IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
Case No. 2011-IA-00534-SCT

EDDIE E. DOUGLAS and YAZOO VALLEY ELECTRIC POWER ASSOCIATION — APPELLANTS

V.

JAMES A. BURLEY, *et al.* — APPELLEE

On Appeal from the Circuit Court of
Yazoo County, Mississippi; Cause No. 2004-CI46

REPLY BRIEF OF APPELLANTS, EDDIE E. DOUGLAS and YAZOO VALLEY ELECTRIC POWER ASSOCIATION

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I. Introduction

In *Ekornes-Duncan v. Rankin Medical Center*, 808 So.2d 955, (¶ 12) (Miss. 2002), this Court called it a "gross violation of our discovery rules" where a party responded to an expert interrogatory some ***three years*** after the discovery had been propounded.

In *Moore v. Delta Reg. Med. Ctr.*, 23 So. 3d 541, (¶ 29) (Miss. App. 2009), the Court of Appeals affirmed the striking of an expert and dismissal of the case, with prejudice, where the plaintiff's expert disclosure was served ***2 months*** late. That court noted that a full ***2 ½ years*** had passed since the filing of the suit and that continuing the trial to allow the late-designated expert would only encourage future dilatory behavior, create further delay and cause increased expense to the defendant. *Id.* at ¶ 28.

In *Bowie v. Montfort-Jones Mem. Hosp.*, 861 So. 2d 1037 (Miss. 2003), the Mississippi Supreme Court held that an expert designated ***36 days*** late was rightfully struck and the plaintiff's case should have been dismissed, with prejudice. The *Bowie* court adopted the trial court's view that "the court, you know, cannot be lax and allow one to follow the rules and others not to." *Id.*

By comparison, the far more pronounced violations which occurred in this case resulted in a finding that an "injustice to the plaintiffs" must be avoided by allowing them to designate Kirk Rosenhan (**"Rosenhan"**) 5 ½ years late. (R.E. 7). In the legion of decisions by this Court, there is not one to be found which is consistent with this ruling. The trial court's decision represents such a sharp split from precedent that it cannot stand without this Court making a 180-degree shift from the pronouncements

in *Ekornes-Duncan*, *Moore*, *Bowie* and their progeny.

The starkest shortcoming of the plaintiffs' response to this appeal is the inability to bring the trial court's decision and its notion of injustice-avoidance within a consistent application of law. The plaintiffs, instead, have argued *their* belief of how or why the trial court could have reached its decision, but each of the plaintiffs' arguments advanced on appeal was either rejected by the trial court or is unsupported by any legal authority.

The plaintiffs respond to YVEPA's[1] appeal on the following grounds:

- The circumstances of the case leading up to Rosenhan's designation are "irrelevant." (*Appellee's Brief*, p.1).
- The estate of Francesca Hill, a long-time plaintiff in this case, was not constrained from designating Rosenhan by any prior orders, rulings or stipulations because a new administratrix was substituted as the estate's personal representative under MISS. R. CIV. PROC. 25.
- Rule 4.04 of the *Uniform Circuit and County Court Rules* entitled the plaintiffs to ignore court orders and disavow stipulations concerning expert designations.
- When this case was previously appealed to the supreme court in *Burley I*, the remand of it "wiped clean" all prior orders of the trial court, particularly those restricting expert designations
- YVEPA was required to show "legal prejudice" as opposed to practical

[1] As in its principal brief, the Appellants will be referred to collectively as "YVEPA" except where otherwise noted.

prejudice in order to have Rosenhan stricken.

- YVEPA did not preserve the insufficiency of Rosenhan's designation for appeal because it did not designate its petition for interlocutory appeal or this Court's corresponding order as part of the record.

YVEPA replies to each of these arguments.

II. The plaintiffs contend the circumstances of this case are irrelevant, but they are the *raison d'etre* of the appeal.

