
IN THE MISSISSIPPI SUPREME COURT
Cause No. 2007-TS-00537

**Estate of Cherry M. Deiorio, by and through
Chad Deiorio, Administrator of the Estate of
Cherry M. Deiorio, for the use and benefit of
the Estate of Cherry M. Deiorio, Deceased, and
for the use and benefit of the wrongful the death
beneficiaries of Cherry M. Deiorio, Deceased**

**Appellant/
Plaintiff**

v.

**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/
Defendants**

**APPEAL FROM THE
CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI**

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal.

Appellant:

Chad Deiorio, Administrator of the Estate of Cherry Deiorio

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Respectfully submitted,

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By: 

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None.

SUMMARY OF THE ARGUMENT

Contrary to Defendants' arguments, the Circuit Court of Harrison County abused its discretion in granting Defendants' Motion for Summary Judgment. The prior Circuit Judge handling the case had specifically entered an Order **suspending the requirements of Rule 4.04** of the Uniform Rules of Circuit and County Court Practice, yet the Court used the requirements of this rule to strike Plaintiff's experts and grant summary judgment in favor of the Defendants. R. 69A, 693-707. Plaintiff stands by his position that there is **no applicable authority** that supports the Court's use of Rule 4.04 to end Plaintiff's case in this situation. Further, neither of the Circuit Judges handling this matter ever entered a deadline for disclosure of experts. R. in its entirety. At all relevant times, it was unclear as to whether this matter would be tried in January 2007 due to Judge Vlahos' retirement and a new Judge taking the bench that month. Finally, the affidavit of Plaintiff's expert is not insufficient as a matter of law. R. 613-23. In light of these facts, the Circuit Court erred in its application of Rule 4.04 to strike Plaintiff's experts, which ultimately resulted in summary judgment in favor of the Defendants.

Ultimately, the Circuit Court continued the trial while the Court considered Plaintiff's cause of action. In doing so, the Court alleviated any potential prejudice and assisted Plaintiff's compliance with Rule 4.04. Defendants have not asserted any prejudice from Plaintiff's designation of experts forty-two days prior to trial. At most, as stated in Plaintiff's principle brief, the proper remedy was a continuance, not summary judgment.

The Circuit Court's Order places the majority of the blame for the delays in this matter on the Plaintiff. However, many of the delays can be attributed to the

Defendants or to both parties mutually through their consent. The most notable delay, however, was caused by Hurricane Katrina, and as a practical matter held this case up for the better part of a year. R.12.

Simply stated, Plaintiff's experts should not have been stricken and the affidavit of Plaintiff's expert should not have been dismissed. The affidavit of Plaintiff's expert establishes that genuine issues of material fact exist in this matter, and the Circuit Court therefore erred in granting Defendants' Motion for Summary Judgment. R. 613-23. Plaintiff requests that this Court reverse the Circuit Court of Harrison's County entry of summary judgment in favor of the Defendants and for all other relief, both general and specific, to which he is entitled.

ARGUMENT

As stated in Plaintiff's principle brief, it is important to note that the Circuit Court's grant of summary judgment was based upon the ruling that Plaintiff's experts were untimely designated pursuant to Rule 4.04(a) rather than a scheduling Order entered by the Circuit Court. R. 696-707. While trial judges "are afforded considerable discretion in managing the pre-trial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of the cases, the Mississippi Supreme Court has clearly indicated that **striking untimely filed responses and affidavits is a drastic measure that should be inflicted in limited circumstances.**" See *City of Jackson v. Presley*, 942 So. 2d 777, 781 (Miss. 2006) (quoting *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So. 2d 1037, 1042 (Miss. 2003)); contra *Thompson v. Patino*, 784 So. 2d 220, 223-24 (¶

25) (Miss. 2001) (citations omitted), emphasis added. *See also Blake v. Wilson*, 962 So. 2d 705, 709 (Miss. Ct. App. 2007) (citing *Thompson*).

I. THE CIRCUIT COURT INCORRECTLY RULED THAT DR. KARP'S EXPERT AFFIDAVIT WAS INSUFFICIENT AS A MATTER OF LAW TO RAISE GENUINE ISSUES OF MATERIAL FACT.

