

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEBORAH KNAPP AND HAROLD KNAPP

APPELLANTS

VS.

NO. 2010-IA-01604-SCT

**ST. DOMINIC-JACKSON MEMORIAL HOSPITAL,
JOHN DOE PERSONS A-M, AND JOHN DOE ENTITIES N-Z**

APPELLEES

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

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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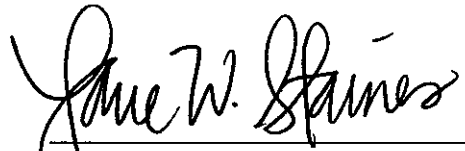
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Deborah Knapp and Harold Knapp, Appellants
2. St. Dominic-Jackson Memorial Hospital, Appellee
3. Honorable Swan Yerger, Former Circuit Court Judge
4. Honorable Jeff Weill, Circuit Court Judge
5. Jonathan R. Werne, Esq. and Lane W. Staines, Esq., Brunini, Grantham, Grower & Hewes, PLLC, Counsel for St. Dominic-Jackson Memorial Hospital; and
6. Jwon T. Nathaniel, Esq., Jared A. Kobs, Esq., Gerald P. Collier, Esq. and Neil B. Snead, Esq., Counsel for Deborah Knapp and Harold Knapp



Lane W. Staines
Attorney of Record for Appellee

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STATEMENT OF THE ISSUES

- I. Whether the Lower Court Abused Its Discretion in Granting St. Dominic's Motion to Strike Plaintiffs' Expert Witness.
- II. Whether the Lower Court Abused its Discretion in Denying Plaintiffs the Opportunity to Designate Another Expert Witness after Dr. Tilelli's Testimony was Stricken.
- III. Whether the Lower Court Abused its Discretion in Denying Plaintiffs' Motion to Extend the Discovery Deadline.

STATEMENT OF THE CASE

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

Plaintiffs Harold and Deborah Knapp filed a cause of action against St. Dominic-Jackson Memorial Hospital ("St. Dominic"), St. Dominic Behavioral Health Services, St. Dominic Behavioral Health Associates, and William Mark Valverde, M.D. on December 5, 2008. (R. 14). As part of their complaint, Plaintiffs alleged claims for negligence (including medical malpractice), gross negligence, and breach of warranty. See Complaint (R. 14). These claims stemmed from Plaintiff Deborah Knapp's ("Mrs. Knapp") two and a half-day admission to St. Dominic and treatment in St. Dominic's Intensive Care Unit ("ICU") and Behavioral Health Unit ("BHU") due to Mrs. Knapp's attempt to commit suicide by overdosing on prescription medication. Plaintiffs dismissed all defendants from this action, except for St. Dominic. (R. 125, 528, 561).

On October 1, 2009, in compliance with the Agreed Scheduling Order, Plaintiffs filed their Designation of Expert Witness, designating John A. Tilelli, M.D. to testify as to the standard of care required by St. Dominic during Mrs. Knapp's treatment in both the ICU and the BHU. (R. 504, 635). In response, St. Dominic filed a Motion to Strike Plaintiffs' Expert Witness and for Partial Summary Judgment on the basis that Dr. Tilelli's curriculum vitae reflected his lack of experience and familiarity with adult intensive care or psychiatric patients. (R. 522). Given that Dr. Tilelli was not qualified to testify as an expert witness regarding Plaintiffs' medical malpractice claims, St. Dominic moved for partial summary judgment as to Plaintiffs' claims related to Mrs. Knapp's transfer to and treatment in the BHU. (R. 525-26). On March 23, 2010, the lower court granted St. Dominic's motion to strike Dr. Tilelli without limitation, finding that Dr. Tilelli did not demonstrate sufficient familiarity with the standard of care for an adult ICU or BHU (herein after referred to as "March 23, 2010, Order"). (R. 562).

As part of the March 23, 2010, Order, the lower court also granted St. Dominic's partial motion for summary judgment that no genuine issue of fact remained as to Plaintiffs' claims related to St. Dominic's psychiatric care and treatment at St. Dominic. (R. 562-64). Although Plaintiffs subsequently filed a motion for reconsideration of the March 23, 2010, Order (which the lower court denied), Plaintiffs did not petition the Supreme Court for interlocutory appeal regarding the March 23, 2010, Order. (R. 622, 629).

On March 29, 2010, Plaintiffs filed a motion to amend the scheduling order. (R. 565). As part of their motion, in an attempt to circumvent the March 23, 2010, Order, Plaintiffs requested "that the time period for Plaintiffs to designate expert witness also be extended for thirty (30) days" (R. 566). On June 23, 2010, the lower court granted Plaintiff's motion to amend the scheduling order in part, but did not extend the deadline for Plaintiffs to designate expert witnesses. (R.E. 1).¹

After St. Dominic produced maintenance work order requests in July 2010, on July 30, 2010, Plaintiffs filed another Motion to Extend the Discovery Deadline, essentially arguing that Plaintiffs were entitled to an extension of the discovery deadline in order to take the deposition of each St. Dominic employee identified in the previously-produced work order requests. (R.E. 2). This motion was filed in spite of St. Dominic's offer to allow them to depose each of the individuals listed in the relevant work order requests. (R.E. 3).

On August 17, 2010, St. Dominic filed a motion seeking clarification of the lower court's March 23, 2010, Order striking Plaintiffs' Expert Witness, John A. Tilelli, M.D. (R. 659). As noted in its motion, St. Dominic filed the motion to clarify out of an abundance of caution due to Plaintiffs' misinterpretation of the lower court's order. (R. 659, Brief of Appellants at 2). Plaintiffs inappropriately interpreted the March 23, 2010, Order to prohibit Dr. Tilelli only from

¹ All references to Record Excerpts are to St. Dominic's Appellee Record Excerpts.

