IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2005-CA-01518-COA

DARON MAXWELL AND PEGGY MAXWELL, INDIVIDUALLY AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF WALTER MAXWELL, DECEASED	**APPELLANTS**
v.	
BAPTIST MEMORIAL HOSPITAL-DESOTO, INC.	**APPELLEE**

DATE OF JUDGMENT:	6/30/2005
TRIAL JUDGE:	HON. ROBERT P. CHAMBERLIN
COURT FROM WHICH APPEALED:	DESOTO COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	DALE DANKS PIETER JOHN TEEUWISSEN
ATTORNEYS FOR APPELLEE:	JOHN H. DUNBAR JOSIAH DENNIS COLEMAN
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT GRANTED TO HOSPITAL
DISPOSITION:	REVERSED AND REMANDED – 04/10/2007
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

IRVING, J., FOR THE COURT:

¶1. Daron and Peggy Maxwell filed a medical negligence action against Baptist Memorial Hospital-Desoto, Inc., alleging that Baptist's negligence caused the death of their father, Walter Maxwell. After discovery, Baptist filed a motion for summary judgment that did not contain any affidavits. In its motion, Baptist alleged that the expert "opinions provided by [the Maxwells] are insufficient to establish a prima facie case of medical negligence against [Baptist's] nurses in that

they fail to set forth the standard of care or identify the manner in which the nurses allegedly breached the standard of care." Following the Maxwells' response, the Circuit Court of Desoto County granted Baptist's motion. This appeal followed in which the Maxwells argue that they produced sufficient evidence to survive Baptist's motion for summary judgment, or that alternatively, they should have been granted a continuance to provide more detailed affidavits.

¶2. On the unique facts of this case, we find that the trial court erred in granting summary judgment; therefore, we reverse and remand for further proceedings.

FACTS

¶3. On December 31, 2002, the Maxwells, individually and on behalf of the wrongful death beneficiaries of their father, Walter Maxwell, filed a complaint against Baptist. In their complaint, the Maxwells allege that:

> On May 11, 2002, Walter Maxwell was admitted to Baptist Memorial Hospital-Desoto and diagnosed as suffering from fluid retention. While at Baptist Memorial Hospital-DeSoto, Mr. Maxwell developed a stage IV bedsore.
>
> In July 2002, Mr. Maxwell was discharged from Baptist Memorial Hospital-Desoto. Prior to Mr. Maxwell's discharge, a wound care nurse told Mr. Maxwell that his bedsore should have been debrided or scraped, but because he was being discharged, it was okay.
>
> Approximately one week after Walter Maxwell's discharge from Baptist Memorial Hospital-Desoto, Mr. Maxwell was admitted to Delta Medical Center for debridement and scraping of the bedsore. Mr. Maxwell later died on August 31, 2002, as a result of the sepsis from the underlying bedsore.

¶4. The complaint further alleges that Baptist was negligent and grossly negligent in the following respects:

> a. Failed to develop and implement appropriate mechanisms to monitor and oversee the treatment provided by the staff, employees and/or agents practicing in the hospital;

b. Failed to continuously monitor the performances of the staff, employees and/or agents practicing in the hospital to ensure their competency to exercise the responsibilities they had been granted;

c. Failed to restrict, suspend or require supervision when medical personnel demonstrated an inability to perform certain types of procedures;

d. Failed to intervene affirmatively and actively to prevent medical personnel from endangering a hospitalized patient;

e. Failed to prevent medical personnel from providing services to hospital patients when those in charge knew or should have known through reasonable inquiry that the medical personnel were not competent;

f. Failed to enact and have in place, standard operating policies and procedures to ensure adequate and proper patient care by its staff and nursing personnel or, in the alternative, failed to ensure that such staff and nursing personnel followed any such standard operating policies and procedures in the care, treatment, monitoring and observation of patients which were in effect during the time complained of herein;

g. Failed to provide in-house training to its staff and nursing personnel to ensure proper and adequate patient care during the time complained herein;

h. Failed to provide adequate number of nursing personnel to ensure proper and adequate patient care during the time complained of herein;

i. Failed to ensure that staff and nursing personnel performed their respective duties in a fashion required to ensure proper and adequate care of patients during the time complained of herein;

j. Failed to require staff and nursing personnel on duty to be available in proximity of patients to ensure patient's needs and safety are promptly attended to timely during the time complained of herein;

k. Failed to ensure that staff and nursing personnel promptly and correctly comply with instructions rendered by patient's physicians relating to the care and treatment of such patients while in the said facility during the time complained of herein; and,

l. Failed to provide the quality and standard of care required by law.

