

**IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI**

ELRAY JONES

APPELLANT

VS.

NO. 2013-CA-00463

**MEA, INC., MEA MEDICAL CLINIC OF
RIDGELAND, MISSISSIPPI; ST.
DOMINIC-JACKSON MEMORIAL HOSPITAL,
ITS AGENT-CORPORATION AND/OR
PARENT COMPANY(S); JACKSON HEART
CLINIC, P.A., ITS AGENT-CORPORATION
AND/OR PARENT COMPANY(S); LAKELAND
DRIVE; AND JOHN DOES 1 - 15**

APPELLEES

**BRIEF OF APPELLEE, MEA, INC.
/ MEA MEDICAL CLINIC OF
RIDGELAND, MISSISSIPPI**

Oral Argument Requested

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to *Mississippi Rules of Appellate Procedure 28(a)1* and *28(b)*, 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 Mississippi Supreme Court and/or the Judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable William A. Gowan
Hinds County Circuit Court
Trial Court Judge
2. Elray Jones, *Appellant*
3. Myra Jones and the other wrongful death beneficiaries of Shirley Nebraska Jones
4. MEA, Inc. / MEA Medical Clinic of Ridgeland, Mississippi, *Appellee*
5. St. Dominic-Jackson Memorial Hospital, *Appellee*
6. Jackson Heart Clinic, P.A., *Appellee*
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10. R. Mark Hodges
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Wise Carter Child & Caraway, P.A.
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SO CERTIFIED, this the 15th day of January, 2014.

**MEA, INC. / MEA MEDICAL CLINIC OF
RIDGELAND, MISSISSIPPI**

By: s//Kimberly N. Howland
R. MARK HODGES
KIMBERLY N. HOWLAND

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STATEMENT OF ISSUES

The trial court correctly granted Appellee MEA, Inc. / MEA Medical Clinic of Ridgeland's¹ Motion for Summary Judgment as:

1. Plaintiff failed to establish a prima facie case of medical negligence due to lack of a qualified medical expert;
2. The "layman exception" to the rule requiring a plaintiff to support a claim of medical negligence with expert testimony does not apply in this case; and
3. The trial court did not abuse its discretion in denying Plaintiff's Motions for Reconsideration and for Extension of Time to Employ Expert Witness.

STATEMENT OF THE CASE

This is a case of alleged medical negligence wherein the Circuit Court for the First Judicial District of Hinds County, Mississippi, the Honorable William Gowan presiding, granted summary judgment to the Defendants, including Appellee MEA, Inc. ("MEA"), because Plaintiff failed to identify and designate a qualified medical expert to support his claims as required by Mississippi law.

I. COURSE OF PROCEEDINGS

Plaintiff, Elray Jones, the representative of the heirs of Shirley Nebraska Jones, filed his *pro se* Complaint in this action on September 19, 2011. [1:10-149]² While the Complaint is difficult to decipher, it appears Plaintiff sued MEA for the actions of Dr. Michael Sanders and Dr. William E. Loper for alleged improper medical treatment of Shirley Nebraska Jones.

¹There is no such legal entity as MEA Medical Clinic of Ridgeland, Mississippi.

²The record in this case is cited as "[Volume: Page(s)]".

Plaintiff's complaints appear to concern the type of tests ordered and the type of medications prescribed for Ms. Jones' medical conditions, including her blood pressure. [1:14-24; 4:554-56]

In the course of discovery MEA propounded Interrogatories to which Plaintiff responded on December 22, 2011. In Interrogatory No. 1, MEA asked Plaintiff to identify the experts expected to be called at trial in support of Plaintiff's claims. [8:1104] Plaintiff responded that "Plaintiffs do not expect to call on expert witnesses for the trial of this cause. Thus, as such, there are no experts identified" [8:1104-05]

On December 28, 2011, Defendants commenced the deposition of Myra Jones, daughter of Plaintiff Elray Jones and Shirley Nebraska Jones. Myra Jones holds a power of attorney for Plaintiff Elray Jones and has been the author of every document filed on behalf of Plaintiff in this case. [8:1107-08] In her deposition, Ms. Jones testified that the Plaintiff had not retained an expert witness and did not intend to do so. [8:1107-110] Elray Jones did not appear for his deposition. [8:1112-117]

