IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2007-TS-01093

BOBBI J. YOUNG and LYNDA L. CARTER,
Next of Kin to CLARENCE C. YOUNG, DECEASED **APPELLANTS**

V.

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

APPEAL FROM THE CIRCUIT COURT OF
DESOTO COUNTY, MISSISSIPPI

BRIEF OF APPELLEES STEVAN I. HIMMELSTEIN and CARDIOVASCULAR PHYSICIANS OF MEMPHIS

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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 in order that the justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1.	Bobbi J. Young	Appellant
2.	Lynda L. Carter	Appellant
3.	Duncan Ragsdale, Esq.	Counsel for Appellants
4.	William R. Bruce, Esq.	Counsel for Appellants
5.	Stevan I. Himmelstein,	Appellee
6.	Cardiovascular Physicians of Memphis	Appellee
7.	Shelby Duke Goza, Esq.	Counsel for Appellees Stevan I. Himmelstein & Cardiovascular Physicians of Memphis
8.	S. Kirk Milam, Esq.	Counsel for Appellees Stevan I. Himmelstein & Cardiovascular Physicians of Memphis
9.	Dion J. Shanley, Esq.	Counsel for Appellees Stevan I. Himmelstein & Cardiovascular Physicians of Memphis
10.	Baptist Memorial Hospital-DeSoto, Inc.,	Appellee
11.	Alan Davis, Esq.	Counsel for Appellees Baptist Memorial Hospital-DeSoto, Inc.

12.	John H. Dunbar, Esq.	Counsel for Appellees Baptist Memorial Hospital-DeSoto, Inc..
13.	Robert R. Meacham,	Appellee
14.	Tommie Williams, Esq.	Counsel for Appellee Robert R. Meacham
15.	Gina V. Bray	Appellee
16.	Michael K. Graves, Esq.	Counsel for Appellee Gina V. Bray
17.	Albert C. Harvey, Esq.	Counsel for Appellee Gina V. Bray
18.	Robert H. Smith	Appellee
19.	David W. Upchurch, Esq.	Counsel for Appellee Robert H. Smith
20.	Hon Robert Chamberlin,	Circuit Court Judge of DeSoto County

Respectfully Submitted,

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STATEMENT OF ORAL ARGUMENT

These Appellees take no position as to whether oral argument is warranted pursuant to Miss. R. App. P. 34(b).

STATEMENT OF THE ISSUES

1. Whether the lower court properly granted summary judgment to Appellees Stevan I. Himmelstein & Cardiovascular Physicians of Memphis irrespective of the issues raised by other parties to this appeal subsequent to Dr. Hansen's withdrawal of his opinions against these Appellees.[1]

2. Alternatively, whether the lower court abused its discretion in striking the supplemental affidavit of Appellant's expert witness.

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[1]Appellants' Statement of Issues suggests that they do not assign error to the lower court's grant of summary judgment for these Appellees. *See* Brief at p. 1. Section 5 (2) ("Whether the Trial Court erred in granting Summary Judgment in favor of Defendants, except for Stevan Himmelstein.") If Appellants have now abandoned their appeal against these Appellees (19:2724) the assessment of costs seem are appropriate. That said, because Appellants assign error to the lower court in granting summary judgment "on behalf of all defendants" (Brief of Appellants at 17) and "as to each defendant herein" (*Id.* at 20), Appellees' submission is necessary. Moreover, the relief requested--reinstatement of Hansen's supplemental designation – effectively jeopardizes the lower court's judgment for these Appellees by placing back in court, Hansen's new allegations against Appellees. *See* Brief of Appellants at 20-21 ("had he received appropriate care from . . . Dr. Himmelstein, his death would have been prevented.")

STATEMENT OF THE CASE

A. Procedural History

Appellants commenced this action in the Circuit Court of DeSoto County, Mississippi on August 22, 2001. R. 1: 22-30. In that complaint, the Appellants alleged claims of medical negligence against Appellant Himmelstein[1] for treatment rendered to Appellants' decedent Clarence Young (Young) during the period August 19, 1999 through August 26, 1999. R.1:22-30. Appellee Himmelstein filed his Answer to the Complaint on September 20, 2001[2] and discovery followed. R. 1: 53-61. Because of insolvency proceedings involving another party, the action was stayed on March 18, 2003. R. 2:274. After the expiration of the stay, discovery again proceeded.

