

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CASE NO. 2008-CA-00041**

EVELYN GWEN MOORE

PLAINTIFF/APPELLANT

V.

DELTA REGIONAL MEDICAL CENTER

DEFENDANT/APPELLEE

BRIEF OF APPELLEE

**Appeal from the Circuit Court of Washington County, Mississippi
Cause No. CI2005-61**

Prepared and submitted by:

**CHRISTOPHER W. WINTER
Mississippi Bar No. [REDACTED]
MARY FRANCES S. ENGLAND
Mississippi Bar No. [REDACTED]
Wilkins, Stephens & Tipton, PA
Post Office Box 4537
Greenville, Mississippi 38704
Telephone (662) 335-5555
Facsimile (662) 335-5700**

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CASE NO. 2008-CA-00041**

EVELYN GWEN MOORE

PLAINTIFF/APPELLANT

V.

DELTA REGIONAL MEDICAL CENTER

DEFENDANT/APPELLEE

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 Court of Appeals may evaluate possible disqualification or recusal.

Evelyn Moore, Plaintiff/Appellant

The Board of Trustees for Delta Regional Medical Center

Jared Kobs, attorney for Appellant
Stamps & Stamps

Christopher W. Winter
Mary Frances S. England, attorneys for Appellee
Wilkins, Stephens & Tipton, P.A.

Honorable Betty W. Sanders

Respectfully submitted,

DELTA REGIONAL MEDICAL CENTER



CHRISTOPHER W. WINTER

Mississippi Bar [REDACTED]
Attorney for Delta Regional Medical Center

TABLE OF CONTENTS

Certificate of Interested Persons	i
Table of Contents	ii
Table of Cases	iii
Statutes	iii
Statement of the Issue	1
Statement of the Case	2
Summary of the Argument	4
Argument	6
I. Facts	6
II. Case Law	11
A. Standard of Review	11
B. Argument	12
C. Conclusion	19
Certificate of Service	21
Certificate of Filing	21

TABLE OF CASES

<i>Banks v. Hill</i>	
978 So. 2d 663 (Miss. 2008)	4, 11, 19
<i>Bowie v. Montfort Jones Mem'l Hosp.</i>	
861 So. 2d 1037 (Miss. 2003)	4, 11, 12, 15, 16, 19
<i>Brooks v. Roberts</i>	
882 So. 2d 229 (Miss. 2004)	12
<i>Estate of Avery M. Deiorio v. Pensacola Health Trust, Inc.</i>	
2007-CA-00537-COA (Sept. 2008)	14
<i>Hudson v. Courtesy Motors, Inc.</i>	
794 So. 2d 999 (Miss. 2001)	4, 12
<i>Langley v. Miles</i>	
956 So. 2d 970 (Miss. Ct. App. 2006)	12, 13, 16
<i>Mariner Health Care, Inc. v. Estate of Edwards,</i>	
964 So. 2d 1138 (Miss. 2007)	18
<i>Mississippi Power & Light Co. v. Lumpkin</i>	
725 So. 2d 721 (Miss. 1998)	17
<i>Murphy v. Magnolia Elec. Power Ass'n</i>	
693 F. 2d 232 (5 th Cir 1981).	18
<i>Palmer v. Volkswagen of America, Inc..</i>	
904 So. 2d 1077 (Miss. 2005)	12, 13, 16
<i>Tinnon v. Martin</i>	
716 So. 2d 604 (Miss. 1998)	4, 11, 19
<i>Travis v. Stewart</i>	
680 So. 2d 214 (Miss. 1996)	4, 12

STATUTES

Miss. Code Ann. § 11-1-58	2, 4, 6, 12, 14
---------------------------------	-----------------

STATEMENT OF THE ISSUE

- I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY GRANTING DELTA REGIONAL MEDICAL CENTER'S MOTION TO STRIKE MOORE'S MEDICAL EXPERTS FOR FAILURE TO PROPERLY, ADEQUATELY AND TIMELY DESIGNATE THEM AND MOTION FOR SUMMARY JUDGMENT BECAUSE MOORE HAD NO MEDICAL EXPERTS TO TESTIFY ON HER BEHALF.

STATEMENT OF THE CASE

On March 18, 2005, Plaintiff filed a medical malpractice claim against Delta Regional Medical Center (DRMC). Thereafter, DRMC filed a Motion to Dismiss for failure to attach the Certificate of Consultation in accordance with the Mississippi Tort Claims Act, MISS. CODE ANN. § 11-1-58. In response, Plaintiff filed a Motion for Leave to Amend Complaint seeking leave to file her Certificate of Consultation. DRMC responded stating it had no object, and on October 5, 2008, an Agreed Order Granting Plaintiff's Motion for Leave to Amend Complaint was entered. On October 24, 2008, Plaintiff filed her Amended Complaint.

