

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**

APPELLANT

VS

**PHC-CLEVELAND, INC., BOLIVAR MEDICAL
CENTER and DR. ROBERT C. TIBBS, MD**

APPELLEE

**APPEAL FROM THE
CIRCUIT COURT OF BOLIVAR COUNTY, MISSISSIPPI
SECOND DISTRICT
CAUSE NO. 2009-0065**

BRIEF OF APPELLANTS

ATTORNEY FOR APPELLANTS:

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MSB No. [REDACTED]
August 30, 2011**

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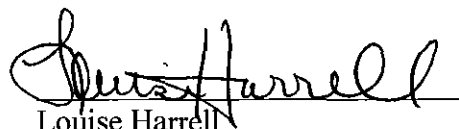
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

1. 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 - Appellants
2. Louise Harrell, Esq. - Attorney for Appellants
3. PHC Cleveland, Inc. d/b/a Bolivar Medical Center - Appellee
4. Lifepoint Hospitals, Inc. - Appellee
5. Dr. Roberts C. Tibbs, MD - Appellee
6. Tibbs Clinics - Appellee
7. L. Carl Hagwood - Attorney for Appellants
Wilkins, Stephens & Tipton, P.A.
8. Mary Frances England - Attorney for Appellants
Wilkins, Stephens & Tipton, P.A.

9. Christopher W. Winter - Attorney for Appellants
Wilkins, Stephens & Tipton, P.A.
10. Diane V. Pradat - Attorney for Appellants
Wilkins, Stephens & Tipton, P.A.
11. Kimberly N. Howland - Attorney for Appellants
Wise, Carter, Child & Caraway, PC
12. Dr. Elliott B. Oppenheim, MD, JD, LLM Health
13. Honorable Kenneth L. Thomas - Circuit Court Judge, Bolivar County,
Mississippi

A handwritten signature in black ink, appearing to read "Louise Harrell", written over a horizontal line.

Louise Harrell
Attorney for Appellants
August 30, 2011

TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	5
II.	STATEMENT OF THE ISSUES	6
III.	STATEMENT OF THE CASE	7
	A. Background	7
	B. Procedural History	7
	C. Statement of Facts	9
IV.	SUMMARY OF THE ARGUMENT	13
V.	ARGUMENT AND AUTHORITIES	14
	Appellant satisfied the requirements of Rule 56(f) of the Mississippi Rules of Civil Procedure for a continuance of the summary judgment hearing.	14
	Appellant had sufficient and good cause, as explained in the affidavit of Attorney Louise Harrell, for the Court to postpone consideration of Defendants’ summary judgment motion.	16
	The Affidavit of Elliot B. Oppenheim MD, JD, LM Health Law identified with specificity what particular information Appellant would present to the Court for consideration after a continuance of the summary judgment hearing.	19
<u>VI.</u>	CONCLUSION	21
VII.	CERTIFICATE OF SERVICE	22

I. TABLE OF AUTHORITIES

Cases Cited:

<i>Carney v. US</i> , 19 F.3d 807, 813 (2 nd Cir. 1994).....	15
<i>Hobgood v. Koch Pipeline Southeast, Inc.</i> , 769 So. 2d 838, 845 (Miss. Ct. App. 2000)	15
<i>Interstate Outdoor Advertising v.</i> <i>Zone Board of the TP. Of Cherry Hill</i> , 672 F. Supp.2d 675 (D NJ 2009).....	16
<i>Securities and Exchange Commission v.</i> <i>Spence & Green Chemical Co.</i> , 612 F.2d. 896 (5 th Cir. 1980).....	18
<i>Simas v. First Citizens Federal Credit Union</i> , 170 F.3d 37, 45-46 (1 st Cir. 1999).....	15
<i>Stearns Airport Equip. Co. v. FMC Corp.</i> , 170 F.3d 518, 535 (5 th Cir.1999).....	15
<i>United States v. Little Al</i> , 712 F.2d 133, 135 (5 th Cir. Tex. 1983).....	15
<i>Valley National Bank v. Greenwich Ins. Co.</i> , 254 F.Supp2d 448 (SD NY 2003).....	15

Other Authorities:

Rule 56, Mississippi Rules of Civil Procedure.....	8, 12-15, 18-21
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II. STATEMENT OF ISSUE

Appellant satisfied the requirements of Mississippi Rules of Civil Procedure, Rule 56(f), for a continuance of the summary judgment hearing.

