IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01796

**MISSISSIPPI BAPTIST MEDICAL CENTER, INC.
AND MISSISSIPPI BAPTIST HEALTH SYSTEMS, INC.** — **APPELLANTS**

VS.

**JONATHAN KELLY, INDIVIDUALLY, AND
ON BEHALF OF ALL WRONGFUL DEATH
BENEFICIARIES OF ELLEN KELLY, DECEASED,
AND THE ESTATE OF ELLEN KELLY, BY AND
THROUGH JONATHAN KELLY, ADMINISTRATOR** — **APPELLEES**

**On Appeal from the Circuit Court of Hinds County, Mississippi
First Judicial District**

BRIEF OF PLAINTIFFS/APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

1. Jonathan Kelly, Plaintiff/Appellee (individually as husband, wrongful death beneficiary and heir at law to the estate and in representative capacity on behalf of all wrongful death beneficiaries and as administrator of the estate of Ellen Kelly);
2. Jacob Kelly, Plaintiff/Appellee (individually as son, wrongful death beneficiary and heir at law to the estate, represented here through Jonathan Kelly);
3. Adam O'Malley, Plaintiff/Appellee (individually as son, wrongful death beneficiary and heir at law to the estate, represented here through Jonathan Kelly);
4. Estate of Ellen Kelly, Plaintiff/Appellee (represented here through Jonathan Kelly, administrator);
5. Gerald J. Diaz, Jr., Christopher P. Williams, Patrick K. Williams, Dennis C. Sweet, Diaz Law Firm, Sweet & Associates, counsel for Plaintiffs/Appellees;
6. Richard Redfern, Richard Schwartz, and George Neville as associate counsel for Plaintiffs/Appellees;
7. Mississippi Baptist Medical Center, Inc. and Mississippi Baptist Health Systems, Inc., Defendants/Appellants;
8. Michael B. Wallace, Eugene Naylor, Rex M. Shannon, III, Rebecca Hawkins, Wise Carter Child & Caraway, counsel for Appellants/Defendants; and
9. Hon. Winston Kidd, Circuit Court Judge.

This the 22 day of February 2011.

GERALD J. DIAZ, JR.

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STATEMENT OF THE CASE

Nature of the Case

Ellen Kelly was a healthy, twenty-nine (29) year old attorney who worked for the Mississippi Department of Human Services when she was admitted to Mississippi Baptist Medical Center on the morning of July 10, 2000 for an elective surgical procedure. Prior to her admission and pursuant to Mississippi Baptist Medical Center's own policies and procedures requiring that all patients be assessed for latex allergy, Ellen went to the hospital on July 3, 2000 for her pre-op admission history and assessment. Ellen met with a nurse who documented that Ellen had an ABC allergy to chestnuts and was also allergic to adhesives on bandaids and many other items. Pursuant to the hospital's policies and procedures, patients included as having a high risk for latex allergy include those who have an ABC allergy (avocado, banana, chestnut). Even though the nurse documented Ellen's ABC allergy, she failed to properly identify or assess Ellen as having a latex allergy or a sensitivity to latex. Further, she failed to implement the Latex Alert Precautions, as listed in the Protocol, in direct violation of the hospital's policies and procedures and the standard of care.

The "Nursing Admission History and Assessment" form filled out by the nurse on July 3, 2000, contained a "Latex Allergy Alert" section which required the nurse to "Notify MD if Yes" if "yes" was answered to any of three questions. The first question, "Pt. Knows allergic to latex," was not filled out by the nurse in direct violation of the hospital's policies and procedures and the standard of care. The second question, "Pt. Has ABC Allergy (avocado, banana, chestnut)," was checked "yes". Therefore, it placed the hospital on notice that Ellen was at high risk for latex allergy and required, pursuant to the policy and procedures and the standard of care, the hospital to follow the Latex Alert Precautions listed in the Protocol. Despite the hospital's form, despite the hospital's

policies and procedures, despite the fact that the nurse knew Ellen was at high risk for latex allergy, the nurse failed to inform the treating physicians that Ellen had an ABC allergy. Further, the nurse failed to implement the required Latex Alert Precautions, as listed in the Protocol, all in violation of the standard of care.

Baptist
MEDICAL CENTER
NURSING ADMISSION HISTORY & ASSESSMENT

* Latex Allergy Alert: *Notify MD if YES*
Pt. Knows allergic to latex- ☐ Yes ☐ No
Pt. Has ABC Allergy (avocado, banana, chestnut) ☐ Yes ☐ No

(EX P-1 at 202).

Even more disturbing was that upon a previous admission to the hospital, Ellen was properly assessed and identified as having a latex allergy. This earlier admission also contained a "Nursing Admission History and Assessment" form which contained the "Latex Allergy Alert" section. "Yes" was answered to both the question, "Pt. Knows allergic to latex," and to the question, "Pt. Has ABC Allergy (avocado, banana, chestnut)". Upon her admission on July 10, 2000, Mississippi Baptist Medical Center was fully aware of Ellen's allergy to latex, but it simply failed to take any precautions whatsoever, in direct violation of the standard of care and its own policies and procedures.

MISSISSIPPI BAPTIST MEDICAL CENTER
NURSING ADMISSION
HISTORY & ASSESSMENT

*LATEX ALLERGY ALERT: NOTIFY MD IF YES
Pt. Knows allergic to latex - YES NO
Pt. has ABC Allergy (avocado, banana, chestnut) - YES NO
Pt. has had unexplained hypotension or anaphylaxis during previous surgery - YES NO

(EX P-1 at 454).

These fatal errors resulted in Ellen's exposure to latex and latex containing products during her hospital stay. The most significant of which was a latex foley catheter, which was inserted into Ellen's urethra, resulting in absorption of large amounts of eluted allergen. A foley catheter makes direct contact with the interior of the body and the mucous membranes, which are extremely vascular, and as such, this results in the absorption of large amounts of eluted allergen, significantly increasing the likelihood of an anaphylactic reaction or shock.

Following what appeared to be a routine procedure with a normal outcome, Ellen began suffering an allergic response to the latex to which she was exposed evidenced by her itching, redness, blister, and nausea which progressed to an anaphylactic reaction to latex early on the morning of July 11, 2000. The anaphylactic reaction was evidenced by Ellen's respiratory arrest, heart arrhythmia, severe drop in blood pressure and bronchoconstriction. These events caused a decrease in blood flow and oxygen to Ellen's brain, which lead to edema of the brain, hypoxia, brain stroke and infarction. Ellen was moved to ICU and placed on ventilator support. Ellen was maintained on life-support systems for the remainder of her days. After neurological examination confirmed brain death, Ellen was removed from ventilator support and died on July 14, 2000, after which her organs were harvested for donation. As a result of Ellen's death, her husband and two small children instituted legal proceeding for her wrongful death.

Course of Proceedings and Disposition Below

Ellen's family, which consisted of her husband, Jonathan Kelly, and her two sons, Jacob Kelly and Adam O'Malley, age 10 and 2 at the time of their mother's death, filed their original

Complaint in this matter on August 31, 2001. (CP 12-36)[1]. The Complaint was eventually amended to add the Estate of Ellen Kelly as a named Plaintiff on March 24, 2008. (CP 328-347). The case proceeded to trial on May 26, 2009 against Mississippi Baptist Medical Center, Inc. and Mississippi Baptist Health Systems, Inc. (hereinafter collectively "MBMC"), Ellen's doctor, Dr. Fred Ingram, his partner who assisted in Ellen's surgery, Dr. Doug Odom, and their clinic, Ob-Gyn Clinic of Jackson, P.L.L.C. (TR 7).

The jury listened to five days of testimony from various witnesses and experts. At trial, Ellen's family demonstrated that Ellen's death resulted in loss wages, discounted to a present value, of $1,415,880.00. (TR 458) (EX P-11). Further, Ellen's family established loss of household services, discounted to present value, of $992,109.00. (TR 284) (EX P-3). Ellen's family also presented medical expenses of $21,783.78 that resulted from Ellen's treatment from July 11, 2000, to her death on July 14, 2000. (TR 520) (EX P-13). Finally, Ellen's family presented damages of $6,128.00 for the funeral and burial of Ellen, as well as $1,692.74 for a headstone at her grave. (TR 521) (EX P-14). Total special damages proven at trial were $2,437,594.52. On June 2, 2009, the duly qualified jury of the First Judicial District of Hinds County, Mississippi returned an unanimous verdict against MBMC, finding them liable for the death of Ellen Kelly. (TR 902-905) (CP 1654-55). The jury awarded damages of $4,691,000.00. (TR 902-905) (CP 1654-55).

On June 30, 2009, the Final Judgment on Jury Verdict was signed by Judge Kidd which provided for interest of 8% per annum, compounding annually, starting on June 2, 2009 the date of the jury verdict. (CP 1722-23). The Final Judgment on Jury Verdict was entered on July 1, 2009.

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[1] References to the Clerk's Papers will be cited as (CP). References to the trial transcript will be cited as (TR). References to Exhibits will be cited (EX).

(CP 1722-23). MBMC filed a "Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial and for Amendment of Judgment Entered July 1, 2009" on July 17, 2009. (CP 1728-49)[2]. A hearing was held on August 10, 2009. (TR 918). On October 14, 2009, the Circuit Court entered an order denying MBMC's motion. (CP 1949). MBMC filed its Notice of Appeal on November 3, 2009. (CP 1950-51).