On March 24,2005, the lower court conducted a motion hearing and entered a scheduling order on March 30, 2005, setting the discovery deadline in this case for October 15, 2005, plaintiffs' expert disclosure deadline for July 15, 2005 and the motion deadline for November 15, 2005. R. 3:449. Subsequently, by agreement of the parties, the lower court extended the discovery and motion deadlines R. 8:1206. Appellants deposed Appellee Himmelstein on April 27, 2005. R.E. 1; R. 4:581. On December 27, 2005, the Plaintiffs filed a motion to extend the discovery deadline to June 15, 2006. R. 16:2359. Appellees deposed Dr. David Hansen, Appellants' expert on February 27, 2006. R.E. 3; R. 12:1771.

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[1] In this pleading, Appellees Stevan I. Himmelstein & Cardiovascular Physicians of Memphis will collectively be referred to as "Appellee Himmelstein." There are no independent acts of negligence charged to his group, present in this case *via* respondent superior.

[2] Appellant filed a Motion to Amend the Answer and Amended Answer on April 15, 2005. R. 4:460-471.

On May 22, 2006, Appellee Himmelstein filed his motion for summary judgment, based upon the testimony of Appellants' expert, Hanson. R. 13:1861-1917. On June 1, 2007, the lower court conducted a hearing on Appellees' motion for summary judgment and those filed by other defendants. Tr. 1: 56-88. On June 20, 2007, the lower court granted Appellees' motion for summary judgment, dismissing these Appellees from the action with prejudice. R. 19:2719-21. On June 25, 2007, Appellants filed a "Notice of Appeal" to this Court. R. 19:2724. Subsequent to the filing of that notice, the lower court granted the pending motions for summary judgment by other defendants. R. 19:2726-27; 19:2732-33; 19:2735-39.

B. Facts

Young presented to Defendant/Appellee Dr. Robert Meacham (Meacham) on August 19, 1999, and again on August 23, 1999. R.2:238-39. Despite Meacham's treatment, Young's symptoms persisted, leading to his admission to Defendant/Appellee Baptist Memorial Hospital-DeSoto (BMH-D) on Wednesday, August 25, 1999. R. In the emergency room, Defendant/Appellee Dr. Robert Smith (Smith) treated Young. R. 2:252. Defendant/Appellee Dr. Gina Bray (Bray) admitted Young to the service of Meacham also on August 25, 1999. R. 2:252. Following examination, Young was diagnosed as having had a myocardial infarction and was admitted to intensive care under the care of Bray at approximately 2:42 a.m. on Thursday, August 26, 1999. R. 11:1623. Bray ordered that an electrocardiogram ("ECG") test be performed on Young. Himmelstein was contacted for consultation on the case at approximately 1:30 p.m. and arrived at the hospital at approximately 5:00 p.m later that day. R. 5:621. Himmelstein

saw Young at approximately 6:00 p.m. that night. R.5:621-25. By that time the ECG had already been performed and the results were pending. R. 16:2415. Young expired several hours later at approximately 11:31 p.m., August 26, 1999. R. 17:2488. A subsequent autopsy revealed that Young had undergone multiple heart attacks prior to his death R. 17:2487-90. Subsequent to Young's death, Himmelstein dictated the ECG report on September 7, 1999, which was transcribed at a later date. R. 17: 2470. This action followed.

