IN THE MISSISSIPPI SUPREME COURT
Case No. 2010-CA-00741
CIVIL

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

Appellant/Plaintiff/Cross - Appellee

v.

MAGNLOIA HEALTHCARE, INC.; FOUNDATION HEALTH SERVICES, INC.; UNIDENTIFIED ENTITIES 1 THROUGH 10 AND JOHN DOES 1 THROUGH 10 (AS TO ARNOLD AVENUE NURSING HOME)

Appellees/Cross-Appellants

APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI

HONORABLE BETTY W. SANDERS, CIRCUIT JUDGE

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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SUMMARY OF REPLY ARGUMENT

In their Answer Brief/Cross-Appeal Brief, Defendants Foundation Health Services, Inc., and Magnolia Healthcare, Inc. d/b/a Arnold Avenue Nursing Home (hereinafter referred to as "Defendants" in the collective, and "Foundation" and "Magnolia" in the singular) essentially make four arguments: 1) the trial court should have granted Defendants' Motion for Judgment Notwithstanding the Verdict (JNOV) due to alleged insufficiency of the evidence; (2) the trial court should have granted Defendants' request for mistrial; (3) there was insufficient evidence for submission of the case to the jury for determination of punitive damages; and (4) Plaintiff waived the right to challenge the constitutionality of the Mississippi statute which caps the amount of non-economic damages a plaintiff may recover.

Defendants have basically used the vast majority of their Answer Brief to challenge the trial court's denial of Defendants' Motion for JNOV. In so doing, Defendants wish to have this Court sit in the shoes of the jurors at the trial of the case and to selectively reevaluate cited trial testimony in a light most favorable to Defendants in order that Defendants may have a second bite at the proverbial trial apple. As shown below, the trial court properly considered and denied Defendants' Motion for JNOV because the jury reasonably considered the facts presented by both sides during an eleven day trial with over eleven volumes of testimony, numerous evidentiary exhibits, and the jury returned a verdict favorable to Plaintiff which any reasonable jury could have returned. Furthermore, the trial court properly denied Defendants' request for a mistrial during the proceedings. Therefore Defendants' Cross-Appeal must fail.

Next, Defendants make a passing argument that the trial judge was correct in refusing to allow Plaintiff to put the issue of punitive damages to jurors after the jury had found Defendants liable for causing harm, disfigurement, and death to James Gibson. Plaintiff once more will show that the evidence he presented at trial met all requirements for allowing jurors to consider and, if so

found, to punish Defendants' pattern and practice of wrongful behavior at their nursing home facility.

Finally, Defendants attack Plaintiff's ability to even challenge the constitutionality of Miss. Code Ann. § 11-1-60 as it was applied to Plaintiff's case at the close of trial and after the verdict of $1,500,000 was reduced to $575,000 on the ground that Plaintiff, who was charged with proving his negligence and wrongful death case, must have first complied with M.R.C.P. 24(d) and M.R.A.P. 44, in that Plaintiff did not notify the Mississippi Attorney General about a challenge to the constitutionality of the statute or provide a copy of Plaintiff's Appellant Brief to the Mississippi Attorney General. As shown below, Plaintiff submits that, due to the nature of his case in chief, no notice under M.R.C.P. 24(d) was required as he did not initiate any lawsuit to challenge Miss. Code Ann. § 11-1-60 as contemplated by the intervention provisions of said Rule. Further, Plaintiff submits that the notice provisions of M.R.A.P. 44 and the commentary show that the failure to provide a notice to the Mississippi Attorney General at the inception of an appeal is not fatal to a party's ability to raise a challenge to Miss. Code Ann. § 11-1-60. Plaintiff will further show that he is providing copies of his original brief and this Reply brief to the Attorney General's office and will provide this Court with a Notice of Filing said materials. At the most, any delay of notice under M.R.A.P. 44 does not operate to bar a challenge; it merely would toll further proceedings in this Court until the Attorney General's office has had the chance to respond to the proceedings if it should so choose to respond. As for Defendants' argument that Plaintiff did not raise the constitutionality of Miss. Code Ann. § 11-1-60 in the trial court below, this statute did not even come into play until Judge Sanders remitted the original $1,500,000 judgment in the Final Order of Judgment on October 9, 2009 **(R. 1405-1407)**. [1]

Plaintiff did indeed promptly raise the challenge to the constitutionality of Miss. Code Ann. § 11-1-

[1] References to the record are denoted as R. _____. References to the excerpts of the record are denoted as R.E. ____. References to the transcript of the proceedings are denoted as Tr. ____.

60 as soon as it was applied to him in the form of the instant appeal to this Court. Had Plaintiff made an earlier challenge, undoubtedly Plaintiff would have been faced with defending an argument that his challenge was not ripe for consideration, and any such challenge was, until the end of his case and application of Miss. Code Ann. § 11-1-60 to the judgment, purely theoretical at best.

LEGAL ARGUMENT

I. Plaintiff presented sufficient evidence during the trial of this case from which a jury could have reasonably concluded that all Defendants were negligent and their negligence was a proximate cause of injury, disfigurement, and death to Henry Gibson, and Plaintiff's counsel or witnesses did not behave improperly during trial; therefore Defendants' Motion for JNOV was properly denied by the trial court.