Statement of the Facts

In 2000, Ellen began experiencing heavy menstruation as well as excessive pain during intercourse. (TR 321, 512). Ellen was seen by Dr. Fred Ingram who suggested that it was necessary for her to have a bilateral partial vulvectomy as well as a hysterectomy. (TR 321-322, 342, 399) (EX P-1 at 8). The procedure was planned for July 10, 2000 at MBMC. (TR 297, 325-326, 399).

Prior to her admission and pursuant to MBMC's own policies and procedures requiring that "all patients should be assessed for latex allergy on admission", (EX P-1 at 225) (TR 202-203), Ellen went to the hospital on July 3, 2000 for her pre-op admission history and assessment. (TR 297). Ellen met with a nurse who documented that Ellen had an ABC allergy to chestnuts and was also allergic to adhesives on bandaids and many other items. (EX P-1 at 202) (TR 304-305). Pursuant to the hospital's policies and procedures, patients included as having a high risk for latex allergy include those who have an ABC allergy (avocado, banana, chestnut). (EX P-1 at 225) (TR 203, 301, 473). Even though the nurse documented Ellen's ABC allergy, she failed to properly identify or assess Ellen as having a latex allergy or a sensitivity to latex. (TR 213, 305-307, 313-317, 473).

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[2] MBMC filed an earlier "Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial" on June 15, 2009. (CP 1656-1721). However, this motion predated entry of the Judgment and was followed by MBMC's second motion after Judgment was entered which contained all the arguments made in their first motion plus additional arguments.

Further, she failed to implement the Latex Alert Precautions, as listed in the Protocol, in direct violation of the hospital's policies and procedures and the standard of care. (EX P-1 at 226) (TR 217, 504).

The "Nursing Admission History and Assessment" form filled out by the nurse on July 3, 2000, contained a "Latex Allergy Alert" section which required the nurse to "Notify MD if Yes" if "yes" was answered to any of three questions. (EX P-1 at 202). The first question, "Pt. Knows allergic to latex," was not filled out by the nurse in direct violation of the hospital's policies and procedures and the standard of care. (TR 504). MBMC's own 30(b)(6) witness testified on this point as follows:

> Q. Up there it says, "latex allergy alert: Patient knows allergy to latex;" correct?
> A. I see nothing marked there.
> Q. Okay. But it's your policies and procedures at the Baptist that whoever the healthcare person is, is supposed to be an assessment? It's supposed to be a yes or no checked?
> A. Ask the questions, a history.
> Q. I understand. What I'm saying to you is the person who's doing the history or assessment is supposed to check one of those boxes?
> A. That is correct.
> * * *
> Q. Your procedure required her to fill out that line; right?
> A. Our admission history should be complete, yes.
> Q. She didn't fill it out; correct?
> A. Yes, sir.
> Q. So she didn't follow you're the policies and procedures; correct?
> A. For admission histories that's correct.
>
> (TR 213-214).

The second question, "Pt. Has ABC Allergy (avocado, banana, chestnut)," was checked "yes". (EX P-1 at 202). Therefore, it placed the hospital on notice that Ellen was at high risk for latex allergy and required, pursuant to the policy and procedures and the standard of care, the hospital to follow the Latex Alert Precautions listed in the Protocol. (EX P-1 at 225) (TR 203, 301,

473). The Latex Alert Precautions would have ensured Ellen was not exposed to latex. Again, MBMC's own 30(b)(6) witness testified on this point as follows:

> Q. Okay. If a known allergy or sensitivity to latex is identified in the patient's admission history, note on allergy sticker and place on the front of the chart; correct?
> A. Correct.
> Q. And that would be in '97 if you're known or in the 2000 admission?
> A. That is correct.
> Q. Place signage on door of patient's room. That's in '97 or 2000 admission; correct?
> A. That is correct.
> Q. Notify central supply and purchasing regarding any special supplies or products needed for patients or employees; correct?
> A. Yes, sir.
> Q. Now, I want you to go to four. "Contact food and nutrition services and notify them that the patient has latex allergy;" right?
> A. Yes, sir.
> Q. And then some of that part it says, "Put on computer;" correct?
> A. Yes, sir.
> Q. What would be put on the computer?
> A. A latex, that they were latex allergic. That's how we send the information to dietary and to other areas.
> Q. So if you put it on the computer, in her history whenever you would pull it up you would have that on there, right, latex allergy?
> A. What you put on the computer is like a consult to dietary informing them of the fact.
> Q. And the computer would inform them of the fact of what?
> A. That she was latex allergy if that was the protocol used. That is our protocol.
> Q. All right. Now, if you go to the back of page 3 which is 227, just so we can go through, it has all the products which may contain latex; right?
> A. It does. A lot of the products.
> Q. A lot of the products, but it has what you use in place of those, what you-all have available in place of the latex products?
> A. Latex alternatives, yes, sir.
> Q. So once you know that, all you do is notify them and you use latex alternatives; correct?
> A. That is correct.
>
> (TR 220-222).

Despite the hospital's form, despite the hospital's policies and procedures, despite the standard of care, and despite the fact that the nurse knew Ellen was at high risk for latex allergy, the nurse failed to inform the treating physicians that Ellen had an ABC allergy. Further, the nurse failed

to implement the required Latex Alert Precautions, as listed in the Protocol, all in violation of the standard of care.

Even more disturbing was that upon a previous admission to the hospital, Ellen was properly assessed and identified as having a latex allergy. (EX P-1 at 454). This earlier admission also contained a "Nursing Admission History and Assessment" form which contained the "Latex Allergy Alert" section. "Yes" was answered to both the question, "Pt. Knows allergic to latex," and to the question, "Pt. Has ABC Allergy (avocado, banana, chestnut)". (EX P-1 at 454). The direct testimony from MBMC's own 30(b)(6) witness for the hospital was as follows:

> Q. This would be indicate that she told a healthcare professional at the Baptist in '97 that she was allergic to latex, won't it?
> A. It would say at that time, yes, that she thought she was latex allergic with no response, no reaction.
> Q. It well, let me just read it.
> A. I'm sorry.
> Q. "Patient knows allergic to latex" is that what is says?
> A. Yes.
> Q. And what did your nurse or healthcare professional circle?
> A. Yes. Is that what you mean?
> Q. Yeah, the one that says yes I'm allergic.
> A. Yes.
> Q. Okay.
> A. And that's how she answered the question at that time, uh-huh.
> Q. **So she had told the Baptist Hospital as early as '97 that she was allergic to latex from your records?**
> A. This is a history.
> Q. From your records?
> A. **Yes, sir.**
> Q. Now, let's go down it says "Patient has ABC allergy;" correct?
> A. Yes, sir.
>
> (TR 207-208) (Emphasis added).

Upon her admission on July 10, 2000, Mississippi Baptist Medical Center was fully aware of Ellen's allergy to latex, in fact the old chart from 1997 was available and brought to surgery (TR

211-212), but the nurses of MBMC simply failed to properly assess Ellen as having a latex allergy, failed to inform the doctors of her allergy, and failed to take any precautions whatsoever to shield Ellen from latex exposure, all in direct violation of the standard of care and its own policies and procedures.

These fatal errors resulted in Ellen's exposure to latex and latex containing products during her hospital stay. (TR 327, 338). The most significant of which was a latex foley catheter, which was inserted into Ellen's urethra, resulting in absorption of large amounts of eluted allergen. (TR 327, 338). A foley catheter makes direct contact with the interior of the body and the mucous membranes, which are extremely vascular, and as such, this results in the absorption of large amounts of eluted allergen, significantly increasing the likelihood of an anaphylactic reaction or shock.

Immediately following the procedure, Ellen suffered all the classic signs and symptoms of an allergic reaction to latex (EX P-1 at 226) (TR 238-242) (TR 352-356) (TR 401-403) namely she was experiencing itching (EX P-1 at 197) (TR 239, 352-352, 403-404, 406-408, 430, 495, 516, 537, 604, 646-647, 725, 757, 777), she was experiencing redness (TR 424, 516), she was experiencing blisters (EX P-1 at 196) (TR 240, 354-355, 401-402, 516, 531), and she was experiencing nausea (EX P-1 at 193, 197) (TR 353, 401, 403, 407-408, 430).

Ellen also suffered all the classic signs and symptoms of an anaphylactic reaction (TR 404-406, 429-430) (TR 670-671) (TR 703) (TR 724), namely bronchoconstriction, heart arrhythmia, respiratory arrest and a severe drop in blood pressure. Ellen's bronchoconstriction is evidenced throughout the medical records. The "24 Hour Nursing Record" under "Nurse's Notes" states that Ellen was experiencing labored respirations, (EX P-1 at 193), the "Critical Care Admission Nursing

Assessment" states that Ellen was experiencing bi-lateral breath sounds with wheezes and rhonchi throughout, (EX P-1 at 68) (TR 709-710), Dr. Gerald Randle, a neurological consultant, notes that Ellen "became extremely short of breath" and that she was "gurgling", (EX P-1 at 55) (TR 410), Dr. Ingrams' "Discharge Summary" notes that Ellen had "gurgled respirations", (EX P-1 at 8), and the "Autopsy Report" notes Ellen was "gurgling", (EX P-1 at 218). It was Ellen's husband, Jonathan, who woke up because of Ellen's "gasping gurgling sounds". (TR 514).

