

**THE SUPREME COURT OF MISSISSIPPI**

**TALMADGE MILLER**

**APPELLANT/PLAINTIFF**

**VS.**

**NO. 2009-CA-00200**

**ANN MYERS**

**APPELLEE/DEFENDANT**

**APPEAL FROM THE CIRCUIT COURT  
OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI**

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**BRIEF OF APPELLEE**

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**CERTIFICATE OF INTERESTED PARTIES**

**IN THE SUPREME COURT OF MISSISSIPPI**

**TALMADGE MILLER**

**APPELLANT/PLAINTIFF**

**VS.**

**NO. 2009-CA-00200**

**ANN MYERS**

**APPELLEE/DEFENDANT**

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 Judge of this Court may evaluate possible disqualification or recusal.

<u>PERSONS OR OTHER ENTITIES</u>	<u>CONNECTION AND INTEREST</u>
1. Pepper Miller	Plaintiff/Appellant
2. Michael P. Younger.	Attorneys of Record for Plaintiff/Appellant
3. Ann Myers, M.D.	Defendant/Appellee
4. Anastasia G. Jones Timothy L. Sensing Mildred M. Morris Watkins & Eager PLLC	Attorneys of Record for Defendant/Appellee
4. Hon. Tomie Green	Hinds County Circuit Court Judge

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### **STATEMENT OF THE ISSUES**

SUMMARY JUDGMENT IS SUPPORTED BY THE RECORD BECAUSE:

- I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT WITHOUT A HEARING;
- II. APPELLANT / PLAINTIFF BELOW NEVER RESPONDED TO DR. MYERS' MOTION FOR SUMMARY JUDGMENT;
- III. THE STATUTE OF LIMITATIONS EXPIRED PRIOR TO THE DATE THE HINDS COUNTY COMPLAINT WAS FILED.

## **STATEMENT OF THE CASE**

### **Nature of the Case**

This is a medical negligence case which alleges that the Appellant/Plaintiff below (hereinafter “Miller” or “Appellant”) developed Guillian-Barre Syndrome as a result of being treated with the drug, Remicade®, for rheumatoid arthritis. R. 3; Appellant’s Brief, p. 3. The issues in regard to the appeal, however, are procedural in nature.

### **Course of the Proceedings / Disposition in the Court Below**

The Complaint in this case was filed in the Circuit Court of Hinds County on December 13, 2005, alleging medical negligence against Appellee/Defendant below (hereinafter, “Dr. Ann Myers” or “Dr. Myers”). R. 3.

However, a prior complaint for the same cause of action was filed in the Circuit Court of Rankin County on August 31, 2004, for which the court entered a default judgment on March 7, 2005. R. 18, 24, 26. On June 24, 2005, Dr. Myers filed a Motion to Set Aside Default Judgment and to Dismiss because she was never served with process and because venue was improper in Rankin County.<sup>1</sup> R. 18, 24, 26. On November 9, 2005, the Circuit Court of Rankin County granted Dr. Myers’ Motions to Set Aside and to Dismiss and entered an Order of Dismissal Without Prejudice because Miller failed to properly serve process on Dr. Myers. R. 24, 26. The Order stated that plaintiff confessed that Dr. Myers was not properly served with process. R. 24, 26. This was adjudicated in the Circuit Court of Rankin County and is not an issue in this appeal. Subsequently, on December 13, 2005, plaintiff filed the Complaint which is the source of this appeal. R. 3.

Dr. Myers filed her Answer (to the Complaint filed in the Circuit Court of Hinds County)

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<sup>1</sup> In the Rankin County action, Miller attempted to serve process on Dr. Myers by serving the receptionist in her business office, who was without authority to accept process on behalf of Dr. Myers. In addition, Dr. Myers’ practices medicine in Hinds County, not Rankin County. R. 3, 24, 26, 36, 42.

on February 21, 2006. R. 11. She then filed a Motion for Summary Judgment, Itemization of Undisputed Facts, and Notice of Hearing on March 28, 2006. R. 1, 11, 16, 18. The hearing was re-noticed on June 23, 2006, and the hearing was held on the Motion for Summary Judgment on August 15, 2006. R. 1, 35.

