IN THE CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI

JOYCE ENGLAND, Individually, and as Administratrix of the **ESTATE OF GLEN HOWARD**, and on behalf of and for the Use and Benefit of the Wrongful Death Beneficiaries of Glen Howard,

Plaintiff,

v.

DOCKET NO. 20-KV-0080-S
JURY DEMAND

NEXION HEALTH AT NATCHES, INC. d/b/a NATCHEZ REHABILITATION AND HEALTHCARE CENTER

Defendant.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL AND SUPPORTING MEMORANDUM

DEFENDANT Nexion Health at Natchez, Inc. d/b/a Nexion Rehabilitation and Healthcare Center, ("Natchez"), pursuant to Rule 50 of the Mississippi Rules of Civil Procedure, hereby respectfully moves for a judgment notwithstanding the verdict or, in the alternative, for new trial, and as ground states as follows:

BACKGROUND FOR MOTION

Dr. Hill-O'Neill Testimony

Trial of this matter began on Monday, May 23, 2022, and ended on Thursday, May 26, 2022, on Plaintiff's complaint for negligence and wrongful death damages related to the care Glen Howard received at Natchez. During the trial, Plaintiff called Dr. Kathleen Hill-O'Neill to testify as an expert on nursing standards of care. Dr. Hill-O'Neill opined that the appropriate standard of care for Natchez would 1) require Natchez to have staff physically present with Mr. Howard's for any transfer at any time in any place in the facility; and 2) require Natchez to move Mr. Howard's

sliding board and wheelchair out of his reach at all times unless staff was present with him to provide assistance. Her opinions were based on documentation within the care plan and MDS that Mr. Howard required limited assistance with transfers.

Motions in Limine

During a pre-trial hearing on Tuesday, May 17, 2022, the Court heard and ruled on multiple Motions in Limine. These included Defendant's Motions in Limine #6-I, #7, and #8, seeking exclusion 1) of testimony from former employees of Natchez; 2) of Mr. Howard's reported statement he fell back and hit his head while transferring on February 15, 2020; and 3) evidence that Mr. Howard was using a slide board on February 15, 2020 to transfer in the morning. These motions were denied.

Dr. Adam Lewis Testimony

Plaintiff also called Dr. Adam Lewis and Dr. Keith Miller, who both opined Mr. Howard sustained a traumatic subdural hematoma based on Dr. Lewis's observation of a subgaleal hematoma on Mr. Howard's CT scan of February 15, 2020. Dr. Lewis is the only physician who identified a subgaleal hematoma.

Marquis Thompson Testimony

Plaintiff additionally called Marquis Thompson, a former Natchez employee who was terminated, as a witness. Mr. Thompson testified that he had been trained at Natchez not to leave a sliding board in Mr. Howard's room and even claimed that staff members had gone through the in-service process to receive such training, but could not produce any evidence to confirm his allegations. Natchez's administrator, Amanda Hasty, who is responsible for the in-service training testified that there was and would not be such training specific to the sliding board.

Joyce England's Status as the Estate Administrator

Before jury selection began, counsel for Natchez identified Mr. Howard potentially had – and reported having – four (4) children who had not been disclosed to the Court in this matter or in Plaintiff Joyce England's Petition for appointment as the adminstratix of the Estate of Glen Howard in the Chancery Court of Adams County on October 30, 2020 and stating that she and her sisters "are the only heirs-at-law and wrongful death beneficiaries" of Glen Howard. Natchez brought this to the Court's attention prior to the start of jury selection and raised an issue of whether Plaintiff had standing to bring the suit. The Court determined that the issues of Mr. Howard's heirs would need to be determined by the Adams County Chancery Court that probated Mr. Howard's estate. The trial proceeded.

LEGAL AUTHORITY TO SUPPORT DEFENDANT'S MOTION

Rule 50 Standard

A motion for judgment notwithstanding the verdict ("JNOV") seeks to set aside the jury's verdict and must be filed not later than 10 days after the entry of a judgment. Miss. R. Civ. P. 50(b). In Mississippi, this time begins running the day after the judgment is entered. Miss. R. Civ. P. 6(a). A motion for JNOV is "a challenge to the legal sufficiency of the evidence." Adcock v. Mississippi Transp. Com'n, 981 So. 2d 942, 948 (Miss. 2008). There must be substantial evidence to support a verdict for a trial court to deny a JNOV motion. Id. "Substantial evidence is information of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions." Id., at 948-949 (internal citations omitted). The evidence must be viewed in a light most favorable to the rendered verdict. Id.

In a medical malpractice action, the plaintiff is required to show that the facility owed a specific standard of care, that standard was breached, and that the patient/resident suffered a resulting injury and ultimately death from that breach. Williams v. Manhattan Nursing & Rehabilitation Center, LLC, 148 So. 3d 20, 24 (Miss. Ct. App. 2014). "Verdicts and judgments in civil actions must be based on the probabilities of the case, not on possibilities; and a verdict, although it is treated with great respect, has no force to convert a possibility to a probability." Martin v. St. Dominic-Jackson Memorial Hospital, 90 So. 3d 43, 48-49 (Miss. 2012). "If a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision." Id.

"Trial courts have three options when motions for JNOV are made: (1) deny the motion and try the case to a verdict; (2) grant the motion and enter a judgment for the moving party; or (3) grant a new trial." McIlwain v. Natchez Community Hosp. Inc., 178 So. 3d 678, 686 (Miss. 2015).

A new trial should only be granted when a verdict is "so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." Adcock, at 950. "A new trial becomes appropriate when a trial court determines that error within the trial mechanism itself has caused a legally incorrect or unjust verdict to be rendered." McIlwain, at 686. If mistakes are made in the application of the law, a new trial may be necessary. Id. New trials have been granted in circumstances where the jurors have been prejudiced. Id.

Motions in Limine

"The primary purpose of a motion in limine is to exclude evidence that would be highly prejudicial to the moving party." McCord v. Gulf Guar. Life Ins. Co., 698 So. 2d 89, 91 (Miss. 1997). A trial court must determine first whether the evidence is admissible and then whether it

would be prejudicial to the movant's case. Id. Where the evidence to be excluded is highly prejudicial, the motion in limine should be granted. Id., at 92.

Speculative and Unreliable Standard of Care and Causation Testimony

The analysis for admission of expert testimony is enumerated in the Mississippi Rules of Evidence, Rule 702: The rule states that:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, *if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.* M.R.E. 702 (emphasis added).

Rule 702 is identical to Rule 702 of the Federal Rules of Evidence. Under Rule 702, expert testimony should be admitted only if it withstands a two-pronged inquiry. *Kansas City S. Ry. v. Johnson*, 798 So.2d 374, 382 (Miss.2001). First, the witness must be qualified by virtue of his or her knowledge, skill, experience or education. *Id.* (citing M.R.E. 702). Second, the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue. *Id.* In addition, Rule 702 "does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge." M.R.E. 702 cmt.