On October 28, 2008, DRMC filed a Motion to Dismiss with Prejudice based on the statute of limitations being expired and the Amended Complaint not relating back to the Original Complaint. DRMC's Motion came on for hearing, and the Court entered an Order denying DRMC's Motion on April 9, 2007. Subsequently, DRMC filed its Answer, Motion and Affirmative Defenses. On April 26, 2007, DRMC petitioned for Interlocutory Appeal and Stay of Trial Court Action based on the denial of its Motion to Dismiss. On May 23, 2007, this Court denied DRMC's Petition for Interlocutory Appeal and Stay of Trial Court Action. This Court later denied DRMC's Motion for Rehearing.

On June 6, 2007, the trial court entered an Order of Continuance and Agreed Scheduling Order setting the trial for December 3, 2007. The court included an alternate setting for June 9, 2008. On August 24, 2007, Plaintiff filed her Designation of Expert Witnesses listing Dr. Richard Sobel as her expert. On that same day, August 24, 2007, Plaintiff's expert designation deadline expired. On September 12, 2007, Plaintiff filed her First Supplemental Designation of Expert Witnesses, listing Dr. Sobel and Netra Cattenhead, CFNP as witnesses. On October 11, 2007,

DRMC filed its Motion for Summary Judgment. Thereafter on October 22, 2007, Plaintiff filed her Second Supplemental Designation of Expert Witnesses. On November 1, 2007, DRMC filed a Motion to Strike Plaintiff's experts. On that same day, the trial court heard arguments on DRMC's Motion for Summary Judgment and took the ruling under advisement until the trial court could hear the Motion to Strike. Subsequently, on November 13, 2007, the trial court heard DRMC's Motion to Strike and ruled from the bench granting DRMC's Motion to Strike and Motion for Summary Judgment. An Order evidencing such was entered November 21, 2007. Feeling aggrieved, Plaintiff appealed to this Court.

SUMMARY OF THE ARGUMENT

A trial court is granted wide discretion in managing discovery and issuing scheduling orders, and an abuse-of-discretion standard of review applies to such orders. *Banks v. Hill*, 978 So. 2d 663, 665 (Miss. 2008), citing *Bowie v. Montfort Mem'l Hosp.*, 861 So. 2d 1037, 1042 (Miss. 2003). An abuse of discretion standard is required when reviewing a trial court's decision to sanction a party for violating a scheduling order. *Id.*, citing *Tinnon v. Martin*, 716 So. 2d 604, 611 (Miss. 1998). Mississippi trial judges :

[A]re 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.

Bowie v. Montfort Jones Mem'l Hosp., 861 So. 2d 1037, 1042 (Miss. 2003).

A de novo standard of review is applied to a lower court's grant or denial of summary judgment. *Bowie v. Montfort Mem'l Hosp.*, 861 So. 2d 1037, 1040 (Miss. 2003), citing *Hudson v. Courtesy Motors, Inc.*, 794 So. 2d 999, 1002 (Miss. 2001). After viewing the evidence in the light most favorable to the nonmoving party, the decision of the trial court to grant summary judgment will be reversed only if a triable issue of fact exists. *Id.*, citing *Travis v. Stewart*, 680 So. 2d 214, 216 (Miss. 1996).

In the case sub judice, Plaintiff knew on March 14, 2005, when she filed her medical malpractice Complaint in this matter, she was required to have a medical expert prepared to testify against this Defendant. On October 24, 2005, in an attempt to avoid a dismissal of this action pursuant to MISS. CODE ANN. § 11-1-58, Plaintiff's counsel affirmed to the trial court, under oath,

that he had a reasonable basis to file suit based on expert opinions he obtained. By signing onto the Agreed Scheduling Order on or around June 6, 2007, Plaintiff knew the deadline for providing DRMC with the identity of all her experts and (1) the subject matter on which the experts are expected to testify, (2) the substance of the facts and opinions to which the experts are expected to testify and (3) a summary of the grounds for each opinion was August 24, 2007. Yet when the trial court's deadline had passed, Plaintiff had produced only the identity of Dr. Sobel. It was not until October 22, 2007 (*i.e.* - 59 days after the deadline, 11 days after DRMC's Motion for Summary Judgment, and 42 days prior to trial) that Plaintiff actually provided opinions for Dr. Sobel. Nurse Cattenhead was not identified until 19 days after the deadline had passed, and full opinions in compliance with MISS. R. CIV. P. 26(b)(4) have still not been produced for her. Plaintiff herein made no attempt to "designate any and all of her expert witnesses in compliance with MISS. R. CIV. P. 26(b)(4)(A)(i) on or before **August 24, 2007**," as ordered by this Court, nor did she move the Court for additional time to designate experts outside of the trial court's imposed deadline.