SUMMARY OF ARGUMENTS

In the court below, it was incumbent for Plaintiffs/Appellants to adduce evidence against these Appellees, establishing a prima facie case of medical negligence to include expert testimony (1) that identified and defined the legal duty Appellees owed to Appellants in the form of an appropriate articulation of the standard of care; (2) that identified how Appellees breached that standard in their treatment of appellants' decedent, and (3) that identified the causal connection between that breach and the appellees' decedents' death. *See Palmer v. Biloxi Regional Med. Ctr.*, 564 So. 2d 1346, 1355, 1357 (Miss. 1990). *See also*; *Phillips v. Hull*, 516 So. 2d 488, 491 (Miss. 1987). Appellants' first submission of their proposed expert testimony (albeit abbreviated in form) identified several specific breaches of the applicable standard of care, allegedly committed by this Defendant/Appellee, necessitating further discovery. Once these Appellees deposed appellants' expert on February 27, 2006, however, it became clear that Appellants could not meet their burden of production on summary judgment necessary to retain Appellee Himmelstein as a party to this action. Irrespective of whether the lower court was correct in excluding the supplemental designation of

Hanson, summary judgment was appropriate as to these Appellees.

The lower court did not abuse its discretion in denying the Appellants' motion to amend the scheduling order and granting Appellees' motions to strike Appellants' Supplemental Rule 26 Expert Disclosure of Dr. David Hansen. Alternatively, summary judgment in favor of these Appellees was appropriate subsequent to Hansen's withdrawal of opinions on causation post review of the echocardiogram.

STANDARDS OF REVIEW

A. SUMMARY JUDGMENT

This Court reviews the granting of summary judgment *de novo* to determine if there was error on the part of the lower court in granting the motion. *Mallet v. Carter*, 803 So.2d 504, 509 (Miss. 2002). The lower court was obliged to follow the dictates of this Court's jurisprudence in applying Rule 56, by considering the parties' respective burdens of production within the summary judgment framework, parallel to their respective burdens of proof at trial. *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So.2d 413, 415-16 (Miss. 1996) In the case *sub judice*, it was incumbent on Appellants to show through Hanson, their only expert against this party, that these Appellees' deviation from the standard of care caused or contributed to Young's death. As demonstrated herein, Appellants failed to support this burden, and remain unable to overcome their expert's findings that these Appellees did not deviate from the standard of care as regards Young's unfortunate outcome.

B. AFFIDAVITS FOR OR AGAINST SUMMARY JUDGMENT

In Mississippi, a properly supported motion for summary judgment cannot be

defeated "by submitting an affidavit which directly contradicts, without explanation, [a witness'] previous testimony." *Foldes v. Hancock Bank*, 554 So.2d 319, 321 (Miss. 1989) (citing *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980)). Moreover, it is generally recognized that affidavits which are inherently inconsistent with prior sworn testimony cannot be used to create a fact in dispute sufficient to prevent summary adjudication. *See Letson v. Liberty Mut. Ins. Co.*, 523 F.Supp. 1221 (D.C. Ga. 1981); *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489 (5th Cir. 1996).[3]

C. DISCOVERY CONTROL

As pointed out by Appellee Bray, trial courts have considerable discretion "[i]n managing the pretrial 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." *Bowie v. Montfort Jones Mem. Hosp.*, 861 So.2d 1037 (Miss. 2003). As Dr. Bray points out, "[t]he discovery orders of the trial court will not be disturbed unless there has been an abuse of discretion." *Mallet v. Carter*, 803 So.2d 504 (Miss. Ct. App. 1992) (citing *Dawkins v. Redd Pest Control Co.*, 607 So.2d 1232, 1235 (Miss. 1992)).

> [T]he phrase "abuse of discretion" does not lend itself to a definitive or precise meaning. This ambiguity is necessary to allow judges enough room to exercise their own sound judgment in the cases coming before them. A more narrow definition of the term would constrict a judge's ability to do what a judge is

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[3]While these are federal decisions interpreting Fed. R. Civ. P. 56, as noted by this Court, where a particular rule of procedure is worded verbatim or exactly the same as the parallel rule contained within the federal rules of civil procedure, construction by the federal judiciary of the rule in question is "persuasive of what our construction of our similarly worded rule ought to be." *King v. King*, 556 So. 2d 716, 720 (Miss. 1990) *quoting Smith v. H. C Bailey Company,* 477 So. 2d 224, 233 (Miss. 1985).

supposed to do--make sound judgments on the issues before the court within the boundaries of the laws of this State, the Mississippi Constitution and the United States Constitution.

White v. State, 742 So.2d 1126, 1136 (Miss.1999).