Appellant had sufficient and good cause, as explained in the affidavit of Attorney Louise Harrell, for the Court to postpone consideration of Defendants' summary judgment motion.

The Affidavit of Elliot B. Oppenheim MD, JD, LM Health Law identified with specificity what particular information Appellant would present to the Court for consideration after a continuance of the hearing.

III. STATEMENT OF THE CASE

A. Background Information

In this case, LaToya Hackler gave birth to A’Kaalín (Hackler) Townes by cesarean section at the Bolívar Medical Center on July 3, 2007. *Circuit Ct. Rec.* p. 5; *Appellants’ Rec. Excp.* p. 27. Upon birth, the newborn A’Kaalín Townes was admitted to Bolívar Medical Center where she remained for the next four (4) days. *Circuit Ct. Rec.* p. 5; *Appellants’ Rec. Excp.* p. 27. Dr. Robert Tibbs, M.D. was A’Kaalín Townes’ treating physician while she was at Bolívar Medical Center. *Circuit Ct. Rec.* p. 6; *Appellants’ Rec. Excp.* p. 28. Dr. Tibbs and Bolívar Medical Center discharged A’Kaalín Townes home with her mother on July 6, 2007. *Circuit Ct. Rec.* p. 6; *Appellants’ Rec. Excp.* p. 28.

On July 8, 2007, A’Kaalín Townes presented to Bolívar Medical Center with apnea and an erratic heart rate. *Circuit Ct. Rec.* p. 6; *Appellants’ Rec. Excp.* p. 28. Baby A’Kaalín was treated at Bolívar Medical Center and transported to the University of Mississippi Medical Center in Jackson, Mississippi. *Circuit Ct. Rec.* p. 6; *Appellants’ Rec. Excp.* p. 28. A’Kaalín Townes died at the University Medical Center on July 8, 2007. *Circuit Ct. Rec.* p. 6; *Appellants’ Rec. Excp.* p. 28.

B. Procedural History

On August 31, 2009, LaToya Hackler filed action against Bolívar Medical Center and Dr. Tibbs, in the Circuit Court of Bolívar County, MS, on behalf of herself individually, and as mother and next friend of A’Kaalín Townes, and any wrongful death beneficiaries of A’Kaalín Townes. *Circuit Ct. Rec.* p. 5; *Appellants’ Rec. Excp.* p. 27. Appellant Latoya

Hackler's complaint alleges that Bolivar Medical Center and Dr. Robert C. Tibbs, III were medically negligent which caused the wrongful death of A'Kaalin Townes. *Circuit Ct. Rec.* pp. 5-9; *Appellants' Rec. Excp.* pp. 27- 31. More specifically, Appellant LaToya Hackler alleged that Bolivar Medical Center and Dr. Robert C. Tibbs, III deviated from the standard of medical care by failure to conduct proper follow-up care and tests on her newborn child. *Circuit Ct. Rec.* pp. 5-9; *Appellants' Rec. Excp.* pp.27 - 31.

All parties conducted discovery through the exchange of interrogatories and requests for production of documents. No depositions were taken. *Circuit Ct. Rec.* pp.1-2; *Appellants' Rec. Excp.* pp. 1-2.

On August 27, 2010, Defendant Robert Tibbs, MD filed for summary judgment. *Circuit Ct. Rec.* p. 32; *Appellants' Rec. Excp.* pp. 1-2. Defendant Bolivar Medical Center filed for summary judgment on September 7, 2010. *Circuit Ct. Rec.* p. 59; *Appellants' Rec. Excp.* pp. 1-2. The basis of both Defendants' Motion for Summary Judgment was that Appellant Hackler had not presented expert witness testimony which supported her claim of medical negligence with respect to the care provided her newborn child and which caused the child's death. *Circuit Ct. Rec.* pp. 32, 59; *Appellants' Rec. Excp.* pp. 1-2.

