

IN THE SUPREME COURT OF MISSISSIPPI
No. 2007-CA-01093

BOBBI J. YOUNG and LYNDAL
CARTER, Next of Kin to CLARENCE
S. YOUNG, Deceased,

Plaintiffs/Appellants,

v.

ROBERT R. MEACHAM, GINA V. BRAY, ROBERT
H. SMITH, STEVAN I. HIMMELSTEIN, BAPTIST
MEMORIAL HOSPITAL, DESOTO, INC., AND
CARDIOVASCULAR PHYSICIANS
OF MEMPHIS,

Defendants/Appellees.

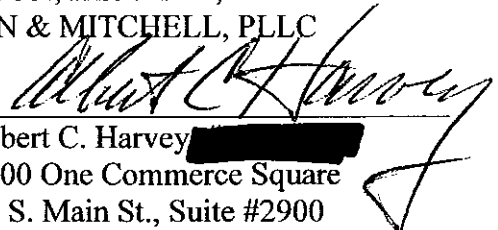
APPEAL FROM THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI
CIVIL ACTION NO. CV-2001-204

BRIEF OF APPELLEE GINA V. BRAY, D.O.

Respectfully submitted,

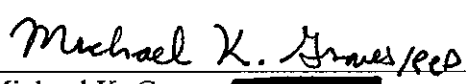
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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

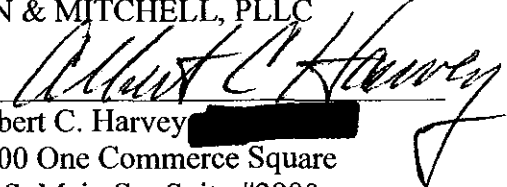
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

Bobbi J. Young and
Lynda L. Carter, next of kin to
Clarence S. Young, Deceased,
Robert R. Meacham, Gina V. Bray
Robert H. Smith, Stevan I. Himmelstein,
Baptist Memorial Hospital Desoto, Inc., and
Cardiovascular Physicians of Memphis

Respectfully submitted,

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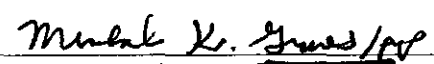

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I. STATEMENT OF THE ISSUES

1. Did the trial court correctly refuse to extend the discovery deadline in the agreed Amended Scheduling Order when the trial judge previously informed the parties that the case needed to move forward due to its long time on the docket and that extensions would not be granted without the consent of all parties?

2. Did the trial court properly strike the attempted Supplemental Rule 26 Designation of Plaintiffs' Expert, David Hansen, M.D. which was filed two months after the court ordered and agreed upon discovery deadline and which set forth expert opinions not proffered in Plaintiffs' original Rule 26 Expert Disclosures, containing Dr. Hansen's expert opinions, or Dr. Hansen's February 27, 1999 deposition testimony?

3. Whether the trial court correctly granted Summary Judgment in favor of Gina Bray, D.O. due to Dr. Hansen's withdrawal of his opinions that Dr. Bray's actions or inactions fell below the standard of care?

II. STATEMENT OF THE CASE

The Circuit Court of DeSoto County, Mississippi granted Dr. Gina Bray's Motion to Strike the Supplemental Rule 26 Expert Disclosure of Dr. David Hansen, the medical expert of Mrs. Bobbi J. Young and Ms. Lynda L. Carter, filed after the expiration of the parties' agreed upon discovery deadline. The Circuit Court then granted Summary Judgment as to claims against Dr. Bray. Mrs. Bobbi Young and Ms. Lynda Carter (Appellants) appealed these decisions. Dr. Bray (Appellee) seeks to have the decisions of the Circuit Court upheld.

A. Nature of the Case, Course of Proceedings and Disposition in the Court Below

Mrs. Bobbi J. Young and Ms. Lynda L. Carter (hereinafter "the Plaintiffs") filed

this medical malpractice case on August 22, 2001 after the death of their father, Mr. Clarence Young. The case progressed slowly primarily due to insolvency of Doctors' Insurance Reciprocal, RRG and the parties' difficulties scheduling depositions.

To foster a sense of urgency regarding discovery, the Circuit Court of DeSoto County, Mississippi entered a scheduling order in October of 2004. Upon entry of the order, the parties assumed management of trial discovery by agreement. The parties entered a consent order extending the original discovery deadline from October 15, 2005 to March 17, 2006 so that the parties could depose Dr. Bray and the Plaintiffs' expert, David Hansen, M.D. Shortly after Dr. Bray's deposition in December 2005, the Plaintiffs filed a Motion to Amend Scheduling Order, requesting to push the discovery deadline to June 15, 2006. The Plaintiffs' stated reasons for requesting the discovery extension were to obtain Dr. Bray's deposition transcripts for expert review and to facilitate scheduling of any remaining depositions. Dr. Hansen's was the only deposition outstanding. Defendants declined to consent to the proposed discovery deadline.

Dr. Hansen was deposed on February 27, 2006, three weeks before the March 17, 2006 discovery deadline. By this date, all parties had access to the complete medical records of Mr. Clarence Young from all sources, either the medical provider, through exchange among the attorneys, by way of exhibits to depositions or other available discovery methods.