On September 10, 2009, ten of the twelve jurors impaneled in this case returned a verdict against the Defendants. The jury awarded Plaintiff $1,500,000.00 in compensatory damages including $75,000.00 in disfigurement damages against Defendants. On October 9, 2009, the court below entered Final Judgment in this matter and limited the award to $575,000.00 in damages against all Defendants. Defendants now ask this Court to discard the jury's verdict on the basis that there was no substantial evidence to support the verdict. As set forth below, Defendants' arguments are without merit and their Cross-Appeal should be denied.

A. Defendants failed to meet their legal burden to obtain a JNOV.

The Mississippi Supreme Court has often stated that if substantial evidence opposed to the motion for JNOV exists, then the jury's verdict should be allowed to stand. *See Upchurch v. Rotenberry,* 761 So.2d 199 (Miss. 2000). In considering a motion for JNOV, the Appellate Courts will review the ruling based on the evidence before the circuit court on the last occasion the challenge was made to the circuit court. *Blake v. Clein*, 903 So.2d 710 (Miss. 2005). The Supreme Court of Mississippi's standard for reviewing the denial of the JNOV is as follows:

> This Court will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

Id. at 731. There was an overwhelming amount of evidence of liability submitted to the jury in this case. Given the evidence, the Plaintiff easily surpasses its burden in opposing a motion for JNOV. Thus, the Defendants' Motion for JNOV is without merit and should be denied.

B. The Evidence Presented Clearly Supported the Jury's Determination that Defendants' Conduct Proximately Caused Mr. Gibson Injury and Death

The Defendants mischaracterize the evidence submitted by Plaintiff as speculative in nature; the truth is that Plaintiff consistently submitted evidence establishing that Mr. Gibson suffered injuries at Arnold Avenue Nursing Home as a result of the Defendants' negligence. The Plaintiff submitted this evidence to the jury in the form of medical testimony, testimony from lay witnesses, as well as numerous medical records. Indeed, the evidence was presented during a trial that lasted eleven days. This evidence was substantial, it was overwhelming, and the jurors reasonably chose to weigh it and to conclude that Plaintiff's evidence was enough to support their verdict of liability against both Defendants.

Expert testimony is sufficient to establish that a health care provider breached the standard of care and caused the plaintiff's injuries and death. *Delta Regional Medical Center v. Venton*, 964 So.2d 500 (Miss. 2007). When there is a conflict of expert medical opinion, it is "to be within the province of the fact-finder to determine the cause of death." *Id.* at 506.

Even in cases where no medical expert "ever testified to a reasonable degree of medical probability or certainty" that a plaintiff's injuries were proximately caused by a Defendant's negligence, the Supreme Court of Mississippi has held that "[a] medical expert need not testify with absolute certainty." *Stratton v. Webb*, 513 So.2d 587, 590 (Miss. 1987). In *Stratton*, the medical expert testified that he could not positively state the cause of plaintiff's medical condition, but felt the injury was related to the accident. *Id.* at 589-90. The Court still found sufficient causation evidence to sustain the verdict and stated that the expert's "testimony, ***taken as a whole***, sufficiently established a reasonable medical certainty that the accident caused the

injuries." *Id*; *See also Blake v. Clein*, 903 So.2d 710 (Miss. 2005) (Court denied JNOV, finding that, although there was a dispute, when taken as a whole, the testimony of two treating doctors and lay testimony from the plaintiff was sufficient to submit the issue of proximate cause to the jury). Finally, in cases alleging that death was caused by the negligence of a nursing home, expert testimony does not have to conclusively establish the cause of death; instead, expert testimony must, at a minimum, show that deviations from the standard of nursing care caused or contributed to the decedent's death. *Mariner Health Care, Inc., v. Estate of Edwards*, 964 So.2d 1138, 1144 (Miss. 2007).

Here, unlike in *Stratton* and *Blake*, Dr. Leonard Williams' testimony directly linked the Defendants' negligence to the significant injuries and death of Mr. Gibson. Dr. Williams' direct testimony, and the evidence highlighted below, which is not exhaustive, goes well beyond what the Court approved of in *Stratton* and *Blake.* Specifically, Dr. Williams, Plaintiff's expert witness, and Dr. Robert Oliver, the treating Radiologist, testified that, more likely than not, the fractured arm was caused by a severe fall. **(R. 2501-2502; Tr. 690:15-17; Tr. 692:3-10; Tr. 693:13-23.)** The type of fracture was identified by Dr. Oliver as a spiral fracture, which requires twisting or torque to break the bone. **(Tr. 690:15-17.)**

Moreover, Dr. Williams testified that the lack of calcification present in the X-ray of Mr. Gibson's fractured arm meant that the injury was recent, and that, more likely than not, both of these injuries occurred from a single traumatic event. **(Tr. 693:8-23; Tr. 711:1-7; Tr. 728:14-20.)** Dr. Hugh Gamble, the treating thoracic surgeon, testified that, based on the blood removed from Mr. Gibson's pleural cavity, the hemothorax occurred during a window of time where the evidence shows Mr. Gibson was undoubtedly at Arnold Avenue Nursing Home. **(Tr. 1572:1-9; Tr. 1573:5-18.)** Furthermore, the jury heard lay testimony from Mr. Gibson's family which further corroborated the medical evidence, that toward the end of Mr. Gibson's residency

at Defendants' facility, he was protective of his arm, drawing his arm back when his grandchildren tried to hug him. **(Tr. 660:16-18; Tr. 661:19-23; Tr. 663:21-27.)**