¶5. Finally, the complaint alleges that Baptist "breached the aforesaid duties, [that] such breaches proximately caused or contributed to Walter Maxwell's injuries and related damages," and that

Baptist was liable under the doctrines of *respondeat superior* or agency for the negligence and gross negligence of its "servants, agents, contractors and employees."

¶6. Baptist filed a general denial and followed up with discovery requests in which it sought the identity, and the subject matter of the testimony, of any experts that the Maxwells planned to call at trial. The Maxwells responded approximately six weeks prior to Baptist filing its motion for summary judgment. In their response to Baptist's discovery request, the Maxwells identified three experts: Albert Britton, III, M.D., Luanne Trahant, R.N., S.S.N., L.N.C., and Andrew Weinberg, M.D., F.A.C.P. For each of the experts, the Maxwells' response gave the expert's schooling and training and advised that the expert would testify that Baptist "deviated from the standard of care in [its] management of Walter Maxwell, and that these deviations caused or contributed to Walter Maxwell's poor condition and subsequent death." The response further identified the documents, inclusive of the decedent's medical records, reviewed by the experts and provided that the testimony would be based upon that review and upon the experts' "training, education and experience" in each expert's respective field. Finally, the response provided that the experts' opinions were to a "reasonable degree of medical certainty and will be seasonably supplemented as more information is learned in discovery."

¶7. After receiving the Maxwells' response, Baptist did not seek to compel any further discovery. Instead, apparently concluding that the response was insufficient to create a genuine issue of material fact regarding Baptist's negligence and its role in causing or contributing to Walter Maxwell's death, Baptist moved for summary judgment. As previously noted, no affidavits were attached to the motion or submitted in support thereof. Also, as previously pointed out, the motion averred that "[t]he opinions provided by [the Maxwells] are insufficient to establish a prima facie case of medical

negligence against [Baptist's] nurses, in that they fail to set forth the standard of care or identify the manner in which the nurses allegedly breached the standard of care."

¶8. The Maxwells responded to the motion for summary judgment, but not until the day of the hearing. In their response, the Maxwells asked that the motion be denied. In support of their position, they submitted three affidavits: one from Luanne Trahant, R.N., one from Leslie Tar, M.D., M.P.H., and one from their attorney, Pieter Teeuwissen. The Maxwells also stated that they were willing to make their experts available for deposition at a mutually convenient time so that Baptist could "further inquire about their opinions." Further, the Maxwells requested alternatively that the hearing be continued for thirty days pursuant to Rule 56(f) of the Mississippi Rules of Civil Procedure or other applicable authority to allow them to submit supplemental affidavits from their experts.

¶9. Dr. Tar stated in his affidavit:

> I have reviewed the material medical facts relevant [sic] Mr. Walter Maxwell's medical care while hospitalized at Baptist Hospital between 05/11/02 and 07/19/02. I have also reviewed the material medical facts relevant to the care he received upon discharge from Baptist Hospital to Graceland Nursing Home. Based on this review, I believe that the development of the patient's decubal [sic] ulcer, and the complications arising from the same, represents a breach from the standard of acceptable medical care. This opinion is expressed within a reasonable degree of medical certainty.

¶10. In her affidavit, Mrs. Trahant stated, among other things, the following:

> In the fall of 2004, I was contacted by Pieter Teeuwissen to review the records of Walter Maxwell, Deceased, to formulate an opinion regarding Mr. Walters' medical treatment from Baptist Memorial Hospital.
>
> * * * *
>
> According to the records from Baptist Hospital, Mr. Maxwell was exposed to repeated pressure from not being turned or provided with a low air loss mattress for pressure reduction. The treatments provided to the coccyx were inappropriate for a Stage IV wound and often the records were void of entries indicating that a treatment was done to the wound. There was a significant delay in the evaluation and treatment

by an enterstomal [sic] therapist and it should be noted that within 6 days after she was consulted and the proper treatment and interventions were implemented, the wound began to show signs of healing and improving. The staff's failure to provide these important assessments and interventions directly resulted in the development and deterioration of Mr. Maxwell [sic] wound. These failures were clearly a breach in the standard of care for nursing as well as violations of the Mississippi Nurse Practice Act, the Mississippi Minimum Standards for Hospitals as well as the Joint Commission on Accreditation for Hospitals.

