

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

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 THE APPELLANTS

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ORAL ARGUMENT REQUESTED

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I. 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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IV. STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument.

V. STATEMENT OF ISSUES

1. Whether the Trial Court erred in refusing to extend the discovery deadline of the Amended Scheduling Order and in striking and excluding the Supplemental Designation of Plaintiffs' Expert, David Hansen, M.D.
2. Whether the Trial Court erred in granting Summary Judgment in favor of Defendants, except for Stevan Himmelstein.

VI. STATEMENT OF THE CASE

A. Nature of the case, course of proceedings, and disposition below.

This is an appeal from the Trial Court's grant of Summary Judgment in favor of all Defendants.

This medical malpractice action was filed August 22, 2001. In the first few months after filing, written discovery was exchanged, and Plaintiff filed a Motion for Summary Judgment, premised on the opinions of Plaintiffs' expert, Dr. Hansen. Objections were lodged to the hearing of Plaintiffs' Motion. Scheduling difficulties on both sides resulted in no depositions being taken.

Proceedings were stayed as of March 18, 2003, because of the insolvency of Doctors' Insurance Reciprocal, RRG, and its re-insurer, Reciprocal of America, RRG. Substantive proceedings began again in October of 2004.

A Scheduling Order was entered, providing that all discovery was to be completed on or before October 15, 2005. Plaintiff obtained the depositions of Defendants Himmelstein, Meacham, and Smith, prior to that date. Defendants requested an extension of the discovery deadline to March 17, 2006, in order to depose Plaintiffs' expert, Dr. Hansen. Plaintiffs extended the courtesy and agreed to the requested extension. Plaintiffs then requested the favor

of an additional extension in return, filing a Motion to Amend Scheduling Order on December 28, 2005, well before the March 17, 2006, deadline. Plaintiffs' Motion requested an extension of the discovery deadline to June 15, 2006. Defendants did not return the courtesy of reply to the Motion.

Defendants took the deposition of Dr. Hansen on February 27, 2006, eighteen (18) days prior to the expiration of the then pending discovery deadline. Defendants asked Dr. Hansen **hypothetical** questions about an echocardiogram report which did not appear in the certified copy of

Defendant Baptist Memorial Hospital's records for the decedent obtained by his widow, Plaintiff Bobbi Young, about a month after his death. Dr. Hansen made clear he questioned the validity of the echocardiogram report based on the presenting symptoms and prior level of physical activity of the decedent, and the clear error in the report's stated date of the study.

Defendants moved for summary judgment, arguing that Dr. Hansen's responses to hypothetical questions amounted to withdrawal of his opinions relative to causation. Plaintiffs obtained a copy of the echocardiogram films, and after review of the films, Dr. Hansen confirmed his earlier opinions in a Supplemental Designation, and added an opinion that Defendant Himmelstein erroneously read the echocardiogram report. Plaintiff served, by U.S. Mail, the Supplemental Designation of Dr. Hansen on June 14, 2006. Defendants moved to strike the Supplemental Designation of Dr. Hansen as untimely.

Without making any ruling on Plaintiffs' December 28, 2005, Motion to Amend Scheduling Order, the Trial Court granted Defendants' Motion to Strike, and then went on to grant Defendants' Motions for Summary Judgment.

B. Relevant Facts

Clarence Young was a patient of Drs. Meacham and Bray. He was scheduled for a physical at their clinic, DeSoto Internal Medicine, on August 19, 1999. Record 000216. At the time, he had been feeling tired, has shortness of breath, felt a heaviness in his chest, but was well enough to take himself to the doctor. Record 000216. Mr. Young's symptoms continued, and he returned to DeSoto Internal Medicine, again on his own, on August 23, 1999, and was sent home without testing or treatment. Record 000217. His condition worsened, and at about 9 PM on August 25, 1999, his wife took him to the Emergency Room of Baptist Memorial Hospital-DeSoto. Record 000217. The Emergency Room doctor, Defendant Robert Smith, called Defendant Gina Bray at about 1:30 AM, telling her that Mr. Young was having a myocardial infarction, and had a lot of fluid in his chest. Record 000217. Dr. Bray never came to see Mr. Young, Dr. Himmelstein did not see Mr. Young until 5:30 PM on August 2, 1999, and Dr. Meacham did not come to see Mr. Young until after 7:00 PM that day. Record 000218.

On August 26, 1999, Dr. Gina Bray wrote an order for an echocardiogram to be performed on the morning of August 27, 1999. Mr. Young went into ventricular fibrillation at 2307 on August 26th and was pronounced dead at 2331.