The Defendants' negligence is inescapable because the undisputed evidence showed that Mr. Gibson was not capable of getting out of his bed when his side rails were up. In fact, on a prior occasion Mr. Gibson fell from his bed when his side rails were left down. **(Tr. 717:2-9.)** Furthermore, there is no dispute that Mr. Gibson's side rails were supposed to be up during the timeframe when he sustained the injuries. **(Tr. 254:18-22.)** Finally, Dr. Williams testified to a reasonable degree of medical probability that Mr. Gibson's injuries were consistent with a fall from his bed, and, more likely than not, these injuries were the result of the Defendants' negligence. **(Tr. 717:1-11.)**

Significantly, despite the fact that medical evidence presented by Plaintiff, which must be afforded every favorable inference, placed the origin of the broken arm and hemothorax at their facility, the Defendants did not present any explanation as to how these injuries could have occurred at their facility without negligence on the part of their staff. On the other hand, the Plaintiff supported his theory through the evidence, which included: records from the nursing home, Dr. Williams' testimony, Nurse Expert Cynthia Clevenger's testimony, the testimony of two CNA's from Arnold Avenue, as well as the testimony of Mr. Gibson's family and treating physicians.

C. Specific Examples of Plaintiff's Trial Evidence Demonstrate Plaintiff's Evidence Was Sufficient and Substantial, and a Jury Could have Reasonably Found Defendants Liable for the Injuries and Death of Mr. Gibson.

Here, the evidence from trial provided the jury with a substantial basis to find that Defendants' negligence caused or significantly contributed to Henry Gibson's injuries and death. Plaintiff's expert, Dr. Leonard Williams, cited several factors, for which he held the nursing home responsible, as significantly contributing to Henry Gibson's death. **(Tr. 741:7 – 742:1-6.)**

First, the fractured right humerus and the hemothorax caused respiratory problems that significantly contributed to Mr. Gibson's death. **(Tr. 741: 7-18.)** In addition, the nursing home staff allowed Mr. Gibson's to become severely dehydrated, which led to his kidney failure, which was also a significant contributing factor to his death. **(Tr. 741:19 – 742:1-6.)** Consequently, Mr. Gibson developed a severe infection that contributed to his demise. **(Tr. 741:19 – 742:1-6.)** Mr. Gibson's death certificate, which was completed by one of his treating physicians, identifies the fractured right humerus and the hematoma of the lungs as contributing causes of his death. **(R. 2370; Tr. 741:1-6.)**

Defendants' Negligence Caused or Significantly Contributed to Mr. Gibson's Fractured Humerus and Hemothorax. Mr. Gibson was totally dependent upon the Defendants and their employees for his care and treatment. **(Tr. 894:12-28.)** The evidence was undisputed that Mr. Gibson could not get out of bed without assistance. The evidence was also undisputed that the side-rails on Mr. Gibson's bed should be up at all times, and that Mr. Gibson's side-rails were left down previously. **(R. 252, 11-23.)**

Dr. Oliver, the treating radiologist, testified that Mr. Gibson's injury was not pathological, but consistent with a severe fall. **(Tr. 2501:10-19 – 2502:1-5)** The type of fracture was identified by Dr. Oliver as a spiral fracture, which typically requires twisting or torque to break the bone. **(Tr. 690:15-17.)** Plaintiff's expert, Dr. Leonard Williams, also agreed with the radiologist that significant trauma caused Mr. Gibson's fractured arm. **(Tr. 686:13-21; 692:3-10 – 693:13-23.)**

Dr. Williams' opinion at trial was that the hemothorax sustained by Henry Gibson was caused by the same fall at the nursing home that fractured Mr. Gibson's arm. **(Tr. 711:1-7; 728:14-20.)** This is the same conclusion that was reached by Henry Gibson's own treating physicians, Dr. Gamble and Dr. Barker, as documented in his hospital records that were viewed

by the jury in trial and introduced into evidence. **(R. 3564; 3605).** In fact, the only evidence to the contrary came from the Defendants' paid experts.