Although Miller claims in Appellant's Brief that he mailed a response to Defendant's Motion for Summary Judgment to Judge Green, a response does not appear on the court's docket and it is evident that he failed to file said Response with the court. Also, Judge Green never received a response. R. 1, 79; Appellant's Brief, p. 4. However, Dr. Myers was served plaintiff's Response to Motion for Summary Judgment on August 10, 2006, which she received. Unbeknownst to Dr. Myers that Miller had not filed said Response with the court, on August 14, 2006, Dr. Myers filed a Rebuttal to Plaintiff's Response to Motion for Summary Judgment and a Motion to Strike Plaintiff's Response to Motion for Summary Judgment for untimeliness in filing. R. 28, 31.

The court did not rule on Dr. Myers' Motion for Summary Judgment at the August 15, 2006 hearing,<sup>2</sup> but allowed Dr. Myers to file a supplement to her Motion for Summary Judgment. R. 35. On August 30, 2006, Dr. Myers filed Supplement to the Motion for Summary Judgment and subsequently filed Second Supplement to Motion for Summary Judgment on August 15, 2008. R. 35, 42. Dr. Myers had also filed Notice of Hearing on said Motion for Summary Judgment on May 30, 2008, which noticed the hearing on said Motion for August 18, 2008. R. 60. Thus a second hearing on the Motion for Summary Judgment was held two (2) years after the first hearing since the court had yet to rule on said Motion. However, plaintiff failed to appear at this hearing, on August 18, 2008, and on August 21, 2008 the Court entered an Order to Show Cause for failure to

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<sup>2</sup> Though Miller states in Brief of Appellant that Dr. Myers' Motion for Summary Judgment was "basically denied," there was not a ruling one way or the other on said Motion at the August 15, 2006 hearing. Brief of Appellant, p. 5.

appear, which gave the plaintiff until August 25, 2008 to show good cause why the court should not grant Dr. Myers' Motion for Summary Judgment. R. 56. Miller's response to the court's Order to Show Cause<sup>3</sup> stated that he did not attend the August 18, 2008 hearing because he did not receive notice, but Miller never responded, as the court directed, to show cause as to why the court should not grant Defendant's Motion for Summary Judgment. R. 56. In fact, Miller never did file a response with the court to Defendant's Motion for Summary Judgment, which Dr. Myers had filed 2 ½ years earlier. R. 57, 79. Dr. Myers filed Rebuttal to Plaintiff's Response to Show Cause Order on August 26, 2008, asserting that notice of the August 18, 2008 hearing had been mailed to plaintiff and that a voicemail message was recorded at plaintiff's counsel's office apprising him of said hearing. R. 57.

However, because Plaintiff responded that he had not received notice of the August 18, 2008 hearing, in an abundance of caution the court required that another hearing date be set to hear Defendant's Motion for Summary Judgment. R. 62. The hearing was scheduled for December 16, 2008, for which Dr. Myers filed Notice of Hearing on October 16, 2008. R. 69. Dr. Myers sent Notice of Hearing to Plaintiff Miller by Certified Mail on October 16, 2008, and filed Verification of Service of Notice of Hearing on December 8, 2008. R. 62-63. Despite three attempts by the United States Post Office to deliver the Notice of Hearing by Certified Mail to Miller's counsel's office, the envelope was never claimed by anyone at plaintiff's counsel's office and was stamped "Unclaimed Returned to Sender." R. 67. The United States Post Office then returned the envelope to Dr. Myers' counsel's office. R. 67. It was only after Dr. Myers made three attempts to hand-deliver, via office courier, that the Notice of Hearing was finally delivered to a receptionist at plaintiff's counsel's office, on October 23, 2008. R. 63, 71, 74, 75, 77, 78. Dr. Myers then filed

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<sup>3</sup> Apparently, Miller filed a Response to Order to Show Cause with the court, though it does not appear in the record. Dr. Myers received a response and filed a Rebuttal. R. 57.



Verification of Service of Notice of Hearing on December 8, 2008, which chronicled the attempts to deliver said Notice for the court's record. R. 62.