Plaintiff Bobbi Young requested a certified copy of the medical records of her late husband's final admission to Baptist Memorial Hospital-DeSoto on September 17, 1999, and received those records on September 27, 1999. These records, supplied a month after Clarence Young died, did not contain a copy of Dr. Himmelstien's echocardiogram report. Given that Dr. Bray's order was for an echocardiogram on the morning of August 27, 1999 and Mr. Young had passed away the previous night, the Plaintiff had no basis to question the absence of an echocardiogram report in Mr. Young hospital record. Plaintiff believed that the record provided

to her by the Defendant hospital was Mr. Young complete record.

Plaintiffs filed the Complaint herein on August 22, 2000. Record 000022. Answers from the various defendants were filed as late as October 19, 2001. Record 000092. Plaintiffs responded to discovery from Defendants on December 21, 2001, identifying Dr. Hansen as one of their medical experts (Record 000125, 000140, 000141, and 000155) and providing an affidavit from Dr. Hansen setting forth his opinions as of that date. Record 000199. Plaintiffs' discovery responses specifically stated that "Dr. Hansen and Dr. Cummings have not yet completed their review of the file and this Answer will be supplemented when they have." Record 000125, 000140, 000141, and 000155.

This matter was stayed pursuant to motions from Defendant Meacham on February 12, 2003 (Record 000269), and from Baptist Hospital on May 15, 2003 (Record 000278) and on July 10, 2003 (Record 000320).

The trial court entered a Scheduling Order on April 1, 2005 (Record 000449), providing that "Plaintiff's (sic) experts shall be designated on or before July 15, 2005," and that "[a]ll discovery shall be completed on or before October 15, 2005." The Scheduling Order makes no mention of, or restrictions on, the circumstances under which it may be amended, and does not set a trial date.

Defendants were unable to schedule the deposition of Dr. Hansen prior to the discovery deadline, and approached Plaintiffs for an extension. Plaintiffs extended professional courtesy and agreed to Defendants' request, and on October 11, 2005, an Amended Scheduling Order was entered (Record 002365), extending the deadline for discovery to March 17, 2006. The Amended Scheduling Order makes no mention of, or restrictions on, the circumstances under which it may be amended. The Amended Scheduling Order also set a deadline of May 19, 2005

(sic), for service of all motions, except motions in limine. It would appear the court's intent was for a deadline of May 19, 2006. The Amended Scheduling Order does not set a trial date.

Plaintiffs filed a Motion to Amend Scheduling Order on December 28, 2005, requesting an extension of discovery "to June 15 and July 15, 2006." Record 000015 and 002359. Defendants declined the courtesy of response to Plaintiffs' request and motion, and filed no response to Plaintiffs' motion with the court.

The deposition of David E. Hansen, M.D. was "taken on behalf of the Defendants, on February 27, 2006." Record 001695, Deposition page 1. During the deposition, Dr. Hansen reported that the history relayed was that Mr. Young had experienced shortness of breath, heaviness and tightness in his chest. Record 001698-99, Deposition pp.15-17. In his deposition, Dr. Hansen was presented with Dr. Himmelstein's report on Mr. Young's echocardiogram. Record 001717, Deposition p.89. Dr. Hansen first notes that according to the report the echocardiogram was performed three days after Mr. Young had died. Record 1717, Deposition p.90. He further questioned the accuracy of the reported ejection fraction of 10-20 %, because with such "a very depressed ejection fraction[, i]t is hard to imagine [Mr. Young] walked around, you know, and just sort of walked into a physician's office." Record 1717, Deposition pp. 91-92. Defense counsel acknowledged that the report "indicates this echocardiogram was performed on 8-30, which I don't understand," and agrees that, as to the accuracy of the report, "we will have to deal with this, I guess, in a hypothetical sense." Record 1717, Deposition p.90. Defense counsel reiterated the hypothetical nature of the questioning, asking Dr. Hansen that "if you were to assume that this echocardiogram that was run on Mr. Young prior to his death, that it was interpreted properly" Record 1717, Deposition p.92. Nowhere in his deposition does Dr. Hansen state he agrees with the assumptions of the hypothetical questions posed to him, and

nowhere in his deposition does he recant his observation that the reported ejection fraction of 10-20% is inconsistent with Mr. Young's symptoms and physical activity prior to his final hospital admission.

