THE SUPREME COURT OF MISSISSIPPI

DOT MERCHANT, as Administratrix of the Estate of Charles Ernie Harris, Sr. and on behalf of all wrongful death beneficiaries of Charles Ernie Harris, Sr. — **APPELLANTS**

VS. — **CAUSE NO. 2009-CA-01622**

FOREST FAMILY PRACTICE CLINIC, P.A., JOHN P. LEE, M.D., And JOHN DOES 1-10 — **APPELLEES**

APPEAL FROM THE CIRCUIT COURT OF SCOTT COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PARTIES

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

	PERSONS OR OTHER ENTITIES	CONNECTION AND INTEREST
1.	Brian Harris Bradley Harris Charles Harris, Jr.	Plaintiff/Appellant
2.	Shane F. Langston Rebecca M. Langston	Attorneys of Record for Plaintiff/Appellant
3.	Dr. John Paul Lee	Defendant/Appellee
4.	James A. Becker, Jr. Anastasia G. Jones Mildred M. Morris Timothy L. Sensing Watkins & Eager PLLC	Attorneys of Record for Defendant/Appellee
4.	Hon. Marcus Gordon	Scott County Circuit Court Judge

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THE VERDICT OF THE TRIAL COURT SHOULD BE AFFIRMED BECAUSE :

I. APPELLANT/PLAINTIFF BELOW HAD A FAIR TRIAL AND THE MOTION TO CHANGE VENUE WAS PROPERLY DENIED;

II. APPELLANT/PLAINTIFF BELOW WAS NOT PREJUDICED BY THE TRIAL COURT FOR NOT STRIKING CERTAIN JURORS FOR CAUSE;

III. APPELLANT/PLAINTIFF BELOW WAS NOT PREJUDICED BY COUNSEL OPPOSITE'S COMMENT TO PLAINTIFF'S EXPERT SINCE THE COMMENT WAS APPROPRIATE, OR, IN THE ALTERNATIVE, THE COURT INSTRUCTED THE JURY TO DISREGARD THE COMMENT;

IV. THERE WAS NO MISCONDUCT BY THE COURT OFFICIALS OR JURORS WHICH CAUSED PREJUDICE TO THE PLAINTIFF;

V. THERE WAS NO EXTRANEOUS INFORMATION WHICH ENTERED THE JURY ROOM DURING DELIBERATIONS.

STATEMENT OF THE CASE

Nature of the Case

This is a wrongful death case wherein the Appellant/Plaintiff below, the Estate of Charles Ernie Harris, Sr. (hereinafter, "the Estate") alleged the medical negligence of Appellee/Defendant below, John P. Lee, M.D. (hereinafter "Dr. Lee") and Forest Family Medical Clinic, P.A. (hereinafter "the Clinic") caused the death of Plaintiff's decedent, Charles Ernie Harris, Sr. Following a trial by jury, a verdict was returned for Dr. Lee and the Clinic. The issues on appeal are not directly relevant to the merits of the case. Appellant's Brief sets forth four issues as grounds for reversible error, all of which Appellant argues point to jury bias which prevented the Estate from having had a fair trial.

Course of the Proceedings / Disposition in the Court Below

Charles Ernie Harris, Sr., died intestate on August 13, 2006. The Estate of Charles Ernie Harris, Sr. filed its Complaint in the Circuit Court of Scott County on August 6, 2008. Vol. 1, p. 4; R.E.A, p. 1. Discovery followed.

On May 29, 2009, on Friday afternoon before the trial was scheduled to begin on Monday, the Estate filed Motion to Change Venue and for Continuance. Vol. 6, p. 782; R.E.A, p. 782.

A hearing on said motions in limine was held on June 1, 2009, just prior to trial. The Motion to Change Venue was denied. Vol. 10, p. 6; R.E.B, p. 6. Following a three-day trial by jury, the jury handed down a verdict for Dr. Lee and the Clinic by a vote of nine (9) jurors for Dr. Lee and the Clinic, two (2) jurors opposed, and one (1) juror undecided. Final Judgment was entered on June 11, 2009. Vol. 7, pp. 885-86; Vol. 13, p. 477; R.E.A, pp 885-86; R.E.B, p. 477.

The Estate then began filing post-trial motions. On June 12, 2009, the Estate filed Motion to Investigate Juror Misconduct, to Set Aside Jury Verdict, to Void or Set Aside Final Judgment,

for New Trial and to Change Venue. Vol. 7, pp. 889, 939, 942; R.E.A, pp. 889, 939, 942. On June 22, 2009, the Estate filed Renewed Motion to Change Venue, Motion to Investigate Juror Misconduct, and Motion to Set Aside or Void Jury Verdict, to Void or Set Aside Final Judgment and for New Trial. Vol. 7, pp. 946, 992; Vol. 8, p. 1042; R.E.A, pp. 946, 992, 1042. Dr. Lee and the Clinic filed their responses to said post-trial motions. Vol. 8, pp. 1109, 1122, 1139; R.E.A, pp. 1109, 1122, 1139.

The court denied all of the Estate's post-trial motions, including motions to change venue and for new trial. Vol. 9, pp. 1154-56; Vol. 13, pp. 538-39, 542; R.E.A, pp. 1154-56; R.E.B, pp. 538-39, 542.

The Estate filed Notice of Appeal on October 1, 2009, and timely perfected its appeal. Vol. 9, p. 1157; R.E.A, p. 1157.

Statement of the Facts

Facts Relevant to the Merits of the Case

Though the merits of the case are not at issue in this appeal, a brief description of the facts will provide the background of the case.

Plaintiff's decedent, Charles Ernie Harris, Sr. (hereinafter "Mr. Harris" or "Plaintiff's decedent") first saw Dr. Lee as a patient in September 2005 for an on-the-job injury while working for Koch Foods. Mr. Harris was an insulin-dependent diabetic, had high blood pressure, and had had several strokes. Vol. 10, p. 107; R.E.B, p. 107. Though he didn't have any major permanent damage from these strokes, they resulted in significant blood vessel blockage. Vol. 10, pp. 108-110; R.E.B, pp. 108-10. Mr. Harris smoked a pack of cigarettes a day and drank a six-pack of beer a day. Vol. 10, p. 113; R.E.B, p. 113. Dr. Lee continued to treat Mr. Harris until June 2006.

Mr. Harris saw Dr. Lee as a patient four times in June 2006. On June 13, 2006, Mr. Harris

went to see Dr. Lee for a checkup. There was no reported problem with his feet at that time. Ex. Vol. 1, pp. 117, 134. Mr. Harris again saw Dr. Lee on June 23, 2006. Vol. 11, pp. 181, 284-87; Ex. Vol. 1, p. 135; R.E.B, pp. 181, 284-87. At that time he had a problem with his right foot. He had been sick the night before with a stomach bug and had fallen when he got up to go to the bathroom. Ex. Vol. 2, p. 151; Vol. 4, p. 471; Vol. 11, pp. 181, 184-85; R.E.A, p. 471; R.E.B, pp. 181, 184-85; R.E.C, p. 151. Mr. Harris came back on June 28 with severe pain in his left foot and Dr. Lee diagnosed and treated him for gout. Vol. 6, p. 795; Vol. 11, p. 295; Ex. Vol. 1, p. 136; R.E.A, p. 795, R.E.B, p. 295. Dr. Lee sent him home with instructions to come back if he had more problems. Mr. Harris returned on Friday, June 30, because he was still having problems with his left foot. Ex. Vol. 1, p. 137. He had no fever and Dr. Lee continued to treat him for gout and prescribed a stronger medication than he had prescribed on June 28. Vol. 10, p. 127; R.E.B, p.127. Dr. Lee testified that his foot looked better than it did on June 28 and sent him home with instructions to come back in a month for a recheck or as needed. Ex. Vol. 1, p. 137; Vol. 12, pp. 305-06; R.E.B, pp. 305-06.

