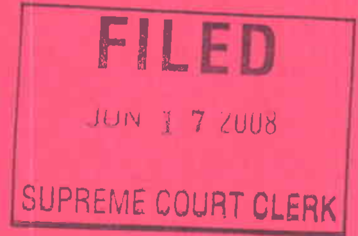

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2007-SC-0414-DG
CASE NO. 2007-SC-0389-DG
CASE NO. 2008-SC-0133-DG

NORTON HOSPITAL, INC.
AND ROBERT SOLINGER, M.D. et al. **APPELLANTS**

vs. **BRIEF FOR APPELLANT, NORTON HOSPITAL, INC.**

MELANIE PEARSON **APPELLEE**

On Review from Court of Appeals No. 2006-CA-000585-MR
and from Jefferson Circuit Court, Action No. 05-CI-02185

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was mailed this 16th day of June, 2008, to: Alan S. Rubin, Esq., 231 South Fifth Street, Suite 200, Louisville, Kentucky 40202; James Grohmann, O'Bryan, Brown & Toner, 455 South Fourth Avenue, 1500 Starks Bldg, Louisville, Kentucky 40202; Hon. Judith McDonald-Burkman, Judge Jefferson Circuit Court, Division 9, 700 West Jefferson Street, Louisville, Kentucky 40202; and Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. It is further certified that Appellant has not withdrawn the record on appeal.

Counsel for Appellant, Norton Hospital, Inc.

INTRODUCTION

This is a medical malpractice case in which the trial court, after granting Plaintiff-Appellee's numerous extensions of time on a variety of matters, including deadlines for identification of expert witnesses, granted Defendants-Appellants' Motions For Summary Judgment because Plaintiff repeatedly failed to disclose any expert witness and therefore was unable to establish a *prima facie* case of negligence. The Kentucky Court of Appeals reversed, citing *Ward v. Housman*, 809 S.W. 2d 717 (Ky. App. 1991), and this Court granted Discretionary Review.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant, Norton Hospital, Inc., requests oral argument because it believes that the Court will thereby better understand the extraordinary extent to which the trial court accommodated the Appellee, and also because discussion and clarification are needed regarding the extent to which trial courts should have authority to meaningfully establish and enforce their own Pretrial Orders.

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STATEMENT OF THE CASE

Plaintiff (Appellee herein) filed this medical malpractice lawsuit *pro se* in Jefferson Circuit Court on March 7, 2005, suing Norton Hospital (hereafter, "Defendant Hospital"), as well as several of her attending physicians (hereafter, "Defendant Physicians"). In her Complaint, Appellee recounted that she had been treated by Defendant Physicians over the course of several years for a multitude of cardiac difficulties and complications, including mitral valve prolapse, mitral regurgitation, tricuspid valve prolapse, tricuspid regurgitation, aortic insufficiency, and atrial fibrillation. (Transcript of Record, hereinafter, "T.R" at 1-7.) She further stated that on February 18, 2004 she was admitted to Norton Hospital on an emergency basis after an episode of atrial fibrillation, and that one of her attending physicians started her on Coumadin, an anticoagulation medication. Plaintiff asserted in her Complaint that her Coumadin levels were not appropriately monitored and managed, thereby allowing those levels to become "toxic." *Id.* She further alleged that Defendants' negligence was the direct and proximate cause of all of the following injuries: irreversible vascular and/or cerebral injury; dilatation of the left atrium and left ventricle of her heart; pleural effusion of her left lower lung; pericardial pleural effusion; atrial fibrillation; cerebral aneurysms; brain damage; internal bleeding and organ damage; and for good measure, "significant damage to her central nervous system, heart, lungs and brain." (*Id.*, at numerical paragraphs 11 through 20 of Plaintiff's Complaint.)

Subsequent to the filing of her Complaint, Defendant Hospital and Defendant Physicians moved to dismiss the Complaint, on the ground that the Complaint was untimely filed under the applicable statute of limitations. (T.R. at 50-54). Plaintiff sought an extension of time to

respond to Defendants' Motion to Dismiss, which extension of time was granted. Thereafter, Defendants' Motions to Dismiss were denied. (T.R. at 61-63).