Defendants filed Motions for Summary Judgment beginning on March 16, 2006 (Record 1653). Plaintiffs responded on May 1 and 17, 2006 with Motions to Continue the Summary Judgment and to Compel Production of the echocardiogram films for review by Plaintiffs' expert (Record 001854 and 001858. Defendants did not object to production, and produced the echocardiogram films, which Dr. Hansen reviewed. Plaintiff then filed a Supplemental Rule 26 Expert Designation of Dr. Hansen on June 16, 2006, which stated that Dr. Hansen found Mr. Young's ejection fraction to be 35-40%, that Dr. Himmelstein mis-interpreted the echocardiogram, that Mr. Young was a candidate for treatment which would have probably prevented his death, and that had he received appropriate care from Dr. Smith, Dr. Meacham, Dr. Bray, and Dr. Himmelstein, his death probably would have been prevented. (Record 001917-19). Unlike the silence which greeted Plaintiffs' December 28, 2005, Motion to Amend Scheduling Order, this supplemental designation engendered quick response of motions to strike, first on behalf of Dr. Bray on July 3, 2006 (Record 001940), and continuing with all other Defendants.

On September 21, 2006, the trial court heard argument on Defendants' Motions to Strike. Transcript of Proceedings, pp. 32-55. On October 5, 2006, the trial court enter an Order striking Plaintiff's Supplemental Designation. Record 002354-355. The Order makes no mention of lack of excusable neglect in the timing of the filing of the Supplemental Designation.

Plaintiffs filed a Supplemental Motion to Extend Discovery Deadlines and Compel Supplemental Deposition of Stevan I. Himmelstein, on November 2, 2006 (Record 002367),

within the apparent deadline for motions under the Amended Scheduling Order, along with a Motion to Reconsider. On June, 1, 2007, the trial court heard argument on these motions, on Plaintiffs' Motion to Extend Discovery Deadlines, and on Defendants' Motions for Summary Judgment. Transcript of Proceedings, pp.56-86. The trial court denied Plaintiffs' motions and requesting Defendants to submit proposed Orders grant their Motions. On July 2, 2007, the trial court entered an Order Denying Plaintiffs' Motion to Extend Discovery Deadlines, Motion to Reconsider and Motion to Compel the Supplemental Deposition of Dr. Himmelstein. Record 002726-27. This order makes no mention of lack of excusable neglect on the part of Plaintiffs, makes no mention of Plaintiffs' December 28, 2005, Motion to Amend Scheduling Order, and simply refers again to the discovery deadline as basis for denial without any further analysis.

Orders granting summary judgment for the various Defendants were entered beginning June 20, 2007. Record 002719.

VII. SUMMARY OF ARGUMENT

The Trial Court, relying on the discovery deadline of the agreed Amended Scheduling Order, erred in not extending discovery and in excluding Plaintiffs' Supplemental Designation without performing the analysis required by Mississippi Power & Light v. Lumpkin, 725 So.2d 721, 733 (Miss. 1998). Further, the Trial Court committed error by failing to allow Plaintiffs a continuation of discovery of limited duration, especially in light of the facts that: 1) Plaintiffs had earlier acted with good faith and professional courtesy in agreeing to allow Defendants an extension for discovery; 2) Defendants would not have had the testimony upon which they premise their motions for summary judgment had they not received that extension; and 3) Plaintiffs filed a timely request for amendment to the scheduling order for additional time for discovery.

The Trial Court's exclusion of evidence by striking Plaintiffs' Supplemental Designation was an abuse of discretion considering all the factors involved: 1) fairness to Plaintiffs dictated the supplementation should be allowed; 2) Plaintiffs' filed a Motion to Amend Scheduling Order prior to the expiration of the discovery deadline; 3) Plaintiffs' reasonably relied upon the certification from Defendant Baptist Hospital-Desoto that the record forwarded to Dr. Hansen was complete and accurate; 4) the evidence excluded is important to a central issue of the case, causation, making clear a genuine issue of material fact and rebutting a questionable document which appeared in Defendants' records late; 5) the lack of substantial prejudice to Defendants in allowing the evidence and the substantial prejudice to Plaintiffs in excluding it; 6) the availability of remedies less extreme than exclusion of the evidence; 7) the time available for Defendants to respond to the proffered evidence; and 8) that allowing the evidence and time for Defendants to respond would not require a continuance of trial setting, as the matter had yet to be set for trial.

The Trial Court failed to consider the evidence in a light most favorable to Plaintiffs and erred in granting summary judgment in favor of Defendants. The grant of summary judgment for Defendants hinged on two premises: 1) that no genuine issue exists as to the accuracy of Dr. Himmelstein's echocardiogram report that Clarence Young's heart had only an ejection fraction of 10-20%, indicating it medically unlikely he could be saved; and 2) that Dr. Hansen's responses to hypothetical questions about a report whose accuracy he questions amount to a withdrawal of all of his opinions that act or omissions on the part of the Defendants caused the death of Clarence Young. The evidence, taken in light most favorable to Plaintiffs, demonstrates these premises false.

