IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EVELYN GWEN MOORE	**PLAINTIFF/APPELLANT**
v.	**CASE NO. 2008-CA-00041**
DELTA REGIONAL MEDICAL CENTER	**DEFENDANT/APPELLEE**

REPLY BRIEF OF APPELLANT

Appeal from the Circuit Court of Washington County, Mississippi

Prepared and Submitted By:

JARED A. KOBS
Mississippi Bar No. [redacted]
Stamps & Stamps
269 East Pearl Street
Jackson, Mississippi 39201
Post Office Box 2916
Jackson, Mississippi 39207-2916
Telephone: (601) 354-4747
Facsimile: (601) 354-0546
Attorney for Plaintiff-Appellant

Oral Argument Not Requested

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EVELYN GWEN MOORE	**PLAINTIFF/APPELLANT**
v.	**CASE NO. 2008-CA-00041**
DELTA REGIONAL MEDICAL CENTER	**DEFENDANT/APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of records 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.

Plaintiff/Appellant At Issue in This Appeal:

1. Evelyn Gwen Moore, Plaintiff/Appellant
   410 West Union Street
   Greenville, Mississippi 38701

Plaintiff/Appellant's Counsel:

1. Jared A. Kobs, Esq.
   Stamps & Stamps
   Attorneys at Law
   269 East Pearl Street
   Jackson, Mississippi 39201
   Telephone: (601) 354-4747
   Facsimile: (601) 354-0546
   Attorney for Appellant, Evelyn Gwen Moore

Defendant/Appellee At Issue in This Appeal:

1. Delta Regional Medical Center, Defendant/Appellee
   1400 East Union Street
   Greenville, Mississippi 38703

Defendant/Appellee's Counsel:

1. Mary Frances S. England, Esq.
Christopher W. Winter, Esq.
Jason E. Dare, Esq.
L. Carl Hagwood, Esq.
WILKINS STEPHENS & TIPTON, P.A.
Post Office Box 4537
Greenville, Mississippi 38704-4537
Post Office Box 9147
Jackson, Mississippi 39286-9147
Attorneys for Appellee, Delta Regional Medical Center

Trial Judge:

1. Honorable Betty W. Sanders, Trial Court Judge
Washington County Circuit Court Judge
Post Office Box 244
Greenwood, Mississippi 38935-0244

Respectfully Submitted,

EVELYN GWEN MOORE

By: _____
JARED A. KOBS, MSB NO. [redacted]
Attorney for Evelyn Gwen Moore

TABLE OF CONTENTS

Certificate of Interested Persons.....i

Table of Contents.....iii

Table of Authorities.....iv

Statement of the Issues.....v

Summary of the Argument.....1

Propositions of Law.....3

Argument.....4

I. THE TRIAL COURT ERRED IN RULING THAT DR. SOBEL WAS NOT "FULLY" DISCLOSED BY THE EXPERT DESIGNATION DEADLINE.....4

II. THE TRIAL COURT CLEARLY ERRED IN STRIKING MOORE'S EXPERT WITNESSES AND GRANTING SUMMARY JUDGMENT TO DRMC.....5

III. DRMC COMPLETELY FAILS TO RESPOND TO HOW IT WOULD HAVE BEEN PREJUDICED OR INCONVENIENCED HAD THE TRIAL COURT CONTINUED THE TRIAL TO THE RESERVED ALTERNATE TRIAL DATE.....14

Conclusion.....15

Certificate of Service.....17

TABLE OF AUTHORITIES

Cases **Page**

Bowie v. Montfort Jones Memorial Hospital, 861 So. 2d 1037 (Miss. 2003). 6, 15
Busick v. St. John, 856 So. 2d 304 (Miss. 2003).....6
Caracci v. International Paper Co., 699 So. 2d 546 (Miss. 1997).....15
Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911 (Miss. 2002).....6
Clark v. Mississippi Power Co., 372 So. 2d 1077 (Miss. 1979).....15
Coltharp v. Carnesale, 733 So. 2d 780 (Miss. 1999).....6
Estate of Deiorio ex rel. v. Pensacola Health Trust, Inc., 990 So. 2d 804 (Miss. Ct. App. 2008).....7
Fluor Corp. v. Cook, 551 So. 2d 897 (Miss. 1989). 15
Holladay v. Holladay, 776 So. 2d 662 (Miss. 2000) 4, 5, 10
Illinois Central Railroad Co. v. Gandy, 750 So. 2d 527 (Miss. 1999).....10
International Paper Co. v. Townsend, 961 So. 2d 741 (Miss.App. 2007) ... .11
Ladner v. Ladner, 436 So. 2d 1366 (Miss. 1983).....15
Langley v. Miles, 856 So. 2d 970 (Miss. Ct. App. 2006).....6, 7
Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138 (Miss. 2007).....3, 16
Miss. Power & Light Co. v. Lumpkin, 725 So. 2d 721 (Miss. 1998) 3, 9
Motorola Communications and Electronics, Inc. v. Wilkerson, 555 So 2d 713 (Miss. 1989).....11
Murphy v. Magnolia Elec. Power Ass'n, 639 F. 2d 232 (5th Cir. 1981).....10
Palmer v. Volkswagen of America, Inc., 904 So. 2d 1077 (Miss. 2005).....5, 6, 7
Scafidel v. Crawford, 486 So. 2d 379 (Miss 1986).....11
State Highway Comm'n v. Havard, 508 So. 2d 1099 (Miss. 1987) 4, 5
TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991 (Miss. 1997).....14
Thompson v. Patino, 784 So. 2d 220 (Miss. 2001). 5, 11
Warren v. Sandoz Pharmaceuticals Corporation, 783 So. 2d 735 (Miss. Ct. App. 2000).. 10
Washington Hospital Center v. Cheeks, 394 F.2d 964 (D.C. Cir. 1968).....10