ARGUMENTS

ARGUMENT I: THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT TO APPELLEES

In Appellants' complaint, it was alleged that Appellee Himmelstein was negligent in failing to attend and examine Young in a timely manner; in failing to order or give thrombolytic drugs; in failing to perform an emergency cardiac catherization, angioplasty or appropriate procedure; in failing to call for an emergency cardiovascular surgical consult for possible bypass surgery; and, in failing to order that Mr. Young be transferred to the Coronary ICU. *See* 1:22-30. To support these allegations, Appellants designated David E. Hansen, M.D. as an expert in the field of cardiology on or about December 12, 2001. As part of the designation, Plaintiffs provided an affidavit from Dr. Hansen which set forth all of his opinions including criticisms of Dr. Himmelstein's care and an opinion that Dr. Himmelstein's care, in part, the cause of Mr. Young's death. R.E. 2.

A. The Original Affidavit

Hansen gave the following opinions in his original affidavit:

> On August 26, 1999, Steven I. Himmelstein fell below the recognized standard of acceptable professional practice in the handling of Mr. Young's case by:
>
> A. Failing to attend and examine Mr. Young in a timely manner;
> B. **Omitted by Dr. Hansen**;
> C. Failing to perform or order an emergency cardiac catherization, angioplasty, or other appropriate procedures

to open Mr. Young's blocked coronary artery;

D. Failing to call for an emergency cardiovascular surgical consult for immediate evaluation of Mr. Young for an emergency bypass procedure; and

E. Failing to order Mr. Young to be transferred to the Coronary Intensive Care Unit.

See R. 13:1883. Hansen was deposed on February 27, 2006. R. 13:1886. During that deposition, counsel for Dr. Himmelstein inquired further into the opinions put forth in Dr. Hansen's affidavit above. As to opinion A above, Dr. Hansen's testimony is as follows:

> Q. Okay, May we, then, agree that -- that you would withdraw number A under paragraph 30?
>
> A. Yes.

See R. 13:1909-10. Hansen's prior contention, that Himmelstein failed to attend to Young in a timely manner, was forcefully extinguished once Appellants' expert actually read Himmelsten's testimony:

> And it seems to me, based on the testimony of Dr. Himmelstein, there was no level of urgency of that consultation when it was requested, so I think not inappropriately, he finished seeing his patients in the office and then went off to see his consultations in the hospital and probably was somewhere like 5:30, 6:00 o'clock at night before he ever saw the patient. . . *And my opinions regarding his role in this case changed rather dramatically because of that understanding of — of what the time lag was between the arrival of the patient and the involvement of the cardiologist as a consultant.*

R. 13:1909 (emphasis supplied). Hansen was then asked about the remaining allegations against Appellee Himmelstein (identified in items C, D and E) The following exchange occurred in connection with those allegations:

> Q. Okay, Are there other changes - - you said that your opinions - - other opinions may have changed as well. In paragraph C., D., and E., there were other criticisms. Would you like to change any of those criticisms as we sit here?

A. Um, yes. I think that with the description of how the patient was at the time that Dr. Himmelstein came upon the patient, I don't believe that C. would be a standard of care issue any more. I don't think that it was a failure not to perform cardiac catheterization at 6:00 o'clock p.m. on the night of August 26, 1999.

R. 13:1910. With regards to item D [failing to call for an emergency consult] Hansen testified as follows:

A. Yes. I would also strike that. I think that the consultation of a surgeon to consider an emergency coronary artery bypass graft procedure would have occurred after you have done a coronary arteriogram and you know what the anatomy is. I think Dr. Himmelstein had a plan to perform that arteriogram. I believe it was, on August 30th, according to the affidavit from one of the family members that I read. And that would seem an appropriate time to perform a coronary arteriogram, providing that the patient was stable over that time. And if at any time they were unstable, I am sure that Dr. Himmelstein could have changed that decision and done the procedure emergently. But I don't think that you can call for cardiac surgery consultation until you have actually seen what the coronary anatomy is.

