

SUPREME COURT OF KENTUCKY
DOCKET NO. 2007-SC-00921

FILED

NOV 10 2008

SUPREME COURT CLERK

HORACE COLLIER

APPELLEES

v. ON GRANT OF DISCRETIONARY REVIEW FROM
KENTUCKY COURT OF APPEALS
NO. 2006-CA-001612-MR

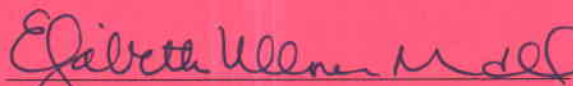
CARITAS HEALTH SERVICES, INC.,
d/b/a CARITAS MEDICAL CENTER, et al.

APPELLANT

BRIEF FOR APPELLANT, CARITAS HEALTH SERVICES, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief for Appellant, CARITAS, was mailed on the 7th day of November, 2008 to: Karl Price, Suite 1011, Kentucky Home Life Building, 239 S. Fifth Street, Louisville, KY 40202, *Counsel for Horace Collier*; David B. Gazak, Darby & Gazak, P.S.C., 3220 Office Pointe Place, Suite 200, Louisville, KY 40220, *Counsel for Robert M. Blankenship, M.D.*; Don A. Pisacano, Miller, Griffin & Marks, P.S.C., 271 W. Short Street, Suite 600, Lexington, KY 40507-1292, *Counsel for Anthem Health Plans of Kentucky, Inc.*; Judge Judith McDonald-Burkman, Jefferson Circuit Court, Division Nine, 700 W. Jefferson Street, Louisville, KY 40202 and Mr. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.



David R. Monohan
Elizabeth Ullmer Mendel

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION..... iv

STATEMENT CONCERNING ORAL ARGUMENT..... v

STATEMENT OF THE CASE..... 1-7

The underlying medical malpractice claim 1-5

The decision of the trial court..... 5- 6

Baylis v. Lourdes Hospital, Inc., 805 S.W.2d 122, 124 (Ky. 1991)5, 6

The Court of Appeals decision..... 6-7

Collier v. Caritas, No. 2006-CA-001612-MR (November 9, 2007)6, 7

Baptist Healthcare Systems, Inc. v. Miller, 177 S.W. 3d 676 (Ky. 2005)6

ARGUMENT..... 7-24

I. The Trial Court Properly Granted Summary Judgment To CARITAS Because Mr. Collier Failed To Identify Any Expert Witnesses...... 7-18

Reams v. Stutler, 642 S.W.2d 586 (Ky. 1982)7

Blair v. Eblen, 461 S.W.2d 370 (Ky. 1970).....7

Baylis v. Lourdes Hospital, Inc., 805 S.W.2d 122 (Ky. 1991)7, 8

Walden v. Jones, 439 S.W.2d 571 (Ky. 1968)7

Morris v. Hoffman, 551 S.W.2d 8 (Ky. App. 1977).....7

Jarboe v. Harting, 397 S.W.2d 775 (Ky. 1965)8

Johnson v. Vaughan, 370 S.W.2d 591 (Ky. 1963)8

Harmon v. Rust, 420 S.W.2d 563 (Ky. 1967).....8

<i>Turner v. Reynolds</i> , 559 S.W.2d 740 (Ky. App. 1977).....	8
<i>Keel v. St. Elizabeth Medical Center</i> , 842 S.W.2d 860 (Ky. 1992).....	8
<i>Perkins v. Hausladen</i> , 828 S.W.2d 652 (Ky. 1992).....	8
<i>Mahaffey v. McMahon</i> , 630 S.W.2d 68 (Ky. 1982).....	8
<i>Neal v. Wilmoth</i> , 342 S.W.2d 701 (Ky. 1961).....	8
<i>Raine v. Drasin</i> , 621 S.W.2d 895 (Ky. 1981).....	10
<i>Hill v. Willmott</i> , 561 S.W.2d 331 (Ky. App. 1978).....	10
A. Kentucky courts routinely grant summary judgment when a party fails to identify an expert in a case requiring expert testimony.....	10-15
<i>Turner v. Reynolds</i> , 559 S.W.2d 740 (Ky. App. 1977).....	10,11
<i>Neal v. Welker</i> , 426 S.W.2d 476 (Ky. 1968).....	11
<i>Nalley v. Banis</i> , 240 S.W.3d 658 (Ky. App. 2007).....	12
<i>Green v. Owensboro Medical Health System, Inc.</i> , 231 S.W.3d 781 (Ky. App. 2007).....	12,13,15
<i>Simmons v. Stephenson</i> , 84 S.W.3d 926 (Ky. App. 2002).....	14
<i>Tackett v. Appalachian Regional Healthcare, Inc.</i> , No. 2007-CA-000720-MR (Ky. App. 2008).....	14
<i>Alexander v. Crawford Radiology Clinic</i> , No. 2007-CA-000567-MR (Ky. App. 2008).....	14
<i>Baker v. St. Joseph Healthcare, Inc.</i> , 2004-CA-000179-MR (Ky. App. 2005).....	14
<i>Dunn v. Norton Hospital, Inc.</i> , No. 2003-CA-001931-MR (Ky. App. 2004).....	15

