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

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

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I. CROSS-APPELLANTS' REPLY ARGUMENT

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.

During his residency, multiple doctors unaffiliated with the nursing home followed and directed Mr. Gibson's care. 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.

At trial, Plaintiffs argued Defendants' negligent care resulted in pressure sores, malnutrition, dehydration, a hemothorax, a fractured right arm, and falls. At the conclusion of trial, 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, including $500,000 for non-economic damages and $75,000 in permanent disfigurement damages. The form of this judgment was proposed by Plaintiffs and agreed by the parties in accordance with Miss. Code

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

Ann. § 11-1-60. Plaintiffs made no effort to modify the trial Court's judgment. Plaintiffs did not file post-trial motions and never challenged the application of § 11-1-60 to the verdict. After the trial court denied Defendants' post-trial motions, Plaintiffs and Defendants timely appealed to this Court.

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

The evidence at trial established that Foundation provided services to Magnolia that were primarily of a financial nature. (Tr. 1351:28-29; 1352:1; 1353:10-14). The services provided by Foundation 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). Foundation never managed the facility nor took part in any supervisory functions. (Tr. 1334:3-5; 1335:1-7). Only Magnolia controlled the operations of management and supervision. (Tr. 1335:11-16). All of the administration and staff were employed by and accountable to Magnolia. (Tr. 1334:6-25; 1335:1-7). Foundation never provided healthcare services to any of the facility's residents, including Mr. Gibson.

On January 1, 1999, Foundation and Magnolia entered into a written management agreement which provided that Foundation would perform certain services for Arnold Avenue. [R.E. 8]. Plaintiffs spill much ink discussing the terms of this agreement. Plaintiffs, however, failed to offer any evidence regarding any services actually provided by Foundation. Plaintiffs could not come forward with one shred of evidence that Foundation actually provided healthcare services to Mr. Gibson. The evidence proves that immediately after the 1999 agreement was signed, the contracting parties determined not to perform the services identified in the agreement. On January 1, 2002, six months into Mr. Gibson's eighteen month residency at Arnold Avenue,

Foundation and Magnolia entered into a "Financial Services Agreement" which evidenced the true agreement under which the parties had been operating since January 1999. [R.E. 9].

Contracting parties are not chained to a written agreement when both parties no longer want the agreement to control their relationship. Until the Financial Services Agreement was entered into, the working relationship between Foundation and Magnolia was the result of the parties' modification of the 1999 contract and/or Magnolia's waiver of certain contractual terms. The Mississippi Supreme Court has made clear that "a party to a contract may by words or conduct waive a right to which he would otherwise have been entitled." Tupelo Redevelopment Agency v. Gray Corp., Inc., 972 So. 2d 495, 507 (Miss. 2007). An oral modification of a written contract can occur even if the written contract provides that all modification must be in writing. Eastline Corp. v. Marion Apartments, Ltd., 524 So. 2d 582, 584 (Miss. 1988).

The subsequent conduct of the contracting parties is proof of the modification/waiver. "The subsequent actions of parties pursuant to a contract may support a finding that the original contract has been modified to an extent consistent with the subsequent course of conduct." Fletcher v. U.S. Restaurant Properties, Inc., 881 So. 2d 333, 337 (Miss. App. 2004). The actions and pattern of conduct of the contracting parties determines the true agreement. Upchurch Plumbing, Inc. v. Greenwood Utilities Commission, 964 So. 2d 1100, 1112 (Miss. 2007). "'What the parties to a contract consistently do thereunder is evidence of what the contract between them required that they should do.'" Fletcher, 881 So. 2d at 337 (quoting Delta Wild Life & F., Inc. v. Bear Kelso Plant., Inc., 281 So. 2d 683, 686 (Miss. 1973)). The Plaintiffs produced no evidence at trial that Foundation ever actually performed anything other than financial and limited administrative services. Plaintiffs also did not assert any third party beneficiary claim or argue they detrimentally relied upon the words of the first written contract.

It is clear from the evidence presented at trial that Foundation never provided healthcare services.

Curiously, Plaintiffs, in their Reply Brief (p. 20), argue Arnold Avenue's administrator's testimony—that there were no changes in the operation of the nursing home during Mr. Gibson's residency—conflicts with Defendants' position that under the second agreement Foundation's responsibilities to Magnolia were limited to financial and administrative services. This argument mischaracterizes Defendants' position. Defendants' position is, and the evidence proves, Foundation never provided healthcare services to Mr. Gibson or any other resident. Foundation only provided financial and limited administrative services. Foundation's responsibilities and course of conduct regarding healthcare services remained unchanged during Mr. Gibson's entire residency.

Plaintiffs also argue in their Reply Brief (pp.20-21) that the 2002 Agreement increased fees including fees calculated using the terms "Regional Director of Operations" and "Regional Nurse." These terms were never explained or even mentioned at trial. Plaintiffs failed at trial and in their briefing before this Court to establish Foundation provided healthcare services to any resident of the nursing home. The overwhelming weight of the evidence shows Foundation's services to Magnolia were administrative and financial in nature.

