IN THE SUPREME COURT OF MISSISSIPPI
No. 2013-TS-02003

MAGGIE MELVIN, ADMINISTRATRIX
OF THE ESTATE OF JIMMY LEE MELVIN — APPELANT

v.

CLEVELAND NURSING AND REHABILITATION CENTER, LLC — APPELLEE

Appeal from the Circuit Court of Bolivar County,
Second Judicial District, Case No. 2009-0107

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

Certificate of Interested Persons

The undersigned counsel of record certifies pursuant to Mississippi Rules of Appellate Procedure 28(a)(1) that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

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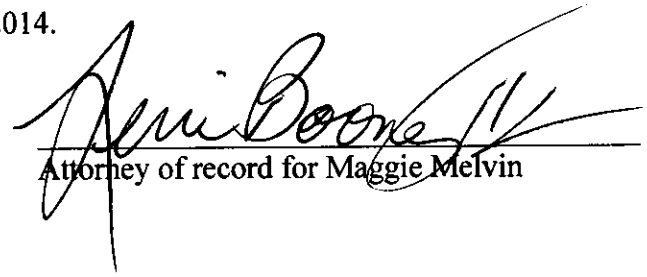
This the 17th day of June, 2014.



Attorney of record for Maggie Melvin

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STATEMENT OF THE ISSUES

1. Whether the trial court committed reversible error by granting Jury Instruction D-22 that reads in part, "nursing homes are not the guarantors of the success of any care provided to a resident of a nursing home."

STATEMENT OF THE CASE

Nature of the Case. Jimmy Melvin, a 71 year old male who was paralyzed on his left side, was a resident of Cleveland Nursing and Rehabilitation Center, LLC ("CNRC") from August 28, 2008 through October 2, 2008. Between August 28, 2008 and October 2, 2008, Jimmy Melvin suffered a Stage II/Stage III pressure ulcer to his sacrum. (Video Deposition Transcript Page 39: Line 11). On December 18, 2009 the Estate of Jimmy Melvin filed suit against CNRC alleging that the pressure ulcer was proximately caused by CNRC's failure to properly turn the body of Jimmy Melvin and its failure to properly apply preventive ointment.

Statement of Facts. Jimmy Melvin became a resident of CNRC on August 28, 2008 after suffering a stroke which left him paralyzed on the left side; he was also incontinent, and dependent on staff for other activities of daily living including turning of his body to prevent pressure ulcers. (Video Deposition Transcript, Page 21: Lines 18-24; Page 22: Lines 1-12). Upon admission to the nursing home, Jimmy Melvin had no skin tears or wounds, except he had evidence of an old healed wound on his left buttocks. (Video Deposition Transcript, Page 26, Lines 13-15). Due to his high risk for development of pressure ulcers, nurses were instructed to turn the patient every two hours, apply Lantiseptic ointment, and provide other daily skin care treatment. (Video Deposition Transcript, Page 37, Lines 10-16). On October 2, 2008, a CNA discovered and reported a Stage II ulcer to Jimmy Melvin's coccyx, significantly not his left buttock. (Video Deposition Transcript, Page 38, Lines 1-7). The ulcer was categorized as a

Stage III by the Bolivar Medical Center on October 4, 2008. (Video Deposition Transcript, 115, Lines 3-5). Jimmy Melvin ultimately developed an infection in this wound requiring radical debridement with associated pain and suffering. (Video Deposition Transcript, Page114: Lines 21-24).

During the 3-day trial, the Estate of Jimmy Melvin relied primarily on the video deposition testimony of its expert witness Dr. Richard Dupee. Dr. Dupee was admitted as an expert in the field of family medicine without objection from defense counsel. Dr. Dupee opined to a reasonable degree of medical probability that the pressure ulcer diagnosed as to Jimmy Melvin on October 4, 2008 was proximately caused or contributed to by the failure of the nursing home staff to properly remove pressure off of the sacral area of Jimmy Melvin's body during his residency at CNRC. (Video Deposition Testimony, Page 123: Lines 3-5). Specifically, Dr. Dupee opined,

> "Additionally, in the turning/repositioning program, there are significant gaps at least in this form where he was not provided turning and repositioning and also there's significant gaps where he was not provided the preventive skin care again according to this form." (Video Deposition Transcript, Page 40: Lines 11-17).

In reference to preventive skin care, Dr. Dupee explained that the Minimum Data Set form showed numerous days where no ointment had been applied when he explained that,

> "there are check marks all over the place for various other things but not for preventive skin care. 9/18, 9/19, 9/21 two shifts on 9/22, shift on 9/23, a couple on 9/24. Nothing between 9/27 and 9/29. 9/29 to 9/30. In fact, none right up through 10/1 and mind you this pressure ulcer was discovered on 10/2." (Video Deposition Transcript, Page 43, Lines 1-7).

