IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

NO. 2010-CA-00621

LUTRICIA MAGEE, INDIVIDUALLY,
AND ON BEHALF OF THE WRONGFUL
DEATH BENEFICIARIES OF LONNIE C.
MAGEE, JR., DECEASED, AND ALL OTHERS
WHO ARE ENTITLED TO RECOVER UNDER
THE WRONGFUL DEATH AND SURVIVAL STATUTE — APPELLANT

V.

GREEN TREE FAMILY MEDICAL CLINIC, PLLC, D/B/A
GREEN TREE FAMILY MEDICAL ASSOCIATES, AND
COVINGTON COUNTY HOSPITAL — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF COVINGTON COUNTY MISSISSIPPI

BRIEF OF APPELLEE, COVINGTON COUNTY HOSPITAL

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V.

GREEN TREE FAMILY MEDICAL CLINIC, PLLC, D/B/A GREEN TREE FAMILY MEDICAL ASSOCIATES, AND COVINGTON COUNTY HOSPITAL **APPELLEES**

CERTIFICATE OF INTERESTED PERSON

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

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9. Green Tree Family Medical Clinic, P.L.L.C.
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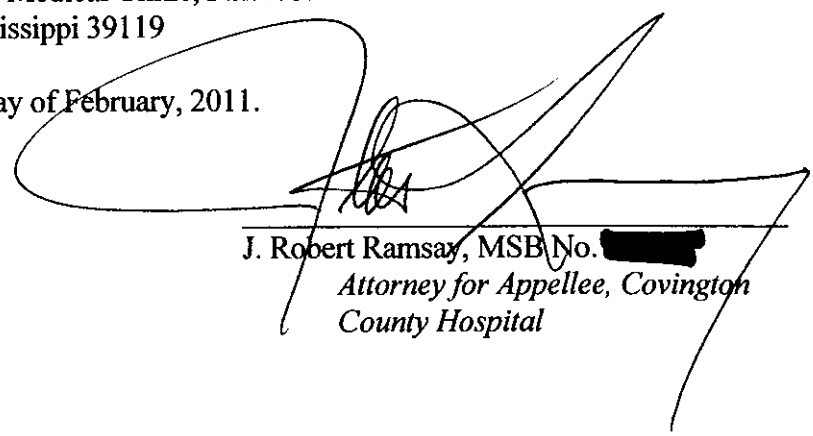
So Certified this the 17th day of February, 2011.



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PRELIMINARY STATEMENT

In her brief, the Appellant barely mentions Covington County Hospital ("CCH"), makes no assignment of error in her "Statement of Issues" regarding the entry of Judgment by the Trial Court, as the fact finder, in favor of CCH, a governmental entity, nor presents a prayer for relief reversing the Trial Court's entry of Judgment in favor of CCH. As such, CCH asserts that Appellant has waived her right to appeal the Trial Court's entry of Judgment in favor of CCH. *Moore v. State*, 996 So. 2d 756, 760 (¶11) (Miss. 2008) (citation omitted) ("[W]here an assignment of error is not discussed in the briefs it is considered abandoned or waived."); *See also Edwards v. Harrison County Bd. of Supervisors*, 22 So. 3d 268, 272 n.3 (Miss. 2009)).

Furthermore, Bettye Logan ("Logan") is not a party to this appeal. On May 7, 2009, the Trial Court entered a Final Judgment finding that Logan at all relevant times was an employee of Covington County Hospital, a community hospital and thus a "governmental entity" as defined by §11-46-10, Miss. Code Ann. (2008); that her activities at the Green Tree Family Medical Clinic on August 7, 2007, were within the scope of her employment with CCH; and therefore, Logan was dismissed as an individual defendant who may be personally liable in this action. The time has long passed for an appeal as to this Order and Judgment.

On November 10, 2009, the Trial Court entered an Order clarifying the Order and Judgment enrolled May 7, 2009; however, this Order did not alter in any manner the final dismissal of Bettye Logan as an individual defendant in this action. Further, as with CCH, in her brief, the Appellant makes no assignment of error as to the dismissal of Logan, individually, and presents no prayer for relief against Logan as to this clarification Order. Contrary to Appellant's assertion in her Statement of Issues No. 1, Logan filed no motions subsequent to the Trial Court's May 7, 2009 Order and Judgment in which she was dismissed, and specifically, *did not file a post trial Motion for JNOV.*

In the event that this Court were to find that Appellant has not waived the issue with regard to the Trial Court's entry of Judgment in favor of CCH, Appellant's claims against CCH still fail. There is ample evidentiary support for the Court's factual findings upon which the Trial Court concluded that Judgment should be rendered in favor of CCH.

STATEMENT OF ISSUES

I. WAIVER OF CLAIMS AS TO CCH

Pursuant to the Mississippi Tort Claims Act, §§11-46-1, *et seq.* ("MTCA") and M.R.C.P. 52(a), after trial, CCH filed its Motion for Entry of Judgment with proposed findings of fact and conclusions of law. Appellant moved to strike CCH's motion as improper and confusing because Green Tree (not CCH) was liable for Logan's actions, as its borrowed servant. Appellant has therefore waived this issue. In Appellant's Brief, Appellant barely mentions CCH, makes no assignment of error in her Statement of Issues with regard to the Trial Court's entry of Judgment in favor of CCH, and presents no prayer for relief from and/or a reversal of the Trial Court's entry of Judgment in favor of CCH. Can she now appeal the Trial Court's granting of CCH's Motion for Entry of Judgment, and Judgment in favor of CCH?

II. WHETHER THERE WAS A LACK OF SUBSTANTIAL, CREDIBLE AND RELIABLE EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS

Pursuant to §11-46-13 Miss. Code Ann. (2008), are the Trial Court's bench findings of fact as to CCH entitled to the same deference as a jury and not to be reversed unless manifestly wrong? Was there substantial, credible and reliable evidence presented which supported the Trial Court's findings of fact supporting its entry of Judgment in favor of CCH?

III. MEDICAL NEGLIGENCE OR INSURER OF RESULTS

Under Mississippi law, a healthcare provider is neither an insurer nor a guarantor with regard to all potential adverse outcomes that may occur following an examination or treatment by that healthcare provider. With regard to CCH, its employee, Logan, performed the Pre-

participation Physical Evaluation ("PPE") for Lonnie Magee ("Magee") on August 7, 2007, in which both he and his mother (Appellant), failed to provide vital medical information and withheld critical historical information, including but not limited to his recent history of hypertension, heart abnormalities and treatment therefor. Can CCH be vicariously liable for Magee's subsequent death during football practice caused by heat stroke with secondary conditions of hypertension and obesity?