The Supreme Court of Mississippi, in *Mississippi Transportation Comm'n v. McLemore*, 863 So.2d 31 (Miss.2003), sets out the existing case law on the exclusion of expert testimony and adopting the *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

In *Daubert,* the Court concluded that the "general acceptance" test is inconsistent with other evidentiary provisions that strive to prevent the admission of **unreliable or irrelevant scientific testimony**. *Daubert*, 509 U.S. at 589, 113 S.Ct. 2786. The rigidity of the "general acceptance" test

also conflicts with the liberal goals of the Federal Rules which include reducing the traditional barriers to opinion testimony. *Id.* at 588–89, 113 S.Ct. 2786 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169, 109 S.Ct. 439, 450, 102 L.Ed.2d 445 (1988)). However, the Court determined that a federal trial court retains authority to review scientific evidence to determine admissibility. *Id.* at 589, 113 S.Ct. 2786. The trial court is vested with a "gatekeeping responsibility." *Id.* **The trial court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning and methodology properly can be applied to the facts in issue."** *Id.* at 592–93, 113 S.Ct. 2786. Preliminary questions of witness qualifications, privileges and admissibility of evidence are resolved pursuant to Rule 104(a) and 104(b). *Id.* at 592, 113 S.Ct. 2786. The trial judge determines whether the testimony rests on a reliable foundation and is relevant in a particular case. *Id.* at 589, 113 S.Ct. 2786. There must be a "valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 592, 113 S.Ct. 2786. The party offering the expert's testimony must show that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation. *Id.* at 590, 113 S.Ct. 2786.

Moreover, the Court in *Daubert* determined that abandoning the general acceptance test does not result in jury confusion from "absurd and irrational pseudoscientific assertions," since "[v]igorous cross examination, presentations of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* at 595–96, 113 S.Ct. 2786 (citing *Rock v. Arkansas*, 483 U.S. 44, 62, 107 S.Ct. 2704, 2714, 97 L.Ed.2d 37 (1987)). **If evidence is deemed insufficient for a reasonable juror to conclude that the position is more likely than not true, the trial court can direct a judgment**

or grant summary judgment. *Id.* at 596, 113 S.Ct. 2786 (citing Fed.R.Civ.P. 50(a), 56). These well-established, traditional devices provide better safeguards than full exclusion of testimony which meets the standards of Rule 702. *Id.*

The Court in *Daubert* adopted a non-exhaustive, illustrative list of reliability factors for determining the admissibility of expert witness testimony. *Id.* at 592–94, 113 S.Ct. 2786. The focus of this analysis "**must be solely on principles and methodology, not on the conclusions they generate.**" *Id.* at 595, 113 S.Ct. 2786. These factors include whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. *Id.* at 592–94, 113 S.Ct. 2786. The applicability of these factors depends on the nature of the issue, the expert's particular expertise, and the subject of the testimony. *Kumho Tire*, 526 U.S. at 151, 119 S.Ct. 1167. The *Daubert* Court emphasized that the reliability inquiry contemplated by Rule 702 "is a flexible one." *Daubert*, 509 U.S. at 594, 113 S.Ct. 2786. In *Kumho Tire*, the Court illustrated such flexibility in that:

> It might not be surprising that in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may not have ever interested any scientist. Nor, on the other and, does the presence of *Daubert's* general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.

Kumho Tire, 526 U.S. at 151, 119 S.Ct. 1167. Therefore, the Court determined that it could "neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert* " because "[t]oo much depends upon the particular circumstances of the particular case at issue." *Id.* at 150, 119 S.Ct. 1167. The *Daubert* factors should be considered "where they are

reasonable measures of the reliability of expert testimony." *Id.* Furthermore, neither *Daubert* nor the Federal Rules of Evidence requires that a court "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert," as self-proclaimed accuracy by an expert an insufficient measure of reliability. *Id.* at 157, 119 S.Ct. 1167 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)).

The Court's holding in *Daubert* was specifically limited to scientific expert testimony since the testimony at issue in that case was "scientific" in nature. *Kumho Tire*, 526 U.S. at 147, 119 S.Ct. 1167. However, the Court in *Kumho Tire* concluded that a trial court's basic "gatekeeping responsibility" applies to the admissibility of expert testimony based on "technical" and "other specialized" knowledge. *Id.* Analyzing the language of Rule 702, the Court concluded that the word "knowledge" and not the words that modify it "establishes a standard of evidentiary reliability." *Id.* at 148, 119 S.Ct. 1167 (quoting *Daubert*, 509 U.S. at 589–90, 113 S.Ct. 2786).

In addition, the Court in *Kumho Tire* noted that the evidentiary rationale that supports trial courts' gatekeeping responsibilities is not limited to scientific knowledge. *Id.* When stating opinions, an expert is given greater latitude than a lay witness under the assumption that an expert's opinion is reliably based on knowledge and experience particular to a chosen discipline. *Id.* **However, whether testimony is based on professional studies or personal experience, the "gatekeeper" must be certain that the expert exercises the same level of "intellectual rigor that characterizes the practice of an expert in the relevant field."** *Id.* at 152, 119 S.Ct. 1167.

Thus, to summarize, the analytical framework provided by the modified *Daubert* standard requires the trial court to perform a two-pronged inquiry in determining whether expert testimony is admissible under Rule 702. *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir.2002). The

modified *Daubert* rule is not limited to scientific expert testimony—rather, the rule applies equally to all types of expert testimony. *Kumho Tire*, 526 U.S. at 147, 119 S.Ct. 1167. First, the court must determine that the expert testimony is relevant—that is, the requirement that the testimony must " 'assist the trier of fact' means the evidence must be relevant." *Mathis v. Exxon Corp.*, 302 F.3d 448, 460 (5th Cir.2002) (citing Fed. R. Evid. 702). Next, the trial court must determine whether the proffered testimony is reliable. *Pipitone*, 288 F.3d at 244. Depending on the circumstances of the particular case, many factors may be relevant in determining reliability, and the *Daubert* analysis is a flexible one. *Id. Daubert* provides "an illustrative, but not an exhaustive, list of factors" that trial courts may use in assessing the reliability of expert testimony. *Id.*

In applying the modified *Daubert* rule, Mississippi's federal courts have recognized that the gatekeeping role of federal trial courts is taken seriously. *Hammond v. Coleman Co.*, 61 F.Supp.2d 533, 537 (S.D.Miss.1999), *aff'd mem.* 209 F.3d 718 (5th Cir.2000). **Moreover, there is universal agreement that the *Daubert* test has effectively tightened, not loosened, the allowance of expert testimony**. 61 F.Supp.2d at 537.

Daubert/Kumho Tire analysis has been used to exclude a medical doctor's testimony on the cause of fybromyalgia. *Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir.1999). Because of the many types of experts and expertise, the application of *Daubert* is fact specific and appropriately uses relevant factors to determine reliability. *Id.* at 311.

