

2010-IA-00190-SCTT

I. 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. The Honorable Thomas W. Allen
P.O. Box 756
Clarksdale, MS 38614-0756
2. Bernice Conner, Plaintiff/Appellee
3. Daniel M. Czamanske, Jr., Esq.
Harland Webster, Esq.
Chapman, Lewis & Swan
501 First Street
P. O. Box 428
Clarksdale, MS 38614

Counsel for Plaintiff/Appellee
4. Mid-South Retina, LLC, Defendant/Appellant
5. S. Kirk Milam, Esq.
Shelby Duke Goza, Esq.
Hickman, Goza & Spragins, PLLC
1305 Madison Ave.
P.O. Drawer 668
Oxford, MS 38655

Counsel for Defendant/Appellant

RESPECTFULLY SUBMITTED, this the 19th day of November, 2010.

MID-SOUTH RETINA, LLC

HICKMAN, GOZA & SPRAGINS, PLLC
1305 Madison Avenue
P.O. Drawer 668
Oxford, MS 38655-0668
(662) 234-4000



S. KIRK MILAM, MSB # [REDACTED]

SHELBY DUKE GOZA, MSB # [REDACTED]

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IV. STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that the issues in this appeal are fairly straight forward and evident in the record. Appellant believes that the Court can decide this appeal without oral argument. Therefore, the Appellant's do not request oral argument in this appeal but welcome any questions the Court may have.

V. STATEMENT OF THE ISSUES

Whether the lower court erred in reversing its award of summary judgment to the Defendant when Plaintiff's expert nurse could not legally opine about medical causation; when Plaintiff's expert's Affidavit lacked of any opinion providing a plausible causal link between Mid-South's nurses actions and the burns on Plaintiff's Arm; and when the lower court mistakenly considered the Plaintiff's supplemental affidavit on reconsideration.

VI. STATEMENT OF THE CASE

A. Statement of the Facts:

Conner, a resident of Coahoma County, was referred to the Mid-South Retina clinic in Memphis, TN by her eye doctor in Clarksdale, Dr. Victor Pang, for decreased visual acuity in her left eye. On February 5, 2003, Dr. Brad Priester first saw Conner in Mid-South's office in Memphis and diagnosed her with age-related macular degeneration. Dr. Priester prescribed photodynamic therapy¹ to help slow the progression of the degeneration of sight in her left eye. On February 12, 2003, Dr. Priester conducted Conner's first photodynamic therapy using a drug called Visudyne. The treatment occurred without incident.

Conner returned for a second round of Visudyne therapy on April 10, 2003. As in February, she was given a pamphlet which outlines the risks and benefits of the treatment including extravasation/infiltration.² Mid-South Retina's nurse, Evelyn Hampton, started an IV in Conner's antecubital (at the bend of the elbow) space and began the automatic syringe machine which applies a constant inflow of Visudyne for approximately five minutes. Halfway through the infusion, Nurse Hampton noticed that the drug was infiltrating into the anectubital space instead of the vein. Dr. Priester determined that enough of the Visudyne was infused and therefore went forward with the remainder of the procedure. Due to the infiltration and the fact

¹ Photodynamic therapy is a procedure utilizing chemicals that are reactive to light. In this case, a patient such as Conner is injected with a drug such as Visudyne which travels through the blood stream to the new forming blood vessels in the back of the retina which are feeding the scar tissue causing the decreased vision. A cold laser is then shot into the eye. The laser activates the chemicals in the drug.

² An extravasation/infiltration is the depositing or injection of a fluid or solution directly into the tissue instead of the vein.

that the Visudyne reacts to light, Dr. Priester instructed Conner to keep her arm out of the sun and to keep in elevated and apply ice-packs for twenty-four hours. Dr. Priester did not let Conner leave Mid-South's office in Memphis until he was satisfied that her arm was sufficiently covered.

Thirty minutes after leaving Mid-South's Memphis office, Conner called and informed Mid-South Retina that her arm was hurting. She was instructed to return to the office. Upon her arrival, Dr. Priester sent her up to a dermatologist who occupied the same building in Memphis. The dermatologist instructed Conner to immediately go to St. Francis Hospital ER in Memphis for further treatment as Conner's complaints of pain was out of proportion with his exam. Conner did not go the St. Francis ER as instructed, but instead returned to Clarksdale, MS. The following day, April 11, 2003, after making numerous calls, Dr. Priester spoke with Conner who informed him that she had not gone to the ER as instructed but was still in pain. She was instructed to go to the ER in Clarksdale who in turn referred her to a general surgeon, Dr. Purifoy who treated her with pain medication and oral antibiotic.

