IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01622

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**

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

ON APPEAL FROM THE CIRCUIT COURT
OF SCOTT COUNTY, MISSISSIPPI
TRIAL COURT NO.:

BRIEF OF THE APPELANT

ORAL ARGUMENT IS REQUESTED

Shane F. Langston, Esquire (MSB No[redacted]
Rebecca M. Langston, Esq. (MSB No.[redacted]
LANGSTON & LANGSTON, PLLC
201 North President Street
Jackson, Mississippi 39201
Telephone No.: 601-969-1356
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01622

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**

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

ON APPEAL FROM THE CIRCUIT COURT
OF SCOTT COUNTY, MISSISSIPPI

CERTIFICATE OF INTERSTED PERSONS

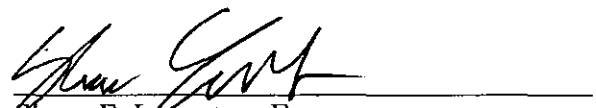
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

Peggy Harris
Bradley Harris
Brian Harris
Charles Harris, Jr.
Shane F. Langston
Rebecca M. Langston
E. Clark Trout
Clinton L. Martin
Langston & Langston, PLLC
201 North President Street
Jackson, MS 39201- Appellants

Dr. John P. Lee
James A. Becker, Jr., Esq.
Mildred M. Morris, Esq.
Timothy L. Sensing, Esq.
Watkins & Eager, PLLC
The Emporium Building
400 East Capitol Avenue, Suite 300
Jackson, Mississippi 39205- Appellees

Hon. Marcus D. Gordon
Scott County Circuit Court Judge
Post Office Drawer 220
Decatur, Mississippi 39327

This the 22nd day of July, 2010.



Shane F. Langston, Esq.
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01622

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**

V. **CAUSE NO.**
FOREST FAMILY PRACTICE CLINIC, P.A.,
JOHN P. LEE, M.D., and JOHN DOES 1-10 **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF SCOTT COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

Appellant 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. ("the Harris Family""), files this Brief of Appellant.

I. STATEMENT OF ISSUES

1. Appellee defendant Dr. John P. Lee ("Dr. Lee") has for decades been a prominent physician in rural Scott County, Mississippi. Dr. Lee's son, Mike Lee, prior to the trial of this cause and throughout the trial was the SHERIFF OF SCOTT COUNTY, MISSISSIPPI; and pursuant to Miss. Code Ann. §19-25-35 (1972) Sheriff Lee was at all relevant times the "executive officer of the circuit and chancery court of his county [SCOTT]"; and pursuant to said statute Sheriff Lee was obligated to "attend all the sessions thereof with a sufficient number of deputies or bailiffs." For these and other reasons set forth below, was the lower court's denial of the Harris Family's motion to transfer venue pursuant to Miss. Code Ann. §11-11-51 (1972) an abuse of discretion requiring reversal?

2. Not content with the jury bias and prejudice that already existed, counsel for Dr. Lee during the trial of this cause deliberately introduced irrelevant and inflammatory "testimony" by announcing that counsel for the Harris Family "is suing Dr. Howard Clark just up the road." Dr. Clark, who has been a resident and physician in this community for more than fifty-three (53) years and who has delivered more than 4,500 babies in this rural county, owned the only other medical clinic in Scott County. Further, Dr. Clark's son is the only chancery court judge in Scott County. Did the lower court err and abuse its discretion in denying the Harris Family's motion for mistrial and new trial in response to this improper, inflammatory and intentionally prejudicial remark?

3. The Harris Family in its post-trial motions introduced clear and uncontradicted evidence of juror misconduct. Notwithstanding the potential for reprisal at the hands of the Scott County Sherriff's Department, juror Maria Lopez had the courage to come forward post-trial and testify under oath that juror Clyde Lowden violated Judge Gordon's "curative" instruction to disregard opposite counsel's prejudicial disclosure that the Harris Family's undersigned counsel "is suing Dr. Howard Clark just up the road." Ms. Lopez revealed that juror Lowden used this inflammatory disclosure and his claim that he was a diabetic patient of Dr. Lee and Dr. Clark to change juror votes and cause the jury to return a verdict against the Harris Family. Did the lower court err and abuse its discretion when denying the Harris Family's post-trial motions for new trial on these grounds and others?

4. The lower court abused its discretion when denying the Harris Family's challenges to strike jurors in the venire for cause. The lower court, for example, refused to strike for cause a juror who during the Monday *voir dire* disclosed that she and her family were long time patients of Dr. Lee and that she was taking her son to be examined by appellee Dr. Lee on

Friday of this same week. (R. 33.) Other potential jurors that the lower court refused to strike for cause had close connections with Sheriff Lee. (See discussion below, pp. 7-12.) The Harris Family was forced to use seven peremptory challenges to strike these and other similarly situated jurors. Did such abuses of discretion, compounded with the many other errors, deprive the Harris Family of the protections of due process guaranteed Fourteenth Amendment to the United States Constitution and Miss. Const. art. III, §14, and justify reversal?