In his deposition, Dr. Hansen answered questions regarding an echocardiogram report contained in the decedent's medical records made available to the Plaintiffs' attorneys on April 27, 2005. In his responses, Dr. Hansen withdrew his previous opinions regarding causation and opined that Dr. Bray had not deviated from the standard

of care on August 25, 1999, when she responded to a phone call from Mrs. Young regarding her husband's condition. Dr. Hansen further opined that had Dr. Bray immediately called a cardiologist in response to Mrs. Young's phone call, the cardiologist, Dr. Himmelstein, would not have rendered any additional care affecting Mr. Young's medical outcome. Similarly, Dr. Hansen's deposition testimony withdrew his opinions as to causation with respect to the remaining Defendants.

Following Dr. Hansen's deposition, all Defendants filed Summary Judgment Motions. In May 2006, two months after the March 17, 2006, discovery deadline, the Plaintiffs filed motions to continue the Defendants' pending Summary Judgment Motions and to compel the production of echocardiogram films for Dr. Hansen's review. On June 16, 2006, the Plaintiffs filed a Supplemental Rule 26 Expert Designation of Dr. Hansen that proffered new opinions not divulged in his deposition or in his responses to interrogatories. Dr. Bray subsequently filed a Motion to Strike Plaintiffs' Supplemental Expert Designation of Dr. Hansen. The trial court heard argument on the issues and later granted Dr. Bray's Motion to Strike and Motion for Summary Judgment. The Plaintiffs filed this appeal of the Circuit Court of DeSoto County's Final Judgment and Order Granting Summary Judgment in favor of all Defendants.

B. Statement of the Facts

On August 19, 1999, Mr. Clarence Young presented to Dr. Meacham's care. (R. at 000919). Dr. Bray did not provide care or treatment to Mr. Young on this date. (R. at 000251). One week later, on August 25, 1999, Mrs. Young called the Desoto Internal Medicine Clinic and talked to a nurse. (R. at 000956). Mrs. Young relayed that Mr. Young was having difficulty sleeping as a result of the medication prescribed by Dr.

Meacham. (R. at 000956). Dr. Bray changed the medication. (R. at 000956).

At approximately 2230 on August 25, 1999, Mr. Young presented to the emergency room at Baptist Memorial Desoto Hospital in Southaven, Mississippi. (R. at 000252, 000644, 000959). The medical personnel at Baptist Memorial Hospital Desoto, including emergency room physician, Dr. Robert Smith treated Mr. Young. (R. at 000252). Dr. Bray was the physician on call, when Mr. Young presented to the hospital. (R. at 000252). Dr. Bray admitted Mr. Young to the service of Dr. Meacham, and issued other orders, all of which appear in the hospital chart. (R. at 000252).

Plaintiffs, Mrs. Bobbi J. Young and Ms. Lynda L. Carter, as next of kin to the deceased, Mr. Clarence S. Young, filed this medical malpractice action in the Circuit Court of DeSoto County on August 22, 2001. (R. at 000010). On March 18, 2003, due to issues regarding the insolvency of Doctors' Insurance Reciprocal, RRG the trial court vacated all previous deadlines and stayed the matter. (R. at 000013, 000274). In October of the following year, Defendant Baptist Memorial Hospital-Desoto, Inc. moved the Circuit Court to set pretrial deadlines to facilitate the orderly disposition of the case. (R. at 000413). The Circuit Court heard the parties' arguments on the Defendant's Motion For Scheduling Order on March 24, 2005. (Tr. R. at 4, ll. 22-29; Tr. R. at 5-26, ll. 1-29; Tr. R. at 27, ll. 1-2.).

The trial judge informed the attorneys for all parties that this case was an "old case" on his docket, and that the case needed to move forward. (Tr. R. at 5, ll. 1-12). The trial judge cautioned the attorneys that they would be held to a scheduling order and that any changes to the order would be made by mutual agreement of the parties. (Tr. R. at 15, ll. 12-29; Tr. R. at 16, ll. 1-3). The trial judge further warned the parties that the

Circuit Court would not enforce any future agreements between the parties regarding changes to the order when the modifications did not work to the parties' satisfaction. (Tr. R. at 15, ll. 12-29; Tr. R. at 16, ll. 1-3).

The Circuit Court entered a scheduling order on March 30, 2005. (R. at 000449). The Order provided that "all discovery shall be completed on or before October 15, 2005." (R. at 000449).

The Plaintiffs deposed Defendant Dr. Himmelstein on April 27, 2005. (R. at 000581). At the conclusion of Dr. Himmelstein's deposition, a copy of Mr. Young's medical records maintained by Defendants was appended as Exhibit 3 to the deposition for the specific purpose of ensuring the parties had the same records. (R. at 000484, ll. 9-25; R. at 000485, ll. 1-18; R. at 000585). The Plaintiffs now had Mr. Young's complete medical records in their possession with five and a half (5 ½) months remaining until the October 15, 2005 discovery deadline. The medical records appended to the deposition contained an echocardiogram report dated August 30, 1999. (R. at 000701).

On August 16, 2005 Defendant, Dr. Robert Meacham, filed his First Supplemental Designation of Experts and Cross-Designation of Experts. (R. at 000755). The supplemental designation more than twice referred to the information contained in Dr. Himmelstein's August 30, 1999 echocardiogram report. (R. at 000761-62). The supplemental designation explicitly referred to the ejection fraction of "between 10% and 20%" in the report. (R. at 000761-62).

