IN THE SUPREME COURT OF MISSISSIPPI

NO. 2011-CA-00289-SCT

DENISE ALLCOCK, ADMINISTRATRIX ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES AND THE ESTATE OF ROBERT E. ALLCOCK, II

v.

ANTOINETTE BANNISTER, M.D. AND THE CHILDREN'S CLINIC

DATE OF JUDGMENT:	10/20/2010
TRIAL JUDGE:	HON. JOHN C. GARGIULO
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	JOHN W. CHRISTOPHER JOHN F. HESTER
ATTORNEYS FOR APPELLEES:	MARY MARGARET KUHLMANN GEORGE F. BLOSS, III
NATURE OF THE CASE:	CIVIL - WRONGFUL DEATH
DISPOSITION:	AFFIRMED - 11/01/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

DICKINSON, PRESIDING JUSTICE, FOR THE COURT:

¶1. After Robert Allcock died at a hospital, his mother sued the hospital, the treating doctor, and the doctor's clinic. Allcock failed to designate an expert, and the trial court denied her motion to amend the pretrial order. Still, a jury found for Allcock, but the trial court granted the defendants' motion for a new trial because of a faulty jury instruction. Before the second trial, Allcock again moved to amend the pretrial order. The trial court again denied her motion, and the jury found for the defendants. Because the jury instruction

stated an incorrect rule of law; and because Allcock was on sufficient notice of the defendants' expert testimony, we affirm the trial court's rulings.

BACKGROUND FACTS AND PROCEEDINGS

¶2. Robert Allcock Sr. and his wife Denise became concerned that their son, Robert Allcock, was showing signs of diabetes, so they took him to the emergency room where Dr. Antoinette Bannister – who practiced with Long Beach Children's Clinic and was the on-call doctor – diagnosed Robert with initial onset diabetes, admitted him into Memorial Hospital in Gulfport, and dictated the admission orders to ER Nurse Laura Quave.

¶3. Dr. Bannister testified that she ordered normal saline, plus twenty milliequivalents of potassium phosphate and twenty milliequivalents of potassium chloride, but Nurse Quave testified that Dr. Bannister dictated normal saline, plus twenty milliequivalents of potassium chloride phosphate and twenty milliequivalents of *calcium chloride*. According to Dr. Bannister, when the floor nurse, Cathy Marousky, called her for clarification of the order, she reiterated her order to Nurse Marousky. But Nurse Marousky testified that Dr. Bannister ordered twenty milliequivalents of potassium chloride, twenty milliequivalents of potassium phosphate, and twenty milliequivalents of *calcium chloride*. Robert died as a result of the mixture in the IV bag. When Dr. Bannister examined Robert's IV bag, she noted it was cloudy and contained calcium chloride – which she says she did not order.

¶4. Denise Allcock, as administrator on behalf of the wrongful-death beneficiaries and Robert's estate, sued Dr. Bannister, The Children's Clinic, and Memorial Hospital. Allcock eventually settled with and dismissed Memorial, leaving Dr. Bannister and The Children's Clinic as the remaining defendants.

First-trial discovery

¶5. On August 19, 2005, Allcock designated her expert witnesses, which included Dr. H. Joseph Byrd as an expert in pharmacy, pharmacology, and toxicology. On October 17, 2006, the defendants first designated their expert witnesses, but later, on July 31, 2007, designated Dr. William J. George, who was "expected to testify that all that can be determined is that while the contents [of the IV bag] were capable of producing precipitate which could, under certain circumstances, potentially produce pulmonary vascular obstruction or other acute respiratory problems, this does not prove specific causation."

¶6. Based on an agreed motion for continuance, the court amended its scheduling order, extending the expert designation and disclosure dates. Allcock was given until October 1, 2007, for Dr. Christopher Long; the defendants were given until November 1, 2007, for Dr. George. The court reopened discovery through December 3, 2007, "for the limited purpose of supplementing expert witness disclosures and deposing the new experts."

¶7. The defendants supplemented Dr. George's disclosure on November 1, 2007, to note that "Dr. George is of the opinion[,] to a reasonable probability, that there is substantially more potassium in the IV fluid than would have been called for by the order in the chart . . . , and that the amount of potassium may have been as high as ten-fold higher than the bag labeling." The court entered the pretrial order on December 19, 2007.