At the close of testimony from Plaintiff's witnesses and Defendant's witnesses, the trial judge discussed jury instructions. The trial court overruled Plaintiff's contemporaneous objection to Jury Instruction D-22 stated as follows:

> "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. 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 the 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 Defendant breached this standard, you must return a verdict in favor of the Defendant."

Defense counsel in closing argument reminded the jurors of the court's instruction that nursing homes are not guarantors of the success of any care provided to a resident at a nursing home. (Trial Transcript, Page 546: Lines 8-22). Apparently persuaded and/or confused by Jury Instruction D-22, the jury found in favor of Defendant CNRC. Plaintiff filed a timely notice of appeal.

Proceedings Below. On December 18, 2009, The Estate of Jimmy Melvin, by and through the Administratrix, Maggie Melvin, filed a lawsuit against CNRC alleging negligence and gross negligence based upon Jimmy Melvin having suffered a pressure ulcer while a resident at CNRC. On October 28, 2013, the case went to trial. At the close of testimony, the trial court instructed the jury, among other instructions, that a nursing home is not a guarantor of the success of care it provides to its residents. After three (3) days of trial, the jury returned a verdict for the Defendant. On December 5, 2013, the Appellant filed their notice of appeal to this Court.

SUMMARY OF THE ARGUMENT

The trial court erroneously granted Jury Instruction D-22 as it was unfairly prejudicial to Plaintiff wherein it allowed jurors to believe that nursing homes are immune to any and all negligent acts or omissions causing injury to residents. In other words, Jury Instruction D-22 conveyed to jurors that no matter how a person is injured or who caused the injury, nursing homes can never be liable for injuries occurring at the facility. This verdict is an error of the trial court. If this verdict is allowed to stand, nursing homes all over Mississippi will fall below all

minimum standards as there would seemingly be no real consequences for negligent treatment of nursing home residents.

Furthermore, no where in Mississippi law is there any statement or concept that nursing homes are not "guarantors of the success of any care provided" to its residents. This phrase is totally out of context with Mississippi case law. All of the cases in this Court's history, and the case law from other jurisdictions where this language was derived, specifically concern whether or not physicians are liable for the bad results of surgical procedures. In crafting Jury Instruction D-22, Defendant substituted the word "physician," replaced it with "nursing home," then presented it to the trial court as if this was the law. To bolster the Court's allowance of the improper instruction, the Defense attorney argued that nursing homes are not "guarantors" of the safety of its residents (Trial Transcript Pg. 546 Line 16) and the jury delivered a defense verdict.

The jury was deceived, misled, and confused. This verdict cannot be permitted to stand.

ARGUMENT

Jury instructions are to be read as a whole. *Southland Enterprises, Inc. v. Newton County*, 838 So.2d 286, 289 (Miss. 2003). The trial judge has considerable discretion in instructing the jury. Id. (citing *Splain v. Hines*, 609 So.2d 1234, 1239 (Miss. 1992)). A defendant is generally entitled to an instruction which presents his side of the case; however, such instruction must correctly state the law. *Humphrey v. State*, 759 So.2d 368, 380 (Miss. 2000) (citing *Heidel v. State*, 587 So.2d 835, 842 (Miss. 1991)). Furthermore, it would be error to grant an instruction which is likely to mislead or confuse the jury as to the principles of law applicable to the facts in evidence. *Southland Enterprises*, 838 So.2d at 289 (citing *McCary v. Caperton*, 601 So.2d 866, 869 (Miss. 1992).

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING JURY INSTRUCTION D-22

A. Jury Instruction D-22 is not the law in Mississippi, specifically the phrase "nursing homes are not guarantors of the success of any care provided to a resident."

The historical context surrounding the language in Jury Instruction D-22 relates to failed surgical procedures and whether a physician was liable for the bad results that flowed from the surgery. The language of this instruction distorted the entire meaning, intent and spirit of the law that has long been argued, analyzed and decided. All of the case law points to physicians specifically when referring to "guarantors" of the success of care of treatment provided to patients.