Dr. Priester continued to try to contact Conner to check on her status. After numerous unsuccessful phone calls, Dr. Priester traveled from Memphis to Clarksdale to check on her. He found her at home where he treated her arm and instructed her to see Dr. Purifoy. Conner saw Dr. Purifoy on April 29, 2003 and again on May 13, 2003 where he noted that the skin breakdown was less than 1 centimeter. Conner never returned for any further treatment by Dr. Purifoy.

B. Statement of the Proceedings.

On April 12, 2004, Conner, filed suit alleging medical negligence on the part of Dr.

Priester and Mid-South Retina in the care and treatment of Ms. Conner. (R. 3-5)³ Plaintiff's Complaint alleges that Dr. Priester and his employees were negligent in the administration of the intravenous Visudyne treatment to Conner. (R. 4) Further, Plaintiff claims that as a result of defendants' negligence, Conner suffered painful, permanent and disfiguring injuries. Discovery was conducted and depositions were taken. (R. 5) Dr. Priester and Mid-South moved for summary judgment on the basis that the Plaintiff did not have an expert to testify to the standard of care which they were required to adhere, that they breached the standard of care and that such breach caused or contributed to Conner's injuries. (R. 97-119, R.E. 2) On November 19, 2008, Conner filed her Designation of Expert, designating LaDonna Northington, R.N. as her sole expert and attaching Nurse Northington's CV and Affidavit as a statement of her qualifications and opinions. (R. 126-140) On the same day, Conner filed her Response to Defendants' Motion for Summary Judgment which relied upon the Affidavit of Nurse Northington. (R. 141-170) Defendants' filed a Rebuttal and a hearing was held on January 13, 2009. (R. 171-177, R.E. 3, R. 192) At the hearing, Conner conceded the Motion as to Dr. Priester and took the motion as to Mid-South Retina under advisement. (R. 194-195). The lower court entered an Order granting Mid-South's motion for summary judgment on August 10, 2009. (R. 200-207, R.E. 4). Conner moved for reconsideration on August 20, 2009 adding a supplemental Affidavit of LaDonna Northington and deposition testimony that was not before the lower court when it considered the Motion for Summary Judgment. (R. 208-220) Mid-South moved to strike the supplemental affidavit of Northington as it amounted to feeble attempt to correct the deficiencies in the

³ Throughout the Brief, R. will be used for the Record, R.E. for Record Excerpt and T for Trial Transcript.

VII. SUMMARY OF THE ARGUMENT

Nurses are not competent to testify to the issue of medical causation. The lower court should not have found Nurse Northington competent to testify after reconsidering its earlier decision that she was incompetent to testify as to the issue of causation. On this ground alone, The lower court's opinion on reconsideration should be overturned and a judgment rendered in Mid-South's favor.

Regardless of whether Nurse Northington was qualified to testify to medical causation, she failed to provide a causal link between her opined breach of the standard of care and Plaintiff's injuries. Summary judgment is warranted in this case when viewing the evidence, the affidavit of Nurse Northington, in a light most favorable to the Plaintiff. Nurse Northington is not critical of Mid-South for allowing an infiltration to occur, only that Mid-South's nurse failed to document certain aspects of the IV treatment. Nurse Northington cannot be critical of the infiltration as it is a common risk when a person inserts a needle under the skin to inject a vein that cannot be seen by the naked eye. Therefore, the only breaches of the standard of care to which Nurse Northington provided are alleged failures to document.

Nurse Northington also testified that the failure to document these various things caused scarring to Mrs. Conner's arm. This opinion is disingenuous. Taking this argument to its logical conclusion would mean that had the nurse who administered the Visudyne drug documented the chart better, there would not have been an infiltration and in turn no injury to Conner's arm. This is simply not the case. Nurse Northington does not provide a plausible causal connection between the only standard of care violation, poor documentation, and the alleged injury, a scarred arm.

Once the lower court ruled against Conner, she had Nurse Northington execute another affidavit correcting the deficiencies of the original affidavit filed months prior. There was no newly discovered evidence that prompted a change in Nurse Northington's opinions, much less newly discovered evidence that could not have been discovered using due diligence. Further, Conner did not provide the Court with any evidence to show that Nurse Northington's opinions could not have been rendered prior to the entry of judgment against her.