Defendants assert that the Circuit Court correctly ruled that Dr. Karp's expert affidavit was insufficient as a matter of law to raise genuine issues of material fact. An examination of the quotations from the Court's Order compared to the Affidavit of Dr. Karp indicates that the Court ignored the plain language contained in the affidavit. For example, the Circuit Court stated that Dr. Karp's affidavit did not establish the "applicable standards of care or state how those standards were breached by the Defendants." R. 705, Defendants' brief at p. 9. "It does not causally relate any particular injury or damage to each or any of the alleged 'failures' of Defendants." *Id.* Further, "Dr. Karp's affidavit . . . does not delineate how the standard of care 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. 706, Defendants' brief at p. 9.

In his affidavit, however, Dr. Karp stated that "during Ms. Deiorio's residency at The Boyington, the staff acted with less than and/or failed to act with ordinary or reasonable care in compliance with the applicable minimum standards of care in providing care to Ms. Deiorio and that their woefully substandard care resulted in painful injuries to her." R. 614. Prior to listing several specific categories, Dr. Karp's affidavit provides that it is his opinion that "The Boyington acted with less than and/or failed to act with ordinary or reasonable care concerning the treatment of Ms. Deiorio." *Id.* "As a

result of Defendants' failure to adequately monitor and assess Ms. Deiorio's medical condition and needs, . . . Ms. Deiorio suffered a decline in both her physical and mental condition." R. 614-15.

Dr. Karp further stated that "Defendants failed to provide Ms. Deiorio with the necessary care, treatment, and services for her to attain or maintain the highest level practicable of mental, physical and psychosocial well-being" and that such failures included:

- (1) Failure to provide the necessary measures to prevent the development of pressure sores, skin tears, excoriations, infections, malnutrition, and contractures;
- (2) Failure to provide adequate nutrition to Ms. Deiorio
- (3) Failure to consistently notify a physician of any changes in the medical status of Ms. Deiorio.
- (4) Failure to properly document care provided in a consistent manner.
- (5) Failure to obtain psychological evaluation of Ms. Deiorio's mental capabilities to continue to make medical decisions for her care.
- (6) Failure of the facility of repeatedly appraise the family of the risks of aspiration and urinary sepsis.

R. at 615. Further, "Defendants failed to monitor Ms. Deiorio's input and output. Consequently, she suffered numerous severe urinary tract infections and urosepsis. *Id.*

Following several more specific failures, Dr. Karp concluded by stating, "As a result of the Defendants' above-referenced failures and general poor nursing care, Ms. Deiorio suffered painful injuries and a decline in both her physical and mental condition."

R. 617. Finally, Dr. Karp's curriculum vitae attached to his affidavit establishes that he is qualified to testify in this matter as an expert and in regard to the applicable standard of care. R. 618-23.

In *Partin v. North Mississippi Medical Center, Inc.*, 929 So. 2d 924 (Miss. Ct. App. 2005), the Mississippi Court of Appeals examined an expert's affidavit for sufficiency. Like the Circuit Court's Order in this matter, defendant NMMC in *Partin* argued that the doctor expert's affidavit "did not make any specific reference to the applicable standard of care, breach, and causation." *Partin*, 929 So. 2d at 931. The Mississippi Court of Appeals found the defendants' argument to lack merit, because although the affidavit did not employ certain "particular terms of art," the affidavit "very clearly refer[ed] to a standard of care or duty, breach of that duty, and the injury (death) caused by that breach." *Id.* "[A] failure to use the terms of art does not render an expert's affidavit deficient." *Id.* (citing *Paepke v. North Mississippi Medical Center, Inc.*, 744 So. 2d 809, 812 (¶ 12) (Miss. Ct. App. 1999)).

When Dr. Karp's affidavit is examined under the standard set forth in *Partin*, it is clear that it is sufficient to establish that genuine issues of material fact exist in regard to Plaintiff's claims and that summary judgment was not warranted. Thus, Plaintiff requests that this Court reverse the Circuit Court of Harrison County and allow Plaintiff to proceed with his claims.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN PROHIBITING PLAINTIFF'S EXPERTS FROM TESTIFYING.

A. The Circuit Court had specifically suspended the deadlines under Rule 4.04(a), yet used these deadlines to Plaintiff's detriment.

