IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

THE ESTATE OF HENRY C. GIBSON, BY AND THROUGH DON R. GIBSON, ADMINISTRATOR FOR THE USE AND BENEFIT OF THE ESTATE OF HENRY C. GIBSON, AND ON BEHALF OF AND FOR THE USE AND BENEFIT OF THE WRONGFUL DEATH BENEFICIARIES OF HENRY C. GIBSON

Plaintiffs-Appellants/Cross Appellees

Supreme Court No. 2010-CA-00741

VS.

Washington County Circuit Court No. CI 2004-195

MAGNOLIA HEALTHCARE, INC.; FOUNDATION HEALTH SERVICES, INC.;

Defendants- Appellees/Cross Appellants

BRIEF OF MAGNOLIA HEALTHCARE, INC. AND FOUNDATION HEALTH SERVICES, INC.

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

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 order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Magnolia Healthcare, Inc. d/b/a Arnold Avenue Nursing Home-
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2. Foundation Health Services, Inc. – Appellee/Cross Appellant
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3. Honorable Betty Sanders, Washington County Circuit Court Judge
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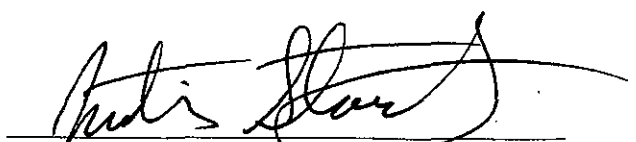

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This is a nursing home liability case filed by the estate of Henry Gibson against Arnold Avenue Nursing Home ("Arnold Avenue"). Mr. Gibson was a resident at Arnold Avenue from June 2001 to December 2002. Magnolia Healthcare, Inc. ("Magnolia") owns and operates Arnold Avenue. After Mr. Gibson died on January 26, 2003, Plaintiffs brought suit alleging, among other things, that the negligent care Mr. Gibson received at Arnold Avenue caused his death and other injuries. [R. 3-33].[1]

Initially, Plaintiffs filed suit against Magnolia, the administrator of the nursing home, the licensee of the nursing home, and Foundation Health Services, Inc. ("Foundation"). Plaintiffs dismissed the administrator and licensee of the nursing home pursuant to this Court's decision in Howard v. Estate of Harper, 947 So. 2d 854 (Miss. 2006), and proceeded against Magnolia and Foundation as defendants. Foundation, at the times relevant to Plaintiffs' complaint, provided certain limited administrative services to Magnolia.

The trial in this case began on August 31, 2009, and concluded on September 10, 2009. The jury returned a verdict in favor of the Plaintiffs in the amount of $1,500,000.00 against Magnolia and Foundation. [R.E. 1]. The jury allocated $75,000 of their verdict for permanent disfigurement. [R.E. 2].

The trial court entered a final judgment in the amount of $575,000.00 in favor of Plaintiffs against Magnolia and Foundation. [R.E. 3]. The form of the judgment was agreed by the parties in accordance with Miss. Code Ann. § 11-1-60. Both Magnolia and Foundation filed post-trial motions which the trial court denied. [R. 1408-1433; R.E. 4]. Plaintiffs did not file post-trial motions and never challenged the application of § 11-1-60 to the verdict. After the trial court denied post-trial motions, Plaintiffs and Defendants timely appealed to this Court.

[1] Citations to the record are "R. __"; to Defendant's record excerpts "R.E. __"; and to the trial transcript "Tr. __".

III. STATEMENT OF THE FACTS

Magnolia Healthcare, Inc. ("Magnolia") owns and operates Arnold Avenue Nursing Home ("Arnold Avenue") in Greenville, Mississippi. Foundation Health Services, Inc. ("Foundation") provided limited administrative services to Arnold Avenue during the time period relevant to this case. Henry Gibson was a resident at Arnold Avenue from June 2001 to December 2002. Mr. Gibson died on January 26, 2003. Mr. Gibson's wife and six children survived him. The estate of Henry Gibson brought suit alleging, among other things, that Mr. Gibson sustained injuries at Arnold Avenue and that negligent care resulted in his death.

At the time of admission, Mr. Gibson was a 71 year old who lived with family in Delta City, Mississippi. At trial, Mr. Gibson's family members testified they made the decision to admit him to Arnold Avenue because they could no longer care for him. When Mr. Gibson entered Arnold Avenue in June of 2001, he suffered from numerous underlying medical conditions discussed below.

A. MR. GIBSON SUFFERED FROM NUMEROUS SERIOUS MEDICAL CONDITIONS UPON HIS ADMISSION TO THE NURSING HOME

According to medical records prepared by his treating physician before admission to the nursing home, Mr. Gibson suffered from a history of alcoholism ("drinking of multiple glasses up to two 5ths of Vodka a day for years"), diabetes, and high blood pressure. [R.E. 5-6]. Six months before his admission to the nursing home, Mr. Gibson's treating physicians became especially concerned with Mr. Gibson's health because he stopped taking his medications and encountered serious psychosocial/economic problems. Mr. Gibson's medical records also note that Mr. Gibson had "poor hygiene and uncontrolled blood pressure." Id. Mr. Gibson's hygiene was so poor that one of his physicians delayed treating him in December, 2000. Id.

Ultimately, in June, 2001, Mr. Gibson sustained a major medical episode at home which one of his treating physicians described:

Chief complaint: fell, not responding

HPI: Elderly black male with hypertension, dm, gout, treated several months ago for tachycardia, had been out of medication for months. Brought by family to office 6/8 because of their concern he was not caring for himself properly. [Prescription] given for all of his medications at that time, filled, but never opened. Wife reports he seemed his normal self last night. She heard him early this am, believing he was getting up. At 9:30 she checked on him and found him on the floor, not responding and shaking. Remained in that condition through transport to ER.

[R.E. 7]. (See also Tr. 825-27). This was near the time Plaintiffs sought to place Mr. Gibson in a nursing home. Mr. Gibson's physicians concluded that he sustained a stroke and described his condition as "status epilepticus," which means Mr. Gibson sustained "recurring seizures, almost nonstop," until his physicians treated him. (Tr. 821-22). Shortly thereafter, Mr. Gibson was admitted to Arnold Avenue.

Mr. Gibson suffered from severe malnourishment when he entered the nursing home. (Tr. 1392). When Mr. Gibson entered Arnold Avenue, he was overweight. (Tr. 980:1-6). His ideal body weight was 118 pounds, but he actually weighed 181, making him 63 pounds overweight. (Tr. 980:1-6; 621:4-9). After nine months at Arnold Avenue, he reached his lowest weight, 140.7 pounds or 22.7 pounds above his ideal weight. When individuals begin a regulated diet, they may experience weight loss. (Tr. 1401:29 – 1402:18; 980:18-21). An individual's nutritional status can increase even as the individual loses weight. (Tr. 1402:23-26). Mr. Gibson weighed the most when he entered Arnold Avenue but that is also the time when he was the most malnourished. (Tr. 1694:16-19).

Just after his admission to the nursing home, Mr. Gibson sustained further seizures and a more serious stroke. Plaintiffs' medical expert at trial, Dr. Williams, acknowledged that Mr. Gibson's failure to take prescribed medications and his inability to care for himself likely led to Mr. Gibson suffering a stroke and multiple seizures in June and July of 2001. (Tr. 827:8-16). These medical issues were preexisting and were not caused by any actions of the Defendants.

Mr. Gibson's stroke caused paralysis on the right side of his body and prevented him from swallowing, further complicating his medical condition. As noted by Appellants/Plaintiffs in their brief, it is undisputed that Mr. Gibson's medical issues, which he sustained just prior to admission to Arnold Avenue, were debilitating. See Appellant's Brief at p. 5. Mr. Gibson's medical conditions resulted in him being a bed-bound patient unable to swallow or otherwise care for himself. These newly sustained medical conditions made him a high risk patient with a bleak prognosis.

Mr. Gibson also had a long history of heart problems on admission. (Tr. pp. 794-97). Among Mr. Gibson's longstanding diagnoses were congestive heart failure, cardiac arrhythmia (irregular heartbeat), and cardiomegaly (enlarged heart). (Tr. pp. 794-97; 1390:14-1391:1; 1437:29 – 1438:6). Plaintiffs' medical expert at trial, Dr. Williams, admitted that cardiomegaly is related to congestive heart failure and even stated that it is one of the first signs of a failing heart because congestive heart failure causes the muscles of the heart to thicken. (Tr. 777:13-23). Cardiomegaly is a condition that worsens over time. (Tr. 779:3-5). On July 27, 2001, doctors found opacification in both of Mr. Gibson's hemithoraces and obscuration of his hemidiaphragm. Dr. Williams testified that these conditions also indicated congestive heart failure. (Tr. 780:8-10). Dr. Williams also admitted that Mr. Gibson suffered from chronic congestive heart failure. (Tr. 724:8-9).

These medical conditions affected Mr. Gibson's course of treatment by his treating physician and other medical professionals. While his treating physician had no affiliation with Arnold Avenue, the nursing home followed orders concerning Mr. Gibson's care while a resident of the nursing home. Defendants will discuss the effect of Mr. Gibson's medical conditions on his care throughout this brief; however, throughout his stay at Arnold Avenue, Mr. Gibson

continued to suffer from congestive heart failure and related conditions, including cardiomegaly, pulmonary edema, and pleural effusions.

B. ARNOLD AVENUE'S CARE OF MR. GIBSON MET THE APPLICABLE STANDARD OF CARE

As noted above, Mr. Gibson was a resident at Arnold Avenue from June 2001 to December 2002. During this residency, multiple doctors unaffiliated with the nursing home followed and directed Mr. Gibson's care. At trial, Plaintiffs argued Defendants' negligent care resulted in pressure sores, malnutrition, dehydration, a hemothorax, a fractured right arm, and falls. Each of these specific issues are discussed briefly below and then more extensively in the relevant portions of this brief.

Related to their wrongful death claim, Plaintiffs never put on proof of any act of Arnold Avenue or its employees that caused the death of Mr. Gibson. Plaintiffs' theory was that Mr. Mr. Gibson must have sustained a traumatic event at Arnold Avenue that resulted in a broken right arm and a hemothorax in his right pleural cavity. Plaintiffs never put on proof of the traumatic event that occurred or that any defendant was responsible for the occurrence of the event. Plaintiffs merely provided speculation, through a hired expert doctor (Dr. Williams), that a traumatic event occurred sometime near November 22, 2002. Dr. Williams surmised that this single traumatic event caused Mr. Gibson to sustain both a broken right arm and a hemothorax. Plaintiffs based the entirety of their theory on the fact that Mr. Gibson had swollen fingers on November 22, 2002. As will be discussed extensively below, Plaintiffs' theory flies in the face of the medical evidence in the record. Plaintiffs cannot escape the fact that they offered no evidence as to what or who caused Mr. Gibson's injury and only offered speculation and conjecture as to the date of the alleged injury.

As it relates to pressure sores, Mr. Gibson's care and treatment met the standard of care, and the few pressure sores he sustained were unavoidable. The pressure sores were superficial,

and all were healed within a reasonable time. As admitted by Plaintiffs' experts, the nursing home provided excellent care to heal his pressure sores.

As it relates to Plaintiffs' malnutrition and dehydration claims, Mr. Gibson's nourishment and hydration were directed, controlled, and closely monitored by his treating physician, who was not an employee or agent of Arnold Avenue. Mr. Gibson entered the nursing home overweight, yet severely malnourished. Since Mr. Gibson could not feed himself or swallow, his treating physician placed him on a feeding tube to regulate his diet and hydration. The nursing home followed his doctor's orders concerning nutrition and hydration. Furthermore, Mr. Gibson did not suffer from malnourishment or dehydration as a result of any actions taken by the nursing home.