The only evidence, other than the 1999 Agreement, produced by the Plaintiffs regarding Foundation's liability were two applications for licensure submitted to the Mississippi State Department of Health by Magnolia. Vol.13, P. 2443-2446; Vol. 13, P. 2449-2452. The first of these two applications was submitted on February 2, 2001, and the second was submitted on February 13, 2002, after Foundation and Magnolia entered into the 2002 Financial Services Agreement. Both applications inquired "[i]s the facility operated through a management agreement," and Magnolia responded affirmatively on both. The applications also requested that

Magnolia identify the management entity, and Magnolia listed Foundation on both. These applications did not request information regarding the specific duties performed by Foundation nor did Magnolia volunteer such information. Moreover, such a representation to the Mississippi State Department of Health does not create a duty to a third party. There was no proof, whatsoever, submitted at trial that any of the Plaintiffs relied on these applications to any degree much less that they mistook it to be a representation that Foundation would provide healthcare services to Mr. Gibson.

Plaintiffs also argue that Defendants' reliance on Howard v. Harper, 947 So. 2d 854 (Miss. 2006) is misguided. According to Plaintiffs, Howard represents a narrow holding in which the Mississippi Supreme Court chose not to extend liability to individual administrators and licensees for merely having statutory duties without a showing of negligence and or violations of those duties. Even a cursory reading of Howard dispatches Plaintiffs' position. The Supreme Court first considered whether a common law duty is owed by a nursing home administrator and licensee to nursing home patients. Howard, 947 So. 2d at 857. The Court explained:

> The Plaintiffs seek to expand the current common law duty that a nursing home or its proprietor or owner can be held liable under general principles of tort law for negligent acts or omissions regarding the care of its residents. Based on the absence of statutory law from the Legislature and the absence of case law calling for the expansion of this duty, as well as the fact that such expansion would be duplicative of the duty already owed by the nursing home business owner or proprietor, we decline to impose the same common law duty upon a nursing home licensee or administrator.

Id. at 858.

The Supreme Court then considered whether a statutory duty is owed. Id. The Court held that the state nursing home licensing statutes do not expressly create a duty by a licensee or an administrator and held that a breach of a licensing statute does not support a negligence action filed by a third party. Id. at 858-59. The Court also reviewed regulations regarding minimum

standards in a nursing home and held that the regulations do not create a separate cause of action nor establish a duty of care. Id. at 860.

The Supreme Court also considered whether an administrator and/or licensee may be held liable for medical malpractice. Id. The Supreme Court held administrators and licensees cannot be held liable for nursing home medical malpractice because they are responsible for administration concerns and regulatory compliance and are not medical care providers. Id. The responsibilities of an administrator and licensee are to the nursing home, not its residents. Id.

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

During the compensatory phase of trial, Plaintiffs' counsel and expert witness introduced improper, highly prejudicial testimony relating only to the issue of punitive damages. As an excuse, Plaintiffs claim the expert witness proffered this statutorily prohibited testimony and it was unsolicited by the Plaintiffs' counsel. The record reveals otherwise. Plaintiffs' counsel specifically solicited testimony relating only to the issue of punitive damages. He asked Plaintiffs' expert nurse, 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). After an objection by Defendants' counsel, 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). Immediately after the Court sustained the objection, Plaintiffs' counsel asked the witness, "how would you characterize the care and treatment of Mr. Gibson?" (Tr. 542:4-5). Nurse Clevenger responded, "I feel like that it was egregious and outrageous and showed blatant disregard for his health and well-being." (Tr. 542:25 – 543:1).

Plaintiffs assert that the prohibited testimony was unsolicited, but the statements made by Plaintiffs' counsel during the argument before the trial court judge regarding the Defendants' motion for a mistrial contradict Plaintiffs' assertion. Plaintiffs' counsel incorrectly argued that at

the second phase of trial he would not be allowed to submit additional evidence. (Tr. 545:26-28). He claimed that this was his "one shot." (Tr. 541:13). He also admitted to conducting himself in this manner in every trial that he participates. (Tr. 545:21). Primary responsibly for ensuring that information presented before a jury does not run contrary to the law falls in the first instance on trial attorneys. Plaintiffs' counsel abdicated this duty.

Plaintiffs also argue that this testimony was not prohibited as it was relevant to both liability and punitive damages. Plaintiffs cite two Florida cases to support their position, Payton Health Care Facilities v. Estate of Campbell, 497 So. 2d 1233 (Fla. 2nd DCA 1986) and Estate of Youngblood v. Halifax Convalescent Center, Ltd., 874 So. 2d 596, 605 (Fla. 5th DCA 2004). These cases are not applicable in Mississippi. Unlike Mississippi, Florida does not have a mandate to bifurcate a trial into compensatory and punitive damages stages. In Florida, a defendant may request bifurcation to avoid presentation of evidence of *financial considerations* relevant to the amount of punitive damages. W.R. Grace & Co. v. Waters, 638 So. 2d 502, 506 (Fla. 1994); Dessanti v. Contreras, 695 So. 2d 845, 847 (Fla. 4th DCA 1997). Florida "does not compel bifurcation of issues so that the defendant can prevent prejudicial information regarding his liability for punitive damages from reaching the jury." Dessanti, 695 So. 2d at 847. Plaintiffs' counsel's office was located in Florida at the time of trial, but during this trial, he was charged with knowing the laws of Mississippi.

