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**

BRIEF OF APPELLANT

Appeal from the Circuit Court of Washington County, Mississippi

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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.

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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: _____
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STATEMENT REGARDING ORAL ARGUMENT

Appellant does not believe that the facts and legal arguments encompassed in this appeal necessitate oral argument, but instead assert that this matter should be decided based on the briefs which have been submitted to the Court.

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STATEMENT OF JURISDICTION

On November 21, 2007, the Circuit Court of Washington County, Mississippi, Honorable Betty W. Sanders, presiding, entered an Order Striking Plaintiff's Expert Witnesses and Granting Summary Judgment and Entering Final Judgment.

Pursuant to Mississippi Rule of Civil Procedure, Plaintiff/Appellant filed her Notice of Appeal on December 19, 2007.

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.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings and Disposition in the Court Below.

This is a medical malpractice action filed by Evelyn Gwen Moore ("Moore") against Delta Regional Medical Center ("DRMC").[1] The course of proceedings in this civil action is briefly summarized below:

March 18, 2005	-	Moore files her Complaint against DRMC. (CP-3-14).
April 12, 2005	-	Without filing an answer and defenses, DRMC immediately files its Motion to Dismiss based on the "failure to the [Moore] to comply with the terms and provisions of the Mississippi Malpractice Tort Reform Act ['MMTRA'], as amended, and the terms and provisions of the Mississippi Tort Claims Act ['MTCA']." (CP-29-30). Former counsel for Moore did not attach the certificate of consultation.
April 15, 2005	-	Moore files her Motion for More Definite Statement requesting that the Court order DRMC to provide Moore with specific facts supporting its conclusion that Moore failed to comply with the terms and provisions of the MMTRA and MTCA. (CP-31-32).
June 27, 2005	-	Moore files her Motion for Leave to Amend Complaint seeking leave to amend in order that she may file her Certificate of Consultation in compliance with Mississippi Code Annotated § 11-1-58. (CP-39-44).
July 12, 2005	-	DRMC files its Response to Motion for Leave to Amend Complaint, stating that it "does not Contest [Moore]'s Motion for Leave to Amend Complaint, as such relief 'shall be freely given when justice so requires.' Miss. R. Civ. P. 15(a)." (CP-45-46).
October 5, 2005	-	The trial court enters an Agreed Order Granting Plaintiff's Motion for Leave to Amend Complaint. (CP-47-48).
October 20, 2005	-	Having not received a copy of the "Filed" Order allowing

[1] Robert S. Corkern, M.D., was also a party to this lawsuit, but on December 8, 2006, Dr. Corkern was dismissed with prejudice by the trial court because he was not served with a notice of claim letter by former counsel for Moore. (CP-507-508).

Moore to Amend her Complaint, counsel for Moore contacts the trial court Clerk's Office to determine whether Judge Betty W. Sanders had executed and filed with the Clerk the Agreed Order Grating Plaintiff's Motion for Leave to Amend Complaint, and counsel for Moore was advised that same had been executed by Judge Sanders on October 3, 2005, and filed on October 5, 2005. (CP-47-48)

October 24, 2005 - Moore immediately files her Amended Complaint against DRMC. (CP-49-63).

October 28, 2005 - DRMC files its Motion to Dismiss With Prejudice (seeking dismissal of Moore's Amended Complaint) based on the statute of limitations and stating that Moore's Amended Complaint could not relate back to the filing of Moore's original Complaint. (CP-66-100).

November 7, 2005 - Moore files her Motion for More Definite Statement. (CP-109-111).

November 8, 2005 - Moore files her Response to DRMC's Motion to Dismiss. (CP-118-170).

March 16, 2006 - DRMC's Motion to Dismiss With Prejudice came on for hearing, and the trial court stayed ruling on the motion until the Mississippi Supreme Court decided the case of ***Nelson v. Baptist Mem. Hospital***[2] and limited discovery was conducted in regard to Robert S. Corkern, M.D.'s, employment status. (CP-213-14).

March 17, 2006-August 9, 2006 Almost **five (5) month** period of time during which the trial court stayed the ruling on DRMC's Motion to Dismiss pending the Mississippi Supreme Court decision in ***Nelson***.

August 10, 2006 - DRMC files its Supplemental Reply to Plaintiff's Response to DRMC's Motion to Dismiss With Prejudice based on the then-recent Mississippi Supreme Court decision of ***Walker v. Whitfield Nursing Center, Inc.***, 931 So. 2d 583 (Miss. 2006), alleging it to be on point with the issue pending in the case sub judice. (CP-317-408).

August 16, 2006 - Moore files her Supplemental Response to DRMC's

[2] Counsel for DRMC advised the trial court that ***Nelson*** was pending before this Court and was dispositive of the case sub judice.

Supplemental Reply to Moore's Response to DRMC's Motion to Dismiss With Prejudice. (CP-409-60).

November 28, 2006 - DRMC's Motion to Dismiss With Prejudice came on again for hearing. (CP-502-03).

November 29, 2006-April 8, 2007 - Approximately **five (5) months passed** between the time DRMC's Motion to Dismiss With Prejudice came on for hearing and was argued and the trial court made a ruling on same. At the November 28, 2006 hearing, the trial court **reserved its ruling** on DRMC's Motion to Dismiss With Prejudice.

April 9, 2007 - Approximately five (5) months following the hearing on DRMC's Motion to Dismiss and after approximately two (2) years of various outstanding motions to dismiss filed by DRMC, the trial court entered an Order denying DRMC's Motion to Dismiss. (CP-847).

April 12, 2007 - ***Over (two) 2 years following the filing of Moore's Complaint and one and a half (1 1/2) years following the filing of Moore's Amended Complaint, DRMC finally filed its Answer, Motion & Affirmative Defenses to Plaintiff's Amended Complaint***. (CP-517-25).

April 12, 2007 - Following a telephone conference between Linda Townsend, Judge Sanders' Court Administrator, wherein Ms. Townsend advised the parties that June 9, 2008, was to be set as the trial date, counsel for Moore forwards a proposed Order to the trial court for execution. (CP-528-29).

April 24, 2007 - Ms. Townsend contacts the parties and advises them that Judge Sanders wants the trial to be set in 2007 despite DRMC's answer only having been filed on April 12, 2007, and zero discovery having had time to be conducted. (CP-531-32).

April 26, 2007 - DRMC files Petition for Interlocutory Appeal and Stay of Trial Court Action with the Mississippi Supreme Court based on the denial of their Motion to Dismiss With Prejudice.

May 1, 2007 - DRMC files Motion for 2008 Trial Setting alleging that a 2007 trial setting was too early. (CP-530-40).

May 8, 2007 - Moore files her Response to DRMC's Petition for Interlocutory Appeal and for Stay of Trial Court Action.

May 23, 2007	-	Mississippi Supreme Court denied DRMC's Petition for Interlocutory Appeal and Stay of Trial Court Action.
May 29, 2007	-	DRMC files its Motion for Rehearing of Petition for Interlocutory Appeal and Motion to Stay.
May 30, 2007	-	Moore files her Response to DRMC's Motion for Rehearing of Petition for Interlocutory Appeal and Motion to Stay.
June 1, 2007	-	Moore re-serves discovery requests on DRMC per counsel's request. (CP-546-47).
June 6, 2007	-	Less than 6 months prior to the trial date, the Court enters an Order of Continuance and Agreed Scheduling Order setting the trial date for December 3, 2007. (CP-548-49). Importantly, this Order also set an ***ALTERNATE TRIAL DATE FOR JUNE 9, 2008***. (CP-549).
June 20, 2007	-	Mississippi Supreme Court denies DRMC's Motion for Rehearing of Petition for Interlocutory Appeal and Motion to Stay. (CP-580).
August 24, 2007	-	Moore timely files ***Designation of Expert Witnesses*** listing Richard M. Sobel, M.D., M.P.H., as her expert. (CP-612-14). In the Designation, Moore states that Dr. Sobel is expected to testify regarding the breach of the standard of care owed to Plaintiff by DRMC and Robert Corkern, M.D., among other things. (CP-612-14).
September 12, 2007	-	Moore files ***First*** Supplemental Designation of Expert Witnesses listing Richard M. Sobel, M.D., M.P.H., and Netra Cattenhead, CFNP as her experts. (CP-648-65).
September 26, 2007	-	DRMC finally responds to Moore's Request for Production of Document and Interrogatories. (CP-680-85).
October 11, 2007	-	DRMC files its Motion for Summary Judgment based upon an alleged "inadequate" designation of expert witnesses and "inadequate" response to interrogatories. (CP-711-51). DRMC never files a Motion to Compel more complete answers to the discovery propounded to Moore. DRMC's Motion for Summary Judgment was *not* based on an undisputed question of material fact, but rather that Moore's experts were "inadequately" designated. DRMC attempted to put the cart before the horse.

