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

v.

JONATHAN KELLY, ET AL. — APPELLEES

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

REPLY BRIEF OF APPELLANTS MISSISSIPPI BAPTIST MEDICAL CENTER, INC. AND MISSISSIPPI BAPTIST HEALTH SYSTEMS, INC.

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Mississippi Baptist Medical Center, Inc., and Mississippi Baptist Health Systems, Inc. suggest that oral argument of this appeal is appropriate under the standard set by M.R.A.P. 34(a). Although the impropriety of the decision by the Circuit Court of the First Judicial District of Hinds County, the Honorable Winston Kidd presiding, to award 8% interest has recently been authoritatively decided by the Supreme Court in *Bluewater Logistics, LLC v. Williford*, 2008-CT-00250-SCT, 2011 WL 240731 at *13-14 (Miss. Jan. 27, 2011), the remaining issues involve the application of well-established law to the intricate facts of this case. The Court will undoubtedly wish to explore the implications of the Circuit Court's misapplication of settled law, and the decisional process would therefore be significantly aided by oral argument, even though the arguments are also well presented in the briefs.

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INTRODUCTION

By failing to appeal the Circuit Court's judgment, R.1722-23, R.E.4, plaintiff Jonathan Kelly has accepted the jury's exoneration of Dr. Fred Ingram and Dr. Doug Odom, the doctors responsible for Ellen Kelly's medical treatment before, during, and after the operation which plaintiff contends led to her death. Plaintiff must therefore explain how Mississippi Baptist Health Systems, Inc., and Mississippi Baptist Medical Center, Inc. (hereinafter collectively "MBMC"), could somehow have borne sole responsibility for negligent conduct proximately causing her death. Because plaintiff admits that Dr. Ingram and Dr. Odom testified that the conduct of MBMC's nurses in no way affected their decisions, Pl.Br. 19,[1] he cannot surmount this hurdle. Because this record discloses no violation of Mississippi's nursing standard of care that could have injured Ellen Kelly, this Court should exonerate MBMC along with the doctors.

The legal errors of the Circuit Court, the Honorable Winston Kidd presiding, certainly contributed to the erroneous verdict. The Court refused to permit the jury to examine large portions of Ellen Kelly's medical records, and the jury instructions authorized them to award damages for mental anguish and lost household services despite no evidence of either. Moreover, the Court improperly refused to allow the jury to assign fault to the anesthesiologist, whose own notes reflect his knowledge of the very allergy that plaintiff says MBMC should have brought to the doctors' attention. After the trial, the Circuit Court literally compounded its error by allowing 8% interest from a date before judgment.

The most obvious defect in this trial was the jury's clear inability or unwillingness to follow the Court's instructions. The jury sent out a note asking the Court, "[C]an we say that the children get this and the husband gets this?" T.898. Receiving no further guidance from the

[1] The brief of Jonathan Kelly as plaintiff and appellee is cited herein as "Pl.Br. [page(s)]." The original brief filed by MBMC in this Court as defendant and appellant is cited herein as "Def.Br. [page(s)]."

Court, the jury proceeded to award to Ellen Kelly's Estate more than four million dollars in damages for pain and suffering, based only on evidence of the nausea and itching common to any operative procedure. Although plaintiff is correct that he introduced evidence of significant future earnings of his wife, the jury awarded the wrongful death beneficiaries much less than the evidence might have warranted. The inescapable conclusion is that a confused jury prejudicially disregarded its instructions.

On this record, then, the judgment against MBMC cannot stand. Judgment should be awarded here to MBMC, or this action should be remanded for a new trial.

ARGUMENT

I. THIS RECORD DOES NOT SUPPORT A JUDGMENT OF LIABILITY AGAINST THE NURSES.

A. Plaintiff presents no lawful basis for exonerating the doctors while holding the nurses liable.

Plaintiff argues the nurses' supposed deficiencies at great length, asserting "that these breaches caused Ellen [Kelly] to be exposed to latex and latex containing products, which lead [*sic*] to an anaphylactic reaction and respiratory arrest, and thus proximately caused her death." Pl.Br. 16. What plaintiff fails to explain is how the jury validly could have found that the doctors did not share the nurses' responsibility for her "expos[ure] to latex and latex containing products." If such exposure "proximately caused her death," then the doctors share liability as a matter of law. The jury's exoneration of the doctors is simply inconsistent with the facts plaintiff claims the jury found.