The court signed an Order of Dismissal on December 15, 2008, which dismissed Dr. Myers and which granted Dr. Myers' Motion for Summary Judgment for Miller's continuous failure to respond to the Motion for Summary Judgment, which the court concluded was a confession on Plaintiff Miller's part of the Motion. The Order was filed on December 16, 2008<sup>4</sup>. R. 79. Plaintiff filed Motion to Reconsider on December 22, 2008. R. 81. The court entered Order Denying Defendant's Motion to Reconsider on January 8, 2009. R. 83. Plaintiff subsequently filed Notice of Appeal. R. 84.

### **Statement of the Facts**

Because the issues in this case are procedural in nature, most of the relevant facts have been enumerated in the above section, "Course of the Proceedings." Any other pertinent facts will be included as needed in the discussion of the issues.

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<sup>4</sup> The Order of Dismissal was signed on December 15, 2008, and the hearing on the Motion for Summary Judgment, which was scheduled and noticed for December 16, 2008, never took place.

## **SUMMARY OF THE ARGUMENT**

Though Appellant's Brief enumerates only one issue, a reading of said brief indicates that two additional issues should be addressed; therefore Appellee's Brief addresses three issues.

First, Appellant/Miller argues that summary judgment should not have been granted because there was not a hearing on the Motion for Summary Judgment. Dr. Myers responds that there is no authority that requires that a hearing be held prior to a court's granting a motion for summary judgment.

Appellant/Miller also seems to argue that the trial court was in error in stating that he had not responded to Dr. Myers' Motion for Summary Judgment. Though Appellant states that he mailed a response to Dr. Myers' Motion for Summary Judgment to Judge Green in the trial court, this is not the equivalent of filing said response with the court. Appellant's Brief, p. 4. In addition, the Uniform Circuit and County Court Rules and Mississippi Rules of Civil Procedure require that pleadings be filed with the clerk of the court. U.C.C.C.R. 4.03(1); Miss. R. Civ. P. 5(e).

Appellant/Miller also argues that because there had been no discovery in this case that the Motion for Summary Judgment was premature and was granted in error. However, the basis of said Motion was that the statute of limitations had expired by the time the plaintiff filed the Complaint in the Circuit Court of Hinds County. Evidence of this issue does not require discovery.

Dr. Myers thus asserts for the aforementioned reasons that the trial court's Order of Dismissal should be affirmed, which granted her Motion for Summary Judgment and dismissed her.

### **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 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.

### **A Preliminary Matter**

A large portion of Appellant's Brief is devoted to an explanation regarding Dr. Myers' use of plaintiff's counsel's old address for mailing various pleadings and notices and states that 90% of the pleadings at one point had been delivered to his old office address.<sup>5</sup> Appellant's Brief, pp. 3-6. An inference could be drawn that Appellant's Brief argues that this is grounds for reversal.

Dr. Myers respectfully refers the Court to the record, which shows that all but two of Dr. Myers' pleadings mailed to the old address<sup>6</sup> were mailed prior to the first hearing on the Motion for Summary Judgment, which was held on August 15, 2006. R. 15, 17, 20; Appellant's Brief, p. 5. This hearing was re-noticed several times to accommodate the fact that notices and other pleadings had been sent to the old address. One of the re-notices is reflected on the court's docket. R. 1. Plaintiff's counsel was thus able to attend and participate in this hearing and any potential for harm was cured.

The other two pleadings sent to the old address were Dr. Myers' Rebuttal to Plaintiff's response to Motion for Summary Judgment, and Dr. Myers' Motion to Strike Plaintiff's response to Motion for Summary Judgment. R. 28, 31. These were filed on August 14, 2006, the day before the hearing on August 15, 2006, and Miller was able to argue his response to the court at the hearing on the next day, August 15, 2006,<sup>7</sup> even though he never filed a response to Motion for Summary

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<sup>5</sup> The old address was 168 W. Government Street in Brandon, whereas the new address is 1700 W. Government Street, Bldg. B, Suite 102 in Brandon.

<sup>6</sup> These pleadings include Dr. Myers' Answer, Itemization of Facts and Motion for Summary Judgment. R. 11, 16, 18.

<sup>7</sup> Thus, Miller admits that he had the benefit of arguing his response to the court even though he never actually filed it with the court.