Concerning falls, Mr. Gibson sustained two falls at the nursing home that did not cause him any injury—a fact conceded by Plaintiffs' physician and nurse experts at trial. Without injury, Plaintiffs cannot recover.

C. FOUNDATION NEVER PROVIDED ANY HEALTHCARE SERVICES TO MR. GIBSON OR ANY OTHER RESIDENT AT ARNOLD AVENUE.

Plaintiffs proceeded in this case against Foundation and Magnolia. At trial, corporate representatives of both Magnolia and Foundation testified that Foundation never performed any healthcare services on behalf of Magnolia. (Tr. 1334-36; 1351-59). The proof at trial showed Magnolia employed and supervised all nursing and other personnel who cared for Mr. Gibson. Id. Furthermore, Magnolia employed the administrator, director of nursing, and all other supervisory staff at Arnold Avenue. Id. Magnolia performed all hiring and termination of employees. Foundation merely provided administrative services to Magnolia.

These administrative services included processing accounts payable, processing monthly reports, and arranging for bulk pricing and volume discount purchasing. (Tr. 1353: 18-29; 1354:1-19; 1352:1; 1353:10-14). Foundation was never called upon by Magnolia to provide any

service relating to healthcare and never provided such services. Foundation performed no duties which impacted Mr. Gibson's care.

IV. SUMMARY OF THE ARGUMENT

Because Foundation did not provide care to Mr. Gibson or serve as one of Mr. Gibson's medical providers, Foundation cannot be held liable to Plaintiffs. Magnolia was solely responsible for providing nursing care services to residents at Arnold Avenue during the time of Mr. Gibson's stay. Foundation merely provided limited administrative services to Magnolia. Because Foundation was never tasked with providing and never provided any care to Mr. Gibson, the judgment against Foundation is against the overwhelming weight of the evidence and Plaintiffs' claims against Foundation fail as a matter of law.

Related to their wrongful death claim, Plaintiffs never put on proof of any act of Arnold Avenue or its employees that caused the death of Mr. Gibson. Plaintiffs' wrongful death theory was based on a hemothorax and broken right arm that Plaintiffs' speculated Mr. Gibson sustained in a single traumatic event at Arnold Avenue. Even if this were true, the overwhelming weight of the evidence shows Mr. Gibson died as a result of staph infection and sepsis. Defendants did not cause these conditions.

According to Plaintiffs, the traumatic event took place at least 39 days before Mr. Gibson was admitted to the hospital. The evidence does not support a finding that Mr. Gibson sustained an arm fracture that went undiscovered for 39 days. Furthermore, the admissible evidence does not support a finding that Mr. Gibson sustained a hemothorax that caused him to have respiratory trouble only after 39 days. Ultimately, the Plaintiffs failed to provide legally sufficient testimony and evidence regarding the timing or cause of the hemothorax and arm fracture. Furthermore, Plaintiffs evidence is wholly devoid of any proof that the act of a person

for which Defendants bore responsibility caused Mr. Gibson to sustain a hemothorax or broken arm.

Plaintiffs also argued Defendants' negligent care resulted in pressure sores, malnutrition, dehydration, falls, and contractures. The evidence offered by Plaintiffs, however, failed to establish Defendants breached any standard or care or that such a breach proximately caused any injuries.

As it relates to pressure sores, Mr. Gibson's care and treatment met the standard of care, and the few pressure sores he sustained were unavoidable. The nickel sized pressure sores Mr. Gibson developed were unavoidable because of Mr. Gibson's significant underlying medical conditions, including diabetes, hypertension, and his bed-bound status. The pressure sores were superficial, and all were healed within a reasonable time. As admitted by Plaintiffs' experts, the nursing home provided excellent care to heal his pressure sores.

As it relates to Plaintiffs' malnutrition and dehydration claims, Mr. Gibson's nourishment and hydration were directed, controlled, and closely monitored by his treating physician, who was not an employee or agent of Arnold Avenue. Mr. Gibson's underlying medical conditions greatly affected his nutrition and hydration status. Since Mr. Gibson could not feed himself or swallow, his treating physician placed him on a feeding tube to regulate his diet and hydration. Plaintiffs failed to present any evidence that the nursing home failed to follow his doctor's orders concerning nutrition and hydration. Furthermore, the overwhelming weight of the evidence established Mr. Gibson did not suffer from malnourishment or dehydration as a result of any actions taken by the nursing home.

Concerning falls, Mr. Gibson experienced two falls while at Arnold Avenue. Importantly, the undisputed evidence clearly established that he suffered no injury whatsoever from these falls. Without injury, Plaintiffs cannot recover.

At the trial of this matter, the jury found that Mr. Gibson had sustained permanent disfigurement and awarded $75,000 in damages for permanent disfigurement. Plaintiffs failed to provide proof of permanent disfigurement or that Defendants caused any alleged disfigurement. Of Mr. Gibson's alleged injuries, only pressure sores, contractures, and broken arm could have possibly caused permanent disfigurement. Plaintiffs offered no evidence that Mr. Gibson's small pressure sores, which healed, caused permanent disfigurement. Furthermore, Mr. Gibson sustained mild contractures as a result of a stroke and immobility, which were not caused by Defendants. Plaintiffs also offered no proof, either through testimony, exhibits, or otherwise, that Defendants caused Mr. Gibson's broken arm or that Mr. Gibson sustained permanent disfigurement as a result.

The trial court erred in not granting a mistrial where Plaintiffs' counsel elicited punitive damages testimony in the compensatory phase of the trial and made other inappropriate comments influencing the jury.

As it relates to the appeal filed by Plaintiffs, the trial court, after hearing plaintiff's proposed evidence, appropriately declined to submit the issue of punitive damages to the jury. Furthermore, Plaintiffs' waived their right to contest the constitutionality of Miss. Code Ann. § 11-1-60.

V. ARGUMENT

The jury's verdict in favor of Plaintiffs is against the overwhelming weight of the evidence and the credible testimony presented at trial. Alldread v. Bailey, 626 So. 2d 99, 101 (Miss.1993). Where, as here, the trial judge refused to grant a motion for JNOV, this Court examines all of the evidence, not just evidence which supports the non-movant's case, in the light most favorable to the party opposed to the motion. C & C Trucking Co. v. Smith, 612 So. 2d 1092, 1098 (Miss. 1992); Wilmoth v. Peaster Tractor Co., 544 So.2d 1384, 1386 (Miss.1989).

The real issue for the Court's consideration is whether the verdict is against the overwhelming weight of the evidence and credible testimony and therefore should be set aside. Wilmoth v. Peaster Tractor Co., 544 So. 2d 1384 (Miss. 1989).

As noted above, the party with the burden of proof has to present substantial, credible evidence to obtain a verdict against another party.

A. FOUNDATION PROVIDED NO HEALTHCARE SERVICES TO MR. GIBSON AND CANNOT BE LIABLE FOR ANY ALLEGED INJURIES SUSTAINED BY HIM

In order to maintain an action against Foundation, Plaintiffs must prove that Foundation provided care to Mr. Gibson or served as one of Mr. Gibson's medical providers. Howard v. Harper, 947 So. 2d 854, 857-60 (Miss. 2007). Cindie Pittman, the Chief Financial Officer of Foundation, testified the services provided by Foundation to Magnolia were primarily of a financial nature. (Tr. 1351:28-29; 1352:1; 1353:10-14). These services included processing accounts payable, processing monthly reports, risk management services, and arranging for bulk pricing and volume discount purchasing. (Tr. 1353:18-29; 1354:1-19). Foundation also assisted in budget preparation by performing calculations and balancing the accounts. (Tr. 1356:21 – 1359:7).

1. Foundation did not manage or operate the nursing home and did not provide any healthcare services

According to the administrator of Arnold Avenue, Diane Kelly, Foundation never managed the facility. (Tr. 1334:3-5.) All of the administration and staff were employed by and accountable to Magnolia. (Tr. 1334:6-25; 1335:1-7). Foundation did not take part in any supervisory functions. (Tr. 1335:1-7). Ms. Kelly knew of Foundation only performing one function: accounting services. (Tr. 1335:26 – 1336:1). The operations of management and supervision were executed by Magnolia. (Tr. 1335:11-16). Magnolia alone ensured that the facility met federal and state regulations. (Tr. 1336:12-19).

On January 1, 1999, Foundation and Magnolia entered into a written management agreement which provided that Foundation would perform certain services for Arnold Avenue.[2] [R.E. 8]. Although the written agreement called for Foundation to perform many services, Magnolia never requested Foundation provide any services relating to the care of any of the residents at Arnold Avenue. Instead, Foundation performed only financial services and limited administrative services. This agreement was only in place for the first six months of Mr. Gibson's residency at Arnold Avenue.

On January 1, 2002, Magnolia and Foundation entered into a "Financial Services Agreement." See [R.E. 9]. The Financial Services Agreement detailed the services Foundation actually provided for Magnolia. (Tr. 1356:5-10). The Financial Services Agreement only addresses financial and limited administrative services, such as budget planning assistance, record keeping, and computer support. The Agreement does not contemplate Foundation performing healthcare services to any resident at Arnold Avenue, including Mr. Gibson. See [R.E. 9].

Plaintiffs failed to establish Foundation caused any of Mr. Gibson's damages. No evidence produced by the Plaintiffs establishes cause in fact or proximate cause. Plaintiffs failed to bring forth any evidence proving that anything Foundation did or failed to do caused injury to Mr. Gibson. Not one specific instance of Foundation causing harm to Mr. Gibson was mentioned during the entire trial. Foundation never provided any healthcare services to Mr. Gibson or any other resident at Arnold Avenue. Foundation performed no duties which impacted Mr. Gibson's care.

[2] Mr. Gibson's residency at Arnold Avenue spanned from June 2001 through December 2002.

2. Foundation is in the same position as an administrator or licensee

Foundation cannot be liable to Plaintiffs under this Court's holding in Howard, because the services performed by Foundation were the same as those that would be performed by an administrator or licensee. This Court has repeatedly held that nursing home proprietors and owners can be held liable for negligent acts or omissions regarding the care of residents, but the Court specifically refused to extend such liability to administrators and licensees. Howard, 947 So. 2d at 857-60 (Miss. 2006).

The Court based its decision in part on the absence of statutory law and case law calling for the expansion of such a duty and the fact that such expansion would be duplicative of the duty already owed by the nursing home business owner or proprietor. Id. at 858. Foundation stands in a position identical to that of the administrator or licensee in Howard. No law, either statutory or common, has called for the expansion of liability to administrative management companies. Such an expansion of liability to Foundation would be duplicative of the duty owed by the owner of the nursing home.

Administrators and licensees cannot be held liable for nursing home or medical malpractice because they are responsible for administration concerns and regulatory compliance, and they are not medical care providers. Id. at 860. Foundation, as established by the uncontroverted evidence at trial, is concerned with nothing more than administrative functions and provided no medical care to Mr. Gibson. Like administrators and licensees, Foundation's responsibilities were to the nursing home and its owner, not the residents. See Id. at 861.

Magnolia was solely responsible for providing healthcare services to residents at Arnold Avenue during the time of Mr. Gibson's stay. Foundation was not a medical care provider. Because Foundation was never tasked with providing and never provided any care to Mr.

Gibson, the judgment against Foundation is against the overwhelming weight of the evidence and Plaintiffs' claims against Foundation fail as a matter of law.

