IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

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

VS. — CIVIL ACTION NO.: 2007-CA-01093

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

BRIEF OF APPELLEE
BAPTIST MEMORIAL HOSPITAL-DeSOTO

ORAL ARGUMENT 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. The representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

1. Honorable Robert Chamberlin, Circuit Court Judge of DeSoto County;
2. Baptist Memorial Hospital-DeSoto, Inc., Appellant;
3. Honorable Walter Alan Davis and Honorable John H. Dunbar, attorneys for Appellee Baptist Memorial Hospital-DeSoto, Inc..;
4. Honorable Duncan Ragsdale, attorney for Appellants;
5. Honorable Duke Goza and Honorable Dion Shanley, attorneys for Appellees Steven I. Himmelstein, and Cardiovascular Physicians of Memphis;
6. Honorable William R. Bruce, attorney for Appellants;
7. Honorable Tommie Williams, attorney for Appellee Robert R. Meacham;
8. Honorable Michael K. Graves, attorney for Appellee Gina V. Bray;
9. Honorable David W. Upchurch, attorney for Appellee Robert H. Smith; and
10. Honorable Albert C. Harvey, attorney for Appellee Gina V. Bray.

CERTIFIED, this the _____ day of February 2008.

_____

WALTER ALAN DAVIS, MSB #9875

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I. STATEMENT REGARDING ORAL ARGUMENT

All issues raised by this appeal can be adequately addressed in the briefing submitted to this Court. As such, the Appellee Baptist Memorial Hospital-DeSoto, Inc. ("BMH-DeSoto") does not request oral argument in this matter.

II. STATEMENT OF ISSUES

1. **Whether DeSoto County Circuit Judge Baker abused his discretion in striking the supplemental affidavit of Appellant's expert witness Dr. Hansen when that supplementation occurred one year after the expert disclosure deadline had passed and four months after the discovery deadline had expired.**

2. **Whether DeSoto County Circuit Judge Baker properly granted summary judgment to the Appellee BMH-DeSoto for the Appellants' failure to come forward with admissible expert witness testimony on the essential element of causation.**

3. **Alternatively, whether this Court should affirm the grant of summary judgment to the Appellee BMH-DeSoto in light of the Appellant's failure to timely respond to Requests for Admission propounded by Dr. Smith and failure to move for and obtain withdrawal of a conclusively established admission regarding failure of proof.**

III. STATEMENT OF THE CASE

1. NATURE OF THE CASE

This case involves claims of medical malpractice made by the Young family against multiple physicians as well as BMH-DeSoto. At issue is the medical care and treatment of Clarence Young during the period of August 19-26, 1999 and more specifically, the care and treatment provided to Mr. Young by multiple medical professionals relative to multiple heart attacks he had prior to and during that period. As a result of these multiple heart attacks, Mr. Young passed away on August 26, 1999.

2. COURSE OF PROCEEDINGS AND DISPOSITION OF BELOW

This action commenced on August 22, 2001, with the filing of the initial Complaint in the Circuit Court of DeSoto County by Bobbi Young and Lynda Carter, the widow and daughter of Clarence S. Young, deceased (hereinafter "Youngs"). R. 22-30. In that Complaint, the Appellants alleged multiple claims of medical malpractice against the Defendants during the period of August 19, 1999 through Mr. Young's demise on August 26, 1999. R. 22-30.

The Appellees filed their Answers to the Complaint and discovery followed. However, in light of the insolvency of insurance companies providing coverage for some of the Defendants, this action was stayed for quite some time. After the expiration of those stays, discovery resumed.

On March 24, 2005, DeSoto County Circuit Judge Andrew Baker conducted a hearing on outstanding motions and, among other matters, imposed a scheduling order on the parties. T. 1-55. Under that scheduling order, the discovery deadline was set for October 15, 2005, the Plaintiffs/Appellants expert disclosure deadline July 15, 2005, the Defendants/Appellees expert disclosure deadline August 15, 2005 and the motion deadline November 15, 2005. R. 449. After a later agreement of the parties, the trial court extended the discovery deadline to March 17, 2006 and extended the motion deadline to May 19, 2006. R. 1206. The parties' expert disclosure deadlines, however, were never altered.

Discovery continued. Following numerous depositions - including that of the Plaintiffs/Appellant's expert witness Dr. David Hansen, all of the Appellees filed motions for summary judgment.

On June 1, 2007, Judge Baker again conducted a hearing on multiple outstanding motions, including various motions for summary judgment filed by the Defendants. T. 56-88. At the conclusion of the hearing, Judge Baker announced that he anticipated granting the Appellees' various motions for summary judgment by subsequent orders. T. 85-86.

By order filed June 20, 2007, Judge Baker granted the pending motion for summary judgment filed by Appellees Dr. Himmelstein and Cardiovascular Physicians of Memphis. R. 2719-21. By order filed June 25, 2007, Judge Baker granted the pending motion for summary judgment filed by Appellee Dr. Smith. R. 2722-23.