After eliminating other possible causes, the expert in *Black* concluded that a fall at Food Lion was the cause of the patient's fibromyalgia. *Id.* at 314. This conclusion was based on an improper exercise in scientific logic and the unacceptable fallacy of post-hoc propter-hoc reasoning. *Id.* A scientifically reliable conclusion on causation was not possible since the doctor did not know the exact process or factors triggering the disease. *Id.* A conclusion for which there was no underlying

medical support was not vindicated by the use of general methodology in the medical field. *Id.* A "standard of meaningless high generality rather than boring in on the precise state of scientific knowledge in this case" could not render a proper determination. *Id.*

The Fifth Circuit has applied *Daubert* to expert testimony in an eminent domain proceeding. *United States v. 14.38 Acres of Land, More or Less Situated in Leflore County, State of Mississippi*, 80 F.3d 1074 (5th Cir.1996). The district court refused to admit expert testimony of Rip Walker[1] and Rogers Varner regarding severance damages resulting from an exercise of eminent domain. The opinions were deemed "speculative and not based on reliable foundations" providing "no aid to the finder of fact in determining just compensation in this case." *Id.* at 1076 (citing 884 F. Supp. 224, 227 (N.D.Miss.1995)). The experts expressed uncertainty about the extent of flooding on the property in the event of heavy rainfall resulting in the district court's decision that the burden to demonstrate a diminution in the value of the landowner's property was not met. *Id.* at 1077. This application of the reliability test was overly stringent. *Id.*

The case of *Smith v. Clement*, 983 So. 2d 285 (Miss. 2008), provides this Court a clear pathway to summary judgment for Natchez. In *Smith*, students brought a personal injury action against school district, seeking damages for injuries sustained when the school bus caught fire. The school district filed third-party complaint against company that had converted the bus from gasoline to propane fuel, claiming the company was negligent in its installation of the propane fuel system for the bus. The Circuit Court, Monroe County, Paul S. Funderburk, J., granted the company's motion to strike an expert's affidavit and entered summary judgment in favor of company. The school district appealed. **The Mississippi Supreme Court held that the trial court did not abuse its discretion in striking the affidavit of Dr. Richard Forbes and, consequently, granting summary judgment and the judgment of the Circuit Court of Monroe County was affirmed.**

Citing, *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2003), and the Supreme Court's adoption of "the federal standards and applie[d] our amended Rule 702 for assessing the reliability and admissibility of expert testimony." *Id.* at 39. **The *McLemore* Court held that the proffered expert opinion was inadmissible because it was mere speculation, unsupported by reliable scientific methods and procedures**. Id. at 40–42.

Further, the Supreme Court stated that in *Edmonds v. State*, the Court considered the State's expert's opinion, based on observation in an autopsy, of causation of the victim's fatal wound. *Edmonds v. State*, 955 So.2d 787, 791 (Miss. 2007). The expert testified that the fatal wound was caused by a gunshot, and that the trigger of the gun was pulled by two persons, as opposed to a single shooter. *Id.* This Court agreed with the defendant's argument that "such testimony was scientifically unfounded: 'You cannot look at a bullet wound and tell whether it was made by a bullet fired by one person pulling the trigger or by two persons pulling the trigger simultaneously.' " *Id.* at 792. **The Court held that the testimony should have been excluded on the ground that the state did not show that its expert's testimony was based on reliable methods or procedures, and therefore, the testimony did not meet our standards for admissibility**. *Id.*

In *Smith*, the Court found that, Amory's expert, Dr. Forbes, opined that the copper tubing which caused the fire was the same copper tubing installed fourteen years earlier by M & H. Had there been no challenge to this opinion, it arguably might have been sufficient to defeat summary judgment. However, M & H challenged Dr. Forbes's opinion by producing expert testimony which stated:

> ...there are no reliable, or valid, scientific principles or methods that could be utilized by any engineer, or any other specialist, that would enable that person to give an opinion based in science regarding from what manufacturer or seller the copper tubing or brass fittings ... came, the age of the tubing and fittings, the date that the tubing and fittings were installed, or the date that the tubing was flared and by whom it was flared.

From May 5, 2005 (the date Nolan's affidavit attacked the scientific basis of Dr. Forbes's opinion), until October 27, 2005 (the date summary judgment was granted), neither Amory nor Dr. Forbes submitted any evidence or scientific findings contradicting Nolan's opinion. Thus, as to whether Dr. Forbes's opinion was properly grounded in science, the only evidence before the trial court was Nolan's affidavit, which clearly stated that it was not.

Amory complained that the trial court "did not conduct a Daubert hearing before reaching its decision. Amory misunderstands what is required under Rule 702. Per the Court, it has never held that a trial court is required to hold a formal "Daubert " hearing when an expert's opinions are challenged. It is only required that, when an expert's opinion is challenged, the party sponsoring the expert's challenged opinion be given a fair opportunity to respond to the challenge. The Court held that it was unable to say in this case that the trial court abused its discretion. For five months, Amory was on notice of the specific challenge to its expert's opinion. It had ample opportunity to submit scientific evidence and other indications of the reliability of Dr. Forbes's opinion. Amory failed, however, to submit any evidence whatsoever that Dr. Forbes's opinion was based on sound scientific principles. Indeed, neither Amory nor Dr. Forbes provided so much as a denial as to the accuracy of Nolen's affidavit. Thus, the Court could not say that the trial court abused its discretion in finding, from the evidence in the record, that Dr. Forbes's affidavit should be stricken.

Without Dr. Forbes's opinion, Amory was unable to prove that the copper tubing which allegedly caused the fire was the same tubing installed by M & W. Consequently, Amory could not prove M & W was negligent in its installation. Therefore, the trial court properly granted summary judgment in favor of M & W.

The case of *The University of Mississippi Medical Center v. Littleton*, 213 So. 3d 525 (Miss. Ct. App. 2017) also supports this Court's striking the opinions of Plaintiff's experts. In *Littleton*,

UMMC argued that the trial court's judgment was not based on substantial credible evidence because Littleton, through her expert Dr. Wiggins, failed to provide sufficient evidence on causation. The Court of Appeals agreed.

To establish a prima facie case of medical malpractice, the plaintiff must prove: (1) the existence of a duty by the defendant to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) a failure to conform to the required standard; and (3) an injury to the plaintiff proximately caused by the breach of such duty by the defendant. *Hubbard v. Wansley*, 954 So.2d 951, 956–57 (Miss.2007) (citing *Drummond v. Buckley*, 627 So.2d 264, 268 (Miss.1993)). **The plaintiff must provide expert testimony articulating "the requisite standard that was not complied with," and "also establish that the failure was the proximate cause, or proximate contributing cause."** Id. at 957 (quoting *Barner v. Gorman*, 605 So.2d 805, 809 (Miss.1992)). For "the proximate-cause element, the plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough." *Barrow*, 107 So.3d at 1034 (quoting *Burnham v. Tabb*, 508 So.2d 1072, 1074 (Miss.1987)). "In cases alleging that death was caused by the negligence of a health care provider, proximate cause must be established by a medical doctor." *Mariner Health Care Inc. v. Estate of Edwards ex rel. Turner*, 964 So.2d 1138, 1144 (Miss.2007) (citation omitted). Finally, it is well established that if a plaintiff fails to produce sufficient admissible evidence to establish a prima facie case, a judgment notwithstanding the verdict is appropriate. *Cleveland v. Hamil*, 119 So.3d 1020, 1024 (Miss.2013) (citing *3M Co. v. Johnson*, 895 So.2d 151, 167 (Miss.2005)).

The admission of expert testimony is governed by the two-prong inquiry of Rule 702 of the Mississippi Rules of Evidence. "A witness may testify as an expert to 'assist the trier of fact to

understand the evidence or to determine a fact issue' if the witness is 'qualified as an expert by knowledge, skill, experience, training, or education' and 'if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.' " Hubbard, 954 So.2d at 957 (quoting M.R.E. 702). The trial court has a "gatekeeping responsibility to ensure that any and all scientific testimony is not only relevant, but reliable." *McDaniel v. Pidikiti*, 39 So.3d 952, 956 (Miss.Ct.App.2010) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)).

