IN THE SUPREME COURT OF MISSISSIPPI

CHERRY M. DEIORIO, BY AND THROUGH CHAD DEIORIO HER NEXT FRIEND FOR THE USE AND BENEFIT OF CHERRY M. DEIORIO — **APPELLANT**

vs — **CAUSE NO. 2007-CA-00537**

PENSACOLA HEALTH TRUST, INC.; DELTA HEALTH GROUP, INC.; SCOTT J. BELL; ELIZABETH L. (HERNDON) SPRENGER; JOHN DOES 1 THROUGH 10; AND UNIDENTIFIED ENTITIES 1 THROUGH 10 (AS TO THE BOYINGTON NURSING CENTER a/k/a THE BOYINGTON NURSING FACILITY) — **APPELLEES**

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI, FIRST JUDICIAL DISTRICT

BRIEF OF THE APPELLEES, PENSACOLA HEALTH TRUST, INC., DELTA HEALTH GROUP, INC., SCOTT J. BELL, ELIZABETH L. (HERNDON) SPRENGER, BOYINGTON NURSING CENTER a/k/a THE BOYINGTON NURSING FACILITY

ORAL ARGUMENT REQUESTED

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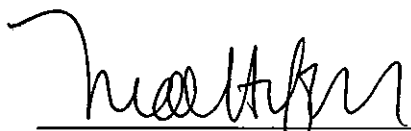
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following people have an interest in the determination of this case. These representations are made in order that the Justices of the Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

2. Chad Deiorio, Administrator of the Estate of Cherry Deiorio, Appellant
4. Annette Mathis, Attorney for Appellant
6. Kenneth L. Connor, Attorney for Appellant
8. Susan Nichols Estes, Attorney for Appellant
10. D. Bryant Chaffin, Attorney for Apellant
12. Pensacola Health Trust, Inc., Appellee
14. Delta Health Group, Inc., Appellee

16. Scott J. Bell, Appellee
18. Elizabeth L. (Herndon) Sprenger, Appellee
20. The Boyington Nursing Center a/k/a The Boyington Nursing Facility, Appellee
22. Honorable Lisa Dodson, Harrison County Circuit Court Judge
24. Lynda C. Carter, Attorney for Appellees
26. Nicole Huffman, Attorney for Appellees
28. Daniel E. Dias, Attorney for Appellees

Respectfully submitted this the _14_ day of January, 2008.



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STATEMENT OF THE CASE [1]

Course of the Proceedings Below

Plaintiff filed his Complaint on July 25, 2001 asserting that Defendants neglected Cherry Deiorio while she was a resident at their nursing home. (R. at 18-48). On December 22, 2006, Defendants filed a Motion for Summary Judgment alleging that Plaintiff was unable to make a prima facie case of negligence because (a) the affidavit of his expert could not be accepted, and his expert could not testify due to Plaintiff's

[1] Throughout Defendants/Appellees' Brief, citations to the lower courts record will be cited as "R.," citations to the Transcript as "T.R.," and citations to the Appellant's Brief will be designated as "A.B."

failure to timely designate him and (b) the affidavit of his expert, even if timely designated, was legally insufficient to support a negligence case. (R. at 411-26). The trial court agreed and entered Summary Judgment for Defendants by Order dated February 28, 2007. (R. at 693-707). Plaintiff appeals from that Order.

Statement of the Facts

Three months after Plaintiff filed his Complaint in this matter, Defendants propounded written discovery to Plaintiff seeking, among other information, the identity of the experts Plaintiff intended to call at trial. (R. at 6 and 603). Plaintiff responded, "Expert witnesses to be called at the trial of this cause have not yet been determined." (R. at 7 and 603). Five years later, despite on-going case development and discovery, Plaintiff still had not designated or identified his experts.

The parties agreed to a trial date of January 22, 2007. (R. at 565-570; 732-738, A.B. at 1, and T.R. in its entirety).[2] Because no scheduling order was entered by the Court, the deadline for the parties to designate their experts, as set by Uniform Rule of Circuit and County Court 4.04(A),[3] was November 23, 2006 (which was sixty days prior to trial).

On November 22, 2006, Defendants timely designated their expert witnesses. (R. at 319-23). Although Plaintiff retained two experts sometime between 2003 and

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[2] For the first time on appeal, Plaintiff attempts to argue there was no order setting January 22, 2007 as the trial date, so the date was not official. However, the parties agreed to that date and the court scheduled it, as Plaintiff acknowledged multiple times, including to the court at the Hearing on Defendants' Motion for Summary Judgment when Plaintiff's counsel asserted that they "were ready to proceed with trial on this matter." (T.R. at 22).

[3] Referred to as "URCCC" or simply "Rule" hereinafter.