Rules **Page**

Mississippi Rules Civil Procedure 26... .....4, 5, 6, 10, 14
Uniform Circuit and County Court Rule 4.04.....1,, 6, 7, 10, 11

STATEMENT OF THE ISSUES

Evelyn Gwen Moore, Plaintiff-Appellant herein, being aggrieved by the judgment of the Circuit Court of Washington County, Mississippi, as rendered in civil action number CI2005-61, hereby prosecutes this, her Appeal, to the Supreme Court of Mississippi.

The Appellant respectfully submits the following issues for review by the Court:

I. **WHETHER THE TRIAL COURT ERRED IN RULING THAT RICHARD SOBEL, M.D., WAS NOT FULLY DISCLOSED BY THE DATED SET FORTH IN THE AGREED SCHEDULING ORDER.**

II. **WHETHER THE TRIAL COURT ERRED IN STRIKING MOORE'S EXPERT WITNESSES AND GRANTING SUMMARY JUDGMENT TO DELTA REGIONAL MEDICAL CENTER.**

III. **WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT A CONTINUANCE OF TRIAL TO THE PREVIOUSLY SCHEDULED AND RESERVED ALTERNATE TRIAL DATE SET BY ORDER OF THE TRIAL COURT.**

Each of the above issues requires reversal of the judgment rendered in civil action number CI2005-61.

SUMMARY OF THE ARGUMENT

The trial court erred in granting DRMC's Motion to Strike Moore's Medical Experts, and thereafter, granting DRMC's Motion for Summary Judgment dismissing Moore's civil action with prejudice. Despite Dr. Richard Sobel, one of Moore's medical expert, being designated according to Mississippi Rule of Civil Procedure 26(b) by the expert designation deadline, the trial court struck him from testifying. Not only did Moore initially designate Dr. Sobel, Moore supplemented his designation on two separate occasions to add more specific information to his opinions, the last of which was forty-three (43) days prior to the trial of this matter and prior to DRMC filing its Motion to Dismiss Moore's Medical Experts. Moore also designated Netra Cattenhead, CFNP,[1] who was designated 83 days[2] prior to trial. Additionally, it is important to note that all of Moore's experts were designated prior to the expiration of the discovery deadline.

DRMC's allegation that it was unable to prepare for these witnesses' testimony forty-three (43) days prior to trial is unfounded, as DRMC was unable to show prejudice. On the other hand, Moore was unduly and severely prejudiced by the dismissal of her experts and the granting of summary judgment to DRMC.

Additionally, the trial court erred in not continuing this matter to the previously set and reserved trial setting, which was signed by Judge Sanders and entered in the trial court's records.

---

[1] In support of its contention that Moore was playing hard and fast, DRMC relies on the fact that Ms. Cattenhead stated at her deposition on November 2, 2007, that she was asked to be an expert witness maybe "a month ago." (Tr.-40). Counsel for Moore responded stating that he could not remember exactly when he contacted her, and therefore, could not represent to the trial court one way or another. (Tr.-40). However, it is important to note that on September 12, 2007, close to two (2) months prior to Ms. Cattenhead's deposition, Moore designated her as an expert witness. Obviously, Ms. Cattenhead was wrong regarding how long ago she was contacted, as Moore would not designate her until she had agreed to be on board as an expert.

[2] At the very least, Ms. Cattenhead was "fully" designated (CP-648-85) prior to the 60-day period contemplated in UCCCR 4.04, and therefore, it is evident that the Court erred in striking her as an expert.

This alternate trial date that the trial court agreed to and reserved for the parties was only six (6) months from the initial trial date and would have completely eliminated any prejudice alleged by DRMC. The trial court failed to explore every alternate means of eliminating any prejudice to DRMC prior to striking Moore's experts from testifying and then granting summary judgment against Moore.