The law in Mississippi is clear and stands in stark contrast to the law in Florida and the cases cited by Plaintiffs.

> Importantly, our punitive damages statute mandates the bifurcation of the issues of liability/compensatory damages and punitive damages. The statute requires that evidence concerning punitive damages be presented separately at a subsequent evidentiary hearing to take place, if and only if, the jury has awarded some measure of compensatory damages. Thus the detailed procedure . . . must be meticulously followed because, without an evidentiary buffer at trial, juries will ultimately confuse the basic issue of fault or liability and compensatory

> damages with the contingent issue of wanton and reckless conduct which may or may not ultimately justify an award of punitive damages.

Bradfield v. Schwartz, 936 So. 2d 931, 938 (Miss. 2006).

In no uncertain language the Mississippi Legislature and Supreme Court have said that no jury shall be retired to deliberate liability and damages if it has been tainted by the prohibited disclosure of information relating to punitive damages. The improper comments by Plaintiffs' counsel and the improper testimony by Ms. Clevenger were not relevant to liability. At the compensatory stage of trial, the only relevant issue was whether the Defendants breached the standard of care, not whether the Defendants "acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." See Miss. Code Ann. § 11-1-65.

Plaintiffs' counsel and witness purposely placed before the jury punitive damages evidence. Plaintiffs' counsel and witness violated a mandatory statute. A jury may not consider punitive damages evidence while determining the compensatory damages award.

> This is a troubling scenario when one considerers that under such procedure, not only is the jury subject to possibly returning an inflated compensation damage award based on consideration of the wrong evidence, it may also forego a finding for the defendant altogether in those situations where the jury may have otherwise seriously considered finding for the defendant, by considering only the appropriate evidence as to fault/liability.

Bradfield, 936 So. 2d at 938. Plaintiffs' expert witness described Defendants' conduct as egregious, outrageous, and demonstrative of a blatant disregard for Mr. Gibson's well-being. The Plaintiffs, in their appellant brief, argue that this specific testimony from Nurse Clevenger provided 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. This Court has stated "it is absolutely imperative that the jury be unbiased, impartial, and not swayed by the consideration of improper, inadmissible information." James v. State, 912 So. 2d 940,

950 (Miss. 2005). Defendants objected to the punitive damages evidence and moved for a mistrial. (Tr. 543:8-24).

Later in the trial, counsel for Plaintiffs asked their physician expert whom he held "accountable" for certain injuries allegedly sustained by Mr. Gibson. (Tr. 733:9-22). Defendants again moved for a mistrial citing the continued improper examinations of Plaintiffs' expert witnesses. (Tr. 733:9 – 738:25). Ultimately, the Court denied the motion for mistrial. (Tr. 745-46). Similar to introducing punitive damage evidence in the compensatory phase of a trial, Plaintiffs' request that an expert witness tell the jury who to hold accountable is reversible error. Triggs v. State, 803 So.2d 1229, 1238-39 (Miss. App. 2002).

After Defendants moved for a mistrial regarding the punitive damages evidence and after a lengthy discussion between the trial court and the litigants, the trial court instructed the jury that it "should disregard completely the last response given by this witness." (Tr.546:23-25). Plaintiffs cite to Forrest v. State, 335 So. 2d 900 (Miss. 1970) for the proposition that remedial acts of the court are usually sufficient to remove any taint of prejudice. The Court in Forrest, however, went on to explain that the "rule, of course, assumes that the remarks were not so prejudicial that the curative acts of the court were ineffective to remove the prejudice." 335 So. 2d at 903. Ultimately, the Court held the improper conduct, when considered as a whole, resulted in the defendant being denied a fair trial. Id.

The Fifth Circuit Court of Appeals stated that "[t]rials are rarely, if ever, perfect, but gross imperfections should not go unnoticed." Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962). In Dunn, the trial court instructed the jury to "disabuse your minds of that statement" after an improper statement was made. Id. The Fifth Circuit, however, held that this instruction could not remove the prejudice. Id. "It is better to follow the rules than to try to undo what has been done. Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is

difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'" Id. "Some references are so prejudicial that it is difficult for curative instructions to resuscitate fairness." Rojas v. Richardson, 703 F.2d 186, 192 (5th Cir. 1983) (citing Pride Transport Co. v. Hughes, 591 S.W.2d 631 (Tex. App.-Eastland 1979)) (disclosure of defendant's insurance coverage was grounds for mistrial).

In Reed v. General Motors Corp., the plaintiff's counsel made a deliberate effort to inform the jury of the amount of the defendant's insurance coverage, and the trial court admonished the jurors that they were not to consider such information in determining who was negligent. 773 F.2d 660, 664 (5th Cir. 1985). The appellate court, however, pointed out the reference to insurance was not accidental or fleeting and held that the trial court's instruction did not suffice to cure the error. Id. In the case *sub judice*, the presentation of punitive damages evidence was purposeful and clearly in violation of Miss. Code Ann. § 11-1-65. The instruction to the jury was not sufficient to cure the harmful effect of the testimony. See Northrop v. Kay, 5 A.D.2d 957, 958 (N.Y. 1958).

