IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-01093

BOBBI J. YOUNG and LYNDA L. CARTER, Next of Kin to CLARENCE S. YOUNG, Deceased — APPELLANTS

V.

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

BRIEF OF APPELLEE, ROBERT H. SMITH, D.O.

ORAL ARGUMENT IS NOT REQUESTED

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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 for evaluation of possible disqualification or recusal:

1. Honorable Andrew C. Baker;
2. Bobbi J. Young, Appellant;
3. Lynda L. Carter, Appellant;
4. Clarence S. Young, Deceased
5. Duncan E. Ragsdale, Esquire, Attorney for Appellants;
6. Law Office of Duncan E. Ragsdale; Attorney for Appellants;
7. William Bruce, Esquire, Attorney for Appellants;
8. John H. Dunbar, Esquire, Attorney for Appellee Baptist Memorial Hospital-Desoto;
9. Walter Alan Davis, Esquire, Attorney for Appellee Baptist Memorial Hospital-Desoto;
10. Dunbar Davis, PLLC, Attorneys for Appellee Baptist Memorial Hospital-Desoto

11. Dion J. Shanley, Esquire, Attorney for Appellees, Stevan I. Himmelstein, M.D. and Cardiovascular Physicians of Memphis;

12. Shelby Duke Goza, Esquire, Attorney for Appellees, Stevan I. Himmelstein, M.D. and Cardiovascular Physicians of Memphis;

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14. J.L. Wilson, Esquire, Attorney for Appellee, Robert R. Meacham, M.D.;

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18. Thomason, Hendrix, Harvey, Johnson & Mitchell, PLLC, Attorneys for Appellee, Gina V. Bray, D.O.;

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20. Myers, Graves, PLLC, Attorneys for Appellee, Gina V. Bray, D.O.;

21. Robert K. Upchurch, Attorney for Appellee, Robert H. Smith, D.O.;

22. David W. Upchurch, Attorney for Appellee Robert H. Smith, D.O.;

23. Janelle M. Lowrey, Attorney for Appellee Robert H. Smith, D.O.; and

24. Holland, Ray, Upchurch & Hillen, P.A., Attorneys for Appellee, Robert H. Smith, D.O.

Respectfully submitted, this the 14th day of March 2008.

HOLLAND, RAY, UPCHURCH & HILLEN, P.A.

BY: [redacted]
JANELLE M. LOWREY
Attorney for Appellee, Robert H. Smith, D.O.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULES

I. STATEMENT REGARDING ORAL ARGUMENT

The issues presented in this appeal can be resolved on the basis of the record and briefs of the parties. Oral argument is not requested.

II. STATEMENT OF THE ISSUES

1. Whether the Trial Court was within its discretion in striking the Plaintiffs' untimely "Supplemental" Rule 26 expert designation of Plaintiffs' expert witness, David E. Hansen, M.D. and the "Supplemental" Affidavit of Dr. Hansen, both of which were filed after the expiration of the Court ordered discovery deadline.

2. Whether the Trial Court properly granted summary judgment in favor of Dr. Smith.

III. STATEMENT OF THE CASE

Dr. Smith adopts and incorporates by reference the STATEMENT OF THE CASE of the Appellee, Baptist Memorial Hospital-DeSoto, Inc. ("BMH-D")[1] with the following additions: On September 19, 2001, Robert H. Smith, D.O., an emergency department physician at BMH-D filed his Separate Answer and Defenses to the Plaintiffs' Complaint, in which he denied all of Plaintiffs' allegations of negligence against him. (R. at 66). On October 11, 2001, Dr. Smith propounded his First Set of Requests for Admissions, Interrogatories and Requests for Production of Documents to the Plaintiffs. (R. at 115-116). Dr. Smith's Requests for Admissions are set forth below:

> 1. Please admit that with regard to the care and treatment provided to Clarence S. Young by Robert H. Smith, D.O., you have no qualified medical expert who is expected to testify at the trial of

[1] Given the nearly identical positions of the Appellees, Dr. Smith will incorporate by reference portions of previously-filed Appellee Briefs to avoid duplication of arguments and citations of authorities.

this case that Robert Smith, D.O. deviated from the applicable standard of care for an emergency room physician.

