IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01796-COA

MISSISSIPPI BAPTIST HEALTH SYSTEMS, INC. D/B/A MISSISSIPPI BAPTIST MEDICAL CENTER — **APPELLANT**

v.

JONATHAN KELLY, INDIVIDUALLY AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF ELLEN KELLY, DECEASED — **APPELLEE**

DATE OF JUDGMENT:	06/30/2010
TRIAL JUDGE:	HON. WINSTON L. KIDD
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	MICHAEL B. WALLACE REBECCA L. HAWKINS EUGENE RANDOLPH NAYLOR REX MORRIS SHANNON III
ATTORNEYS FOR APPELLEE:	G. JOSEPH DIAZ JR. CHRISTOPHER P. WILLIAMS DENNIS C. SWEET III
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
TRIAL COURT DISPOSITION:	$4.6 MILLION MEDIAL MALPRACTICE VERDICT IN FAVOR OF APPELLEES, PLUS 8% INTEREST FROM DATE OF VERDICT
DISPOSITION:	AFFIRMED - 12/13/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

ISHEE, J., FOR THE COURT:

¶1. Mississippi Baptist Health Systems, Inc. d/b/a Mississippi Baptist Medical Center (Baptist), appeals the Hinds County Circuit Court jury award of $4,691,000 in favor of

Jonathan Kelly and the estate of his wife, Ellen Kelly, for her wrongful death. The subject tort was committed in 2000, and the subsequent lawsuit was filed in 2001. Both occurred before the passage of Mississippi Code Annotated section 11-1-60 (Supp. 2011), which capped non-economic damages in medical-malpractice lawsuits at $500,000[1] and actual economic damages at $1,000,000.[2]

¶2. Baptist argues the following on appeal: (1) the verdict is inconsistent because the jury found the doctors who cared for Ellen were not at fault, yet the jury held the nurses and their employer, Baptist, were responsible for Ellen's death; (2) portions of Ellen's medical records were improperly excluded; (3) there was insufficient evidence of Ellen's pain and suffering to support the award; (4) the verdict was contrary to the overwhelming weight of the evidence; and (5) the trial court's award of 8% interest on the judgment was improper. Finding no errors, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3. Ellen was a twenty-nine-year-old attorney and mother of two sons, Adam O'Malley and Jacob Kelly, ages ten and two at the time of her death. She was married to Jonathan, and the family lived outside of Monticello, Mississippi. She was employed by the Mississippi Department of Human Services in the child-support-collection division. On July 10, 2000,

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[1] H.B. 2, 2002 Leg., 3d Ex. Sess., § 7 (Miss. 2002) (cap increased to $750,000 in 2011 and to $1 million in 2017) (codified at Miss. Code Ann. § 11-1-60).

[2] H.B. 13, 2004 Leg., 2d Ex. Sess. (Miss. 2004), amending Miss. Code Ann. § 11-1-60.

Ellen was admitted to Baptist to undergo a hysterectomy and a partial vulvectomy, both of which were recommended by her gynecologist, Dr. Fred Ingram. Dr. Ingram had been Ellen's obstetrician-gynecologist since 1997. He treated her throughout her second pregnancy and delivery, which included two hospitalizations at Baptist. She was hospitalized once during the early months of her pregnancy and again in 1998 for the Caesarean-section delivery of her second child.

¶4. On July 10, 2000, Dr. Ingram performed Ellen's surgery with the assistance of his partner, Dr. Doug Odom. It is undisputed Ellen regained consciousness after the surgery. However, Jonathan's expert physician, Dr. Eric Gershwin, testified Ellen experienced an allergic reaction to the latex she was exposed to during the surgery. She complained of itching, had blisters on her lips, redness of the face, and nausea following the surgery. She was given Benadryl for the itching and Phenergan for the nausea and vomiting. Dr. Patricia Beare, a nursing expert, testified the administration of Benadryl was a possible sign of an allergic reaction.

¶5. Jonathan remained with Ellen throughout the afternoon and night following her surgery and spoke to her approximately every forty-five minutes. In the early morning, Jonathan heard Ellen making "gasping [and] gurgling sounds." When she was unable to respond to Jonathan, he contacted her nurse. The nurse then called Dr. John Brooks, an emergency physician. Dr. Brooks immediately intubated Ellen. She had also developed ventricular tachycardia, a condition where the heart is unable to maintain its rhythm, and she lost her pulse. Due to the intubation, Ellen was unable to breathe on her own. Thereafter,

she was placed on a ventilator and transferred to the intensive care unit (ICU) at Baptist. Ellen had no neurological function following cardiac arrest and never regained consciousness. The family elected to take her off the ventilator four days later, and she died on July 14, 2000.

¶6. Jonathan brought a wrongful-death action in the Hinds County Circuit Court.[3] He claimed Ellen died of anaphylactic shock due to the doctors' and Baptist's negligent failure to discover Ellen was allergic to latex and to thereafter take proper precautions. He asserted Ellen died as a result of the latex allergy, which caused her cardiac arrest.

¶7. At trial, Jonathan introduced Baptist's latex allergy policies and procedures. Those policies and procedures require that upon admission, "all patients should be assessed for [a] latex allergy." The policy also provided that patients should be questioned about certain items which would indicate a patient was at a high risk of having a latex allergy. The "ABC Food Allergies (Avocado, Banana, Chestnuts)" are an example of one such risk. On the Pre-Procedure/Surgery Check List, prepared on July 3, 2000, by Nurse Debra Priester (Priester), Ellen's allergies were listed as "sulfa, Lorcet, dairy products, seafood[,] and adhesive tape." The listing "old chart sent with patient" was also marked with an "X."

¶8. On a nursing admission history and assessment form, prepared a week before surgery, Ellen's allergies were listed as "sulfa, Lorcet, all dairy products and seafood, adhesive on

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[3] In addition to Baptist, Jonathan named as defendants, Dr. Ingram (gynecologist), Dr. Odom (gynecologist), OB-Gyn Clinic of Jackson, PLLC (clinic of Dr. Ingram and Dr. Odom), Dr. Carroll McLeod (anesthesiologist), and Dr. Timothy D. Cannon (pulmonologist). Baptist is the only defendant involved in this appeal.

Band-Aids." This form also included a subsection titled "Latex Allergy Alert" and listed various questions probing for a latex allergy. At the top of the form is the notation, "Notify MD if Yes." A nursing expert testified this notation meant the physician should be notified if the patient answered affirmatively to any of the questions. The first question on the form asked whether "[patient] knows allerg[y] to latex." Neither box was checked, but a dash was written beside "[n]o." The second question asked whether "[patient] has ABC Allergy (Avocado, Banana, Chestnut)." "Chestnut" was circled and the "[y]es" box was checked. The next question asked whether "[patient] has had unexplained hypotension or anaphylaxis during [a] previous surgery"; neither box was checked. However, written in parentheses after the question was "had epi [and] spinal."