STATEMENT OF THE CASE

A. Nature of the Case

This action arises from the death of Lonnie C. Magee, Jr. ("Magee"), a 17 year old student football player at Mount Olive Attendance Center in Mount Olive, Mississippi, on August 8, 2007. The Plaintiff, Lutricia Magee ("Appellant"), Lonnie Magee's mother, filed suit, in the Circuit Court of Covington County, Mississippi, ultimately naming Green Tree Family Medical Clinic, PLLC d/b/a Green Tree Family Medical Associates ("Green Tree") and Bettye Logan, FNP, ("Logan"), an employee of Covington County Hospital ("CCH"), and CCH, alleging negligence (medical malpractice) on the part of Green Tree and Logan in the performance of a "Sports Participation Physical Evaluation" of Lonnie Magee at Green Tree on August 7, 2007.

B. Statement of Facts

Magee was born with a heart murmur, and as a child, he suffered from asthma.[1] As early as age 4, Magee was taken to the Forrest General Hospital emergency room with complaints of chest pain.[2] Again on December 18, 1997, at age 7, Magee was taken to Forrest General Hospital for left-sided chest pain.[3] On September 1, 2000, at age 10, Magee was transported by

[1] (EXD-3; RE197)
[2] (EXD-6)
[3] (EXD-6)

ambulance from his school to the emergency room at CCH after he was "found lying on the sidewalk at [school] [with an] abrupt onset of mid[-]chest pain and near syncope[4] with a past medical history of asthma but currently on no medication.[5]

On September 3, 2003, Magee was brought to the Family Medical Associates Clinic in Collins, Mississippi by his mother, for a PPE. Beginning a pattern that would persist throughout, Magee and his mother denied that Magee had any history of chest pain or passing out during or after exercise, or asthma. Surely based in no small part on this misinformation, Dr. William K. Tordzro cleared Magee to participate in sports.[6]

On August 25, 2005, Magee presented to the Green Tree Family Medical Clinic in Mount Olive, Mississippi, for a PPE to play basketball. At that time, Magee was seen by Nurse Practitioner Oglesbee. In response to specific health questions asked, i.e. had he ever passed out or lost consciousness; ever been in the hospital; ever had any medical conditions; and/or taken any medication, Magee responded in the negative. The physical examination revealed that Magee's height was 6'4 inches, his weight 281 lbs. However, Magee's blood pressure on that date was 164/80. Nurse Practitioner Oglesbee noted that he needed to be evaluated by his primary provider for hypertension before playing or practicing sports.[7]

Subsequently, on November 10, 2005, Magee, **in the company of his mother**, presented to Family Medical Associates Clinic in Collins, Mississippi at which time he was seen by Dr. Brian B. Kerrigan. Dr. Kerrigan noted that Magee was at a screening to play basketball at the Green Tree Family Clinic, was found to have a systolic blood pressure of 164, and was advised to follow up with his regular physician. Dr. Kerrigan noted that Magee was a very big kid with a

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[4] "A temporary loss of consciousness, usually due to a failure in the blood supply to the brain. This may be caused by a sudden fall of blood pressure, skipped heart beats, etc . . . . Also called fainting." See 5-S Attorneys' Dictionary of Medicine, available at S-112542, LEXIS.

[5] (EXD-5)

[6] (EXD-2; RE184)

[7] (TR389-91; EXD-10; RE205)

height of 6'4 inches and a weight of 284 lbs. Dr. Kerrigan noted that **he asked Magee and his mother** if he had ever had any passing out incidents or had any history of asthma. **Magee and his mother responded in the negative.** Dr. Kerrigan noted that Magee's blood pressure on this date was 130/82. Dr. Kerrigan advised Magee and his mother that Magee should lose some weight and that he should more appropriately weigh 240-245 lbs rather than the 284 lbs; that Magee was going to have to be careful about his weight, and was going to have to exercise. Dr. Kerrigan reflected that Magee was "fit for basketball and I clear him today."[8]

On April 24, 2006, Magee**, in the company of his mother**, presented to the Family Medical Associates Clinic in Collins, Mississippi with complaints of headache and abdominal pain. At that time, Magee was seen by Dr. Tordzro. Dr. Tordzro noted that his weight on that date was 286 lbs. and that the single blood pressure measurement taken on that date was 182/90. It was Dr. Tordzro's impression that Magee may be suffering from hypertension; however, Dr. Tordzro noted that the last blood pressure obtained at Family Medical Associates (on 11/10/05) was only 130/82. Magee and his mother were requested to return to the Family Medical Associates Clinic on Friday, April 28, 2006 for another measurement of Magee's blood pressure.[9]

On April 28, 2006, Magee, **in the company of his mother,** returned to Family Medical Associates Clinic. At that time, Magee's blood pressure was noted to be 162/64. On physical exam, Dr. Tordzro noted that on auscultation, Magee demonstrated a significant *systolic heart murmur (III/VI).* Dr. Tordzro ordered an EKG. Dr. Tordzro reviewed the EKG and reflected that it was abnormal. Magee was given a prescription for high blood pressure medication, Hydrochlorothiazide (HCTZ), with 2 refills and was referred *immediately* to see a cardiologist, Dr. John R. Lovejoy (who came from Hattiesburg to Collins one afternoon a week) at CCH on

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[8] (EXD-10;RE206)
[9] (EXD-2;RE180)

that day. At the conclusion of this visit, Magee was given a return appointment with Dr. Tordzro for June 23, 2006.[10]

On that same day, April 28, 2006, Magee, **in the company of his mother,** was seen at CCH by Dr. Lovejoy, the cardiologist, on referral by Dr. Tordzro. At that time, **Dr. Lovejoy received a history from Magee and his mother that Magee did have a heart murmur at birth.** In the course of his physical examination, Dr. Lovejoy noted a *grade II/VI holosystolic murmur*; Dr. Lovejoy reviewed the EKG performed that day and reflected that the EKG demonstrated *left ventricular hypertrophy* (enlargement) with ST segment T-wave changes. Dr. Lovejoy believed that Magee suffered from possible malignant hypertension. Magee was scheduled for an echocardiogram and renal artery ultrasound at HeartSouth Clinic in Hattiesburg, Mississippi.[11]

On April 28, 2006, **Magee and his mother,** had the prescription ordered by Dr. Tordzro for blood pressure, HCTZ, filled (30 tablets to be taken once a day, with 2 refills) at Fred's Pharmacy, Collins, Mississippi. The records of Fred's Pharmacy reflect that this medication prescription was never refilled as directed.[12]