October 23, 2007	-	Moore files her ***Second*** Supplemental Designation of Expert Witnesses more specifically stating the substance of Dr. Sobel's expected testimony. (CP-786-800).
November 1, 2007	-	DRMC files its Motion to Strike Plaintiff's Medical Experts. (CP-1014-81). This Motion was filed after Moore's Second Supplemental Designation of Expert Witnesses was filed.
November 1, 2007	-	DRMC's Motion for Summary Judgment comes before the trial court for hearing. (CP-778-80). The trial court takes this motion under advisement until depositions of Moore's expert and DRMC's Motion to Strike Moore's experts are before the trial court.
November 5, 2007	-	Moore files her Response to DRMC's Motion to Strike Moore's Medical Experts, or In the Alternative, Motion to Continue Trial to Alternate Trial Date. (CP-1093-1113).
November 13, 2007	-	DRMC's Motion to Strike Plaintiff's Medical Experts come on for hearing before the trial court. (CP- 1130-31).
November 15, 2007	-	Moore files Notice of Supplemental Evidentiary Material in Support of Opposition to DRMC's Motion for Summary Judgment. (CP-1132-44).
November 21, 2007	-	The trial court grants DRMC's Motion to Strike Plaintiff's Medical Experts, and therefore, since Moore does not have any medical experts to testify to the breach of the standard of care, the trial court grants DRMC's Motion for Summary Judgment. (CP-1149-50).
December 19, 2007	-	Moore files her Notice of Appeal with this Court. (CP-1153-54).

B. Statement of the Facts

On or around September 20, 2003, Appellant, Evelyn Gwen Moore ("Moore"), was examined at the Emergency Department at Delta Regional Medical Center ("DRMC"). (CP-51). Moore's treating emergency room physician was Robert Corkern, M.D. (CP-52). Upon admission to DRMC, Moore's blood pressure was 265/158, which is considered a hypertensive emergency. (CP-52). Moore was also in renal failure along with a low potassium level. (CP-52). Dr. Corkern assessed

Moore's lab values, and sent Moore to the nursing unit. (CP-52). However, based upon the lab as well as physical findings, Moore should have been ordered to go to ICU/CCU critical care units, as it was important to monitor her blood pressure on a regular basis. (CP-52).

Additionally, Dr. Corkern ordered specific amount of medication be given to Moore, but as alleged in her Amended Complaint, she was given at least two (2) medication errors by DRMC's nurses.

During the time Moore was at DRMC, after receiving the 200MG dose of normadyne within a five (5) minute period Moore experienced a sudden drop in her blood pressure to 100/80. (CP-52-53). Moore alleges in her Amended Complaint that she believes that the increased amounts of normadyne being given so rapidly caused her to vomit which lead to a sudden drop in her blood pressure. (CP-53). As a result of DRMC's emergency room physician, Dr. Corkern, and nurses, lowering her blood pressure rapidly, Moore suffered a stroke.

Additionally, once Moore arrived to the nursing unit, two medication errors were made by Ms. Emma Ware, LPN. (CP-52-53). Dr. Corkern wrote an order to give clonidine 0.2MG every six(6) hours for a diastolic blood pressure greater than 100. (CP-52-53). However, the second dose of clonidine was received by Moore approximately four (4) hours sooner than she should have received. (CP-52-53).

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, who was designated 83 days prior to trial. Additionally, it is important to note that 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 prejudiced by the dismissal of her experts and the granting of summary judgment.

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. 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.

The trial court ruled that Dr. Sobel was not "fully" designated by the expert deadline disclosure date of August 24, 2007. However, in Moore's initial designation, she stated that:

> [Dr. Sobel] will provide testimony regarding the breach of the standard of care owed to Plaintiff by DRMC and Robert Corkern, M.D. [Moore] reserves the right to introduce the transcript of Dr. Sobel's deposition testimony in lieu of calling him live at trial. [Moore] expects to request that Dr. Sobel remain in the courtroom during the presentation of [Moore]'s and [DRMC]'s case, and therefore, Dr. Sobel's opinions may be modified by the evidence presented. Furthermore, Dr. Sobel may rebut any expert opinions offered by experts testifying on behalf of [DRMC]. All opinions of Dr. Sobel will be expressed in terms of reasonable medical probabilities and are based on his education, knowledge, training and experience. [Moore] reserves the right to supplement the substance of which Dr. Sobel is expected to testified to as discovery develops. A copy of Dr. Sobel's *Curriculum Vitae* is attached hereto as Exhibit "A."

(CP-612-14). Moore's initial Designation of Expert Witnesses was filed prior to the expiration of the deadline.

In ***Holladay v. Holladay***, 776 So. 2d 662, 673, the Mississippi Supreme 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.* 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.

(Emphasis added). 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 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 that this Court finds that Moore's experts were not "fully" disclosed, it is uncontested that they were "fully" disclosed at least forty-three (43) days before the trial of this matter was scheduled to begin. *See* discussion *infra*, II(A)(2).

A. DRMC Did Not File a Motion to Compel or Otherwise.

According to ***Havard***, the trial court lacks the authority to bar the testimony of the expert witness if the party opposing the expert testimony fails to bring a motion to compel and have the trial court enter an order compelling the offering party to provide additional information or some other remedy to obtain additional information. ***Id.*** at 1104. In other words, a motion to compel is a *condition precedent* to obtaining an order barring an expert from testifying at trial. In the case sub judice, no motion to compel or otherwise was filed and brought before the trial court prior to the trial court striking Moore's experts. This is reversible error.

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

"The discovery orders of the trial court will not be disturbed unless there has been an abuse of discretion." ***Dawkins v. Redd Pest Control Co.***, 607 So. 2d 1232, 1235 (Miss. 1992).

In the case sub judice, the trial court excluded Moore's medical experts because they were not "fully" disclosed[3] before a certain date (August 24, 2008) stated in the Agreed Scheduling Order

[3] Moore did designate Dr. Sobel (and stated that he was expected to testify that 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).

despite the fact that disclosure occurred within the deadline to end all discovery. (CP-548-49). In ***Mississippi Power & Light Co. v. Lumpkin***, 725 So. 2d 721 (Miss. 1998), the Mississippi Supreme 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.

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), 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.***"

Id. (quoting ***McCollum v. Franklin***, 608 So. 2d 692, 694 (Miss. 1992)) (emphasis added).

A. Factors Set Forth in *Lumpkin*.

These considerations should have greater force here because Moore did not violate any discovery rules but a pre-trial order, and so the intent of the rules to prevent unfair surprise to the opposing party at trial fails to be a significant factor.

1. There was No Deliberate Withholding of Any Expert's Opinion by Moore Nor Serious Neglect on Moore's Behalf.

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

In the trial court's oral opinion, it stated that, "While the Court stops short of saying that this was bad faith, the Court does find that the plaintiff has simply failed to comply." (Tr.-80).