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testifying regarding the standard of care in the Behavioral Health Unit at St. Dominic, but not prohibiting him from testifying regarding the standard of care in the Intensive Care Unit. (R. 659-60).

After the motion to clarify was filed by St. Dominic and prior to the court's ruling on said motion, on August 24, 2010, Plaintiffs filed another discovery motion, their Motion to Extend Deadline to Designate Expert². (R.E. 4). In their motion, Plaintiffs again attempted to circumvent the lower court's previous ruling by requesting additional time to designate another expert witness. (R.E. 4).

The lower court granted St. Dominic's Motion to Clarify on September 17, 2010, finding that the Plaintiffs' former expert, Dr. Tilelli was stricken by this Court's March 23, 2010, Order and that Plaintiffs' only remaining claims were premises liability claims (hereinafter referred as the "September 17, 2010, Order"). (R.E. 5). The lower court also extended the discovery deadline, granting Plaintiffs an additional month to depose any witnesses with first-hand knowledge of the work order requests. (R.E. 5). However, it denied Plaintiffs' Motion to Extend the Deadline to Designate Expert, reiterating that "[a]s the Court has previously held, the deadline under which the Plaintiff [sic] could designate an expert has passed." (R.E. 5).

On October 4, 2010, Plaintiffs filed a Petition for Interlocutory Appeal and for Stay of Trial Court related to the lower court's order on St. Dominic's Motion for Protective Order,³ Motion for Clarification, Plaintiffs' Motion to Extend the Discovery Deadline, and Motion to

² As part of this motion, Plaintiffs also sought to compel the deposition of Jerry Farr, the Risk and Safety Manager of St. Dominic, and responded to St. Dominic's motion for a protective order seeking to prohibit Plaintiffs from deposing Mr. Farr. (R.E. 4). Although the lower court granted St. Dominic's motion for protective order, Plaintiffs did not specifically appeal the lower court's granting of St. Dominic's motion or the lower court's denial of the motion to compel the deposition of Mr. Farr. Thus, it is not discussed as part of this appeal.

³ As previously stated, Plaintiffs did not specifically appeal the lower court's ruling on this motion. Thus, it is not discussed.

Extend the Discovery Deadline to Designate Expert. Plaintiffs' petition was granted by this Court on November 24, 2010.

B. *Statement of Facts Relevant to Issues Presented for Review.*

On October 9, 2006, Mrs. Knapp presented to St. Dominic's emergency room after attempting suicide by overdosing on prescription medicine in the presence of her husband. (Brief of Appellants at 7, R. 540, R. 576, R. 607, R. 656). After her arrival at St. Dominic, Mrs. Knapp was placed on a seventy-two hour psychiatric hold and was treated in the ICU followed by continued treatment in the BHU. (R. 607). While in the ICU, Mrs. Knapp claims that she slipped and fell as a result of a leaky toilet in her bathroom. (R. 576). After she was discovered by St. Dominic staff and x-rayed, Mrs. Knapp was then taken to the BHU. (R. 607, 656). Later, Mrs. Knapp attempted to use the telephone in the BHU but was allegedly beaten over the head with the telephone and forcefully kicked by another patient in the BHU. (R. 18, 607). She was discharged from the BHU the next day under threat of litigation by Mr. Knapp (R. 657). Plaintiffs subsequently filed this Complaint against St. Dominic.

SUMMARY OF THE ARGUMENT

In its March 23, 2010, Order (R. 562), the lower court properly struck Plaintiffs' expert witness, John A. Tilelli, M.D. Again, in its September 17, 2010, Order, the lower court appropriately clarified its original intention in the March 23, 2010, Order to strike Dr. Tilelli as an expert witness. Plaintiffs designated Dr. Tilelli to testify as to the standard of care required by the hospital and its staff in treating Mrs. Knapp in the ICU and BHU. (R. 504-07). Dr. Tilelli's curriculum vitae reflects his extensive practice in pediatric medicine, including pediatric critical care, as well as his most recent emergency room experience approximately ten years ago. (R. 516-20). His board certification in critical care is by the American Board of Pediatrics. (R. 517). Mississippi law requires that an expert witness demonstrate "satisfactory familiarity" with a specialty in order to testify as to the standard of care owed to a patient. Though Dr. Tilelli appears qualified to testify as to the standard of care involved in pediatric medicine, his background and work experience do not reflect any familiarity at all, much less "satisfactory familiarity," with adult intensive care medicine or psychiatric medicine. Consequently, Dr. Tilelli cannot testify as an expert in this case which calls into question the standard of care for the "failure to monitor" an adult patient exhibiting psychiatric conditions in the ICU.⁴

Moreover, the lower court did not abuse its discretion in denying Plaintiffs' August 24, 2010, Motion to Extend Deadline to Designate Expert. Although the deadline for designating expert witnesses had passed, Plaintiffs sought for the second time to circumvent the lower court's order striking Dr. Tilelli by requesting additional time to designate a new expert witness. Though Plaintiffs rely on Rule 4.04(A) to argue that they are entitled to additional time to

⁴ Plaintiffs do not dispute that Dr. Tilelli is not qualified to testify regarding the standard of care in the BHU. As indicated in the Plaintiffs' Statement of Issues, the only issue for this Court is whether Dr. Tilelli is "qualified to render an expert opinion regarding the standard of care for the treatment, care, and monitoring of Deborah Knapp while she was a patient in the intensive care unit" (Brief of Appellants at 1-2).