Both parties to this action had time to prepare and present their best arguments for and against summary judgment. The lower court considered all of the evidence and argument properly before it. The lower court initially made the correct determination that summary judgment was warranted for numerous reasons including that Nurse Northington did not provide a plausible opinion on the necessary element of causation. The lower court erred in considering a supplemental affidavit based on information available prior to the initial hearing that was produced for the sole purpose of correcting the deficiencies that warranted summary judgment. The lower court further erred by reversing its initial decision on the basis that Plaintiff made a prima facie case by providing an opinion on causation. The lower court's denial of summary judgment upon reconsideration should be reversed and a judgment in favor of the remaining Defendant rendered.

VIII. ARGUMENT

A. Nurse Northington Is Not Qualified to Render an Opinion on Medical Causation.

The lower court correctly found that Nurse Northington was not qualified to testify either live or by affidavit. However, the lower court reversed itself upon reconsideration and found that she was qualified to testify on the issue of causation. The law is clear in Mississippi. “We now explicitly hold that nurses cannot testify to medical causation.” *Vaughn v. Mississippi Baptist Medical Center*, 20, So. 3d 645, 652 (Miss. 2009). Since medical diagnosis is outside a nurse's scope of practice, logically it would follow that a nurse should not be permitted to testify as to his/her diagnostic impressions or as to the cause of a particular infectious disease or illness. This is in keeping with the majority rule that nursing experts cannot opine as to medical causation and are unable to establish the necessary element of proximate cause. *Id.*

Since Nurse Northington cannot testify about the element of causation, any opinion she may give on the subject of causation is incompetent. Without an expert opinion on causation, plaintiff cannot prove a critical element required to make a prima facie case of medical negligence. The lower court should not have reversed its earlier decision that she was incompetent to testify as to the issue of causation. On this ground alone, The lower court's opinion on reconsideration should be overturned and a judgment rendered in Mid-South's favor.

B. Summary Judgment Was Warranted for Failure to Provide a Causal Link Between the Alleged Standard of Care Violations and the Injury to Conner.

Even if the Court disregarded Northington's qualifications, summary judgment was still warranted. As a general matter of Mississippi law, summary judgments should only be issued

where the moving party successfully demonstrates to the Court that no genuine issue of material fact exists from the record and he is entitled to judgment as a matter of law. *Palmer v. Biloxi Regional Medical Center*, 564 So.2d 1346, 1355 (Miss.1990); *American Legion Ladnier Post No. 42, Inc. v. City of Ocean Springs*, 562 So.2d 103, 106 (Miss.1990); *Brown v. Credit Center, Inc.*, 444 So.2d 358, 362 (Miss.1983). All evidentiary matters before the Court must be considered in the light most favorable to the non-moving party. *McFadden v. State*, 580 So.2d 1210, 1214 (Miss.1991); *Webster v. Mississippi Publishers Corp.*, 571 So.2d 946, 949 (Miss.1990); *Brown*, 444 So.2d at 362. The non-moving party may not defeat the motion merely by making general allegations or unsupported denials of material fact, however. *Palmer*, 564 So.2d at 1356; *Smith v. Sanders*, 485 So.2d 1051, 1054 (Miss.1986); *Hill v. Consumer National Bank*, 482 So.2d 1124, 1128 (Miss.1986). The **“party opposing the motion must by affidavit or otherwise set forth specific facts showing that there are indeed issues for trial.”** *Palmer*, 564 So.2d at 1356; *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 199 (Miss.1988); *Smith v. First Federal Savings & Loan Association of Grenada*, 460 So.2d 786, 792 (Miss.1984) *emphasis added*. “ A court simply may not rely upon unsupported, conclusory allegations to defeat a motion for summary judgment where there are no issues of material fact. *Jacox v. Circus Circus of Mississippi, Inc.*, 908 So. 2d 181, 184 (Miss. 2005) (citing *Richardson v. Oldham*, 12 F.3d 1373, 1378-79 (5th Cir.1994) (affidavits in opposition to summary judgment that contain conclusions or conjecture not based on personal knowledge and insufficient factual specificity are not competent summary judgment evidence); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.1994) (unsubstantiated assertions are not competent summary judgment evidence); *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1449 (5th Cir.1993) (if the nonmoving party rests merely

upon conclusory allegations, improbable inferences and unsupported speculation, summary judgment may be appropriate)).

