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IN THE MISSISSIPPI SUPREME COURT  
Cause No. 2007-T8-00537

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**COPY**

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

**FILED**

OCT 05 2007

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

**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

---

BRIEF OF APPELLANT

---

ORAL ARGUMENT REQUESTED

---

Annette Bulger Mathis (MS Bar #101031)  
Kenneth L. Connor (MS Bar #101067)  
Susan Nichols Estes (MS Bar # 101038)  
D. Bryant Chaffin (MS Bar #100379)  
Wilkes & McHugh, P.A.  
16 Office Park Drive, Suite 8  
Post Office Box 17107  
Hattiesburg, MS 39404  
(601) 545-7363  
(601) 545-7364 facsimile  
Attorneys for Appellant

---

IN THE SUPREME COURT OF MISSISSIPPI  
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

VS:

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

**APPELLANT'S RECORD EXCERPTS**

Attached below, pursuant to Rule 30 of the Mississippi Rules of Appellate  
Procedure, are Appellant's Record Excerpts for consideration in this matter.

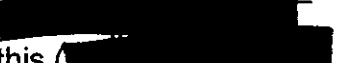
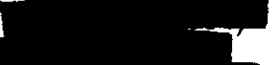
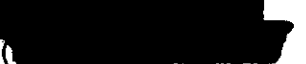

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c.	Stipulation Regarding Disclosure of Experts.....	R. 82-83
d.	Defendants' Motion for Summary Judgment.....	R. 411-426
e.	Plaintiff's Response to Defendants' Motion for Summary Judgment and exhibits (w/o Ex. A, Plaintiff's complaint).....	R. 565-571, 603-640
f.	Order Granting Summary Judgment.....	R. 693-707

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 death  
beneficiaries of Cherry M. Deiorio, Deceased

By: 

D. Bryant Chaffin (   
Annette Bulger Mathis (   
Kenneth L. Connor (   
Susan Nichols Estes (   
WILKES & MCHUGH, P.A.  
Post Office Box 17107  
Hattiesburg, MS 39404-7107  
601-545-7363//601-545-7364 facsimile  
ATTORNEYS FOR APPELLANT

### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Record Excerpts has been furnished by United States Mail, postage prepaid, to the following on this the 5<sup>th</sup> day of October 2006:

Hon. Lisa Dodson  
Harrison County Circuit Court Judge  
P. O. Box 7575  
Gulfport, MS 39506

Sam Morris, Esq.  
Wise, Carter, Child & Caraway, P.A.  
600 Heritage Building  
401 E. Capitol St.  
Jackson, MS 39201

Lynda C. Carter, Esq.  
Nicole Huffman, Esq.  
Wise, Carter, Child & Caraway, P.A.  
154 Porter Avenue  
Biloxi, Mississippi 39530

Daniel Dias, Esq.  
Mancuso & Dias, P.A.  
2002 North Lois Avenue, Suite 510  
Tampa, FL 33607-2393

  
Attorney for Appellant

CASE NO: A24010100323

Litigant: DEIORIO, CHERRY M  
081803 NOTICE OF VIDEO DEPOSITION F/B RICHARD E. CIRCEO  
Litigant: DEIORIO, CHERRY M  
ELIZABETH (HERNDON) SPRENGER  
082903 SECOND SUPP RESPONSES TO INTERROG/REQUEST FOR PROD F/B RICHARD CIRCEO  
Litigant: DEIORIO, CHERRY M  
NOTICE OF SERVICE  
091603 SUBPOENA DECUS TECUM RETURNED ON AG'S OFFICE BY P/S/P/S  
Litigant: PENSACOLA HEALTH TRUST INC  
Completed: 9/08/03  
Disposition: SERVICE RETURN  
CUSTODIAN OF RECORDS AT AG'S OFFICE  
091703 SUBPOENA DECUS TECUM RETURNED ON COMMUNITY LIVING CENTER BY P/S/P/S  
Litigant: DEIORIO, CHERRY M  
Completed: 9/08/03  
Disposition: SERVICE RETURN  
C/O VIRGIE JACKSON RECORDS CUSTODIAN  
091703 SUBPOENA DECUS TECUM RETURNED ON MICHAEL ALBERT BY P/S/P/S  
Litigant: DEIORIO, CHERRY M  
Completed: 9/08/03  
Disposition: SERVICE RETURN  
C/O JESSICA CRAWFORD RECORDS CUSTODIAN  
091703 SUBPOENA DECUS TECUM RETURNED ON ST. DOMINIC BY P/S/P/S  
Litigant: DEIORIO, CHERRY M  
Completed: 9/08/03  
Disposition: SERVICE RETURN  
C/O TINA JONES RECORDS CUSTODIAN  
091703 SUBPOENA DECUS TECUM RETURNED ON ADELE THEIL BY P/S/P/S  
Litigant: DEIORIO, CHERRY M  
Completed: 9/08/03  
Disposition: SERVICE RETURN  
C/O LISA MCCAY RECORDS CUSTODIAN  
091703 SUBPOENA DECUS TECUM RETURNED ON RIVER OAKS BY P/S/P/S  
Litigant: DEIORIO, CHERRY M  
Completed: 9/08/03  
Disposition: SERVICE RETURN  
C/O TONY JONES RECORDS CUSTODIAN  
091803 LETTER FROM ATTORNEY TO CLERK  
Litigant: DEIORIO, CHERRY M  
092503 SUBPOENA DECUS TECUM RETURNED ON BOYINGTON BY P/S/P/S  
Litigant: DEIORIO, CHERRY M  
Completed: 8/14/03  
Disposition: SERVICE RETURN  
092603 RESPONSE TO MOTION F/B WILLIAM MCDONOUGH  
Litigant: PENSACOLA HEALTH TRUST INC  
RESPONSE TO MOTION TO COMPEL

I hereby certify that the above and foregoing  
constitutes a true and correct copy.

Gayle Parker  
Circuit Court Clerk

By Lisa Hick D.C.

CASE NO: A24010100323

NOTICE OF SERVICE

100103 3RD SUPP ANSWER TO INTERR & REQUEST FOR PRODUCTION F/B RICHARD CIRCEO  
Litigant: DEIORIO, CHERRY M

NOTICE OF SERVICE

100603 JURY TRIAL

Begin Time: 9:30 AM End Time: 5:00 PM

Completed: 10/06/03

Litigant: DEIORIO, CHERRY M

Court Room: GCIR3 Judge : KOSTA N. VLAHOS

Comments: SET BY ORDER

CONT. BY AGREEMENT

101003 SUBPOENA DUCUS TECUM RETURNED BY P/S/P/S

Litigant: PENSACOLA HEALTH TRUST INC

Completed: 9/29/03

Disposition: SERVICE RETURN

RUTH MONTALVO -RECORDS CUSTODIAN

101003 SUBPOENA DUCUS TECUM RETURNED BY P/S/P/S

Litigant: PENSACOLA HEALTH TRUST INC

Completed: 9/29/03

Disposition: SERVICE RETURN

MEMORIAL HOSPITAL GPT RECORDS CUSTODIAN

101003 SUBPOENA DUCES TECUM RETURNED BY P/S/P/S

Litigant: PENSACOLA HEALTH TRUST INC

Completed: 9/29/03

Disposition: SERVICE RETURN

DONALD WEAVER MD RECORDS CUSTODIAN

101003 SUBPOENA DUCUS TECUM RETURNED BY P/S/P/S

Litigant: PENSACOLA HEALTH TRUST INC

Completed: 9/29/03

Disposition: SERVICE RETURN

STEPHEN JOHNS MD RECORDS CUSTODIAN

101003 SUBPOENA DUCUS TECUM RETURNED BY P/S/P/S

Litigant: PENSACOLA HEALTH TRUST INC

Completed: 9/26/03

Disposition: SERVICE RETURN

GARDEN PARK MEDICAL CENTER- RECORDS CUSTODIAN

111003 SUBPOENA DUCES TECUM RETURNED BY P/S/P/S

Litigant: DELTA HEALTH GROUP INC

Completed: 9/26/03

Disposition: SERVICE RETURN

111003 SUBPOENA DECUS TECUM RETURNED ON SHERRY DEIORIO

Litigant: DEIORIO, CHERRY M

Completed: 10/03/03

Disposition: SERVICE RETURN

120403 NOTICE OF VIDEO DEPOSITION F/B RICHARD CIRCEO

Litigant: DEIORIO, CHERRY M

OF SCOTT BELL-TONY HAMRICK-

I hereby certify that the above and foregoing  
constitutes a true and correct copy.

Gayle Parker

Circuit Court Clerk

By Elia Rock D.C.

CASE NO: A24010100323

012204 NOTICE OF VIDEO DEPOSITION OF SCOTT BELL F/B RICHARD CIRCEO  
Litigant: DEIORIO, CHERRY M  
012704 RENOTICE OF VIDEO DEPOSITION F/B RICHARD CIRCEO  
Litigant: DEIORIO, CHERRY M  
OF SCOTT BELL  
013004 NOTICE OF TAKING VIDEO DEPOSITION F/B RICHARD CIRCEO  
Litigant: DEIORIO, CHERRY M  
SHELLY KNIGHT AND SHEILA WILLIAMS  
013004 RENOTICE OF TAKING VIDEO DEPOSITION F/B RICHARD CIRCEO  
Litigant: DEIORIO, CHERRY M  
GENE TRIPLETT AND DANA FOSTER  
021104 MOTION FOR PROTECTIVE ORDER F/B WILLIAM MCDONOUGH  
Litigant: PENSACOLA HEALTH TRUST INC  
031804 NOTICE OF HEARING ON MOTION FOR PROTECTIVE ORDER F/B WILLIAM MCDONOUGH  
Litigant: PENSACOLA HEALTH TRUST INC  
031904 RESPONSE TO MOTION FOR PROTECTIVE ORDER F/B CHRISTINE ALTHOFF  
Litigant: DEIORIO, CHERRY M  
032404 MOTION TO COMPEL F/B RICHARD CIRCEO  
Litigant: DEIORIO, CHERRY M  
MOTION TO COMPEL DEPO ANSWERS AND FOR SANCTIONS  
032604 NOTICE OF CANCELLATION OF VIDEO DEPOSITION F/B RICHARD CIRCEO  
Litigant: UNIDENTIFIED ENTITIES 1 THROUGH 10  
032904 NOTICE OF HEARING F/B RICHARD CIRCEO  
Litigant: UNIDENTIFIED ENTITIES 1 THROUGH 10  
040504 RESPONSE TO MOTION TO COMPEL F/B WILLIAM MCDONOGH  
Litigant: BELL, SCOTT J  
041604 REPLY TO RESPONSE TO MOTION TO COMPEL F/B CHRISTINE ALTHOFF  
Litigant: UNIDENTIFIED ENTITIES 1 THROUGH 10  
REPLY TO MOTION TO COMPEL DEPOSITION ANSWERS AND FOR SANCTIONS COUNTER  
MOITON TO DEEM DEPOSITION TERMONATED ALTERNATIVELY COUNTER MOTION FOR  
SANCTIONS AND FOR A PROTECTIVE ORDER AND MOTION TO COMPEL ATTENDENCE  
OF JIM WILKES ESQ TO ATTEND HEARING ON PLT MOTION TO COMPEL  
042704 MOTIONS  
Begin Time: 9:30 AM End Time: 5:00 PM Completed: 04/27/04  
Litigant: UNIDENTIFIED ENTITIES 1 THROUGH 10  
Court Room: GCIR3 Judge : KOSTA N. VLAHOS  
Comments: MOTION TO COMPEL & FOR SANCTIONS AND DEFT'S MOTION FOR PROT.  
ORDER NOTICED BY RICHARD CIRECO  
092104 ENTRY OF APPEARANCE OF/F/B JAMES MCHUGH  
Litigant: DEIORIO, CHERRY M  
092104 ENTRY OF APPEARANCE OF MICHAEL FULLER JR F/B JAMES MCHUGH  
Litigant: DEIORIO, CHERRY M  
121704 NOTICE OF APPEARANCE AS COUNSEL F/B JAMES THORNTON  
Litigant: DEIORIO, CHERRY M  
122304 PLT'S COMBINED SET OF DISCOVERY CONCERNING INS MATTERS F/B J THORNTON  
Litigant: DEIORIO, CHERRY M

I hereby certify that the above and foregoing  
constitutes a true and correct copy.

Gayle Parker

/Circuit Court Clerk

By Lila Luck D.C.

CASE NO: A24010100323

NOTICE OF SERVICE  
012805 NOTICE OF SERVICE  
Litigant: PENSACOLA HEALTH TRUST INC  
RESPONSE TO PLAINTIFFS REQUEST FOR ADMISSION CONCERNING INSURANCE  
COVERAGE  
020305 NOTICE OF SERVICE  
Litigant: PENSACOLA HEALTH TRUST INC  
RESPONSE TO PLAINTIFFS COMBINED DISCOVERY CONCERNING INSURANCE  
COVERAGE  
032905 NOTICE OF DEPOSITION/TO BE TAKEN ON SCOTT BELL ON 4/11/05 AT 9AM  
Litigant: PENSACOLA HEALTH TRUST INC  
040505 WITHDRAWAL OF NOTICE OF DEPOSITION OF SCOTT BELL F/B W MCDONOUGH, JR  
Litigant: DELTA HEALTH GROUP INC  
053006 REQUEST FOR ISSUANCE OF SUBPOENA DUCES TECUM F/B ANNETTE BULGER MATHIS  
Litigant: DEIORIO, CHERRY M  
053006 SUBPOENA DUCES TECUM ISSUED TO MR. TIM HOWARD OF MS ATTY GENERAL OFC  
Litigant: DEIORIO, CHERRY M  
MLD BK TO ATTY FOR SERVICE  
060806 ENTRY OF APPEARANCE F/B ANNETTE MATHIS  
Litigant: DEIORIO, CHAD  
060806 ENTRY OF APPEARANCE F/B ANNETTE MATHIS  
Litigant: DEIORIO, CHAD  
061906 ENTRY OF APPEARANCE F/B LYNDY CARTER  
Litigant: PENSACOLA HEALTH TRUST INC  
062806 MOTION FOR SCHEDULING ORDER AND TRIAL SETTING F/B ANNETTE MATHIS  
Litigant: DEIORIO, CHERRY M  
070506 PLT'S MOTION TO COMPEL DEF'S ANS & RESPONSES TO INT & F/B A. MATHIS  
Litigant: DEIORIO, CHERRY M  
AND 1 ST REQUEST FOR PRODUCTION  
070706 MOTION TO WITHDRAW AS COUNSEL OF RECORD F/B WILLIAM MCDONOUGH  
Litigant: PENSACOLA HEALTH TRUST INC  
071006 NOTICE OF HEARING ON 7-17-06 F/B ANNETTE BUGLER MATHIS  
Litigant: DEIORIO, CHAD  
071306 RESPONSE TO PLAINTIFF'S MOTION FOR SCHEDULING ORDER F/B LYNDY CARTER  
Litigant: PENSACOLA HEALTH TRUST INC  
AND TRIAL SETTING  
082406 NOTICE OF DEPOSITION F/B LYNDY CARTER OF CHAD DEIORIO, ELIZABETH  
Litigant: PENSACOLA HEALTH TRUST INC  
RULTAND, BRANDY DEIORIO, MICHELLE IRBY ON 9/20/06 THRU 9/21/06  
083006 PLT'S SUPPLEMENTAL REQUEST FOR PRODUCTION TO DEF, F/B ANNETTE MATHIS  
Litigant: DEIORIO, CHERRY M  
DELTA HEALTH GROUP, INC  
091106 DEF'S SUPPLEMENTAL RESPONSES TO PLT'S INTERROGATORIES F/B NICOLE  
Litigant: PENSACOLA HEALTH TRUST INC  
HUFFMAN AND FIRST REQUEST FOR PRODUCTION  
100306 DELTA HEALTH GROUP'S RESPONSES TO PLT'S F/B NICOLE HUFFMAN

I hereby certify that the above and foregoing  
constitutes a true and correct copy.