Defendants' summary judgment motions were set for hearing on November 18, 2010. *Circuit Ct. Rec.* p. 84; *Appellants' Rec. Excp.* p. 33. On November 16, 2010, Appellant LaToya Hackler filed a Motion to Continue the hearing pursuant to Rule 56(f) of the Mississippi Rules of Civil Procedure. *Circuit Ct. Rec.* p. 86-88; *Appellants' Rec. Excp.* pp. 35-37. The Circuit Court Judge did not grant the continuance and issued Orders granting summary judgment to both Bolivar Medical Center and Dr. Tibbs. *Circuit Ct. Rec.* pp. 157-

158; *Appellants' Rec. Excp.* pp. 3-4. Appellant LaToya Hackler filed this appeal on January 4, 2011. *Circuit Ct. Rec.* p. 159; *Appellants' Rec. Excp.* p 2.

C. Statement of Facts

Appellant LaToya Hackler appealed the Circuit Judges' denial of her Rule 56 (f) Motion to continue the summary judgment hearing, and the granting of summary judgment to both Bolivar Medical Center and Dr. Tibbs. *Circuit Ct. Rec.* p. 159. In support of her Motion for Continuance, Appellant presented the Affidavit of her Attorney Louise Harrell and the affidavit of her medical legal consultant, Dr. Elliott B. Oppenheim, MD, JD, LLM Health Law. *Circuit Ct. Rec.* 90-100, 101-102; *Appellants' Rec. Excp.* pp . 39-49, 50-52 The Affidavit of Appellant Hackler's Attorney detailed why Appellant needed a continuance of the hearing and, the affidavit of Dr. Oppenheim detailed what specific testimony Appellant would present to the Circuit Court if granted the continuance. *Circuit Ct. Rec.* pp. 90-100, 101-102; *Appellants' Rec. Excp.* pp. 39-49, 50-52.

Appellant's Complaint was filed on August 31, 2009. *Circuit Ct. Rec.* p. 5; *Appellants' Rec. Excp.* p. 27. As outlined in the affidavit of Appellant Hackler's Attorney, prior to August 2009, on behalf of Appellant, medical records were submitted to a medical legal consultant to provide medical expert witness testimony on behalf of Appellant Hackler. *Circuit Ct. Rec.* pp. 90-91; *Appellants' Rec. Excp.* pp. 39-40. Appellant Hackler's medical - legal consultant provided a preliminary opinion that the defendants' breached the standard of care with respect to the medical treatment provided to her baby, A'Kaalinn Townes. *Circuit Ct. Rec.* pp. 90-92, 100-102; *Appellants' Rec. Excp.* pp. 39-41, 50-51.

The medical -legal consultant's opinion was pending further review of medical records from the University of Mississippi Medical Center which were not available at the time of the preliminary opinion. *Circuit Ct. Rec.* pp. 90-92; *Appellants' Rec. Excp.* pp. 39-41. Although Appellant Hackler did have a copy of the autopsy report from the University of Mississippi Medical Center, Hackler was not aware that the University of Mississippi Medical Center did not include the medical records when it sent the autopsy report. *Circuit Ct. Rec.* pp. 90-92; *Appellants' Rec. Excp.* pp. 39-41. Hackler learned from the medical legal consultant that certain records from the University of Mississippi Medical Center were not included with the autopsy report. *Circuit Ct. Rec.* pp 90-92; *Appellants' Rec. Excp.* pp. 39-41. For several months, Appellant Hackler was unable to obtain the necessary medical records from the University of Mississippi Medical Center. *Circuit Ct. Rec.* pp. 90-100; *Appellants' Rec. Excp.* pp. 39-49.