In finding UMMC liable for Cleopatra's death, the trial court based the majority of its ruling on Dr. Wiggins's expert testimony. Although Littleton tendered Nurse Ross as an expert witness on the alleged breach of the standard of care by UMMC employees, Dr. Wiggins was Littleton's only expert witness on causation. Further, because Cleopatra's specific cause of death was unknown, Dr. Wiggins could not establish, except through speculation, what UMMC medical staff could have done to save her life. It was his opinion that Cleopatra's death was caused by the alleged failure to send her to the ICU where she would have been more closely monitored. The Court of Appeals found, though, that Dr. Wiggins failed to establish a causal connection between UMMC's alleged negligence and Cleopatra's death because his testimony was impermissibly based on speculation. Dr. Wiggins's cause-of-death testimony and standard-of-care testimony in turn was discussed in depth.

The Court of Appeals found the trial court abused its discretion in relying upon Dr. Wiggins's speculative testimony in order to find UMMC liable for Cleopatra's death. Dr. Wiggins claimed that admitting Cleopatra to the ICU would have saved her life from an unknown cause of death. **Yet he offered no specifics on the treatment that she would have received, and how**

monitoring would have saved her life. Moreover, under the "lost chance of recovery" theory, Dr. Wiggins did not offer sufficient evidence to show that, absent malpractice, there was a greater than fifty-percent chance that a substantially better result would have occurred had Cleopatra been admitted to the ICU. Accordingly, the trial judgment was reversed and rendered in favor of UMMC.

Hearsay

A statement made for medical diagnosis or treatment must meet three distinct elements to be an exception to the rule against hearsay: it must be made for medical diagnosis or treatment, it must describe past or present symptoms and their general cause, and it must be "supported by circumstances that substantially indicate its trustworthiness." Miss. R. Evid. 803(4). "There is a two-part test for admitting hearsay statements under Rule 803(4): '(1) the declarant's motive in making the statement must be consistent with purposes of promoting treatment; and, (2) the content of the statement must be such as is reasonably relied on by the physician'." In re. E.G., 191 So. 3d 763, 772 (Miss. Ct. App. 2016) (internal citations omitted). Medical records describing medical conditions and medical impressions of the treating provider do not fall within the exception set out in Rule 803(4). Id., *citing* Rice v. State, 815 So. 2d 1227, 1228-1229 (Miss. Ct. App. 2001) *and* Caswell v. Caswell, 763 So. 2d 890, 892 (Miss Ct. App. 2000). Mississippi further agrees with the federal rulings on 803(4) which hold that the Rule does not apply to "statements by the person providing the medical attention to the patient." Id.at 772-773, citing Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 564 (7th Cir. 1996). A statement of a medical provider's impressions of an interaction with a patient do not meet the 803(4) requirements. McCammon v. State, 299 So. 3d 873, 887 (Miss. Ct. App. 2020).

Even if the statement fell within the two prongs required for admission, the Court must "affirmative find that the proffered circumstances substantially indicated their trustworthiness." E.G.. at 773. When the party seeking to introduce the evidence cannot establish its trustworthiness, the evidence is rightfully excluded. Id.

Requirement of Specific Facts

A plaintiff must present credible evidence that establishes the necessary elements of his or her claim. Partain v. Sta-Home Health Agency of Jackson, 904 So. 2d, 1112, 1116 (Miss. Ct. App. 2004). Law prohibits a plaintiff from relying "upon mere allegations," instead requiring that the plaintiff "set forth specific facts" to support its case. Burns v. Gray, 270 So. 3d 1084, 1088 (Miss. Ct. App. 2018). Allegations "must be supported by more than a mere scintilla of colorable evidence." Id. Mississippi law prohibits plaintiffs from relying on "insufficient evidence of causation." Id., at 1091. Further, the court in Burns held that the plaintiffs presented "only conjecture and possibility" as to the alleged incident and that "such speculation is never sufficient."

Standard of Care

Mississippi physicians are bound only to meet the standard of care for minimally competent physicians. Id. This same standard applies to healthcare facilities for "alleged breaches in the nursing standard of care." Butler v. Chadwick, 223 So. 3d 835, 842 (Miss. 2017). "The expert's own personal preferences or practices – i.e., simply what the expert says that he or she would have done in the same scenario – are insufficient to establish an objective, national standard of care." Id., at 841. This Court has previously ruled that, when a plaintiff's expert fails to establish the correctly applicable standard of care, a defendant's motion for JNOV should be granted, and that ruling was upheld by the Mississippi Supreme Court. McIlwain., at 687. Mere testimony regarding

the standard of care adhered to by the testifying expert is insufficient to establish the standard of care of a minimally competent healthcare provider. Id., at 689.

The Mississippi Department of Health is tasked with setting forth the minimum standard of care requirements for a healthcare facility. Miss. Code Ann. §43-11-13. A resident of healthcare facilities is assured of "adequate and appropriate medical care, is fully informed by a physician or nurse practitioner/physician assistant of his medical conditions unless medically contraindicated (as documented by a physician or nurse practitioner/physician assistant in his medical record, [and] is afforded the opportunity to participate in the planning of his medical treatment." MS Minimum Standards for Institutions for the Aged or Infirmed ("MS Min. Standards"), Rule 45.17.2(3). Further, "residents shall be provided rehabilitative services as needed" and "each resident's medical record shall contain written evidence that services are provided in accordance with the written orders of an attending physician or nurse practitioner/physician assistant." MS Min. Standards, Rule 45.23.1.

A facility is required to develop and implement a comprehensive care plan that addresses services to be furnished to meet the resident's highest well-being and the resident's goals for admission with desired outcomes. C.F.R. §483.21(b)(1). These must also be revised after assessments, including the comprehensive and quarterly review assessments. C.F.R. §483.21(b)(2). Based on a resident's assessment and consistent with a resident's choices, a facility is required to provide care and services to assist with transfer and ambulation. C.F.R. §483.24(b)(2). A facility must provide "services, equipment, and assistance to maintain or improve mobility with the maximum practicable independence." C.F.R. §483.25(c)(3).

Inadmissibility of Unduly Prejudicial Testimony

Evidence is only relevant if it "has a tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the case." Miss. R. Evid. 401. If the evidence is likely to affect the probability of a fact of consequence, then the evidence is relevant. Mississippi State Highway Commission v. Dixie Contractors, Inc., 375 So. 2d 1202, 1205 (Miss. 1979). Even if evidence is determined to be relevant, it may be excluded if it is unfairly prejudicial, confuses the issues, or misleads the jury. Miss. R. Evid. 403. A disgruntled former employee's testimony is not only unfairly prejudicial, it is also irrelevant. E.I. DuPont de Nemours and Co. v Strong, 986 So. 2d 410, 416-417 (Miss. 2007). "Evidence which is not relevant is not admissible." Id., at 417. When the issue in a case is whether a standard of care was breached on a specific date, an individual's testimony regarding events outside of that date are irrelevant. Boyd v. Magic Golf, Inc., 52 So. 3d 455, 461 (Miss. Ct. App. 2011) (holding that testimony regarding condition of slides at a waterpark the day after an accident occurred was inadmissible).