Gayle Parker

Circuit Court Clerk

By Ella Lock D.C.

CASE NO: A24010100323

Litigant: DELTA HEALTH GROUP INC  
SUPPLEMENTAL REQUEST TO PRODUCE  
110706 NOTICE OF TRIAL SETTING  
Litigant: DEIORIO, CHAD  
Quantity: 1  
DEIORIO, CHAD  
111606 PLT'S MOTION TO COMPEL DEPOSITIONS F/B ANNETTE BULGER MATHIS  
Litigant: DEIORIO, CHERRY M  
111606 AMENDED NOTICE OF HEARING F/B ANNETTE BULGER MATHIS ON JANUARY 12  
Litigant: DEIORIO, CHERRY M  
TH AT 9:00  
111606 NOTICE OF HEARING F/B ANNETTE BULGER MATHIS ON JANUARY 12TH AT  
Litigant: DEIORIO, CHERRY M  
9:00  
111606 NOTICE OF TAKING VIDEO DEPOSITION F/B ANNETTE MATHIS ON NANCY HOLSTON  
Litigant: DEIORIO, CHERRY M  
DECEMBER 13TH AT 10:00  
111606 NOTICE OF TAKING VIDEO DEPOSITION F/B ANNETTE MATHIS ON TOMMY HUSLEY  
Litigant: DEIORIO, CHERRY M  
ON DECEMBER 15TH AT 9:00  
112006 RE-NOTICE OF DEPOSITION F/B NICOLE HUFFMAN OF CHAD DEIORIO ON  
Litigant: PENSACOLA HEALTH TRUST INC  
NOVEMBER 21ST AT 9:30  
112706 DEF'S DESIGNATION OF EXPERT WITNESSES F/B LYNDIA CARTER  
Litigant: PENSACOLA HEALTH TRUST INC  
120406 NOTICE OF APPEARANCE FOR INTERVENER, F/B JEFFERY PIERCE ROYAL  
Litigant: ROYAL SURPLUS LINES INSURANCE COMP  
SURPLUS LINES INSURANCE COMPANY  
120406 VERIFIED APPLICATION FOR PRO HAC VICE F/B JEFFERY PIERCE  
Litigant: ROYAL SURPLUS LINES INSURANCE COMP  
120406 MOTION FOR ADMISSION PRO HAC VICE F/B JEFFERY PIERCE WITH ORDER  
Litigant: ROYAL SURPLUS LINES INSURANCE COMP  
SENT TO BACK  
120706 LETTER FROM SUPREME COURT CLERK'S PRO HAC VICE STATEMENT  
Litigant: DEIORIO, CHERRY M  
121106 MEMORANDUM OF AUTHORITIES IN SUPPORT OF SCOTT BELL F/B LYNDIA CARTER  
Litigant: BELL, SCOTT J  
AND ELIZABETH SPRENGER'S MOTION TO DISMISS  
121106 NOTICE OF HEARING F/B LYNDIA CARTER  
Litigant: BELL, SCOTT J  
121106 SCOTT BELL AND ELIZABETH SPRENGER'S MOTION TO DISMISS F/B LYNDIA CARTER  
Litigant: BELL, SCOTT J  
121106 LETTER FROM ATTY JEFFERY PIERCE STATING A COPY OF MS. BAR'S  
Litigant: DEIORIO, CHERRY M  
ACKNOWLEDGEMENT OF PAYMENT AS REQUIRED BY RULE 46(B)(5)  
121306 PLT'S FOURTH SUPPLEMENTAL RESPONSES TO DEF'S F/B ANNETTE MATHIS

I hereby certify that the above and foregoing  
constitutes a true and correct copy.

Gayle Parker  
Circuit Court Clerk



CASE NO: A24010100323

Litigant: DEIORIO, CHERRY M  
COMBINED INTERROGATORIES & REQUEST FOR PRODUCTION (BY NOTICE OF SERVICE)  
121406 VERIFIED APPLICATION F/B LYNDIA HUFFMAN FOR ADMISSION OF COUNSEL  
Litigant: PENSACOLA HEALTH TRUST INC  
PRO HAC VICE  
121806 SERVICE OF CLERK'S STATEMENT AND PRO HAC VICE REPORT F/B LYNDIA CARTER  
Litigant: PENSACOLA HEALTH TRUST INC  
121906 PLT'S RESPONSE TO DEF'S SCOTT BELL F/B ANNETTE BULGER MATHIS  
Litigant: DEIORIO, CHERRY M  
AND ELIZABETH SPRENGER'S MOTION TO DISMISS  
122006 PLT'S FIFTH SUPPLEMENTAL RESPONSES TO DEF'S F/B ANNETTE MATHIS  
Litigant: DEIORIO, CHERRY M  
COMBINED INTERROGATORIES AND REQUEST FOR PRODUCTION  
122706 DEF'S ITEMIZATION OF FACTS F/B NICOLE HUFFMAN IN SUPPORT OF THEIR  
Litigant: PENSACOLA HEALTH TRUST INC  
MOTION FOR SUMMARY JUDGMENT  
122706 DEF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT F/B LYNDIA  
Litigant: PENSACOLA HEALTH TRUST INC  
CARTER  
122706 DEF'S MOTION FOR SUMMARY JUDGMENT F/B NICOLE HUFFMAN  
Litigant: PENSACOLA HEALTH TRUST INC  
122706 NOTICE OF HEARING F/B NICOLE HUFFMAN ON JANUARY 12TH AT 9:00  
Litigant: PENSACOLA HEALTH TRUST INC  
122906 SUPPLEMENT TO PLT'S MOTION TO COMPEL F/B ANNETTE MATHIS DEF'S  
Litigant: DEIORIO, CHERRY M  
ANSWERS AND RESPONSES TO INTERROGATORIES AND FIRST REQUEST FOR PRODUCTION  
122906 NOTICE OF HEARING F/B ANNETTE MATHIS ON JANUARY 12TH AT 9:00  
Litigant: DEIORIO, CHERRY M  
010207 DEF'S REPLY TO PLT'S RESPONSE TO THE MOTION TO DISMISS F/B MARY PERRY  
Litigant: BELL, SCOTT J  
010807 PLT'S SIXTH SUPPLEMENTAL RESPONSES TO DEFENDANTS' F/B ANNETTE MATHIS  
Litigant: DEIORIO, CHERRY M  
COMBINED INTERROGATORIES AND REQ/FOR PRO/DOCS (NOTICE OF SERVICE OF DISCOVERY)  
010907 ORDER FOR PRO HAC VICE- DANIEL E DIAS, ESQ SHALL BE AND HEREBY IS  
Volume #: 0446 Begin Page#: 0076 End Page#: 0076  
ADMITTED TO PRACTICE PRO HAC VICE IN THE CAUSE  
011007 PLAINTIFF'S RESPONSE F/B ANNETTE MATHIS TO DEF'S MOTION FOR  
Litigant: DEIORIO, CHERRY M  
SUMMARY JUDGMENT  
011107 DEF'S REBUTTAL TO PLT'S RESPONSE TO THE MOTION F/B NICOLE HUFFMAN  
Litigant: PENSACOLA HEALTH TRUST INC  
FOR SUMMARY JUDGMENT  
011107 LETTER FROM ATTORNEY TO SUPREME COURT FOR PRO HAC VICE APPLICATION

I hereby certify that the above and foregoing  
constitutes a true and correct copy.

Gayle Parker  
Circuit Court Clerk

By Elia Lock D.C.

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

CHERRY M. DEIORIO, by and through  
CHAD DEIORIO her next friend  
for the use and benefit of CHERRY M. DEIORIO

PLAINTIFFS

vs.

CAUSE NO.: A2401-201-323

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)

DEFENDANTS

**ORDER EXTENDING TIME FOR RESPONSE TO DISCOVERY AND  
SUSPENSION OF DISCOVERY DEADLINE UNDER RULE 4.04(A)**

THIS CAUSE, is here before this Court on the joint motion, *ore tenus*, of the parties for suspension of the discovery deadline under Rule 4.04(A), and this Court being fully advised in the premises, and noting the agreement of the parties hereto, finds that the *ore tenus* motion of the parties is well taken and is hereby GRANTED. It is therefore,

ORDERED AND ADJUDGED, that the provisions of Rule 4.04(A) are suspended, and the parties are directed to meet and attempt to confer on a suitable scheduling order which includes a trial date at the earliest convenience of the parties. Further,

ORDERED AND ADJUDGED, that the defendant shall be authorized an additional 30 days from the date of this order to prepare and respond to outstanding discovery herein.

SO ORDERED, this the 16th day of October, 2001.

  
CIRCUIT COURT JUDGE

APPROVED AS TO FORM:

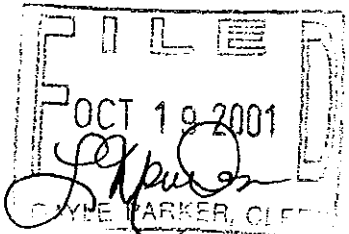
  
ATTORNEY FOR PLAINTIFF

  
ATTORNEY FOR DEFENDANT

**RECEIVED**

OCT 19 2001

DAVE PARKER  
CIRCUIT COURT CLERK



349/316


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

CHERRY M. DEIORIO, by and through  
CHAD DEIORIO her next friend  
for the use and benefit of CHERRY M. DEIORIO

PLAINTIFFS

vs.

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)

CAUSE NO.: A2401-201-323  
**FILED**  
OCT 19 2001  
GAYLE PARKER  
CIRCUIT CLERK  
BY:  D.C.

DEFENDANTS

NOTICE OF SERVICE

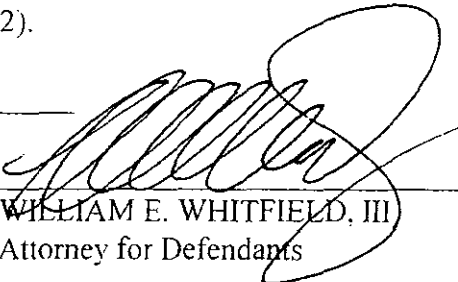
TO: Mary J. Perry, Esq.  
WILKES & McHUGH, P.A.  
One North Dale Mabry, Suite 601  
Tampa, FL 33609

Notice is hereby given, pursuant to Uniform Local Rule 6(e)(2), that the Defendants in the above styled and numbered cause has this date served in the above entitled action:

- (1) Combined Interrogatories and Requests for Production of Documents Propounded to the Plaintiffs by the Defendants.

The undersigned retains the original(s) of the above paper(s) as custodian thereof pursuant to Uniform Local Rule 6(e)(2).

Dated: 10-18-01

  
\_\_\_\_\_  
WILLIAM E. WHITFIELD, III  
Attorney for Defendants

NOTICE OF SERVICE (COMBINED DISCOVERY TO PLAINTIFFS)

**IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI  
FIRST JUDICIAL DISTRICT**

CHERRY M. DEIORIO, by and through  
CHAD DEIORIO her next friend  
for the use and benefit of CHERRY M. DEIORIO,

PLAINTIFF,

vs.

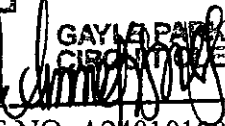
PENSACOLA HEALTH TRUST, INC.;  
DELTA HEALTH GROUP, INC.;  
SCOTT J. BELL; ELIZABETH L. (HERNDON)  
SPRENGER; JOHN DOES 1 THROUGH 10;  
and UNIDENTIFIED ENTITIES 1 THROUGH 10  
(as to THE BOYINGTON NURSING CENTER a/k/a  
THE BOYINGTON NURSING FACILITY),

DEFENDANTS.

/

**FILED**  
AUG 06 2003

GAYLA PARKER  
CIRCUIT CLERK

By  D.C.


CAUSE NO. A24010100323

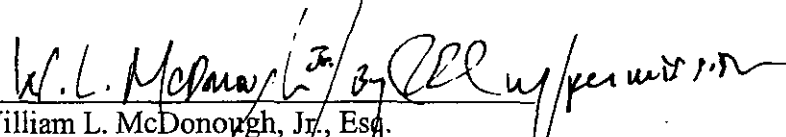
Jury Demanded

**STIPULATION REGARDING DISCLOSURE OF EXPERTS**

Each of the litigants in the above-styled case, by and through counsel, stipulate that, insofar as this matter will be mediated on August 25, 2003, the date for the disclosure of the parties' experts shall be extended. The parties further stipulate that, should the matter not be resolved at the mediation, the parties will within one (1) week of the mediation agree upon a reasonable date for expert disclosures.

Agreed to this 4 day of August, 2003.

  
Richard E. Circeo, Esq.  
WILKES & McHUGH, P.A.  
Post Office Box 17107  
Hattiesburg, MS 39404-7107  
Attorney for Plaintiff

  
William L. McDonough, Jr., Esq.  
BRYANT, CLARK, DUKES, BLAKESLEE,  
RAMSAY & HAMMOND, P.L.L.C.  
2223 14<sup>th</sup> Street  
P.O. Box 10  
Gulfport, MS 39502-0010

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

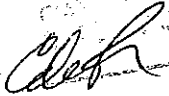
CHERRY M. DEIORIO, BY AND THROUGH  
CHAD DEIORIO HER NEXT FRIEND FOR THE  
USE AND BENEFIT OF CHERRY M. DEIORIO

PLAINTIFFS

VS

CAUSE NO. A2401-201-323

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)

 DEFENDANTS

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendants, Pensacola Health Trust, Inc., Delta Health Group, Inc., Scott J. Bell, and Elizabeth Sprenger, and file this Motion for Summary Judgment as follows:

1. Mississippi law is well settled that a Plaintiff alleging medical negligence must establish such medical negligence by expert testimony. Without an expert to articulate the duty of care, and the particular point at which said duty was breached, "a plaintiff's claim for negligence **must** fail." See *Potter v. Hopper*, 907 So.2d 376, 380 (Miss. Ct. App. 2005)(emphasis added).

2. Plaintiffs filed the Complaint in this action on July 20, 2001, **over five years ago**, against the Defendants, alleging negligence in the care and treatment of Cherry Deiorio during her residency at The Boyington from June 1999 to December 2000. As these claims are not ones within the practical knowledge and experience of lay persons,

Plaintiff is required to present expert testimony, otherwise his claims must fail as a matter of law.