¶11. Mr. Teeuwissen stated the following in his affidavit:

Since March 11, 2005, I have attempted to secure affidavits in support of Plaintiffs' Response to the Motion for Summary Judgment filed by Baptist Memorial Hospital-Desoto.

Since that time, I learned that one of Plaintiffs' experts, Andrew Weinberg, M.D. has been recalled to active military duty in his capacity as a Naval medical officer attached to a Marine Reserve Unit located in Virginia.

While attempting to secure the necessary affidavits to prove a prima facie case, the undersigned has maintained a busy calendar consisting of the following:

- Grading the February bar exams, chancery section, as a member of the Mississippi Board of Bar Examiners which were due March 23, 2005;
- Attending the National Conference of Bar Examiners in Seattle, Washington April 7 - 10, 2005;
- Preparing for trial (defense counsel) in *Zid Thompson v. The City of Jackson,* United States District Court for the Southern District of Mississippi, set for April 28, 2005;
- Preparing for testimony as a chancery practice expert for the defendants in the matter of *Juliet Lawson Jowett v. Richard F. Scruggs, et al.,* Jackson County Circuit Court Cause No. CI-99-0402(1);
- Researching and presenting two CLE Seminars on April 15, 2005 and May 4, 2005, respectively, as well as attending the quarterly Mississippi Board of Bar Admissions Meeting on April 21, 2005;
- Preparing for and participating in four-day binding arbitration in *Amanda May v. Dillards,* United States District Court for the Southern District of Mississippi, May 16, 2005;

- Preparing for [and] serving as lead counsel (defense) in the matter of *Thomas Johnson v. The City of Jackson,* Hinds County Circuit Court Cause Number 251-01-1371, beginning Monday, May 23, 2005; and,

- Preparing for trial in *Theopal Smith v. King's Daughters Hospital, et al.,* Washington County Circuit Court Cause Number. CI 2002-2380, which begins Monday, June 6, 2005 as a first setting set in January 2004.

> All of these matters came after having traveled every week during January in preparation for trial in *Barbara Reed v. Beverly Healthcare, et al.,* Hinds County Circuit Court Cause Number 251-02-1791CIV, a trial which lasted from February 7 through February 18, 2005. In addition, counsel prepared for and participated in oral argument before the Mississippi Supreme Court on March 7 and 8, 2005 in separate matters.

¶12. The matter was heard by the court on June 30, 2005. At the hearing, Baptist argued that the submitted affidavits were insufficient to establish a prima facie case of negligence on the part of Baptist. Additionally, Baptist orally moved that the affidavits be stricken as untimely because they were filed on the day of the hearing.[1] The trial court struck the affidavits but also ruled that they were insufficient to prevent summary judgment. However, the court did not rule on the Maxwells' request that the case be continued for thirty days to allow supplementation of their expert affidavits.

DISCUSSION OF THE ISSUE

¶13. We review de novo a lower court's grant of summary judgment. *Walker v. Whitfield Nursing Ctr., Inc.,* 931 So. 2d 583 (¶11) (Miss. 2006). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." M.R.C.P. 56(e).

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[1] Rule 56 of the Mississippi Rules of Civil Procedure requires that affidavits be filed at least one day prior to the hearing.

¶14. We find that the affidavits submitted by the Maxwells were not as complete as they should have been, but we conclude that the pleadings in this case, along with the answers to interrogatories and the lack of a medical affidavit by Baptist contradicting the allegations of the complaint and the answers to the interrogatories, are sufficient to prevent summary judgment. We are not unmindful that a motion for summary judgment may be made without accompanying affidavits. However, based on the pleadings and the Maxwells' response to Baptist's interrogatory regarding the identification of experts, Baptist could not simply rely on its motion. After all, the proponent of a motion for summary judgment must prove that he is entitled to summary judgment even if the opponent to the motion makes no response. *Foster v. State,* 715 So. 2d 174, 180 (¶36) (Miss. 1998); *Brown v. Credit Ctr., Inc.*, 444 So. 2d 353, 364 (Miss. 1983).

¶15. Further, considering the totality of the pleadings, the answers to interrogatories, and the affidavits submitted by the Maxwells in opposition to the motion for summary judgment and in support of their request for a thirty-day continuance, we find that the court erred in not permitting supplementation of the affidavits and in not continuing the hearing pursuant to Rule 56(e) and (f)[2] of Mississippi Rule of Civil Procedure.

