IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

LAURA SANDERS, ADMINISTRATRIX
OF THE ESTATE OF CHANNA MCCORD,
AND ON BEHALF OF ALL OF THE HEIRS
AT LAW AND WRONGFUL DEATH
BENEFICIARIES OF CHANNA MCCORD, DECEASED — PLAINTIFF

V. — NO. 251-11-633CIV

MISSISSIPPI BAPTIST MEDICAL CENTER, INC., ET AL. — DEFENDANTS

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

COMES NOW defendant, Mississippi Baptist Medical Center, Inc.,[1] ("MBMC") by and through counsel, and files this its *Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for A New Trial*, pursuant to Rules 50 and 59, respectively, of the *Mississippi Rules of Civil Procedure* ("MRCP"), and in support thereof would show unto the Court the following:

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

1. STANDARD FOR JUDGMENT NOTWITHSTANDING THE VERDICT ("JNOV") PURSUANT TO MRCP 50: A motion for JNOV tests the legal sufficiency of the evidence supporting the verdict. *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 54 (Miss. 2004). The trial court considers all of the evidence in the light most favorable to the non-moving party, giving that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. *Id.* "If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable men could not have arrived at a contrary verdict, granting the motion

[1] Defendant, Mississippi Baptist Health Systems, Inc., was dismissed with prejudice during trial by agreement of the Parties.

is required." *Id.* "When it is clear that the jury decided issues in a case with total disregard for the conclusions that were mandated by the overwhelming evidence, a trial court has the authority to set aside an unjust verdict." *Alpha Janitorial & Paper Co. v. Crawford*, 924 So. 2d 547, 549 (Miss. Ct. App. 2005) (emphasis added).

As grounds for its *Motion for Judgment Notwithstanding the Verdict*, MBMC would show unto the Court the following:

2. In the case at bar, Plaintiff bore the burden of proof with regard to breach of the standard of care by MBMC nursing personnel. Plaintiff's core allegations against MBMC consisted of her claims that nursing personnel did not review transfer documents from Brentwood Behavioral Healthcare and bring the content of the documents (which were undusputedly contained in, and made a part of the medical record of the emergency room encounter), to the attention of the emergency room physician. (This, against the backdrop of the testimony of plaintiffs' emergency room physician expert that a finding that the patient was "unresponsive" and had "pinpoint pupils", both of which were recorded by nurses and known by the ER physician, Dr. Brooks, required him to immediately order a computerized tomography (CT) scan.)

3. It was undisputed at trial that the Brentwood transfer documents were made part of the MBMC medical records related to Channa McCord and those records were available for the emergency room physician to review. Plaintiff's nursing expert, Dr. Russell Bennett, acknowledged that nurses do not substitute their decisions for those of physicians, and that nurses do not make medical diagnoses or order CT scans. Further, Dr. Bennett testified at trial, in accord with his deposition, that the MBMC record accurately reflected the history and presentation of Channa McCord, that after declaring Channa McCord urgent and recording the

patient's presenting symptoms on the chart, he acknowledged, as concerns MBMC nurses, that "I don't see anything else that they should have done." As was the subject of MBMC's *Motion for Partial Summary Judgment on Plaintiff's Non-Physician Hospital Claims*, Dr. Bennett did not articulate a breach of the standard of care by MBMC nurses. Accordingly, the Court erred in denying MBMC's *Motion for Partial Summary Judgment on Plaintiff's Non-Physician Hospital Claims and defendants' motions for directed verdict at trial.*

4. Further, the evidence presented related to medical causation was insufficient to sustain a verdict for Plaintiff against MBMC. Plaintiff bore the burden of proving by a preponderance of the credible evidence that had a CT scan been ordered sooner, Channa McCord had a greater than fifty (50) percent chance of a substantially better outcome. Assuming *arguendo* that Dr. Bennett had articulated a breach of the standard of care by MBMC nurses, there was no expert causation testimony which provided a causative link from what MBMC nurses allegedly did or did not do in their care and treatment of Channa McCord which caused or contributed to her death, (discussed *infra*).