3. URCCC 4.04(c) provides that, absent special circumstances, experts must be designated at least sixty days prior to trial, otherwise, they will not be allowed to testify. Thus, Plaintiff had (in addition to the five-plus years since the case was filed) **four months** from the setting of the trial date in which to timely disclose her experts for trial.

4. With the trial of this matter being set to begin on January 22, 2007, all parties' expert designations were **due on or before November 23, 2006**. It should be noted that Defendants, in accordance with the rules, designated their trial experts on November 22, 2006, including Lou Ann Alexander, whose affidavit is attached. See Exhibit "A," Defendant's Expert Designation, Exhibit "B," Affidavit of Lou Ann Alexander.

5. It is uncontested that the Plaintiff failed to timely disclose their experts by November 23, 2006 in compliance with URCCC 4.04(c). As such, this Court is prohibited from permitting such late-designated expert testimony. See, *Miss. Dept. of Wildlife, Fisheries, and Parks v. Brannon*, 2004-CA-0046-COA, ¶ 20 (Miss. Ct. App. March 28, 2006)(the trial court was in error to allow expert testimony of individual who was not designated at least sixty days before trial and in accordance with Rule 4.04). Further, the Plaintiff never requested additional time to designate experts or alleged any special circumstances which prevented the timely disclosure<sup>1</sup> of the same.

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<sup>1</sup>In all candor, on December 11, 2006, nearly three weeks too late, Plaintiff filed Supplemental Discovery Responses indicating two individuals who were to provide expert testimony at the trial of this case. It is anticipated that Plaintiff will argue that this supplementation served as a proper disclosure of experts. This is not so. URCCC 4.04(c) as well as case-law, clearly show that, absent special circumstances, unless an expert is designated

6. Defendants have provided this Court with the affidavit of Lou Ann Alexander, which states that nothing that the Defendants did or did not do caused or contributed to the injuries suffered by the Plaintiff. Exhibit "B."

7. As Plaintiff has no experts who may be allowed to testify at trial, Plaintiff cannot establish, through expert medical testimony, a prima facie case of negligence against Defendants or overcome the testimony of Lou Ann Alexander. It is uncontested that, without such expert testimony, a Plaintiff cannot survive a Motion for Summary Judgment. See, *Paepke v. North Miss. Med. Ctr., Inc.*, 744 So.3d 809 (Miss. App. 1999). Thus, it is clear that Defendants are entitled to summary judgment as a matter of law.

8. As Plaintiff cannot rebut Defendants' expert testimony, it is clear that Defendants are entitled to summary judgment as a matter of law.

9. Defendants reply on the following exhibits in support of their Motion for Summary Judgment:

Exhibit "A," Defendant's Timely Expert Disclosure

Exhibit "B," Affidavit of Lou Ann Alexander, RNC, CLNC, SANE

WHEREFORE, PREMISES CONSIDERED, for the forgoing reasons and for the

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at least sixty (60) days before trial, he or she will **not** be allowed to testify. In the instant case, Defendants sought the identity of Plaintiff's experts beginning in October of 2001— **five years before the disclosure deadline**. Moreover, when Plaintiff pushed for a January trial date, he was acutely aware that, under the Rules, he would soon be required to disclose experts. Yet Plaintiff **never** sought additional time or otherwise stated why he would be unable to timely disclose his experts. As such, Plaintiff cannot now argue that any "special circumstances" existed. In fact, as Plaintiff cannot argue such circumstances, Rule 4.04 becomes a bright line rule, with the sole inquiry being: "Did, at least sixty days before trial, Plaintiff disclose his experts." As the clear answer is "**no**," Plaintiff's untimely-disclosed experts cannot be allowed to testify. Thus, having no experts, Plaintiff's Complaint must be dismissed. To allow Plaintiff to be held to a lesser standard than Defendants would be improper and in error.



reasons as more fully articulated in their Memorandum of Authorities, Defendants respectfully request that this Court enter summary judgment in their favor and dismiss Plaintiff's Complaint, with prejudice.

Respectfully submitted,

SCOTT J. BELL, ELIZABETH SPRENGER,  
PENSACOLA HEALTH TRUST, INC., and  
DELTA HEALTH GROUP, INC.

BY: Nicole C Huffman  
LYNDA C. CARTER, MSBN 99539  
NICOLE HUFFMAN, MSBN 101457  
SAM MORRIS, MSBN 10321

**OF COUNSEL:**

WISE, CARTER, CHILD & CARAWAY  
Professional Association  
Lynda C. Carter  
Nicole Huffman  
154 Porter Avenue  
Biloxi, Mississippi 39530  
Telephone: (228) 432-5500

WISE, CARTER, CHILD & CARAWAY  
Professional Association  
Sam Morris  
600 Heritage Building  
401 E. Capitol Street  
Jackson, MS 39201  
Telephone: (601) 968-5598

**CERTIFICATE OF SERVICE**

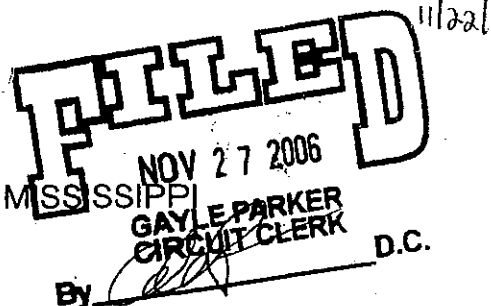
I, LYNDA C. CARTER, do hereby certify that I have this day caused to be mailed,  
by United States Mail, first-class, postage pre-paid, a true and correct copy of the foregoing  
pleading to all counsel of record as follows:

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

This the 22 day of December, 2006.

  
\_\_\_\_\_  
LYNDA C. CARTER

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



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

PLAINTIFFS

vs

CAUSE NO. A2401-201-323

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)

DEFENDANTS

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DEFENDANTS'  
DESIGNATION OF EXPERT WITNESSES

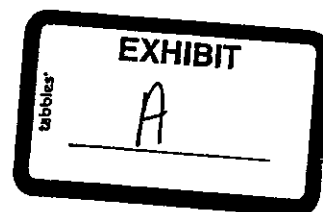
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Defendants, Pensacola Health Trust, Inc, Delta Health Group, Inc., Scott Bell, and Elizabeth (Herndon) Sprenger ("Defendants"), by and through counsel, files this their Designation of Expert Witnesses pursuant to the Rule 4.04 of the Uniform Circuit and County Court Rules and would show unto the Court the following:

1. Defendant may rely upon the following individuals as an expert witness at the trial of this cause to provide testimony based upon a reasonable degree of medical probability, on the issues of liability, causation and damages:

Dr. Michael Silverman  
Miami Jewish Home and Hospital  
5200 Northeast 2<sup>nd</sup> Avenue  
Miami, FL 33137

Lou Ann Alexander, RNC, CLNC, SANE  
Alexander and Associates, Inc.  
1123 W. Bond Avenue  
Wiggins, MS 39577



Defendants cannot ascribe opinions because neither experts nor expert opinions have

been identified by Plaintiff.

2. Defendants reserve the right to rely upon testimony from the physicians and other health care providers who treated Cherry Deiorio, who have not been specifically retained by the Defendants as an expert, but based upon their education and experience, may provide expert opinions on liability, causation and/or damages, including, but not limited to, the following:

Dr. Michael Albert  
Dr. Mark Wilson  
187 Doctors Drive  
Jackson, MS 39208

Dr. Donald Weaver  
419 Security Square  
Gulfport, MS 39507

Dr. Stephen Johns  
1110 Broad Ave  
Gulfport, Ms 39501

Dr. Adele A. Thiel  
1020 River Oaks Drive  
Jackson MS 39208

Dr. Mark Wilson

Dr. Morris Hamilton

Dr. Frank Schmidt - Radiologist  
Dr. Barbara Massony - Radiologist  
PO Box 1330  
Gulfport, MS 39502

Dr. Charles Kowalewski, DO

Dr. Robert L. Mack

Dr. Marvin Barry McCay

Dr. Carlos A. Ruiz

Dr. Milton Raines - Radiologist

Dr. Ekow J. Acquah

Dr. Raymond Tipton  
122 Ridgecrest Drive  
Lucedale, MS 39452

Dr. Joseph Jackson

Dr. Stephen McAliffe, DO

Dr. Ruth D. Montalvo  
15286 Community Road  
Gulfport, MS 39503

Healthcare Providers identified in the medical chart from  
Clinton Health & Rehabilitation,  
Clinton, MS

Healthcare Providers identified in the medical chart from  
Select Specialty Hospital,

Healthcare Providers identified in the medical chart from  
Pleasant Hills Community Living Centers  
1600 Raymond Road  
Jackson, MS 39204

Healthcare Providers identified in the medical chart from  
Boyington Nursing Center,  
c/o Wise Carter Child & Caraway  
154 Porter Ave.  
Biloxi, MS 39530

Healthcare Providers identified in the medical chart from  
River Oaks Hospital  
Flowood, MS

Healthcare Providers identified in the medical chart from  
St. Dominic Hospital  
Jackson, MS

Healthcare Providers identified in the medical chart from  
Garden Park Medical Center,  
Gulfport, MS

Healthcare Providers identified in the medical chart from  
Biloxi Specialty Hospital,

Nurses and care providers identified in the chart of  
Memorial Hospital of Gulfport , including:  
Joel B. Burwell, DO

Sartin's Vital Care  
4300 Fifteenth Street  
Gulfport, MS 39501

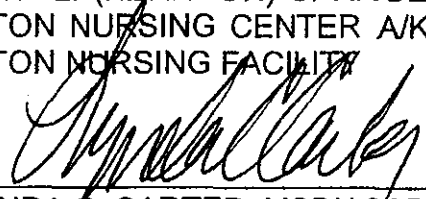
3. Defendants reserve the right to rely upon testimony from any adverse expert designated by the Plaintiff.

4. Defendants reserve the right to supplement this designation once additional discovery has been conducted including depositions, and once the Plaintiff has designated expert witnesses, if any.

Respectfully submitted,

PENSACOLA HEALTH TRUST, INC.; DELTA  
HEALTH GROUP, INC.; SCOTT J. BELL;  
ELIZABETH L. (HERNDON) SPRINGER; THE  
BOYINGTON NURSING CENTER A/K/A THE  
BOYINGTON NURSING FACILITY

BY:

  
LYNDA C. CARTER, MSBN 99539  
NICOLE HUFFMAN, MSBN 101457  
SAM MORRIS, MSBN 10321

**OF COUNSEL:**

WISE, CARTER, CHILD & CARAWAY  
Professional Association  
Lynda C. Carter  
Nicole Huffman  
154 Porter Avenue  
Biloxi, Mississippi 39530  
Telephone: (228) 432-5500


WISE, CARTER, CHILD & CARAWAY  
Professional Association  
Sam Morris  
600 Heritage Building  
401 E. Capitol Street  
Jackson, MS 39201  
Telephone: (601) 968-5598

**CERTIFICATE OF SERVICE**

I, LYNDA C. CARTER, do hereby certify that I have this day caused to be mailed, by United States Mail, first-class, postage pre-paid, a true and correct copy of the foregoing pleading to all counsel of record as follows:

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

This the 22<sup>nd</sup> day of November, 2006.

  
\_\_\_\_\_  
LYNDA C. CARTER

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

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

PLAINTIFFS

VS

CAUSE NO. A2101-201-323

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)

DEFENDANTS

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AFFIDAVIT OF LOU ANN ALEXANDER, RNC, CLNC

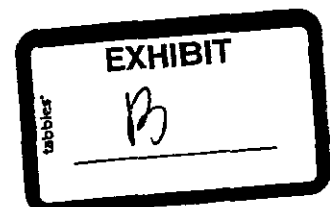
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STATE OF MISSISSIPPI

COUNTY OF STONE

PERSONALLY CAME AND APPEARED BEFORE ME, the undersigned  
authority, in and for the County and State aforesaid, Lou Ann Alexander, RNC, CLNC,  
who, having been first by me duly sworn, states on her oath the following:

1. My name is Lou Ann Alexander, RNC, CLNC, and I am an adult resident  
citizen of the State of Mississippi. I am a licensed and practicing nurse in the State of  
Mississippi. A copy of my curriculum vitae is attached hereto.
2. The testimony in this Affidavit is based upon my review of the Complaint  
filed by the Cherry Delorio, by and through Chad Deiorio, her next friend, for the use  
and Benefit of Cherry Delorio against Pensacola Health Trust, Inc., Delta Health Group,  
Inc., Scott Bell, and Elizabeth Sprenger and the medical records concerning the care





and treatment of Cherry Deiorio that is the subject of this lawsuit, including records from The Boyington and Gulfport Memorial Hospital.

3. My conclusions and opinions are based upon my knowledge, training and experience as a licensed nurse, as well as my knowledge, training, and experience with geriatric patients, including nursing homes residents. The opinions contained in this Affidavit are given to a reasonable degree of medical probability.

4. It is my opinion that the staff and employees of Pensacola Health Trust, Inc. and/or Delta Health Group, Inc. appropriately cared for and monitored Ms. Deiorio. Further, the monitoring, care and treatment provided to Cherry Deiorio by the employees and staff of Pensacola Health Trust, Inc. and/or Delta Health Group, Inc., during her residency at The Boyington, complied in all respects to the standard of care to be expected of them and that nothing they did or did not do, caused or contributed to the injuries of Cherry Deiorio, as alleged by the Plaintiff.

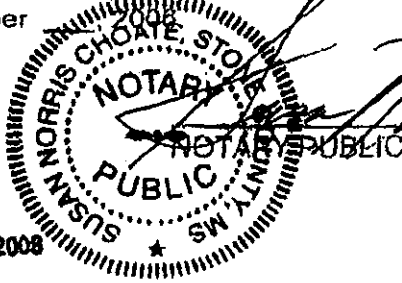
FURTHER AFFIANT SAYETH NAUGHT.

  
Lou Ann Alexander, RNC, CLNC

STATE OF MISSISSIPPI,

COUNTY OF Stone.