On September 21, 2005, the Plaintiffs filed a motion to extend discovery deadlines citing the parties scheduling difficulties and the need for additional time to complete discovery depositions. On September 29, 2005, by agreement of the parties, an

Amended Scheduling Order was entered extending the discovery deadline to March 17, 2006. (R. at 001206). Both the Plaintiffs and the Defendants benefited from this extension. The Plaintiffs deposed Dr. Bray on December 5, 2005. (R. at 001448). Dr. Bray's deposition was videotaped by the Plaintiffs' attorney and memorialized by court reporter. At this point, the Plaintiffs had possession of Dr. Himmelstein's August 27, 1999 echocardiogram report for nearly eleven (11) months and had also received Dr. Meacham's First Supplemental Designation of Experts offering specific opinions based on findings in the report.

On December 27, 2005, the Plaintiffs filed a motion to extend the discovery deadline to June 15, 2006. (R. at 002359). The motion stated the following reasons for request: 1) Dr. Bray's deposition had not been transcribed, 2) Plaintiff's experts had not reviewed Defendants' depositions, and 3) the Christmas and New Years holidays prevented the reasonable scheduling of depositions. (R. at 002359). More than two and a half (2 ½) months remained before the March 17, 2006 discovery deadline.

The Plaintiffs filed Dr. Bray's deposition transcript with the Circuit Court on January 17, 2006. (R. at 000015). Dr. Bray's deposition transcript and a video were available for the Plaintiffs' experts to review with more than two (2) months available for discovery. The only remaining deposition was Dr. Hansen's deposition. Defendants never agreed to further extend the discovery deadline, nor did they respond to the Plaintiffs' motion. The trial judge previously stated upon entry of the scheduling order that he would not enforce changes to the order when the parties' agreements failed to work to the parties' satisfaction. (Tr. R. at 15, ll. 12-29; Tr. R. at 16, ll. 1-3).

Defendants deposed Dr. Hansen on February 27, 2006, nearly three weeks prior to

the discovery deadline. (R. at 001771). As to standard of care, Dr. Hansen initially opined by affidavit that Dr. Bray deviated from the standard of care concerning Dr. Bray's response to a phone call that took place on August 25, 1999. (R. at 001687). However, in his deposition, Dr. Hansen testified that under the assumption that Mrs. Young told the nurse in Dr. Meacham's office the information recorded on the telephone slip, and based on the medical history recorded in Mr. Young's medical chart, Dr. Bray would not have been below the standard of care in not sending Mr. Young to the emergency room. (R. at 001784, ll. 14-25; R. at 001785, ll. 1-20; R. at 001786, ll. 3-9). Having altered his testimony regarding the August 25th phone call, the only criticism that Dr. Hansen possessed of Dr. Bray was her alleged failure to call a cardiologist when Dr. Bray was phoned by the emergency room physician at 2:30 a.m. on August 26, 1999. (R. at 001789, ll. 5-25; R. at 001790, ll. 1-11). However, during his deposition, Dr. Hansen stated that even if the cardiologist, Dr. Himmelstein, had been called at 2:30 a.m., Dr. Himmelstein would not have rendered any additional medical care. (R. at 001791, ll. 21-25; R. at 001792, ll. 1-18). Dr. Hansen reiterated a second time in his testimony that "the cardiology consult on an earlier time would not have affected the outcome." (R. at 001793, ll. 22-24). This testimony effectively negated any criticisms with respect to Dr. Bray, because had she called Dr. Himmelstein immediately, he would not have rendered any additional care to affect Mr. Young's outcome.

Dr. Hansen also opined that severe damage to Mr. Young's heart had already occurred by the time Mrs. Young called Dr. Bray. Dr. Hansen testified that Mr. Young's heart attack occurred between 6:00 p.m. and 8:00 p.m. on the night of August 25, 1999. (R. at 001783, ll. 15-23). Dr. Hansen also testified that there was a six-hour window

from the onset of the chest pain to save the heart muscle tissue in Mr. Young. (R. at 001784, ll. 5-19). The six hour window, for the best chance to save Mr. Young's heart muscle, expired somewhere around "2:00 a.m., 3:00 a.m., 4:00 a.m." on August 26, 1999. (R. at 001773, ll. 1-19; R. at 001775, ll. 1-25; R. at 001776, ll. 1-4). Based on the results of the first set of cardiac enzymes drawn on August 26, 1999, the latest his heart attack could have started would have been 9:00 p.m. (R. at 001773, ll. 1-19; R. at 001775, ll. 1-25; R. at 001776, ll. 1-4). The testimony of the plaintiff's expert demonstrates: 1) the heart attack took place hours before Dr. Bray was phoned, and 2) the damage to Mr. Young's heart muscle was virtually complete at the time Dr. Bray was called. Thus, the damage occurred prior to Dr. Bray's involvement in this case, and no action or inaction on her account caused the injuries to Mr. Young.

Dr. Hansen initially testified that Mr. Young's long-term survival was predicated on getting a bypass operation. (R. at 001776, ll. 3-6). However, during the course of his deposition, he changed his testimony and indicated that it was questionable if Mr. Young was even a candidate for a coronary artery bypass graft procedure (CABG). (R. at 001781, ll. 23-25; R. at 001782, ll. 1-5). When the Defendants asked Dr. Hansen his opinion regarding the 10 to 20% ejection fraction measured in the August 27, 1999 echocardiogram report, Dr. Hansen indicated that he might have missed the echocardiogram report in his review of Mr. Young's medical records. (R. at 001777, ll. 9-25). Dr. Hansen had earlier asked Plaintiffs' attorney whether he had the echocardiogram for him to review. (R. at 001777, ll. 17-25).

