IN THE SUPREME COURT OF MISSISSIPPI

No. 2011-CA-0078

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

v.

PHC-CLEVELAND, INC., and ROBERT C. TIBBS, III, M.D. — APPELLEES

On appeal from the Circuit Court of Bolivar County, Mississippi,
Second Judicial District

BRIEF OF APPELLANT PHC-CLEVELAND, INC.

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ORAL ARGUMENT NOT REQUESTED

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. LaToya Hackler, plaintiff and appellant;
2. Any wrongful death beneficiaries of A'Kaalin Hackler Townes, deceased, identified by Hackler in discovery responses, to include, in addition to plaintiff LaToya Hackler, A'Kevious Townes, and Antonio L. Townes;
3. Louise Harrell, Jackson, Mississippi, counsel for plaintiff/appellant Hackler;
4. Robert C. Tibbs, III, M.D., defendant and appellee;
5. L. Carl Hagwood and Mary Frances S. England, Wilkins Tipton, P.A., Greenville, Mississippi, counsel for defendant/appellee Dr. Tibbs;
6. Diane V. Pradat and J. Michael Coleman, Wilkins Tipton, P.A., Jackson, Mississippi, additional counsel for defendant Dr. Tibbs in trial court;
7. PHC-Cleveland, Inc., d/b/a Bolivar Medical Center, defendant and appellee;
8. Kimberly N. Howland and Rebecca Hawkins, Wise Carter Child & Caraway, P.A., Jackson, Mississippi, counsel for defendant/appellee PHC-Cleveland, Inc.

SO CERTIFIED, this the 18th day of November, 2011.

REBECCA HAWKINS,
Attorney for Appellee PHC-Cleveland, Inc.

STATEMENT REGARDING ORAL ARGUMENT

Summary judgment was entered in favor of Defendants/Appellees PHC-Cleveland, Inc., d/b/a Bolivar Medical Center, and Dr. Robert C. Tibbs, III, because Plaintiff Hackler had no expert to support her claims in this medical malpractice action. The sole issue presented in this appeal is whether the Circuit Court acted within its discretion when it denied Hackler's request for a continuance under M.R.C.P. 56(f) in order to allow her more time, in addition to the fourteen and a half months she had from the filing of her complaint, to locate an expert. As set forth in this brief, the Court's decision is consistent with numerous decisions of Mississippi appellate courts. Because the legal arguments are adequately set forth in the appellate briefs and all relevant facts are contained in the record, which consists of less than 200 pages, Appellee PHC-Cleveland, Inc., submits that "the decisional process would not be significantly aided by oral argument." M.R.A.P. 34(a)(3).

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STATEMENT OF ISSUE

Whether the Circuit Court acted within its discretion in denying Hackler's request for a Rule 56(f) continuance in order to find an expert when the request was made over a year after the complaint was filed, over two months after the defendants' summary judgment motions were filed, and only two days before the summary judgment hearing.

STATEMENT OF THE CASE

This is a medical malpractice action in which the Circuit Court of Bolivar County, the Honorable Kenneth L. Thomas presiding, granted summary judgment to the defendants, including appellee PHC-Cleveland, Inc., d/b/a Bolivar Medical Center ("BMC"), because the plaintiff had no expert testimony to support her claims.

I. Course of Proceedings.

Plaintiff LaToya Hackler filed this action on August 31, 2009. 1:1, R.E.1, R.E.27.[1] She sued both BMC and Dr. Robert C. Tibbs, III, alleging that her infant daughter, A'Kaalin Hackler Townes, deceased, had "received incorrect and improper diagnosis and medical tests," 1:2, R.E.28, and that the hospital and physician's "medical negligence ... caus[ed] the wrongful death of A'Kaalin Hackler." 1:3, R.E.29. Included as part of the complaint was a Certificate of Compliance in which counsel for Hackler stated she had "reviewed the facts of this case" and had also "consulted with at least one (1) expert who is qualified to give expert testimony as to the standard of care or negligence," and that counsel had "concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of this action." 1:10, R.E.32.

BMC answered the complaint denying liability, 1:25-29, and served discovery

[1] The record in this case is cited as "[Volume:Page(s)]." The Appellants' Record Excerpts are cited as "R.E.[page(s)]."

requests on Hackler to which responses were served on March 8, 2010. 1:71-81. In response to BMC's request regarding expert witnesses, Hackler stated, "At this time Plaintiff has 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."[2] 1:72.