On June 29, 2012, MEA filed its motion for summary judgment on the basis that Plaintiff had failed to establish a *prima facie* case of medical negligence due to Plaintiff's failure to designate a qualified medical expert to support his allegations. [8:1068-70] Defendants Jackson Heart Clinic and St. Dominic - Jackson Memorial Hospital filed similar motions. [7:1071-19; 4:483-87] Defendants' motions were initially set for hearing July 20, 2012. [4:505] Plaintiff filed a Request for Extension of Time to Respond to the summary judgment motions, asking that he be allowed until August 6, 2012, to respond. [4:467] The motions were then re-noticed for hearing on August 6, 2012. [4:516] On August 5, 2012, Plaintiff filed his response to MEA's motion for summary judgment [4:528-659], admitting that Plaintiff had no expert witness

supportive of his claims, but relying upon the layman exception that a medical expert is not required in cases where a layman can observe and understand the alleged negligence as a matter of common sense and practical experience. [4:552-556]

The trial court conducted a hearing on August 6, 2012, at which time Plaintiff failed to provide an affidavit from a qualified medical expert, and argued (through Myra Jones) to the trial court the applicability of the layman exception to the rule requiring expert testimony.

[10:13-14; 23] The trial judge advised Plaintiff of the legal necessity of expert testimony in this case, which involves the use of medical judgment and discretion, and of the inapplicability of the layman exception to the case. The trial court granted the Defendants' motions for summary judgment by Order dated August 16, 2012. [5:660]

Plaintiff then retained counsel who, on August 23, 2012, filed a Motion to Continue, to Reconsider and Set Aside Order of Dismissal, For Stay of Proceedings, to Alter or Amend the Order of Dismissal, to Extend the Time to Perfect Appeal, and for Emergency Relief (hereinafter sometimes referred to as the "Motion to Reconsider"). [5:662] This motion was set for hearing December 17, 2012. [5:684] On December 6, 2012, Plaintiff filed a Motion for Extension of Time to Employ Expert Witness, which was also heard by the trial court on December 17, 2012. [5:689; 10:38-60] As none of the Mississippi Rules of Civil Procedure argued by Plaintiff in his Motion to Reconsider applied to the posture of the case or provided any basis for the requested relief, and as Plaintiff had had ample time to designate an expert witness and failed to do so, Plaintiff's Motions to Reconsider and for Extension of Time to Employ Expert Witness were denied. An order reflecting the trial court's ruling was entered January 8, 2013. [5:709]

Plaintiff now appeals the trial court's grant of summary judgment in favor of the Defendants, including MEA, and denial of the motions for reconsideration and for additional time to employ an expert witness. [5:660; 709] For the reasons set forth in this brief, Plaintiff's appeal is without merit and the trial court's rulings should be affirmed.

II. STATEMENT OF FACTS

Shirley Nebraska Jones was initially seen as a patient at the MEA Primary Care Clinic in Ridgeland in April of 2005, by Dr. Michael Sanders. She was not seen at MEA as a patient for another four and one-half years until she again presented to the MEA Primary Care Clinic in Ridgeland on September 17, 2009. On that date, Ms. Jones had a chief complaint of headaches. Comments from her family indicated she was becoming increasingly less active and appeared to be getting weaker. She was again seen by Dr. Sanders, who ordered lab work (which was essentially normal) and recommended imaging studies; however, Ms. Jones' family stated they did not want the imaging studies performed at that time. Dr. Sanders also ordered home health services for Ms. Jones, to include physical therapy and nursing assessments. [8:1130-32]

On September 23, 2009, the home health nurse visited Ms. Jones and found her blood pressure to be elevated. The nurse called the MEA clinic and was instructed to have Ms. Jones' family bring her to the clinic to be seen. Ms. Jones was seen in the MEA clinic that day by Dr. William Loper, who ordered that she be admitted to St. Dominic Hospital due to her elevated blood pressure and complaint of chest pains. Dr. Loper's initial orders for Ms. Jones at St. Dominic included beta blocker medication for her blood pressure, medication for pain and nausea, and continuation of her daily aspirin. He also ordered cardiac enzyme tests and EKGs to

evaluate Ms. Jones for a possible heart attack. Dr. Loper also ordered a cardiology consult.