On May 3, 2006, Magee, **in the company of his mother**, presented to HeartSouth in Hattiesburg, Mississippi, at which time an echocardiogram and a renal ultrasound were obtained. The echocardiogram demonstrated concentric left ventricular hypertrophy with "near obliteration of the left ventricle in systole." The renal ultrasound demonstrated atherosclerosis of the bilateral renal arteries with hemodynamic evidence of less than 60% stenosis.[13]

On May 30, 2006, **Magee, in the company of his mother,** returned to see Dr. Lovejoy at the HeartSouth Clinic in Hattiesburg, Mississippi. Dr. Lovejoy noted that Magee was currently

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[10] (EXD-2;RE178)
[11] (EXP-10;RE197-198)
[12] (EXP-11;RE193-194)
[13] (EXP-10;RE199-200)

on the medication HCTZ; that Magee's blood pressure was only 118/60. Dr. Lovejoy noted that he encouraged Magee's mother to get a blood pressure cuff and to check Magee's blood pressure regularly. Dr. Lovejoy was still of the impression that Magee was possibly suffering malignant hypertension. Dr Lovejoy ordered CT angiography of the aorta and renal arteries and multiple laboratory testing.[14] Magee and his mother never presented to Wesley Medical Center to have this imaging/testing performed. Magee and his mother were a "no show" for the return appointment with Dr. Lovejoy for a repeat echocardiogram on November 29, 2006, at which time a card was mailed to Magee and his mother; Dr. Lovejoy's records reflect that the return appointment made for early December 2006 at HeartSouth, was canceled by the Magees.[15]

Magee did not return for his scheduled June 23, 2006, appointment with Dr. Tordzro (who had prescribed the HTCZ) at the Family Medical Associates Clinic. On that date, Dr. Tordzro's records reflect that a letter was sent to Magee and his mother advising of Magee's "no show" and the need to reschedule an appointment.[16]

On August 24, 2006, *only three months after being treated by the cardiologist*, **Magee in the company of his mother,** presented to the Green Tree Family Clinic in Mount Olive, Mississippi, for a PPE to play football and basketball. At that time, in response to the PPE questionnaire, i.e. have you ever passed out or lost consciousness; ever been in the hospital; have any medical conditions; take any medications, **Magee and his mother responded in the negative**. On that date, Nurse Practitioner Oglesbee also performed an EPSDT, Medicaid approved wellness physical (i.e., well-child exam), and updated Magee's immunization. In the course of the wellness physical, based upon the history obtained from Magee and his mother, Nurse Practitioner Oglesbee recorded that Magee had no significant past medical history, no

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[14] (EXP-10;RE195)
[15] (EXP-10)
[16] (EXD-2)

hospitalizations, no surgery, and no medications. Nurse Practitioner Oglesbee noted that she discussed with Magee and his mother the issue of obesity and that while Magee could play football, she discussed in detail with the Magees both diet and weight loss tips.[17]

On August 7, 2007, Magee presented to the Green Tree Family Clinic in Mount Olive, Mississippi, along with other student athletes for a PPE to play football. According to the testimony of Logan, while Appellant had signed the PPE form, the health questionnaire had not been answered; consequently, **Logan telephoned Appellant** with regard to the appropriate answers to the health questionnaire as to whether, by history, Magee had a heart murmur, experienced fainting while exercising, chest pain, or history of asthma or wheezing. All questions were noted to have been answered in the negative. On that date, Magee was weighed and his blood pressure taken. Magee's height was 6'5", weight was 297 lbs, and blood pressure was 140/86. Logan performed the standard limited physical evaluation for a PPE and reflected that there were no physical findings that should limit participation in contact/collision sports.[18]

On August 8, 2007, Magee collapsed while on the football practice field and was taken by ambulance to CCH in full cardiac arrest. Resuscitation efforts were unsuccessful and at approximately 17:14 hours, Magee was pronounced dead.[19] An autopsy was performed. The conclusion of the medical examiner and the cause of death subsequently listed on the Certificate of Death reflected "immediate cause of death: changes consistent with Heat Stroke. Contributory causes of death (1) hypertensive heart disease, severe, (2) morbid obesity, severe."[20]

C. Course of Proceedings

Soon after Magee's death, Appellant filed this action individually, and on behalf of the wrongful death heirs of Magee, in the Circuit Court of Covington County, Mississippi on

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[17] (TR395-402; EXP-4,P-6;RE202-204)
[18] (TR444-47; EXP-3;RE201)
[19] (EXP-1)
[20] (EXP-2)

February 6, 2008, Cause No. 2008-45(C) against the Covington County School District ("CCSD"). (R15) Appellant alleged negligence and *res ipsa loquitur* against CCSD.[21] On February 25, 2008, Appellant filed her First Amended Complaint, adding John Doe Persons and Entities. (R23) On July 3, 2008, Appellant filed her Second Amended Complaint adding Defendants Green Tree Family Clinic, PLLC ("Green tree"), Dr. Word Johnston, and Dr. Joe Johnston (sometimes referred to as the "Drs. Johnston"), Logan, John Doe Persons, and John Doe Entities (hereinafter sometimes referred to collectively as "Defendants").[22] (R193) In Appellant's Second Amended Complaint, she alleged that Logan breached the standard of care by releasing Magee to play sports on August 7, 2007, following a PPE, based upon the fact that he was six-feet-five-inches (6'5") tall and weighed approximately 300 pounds. (R198)

A Motion to Dismiss and Separate Answer on behalf of Logan, was filed on or about July 11, 2008. (R209) Logan asserted that at all times relevant to the events in the instant case, she was an employee of CCH, a community hospital and thus a "governmental entity" as defined in Miss. Code Ann. §11-46-1(i) (2008). (R209) Appellant's Motion to file a Third Amended Complaint, adding CCH as a defendant, was granted on or about December 23, 2008. (R539, 560) CCH is a community hospital as defined in Miss. Code Ann. §41-13-10 (1972), and as such, is subject to the limited waiver of immunity of the State and its political subdivisions pursuant to Miss. Code Ann. §11-46-1, *et seq.* Pursuant to §11-46-13 of the Mississippi Tort Claims Act ("MTCA"), the Trial Court was obligated to hear this suit sitting without a jury as to CCH and determine the Judgment as to CCH. (R1269;RE52)

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[21] This Court subsequently granted an Interlocutory Appeal for CCSD as to the Trial Court's Order Denying in Part and Granting In Part CCSD's Motion for Summary Judgment. (R258) On January 28, 2010, the Supreme Court reversed and rendered, finding that the Motion for Summary Judgment" by CCSD should have been granted in *toto*. (R1544-64). *Covington County School District v. Magee*, 29 So. 3d 1 (Miss. 2010).