Also on June 25, 2007, the Appellants filed their "Notice of Appeal" to this Court. R. 2724. In that notice, the Appellants designated as the matter for appeal "the final judgment entered in this case on June 6, 2007." R. 2724.

Following the Plaintiffs' filing of their Notice of Appeal, Judge Baker entered additional orders in the case, including orders granting the pending motions for summary judgment by BMH-DeSoto, Dr. Meacham and Dr. Bray. R. 2726-27, 2732-33, 2735-39.

The matter now rests before this Court for consideration.

IV. STATEMENT OF FACTS

A. Pre-Suit Factual Matters Relevant to Appeal

Following two weeks of feeling ill, including problems such as being tired, short of breath and having a "heaviness" on his chest, Clarence Young went to the office of Appellee Dr. Robert Meacham in Hernando, Mississippi on Thursday, August 19, 1999. R. 238. Following his visit with Dr. Meacham, Mr. Young returned home. R. 238. Over the next few days and weekend, Mr. Young continued to feel bad and returned to see Dr. Meacham on Monday,

August 23, 1999. R. 239. Again, he returned home.

Ultimately, after having undergone chest tightness and the inability to sleep prone for at least five days, Mr. Young's wife took him to the Emergency Room at Baptist Memorial Hospital-DeSoto at approximately 10:24 p.m. on Wednesday, August 25, 1999. R. 1589. Following examination and initial treatment, Mr. Young was diagnosed as having had a myocardial infarction and was admitted to intensive care under the care of the Appellee Dr. Bray at approximately 2:42 a.m. on Thursday, August 26, 1999. R. 1623.

Despite care and treatment, Mr. Young expired at approximately 11:31 p.m. on August 26, 1999. R. 2488. A subsequent autopsy revealed that Mr. Young had undergone multiple heart attacks and that four separate arteries leading to his heart had been 95%-100% blocked. R. 2487, 2490.

Approximately two weeks after Mr. Young's demise, the Appellants retained counsel and requested a copy of Mr. Young's medical records from the Appellee BMH-DeSoto. R. 2517. The records obtained ***at that time*** included entries that: 1) Appellee Dr. Bray ordered that an electrocardiogram ("ECG") test be performed on Mr. Young on August 26, 1999 and 2) at the time of a physical exam of Mr. Young at 8:20 p.m. on August 26, 1999 by appellee Dr. Meacham, the ECG had already been performed and the results were pending. R. 2447 ("Echocardiogram in A.M.); R. 2413-18 ("Echocardiogram is pending.").

However, as would later become apparent, the Appellants had requested Mr. Young's medical records so soon after his death that not enough time had passed for all of the medical records to be transcribed and included in the copy they had received. As a result, the copy of medical records obtained by the Appellants at that time did not include approximately thirty (30)

pages of medical records, including the autopsy report on Mr. Young as well as a ECG report dictated by Appellee Dr. Himmelstein on September 7, 1999 and transcribed at a later date. R. 2470.

B. Post-Suit Factual and Procedural Matters

On August 21, 2001, the Appellants filed their initial Complaint in this case. R. 87-91. During the exchange of written discovery, the Appellants served one set of Requests for Admission and a single Interrogatory regarding the use of expert witnesses. R. 2214-2215. However, at no time during the entire course of discovery did the Appellants request a copy of Mr. Young's medical records from BMH-D, nor did they ever seek to confirm the contents of the medical records they had already received as being complete. Even though no records or confirmation was requested by the Appellants, all of the other parties requested copies of the BMH-D medical records from counsel after suit had been filed. Each party that requested records were provided the records *in toto*. BMH-D was wholly unaware that the Appellants had obtained their copy of medical records before the record was complete.

On March 30, 2005, this Court entered a scheduling order to control the orderly disposition of this action. R. 449. The deadline set for the disclosure of Appellants' experts was July 15, 2005 - a date of almost four years after this action was filed. After a later agreement of the parties, this Court extended the discovery deadline to March 17, 2006 and extended the motion deadline to May 19, 2006. R. 1206. The Appellants' expert disclosure deadline, however, was never extended and expired as established under the original scheduling order.

On April 27, 2005, Appellants' counsel deposed the Appellee Dr. Himmelstein. R. 2419. During the deposition, counsel for the Appellants obtained a full copy of the medical record from counsel for Dr. Himmelstein and attached it as an exhibit to the deposition - which included Dr. Himmelstein's ECG report missing from the set of records obtained by Appellant's counsel pre-suit as well as the other 29 pages of records. R. 2421. In fact, when doing so, Appellant's counsel specifically noted that he attached that copy of the medical record ***"just to make sure we've got the same record."*** R. 2421-22 (emphasis added).

