IN THE SUPREME COURT OF MISSISSIPPI

KENNETH JOHNSON — PLAINTIFF-APPELLANT

VS. — NO.2008-CA-00373

JOHN PAUL LEE, M.D.,
MEDCO HEALTH SOLUTIONS OF DUBLIN,
DAIICHI SANKYO, INC., AND
FORREST LABORATORIES, INC. — DEFENDANTS-APPELLEES

APPEAL FROM THE CIRCUIT COURT
OF SCOTT COUNTY, MISSISSIPPI

BRIEF OF APPELLEE
JOHN PAUL LEE, M.D.

James A. Becker, MSB #[redacted]
Mildred M. Morris, MSB #[redacted]
Timothy L. Sensing, MSB #[redacted]
WATKINS & EAGER, PLLC
400 East Capitol Street, Suite 300
Post Office Box 650
Jackson, MS 39205
Telephone: (601)965-1900
Facsimile: 601965-1901

ATTORNEYS FOR APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These presentations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Kenneth Johnson	Plaintiff/Appellant
John Paul Lee, M.D.	Defendant/Appellee
Medco Health Solutions, Inc.	Defendant/Appellee
Mark D. Morrison	Attorney of Record for Plaintiff/Appellant
James A. Becker	Counsel of Record for Defendant/Appellee John Paul Lee, M.D.
Mildred M. Morris	Counsel of Record for Defendant/Appellee John Paul Lee, M.D.
Timothy L. Sensing	Counsel of Record for Defendant/Appellee John Paul Lee, M.D.
Joseph G. Baladi	Counsel of Record for Defendant/Appellee Medco Health Solutions, Inc.
J. Collins Wohner	Counsel of Record for Defendant/Appellee Medco Health Solutions, Inc.
Judge Marcus D. Gordon	Scott County Circuit Court Judge

Respectfully submitted this the 1 day of December, 2008.

Timothy L. Sensing

TIMOTHY L. SENSING

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STATEMENT OF ISSUES

I. **WHETHER THE TRIAL COURT ERRED IN GRANTING DR. LEE'S MOTION FOR SUMMARY JUDGMENT FOR PLAINTIFF'S FAILURE TO TIMELY DESIGNATE AN EXPERT AS REQUIRED BY U.C.C.C.R. 4.04;**

II. **WHETHER THE TRIAL COURT ERRED IN GRANTING DR. LEE'S MOTION FOR SUMMARY JUDGMENT FOR PLAINTIFF'S FAILURE TO CREATE A GENUINE ISSUE OF FACT PURSUANT TO RULE 56 BY NOT COMING FORTH WITH AN AFFIDAVIT OF AN EXPERT STATING THAT DR. LEE BREACHED THE STANDARD OF CARE.**

III. **WHETHER THE TRIAL COURT ERRED IN NOT GRANTING RELIEF TO JOHNSON PURSUANT TO RULE 56(f).**

STATEMENT OF THE CASE

1. Nature of the Case

This is a medical malpractice case where the Kenneth Johnson, Plaintiff below/Appellant (hereinafter "Johnson"), alleges his one-car accident was caused by a fainting spell which was the result of the effects of Benicar, a drug which was prescribed by defendant, Dr. John Paul Lee (hereinafter "Dr. Lee"), and manufactured or distributed by the other defendants.

Johnson alleges he incurred severe injuries and damages of $50,000. Vol. 1, p. 5 ¶9. The trial court granted summary judgment to Dr. Lee for Johnson's failure to timely designate an expert as required by U.C.C.C.R. 4.04 and for failure to create a question of fact by not providing an expert affidavit stating that the standard of care had been breached. Johnson appeals from the Order Granting Defendant Dr. Lee's Motion for Summary Judgment. Vol. 1, p. 93.

2. Course of the Proceedings

Johnson filed the Complaint on July 3, 2007, naming as defendants Dr. Lee and Medco Health Solutions of Dublin (hereinafter "Medco"). Allegations were also made against defendants Dauchi Sankyo, Inc. and Forest Laboratories, Inc. Vol. 1, p. 6, ¶12. Because this brief is in regard only to defendant Dr. Lee, proceedings and facts as to the other defendants will be included only as they affect Dr. Lee's case.

