

**SUPREME COURT OF THE STATE OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

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NO. 2013-TS-02003

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**MAGGIE MELVIN, ADMINISTRATRIX  
OF THE ESTATE OF JIMMY LEE  
MELVIN**

**APPELLANT**

**v.**

**CLEVELAND NURSING AND  
REHABILITATION CENTER, LLC**

**APPELLEE**

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On Appeal from the Circuit Court of Bolivar County, Mississippi;  
Second Judicial District  
Civil Action No. 2009-0107

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**BRIEF OF APPELLEE,  
CLEVELAND NURSING AND REHABILITATION CENTER, LLC**

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*Oral Argument Not Requested*

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**MAGGIE MELVIN, ADMINISTRATRIX  
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**v.**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Albert Smith, Trial Judge
2. Maggie Melvin, Appellant
3. Levi Boone III, Counsel for Maggie Melvin
4. Kelvin Pulley, Counsel for Maggie Melvin
5. Cleveland Nursing & Rehabilitation Center, LLC
6. Bradley W. Smith, Counsel for Cleveland Nursing & Rehabilitation Center, LLC
7. Barry W. Ford, Counsel for Cleveland Nursing & Rehabilitation Center, LLC
8. Clay Gunn, Counsel for Cleveland Nursing & Rehabilitation Center, LLC
9. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Counsel for Cleveland Nursing & Rehabilitation Center, LLC

So certified, this the 20th day of August, 2014.

*s/ Clay Gunn*  
CLAY GUNN

### **STATEMENT REGARDING ORAL ARGUMENT**

Defendant Cleveland Nursing & Rehabilitation Center, LLC ("Cleveland") respectfully submits that oral argument is not necessary for the disposition of this appeal. Both the facts and legal arguments are straightforward and sufficiently presented in the record and briefs such that oral argument would not substantially aid the Court in deciding the issues on appeal.

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## **STATEMENT OF THE ISSUE**

Whether the trial court properly instructed the jury on the law of medical negligence applicable to this case.

## **INTRODUCTION**

The trial court properly instructed the jury of the law of medical negligence applicable to this case. Although the trial court's instructions have been approved by this Court multiple times, Appellant contends that the instructions warrant reversal of the jury's verdict in favor of Cleveland Nursing and Rehabilitation Center, LLC. Because the instructions correctly convey the applicable law, the trial court's judgment should be affirmed.

## **STATEMENT OF THE CASE**

### **I. Course of Proceedings and Disposition in the Court Below**

Maggie Melvin, as Administratrix for Jimmy Melvin's estate, filed a medical negligence action against Cleveland Nursing and Rehabilitation Center, LLC ("Cleveland"). In the Complaint, Maggie Melvin alleged that her husband Jimmy Melvin ("Melvin") developed a decubitus ulcer while a resident at Cleveland because the nursing home failed to properly turn and reposition Melvin's body and apply preventive ointment. After a three day trial, the jury returned a verdict in favor of Cleveland. Maggie Melvin filed a notice of appeal to this Court assigning error to one of the jury instructions given.

### **II. Statement of Facts**

Jimmie Lee Melvin was admitted to Cleveland at age 72. At the time of his admission, Melvin had suffered multiple strokes and was bedridden. (Tr. 449:5-24.)<sup>1</sup> Additionally, he had a healed ulcer on his coccyx. (Tr. 383:9-24, 384:10-22.) Because of Melvin's immobility and

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<sup>1</sup> To avoid confusion, citations in this brief to "Tr." refer to the trial transcript that is a part of the record. The Clerk of this Court did not renumber the transcript for inclusion in the record. Citations to "R." refer to the pages of the record that were numbered by the clerk of this Court.

history of decubitus ulcers, Cleveland implemented a care plan that included repositioning Melvin's body and applying preventive ointment. (Tr. 384:10-385:16.) Even with this treatment, Melvin developed a wound in the same area as the old wound. (Tr. 396:3-27.) Two days after the ulcer opened, Melvin was discharged to the hospital, and he never returned to Cleveland. (Tr. 102:28-103:5.) Melvin's wound subsequently healed. He died several years later from acute cerebral infarction.

During a three day trial, the parties presented competing expert testimony regarding the applicable standard of care and whether Cleveland deviated from this standard. Specifically, Cleveland's nurse and physician experts testified that, despite Melvin's injuries, Cleveland complied with the nursing home standard of care in its care and treatment of Melvin. (Tr. 379:16-381:16; 448:9-22.)

During the jury instruction conference, appellant's counsel objected to an instruction that read, in part, "nursing homes are not guarantors of the success of any care provided to a resident of a nursing home." The trial court overruled the objection. (Tr. 484:21-28.) After carefully considering the testimony and evidence presented, the jury found that Plaintiff failed to prove that Cleveland deviated from the standard of care with respect to the care provided to her husband and returned a verdict in favor of Cleveland. (R. 22-24.)