Despite additional requests from Dr. Tibbs for the expected report and supplementation, 1:56, Hackler never supplemented her discovery responses with any information as to expert witnesses. Accordingly, on September 7, 2010, over a year after the suit was filed and six months after the initial discovery responses, BMC filed its motion for summary judgment.[3] 1:59-81. BMC pointed out that Hackler's failure to identify expert testimony to establish the elements of her medical malpractice action against BMC was fatal to her claim under established Mississippi law. 1:61-63.

Hackler filed no response to either of the defendants' summary judgment motions. The motions were scheduled to be heard on November 18, 2010, and a notice was served seven weeks beforehand. 1:82-85, R.E.33-34. Two days before the summary judgment hearing, Hackler filed Plaintiff's Motion Pursuant to Rule 56(f) to Continue Hearing and Motion to Conduct Discovery, 1:86-2:156, R.E.35-105, although she did not notice the motion for hearing. R.E.2.

In the motion, Hackler requested "a continuance by the Court of any ruling on Defendants' Motion for Summary Judgment for sixty (60) days so that plaintiff can secure

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[2] In her responses to Dr. Tibbs's discovery requests served the same day, Hackler initially repeated this same information, 1:43, but then, in response to additional questions related to expert testimony, stated that she expected "to receive the report within the next 15-20 days ...." 1:43-44. Neither estimate proved accurate.

[3] Dr. Tibbs had filed his summary judgment motion based on the same grounds on August 27, 2010. 1:32-56.

another expert witness." 1:87, R.E.36. Attached to the motion was an affidavit of Hackler's counsel outlining various delays in obtaining certain records from University Medical Center, 1:90-92, R.E.39-41, but admitting that those records had been obtained back in August, 1:91, R.E.40. However, according to Hackler's counsel, once the records were obtained, "Plaintiff was in a financial hardship and 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." *Id.* Also attached to the motion was an unsigned copy of an affidavit by Hackler stating that she had been unemployed for three weeks starting September 1, 2010, and then again after October 25, 2010, and that she was "was unable to provide any money towards the cost of obtaining a medical expert" and needed "additional time to employ a medical expert for her case." 2:155-56, R.E.104-05.

Another exhibit to the motion was an affidavit by "a medical-legal analyst consultant," 1:101, R.E.50, Dr. Elliott B. Oppenheim, a former physician in family practice and emergency medicine who has not practiced medicine since 1992, but who has a law degree and apparently runs an expert referral service. 1:103, R.E.52. Dr. Oppenheim stated in his affidavit that he was acting as a consultant only, would not be testifying in the case, and that he does "not practice law or medicine." 1:101, R.E.50.

At the hearing on the summary judgment motions, the Court inquired of Hackler's counsel as to whether she had the name of her potential expert witness at that point, and she stated that she did not. 3:13, R.E.18. It was thus clear that, although some consulting doctor had apparently requested the additional records from UMC, he was not going to testify in this matter[4] and Hackler was requesting time to find an expert who could or

[4] Counsel referred to a Dr. Wise in Florida as the physician seeking the records from UMC. *See* 3:12, R.E.17 ("We still did not get the records from the University Medical Center, that the

would.

In response, Dr. Tibbs's counsel pointed out that the issue regarding the UMC records was a "red herring" as the UMC records would not address the duty of care and breach by either Dr. Tibbs or BMC. 3:16, R.E.21. Indeed, Hackler's consultant did not list any of the UMC records (other than the autopsy report) as items that he had reviewed in his affidavit, but he nevertheless found the records sufficient to assert his own, albeit inadmissible, opinion[5] on the matter. 1:101-02, R.E.50-51.

The Circuit Court stated that Hackler had not sought additional time in a timely fashion. 3:19, R.E.24. Because she failed to designate an expert to support her medical malpractice claims, the Court granted summary judgment to the defendants. 2:157-58, R.E.3-4; 3:18-19, R.E.23-24. Hackler appealed. 2:159-60.