2004(T.R. at 35), Plaintiff did not identify them until December 11, 2006, forty-two (42) days prior to the trial date and two weeks after the deadline set by Rule 4.04(A). (R. at 603).[4] (R. at 13 and 603-05).

Rule 4.04(a) provides absent "special circumstances," a party's failure to timely designate expert witnesses precludes those witnesses from testifying at trial. Based on the preclusion in the Rule, Defendants moved for summary judgment against Plaintiff, asserting that Plaintiff could not present the requisite expert testimony to establish a prima facie case of negligence against Defendants. (R. at 411-26).

Plaintiff filed his Response to Defendants' Motion for Summary Judgment and, in an effort to establish a prima facie case of negligence, attached the affidavit of Dr. Jeffery Karp, one of the two experts that Plaintiff identified forty two days prior to trial. (R. at 565-640). Dr. Karp's affidavit offered no specific evidence of the applicable standard of care, how that standard was breached, nor were his opinions within a reasonable degree of medical certainty. (R. at 613-23).

At the hearing on Defendants' Motion, Plaintiff suggested that his failure to timely designate his experts by the November 23, 2006 deadline was due to the Christmas holidays. (T.R. at 35). The trial court roundly rejected that rationalization as inadequate to establish "special circumstances" under Rule 4.04(A). However, at the close of the hearing, and, in an abundance of caution, the Judge allowed Plaintiff five additional days to submit any legal authority that Rule 4.04(A) was not applicable. (T.R. at 81).

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[4] While Plaintiff's Interrogatory Responses were supplemented, the Record does

Plaintiff did not provide any such authority to the court but did confirm his failure to timely designate his experts was due to an attorney scheduling error, not any recognizable special circumstance. (R. at 735-38). On February 28, 2007, the trial court entered an Order granting Defendants' Motion for Summary Judgment because Plaintiff failed to make a prima facie case of negligence against Defendants. (R. at 693-707).

The trial court's decision was two-pronged. First, it held that Plaintiff's expert affidavit should be excluded due to Plaintiff's failure to timely designate experts under Rule 4.04(A) and his failure to supplement his earlier discovery response as required by the Mississippi Rules of Civil Procedure and case law. (R. at 705). Second, the trial court held that, even if it were to consider the affidavit (despite the late designation), the affidavit was legally insufficient, and therefore excluded, because it did not contain any opinions as to the applicable standard of care, breach of that standard or causation, or that any opinion offered was to a reasonable degree of medical certainty. (R. at 705-07).

Because Plaintiff had either no expert evidence or legally insufficient expert evidence, the trial court determined that summary judgment was appropriate for Defendants.

Plaintiff timely appealed that Order to this Court.

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not contain any formal "Designation" of expert witness.

SUMMARY OF THE ARGUMENT

The trial court correctly determined that Plaintiff failed to supply the requisite expert testimony necessary to make a prima facie case of medical negligence against Defendant because either (a) Plaintiff was barred from submitting his expert affidavit due to his failure to timely designate or identify experts or (b) Plaintiff failed to submit a legally sufficient expert affidavit. Accordingly, the issue raised by this appeal is whether either of these evidentiary rulings were clear error by the trial court. Both rulings are legally correct and should not be disturbed.

Uniform Rule of Circuit and County Court 4.04(A) provides, absent "special circumstances," a party's failure to timely designate expert witnesses precludes those witnesses from testifying at trial. In the instant matter, Defendants properly and timely designated their expert witnesses, and, when Plaintiff failed to do the same, moved for Summary Judgment on the basis that Plaintiff could not present the requisite expert testimony to establish a prima facie case of negligence against the Defendants. In an effort to establish a prima facie case of negligence, Plaintiff filed a Response attaching the affidavit of Dr. Karp, one of the untimely designated experts.

Despite the fact that Plaintiff had retained trial experts in 2003 or 2004, it was not until December 11, 2006, forty-two (42) days prior to the trial date that Plaintiff, for the first time, identified his trial experts to Defendants. This designation did not comply with Rule 4.04(A), and Plaintiff admitted that no special circumstances existed as to why his designation was untimely. In addition, disclosing experts on December 11, 2006, over

(two or) three years after the experts had been retained, violated the requirements of the Mississippi Rules of Civil Procedure and case law regarding timely supplementation. As a result, the trial court properly excluded the affidavit of Dr. Karp.

Although the trial court properly excluded Dr. Karp's affidavit due to Plaintiff's failure to timely designate, the court still considered his affidavit, finding it to be insufficient as a matter of law. Specifically, the trial court appropriately found that Dr. Karp's affidavit failed to provide medical opinions to a reasonable degree of medical probability and failed to establish a prima facie case of medical negligence—the affidavit failed to articulate the standard of care, how it was breached, and/or otherwise establish the required causal element. Failing to provide competent expert testimony to rebut Defendants' Motion, the trial court properly determined that Defendants were entitled to summary judgment. The insufficiency of Dr. Karp's Affidavit, one of the trial court's bases for its grant of summary judgment, remains unchallenged by the Plaintiff.