[22] A Judgment of Dismissal with Prejudice was granted to the Drs. Johnston on October 20, 2009. (R1261) The trial transcript will be referred to as "TR" throughout the remainder of this brief.

On March 10, 2009, Logan and CCH filed a Motion for Partial Summary Judgment. (R626;RE115). An Order and Judgment was entered by the Trial Court on May 7, 2009, dismissing Logan individually, *with prejudice.* The Trial Court found her to be an employee of CCH, a governmental entity; that all of her activities at Green Tree in the performance of PPE's were within the scope of her employment with CCH; and, that Logan was entitled to individual immunity for any act or omission performed by her with respect to the allegations of the Complaint. (R937-40;RE111-114) The Trial Court further found that CCH would be vicariously liable for any alleged acts or omissions committed by Logan. (R937-40;RE111-114) The Order granting summary judgment was certified as "Final" pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure. Appellant did not appeal the Judgment. (R1565) On May 12, 2009, the Court entered a separate Order granting Partial Summary Judgment, confirming the dismissal of Logan, but reflecting that it was reserving ruling as to whether Logan was a "borrowed servant" of Green Tree on August 7, 2007. (R974-75;RE108)

A jury trial transpired October 19-22, 2009. (R1267) After the parties rested, during the jury instruction conference, the trial judge stated that he was going to amend the Order and Judgment enrolled on May 7, 2009, which had dismissed Logan with prejudice. (TR651) *Nunc pro tunc*, the Trial Court amended its prior order, and again ruled that on August 7, 2007, Logan was an employee of CCH, within the course and scope of her employment with CCH in the performance of the PPEs at Green Tree Family Clinic for student athletes of Mount Olive High School. (R1264;RE105-107) However, the Trial Court found that on August 7, 2007, in the performance of Magee's PPE, Logan was also a borrowed servant of Green Tree and it was a jury question whether Green Tree was vicariously liable due to Logan's acts or omissions. (R1264;RE105-107) The Trial Judge based this decision upon portions of a management agreement, or contract, for the provision by CCH of clerical and non-physician healthcare

personnel to Green Tree.[23] (R1264-1265;RE105-107) The Order clarifying the May 7, 2009, Order and Judgment, was entered on November 10, 2009. (R1264;RE105-107)

The Trial Judge determined that it would exclusively determine the findings of fact and Judgment as to CCH. For this reason, the case was submitted to the jury as to Green Tree only. The jury found that Appellant and Green Tree were each fifty (50) percent negligent and assessed the Appellant's damages to be $750,000. (R1136) Final Judgment was entered on November 12, 2009. (R1267-1268)

Pursuant to Miss. Code Ann. §11-46-13 (2008)[24] and Rule 52(a) of the Mississippi Rules of Civil Procedure, CCH filed a Motion for Entry of Judgment with proposed findings of fact and its conclusions of law. (R1269-1289;RE52-72) Appellant filed a Motion to Strike CCH's Motion for Judgment, asserting that it was improper and confusing. (R1532;RE10-13) CCH's Motion for Entry of Judgment was granted and Judgment entered in favor of CCH on March 17, 2010. (R1541;RE3) Appellant filed her Notice of Appeal on or about April 9, 2010. (R1565)

SUMMARY OF THE ARGUMENT

Appellant has waived her claims against CCH, as she aggressively argued post trial that CCH's Motion for Entry of Judgment was improper and confusing and that any alleged liability lay with Green Tree. As such, Appellant should be barred from raising any issue related to CCH on appeal. The law is clear that a party cannot take a position during litigation, in order to benefit from that position, and then seek to take a different position later.

Further, Appellant's brief does not even address any issue as to the Trial Court's factual

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[23] Never introduced at trial.

[24] Miss. Code Ann. § 11-46-13 (1) provides, as follows:

> Jurisdiction for any suit filed under the provisions of this chapter shall be in the court having original or concurrent jurisdiction over a cause of action upon which the claim is based. The judge of the appropriate court shall hear and determine, without a jury, any suit filed under the provisions of this chapter. Appeals may be taken in the manner provided by law.

findings and entry of Judgment in favor of CCH. The law is well settled that this Court will not address an issue raised by a party, when that party fails to cite authority for their argument, much less when that party fails to even state the issue or argument itself. Finally, prior to trial, Logan was dismissed individually and Appellant did not appeal that decision. Nor has Appellant appealed the Trial Court's finding that Logan was the borrowed servant of Green Tree, at the time of Magee's 2007 PPE. The law states that a borrowed servant is the servant of the borrower to the exclusion of the lender. Accordingly, Appellant has waived any right to appeal the Trial Court's ruling, as it relates to Logan individually or as to CCH.

Notwithstanding Appellant's waiver of any claims/issues as to the Judgment in favor of CCH (and for that matter, the Judgment previously entered on May 7, 2009, with regard to the immunity and dismissal of Logan, individually), there was substantial, credible and reliable evidence presented at trial supporting the findings of fact by the Trial Court, as the trier of fact as to CCH. The Trial Court's Judgment in favor of CCH is entitled to the same deference regarding his findings of fact as a jury, and will not be reversed unless manifestly wrong.

In addition, it is firmly established under Mississippi Law that before CCH could be held legally liable, the Appellant had the burden of proving that in the performance of Magee's PPE on August 7, 2007, the employee of CCH, Logan, deviated or fell below the standard of care of a reasonably prudent and minimally competent nurse practitioner under the circumstances then and there existing. *Hall v. Hilbun*, 466 So.2d 856, 869-71 (Miss. 1985). There was no credible evidence presented at trial supporting a theory of negligence against CCH.

STANDARD OF REVIEW

The Mississippi Tort Claims Act ("MTCA") is the exclusive remedy for filing a lawsuit against governmental entities. *Scott v. City of Goodman*, 997 So. 2d 270, 275 (¶13) (Miss. Ct. App. 2008) (citing *City of Jackson v. Powell*, 917 So. 2d 59, 69 (P36) (Miss. 2005)). "The judge

of the appropriate court shall hear and determine, without a jury, any suit filed under the provisions of this chapter. Appeals may be taken in the manner provided by law." Miss. Code Ann. §11-46-13. On Appeal, the findings of the Circuit Judge, sitting without a jury, is entitled to the same deference as a jury and will not be reversed unless manifestly wrong. *Mississippi Dep't of Transp. v. Johnson,* 873 So.2d 108, 111 (¶8) (Miss. 2004). "A decision of a circuit judge sitting without a jury falls under the manifest error standard of review." *McAllister v. Franklin County Memorial Hosp.*, 910 So.2d 1205 (¶10) (Miss. COA 2005), citing *Sweet Home Water and Sewer Ass'n v. Lexington Estates, Ltd.,* 613 So.2d 864, 871 (Miss. 1993) (other citations omitted). Questions of law are reviewed *de novo*, including the proper application of the MTCA. *Id.* (citing *Philips v. Miss. Dep't of Pub. Safety*, 978 So. 2d 656, 660 (¶13) (Miss. 2008)).