The Affidavit of Louise Harrell details Appellant Hackler's efforts to obtain the medical records from the University Medical Center. *Circuit Ct. Rec.* pp 90-100; *Appellants' Rec. Excp.* pp. 39-49. On April 9, 2010, Appellant Hackler requested the needed medical records from the University of Mississippi Medical Center. *Circuit Ct. Rec.* pp. 90-91, 93-94; *Appellants' Rec. Excp.* pp. 39-40, 42-43. When Appellant Hackler did not timely receive the medical records from the medical center, Appellant Hackler again requested the needed medical records on May 3, 2010. *Circuit Ct. Rec.* pp. 90-91, 95-96; *Appellants' Rec. Excp.* pp. 39-40, 44-45. Appellant Hackler's April and May 2010 medical records requests were provided to the Circuit Court in support of her Motion for a Continuance. *Circuit Ct. Rec.* pp. 95-96; *Appellants' Rec. Excp.* pp.44-45.

When the needed medical records were not received after the May 2010 request, Appellant's attorney contacted the University of Mississippi Medical Center regarding the records. *Circuit Ct. Rec.* pp. 90-91; *Appellants' Rec. Excp.* pp. 39-40. Appellant's attorney was advised to re-submit the medical records request along with a copy of the Death Certificate of A'Kaalin Hackler Townes. On June 3, 2010, Appellant submitted the Death Certificate as requested and again, for the third time, requested the medical records. *Circuit Ct. Rec.* pp. 90-91, 97-98; *Appellants' Rec. Excp.* pp. 39-40, 46-47. This information was also provided to the Circuit Court. *Circuit Ct. Rec.* pp. 90-91; *Appellants' Rec. Excp.* pp. 39-40.

Even after the June 3, 2010 third request, the University Medical Center still did not provide the medical records to Appellant Hackler. On July 16, 2010, Appellant Hackler made a fourth request for the medical records from the University of Mississippi Medical Center. *Circuit Ct. Rec.* pp. 90-91, 99-100; *Appellants' Rec. Excp.* pp. 39-40, 48-49. The University Medical Center finally provided the needed medical records in August 2010. *Circuit Ct. Rec.* pp. 90-91; *Appellants' Rec. Excp.* pp. 39-40.

When Appellant finally received the medical records in August 2010, Defendant Tibb's had filed his summary judgment motion. *Circuit Ct. Rec.* pp. 32, 59; *Appellants' Rec. Excp.* pp. 1-2. Appellant was thus facing a reduced amount of time to get everything to her medical expert. Unfortunately, Appellant Hackler had also her job and was in a financial hardship. *Circuit Ct. Rec.* pp. 90-92; *Appellants' Rec. Excp.* pp. 39-41. This caused further delay and she was unable to pay the amount requested by the physicians to

complete the review of the records and get an affidavit by the hearing date of November 18, 2010. *Circuit Ct. Rec.* pp. 90-92; *Appellants' Rec. Excp.* pp. 39-42.

Because of the delay in receiving medical records from the University of Mississippi Medical Center and Appellant Hackler's then existing financial hardship, Hackler requested additional time to have her potential expert witnesses complete their review of the medical records and provide appropriate affidavits to the court. *Circuit Ct. Rec.* pp. 86-99; *Appellants' Rec. Excp.* pp. 35-38.

In further support of her Rule 56(f) , Motion for Continuance Appellant Hackler presented the Affidavit of Elliott B. Oppenheim, MD, JD, LLM Health Law, to detail the specific information which Appellant Hackler would present through expert witnesses if she was given a continuance. *Circuit Ct. Rec.* pp. 101-102; *Appellants' Rec. Excp.* pp. 50-51. Dr. Oppenheim, who reviewed available medical records of the Appellant Hackler and baby A'Kaaline, stated expert testimony would show the mother was diagnosed with Group B streptococcus and treated at delivery with antibiotics. *Circuit Ct. Rec.* pp. 101-102; *Appellants' Rec. Excp.* pp. 50-51. Baby A'Kaaline Townes was jaundiced at birth and was discharged home after approximately two days without evaluation of the source of the jaundice. *Circuit Ct. Rec.* pp. 101-102; *Appellants' Rec. Excp.* pp. 50-51. The expert would further testify that the medical records contained no documentation that the proper blood work was performed on baby A'Kaaline. *Circuit Ct. Rec.* pp. 101-102; *Appellants' Rec. Excp.* pp. 50-51. Baby A'Kaaline was showing signs of sepsis, jaundice, poor feeding, and some respiratory distress. *Circuit Ct. Rec.* pp. 101-102; *Appellants' Rec. Excp.* pp. 50-