According to the plaintiffs, the history of this case is "irrelevant." *Appellee's Brief*, p. 1. To them, it is *irrelevant* that on **March 8, 2005**, the trial court ordered them to serve a "full and complete" response to YVEPA's expert interrogatory within ten days, but failed to do so. It is *irrelevant* that the plaintiffs were ordered by the trial court to designate all experts, together with Rule 26(b)(4) disclosures, by **May 30, 2005**, but failed to do so. It is *irrelevant* that YVEPA twice moved to compel the plaintiffs to disclose expert opinions, but failed to do so. It is *irrelevant* that YVEPA designated its experts in a timely fashion, but the plaintiffs were still not to be heard from by way of their expert designation. It is *irrelevant* that after spending nearly two years of resisting discovery requests and court orders, the plaintiffs, on **March 16, 2006,** stipulated they would not call a liability expert and induced YVEPA to dismiss its motion to compel. It is *irrelevant* that this case was set for trial on **December 3, 2007**, when memories and evidence were still fresh, but the plaintiffs pled for and received a stay. It is *irrelevant* that after more than seven years of litigation and considerable resources spent, the plaintiffs disavowed their stipulation, flouted the trial court's orders, claimed the stay was not really a stay, and designated Rosenhan

as an expert without providing Rule 26(b)(4)-worthy disclosures, sending this case to its fifth trial setting some eight years after suit was filed.

The plaintiffs might consider these circumstances to be irrelevant – but they neither deny nor dispute any of them as being true. The plaintiffs insist, still, that none of this matters. All that matters is that the trial court ruled in their favor and, "at most, this Court could disagree with the trial court's decision," but it cannot do anything about it. *Id.* at p. 3. The rule of law does not counsel that view.

Matters of judicial discretion are not coin-tosses such that if "heads," you win; if "tails," you lose – either is right and neither can be questioned. If judicial discretion cannot be checked by this Court, as plaintiffs assert, we would have an arbitrary form of government where justice is dictated by men and not by laws. As it stands now, and until overruled, judicial discretion is the antithesis of its portrayal by plaintiffs. The correct view is that judicial discretion is a grant of authority to decide a matter with "sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable ***in circumstances and law***, and which is directed by reasoned conscience of the trial judge to a just result." *White v. State*, 742 So. 2d 1126, (¶42) (Miss. 1990) (emphasis supplied). This statement of law is the beacon by which the shoals of this appeal are to be navigated.

III. Under M.R.C.P. 25, Earnestine Hill should have stepped into the same position as James Burley.

The plaintiffs argue that Earnestine Hill (**"Earnestine"**), the newly substituted representative of Francesca's Estate under MISS. R. CIV. PROC. 25, was a new party to the case and, therefore, she was not bound by prior court orders and stipulations

prohibiting Rosenhan's designation. Earnestine, the plaintiffs' argument goes, was entitled to hit the reset button for *everyone* to designate Rosenhan.[2] There are a number of fallacies in this position.

First, Earnestine's substitution for James A. Burley ("**Burley**") under Rule 25 vested her with no new rights, much less the right to undo prior court orders or stipulations. In their brief, the plaintiffs neither discuss Rule 25 nor the zero-sum effect of a substituted party in interest. Under Rule 25, "a substituted party steps into the ***same position*** of the original party." *Kirk v. Pope*, 973 So. 2d 981, (¶ 29) (Miss. 2007), quoting *Ransom v. Brennan*, 437 F.2d 513, 516 (5th Cir. 1971), *cert. denied*, 403 U.S. 904, 91 S. Ct. 2205, 29 L. Ed.2d 680 (1971) (emphasis supplied); see also *U.S. v. Miller Bros. Const. Co.*, 505 F.2d 1031, 1036 (10th Cir. 1974). When Earnestine was substituted as the personal representative of Francesca's Estate, she should have stepped into Burley's shoes, assumed his "same position" and the action should have proceeded unabated. She acquired no new rights – but had the same duties and obligations.