[8:1130-32]

Medical specialists, including cardiologist Dr. Mockmuhammad and neurologist Dr. Tiwari, then became involved in Ms. Jones' care and followed her during the St. Dominic hospitalization, along with Dr. Michael Sanders, who took over in place of Dr. Loper. The results of the tests that had been ordered on admission showed Ms. Jones had not had a heart attack. Dr. Mockmuhammad modified Jones' medical therapy for her blood pressure and other symptoms. The cardiologist and neurologist made other recommendations regarding Ms. Jones' medication regimen and managed the medications she was to receive for her blood pressure.

[8:1130-32]

On September 26, 2009, at the family's request, Ms. Jones was discharged from St. Dominic Hospital. Although she was supposed to follow-up with Dr. Sanders in the MEA clinic, Ms. Jones never returned to the MEA Primary Care Plus Clinic and MEA had no further contact with her. [8:1130-32]

Plaintiff's allegations of medical negligence against MEA appear to be that Dr. Sanders did not give Jones medication for her blood pressure at the MEA clinic on September 17, 2009, and that she received medications her family members believe were not appropriate during her September 23 - 26 St. Dominic hospitalization. [1:14-24] Medical treatment decisions regarding management of hypertension are not within the common knowledge and experience of lay persons.

SUMMARY OF THE ARGUMENT

The Circuit Court properly granted summary judgment to the Defendants, including MEA. Plaintiff's allegations of medical negligence against MEA concern whether MEA physicians appropriately treated Ms. Jones in the MEA clinic on September 17, 2009, and then subsequently during her hospitalization at St. Dominic Hospital from September 23 through 26, 2009. Plaintiff's allegations appear to focus on whether MEA physicians appropriately treated Ms. Jones' hypertension. MEA's motion for summary judgment was heard eleven months after the filing of the Complaint, and after completion of written and oral discovery.³ Plaintiff produced no expert to provide *prima facie* proof of the elements of his medical malpractice claim as required by Mississippi law. Thus the trial court correctly granted MEA's Motion for Summary Judgment. *Johnson v. Pace*, 122 So.3d 66,69 (Miss. 2013); *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).

The medical management of an elderly patient with numerous co-morbidities, including hypertension, is not within the common knowledge of laypersons. Thus, the "layman exception" to the expert witness requirement is inapplicable in this case.

After the appropriate grant of summary judgment to the Defendants, Plaintiff's counsel appeared for the first time and filed a Motion to Continue, to Reconsider and Set Aside Order of Dismissal, for Stay of Proceedings, to Alter or Amend the Order of Dismissal, to Extend the Time to Perfect Appeal, and for Emergency Relief, and a subsequent Motion for Extension of

³The only requested discovery that was not completed was the deposition of Mr. Elray Jones who failed to appear for his deposition after a brief appearance at the deposition of his daughter and attorney-in-fact, Myra Jones.

Time to Employ Expert Witness. Plaintiff's counsel was aware from time of his entry of appearance in the case that the trial court had already granted summary judgment due to Plaintiff's lack of a qualified medical expert and had ruled that the layman exception did not apply to excuse the failure of Plaintiff to designate a medical expert⁴. Nevertheless, Plaintiff still had not retained an expert supportive of his claims by the time of the hearing on Plaintiff's motions on December 17, 2012.

Dismissal of Plaintiff's claim of medical negligence was compelled and supported by Mississippi law. Accordingly, the trial court's grant of summary judgment to MEA should be affirmed.

ARGUMENT

I. Summary judgment was proper because Plaintiff had no expert testimony to support his claim of medical malpractice as required by Mississippi law.