ARGUMENT

I. **WAIVER OF CLAIMS AS TO CCH:** Subsequent to trial, pursuant to the MTCA and M.R.C.P. 52(a), CCH filed its Motion for the Entry of Judgment in its favor. Appellant moved to strike CCH motion as improper and confusing because Green Tree was liable for Logan's actions as its borrowed servant. Appellant makes no assignment of error in her "Statement of Issues", nor makes any argument against or pray for reversal of the Judgment in favor of CCH. Appellant has waived these issues.

It is undisputed that CCH is a governmental entity. Pursuant to MTCA and M.R.C.P. 52(a), CCH filed its Motion for Entry of Judgment on or about November 12, 2009, after the trial of this matter.[25] Perhaps Appellant lost sight of the fact that the jury's verdict in favor of Appellant, assigning fifty (50) percent negligence for both Appellant and Green Tree, did not

[25] M.R.C.P. 52(a) provides, as follows: "In all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly."

address CCH and its liability, *vel non*.[26] Appellant aggressively moved the Trial Court to strike CCH's Motion for Entry of Judgment, and argued that CCH's motion was improper and confusing because the Court had held that Logan was a borrowed servant of Green Tree, and Green Tree was, therefore, vicariously liable for any act. (R1532;RE10) "[A] party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation." *Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495, 525 (¶94) (Miss. 2007)(citing *Richardson v. Cornes* (In re Estate of Richardson), 903 So. 2d 51, 56 (¶17) (Miss. 2005).

Moreover, in her brief to this Court, Appellant makes no assignment of error in her *Statement of Issues* and makes no argument to support a reversal of the Trial Court's grant of CCH's Motion for Entry Judgment. Moreover, while Appellant specifically prays that this Court will reverse the Trial Court's Order granting "JNOV" as to Green Tree, she makes no argument to support or prayer to reverse the Trial Court's granting of CCH's Motion for Entry of Judgment, and the entry of Judgment in favor of CCH. (Appellant's Brief at pp.11, 29) This Court has held that "[f]ailure to cite any authority in support of claims of error precludes this Court from considering the specific claim on appeal." *Grey v. Grey*, 638 So. 2d 488, 491 (Miss. 1994) (citation omitted). In this instance, Appellant has not only failed to cite authority to support any argument that the Trial Court erred in its findings and conclusions as to CCH, she has presented no argument as to this issue at all! Appellant has waived any claims against CCH. *Moore v. State*, 996 So. 2d at 760 (¶11) (Miss. 2008).

Appellant has also waived any right to appeal the Trial Court's dismissal of Logan individually. Judgment was entered May 7, 2009, finally dismissing Logan, individually. Her

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[26] In its *nunc pro tunc* Order filed on or about November 10, 2009, clarifying its earlier Order enrolled on or about May 7, 2009, the Trial Court found that Logan was a borrowed servant of Green Tree during Magee's PPE on August 7, 2007. (R1264;RE105)

dismissal was reaffirmed in the Trial Court's Order granting the Motion for Partial Summary Judgment on behalf of CCH and Logan on or about May 14, 2009. (R 974;RE108) In its *nunc pro tunc* clarification order, entered on or about November 10, 2009, the Trial Court determined that Logan was a borrowed servant of Green Tree, but otherwise simply affirmed its prior factual findings and dismissal of Logan in her individual capacity. (R1264;RE105) Appellant did not appeal either the Final Judgment entered May 7, 2009, or the *nunc pro tunc* Order rendered November 10, 2009, as it related to Logan.[27] Through her post-trial actions, Appellant has waived claims of vicarious liability as to CCH.

II. WHETHER THERE WAS A LACK OF SUBSTANTIAL, CREDIBLE AND RELIABLE EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS

Is the Trial Court's findings of fact as to CCH entitled to the same deference as a jury and not be reversed unless manifestly wrong? Was there substantial, credible, and reliable evidence presented which supported the Trial Court's findings of fact and Judgment in favor of CCH?

Having heard all of the evidence, the Circuit Court Judge, sitting without a jury (pursuant to MTCA, §11-46-13, Miss. Code. Ann. (2008), specifically made findings of fact that the evidence demonstrated:

> ... conclusively that the Plaintiff and Plaintiff's deceased withheld vital history and medical information on each of the occasions he was seen at Green Tree Family Medical Clinic... [and that] ... at the time of the Preparticipation Physical Evaluation by Nurse Practitioner Bettye Logan at Green Tree Family Medical Clinic on August 7, 2007, the record is clear that critical information was withheld from Nurse Practitioner Logan. All of the physician experts at trial, specifically including the Plaintiff's singular expert, Dr. Leggett, testified that the history obtained from the patient was critically important in a Preparticipation Physical Screening and that student athletes (and their parents) have an implicit duty to use reasonable care to protect their own health and safety as part of the

[27] When the Trial Court certified its order dismissing Logan individually pursuant to M.R.C.P. 54, it became a final judgment, and Appellant had thirty (30) days to appeal. *Busby v. Anderson*, 978 So. 2d 637, 639 (¶7) (Miss. 2008) (Mississippi Rule of Appellate Procedure 4(a) requires the notice of appeal to be filed with the clerk of the Trial Court within thirty days after the date of entry of the judgment or order being appealed. M.R.A.P. 4(a)); *See also Tandy Electronics, Inc. v. Fletcher*, 554 So. 2d 308, 309 (Miss. 1989)

> Preparticipation Physical process. As such, players and parents have a duty to be truthful in providing their medical history with accurate responses to the historical questions and any material information that may be pertinent to their health. (R1536-1538;RE5-7)

The Trial Court, sitting in a bench trial as the trier of fact, has the sole authority for determining the credibility of the witnesses. *McAllister v. Franklin County Memorial Hosp.*, 910 So.2d 1205 (Miss. COA 2005), citing *Rice Researchers, Inc. v. Hiter,* 512 So.2d 1259, 1265 (Miss. 1987).

Furthermore, the Trial Court's findings and entry of Judgment in favor of CCH is entitled to the same deference as that of a jury and, unless this Court finds that the Circuit Court Judge's findings of fact were not supported by substantial, credible and reliable evidence, the Judgment for CCH may not be reversed based upon manifest error. *McAllister v. Franklin County Memorial Hosp.,* 910 So.2d 1205 (Miss. COA 2005). The Trial Court's findings of facts and Judgment for CCH are supported by substantial, credible, in fact, irrefutable evidence.