Secondly, Rosenhan was improperly designated *before* Earnestine was substituted. Earnestine was not substituted until April of 2011. By that time, the designation of Rosenhan which is the subject of this appeal had already occurred. Rosenhan was designated on October 7, 2010, six months prior. Thus, the violation

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[2] This argument actually appears in plaintiffs' appellate brief which is titled "Brief of Appellee James A. Burley, et al." The brief is signed and submitted by the attorneys for James A. Burley who represented *all* plaintiffs throughout this litigation. The "new" attorneys for Earnestine did not even join in it.

had already occurred.

Thirdly, Earnestine's substitution could not, as plaintiffs argue, create a "special circumstance" sufficient for the court to permit Rosenhan's designation. (While claiming this special treatment for Earnestine, Burley conveniently agglomerates himself to the same position and says – I, too, get to disregard orders of the court and designate Rosenhan.) As a matter of law, the trial court was constrained from using Earnestine's substitution under Rule 25 as grounds for allowing Rosenhan's designation. A substitution of a party cannot result in a game-changer of any kind. Rule 25 was "not designed to create new relationships among [the] parties to the suit but [was] designed to allow the action to continue unabated." See *In the Matter of Covington Grain Co.*, 638 F.2d 1362, 1364 (5th Cir. 1981) (construing F.R.C.P. 25(c)).

As to Earnestine's substitution, the trial court ruled:

> The Motion of Earnestine Hill for substitution of part and transfer of interest is hereby GRANTED, and the Court hereby orders that, thenceforth the caption of this case will reflect the substitution: JAMES BURLEY, PARENT/GUARDIAN AND NEXT FRIEND OF JOSHUA HILL AND JAKURA HILL, MINORS and EARNESTINE HILL, AS ADMINISTRATOR OF THE ESTATE OF AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF FRANCESCA HILL.

(C.P. 78-79; R.E. 7).

The literal wording of this ruling should have been the only effect of Earnestine's substitution. However, as pointed out by the plaintiffs, the trial court went one step further and, in violation of Rule 25, did not allow the action to continue unabated, the trial court did not place Earnestine in Burley's shoes, and an unmistakable abuse of discretion occurred by permitting her and the other plaintiffs to designate Rosenhan.

While failing to acknowledge the non-consequential effect of Earnestine's substitution, the plaintiffs offer a number of erroneous assertions which are intended to excite in this Court the impression that Earnestine's substitution was not a calculated maneuver designed to facilitate the improper designation of Rosenhan. To this point, the plaintiffs assert with considerable particularity the following:

- That "about the same time" when this case was remanded following its first appeal in *Burley I*, Earnestine was appointed in a chancery court proceeding as the new administratrix of Francesca's Estate. (*Appellee's Brief*, p. 2).

This is inaccurate. Earnestine's chancery court appointment (made at Burley's request) did not coincide with or have any other nexus to this Court's remand in *Burley I*. The mandate in *Burley I* issued on February 25, 2010, whereas the chancery court appointment did not occur until October 6, 2010. **Exactly one day later**, the plaintiffs designated Rosenhan. The only event to which Earnestine's chancery court appointment had a nexus was Rosenhan's designation.

Next, the plaintiffs assert:

- That Francesca's Estate hired new counsel to represent its interests and protect against potential conflicts among plaintiffs.

Apart from argument of counsel, there is no record support for this assertion. The inference is clear, still. The plaintiffs suggest that Francesca's Estate needed separate legal counsel on account of Francesca being the host driver of the car, whereas her children were guest passengers, thus their interests are pitted against one another.

Yet, Eduardo Flechas, who continues as the attorney for the deceased passengers, represented the interests of *all* decedents – host driver and passengers – throughout the entirety of the pretrial process for this case, handling all aspects of discovery, pleadings, motions and appeal. With the exact same quantum of evidence as now exists, Mr. Flechas agreed to four previous trial settings as the attorney for *all* plaintiffs without any reticence about a conflict. If the interests of the deceased passengers are genuinely adverse to those of their host driver and a conflict exists between the two groups, how is it that Mr. Flechas continues to be involved in this suit, choosing one group of clients over another? *See* Miss. R. Prof. Con. 1.9. Of course, there is no genuine conflict – the plaintiffs are in one accord evidenced by their concerted efforts at designating Rosenhan, who assigns no fault to the host driver for crossing the center line and into the path of the oncoming YVEPA truck. Burley's arrangements to have the chancery court appoint Earnestine to replace him as the administrator of Francesca's Estate had nothing to do with a conflict and everything to do with creating the argument they now make to facilitate the tardy designation of Rosenhan.