5. Further, and unbeknownst to the Harris Family until after the trial, the son of courtroom officer and Scott County Circuit Court Clerk Joe Rigby was at the time of trial employed as Deputy Sheriff of the Scott County Sheriff's Department serving at the will and pleasure of appellee Dr. Lee's son.[1] Circuit Court Clerk Rigby, of course, is responsible for issuing summonses to jurors and participates throughout the trial proceedings. He physically hands trial exhibits to jurors and is interacting and communicating with jurors throughout the trial. Also, the Harris Family presented uncontradicted evidence that Circuit Court Clerk Rigby "winked" in the direction of juror Lowden identified above when Dr. Lee's expert witness offered opinion testimony favorable to Dr. Lee. Juror Lowden, coincidentally or not, is the juror to whom Circuit Clerk Rigby physically handed the trial exhibits when the court ordered the jury to retire for deliberations.[2] (R. 512, 514-17.) The overwhelming showing of juror bias and prejudice discussed above combined with the additional evidence of the Circuit Court Clerk's improper gestures to the jury and his son's employment as a Deputy Sheriff mandated that the

[1] The Harris family learned that Circuit Court Clerk Rigby was the father of a Deputy Sheriff when following the trial the Clarion-Ledger published an unrelated newspaper article featuring Deputy Sheriff Joey Rigby's under water "snake catching" skills.

[2] Rebecca Langston, Esq., co-counsel for the Harris Family, personally witnessed the "wink" incident and described it under oath during post-trial proceedings. (R. 512, 514-17.) Ms. Langston also testified that when Judge Gordon instructed the jury to retire for deliberations Circuit Clerk Rigby personally delivered the trial exhibits to juror Lowden. Circuit Clerk Rigby testified after Ms. Langston and offered no testimony denying the "wink" incident or the fact that he delivered the trial exhibits to Lowden.

court grant a new trial. Was the lower court's denial of the Harris Family's motion for new trial on these grounds an abuse of discretion requiring reversal?

6. Even if none of the above errors standing alone justify reversal, do these errors when combined show that the Harris Family was deprived of their fundamental right to a fair trial in violation of the due process clauses of the United States Constitution and Mississippi Constitution?

II. STATEMENT OF THE CASE

a. Nature of the Case

This is a medical malpractice case where the Harris Family claimed that medical negligence on the part of Dr. Lee and his clinic proximately caused the amputation of the leg of Charles Harris, Sr., deceased, and ultimately his death. Following the lower court's denial of the Harris Family's motion to change venue (and a renewed motion on the day of trial), the jury was selected and the case was tried for 3 days. During the course of the trial the Harris Family moved multiple times for a mistrial. All such motions were denied. On the third day of trial the jury returned a verdict in favor of appellees Dr. Lee and Forrest Family Practice Clinic. P.A. (the "Clinic"). The jury was polled revealing that nine jurors (including juror Clyde Lowden discussed below) voted in favor of the appellees while two jurors voted in favor of the Harris Family and one remained undecided. Final Judgment was entered on June 11, 2009.

The Harris Family timely filed their post-trial motions for a new trial and renewed their motion for change of venue. Also, pursuant to Rule 3.10 of the Uniform Circuit and County Court Rules and Miss. R. Evid. 606(b) the Harris Family filed their motion to "Investigate Juror Misconduct" and set aside the verdict on grounds of juror misconduct . After an evidentiary

hearing and argument of counsel, the lower court denied all such post-trial motions. The Harris Family timely perfected their appeal pursuant to Miss. R. App. P. 3.

b. **Statement of the Facts**

(1) The medicine. The Harris Family presented competent and compelling evidence at trial that on no fewer than three separate visits to the appellee Dr. Lee and his co-defendant Clinic that Dr. Lee misdiagnosed Charles Harris, Sr.'s, deceased, medical condition. (R.) On these visits, Dr. Lee and his Clinic failed to recognize obvious symptoms of infection and sepsis surrounding Mr. Harris' left ankle and foot. (See photograph, Exh. 1, R. 1.)

The infection should have been obvious and Dr. Lee on the first visit should have administered aggressive antibiotic therapy. Instead, Dr. Lee repeatedly misdiagnosed Mr. Harris' illness as "gout" and sent him home with no antibiotic therapy. After several days since the first misdiagnosis, Mr. Harris was taken to the emergency room where he was properly diagnosed as suffering from severe sepsis. By this time it was too late. Mr. Harris' leg was amputated and he died days later.

(2) The Sheriff. On Wednesday night during the week prior to trial while attempting to retain local counsel to help the Harris Family choose a fair and impartial jury, the Harris Family and their counsel for the first time learned that Scott County Sheriff Mike Lee, whose statutory duties include official trial participation such as providing security for the jury, monitoring the jury, feeding the jury, etc., was the <u>son</u> of appellee Dr. Lee. (R. 3.) In addition to the Sheriff's official duties that bring his deputies and him into direct contact and direct communication with the jury, counsel for the Harris Family in their motion to change venue pointed out the obvious: that the entire venire depended on Dr. Lee's son and his department to serve and protect them and their families; and, just as importantly, to treat them and their

families fairly and impartially in the event they became the subject of a criminal charge or criminal investigation.[3] Any objective jurist or trier of fact would conclude that such enormous dependence on Dr. Lee's son involving, literally, the life, liberty and property of the venire and their families makes it IMPOSSIBLE to choose a fair and impartial jury from Scott County where all of the venire live.

In light of this new evidence discovered on Wednesday night, the Harris Family on Friday filed and faxed to Your Honor and opposite counsel a motion to change venue, and attempted unsuccessfully to secure an emergency hearing. (R. 3-4.) So, the Harris Family brought the motion on for hearing on the Monday morning of the scheduled trial, i.e., the first available opportunity. (R. 2-8.)

When the Harris Family asked to argue the motion Honorable Gordon without hearing a word announced, "You have a motion for change of venue, and that's overruled." (R. 2.) Undersigned counsel insisted on making a record. Then, after having been "chastis[ed]" by Judge Gordon for not having filed the motion earlier, counsel for the Harris Family began explaining how jurors likely would be intimidated to return a verdict against the Sheriff's father:

> BY THE COURT: You know, I know all that.
> BY SHANE LANGSTON: Well, I'm making my record.
> BY THE COURT: Well, the Supreme Court Judges know that, too, and I don't want to hear all of that argument.
> ...