Standing

In seeking to act as an administratrix in a probate estate, the movant has a responsibility to "ascertain the names of potential heirs and to file the names of such heirs" with the Chancery Court. Smith By and Through Young v. Estate of King, 579 So. 2d 1250, 1251 (Miss. 1991). Fraud exists when an individual purports to be the sole heir of an estate despite knowledge of the existence of other heirs. Id. While an administratrix does not have a duty to seek out unknown heirs, she defrauds the Court by failing to disclose known heirs due to the fiduciary nature of the appointment. Id., at 1253. Omitting knowledge of the existence of a child, even when the administratrix may not believe the child is an heir, constitutes fraud. Id. Denial of a child's legal rights "when the child, of whose existence the administratrix was aware, had no knowledge that

the administratrix published notice to creditors is a harsh result which [the court does] not look upon favorably." Id. The unconstitutionality of the lack of notice to known heirs voids a court decree. Id., at 1253-1254.

When an individual dies intestate, rights to his estate pass first to the decedent's children. Miss. Code Ann. § 91-1-3. Only if there are no living children do siblings inherit from an estate. Id. While Mississippi law limits the time within which illegitimate children may establish legitimacy, that time limit is not enforced when an administratrix breaches her fiduciary duty to notify said children. Smith at 1253-1254.

Wrongful death suits may be brought by the personal representative on behalf of the estate, a wrongful death beneficiary on behalf of those entitled to recover, or by all interested parties. Burley v. Douglas, 26 So. 3d 1013, 1017-1018 (Miss. 2009). For a legal action to be brought by a personal representative, that personal representative must be duly appointed through Chancery Court. Id., at 1019. Standing must be determined at the commencement of an action. Id., at 1019. To qualify as a listed relative, the party must be a "widow or child(ren) or father or mother, or sister or brother," pursuant to Miss Code. Ann § 11-7-13. Id., *at* 1020. Intestate law necessitates that the court must only allow siblings to act where there are no children. Miss. Code Ann. § 91-1-3. Finally, to be an "interested party," individuals who qualify as heirs under Miss. Code Ann. §91-1-3 are interested parties to a wrongful death lawsuit.

ARGUMENT TO SUPPORT GRANTING THE JNOV OR MOTION FOR NEW TRIAL

1. The Court Misapplied the *Daubert* Standard and Allowed the Testimony of Plaintiff's Experts Based on Speculation of What Occurred on February 15, 2020.

The opinions of Plaintiff's experts was based on speculation of the events on February 15, 2020 and inadmissible hearsay. Beginning with the testimony of Dr. Hill O'Neill who opined that the slide board and wheelchair should not have been accessible to Mr. Howard at any time unless

staff was nearby to the testimony of Dr. Keith Miller, Plaintiff's causation expert that Mr. Howard's death was caused by him hitting his head because his slide board was accessible, and finally to the testimony of Dr. Adam Lewis, that Mr. Howard suffered a subgaleal hematoma from hitting his head on the wall (implying that the underlying speculative event that Mr. Howard fell back and hit his head when using his sliding board) the legend of the sliding or transfer board was perpetuated all based on the inadmissible hearsay statement of Mr. Howard.

Dr. Miller testified that his causation opinion – that Natchez's failure to keep the slide board away from Mr. Howard and failure to be with him every time he wanted to transfer himself - was predicate upon the opinion of Dr. Hill-O'Neill that he heard contemporaneously with her trial testimony. Those opinions are that 1) Natchez failed to keep his slide board and wheelchair out of reach on February 15, 2020; and 2) Natchez failed to monitor and supervise Mr. Howard and be with him at every transfer forcing him to use his call light whenever he wanted to transfer from his bed, wheelchair, chair, commode. Dr. Hill O'Neill's testimony was not based on any direct evidence or circumstances that Mr. Howard was using his sliding board on February 15, 2020 when transferring or if he hit his head second or minutes or hours before he went to breakfast having safely transferred. His opinions regarding causation are based on a hearsay statement made by Howard to a staff member and then stated to another staff member who documented the statement that was delivered after a change in mental status.

The evidence before the jury was that CNA Tara Conner called CNA Shonna Riley to the room after a change in Mr. Howard's condition. Ms. Riley is one who stated to Nurse Dixon that she was able to piece together from garbled speech Mr. Howard's statement that he'd hit his head on the wall while transferring from the bed to his wheelchair before breakfast that morning, which he attended before taking a smoke break where he experienced no issues and then returning to his

room. The information about possibly hitting his head was not obtained until after he experienced a change in condition and staff had already contacted EMS to transport Mr. Howard to the hospital.

He also testified that records from University of Mississippi Medical Center ("UMMC") note a diagnosis of a **nontraumatic acute subdural hemorrhage** (emphasis added), no known trauma with a head exam showing Mr. Howard's head presented as normocephalic and atraumatic, and that while in ICU, Mr. Howard stabilized before self-extubating and finally undergoing a craniotomy for evacuation of the subdural hematoma on March 2, 2020. There is no reference to injury or trauma to Mr. Howard's head.

Dr. Lewis opined from looking at the CT scan from February 15, 2020, that Mr. Howard's it clearly demonstrates a subgaleal hematoma to the back of Mr. Howard's scalp consistent with his report of falling back and hitting his head on the wall during transfer to bed. Again. This opinion must rely on the underlying statement of Mr. Howard and the opinion of Dr. Hill O'Neill that Mr. Howard must never be left alone for any transfers and must never be allowed to have his slide board or wheelchair within his personal reach

Dr. Lewis is basing his entire opinion on an unclear verbal report that Mr. Howard hit his head on the wall and providing no evidence that any such event occurred. Between Merit Health and UMMC, there are **over fifteen entries** in Mr. Howard's medical records that explicitly describe Mr. Howard's condition as atraumatic.

The plaintiff establishes a prima facie case for medical malpractice by showing:
(1) the defendant had a duty to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) the defendant failed to conform to that required standard; (3) the defendant's breach of duty was a proximate cause of the plaintiff's injury, and; (4) the plaintiff was injured as a result. *McGee v. River Region Med. Ctr.*, 59 So.3d 575, 578 (¶ 9)

(Miss.2011) (quoting *Delta Reg'l Med. Ctr. v. Venton*, 964 So.2d 500, 504 (¶ 8) (Miss.2007)). "Liability turns on a failure to provide the required level of care." *Hall v. Hilbun*, 466 So.2d 856, 869 (Miss.1985) (superceded by statute on other grounds). **Thus, "[t]he success of a plaintiff in establishing a case of medical malpractice rests heavily on the shoulders of the plaintiff's selected medical expert. The expert must articulate an objective standard of care.**" *McGee,* 59 So.3d at 578 (quoting *Estate of Northrop v. Hutto*, 9 So.3d 381, 384 (Miss.2009)). "**Not only must an expert identify and articulate the requisite standard that was not complied with, the expert must also establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries.**" *Id.* (quoting *McDonald v. Mem'l Hosp.*, 8 So.3d 175, 180 (Miss.2009)).