Every since at least 1946, the Supreme Court of Mississippi has analyzed the words "guarantor", "warrantor", and "insurer" in the context of medical malpractice and a physician's liability after botched surgeries. From that time, there has never been a Mississippi case where nursing homes escaped liability because they were not deemed to be "guarantors of the success" of the care and treatment of patients in nursing homes. In every case decided there was some type of surgery that yielded bad results where the issue was whether or not the physician, and not a nursing home, breached the standard of care. The following cases clearly demonstrate that the context of the language used in Jury Instruction D-22 primarily dealt with medical procedures and not the kind of care related to the treatment of bed sores at nursing homes.

In *Sanders v. Smith*, 27 So.2d 889 (Miss. 1946), a ten year old girl died shortly after her physician performed a tonsillectomy. This case only mentions the operation and the death. The Supreme Court in that case, citing a California Court in *Engelking v. Carlson*, 13 Cal.2d 216 (1939), stated that "the law has never held a physician or surgeon liable for every untoward

result which may occur in medical practice." Even in the *Engelking* case from the California Supreme Court it involved a knee operation that resulted in severe nerve damage.

In *Dazet v. Bass*, 254 So. 2d 183 (Miss. 1971), a woman underwent surgery to remove her uterus and left ovary. The physician only removed growth from the left ovary and did not completely remove the ovary causing excessive vaginal bleeding and a "sudden gushing" of urine from her vagina. The court stated that there was no proof that either doctor failed to use reasonable care in the operative or post-operative procedures explaining that "the most plaintiff proved was that an undesired and bad result followed the operation."

In today's case, Jury Instruction D-22 uses this same language stating instead that a "nursing home" cannot be liable for bad results of the treatment of Jimmy Melvin. Mississippi case law never contemplated a nursing home's duty in this context. The *Dazet* case deals with a surgical procedure that unfortunately caused the patient major complications but also where the **physician** was found to have done what any other gynecologist would have done in the same situation. The *Dazet* case is a far cry from the situation in today's case where the only care Jimmy Melvin needed to prevent a bedsore was proper turning/repositioning and the proper application of ointment by nursing home staff in accordance with the doctor's orders.

In *Hall v. Hilbun*, 466 So. 2d 856 (Miss. 1985), a physician performed an exploratory laporatomy on a patient to alleviate abdominal discomfort caused by obstruction of the small bowel. The patient died fourteen hours later. This Court explaining a physician's duty stated,

> "Medical malpractice is legal fault by a **physician or surgeon** . . . A physician does not guarantee recovery. If a patient sustains injury because of the physician's failure to perform the duty he has assumed under our law, the physician may be liable in damages. A competent physician is not liable per se for a mere error of judgment, mistaken diagnosis or the **occurrence of an undesirable result.**

The underlying theme in the *Hall* case, as it relates to today's case, concerning the context of the language used in Jury Instruction D-22 is that physicians are immune from liability for bad results accompanying surgery if that physician performed the surgery as any other physician would have done in the same situation. Nursing homes and its staff provide a much different service than do hospitals and/or physicians and surgeons. Hypothetically, if Jimmy Melvin needed surgery while in the care of CNRC, the nursing home would have transferred him to a hospital for the surgical operation. Also, if Jimmy Melvin was injured as a result of the surgery, the nursing home would not be a proper party to a lawsuit because nursing homes do not perform surgeries. Therefore, Jury Instruction D-22 is a misstatement of the law as it incorrectly applies the law for physician's liability after a surgical operation to that of nursing home negligence. The two are not the same.

In *Hudson v. Taleff*, 546 So. 2d 359, (Miss. 1989), a patient sued an ophthalmologist after she sustained iritis/inflammation and lost of vision following cataract surgery and lens implantation. A central issue on appeal was whether the trial court erred in granting an instruction which read in part that, "a surgeon is not an insuror or guarantor of favorable results." Id. at 364. These instructions were upheld because they were used within the context of the case involving physician's liability following bad results of surgery. In today's case, the jury was improperly instructed and misled as to the law of Mississippi substituting the word "physician" then inputting the words "nursing home" and the jury rendered a verdict in reliance upon an incorrect statement of law.

In *Day v. Morrison*, 657 So. 2d 808 (Miss. 1995), a man sued his physician for damages arising from complications of a penile implant surgery. During trial, the injured patient contested two jury instructions where one stated in part that "a competent physician is not liable

per se for a mere error of judgment or the occurrence of undesirable results." The other contested instruction contained the language that "no physician is either a guarantor nor does he insure the success of any medical care and treatment rendered to a patient." Specifically, the appellant argued that these instructions on the physician's "mere error of judgment" confuse the jury. The court stated that the instructions,

> "in fact preclude the plaintiff from ever recovering because these two instructions, when read together, tell the jury that even though a doctor may be negligent, that he may not have treated a patient according to the minimally accepted standards, or that he was mistaken, this is acceptable." Id. at 812.