At no time did the trial court abuse its discretion in excluding the Plaintiff's untimely designated experts. Mississippi case law is clear that Rule 4.04(A) is to be enforced as it is written. Contrary to Plaintiff's argument, there are no requirements that the party seeking enforcement demonstrate prejudice, file a motion to compel, or move for a continuance. The Plaintiff's cavalier attitude and bold assumption that it could ignore the Rules and his error be corrected via a continuance was properly and wholly rejected by the court. As a result, the trial court committed no error in granting summary judgment to Defendants. Further, with respect to the issues of waiver and improper trial setting, which issues were never raised before the trial court, Plaintiff's arguments are

now barred and cannot be considered by this Court on appeal.

STANDARD OF REVIEW

Typically, an appeal of an order granting summary judgment to this Court require this Court to conduct a *de novo* review. However, the Order granting summary judgment to Defendants in this case does not requires such a review. Instead, the case turns entirely on whether the trial court's *evidentiary* rulings that the Plaintiff's expert affidavit should be excluded, or not considered, either because of (a) the untimely designation of the expert by Plaintiff or (b) the legal insufficiency of the affidavit, were correct. The standard of review for such evidentiary rulings is abuse of discretion. *Boutwell v. Boutwell*, 829 So.2d 1216, 1223 (Miss.2002); *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So.2d 703, 708 (Miss. 2005)(citation omitted). The trial court's decision should be affirmed unless the trial court committed a clear error in its conclusion. *Plaxico v. Michael*, 735 So.2d 1036, 1039 (Miss. 1999)(citing *Cooper v. State Farm Fire & Cas. Co.*, 568 So.2d 687, 692 (Miss.1990)(citations omitted)).

ARGUMENT

I. The Trial Court Correctly Determined that Plaintiff Failed to Submit Required Expert Testimony so that Summary Judgment was Appropriate

The trial court's evidentiary rulings cannot be considered outside the context of Mississippi law for establishing a prima facie case of medical negligence. That law requires any Plaintiff bringing a medical negligence claim in Mississippi to provide expert testimony that defines (a) the required standard of care, (b) breach of that standard and (c) causation of damages as a result of the breach in order to make a

prima facie case. *See Young v. University of Miss. Med. Ctr.*, 914 So.2d 1271, 1276 (Miss. At. App. 2005); *See also Palmer v. Biloxi Reg. Med. Ctr., Inc.*, 564 So.2d 1346, 1355-57 (Miss. 1990); *Mallett v. Carter,* 803 So.2d 504, 508 (Miss. Ct. App. 2002); *Luvene v. Waldrup,* 903 So.2d 745, 748-49 (Miss. 2005). If no such evidence is available, Defendant is entitled to summary judgment. *Potter v. Hopper,* 907 So.2d 376, 380 (Miss. Ct. App. 2005). As shown below, the trial court correctly concluded that no such evidence was before the court so that its determination that Defendants were entitled to summary judgment is correct.

A. The Court Correctly Ruled that Dr. Karp's Expert Affidavit was Insufficient as a Matter of Law to Raise Genuine Fact Issues Regarding whether Defendant was Negligent, and Plaintiff has not Challenged that Ruling

As noted above, Mississippi case law is clear that a Plaintiff must provide expert testimony that establishes the standard of care and, within a reasonable degree of medical probability, there was both a breach of that standard and the breach was the proximate cause of injury. *See Young v. University of Miss. Med. Ctr.*, 914 So.2d 1272 (Miss. Ct. App. 2005)*; Palmer v. Biloxi Regional Med. Ctr.,* 564 So.2d 1346 (Miss. 1990)(expert testimony is a "vital means" to establish a Plaintiff's prima facie case of medical negligence); *Mallet v. Carter,* 803 So.2d 504 (Miss. Ct. App. 2002)(affidavit was insufficient where expert failed to supply standard of care or evidence of causation); *Luvene v. Waldrup,* 903So.2d 748-49 (Miss. 2005).

In the instant case, the trial court reviewed the sole expert affidavit submitted by Plaintiff, and evaluated it thusly:

This Court did review the Affidavit of Dr. Karp. Regardless of any of the

> issues of expert designation or supplementation, Dr. Karp's Affidavit is insufficient. The Affidavit fails to state any of his opinions to a reasonable medical probability or certainty. Nor does the Affidavit establish the applicable standards of care or state how those standards were breached by the Defendants. It does not causally relate any particular injury or damage to each or any of the alleged "failures" of Defendants. The Affidavit is conclusory.
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> * * *
>
> Dr. Karp's affidavit does not provide the standard of care on any issue or claim, does not indicate what the appropriate treatment or care would be, does not delineate how the standard was breached, does not state that but for the breach the injury or condition would not have occurred, and does not causally connect each breach to any particular injury.