Judgment with the court. Appellant's Brief, p. 5; R. 30, 34. Because Miller never filed a response to Dr. Myers' Motion for Summary Judgment with the court, these responsive pleadings filed by Dr. Myers were essentially useless, moot, and irrelevant. The fact that the court issued an Order to Show Cause following the second hearing on the Motion for Summary Judgment, on August 18, 2008, gave Miller yet another opportunity to file a response to Dr. Myers' Motion for Summary Judgment. R. 56. Miller did not take advantage of this opportunity and never filed a response to Dr. Myers' Motion for Summary Judgment with the court. R. 56.

It is interesting to note that Miller's counsel stated that the reason he did not attend the August 18, 2008 hearing on Dr. Myers' Motion for Summary Judgment was because he did not receive notice of the hearing, even though the record explicitly indicates that the Notice of Hearing for said August 18 hearing was mailed to the correct address. R. 57, 60, 61.

Thus, any adverse effects of the use of the old address were cured during the litigation process and present no viable issue in this appeal.

## ARGUMENT AND DISCUSSION

### I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT WITHOUT A HEARING.

Appellant/Miller argues that summary judgment should not have been granted because there was not a hearing on the Motion for Summary Judgment. Dr. Myers responds that Appellant has cited no authority that states that a hearing is necessary before a court has the authority to grant a motion for summary judgment. To the contrary, a court has the discretion to dispense entirely with oral argument on a motion, and can rule based only upon the brief written statements of reasons in support and in opposition to the motion. *Hosey v. Mediamolle*, 963 So.2d 1267, 1270 (Miss.App. 2007); Miss. R. Civ. P. 78.

Furthermore, Rule 4.03 of the Uniform Circuit and County Court Rules makes no mention that a hearing is required when a movant files a motion for summary judgment. U.C.C.C.R. 4.03. In addition, Judge Green's *Procedures for Pretrial Matters, Trial, Mediation and Referrals in Civil Cases*, which is in effect for the Circuit Court of Hinds County, explicitly states in regard to motions, "Hearings are not automatically granted." Judge Green's *Procedures for Pretrial Matters, Trial, Mediation and Referrals in Civil Cases*, § 1. (Exhibit A)<sup>8</sup>. Also, said *Procedures* states that the court may decide issues on motion "based on the submitted pleadings." *Id.*

For the sake of clarity it is noteworthy at this point to enumerate the three hearings scheduled regarding Dr. Myers' Motion for Summary Judgment. The first was held on August 15, 2006. R. 35. Counsel for Miller attended this hearing but the court did not rule on said Motion because the court had questions regarding the Rankin County dismissal of Dr. Myers, which included whether Dr. Myers had been sufficiently served with process because process was served to her office

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<sup>8</sup> Said *Procedures for Pretrial Matters, Trial, Mediation and Referrals in Civil Cases* are accessible online at [www.co.hinds.ms.us](http://www.co.hinds.ms.us).

receptionist. R. 3, 24, 36, 42. The second hearing was held on August 18, 2008. R. 56, 62. Dr. Myers had filed a Second Supplement to Motion for Summary Judgment just prior to this hearing which clarified with new case law that service upon a receptionist was insufficient process. R. 42. Counsel for Miller did not attend this hearing, as he stated that he never received notice. R. 56. At the hearing the court stated that it would issue to Miller an Order to Show Cause regarding whether the Motion for Summary Judgment should be granted; however, Miller never responded to the order to Show Cause. R. 56, 79. The last hearing was scheduled for December 16, 2008. R. 62. The court, however, signed its Order of Dismissal on December 15, 2008, and the hearing was not held. R. 79. Again, Miller never did respond to the court's Order to Show Cause. R. 56, 79. It is the court's failure to hold this hearing of which Miller now complains.

However, the court gave Miller every opportunity to be heard and Miller repeatedly failed to respond to the court. A court has the discretion to dispense entirely with oral argument on a motion, and can rule based only upon the brief written statements of reasons in support and in opposition to a motion. *Hosey v. Mediamolle*, 963 So.2d at 1270; Miss. R. Civ. P. 78<sup>9</sup>. Miller has cited no authority to support his claim that he should have been granted this hearing prior to the court's granting Dr. Myers' Motion for Summary Judgment. This assignment of error is without merit.