SWORN TO AND SUBSCRIBED before me, You Ann Alexander, R.I.C., CLNC,  
(his the 22 day of December



My Commission Expires:

MY COMMISSION EXPIRES MAY 19, 2008

Curriculum Vitae

***Lou Ann Alexander, RNC, CLNC, SANE***

***Alexander & Associates, Inc.  
Medical-Legal Nurse Consultants  
1123 West Bond Avenue  
Wiggins, Ms. 39577  
Telephone: (601) 928-6036  
Fax: (601) 928-9207***

**EDUCATION:**

October 2001:

University Medical Center, Jackson, MS.  
Sexual Assault Nurse Examiner (SANE) under the authority of the Mississippi Coalition  
Against Sexual Assault

September 2001:

Medical-Legal Consulting Institute, Houston, TX.  
Board Examination Certified under the authority of the National Alliance for Certified  
Legal Nurse Consultants (CLNC). Attended and completed intensive training for  
Medical-Legal Nurse Consulting through the Institute under the instruction of LNC  
Pioneer and Institute founder, Vickie L. Millazzo, RN, MSN, JD

May 1990:

University Medical Center, Jackson, MS.  
Board Examination Certified under the authority of the American Nurses Credentialing  
Center as a Nurse Specialist in Gerontological Nursing (RNC)

May 1980:

Jones County Junior College, Ellisville, MS.  
Associate Degree in Nursing. Board Examination Licensed as a Registered Nurse (RN)  
under the authority of the Mississippi State Board of Nursing. Graduated with High  
Honors, Deans List, Class Officer, Who's Who, Academic Scholarship

May 1977:

Mize High School. Graduated with High Honors, Beta Club Officer, Class  
Officer, Who's Who Among High School Students, Academic Scholarship

## EXPERIENCE:

September 2001 – Present: Alexander and Associates Inc. Medical–Legal Nurse Consultants; President and Founder; Trained through the Medical – Legal Consulting Institute, Inc. Houston, TX; Specializing in Long Term Care

### *Responsibilities:*

*Screen and analyze medical malpractice/general negligence cases for merit; define deviations from, and adherences to, the applicable Standards of Care; conduct literature research and integrate standards/guidelines in the case analysis; locate and interface with expert witnesses; assist with case development through all phases of litigation; organize, tab, and paginate medical records; Healthcare Consultant for LTC*

March 2000 – September, 2001: Administrative Nursing Supervisor – Conner Cain Enterprises, Gulfport, MS (Azalea Gardens Nursing Center, Wiggins, MS and Driftwood Nursing Center, Gulfport, MS.)

### *Responsibilities:*

*Direct supervision of the Nursing Department, Nursing Department Heads, Staff Nurses and CNA; worked directly with Medical Directors and Staff Physicians; QA/QI Committee; Residential Care Planning Committee; Administrative Committee; Resident and Family Council Committee; Staffing; Scheduling; Job Performance Standards and Evaluations; Ensuring compliance with all Federal/State Regulations through the Survey Process; Standards of Care Compliance for Physicians and Nursing Staff*

April 1992 – March 2000: Patient Care Coordinator, Home Health Division – Wesley Medical Center, Hattiesburg, MS.

### *Responsibilities:*

*Coordination of physician referrals and specific patient care needs to appropriate qualified staff; compliance maintenance of Standards of Care and Policies and Procedures; Federal/State/JCAHO Regulation compliance through medical record audits and direct supervision*

January 1982 – April 1992: Administrative Nursing Supervisor – Conner Cain Enterprises, Gulfport, MS (Azalea Gardens Nursing Center, Wiggins, MS and Driftwood Nursing Center, Gulfport, MS.)

### *Responsibilities:*

*Direct supervision of Nursing Department; Nursing Department Heads; Staff Nurses and CNA; worked directly with Medical Directors and Staff Physicians; QA/QI Committees; Residential Care Planning Committee; Administrative Committee; Resident and Family Council Committee; Staffing; Scheduling; Job Performance Standards and Evaluations; Ensuring Compliance with all Federal/State Regulations through the Survey Process; Standards of Care Compliance for Physicians and Nursing Staff*

Other work history available upon request

## **COMMITTEES/ORGANIZATIONS:**

Mississippi Nurses Association – Needle Stick Task Force  
Mississippi State Department of Health - Medicaid Division/MDS Task Force  
NACLNC – National Alliance of Certified Legal Nurse Consultants  
ANCC – American Nurses Credentialing Center - Gerontological Nurses  
Wesley Medical Center – Marketing Committee  
Conner Cain Enterprises – Administrative Council; QA/QI Committee  
Stone County Rural Health Coalition  
Pearl River County Rural Health Coalition  
Hancock County Rural Health Coalition

## **REFERENCES:**

William E. Whitfield III, Esq.  
Bryant, Clark Law Firm  
Gulfport, MS. 39502  
(228) 863-1844

Patrick Pendleton, Esq.  
Alford, Clausen & McDonald  
Mobile, ALA. 36602  
(251) 432-1600

John E. Wade, Jr., Esq.  
Brunini Law Firm  
Jackson, MS. 39205  
(601) 960-6872

Jack or Tadd Parsons, Esq.  
Parsons Law Firm  
Wiggins, MS. 39577  
(601) 928-2838

H.F. Campbell, MD  
Medical Director  
Azalea Gardens Nursing Center  
Wiggins, MS. 39577  
(601) 928-5281

Deloris Compston, RN  
Administratrix  
Wesley Medical Center  
Home Health Division  
Hattiesburg, MS. 39401  
(601) 868-8450

William L. McDonough, Jr., Esq.  
Bryant, Clark Law Firm  
Gulfport, MS. 39502  
(228) 863-1844

Thomas B. Walsh, Esq.  
Alford, Clausen & McDonald  
Mobile, ALA. 36602  
(251) 432-1600

Julie Bowman, Esq.  
Copeland, Cook, Taylor & Bush  
Ridgeland, MS. 39158  
(601) 352-7500

Rebecca Taylor, Esq.  
Taylor and Taylor Law Firm  
Wiggins, MS. 39577  
(601) 928-7272

Conner Cain  
Conner Cain Enterprises  
Gulfport, MS. 39501  
(228) 832-4800

Benny Hubbard  
Skilled Health Services  
Health Care Consultants  
Magee, MS. 39111  
(601) 849-2316

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

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

**FILED**  
JAN 10 2007

GAYLE PARKER  
CIRCUIT CLERK

By 

D.C.

PLAINTIFF

vs.

Cause No. A24010100323

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),

DEFENDANTS

**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiff files this Response to Defendants Pensacola Health Trust, Inc.; Delta Health Group, Inc.; Scott J. Bell; and Elizabeth Sprenger's Motion for Summary Judgment.

1. Defendants seek inappropriate relief for 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). There is no Mississippi law to support summary judgment based on late designation of experts under Rule 4.04(A).

2. In fact, there is case law that states that exclusion of expert testimony based on insufficient designation is too harsh, inappropriate, and an abuse of discretion. See e.g., *Caracci v. International Paper Co.*, 699 So. 2d 546, 559 (Miss. 1997).

3. Summary judgment is an inappropriate sanction, and as "[c]ourts are courts of justice not of form," 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) (holding that the exclusion of expert testimony based on insufficient designation is too harsh, inappropriate, and an abuse of discretion).

4. The one case cited by Defendants is not on point because in that case, there was no designation of the expert at all. *See Mississippi Dept. of Wildlife Fisheries, and Parks v. Brannon*, 2006 WL 772872 (Miss. Ct. App. March 28, 2006). The Mississippi Court of Appeals found that the trial judge erred in allowing the witness to testify as an expert at trial when he had not been designated as such and reversed the trial judge's award of damages to the plaintiff based on evidence that the defendant had exercised reasonable care in its inspections of the walkways. *Id.* at 2006 WL 772872, \*7, 12.

5. Thorough review of Mississippi case law concerning the issue<sup>1</sup> reveals that the only other case where the court stated that expert testimony should have been excluded also involved the situation in which the expert was never disclosed prior to trial and was allowed to testify at trial. *See Harris v. General Host Corp.*, 503 So. 2d 795 (Miss. 1987).<sup>2</sup> The Mississippi Supreme Court ruled that the trial court erred in allowing the rebuttal expert to testify and reversed the jury's verdict in favor of the defendant and remanded the case to the circuit court for a new trial. *Id.* at 798. Notably, **on remand, the defendant was allowed to supplement its answer and designate the witness as an expert** and the plaintiff was not allowed to object to such designation as untimely. *Id.* n. 5.

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<sup>1</sup>This review does not include failure to timely designate experts in accordance with a court order as there is no scheduling order in this case.

<sup>2</sup>This case and any other case decided before May 1, 1995, is not based on Uniform Circuit Court Rule 4.04(A), as that rule was adopted effective May 1, 1995.

6. This case is clearly distinguishable because Plaintiff did in fact disclose his experts. Plaintiff disclosed his experts forty-two days prior to the agreed upon trial date. See Pl.'s Fourth Supplemental Resp. to Defs' Combined Interrogs. and Req. for Produc. (Dec. 11, 2006), Ex. B Plaintiff's interrogatory response not only identifies his experts but also states the substance of their opinions. See Pl.'s Fourth Supplemental Resp. to Defs' Combined Interrogs. and Req. for Produc. at 2, Ex. B. However, Defendants failed to fully comply and designate their experts on November 22, 2006, as their designation failed to state any opinions to which their experts are expected to testify. Moreover, on March 1, 2003, Defendants responded to Plaintiff's interrogatory concerning expert testimony stating that their experts were unknown. Defs.' Resp. to Pl.'s Second Set. Interrogs. and Third Req. for Produc., Ex. C. Defendants have failed to provide any supplementation as to the substance of the facts and opinions to which their experts are expected to testify.

7. Defendants have failed to inform the court of any resulting prejudice from Plaintiff's designation of experts forty-two days prior to trial.

8. Defendants cannot claim prejudice as they have had four weeks to depose Plaintiff's experts.

9. Rather than requesting depositions, Defendants have chosen to sit back and attempt to escape liability based on a procedural technicality. However, justice requires that this case be decided on its merits.

10. Because Defendants have not claimed any resulting prejudice by Plaintiff's designation of experts forty-two days before trial and have not requested a continuance, Plaintiff requests that this Court not summarily dismiss his claims and that



the trial go forward as scheduled. However, should the Court determine that prejudice would result, a continuance of trial is the appropriate remedy. See, e.g., *Motorola Communications and Electronics, Inc. v. Wilkerson*, 555 So.2d 713, 718 (Miss. 1989) (upholding the trial court's decision that **allowed the testimony of an expert identified only ten days before trial in part because the defendants failed to request a continuance**); *Nichols v. Tubb*, 609 So.2d 377, 386-387 (Miss. 1992) (determining that the plaintiff "should have moved for a continuance" if answers to interrogatories concerning experts were not being filed sufficiently in advance of the trial date); *International Paper Co. v. Townsend*, 2006 WL 279343, \*11 (Miss. Ct. App. Feb. 7, 2006)<sup>3</sup> (determining that a fifty-nine day versus a sixty day designation of expert did not in and of itself result in prejudice but in combination with other circumstances resulted in a severe prejudice that could have easily been avoided had the trial court allowed a continuation of the trial).

13. In response to Defendants' expert affidavit, Plaintiff attaches the affidavit of Jeffery Michael Karp, M.D. that clearly creates a genuine issue of material fact making summary judgment inappropriate. Aff. Jeffery Michael Karp, M.D., Ex. D. Dr. Karp lists numerous failures of Defendants and opines that such failures and the general poor nursing care provided by the Defendants caused Ms. Deiorio to suffer pressure sores, skin tears, excoriations, urinary tract infections, urosepsis, malnutrition, and contractures resulting in a decline in both Ms. Deiorio's physical and mental condition. The affidavit of Jeffery Michael Karp, M.D. clearly creates a genuine issue of material fact making summary judgment inappropriate.

---

<sup>3</sup>This opinion has not been released in the permanent law reports and is subject to revision or withdrawal.

14. Plaintiff requests that the Court deny Defendants' Motion for Summary Judgment and allow the trial to go forward as scheduled as there is no basis in law for such a sanction for 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). Exclusion of expert testimony based on insufficient designation is too harsh, inappropriate, and an abuse of discretion. See e.g., *Caracci v. International Paper Co.*, 699 So. 2d 546, 559 (Miss. 1997). Defendants have not claimed prejudice and have not requested a continuance to depose Plaintiff's experts. However, should the Court determine that prejudice would result, a continuance of trial is the appropriate remedy.

In support of this Response, Plaintiff relies upon the following attached exhibits:

**Exhibit A** – Complaint (July 25, 2001);

**Exhibit B** – Plaintiff's Fourth Supplemental Response to Defendants' Combined Interrogatories and Req. for Production. (Dec. 11, 2006);

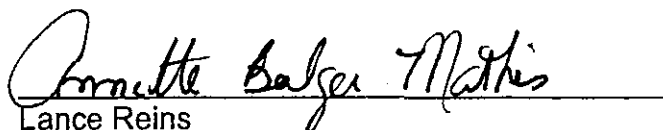
**Exhibit C** – Defs.' Resp. to Pl.'s Second Set. Interrogs. and Third Req. for Produc. (April 1, 2003); and

**Exhibit D** – Affidavit of Jeffery Michael Karp, M.D. (Jan. 8, 2007).

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

WILKES & MCHUGH, P.A.

  
Lance Reins

Mississippi Bar No. 101031  
Annette Bulger Mathis  
Mississippi Bar No. 101237  
16 Office Park Drive, Ste. 8  
Hattiesburg, MS 39402  
Mailing Address:  
P. O. Box 17107  
Hattiesburg, MS 39404  
Telephone: 601-545-7363  
Facsimile: 601-545-7364

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by First Class Mail on the following this 8<sup>th</sup> day of January 2007:

William L. McDonough, Jr.,  
Bryant, Dukes & Blakeslee, PLLC  
1639 East Pass Road  
P. O. Box 10  
Gulfport, MS 39502-0010

Lynda C. Carter  
Nicole Huffman  
Wise, Carter, Child & Caraway, P.A.  
154 Porter Avenue  
Biloxi, Mississippi 39530

Sam Morris  
Wise, Carter, Child & Caraway, P.A.  
600 Heritage Building  
401 E. Capitol Street  
Jackson, MS 39201

  
\_\_\_\_\_  
Attorney for Plaintiff

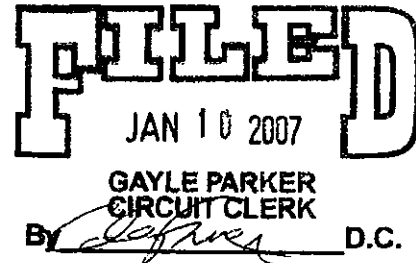
**WILKES & McHUGH, P.A.**  
ATTORNEYS AT LAW

POST OFFICE BOX 17107  
HATTIESBURG, MS 39404

PHONE (601) 545-7363  
FAX (601) 545-7364  
TOLL FREE (866) 545-7363

January 8, 2007

Ms. Gayle Parker  
Harrison County Circuit Court Clerk  
P. O. Box 998  
Gulfport, MS 39502



**Re: Estate of Cherry M. Deiorio v. Pensacola Health Trust, Inc., et al**  
**Harrison County Circuit Court, First District No. A24010100323**

Dear Ms. Parker:

Enclosed please find the original and one copy of Plaintiff's Response to Defendants' Motion for Summary Judgment in the above-referenced matter. Please file the original into the record and return the filed copy to me using the enclosed, self-addressed, postage paid envelope.

By copy of this letter, a copy of the enclosed document is being provided to counsel opposite.

Thank you for your time and attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Annette Bulger Mathis".

Annette Bulger Mathis

ABM/jce  
Enclosures  
cc (w/encl): Lynda C. Carter, Esq.  
Nicole Huffman, Esq.  
Sam Morris, Esq.  
Shirley Valdez

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

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 death beneficiaries of  
CHERRY M. DEIORIO, DECEASED  
PLAINTIFF

vs.