PROPOSITIONS OF LAW

I. WHEN DETERMINING TO EXCLUDE AN EXPERT WITNESS UNTIMELY DISCLOSED AS A SANCTION, THE TRIAL COURT SHOULD CONSIDER:

(A) THE EXPLANATION FOR THE PARTY'S FAILURE TO RESPOND (I.E., WAS THE FAILURE DELIBERATE, SERIOUSLY NEGLIGENT, OR AN EXCUSABLE OVERSIGHT);

(B) THE IMPORTANCE OF THE EXPERT'S TESTIMONY;

(C) SURPRISE TO THE PARTY SEEKING PRECLUSION OF THE EXPERT'S TESTIMONY AND THE NEEDED TIME TO PREPARE TO MEET THE TESTIMONY FROM THE EXPERT; AND

(D) THE POSSIBILITY OF A CONTINUANCE.

Miss. Power & Light Co. v. Lumpkin, 725 So. 2d 721, 733-34 (Miss. 1998).

II. EVERY REASONABLE ALTERNATIVE MEANS OF ASSURING THE ELIMINATION OF ANY PREJUDICE TO THE MOVING PARTY AND A PROPER SANCTION AGAINST THE OFFENDING PARTY SHOULD BE EXPLORED BEFORE ORDERING THE EXCLUSION OF EVIDENCE AS A SANCTION FOR A DISCOVERY VIOLATION.

Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner, 964 So. 2d 1138, 1152 (Miss. 2007).

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT DR. SOBEL WAS NOT "FULLY" DISCLOSED BY THE EXPERT DESIGNATION DEADLINE.

In its brief, Appellee/DRMC states that Appellant/Moore failed to designate her experts pursuant to Mississippi Rule of Civil Procedure 26(b)(4)(A)(i). [Brief of Appellee 7]. However, it is Moore's contention that Dr. Sobel was designated "fully" prior to expert designation deadline.[3] *See* ***Holladay v. Holladay***, 776 So. 2d 662, 673 (Miss. 2000) (emphasis added) (where this Court stated: "*Nothing in the case law submitted by counsel or the pertinent procedural rule suggests that an expert will be restricted to testify only to the literal words from their opinion and a summary of the related grounds*" and "The very use of the words 'substance' and 'summary' show that the Rule does not require an expert to state solely the words of their compiled reports. Such a view would place form over substance, and [. . .] we hold that a ruling to that effect is an abuse of discretion. The trial court's limitation of [the expert's] testimony under this issue was error."). In ***State Highway Commission of Mississippi v. Havard***, 508 So. 2d 1099, 1104 (Miss. 1987), the Mississippi Supreme Court held that where a party tendering an expert witness stated that the expert would "base [his] opinion upon a series of comparable sales for approximately the past eight (8) years," albeit a "bare bones" response within the meaning of Mississippi Rule of Civil Procedure 26(b)(4), it qualified as a "summary" of his opinions, and thus, in compliance with Mississippi Rule of Civil

---

[3] In regard to DRMC's disingenuous statement that counsel for Moore conceded that Dr. Sobel was not fully designated by the expert designation deadline, it is totally wrong. Counsel for Moore has consistently stated that he believed Dr. Sobel's original designation was in compliance with Rule 26 (Tr. 16), and that alternatively, DRMC was in possession of the "specifics" at least 43 days prior to trial. Counsel for Moore conceded that he did not have the report containing the "specifics," but provided the summary. (Tr.-60). DRMC takes counsel for Moore's statements way out of context, as counsel for Moore provided the "specifics" 43 days prior to trial. Counsel for Moore, by supplementing to provide the "specifics" as to what the experts were expected to testify to, believed that he was doing more than what was required by Rule 26. This should not be taken to mean that he believed that he had not fully supplemented with what was required by Rule 26.

Procedure 26(b)(4).

According to ***Holladay*** and ***Havard***, Moore, in her initial designation of experts dated August 24, 2007, provided DRMC all that was required by Mississippi Rule of Civil Procedure 26(b)(4). As such, it is clear that the trial court abused its discretion in striking Dr. Sobel's testimony, and this ruling should be reversed. In the alternative, if this Court finds that Moore's experts were not "fully" disclosed in her first designation of experts[4], it is uncontested that Dr. Sobel was "fully" disclosed at least forty-three (43) days, and Ms. Cattenhead was "fully" disclosed over 80 days, before the trial of this matter was scheduled to begin.