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. In fact, counsel for Moore advised that trial court at the hearing on November 13, 2007, that the reason that DRMC had not been provided with all the "specific"[4] details of what Dr. Sobel was expected to testify to was because counsel for Moore had not been provided with a detailed written report from the expert given the short time between the date the trial court denied DRMC's Motion to Dismiss and the trial date. (Tr.-43). To say the

[4] Despite that Mississippi Rule of Civil Procedure 26(b) only states that the substance of the expert's opinion and a summary of grounds be provided (*see* ***Holladay***, 776 So. 2d 662), counsel for Moore intended, and in fact did in Moore's Second Supplemental Designation of Expert Witnesses (CP-786-800), to provided the "specifics" to DRMC once counsel for Moore obtained the detailed report from Dr. Sobel.

very least, counsel for Moore was completely floored at the hearing when the trial court stated that it "stops short of saying that this was bad faith," (Tr.-43) as there is absolutely no evidence–on the record or off the record–that counsel for Moore acted in bad faith or wilfully withheld the experts' opinions from DRMC.

Additionally, Moore would like to again point out that DRMC's counsel was totally incorrect when he stated on the record that the reason Dr. Sobel's opinion had not been provided to Moore's counsel was because Moore's counsel had not paid the bill. (CP-8-9; 47-48). Moreover, as was discussed at the hearing, this inappropriate and untrue representation to the trial court had no bearing whatsoever on the issue to be decided by the trial court. (CP-8-9; 47-48). Not only was it untrue and uncalled for, but it was unfounded, as the record before the trial court provided no evidence that Moore's counsel had not paid Dr. Sobel's bill.

2. Moore was Severely Prejudiced by the Exclusion of Her Experts' Testimony and There is No Prejudice to DRMC in Admitting Moore's Expert's Testimony.

The testimony of Moore's experts was extremely important to Moore's case, as it is well-settled that, in a medical malpractice action, the plaintiff must have medical expert testimony to show a prima facie case of negligence. ***Boyd v. Lynch***, 493 So.2d 1315, 1318 (Miss. 1986) (citations omitted). Without same, a plaintiff's case cannot survive. This is exactly what happened here–the trial court stuck Moore's medical experts' testimony, and as such summary judgment was ripe for DRMC. (CP-1149-50). As Moore's counsel repeatedly stated at the hearings, the prejudice that Moore would suffer far outweighed any prejudice that DRMC would suffer. (Tr.-72). "[F]or a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party." ***Terrain Enters., Inc. v. Mockbee***, 654 So. 2d 1122, 1131 (Miss. 1995). "Error is reversible only where it is of such magnitude as to leave no doubt that

the appellant was unduly prejudiced." ***In re Estate of Mask***, 703 So. 2d 852, 859 (Miss. 1997). The exclusion of Moore's experts' testimony, which prompted summary judgment to be granted to DRMC, is no doubt highly prejudicial to Moore.

At the hearing, DRMC stated that the prejudice that it would be faced with if Dr. Sobel's opinion was not stricken would be the costs of having to pay for the taking of his deposition. (Tr.-65). However, as noted at the November 13, 2007, hearing, DRMC had already paid a non-refundable deposit for the deposition. (Tr.-65). When the trial court asked DRMC what prejudice it would be faced with at the November13, 2007 hearing, it was unable to respond with a legitimate reason, and interestingly, stated the following:

> BY MR. WINTER: ***It's our position we don't have to demonstrate prejudice in order for the Court to grant the Motion***. However, we do feel that we would be prejudiced by the whole timeliness. The whole issue of the plaintiff filing their [designation] so close to trial puts us in a bind of trying to get everybody deposed and get all of the opinion done and get everything done before trial.

(Tr.-75-76) (emphasis added). How far from the truth can it be that DRMC did not have to show prejudice when Moore is faced the unconscionable sanction of striking her experts???? Also, despite DRMC's counsel stating that it would put them in a bind to schedule depositions, ALL depositions (of Moore's experts and DRMC's experts) had already been noticed and scheduled to go forward and numerous fact witness depositions had previously taken place!

3. Moore Did Not Disclose Her Experts on the Eve of Trial and DRMC Had Ample Time to Prepare for Moore's Experts' Testimony.

Mississippi Rule 26(b)(4)(A)(i) provides that "[a] party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for

each opinion." 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 (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." *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[5] try to prevent DRMC from having adequate time to prepare. Moore's designation of all experts was well in advance of trial, and counsel for DRMC certainly had a "reasonable opportunity to prepare to meet and cross-examine the evidence to be offered." ***Harris v. General Host Corp.***, 503 So. 2d 795, 798 (Miss. 1986). The cases cite by DRMC when the experts are stricken are situations where they are not designated altogether or are not designated until the "eve of trial." Forty-Three (43) days prior to trial can hardly be said to be on the "eve of trial."

Moore's explanations were not seriously reviewed by the trial court to consider any reasons for the delay, as the only stated reason for excluding the expert witnesses was untimely disclosure. Moore, however, acted in good faith to comply with the trial court's scheduling order and was not involved in abusive discovery practices. As Moore explained to the trial court, she not only designated within the appropriate time period, but she also immediately supplemented additional specific information once it became available to her. Additionally, Moore's disclosure was slowed by the changing of hands of the case within the undersigned's firm due to an inopportune event and the delay in response from the experts at issue.[6] There was conversation between counsels as to the

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[5] *See* discussion, *supra* II(A).

[6] Moore had been given a summary by Dr. Sobel (and designated accordingly by the deadline), and when she received the written report, Moore supplemented to provide the specifics. (Tr.-47).

time frame of production and reasons for the delay. Counsel for the DRMC never made it clear that the time frame was a problem nor that he was going to make a motion due to the delay.[7] Moore simply tried to avoid involving the court unless it was something the parties could not work out on their own, and this is what Moore's counsel thought was being done.

In the case sub judice, Moore has not once made any attempt to deliberately ambush or surprise DRMC. Moore freely gave any information to DRMC as early as possible. Moore never acted in a manner consistent with serious negligence. As stated by counsel for Moore, the delay was of the most part due to the expert himself (Dr. Sobel), and not Moore. In addition, as mentioned *supra*, counsel for Moore did experience misfortune in the office staff, which created a further unavoidable delay of which is clearly excusable.

The Mississippi Supreme Court held in ***Holladay*** that it was an abuse of discretion to strike a witness where the expert witness was identified *two months after the discovery deadline.*[8] 776 So. 2d 662. Reversing the trial court, the Mississippi Supreme Court stated that the penalty should have been something less drastic than striking the witness. Id. at 662 (Miss. 2000).

In ***International Paper Co. v. Townsend***, 961 So. 2d 741, 756-57 (Miss. Ct. App. 2007), the Mississippi Court of Appeals 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

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[7] Additionally, as noted *supra* I(A), DRMC never filed a Motion to Compel or otherwise, which is required before the expert may be stricken.

[8] In the case sub judice, Moore's expert witnesses were designated well in advance of the discovery deadline. (CP-612-14; 648-65; 786-800).

until five (5) days before trial.

In ***Illinois Central Railroad Co. v. Gandy***, 750 So. 2d 527 (Miss. 1999), the Mississippi Supreme Court held that the trial court did not abuse its discretion in allowing an expert witness to testify despite that the expert's disclosures were not provided until twelve (12) days before trial. ***Id.*** at 532.

In ***Thompson v. Patino***, 784 So. 2d 220 (Miss. 2001), Thompson named her expert witnesses, but she failed to state what their opinion would be. 784 So.2d at 221. In fact, Thompson's counsel was seventy-five days late in production with regard to the designation of expert witnesses. ***Id.*** at 221-25. Even 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. ***Id.*** at 221-22. Despite the foregoing, the Mississippi Supreme Court still found summary judgment to be inappropriate and sanctions to be the preferred discipline for disregard of discovery rules. ***Id.*** at 224. This Court held that the trial court abused its discretion in striking Thompson's discovery supplementation regarding her expert witnesses, and therefore, erred in granting the defendant's motion for summary judgment. ***Id.*** at 223-26. The ***Thompson*** Court reasoned that although clearly Thompson could have done more, the doctor's expert testimony was critical, and the delay was due to scheduling problems, and thus, Thompson should not have been dealt such a detrimental sanction as summary judgment. ***Id.*** Needless to say, Moore's experts' opinions were critical to her case.

In ***Motorola Communications and Electronics, Inc. v. Wilkerson***, 555 So. 2d 713 (Miss. 1989), the Mississippi Supreme 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 expert testimony.