The accuracy of Dr. Himmelstein's echocardiogram report is questioned: 1) because of its late appearance in the hospital record; 2) because of inaccuracy on the face of the report; 3) because its findings are inconsistent with the symptoms and level of physical activity documented for Mr. Young prior to his final hospital admission; and 4) because Dr. Hansen's review of the echocardiogram films finds the ejection fraction to be between 35 and 40%, which is consistent with Mr. Young's prior symptoms and physical activity, and which indicates it medically likely he could have been saved. Even considering only the first three of these factors, a genuine issue exists as to the reliability and accuracy of Dr. Himmelstein's finding that Mr. Young had an ejection fraction of only 10-20%.

During his deposition, Dr. Hansen questions the accuracy of the echocardiogram report because it states the study was done three days after Mr. Young's death and because Mr. Young's symptoms and level of physical activity prior to his admission to the hospital was inconsistent with the stated ejection fraction of 10-20%. Defense counsel then stated "we'll have to deal with this in a hypothetical sense," and asks Dr. Hansen to **assume** an ejection fraction of 10-20%. Dr. Hansen never agreed with the assumption, and never recanted his observation that Mr. Young's symptoms and level of physical activity were inconsistent with an ejection fraction of 10-20%. This alone is enough to create a genuine issue on the material fact of whether the condition of Mr. Young's heart made it more likely than not that he would not have died August 26, 1999, had he received different medical treatment.

The trial court did not consider the evidence in a light most favorable to Plaintiffs, and erred in entering summary judgment in favor of the Defendants.

VIII. ARGUMENT

A. The Trial Court abused its discretion in striking and excluding the Supplemental Designation of Plaintiffs' Expert, David Hansen, M.D.

It is well settled that Mississippi trial courts have considerable discretion in matters regarding discovery, and that discovery orders of the trial courts will not be disturbed unless there has been an abuse of discretion. Hariel v. Biloxi MHA, Inc., 964 So.2d 600, 607 (Miss. 2007), *additional citations omitted*. This basic premise is tempered by a “mandate of fairness to all parties” (Erby v. North Mississippi Medical Center, 654 So.2d 495, 502 (Miss. 1995)) and by the rule that exclusion of evidence is an extreme measure to be used as a last resort, especially in circumstances where such exclusion necessarily results in judgment in favor of the other party (*See* Mississippi Power & Light v. Lumpkin, 725 So.2d 721 (Miss. 1998)).

1. Factors to be considered before striking and excluding evidence.

In Erby v. North Mississippi Medical Center, 654 So.2d 495 (Miss. 1995), a medical malpractice case involving an appeal from a grant of summary judgment, the trial court denied plaintiff's post summary judgment hearing request for additional time to take depositions and submit additional testimony. 654 So.2d at 498. This Court stated that “[t]he issue of whether to grant additional requested discovery, although clearly discretionary with the trial judge, also mandates fairness to all parties.” 654 So.2d at 502. This Court went on to reason that:

Where a request for additional time to gather material evidence is properly and timely made, and the request refused by the trial court, this Court has reversed “on the basis that ‘fairness required a continuance of limited duration to afford ... plaintiff the opportunity to go forward, if possible, with her case.’ ” Erby v. North Mississippi Medical Center, 654 So.2d 495, 502 (Miss. 1995), *quoting* McQueen v. Williams, 587 So.2d 918, 923-24 (Miss. 1991).

After looking at the circumstances, this Court found that “[f]airness dictates that the allowance of the two additional depositions would not have unnecessarily prolonged the record

to the extent requiring the closure by the trial court. 654 So.2d at 503.

In Mississippi Power & Light v. Lumpkin, 725 So.2d 721 (Miss. 1998), this Court set out the factors that should be considered before imposing the extreme measure of excluding testimony. “Before imposing such a sanction a trial court should consider the explanation for the transgression, the importance of the testimony, the need for time to prepare to meet the testimony and the possibility of a continuance. 725 So.2d at 733-34 (*quoting* Murphy v. Magnolia Elec. Power Ass'n, 639 F.2d 232, 235 (5th Cir.1981)).” This Court went on to explain

The first consideration involves a determination whether the failure was deliberate, seriously negligent or an excusable oversight. The second consideration involves an assessment of harm to the proponent of the testimony. The third and fourth considerations involve an assessment of the prejudice to the opponent of the evidence, the possibility of alternatives to cure that harm and the effect on the orderly proceedings of the court. 725 So.2d at 734.