There was absolutely no evidence presented that any alleged breach of the standard of care by nurses of Baptist caused or contributed to a delayed diagnosis or to an injury or the death of Channa McCord. Neither of plaintiff's medical experts offered any opinion that any conduct attributed to the nurses in the ER at Baptist was a causative factor in Channa McCord's death.

Further, Dr. John Brooks, the emergency room physician who treated Channa McCord on February 20, 2010, not only did not deny seeing the Brentwood transfer documents, he affirmatively testified that there was no information contained in the Brentwood documents that would have altered his diagnosis or treatment of Channa McCord on February 20, 2010. Thus, Dr. Brooks affirmed that regardless of whether or not the MBMC nurses provided him with the

Brentwood documentation, which Plaintiff contends nurses should have provided, he would not have ordered the CT scan of Channa McCord any sooner than he did. Therefore, even assuming that the MBMC nurses breached a standard of care by not specifically bringing the Brentwood transfer documentation to Dr. Brooks' attention, that breach, if any, did not alter Channa McCord's course of treatment as directed by Dr. Brooks, and the conduct of MBMC nurses was not a proximate cause or contributing proximate cause to Channa McCord's death.

5. Plaintiff's sole proffer as to the course of events leading up to the death of Channa McCord was the opinion of a hired expert, Dr. Raymond Baule, who testified via deposition[2] that Channa McCord had a "second bleed" in her brain while in the emergency room at MBMC. He based his opinion on a presumed "clinical deterioration" in her condition, which was based solely upon Dr. Brooks' decision to order the CT scan on Channa McCord. Dr. Baule admitted that his conclusion that Channa McCord suffered a clinical deterioration was based on his **assumption** that Dr. Brooks was motivated by a change in condition to order a CT scan, and not on facts in her medical records or circumstances in the case. Such an expert opinion, which is not based on reliable facts or data, should have been excluded from the trial of this matter. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); and *Mississippi Transportation Commission v. McLemore*, 863 So. 2d 31 (Miss. 2003) (adopting *Daubert* and *Kumho Tire*).

6. Moreover, Dr. Baule's assumption (of a deterioration) was fully rebuffed when Dr. Brooks testified that he ordered a CT scan after having received laboratory results which did

[2] The use of Dr. Baule's discovery deposition at trial was the subject of a motion *in limine* (Dkt #196) to prevent the use of deposition of Dr. Baule at trial and was denied by the Court. The Court erred by denying this motion.

not indicate that Channa McCord was having an adverse reaction to medications, and that there was no clinical deterioration.

7. The only other expert Plaintiff designated in the area of causation was Dr. William Truly. Dr. Truly did not proffer an opinion on standard of care or causation related to MBMC nurses. Dr. Truly did, however, proffer an opinion related to Dr. Brooks that a CT scan should have been ordered immediately upon Channa McCord's arrival in the MBMC emergency department. Dr. Truly's opinion against Dr. Brooks was based on Channa McCord's presenting condition of pinpoint pupils and decreased level of consciousness both of which were documented in multiple places in the record by MBMC nurses. Thus, as concerns Dr. Truly's causation opinion, MBMC nurses neither caused nor contributed to Channa McCord's death.

8. Accordingly, Plaintiff failed to demonstrate by a preponderance of the evidence that "but for" the alleged negligence of MBMC nursing personnel, Channa McCord's treating physicians would have ordered a CT scan sooner than it was ordered. Absent requisite proof on this essential element of her claim of medical negligence against MBMC, Plaintiff failed to make out a prima facie case to sustain a verdict for Plaintiff.

9. The aforementioned evidence points so overwhelmingly in favor of MBMC that, even viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could not have arrived at a verdict for Plaintiff except in a complete disregard for the evidence presented and as guided by erroneous instructions of law. Plaintiff's nursing expert, Dr. Bennett, did not articulate a standard of care or breach of such standard by MBMC nurse. Likewise, the unfounded testimony of Dr. Raymond Baule, regarding a second bleed was legally insufficient to sustain Plaintiff's prima facie case against MBMC. For these reasons, the verdict returned is

patently unjust, and MBMC respectfully requests that the Court would set it aside and enter judgment for MBMC pursuant to MRCP 50.