The medical testimony and records introduced at trial presented overwhelming evidence that Mr. Gibson sustained the fractured arm and hemothorax in a window of time where he was in no other place except the Defendants' facility. Dr. Williams testified that the lack of calcification present in the X-ray of Mr. Gibson's arm taken when he arrived at the hospital meant that the fracture occurred within four (4) to six (6) weeks of December 31, 2002. **(Tr. 694:8-15.)** Furthermore, given the lack of swelling or bruising on Mr. Gibson's arm when he arrived at the hospital and prior to X-ray, the traumatic event that caused the fracture did not occur at or on the way to the hospital, but was at least two (2) weeks old. **(Tr. 693:13-16.)** Defendants' argue that, had the spiral fracture been present prior to transfer from Arnold Avenue Nursing Home, then the Ambulance transport or the ER staff would have noticed the injury. Yet, Dr. Williams testified that, in this stage of the healing process, the swelling in Mr. Gibson's arm would have subsided and, unless a caregiver were specifically looking for a fracture, it would go unnoticed, especially considering Mr. Gibson's condition of having a stroke effecting that arm and his cognitive status. **(Tr. 693:24-29 – 694:1-5.)**

Defendants attempted to argue that the ambulance crew would have recognized the spiral fracture when they put IV's in Mr. Gibson, yet the evidence refuted this argument, as there is no indication that the ambulance crew even used an IV. **(Tr. 727:19-25.)** Furthermore, Dr. Williams explained that the ER nurses may not have recognized the fracture initially because any manipulation of his right side in order to use an IV would have been minimal given Henry Gibson's right-sided stroke and contractures. **(R. 728:3-13.)** Nevertheless, the hospital discovered the spiral fracture within hours of Mr. Gibson's admission when a CT Scan revealed a fracture.

It is undisputed that, prior to arriving at the hospital on December 31, 2002, Mr. Gibson had been exclusively in the Defendants' facility for the prior twelve (12) weeks. Per Dr. Williams, the window of time for Mr. Gibson to have fractured arm is at least two (2) weeks, but no more than six (6) weeks from December 31, 2002. **(Tr. 693:13-21.)** During this window of time, Dr. William's directed the jury to a nursing note dated November 22, 2002, which identified swelling to Mr. Gibson's right hand and fingers, and also noted he did not extend his arm. **(Tr. 688:1-28.)** There was no investigation by Defendants' nursing staff to determine the source of this injury. **(Tr. 688:1-28.)** In fact, during the last six (6) weeks of Mr. Gibson's residency at Arnold Avenue Nursing Home, the nursing documentation is scant. **(Tr. 688:24-28.)** Prior to November 22, 2002, when Mr. Gibson had swelling to his right hand and fingers, three weeks go by where the Defendants' nursing staff failed to document any nursing assessments. **(Tr. 689:1-17; 868:8-12.)** Family testimony also corroborates that the spiral fracture occurred at Defendants' facility as they recalled that, towards the end of Mr. Gibson's residency at Arnold Avenue Nursing Home, he would protectively withdraw his arm when his grandchildren tried to hug him. **(Tr. 660:16-18; 661:19-23; 663:21-27.)**

As to the hemothorax, Plaintiff presented ample evidence that the injury occurred during a period of time when Mr. Gibson was in the exclusive control of the Defendants. Dr. Gamble testified that the hemothorax that Mr. Gibson sustained probably occurred at least forty-eight (48) hours prior to when Dr. Gamble drew the slightly bloody liquid from Mr. Gibson's chest area. **(Tr. 1572:1-9; 1573:5-18.)**

Defendants argue now just as they argued to the jury, that the blood found in Mr. Gibson's chest cavity was caused by Dr. Gamble nicking an artery during thoracentesis, rather than from trauma, i.e., the hemathorax. The jury however, rejected this argument, siding with the testimony of the treating thoracic surgeon, Dr. Hugh Gamble, and Plaintiff's expert, Dr.

Williams. Both doctors explained that blood in the pleural cavity is not a spontaneous occurrence and indicates one of three causes: (1) cancer, (2) tuberculosis, or (3) trauma. **(Tr. 694:-18-29; 1564:1-6.)** It is uncontested that Mr. Gibson did not have cancer or tuberculosis, and the jury was presented with evidence corroborating significant trauma, including the spiral fracture. to Mr. Gibson's arm. Defendants chose to present the jury with yet another alternative that Dr. Gamble nicked an artery during the thoracentesis. The Defendants' alternative was thoroughly debunked at trial, as Dr. Williams testified that (1) the X ray post-thoracentesis showed improvement and (2) fibrin was present in the laboratory study of the blood. **(Tr. 712:1-29 – 713:1-28.)** Significantly, the presence of fibrin meant that the blood found in Mr. Gibson's pleural cavity was clotting and not new blood, as would be present had Dr. Gamble nicked an artery. **(Tr. 712:14-19.)**

Plaintiff's expert testified that, more likely than not, both of the injuries were due to significant trauma, such as a fall or being dropped to the floor, and that the injuries were sustained at the nursing home. **(Tr. 711:1-7; Tr. 728:14-20.)** Whether Mr. Gibson was dropped by the staff or the side-rails were left down (as Mr. Gibson could not get out of bed unassisted), the Defendants are negligent because staff never should have allowed an individual who is totally dependent on the staff to sustain such injuries. **(Tr. 717:2-11.)** According to medical records from Delta Regional Medical Center, Mr. Gibson's treating physicians, Dr. Gamble and Dr. Barker, were also of the opinion that Mr. Gibson suffered from a traumatic episode at Arnold Avenue Nursing Home that resulted in a spiral fracture of his right humerus and hemothorax. **(R. 3564; 3605.)**

In this case, expert testimony established that deviations from the standard of nursing care caused Mr. Gibson's injuries and contributed to his death. Given the evidence that was available for the jury's consideration, especially when viewed in the light most favorable to the non-

movant, and, with all the favorable inferences from said evidence, it cannot be said that the jury lacked substantial evidence to support its verdict.