51. The expert would testify that, given the circumstances, further evaluation of baby A’Kaalín was mandatory. *Circuit Ct. Rec.* pp. 101-102; *Appellants’ Rec. Excp.* pp. 50-51.

Dr. Oppenheim further informed the Circuit Court, to a reasonable degree of medical certainty the Defendants’ serious omissions, violated the standard of care and directly and proximately caused baby A’Kaalín’s death. *Circuit Ct. Rec.* pp. 101-102; *Appellants’ Rec. Excp.* pp. 50-51. Dr. Oppenheim informed the Circuit Court that the defendants violated these enunciated standards, and, but for the Defendants’ omissions baby A’Kaalín would have lived. *Circuit Ct. Rec.* pp.101-102; *Appellants’ Rec. Excp.* pp. 50-51.

The Circuit Court did not grant Hackler’s motion. *Circuit Ct. Rec.* pp. 157, 158, *Appellants’ Rec. Excp.* pp. 3, 4. In the face of the specific information provided to the Circuit Court, the Circuit Court erred in not granting a continuance, and further erred in granting summary judgment.

VI. SUMMARY OF THE ARGUMENT

The Circuit Court erred in denying Appellant Hackler’s Motion for a continuance pursuant to Rule 56 (f) of the Mississippi Rules of Civil Procedure. Rule 56 (f) protects a litigant opposing summary judgment who for valid and good cause cannot, by affidavit or otherwise, present evidence as authorized by Rule 56 (e). Under Rule 56 (f), the party is not required to present evidentiary facts going to the merits of the case, rather, the party must show what circumstances prevented her from presenting proof by affidavit which opposes summary judgment.

Appellant provided to the Circuit Court Affidavits her attorney, Louise Harrell, and Dr. Elliott Oppenheim to show why she needed a continuance of the summary judgment hearing. The Harrell and Oppenheim affidavits showed that Appellant had been diligent in her efforts to obtain information from the University of Mississippi Medical Center, and through circumstances beyond her control, there was a delay in Appellant getting certain medical records. The affidavit of Dr. Elliott Oppenheim presented to the Circuit Court the specific facts and other evidence Appellant Hackler would present if granted the requested continuance.

Unforeseen circumstances which were beyond her control prevented Appellant Hackler from filing appropriate expert affidavits before the November 18, 2010 hearing date. Under the facts of this case, the Circuit Court erred in denying Appellant Hackler's Rule 56(f) Motion for Continuance.

VII. ARGUMENT AND AUTHORITIES

1. Appellant satisfied the requirements of the Mississippi Rules of Civil Procedure, Rule 56(f), for a continuance.

Rule 56 (f), Mississippi Rules of Civil Procedure, states:

When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Thus, in accord with Rule 56(f), a "party may defend against summary judgment by presenting affidavits that prove 'that he cannot for reasons stated present by affidavit facts essential to justify his opposition'; the result of such proof is that the trial court should continue the case to allow discovery to develop further." M.R.C.P. 56(f); *Hobgood v. Koch Pipeline Southeast, Inc.*, 769 So. 2d 838, 845 (Miss. Ct. App.2000). "[T]he party resisting summary judgment must present specific facts why he cannot oppose the motion and must specifically demonstrate 'how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.'" *Hobgood*, 769 So. 2d at 845, (citing *United States v. Little Al*, 712 F.2d 133, 135 (5th Cir. Tex. 1983)).