Next, the plaintiffs assert:

- That, on **October 8, 2010**, Francesca's Estate appeared in the circuit court action to substitute parties and *moved* for "permission to designate an expert witness on the issue of causation."

This is inaccurate. No plaintiff ever moved for leave or asked for permission to designate Rosenhan or any other expert "on the issue of causation." When Rosenhan

was designated, no plaintiff had even moved to have Earnestine substituted. That the plaintiffs offer pin-point record citations to such motions and requests is mysterious considering the record support does not exist. The exact opposite of this representation does, however, exist in the record. The trial court admonished plaintiffs' counsel, "I haven't seen ***any documents*** whereby you requested of the Circuit Court to substitute an administrator in this cause" and "there has been ***no request*** from Earnestine Hill to designate an expert outside of the scheduling order that was already entered." (Tr. 13). To this, plaintiffs' counsel replied, "***Oh, I understand, Your Honor. Your Honor, you are correct.***" (Tr. 14).

In the final analysis, the trial court should not have considered the reasons why the plaintiffs allegedly wanted Earnestine substituted as the personal representative of Francesca's Estate. What mattered is that it was done under Rule 25, in which event the trial court was required to place Earnestine directly into the shoes of the personal representative she was replacing, Burley. By allowing the plaintiffs to use Earnestine's substitution as a springboard for Rosenhan's designation, an abuse of discretion occurred.

IV. Even the trial court rejected the plaintiffs' misuse of Uniform Rule of Circuit and County Court Practice 4.04 to ignore prior court orders.

The plaintiffs' next contention is that because their designation occurred more than 60 days prior to the most recently scheduled trial date, the trial court "had authority pursuant to URCCC 4.04 to permit the designation." The trial court rejected this same argument, for obvious reasons.

As the plaintiffs' argument goes, because of the existence of Rule 4.04, they did not have to honor the trial court's **March 8, 2005**, order compelling them within 10 days to make complete expert designations; they did not have to honor the trial court's subsequent order to complete expert designations by **May 30, 2005**; they did not have to honor their stipulation which induced YVEPA to withdraw its motion to compel the plaintiffs to disclose their experts; and, when they were granted a stay of the **December 3, 2007**, trial, the seemingly limitless reach of Rule 4.04 trumped the stay. In plaintiffs' estimation, the omnipotence of Rule 4.04 is a license to disregard any order, ruling or stipulation concerning expert designations.

Only the plaintiffs read such plenary authority into the rule. The literal wording of the rule merely identifies *one* circumstance when expert testimony will not be allowed – when not disclosed within 60 days before trial. The rule goes no farther.

When the plaintiffs attempted their Rule 4.04 argument in the trial court proceedings, the court responded:

> THE COURT: Well, let me say this. You know, you're saying that the scheduling order doesn't matter; you're going under ***the rule.*** And the scheduling order comports to the rules, okay? And in *Mallett,* the Supreme Court says that a trial court has the inherent authority to manage their own docket.
>
> PLAINTIFFS: That's right.
>
> THE COURT: And that's the purpose for the scheduling order. And we're talking about a scheduling order that's supposed to have concluded in '07.

(Tr. 37) (emphasis added).