Defendants offered Dr. Hansen a break in the deposition so that he could further examine the echocardiogram. (R. at 001778, ll. 1-3). Dr. Hansen refused the break

stating, "I don't need five minutes to look at it. I have digested it already." (R. at 001778, ll. 4-5).

Dr. Hansen initially questioned the echocardiogram report stating that the report indicated that the echocardiogram was performed on August 30, 1999, three days after Mr. Young's death. (R. at 001778, ll. 8-12). Dr. Hansen acknowledged that the report referred to an echocardiogram performed on Mr. Young, and was asked to give his opinion under the assumption that the echocardiogram was in fact taken before Mr. Young's death. (R. at 001778, ll. 13-15; R. at 001779, ll. 14-25; R. at 001780, ll. 1-20). Dr. Hansen testified that the normal ejection fraction by echocardiogram would be greater than 55 percent. (R. at 001778, ll. 20-25). He opined that if Mr. Young had a 10 to 20 percent ejection fraction measured prior to his death, it would most likely be the result of the lateral wall infarction and other co-morbid heart conditions that were discussed in the autopsy. (R. at 001779, ll. 14-25; R. at 00180, ll. 1-4). He also testified that

"if this if this, obviously, incorrectly dated study is actually a study of Clarence Young prior to this death, then that would greatly increase his risk for undergoing [coronary bypass] surgery [multi-vessel type]... . I think that with an ejection fraction of 10 to 20 percent, coronary artery bypass surgery may be contraindicated, unless it is very thoughtfully done. . ."

(R. at 001780, ll. 16-24) (Emphasis added). Dr. Hansen further agreed that "if this is Mr. Young's echo report as of the time of his hospitalization at Baptist Desoto, that it is, at best, questionable as to whether he would, in fact, be a candidate for bypass surgery[.]" (R. at 001781, ll. 23-25; R. at 001782, ll. 1-5)(Emphasis added).

Upon review of the echocardiogram report shown to Dr. Hansen during his deposition, Dr. Hansen changed his opinions with respect to Mr. Young's survival rate.

Dr. Hansen was asked how the ejection fraction as described in Dr. Himmelstein's report changed his opinion. (R. at 001786, ll. 18-25; R. at 001787, ll. 1-4). Dr. Hansen testified that he could not testify to a reasonable degree of medical certainty with regard to Mr. Young's percent survival rate. (R. at 001787, ll. 12-28). He speculated that the mortality rate was close to fifty-percent (50%). (R. at 001786, ll. 13-25; R. at 001787, ll. 1-25; R. at 001788, ll. 1-16).

On April 28, 2006 Dr. Bray filed a Motion For Summary Judgment. (R. at 001740). Plaintiffs, on May 1, 2006 and May 17, 2006 filed motions to continue the Defendants' Summary Judgment Motions and to compel the production of the echocardiogram films for Dr. Hansen's review. (R. at 001854, 001858). One month later, Plaintiffs filed a Supplemental Rule 26 Expert Designation of Dr. Hansen which sought to alter his deposition testimony given on February 27, 2006 and provide new opinions. (R. at 001917-19). On July 3, 2006, Dr. Bray filed a Motion to Strike Plaintiff's Supplemental Designation of Dr. Hansen. (R. at 001940-48).

The Trial Court heard argument on Defendants' Motions to Strike on September 21, 2006. (Tr. R. at 32). The Trial Court struck Dr. Hansen's attempted Supplemental Rule 26 Expert Disclosure on October 03, 2006 citing: 1) The Plaintiffs' and Defendants' assumption of the duty to manage discovery by agreement; 2) the Plaintiffs' failure to meet the agreed deadline for the completion of all discovery; 3) reliance on the March 30, 2005 Agreed Scheduling Order; 4) Plaintiffs' access to Mr. Young's complete medical records by February 27, 2006; and, 5) fairness. (R. at 002558). The trial court entered Final Judgment and Order Granting Summary Judgment for Defendant Dr. Gina V. Bray on July 9, 2007. (R. at 002737).

III. SUMMARY OF ARGUMENT

The Circuit Court of DeSoto County, Mississippi did not abuse its discretion in denying the Appellant's Motion to Amend Scheduling and granting Dr. Gina Bray's Motion to Strike the Supplemental Rule 26 Expert Disclosure of Dr. David Hansen and Motion For Summary Judgment. To justify reversing the Circuit Court's decisions, the Appellant must establish that the Plaintiffs seasonably filed Dr. Hansen's Supplemental Rule 26 Expert Disclosure and brought forth significant and probative evidence showing the existence of a genuine issue of material fact.

The Circuit Court held that the parties took responsibility for managing discovery after the initial scheduling order was entered and that subsequent modifications required the agreement of the parties. While the parties agreed to extend the discovery deadline from October 15, 2005 to March 17, 2006, the parties did not agree to further extend the deadline to June 15, 2006. Thus, any supplementations to discovery after this date were untimely.

In June 2006, the Plaintiffs attempted to supplement their expert's disclosure based on "new" information allegedly discerned during Dr. Hansen's February 27, 2006 deposition. The disputed information was made available to the Plaintiffs' attorneys in April 27, 2005, more than ten (10) months prior to Dr. Hansen's deposition and eleven (11) months prior to the March 17, 2006 discovery cutoff. The Plaintiffs waited until after the Defendants filed summary judgment motions before they filed Dr. Hansen's supplemental expert disclosure. The Plaintiffs' filed the disclosure more than three months after the discovery deadline.