Summary judgment is warranted in this case when viewing the evidence, the affidavit of Nurse Northington, in a light most favorable to the Plaintiff. Nurse Northington's opinions do not provide a complete prima facie case of medical negligence against Mid-South sufficient to defeat the Motion for Summary Judgment. Nurse Northington's Affidavit states:

Based on my education and experience, a review of the above items, it is my opinion that Mid South Retina Associates were negligent in the care and follow [up] treatment provided to Bernice Conners on April 10, 2003, and that such negligence was a violation of the applicable standard of care with regard to IV treatment and follow up. Specifically, it was below the applicable standard of care for Mid South Retina Associates to not document in the medical records the manner and method in which the IV was place[d] and the presence of proof of proper placement, the length of time between the onset of infusion and infiltration, the appearance of the site post infiltration, evaluation of the infiltration site, or the actions taken post infiltration to treat the area. Further there is no documentation or testimony to indicate that the area was bandaged to prevent any incidental exposure to sunlight. The testimony indicates that the healthcare providers were aware of the caustic nature of the Visudyne and its reactive nature with regard to sunlight. It is further my opinion, to a reasonable degree of medical probability, that the above mentioned negligent acts of nursing care caused or contributed to cause the injury and scarring to Bernice Conner's antecubital fossa.

(R. 156, R.E. 7). Nurse Northington's opinion is that Mid-South breached of the standard of care with regard to IV treatment and follow up. She goes on to opine that Mid-South specifically breached the standard of care with regard to IV treatment by failing to document: (1) the manner and method in which the IV was placed; (2) the presence of proof of the proper placement; (3) length of time between the onset of infusion and infiltration; (4) the appearance of the site post infiltration, evaluation of the infiltration

site; (5) the actions taken post infiltration to treat the area; and (6) that the area was bandaged to prevent any incidental exposure to sunlight. *Id.* Nurse Northington is not critical of Mid-South for allowing an infiltration to occur, only that Mid-South's nurse failed to document certain aspects of the IV treatment. Nurse Northington cannot be critical of the infiltration as it is a common risk when a person inserts a needle under the skin to inject a vein that cannot be seen by the naked eye. Therefore, the only breaches of the standard of care to which Nurse Northington provided are alleged failures to document.

Nurse Northington also testified that the failure to document these various things caused scarring to Mrs. Conner's arm. Specifically, she stated "it is further my opinion, to a reasonable degree of medical probability, that the above mentioned negligent acts of nursing care caused or contributed to cause the injury and scarring to Bernice Conner's antecubital fossa." (R. 156, R.E. 7) This opinion is disingenuous. Taking this argument to its logical conclusion would mean that had the nurse who administered the Visudyne drug documented the chart better, there would not have been an infiltration and in turn no injury to Conner's arm. This is simply not the case. Nurse Northington does not provide a plausible causal connection between the only standard of care violation, poor documentation, and the alleged injury, a scarred arm.

The lower court correctly found that summary judgment was warranted and then reversed itself by ignoring the substance of Northington's affidavit and focusing on whether she used the correct terms of art in forming her affidavit.

Two years ago, the Mississippi Court of Appeals dealt with a similar appeal over a

lower court's award of summary judgment in a medical malpractice case in *Dotson v. Jackson*, 8 So. 3d 230 (Miss. App. 2008). Mrs. Dotson filed suit against Dr. Jackson for injuries to her bladder after a hysterectomy. *Id.* The Court of Appeals found that Dotson's expert, Dr. Reiss' affidavit did not establish a prima facie case of medical negligence due to a lack of a causal connection between the asserted breach of the standard of care and Dotson's injuries. The Court of Appeals stated:

But more importantly, Dr. Reiss does not make the causal connection of Dr. Jackson's failure to perform a proper abdominal exam with Dotson's injury-the cutting of her bladder. Dr. Reiss does not state that, had Dr. Jackson performed the proper abdominal exam, Dr. Jackson would not have cut the bladder. Even if Dr. Jackson were to have performed this "proper" abdominal exam, it is clear from Dr. Reiss's affidavit that Dr. Jackson would still be required to anticipate cutting the bladder.