Plaintiffs' counsel undertook a willful and calculated effort to deprive the Defendants of a fair and impartial trial. Appellate courts have not closed their eyes to the detrimental effects of such wanton acts simply because of curative instructions.

> The tactics of counsel cannot be condoned or overlooked. We feel compelled to state that, even if the incompetent testimony elicited from the plaintiff had been much less detrimental to defendants than it was, we would not, on the trial record of this case, allow the error to stand and thus set a precedent that might be taken as militating against the professional standard of candor which proscribes an attorney from getting evidence before a jury which he knows or should know the court should reject.

Young v. Price, 395 P.2d 365, 369 (Haw. 1964). These improper comments along with other comments previously discussed in Plaintiffs' Cross-Appellant's Brief warrant reversal of this case and remand for new trial.

C. PLAINTIFFS FAILED TO ESTABLISH ANY ACT TAKEN BY DEFENDANTS CAUSED MR. GIBSON'S DEATH

Simply put, Magnolia and Foundation's appeal challenges the legal sufficiency of Plaintiff's wrongful death evidence. The testimony proffered by Plaintiffs is insufficient to uphold the wrongful death verdict.

Plaintiffs take the position that once an expert utters certain words this Court loses its ability to review the legal sufficiency of the evidence on appeal. Defendants' position on appeal and this Court's cases establish that a plaintiff must prove cause in fact and proximate cause to succeed on a wrongful death claim. In this case, Plaintiffs provided nothing more than undated or generalized allegations that any conduct of the nursing home caused Mr. Gibson's death.

In Plaintiffs' Reply Brief (p. 13), Plaintiffs argue their wrongful death claim was proven by two events:

(1) Mr. Gibson's fractured right humerus and hemothorax caused respiratory problems; and
(2) Nursing home staff allowed Mr. Gibson to become severely dehydrated leading to kidney failure.

Plaintiffs, without any citation to proof in the record, state that "[c]onsequently, Mr. Gibson developed a severe infection that contributed to his demise." The overwhelming weight of the evidence shows Mr. Gibson died as a result of staph infection and sepsis. Defendants did not cause these conditions. Absolutely no evidence was presented that Defendants caused his staph infection or sepsis.

As will be discussed in more detail below, there is no evidence that any event at the nursing home caused Mr. Gibson's arm fracture or hemothorax. Furthermore, Mr. Gibson's hydration was controlled by his treating physician, who was not an employee or agent of either defendant. Additionally, Mr. Gibson's hydration labs were affected by his underlying medical

condition, and Plaintiffs produced no evidence the nursing home caused Mr. Gibson's death by failing to follow doctor's orders concerning Mr. Gibson's hydration requirements.

In a medical malpractice claim, a plaintiff must prove, through expert testimony, the healthcare provider breached a duty to conform to a specific standard of conduct. Young v. UMC, 914 So. 2d 1272, 1276 (Miss. App. 2005). Plaintiffs bear the burden of proving a causal connection exists between the injury and Defendants' specific wrongful act. Powell v. Methodist HealthCare-Jackson Hospitals, 876 So. 2d 347, 348 (Miss. 2004). Speculative testimony, even by expert witnesses, is insufficient as a matter of law to establish proximate cause. Double Quick, Inc. v. Lymas, 50 So.3d 292, 299 (Miss. 2010). The general nature of the testimony in this case resulted in the jury's having been left to speculate and guess about causation. While the Court must view the evidence in the light most favorable to the verdict, speculation and conjecture alone will not support a verdict. Id.

1. Plaintiffs Evidence Concerning Mr. Gibson's Broken Arm and Alleged Hemothorax is Speculative

Concerning Mr. Gibson's broken arm and hemothorax, Plaintiffs failed to present evidence of a specific wrongful act on the part of Defendants that caused Mr. Gibson's injuries. Instead, Plaintiffs offered only speculation concerning the cause of the broken arm and alleged hemothorax. Recognizing the lack of testimony concerning factual or proximate cause, Plaintiffs imply that this case should be treated as a res ipsa loquitur case.

Res ipsa loquitur is a burden shifting doctrine. If this doctrine is established, it creates a rebuttable presumption of negligence. Thomas v. Bradley, 987 So. 2d 1020, 1026 (Miss. App. 2008). Without this doctrine, the jury could not presume negligence from the fact of an injury alone and Plaintiffs continue to bear the burden of showing a specific wrongful act on the part of Defendants that caused Mr. Gibson's injuries. Plaintiffs did not include this burden-shifting argument in any of their pleadings, never presented it to the trial court, and failed to request the

trial court to instruct the jury regarding this burden-shifting argument. Accordingly, Plaintiffs are barred from asserting it for the first time on appeal. Triplett v. City of Vicksburg, 758 So. 2d 399, 401 (Miss. 2000); 57B Am. Jur. 2d Negligence § 1359 (2011).