CAUSE NO. A24010100323

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),  
DEFENDANTS

**PLAINTIFF'S FOURTH SUPPLEMENTAL RESPONSES TO DEFENDANTS'  
COMBINED INTERROGATORIES AND REQUESTS FOR PRODUCTION**

Plaintiff serves the following fourth supplemental responses to  
Defendants' Combined Interrogatories and Requests for Production:

**INTERROGATORY NO. 5:** Identify fully, giving the name, address and telephone  
number, of each and every person you expect to call as an expert witness at the  
trial of this cause, and state the following about each such expert:

- (a) The subject matter, in specific detail, on which the expert is  
expected to testify;
- (b) The substance of the facts and opinions to which the expert is  
expected to testify;
- (c) A summary of the grounds for each opinion to which the expert is  
expected to testify;
- (d) By way of request for production of documents, please produce for  
copying and inspection any and all reports or findings submitted by said  
expert concerning those areas requested herein.

**RESPONSE:** Expert witnesses to be called at the trial of this cause  
have not yet been determined.

### **SUPPLEMENTAL RESPONSE:**

1. Jeffrey Karp, M.D.  
3251 McMullen Booth Road Suite 302  
Clearwater, FL 33761  
727-726-4817
2. Cheryl Ciechomski, R.N.  
1758 Washington Avenue  
Portland, ME 04103-1624  
207-878-8768

1. Jeffrey Karp, M.D., 3251 McMullen Booth Road Suite 302, Clearwater, FL 33761, Phone No. (727) 726-4817. See Curriculum Vitae attached as Exhibit "A" to this supplementation. Dr. Karp will testify regarding his review of the nursing home and medical records of Ms. Deiorio. Dr. Karp will testify regarding his findings that the Defendants deviated from the appropriate standards of nursing care in their care and treatment of Ms. Deiorio. Dr. Karp's testimony will include but not be limited to the Defendants' failures in the areas of skin injuries, contractures, psychiatric care, infection control, and evaluations of changes in condition of the resident. Dr. Karp will testify concerning the deviations of the Defendants in the above-referenced areas and how these deviations resulted in injuries to Ms. Deiorio, including but not limited to, pneumonia, malnutrition, dehydration, multiple falls, urinary tract infections, unexplained injuries, body rashes, multiple bruises and skin tears, numerous fecal impactions with related complications, poor hygiene, sepsis and other blood-borne infections, contractures, multiple pressure sores, loss of weight, and unmonitored and unreported signs and symptoms of rapidly deteriorating condition.

2. Cheryl Ciechomski, R.N., 1758 Washington Avenue, Portland, ME 04103-1624, Phone No. (207) 878-8768. See Curriculum Vitae attached as Exhibit "B". Ms. Ciechomski's testimony in the case will focus upon her review of the nursing home chart and medical records, and discovery materials provided by Defendants. Ms. Ciechomski's testimony will focus upon the Defendants' deviation from the appropriate standard of care in the areas of infections, falls, impactions, skin integrity, unexplained injuries, weight loss, documentation, contractures, and care-planning. Ms. Ciechomski will testify concerning the deviations of the Defendants in the above-referenced areas and how these deviations resulted in injuries to Ms. Deiorio, including but not limited to malnutrition, dehydration, multiple falls, urinary tract infections, unexplained injuries, multiple bruises and skin tears, fecal impactions, contractures, pressure sores, and loss of weight.

4. All treating physicians may be used as expert witnesses. Such witnesses may be expected to testify concerning their observations of Ms. Deiorio in any deviations in the appropriate standards of care.

5. In addition to the treating expert witnesses listed above, Plaintiff may call any treating licensed practical nurses or registered nurses as expert witnesses.

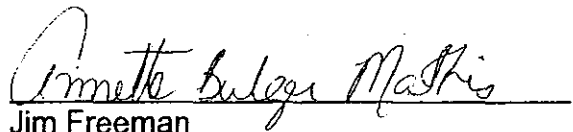
6. All experts listed by any other party to this action.

7. Plaintiff reserves the right to add rebuttal expert witnesses based on Defendants' designation of experts.

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

WILKES & MCHUGH, P.A.



Jim Freeman

Mississippi Bar No. 101335

Annette Bulger Mathis

Mississippi Bar No. 101237

16 Office Park Drive, Ste. 8

Hattiesburg, MS 39402

Mailing Address:

P. O. Box 17107

Hattiesburg, MS 39404

Telephone: 601-545-7363

Facsimile: 601-545-7364

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by First Class Mail on the following this 11<sup>th</sup> day of December, 2006:

William L. McDonough, Jr., Bryant, Dukes & Blakeslee, PLLC 1639 East Pass Road P. O. Box 10 Gulfport, MS 39502-0010	Lynda C. Carter Nicole Huffman Wise, Carter, Child & Caraway 154 Porter Avenue Biloxi, Mississippi 39530
Sam Morris Wise, Carter, Child & Caraway 600 Heritage Building 401 E. Capitol Street Jackson, MS 39201	

  
Attorney for Plaintiff



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

CHERRY M. DEIORIO, by and through  
CHAD DEIORIO her next friend  
for the use and benefit of CHERRY M. DEIORIO

PLAINTIFFS

vs.

CAUSE NO.: A2401-201-323

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)

DEFENDANTS

**RESPONSE TO PLAINTIFF'S SECOND SET OF INTERROGATORIES  
AND THIRD REQUESTS FOR PRODUCTION**

COME NOW the named Defendants, by and through their counsel of record, and in answer to the Plaintiff's Second Set of Interrogatories and Third Requests for Production would state as follows, to-wit:

**INTERROGATORIES**

1. Please identify each and every expert witness who may testify on your behalf at the trial of this matter, including in our answer the following for each expert witness:

- a. Name and address;
- b. The subject matter on which the expert witness is expected to testify;
- c. The substance of the facts and opinions to which the expert witness is expected to testify and a summary of the grounds for each opinion;
- d. State specific dates of each breach in the standard of care alleged in your complaint; and



- e. State expert's deposition and/or litigation experience.

**ANSWER:** Unknown at this time.

**REQUEST FOR PRODUCTION**

1. Audited financial statements of all Defendants for the years 1999 to the present.

**RESPONSE:** Objection. This request seeks documents beyond the permissible scope of discovery.

2. Unaudited financial statements of all Defendants for the years 1999 to the present.

**RESPONSE:** Objection. This request seeks documents beyond the permissible scope of discovery.

3. State and Federal Income Tax Returns for all Defendants for the years 1999 to present.

**RESPONSE:** Objection. This request seeks documents beyond the permissible scope of discovery.

4. All loan applications filed by, or on behalf of the Defendants during the past five years.

**RESPONSE:** Objection. This request seeks documents beyond the permissible scope of discovery.

5. All annual reports prepared by Defendants and/or their parent company for the years 1999 to present.

**RESPONSE:** Objection. This request seeks documents beyond the permissible scope of discovery.

6. All Securities and Exchange Commission 10-K filings for Defendants and/or their parent company, for the years 1999 to present.

**RESPONSE:** None.

7. All documents you intend to introduce at trial concerning the punitive damages aspect of this case.

**RESPONSE:** Unknown at this time.

8. All documents reviewed and/or relied upon by any witness who will testify concerning the punitive damages aspect of this case.

**RESPONSE:** Unknown at this time.

9. Documents describing the compensation and incentives provided by Defendants to the officers and directors of Defendants from 1999 to present.

**RESPONSE:** Objection. This request seeks documents beyond the permissible scope of discovery.

10. Any and all documents constituting pre-survey or mock survey questionnaires, pre-survey or mock survey results, and pre-surveys or mock survey reports, relating to the nursing facility at issue in this matter from 1999 to present.

**RESPONSE:** Objection. This request seeks documents beyond the permissible scope of discovery.

11. Articles of Incorporation for each corporate Defendant.

**RESPONSE:** Objection. This request seeks documents beyond the permissible scope of discovery.

12. Bylaws for each corporate Defendant covering 1999 to present.

**RESPONSE:** Objection. This request seeks documents beyond the permissible scope of discovery.

13. The current curriculum vitae for each expert you plan to use at the trial of this case.

**RESPONSE:** Unknown at this time.

14. A copy of any written opinion of each expert which you plan to use at the trial of this case.

**RESPONSE:** Objection. This request seeks documents beyond the permissible scope of discovery.

15. A copy of all documents, treatises, authoritative publications, etc. upon which any of the experts you plan on using at trial in this case have relied.

**RESPONSE:** Unknown at this time.

16. All reports based upon tests, examinations and analysis of documents that any of your testifying experts in this case have provided.

**RESPONSE:** Objection. This request seeks documents beyond the permissible scope of discovery.

17. A complete list of all documents, depositions, exhibits, plans, drawings, ordinances or statutes which each testifying expert has used in developing his opinion.

**RESPONSE:** Objection. This request seeks documents beyond the permissible scope of discovery.

18. All reports setting forth your testifying expert's opinions or conclusions reached from their examination or any test they conducted.

**RESPONSE:** None.

19. Profit and Loss statements of all Defendants for the years 1999 to the present.

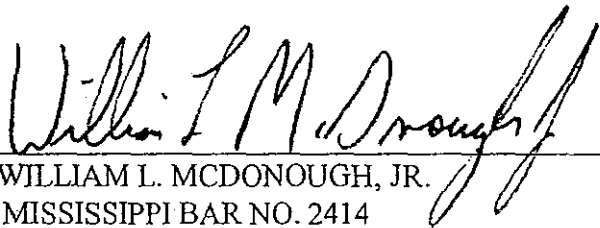
RESPONSE: Objection. This request seeks documents beyond the permissible scope of discovery.

Respectfully submitted,

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

BY: BRYANT, CLARK, DUKES, BLAKESLEE,  
RAMSAY & HAMMOND, P.L.L.C.

BY:

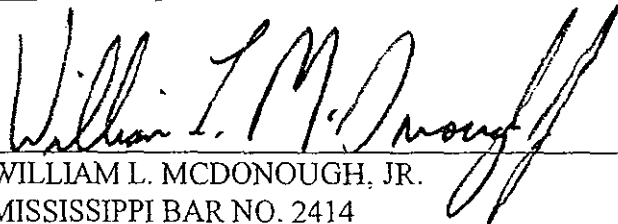
  
WILLIAM L. MCDONOUGH, JR.  
MISSISSIPPI BAR NO. 2414

CERTIFICATE

I, WILLIAM L. MCDONOUGH, JR., of the law firm of Bryant, Clark, Dukes, Blakeslee, Ramsay & Hammond, P.L.L.C., do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the within and foregoing **RESPONSE TO PLAINTIFF'S SECOND SET OF INTERROGATORIES AND THIRD REQUESTS FOR PRODUCTION** to the following counsel of record at their record mailing address:

Richard E. Circeo  
WILKES & McHUGH, P.A.  
Post Office Box 1768  
Hattiesburg, Mississippi 39403

SO CERTIFIED, this the 1<sup>st</sup> day of April, 2003.

  
WILLIAM L. MCDONOUGH, JR.  
MISSISSIPPI BAR NO. 2414

William L. McDonough, Jr.  
BRYANT, CLARK, DUKES,  
BLAKESLEE, RAMSAY & HAMMOND, P.L.L.C.  
2223 - 14th Street  
Post Office Box 10  
Gulfport, Mississippi 39502  
Telephone: (228) 863-6101  
Telecopier: (228) 868-9077

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

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

PLAINTIFF

vs.

Cause No. A24010100323

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),

DEFENDANTS

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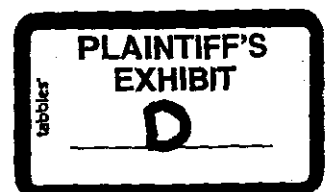
**AFFIDAVIT OF JEFFREY MICHAEL KARP, M.D.**

---

I, Jeffrey Michael Karp, M.D., being duly sworn, state that I am a duly licensed physician in the state of Florida. My curriculum vitae, attached as Exhibit A, accurately reflects my education, my training, and my experience.

1. I have reviewed the following records in this matter:

- River Oaks Health System 8/27/98 - 8/31/98; 9/27/98 ER; 3/01/99 - 3/08/99; 4/02/99 - 4/09/99;
- Garden Park Medical Center 12/03/98 ER; 3/21/00 - 3/24/00; 6/09/00 - 6/19/00;
- St. Dominic Hospital 1/12/99 - 1/19/99; 3/03/99 OP;
- Clinton Health & Rehabilitation 1/19/99 - 3/01/99; 3/08/99 - 4/02/99; 4/09/99 - 6/10/99;
- The Boyington 6/10/99 - 8/25/99; 8/27/99 - 11/14/99; 11/17/99 - 3/21/00; 3/24/00 - 6/09/00; 6/19/00 - 9/05/00; 9/09/00 - 10/04/00; 10/06/00 - 12/08/00;



- Memorial Hospital of Gulfport 8/25/99 – 8/27/99; 11/14/99 – 11/17/99 9/05/00 – 9/09/00; 10/04/00 – 10/06/00; 12/08/00 – 12/13/00;
- Select Specialty Hospital for the period 12/13/00 – 2/03/01;
- Pleasant Hills Community Living Center 2/03/01 - 5/12/01; 5/17/01 - 9/27/01; 10/03/01 - 10/09/01; 10/17/01 - 11/24/01;
- Central Mississippi Medical Center 5/12/01 - 5/17/01; 9/27/01 - 10/03/01; 10/09/01 OP; 10/09/01 - 10/17/01; 11/24/01 - 11/28/01 (DOD); Gastroenterology Center, PA;
- Death Certificate;
- Survey of The Boyington Health Care Facility;
- Complaint Investigation dated 10/27/00 regarding Ms. Deiorio not being fed all day; and
- Office of the Attorney General's Closure Memo 4/03/01.

2. Based on a review of the records, my education, training and background, it is my opinion 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.

3. It is my opinion that The Boyington acted with less than and/or failed to act with ordinary or reasonable care concerning the treatment of Ms. Deioio, and their negligence led to the following:

**A. FAILURE TO ADEQUATELY MONITOR AND ASSESS MS. DEIORIO'S CONDITION:**

It is my opinion that Defendants failed to adequately monitor and assess Ms. Deiorio's medical condition and needs. For example, Defendants failed to provide for the necessary care and treatment to prevent and minimize the development of



pressure sores, skin tears, excoriations, infections, malnutrition, and contractures. The care plan should have been reviewed and revised on a regular and ongoing basis to meet Ms. Deiorio's needs. As a result of this negligence, Ms. Deiorio suffered a decline in both her physical and mental condition.

**B. FAILURE TO MAINTAIN OR ATTAIN HIGHEST QUALITY OF LIFE:**

It is my opinion 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.

- (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 to repeatedly appraise the family of the risks of aspiration and urinary sepsis.

**C. FAILURE TO PREVENT URINARY TRACT INFECTIONS:**

It is my opinion that Defendants failed to provide care and treatment to Ms. Deiorio in a manner that minimizes the risk of infection. For example, Defendant failed to monitor Ms. Deiorio's input and output. Consequently, she suffered numerous severe urinary tract infections and urosepsis.