In a medical malpractice action, the plaintiff carries the burden of proof at trial and, thus, the burden of production on summary judgment. *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So. 2d 1346, 1355 (Miss. 1990). A plaintiff in a medical malpractice case has the burden of proving: (1) the existence of a duty by the defendant to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) a failure to conform to the required standard; and (3) an injury to the plaintiff proximately caused by the breach of such duty by the defendant. *Hubbard v. Wansley*, 954 So. 2d 951, 956-57 (Miss. 2007). Expert testimony establishing these elements is required for the non-moving party to survive summary judgment. *Smith v. Gilmore Mem'l Hosp., Inc.*, 952 So. 2d 177, 180 (Miss. 2007) (citing *Sheffield v.*

⁴In the pleadings filed after summary judgment was granted, Plaintiff repeatedly admitted that he was incorrect in his position that the layman's exception applied to this case. [5:663; 5:690; 5:693-94] Nevertheless, Plaintiff posits that position in this appeal.

Goodwin, 740 So. 2d 854, 856 (Miss. 1999). “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 a proximate contributing cause, of the alleged injuries.” *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992) (citing *Latham v. Hayes*, 495 So. 2d 453 (Miss. 1986)).

AUGUST 6, 2012, HEARING

MEA filed its motion for summary judgment approximately nine months after the filing of Plaintiff’s Complaint, when written discovery responses and deposition testimony established that Plaintiff had no qualified medical expert witness to support his claims and that Plaintiff did not intend to retain such an expert.⁵ It is undisputed that Plaintiff did not present any sworn expert testimony (by affidavit or otherwise) in support of his claims against MEA at the hearing on August 6, 2012.

Plaintiff contends in his brief that the trial court disregarded the Affidavit of Myra Jones filed with Plaintiff’s response to MEA’s summary judgment motion; however, the transcript of the August 6, 2012, hearing demonstrates this is not true. After hearing Myra Jones’ testimony, the trial court explicitly advised Ms. Jones that he had reviewed Plaintiff’s response to MEA’s motion and all of the attachments to it, including her Affidavit. [10:14] However, Ms. Jones’ Affidavit contains nothing that could be construed as either expert testimony or anything demonstrating a genuine issue of material fact in this medical malpractice case. Accordingly, the

⁵Plaintiff also failed to provide the usually mandatory certification of expert consultation in his Complaint, but this flaw was excused by his *pro se* status. See *Miss. Code Ann. § 11-1-58(6)*. Discovery was thus necessary to confirm Plaintiff had no expert.

trial court's ruling to grant MEA's motion for summary judgment and to dismiss Plaintiff's claims was supported, indeed compelled, by Mississippi law.

DECEMBER 17, 2012, HEARING

All parties were again before the court on December 17, 2012, on Plaintiff's Motion for Reconsideration and Motion for Extension of Time to Employ Expert Witness. At the hearing, Plaintiff's counsel acknowledged several times his belief that the trial court's prior grant of summary judgment to the Defendants was legally correct. [10:42, 48] Nevertheless, the state of Plaintiff's evidence on December 17, 2012, more than four months after the trial court had explicitly advised Plaintiff that a medical expert was required, had not changed. Plaintiff still had not retained a qualified medical expert to support his claims against MEA but sought leniency from the trial court based solely upon presentation of a curriculum vitae of a physician who had not reviewed the relevant medical records of Ms. Jones, or indicated any willingness to testify on behalf of Plaintiff. [10:40-46] The curriculum vitae itself, while not probative of anything other than the ability to print from a computer, was not produced until the date of the December 17 hearing. [10:40,54]

In the recent case of *Posey v. Burrow*, 93 So.3d 905 (Miss. Ct. App. 2012), the Mississippi Supreme Court affirmed a trial court's grant of summary judgment for a physician defendant where the plaintiff's evidence presented in opposition to the defendant's summary judgment motion consisted of two unsworn letters from physicians who were actually supportive of the plaintiff's position. In affirming the trial court's grant of summary judgment, the Mississippi Supreme Court emphasized the "extreme importance" of the lack of sworn expert affidavits in support of the plaintiff's case. *Id.* at 907. The ruling in *Posey* is consistent with