designate a new expert witness, Rule 4.04(A) is inapplicable since the lower court had entered an Agreed Scheduling Order which required Plaintiffs' designation of experts by October 1, 2009. Additionally, Plaintiffs should not be allowed to circumvent the lower court's order by designating a new expert witness outside of the deadline and in this late stage of litigation as to do so would greatly prejudice St. Dominic. Following the lower court's March 23, 2010, Order which determined that Dr. Tilelli lacked qualifications to testify as to the standard of care in the ICU or BHU, this case became a premises liability case rather than a medical malpractice case. However, if Plaintiffs are allowed to designate a new medical expert, this trial-ready case again becomes a medical malpractice case (completely undermining the lower court's March 23, 2010, Order granting of partial summary judgment in favor of St. Dominic and against Plaintiffs), forcing St. Dominic to fully alter its defense and likely its own expert witness testimony. Plaintiffs have failed to carry their burden of proof and show that the lower court abused its discretion in denying Plaintiffs' Motion to Extend Deadline to Designate Expert. Consequently, the order of the lower court should stand.

Similarly, the lower court did not abuse its discretion in denying Plaintiffs' July 30, 2010 Motion to Extend the Discovery Deadline. Plaintiffs contend that they are entitled to an extension of the discovery deadline due to maintenance work order requests St. Dominic produced in July 2010 immediately prior to the depositions of other St. Dominic's employees. (Brief of Appellants at 15-19). After producing the work order requests, St. Dominic offered, and the lower court also ordered, that Plaintiffs be allowed to depose all persons whose names were listed on the work orders. This resolution appropriately cured Plaintiffs' discovery concerns at the time.

Now that the discovery deadline has passed, however, Plaintiffs again seek to circumvent the parties' scheduling order, arguing that an extension is necessary in order "to compel the

production of other discovery which is in existence, but is presently being withheld from the Plaintiffs.” Plaintiffs, however, never properly filed a motion to compel against St. Dominic. As required by Rule 4.04(C) of the Uniform Rules of Circuit and County Court Practice, “[n]o motion to compel shall be heard unless the moving party shall incorporate in the motion a certificate that movant has conferred in good faith with the opposing attorney in an effort to resolve the dispute and has been unable to do so.” Not only did Plaintiffs not file a motion to compel, but also Plaintiffs did not provide the lower court with a good faith certificate. Finally, Rule 4.04(C) also requires “[m]otions to compel [to] quote verbatim each contested request, the specific objection to the request, the grounds for the objection and the reasons supporting the motion.” Nowhere in the Motion to Extend the Discovery Deadline does the Plaintiffs comply with Rule 4.04. Thus, the lower court properly denied any request through the Motion to Extend the Discovery Deadline to compel St. Dominic to produce additional documents.

Plaintiffs’ mischaracterize the lower court’s ruling on their Motion to Extend the Discovery Deadline as a ruling that St. Dominic is not required to produce additional documents, if any, that have been requested and that are relevant and reasonably calculated to lead to the discovery of admissible evidence. However, pursuant to Rule 26(f) of the Mississippi Rules of Civil Procedure, both parties are required to supplement their discovery responses in a timely fashion so Plaintiffs’ request for an extension is unnecessary and is merely sought to further delay the trial of this matter. St. Dominic has produced the requested work order requests and other relevant, nonprivileged documents that are responsive to Plaintiffs’ discovery requests. Accordingly, Plaintiffs have failed to show that the lower court abused its discretion, and there is no basis for Plaintiffs’ request for an extension of the discovery deadline.

ARGUMENT

I. STANDARD OF REVIEW

In its review of a lower court's decision to allow or disallow evidence, including expert testimony, the Court applies an abuse of discretion standard of review. Bullock v. Lott, 964 So. 2d 1119, 1128 (Miss. 2007) (citing Webb v. Braswell, 930 So. 2d 387, 396-97 (Miss. 2006)). "A trial judge's determination as to whether a witness is qualified to testify as an expert is given the **widest possible discretion** and that decision will only be disturbed when there has been a clear abuse of discretion." Denham v. Holmes ex rel. Holmes, 60 So. 3d 773, 783 (Miss. 2011) (quoting Worthy v. McNair, 37 So. 3d 609, 614 (Miss. 2010)) (emphasis added) (internal quotation marks omitted). "[U]nless we can safely say that the trial court abused its discretion in allowing or disallowing evidence so as to prejudice a party in a civil case . . .," the lower court's decision to allow expert testimony must be affirmed. Id. (quoting Jones v. State, 918 So. 2d 1220, 1223 (Miss. 2005)) (internal quotation marks omitted).

For matters related to discovery, the lower court's exercise of discretion in discovery matters will not be set aside absent an abuse of discretion. Payton v. State, 897 So. 2d 921, 942 (Miss. 2003) (citing Gray v. State, 799 So. 2d 53, 60 (Miss. 2001)). The lower court's decisions on discovery matters "should be reviewed with great deference." Riverbend Utils., Inc. v. Brennan, 68 So. 3d 59, 62 (Miss. 2011) (quoting Cucos, Inc. v. McDaniel, 938 So. 2d 238, 242 n. 1 (Miss. 2006)).

II. THE LOWER COURT PROPERLY CLARIFIED ITS MARCH 23, 2010, ORDER STRIKING PLAINTIFFS' EXPERT WITNESS AS JOHN A. TILELLI, M.D. IS NOT QUALIFIED TO TESTIFY AS TO THE STANDARD OF CARE.