"Before a qualified expert's opinion may be received, it must rise above mere speculation." *Williams v. State*, 35 So.3d 480, 486 (Miss.2010) (quoting *Goforth v. City of Ridgeland*, 603 So.2d 323, 329 (Miss.1992)). "**Only opinions formed by medical experts upon the basis of credible evidence in the case and which can be stated with reasonable medical certainty have probative value.**" Id. (quoting *Catchings v. State*, 684 So.2d 591, 596 (Miss.1996)).

On the critical causation question, "[r]ecovery is allowed only when the failure of the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition." *Ladner v. Campbell*, 515 So.2d 882, 888 (Miss.1987) (quoting *Clayton v. Thompson*, 475 So.2d 439, 445 (Miss.1985)). There must be proof of "a greater than fifty (50) percent chance of a better result than was in fact obtained." *Id.* at 889 (citation omitted). This "greater than fifty percent" opinion must be backed up by specific facts. *Hubbard*, 954 So.2d at 965–66.

In *Poole v. Avara*, 908 So.2d 716 (Miss.2005), the Supreme Court held that support for an

expert opinion in the scientific literature was only one factor to be considered and not an absolute requirement. Id. at 724 (citing *Kumho Tire Co.*, 526 U.S. at 151, 119 S.Ct. 1167; *Daubert,* 509 U.S. at 596, 113 S.Ct. 2786). **Where there is study of the expert's theory in the expert community, however, support for the theory is important**. *In Hill v. Mills*, 26 So.3d 322 (Miss. 2010), the Supreme Court upheld the exclusion of a medical expert's opinion that had been challenged because it was not supported by the medical literature. The court noted:

> In contrast to Poole, the subject matter of the expert opinion in the case before us today has been extensively explored and documented, and one hundred percent of documentation presented to the trial judge contradicts [the medical expert's] opinion. Thus, we cannot say that the trial judge abused his discretion in finding that, under Rule 702, [the medical expert's] opinions ... were unreliable and inadmissible.
>
> We restate for emphasis that, **when the reliability of an expert's opinion is attacked with credible evidence that the opinion is not accepted within the scientific community, the proponent of the opinion under attack should provide at least a minimal defense supporting the reliability of the opinion. The proponent of the expert cannot sit on the side lines and assume the trial court will ignore the unrebutted evidence and find the expert's opinion reliable. Were we automatically to allow introduction of expert opinions which are based upon nothing more than personal experience in cases where those opinions are contradicted in the scientific literature, we would effectively render Rule 702 and Daubert a nullity.** *Id.* at 332–33 (internal citations omitted).

Hill was cited with approval in *Patterson v. Tibbs*, 60 So.3d 742 (Miss.2011). There, a medical expert's opinion was contradicted by the medical literature, and the expert cited no medical studies supporting his opinion. The supreme court held:

> Patterson is correct in her assertion that lack of consensus among sources does not automatically render an expert opinion inadmissible. An offered opinion that has been contradicted by published and peer-reviewed data, however, must be supported by some evidence of support and acceptance in the scientific community. Patterson has failed to meet this standard. Accordingly, the trial court did not abuse its discretion in excluding the expert witnesses' testimony....
> Id. at 751

See also *Sherwin–Williams Co. v. Gaines ex rel. Pollard*, 75 So.3d 41, 46 (¶ 16) (Miss.2011) (upholding the exclusion of medical experts' opinions, in part because they "did not present any scientific authority" for their conclusions).

Plaintiff's expert's opinions are based on nothing more than their willingness to state that a death occurred because of Natchez's negligence and relying upon the speculation of what occurred on February 15, 2020. A misapplication of the law allowing those opinions to be presented to the jury resulted in the jury being also allowed to speculate about what occurred and reach a conclusion unsupported credible evidence.

2. **Dr. Hill-O'Neill's Opinion Contradicted Mississippi Law on Standards of Care and Prejudiced Natchez by Holding the Facility to an Inappropriate, Higher-Than-Required Standard.**

Dr. Hill-O'Neill's testimony that Natchez failed to meet a correct standard of care relying on documentation in the comprehensive care plan and MDS regarding Mr. Howard's ability to transfer did not comport with Mississippi law on applicable standards of care. Rather, Dr. Hill-O'Neill lead the jury to impose a higher standard of care than is legally required on Natchez, therefore leading the jury to a legally insufficient verdict.

While Dr. Hill-O'Neill may not have been willing to allow Mr. Howard to use the restroom alone or allow him access to his sliding board and wheelchair, her opinions do not comport with the Mississippi's minimum requirements. In Mississippi, a minimally competent healthcare facility is required to create a care plan that is updated quarterly and yearly, and after various assessments. Natchez timely created Mr. Howard's care plan and updated it following an assessment after his January 28, 2020, incident in the bathroom after which he had no further transfer events or any events at all. As Mr. Howard had only been a resident at Natchez for thirty-six (36) days when he was transferred to the hospital on February 15, 2020, no quarterly or yearly update was required.

Further, although Dr. Hill-O'Neill only testified regarding minimal selections from Mr. Howard's care plan, assessments, and MDS at Natchez, the full chart admitted into evidence

provides a complete picture of Mr. Howard's condition, abilities, and care at Natchez than Dr. Hill-O'Neill's limited excerpts suggest. Her testimony and opinions ignored critical evidence, including Mr. Howard's documented ability to use the sliding board on his own without issue or injury as noted by physical therapy.

The evidence in this matter showed Mr. Howard was taught to use a sliding board during his therapy sessions and showed a one hundred percent (100%) ability to use the device on his own. See Trial Exhibit D-1, Glen Howard – Nexion Therapy Chart 025. The ADL charts admitted also showed Mr. Howard was frequently able to transfer completely on his own or with limited supervision (but no assistance) particularly towards the end of his admission at Natchez after progressing through rehabilitation and he could move in his bed without issue, consistent with his therapy goals and Care Plan goals to improve overall function, improve transfer ability, and maintain independence with bed mobility. See Trial Exhibit P-3, HOWARD 00975 and 00984-985; see also Trial Exhibit P-4, HOWARD 0962-964. While Plaintiff may argue that the records indicated Mr. Howard needed higher level of assistance on February 15, 2020, the records more importantly indicate that Mr. Howard attended breakfast in the dining room without assistance and that it was not until 9:38 a.m. on February 15, 2020 that Natchez became aware of change in Mr. Howards condition. These documents not only met the minimum documentation requirements for Mississippi, but also demonstrate compliance with the legal requirement to provide both services ***and equipment*** necessary to "maintain or improve mobility with the ***maximum practicable independence***." (emphasis added). Even if Mr. Howard had not progressed through his therapy to reach a higher level of independence as evidenced by his medical records, Natchez would still have been legally required to provide him with the tools he needed for independence.

The standards in Mississippi are consistent with trial testimony provided by Natchez's retained expert Dr. Robert Kelly, as well as witnesses Kayla Morris and Amanda Hasty. All three explained that keeping Mr. Howard's sliding board and wheelchair out of reach constitutes a restraint because it restricts mobility. Dr. Kelly and Ms. Hasty testified that instituting a restraint of any kind, including removing a slide board, requires a physician evaluation and a physician order. Ms. Hasty further clarified that Natchez would also have to exhaust all other interventions without success prior to pursuing any sort of restraint.