II. Statement of Facts.

Hackler alleged in her complaint that her daughter was delivered by cesarean section at BMC and remained in BMC's nursery for four days as a patient of Dr. Tibbs. 1:1-2, R.E.27-28. According to the complaint, two days after her discharge, A'Kaalin returned to

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physician was requesting, or was waiting and wouldn't, would not give us an opinion until they got the records from the University Medical Center. [¶] BY THE COURT: Which physician was making a request? [¶] BY MS. HARRELL: This was a physician in Florida, a Dr. Wise. It wasn't a doctor, it wasn't Dr. Oppenheim. He was the one that, well, I had two people review it that I knew would not be testifying.").

[5] Not only did Dr. Oppenheim admit in his affidavit that he would not be testifying, but he would not be qualified to render testimony in this case as he had not practiced medicine in almost 20 years and when he did practice, it was in the area of family practice and emergency medicine. 1:101, R.E.50; 1:103, R.E.52. *See Troupe v. McAuley*, 955 So. 2d 848, 857 (Miss. 2007) (finding a neurosurgeon was not qualified to testify as to standard of care required of a neuro-otolaryngologist because of lack of experience in that particular field, but also noting that expert "last performed surgery in 1999" and "was not actively practicing medicine" at the time of plaintiff's surgery); *Palmer v. Biloxi Regional Med. Ctr., Inc.*, 564 So. 2d 1346, 1358 (Miss. 1990) (expert witness unqualified in part because of his lack of familiarity with hospital facilities and fact that "he currently has no affiliations with any hospital anywhere and has had no hospital privileges for the past nine years").

BMC where she presented "with apnea and had a erratic heart rate." 1:2, R.E.28. According to the clinical summary in the autopsy report, the infant's mother stated "that the patient was healthy until the day of admission when the patient stopped breathing." 1:150, R.E.99. She "was taken to an OSH [outside hospital] in Cleveland, MS" where her heart rate was "in the 20s and [she] was apneic on exam." *Id.* At BMC, she "received Ampicillin, Claforan, Bicarb, Atropine and Epinephrine," and "CPR was begun, the patient was intubated, and a NG tube was placed." *Id.* A CBC was also obtained, *id.*, and the patient was transferred to UMC by AirCare, where she died later that day after coding in pediatric ICU. 1:150-2:151, R.E.99-100. The autopsy report lists the cause of death as sepsis. 1:149, R.E.98.

SUMMARY OF THE ARGUMENT

The Circuit Court properly granted summary judgment to BMC. Hackler had no expert to provide proof of the elements of her medical malpractice claim as is required by Mississippi law. *Vaughn v. Mississippi Baptist Med. Ctr.*, 20 So. 3d 645, 650 (Miss. 2009); *Maxwell v. Baptist Memorial Hosp. – Desoto, Inc.*, 15 So. 3d 427, 434 (Miss. Ct. App.), *cert. denied*, 15 So. 3d 426 (Miss. 2009).

Although Hackler requested additional time, pursuant to M.R.C.P. 56(f), to locate an expert, the Circuit Court did not abuse its "sound discretion" in denying this request. *Stallworth v. Sanford*, 921 So. 2d 340, 342-43 (Miss. 2006). When the request was made, two days before the summary judgment hearing, Hackler's suit had been pending for over fourteen months, her discovery responses saying she would supplement with information as to experts had been served eight months earlier, and the summary judgment motions had been pending for two months. In fact, Hackler had had notice of the hearing itself for almost two months. Under these circumstances, the Circuit Court did not err in finding this request to be untimely. *See e.g., Stallworth*, 921 So. 2d at 343 (affirming summary

judgment and denial of Rule 56(f) continuance where plaintiff "had ample time to locate a medical expert to assist with her claim").

Although Hackler asserted as a basis for her request a delay in getting medical records from UMC and her inability to pay for an expert after the records were obtained, the lack of diligence in locating an expert was made evident at the hearing. First, the physician requesting the UMC records, the relevance of which is questionable, was not someone that was ever expected to testify, but was merely a consultant. Furthermore, the records were obtained two to three months before the summary judgment hearing. Moreover, Hackler's loss of a job around the time the summary judgment motions were filed provided no explanation for the failure to hire an expert during the year prior to that while her suit was pending. Simply put, it was made clear at the hearing that Hackler had no expert to support her claims and could not definitively show that additional time would change that circumstance.