Dr. Lee filed his Answer and propounded discovery to Johnson on August 24, 2007. Vol. 1, p. 1. Johnson filed responses to Dr. Lee's discovery on September 24, 2007. Supp. Vol., p. 26. Dr. Lee filed his designation of expert witnesses on December 10, 2007 and filed his Motion for Summary Judgment on December 20, 2007. Vol. 1, pp. 1, 29; R.E. Tab 3.

On January 3, 2008, Dr. Lee filed an expert affidavit of Dr. Thais Tonore. Vol. 1, p. 1; R.E. Tab 4. Johnson filed his Response in Opposition to Dr. Lee's Motion for Summary Judgment on January 7, 2008, which did not have attached thereto an affidavit of an expert stating that Dr. Lee had breached the standard of care. Vol. 1, p. 53. Dr. Lee filed a Rebuttal to Plaintiff's Response in Opposition to Dr. Lee's Motion for Summary Judgment. Vol. 1, pp. 1, 68. Dr. Lee filed an Amended Rebuttal to Plaintiff's Response in Opposition to Dr. Lee's Motion for Summary Judgment on January 9, 2008. Supp. Vol., p. 68.

Johnson filed Rule 56(f) Affidavit of Kenneth Johnson on January 14, 2008. Vol. 1, p. 89.

Johnson filed Supplemental Discovery Responses on January 29, 2008. Vol. 1, p. 91; Supp. Vol., pp. 42-44. Dr. Lee filed Motion to Strike Plaintiff's Supplemental Discovery Responses and Plaintiff's Designation of Expert on February 1, 2008. Supp. Vol., p. 89.

On February 4, 2008, the Court filed its Order Granting Dr. Lee's Motion for Summary Judgment and Medco's Motion to Dismiss. Vol. 1, pp. 93, 95. The remaining defendants, Daiichi Sankyo, Inc., and Forest Laboratories, Inc., were subsequently dismissed with prejudice on March 13, 2008, by Agreed Order of Dismissal. Vol. 1, p. 2.

On February 8, 2008, Johnson filed a Motion for Reconsideration, to which Dr. Lee responded on February 14, 2008. Vol. 1, p. 97; Vol. 2, p. 126.

Johnson filed a Notice of Appeal on February 29, 2008, and perfected this appeal. Vol. 2, p. 235. On March 6, 2008, a hearing was held before the trial court on Johnson's Motion for Reconsideration. Supp. Vol., p. 14. However, the trial court determined it no longer had jurisdiction in the matter because Notice of Appeal had been filed and jurisdiction had been transferred to the Supreme Court. Supp. Vol., pp. 18-19.

3. Statement of the Facts

Johnson alleges that on July 5, 2005, Dr. Lee changed the medication that had been prescribed to control his high blood pressure from Avalide to Benicar due to cost considerations. Vol. 1, pp. 4-5, ¶ 7. Johnson further alleges that shortly after beginning his treatment on Benicar that he experienced fainting episodes and that on July 24, 2005, he was involved in a one-car accident which was caused by his having fainted while driving under the effects of Benicar. Vol. 1, p. 5, ¶¶ 8-9.

Because the issue in this case is whether summary judgment was erroneously granted, the pertinent facts are centered on pre-trial proceedings and the timeliness of the filing of discovery responses and other pleadings. The most significant facts in this regard are:

1. Johnson filed Complaint on July 3, 2007. Vol. 1, p. 3.

2. Dr. Lee answered the Complaint on August 22, 2007, and propounded discovery to Johnson.

3. Johnson responded to Dr. Lee's discovery on September 21, 2007, but did not name an expert witness. Vol. 1., pp. 76-77, 86.

4. On November 14, 2007, the trial court scheduled trial for February 6, 2008. Vol. 1, p. 1; Supp. Vol. 1, p. 16 (hearing transcript).

5. Dr. Lee filed his designation of expert witness on December 10, 2007. Vol. 1, p. 1; R.E. Tab 3.

6. Johnson propounded discovery on Dr. Lee on December 18, 2007, which was after the 60-day deadline prior to the trial date for designating experts required by Uniform Circuit and County Court Rule 4.04. Supp. Vol., p. 69.

7. On December 20, 2007, Dr. Lee filed his Motion for Summary Judgment for Johnson's failure to designate an expert. Vol. 1, p. 29.

8. On January 7, 2008, Johnson filed a Response to Motion for Summary Judgment, which did not have attached an expert affidavit. Vol. 1, p. 53.