The Mississippi Supreme Court found that a trial court properly admitted testimony of expert not made known to defendant until the day of trial. ***Scafidel v. Crawford***, 486 So. 2d 370 (Miss. 1986).

In addition to already being advised of what Moore's experts were to testify to, DRMC had at least forty-three (43) days prior to the trial date to prepare for Moore's experts' testimony. At least forty-three (43) days prior to trial, DRMC was provided with the following regarding Moore's experts notwithstanding their allegation that these experts are not "fully" disclosed:

> COMES NOW, Plaintiff, Evelyn Gwen Moore, by and through counsel, and files this her Second Supplemental Designation of Expert Witnesses pursuant to the Mississippi Uniform Circuit and County Court Rules and would designate the following expert witnesses:
>
> 1. Richard M. Sobel, M.D., M.P.H.
> 101 Passage Point
> Peachtree City, Georgia 30269
> (800) 381-2795
>
> The above-listed expert will provide testimony regarding the breach of the standard of care owed to Plaintiff by DRMC and Robert Corkern, M.D.
>
> If called to testify at trial, it is expected that Dr. Sobel is expected to testify to the following:
>
> I am a Board Certified and actively practicing emergency physician in Georgia. I have held several academic positions providing training to physicians on a wide spectrum of patient management topics and specifically the treatment of uncontrolled hypertension in the emergency department. I have served as a medical director of a hospitalist program. I have provided quality review for State Boards and peer review organizations. I have served in an author or in an editorial capacity for organizations providing continuing medical education materials on a wide spectrum of medical topics. I am and have been actively involved in peer review for many years concerning standards of practice including the treatment of hypertension in the emergency department. I am well qualified to comment on the standards of reasonable professional practice in the management of the patient's hypertension and care in the emergency department and aspects of her subsequent hospitalization.
>
> I have reviewed the records of Delta Medical Center, University Medical Center, University Neurology Group, University Neurosurgeons and several other participating medical providers, including the related billing records, the depositions

of Verlillian Vicy Rucker, L.C. Moore, Beverly Purdie, and Evelyn Gwen Moore.

The documentation of the emergency department encounter by Dr. Corkern lies in the records from DRMC. These records indicate that the patient presented with a chief complaint of "elevated blood pressure, prior to arrival (<1h), associated signs and symptoms of congestion and a negative review of systems." The physician indicates that the patient had a past medical history of hypertension. There is no documentation of any abnormal findings on the physician's physical exam other than the box abnormal vital signs being checked. An impression of "hypertensive emergency and hypokalemia" is provided by Dr. Corkern. Laboratory testing (CBC and chemistry) are checked by the physician but no interpretation of laboratory data or diagnosis is found in the physician's records regarding the patient's renal failure. The laboratory records indicate the presence of severe renal failure (creatinine 7.9 and BUN 54).

Ms. Moore's vital signs on presentation to the emergency department were a blood pressure of 248/154, pulse 120 and respiratory rate 26. A CT of the head and a chest x-ray were ordered by Dr. Corkern. Kara Tooley, RN writes, "pt states shortness of breath, weakness, loss of appetite for past month and worsening, lost 15 pounds in 1 month. Sent from MD office today." Continuing on bates stamp 00319, Carolyn White, RN documents at 1605, "Normodyne (labetalol) 20mg IVP given then 20mg IVP given for BP of 197/129. Normodyne 80mg IVP given for BP continuing to be high." She continues, "lasix 40mg IVP given" at 1610. 1610, "BP 197/129, Normodyne 80mg IVP given. At 1611 BP 165/111." At 1615, she states, "BP 159/111. PT gagging and vomiting...In the process of vomiting BP decreased to 100/80." At 1704, Ms. White states,"PT to and from CT. BP 170/120. Dr. Corkern notified and clonidine 0.2mg PO given."

Dr. Cockern's orders for Normodyne were: "Normodyne 20mg IVP; in 10 mins, give 40mg IVP; in 10 mins give 80mg IVP in 10 mins in 10 mins give 160mg IVP hold subsequent doses if BP (decreases) to diastolic BP 110 or below Clonidine 0.2mg PO now" at 3:30 PM, 9/20/03. At 5PM, Dr. Corkern provided admitting orders for Ms. Moore. They include an order of a 4 gm NA (sodium) diet, a CT abd with adrenal cuts "r/o adrenal mass", and medication: "Clonidine 0.2mg PO q6hours hold for diastolic less than 100, Norvasc 10mg qday, Clonidine 0.1mg PO q4hours PRN diastolic of greater than 115." There is no consultation with a nephrologist apparent in his orders.

Ms. Moore was transferred to the medical unit. Telemetry readings of sinus bradycardia are documented at 2145 and "BP within normal limits" at 0530. The medication administration records (MAR) appear to indicate that Ms. Moore was given clonidine 0.2mg and amlodipine 10mg at 1900 by a nurse initials SW. Subsequent doses of clonidine were held during the hours of 1900-0659 due to vital signs blood pressure 124/64 and heart rate 58 and blood pressure 93/57 heart rate 52. There is evidence of persistent bradycardia on the telemetry record documentation sheet.

A note entitled, IM (Internal Medicine), I believe by Dr. Michael Last, reveals an A/P (assessment and plan) of "1) Severe hypotension now c relative hypotension and mental status changes. Check CT brain now and (transfer) to ICU" at 0830 on 9/21/03. A consultation was called with Dr. Patel. Upon transfer to the ICU, Ms. Moore's vital signs were blood pressure 100/60, pulse 50 and respirations 20 at 0900. There is an order for "Dopamine IV Renal Dose to start now" at 2050.

According to the consultation note of Amita Patel, MD, Ms. Moore was found to be "very lethargic" with a blood pressure of "95/70". Her creatinine at the time of his consultation was 8.8. The nephrologist did not recommend dialysis at that time. "I will not hurry up for the dialysis."

A CT Scan of the abdomen and pelvis after the administration of IV and oral contrast was performed on 9/21/03. According to the radiologist's report, there was "no excretion of the isotope from the kidneys indentified suggesting the presence of renal failure though the kidneys appear to be of normal size." Ms. Moore's creatinine was 8.2 on 9/22/03. The patient was dialyzed on 9/22/03. She was transferred to the Neuro/ICU at UMC Jackson on 9/25/03. On 9/26/03, an MRI of the brain with and without contrast was interpreted to show, "Multiple small areas of acute to subacute infarction involving multiple vascular distributions." An echocardiogram showed "Left ventricular hypertrophy with normal systolic function, EF 65%. Moderate mitral regurgitation. Trace pericardial effusion." A neurologist's note at University Hospital is found, which states that their assessment is that the neurological deficits that were found on examination of Ms. Moore were likely due to "Bilateral watershed and left occipital infarcts – acute, possibly related to sudden lowering of BP at OSH" (outside hospital).

Ms. Moore was transferred back to Delta Regional Medical Center where she continued her rehabilitation until her final discharge in November, 2003.

After careful review of the available medical records, it is my considered opinion that Robert S. Corkern, MD and the nursing staff of Delta Regional Medical Center did not comply with the minimum acceptable standards of professional practice in his care of Evelyn Gwen Moore in the emergency department of Delta Regional Medical Center in Greenville, Mississippi on September 20, 2003 and at time during the subsequent hospitalization. It is further my opinion that the medical actions and omission by Dr. Corkern and said nursing staff were proximal and substantial contributory cause(s) of the neurological event or stroke and its evolution that Ms. Moore suffered. My opinions are based on a reasonable degree of medical certainty.