II. THE TRIAL COURT CLEARLY ERRED IN STRIKING MOORE'S EXPERT WITNESSES AND GRANTING SUMMARY JUDGMENT TO DRMC.

DRMC relies on the case of ***Palmer v. Volkswagen of America, Inc.***, 904 So. 2d 1077 (Miss. 2005), in support of its proposition that the trial court did not err in striking the testimony of Dr. Sobel and Ms. Cattenhead. [Brief of Appellee 12-13]. However, ***Palmer*** is clearly distinguishable. The difference in ***Palmer*** and the case sub judice is that, in ***Palmer***, the plaintiff altogether failed to give any information[5] regarding the expert other than a name and brief statement following *several* scheduling orders, and the plaintiff *attempted to call this witness at trial without supplementing to*

---

[4] In her Designation of Expert Witnesses, Moore reserved the right to supplement the substance of Dr. Sobel's expected testimony. (CP-612-14). Moore supplemented on two (2) occasions to provide more specific information once obtained from the experts. (CP-648-65, 786-800). "This Court found that Rule 26 of the Mississippi Rules of Civil Procedure provides for seasonable supplementation." ***Thompson v. Patino***, 784 So. 2d 220, 223 (Miss. 2001).

[5] In ***Palmer***, the following information was provided prior to actually calling the witness to testify at trial: the name of the expert and that she was expected to testify to "[t]he extent and nature of injuries sustained by Plaintiffs, Randal Palmer, Lynn Palmer, and Ann Palmer, as well as the treatment rendered." ***Id.*** at 1089. However, in the case sub judice, at the very least, Moore supplemented to provide the "specifics" 43 days prior to trial, and assuming arguendo that Moore had not fully complied with Rule 26 until this date, it was done this far in advance of trial and in plenty of time for DRMC's seasoned counsel to prepare to meet cross-examination.

provide more; in the case sub judice, DRMC was, at the very least, provided with (via Moore's Second Supplemental Designation of Expert Witnesses) the "specifics" forty-three (43) days prior to the trial of this matter.[6] (CP-786-800). Clearly, ***Palmer*** is distinguishable from the case sub judice.

As further support for its position, DRMC cites ***Langley v. Miles***, 956 So. 2d 970 (Miss. Ct. App. 2006). ***Langley*** is clearly distinguishable in that the plaintiff in ***Langley*** completely failed to respond to requests for admissions propounded by defendants, and did not even list the name of any expert witnesses regarding medical malpractice in response to defendant's discovery requests. ***Id.*** at 971-73. Here, we are dealing with a situation in which Moore designated her expert witnesses, and moreover, Moore did respond to the requests for admission propounded to her.

The Mississippi Supreme Court has stated that "[w]e have long held that the rules of discovery are to prevent trial by ambush." ***Busick v. St. John***, 856 So. 2d 304, 321 (Miss. 2003) (citing ***Choctaw Maid Farms, Inc. v. Hailey***, 822 So. 2d 911, 917 (Miss. 2002)). In ***Bowie v. Montfort Jones Memorial Hospital***, 861 So. 2d 1037, 1047 (Miss. 2003), the Mississippi Supreme Court made it clear that the main purpose of the discovery rules regarding designation of experts is to prevent ***purposeful*** "trial by ambush," and "*the clear thrust of the rule [(UCCCR 4.04)] centered around designation of an expert anticipates situations where one party attempts to designate an expert **close to the trial date***." *See* ***Coltharp v. Carnesale***, 733 So. 2d 780 (¶¶ 25-27) (Miss. 1999) (The Court wants to prevent "trial by ambush.") Here, the facts are very, very clear that Moore did not intentionally try to prevent DRMC from having adequate time to prepare, and 43 days, at the very

---

[6] Assuming arguendo that Moore's designation of Dr. Sobel on August 24, 2007, was similar to the plaintiff's designation in ***Palmer***, the distinguishing factor between the cases is that Moore was no doubt in compliance 43 days prior to trial, and in ***Palmer***, the plaintiff was *never* in compliance (*i.e.*, did not provide the "specifics") and attempted to call the expert witness at trial, 904 So. 2d at 1090; stated differently, the plaintiff in ***Palmer*** did not supplement the designation and was never in compliance with Rule 26.

least, is not on the "eve of trial." DRMC provided no evidence, and the trial court did not have any evidence at the hearing, that Moore had these opinions/reports and was holding same from DRMC. In fact, the only contention is that Moore seasonably supplied the opinions to DRMC upon her receipt.

In fact, Moore's original Designation of Expert Witnesses (which listed Dr. Sobel) was filed over one hundred (100) days prior to the trial date (CP-612-14), and Moore First Supplemental Designation of Expert Witnesses (which added Nurse Cattenhead) was filed over eighty (80) days prior to the trial date (CP-648-65). These were all done prior to the discovery deadline in the case, in addition to yet another supplemental designation of experts being filed before the discovery deadline. (CP-548-49, 786-800). Obviously, Moore was not attempting to hide anything from DRMC and play the game of "trial by ambush," and this is evidenced by the numerous supplemental designations.