Nearly three years ago, on December 5, 2008, Plaintiffs Harold and Deborah Knapp filed the underlying action against St. Dominic, St. Dominic BHU, St. Dominic Behavioral Health Associates, and William Mark Valverde, M.D. (R 14). In their Complaint, Plaintiffs contend

that St. Dominic negligently caused Mrs. Knapp's slip and fall in her hospital room in the ICU. (R. 17). This fall was allegedly partially due to the hospital's failure to restrain Mrs. Knapp in the ICU. (R. 17). Specifically, Plaintiffs allege that "[d]efendants, their agents, servants or employees carelessly and negligently failed to properly monitor and/or supervise Plaintiff, Deborah Knapp, while she was a patient at their facilities" and "failed to ensure that such staff and nursing personnel followed any such standard operating policies and procedures in the care, treatment, monitoring, and observation of patients." (R. 9, 10). Plaintiffs also alleged that St. Dominic was liable for negligently allowing another BHU patient to attack Mrs. Knapp with a telephone, causing her to sustain injuries. (R. 18). Defendants purportedly failed "to properly monitor patients in the Behavior [sic] Health Unit." (R. 24). Since Plaintiffs first filed their Complaint in December 2008, all parties except for St. Dominic have been dismissed. (R. 125, 528, 561).

On October 1, 2009, as required by the Agreed Scheduling Order, Plaintiffs designated Dr. Tilelli as their expert witness. In their Expert Designation, Plaintiffs state that Dr. Tilelli will testify that the standard of care requires the hospital, its staff and agents:

(1) to exercise reasonable care to **safeguard the patient from any known or reasonably apprehensible danger from herself** and to exercise such reasonable care for her safety **as her mental and physical condition**, if known, **may require**; (2) to exercise reasonable care to **know the location of each patient and the actions in which each patient is engaged**; (3) to exercise reasonable care in **monitoring their patients' activities** and to have and utilize monitoring equipment; and (4) to exercise reasonable care to **keep and maintain its premises in a reasonably safe condition** for Plaintiff and other patients at its facility.

(R. 505) (emphasis added). Dr. Tilelli will testify St. Dominic breached the standard of care "by failing to properly monitor Deborah Knapp and/or exercise reasonable care to keep and maintain its premises in a reasonably secure or safe condition for Plaintiff and other patients at its facility during her stay in St. Dominic's Intensive Care Unit." (R. 504, 506). Dr. Tilelli is expected to

testify that St. Dominic “breached the standard of care in their treatment of Mrs. Knapp **given that she was unrestrained, and unsupervised** in the intensive care unit when she was **admitted due to an overdose (suicide attempt), mental disorder** and was **placed on a seventy-two (72) hour hold.**” (R. 506) (emphasis added). Furthermore, Dr. Tilelli will testify that St. Dominic “failed to have and/or utilize the proper monitoring equipment while Deborah Knapp was in the . . . Intensive Care Unit” and will generally testify as to the standard of care for monitoring Mrs. Knapp in the ICU. (R. 506).

St. Dominic filed a Motion to Strike Plaintiffs’ Expert Witness and for Partial Summary Judgment on November 2, 2009. (R. 498). In its motion and supporting memorandum, St. Dominic asserted that Dr. Tilelli, M.D. was not qualified to testify as to the standard of care required in the treatment of Mrs. Knapp in St. Dominic’s ICU and BHU. (R. 498, 522). Specifically, Dr. Tilelli’s curriculum vitae revealed that Dr. Tilelli is a pediatric critical care emergency room physician and is not board certified in psychiatry, psychology, or adult critical care. (R. 525). Thus, Dr. Tilelli could not provide expert testimony as to the appropriateness of 72-hour holds, the use of restraints in the ICU, or proper monitoring of psychiatric patients in the ICU. (R. 525).

The lower court agreed with St. Dominic, and though it noted many of the same cases now cited by Plaintiffs in their Appellants Brief, the court determined that Dr. Tilelli’s curriculum vitae reflected “no experience, on the part of Dr. Tilelli, related to any knowledge of the standard of care required of a hospital, regarding the Adult Intensive Care Unit or the Behavioral Health Unit, under similar circumstances.” (R. 562-63). As noted in its March 23, 2010, Order, “[i]t is undisputed that Dr. Tilelli has worked almost exclusively with children since 2001.” (R. 563). Furthermore, the lower court observed that Dr. Tilelli had “never treated a patient in the same situation as the Plaintiff’s.” (R. 563). Accordingly, in its March 23, 2010,

Order, the court appropriately granted St. Dominic's Motion to Strike Plaintiffs' Expert Witness and for Partial Summary Judgment on Plaintiff's claims related to St. Dominic's psychiatric care. (R. 564).

Shortly after the lower court entered its March 23, 2010, Order (R. 562), Plaintiffs' counsel contacted St. Dominic's counsel regarding their Motion to Amend Scheduling Order and explained that a trial date could not be assigned at that point since they "still had not received confirmation regarding [their] expert's availability." (R. 665). Plaintiffs' counsel explained that, in spite of the lower court's March 23, 2010, Order, Dr. Tilelli was only excluded from testifying as an expert on the standard of care in the BHU. (R. 665). Although St. Dominic believed the order to be clear, out of an abundance of caution, on August 17, 2010, St. Dominic filed a Motion to Clarify Court's Order Striking Plaintiffs' Expert Witness. (R. 659). St. Dominic sought clarification that the lower court's March 23, 2010, Order prohibited Dr. Tilelli from testifying as to the standard of care in both the BHU and the ICU. (R. 659-60). In its September 17, 2010, Order, the lower court granted St. Dominic's Motion to Clarify and confirmed that Dr. Tilelli was stricken as an expert in the previous March 23, 2010, Order and that Plaintiffs' only remaining claims were for premises liability. (R.E. 5).