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<sup>9</sup> Rule 78 states: Each court shall establish procedures for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition. Miss. R. Civ. P. 78

## II. APPELLANT / PLAINTIFF NEVER RESPONDED TO DR. MYERS' MOTION FOR SUMMARY JUDGMENT.

Appellant/Miller also seems to argue that the trial court was in error in stating that he had not responded to Dr. Myers' Motion for Summary Judgment. Though Appellant states that he mailed a response to Dr. Myers' Motion for Summary Judgment to Judge Green in the trial court, this is not the equivalent of filing said response with the court<sup>10</sup>. Appellant's Brief, p. 4. Though Appellant is perplexed at this result, this clearly explains why said response does not appear in the court's docket. Appellant's Brief p. 4; R. 1. It was Miller's failure to ever file a response to Dr. Myers' Motion for Summary Judgment with the clerk of the court subsequent to the Order to Show Cause after the hearing on August 18, 2008 that was fatal to his case.

Rule 4.03 of the Uniform Circuit and County Court Rules states, "The original of each motion . . . shall be filed with the clerk in the county where the action is docketed." U.C.C.C.R. 4.03(1). Also, the Mississippi Rules of Civil Procedure require that pleadings be filed with the clerk of the court unless the judge permits them to be filed with him or her, in which case the judge will transmit the pleadings to the office of the clerk. Miss. R. Civ. P. 5(e). Judge Green clearly does not permit pleadings to be filed with her, as indicated in her *Procedures for Pretrial Matters, Trial, Mediation and Referrals in Civil Cases*, which states, "Motions must be filed with the Hinds County circuit clerk, with a copy to the court." *Procedures for Pretrial Matters, Trial, Mediation and Referrals in Civil Cases*, § 1. (Exhibit A).

Furthermore, the trial court did nothing more than follow its own rules. Judge Green's *Procedures for Pretrial Matters, Trial, Mediation and Referrals in Civil Cases*, states, "A party against whom a motion is filed who does not timely respond to the motion or who fails to appear

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<sup>10</sup> In addition, Judge Green indicated that she never received a response from Miller to Dr. Myers' Motion for Summary Judgment. R. 79.

for a hearing runs the risk of having the court consider the motion confessed.” Judge Green’s *Procedures for Pretrial Matters, Trial, Mediation and Referrals in Civil Cases*, § 2. (Exhibit A). The court, by issuing the Order to Show Cause, gave Miller an opportunity to respond to the Motion for Summary Judgment. R. 56.<sup>11</sup> Because Miller failed to respond, the court considered the Motion for Summary Judgment confessed. R. 79.

The trial court was correct in concluding that Miller failed to respond to Dr. Myers’ Motion for Summary Judgment and in construing the failure to respond as a confession of said Motion.

### III. THE STATUTE OF LIMITATIONS EXPIRED PRIOR TO THE DATE THE HINDS COUNTY COMPLAINT WAS FILED.

Appellant/Miller argues that because there had been no discovery in this case that the Motion for Summary Judgment was premature and was granted in error. However, the basis of said Motion was that the statute of limitations had expired by the time that Miller filed his Complaint in the Circuit Court of Hinds County. Evidence of this issue does not require discovery.

Furthermore, the record supports that Dr. Myers’ Motion for Summary Judgment was correctly granted on its own merits. Because an appeal from summary judgment is reviewed *de novo*, upon review of the record it is readily apparent that the record supports that the trial court was correct in granting Dr. Myers’ Motion for Summary Judgment. *Cossitt v. Alfa Ins. Corp.* 726 So.2d 132, 136 (¶ 19) (Miss.1998).