	<i>McCarty v. Boswell</i> , No. 2001-CA-001471-MR (Ky. App. 2003).....	15
	<i>Hoke v. Cullinan</i> , 914 S.W.2d 335 (Ky. 1995).....	15
B.	Summary judgment was not used as a “sanction” by the trial court in this case.	16-21
	<i>Ward v. Houseman</i> , 809 S.W.2d 717 (Ky. App. 1991).....	16,17
	<i>Poe v. Rice</i> , 706 S.W.2d 5 (Ky. App. 1986).....	17
II.	The Court Of Appeals’ Decision, Which Requires A Written Order Instructing A Plaintiff That He Must Have An Expert Before Summary Judgment Can Be Granted, Must Be Reversed	18-22
	<i>Baptist Healthcare Systems, Inc. v. Miller</i> , 177 S.W. 3d 676 (Ky. 2005)	19,20
	<i>Jarboe v. Harting</i> , 397 S.W.2d 775 (Ky. 1965)	20
III.	Trial Courts Must Have the Authority To Set And Enforce Reasonable Pretrial Deadlines	22-25
	CONCLUSION	25
	APPENDIX	

INTRODUCTION

This is a medical malpractice case, involving an alleged delay in the diagnosis of appendicitis. The trial court granted summary judgment to the hospital because the plaintiff below failed to identify any expert who could testify in support of his claims that the hospital violated the standard of care and caused him damage. The Court of Appeals reversed, holding that the trial court should have first entered a written order directing plaintiff that he needed an expert before granting summary judgment and moreover that the trial court should grant summary judgment only if plaintiff fails to name an expert on "the eve of trial." This Court should reinstate the trial court's decision, rejecting the Court of Appeals' addition of an unnecessary step in the pretrial process, and affirm the authority of trial courts to set and enforce reasonable pretrial deadlines.

STATEMENT REGARDING ORAL ARGUMENT

CARITAS Medical Center requests oral argument in this case. The issues presented are important to the practicing trial bar who routinely handle complex medical malpractice cases. CARITAS has knowledge regarding not only the facts of this particular case, but also more generally is aware of the impact the Court of Appeals decision (if left in place) will have on all medical malpractice cases tried in Kentucky. At oral argument, CARITAS can respond to any of this Court's public policy questions regarding the effect of the Court of Appeals decision.

STATEMENT OF THE CASE

The underlying medical malpractice claim

This is a medical malpractice case, and more specifically, an alleged delay in diagnosing appendicitis. Appellee is Horace Collier and Appellant is CARITAS Medical Center ("CARITAS"), a non-profit healthcare corporation. Mr. Collier presented himself to CARITAS on February 17, 2004, complaining of abdominal pain. Dr. Robert Blankenship was one of his attending physicians during this admission. After an extensive work-up, Mr. Collier was diagnosed with possible appendicitis and underwent an appendectomy the next day without complication. He was discharged home five days later.

A year later, Mr. Collier filed a complaint against CARITAS and Dr. Blankenship. He claimed CARITAS provided services to him "in such a medically negligent fashion as to deviate from acceptable standards of medical care and said deviations constitute medical negligence."¹ Mr. Collier further claimed that, as a direct and proximate result of CARITAS' negligence, he sustained injury.² Specifically, Mr. Collier alleged that CARITAS was negligent in failing to order certain tests to diagnose his condition, failing to obtain and share test results in a timely manner, failure to properly assess his symptoms and

¹ R.A. Vol. 1, pp. 1-6, Complaint, ¶ 9. A copy of the Complaint is attached in the Appendix behind Tab 1.

² *Id.* at ¶ 10.

order additional tests, and failure to recognize and respond to his symptoms, such as his rapidly increasing temperature.³

On March 14, 2005, CARITAS propounded Interrogatories and Requests for Production of Documents to Mr. Collier, including Interrogatories specifically asking Mr. Collier to identify his expert witnesses, their opinions and the grounds therefore, pursuant to CR 26.02(4). After considerable delay, Mr. Collier finally responded to this discovery on August 22, 2005. With respect to experts, he stated:

INTERROGATORY NO. 8: State the name and address of every expert witness whom the plaintiff or plaintiff's counsel may call to testify as an expert at the trial of this action.

ANSWER: Not determined yet.

INTERROGATORY NO. 9: With respect to each witness listed in answer to Interrogatory No. 8, state the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

ANSWER: See answer to Interrogatory #8.⁴

Nowhere in the answers did Mr. Collier claim that his case was one in which expert testimony would not be required.

Written discovery was exchanged and Mr. Collier was deposed. On November 30, 2005, a pretrial conference was held. All parties to this litigation

³ R.A. Vol. 2, pp. 246-258, Plaintiff's Response to Interrogatories & Request for Production of Documents Propounded by Defendant, CARITAS Health Services, Inc., Interrogatory #2. A copy of these discovery responses is in the Appendix behind Tab 2.