The Circuit Court's denial of Hackler's request for a continuance and granting of summary judgment in favor of BMC should be affirmed.

ARGUMENT

I. Summary judgment was proper because Hackler had no expert testimony to support her claims of medical malpractice.

The Mississippi Supreme Court has held that "the time must arrive in every case where the [party] must demonstrate that there is a genuine issue for trial or have summary judgment entered against him." *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1219-20 (Miss. 2001) (quoting *Bourne v. Tomlinson Interest, Inc.*, 456 So. 2d 747, 749 (Miss. 1984)). "[T]o produce evidence demonstrating the existence of a genuine issue of material fact," plaintiffs in medical malpractice suits are "required to produce proof of each element

of their medical malpractice claim." *Maxwell*, 15 So. 3d at 434 (citing *Palmer v. Biloxi Regional Med. Ctr., Inc.*, 564 So. 2d 1346, 1356-57 (Miss. 1990)).

In *Vaughn*, 20 So. 3d at 650, the Supreme Court stated that Mississippi "law is clear as to what is required to make out a *prima facie* case of medical negligence" and listed the following elements:

> In order to establish a prima facie case of medical negligence, [a plaintiff] must prove that (1) the defendant had a duty to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) the defendant failed to conform to that required standard; (3) the defendant's breach of duty was a proximate cause of the plaintiff's injury, and (4) the plaintiff was injured as a result.

Id. (quoting *McDonald v. Memorial Hosp. at Gulfport*, 8 So. 3d 175, 180 (Miss. 2009)).

"Moreover, expert testimony is required to establish these elements." *Maxwell*, 15 So. 3d at 434. As stated by the Court of Appeals:

> "Not only must this expert identify and articulate the requisite standard that was not complied with, the expert must also establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries." [*Hubbard v. Wansley*, 954 So. 2d 951, 956-57 (Miss. 2007)] (quoting *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992)). In the absence of expert testimony supporting each element, [the hospital] was entitled to summary judgment. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial," entitling the moving party to a judgment as a matter of law. *Celotex* [*Corp. v. Catrett*], 477 U.S. [317,] 323 [1986)].

Maxwell, 15 So. 3d at 434 (footnote omitted).

Here, Hackler had no expert to support any of the elements of her claim against BMC, and her own "medical-legal analyst consultant" admitted in his affidavit that without such testimony, Hackler's suit would have to be dismissed.[6] 1:102, R.E.51. BMC was thus

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[6] While Mississippi law does provide an exception to the expert testimony requirement "for instances where a layman can observe and understand the negligence as a matter of common sense and practical experience," *Vaughn*, 20 So. 3d at 650 (quoting *Coleman v. Rice*, 706 So. 2d 696, 698 (Miss. 1997)), Hackler has never asserted that such an exception would apply in this case, and

entitled to summary judgment, and the Circuit Court properly granted it.

Hackler argues, however, that the Court should not have entered summary judgment, but should have instead granted her request for a continuance to give her more time to locate an expert. As discussed further below, the Circuit Court did not err in denying this request.

II. The Circuit Court did not abuse its discretion in denying Hackler's untimely request for a continuance to locate an expert to support her medical malpractice claims.

The Circuit Court was clearly frustrated that Hackler had made no mention of any difficulties in locating an expert before filing her Rule 56(f) motion two days before the hearing on a summary judgment motion that had been pending for almost three months. The Court noted in granting summary judgment, that Hackler had failed "to seek additional time in a timely manner" either informally with defense counsel or by motion to the Court. 3:19, R.E.24. The Court stated that "designation of an expert in a timely manner" was required, 3:18, R.E.23, and that had clearly not been done in this case.

Hackler had asserted eight months earlier in discovery responses that she had an expert whose report would be ready in ten to twenty days. Yet over two months after the second summary judgment motion was filed, and two days before the hearing on the motions, Hackler requested an additional sixty days to allow her to locate an expert, although she was not sure that would be enough time either. The Circuit Court did not err

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rightfully so. As noted by counsel for Dr. Tibbs at the summary judgment hearing: "This is a complicated case about treating a baby and various problems the baby and mother had. That's not within the knowledge of a layperson so an expert is required." 3:7, R.E.12. *See also* 1:34 (Dr. Tibbs's itemization of undisputed facts includes the fact that "[t]he medical conditions and principles at issue, the cause of the Plaintiffs' alleged injuries and/or the death of Baby Townes, as well as, the standard of care for Dr. Tibbs' treatment of Baby Townes, are not within the knowledge and understanding of ordinary lay persons"); 1:63 (BMC states in its summary judgment motion that because the issues in this action "are clearly not within the common knowledge and experience of lay persons, expert testimony is required for the Plaintiff to establish her prima facie case of medical negligence against UMC").

in denying her request.