2. Please admit that you have no qualified medical expert who is expected to state an opinion at trial that any alleged deviation from the applicable standard of care on the part of Robert H. Smith, D.O., proximately caused or contributed to the death of Clarence S. Young.

The Plaintiffs did not respond to these Requests for Admissions within the 30-day period allowed by M.R.C.P. 36. On December 18, 2001 - 68 days after service of the Requests for Admissions - Dr. Smith filed a Motion for Summary Judgment arguing that under the plain language of M.R.C.P. 36, the Plaintiffs, by their failure to file a timely response to Dr. Smith's Requests for Admissions, had admitted the subject matter of each request, i.e., the Plaintiffs were deemed to have admitted that they did not have a medical expert witness who was expected to testify at trial on any element of their negligence claim against Dr. Smith. (R. at 102-104). On December 21, 2001, after receiving Dr. Smith's Motion for Summary Judgment, the Plaintiffs filed their Response to his Requests for Admissions, denying each request. (R. at 119-120). However, the Plaintiffs never filed a motion requesting leave of Court to withdraw the admissions they had made by having failed to respond to the requests within 30 days of service.

On December 21, 2001, the Plaintiffs also responded to Dr. Smith's Motion for Summary Judgment and filed an Affidavit dated December 1, 2001, of David E. Hansen, M.D., a cardiologist from Nashville, TN. (R. at 199). Dr. Hansen's Affidavit contained criticisms of Dr. Smith's involvement in Mr. Young's care and treatment during his August 25, 1999 admission to the BMH-D emergency department, Dr. Hansen but did not contain any opinion causally connecting the alleged negligence of Dr. Smith to the death of Mr. Young. Dr. Hansen addressed causation in ¶6 of his Affidavit:

> It is my opinion, based upon a reasonable degree of medical certainty, that Mr. Young died as a direct and proximate result of an acute myocardial infarction, a death that probably would have

> been prevented if he had received appropriate care by Dr. Meacham, Dr. Bray and Dr. Himmelstein on August 19, 23, 25 and 26, 1999. (Emphasis added) (R. at 199).

No mention was made of Dr. Smith. Dr. Hansen opined Mr. Young's death was caused by "Dr. Meacham, Dr. Bray and Dr. Himmelstein" and not by Dr. Smith.

Dr. Hansen was deposed on February 27, 2006. During his deposition, Dr. Hansen withdrew his earlier-stated causation opinions and acknowledged that he was not holding himself out as an expert in Dr. Smith's field of practice - emergency medicine. After the Court ordered discovery deadline of March 17, 2006 expired, all defendants filed Motions for Summary Judgment and/or joined in a Motion for Summary Judgment made by another defendant. Dr. Smith filed his Joinder in BMH-D's Motion for Summary Judgment on April 27, 2006. (R. at 1852). He also subsequently joined in BMH-D's Motion to Strike the Plaintiffs' untimely "Supplemental" Rule 26 expert designation of Dr. Hansen, filed on June 14, 2006, and the "Supplemental" Affidavit of Dr. Hansen, filed on July 19, 2006. (R. at 2352).

The defendants' dispositive motions came on for hearing before Circuit Judge Baker on June 1, 2007. After considering Dr. Smith's motion and the Plaintiffs' response, and having heard oral argument of counsel, on June 18, 2007, Judge Baker signed a Final Judgment and Order Granting Summary Judgment in favor of the Defendant, Robert H. Smith, D.O., which was filed with the circuit clerk on June 25, 2007. (R. at 2722).

IV. STATEMENT OF FACTS

Dr. Smith incorporates herein by reference the STATEMENT OF FACTS of the Appellee, BMH-D, with the following additions: Dr. Smith was the emergency department physician on duty when Mr. Young presented to the BMH-D emergency department late in the evening on August 25, 1999. (R. at 1589). Dr. Smith obtained a history from Mr. Young, performed a physical examination and ordered appropriate tests, including a chest x-ray, EKG,

and cardiac enzymes. (R. at 1590, 1592). During the early morning hours of August 26, Dr. Smith received the results of these tests and contacted Gina Bray, D.O., the physician taking call for Robert Meacham, M.D., (Mr. Young's primary care physician), and Dr. Bray admitted Mr. Young to the Intensive Care Unit at BMH-D to the service of Dr. Meacham. (R. at 1590, 1592, 1595). Dr. Smith's shift in the emergency department ended at 7:00 a.m. on August 26, and he had no further contact with or involvement in Mr. Young's care and treatment.