Plaintiffs now assert that the lower court abused its discretion in clarifying its previous ruling striking Plaintiffs' expert witness, Dr. Tilelli, and only leaving Plaintiff's remaining premises liability claims. The lower court, however, in its September 17, 2010, Order correctly granted St. Dominic's Motion to Clarify, finding that "Plaintiffs' claims regarding 'Ms. Knapp's psychiatric care and treatment at St. Dominic' were clearly dismissed." (R.E. 5).

Rule 702 of the Mississippi Rules of Evidence states that a witness may testify if he is qualified by "**knowledge, skill, experience, training or education**" and if his "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence

or to determine a fact in issue.” (emphasis added). An expert’s testimony must be “based upon sufficient facts or data,” be the “product of reliable principles and methods,” and the expert must have “applied the principles and methods reliably to the facts of the case.” Id.

As the general acceptance rule from Frye no longer applies, an expert’s testimony must meet the Daubert requirements as set forth in the amended Rule 702. Miss. Transp. Comm’n v. McLemore, 863 So. 2d 31, 39-40 (Miss. 2003). A party offering an expert’s testimony “must show that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation.” Id. at 36 (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 (1993)). In addition, the lower court must consider “whether the theory of technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique’s operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community.” McLemore, 863 So. 2d at 37. As gatekeeper, the lower court must determine whether an expert “exercises the same level of ‘intellectual rigor that characterizes the practice of an expert in the relevant field.’” Sacks v. Necaize, 991 So. 2d 615, 662 (Miss. Ct. App. 2007) (quoting McLemore, 863 So. 2d at 37-38 (citations omitted)).

Here, the lower court properly granted St. Dominic’s Motion to Strike Plaintiffs’ Expert Witness in its March 23, 2010, Order as Dr. Tilelli is not qualified to testify as to the standard of care. (R. 562). Additionally, the lower court in its September 17, 2010, Order appropriately clarified its March 23, 2010, Order noting that Plaintiffs’ claims regarding psychiatric care and treatment “were clearly dismissed.” (R.E. 5). Dr. Tilelli is not board certified in psychiatry, psychology, or adult critical care. According to his curriculum vitae, Dr. Tilelli is board certified in the following areas: Pediatrics by the American Board of Pediatrics; Critical Care by the

American Board of Pediatrics; Medical Toxicology by the American Board of Medical Toxicology; Emergency Medicine by the American Board of Emergency Medicine; and Pediatric Emergency Medicine by the American Board of Pediatric Emergency Medicine. (R. 517). Dr. Tilelli is not board certified in psychiatry, psychology, or adult critical care, nor does he have any relevant experience related to adult intensive and/or psychiatric care. His certifications are all by **pediatric boards** with the exception of his board certification for medical toxicology (American Board of Medical Toxicology) and emergency medicine (American Board of Emergency Medicine). (R. 517).

Dr. Tilelli practices pediatric critical care and works for Arnold Palmer Hospital for Children. Although Plaintiffs add that this is also a hospital for women (i.e., adults), the hospital only provides gynecology services for women, and Dr. Tilelli is neither a gynecologist nor an obstetrician (R. 676-77). Additionally, the majority of Dr. Tilelli's recent publications were in pediatric journals or focused on pediatric issues, and **all** of his recent chairman and director positions were at the Arnold Palmer Hospital for Children and involved pediatric care. In spite of Dr. Tilelli's medical experience and certifications, Plaintiffs' claims do not involve pediatrics, medical toxicology, emergency medicine, pediatric critical care, or pediatric emergency medicine. See Complaint (R. 14). Dr. Tilelli's curriculum vitae reflects no experience, and thus no familiarity, with adult ICU patients, particularly those with psychiatric conditions (R. 516-18).⁵

⁵ Plaintiffs state that they have produced medical literature which supports their contentions that "doctors similarly situated as Dr. Tilelli are more than qualified to render an expert opinion regarding the standard of care for the treatment, care and monitoring of Deborah Knapp while she was a patient in the intensive care unit of St. Dominic." (R. 12). However, Plaintiffs did not produce this medical literature until filing their second Motion for Reconsideration on September 23, 2010, which is five days after the lower court's September 17, 2010, Order. (R.685). The lower court did not rule on this Motion for Reconsideration prior to the time Plaintiffs filed their Petition for Interlocutory Appeal on October 4, 2010. Thus, neither this motion nor the medical literature exhibits are properly before this Court for consideration.

Although Plaintiffs argue in their Appellants Brief that it is “clearly erroneous” for the Court to state in its March 23, 2010, Order that Dr. Tilelli’s curriculum vitae reflects no experience related to any knowledge of the standard of care for the Adult ICU or BHU, Plaintiffs fail to point out Dr. Tilelli’s experience that is relevant to Mrs. Knapp’s treatment and care in the adult ICU for a psychiatric condition. (Brief of Appellants at 10.). Plaintiffs also fail to point out any evidence to show that Dr. Tilelli is familiar with adult ICU medicine, regardless of whether or not he specializes in adult intensive care medicine. Plaintiffs essentially contend that the procedures of St. Dominic’s ICU, such as monitoring and restraint of patients, are simply “general hospital procedures,” rather than specialized procedures tailored to accommodate the needs of suicidal or psychiatric patients like Mrs. Knapp. (R. 422). Accordingly, Plaintiffs assert that Dr. Tilelli’s recent experience in treating children at the Arnold Palmer Hospital for Children is sufficient for testifying as an expert on the standard of care required for monitoring, restraining and supervising psychiatric patients in St. Dominic’s ICU.