Defendants next served written discovery upon Plaintiff, including Interrogatories which contained a request for identification of Plaintiff's expert witnesses and expert opinions. In response, Plaintiff twice sought, and was twice granted extensions of time to file answers to this discovery, totaling more than 60 days. (T.R. at 103-133 and T.R. at 136-139). Subsequently, on the final day of her second extension, Plaintiff did file responses to Defendants' written discovery, but in those responses declined to identify any expert witnesses. (T.R. at 370-450.)

On May 20 and May 23, 2005, respectively, Defendant Hospital and Defendant Physicians filed Motions for Summary Judgment, asserting, *inter alia,* that Plaintiff's Complaint failed as a matter of law because she lacked a medical expert to substantiate her claims. (T.R. at 154-203 and T.R. 142-148). In her Response to Defendants' Motions for Summary Judgment, Plaintiff stated that she "has retained a medical expert which supports her contentions in this matter," and "is attempting to obtain additional medical experts...." (T.R. at 230-265). However, notwithstanding this representation, Plaintiff still failed to disclose the identity of her "retained medical expert" in that Response. *Id.*

At a hearing on July 27, 2005 the Trial Court, the Hon. Judith McDonald-Burkman presiding, entered a Civil Jury Trial Order, setting a trial date of April 25, 2006. That Order required Pearson to identify her expert witnesses, along with applicable Rule 26 disclosures regarding their opinions, on or before October 1, 2005 (T.R. at 331-334; see Appendix 4.) The Order further provided that "[t]here must be literal compliance with the requirements of CR 26.02(4)(1)(i)," and that Pearson "*must identify* each person whom the party expects to call as an

expert witness at trial" no later than the October 1 deadline. The Order warned that the pretrial deadlines, including the expert witness disclosure deadlines, were "*mandatory*," and that "[f]ailure to comply with the letter and spirit of the aforesaid civil rule may result in the suppression of the expert's testimony." (Emphasis added.) *The record further establishes that the trial judge explained the importance of the deadline to Pearson at the hearing*, and that Pearson did not object to it. (Transcript of 7/27/05 Status Conference, pp 4-5.)

On October 1, 2005 Pearson moved the court for a sixty (60) day extension of time, through and including December 1, 2005, in which to identify her expert witnesses. In that October 1, 2005 motion for an extension of time, Pearson represented to the court and opposing counsel that she "has retained an anticoagulation expert and has made arrangements to obtain a neurologist. . . ." However, as she had done previously, Plaintiff again declined to disclose the identity of any such expert(s). Even though a December 1 deadline meant that Defendants would learn of Pearson's experts less than five months before trial, Judge McDonald-Burkman granted Pearson's motion for an extension. Moreover, at an October 11, 2005 status conference, *the judge again reminded Pearson of the expert witness deadline*. (Transcript of 10/11/05 Status Conference, pp. 5-8.)

In spite of the clear terms of the Civil Jury Trial Order, the judge's personal reminders to Pearson about the deadline, and the court's 60-day extension of time for Pearson to identify her expert witnesses, *Pearson failed to identify any expert witnesses by December 1, as required and as personally explained to her by the trial judge, nor offered any explanation for her failure to do so. Moreover, Pearson sought no further extension of time to identify her expert witnesses.* Accordingly, on December 12, 2005, the trial court granted the earlier-filed Motions for

Summary Judgment, holding that Pearson's claim failed as a matter of law because she had failed to identify any expert witnesses in this potentially complicated medical malpractice case. (T.R. at 704-705; see Appendix 2.) Judge McDonald-Burkman concluded that because Pearson was "unable to sustain her burden of proof against any of the Defendants without competent expert testimony," there were no genuine issues of material fact as to the defendants' negligence, and Summary Judgment was proper. (*Id.*, at p. 1.)