B. PLAINTIFFS' PROOF AT TRIAL ONLY PROVIDED SPECULATION CONCERNING THE FACTUAL AND PROXIMATE CAUSE OF MR. GIBSON'S DEATH

In this case, Plaintiffs failed to establish that the conduct of the Defendants proximately caused Mr. Gibson's death. See Birrages v. Illinois Cent. R.R. Co., 950 So. 2d 188, 193 (Miss. App. 2006). The undisputed evidence shows that Mr. Gibson died of sepsis as a result of a staph infection. The Plaintiffs offered no evidence that Arnold Avenue caused Mr. Gibson's staph infection and resulting sepsis. In order for the Plaintiffs to prevail on their wrongful death action, they must establish that the conduct of the Defendants proximately caused the death in question. Id. It is simply not enough to show that there were deviations from the requisite standard of care for nursing. Richardson v. Methodist Hosp. of Hattiesburg, Inc., 807 So. 2d 1244, 1248 (Miss. 2002). "The negligence, and not something else, must have been the cause which produced or directly contributed to the death." Id. (quoting Berryhill v. Nichols, 158 So. 470, 471 (Miss. 1935)). A wrongful death action like other actions requires that the essential element of proximate cause be proven as a reasonable probability. Id.

Plaintiffs base their wrongful death claim on the argument that Arnold Avenue caused Mr. Gibson to sustain a left hemothorax and broken right arm. Plaintiffs contend the broken arm and hemothorax occurred in one traumatic event. Even if this were true, the overwhelming weight of the evidence shows Mr. Gibson died as a result of staph infection and sepsis. Defendants did not cause these conditions.

In order for the Plaintiffs to prevail on their wrongful death action, they must establish that the conduct of the Defendants proximately caused the death in question. See Birrages v. Illinois Cent. R.R. Co., 950 So. 2d 188, 193 (Miss. App. 2006). Ultimately, the weight of the

evidence creates an inescapable conclusion—the verdict cannot be sustained because the evidence is too speculative to support a jury verdict that the Defendants caused the death of Mr. Gibson.

C. PLAINTIFFS FAILED TO ESTABLISH ANY ACT TAKEN BY DEFENDANTS WHICH CAUSED MR. GIBSON TO SUFFER A BROKEN ARM OR HEMOTHORAX

Not only did Plaintiffs fail to offer evidence to support Mr. Gibson's cause of death, they also offered rank speculation that Defendants caused the broken arm and hemothorax. At trial, Plaintiffs surmised that these injuries occurred in one traumatic event.

This Court has made it clear that "[t]o prove no more than that it was a possibility is not sufficient foundation for the support of a verdict or judgment." Richardson v. Methodist Hosp.of Hattiesburg, Inc., 807 So. 2d 1244 (Miss. 2002). (quoting Berryhill, 158 So. at 471). Speculation is insufficient to support a jury verdict because the plaintiff's injuries and death must be traced with requisite certainty to an efficient cause for which the defendant is responsible and may not be based on surmise and conjecture. Blizzard v. Fitzsimmons, 10 So. 2d 343 (Miss. 1942). In this case, Plaintiffs cannot simply rely on conjecture or speculation, placing the jury in the untenable position of making a guess as to what happened to Mr. Gibson among several different possibilities. Western Geophysical Co. v. Martin, 174 So. 2d 706, 713 (Miss. 1965). Furthermore, unexplained injuries that fail to show any specific wrongful act by the alleged defendant fail as a matter of law. Caffrey v. Barlett Western R.R. Co., 198 S.W. 810 (Tex. Ct. App. 1917). In other words, conclusory statements, endless "possibilities", and lack of supporting evidence are simply not enough to show with reasonable definiteness that Defendants are actually responsible for Mr. Gibson's medical conditions. Proof that past events possibly happened or that a result was possibly caused by a past event is not sufficient to take to the jury. Western Geophysical Co., 174 So. 2d at 714. "[A] verdict cannot convert a possibility or any

number of possibilities into a probability." Elsworth v. Glindmeyer, 234 So. 2d 312, 319 (Miss. 1970); Miss. Valley Gas Co. v. Walker, 725 So. 2d 139, 145-46 (Miss. 1998). The jury should not have to speculate without sufficient facts to make any one possibility more likely than not the proximate cause of the injury. International Paper Co. v. Townsend, 961 So. 2d 741, 748 (Miss. Ct. App. 2007). See also Magnolia Petroleum Co. v. J.W. Williams, 76 So. 2d 365, 367 (Miss. 1954) (Inferences must be reasonably cogent, and "[n]o recovery may be had in a tort action where there are several possible causes of the injury, some not involving the negligence of the party charged, if there is no showing from which it can be determined which of the several possible causes probably produced the injury); Western Geophysical Co. v. Martin, 174 So. 2d at 713 (The jury should not be placed in the position of making an unsafe guess or providing a verdict based on assumptions because testimony based on possibilities is "not substantial testimony at all."); and McCain v. Wade, 180 So. 2d 748, 749 (Miss. 1938). The proof offered by Plaintiffs at trial is too speculative to support a jury verdict that the Defendants caused the alleged hemothorax or broken arm.

1. Plaintiffs' Evidence Regarding Mr. Gibson's Broken Arm is Speculative

Plaintiffs' assertion that Arnold Avenue caused Mr. Gibson's right arm spiral fracture was based solely on the fact Mr. Gibson had swelling in his right hand on November 22, 2002. Plaintiffs' expert doctor (Dr. Williams) explained this swelling in the hand was the basis for his opinion that Arnold Avenue caused Mr. Gibson's right arm fracture. (Tr. 697:6-8). Dr. Williams testified the swelling in the hand was caused by the same trauma that caused the fracture. (Tr. 687:20-21). Plaintiffs' expert nurse also associated the swelling on November 22 with the fracture. (Tr. 551:13-19). This assertion can only be accepted if the overwhelming weight of the evidence is ignored.

One of Mr. Gibson's licensed practical nurses (LPN), Betty Munson, testified that, on the morning of November 22, 2002, she noticed edema or swelling in Mr. Gibson's right hand, performed a physical assessment of Mr. Gibson's entire right arm, and found no pain, abnormalities, or swelling in his arm. (Tr. 1295:23 – 1296:5; and [R.E. 10]. The swelling in his hand did not extend up the arm. Id. Nurse Munson raised his hand up on a pillow and charted that the hand would be observed closely. Id. Plaintiffs' physician expert admitted that Nurse Munson examined the arm and did not find swelling in the arm. (Tr. 749:28 – 750:6). Plaintiffs' expert nurse also acknowledged there was no swelling in Mr. Gibson's right arm. (Tr. 552:13-16).

Later, during the afternoon of November 22, 2002, Mr. Gibson's treating physician, Dr. Barker, performed a physical examination of Mr. Gibson and did not document any swelling in his right arm or hand. [R.E. 11]. Three days later, on November 25, 2002, a nurse performed a skin assessment and found Mr. Gibson did not have any edema. [R.E. 12]. Dr. Williams conceded Mr. Gibson did not have swelling in his hand at the time of the skin assessment. (Tr. 755:19-21). On December 20, 2002, Dr. Barker performed another physical examination of Mr. Gibson and again did not document any swelling in his right arm or hand. [R.E. 11].

Key to analysis of this issue is that Plaintiffs' experts testified that the signs and symptoms of a spiral fracture similar to Mr. Gibson's would include swelling, bruising, and pain. (Tr. 555:1-5). Dr. Barker, during her examinations on November 22 and December 20, did not mention any swelling, bruising, or pain. (Tr. 1450:9-16). Defendants' nurse expert (Slevenski) testified she would expect a patient with an arm fracture to display indications of pain. (Tr. 1029:15-18). Dr. Barker noted Mr. Gibson was alert and responsive, but she did not document any indications of pain. [R.E. 11]. On December 31, 2002, before Arnold Avenue called an

ambulance to take Mr. Gibson to the hospital because of respiratory problems, Mr. Gibson's nurse noted he denies pain or discomfort. [R.E. 13].

The emergency medical technicians ("EMTs") that responded on December 31 did not document anything that would indicate Mr. Gibson had suffered an arm fracture. (Tr. 1028:14-21). The EMTs did not document any pain, swelling, or bruising. (Tr. 555:8-20). The EMTs did not document that Mr. Gibson favored his right arm during the transfer process. (Tr. 841:25 – 842:5). Mr. Gibson expressed no pain despite the fact the strap on the gurney was placed across the patient's arms. (Tr. 557:5-7). Defendants' nurse expert (Slevenski) also testified that patient's heart rate will increase when he is in pain. (Tr. 1029:28 – 1030:4). Mr. Gibson's heart rate in the ambulance and upon arrival to the emergency room was normal. (Tr. 1029:28 – 1030:4).

Once Mr. Gibson arrived at the hospital emergency room, the admitting nurse did not document any indications of pain. (Tr. 538:3-6). On the emergency room admission form, Mr. Gibson's daughter stated that Mr. Gibson had "[n]o frequent or persistent pain during the last 2 weeks." [R.E. 14]. The admitting nurse placed an IV in Mr. Gibson's right forearm which required attaching a tourniquet on his right arm, yet Mr. Gibson did not experience any discomfort or pain. (Tr. 561:22 – 562:17). In fact, the nurse noted "[n]o acute distress." [R.E. 15]. Plaintiffs' expert physician (Dr. Williams) admitted that not a single doctor, nurse, or CNA documented any pain or bruising. (Tr. 830:11-20). There is no evidence of a fracture when Mr. Gibson left the nursing home or when he first arrived at the emergency room. (Tr. 1072:26-28; 1072:18-23).

More than three hours after Mr. Gibson left the nursing home, the hospital performed a CT scan which showed a fracture. [R.E. 16]. A doctor diagnosed Mr. Gibson as having an acute, palpable fracture of the right humerus. Early the next day, Mr. Gibson started to show

signs and symptoms of an arm fracture. At 6:15 a.m., a nurse noted "minor vocalization, resistant to maneuvering right upper extremity." [R.E. 17]. This is the first indication anywhere in any medical record of Mr. Gibson experiencing any pain. (Tr. 567:15-22; 832:26-28). Later that same day, his right arm and fingers became swollen. [R.E. 17].

As mentioned, this was an acute fracture which means it occurred sometime recent to its discovery. (Tr. 1131:9-21). The fracture was also a palpable fracture which means that one can feel the fracture by touching the area around the fracture and that the fracture could be seen by a visual inspection of Mr. Gibson's arm. (Tr. 1131:22 – 1132:12; 844:17-24). A trained medical professional would have had no difficulty finding this fracture. (Tr. 1449:25 – 1450:4).

Many people came in contact with Mr. Gibson between November 22, 2002, and the time he left Arnold Avenue, and not a single person, including numerous medical professionals and other individuals unaffiliated with the nursing home, noticed an arm fracture. Those people coming in contact with Mr. Gibson during this time included nurses, CNAs, and other staff of the nursing home, as well as nurses, doctors, EMTs, and other staff members from entities that observed and assessed Mr. Gibson. Mr. Gibson received daily visits from family members who never reported any deformity or problems with Mr. Gibson's arm. The evidence proved this was a palpable fracture which could be seen and felt and therefore would have been easily noticed by trained individuals. The evidence does not support a finding that Mr. Gibson sustained an arm fracture that went undiscovered for 39 days. There is no direct or other evidence that Mr. Gibson sustained an event at Arnold Avenue which proximately caused any injury to his arm.