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[2] Subsection (e) provides in part:

> The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

Subsection (f) provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

¶16. Therefore, we reverse and remand this case for further proceedings consistent with this opinion.

¶17. THE JUDGMENT OF THE CIRCUIT COURT OF DESOTO COUNTY IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

KING, C.J., LEE, P.J., CHANDLER, BARNES AND ISHEE, JJ., CONCUR. ROBERTS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY MYERS, P.J. AND GRIFFIS, J. CARLTON, J., NOT PARTICIPATING.

ROBERTS, J., DISSENTING:

¶18. I cannot agree that the trial court erred in granting Baptist Memorial Hospital's (BMH) motion for summary judgment. Therefore, I must dissent.

¶19. The record shows that the Maxwells filed their complaint on December 31, 2002, the day before the requirements of Mississippi Code Annotated section 11-1-58 (Supp. 2006) took effect. Section 11-1-58 now requires a certificate to accompany a complaint alleging medical malpractice stating that the attorney has consulted an expert and concluded that there is a reasonable basis for the action or that the attorney failed to consult with an expert after a good faith effort. Miss. Code Ann. §11-1-58(1). While it is understandable that in filing before January 1, 2003, the Maxwells wished to avoid the additional requirements of section 11-1-58, their hurry to initiate this civil action should not avail them of any relief for noncompliance with discovery and evidentiary requirements.

> To present a prima facie case of medical malpractice, a plaintiff, (1) after establishing the doctor-patient relationship and its attendant duty, is generally required to present expert testimony (2) identifying and articulating the requisite standard of care; and (3) establishing that the defendant physician failed to conform to the standard of care. In addition, (4) the plaintiff must prove the physician's noncompliance with the standard of care caused the plaintiff's injury, as well as proving (5) the extent of the plaintiff's damages.

Cheeks v. Bio-Medical Applications, Inc., 908 So. 2d 117 (¶8) (Miss. 2005). The supreme court in *Cheeks* affirmed the lower court's grant of summary judgment in favor of the defendant after

determining that the plaintiff's sole expert was not qualified to give expert testimony. *Cheeks*, 908 So.2d at (¶11). Having no expert medical testimony, the plaintiff's medical malpractice claim failed. *Id.* Furthermore, "Mississippi case law demands that 'in a medical malpractice action, negligence cannot be established without medical testimony that the defendant[s] failed to use ordinary skill and care'." *Travis v. Stewart*, 680 So.2d 214, 218 (Miss. 1996) quoting *Phillips v. Hull,* 516 So. 2d 488, 491 (Miss. 1987). In the case *sub judice*, the record shows that medical testimony was simply not timely submitted, despite more than ample opportunity to supply such.

¶20. In relying on the Maxwells' response to interrogatories as a basis for reversing the trial court, the majority states that the Maxwells responded to BMH's request for discovery six weeks prior to BMH filing its motion for summary judgment. While this is correct, some elaboration is necessary. BMH filed its first set of interrogatories, request for production of documents, and request for admissions on June 5, 2003. They followed with their second set of interrogatories on June 10, 2003. The Maxwells failed to answer either request within thirty days. On August 27, 2003, the trial court entered an agreed scheduling order stating that "all discovery shall be completed on or before February 11, 2004," and also stated that the Maxwells' "experts shall be designated on or before November 11, 2003." Receiving absolutely no response from the Maxwells, BMH would file two more discovery requests on July 28, 2004, and August 3, 2004. Again, the Maxwells failed to answer within thirty days. Eventually, the Maxwells partially responded to the discovery requests of BMH, but it was not until January 31, 2005, almost a year and eight months after BMH's initial discovery request and eleven months past the agreed discovery deadline.

> Our trial judges also have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril. *See, e.g.*, *Kilpatrick v. Miss. Baptist Med. Ctr.*, 461 So.2d 765, 767-68 (Miss. 1984) (held that trial court did not abuse discretion in dismissing case due to failure to comply with pre-rules discovery statutes relating to timely designation of expert witnesses); *Mallet v. Carter*, 803

So.2d 504, 507-08 (Miss. Ct. App. 2002) (held that trial court did not abuse discretion in dismissing case for failure to timely designate expert witness within the time allowed by the trial court's scheduling order).

Bowie v. Montfort Jones Mem'l Hosp., 861 So.2d 1037 (¶14) (Miss. 2003). In addition to the Maxwells' violation of Rule 33 of the Mississippi Rules of Civil Procedure which states that answers shall be served within thirty days of receipt of interrogatories, the timing of the Maxwells' response was also well beyond the trial court's agreed scheduling order and required deadline for the Maxwells to designate their experts. As such, the trial court was not obliged to consider the tardy partial answers to the defendant's interrogatories in its ruling on the motion for summary judgment.