V. SUMMARY OF THE ARGUMENT

Trial judges are afforded considerable discretion over discovery matters including the enforcement of scheduling orders setting discovery deadlines. The Trial Court properly exercised his discretion in striking the Plaintiffs' "Supplemental" Rule 26 expert designation of Dr. Hansen and the "Supplemental" Affidavit of Dr. Hansen, both of which were filed well after the Court ordered discovery deadline of March 17, 2006. No excusable neglect exists for the Plaintiffs' failure to comply with the Court's scheduling order.

The Trial Court's grant of summary judgment in favor of Dr. Smith was appropriate on at least four grounds. First, Dr. Hansen, neither in his original affidavit nor in his deposition testimony, opined that anything which Dr. Smith did or did not do caused or contributed to Mr. Young's death. Absent competent expert proof on the essential element of causation, the Plaintiffs failed to create a genuine issue of material fact on their claim against Dr. Smith and summary judgment in his favor was appropriate. Second, Dr. Hansen, a cardiologist, testified at his deposition that he was not holding himself out as an expert in the field of Dr. Smith's specialty of emergency medicine. This Court has long held that an expert must be familiar with the standard of care applicable to the specialty of the defendant physician. By his own admission, Dr. Hansen was not competent to render any standard of care opinions against Dr. Smith. Third, even if the Trial Court had considered the Plaintiffs' "Supplemental" expert

designation, the supplementation would not have defeated Dr. Smith's motion. The "Supplemental" designation was prepared and signed by Plaintiffs' counsel and did not contain sworn testimony of Dr. Hansen or any other medical expert. Absent sworn testimony, the Plaintiffs could not create a genuine issue of material fact on their claim against Dr. Smith. Fourth, by failing to timely respond to Dr. Smith's Requests for Admissions and by failing to move for and obtain an order of the Court allowing the Plaintiffs to withdraw their admissions to Dr. Smith's Requests, it was conclusively established that the Plaintiffs had no opinion of a qualified medical expert who was expected to testify at a trial as to any element of their claim of medical negligence against Dr. Smith. For each of the reasons stated above, the Trial Court properly granted Dr. Smith's Motion for Summary Judgment.

VI. ARGUMENT

1. THE TRIAL COURT WAS WELL WITHIN ITS DISCRETION IN STRIKING THE PLAINTIFFS' UNTIMELY ATTEMPTS TO SUPPLEMENT THE OPINIONS OF THE PLAINTIFFS' EXPERT, DAVID HANSEN, M.D.

By an Amended Scheduling Order dated September 29, 2005, the Trial Court ordered that "All discovery shall be completed on or before March 17, 2006." (R. at 1206). The Plaintiffs' expert, Dr. Hansen, was deposed on February 27, 2006, three weeks prior to the expiration of the discovery deadline. Notwithstanding the questions posed to Dr. Hansen regarding the echocardiogram performed on Mr. Young during his August 25, 1999 admission, the Plaintiffs did not file their "Supplemental" Rule 26 expert designation of Dr. Hansen until June 14, 2006 (almost 90 days after the expiration of the discovery deadline) and did not file Dr. Hansen's "Supplemental" Affidavit until July 21, 2006, some 120 days after the expiration of the discovery deadline. (R. at 1982, 2027). No excusable neglect exists for this failure to supplement timely. *Shelton v. Lift, Inc.*, 967 So.2d 1254, 1256 (Miss.App. 2007) ("[T]he law in this state is clear that "simple inadvertence or mistake of counsel, is neither good cause nor

excusable neglect.").

The Trial Court has considerable discretion in matters pertaining to discovery and orders governing discovery will not be disturbed in the absence of an abuse of discretion. *Clark v. Mississippi Power Co.,* 372 So.2d 1077 (Miss. 1979); *Harkins v. Paschall,* 348 So.2d 1019 (Miss. 1977); *Paulk v. Housing Authority of City of Tupelo,* 228 So.2d 871 (Miss. 1969); *Kilpatrick v. Mississippi Baptist Medical Center,* 461 So.2d 765, 767 (Miss. 1984). Moreover, "Attorneys and parties must take seriously the deadlines established in the pre-trial orders entered by our trial courts. Attorneys and parties should not complain about the consequences when they consciously fail to adhere to our trial judges' orders." *Stuckey v. The Provident Bank,* 912 So.2d 859, 869 (Miss.,2005); *see also, Buchanan v. Ameristar Casino Vicksburg, Inc.,* 957 So.2d 969, 975 (Miss. 2007); *Bowie v Montfort Jones Memorial Hosp.,* 861 So.2d 1037, 1042 (Miss. 2003).