¶9. Priester, the nurse who completed the form, testified the Latex Allergy Policy/Procedure for Baptist required a nursing assessment for each patient to minimize the risk of patients having an allergic or anaphylactic reaction to latex during a surgical procedure. The assessment intended to discover the patient's known allergens to latex. According to the policy: "Patients included as high risk may include: . . . ABC Food Allergies (Avocado, Banana, Chestnuts)." If a risk of a latex allergy was detected, the procedures required the nurse to indicate that risk on the assessment form. According to the protocol in Baptist's Latex Allergy Policy/Procedure, if a known allergy or sensitivity to latex is identified in the patient's admission history, an allergy sticker should be placed on the front of the patient's chart, signage should be placed on the patient's door, central supply and purchasing should be notified regarding any special supplies or products needed for the

patient, and food and nutrition services should be notified to ensure servers would not wear latex gloves when serving the patient food.

¶10. Priester then testified regarding the form dated July 3, 2000. On the Latex Allergy Alert portion of the assessment regarding the question, "[patient] knows allerg[y] to latex," Priester stated neither box was checked because Ellen did not tell her she had a latex allergy. However, she had just testified she did not have any independent knowledge of Ellen's assessment completed some nine years before. When asked about the fact Ellen circled "chestnuts" as an allergy, Priester testified that in her opinion, "one item in and by itself would not have made her necessarily allergic." According to the policy, if a patient is deemed "high risk" as Ellen was due to her chestnut allergy, a possible latex allergy may exist and the latex-allergy protocol should be followed. Priester said she did not follow the protocol because "[Ellen] did not have a latex allergy, so I did not notify a physician." When asked if she notified Ellen's doctors about a potential latex allergy, she replied: "No. [Ellen] did not give me any information about being allergic to latex." On cross-examination, Priester testified she based her opinion that Ellen was not latex sensitive on her experience in the "nursing process." She stated it was her interpretation of the latex-allergy procedure that she should only notify a doctor if the patient acknowledged she had a known allergy to latex.

¶11. To further his claim that an undetected latex allergy caused Ellen's death, Jonathan introduced a nursing admission history and assessment form from Ellen's admission to Baptist on October 15, 1997, during the early part of her second pregnancy. The form shows

Ellen answered affirmatively to the question, "[patient] knows allerg[y] to latex," and she also noted a chestnut allergy. Rebecca Dawn Davis, the nursing clinical director for Baptist, testified regarding Baptist's latex-allergy procedures. She said on the form dated July 10, 2000, the date of the surgery in question, Nurse Christine Lang noted on the form that she had sent the old chart to surgery. Davis testified the notation meant Ellen's record from 1997, which showed she was allergic to latex, would have been part of the record for her surgery. Davis also stated Priester did not follow Baptist's policies and procedures when she did not fill in an answer as to whether Ellen knew she was allergic to latex. Lang, Ellen's pre-operation nurse, stated Ellen told her she was allergic to "sulfur, Lorcet, dairy products, seafood[,] and adhesive tape." She testified she did not consult the form Priester filled out one week before the surgery to check for possible allergies.

¶12. A nursing expert, Dr. Beare, opined Baptist's nurses breached their duty of care to Ellen. Dr. Beare based this conclusion on the fact the nurses received positive responses from Ellen on latex-allergy questions but did not report it to the doctors. Significantly, Dr. Gershwin, Jonathan's main medical expert, testified that repeated exposure to latex worsens the reaction in an individual. He opined she developed the allergy during her previous surgeries in which latex products were used. According to Dr. Gershwin, Ellen suffered all the classic signs and symptoms of a latex allergy. The symptoms included itching, redness, blisters, and nausea. He concluded Ellen's cardiac arrest was a result of her allergy to latex. Further, Dr. Gershwin testified Ellen displayed all the signs and symptoms of an anaphylactic reaction, specifically bronchoconstriction, heat arrhythmia, respiratory arrest, and a severe

drop in blood pressure. The nurses' notes, written at various times, support his testimony and show Ellen experienced labored respirations and bi-lateral breath sounds with wheezes and rhonchi.

¶13. Ellen's gynecologist, Dr. Ingram, and his partner, Dr. Odom, stated Ellen did not have an allergy to latex. Dr. Ingram testified he had been Ellen's gynecologist since 1997. He said he treated her throughout her second pregnancy and Caesarean-section, all the while using various latex products, without any adverse reaction from Ellen. Dr. Ingram took a complete history from Ellen when she initially became his patient. Although she notified him of several allergies, he testified she never reported she had a latex allergy.

¶14. Dr. Ingram and Dr. Odom both testified they used their own files from their clinic instead of the hospital files for the surgery. They stated this was their standard practice. Dr. Ingram testified he had taken a complete history from Ellen, and there was no indication she was allergic to latex. He said he did not consult the hospital's forms concerning Ellen's allergies. Dr. Odom testified to the same.

¶15. Dr. Carroll McLeod, the anesthesiologist who treated Ellen at Baptist during her surgery, took a separate history from Ellen in which she indicated an allergy to adhesive tape. According to expert testimony, this indicates a possible latex allergy. However, Dr. Brooks, the emergency physician, testified, in his opinion, Ellen did not die of an adverse reaction to latex. He testified the itching was very common in post-operative patients who received morphine, as Ellen did.

¶16. Baptist called Dr. Richard DeShazo, an allergist at the University of Mississippi

Medical Center in Jackson, as an expert witness. He had reviewed Ellen's medical records, including the documents from her surgery. Dr. DeShazo concluded that Ellen did not have an allergy to latex and that she did not have an anaphylactic reaction to latex.

¶17. After hearing all of the testimony, the jury returned a verdict finding Baptist liable for Ellen's death through the negligence of its nurses. The jury exonerated the doctors. It further held Baptist's nurses were negligent by failing to notify the doctors of Ellen's latex allergies and for failing to follow the hospital's latex-allergy procedures. The jury awarded $516,000 to the wrongful-death beneficiaries and $4,175,000 to Ellen's estate. The trial judge entered a final judgment on July 1, 2009, awarding an interest rate of 8% beginning on June 2, 2009, the date of the jury's verdict. From this ruling, Baptist appeals.

DISCUSSION

¶18. The essential elements to establish a medical-malpractice claim are:

> (1) the existence of a duty on the part of a physician to conform to the specific standard of conduct, (2) the applicable standard of care, (3) the failure to perform to that standard, (4) that the breach of duty by the physician was the proximate cause of the plaintiff's injury, and (5) that damages to the plaintiff resulted.

Patterson v. Tibbs, 60 So. 3d 742, 753 (¶41) (Miss. 2011) (quoting *Estate of Northrop v. Hutto*, 9 So. 3d 381, 384 (¶9) (Miss. 2009)).

I. INCONSISTENT VERDICT

¶19. Baptist argues it is entitled to a new trial because the jury's verdict shows "inescapable inconsistency." Under this argument, Baptist asserts that because the doctors had a duty to take a proper history from Ellen and the jury exonerated the doctors, the jury

could not find the nurses were negligent for failing to follow hospital procedures regarding latex allergies.