It does not suffice to say, as plaintiff does, that "[t]he MBMC nurses had the *independent* duties to assess Ellen for latex allergy or sensitivity." Pl.Br. 15 (emphasis in original). MBMC has already told this Court exactly the same thing: "Certainly, nurses owe duties to their patients independent from duties delegated to them by the patients' doctors." Def.Br. 15. However,

plaintiff's brief ignores the fact that the doctors have their own independent duties as a matter of Mississippi law. Plaintiff's own Instruction No. 18 required the jury to determine whether the doctors "failed to obtain a complete clinical history and identify Ellen Kelly as at risk for latex, if any." R.1514. Indeed, our law provides that "each physician has a non-delegable duty to render professional services" such as "history, ... diagnosis, ... course of treatment." *Hall v. Hilbun*, 466 So. 2d 856, 871 (Miss. 1985). If "expos[ure] to latex and latex containing products ... proximately caused her death," Pl.Br. 16, as plaintiff contends, then the doctors plainly breached their non-delegable duty to take a proper history, make a proper diagnosis, and administer a proper course of treatment.

Plaintiff denies none of this. Plaintiff contends only that the jury could ignore it:

> 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 [*sic*] the hospital's Latex Alert Precautions ....

Pl.Br. 16.[2] Whether or not it is understandable that the jury exonerated the doctors, it was not the jury's prerogative to ignore the doctors' non-delegable duties. MBMC's counsel plainly raised this argument at the hearing on post-trial motions, noting that "the jury surmising that the physicians had not been properly informed exonerated those physicians and casted [*sic*] MBMC MBHS in a sole fault contrary to Your Honor, so we submit to the law and the facts." T.918. Based on the facts that plaintiff claims the jury found, Mississippi law does not allow imposition of sole fault on the nurses.

The real explanation for the jury's behavior is likely found in *Magnolia Hosp. v. Moore*, 320 So. 2d 793 (Miss. 1975), a case which plaintiff completely ignores. "The jury's natural

[2] The assertion that the allergy information "is nowhere noted in the doctor's chart for Ellen" squarely admits that the doctors failed to take a proper history, under plaintiff's view of the facts.

sympathies in the case may have found expression in its inconsistent verdicts whereby Dr. Hamrick was exonerated and a verdict was rendered against the hospital." *Id.* at 800. Natural sympathies cannot save an inherently inconsistent verdict. Although plaintiff attempts to distinguish on their facts the cases of *Gallagher Bassett Services, Inc. v. Malone*, 30 So. 3d 301 (Miss. 2010), and *First Bank of Sw. Miss. v. Bidwell*, 501 So. 2d 363 (Miss. 1987), Pl.Br. 17-18, the brief makes no attempt to undermine the legal principle established by those cases. Because such an inconsistent verdict cannot stand under our law, MBMC is, at least, entitled to a new trial.

B. Plaintiff's failure to prove causation requires a defense judgment or a new trial.

Plaintiff claims that latex killed Ellen Kelly, but plaintiff has not proven that the nurses' conduct in any way caused the doctors to use latex in the operating room and in their treatment of their patient. Remarkably, plaintiff admits that the doctors affirmed that their conduct was not influenced by the nurses. "The fact that the doctors now testify they would do nothing *is after the fact*." Pl.Br. 19 (emphasis in original). To the contrary, the best evidence of what the doctors would have done in 2000 is what the record shows they did in 1997. As plaintiff emphasizes, the MBMC nurse who took Ellen Kelly's history in 1997 recorded the patient's belief that she was allergic to latex, Ex. P-1 at 454, and that record reflects no latex precautions taken by these very same doctors.[3]

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[3] Plaintiff chose not to challenge their testimony before the jury, probably because of what Dr. Ingram had already said in his deposition. He confirmed that he "probably would not have done anything differently" had he been told that she was allergic to chestnuts, and he explained his reasons:

> Because of my association with this lady since [1997], her examinations in the office. She never manifest any type of the reactions associated with latex during her examinations in the office, during her cesarean [*sic*] section, follow-up examinations in the office. She never had any of the symptoms associated with that.

R.2050 (date corrected on record).