After Dr. Hansen's deposition was taken on February 27, 2006, the Plaintiff had three weeks before the Court ordered discovery deadline expired to supplement Dr. Hansen's expected opinions. In fact, the Plaintiffs were under a duty to seasonably supplement Dr. Hansen's opinions if his opinions had changed or differed from opinions which he had previously disclosed or expressed. *See,* M.R.C.P. 26(f)(2). Given the Plaintiffs' subsequent claims about the accuracy and reliability of Mr. Young's echocardiogram report, one would have expected immediate supplementation, but timely supplementation was not received.

Based upon the above authorities and the argument and authorities on this issue set forth in the Appellee Briefs of BMH-D, Gina D. Bray, D.O., and Robert R. Meacham, M.D., all of which are incorporated herein by reference, this Court should affirm the Trial Court's ruling striking Plaintiffs' "Supplemental" Rule 26 expert designation and "Supplemental" Affidavit of

Dr. Hansen.[2]

2. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DR. SMITH

A. Plaintiff had no expert testimony on the essential element of causation.

In order to defeat Dr. Smith's Motion for Summary Judgment, the Plaintiffs had the burden to establish the following elements of their medical negligence claim against him: (1) The existence of a duty on behalf of Dr. Smith to conform to a specific standard of care; (2) failure to conform to that standard of care; and (3) an injury to the plaintiff proximately caused by a breach of the standard of care. *McCaffrey v. Puckett,* 784 So.2d 197, 206 (Miss. 2001). Since the subject matter of plaintiffs' claims against Dr. Smith were outside the common knowledge of laymen, the plaintiffs were required to prove their claim against him through competent medical expert testimony. *Gatlin v. Methodist Medical Center, Inc.*, 772 So.2d 1023, 1026 (Miss. 2000). "Not only must this expert identify and articulate the requisite standard of care that was not complied with, the expert must also establish that the failure was the proximate cause, or a proximate contributing cause of the alleged injuries." *Hubbard v. Wansley*, 954 So.2d 951, 957 (Miss. 2007). A plaintiff cannot maintain a wrongful death action against a defendant absent evidence that negligence on the part of the defendant caused or contributed to the death of plaintiff's decedent. *Richardson v. Methodist Hosp. of Hattiesburg*, 807 So. 2d 1244, 1248 (Miss. 2002) (holding the Trial Court properly granted summary judgment on plaintiff's wrongful death claim for the plaintiff's failure to provide qualified testimony establishing a genuine issue of material fact as to whether defendant's alleged negligence caused the death of plaintiff's decedent). The plaintiff "must show that there is causation

[2] See BMH-D's Brief at Section IV (1) (A) and (B); Brief of Dr. Bray at Section IV (B); and Dr. Meacham's Brief at Section VII (A).

in fact," *Id.* Moreover, "[r]ecovery is allowed only when the failure of the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition. *Ladner v. Campbell*, 515 So.2d 882, 888-89 (Miss. 1987); *See also*, *Harris v. Shields*, 568 So.2d 269 (Miss. 1990); *Clayton v. Thompson*, 475 So.2d 439 (Miss. 1985); *Hubbard v. Wansley*, 954 So.2d 951 (Miss. 2007).

The original affidavit of the Plaintiffs' expert, Dr. Hansen, contained no opinion linking Dr. Smith's alleged negligence to Mr. Young's death and, at his deposition, Dr. Hansen withdrew his causation opinions as to all defendants. Dr. Hansen testified that he could no longer state to a reasonable degree of medical certainty that Mr. Young would have survived his August 25, 1999 hospitalization even if the defendants had complied with what he opined was the applicable standard of care. Dr. Hanson testified:

> Q. Can you say, to a reasonable degree of medical certainty, that Mr. Young would have survived at all, based on what you now know?
>
> A. **No**...(R. at 1729) (Hansen Dep. at 137, 12-15) (Emphasis added).