¶20. Jonathan correctly asserts Baptist never raised this issue before the trial court; thus, we should not consider the argument on appeal. Case law clearly establishes "[i]ssues not raised at trial cannot be raised on appeal." *Fitch v. Valentine*, 959 So. 2d 1012, 1021 (¶19) (Miss. 2007) (citation omitted). After a review of Baptist's motion for a judgment notwithstanding the verdict or, alternatively, a motion for a new trial, we can find no instance where Baptist raised this issue before the trial court. In its reply brief on appeal, Baptist cites to a portion of one sentence as support for its position that the issue was placed before the trial court. That sentence fragment reads, "the jury[,] surmising that the physicians had not been properly informed[,] exonerated those physicians and casted [sic] [Baptist] in a sole fault contrary to Your Honor [sic], so we submit to the law and the facts." Giving this statement a plain reading rather than the strained one urged by Baptist, we cannot find these few words and nothing more placed this issue before the trial court. Therefore, we conclude the issue is procedurally barred.

¶21. Procedural bar notwithstanding, we find there is nothing inconsistent in the verdict. The doctors and the nurses owed Ellen different duties. Thus, the jury's finding the doctors did not breach their duty of care but the nurses did breach their duty of care was consistent. Furthermore, the jury instructions enumerated the different duties.

¶22. Jury Instruction 15 set forth the duties the Baptist nurses owed to Ellen. The instruction advised the jury if they found the nurses did the following and that such

negligence caused or contributed to injury or damage to Ellen bringing about her eventual death, then the jury was to return a verdict against Baptist:

> (1) failed to properly assess or identify Ellen Kelly as at risk for latex allergy or sensitivity, if any, and/or
> (2) failed to properly inform the treating physicians that Ellen Kelly was at risk for [a] latex allergy, if any, and/or
> (3) failed to implement the Mississippi Baptist Medical Center's Policies and Procedures in regard to latex allergies or sensitivity, if any

Thus, the jury was informed about the nurses' separate duties. Those duties included the independent duty to assess Ellen for a latex allergy or sensitivity; the duty to notify the doctors of any allergy or sensitivity; and the duty to implement the latex-alert procedures of Baptist, which would ensure Ellen was not exposed to latex. Dr. Beare testified regarding the proper standard of care employed when assessing a patient for latex allergies; these duties are generally required and are not solely required by Baptist's policies. Those duties include: reviewing past records; reviewing pre-admission assessments; thoroughly filling out admission forms; and, when necessary, notifying the doctor about potential allergies. Under the protocol of Baptist's latex-alert procedures, the nurses were required to place an allergy sticker in Ellen's chart and a sign on her door noting the latex allergy. The nurses were also required to notify central supply that all products used during Ellen's operation must be latex free. These are separate duties from those required of the doctors who performed Ellen's surgery. Dr. Beare testified Baptist's nurses breached these independent duties on a variety of occasions.

¶23. The doctors owed a different set of duties to Ellen, which were outlined in several jury

instructions. Jury Instruction 18 prescribed one set of the duties owed to Ellen by Dr. Ingram and Dr. Odom. That instruction informed the jury the doctors were negligent if they:

> (1) failed to obtain a complete clinical history and identify Ellen Kelly as at risk for latex if any, and/or
> (2) failed to properly diagnose that Ellen Kelly suffered from a latex allergy or sensitivity, if any, and/or
> (3) failed to take precautions for Ellen Kelly's latex allergy or sensitivity, if any, and/or
> (4) failed to diagnose the allergic reaction to latex products, if any

¶24. Jury Instruction 19 advised the jury to find the doctors negligent if the evidence showed:

> Dr. Fred Ingram and/or Doug Odom in their care and treatment of Ellen Kelly failed to exercise that degree of reasonable diligence, skill, care, competence, and prudence ordinarily exercised by minimally-competent physicians throughout the United States in like and similar circumstances, then Dr. Ingram and/or Dr. Odom were negligent. If you further find that said negligence, if any proximately caused, or proximately contributed to cause, injury to Ellen Kelly, and her eventual death, then you should return a verdict in favor of the Kelly family against Dr. Fred Ingram and Ob-Gyn Clinic of Jackson, PLLC and/or Dr. Doug Odom [of the] Ob-Gyn Clinic of Jackson and assess their damages, if any.

¶25. Jury Instruction 21 explained the standard of care and skill applicable to physicians. That instruction further stated if the jury found the doctors acted with "such reasonable diligence, skill, competence[,] and prudence as is practiced by minimally competent obstetricians and gynecologists throughout the United States who had available to them the same general facilities, services, equipment[,] and options as Dr. Ingram and Dr. Odom had on July 10, 2000"; then the doctors complied with the requisite standard of care in treating Ellen, the doctors' care did not proximately cause her death, and the jury should find in favor

of the doctors.

¶26. Baptist argues the nurses' failure to conform to the appropriate standard of care did not proximately cause Ellen's death because the doctors admitted they performed their own assessment of Ellen and used their own charts during surgery. However, the nurses were required to take other precautions outside of making notations within the chart. The nurses should have placed a sign on her door and a sticker on her chart noting the allergy, among other duties. Additionally, Dr. Beare testified that under the proper standard of care, if the nurse noticed a latex allergy was indicated on the form, the nurse should have informed the doctor. Dr. Gershwin testified on cross-examination he had sympathy for the doctors. He stated:

> They depended on the nurse[s]. The nurse[s] let them down at Baptist Hospital. The doctors then used latex products. . . . So unwittingly, they were pulled into this. Yes. They should have been aware of her history before. She filled it out and they gave it, but the gatekeeper was in fact the Baptist Hospital.

There is no evidence to suggest that had the nurses followed the proper standard of care and placed a sticker on the chart or notified the doctors about Ellen's latex allergy the doctors would not have heeded their warnings. Because the jury found the nurses had not informed the doctors of the allergy, it is consistent that the jury also found the doctors had no notation of Ellen's allergy to latex in the record. Baptist's policy made the nurses the gatekeepers for patients' allergies by developing a latex-allergy policy and requiring the nurses to conduct a latex-allergy assessment prior to a patient's surgery. Considering the decision to assess fault is one for the jury, we find no error in its assessment of fault to Baptist and not to the

doctors. Accordingly, this issue is without merit.

II. EXCLUDED PORTIONS OF MEDICAL RECORDS

¶27. We review a trial court's decision to admit or exclude evidence under an abuse-of-discretion standard. *Whitten v. Cox*, 799 So. 2d 1, 13 (¶27) (Miss. 2000). Baptist argues Ellen's medical records from her prior hospitalizations should not have been excluded from evidence. Baptist sought to introduce Ellen's records from King's Daughters Hospital-Brookhaven for admissions dated September 11, 1989; June 28, 1999; April 13, 1998; and September 3, 1994. Baptist also sought to introduce the records of Dr. Joseph S. Moak of Brookhaven, records from a 1989 Caesarean section at King's Daughter's Hospital-Brookhaven, and records from emergency room visits from 1994 and 1999, which were intended to show that Ellen did not have an allergic reaction to alleged latex exposure.