R. 13:1911-12. With regards to Hansen's final standard of care criticism-- that Dr. Himmelstein failed to order Mr. Young to be transferred to the Coronary Intensive Care Unit [Item E], Hansen stated in his deposition that:

A. There was already an existing order for the patient to be in an ICU. I think it would be redundant for him to order once again to send the patient to ICU.

R. 13:1912-13.

The last criticism Hansen offered that related to Himmelstein was stated in his affidavit as follows:

As a direct and proximate result of the departures from the standard of practice, Mr. Young died of the effects of an acute myocardial infarction. Had Dr. Himmelstein provided care consistent with the standard of practice, it is probable that Mr. Young would not have died.

R. 13:1883 (¶ 30) During his deposition the following discourse took place between Himmelstein's counsel and Hansen:

> Q. ... In all fairness, you have essentially taken your criticisms of Dr. Himmelstein out. Is it fair to say that - - that you would withdraw that indictment of Dr. Himmelstein insofar as his care and treatment in Mr. Young dying?
>
> A. Yes, I would.

R. 13:1913-14. And though it is clear that Hansen withdrew each and every criticism of Dr. Himmelstein's care during his February 27, 2006 testimony, in light of the parties' wide-ranging procedural fencing over the consequences of Hansen's subsequent deposition testimony regarding the echocardiogram Bray ordered and Himmelstein read, it bears emphasis in this appeal that none of Hansen's testimony cited above and relied upon in the court below has any connection whatsoever with the echocardiogram and Hansen's review of that test result for the first time in his deposition. Absolutely, none. Instead, it is predicated on several independent bases to include (1) the deposition of Himmelstein and "others" (described as new information) R. 13:1908; and, (2) an affidavit of family members. R. 13:1911-12. It was not until sixty pages after he had completed his discussion about his opinions of Dr. Himmelstein's care, where Dr. Hansen was shown the ECG report, that he began to change his opinions regarding the other defendants. Hansen's review of the echocardiogram begins during the examination by counsel for Appellee Meacham at page eighty-nine (89) of the transcript. *See* R.12:1777. Absent a viable opinion on causation (retracted at the behest of Hansen prior to any discussion of the echocardiogram), Appellants' claims against this defendant could not survive summary judgment. After conducting a full

hearing on the matter, the lower court recognized this fatal flaw in the Appellants' case against these Appellees:

> Dr. Hansen was deposed on February 27, 2006. In his deposition, Dr. Hansen withdrew each and every criticism offered in his affidavit of the care provided by Dr. Himmelstein to Mr. Young.
>
> * * * *
>
> Because plaintiff has not presented an expert to testify that Dr. Himmelstein or, by extension, Cardiovascular Physicians of Memphis failed to treat Mr. Young in accordance with the applicable standard of care, Summary Judgment is appropriate.

R. 19:2719; R.E. 8.

B. The Supplemental Designation and Affidavit

Dr. Himmelstein was deposed only once. Between the time his testimony was taken (February 27, 2006) and the submission of Appellants' proposed supplemental designation of Hansen (June 14, 2006), only one thing of consequence had changed, material to Appellants' legal position *vis-a-vis* Appellees: the filing of Appellees' motion for summary judgment, a motion predicated, in part, on this exact testimony. R. 13:1861-63. In an attempt to counter Appellees' motion, Appellants' supplemental designation (R.E. 4) tracked verbatim, Hansen's original opinions against these Appellees, despite their retraction four months previously. Compare R. 12:1693 with R.13:1922. Approximately one month later, however, Hansen submitted a supplemental affidavit at odds with both the original affidavit, as well as the supplemental designation. (R.E. 5) Compare R. 13:1922 with R. 14:2027. And while in his new "supplemental affidavit" Hansen did attest that "the opinions I hold in this matter are those set forth in my original Affidavit signed on December 1, 2001," gone is the

itemization of specific acts of malpractice found in his previous affidavit. R. 14:2026-28. In its stead is found the assertions that Himmelstein should have "correctly and accurately interpret[ed] Mr. Young's Echocardiogram and perform or order appropriate treatment therapy that would have saved his life. Dr. Himmelstein's failure to do so is below the standard of care and resulted in Mr. Young's death."[4] Each of these contentions is addressed in turn.