D. Substantial Evidence was Submitted to the Jury Demonstrated that Short Staffing and Breaches in the Standard of Care Significantly Contributed to Mr. Gibson's Injuries

Dr. Williams testified to the correlation between the Defendants' breaches in the standard of care and the disfigurement suffered by Mr. Gibson. **(Tr. 745: 9-17.)** Namely, he testified that Mr. Gibson developed a serious pressure ulcer and worsening of his contractures. **(Tr. 745: 9-17.)**

Defendants' Negligence Caused or Significantly Contributed to Mr. Gibson's Dehydration and Malnutrition. The Defendants knew and acknowledged that Mr. Gibson was at high risk for suffering from malnutrition and dehydration, and they had the duty to provide him with appropriate nutrients and fluids to sustain life and well-being. **(Tr. 428:6-28; 441:1-7; 442:10-29.)** Mr. Gibson was on a PEG tube, so there should have been no difficulty getting him what he needed. **(Tr. 432:8-14; 729:4-13.)** According to multiple experts, Mr. Gibson would not have become dehydrated or malnourished had Defendants' staff provided him with the hydration and nutrition that he required. **(Tr. 731, 7-25; 729:4-20.)**

Experts explained that signs and symptoms of dehydration include dry lips, dry tongue, and poor skin turgor. **(Tr. 445:15-28.)** Family members testified they would find Mr. Gibson with dry lips, and, without knowing what was wrong, would dab his lips with cold water. **(Tr. 664:10-14.)** Mr. Gibson's caregiver Jacqueline Rollins testified that on many occasions his mentally challenged roommate would pull out Mr. Gibson's PEG tube and it would leak all over his bed, which she would report, but the nursing home failed to intervene. **(Tr. 252:6-25;**

255:11-15.) Mr. Gibson's family members also recalled finding his PEG tube disconnected and leaking all over his bed.

Defendants' Negligence Caused or Significantly Contributed to Mr. Gibson's Contractures. The nursing staff failed to properly assess and prevent the development of contractures, and the progression of his contractures was exacerbated by the failure of the staff to provide restorative care. **(Tr. 738:12-29; 740:1-15; 502:1-20.)** The Defendants did not offer any evidence to contradict Plaintiff's expert on this issue.

Defendants' Negligence Caused or Significantly Contributed to Mr. Gibson's Skin Breakdowns. The nursing staff failed to provide appropriate care and assessment to prevent Mr. Gibson from developing painful pressure sores. **(Tr. 732:28-29; 733:1-8.)** The nursing staff failed in their responsibility to turn and reposition Mr. Gibson. **(Tr. 248:3-17; 305:17-20.)** Also, the Defendants failed to follow their own care plans, policies and procedures, and violated state and federal regulations. **(Tr. 489:23 – 490:1-17.)** As a result, Mr. Gibson developed several infected pressure sores. **(Tr. 733:18-22; 738:27-29; 739:1-7.)**

Mr. Gibson's own caregivers testified that due to short-staffing they were unable to turn and reposition him in a timely fashion. Viola Bryant and Jacqueline Rollins, Certified Nursing Assistants ("CNA"), testified specifically that short staffing affected their ability to care for Mr. Gibson. **(Tr. 248:3-17; 305:8-12; 308:16-19.)** Ms. Bryant worked on the 3pm to 11pm shift that required the staff to make four (4) rounds per shift to provide care for residents, but, because of short staffing, she might only finish three (3) rounds. **(Tr. 305:17-20.)** Ms. Rollins testified she was only able to make two rounds to care for Mr. Gibson. **(Tr. 248:15-17.)** It was during these rounds where the CNAs were supposed to ensure residents were fed, cleaned, and turned (to prevent skin breakdown). **(Tr. 246:26-28; 305:1-7.)** Defendants attempted to minimize the relevancy of the CNA testimony by arguing that the two CNAs only charted in Mr.

Gibson's chart on a few occasions. Yet, the jury learned from Ms. Bryant, that when she cared for Mr. Gibson, it was to assist other caregivers because they were short staffed, so she would not be the one initialing his chart. **(Tr. 318:22-29.)** Further, evidence of short staffing came from family members who testified that they would have to wait 30 to 45 minutes for staff to respond to family requests for Mr. Gibson's needs. **(Tr. 327:20-3.)**

E. Substantial Evidence Supports the Jury's Determination of the Liability of Defendant Foundation.

Substantial evidence was presented at trial to support the liability of Foundation. During Mr. Gibson's residency, Foundation identified itself every year to the State of Mississippi as the management company for Arnold Avenue Nursing Home, and, as such, it was charged with the responsibility of the overall operation of the facility pursuant to their own management agreement. **(R. 2439-2454.)** The management agreement between Foundation and Magnolia was admitted into evidence and outlined Foundation's duties and responsibilities. **(R. 2401-2424.)** The Applications for Licensure, filed with the Mississippi State Department of Health from April 1, 2000, through March 31, 2003, stated that Arnold Avenue Nursing Home was operated through a management agreement, and listed Foundation as the management entity. **(R. 2439-2454.)** On January 1, 2000, Magnolia and Foundation entered into a five (5) year Management Agreement, titled "Management Agreement." **(R. 2401-2424.)** Every year, during Mr. Gibson's residency, Magnolia affirmed to the State that Arnold Avenue Nursing Home was operated through this management agreement with Foundation. **(R. 2439-2454.)**