A. Mississippi courts have refused continuances in similar cases.

"A trial court has sound discretion to grant or deny a continuance under Rule 56(f)," and will only be reversed "where its decision can be characterized as an abuse of discretion."[7] *Stallworth*, 921 So. 2d at 342-43. In *Stallworth*, the Supreme Court affirmed a trial court's denial of a request for a thirty-day continuance in order to locate an expert in a medical malpractice case. The Court noted that the rule was "not designed to protect litigants who are lazy or dilatory," and that "Stallworth had ample time to locate a medical expert to assist with her claim." *Id.* at 343.

The plaintiff in that case had filed her initial complaint a year before the summary judgment hearing. *Id.* at 341-42. Three days before the summary judgment hearing, counsel for the plaintiff filed an affidavit requesting a Rule 56(f) continuance and stating that the plaintiff had had trouble locating an expert "over the last several months," but that one had recently been located who had said he would testify and provide an affidavit, but

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[7] Notably, in the six appellate decisions cited in Hackler's brief (only one of which is from Mississippi), the appellate courts affirmed the trial court's decision as to the Rule 56(f) motion in all but one of those cases, and in each one the trial court had denied the motion. *Hobgood v. Koch Pipeline Southeast, Inc.*, 769 So. 2d 838, 846 (Miss. 2000); *Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 535 (5th Cir. 1999); *Carney v. United States Dept. of Justice*, 19 F.3d 807, 813 (2d Cir.), *cert. denied*, 513 U.S. 823 (1994); *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983); *SEC v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980).

In the one exception, the lower court had "never resolved the Rule 56(f) motion on the merits" but had "denied the Rule 56(f) motion as moot." *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 45-46 (1st Cir. 1999). The motion had been made only as to one ground submitted for summary judgment, and the district court had granted summary judgment on another basis. The appellate court addressed the Rule 56(f) motion in the context of the defendants' seeking affirmance of the summary judgment on this alternative ground on which the district court had not ruled. *Id.*

The only other two cases cited by Hackler are two federal district court cases. In one, the court denied the Rule 56(f) motion, *Valley Nat'l Bank v. Greenwich Ins. Co.*, 254 F.Supp.2d 448, 463 (S.D.N.Y. 2003), and in the other, the court granted the motion after finding that a summary judgment, filed by the defendants eleven days after plaintiff served discovery on them which had gone unanswered, was premature, *Interstate Outdoor Advertising v. Zoning Bd. Of Township of Cherry Hill*, 672 F.Supp.2d 675, 677 (D.N.J. 2009).

that additional time was needed to submit the affidavit. The Court denied this request and granted summary judgment.

In this case, Hackler still had not located an expert to testify on her behalf. She was not seeking additional time to get an affidavit from a known expert, but was seeking additional time to find an expert who would testify in the first instance. Hackler's complaint had been pending for over a year when the summary judgment motions were heard, and she had known from the beginning that an expert would be needed. Indeed, her counsel certified in the complaint that she had consulted with an expert "qualified to give expert testimony as to the standard of care or negligence." 1:10, R.E.32. Yet no such expert was produced during discovery or in response to BMC's summary judgment motion.