(1) Adoption of Retracted December 1, 2001 Opinions

For obvious reasons, this supplemental contention cannot prevent the entry of summary judgment. Hansen should not be allowed revive his December, 2001 opinions via his supplemental affidavit after specifically retracting each one of those opinions against these Appellees in February, 2006, for several reasons. First, Hansen's original opinions were based on evidence presented to him that did not include deposition testimony, whereas the retraction of those opinions was specifically based upon Himmelstein's care in view of the complete clinical picture, as described in the testimony of Himmelstein and others. If Hansen's independent interpretation of the echocardiogram could support the re-adoption of his original opinions, one would expect no material variance between his original opinions and those subsequent to his own interpretation of the echocardiogram. Yet, material variances exist, and Hansen's

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[4]At the motion hearings, Appellants misrepresented what Hansen ultimately had to say against these Appellees post review of the echocaridogram by mixing portions of the original affidavit (14:1969) with portions of the supplemental affidavit (14:2025) to support the argument that "defendants, by failing to do the things that he said in his original affidavit, fell below the standard of care." See Tr. 42-44. As pointed out, Appellants' supplemental designation does not conform with Hansen's supplemental affidavit.

original opinions are hopelessly at odds with his supplemental opinions against these parties. For instance, while Hansen originally placed an affirmative duty upon Himmelstein to "perform or order an emergency cardiac arteriography, catherization [or] angioplasty" R. 13:1922), gone from his supplemental affidavit is this contention. While Hansen still believes Young should have undergone "cardiac arteriography" there is no mention of who, among the many care providers, should have performed that task and when.[5] This omission is more than academic to these Appellees, since Hansen threw out the temporal component of his original opinion against these Appellees after learning of the time Himmelstein became involved in Young's care. R. 13:1909. (" there was no level of urgency of that consultation when it was requested.") In short, nothing about Hansen's independent review of the echocardiogram logically revives this prior opinion. And while other aspects of his December 2001 opinions against these Appellees cannot be legitimately resuscitated by reference to Hansen's independent review of the echocardiogram,[6] the material point here is that allowing the late supplementation would have changed nothing as regards the merits of Appellees' motion for summary judgment. Hansen's disagreement with Himmelstein's post mortem interpretation of echocardiogram does not cure the inconsistencies between his

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[5]Appellees do not suggest here that Hansen would still agree that Himmelstein's plan to perform the arteriogram on August 30, 1999 was appropriate; only that his supplemental affidavit is so imprecise as to these Appellees as to be unknowable in light of his prior retractions.

[6]For instance, in his deposition Hansen agreed that Himmelstein could not be faulted for "[f]ailing to order Mr. Young to be transferred to the Coronary Intensive Care Unit. See R. 13:1912-13 ("There was already an existing order for the patient to be in an ICU. I think it would be redundant for him to order once again to send the patient to ICU.") This opinion likewise purports to be revived in the supplemental affidavit.

testimony, the original affidavit, and the supplemental affidavit. *See John Mozingo Real Estate & Auction Inc. v. National Auction Group*, Inc., 925 So.2d 141 (Miss. Ct. App. 2006) (lower court correct in refusing to consider affidavit inconsistent with the party's prior sworn and recorded statements). *See also Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365 (8th Cir. 1983) ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own earlier testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.") (*citing Perma Research & Development Co. v. The Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)). Appellants proffer no explanation for the patent inconsistencies between all of these manifestations of Hansen's opinions and allowing the unseasonable Rule 26 supplementation would not change the result as to these Appellees.[7]

(2) Failing to Correctly Interpret the Echocardiogram

According to Hansen, the echocardiogram ordered by Bray was misinterpreted by Himmelstein. R. 14:2027. Putting aside the irony involved in Appellants' reliance on the Echo now[8], the study shows that the echocardiogram was performed on the

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[7]Although the lower court did not strike Hansen's supplemental affidavit, it was of no effect after the court struck the supplemental designation. Should the court find the supplementation should have be allowed, the question then arises as to whether the supplemental affidavit would have been sufficient to keep these Appellees in this case. As demonstrated *supra.*, that is not the case as to these Appellees. Appellee BMH-D points out that "this Court may affirm a decision on grounds not addressed by the trial Judge." Brief of Appellee BMH-D at p. 20 citing *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.")