At trial, Plaintiffs' Counsel asked Plaintiffs' expert doctor, Dr. Williams, "[w]ho do you hold responsible for the hemothorax, as well as the acute fracture of the humerus?" (Tr. 716:28 – 717:1). Dr. Williams responded:

> In my opinion, it was negligence on the part of the nursing home staff because Mr. Gibson should have, first of all, never been allowed to sustain such an injury. He had fallen in the past. He had fallen out of bed once when the side rails were up. Then had fallen out of bed once when the side rails were down. So the nursing home staff knew that he could fall or he was at risk for injury. And to have him sustain such an injury without it ever being noticed in the nursing home is something unexplainable.

(Tr. 717:2-11). According to Dr. Williams, simply because injuries occurred, the nursing home was negligent. Dr. Williams does not point to any act of Defendants which caused the injuries.

Based on the jury instructions granted by the Court, unexplained injuries alone are not enough to sustain a verdict in this case. Plaintiffs are not entitled to have their burden of proof shifted to Defendants. Plaintiffs did not present an argument or evidence at trial concerning the applicability of any burden-shifting doctrine. Even if the Plaintiffs had presented such an argument, Plaintiffs could not have established that they were entitled to a burden shift. Res ipsa loquitur is only applicable where a plaintiff demonstrates the following elements: (1) the instrumentality causing the damage must be under the exclusive control of the defendant, (2) the occurrence must be such as in the ordinary course of things would not happen if those in control of the instrumentality used proper care, and (3) the occurrence must not be due to any voluntary act on the part of the plaintiff. Thomas, 987 So. 2d at 1026.

The doctrine cannot be established in this case because the instrumentalities which may have caused damages were not under the exclusive control of the Defendants. Mr. Gibson's bed,

his bed rails, his room, and Mr. Gibson himself were not under the exclusive control of Defendants. Mr. Gibson received visits from his treating physician, who was not an employee or agent of Arnold Avenue. [R.E. 2] He also received daily visits from family members. (Tr. 326:23-27; 380:18-23; 394:22-25; 653:6-12; 659:2-16; 876:10-26; 903:3-6). Everyday, Mr. Gibson's bed, his bed rails, his room, and Mr. Gibson himself came under the care and control of third parties for whom the nursing home had no responsibility.

Furthermore, a fall in a nursing home is not the type of occurrence which, in the ordinary course of things, would not happen without the presence of negligence. Courts "judicially know that the fall of an elderly person does not necessarily result alone from the negligence of another but may occur under circumstances when there is a complete absence of negligence on the part of any third party, or even of the injured party . . . ." Cannon v. McKendree Village, Inc., 295 S.W.3d 278, 285 (Tenn. App. 2009). Plaintiffs have the burden of proof in this case, and "[t]o prove no more than that it was a possibility is not sufficient foundation for the support of a verdict or judgment." Birrages v. Illinois Cent. R.R. Co., 950 So. 2d 188, 193 (Miss. App. 2006) (quoting Berryhill v. Nichols, 158 So. 470, 471 (Miss. 1935)).

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, 345-46 (Miss. 1942). In this case, Plaintiffs' experts failed to identify any act or failure to act by Arnold Avenue which was the cause in fact or proximate cause of Mr. Gibson's injuries. Plaintiffs' evidence, or lack thereof, placed 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). Plaintiffs' expert doctor even described Mr. Gibson's injuries as an unexplained occurrence. (Tr. 717:2-11). Unexplained

injuries that fail to show a specific wrongful act by the defendant fail as a matter of law. Caffrey v. Barlett Western R.R. Co., 198 S.W. 810, 810 (Tex. 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 injuries.

Mr. Gibson was never in the exclusive control of Arnold Avenue as argued by Plaintiffs. Many people unaffiliated with the nursing home came in contact with Mr. Gibson on a daily basis. 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.

Broken Arm. Plaintiffs presented no evidence of any specific act of Defendants' which caused Mr. Gibson's broken arm. Plaintiffs' assertion that Arnold Avenue caused Mr. Gibson's broken right arm was based solely on the fact Mr. Gibson had swelling in his right hand on November 22, 2002, which they claim must have been caused by the fracture. (Tr. 697:6-8; 687:20-21; 551:13-19). However, on November 22, 2002, a licensed practical nurse, Betty Munson, noticed 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); [R.E. 10]. Later that same day, Mr. Gibson's treating physician performed a physical examination of Mr. Gibson and did not document any swelling, pain, or abnormalities in his right arm. [R.E. 11]. On November 25, 2002, another nurse performed a skin assessment and found no swelling, pain, or abnormalities in his arm. [R.E. 12]. On December 20, 2002, Mr. Gibson's treating physician performed another physical examination and again did not document any swelling, pain, or abnormalities in his arm. [R.E. 11].