DRMC cites the recent Mississippi Court of Appeals case of ***Estate of Deiorio ex rel. v. Pensacola Health Trust, Inc.***, 990 So. 2d 804 (Miss. Ct. App. 2008), for the proposition that Moore's experts were properly stricken. [Brief of Appellee 14]. However, just as with all the other cases[7] cited by DRMC in support of this argument, ***Pensacola Health Trust, Inc.***, too, is clearly distinguishable. In fact, the plaintiff completely failed to designate expert witnesses prior to sixty (60) days before trial pursuant to Rule 4.04(A) of the Uniform Rules of Circuit and County Court. ***Id.*** at 805. Interestingly, though, in ***Pensacola Health Trust, Inc.***, the trial court ***GRANTED a continuance of the trial***[8] "to allow the parties additional time to provide authority relating to the applicability of Rule 4.04(A)," and the plaintiff completely failed to do same! ***Id.*** at 805. In light

[7] ***Palmer*** and ***Langley***.

[8] A continuance of trial to the alternate trial date set and reserved by the trial court was requested by Moore in the case sub judice. (CP -1093-1113).

of the plaintiff's failure to provide additional authority, the trial court granted the motion. ***Id.***

DRMC continues to state that Moore knew that medical expert testimony was required to prove negligence since the filing of the lawsuit. [Brief for Appellee 12, 14] . Yes, Moore knew this. However, it is important to note that Moore is not required to use as her testifying medical expert at trial the same "consulting" expert that she used prior to filing suit. In fact, what is the point of spending tens of thousands of dollars to have an expert review thousands of pages of medical records and prepare a report when faced with Motions to Dismiss immediately after the filing of the Complaint? How is this a good steward of a client's money? As mentioned *supra*, DRMC did not file an Answer and Defenses, but instead immediately filed Motions to Dismiss Moore's claims, as Moore did not attach a Certificate of Consultation in compliance with Mississippi Code Annotated § 11-1-58. In the face of uncertainty regarding dismissal of the whole civil action for failure to attach the certificate of consultation, it would be ill-advised for Moore to expend tens of thousands of dollars. At the point when Moore was advised that DRMC would not be dismissed from the lawsuit (*i.e.*, when the Court denied DRMC's second Motion to Dismiss on or around April 2007[9]), she immediately began conferring again with testifying experts. Moore has consistently stated that once she received more specific information from her experts, she seasonably supplemented. In the case sub judice, the trial court excluded Moore's medical experts because they were not "fully" disclosed[10] before a certain date (August 24, 2008) stated in the Agreed Scheduling Order despite the fact that disclosure occurred within the deadline to end all discovery (CP-548-49), and despite the fact that Moore supplemented this designation on two (2) subsequent occassions.

---

[9] This ruling was based on DRMC's agreement to allow Moore to amend her Complaint to attach a certificate of consultation. (CP-47-48).

[10] Moore did designate Dr. Sobel (and stated that he was expected to testify regarding the breach of the standard of care on DRMC and Corkern breached the standard of care in their treatment of Moore among other things) by the date (August 24, 2007) set out in the Agreed Scheduling Order. (CP-612-14).

Moore would again note that, in ***Mississippi Power & Light Co. v. Lumpkin***, 725 So. 2d 721 (Miss. 1998), this Court set out a four-part test and stated that when an expert witness is not timely named under discovery rules, the trial court should weigh several considerations before excluding that testimony:

(1) Whether the failure was deliberate, seriously negligent, or an excusable oversight.

(2) What is the importance of the testimony involving an assessment of the harm to the opposing party if the testimony is admitted.

(3) Time needed to prepare to face the testimony involving an assessment of any prejudice that may be done to the opposing party if testimony is admitted.

(4) The *possibility of a continuance* or other means the court has to cure the harm to the opposing party.

Id. at 733-34. Regarding the first factor, ***there is ABSOLUTELY NO EVIDENCE WHATSOEVER, IN ANY SHAPE, FORM OR FASHION, that Moore acted in bad faith or was seriously neglectful in regard to Dr. Sobel's and Ms. Cattenhead's opinions being produced to DRMC***! Regarding the second factor, the prejudice that Moore suffered by having her case dismissed far outweighed any prejudice that DRMC would have allegedly suffered. Regarding the third factor, at the very least, DRMC had the "specifics" of Dr. Sobel's opinions 43 days prior to trial and the "specifics" of Ms. Cattenhead's opinions over 80 days prior to trial, and DRMC's seasoned attorney had ample time to prepare to meet cross-examination for both expert witnesses. Regarding the forth factor, and the most important of the four factors, the possibility of a continuance was in existence, ***as the trial court had already previously set and reserved by Order an alternate trial date approximately 6 months later***. (CP-549). Despite DRMC's statement that Moore's reliance on ***Lumpkin*** is misplaced (Brief for Appellee 17-18), ***Lumpkin*** stands for the same proposition

regardless of whether the experts were designated on time or late. Further investigation reveals that the language noted in ***Lumpkin*** is from a Federal case where the plaintiff's "failed to supplement their interrogatory answers to provide opposing counsel with the expert's name as required under Fed.R.Civ.P. 26(e)":