¶8. On February 7, 2008, the defendants moved to strike Dr. Byrd because he was not listed as a will-call or may-call witness in the pretrial order (the pretrial order does, however, set a date for Dr. Byrd's deposition for no later than March 1, 2008). But because Allcock

represented to the court that she would not call Dr. Byrd as a witness, the court denied the defendants' motion as moot.

¶9. On May 23, 2008, Allcock moved to amend the pretrial order to add Dr. Byrd as an expert witness. Allcock argued that the defendants – in their motion in limine – for the first time "put forth the proposition that the amount of calcium chloride in the IV bag was 10 times the amount called for in the order written by the floor nurse," and stated that this was the first time the defendants had raised the issue of the dosing relationship between calcium chloride and potassium phosphate. Allcock also argued that the Defendants had "consistently maintained that Dr. Bannister did not order a[n] IV mixture that contained any amount of calcium chloride." The trial court, however, denied Allcock's motion to amend, saying "it comes too late."

¶10. The first trial began on August 4, 2008. The defendants objected to jury instruction P-13A, arguing that the instruction forced the jury to find that Dr. Bannister had a "non-delegable duty." Allcock objected to the defendants' instruction D-6A. The court overruled both objections.

¶11. The jury found Dr. Bannister thirty percent at fault and Memorial seventy percent at fault, and awarded $4,805,800 in damages – $805,800 in economic and $4,000,000 in noneconomic. The trial court entered judgment against Dr. Bannister for $391,740.

¶12. Allcock then moved the trial court to declare unconstitutional Mississippi Code Section 11-1-60's cap on noneconomic damages. She also moved the court to amend the judgment for an additur, or in the alternative, a new trial. She argued that the court had failed to amend the pretrial order to allow Dr. Byrd to testify.

¶13. The defendants also moved for a new trial, arguing that jury instruction P-13A was an incorrect statement of the law and in direct conflict with D-12A and D-6A. The trial court granted the defendants' motion for a new trial, concluding that jury instruction P-13A incorrectly forced the jury to conclude that "(1) the hospital was negligent as a result of the acts of the nurses and pharmacy, and (2) since Dr. Bannister has a non-delegable duty to assure that the physical exam, diagnoses, treatment and medication ordered were correct, then Dr. Bannister is strictly liable for the breach of care by the hospital nurses and pharmacy regardless of whether she was at the hospital or was aware of the mistake."

¶14. Before the second trial, Allcock again moved to amend the pretrial order to add Dr. Byrd as an expert witness. The trial court denied the motion, and a jury found in favor of the defendants.

¶15. Allcock appealed, raising several issues, which we have restated as follows:

1. Did the trial court err by denying her motion to amend the pretrial order for the first trial?

2. Did the trial court err when it granted the defendants' motion for a new trial for faulty jury instructions?

3. Did the trial court err in its calculation of the judgment amount for the first trial?

4. Did the trial court err by refusing to rule on the constitutionality of Section 11-1-60?

5. Did the trial court err by denying Allcock's motion to amend the pretrial order in the second trial?

ANALYSIS

¶16. We affirm the trial court's ruling on the pretrial order and its decision to grant a new trial. Thus, we decline to address whether the trial court erred in calculating the judgment for the first trial and whether Section 11-1-60 is unconstitutional.

I. The trial court did not abuse its discretion by denying Allcock's first motion to amend the pretrial order.

¶17. We review a trial court's decision regarding discovery violations under an abuse-of-discretion standard.[1] Therefore, we grant a trial court considerable discretion in managing pretrial discovery.[2]

¶18. Mississippi Rule of Civil Procedure 16 governs pretrial orders: "The court may enter an order reciting the action taken at the conference . . . and such order shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice."[3]

¶19. In her motion to amend the pretrial order, Allcock argued that the defendants – in their motion to strike – "for the first time in this case put forth the proposition that the amount of calcium chloride in the IV bag was 10 times the amount called for in the order written by the floor nurse." Allcock further argued that the Defendants had "consistently maintained that Dr. Bannister did not order a[n] IV mixture that contained any amount of calcium chloride." The trial court denied her motion.

¶20. On appeal, Allcock argues that she did not have the benefit of having Dr. Byrd testify to rebut Dr. George's testimony – that, had the pharmacist filled the order as written, no

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[1] ***Rhoda v. Weathers***, 87 So. 3d 1036, 1038 (Miss. 2012) (citing ***Jones v. Jones***, 995 So. 2d 706, 711 (Miss. 2008)).