There was indeed reason to believe that Ms. Moore was presenting to the emergency department with a hypertensive emergency. However, evidence of medical decision making on the part of Dr. Corkern relative to this diagnosis is completely lacking in his documentation. Specifically, elevated blood pressure, not even to the level that was found in triage when Ms. Moore presented, does not

constitute a basis for a diagnosis of a hypertensive emergency. To meet the established requirement for such diagnosis, a patient must present with sign(s), symptom(s) or evidence of end-organ failure. The term end-organ failure is used to connote the presence or likelihood of on-going damage to an organ system related to uncontrolled hypertension. Ms. Moore did not have frank or obvious symptoms that one would conclude were specifically related to uncontrolled hypertension by history. However, her kidney function was reported on a specimen timed 1550 on 9/20/03 to be related to a creatinine of 7.9 consistent with severe renal failure. Ms. Moore's baseline creatinine was unknown. The value of this creatinine was not likely known by Dr. Corkern when he embarked on a protocol of aggressive reduction of her blood pressure at 1530 with intravenous labetolol. Aggressive reduction of blood pressure in this manner without a specific rationale for the diagnosis of a hypertensive emergency is negligent and potentially reckless. Even after her diagnostic testing was complete, I can find no other basis for the diagnosis of a hypertensive emergency in the medical records of Ms. Moore on 9/20/03, save the presence of her renal failure. Furthermore, there is no documentation by Dr. Corkern that he ever noted or considered the laboratory value of Ms. Moore's creatinine in these medical records. To embark on a protocol consistent with what could cause drastic, precipitous or excessive reduction of blood pressure in a patient without specific rationale is clearly reckless. Furthermore, the protocol ordered by Dr. Cockern was itself reckless and below the applicable standards of care for the management of severe hypertension in a patient the same or similar to Ms. Moore with renal failure.

The management of a patient that is thought to have a hypertensive emergency based on the presence of acute renal failure mandates the consultation of a nephrologist (renal specialist). No such consultation was made by Dr. Corkern. The records do not indicate a conversation with the admitting physician, Dr. Michael Last, reflecting the urgency or the planning of such consultation. The management of hypertension in a patient with severe renal failure requires an understanding of the presence of altered excretion and elimination of medication that exist in patients with renal failure. The method, the amounts and the actual administration of medication as described in the orders of Dr. Cockern indicate to me a severe knowledge deficit as to the potential for accumulation of medications and increased likelihood of drug interactions in the renal failure patient.

Accepting that Ms. Moore had a hypertensive emergency based solely on the presence of acute renal failure and in all cases of hypertensive emergencies, the prime directive of "do no harm" would surely apply. Any attempt to lower blood pressure should have been done in a gradual and stepwise fashion, so as to avoid drastic reduction or relative hypotension. Dr. Corkern's orders for labetolol both in the magnitude of dosing, the dosage intervals and the lack of prudent monitoring of a patient with severe renal failure not only imply that the physician has turned over the management of the patient's blood pressure to the nurse but they indicate a wonton disregard for the potential for overtreatment. Specifically, a reasonable and prudent emergency physician would not write blanket protocol orders for a patient the same or similar to Ms. Moore. The administration of repeated dose intravenous labetolol

to a patient with a hypertensive emergency requires the personal presence and input of the emergency physician by patient re-examination and re-measuring of blood pressures usually obtaining blood pressures at frequent interval. The verification of blood pressure reading are required, often comparison of automatic and manually readins and the measurement of blood pressures in both arms. Particularly, in a patient in severe renal failure, a physician must know that large doses of medication are more likely to accumulate and even smaller doses of medicines with known drug interactions may be more likely to occur. The protocol written by Dr. Cockern is in excess of 300 mgs, which is the maximal recommended dose by the manufacturer. Not only did Dr. Cockern write an order for more than this dose, he should have been aware that more caution was required in the renal failure patient. Further, the addition of other medication, that is lasix, clonidine and amlodipine would be reasonably expected to cause delayed effects and the potential for subsequent hypotension or relative hypotension. The orders both in the emergency department and on hospitalization of Ms. Moore reflect a practice of over aggressive treatment of hypertension by Dr. Cockern that was inherently dangerous and below the applicable standards of care. Furthermore, the single administration of labetolol in amount of 1 mg/kg or more intravenously is known to be associated with the potential for hypotension. Thus, such dosing should never be left to nursing discretion. Such high dose labetolol therapy must only be ordered by the physician if it is clearly warranted and required by the patient clinical status. D. Cockern wrote successive orders for 80 and 160 mgs of labetolol without such reasonable basis, exposing Ms. Moore to the possibility of overtreatment. Additionally, he wrote orders for other intravenous and oral anti-hypertensive agents which would result in overtreatment. There is evidence of overtreatment in the emergency department. There is no evidence of adequate physician monitoring and medical decision making. There is no evidence of physician understanding of the potential for overtreatment in this patient both in the emergency department and on admission.

With respect to nursing, there are similar concerns. There is no evidence that the initial blood pressure obtained in triage was repeated and verified. There is evidence that the nurse exceeded the 10 minute dosing interval ordered by Dr. Cockern. There is evidence of an episode of severe relative hypotension in the emergency department. There is no evidence that this was reported by the nurse to Dr. Cockern. There is no evidence that the nurse or the physician considered the possible adverse effect of this drastic reduction of Ms. Moore's blood pressure; additional anti-hypertensive medications were subsequently given.

Rather than ordering large doses of labetalol exceeding the manufacturer's recommendation and several other anti-hypertensive medications, the usual and customary reduction of blood pressure in a renal failure patient is by intravenous drip if a severe on-going hypertensive emergency exists. This was not done. Such patients require admission to an intensive care unit. This was not done. The occurrence of a relative hypotensive episode, the existence of severe renal failure and an on-going hypertensive emergency were reasonably criteria for placement of Ms. Moore in the intensive care unit to be seen by an internist and a nephrologist. This

was not ordered.

A prudent emergency physician would consider the possibility of toxicity for all drugs given to a patient with a severely impaired creatinine clearance, such as Ms. Moore. Not only would there be concern that the labetolol may accumulate, but also the other medications prescribed by Dr. Corkern, amlodipine, clonidine and furosemide. Again, I find no evidence that Dr. Corkern made the diagnosis of renal failure, understood its implications for drug accumulation or elimination nor requested consultation from a nephrologist to assist Ms. Moore's pharmaceutical management and treatment of her severe hypertension and renal failure.

Finally, there is nothing to suggest that Dr. Corkern considered the possibility of drug interaction in the case of Ms. Moore. Both labetolol and clonidine have alpha antagonist effects. Both labetolol and amlodipine have potential negative inanotropic effect (slow the heart rate). Such aggressive reduction of blood pressure as ordered by Dr. Cockern with these medications in a patient with severely low creatinine clearance (minimal kidney function) should not have been ordered even such without a consultation by a nephrologist.

On the evening of 9/20/03, Evelyn Gwen Moore became hypotensive or relatively hypotensive and bradycardic. As indicated above, she had a precipitous fall in her blood pressure following the administration of intravenous labetolol in the emergency department; at 1615 on 9/20/03 "BP decreased to 100/80". The vital signs found in the medical records represent the effects of the negligent overtreatment of hypertension to a reasonable degree of medical certainty.

After review of the medical records and the response to interrogatories, I find no evidence that Dr. Michael Last was informed of the patient's hypotension and bradycardia on a timely basis. The records reflect hypotension, relative hypotension and persistent bradycardia of a degree that would result in cerebral hypoperfusion (reduced blood flow to brain tissue) in a patient the same or similar to Ms. Moore. Cerebral hypoperfusion was the proximate cause of Ms. Moore's neurological injury to a reasonable degree of medical certainty.

Ms. Moore did not present to the emergency department with a stroke syndrome. Her hypertension was likely chronic. In patients with chronic hypertension, the brain undergoes a process known as autoregulation. In this state, cerebral circulation is maintained when vascular resistance is reset to compensate for hypertension. Thus cerebral blood flow remains fairly constant in the presence of hypertension. In a sense, the brain is dependent or expects hypertension to maintain constant blood flow. If blood pressure is dramatically reduced, as it was in the case of Ms. Moore, cerebral blood flow drops and hypoperfusion may occur. The overtreatment of Ms. Moore's blood pressure by Dr. Corkern's or similar management of hypertension in patients with chronic hypertension thus places them at risk for ischemic stroke. This is what happened to Ms. Moore. The lack of appropriate reporting of the presence of abnormal vital signs after admission to Dr. Michael Last

by the nursing staff of Delta Regional Medical Center deprived her of the possibility of timely treatment.