[8]Appellants moved to strike the Echo study in the court below as unreliable. R. 16:2369. At the motions hearing, Appellants reiterated that position. See Tr. 40 ("It is an impossible report.")

afternoon of August 26, 1999. R. 18:2611. There is no indication in this voluminous record, however, that Himmelstein knew an echocardiogram had been performed,[9] much less evidence that he interpreted those results at some time prior to Young's demise. Instead, the only evidence in this record is that Himmelstein read the results sometime after Young's demise and dictated his interpretation of the study on September 7, 1999. R. 14:2020.

In this context, it is important to note what Hansen does not say, relevant to the utility of the supplemental affidavit in preventing summary judgment. Hansen does not say Himmelstein did or should have based his care of Young on the echocardiocgram. As Appellants have never withdrawn their objection to Himmelstein's interpretation of the echo, they remain on record as asserting that the study "was done on August 26, 1999 and not dictated or interpreted until September 7, 1999, if at all." R.E. 7; R. 16:2369. Obviously, Himmelstein's alleged misinterpretation of the echo study in September is of no consequence to any question about the management of Young's care in August.[10] Appellants should be estopped to argue otherwise. *See Dockins v. Allred*, 849 So.2d 151, 155 (Miss.2003) ("Because of judicial estoppel, a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation.") (citing *Banes v. Thompson,* 352 So.2d 812, 815 (Miss.1977).

Finally, whereas Hansen's December, 2001 withdrawn opinions are specific as

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[9]The only inference to be drawn from this record is that the echocardiogram was not available to Himmelstein at the time of his consultation. It was not in the hospital medical records obtained by Appellants shortly after Mr. Young's demise. R. 17:2517.

[10]Dr. Bryan Barksdale, Appellee Meacham's expert, agreed that "plaintiffs ejection fraction was between 10 and 20%." R. 17:2525.

regards to what Himmelstein did or failed to do, the supplemental affidavit is hopelessly vague in this regard ("perform or order appropriate treatment"), a distinction with a difference in this case. Himmelstein's testimony outlines a complete clinical picture of Young when Himmelstein saw Appellants' decedent. R. 4:581-5:620 (deposition of Himmelstein pp. 1-40); R. 4:472-575 (deposition of Himmelstein pp. 41-144);R. 5:621-650 (deposition of Himmelstein pp. 145–175). Hansen withdrew his prior specific opinions against Himmelstein after reviewing that testimony (R.13:1909) and, specifically, the clinical picture presented to Himmelstein. R. 13:1910. As demonstrated *supra*., Hansen's February 2006 recantation has several dimensions and is at odds with both the supplemental designation as well as the supplemental affidavit, in material ways. His recent disagreement with Himmelstein's interpretation of the echo does not vitiate his previous retractions, nor make his vague observation concerning "appropriate treatment therapy" mean anything material to the merits of Appellees' Rule 56 motion. Accordingly, the lower court was correct in granting summary judgment to these Appellees and should be affirmed.

ARGUMENT II: THE LOWER COURT PROPERLY EXCLUDED APPELLANTS' SUPPLEMENTAL DESIGNATION

Appellee Bray and Appellee BMH-D's submissions throughly cover this issue on appeal. Appellee Himmelstein will not burden the Court in covering the same ground. Suffice it to say that the lower court did not abuse its discretion in denying Appellants' unseasonable putative supplementation. R.E. 6. The June 16, 2006 proposed supplementation was clearly untimely, proffered new opinions not divulged previously against defendants, and ultimately did not even conform to the affidavit of the expert for

whom the supplementation was prepared. (Compare R. 13:1917-23 with R. 13:2027-28.)[11] In light of the procedural history of this case, a history which is undisputed, it cannot be said that the lower court departed from the exercise of "sound judgment" in denying this supplementation. R. 16:2380.