2. Recent case law applying these factors.

In Thompson v. Patino, 784 So.2d 220 (Miss. 2001), a medical malpractice case, this Court found it to be an abuse of the trial court’s discretion to exclude plaintiff’s late filed medical expert’s affidavit, predicated a grant of summary judgment in favor of defendants, under a set of facts far less favorable to plaintiff than exist in the case at bar.

After filing suit in February, 1994, Thompson first identified experts on the last day under a order compelling discovery, June 24, 1994, without stating what the experts’ opinions would be. 784 So.2d at 221. Shortly thereafter, on July 14, 1994, Thompson moved for an extension of time to conduct discovery. *Id.* Over a year later, an **order** was entered allowing Thompson 90 days from September 25, 1995, to complete discovery *Id.* at 221-22. Thompson added a Dr. Gorecki as defendant in February 1995, and in September, 1996, Thompson finally deposed that doctor. *Id.* at 222. Thompson named **new** experts in an interrogatory supplementation filed February 10, 1997, five days after one of the defendants filed a motion to

dismiss, or, alternatively, for summary judgment. *Id.* Thompson finally filed affidavits from medical experts on February 21, 1997, 14 months after the deadline and 5 months after deposing Dr. Gorecki. The trial court upheld defense motions to strike these affidavits, and granted summary judgment in favor of the defendants. *Id.*

This Court examined the “seasonableness” of Thompson’s interrogatory supplementation in light of the new information obtained from Dr. Gorecki, noting that “seasonable supplementation” requires supplementation “far enough in advance of trial for the other side to prepare,” “to avoid surprise at trial,” and “to prevent trial by ambush.” Thompson, at 223 (citations omitted). While this Court found that some sanctions were appropriate, the severe measure of “exclud[ing] medical expert evidence which prompted dismissal of Thompson’s action amounted to an abuse of discretion,” especially considering the “significant factor” of a “substantial length of time between supplementation and a trial date, or lack of a trial date altogether.” *Id.*

This Court then distinguished Thompson from three cases where late designations or failure to respond to discovery resulted in exclusion of expert testimony and dismissal. Thompson was distinguished from Palmer v. Biloxi Reg’l Med. Ctr., 564 So.2d 1346 (Miss.1990), on the basis that: Thompson had responded to discovery, where Palmer had not; and Thompson’s experts were competent and rendered opinions creating genuine issues of material fact, where Palmer’s experts were deemed unqualified. Thompson, at 224-25. Thompson was distinguished from Cunningham v. Mitchell, 549 So.2d 955 (Miss.1989), on the basis that “Cunningham’s counsel engage in deceitful behavior, [and] a question of fact concerning negligence was never established.” Thompson, at 225. Finally, Thompson was distinguished from Kilpatrick v. Mississippi Baptist Med. Ctr., 461 So.2d 765 (Miss.1984), on

the grounds that, unlike Thompson, Kilpatrick was “repeatedly warned that dismissal would occur if he did not comply with the court's orders” and “no proof of negligence was never (sic) presented.” Thompson, at 226. This Court ended its discussion in Thompson with the observation that

Prior to the hearings on the motion to dismiss, Thompson supplemented in detail and presented possible arguable questions of fact of medical negligence. Such actions and a viable claim were absent from *Palmer*, *Cunningham* and *Kilpatrick*. Dismissal of Thompson's case was not appropriate. Thompson, at 226.

The case at bar can be distinguished from this Court’s decision in Bowie v. Montfort Jones Memorial Hospital, 861 So. 2d 1037 (Miss. 2003). In Bowie, the trial judge entered an agreed scheduling order under which plaintiffs were to designate experts not later than December 31, 2000, and that all discovery was to be completed by March 1, 2001. 861 So. 2d at 1039. “The order further provided that the deadlines could ‘not be extended by agreement of the parties, but only by permission of the Court upon showing of good cause.’” *Id.* Plaintiff did not file any expert designation until February 5, 2001, filed the expert affidavit after that, both occurring after Defendants had filed their own expert designations and motions for summary judgment. *Id.* At the March 5, 2001, hearing on summary judgment, Plaintiff filed a motion for extension of time, asking it to be applied retroactively. This motion fell on deaf ears, and defendants’ summary judgment motions were granted. 861 So. 2d at 1040. The Court of Appeals, relying on Thompson, reversed. *Id.* This Court agreed with the actions of the trial court, taking care to note “the expert was not timely designated,” that “the trial judge made a specific finding that the plaintiffs had failed to show *any* excusable neglect as to why the designation of the expert was not timely filed,” and that “the parties and the attorneys knew from the express language of the scheduling order that the therein stated deadlines could ‘not be

extended by agreement of the parties, but only by permission of the Court upon showing of good cause.” 861 So. 2d at 1042. Finally, this Court noted the sequence of events: defendants filed motions for summary judgment before plaintiffs finally designated experts, and only at the hearing on those motions did plaintiffs move for an extension. *Id.* at 1043.