The trial court thoroughly analyzed the facts and law on the record when rendering its decision to strike Plaintiff's experts and subsequently grant DRMC's Motion for Summary Judgment since Plaintiff was left with no medical experts in this medical malpractice case. In its discretion, the trial court found that Plaintiff failed to adequately and timely designate her experts, and that Plaintiff offered no good cause why she failed to comply with the scheduling order. Therefore, the trial court's order should be affirmed.

ARGUMENT

I. FACTS

A brief synopsis of the facts pertinent to DRMC's Brief are as follows:

- March 18, 2005** - Plaintiff filed her medical malpractice Complaint against DRMC and Dr. Corkern.
- April 11, 2005** - DRMC filed its Motion to Dismiss premised on Plaintiff not attaching to her Complaint an Attorney Certificate in compliance with MISS. CODE ANN. § 11-1-58. (R.E. 1; R. pg. 29-30).
- October 24, 2005** - After being granted leave to amend on October 5, 2005 (after the statute of limitations had expired), Plaintiff filed her Amended Complaint. Attached thereto as Exhibit A, Plaintiff filed a "Certificate of Compliance" which stated:

Pursuant to M.C.A. § 11-1-58, as amended, Plaintiff's attorneys have reviewed the facts of this case and have consulted with at least one (1) expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who is qualified to give expert testimony as to the standard of care or negligence and who these attorneys reasonably believe is knowledgeable in the relevant issues involved in this particular action, and that these attorneys have concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action.
- April 9, 2007** - The trial court denied DRMC's Motion to Dismiss, ruling that Plaintiff's Attorney Certificate was timely filed.
- April 12, 2007** - DRMC propounded on Plaintiff its expert witness Interrogatories in compliance with Miss. R. Civ. P. 26(b)(4)(A)(i). (R.E. 2; R. pg. 526-527).
- June 6, 2007** - The trial court entered its Order of Continuance and Agreed Scheduling Order. (R.E. 3; R. pg. 548-549). Therein, this Court set as a deadline in section #1 the following:

That Plaintiff shall fully and completely designate any

and all of her expert witnesses in compliance with Miss. R. Civ. P. 26(b)(4)(A)(i) on or before **August 24, 2007**. That Defendant shall fully and completely designate any and all of its expert witnesses in compliance with the Miss. R. Civ. P. 26(b)(4)(A)(i) on or before **September 24, 2007**.
(Emphasis in original).

- August 21, 2007** - Plaintiff filed Plaintiff, Evelyn Gwen Moore's Designation of Expert Witnesses. (R.E. 4; R. pg. 612-614). Therein, Plaintiff identified as her expert Richard M. Sobel, M.D., M.P.H., but failed to (1) state the subject matter on which this expert is expected to testify, (2) state the substance of the facts and opinions to which the expert is expected to testify and (3) state a summary of the grounds for each opinion, all in compliance with Miss. R. Civ. P. 26(b)(4)(A)(i) and ordered by this Court.
- August 24, 2007** - **Plaintiff's expert designation deadline expired.**
- September 12, 2007** - Plaintiff filed Plaintiff Evelyn Gwen Moore's Supplemental Designation of Expert Witnesses, and therein identified Richard M. Sobel, M.D., M.P.H. and Netra B. Cattenhead, CFNP. (R.E. 5; R. pg. 649-65). Plaintiff again failed to (1) state the subject matter on which this expert is expected to testify, (2) state the substance of the facts and opinions to which the expert is expected to testify and (3) state a summary of the grounds for each opinion for Dr. Sobel in compliance with Miss. R. Civ. P. 26(b)(4)(A)(i) as ordered by this Court. Plaintiff likewise failed to (1) state the subject matter on which this expert is expected to testify and (2) state a summary of the grounds for each opinion for Mrs. Cattenhead in compliance with Miss. R. Civ. P. 26(b)(4)(A)(i) as ordered by this Court.
- September 24, 2007** - Defendant filed DRMC's Responses to Plaintiff's First Set of Interrogatories, which contained in response to Interrogatory No. 17 the identity of Defendant's experts (*i.e.* - Michael Stoddard, M.D., Rita Wray, RN, James Boyd, M.D., Robert Corkern, M.D.) and a full designation in compliance with Miss. R. Civ. P. 26(b)(4)(A)(i).
- September 24, 2007** - Defendant's expert designation deadline expired.
- October 11, 2007** - DRMC filed its Motion for Summary Judgment.

