IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2011-CA-00078

LATOYA HACKLER, on behalf of herself, individually, and as mother and next friend of A'KAALIN HACKLER TOWNES, a minor deceased, and any wrongful death beneficiaries of A'KAALIN HACKLER TOWNES, Deceased

PLAINTIFFS/APPELLANTS

VS.

BOLIVAR MEDICAL CENTER, owned and operated by LIFEPOINT HOSPITALS, INC., DR. ROBERT C. TIBBS, III, TIBBS CLINICS, and JOHN DOE DEFENDANTS 1-5

DEFENDANTS/APPELLEES

BRIEF OF APPELLEE DR. ROBERT C. TIBBS, III

Appeal from the Circuit Court of Bolivar County, Mississippi
Second Judicial District
Cause No. 2009-0065

Prepared and submitted by:

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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 Court of Appeals may evaluate possible disqualification or recusal.

1. Latoya Hackler, Plaintiff/Appellant
2. Wrongful death beneficiaries of A'Kaalin Hackler, Deceased, Plaintiffs/Appellant
3. Dr. Robert C. Tibbs, III, Defendant/Appellee
4. PHC Cleveland, Inc., d/b/a Bolivar Medical Center, Defendant/Appellee
5. L. Carl Hagwood, Attorney for Defendant/Appellee, Dr. Tibbs
6. Mary Frances S. England, Attorney for Defendant/Appellee, Dr. Tibbs
7. Kimberly N. Howland, Attorney for Defendant/Appellee, PHC Cleveland, Inc., d/b/a Bolivar Medical Center
8. Honorable Kenneth L. Thomas, Circuit Court Judge

DR. ROBERT C. TIBBS, III

MARY FRANCES S. ENGLAND, MB[redacted]

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1. The trial court did not abuse its discretion in denying Plaintiff's request for a continuance under M.R.C.P. 56(f).

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STATEMENT OF THE CASE

On August 31, 2009, Plaintiff filed a medical negligence action against Dr. Robert C. Tibbs, III, and Bolivar Medical Center (BMC) alleging Dr. Tibbs and BMC committed medical negligence against A'Kaalin Hackler Townes, causing her death in July 2007. R. at 5-10.[1] Plaintiff alleged, among other claims, that Dr. Tibbs failed to provide proper evaluation, care, supervision or to respond to exigent circumstances created in connection with the treatment of Baby Townes. *Id.*

In response, Dr. Tibbs filed an Answer denying liability and also propounded discovery requests. In those discovery requests, Dr. Tibbs requested Plaintiff identify her experts, state the substance of the facts and opinions the experts are expected to testify to, and the grounds for the experts' opinions. R. at 43-56; T.R.E. 1. Thereafter, Plaintiff answered discovery on March 8, 2010, but failed to identify her experts. *Id.* In her responses, Plaintiff stated she "had not decided which expert will testify at trial. The anticipated expert has not completed the report. Plaintiff expects to receive the report within the next 10-14 days and will supplement this response at that time." *Id.* Plaintiff failed to supplement her responses and on July 6, 2010, Dr. Tibbs' counsel requested that Plaintiff supplement her discovery responses to identify her experts. R. at 56; T.R.E. 1.

Thereafter, Plaintiff failed to identify her experts, and on August 24, 2010, Dr. Tibbs filed a Motion for Summary Judgment since Plaintiff had failed to identify any experts in this medical malpractice case. R. at 32-58; T.R.E.1. Subsequently, BMC filed a similar Motion for Summary Judgment on September 7, 2010. R. at 59-81. On September 30, 2010, Dr. Tibbs noticed his Motion for Summary Judgment for hearing on November 18, 2010. R. at 82-83; T.R.E. 2. Two days prior to the hearing, Plaintiff filed a Motion Pursuant to Rule 56(f) to Continue Hearing and Motion to

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[1] The abbreviations for the citations to the record are as follows: R. - Clerk's Papers; Tr. - Hearing Transcript; R.E. - Appellant's Record Excerpts; T.R.E. - Dr. Tibbs' Record Excerpts.