Evidence submitted in support of request for a Rule 56(f) continuance need not be presented in a form suitable for admission as evidence at trial, so long as it raises sufficiently above mere speculation; therefore, reliance on hearsay, or other inadmissible material, is not a dispositive defect under Rule 56(f). *Valley National Bank v. Greenwich Ins. Co.*, 254 F.Supp2d 448 (SD NY 2003); *Simas v. First Citizens Federal Credit Union*, 170 F.3d 37, 45-46 (1st Cir. 1999). Rule 56(f) is a complement to the remaining provisions of Rule 56. It's intent is to allow the opposing party to explain why she is as yet unable to present a complete evidentiary opposition to summary judgment, which would be subject to the more rigid evidentiary standards of Rule 56(c). *Carney v. US*, 19 F.3d 807, 813 (2nd Cir. 1994).

Rule 56(f) motions are generally favored and should be liberally granted. *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 535 (5th Cir.1999). A party "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified

facts." *Krim*, 989 F.2d at 1442 . Any party seeking further discovery in response to summary judgment motion must submit an affidavit specifying what particular information is sought, how, if uncovered, it would preclude summary judgment, and why it has not previously been obtained; since the court has discretion, affidavit requirements serve as a guide, not as exhaustive list. *Interstate Outdoor Advertising v. Zone Board of the TP. Of Cherry Hill*, 672 FSupp.2d 675 (D NJ 2009).

2. Appellant had sufficient and good cause for the Court to postpone consideration of Defendants' summary judgment motion.

Appellant Hackler requested a continuance by the Court of any ruling on Defendants' Motion for Summary Judgment or in the Alternative to Dismiss for sixty (60) days so that plaintiff can secure another expert witness. *Circuit Ct. Rec.* pp. 86-89; *Appellants' Rec. Excp.* pp. 35-38. Appellant had sufficient and good cause, as explained in the affidavit of Attorney Louise Harrell, for the Court to postpone consideration of Defendants' summary judgment motion. *Circuit Ct. Rec.* pp. 90-100; *Appellants' Rec. Excp.* pp. 39-49. Through no fault of Appellant Hackler, the University Medical Center took several months to provide certain medical records to Hackler and, for that reason, Appellant Hackler was unable to obtain the necessary medical records to complete preparation of her expert evidence to the Circuit Court by the hearing date. *Circuit Ct. Rec.* pp. 90-100; *Appellants' Rec. Excp.* pp. 39-49.

As stated, the Affidavit of Louise Harrell details Appellant Hackler's four (4) month long effort to obtain the medical records from the University Medical Center. *Circuit Ct.*

Rec. pp. 90-100; *Appellants' Rec. Excp.* pp. 39-49. Over a four (4) month period, Appellant Hackler made four separate written request to the University of Mississippi Medical Center for medical records. *Circuit Ct. Rec.* pp. 90-91, 93-94; *Appellants' Rec. Excp.* pp. 39-40, 42-43. Hackler made written requests for the needed medical records on April 9, 2010, on May 3, 2010, on June 3, 2010, and on July 16, 2010. *Circuit Ct. Rec.* pp. 90-91, 93-100; *Appellants' Rec. Excp.* pp. 39-41; 42-49. Additionally, Appellant Hackler's attorney verbally contacted the University of Mississippi Medical Center regarding the records. *Circuit Ct. Rec.* pp. 90-91; *Appellants' Rec. Excp.* pp. 39-40. The University Medical Center finally provided the needed medical records in August 2010. *Circuit Ct. Rec.* pp. 90-91; *Appellants' Rec. Excp.* pp. 39-40. All this information was provided to the Circuit Court. *Circuit Ct. Rec.* pp. 90-91; *Appellants' Rec. Excp.* pp. 39-40.