longstanding Mississippi jurisprudence that unsworn statements from persons purporting to be willing to advance a plaintiff's medical malpractice claims are an insufficient basis upon which to deny a defendant's motion for summary judgment. (See *Scales v. Lackey Memorial Hosp.*, 988 So. 2d 426 (Miss. Ct. App. 2008) (Plaintiff's unsworn interrogatory responses signed by her attorney are not enough to create a genuine issue of material fact); *Griffin v. Pinson*, 952 So. 2d 963 (Miss. Ct. App. 2007) (Plaintiff's supplemental designation of experts providing unsworn anticipated expert opinions was insufficient to defeat summary judgment); *Busby v. Mazzeo*, 929 So. 2d 369 (Miss. Ct. App. 2006) (Plaintiff erred in relying on an unsworn letter from a physician which criticized the Defendant's care of the decedent and summary judgment was properly granted); *Potter v. Hopper*, 907 So. 2d 376 (Miss. Ct. App. 2005) (A letter from plaintiff's expert setting forth his opinions did not fulfill requirement of sworn expert testimony and summary judgment was appropriate). Summary judgment was clearly appropriate in the instance case, where the physician whose curriculum vitae was provided to the trial court had not even reviewed the medical records/case materials or indicated *any* support for plaintiff's claims of negligence against MEA.

The trial court correctly held that the Plaintiff's failure to identify and designate a qualified medical expert to substantiate his claims of medical negligence against MEA was fatal to Plaintiff's case. Mississippi law required that summary judgment be granted to the Defendants at the time of the hearing on the motions for summary judgment on August 6, 2012, and summary judgment was properly granted at that time. Assuming *arguendo* that Plaintiff had presented the same proof (i.e. - the curriculum vitae of a physician who had not reviewed the records and had not expressed sworn support of Plaintiff's claims to the trial court) on August 6,

2009, the same ruling would have been compelled by the law at that time. Conversely, had the summary judgment hearing itself been postponed until December 17, 2012, Mississippi law mandated the grant of summary judgment, because the curriculum vitae of a doctor with no opinions about the medical care at issue cannot defeat a proper summary judgment motion in a medical malpractice case. Here, the Plaintiff had two chances (i.e. two hearings) over more than four months to present competent expert testimony to support his case and he failed to do so. The trial court was correct in its ruling at the August 6 hearing and continued to be correct in its application of the law on December 17, 2012.

II. The “layman exception” to the rule requiring expert testimony in cases of alleged medical negligence is inapplicable in this case.

Mississippi law does recognize a narrow exception to the rule that expert testimony is required to establish a *prima facie* case of medical negligence. As stated by the Mississippi Supreme Court in *Sheffield v. Goodwin*, 740 So. 2d 854 (1999):

In certain instances, a layman asked to evaluate a physician’s negligence can ‘observe and understand the negligence as a matter of common sense and practical experience.’ *Palmer v. Anderson Infirmary Benevolent Ass’n*, 656 So. 2d 795. For instance, a layman can understand without expert testimony that ‘the unauthorized and unexplained leaving of an object inside a patient during surgery is negligence.’ *Coleman v. Rice*, 706 So. 2d 696, 698. However, ‘Lay testimony is sufficient to establish only those things that are purely factual in nature or thought to be in the common knowledge of laymen.’ *Id.*

In the present case, Plaintiff has totally failed to articulate how MEA’s treatment of Ms. Jones fell below the applicable standard of care and has also failed to demonstrate how a lay person would be capable of understanding this alleged negligence by use of mere common sense and practical experience. As is evident from the volume of writings from Plaintiff in the record, Myra Jones and Plaintiff have submitted reams of paper in support of Plaintiff’s claims, but one

cannot derive from it how anyone provided improper medical care, much less how that impropriety is evident to a layman. Plaintiff's counsel's efforts provide no guidance on this point either.