- October 22, 2007** - A mere forty-two (42) days prior to the commencement of the trial of this cause (*i.e.* - On December 3, 2007), Plaintiff filed Plaintiff, Evelyn Gwen Moore's, Second Supplemental Designation of Expert Witnesses. Plaintiff still failed to (1) state the subject matter on which this expert is expected to testify and (2) state a summary of the grounds for each opinion for Mrs. Cattenhead in compliance with Miss. R. Civ. P. 26(b)(4)(A)(i) as ordered by this Court. (R.E. 6; R. pg. 786-800).
- November 1, 2007** - DRMC filed a Motion to Strike Moore's experts, as they were designated untimely. (R.E. 7; R. pg. 1014-81).

At the November 1, 2007, hearing on DRMC's Motion for Summary Judgment, Plaintiff's counsel conceded that Plaintiff's initial designation of Dr. Sobel, although filed prior to the Plaintiff's expert designation deadline, was a blanket "breach of standard of care" because "at that point, [he] had not been provided with a final expert opinion." (R.E. 8; Tr. pg. 12). Pertaining to Uniform Rules of Circuit and County Court 4.04, Plaintiff's counsel argued that despite the scheduling order, the Plaintiff's initial designation of Dr. Sobel and her first supplemental designation were completed sixty days in advance of trial but conceded that the second supplemental designation was completed forty-two days in advance of trial. (R.E. 8; Tr. pg. 15-16).

At the November 13, 2007, hearing on DRMC's Motion to Strike Plaintiff's medical experts, Plaintiff's counsel argued that after the trial court denied DRMC's Motions to Dismiss in April 2007, they had "been doing everything [they could] to get this thing to go forward because, in essence, this case just really started in April." (R.E. 9; Tr. pg. 25). The trial court pointed out to Plaintiff's counsel that the case began in 2005, when the Plaintiff filed her Complaint. (R.E. 9; Tr. pg. 25 & 37. When Plaintiff argued that an alternative trial date had been scheduled, the trial court reasoned:

I don't think the alternative date satisfies. I don't think we can muddle this by saying if you didn't designate your experts in a timely manner, oh, well, we have an

alternate date. Because even though in other trials the date may not be agreed upon, that's always out there.

There's always that possibility that if you don't designate on time, then we can just continue the case. I don't believe that was the intent of the rule.

(R.E. 9; Tr. pg. 38).

As to Plaintiff's late designation of Ms. Cattenhead, Plaintiff's counsel offered as good cause the fact that he began trying to retain experts immediately following the trial court's denial of DRMC's Motion to Dismiss and that experts need time to review the information and draft an opinion. (R.E. 9; Tr. pg. 54-55). However, defense counsel pointed out that during Ms. Cattenhead's November 2, 2007, deposition, defense counsel asked, "When were you first contacted to work on this case?" Ms. Cattenhead responded, "I was asked to be an expert witness, I guess, maybe a month ago. Was it? I believe it was a month ago." (R.E. 9; Tr. pg. 40). In response, Plaintiff's counsel said he could not remember when he contacted her. (R.E. 9; Tr. pg. 40).

In addition, Plaintiff's counsel argued that he designated Dr. Sobel prior to the deadline by providing Dr. Sobel's name, address, telephone number, CV and that DRMC and Dr. Corkern breached the standard of care. (R.E. 9; Tr. pg. 56-58). Defense counsel pointed out that the initial designation stated, "The above-listed expert will provide testimony regarding the breach of the standard of care owed to plaintiff by DRMC and Robert Corkern," not that DRMC and Dr. Corkern breached the standard of care. (R.E. 9; Tr. pg. 58).

As to Miss. R. Civ. P. 26, Plaintiff's counsel stated that he believed Plaintiff was in compliance with Rule 26 "at least with Dr. Sobel." (R.E. 9; Tr. pg. 59). He also stated that, "I do certainly understand that the Court ordered us to have it done by August the 24th. All I can say is that I cannot provide them with something I don't have yet," and he chose to not move the trial court for

additional time to designate and provide an expert opinion. (R.E. 9; Tr. pg. 59-60). The trial court responded:

You knew these deadlines, and you knew the remedy if you could not meet the deadline, and you chose not to waste the Court's time or whatever you said, and you knew the burden that would be placed on your client if the Court granted the motion, and counsel made these decisions. The Court does not accept that.

(R.E. 9; Tr. pg. 66).

When rendering its opinion, the trial court stated on the record the findings of fact and conclusions of law, stating:

I have reviewed the file with the cases as they pertain to today's motion, and I looked carefully at the timeline that plaintiffs included in their response; and when we came to this part today, there were some differences or omissions on that document that are of concern to the Court. September 24th, the designation filed; September 12th, the first supplemental designation; and October 23rd, 2007, the second supplemental designation.

Rule 404, all discovery must be completed within 90 days from service of an answer by the applicable defendant. We know that there was a year where this case was derailed, and we had to contact plaintiff's counsel in order to get this case moving again.