2. Plaintiffs' Evidence Regarding Mr. Gibson's Hemothorax is Equally Speculative

According to Plaintiffs' physician expert, the same event, which took place on or before November 22, 2002, caused Mr. Gibson to suffer a broken arm and hemothorax. (Tr. 686:8-12). After Mr. Gibson arrived at the emergency room on December 31, 2002, the doctors performed a

computerized tomography ("CT") scan of his chest, revealing bilateral pleural effusions, which is fluid around the lungs. (Tr. 1431:5-7). He had a large left pleural effusion and a smaller right pleural effusion. (Tr. 1432:3-5). The CT scan also revealed a pericardial effusion, which is fluid around the heart. (Tr. 1431:5-9). These conditions were caused by Mr. Gibson's congestive heart failure. (Tr. 1431:10-15). Specifically, Mr. Gibson was suffering from a flare up or exacerbation of his congestive heart failure. (Tr. 1432:11-13).[3]

In response to these conditions, one of the doctors at the hospital, Dr. Gamble, performed a thoracentesis. (Tr. 1432:14-19). A thoracentesis is performed by inserting a thoracentesis needle (approximately the size of a small straw) through the patient's skin, through the rib cage, and into the pleural cavity where the excess fluid is located and withdrawing the fluid. (Tr. 771:12-25). After the procedure, Dr. Gamble documented that there was a good evacuation, indicating he withdrew most of the fluid. [R.E. 18]. Dr. Gamble removed approximately one and a half liters of fluid. Dr. Gamble described the fluid as slightly blood tinged. Id. This bloody coloration must have been very slight because Mr. Gibson's treating physician, Dr. Barker, documented that the thoracentesis showed clear fluid only. (Tr. 1434:12-16). Defendants' physician expert (Dr. Payne) explained that it is commonplace for a thoracentesis to cause bleeding. (Tr. 1433:18-19). In fact, bleeding is one of the primary complications of a thoracentesis. (Tr. 1436:17-19). The fluid's slight coloration indicates that the doctor most likely nicked an artery or vein when performing the thoracentesis. (Tr. 1434:2-4). When a blood vessel is cut during such a procedure, it causes bleeding in the pleural space where the fluid is located. (Tr. 1434:6-8).

For a typical thoracentesis, the post procedure treatment requires only a Band-Aid. (Tr. 1434:27-29). After Mr. Gibson's thoracentesis, however, the doctor was forced to use two

[3] Mr. Gibson had a long history of problems with his heart, including congestive heart failure.

sutures. (Tr. 1435:1-10). Plaintiffs' physician expert (Williams) testified he was not even aware of any thoracentesis technique that would require the patient receive sutures. (Tr. 847:5-18; 848:18-22). The use of sutures indicates unusual trauma to the area where the procedure was performed. (Tr. 1435:10).

Within 24 hours, fluid again accumulated in Mr. Gibson's pleural cavity. (Tr. 1435:18-26). Dr. Gamble performed another thoracentesis, but this time he removed bloody fluid. (Tr. 1436:7-10). The first thoracentesis was a "traumatic tap," where the doctor knicked an artery causing blood to accumulate in the pleural cavity. (Tr. 1436:12-27). By the time the doctor performed the second thoracentesis, blood had accumulated in the pleural cavity. Id. Plaintiffs' physician expert (Williams) confirmed that a penetrating trauma can cause a hemothorax. (Tr. 694:27-29).

At the conclusion of the trial of this matter, Dr. Gamble testified as a rebuttal witness for the Plaintiffs. Dr. Gamble claimed that he did not cause the hemothorax. He based his testimony on the color of the fluid drawn from Mr. Gibson's pleural cavity. (Tr. 1573:12-14). He stated, "[h]ad [the hemothorax] occurred at the time of the procedure, [the fluid removed] would be blood like you draw from your arm." (Tr. 1573:12-14). This self serving testimony defies logic. According to this testimony, had any blood been released into the clear fluid-filled cavity at the time of the traumatic tap, all of the fluid would have inexplicably become "blood like you draw from your arm." Common sense dictates that if blood had leaked into the large volume of fluid already present and started filling the cavity at the time of the procedure, then the blood would have mixed with the fluid turning it slightly bloody.

Dr. Gamble's own documentation of the second procedure shows the second tap removed only blood, not fluid. [R.E. 19]. The day before, after the first thoracentesis, an x-ray revealed the pleural cavity had been evacuated and Dr. Gamble was satisfied. [R.E. 20]. The x-ray taken

on the following day, however, showed that the pleural cavity was cloudy. This cloudiness was caused by the blood that had entered the cavity. (Tr. 1436:7-10).

Additionally, the trial court admitted Dr. Gamble's testimony despite objection by defense counsel because Dr. Gamble's opinions went outside that of a treating physician and rebuttal witness. (Tr. 1532 – 1572). Further, this was in the nature of expert testimony, and Dr. Gamble could only testify as to what he did when treating Mr. Gibson and could not render expert testimony. Scafidel v. Crawford, 468 So. 2d 370, 372 (Miss. 1986). Any testimony regarding the timing of the hemothorax is improper expert testimony, and the trial court abused its discretion in admitting this testimony. See Griffin v. McKenney, 877 So. 2d 425, 439-41 (Miss. App. 2003).

The admissible evidence does not support a finding that Mr. Gibson sustained a hemothorax that caused him to have respiratory trouble only after 39 days. Plaintiffs put forth the proposal that some unknown and unexplained event caused Mr. Gibson's hemothorax and not the traumatic tap performed by Dr. Gamble which caused enough damage to require sutures.

Ultimately, the Plaintiffs failed to provide legally sufficient testimony and evidence regarding the timing or cause of the hemothorax and arm fracture. Furthermore, Plaintiffs' evidence is wholly devoid of any proof that the act of a person for which Defendants bore responsibility caused Mr. Gibson to sustain a hemothorax or broken arm.

D. PLAINITFFS CLAIMS CONCERNING ALLEGED BREACHES OF THE STANDARD OF CARE AND INJURIES ARE NOT SUPPORTED BY THE EVIDENCE

The overwhelming weight of the evidence shows Plaintiffs are not entitled to any recovery from Defendants in this case. At trial, Plaintiffs also argued Defendants' negligent care resulted in pressure sores, malnutrition, dehydration, falls, and contractures. The evidence

offered by Plaintiffs, however, failed to establish Defendants breached any standard of care or that such a breach proximately caused any injuries.

To establish a *prima facie* case for nursing home negligence, a plaintiff must prove (1) the defendant had a duty to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) the defendant failed to conform to that required standard; (3) the defendant's breach of his duty was a proximate cause of the plaintiff's injury; and (4) the plaintiff was injured as a result. Deiorio v. Pensacola Health Trust, Inc., 990 So. 2d 804, 806-7 (Miss. App. 2008) (citing Burnham v. Tabb, 508 So. 2d 1072, 1074 (Miss. 1987)). Expert testimony is required to "identify and articulate the requisite standard that was not complied with, [and] the expert must also establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries." Id. at 807 (quoting Barner v. Gorman, 605 So. 2d 805, 809 (Miss. 1992)). Proximate cause must be stated in terms of and based upon reasonable medical probability. Id.

As already noted above, the jury should not have to speculate without sufficient facts to make any one possibility more likely than not the proximate cause of the injury. International Paper Co. v. Townsend, 961 So. 2d at 748. The plaintiff's injuries must be traced with requisite certainty to an efficient cause for which the defendant is responsible. Blizzard v. Fitzsimmons, 10 So. 2d 343 (Miss. 1942).

1. Defendants Provided Adequate Care To Prevent, Identify, And Treat Pressure Sores

The overwhelming weight of the evidence concerning pressure sores supports the fact that the Defendants did not breach the standard of care. Mr. Gibson's medical reality put him at risk of developing pressure sores. Dr. John Payne, the only wound care expert to offer testimony at trial, explained that the nickel sized pressure sores Mr. Gibson developed were unavoidable because of Mr. Gibson's significant underlying medical conditions, including diabetes,

hypertension, and his bed-bound status. (Tr. 1404:12-29). Defendants' nurse expert (Slevenski) also testified that Mr. Gibson was at high risk for developing pressure sores because of his underlying medical conditions. (Tr. 1006:20 – 1007:24). In addition to heightened risk factors due to diabetes, hypertension, and his bed-bound status, Mr. Gibson also suffered from anemia, edema, poor femoral pulse, overweight issues, and shear problems. (Tr. 1006:20 – 1007:24). It is unavoidable for patients with these types of risk factors to develop pressure sores. (Tr. 1404:12-29; 1009:18-22).

Because of these risk factors, Arnold Avenue took precautions to ensure that Mr. Gibson was turned properly. Pinkie Myles and Betty Munson, two of Mr. Gibson's treating licensed practical nurses, testified that Arnold Avenue utilized a turning chart which hung on the wall of Mr. Gibson's room to maintain a turning schedule. (Tr. 1155:13-29; 1292:15-19). This chart looked like a clock and would specify which position Mr. Gibson was to be in during different times throughout the day. (Tr. 1144:13-29).

The wound care expert, Dr. Payne, testified that, in many instances, patients suffering from conditions similar to Mr. Gibson's will develop pressure sores, despite the best of care. (Tr. 1404:12-29). Plaintiffs' own expert nurse (Clevenger) also testified that pressure sores routinely develop despite good care. (Tr. 590:6-11; 591:12-22). In fact, residents in the nursing homes where Ms. Clevenger was the director of nursing developed such sores. (Tr. 590:6-11; 591:12-22). Consequently, Ms. Clevenger did not criticize Arnold Avenue because the pressure sores developed. (Tr. 590:11-12). Plaintiffs' expert physician (Williams) testified that the development of a Stage I or Stage II pressure sore is not a deviation for the standard of care because such sores are very shallow. (Tr. 732:17-21). Therefore, all of the expert testimony at trial indicated that a resident of a nursing home could develop pressure sores even where there is

no breach of the standard of care by the nursing home. Such pressure sores are unavoidable despite the best of care.

Mr. Gibson first developed a pressure sore on his sacrum in September, 2001. Plaintiffs' expert nurse (Clevenger) verified this pressure sore was never classified higher than a Stage II sore and was "just a break of the skin." (Tr. 576:11-16). Ms. Clevenger described the pressure sore by stating a "[s]uperficial layer of skin is gone." (Tr. 576:18). Dr. Payne testified that a Stage II pressure sore is not very deep. (Tr. 1416:7-8). This pressure sore healed by October 30, 2001.

Mr. Gibson developed another pressure sore on his sacrum in January, 2002, which consisted of two small spots. When this pressure sore did not immediately heal, Arnold Avenue sent Mr. Gibson to a wound care clinic. The pressure sore was classified as a Stage II sore. [R.E. 21]. At the pressure sore's worst point, the wound care clinic measured the depth to be .2 centimeters, or approximately the thickness of two thumbnails. (Tr. 584:26-29). Both of the spots were small, approximately the size of a nickel. (Tr. 1413:23-25; 1014:29 – 1015:6). Dr. Payne testified that the depth of the pressure sore indicated that it was superficial. (Tr. 1414:10-15). Ms. Slevenski also described this sore as superficial, and Ms. Clevenger stated that the sore was not very deep. (Tr. 1413:23-25; 585:9-10). One of the spots completely healed by May, 2002, and the other spot healed by June, 2002.

The most telling evidence supporting the fact that Defendants did not breach the standard of care is that Mr. Gibson's pressure sores healed. Ms. Slevenski testified that for the pressure sores to heal the nursing home had to be turning Mr. Gibson, giving him sufficient calories and protein, and providing overall good nursing. (Tr. 1011:17-22; 1106:14-19). Plaintiffs' expert doctor testified to the necessity of good nursing care to heal a pressure sore. (Tr. 852:12-16). Plaintiffs' expert nurse (Clevenger) echoed this sentiment and stated good care is required to heal

a pressure sore. (Tr. 570:28-29). Ms. Clevenger confirmed that Arnold Avenue's nursing care was effective and led to the healing of the pressure sores. (Tr. 472:22-24; 573:17-19). Ms. Clevenger also stated that effective care requires turning the patient every two hours. (Tr. 577:1-4). The evidence from all witnesses on the subject made it clear that if pressure sores are not treated properly they will inevitably get worse. Mr. Gibson's did not get worse; they healed. Dr. Payne, the only wound care expert at trial, testified the nursing home provided appropriate care for Mr. Gibson. (Tr. 1413:3 – 1414:3).