(R. at 705-06).

The trial court found that the affidavit failed, on its face, to meet the clear requirements of Mississippi law. Accordingly, its determination that the affidavit was insufficient as a matter of law was not clear error.

Plaintiff offers no substantive argument to refute the judge's findings with regard to the sufficiency of the affidavit. He does not argue that the trial court misstated the legal requirements for an expert affidavit in Mississippi negligence cases and submits no portion of the affidavit for the proposition that the judge's assessment of it was incomplete or incorrect. Instead, Plaintiff blindly argues that the judge "failed to consider" the affidavit, an untenable position given the clear statement in the Order that the "Court did review the affidavit of Dr. Karp." (A.B. at 24 and R. at 705).

Plaintiff's failure to offer any substantive argument to refute the judge's ruling that the expert affidavit was legally insufficient is tantamount to a concession that the trial court was correct. "It is the duty of an appellant to provide authority in support of an

assignment of error." *Jones v. Howell*, 827 So.2d 691, 702 (Miss. 2002) *citing Hoops v. State,* 681 So.2d 521, 526 (Miss.1996); *Kelly v. State,* 553 So.2d 517, 521 (Miss.1989); *Smith v. State,* 430 So.2d 406, 407 (Miss.1983); *Ramseur v. State,* 368 So.2d 842, 844 (Miss.1979). The Supreme Court considers assertions of error not supported by citation of authority to be abandoned and procedurally barred. *Jones,* 827 So.2d at 702 *citing Thibodeaux v. State,* 652 So.2d 153, 155 (Miss.1995) and *Drennan v. State,* 695 So.2d 581, 585-86 (Miss.1997).

Because Plaintiff's expert affidavit is, and was correctly found to be, legally insufficient, and because Plaintiff offered no other expert testimony to support his case, Defendants were entitled to summary judgment. The trial court's order was thus correct and must be upheld.

B. The Court did not Abuse its Discretion in Excluding Plaintiff's Untimely Designated Expert Under URCCC 4.04(A)

Cases which have interpreted and applied URCCC 4.04(A) in Mississippi make clear that the requirements of the rule **must** be adhered to, with minor exceptions. For example, in *Mississippi Department of Wildlife v. Brannon*, 943 So.2d 53 (Miss. Ct. App. 2006), the Mississippi Court of Appeals refused to require an aggrieved party to show it was prejudiced by the failure of the other party to designate an expert under the Rule in order to obtain an order disallowing the expert testimony. However, the Mississippi Supreme Court held that the penalty of disallowance of experts who were not timely designated by Rule 4.04(A) would only be enforced where there was an earlier discovery request by the aggrieved party for expert information made pursuant to Mississippi Rule of Civil Procedure 26(b)(4). *City of Jackson v. Perry,* 764 So.2d 373,

384 (Miss. 2000).

In the instant case, Plaintiff does not dispute the lower court's finding that his designation of experts did not occur prior to the 60 day deadline of the Rule. Plaintiff also does not dispute the lower court's finding that the Defendants made a discovery request for disclosure of Plaintiff's experts five years prior to the expert designation deadline. Plaintiff instead argues his error was inadvertent and unimportant, and/or there were other remedies available to the trial judge that would have been more equitable and more appropriately serve justice.

URCCC 4.04(A) does permit a Plaintiff to request an extension from the court, or to have an untimely designated expert allowed, if he or she is able to demonstrate "special circumstances" existed for their failure to comply with the rule. However, in the present case neither the Plaintiff nor his counsel has demonstrated such "special circumstances" existed.

Both at the hearing and in their post hearing letter, Plaintiff's counsel accepted blame for the failure to timely designate experts and offered two different reasons for the failure. First, the designation date occurred around the holidays when people were distracted or busy, or, second, counsel simply failed to schedule the date for disclosure on a calendar. (T.R. at 35 and R. at 737, respectively). Neither of Plaintiff's explanations requires the trial court to allow Plaintiff to submit expert testimony under the Rule.

Although "special circumstances" are not specifically defined or described in URCCC 4.04(A), it is understood in Mississippi in connection with other similar rules that simple inadvertence or mistake of counsel does not suffice. *See generally Bacou-*