Ten days later, on December 22, 2005, Pearson filed a Rule 59.05 Motion to Vacate, again asserting that she had an expert, *yet still declining to identify who that expert might be.* (T.R. at 725-728.) Only on January 17, 2006, more than a month after entry of the Summary Judgment, did Pearson seek to file a belated expert witness disclosure. On February 24, 2006, Judge McDonald-Burkman denied Pearson's Motion to Vacate, pointing out that "[n]o genuine issue of material fact existed" when the Summary Judgment had been granted, or even ten days later, when the Motion to Vacate had been filed. (T.R. at 834-837; see Appendix 3.) She also pointed out that the offer of an expert witness more than a month after the Summary Judgment was entered, and almost a full month after Pearson had filed her Motion to Vacate, was untimely, and therefore would be denied. *Id.*

Pearson appealed the Summary Judgment to the Court of Appeals, which vacated the Summary Judgment and remanded the case back to the Trial Court. In its May 11, 2007 Opinion, the Court of Appeals noted that the trial judge had not applied the "six-factor analysis for determining whether a case should be involuntarily dismissed" pursuant to *Ward v. Housman*, 809 S.W. 2d 717 (Ky. App. 1991) (See Court of Appeals' Opinion, attached as Appendix 1, at p. 7), and suggested further that it was incumbent upon the trial judge to make

findings as to "whether Pearson acted willfully or in bad faith in seeking the extensions [of time to identify expert witnesses]." (*Id.*, at 8.) Finally, the Court of Appeals' Opinion suggested that Judge McDonald-Burkman had improperly used "essential expert 'testimony as a sanctioning technique for the dilatory conduct'" of the plaintiff. (*Id.*, at 7.)

Appellant now appeals to this Court on the grounds that the Court of Appeals misperceived Judge McDonald-Burkman's reasons for entering Summary Judgment in this case, and that the Court of Appeals' Opinion excessively restricts the authority of a trial judge to enter Summary Judgment in medical malpractice cases where a Motion for Summary Judgment has been filed, but where plaintiffs are unable or unwilling to identify any expert witnesses despite generous allowances by the trial judge.

ARGUMENT

I.

APPELLEES' SUMMARY JUDGMENTS SHOULD HAVE BEEN AFFIRMED.

A.

Summary Judgment Should be Reversed Only When the Trial Court Has Abused Its Discretion.

Kentucky Civil Rule 56.03 provides that Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party if entitled to a judgment as a matter of law." While it is sometimes said that the Appellant's burden is to demonstrate that it would be "impossible" for a respondent to produce evidence warranting a judgment in his favor, the Kentucky courts have recognized that the impossibility standard is to be understood "in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). As long as litigants are afforded the opportunity to present evidence which reveals the existence of disputed material facts, and upon the trial court's determination that there are no such disputed facts, summary judgment is appropriate. *Hoke v. Cullinan*, 914 S.W.2d 335, 337 (Ky. 1996).

The standard of review on appeal of a Summary Judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the opposing party was afforded a fair opportunity to file evidence to the contrary. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Appellate courts should not second-guess lower court decisions unless those decisions constitute an abuse of discretion. *Medley v. Board of Education,*

Shelby County, 168 S.W.3d 398 (Ky. App. 2004). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004). The appellate court should not substitute its opinion for that of the trial court, absent clear error. *Phillips v. Akers*, 103 S.W.3d 705 (Ky. App. 2002). Indeed, the question is not whether the reviewing court would have decided the issue differently, but whether the opposite result is compelled, or the trial court has abused its discretion. *ARA Services, Inc. v. Pineville Community Hospital*, 2 S.W.3d 104 (Ky. App. 1999).

B.

Trial Courts have Broad Powers to Regulate the Pretrial Process.

Although not unlimited, the trial court has inherent and broad authority to control the pretrial and discovery process, and to prevent its abuse. *Hoffman v. Dow Chemical Co.*, 413 S.W.2d 332, 333 (Ky. 1967). Generally, decisions bearing upon such pretrial issues as amendments to pleadings, scope and timing of discovery, and even entry and setting aside of default judgments are left to the discretion of the trial judge, and the judge's rulings will not be disturbed in the absence of abuse of discretion. *See*, e.g., *Newman v. Newman*, 451 S.W.2d 417 (Ky. 1970); *Humana of Kentucky, Inc. v. McKee*, 834 S.W.2d 711 (Ky. App. 1992); *Humana, Inv. v. Fairchild*, 603 S.W.2d 918 (Ky. App. 1980); and *S. R. Blanton Development, Inc.*, 819 S.W.2d 727 (Ky. App. 1991). *See also Baptist Healthcare Systems v. Miller*, 177 S.W.3d 676, 680 (Ky. 2005) ["The trial judge has wide discretion to admit or exclude evidence including that of expert witnesses."] Moreover, CR 41.02 provides that "[f]or failure of the plaintiff to

prosecute or to comply with these rules *or any order of the court*, a defendant may move for dismissal of an action or any claim against him." (Emphasis added.)