Dr. Tilelli’s experience is in working with children, not adults with psychiatric conditions requiring restraints or monitoring. Plaintiff repeatedly points out to this Court that Dr. Tilelli is board certified in critical care - “Dr. Tilelli is board certified in Emergency Medicine and Critical Care, among other board certifications.” (Brief of Appellants at 10). However, his board certification in critical care is by the **American Board of Pediatrics**, rather than a board dedicated to adult medicine. The Mississippi Supreme Court has held that “[s]atisfactory familiarity with the specialty of the defendant doctor is . . . required in order for an expert to testify as to the standard of care owed to the plaintiff patient.” West v. Sanders Clinic for Women, P.A., 661 So. 2d 714, 718-19 (Miss. 1995) (emphasis added). The Court also noted that it is the “scope of the witness’ knowledge” that determines whether expert testimony is admissible. Id.

While Plaintiffs are correct that Mississippi law does not mandate that an expert must be a specialist in a field in order to testify about the standards of that field, the law does require the physician to have familiarity with the applicable standards of care. As Plaintiffs' medical malpractice allegations relate solely to the standard of care in monitoring, restraining, and supervising Mrs. Knapp in the ICU following her attempted suicide by an overdose of prescription medicine, Dr. Tilelli has no relevant knowledge, skill, experience, training, or education which relate to proper monitoring and restraining of such adult patients in the ICU. Dr. Tilelli's experience in emergency medicine and pediatric critical care do not reflect any knowledge of what measures should have been taken to monitor or restrain Mrs. Knapp in St. Dominic's ICU and BHU.

Although Plaintiffs insist that the lower court focused only on Dr. Tilelli's "titles" in determining that he was not qualified to testify to the standard of care, these titles are essentially all the evidence that Plaintiffs provided to support their argument that Dr. Tilelli was, in fact, a qualified expert. Plaintiffs gave no description of Dr. Tilelli's titles, such as Director of Quality Management for Acute Care Services, in order to show that how any of these positions with a children's hospital provided Dr. Tilelli with sufficient familiarity with the standard of care at issue. In fact, Plaintiffs simply assume that based upon these "titles" Dr. Tilelli has been "**bound to deal** with the care and treatment of a patient admitted to the hospital in the same or similar situation as the Plaintiff." (Brief of Appellants at 10) (emphasis added). But this is mere speculation on the part of Plaintiffs. Despite Plaintiffs' assertion that Dr. Tilelli has "treated patients similar to the Plaintiff," there is no evidence to support this statement. Finally, though Plaintiffs argue that Dr. Tilelli "has many years of work experience in intensive care units," Dr. Tilelli's curriculum vitae reflects that his only intensive care unit experience is for pediatric facilities. (R. 518).

Mississippi law provides that a trial judge is given the “widest possible discretion” in determining whether a witness is qualified to testify an expert. Denham, 60 So. 3d at 783 (citing Worthy, 37 So. 3d at 614 (citations omitted)). Dr. Tilelli has spent the vast extent of his medical career practicing in pediatric hospitals, including the Arnold Palmer Hospital for Children since 1987, and the majority of his medical board certifications, including critical care certification, are by the American Board of Pediatrics. (R. 517-18). As Plaintiffs have admitted, this is a case concerning St. Dominic’s alleged “failure to monitor” Mrs. Knapp in the ICU and BHU. (R. 623). Plaintiffs did not appeal the lower court’s determination that Dr. Tilelli is unqualified to testify as to the standard of care for failure to monitor Mrs. Knapp in the BHU, so it would seem that logical that the court’s decision that Dr. Tilelli is unqualified to testify as to the standard of care in the ICU also be upheld. Plaintiffs failed to present any evidence in the lower court that would show that Dr. Tilelli is sufficiently familiar with the applicable standard of care (i.e., proper monitoring/restraining of adult patients in the ICU with psychiatric conditions or recovering from overdoses) in order to testify as an expert in this case. Accordingly, the lower court did not abuse its discretion in clarifying its original March 23, 2010 Order granting St. Dominic’s Motion to Strike Plaintiffs’ Expert Witness.

III. THE LOWER COURT PROPERLY DENIED PLAINTIFFS THE OPPORTUNITY TO DESIGNATE ANOTHER EXPERT WITNESS AS THE DEADLINE FOR EXPERT DESIGNATION PER THE PARTIES’ AGREED SCHEDULING ORDER HAD EXPIRED.

After the lower court granted St. Dominic’s Motion to Strike Plaintiffs’ Expert Witness and for Partial Summary Judgment in its March 23, 2010, Order (R. 562), Plaintiffs filed a Motion to Amend Scheduling Order on March 29, 2010, attempting to circumvent the lower court’s order and to extend Plaintiffs’ deadline to designate an expert witness by thirty (30) days from the date of the entry of the court’s order on the motion. However, Plaintiffs’ deadline for designating an expert witness had long passed. Plaintiffs and St. Dominic, along with the now

dismissed defendants, entered into an Agreed Scheduling Order on June 12, 2009. (R. 635). Pursuant to the scheduling order, Plaintiffs' deadline to designate an expert witness was October 1, 2009 – almost ten months after Plaintiffs filed their Complaint. (R. 635). As required by the scheduling order, Plaintiffs designated Dr. Tilelli as their expert witness. (R. 504). As previously discussed, the lower court, however, struck Plaintiffs' expert witness in its March 23 2010, Order. Plaintiffs attempted to get two bites of the same apple by requesting additional time to designate another expert witness. While the lower court agreed to extend the discovery deadline by a little more than one month to allow Plaintiffs to depose eight (8) additional fact witnesses, the lower court properly denied Plaintiffs an extension to designate experts. (R.E. 5).