Plaintiff adds that "it is up to the jury to decide to believe or not believe the doctors," Pl.Br. 19, so presumably plaintiff thinks that the doctors would have done something different had the nurses done something different. Certainly, the jury is the judge of credibility, but plaintiff offers no explanation of why the doctors would lie to their own disadvantage. It would have been easy for the doctors to blame the nurses for failure to deliver sufficient information, but the doctors did no such thing. They testified that they took their own histories and that they made their own decisions based on those histories. Plaintiff cannot begin to explain why the jury would have disbelieved that testimony or how to reconcile this verdict with those undisputed facts.

In any event, disbelief is not sufficient to carry the burden of proof. A jury is always free to disbelieve witnesses, but a plaintiff must produce affirmative evidence in support of his allegations. "It is settled ... that 'disbelief of a witness's testimony is not sufficient to carry a plaintiff's burden.'" *Mato v. Baldauf*, 267 F.3d 444, 451-52 (5th Cir. 2001) (per Jolly, J.), quoting *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 965 (5th Cir. 1995). Indeed, our Court of Appeals held earlier this year that a plaintiff must present expert testimony to prove that a nurse's failure to communicate with a doctor proximately caused an injury:

> To establish her prima facie case, Griffin had to offer expert testimony to establish that had Crenshaw timely recognized the blood loss and timely warned a surgeon, the surgeon would have intervened, and that intervention would have, more likely than not, saved her mother's life.

Griffin v. N. Miss. Med. Ctr., No. 2009-CA-00672-COA, 2011 WL 135728 at *3 (Miss. App. Jan. 18, 2011). Plaintiff presented two expert witnesses, but neither of them nor any other witness said that the doctors would have invoked latex precautions in the operating room if the nurses had behaved differently. This record contains no evidence to support any such conclusion by the jury.

In any event, a jury's credibility findings must be made in the context of proper instructions on the substantive law. Plaintiff does not deny that *Wyeth Labs, Inc. v. Fortenberry*, 530 So. 2d 688, 691 (Miss. 1988), and *Ekornes-Duncan v. Rankin Med. Ctr.*, 808 So. 2d 955, 959 (Miss. 2002), establish that plaintiff has the burden to prove that a defendant's alleged negligence would have affected the conduct of the doctors. Nor does plaintiff deny that the jury should have been instructed of this principle under *Eckman v. Moore*, 876 So. 2d 975, 979-82 (Miss. 2004), and *Blake v. Clein*, 903 So. 2d 710, 719-20 (Miss. 2005). At the very least, then, MBMC is entitled to a new trial because of the Court's refusal of its Instruction MBMC-15. R.2319, T.834-35.

However, without citing any legal authority, plaintiff seems to argue that the nurses had a duty to protect Ellen Kelly from the doctors. "MBMC would have this Court believe that should a patient present to a hospital with a latex allergy (or any allergy) that the nurses and the 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*." Pl.Br. 19 (emphasis in original). MBMC says no such thing. The nurses are not allowed to do nothing; they are compelled to do exactly what the doctors say. The doctors are in charge of the operating room, and the Supreme Court has acknowledged that "the hospital was under a duty to carry out the orders of the attending physician." *Porter v. Pandey*, 423 So. 2d 126, 127 (Miss. 1982).[4] Plaintiff seeks a rule of law whereby the nurses must substitute their own judgment for that of the doctors or face potential liability in court. No

[4] This recognition is consistent with our statute defining the "practice of nursing" to include "the administration of medications and treatments prescribed by any licensed or legally authorized physician," while excluding "acts of medical diagnosis or prescriptions of medical, therapeutic or corrective measures." MISS. CODE ANN. § 73-15-5(2) (Supp. 2010). Although other language in *Porter* was criticized by the Supreme Court in determining that a hospital may be held vicariously liable for the negligence of doctors it employs, *Hardy v. Brantley*, 471 So. 2d 358, 373 & n.7 (Miss. 1985), no decision of the Supreme Court has ever questioned the principle that hospital employees must execute doctors' orders.

such rule of law exists, and any such proposition is utterly inconsistent with the prescribed roles of physicians and nurses in actual medical practice.

The law places the doctors in charge of the care of the patient. These doctors truthfully testified that they accepted that responsibility and made their own decisions. Because nothing the nurses did affected those decisions, MBMC is entitled to entry of judgment in its favor.