Peggy Harris testified that the condition of his foot had dramatically changed by Sunday morning. Vol. 4, p. 479; Vol. 10, p. 130; R.E.A, p. 479; R.E.B, p.130. He was admitted to Mississippi Baptist Medical Center on Sunday, July 2 and was diagnosed with a severe infection in his foot. Ex. Vol. 2, p. 157; R.E.C, p. 157. He was later diagnosed with necrotizing fasciitis, a very rapidly progressing infection. Vol. 10, p. 130; R.E.B, p.130. His foot was amputated and he died on August 13, 2006. Ex. Vol. 2, pp. 161, 165; R.E.C, pp, 161, 165.

Facts Relevant to This Appeal

Late in the afternoon on the Friday before this trial began on Monday, June 1, 2009, Plaintiff filed a Motion to Change Venue and For Continuance. Vol. 6, p. 782; R.E.A, p.782. The trial court

heard that motion prior to the beginning of trial on June 1 and denied the motion for change of venue. Following a three day trial by jury, the jury handed down a verdict for Dr. Lee and the Clinic by a vote of nine (9) jurors for Dr. Lee and the Clinic, two (2) jurors opposed, and one (1) juror undecided. Final Judgment was entered on June 11, 2009. Vol. 7, p. 885; Vol. 13, p. 477; R.E.A, p.885; R.E.B, p.477.

The Estate filed several post-trial motions. On June 12, 2009, the Estate filed Motion to Investigate Juror Misconduct, to Set Aside Jury Verdict, to Void or Set Aside Final Judgment, for New Trial and to Change Venue. Vol. 7, pp. 889, 939, 942; R.E.A, pp. 889, 939, 942. On June 22, 2009, the Estate filed Renewed Motion to Change Venue, Motion to Investigate Juror Misconduct, and Motion to Set Aside or Void Jury Verdict, to Void or Set Aside Final Judgment and for New Trial. Vol. 7, pp. 946, 992; Vol. 8, p. 1042; R.E.A, pp. 946, 992, 1042. Dr. Lee and the Clinic filed their responses to said post-trial motions. Vol. 8, pp. 1109, 1122, 1139; R.E.A, pp. 1109, 1122, 1139.

A hearing on the post-trail motions was held on August 17, 2009, where testimony from witnesses was given and counsel made their arguments. Vol. 13, p. 479; R.E.B, p. 479. Plaintiffs brought Maria Lopez, one of the jurors at the trial, to testify at the hearing, where she backed down from several statements she made in her sworn affidavit regarding juror misconduct. She stated at the hearing that when she walked into the courtroom and saw Juror Clyde Lowden walking close to some sheriff's deputies, that she did not know whether the sheriff was with them. She said only that she thought it was the sheriff, whereas in her Affidavit she stated definitively that the sheriff was there. Vol. 7, pp.953-54; Vol. 13, p. 509; R.E.A, pp. 953,54; R.E.B, p. 509. Her Affidavit also states she heard the trial being discussed when Juror Lowden was walking into the courthouse with Sheriff Lee and Circuit Clerk Rigby, but she testified at the hearing that she never heard anyone on

the jury discuss the trial prior to going into the jury room or prior to the close of evidence. Vol. 7, pp.953-54; Vol. 13, p. 510; R.E.A, pp. 953-54; R.E.B, p. 510.

Next, Rebecca Langston, counsel for the estate, also testified at the hearing on post-trial motions and stated that she saw the Clerk of the Circuit Court, Joe Rigby, wink at Juror Lowden, and that Mr. Rigby handed the stack of documentary evidence marked as exhibits during the trial to Juror Lowden at the close of the trial. Vol. 8, p. 1040; Vol. 13, p. 512; R.E.A, p. 1040; R.E.B, p. 512. She then "connected the dots" and determined that there was a relationship between Circuit Clerk Rigby and Juror Lowden. Vol. 13, pp. 515-17; R.E.B, pp. 515-17. During the trial, she did not bring the "wink" to the attention of the trial court because she had not yet "connected the dots". Vol. 13, p. 513; R.E.B, p. 513.

Mr. Rigby was called to the stand and testified that he did not wink at the jurors. Vol. 13, p. 517; R.E.B, p. 517. He also stated at the end of the trial that he generally hands the trial exhibits to a man if the documents are heavy, and that he hands them to a juror sitting in either seats three (3), four (4), or five (5). Vol. 13, p. 518; R.E.B, p. 518. The Estate argued that Mr. Rigby had handed the evidence to Juror Lowden, who was sitting in chair two (2). Vol. 13, pp. 521-22; R.E.B, pp. 521-22. In other words, the Estate implied that Mr. Rigby intentionally deviated from his customary practice to hand the documents specifically to Juror Lowden. At that time, the trial court produced the seating chart which verified Joe Rigby's testimony that Juror Lowden was seated in seat three (3) and that he handed the evidence to the juror in seat three (3), who was Juror Lowden. Vol. 13, p. 523; R.E.B, p. 523.

Other pertinent facts will be discussed along with the issues to which they are relevant.

SUMMARY OF THE ARGUMENT

The Estate claims it did not get a fair trial because: 1) the Defendant was a well-known physician in the community, 2) the trial judge did not strike for cause all jurors who had any connection to Dr. Lee, the Clinic, or his son, who was the sheriff, 3) counsel opposite made a prejudicial statement on cross-examination of the Estate's expert, and 4) extraneous remarks were made during jury deliberations which caused a juror to change his vote.

Dr. Lee counters that the Estate had a fair trial because: 1) there is no authority which requires a well-known physician in a rural venue to be tried in a venue other than his county of residence or which requires a change of venue if the defendant is related to the sheriff, 2) the Estate did not exhaust its peremptory challenges and therefore cannot complain that certain potential jurors were not stricken for cause, 3) remark made by counsel opposite was within the scope of permitted discovery to disclose an expert's bias, 4) there was no misconduct during the trial by jurors or court officials which caused prejudice to the Estate, and 5) there was no evidence of extraneous information having been presented in the jury room. Therefore, the Estate had a fair trial and the verdict of the trial court should be affirmed.

Standard of Review

Review of the trial court's denial of a motion for new trial is subject to the abuse of discretion standard of review. *Miss. Transp. Comm'n v. Highland Dev., LLC,* 836 So.2d 731, 734 (¶10) (Miss. 2002). Furthermore, a motion for a new trial is only granted in rare circumstances when there would be an injustice in allowing the verdict to stand. *C & C Trucking Co. v. Smith,* 612 So.2d 1092, 1099 (Miss.1992) .

A Preliminary Matter

The issues in this appeal center on whether the Estate had a fair trial. Specifically, the Estate claims that many persons involved in the trial - including the circuit court judge, the entire jury venire, the sheriff of Scott County, sheriff's deputies, the Scott County Circuit Clerk, and the circuit clerk's son - were biased to the extent it could not get a fair trial. Before considering the issues raised by the Estate on appeal, it is important to note that these trial-oriented allegations of bias were not the first ones advanced by the Estate. Rather, the Estate's accusations of bias and prejudice began many months earlier during the pretrial litigation process and only grew louder during and after the trial. As the circuit court recognized after the trial, it was the Estate, not those it accused, that had not been forthright throughout the litigation. Vol. 13, pp. 539-42; R.E.B, pp. 539-42.

The allegations of bias began when the issue of the marital status of Peggy Harris, the putative wife of Charles Harris, Sr., arose[1]. But first, some background: On May 1, 2008, counsel for the Estate, the Langston Law Firm, filed for letters of administration claiming that Peggy Harris was the spouse of the decedent. Vol. 2, p. 208; R.E.A, p. 208. Based on that representation, the Chancery Court of Leake County named Peggy Harris as Administratrix of the Estate. Vol. 2, p. 260.; Vol. 3, pp. 378-79; R.E.A, pp. 260, 378-79. Shortly thereafter Peggy Harris filed the original Complaint in this case in her capacity as Administratrix of the Estate. Vol. 1, p. 4; R.E.A, p. 4.