On December 31, 2002, before Arnold Avenue called an ambulance for Mr. Gibson because of respiratory problems, Mr. Gibson's nurse noted he denies pain. [R.E. 13]. The emergency medical technicians that responded did not document any pain, swelling, or bruising

despite the fact the strap on the gurney was placed across Mr. Gibson's arms. (Tr. 555:8-20; 557:5-7). Also, Mr. Gibson's heart rate in the ambulance and upon arrival at the emergency room was normal, indicating a lack of pain. (Tr. 1029:28 – 1030:4). The admitting nurse at the emergency room did not document any indications of pain even though she placed an IV in Mr. Gibson's right arm which required the use of a tourniquet. (Tr. 538:3-6; 561:22 – 562:17); [R.E. 15]. On the admission form, Mr. Gibson's daughter stated the he had "[n]o frequent or persistent pain during the last 2 weeks." [R.E. 14]. Accordingly, there is no evidence of a fracture when Mr. Gibson left the nursing home or when he first arrived at the emergency room. (Tr. 1072:18-28).

More than three hours after Mr. Gibson left the nursing home, the hospital performed a CT scan which showed a fracture. [R.E. 16]. This was a "palpable" fracture that could have been easily found by a trained medical professional. (Tr. 1449:25 – 1450:4). Early the next day, Mr. Gibson first began showing signs and symptoms of an arm fracture, such as pain and swelling. [R.E. 17]. There is no direct or other evidence that Mr. Gibson sustained an event at Arnold Avenue which proximately caused any injury to his arm.

Hemothorax. According to Plaintiffs' physician expert, the same unexplained 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, a CT scan revealed he had bilateral pleural effusions (fluid around the lungs) and a pericardial effusion (fluid around the heart). (Tr. 1431:5-9). Mr. Gibson was suffering from a flare up of his congestive heart failure. (Tr. 1431:11-13).

In response to these conditions, one of the doctors at the hospital, Dr. Gamble, performed a thoracentesis by inserting a needle through Mr. Gibson's rib cage and into the pleural cavity where the excess fluid was located and withdrawing the fluid. (Tr. 771:12-25; 1432:14-19). Dr.

Gamble documented that there was a good evacuation, and he removed one and a half liters of slightly blood tinged fluid. [R.E. 18]. Bleeding is one of the primary complications of a thoracentesis. (Tr. 1433:18-19; 1436:17-19). The fluid's slight coloration indicates that the doctor most likely nicked an artery or vein, causing bleeding in the pleural space where the fluid was located. (Tr. 1434:2-8).

For a typical thoracentesis, the post procedure treatment requires only a Band-Aid, but after Mr. Gibson's thoracentesis, the doctor had to use two sutures. (Tr. 1434:27 – 1435:10). This indicates unusual trauma. (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 blood. [R.E. 19]; (Tr. 1436:7-10). The first thoracentesis was a "traumatic tap," where the doctor nicked a vessel causing blood to accumulate in the pleural cavity. (Tr. 1436:12-27).

At the conclusion of the trial of this matter, Dr. Gamble testified as a rebuttal witness for the Plaintiffs and claimed he did not cause the hemothorax. 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. Common sense dictates that the released blood would have mixed with the fluid turning it slightly blood tinged. Additionally, the trial court admitted Dr. Gamble's testimony despite defense objection. (Tr. 1532 – 1572). This testimony was in the nature of expert testimony, and Dr. Gamble could only testify as to what he did when treating Mr. Gibson, not render expert testimony. Scafidel v. Crawford, 468 So. 2d 370, 372 (Miss. 1986); Griffin v. McKenney, 877 So. 2d 425, 439-41 (Miss. App. 2003).

The Plaintiffs failed to provide legally sufficient evidence regarding the timing or cause of the hemothorax and arm fracture. 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.

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

During Mr. Gibson's stay at Arnold Avenue, his treating physician was responsible for orders concerning his hydration, and his treating physician was not an employee or agent of Arnold Avenue. (Tr. 799:9-17; 1423:21-26; [R.E. 2]). Mr. Gibson's hydration status was greatly affected by his underlying conditions. Mr. Gibson suffered from chronic renal insufficiency. [R.E. 7]; Tr. 998:12-13; 451:1-4; 819:24 – 820:4). Mr. Gibson also suffered from gastrointestinal ("GI") bleeds, which caused him to be anemic. (Tr. 1001:17-24). Mr. Gibson's GI bleeds caused volume depletion, which led to dehydration. (Tr. 764:23-25; 1424:12-17; 1517:29 – 1518:5). Importantly, the GI bleeds were not caused by Arnold Avenue. (Tr. 1427:23-26).

Additionally, Mr. Gibson suffered from congestive heart failure. Physicians must be cautious when providing fluids to a patient with congestive heart failure, so Mr. Gibson's fluids were regulated by his personal doctor so as to maintain a functional level of health. (Tr. 1000:18-28; 828:11-26). Extra fluid worsens the patients' situation, so proper hydration was a constant balancing act for Mr. Gibson's treating physician. (Tr. 1000:18-28; 719:21-29; 992:2-3).
In support of their dehydration claim, Plaintiffs point to generalized testimony of two former certified nursing assistants (CNA) of the nursing home. However, their testimony is irrelevant to Mr. Gibson's death claim because both of these employees were terminated months before Mr. Gibson's death.