In the disclosure, Dr. Hansen changed his opinions regarding the information

contained in an echocardiogram report prepared by Dr. Himmelstein on August 27, 1999. Although Dr. Hansen reviewed and gave extensive testimony regarding Mr. Young's 10% to 20% ejection fraction during his deposition, his supplemental disclosure contained new opinions, which were never proffered in the Plaintiffs' interrogatory responses or Dr. Hansen's deposition.

The Circuit Court also held that summary judgment was proper to Dr. Bray on the basis of Dr. Hansen's retraction of causation opinions previously expressed in his initial expert affidavit. In his February 27, 2006 deposition, the Dr. Hansen opined that 1) Mr. Young's heart attack took place hours before Dr. Bray was phoned, 2) the damage to Mr. Young's heart muscle was virtually complete at the time Dr. Bray was called, 3) had Dr. Bray immediately called a cardiologist, no lifesaving action would have been taken, and 4) Mr. Young's survivability was questionable at best. Thus, the Plaintiffs could not establish that any action or failure to act by Dr. Bray caused Mr. Young's injury. Further, the Plaintiffs failed to raise any material questions of fact regarding this issue.

In absence of a clearly erroneous ruling, this Court should defer to the Circuit Court's discretion and uphold the Circuit Court's denial of the Appellant's Motion to Amend Scheduling and grant of Dr. Bray's Motion to Strike the Supplemental Rule 26 Expert Disclosure of Dr. David Hansen and Grant of Dr. Bray's Motion For Summary Judgment.

IV. ARGUMENT AND AUTHORITIES

Mississippi trial court judges have considerable discretion "[i]n managing the pre-trial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of

the cases. [These] judges also have a right to expect compliance with their orders and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril.” *Bowie v. Montfort Jones Mem. Hosp.*, 861 So.2d 1037, (¶ 14) (Miss. 2003) (citations omitted). When a party fails to timely file evidence in accordance with the scheduling order, a trial judge may exclude the evidence, even in circumstances where the exclusion ultimately results in summary judgment against the party. *Bowie*, 861 So.2d at 1037 (¶ 11).

On appeal, “[t]he discovery orders of the trial court will not be disturbed unless there has been an abuse of discretion.” *Mallet v. Carter*, 803 So.2d 504, (¶ 6) (Miss. Ct. App. 1992) (citing *Dawkins v. Redd Pest Control Co.*, 607 So.2d 1232, 1235 (Miss.1992)). The Supreme Court of Mississippi has held that discovery responses are to be supplemented “seasonably” pursuant to Rule 26(f) of the Mississippi Rules of Civil Procedure. *Bowie* 861 So.2d at 1037 (¶ 10). To meet the seasonableness requirement, supplementation should be immediate. *Id.* (citations omitted). Further, seasonableness is “determined on a case by case basis looking to the totality of the circumstances surrounding the supplemental information the offering party seeks to admit.” *Id.* (citations omitted).

A. The Trial Court Appropriately Excluded the Supplemental Designation of Plaintiffs’ Expert, Dr. David Hansen, Offered Three (3) Months After the Parties Agreed Discovery Deadline and Based on Information in Plaintiffs’ Possession Eleven (11) Months Prior to the Agreed Discovery Deadline

1. The Plaintiffs Failed to Seasonably Supplement the Rule 26 Expert Designation of Dr. Hansen

The Supreme Court of Mississippi specifically addressed seasonableness in the context of a party’s “failure to comply with a trial court’s order concerning the time

frame for the completion of discovery.” *Bowie*, 861 So.2d 1037 (¶ 13). In *Bowie v. Montfort Jones Mem. Hosp.*, the Court held that the exclusion of an expert affidavit was proper when the Plaintiffs failed to demonstrate any excusable neglect in their failure to timely file the expert designation. *Id.* at (¶ 11). The Court further held that dismissal may be justified if the violation is the result of willfulness or any fault of the party. *Id.* at (¶ 13).

In *Bowie*, the plaintiffs failed to designate an expert witness and file his expert affidavit until one month after the passage of the deadline specified in the trial court’s scheduling order. 861 So.2d 1037 (¶ 11). The trial judge entered an agreed scheduling order on August 16, 2000 providing for the completion of all discovery by March 1, 2001. *Id.* at 1037 (¶ 4). The scheduling order also set December 31, 2000 and January 31, 2001 as deadlines for the designation of plaintiffs’ and defendants’ experts, respectively. *Id.* The order explicitly restricted modification stating that the deadlines “could not be extended by agreement of the parties, but only by permission of the Court upon showing good cause.” *Id.*

The *Bowie* plaintiffs failed to designate their expert prior to the December 31, 2000 deadline. *Bowie*, 861 So.2d 1037 (¶ 11). Each of the defendants timely designated their experts in accordance with the scheduling order. *Id.* Shortly thereafter, both defendants filed motions for summary judgment citing plaintiffs’ failure to designate a medical expert to support a prima facie case of medical malpractice. *Id.* After the summary judgment motions were filed, the plaintiffs identified their expert and filed his affidavit on February 28, 2001. *Id.*

The *Bowie* plaintiffs then filed a motion for extension of time to designate an

expert and sought a retroactive order permitting the late designation. *Id.* at (¶5). On March 5, 2001, the trial court heard the parties' motions and found

"that the motion for extension of time was untimely as it was filed 'over two months after the deadline for designation of expert witnesses had passed and over a month after one or more of the Defendants' Motion[s] for Summary Judgment were filed.' The trial judge noted that the [plaintiffs'] motion claimed the original deadline was not met due to counsel's attendance at other trials or legal proceedings but that [plaintiffs'] counsel offered no evidence such as calendars to support the claim."