[2] ***Bowie v. Monfort Jones Mem'l Hosp.***, 861 So. 2d 1037, 1042 (Miss. 2003).

[3] Miss. R. Civ. P. 16.

precipitant would have formed in the IV bag. She argues that Dr. Byrd's affidavit provided that Dr. Bannister's order – as written – could have formed the precipitant of calcium phopshate.

¶21. We find no abuse of discretion in the trial court's decision. Allcock did not move to add Dr. Byrd as an expert until almost six months after the discovery deadline had passed – less than three months before the scheduled trial date. And the only reason Allcock gave for her untimely disclosure was that she did not learn that Dr. George would testify about the dosing relationship between calcium chloride and potassium phosphate until April 2008. Her excuse, however, is inadequate.

¶22. The defendants disclosed the substance of Dr. George's testimony – the mixture in the IV bag, the hospital pharmacy's compounding errors regarding the excessive use of potassium phosphate – in November 2007, before Allcock's disclosure deadline. In fact, Allcock's main contention at trial was that Dr. Bannister had prescribed improper treatment, so the dosing issue was always in question. And, contrary to Allcock's assertion to the trial court, the defendants maintained at trial that Dr. Bannister did not order any amount of calcium chloride. Thus, the defendants' November disclosure placed Allcock on sufficient notice that their expert would testify to the IV bag's contents.

¶23. The dissent, however, relies on ***Mississippi Power & Light Co. v. Lumpkin***[4] and ***Thompson v. Patino***[5] to find the trial court in error for denying Allcock's motion to amend.

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[4]***Miss. Power & Light Co. v. Lumpkin***, 725 So. 2d 721 (Miss. 1998).

[5]***Thompson v. Patino***, 784 So. 2d 220 (Miss. 2001).

But each of those cases involved discovery sanctions.[6] Here, there was no discovery violation or sanction, but rather, a trial judge's denial of a motion to amend a pretrial order. While other judges might have decided Allcock's motion differently, we grant a trial court considerable discretion in managing cases, and we cannot say that the trial court erred by denying Allcock's motion to amend the pretrial order. We therefore affirm the trial court's decision on this issue.

II. The trial court did not err by granting the defendants a new trial for faulty jury instructions.

¶24. We review a trial court's decision to grant a new trial under an abuse-of-discretion standard.[7] And we will view the evidence in the light most favorable to the nonmoving party and reverse only if "the verdict, if allowed to stand, would work a miscarriage of justice."[8] A jury instruction likely to confuse or mislead the jury on the applicable law requires reversal.[9]

¶25. Mississippi Rule of Civil Procedure 59 authorizes a trial judge to set aside a jury verdict and grant a new trial whenever justice requires.[10] Here, the trial court granted the defendants' motion for a new trial, finding that Jury Instruction P-13A – a vicarious-liability instruction – improperly instructed the jury on the law. P-13A read as follows:

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[6]*See* ***id.*** at 225-26; ***Lumpkin***, 725 So. 2d at 733-34.

[7]***Rutland v. State***, 60 So. 3d 137, 142 (Miss. 2011) (citing ***Irby v. State***, 49 So. 3d 94, 103 Miss. 2010)).

[8]***United Servs. Auto Ass'n v. Lisanby***, 47 So. 3d 1172, 1176 (Miss. 2010).

[9]***Young v. Guild***, 7 So. 3d 251, 259-60 (Miss. 2009).

[10]Miss. R. Civ. P. 59 cmt.

> The Court instructs the jury that Robert Allcock, II, was the patient of Dr. Bannister and that Dr. Bannister, as the admitting and treating physician of Robert Allcock, II, had a non-delegable duty to Robert Allcock, II. That means that if a doctor chooses to allow a nurse to perform a ***non-delegable duty***, the doctor must accept responsibility if that duty is breached. Dr. Bannister had a non-delegable duty to Robert Allcock, II, to assure that the physical examination, diagnoses, treatment and medication ordered ***were correct and properly administered***.

¶26. Allcock argues that the instruction did not, in fact, require the jury to impose a nondelegable duty on the nursing staff, but instead simply to find for the plaintiff if Dr. Bannister failed to act as a reasonably prudent, minimally competent physician under the circumstances. We reject this argument. The jury instruction undoubtedly required the jury to find Dr. Bannister at fault if the nursing staff improperly had administered the IV bag.