MOTION IN THE ALTERNATIVE FOR A NEW TRIAL

10. STANDARD FOR NEW TRIAL PURSUANT TO MRCP 59: A motion for a new trial addresses the weight of the evidence. *Bailey*, 878 So. 2d at 55. A new trial may be granted for any number of reasons, "such as when the verdict is against the overwhelming weight of the evidence, or when the jury has been confused by faulty jury instructions, or when the jury has departed from its oath and its verdict is a result of bias, passion, and prejudice." *Poole ex rel. Wrongful Death Beneficiaries of Poole v. Avara*, 908 So. 2d 716, 726-27 (Miss. 2005). "A motion for a new trial is within the sound discretion of the trial judge, who may grant a new trial if the verdict is contrary to the law or the weight of the evidence or is required in the interest of justice." *Rogers v. State*, 796 So. 2d 1022, 1030 (Miss. 2001).

As grounds for their *Motion for A New Trial*, Defendants would show unto the Court the following:

11. The verdict is against the overwhelming weight of the evidence. Defendants hereby incorporate paragraphs two (2) through nine (9) *supra*, applying the standard of MRCP 59. Furthermore, in light of the errors presented *infra*, the verdict is contrary to the overwhelming weight of the evidence. To permit this verdict to stand against the overwhelming weight of the evidence and the jury's summary disregard of the same would sanction a grave injustice which can only be remedied by a new trial on the merits.

12. The verdict is contrary to the law. The jury returned a verdict apportioning 10% of fault to MBMC and awarding damages pursuant to Jury Instruction No. 35 (submitted by Plaintiff) as follows: (1) $880,180 to "the decedent's family" for economic damages; (2)

$250,000 to "the decedent's family for the pain and suffering sustained as a result of the death of Channa McCord"; and (3) $250,000 to "the decedent's family for the loss of love society, and companionship sustained as a result of the death of their loved one, Channa McCord." There is utterly no proof in the record to support an allocation of 10%, or any allocation of fault, against MBMC, and the jury's finding in this regard can only be the result of random guesswork or speculation, or an improper compromise decision influenced by bias, passion or prejudice.

Furthermore any award of damages for pain and suffering against MBMC was precluded by Mississippi law because Plaintiff presented no proof that Channa McCord was even conscious from or after the time of her arrival at the MBMC emergency department on February 20, 2010. Indeed, the undisputed evidence demonstrated that at all times she was non-responsive and did not react to verbal or painful stimulus. In sum, there was a complete failure of proof necessary to sustain a recovery for conscious pain and suffering under MISS. CODE ANN. § 11-7-13 (1972).[3] *M & M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts*, 531 So. 2d 615, 621 (Miss. 1988); *Moore v. Johnson*, 114 So. 734, 735 (Miss. 1927). The jury's finding against MBMC on the issue is further proof that it disregarded the facts of the case and rendered a verdict predicated on bias, passion or prejudice. Further, under the circumstances, the Court erred in giving Jury Instruction No. 35.

13. The Court further erred in denying MBMC's *Motion for Partial Summary Judgment on Plaintiff's Non-Physician Hospital Claims*. As noted above, Dr. Bennett did not articulate a breach of the standard of care by MBMC nurses and further stated that after declaring

[3] MBMC medical records document that Channa McCord was unresponsive at the time of her arrival at MBMC, and further, that she did not response to painful stimuli nor did she respond to the insertion of a foley catheter.

Channa McCord urgent he was "not certain [the MBMC nurses] should have done anything else. I don't see anything else that they should have done."