Almost three months later, the Appellants' expert disclosure deadline of July 15, 2005 expired without any attempt to extend the deadline. The only expert witnesses ever designated by the Appellant were Dr. William S. Cummings and Dr. David Hansen. R. 125. Yet, the Appellants did not answer the interrogatory further and did not disclose "the substance of the facts and opinions" nor a "summary of the grounds" for the proffered expert opinions as required by Miss. R. Civ. P. 26(b)(4). Instead, beyond simply identifying these two proffered experts, they simply stated "Dr. Hansen and Dr. Cummings have not yet completed their review of the file and this Answer will be supplemented when they have." R. 125.

Dr. Meacham filed a "Supplemental Designation of Expert Witnesses" on August 15, 2005. R. 2518. In that supplemental disclosure, the August 26, 1999 ECG report and the resulting findings of Mr. Young's "ejection fraction" are referenced as a basis for expert opinion by one of Dr. Meacham's expert witnesses, Dr. Bryan Barksdale:

> The Plaintiff's ejection fraction was between 10 and 20%. . . . . Further, his ejection fraction of 10 to 20% and severe myopathy would require that Mr. Young be stabilized further for several days prior to being catheterized.

R. 2525. To the knowledge of the undersigned, the Appellants have never sought to depose

Dr. Barksdale or pursue additional discovery regarding his opinions.

Counsel for the various Appellees took the deposition of Dr. Hansen on February 27, 2006. R. 2531. During the course of that deposition, Dr. Hansen testified that he was provided with a copy of Dr. Himmelstein's deposition (to which a complete copy of the medical records had previously been attached by Appellants' counsel as an exhibit[1]). R. 2532-2533. Appellants chose not, however, to provide Dr. Hansen with Dr. Meacham's Supplemental Designation of Experts or for that matter, any of the defense expert designations. R. 2539. Further, on the morning of his deposition, Dr. Hansen requested a copy of the ECG report from Appellants' counsel, but was not provided a copy. R. 1717 ("I actually spoke to the - - my lawyer this morning and asked him if he had this for me to look at because I was - - I hadn't seen it until this moment.").

While the Youngs' expert disclosures did not contain any proffered opinions, the Youngs had previously produced an affidavit by Dr. Hansen. That affidavit did not contain any opinions against BMH-D in this matter, but did contain opinions that some of the physician Appellees violated relevant standards of care and that those violations were a proximate cause of Mr. Young's death. R. 2538-2545.

During his deposition, Dr. Hansen ***withdrew*** a large number of his opinions from the Affidavit, including virtually all of his opinions that Appellee Dr. Smith violated a relevant standard of care. R. 1732. Most importantly, however, in light of his review during the deposition of the echo-cardiogram of Mr. Young, he withdrew ***all*** of his causation opinions and

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[1]It is unknown whether Appellants' counsel provided a copy of the exhibits to Dr. Hansen or merely a copy of the deposition itself. In any event, that was a decision made by Appellants' counsel which should not be charged to the Appellees.

instead stated that he was unable to say that Mr. Young had any viable chance of survival in light of the extensive damage to his heart:

> 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, I mean, I think now it is not possible to know, to a reasonable degree of medical certainty. I think that in point of fact now, we are sort of flirting with that 50 percent threshold that's required, and his mortality might be close to 50 percent.

R. 1787. Dr. Hansen clearly stated with an ejection fraction of only 10-20% that ***"I can no longer say with the type of confidence I like to have that he would more likely than not survive this heart attack."*** R. 1788 (emphasis added).

In fact, Dr. Hansen noted that Mr. Young ran a substantial risk of death even if he had not had these particular heart attacks on this occasion.

> We know that people with low ejection fractions [2] in the 10 to 20 percent range probably have an annual mortality of minimum of 20 percent, maybe as high as 50 percent. So that would be a one-year expected mortality for -- take away the heart attack -- just the low ejection fraction.

R. 1729.

Following the deposition of Dr. Hansen, all of the Appellees filed Motions for Summary Judgment, citing Dr. Hansen's withdrawal of his causation opinions. In response, Appellants' counsel - for the first time during the five year litigation history of the case - requested a copy of the ECG tape which served as the basis for Dr. Himmelstein's report. Just as it had complied with every other informal discovery request in this matter, BMH-DeSoto provided a copy of the

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[2]This echocardiogram revealed that Mr. Young had a low "ejection fraction." R. 1717. An "ejection fraction" is a measurement of how much blood is moved through the heart with each beat. While a normal ejection fraction is 55% or greater, Mr. Young's ejection fraction was only 10-20%. R. 1717.

tape as requested.