This Court took care to distinguish Bowie from Thompson. First, this Court noted in Thompson that “[a]lthough the plaintiffs' expert affidavit was not filed until after the motion for summary judgment was filed, the expert in that case had been timely designated and his deposition had been taken,” pointing out that the expert was designated in 1994 and that what was sought was a supplementation of the testimony with a deposition from 1996. 861 So.2d at 1042. This Court then pointed out the issue in Bowie was “failure to comply with a trial court's order concerning the time frame for the completion of discovery,” while the issue in Thompson was “propriety of a particular sanction for the violation of a discovery rule.” *Id.* However, this Court recites in its opinion in Thompson, “[b]y agreed order dated September 25, 1995, the circuit court extended discovery for 90 days.” Thompson v. Patino, 784 So.2d 220, 221. Thompson’s failure to comply with an order specifying the time frame for completion of discovery was not fatal to this Court’s rendering a decision in his favor.

Barely three months ago, in a case that stands in sharp contrast to the case *sub judice*, in Hariel v. Biloxi MHA, Inc., 964 So.2d 600 (Miss. 2007), this Court reviewed the grant of summary judgment in favor of defendants in a medical malpractice action where the plaintiff made a second motion for additional time and filed a medical expert affidavit **after** the summary judgment hearing. In Hariel, the defendants moved for summary judgment about a year after suit was filed because plaintiff had not identified a medical expert. 964 So.2d at 601. The plaintiff requested, and was granted, an additional 90 days to designate the requisite medical

expert, but did not within the extension. *Id.* at 601-02. The plaintiff unsuccessfully sought a continuance of the summary judgment hearing. *Id.* at 602. Only after the trial court heard defendants' summary judgment motions did plaintiff finally file a second request for extension of time and an affidavit of a medical expert. *Id.* The trial Court granted summary judgment in favor of defendants. *Id.*

This Court upheld the trial court's ruling, first noting that the trial court's discretion regarding discovery matters will only be reversed where the trial court's decision can be characterized as an abuse of discretion. *Id.* at 607. This Court then stated the importance of considering the sequence of events and reviewed the sequence described above in detail. *Id.* at 607-08. This Court found that "[c]onsidering the peculiar circumstances involved, we cannot say the circuit court abused its discretion when it did not allow Hariel to submit an untimely affidavit." *Id.* at 609.

3. Application to the facts of the case at bar.

Fairness dictates that Plaintiffs' Supplemental Designation of Dr. Hansen should not have been excluded. When Defendants were unable to schedule Dr. Hansen's deposition prior to the original October 15, 2005 deadline, Plaintiffs acted with good faith and professional courtesy by agreeing, prior to the expiration of that deadline, to allow Defendants an extension for discovery to March 17, 2006. Record 001206-207. Defendants would not have had the testimony upon which they premise their motions for summary judgment had they not received that extension. Defendants did not return the courtesy when Plaintiffs asked, on December 28, 2005, that discovery be extended to June 15, 2006. Record 002359. Interestingly, Defendants did not refuse to produce the echocardiogram film requested on May 1 and 17, 2006, after the

discovery deadline. It was only when Dr. Hansen's interpretation was at odds with Dr. Himmelstein's, that they then invoked the deadline. Finally, Plaintiffs did not simply ignore the deadline; Plaintiffs filed a timely request for amendment to the scheduling order for additional time for discovery. "Where a request for additional time to gather material evidence is properly and timely made, and the request refused by the trial court, this Court has reversed on the basis [of fairness]." Erby v. North Mississippi Medical Center, 654 So.2d 495, 502 (Miss. 1995).

Considering fairness to all parties, and in light of the fact that any prejudice to Defendants in allowing the Supplemental Designation can be cured, the trial court erred in excluding the Supplemental Designation of Dr. Hansen.

Turning now to the first of the factors outlined in Mississippi Power & Light v. Lumpkin, Plaintiffs' explanation as to why they did not previously provide the echocardiogram films or report to Dr. Hansen reveals excusable oversight, rather than deliberateness or serious negligence. Plaintiffs obtained a certified copy of the hospital records for Mr. Young's final admission a full month after his death. Plaintiff did observe that an echocardiogram had been ordered for the day after Mr. Young died, and did not find any echocardiogram report in the record. Plaintiff forwarded these records to Dr. Hansen for review.