Then, on December 16, 2008, Peggy Harris testified at her deposition that she was married to Charles Ernie Harris, Sr. for 16 years and had three sons. Vol. 2, pp. 202, 205; R.E.A, pp. 202, 205. She testified they divorced in Olympia, Washington and 6 months later she married one Paul

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[1] Though Peggy Harris' marital status was resolved and is not an issue in this appeal, that issue was the subject of numerous motions and several hearings in two courts (the Circuit Court of Scott County and the Chancery Court of Leake County). Vol. 3, p. 364; R.E.A, p. 364; Supp. Vol. 1, p. 17; R.E.D, p. 17; Vol. 13, pp. 539-40; R.E.B, pp. 539-40. The pleadings filed in regard to this issue constitute half of the pre-trial Record of the case. Vol. 2, pp. 194-285; Vol. 3, pp. 286-430; Vol. 4, pp. 431-573; Vol. 5, pp. 574-624; Vol. 6, pp.772-76, 806-09.

McJunkin, also in Olympia, Washington. Vol. 2, p. 203; R.E.A, p. 203. After three (3) years, she and McJunkin were divorced and she went back to Harris but never remarried him. Vol. 2, p. 203; R.E.A, p. 203. Shortly after learning this information, the Defendants filed a Motion to Dismiss on December 23, 2008, asserting that Peggy Harris had no standing to represent the Estate since she was neither a beneficiary to the Estate nor a wrongful death beneficiary. Vol. 2, p. 194; R.E.A, p. 194. The Estate responded that Peggy Harris was the common law wife of the decedent since she and the decedent had lived in South Carolina, where common law marriage is recognized, prior to moving to Mississippi. Vol, 2, pp. 210, 214. R.E.A, pp. 210, 214. Attached to the Estate's Response was an affidavit of Peggy Harris stating that she divorced McJunkin in 1985 and reunited with Harris but did not find it necessary to formalize the reunion with a marriage ceremony. However, the Estate never produced a certificate of divorce. Vol. 2, pp. 227-28; R.E.A, pp. 227-28.

Dr. Lee pursued a thorough investigation to search for evidence of a divorce in three (3) states (Washington, South Carolina, and Arkansas) and six (6) counties, where there had been testimony that the couple had lived. Certificates were obtained from each of those counties stating that there was no such divorce on file. Vol. 3, pp.355-60; R.E.A, pp. 355-60. Though Peggy Harris stated five times in her sworn deposition that she was divorced from McJunkin, as well as via other sworn affidavit testimony, there was never a divorce. Vol. 2, pp.199, 227-28; R.E.A, pp. 199, 227-28. Rather than come forward with the truth, the Estate remained silent.

Meanwhile, it had come to the attention of the Chancery Court of Leake County via pleadings filed in the Circuit Court of Scott County, that Peggy Harris may not be the lawful wife of the decedent. Vol. 3, pp. 367, 387, 417; R.E.A, pp. 367, 387, 417. At a hearing before the Chancery Court the Estate argued that Peggy Harris never attempted to mislead the court, that she testified truthfully at her deposition, and that she did not know her marital status because she had

no legal training. Vol. 3, pp. 374-75; R.E.A, pp. 374-75. The Estate also claimed that despite the fact there was no legal marriage, the Chancery Court would have appointed her as Administratrix anyway because the adult children of the decedent consented. Vol. 3, pp. 378-79, 394; R.E.A, pp. 378-79, 394. The chancellor responded vehemently that that was not so, that Peggy Harris was a stranger to the Estate and, as a stranger, she would not have been appointed without a heavy bond. Vol. 3, pp. 378-79, 394; R.E.A, pp. 378-79, 394. Though the chancery court did not accuse the Estate of fraud, it stated that the pleadings were misleading at best, were not accurate, and bordered on being false. Vol. 3, p. 395; R.E.A, p. 395.

After the chancellor's scolding, the Estate's counsel launched its first tirade declaring bias and impropriety. Specifically, counsel:

1) accused Judge Gordon and the chancellor of having had *ex parte* communications with each other about the alleged inappropriate appointment of Ms. Harris as Administratrix of the Estate; Vol. 3, pp. 375-76; R.E.A, pp. 375-76.

2) criticized and blamed Judge Gordon, at least three times, for sending pleadings to the Chancery Court regarding the case without having notified the Estate; Vol. 3, pp. 376, 379, 380; R.E.A, pp. 376, 379, 380.

3) accused Judge Gordon of having had *ex parte* communications with Dr. Lee's counsel, which said counsel denied; Vol. 3, pp. 380, 386; R.E.A, pp. 380, 386.

4) criticized Judge Gordon for not having notified him that he thought Ms. Harris should be removed as Administratrix; Vol. 3, p. 376; R.E.A, p. 376.

5) expressed extreme anger at Dr. Lee's counsel for having filed a Motion to Dismiss because of Plaintiff's lack of standing and asked for sanctions; Vol. 3, p. 378; R.E.A, p. 378.

6) accused the chancellor of having had *ex parte* communications with Dr. Lee's counsel, which she denied; Vol. 3, p. 380; R.E.A, p. 380.

7) criticized the chancellor for noticing Dr. Lee's counsel for the hearing because they were not parties to the proceedings; Vol. 3, p. 380; R.E.A, p. 380.

Ultimately, the chancellor concluded that Peggy Harris had no standing and could not stand as Administratrix. Vol. 2, pp. 284-85; R.E.A, pp. 284-85. Furthermore, the Chancery Court denied the Estate's motion to substitute one of the decedent's adult children as administrator because the adult children had said that they did not know that their mother was not the lawful wife of their father. Vol. 3, p. 395; Vol. 5, pp. 583, 586, 589; R.E.A pp. 395, 583, 586, 589.

After the Chancery Court hearing there was a hearing in the Circuit Court of Scott County where the Clerk of the Chancery Court of Leake County was substituted for Peggy Harris as Plaintiff and Administratrix. Supp. Vol. 1, p. 21; R.E.D, p. 21. At that hearing the court found it incredible that Peggy Harris claimed to have been divorced but did not know where she got her divorce. Supp. Vol. 1, p. 20; R.E.D, p. 20. The court also found it incredible that counsel for the Estate did not follow through with the responsibility to research the issue of her marital status. Supp. Vol. 1, pp. 20-21; R.E.D, pp. 20-21. Furthermore, the court stated that the chancellor's description of the Estate's lack of diligence as being derelict was not a strong enough term to describe the manner in which it handled its responsibility. Supp. Vol. 1, p. 19; R.E.D, p. 19.

Counsel for the Estate never acknowledged an understanding of the significance of the misrepresentations made to two courts and the responsibility both courts expressed that counsel had to represent the truth. Vol. 3, pp. 376-78, 393, 395; R.E.A, pp. 376-78, 393, 395. Instead, accusations of bias and prejudice began. Similar allegations persisted throughout and after the trial and form the basis of the Estate's appeal.

ARGUMENT AND DISCUSSION

I. APPELLANT/PLAINTIFF BELOW HAD A FAIR TRIAL AND THE MOTION TO CHANGE VENUE WAS PROPERLY DENIED;

At the outset, it is important to note that Appellees have a statutory right to venue in Scott County. Section 11-11-3(3) states:

> Notwithstanding subsection (1) of this section, any action against a licensed physician, osteopath, dentist, nurse, nurse-practitioner, physician assistant, psychologist, pharmacist, podiatrist, optometrist, chiropractor, institution for the aged or infirm, hospital or licensed pharmacy, including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake, breach of standard of care or the unauthorized rendering of professional services shall be brought only in the county in which the alleged act or omission occurred.

MISS. CODE ANN. § 11-11-3(3) (Rev. 2004). This statute mandates that Scott County, Mississippi is the only proper venue for this action. Plaintiff is asking this Court to ignore this statute without providing any justification for doing so.