Plaintiff has cited no case where Mississippi courts have found the layman exception applicable when the case concerns medical treatment decisions. In *Sheffield v. Goodwin*, 740 So. 2d 854 (Miss. 1999), plaintiff Sheffield alleged medical malpractice on the part of her dentist, Dr. Goodwin. After Dr. Goodwin performed a root canal, Sheffield experienced severe pain and facial swelling and returned to Dr. Goodwin, who did not re-examine the tooth, but prescribed antibiotics. Sheffield later had several of her teeth removed by an oral surgeon. Sheffield contended that since Dr. Goodwin "did nothing" when she returned to his office complaining of pain and swelling, it was "obvious" he was negligent, such that no medical expert testimony was required to support her claims. *Id.* at 857. However, the Mississippi Supreme Court recognized that, "[d]iagnosing symptoms and prescribing antibiotics is beyond the common knowledge of laymen. The layman exception does not apply in this case." *Id.* at 858. (See also, *Travis v. Stewart*, 680 So. 2d 214, rehearing denied 691 So. 2d 1026 (Miss. 1996) (Without a qualified medical expert, mother of child w/neurological problems failed to establish child's problems resulted from hospital and physician's negligence in failing to perform a caesarian section delivery); *Palmer v. Anderson Infirmary Benv. Ass'n.*, 656 So. 2d 790 (Miss. 1995) (Expert testimony was required to establish alleged negligence of hospital in failing to require two surgeons be present during performance of surgery, even though it would not be difficult for laymen to see causal connection between the alleged negligence and injury); *Walker v. Skiwski*, 529 So. 2d 184 (Miss. 1988) (Circumcision is not surgical procedure which is an

exception to general rule that medical negligence must be established by expert testimony, because laymen cannot observe and understand negligence in performance of a circumcision as a matter of common sense and practical experience); *Cole v. Wiggins*, 487 So. 2d 203 (Miss. 1986) (Patient could not establish negligence of physician in amputating finger without use of expert testimony.)) The same reasoning applies to the medical issue in the instant case. The appropriate treatment for high blood pressure, and whether additional treatment or tests were compelled by the medical standard of care, are not matters within the common knowledge and experience of lay persons. These matters are within the specialized knowledge of qualified medical experts.

Plaintiff attempts to argue that Dr. Mockmuhammad's proposed treatment plan contained in his consultation report of September 24, 2009, [Appellant's R.E., 93-96] establishes negligence by MEA because MEA physicians did not carry out Dr. Mockmuhammad's treatment recommendations. This position is inaccurate and also untenable. Plaintiff relies on paragraph 8 of Dr. Mockmuhammad's plan and management recommendations, which states:

The patient **possibly** may benefit from a permanent pacemaker **if** any return of significant sinus bradycardia is present on cardiac telemetry or **if** any need for long-term beta blocker therapy is determined. Will continue to follow and observe with primary service. Also recommend that the patient will **likely** need a noninvasive stress test **at some point in time** to evaluate for inducible ischemia and **possible** percutaneous intervention need.

[Appellant's R.E. 96] (emphasis added)

The plain reading of Dr. Mockmuhammad's note establishes that he is recommending *possible future consideration* of placement of a pacemaker for Jones if certain clinical symptoms occur: 1) return of significant sinus bradycardia; or 2) if Jones is placed on long-term beta

blocker mediation. In the absence of medical testimony, Plaintiff cannot establish whether either of those clinical events occurred, or if pacemaker placement would have been recommended at that time given other medical considerations. Plaintiff also fails to present evidence that the decision to install a pacemaker would be made and carried out by a family practice doctor (as opposed to a cardiologist), nor does he present any evidence or even an explanation why these “recommendations” in a cardiologist’s treatment plan point the finger at two family practice doctors, rather than at the cardiologist who allegedly made the recommendations. In the absence of expert medical testimony, Plaintiff cannot establish whether Jones should have undergone a noninvasive stress test, and what, if any, effect such test would have had on her medical outcome.⁶ Regardless, Jones never presented to MEA again after her discharge from St. Dominic Hospital on September 26, 2009.

In summary, this simply is not a case in which a layman, exercising common sense from normal life experiences, can make a determination that MEA breached a duty to Ms. Jones. The trial court correctly ruled that Plaintiff’s claims of medical negligence required expert testimony, and that the layman exception was inapplicable to this matter.

III. The trial court did not abuse its discretion in denying Plaintiff’s Motion for Reconsideration and Motion for Extension of Time to Employ Expert Witness.

THE MOTION FOR RECONSIDERATION

After the trial court properly granted MEA’s Motion for Summary Judgment, Plaintiff filed a Motion to Continue, to Reconsider and Set Aside Order of Dismissal, for Stay of Proceedings, to Alter or Amend the Order of Dismissal, to Extend the Time to Perfect Appeal,

⁶Although Plaintiff apparently sought to enlist the aid of Dr. Mockmuhammad as a medical expert in the case, he apparently declined. [10:47-48]

and for Emergency Relief. [5:662] Neither in the motion filed in the trial court nor in his brief to this Court does Plaintiff cite a single legal authority for the proposition that Mississippi Rules of Civil Procedure 52(b), 56(f), 60(b) and/or 62(b) are applicable to this case. Given the foregoing, MEA submits that Plaintiff's brief is tantamount to a brief without supporting authority, and this Court will be well within its authority to decline to review this issue.