Dotson v. Jackson, 8 So. 3d 230, 237 (Miss. App. 2008). Nurse Northington's affidavit also fails to make a causal connection between Mid-South's failure to document these six various treatments and the injury to Conner's arm. Nurse Northington did not state that had Mid-South properly documented Conner's chart, the infiltration would not have occurred and Conner's arm would not have been injured or scarred. She provides no link between the failure to document and Conner's scarred arm. Nurse Northington's affidavit does not establish a prima facie case of medical negligence against Mid-South when viewed in a light most favorable to the plaintiff sufficient to establish material issues of fact. Therefore, summary judgment was appropriate and should not have been denied upon reconsideration.

The lower made such a finding initially:

Nurse Northington's testimony that the nurses' failure to document

certain things was the cause of Mrs. Conner's injuries. Nurse Northington's opinion, if taken to its logical conclusion would mean that had the nurse who administered the Visudyne drug documented the chart better, there would not have been an infiltration and in turn no injury to the Plaintiff.

The Court finds that Nurse Northington does not provide a plausible causal connection between the only standard of care violation, poor documentation and the alleged injury – a scarred arm. Because of the lack of a competent opinion that the breach of the standard of care by the nurse at Mid-South Retina caused scarring to Mrs. Conner's arm, Summary Judgment is warranted for Mid-South Retina.

(R. 206, R.E. 4).

However, the lower court reversed its decision upon reconsideration and denied summary judgment to Mid-South. The lower court did not revisit its findings and determine that Nurse Northington's affidavit did indeed provide a causal connection between the breach of the standard of care and Conner's injury. No, instead, the lower court focused on form over substance and found that the affidavit contains a reference to standard of care or duty, breach of that duty and that the resulting injury caused by that breach. (R. 231-234, R.E. 6) Specifically, the lower court found on reconsideration:

...the specific term "duty" expressed in Nurse Northington's statement "...it is my opinion that Mid South Retina Associates were **negligent in the care and follow (up) treatment** provided...". The term "breach" is seen in the statement "**such negligence was a violation of the applicable standard of care**" and in the statement "**...it was below the applicable standard of care...**" The affidavit stated that "**...the providers were aware of the caustic nature of the Visudyne and its reactive nature with regard to sunlight...**"; this statement goes to show there was a "duty" to use the drug properly. Lastly Nurse Northington states the "causal connection" with her statement that "**the above mentioned negligent acts of nursing care caused or contributed to cause injury and scarring to Bernice Conner's antecubital fossa.**" (Emphasis added by Court).

(R. 233, R.E. 6). The Court goes on to cite *Partin v. North Mississippi Medical Center, Inc.*, 929 So. 924, 931-33 (Miss. App. 2005) to support its new finding that failure to use terms of art does not render an expert's affidavit deficient and that the non-moving party does not have to prove all elements of its case but only has to demonstrate that there are genuine issues of material fact. *Id.* The lower court further stated that it did not find that the statements in Nurse Northington's affidavit are, in fact, correct, rather "simply note that the affidavit does speak to all of the elements required for establishing genuine issues of material fact for a jury to decide the case." *Id.*

In a negligence action, the plaintiff bears the burden of producing evidence sufficient to establish the existence of the conventional tort elements of duty, breach of duty, proximate causation, and injury. *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So. 2d at 1356 (Miss. 1990). Therefore, in a summary judgment proceeding, the plaintiff must rebut the defendant's claim (*i.e.*, that no genuine issue of material fact exists) by producing supportive evidence of *significant* and *probative* value; this evidence must show that the defendant breached the established standard of care and that such breach was the proximate cause of her injury. *Id.* Terms of art are not required in an affidavit to establish each element of a case of medical negligence sufficient to defeat summary judgment. However, The "**party opposing the motion must by affidavit or otherwise set forth specific facts showing that there are indeed issues for trial.**"

Palmer, 564 So.2d at 1356 *emphasis added*.

Further, a court simply may not rely upon unsupported, conclusory allegations to defeat a motion for summary judgment where there are no issues of material fact. *Jacox v.*

Circus Circus of Mississippi, Inc., 908 So. 2d 181, 184 (Miss. 2005). The lower court, upon reconsideration, has disregarded the authority above and the specific opinions noted by Nurse Northington which fail to provide a material issue of fact on the required element of causation. Instead, the lower court cherry picked conclusory statements from Northington's affidavit in an attempt to piece together an opinion sufficient to provide material issues of fact for each necessary element of the prima facie case that would warrant a denial of Mid-South's motion. If the lower court's logic upon reconsideration held true, a plaintiff opposing a motion for summary judgment in a medical negligence case would only need to provide an affidavit which merely stated that the expert is familiar with the standard of care; that in his or her opinion, the medical professional violated the standard of care and that in his or her opinion the breach caused the injury to the plaintiff. This would allow a plaintiff to defeat a motion for summary judgment using conclusory opinions without citing to specific failures on the part of the medical professional or specifically how those failures caused or contributed to cause the injury to the plaintiff. The law requires more than conclusory statements. The law requires specific opinions for each element. While Northington's affidavit may be sufficient to provide opinions on duty and breach, It fails to provide a specific opinion on how Mid-South's failure to document caused or contributed to the injury and scarring to Conner's arm.