Given Dr. Hansen's original affidavit, the withdrawal of his causation opinion at his deposition, and the Trial Court's striking of the Plaintiffs' untimely "Supplemental" expert designation of Dr. Hansen's opinions and Dr. Hansen's "Supplemental" Affidavit, the Plaintiffs had no expert testimony causally linking the care and treatment of Dr. Smith, or any other defendant, to Mr. Young's death, and summary judgment in favor of Dr. Smith was appropriate.

B. Dr. Hansen, a cardiologist, was not competent to render standard of care opinions against Dr. Smith, an emergency department physician.

Familiarity with the specialty of the defendant physician is required in order for an

expert to testify as to the standard of care applicable to that physician. *Hubbard v. Wansley*, 954 So.2d 951, 957 (Miss. 2007). Dr. Hansen did not attempt to claim familiarity with the standard of care that would be required of an emergency department physician, such as Dr. Smith, in treating a patient such as Mr. Young in August 1999. To the contrary, he testified at his deposition that he was not holding himself out as an expert in the field of emergency department medicine:

> Q. **Dr. Hansen, are you representing to the court and jury in this case that you are offering opinions as an expert in the field of emergency room medicine?**
>
> A. **No.** I mean my qualifications are that of a cardiologist, so I plan to speak to the things that a cardiologist can address.
>
> Q. So you would, then, limit your opinions to things that would involve standard of care issues involving cardiology aspects of this gentleman's care and treatment, correct?
>
> A. I would try to.
>
> Q. Is that a yes?
>
> A. Yes, sir. (Emphasis added) (R. at 1731) (Hansen Dep. at 147, 16-25; 148, 1-4).

Dr. Smith does not contend that the Plaintiffs' expert, Dr. Hansen, a cardiologist, was not familiar with the diagnosis and treatment of heart disease. It is Dr. Smith's contention that the well-established precedent of this Court "requires familiarity not with a particular subject, but with a specialty." *Hubbard*, 954 So.2d at 958. (holding the Trial Court properly granted summary judgment in a medical negligence case, in part, because the plaintiff's expert, a neurosurgeon, who was intimately familiar with the subject matter of the lawsuit, failed to demonstrate the requisite familiarity with the standard of care applicable to the defendant physician - an internist). (Emphasis added).

Dr. Hansen admitted that he was not offering opinions as an expert in the field of

emergency room medicine. Therefore, under *Hubbard,* Dr. Hansen was not qualified to testify as to the standard of care applicable to Dr. Smith, an emergency department physician, and the grant of summary judgment in favor of Dr. Smith was appropriate on these grounds as well.[3]

C. Even if the Trial Court had considered Plaintiffs' "Supplemental" expert designation of Dr. Hansen's expected opinions, summary judgment in favor of Dr. Smith would have been appropriate.

The party opposing a motion for summary judgment "must bring forth probative evidence legally sufficient to make apparent the existence of triable fact issues." *Smith v First Federal Savings & Loan Ass'n of Grenada*, 460 So.2d 786, 792 (Miss. 1984) (citing *Union Planters National Leasing, Inc. v Woods,* 687 F.2d 117, 119 (5th Cir. 1982)). The non-movant "may not rely solely upon the unsworn allegations in the pleadings or arguments and assertions in briefs or legal memoranda." *Magee v Transcontinental Gas Pipeline Corp.,* 551 So.2d 182, 186 (Miss. 1989); *Hill v Consumer National Bank*, 482 So.2d 1124, 1128 (Miss. 1986). Rather, the "party opposing the motion must, by affidavit or otherwise, set forth specific facts showing that there are, indeed, genuine issues for trial." *Fruchter v. Lynch Oil Co.,* 522 So.2d 195, 199 (Miss. 1988), (citing *Matter of Lanius*, 507 So.2d 27, 30 (Miss. 1987); *First Federal Savings & Loan Ass'n,* 460 So.2d at 792)). The "affidavit or otherwise" must: (1) be sworn; (2) be made upon personal knowledge; and (3) show that the party providing the factual evidence is competent to testify. *Magee v Transcontinental Gas Pipeline Corp.*, 551 So.2d 182, 186 (Miss. 1989) (citing Miss. R. Civ. P. 56(e); In re *Estate of Smiley,* 530

[3] Although the Plaintiffs' lack of causation testimony made it unnecessary for Dr. Smith to address Dr. Hansen's lack of familiarity with the standard of care applicable to an emergency department physician such as Dr. Smith, this Court may consider this issue on appeal. *Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828, 843 (Miss. 2203).