¶28. The trial judge found the documents were not relevant because Baptist offered nothing to show Ellen was exposed to latex during any of these medical visits nor did it offer any expert testimony about Ellen's latex exposure during those visits. Importantly, the medical records from six of Ellen's hospitalizations at Baptist were placed in evidence. The records began in October 1997 and continued through her final hospitalization on July 14, 2000. The trial judge allowed Baptist to mark the records for identification purposes and to use them when questioning witnesses. We find the trial judge did not abuse his discretion. Accordingly, this issue is without merit.

III. ASSESSMENT OF DAMAGES

¶29. In its next claim, Baptist makes several arguments against the jury's assessment of

damages, ultimately asserting a new trial should be held on damages. Baptist argues the following three main issues: (1) the jury incorrectly assessed the value of household services; (2) the jury incorrectly assessed Ellen's medical expenses, funeral expenses, and compensation for Ellen's physical and emotional pain and suffering; and (3) the anesthesiologist, Dr. McLeod, should have been listed as a responsible party on the jury's damage form because he bore "potential responsibility" for Ellen's injuries.

¶30. Mississippi's wrongful-death statute allows recovery of damages in the amount the jury determines to be just, taking into consideration all damages of every kind to the decedent and all damages of every kind to any and all interested parties in the suit. Miss. Code Ann. § 11-7-13 (Rev. 2004). This statutory language provides for (1) medical and funeral costs; (2) the present net cash value of the life expectancy of the deceased if older than the beneficiaries; (3) the loss of the companionship and society of the decedent; (4) the pain and suffering of the decedent between the time of injury and death; and (5) punitive damages, when appropriate.[4] *See Jesco, Inc. v. Whitehead*, 451 So. 2d 706, 710 (Miss. 1984); *Sheffield v. Sheffield*, 405 So. 2d 1314, 1318 (Miss. 1981).

¶31. "It is primarily the province of the jury . . . to determine the amount of damages to be awarded[,] and the award will normally not be 'set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount[,] and outrageous.'" *Estate of Jones v. Phillips ex rel. Phillips*, 992 So. 2d 1131, 1150 (¶50)

[4] The parties agreed at the close of evidence that punitive damages would not be sought.

(Miss. 2008) (quoting *Foster v. Noel*, 715 So. 2d 174, 183 (¶56) (Miss. 1998)). However, this Court may order a new trial if we find the damages are "excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence." Miss. Code Ann. § 11-1-55 (Rev. 2002).

¶32. Finally, all three of Baptist's challenges to the damages awarded involve jury instructions; thus, we state the familiar standard of review that the instructions must be read as a whole. *Entergy Miss., Inc. v. Bolden*, 854 So. 2d 1051, 1054 (¶6) (Miss. 2003). Once the jury has returned a verdict, we will not direct judgment be entered to the contrary unless we find, given the evidence as a whole and taken in the light most favorable to the verdict, no reasonable hypothetical juror could have found as the jury found. *Miss. Power & Light Co. v. Cook*, 832 So. 2d 474, 478 (¶5) (Miss. 2000). However, an instruction need not be given that incorrectly states the law, is covered fairly in another instruction, or is without foundation in the evidence. *Heidel v. State*, 587 So. 2d 835, 842 (Miss. 1991) (citations omitted).

A. VALUE OF HOUSEHOLD SERVICES

¶33. First, Baptist argues Jonathan provided no evidence regarding the actual value of Ellen's household services. Baptist makes this argument despite the fact it cross-examined Jonathan's expert on the value of Ellen's household services.

¶34. As with all damages, Jonathan bore the burden of showing the amount of the loss of Ellen's household services. *Puckett Mach. Co. v. Edwards*, 641 So. 2d 29, 36 (Miss. 1994).

James Elbert Bivins, a Jackson CPA who specializes in valuation analysis, testified as an expert regarding the value of Ellen's household services. Baptist did not object to Bivins testifying. Bivins explained the physical activities a mother does for her family, such as cleaning the house, traveling, buying groceries, and taking care of the children, can be quantified. He used federal government statistics and considered inflation in arriving at his figure.

¶35. Bivins testified Ellen was twenty-nine-years old when she died and had a life expectancy of seventy-four years. He also considered the fact she provided care to her two small children. However, he adjusted his figures to take into account less care would be required as the children aged. Bivins testified the appropriate figure for the loss of her household services was $992,109. Baptist offered no expert testimony to dispute Bivins's figure. As with all witnesses, the jury was entitled to believe or disbelieve Bivins's testimony. *See Indep. Life & Acc. Ins. Co. v. Mullins*, 252 Miss. 644, 651, 173 So. 2d 663, 665 (1965). In this instance, the jury chose to believe the expert. We find no error in the jury's valuation of the household services.

B. MEDICAL EXPENSES, FUNERAL EXPENSES, AND COMPENSATION FOR PHYSICAL AND EMOTIONAL PAIN AND SUFFERING

¶36. Baptist argues Jonathan provided no substantial evidence of Ellen's conscious pain and suffering. Baptist does not dispute the jury award for Ellen's funeral and medical expenses totaling $29,604.52. As previously discussed, expert testimony established the family lost $992,109 for the value of Ellen's household services. Dr. Glenda Glover, dean

of the business college at Jackson State University, who is also a certified public accountant and attorney, testified regarding the amount of Ellen's lost wages. Using wages from the year of Ellen's death and considering her work-life expectancy, Dr. Glover testified Ellen's future lost wages totaled $1,415,881. Baptist did not offer any expert testimony to dispute this figure.

¶37. The actual damages awarded include: $29,604.52 for funeral and medical expenses; $992,109 for the loss of Ellen's household services; and $1,415,880 for Ellen's lost wages. Therefore, the actual damages awarded totaled $2,437,934.52. The total amount of the damages awarded by the jury totaled $4,691,000. Thus, the jury awarded $2,253,065.48 for pain and suffering.

¶38. As previously stated, Mississippi's wrongful-death statute allows for recovery of damages by the survivors for the pain and suffering of the decedent from the time of injury until their subsequent demise. Baptist cites *M&M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts*, 531 So. 2d 615, 621 (Miss. 1988), as support for the proposition the plaintiff has the burden of proving survival and consciousness after the wrongful injury and the burden is not sustained "unless there is 'substantial proof' of consciousness after the [injury]." Baptist claims Jonathan submitted no evidence to show Ellen ever regained consciousness. Case law states pain and suffering damages are measured from "the time of injury and death[.]" *McGowan v. Estate of Wright*, 524 So. 2d 308, 311 (Miss. 1988). Baptist incorrectly states the "time of injury" was "the time between her cardiorespiratory arrest/resuscitation on July 11, 2000, and her death four days later." Clearly the "injury" was

the surgery during which she was exposed to latex. It is uncontradicted that Ellen regained consciousness after the surgery. The jury found during this period that she suffered an allergic reaction, which included itching, redness of the face, blisters on the lips, and nausea. As her reaction progressed, she struggled to breathe due to the anaphylactic reaction. The reaction caused Ellen's bronchoconstriction, heart arrhythmia, respiratory arrest, and a severe drop in blood pressure. There is no doubt she suffered physical agony and mental anguish as she struggled to breathe. In fact, she had to be intubated in order to breathe. She also experienced heart arrhythmia, which is typically characterized by severe chest pain. As her reaction continued, the flow of blood to her brain decreased, which led to extreme swelling of her brain and ultimately a brain stroke and infarction. She remained in the ICU for four days until her family decided to end her suffering and disconnect the ventilator.