Crawford v. Butler, 924 So. 2d 569, 576 (Miss. Ct. App. 2005) (stating that the court would decline to review an issue where the Appellant failed to cite relevant authority and/or failed to connect relevant authority to the case. "The failure to cite relevant authority obviates this Court's responsibility to review this issue, and it is procedurally barred. . . . Dr. Crawford has failed to relate relevant authority with the facts of the case; therefore, this issue is procedurally barred.") (citing *Mann v. Mann*, 904 So. 2d 1183, 1185 (Miss. Ct. App. 2004). Nevertheless, MEA will briefly discuss why each of these rules fails to be applicable or to provide a basis for relief from the trial court's proper grant of summary judgment for all Defendants.

Miss. R. Civ. Pro. 52(b) allows a trial court to amend its findings of fact and conclusions of law after a bench trial. Here, Plaintiff's action was not "tried" by the court without a jury, and the court did not enter findings of fact and/or conclusions of law. Rather, the court ruled on the Defendants' respective motions for summary judgment pursuant to Miss. R. Civ. Pro. 56. As stated in *Harmon v. Regions Bank*, 961 So. 2d 693, 700 (Miss. 2007), "[e]ven though on motion for summary judgment, evidence may be received by way of sworn affidavits, deposition testimony, and other such evidence, a hearing on a motion for summary judgment is not an 'action tried upon the facts without a jury,' so as to trigger Rule 52 applicability." As Miss. R. Civ. Pro. 52 is not implicated by a ruling on a summary judgment motion, Plaintiff had no claim

for Rule 52(b) relief, and the trial court appropriately denied Plaintiff's Motion to Alter or Amend its summary judgment ruling on that basis.

Plaintiff's motion also referenced Miss. R. Civ. Pro. 60(b), which allows a court to relieve a party from a final judgment, order or proceeding upon a showing of accident or mistake. Neither Plaintiff's motion before the trial court, nor Plaintiff's appeal brief identifies the "accident or mistake" Plaintiff contends occurred in the instant case. Perhaps Plaintiff refers to his misunderstanding of the law that the layman exception to the expert testimony rule applied in this case, but his own misunderstanding of the law does not afford Plaintiff any basis for the requested relief. In *Sabal Corp. v. Howell*, 853 So. 2d 122, 124 (Miss. Ct. App. 2003), the Court of Appeals stated that Rule 60(b) is for "exceptional problems" and "[g]ross negligence or ignorance of the law is insufficient." *See also Accredited Surety & Casualty Co., Inc. v. Bolles*, 535 So. 2d 56 (Miss. 1988) (A 60(b)(2) motion will only be granted upon an adequate showing of exceptional circumstances. Ignorance of the rules or law, gross negligence, or an attorney's carelessness are not grounds for relief from judgment.) Clearly Plaintiff's motion was simply seeking to re-litigate the issue which had already been appropriately decided by the trial court.⁷ Plaintiff has not identified any accident or mistake contemplated by Miss. R. Civ. Pro. 60(b)(2) and the trial court was correct to deny Plaintiff's motion for relief on that basis.

Plaintiff also referenced Miss. R. Civ. Pro. 62(b) which provides that the court may stay the execution or enforcement of a judgment pending disposition of a Rule 52(b) or 60(b) motion.

⁷As noted in Section I above, Plaintiff failed to provide a basis for relief, even if the December hearing were viewed as re-litigating the summary judgment motion. More than four months after the August hearing, Plaintiff still provided no expert affidavit to make a *prima facie* case of medical negligence.

However, as Rules 52(b) and 60(b) are inapplicable for the reasons set forth above, Rule 62(b) provides no basis for any relief to Plaintiff.