Id. at (¶ 5). This Court affirmed the trial court's decision and opinion that "the plaintiff has just failed to show any excusable neglect for why the designation of experts was not filed timely." *Id.* at (¶ 11).

As a threshold matter, the undisputed facts of this case indicate that no new facts were revealed in Dr. Hansen's deposition on February 27, 2006. Although the Plaintiffs allege surprise, the Plaintiffs possessed Dr. Himmelstein's echocardiogram report in April 2005, and their expert offered his opinion of the report three weeks before discovery closed. To meet the seasonable requirement, one would have expected "immediate" supplementation of the expert's disclosure in close temporal proximity to the analysis of the Dr. Himmelstein's echocardiogram report in April 2005.

The Plaintiffs' expert supplementation is also unseasonable considering the totality of the circumstances. When the Plaintiffs first obtained the echocardiogram report, they had more than five months to review the report and supplement Dr. Hansen's affidavit. They did not. Shortly before the October 15, 2005 discovery deadline, the parties mutually consented to extend discovery until March 17, 2006. This change afforded the Plaintiffs an additional five months to review Mr. Young's medical records and to supplement Dr. Hansen's affidavit. They did not.

The Court's reasoning in *Bowie* is directly applicable in the present case. Like the plaintiffs in *Bowie*, the Plaintiffs in this case entered an agreed scheduling order that provided for the completion of discovery by a designated date. Although the scheduling order did not contain language explicitly stating that deadlines could not be extended by agreement of the parties, the trial court judge informed all parties that the original scheduling order was controlling absent agreed modifications by the parties. The trial judge went further and warned the parties that relief would not be forthcoming should their modifications fail to work to the parties' satisfaction.

The *Bowie* plaintiffs did not designate an expert prior to the discovery deadline, but did so only after the defendants filed motions for summary judgment. By then, their designations were more than two months overdue. Similarly, the Plaintiffs in this case attempted to supplement their expert designation after the Defendants filed summary judgment motions and more than three months after the discovery deadline.

In *Bowie*, the plaintiff's counsel claimed that the original deadline was not met due to counsel's attendance at other trials and legal proceedings. Counsel, however, failed to offer evidence to support his claim. The Plaintiffs in the current case claim that the single sheet echocardiogram report was overlooked in the multi-page medical record. This admission provides sufficient justification for the exclusion of the evidence.

Months before the discovery deadline, Dr. Meacham's supplemental expert disclosures referenced information specifically contained in the August 30, 1999 echocardiogram report and not present elsewhere in the record. Thus, the Plaintiffs' attention should have been drawn to the "missing" information sometime prior to Dr. Hansen's deposition. Further, when Dr. Hansen stated that he had not had the

opportunity to review the echocardiogram report, Defendants offered to take a break from the deposition to permit his analysis. Dr. Hansen refused the Defendants' offer to further examine the echocardiogram report during his deposition, and apparently made no attempt to modify his affidavit in the remaining three weeks of discovery. Therefore, the Plaintiffs cannot show that Dr. Hansen's Rule 26 Expert Supplementation was seasonably filed.

B. The Trial Court Acted Within Its Discretion When It Refused to Extend the Discovery Deadline After the Parties Assumed Discovery Management

1. A Party's Request to Extend Discovery Deadlines Is Ineffective to Extend Discovery Except When Approved by the Trial Court

The Supreme Court of Mississippi "has adhered to the rule that filing a motion is not a release from a trial court's order unless the motion is heard and a decision is made." *Beck v. Sapet*, 937 So.2d 945, (¶ 11) (Miss. 2006) (holding efforts should have been made to supplement discovery before onset of ordered discovery deadline).

In *Hariel v. Biloxi HMA, Inc.*, this Court upheld the circuit court's decision to strike an expert's affidavit filed after the discovery deadline. *Hariel v. Biloxi HMA, Inc.*, 964 So.2d 600, (¶ 28) (Miss. Ct. App. 2007). In *Hariel*, the plaintiff failed to timely respond to the defendants' motions for summary judgment. *Hariel*, 964 So.2d 600 (¶ 28). The defendants agreed to allow Hariel ninety (90) days to respond to their motions for summary judgment and to conduct additional discovery. *Id.* at (¶ 12). During the extension period, the parties had difficulty scheduling depositions. *Id.*

Hariel's attorneys later proposed an agreed scheduling order granting Hariel an additional thirty days after a doctor's deposition to designate expert witnesses. *Id.* at (¶ 13). The agreed order was signed by only one of the two defendants and was not signed

by the court. *Id.* When the doctor's deposition was finally scheduled, approximately nineteen (19) days separated the deposition from the extended discovery deadline. *Id.* at (§§ 12, 14). Hariel deposed the doctor, but waited more than four months after the deposition to file his expert's affidavit. *Id.* at (§ 25). Shortly after the expert filing, the court heard the defendants' motions and granted summary judgment to the defendants. *Id.* at (§§23, 26).