> We agree with appellants that the trial judge erred in refusing to permit their expert witness to testify. We reach this conclusion despite the fact that appellants breached their duty under Fed.R.Civ.P. 26(e) to supplement their answers to appellee's interrogatories. Exclusion of evidence in some instances is an appropriate sanction for such a breach, see Advisory Committee Note to Rule 26(e), and the district judge enjoys considerable discretion in determining when it is properly imposed, *see* ***Washington Hospital Center v. Cheeks***, 394 F.2d 964, 965 (D.C. Cir. 1968) (Burger, J.). Among the factors which the court should take into consideration in determining whether to exclude evidence are "the explanation, if any, for the failure to name the witness, the importance of the testimony of the witness, the need for time to prepare to meet the testimony, and the possibility of a continuance." 8 C. Wright & A. Miller, Federal Practice and Procedure, s 2050 at 327 (1970).

Murphy v. Magnolia Elec. Power Ass'n, 639 F. 2d 232, 234-35 (5th Cir. 1981).

Moore has provided, in the Brief of Appellant, numerous cases regarding experts being allowed to testify when designated past the 60-day period prescribed by UCCCR 4.04 or following the discovery deadline/expert designation deadline. *See* ***Warren v. Sandoz Pharm. Corp.***, 783 So. 2d 735 (Miss. Ct. App. 2000) (where the Court upheld a trial court's allowance of expert testimony even though the proponent of the expert testimony *failed* to file a designation of expert witness)[11]; ***Holladay***, 776 So. 2d 662 (where this Court noted that it was an abuse of discretion to strike a witness where the expert witness was identified *two months after the discovery deadline* and stating that the penalty should have been something less drastic than striking the witness)[12]; ***Illinois Central Railroad Co. v. Gandy***, 750 So. 2d 527, 532 (Miss. 1999) (where this Court held that the trial court did not abuse its discretion in allowing an expert witness to testify despite that the expert's

[11] DRMC does not even attempt to distinguish ***Warren*** from the case sub judice.

[12] DRMC does not even attempt to distinguish ***Holladay*** from the case sub judice.

disclosures were not provided until twelve (12) days before trial)[13]; ***Scafidel v. Crawford***, 486 So. 2d 370 (Miss. 1986) (where this Court found that a trial court properly admitted testimony of expert not made known to defendant until the day of trial)[14]; ***International Paper Co. v. Townsend***, 961 So. 2d 741, 756-57 (Miss. Ct. App. 2007) (where the Court held that the trial court abused its discretion by failing to grant continuance of trial due to untimely designation of liability expert by logging truck driver after the expert designation deadline set out in UCCCR 4.04, despite that there was a representation by driver's counsel that no liability experts would be designated and the woodyard owner being taken by surprise by the last-minute designation and the woodyard owner was not able to depose expert until five (5) days before trial)[15]; ***Thompson v. Patino***, 784 So. 2d 220, 221-22 (Miss. 2001) (where this Court held that summary judgment was inappropriately granted and the trial court abused its discretion in striking Thompson's discovery supplementation regarding her expert witnesses, despite Thompson only naming the expert witness and failing to state what their opinions would be; Thompson's counsel being seventy-five days late in production with regard to the designation of expert witnesses; and after a motion to compel was filed by the defendants, it took Thompson's counsel sixty-nine (69) days to submit responses, which were still alleged to be unacceptable by defendants)[16]; ***Motorola Communications and Electronics, Inc. v. Wilkerson***, 555 So. 2d 713 (Miss. 1989) (where this Court held an expert identified just ten (10) days prior to trial and after the discovery deadline was timely supplemented, and therefore, allowed admittance of the

---

[13] DRMC does not even attempt to distinguish ***Gandy*** from the case sub judice.

[14] DRMC does not even attempt to distinguish ***Scafidel*** from the case sub judice.

[15] DRMC does not even attempt to distinguish ***Townsend*** from the case sub judice.

[16] DRMC does not even attempt to distinguish ***Thompson*** from the case sub judice.

expert testimony)[17]. DRMC does not even attempt to distinguish any of the cases Moore cites in support of the trial court abusing its discretion from the case sub judice.