The Estate essentially states that Defendants, Defendants' counsel, and the trial court had a duty to inform it of the fact that Sheriff Mike Lee is Dr. Lee's son. However, the Estate cites no authority to support this. Neither Dr. Lee nor the trial court had a duty to undertake the Estate's due diligence. Brief of Appellant, p. 16.

Appellant argues that a change of venue was proper simply because Sheriff Mike Lee is the son of Dr. Lee. More specifically, Appellant argues that a change of venue was proper because Sheriff Lee would be required to participate in the trial and have direct communications with jurors. Brief of Appellant, p. 16.

Also, the Estate claims it was impossible to field a fair and impartial jury in Scott County because of the relationship between Dr. Lee and Sheriff Lee. Brief of Appellant, p. 5. Appellant argues that it was "IMPOSSIBLE to choose a fair and impartial jury from Scott County" because

the entire venire depends on Sheriff Lee and his deputies to protect them and their families. Brief of Appellant, pp. 6, 16. Rebutting this argument, the trial judge stated, "[i]t is a matter of record that Mike Lee is the son of Dr. John Paul Lee...[and the] fact that he is a son, that in and of itself, does not entitle you to have me to sustain your motion for change of venue." R. Vol. 10, p. 4. R.E.B, p. 4. Furthermore, the fact that Sheriff Lee resides in the county does not automatically signify a favorable verdict for Dr. Lee. The trial judge noted that he had presided over many cases where Sheriff Lee testified as a witness against a criminal defendant who was acquitted in a trial by jury. R. Vol. 11, p. 254; R.E.B, p. 254. As the trial judge stated, "I'm not going to presume that a juror cannot be fair and impartial just simply because they know that the Sheriff will be called if they have a need for law enforcement. I'm not going to presume that the jurors will be prejudiced by the fact that the Defendant in this case is a local doctor." R. Vol. 10, p. 7; R.E.B, p. 7. Thus the court emphasized that it has witnessed on numerous occasions where a jury was not influenced by a sheriff's affiliation with one party in a case.

Case law is in agreement with the trial court's ruling, as the Supreme Court has held on more than one occasion that the fact that a sheriff or court official is related to a party in a case is not grounds to grant a change of venue motion.

The facts in *Bond v. State,* 91 So. 461 (Miss. 1922) are strikingly similar to those in this case. In *Bond*, a motion for change of venue was made because the men who were killed in that case were members of large and prominent families in the community and a great number of the veniremen were related to them, as well as the sheriff. *Id.* at 462. The trial court denied the motion, which the Supreme Court affirmed because these facts alone were not enough to support that the motion should have been granted. *Id.* at 465-66. The Supreme Court noted that the sheriff had not summoned the venire but had authorized a deputy to do so. *Id.* at 466. There was no evidence of

fraud and it would not be presumed that the deputy did anything other than his duty in summoning the venire. *Id.*

Also, in *Adams v. State*, 944 So.2d 86, 89 (Miss. App. 2006), the trial court denied a motion to change venue because of pre-trial publicity and because the twin sibling of the victim was the deputy circuit clerk. The court stated that the motion was not supported by any case law that the employment of the victim's twin required a change of venue. Furthermore, the court found that there was an adequate opportunity during voir dire to question the members of the venire and an opportunity to challenge jurors for cause and peremptorily. *Id.* Likewise, the Estate offers no case law to support that Dr. Lee's position or employment as sheriff requires a change of venue. In addition, the Estate had ample opportunity to challenge jurors. Vol. 10, pp. 74-76; R.E.B, pp. 74-76.

In *Fondren v. State* the Supreme Court affirmed the trial court in overruling a motion to quash the jury panel because several of the jurors were related to the sheriff. *Fondren v. State*, 175 So. 2d 628, 637 (Miss. 1965). Further, the Supreme Court found it was in the trial court's discretion to permit the sheriff to sit in the courtroom even though he was a witness in the case because he was an officer of the court. *Id.*

The Estate also claims it was the sole responsibility of Dr. Lee and the lower court to inform it that Mike Lee was a sheriff. Appellant has failed to cite a single rule of law or authority on the matter. Appellant has been aware since Dr. Lee's deposition in 2008 that Mike Lee was Dr. Lee's son. R. Vol. 10, p.5; R.E.B., p. 5. The Estate did not inquire at the deposition as to Mike Lee's occupation. Furthermore, there is no obligation on Dr. Lee to disclose such information. Instead of exercising due diligence, the Estate blamed "Judge Gordon, appellee Dr. Lee and his counsel." Brief of Appellant, p. 7.[2]

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[2] It is important to note that Sheriff Lee was not in town during the trial and did not attend any part of the trial. Vol. 8, p. 1120; R.E.A, p. 1120; Vol. 13, p. 519; R.E.B, p. 519.

The trial court addressed this very issue, noting that it was an easy matter of discovery, and one which was the responsibility of Plaintiff's counsel. Vol. 10, p.4; R.E.B, p. 4. The fact that Mike Lee is the Sheriff of Scott County is a matter of public record and is easily and quickly discovered.[3] In a desperate, last minute attempt to change venue, Appellant chose to file a Motion to Transfer at 3:00 p.m. on Friday, May 31, 2008, less than 72 hours before the trial was set to begin on Monday. Vol. 10, p. 6; R.E.B, p. 6. Importantly, the Estate has not provided any evidence that it was in any way prejudiced by Sheriff Lee's relationship to Dr. Lee, nor did their relationship cause the Estate to receive an unfair trial.

Of the twelve jurors, none had a connection to Sheriff Lee. Only the alternate juror, William Davis, had an indirect connection to the Sheriff. He stated during voir dire that his brother-in-law was employed as a dispatcher for the Sheriff's Department but that he could be fair and impartial in the trial. Vol. 10, pp. 50-51; R.E.B, pp. 50-51. However, the record indicates that the alternate juror did not serve as a juror since no juror vacated his seat. Vol. 13, p. 474; R.E.B, p. 474.

Also, the Estate claimed prejudice because Dr. Lee was a physician in the community. Brief of Appellant, p. 8. Of the twelve jurors, two stated there was a connection to Dr. Lee or to the Clinic.[4] Those jurors were Ronald Wade and Meosha Loper. Vol. 10, pp. 33, 34, 39; R.E.B, pp. 33, 34, 39. Juror Ronald Wade had never seen Dr. Lee as a patient but used another doctor at the Clinic. It had been three or four months since he had been to the Clinic. Vol. 10, p. 33; R.E.B. p. 33. Juror Meosha Loper had seen Dr. Lee in the past but had used another doctor at another clinic for the last

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[3] Judge Gordon discussed this with Estate's counsel. He stated, "If you did not know that Mike was the son of Dr. John Paul Lee, then you should be looking at your associate there or your investigator, because that was such an easy matter of discovery that one little simple phone call would have alerted you to that, certainly by the fact of the name of Dr. Lee and son, Mike Lee." R. Vol. 10, p. 4; R.E.B, p. 4.

[4] A third juror, Deborah Ennis, thought her mother was a patient at the Clinic but was mistaken. Vol. 10, p. 34. She thought the Clinic was on Highway 35 but that is not where Forrest Family Practice Clinic is located. Vol. 10, p. 34; R.E.B, p. 34. It is located on Medical Lane. Vol. 1, p. 4; R.E.A, p. 4.

four years. Vol. 10, p. 39; R.E.B, p. 39. Both Jurors Wade and Loper indicated during voir dire that they could be fair and impartial in the case. Vol. 10, pp. 16, 32, 39; R.E.B, pp. 16, 32, 39.

In reviewing whether a motion for change of venue was properly overruled, the trial itself is reviewed from its conclusion. *Bond v. State,* 91 So. 461, 465 (Miss. 1922). If it is found to be free of bias, the court's ruling should be affirmed. *Id.* Because no member of the jury had a connection with Sheriff Lee, the Estate can not claim that his relationship to Dr. Lee resulted in prejudice. Because the two jurors who had prior contacts with Dr. Lee or the Clinic said they could be fair and impartial, the Estate cannot claim prejudice on the basis of that relationship either. The jurors' promise is entitled to considerable deference. *Heaney v. Hewes*, 8 So. 3d 221, 226 (Miss. App. 2008).