(R. 6.)

Opposite counsel argued that the motion was untimely because Dr. Lee in his deposition six months earlier had identified "Mike Lee" as one of his children. (R. 5.) Undersigned counsel responded that Miss. Code Ann. §11-11-51 (1972) on its face allows the motion to be made "as

[3] Juror Ethel Mangum, who the court refused to strike for cause, has a grandson who was under criminal investigation by the Scott County Sheriff's Department. (R. 50. 72-73.)

soon as convenient after being advised of such undue influence, prejudice, or other cause . . . ." Id. (emphasis added). The "undue influence, prejudice, or other cause" in the context of the case *sub judice* is not whether the Harris Family knew that Dr. Lee had a son named "Mike Lee". The issue is when did the Harris Family or their counsel learn that Dr. Lee's son was the Sheriff of Scott County:

> BY SHANE LANGSTON: - - -after being advised of such undue influence, prejudice, or other cause. We were just advised Wednesday night, and I'll state that under oath.
>
> BY THE COURT: Did you hear the lady's [Ms. Morris'] statement that that was developed during deposition as to Dr. Lee's relatives?
>
> BY SHANE LANGSTON: In deposition Dr. Lee testified that his son was Mike Lee. We didn't know Mike Lee. He didn't say he was the Sheriff of Scott County. We did not know that Mike Lee was the Sheriff of Scott County until Wednesday night. It's an objective standard when we were advised. We were advised Wednesday night.

(R. 7) (emphasis added).

In other words, long before trial Judge Gordon knew of the relationship. Dr. Lee, of course, knew of the relationship. Opposite Counsel knew of the relationship.[4] Circuit Court Clerk Rigby knew of the relationship. But, despite actual and constructive knowledge of the significant role that the Sheriff and his deputies and bailiffs were to play in the actual trial of this cause, none of the above made any effort to advise the Harris Family or their counsel of the relationship. The fact that the motion was filed on the eve of trial is not the fault of the Harris Family. If any fault is to be assigned, it should be assigned to Judge Gordon, appellee Dr. Lee and his counsel for sitting silent when they had actual knowledge of an IMPOSSIBLY prejudicial situation. And, regardless, the objective standard of §11-11-51 regarding timeliness without doubt was satisfied.

[4] Even Dr. Lee's own attorneys, who had been representing him for well over a year, were unaware of this relationship until "a couple of months before trial . . . ." (R. 529.) They, nonetheless, chose to remain silent.

(3) Patients of appellee Dr. Lee and appellee the Clinic / Ties to Sheriff. The evidence of prejudice and bias continued to mount during the *voir dire* process. As expected in this rural county, twenty (20) of the fifty-two (52) potential jurors in the venire (or 38%) admitted that they or their immediate family members were patients of Dr. Lee or his Clinic.[5] (See details below, pp. 8-9.) Ten (10) jurors or their families either worked for the Sheriff's Department or had a close relationship with the Sheriff's department. (See details below, pp. 8-9.) The Harris Family moved to strike all of these potential jurors for cause. (R. 66-67.) With one exception, the lower court denied all these for cause challenges.[6]

Perhaps most illustrative of the bias and prejudice exhibited by Judge Gordon during the *voir dire* process is His Honor's ruling on the Harris Family's challenge to potential juror Bonny Gordon who was seated on the very first jury panel. (R. 20.) This juror admitted during the Monday morning voir dire that she herself had been treated by Dr. Lee during the past thirty days AND that she was taking her son to visit appellee Dr. Lee on Friday of the same week. (R. 20, 33.) She also was related to Dr. Lee's wife's family, "[b]y marriage", according to Judge Gordon. (R. 68.) My goodness, although it was conceivable that the trial would still be in progress during this scheduled visit, Judge Gordon denied the Harris Family's request that Ms. Gordon be stricken for cause. (R. 67-68.) The Harris Family was forced to exercise a peremptory strike. (R. 74.)

---

[5] It may be presumed that the balance of the venire were patients of Dr. Howard Clark and his clinic, i.e., the only other medical clinic in Scott County. This prejudice, as discussed below, was intentionally interjected by counsel for Dr. Lee.

[6] One former patient, Ivan Kiani, was stricken *sua sponte* because Mr. Kiani believed Dr. Lee had misdiagnosed one of his children. (R. 59.) Curiously and inexplicably, Willie Bowie was the only potential juror challenged by the Harris Family and stricken because he was a patient of Dr. Lee and the Clinic. (R. 40, 71.) Neither Mr. Bowie nor his family had visited Dr. Lee or the Clinic during the previous 30 days, i.e., an arbitrary "for cause" threshold established by Judge Gordon. (R. 20-22.) Judge Gordon offered no explanation of why he viewed Mr. Bowie in a light so different than the other patients.