Mid-South's motion was never predicated on the argument that Nurse Northington's affidavit fails to establish a prima facie case because it fails to identify duty, breach, causation and injury through the use of terms of art. Mid-South's motion

and the lower court's first opinion are based on the fact that Nurse Northington's affidavit does not establish, using any terms, that Mid-South's failure to document caused the injury or scarring to Conner's arm. The lower court stated that plaintiff is not be required under *Partin* to prove every element of his case. However, *Palmer, supra.* requires the plaintiff to provide material issues of fact on the essential elements of breach of the standard of care and causation. The lower court was wrong to reverse its opinion and deny Mid-South's motion for summary judgment. The lower court's order on reconsideration should be overturned and a judgment rendered in favor of Mid-South.

C. Conner Should Not Have Been Allowed to Present a Supplemental Affidavit after the Court Entered a Judgment in Favor of Mid-South.

MISSISSIPPI RULE OF CIVIL PROCEDURE 59 provides for amendment of judgments when the motion is filed within ten days of the entry of the judgment. MISS. R. CIV. P. 59(e); *see also Hussey v. Fidelity and Guar. Life Ins. Co.*, 560 F. Supp. 2d 493, 501 (S.D. Miss. 2008) (stating that a motion for reconsideration filed within ten days of judgment is treated as a motion to alter or amend a judgment under Rule 59).⁴ A Rule 59 motion can never be used to raise arguments that were available to the moving party prior to the entry of judgment. *Hussey*, 560 F. Supp. 2d at 501.

In order for the lower court's grant of plaintiff's motion to reconsider under Rule 59 to be proper, (1) the new opinions offered by plaintiff after the entry of judgment

⁴Mississippi interprets its Rule 59 in accordance with the federal construction. *Bang v. Pittman*, 749 So. 2d 47, 52 (Miss. 1999), *overruled on other grounds by Cross Creek Prod. v. Scafadi*, 911 So. 2d 958 (Miss. 2005).

against her must have been discovered after the grant of summary judgment; (2) the plaintiff must show due diligence on her part to have discovered the new opinions prior to entry of judgment against her; (3) the opinions must be material and not cumulative; and (4) the opinions must be such that reversing the judgment “would probably produce a new result.” *Cuffee v. Wal-Mart Stores, Inc.*, 977 So. 2d 1187, 1192 (Miss. App. 2007); *Goode v. Synergy Corp.*, 852 So. 2d 661, 663 (Miss. App. 2003).

The result would be no different under MISS. R. CIV. P. 60. Rule 60(b)(3) itself limits relief based on new evidence to “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). . . .” The Supreme Court of Mississippi considered a comparable situation in *Bang v. Pittman*, 749 So. 2d 47 (Miss. 1999), *overruled on other grounds by Cross Creek Prod. v. Scafadi*, 911 So. 2d 958 (Miss. 2005). In *Bang*, the circuit court dismissed the medical negligence claims of the plaintiff for failure to properly serve process. *Id.* at 49. After the dismissal, the plaintiff moved for reconsideration and submitted a new affidavit allegedly demonstrating good cause for the failure to timely serve the defendant. *Id.* The Supreme Court affirmed the lower court’s denial of the motion to reconsider, noting that the affidavit submitted by plaintiff contained information available to plaintiff prior to the order dismissing the case. *Id.* at 53. A plaintiff “cannot withhold relevant evidence . . . he gains before entry of an order of dismissal from the Court then use the same evidence to support a claim of a discovery of new evidence.” *Id.* (citing *Snavely v. Nordskog Elect. Vehicles “Marketeer”*, 947 F. Supp. 999, 1011 (S.D. Miss. 1995)).