⁴ *Id.*

and the trial court were operating on the belief that this complex medical malpractice case would require testimony from an expert to establish Mr. Collier's prima facie case. Mr. Collier's counsel never suggested at the pretrial conference that he thought he could proceed without expert testimony.⁵ To the contrary, he understood expert testimony would be required and asked for sixty to ninety days to secure appropriate experts.⁶

The trial court, as is typical in complex cases of this sort, required the disclosure of Mr. Collier's experts well in advance of trial, in order to allow CARITAS an opportunity to select appropriate responsive experts and time for both sides to take depositions of experts. Accordingly, in response to the trial court's questions at the pretrial, Mr. Collier's counsel requested and was given until January 30, 2006 to disclose his experts. The trial court specifically asked Mr. Collier's counsel if it was realistic for him to provide expert disclosures by that day and he agreed it was.⁷

At the pretrial conference, the trial court set the case for trial on October 10, 2006. An extensive and detailed pretrial order was subsequently entered,⁸ which required, among numerous other deadlines, that Mr. Collier provide the expert information requested in the previously propounded expert interrogatories on or before January 30, 2006.

⁵ 30-9-05-VCR-026, 10-30-05, 09:05:00 - 09:10:00.

⁶ *Id.* at 09:08:35.

⁷ *Id.* at 09:08:07 - 09:08:45.

⁸ R.A. Vol. 3, pp. 312-315, Civil Jury Trial Order. A copy of this Order is in the Appendix behind Tab 3.

Mr. Collier failed to identify experts by the January 30, 2006 deadline. Instead, on February 2, 2006, he filed a motion for an extension of time to identify experts. The motion did not suggest or imply that this was a case in which Mr. Collier would not need an expert; to the contrary, by asking for additional time to name experts, Mr. Collier's motion confirmed that he knew he needed experts to proceed. Mr. Collier's motion was heard by the trial court on February 6, and over the objection of defense counsel, Mr. Collier was given until February 28, 2006 to identify experts.⁹

However, once again, the deadline for naming experts came and went. On February 28, 2006, Mr. Collier failed to either identify experts or seek another extension of time to do so.

Thereafter, CARITAS and Dr. Blankenship both filed motions for summary judgment.¹⁰ CARITAS argued that it was impossible for Mr. Collier to prevail at trial without expert proof and because his time for identifying experts had expired, CARITAS was entitled to summary judgment. In response, Mr. Collier argued **for the first time** that he did not need expert testimony in order to proceed to trial. He stated in his Response: "[t]here are many instances where the exception to the general rule [that expert proof is necessary in medical

⁹ R.A. Vol. 3, pp. 317-320, Plaintiff's Notice-Motion-Order for Extension of Time to Disclose Expert Witness. A copy is in the Appendix behind Tab 4.

¹⁰ R.A. Vol. 3, pp. 329-342, CARITAS' Motion for Summary Judgment, Appendix, Tab 5; R.A. Vol. 3, pp. 343-352, Dr. Blankenship's Motion for Summary Judgment, Appendix, Tab 6.

malpractice cases] applies. This case is such a case.”¹¹ Mr. Collier made no attempt to name an expert or seek a further extension of time to do so.

The decision of the trial court

The Jefferson Circuit Court, Division Nine, Honorable Judith E. McDonald-Burkman, ultimately agreed with CARITAS and granted summary judgment in its favor on July 7, 2006.¹² The trial court first noted the general rule in Kentucky that “in most medical malpractice cases, an expert witness is needed to prove causation.”¹³ The trial court also recognized there are some limited exceptions to this rule, but reached the obvious conclusion that Mr. Collier needed an expert to proceed in this case given the nature of the claims he was asserting. As the trial court explained: “a layperson would not be able to discern (without specialized knowledge that an expert in that field possessed) whether Dr. Blankenship’s delay in treatment, if any, caused Plaintiff permanent physical and mental injuries.”¹⁴ The trial court further reminded Mr. Collier that he “has been instructed by this Court to demonstrate such expert testimony is available, such that causation between Defendants’ acts and Plaintiff’s injuries is at least *possible*.”¹⁵ Because Mr. Collier had failed to identify any experts to support his

¹¹ Plaintiff’s Response and Opposition to [CARITAS’] Motion for Summary Judgment. A copy of this Response is attached behind Tab 7.

¹² R.A. Vol. 3, pp. 438-442, Opinion and Order entered July 7, 2006. A copy of this order is in the Appendix, Tab 8.

¹³ *Id.* at 3, citing *Baylis v. Lourdes Hospital, Inc.*, 805 S.W.2d 122, 124 (Ky. 1991).

¹⁴ *Id.* at 3 (parenthetical in original).

¹⁵ *Id.* at 4 (italics in original).

claims, the trial court accordingly concluded it would be impossible for him to prevail at trial against CARITAS and granted summary judgment.¹⁶

The Court of Appeals decision

The Court of Appeals issued a "To be Published" Opinion Vacating and Remanding the Opinion of the Jefferson Circuit Court.¹⁷ The panel held that this Court's decision in *Baptist Healthcare Systems, Inc. v. Miller*¹⁸ required: "[b]efore deciding on summary judgment motions in medical malpractice cases, a court should make a ruling whether an expert is necessary and give the plaintiff reasonable time to secure an expert."¹⁹ Thus, the Court of Appeals has interpreted *Miller* to mean that in every medical malpractice case (even those where it is obvious an expert is needed) the trial court must have a hearing and make an express written finding that an expert is required, then give plaintiff time to secure such an expert. Only then, according to the Court of Appeals, can summary judgment be granted against a plaintiff who has no expert.

According to the Court of Appeals opinion, if the plaintiff does not secure an expert after being told he needs one and having reasonable time to retain someone, "sanctions may be appropriate."²⁰ However, the Court of Appeals decision then shifts the focus away from the party who has flouted the trial

¹⁶ *Id.*

¹⁷ A copy of the Court of Appeals' opinion in *Collier v. Caritas*, No. 2006-CA-001612-MR, is attached behind Tab 9.