Another example of Judge Gordon's extreme bias in the voir dire process is his refusal to strike potential juror Ronald Wade. Mr. Wade acknowledged that, "I use the [appellee/co-defendant] clinic regular" and had done so "for years"; that he had used the Clinic as recently as the past "three or four months"; and that he would use the Clinic again if he got sick "next week". (R. 33-34.) Strike for cause denied. (R. 69.)[7]

Similarly, the lower court showed extreme bias and prejudice by refusing to strike for cause the following potential jurors: Emily Baker (acquaintance; current patient and would see Dr. Lee "next week" if sick; friend of Sheriff Lee) (R. 36, 67, 69); Leland Burchfield (brother-in-law current Scott County Deputy Sheriff (R. 51, 69); Michael Kincaid (patient; friend of Sheriff; provided legal representation by Dr. Lee's relative Roy Noble Lee) (R. 36, 47, 69); Tammy White (she and family patients "for years") (R. 37, 70); Jacqueline Bobbitt (she and family patients "for years") (R. 37, 71); Meosha Loper (former patient of Dr. Lee and Clinic) (R. 38, 70); Charles Hines (nephew works for Dr. Lee's son) (R. 51, 70); Paula Lewis (appellee Clinic is her "family clinic" and she has seen all three doctors in Clinic including Dr. Lee)[8] (R. 39, 71); Betty Little (personal friend for "years" of both Dr. Lee and his son Sheriff Lee) (R. 48, 72); Royial Joseph (patient of Clinic and considers Clinic "family clinic") (R. 40-41); Angela Course (Dr. Lee and Clinic her "family doctors"; Dr. Lee "**delivered my baby**") (R. 42, 73); Freddie Beatty (appellee Clinic his "family clinic") (R. 42, 73); Ethal Mangum (grandson under arrest by Sheriff Lee's department) (R. 50. 72).[9]

---

[7] Again, Judge Gordon offered no explanation of why Mr. Bowie deserved to be stricken but Mr. Wade did not.

[8] In refusing to strike Ms. Lewis for cause Judge Gordon reasoned, "She said they go to all doctors [including Dr. Lee] there [the Clinic], though. Overruled." In all due respect, this reasoning was baffling.

[9] When undersigned counsel noted that potential juror Gwendolyn Dillon was acquainted with the Sheriff, Judge Gordon commented, "Good looking, though. We'll keep her. Overruled." (R. 73) Then, when undersigned counsel clarified that the Harris Family was not moving to strike Ms. Dillon counsel for Dr. Lee moved to strike her because Ms. Dillon's husband was a former political opponent of Sheriff Lee. Not surprisingly but totally inconsistent with

Presented with an impossible task of choosing a fair and impartial jury, the Harris Family did the best they could. They exercised seven of their ten peremptory strikes in an attempt to choose whom they believed to be the least biased jurors.[10] The Harris Family was forced to save peremptory strikes to eliminate multiple potential jurors whom the lower court refused to strike for cause.

(4) Deliberate, inflammatory, extreme prejudice interjected by counsel for Dr. Lee/Clinic. The trial progressed. Not content with the extreme jury bias that already existed in favor of her client, Mildred Morris, Esq., counsel for appellee Dr. Lee and his co-defendant Clinic, while examining a medical expert deliberately and with the intent to further prejudice the jury, asked, ". . . [C]an you tell me if you've been retained as an expert in the case where Mr. Langston is suing Dr. Howard Clark just up the road?"(R. 191)

This question was outrageous on many levels. Dr. Clark, who had resided and practiced medicine in Scott County for fifty-three (53) years, had the only other medical clinic in all of Scott County. He had delivered some 4,500 babies in this small community. For fifty-one (51) years he served as the team physician for all Morton High School athletic teams. He had long served as a Sunday school teacher in Morton at a church with a 350 person denomination. His son was the sole chancery judge in Scott County. (R. 905.) And, most damning, Dr. Clark likely was the treating physician for every juror who was not already being treated by appellee Dr. Lee.

Momentarily stunned and, quite literally, while attempting to avoid eye contact with the glaring jurors, undersigned counsel objected and asked Judge Gordon to instruct the jury to

---

the "for cause" standard applied to the Harris Family, Judge Gordon reversed himself and struck Ms. Dillon for cause. (R. 74.)

[10] The practical impossibility of using all ten peremptory challenges without eliminating fair or "lesser biased" jurors will be discussed in the "Argument" below.

disregard the prejudicial comment. (R. 192.) The court sustained the objection and so instructed the jury. Immediately after the instruction, counsel for the Harris Family notified the court that the Harris Family "would like to make a motion out of the presence of the jury when we finish this witness." Before questioning resumed, counsel then approached the bench and undersigned counsel notified His Honor that the Harris Family requested a mistrial due to the highly prejudicial nature of the comment and the fact that a curative instruction to "disregard" the comment that "Mr. Langston is suing Dr. Clark just up the road" could not possibly undue the extreme prejudice that this comment certainly evoked. (R. 192.) To borrow an overused cliché, that toothpaste was already out of the tube.

At the next break out of the jury's presence, counsel for the Harris Family then argued their motion for mistrial. Judge Gordon, with no response from counsel for Dr. Lee, summarily denied the motion explaining that the jurors had agreed to disregard the comment. (R. 204-205.)

And, like a moray ill hiding in the dark recesses of a coral reef awaiting his prey, juror Clyde Lowden sat silently lying in wait.

(5) Juror Clyde Lowden. On Wednesday, June 3, 2009, the jury returned a verdict in favor of defendants/appellees Dr. Lee and the Clinic. The jury was polled and nine (9) voted in favor of the verdict, two (2) voted against and one (1) was undecided. (R. 477.)

Before counsel for the Harris Family had left the courthouse, juror Maria Lopez approached undersigned counsel, apologized for the unjust verdict and reported extreme, prejudicial and vote-changing juror misconduct on the part of juror Clyde Lowden.[11] With this evidence (discussed below) of "extraneous prejudicial information brought to the jury's

[11] For Ms. Lopez's complete sworn testimony, see her affidavit attached as Exhibit A to Plaintiff's post-trial "Motion to Investigate Juror Misconduct, etc." (R. 901-90), and her sworn testimony at the post-trial hearing (R. 497-510.)

attention" within the meaning of Miss. R. Evid. 606(b), the Harris Family under the authority of Rule 3.10 of the Uniform Circuit and County Court Rules filed their motion to investigate juror misconduct and impeach the jury verdict.[12]

The uncontradicted sworn testimony supporting juror misconduct and "extraneous prejudicial information brought to the jury's attention" is as follows:

° Juror Lowden, to whom Circuit Clerk Rigby delivered the trial exhibits and toward whom Circuit Court Rigby "winked" during testimony favorable to Dr. Lee (R. 511-515), stepped into the jury room before even choosing a foreman and announced, "We have the votes. Let's get this over with." (R. 498-511, 953-955.)