Moreover, in its order granting Rosenhan's designation, the trial court expressly

ruled, "The Plaintiffs responded by arguing that Earnestine Hill, as well as Plaintiff James Burley, ***can abide by the MRC 4.04 and completely ignore the Circuit Court orders in place*** . . . The Court do [sic] not accept Plaintiffs' argument to this motion[.]" (C.P. 78; R.E. 7). Running counter to the plaintiffs' assertion that the trial court "had the authority" under Rule 4.04 to permit Rosenhan's designation, the trial court ruled otherwise. The plaintiffs neither sought nor perfected an appeal under M.R.A.P. 5 or a cross-appeal under M.R.A.P. 4(c) from that ruling. Nor is the question of whether the trial court should have applied Rule 4.04 included in any party's statement of issues. The plaintiffs have failed to place this issue properly before this Court and their claims that the trial court could have applied Rule 4.04, together with their argument that Rosenhan's designation was within 60 days of trial, are procedurally barred.

Notwithstanding the procedural bar, the argument fails on the merits. While the plaintiffs cite a number of cases involving the application of Rule 4.04, the vast majority of those decisions resulted in an expert being struck, which is the result YVEPA submits was the proper outcome here. Only one of the plaintiffs' cited cases involved a plaintiff attempting to circumvent a scheduling order by retreating to Rule 4.04. That exception is *Venton v. Beckham*, 845 So. 2d 676 (Miss. 2003).

In *Venton*, the plaintiffs' expert was excluded for being designated outside of the scheduling order, although it was still ten months before trial. On appeal, the plaintiffs argued that while the designation violated the scheduling order, it must be allowed nonetheless under Rule 4.04. *Id.* at ¶ 21. In its decision affirming the

exclusion of the expert, the Mississippi Supreme Court paid particular attention to three significant features of the case which it found to be compelling – first, that Rule 4.04 does not take precedence over a scheduling order (*id.* at ¶ 22); secondly, that the plaintiffs had entered into an agreed order containing the designation deadline and no motion for an extension of the deadline was ever made (*id.*); and thirdly, that while the improper designation was made ten months before the actual trial, it was not made more than 60 days before the originally scheduled trial date (*id.* at ¶ 23). After reviewing these points, the *Venton* court upheld the exclusion of the expert. *Id.* at ¶ 25.

The *Venton* court's subordination of Rule 4.04 to orders of the trial court is a consistent view. In *Scales v. Lackey Memorial Hosp.*, 988 So.2d 426 (Miss. App. 2008), that court noted the distinction between cases governed by a scheduling order and those which are not:

> We note that there is no indication from the record that a scheduling order was ever issued in this case; ***therefore, presumably, the parties were operating under Rule 4.04(a) of the Uniform Rules of Circuit and County Court***.

Id. at 434, n. 2.

Venton compares favorably only to YVEPA's position. As in *Venton*, the plaintiffs here designated Rosenhan long after termination of the scheduling order without moving for leave to do so. As in *Venton*, while the plaintiffs designated Rosenhan within 60 days of the most recent trial setting, the designation was not made within 60 days of any of the previous trial settings, much less the December 3, 2007, setting when the case was stayed by order of the court.

The plaintiffs also rely on *O'Keeffe v. Biloxi Casino Corp.*, 76 So. 3d 726 (Miss.

App. 2011), *cert. denied* 78 So. 3d 906 (Miss. 2012), for the proposition that our appellate courts are deferential to trial courts which permit untimely expert designations. In fact, *O'Keeffe* provides on point authority for YVEPA's position that the trial court abused its discretion by allowing Rosenhan's designation. In *O'Keeffe*, the trial court excluded the expert testimony of Dr. Bert Bratton as a late-designated expert. *Id.* At ¶ 10. O'Keeffe, the plaintiff, contended that the designation was timely under Rule 4.04 because he designated Dr. Bratton 73 days before the trial date. *Id.* at ¶ 13. But, the trial date which the plaintiff was using to calculate time under Rule 4.04 was a continued trial date, not the original trial date. To that, the Court of Appeals had this to say:

> O'Keeffe mistakenly uses the continued trial date for purposes of determining timely designation under Rule 4.04. Following the November 7, 2008 hearing, the circuit court continued the trial date from December 8, 2008 to February 2, 2009. However, the circuit court granted the continuance for the express purpose of allowing O'Keeffe to fully recover from his surgery and to obtain the testimony of [another doctor]. ***The continuance did not give O'Keeffe a new opportunity to designate additional experts.***

Id. at ¶ 15.