Conduct Discovery, but never noticed the motion for hearing. R. at 86-156; R.E. at 35-106. Attached to Plaintiff's Motion was the Affidavit of Elliott B. Oppenheim, M.D., J.D. R. at 101-02; R.E. at 50-51. In the Affidavit, Dr. Oppenheim stated that, "My role is that of a medical-legal analyst consultant. I will not testify in this case," and " I do not practice law or medicine." *Id.* No other medical expert affidavit was attached. Also attached to Plaintiff's Motion was an unsigned affidavit of Latoya Hackler stating that she had exhausted her funds and "was unable to provide any money towards the cost of obtaining a medical expert to testify in the case regarding her deceased infant child, A'Kaalin Hackler Townes." R. at 155-56; R.E. at 104-05. Finally, Plaintiff's counsel, Ms. Louise Harrell attached an affidavit stating that University Medical Center, who was not a party to the suit, took several months to provide certain medical records. R. at 90-100; R.E. at 39-49. However, the affidavit did state that Plaintiff received the UMC records in August, three months prior to the hearing. *Id.*

At the hearing, the trial judge heard arguments from the parties and ruled from the bench that Dr. Tibbs' Motion for Summary Judgment was granted and denied Plaintiff's request for a continuance. Tr. at 19. Subsequently, the trial judge entered an Order Granting Defendant Robert C. Tibbs, III, M.D.'s Motion for Summary Judgment. R. at 157. Thereafter, Plaintiffs filed a Notice of Appeal. R. at 159-60.

SUMMARY OF THE ARGUMENT

"[I]n order to prevail in a medical malpractice action, a plaintiff must establish, by expert testimony, the standard of acceptable professional practice; that the defendant physician deviated from that standard; and that the deviation from the standard of acceptable professional practice was the proximate cause of the injury [or death] of which plaintiff complains." *Brown v. Baptist Mem'l Hosp. DeSoto, Inc.* 806 So.2d 1131, ¶ 12 (Miss. 2002)(citing *Phillips ex rel. Phillips v. Hull,* 516 So.2d 488, 491 (Miss. 1987) and *Burnham v. Tabb,* 508 So.2d 1072, 1074 (Miss. 1987)). "Unless the issue under consideration is within the common knowledge of laymen, expert testimony is required." *Mallet v. Carter* 803 So.2d 504, ¶ 11 (Miss. App., 2002)(citing *Palmer v. Biloxi Reg'l Med. Ctr*, 564 So.2d 1346, 1355 (Miss. 1990)).

In one of the most recent cases on point, the Mississippi Supreme Court held, "The general rule in medical-negligence claims is 'that negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care.'" *Hill v. Mills,* 26 So.3d 322, ¶ 21 (Miss. 2010)(quoting *Troupe v. McAuley*, 955 So.2d 848, 856 (Miss.2007)(quoting *Brooks v. Roberts*, 882 So.2d 229, 232 (Miss.2004)). The *Hill* court also noted:

> In *Troupe*, we held:
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> > To present a prima facie case of medical malpractice, a plaintiff, (1) after establishing the doctor-patient relationship and its attendant duty, is generally required to present expert testimony (2) identifying and articulating the requisite standard of care; and (3) establishing that the defendant physician failed to conform to the standard of care. In addition, (4) the plaintiff must prove the physician's noncompliance with the standard of care caused the plaintiff's injury, as well as proving (5) the extent of the plaintiff's damages.

Id. (quoting *Troupe*, 955 So.2d at 856 (quoting *Cheeks v. Bio-Medical Applications, Inc.*, 908 So.2d 117 (Miss.2005)).