9. Johnson designated an expert on January 29, 2008, just 8 days prior to trial. Vol., p. 44.

10. Dr. Lee was granted summary judgment on February 4, 2008. Vol. 1, p. 93.

Other relevant facts will be included as necessary in the discussion of the issues.

SUMMARY OF THE ARGUMENT

Johnson's argument is essentially that the trial court abused its discretion in granting Dr. Lee's Motion for Summary Judgment because litigation had been pending a "mere seven (7) months." Brief of Appellant, p. 5. Johnson argues that when the trial court set the trial date he was left with only a few weeks for designating an expert in order to be in compliance with the 60-day deadline for expert designation required by the Uniform Circuit and County Court Rule 4.04.

Dr. Lee argues that Johnson never provided any legitimate reason for his failure to timely designate an expert witness as required by Rule 4.04. In addition, he asserts that the trial court's Order Granting Summary Judgment for Dr. Lee should be affirmed because Johnson did not timely designate an expert and because he failed to submit an expert's affidavit stating that Dr. Lee breached the standard of care as required in a medical malpractice case.

Standard of Review

An appeal from summary judgment is reviewed *de novo*. *Cossitt v. Alfa Ins. Corp.* 726 So.2d 132, 136 (¶ 19) (Miss.1998). A motion for summary judgment will be granted only where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Brown v. Credit Ctr., Inc.*, 444 So.2d 358, 362 (Miss.1983); Miss. R. Civ. P. 56. However, discovery is left to the sound discretion of the trial court. A trial court's ruling regarding discovery may be reversed on review only if there has been an abuse of discretion. *Harkins v. Paschall*, 348 So. 2d 1019, 1022 (Miss. 1977).

ARGUMENT

A Preliminary Matter

The issues in the case are centered on whether the trial court erred in granting summary judgment to Dr. Lee pursuant to Rule 56(b) of the Mississippi Rules of Civil Procedure, not whether the trial court erred in dismissing Dr. Lee pursuant to a Rule 12(b)(6) motion, as argued in Brief of Appellant. Vol. 1, p. 93. Thus, Johnson's reliance on *Beck v. Sapet*, 937 So.2d 945 (Miss. 2006), and every other case cited in his argument regarding Dr. Lee, is misplaced and is irrelevant to this case, as Dr. Lee was granted summary judgment, not a dismissal on a motion to dismiss as Johnson repeatedly argues, and cases cited and relied upon in Brief of Appellant are cases construing an appellate court's review of a trial court's motion to dismiss. Brief of Appellant, pp. 4-6. Brief of Appellant presents no argument or authority which addresses the law for reviewing whether summary judgment was erroneously granted.

Dr. Lee will therefore not address the arguments presented in Brief of Appellant in regard to a motion to dismiss, but will set forth the law to show that the trial court was correct in granting summary judgment to Dr. Lee for Johnson's failure to timely designate an expert and his failure to produce an expert affidavit.

I. WHETHER THE TRIAL COURT ERRED IN GRANTING DR. LEE'S MOTION FOR SUMMARY JUDGMENT FOR PLAINTIFF'S FAILURE TO TIMELY DESIGNATE AN EXPERT AS REQUIRED BY U.C.C.C.R. 4.04.

Rule 4.04 of the Uniform Rules of Circuit and County Court states in pertinent part that "[a]bsent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty (60) days before trial." U.C.C.C.R. 4.04. The trial of this matter was set by the trial court for February 6, 2008. Therefore,

Johnson had until December 10, 2007 to designate any potential expert witnesses that would testify at trial.

The law in Mississippi is clear that, under Rule 4.04, "it is error for an expert witness to testify when he was not properly designated as an expert, and the opposing side had asked for this information in discovery." *Miss. Dept. of Wildlife, Fisheries & Parks v. Brannon*, 943 So. 2d 53, 61 (Miss. Ct. App. 2006) (citing *City of Jackson v. Perry*, 764 So. 2d 373, 384 (Miss. 2000)). Johnson failed to properly designate an expert under Rule 4.04. Further, in his First Set of Interrogatories, Dr. Lee asked Johnson to identify each person he expected to call as an expert witness for the trial. Vol. 1, pp. 76-77. Johnson responded that his expert witness has yet to be determined. Rule 4.04 requires a plaintiff to definitively state the name of the expert who will testify. Dr. Lee requested the name of Johnson's expert witness and he failed to designate an expert witness sixty (60) days prior to trial. Therefore, under Rule 4.04 and *Brannon*, Johnson was barred from calling an expert witness at the trial of this matter.