° Juror Lopez and juror Pace requested that the jury discuss the evidence and deliberate before voting. This angered Lowden and some of the other jurors. A vote was taken without deliberation and the count was 9 to 3 in favor of Dr. Lee and the Clinic. Id.

° Juror Lopez and Juror Pace persisted and convinced the jury to allow them to discuss the evidence. After discussing the evidence and deliberating another vote was taken and it was 7 to 5 in favor of the Harris Family. Id.

° Juror Lowden's anger grew and he stated that he would not leave the jury room with a verdict against Dr. Lee. He then offered (whether true or not) personal, extraneous testimony that he was a diabetic (just like the deceased Mr. Harris) and that he personally had been treated by both Dr. Lee and Dr. Clark and that they were both good doctors. He then declared that the Jury could not "let those attorneys keep taking money from our doctors." Id.

° Jurors Lopez and Pace cautioned Juror Lowden that Judge Gordon had instructed them to disregard Ms. Morris' comment about Langston having sued Dr. Clark. Lowden ignored this caution and ignored Judge Gordon's "curative charge" and continued referring to the lawsuit against Dr. Clark until he finally persuaded nine (9) jurors to vote in favor of Dr. Lee and the Clinic. Two held out for the Harris Family and a third was undecided.

° One juror, Christopher Patrick, acknowledged that it was Lowden's argument regarding the lawsuit against Dr. Clark that convinced him to change his vote in favor of Dr. Lee and the Clinic. Id. Absent Mr. Patrick's vote in favor of Dr. Lee, the jury would have been deadlocked.

[12] The original motion filed on June 101, 2009 was a consolidated "Motion to Investigate Juror Misconduct, to Set Aside or Void Jury Verdict, to Void or Set Aside Final Judgment, for New Trial and to Change Venue." (R. 889-941.) At the court's direction (R. 1108), the Harris Family on June 22, 2009 filed a separate "Motion to Investigate Juror Misconduct" (R. 946-991) and "Motion to Set Aside Jury verdict, etc." (R. 992-1041) and "Renewed Motion to Transfer Venue." (R. 1042-1108.) Prior to the hearing, the Harris Family filed their "Second Supplemental Motion to Transfer Venue, Set Aside Jury Verdict, . . . New Trial, etc." after learning that Circuit Court Clerk Rigby's son was a Scott County Deputy Sheriff.

The error and injustice caused by the extraneous evidence improperly interjected and argued during jury deliberations by juror Lowden was compounded by the fact that it was Dr. Lee's counsel who deliberately planted this prejudice. Well, her purpose succeeded. This prejudice turned the jury.

(6) Deputy Sheriff Rigby. During the course of the trial, as happens with most trials, the Deputy Sheriffs were in constant contact and communication with jurors. (R. 990.) Indeed, to some extent that was their job. With these official responsibilities, however, comes opportunities to intentionally or unintentionally influence and/or bias jurors.

While all of the Deputy Sheriffs at all times throughout the trial were employed at the will and pleasure of Dr. Lee's son, the Harris Family and their counsel were unaware until after the trial that one of these Deputy Sheriffs was the son of Circuit Court Clerk Rigby. (R. 942, 520-21.) Nor were the Harris Family or their counsel aware until after trial that Circuit Clerk Rigby's wife was related to Sheriffs Lee's wife. None of these relationships between the Lees and the Rigbys were disclosed to the Harris Family or their counsel. (R. 521.)

These undisclosed relationships are particularly troubling when combined with the undisputed evidence that Circuit Court Clerk Rigby "winked" toward juror Lowden during testimony favorable to Dr. Lee and physically handed juror Lowden the trial exhibits when Judge Gordon ordered that the jury retire for deliberations. Further, it is undisputed that during the course of the trial and in the presence of the entire jury one unidentified Deputy Sheriff approached appellee Dr. Lee, greeted him and shook his hand. (R. 990.) When undersigned counsel brought this impropriety to the attention of the court, Judge Gordon with the jury still seated called a bench conference. In a voice loud enough that undersigned counsel was concerned that the jury could hear the conversation, Judge Gordon perhaps sarcastically inquired

if undersigned counsel wanted him to order the deputies to leave the courtroom – an impossible situation on many levels.

(7) Renewed Motion for Mistrial and Change of Venue. At the close of the Harris Family's case in chief, the Harris Family again moved for a mistrial and change of venue. (R. 251-58.) Undersigned counsel, among other arguments, discussed the Sheriff and his deputies, the "hand shake" and opposite counsel's inflammatory, prejudicial comment about, "Mr. Langston is suing Dr. Howard Clark down the road."

To demonstrate the extent of the prejudice, undersigned counsel requested that the Harris Family be allowed to supplement the record with Dr. Clark's deposition (taken in the unrelated medical malpractice case pending against Dr. Clark) to show his extensive, 53 year practice in the community. Judge Gordon denied the request. (R. 257.) Again, opposite counsel when asked to respond declined other than noting that she did not personally witness the "hand shake." Id.