Ellen's heart arrhythmia as well as her respiratory arrest are clearly noted in the "Discharge Summary" of Dr. Brooks, the ER physician called to Ellen's Code 99, (EX P-1 at 11), is clearly noted in Dr. Ingram's "Discharge Summary", (EX P-1 at 8), is clearly noted in the Autopsy Report, (EX P-1 at 218), and is clearly noted on Ellen's Death Certificate, (EX P-17). (See also TR 429-430, 528, 601, 671, 724, 774, 777). Ellen's severe drop in blood pressure (hypotension) is clearly noted in the "Discharge Summary" of Dr. Brooks, the ER physician called to Ellen's Code 99, (EX P-1 at 11), and is clearly noted in Dr. Ingram's "Discharge Summary", (EX P-1 at 8). (See also TR 241, 354, 604, 670, 724).

These events caused a decrease in blood flow and oxygen to Ellen's brain which lead to edema of the brain, (EX P-1 at 105) (EX P-1 at 219, 224) (EX P-1 at 8), hypoxia, brain stroke and infarction, (EX P-1 at 217, 224), and finally resulted in the death of Ellen Kelly (EX P-17). (See also TR 403-406, 429-430).

SUMMARY OF THE ARGUMENT

The nurses of MBMC had the independent duties to properly assess and identify Ellen for risk of latex allergy or sensitivity, to properly inform the treating physicians of that risk for latex allergy, and to properly implement the policy and procedures, which would require the Latex Alert

Precautions as listed in the Protocol which necessitate a latex free environment. It is axiomatic that a nurse should not expose someone with an allergy to that allergen. These duties are apart and independent of anything the physicians did or did not do. The nurses simply failed to proper assess Ellen, failed to inform the doctors and exposed Ellen to latex. Through expert testimony, Appellees showed that these breaches caused Ellen to be exposed to latex and latex containing products, which lead to an anaphylactic reaction and respiratory arrest, and thus proximately caused her death.

At trial, Ellen's family demonstrated that her death resulted in loss wages, discounted to a present value, of $1,415,881.00, they established loss of household services, discounted to present value, of $992,109.00, they presented medical expenses of $21,783.78 that resulted from Ellen's treatment from July 11, 2000, to her death on July 14, 2000, and finally, they presented damages of $6,128.00 for the funeral and burial of Ellen, as well as $1,692.74 for a headstone at her grave. Total special damages proven at trial were $2,437,594.52.

Ellen's family was unalterably changed by her needless death. Ellen's family's loss of services, comfort, society, protection, support, abilities, counsel, affection and companionship of Ellen cannot be measured. The death of their mother will affect Adam and Jacob for the remainder of their lives, as it will her husband, Jonathan. These damages, as well as Ellen's own pain and suffering and mental anguish, coupled with the special damages as outlined above, more than justify the damages awarded of $4,691,000.00.

ARGUMENT

I. DEFENDANT NURSES CAN BE HELD LIABLE FOR BREACH OF THEIR OWN DUTIES TO PROPERLY ASSESS FOR LATEX ALLERGY OR SENSITIVITY, TO PROPERLY INFORM THE TREATING PHYSICIANS OF THAT RISK FOR LATEX ALLERGY, AND THEIR FAILURE TO IMPLEMENT THE HOSPITAL'S LATEX ALERT PRECAUTIONS AS REQUIRED BY THE STANDARD OF CARE.

MBMC's first assignment of error is a hodgepodge of various theories that fails to specifically state what they contend the trial court did that constituted reversible error. MBMC further fails to delineate the standard of review for this Court regarding this assignment. Our Supreme Court has repeatedly stated "[t]here is a presumption that the judgment of the trial court is correct, and the burden is on the appellant to demonstrate some reversible error to this Court." *Ewing v. State*, 2010-KA-00251-SCT, ¶9 (Miss. 2010) (citing *King v. State*, 857 So. 2d 702, 731 (Miss. 2003)).

This assignment centers on several arguments the first of which states "A. The jury's exoneration of the doctors is inconsistent with the liability of the nurses" for which MBMC claims it is entitled to a new trial. Next, MBMC argues that "B. Because the doctors did not rely on the nurses to obtain Kelly's history, the nurses conduct could not have caused her death, thus requiring a judgment for MBMC". MBMC concludes by arguing that "C. On this record, either the nurses met their duty as a matter of law, or the defective instruction on duty requires a new trial" for which MBMC claims it is entitled to judgment or a new trial. We can only assume that MBMC is aggrieved by the trial court's denial of their "Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial and for Amendment of Judgment Entered July 1, 2009". (CP 1728-1749).

"A Motion for JNOV tests the legal sufficiency of the evidence supporting the verdict." *Tharp v. Bunge Corp.*, 641 So. 2d 20, 23 (Miss. 1994) (citing *Goodwin v. Derryberry Co.*, 553 So. 2d 40, 42 (Miss. 1989); *Stubblefield v. Jesco, Inc.*, 464 So. 2d 47, 54 (Miss. 1984)). The movant asks the trial court to hold, as a matter of law, that the verdict cannot stand. *Id.* "The trial court must consider the evidence of the non-moving party in the light most favorable to the non-moving party and give that party the benefit of all favorable inferences that reasonably may be drawn." *Id.* The motion for a JNOV must be denied "if the evidence is sufficient to support a verdict in favor of the non-moving party." *Id.* (citing *Goodwin*, 553 So. 2d at 42-43).

Regarding the appeal of a denial of a Motion for JNOV, the Mississippi Supreme Court has stated:

> This Court applies a *de novo* review to the denial of a motion for JNOV, considering all of the evidence in the light most favorable to the verdict. *United States Fid. and Guar. Co. of Miss. v. Martin*, 998 So. 2d 956, 964 (Miss. 2008) (citations omitted). We will affirm the denial where there is "substantial evidence to support the verdict," but we will reverse if "the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated." *Id.* (quoting *White v. Stewman*, 932 So. 2d 27, 32 (Miss. 2006)).
>
> *Quick v. Lymas*, 2008-CA-01713-SCT, ¶29 (Miss.2010).

"The grant or denial of a motion for a new trial is and always has been a matter largely within the sound discretion of the trial judge." *Clark v. Columbus & Greenville Ry. Co.*, 473 So. 2d 947, 950 (Miss. 1985) (citations omitted). A motion for new trial is a challenge to the weight of the evidence. *Alpha Gulf Coast, Inc. v. Jackson*, 801 So. 2d 709, 725 (Miss. 2001). "The credible evidence must be viewed in the light most favorable to the non-moving party. The credible evidence supporting the claims or defenses of the non-moving party should generally be taken as true." *Clark v. Columbus & Greenville Ry. Co.*, 473 So. 2d at 950. A trial court should only grant a motion for

a new trial "when upon review of the entire record a judge is left with a firm and definite conviction that the verdict if allowed to stand would work a miscarriage of justice." *Id.*

Regarding the appeal of a denial of a Motion for New Trial, the Mississippi Supreme Court has stated:

> The standard of review for the grant or denial of a motion for a new trial is abuse of discretion. *White v. Yellow Freight Sys., Inc.*, 905 So. 2d 506, 510 (Miss. 2004) (citing *Green v. Gant*, 641 So. 2d 1203, 1207 (Miss. 1994)). As with motions for JNOV, we review the evidence in the light most favorable to the nonmoving party and will reverse "only when, upon review of the entire record, we are left with a firm and definite conviction that the verdict, if allowed to stand, would work a miscarriage of justice." *Id.* at 510-11 (citing *Green*, 641 So. 2d at 1207-08).
>
> *United Ser. Auto. Asso. v. Lisanby*, 2009-CA-00529-SCT, ¶9 (Miss. 2010).

Appellees will address each of MBMC's arguments under this assignment. The first part of MBMC's argument centers on the supposedly inconsistent verdict. MBMC cites two cases, namely *Gallaher Bassett Services, Inc. v. Malone*, 30 So. 3d (Miss. 2010) and *First Bank of Sw. Miss. v. Bidwell*, 501 So. 2d 363 (Miss. 1987), for the proposition they are entitled to a new trial where "a verdict shows inescapable inconsistency". MBMC did not raise this issue at trial and did not raise this issue in its "Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial and for Amendment of Judgment Entered July 1, 2009". (CP 1728-1749). Therefore, MBMC is procedurally barred from raising this issue for the first time on appeal. "[A]n issue not raised at the trial level is not properly preserved for Appeal." *Weeks v. City of Clinton*, 955 So. 2d 307, 331 (Miss. 2007). In *Weeks*, the Appellant raised an issue on appeal that he did not raise at hearing nor in his motion for new trial. *Id.* The Mississippi Supreme Court procedurally barred the Appellant from raising it for the first time on appeal. *Id.* The Mississippi Supreme Court has consistently held that matters raised for the first time on appeal are procedurally barred. *Williams v. Skelton*,

2007-CT-00095-SCT, ¶6 (Miss. 2009) (citations omitted). As such, Appellants are procedurally barred from raising this issue for the first time on appeal.