Johnson also asserts that summary judgment was granted a mere seven months from the time the Complaint was filed and that the trial date was premature given the incomplete nature of discovery. Brief of Appellant, p. 5. Notably, Johnson cites no case, statute, rule, or treatise in support of the notion that an action should be pending longer than seven months before summary judgment can be granted or supporting that the trail date was prematurely set.

Mississippi law[1] is replete with cases in which courts have held that seven months is ample time to conduct discovery. For example, the Mississippi Court of Appeals recently held that four months is sufficient time for a party to avail himself of the discovery process. *Journeay v. Berry*,

[1] Federal courts have held similarly. For example, the Fifth Circuit, held that failure to engage in discovery for six months bars a continuance under Rule 56(f). *Aviation Specialties, Inc. v. United Tech, Corp.*, 568 F. 2d 1186, 1189 (5th Cir. 1978).

953 So. 2d 1145, 1160 (¶ 49) (Miss. Ct. App. 2007). In *Journeay*, the trial court granted the plaintiff's cross motion for summary judgment approximately four months after the plaintiff filed his complaint. *Id.* On appeal, the defendants argued that the trial court abused its discretion by not granting the defendants Rule 56(f) motion. *Id.* The *Journeay* court found that the defendants did not file any discovery requests or deposition notices during the litigation. *Id.* The court held that "we find that sufficient time passed [four months] in which neither [defendant] attempted to avail themselves of the discovery process." *Id.*

In a similar holding, the Mississippi Court of Appeals determined that three months was sufficient time for the discovery process. *Hobgood v. Koch Pipeline S.E., Inc.*, 769 So. 2d 838, 845 Miss. Ct. App. 2000). In *Hobgood*, the plaintiff filed a motion for summary judgment approximately three months after filing the complaint. In affirming the trial court's order granting summary judgment to the plaintiff, the *Hobgood* court pointed out that the defendant "propounded no discovery during the three months between the filing of the complaint and the hearing on summary judgment." *Id. Hobgood* further emphasized that the defendant "never sought any discovery, not after filing his answer nor after being served with the summary judgment motion." *Id.*

The holdings of *Journeay* and *Hobgood* are very helpful in evaluating the merits of Johnson's contention that the trial setting was premature since the discovery process, or lack thereof, had been ongoing for only seven months. *Journeay* and *Hobgood* held that four and three months (respectively) is sufficient time for a party to avail himself of the discovery process. In each case, the court found that the aggrieved parties failed to fully take advantage of the opportunity to conduct discovery. Such is the case in the present action.

Johnson did not propound discovery to Dr. Lee until December 18, 2007, eight days after the deadline for designating experts under Rule 4.04. *Journeay* and *Hobgood* essentially state that a party who does not engage in discovery is estopped from complaining that the discovery period is insufficient in length. For all practical purposes, Johnson did not avail himself of the discovery process and he should not be heard to complain that the discovery period was too short.

Dr. Lee was able to timely designate his experts in compliance with the court's order which subjected him to the same scheduling as Johnson. Vol. 1, p. 1; R.E. Tab 3. Additionally, Johnson asserts that he was not able to designate an expert because discovery was necessary to frame the issues but he did not explain what information he needed from Dr. Lee before he could secure an expert. Brief of Appellant, p. 6. Since Johnson had access to his medical records and all other pertinent information, it is difficult to imagine what additional information he needed that he could obtain only through discovery before he could designate an expert witness.

Johnson's failure to timely designate an expert witness is perplexing in light of his Supplemental Discovery Responses, where he responds that his expert witness was consulted before filing this lawsuit as well as during the course of this litigation and remained of the opinion that Dr. Lee breached the standard of care. Supp. Vol., pp. 46-47. With such frequent consultation, it was entirely possible for Johnson to have formally designated his expert within the Rule 4.04 deadline.