Defendants argue that Plaintiffs had notice of the actual existence of the August 26, 1999 echocardiogram and report because "the ejection fraction was disclosed as part of another one of the defendants' expert disclosures. Dr. Meacham's expert disclosures - - his experts specifically addresses this ejection fraction" Transcript of Proceedings, pp. 38-39. In the First Supplemental Designation of Experts and Cross-Designation of Experts filed on behalf of Dr. Meacham on August 16, 2005, Dr. Barksdale makes mention of the ejection fraction. While the designation makes specific mention the specific dates of other reports, there is absolutely no

mention of the date of the echocardiogram report, or the date the study was performed. Record at 000761-62. Further, the designation does not state that Dr. Barksdale reviewed the echocardiogram films.

Defendants also argue that the report itself was revealed to Plaintiffs during Dr. Himmelstein's deposition. However, this "disclosure" did **not** include any mention of the report's existence; there were no questions posed to Dr. Himmelstein about the echocardiogram study or report by any lawyer, the report was contained within a stack of medical records which had every appearance of being the same record produced by the hospital a month after Mr. Young died. Plaintiffs' failure to notice this one sheet of paper within that voluminous record does not rise above excusable neglect.

As mentioned above, any prejudice to the Defendants in allowing the Supplemental Designation of Dr. Hansen can be cured. The only articulated prejudice to Defendants in allowing Plaintiff's Supplemental Designation is that Defendants would have to bear the expense of resuming the deposition of Dr. Hansen (Transcript of Proceedings, pp.50-51). This was, and is, subject to being cured by simply resuming the deposition of Dr. Hansen for the limited purpose of examining the new information at Plaintiffs' expense. On the other hand, exclusion of Dr. Hansen's testimony substantially prejudices Plaintiffs: it was the basis, albeit inappropriate, for entry of summary judgment on behalf of all Defendants, and removed from Plaintiffs a strong piece of evidence on causation.

Finally, had the trial court allowed Plaintiffs' Supplemental Designation, the effect on the orderly proceedings of the court would have been minimal. No continuance would have been necessitated as this matter had not yet been set for trial.

‘not be extended by agreement of the parties, but only by permission of the Court upon showing of good cause.’” 861 So. 2d at 1042. In the case *sub judice*, Plaintiffs’ experts were timely designated, the trial judge made no finding of Plaintiffs failing to show excusable neglect, and the express language of the scheduling orders make no mention of, or restrictions on, the circumstances under which the deadlines could be extended. Further differentiating Plaintiffs herein from those in Bowie, is the fact that not only was Dr. Hansen designated prior to the Summary Judgment hearing, Plaintiffs had a pending Motion to Amend Scheduling Order filed prior to the expiration of the then current scheduling order, and Plaintiffs filed the Supplemental Designation of Dr. Hansen prior to the Summary Judgment hearing.

Finally, the case at bar stands in stark contrast to the sequence and circumstances of Hariel. Plaintiffs’ proffered the requisite affidavit from a medical expert early in the case, on December 21, 2001 (Record 000199). Plaintiffs consented to an Amended Scheduling Order (Record 002365), allowing Defendants additional time to obtain depositions. Dr. Hansen’s deposition, taken February 27, 2006 (record 001695), upon which Defendants rely for summary judgment, would not have been timely obtained without that extension. Plaintiffs’ **first** request for a discovery extension, their Motion to Amend the Scheduling Order of December 28, 2005 (Record 000015 and 002359), and was made well **before** the March 17, 2006 discovery deadline of the agreed Amended Scheduling Order, and **before** the hearing on Defendants’ Motions for Summary Judgment on September 21, 2006 (Record 000017).

Clearly the case at hand shares more of a factual basis with Thompson than any of the other cases described, and, like Thompson, relief should be granted to Plaintiffs herein: Plaintiffs’ Supplemental Designation of Dr. Hansen should be allowed.

B. The trial court erred in granting summary judgment in favor of the Defendants.

Pursuant to Rule 56(c) of the Mississippi Rules of Civil Procedure, summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Miss. R. Civ. P. 56(c).