¶27. Under Mississippi law, a physician has a nondelegable duty

> to render professional services consistent with that objectively ascertained minimally acceptable level of competence he may be expected to apply given the qualifications and level of expertise he holds himself out as possessing and given the circumstances of a particular case. The professional services contemplated within this duty concern the entire caring process, including but not limited to examination, history, testing, diagnosis, course of treatment, medication, surgery, follow-up, after-care and the like.[11]

¶28. But a nondelegable duty is not synonymous with vicarious liability. Mississippi law "imposes liability on a physician for the negligence of a nurse *only if* the nurse committed the negligent acts or omissions pursuant to the direction or control of the physician."[12] Jury Instruction P-13A goes further than that, imposing liability on Dr. Bannister for the nurse's

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[11] ***Hall v. Hilbun***, 466 So. 2d 856, 871 (Miss. 1985), *superceded by statute on other grounds*, Miss. Code Ann. § 85-5-7, as recognized in ***Narkeeta Rimber Co., Inc. v. Jenkins***, 777 So. 2d 39 (Miss. 2000).

[12] ***Dearman v. Christian***, 967 So. 2d 636, 640 (Miss. 2007) (emphasis added) (citing ***Hunnicutt v. Wright***, 986 F. 2d 119, 124 (5th Cir. 1993)).

actions that were not committed under the "direction or control of the physician." Therefore, the instruction incorrectly states the law and imposes vicarious liability on Dr. Bannister for the nurse's actions.

¶29. Allcock also argues that, because the jury found Dr. Bannister and the Children's Clinic only thirty percent at fault, the jury could not have considered this jury instruction because, if it had, it would have found Dr. Bannister one hundred percent at fault. But this also is incorrect. P-13A allowed the jury to find the doctor at fault for administering the IV bag, thus confusing the jury in its decision. It does not follow that the jury would have found Dr. Bannister 100 percent at fault had it found that the nurse improperly administered the IV, as the jury had other issues of fault to consider as well.

¶30. We therefore affirm the trial court's grant of a new trial. And because we find that the trial court did not abuse its discretion by granting a new trial, we decline to address the moot issues of whether the trial court miscalculated the first trial's judgment or whether Section 11-1-60 is unconstitutional.

III. The trial court did not abuse its discretion by denying Allcock's motion to amend the pretrial order in the second trial.

¶31. Again, we grant considerable discretion in considering a trial court's decision to deny a party's motion to amend a pretrial order.[13] Allcock argues that the trial court erred by not granting her motion to amend the pretrial order before the second trial. In support of her argument, she advances several points: (1) she filed her second motion to amend the pretrial order in August 2008, soon after the first trial's completion; (2) she had no way to attack Dr.

[13] ***Bowie***, 861 So. 2d at 1042.

George's credibility; (3) the defendants would not have been prejudiced by the amendment; and (4) the trial court continued the second trial to sixteen months after it had denied her motion to amend.

¶32. As noted in one treatise, "[t]he purpose of a motion for a new trial . . . is to give the trial court an opportunity to correct its own errors, or errors that have occurred in the conduct of the trial or proceedings, without the delay, expense, inconvenience, or other hardships of an appeal . . . ."[14] Thus the purpose of the second trial in this case was to correct the faulty jury instructions – not to allow for additional discovery. Allcock argues, in substance, that – because the trial judge granted a new trial – he should have overlooked her failure to designate an expert in the first trial. The trial court was within its discretion to deny Allcock's second motion to amend.

CONCLUSION

¶33. The trial court did not abuse its discretion by granting the defendants' motion for a new trial. Likewise, the trial court did not abuse its discretion by denying either of Allcock's motions to amend the pretrial order. We therefore affirm.

¶34. **AFFIRMED.**

WALLER, C.J., RANDOLPH, LAMAR AND PIERCE, JJ., CONCUR. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY CARLSON, P.J., KITCHENS AND CHANDLER, JJ.

KING, JUSTICE, DISSENTING:

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[14] 66 C.J.S. *New Trial* § 5 (2009).

¶35. Because I believe that the majority's rigid application of the Rules of Civil Procedure in refusing to allow Allcock's expert to testify creates a manifest injustice under the facts of this case, I respectfully dissent.[15]

¶36. A crucial issue in the case was whether Dr. Bannister ordered calcium chloride for Robert's IV fluids, or whether another party, without authorization, added the calcium chloride to his IV fluids, and whether the calcium chloride in Robert's IV caused his death.