¹⁸ 177 S.W. 3d 676 (Ky. 2005).

¹⁹ See Exhibit 9, pp. 8 and 12.

²⁰ *Id.* at 12.

court's pretrial order and suggests that opposing counsel must seek to enforce the terms of the pretrial order by requesting that sanctions be imposed.²¹ And even then dismissal of a case is appropriate only "if plaintiffs have not disclosed their expert witnesses on the **eve of trial.**"²²

Because the Court of Appeals' decision in this case conflicts with other opinions issued by different Court of Appeals panels and fails to follow this Court's precedent regarding summary judgment in medical malpractice cases, CARITAS sought discretionary review.

ARGUMENT

I. **The Trial Court Properly Granted Summary Judgment To CARITAS Because Mr. Collier Failed To Identify Any Expert Witnesses.**

In Kentucky, a plaintiff in a medical negligence action must prove that the defendant provided care below the degree of care expected of a reasonably competent practitioner and that the defendant's negligence was the proximate cause of the plaintiff's injury.²³ Causation, an essential element of a plaintiff's burden of proof in a medical negligence action, must be established in terms of probability rather than mere possibility.²⁴

²¹ *Id.*

²² *Id.* (emphasis supplied).

²³ See e.g., *Reams v. Stutler*, 642 S.W.2d 586 (Ky. 1982) and *Blair v. Eblen*, 461 S.W.2d 370 (Ky. 1970).

²⁴ *Baylis v. Lourdes Hospital, Inc.*, 805 S.W.2d 122, 124 (Ky. 1991), citing *Walden v. Jones*, 439 S.W.2d 571 (Ky. 1968) and *Morris v. Hoffman*, 551 S.W.2d 8 (Ky. App. 1977).

Moreover, long-standing Kentucky precedent holds that a plaintiff in a medical malpractice case must establish, **through expert testimony**: (1) the applicable standard of care; (2) a deviation from the applicable standard of care; and (3) that this deviation caused plaintiff's injuries. The rationale for such a requirement is that lay witnesses are generally not competent to draw their own conclusions in these cases without the aid of expert testimony.²⁵

The only exception to the requirement of expert proof in medical negligence cases is where "negligence and injurious results are so apparent that a layman with general knowledge would have no difficulty recognizing it."²⁶ The classic example of obvious negligence not requiring expert proof is where the wrong leg is amputated.²⁷ However, in cases involving complex medical issues, such as Mr. Collier's allegation of delayed diagnosis, expert proof is always required. It is the rare and exceptional case which does not require expert testimony.²⁸ It is apparent from Mr. Collier's answers to interrogatories, which outline his theories of liability against CARITAS, that Mr. Collier's case does not fall within this rare exception.

²⁵ *Baylis*, citing *Jarboe v. Harting*, 397 S.W.2d 775 (Ky. 1965) and *Johnson v. Vaughan*, 370 S.W.2d 591 (Ky. 1963). See also, *Harmon v. Rust*, 420 S.W.2d 563 (Ky. 1967).

²⁶ *Turner v. Reynolds*, 559 S.W.2d 740, 741 (Ky. App. 1977). See also, *Keel v. St. Elizabeth Medical Center*, 842 S.W.2d 860, 862 (Ky. 1992) and *Perkins v. Hausladen*, 828 S.W.2d 652, 655 (Ky. 1992).

²⁷ See *Mahaffey v. McMahan*, 630 S.W.2d 68, 70 (Ky. 1982).

²⁸ *Neal v. Wilmoth*, 342 S.W.2d 701 (Ky. 1961) (drill slipped off tooth and went through patient's gum and throat.)

The pertinent facts in this case are undisputed. Mr. Collier presented to CARITAS with abdominal pain, was worked up for this pain, was diagnosed with appendicitis, underwent an appendectomy a day later, and was discharged to his home. There is no dispute that his appendix needed to be surgically removed. Mr. Collier's claims against CARITAS rest on his assertions that he needed certain tests to be ordered and taken, that the hospital failed to read or respond to test results promptly, or that CARITAS failed to promptly react to his symptoms. Thus, he is essentially alleging that there was a delay in his diagnosis which caused him injury.

Only a health care professional can establish whether CARITAS was negligent. This subject is not within the ordinary knowledge of the reasonable juror. Jurors do not know what standards a hospital must live up to regarding what tests should be ordered and what is an appropriate time for results of those tests to come back and be responded to. Mr. Collier needed a doctor or nurse to say what CARITAS should have done in response to his increased temperature and other symptoms. Moreover, even assuming *arguendo* that there was a delay in diagnosing his condition that was caused by CARITAS, Mr. Collier could not establish that any such delay caused him injury without a medical causation expert.