III. Summary of Argument

Counsel for the Harris Family has undertaken an exhaustive research of Mississippi case law (discussed below) and has found no reported "change of venue" decision with greater evidence of the impossibility of choosing a fair and impartial jury than existed in the case *sub judice*. This impossibility combined with the deliberate "suing Dr. Clark" prejudice interjected by opposite counsel, the "wink" incident by the Circuit Court Clerk, the "hand shake" incident by the Deputy Sheriff, and the juror misconduct of Lowden ignoring the court's instructions and interjecting extraneous, verdict-changing evidence of his personal experiences with Dr. Lee and Dr. Clark, deprived the Harris Family of their right to a fair trial guaranteed under the due process clauses of United States Constitution and the Mississippi Constitution.

Even if this Supreme Court was to find that no one of the many errors standing alone justified reversal, there is no doubt that the cumulative effect of the errors deprived the Harris Family of a fair trial. The Harris Family requests this Court to reverse the judgment of the lower court and remand this case back to the trial court with instructions to order a change of venue outside Scott County, impanel a fair and impartial jury and allow a fair trial on the merits.

IV. ARGUMENT

A. The Lower Court Committed Reversible Error in Denying The Harris Family's Motion to Change Venue.

While Dr. Lee's prominence in Scott County in and of itself may not have justified a change of venue (at least not until the parties conducted voir dire), the fact that his son was the Sheriff of the county whose office in fact and pursuant to his statutory obligations participated in the trial of this cause including direct communications with jurors outside the presence of the Harris Family necessarily justified a change of venue. See Miss. Code Ann. §19-25-35 (1972) (" ... sheriff shall be the executive officer of the circuit and chancery court of his county, and shall attend all the sessions thereof with a sufficient number of deputies or bailiffs.").

The Supreme Court of the United States in 1972 addressed due process issues related to biased jurors. Peters v. Kiff, 407 U.S. 493 (1972). The Court stated that the "Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law." Id. at 501. Even the "appearance of bias" is considered to violate due process. Id. at 502.

Miss. Code Ann. §11-11-51 (1972) provides:

> When either party to any civil action in the circuit court shall desire to change the venue, he shall present to the court, or the judge of the district, a petition setting forth under oath that he has good reason to believe, and does believe that, **from the undue influence of the adverse party, prejudice existing in the public mind, or for some other sufficient cause to be stated in the petition, he cannot obtain a fair and impartial trial in the county where the action is pending**, and that the application

> is made as soon as convenient after being advised of such undue influence, prejudice, or other cause and not to delay the trial or to vex or harass the adverse party.

This statue is the "venue" mechanism by which our legislature sought to ensure compliance with the right to a fair trial guaranteed by the due process clauses found under the Fourteenth Amendment to the United States Constitution and its Mississippi counterpart found at Miss. Const. art. III, §14. It is §11-11-51 under which the Harris Family moved for a change of venue.

The Mississippi Supreme Court has adopted an "abuse of discretion" standard in determining whether a trial court erred in denying a motion to change venue. Beech v. Leaf River Forest Products, Inc., 691 So.2d 446 (Miss. 1997) (citing Mississippi State Highway Comm'n v. Rogers, 240 Miss. 529, 128 So.2d 353, 358 (1961)). Without repeating the facts discussed above at length, it is clear that the Harris Family has met their burden of showing that Judge Gordon abused his discretion in denying their motion to change venue. (See Statement of Facts above, pp. 5-7.)

At no time before the beginning of trial or during the several times when the Harris Family renewed their motion to change venue did counsel for Dr. Lee and the Clinic attempt to articulate any argument that a fair jury could be drawn under the impossible circumstances existing. Instead, counsel opposite took Judge Gordon's lead and argued that the Harris Family's motion was untimely because counsel when taking Dr. Lee's deposition six months earlier asked if Dr. Lee had children and was told that Dr. Lee had a son named, "Mike Lee." (R. 5,7.) No one, not Dr. Lee and not opposite counsel, bothered to mention that Mike Lee was the Sheriff of Scott County and, therefore, he and his deputies would be participating in the trial of his cause.

The "timeliness" standard for bringing on a motion to change venue under §11-11-51 on its face is an objective standard, not a "should of known"[13] standard as suggested by opposite counsel and the lower court. The statue specifically provides that the motion shall be brought on, "as soon as convenient after being advised of such undue influence, prejudice, or other cause and not to delay the trial or to vex or harass the adverse party." Id. The Harris Family satisfied this standard by presenting undisputed evidence that neither the family nor their counsel knew of the Sheriff relationship until the Wednesday night before the motion was filed on Friday. While perhaps inconvenient, the lower court should have weighed Constitutional guarantees of a fair trial over inconvenience and should have granted the motion. Moreover, such inconvenience could have been avoided had Dr. Lee, Judge Gordon or opposite counsel advised the Harris Family of an impossibly prejudicial situation.

B. The Lower Court Committed Reversible Error by Denying the Harris Family's Many Requests to Strike Potential Jurors for Cause.

It is literally inconceivable that Judge Gordon would refuse to strike a juror for cause in this medical malpractice case when the subject juror was not only a patient of the defendant Dr. Lee and his Clinic for years but, in fact, had a scheduled appointment on the same week of the trial to bring her son into visit Dr. Lee for medical treatment. (R. 33, 68.) But, he did so refuse. Had Ms. Gordon been chosen and had the trial progressed until Friday when juror Gordon had her scheduled visit, then presumably juror Gordon would have had to call Dr. Lee (or motion to him across the room) and cancel the appointment; or, perhaps, Judge Gordon would have recessed the trial until Dr. Lee finished treating juror Gordon's son.

[13] While, in retrospect, undersigned counsel could have asked, "Is your son the Sheriff?", or "What is your son's employment?", such inquiry was not made.