Jacqueline Rollins, a former CNA at Arnold Avenue, testified that the nursing home was understaffed on numerous occasions, but she could not recall any 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 charted on Mr. Gibson very few times. Ms. Bryant was only employed at Arnold Avenue for three months during Mr. Gibson's stay, with her employment ending in August 2002. (Tr. 309:10-12; 316:29 – 317:2). 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).

Plaintiffs' generalized allegations of short-staffing are legally insufficient to support any claim that the nursing home failed to meet the hydration needs of Mr. Gibson or that any such failure proximately caused his death. See Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138, 1150 (Miss. 2007) (citing Estate of Finley v. Beverly Health & Rehab. Servs., 933 So. 2d 1026 (Miss. App. 2006).

D. PLAINITIFFS OTHER 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, 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., 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

Plaintiffs argue Arnold Avenue failed to appropriately assess and care for Mr. Gibson as it related to pressure sores. The overwhelming weight of the evidence supports the opposite conclusion. Arnold Avenue assessed Mr. Gibson, developed a plan of care, and took precautions to decrease the risk of Mr. Gibson developing pressure sores. Mr. Gibson's medical reality put him at high risk of developing pressure sores. He had significant underlying medical conditions, including diabetes, hypertension, anemia, edema, poor femoral pulse, overweight issues, shear problems, and bed-bound status. (Tr. 1006:2 – 1007:24; 1404:12-29). Two 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; 1292:25-19).

The only wound care expert to testify at trial, Dr. John Payne, explained that in many instances pressure sores are unavoidable, despite the best of care, in patients with significant underlying medical conditions similar to Mr. Gibson's. (Tr. 1404:12-29). Plaintiffs' own experts, Nurse Clevenger and Dr. Williams, testified that pressure sores routinely develop despite good care. (Tr. 590:6-11; 591:12-22; 732:17-21). Nurse Clevenger did not criticize Arnold Avenue because the pressure sores developed. (Tr. 590:11-12). All experts testified that a nursing home resident could develop pressure sores even without a breach of the standard of care.

Mr. Gibson first developed a pressure sore on his sacrum in September, 2001. Dr. Payne described this as a Stage II pressure sore which is not very deep. (Tr. 1416:7-8). Plaintiffs' expert nurse described the sore as "just a break of the skin" where a "[s]uperficial layer of skin is gone" and testified that the sore was never classified higher than a Stage II. (Tr. 576:11-18). Plaintiffs' expert doctor testified that the development of a Stage I or Stage II sore is not a deviation from the standard of care. (Tr. 732:17-21). 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. At its worst, the sore had a depth of .2 centimeters (the thickness of two thumbnails) and was approximately the size of a nickel. (Tr. 584:26-29; 1413:23-25; 1014:29 – 1015:6). Dr. Payne and Nurse Slevenski described the wound as superficial. (Tr. 1015:7-12; 1414:10-15). Nurse Clevenger also stated that the sore was not very deep. (Tr. 585:9-10). Because the sore did not immediately heal, Arnold Avenue sent Mr. Gibson to a wound

care clinic, and the clinic classified the sore as a Stage II. [R.E. 21]. One of the spots completely healed by May, 2002, and the other spot healed by June, 2002.

Mr. Gibson's pressure sores healed. For the pressure sores to heal, Arnold Avenue had to provide overall good nursing. (Tr. 1011:17-22; 1106:14-19). Plaintiffs' experts admitted good nursing care is required to heal a pressure sore. (Tr. 852:12-16; 570:28-29). In addition to good care, the healing process also requires that the pressure sores not be infected. (Tr. 1109:18-19; 589:6-23). Accordingly, Nurse Clevenger admitted that Arnold Avenue's nursing care was effective and led to the healing of the pressure sores. (Tr. 472:22-24; 573:17-19). The evidence firmly established that without proper care pressure sores will get worse. Mr. Gibson's healed. Dr. Payne, the wound care expert, 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 Monitored By His Treating Physician

When Mr. Gibson arrived at Arnold Avenue, his treating physician ordered a feeding tube for him because he had suffered a stroke and was suffering from seizures. (Tr. 429:27 – 430:2). At all times, Mr. Gibson's physician was in charge of orders concerning his diet, and the physician was not an employee or agent of Arnold Avenue. (Tr. 1423:21-26). Arnold Avenue adhered to the orders of the 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 in the body, and Mr. Gibson's was very low. (Tr. 981:8-11; 982:27 – 983:2). 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 & 26-28). Plaintiffs' expert doctor confirmed Mr. Gibson's prealbumin levels were low on admission, indicating poor nutrition, and confirmed

that, during Mr. Gibson's stay at Arnold Avenue, his prealbumin levels rose into the normal range and remained there. (Tr. 805:29 – 806:5; 807:5-27; 808:18-20). Mr. Gisbon's prealbumin levels would not have risen into the normal range had he remained malnourished. (Tr. 1005:2-4).