¶39. "Awards fixed by jury determination are not merely advisory and will not under the general rule be set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount[,] and outrageous." *Jack Gray Transp., Inc. v. Taylor*, 725 So. 2d 898, 899 (¶5) (Miss. 1998) (citations omitted). Our courts have repeatedly recognized the amount of damages awarded is primarily a question for the jury. *S. Cent. Bell Tel. Co. v. Parker*, 491 So. 2d 212, 217 (Miss. 1986).

¶40. Furthermore, Jonathan points out the amount for pain and suffering is less than the actual damages. The Mississippi Supreme Court has upheld damages with far greater disparities than the award in this case. *Estate of Jones v. Phillips*, 992 So. 2d 1131, 1150 (¶52) (Miss. 2008) (upholding a $5,000,000 verdict and finding although economic damages

only totaled $440,511.46, the amount of the verdict was not so excessive as to shock the conscience); *Gatewood v. Sampson,* 812 So. 2d 212, 223 (¶¶ 25-27) (Miss. 2002) (upholding jury verdict of $308,000 in compensatory damages although proof of lost wages and medical expenses only totaled $8,002.50); *Dorrough v. Wilkes*, 817 So. 2d 567, 575 (¶30) (Miss. 2002) (upholding jury verdict of $1,500,000 although medical fees and loss of services only totaled $339,000).

¶41. It is clear Ellen was conscious after her surgery and experienced significant pain and suffering. The jury heard the testimony and rendered damages for pain and suffering in the amount of $2,253,065.48. We do not find the amount outrageous or unreasonable; therefore, we find this issue is without merit.

C. DR. MCLEOD, ANESTHESIOLOGIST, AS A RESPONSIBLE PARTY

¶42. Baptist argues the trial court erred by not allowing Dr. McLeod, Ellen's anesthesiologist, to be listed as a responsible party for the jury to consider in awarding damages. However, there was no testimony even offered to suggest Dr. McLeod had deviated from the standard of care and proximately caused Ellen's death. In order to have an instruction granted, there must be some supporting evidence presented. *Canadian Nat'l Ill. Cent. R. Co. v. Hall*, 953 So. 2d 1084, 1101 (¶62) (Miss. 2007). Furthermore, Baptist never offered an instruction at trial that would have allowed the jury to find Dr. McLeod partially liable. Baptist did proffer a proposed instruction that would have added a blank space where the jury could have assessed fault "as to other parties not present." However,

the trial court denied the jury instruction. We find no merit to this argument.

IV. MOTION FOR A NEW TRIAL

¶43. Baptist claims it is entitled to a new trial because the jury's verdict exhibits bias, passion, prejudice, and confusion all contrary to the overwhelming weight of the evidence. Baptist cites a portion of *Poole ex rel. Poole v. Avara*, 908 So. 2d 716, 726-27 (¶25) (Miss. 2005) for the familiar standard used by an appellate court to determine if a new trial is appropriate. The Mississippi Supreme Court stated:

> A new trial may be granted in a number of circumstances, 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.

Id. (quoting *Shield v. Easterling*, 676 So. 2d 293, 298 (Miss. 1996)). However, Baptist fails to cite the rest of the quote from *Poole*, which reads:

> This Court will reverse a trial judge's denial of a request for new trial only when such denial amounts to an abuse of that judge's discretion. The existence of trial court discretion, as a matter of law and logic, necessarily implies that there are at least two differing actions, neither of which if taken by the trial judge will result in reversal.

Id.

¶44. Baptist claims the jury was confused when it awarded the amount of damages for pain and suffering. Baptist uses a note passed to the trial court by the jury to support its argument. The note reads: "The first question is, how are we to determine the amount for each family member? And the second question is, can we say that the children get this and husband gets this?" The trial court correctly told the jury to follow the instructions it had been given.

There is nothing in the final judgment award by the jury that shows any confusion.

¶45. Baptist also asserts the verdict is against the overwhelming weight of the evidence. However, we find Jonathan presented two qualified medical experts who outlined the standard of care and testified regarding Baptist's nursing staff's failure to conform to that standard of care. This issue is without merit.

V. INTEREST RATE

¶46. In their final issue on appeal, Baptist challenges the interest rate awarded on the judgment. Baptist argues the trial court erroneously awarded interest at the rate of 8% per annum, compounded annually, to accrue as of June 2, 2009, the date of the verdict. Baptist also disputes the interest rate of 8%. Baptist argues when the interest rate is applied to the judgment amount of $4,691,000, the interest accrues at $1,028.16 per day. This means in the twenty-nine days between the jury's verdict and the entry of final judgment, interest accrued in the amount of $29,816.76. Baptist states that before a final and appealable judgment was entered on October 13, 2009, the interest amount had climbed to $137,774.03.

¶47. Baptist challenges the date on which interest should have begun to accrue. Baptist argues the trial court erroneously awarded "interest at a rate of 8 percent (%) per annum, compounded annually, beginning to accrue as of June 2, 2009." Baptist claims the jury verdict was returned on June 2, 2009, and Baptist moved to amend the interest portion of the judgment on July 8, 2009. Thus, the judgment did not become final and appealable until the trial court denied Baptist's motion on October 14, 2009. Baptist claims the trial court erred when it awarded prejudgment interest retroactively to the date of the judgment.

¶48. Mississippi Code Annotated section 75-17-7 (Rev. 2009), governs the application of interest rates to judgments. That section provides:

> All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. *All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.*

Miss. Code Ann. § 75-17-7 (emphasis added).

¶49. Baptist claims while section 75-17-7 requires a judgment to bear interest, the statute also requires the trial court to be fair in its assessment of interest. Baptist argues: "It is simply not fair for a [c]ircuit [c]ourt to order the accumulation of a massive amount of interest while the [c]ourt itself fails to enter an appealable judgment."