At 0740 on 9/21/03, Ms. Moore was found to be "very hard to arouse. Will not speak. Only open eyes partially. Will groan when name called. V/S R 50 R 20 T 98.8". The note by Dr. Michael Last reveals an "A/P (assessment and plan) 1) Severe hypotension now c relative hypotension and mental status changes." It is my opinion that the aggressive treatment of Ms. Moore's blood pressure by Dr. Corkern was the cause of this relative hypotension and neurological event. I would agree with the note of Dr. Last here. Further, the relative and absolute hypotension that Ms. Moore experienced on 9/20-21/03 at Delta Regional Medical Center was consistent with the pathology found on MRI and University Hospital subsequently in my opinion.

At University Hospital, the neurology service comments that Ms. Moore suffered, "Bilateral watershed and left occipital infarcts – acute, possibly related to sudden lowering of BP at OSH." I agree with this determination.

In summary, the prescription and the subsequent lowering of blood pressure by Dr. Corkern and the nurses of Delta Regional Medical Center in the emergency department were unjustified, inappropriate, negligent and reckless. They fell below the applicable standards of acceptable medical practice. The lack of reporting of Ms. Moore's vital signs and possibly her neurological condition by the nurses on the floor to Dr. Last was also below the applicable standards of care. These actions and inactions of the responsible medical care providers was the proximate and substantial contributory cause of Ms. Moore's neurological event.

Plaintiff reserves the right to introduce the transcript of Dr. Sobel's deposition testimony in lieu of calling him live at trial. Plaintiff expects to request that Dr. Sobel remain in the courtroom during the presentation of Plaintiff's and Defendant's case, and therefore, Dr. Sobel's opinions may be modified by the evidence presented. Furthermore, Dr. Sobel may rebut any expert opinions offered by experts testifying on behalf of Defendant. All opinions of Dr. Sobel will be expressed in terms of reasonable medical probabilities and are based on his education, knowledge, training and experience. Plaintiff reserves the right to supplement the substance of which Dr. Sobel is expected to testified to as discovery develops.

2. Netra B. Cattenhead, CFNP
5015 Meadow Oaks Park
Jackson, Mississippi 39211
(601) 206-8017

The above-listed expert will provide testimony regarding the breach of the standard of care owed to Plaintiff by DRMC and its employees and agents, including, but not limited to its nursing staff.

Ms. Cattenhead is expected to testify that ordered dosage of normadyne exceeded the recommended dosage to be given to a patient with a condition similar to Plaintiff's on September 20, 2003, and this should have been noticed by the nursing staff and Emma White.

Ms. Cattenhead is further expected to testify that the DRMC nursing staff breached the standard of care when the normaydyne was administered in the order and frequency in which it was administered. Ms. Cattenhead is expected to testify as to various medication errors by the nursing staff, including, but not limited to, Carolyn White and Emma Ware.

Ms. Cattenhead is further expected to testify that DRMC breached the standard of care when the ER nursing staff reported to an LPN on the night on September 20, 2003. An RN was not on handling Plaintiff's treatment all night on this date. It is Ms. Cattenhead's opinion that an RN, as opposed to an LPN, should have been the nursing personnel responsible for an individual in Plaintiff's condition during the night of September 20, 2003, to early morning of September 21, 2003, as an LPN does not posses the education and training to understand the dynamics of fluctuating blood pressure that an RN possesses.

Ms. Cattenhead is further expected to testify that the DRMC nursing staff breached the standard of care when it failed to monitor Plaintiff's blood pressure on a more frequent basis.

Plaintiff reserves the right to introduce the transcript of Ms. Cattenhead's deposition testimony in lieu of calling her live at trial. Plaintiff expects to request that Ms. Cattenhead remain in the courtroom during the presentation of Plaintiff's and Defendant's case, and therefore, Ms. Cattenhead's opinions may be modified by the evidence presented. Furthermore, Ms. Cattenhead may rebut any expert opinions offered by experts testifying on behalf of Defendant. All opinions of Ms. Cattenhead will be expressed in terms of reasonable medical probabilities and are based on her education, knowledge, training and experience. Plaintiff reserves the right to supplement the substance of which Ms. Cattenhead is expected to testified to as discovery develops.

(CP-786-800). These are the "specific" which Moore provided to DRMC.

Although the testimony may not be to the advantage of DRMC, DRMC, nonetheless, had time to follow-up with these experts, as well as prepare a cross-examination; moreover, as noted in Moore's responses to DRMC's Motion to Strike and at the hearing, DRMC has previously *scheduled*

and paid for the deposition of Dr. Sobel,[9] and at the time the trial court granted DRMC's Motion to Strike and Motion for Summary Judgment, it had already deposed Ms. Cattenhead.[10] At the time the trial court struck Moore's experts, Moore had not even taken the deposition of DRMC's experts, but same was scheduled, and Moore would have had enough time to prepare for their testimony.[11] Judgment is not fair to Moore who has experienced serious injury due to alleged negligence of DRMC simply because there was a delay in getting DRMC the "full" information requested.

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; 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[12] 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.

As a pre-trial motion, surprise at trial could not be argued by DRMC. Moore had identified

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[9] Dr. Sobel's deposition was scheduled for the day after the November 13, 2008, hearing.

[10] As counsel for Moore advised the trial court at the hearing on November 13, 2007, Ms. Cattenhead's testimony at her deposition was consistent with the opinions that Moore stated Ms. Cattenhead was expected to express in the First Supplemental Designation of Expert Witnesses. (Tr.-52-53).

[11] As counsel for Moore stated at the hearing on November 13, 2007, counsel for DRMC had a particular order that he wanted the depositions to be scheduled, and in good-faith, counsel for Plaintiff agreed to same. (Tr.-62).

[12] *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).

and disclosed both expert witnesses before the discovery deadline and before the filing of DRMC's Motion to Strike.

The "full" disclosure of the expert witnesses was still within the discovery deadline. DRMC presumably had time to respond to a new witness just as it was deemed to be enough time to deal with any newly discovered evidence. Mississippi law requests trial courts to consider whether the opposing party actually complains of being disadvantaged. The Mississippi Supreme Court has stated that a significant factor when deciding to exclude an expert witness for untimely disclosure, is whether the opposing party had made a showing that their trial preparation was hampered by the timing of the disclosure. ***Denman v. Hardy***, 437 So. 2d 426 (Miss. 1983). DRMC's motion to exclude did not evidence any reasonable complaints that trial preparation was harmed by lacking time to meet the expert's testimony. In the present case, the expert witnesses' identities were known to DRMC in time to prepare for trial.

Again, as mentioned *supra*, "[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.***, 551 So. 2d at 903 (citations omitted)) (emphasis added). There is no evidence that Moore acted in bad faith regarding these expert opinions.

4. By Order of the Trial Court, there was a Previously Scheduled and Reserved ALTERNATE TRIAL DATE Six Months Away that this Case Could Have Easily Been Continued to.

In the case sub judice, shortly following the trial court denying DRMC's Motion to Dismiss With Prejudice, the parties were advised on or around April 12, 2007, by Linda Townsend, Judge Sanders' Court Administrator, that June 9, 2007, was available for a trial setting. Therefore, the

parties prepared an agreed order setting the matter for trial and forwarded same to the trial court for execution by Judge Sanders. (CP-528-29). On or around April 24, 2007, Ms. Townsend contacted the parties and advised them that Judge Sanders wanted the trial to be set in 2007 despite DRMC's answer only having been filed on April 12, 2007, and zero discovery having had time to be conducted. (CP-531-32). As a result of that conversation, DRMC filed a Motion for 2008 Trial Setting alleging that a 2007 trial setting was too early, as it was only approximately six (6) months until the December 3, 2007, trial setting. (CP-530-40). Still being advised by the trial court that the only dates that the trial court would accept would have to be in 2007, and in light of the Court mandate for a 2007 trial setting and the recent filing of DRMC's Answer and Defenses, counsel for Moore requested allowance from the trial court for an alternate trial date to be place in the Order of Continuance and Agreed Scheduling Order. (CP-548-49). 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 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, 232 days to prepare for the expert's testimony. (Tr.-51). If anyone was unduly prejudiced or treated unfairly, it was Moore, not DRMC, as Moore's case was disposed of by way of summary judgment. DRMC possibly had this planned the entire time, as it is suspicious that it never filed a motion to compel, but instead waited until close to the trial date to make its motion to strike and for summary judgment.