On June 16, 2006 - almost five years after filing the Complaint and one year after the Appellants' expert disclosure deadline has passed, the Appellants file a "supplemental" unsworn expert designation of Dr. Hansen in which he challenged Dr. Himmelstein's interpretation of the ECG tape. R. 2025. On July 21, 2006, the Appellants filed an affidavit by Dr. Hansen which tracked the June 16th supplemental disclosure. R. 2025, 2029. On July 28, 2006 - four months after the expiration of the discovery deadline and five months after the deposition of Dr. Hansen - the Appellants file a motion to extend the discovery deadline. R. 2042. However, in that motion, the Appellants only argued that an extension of time was justified because of "scheduling conflicts" regarding the deposition of Appellants' proffered expert Dr. Cummings (despite no party requesting to take a deposition of Dr. Cummings). R. 2042. Nothing is mentioned in the motion about Dr. Hansen or the ECG tape or report. Likewise, no affidavit is attached to put the motion in compliance with Miss. R. Civ. P. 56(f) and no motion is ever filed to reopen the expert disclosure deadline.

By order dated October 3, 2006, Judge Baker granted BMH-DeSoto's Motion to Strike the supplemental affidavit of Dr. Hansen as untimely and outside the discovery period set by the previous scheduling order. Additional motions and an unsuccessful attempt at an interlocutory appeal of the October 3 order followed.

Following a hearing conducted on June 1, 2007, DeSoto County Circuit Judge Andrew Baker granted all of the Appellees' Motions for Summary Judgment.

V. SUMMARY OF THE ARGUMENT

DeSoto County Circuit Judge Baker properly granted the motion to strike Dr. Hansen's supplemental affidavit in the exercise of his considerable discretion over discovery matters and the enforcement of scheduling orders entered by the Court. In light of Judge Baker's factual determination that the Appellants had access to Mr. Young's complete medical records as of at least February 27, 2006, the Appellants had more than sufficient time to seek an extension of the discovery deadline before it expired on its own terms on March 17, 2006, but failed to do so. Likewise, the Appellants never sought to reopen the expert disclosure deadline in this matter nor ever filed a properly supported motion pursuant to Miss. R. Civ. P. 56(f) to conduct additional discovery. As inadvertence by counsel and ignorance of the rules are insufficient to demonstrate "excusable neglect," the Appellants have not demonstrated that Judge Baker was in error to strike the untimely affidavit of Dr. Hansen.

Further, in the absence of the causation testimony specifically withdrawn by Dr. Hansen, the Appellants failed to come forward in support of their claims with sufficient expert medical testimony on the essential element of causation. As such, Judge Baker properly granted summary judgment to all of the Appellees, including BMH-DeSoto. Further, even if Dr. Hansen's supplemental affidavit were considered as proper summary judgment evidence, summary judgment was nevertheless proper with respect to BMH-DeSoto. The only potential claim against BMH-DeSoto was based upon a theory of *respondeat superior* liability through the supposed actions/inactions of the emergency room physician, Appellee Dr. Smith. As the Appellants failed to timely respond to Requests for Admission propounded by Dr. Smith and the Appellants have never sought to withdraw those admissions much less successfully so, the

Appellants' failure of proof against Dr. Smith (and therefore BMH-DeSoto) is conclusively established. This Court should affirm the decisions of Judge Baker in this matter with respect to both Dr. Smith and BMH-DeSoto.

VI. ARGUMENT

1. JUDGE BAKER WAS WITHIN HIS DISCRETION IN STRIKING THE ATTEMPT TO SUPPLEMENT DR. HANSEN'S TESTIMONY

A. FACTUAL DETERMINATIONS BY JUDGE BAKER UNDERPINNED HIS RULING

In rendering his decision which struck the Appellants' attempt to supplement Dr. Hansen's opinions in this matter, Judge Baker made specific factual findings, including that:

> The records in this case reflect that by February 27, 2006, all parties had or had access to the complete medical records of the Plaintiff from all sources, either from the medical provider, or through the exchange among attorneys, or by way of exhibits to depositions or other available discovery methods.

R. 2380. Judge Baker further noted:

> On June 14, 2006, the Plaintiff's filed a supplement to the deposition of Plaintiff's witness David Hansen, M.D., in an effort to alter his testimony and opinion previously given on February 27, 2006. The deadline for completion of discovery had passed after March 17, 2006. In fairness to the Mississippi Rules of Civil Procedure and all the attorney's involved, this Court must and hereby does strike this attempted supplementation of the deposition of Dr. Hansen. The agreement of all the attorneys for a discovery completion date was agreed to by all the attorneys and this Court is bound by the lawful orders entered when all the attorneys are in agreement and come before this Court with such a request.

R. 2380.

Based upon the record before him, Judge Baker did not abuse his discretion. Indeed, the uncontradicted evidence was that the Appellants had possession of the complete medical records as early as April 27, 2005 and were also on notice of the existence of ECG findings when they originally obtained the records in 1999 prior to instituting suit. The evidence before Judge Baker clearly showed that:

- From before the inception of this litigation, Appellants had evidence that an ECG was scheduled for and in fact had been performed on August 26, 1999. R. 2447 ("Echocardiogram in A.M.); R. 2413-18 ("Echocardiogram is pending.").