2. Mr. Gibson's Nutritional Needs Were Met and Were Determined, Directed and Closely Monitored By His Treating Physician

The Plaintiffs failed to prove the Defendants breached the standard of care as to Mr. Gibson's nutrition. In fact, the evidence proved quite the opposite. Before Mr. Gibson arrived at Arnold Avenue, he had recently suffered a major stroke. As a result of the stroke and constant seizures that occurred shortly thereafter, Mr. Gibson lost the ability to swallow and his doctor ordered a feeding tube for him. (Tr. 429:27 – 430:2). The feeding tube allowed regulation of his diet by his treating physician and registered dietitian. At all times, his physician was in charge of orders concerning his diet. The nursing home had no affiliation with Mr. Gibson's treating physician. (Tr. 1423:21-26). The treating physician was not an employee or agent of Arnold Avenue. Plaintiffs' expert doctor, Dr. Williams, testified that Mr. Gibson's physician and dietitian monitored him and issued progress notes and new orders as needed. (Tr. 805:12-17; 811:11-25). The nursing home adhered to the orders of the physician. There was no proof offered by Plaintiffs at trial that Mr. Gibson did not receive the nourishment ordered by his treating physician.

When Mr. Gibson arrived at Arnold Avenue, he was malnourished, as indicated by his prealbumin levels. (Tr. 1392:17-20). Albumin is a protein found in the body, and Mr. Gibson's was very low. (Tr. 981:8-11; 982:27 – 983:2). Dr. Williams confirmed that Mr. Gibson's

prealbumin levels were low and stated this is an indicator of poor nutrition. (Tr. 805:29 – 806:5; 807:5-15). Mr. Gibson's physician and dietitian relied on his prealbumin levels to evaluate his nutrition. (Tr. 806:9-13; 807:28 – 808:2; 811:11-25).

Mr. Gibson's prealbumin levels consistently rose during his stay until they reached the normal range. (Tr. 1397:4-6. 1396:4-7; 983:1-2; 983:26-28). Dr. Williams conceded that Mr. Gibson's prealbumin levels climbed into the normal range and remained there. (Tr. 807:16-27; 808:18-20). If Mr. Gibson had been malnourished, his prealbumin levels would not have increased as they did. (Tr. 1005:2-4).

Plaintiffs based their allegation of malnutrition entirely on weight loss. Dr. Williams testified the only evidence which he relied on to support his finding of malnutrition was weight loss. (Tr. 729:14-20). Dr. Williams was critical of Mr. Gibson's physician for relying on the prealbumin tests to determine Mr. Gibson's nutrition status. (Tr. 811:3-25). This physician was not an employee or agent of Arnold Avenue, but Arnold Avenue had a duty to adhere to the orders of the physician.

When Mr. Gibson entered Arnold Avenue, he was overweight. (Tr. 980:1-6). His ideal body weight was 118 pounds, but he actually weighed 181, making him 63 pounds overweight. (Tr. 980:1-6; 621:4-9). After nine months at Arnold Avenue, he reached his lowest weight, 140.7 pounds or 22.7 pounds above his ideal weight. Dr. Payne and Ms. Slevenski explained that when individuals begin a regulated diet, they routinely experience weight loss. (Tr. 1401:29 – 1402:18; 980:18-21). An individual's nutritional status can increase even as the individual loses weight. (Tr. 1402:23-26). Dr. Payne explained that Mr. Gibson weighed the most when he entered Arnold Avenue, but that is also the time when he was the most malnourished. (Tr. 1694:16-19).

Throughout Mr. Gibson's stay at Arnold Avenue, his physician determined, directed, and monitored Mr. Gibson's nutritional needs.[4] One of the best indicators that Mr. Gibson was not malnourished as a result of his stay at Arnold Avenue is the fact that his pressure sores healed. Dr. Payne, the wound care expert, testified that the healing process requires an adequate or improving nutritional status. (Tr. 1404:7-9). According to Ms. Slevenski, it is absolutely impossible to heal a skin wound without sufficient calories and protein stores. (Tr. 992:8-10; 997:1-4; 1106:14-19). Dr. Williams also admitted that adequate nutrition is important to the healing process. (Tr. 810:16-24). He testified that pressure sores will not heal if the patient does not get appropriate nutrition. (Tr. 732:5-7). Ms. Clevenger corroborated the fact that nutrition plays a vital role in the healing process. (Tr. 481:4-11). There is insufficient proof to support the allegation that Arnold Avenue caused Mr. Gibson to be malnourished simply because he lost weight when placed on a regulated diet by his physician.

3. Mr. Gibson's Hydration Needs Were Met and Were Determined, Directed, and Monitored By His Treating Physicians

The evidence offered by Plaintiffs concerning Mr. Gibson's hydration simply did not prove that Arnold Avenue was responsible for any dehydration suffered by Mr. Gibson. Because Mr. Gibson could not swallow, he received hydration through his feeding tube. During Mr. Gibson's stay at Arnold Avenue, his physician was responsible for orders concerning his hydration. (Tr. 799:9-17). His treating physician was not an employee or agent of Arnold Avenue. (Tr. 1423:21-26).

Mr. Gibson's hydration status was greatly affected by his underlying conditions. First, Mr. Gibson had chronic renal insufficiency. [R.E. 7]. Dr. Williams explained that chronic renal

[4] His physician frequently made adjustment to his primary nutritional source, Glucerna. (Tr. 1397:4-11). At one point a protein supplement, ProMod, was added to his diet, and then later, a second protein supplement, Arginaid, which bypasses the liver was added. 1397:4-11; 983:13-20. These adjustments were in response to his albumin levels. 993:20-25.

insufficiency means Mr. Gibson's kidneys had not been functioning at a normal level for an extended period of time. (Tr. 823:6-10). Ms. Slevenski stated Mr. Gibson definitely had chronic kidney disease. (Tr. 998:12-13). Ms. Clevenger admitted that there was evidence of renal failure. (Tr. 451:1-4). During the early part of Mr. Gibson's stay at Arnold Avenue, a urinalysis revealed the presence of protein which indicates damage to the kidneys. (Tr. 819:24 – 820:4).

Second, Mr. Gibson suffered from gastrointestinal ("GI") bleeds. (Tr. 1001:17-24). This caused him to be anemic and severely anemic at times. (Tr. 1001:22-24). Dr. Williams testified that Mr. Gibson's GI bleed caused volume depletion. (Tr. 764:23-25). Volume depletion means the fluid inside the vasculature is insufficient to keep the whole body working. (Tr. 764:26 – 765:1). If an individual loses too much blood due to a GI bleed, a blood transfusion will be required. (Tr. 765:8-16). During Mr. Gibson's stay at the hospital beginning in December of 2002, the hospital had to administer several blood transfusions. Id. His blood count was fifty percent below normal. (Tr. 1424:23-25). Ms. Slevenski described this as being almost inconsistent with life. (Tr. 1001:25-28). The dehydration Mr. Gibson experienced was due to his volume depletion caused by his GI bleed. (Tr. 1424:12-17; 1517:29 – 1518:5). The GI bleed was not caused by Arnold Avenue. (Tr. 1427:23-26). None of the Plaintiffs' witnesses or the Plaintiffs' evidence attributed the GI bleed to Arnold Avenue.

Third, Mr. Gibson also suffered from congestive heart failure. The registered dietitian's notes reflected the fact that Mr. Gibson's physician was cognizant of Mr. Gibson's congestive heart failure when planning his hydration. Dr. Williams confirmed that Mr. Gibson's fluids were regulated so as to maintain a functional level of congestive heart failure. (Tr. 828:11-26). Medical care providers must be cautious when providing fluids to a patient with congestive heart failure. (Tr. 1000:18-28). Extra fluid worsens the patient's situation and causes heart failure. (Tr. 1000:18-28; 719:21-29). Accordingly, proper hydration was a constant balancing act. (Tr.

992:2-3). Again, however, Mr. Gibson's treating physician determined, monitored, and directed Mr. Gibson's hydration needs.

Another indicator that Arnold Avenue provided Mr. Gibson proper hydration is the fact that his pressure sores healed. Like nutrition, proper hydration in necessary to heal a pressure sore. (Tr. 1106:14-19). Plaintiffs failed to establish any specific breach of care committed by Defendants that resulted in dehydration by Mr. Gibson.

4. Plaintiffs' Claims Concerning Two Falls By Mr. Gibson Were Red Herrings Intended To Improperly Influence The Jury As Plaintiffs Conceded Mr. Gibson Sustained No Injuries From The Falls

The Plaintiffs complained that Mr. Gibson experienced two falls while at Arnold Avenue. Each of his two falls was documented by staff and investigated. Importantly, the undisputed evidence clearly established that he suffered no injury whatsoever from these falls. There can be no liability in tort without injury, and the Plaintiffs did not present proof of any fall accompanied by harm to Mr. Gibson. Phillips v. Delta Motor Lines, Inc., 108 So. 2d 409, 415 (Miss. 1959).

Upon admission, Arnold Avenue created an initial care plan for Mr. Gibson which addressed falls. Among other things, it called for the height of his bed to be lowered near the floor. Later, side rails were included in Mr. Gibson's care plan.

On November 24, 2001, Mr. Gibson fell out of his bed. After Arnold Avenue discovered the fall, they launched an investigation and developed a new care plan. (Tr. 1116:21-28). The new care plan called for, among other things, the monitoring of the positioning of side rails and patient. Ms. Clevenger admitted that Arnold Avenue's response to this fall was good. (Tr. 514:16 – 515:12). More importantly, Mr. Gibson did not sustain any injuries as a result of this fall. (Tr. 602:19-25).

Approximately six months later, on May 25, 2002, Mr. Gibson fell again, but on this occasion, Arnold Avenue's investigation revealed the latch on the side rail malfunctioned when

pressure was applied to it. Arnold Avenue remedied the problem by providing Mr. Gibson a new bed. (Tr. 603:3-12). He did not experience any more falls after he received a new bed. (Tr. 603:13-15). Again, Mr. Gibson sustained no injury in the fall.

Ultimately, a party may not maintain an action in tort unless he or she has suffered damage. Phillips, 108 So. 2d at 415. "Damage is the gravamen of such an action for negligence." Id. Mr. Gibson did not suffer any injuries as a result of these two falls; Plaintiffs' own expert conceded this fact. (Tr. 603:3-12). Accordingly, Plaintiffs cannot maintain this action based on falls.

5. Mr. Gibson Suffered From Contractures As A Result Of His Medical Problems And His Physician Directed And Monitored Treatment For His Contractures

The Plaintiffs wholly failed to prove that Defendants caused Mr. Gibson's contractures. The evidence at trial established that Mr. Gibson suffered from mild contractures as a result of his medical conditions and not as a result of any actions of the Defendants. Plaintiffs' expert confirmed Mr. Gibson's stroke and accompanying medical problems placed him at a very high risk of developing contractures. (Tr. 507:20-27).