C.

Medical Malpractice Cases Require Plaintiffs To Demonstrate the Existence of Expert Testimony.

It has long been the case in Kentucky that expert testimony is required in medical malpractice cases to establish even a *prima facie* case of negligence. *Jarboe v. Harting*, 397 S.W.2d 775 (Ky. 1965). Absent expert testimony, plaintiffs in medical malpractice cases cannot meet their burden of showing that the defendants deviated from accepted standards of care. *Perkins v. Hausladen*, 828 S.W.2d 652 (Ky. 1992) and *Baylis v. Lourdes Hospital, Inc.*, 805 S.W.2d 122 (Ky. 1991). Moreover, expert testimony is needed not only to establish a deviation from accepted standards of care, but also to demonstrate that this deviation was the proximate cause of the plaintiff's injuries. *Reams v. Stutler*, 642 S.W.2d 586 (Ky. 1982).

In this case Plaintiff repeatedly declined or otherwise failed to identify an expert witness, notwithstanding numerous opportunities to do so. The facts are clear that Plaintiff was asked about expert witnesses by both Defendants in their Interrogatories, but in her Responses, Plaintiff failed to identify a single expert. The Court then entered a Civil Jury Trial Order, which established a "mandatory" timeline for identification of experts by all parties. Plaintiff did not object to that timeline, nor to the dates contained therein, when it was entered. Subsequently, Plaintiff sought, and received, a 60-day extension of time in which to identify her experts under the Civil Jury Trial Order. On several occasions the trial judge took pains to explain the importance of this deadline to Plaintiff. Nevertheless, by the end of this 60-day extension period,

Plaintiff still had failed to identify any experts, and had not moved for any additional extensions of time, even though in her earlier discovery responses and again in her July 22, 2005 Status Conference Statement, Plaintiff claimed already to have retained one medical expert.

D.

The Trial Court and the Court of Appeals Both Properly Held That This Is Not a *Res Ipsa Loquitur* Case, and Therefore, Plaintiff Needed an Expert.

Plaintiff-Appellee argued below that that the Trial Court erred in granting Summary Judgment because she might have been able to proceed under a *res ipsa loquitur* theory. This argument is without merit for several reasons. First, Appellee did not plead *res ipsa loquitur*.

Moreover, *res ipsa loquitur* is reserved for those rare cases where the Defendants' negligence is obvious, or at least can be inferred from the circumstances without expert testimony, and where such negligence is the only reasonable explanation for Plaintiff's injury. *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). Even a cursory review of Plaintiff's Complaint demonstrates that this is not a *res ipsa loquitur* situation. Specifically, Plaintiff's Complaint alleged that she suffered the following injuries as a direct result of Defendants' negligence:

- "Irreversible vascular and/or cerebral injury" (T.R. 1-7, ¶ 11 of Plaintiff's Complaint.
- "Dilatation of the heart, left atrium and left ventricle" (Id., ¶ 12).
- "Pleural effusion of her left lower lung" (Id., ¶12).
- "Pericardial pleural" (Id., ¶ 12).
- "Atrial fibrillation" (Id., ¶ 14).
- "Toxic" blood (Id., ¶ 17).

- "Internal bleeding of her organ and/or organs" (Id., ¶ 18).
- "Brain damage" (Id., ¶ 18).
- "Cerebral aneurysms" (Id., ¶ 20).
- "Significant damage to her central nervous system, heart, lungs and brain" (Id., ¶ 20).