The Plaintiff's claims against Dr. Tibbs in the present case involve the standard of care for a newborn in distress. Thus, the facts of this case are not such that the standard of care for Dr. Tibbs is within the knowledge of lay persons. Without expert testimony establishing the relevant standard of care and tending to show that Dr. Tibbs breached that standard, the Plaintiff cannot make out her prima facie case, and all other issues in this case become immaterial. *See Williams v. Bennett*, 921 So.2d 1269, ¶ 10(Miss. 2006)("[w]here the summary judgment evidence establishes that one of the essential elements of the plaintiff's' cause of action does not exist as a matter of law, or that plaintiffs' cause of action is barred by a statute of limitations, all other contested issues of fact are rendered immaterial.")(citing *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552 (1986)("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."); *See also Topalian v. Ehrman*, 954 F.2d 1125, 1138 (5th Cir.1992). *Bowie v. Montfort Jones Mem'l Hosp., et al.*, 861 So.2d 1037, ¶¶ 14-17 (Miss. 2003).; *Sheffield v. Goodwin*, 740 So.2d 854, ¶ 16-17 (Miss. 1999), *Erby v. N. Miss. Med'l Ctr,* 654 So.2d 495, 500 (Miss. 1995) *Galloway v. Travelers Ins. Co.*, 515 So.2d 678, 683 (Miss. 1987), *Ladner v. Campbell,* 515 So.2d 882, 887-88 (Miss.1987).

Furthermore, "[o]nce the absence of genuine issues of material fact has been shown by the movant, the burden of rebuttal falls upon the non-moving party." *Wilbourn v. Stennett, Wilkinson & Ward,* 687 So.2d 1205, 1213 (Miss. 1996). And, when defending a motion for summary judgment, a plaintiff may not merely rest upon the allegations in his pleadings. *See Travis v. Stewart,* 680 So.2d 214 (Miss. 1996). Instead, "[t]he non-moving party must produce specific facts showing that there is a genuine material issue for trial. The non-moving party's claim must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict." *Van v. Grand Casinos of Miss., Inc.*, 767 So.2d

1014,1018 (Miss. 2000) (citations omitted).

A trial court "has sound discretion to grant or deny a continuance under Rule 56(f)." *Owens v. Thomae*, 759 So. 2d 1117, 1120 (Miss 1990). The appellate court "will only reverse a trial court where its decision can be characterized as an abuse of discretion. *Id.*

At the hearing, the trial court ruled in favor of Dr. Tibbs and dismissed the Plaintiff's case with prejudice. Tr. at 19; R. at 157. The trial court based its decision on controlling case law that the general rule in medical-negligence claims "that negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care." *Hill v. Mills*, 26 So.3d 322, ¶ 21 (Miss. 2010)(quoting *Troupe v. McAuley*, 955 So.2d 848, 856 (Miss.2007)(quoting *Brooks v. Roberts*, 882 So.2d 229, 232 (Miss.2004)). Tr. at 18. The trial court also found that Plaintiff did not seek additional time to identify an expert in a timely manner, either informally from opposing counsel or with the trial court. Tr. at 19. Therefore, the trial court denied Plaintiff's Motion for Continuance. *Id.*

Plaintiff has failed to set forth any reason that an additional sixty (60) days would change the fact that she has no expert to testify in this medical malpractice claim. Without expert testimony establishing the relevant standard of care and tending to show that Dr. Tibbs breached that standard, the Plaintiff cannot make out her prima facie case, and all other issues in this case become immaterial. Therefore, summary judgment was proper and should be affirmed.