¶50. The purpose of an award of interest is to make the aggrieved plaintiff whole, that is, to fully compensate the party. 47 C.J.S. *Interest & Usury* § 12 (2005). "Additionally, statutory interest guarantees that the successful plaintiff will receive prompt payment, and prevents the judgment debtor from profiting at the expense of the plaintiff." *Id*. Stated another way, "[i]nterest on a monetary award is designed to compensate for the loss that results when a claimant is deprived of the use of money to which she was entitled from the moment that liability was determined." 44B Am. Jur. 2d *Interest and Usury* § 38 (2007). Traditionally, the supreme court has allowed interest to run from the date of the tort. *See Phillips Distribs., Inc. v. Texaco, Inc*., 190 So. 2d 840, 842 (Miss. 1966) (Texaco assessed interest on the judgment from the date of the tort of conversion.). Furthermore, the statute provides the only limit regarding the time when interest can be awarded is that it can "in no

event [be] prior to the filing of the complaint." Miss. Code Ann. § 75-17-7. Thus, the trial court could have allowed the interest to begin anytime after the date on which the complaint was filed, August 31, 2001.

¶51. Next, Baptist disputes the percentage of interest awarded, stating the trial court abused its discretion in awarding 8% interest. Baptist notes prior to its amendment in 1989, section 75-17-7 required a judgment interest rate of 8%, but now the rate is left to the trial court's discretion. Baptist argues the trial court should not "blindly rely" on the previous rate.

¶52. Baptist points out that federal judgments pursuant to 28 U.S.C. section 1961(a) (2006) bear interest calculated from the date of the entry of the judgment, at a rate equal to the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System for the calendar week preceding the judgment. Indeed, Baptist asserts the interest rate using the federal figures on June 26, 2009, was 0.48%. Further, Baptist claims the prime rate on the date of the entry of the judgement according to the Federal Reserve Selected Interest Rates was 3.25%.

¶53. Nonetheless, the right to post-judgment interest is a statutory right and within the discretion of the ruling judge. *U.S. Fid. & Guar. Co. v. Estate of Francis ex rel. Francis*, 825 So. 2d 38, 50 (¶38) (Miss. 2002). Section 75-17-7 provides that interest "shall" be awarded. In *Houck v. Ousterhout*, 861 So. 2d 1000, 1003 (¶14) (Miss. 2003), Timothy Houck argued interest on child support arrearages at 8% "does not appear to be fair in today's economy." The supreme court rejected that argument and upheld the chancellor's discretion in determining the rate of interest. *Id*. at (¶15). *See Adams v. Adams*, 591 So. 2d 431, 436

(Miss. 1991) (appellate court found chancellor erred in not awarding interest on past-due child support and court assessed interest at 8%).

¶54. As such, we cannot agree with Baptist's argument that 8% interest was "simply not fair" and an abuse of discretion. Accordingly, we find no error in the trial court's award of interest at the rate of 8% to run from the date of the jury verdict. This issue is without merit.

¶55. THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

LEE, C.J., IRVING, P.J., ROBERTS AND RUSSELL, JJ., CONCUR. MAXWELL, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY ROBERTS, J., AND JOINED IN PART BY ISHEE, J. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION. GRIFFIS, P.J., MYERS AND BARNES, JJ., NOT PARTICIPATING.

MAXWELL, J., SPECIALLY CONCURRING:

¶56. I agree with the result reached by the majority but write separately to address my reasons for doing so.

I. The Jury's Verdict

¶57. Like most cases alleging negligence on the part of doctors and nurses engaged in professional services, this case is replete with conflicting expert testimony concerning causation. While there is certainly room for disagreement with the jury's ultimate evaluation of the disputed evidence, the task of wading through competing expert testimony and resolving conflicting factual evidence falls properly within the jury's province—not an appellate court's. In performing its role as the fact-finder, a jury is "free to accept or reject any or all of the testimony and evidence presented." *Johnson v. St. Dominics-Jackson Mem'l*

Hosp., 967 So. 2d 20, 23 (¶11) (Miss. 2007). So long as opinion testimony is properly admitted, an appellate judge's hands are largely tied, particularly in making credibility assessments.

¶58. Before the jury began its deliberations, the circuit judge instructed the jury:

> You should consider each expert opinion received into evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that a reason given in support of the opinion is not sound, or that the opinions are outweighed by other evidence, then you may disregard the opinion entirely.

¶59. Baptist does not claim this instruction was in error or that the jury was otherwise improperly instructed about how it should size up each expert's opinion. Instead, Baptist essentially argues it presented medical experts in a greater quantity and quality (treating-physicians versus non-treating) than Jonathan Kelly. But the mere number of experts offered is by no means a controlling factor. *See Univ. Med. Ctr. v. Martin*, 994 So. 2d 740, 748 (¶33) (Miss. 2008) (holding the findings of the trial judge, sitting as fact-finder, would not be disturbed "merely for adopting the testimony of one party's [single] expert while disregarding that of the other party's [four] experts"). Jurors are certainly free to accept or reject expert testimony as they see fit, even if that means rejecting a host of experts, in the face of a lone contradictory opinion. Apparently, such was the case here, as the jury chose to accept Jonathan's medical-causation expert over Baptist's. Perhaps the jury was skeptical of the opinions of treating physicians, who were also seated at the defense table. But such speculation on our part is unnecessary, since Jonathan's expert was duly qualified and had

reviewed Ellen Kelly's medical records before opining that she died from anaphylactic shock, in reaction to exposure to latex. While the dissent claims the medical evidence outweighs this opinion, a reviewing court should not supplant a jury's decision when it is supported by substantial evidence. Thus, I find we are restrained to interfere in this instance.

II. Jury Instruction 15

¶60. Baptist and the dissent take issue with jury instruction 15, claiming it was given in error and caused a great injustice by misstating the law. After a close examination of this jury instruction and considering our required standard of review, I have no option but to disagree. Jury instruction 15 did not, as the dissent suggests, permit the jury to find Baptist liable *solely* though its nurses' violations of hospital policy. Instead, it instructed the jury that if it found the nurses failed in any of the following—(1) to properly assess Ellen's risk for latex allergy, if any; (2) to properly inform the treating physicians of Ellen's risk for latex allergy, if any; or (3) to implement Baptist's polices and procedures in regard to latex allergies, if any—***and*** **further if the jury found the failure(s) constituted negligence "as that term is defined elsewhere in theses instructions, *and* that this negligence, if any, caused, or contributed to cause, injury or damage to Ellen," *then* the jury should return a verdict against Baptist**.

¶61. Precedent clearly instructs that appellate courts do "not review jury instructions in isolation[.]" Instead, reviewing courts are required to "read [them] as a whole to determine if the jury was properly instructed." *O'Flynn v. Owens-Corning Fiberglas*, 759 So. 2d 526, 531 (¶6) (Miss. Ct. App. 2000) (quoting *Lovett v. Bradford*, 676 So. 2d 893, 896 (Miss.

1996)). So here we are tasked with considering jury instruction 15 in tandem with jury instruction 10—the companion "negligence" instruction referenced in jury instruction 15. An objective review of jury instruction 10 reveals that it neither defines "negligence" as a failure to follow internal hospital procedures nor states that a regulatory violation amounts to negligence per se. Rather, jury instruction 10 reads:

> [T]he word "negligence" as used in the instructions of the Court means the doing of something that a reasonably prudent, minimally competent nurse or physician, as the case may be, would not have done under the same or similar circumstances, or the failure to do something which a reasonably prudent, minimally competent nurse or physician, as the case may be, would have done under the same or similar circumstances.