The trial court correctly concluded that Mr. Collier was required to establish through expert testimony that the care provided to him at CARITAS was below the applicable standard, and that the allegedly substandard care at

CARITAS was a substantial factor in causing him injury. Absent such expert proof, Mr. Collier's case against CARITAS could not progress. In fact, under Kentucky law, Mr. Collier should have consulted with an expert before he even filed suit against CARITAS.²⁹

For unknown reasons, despite having more than sufficient time to identify experts, agreeing to a date certain for disclosure, being ordered by the trial court to do so, and being granted additional time to retain experts, Mr. Collier failed to identify a single expert in this case. Instead of requesting additional time to identify experts, Mr. Collier attempted to avoid the consequences of his failure to procure an expert by claiming at the last minute that he didn't need an expert to proceed. The trial court saw through this ruse and correctly ruled that absent expert proof, it would be "impossible" for Mr. Collier to prevail at trial and appropriately granted summary judgment to CARITAS.

A. Kentucky courts routinely grant summary judgment when a party fails to identify an expert in a case requiring expert testimony.

Kentucky trial courts can and routinely do grant summary judgment in medical malpractice cases when the plaintiff has failed to offer expert proof. For example, in *Turner v. Reynolds*,³⁰ a plaintiff who was treated after a knife assault sued the treating physician for malpractice when x-rays taken a year later revealed knife fragments in his skull. The plaintiff alleged medical malpractice

²⁹ *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981); *Hill v. Willmott*, 561 S.W.2d 331 (Ky. App. 1978).

³⁰ *Turner v. Reynolds*, 559 S.W.2d 740 (Ky. App. 1977).

by the physician who initially saw him for failing to discover and treat the problem, and specifically, for failing to take x-rays. The trial court granted summary judgment based upon plaintiff's admission that he did not intend to present a medical expert. In upholding the lower court's decision, the Court of Appeals concluded that it was incumbent upon the plaintiff to produce expert evidence that the standard of care required the taking of x-rays.³¹

*Neal v. Welker*³² likewise sustained the trial court's summary judgment because plaintiff offered no expert proof that inadequate treatment was a factor in a patient's death. The defendant filed a motion for summary judgment and plaintiff filed a response indicating that he would offer proof, but ultimately did not do so. The Court affirmed the summary judgment, noting:

The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment, since 'hope springs eternal in the human breast.' The hope or bare belief ... that something will 'turn up' cannot be made [the] basis for showing that a genuine issue as to a material fact exists. ... There was no request for continuance to obtain additional affidavits....³³

Mr. Collier, like the plaintiffs in *Turner* and *Neal*, offered no expert proof to establish that the care provided to him at CARITAS in February of 2004 was below the applicable standard and resulted in injury to him. Nor did he seek

³¹ *Id.* at 741.

³² 426 S.W.2d 476 (Ky. 1968).

³³ *Id.* at 479-80 (citation omitted)

additional time to secure such experts. Absent such proof, he could not establish his medical malpractice claims against CARITAS.

Ironically, the very same panel which rendered the decision in the case at bar rendered another decision reaching exactly the opposite result in a case involving virtually identical facts. In *Nalley v. Banis*,³⁴ the plaintiff had no expert in a medical malpractice case. She alleged that she did not need expert testimony to establish that metal slivers left in her chin after surgery were the result of negligence or that her infection following the surgery was caused by either a delay in the procedure or the use of unsterilized instruments. Defendant filed a motion for summary judgment. The trial court held that expert testimony was needed, that plaintiff had not identified any expert within the time provided for by the pretrial order, and granted summary judgment. The Court of Appeals affirmed, holding the trial court did not err in concluding that expert testimony was required and granting summary judgment to the defendants because plaintiffs did not have an expert.

Another recent Court of Appeals decision, *Green v. Owensboro Medical Health System, Inc.*,³⁵ also upheld a trial court's grant of summary judgment to a hospital where no expert testimony was produced by plaintiff. In *Green*, the plaintiff had surgery on her hand. After the surgery, she discovered that her four front teeth were loose, misaligned, and bloody. She sued her doctors and the

³⁴ 240 S.W.3d 658 (Ky. App. 2007).

³⁵ 231 S.W.3d 781 (Ky. App. 2007).

hospital, alleging negligence. The hospital propounded expert interrogatories, which Green did not answer. The hospital then filed a motion to compel, which was granted. However, Green still failed to provide information regarding experts. The trial court entered another order requiring Green to identify experts, and she identified a dentist. After he was deposed, it was clear the dentist was merely a treater and not a “standard of care” expert against the hospital or the doctors. The defendants all filed motions for summary judgment, arguing that Green could not prevail at trial without experts. The trial court first denied the motion and gave Green even more time to find experts, but she still failed to do so. Thereafter, the trial court entered summary judgment.

On appeal, Green argued that she did not need expert testimony to prevail and that summary judgment was improperly entered. The Court of Appeals rejected both arguments. It held that “[w]hether expert testimony is required in a given case is squarely within the trial court’s discretion.”³⁶ The Court of Appeals then concluded that since expert testimony was required and Green had not produced any experts, “it necessarily follows ... that we find no error in the granting of summary judgment.... Summary judgment is appropriate when a party is given the opportunity to present evidence showing a disputed material fact exists and the court ultimately finds no such dispute exists.”³⁷ The Court went on to conclude that “having failed to introduce evidence sufficient to

³⁶ *Id.* at 783.