Other cases also support the Circuit Court's decision in this case. In *Vaughn,* 20 So. 3d at 655-56, the Supreme Court upheld a trial court's decision to deny Vaughn's request for additional time to find an expert after her initial expert was stricken as being unqualified to testify as to proximate causation. The Court found that the year and a half that had transpired between the filing of the complaint and the granting of summary judgment "was more than ample time for Vaughn to obtain expert testimony in an effort to avoid a grant of summary judgment against her." *Id.* at 656. Accordingly, the trial court had not abused its discretion "in denying Vaughn more time to procure an additional expert." *Id. See also McDaniel v. Pidikiti,* 39 So. 3d 952, 958 (Miss. Ct. App.) (trial court did not abuse its discretion in denying continuance under Rule 56(f), two months after striking plaintiff's expert, trial court entered order allowing plaintiff 60 days to find another; two days after deadline, plaintiff submitted names of two experts and requested a twenty-one day extension to obtain their opinions; court denied request and entered summary judgment), *cert. denied,* 39 So. 3d 5 (Miss. 2010); *Maxwell,* 15 So. 3d at 436 (trial court did

not abuse discretion in refusing plaintiff's request for a thirty-day extension to supplement affidavits which request was filed day of summary judgment hearing; plaintiff's counsel stated in affidavit he had been trying to secure expert affidavits since time summary judgment motion was filed three months earlier; plaintiff had listed names of experts in discovery responses prior to the summary judgment motion being filed); *Scales v. Lackey Mem'l Hosp.*, 988 So. 2d 426, 436, 435 (Miss. Ct. App. 2008) ("Scales knew from the time she filed her complaint that expert testimony would be necessary to withstand a summary judgment by Lackey Memorial, and we find no abuse of discretion in the trial court's refusal to allow additional time for discovery prior to ruling on Lackey Memorial's motion for summary judgment"; "four months elapsed between the time the summary judgment motion was filed and the time the hearing on the motion was held"); *Hill v. Warden*, 796 So. 2d 276, 281 (Miss. Ct. App. 2001) ("Hill was given ample time to designate an expert to meet her burden and establish both proximate cause and damages, and she failed to do so"; summary judgment affirmed).[8]

Simply put, Hackler knew even before she filed her suit in August, 2009, that an

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[8] In two medical malpractice cases in which summary judgment was reversed, the circumstances were vastly different from those in this case. In *Hudson v. Parvin*, 511 So. 2d 499, 500 (Miss. 1987), plaintiff's attorney withdrew on the date of the summary judgment hearing, and the lower court gave her new attorney only five days to locate an expert.

In *Terrell v. Rankin*, 511 So. 2d 126, 127-28 (Miss. 1987), plaintiff's attorney had not prosecuted her case, and plaintiff was unable to obtain her medical records from that attorney until two days before the summary judgment hearing, at which point she shipped them to her expert in Florida who received them the day before the hearing. Although the expert had stated on the phone that, based on his review of the records, the standard of care had been breached, it was "impossible to have a written and signed affidavit of his opinion delivered to her by 9:00 a.m." the next morning when the hearing was scheduled. Plaintiff filed a motion to reconsider the order granting summary judgment just ten days after the hearing and attached her expert's affidavit. The Court held that "the lower court abused its discretion in granting the summary judgment and in declining to alter or amend the judgment upon appellants' motion, accompanied by affidavits, including the affidavit of [plaintiff's expert], a consideration of which undoubtedly would have resulted in a denial of the motion for summary judgment." *Id.* at 129.

expert would be required to support her claims. When BMC filed its summary judgment motion over a year later, Hackler had two months before the hearing to provide an affidavit by a qualified expert to support her claim. Instead, two days before the hearing, she asked for more time to find an expert, despite the year and over two months that she had already had. The Circuit Court did not abuse its discretion in finding that this request came too late.

B. Hackler's stated reasons for requesting a continuance provide no basis for postponing the summary judgment hearing.

Although Hackler alleges in her brief that she presented "sufficient and good cause" for the Rule 56(f) motion to be granted, the record reflects otherwise. Hackler first relies on the information in her counsel's affidavit as to the difficulty in obtaining medical records from UMC. While the relevance of such records is questionable, given that Hackler's claims revolve around events at BMC prior to her daughter's being transported to UMC,[9] nevertheless, her attorney made clear at the hearing that those records were requested by another consulting expert who she knew was not going to be testifying in this matter. *See* 3:12, R.E.17 (when asked by Court which physician was requesting the UMC records before he would give an opinion, counsel responds: "This was a physician in Florida, a Dr. Wise. It wasn't a doctor, it wasn't Dr. Oppenheim. He was the one that, well, I had two people review it that I knew would not be testifying.")