Interestingly, despite Judge Sanders 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 Judge Sanders acted like it was the first time she had seen the order to which she had signed. The following dialogue ensued at the hearing on DRMC's Motion to Strike:

> BY MR. KOBS: We also have an additional trial date, I believe, set for June.
>
> BY THE COURT: An additional trial date for June?
>
> BY MR. KOBS: Yes, ma'am. . . .
>
> BY THE COURT: That's not my practice to have two. We have two trial dates?
>
> BY MR. KOBS: Yes ma'am.
>
> * * *
>
> BY THE COURT: We've got this alternate date, and it's in the order, and that a problem in the way it is written. I remember that we had difficulty in setting the case and some real concern by the defense.
>
> * * *
>
> *I don't know how we got to putting in the order an alternate trial date.* Sometime we may have it, and we reserve the courtroom, and we are thinking about it, but this is my first time -- *maybe I wasn't -- I was asleep at the wheel or something.*
>
> BY MR. KOBS: Your Honor, if I may, just very briefly. My recollection of it was that when the order came down in April saying that Delta Regional's Motion to Dismiss was going to be denied --
>
> BY THE COURT: Say what now?
>
> BY MR. KOBS: Delta Regional Medical Center's Motion to Dismiss for, I guess, failure to attach the certificate of consultation, we took those motions up. The Court made a ruling on that in April. We all sat down -- Mr. Dare and I sat down and tried to agree on some dates as far as trial was concerned.
>
> I think what originally happened was in April we wanted to give ourselves enough time since this is what we were kind of all considering a complex medical malpractice action, and we didn't think we could get it done this year. We agreed to a June 9th date.

> I believe I spoke with Ms. Townsend before that order was actually entered. . . . Before that order was entered, Ms. Townsend contacted Mr. Dare and I and advised us that you wanted a 2007 setting. Mr. Dare was adamantly opposed to that, and I think Ms. Townsend came back to us again after Mr. Dare filed a motion for a 2008 setting. He didn't believe a December 3, 2007, setting was enough time. Ms. Townsend came back to us and said the Judge still wants a 2007 setting.
>
> I think we all agreed to the 2007 setting; but in that conversation, I mentioned . . . we are under a real small time frame because it was only about six of seven months [ago] that this case really started. [DRMC's] answer was not filed until April of 2007. It was like this case had just began, and discovery started and everything like that.
>
> So as an alternate, I asked . . . if we could do the 2007 setting and keep the one in June as an alternate one in case we weren't able to prepare in time and get everybody deposed and all of the discovery done by that time period. So we drafted the agreed order -- scheduling order to that effect.

(Tr. 19, 34-36) (emphases added).

Despite that the trial court seemed unaware of the alternate trial date, all the way up until the trial court granted DRMC's Motion to Strike and Motion for Summary Judgment, this remained an alternate trial date (only six months from the December 3, 2008 trial setting), which was not revoked or continued by the trial court. Moore filed a Motion to Continue (CP-1093-1113) to the June 9, 2008, trial setting on November 5, 2007, and advised the trial court that the Motion to Continue was filed if the trial court was inclined to grant DRMC's Motion to Strike;[13] the trial court was further advised that this would alleviate the prejudice complained of by DRMC by allowing, at the very least, 232 days to prepare to meet cross-examination of Moore's experts.

A continuance is ordinarily the proper method for dealing with an accusation of failure to disclose in a timely manner. According to Mississippi Rule of Civil Procedure 37(b)(2)(B), and the Mississippi Supreme Court, it has been held that exclusion is not mandatory, particularly when the

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[13] Counsel for Moore advised that trial court that Moore was prepared for trial on December 3, 2007, but was requesting a continuance to alleviate any prejudice to DRMC, despite Moore's belief that none existed. (Tr.-37).

trial court has the option to allow the defendant time to depose the plaintiff's expert.[14] ***TXG Intrastate Pipeline Co. v. Grossnickle***, 716 So. 2d 991 (Miss. 1997). "*Exclusion of evidence is a last resort*." ***Id.*** at 1013 (quoting ***McCollum***, 608 So. 2d at 694) (emphasis added). Here, no continuance was granted despite the Motion to Continue filed by Moore and the alternate trial date, and since disclosure of the "specifics" of Moore's expert witness, Defendant had forty-three (43) days to dispose these witnesses. The ***Grossnickle*** Court found that the fact that the party opposing admission of the testimony did not request a continuance was a significant factor in the decision to exclude expert testimony. ***Id.*** at 1013-14. Here, DRMC did not request a continuance, but instead sought to exclude the witness solely on the grounds of untimely disclosure. Moore never sought a continuance of trial.

Furthermore, there was already an alternate date set on the trial calendar for June 9, 2008, allowing for even more time for DRMC's counsel to prepare. *Had the trial court simply continued the trial to the **alternate date that was previously reserved and set by order** of the trial court, any prejudice whatsoever would have easily been avoided*!

This Court considers exclusion for untimely disclosures to be a very severe sanction. As stated *supra*, and in several other cases, the Mississippi Supreme Court and Court of Appeals have held that exclusion of an expert witness for untimely disclosure was too harsh of a sanction without first exploring other possibilities. *See also* ***Lumpkin***, 725 So. 2d 991. In the case sub judice, that harshness is exacerbated because it led to summary judgment against Moore's entire cause of action. Exclusion of a witness for a discovery violation is a sanction of last resort. ***Brennan v. Webb***, 729 So. 2d 244, 247 (Miss. Ct. App. 1998).

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[14] In the case sub judice, additional time to depose Dr. Sobel is not an issue, as his deposition was scheduled to begin the day after the November 13, 2007 hearing (CP-761-62), and Ms. Cattenhead's deposition had already been taken (CP-772-74).

In ***Brennan***, the Mississippi Court of Appeals held that the exclusion of an expert witness was an abuse of discretion when other sanctions were available such as continuation or giving the opposing part an opportunity to interview the witness. ***Id.*** In the present case, Moore was not granted a continuance despite having requested same. (CP-1093-1113). Further, even after Moore filed her Second Supplemental Designation of Expert Witnesses (and DRMC finally appeared to be satisfied), within forty-three (43) days before trial, Moore's experts were available for the DRMC to depose. In fact, after the November 1, 2007, hearing on DRMC's Motion for Summary Judgment, and prior to the trial court granting DRMC's Motion to Strike at the November 13, 2007 hearing, Ms. Cattenhead was deposed; Dr. Sobel's deposition was scheduled to take place on November 14, 2008, but was cancelled due to the trial court's ruling the previous day.

Since DRMC failed to seek a continuance to prepare for Moore's expert witnesses' testimony, it has waived its argument of unfair prejudice. ***Nichols v. Tubb***, 609 So. 2d 377, 386-87 (Miss. 1992); *see* ***Motorola Communications & Elecs., Inc. v. Wilkerson***, 555 So. 2d 713, 718 (Miss. 1989).

There would have been no harm or prejudice to either of the parties in continuing this trial until the previously scheduled and reserved alternate trial date on June 7, 2008. *See* ***Townsend***, 961 So. 2d 741 ("[W]e see no harm or prejudice that could have resulted from the trial court's continuing the trial.").

B. Opinions of Experts Outside the Rule 26(b) Disclosures that Were at Least Provided Forty-Three (43) Days Before the Trial Date.

In the event that Moore's experts were to testify at deposition or trial to some matters outside of what was provided in Moore's Second Supplemental Designation of Expert Witnesses, it may have been appropriate for the trial court to limit and/or strike that portion of the expert's testimony, as it was not disclosed pursuant to Rule 26(b)(4). In fact, the trial court considered this option at the

November 1, 2007 hearing, (Tr.-18-20), but despite the trial court ordering the depositions to go forward to determine what Moore's experts had to opine to and determine whether same had been disclosed, the trial court instead chose to strike the experts altogether.