Despite this, the jury was presented with testimony that Natchez had a duty to notate Mr. Howard's higher level of independence directly within the care plan. As a result, the jury was presented with testimony that Mr. Howard was not safely able to use his sliding board and, therefore, Natchez breached its duty to Mr. Howard, causing him severe injury and ultimately death. Natchez met the minimally competent standard by documenting Mr. Howard's abilities in his therapy chart, and Natchez appropriately followed legal requirements in the creation and revision of Mr. Howard's care plan. The incorrect application of the law led the jury to an unjust verdict. As such, Natchez respectfully requests this Court enter a judgment notwithstanding the verdict or, in the alternative, that this Court grant a new trial within which the Plaintiff must present the correctly applicable standard of care.

3. Physician Speculation on Trauma Contradicted Evidence and Applicable Standards for Connecting Alleged Breaches of the Standard of Care to the Alleged Injuries.

Plaintiff's physician expert Adam Lewis, MD testified that it is his opinion that Mr. Howard had a subgaleal hematoma on February 15, 2020, indicative of trauma consistent with Mr. Howard hitting his head. Dr. Lewis and Keith Miller, MD (Plaintiff's causation expert) conceded that the none of Mr. Howard's treating healthcare providers at Merit Health Natchez, University of Mississippi Medical Center, or Select Specialty Hospital identified a subgaleal hematoma or

physical signs of an abnormal head, bruising on the head or any outward sign of trauma. The evidence in Mr. Howard's medical records admitted as exhibits, as well as the testimony of Natchez's expert Dr. Kelly, demonstrated that none of the treaters identified signs of trauma, be it through imaging studies or physical examinations. See Trial Exhibits P-35, HOWARD 00063; P-38, HOWARD 1553, 1570, 1576, 1709, 1756, 1763, 1769, 1785, 1791, 1800, 1806, 1807, 1829, 1854, 1983; P-44, HOWARD 1407, 1463, 1469. It is further inconsistent with the evidence and testimony surrounding Mr. Howard's death certificate cause of death, which does not identify trauma, accident, or injury as the source of the subdural hematoma. See Trial Exhibit P-47, HOWARD 001.

The only evidence upon which these experts rely that Mr. Howard hit his head at Natchez was the statement that CNA Riley was able to piece together through Mr. Howard's garbled speech hours after breakfast after he had a change in condition. As argued herein, that statement is inadmissible hearsay and should have been excluded by this Court. This testimony from Dr. Lewis and Dr. Miller, despite being couched in the magic words of "probability" during the trial, amounts to nothing more than a speculative probability insufficient for verdict and prejudicial testimony that confuses the issues and misleads the jury.

The incorrect application of the law led the jury to an unjust verdict and Mississippi law prohibits irrelevant testimony and testimony in which the prejudicial nature outweighs its probative value. As such, Natchez respectfully requests this Court enter a judgment notwithstanding the verdict or, in the alternative, that this Court grant a new trial within which the Plaintiff must present the correctly applicable standard of care and its causal link to Mr. Howard's injuries.

4. Marquis Thompson's Testimony was Irrelevant and Unfairly Prejudicial

Plaintiff called Marquis Thompson to testify regarding his recollection of his care of Mr. Howard during his time as a Natchez employee, despite two objections to his trial testimony. Counsel for Natchez raised the first objection to Mr. Thompson's testimony while arguing Natchez's Motion in Limine #6-I related to testimony and criticisms from former facility employees, and renewed the objection Tuesday morning prior to Mr. Thompson's testimony. The substance of the objection focused on the fact that Mr. Thompson was fired from Natchez and subsequently made numerous complaints against the facility, as well as the fact Mr. Thompson did not work on February 15, 2020 and could not provide testimony regarding any events of February 15, 2020 and specific to any event that did or did not transpire on February 15, 2020.

At trial, Mr. Thompson testified Mr. Howard was not physically capable of transferring from bed to chair without assistance from staff and that staff had been required to complete inservice training regarding not allowing residents to have a sliding board within their reach in their rooms. There was no evidence within the record to support either claim. As discussed in a prior section, the evidence showed Mr. Howard was frequently able to transfer completely on his own or with limited supervision (but no assistance) particularly towards the end of his admission at Natchez after progressing through rehabilitation. See Trial Exhibit P-3, HOWARD 00975 and 00984-985. Further, Mr. Thompson was unable to offer any testimony on the specifics of the alleged inservice, including whether it occurred during or related to Mr. Howard's admission, and could not show documentation supporting the claim. No one knows if Mr. Howard used his sliding board on February 15, 2020 and Mr. Thompson's testimony caused confusion of the jury and prejudice to Natchez.

Without any knowledge of the circumstances surrounding the events of February 15, 2020, Mr. Thompson had no relevant testimony. Allowing Mr. Thompson to testify served no purpose

other than to confuse the issues and mislead the jury by alleging trainings and conditions that did not exist and causing an unfair prejudice against Natchez.

As Mississippi law prohibits irrelevant testimony and testimony in which the prejudicial nature outweighs its probative value, Natchez respectfully requests that this Court grant its Motion for Judgment Notwithstanding the Verdict or, in the alternative, for New Trial, due to the error in allowing his testimony.

5. Three of Natchez's Motions in Limine Were Incorrectly Denied.

The Court denied Natchez's Motions in Limine to exclude: testimony from Marquis Thompson, the "statement" of Mr. Howard, and testimony that Mr. Howard used a sliding board on February 15, 2020. The basis for Natchez's motion to exclude testimony from Mr. Thompson is detailed above and reincorporated in this section.

"Statement" of Mr. Howard

In order to determine whether the "statement" that Mr. Howard fell back and hit his head while transferring to breakfast on the morning of February 15, 2020, is admissible as an exception to Hearsay under Rule 803(4) of the Mississippi Rules of Evidence, the Court must first determine if it was actually a statement made by Mr. Howard. The medical records, deposition testimony, and the testimony presented at trial explain that, after Mr. Howard exhibited a significant change in condition, Shonna Riley, CNA asked him multiple times if he hit his head. She finally pieced together through his "garbled" explanation that he had hit his head on the wall before breakfast that morning.

As discussed in E.G., *supra,* medical records describing medical conditions and medical impressions of the treating provider do not fall within the exception set out in Rule 803(4). Clearly, this statement was not written by Mr. Howard and does not even appear to be a direct quote. Rather,

the evidence in Ms. Riley's deposition notes that she shared her *impression* of what Mr. Howard was telling her. Even in testifying in her deposition that Mr. Howard did tell her that he hit his head, through garbled speech, Ms. Riley still indicated that the notes within the records were based on *her* accounting of her conversation with Mr. Howard. Because a statement of a medical provider's impressions of an interaction with a patient do not meet the 803(4) requirements, McCammon, Natchez's motion to exclude the statement should have been granted.