- During a four and a half year period of discovery, the Appellants never once made discovery requests for medical records from BMH-D nor did they ever seek to confirm the completeness of the records that they obtained immediately following Mr. Young's demise but before all of the documents had time to make their way into the records.

- On March 30, 2005, Judge Baker entered a scheduling order which set the discovery deadline in this case for October 15, 2005 and an expert disclosure deadline for the Appellants of July 15, 2005. R. 449. The Appellants' expert disclosure deadline was never extended and the Appellants never even moved to extend that deadline.

- On April 27, 2005, Appellants' own counsel attached a complete set of Mr. Young's medical records as an exhibit to the deposition of Dr. Himmelstein "***just to make sure we've got the same record***." R. 2421-22. (Emphasis added)

- On August 15, 2005, Appellee Dr. Meacham filed a supplemental designation of expert witness which specifically references the ECG findings and the fact that Mr. Young's ejection fraction was 10-20%. R. 2518.

- On September 29, 2005, Judge Baker enters an "Amended Scheduling Order" which resets the discovery deadline to March 17, 2006 but does not reset the Appellants' expert disclosure deadline. R. 1206.

- On February 27, 2006, during the deposition of the Appellants' expert Dr. Hansen, the ECG report is utilized, attached as an exhibit to the deposition and is the basis of substantial questioning of Dr. Hansen. Consequently, Dr. Hansen withdraws all of his opinions on causation leaving no admissible expert medical testimony on that element of the Appellants' claims. R. 1717-1718.

- On March 17, 2006, the discovery deadline passes with no motion from the Appellants' to extend it, no motion to reopen an expert disclosure period and no attempt to supplement Dr. Hansen's testimony.

- On June 16, 2006, the Appellants file a supplemental expert designation for Dr. Hansen which criticizes Dr. Himmelsteins' interpretation of the ECG, but does not include an affidavit from Dr. Hansen. R. 1917.

- On July 21, 2006, Appellants file a new affidavit executed by Dr. Hansen on July 19, 2006, which tracks the disclosure of June 16th. R. 2025, 2028.

- On July 28, 2006, the Appellants move to reopen the discovery period in light of "scheduling difficulties." R. 2042. No mention of Dr. Hansen or the ECG report is made in the motion. No affidavit of counsel is attached pursuant to Miss. R. Civ. P. 56(f).

The Appellants spend much time in their brief re-arguing that they were unaware of the existence of the ECG report. For purposes of reviewing Judge Baker's ruling, however, this is a non-issue. The specific factual determination made by Judge Baker was that the Appellants had access to the complete medical records of Mr. Young by at least ***February 27, 2006*** - the date of Dr. Hansen's deposition where the ECG report itself was openly discussed and when Dr. Hansen specifically withdrew his causation opinions. While the record certainly establishes that Appellants' counsel *should have been aware* of the ECG report before filing suit and in fact had possession of the report by at least April 27, 2005, Judge Baker did not hold the Appellants to any actual knowledge of the ECG (or consider "excusable neglect" for failure to know) prior to

Dr. Hansen's deposition. As such, Judge Baker's decisions should be reviewed in this context.

B. JUDGE BAKER DID NOT ABUSE HIS DISCRETION BY ENFORCING THE COURT'S SCHEDULING ORDERS AND STRIKING THE SUPPLEMENTAL AFFIDAVIT OF DR. HANSEN

After having properly made the factual determination that the complete medical records were available to the Appellants at least as early as February 27, 2006, Judge Baker did not abuse his discretion in upholding the scheduling orders in this matter and its deadlines.

> Our trial judges are afforded considerable discretion in managing the pre-trial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of the cases. Our trial 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.
>
> . . .
>
> While the end result in today's case may appear to be harsh, litigants must understand that there is an obligation to timely comply with the orders of our trial courts. As we noted in *Guaranty National,* the parties must take seriously their duty to comply with court orders. "At some point the train must leave."

Bowie v. Montfort Jones Memorial Hosp., 861 So. 2d 1037, 1042 (Miss. 2003); see also Buchanan v. Ameristar Casino Vicksburg, Inc., 957 So. 2d 969, 975 (Miss. 2007); Miss. Ins. Guar. Ass'n v. Miss. Cas. Ins. Co., 947 So. 2d 865, 877 (Miss.2006).

Here, as found by Judge Baker, Appellants' counsel most certainly knew of the existence of the ECG report and its contents at the latest on February 27, 2006 - almost three weeks prior to the expiration of the discovery deadline of March 17, 2006. Despite this fact, Appellants' did not seek to extend or reopen discovery until July 28, 2006, more than four months after the

discovery deadline had expired.[3] R. 2042. Indeed, even in their motion to reopen discovery, the Appellants mention nothing about Dr. Hansen or the ECG report. R. 2042. Instead, they simply because of "scheduling difficulties" and the fact that the Appellants' proffered expert Dr. Cummings had not been deposed.[4] Moreover, there was nothing at all offered in support of the motion. Likewise, in response to the pending motions for summary judgment, the Appellants never submitted an affidavit as required by Miss. R. Civ. P. 56(f) requesting a continuance to reopen discovery. R. 2042; Miss. R. Civ. P. 56(f).