See Moore ex rel. Moore v. Mem'l Hosp. of Gulfport, 825 So. 2d 658, 665-66 (¶24) (Miss. 2002) (noting that a violation of an internal regulation, while not creating a separate cause of action, "may serve as evidence of negligence"); *see also Quijano v. United States*, 325 F.3d 564, 568 (5th Cir. 2003) (applying Texas law) (Though "hospital rules alone do not determine the governing standard of care[,] " the "hospital's internal policies and bylaws may be evidence of the standard of care[.]"); *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 713 n.22 (5th Cir. 1981) (noting plaintiff's proper use of internal regulation "only as evidence of negligence, which the trier of fact 'may accept or reject as it sees fit'") (citing W. Prosser, The Law of Torts s 36, at 201). When read as a whole, I am simply unable to find the jury instructions mis-stated the proper negligence standard.

¶62. And reading beyond jury instruction 15 allays any concern that the instructions improperly transferred the doctors' non-delegable duties to Baptist's nurses. The dissent

argues that, because Dr. Odom and Dr. Ingram had non-delegable duties to take Ellen's patient history, the circuit court committed reversible error by instructing the jury about Baptist's duty to Ellen.

¶63. But the jury was instructed to consider both the doctors' non-delegable duties as Ellen's treating physicians as well as Baptist's duties. Jury instruction 14 described the *separate* claims Jonathan had brought against Baptist and the two doctors. The jury was given separate instructions to determine duty and breach of that duty by Baptist (jury instruction 15) and duty and breach of that duty by the doctors (jury instruction 18). Aided by expert testimony about what a reasonably competent nurse working for a hospital would have done and what a reasonable competent physician would have done, the jury separately considered: (1) whether the nurses negligently failed to assess for a latex allergy, to inform the physician about a latex allergy, and/or to implement procedures regarding latex allergies; and (2) whether the two physicians negligently failed to complete a clinical history, to diagnose a latex allergy and allergic reaction, and/or to take proper precautions against latex allergy. That the jury's separate considerations led to separate conclusions—that Baptist was liable, but the doctors were not—was within their purview.

¶64. Jonathan's theory of liability was not that the doctors should be vicariously liable for the nurses' actions performed on behalf of the doctors. Instead, jury instruction 14 states the nurses were working within the course and scope of their employment with *Baptist*, not the doctors. Thus, it was not inconsistent to hold that the nurses were negligent but the treating physicians were not. *Cf. Sacks v. Necaise*, 991 So. 2d 615, 619 (¶9) (Miss. Ct. App. 2007)

(holding doctor vicariously liable for administration of chemotherapy drugs by nurse *under doctor's supervision* and performing non-delegable duty of doctor).

¶65. For these reasons, I specially concur with the majority's decision that the jury's verdict should not be disturbed.

ROBERTS, J., JOINS THIS OPINION. ISHEE, J., JOINS THIS OPINION IN PART.

CARLTON, J., DISSENTING:

¶66. Finding that the evidence lacks proof of medical causation, I respectfully dissent from the majority's opinion as I would reverse and render.[5] Further, the trial judge committed reversible error by improperly instructing the jury on the law. Alternatively, at the very least, I would reverse the final judgment and remand this case for a new trial on the merits in light of the error in the jury instructions.

¶67. Physicians bear the duty to ascertain the proper medical history of a patient and the responsibility to confirm any medical history taken for him by another medical provider under his supervision, or taken under his authority to fulfill his or her treatment responsibilities. *See generally Hall v. Hilburn*, 466 So. 2d 856, 871 (Miss. 1985) (superseded by statute).[6] This duty goes to the core of the error in the jury instructions and

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[5] *See generally Estate of Finley ex rel. Jordan v. Beverly Health and Rehab. Servs., Inc.,* 933 So. 2d 1026, 1036-37 (¶¶34-36) (Miss. Ct. App. 2006) (discussing the need for evidence supporting causation).

[6] *See also Sacks v. Necaise*, 991 So. 2d 615, 619 (¶9) (Miss. Ct. App. 2007) ("If a doctor chooses to allow a nurse to perform a non-delegable duty, the doctor must accept responsibility if that duty is breached.") (citation omitted).

the sufficiency of the evidence of negligence in the present case. I submit that the evidence presented in this medical-malpractice case at trial must first establish that a duty was owed to the patient and by whom the duty was owed. The evidence must show that such duty was breached, and the jury must be properly instructed as to whom the duty belonged.

¶68. The duty to ascertain an accurate patient history constitutes a non-delegable duty of the treating physician. The physician must confirm the patient's medical history collected for his treatment, and the physician may not escape liability or the responsibilities of this medical duty by delegating the duty to ascertain and confirm an accurate medical history to a medical provider collecting such history for him. The record shows that Debra Priester, a nurse at Baptist, conducted Ellen Kelly's pre-operative admission history and assessment on July 3, 2000, a week prior to Ellen's admission into the hospital for surgery. Nurse Priester prepared the Pre-Procedure/Surgery Check List and listed Ellen's allergies as sulfa, Lorcet, dairy products, seafood, and adhesive tape. On the Nursing Admission History and Assessment form, Ellen's allergies were listed as sulfa, Lorcet, all dairy products and seafood, and adhesive on band-aids. The section on this form entitled, "Latex Allergy Alert," listed several questions related to latex allergies inquiring as to whether the patient possessed a known allergy to latex or possessed an allergy to three items indicating a potential latex allergy to wit: avocados, bananas, or chestnuts. The form reflected that Ellen possessed an allergy to chestnuts. However, Nurse Priester failed to notify the treating physicians, Dr. Fred Ingram and Dr. Doug Odom, that Ellen responded yes to an allergy to chestnuts. This constitutes the crux of Jonathan Kelly's case of negligence. However, even if Nurse Priester

failed to notify Dr. Ingram and Dr. Odom as to Ellen's allergy to chestnuts, the treating physicians possessed a non-delegable duty to confirm Ellen's medical history. I submit that if the treating physicians had reviewed Ellen's medical history obtained by the hospital which showed a known allergy to chestnuts, an apparent indicator of potential latex allergy, then they would have possessed a duty to confirm the medical history with Ellen to ascertain an accurate history. In this case, the failure of Nurse Priester to take the extra precaution fails to constitute medical causation since the treating physicians, Dr. Ingram and Dr. Odom, did not review or rely on the medical history obtained by Nurse Priester for the hospital.

¶69. Regarding a physician's non-delegable duty of care, the Mississippi Supreme Court has held:

> In the care and treatment of each patient, each physician has a non-delegable duty to render professional services consistent with that objectively ascertained minimally acceptable level of competence he may be expected to apply given the qualifications and level of expertise he holds himself out as possessing and given the circumstances of the particular case. The professional services contemplated within this duty concern the entire caring process, including but not limited to examination, history, testing, diagnosis, course of treatment, medication, surgery, follow-up, after-care and the like.