ARGUMENT

I. FACTS

On August 31, 2009, Plaintiff filed a medical negligence action against Dr. Robert C. Tibbs, III, and Bolivar Medical Center (BMC) alleging Dr. Tibbs and BMC committed medical negligence against A'Kaalin Hackler Townes, causing her death in July 2007. R. at 5-10. Plaintiff alleged,

among other claims, that Dr. Tibbs failed to provide proper evaluation, care, supervision or to respond to exigent circumstances created in connection with the treatment of Baby Townes. *Id.*

In response, Dr. Tibbs filed an Answer denying liability and also propounded discovery requests. In those discovery requests, Dr. Tibbs requested Plaintiff identify her experts, state the substance of the facts and opinions the experts are expected to testify to, and the grounds for the experts' opinions. R. at 43-56; T.R.E.1. Thereafter, Plaintiff answered discovery on March 8, 2010, but failed to identify their experts. *Id.* In her responses, Plaintiff stated she "had not decided which expert will testify at trial. The anticipated expert has not completed the report. Plaintiff expects to receive the report within the next 10-14 days and will supplement this response at that time." *Id.* Plaintiff failed to supplement her responses and on July 6, 2010, Dr. Tibbs' counsel requested that Plaintiff supplement her discovery responses to identify her experts. R. at 56; T.R.E. 1.

Thereafter, Plaintiff failed to identify her experts, and on August 24, 2010, Dr. Tibbs filed a Motion for Summary Judgment, since Plaintiff had failed to identify any experts in this medical malpractice case. R. at 32-56; T.R.E.1. Subsequently, BMC filed a similar Motion for Summary Judgment on September 7, 2010. R. at 59-81. On September 30, 2010, Dr. Tibbs noticed his Motion for Summary Judgment for hearing on November 18, 2010. R. at 82-83; T.R.E.2. Two days prior to the hearing, Plaintiff filed a Motion Pursuant to Rule 56(f) to Continue Hearing and Motion to Conduct Discovery but never noticed the motion for hearing. R. at 86-156. Attached to Plaintiff's Motion was the Affidavit of Elliott B. Oppenheim, M.D., J.D. R. at 101-02. Among other things in the Affidavit, Dr. Oppenheim stated that, "My role is that of a medical-legal analyst consultant. I will not testify in this case," and " I do not practice law or medicine." *Id.* Also attached to Plaintiff's Motion was an unsigned Affidavit of Latoya Hackler stating that she had exhausted her funds and "was unable to provide any money towards the cost of obtaining a medical expert to testify

in the case regarding her deceased infant child, A'Kaalin Hackler Townes." R. at 155-56. Finally, Plaintiff's counsel, Ms. Louise Harrell attached an affidavit stating that University Medical Center, who was not a party to the suit, took several months to provide certain medical records. R. at 90-100. However, the affidavit did state that Plaintiff received the UMC records in August, three months prior to the hearing. *Id.*

At the hearing, the trial judge heard arguments from the parties and ruled from the bench that Dr. Tibbs' Motion for Summary Judgment was granted and denied Plaintiff's request for a continuance. Tr. at 19. Subsequently, the trial judge entered an Order Granting Defendant Robert C. Tibbs, III, M.D.'s Motion for Summary Judgment. R. at 157. Thereafter, Plaintiffs filed a Notice of Appeal. R. at 159-60.

II. LAW AND ANALYSIS

A. Standard of Review

This Court reviews summary judgments de novo. *Stallworth v. Sanford*, 921 So. 2d 340, 341-42 (Miss. 2006), *citing Davis v. Hoss*, 869 So. 2d 397, 401 (Miss. 2004). Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Id., citing* M.R.C.P. 56(c). "The evidence is viewed in the light most favorable to the party opposing the motion." *Id.* "If there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment should be entered in his favor." *Id.* The burden of demonstrating that a genuine issue of material fact does not exist is placed on the moving party. *Id.*

A trial court has sound discretion to grant or deny a continuance under Rule 56(f). *Stallworth v. Sanford*, 921 So. 2d 340, 342-43 (Miss. 2006), *citing Owens v. Thomae*, 759 So. 2d 1117, 1120

(Miss. 1990). "This Court will only reverse a trial court where its decision can be characterized as an abuse of discretion." *Id.*

B. <u>The trial court did not abuse its discretion in denying Plaintiffs' request for a continuance under M.R.C.P. 56(f).</u>

At the summary judgment hearing, Plaintiff's counsel admitted that even at the hearing she still did not have a name of a testifying expert, and her request for additional time to identify an expert was not made prior to the setting of the motion for summary judgment. Tr. at 13. Plaintiff's counsel stated that two doctors had reviewed the case, but they would not be testifying. Tr. at 12. Plaintiff's counsel also admitted she did not informally request any additional time to identify an expert from defense counsel. Tr. at 13-14. The summary judgment hearing occurred on November 18, 2010, over three years after the alleged negligence occurred and over a year after Plaintiff filed suit in this medical malpractice case.