Is there any possibility that the average layperson might intuitively understand the nature of these injuries, let alone the causal mechanism which allegedly exists between Defendants' conduct and Plaintiff's injuries? Obviously, the answer is "no." That conclusion seems inescapable when one reads the Status Conference Statement filed by Plaintiff in the Trial Court. In her Status Conference Statement, Plaintiff describes her Complaint, and the issues raised by that Complaint, as follows:

> The Complaint alleges causes of action against the Defendants for medical malpractice and negligence. The Complaint seeks both compensatory and punitive damages against all Defendants for the Defendants' alleged negligent conduct, which said conduct *is alleged by Plaintiff to have caused Plaintiff to suffer severe vascular injuries to her heart, lungs, central nervous system and serious cerebral injuries to Plaintiff's brain.* (Complaint pp. 3-6). The Complaint alleges, generally, that Defendant Physicians and their practice, along with Defendant Norton Hospital, had treated Plaintiff over the course of several years prior to the filing of this action for atrial fibrillation and other heart problems and the Defendant Physicians and their practice, along with Defendant Norton Hospital, knew or should have known that Plaintiff's heart condition had deteriorated to the point that Plaintiff should have been referred to a vascular surgeon no later than May of 2003. (Complaint pp. 3-4).
>
> * * *
>
> On May 9, 2005, Plaintiff underwent cardiothoracic surgery in which her mitral valve, aortic valve, ascending aorta, and aortic root were replaced. *Thus, the primary issues in this case involved the cardiovascular care Plaintiff received from the Defendants from 1978 continuing until 2004, the extent to which this care was improper, the date the care first became improper, the extent to which the Defendants knew that Plaintiff's cardiovascular illnesses were no longer stable and were deteriorating, to Plaintiff's detriment. Additionally, the failure*

of the Defendants to advise Plaintiff that her cardiovascular conditions were deteriorating, the failure to refer Plaintiff to a cardiothoracic surgeon once the Defendants discovered Plaintiff's cardiovascular conditions were deteriorating and, finally, the failure to properly prescribe, administer and monitor Plaintiff's anticoagulation therapy.

(Plaintiff's Status Conference Statement, pp. 3-5, at T.R. 331-334, emphasis added). Given these varied and *extremely* complex medical issues, the Trial Court and the Court of Appeals were certainly correct when they both held that this case requires Plaintiff to have an expert witness.

II.

THE COURT OF APPEALS ERRED IN ITS REASONS FOR REVERSING THE TRIAL COURT

A.

The Court of Appeals Incorrectly Interpreted the Trial Court's Decision as a Discovery Sanction or an Involuntary Dismissal For Procedural Non-Compliance, Instead of Summary Judgment on the Merits.

In its decision reversing the trial court, the Court of Appeals stated that "the summary judgment and the Order denying the motion to vacate clearly demonstrates that the trial court was sanctioning Pearson for failing to adhere to its deadline for disclosing her expert witnesses." (Court of Appeals Opinion, Appendix 1, p. 8.) Unfortunately, this misperceives and mischaracterizes the basis for the trial court's summary judgment. As Judge McDonald-Burkman stated in her December 12, 2005 Order Granting Summary Judgment, she entered the Order because "Pearson is unable to sustain her burden of proof against any of the Defendants without competent expert testimony . . . [and] she has not identified any experts nor supplied CR 26.02 information." (Order Granting Summary Judgment, Appendix 2, p. 1). Later, in her February 24, 2006 Order overruling Pearson's motion to vacate the summary judgment, Judge

McDonald-Burkman emphasized that the basis for her summary judgment was that "Pearson was unable to sustain her burden in this medical malpractice case without expert testimony." (February 24, 2006 Order, Appendix 3, p. 2.) Again, later in that same Order she reiterated that Pearson "could not sustain her burden," *i.e.*, because she did not have an expert. (*Id.*, at p. 3.)

Contrary to the implications of the Court of Appeals' Opinion, which vacated and remanded the summary judgment, Judge McDonald-Burkman was careful to explain that the basis for her summary judgment was Pearson's inability to present even a *prima facie* case of negligence. Without an expert witness, Pearson was simply unable to present a submissible case against any of the Defendants below, including this Appellant herein. In short, Appellant respectfully submits that the Court of Appeals incorrectly perceived this case as a dismissal for non-compliance with a procedural deadline, as opposed to a summary judgment on the merits, which in fact it was.

B.