When reviewing the trial court's denial of a motion to change venue on appeal, the standard of review is abuse of discretion. *Crenshaw v. Roman,* 942 So. 2d 806, 809 (Miss. 2006). Thus, on appeal, a trial court's ruling will not be overturned "unless it clearly appears that there has been an abuse of discretion or that the discretion has not been justly and properly exercised under the circumstances of the case." *Crenshaw,* 942 So.2d at 806. The Estate has provided no factual evidence of prejudice or any supporting law to show that the trial court abused its discretion in denying its Motion to Change Venue. The trial court was correct in denying the Motion to Change Venue.

II. APPELLANT/PLAINTIFF BELOW WAS NOT PREJUDICED BY THE TRIAL COURT FOR NOT STRIKING CERTAIN JURORS FOR CAUSE.

Although the Estate's arguments regarding error in the jury selection process are incorrect, the issue is moot. Stated differently, even if the Estate were correct regarding the Court's decision to strike jurors for cause, the result is harmless error since the Estate did not utilize all of its peremptory challenges. It is long established Mississippi precedent that reversal is not warranted

unless both error and injury are shown. *Gray v. State*, 799 So. 2d 53, 61 (Miss. 2001). In fact, "[e]rror is harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no way affects the final outcome of the case . . . ." *Id.* Specifically, within the context of juror selection, the Mississippi Supreme Court held that "before a trial court could be put in error for denying a challenge for cause the record should show that the complaining party exhausted his peremptory challenges." *Knotts by Knotts v. Hassel*, 659 So. 2d 886, 891 (Miss. 1995).

Both parties were allowed ten (10) peremptory challenges, more than twice the number traditionally afforded in civil circuit court matters.[5] Miss. R. Civ. P. 47(c); Vol. 10, p. 74; R.E.B, p. 74. Although the Estate was allowed ten peremptory challenges; **the Estate only utilized seven out of ten.**[6] Vol. 10, pp. 74-76; R.E.B, pp. 74-76. Further, the Estate complains that the trial court should have stricken for cause 15 potential jurors who were not stricken for cause.[7] Brief of Appellant, pp. 8-9. However, only two (2) of the jurors which the Estate asserts should have been stricken for cause actually served on the jury[8]. Yet, the Estate had three peremptory challenges that were not used and therefore could have stricken both of these jurors and still would not have used all its challenges. Brief of Appellant verifies this fact, as it states that the Estate "was forced to save peremptory strikes" in case it needed them for later in the jury selection process. Brief of Appellant, p. 10. The Mississippi Supreme Court stated that "[w]e have consistently held that the trial court

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[5] Miss. R. Civ. P. 47(c) states that each side may exercise four peremptory challenges in actions tried before a twelve-person jury.

[6] Plaintiff's counsel used seven of their ten peremptory strikes and struck the following potential jurors: Bonny Gordon, Emily Baker, Michael Kincaid, Leland Burchfield, Tammy White, Jacqueline Bobbit, and Charlie Hines. Vol. 10, pp. 74-76; R.E.B, pp. 74-76.

[7] The Estate complains that the following should have been stricken for cause but were not: Bonny Gordon, Ronald Wade, Emily Baker, Leland Burchfield, Michael Kincaid, Tammy White, Jacqueline Bobbit, Meosha Loper, Charles Hines, Paula Lewis, Betty Little, Royial Joseph, Angela Course, Freddie Beatty, and Ethel Mangum. Appellant's Brief, pp. 8-9.

[8] Of the 15 potential jurors the Estate complains should have been stricken for cause, only two actually served as jurors. They were Ronald Wade and Meosha Loper. Vol. 10, p. 78; R.E.B, p. 78.

may not be put in error for refusal to excuse jurors challenged for cause when the complaining party chooses not to exhaust his peremptory challenges." *Scott v. Ball*, 595 So. 2d 848, 851 (Miss. 1992). Mississippi case law is clear that the Estate cannot be heard to object to jurors who were not stricken for cause when it did not utilize all of the peremptory challenges. The Estate acknowledges that this is the law and argues that this long-established precedent be overruled. Brief of Appellant, p. 20.

The Estate claims there were 52 potential jurors in the venire. Brief of Appellant, p. 8. Brief of Appellant provides no citation to the record for this information because the list of jurors is not in the record. Matters outside the record cannot be considered on appeal.[9] *Jones v. State*, 776 So. 2d 643, 649 (Miss. 2000). Nevertheless, the Estate claims prejudice from a statistical aberration in the ratio of potential jurors in the venire who had contacts or a family relationship with Dr. Lee or the Clinic. Brief of Appellant, p. 8. However, the Supreme Court has provided a mechanism for courts to follow when there is a statistical aberration so that a fair and impartial jury can be selected. *Hudson v. Taleff*, 546 So. 2d 359, 361-62 (Miss. 1989).

In medical malpractice cases, where there is a statistical aberration in the jury venire of those who had been treated by a defendant, the trial court should take remedial measures to ameliorate the influence the members could have on the jury. *Id.* Under these circumstances, the trial court should grant more peremptory challenges, increase the size of the venire, and sustain some of the challenges for cause. *Id.* at 363.

In this case the trial court followed the remedial measures enumerated in *Hudson v. Taleff*, and expanded the peremptory challenges from the four (4) permitted by law to ten (10). Vol.10, pp.

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[9] A list of the jurors is not in the record. The trial transcript indicates there were four panels and a partial fifth panel but does not state how many remained in each panel after jurors were excused. The transcript states of the 185 jurors initially summoned that 39 remained after being excused for illness, etc. and that another 65 jurors were summoned. However, it does not indicate how many in this second group were excused so there is no way to calculate from the record the total number remaining in the jury pool. Vol. 10, p. 10.

10, 65, 78; R.E.B, pp. 10, 65, 78. The court also increased the size of the venire and granted seven (7) challenges for cause. Vol. 10, pp. 10, 46, 59, 67, 71-74; R.E.B, pp. 10, 46, 59, 67, 71-74. These measures are taken to insure a fair and impartial jury. *Id.*

Given that the issue is irrelevant due to the Estate's failure to exhaust its peremptory challenges, Dr. Lee briefly responds to the Estate's substantive argument. First, the Estate argues that in a medical malpractice case a circuit judge must strike for cause anyone in the venire when challenged because that person or a family member is a past or present patient of the defendant doctor or one of the doctor's partners. Brief of Appellant, pp. 18-19. The Estate challenged for cause all members of the venire with prior contacts with the Dr. Lee or Forest Family Practice Clinic and cites *Scott v. Ball* as support. Vol. 10, p. 66; R.E.B, p. 66. However, *Scott v. Ball* was decided in 1992 and subsequent to that decision the Supreme Court has defined a new analysis to determine this issue, which is articulated in *Heaney v. Hewes*, 8 So. 3d 221 (Miss. App. 2008).

With regard to this issue *Heaney* held that "jurors with prior contacts should not be per se summarily excused for cause." The court went on to explain that there are "two competing forces that enter into the equation as to the impartiality of a juror. The first force is the factor or circumstance which tends to indicate a potential for bias on the part of that juror. The second force is the juror's promise that he or she can and will be impartial." *Id.* at 226 (¶ 17). The circumstances that might have indicated a potential bias were probed and each juror stated that he could be fair and impartial. This promise is "entitled to considerable deference." *Id.*

Of the twelve jurors in this case, none had a connection to Sheriff Lee. Only the alternate juror, William Davis, had an indirect connection to the Sheriff. However, the record indicates that the alternate juror did not serve as a juror since no juror vacated his seat. Vol. 13, p. 474; R.E.B,

p. 474. Also, of the twelve jurors, two stated there was a connection to Dr. Lee or to the Clinic.[10] Those jurors were Ronald Wade and Meosha Loper. Vol. 10, pp. 33, 34, 39; R.E.B, pp. 33, 34, 39. Juror Ronald Wade had never seen Dr. Lee as a patient but used another doctor at the Clinic. It had been three (3) or four (4) months since he had been to the Clinic. Vol. 10, p. 33; R.E.B, p. 33. Juror Meosha Loper had seen Dr. Lee in the past but had used another doctor at another clinic for the last four (4) years. Vol. 10, p. 39; R.E.B, p. 39. Both Jurors Wade and Loper indicated that they could be fair in the case. Vol. 10, pp. 16, 32, 39; R.E.B, pp. 16, 32, 39. This promise is "entitled to considerable deference." *Heaney v. Hewes*, 8 So. 3d at 226. There is no evidence of jury bias.