The critical medical history of Magee has been set out in detail in the "**Statement of Facts**" and will not be repeated. However, the evidence and testimony presented at the trial of this matter clearly and irrefutably demonstrated that Magee indeed had a history of heart murmur, asthma throughout his childhood, chest pain, syncope, and hypertension. Yet, Magee and the Appellant, reported to Logan in response to specific health questions, that Magee **never** had (1) heart murmur, (2) chest pain, (3) fainting while exercising, (4) asthma, or (5) high blood pressure. Moreover, the overwhelming evidence demonstrated:

- the visits to Drs. Tordzro and Lovejoy in May 2006;
- the impression of, and prescription for high blood pressure (never refilled);
- the finding of abnormalities on the EKG;
- the subsequent visits to Dr. Lovejoy at HeartSouth;
- the findings on echocardiogram of "near obliteration of the left ventricle in systole";

- Dr. Lovejoy's impression that Magee possibly was suffering from malignant hypertension;

- the advice by Dr. Lovejoy to the Appellant that she acquire a blood pressure cuff to check Magee's blood pressure frequently;

- the orders by Dr. Lovejoy for CT angiography of the aorta and renal arteries and multiple laboratory testing (that Magee and his mother **never had** performed);;

- the "no show" for the repeat echocardiogram scheduled by Dr. Lovejoy in November 2006;

- the canceled and/or "no show" for return appointments with both Drs. Tordzro and Dr. Lovejoy;

- that this medical history took place just three months prior and was withheld from Nurse Practitioner Oglesbee in the performance of a PPE and Well Child Exam in August 2006; and

- that this medical history was withheld from Logan in the PPE performed on August 7, 2007..

The objective evidence presented at trial revealed that the responses of Magee and the Appellant to medical and historical inquires were patently false! Further examination of the Appellant at trial revealed:

> Appellant ***admitted she knew*** that Magee had a heart murmur when he was young. (TR231;RE140)
>
> Appellant testified that she was the one that always accompanied Magee to his doctor's visits, but at trial, she claimed that she did not remember him collapsing at school and being transported by ambulance to the emergency room. (TR213-215;RE127-129)
>
> Appellant told Logan that Magee had not experienced chest pains, asthma or wheezing, or other medical problems, nor had any family member, other than the Appellant, experienced blood pressure problems. (TR 208-209;RE124-125)
>
> Appellant, reluctantly acknowledged during cross-examination that, in her previous deposition, she ***admitted she knew*** that Magee's referral to and subsequent appointment with the cardiologist in Hattiesburg meant that "he probably had a heart problem." (TR235;RE141)

Appellant ***admitted she knew*** that Dr. Tordzro told her that Magee had high blood pressure and needed to be on medication. (TR235-36;RE141-142)

Substantial, credible evidence supported the Trial Court's findings and Judgment in favor of CCH.

III. MEDICAL NEGLIGENCE OR INSURER OF RESULTS: Under Mississippi law, a healthcare provider is neither an insurer nor a guarantor with regard to all potential adverse outcomes that may occur following an examination or treatment by that healthcare provider. With regard to CCH, Bettye Logan, its employee, performed a Pre-participation Physical Evaluation for Lonnie Magee ("Magee"), in which both he and his mother, the Appellant, failed to provide vital medical information and withheld critical historical information, including but not limited to his history of heart abnormalities and treatment therefor. Can CCH be vicariously liable for Magee's subsequent death during football practice caused by heat stroke with secondary conditions of hypertension and obesity?

"Given the circumstances of each patient, each physician [or medical provider] has a duty to treat each patient, with such reasonable diligence, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States." *Estate of Northrop v. Hutto*, 9 So. 3d 381, 384 (¶9) (Miss. 2009) (internal quotation and citation omitted). A medical provider is under a duty to meet the national standard of care. *Id.* The "general rule is that the negligence of a physician [or medical provider] may be established only by expert medical testimony." *Id.* (citation omitted). The standard articulated must be objective, not subjective, and a physician or medical provider will incur civil liability *only* when the quality of care they render falls below objectively ascertained minimally acceptable levels. *Id.*

Defendants' experts presented ample objective evidence at trial that Logan performed Magee's PPE with prudence and as is practiced by competent nurse practitioners in the performance of PPEs throughout Mississippi and/or the United States. As required, Appellant presented her own expert, Dr. Christopher Leggett, in an attempt to establish a *prima facie*

case.[28] However, the law is clear that an expert's articulation of the standard of care must be based on objective and accurate criteria reflective of the standard of care in the specified field throughout the region and throughout the United States. *Smith v. Commercial Trucking Co.*, 742 So. 2d 1082, 1087 (¶13) (Miss. 1999); *Hall*, 466 So. 2d at 871. Plaintiff's expert's testimony was neither objective nor was it reflective of the standard of care related to PPEs throughout Mississippi or the United States. It simply reflected his personal opinion. A comparative review of the expert testimony presented at trial relating to Magee's blood pressure, weight, and race confirms the appropriateness of the Trial Court's findings of fact and entry of Judgment for CCH's.[29]

1. Magee's blood pressure

Plaintiff's singular expert, Dr. Christopher Leggett, an expert in the field of interventional cardiology[30], testified that Magee's blood pressure reading on August 7, 2007, his weight, and his race, placed him at an increased risk and, were "red flags" that should have prevented Logan from clearing Magee for sports participation. (TR272-73) Dr. Leggett testified that Magee's

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[28] To present a prima facie case of medical malpractice, a plaintiff, (1) after establishing the doctor-patient relationship and its attendant duty, is generally required to present expert testimony (2) identifying and articulating the requisite standard of care; and (3) establishing that the defendant physician failed to conform to the standard of care. In addition, (4) the plaintiff must prove the physicians noncompliance with the standard of care caused the plaintiff's injury, as well as proving (5) the extent of the plaintiff's damages.

Hill v. Mills, 26 So. 3d 322, 329 (¶21) (Miss. 2010) (citation omitted).

[29] In addition to claiming that Magee's weight, race, and blood pressure should have prevented Logan from clearing Magee for sports participation, Appellant claimed that Green Tree should have had a copy of Magee's 2005 PPE form in his Green Tree chart that was created in 2006, the point in time when Magee became a patient of Green Tree. (Appellant's brief at 15) Appellant does not argue in her brief that CCH or Logan were responsible for the retention of the 2005 PPE, nor did she present argument or evidence of such at trial. Indeed, Logan was not hired by CCH until March 23, 2006. (R663) Since Appellant has not raised this issue against CCH or Logan, it is waived as to CCH and Logan.