Even if this Court should consider this issue on its merits, no error was made. There is nothing contradictory in the jury verdict. The jury properly found that the nurses of MBMC breached one of their independent duties owed to Ellen Kelly as testified to by expert testimony. (TR 365-448) (TR 464-507). Jury Instruction No. 15 articulated Plaintiffs' theory of the case against the nurses as follows:

> If you find from a preponderance of the evidence in this case that on July 3, 2000, and on July 10-14, 2000, the nursing personnel at Mississippi Baptist Medical Center:
>
> (1) failed to properly assess or identify Ellen Kelly as at risk for latex allergy or sensitivity, if any, and/or
>
> (2) failed to properly inform the treating physicians that Ellen Kelly was at risk for latex allergy, if any, and/or
>
> (3) failed to implement the Mississippi Baptist Medical Center's Policies and Procedures in regard to latex allergies or sensitivity, if any
>
> And if you further find that said failure or failures, if any, constituted negligence as that term is defined elsewhere in these instructions; and that this negligence, if any, caused, or contributed to cause, injury or damage to Ellen Kelly and her eventual death, then you should return a verdict in favor of the Kelly Family against Defendants Mississippi Baptist Health Systems, Inc., Mississippi Baptist Medical Center, Inc.
>
> (CP 1511).

The MBMC nurses had the independent duties to assess Ellen for latex allergy or sensitivity, to inform the treating physicians of the same, and to implement proper procedures which would ensure that Ellen was not exposed to latex as provided in the Latex Alert Precautions. None of which the nurses did. (TR 295-317) (TR 246-272). If the nurses would have just followed their hospital's own policy and procedures as the standard of care required, (TR 503-504), Ellen would not have been exposed to latex and would be alive today.

The Latex Alert Precautions as listed in the Protocol would have meant that an allergy sticker for latex would have been placed on Ellen's chart, a latex allergy sign would have been placed on Ellen's door, and most importantly, central supply would be notified to ensure that all products used on Ellen were latex-free. (TR 219-222, 474-475). These duties are apart and independent of anything the physicians did or did not do. Through expert testimony, it was proven that these breaches caused Ellen to be exposed to latex and latex containing products, which lead to an anaphylactic reaction and respiratory arrest, and thus proximately caused her death.

If the nurses had fulfilled part of their duty by informing the treating physicians of Ellen's risk for latex allergy, and the treating physicians refused to do anything, then that would not relieve the nurses of their other duties outlined above, including their duty to properly assess and identify Ellen Kelly's risk for latex allergy or sensitivity and to follow the policy and procedures by implementing the Latex Alert Precautions as listed in the Protocol.

Although a case was made against the doctors as well, it was the prerogative of the jury to find in their favor. It is certainly understandable that the jury found for the doctors given the fact that Ellen's ABC allergy and latex allergy is nowhere noted in the doctor's chart for Ellen, it was the nurses who failed to relay information about Ellen's ABC allergy and latex allergy to the doctors, and it was the nurses who failed to implemented the hospital's Latex Alert Precautions which would have meant Ellen would have never been exposed to latex. It is MBMC through its nurses that is the gatekeeper with regard to products used and not used and to ensure only latex free products are used on patients with an ABC allergy and/or latex allergy. On cross-examination by the attorney for the doctors, Appellees' medical expert, Dr. Eric Gershwin, testified "What I've said that in the chain of events I feel very sympath[etic] for the doctors here. They depended on the nurse. The nurse let

them down at Baptist Hospital. The doctors then used latex products on them. So unwittingly, they were pulled into this. Yes. They should have been aware of [her] history before. She filled it out and they gave it, but the gatekeeper was in fact the Baptist Hospital." (TR 441-442). Again, under such circumstances, it was the prerogative of the jury to find against the hospital and for the doctors and there is nothing contradictory in the verdict.

MBMC first cites *Gallaher Bassett Services, Inc. v. Malone*, 30 So. 3d 301 (Miss. 2010) as authority for a new trial when a verdict is allegedly inconsistent. *Gallaher* was a very confusing case that involved a worker in a worker's compensation case suing his employer as well as the company (Gallaher Bassett Services) that handled claims for the employer's workers' compensation insurance carrier (CNA). The worker's claim was for bad faith in failing to pay a compensable claim on time. The employer cross-claimed against Gallaher Bassett Services on a breach of contract claim and Gallaher Bassett Services cross-claimed back against the employer for indemnification. To make it even more confusing, the worker settled with his employer and together they entered a Mary Carter agreement where the employer stayed in the case but would receive a specified reimbursement from the worker's recovery from Gallaher Bassett Services.

The jury ultimately found for the worker for $250,000 but allocated 42.5% of fault to Gallaher Bassett Services, 42.5% to the employer, and 15% to the worker. The jury also found for the employer against Gallaher Bassett Services on the breach of contract claim for $1.25 million (a figure five times the amount which the jury had established as reasonable damages to the worker). Further, one jury instruction stated that to find for the employer the jury had to find that the employer did nothing to contribute to the employee's damages. It was under these circumstances, where you have a bad faith claim, breach of contract and indemnity case all in one and a verdict that cannot be

reconciled that the Mississippi Supreme Court ordered a new trial. The Mississippi Supreme Court went even further strongly urging on remand that the claims be severed. The Kelly case is nothing more than a medical malpractice case against two defendants. There is nothing contradictory or confusing in the verdict.

MBMC also cites *First Bank of Southwest Miss. v. Bidwell*, 501 So. 2d 363 (Miss. 1987) as authority for a new trial when a verdict is allegedly inconsistent. *First Bank* was a case involving a son and father who opened a safe deposit box together. After the father's death, it was alleged the bank negligently allowed someone to enter and remove the contents of the box. A special interrogatory was submitted to the jury to determine the amount of cash in the box which was returned as $8,700.00. However, the jury returned a general verdict for the son against the bank for $20,000.00. There was evidence supporting both the $8,700 and $20,000 figure but there was simply no way to reconcile the two verdicts and a new trial was ordered. Again, the case *sub judice* was nothing more than a medical malpractice claim against two defendants. The jury found for one and against the other. There is nothing contradictory in the verdict and nothing that requires a new trial.

The second part of MBMC's argument centers on a causation theory. MBMC argues that even if the nurses had informed the doctors of Ellen's latex allergy or sensitivity, the doctors would have done nothing different thereby supposedly relieving the hospital from liability. This argument completely ignores all the duty the nurses owed to Ellen. The nurses had the duties to properly assess and identify Ellen Kelly for risk of latex allergy or sensitivity, to properly inform the treating physicians of that risk for latex allergy, and to properly implement the policy and procedures, which would require the Latex Alert Precautions as listed in the Protocol. (TR 365-448) (TR 464-507) (TR 503-504).

If the nurses had fulfilled part of their duty by informing the treating physicians of Ellen's risk for latex allergy, and the treating physicians refused to do anything, then that would not relieve the nurses of their duty to properly assess and identify Ellen Kelly's risk for latex allergy or sensitivity and to follow the policy and procedures by implementing the Latex Alert Precautions as listed in the Protocol. In essence, MBMC's argument is nothing more than an admission that had the nurses informed the treating physicians of Ellen Kelly's risk for latex allergy, and the treating physicians refused to do anything, then they too would do nothing, thus breaching the other duties owed Ellen Kelly. MBMC would have this Court believe that should a patient present to a hospital with a latex allergy (or any allergy) which the nurses and hospital know about and the doctor refuses to use latex free products, the nurses and hospital are free to turn a blind eye and do nothing. That is obviously not the standard of care and this Court should not sanction such frivolous behavior.

The reality is we will never truly know what the doctors would have done or not done had they in fact been informed by the nurses of Ellen's latex allergy or sensitivity, as required by the standard of care, because it never happened. The fact the doctors now testify they would do nothing is after the fact. This argument goes straight to the credibility of the witnesses and it is up to the jury to decide to believe or not believe the doctors. "[I]t is well-settled law that the jury determines the credibility of witnesses and resolves conflicts in the evidence". *Baker v. State*, 2009-KA-01194-COA, ¶18 (Miss. App. 2011) (citing *Davis v. State*, 866 So. 2d 1107, 1112 (Miss. App. 2003). As Jury Instruction 1 properly stated, "You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves." (CP 1496-97).

We have a situation in which Ellen had a latex allergy or sensitivity and we are asked to believe that had that information been given to the doctors they would still expose Ellen to latex.

It simply strains logic and credibility that the doctors would have done so. Under such circumstances, it was the jury's prerogative to believe or not believe the doctors. To hold otherwise would mean that in any case a witness could simply lie in order to protect or shield another party from liability. That is simply not the law and should not be sanctioned here.

The final part of MBMC's argument under this assignment is that the only duty owed by the nurses was to notify the doctors of Ellen's latex allergy or sensitivity, and the nurses meet that duty by delivering the medical chart to the doctors. It is undisputed that the nurses failed to notify the doctors. The nurse who made the pre-op admission history and assessment on Ellen on July 3, 2000, testified directly that she did not notify the doctors as follows:

> Q. After you do this initial assessment, did you notify any doctors of any allergies or anything of that nature?
> A. She did not have a latex allergy, so I did not notify a physician.
> Q. So you did not notify a doctor?
> A. No. She did not give me any information about being allergic to latex.
>
> (TR 306-307).

The second MBMC nurse who saw Ellen on the day of her surgery on July 10, 2000, testified as follows:

> Q. Did you look at the record to see that [she] told Nurse Priester that she allergic to chestnuts?
> A. I did not.
> Q. So you did not?
> A. I did not, no.
> Q. All right. So you didn't reflect that information on the armband either, did you?
> A. Yes. I put the armband on what she told me she was allergic to.
> Q. Did you put chestnuts on there?
> A. No. I put what she told me she was allergic to.
> Q. She you didn't put chestnuts on the allergic armband, didn't you?
> A. She did not tell me she was allergic to chestnuts.
> Q. Is the answer to my question no?
> A. No. The answer is no.
> Q. And you didn't reflect it on the front of the chart?