In addition, Johnson relies on *Brennan v. Webb*, 729 So. 2d 244 (Miss. App. 1998) to support that a continuance would have been most appropriate under the circumstances and that dismissal is a sanction of last resort. Brief of Appellant , p. 7. However, there is a fundamental difference between the facts in *Brennan* and the facts of the present case, as Rule 4.04 did not become effective until nineteen months after *Brennan* was filed. *Brennan v. Webb*, 729 So. 2d at 246. Although Rule

4.04 became effective during the course of the *Brennan* litigation, the court's decision, at least in part, was that it would be unfair to penalize the plaintiff for failure to follow a rule that was not in place when the litigation began. *Id.* at 247. The court stated that the plaintiff was unduly prejudiced, in part, because "the rules of discovery changed dramatically during the course of this action." *Id.*

Such is not the case in the present action. Rule 4.04 became effective on May 1, 1995. Plaintiff filed his Complaint in July of 2007. Therefore, the element of prejudice in *Brennan*, constituted by the date upon which Rule 4.04 became effective, is not present in this case. Consequently, the holding of *Brennan* simply is not analogous to the Court's decision to grant summary judgment to Dr. Lee.

In summary, Johnson did not show any "special circumstances" or assert any legitimate justification for his failure to designate an expert witness sixty (60) days prior to trial as required by Rule 4.04. After filing this lawsuit in July of 2007, he sat idly and, until the trial court issued its Order setting the case for trial, did not take any action to move the case forward. Johnson did not comply with Rule 4.04 and, consequently, could not submit expert testimony at trial. Therefore, Dr. Lee was entitled to summary judgment.

II. WHETHER THE TRIAL COURT ERRED IN GRANTING DR. LEE'S MOTION FOR SUMMARY JUDGMENT FOR PLAINTIFF'S FAILURE TO CREATE A GENUINE ISSUE OF FACT PURSUANT TO RULE 56 BY NOT COMING FORTH WITH AN AFFIDAVIT OF AN EXPERT STATING THAT DR. LEE BREACHED THE STANDARD OF CARE.

A basic premise of medical malpractice actions is that "the negligence of a physician may be established only by expert medical testimony." *Walker v. Skiwski*, 529 So. 2d 184, 187 (Miss. 1988). In fact, Mississippi law "demands that in a medical malpractice action, negligence cannot

be established without medical testimony that the defendant failed to use ordinary skill and care." *Palmer v. Biloxi Regl. Med. Ctr., Inc.*, 564 So. 2d 1346, 1355 (Miss. 1990).

The aforementioned case law makes it clear that a plaintiff cannot present his case to the jury without expert testimony. As stated above, Johnson is procedurally barred from submitting expert testimony in the present case. As a matter of law, this bar effectively extinguishes his case.

As a threshold matter, it is important to note that Johnson did not file an affidavit with his Response in Opposition to Dr. Lee's Motion for Summary Judgment. Vol. 1, p. 53. Mississippi law is clear that, with regard to summary judgment, the burden is on the moving party to show that a genuine issue of material fact does not exist. *Thomas v. Greenwood Leflore Hospital*, No. 2006-CA-00377-COA (Miss. Ct. App. Dec. 11, 2007). Accordingly, Dr. Lee submitted the sworn affidavit of Thais Tonore, M.D. which stated that Dr. Lee's treatment of Johnson was within the applicable standard of care. Vol. 1, p. 1; R.E. Tab 4.

The law in Mississippi is clear that a party must be diligent in opposition to a motion for summary judgment and may not rely upon the mere unsworn allegations in his pleadings to create an issue of fact. *Id.* Specifically, the non-moving party may not create an issue of genuine fact through briefs and argument alone. *Id.* In fact, the Mississippi Supreme Court stated that the parties bear the same burden of production at the summary judgment phase as they would at trial. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 600 (Miss. 1993). The *Daniels* court stated that "the non-movant, provided they would bear the burden of proof at trial on the issue in question, is responsible for producing supportive evidence of ***significant*** and ***probative*** value in opposition to the motion for summary judgment." *Id.* (emphasis in original).

Mississippi courts are unrelenting in enforcing the mandate that sworn testimony is a prerequisite to successfully oppose a motion for summary judgment. *Busby v. Mazzeo*, 929 So. 2d 369, 372 (Miss. Ct. App. 2006). In emphasizing the necessity of sworn testimony, the *Busby* court refuted the plaintiff's claims that a letter from his medical expert was sufficient to satisfy his burden in opposing summary judgment. *Id.* *Busby* stated that "the law is clear that [plaintiff] must support her claims by facts sworn to on personal knowledge in depositions, answers to interrogatories or affidavits...." *Id.* Specifically with regard to medical malpractice actions, the *Busby* court stated that in order to establish a prima facie case, a plaintiff "must establish that the defendants were negligent through medial testimony that shows they failed to use ordinary skill and care." *Id.*