A circuit court has wide discretion in determining whether a prospective juror should be excused for cause. *Brown By and Through Webb v. Blackwood*, 697 So. 2d 763, 769 (Miss. 1997). The trial court was within its discretion in denying a new trial on this issue. Therefore, there is no error in the trial court's ruling during jury selection and the ruling should be affirmed.

III. APPELLANT/PLAINTIFF BELOW WAS NOT PREJUDICED BY COUNSEL OPPOSITE'S COMMENT TO PLAINTIFF'S EXPERT SINCE THE COMMENT WAS APPROPRIATE, OR, IN THE ALTERNATIVE, THE COURT INSTRUCTED THE JURY TO DISREGARD THE COMMENT.

The Estate alleges error in that the court did not grant a mistrial for an allegedly inflammatory statement made by counsel opposite during cross-examination of the Estate's expert, Dr. Schwartz. Initially, the Estate objected to the comment and the trial court sustained the objection and instructed the jury to disregard the comment. However, the Estate then moved for a mistrial. Vol.11, p. 204; R.E.B, p. 204.

The statement for which the court granted a curative instruction was made during cross-examination of the Estate's expert when he was asked if he was also testifying against Dr. Clark,

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[10] A third juror, Deborah Ennis, thought her mother was a Clinic patient. Vol. 10, p. 34; R.E.B, p. 34. She thought the Clinic was on Highway 35 but Forrest Family Practice Clinic is located on Medical Lane. Vol. 10, p. 34; R.E.B, p. 34; Vol. 1, p. 4; Vol. 3, p. 291; R.E.A, pp. 4, 291.

a physician who practiced down the road from Dr. Lee, who was also being sued by the Estate's counsel. Vol. 11, p. 191; R.E.B, p. 191. The Estate objected. The court sustained the objection and instructed the jury to disregard the statement. Vol. 11, pp. 191-92; R.E.B, pp. 191-92. The Estate then moved for a mistrial. Vol.11, p. 204; R.E.B, p. 204.

Jurors are presumed to have followed a curative instruction. To presume otherwise would render the jury system inoperable. *Illinois Cent. R. Co. V. Hawkins*, 830 So. 2d 1162, 1176 (Miss. 2002). Though Dr. Lee contends the remark was wholly appropriate in cross-examination, the Supreme Court has stated that it is not necessary to order a mistrial every time a lawyer makes an improper remark in a trial where the jury is instructed to disregard the remark. *Welch v. Morgan,* 82 So. 2d 820, 822 (Miss. 1955).

Appellant's Brief does not cite a single authority for the proposition that the question asked to the Estate's expert was improper. It is established that liberal cross-examination regarding bias and previous experience as an expert in medical malpractice cases is allowed. *Hall v. Hilburn*, 466 So. 2d 856, 875 (Miss. 1985). In fact, the Mississippi Rules of Evidence states that "[f]or the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." Miss. R. Evid. 616(b). It is well settled in Mississippi that cross examination "may proceed into the collateral circumstances surrounding or in any way affecting, the transaction to the full extent that they have relevant connection by way of testing the memory, accuracy, **sincerity**, interest, or **bias** of the witness." *Bennett v. State,* 933 So. 2d 930, 947 (Miss. 2006) (emphasis added). Further, "bias, prejudice and credibility are always in issue" and "[w]ide latitude is permitted in cross-examination to show bias or motive and the affect on a witness's credibility." *Id.*

Defendants' counsel's question to Dr. Schwartz was intended precisely for these purposes.

Dr. Schwartz was not deposed prior to his trial testimony. Dr. Schwartz advertises his expert testimony services via his resume. Further, Dr. Schwartz bolstered his testimony at trial with his academic credentials and experience. Additionally, he made it apparent that his practice of actually seeing patients is limited because of his academic duties. Vol.11, p. 190; R.E.B, p. 190. It was absolutely appropriate to question Dr. Schwartz on what appeared to be a bias against physicians practicing in rural communities in high volume practices. He testified that it was insane for a doctor to see 40 patients a day, as does Dr. Lee. Vol. 11, p. 193; Vol. 12, p. 315; R.E.B, pp. 193, 315. It is wholly proper for Defendants to inquire as to whether his opinions were colored by bias or prejudice associated with other employment with the Estate's counsel. Further, Defendants were entirely unaware that the Estate's counsel had previously sued Dr. Clark until it was brought to the trial court's attention in correspondence from Estate's counsel prior to the trial. If Estate's counsel was concerned about the impact on the jury of its lawsuit against Dr. Clark, counsel could have addressed this issue in voir dire. However, said counsel chose to remain silent.

The trial judge is in the best position to determine the prejudicial effect of an objectionable comment. *King v. State*, 580 So. 2d 1182, 1189 (Miss. 1991). Review of the denial of a motion for a new trial is subject to abuse of discretion standard. *Miss. Transp. Comm'n v. Highland Dev., LLC,* 836 So.2d at 734 (¶10) (Miss. 2002). The trial court acted within its discretion in overruling the Estate's motion for a mistrial on this issue.

IV. THERE WAS NO MISCONDUCT BY THE COURT OFFICIALS OR JURORS WHICH CAUSED PREJUDICE TO THE PLAINTIFF.

Maria Lopez's Affidavit alleges juror misconduct in that Mr. Lowden failed to reveal that he formerly was a patient of Dr. Lee. Vol. 7, pp. 953-54; R.E.A, pp. 953-54. Dr. Lee cannot speak to what Juror Lowden stated during jury deliberations as counsel for Dr. Lee did not receive the Court's permission to contact any jurors and did not do so. However, a search of Forest Family

Practice Clinic's electronic patient records – which included patient records for the previous eight years – indicated that Juror Lowden had not been treated by any doctor at the Clinic during this time period. Vol. 9, p. 1134; R.E.A, p. 1134. Notwithstanding the Estate's allegations in this regard, by the Estate's own admission, Juror Lowden's alleged comments had no affect on the outcome of the verdict. Maria Lopez's affidavit states that the initial vote – which occurred before the alleged comments – was nine (9) to three (3) in favor of Defendants. Vol. 7, p. 953; R.E.A, p. 953.

Further, the Affiant Maria Lopez alleges juror misconduct by claiming that the jurors must have talked about the case prior to formal jury deliberations. The Estate's Motion to Investigate Juror Misconduct states that "Mr. Lowden could only have known that Dr. Lee 'had the votes' if prior to the close of evidence he had discussed the case with his fellow jurors . . ." Vol. 7, pp. 948-49; R.E.A, pp. 948-49. By speculating on what a juror *could have known*, the Estate was asking the trial court to do precisely what Rule 606(b) prohibits. Miss. R. Evid. 606(b); Vol. 13, p. 507; R.E.B, p. 507. Furthermore, Maria Lopez testified at the hearing on the Motion to Investigate Juror Misconduct that she never heard anyone on the jury discuss the trial prior to going into the jury room or prior to the close of evidence, nor did she mention any juror communication prior to the close of evidence in her Affidavit. Vol. 7, pp.953-54; Vol. 13, p. 502; R.E.A, pp. 953-54; R.E.B, p. 502.