The Appellants' particular failures to timely seek to reopen discovery in this case take this matter outside the scope of the "fairness" inquiries of the Erby decision and its progeny. Indeed, the passages cited by Appellants demonstrates that by its own terms Erby only applies "where a request for additional time to gather material evidence ***is properly and timely made***, and the request refused by the trial court . . . " Erby v. North Mississippi Medical Center, 654 So. 2d 495, 502 (Miss. 1995) (emphasis added). This requirement of timeliness and diligence upon counsel has also been more bluntly stated:

> ***A litigant desiring to avail herself of the right to present more evidentiary material has an affirmative duty to timely raise the issue with the trial court or be deemed to have waived objection to the court proceeding on the motion.*** *Russell v. Williford,* 907 So. 2d 362(¶ 36) (Miss. Ct. App. 2004). Pursuant to Rule 56(f), when a party who opposes summary judgment "cannot for reasons stated present by affidavit facts essential to justify his opposition," that party must file an affidavit to that effect in order to claim his right to a continuance in order to obtain affidavits or to pursue further discovery. M.R.C.P. 56(f).

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[3]In their brief, the Appellants contend their motion to reopen the discovery deadline was timely, despite the record clearly demonstrating otherwise.

[4]Notably, no party has ever requested dates for a deposition of Dr. Cummings.

Hariel v. Biloxi HMA, Inc. 964 So. 2d 600, 608 (Miss. App. 2007) (emphasis added). As already noted, the Appellants have never filed a Rule 56(f) affidavit in this case.

Untimely efforts to retroactively extend Court-imposed deadlines are insufficient. For example, the Court in Bowie declined to reward an untimely attempt to retroactively extend the discovery deadline set by the Court:

> This Court has previously held that an action may not be dismissed for a discovery violation if a party is simply unable to comply, but that dismissal may be justified if the violation is the result of "willfulness, bad faith, ***or any fault of the party***." *Fluor Corp. v. Cook,* 551 So. 2d 897, 903 (Miss.1989) (emphasis added).

Bowie v. Montfort Jones Memorial Hosp. 861 So. 2d 1037, 1042 (Miss. 2003) (emphasis added).

> The trial judge found that the plaintiffs' motion for extension of time was untimely inasmuch as it had been 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."

Id at 1043. Here, the Appellants' motion for an extension of discovery was filed more than four months after the discovery deadline had passed, more than one year after their expert designation deadline had passed and more than four months after the filing of BMH-DeSoto's Motion for Summary Judgment. R. 1206; 1653-58; 2042.

There is much talk in the Appellants' brief regarding "excusable neglect." Yet, Mississippi law is clear that "excusable neglect" is a strict standard and that it cannot be established by simple inadvertence, mistake of counsel or ignorance of the rules. Spurgeon v. Egger, 2007 WL 4303501, *5; — So. 2d — (Miss. App. 2007); 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 Appellants have

offered nothing that rises to the level of excusable neglect in this case.

Instead of admitting they are bound by Bowie and the other authorities cited, the Appellants instead rely upon the decision in Thompson v. Patino. As already pointed out by Appellee Dr. Bray, the Thompson "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 at 1037. The decision has yet to be relied upon by any subsequent decision and instead, has repeatedly been limited or distinguished. See, e.g., Bowie v. Montfort Jones Memorial Hosp. 861 So. 2d 1037, 1042 (Miss. 2003); Mallet v. Carter, 803 So. 2d 504, 508 (Miss. App. 2002); Hubbard v. Wansley , 954 So. 2d 951, 963 (Miss. 2007). This case is more akin to Bowie and is likewise distinguishable from Thompson, particularly in light of the fact that this case also "involves the failure to comply with a trial court's order concerning the time frame for the completion of discovery" instead of "the propriety of a particular sanction for the violation of a discovery rule" like Thompson. Bowie, 861 So. 2d at 1037. Judge Baker was explicit in his order that the basis of his decision was the enforcement of "lawful order" which bound the Court and parties to a discovery deadline. R. 2380.

Despite having knowledge of an ECG test from the onset of this matter and having a copy of the ECG report itself approximately one year before the passing of the discovery deadline, the Appellants did not provide that report to Dr. Hansen prior to his deposition. No showing of excusable neglect has ever been made regarding these failures. Further, despite having full knowledge that their sole expert witness withdrew all of his causation opinions three weeks prior to the expiration of a Court imposed discovery deadline, the Appellants failed to timely move to extend that deadline. Likewise, they never sought to reopen the expert

disclosure deadline and never filed a properly supported motion for continuance pursuant to Miss. R. Civ. P. 56(f).