### **SUMMARY OF THE ARGUMENT**

The trial court properly instructed the jury on the law of medical negligence applicable to this case. More specifically, the only jury instruction to which Melvin assigns error was a proper statement of Mississippi law. As a result, the Court should affirm the trial court's judgment in favor of Cleveland.

## ARGUMENT

### I. Standard of Review

When reviewing jury instructions, this Court must review all of the instructions given as a whole. *Beverly Enters. v. Reed*, 961 So.2d 40, 43 (Miss. 2007) (citing *Richardson v. Norfolk & Southern Ry.*, 923 So. 2d 1002, 1010 (Miss. 2006)). "No instruction should be reviewed in isolation." *Id.* (citing *Burr v. Miss. Baptist Med. Ctr.*, 909 So. 2d 721, 726 (Miss. 2005)). Further, "[d]efects in specific instructions will not mandate reversal when all of the instructions, taken as a whole fairly . . . announce the applicable primary rules of law." *Id.* (citing *Burton v. Barnett*, 615 So. 2d 580, 583 (Miss. 1993)).

### II. The Jury Was Properly Instructed On The Law Of Medical Negligence.

The judgment should be affirmed because the trial court properly instructed the jury on the law applicable to this case. It is well settled that in order to recover in a medical negligence action, the plaintiff must prove by a preponderance of the evidence that: (1) the defendant had a duty to conform to the applicable standard of care; (2) the defendant deviated from that standard of care; (3) the plaintiff suffered damages; and (4) and the defendant's deviation from the standard of care proximately caused the plaintiff's injuries. *See Vaughn v. Miss. Baptist Med. Ctr.*, 20 So.3d 645, 650 (Miss. 2009) (internal citations omitted); *Estate of Finley v. Beverly Health & Rehab. Servs.*, 933 So.2d 1026, 1035 (Miss. Ct. App. 2006). Here, the jury received an instruction that clearly conveyed this burden of proof. The jury was instructed:

As a resident of the Defendant nursing home, the Defendant owed Jimmy Melvin a duty to provide reasonable care consistent with his age; mental and physical condition. If you find by a preponderance of the evidence that the Defendant failed to provide Jimmy Melvin with such care; that as a result Jimmy Melvin suffered injury, then in that event, your verdict should be for the Plaintiff and you should assess all damages proximately caused to Jimmy Melvin by such failure. . .

In order to prevail in this action, the Plaintiff must establish by a preponderance of the evidence, and by expert testimony, all of the following elements: The



standard of acceptable nursing home care; Cleveland Nursing and Rehabilitation Center deviated from that standard when providing care and treatment to Jimmy Lee Melvin. Jimmy Lee Melvin suffered damages and Cleveland Nursing and Rehabilitation Center's deviation from the applicable standard of care was the proximate cause of Jimmy Lee Melvin's damage.

Expert testimony is required to establish each of these elements. If the Plaintiff has established each of these elements with expert testimony by a preponderance of the evidence, then your verdict shall be for the Plaintiff.

However, if you believe the Plaintiff has failed to show any one of the above elements by a preponderance of the evidence in this case, then your verdict shall be for the Defendant.

(R. 15, 19; Tr. 507:6-18, 509:21-510:2.) The jury was further instructed:

The Court instructs the jury that nursing homes are not guarantors of the success of any care provided to a resident of a nursing home. Unlike the nursing home -- unless the nursing home breached the standard of care, a nursing home is not liable for the occurrence of an undesirable result to a resident at a nursing home. A nursing home is only required to provide a resident with that degree of care, skill and diligence which would be practiced in the same or similar circumstance by a minimally competent and reasonably prudent nursing home. Therefore, unless the Plaintiff has proved by a preponderance of the evidence that the Defendant breached this standard, you must return a verdict in favor of the Defendant.

(R. 21; Tr. 511:13-512:2.)

During trial, both sides presented expert testimony on the applicable standard of care and whether Cleveland deviated from the standard of care when providing care and treatment to Melvin. Specifically, Melvin's physician expert testified that Cleveland deviated from the standard of care by failing to prevent the development of the ulcer. (Dupee Dep. 37:9-40:20; 64:21-65:20; 97:5-98:8.)<sup>2</sup> Conversely, Cleveland's experts testified that the nursing home met the standard of care in its care and treatment of Melvin. (Tr. 390:23-395:3; 448:9-22; 454:1-16.)

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<sup>2</sup> Although the Appellant designated the video deposition transcript of Dr. Richard Dupee, the transcript does not appear in the record. Cleveland does not oppose the inclusion of the transcript in the record, and the citations included in this brief refer to the page numbers in Appellant's Record Excerpts.