Dr. Myers is entitled to summary judgment because the applicable two-year medical malpractice statute of limitations barred Miller’s claims. It is undisputed that Miller was made aware of his diagnosis of Guillian-Barre Syndrome on March 24, 2003 and was allegedly told that

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<sup>11</sup> Miller responded to the Order to Show Cause, though it is not in the record. Nevertheless, his Response failed to address the Motion for Summary Judgment, as the Order to Show Cause required, it merely offered his excuse for not having attended the August 18, 2008 hearing on the Motion for Summary Judgment. This is documented in Dr. Myers’ Rebuttal to Plaintiff’s Response to Show Cause Order, which is in the record. R. 56, 57.



it was the result of his use of Remicade®. R. 23; Appellant's Brief, p. 3. Therefore, all claims and causes of action alleged by Miller necessarily occurred on or before March 24, 2003. On August 31, 2004, Miller filed his first complaint (in the Circuit Court of Rankin County) alleging medical negligence against Dr. Myers for prescribing Remicade® for treatment of his rheumatoid arthritis. R. 18. Because this Complaint was dismissed for failure to properly serve process within 120 days pursuant to Rule 4(h) of the Mississippi Rules of Civil Procedure, the statute of limitations period was tolled from the date of its filing, on August 31, 2004, until December 29, 2004. Miss. R. Civ. P. 4(h); R. 24, 26. Beginning on December 30, 2004, the 121<sup>st</sup> day, the statute of limitations governing this medical malpractice action started to run again and expired on July 23, 2005. *Williams v. Fornett*, 906 So. 2d 810, 812 (Miss. App. 2004). The Complaint which is the source of this appeal, however, was not filed until December 13, 2005, almost another five (5) months later, and, as a result, Miller's claims against Dr. Myers were time-barred and summary judgment was appropriate as a matter of law. R. 3.

The Mississippi Supreme Court has stated, "Consistent with the Mississippi Rules of Civil Procedure, we are of the opinion that the question of the running of the statute of limitations to bar an action may also be the subject of a summary judgment if there exist no genuine issues of material fact concerning the question." *Smith v. Sanders*, 485 So. 2d 1051, 1053 (Miss. 1986). Summary judgment is appropriate in this matter because "the pleadings, depositions, answers to interrogatories and admissions on file . . . show that there is no genuine issue as to any material fact" concerning the statute of limitations issue and no "reasonable minds can differ as to the disposition" of this question. Miss. R. Civ. P. 56(c); *Brumfield v. Lowe*, 744 So. 2d 383, 386 (Miss. Ct. App. 1999). Furthermore, the court has stated that questions concerning the statute of limitations are to be resolved by the trial judge. *Brumfield*, 744 So. 2d at 387.

The statute of limitations governing medical malpractice actions in Mississippi states:

no claim in tort may be brought against a licensed physician . . . for injuries or wrongful death arising out of the course of medical, surgical or other professional services *unless it is filed within two years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered*

MISS. CODE ANN. § 15-1-36 (Rev. 2003) (emphasis added). Any of the alleged acts, omissions or neglect resulting in the claims brought by the Plaintiff occurred and/or were discovered on or before March 24, 2003.

The Mississippi Supreme Court considered whether the tolling period should end 120 days after the filing of the initial Complaint or when the case is dismissed, and the Court held that it is only tolled for the 120-day service period. *See Fortenberry v. Memorial Hospital at Gulfport*, 676 So.2d 252, 254 (Miss. 1996); *Watters v. Stripling*, 675 So.2d 1242, 1244 (Miss. 1996). The Mississippi Supreme Court has recently stated that the two-year statute of limitations for medical malpractice actions is tolled when a complaint is filed *unless* the plaintiff fails to serve process within the 120 days prescribed by Rule 4 of the Mississippi Rules of Civil Procedure. *See Triple C Transport v. Dickens*, 870 So. 2d 1195, 1199-1200 (Miss. 2004) (citing *Holmes v. Coast Transit Authority*, 815 So. 2d 1183, 1185 (Miss. 2002)); Miss. R. Civ. P. 4. If the 120-day period expires and process has not been served on the defendant, “the statute of limitations automatically begins to run again.” *Id*; *see also Williams v. Fornett*, 906 So. 2d 810, 812 (Miss. App. 2004) (holding that when a defendant was not served within the 120-day period, the statute of limitations period began to run again and another complaint should have been filed before the statute of limitations expired). The only other alternative left for the plaintiff was to refile the complaint before the statute of limitations period ended or show good cause for having failed to timely serve process on the defendant. *Triple C Transport, Inc. v. Dickens*, 870 So.2d at 1200.