Defendants offer no substantive argument in response to the fact that the Circuit Court previously suspended the deadlines under Rule 4.04(a), yet ultimately used these deadlines to grant summary judgment in favor of the Defendants. On October 19, 2001, the Circuit Court entered an Order on the joint *ore tenus* motion of the parties that

specifically suspended the provisions of Rule 4.04(a) of the Uniform Rules of Circuit and County Court Practice. R. 69A. This Order was never rescinded or revoked. R. in its entirety. Having suspended the deadlines under Rule 4.04(a) and not having set a specific deadline for expert disclosure, the Circuit Court should not have stricken Plaintiff's experts.

As the Mississippi Supreme Court stated in *Caracci v. International Paper Co.*, 699 So. 2d 546, 559 (Miss. 1997), "[c]ourts are courts of justice not of form," and the Plaintiff "should not be penalized for a procedural failure that may be handled without doing violence to court procedures." *Id.* at 556 (Miss. 1997) (citation omitted). This case is wholly unlike the *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So. 2d 1037, 1042 (Miss. 2003)), in which a party failed to comply with a deadline set by the Court. Instead, the Defendants in this matter alleged, and the Circuit Court ruled, that the Plaintiff failed to comply with the requirements of a rule that had been suspended by the Court upon the agreement of the parties. This was improper and should be reversed.

B. Plaintiff has distinguished the case law cited by Defendants .

Defendants cite this Court to *Mississippi Dept. of Wildlife Fisheries, and Parks v. Brannon*, 943 So. 2d 53 (Miss. Ct. App. 2006), which Plaintiff distinguished from the matter at bar in Plaintiff's principle brief on pages 16-17. See also *Harris v. General Host Corp.*, 503 So. 2d 795 (Miss. 1987), distinguished on page 17. Defendants attempt to cloud the Mississippi Court of Appeals' decision in *International Paper Co. v. Townsend*, 961 So. 2d 741 (Miss. Ct. App. 2007), by asserting that the decision revolves around a continuance. However, the salient fact remains that the defendants in *Townsend* filed a motion to strike the plaintiff's expert claiming that the expert was not

timely designated pursuant to Rule 4.04. *Townsend*, 961 So. 2d at 755. The motion to strike, only *in the alternative*, sought a continuance. *Id.* The trial court considered the issue of the untimeliness of the designation and found that, "since the designation was made fifty-nine days prior to trial, the trial should be continued for one day to comply with the sixty day requirement of Uniform Circuit and County Court Rule 4.04." *Id.* at 756. This continuance was made one week before trial was to begin. *Id.* Aside from this continuation, the court denied the motion in limine and defendants were finally able to depose the expert five days prior to trial. *Id.*

The Mississippi Court of Appeals examined whether the trial judge abused his discretion in failing to grant a continuance or in failing to strike the plaintiff's expert witness due to the untimeliness of his designation under Rule 4.04. *Id.* The Court of Appeals found that the expert's designation fifty-nine days rather than sixty prior to trial in and of itself did not prejudice the defendants. *Id.* Similarly, in this matter, Plaintiff submits that the designation of experts forty-two (42) days before trial did not in and of itself prejudice the Defendants. The Court of Appeals further held in *Townsend* that "the confused circumstances that ensued following the tardy designation did unfairly tilt the playing field, and the trial court judge abused his discretion by failing to grant a continuance of the trial." *Id.* It is important to note that the Court of Appeals felt that **a continuance, rather than the striking of the plaintiff's expert**, was the proper remedy. This decision was made in despite the fact that the Court of Appeals found that defendants were prejudiced by plaintiff's counsel informing them that the expert would not be available for deposition until six (6) days before trial, that the expert's affidavit added a new theory of liability only nine (9) days before trial, and that the

defendants were not able to actually depose the expert until five (5) days before trial. The Court of Appeals ultimately determined that the expert was not qualified to provide testimony rather than dismissing his testimony for any other reason. *Id.* at 761. No such determination has been made in this matter.

In this matter, Plaintiff designated his experts forty-two (42) days before trial, the experts did not purport to introduce any new theories of liability, and Plaintiff submits that they were available for deposition but that Defendants did not attempt to depose them, instead choosing to move for summary judgment. Under the Court of Appeals' ruling in *Townsend*, it is clear that a continuance of trial would have been the appropriate remedy rather than prohibiting the testimony of the Plaintiff's experts. The Circuit Court examined a prior version of *Townsend* before the mandate had issued in its Order, noting that "*Townsend* focuses on whether or not a continuance should have been granted" which is "not the issue in this case." R. 705. As set forth above, the continuance was a collateral matter, as the Court of Appeals' analysis and refusal to strike the plaintiff's experts in *Townsend* are directly applicable in the matter at bar.