Under the agreement, Magnolia retained the services of Foundation as manager of the Facility "with the responsibility for managing, operating, maintaining and servicing the Facility and for performing, solely as agent and acting on behalf of [Magnolia]..." **(R. 2401.)** Under the agreement, Foundation contracted to perform its duties "in a diligent, careful, and vigilant

manner and provide the Management Services consistent with all applicable licensing, accreditation, and professional standards." **(R. 2403.)** Under the agreement, Foundation contracted to perform duties related to staffing and personnel, including hiring and supervising the "personnel necessary for the efficient operation of the Facility." **(R. 2404.)** Under the agreement, Foundation was required to "exercise due care in the selection of competent, diligent, and honest Personnel" and to "provide an adequate level of staffing for all categories of employees." **(R. 2404.)** Under the agreement, Foundation provided Magnolia with an on-site nursing home administrator for the Facility. **(R. 2405.)** Under the agreement, Foundation agreed to furnish and make all the arrangements related to the necessary utilities and supplies for the management, operation, maintenance, and service of the facility. **(R. 2405.)** Under the agreement, Foundation contracted to ensure, by any means necessary, that the operation of the facility complies "with all federal, state, and local laws, rules, regulations, and ordinances applicable to the facility" including the particular "laws and regulations applicable to nursing homes owned by nonprofit organizations." **(R. 2406.)**

On January 1, 2002, Magnolia and Foundation entered into an additional five (5) year agreement titled, Financial Services Agreement, which embodied the parties' understanding as to subject matter of financial services. **(R. 2425-2438.)** Foundation argued that, under the second agreement, Foundation's responsibilities to Magnolia were limited to financial and administrative services, yet evidence offered at trial conflicted with Foundation's position, as the Facility's own administrator, Diane Oltremari, testified that, during Mr. Gibson's residency, there were no changes in the operation of the nursing home. **(Tr. 1344:6-12)** Also, under the new agreement, Foundation's fee rose from $4,500.00 per month to $27,675.00 per month, an increase of over five (5) times the amount of the prior fee. **(R. 2432.)** The new agreement was also inconsistent with Foundation's position that it was only limited to financial and

administrative services as the new agreement sat out additional fees for the "Regional Director of Operations" and the "Regional Nurse." **(R. 2432.)**

This is not a case where Foundation was precluded from presenting evidence that the Management Agreement, dated January 1, 2000, did not accurately reflect the parties course of conduct, or that the second agreement modified or usurped the first agreement. Rather, Foundation was allowed to present such evidence; however, as evident by the verdict, the jury chose to accept the Plaintiff's evidence, and the evidence at trial provided a substantial basis for the jury's decision. Here, the Management Agreement, the Applications of Licensure filed with the State, and the testimony provided the jury with a substantial basis on which to reach their verdict.

Finally, Foundation's argument that the Mississippi Supreme Court precludes liability as to management companies, such as itself, is clearly misguided in the reliance on *Howard v. Harper*, 947 So.2d 854 (Miss. 2006). In *Howard*, the 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. *Id.* at 860. Here, the Plaintiff has put forth sufficient evidence to establish that Foundation operated this facility in a negligent manner. Furthermore, there is no case law that holds a management company cannot be liable for negligently performing the duties that Foundation undertook.

II. The Trial Court is Vested with Great Discretion in Conducting the Trial of a Case, and Defendants Stated Insufficient Grounds for Declaring a Mistrial.

A. Legal precedent did not favor a mistrial in this case.

The Defendants make a number of vague arguments as to the conduct of Plaintiff's witnesses and counsel at trial, but none of the Defendants' vague allegations of improper conduct, whether looked at in isolation or cumulatively, can be said to have undermined the jury's verdict in this case. The trial judge has great discretion in conducting the trial of a case.

Assuming arguendo that any of the vague examples cited by Defendants constituted misconduct, "the misconduct of counsel normally is not grounds for a discharge of the jury if the nature of such misconduct is such that its effect can be cured by an admonition to the jury." *Am. Jur. 2d, Trial* § 1746; *Forest v. State*, 335 So.2d 900 (Miss. 1976) (Remedial acts of trial judge in sustaining an objection to improper remarks and instructing the jury to disregard are usually sufficient to remove the taint of prejudice); *Alpha Gulf Coast, Inc., v. Jackson*, 801 So.2d 709 (Miss. 2001) (Attorneys are allowed wide latitude in closing argument, the trial judge is in best position to determine if an alleged questionable remark has prejudicial effect, and "send the message" arguments by Plaintiff's counsel do not require mistrial).