14. The Court erred in denying MBMC's *Motion to Strike and Exclude the Testimony of Kristena Gaylor, Ph.D., MBA*, filed on July 5, 2016, and the supplement to the motion filed on July 26, 2016. Plaintiff's designation of Kristena Gaylor, Ph.D., MBA failed to disclose the substance of her opinions and the factual bases for those opinions as mandated by Rule 26(b)(4), *Mississippi Rules of Civil Procedure*. Further, on July 25, 2016, the Court held a hearing on the *Motion to Strike and Exclude the Testimony of Kristena Gaylor, Ph.D., MBA* during which it appeared, for the first time, that Plaintiff was in possession of a report from her expert, Dr. Gaylor prepared on or about June 18, 2013. Accordingly, the Court erred by denying MBMC's *Motion to Strike and Exclude the Testimony of Kristena Gaylor, Ph.D., MBA*.

15. The Court erred in denying Defendants' *Motion to Exclude Certain Testimony of Raymond Baule, M.D.*, filed on July 26, 2016, and joined by MBMC, and in admitting the expert testimony of Dr. Raymond Baule as it related to a "second bleed," "re-bleed" or "re-hemorrhage", because these opinions, as discussed *supra*, were based on his assumptions that were patently wrong and contrary to undisputed facts. For these reasons, those previously presented and briefed in support of Defendants' *Motion to Exclude Certain Testimony of Raymond Baule, M.D.*, Dr. Baule's opinions related to a second brain bleed of Channa McCord were unreliable and inadmissible pursuant to the evidentiary standard of *Daubert*/*McLemore*, and should have been excluded from the trial of this matter.

16. The Court erred in denying the *Motion in limine to Prevent the Use of Deposition of Dr. Baule at Trial*, filed on July 28, 2016. The deposition of Dr. Baule was taken for discovery purposes and by order of this Court due to Plaintiff's insufficient expert designation.

During Dr. Baule's testimony he proffered a previously undisclosed opinion that Channa McCord experienced a second brain bleed while in the MBMC emergency department; thus, at the time of the discovery deposition, MBMC was not in a position to cross-examine Dr. Baule related to the previously undisclosed opinion, or the bulk of his opinions which were not disclosed in Plaintiff's expert designation. Consequently, his testimony by deposition should not have been admitted. Further, as a paid, retained expert, he was not unavailable and his presence was fully within the control of the Plaintiff. *In Re: Aircrash Disaster at Stapleton International Airport, Denver, Colorado, on November 15, 1987*, 720 F.Supp 1493 (D. Colo. 1999).

17. The Court erred in permitting Plaintiff to show the jury a map of a route (one of several possible routes) between Brentwood Behavioral Healthcare and MBMC as this map was not relevant to any issue in the case and was displayed for no other purpose than to mislead and inflame the jury, resulting in unfair prejudice to MBMC. Not only was there no proof of the route taken by the ambulance from Brentwood to MBMC, the proof at trial demonstrated that only the ambulance company, AMR, made the choice of routes, not MBMC.

18. The Court erred in permitting Plaintiff to show the jury a timeline which indicated that Channa McCord did not receive treatment for five (5) hours after her collapse at Brentwood Behavioral Healthcare, as this timeline was factually inaccurate as it related to nursing care and treatment by MBMC nurses. Most significantly, the timeline was squarely opposed by Plaintiff's own expert, Dr. Bennett, who acknowledged that the MBMC nurses did provide nursing care and treatment to Channa McCord. The timeline was misleading, inaccurate and inflammatory, resulting in unfair prejudice to MBMC.

19. The Court erred in denying MBMC's motions for a directed verdict. Plaintiff's nursing exert, Dr. Bennett, testified that, having declared Channa McCord urgent and providing

an accurate summary of the patient's history and presentation, he (didn't) "see anything else that they should have done." Accordingly, Plaintiff did not make out a prima facie case against MBMC.

20. The Court erred in allowing Plaintiff's counsel, over Defendants' objection, to argue to the jury that MBMC did not call any of its nurses to testify at trial. The comment was unfairly prejudicial to MBMC and had no relation to issues of fact submitted for the jury's determination. *See Bailey*, 878 So. 2d at 62. Furthermore, this comment was inflammatory, prejudicial and misleading, see *id.*, in that Plaintiff could have called any of the MBMC nurses listed in the medical records. Indeed, plaintiff subpoenaed at least one of MBMC's nurses, but chose not to call her to testify at trial.