Regarding *Troupe v. McAuley*, 955 So. 2d 848 (Miss. 2007), Defendants assert that because the Supreme Court could find nothing in the record regarding the disposition of the motion to strike the plaintiff's expert witnesses, the opinion should not be considered. It is well-settled that an appellate court may affirm a trial court if the correct result is reached, even if the trial court reached the result for the wrong reasons. *Puckett v. Stuckey*, 633 So. 2d 978, 980 (Miss. 1993). See also *Mason v. Southern Mortg. Co.*, 828 So. 2d 735, 738 (Miss. 2002). The Supreme Court certainly could have held that plaintiff's experts should have been excluded solely based on the

plaintiff's failure to comply with Rule 4.04. *Id.* at 858. Instead, however, the Court chose not to do so but to examine the education, training, and experience in the medical specialty of the health care provider defendants or knowledge of the applicable standards of care in order to determine if the plaintiff's expert should have been allowed to testify. *Id.* at 856-57.

Similarly, in the matter at bar, Plaintiff's experts should have been examined based on their education, training, and experience and ability to testify regarding the applicable standards of care rather than on the fact that they were designated less than sixty (60) days prior to trial. Thus, the Circuit Court of Harrison County should be reversed.

Defendants and the Circuit Court incorrectly analyzed *Warren v. Sandoz Pharmaceuticals Corp.*, 783 So. 2d 735 (Miss. Ct. App. 2000), asserting that the "blanket designation" in *Warren* was the deciding factor for the Court. Plaintiff submits that in *Warren*, the Court of Appeals held that the trial judge did not abuse his discretion in allowing a medical expert to testify who had been *vaguely* disclosed forty-two days before trial, the exact differential as in the case at bar. *Id.* at 744. The initial vague response to discovery in *Warren* reserved the right to call any physician or expert listed by the plaintiff or any co-defendant. *Id.* at 743. The Court of Appeals held that the trial judge did not err in allowing the expert to testify based on the fact that the plaintiff had approximately a month and a half to pursue a motion to compel: "The trial did not commence until September 15, 1997. This meant that Warren had approximately a month and a half to pursue a motion for additional supplementation." *Id.*

Unlike the party's vague designation in *Warren*, in this case Plaintiff specifically identified his medical experts a month and a half before trial. As the Court of Appeals in *Warren* determined, the sanction of dismissal or exclusion is inappropriate. Defendants should not be allowed to escape liability based on a procedural technicality. The Circuit Court of Harrison County should be reversed.

In Plaintiff's Opening Brief, Plaintiff asserted that trial date agreed upon by the parties was never entered by the Circuit Clerk. See Plaintiff's Brief at pp. 20-22. Indeed, the record certified as complete by both parties did not contain such a document, nor did Plaintiff ever receive a copy of said document. However, following the filing of Plaintiff's principle Brief, Defendants obtained a copy of an undated Notice of Setting or Re-setting that is not file-stamped but is, however, certified as a true and correct copy by the Circuit Clerk's office. After the Mississippi Supreme Court granted Defendants' Motion to Supplement the Appellate Record, Plaintiff was informed by the Harrison County Circuit Clerk's office that the document at issue could be generated at any time and does not appear in the original record prior to the instant appeal. Thus, Plaintiff stands by his assertion that the trial date was never entered by the Circuit Clerk pursuant to Rule 40 of the Mississippi Rules of Civil Procedure. The document subsequently supplemented into the record was not part of the record when Plaintiff examined the record and prepared his opening brief. Its inclusion at a subsequent time without a date is questionable at best.

CONCLUSION

As the Mississippi Supreme Court stated in *Caracci*, "[c]ourts are courts of justice not of form," and the Plaintiff "should not be penalized for a procedural failure

that may be handled without doing violence to court procedures.” *Id.* at 556 (Miss. 1997) (citation omitted). In this case, the Circuit Court did not enter a scheduling order or order of any kind regarding deadlines for the designation of experts. In fact, the Court specifically entered an Order suspending the requirements of Rule 4.04(a). However, Defendants alleged that Plaintiff failed to comply with these requirements, and the Circuit Court ruled in their favor, despite the fact that Defendants failed to cite any specific example of how they have been prejudiced by Plaintiff’s designation of experts forty-two days before trial instead of sixty days.