In the case at bar, it has already been adjudicated by the Rankin County Circuit Court that Miller failed to serve process within the 120-day period<sup>12</sup>, thus resulting in the dismissal of the action. In fact, the Order of the Rankin County Circuit Court Granting Motions to Set Aside Default states that Miller “confessed” that Dr. Myers was “not properly served with process.” R. 24. Thereafter, Miller refiled in the Circuit Court of Hinds County in an attempt to revive his lawsuit; however, his claim was barred by the statute of limitations.

After the tolling period ended and the limitations period started to run again, the deadline for Miller to have filed another Complaint was July 23, 2005. Miller did not, however, file his new Complaint until December 13, 2005. Consequently, his claims against Dr. Ann Myers were time-barred by the statute of limitations despite the filing of the new Complaint.

Dr. Myers thus asserts that the trial court’s Order of Dismissal should be affirmed, which granted her Motion for Summary Judgment and dismissed her.

### CONCLUSION

The Order of Dismissal of the Circuit Court of Hinds County should be affirmed because:

1. The trial court was not required to hold a hearing prior to granting Dr. Myers’ Motion for Summary Judgment;
2. A response to the Motion for Summary Judgment was never filed with the clerk of the trial court and the trial court was within its authority to construe the failure to respond as a confession of said Motion;
3. The statute of limitations had expired prior to the date the Complaint was filed in the Circuit Court of Hinds County.

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<sup>12</sup> See Order Granting Motions to Set Aside and Order of Dismissal entered by the Rankin County Circuit Court. R. 24, 26.

Dr. Myers thus asserts that the trial court's Order of Dismissal should be affirmed, which granted her Motion for Summary Judgment and dismissed her.

Respectfully Submitted,

ANN MYERS, M.D.

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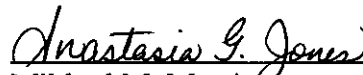
CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this day caused to be served via U.S. mail, postage prepaid, a true and correct copy of the foregoing to:

Honorable Tomie T. Green  
Hinds County Circuit Court Judge  
P. O. Box 327  
Jackson, MS 39205-0327

Michael P. Younger  
Younger Law Firm  
1700 West Government Street, Bldg. B, Suite 102  
Brandon, Mississippi 39042

THIS the 1st day of September, 2009.



Mildred M. Morris  
Anastasia G. Jones

# **PROCEDURES FOR PRETRIAL MATTERS, TRIAL, MEDIATION and REFERRALS IN CIVIL CASES**

**Judge Tomie Green**

## **SETTING MOTION HEARINGS**

1. Motions must be filed with the Hinds County circuit clerk, with a copy to the court. Hearings are not automatically granted. The court may decide the issue(s) based on the submitted pleadings. Responses to motion must be filed within ten(10) days of receipt of the motion. Should the court require a motion hearing, the party filing the motion shall be notified by the court. Thereafter, the moving party shall be responsible for serving notice of the hearing on all parties to the action. A copy of the notice shall also be sent to the court.

2. If a moving party cancels, postpones or fails to appear for a motion hearing, the motion must be refilled in order for the court to reset the matter and take any action on the motion. A party against whom a motion is filed who does not timely respond to the motion or who fails to appear for a hearing runs the risk of having the court consider the motion confessed. **ALL PARTIES MUST AGREE** in order for a motion to be canceled, postponed or removed from the motion docket.

3. **TELEPHONIC HEARINGS** are sparingly granted by the court. Once granted, a requesting party must give notice to all parties of the date and time of the telephone conference. Telephonic hearings are generally restricted to emergency matters and/or unusual circumstances. The court will not meet with one party in person while conferring with other parties on the phone.

## **DISCOVERY DISPUTES**

4. In accordance with the Rules of Civil Procedure and local rules, good faith efforts must be made to settle discovery disputes. Non-prevailing parties in motion to compel will be subject to assessment of expenses and/or attorney fees.

5. Discovery is intended to assist litigants in obtaining all non-privileged information reasonably calculated to lead to the discovery of admissible evidence. All of the rules of MRCP, including those of discovery, are designed to ensure the "just, speedy, and inexpensive determination of every action."