³⁷ *Id.* at 784.

establish the respective applicable standards of care, it was a legal impossibility for Green to prove the essential elemental of any alleged breach thereof.”³⁸ The Court of Appeals thus affirmed the summary judgment.³⁹

This area of the law is so well settled that there are numerous unpublished decisions which reach the same result. Presumably, those decisions are unpublished because they do not stand for any new or different proposition of law than the published decisions cited above. Just a few of these recent unpublished cases include: *Tackett v. Appalachian Regional Healthcare, Inc.*⁴⁰ (summary judgment granted for defendant where plaintiff had three years to produce expert testimony attributing his vision loss to malpractice, but none of the doctors who testified supported that claim); *Alexander v. Crawford Radiology Clinic*⁴¹ (plaintiff failed to produce expert testimony supporting his claim that his kidneys were damaged by treatment rendered by defendants; summary judgment for defendants affirmed); *Baker v. St. Joseph Healthcare, Inc.*⁴² (plaintiff produced no expert testimony, relying on *res ipsa loquitur* to support claim that his shoulder injury was the result of negligence during an operation to insert a pacemaker; summary judgment for hospital and doctor affirmed: “To survive a

³⁸ *Id.*

³⁹ See also, *Simmons v. Stephenson*, 84 S.W.3d 926 (Ky. App. 2002)(summary judgment for defendant affirmed where plaintiff failed to produce expert testimony to support claim).

⁴⁰ No. 2007-CA-000720-MR (Ky. App. 2008)(these unpublished cases are cited pursuant to CR 76.28(4)(c) and copies are attached behind Tab 10).

⁴¹ No. 2007-CA-000567-MR (Ky. App. 2008).

⁴² 2004-CA-000179-MR (Ky. App. 2005).

motion for summary judgment in a medical malpractice case in which a medical expert is required, the plaintiff must produce expert evidence or summary judgment is proper"); *Dunn v. Norton Hospital, Inc.*,⁴³ (expert testimony required where claim was that arm injured during surgery; testimony of treating doctors who were not defendants and hearsay statements of defendant doctors insufficient to satisfy need for expert testimony, thus summary judgment for defendants affirmed); *McCarty v. Boswell*,⁴⁴ (affirmed summary judgment for defendant doctor where plaintiff's expert excluded after a *Daubert* hearing and plaintiff's motion for extension of time to obtain another expert was overruled).

This Court has said: "Summary judgment is appropriate when a party is given the opportunity to present evidence showing a disputed material fact exists and the court ultimately finds no such dispute exists."⁴⁵ The trial court in the case at bar correctly ruled that pursuant to long-standing Kentucky law as cited above, expert proof was needed to establish Mr. Collier's medical malpractice case. Mr. Collier did not present such proof and claimed in his responsive pleadings he did not need it. He is bound by his decision and the trial court's grant of summary judgment should be affirmed.

⁴³ No. 2003-CA-001931-MR (Ky. App. 2004).

⁴⁴ No. 2001-CA-001471-MR (Ky. App. 2003).

⁴⁵ *Green* at 784, citing *Hoke v. Cullinan*, 914 S.W.2d 335, 337 (Ky. 1995).

B. Summary judgment was not used as a “sanction” by the trial court in this case.

At the Court of Appeals, Mr. Collier suggested that the lower court was “sanctioning” him by granting a summary judgment for his failure to comply with the trial court’s pretrial order. This was an obvious effort by Mr. Collier to attempt to distinguish his case from the long line of cases which approve summary judgments when a plaintiff fails to come forward with a necessary expert. Mr. Collier attempted to fit his case into that category of cases where the trial court was reversed for using summary judgment as a sanctioning device. Unfortunately for Mr. Collier, try as he might, his case does not fall into this prohibited category. The trial court did not “sanction” him for failing to comply with its order. To the contrary, the trial court gave Mr. Collier every opportunity to identify an expert to support his case – something he repeatedly promised but ultimately failed to do.

Mr. Collier relied on two Court of Appeals’ opinions below to support his claim that his case should not have been thrown out for his failure to produce an expert. *Ward v. Houseman*⁴⁶ involved a defendant physician in a medical malpractice case who moved to limit the plaintiffs’ proof by excluding testimony of an expert witness who was identified late. The trial court granted the motion, and subsequently entered summary judgment dismissing the complaint. In

⁴⁶ *Ward v. Houseman*, 809 S.W.2d 717 (Ky. App. 1991).

reversing the lower court's decision, the Court of Appeals distinguished the situation where a plaintiff in a medical malpractice case lacks expert proof:

Keep in mind, the case in hand was not one where the dismissed party had no expert but was prevented from using the expert's testimony as a sanctioning technique for the dilatory conduct of the Wards' counsel. CR 56, Summary Judgments, is not to be used as a sanctioning tool of the trial courts.⁴⁷

This opinion implies that dismissal is proper when a party has no expert, which is precisely the situation Mr. Collier was in.

*Poe v. Rice*⁴⁸ is likewise distinguishable. In *Poe*, the trial court granted summary judgment after the plaintiffs objected to producing information about their expert witnesses in response to written discovery (although they admitted they had experts). The lower court granted summary judgment despite the fact that the defendant did not move to compel, nor had the court entered an order requiring plaintiffs to respond to interrogatories regarding expert witnesses.⁴⁹ The Court of Appeals held that the lower court's grant of summary judgment had "more of the flavor of a dismissal for failure to prosecute than a summary judgment," and was inappropriate under the circumstances.⁵⁰ Unlike the plaintiffs in *Poe*, Mr. Collier was ordered to respond to expert interrogatories, given an extension of time to do so, and yet still failed to comply with the trial court's direction.