¶21. Moving to the stricken affidavits, I find that BMH filed its motion for summary judgment on March 14, 2005, in an effort to flesh out whether the Maxwells had a genuine medical malpractice case or not. The Maxwells had over two months in which to file their response and required expert affidavits. They failed to do so prior to the day of the hearing. Mississippi Rule of Civil Procedure 56(c) states that "the adverse party prior to the day of the [summary judgment] hearing may serve opposing affidavits." M.R.C.P. 56 (c). Rule 6 (b) prohibits a trial judge from receiving documents filed after the specified period unless the "failure to act was the result of excusable neglect . . . ." MRCP 6 (b); *Smith v. Smith (In re Will of Smith)*, 910 So. 2d 562 (¶22) (Miss. 2005) (quoting *Richardson v. APAC - Mississippi, Inc.*, 631 So.2d 143, 146 (Miss. 1994)). The vast majority of Pieter Teeuwissen's, the Maxwell's attorney, excuses amounted to a "busy calendar." Also, Teeuwissen declared during the June 2, 2005 hearing that, "This is simply something that I have not kept up with in my calendaring like I should have." In the June 30, 2005 ruling from the bench, the trial court found this inaction not to qualify as excusable neglect and excluded the response and affidavits. Given the facts before the lower court, I would agree with its findings as the supreme court has stated that "excusable neglect will not be shown by counsel's busy trial schedule." *In re*

Estate of Ware, 573 So.2d 773, 775 (Miss. 1990). As such, I contend the trial court did not abuse its discretion in striking the Maxwells' response and accompanying affidavits submitted the day of the hearing. Therefore, without expert medical testimony "identifying and articulating the requisite standard of care; and (3) establishing that the defendant physician failed to conform to the standard of care," I cannot agree that the trial court erred in granting BMH's motion for summary judgment.

¶22. Lastly, the majority states that the trial court erred in failing to grant the Maxwells' request for a continuance. Again, I cannot agree. It is well settled that the decision to grant or deny a continuance under Rule 56(f) is within the sound discretion of the trial court. *Stallworth v. Sanford*, 921 So. 2d 340 (¶9) (Miss. 2006). This Court will only reverse the trial court's decision if it amounted to an abuse of discretion. *Id.* Under the facts of this case, I contend that the trial court's decision not to grant a continuance was far from an abuse of discretion. The Maxwells had almost two years from the time their complaint was filed to obtain expert medical testimony, be it in an affidavit, deposition or other acceptable form, required to support their claim. They failed to do so as a result of, as explained above, inexcusable neglect. It is especially telling that the Maxwells saw fit to request a continuance the day of the hearing, but, as the trial court pointed out, never requested additional time prior to the day of trial, which is an easily drafted and routinely granted request.

¶23. A summary of the relevant events may be beneficial. The facts show that the decedent passed away on August 31, 2002. Rather than take advantage of the full time allowed by the statute of limitations for the Maxwells' claim, they decided to file their complaint the day before section 11-1-58 became effective. As such, it is apparent that the Maxwells and their counsel were fully aware of the import and necessity of expert medical testimony to substantiate their claim. Over the course of almost two years they chose to ignore this requirement. From June 5, 2003, to January 30, 2005, the Maxwells, in violation of the Mississippi Rules of Civil Procedure, ignored four separate

discovery requests from BMH and the trial court's discovery scheduling order and deadline to designate their experts that they agreed to. When they finally decided to respond, one year and eight months after BMH's initial request, their response did not conform to the requirements of Rule 26(b)(4) of the Mississippi Rules of Civil Procedure. Finally, the affidavits submitted in response to BMH's motion for summary judgment are a nullity and should not even be considered. Not only were two of the experts totally different from those identified in the Maxwells' incomplete response five months earlier, but they were also submitted the day of the hearing, which, pursuant to Rule 56(c) and under the facts of this case, was a day late and a dollar short. Therefore, I cannot agree that the trial court abused its discretion in granting BMH's motion for summary judgment as the affidavits submitted the day of the hearing are irrelevant and the trial court should not be obliged to consider the Maxwells' tardy and incomplete discovery response.

MYERS, P.J. AND GRIFFIS, J., JOIN THIS OPINION.