Neither does Miss. R. Civ. Pro. 56(f), also referenced by Plaintiff in the motion to reconsider with no discussion of case law, support Plaintiff's position. Rule 56(f) allows a party additional time to obtain affidavits with which to oppose summary judgment. Here, Plaintiff made only a passing reference to Rule 56(f) *after* the motion for summary judgment had already been granted. Mississippi law is clear that a Rule 56(f) request for continuance to obtain affidavits must be made before summary judgment is granted. See *Paige v. Miss. Baptist Medical Center*, 31 So.3d 637, 640 (Miss. Ct. App. 2009) (Plaintiff's request for a Rule 56(f) continuance was without merit as he failed to request additional time before the court ruled on the summary judgment motion); *Morton v. City of Shelby*, 984 So. 2d 323, 342-43 (Miss. Ct. App. 2007) (Rule 56(f) contemplates that a motion for 56(f) continuance will be made prior to the court's grant of summary judgment.) Neither the Rules of Civil Procedure referred to by Plaintiff, nor Mississippi case law provides support for Plaintiff's attempt to have the trial court reverse the grant of summary judgment to the Defendants. Accordingly, the trial court did not abuse its discretion in denying Plaintiff's motion for reconsideration.

THE MOTION FOR EXTENSION OF TIME TO EMPLOY EXPERT WITNESS

The undisputed proof is that the Plaintiff did not attempt to retain an expert until after the case had been pending for approximately one year and after the grant of summary judgment to the Defendants. In the more than four months between the trial court's grant of summary judgment to the Defendants and the hearing on December 17, 2012, Plaintiff still did not retain an expert to support his claims, and in fact he appeared at the hearing with only the curriculum

vitae of a physician who had not reviewed the relevant medical records or indicated any support for the Plaintiff's case. The curriculum vitae presented by Plaintiff to the trial court on December 17, 2012, had apparently only been received by Plaintiff's counsel the day of the hearing, as it bore a fax header timed just one hour prior to the time of the hearing. [10:54] Additionally, Plaintiff provided no basis upon which to conclude that the requested ninety days would be of benefit to Plaintiff. To the contrary, Plaintiff's counsel openly admitted, "They [the Defendants] may win on the expert we have. The expert we have may agree with them. . . ." [10:46]

Plaintiff's contention that counsel's inability to locate the court file somehow prevented Plaintiff from retaining an expert is unfounded as a medical expert would need to review the relevant medical treatment records, not the court file. It is further undisputed that Plaintiff's counsel first requested medical records from all of the Defendants, including MEA, on December 6, 2012, *after* the trial court had granted summary judgment. Nevertheless, all defense counsel offered to provide copies of their pleadings which would have been contained in the court file to Plaintiff's counsel in September of 2012. [5:707]

Clearly, the trial court did not abuse its discretion in denying Plaintiff's Motion to Continue, to Reconsider and Set Aside Order of Dismissal, For Stay of Proceedings, to Alter or Amend the Order of Dismissal, to Extend the Time to Perfect Appeal, and for Emergency Relief and Plaintiff's Motion for Extension of Time to Employ Expert Witness.

CONCLUSION

Plaintiff simply failed to meet the burden required to survive summary judgment. Having failed to create a genuine issue of material fact after a year of litigation, Plaintiff could not

sustain his claims to trial, and MEA was entitled to summary judgment pursuant to well established Mississippi law. For all of the reasons set forth herein, this Court should affirm the ruling of the Hinds County Circuit Court granting judgment as a matter of law to MEA, Inc.

DATED this the 15th day of January, 2014.

Respectfully Submitted,

**MEA, INC. / MEA MEDICAL CLINIC
OF RIDGELAND, MISSISSIPPI**

By: s/Kimberly N. Howland
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CERTIFICATE OF SERVICE

I, Kimberly N. Howland, one of the attorneys for MEA, Inc. / MEA Medical Clinic of Ridgeland, Mississippi, hereby certify that I have this day filed the foregoing document with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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and by U. S. Mail, first class, postage prepaid to the following:

Honorable William A. Gowan
Hind County Circuit Court
P. O. Box 22711
Jackson, MS 39225
Trial Court Judge

THIS, the 15th day of January, 2014.

s/Kimberly N. Howland
KIMBERLY N. HOWLAND