So.2d 18, 25-26 (Miss. 1988); *Walker v Skiwski*, 529 So.2d 184, 186 (Miss. 1988); *Bush v Mullen*, 478 So.2d 313, 315 (Miss. 1985); *Brown v Credit Center, Inc.*, 444 So.2d 358, 364 (Miss. 1983)).

Plaintiffs filed their response to Dr. Smith's Motion for Summary Judgment on June 16, 2006. (R. at 1924). There was no affidavit from Dr. Hansen included and the response only made reference to the Plaintiffs' unsworn Supplemental Rule 26 designation of Dr. Hansen which had been filed on June 14, 2006. The "Supplemental" expert designation was prepared and signed by counsel for the Plaintiffs (R. at 1917) and was not accompanied by an affidavit of Dr. Hansen adopting the opinions contained in the supplement. As a result, the Plaintiffs' "Supplemental" expert designation and the Plaintiffs' response to Dr. Smith's Motion for Summary Judgment were not sufficient to create a genuine issue of material fact on the Plaintiffs' claims against Dr. Smith. *See*, *Walter v. Skiwski*, 529 So.2d 184 (Miss. 1988).

Skiwski involved a medical malpractice action brought by a father on behalf of his minor son in which the defendant physician moved for summary judgment. *Id.* at 185. In response to the motion, the plaintiff relied on his sworn interrogatory responses containing his opinions that the doctor was negligent and his (the plaintiff's) summary of the expected opinion of his medical expert witnesses. *Id.* at 186. In affirming the Trial Court's grant of summary judgment, This Court held the response was insufficient to defeat summary judgment because the record did not indicate that the Plaintiff was competent to give a medical opinion, and because the Plaintiff's characterization of the expert's testimony was "garden variety" hearsay. *Id.* at 186-187.

In *Potter v. Hopper*, 907 So.2d 376 (Miss. 2005), a plaintiff again attempted, unsuccessfully, to use unsworn expert testimony to defeat the defendant's motion for

summary judgment. In addressing the adequacy of the plaintiff's response on appeal, the *Potter* Court stated:

> [t]hough we are sympathetic to Mr. Potter's injury and can only imagine coping with the loss of a limb, we simply cannot initiate precedent that would carve a path leading to prosecution of medical malpractice claims based on allegations alone. Unfortunately, in lacking sworn expert testimony, that is what the circuit court had before it. The circuit court followed precedent when it granted Dr. Hopper's motion for summary judgment. Likewise, this court follows precedent and affirms. *Id.* at ¶13. (Emphasis added).

Notably, the *Potter* court also commented that if the plaintiff did not bring a sufficient defense to the defendant doctor's motion for summary judgment, then consideration of the timing and sequence of expert designation and whether the plaintiff complied with the agreed scheduling order becomes irrelevant. *Potter*, 907 So.2d at (¶8).

The Mississippi Court of Appeals addressed an issue almost identical to the issue presented in the instant case in *Griffin v. Pinson*, 952 So. 2d 963 (Miss.App. 2006). *Griffin* involved a wrongful death claim sounding in medical negligence in which the Plaintiff responded to the defendant physician's Motion for Summary Judgment by attaching a supplemental response to the Defendant's expert witness interrogatory. The supplemental response was prepared by Plaintiff's attorney and sworn to by the Plaintiff, but did not contain an affidavit from the Plaintiff's expert witness. The Trial Court granted summary judgment in favor of the Defendant, and the Plaintiff appealed. The Court of Appeals affirmed the Trial Court's grant of summary judgment finding:

> [I]n neglecting to provided the affidavit of a medical expert to support her medical malpractice claim, Ms. Griffin failed to comply with Rule 56(e) of the Mississippi Rules of Civil Procedure. The anticipated expert opinion set forth by Ms. Griffin could not have been based on her personal knowledge. Furthermore, Ms. Griffin had more than adequate time to submit the affidavit of a medical expert. It is well established that .the party opposing the motion must be diligent and may not rest upon mere allegations or denials in the pleadings but must by allegations or

denials set forth specific facts showing there are genuine issues for trial.