Because of his medical issues, Mr. Gibson did not have full range of motion, and his medical providers repeatedly documented stiffness in his appendages. (Tr. 511:14-24). Mr. Gibson's treating physician ordered occupational therapy for his developing contractures. (Tr. 610: 13-17). Before Mr. Gibson began occupational therapy in January of 2002, his left arm had range of motion of thirty degrees, and he had full extension in his right arm. (Tr. 854:12-21). After a month of occupational therapy, the range of motion in his left arm did not improve, and he also developed a contracture limiting range of motion in his right arm. (Tr. 854:28 – 855:14). Plaintiffs' expert doctor admits that Mr. Gibson actually developed a contracture in his right arm in spite of skilled therapy by an occupational therapist. (Tr. 855:9-14; 857:6-10). After this

deterioration, Mr. Gibson's treating physician made a professional medical judgment to discontinue occupational therapy. (Tr. 855:15-17).

On May 21, 2002, after an assessment of Mr. Gibson, a physical therapist determined that he was not a candidate for physical therapy, so Mr. Gibson continued restorative care at Arnold Avenue. (Tr. 608:27 – 609:1; 855:21-24). After several months of care by Arnold Avenue employees, his contractures improved. On October 10, 2002, sixteen months into his stay at Arnold Avenue, Mr. Gibson's physician determined that he had mild contractures and weakness on his right side, but did not mention any contracture or weakness on the left side. (Tr. 614:14-21). Mr. Gibson's contractures worsened when he received therapy, but his condition improved after termination of the therapy when Arnold Avenue was treating him. Ultimately, Mr. Gibson's treating physician directed his contracture care, and Plaintiffs failed to demonstrate any act by Defendants that caused or contributed to Mr. Gibson's contractures.

E. PLAINTIFFS' GENERALIZED ALLEGATIONS OF SHORT STAFFING WERE INSUFFICIENT TO PROVE BREACH OF ANY STANDARD OF CARE CAUSING DAMAGE TO MR. GIBSON

At trial, Plaintiffs called two CNAs formerly employed at Arnold Avenue in an attempt to demonstrate generalized understaffing at the nursing home. The two CNAs testified regarding the general condition at the nursing home. Generalized allegations of short staffing, however, are not sufficient to sustain a verdict. Finley v. Beverly Health and Rehab. Services, Inc., 933 So. 2d 1026, 1035-37 (Miss. App. 2006).

Jacqueline Rollins, a former CNA at Arnold Avenue, testified that the nursing home was understaffed on numerous occasions, but she could not recall the dates or the approximate number of times the nursing home was understaffed. (Tr. 250:11-17). Viola Bryant, another former CNA at Arnold Avenue, also testified, without specifics, that the nursing home was understaffed. (Tr. 304:11-17). These two former CNAs, however, charted on Mr. Gibson very

few times. Ms. Bryant was only employed at Arnold Avenue for three months during Mr. Gibson's stay. (Tr. 309:15). During those three months, she only charted as having cared for Mr. Gibson one time. (Tr. 314:21-25; 315:18-25; 316:13-28). Jacqueline Rollins only charted as having provided care to Mr. Gibson a few days during the months she actually charted on Mr. Gibson. (Tr. 273:11-19; 274:12-22; 280:29 – 281:22; 282:24 – 284:4; 284:8-22; 284:25 – 285:13; 285:16-25). There were several months during which she did not chart on Mr. Gibson even once. (278:18-27; 279:13-15; 279:20-27; 280:2-8; 280:11-18). Ms. Rollins did not recall providing care to Mr. Gibson from August 2002 through the remainder of his stay because she did not know if she worked at Arnold Avenue after July 2002. (Tr. 293:27 – 294:2).

Ms. Bryant complained that there were problems with some of the supplies, such as insufficient amounts of pads, towels, soap, and powder. (Tr. 305:21-27). Ms. Rollins complained that there were insufficient amounts of barrier cream, which helps with skin breakdown. (Tr. 257:26-29). At Arnold Avenue, the CNAs requested supplies from the nurses because the nurses had access to the supply room. (Tr. 1161:5-12). Nurses Pinkie Miles and Betty Munson, who cared for Mr. Gibson numerous times during his entire stay, testified that Arnold Avenue had plenty of supplies at the facility. (Tr. 1159:28 – 1160:2; 1287:1-7; 1161:21-28; 1287:23-29). The nurses supervised the CNAs, and when supplies were requested by the CNAs, the nurses provided them. (Tr. 1292:1-3; 1328:9-18). According to his nurses, Arnold Avenue took good care of Mr. Gibson. (Tr. 1181:28-29). Ms. Slevenski, a nursing expert, testified that their was no evidence of short staffing. (Tr. 1113:7-15). Notably, Plaintiffs did not attempt to offer any documentary evidence establishing staffing levels or lack of supplies.

The CNA witnesses did not report any abuse or neglect to Arnold Avenue's administration, the Department of Health, or the Department of Nursing. (Tr. 267:5-15). These two CNAs failed to produce any evidence of specific dates of short staffing or lack of supplies.

There is also no evidence that either of these CNAs provided substandard care to Mr. Gibson or saw the effects of substandard care on Mr. Gibson. The two CNAs did not provide evidence of any specific injuries resulting to Mr. Gibson because of substandard care. Their testimony failed to provide any causation evidence regarding any injury to Mr. Gibson, which is required by Mississippi law. See Finley, 933 So. 2d at 1036.

The evidence established the fact that Mr. Gibson received continuous care from Arnold Avenue staff and individuals independent of Arnold Avenue. Those in contact with Mr. Gibson included nursing home staff, nurse, doctors, dietitians, and family members. Mr. Gibson's family visited him almost every day and confirmed staff responded to any request made by the family. It is impossible to tie generalized allegations of lack of supplies or short staffing to any injuries allegedly sustained by Mr. Gibson.

F. THE JURY'S AWARD OF PERMANENT DISFIGUREMENT DAMAGES IS NOT SUPPORTED BY EVIDENCE THAT DEFENDANTS CAUSED ANY SUCH INJURIES

At the trial of this matter, the jury found that Mr. Gibson had sustained permanent disfigurement and awarded $75,000 in damages for permanent disfigurement. (Tr. 1746:10 – 1752:1). This finding is against the weight of the evidence. "It is axiomatic that to recover for negligence, a plaintiff must prove the elements of a negligence claim, which" includes damages. Crosthwait v. Southern Health Corp. of Houston, Inc., --- So. 3d ---, 2011 WL 2185609, *3 (Miss. App. June 7, 2011). Plaintiffs were required to prove Mr. Gibson suffered permanent disfigurement but entirely failed to provide proof of permanent disfigurement or that Defendants caused any alleged disfigurement.

Of Mr. Gibson's alleged injuries, only pressure sores, contractures, and broken arm could have possibly caused permanent disfigurement. As previously discussed, the pressures sores which developed on Mr. Gibson's sacrum were small. It is undisputed that the spots were

approximately the size of a nickel. (Tr. 1413:23-25; 1014:29 – 1015:6). More important to the issue of permanent disfigurement, the pressure sores healed. Plaintiffs offered no evidence that these small pressure sores, which healed, caused permanent disfigurement.

Mr. Gibson was at a greater risk of developing contractures because he had suffered a stroke. (Tr. 507:20-27). After his stroke, Mr. Gibson did not have full range of motion, so his physician ordered occupational therapy to help his contractures. (Tr. 511:14-24; 610:13-17). During the occupational therapy, Mr. Gibson's contractures worsened. (Tr. 854:28 – 855:14). Therefore, his physician discontinued the occupational therapy. (Tr. 855:15-17). As extensively discussed above, Mr. Gibson's treating physician determined that his contractures improved after discontinuing therapy. (Tr. 614:14-21). Any contractures remaining at the time of his death were the result of Mr. Gibson's underlying medical condition and were not caused by Defendants.

On December 31, 2002, an x-ray revealed that Mr. Gibson had a spiral fracture of the right humerus. As a spiral fracture, the bone had not punctured the skin. Plaintiffs offered no proof, either through testimony, exhibits, or otherwise, that Mr. Gibson was permanently disfigured as a result of his broken arm or that Defendants caused his broken arm.

G. NUMEROUS STATEMENTS BY COUNSEL AND PLAINTIFFS' EXPERT WITNESSES IN THE COMPENSATORY DAMAGES PHASE UNDERMINED THE JURY'S DECISION

During the trial of this matter, Plaintiffs wrongfully introduced overtly prejudicial information at the compensatory phase, which, under Mississippi law, must be reserved until the punitive damages phase. Punitive damages may be awarded if a plaintiff proves by clear and convincing evidence that a defendant "acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." Miss. Code Ann. § 11-1-65(a). Pursuant to Miss. Code Ann. § 11-1-65(b) & (c), however, bifurcation of trial into compensatory and punitive damages stages is mandated.

> In clear terms, our punitive damages statute mandates that all evidence regarding the punitive damages issue be tried in a separate evidentiary hearing before the same trier of fact, if but only if, the jury has awarded some measure of compensatory damages. As such, the clear intent of the legislature was to prevent issue confusion and to create a barrier between testimony regarding the fundamental issue of liability and the inflammatory issue of egregious conduct. Moreover, a jury is, by express legislative design, insulated from both the issue and the evidence regarding punitive damages until after it has heard evidence concerning the basic issue of the culpability of the defendant, and rendered its verdict on the culpability issue. Then, and only if the jury has determined that compensatory damages are appropriate, may the jury hear the evidence concerning the issue of punitive damages.

Hartford Underwriters Ins. Co. v. Williams, 936 So. 2d 888, 896-97 (Miss. 2006). Accordingly, evidence which seeks to demonstrate maliciousness or gross negligence must not be heard by the jury until liability has been determined. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138, 1148 (Miss. 2007).

During the compensatory phase of trial, Plaintiffs' counsel specifically solicited evidence applicable only to the punitive damages stage of trial. Plaintiffs' counsel asked Ms. Clevenger if she had "an opinion as to whether the standards of care were grossly deviated from in this case?" (Tr. 540:12-15), (emphasis added). Defendants objected to the question in part because the testimony would of course relate to gross negligence and punitive damages. (Tr. 540:16 – 541:24). The Court explained that "I don't think she can get to the gross deviation. I don't think she can do that." (Tr. 541:26-27). Thereafter, Plaintiffs' counsel asked the witness, "how would you characterize the care and treatment of Mr. Gibson?" (Tr. 542:4-5). Nurse Clevenger, in part, stated "I feel like that it was egregious and outrageous and showed blatant disregard for his health and well-being." (Tr. 542:25 – 543:1) (emphasis added). Defendants objected and moved for a mistrial at that point, arguing that the comments were right out of case law. (Tr. 543:8-24). Indeed, Nurse Clevenger's description of Defendants' conduct is found throughout Mississippi law. See Miss. Code Ann. § 11-1-65(a) (punitive damages may be awarded for the wanton or reckless disregard for the safety of others); Paracelsus Health Care Corp. v. Willard, 754 So. 2d

437, 442 (Miss. 1999) (punitive damages are only appropriate in the most egregious cases); and Bluewater Logistics, LLC v. Williford, 55 So. 3d 148, 164 (Miss. 2011) (outrageous conduct can support punitive damages).

Plaintiffs' counsel asked Nurse Clevenger a question concerning gross negligence, and after the Court disallowed the question, Plaintiffs' counsel continued to probe the witness until she, as though it came to her in an epiphany, blurted out terms which are used in Mississippi law to describe conduct sufficient to award punitive damages. During the argument before the trial court judge regarding the motion for a mistrial, Plaintiffs' counsel argued that at the second phase of trial he would not be allowed to submit additional evidence. (Tr. 545:26-28). Plaintiffs' counsel claimed that this was his "one shot." (Tr. 541:13). Plaintiffs' counsel also admitted that he conducted himself in this manner in every trial that he participates. (Tr. 545:21).