21. The Court erred in refusing jury instruction DI/DII-9, which stated that MBMC does not practice medicine as a matter of law and could not be held liable for the independent medical treatment provided by Channa McCord's treating physicians or any results of the treating physicians' decisions regarding the care and treatment of Channa McCord. *Clark v. St. Dominic-Jackson Mem'l Hosp.*, 660 So. 2d 970, 972 (Miss. 1995); *Hardy v. Brantley*, 471 So. 2d 358, 371, 373 (Miss. 1985).

22. The Court erred in refusing jury instruction DI/DII-19, which stated that Defendants had no duty to disprove the claims against them but rather that Plaintiff bore the burden of proof by a preponderance of the evidence. *See Sacks v. Necaise*, 991 So. 2d 615, 619 (Miss. Ct. App. 2007).

23. The Court erred in refusing jury instruction DI/DII-22, which set forth the elements of Plaintiff's prima facie case against MBMC and stated that the failure of Plaintiff to prove any one of these elements by a preponderance of the credible evidence required the jury to

return a verdict for MBMC. *See Delta Reg'l Med. Ctr. v. Venton*, 964 So. 2d 500, 504 (Miss. 2007). Absent the requested instruction, the jury was not required to evaluate whether Plaintiff submitted sufficient proof on each element of their prima facie case against MBMC.

24. The Court erred in refusing jury instruction DI/DII-28, which provided that the jury may not award damages for conscious pain and suffering to the Plaintiff against MBMC. Plaintiff presented no proof that Channa McCord was conscious between the time of her arrival at the MBMC emergency department on February 20, 2010, and the instant of her death as required to sustain recovery for conscious pain and suffering under Miss. Code Ann. § 11-7-13 (1972).[4] *M & M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts*, 531 So. 2d 615, 621 (Miss. 1988); *Moore v. Johnson*, 114 So. 734, 735 (Miss. 1927).

25. The Court erred in giving Jury Instruction No. 13, as the instruction, which attempted to define the "cause in fact" element of causation, omitted the "but for" test for cause in fact. *Davis v. Christian Bhd. Homes of Jackson, Miss., Inc.*, 957 So. 2d 390, 404 (Miss. Ct. App. 2007); *Johnson v. Alcorn State Univ.*, 929 So. 2d 398, 411 (Miss. Ct. App. 2006).

26. The Court erred in giving Jury Instruction No. 28, over MBMC's objection, as said Plaintiff presented no proof whatsoever of conscious physical and/or mental pain and suffering between Channa McCord's presentation to the MBMC emergency department on February 20, 2010, and the instant of her death on February 21, 2010. *Moore*, 114 So. at 735; *Roberts*, 531 So. 2d at 621.

[4] MBMC medical records document that Channa McCord was unresponsive at the time of her arrival at MBMC, and further, that she did not response to painful stimuli nor did she respond to the insertion of a foley catheter.

27. The cumulative effect of all errors at trial worked such unjust prejudice on MBMC as to deprive MBMC of a fair trial, thereby entitling MBMC to a new trial on the basis of cumulative error. *Blake v. Clein*, 903 So. 2d 710, 732 (Miss. 2005).

WHEREFORE, PREMISES CONSIDERED, defendant Mississippi Baptist Medical Center, Inc., respectfully requests that the Court would make and enter its Order setting aside the verdict and judgment (to be) entered in the above-styled action and enter judgment in favor of MBMC or, in the alternative, grant MBMC a new trial on all issues.

THIS the 19th day of August, 2016.

Respectfully submitted,

MISSISSIPPI BAPTIST MEDICAL CENTER, INC., DEFENDANT

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CERTIFICATE OF SERVICE

I, Jason P. Varnado, one of the attorneys for defendants, Mississippi Baptist Medical Center, Inc. and Mississippi Baptist Health Systems, Inc., do hereby certify that I have this date caused to be sent, via MEC electronic filing, a true and correct copy of the above and foregoing to the following:

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THIS the 19th day of August, 2016.

/s/ Jason P. Varnado
JASON P. VARNADO