373, 380 (Miss. 2000). In cases like the present case where evidence of pain and suffering is slight, this Court has significantly reduced jury verdicts. *Entergy Miss. Inc. v. Bolden*, 854 So. 2d 1051 (Miss. 2003) (reducing an award of $532,000, of which almost $500,000 was for future pain and suffering, to $232,000, finding that the evidence for pain and suffering did not justify the amount of the award).

In the present case, as explained in more detail in the Pinecrest Parties' original Brief, there was little evidence of loss of companionship or pain and suffering in this matter. *See* Appellant's Brief, pp. 28-29, 31. So little evidence, that it can only be reasoned that the jury's verdict was the result of bias, passion and prejudice from the introduction of the 2002 Department of Health Survey and certain photographs of the frail and bruised Ms. Callendar entered into evidence over the objection of Pinecrest Parties. Indeed, Judge Pickard, who witnessed the trial, recognized that such bias, passion and prejudice actually occurred. As discussed above, deference should be given to Judge Pickard with regard to these personal observations, if not with regard to his grant of a new trial, then certainly with regard to this request for remittur.

Accordingly, the award of $750,000 for Harris's damages is excessive and not "within the range of reasonableness," as it is totally unsupported by the record and obviously the result of bias, passion and prejudice on the part of the jury, which deliberated a mere 20 minutes. This Court

should grant a significant remittitur consistent with the evidence adduced in this cause. Pinecrest Parties respectfully submit that the award should be remitted to arguably no more than 10 times the medicals, and Pinecrest Parties urge that under the specific circumstances of this case, the reduction should be to no more than 5 times the medicals.

V. THE JURY'S VERDICT AS TO LIABILITY WAS AGAINST THE OVERWHELMING WEIGHT OF THE CREDIBLE EVIDENCE

A review of the evidence presented at trial reveals that there was no proof presented at trial of negligent acts or omissions on the part of the Pinecrest Parties or any of their agents or employees. The Pinecrest Parties presented a detailed and thorough summary of the evidence presented at trial. *See* Appellant's Brief, pp. 33-36. In response, Harris was required to present substantial credible evidence to defeat the Pinecrest Parties' judgment notwithstanding the verdict, or in the alternative, a new trial. *See Henson v. Roberts*, 679 So. 2d 1041, 1045 (Miss. 1996); *Moody v. RPM Pizza, Inc.*, 659 So. 2d 877, 881 (Miss. 1995), *Hageney v. Jackson Furniture of Danville, Inc.*, 746 So. 2d 912 (Miss. 1999). Instead, Harris presented merely argument regarding what evidence was presented without a single cite to the record. See Appellee's Brief, pp. 47-48. Harris's mere argument that "substantial, credible evidence presented at trial was sufficient," does not meet the burden required of Harris in response to the Pinecrest Parties' proof.

As thoroughly briefed by the Pinecrest Parties, there was no proof presented at trial of negligent acts or omissions on the part of the Pinecrest Parties or any of their agents or employees. When the sworn credible testimony and documentary evidence are reviewed, it is clear that there was no substantial credible evidence offered in support of the jury's verdict. Harris claims that the Pinecrest Parties are attempting to "interject their opinion in place of the jury's." Appellee's Brief,

p. 48. That is simply not the case, as this is a matter of law, not a matter of opinion. The Pinecrest Parties have merely set forth the lack of credible evidence presented at trial, and based on well-settled legal standards, such evidence cannot sustain the jury's verdict in this case. *See Hageney*, 746 So. 2d 912; *C&C Trucking Co. v. Smith*, 612 So. 2d 1092, 1098 (Miss. 1992) (recognizing that only the credible evidence of the non-movant should be considered in analyzing a motion for JNOV); see also *Jones v. Southern Healthcare Agency*, 930 So. 2d 1270 (Miss. Ct. App. 2006) (sufficient evidence to sustain a verdict is evidence "**affording a substantial basis of fact from which the fact in issue can be reasonably inferred**.") (internal citations omitted) (emphasis added).

Based on the evidence fully briefed and explained in the Pinecrest Parties' original Brief, it is clear that the verdict in this matter was against the overwhelming weight of the substantial credible evidence, as there was **no substantial credible evidence** to support a finding of liability on the part of the Pinecrest Parties. Consequently, this Honorable Court should either grant Pinecrest Parties a judgment notwithstanding the verdict of the jury, or order a new trial.

CONCLUSION

Harris's assertion that this appeal is not timely is unfounded. Additionally, the issue of Judge Strong's authority was properly preserved for appeal. Moreover, Judge Strong did not have the authority to review Judge Pickard's ruling, because Judge Pickard's ruling was based primarily on his observations of the evidence at trial, requiring deference to Judge Pickard. Even if Judge Strong had not abused his discretion in reviewing Judge Pickard's previous ruling, there were no exceptional and compelling circumstances warranting relief from Judge Pickard's order as asserted by Harris. Furthermore, contrary to Harris's argument, the admission of the 2002 Mississippi Department of Health survey was reversible error and, as Judge Pickard acknowledged, resulted in

unfair bias, passion, and prejudice of the jury. Finally, Harris's arguments regarding the verdict are unconvincing; the verdict was excessive in that it was the result of bias, passion, and prejudice, and was also contrary to the overwhelming weight of the credible evidence.

This the 16th day of February, 2010.

Respectfully submitted,

PINECREST, LLC and MASTERCARE, INC.

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CERTIFICATE OF SERVICE

I, Charles R. Wilbanks, Jr., do hereby certify that I have this date caused to be served via first class mail, electronic mail and/or by hand delivery, a true and correct copy of the above and foregoing pleading to:

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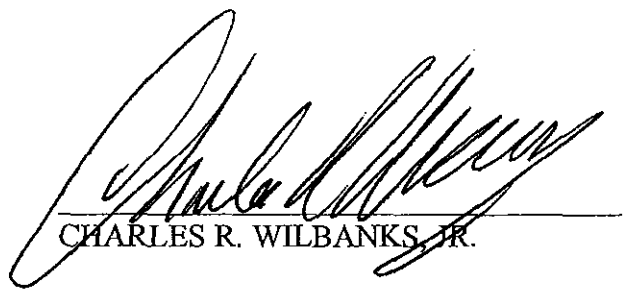
This the 16th day of February, 2010.



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