C. The nurses violated no duty recognized by Mississippi law.

Plaintiff mischaracterizes MBMC's argument as a contention "that the only duty owed by the nurses was to notify the doctors of Ellen's latex allergy or sensitivity." Pl.Br. 20. To the contrary, MBMC emphasized that Instruction No. 15 allowed the jury to find a breach of any one of three separate duties, at least one of which does not exist. Def.Br. 27. The nurses plainly satisfied the other two.

Plaintiff asserts that Ellen Kelly would not have died "[i]f the nurses would have simply implemented The Latex Alert Precautions," Pl.Br. 21, required by MBMC's policies and procedures.[5] Indeed, Instruction No. 15 told the jury that failure to implement those procedures by itself would constitute a sufficient breach of duty to support a verdict against MBMC. However, as MBMC explained in its original brief, Def.Br. 26-27 & nn.21-22, MBMC's internal policies do not set the legal standard of care required by Mississippi law. Plaintiff's brief does not dispute this demonstration because it is indisputable. The erroneous instruction concerning MBMC's duties by itself requires reversal for a new trial. Def.Br. 27-28 & n.23.

However, because there is no evidence that the nurses violated the duties actually recognized by Mississippi law, judgment should be rendered here for MBMC. Although plaintiff is correct that Nurse Priester did not notify the doctors of Ellen Kelly's supposed latex

[5] The second nurse on whose testimony plaintiff relies, Christine Lang, Pl.Br. 20-21, testified only that she did not invoke the latex precautions. She was not asked whether she notified the doctors.

allergy, Pl.Br. 20, the record reflects that other MBMC nurses delivered that information to the doctors. Plaintiff's nursing expert, Dr. Patricia Beare, admitted that the record of Kelly's 1997 admission "said a latex allergy," T.499,[6] and that the record was delivered to her doctors. T.501. No evidence in this record would have permitted the jury to regard the delivery of her record as outside the boundaries of minimally acceptable care. As Dr. Beare concluded, if the doctors "chose to ignore it, that is [their] responsibility." T.489.

For multiple reasons, then, the verdict against MBMC is unsupportable. Judgment should be entered here for MBMC, or, at a minimum, the case should be remanded for a new trial on proper instructions.

II. FOR MULTIPLE REASONS, KELLY'S BROOKHAVEN MEDICAL RECORDS ARE RELEVANT TO SHOW THAT SHE HAD NO LATEX ALLERGY.

Plaintiff completely ignores Dr. Gershwin's expert testimony that the jury should have had access to all of Ellen Kelly's medical records. T.434. Instead, plaintiff falsely asserts that the records from the hospital and doctors in Brookhaven contain "nothing showing that Ellen Kelly was exposed to latex." Pl.Br. 22. To the contrary, the records for several reasons undermine the claim that Ellen Kelly was killed by an allergic reaction to latex.

It is not merely common sense that confirms that she would have been exposed to latex during three hospital visits in 1989, 1994, and 1999. Hospital records excluded from evidence expressly reveal that she was exposed to a Foley catheter on September 11, 1989. Ex. D-7(ID). Dr. Gershwin himself confirmed that a Foley catheter is made of latex. T.398. Kelly nevertheless survived this exposure without an allergic reaction.

Moreover, the Brookhaven records show that the symptoms Kelly exhibited after her

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[6] The third duty recognized by Instruction No. 15 was "to properly assess or identify Ellen Kelly as at risk for latex allergy or sensitivity, if any." R.1511. Because nurses have no authority to diagnose medical conditions, this language is somewhat questionable, but any duty was plainly satisfied by the record notation of a latex allergy.

2000 surgery are not necessarily attributable to an allergic reaction. Although Dr. Gershwin attributed her nausea and itching at MBMC to a latex allergy, T.406-08, exactly the same symptoms were recorded after her 1989 surgery in Brookhaven. Ex. D-7(ID). The records tend to show that these normal post-surgical reactions have nothing to do with latex.