The Supreme Court went on to state that the standard for physicians is best viewed through the lens of traditional negligence stating that,

> "In *Day's* case, there was only one method of correcting the problem, therefore leaving no room for choice for the physician, and ultimately making a mere error of judgment instruction not only unnecessary, but absolutely inapplicable." Id.

To be clear, in today's case, the jury instruction at issue does not include the language "mere error of judgment" and in no way is Appellant claiming that Jury Instruction D-22 is the exact same as in the *Day* case. However, the effect of the language "mere error of judgment" in jury instructions as it relates to physicians provided immunity for physicians when performing surgery. The *Day* case struck down this "mere error of judgment" language because "the jury could too readily conclude, incorrectly, that a physician is not liable for malpractice even if he or she is negligent." Id. at 812.

Here in the Appellant's case, like in the *Day* case, the language in Jury Instruction D-22 that nursing homes are not "guarantors of the success of any care provided" effectually operates to insulate nursing homes from all liability. If this Supreme Court has stated that it is best to view a physician's duty through the eyes of traditional negligence and if Jury Instruction D-22 presupposes that the words "physician" and "nursing home" are interchangeable, then this court

must also strike the "guarantor" language as it did the "mere error of judgment" language. In the *Day* case the Court stated essentially that it did not matter whether the doctor made an error of judgment, because "he either acted as a competent physician would or he did not." Id. at 815.

CNRC breached the standard of care when it allowed Plaintiff to develop a bed sore and not properly treat it. Plaintiff presented evidence throughout the trial that demonstrated several hours and days where Plaintiff did not receive turning/repositioning and/or the application of ointment. However, the Defendant responded that it did not document every time treatment was provided and Defendant said they were not required. In other words, it did not matter whether or not the nursing home documented properly or provided sufficient care because they operate as if they are immune from liability.

To allow this "guarantor" language in Jury Instruction D-22 would be to allow CNRC to always claim that it is not a "guarantor of the success of any care provided" to residents even though the nursing home staff was negligent. Just like the *Day* case, the trial court in Appellant's case instructed the jury on the traditional standard of care, but in the same breath, stated that nursing homes are not liable for undesirable results because nursing homes are not "guarantors" of the success of care and treatment provided. The Court in the Day case said it best, "the jury cannot be expected to separate the two charges." *Id.*

Furthermore, the words "physician and "nursing home" are not interchangeable in the context of medical malpractice. This court has admonished attorneys for taking language from opinions and creating jury instructions. *Freeze v. Taylor*, 257 So.2d 509 (Miss. 1972). Nursing homes as "guarantors", as Jury Instruction D-22 suggests, is not mentioned anywhere in Mississippi case law. The only case Appellant is aware of that relates to the general term healthcare providers as "guarantors" also concern a surgical procedure and whether physicians,

not nursing homes, are liable for bad results of surgery. *Magee v. Covington County School District*, 96 So.3d 742 (Miss. Ct. App. 2012). Without being redundant, there are many more cases not discussed here that also involve the language of "guarantor" or "insurer" in the physician/surgeon context in the aftermath of surgery that produced bad results. *Daughtry v. Kuiper*, 852 So.2d 675 (Miss. Ct. App. 2003); *Clayton v. Thompson*, 475 So. 2d 439 (Miss. 1985); *Walker v. Skiwski*, 529 So.2d 184 (Miss. 1988); *Austin v. Baptist Memorial Hospital-North Mississippi*, 768 So.2d 929 (Miss. Ct. App. 2000); *Thompson v. Carter,* 518 So.2d 609 (Miss. 1987). Neither of those cases involved a nursing home in the context of "guarantor" as it relates to a patient's care and treatment. Ultimately, any jury instruction which could potentially confuse a jury should not be granted. The trial court is in error.

Defense counsel in closing argument reminded the jurors of the court's instruction that nursing homes are not guarantors of the success of any care provided to a resident at a nursing home as follows, "We're not a guarantor . . . (Trial Transcript, Page 546: Lines 16-18).

CONCLUSION

The trial court erred in granting Jury Instruction D-22. This instruction, specifically the language that "nursing homes are not guarantors of the success of any care provided," misled and confused the jury. Any jury instruction which suggests that nursing homes are immune from liability is incorrect and misguided. This verdict cannot stand.

Appellant, Estate of Jimmy Melvin, asks the Supreme Court to reverse the jury verdict in favor of CNRC and order a new trial.

Respectfully submitted, this the 17th day of June, 2014.

LEVI BOONE, III, ESQ., MSB #3686