Despite the lower court's June 23, 2010, ruling on Plaintiff's Motion to Amend the Scheduling Order (R.E. 1), on August 24, 2010, Plaintiffs again filed a Motion to Extend Deadline to Designate Expert, "requesting an additional thirty (30) days to designate expert witnesses." (R.E. 4). This Motion was filed six days after St. Dominic filed a Motion to Clarify Court's Order Striking Plaintiffs' Expert Witness (R. 659) and prior to the court's ruling on this motion. However, in its September 17, 2010, Order, the lower court reinforced that Plaintiffs' deadline for designating experts had passed, stating "[a]s the Court has previously held, the deadline under which the Plaintiff could designate an expert witness has passed, and the Plaintiffs Motion to Extend the Discovery Deadline to Designate Expert is not well-taken and should be DENIED." (R.E. 5).

In their Appellants Brief, Plaintiffs correctly note that Rule 4.04(A) of the Uniform Circuit and County Court Rules prohibits trial testimony by an expert witness who was not designated as an expert witness **at least** sixty days before trial. (Brief of Appellants at 13-14). Though Plaintiffs make much of the fact that no trial date has been set for this case, it is disingenuous to suggest that the reason for this is because of any delay on the part of Defendants.

In fact, St. Dominic requested a trial date over a year and five months ago. (R. 570). Plaintiffs fail to cite any support for the argument that they should be allowed an extension (i.e., a second chance) to designate an expert witness.⁶ Clearly, Rule 4.04(A) is intended to apply when the parties have no scheduling order in place.

In Venton v. Beckham, the plaintiffs sought leave to designate an expert within the time period provided in Rule 4.04(A) though their time for designating experts in accordance with the scheduling order had passed. 845 So. 2d 676, 683 (Miss. 2003). The lower court denied the plaintiffs' request to designate their experts after the scheduling order deadline but prior to sixty days before trial. Id. at 684. On appeal, the Mississippi Supreme Court affirmed the order of the lower court, deferring to its "considerable discretion" and its authority and duty to "maintain control of the docket and ensure the efficient disposal of court business." Id. (citing Harris v. Fort Worth Steel & Mach. Co., 440 So. 2d 294, 296 (Miss. 1983)). The Court has stated that "trial judges also have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril." Bowie v. Montfort Jones Mem'l Hosp., 861 So. 2d 1037, 1042 (Miss. 2003).

As in Bowie, Plaintiffs knew when their expert witness designations were due per the scheduling order. Although Plaintiffs designated an expert witness prior to the scheduling order's deadline, St. Dominic should not be burdened and prejudiced by their failure to designate a qualified expert within the ten months following the filing of their Complaint. If Plaintiffs are allowed to conduct discovery and designate a new expert witness(es) outside of the parties' Agreed Scheduling Order, then the purpose of this court-entered scheduling order is rendered moot. Though Plaintiffs assert that St. Dominic will not be prejudiced by the designation of another expert and that its new expert will not state any facts, opinions or theories of liability that

⁶ Interestingly, Rule 4.04(A) also requires that all discovery be completed within ninety days after service of the defendant's answer, though Plaintiffs disregard this portion of the local rule.

differ greatly from Dr. Tilelli's, these statements are purely speculative. Following the lower court's March 23, 2010, Order striking Dr. Tilelli, this case became a premises liability case. However, if Plaintiffs are allowed to designate a new medical expert, the case will again become a medical malpractice case (completely undermining the lower court's granting of partial summary judgment against Plaintiffs). St. Dominic will be prejudiced, especially at this late stage of litigation, as it would then have to shift its entire defense from a premises liability standpoint to a medical malpractice one. Thus, because Mississippi law supports the lower court's authority to enter and uphold scheduling orders and because St. Dominic will be prejudiced if Plaintiffs are allowed to designate another expert witness after the scheduling order deadline, the lower court's denial of Plaintiffs' Motion to Amend Scheduling Order should be affirmed.

IV. THE LOWER COURT PROPERLY DENIED PLAINTIFFS' MOTION TO EXTEND THE DISCOVERY DEADLINE AS THE DISCOVERY DEADLINE HAD ALREADY BEEN EXTENDED NUMEROUS TIMES TO ADDRESS PLAINTIFFS' DISCOVERY ISSUES.

Plaintiffs filed a Motion to Amend Scheduling Order on March 29, 2010, seeking an extension of the parties' discovery deadline by ninety days. (R. 565). After a hearing on the matter, the lower court granted Plaintiffs a thirty-day extension and allowed them to depose up to eight fact witnesses in order to address Plaintiffs' concerns. (R.E. 1). Plaintiffs later filed a Motion to Extend Discovery Deadline on July 30, 2010, and the court granted Plaintiffs an additional extension until October 15, 2010 to depose witnesses associated with work order requests produced by St. Dominic. (R.E. 5). In spite of this second discovery extension, Plaintiffs petition this Court for additional time to conduct discovery based on the unsupported belief that St. Dominic is willfully withholding certain discoverable documents from Plaintiffs.

St. Dominic has never denied that, prior to one of the eight depositions scheduled in July 2010, it discovered maintenance work order requests (dated after Mrs. Knapp's admission) for

the bathroom in the ICU room where Mrs. Knapp was staying.⁷ However, upon the discovery of these work order requests, St. Dominic immediately produced the documents to Plaintiffs, and St. Dominic appropriately offered, and the lower court ordered, that Plaintiffs be allowed to depose the individuals listed in the work order requests who had first-hand knowledge of the requests. Thus, the lower court addressed and resolved any discovery deficiencies that concerned Plaintiffs after St. Dominic produced the work order requests. Nonetheless, Plaintiffs now attempt to persuade this Court that St. Dominic unlawfully concealed these work order requests (and perhaps other documents) and that discovery should be further extended because of this possibility. See Brief of Appellants at 16 (“The failure to produce these highly relevant maintenance records cannot and should not be viewed by this Court as a mere oversight on the part of the Defendant”).