Recognizing the weakness of the relevance argument, plaintiff claims that MBMC suffered no prejudice because its counsel was allowed to use the records to cross-examine plaintiff's witnesses. Pl.Br. 23. Of course, in the very portions of the transcript on which plaintiff relies, her husband denied knowing whether she suffered any complication from her surgery in 1989, T.529-30, and Dr. Beare refused comment on the meaning of the records. T.499. In any event, the only legal authority on which plaintiff relies, *Byrom v. State*, 863 So. 2d 836, 871 (Miss. 2003), held that the relevant documents were properly excluded, not that the ability to cross-examine rendered an improper exclusion harmless. Here, the improper exclusion of the Brookhaven medical records was by no means corrected by the refusal of adverse witnesses to address them.

As Dr. Gershwin said, the jury should have been able to review all of Ellen Kelly's medical records. The exclusion of the Brookhaven records requires a new trial.

III. PLAINTIFF FAILS TO DEFEND THE COURT'S RULINGS ON DAMAGES.

Plaintiff complains that MBMC has failed to say "exactly what error they are alleging the trial court did," Pl.Br. 24, but MBMC's issue regarding damages is plainly declared at the outset of the brief, as M.R.A.P. 28(a)(3) requires:

> 3. Whether a new trial is required where the jury awarded $4,145,395.60 in pain and suffering damages despite insufficient evidence of conscious pain and suffering, where the jury was allowed to award damages for mental anguish and lost household services despite no evidence of either, and where the Court improperly refused to allow the jury to assign fault to the anesthesiologist.

Def.Br. 1. Plaintiff fails to defend the Circuit Court's action in any of these three respects.

First, MBMC challenges, not the authority of the jury to award damages for pain and suffering, but the sufficiency of the evidence to support the massive amount the jury actually awarded. At no point in the brief does plaintiff dispute the mathematical fact that the jury awarded the Estate $4,145,395.60 for Ellen Kelly's conscious pain and suffering. Neither does plaintiff dispute that she never regained consciousness after her cardiorespiratory arrest early on the morning of July 11, 2000. The only pain and suffering plaintiff identifies from the record before her loss of consciousness are "itching, redness, blister, and nausea," Pl.Br. 25,[7] symptoms which were so insignificant that her husband saw no need to notify any medical practitioner. T.530-31. Plaintiff cites not a single case supporting any significant award of damages for such symptoms.[8]

Plaintiff's real argument seems to be that the jury was entitled to ignore the legal distinctions drawn in Instruction No. 28 "in awarding damages between the wrongful death beneficiaries in the estate." Pl.Br. 27. Because all of the individuals receiving the award are identical,[9] the jury's error in awarding the Estate millions of dollars for pain and suffering

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[7] Plaintiff also argues that "[h]eart arrhythmia ... is characterized by severe chest pain," Pl.Br. 26, but provides no citation to the record supporting that assertion. It is true that, after her arrest, Ellen Kelly "remained dependent on a machine in order to breathe," but it is not true that she "suffered...in a vain attempt to breathe." *Id.* Dr. Tim Cannon, the pulmonologist, testified that her lungs "continued to be normal" with the help of the machine. T.697.

[8] Moreover, the Court erroneously withheld from the jury the Brookhaven medical records revealing that Ellen Kelly had experienced exactly those same symptoms after earlier surgery under anesthesia which is a normal, expected response to morphine. MBMC should have been allowed to use those records to argue that the symptoms had nothing at all to do with any latex allergy.

[9] Although Instruction No. 11 told the jury that the heirs of the Estate were the same individuals as the wrongful death beneficiaries, it did not tell the jury in what proportions the heirs would divide the Estate. That was evidently very important to the jury in light of their question: "[C]an we say that the children get this and the husband gets this?" T.898. Indeed, because Instruction No. 11 defines the "Kelly Family" to include both "the wrongful death beneficiaries and estate heirs of Ellen Kelly," they may have been further confused by the verdict form requiring them to distinguish between the "Kelly Family" and the "Estate of Ellen Kelly."

instead of, for instance, millions of dollars in lost wages to the wrongful death beneficiaries is said to be "harmless." *Id.* Plaintiff cites no case explaining the circumstances in which an error by the jury can ever be considered harmless. In the only Mississippi case on the subject, *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954 (Miss. 1999), the jury returned a handwritten verdict on a separate sheet of paper, instead of using the printed form provided by the Court. *Id.* at 967. "The only difference between the form of the verdict given to the foreman to fill out and the handwritten jury verdict was the order of the responses regarding duplication of awards." *Id.* at 969. The Supreme Court declared any error to be harmless because it had no effect on the award of damages. *Id.* Here, by contrast, the jury's error was to award more damages for pain and suffering than the law and the evidence can possibly support. Nothing about that error is harmless.