Conner had more than sufficient time to consult an expert and prepare a

competent affidavit setting forth all of the expert's opinions. As recorded in the lower court clerk's docket, Defendants filed their Notice of Service for Interrogatories and Requests for Production of Documents on May 17, 2005. (R. 1, R.E. 1) Conner's response to the second Interrogatory requesting information on any expert's opinions merely states that it will be supplemented. (R. 105-106, R.E. 2). It was not until three years later, on October 23, 2008, that Mid-South and its co-defendant filed their Motion for Summary Judgment. (R. 1, R.E. 1). Conner filed her Designation of Experts and Response to Motion for Summary Judgment, including Nurse Northington's first Affidavit on November 19, 2008 (R. 1, R.E. 1). On December 4, 2008, Mid-South and its co-defendant filed a Rebuttal Memorandum in support of their Motions for Summary Judgment. (R. 1, R.E. 1). A hearing was set for January 13, 2009 and properly noticed on December 7, 2008. (R. 2, R.E. 1). The hearing was held on January 13, 2009.

MISS. R. CIV. P. 56 (c) states "The adverse party prior to the day of the hearing may serve opposing affidavits." Conner submitted Nurse Northington's initial Affidavit 25 days after receiving the Motion. Mid-South's Rebuttal Memorandum filed on December 4, 2008 clearly sets forth its argument that Nurse Northington's opinions contained in her affidavit do not provide a plausible causal connection between the violation of the standard of care and the injury sufficient to make a prima facie case of medical negligence. (R. 175, R.E. 3). Conner had over one month to submit an amended affidavit prior to the hearing on January 13, 2009 but failed to file any supplemental proof.

Once the lower court ruled against Conner, she had Nurse Northington execute

another affidavit correcting the deficiencies of the original affidavit filed months prior. There was no newly discovered evidence that prompted a change in Nurse Northington's opinions, much less newly discovered evidence that could not have been discovered using due diligence. Further, Conner did not provide the Court with any evidence to show that Nurse Northington's opinions could not have been rendered prior to the entry of judgment against her. The lower court should not have reversed its initial grant of summary judgment on rehearing.

IX. CONCLUSION

The lower court erred when it reversed its initial grant of summary judgment in favor of Mid-South Retina, LLC. The lower court initially made the correct finding that Conner failed to make a prima facie case of medical negligence. Nurse Northington is not legally qualified by her training to render an opinion on medical causation. Regardless of the law, Nurse Northington's opinions did not provide a causal link between the breach of the standard of care and the injuries sustained by Mrs. Conner. The lower court should never have allowed Conner the opportunity to correct Nurse Northington's initial affidavit by providing a supplemental affidavit addressing the lack of opinion the lower court initially based its ruling upon. Conner had sufficient time to rebut Mid-South's Motion with complete affidavits. To allow a respondent to supplement the proof without a showing that such proof could not have been discovered prior to the judgment would serve to continue litigation ad infinitum. The lower court's denial of Mid-South's Motion for Summary Judgment on reconsideration should be reversed and a judgment in favor of Mid-South rendered thereby concluding this

litigation.

RESPECTFULLY SUBMITTED, this the 19th day of November, 2010.

MID-SOUTH RETINA, LLC

HICKMAN, GOZA & SPRAGINS, PLLC
1305 Madison Avenue
P.O. Drawer 668
Oxford, MS 38655-0668
(662) 234-4000



S. KIRK MILAM, MSB # [REDACTED]

SHELBY DUKE GOZA, MSB # [REDACTED]

X. CERTIFICATE OF SERVICE

I, S. Kirk Milam, of Hickman, Goza & Spragins, Attorneys at Law, Madison, Mississippi, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above foregoing to:

Daniel M. Czamanske, Jr., Esq.
501 First Street
P. O. Box 428
Clarksdale, MS 38614

The Honorable Tommy W. Allen
Coahoma County Court Judge
P. O. Box 756
Clarksdale, MS 38614-0756

This, the 19th day of November, 2010.

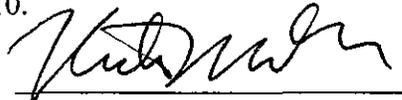


S. KIRK MILAM

X. CERTIFICATE OF FILING

I, S. Kirk Milam, of Hickman, Goza & Spragins, Attorneys at Law, Madison, Mississippi, do hereby certify that I have this day filed the original and three (3) copies of Appellant's Brief along with a CD-ROM containing a copy of the brief in PDF format.

This, the 19th day of November, 2010.



S. KIRK MILAM