A. No.
Q. And you didn't instruct central supply?
A. No.
Q. And you didn't put it on the computer?
A. No. I put what she told me she was allergic to.

(TR 252).

Further, MBMC again ignores the other duties owed by the nurses to Ellen as outlined by expert testimony. (TR 365-448) (TR 464-507). Through duly qualified experts, three duties for the nurses were established as outlined Jury Instruction No. 15. (CP 1511). Whether or not the nurses met one of their duties does not relieve them of their other duties. If the nurses would have simply implemented The Latex Alert Precautions (sticker on chart, a sign on the door, and latex-free products) as the standard of care required, Ellen would not have been exposed to latex, and she would not have died as a result of an anaphylactic reaction.

The fact remains that Ellen was a healthy 29 year old attorney who died a senseless death because the MBMC nurses failed to properly assess her for latex allergy, failed to notify the physicians and failed to provide a latex free environment that the standard of care and MBMC's own Latex Alert Precautions required.

II. THE COURT PROPERLY ALLOWED ALL RELEVANT MEDICAL RECORDS OF ELLEN KELLY INTO EVIDENCE AND PROPERLY EXCLUDED IRRELEVANT MEDICAL RECORDS.

MBMC next argues that the trial court erred in excluding medical records covering hospital admissions and physicians' office records pertaining to Ellen Kelly, namely King's Daughters Medical Center (EX D-7(id)), Brookhaven OB-GYN (Dr. Stephen Mills) (EX D-8(id)), and Dr. Joseph S. Moak, Jr. (EX D-9(id). "When reviewing a trial court's decision regarding evidentiary matters, the standard of review is abuse of discretion". *United States Fidelity and Guar. Co. of*

Mississippi v. Martin, 998 So. 2d 956, 968 (Miss. 2008) (citing *Payne v. Whitten*, 948 So. 2d 427 (Miss. 2007)). MBMC sought to introduce these records in an attempt to show that Ellen Kelly was not allergic to latex because of the alleged lack of allergic reactions to alleged latex exposure contained therein. This is a contention that is in direct contradiction to the MBMC's own records, specifically (EX P-1, at p. 454), that stated Ellen Kelly was allergic to latex.

The records from King's Daughters Medical Center covered Ellen's c-section in 1989 and a couple of ER visits in 1994 and 1999 (EX D-7(id)), Dr. Mills' records consist of nothing more than a duplication of King's Daughters 1989 records and a few additional King's Daughters records (EX D-8(id)), and Dr. Moak's records consist of nothing more than one office visit in 1999 and several phone conversations for prescriptions (EX D-9(id)). The medical records from King's Daughters, Dr. Mills, and Dr. Moak were properly excluded due to their lack of relevancy. MBMC offered nothing showing that Ellen Kelly was exposed to latex during any of these previous medical visits. MBMC neither offered an expert to testify specifically about any latex exposure during these visits, nor called any of the specific doctors, nurses or other medical personnel treating Ellen Kelly during these visits to testify that Ellen was in fact exposed to latex during these visits. Therefore, these records had no probative value as to whether Ellen was allergic to latex. M.R.E. 401. As such, these records were irrelevant and properly excluded.

Further, the medical records that were admitted (EX P-1) covered six hospital admissions by Ellen to MBMC. These visits were on 10/15/97, 12/15/97, 05/06/98, 05/08/98, 05/21/98, and her last visit of 07/10/00. In addition, EX P-1 contained the records of the Ob-Gyn Clinic of Jackson dating back to October 6, 1997, Ellen's first obstetrical visit to Dr. Odom, all the way to her death at MBMC on July 14, 2000. Whatever MBMC was hoping to obtain by admitting these records was

certainly contained in the records that were admitted. Therefore, the records from King's Daughters, Dr. Mills, and Dr. Moak were cumulative to what was already into evidence. Given these records cumulative nature, remoteness, danger of unfair prejudice, and confusion of the issues, any probative value they may have offered was substantially outweighed by these concerns. M.R.E. 403. Therefore, the records were properly excluded.

Finally, MBMC was not prejudiced in any way by exclusion of these records into evidence. Although the records were not admitted into evidence, MBMC was free to use them. The trial court's specific ruling was "Okay. Counsel, **you can use them**, but let them be marked for identification at this time." (TR 421) (Emphasis added). MBMC was free to specifically refer, reference, discuss and even exhibit all of these medical records, which they did multiple times, to the jury. (TR 186, 420-422, 495-499, 529). Counsel for MBMC was allowed to exhibit a portion of the King's Daughters records to the jury and questioned Appellees' nursing expert specifically about the same. (TR 495-499). There was nothing prohibiting counsel for MBMC to go into any portion of those records he considered relevant while cross-examining Appellees' nursing expert or any other witness. Counsel's failure to probe more into these records with the various witnesses, should not now be grounds for a new trial. Therefore, although excluded from evidence, these records were before the jury and counsel had the opportunity to explore these records in detail with the witnesses if he so choose, as such their exclusion from evidence does not warrant a new trial. *Byrom v. State*, 863 So.2d 836, 871 (Miss. 2003).

III. A NEW TRIAL IS NOT REQUIRED WHERE THERE IS SUFFICIENT EVIDENCE SUPPORTING THE AMOUNT AWARDED AS WELL AS SUPPORTING PAIN AND SUFFERING, MENTAL ANGUISH AND LOST OF HOUSEHOLD SERVICES, AND THE COURT PROPERLY REFUSED TO ALLOW THE JURY TO ASSIGN FAULT TO THE ANESTHESIOLOGIST.

MBMC next takes issue with the fact the jury was allowed to considered damages for Ellen's pain and suffering and mental anguish as well as lost of household services. MBMC further takes issue that the amount awarded between the estate and the wrongful death beneficiaries is allegedly not supported by the evidence. Also under this assignment, MBMC takes issue with the fact that the jury was not allowed to allocate fault to the anesthesiologist, Dr. McLeod. Again, MBMC neither states exactly what error they are alleging the trial court did nor what standard of review should be applied. Appellees can only assume that MBMC is aggrieved by the granting of Jury Instruction 28, (CP 1526-27), which delineated the category of damages the jury could consider and the failure to grant an instruction which would have allowed the jury to allocate fault to Dr. McLeod.

In reviewing the granting or denial of jury instructions our Supreme Court has stated, "In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." *Coleman v. State*, 697 So. 2d 777, 782 (Miss. 1997) (citations omitted).

Jury Instruction No. 28, (CP 1526-27), properly delineated the elements of damages the jury could consider. Such elements as the pain and suffering and mental anguish experienced by Ellen Kelly from the moment of injury to her death are proper elements to consider. *Motorola Communications & Electronics, Inc. v. Wilkerson*, 555 So. 2d 713, 724 (Miss. 1989) (affirming damage award in wrongful death case based on evidence of elderly decedent's pain, suffering and mental anguish before death, as well as the loss of society and companionship suffered by plaintiffs). Our Supreme Court has further stated:

> Mississippi Code Annotated § 11-7-13 (Supp.1984), provides that in a wrongful death action the party or parties suing shall recover such damages as the jury may determine to be just,

> taking into consideration all the damages of every kind to the decedent and all the damages of every kind to any and all parties interested in the suit. This statutory language has been held to include (1) the present net cash value of the life expectancy of the deceased, (2) the loss of the companionship and society of the decedent, (3) **the pain and suffering of the decedent between the time of injury and death**, and (4) punitive damages. *Jesco, Inc. v. Whitehead*, 451 So. 2d 706, 710 (Miss. 1984); *Sheffield v. Sheffield*, 405 So. 2d 1314, 1318 (Miss. 1981); *Dickey v. Parham*, 331 So. 2d 917, 918-919 (Miss. 1976); *Thornton v. Ins. Co. of North America*, 287 So. 2d 262, 265 (Miss. 1973); *Scott v. K-B Photo Service, Inc.*, 260 So. 2d 842, 844 (Miss. 1972); *Boyd Constr. Co. v. Bilbro*, 210 So. 2d 637, 643 (Miss. 1968).
>
> *McGowan v. Estate of Wright*, 524 So. 2d 308, 311(Miss. 1988) (Emphasis added).

Appellees presented expert testimony that Ellen Kelly's injury began when she started experiencing an allergic reaction after being exposed to latex during her admission to MBMC on July 10, 2000. Appellees presented expert testimony that this allergic reaction was evidenced by her itching, redness, blister, and nausea which were manifesting by July 11, 2000. (EX P-1 at 226) (TR 238-242)(TR 352-356) (TR 401-403). It is undisputed that Ellen Kelly regained consciousness after surgery and that she began experiencing itching, redness, blister, and nausea, all of which support an instruction on pain and suffering and mental anguish. (EX P-1 at 197) (TR 239, 352-352, 403-404, 406-408, 430, 495, 516, 537, 604, 646-647, 725, 757, 777); (TR 424, 516); (EX P-1 at 196) (TR 240,354-355, 401-402, 516, 531); (EX P-1 at 193, 197) (TR 353, 401, 403, 407-408, 430).