B. Plaintiff's counsel and witnesses did not do anything to warrant a mistrial.

The Defendants' arguments as to Plaintiff's counsel's comments about Dr. Payne's testimony are disingenuous and misleading. Plaintiff's counsel and the trial court merely prevented the Defendants' attempt to ambush the Plaintiff at trial with new and undisclosed expert opinions, which is supported by the Supreme Court of Mississippi's view on trial by ambush and surprise. *Square D Co. v. Edwards*, 419 So.2d 1327, 1329 (Miss. 1982) (the testimony excluded at trial constituted unfair surprise as it had never been disclosed by interrogatories and the opinions offered were not included in deposition testimony); *Coltharp v. Carnesale*, 733 So.2d 780 (Miss. 1999) (expert testified concerning avascular necrosis theory of plaintiff's injury which was not revealed to plaintiff during discovery; trial court committed reversible error in allowing doctor's testimony). Furthermore, the trial court is afforded considerable discretion when addressing discovery violations and will not be found in error absent abuse of that discretion. *See Robert v. Colson*, 729 So.2d 1243, 1245 (Miss. 1999); *McCollum v. Franklin*, 608 So.2d 692, 694 (Miss. 1992). Prior to trial, the Plaintiff deposed Dr. Payne where he was repeatedly given the opportunity to discuss all of the opinions he planned to

offer at trial. The Defendants also could have supplemented his opinions pursuant to Mississippi Rule of Civil Procedure 26(b)(4)(A)(i). The purpose of this rule, and generally of the rules of civil procedure, is "that trial by ambush should be abolished, the experienced lawyer's nostalgia to the contrary notwithstanding." *Harris v. General Host Corp.*, 503 So.2d 795, 796 (Miss.1986). Therefore, any comments by Plaintiff's counsel concerning Dr. Payne's previous deposition testimony and his inconsistent statements when compared to that previous deposition testimony were entirely appropriate, given the circumstances, and Defendants suffered no undue prejudice.

Nurse Clevenger's characterization of the Defendants' conduct is probative of liability; especially when the testimony is given in the context of deviations from competent care as it relates to the injuries suffered by Mr. Gibson. *Mariner Health Care, Inc., v. Estate of Edwards*, 936 So.2d at 1148 ("Evidence may, of course, be probative of both liability and the assessment of punitive damages"). Other jurisdictions find testimony from an expert witness that characterizes the deviations from the standard of care as relevant to both liability and punitive damages. *Payton Health Care Facilities v. Estate of Campbell*, 497 So.2d 1233 (Fla. 2nd DCA 1986); *Estate of Youngblood v. Halifax Convalescent Center, Ltd.*, 874 So.2d 596, 605 (Fla. 5th DCA 2004). In any event, Nurse Clevenger's characterization of Defendants' conduct was unsolicited by Plaintiff's counsel, and the fact that the Court promptly sustained the objection, which was coupled with the Court's limiting instruction, was sufficient to remove any arguable taint of prejudice. *Forest v. State*, 335 So.2d at 900; *Alpha Gulf Coast, Inc. v. Jackson*, 801 So.2d at 727 (Jury presumed to understand that the court disapproves of any testimony when an objection is sustained).

III. The Trial Court Erred When it Failed to Allow Plaintiff to Put the Issue of Punitive Damages Before the Jury

As set forth above in Plaintiff's rather extensive discussion of the evidence presented at trial, and, as stated in Plaintiff's original Appellant's Brief, Plaintiff submits that he has provided significant and sufficient evidence for the trial court to have placed a punitive damages claim before the jury. For the reasons set forth above and in the previous Brief, Plaintiff submits that the trial court below erred as a matter of law in disallowing proof of punitives to go to the jury. Therefore, the case should be remanded with instructions to the trial court below to allow submission of punitive damages to a jury.

IV. Plaintiff Did Not Waive His Right to Challenge the Constitutionality of Miss. Code Ann. § 11-1-60.

A. Plaintiff Challenged the Constitutionality of the Cap on Non-Economic Damages as Soon as the Cap was Applied to The Final Judgment.

Defendants have argued that Plaintiff failed to raise this issue in the trial court below, and he has consequently waived his right to challenge the constitutionality of the statute. However, Defendants ignore a basic fact that, in order to challenge the statute, Plaintiff must have had the appropriate standing to challenge the statute, and his challenge must have been ripe for a court to decide. In the case below, Plaintiff was pursuing a medical negligence/wrongful death case. Plaintiff did not file this suit in order to challenge the constitutionality of the cap on economic damages. Plaintiff filed the instant suit to recover for the injuries, disfigurement, and death of Mr. Gibson at the Defendants' nursing home facility.

Indeed, until the trial court actually remitted Plaintiff's original verdict of $1,500,000 to $575,000 due to that court's belief that the Miss. Code Ann. § 11-1-60 mandated such a remitter, there was not yet any issue ripe for Plaintiff to appeal. Until the Final Judgment was entered by the trial court below, there was nothing for Plaintiff to appeal. An appeal or even raising the specter of the unconstitutionality of the Miss. Code Ann. § 11-1-60 at any time prior to when Plaintiff filed his Notice of Appeal would have been premature, and Defendants would have

most certainly argued that Plaintiff lacked standing to make such an argument prior to the Plaintiff actually being impacted by the statutory caps.