The argument that plaintiffs – plaintiff, one, Evelyn Gwen Moore – seems to base everything on, I noted from their argument, which at times was difficult to follow, but counsel said he asked – defense asked more than once on more than one occasion about their designation, and I gleaned from that that there was some agreement as to that as opposed to leave of the Court and for good cause asking for an extension. Counsel also said in his argument that another reason was they simply did not have the information and as soon as the experts would get it to them that they would get it to counsel opposite.

Again, if they needed to relax the deadline, good cause should be shown. I did not hear special circumstances wherein the Court should fail to abide and follow the rules. Counsel said that the opinions were seasonably supplemented, and I believe the status of the law is that we should examine the cases on a case by case basis. If we look back on where we are with this case and the amending of the initial complaint and the reasons – and the Court has already ruled and stated its reason for that in allowing counsel the opportunity to amend where counsel stated they had

some series of problems within their office that prohibited them from complying and following....

If a party is simply unable to comply or does not comply, the Court should consider carefully whether or not that was willful or done in bad faith. While the Court stops short of saying that this was bad faith, the Court does find that plaintiff has simply failed to comply.

We were again presented today with the deposition – a portion of the deposition where the plaintiff says that – the defense says that one of their experts was not contacted until after the deadline. Plaintiff responded by saying they had submitted the name of this expert in excess of 30 days and that that witness may have been mistaken.

Again, looking at the totality of these circumstances as outlined in *Bowie v. Montfort Jones Memorial Hospital* and having heard and questioned plaintiff as to the reasons for this delay, and even having asked plaintiff – asked the defense in the discretion of the Court what prejudice would be had, and considering that defense has had to repeatedly request of plaintiff to provide them information on the experts and from plaintiff finding that their response was “as soon as we get them, we’ll get it to you,” knowing that they were outside of these deadlines and failing to seek leave of the Court in order that they may supplement and prepare for trial, the Court finds that plaintiff has failed to properly and adequately respond in a timely manner and provide the substance of the facts and opinions to which their expert is expected to testify, and that the motion to strike should be granted.

(R.E. 9; Tr. pg. 77-81). Following, the trial court entered an order striking Plaintiff’s experts and granting DRMC’s motion for summary judgment.

II. CASE LAW

A. STANDARD OF REVIEW

A trial court is granted wide discretion in managing discovery and issuing scheduling orders, and an abuse-of-discretion standard of review applies to such orders. *Banks v. Hill*, 978 So. 2d 663, 665 (Miss. 2008), citing *Bowie v. Montfort Mem’l Hosp.*, 861 So. 2d 1037, 1042 (Miss. 2003). An abuse of discretion standard is required when reviewing a trial court’s decision to sanction a party for violating a scheduling order. *Id.*, citing *Tinnon v. Martin*, 716 So. 2d 604, 611 (Miss. 1998).

A de novo standard of review is applied to a lower court's grant or denial or summary judgment. *Bowie v. Montfort Mem'l Hosp.*, 861 So. 2d 1037, 1040 (Miss. 2003), citing *Hudson v. Courtesy Motors, Inc.*, 794 So. 2d 999, 1002 (Miss. 2001). After viewing the evidence in the light most favorable to the nonmoving party, the decision of the trial court to grant summary judgment will be reversed only if a triable issue of fact exists. *Id.*, citing *Travis v. Stewart*, 680 So. 2d 214, 216 (Miss. 1996).

B. ARGUMENT

From the instant a plaintiff files a medical malpractice action, she knows "that an expert witness [will] be needed to survive summary judgment, for it is [the Mississippi court's] general rule that in a medical malpractice action negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care." *Brooks v. Roberts*, 882 So. 2d 229, 232 (Miss. 2004); *see also* MISS. CODE ANN. § 11-1-58. "In a medical malpractice action, the plaintiff carries the burden of proof at trial and thus, the burden of production on summary judgment." *Langley v. Miles*, 956 So. 2d 970, 976 (Miss. Ct. App. 2006).

In *Palmer v. Volkswagen of America, Inc.*, 904 So. 2d 1077 (Miss. 2005), the Mississippi Supreme Court ruled on whether one of the plaintiffs' witnesses could testify as an expert at trial. One of the defendants filed expert witness interrogatories during the discovery of the suit as allowed by MISS. R. CIV. P. 26(b)(4), but the plaintiffs merely responded by identifying the name Myrna Kruckenburg as well as the information that she would testify regarding "[t]he extent and nature of injuries sustained by Plaintiffs . . . as well as the treatment rendered." *Palmer*, 904 So. 2d at 1089. The trial court set a scheduling order for designation of experts, but the plaintiffs failed to meet this deadline. *Id.* The defendants objected when the plaintiffs attempted to call Kruckenburg at trial, to