<u>The Court of Appeals' Opinion Mandates Application of the *Ward v. Housman* "Six-Factor Analysis," Which this Court has not Specifically Adopted And Should not Apply to this Case.</u>

In its Opinion, the Court of Appeals criticizes the trial court's failure to engage in the "six-factor analysis" adopted in *Ward v. Housman*, 809 S.W. 2d 717 (Ky. App. 1991), which decision articulated six factors which the Court of Appeals said should be examined before a case is "involuntarily dismissed." (*See* Appendix 1, pp. 7-8.) The Court of Appeals also criticized the trial court for its failure to "make findings [as to] whether Pearson acted willfully or in bad faith in seeking the extensions or whether it considered any less drastic sanctions other than dismissal." (*Id.*, at p. 8).

Respectfully, Appellant submits that the Court of Appeals' "six-factor analysis" exceeds what this Court has adopted. While it certainly is true, as the Court of Appeals' points out in its Opinion, that the trial court is free to "impose sanctions for failure to comply" with the court's discovery orders, instead of granting summary judgment, nevertheless, that decision is properly "within the trial court's discretion." *Baptist Healthcare System, Inc. v. Miller*, 177 S.W. 3d 676, 681-82 (Ky. 2005). As *Miller* suggests, it should be within the trial court's discretion to *either* impose sanctions for the failure of a party to comply with court ordered deadlines *or* to grant summary judgment if such compliance means that the Pearson is thereby unable to make a *prima facie* case. However, the Opinion of the Court of Appeals effectively takes that discretion away from the trial judge, and mandates that the imposition of sanctions is the appropriate remedy, rather than the granting of summary judgment.

In the instant case, Judge McDonald-Burkman in her February 24, 2006 Order denying Pearson's motion to vacate, emphasized that the basis for her Order of Summary Judgment went to the merits, in that Pearson failed to secure a necessary medical expert to support her case, notwithstanding reasonable deadlines imposed by the court. In so finding, she was not sanctioning or penalizing Pearson for a failure to meet deadlines, but simply recognizing that *Pearson was unable to prove an essential element of her claim*. Under such circumstances, the trial judge should be empowered with authority to enter summary judgment, as Judge McDonald-Burkman did here.

C.

The "Six-Factor Analysis" of *Ward v. Housman* Should Not Apply, Because the Facts Herein are Substantially More Egregious Than in *Ward.*

The facts in this case demonstrate a consistent pattern of dilatory conduct and delay on the part of Pearson, not simply one missed deadline. From the inception of her lawsuit, Pearson repeatedly requested, and was granted, extensions of time by the Court on all types of matters: responses to discovery, responses to dispositive motions, and responses to court orders. Moreover, these motions for extension of time were usually filed at the last minute, or after the fact. Nevertheless, the court very patiently and generously granted every one of Pearson's requests for extension of time, even in the face of objections by opposing parties.

The Court of Appeals cites *Ward v. Housman*, 809 S.W.2d 717 (1991) as authority for the proposition that the Summary Judgments below were improvidently granted. However, that reliance is misplaced, because *Ward* is distinguishable from the instant case. In *Ward*, the Kentucky Court of Appeals was critical of the trial court for dismissing plaintiff's Complaint after "a one-time dilatory act of counsel." As noted above, and as recited in detail by the trial judge herein in her Order overruling Pearson's Motion to Vacate, the case *sub judice* does not involve "a one-time dilatory act," but rather a consistent and repeated pattern of dilatory conduct.

Second, *Ward* is distinguishable because, unlike the instant case, the defendant in *Ward* never asked the Court to dismiss plaintiff's complaint, so in dismissing plaintiff's complaint the trial court gave the defendant more than he even requested. As the *Ward* court noted: "The result that [the defendant] got was more than what he had asked for." 809 S.W.2d at 719. In the

instant case, unlike *Ward*, both defendants had long-standing Motions for Summary Judgment pending, so the trial court gave the defendants their requested relief.

Third, unlike *Ward*, the Trial Court in the case *sub judice* had warned the parties that "full and complete compliance with this [civil jury trial order] is mandatory," and further that failure to comply with the Civil Jury Trial Order may cause the Court to "limit/deny testimony of witnesses." (*See* Civil Jury Trial Order, Appendix 4, at ¶ 17, copy attached). Further, the Civil Jury Trial Order warned that "failure to comply with the letter and spirit of [Rule 26, regarding identification of experts and expert opinions] may result in the suppression of the expert's testimony." (*Id.,* at ¶ 16.) In short, Pearson had been fully placed upon notice by the Trial Court that her failure to comply with the Court's Civil Jury Trial Order, including timely identification of expert witnesses, might result in the Court striking her expert witnesses, or otherwise foreclosing their testimony.