After reviewing the pleadings and hearing arguments from the parties, the trial court ruled from the bench stating,

> Under rule 56, and the various controlling cases, it is absolutely a prerequisite that there be a designation of an expert in a timely manner.
>
> Had you sought leave of the Court, had you got an informal consent from opposing counsel for you to delay this matter further in an effort to obtain the name of an expert, that would have been okay. But I cannot let the matter proceed on under the circumstances.
>
> ...
>
> But you didn't seek additional time in a timely manner. Not either informally with your fellow counsel or with the Court. It's not an automatic.

Tr. at 18-19.

In a case on point, this Court upheld a trial court's grant of summary judgment to a

defendant/doctor when Plaintiff failed to timely respond to the doctor's interrogatory request for designation of an expert witness. *Stallworth v. Sanford*, 921 So. 2d 340 (Miss. 2006). In the *Stallworth* case, instead of providing an expert opinion at the summary judgment hearing, Plaintiff filed an affidavit three days before the hearing requesting additional time to file an expert affidavit. *Id.* at 342. In the affidavit, Plaintiff's counsel explained why she had not obtained an expert opinion by that time in the litigation, stating she had recently located an expert who was willing to testify. *Id.* Thereafter, the trial judge did not grant a continuance and granted the defendant/doctor's motion for summary judgment. *Id.* The trial court noted that Plaintiff did not file sworn discovery responses, had ample time to locate a medical expert and the affidavit filed did not comply with the rules regarding supplementation of discovery and did not excuse Plaintiff from having an expert to support her claim. *Id.* at 343. On appeal, the Supreme Court found that the trial court did not abuse its discretion when it denied Plaintiff's request for an additional thirty days to obtain a medical expert and noted Rule 56(f) is not designed to protect litigants who are lazy or dilatory. *Id., citing In re Last Will & Testament of Smith*, 910 So. 2d 562, 570 (Miss. 2005).

In a similar Court of Appeals' case, the court affirmed summary judgment to the defendant when the plaintiff had failed to designate any medical expert which would establish the requisite elements of the medical malpractice claim. *Scales v. Lackey Mem'l Hosp.*, 988 So. 2d 426, 429 (Miss. Ct. App. 2008). On appeal, the plaintiff alleged the trial court erred in granting summary judgment and argued that a continuance should have been granted. *Id.* at 430. In its opinion, the Court of Appeals pointed out that plaintiff had had three years from the time she filed her complaint until the time summary judgment was granted stated, "[a]s the Mississippi Supreme Court has stated, a plaintiff in a medical malpractice action knows 'from the very moment the suit [is] filed ... that an expert witness [will] be needed to survive summary judgment.'" *Id.* at 436, *citing Brooks v. Roberts*,

882 So. 2d 229, 232 (Miss. 2004). The Court of Appeals held that the trial court did not abuse its discretion in refusing to allow additional time for discovery and affirmed summary judgment. *Id.*

In this case, Plaintiff requested additional time due to the delay in receiving the UMC medical records and Plaintiff's financial hardship. R. at 86-99; R.E. at 35-105. However, UMC is not a party to this case; the events at UMC are not relevant to determining whether Dr. Tibbs breached the standard of care at BMC; and Plaintiff received the UMC records three months prior to the hearing on Dr. Tibbs' and BMC's motions for summary judgment. R. at 90-100; R.E. at 39-49. Also, Plaintiff had ample time to request additional time when she realized the UMC records had not been received. In addition, Plaintiff had ample time to locate an expert prior to Plaintiff losing her job. This is a medical malpractice case, and Plaintiff should have been aware from the beginning that a medical expert would have to be retained to testify on her behalf in order to make out a claim for medical malpractice.