⁴⁷ *Ward*, 809 S.W.2d at 719.

⁴⁸ *Poe v. Rice*, 706 S.W.2d 5 (Ky. App. 1986).

⁴⁹ *Id.* at 6.

⁵⁰ *Id.*

Mr. Collier was given every opportunity to present his case and identify experts. It was only when he decided that he did not need experts to proceed that the trial court entered summary judgment against him, not as a punishment, but because he could not prevail without expert proof.

II. The Court Of Appeals' Decision, Which Requires A Written Order Instructing A Plaintiff That He Must Have an Expert Before Summary Judgment Can Be Granted, Must Be Reversed.

The traditional practice of trial courts in this state, which has been regularly affirmed by this Court, is to grant summary judgment in cases where an expert is required and one has not been timely identified. The decision in the present case, however, imposes a whole new layer of procedures before such a decision can be reached. The Court of Appeals' decision here instructs that in every medical malpractice case the trial court must first enter a written order advising the plaintiff that he needs expert proof, even in cases where the need for an expert is obvious, like Mr. Collier's.⁵¹ Only after giving the plaintiff time to secure experts following such an order, and the plaintiff failing to do so, may the trial court enter summary judgment. Even then, the Court of Appeals suggested that such a motion for summary judgment can be granted only if experts have not been identified "on the eve of trial." The trial court in the case at bar did not follow this procedure, so the Court of Appeals reversed. But there is no requirement for such a procedure under Kentucky law, nor should there be.

⁵¹ Exhibit 2, Answer to Interrogatory 2.

In cases where there is a legitimate dispute about whether an expert is needed, it is appropriate to require the trial court to first rule on that issue and then grant summary judgment only if the plaintiff fails to obtain an expert. That was the situation in *Baptist Healthcare Systems, Inc. v. Miller*.⁵² But *Miller* did not impose a requirement that the trial court must have a hearing and enter a written order in every case instructing a plaintiff that he must have an expert, even when it is obvious and agreed upon by all sides that an expert will be required.

In *Miller*, the plaintiff alleged nerve damage from a tourniquet placed by a hospital phlebotomist. The hospital moved for summary judgment three weeks before trial on the grounds that the plaintiff had no expert to establish the standard of care. After a hearing, the trial court agreed that such an expert was needed, but denied the hospital's motion for summary judgment, instead giving the plaintiff a 30-day continuance to identify an expert. At trial the plaintiff presented a phlebotomist to testify that there was a deviation from the standard of care, as well as a physician to testify that the plaintiff's nerve injury was caused by the tourniquet. The jury found in favor of the plaintiff.

On appeal, the hospital argued that it was entitled to summary judgment, or in the alternative, that a continuance should not have been granted. This Court reiterated the rule that expert testimony is generally required in a medical

⁵² 177 S.W. 3d 676 (Ky. 2005).

malpractice case to show that the defendant failed to conform to the required standard.⁵³ The opinion went on to note:

As the standard of care is not within the scope of common experience of jurors, requiring expert testimony as to the standard of care of a phlebotomist was a proper exercise of trial court's discretion.⁵⁴

This Court concluded that it was appropriate for the trial court to grant the plaintiff an extra thirty days to make expert disclosures (which is exactly what the trial court here did for Mr. Collier), and that when plaintiff in *Miller* did produce experts pursuant to that extension, the case properly went to trial. Since Mr. Miller took the position that an expert was not required, this Court concluded that the trial court followed the proper procedure in first ruling that expert testimony was required and then giving plaintiff time to secure such testimony.

In the present case, however, Mr. Collier was given a lengthy period of time to secure a testifying expert, then an extension of time to find one, but he still failed to produce expert testimony to support his case. Instead, after his time for naming experts had expired, **for the first time** he took the position that, "[t]here are many instances where the exception to the general rule [that expert proof is necessary in medical malpractice cases] applies. This case is such a

⁵³ *Id.* at 680, citing *Jarboe v. Harting*, 397 S.W.2d 775, 778 (Ky. 1965).

⁵⁴ *Miller*, 177 S.W.3d at 680-81.

case.”⁵⁵ The trial court properly rejected Mr. Collier’s argument, holding that he indeed needed expert proof to establish his medical malpractice case.⁵⁶ The trial court’s decision indicated that Mr. Collier had been given sufficient time to procure said experts and his failure to do so was fatal to his case.

Many types of complex litigation, particularly medical malpractice and product liability cases, require expert testimony. Kentucky trial courts clearly understand their role in such complex cases. In cases where experts are obviously needed, summary judgment can be entered if a plaintiff fails to identify experts in compliance with the trial court’s pretrial order, despite being given repeated opportunities to do so.

This Court should advise the trial courts throughout the Commonwealth that they are following the correct procedure and disavow this aberrant Court of Appeals’ opinion. Failure to do so will result in clogging Kentucky’s already hectic dockets with additional unnecessary hearings and cause delay in moving cases to trial. It is fair to note that rising health care premiums and costs are related at least in part to the increasing numbers of medical malpractice suits and the attendant attorney fees and expert costs incurred in defending even meritless suits. Requiring trial courts to wait until the last possible minute before trial to grant summary judgment, just in case the plaintiff comes up with a last minute

⁵⁵ R. A. Vol. 3, pp. 369-387, Plaintiff’s Response and Opposition to [CARITAS’] Motion for Summary Judgment, Exhibit 7, p. 5.