Given that the Court in *Ward* made a point of emphasizing that the plaintiff's Complaint should not have been dismissed for "a one-time dilatory act," an appropriate implication to be drawn is that the result would not be the same where a pattern of dilatory conduct is involved. That conclusion seems almost to be inescapable; otherwise, our trial courts would have little effective means of enforcing their pretrial orders, and particularly, their pretrial deadlines. Moreover, the fact that *Ward* emphasized that the defendant never sought the remedy of dismissal, and also, that the trial court had never warned the plaintiff about the possibility of dismissal, may also be taken as an indication that the result would be different where (as in the instant case) the trial court *did warn* about the possibility of striking the parties' expert witnesses, and the defendants *did seek* summary judgment. In short, had the *Ward* Court been presented

with the facts of the instant case, Appellant respectfully submits that the holding in *Ward* would have been different.

D.

The Burden of Proof Imposed by the Court of Appeals to Justify Summary Judgment was Unattainable and Unreasonable.

In its Opinion, the Court of Appeals stated that the defendants below, including this Appellant, "had the burden of demonstrating the non-existence of a genuine issue of material fact," and failed to do so because those defendants "did not aver [that] it was impossible for Pearson to obtain expert testimony." (Court of Appeals' Opinion, Appendix 1, at p. 8). Remarkably, it reached this conclusion *despite the fact that it also agreed with the defendants that "the record does not establish the existence of a genuine issue of material fact. . . ."* *Id.*, at pgs. 6-7. (emphasis added.) In effect, the Court of Appeals appeared to be saying that Plaintiff had not demonstrated the existence of a genuine issue of material fact; nevertheless, summary judgment was inappropriate because defendants somehow had the burden of showing that "it was impossible for Pearson to obtain expert testimony." (*Id.*, at p. 8.)

Respectfully, Appellant submits that the burden of proof required by the Court of Appeals is effectively impossible to meet, and is more than what is required in standard summary judgment motions. In fact, a motion for summary judgment must be analyzed based on upon the evidence *which is in the record*, rather than what *might be* presented at trial. *Benningfield, v. Pettit Environment, Inc.* 183 S.W. 3d 567 (Ky. App. 2005). Otherwise, it is always possible that something will "turn up" at a later date; accordingly, if summary judgment is denied on this basis, then a summary judgment becomes a practical impossibility. *See Conley v. Hall*, 395 S.W.

2d 575 (Ky. 1965). " The curtain must fall at some time upon the right of litigant to make a showing that a genuine issue as to a material fact does exist." *Neal v. Welker*, 426 S.W. 2d 476 (Ky. App., 1968).

The standard imposed by the Court of Appeals was that the defendants had to demonstrate that "it was impossible for Pearson to obtain expert testimony." Aside from the practical difficulty (or impossibility) of meeting such a burden, Appellant submits that this exceeded the proper standard, which is to demonstrate that there exists no genuine issue of material fact *in the record*. In its Opinion, the Court of Appeals found that to be true (*Id.*, at pgs. 6-7), yet demands more of the defendants. The burden imposed by the Court of Appeals is excessive, and must be corrected by this Court.

CONCLUSION

Plaintiff-Appellee repeatedly and consistently sought and obtained extensions of time, which the Trial Court invariably granted. In fact, almost no procedural step occurred without Plaintiff seeking, and obtaining, an extension of time. Finally, after obtaining a liberal extension of time to identify her experts, Plaintiff failed to file the required disclosure, failed to timely explain this omission, and failed to timely request an additional extension. Under circumstances such as these, our trial courts must have the inherent authority to strike or prohibit expert witnesses; otherwise, their pretrial orders mean very little. Given that this is a medical malpractice case, the Trial Court properly determined that Plaintiff's case could not succeed without an expert, and in light of Plaintiff's failure to designate one, Summary Judgment was warranted under the circumstances.

For all of the foregoing reasons, the Opinion of the Court of Appeals should be reversed, and the Order of Summary Judgment entered by the Trial Court should be reinstated.

Respectfully submitted,

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