Likewise, in this case, the trial court made it clear that it granted the plaintiffs a stay of the December 3, 2007, trial date for the express purpose of allowing the plaintiffs to avoid the prospect of conducting two trials. The stay, resulting in the continuance, did not give the plaintiffs a new opportunity to designate additional experts. Quoting the trial court:

> The [plaintiffs'] argument was that, you know, everything is ready. Discovery is completed; we're ready to go to trial. You know, if we can just stay this so that we won't have to have two trials. Everything was

ready for trial at that point.

So, now to come back and say that the supreme court wiped all that away with their opinion, that's just not the case.

(Tr. 29). Despite the trial court's perceptive analysis of the situation, it essentially ruled against its own logic by denying YVEPA's motion to strike.

Finally, the plaintiffs ask the Court to analogize Rosenhan's designation to the expert designation made in *International Paper Co. v. Townsend*, 961 So. 2d 741 (Miss. App. 2007). The plaintiffs assert that *Townsend* offers a rare example of a Mississippi appellate court holding that a trial judge abused its discretion in its application of Rule 4.04. *Townsend*, however, dealt with a defendant specifically using Rule 4.04 to strike the plaintiff's expert. *Id.* at ¶ 28. Here, YVEPA did not seek exclusion of Rosenhan under Rule 4.04. It was the plaintiffs who attempted to use the rule as a shield, and the trial court properly rejected the attempt. *Townsend* is factually dissimilar and affords no support to the plaintiffs.

The trial court was spot-on in its rejection of the plaintiffs' Rule 4.04 argument, and it avails the plaintiffs nothing to now argue that the trial court could have granted Rosenhan's designation under the rule.

V. The trial court also rejected the plaintiffs' "wiped clean" f/k/a "clean slate" argument.

The plaintiffs lodge another argument which was unequivocally rejected by the trial court. This is what the plaintiffs formerly referred to as the "clean slate" principle and now call the "wiped clean" principle. In their brief, plaintiffs recite how they "urged the trial court to recognize that remand after a previous appeal effectively

'wiped clean' any previous scheduling orders or other procedural deadlines." *Appellees' Brief*, p. 9. The plaintiffs go on to concede, as they must, that the trial court rejected this contention. *Id.* Again, the plaintiffs neither sought nor perfected an appeal or cross-appeal from this ruling, nor is the question of whether the trial court should have applied the "wiped clean" principle included in any party's statement of issues. Having failed to place that issue properly before this Court, the plaintiffs are procedurally barred from seeking review of the trial court's ruling.

It bears noting that the plaintiffs' principal arguments made on appeal to try to rationalize the trial court's decision were arguments expressly rejected by the trial court. YVEPA submits this is because the ruling below cannot be rationalized. The trial court adhered to the law when analyzing the plaintiffs' arguments, but departed from the law in granting them relief. At any rate, the plaintiffs' "wiped clean" principle was thoroughly discussed in YVEPA's principal brief and it is not necessary to repeat those same points here. Suffice it to say that the principle has no application here. It is a principle reserved for the unique situation where there has been the reversal of a verdict rendered in a first trial and then a retrial has been granted. In such an event, the new trial is "to be tried *de novo* on all issues." *West v. State*, 519 So. 2d 418, 425 (Miss. 1988). That did not happen in this case and none of the cases relied on by the plaintiffs support their position.

VI. Legal prejudice is not the standard.

Without citing any authority, the plaintiffs summarily contend that YVEPA was required to show so-called "legal prejudice" resulting from Rosenhan's designation in

order to prevail on their motion to strike. Plaintiffs accuse YVEPA of confusing its practical prejudice – which the plaintiffs do not dispute – for legal prejudice.