DRMC had more than adequate time to prepare to face the testimony of Moore's expert witnesses. DRMC had approximately six (6) weeks to prepare; furthermore, DRMC knew from the very beginning of the case, simply by reading the facts of the Complaint and Amended Complaint, what the experts would have to discuss. Clearly, Moore's experts would be speaking in favor of the alleged conduct by DRMC;[18] otherwise, Moore would not be calling them as expert witnesses. The only issue to be discussed is the standard of care under the circumstances of this particular case. DRMC could have easily prepared to face the testimony without even knowing an expert would be called; nevertheless, Moore continued to update[19] her expert information as early as possible, with the experts "fully" disclosed as to the "specifics" forty-three (43) days prior to the trial date.

In regard to DRMC's statement that Moore did not provide an affidavit in support of its opposition to DRMC's Motion for Summary Judgment, [Brief of Appellee 16], it is certainly important to note that DRMC's Motion for Summary Judgment was not necessarily based on an alleged lack of medical expert testimony to support breach of the standard of care, but rather based

---

[17] DRMC does not even attempt to distinguish ***Wilkerson*** from the case sub judice.

[18] DRMC attempts to make a mound out of a molehill when it states that Moore did not precisely state that her experts would testify that DRMC and Dr. Corkern breached the standard of care, but rather said that they would "provide testimony regarding the breach of the standard of care owed to plaintiff by DRMC and Dr. Corkern." [Brief for Appellee 9]. Clearly, DRMC is trying to make something out of nothing. Did DRMC really take from this statement that Moore's experts were going to testify that DRMC and Dr. Corkern did not breach the standard of care in regard to their treatment of Moore??? Did DRMC really take from this designation that Moore's experts would be providing favorable testimony to DRMC instead of Moore???

[19] *See* Moore's Designation of Expert Witnesses (CP-612-14); *See* Moore's First Supplemental Designation of Expert Witnesses (CP-648-65); *See* Moore's Second Supplemental Designation of Expert Witnesses (CP-786-800); *See* Notice of Service of Discovery regarding Moore's First Supplemental Responses to DRMC's First Set of Interrogatories (CP-784-85).

on the alleged untimely designation by Moore.[20] This was explained to the Court at the hearing on the Motion for Summary Judgment on November 1, 2007. (Tr. 13-16). Counsel for Moore explained that he did not believe an affidavit was needed in light of how DRMC posed its Motion, which was based on the timeliness of the designation of experts as opposed to Moore having no experts at all or there being an argument that the experts were not able to provide testimony regarding the breach of the standard of care. (Tr. 13-16). In fact, the first time that anything was brought up about the breach of the standard of care was not until DRMC's ***Reply*** to Plaintiff's Response to Motion for Summary Judgment. (Tr. 14-15) (CP-942-96). Stated differently, it was not brought up in the Motion for Summary Judgment itself. (CP-711-51). Counsel for Moore advised the trial court that, despite that this was not a typical summary judgment motion regarding breach of the standard of care and he did not believe an affidavit was needed, he would be happy to provide an affidavit if the trial court would grant him additional time to provide same. (Tr. 15). The trial court agreed to provide additional time for an affidavit to be obtained (Tr. 15), and on November 15, 2007, prior to the trial court entering the order striking Moore's experts and granting summary judgment, counsel for Moore filed a Notice of Filing of Supplemental Evidentiary Materials in Support of Opposition to Motion for Summary Judgment filed by DRMC, which included an affidavit of Richard Sobel regarding the breach of the standard of care. (CP. 1132-44). DRMC's argument that Moore did not support her response to its Motion for Summary Judgment is disingenuous and without merit, especially in light of the trial court's agreement to allow Moore additional time.

---

[20] DRMC attempted to put the cart before the horse by filing its Motion to for Summary Judgment and asking the trial court to dismiss based on untimely designation (at which time Moore's experts were still in the case) prior to filing its Motion to Strike and actually having the experts stricken. (Tr. 17-18).

III. DRMC COMPLETELY FAILS TO RESPOND TO HOW IT WOULD HAVE BEEN PREJUDICED OR INCONVENIENCED HAD THE TRIAL COURT CONTINUED THE TRIAL TO THE RESERVED ALTERNATE TRIAL DATE.

Of great importance is that DRMC does not state how it would have been prejudiced or inconvenienced had this trial been continued to the alternate trial date, which was already set and reserved by the trial court. The reason that DRMC does not state how it would have been prejudiced or inconvenienced, is because there would have been no prejudice or inconvenience whatsoever had the trial been continued a short 6 months to the previously reserved alternate trial date.

AGAIN, the trial court agreed to allow the parties to obtain an alternate trial setting (June 9, 2008) in the event that the parties were unable to prepare in time for the December 3, 2007, trial setting, and this was placed in the order. (CP-548-49). The alternate trial setting was reserved for this very purpose. The trial court had already set an alternate trial date for the case in the event that the parties were unable to get the case prepared by December 3, 2007, and as such, there was a very easy way to cure the harm, if any, due to the delay by simply using the alternate trial date. Had the trial court continued the case to the June 9, 2008 date, it would have given DRMC, at the very least, 188 days to prepare for the expert's testimony. (Tr.-51). Interestingly, despite the trial court judge personally signing the order (CP-548-49) with the alternate trial setting and it being entered in the Court's file, at the hearing on November 13, 2007, it appeared to counsel for Moore that the trial judge acted like it was the first time she had seen the order to which she had signed. (Tr. 19, 34-36).