**D. FAILURE TO MAINTAIN DIGNITY:**

It is my opinion that Defendants failed to provide care and treatment to Ms. Deiorio in a manner that would protect and promote the dignity to which she was entitled. For example, Defendants failed to adequately perform activities of daily living for Ms. Deiorio.

**E. FAILURE TO CONSISTENTLY NOTIFY PHYSICIAN IN A TIMELY MANNER:**

It is my opinion that Defendants failed to consistently notify the treating physician of changes in Ms. Deiorio's condition in a timely manner.

**F. FAILURE TO PROTECT MS. DEIORIO FROM ABUSE:**

It is my opinion that Defendants failed to protect Ms. Deiorio. The Defendants knew that Ms. Deiorio was totally dependent on them to provide for her basic needs. In spite of this knowledge, Defendants willfully deprived Ms. Deiorio of services necessary to maintain his mental and physical health and to prevent pressure sores, skin tears, excoriations, infections, malnutrition, and contractures.

**G. FAILURE TO PROTECT MS. DEIORIO FROM NEGLECT:**

It is my opinion that Defendants failed to protect Ms. Deiorio from neglect. The Defendants knew that Ms. Deiorio was dependent on them to provide for her basic needs. In spite of this knowledge, Ms. Deiorio was allowed to suffer from pressure sores, skin tears, excoriations, infections, malnutrition, and contractures.

**H. FAILURE TO PROPERLY DOCUMENT CARE:**

It is my opinion that Defendants failed to provide an accurate and complete record of the care and treatment provided to Ms. Deiorio. The records were often void of important information, often inconsistent with regard to the care that was supposedly provided, and often altogether missing.

**I. FAILURE TO PROVIDE ADEQUATE NUTRITION:**

It is my opinion that Defendants failed to provide sufficient nutrition and hydration to Ms. Deiorio.

4. 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.

In WITNESS WHEREOF, I have set my hand this 8<sup>th</sup> day of January 2007.

*[Signature]*

STATE OF FLORIDA

COUNTY OF Pinellas

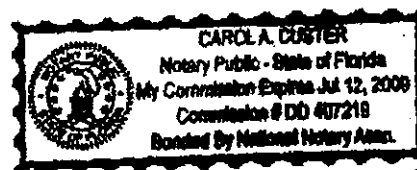
On this the 8 day of January 2007, the individual known to me to be the person whose name is subscribed to the above and foregoing Affidavit, appeared before me and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

*Carole A. Custer*  
NOTARY PUBLIC

My Commission Expires:

July 12, 2009



## CURRICULUM VITAE

JEFFREY M. KARP, M.D.

OFFICE ADDRESS: 3251 McMullen Booth Road  
Suite 302  
Clearwater, Florida 33761

Phone: (727) 726-4817  
Fax : (727) 726-5246

## EDUCATION:

1963 - 1967 Island Trees High School  
Bethpage, New York  
Academic - Cum Laude

1967 - 1971 S.U.N.Y. Stony Brook  
Stony Brook, New York  
Bachelor of Science - Cum Laude

1971 - 1975 S.U.N.Y. Downstate Medical Center  
Brooklyn, New York  
Doctor of Medicine - Cum Laude

1975 - 1976 Emory University  
Atlanta, Georgia  
Internal Medicine Internship

1976 - 1977 Emory University  
Atlanta, Georgia  
Internal Medicine Residency

1977- 1980 Emory University  
Atlanta, Georgia  
Neurology/Psychiatry Fellowship

## HONORS:

1973 - American Society of Anesthesia, summer clerkship  
S.U.N.Y. Downstate Medical Center

(2)

1995 - Clerkship Hematology  
Royal Postgraduate Medical Center  
Hammersmith, England

**CERTIFICATION:** 1982 - American Board of Psychiatry and Neurology  
Honors

1978 - Board eligible - American Board of Internal  
Medicine

**HONORS:** 1975 - Alpha Omega Alpha  
Medical Honor Society

Physician' Recognition Award - Multiple years

**LICENSURE:** State of Florida - active since 1980

**HOSPITAL STAFF:** Morton Plant Mease Hospital Countryside  
1984 - present

Morton Plant Mease Hospital Dunedin  
1980 - present

**OFFICERSHIPS:** President of Department of Internal Medicine  
Mease Hospital Dunedin 1985 - 1987

Board of Directors, Mease Clinic - 1990 - 1992

(3)

**SOCIETIES:**

Fellow – American Academy of Neurology  
Member – Alpha Omega Alpha. Medical Honor Society  
Member – American Society of Neuroimaging  
Member – Florida Medical Association  
Member – Pinellas County Medical Association

**APPOINTMENTS:**

Medical Clinic Director, Muscular Dystrophy Association  
Pinellas, Pasco, Hernando, Citrus Counties  
1981 – 1994

**PUBLICATIONS:**

JAMA 246:#17, October 23, 1981, p. 1934  
“Metaclopramide Treatment of Tardive Dyskinesia”

Selecta 29, July 1982

“Neuroleptika Dyskinesien: Gegenmittel in der prufung”

The Medical Letter, June 4, 1982

“Metaclopramide”

**RESEARCH STUDIES:**

(ATTACHED)

SPONSOR	CLINICAL AREA	YEAR
Dupont	Alzheimer's Disease (#2)	1989
Dupont	Alzheimer's Disease(#2)	1990
Dupont	Alzheimer's Disease(#2)	1991
Sandoz	Migraine	1992
Upjohn	Parkinson's Disease(#2)	1993
Dupont	Alzheimer's Disease	1993
Hoechst	Alzheimer's Disease	1993
Forrest	Alzheimer's Disease	1994
Besselar	Alzheimer's Disease	1994
Boehringer Ingelheim	Parkinson's Disease	1994
Besselar	Parkinson's Disease	1994
Hoechst - Roussel	Alzheimer's Disease	1994
Besselar	Alzheimer's Disease	1994
Forrest	Alzheimer's Disease	1995
Smith Kline	Alzheimer's Disease	1995
Somerset	Parkinson's Disease	1995
Lorex	Stroke	1995
Boehringer Ingelheim	Parkinson's Disease	1995
Janssen	Stroke	1995
Astra Merck	Alzheimer's Disease	1996
Boehringer Ingelheim	Stroke	1996
Glaxo Wellcome	Stroke	1996

Glaxo Wellcome	Stroke	1997
Boehringer Ingelheim	Stroke	1997
RPR	Parkinson's Disease	1998
Bayer	Alzheimer's Disease(#2)	1998
Astra	Stroke	1998
Glaxo	Stroke	1998
McNeil	Migraine	1998
RPR	Parkinson's Disease	1999
McNeil	Migraine	1999
Glaxo	Stroke	1999
McNeill	Migraine	2000
RPR	Parkinson's Disease	2000
Pharmacia, Upjohn	Parkinson's Disease	2000
Janssen	Parkinson's Disease	2001
Pharmacia	Parkinson's Disease(#2)	2001
Schwarz	Parkinson's Disease	2002
Eisai	Migraine	2002
Pharmacia	Migraine	2002
Forrest	Alzheimer's Disease	2003
Merck	Alzheimer's Disease	2003
Ortho McNeill	Migraine	2003
Ortho McNeill	Migraine	2004
Myriad	Alzheimer's Disease	2005



Pharmacia	Parkinson's Disease	2005
Endo	Migraine	2005
Forrest	Alzheimer's Disease	2005

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

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

PLAINTIFF

vs.

Cause No. A24010100323

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),

DEFENDANTS

---

**PLAINTIFF'S RESPONSE TO DEFENDANTS' ITEMIZATION OF FACTS**

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Plaintiff files this Response to Defendants Pensacola Health Trust, Inc.; Delta Health Group, Inc.; Scott J. Bell; and Elizabeth Sprenger's Itemization of Facts in Support of their Motion for Summary Judgment.

1. It is undisputed that Plaintiff filed this Complaint on July 25, 2001 (not July 20, 2001, as stated by Defendants) based on Defendants' negligent care and treatment of Cherry Deiorio during her residency at The Boyington from June 1999 to December 2000. However, Plaintiff disputes that all of his claims require the introduction of expert testimony. A plain reading of Plaintiff's Complaint reveals that Counts I and II are for ordinary/custodial neglect against the Defendants named in those Counts. Further, Count IV is for gross negligence and Count V is for fraud against all Defendants. None of these counts are for "professional negligence" which falls under the medical malpractice act thereby requiring expert testimony. Rather, the

negligence and gross negligence claims rely upon acts of ordinary/custodial neglect such as the failure to feed Ms. Deiorio, bathe Ms. Deiorio, turn and reposition Ms. Deiorio, or provide her with enough water to maintain hydration or food to supply adequate nutrition. The fraud count clearly does not rely on acts of professional negligence.

When confronted with the issue of defining "professional services" in the content of an exclusionary clause involving an insurance dispute for a claim against a governmentally owned and operated nursing home, the Mississippi Supreme Court wrote:

In determining whether or not a particular act or failure to act is of a professional nature we should look not to the title or character of the party performing the act but to the act itself." *Marx*, 157 N.W.2d at 872. Inevitably, every service performed, or activity engaged in, by a physician, dentist, nurse or lawyer is not a "professional" service. Here we are presented not with a nurse but with a nurse's aide, which the State of Mississippi does not require to be licensed. The State Board of Nursing only provides a certification process for nurse's aides.

Simply because a nurse's aide may usually be associated with nurses, and because the aide may be exposed to certain activities performed by nurses while trained, does not necessarily mean that bathing is a "nursing treatment" which constitutes "professional service."

*Burton v. Choctaw County*, 730 So. 2d 1, 7-8 (Miss.1999).

Various state guidelines treat bathing as a personal care skill, not as a basic nursing skill. It is unrealistic to say that the average lay person could not be expected to know personal skills such as bathing, grooming, dressing and toileting.

*Id.* at 8.

2. It is undisputed that Uniform Circuit Court and County Rule 4.04(A) states: "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." However, Plaintiff disputes Defendants' claim that his expert should not be allowed to testify. There is no Mississippi law to support summary judgment based on late designation of experts under Rule 4.04(A). In fact, there is case law that states that exclusion of expert testimony based on insufficient designation is too harsh, inappropriate, and an abuse of discretion. See e.g., *Caracci v. International Paper Co.*, 699 So. 2d 546, 559 (Miss. 1997).

3. It is undisputed that expert designations were due on or before November 23, 2006, pursuant to Uniform Circuit and County Court Rule 4.04(A) and that Defendants identified their experts on that date. However, it is disputed that Defendants fully complied and designated their experts on November 22, 2006, as Defendants failed to state any opinions to which their experts are expected to testify. Moreover, on March 1, 2003, Defendants responded to Plaintiff's interrogatory concerning expert testimony stating that their experts were unknown. Defs.' Resp. to Pl.'s Second Set. Interrogs. and Third Req. for Produc., Ex. C. Defendants have failed to provide any supplementation as to the substance of the facts and opinions to which their experts are expected to testify.

4. It is undisputed that Plaintiff's experts were designated forty-two days before trial instead of the sixty days stated in Uniform Circuit Court and County Rule 4.04(A).

5. Plaintiff disputes that he has no expert testimony to establish a *prima facie* case of medical negligence against Defendants because summary judgment is an inappropriate sanction for designation of experts forty-two days before trial instead of sixty days. "Courts 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.” *Caracci v. International Paper Co.*, 699 So. 2d 546, 556 (Miss. 1997) quoting *Clark v. Mississippi Power Co.*, 372 So. 2d 1077, 1078 (Miss. 1979). Should the Court determine that prejudice would result, a continuance of trial is the appropriate remedy. See, e.g., *Motorola Communications and Electronics, Inc. v. Wilkerson*, 555 So.2d 713, 718 (Miss. 1989) (upholding the trial court’s decision that **allowed the testimony of an expert identified only ten days before trial in part because the defendants failed to request a continuance**); *Nichols v. Tubb*, 609 So.2d 377, 386-387 (Miss. 1992) (determining that the plaintiff “should have moved for a continuance” if answers to interrogatories concerning experts were not being filed sufficiently in advance of the trial date); *International Paper Co. v. Townsend*, 2006 WL 279343, \*11 (Miss. Ct. App. Feb. 7, 2006)<sup>1</sup> (determining that a fifty-nine day versus a sixty day designation of expert did not in and of itself result in prejudice but in combination with other circumstances resulted in a severe prejudice that could have easily been avoided had the trial court allowed a continuation of the trial).

6. Plaintiff disputes that there remains no genuine issue of material fact and that Defendants are entitled to summary judgment. The one case cited by Defendants for exclusion of expert testimony is not on point because in that case, there was no designation of the expert at all. See *Mississippi Dept. of Wildlife Fisheries, and Parks v. Brannon*, 2006 WL 772872, \*7, 12 (Miss. Ct. App. March 28, 2006) (finding that the trial judge erred in allowing the witness to testify as an expert when he had not been designated as such before trial and reversing the trial judge’s award of damages to the

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<sup>1</sup>This opinion has not been released in the permanent law reports and is subject to revision or withdrawal.

plaintiff based on evidence that the defendant had exercised reasonable care in its inspections of the walkways). This case is clearly distinguishable because Plaintiff did in fact disclose his experts. Plaintiff disclosed his experts forty-two days prior to the agreed upon trial date. See Pl.'s Fourth Supplemental Resp. to Defs' Combined Interrogs. and Req. for Produc. (Dec. 11, 2006), Ex. B. Defendants have failed to inform the court of any resulting prejudice from Plaintiff's designation of experts forty-two days prior to trial. Defendants cannot claim prejudice as they have had four weeks to depose Plaintiff's experts. Rather than requesting depositions, Defendants have chosen to sit back and attempt to escape liability based on a procedural technicality. However, justice requires that this case be decided on its merits. The affidavit of Jeffery Michael Karp, M.D. clearly creates a genuine issue of material fact making summary judgment inappropriate. Aff. Jeffery Michael Karp, M.D., Ex. C.

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

WILKES & MCHUGH, P.A.



Lance Reins  
Mississippi Bar No. 101031  
Annette Bulger Mathis  
Mississippi Bar No. 101237  
16 Office Park Drive, Ste. 8  
Hattiesburg, MS 39402  
Mailing Address:  
P. O. Box 17107

Hattiesburg, MS 39404  
Telephone: 601-545-7363  
Facsimile: 601-545-7364

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by First Class Mail on the following this 8th day of January 2007:

William L. McDonough, Jr.,  
Bryant, Dukes & Blakeslee, PLLC  
1639 East Pass Road  
P. O. Box 10  
Gulfport, MS 39502-0010

Lynda C. Carter  
Nicole Huffman  
Wise, Carter, Child & Caraway, P.A.  
154 Porter Avenue  
Biloxi, Mississippi 39530

Sam Morris  
Wise, Carter, Child & Caraway, P.A.  
600 Heritage Building  
401 E. Capitol Street  
Jackson, MS 39201

  
Attorney for Plaintiff

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

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

PLAINTIFF

vs.