When Appellant finally received the medical records in August 2010, she was facing Defendants' summary judgment motions. *Circuit Ct. Rec.* pp. 32, 59; *Appellants' Rec. Excp.* pp. 1-2. Unfortunately, by this time, Appellant Hackler had lost her job and was in a financial hardship. *Circuit Ct. Rec.* pp. 90-92; *Appellants' Rec. Excp.* pp. 39-40. This caused further delay and she was unable to pay the amount requested by the physicians to complete the review of the records and get an affidavit by the hearing date of November 18, 2010. *Circuit Ct. Rec.* pp. 90-92; *Appellants' Rec. Excp.* pp. 39-40.

Due to the delay in receiving medical records from the University of Mississippi Medical Center and Appellant Hackler's unforeseen financial hardship, Hackler requested additional to time have her potential expert witnesses complete their review of the medical

records and provide appropriate affidavits to the court. *Circuit Ct. Rec.* pp. 86-89; *Appellants' Rec. Excp.* pp. 35-38.

Hackler had good cause for her request for a Rule 56(f) continuance as detailed by the sequence of events above. Appellant Hackler was diligently making effort to get the medical records. *Circuit Ct. Rec.* pp. 90- 100; *Appellants' Rec. Excp.* pp. 39-49. Appellant Hackler was not passively sitting and waiting for the medical records over this four month period. She was actively requesting the records and following up on each request. *Circuit Ct. Rec.* pp. 90- 100; *Appellants' Rec. Excp.* pp. 39-49. Appellant Hackler was not dilatory. The University Medical Center's delay in providing the medical records was through no fault of Appellant Hackler.

Appellant Hackler had sufficient and good cause for the Circuit Court to postpone consideration of Defendants' summary judgment motion. Because of the unforeseen delay in receiving medical records from the University of Mississippi Medical Center and Appellant Hackler's unforeseen loss of her job and resulting financial hardship, Hackler needed additional time have her expert witnesses complete their review of the medical records and provide appropriate affidavits to the court. Appellant Hackler presented facts to the Circuit Court which explained her good cause and justified her entitlement to continuance. She presented specific facts explaining her inability to make a substantive response to Defendants' summary judgment motions. Appellant Hackler also specifically demonstrated how postponement of a ruling on motion would enable her, by discovery or other means, to rebut any showing of absence of genuine issue of fact. *Securities and Exchange Commission v.*

Spence & Green Chemical Co. 612 F.2d. 896 (5th Cir. 1980). The Circuit Court erred in denying Appellant Hackler's Rule 56(f) motion for a continuance.

3. The Affidavit of Elliot B. Oppenheim MD, JD, LM Health Law identified with specificity what particular information Appellant would present to the Court for consideration after a continuance of the hearing.

In further support of her Rule 56(f) Motion for Continuance, Appellant Hackler presented the Affidavit of Elliott B. Oppenheim, MD, JD, LLM Health Law. Dr. Oppenheim's affidavit detailed the specific information which Appellant Hackler would present through expert witnesses if she was granted a continuance. *Circuit Ct. Rec.* pp. 101-102; *Appellants' Rec. Excp.* pp. 50-51. Dr. Oppenheim had reviewed available medical records of the Appellant Hackler and her baby. He stated expert testimony would show that baby A'Kaaline Townes was jaundiced at birth and was discharged home without evaluation of the source of the jaundice. *Circuit Ct. Rec.* pp. 101-102; *Appellants' Rec. Excp.* pp. 50-51. The expert would further testify that the medical records did not show that proper blood work was performed on baby A'Kaaline. *Circuit Ct. Rec.* pp. 101-102; *Appellants' Rec. Excp.* pp. 50-51. The expert would testify that, given the circumstances, further evaluation of baby A'Kaaline was mandatory. *Circuit Ct. Rec.* pp. 101-102; *Appellants' Rec. Excp.* pp. 50-51.

Dr. Oppenheim further informed the Circuit Court, to a reasonable degree of medical certainty the Defendants' serious omissions, violated the standard of care and directly and proximately caused baby A'Kaaline's death. *Circuit Ct. Rec.* pp. 101-102; *Appellants' Rec.*

Excp. pp. 50-51. Dr. Oppenheim informed the Circuit Court that the defendants violated these enunciated standards, and, but for the Defendants' omissions baby A'Kaalin would have lived. *Circuit Ct. Rec.* pp.101-102; *Appellants' Rec. Excp.* pp. 50-51.