This no doubt had a profound effect on the jury to hear Plaintiffs' counsel discuss a gross deviation and Plaintiffs' expert witness describe Defendants' conduct as egregious, outrageous, and demonstrative of a blatant disregard for Mr. Gibson's well-being. There is no way to know exactly how much effect inflammatory punitive damages evidence had on the preliminary determination, but even the Plaintiffs, in their appellant brief, admit that this specific testimony from Nurse Clevenger helped provide the jury with a substantial basis to find that Defendants' negligence caused or significantly contributed to Mr. Gibson's injuries and death. See Appellant's Brief at p. 11. ("On this record, the jury returned its verdict").

Also, throughout the trial of this matter, Plaintiffs' counsel interjected his own testimony regarding the evidence before the jury. At one point, after Defendants' expert, Dr. Payne, provided testimony regarding a deposition, Plaintiffs' counsel asked the trial court to move the deposition at issue into evidence "so the jury can see that is not the case." (Tr. 1489:3-24). After

the Defendants' counsel objected to such statements concerning the evidence, the trial court instructed Plaintiffs' counsel to not comment on the evidence. Id. Dr. Payne continued his testimony regarding the deposition, and Plaintiffs' counsel again commented that "the jury will have their notes on that." (Tr. 1490:10-26). Defense counsel was forced to again object to Plaintiffs' counsel's comments regarding the evidence and his baseless insinuations that Defendants' witnesses were not telling the truth. Id. These multiple improper comments were the subject of a motion for mistrial and warrant the reversal of the case and remand for a new trial. Mariner Healthcare, Inc. v. Estate of Edwards, 964 So. 2d 1138 (Miss. 2007).

H. AFTER HEARING PLAINTIFFS' PROPOSED EVIDENCE, THE TRIAL COURT APPROPRIATELY DECLINED TO SUBMIT THE ISSUE OF PUNITIVE DAMAGES TO THE JURY

The trial court is the gatekeeper for the issue of whether punitive damages should be considered by the jury. Doe v. The Salvation Army, 835 So. 2d 76, 79 (Miss. 2003). Appellate courts employ an abuse of discretion standard when reviewing a trial court's decision on whether punitive damages should be considered by the jury. Bradfield v. Schwartz, 936 So. 2d 931, 936 (Miss. 2006). Under the abuse of discretion standard, a trial court's decision will stand unless the decision is found to be arbitrary and clearly erroneous. Gulf South Pipeline Co., LP v. Pitre, 35 So. 3d 494, 499 (Miss. 2010). Appellate courts must have a "definite and firm conviction" that the trial court committed a clear error of judgment before it will reverse the trial court's decision. McCord v. Healthcare Recoveries, Inc., 960 So. 2d 399, 405 (Miss. 2007).

Mississippi law does not favor punitive damages, and they are considered an extraordinary remedy. Bradfield, 936 So. 2d at 936. Punitive damages are only allowed with caution and within narrow limits. Id. They are "only appropriate in the most egregious cases, when the actions are extreme." Paracelsus Health Care Corp. v. Willard, 754 So. 2d 437, 442 (Miss. 1999).

The trial court, in this case, explained that after a determination of compensatory damages is made by the trier of fact, "the Court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier of facts." (Tr. 1771:2-12). "[T]he Court should decide whether under the totality of the circumstances in viewing the defendant's conduct in the aggregate a reasonable, hypothetical trier of facts could find either malice or gross negligence, reckless disregard." (Tr. 1771:18-25).

After "listening to the argument of counsel and having sat through and, of course, heard each and every witness brought before this Court, having heard motions, objections as presented to the Court," the trial court found that the issue of punitive damages should not be submitted to the jury. (Tr. 1771:26 – 1772:26). The trial court found that Defendants' conduct amounted to ordinary negligence and a hypothetical trier of fact could not find malice or gross negligence. The trial court's ruling was not arbitrary and erroneous.

Plaintiffs made many extravagant yet baseless claims in their Brief in an attempt to convince this Court that the court below abused its discretion in ruling that the issue of punitive damages should not be submitted to the jury. The evidence presented at trial, however, revealed Arnold Avenue to be a facility that recognized Mr. Gibson's medical reality, identified Mr. Gibson's acute medical problems, and took steps to improve his condition.

1. Defendants' Care Of Mr. Gibson's Pressure Sores Was Adequate Considering His Risk Factors

Plaintiffs assert Mr. Gibson's pressure sores are evidence indicating that the question of punitive damages should have been submitted to the jury. The evidence concerning pressure sores, however, confirms that punitive damages should not have been submitted to the jury. Defendants have extensively briefed the issue of Mr. Gibson's pressure sores. In short, Mr. Gibson's medical problems put him at high risk of developing pressure sores. (Tr. 1404:12-29; 1006:20 – 1007:24). Because of the risk factors, Arnold Avenue took precautions, such as a wall

mounted chart, to ensure that Mr. Gibson was turned properly. (Tr. 1155:13-29; 1292:15-19). Despite these precautions, Mr. Gibson's pressure sores were unavoidable. (Tr. 1404:12-29). Plaintiffs' own experts refused to criticize Arnold Avenue for the initial development of pressure sores. (Tr. 590:6-11; 591:12-22; 590:11-12; 732:17-21). All of the testimony at trial indicated that a resident of a nursing home could develop pressure sores even where there is no breach of the standard of care by the nursing home and that that good care is required to heal a pressure sore. (Tr. 1011:17-22; 1106:14-19; 852:12-16; 570:28-29). In addition to good care, the healing process also requires that the pressures sores not be infected. (Tr. 1109:18-19; 589:6-23). Revealingly, Mr. Gibson's pressure sore healed under the care of the nurses at Arnold Avenue.

2. Plaintiffs Presented No Medical Evidence That The Nursing Home Breached The Standard Of Care Concerning Mr. Gibson's Hygiene

Plaintiffs also baldly allege Mr. Gibson "languished in urine and feces." See Appellant's Brief at p. 13. First, the presence of urine or feces on a non-ambulatory resident is not a breach of the standard of care. Plaintiffs' expert nurse admitted this fact. (Tr. 599:5-9). Second, the evidence also does not support the allegation that Mr. Gibson languished in urine or feces. Nurse Munson testified that she would find Mr. Gibson wet on occasion but there was never an unreasonable delay in cleaning him. (Tr. 1327:19-25). Nurse Munson testified that a nurse can recognize when a patient has been lying in excrement for an extended period of time, and Mr. Gibson never experienced such treatment. (Tr. 1327:19-25). CNA Rollins admitted that she never saw Mr. Gibson lying in feces. (Tr. 265:4-8).

Dr. Payne testified that if a patient lies in urine or feces for unreasonable amounts of time, he or she will develop dermatitis covering the entire exposed area. (Tr. 1416:23 – 1417:5). There will usually be discoloration of the skin. Id. Mr. Gibson did not have any of these conditions. Id. Nurse Slevenski also testified that Mr. Gibson did not exhibit any signs associated with long term exposure to urine or feces. (Tr. 1115:10-13). Nurse Slevenski also

pointed out the pressure sore on Mr. Gibson's sacrum would not have healed had he been lying in urine or feces for unreasonable amounts of time. (Tr. 1043:14-18).

3. Plaintiffs' Conclusory, Generalized Evidence Concerning Short Staffing Lacked Any Evidentiary Support

Plaintiffs' generalized evidence regarding staffing and supplies came from two former CNAs. These two former CNAs, however, charted on Mr. Gibson very few times. One of them, Ms. Bryant, was only employed at Arnold Avenue for three months during Mr. Gibson's stay and only cared for Mr. Gibson one time. (Tr. 309:15; 314:21-25; 315:18-25; 316:13-28). Jacqueline Rollins only charted as having provided care to Mr. Gibson a few days during the months she actually charted on Mr. Gibson. (Tr. 273:11-19; 274:12-22; 280:29 – 281:22; 282:24 – 284:4; 284:8-22; 284:25 – 285:13; 285:16-25). The two CNAs never reported abuse or neglect to Arnold Avenue administration, the Department of Health, or the Department of Nursing. (Tr. 267:5-15). These CNAs never saw another nurse or CNA abuse Mr. Gibson. (Tr. 311:20-23).

The trial judge had ample evidence before her concerning the care provided by Arnold Avenue employees. (Tr. 1181:28-29). Arnold Avenue always had sufficient staffing, and supplies were readily available. (Tr. 1152:15; 1159:28 – 1160:2; 1287:1-7). Nurse Myles testified that if the facility had not been able to care for the patients she would not have stayed for eighteen years. (Tr. 1153:1-9). She stated because she was older than some of her residents, she was easily able to put herself in the residents' position. (Tr. 1153:1-9).

4. Plaintiffs Failed To Establish The Nursing Home Breached The Standard Of Care Concerning Any Feeding Tube Dislocation

Plaintiffs' also baldy allege Mr. Gibson's roommate pulled out Mr. Gibson's feeding tube. See Appellant's Brief at p. 7. In reality, Arnold Avenue recognized that Mr. Gibson had a problem with pulling his tube and addressed it in his care plan. (Tr. 602: 9-11). Nurse Myles explained that the feeding tube actually always stayed in Mr. Gibson but he would occasionally

disconnect his feeding tube from the PEG tube. (Tr. 1193:17 – 1194:4; 1159:13-21). She also explained that Mr. Gibson's roommate was a sweet young man named Larry who suffered from hydrocephalus and there was never any report of Larry pulling out Mr. Gibson's feeding tube. (Tr. 1216:1-19; 1195:3-11). Similarly, Nurse Munson testified Mr. Gibson would occasionally pull on his tube. (Tr. 1286: 16-29). Plaintiffs' expert nurse admitted the standard of care would not be breached if a patient pulls out his feeding tube and the patient is disconnected for a significant amount of time because residents are not provided continuous observation. (Tr. 600: 15-27).

5. Mr. Gibson's Physician and Dietitian Closely Monitored and Controlled His Nutrition and Hydration Levels

Plaintiffs make the audacious statement that Mr. Gibson was not fed or given water. Appellant's Brief at p. 11. Again, the evidence does not support the Plaintiffs' allegations. When Mr. Gibson arrived at Arnold Avenue, he was malnourished. (Tr. 1392:17-20). Mr. Gibson's treating physician and dietitian monitored and regulated Mr. Gibson's nutrition. Mr. Gibson's physician and dietitian relied on his prealbumin levels to evaluate his nutrition, and they were initially low. (Tr. 1392:17-20; 806:9-13; 807:28 – 808:2). Throughout Mr. Gibson's stay at Arnold Avenue, the physician and dietitian monitored and adjusted his nutrition sources in response to his albumin levels which continuously improved after admission to the nursing home. (Tr. 993:20-25).

The evidence at trial demonstrated Mr. Gibson's underlying medical conditions had a great effect on his hydration status. Mr. Gibson suffered from chronic renal insufficiency, and his kidneys had not been functioning at a normal level for an extended period of time. (Tr. 998:12-13; 823:6-10; 819:24 – 820:4). Mr. Gibson also suffered from gastrointestinal ("GI") bleeds, which caused him to be anemic and volume depleted. (Tr. 1001:17-24; 764:23-25). It is undisputed that Mr. Gibson's GI bleed was not caused by Arnold Avenue. (Tr. 1427:23-26).

Mr. Gibson also suffered from congestive heart failure, and his treating physician remained cognizant of Mr. Gibson's congestive heart failure when planning his hydration. Medical care providers must be cautious when providing fluids to a patient with congestive heart failure. (Tr. 1000:18-28; 1000:18-28; 719:21-29; 828:11-26). For Mr. Gibson's healthcare providers, proper hydration was a constant balancing act. (Tr. 992:2-3).