6. Standard boilerplate objections, such as repeating the litany that "the request is overly broad, burdensome, oppressive, and irrelevant," is no response at all, and, upon motion to compel, will result in imposition of sanctions, including attorney fees, under MRCP Rule 37(4). Rather, the objecting party must state specifically how each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive.

7. Motions to compel discovery must comply with 37 MRCP, and Rule 4.04(c), URCCC. Failure to act in good faith to provide discovery and/or to act in good faith in resolving discovery disputes to avoid unnecessary time and resources expended by the Court will result in the imposition of sanctions.



**8. PROTECTIVE ORDERS:** The court does not sign blanket protective orders that potentially cover all or most discovery. Discoverable documents and/or information are generally not subjects for protective orders. However, where parties agree regarding the confidentiality or sensitivity of documents and/or information, the court will consider executing narrowly drafted Confidentiality Agreements.

### **AMENDMENTS**

**9.** The court grants motions to AMEND freely. As such, agreement of the parties on this issue may be submitted as agreed orders without the necessity of hearing. Should a party refuse to agree to an amendment, the amending party may seek redress by motion with the court.

### **PRESENTATION OF ORDERS**

**10.** Orders unaccompanied by a cover letter OR orders left or mailed to the circuit clerk's office will not be signed by the court. Orders must be presented directly to Judge Green's court administrator as required by the local rules.

### **SCHEDULING, PRETRIAL AND TRIAL ORDERS**

**11.** In all cases filed after January 1, 1999, an agreed scheduling order must be submitted to the court for approval. Thirty (30) days after the defendant or the last of the defendants has responded to Plaintiff(s)'s complaint, Plaintiff(s) shall initiate the filing of an agreed scheduling order. Any party who fails, without just cause, to agree to a scheduling order shall be subject to sanctions by the court.

**12.** The court sets all cases for trial by COURT ORDER. Pretrial orders must be submitted to the court not later than thirty (30) days before the date of trial.

**13.** Failure to appear for trial, without notice of a settlement or without securing an order of continuance may be sanctioned by the court. Agreement of the parties does not guarantee a continuance of a trial.

**14.** Parties shall notify the court immediately of all case settlement, so as to avoid unnecessary jury costs for the county and taxpayers. Notification may be by mail, telephone, e-mail and/or fax communication.

### **MEDIATION REFERRALS**

**15.** Mediation is most effective and will generally be ordered after the first discovery deadline. Dispositive motions should not be filed before meaningful mediation, voluntary or court ordered. All parties must make good faith efforts to resolve the action through mediation, in accordance with the mandates of the Mississippi Supreme Court. The parties must notify the court within 10 days of the disposition of the mediation.

## **REFERRAL TO COUNTY COURT**

16. In order for the court to appoint a Hinds county court judge for trial in a case, the parties must file an agreed request, by motion, to the court. A proposed "Order Assigning Acting Circuit Court Judge" granting the relief sought pursuant to Section 9-9-35, Miss. Code Ann. (1972) must accompany the parties' motion. The must identify the county judge who has agreed to sit as the "Acting Circuit Judge". A motion requesting referral to a county court judge must be specific and justify the reasons for the request. Agreement of the parties to have a case heard by a county court judge does not require the court to order the relief sought. Appeals after the referral or transfer to the "Acting Circuit Judge" will be to the Mississippi Supreme Court.

## **COURTROOM TECHNOLOGY ("ELMO")/COURT REPORTER**

17. Any party who wishes to plug any mechanism into the Court's ELMO System must first get the approval of the Court.

18. The Court maintains the ONLY official court reporter for all cases. With the exception of criminal cases, the court reporter is not available for pretrial matters. Requests and payment for the court reporter in pretrial matters must be made in writing at least 48 hours before a hearing.

19. The court reporters are available to provide any party daily copy during trial. With the exception of criminal cases, the court does not transcribe opening and closing statements, voir dire or instruction conferences. A party who desire a transcription of these proceedings or who want daily copy must make arrangement with the court reporter to transcribe the same. Cost of this service will be borne by the party making the requests and not the county.

Revised September 2008