Hall, 466 So. 2d at 871.

¶70. In applying the law to the duty owed in this case, I must address the trial court's error in instructing the jury on the law in this regard. I submit that Jury Instruction 15,[7] given by

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[7] Jury Instruction 15 provides:

> If you find from a preponderance of the evidence in this case that on July 3, 2000, and on July 10-14, 2000, the nursing personnel at Mississippi Baptist Medical Center:

the trial court over Mississippi Baptist Medical Center's (Baptist) objection, causes a great injustice in this case by misstating the law as to applicable duties of standard of care by allowing the jury to find liability for a violation of a hospital policy and in transferring responsibility of the physician's non-delegable duty of treatment[8] to a nurse. While I agree that nurses certainly should notify the treating physician of any potential risks or indications raised by the medical history provided by the patient, I submit that the treating physician bears the ultimate responsibility to confirm the medical history with the patient and may not transfer this responsibility to the nurse that took the patient's medical history.[9] I will now turn to the application of these duties to the evidence in this case.

¶71. Two glaring deficiencies compel me to conclude that the evidence lacks proof of

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> (1) failed to properly assess or identify Ellen Kelly as at risk for latex allergy or sensitivity, if any, and/or
> (2) failed to properly inform the treating physicians that Ellen Kelly was at risk for latex allergy, if any, and/or
> (3) failed to implement the Mississippi Baptist Medical Center's Policies and Procedures in regard to latex allergies or sensitivity, if any [sic]
>
> And if you further find that said failure or failures, if any, constituted negligence as that term is defined elsewhere in these instructions; and that this negligence, if any, caused, or contributed to cause, injury or damage to Ellen Kelly and her eventual death, then you should return a verdict in favor of the Kelly Family against [the] [d]efendant[][,] Mississippi Baptist Health Systems, Inc. [d/b/a] Mississippi Baptist Medical Center[.]

[8] *See Hall,* 466 So. 2d at 871.

[9] *See generally Ekornes-Duncan v. Rankin Med. Ctr.*, 808 So. 2d 955, 959 (¶10) (Miss. 2002) (A nurse's failure to communicate signs of ruptured aorta failed to lead to liability where physician already conducted initial assessment.).

medical causation. First, the evidence shows that even if the nurses at the hospital were negligent in assessing the patient's medical history, the treating physicians, Dr. Ingram and Dr. Odom, did not review or use the medical history obtained by Nurse Priester.[10] Instead, these physicians used Ellen's medical history from their own clinical practice and their past physician-patient relationship with Ellen. Second, with respect to the physical cause of death, I find the record in this case fails to show physical medical evidence that supports expert opinion that Ellen suffered an anaphylactic reaction resulting from an allergy to latex. I will briefly explain these two identified deficiencies separately.

¶72. With respect to the deficiency in medical causation pertaining to the nurse's negligence, the nurses employed by Baptist gave the physicians Ellen's complete medical records, including information that Jonathan Kelly's experts contended should have alerted them to the possibility of a latex allergy. However, the treating physicians, Dr. Ingram and Dr. Odom, did not review the records provided by Baptist; instead, they relied on their own clinical history with Ellen, as well as their lengthy physician-patient experience with Ellen. Both Dr. Ingram and Dr. Odom testified that Ellen possessed no latex allergy, and they ordered no latex precautions.[11] Therefore, any negligence by the nurses at Baptist in taking

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[10] *See also Wyeth Labs., Inc. v. Fortenberry*, 530 So. 2d 688, 691 (Miss. 1988) (finding a lack of causation even if warning in package was insufficient).

[11] Dr. Carroll McLeod, the anesthesiologist who treated Ellen at Baptist during her surgery, took her own clinical history of Ellen which showed the same type of information found in the hospital records, and Dr. McLeod also ordered no latex precautions. Other treating physicians testified that Ellen did not die from a reaction to latex.

Ellen's medical history could not have proximately caused her tragic death. Also relevant to the issue of causation, the trial court erred by instructing the jury that Baptist could be held liable solely on a finding that the nurses violated the internal hospital policy because of the intervening issue that both Dr. Ingram and Dr. Odom did not review Ellen's medical histories taken by the hospital and also because the internal hospital policy fails to define the applicable standard of care.[12]

¶73. Second, the only symptom that Ellen exhibited that indicated a potential allergic reaction to latex was itching. All of the other physical findings and tests measuring Ellen's various body gas levels, sodium serum levels, oxygen levels, air way or broncho-constriction, and other physical conditions, as set forth in the record, fail to support the existence of an allergic reaction rising to the level of an anaphylactic reaction as Ellen's cause of death. Certainly a jury can choose between experts, but the then-existing medical test results and physical medical conditions remain the same. While experts may battle on the interpretation of those various results and conditions, their interpretations must be supported by some

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[12] *See Quijano v. United States,* 325 F.3d 564, 568 (5th Cir. 2003) ("In Texas, a hospital's internal policies and bylaws may be evidence of the standard of care, but hospital rules alone do not determine the governing standard of care.") (citations omitted); *Gallagher v. Detroit - MaComb Hosp. Ass'n.,* 431 N.W.2d 90, 92 (Mich. Ct. App. 1988) (finding that an institution's internal rules and regulations do not establish a standard of care); *Darling v. Charleston Cmty. Mem'l Hosp*., 211 N.E.2d 253, 257 (Ill. 1965) (explaining that hospital rules and bylaws may be admissible but do not conclusively establish the standard of care). *See generally* 57A Am. Jur. 2d *Negligence* § 174 (2004) ("The failure to comply with a company rule does not constitute negligence per se; the jury may consider the rule, but the policy does not set forth a standard of conduct that establishes what the law requires of a reasonable person under the circumstances.").

evidence.[13]

¶74. Instead, the record shows that Ellen experienced cardiac arrest, a good oxygen level, no wheezing, and no evidence of blueness in her nail beds. She did, however, show other signs including an alarming bicarbonate level. Defense experts testified as to their interpretation of the physical findings and indicators arising from test results of Ellen's bodily functions, tissues, levels, and gases. The defense experts testified that the bicarbonate level affects the heart's ability to work properly, and the experts testified that the brain swelling was due to a rapid drop in serum sodium levels. The defense experts further testified that Ellen's brain swelling caused her brain to push downward on the swollen brain tissue, which impinged the functions of the brain that control respiration, causing Ellen to stop breathing. Whether Ellen's tragic death resulted from such ultimate cause lies beyond the scope of this Court's appellate review, except to opine that such interpretation is supported by the evidence, whereas the testimony that her tragic death resulted from an anaphylactic reaction to latex is not supported by the physical medical evidence in this case.

¶75. Based on the foregoing reasons, I dissent.

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[13] *See* M.R.E. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence 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 . . . ."). *See also Univ. of Miss. Med. Ctr. v. Pounders*, 970 So. 2d 141, 146-47 (¶¶20-22) (Miss. 2007).