As counsel for Moore was happy to report to the trial court at the November 13, 2007, hearing, Ms. Cattenhead did not testify outside the scope of what Moore stated in the expert designation. (Tr.-52-53). The same could have been done with Dr. Sobel's deposition testimony.

C. Other Deadlines Were Relaxed By the Parties Without Resorting to the Trial Court.

Because the parties realized the short amount of time (approximately six months) they had to prepare this matter for trial, other deadline, including, but not limited to, discovery, were relaxed. (Tr. 61-64). More specifically, as noted by counsel for Moore at the hearing on November 13, 2008, counsel for DRMC wanted to do the depositions of the parties and witnesses in a particular order. (Tr. 62). In fact, Sr. Sobel's deposition was scheduled by DRMC to occur five days following the expiration of the discovery deadline (CP-761-62), but as noted above, the parties were attempting to get this case in a position to go to trial within a short amount of time, and counsel for Moore did not believe it would be necessary to involve the trial court in granting an extension to conduct discovery. Apparently, as no motion for extension of time to complete discovery was filed by DRMC, it, too, must have believed there was no need to get the Court involved. Also, since counsel for DRMC wanted to take the deposition of Moore's depositions prior to the taking of DRMC's experts,[15] Plaintiff scheduled the depositions of its experts for November 19, 2007 and November 26, 2007 (CP-752-56), which is only days before trial; despite this, counsel for Moore believed he

[15] Interestingly, DRMC's designation of experts does not list Rita T. Wray, R.N., as an expert, and although it lists William O. Stoddard, M.D., the summary of opinions is comparable to Moore's Designation of Expert Witnesses. (CP-568–70). DRMC completely failed to designate Rita T. Wray, R.N.

would have time to prepare to meet their testimony at trial.

The Mississippi Supreme Court has stated numerous times that there is no "hard and fast rule" as to what amounts to seasonal supplementation and has not stated that any expert not "fully" designated prior to the designation deadline must be stricken, ***Eastover Bank for Sav. v. Hall***, 587 So. 2d 266, 272 (Miss. 1991), but that the overall purpose of the procedural rule is to focus on the "necessity to avoid surprise at trial." ***Foster v. Noel***, 715 So. 2d 174, 182-83 (Miss. 1998). Here, it is clear that Moore had no intention of trial by ambush, as Dr. Sobel was designate by the expert designation deadline, which was 102 days prior to trial, and Ms. Cattenhead was designated 83 days before trial.

Given that (i) Moore did not deliberately withhold the experts' expected testimony or act in bad faith in this regard; (ii) Moore was severely prejudiced by the trial court striking her experts' testimony making summary judgment for DRMC ripe; (iii) DRMC can show no prejudice in any amount similar to the prejudice that Moore suffered; (iv) the identity and opinions of Dr. Sobel were disclosed to DRMC by the expert designation deadline and the identity opinions of Ms. Cattenhead were disclosed to DRMC 83 days prior to trial; (v) the "specifics" of Dr. Sobel's opinions were disclosed at least forty-three (43) days prior to the trial of this matter, and DRMC had ample time to prepare for Moore's experts' testimony; and (vi) that the trial court could have very easily continued this matter to the previously scheduled and reserved alternate trial date six (6) months away in order to alleviate any prejudice DRMC alleged to be faced with; it is very clear that the trial court abused its discretion in striking Moore's experts' testimony and granting summary judgment to DRMC. Simply stated, the trial court did not explore every alternative means of eliminating the alleged prejudice to DRMC. *See* ***Mariner Health Care, Inc.***, 964 So. 2d at 1152.

D. Summary Judgment was Inappropriately Granted.

The Mississippi Supreme Court has found it too harsh of a sanction to enter a ruling of

summary judgment as penalty for untimely discovery. There are too many other viable sanctions in the power of the court for such an unintentional violation. *See* Miss. R. Civ. Proc. 37. Unless there is clear evidence of deliberate delay for the purpose of harming the opposition, the court should make use every option available to cure the harm to the opposition before entering judgment against the party in delay.

Moore admits that without the expert testimony, there would be no purpose to go on with trial and; therefore, judgment for DRMC would have been appropriate; however, in the present case, Moore was all the while supplementing her expert disclosures when that information became available. The case passed hands within the firm and there was a delay in closing that gap, but there is by no means any intentional delay on the part of Moore's counsel. Had the goal of Moore been trial by ambush, the full expert information received forty-three days (43) before trial would have been given to DRMC much, much closer to trial, not at least six (6) weeks in advance-adequate time to prepare for these experts.

Furthermore, there would have been no conflict with the court as there was already an alternate trial date set the trial calendar set for the upcoming June 2009, which would have given DRMC 232 additional days to prepare.

It appears as though the trial court is simply trying to use this as an opportunity to use this situation to set an example for future attorneys. The problem, however, is that this is not the right situation to use for such an example as there was nothing done intentionally on the part of Moore or her counsel and as a result, an innocent parties will suffer because the judge wants to prove a point. With all respect for that choice, this is not the right case for that example. The facts just are not there to establish any intentional delay, intent to ambush, or purposeful harassment to opposing counsel.

III. THE TRIAL COURT ERRED IN FAILING TO GRANT A CONTINUANCE TO THE ALTERNATE TRIAL DATE ORDERED BY THE TRIAL COURT ITSELF.

As discussed in more detail *supra* (II.(A)(4)), Moore filed a Motion to Continue to the

Alternate Trial Date of June 9, 2008, which was set and reserved by the trial court by the Order of Continuance and Agreed Scheduling Order. (CP-548-49). Moore filed this motion to continue to eliminate any prejudice DRMC may be faced with, but the trial court failed to grant Moore's motion. DRMC did not show any prejudice that it would be burdened with had this Motion been granted by the Court. In light of the foregoing discussions, it is clear that the trial court judge abused her discretion.

Interestingly, the trial court even realized the substantial prejudice that would be cause to Moore if her experts were stricken:

BY THE COURT: If you strike his experts, I think that's harsh.

BY MR. WINTER: That's correct.

BY THE COURT: I think that's dispositive.

BY MR. WINTER: It will be.

BY THE COURT: Sounds harsh to me, but let's hear it.

(Tr. 30). Still the trial court struck Moore's experts. Failure to continue this matter to the alternate trial date that was already previously set by order of the trial court was an abuse of discretion.

CONCLUSION

The trial court should have allowed Moore to proceed with the experts she, as DRMC was unable to show any meaningful prejudice. DRMC would not have been surprised regarding the expert opinion, and it had adequate time to depose the experts and to prepare. In the alternative, the trial court should have granted a continuation substituting the alternate trial date already set by the court rather than ruling so harshly as to exclude the evidence. Summary Judgment against the Moore was too harsh and undeserved as the delay on behalf of Moore was clearly not done intentionally nor to ambush DRMC at trial.

Moore designated her experts seasonably as soon as she received the "specific" information,

despite that she provided a summary to DRMC. At the very least, DRMC knew exactly what Moore's experts were expected to testify to at least forty-three (43) days prior to the trial, and this can hardly be said to be on the "eve of trial." In ***Warren v. Sandoz Pharm. Corp.***, 783 So. 2d 735 (Miss. Ct. App. 2000), the Court of Appeals 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. Here, Plaintiff's experts were at least designated.

The prejudice Moore has suffered was highly prejudicial, and deprived her of her day in Court.

In ***Mariner Health Care, Inc.***, 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***."

Id. at 1152 (Miss. 2007) (quoting ***McCollum at*** 694) (emphasis added). Clearly, the trial court did not explore every reasonable alternative means before striking Moore's experts witnesses and granting summary judgment to DRMC, as there was an alternate trial date only six (6) months away in the event that the parties were unable to work the case up within the short amount of time between the filing of DRMC's answer on April 12, 2007 and the original trial date of December 3, 2007. Complete failure to explore this alternate means, is an abuse of discretion by the trial court judge.

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 27th day of August, 2008.

EVELYN GWEN MOORE

BY: _____

JARED A. KOBS, MS [redacted]

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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:

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THIS, the 27th day of August, 2008.

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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:

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Honorable Betty W. Sanders, Trial Court Judge
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