which the plaintiffs responded that they had made Kruckenburg available for deposition. *Id.* at 1089-90. The trial court sustained the defendants' objections, but the Court of Appeals reversed the trial court, holding that the defendants "had the burden to request further discovery or file a motion to compel, but it failed to complain until the trial." *Id.* at 1090. The Mississippi Supreme Court reversed the Court of Appeals, holding that a party "who file appropriate interrogatories seeking expert information [does not] acquire the additional burden of filing a motion to compel." *Id.* The *Palmer* Court's ruling was that the expert testimony of Kruckenburg was properly disallowed "based upon the failure of plaintiffs to provide expert information in response to either the interrogatory filed by defendants and the trial court's scheduling order." *Id.*

In *Langley supra*, the Mississippi Court of Appeals analyzed the issue of whether summary judgment is appropriate where, in a medical malpractice action, the plaintiff failed to timely designate medical experts in response to the defendants' expert witness interrogatories. *Langley*, 956 So. 2d at 971-72. In the underlying case, the defendants served in May of 2003, with their answers, interrogatories seeking plaintiff's medical expert designation. *Id.* at 971. When no responses had been filed by the plaintiffs by September of 2003, the defendants moved for summary judgment. *Id.* After acquiring additional time to respond, the plaintiff served her responses to discovery in October of 2003. *Id.* In affirming the trial court grant of summary judgment, the *Langley* Court held that the plaintiff lacked expert medical evidence at the hearing on the defendants' motion for summary judgment, the defendants met their "burden of persuading the trial court that no genuine issue of material fact exist[ed]." *Id.* at 976. In order to withstand summary judgment, the Court held that the plaintiff "needed to produce evidence of 'significant and probative value' tending to show that a material fact existed." *Id.* "This would have *required a sworn affidavit of an expert witness*

attesting to the standard of care that the defendants' treatment of [the plaintiff] breached the standard of care." *Id.* (emphasis added). Because the plaintiff failed to produce such evidence, the Court of Appeals held that the trial court "appropriately granted summary judgment." *Id.*

In a recent Mississippi Court of Appeals decision, the court upheld a trial court's grant of summary judgment for the defendant when the Plaintiffs designated their expert witnesses forty-two (42) days prior to trial. *Estate of Cherry M. Deiorio v. Pensacola Health Trust, Inc.*, 2007-CA-00537-COA (Sept. 2008). Deiorio designated his experts forty-two days prior to trial, and subsequently, Defendants filed for summary judgement asserting that Deiorio failed to timely designate his experts sixty days prior to trial pursuant to Rule 4.04(A) of the Uniform Rules of Circuit and County Court. In his response, Deiorio attached an affidavit of his expert, in an effort to establish a prima facie case of negligence. At the hearing, the trial court granted the Defendant's Motion for Summary Judgment and held that even if the affidavit was considered, it was legally insufficient. In addition, the trial court noted that Deiorio offered several reasons for the late designation, including that it was Christmas and counsel had other concerns at the time. Ultimately, the trial court found that Deiorio had not offered any special circumstances that would allow for the tardy designation of the experts. The Court of Appeals could not find any abuse of discretion by the trial court and upheld the court's granting of summary judgment to the Defendants.

In the case sub judice, Plaintiff knew on March 14, 2005, when she filed her medical malpractice Complaint in this matter, she was required to have a medical expert prepared to testify against this Defendant. On October 24, 2005, in an attempt to avoid a dismissal of this action pursuant to MISS. CODE ANN. § 11-1-58, Plaintiff's counsel affirmed to the trial court, under oath, that he had a reasonable basis to file suit based on expert opinions he obtained. By signing onto the

Agreed Scheduling Order on or around June 6, 2007, Plaintiff knew the deadline for providing DRMC with the identity of all her experts and (1) the subject matter on which the experts are expected to testify, (2) the substance of the facts and opinions to which the experts are expected to testify and (3) a summary of the grounds for each opinion was August 24, 2007. Yet when the trial court's deadline had passed, Plaintiff had produced only the identity of Dr. Sobel. It was not until October 22, 2007 (*i.e.* - 59 days after the deadline, 11 days after DRMC's Motion for Summary Judgment, and 42 days prior to trial) that Plaintiff actually provided opinions for Dr. Sobel. Nurse Cattenhead was not identified until 19 days after the deadline had passed, and full opinions in compliance with Miss. R. Civ. P. 26(b)(4) have still not been produced for her.

Mississippi trial judges:

[A]re 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.