[30] Interventional cardiology is a branch of the medical specialty of cardiology that deals specifically with the catheter-based treatment of structural heart diseases. See, Attorneys' Dictionary of Medicine, available at 3-I I-61855, LEXIS.

blood pressure reading, of 140/86 on August 7, 2007, was elevated. (TR272) He opined that "any blood pressure greater than 140 is considered to be the first line or stage one of hypertension." (TR272) For this opinion, Dr. Leggett erroneously relied upon criteria for "adults" published by the National Joint Committee ("JNC"). (TR272)

However, the objective evidence presented by CCH illustrated that these physical finding were either within the normal range, or they were not factors that should have prevented Logan from clearing Magee to play sports. Defendants' expert, Dr. Malcom Taylor, a board certified cardiologist, testified that Dr. Leggett inappropriately referred to the adult section of the criteria published by the JNC – *not* the pediatric section, which published the normal blood pressure guidelines for children. (TR598; 602; 624-25) Accordingly, Dr. Leggett's reliance on the adult section of the JNC article was misplaced, and as such, resulted in an erroneous opinion. Dr. Taylor testified that even though Magee may have been large, he was still a child. (TR598) As such, Magee would have been considered a pediatric patient consistent with the American Academy of Pediatrics which defines the normal range of blood pressures in a child, based upon height and age. Magee's blood pressure at 140/86 was not hypertensive by these definitive standards. (TR559-61; 598; 602; 624-25)

Dr. William Sorey, an expert in the fields of pediatric and adolescent medicine, referred to the Stature for Age Tables for Children, Ages 2 to 20 years, Selected Percentiles, published by the Centers for Disease Control in conjunction with the "Blood Pressure Levels for Boys by Age and Height Percentile" published in the Fourth Report on Diagnosis, Evaluation and Treatment of High Blood Pressure In Children and Adolescents from the National High Blood Pressure Education Program Working Group on High Blood Pressure in Children and Adolescents. (TR507-512; R1317-1344;RE77-104) Dr. Sorey testified that in an adolescent, like Magee, with a height of 6'5" at age 17, Magee's systolic blood pressure was within the

upper limits of normal based upon his age-height percentile. (TR507-512; R1317-1344RE77-104) Dr. Sorey testified unequivocally that that in his experience over the last 20 years in the performance of PPEs, "pre-hypertension" or high normal pressure would never be a disqualifier to engage in competitive sports. (TR509)

2. Magee's weight

Plaintiff's expert, Dr. Leggett testified that Magee's race and weight on August 7, 2007, were also "red flags" which should have prevented Logan from clearing Magee for sports participation. (TR270-276) Dr. Leggett testified that Magee was severely obese and should have been set aside because of this risk factor. (TR270)

To the contrary, Defendants' expert cardiologist, Dr. Taylor testified that, as a cardiologist, he would have encouraged Magee to exercise to be healthier. (TR561) Dr. Taylor further testified that while Magee was obese, he was not morbidly obese and obesity would not have prevented him from clearing Magee to play football. (TR561-562)

Defendants' expert, Dr. William Sorey, also testified that Magee was not severely obese or morbidly obese. (TR500-505) Dr. Sorey testified that "obesity" is based on one's height and weight. (TR490-493) Objective evidence was introduced that a body mass index ("BMI") of a seventeen (17) year old male, with a height of 6'5" and weight of 297 pounds was 35. (TR501-503; EXD-11;RE207) Objective evidence was also introduced that the National Institutes of Health classified a BMI of 35 as moderately obese, not severely or morbidly obese. (TR503-506; EXD-12;RE208-209) Dr. Sorey explained that severe obesity would have required a BMI of 40, and that the term "morbid obesity" had been replaced with the new descriptive term "extreme obesity or clinically severe obesity." (TR504)

Dr. Sorey testified that in his twenty (20) years of experience, and the performance of hundreds, if not thousands of PPEs, he did not recall an athlete ever being disqualified from

participation in sports based upon the fact that he was obese. (TR505) Dr. Sorey testified that "obesity by itself is not necessarily a disease. It's a physical finding or a physical characteristic." (TR505) Dr. Sorey testified that "[i]f we booted everybody out of sports for obesity, we would have no lineman on the football team." (TR505) Further, Logan was not the first medical provider to clear Magee for sports participation while he was overweight. Magee was cleared for basketball by Dr. Brian Kerrigan in August 2005 after Nurse Practitioner Oglesbee had referred Magee back to his family physician due to an elevated blood pressure of 164/80 on August 5, 2005. (EXP-5; D-2;RE206) In 2006, Nurse Practitioner Oglesbee performed a Medicaid-approved well-child examination and PPE for Magee at which time Magee was cleared. (TR395-402; EXP-4, P-6;RE202-204) No objective evidence was presented that supported the notion that Magee's weight was a "red flag", which should have prohibited Logan from clearing Magee for sports participation.

3. Magee's race.

Dr. Leggett also testified that Magee's race was a huge factor because of the incidence or likelihood of sudden cardiac death in African-American males. (TR273) However, in contrast, Defendant's expert, Dr. Malcom Taylor who had performed hundreds of PPEs of student athletes in his career and had performed research with regard to hypertension and heart failure in African-Americans. (TR547-54), testified that, as a cardiologist, in his experience, Magee would not have been disqualified for sports participation based upon his race. (TR623)

4. Logan's evaluation of Magee and the standard of care for PPEs

Both of Defendants' experts testified that they had extensive experience in the performance of PPEs over the years. (TR493, 547-554) Drs. Taylor and Sorey, both experts with vast experience in the field of cardiology, pediatrics, and PPEs, testified unequivocally that Logan's performance of Magee's PPE fully met the standard of care. In fact, Logan went above

and beyond what was required in a PPE in making the effort to track down the Appellant, Magee's mother, and made specific inquiry to her about Magee's personal, medical and family history before clearing him for sports participation. (TR494, 553-554, 608) CCH does not dispute Dr. Leggett's qualifications as an interventional cardiologist, but by Dr. Leggett's own testimony, he had never performed a PPE; he did not see children in his practice; and his only experience with PPEs was within the context of this case. (TR306)

Dr. Leggett, Appellant's expert, was far less prepared to state that Logan's performance fell below the objective applicable standard of care for PPEs. In his direct testimony, when asked if Logan "fell below the standard of care", [and] did [her action's] ultimately contribute to the cause of [Magee's] death? (TR301) Dr Leggett responded:

> ***What I believe*** is that we all – the literature is clear that young men like this with his history with his underlying cardiac issues – thickened heart, hypertrophy, hypertension, history of murmur, history of fainting spell – what we know for a fact is that when you allow these individuals to participate in high intensity sports, that they are at increased risk of sudden cardiac death. We know that.
>
> And ***what I believe*** is that if we had as a medical community done our job and not allowed him to participate, we could have decreased his likelihood of dying from sudden cardiac death while participating in high intensity sports, and ***I think*** that that is a true and honest statement ***that I would like to make*** about that.