Based on the evidence and testimony presented, the jury concluded that Cleveland did not deviate from the standard of nursing home care in its treatment of Melvin and returned a verdict in favor of Cleveland. (R. 22-24; Tr. 562:2-563:10.) The instructions correctly instructed the jury that, if Cleveland did not deviate from the standard of care, then their verdict should be for Cleveland. The instructions given to the jury, reviewed as a whole, clearly and fairly conveyed Mississippi law on medical negligence. They were not confusing or misleading. As such, no reversible error exists, and this Court should affirm the judgment.

**III. The Jury Instruction That Read, In Part, "Nursing Homes Are Not Guarantors Of The Success Of Any Care Provided To A Resident Of A Nursing Home" Is A Proper Statement Of Mississippi Law.**

Appellant argues that the trial court committed reversible error by granting an instruction that read, in part, "nursing homes are not guarantors of the success of any care provided to a resident of a nursing home." This language has been used and approved in medical negligence cases involving allegedly negligent physicians for over twenty years. *See, e.g., Bickham v. Grant*, 851 So. 2d 299 (Miss. 2003); *Bickham v. Grant*, No. 97-C01639-COA (Miss. 2001); *Day v. Morrison*, 657 So. 2d 808 (Miss. 1995); *McCarty v. Kellum*, 667 So. 2d 1277 (Miss. 1995); *Hudson v. Taleff*, 546 So. 2d 359 (Miss. 1989); *Austin v. Baptist Mem'l Hosp.*, 768 So. 2d 92 (Miss. Ct. App. 2000). Because the elements of the cause of action and burden of proof for a nursing home negligence case are the same as those for a physician negligence case, the instruction at issue is a proper statement of Mississippi law as applied to nursing homes.

Appellant devotes a significant portion of her brief to an inconsequential comparison of the level of care that a physician or surgeon provides to a patient and the care and treatment that a nursing home provides. This distinction is not relevant to the issue before the Court and does not make the jury instruction given a misstatement of Mississippi law. The issue faced by the courts in the cases discussed by Appellant was whether the healthcare provider deviated from the

standard of care. The inquiry was not focused on the specific type of treatment, but whether the healthcare provider conformed to the applicable standard of care for the treatment. The courts consistently held that the jury must focus on the standard of care and any alleged deviation from the standard of care because the healthcare professionals cannot guarantee the success of treatment.

Similarly, nursing homes do not guarantee the success of the care given at their facilities. Indeed, a plaintiff alleging nursing home negligence must prove the same elements as a plaintiff alleging physician negligence—that a deviation from the applicable standard of care proximately caused the plaintiff's injury. The "mere fact that an injury has occurred is not, of itself, evidence of negligence . . . on the party of anyone." (Tr. 509:17-20.)

Further, the instruction given did not, as Appellant argues, insulate Cleveland from liability for negligent care and treatment of Melvin. Indeed, the instruction itself instructed the jury to find for Plaintiff if they concluded that Cleveland deviated from the standard of nursing home care. (Tr. 510:10-14.) ("If the Plaintiff has established each of these elements with expert testimony by a preponderance of the evidence, then your verdict shall be for the Plaintiff.") But, based on the evidence and testimony presented, the jury concluded that Cleveland did not deviate from the standard of care in its care and treatment of Melvin. The instruction at issue correctly stated Mississippi law, and the trial court's judgment should be affirmed.

## **CONCLUSION**

The jury was properly instructed on Mississippi medical negligence law as it applies to nursing homes. Read as a whole, the instructions correctly conveyed the law applicable to this case. Specifically, the instructions stated that the Plaintiff had the burden to establish: (1) the applicable standard of care; (2) Cleveland deviated from that standard of nursing home care in its care and treatment of Melvin; (3) Melvin suffered damages; and (4) Cleveland's deviation

from the standard of care proximately caused the Melvin's injuries. Because the instructions given to the jury, reviewed as a whole, properly stated the applicable law, no reversible error exists, and this Court should affirm the trial court's judgment in favor of Cleveland.

This 20th day of August, 2014.

Respectfully submitted,

s/ Clay Gunn

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LLC**

## **CERTIFICATE OF SERVICE**

I, Clay Gunn, one of the attorneys of record for the Appellee, Cleveland Nursing and Rehabilitation Center, LLC hereby certify that I have electronically filed the foregoing document with the court's electronic filing system which sent notification of such filing to the following:

### **TRIAL COURT JUDGE:**

Honorable Albert B. Smith  
Bolivar County Circuit Court Judge  
Post Office Drawer 478  
Cleveland, Mississippi 38732

### **ATTORNEYS FOR APPELLANT:**

Levi Boone, III  
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I further certify that I have forwarded via United States Mail a copy of the foregoing document to any party not registered with MEC.

SO CERTIFIED, this 20th day of August, 2014.

*s/ Clay Gunn*  
CLAY GUNN