Moreover, Himmelstein, perhaps more than any other party, would have been greatly prejudiced by granting the late supplementation. Here, Himmelstein had established his right to Rule 56 relief after giving his evidence without qualification or evasion and after making the echo study available to Appellants at the time they took his testimony for several hours on April 27, 2005. Moreover, Hansen's late disagreement with Himmelstein's reading of the Echo, in turn, spurred Appellants to then seek to re-depose this party eights months after expiration of the discovery deadline. R.16:2367. "At some point the train must leave." *Bowie v. Montfort Jones Memorial Hosp.*, 861 So. 2d 1037, 1042 (Miss. 2003). The lower court's opinion striking the supplementation is expressly grounded in "fairness to . . . all the attorneys involved." R. 16:2380. As regards these Appellees, its decision is eminently correct. *See 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). *See also Hariel v. Biloxi HMA, Inc.*, 964 So.2d 600, (Miss. Ct. App. 2007).

ARGUMENT III: SUMMARY JUDGMENT IN FAVOR OF APPELLEE HIMMELSTEIN WAS APPROPRIATE CONSIDERING HANSEN'S WITHDRAWAL OF OPINIONS ON CAUSATION

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[11] Hansen's opinion continued to evolve after his deposition and the discovery deadline, as illustrated by its various manifestations.

As regards Hansen's retraction of his prior opinions against other medical care providers sued by Appellants, the lower court determined:

> [t]hat, independent of these grounds for dismissal of these defendants, the Court finds that the arguments supporting Baptist Memorial Hospital Desoto, Inc. Robert R. Meacham, and Gina V. Bray's motions for judgment as a matter of law on the question of lack of causation is, likewise, fully applicable to this defendant as well, and form an alternative basis for dismissal of Stevan I. Himmelstein and Cardiovascular Physicians of Memphis.

R. 19:2719. These Appellees have already demonstrated that, irrespective of the Appellants' unexcused late discovery of the Himmelstein Echo study interpretation,[12] summary judgment was appropriate on the issue of causation:

> Q. In all fairness, you have essentially taken your criticisms of Dr. Himmelstein out. Is it fair to say that - - that you would withdraw that indictment of Dr. Himmelstein insofar as his care and treatment in Mr. Young dying?
>
> A. Yes, I would.

R. 13:1913-14. Hanson's testimony in this regard was not predicated on the Echo study whatsoever but, as discussed *supra*, completely upon Young's clinical picture as related by Himmelstein in the latter's deposition. Subsequently, in response to questioning by counsel for the remaining Appellees in this action post review of that study, Hansen withdrew all of his causation opinions previously held in this case.

> 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

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[12] *See* Brief of Appellee BMH-D at p. 16 for discussion of this issue, *citing 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.").

close to 50 percent.[13]

R. 12:1787. Young's 10-20% ejection fraction meant that Appellants' expert could not provide an opinion to a reasonable degree of certainty that Young would have been an appropriate candidate for coronary artery bypass surgery (12:1787) or survived his heart attack. R. 12:1788. Accordingly, summary judgment was appropriate on this alternative basis.

CONCLUSION

Appellants suffered a tragedy in the loss of Mr. Young. These Appellees did not cause or contribute to that tragedy and accordingly, request that the lower court's opinion granting them summary judgment be affirmed. The lower court was correct in striking the Supplemental Rule 26 Expert Disclosure of Dr. David Hansen and, as in all matters pertaining to control of its docket, acted well within its lawful discretion. The lower court should be affirmed in all respects. Appellees so pray.

Respectfully submitted, this the 13th day of March, 2008.

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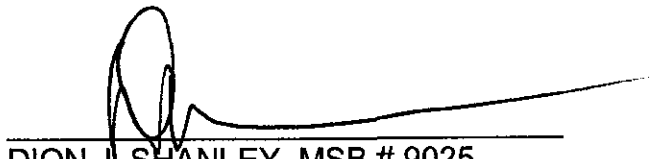
[13]Thus, placing Appellants out of court as to all defendants. *See Ladner v. Campbell*, 515 So. 2d 882, 889 (Miss.1987) (for actionable medical negligence, evidence must demonstrate "a greater than fifty percent chance of a better result" than that obtained.")



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