MBMC does argue that Instruction No. 28 improperly allowed the jury to award damages for mental anguish and loss of services because the record contains no evidence of either. Plaintiff cites not a single witness who presented evidence of mental anguish, nor a single case allowing a jury to assume mental anguish in the absence of evidence. To the contrary, the Supreme Court has said, "Mental anguish is a nebulous concept and requires substantial proof for recovery." *Wilson v. Gen. Motors Acceptance Corp.*, 883 So. 2d 56, 64 (Miss. 2004), quoting *Morrison v. Means*, 680 So. 2d 803, 805 (Miss. 1996). Although plaintiff's expert J. Elbert Bivins analyzed government statistics concerning the value of services performed by a woman statistically similar to Ellen Kelly, he offered no evidence concerning the services the real Ellen Kelly actually performed. In fact, when questioned about actual expenses for asserted lost services, Bivens replied, "No, none of that was my concern." T.291. Bivins possessed the qualifications necessary to make such an expert analysis; he simply failed to perform it.

As for the anesthesiologist, Dr. McLeod, plaintiff is certainly correct that sufficient

evidence is required to include his name in the jury form as a potentially liable person. That evidence unquestionably appears in this record. Dr. McLeod's own notes showed his awareness that Ellen Kelly claimed to be allergic to "some adhesive tapes," Ex. P-1 at 73, R.E.10, and plaintiff's expert Dr. Gershwin testified that allergy to adhesives is "a warning of latex allergy." T.396. Based on that evidence, MBMC's counsel requested an instruction adding a blank to assign percentage of fault "to other parties not present." T.831. Because MBMC was entitled to rely on plaintiff's expert to seek an appropriate instruction allocating fault under MISS. CODE ANN. § 85-5-7(5) (Supp. 2010), *Blailock ex rel. Blailock v. Hubbs*, 919 So. 2d 126, 131 (Miss. 2005), the Circuit Court prejudicially erred in denying the requested instruction.

For all of these reasons, the jury's assessment of damages to MBMC cannot stand. A new trial is required.

IV. PLAINTIFF'S INABILITY TO FIND RECORD SUPPORT FOR THE JURY'S VERDICT WARRANTS A NEW TRIAL.

Part IV of MBMC's original brief fully demonstrates that "the verdict exhibits bias, passion, prejudice and confusion and is contrary to the overwhelming weight of the evidence." Def.Br. 1. The excessive nature of the jury's award for pain and suffering, fully demonstrated in Part III of this brief and of MBMC's original brief, merely constitutes one indication of the jury's failure to adhere to the law and evidence as instructed by the Court. Accordingly, plaintiff's unsuccessful attempt to demonstrate that the total amount of the judgment might not be excessive had the jury followed instructions entirely misses the point. Because the jury failed to follow instructions, from either confusion, bias, passion, or prejudice, a new trial must be ordered.

Aside from its mathematical inconsistency, plaintiff's analysis of prior Mississippi damage awards, Pl.Br. 31, confuses the proportionality analysis required for punitive damages with review of other non-economic damages. Consistent with the mandate of the Supreme Court

of the United States, Mississippi considers the ratio between punitive damages and compensatory damages. *Cooper Tire & Rubber Co. v. Tuckier*, 826 So. 2d 679, 691 (Miss. 2002) ("this punitive award damages award was nearly ten times the compensatory damages award"), citing *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996). *See also Miss. Power & Light Co. v. Cook*, 832 So. 2d. 474, 485-487 (Miss. 2002) (on compensatory damages of $150,000, remitting punitive damages from $5,000,000 to $500,000). No case cited by plaintiff holds that the propriety of an award of non-economic damages may be determined by its ratio to economic damages. Even in *Estate of Jones v. Phillips ex rel. Phillips*, 992 So. 2d 1131 (Miss. 2008), the only cited case which actually mentions the ratio between economic and non-economic damages, the Supreme Court carefully explained the evidence supporting a multiple of eleven to one:

> The jury heard proof that Mr. Phillips suffered severe, recurring headaches from March 17, 2000, until he entered the hospital again on March 28. He then lived in a *persistent vegetative state* for almost two years. He could not care for himself and required a breathing machine and feeding tube to keep him alive. His wife Mary and his son Tyson, together with home health agencies, cleaned, fed and cared for Mr. Phillips and maintained his medical equipment.