Dalloz Safety, Inc. v. Hall, 938 So.2d 820, 823 (Miss. 2006) Under Rule 6(b), "excusable neglect" is at least as strict as that of "good cause." *Crumpton v. Hegwood,* 740 So. 2d at 292, 294 (Miss. 1999). Both standards require the moving party to show an objectively sufficient reason for extending a deadline. *Corkrey v. I.R.S.,* 192 F.R.D. 66, 67 (2000). "[E]vents occurring after the entry of a scheduling order which were reasonably unforeseeable may suffice to establish good cause." *Id.* The moving party must show that the scheduling deadline could not be met despite his diligent efforts. *Id.; see also Rothermund v. City of Craig,* No. Civ.A. 00-N-311, 2000 WL 1456953 (U.S. Dist. Ct. D. Colo. Sept. 25, 2000). Simply put, "[c]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Id.* (Denying motion for enlargement of time because party failed to show that, despite diligent efforts, he could not meet the scheduling order deadline). Likewise, the mistake or inadvertence of counsel does not support a finding of good cause. *Corkrey,* 192 F.R.D. at 67; *see also* Crumpton, 740 So. 2d at 293-4; *and Fortenberry v. Mem'l Hosp. at Gulfport*, 676 So. 2d 252, 254 (Miss. 1996).

The above cited line of cases make clear that Plaintiff failed to provide any sufficient evidence of "special circumstances" to justify relieving Plaintiff from the penalty provided in the rule. Plaintiff failed to offer any explanation that suggested that he or his counsel was diligent in trying to meet the expert disclosure deadline or that the failure to disclose occurred for any reason other than (a) inadvertence or (b) a cavalier belief that counsel could ignore the deadline and later correct it via a continuance[5].

[5] In this case, Plaintiff never requested a continuance but, instead, assumed that the continuance necessitated by the court's consideration of the Motion for Summary Judgment to be sufficiently remedial of Plaintiff's blatant error.

Accordingly, the trial court committed no legal error in finding that no special circumstances existed to excuse Plaintiff from complying with the Rule.

C. The Court did not Abuse its Discretion in Refusing to Continue the Case or Seek a Cure for Plaintiff's Violation of URCCC 4.04(A)

Plaintiff argues that the trial court abused its discretion by not granting a continuance of the trial date and further argues that such a decision would have cured both the failure to timely designate the experts and any prejudice that may have accrued to Defendants by virtue of his failure to timely designate. (A.B. at 12-15). In support of this proposition, Plaintiff submits the case of *International Paper Co. v. Townsend,* 961 So. 2d 741 (Miss. Ct. App. 2007) for this Court's consideration.

In *Townsend*, the defendants, aggrieved by the one-day-late designation of the plaintiff's trial experts, **moved to continue the trial** and strike the plaintiff's experts. *Id.* at 755. (emphasis added). The trial court ruled that there was no need for a continuance, but continued the trial by one day to "comply" with the sixty (60) day requirement of Rule 4.04, and the defendants therein appealed. *Id.* The Court of Appeals reviewed that ruling and held that the trial court abused its discretion by not granting the aggrieved party its requested continuance of trial. *Id.*

Townsend is not authority for the proposition that a trial court abuses its discretion if it fails to grant relief to a party which does not comply with the requirements of the Rule. Clearly, the issue in *Townsend* was whether the refusal to grant a continuance to the aggrieved party, not the violating party, a distinction noted by the trial court in this case. (R. at 705, "*Townsend* focuses on whether or not a continuance should have been granted. That is not the issue in this case.") .

The rule is clear that "the court **will not** allow testimony at trial . . ." unless the sixty day deadline is complied with. (R. at 698)(emphasis added). *See McFadden v. State,* 580 So.2d 1210, 1215 (Miss. 1991)(words such as "shall, will, or must" are mandatory in nature). Through the use of mandatory language, no judicial discretion is permitted, and, contrary to Plaintiff's assertion, there is no requirement for prejudice by the adverse party. (R. at 698) *See In the Interest of D.D.B. v. Jackson County Youth Court,* 816 So.2d 380, 383 (Miss. 2002)(where mandatory language is used, it eliminates any possible interjections of judicial discretion). As the trial court correctly noted, the Mississippi Supreme Court "discourage[s] trial courts from granting continuances because of discovery violations in civil cases, particularly where the surprised party has gone to some expense and trouble in preparing to try the case on the day it is set." *Read v. Southern Pine Electric Power Assoc.*, 515 So.2d 916 (Miss. 1987)(citation omitted)(R. at 704).

If this Court were to accept Plaintiff's argument that a continuance is the proper remedy for a total and willful disregard for the Rules, it would render Rule 4.04 meaningless as each time the rule was violated, the violating party could simply urge for a continuance. Moreover, such a tactic by dilatory parties could be used to subvert trial dates and undermine a trial court's discretion. In short, a rule which is not enforced is not rule at all. *Salts v. Gulf Nat. Life Ins. Co.*, 872 So. 2d 667, 674 (Miss. 2004).