The cases cited by Defendants do not show that Plaintiff waived any argument concerning the constitutionality of Miss. Code Ann. § 11-1-60. For instance, in *Barnes v. Singing River Hosp. Sys.*, 733, So.2d 199 (Miss. 1999), and in *Pickens v. Donaldson*, 748 So,2d 684 (Miss. 1999), plaintiffs in those cases raised for the first time on appeal the constitutionality of statute of limitation provisions of the Mississippi Tort Claims Act when the limitation provisions had been at issue in the trial court's pre-trial proceedings during which plaintiffs' complaints were challenged for statute of limitation purposes. Those plaintiffs clearly should have raised the constitutionality of that statute at the inception of the case when the defendants claimed plaintiffs' claims were time barred. Here, the application of Miss. Code Ann. § 11-1-60 only came into play once the trial was over, and the Final Judgment was entered. Further, the only other case cited by Defendants for their waiver argument, *Hemmingway v. Donaldson*, 483 So.2d 1335 (Miss. 1986), dealt with a criminal defendant's failure to raise an evidentiary objection during trial, and it has no application in any shape, form, or fashion to the case before this Court.

B. Plaintiff's Lawsuit did not invoke the application of M.R.C.P. 24(d), and Plaintiff's M.R.A.P. 44 Notice timing does not preclude a challenge to the constitutionality of Miss. Code Ann. § 11-1-60 as it was applied to Plaintiff.

As argued above, Plaintiff filed a lawsuit to recover for the injury, disfigurement, and wrongful death of Henry Gibson. Plaintiff did not set out to bring a lawsuit against the State of Mississippi or any of its officers, municipalities, or any other arm of the State. As such, Plaintiff submits that the plain language of M.R.C.P. 24(d) and the commentary to this Rule show that the Rule pertains to direct challenges by a party, not to a personal injury/wrongful death lawsuit

where the constitutional provision in question was not even at issue until a Final Judgment was entered.

Further, M.R.A.P. 44 does not mandate the waiver of a constitutionality argument raised by an appellant. A plain reading of that Rule and its commentary shows that, at most, the Appellate Court may stay further proceedings until the State Attorney General is served with Appellant's briefs and has time to either respond or to waive a response. Plaintiff is contemporaneously with the filing of this Reply Brief serving both briefs on the Mississippi Attorney General, and Plaintiff is filing a Notice of Compliance with M.R.A.P. 44. Consequently, this Notice and service should satisfy any M.R.A.P. 44 requirements.

V. The Application of Miss. Code Ann. § 11-1-60 to Reduce Plaintiff's Recovery in this Case Was Unconstitutional.

Plaintiff provided a large amount of substantial evidence at trial from which a reasonable jury made a logical determination that Mr. Gibson was injured, disfigured, and ultimately died as a result of the negligence of Defendants. The jury determined that the compensatory injuries, including non-economic damages and disfigurement, should be $1,500,000. Undoubtedly, the jurors took into consideration the fact that Mr. Gibson was an elderly, completely dependent, and helpless gentleman who suffered horribly at the hands of Defendants.

Under the circumstances of this case, it would be a huge miscarriage of justice and a significant deprivation of the constitutional rights of Mr. Gibson and his family to limit the jury's award of non-economic damages to only $500,000. The cap on non-economic damages as applied to the elderly and helpless, who have long ago passed their income producing years, smacks of blatant discrimination against the elderly, and the cap deprives these individuals and their families of a right to have a jury determine the amount of recovery, it is in derogation of the Mississippi and United States' Constitutions, and it violates the equal protection and due process rights of these individuals. Therefore, for these reasons, and, based on the authority previously

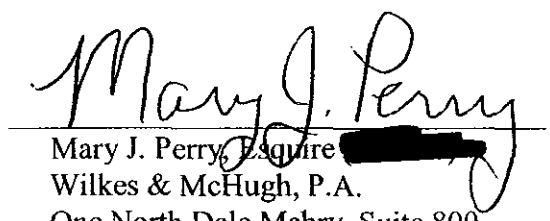
cited in Plaintiff's original Appellant's Brief, Miss. Code Ann. § 11-1-60 should be declared unconstitutional as it was applied in this case.

CONCLUSION

For the reasons set forth in this Reply Brief and in the original Brief of Appellant, Plaintiff respectfully submits that this Honorable Court should uphold the original jury verdict and award of $1,500,000 in compensatory and disfigurement damages, and remand the case for presentation to a jury on the issue of punitive damages. Further, Defendants' Cross-Appeal should be denied.

Respectfully submitted,

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 of the Wrongful Death Beneficiaries of Henry C. Gibson.

By: 

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CERTIFICATE OF SERVICE

I further certify that a copy of the preceding pleading has been served via Federal Express on the following on this 22nd day of August, 2011:

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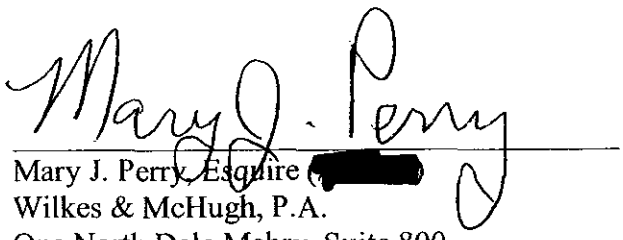

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