¶37. On August 19, 2005, Allcock designated her expert witnesses, including Dr. H. Joseph Byrd as an expert in pharmacy, pharmacology, and toxicology. On October 17, 2006, the defendants designated their expert witnesses, *not* including Dr. William J. George. The defendants supplemented their expert designation on July 31, 2007, adding Dr. George as a pharmacologist and toxicologist who was "expected to testify that all that can be determined is that while the contents [of the IV] were capable of producing a precipitate which could, under certain circumstances, potentially produce pulmonary vascular obstruction or other acute respiratory problems, this does not prove specific causation." This supplemental designation was submitted after the discovery deadlines outlined in the court's Third Amended Scheduling Order, and was the subject of the Estate's motion to strike on August 3, 2007. The court granted this motion on August 30, 2007.

¶38. On October 5, 2007, the court changed course and amended its scheduling order based on an agreed motion for continuance. The court allowed Allcock until October 1, 2007, to

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[15]Like the majority, I agree that the trial court did not err in granting the defendants' motion for new trial based on faulty jury instructions, and likewise agree that this moots Allcock's appealed issues regarding the judgment in the first trial. I write to express my disagreement solely on the issue of the trial court's denial of Allcock's motion to amend the pretrial order to add Dr. Joseph Byrd as an expert.

designate with regard to Dr. Christopher Long, and allowed the defendants through November 1, 2007, to designate with regard to Dr. George. The court reopened discovery through December 3, 2007, "for the limited purpose of supplementing expert witness disclosures and deposing the new experts." Thus, despite the defendants' utter failure to timely designate Dr. George as an expert, the court ultimately allowed the defendants to designate Dr. George due to a trial continuance. The defendants supplemented Dr. George's disclosure on November 1, 2007, to note that "Dr. George is of the opinion, to a reasonable probability that there is substantially more potassium in the IV fluid than would have been called for by the order in the chart . . . , and that the amount of potassium may have been as high as ten-fold higher than the bag labeling." This was the first time the issue of the contents of the IV bag not comporting with the label and the attendant issue of dose relationship were injected into the case. The court entered the pretrial order on December 19, 2007, and provided that it was binding on all parties "unless this order be hereafter modified by the Court for good cause and to prevent manifest injustice."

¶39. On February 7, 2008, the defendants moved to strike Dr. Byrd as an expert witness. Their basis was that Dr. Byrd was not identified as a will-call or may-call witnesses in the pretrial order. While Dr. Byrd is not listed in the pretrial order as a may- or will-call witness, the pretrial order did specifically state that "[d]epositions of plaintiff's experts Alan L. Nager, M.D., Christopher Long, Ph.D., and H. Joseph Byrd, Pharm.D., will be completed no later than March 1, 2008," a date after the date the defendants filed their motion to strike. On April 2, 2008, the court denied the motion to strike Dr. Byrd as moot, based on Allcock's representation that Dr. Byrd would not be called as a witness.

¶40. On May 13, 2008, Allcock moved to amend the pretrial order to add Dr. Byrd as an expert witness. Allcock represented that, had she known that the defendants would rely on this theory of dose relationship, she would have included Dr. Byrd in the original pretrial order. The defendants contend that Allcock was on notice of the dose relationship issue by the pretrial order's contention that the pharmacy improperly filled the IV order,[16] as well as by Dr. George's expert designation. On May 23, 2008, the court denied the motion to amend the pretrial order regarding Dr. Byrd, stating that "it comes too late."

¶41. The first trial in this case began on August 4, 2008, and ended in a jury verdict for Allcock. On October 10, 2008, the court granted Dr. Bannister's motion for a new trial based on jury instruction conflicts.

¶42. On May 1, 2009, Allcock moved to amend the pretrial order to add Dr. Byrd as an expert in pharmacy, pharmacology, and toxicology. The defendants opposed the motion, claiming that the retrial "should be about correcting the error from the first trial and nothing more." On June 24, 2009, the court denied Allcock's motion to amend the pretrial order, and stated that the original pretrial order entered December 19, 2007, remained in effect. The court did not give any specific reason for denying Allcock's motion, but merely stated that "the motion is not well taken" based on the motion, response, and oral arguments.