In another medical malpractice action with a similar issue, the Mississippi Court of Appeals affirmed summary judgment for the defendant doctor after the plaintiff failed to provide sworn expert testimony. *Griffin v. Pinson*, 952 So. 2d 963, 967 (Miss. Ct. App. 2006). In *Griffin*, the defendant doctor filed a summary judgment motion four months after the plaintiff initially filed the complaint because the plaintiff did not supply any sworn expert testimony alleging a violation of the standard of care. *Id.* at 964. The plaintiff responded to the motion by filing supplemental interrogatory responses that identified her expert witness and the expert opinion. *Id.* The defendant doctor filed a motion to strike the expert opinion since it was not accompanied by a sworn affidavit. *Id.* In upholding the trial court's grant of summary judgment, the court reiterated that the plaintiff neglected to provide the affidavit of a medical expert to support her medical malpractice claim, and that she failed to comply with the Mississippi Rules of Civil Procedure. The court also stated that plaintiff had more than adequate time to submit the affidavit of a medical expert." *Id.* at 967.

In a recent medical malpractice case very similar to one at hand, the Mississippi Court of Appeals refused to entertain a plaintiff's underlying arguments against the defendant's motion for summary judgment because the plaintiff failed to adequately oppose the motion with sworn testimony. *Potter v. Hopper*, 907 So. 2d 376, 379 (Miss. Ct. App. 2005). In *Potter*, the trial court granted the defendant's motion for summary judgment after the plaintiff was one week late in designating his expert witness. *Id.* 378. The plaintiff appealed the trial court's ruling and argued that the defendant doctor was not prejudiced by the late designation, the defendant doctor had notice of the opinion of the plaintiff's expert, the defendant doctor did not file a motion to compel the designation, and dismissal was harsh and unwarranted. *Id.* at 378. These are many of the same arguments Johnson has made.

In outlining the burdens of the parties in a summary judgment motion, the *Potter* court emphasized that the non-moving party must provide affidavits or set forth specific facts that demonstrate genuine issues for trial. *Id.* The *Potter* court found that the plaintiff filed only a letter from his expert. *Id.* at 380. The court stated that a letter clearly was not an affidavit and upheld the trial court's grant of summary judgment in favor of the defendant doctor. *Id.* The court stated that "Potter did not present an expert's affidavit that complied with the requirements in a medical malpractice case. No affidavit articulated the duty of care that Dr. Hopper owed Potter. No affidavit identified the point that Dr. Hopper breached a duty to Potter or how such a breach caused Potter's injury." *Id. Potter* stated:

> Our reasoning stems not from the fact that Potter failed to file his expert's designation one week late. We affirm because Potter failed to respond to Dr. Hopper's motion for summary judgment with an affidavit, submitted by an expert, that established the standard of acceptable professional practice, that Dr. Hopper deviated from that standard, that such deviation was the proximate cause of Potter's injuries, and that Potter suffered damages as a result."

Id.

The factual similarities between *Potter* and the present case are striking. As in *Potter*, Johnson failed to respond to Dr. Lee's Motion for Summary Judgment with an affidavit establishing the standard of care, Dr. Lee's alleged breach of the standard of care, proximate cause, and Johnson's alleged damages. As in *Potter*, the trial court granted the Dr. Lee's motion for summary judgment since, in the absence of an affidavit from Johnson, Mississippi law supported no other conclusion. As in *Potter*, Johnson is now asking the Court to reconsider his underlying arguments opposing summary judgment without providing legal justification for failing to produce an affidavit from his medical expert. And, as in *Potter*, Johnson's failure to produce an expert affidavit in response to Dr. Lee's Motion for Summary Judgment renders Johnson's underlying arguments irrelevant. As a threshold matter, Johnson's underlying arguments against summary judgment could not be heard after he failed to provide sworn expert testimony.

III. WHETHER THE TRIAL COURT ERRED IN NOT GRANTING RELIEF TO JOHNSON PURSUANT TO RULE 56(f).

Brief of Appellee states briefly that Johnson submitted a Rule 56(f) affidavit in opposition to Dr. Lee's Motion for Summary Judgment. Brief of Appellee, p. 7. The Mississippi Supreme Court has stated that pursuant to Rule 56(f) a party may file his own affidavit with the court explaining his inability to oppose a motion for summary judgment because the party is *unable* to produce affidavits to oppose a motion for summary judgment. *Marx v. Truck Renting & Leasing Ass'n, Inc.*, 520 So. 2d 1333, 1343 (Miss. 1987) (emphasis added).