Assuming, *in arguendo*, that the statement can be legitimately attributed to Mr. Howard and not to Ms. Riley's impression of her conversation with him, the statement still does not meet the hearsay exception outlined in 803(4). Specifically, the statement was not necessary for treating Mr. Howard. Natchez noted that there were no observable injuries. *See* P-7, Supp Pro (03) 339-341. While Mrs. Morris did relay Ms. Riley's statement to Merit Hospital, the report of Mr. Howard's head CT at Merit suggested no skull fracture "or other abnormality." *See* P-35, Howard 63. Treating providers at University of Mississippi Medical Center concurred that there were no signs that Mr. Howard suffered a physical trauma. P-38, HOWARD 1553, 1570, 1576, 1709, 1756, 1763, 1769, 1785, 1791, 1800, 1806, 1807, 1829, 1854, 1983; P-44, HOWARD 1407, 1463, 1469. Select Specialty charted that Mr. Howard's treatment goal was to complete rehabilitation ***from a stroke***. P. 44, Howard 1394. Even counsel for the Plaintiff agrees that whether or not Mr. Howard hit his head is irrelevant:

over you. I just -- I keep thinking you're done. Go ahead.

A. The -- the history at this point, the man with such a dramatic change in condition, is not going to influence the path taken by the physicians. The path taken by the physicians will begin as it did about four minutes after arrival in the hospital with CT scanning to establish what injury there is present.

Q. And I agree with you, Doctor, that it is not important as it relates to the course of treatment, because whether a subdural hematoma is traumatic or atraumatic, the treatment is the same; however, you are here offering an opinion in this case that the statement that he struck his head is not true, and offering an opinion that it is a spontaneous subdural hematoma, even though the patient reported striking his head on the wall, so --

Because Mr. Williams himself agrees that it is not important to the course of treatment, the statement does qualify as a statement made for purposes of diagnosis and Dr. Lewis also testified that treatment would not have changed whether there was a traumatic or atraumatic subdural hematoma or if there was or was not a subgaleal hematoma

Finally, if the statement is attributable to Mr. Howard, and if the statement was made for purposes of treatment or diagnosis, the statement must ***still*** meet a final requirement: Court must "affirmative find that the proffered circumstances substantially indicated their trustworthiness." E.G.. at 773. When the party seeking to introduce the evidence cannot establish its trustworthiness, the evidence is rightfully excluded. Id. Here, the Plaintiff has not overcome the overwhelming evidence calling the trustworthiness of the statement into question. Mr. Howard had an elevated blood pressure of 189/100 (*see* P-10, Howard 343-349) and was noted as sluggish and hard to

arouse. *See* P-8, Howard 866. Per Ms. Riley's statement, he initially told her he had not fallen. *See* P-7, Supp Pro (03) 339-341. It was not until after she mentioned hitting his head ***multiple times*** that he finally responded that he hit his head on the wall. All of this, in addition to medical notations that Mr. Howard had suffered a stroke, P. 44, Howard 1394, indicates that Mr. Howard was not in an appropriate state of mind at the time of his "conversation" with Ms. Riley. Because the Plaintiff lacks evidence to support claims that the statement was trustworthy (other than through testimony of Dr. Lewis that directly contradicts documentation of a multitude of medical providers with no medical records supporting his opinion), the law supported granting Natchez's motion in limine regarding the "statement" of Mr. Howard.

Testimony Regarding the Use of a Sliding Board

Plaintiff elicited testimony through her experts that Mr. Howard was using a sliding board to transfer on the morning of February 15, 2020. Indeed, the entire basis for Dr. Hill-O'Neill's testimony that Natchez breached a standard of care (despite the incorrect standard to which she testified), was that Mr. Howard should not have had access to his sliding board when staff was not present. Prior to trial, Natchez filed a motion in limine to exclude such testimony, as there is no actual evidence that Mr. Howard was using a sliding board that morning. Plaintiff relies on Ms. Riley's statement that Mr. Howard hit his head while transferring to breakfast that morning and Mr. Thompson's incorrect testimony that Mr. Howard was not physically capable of transferring himself, but there is no evidence to show that a sliding board was being used specifically at that time. Mississippi law requires that a Plaintiff provide actual facts to support its allegations rather than conjecture based on the records. Mr. Howard could have just as easily been sitting himself up to begin the transfer process. While questions of fact are left to the jury, the law is clear that the Plaintiff must provide actual evidence to support her position before the jury may be allowed to

consider it. Without any specific evidence acknowledging that Mr. Howard was using a sliding board on February 15, 2020, and with evidence from all defense witnesses that Mr. Howard could transfer without his sliding board any testimony or expert opinions based on that assumption are improper. Further, they are highly prejudicial to Natchez pursuant to Rule 403, as the testimony and expert opinions lead the jury to believe that the evidence supports such an allegation. For these reasons, Natchez asserts that its motion in limine to exclude testimony related to Mr. Howard's sliding board on February 15, 2020, should have been granted.

6. Joyce England Did Not Have Standing to Bring This Lawsuit on Behalf of Glen Howard.

Prior to the testimony of Joyce England, counsel for Natchez submitted to the Court that there was concern as to whether Ms. England had standing to proceed on behalf of Mr. Howard's estate. The Court was not inclined to entertain any objections regarding the matter, instead attributing it to an issue for Chancery Court.

During Ms. England's testimony, Ms. England confirmed that Mr. Howard indeed had four (4) living children. She did not provide any testimony indicating she may not have known about the children prior to institution of this lawsuit. Rather, she openly admitted she knew about the children. Where an administratrix has committed fraud in the course of acting on behalf of an estate, Mississippi law is clear that an Order granting her authority to act on behalf of an estate is void. Additionally, under intestate succession statutes, Mr. Howard's children are his only legal heirs and Mrs. England and Mrs. Preston are not entitled to any recovery in this action. Therefore, once Mrs. England confirmed she was aware of Mr. Howard's children, in contradiction to her sworn statements to the Chancery Court, this Court should have concluded that the Chancery order was void and that Mrs. England did not have standing to bring suit on behalf of Mr. Howard's estate.

Further, Mrs. England did not have standing to bring a wrongful death action in this matter. She does not qualify as a personal representative as a result of the void Chancery Order. Mr. Howard has four living children who qualify in the intestate succession laws as listed relatives and interested parties. Even if this Court were to determine that Mrs. England and Mrs. Preston may qualify as listed relatives, neither can have any wrongful death claim without the existence of a valid claim for negligence on behalf of Mr. Howard's estate.

In its Answer to the Complaint, Natchez specifically noted that "Plaintiffs have failed to state a statutory survival claim for which relief can be granted, and therefore, the same should be denied" in its Fifth Defense. In its Sixth Defense, Natchez presented that "Plaintiffs have failed to state a claim or cause of action for wrongful death for which relief can be granted, and therefore, the same should be denied." Indeed, without proper standing to bring either a survival action or wrongful death action, Plaintiffs did not state appropriate claims for which relief could be granted. Based on the foregoing in combination with Mississippi law, neither Mrs. England nor Mrs. Preston had standing to proceed with this action.

CONCLUSION

Mississippi law provides for a judgment notwithstanding the verdict or a new trial in circumstances where the jury's verdict is based on evidence contradictory to the law. For the reasons set forth herein, Nexion Health at Natchez, Inc. d/b/a Nexion Rehabilitation and Healthcare Center request this Court grant its Motion Notwithstanding the Verdict or, in the alternative, for New Trial. It further requests any other such relief to which this Court deems it may be entitled.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document has been served via email upon the following counsel of record:

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On this 3rd day of June, 2022.

Rebecca Adelman