Furthermore, the records were actually obtained in August, 1:91, R.E.40, three months before the summary judgment hearing, yet counsel for Hackler stated that, as of the date of the hearing, she still did not have the name of an expert who would be testifying. 3:13, R.E.18. The records were thus not requested by an expert that would be providing

[9] As counsel for Dr. Tibbs pointed out, UMC is not a party to this malpractice suit and "[w]hat happened at UMC is not relevant to determining whether there was a, what the duty of care was, whether there was a breach, whether that caused any damages." 3:16, R.E.21.

testimony in this case, and any delay in obtaining the records requested by someone else has no bearing on Hackler's failure to designate an expert.

Nor does the record reflect due diligence in attempting to obtain the UMC records. *Hobgood*, 769 So. 2d at 846 (in exercising discretion under Rule 56(f), trial court "must have proof of diligence by the party seeking delay"). According to counsel's affidavit, the non-testifying expert who wanted to see the records asked for them apparently some time before April 9, 2010, which is the date of Hackler's first letter to UMC requesting the additional records. 1:90-91, R.E.39-40. Counsel stated at the hearing that she had requested records from UMC prior to that date and had received an autopsy report and thought that was all the records they had.[10] 3:11, R.E.16. She learned from the consultant that additional records should have been included. 1:90-91, R.E.39-40.

Although this initial request was over a month after Hackler had told the defendants that she would have an expert's report in 10 to 20 days, Hackler's counsel waited almost a month before sending a second request. 1:91, R.E.40. The affidavit does not show how much time passed between this request and counsel's contacting UMC, but the next written request was yet another month later. *Id.* The affidavit makes no mention of any other contacts other than the subsequent written request over a month later. *Id.*

Moreover, the "four (4) month delay" in obtaining the UMC records referenced in Hackler's Rule 56(f) motion, 1:88, R.E.37, represents less than a third of the over 14 months from the filing of Hackler's complaint until the summary judgment hearing. *See Scales*, 988 So. 2d at 436 (noting that attorney's "five surgeries in thirteen months" "accounts for only approximately one third of the time between filing of the complaint and the grant of

[10] The autopsy report in the record as an exhibit to Dr. Oppenheim's affidavit contains a footer on each page stating that it was printed on August 3, 2010. 1:149-2:154, R.E.98-103. Presumably it was reprinted when all the UMC records were produced to Hackler.

summary judgment").

The time it took to obtain the UMC records at the request of a non-testifying expert provides no support for Hackler's failure to have an expert's affidavit in response to BMC's summary judgment motion.

Hackler also asserts that by the time she obtained the medical records from UMC, she could not afford 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." 1:91, R.E.40. While this statement in Hackler's counsel's affidavit would seem to indicate that Hackler had experts but was just unable to pay them to complete their reports, it became clear at the hearing that Hackler in fact had no testifying expert on standby who was simply waiting for payment.

> **BY THE COURT:** Let me see where we are, Ms. Harrell. The issue here is whether or not, in compliance with the controlling rule here that you must tender the name of the expert, etc., to opposing counsel within a timely manner. And, obviously, the answer is no.
>
> So I guess you are arguing your just cause for not having done so.
>
> **BY MS. HARRELL:** Right. We were making every effort to get the expert, get the expert, get the report and get it tendered.
>
> **BY THE COURT:** *Do you have the name of the expert even as of the date of the hearing for summary judgment?*
>
> **BY MS. HARRELL:** *No, I don't.* That's why I was requesting additional time.

3:13, R.E.18 (emphasis added). *See also* 1:102, R.E.51 ("Plaintiff requires additional time *to find* a well-qualified medical expert witness to support this case") (emphasis added); 2:155, R.E.104 (Hackler "was unable to provide any money towards the cost *of obtaining* a medical expert to testify in this case") (emphasis added).