Plaintiff cites multiple cases in which experts were permitted to testify despite being designated less than sixty (60) days prior to trial and argues that "long-standing" precedent does not support the trial court's exclusion. *See, Motorola Communications and Electronics, Inc. v. Wilkerson,* 555 So.2d 713 (Miss. 1989)(cited on A.B. at 18);

Harris v. General Host Corp., 503 So.2d 795 (Miss. 1987)(cited on A.B. at 17). However, none of those cases involved application of the Rule, as they pre-dated its enactment on May 1, 1995. As such, the pre-Rule 4.04 cases have no bearing and are merely a ruse to distract this Court away from Plaintiff's blatant and inexcusable error.

In a similar vein, Plaintiff submits various cases where Rule 4.04 was mentioned but was not substantively at issue. For example, *Troupe v. McAuley,* 955 So.2d 848 (Miss. 2007) mentions Rule 4.04(A) and the fact that a Motion to Strike Plaintiff's Designation of Expert Witnesses was filed by the Defendants therein due to the Plaintiff's failure to designate in conformity with the Rule. However, neither Rule 4.04 nor the Motion to Strike is specifically analyzed or discussed as the Court could "find nothing in the record concerning the trial court's disposition of these motions." *Id.* at 851. Instead, the Court concluded that the trial court correctly struck Plaintiff's witness on grounds that he was not qualified as an expert in the area in which he was proffered and upheld the trial court's directed verdict for Defendant. *Id.* at 858.

Plaintiff also cites *Warren v. Sandoz Pharmaceuticals Corp.,* 783 So.2d 735 (Miss. Ct. App. 2002). In the *Warren* case, Plaintiff objected to the testimony of an expert called by Sandoz who had not specifically been designated by Sandoz. However, the court noted that Sandoz had timely filed a "blanket designation" stating that it might call any expert designated by Warren or any co-defendant, but had not simply listed any expert by name. The Court of Appeals held that the blanket designation shifted the burden to Warren to seek further supplementation and, as Warren did not, the Court of Appeals found there was no error in the trial court's admission of the expert's testimony. *Id.* at 743.

As noted by the trial court here, this case is distinguishable from *Warren.* "There has been no prior designation of [Deiorio's Experts] by anyone. Defendants had no information about them from any source before December 11, 2006. There was no general or blanket designation to put Defendants on notice that they needed to seek supplementation regarding the [proposed experts]". (R. at 703).

Similarly, the case of *Caracci v. International Paper Company* does not stand for any authority involving the Rule. 699 So.2d 546 (Miss. 1997). In *Caracci,* the plaintiff's discovery responses *identified* what experts plaintiff would call at trial. *Id.* at 547. While, defendant thought that the identification of the consulting firm as experts was insufficient, he informed plaintiff's counsel that he would address the issue later. *Id.* Plaintiff subsequently filed an unsworn supplementation attaching a damage report to its expert witness interrogatory response. *Id.* at 550. The trial court refused to permit plaintiff's experts at trial due to the untimely designation, and the Supreme Court found this to be too harsh a sanction. *Id.* at 557.

The Court found that Caracci had been aware of the deficiencies when plaintiff submitted his response regarding his trial experts. *Id.* The Court reasoned that "'[w]here an answer may **at worst** be held 'evasive,' the discovering party must seek and obtain an order compelling a more detailed response as a precondition of obtaining Rule 37(b) sanctions. . ." *Id.* (citation omitted).

Clearly, *Caracci* is not applicable to the instant matter. Defendants have not sought Rule 37(b) sanctions; instead, they moved for summary judgment due to Plaintiff's failure to timely designate under Rule 4.04(A). Here, Plaintiff did not file an "evasive" discovery answer, rather, Plaintiff specifically stated that it had no experts and

never timely supplemented the response.

As such, the remedy of refusal to allow the testimony of Plaintiff's experts rests solely in Rule 4.04(A), and the Rule does not state, and its language cannot be contorted into the conclusion, that an aggrieved party must first file a Motion to Compel in order to obtain the relief provided by the Rule. As *Caracci*'s rationale is grounded in Rule 37(b), it cannot be applied to the instant case.

Rule 4.04 is clear in that it contains both a mandate and a remedy for non-compliance. In the event a party does not timely and properly designate his experts at least 60 days prior to trial, and does not show special circumstances for his failure to so, the trial court cannot permit the experts to testify at trial. It does not require the Court to look to other remedies or to other cases to determine what the proper course of action is for a party who violates the rule, absent special circumstances. If the rule is not strictly complied with, then the untimely designated expert shall not be allowed to testify at trial. "To hold otherwise would render . . . the rule meaningless and one which we should simply judicially abrogate if it is not going to be enforced. A rule which is not enforced is no rule at all." *Salts v. Gulf Nat. Life Ins. Co.,* 872 So.2d 667, 674 (Miss. 2004).