¶43. Mississippi Rule of Civil Procedure 16 governs pretrial orders. The rule provides that a pretrial order "shall control the subsequent course of the action, unless modified at the trial

[16]The pretrial order stated that "[d]efendants contend that the former defendant Memorial Hospital at Gulfport was negligent in failing to follow Dr. Bannister's orders regarding the IV medications, in failing to recognize and stop the error of it [sic] own employees, including its nurses and pharmacy personnel, and in improperly filling the IV medication order."

to *prevent manifest injustice*." Miss. R. Civ. P. 16 (emphasis added). This Court has held that, under Rule 16, the court cannot modify a pretrial statement unless the modification is agreed upon by the parties or unless manifest injustice would occur. ***Singley v. Singley***, 846 So. 2d 1004, 1013 (Miss. 2002). The Rules of Civil Procedure "shall be construed to secure the *just*, speedy, and inexpensive determination of every action." Miss. R. Civ. P. 1 (emphasis added). "The primary purpose of procedural rules should be to promote justice[.]" *Id.* cmt. (2011).

¶44. A new trial may be granted due to mistakes made in conducting the trial, and a new trial provides a clean slate, during which the issues are retried and the parties may present evidence differently.[17] ***White v. Stewman***, 932 So. 2d 27, 33 (Miss. 2006).

¶45. Exclusion of evidence for a discovery transgression is an extreme sanction. ***Miss. Power & Light Co. v. Lumpkin***, 725 So. 2d 721, 733-34 (Miss. 1998) (finding abuse of discretion where trial court did not allow an expert to testify as to foreseeability); *see also* ***Thompson v. Patino***, 784 So. 2d 220, 223-24 (Miss. 2001) (finding abuse of discretion where trial court struck an expert supplementation and affidavit and granted summary judgment). "Before imposing such a sanction a trial court should consider the explanation for the transgression, the importance of the testimony, the need for time to prepare to meet the testimony and the possibility of a continuance." ***Lumpkin***, 725 So. 2d at 733-34.

> The first consideration involves a determination whether the failure was deliberate, seriously negligent or an excusable oversight. The second consideration involves an assessment of harm to the proponent of the testimony. The third and fourth considerations involve an assessment of the

[17] The trial court in this case did indeed allow the parties to present evidence differently during the second trial.

> prejudice to the opponent of the evidence, the possibility of alternatives to cure that harm and the effect on the orderly proceedings of the court.

Id. at 734. Furthermore, even if counsel does not pursue the case perfectly, such that some form of sanctions may be warranted, a more extreme sanction such as exclusion of evidence or dismissal may be too drastic.[18] ***Thompson***, 784 So. 2d at 225-26.

¶46. In the case at hand, the original failure to include Dr. Byrd in the pretrial order for the first trial does appear to be negligent on the part of Allcock, although no evidence exists that it was deliberate, nor does Dr. Bannister contend it was. Allcock also does not have a valid excuse for failing to move to amend the pretrial order in a more timely manner. This factor favors the defendants' contention that Dr. Byrd's exclusion was proper.

¶47. The second consideration, involving the importance of the testimony and the harm to Allcock if it is excluded, weighs in favor of Allcock. A thorough review of the record indicates that this is a close case with regard to liability, something that is also indicated by the differing verdicts. The second trial hinged primarily on whether the alleged precipitation of calcium phosphate killed Robert -- the calcium/phosphate combination in the IV was the central issue. Dr. Bannister, in addition to claiming that she never ordered calcium in the IV,

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[18] Whether the trial court erred in denying Allcock's first motion to amend the pretrial order in 2007 is immaterial. Even if the trial court did err in denying Allcock's motion to amend the pretrial order, any such error was harmless. "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Miss. R. Civ. P. 61. The remedy that Allcock requested for any error in denying the motion to amend the pretrial order was a new trial. The court indeed conducted a new trial in this case. Allcock received the requested remedy for this error. Thus, any alleged error in refusing to allow Dr. Byrd to testify would occur in the conduct of the second trial, not the first, as the remedy requested for the alleged error in the first trial was received. Therefore, I address only the issue of whether the court erred in denying Allcock's second motion to amend the pretrial order, presented in 2009.

relied heavily on the dose relationship theory-- that only the dose as sent by the pharmacy, not the dose as written in the order, could have killed Robert. The defendants' expert, Dr. George, testified in favor of their theory on the dose relationship. Allcock, while allegedly having experts willing to testify as to her theory on the dose relationship, was barred from introducing potentially pivotal testimony that the dose as written in the order could have killed Robert. It is obvious that the expert testimony that Allcock is attempting to introduce could be vital to her case. Thus, this factor favors Allcock.