On appeal, Hariel argued that the trial court erred when it did not allow him to submit the expert affidavit after the discovery deadline. *Id.* at (§§ 28-29). This Court held that while the facts demonstrated that Hariel requested additional time to obtain the expert's affidavit, the trial court never extended the time for discovery. *Id.* at (§ 29). Nor did Hariel establish excusable neglect in his failure to timely procure the expert affidavit. *Id.*

In the present case, the Plaintiffs sought to extend discovery to June 15, 2006. The defendants never agreed to the extension. The circuit court never entered an order. Thus, the Plaintiffs cannot rely on the proposed extension to deem their filings timely.

2. The Supreme Court of Mississippi Limited the Holding in *Thompson v. Patino* to No Longer Stand for the Proposition That a Trial Court May Never Strike An Expert Affidavit in Response to a Discovery Violation

In *Bowie v. Montfort Jones Mem. Hosp.*, this Court limited the precedential authority of *Thompson v. Patino*, 784 So.2d 220 (Miss. 2001) by opining: "That 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*, 861 So.2d 1037 (§ 12).

In *Thompson*, the plaintiff filed interrogatories naming two experts but failing to

state what their opinions would be. *Thompson*, 784 So.2d 220 (§ 7). Before plaintiff supplemented her interrogatories with the missing information and after the discovery deadline, the defendants filed a motion for summary judgment. *Id.* at (§§ 8-12). Plaintiff then supplemented her responses to interrogatories and named for the first time two new expert witnesses. *Id.* at (§ 12). In response, a defendant filed a motion to strike the plaintiff's supplemental responses which was granted by the trial court. *Id.* at (§§ 14-16). The trial court's decision was later affirmed by the Court of Appeals of Mississippi. *Id.* at (§ 20).

The Supreme Court of Mississippi granted certiorari to decide what sanctions were appropriate for the discovery violation in that civil action. *Id.* at (§§ 2-3). The Court reversed the Court of Appeals, citing *Mississippi Power & Light Co. v. Lumpkin*, 725 So.2d 721 (§ 60) (Miss. 1998), for the premise that the exclusion of evidence for discovery violations is extreme measure and treating the length of time between supplementation and the trial date as a significant factor. *Thompson*, 784 So.2d 220 (§ 25).

The facts of *Thompson* are inapposite to the present case. In *Thompson*, the plaintiff argued that she learned additional information, during the deposition of a newly added defendant, causing her delay in naming two new expert witnesses. *Id.* at (§ 16). In the present case, no new Defendant was added after Plaintiffs' original Complaint, nor was there any discovery of additional information which caused a delay in naming expert witnesses or requiring a supplementation of discovery. Instead, these Plaintiffs attempted to supplement their expert's disclosure to re-characterize Dr. Hansen's opinions regarding Dr. Hammerstein's, August 30, 1999, echocardiogram report. This

supplementation was filed after Dr. Hansen was deposed, the discovery deadline expired and Defendants' summary judgment motions were filed.

The Plaintiffs in this case cannot demonstrate the discovery of any additional information to justify supplementation. The record indicates that Plaintiffs were in possession of Dr. Himmelstein's, August 30, 1999, echocardiogram report more than ten (10) months prior to Dr. Hansen's deposition and eleven (11) months before the discovery deadline passed. The facts of this case are incongruous with those of *Thompson*. Thus, as the Supreme Court of Mississippi held in *Bowie, Thompson* does not stand for the proposition that a trial court may not strike an expert affidavit in this case.

C. Summary Judgment in Favor of Dr. Bray Is Appropriate Considering Dr. Hansen's Withdrawal of Opinions on Causation

1. Dr. Hansen Testified That Dr. Bray's Action and Inaction Did Not Fall Below The Standard of Care

In order to prevail on a medical malpractice action, a plaintiff must establish, by expert testimony: 1) the standard of acceptable professional practice; 2) that the defendant physician deviated from that standard; and, 3) that the deviation from the standard of acceptable professional practice was the proximate cause of the injury for which the plaintiff complained. *Burnham v. Tabb*, 508 So.2d 1072, 1074 (Miss. 1987). Unless the matter at issue is within the common knowledge of laymen, negligence cannot be established without expert medical testimony demonstrating that the physician failed to use ordinary skill and care. *Kilpatrick v. Miss. Baptist Medical Center*, 461 So.2d 765, 768 (Miss. 1984).

The Mississippi Supreme Court stated that a party opposing a motion for summary judgment must be diligent in bringing forth significant and prohibitive evidence

showing the existence of a genuine issue of material fact. General allegations without precisely stated facts are insufficient. *Brown v. Credit Center, Inc.*, 444 So.2d 358, 364 (Miss. 1983). If a party opposes a motion for summary judgment on a claim or defense upon which it bears the burden of proof at trial, and the moving party can show a complete failure of proof on an essential element of the claim or defense, other issues become immaterial, and the moving party is entitled to summary judgment. *Crain v. Cleveland Lodge 1532 Order of Moose, Inc.*, 641 So.2d 1186, 1188 (Miss. 1994).