The Estate also alleged that Juror Lowden acted improperly by walking into the courthouse behind members of the Sheriff's Department and Circuit Court Clerk Joe Rigby. Vol. 7, pp. 949, 954; R.E.A, pp. 949, 954. The Affdavit of Rebecca Langston, counsel for the Estate, who also testified at the hearing on post-trial motions, states that she saw the Clerk of the Circuit Court, Joe Rigby, wink at Juror Lowden on the second day of the trial and that he handed the evidence to Juror Lowden at the close of the trial. Vol. 8, p. 1040; Vol. 13, p. 512; R.E.A, p. 1040; R.E.B, p.512. The Estate claims Rebecca Langston's Affidavit is undisputed evidence of Joe Rigby's wink Brief of

Appellant, pp. 3, 13. This is not true. Mr. Rigby testified under oath at the same hearing on post-trial motions that he did not wink in the direction of the jury. Vol. 13, p. 517; R.E.B, p. 517. In an attempt to "connect the dots" Rebecca Langston was alleging that there was a relationship between Joe Rigby and Juror Lowden which attempted to influence the jury. Vol. 13, pp. 515-17; R.E.B, pp. 515-17. She did not bring the "wink" to the attention of the trial court at the time or during the next twenty four hours before the jury returned a verdict on June 3. Vol. 13, pp. 513; R.E.B, pp. 513. In regard to Rebecca Langston's statement that Joe Rigby handed documents to Juror Lowden, Rigby stated that at the end of the trial he generally hands the trial exhibits to a man if the documents are heavy and that he hands them to a juror sitting in seats three, four, or five. Vol. 13, p. 518; R.E.B, p. 518. The Estate argued that Joe Rigby handed the evidence to the juror in chair two this time, where Juror Lowden was seated. Vol. 13, pp. 521-22; R.E.B, pp. 521-22. The Estate was implying that Rigby intentionally deviated from his customary practice to hand the documents to Lowden. However, the trial court produced the seating chart which verified Joe Rigby's testimony that Juror Lowden was seated in seat three and that he handed the evidence to the juror in seat three, as was his custom. Vol. 13, p. 523; R.E.B, p. 523.

The Estate also claims courtroom bias and prejudice, as stated in Rebecca Langston's Affidavit, from the allegation that she saw an unidentified sheriff's deputy shake Dr. Lee's hand and greet him. Brief of Appellant, p. 13; Vol 7, p. 990; R.E.A, p. 990. The court in *Atwood v. Lever*, 274 So. 2d 146 (Miss. 1973), would not grant a mistrial when it was disclosed that during a break in the trial a juror told the plaintiff she was getting better looking all the time and the plaintiff replied, "Thank you" and walked away. *Id.* at 147. The Supreme Court considered this a casual comment since there was no evidence that there was an attempt to engage in conversation and nothing was said concerning the issues involved in the case. *Id.* Likewise in the case *sub judice,*

there is no evidence that there was a conversation between the unidentified sheriff's deputy and Dr. Lee and the alleged handshake is akin to a casual comment. A mistrial or a new trial should not be granted on this ground in a civil case, unless the circumstances indicate some prejudice, wrongful intent, or unfairness. *Id.*

However, perhaps the most disturbing point of Estate's allegation surrounds Maria Lopez's Affidavit, which states that Sheriff Mike Lee was among those who preceded Juror Lowden into the courthouse. Vol. 7, pp. 953-54; R.E.A, pp. 953-54. The Affidavit states that on the morning of June 2, 2009, that the Affiant, Maria Lopez saw Sheriff Lee walking in the courthouse and that she heard Sheriff Lee and others mention "Dr. Lee" and the "Harris family." Vol. 7, pp. 953-54; R.E.A, pp. 953-54. As a matter of fact, this cannot be true since Sheriff Lee provided a sworn affidavit that he was attending a sheriff's conference on the Mississippi Gulf Coast for the entire duration of the trial, from June 1, 2009, to June 5, 2009. Vol. 8, p. 1120; R.E.A, p. 1120. Circuit Court Clerk Joe Rigby corroborated Sheriff Lee's affidavit, testifying under oath that Sheriff Lee was not at the courthouse, but on the coast. R. Vol. 13, p. 519; R.E.B, p. 519. This fact calls into question Ms. Lopez's credibility and the credibility of her Affidavit.

The trial court was not persuaded by these arguments and denied a new trial and all post-trial motions. Vol. 9, pp. 1154-55; R.E.A, pp. 1154-55. A trial court's denial of a motion for new trial is subject to the abuse of discretion standard of review. *Miss. Transp. Comm'n v. Highland Dev., LLC,* 836 So.2d at 734(10). The trial court was within its discretion in denying a new trial on the basis of the evidence presented in support thereof.

V. THERE WAS NO EXTRANEOUS INFORMATION WHICH ENTERED THE JURY ROOM DURING DELIBERATIONS.

After the trial the Estate filed post-trial motions, including Motion to Investigate Juror Misconduct. Vol. 7, p. 946; R.E.A, p. 946. Attached to that motion was an Affidavit of Maria

Lopez, a juror, which contains the substance of the allegations of juror misconduct. Vol. 7, pp. 953-54; R.E.A, pp. 953-54. That affidavit states:

1) That Juror Clyde Lowden entered the jury room and announced, before any evidence was discussed or reviewed, "We have the votes. Let's get this over with." A vote was taken, which was nine (9) in favor of Dr. Lee and three (3) opposed.

2) The jury then began to discuss the evidence and another vote was taken, which, the Affidavit originally said was ten (10) in favor of Dr. Lee and two (2) opposed, but was revised and initialed to seven (7) in favor of Dr. Lee and five (5) opposed.

3) Juror Lowden then became angry and said he would not leave the room with a verdict against Dr. Lee. He told the fellow jurors he was diabetic and had been a patient of both Dr. Lee and Dr. Clark and that both were good doctors and that the jury could not let the attorneys keep taking money from our doctors.

4) There was another vote, which was the final vote, nine (9) in favor of Dr. Lee, two (2) opposed, and one (1) undecided.

5) One juror told Affiant Maria Lopez that he changed his vote in favor of Dr. Lee because of juror Lowden's comment regarding Dr. Clark.

6) That on the second day of the trial, June 2, 2009, Affiant Maria Lopez was walking into the courthouse with juror Lowden and another juror who was following closely behind her. Directly in front of her were Circuit Clerk Joe Rigsby and several officers from the Sheriff's Department, including Sheriff Lee. Affiant heard Dr. Lee's name mentioned as well as the Harris family mentioned and Affiant immediately turned around and walked in the other direction, however, Lowden and the other juror continued following the officers and Circuit Clerk.

Rule 606(b) of the Mississippi Rules of Evidence states:

> Upon an inquiry into the validity of a verdict or indictment, a juror **may not testify** as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to absent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, **except** that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Miss. R. Evid. 606(b) (emphasis added). A full reading of the rule indicates that allowing juror testimony regarding the deliberation process is a narrow exception to the rule.

The statement in the Maria Lopez Affidavit that one juror changed his vote because of Clyde Lowden's remark is prohibited by Rule 606(b) since it does not permit inquiry as to the impact statements made during jury deliberations had on a juror's vote. Miss. R. Evid. 606(b). The trial court was correct in prohibiting testimony at the hearing on post-trial motions on that issue. Vol. 13, pp. 500, 502; R.E.B, pp. 500, 502.