Appellees further presented expert testimony that Ellen's allergic reaction progressed to an anaphylactic reaction characterized and evidenced by Ellen Kelly's bronchoconstriction, heart arrhythmia, respiratory arrest and a severe drop in blood pressure (TR 404-406, 429-430) (TR 670-671) (TR 703) (TR 724). At the time Ellen Kelly's husband found her on the morning of July 11, 2000, Ellen was making "gasping gurgling" respirations in an attempt to breathe. (TR 514). It is further undisputed that Ellen was alert and conscious shortly before this period. It is also undisputed that the ER doctor called to the Code 99 intubated Ellen Kelly by inserting a tube down her throat

because she could not breathe on her own. For the remainder of her life until her eventual death on July 14, 2000, Ellen remained dependent on a machine in order to breathe. Ellen Kelly suffered severe physical agony and mental anguish in a vain attempt to breathe, further supporting an instruction on pain and suffering and mental anguish. It is further undisputed that Ellen Kelly experienced heart arrhythmia. (EX P-1 at 8, 11, 218) (EX P-17) (TR 429-430, 528, 601, 671, 724, 774, 777). Heart arrhythmia manifests itself and is characterized by severe chest pain, further supporting an instruction on pain and suffering.

Finally, Appellees presented expert testimony that these events caused a decrease in blood flow and oxygen to Ellen Kelly's brain which lead to edema of the brain, hypoxia, brain stroke and infarction and finally resulted in the death of Ellen Kelly. (EX P-1 at 8, 105, 217, 219, 224) (EX P-17) (TR 403-406, 429-430). It is undisputed that Ellen suffered extreme swelling of the brain to the point that she suffered a brain stroke and infarction. Again, this further supports an instruction on pain and suffering and mental anguish. Ellen Kelly then spent the remainder of her days in ICU hooked to machines, unable to breathe on her own, suffering to the point of death. The instruction on pain and suffering and mental anguish was properly given.

MBMC next argues that the evidence did not support awarding $4,175,000 to the Estate of Ellen Kelly given the damages available to the estate. Appellees presented credible substantial evidence demonstrating damages of $1,415,881.00 representing the present net cash value of the life expectancy of Ellen Kelly, (TR 458) (EX P-11), damages of $992,109.00 representing the present net cash value of the loss of household services resulting from the death of Ellen Kelly, (TR 284) (EX P-3), damages of $21,783.78 in medical expenses for Ellen's treatment from July 11, 2000 to her death on July 14, 2000, (TR 520) (EX P-13), damages of $6,128.00 for the funeral and burial of

Ellen and $1,692.74 for a headstone at her grave. (TR 521) (EX P-14). As proven at trial, total special damages in this matter equaled $2,437,594.52. Appellees were also entitled to damages for Ellen's pain and suffering and mental anguish, as well as the loss of services, comfort, society, protection, support, abilities, counsel, affection and companionship of Ellen Kelly, deceased, sustained by Ellen's two sons and husband.

The form of the verdict (TR 1654-55) delineated between the wrongful death beneficiaries and the Estate of Ellen Kelly in order to comply with our Supreme Court's decision in *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004). Given the medical expenses incurred, the funeral burial expenses incurred, and Ellen's pain and suffering to the point of death as well as mental anguish, as outline above, the amount awarded to the Estate was fully supported by the evidence. However, the fact remains that the wrongful death beneficiaries as well as the heirs to the estate are in this case one in the same, namely Ellen's husband, Jonathan Kelly, and her two sons, Jacob Kelly and Adam O'Malley. The jury was instructed on this fact in Instruction 1. (CP 1506). Therefore, any alleged error by the jury in awarding damages between the wrongful death beneficiaries and the estate is harmless. Any alleged error was further cured with the Final Judgment on Jury Verdict (CP 1722-23) which stated in pertinent part as follows:

> IT IS, THEREFORE, ORDERED AND ADJUDGED that the Plaintiffs, Jonathan Kelly, Individually, and on Behalf of All Wrongful Death Beneficiaries of Ellen Kelly, Deceased, and the Estate of Ellen Kelly, by and through Jonathan Kelly, Administrator, are hereby awarded judgment against the separate defendants, Mississippi Baptist Health Systems, Inc. Mississippi Baptist Medical Center, Inc. For damages in the amount of $4,691,000.00 together with interest at the rate of 8 percent (%) per annum, compounding annually, beginning to accrue as of June 2, 2009, plus all costs associated with those separate defendants;
>
> (CP 1722-23).

Both the wrongful death beneficiaries and the estate were awarded judgment in the total amount of $4,691,000.00 ($4,175,000 plus $516,000). The Judgment simply reflected the truth that the amount awarded went to both the wrongful death beneficiaries and the estate heirs who are the same. In the case *sub judice*, the jury was properly instructed as to the damages that may be considered and rendered a verdict accordingly. The total verdict amount was fully supported by the overwhelming damages proven at trial with special damages alone equaling $2,437,594.52.

MBMC next argues that Appellees "failed to present any evidence establishing the value of household services actually performed by Ellen Kelly" and thus Jury Instruction 28 allowing such was improperly given. Contrary to such an assertion, Appellees offered the expert testimony of J. Elbert Bivins regarding loss of household services, (TR 277-295), and no objection was made to his expertise as an economist and accountant. (TR 280-281). J. Elbert Bivins provided expert testimony calculating in dollars and cents the loss of Ellen's household services to her family and her spouse as a result of her death. (TR 281). Using governmental statistics, surveys, U.S. Department of Labor tables, basic information regarding how old Ellen was, that she was married and working, that she had two children, and the children were under the age of 12, and interviews with Ellen's husband Jonathan, J. Elbert Bivins was able to calculate the loss of household services provided by Ellen reduced to present value. (TR 277-295). Ellen Kelly provided certain household services to Jonathan and her two children, and these services were lost upon her death. J. Elbert Bivins was a qualified expert who quantified that loss in a dollar amount discounted to present value. Loss of services has always been recognized as a proper element of damages for a wrongful death. *Dorrough v. Wilkes*, 817 So. 2d 567, 575 (Miss. 2002) (affirming damage award in wrongful death case of $1.5 million based on evidence of $39,000 in medical expenses and $300,000 in loss of

services as well as the loss of life). There was nothing improper by allowing J. Elbert Bivins to testify to the same and Jury Instruction 28, (CP 1526-27), allowing such was properly given.

MBMC's final argument under this assignment is that it was improper not to allow the jury to assign fault to anesthesiologist, Dr. McLeod. "Jury instructions should be granted only where some **supporting evidence** has been presented." *Canadian National v. Hall*, 953 So. 2d 1084, 1101 (Miss. 2007) (Emphasis added). Our Supreme Court has further stated that "parties have the right to embody their theories of the case in the jury instructions **provided there is testimony to support it**." *Reese v. Summers*, 792 So. 2d 992, 994 (Miss. 2001) (Emphasis added). Nowhere did MBMC or any other party ever offer any expert testimony that Dr. McLeod deviated from acceptable standards of care and that such deviation proximately resulted in the death of Ellen Kelly. In fact MBMC argued at trial and continues to argue on appeal that no party did anything wrong and that Ellen was not even allergic to latex. As such, MBMC was not entitled to an instruction which would have allowed fault to be attributed to Dr. McLeod. Further, MBMC failed to even offer such an instruction at trial which would have allowed the jury to assign fault to Dr. McLeod. "A party preserves error in the denial of a jury instruction by tendering the instruction to the trial court, suggesting the instruction is correct, and requesting that the court submit the instruction to the jury". *Clayton v. State*, 946 So. 2d 796, 803 (Miss. App. 2006) (citing *Carmichael v. Agur Realty Co., Inc.*, 574 So. 2d 603, 613 (Miss. 1990)). MBMC never submitted or requested an apportionment instruction as to Dr. McLeod and therefore did not obtain a ruling on the instruction from the trial court and did not preserve this issue for appellate review. According, this issue is also procedural barred.

IV. A NEW TRIAL SHOULD NOT BE AWARDED BECAUSE THE VERDICT DID NOT EXHIBIT BIAS, PASSION, PREJUDICE, AND CONFUSION AND IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

MBMC next argues that they should be entitled to a new trial because the verdict exhibited bias, passion and prejudice and the verdict was against the overwhelming weight of evidence and that cumulative error deprived MBMC of a "fair" trial. There is absolutely nothing excessive of the damages awarded by the jury in this matter and certainly nothing to suggest that the award was the result of bias, passion and prejudice. The standard of review to determine whether a jury verdict is excessive is as follows:

> The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous, and such as manifestly show the Jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, where they have no standard by which to ascertain the excess.
>
> *Dorrough v. Wilkes*, 817 So. 2d 567, 575 (Miss. 2002) (citations omitted).

Appellees presented credible substantial evidence demonstrating damages of $1,415,881.00 representing the present net cash value of Ellen Kelly's lost wages, (TR 458) (EX P-11), damages of $992,109.00 representing the present net cash value of the loss of household services resulting from the death of Ellen Kelly, (TR 284) (EX P-3), damages of $21,783.78 in medical expenses for Ellen's treatment from July 11, 2000 to her death on July 14, 2000, (TR 520) (EX P-13), damages of $6,128.00 for the funeral and burial of Ellen and $1,692.74 for a headstone at her grave. (TR 521) (EX P-14). As proven at trial, total special damages in this matter equaled $2,437,594.52. Appellees were also entitled to damages for Ellen's pain and suffering and mental anguish, as well as the loss of services, comfort, society, protection, support, abilities, counsel, affection and companionship of

Ellen Kelly, deceased, sustained by Ellen's two sons and husband. The final total amount awarded was $4,691,000.00, less than two (2) times special damages presented.