In addition, Dr. Oppenheim's Affidavit offers no support for Plaintiff's request for a continuance. Although he alleges that Defendants breached the standard of care, and "[i]n [his] experience, however, given some time this expert support will be forthcoming on this meritorious case," by his admission, he is a medical-legal analyst consultant who does not practice law or medicine. R. at 101-02; R.E. at 50-51. Dr. Oppenheim stated, "[t]he Plaintiff requires additional time to find a well-qualified medical expert witness to support this case." *Id.* At the summary judgment hearing, Plaintiff's counsel admitted that even at the hearing she still did not have a name of a testifying expert. Tr. at 13. Plaintiff's counsel stated that two doctors had reviewed the case, but they would not be testifying. Tr. at 12. This is a medical malpractice case; therefore, Plaintiff should have known from the beginning that a medical expert would have to be retained to testify on her behalf in order to make out a claim for medical malpractice. Plaintiff failed to set forth any

reason that an additional sixty (60) days would change the fact that she has no expert to testify in this medical malpractice claim. Therefore, the trial court did not abuse its discretion in denying Plaintiff's request for a continuance under Rule 56(f).

C. Summary judgment was proper in this case, as Plaintiff has no medical expert to testify on her behalf.

"[I]n order to prevail in a medical malpractice action, a plaintiff must establish, by expert testimony, the standard of acceptable professional practice; that the defendant physician deviated from that standard; and that the deviation from the standard of acceptable professional practice was the proximate cause of the injury [or death] of which plaintiff complains." *Brown v. Baptist Mem'l Hosp. DeSoto, Inc.* 806 So.2d 1131, ¶ 12 (Miss. 2002)(citing *Phillips ex rel. Phillips v. Hull,* 516 So.2d 488, 491 (Miss. 1987) and *Burnham v. Tabb,* 508 So.2d 1072, 1074 (Miss. 1987)). "Unless the issue under consideration is within the common knowledge of laymen, expert testimony is required." *Mallet v. Carter* 803 So.2d 504, ¶ 11 (Miss. App., 2002)(citing *Palmer v. Biloxi Reg'l Med. Ctr*, 564 So.2d 1346, 1355 (Miss. 1990)).

In one of the most recent cases on point, the Mississippi Supreme Court held, "The general rule in medical-negligence claims is 'that negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care.'" *Hill v. Mills*, 26 So.3d 322, ¶ 21 (Miss. 2010)(quoting *Troupe v. McAuley*, 955 So.2d 848, 856 (Miss.2007)(quoting *Brooks v. Roberts*, 882 So.2d 229, 232 (Miss.2004)). The *Hill* court also noted:

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> noncompliance with the standard of care caused the plaintiff's injury, as well as proving (5) the extent of the plaintiff's damages.

Id. (quoting *Troupe*, 955 So.2d at 856 (quoting *Cheeks v. Bio-Medical Applications, Inc.*, 908 So.2d 117 (Miss.2005)).