Regardless of the Estate's assertion that the question posed to the Estate's expert, Dr. Schwartz, was appropriate, it is not the type of extraneous information contemplated by Rule 606(b). The Mississippi Court of Appeals recently addressed a very similar claim of extraneous information. *Perkins v. Dauterive*, 882 So. 2d 773, 780 (Miss. App. 2004). After a jury verdict in favor of the defendant doctor, Perkins moved for a new trial claiming that the jury received extraneous prejudicial material. *Id.* In *Perkins,* a juror in the minority alleged that a majority juror made a prejudicial statement to the jury during deliberations. *Id.* Specifically, the minority juror claimed that the majority juror (who was a nurse) stated that "she was familiar with what doctors go through and . . . that if we returned a verdict for the Plaintiffs that the doctor would lose his medical license or have his license suspended." *Id.* The *Perkins* Plaintiff claimed that the majority juror

"emphasized for that reason that the jury should vote for the Defendant." *Id.* Shortly after these alleged comments, the *Perkins* jury returned a verdict in favor of the defendant doctor by a count of nine (9) to three (3). *Id.* In its motion for a new trial, the *Perkins* plaintiff asserted that the majority juror's comments were the impetus for the jury's verdict in favor of defendant. *Id.* In fact, the *Perkins* plaintiff argued that but for the majority juror's comments, there would have been a verdict in favor of the plaintiff. *Id.* The trial court denied the plaintiff's motion and the plaintiff appealed. *Id.*

The Court of Appeals noted that "the statement regarding the verdict's potential impact on [defendant's] licensing was based on the personal knowledge of one of the twelve jurors and did not come from someone outside the jury room. . . . [J]urors are permitted to bring some degree of personal knowledge and experience into the deliberation process without jeopardizing their verdict." *Id.* at 782. In addition, the court stated that extraneous facts must be quantitatively different from the evidence presented in the case and must go to a material issue. *Id.* at 781. The questioned statement in this case had nothing to do with the issue for the jury, which was whether Dr. Lee breached the standard of care, and is therefore not extraneous information as contemplated by Rule 606.

Just as the alleged juror misconduct in *Perkins* did not constitute extraneous, prejudicial information, neither does the alleged juror misconduct in the present case. In *Perkins*, the plaintiff argued that the majority juror's comments were extraneous, prejudicial and altered the eventual verdict. Similarly, the Estate argues that Mr. Lowden's comments regarding Defendants and Dr. Clark were extraneous and prejudicial. Further, the *Perkins* plaintiff argued that although the jury was inclined to vote for the plaintiff, it was swayed to vote for the defendant because of the alleged juror statements. Just as in *Perkins*, the Estate intimates that but for Mr. Lowden's comments the

jury may have returned a verdict for the Plaintiff. Therefore, given the factual similarity between the two cases, the *Perkins* court affords this court a guidepost for ruling on the Estate's allegations of juror misconduct. The Estate has not alleged anything that entered into the jury's deliberation that rises to extraneous and prejudicial information since the information that allegedly caused a juror to change his vote did not come from someone who was not a juror. *Perkins*, 882 So. 2d at 782.

However, out of an abundance of caution the trial court allowed a hearing on the Estate's claim that extraneous information was brought to the jury room and the Estate argued that Defendants' counsel's question to Dr. Schwartz is the type of extraneous prejudicial information contemplated by Rule 606(b). Vol. 13, pp. 499-507; R.E.B, pp. 499-507.

At that hearing Affiant Maria Lopez testified as to the statements she made in the Affidavit. Vol. 13, p. 497; R.E.B, p. 497. The trial court held that the Estate was not entitled to a new trial for the alleged juror misconduct. Vol. 13, p. 533; R.E.B, p. 533. It relied on *Payton v. State*, which held there was no extraneous information where the only allegations were that the jurors themselves discussed matters outside the evidence at trial and there was no evidence that someone outside the twelve jurors did something to influence the jury's deliberations.[11] *Payton v. State,* 897 So. 2d 921, 953-54 (Miss. 2003).

On appeal, the Estate alleges Juror Lowden's misconduct during jury deliberations is grounds for reversal, relying on *Mariner Health Care, Inc. v. Estate of Charles E. Edwards*, 964 So. 2d 1138 (Miss. 2007). Brief of Appellant, p. 22.

The Estate claims *Mariner* is squarely on point and that the juror misconduct in the case *at*

[11] In *Payton,* a juror informed other jurors, not during jury deliberation, that the defendant had been previously convicted of arson and was serving time for that conviction. *Payton v. State,* 897 So. 2d at 953.

bar is not distinguishable from the misconduct in *Mariner*. Brief of Appellant, p. 22. A review of the complete facts of *Mariner* indicates the Estate's claim is disingenuous. First, the similar facts from *Mariner* cited by the Estate are that one of the jurors commented that 1) she *knew of* nursing home patients who similarly had received poor care, and 2) white people have been taking black people's money and black people have figured out that lawsuits are the way to get the money back. *Mariner Health Care*, 964 So. 2d at 1145.

A cursory reading of *Mariner* reveals the deficiencies in the Estate's comparison to the present case. The actual facts of juror misconduct in *Mariner* were that Juror W stated on the first day of trial that 1) "she had made up her mind in favor of the plaintiff," 2) "she could not wait to give money to the plaintiff," 3) "there was nothing anyone could say that could change her mind," 4) she had a relative living at the defendant nursing home who she had witnessed "lying in her own waste and receiving poor care, and that because that resident had received poor care, [the plaintiff] must also have received poor care," and 5) she "saw other residents unknown to her receive poor care when she visited the nursing home." *Id.* at 1145. These facts, which the Estate omitted in Appellant's Brief, were critical to the *Mariner* court's decision.

In *Mariner*, the plaintiff's primary allegation was neglect of a nursing home resident. Juror W's comments that she had a relative at the same nursing home who was mistreated is evidence that goes to the material issue in the case. Also, that Juror W had made up her mind on the first day of trial in favor of the plaintiff evidenced her inability to be fair and impartial. In fact, the *Mariner* court was careful to emphasize that "[a] new trial is appropriate only when the jury received facts that concern a material issue in dispute and they are qualitatively different from the evidence admitted at trial." *Id.* at 1146. The Estate did not show sufficient facts to meet this burden and a full reading of *Mariner* reveals a significant factual difference. The Estate is correct that *Mariner* is helpful in

deciding the present issue; but, it reveals the Estate's allegations do not warrant a new trial.

Consequently, just as in *Perkins,* the Estate's argument of extraneous and prejudicial information is without merit. Thus, the trial court was within its discretion in denying the Estate a new trial on this basis. A trial court's denial of a motion for new trial is subject to the abuse of discretion standard of review. *Miss. Transp. Comm'n v. Highland Dev., LLC,* 836 So.2d 731, 734(10) (Miss.2002). A new trial may be ordered where facts outside the record affect an issue of importance in the case and are different from the evidence which was properly before the jury. *Salter v. Watkins,* 513 So.2d 569, 571 (Miss. 1987).

CONCLUSION

The Appellees, Dr. Lee and Forrest Family Practice Medical Clinic, P.A., have shown that the Estate had a fair trial because: 1) there is no authority which requires a well-known physician in a rural venue to be tried in a venue other than his county of residence or which requires a change of venue if the sheriff is related to the defendant, 2) the Estate did not exhaust its peremptory challenges and therefore cannot complain that certain potential jurors were not stricken for cause, 3) remark made by counsel opposite was within the scope of permitted discovery to disclose an expert's bias, 4) there was no misconduct during the trial by jurors or court officials which caused prejudice to the Estate, and 5) there was no evidence of extraneous information having been presented in the jury room.

In addition, the Estate claims that errors that do not require reversal standing alone may require reversal taken cumulatively. Brief of Appellant, p. 23. However, where each assignment of error lacks merit, the cumulative effect also lacks merit. *Gibson v. State*, 731 So. 2d 1087, 1098 (Miss. 1998). Because there is no merit to any of the issues argued by the Estate, there is no cumulative error.

For the aforementioned reasons, the ruling of the trial court should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this day caused to be served via U.S. mail, postage prepaid, a true and correct copy of the foregoing to:

Honorable Tomie T. Green
Hinds County Circuit Court Judge
P. O. Box 327
Jackson, MS 39205-0327

Shane F. Langston, Esq.
Rebecca M. Langston, Esq.
201 North President Street
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THIS the 25th day of October, 2010.

Anastasia G. Jones

Mildred M. Morris
Anastasia G. Jones