The *Marx* court stated that Rule 56(f) is appropriate when additional discovery is necessary or beneficial before the trial court can determine if there is a genuine issue of material fact. *Id.* The Court continued that "this is especially true where the party . . . claims the necessary information rests within the possession of the party seeking summary judgment. However, the party resisting summary judgment must present specific facts why he cannot oppose the motion and must specifically demonstrate how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing . . . ." *Id.* at 1344. Finally, *Marx* states that the opposing party "may not rely on vague assertions that discovery will produce needed, but unspecified, facts particularly where there was ample time and opportunity for discovery." *Id.* The *Marx* court eventually affirmed the trial court's grant of summary judgment after determining that the non-moving party had adequate time for discovery (five months) and did not show why additional discovery was necessary. *Id.*

Applying *Marx* to the present action, it is noteworthy that Johnson did not claim that Dr. Lee possessed any information that was necessary in order for Johnson to obtain an affidavit to attach to his Response to Dr. Lee's Motion for Summary Judgment. Additionally, Johnson did not state specific facts as to why he was unable to oppose Dr. Lee's motion with the required expert affidavit or specifically demonstrate how postponement of the Court's ruling would allow him to rebut Dr. Lee's Motion for Summary Judgment with the required affidavit.

Johnson filed a Rule 56(f) affidavit, but did not include any of the specific, necessary information required to oppose a summary judgment motion. In fact, the Court's assessment in *Marx* is directly applicable to the present case. The Court stated that Marx had five months to avail himself to the mechanisms of discovery and he failed to explain what he might reasonably have

expected additional discovery to produce. Therefore, the Court would not allow him to fall back on Rule 56(f). *Id.* Likewise, although this case was pending for seven months, Johnson did not avail himself of the discovery process (with the exception of propounding discovery after the Court entered an order setting the case for trial) and failed to provide any insight as to why additional discovery would have enabled him to produce the required expert affidavit he had otherwise failed to produce. Therefore, his Rule 56(f) affidavit provides no relief.

CONCLUSION

Johnson did not show any "special circumstances" or assert any legitimate justification for his failure to designate an expert witness sixty (60) days prior to trial as required by Rule 4.04. In addition, without an expert affidavit, he could not create a question of fact in response to Dr. Lee's Motion for Summary Judgment to establish the standard of care, a breach in the alleged standard of care, proximate cause, and Johnson's alleged damages. As in *Potter*, in the absence of an affidavit, Mississippi law supports no other conclusion than to affirm the trial court in granting Dr. Lee's motion for summary judgment. Also, because Johnson did not avail himself of the discovery process and failed to explain why additional discovery would have enabled him to produce the required expert affidavit he had otherwise failed to produce, his Rule 56(f) affidavit provides no relief.

Because discovery issues are left to the sound discretion of the trial court, a trial court's ruling regarding discovery may be reversed on review only if there has been an abuse of discretion. *Harkins v. Paschall*, 348 So. 2d at 1022.

For the aforementioned reasons, the ruling of the trial court granting summary judgment to Dr. Lee should be affirmed.

Respectfully submitted,

JOHN PAUL LEE, M.D.

BY: Timothy L Sensing
TIMOTHY L. SENSING, MSB #102575

OF COUNSEL:

Mildred M. Morris, MSB #[redacted]
James A. Becker, MSB #[redacted]
Timothy L. Sensing, MSB #[redacted]
WATKINS & EAGER, PLLC
400 East Capitol Street, Suite 300
Post Office Box 650
Jackson, MS 39205
Telephone: (601) 965-1900
Facsimile: (601) 965-1901

CERTIFICATE OF SERVICE

I, Timothy L. Sensing, attorney of record for the Appellee, do hereby certify that I have this day mailed, via United States first class mail, postage prepaid, a true and correct copy of the foregoing to the following:

Mark D. Morrison
Adcock & Morrison
P.O. Box 3308
Ridgeland, MS 39158

Joseph G. Baladi
Watkins & Eager
P.O. Box 650
Jackson, MS 39205

J. Wade Sweat
Copeland Cook Taylor & Bush
P.O. Box 6020
Ridgeland, MS 39158-6020

Honorable Marcus D. Gordon
Scott County Circuit Court
P. O. Drawer 220
Decatur, MS 39327

This the 1 day of December, 2008.

Timothy L. Sensing