First, it is old hat that the failure to cite any authority for an appellate proposition may be treated as a procedural bar. See *Pearson v. State*, 937 So. 2d 996, (¶ 7) (Miss. App. 2006); *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1983). Secondly, this concept of legal prejudice appears nowhere within this Court's body of law concerning the issue of whether an expert should be stricken. Thirdly, the concept of legal prejudice focuses on the rights available to a party in future litigation.

> For example, in determining what will amount to legal prejudice, courts have examined whether a dismissal without prejudice would result in the loss of a federal forum, or the right to a jury trial, or a statute of limitations defense. See *American Nat'l Bank & Trust Co. of Sapulpa v. Bic Corp.*, 931 F.2d 1411, 1412 (10th Cir. 1991); *Manshack v. Southwestern Electric Power Co.*, 915 F.2d 172, 174 (5th Cir. 1990); *Templeton v. Nedlloyd Lines*, 901 F.2d 1273, 1276 (5th Cir. 1990); *Davis v. U.S.X. Corp.*, 819 F.2d 1270, 1276 (4th Cir. 1987); *Schroeder v. International Airport in Partnership (In re Inter'l Airport in Partnership)*, 517 F.2d 510, 512 (9th Cir. 1975).

5 James W. Moore, MOORE'S FEDERAL PRACTICE ¶ 41.05[1], nn. 51-53 and cases cited therein.

Legal prejudice is a horse of a different color from practical prejudice, a point which is undebatable. In *Bell South Personal Communications, LLC v. Board of Sup'rs of Hinds County*, 912 So. 2d 436 (Miss. 2005), this Court reviewed the concept of legal prejudice and provided the following instructive analysis:

> In *LeCompte v. Mister Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976), the Fifth Circuit examined the concept of "legal prejudice." Moreover, according to the Fifth Circuit, its research evidenced a difference between prejudice in a practical sense – "paying costs or expenses, producing documents, producing witnesses" – and prejudice in a legal sense –

> "which would entitle a plaintiff to appeal the grant of dismissal he obtains." *LeCompte*, 528 F.2d at 603.

Bell South, 912 So. 2d at ¶ 17.

The clear distinction between legal prejudice and practical prejudice is not some subtle point of law subject to confusion. Either the plaintiffs failed to research the position of law which they urge or they did so and disregarded legal authority to the contrary. That plaintiffs add this new argument to their arsenal while not arguing the point to the trial court hearkens U.S. Supreme Court Justice Robert H. Jackson's observation that "multiplicity of [arguments] hints at lack of confidence in any one." Jackson, *Advocacy Before the Supreme Court*, 25 Temple L.Q. 115, 119 (1951) (cited in *Jones v. Barnes*, 463 U.S. 745, 752, 103 S.Ct. 3308 (1983)).

Equally significant is the fact that the plaintiffs do not make any legitimate dispute that YVEPA suffered practical prejudice, such as the prejudice found by this Court in *Moore v. Delta Regional Medical Center*, 23 So. 3d 541 (Miss. App. 2009). At best, the plaintiffs merely say that whatever prejudice YVEPA suffered was also suffered by them. It is well established, however, that the question of prejudice involves determining the prejudice to YVEPA, not the plaintiffs. See *Moore*, 23 So. 3d at ¶ 24. That plaintiffs will suffer similar prejudice at their own hands makes it nonetheless prejudicial.

The plaintiffs' inability to credibly refute the prejudice caused to YVEPA is because they cannot, further demonstrating the error of the trial court under the abuse of discretion standard.

VII. The insufficiency of Rosenhan's designation.

Finally, the plaintiffs contend that the issue of the insufficiency of Rosenhan's designation is not properly before this Court. The plaintiffs anchor this proposition with the claim that YVEPA's petition for interlocutory appeal and this Court's order granting it were not designated as part of the record nor made record excerpts. Needless to say, YVEPA's petition for interlocutory appeal and the corresponding order are not part of the trial court's record – they appear on this Court's docket. The designation of the record was made pursuant to Rule 10 of the *Mississippi Rules of Appellate Procedure* and its contents consisted "of designated papers and exhibits filed in the trial court," not this Court. See M.R.A.P. 10(a). It would be a rather unnecessary requirement indeed for a party to have to designate appellate filings as part of the trial court record.