Even so, the trial court considered, and declined, the Plaintiff's argument with respect to the case of *Thompson v. Patino*[6], 784 So.2d 220 (Miss. 2001). In *Thompson*, unlike in the instant case, no trial date had been set. Moreover, as the trial court noted "Thompson pursued her case, not perfectly, but fairly diligently from filing until dismissal." *Id.* at 226. (R. at 703). However, "Deiorio's supplementation was not

[6] Again, this case did not deal with Rule 4.04.

seasonable . . . It cannot be said that Deiorio has diligently pursued his case; that he supplemented in detail; or that he has presented arguable questions of fact. Further, the Mississippi Supreme Court has specifically held that the *Thompson* decision 'is clearly limited to the facts of that case and does not stand for the proposition that a trial court may never strike an expert affidavit in response to a discovery violation.' *Bowie v. Monfort Jones Memorial Hospital,* 861 So.2d 1037, 1047, ¶ 12 (Miss. 2003)." (R. at 704).

D. The Court did not Commit Clear Error in Ruling that Plaintiff Could not Submit Expert Testimony due to His Failure to Seasonably Supplement his Interrogatory Responses

In addition to excluding Plaintiff's expert testimony because of non-compliance with Rule 4.04(A), the trial court also held the testimony should be excluded because Plaintiff's supplementation "was not seasonable and did not give Defendants sufficient time to prepare before trial." (R. at 704). Seasonable supplementation means "soon after new information is known and far enough in advance for the other side to prepare." *Thompson v. Patino*, 784 So.2d 220 (Miss. 2001)[7].

As noted earlier herein, Defendants propounded discovery to Plaintiff in 2001. (R. at 6). Plaintiff responded that same year and stated expert witnesses had not yet been determined. (R. at 7 and 603). Even though Plaintiff retained experts in 2003 or 2004, (T.R. at 35), he waited until mere days before the trial to file any supplementation. (R. at 603).

Plaintiff clearly did not file "soon after" his experts were known to him, or far enough in advance for the Defendants to prepare for them, and thus did not seasonably

[7] *See* further discussion of *Thompson, infra.*

supplement. As the trial court succinctly and accurately noted, "'a plaintiff in a medical malpractice case who waits three years to respond to expert interrogatories may expect her case to be dismissed with prejudice." *Id.* at 224. (*citing Palmer, supra* at 1356-63)(R. at 703). The trial court's ruling to that effect was thus not clear error.

II. Plaintiff Raises Issues for the First Time on Appeal, which Issues Cannot be Considered by the Court

Plaintiff raises, for the first time on appeal, two new issues. First, Plaintiff raises the issue of an alleged suspension of URCCC 4.04 based upon the anticipation of a scheduling order that, while ordered, was never published[8]. Nowhere in Plaintiff's pre-hearing motions or briefs, at the hearing on Defendants' Motion for Summary Judgment, or anytime before the trial court did Plaintiff raise this issue. (R. and T.R. in their entirety). Second, Plaintiff now attempts to raise the issue that the trial court had not properly set the matter for trial– despite the fact that all parties acknowledged the trial date, the Court Administrator had served Plaintiff with a Written Notice of Trial Setting or Resetting, and that all parties, including the court, were proceeding under the knowledge that the trial was set to begin on January 22, 2007. (See Supplement to Record filed by Defendants, R. at 12, A.B. and T.R. in their entirety). In addition to

[8] In fact, the suspension was only to the discovery deadline portion of Rule 4.04 and the suspension was based upon the "joint motion, *ore tenus*, of the parties for suspension of the discovery deadline under Rule. 4.04(A)." As the Court is aware, under Rule 4.04, discovery is to be completed within 90 days unless extended by Order of the Court. In the instant case, the trial court did extend this 90 day deadline, but never stated that the expert designation requirement was suspended, nor did the Court ever address the designation requirement at the hearing on the Motion for Summary Judgment.

being disingenuous[9], both of these arguments are procedurally barred and should not be considered by this Court. *Alexander v. Daniel*, 904 So.2d 172, 183 (Miss. 2005).

It has long been the rule of our State that matters brought for the first time on appeal are procedurally barred from consideration and cannot form the basis [10] of the reversal of a lower court's ruling. *Id.* at 183. ("We need not consider matters raised for the first time on appeal, which practice would have the practical effect of depriving the trial court of the opportunity to first rule on the issue, so that we can then review such trial court ruling under the appropriate standard of review.") Further, even if these were otherwise valid arguments, which Defendants contend they are not, the appellate courts cannot consider issues raised for the first time on appeal as it is "a practice that is not permitted since it is the role of an appellate court to review alleged errors committed during the trial of the case rather than to consider matters, however meritorious, that were not presented to the trial court for consideration." *Aron v. Reid*, 850 So.2d 108, 113 (Miss. 2002)(citation omitted). *See also, Boutwell v. State,* 143 So. 479, 482 (Miss. 1932)("the trial court cannot be put in error, unless it has had an opportunity of committing error.") Since these arguments were not addressed to the trial court, they cannot form the basis for this Court to find error.