Id. at 967. (Emphasis added).

In the instant case, the Plaintiffs responded to Dr. Smith's Motion for Summary Judgment by merely making reference to their "Supplemental" Designation of Experts. The designation was prepared by counsel for the Plaintiffs and, as in *Griffin*, "could not have been based on [counsel's] personal knowledge." The designation constituted inadmissible hearsay and was inadequate to overcome Dr. Smith's motion. Under the authorities cited above, the Plaintiffs "Supplemental" expert designation was legally insufficient to create a genuine issue of material fact on the Plaintiffs' medical negligence claim against Dr. Smith; therefore, summary judgment in Dr. Smith's favor was appropriate.

D. Plaintiffs are deemed to have admitted Dr. Smith's Requests for Admissions.

On October 11, 2001, Dr. Smith served Requests for Admission on the Plaintiffs. (R. at 115-116). The requests asked the Plaintiffs to admit that they did not have an opinion from a medical expert who was expected to testify at trial as to any element of their medical negligence claim against Dr. Smith. The Plaintiffs failed to answer Dr. Smith's Requests for Admissions within 30 days from the service of the requests as required by M.R.C.P. Rule 36, which provides that "...The matter is admitted unless, within 30 days after service of the request...the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or his attorney,..." On December 18, 2001, 68 days after serving his Requests for Admissions on the Plaintiff and having received no response to those requests from the Plaintiffs, Dr. Smith filed a Motion for Summary Judgment on the grounds that his Requests for Admissions to the Plaintiffs were deemed

admitted and, therefore, the Plaintiffs had admitted to not having a medical expert witness who was expected to testify at trial on any element of their medical negligence claim against Dr. Smith. Although the Plaintiffs filed a Response to Dr. Smith's Requests for Admissions subsequent to receiving Dr. Smith's Motion for Summary Judgment, they never moved the Court for an order allowing them to withdraw the admissions they were deemed to have made. Absent an appropriate motion to withdraw an order granting the motion, Dr. Smith's Requests for Admissions were deemed admitted and the admissions established that the Plaintiffs had no medical expert testimony to support their medical negligence claim against Dr. Smith. *See, Scoggins v. Baptist Memorial Hospital*-DeSoto, 967 So.2d 646 (Miss. 2007). For this additional reason, the Court's granting of summary judgment in favor of Dr. Smith was appropriate.

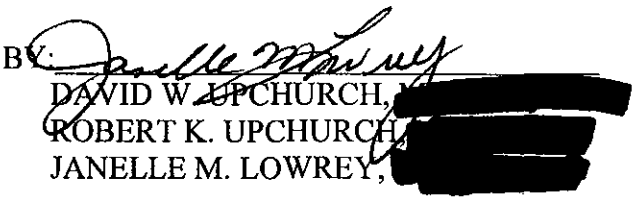
CONCLUSION

The Trial Court was well within its discretion in striking the untimely "Supplemental" expert designation of Dr. Hansen's expert opinions and Dr. Hansen's "Supplemental" Affidavit. The Trial Court was also proper in granting summary judgment in favor of Dr. Smith. The Plaintiffs failed to come forward with competent, admissible medical expert proof on the essential element of causation; Dr. Hansen admitted he was not offering an opinion as to the standard of care applicable to an emergency department physician such as Dr. Smith; Plaintiffs' response to Dr. Smith's motion which merely made reference to their "Supplemental" expert designation was inadequate to create a genuine issue of material fact; and, by failing to move the Trial Court to withdraw the admission of Dr. Smith's Requests for Admissions, it was conclusively established that the Plaintiffs lacked testimony from an expert who is expected to testify at trial on any element of the Plaintiffs' claim against Dr. Smith. For these reasons, the Final Judgment and Order Granting Summary Judgment of the Circuit Court in favor of Dr.

Smith should be affirmed.

Respectfully submitted, this the 14th day of March 2008.

ROBERT H. SMITH, D.O.

BY: 
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CERTIFICATE OF SERVICE

I, Janelle M. Lowrey, one of the attorneys of record for the Appellee, Robert H. Smith, D.O., do hereby certify that I have this day mailed by United States Mail, proper postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee, Robert H. Smith, D.O., to:

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Dated this the 14th day of March 2008.

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