Dr. Oppenheim's affidavit showed that Appellant Hackler was not asking the Circuit Court to grant a continuance based on mere speculation regarding what expert testimony she would provide. Dr. Oppenheim had reviewed the medical records and medical literature and his affidavit was based on his personal knowledge and experience in the medical field. *Circuit Ct. Rec.* pp. 101-102, 103-106, 111; *Appellants' Rec. Excp.* pp. 50-51, 52-56, 60.

The Circuit Court did not grant Hackler's motion. *Circuit Ct. Rec.* pp. 157, 158; *Appellants' Rec. Excp.* pp 1-2. In the face of the specific information provided to the Circuit Court, the Circuit Court erred in not granting a continuance, and further erred in granting summary judgment.

The Circuit Court was wrong in denying Appellant Hackler's Rule 56(f) motion. Appellant Hackler's Motion was not based on mere hope that further evidence may be developed. The Affidavit of Elliott B. Oppenheim, MD, JD, LLM Health Law specifically states to the Court the information Plaintiff will receive from the testifying expert witness. Appellant Hackler's motion was not based on speculation as to what potentially could be discovered. Under the circumstances of the instant case and the cited authorities, Appellant Hackler met the standards for a continuance pursuant to Rule 56(f). The Circuit Court incorrectly denied Appellant's request for a continuance of the summary judgment hearing.

VIII. CONCLUSION

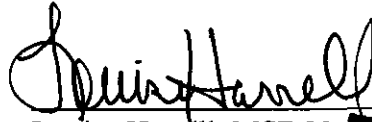
Appellant had sufficient and good cause, as explained in the affidavit of Attorney Louise Harrell, for the Court to postpone consideration of Defendants' summary judgment motion. Unforeseen circumstances beyond her control, there was a delay in Appellant getting certain medical records and caused a delay in preparing her expert testimony for the court. Under these circumstances, the Circuit Court incorrectly denied Appellant Hackler's Rule 56(f) Motion to continue the summary judgment hearing.

Additionally, Appellant Hacker provided the Circuit Court with very specific information on what evidence shew would present if granted a continuance. Dr. Oppenheim had reviewed the records and medical literature and based his statements on the facts in the medical records and the medical literature. His statements to the court were not based on speculation or unfounded and unsupported conclusions. He gave specific details of what information would present to court if continuance granted. With this information before the Circuit Court, Appellant Hackler met the established standards for the granting of a Rule 56(f) continuance. The Circuit Court should have granted Appellant's continuance request.

Dated: the 30th day of August 2011.

Respectfully submitted,
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, Appellants

By:



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Facsimile: (601) 608-7999

CERTIFICATE OF SERVICE AND FILING

Pursuant to Rule 25 (a) of the Mississippi Rules of Appellate Procedure, I Louise Harrell, Attorney for Appellant LaToya Hackler, do hereby certify that on this date, August 30, 2011, I hand-delivered to the Clerk of this Court an original and three (3) copies of the Brief of Appellant LaToya Hackler, one computer readable disk containing Appellants' Brief, and four (4) copies of Appellants' Record Excerpt.

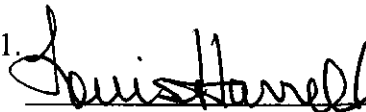
I, Louise Harrell, further certify that on August 30, 2011, I forwarded a true and correct copy of Appellants' Brief and Record Excerpts by U. S. mail, postage pre-paid, to the following:

Kimberly N. Howland, Esq.
P. O. Box 651
Jackson, MS 39225
Bolivar Medical Center

Carl L. Hagwood, Esq.
P. O. Box 4537
Greenville, MS 38704
Dr. Tibbs, MD

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

THIS, the 30th day of August 2011.



Louise Harrell