CONCLUSION

Uniform Rule of Circuit and County Court 4.04(A) mandates a remedy for non-

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[9] The Plaintiff in his pre-hearing briefs, at the hearing, and in the letter he provided to the trial court following the hearing, acknowledged the January trial date as valid and never disputed that Rule 4.04(A) was in effect.

[10] Even though this issue is procedurally barred, as Plaintiff has failed to cite authority in support of this argument, it cannot be considered by the Court in any

compliance when a party fails to timely designate experts, which is the preclusion of the submission of expert testimony by the violating party. A violating party can only obtain relief from the remedy of preclusion of expert testimony where it can provide evidence of "special circumstances" for not timely disclosing the experts. The Rule does not require aggrieved parties to demonstrate prejudice nor that they first file Motions to Compel, Motions for Continuance or other similar Motions in order to obtain the relief provided in the Rule.

It remains uncontested that Plaintiff failed to disclose his experts at least 60 days prior to the January 22, 2007 trial date as required by the Rule. The trial court thus did not commit clear legal error in ruling that Plaintiff had no required expert testimony to support his case. Its determination that Defendants were entitled to summary judgment as a result thereof is clearly correct.

Even if the trial court was incorrect in its analysis under Rule 4.04(A), the trial court properly found that Plaintiff did not seasonably supplement his discovery despite the fact that he retained two experts sometime between 2003 and 2004, and Plaintiff did not identify them until December 11, 2006—42 days before trial. This is not seasonable supplementation under Mississippi law. Furthermore, as additional grounds for dismissal, the trial court properly found that the affidavit of Dr. Karp failed to provide expert testimony that established the standard of care and, that within a reasonable degree of medical probability, there was both a breach of that standard to the Plaintiff and that breach was the proximate cause of injury to the Plaintiff. The Plaintiff offers no substantive argument to refute the judge's findings with regard to the sufficiency of the

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event. *See Jones v. Howell*, 827 So.2d 691, 702 (Miss. 2002).

affidavit on its face. As such, the trial court's determination that it was insufficient as a matter of law was correct and must be upheld.

Finally, Plaintiff's attempts to argue issues not presented to the trial court, and/or unsupported by case law, should be ignored by this Court and are procedurally barred.

The trial court correctly determined that Plaintiff failed to supply the requisite expert testimony necessary to make a prima facie case of medical negligence against Defendant because either (a) Plaintiff was barred from submitting his expert affidavit due to his failure to timely designate or identify experts or (b) Plaintiff failed to submit a legally sufficient expert affidavit. Without this required expert testimony, Plaintiff's claims fail as a matter of law and the summary judgment entered by the trial court was proper and should be upheld.

WHEREFORE, PREMISES CONSIDERED, the Appellees respectfully request that the Appellant's appeal be denied and that the decision of the trial judge be affirmed.

Respectfully submitted,

BY: _____

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CERTIFICATE OF FILING

I hereby certify that I, Nicole Huffman, counsel for the Appellees, on this the 14th day of January, 2007, have caused to be hand delivered to the Mississippi Supreme Court Clerk's Office the following:

The original and four (4) copies of the Appellees' Brief;

The original and four (4) copies of Appellees' Record Excepts; and

One disk containing an electronic copy of the Appellees' Brief.

Attorney for Appellees

CERTIFICATE OF SERVICE

I, NICOLE HUFFMAN, do hereby certify that I have this day caused to be mailed, by US First Class Mail, postage prepaid, pursuant to Miss. R. App. P. 25, a true and correct copy of the foregoing to:

Annette Mathis, Esq.
Lance Reins, Esq.
Wilkes & McHugh, PA
16 Office Park Drive, Suite 8
Hattiesburg, MS 39402

The Honorable Lisa P. Dodson
Harrison County Circuit Judge
Post Office Box 7575
Gulfport, MS 39506

This the_14__day of January, 2008.

NICOLE HUFFMAN

REPOUDCTION OF:

UNIFORM RULES OF CIRCUIT AND

COUNTY COURT PRACTICE

Adopted Effective May 1, 1995

Rule 4.04

DISCOVERY DEADLINES AND PRACTICE

A. All discovery must be completed within ninety days from service of an answer by the applicable defendant. Additional discovery time may be allowed with leave of court upon written motion setting forth good cause for the extension. Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial.

B. When responding to discovery requests, interrogatories, requests for production, and requests for admission, the responding party shall, as part of the responses, set forth immediately preceding the response the question or request to which such response is given. Responses shall not be deemed to have been served without compliance to this subdivision.

C. No motion to compel shall be heard unless the moving party shall incorporate in the motion a certificate that movant has conferred in good faith with the opposing attorney in an effort to resolve the dispute and has been unable to do so. Motions to compel shall quote verbatim each contested request, the specific objection to the request, the grounds for the objection and the reasons supporting the motion.