Id. at 1150 (emphasis in original). The proof in this record does not begin to approach that standard.[10]

In any event, the form of analysis advocated by plaintiff demonstrates the jury's failure to adhere to the law and the evidence. The award of pain and suffering damages to Ellen Kelly's Estate is approximately 140 times her medical and funeral expenses of $29,604.52. No case cited by plaintiff comes near endorsing such a disparity. Although the Circuit Court admitted

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[10] At least two of the large damage awards cited by plaintiff, *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611, 621-22 (Miss. 2001), and *Gen. Motors Corp. v. Jackson*, 636 So. 2d 310, 315 (Miss. 1992), include awards for the loss of enjoyment of life, a type of damages not authorized by Instruction No. 28 and now prohibited by MISS. CODE ANN. § 11-1-69(2) (Supp. 2010). Another case reviewed, not a jury verdict, but an additur awarded by the Circuit Court. *Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1160 (Miss. 1992). No rule governing the analysis of jury verdicts emerges from this eclectic assortment of damage awards.

evidence of almost two and a half million dollars in lost income and household services, the jury chose to award her wrongful death beneficiaries only $516,000.

Plaintiff achieves a total damages ratio of "less than two (2) times special damages presented," Pl.Br. 31, only by ignoring the Supreme Court's careful teaching in its unanimous decision in *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004). The distinction drawn between the damages payable to the Estate and those payable to the statutory beneficiaries, *id.* at 169, can make a substantial difference in many cases. *See, e.g., Willing v. Estate of Benz*, 958 So. 2d 1240, 1255-57 (Miss. App. 2007) (vacating fee award to attorney who did not represent all beneficiaries). The fortuity that the same people comprise both groups in this case did not entitle the jury to ignore the distinctions mandated by Instruction No. 28.[11]

Plaintiff's only response to the overwhelming evidence against the jury's determination that latex caused Ellen Kelly's death is to cite the qualifications of the two experts. MBMC's brief challenged neither the experts' qualifications nor the sufficiency of Dr. Gershwin's testimony to raise a jury issue on the cause of death.[12] Plaintiff does not dispute that, where technically sufficient evidence is outweighed by overwhelming contrary evidence, in this case by the hands-on observations and opinions of every physician who treated Ellen Kelly, a new trial may be ordered. *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 61 (Miss. 2004). Indeed, significantly weak evidence can lead to a defense judgment. *Univ. of Miss. Med. Ctr. v. Gore*, 40 So. 3d 545 (Miss. 2010).

The fatal problem with this verdict, resting as it does on extremely weak evidence, is the jury's indisputable failure to follow the Circuit Court's instructions based on *Long v. McKinney*.

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[11] Even in this case, the distinction may make some practical difference, since the massive award to the Estate, like any other asset, is subject to judicial administration and the claims of Ellen Kelly's creditors. *Long*, 897 So. 2d at 175.

[12] Patricia Beare, as a nursing expert, could not and did not offer an opinion on cause of death.

Because such a verdict is such a nullity, *Dedeaux v. Pellerin Laundry, Inc.*, 947 So. 2d 900, 908 (Miss. 2007), citing *Odom v. Roberts*, 606 So. 2d 114, 122 (Miss. 1992) (Banks, J., dissenting), MBMC is entitled to a new trial on all issues.

V. THE CIRCUIT COURT'S AWARD OF INTEREST MUST BE REVERSED.

If this Court orders judgment here for MBMC, as it should, then it will not need to address the Circuit Court's erroneous award of 8% interest from the date of verdict. Any other disposition of this appeal will require this Court to address the Circuit Court's errors in this regard. In defending those errors, plaintiff ignores the Supreme Court's opinion earlier this year in *Bluewater Logistics, LLC v. Williford*, 2008-CT-00250-SCT, 2011 WL 240731 (Miss. Jan. 27, 2011), and advances an interpretation of MISS. CODE ANN. § 75-17-7 (Rev. 2009) that has not been adopted by any court since the statute was amended 22 years ago.