Instead, the Appellants simply violated the existing scheduling order in the apparent hope that forgiveness would be easier to obtain than permission. This Court has repeatedly noted that our trial Courts have the ability to enforce scheduling orders and our trial Judges have the right to rely upon those declarations by the Mississippi Supreme Court. Judge Baker did not abuse his discretion in striking the untimely affidavit of Dr. Hansen.

2. JUDGE BAKER PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF BMH-D

A. THE LACK OF APPROPRIATE EXPERT MEDICAL TESTIMONY WAS FATAL TO THE APPELLANTS' CLAIMS

In their brief, the Appellants challenge the accuracy of the ECG findings themselves and contend that Dr. Hansen only withdrew his opinions on causation based upon the supposed "hypothetical" accuracy of the ECG report.

The ECG report is itself a self-authenticating report under Miss. R. Evid. 902(11)(A). R. 2608-2613. It is admissible as evidence in this matter and properly considered as summary judgment evidence. Notably, the accuracy of no other portion of the voluminous medical record is challenged, including the autopsy report and the other documents that had not yet made it into the medical record when the Appellants raced to obtain the records immediately following Mr. Young's demise. The Appellants' arguments about when the report was dated or transcribed offer nothing to contradict the actual ***findings*** of the ECG report, *i.e.*, that Mr. Young had a 10-20% ejection fraction. Likewise, Dr. Hansen's anecdotal testimony that it would be "hard to imagine" Mr. Young engaging in regular physical activity with that sort of ejection fraction does

not constitute admissible expert medical testimony by Dr. Hansen that - to a reasonable degree of medical certainty - those findings are incorrect. Indeed, it is likewise "hard to imagine" how Mr. Young could undertaken his regular daily activities with his heart surrounded by three coronary arteries which were 100% totally blocked off, but no one disputes the accuracy of Mr. Young's autopsy report. R. 2289.

In any event, it is the Appellants who carried the burden of coming forward with admissible expert medical testimony in this case. It is the Appellants who, when faced with properly supported motions for summary judgment, carried the burden of coming forward with proof establishing genuine issues of material facts in support of each element of their claims.

Their attempt to counter the validity of the ECG report was contained in the supplemental affidavit of Dr. Hansen, which in turn was properly struck by Judge Baker as discussed, *supra*. As such, there is nothing in the record before this Court to create a genuine issue of material fact as to whether Mr. Young could have survived cardiac intervention in this case and therefore, the Appellants' failed to come forward with admissible expert medical testimony with respect to the essential element of causation.

> In a medical malpractice case, as in all claims for negligence, causation must be proven in order to establish a prima facie case. *Drummond,* 627 So. 2d at 268. Finding that Hubbard had failed to establish a prima facie case, the trial court granted Dr. Wansley's motion for summary judgment. The trial court found, that Hubbard's proposed causal link between Dr. Wansley's actions and Hubbard's injuries amounted to nothing more than a claim for diminishment of a chance of recovery. This Court has concluded "that Mississippi law does not permit recovery of damages because of mere diminishment of the 'chance of recovery.' ***Recovery 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) (citing *Clayton v. Thompson,* 475 So. 2d 439, 445 (Miss.1985)). *The Ladner Court went on to say that Clayton put Mississippi in line with those jurisdictions which require that a plaintiff show that "proper treatment would have*

> *provided the patient 'with a greater than fifty (50) percent chance of a better result than was in fact obtained.'* " *Ladner,* 515 So. 2d at 889 (citing 54 A.L.R.4th 10 § 2[a]). *Clayton* "rejected the notion that a mere 'better result absent malpractice' would meet the requirements of causal connection." *Id.*

Hubbard v. Wansley, 954 So. 2d 951, 964 (Miss. 2007) (emphasis added). Judge Baker properly granted summary judgment for all of the Appellees in this case for the Appellants' failure to have sufficient evidence of causation in this case.

B. SUMMARY JUDGMENT WAS APPROPRIATE REGARDLESS OF JUDGE BAKER'S DECISION TO STRIKE THE ATTEMPT TO SUPPLEMENT DR. HANSEN'S TESTIMONY

Even if this Court were to accept the Appellants arguments regarding supposed error in striking the attempt to supplement Dr. Hansen's testimony, summary judgment is nevertheless appropriate for Dr. Smith, and therefore also appropriate for BMH-D. It is well established that this Court may affirm a decision on grounds not addressed by the trial Judge:

> [T]he Gatlins contend that this Court can affirm that decision on other grounds. The Gatlins are correct. ***This Court may affirm a decision on appeal for a different reason than it was decided by the lower court.*** *See Askew v. Askew,* 699 So. 2d 515, 519 n. 3 (Miss.1997) (holding that "a trial court judgment may be affirmed on grounds other than those relied upon by the trial court"); *Stewart v. Walls,* 534 So. 2d 1033, 1035 (Miss.1988) (holding that "this Court will affirm the lower court where the right result is reached, even though we may disagree with the reason for the result").