In *Estate of Jones v. Phillips ex rel. Phillips*, 992 So. 2d 1131, 1150-51 (Miss. 2008), our Supreme Court upheld a five million dollar verdict, stating that verdict, while just over eleven times special damages, was not so excessive as to shock the conscience. Citing *Gatewood v. Sampson*, 812 So. 2d 212, 223 (Miss. 2002) (jury's verdict thirty-eight times special damages); *Edwards v. Ellis*, 478 So. 2d 282 (Miss. 1985) (forty times the amount of medical expenses); *Purdon v. Locke*, 807 So. 2d 373 (Miss. 2001) (fourteen times the amount of damages); *Dorrough*, 817 So. 2d at 575 (jury's verdict more than four times special damages); *Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149 (Miss. 1992) (jury's verdict approximately four times special damages and reduced for plaintiff's negligence and failure to mitigate damages affirmed); *W.J. Runyon & Son v. Davis*, 605 So. 2d 38, 50 (Miss. 1992) (jury's verdict approximately thirteen times special damages), overruled in part, *J & J Timber Co. v. Broome*, 932 So. 2d 1, 4-6 (Miss. 2006). See generally *Choctaw Maid Farms v. Hailey*, 822 So. 2d 911 (Miss. 2002) ($5,350,162.10 actual damages verdict affirmed); *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611 (Miss. 2001) ($9 million actual damages verdict affirmed); *General Motors Corp. v. Jackson*, 636 So. 2d 310 (Miss. 1992) ($7 million actual damages verdict affirmed). Total damages awarded for the needless death of a healthy, twenty-nine (29) year old attorney, with a husband and two children, of less than two times special damages does not shock the conscience and are fully supported by the evidence.

The verdict was further not against the weight of evidence. There was more than enough substantial credible evidence to allow this case to go to the jury. Appellees offered two highly qualified medical experts in Dr. Eric Gershwin and Dr. Pat Beare, who set forth the proper standard

of care and how the nursing staff of MBMC failed to conform to that standard of care. (TR 365-448) (TR 464-507). Dr. Gershwin further provided testimony of how such failure proximately and foreseeably caused injury and the eventual death of Ellen Kelly.

Dr. Gershwin is a Distinguished Professor of Medicine, The Jack and Donald Chia Professor of Medicine, Chief, Division of Rheumatology, Allergy and Clinical Immunology, Genome and Biomedical Sciences Facility, for the University of California at Davis. Dr. Gershwin is the highest ranking professor for the University of California at Davis. Dr. Gershwin holds numerous patents such as on a new diagnostic test in autoimmunity that is used all over the world in diagnostic care and a patent on molecules that it is hoped will reduce some of the inflammation seen in people that have immune diseases. Dr. Gershwin holds three board certifications, one in internal medicine, one in rheumatic disease, and one in allergy and immunology. Dr. Gershwin is presently licensed to practice medicine in the State of California with previous licensure in the states of Maryland, Massachusetts and New York. Dr. Gershwin finished first in his medical class and has won the Eckinger Award, the Guggenheim Award, a Guggenheim Fellowship, and the Askew prize for a lifetime contribution in immunology (given in Europe, Dr. Gershwin was only the second American ever to receive it). Dr. Gershwin has received an honorary PhD degree from the University of Athens, the first or the second American ever to receive that honor. Dr. Gershwin is the editor-in-chief of the Journal of Autoimmunity, the largest journal that specializes in autoimmune diseases in the world, he is also the editor-in-chief of the journal Reviews and Allergy Immunology, and he is also on the editorial board of at least a dozen other journals around the world. Dr. Gershwin has been an adviser for the governor of Japan, adviser for the governor of Holland, for the Medical Research Council of England, of the UK, and the Austrian Cancer Foundation. Dr.

Gershwin has written over 25 books in immunology for patients, for families in particular who have children, who suffer from allergies and asthma. Dr. Gershwin has written over 700 Experimental papers since 1967, over 100 book chapters, and over 100 reviews and editorials. Dr. Gershwin has received research grants from all over the world, particularly from the National Institute of Health, the U.S. government, and from allergy foundations, immunology foundations, and foundations from around the world.

Dr. Gershwin has expertise, training, and certification in Internal Medicine, with subspecialties in Rheumatology and Allergy and Clinical Immunology. Dr. Gershwin is intimately familiar with the accepted procedures/standards of care required with regard to the care and treatment of patients such as Ellen Kelly.

Dr. Pat Beare is a nurse with over 40 years of nursing experience, was a professor of nursing at LSU for over 20 years, and has written textbooks routinely used in nursing education. Dr. Beare has a bachelor of science in nursing from the University of Pittsburgh, a masters in education from Ducane University, masters in nursing from the University of Texas at Arlington, and she has a PhD from North Texas State University. Dr. Beare has received numerous awards such as from the World's Foundation of Successful Women, The Who's Who of Woman, The Who's Who in Professional Business Members, Who's Who in the South and the Southwest, and The Scientists Research Society. Dr. Beare has received a Commemorative Medal of Honor for a lifelong achievement in excellent professional performance and has been recognized by Phi Delta Kappa which is a national education society. Dr. Beare is extensively published, having published a medical surgical textbook used by nurses all over the world, of which there are three editions and which was recently translated into Russian and Spanish, she has published a geriatric textbook, three

editions, she has published several editions of RN collects and LPN collects, books to help people pass their state board examine, and she has published a laboratory and diagnostic book. In all, Dr. Beare has published close to 50 publications in magazines and journals. As such, Dr. Gershwin and Dr. Beare were highly qualified experts and Appellees fully met their burden.

Finally, the alleged cumulative errors warranting a new trail simply do not exist. Any alleged errors raised by MBMC have been fully and completely addressed and found to be lacking. We are left with a tragic and senseless death of a 29 year old attorney who died as a result of MBMC's nurses failing to simply provide necessary care to their patient.

V. THE COURT DID NOT ERR IN AWARDING INTEREST OF 8% FROM THE DATE OF VERDICT.

MBMC's final issue surrounds the amount the trial judge awarded for interest on the verdict and when such interest began to accrue. MBMC takes exception to the fact that interest was awarded from the date of the verdict and further takes exception to the 8% amount awarded. The authority for interest in this case comes from Miss. Code § 75-17-7 which states as follows:

> All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees **shall** bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.
>
> (Emphasis Added).

Whether interest is to be awarded is not left to the discretion of the trial court but is mandated by the statute. In *Mississippi Dept. of Mental Health v. Hall*, 936 So. 2d 917 (Miss. 2006), which dealt with an award of interest against a Mississippi tort claim entity, our Supreme Court recognized not only the mandatory nature of Miss. Code § 75-17-7, but also the public policy reasons for such interest as follows:

We find, however, that, even if the circuit court did not have jurisdiction to rule upon Hall's motion, the error would be harmless due to the mandatory nature of Miss. Code Ann. § 75-17-7 (Rev.2000): post-judgment interest "shall" be awarded.

* * *

Public policy also demands that governmental entities covered by the MTCA pay post-judgment interest:

> Several important public policy considerations undergird both legislative intent and our interpretation of that intent today regarding post-judgment interest. Post-judgment interest is generally recognized as a common-law element of actual damages in civil actions. In fact, we have long held that interest is not imposed as a penalty but instead as compensation for detention of overdue money. This resolves any questions of hybrid situations where the governmental entity is represented by an insurance company to which the governmental entity has paid a premium for costs, interest, and statutory damages. Indeed, our citizenry must be given the benefit of that which they have already paid. Dealing with the current issue as we have rectifies the gamut of potential scenarios that may arise.
>
> Further, simple interest is not a sufficient remedy. The utility of post-judgment interest, statutory damages, and costs is that of supplementing this simple damages interest with necessary additional damages. In addition, the application of post-judgment interest and statutory damages discourages frivolous appeals and encourages governmental actors to settle legitimate claims when made. The potential of paying post-judgment interest and statutory damages encourages speedy compensation of legitimate claims and discourages litigation of unworthy issues. The strategy of delaying payment until the award has actually diminished in value will be thwarted. The interests of worthy claimants and judicial economy will each be advanced by today's holdings.
>
> *Williamson*, 740 So. 2d at 823 (citations omitted).

We find that, due to the mandatory nature of § 75-17-7 and because public policy heavily favors post-judgment interest, post-judgment interest over and above the statutory cap may be awarded against a governmental entity.

Mississippi Dept. of Mental Health v. Hall, 936 So. 2d 917, 930 (Miss. 2006).

The Mississippi Court of Appeals has further stated:

Post-judgment interest on the jury's award is required by Mississippi statutory law: "All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing

> of the complaint." Miss. Code Ann. § 75-17-7 (Rev.2000). Cash argues that the language "to be fair" indicates that the grant or denial of post-judgment interest is solely at the judge's discretion. We disagree; the "to be fair" **qualifies the date used for awarding interest**. It does not clothe the trial judge with the discretion to award or not to award interest. The language of the statute indicates that post-judgment interest should be given, at a rate subject to the discretion of the court. On remand, the trial judge shall award post-judgment interest in the amount he deems appropriate in this case.
>
> *Cash Distributing Co., Inc. v. Neely*, 947 So.2d 317, 328 (Miss. App. 2006) (Emphasis added).