The unsigned affidavit of Hackler[11] indicates that she was employed prior to

[11] The affidavit attached as Exhibit 3 to the motion seeking a Rule 56(f) continuance in the appeal record is unsigned. 2:155-56, R.E.104-05. Although counsel for Hackler indicated at the

September 1, 2010, and again from September 22 until October 25, 2010. 2:155, R.E.104. Nothing in the affidavit provides any information as to why an expert was not hired during the year after her complaint was filed and before her initial date of unemployment. Furthermore, Hackler cites no authority stating that inability to pay for an expert excuses a plaintiff from having one as required in a medical malpractice action. In *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 27 F.R.D. 468 (S.D.N.Y. 1961), the federal court granted summary judgment and refused a request for a Rule 56(f) continuance after counsel for the plaintiff indicated that the taking of depositions needed to respond to summary judgment was "simply impractical from the plaintiff's standpoint inasmuch as no funds whatsoever are available for this purpose." *Id.* at 475. The court, however, held that "[s]tating that the plaintiff is unable to expend the necessary funds for the purpose of taking depositions is not justification for failure to submit such depositions under Rule 56(f)." *Id.* at 476.

Furthermore, Rule 1.8(e) of the Mississippi Rules of Professional Conduct allows a lawyer to "advance court costs and expenses of litigation to a client in connection with pending ... litigation,"[12] so Hackler's inability to pay at the time the UMC records became available would not necessarily be relevant.

The Circuit Court was well within its discretion in finding that Hackler had not

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hearing that she had a signed copy, 3:19, R.E.24, such a document does not appear in the record. In *Moore v. M & M Logging, Inc.*, 51 So. 3d 216 (Miss. Ct. App. 2010), *cert. denied*, 50 So. 3d 1003 (Miss. 2011), the Court of Appeals found that a trial court's failure to consider an unsigned affidavit was not an abuse of discretion, as "an affidavit which is not sworn 'is merely a piece of paper with the word "affidavit" as its title.'" *Id.* at 221-22 (quoting *Thomas v. Greenwood Leflore Hosp.*, 970 So. 2d 273, 277 (Miss. Ct. App. 2007)).

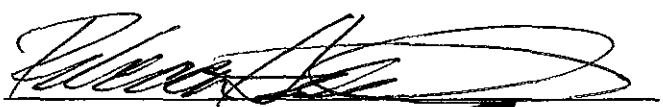
[12] Litigation expenses include the costs of experts. *See* RESTATEMENT (3D) OF THE LAW GOVERNING LAWYERS § 36, cmt. c (2000) (referring to "court costs and litigation expenses such as ordinary- and expert- witness fees ..."). *See also Ivey v. Harney*, 47 F.3d 181, 186 (7th Cir. 1995) ("[l]awyers often advance the fees and costs of expert assistance in tort litigation ... expecting to recover the outlays on the successful conclusion of the litigation") (citing ABA, *Model Rules of Professional Conduct* 1.8(e) (1994 ed.)).

provided sufficient cause for her failure to designate an expert and to submit an opinion supporting her claims in order to overcome BMC's summary judgment motion. Hackler's motion for a continuance did not provide that an expert's opinion in support of her claims was forthcoming, but rather asserted only a "mere hope" that she would find someone to support her claims if she got an extra two months added to the over fourteen months she had already taken. *See Valley Nat'l Bank*, 254 F.Supp.2d at 463, cited in Brief of Appellants at 15 ("'opposing party's mere hope that further evidence may develop prior to trial is an insufficient basis upon which to justify the denial of [a summary judgment] motion'" (quoting *Gray v. Town of Darien*, 927 F.2d 69, 74 (2d Cir.), *cert. denied*, 502 U.S. 856 (1991)); *Hobgood*, 769 So. 2d at 846 (continuance under Rule 56(f) not justified when party presented "at most only speculation of what might be uncovered").

CONCLUSION

As can be seen from the discussion of cases herein, the Circuit Court, in denying Hackler's request for additional time to find an expert to support her claims and granting summary judgment to BMC in this medical malpractice action, was well within its discretion and in accordance with numerous Mississippi decisions. The summary judgment in favor of BMC should be affirmed.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I, Rebecca Hawkins, one of the attorneys for Appellee PHC-Cleveland, Inc., do hereby certify that I have this day caused the original and three copies of the above and foregoing Brief of Appellee PHC-Cleveland, Inc., as well as a PDF version on CD-ROM, to be mailed, via United States mail, postage prepaid, to the following:

Kathy Gillis, Clerk
Mississippi Supreme Court
Post Office Box 117
Jackson, Mississippi 39205

and have also caused a true and correct copy of the brief to be mailed, via United States mail, postage prepaid, to the following persons at the addresses indicated:

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Trial Court Judge

This the 18th day of November, 2011.

REBECCA HAWKINS