⁵⁶ R.A. Vol. 3, pp. 338-442, Opinion and Order entered July 7, 2006, Exhibit 8.

expert only. unnecessarily adds to those costs, while providing no benefit to legitimate claimants.

III. Trial Courts Must Have The Authority To Set And Enforce Reasonable Pretrial Deadlines

The Court of Appeals' decision in this case makes it virtually impossible for a trial court to enforce its pretrial scheduling orders, which are designed to ensure fairness to all parties in the handling of a complex case. If this opinion stands, trial courts are given the message that violation of trial deadlines can't be enforced in any meaningful way. According to the Opinion, the trial court may impose sanctions on a plaintiff who does not name an expert as required in the pretrial order, but must give him or her as much time as needed to find an expert, up to and including "the eve of trial." Only then can the trial court grant summary judgment to the defendant.

The Court of Appeals panel seems to be particularly offended that Mr. Collier was required to identify his experts several months before trial.⁵⁷ But such deadlines are necessary in complex cases to permit expert depositions, *Daubert* motions and hearings, if needed, and to avoid last minute rescheduling. These deadlines have the salutary effect of not wasting time and effort preparing cases for trial that will not proceed because a plaintiff is unable to find an expert to support his or her claims.

⁵⁷ See Exhibit 9, p. 5, 7, 11.

In this time of ever rising healthcare costs, it is not in the public's best interest to require medical malpractice cases to be fully prepared for trial, only to have to a last minute dismissal because a party fails to produce an expert. Cases that should be dismissed, because no expert will testify in support of a plaintiff's claim, should be dismissed promptly, thus reducing the cost of litigation and the burden on the courts. Waiting until the "eve of trial" to grant a summary judgment, that could and should have been granted earlier, only increases the costs of litigation for all parties.

The trial court must have the authority to enforce its orders and require parties to identify their experts well in advance of trial. Trial by ambush was abolished in this Commonwealth a long time ago. It is fair for the trial court to put the parties to their proof. If Mr. Collier needed additional time to secure experts, he could have requested additional time even after the motion for summary judgment was filed. CR 56.06 specifically authorizes a continuance to enable a party to gather information to respond to a motion for summary judgment. Mr. Collier did not ask for this relief. He could even have requested additional time during the four month period the motion for summary judgment was pending. But again Mr. Collier did not do so.

It is Mr. Collier who had the burden of identifying his experts in a timely manner and in compliance with the trial court's orders. Indeed, under existing Kentucky law, he should have consulted with an expert before he even filed suit. Instead, Mr. Collier flouted the trial court's authority. The Court of Appeals'

opinion in this case would allow similarly situated plaintiffs to do the same thing—ignore the trial court’s orders with impunity. The only consequence to such a plaintiff is the inevitable continuance if the plaintiff finally does name an expert on the eve of trial.

The Court of Appeals decision in this case encourages “gaming” the system, by permitting a plaintiff to unilaterally force a continuance by simply naming an expert only a few weeks before trial. Following the logic of this Opinion, the trial court cannot dismiss the case because plaintiff did not timely identify an expert, and defendant is left with no time to find a responsive expert, so a continuance would be the only solution. The opportunities for mischief are apparent.

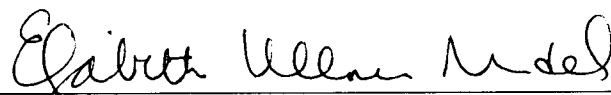
This case presents the perfect example of how a plaintiff can circumvent a trial court’s pretrial orders. Mr. Collier, the trial court, and all the parties knew that expert testimony would be required in this case. Clearly, whether a purported delay in diagnosis caused Mr. Collier injury is not a question within the province of ordinary jurors. But Mr. Collier either did not or could not find any expert to testify in support of his theory. Thus, he made a last ditch argument to try and preserve his case in response to CARITAS’s motion for summary judgment by arguing that an expert was not necessary. The trial court saw through this transparent effort to save an unwinnable case and expressly ruled what had been understood by all parties, including Mr. Collier, for months--that his claim could not proceed without expert testimony.

The Court of Appeals opinion in this case allows Mr. Collier and others in his position to simply ignore pretrial deadlines and then get a last minute continuance simply by claiming that their cases doesn't require an expert. Raising such an argument at the eleventh hour is enough, under the reasoning adopted by the Court of Appeals in this case, to force the trial court to backtrack, make an express written ruling that an expert is required, and then grant additional time for the plaintiff to find one. Such a conclusion severely undermines the trial court's authority.

CONCLUSION

Mr. Collier had no expert proof to establish his medical malpractice case against CARITAS. Lacking experts to prove that he received substandard care at CARITAS resulting in injury to him, it was impossible for him to for him to establish his claims. The trial court correctly granted summary judgment, and its decision should be affirmed.

Respectfully submitted,



David R. Monohan
Elizabeth Ullmer Mendel
Rebecca L. Didat
WOODWARD, HOBSON & FULTON, L.L.P.
2500 National City Tower
Louisville, Kentucky 40202
Telephone: (502) 581-8000
Facsimile: (502) 581-8111
Counsel for Appellant,
CARITAS Health Services, Inc.