Cause No. A24010100323

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),

DEFENDANTS

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**PLAINTIFF'S MEMORANDUM IN SUPPORT OF RESPONSE TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

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Plaintiff files this Memorandum in Support of his Response to Defendants Pensacola Health Trust, Inc.; Delta Health Group, Inc.; Scott J. Bell; and Elizabeth Sprenger's Motion for Summary Judgment.

**I. INTRODUCTION**

Defendants seek inappropriate relief for 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). There is no Mississippi law to support summary judgment based on late designation of experts under Rule 4.04(A). In fact, there is case law that states that exclusion of expert testimony based on insufficient designation is too harsh, inappropriate, and an abuse of discretion. See e.g., *Caracci v. International Paper Co.*, 699 So. 2d 546, 559 (Miss. 1997).



Moreover, Defendants have failed to inform the Court of any resulting prejudice as a result of Plaintiff's designation of experts forty-two days before trial. Plaintiff designated his experts four weeks ago,<sup>1</sup> and Defendants cannot offer any evidence that they have tried to secure the deposition of Plaintiff's experts over the last four weeks. Additionally, Defendants have failed to request a continuance to depose Plaintiff's expert. Instead, Defendants filed this Motion for Summary Judgment in an attempt to escape liability based on a procedural technicality. However, justice requires that this case be decided on its merits.

Because Defendants have not claimed any resulting prejudice by Plaintiff's designation of experts forty-two days before trial and have not requested a continuance, Plaintiff requests that this Court not summarily dismiss his claims and that the trial go forward as scheduled. However, should the Court determine that prejudice would result, a continuance of trial is the appropriate remedy. See, e.g., *Motorola Communications and Electronics, Inc. v. Wilkerson*, 555 So.2d 713, 718 (Miss. 1989) (upholding the trial court's decision that **allowed the testimony of an expert identified only ten days before trial in part because the defendants failed to request a continuance**); *Nichols v. Tubb*, 609 So.2d 377, 386-387 (Miss. 1992) (determining that the plaintiff "should have moved for a continuance" if answers to interrogatories concerning experts were not being filed sufficiently in advance of the trial date); *International Paper Co. v. Townsend*, 2006 WL 279343, \*11 (Miss. Ct. App. Feb. 7, 2006)<sup>2</sup> (determining that a fifty-nine day versus a sixty day designation of expert did not

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<sup>1</sup>See Pl.'s Fourth Supplemental Resp. to Defs' Combined Interrogs. and Req. for Produc. (Dec. 11, 2006), Ex. B.

<sup>2</sup>This opinion has not been released in the permanent law reports and is subject to revision or withdrawal.

in and of itself result in prejudice but in combination with other circumstances resulted in a severe prejudice that could have easily been avoided had the trial court allowed a continuation of the trial).

## II. BACKGROUND

This case involves the care and treatment, or lack thereof, rendered to Cherry Deiorio during her residency at The Boyington Nursing Facility (the "Facility"), a skilled nursing facility owned and operated by Defendants. See Compl., Ex. A (July 25, 2001). Ms. Deiorio was a resident of Defendants' Facility from June 1999 to December 2000. While a resident, Ms. Deiorio suffered from dehydration; malnutrition; decubitus ulcers; severe contractures; poor hygiene and daily care; falls; urosepsis; fecal impaction; a half-dollar-size hematoma on her stomach; coumadin toxicity; and unexplained injuries.

## III. ARGUMENT

- A. Summary judgment is an inappropriate sanction, and as "[c]ourts are courts of justice not of form," the Plaintiff "should not be penalized for a procedural failure that may be handled without doing violence to court procedures." *Caracci v. International Paper Co.*, 699 So. 2d 546, 556 (Miss. 1997) quoting *Clark v. Mississippi Power Co.*, 372 So. 2d 1077, 1078 (Miss. 1979).

In moving for summary judgment, Defendant ignores the heavy burden placed upon them by the Mississippi Rules of Civil Procedure and Mississippi precedent:

For a summary judgment motion to be granted there must exist no genuine issues of material fact and the moving party must be entitled to judgment as a matter of law. Miss. R. Civ. P. 56(c). . . . The evidence must be viewed in the light most favorable to the party against whom the motion has been made. . . . Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and other says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is the non-movant would be given the benefit of the doubt.

*Leflore County v. Givens*, 754 So. 2d 1223, 1225 (Miss. 2000) (citing *Quinn v Mississippi State Univ.*, 720 So. 2d 843, 846 (Miss. 1998) (collecting authorities).

On the other hand, the burden on Plaintiff, as the non-movant, is light:

All that is required of a non-movant to survive a motion for summary judgment is to establish a genuine issue of material fact by the means available under the rule. Furthermore, it is standard practice that "(a)ll motions for summary judgment should be reviewed with great skepticism and if the trial court is to err, it is better to err on the side denying the motion."

*Simmons v. Thompson Mach. Of Miss., Inc.*, 631 So. 2d 798, 801 (Miss. 1994) (quoting *Claiborne County Bd. Of Educ. V. Martin*, 500 So. 2d 981 (Miss. 1986)) (citing *Lyle v. Mladinich*, 584 So. 2d 397, 398 (Miss. 1991)).

In deciding whether expert testimony should be excluded based on insufficient designation of expert, the Mississippi Supreme Court has set forth the following standard for lower courts:

**"Lower courts should be cautious in either dismissing a suit or pleadings or refusing to permit testimony. . . . The reason for this is obvious. Courts are courts of justice not of form. The parties should not be penalized for any procedural failure that may be handled without doing violence to court procedures."** *Clark v. Mississippi Power Co.*, 372 So. 2d 1077, 1078 (Miss. 1979); *see also Ladner v. Ladner*, 436 So. 2d 1366, 1370 (Miss. 1983).

*Caracci v. International Paper Co.*, 699 So. 2d 546, 556 (Miss. 1997) (emphasis added).

**B. There is no Mississippi law to support Defendants' Motion for Summary Judgment.**

The affidavit of Jeffery Michael Karp, M.D. clearly creates a genuine issue of material fact making summary judgment inappropriate. See Aff. Jeffery Michael Karp, M.D., Ex. D. Dr. Karp lists numerous failures of Defendants and opines that such failures and the general poor nursing care provided by the Defendants caused Ms.

Deiorio to suffer pressure sores, skin tears, excoriations, urinary tract infections, urosepsis, malnutrition, and contractures resulting in a decline in both Ms. Deiorio's physical and mental condition.

The one case cited by Defendants in support of its motion for summary judgment is not on point because in that case, there was no designation of the expert at all. See *Mississippi Dept. of Wildlife Fisheries, and Parks v. Brannon*, 2006 WL 772872 (Miss. Ct. App. March 28, 2006). There, the plaintiff filed suit claiming that the defendant had knowledge of the hazardous condition that caused her to fall and break her hip while walking on the grounds of the state park. *Id.* at 2006 WL 772872, \*2. There was a bench trial, and the trial judge found that the defendant's employees did not use ordinary care in the inspection of walkways based on expert testimony from a witness who had never been designated as an expert in discovery or in the pre-trial order. *Id.* at 2006 WL 772872, \*5-6. The Mississippi Court of Appeals found that the trial judge erred in allowing the witness to testify as an expert when he had not been designated as such. *Id.* at 2006 WL 772872, \*7. The court reversed the trial judge's award of damages to the plaintiff based on evidence that the defendant had exercised reasonable care in its inspections of the walkways. *Id.* at 2006 WL 772872, \*12.

Thorough review of Mississippi case law concerning the issue<sup>3</sup> reveals that the only other case where the court stated that expert testimony should have been excluded also involved the situation in which the expert was never disclosed prior to trial. See *Harris v. General Host Corp.*, 503 So. 2d 795 (Miss. 1987).<sup>4</sup> In that case, the

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<sup>3</sup>This research does not include failure to timely designate experts in accordance with a court order as there is no scheduling order in this case.

<sup>4</sup>This case and any other case decided before May 1, 1995, is not based on Uniform Circuit and County Court Rule 4.04(A), as that rule was adopted effective May 1, 1995.

600 Heritage Building  
401 E. Capitol Street  
Jackson, MS 39201

  
Attorney for Plaintiff

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

CHERRY M. DEIORIO, by and through  
CHAD DEIORIO, her next friend and for  
the use and benefit of CHERRY M. DEIORIO

PLAINTIFF

VERSUS

CAUSE NO. A2401-01-00323

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)

DEFENDANTS

ORDER GRANTING SUMMARY JUDGMENT  
WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on to be heard on the Defendants' Motion for Summary Judgment. This cause was filed on July 25, 2001, by Cherry Deiorio alleging various claims regarding care she received (or lack thereof) at a nursing home. The Complaint alleges that Defendant Scott J. Bell was the licensee of the nursing home and Defendant Elizabeth L. (Herndon) Sprenger was the administrator of the nursing home. The Complaint alleges that the Defendants owned, operated, managed and/or controlled the nursing home. Plaintiff's Complaint alleges negligence, medical malpractice, malice and/or gross negligence, and fraud relating to the care and treatment received by Ms. Deiorio at the nursing home.

Defendants filed their answer on October 12, 2001. Defendants filed their Notice of Service on October 19, 2001, indicating that Interrogatories and Requests for Production had been served on Plaintiff. Ms. Deiorio died several months after the filing of the suit and her

son Chad Deiorio was substituted in her stead. On December 13, 2001, an Order was entered giving Plaintiff (hereinafter Deiorio) until December 17, 2001, to respond to the discovery propounded. Unverified responses were filed December 26, 2001. In response to the Interrogatory seeking the identities and expected testimony of any expert witnesses, Deiorio's answer was, "We don't know at this time." Deiorio's counsel filed a Motion for Scheduling Conference and Peremptory Trial Date on August 29, 2002. That motion clearly states that counsel recognized the guidelines with regard to disposition of civil matters within eighteen (18) months. That Motion also stated that a number of experts were expected for all parties and asked for a peremptory trial setting. Although this Motion was set for hearing on September 13, 2002, it does not appear that it was ever heard and no order was entered.

On August 6, 2003, the parties entered a Stipulation that the case be mediated on August 25, 2003, that the deadline for disclosure of experts be extended and that, if the case was not resolved by the mediation, the parties had one (1) week to agree to a disclosure date for expert information. No further agreement or order setting a new disclosure date is in this record.

There appears to have been little effort to conclude this matter through the years until Deiorio filed a Motion for Scheduling Order and Trial Setting on June 28, 2006, and a Motion to Compel on July 5, 2006. Deiorio sought a trial date for October of 2006. These motions were noticed for hearing on July 17, 2006, but were not heard while the parties were attempting to resolve the motion matters. On November 11, 2006, Deiorio filed a Notice of Trial Setting which set this case for trial on January 22, 2007. Depositions were set by the parties for November and December 2006. None of these were depositions of any expert witness or of any medical provider.

On November 22, 2006, Defendants designated their experts, but indicated that they could not give complete information as they had never received any expert information from Deiorio. On December 11, 2006, forty-two (42) days prior to trial, Deiorio submitted his fourth supplemental response to Defendants' discovery which had been propounded to him over five (5) years earlier. This fourth supplementation listed for the first time Dr. Jeffrey Karp and Cheryl Ciechomski (a registered nurse) as expert witnesses. This was the first time Deiorio had provided any expert witness information.

Defendants filed their Motion for Summary Judgment on December 27, 2006, arguing that Deiorio's failure to designate his expert witnesses not less than sixty (60) days prior to trial, left him with no experts who could testify at trial and, therefore, an inability to meet his burden of proof. Defendants submitted the Affidavit of Lou Ann Alexander, R.N., one of their listed experts, in support of their Motion. Deiorio responded, arguing that Defendants were not prejudiced by the late designation and that Defendants had a duty to file a motion to compel Deiorio's responses before any experts could be disallowed. Deiorio submitted with his response copies of various pleadings and the Affidavit of Dr. Karp. No additional documents were filed by any party or submitted at the hearing.

The Motion for Summary Judgment was heard on January 12, 2007, ten (10) days prior to the trial setting of January 22, 2007. Deiorio was given until January 17, 2007, and Defendants were given until January 19, 2007, to provide any additional authorities to the Court.

It is disturbing that this case has been filed for over five (5) years without resolution. There appears to have been little done in the way of discovery. However, counsel for all parties indicated that the matter was ready for trial and that discovery was complete except as



to the documents at issue in the Motion to Compel and the issue concerning Deiorio's experts.

The starting point for consideration of a motion for summary judgment is, of course, Rule 56 of the Mississippi Rules of Civil Procedure. Rule 56(c) provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In *Young v. Wendy's International, Inc.*, 840 So.2d 782 (Miss. Ct. App. 2003), the Court reiterated the familiar rule that the burden of showing that there is no genuine issue of material fact is on the movant. *Id.* at 783, ¶5, citing *Tucker v. Hinds*, 558 So.2d 869, 872 (Miss. 1990). The opinion further reminds litigants that the non-moving party "must bring forward 'significant probative evidence demonstrating the existence of a triable issue of fact.'" *Id.* at 784, ¶5, quoting *Newell v. Hinton*, 556 So.2d 1037, 1042 (Miss. 1990). The Court held:

Furthermore, the plaintiff must show that the party charged is the party actually responsible for the wrong, with reasonable certainty or definiteness. *Berry v. Brunt*, 252 Miss. 194, 172 So.2d 398, 401 (Miss. 1965). Also noted by the *Berry* court was that "it is not enough that this shall be left to conjecture or to inferences so loose that it cannot be dependently told where conjecture ceases and cogent inferences begins." *Id.* (citing *McCain v. Wade*, 181 Miss. 664, 180 So.2d 748 (1938)).

*Id.* at 784, ¶6.

Defendants maintain that since Deiorio failed to timely provide his expert information, those experts would not be allowed to testify. It follows, then, that without expert testimony, Deiorio cannot meet his burden of proof on his claims and there is, therefore, no genuine issue of material fact. Since no scheduling order was entered in this

December 11, 2006, supplementation. Deiorio's counsel could give no reason of any kind as to why the expert information had not been provided in the three (3) years between the hiring of the experts and the December 2006 disclosure.<sup>1</sup> Subsequent to the hearing, Deiorio's counsel advised the Court and Defendants' counsel by letter that she could not provide any "special circumstances" for the late designation of experts. She advised, contrary to what was stated at the hearing, that the reason for the late designation was that she believed mistakenly that UCCCR 4.04A required designation of experts six (6) weeks before trial and had instructed her assistant to calendar the designation for that six (6) week date.<sup>2</sup>

UCCCR 4.04 is specific in its requirements and does not require a finding of prejudice. Its language is mandatory in stating "the court *will not* allow testimony at trial...." See, e.g., *Crenshaw v. Roman*, 942 So.2d 806, 809-10, 811 ¶¶15, 17, 18 (Miss. 2006) (use of language such as "shall" is mandatory language); *Edmond v. Hancock*, 830 So.2d 658, 660, ¶5 (Miss. Ct. App. 2002) ("shall" is mandatory while "may" is permissive); *In the Interest of D.D.B. v. Jackson County Youth Court*, 816 So.2d 380, 383, ¶¶7, 9 (Miss. 2002) (same, stating that "[t]he statute uses 'shall' not 'may', thereby eliminating any possible interjections of judicial discretion."); *Wicks v. Mississippi Valley State University*, 536 So.2d 20, 23 (Miss. 1988) (words such as "shall," "will," or "must" are mandatory language); *et al.* Rule 4.04 provides an exception to the prohibition of testimony only if there is a showing of "special circumstances." No special circumstances were shown by Deiorio or exist in this record. UCCCR 4.04A prohibits Deiorio's experts from testifying.