Bowie v. Montfort Jones Mem'l Hosp., 861 So. 2d 1037, 1042 (Miss. 2003). Plaintiff herein made no attempt to "designate any and all of her expert witnesses in compliance with Miss. R. Civ. P. 26(b)(4)(A)(i) on or before **August 24, 2007**," as ordered by this Court, nor did she move the Court for additional time to designate experts outside of the trial court's imposed deadline. Similar to *Bowie*, the Plaintiff herein failed to meet the trial court's imposed deadline for designating experts, but filed a late designation. The *Bowie* Court held that where the plaintiff cannot show "any excusable neglect as to why the designation of the expert was not timely filed," then striking of the expert designation (if filed) and summary judgment is appropriate. *Bowie*, 861 So. 2d at 1042.

Similarly, the Plaintiff has failed to state any “excusable” reason why she missed the trial court’s deadlines, and the same fate as *Bowie* is warranted.

Similar to *Langley*, Plaintiff herein also filed discovery responses after DRMC filed its Motion for Summary Judgment. The *Langley* Court held that in order to meet her burden in response to DRMC’s Motion for Summary Judgment, Plaintiff is “**required** [to produce] a **sworn affidavit of an expert witness** attesting to the standard of care that the defendants’ treatment of [Plaintiff] breached the standard of care.” No such Affidavit was timely filed by Plaintiff in compliance with MISS. R. CIV. P. 56©.

Similar to *Palmer supra*, Plaintiff claims “no harm / no foul” by stating that she has made her experts available to be deposed prior to trial. The *Palmer* Court, however, held this was insufficient where Plaintiff fails to respond to Interrogatories in compliance with Rule 26(b)(4) and fails to comply with the trial court’s scheduling order.

The trial court set deadlines agreed to by all parties in order to facilitate an appropriate, speedy and smooth discovery period pursuant to the *Mississippi Rules of Civil Procedure*. The trial court set Plaintiff’s expert designation deadline three months and one week prior to the start of the trial of this cause and set the scope of that deadline (*i.e.* - in compliance with Rule 26(b)(4)(A)(i)). When Plaintiff missed her expert designation deadline by almost two months, and only filed expert opinions in response to DRMC’s Motion for Summary Judgment, she blatantly disregarded the trial court’s mandate.

In her brief, Plaintiff argues that the trial court erred in ruling that Dr. Sobel was not fully disclosed prior to the August 24, 2007, deadline. On August 21, 2007, Plaintiff filed Plaintiff, Evelyn Gwen Moore’s Designation of Expert Witnesses. Therein, Plaintiff identified as her expert

Richard M. Sobel, M.D., M.P.H., but failed to (1) state the subject matter on which this expert is expected to testify, (2) state the substance of the facts and opinions to which the expert is expected to testify and (3) state a summary of the grounds for each opinion, all in compliance with Miss. R. Civ. P. 26(b)(4)(A)(i) and ordered by this Court. At the November 1, 2007, hearing on DRMC's Motion for Summary Judgment, Plaintiff's counsel conceded that Plaintiff's initial designation of Dr. Sobel, although filed prior to the Plaintiff's expert designation deadline, was a blanket "breach of standard of care" because "at that point, [he] had not been provided with a final expert opinion." However, at the hearing on DRMC's Motion to Strike, Plaintiff's counsel argued that Plaintiff was in compliance with Rule 26 "at least with Dr. Sobel." He also stated that, "I do certainly understand that the Court ordered us to have it done by August the 24th. All I can say is that I cannot provide them with something I don't have yet." Therefore, Plaintiff conceded at the November 1, 2007, hearing that his initial designation of Dr. Sobel (the only one filed prior to the deadline) was a blanket "breach of standard of care" designation because he did not have Dr. Sobel's report, but now argues that the August 21, 2007, designation of Dr. Sobel meets the requirements of Miss. R. Civ. P. 26(b)(4)(A)(i).

In her brief, Plaintiff relies on *Mississippi Power & Light Co. v. Lumpkin*, 725 So. 2d 721 (Miss. 1998) for the proposition that this Court set forth a four-part test to determine when to exclude an expert not timely designated under the discovery rules. However, Plaintiff's reliance is misplaced, as *Lumpkin* concerns an expert who was properly and timely designated. *Id.* at 733. MP&L designated the expert, offered him as a 30(b)(6) representative to respond to the issue of whether the accident at issue was foreseeable, and the expert was deposed as such. *Id.* *Lumpkin* objected at trial to the expert's testimony as to foreseeability because MP&L did not supplement

their Rule 26 responses to Lumpkin's interrogatories to include foreseeability issues. *Id.* The Court stated that before the trial court can exclude evidence for a "transgression in discovery," the trial court should, (1) consider the explanation for the transgression, (2) the importance of the testimony, (3) the need for time to prepare to meet the testimony, and (4) the possibility of a continuance. *Id.*, citing *Murphy v. Magnolia Elec. Power Ass'n*, 639 F. 2d 232, 235 (5th Cir. 1981). *Lumpkin* is not analogous to the case *sub judice*, as Moore did not properly or timely designate her experts. Moore did not abide by the court's scheduling order and offered no good cause why she did not comply. Not complying with a scheduling order is more than a "transgression in discovery," and therefore, *Lumpkin* does not apply.