The law in Mississippi on review of grants of summary judgment is well settled, and was recapped in Bowie:

This Court applies a de novo standard of review of a lower court's grant or denial of summary judgment. Hudson v. Courtesy Motors, Inc., 794 So.2d 999, 1002 (Miss.2001). The proponent of a summary judgment motion bears the burden of showing that there are no genuine issues of material fact such that he is entitled to judgment as a matter of law. Collier v. Trustmark Nat'l Bank, 678 So.2d 693, 696 (Miss.1996). The motion may not be defeated merely by responding with general allegations, but must set forth specific facts showing that issues exist which necessitate a trial. Drummond v. Buckley, 627 So.2d 264, 267 (Miss.1993). After viewing the evidence in a light most favorable to the nonmoving party, this Court will only reverse the decision of the trial court if triable issues of fact exist. Travis v. Stewart, 680 So.2d 214, 216 (Miss.1996). Bowie v. Montfort Jones Memorial Hospital, 861 So.2d 1037, 1040-41 (Miss. 2003).

1. Had Plaintiffs' Supplemental Designation of Dr. Hansen been allowed, the trial court's grant of summary judgment would be clearly reversible.

Summary Judgment as to each Defendant herein was granted on the premise that Mr. Young's echocardiogram revealed an ejection fraction of only 10-20%, and that with such a low ejection fraction any action or omission cannot be said to have caused in death. In the Supplemental Designation of Dr. Hansen, a genuine issue of this material fact is directly attacked: Dr. Hansen found Mr. Young's ejection fraction to be 35-40%, that Dr. Himmelstein mis-interpreted the echocardiogram, that Mr. Young was a candidate for treatment which would have probably prevented his death, and that had he received appropriate care from Dr. Smith, Dr.

Meacham, Dr. Bray, and Dr. Himmelstein, his death probably would have been prevented. (Record 001917-19). Viewing this evidence in a light most favorable to Plaintiffs, a genuine issue of a material fact exists and this Court must reverse the decision of the trial court.

2. Even without the Supplemental Designation of Dr. Hansen, a genuine issue as to the condition of Mr. Young's heart, and whether he was a candidate for life saving treatment, exists, and the trial court erred in granting summary judgment.

Again, Summary Judgment as to each Defendant herein was granted on the premise that Mr. Young's echocardiogram revealed an ejection fraction of only 10-20%, and that with such a low ejection fraction any action or omission cannot be said to have caused in death. Defendants assert that the report must be accepted as accurate and that Dr. Hansen withdrew his opinions regarding causation when confronted with the facially inaccurate echocardiogram report of Dr. Himmelstein. That is not the case.

Dr. Hansen questioned the accuracy of the report based on its reciting that the study was done three days after Mr. Young's death and questioned the reported ejection fraction of 10-20 %, because with such "a very depressed ejection fraction[, i]t is hard to imagine [Mr. Young] walked around, you know, and just sort of walked into a physician's office." Defense counsel acknowledged that the clear inaccuracy of the report, and therefore "deal[t] with this, I guess, in a hypothetical sense." Defense counsel asked Dr. Hansen "to assume that this echocardiogram that was run on Mr. Young prior to his death, that it was interpreted properly" Nowhere in his deposition does Dr. Hansen state he agrees with the assumptions of the hypothetical questions posed to him, and nowhere in his deposition does he recant his observation that the reported ejection fraction of 10-20% is inconsistent with Mr. Young's symptoms and physical activity prior to his final hospital admission.

Viewed in a light most favorable to Plaintiffs, the accuracy of Dr. Himmelstein's report is also questioned based on its failure to appear in the medical records provided to Plaintiff Bobbi Young a month after Clarence Young's death.

Summary judgment in favor of Defendants hinges on the accuracy of the echocardiogram findings of Dr. Himmelstein. The Supplemental Designation of Dr. Hansen directly attacks those findings. The report is inaccurate on its face. Even without consideration of the Supplemental Designation of Dr. Hansen, there exists a factual issue between the documented physical activities and symptoms of Mr. Young and those findings. Therefore, the trial court erred in granting summary judgment and this Court should reverse.

IX. CONCLUSION

For all the reasons stated above, Plaintiffs pray this Court reverse the trial court's striking of Plaintiff's Supplemental Designation of Dr. Hansen, reverse the trial court's grant of summary judgment in favor of Defendants, and remand this action to the circuit court for further proceedings and trial.

Respectfully submitted,



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Certificate of Service

I hereby certify that a copy of the foregoing document has been served upon:

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Certifying Attorney

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

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.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Appellants' Brief in the above referenced matter was
served upon:

Hon. Andrew C. Baker
Circuit Court Judge
P.O. Drawer 368
Charleston, MS 38921

by mailing the same, via United States mail, postage prepaid, on the 17th day of December, 2007.

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