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<sup>1</sup> The court specifically inquired as to whether any of the items or information sought in Deiorio's Motion to Compel would have been something that the experts would have needed to reach an opinion or to review in any manner. Deiorio advised that it was not.

<sup>2</sup> This letter was apparently never filed with the Clerk.

Deiorio argues that (1) the Court should grant a continuance if Defendants could not be ready regarding the experts; and (2) since this case was not now going to trial on January 22, 2007, there was, in effect, a continuance thereby making his supplementation now timely (a position taken in the letter to the Court and counsel subsequent to the hearing). These reasons simply highlight counsel's cavalier attitude. Deiorio's counsel appears unconcerned with following UCCCR 4.04 and their position that the effective continuance of the trial retroactively makes Deiorio's supplementation timely is without merit.

Without expert testimony, Deiorio cannot meet his burden of proof as all of his claims of necessity involve expert testimony. Deiorio's argument that the negligence issues regarding daily living care by nurses' aides and of fraud do not require expert testimony is without merit. A lay person could testify that certain activities, such as brushing hair or assistance with eating or bathing, were or were not performed, but, there is no testimony or proof in this record of activities being done or not being done. Deiorio's counsel argued that somewhere in some deposition or medical record were indications that Ms. Deiorio was left soiled or was left where she was unable to reach her food. Nothing was submitted to this Court. There is no proof of any damage or injury sustained as a result of any activities or lack of activities. Even if some proof had been submitted, expert testimony is still required to establish the applicable standard of care, whether it was breached, and causation between a breach and any injury/damage. There is nothing presented which establishes these things.

Deiorio also maintains that the fraud allegation does not require expert testimony. The only proof in this record of any representation allegedly made is in an excerpt of the deposition of Charles Deiorio submitted as part of Deiorio's response to the Motion to Dismiss filed by Bell and Sprenger. The totality of that testimony is:

Q. You testified that during the admission process, you were present. Did any of the nursing home staff members make any representations to you that didn't turn out to be true?

A. Well, I was told my mother would be well taken care of. I was told that if she needed assistance eating, things like that, that she would get it. She would be bathed regularly. She would have regular visits from her doctor. I don't feel like any of those actually took place.

There is nothing in the record to reflect that any of these things did or did not occur other than Charles Deiorio's opinion that he did not "feel like any of those actually took place."

Nor is there anything in the record to indicate what, if any, damage or injury was suffered by Ms. Deiorio as a result. The fraud alleged in this case concerns providing proper care, treatment, and services at a nursing home; providing adequate and qualified nursing aides; providing nursing care; and compliance with licensing requirements and standards of care under the laws and regulations applicable to nursing homes. These issues would require expert testimony concerning who were proper, adequate, or qualified personnel, what was proper and adequate care and compliance, and any causal connection between any failure in those standards and any injury alleged.

To prove a medical malpractice claim, a plaintiff must show: (1) the existence of a duty on the part of the physician to conform to a specific standard of conduct; (2) the specific standard of conduct; (3) that the physician's breach of the duty was the proximate cause of the plaintiff's injury, and (4) that damages resulted. *Barner v. Gorman*, 605 So.2d 805, 808-09 (Miss.1992). Generally, these elements must be proven by expert testimony. *Palmer [v. Biloxi Reg. Med. Ctr. Inc.]*, 564 So.2d [1346] at 1355 [(Miss.1990)]. "Not only must this expert [testimony] identify and articulate the requisite standard that was not complied with, the expert [testimony] [sic] must also establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries." *Barner*, 605 So.2d at 809.

*Young v. The University of Mississippi Medical Center*, 914 So.2d 1272, 1276, ¶15 (Miss. Ct. App. 2005). See also, *Brown v. Baptist Memorial Hospital Desoto, Inc.*, 806 So.2d 1131, 1134, ¶12 (Miss. 2002); *Phillips v. Hull*, 516 So.2d 488, 491 (Miss. 1987); *Burnham v. Tabb*, 508 So.2d 1072, 1074 (Miss. 1987); *Latham v. Hayes*, 495 So.2d 453 (Miss. 1986); *et al.*

If Dr. Karp is not allowed to testify as an expert witness, his Affidavit likewise cannot be allowed. There is, then, nothing to prove the necessary elements of Deiorio's claims. There is no deposition testimony, affidavit, or other sworn information about any injuries suffered by Ms. Deiorio or their cause. There is no sworn proof concerning what the Defendants did or did not do. There is nothing to establish the standard of care, nothing to show whether there was any breach of any duty owed to Ms. Deiorio, and nothing to causally connect any injury Ms. Deiorio may have suffered to any breach of care. We are left only with the allegations of the Complaint, which cannot be relied on to defeat a motion seeking summary judgment.

Mere allegation or denial of material fact is insufficient to generate a triable issue of fact and avoid an adverse rendering of summary judgment. *Sanders*, 485 So.2d at 1054; *Hill v. Consumer Nat'l Bank*, 482 So.2d 1124, 1128 (Miss. 1986), cited in *Fruchter*, 522 So.2d at 198-99. More specifically, the plaintiff may not rely solely upon the unsworn allegations in the pleadings, or "arguments and assertions in briefs or legal memoranda." *Magee v. Transcontinental Gas Pipe Line Corp.*, 551 So.2d 182, 186 (Miss. 1989); *Hill*, 482 So.2d at 1128-29; *First Fed. Savs. & Loan Ass'n*, 460 So.2d at 791-92; *Transurface Carriers, Inc. v. Ford Motor Co.*, 783 F.2d 42, 46 (1<sup>st</sup> Cir. 1984); *Watts v. United States*, 703 F.2d 346, 353 (9<sup>th</sup> Cir. 1983); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2739 (1983).

The "party opposing the motion must by affidavit or otherwise set forth specific facts showing that there are indeed genuine issues for trial." *Fruchter*, 522 So.2d at 199 (citing *Matter of Launius*, 507 So.2d 27, 30 (Miss. 1987); *First Fed. Savs. & Loan Ass'n*, 460 So.2d at 792).

*Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So.2d 1346, 1356 (Miss. 1990). There is no genuine issue of material fact under the circumstances in this case.

Deiorio argues that, pursuant to Rule 26 and Rule 37 of the Mississippi Rules of Civil Procedure, Defendants were required to file a motion to compel before the experts can be prohibited from testifying. Rule 26 permits the discovery of expert information and provides:

(f) Supplementation of Responses. \*\*\*

(1) A party is under a duty seasonably to supplement that party's response with respect to any question addressed to ... (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.

Deiorio relies on *Warren v. Sandoz Pharmaceuticals Corp.*, 783 So.2d 735 (Miss. 2000). In *Warren*, the plaintiff objected to the testimony of an expert witness called by Sandoz. The expert, designated by a codefendant to Sandoz, was not specifically designated by Sandoz. Sandoz's responses to the expert interrogatory repeatedly stated that Sandoz might call any expert designated by Warren or any codefendant. The Court of Appeals of Mississippi stated:

Mississippi Rule of Civil Procedure 26 is to be strictly interpreted and should be rigidly enforced. *Hudson v. Parvin*, 582 So.2d 403, 312-13 (Miss.1991). \*\*\*

Mississippi Rule of Civil Procedure 26(f)(1) requires a party to seasonably supplement an interrogatory answer and a failure to do so means that the expert testimony may be stricken. *Hudson*, 582 So.2d at 412. \*\*\* The difference between the Federal and Mississippi Rules of Civil Procedure regarding the obtaining of a more specific answer pertains to the necessity of the filing of a motion to compel prior to requesting and receiving sanctions. \*\*\* Under this Mississippi rule if an answer to an interrogatory regarding an expert witness who will testify at trial is deemed insufficient by opposing counsel, some means of notice of such insufficiency must be given to the opposing party in order to let them know that additional information is desired. *State Highway Comm'n v. Havard*, 508 So.2d 1099, 1104 (Miss. 1987). [Emphasis added.]

*Id.* at 742. It was undisputed that Warren had been given the information about the expert by the codefendant in a timely manner. Her complaint was a technical one in that Sandoz had not specifically listed the expert as its own. The Court in *Warren* specifically found that the "blanket designation" by Sandoz shifted the burden to Warren to seek supplementation. *Id.* at 743. The Court of Appeals found no error in the admission of the testimony of the expert.

This case is distinguishable from *Warren*. There has been no prior designation of Dr. Karp or Ms. Ciechomski 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 Karp or Ciechomski. Further, the opinion in *Warren* at no point mentions UCCCR 4.04 as being in issue.

*Thompson v. Patino*, 784 So.2d 220 (Miss. 2001) is also cited by Deiorio. That decision provided:

We have held “seasonable supplementation” to mean soon after new information is known and far enough in advance of trial for the other side to prepare. We have not, however, set a “hard and fast rule as to what amounts to seasonable supplementation or amendment of answers.” *Eastover Bank for Sav. v. Hall*, 587 So.2d 266, 272 (Miss.1991). Our decisions addressing what constitutes a seasonable supplementation focus on the necessity to avoid surprise at trial.

*Id.* at 223, ¶22. At the time of the dismissal of Thompson’s case, no trial date had been set. There had been some discussion of a trial date in January 1998, ten (10) months after the expert’s affidavit was stricken and six (6) months after the summary judgment was granted.

*Id.* at 222, 223, ¶¶16, 17, and 24. “One significant factor in *Robert* and other cases decided by this Court is the substantial length of time between supplementation and a trial date, or lack of a trial date altogether.” *Id.* at 224, ¶25. The Court went on the quote from *Palmer*, *supra* at 1356-63 (Miss. 1990), that “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, ¶27. The Court found:

Thompson pursued her case not perfectly but fairly diligently from filing until dismissal. Prior to the hearings on the motion to dismiss, Thompson supplemented in detail and presented possible arguable questions of fact of medical negligence.

*Id.* at 226, ¶33.

Again, Deiorio's reliance is misplaced. Deiorio's supplementation was not seasonable and did not give Defendants sufficient time to prepare before trial. There was a trial date (one which Deiorio himself sought) only forty-two (42) days from the date of the supplementation. *Thompson* clearly places emphasis on the length of time or lack thereof. 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. Montfort Jones Memorial Hospital*, 861 So.2d 1037, 1041, ¶12 (Miss. 2003).

The third decision relied on by Deiorio on this issue is *Read v. Southern Pine Electric Power Association*, 515 So.2d 916 (Miss. 1987). That case very clearly cuts against Deiorio's position in this case. It clearly states:

We discourage 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. *Huff v. Polk*, 408 So.2d 1368 (Miss.1982).

*Id.* at 922.

None of the cases cited by Deiorio refer in any way to UCCCR 4.04. This Rule was not in issue in *Thompson*, *Read*, or *Warren*. None of these cases are instructive as to the issue of a violation of UCCCR 4.04.

There are few cases specifically addressing UCCCR 4.04 in any manner. *International Paper Company v. Townsend*, \_\_\_ So. 2d \_\_\_ (Miss. Ct. App. No. 2003-CA-02774-COA, 02/07/06) and *Mississippi Department of Wildlife v. Brannon*, 943 So. 2d 53 (Miss. Ct. App. 2006) have both been cited to this Court. Neither case is precisely



on point with the facts of Deiorio's case. *Brannon* clearly differs as Deiorio has supplemented his discovery responses to list his experts. *Townsend* focuses on whether or not a continuance should have been granted. That is not the issue in this case.

Deiorio has shown no excusable neglect for the untimeliness of his designation of expert witnesses. The Mississippi Rules of Civil Procedure and case law require reasonable supplementation of discovery information on experts. The Mississippi Supreme Court has found the granting of summary judgment to be proper where the supplementation of expert information was untimely. *See, e.g., Bowie, supra* at 1041, ¶9 and 1043, ¶¶16-17 and *Ekornes-Duncan v. Rankin Medical Center*, 808 So.2d 955, 958-59, ¶¶8-10, 12 (Miss. 2002). Providing the expert information on December 11, 2006, violated not only UCCCR 4.04, but also the requirement of the Mississippi Rules of Civil Procedure and case law in this state regarding supplementation of discovery responses.

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 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.

Dr. Karp's Affidavit has not "identif[ied] and articulate[d] the requisite standard that was not complied with...." *Young, supra*, at 1276, ¶15. *See also Palmer, supra*, at 1357; *Mallet v. Carter*, 803 So.2d 504, 508, ¶¶11-12 (Miss. Ct. App. 2002); *Luvane v. Waldrup*, 903 So.2d 745, 748-49, ¶¶11-12 (Miss. 2005); *et al.* 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.

Absent expert medical testimony which (a) articulates the duty of care the physician owes to a particular patient under the circumstances and (b) identifies the particular(s) wherein the physician breached that duty and caused injury to the plaintiff patient, the plaintiff's claim for negligence. . . must fail.

*Paepke v. North Mississippi Medical Center, Inc.*, 744 So.2d 809, 811, ¶9 (Miss. Ct. App. 1999), quoting *Phillips v. Hull*, 516 So.2d 488, 491 (Miss. 1987). See also *Potter v. Hopper*, 907 So.2d 376, 380, ¶¶11-12 (Miss. Ct. App. 2005).

This court has reviewed the motions and affidavits provided by the parties and considered the arguments of counsel. In resolving the facts in the light most favorable to Deiorio as the non-movant, there is no genuine issue of material fact.

This Court has noted that "the time must arrive in every case where the [party] must demonstrate that there is a genuine issue for trial or have summary judgment entered against him." *Bourn v. Tomlinson Interest, Inc.*, 456 So.2d 747, 749 (Miss. 1984); *Key Constructors, Ins. V. H & M Gas Co.*, 537 So.2d 1318, 1323 (Miss. 1989).

*Travis v. Stewart*, 680 So.2d 214, 219 (Miss. 1996). That time arrived in Deiorio's case without the required showing being made. Defendants are entitled to summary judgment as Deiorio failed to either supplement his discovery responses concerning expert witnesses or to file a designation of expert witnesses sixty (60) or more days before the trial setting leaving Deiorio without expert testimony in support of his claims. In the alternative, Defendants are entitled to summary judgment as the Affidavit of Dr. Karp is insufficient to create a genuine

issue of material fact. It is, therefore,

ORDERED that the Defendants' Motion for Summary Judgment be and it is hereby granted in this case and this cause is hereby dismissed.

ORDERED this the 28<sup>th</sup> day of February, 2007.

  
CIRCUIT COURT JUDGE

**FILED**  
418 / 503-517  
FEB 28 2007

GAYLE PARKER  
CIRCUIT CLERK  
By Carly Reynolds D.C.