A simple reading of Miss. Code § 75-17-7 clearly indicates that the trial judge has the authority to set the running of the interest "**from a date determined by such judge to be fair but in no event prior to the filing of the complaint**." (Emphasis added). The damages in this case became liquid on the date the jury returned its verdict. To set the running of the interest from said date is certainly "fair" as the damages are now determined and liquidated. Further, to have the interest begin to run from the date of the verdict meets the public policy reasons behind said interest for "compensation for detention of overdue money" and to ensure that "delaying payment until the award has actually diminished in value will be thwarted". *Williamson*, 740 So. 2d at 823. The trial court had full statutory authority to set the date for the running of the interest on the date of the verdict, and the trial court did not abuse its discretion in so doing.

The cases cited by MBMC either pre-date the effective date of the statute in question or do not stand for the proposition that interest may only be awarded from the date of judgment as opposed to the date of verdict. MBMC first cites *Coho Resources v. Mccarthy*, 829 So. 2d 1, 19-20 (Miss. 2002), in which the Mississippi Supreme Court interpreting Miss. Code § 75-17-7 held:

> An award of prejudgment interest rests in the discretion of the awarding judge. Under Mississippi law, prejudgment interest may be allowed in cases where the amount due is liquidated when the claim is originally made or where the denial of a claim is frivolous or in bad faith. **No award of prejudgment interest may rationally be made where the**

principal amount has not been fixed prior to judgment. *Warwick v. Matheney*, 603 So. 2d 330, 342 (Miss. 1992) (internal citation omitted).

Coho Resources v. McCarthy, 829 So. 2d 1, 19-20 (Miss. 2002) (Emphasis in original).

In the case *sub judice*, the principal **was fixed** by the jury at verdict prior to actual judgment being entered. To set the interest running from date of verdict is completely consistent with the ruling in *Coho Resources.* Further, nowhere in *Coho Resources* does it state the date of the actual jury verdict, the date when judgment was entered, and what was the specific date the trial court set the running of the interest. We are only given the fact that "[a]fter the judgment" a motion was filed for "prejudgment interest" which the trial court awarded but which was reversed. *Id.* For all we know, verdict and judgment were entered the same day and the trial court entered interest to start prior to that date. We simply do not know. What we do know is the running of interest from the date of verdict when the principal amount becomes fixed and liquidated is completely consistent with *Coho Resources* and Miss. Code § 75-17-7.

MBMC next cites the Mississippi Court of Appeals case of *Jones v. Jones*, 904 So. 2d 1143, 1150 (Miss. App. 2004) for the proposition that "there is no authority to award interest on judgments based on an unliquidated claim until the judgment is entered". This quote, which is cited in *Jones,* comes from the Mississippi Supreme Court case of *Altom v. Wood*, 300 So. 2d 786 (Miss. 1974). *Altom* deals with "Mississippi Code 1972 Annotated section 75-17-5" and was dealing with a situation in which an attempt was made to add interest to an additur. Miss. Code § 75-17-7 is the applicable statute for the case at bar and is effective from and after July 1, 1989. *Altom* therefore pre-dates the effective date of Miss. Code § 75-17-7, deals with the issue of interest on an additur and is simply not applicable to this case.

Further, the *Jones* case itself was dealing with a situation in which a chancellor miscalculated the value of an asset in a divorce decree. This miscalculation resulted in a judgment in which the wife owed the husband $8,390.44. The Mississippi Court of Appeals found that the asset had been miscalculated and upon re-calculation rendered a decision resulting in the wife actually owing $10,601.07 to the husband. The Court of Appeals denied interest on the additional $2,210.63 because that amount was unliquidated until the Court of Appeals' decision. In this case, the damages became liquid on the date of the verdict and as such, this Court properly awarded interest from that date.

MBMC finally cites *Grice v. Cent. Elec. Power Ass'n,* 230 Miss. 437, 92 So. 2d 837 (1957) for the proposition that it is erroneous to award interest from the date of verdict. *Grice* is a 1957 case interpreting Section 39 of the Code of 1942 and pre-dates the effective date of Miss. Code § 75-17-7 and is neither applicable nor good law for the case at hand.

Finally, MBMC takes offense at the 8% percent interest awarded, stating that such is not "fair". Under Miss. Code § 75-17-7, it is purely up to the discretion of the judge to set the rate of interest. An interest rate of 8% granted under authority of Miss. Code § 75-17-7 has been upheld multiple times by our Supreme Court. See *In re Guardianship of Duckett*, 991 So. 2d 1165 (Miss. 2008); *Upchurch Plumbing, Inc. v. Greenwood Utilities Com'n*, 964 So. 2d 1100 (Miss. 2007); *Houck v. Ousterhout*, 861 So. 2d 1000 (Miss. 2003).

In *Houck*, the appellant made the exact same argument as MBMC makes here, namely "that 8% "does not appear to be fair . . . in today's economy." He cites no case law in support of his argument." *Houck*, 861 So. 2d at 1003. Our Supreme Court nevertheless affirmed the chancellor's award of 8% interest. An interest rate of 8% has been upheld by the Mississippi Supreme Court

multiple times and the trial court certainly did not abuse its discretion in awarding a rate of interest at 8%. See also Mississippi Court of Appeal cases of *Beasnett v. Arledge*, 934 So. 2d 345 (Miss. App. 2006) and *Morris Newspaper Corp. v. Allen*, 932 So. 2d 810 (Miss. App. 2005).

Our Supreme Court has just recently held in *Bluewater Logistics, LLC v. Williford*, 2008-CT-00250-SCT, ¶73-75 (Miss. 2011), that "Under the statute, a two- or three percent interest rate might sometimes be fair and reasonable, while, at other times, market conditions and other relevant factors might require the trial judge to set a higher rate." (Emphasis Added). An 8% interest rate is not unfair nor unreasonable considering that Ellen died in 2000, and her family has been deprived of her income, her services and her life since that time. The interest is not a penalty but compensation for detention of money long overdue. *Williamson*, 740 So. 2d at 823. Verdict in this case was rendered on June 2, 2009. On June 2, 2009, the S&P 500 closed at 944.74, the DJIA closed at 8740.87 and the Nasdaq closed at 1836.80. The "market conditions" from date of verdict to today have allowed those market to increase by 40% or more. Under such circumstances, where a defendant is allowed to invest money with a potential return of over 40% instead of satisfying a judgment, it is certainly not unreasonable or unfair or an abuse of discretion to set a rate of interest at 8%.

Moreover, in response to a request by MBMC, Appellees specifically waived the posting of a supersedeas bond in this matter, saving MBMC tremendous expense and costs. Appellees have been more than fair to MBMC in this regard. MBMC could have avoided all interest by simply paying the verdict. Instead, it was MBMC choice to appeal this matter. Where the "market conditions" provide a 40% return, the death occurred in 2000, and the family has been deprived of income for over eleven (11) years, it is not unfair to set a rate of interest at 8%.

CONCLUSION

Ellen Kelly was a young, healthy (TR 322), vibrant (TR 511), twenty-nine (29) year old wife, mother and attorney who worked for the Mississippi Department of Human Services. (TR 360). Ellen was known as the defender of children because she was such an advocate for kids. (TR 361). Ellen received numerous awards for her dedication to her job and for going beyond the call of duty. (TR. 361). Ellen was someone everyone liked and was an up and comer having applied to the Mississippi Attorney General's office shortly before she tragically died. (TR 362-362).

Ellen was married to Jonathan at the time of her death leaving him alone with her two children, Jacob Kelly and Adam O'Malley, age 10 and 2 at the time of their mother's death. Ellen was seen at MBMC on July 10, 2000, with a known history to many allergies including adhesives on tape, ABC allergy, and **a know allergy to latex** as documented in her 1997 admission. All of this information was known and available to MBMC. Despite all of this, the nurses of MBMC failed to properly assess Ellen for latex allergy or sensitivity, failed to notify the physicians and failed to provide a latex free environment that the standard of care and MBMC's own Latex Alert Precautions required. As a result, Ellen died a senseless and needless death. Under these circumstances, a $4,691,000.00 verdict is not excessive and is totally consistent with the damages proven at trial. Further, an 8% interest rate which began to run on the date of verdict is not unfair considering that Ellen died in 2000, and her family has been deprived of her income, her services and her life since that time. Insurance companies and corporations understand the time value of money. The interest is not a penalty but is compensation for detention of money long overdue.

The trial court committed no errors on any of the assignments propounded by MBMC. Therefore, this court should affirm the verdict on all points.

Respectfully submitted,

JONATHAN KELLY, INDIVIDUALLY, AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF ELLEN KELLY, DECEASED, AND THE ESTATE OF ELLEN KELLY, BY AND THROUGH JONATHAN KELLY, ADMINISTRATOR

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CERTIFICATION OF SERVICE

I, Gerald J. Diaz, Jr., do hereby certify that I have this day forwarded by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Plaintiffs/Appellees* to:

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Hon. Winston L. Kidd
Hinds County Circuit Court Judge
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This the 22 day of February 2011.

GERALD J. DIAZ, JR., ESQ.