After the trial was ultimately continued as had been initially expected due to the retirement of the prior Circuit Judge, Defendants would in no way have been prejudiced by the testimony of Plaintiff’s expert witnesses as they would have had ample time to depose Plaintiff’s experts if they so chose and to prepare a defense. *See, e.g., Read v. Southern Pine Elec. Power Assoc.*, 515 So. 2d 916 (Miss. 1987) (The trial court, over the defendant’s objections, granted a continuance due to the plaintiff’s failure to disclose her expert’s identity during discovery. The plaintiff had only informed the defendant of her expert the Friday before the case was to be tried on Monday. This Court held that there had been no prejudice to the defendant by the expert’s testimony because the continuance had allowed for preparation.).

The sanction of dismissal and/or exclusion is simply too harsh a sanction. Despite Defendants’ arguments to the contrary, dismissal of a plaintiff’s suit is a severe sanction whether it occurs under Rule 37 or Rule 4.04. Mississippi Appellate Courts have previously affirmed the following four factors as guidance in determining the appropriateness of dismissal with prejudice:

- (1) Dismissal is authorized only when the failure to comply with the court's order results from willfulness or bad faith, and not from the inability to comply.
- (2) Dismissal is proper only in [a] situation where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions.
- (3) Another consideration is whether the other party's preparation for trial was substantially prejudiced.
- (4) [D]ismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client, or when a party's simple negligence is grounded in confusion or sincere misunderstanding of the court's orders.

Ngo v. Centennial Ins. Co., 893 So. 2d 1076 (Miss. Ct. App. 2005) (citing *Pierce v. Heritage Properties, Inc.*, 688 So. 2d 1385, 1388 (Miss. 1997)).

In this case, Plaintiff's designation of experts forty-two days before trial instead of the sixty days stated in Uniform Circuit Court and County Rule 4.04(a) was not the result of willfulness or bad faith. Further, dismissal is improper as the deterrent value can be substantially achieved by the use of a less drastic sanction. See, e.g., *Read v. Southern Pine Elec. Power Assoc.*, *supra* (The Supreme Court held that there had been no prejudice to the defendant by the expert's testimony because the continuance had allowed for preparation but, as a sanction, allowed the defendant a reasonable amount of expenses or attorney's fees in preparing for and obtaining the attendance of expert witnesses for the original trial date.). In this case, Defendants' preparation for trial has not been substantially prejudiced.

Wherefore, for the reasons set forth herein and in Plaintiff's principle brief, Plaintiff respectfully requests that the Court reverse the Circuit Court of Harrison

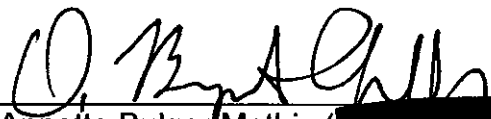
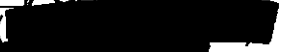
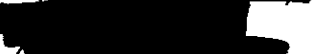
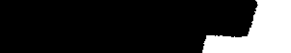

County's grant of summary judgment in favor of the Defendants and for all other relief, both general and specific, to which he is entitled.

Respectfully submitted,

Estate of Cherry M. Deiorio, by and through Chad Deiorio, Administrator of the Estate of Cherry M. Deiorio, for the use and benefit of the Estate of Cherry M. Deiorio, Deceased, and for the use and benefit of the wrongful the death beneficiaries of Cherry M. Deiorio, Deceased

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CERTIFICATE OF FILING

I hereby certify that I, D. Bryant Chaffin, counsel for the Appellant, on this 3rd day of March, 2008, deposited with the United States Post Office for delivery via First Class Mail, postage prepaid, to the Mississippi Supreme Court Clerk's Office, the following original documents and copies:

The original and five (5) copies of the above Reply Brief of the Appellant..

This certificate of filing is made pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure.



Attorney for Appellant

CERTIFICATE OF SERVICE

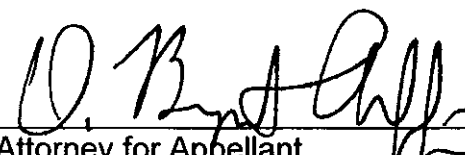
I hereby certify that a true and correct copy of the foregoing Brief of the Appellant has been furnished by United States Mail, postage prepaid, to the following on this the 3rd day of March, 2008:

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Reproduction of Statutes, Rules, and Regulations

UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE
Adopted Effective May 1, 1995

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.