Plaintiff also relies on *Mariner Health Care, Inc. v. Estate of Edwards*, 964 So. 2d 1138, 1152 (Miss. 2007) to support her argument that every reasonable alternative means of assuring the elimination of prejudice to the moving party and every reasonable sanction should be explored before excluding evidence as a discovery sanction. However, *Mariner Health* concerns labor-hour reports not disclosed in responses to requests for production of documents. *Id.* In the case *sub judice*, the Plaintiff violated a scheduling order imposed by the court, and like the Court found in *Mariner Health*, the trial court did not abuse its discretion in excluding the evidence. *Id.* at 1153.

In her brief, Plaintiff offers other arguments, one of which is that even if the expert opinions were not disclosed pursuant to Rule 26(b)(4), they were provided forty-three days before the trial date. In addition, the Plaintiff argues that other deadlines were relaxed by the parties without resorting to court and that the trial court erred because an alternative trial date was listed in the scheduling order. However, Plaintiff's arguments fail because, "A trial court is granted wide discretion in managing discovery and issuing scheduling orders, and an abuse-of-discretion standard


of review applies to such orders.” *Banks v. Hill*, 978 So. 2d 663, 665 (Miss. 2008), *citing Bowie v. Montfort Mem’l Hosp.*, 861 So. 2d 1037, 1042 (Miss. 2003). “In addition, [the Court] similarly employ an abuse-of-discretion standard in reviewing a trial court’s decision to sanction a party for violation of a scheduling order. *Id.*, *citing Tinnon v. Martin*, 716 So. 2d 604, 611 (Miss. 1998). The trial court thoroughly analyzed the facts and law on the record when rendering its decision to strike Plaintiff’s experts and subsequently grant DRMC’s Motion for Summary Judgment since Plaintiff was left with no medical experts in this medical malpractice case. In its discretion, the trial court found that Plaintiff failed to adequately and timely designate her experts, and that Plaintiff offered no good cause why she failed to comply with the scheduling order.

C. CONCLUSION

Therefore, because Plaintiff failed to adequately and timely designate her experts pursuant to the scheduling order, the trial court did not abuse its discretion when it granted DRMC’s Motion to Strike Plaintiff’s experts and subsequent Motion for Summary Judgment because Plaintiff was left with no experts to testify on her behalf in this medical malpractice case. In addition, Plaintiff did not seek an extension of time to properly designate her experts, and the trial court, after thoroughly analyzing the facts and case law determined that Plaintiff offered no good cause as to why she failed to properly and adequately designate her witnesses and thereafter entered an order striking Plaintiff’s experts and granting summary judgment to DRMC. Therefore, because the trial court did not abuse its discretion, DRMC respectfully requests this Court affirm the trial court’s Order.

RESPECTFULLY SUBMITTED, this 14th day of November, 2008.

DELTA REGIONAL MEDICAL CENTER

BY: 
CHRISTOPHER W. WINTER
Mississippi Bar No. [REDACTED]
MARY FRANCES S. ENGLAND
Mississippi Bar No. [REDACTED]

OF COUNSEL:

WILKINS, STEPHENS & TIPTON, P.A.

1417 Trailwood Drive, Suite C
Post Office Box 4537
Greenville, Mississippi 38704-4537
Telephone: (662) 335-5555
Facsimile: (662) 335-5700

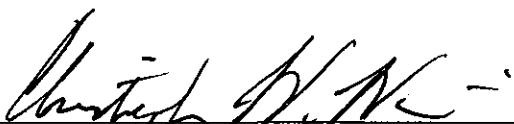
CERTIFICATE OF SERVICE

I, Christopher W. Winter, one of the attorneys of record for Defendant DRMC herein, certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing document to:

Honorable Betty W. Sanders
Circuit Court Judge
P.O. Box 244
Greenwood, MS 38935-0244

Jared A. Kobs, Esq.
Stamps & Stamps
P.O. Box 2916
Jackson, MS 39207-2916

THIS, 14th day of November, 2008.


CHRISTOPHER W. WINTER

CERTIFICATE OF FILING

I, Christopher W. Winter, certify that I have this day delivered via U.S. Mail, postage prepaid, the original and three copies of, and a floppy disc containing, Brief of Appellee on November 16th, 2008, to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, P.O. Box 117, Jackson, Mississippi 39205.


CHRISTOPHER W. WINTER