Plaintiffs based their allegation of malnutrition entirely on weight loss. (Tr. 729:14-20). When Mr. Gibson arrived at Arnold Avenue he was 63 pounds overweight. (Tr. 980:1-6; 621:4-9). Mr. Gibson weighed the most when he entered Arnold Avenue, but that was when he was also the most malnourished. (Tr. 1694:16-19). At his lowest weight, Mr. Gibson was still 22.7 pounds above his ideal weight. Dr. Payne and Nurse Slevenski explained that when individuals begin a regulated diet, they routinely experience weight loss, even as their nutritional status increases. (Tr. 1401:29 – 1402:26; 980:18-21). Throughout Mr. Gibson's stay at Arnold Avenue, his physician determined, directed, and monitored his nutritional needs, frequently making adjustments to his nutritional sources in response to his albumin levels. (Tr. 993:20-25; 1397:4-11; 983:13-20). Dr. Williams was critical of Mr. Gibson's physician for relying on the prealbumin tests to determine his nutrition status, but the physician was not an employee or agent of Arnold Avenue. (Tr. 811:3-25).

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. Defendants' expert doctor and nurse testified that the healing process absolutely requires an adequate nutritional status. (Tr. 1404:7-9; 992:8-10; 997:1-4: 1106:14-19). Plaintiffs' expert doctor and nurse confirmed the importance of adequate nutrition to the healing process. (Tr. 810:16-24; 732:5-7; 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.

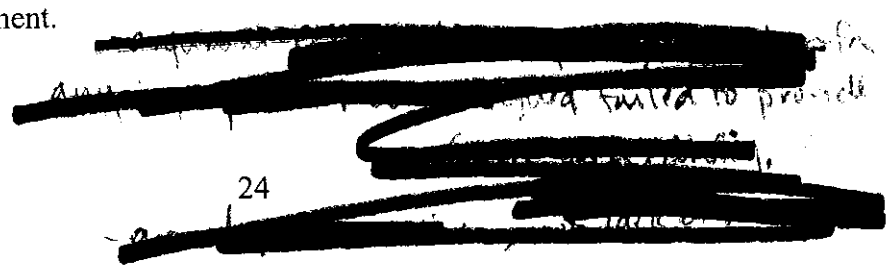
3. Mr. Gibson Suffered From Contractures As A Result Of His Medical Problems, And His Physician Directed And Monitored Treatment For His Contractures

Because of Mr. Gibson's underlying medical conditions, including strokes and seizures, he did not have full range of motion and was at a very high risk of developing contractures. (Tr. 511:14-24: 507:20-27). In January of 2002, Mr. Gibson's treating physician ordered occupational therapy by a therapist for his developing contractures, but after a month, his range of motion in his left arm, which was significantly limited, did not improve, and he actually developed a contracture in his right arm. (Tr. 610:13-17; 854:12 – 855:14). After this deterioration, his treating physician discontinued occupational therapy. (Tr. 855:15-17).

On May 21, 2002, a physical therapist determined that Mr. Gibson 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, his contractures improved. On October 10, 2002, Mr. Gibson's physician determined that he had mild contractures and weakness on his right side and did not have contractures or weakness on his left side. (Tr. 614:14-21). Mr. Gibson's condition improved while Arnold Avenue was treating him.

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

Plaintiffs maintain that there is a correlation between disfigurement and Mr. Gibson's pressure sores and contractures. Plaintiffs' expert doctor simply stated pressure sores and contractures "would be two things in a person that you could consider disfigurement." (Tr. 745:14-17). 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 permanent disfigurement.



As previously discussed, the pressures sores on Mr. Gibson's sacrum were small, 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 completely healed. Plaintiffs offered no evidence that these small pressure sores, which healed, caused permanent disfigurement. Also, Mr. Gibson's treating physician determined that his contractures improved as a result of restorative care provided by Arnold Avenue. (Tr. 614:14-21). Any contractures remaining at the time of Mr. Gibson's death were the result of his underlying medical conditions and were not caused by Defendants. White v. Thomason, 310 So. 2d 914, 918 (Miss. 1975).

VI. CONCLUSION

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.

Respectfully submitted,

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

By: _____
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CERTIFICATE OF SERVICE

I, Justin M. Starling, do hereby certify that I have this day caused to be served, via U.S. Mail, a true and correct copy of the above and foregoing document to:

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Honorable Betty Sanders
Washington County Circuit Court Judge
900 Washington Avenue
Greenville, Mississippi 38701

This the 10th day of October, 2011.

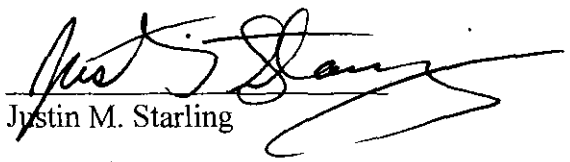
Justin M. Starling

CERTIFICATE OF FILING

I hereby certify that I, Justin M. Starling, counsel for the Appellee, on this 10th day of October, 2011, deposited with the United States Postal Service for delivery to the Mississippi Supreme Court Clerk's Office, the following original documents and copies:

The original and three (3) copies of the above Appellees/Cross-Appellants' Reply Brief.

This certificate of filing is made pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure.



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