While the bias exhibited by Judge Gordon during the jury selection process is a very serious matter and while undersigned counsel apologizes if the above sarcasm offends anyone, such a ridiculous situation is pointed out to illustrate the extreme nature of the bias. Judge Gordon's refusal to strike this potential juror for cause and the many others similarly situated, again, was inexplicably opposite to his decision to strike potential juror Willie Bowie when Mr. Bowie disclosed that he and his family were patients of Dr. Lee. (R. 40, 71.) It made no sense and cast a cloud of injustice over this jury selection.

The Mississippi Supreme Court has made clear that in a medical malpractice case a circuit judge must strike for cause anyone in the venire when challenged because they or a family member are a past or present patient of the defendant doctor or one of the doctor's partners. Scott v. Ball, 595 So. 2d 848 (Miss. 1992); Hudson v. Taleff, 546 So. 2d 359 (Miss. 1989). These decisions specifically were brought to Judge Gordon's attention during the jury selection process. Opposite counsel offered no distinction. Judge Gordon offered no explanation for refusing to follow this clear and unequivocal supreme court precedent other than to comment that Scott County was a small rural county with few doctors – the exact situation that existed in Scott vs. Ball and Hudson vs. Taleff when the Mississippi Supreme Court reversed jury verdicts for the defendant doctors and remanded for another trial on grounds that the trial judge had an absolute duty to strike these jurors.

Scott vs. Ball was a medical malpractice case tried in Panola County, Mississippi. Twelve potential jurors in the venire or one of their family members had a relationship with the doctor defendant or one of the physicians in his clinic. The trial judge struck for cause seven of these potential jurors because they OR THEIR FAMILY MEMBERS had been (IN PAST)

treated by the defendant doctor OR MEMBERS OF HIS MEDICAL FIRM.[14] Scott vs. Ball, 595 So. 2d at 849. Of the remaining five jurors that the trial judge refused to strike, the doctor defendant had OCCASIONALLY TREATED THE FAMILY of one potential juror over a TEN YEAR PERIOD but was not the "family doctor" of the potential juror. Id.

In Scott vs. Ball the supreme court ruled that the trial judge's refusal to strike this juror constituted reversible error. The supreme court's reasoning is particularly applicable to a medical malpractice trial in Scott County, Mississippi:

> In a suit in which a physician is a party, a circuit judge must be sensitive to the qualification of a juror who has himself or herself been treated by him, or whose family members have at one time or another been patients of his. This is especially true in our smaller cities and towns, where often there is a shortage of practicing physicians. Mississippians in less populated areas enjoy a close, fraternal relationship with their doctors, and regardless of a prospective juror's complete sincerity in his belief of his ability to be fair, it is only human nature that in most cases he will be more than reluctant to return a verdict against the physician.

Id. at 850.

Never could such reasoning be more applicable than to the Harris Family's trial against Dr. Lee in Scott County, Mississippi.

The Harris Family will not repeat the many errors that Judge Gordon made in refusing to strike potential jurors challenged by the Harris Family for cause. (See Statement of Facts above, pp. 7-10.) These errors are clear. Instead, the Harris Family will address the Mississippi case law that suggests that such errors are waived unless the offended party exercises all peremptory strikes available.

In American Creosote Works of Louisiana v. Harp, 215 Miss. 5, 60 So. 2d 263, 268 (1952) the Mississippi Supreme Court held that "[b]efore a trial court could be put in error for

[14] Your Honor, by contrast, did not use this standard and refused to strike potential jurors who were treated by the partners of the defendant Dr. Lee.

denying a challenge for cause the record should show that the complaining party exhausted his peremptory challenges." This condition precedent to preserving the error for appeal has since been cited with approval by this Court. See, e.g., Knotts by Knotts v. Hassel, 659 So. 2d 886, 891 (Miss. 1995).

The Harris Family, in all due respect to past precedent, asks that the Court overrule American Creosote and its progeny to the extent that exercising all peremptory challenges is a condition precedent to claiming error on appeal for the lower court's failure to strike jurors for cause. Given the "Stennis" method of jury selection utilized by the lower court in the case *sub judice*, such a requirement is completely unworkable and serves to punish a party for taking a very bad situation and trying to make the best of it. An illustration will help explain.

Under the "Stennis" method of peremptory jury strikes as utilized by Judge Gordon the Harris Family was tendered the first 12 jurors after eliminating the jurors stricken for cause. To comply with American Creosote the Harris family would have been forced to exercise all 10 of their strikes on these first 12 jurors. Otherwise, if fewer than the allotted 10 peremptories were exercised, then when a panel of 12 is tendered to the defendants Dr. Lee and the Clinic need only accept the tendered panel and those 12 would constitute the jury. No "strike backs" would have been allowed. In other words, under American Creosote in order to preserve for appeal purposes the gross and unjust errors made by Judge Gordon during the jury selection process the Harris Family would have been forced to not only strike jurors that they had previously challenged for cause but strike jurors that they had not challenged, i.e., jurors that the Harris Family believed to have been fair or at least less biased than others seated further down the panels.

With 20 potential jurors having been patients of Dr. Lee and his Clinic and with many others having had close ties to the Sheriff, the Harris Family literally was forced to speculate as to who Dr. Lee would strike and was forced to save some of their peremptory challenges for other, perhaps more biased, jurors that Judge Gordon refused to strike for cause. Instead of a hard and fast rule that all peremptories must be exercised, the Harris Family urges this Court to adopt a fair and practical approach that would allow this Court to assess the overall jury selection to determine if it offended traditional notions of fair play and fell short of due process guarantees. The subject jury selection process certainly fell below this minimum standard and the jury verdict should be reversed as a result.[15]

C. Intentional Prejudice Interjected by Opposite Counsel and Improperly Interjected and Argued During Jury Deliberations in Violation of the Court's "Curative Instruction" Constitutes Reversible Error.