The Plaintiff's claims against Dr. Tibbs in the present case involve the standard of care for a newborn in distress. Thus, the facts of this case are not such that the standard of care for Dr. Tibbs is within the knowledge of lay persons. Without expert testimony establishing the relevant standard of care and tending to show that Dr. Tibbs breached that standard, the Plaintiff cannot make out her prima facie case, and all other issues in this case become immaterial. *See Williams v. Bennett*, 921 So.2d 1269, ¶ 10(Miss. 2006)("[w]here the summary judgment evidence establishes that one of the essential elements of the plaintiff's' cause of action does not exist as a matter of law, or that plaintiffs' cause of action is barred by a statute of limitations, all other contested issues of fact are rendered immaterial.")(citing *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552 (1986)("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."); *See also Topalian v. Ehrman*, 954 F.2d 1125, 1138 (5th Cir.1992). *Bowie v. Montfort Jones Mem'l Hosp., et al.*, 861 So.2d 1037, ¶¶ 14-17 (Miss. 2003).; *Sheffield v. Goodwin*, 740 So.2d 854, ¶ 16-17 (Miss. 1999), *Erby v. N. Miss. Med'l Ctr*, 654 So.2d 495, 500 (Miss. 1995) *Galloway v. Travelers Ins. Co.*, 515 So.2d 678, 683 (Miss. 1987), *Ladner v. Campbell*, 515 So.2d 882, 887-88 (Miss.1987).

Furthermore, "[o]nce the absence of genuine issues of material fact has been shown by the movant, the burden of rebuttal falls upon the non-moving party." *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1213 (Miss. 1996). And, when defending a motion for summary judgment, a plaintiff may not merely rest upon the allegations in his pleadings. *See Travis v.*

Stewart, 680 So.2d 214 (Miss. 1996). Instead, "[t]he non-moving party must produce specific facts showing that there is a genuine material issue for trial. The non-moving party's claim must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict." *Van v. Grand Casinos of Miss., Inc.*, 767 So.2d 1014,1018 (Miss. 2000) (citations omitted).

Plaintiff offered no rebuttal to Defendants' Motion for Summary Judgment. Instead, Plaintiff requested a continuance under Rule 56(f). Once the trial court denied Plaintiff's request for a continuance, summary judgment was required under Rule 56 and case law. Without expert testimony establishing the relevant standard of care and tending to show that Dr. Tibbs breached that standard, the Plaintiff cannot make out her prima facie case, and all other issues in this case become immaterial. Therefore, summary judgment was proper and should be affirmed.

CONCLUSION

Plaintiff has failed to set forth any reason that an additional sixty (60) days would change the fact that she has no expert to testify in this medical malpractice claim. Without expert testimony establishing the relevant standard of care and tending to show that Dr. Tibbs breached that standard, the Plaintiff cannot make out her prima facie case, and all other issues in this case become immaterial. Therefore, summary judgment was proper and should be affirmed.

WHEREFORE, PREMISES CONSIDERED, Defendant/Appellee respectfully requests that the Order Granting Defendant Robert C. Tibbs, III, M.D.'s Motion for Summary Judgment be affirmed.

RESPECTFULLY SUBMITTED, this, the 18 day of November, 2011.

ROBERT C. TIBBS, III, M.D.

BY: Mary Frances S. England

L. CARL HAGWOOD, MBN [redacted]
MARY FRANCES S. ENGLAND, MBN [redacted]
Attorneys for Robert C. Tibbs, III, M.D.

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CERTIFICATE OF SERVICE

I, MARY FRANCES S. ENGLAND, one of the attorneys for Robert C. Tibbs, III, M.D., certify that I have this day delivered via U.S. Mail, postage prepaid, a true and correct copy of the foregoing document to the following:

Louise Harrell, Esq.
P.O. Box 2977
Jackson, MS 39207

Kimberly N. Howland, Esq.
Wise, Carter, Child & Caraway
P.O. Box 651
Jackson, MS 39205-0651

Honorable Kenneth L. Thomas
Circuit Court Judge
P. O. Box 548
Cleveland, MS 38732

THIS, the 18 day of November, 2011.

Mary Frances S. England

MARY FRANCES S. ENGLAND

CERTIFICATE OF FILING

I, MARY FRANCES S. ENGLAND, certify that I have this day delivered via United States First Class Mail, postage prepaid, the original and three copies of, and a CD containing, Brief of Appellee Dr. Robert C. Tibbs, III, on November 18, 2011, to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, P.O. Box 249, Jackson, Mississippi 39205.

MARY FRANCES S. ENGLAND