In their Appellants Brief, Plaintiffs cite Rule 26(f)(2) of the Mississippi Rules of Civil Procedure as support for their arguments to extend the discovery deadline. Rule 26 mandates that a party must seasonably amend previous discovery responses if the party “obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.” Miss. R. Civ. P. 26(f)(2). Contrary to Plaintiffs’ assertions, St. Dominic does not argue that Rule 26’s duty to supplement is inapplicable after the discovery deadline, and Plaintiffs’ insistence that St. Dominic not be allowed to circumvent Rule 26 is baseless. Indeed, if any documents are discovered which are relevant to this case and reasonably calculated to lead

⁷ In their Appellants Brief, Plaintiffs repeatedly refer to documents at Supp. R. 8-11, 44-46, and 47-53. These documents are exhibits to Plaintiffs’ Notice of Attorney’s Examination and Proposed Corrections to Record but are not properly before the Court and thus, should not be referred to by Appellants. See July 1, 2011 Order, dismissing Plaintiffs’ Motion for Correction of the Record.

to the discovery of admissible evidence, then both Plaintiffs and St. Dominic have an **ongoing** duty to supplement previous discovery responses and to **timely** provide these documents.

Plaintiffs' sole argument for extending the discovery deadline is their emphatic, yet unsupported, belief that St. Dominic has not produced relevant documents and that St. Dominic will not supplement its discovery responses in accordance with Rule 26 if such documents are discovered. Additionally, Plaintiffs have provided no basis for their argument that they are "being denied an opportunity to completely develop their case for trial." (Brief of Appellants at 17). The parties' scheduling order requires that the order only be extended upon a showing of "good cause." (R. 636). As this case was filed nearly three years ago, Plaintiffs have had more than ample time to develop their case and have not been hindered by any actions of St. Dominic. Plaintiffs have failed to show good cause to justify an extension of the scheduling order.

The Supreme Court has recognized that the trial court has considerable discretion in deciding discovery matters and that their determinations will not be disregarded absent a showing of abuse of such discretion. Thompson v. Patino, 784 So. 2d 220, 223 (Miss. 2001); Payton, 897 So. 2d at 942 (citations omitted). See also Collins v. Koppers, Inc., 59 So. 3d 582, 590 (Miss. 2011) (quoting Bowie, 861 So.2d at 1042) ("Our trial judges are afforded considerable discretion in managing the pre-trial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of the cases"). In resolving Plaintiffs' discovery issues, the lower court determined that Plaintiffs were entitled to take the depositions of persons listed in the work order requests that were produced by St. Dominic, and Plaintiffs proceeded to do so. Plaintiffs, however, have failed to show how the lower court abused its "considerable discretion" by denying Plaintiffs a third extension of the discovery deadline. Thus, the decision of the lower court should be affirmed.

In their Appellants Brief, Plaintiffs also argue that an extension is necessary in order “to *compel* the production of other discovery which is in existence, but is presently being withheld from the Plaintiffs.” (Brief of Appellants at 17) (emphasis added). Plaintiffs, however, filed a motion for extension of discovery deadline and not a motion to compel. Even if Plaintiffs’ actions could be construed as a motion to compel, Plaintiffs still failed to comply with the motion to compel requirements. Rule 4.04(C) of the Uniform Rules of Circuit and County Court Practice states, “[n]o motion to compel shall be heard unless the moving party shall incorporate in the motion a certificate that movant has conferred in good faith with the opposing attorney in an effort to resolve the dispute and has been unable to do so.” Not only did Plaintiffs not file a motion to compel, but Plaintiffs also did not provide the lower court with a good faith certificate as part of the motion for extension of discovery. Finally, Rule 4.04(C) also requires “[m]otions to compel [to] quote verbatim each contested request, the specific objection to the request, the grounds for the objection and the reasons supporting the motion.” Once again, Plaintiffs wholly failed to comply with these requirements. Thus, the lower court properly denied any request through the Motion to Extend the Discovery Deadline to compel St. Dominic to produce additional documents.

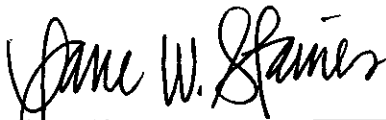
V. CONCLUSION

The Court should affirm the lower court’s order clarifying its March 23, 2010, Order striking Dr. Tilelli as an expert witness. Though Plaintiffs contend that Dr. Tilelli’s board certification and experience in pediatric critical care and emergency medicine qualify him as an expert in this case, Plaintiffs failed to demonstrate that Dr. Tilelli is familiar with the standard of care required in adult intensive care, particularly with respect to the proper monitoring and use of restraints for psychiatric patients. Furthermore, the Court should affirm the lower court’s decision to deny Plaintiffs’ request to designate a new expert and to extend the discovery

deadline a third time. The parties' deadline for designating expert witnesses has now expired, and St. Dominic will be prejudiced by the addition of a new expert witness at this late stage of litigation. Moreover, as this case was filed nearly three years ago and Plaintiffs have failed to show good cause for extending the scheduling order, the lower court's decision should stand. For these reasons, the Court should affirm the decisions of the lower court.

Respectfully submitted, this the 19th day of October, 2011.

ST. DOMINIC-JACKSON MEMORIAL HOSPITAL

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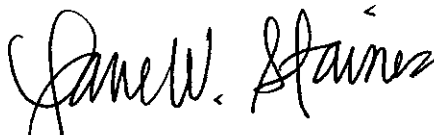
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