"*Exclusion of evidence is a **last resort***." ***TXG Intrastate Pipeline Co. v. Grossnickle***, 716 So. 2d 991, 1013 (Miss. 1997) (quotations omitted) (emphasis added). Exclusion of evidence is not the only, or first, resort! Clearly, the trial court abused its discretion in striking Moore's expert witnesses, and thereafter, granting DRMC's Motion for Summary Judgment.

Even if Moore's designation did not comply with Rule 26 until the second supplemental

designation served and filed 43 days prior to the trial date, is this not adequate time for a seasoned trial attorney to prepare to meet cross-examination? Moore would submit that this is ample time to prepare, and as previously noted in the Brief of Appellant at pages 33-34, Moore had not even taken the depositions of DRMC's expert witnesses, which were scheduled for November 19, 2007 (13 days before trial), and November 26, 2007 (6 days before trial), because DRMC wanted to take the depositions of Moore's experts first.

CONCLUSION

"[A]n action may not be dismissed for a discovery violation if a party is *simply unable to comply*, but that dismissal may be justified if the violation is the result of "'*willfulness, bad faith, or any fault of the party.*'" ***Bowie***, 861 So. 2d at1042 (quoting ***Fluor Corp. v. Cook***, 551 So. 2d 897, 903 (Miss. 1989) (citations omitted)) (emphasis added). Notwithstanding that Moore believes that Dr. Sobel was designated by the expert designation deadline, but assuming arguendo that he was not, Moore was "***simply unable to comply***" with the designation, as counsel for Moore clearly and unequivocally stated that he was not in receipt of Dr. Sobel's report by the designation deadline (Tr.-60); moreover, there is absolutely no evidence of willfulness of bad faith on Moore's part. This same proposition holds true in regard to Ms. Cattenhead's designation.

In ***Caracci v. International Paper Co.***, 699 So. 2d 546 (Miss. 1997), the Mississippi Supreme Court stated:

> "*Lower courts should be cautious* in either dismissing a suit or pleadings or *refusing to permit testimony....* The reason for this is obvious. *Courts are courts of justice not of form. The parties should not be penalized for any procedural failure that may be handled without doing violence to court procedures.*" ***Clark v. Mississippi Power Co.***, 372 So. 2d 1077, 1078 (Miss. 1979); *see also* ***Ladner v. Ladner***, 436 So. 2d 1366, 1370 (Miss. 1983).

Caracci, 699 So. 2d at 556 (emphasis added). The trial court in the case sub judice was not very cautious.

In ***Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner***, 964 So. 2d 1138, 1152 (Miss. 2007) (quotations omitted), the Mississippi Supreme Court clearly and unequivocally stated:

> "***EVERY reasonable alternative means of assuring the elimination of any prejudice to the moving party and a proper sanction against the offending party should be explored before ordering exclusion***."

(Emphasis added). The trial court failed to explore every reasonable means of assuring the elimination of any prejudice that DRMC alleged to have been saddled with regarding the designations.

For the reasons stated herein ,this Court should reverse the verdict of the Circuit Court of Washington County, Mississippi, and remand this case for a trial on the merits.

RESPECTFULLY SUBMITTED, this the 19th day of November, 2008.

EVELYN GWEN MOORE

BY: _____

JARED A. KOBS, MSB NO. [redacted]
ATTORNEY FOR APPELLANT

OF COUNSEL:

STAMPS & STAMPS
ATTORNEYS AT LAW
POST OFFICE BOX 2916
JACKSON, MISSISSIPPI 39207-2916
269 EAST PEARL STREET
JACKSON, MISSISSIPPI 39201
TELEPHONE: (601) 354-4747
FACSIMILE: (601) 354-0546

CERTIFICATE OF SERVICE

I, Jared A. Kobs, attorney for Appellant, do hereby certify that I have this day caused a true and correct copy of the above and foregoing document to be served by United States Mail, postage-prepaid, to the following:

Christopher W. Winter, Esq.
Mary Frances S. England, Esq.
Wilkins, Stephens & Tipton, P.A.
Post Office Box 4537
Greenville, Mississippi 38704-4537
Attorney for Appellee

Honorable Betty W. Sanders, Trial Court Judge
Washington County Circuit Court Judge
Post Office Box 244
Greenwood, Mississippi 38935-0244

THIS, the 19th day of November, 2008.

ATTORNEY FOR APPELLANT