In its petition for interlocutory appeal, YVEPA unquestionably preserved for appellate review the insufficiency of Rosenhan's designation under Rule 26(b)(4) of the *Mississippi Rules of Civil Procedure* and the trial court's failure to strike it on that ground. The plaintiffs' contention that this issue is not properly before this Court is without merit.

While claiming that the issue is barred, the plaintiffs "concede" that the trial court did not address the insufficiency of Rosenhan's disclosure. *Appellee's Brief*, p. 12. Accordingly, YVEPA's contention on this point is confessed.

The plaintiffs go on to say that "even if the disclosures were insufficient," they had ample time for supplementation and, besides, YVEPA could always move to compel

if it was dissatisfied with Rosenhan's designation. Thus, plaintiffs contend, the insufficiency issue is premature.

Premature? YVEPA *already* moved to compel the plaintiffs to supplement their expert designations over six years ago, which led to the trial court's March 8, 2005, order directing them to serve "a full and complete response" to YVEPA's expert interrogatory within ten days of the order. (C.P. 21; R.E. 1). Then, on April 3, 2006 – five years ago – YVEPA moved for a second time to compel plaintiffs to serve complete Rule 26(b)(4) expert disclosures. YVEPA's second motion to compel is the one which plaintiffs induced YVEPA to withdraw by stipulating they would not call an expert. Plaintiffs now suggest that YVEPA should be required to submit a third motion to compel? This brings to bear precisely why the circumstances of this case are not, as plaintiffs claim, irrelevant.

That the plaintiffs continue their game of cat-and-mouse with expert designations is unacceptable. This sort of dilatory conduct at YVEPA's expense is akin to what the Court of Appeals in *Moore, supra*, found to be inherently prejudicial and intolerable.

While the case was still young, YVEPA followed the very procedure which plaintiffs assert they should repeat relative to Rosenhan's designation. Twice, YVEPA moved to compel. Twice, the plaintiffs evaded expert designations and disclosures. Now they say – well maybe Rosenhan's designation *is* insufficient, but we'll just take even more time to supplement it and, if not, YVEPA can just engage in more motion practice? "At some point the train must leave." *Bowie v. Montfort-Jones Mem. Hosp.*,

861 So. 2d 1037, (¶ 16) (Miss. 2003).

Rosenhan's designation, at best, is a sham designation that is indefensible under Rule 26(b)(4). The trial court abused its discretion in not striking it on this additional ground.

VIII. Plaintiffs' footnote 2

Before concluding, there is one final matter to be addressed. This appeal centers on the tardy designation of Rosenhan made on October 8, 2010. In footnote 2 of the plaintiffs' brief, they state, without elaboration, that the expert designation included a certificate of service date of May 7, 2010 – some five months earlier. The certificate of service date is unquestionably erroneous and never have the plaintiffs disputed the actual designation date of October 8, 2010. Why plaintiffs were compelled to mention the certificate of service date without any elaboration is inscrutable. Suffice it to say, Rosenhan's designation was not served on May 7, 2010.

IX. Conclusion

On the foregoing grounds, it is respectfully submitted that the order of the circuit court of Yazoo County, Mississippi, denying YVEPA's motion to strike Rosenhan's designation should be reversed, with instructions to vacate the court's order of March 21, 2011, insofar as it permits the plaintiffs to designate experts.

RESPECTFULLY SUBMITTED, this, the 10th day of April, 2012.

EDDIE E. DOUGLAS and YAZOO VALLEY ELECTRIC POWER ASSOCIATION

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on the **10th day of April, 2012,** he filed and served ***Via Federal Express*** the original and three (3) copies of the foregoing Reply Brief of Appellants, Eddie E. Douglas and Yazoo Valley Electric Power Association, on the Clerk of Court and has served a copy of same ***Via U.S. Mail*** on the below-named Circuit Court Judge and counsel, and further certifies that all persons required to be served have been served:

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