On November 21, 2001, the Mississippi Department of Health completed one of its surveys of Arnold Avenue. [R.E. 22]. In this survey, thirteen residents were examined and the surveyors concluded that there were deficiencies with three of the thirteen residents regarding hydration. No deficiencies were found for ten of the thirteen residents. While courts may look to prior conduct to assist in establishing punitive damages, the conduct at issue in Mr. Gibson's case, however, must be so typical of the defendant's prior conduct that it raises an inference of intentional conduct.. H.L. Dawkins, Jr. v. Redd Pest Control Co., Inc., 607 So. 2d 1232, 1236 (Miss. 1992).

Plaintiffs assert that the survey "demonstrates that Magnolia was on notice of residents suffering from the very same injuries that Mr. Gibson suffered." Appellant's Brief at p. 12. This is not the case. This survey relates to residents facing circumstances completely different that those faced by Mr. Gibson. One of the three residents was "at risk for dehydration due to the use of diuretic medication and the frequent refusal of fluid." Another one of the residents exhibited partial loss of voluntary movement which limited the ability of the resident's ability to obtain fluids for him/her self. Mr. Gibson was on a feeding tube; therefore, he could not refuse fluids and did not face any issue with obtaining fluid for himself. The third other resident was at risk for dehydration due to daily use of Lasix, but the survey does not explain the resident's circumstances. The survey did not cite any deficiencies with residents on feeding tubes. The survey did not conclude that the facility was short staffed.

Unlike the survey submitted by the Plaintiffs, Defendants submitted findings from the Mississippi State Department of Health ("DOH") that specifically addressed Mr. Gibson. [R.E. 23]. DOH launched an investigation in response to allegations surrounding Mr. Gibson. The DOH investigation arose out of the alleged incidents at issue in this case. The investigation report concluded the allegations could not be substantiated. Furthermore, the investigation report notes "no deficiencies were cited." These findings were issued by an entity whose job it is to identify and investigate complaints.

6. The Nursing Home Established a Care Plan Addressing Mr. Gibson's Risk Factors, Including Risk for Falls

Plaintiffs also allege Arnold Avenue did not take fall precautions to help ensure the safety of Mr. Gibson. See Appellant's Brief at p. 17. The evidence at trial actually revealed the opposite to be true. At the beginning of Mr. Gibson's stay, Arnold Avenue created a care plan which addressed falls. Unfortunately, on November 24, 2001, Mr. Gibson fell out of his bed, and in response, Arnold Avenue launched an investigation and developed a new care plan. (Tr. 1116:21-28). Plaintiffs' expert nurse admitted Arnold Avenue's response to the fall was good. (Tr. 514:16 – 515:12). Some six months later, Mr. Gibson fell again, but on this occasion, the latch on the side rail malfunctioned. Arnold Avenue provided Mr. Gibson a new bed, and he did not experience any more falls. (Tr. 603:3-15). Mr. Gibson did not suffer any injuries as a result of these two falls. (Tr. 603:3-12)

7. Plaintiffs Presented No Proof That Mr. Gibson Suffered Pain For 39 Days as a Result of a Fractured Arm or Hemothorax

Plaintiffs allege Mr. Gibson suffered agonizing pain from November 22, 2002, until he went to the hospital on December 31, 2002. See Appellant's Brief at p.13. The evidence, however, demonstrated many people came in contact with Mr. Gibson between November 22, 2002, and the time he left Arnold Avenue, and not a single person, including numerous

individuals unaffiliated with the nursing home, noticed him suffering from pain. Plaintiff's claims concerning the fractured arm and hemothorax are without any basis in the record as has been previously briefed by Defendants.

8. Mr. Gibson's Contractures Improved and Were Mild Upon His Discharge from the Nursing Home

Plaintiffs also distort the evidence by claiming Arnold Avenue caused Mr. Gibson to contract into the fetal position. See Appellant's Brief at p. 9. Mr. Gibson was at a greater risk of developing contractures because he had suffered a stroke. (Tr. 507:20-27). It is also undisputed that Mr. Gibson's treating physician closely monitored his contractures, discontinued occupational therapy, and chose not to order physical therapy. (Tr. 511:14-24; 610: 13-17; 854:28 – 855:14; 855:15-17). Under care by Arnold Avenue, Mr. Gibson's contractures improved. (Tr. 614:14-21). Plaintiffs' claims are without merit.

I. PLAINTIFFS WAIVED THE RIGHT TO CHALLENGE THE CONSTITUTIONALITY OF § 11-1-60

For the first time on appeal, Plaintiffs contend that Miss. Code Ann. § 11-1-60 violates Plaintiffs' Constitutional rights to a jury trial and the separation of powers clause. Arguments not raised with the trial court cannot be raised for the first time on appeal. Hemmingway v. State, 483 So. 2d 1335, 1337 (Miss. 1986); Debrow v. State, 972 So. 2d 550, 553 (Miss. 2007); and Pickens v. Donaldson,748 So.2d 684 (Miss. 1999).

Plaintiffs' constitutional claims are also barred because they failed to notify the Attorney General's Office of the planned challenge. See Pickens,748 So.2d 684. Furthermore, Rule 24(d) of the Miss. R. of Civ. P. and Rule 44(a) of the M.R.A.P. require that proper notice be given to the Attorney General when the constitutionality of a statute is challenged to afford him an opportunity to intervene and argue the question of constitutionality.

Plaintiffs' failure to raise the issue of the constitutionality of § 11-1-60 at trial or to notify the Attorney General's Office of their challenge to the statute results in the procedural bar on this issue. Pickens, 748 So.2d at 691-692; Barnes v. Singing River Hosp. Sys., 733 So. 2d 199, 202-203 (Miss. 1999).

J. MISSISSIPPI'S STATUTORY CAP ON NON-ECONOMIC DAMAGES DOES NOT VIOLATE PLAINTIFF'S RIGHT TO A JURY TRIAL OR THE SEPARATION OF POWERS CLAUSE

A constitutional challenge to a state statute "is not sustainable unless the case is so clear as to be free from doubt." Moor v. Texas & N.O.R. Co., 75 F.2d 386, 389 (5th Cir. 1935). "[T]he burden is on the party challenging the constitutionality of a statute to demonstrate beyond all reasonable doubt that the legislation is unconstitutional." Bond v. Marion County Bd. of Supervisors, 807 So. 2d 1208, 1220 (Miss. 2001). The legislation under review must be found "in palpable conflict with some plain provision of the constitution." State v. Mississippi Ass'n of Supervisors, 699 So. 2d 1221, 1223 (Miss. 1997).

The Mississippi Supreme Court has recognized for more than a century that the jury's authority to measure damages is tempered by the reality that, "'trial by jury' means in court under the forms of law, with a judge presiding to direct the proceedings in conformity with it." Yazoo & Mississippi Valley R.R. Co. v. Wallace, 43 So. 469, 470-71 (Miss. 1907). "Twelve men in the woods or on a street corner were not imagined." Id. at 471. The "inviolate" right to trial by jury under Article 3, Section 31, in sum, refers to "a jury with power alone to try issues of fact, and not of law." Natchez & S. R.R. Co. v. Crawford, 55 So. 596, 598 (Miss. 1911). Thus, the jury finds the facts giving rise to the judgment, but it is the court that "pronounces the judgment," and that judgment is "the award of the law[.]" Lewis v. Garrett's Adm'rs, 6 Miss. 434, 1861 WL 1864, *15 (Miss. Err. & App. 1841).

To the extent Plaintiffs base their challenge on Section 31 of the Mississippi Constitution, § 11-1-60 operates after the jury has determined the facts of liability and damages, has returned a verdict in favor of a plaintiff, and has awarded an amount that exceeded the noneconomic damages cap. Section 11-1-60 requires the trial court, as a matter of law, to reduce the award of noneconomic damages. The statute does not deprive the jury of its fact-finding duty or a plaintiff of his trial by jury. Section 11-1-60(2) is not in "palpable conflict" with the right to trial by jury under Section 31.

The right to a jury trial is affected not only by the power of the judiciary but also by the power of the legislature. In Walters v. Blackledge, the Mississippi Supreme Court found that the Workers' Compensation Act, which replaced traditional tort actions with a statutory scheme of limited indemnity, did not violate Mississippi's Constitution, including the right to a jury trial. Walters, 71 So. 2d 433 (Miss. 1954).

In Walters, the Court acknowledged "that there is no vested right in any remedy for a tort yet to happen which the Constitution protects. Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies." Id. at 441. The Court further noted that the constitution "guarantees a trial only in those cases where a jury was necessary according to the principles of common law" and that "there is no vested right in any remedy for torts yet to happen, and except as to vested rights a state legislature has full power to change or to abolish existing common law remedies or methods of procedure." Id. at 446. See also Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989) ("If a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages recoverable for a cause of action as well."). The Mississippi Legislature's authority to alter or abolish common-law remedies was central to the Court's determination that the Workers' Compensation Act was constitutional. Id. See also Wells v. Panola County Bd. of Educ., 645 So.

2d 883 (Miss. 1994) (upholding limitation on recoverable damages against school districts in Accident Contingency Act). The Wells court noted that "a constitutional guarantee of a remedy does not mean that recovery must be absolute or that it may be unlimited." Id. at 891-92.

Plaintiffs cite Isom v. Mississippi Cent. R. Co., 7 George 300, 1858 WL 3114 (Miss. Err. App. 1858), as their sole Mississippi authority in arugment that § 11-1-60 violates the separation of powers clause in the Mississippi Constitution. However, Isom deals with separation of powers in the context of Mississippi's Takings Clause and not in conjunction with a limitation on common law remedies. The Mississippi Supreme Court has traditionally respected the legislature's authority to decide broad tort policy rules. See, e.g., Thomas v. Warden, 999 So. 2d 842 (Miss. 2008) (upholding pre-suit notice requirement in medical malpractice actions); Barnes v. Singing River Hosp. Sys., 733 So. 2d 199 (Miss. 1999) (upholding one-year statute of limitations of Tort Claims Act); Vortice v. Fordice, 711 So. 2d 894 (Miss. 1998) (upholding notice requirements of the Tort Claims Act); (upholding limitation on school bus accident recoveries); and Walters, 71 So. 2d 433 (upholding Workers' Compensation Law).

The Mississippi Legislature has authority to dictate the legal consequences of a jury's assessment of damages through the enactment of statutory caps on non-economic damages.

VI. CONCLUSION

A. ON DIRECT APPEAL

For the foregoing reasons, Defendants request this Court reverse the trial court's judgment and render judgment in favor of Defendants. Alternatively, Defendant Foundation requests this Court reverse the trial court's judgment and render judgment in its favor because it did not provide any healthcare services to Henry Gibson. Alternatively, Defendants request the Court reverse the trial court's judgment and remand this case for a new trial.

B. AS TO PLAINTIFFS' CROSS-APPEAL

For the foregoing reasons, Plaintiffs' assignments of error are without merit. The trial court did not abuse its discretion in concluding Plaintiffs' proof insufficient to submit the question of punitive damages to the jury. Furthermore, Plaintiffs' constitutional claims concerning § 11-1-60 are procedurally barred. Alternatively, Plaintiffs constitutional claims fail as a matter of law. Defendants respectfully request the Court affirm the decisions of the trial court that have been appealed by Plaintiffs.

Respectfully submitted,

MAGNOLIA HEALTHCARE, INC. AND FOUNDATION HEALTH SERVICES, INC.

By: _____
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CERTIFICATE OF SERVICE

I, Michael A. Heilman, do hereby certify that I have this day caused to be served, via hand delivery, a true and correct copy of the above and foregoing document to:

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This the 5th day of July, 2011.

Michael A. Heilman
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