The Plaintiffs' expert witness, David E. Hansen, M.D., filed his affidavit after which Defendants deposed him on February 27, 2006. As to standard of care, Dr. Hansen initially opined by affidavit that Dr. Bray deviated from the standard of care concerning Dr. Bray's response to a phone call that took place on August 25, 1999. However, in his deposition, Dr. Hansen retracted this criticism. Dr. Hansen testified that, based upon Mr. Young's medical history and the information relayed to a nurse in Dr. Meacham's office by Mrs. Young, Dr. Bray would not have been below the standard of care in not sending Mr. Young to the emergency room.

Dr. Hansen also retracted his opinion that Dr. Bray's failure to call a cardiologist at 2:30 a.m. on August 26, 1999, after the emergency room physician phoned her, contributed to Mr. Young's death. His new testimony suggested Dr. Bray called the cardiologist, Dr. Himmelstein, at 2:30 a.m., the cardiologist would not have rendered any additional medical care which would have changed the outcome. (R. at 00191, ll. 21-25; R. at 001792, ll. 1-18). Dr. Hansen further opined that Mr. Young's heart attack took place hours before Dr. Bray was phoned and the severe damage to Mr. Young's heart had already occurred by the time Mrs. Young called Dr. Bray. (R. at 001783, ll. 15-23; R. at

001784, ll. 5-19; R at 001773, ll. 1-19; R. at 001775, ll. 1-25; R. at 001776, ll. 1-4). Thus, the damage occurred prior to Dr. Bray's involvement in this case, and no action or inaction on her account caused the injuries to Mr. Young.

Dr. Hansen also recanted his initial opinion that Mr. Young's long-term survival was predicated on getting a bypass operation. After his review of the echocardiogram report, Dr. Hansen changed his opinions and testified that he could no longer testify to a reasonable degree of medical certainty with regards to Mr. Young's percent survival rate. (R. at 01781, ll. 23-25; R. at 001782, ll. 1-5).

Thus, summary judgment is appropriate as Dr. Hansen has failed to offer any opinion that any action or failure to act by Dr. Bray 1) caused damage to Mr. Young's heart, 2) caused his heart attack, or 3) could have prevented any damage to his heart.

2. Dr. Hansen's Uncertainty Regarding the Date/Time Stamp of Dr. Himmelstein's Echocardiogram Report Does Not Raise a Material Fact

The Plaintiffs argue that Dr. Hansen's questioning of the echocardiogram report based upon its date and Dr. Hansen's inability to imagine the condition of Mr. Young creates a material fact sufficient to preclude summary judgment. Admittedly, the defendants requested that Dr. Hansen assume that the information contained in the record was true. Notwithstanding this request, the fact remains that the echocardiogram report is a part of Mr. Young's medical record made available to the defendants by the hospital and certified as authentic by the records custodian. As such, the echocardiogram report contained in the medical record speaks for itself.

Dr. Hansen's opinions regarding information contained in an authentic medical record, even if requested in the hypothetical, are sufficiently based in fact to form binding

expert testimony. While Dr. Hansen may have been uncertain of the authenticity of the record at that moment he testified in deposition, the totality of medical records and expert opinions found elsewhere in this record demonstrate that the echocardiogram report is authentic, and was performed upon Mr. Young prior to his death. As such, there is no legitimate dispute of fact on this issue of the report's authenticity.

In his deposition, Dr. Hansen recanted the opinions he previously offered in his expert affidavit under the assumption the echocardiogram was authentic and performed before Mr. Young's death. Having seen that the record is in fact authentic, he cannot now recant his deposition testimony, and supplement his disclosure to create a material issue of fact. For the reasons argued in the brief above, Dr. Hansen's deposition testimony supports the grant of summary judgment as to all defendants.

Dr. Hansen's untimely filed supplemental disclosure was stricken from the record and has no bearing on this issue.

CONCLUSION

The Appellee, Dr. Gina Bray, seeks affirmation of the Circuit Court of DeSoto County, Mississippi's grant of Dr. Gina Bray's Motion to Strike the Supplemental Rule 26 Expert Disclosure of Dr. David Hansen and Final Order and Grant of Summary Judgment in favor of Dr. Bray. This holding is correct because the Circuit Court acted within its discretion in managing the pre-trial discovery process in this case. The Plaintiffs cannot be said to have seasonably supplemented their Rule 26 Expert Disclosure of Dr. David Hansen when the supplementation occurred after the discovery deadline and eleven (11) months after the report was obtained. Under *Bowie* this late-filed Supplemental Rule 26 Expert Disclosure of Dr. David Hansen can be excluded even if it results in summary judgment for the defendants. Without this supplement, Dr. Hansen's deposition testimony serves to withdraw all opinions regarding causation with respect to Dr. Bray. Therefore, the Appellee respectfully requests that the Court affirm the lower court's decision to Strike the Supplemental Rule 26 Expert Disclosure of Dr. David Hansen and Final Order and Grant of Summary Judgment in favor of Dr. Bray.

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a true and correct copy of the foregoing document via U.S. Mail, postage prepaid this 9 day of JAN, 2008, to the following:

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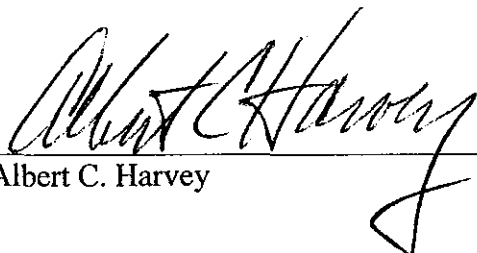
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