(TR301-302) (Emphasis added).[31] Although Dr. Leggett recited Magee's health maladies, he refused to acknowledge that the reason those facts were unknown to Logan was due to the

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[31] Dr. Leggett echoed his subjective opinion during redirect, as follows:

> The issues here was [sic] that you have a 17-year old that died of sudden cardiac death. There were multiple points along the way where he interacted with the medical profession that could have provided an opinion to interrupt his athletic pursuits that may have played a significant role in his survival. ***I believe*** that that [sic] last point on the curve was on August 7, 2007, where we had yet our final opportunity, and that opportunity was in the hands of Ms. Logan. ***It is my belief*** that she made a decision ***that I would not have made***, and ***I also believe*** that who knows what another chance could have meant to this young man in terms of helping him understand his disease, helping his family understand his disease and giving him a chance for survival.

(TR369-370) (emphasis added).

consistent refusal by Magee and the Appellant to give accurate medical information to Logan or anyone else who assessed Magee at Green Tree – about Magee's "underlying cardiac issues," "hypertension," "history of murmur," and "history of fainting." Dr. Leggett did, however, admit that there was ***nothing*** in the medical history on Magee's PPE form on August 7, 2007, that suggested a problem.[32] (TR315)

Further, Dr. Leggett's opinion testimony was merely subjective. This is reflected in Appellant's own briefing of Dr. Leggett's testimony, as follows:

> ***I think*** on that day in question irrespective of the information that his mother or he was able to provide from a history standpoint, ***I think*** we missed an opportunity to save this young man as a medical community and as a person providing the care, who in this case ***I believe*** was Ms. Logan. ***I think*** she missed an opportunity to set him aside and say, we need to further evaluate you before we allow you to participate in sports. And with that said, ***it is my belief*** that the standard of medical care was breached.

(TR300; Appellant's Brief pp.6-7) (emphasis added). Dr. Leggett's personal thoughts and beliefs – formulated in hindsight – were not sufficient to show that Logan breached the standard of care for PPEs and proximately caused Magee's injuries.

The standard of care articulated by a medical expert must be objective, not subjective. *Estate of Northrop v. Hutto*, 9 So. 3d 381, 384 (¶9) (Miss. 2009)[33] Liability should never be imposed upon a physician or medical provider for the mere exercise of a bona fide medical

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[32] Dr. Leggett offered no testimony that Logan breached the standard of care by not hearing Magee's heart murmur, or detecting his cardiomyopathy, on August 7, 2007. Unchallenged testimony by Dr. Taylor established that heart murmurs may be missed by medical professionals because they "come and go," and in large patients the sounds may be distant. (TR557, 581) He further testified that cardiomyopathy was not something one can hear with a stethoscope. (TR581) He testified that the only way to diagnose hypertrophic cardiomyopathy was to perform an echocardiogram. (TR581) However, Logan had no way to know that Magee had, indeed, had an echocardiogram performed prior to his August 7, 2007, PPE visit because Appellant and Magee failed to disclose that information to Logan; further, they failed to disclose it to Oglesbee just months after these tests were performed – during Magee's 2006 well-child exam and PPE.

[33] Plaintiff's expert in *Hutto, supra p. 384* testified at length as to his practice, and how things were done at his institution; after lengthy litigation, the supreme court held that testimony of the expert's own preferences and practices were insufficient to establish the standard of care.

judgment which turns out, with the benefit of 20-20 hindsight, to have been mistaken or to be contrary to what a medical expert witness would have done in the exercise of his good medical judgment. *Hall*, 466 So. 2d at 871. "[A] physician [or medical provider] may incur civil liability *only* when the quality of care he renders (including the exercise of his clinical judgment) falls below minimally acceptable levels." *Id.* (emphasis added).

All of the experts agreed, including the Plaintiff's singular expert, Dr. Leggett, that the history given by a patient (or his parent) is the most important critical piece of information for the healthcare provider in the Preparticipation Physical Evaluation. All of the experts agreed that Magee and his mother had the obligation to give accurate medical and truthful historical information to the healthcare providers, including Nurse Practitioner Oglesbee in 2005 and 2006, and to Logan at the time of the Preparticipation Physical Evaluation in August 2007. (TR355, 356, 496-499, 554-555, 608)

Abundant, credible, if not irrefutable, evidence was introduced at trial which supports the Trial Court's findings that Magee and the Appellant failed to provide accurate medical information and withheld critical historical information regarding Magee's health issues at the PPE performed by Logan on August 7, 2007. The Trial Court's conclusion that a healthcare provider is not a guarantor or insurer of the results of any assessment or treatment is totally consistent with established Mississippi law. The Trial Court's entry of Judgment in favor of CCH should be affirmed.

CONCLUSION

Appellant has waived any issue on appeal with regard to the Trial Court's findings and entry of Judgment in favor of CCH. Alternatively, the Circuit Court Judge's findings of fact that Magee and the Appellant failed to give accurate vital medical and withheld critical historical information were supported by substantial, credible, in fact, reliable evidence. The Trial Court's

determination that to allow a judgment in favor of the Appellant would be to place the healthcare provider in the position of an "insurer" of the results of the Preparticipation Physical Evaluation, would be contrary to Mississippi law, was eminently correct. Mississippi law has consistently held that a healthcare provider is not an insurer or guarantor of the success of the care and treatment rendered.

The Judgment in favor of CCH should be affirmed.

Respectfully submitted, this the 17th day of February, 2011.

COVINGTON COUNTY HOSPITAL

By: _____
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CERTIFICATE OF SERVICE

I, the undersigned, J. Robert Ramsay, hereby certify that I have this date mailed, via Federal Express, the original and three paper copies and one copy on CD of the **Brief of Appellee, Covington County Hospital** in No. 2010-CA-00621, Lutricia Magee, Appellant versus Green Tree Family Medical Clinic, PLLC d/b/a Green Tree Family Medical Associates and Covington County Hospital addressed to the Clerk of the Supreme Court of Mississippi. I also hereby certify that copies of the same will be deposited in the U.S. Mail, first class mail postage prepaid to the following:

Honorable Eddie Bowan (*in place of Hon. Robert Evans, Deceased)*
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This, the 17th day of February, 2011.

J. ROBERT RAMSAY