Sanderson Farms, Inc. v. Gatlin, 848 So.2d 828, 843 (Miss. 2003) (emphasis added). Here, as summary judgment was granted to the Appellees based upon Dr. Hansen's withdrawing of his causation opinions and the order striking the attempt to supplement Dr. Hansen's opinions, Judge Baker did not have occasion to address a number of other grounds for dismissal - including the Appellants' failure to timely respond to Requests for Admission propounded by Dr. Smith.

The Appellants' expert Dr. David Hansen never offered any expert opinions that BMH-DeSoto or any of its employees breached any relevant standard of care to Mr. Young nor that any such breach proximately caused damage to Mr. Young. R. 1687-1694. As such, the only possible liability that could be imposed upon BMH-DeSoto would have to be based upon the actions or inactions of Dr. Smith, the independent contractor emergency room physician.

However, on October 11, 2001, counsel for Dr. Smith served Requests for Admission on the Appellants. R. 115-116. Included were the following requests:

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 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.

R. 115-116. Pursuant to Miss. R. Civ. P. 36, responses to those requests were due "within 30 days of service," or in this case, on or before November 11, 2001. As they were not timely answered, those matters became conclusively established:

> This concept is taken very seriously, as "[t]he matter is admitted unless, within thirty 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 by his attorney...." Miss. R. Civ. P. 36(a). Accordingly, "[a]ny matter admitted under this rule is conclusively established ***unless the court on motion permits withdrawal or amendment of the admission***." Miss. R. Civ. P. 36(b).

Scoggins v. Baptist Memorial Hospital-Desoto, 2007 WL 3104947, *2 (Miss. 2007) (emphasis added).

On December 18, 2001, with no response having been filed by the Appellants, Dr. Smith filed his Motion for Summary Judgment and cited the Appellants' failure to respond to the Requests for Admission. R. 102-04. Not surprisingly, ***after*** the failure to respond had been pointed out to the Youngs, the Youngs then filed a response to the Requests for Admission on December 21, 2001, some seventy-one (71) days after service of the requests. R. 119-20.

The Appellants did ***not***, however, ever move to withdraw the admissions and consequently, no order has ever been entered permitting the Appellants to withdraw those admissions. Just as the Court held in Scoggins, the Appellants' failure to obtain withdrawal of these admissions is fatal to their claims.

> The problems encountered by the [plaintiff] in this case could easily have been eliminated if a motion to withdraw or amend the answers had been filed pursuant to Rule 36(b) and if there were justifiable excuse."

Scoggins v. Baptist Memorial Hospital-Desoto, 2007 WL 3104947, *3 (Miss. 2007) (citing Martin v. Simmons, 571 So. 2d 254, 257 (Miss. 1990)).

Consequently, Judge Baker's grant of summary judgment to Dr. Smith was appropriate for this reason as well. The lack of appropriate expert medical testimony was "conclusively established" by the failure to timely respond to the Requests for Admission. With no admissible expert medical testimony to establish a claim against Dr. Smith - and no admissible expert medical testimony to otherwise state a claim against BMH-Desoto, the grant of summary judgment to BMH-DeSoto was also appropriate for this reason.

VII. CONCLUSION

Judge Baker imposed scheduling deadlines in this matter and properly enforced those deadlines in striking the Appellants' untimely attempt to supplement their expert testimony. In light of the fact that Dr. Hansen's supplemental affidavit was struck, Judge Baker properly granted summary judgment to all of the Appellees in light of the Appellants' failure to come forward with sufficient evidence on the essential element of causation. Finally, even if Dr. Hansen's supplemental affidavit were properly considered as summary judgment evidence, the grant of summary judgment to BMH-DeSoto was nevertheless appropriate in light of the Appellants' failure to timely respond to Requests for Admission served upon them by the Appellee Dr. Smith. For the foregoing reasons, Judge Baker's orders in this case should be affirmed.

Respectfully submitted, this the 22nd day of February 2008.

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Telephone: (662)281-0001
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BY: _____
WALTER ALAN DAVIS [redacted]

CERTIFICATE OF SERVICE

I, Walter Alan Davis, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing document by U. S. Mail, postage prepaid, to:

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This, the 22nd day of February 2008.

WALTER ALAN DAVIS

CERTIFICATE OF SERVICE

I, Walter Alan Davis, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Record Excerpts of Appellee, BMH-DeSoto, Inc., by U. S. Mail, postage prepaid, to:

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Honorable Andrew C. Baker
Circuit Court Judge
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This, the 20th day of February 2008.

WALTER ALAN DAVIS