The Harris Family above has reviewed in detail the prejudice interjected by Mildred Morris, Esq., counsel for appellees Dr. Lee and the Clinic, regarding undersigned counsel's pending medical malpractice claim against Dr. Howard Clark. (See Statement of Facts above, pp. 10-13.) The Harris Family has demonstrated the extreme nature of the prejudice. Id. Finally, the Harris Family has shown that this prejudice, through juror Lowden's misconduct and in violation of the court's instruction to disregard, was actually interjected and argued during jury deliberations to change the outcome of the verdict. Id. These facts will not be repeated.

The introduction of this extreme prejudice by counsel opposite standing alone justifies reversal. It was not curable by the court's instruction to disregard it. Brown v. State, 749 So. 2d 204 (Miss. App. Ct. 1999) ("... [I]f the inadmissible testimony is so damaging that its effect

[15] Even if this Court finds that the Harris Family waived this error as a ground for reversal standing alone, the Court may consider the cumulative effect of these errors combined with the many others as justifying reversal for failing to allow the Harris Family a fair trial. __ v. ___.

upon the jury could not be adequately tempered by admonition or instruction, the trial court should grant a mistrial.") Moreover, the undisputed fact that this prejudice combined with extraneous "evidence" of Lowden's testimonial that he was a diabetic and had been treated by both Dr. Lee and Dr. Clark was used to change the verdict in favor of Dr. Lee and the Clinic more than satisfies the standard for reversal on grounds of juror misconduct as articulated in Mariner Health Care, Inc. v. Estate of Charles E. Edwards, 964 So. 2d 1138 (Miss. 2007).

Mariner Health Care like the case *sub judice* involved a medical malpractice case and is squarely on point. The "threshold" evidence of juror misconduct in Mariner Health Care, as in the case *sub judice*, began following a jury verdict and discharge of the jury when a lone juror contacted the losing party defendant and alleged misconduct on the part of a fellow juror. The party defendant then secured an affidavit from this juror and submitted it to the Court as the "threshold showing" of juror misconduct under Rule 606(b). The affidavit alleged that during jury deliberations that a fellow juror commented that she knew of nursing home patients other than the subject plaintiff who similarly had received poor care. Id. at 1145. This fellow juror also argued that "' 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.'" Id. The trial court refused to conduct an investigatory hearing[16] and denied the defendant nursing home a new trial. The Mississippi Supreme Court reversed and rendered. Id. at 1158.

The juror misconduct in the case *sub judice* is not distinguishable from the misconduct in Mariner Health Care. The Harris Family respectfully submits that outcome, i.e., reversal, should likewise be the same.

[16] Judge Gordon in the court below actually found that the Harris Family had met its threshold burden justifying an investigation. (R. 497.) The

D. The Cumulative Effect of the Many Errors Discussed Above and the Extreme Prejudice Suffered by the Harris Family Justifies Reversal – Even if No One Error Standing Alone Does.

"This Court has often ruled that errors in the lower court that do not require reversal standing alone may nonetheless taken cumulatively require reversal." Jenkins v. State, 607 So.2d 1171, 1183-84 (Miss.1992). Similarly, in Byrom v. State, 863 So.2d 836, 847 (Miss.2003) the Court stated that: "It is also well stated that: upon appellate review of cases in which we find harmless error or any error which is not specifically found to be reversible in and of itself, we shall have the discretion to determine, on a case-by-case basis, as to whether such error or errors, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting cumulative prejudicial effect."

Again, to avoid repetition, the Harris Family will not recite the multiple, multiple errors each of which resulted in extreme and jury-verdict-changing prejudice. But, in the event the Court disagrees and believes that these multiple errors standing alone were harmless, the Harris Family urges this Court in its discretion to consider the cumulative effect of the errors and to reverse on grounds that the Harris Family was deprived of a fair trial.

V. CONCLUSION

Never in a reported decision involving a civil trial has this Court been confronted with a venue inherent with such extreme and impossible bias and prejudice as shown in the case *sub judice*. Choosing a fair and impartial jury was impossible before jury selection began.

To compound the prejudice, Judge Gordon ignored established Mississippi Supreme Court precedent in refusing to grant the Harris Family's challenges for cause. Moreover, the "wink" incident involving the Circuit Court Clerk, the "hand shake" and greetings between the

Sheriff deputy and appellee/defendant Dr. Lee, the deliberate interjection of prejudice by counsel opposite and the misconduct of juror Lowden demand that this case be reversed and remanded for a new trial at a venue other than Scott County, Mississippi.

Respectfully submitted this the 22nd day of July, 2010.

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.

By: _____
Shane F. Langston (MSB[redacted])
Counsel for Appellants

Counsel for Appellants:

Shane F. Langston, (MSB[redacted])
Langston & Langston, PLLC
201 North President Street
Jackson, Mississippi 39201
Telephone: (601) 969-1356
Facsimile: (601) 968-3866

Certificate of Service

I do hereby certify that a true and correct copy of the foregoing Brief of Appelant has been delivered via United States Mail to the following counsels of record at their usual business address:

James A. Becker, Jr., Esq.
Mildred M. Morris, Esq.
Timothy L. Sensing, Esq.
Watkins & Eager, PLLC
The Emporium Building
400 East Capitol Avenue, Suite 300
Jackson, Mississippi 39205

Hon. Marcus D. Gordon
Scott County Circuit Court Judge
Post Office Drawer 220
Decatur, Mississippi 39327

This the 22nd day of July, 2010.

SHANE F. LANGSTON