¶48. In terms of the time needed to prepare to meet the testimony, Allcock moved to amend the pretrial order approximately five months before trial was scheduled.[19] Moreover, the trial was continued until October 2010, giving the parties one year and five months from the time of the motion to prepare. At oral argument in this case, the defendants' counsel conceded that timing was not an impediment in allowing Dr. Byrd to testify in the second trial.

¶49. It is also difficult for the defendants to claim surprise regarding Dr. Byrd. Dr. Byrd was designated as a witness in August 2005, and he remained so designated for more than two years. The issue of dosage was not injected into the trial until November 2007, and then, only by a discovery of the defendants' expert. Additionally, while Dr. Byrd was not listed in the pretrial order as a may- or will-call witness, he was mentioned in the pretrial order in regard to his deposition. The defendants even requested clarification as to Allcock's intent to call Dr. Byrd in January 2008, indicating that there was certainly no surprise as to the potential of Dr. Byrd being a witness. After the new trial was granted, the defendants were aware that

[19]When Allcock moved to amend the pretrial order in May 2009, trial was scheduled for October 2009, according to the briefs. The trial did not actually occur until October 2010.

Dr. Byrd's testimony was an issue of import to Allcock, especially given that Allcock's post-trial motions included allegations of error in not allowing Dr. Byrd to testify. The defendants had ample time between the second motion to amend the pretrial order and the second trial of this case to take Dr. Byrd's deposition and have their expert, Dr. George, review it. Thus, the third factor favors Allcock.

¶50. The fourth factor, the availability of a continuance, also favors Allcock, given that the trial was indeed continued until October 2010. Furthermore, the trial court did not give any specific reason whatsoever for denying the second motion to amend the pretrial order or Allcock's motion for new trial. It merely stated summarily that the motions were not well-taken. This Court cannot ascertain whether the trial court believed this was a timeliness issue, an issue of prejudice, or what other reason the trial court may have had for denying the motions.

¶51. The entire purpose of the Rules of Civil Procedure and their deadlines is to promote justice. Under the facts of this case, "the net result of adhering to the letter of the rules of procedure, by way of rigid application, would be to thwart, rather than promote justice." ***Hartford Underwriters Ins. Co. v. Williams***, 936 So. 2d 888, 894-95 (Miss. 2006). This is not a case of inexcusable delay coupled with surprise and manifest prejudice, in which a more rigid application of the rules may be appropriate. While it is true that Allcock did not pursue her case perfectly and could have been more timely in 2007, given the importance of the testimony, the lack of prejudice to the defendants in allowing the testimony, and the lack of disruption to the orderly proceedings of the court, combined with the utter failure of the trial

court to specify any reason for denying Allcock's motions,[20] the trial court abused its discretion in denying Allcock's motion to amend the pretrial order, and by extension, her motion for new trial. Exclusion of evidence is a harsh penalty, and some lesser form of sanction for Allcock's actions would be more appropriate, especially when considered in light of the Rules' mandate that they be construed to promote justice. Furthermore, a miscarriage of justice occurred by Dr. Byrd's exclusion, as Allcock could not controvert Dr. George's testimony. It is difficult to imagine how a jury could find for Allcock, where the only testimony on the main issue at trial was that Dr. Bannister could not have possibly been the cause of Robert's death, even had she ordered calcium chloride in the IV.

¶52. For these reasons, I dissent from the majority and would reverse the trial court's decision to deny Allcock's second motion to amend the pretrial order, and by extension, its decision to deny Allcock's motion for a new trial, and I would remand the case for a new trial in which Dr. Byrd would be allowed to testify.

CARLSON, P.J., KITCHENS AND CHANDLER, JJ., JOIN THIS OPINION.

[20]In fact, the trial court allowed the defendants to designate Dr. George as an expert despite their untimely designation in violation of the Third Amended Scheduling Order, and after striking Dr. George as an expert, because the parties ultimately agreed to a continuance and a new scheduling order. Because the second trial was continued until a date more than a year after Allcock's second motion to amend the pretrial order, the trial court had no reason to deny Allcock the same consideration it had given the defendants.