The Circuit Court ordered interest to run from the date of verdict. R.1722-23, R.E.4. Interest of $29,816.76 accumulated before the date of the original judgment, and total interest of $137,774.03 accumulated before a final and appealable judgment went into effect on October 14, 2009. R.1949, R.E.6. The Court of Appeals has unequivocally stated, "There is no authority to award interest on judgment on an unliquidated claim until the judgment is entered." *Jones v. Jones*, 904 So. 2d 1143, 1150 (Miss. App. 2004). Plaintiff argues that the 1989 amendment to § 75-17-7 allows a trial court to award prejudgment interest in all cases. Pl.Br. 36. No Mississippi appellate decision has ever held that the 1989 amendment repealed the long-standing prohibition against prejudgment interest on unliquidated claims.[13] Both the Supreme Court and the Court of Appeals have reiterated that prohibition on multiple occasions since the 1989 amendment. *Coho Resources, Inc. v. McCarthy*, 829 So. 2d 1, 19-20 (Miss. 2002); *Warwick v. Matheney*, 603 So.

[13] Just last year, the Supreme Court noted that the 1989 amendment "require[d] trial judges to set a reasonable rate of interest." *Stewart v. Prudential Life Ins. Co.*, 44 So. 3d 953, 958 n.1 (Miss. 2010).

2d 330, 342 (Miss. 1992); *Gulf City Seafoods, Inc. v. Oriental Foods, Inc.*, 986 So. 2d 974, 980 (Miss. App. 2007); *Southland Enters., Inc. v. Newton County*, 940 So. 2d 937, 943 (Miss. App. 2006). Plaintiff cites no case that suggests that prejudgment interest may now be awarded in actions involving unliquidated claims.

Instead, plaintiff simply asserts that this claim became liquidated on the date of verdict. Pl.Br. 37. Likewise, the claim in *Grice v. Cent. Elec. Power Ass'n.*, 230 Miss. 437, 92 So. 2d 837 (1957), became equally liquidated when the jury returned its verdict. However, when the Supreme Court reinstated that verdict, it awarded interest, not from the date of the verdict, but from "the date of the judgment entered in this Court." *Grice v. Cent. Elec. Power Ass'n.*, 230 Miss. 437, 458, 96 So. 2d 909, 911 (1957). Plaintiff answers only that *Grice* is an old case, Pl.Br. 38, but no appellate decision criticizes *Grice* or accepts plaintiff's argument that interest may be awarded from the date an unliquidated claim becomes liquidated.

As for the 8% rate, plaintiff acknowledges the Supreme Court's holding in *Bluewater* that the trial court must consider "market conditions and other relevant factors." *Bluewater*, 2011 WL 240731 at *13, ¶74. Plaintiff observes that Ellen Kelly died in 2000, but makes no argument that MBMC is in any way responsible for the nine years it took plaintiff to bring the case to trial. Plaintiff makes certain unsubstantiated allegations about the movement of stock prices since the verdict, but offers no evidence concerning actual interest rates over that period. Indeed, the only actual evidence of "market conditions and other relevant factors" was placed into this record by MBMC without objection. It showed multiple rates in the real world far under 8%, including a current judgment rate in federal court of 0.48%. R.1746-49, R.E.5.

MBMC does not suggest that this Court should order the enforcement of the federal rate. Instead, it should do exactly what the Supreme Court did in *Bluewater*: "[W]e must reverse the award of post-judgment interest and remand for a determination of post-judgment interest at a

rate that complies with the requirements of the statute." *Id.* at *14, ¶75. *Accord, Watson v. Watson*, 882 So. 2d 95, 111 (Miss. 2004) (requiring reexamination on remand "in light of today's prevailing interest rates"). In the event there should be a need for the Circuit Court to consider a post-judgment interest rate on remand, all parties will be entitled to offer relevant evidence and argument.

CONCLUSION

For the reasons stated herein and in MBMC's original brief, this Court should reverse and order judgment in favor of MBMC. In the alternative, this Court should remand for a new trial on all issues. Further in the alternative, this Court should vacate the award of interest and remand for reconsideration of an award of interest at an appropriate rate from the date of judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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TRIAL COURT JUDGE

THIS the 11TH day of April, 2011.

Michael B. Wallace

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