COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2007-SC-000389
CASE NO. 2007-SC-000414
CASE NO. 2008-SC-000133

FILED
SEP 03 2008
SUPREME COURT CLERK

MELANIE LYNN PEARSON — APPELLEE/CROSS APPELLANT

ON DISCRETIONARY REVIEW
FROM KENTUCKY COURT OF APPEALS
CASE NO. 2006-CA-000585-MR

JEFFERSON CIRCUIT COURT CASE NO. 05-CI-002182

ROBERT E. SOLINGER, M.D.,
CHRISTOPHER JOHNSRUDE, M.D.,
MICHAEL RECTO, M.D., AND
PEDIATRIC CARDIOLOGY
ASSOCIATES, P.S.C. — APPELLANTS/CROSS APPELLEES

BRIEF ON BEHALF OF APPELLEE/ CROSS APPELLANT MELANIE LYNN PEARSON

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing Brief was mailed this, the 2nd day of September, 2008, via first class mail postage prepaid and properly addressed to James Grohmann, O'Bryan, Brown & Toner, 455 S. Fourth Avenue, 1500 Starks Bldg., Louisville, KY 40202; Bradley R. Hume, Thompson, Miller & Simpson, 600 W. Main Street, Suite 500, Louisville, KY 40202; Hon. Judith McDonald-Burkman, Judge Jefferson Circuit Court, Division 9, 700 W. Jefferson St., Louisville, KY 40202; and Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. It is further certified that Appellee/Cross Appellant has not withdrawn the record on appeal.

Alan S. Rubin
231 S. Fifth Street, Suite 201
Louisville, KY 40202
(502)587-1050

I. INTRODUCTION

This is a medical malpractice case in which the Court of Appeals Reversed the trial court's summary judgment which was rendered against Appellee/Cross Appellant Melanie L. Pearson on December 12, 2005. The trial court dismissed Pearson's medical malpractice complaint as a discovery sanction because Pearson was eleven days late in disclosing her hired medical expert witnesses. At the time the trial court dismissed Pearson's complaint, the case was only nine (9) months old and Pearson had disclosed several treating physician expert witness opinions which supported Pearson's claims that the Appellants had caused Pearson's injuries due to a patent breach in the applicable standard of care. Pearson appealed the trial court's so called "summary judgment" and the Court of Appeals correctly applied CR 56.03 and a long line of Kentucky Appellate Cases and concluded that the trial court had improperly granted summary judgment against Pearson. Indeed, the Court of Appeals stated that, "Reviewing the record in a light most favorable to Pearson, resolving all doubts in her favor, we conclude that Appellees did not meet their burden of demonstrating the non-existence of any genuine issue of material fact." (Court of Appeals Opinion, p. 8)

Thus, the Court of Appeals clearly held that there were material issues of fact in dispute at the time the trial court granted Summary Judgment to Solinger. The Court of Appeals also treated the trial court's so called Summary Judgment as an involuntary dismissal under CR 41.02 (Opinion pg. 8) and Remanded the case to the trial court with instructions for the trial court to conduct a six factor analysis as is required under Ward v. Housman, 809 S.W. 2d 717, 719 (Ky. App.1991). The Court specifically held that the responsibility to make findings under the six factors enumerated in Ward falls "solely upon the trial court." The Court of Appeals cited the very recent case of Toler v. Rapid American, 190 S.W. 3d 348, 351 (Ky. App. 2006), for this proposition. (Opinion pg. 8)

II. STATEMENT CONCERNING ORAL ARGUMENT

Appellee/Cross Appellant respectfully requests oral argument be held because oral argument will assist the Court in understanding that the trial Court erred in granting summary judgment by ignoring the holdings in cases such as Ward v. Housman, 809 S.W.2d 717 (Ky. App. 1991); Perkins v. Hausladen, 828 S.W.2d 652 (Ky. 1991); Baptist Health Care Systems Inc v. Miller, 77 S.W.3d 676 (Ky. 2005); Bank One, Kentucky, N.A. v. Murphy, 52 S.W.3d 540, 545 (Ky. 2001); Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985); and Barton v. Gas Service Co., 423 S.W. 2d 902, 904 (Ky.1968).

III. COUNTERSTATEMENT OF POINTS AND AUTHORITIES

I. INTRODUCTION i

II. STATEMENT CONCERNING ORAL ARGUMENTS ii

III. COUNTERSTATEMENT OF POINTS AND AUTHORITIES iii

IV. INTRODUCTORY COMMENT 1

V. STATEMENT OF FACTS 1

1. Specific Allegations Of Negligence 1

2. Lack of Informed Consent / Breach In The Applicable Standard Of Care For Prescribing,Monitoring And Managing Pearson's Coumadin Anticoagulation Therapy 3

VI. PROCEDURAL HISTORY OF THE CASE 7

1. Solinger's Rush To Have Pearson's Case Dismissed 7

2. Pearson Develops Congestive Heart Failure And Undergoes Major Open Heart Surgery 8

3. Extensions Of Time Sought By Pearson During The First Three Months Of This Case 9

4. Solinger Files A 3 Paragraph Motion For Summary Judgment Based Upon Non-Existent Judicial Admissions 11

5. Pearson Responds To Solinger's 3 Paragraph Motion For Summary Judgment ... 12

6. Pearson Discloses That She Has Both Treating Physician And Hired Expert Witnesses To Support Her Claims And Discloses The Substance And Basis Of The Experts' Opinions 13

7. Pearson Attempts, On Numerous Occasions, To Have The Court Clarify Its Intentions Concerning Solinger's Summary Judgment Motion 15

8. The Trial Court, In Contravention Of JRP Local Rule 707, Enters A Civil Jury Trial Order And Sets The Case For Trial Only Four Months And Seventeen Days After The Complaint Is Filed 16

9. The Trial Court's Civil Jury Trial Order Requires Disclosure Of Pearson's

Treating Physician Experts Sixty Days Prior To Trial 17

10. Pearson Propounds Interrogatories And Requests For Admission To Dr. Johnsrude And Dr. Johnsrude's Answers To These Discovery Requests Are Evasive And Non Responsive 19

11. Pearson Timely Moves The Trial Court For A 60 Day Extension Of Time To Disclose The Identity Of Her Hired Expert Witnesses 20

12. The Hearing On The Motion For Extension Of Time And The October 2005 Statu Conference 22

13. Pearson Is Unable To Attend The December 9, 2005 Status Conference And Requests The Status Conference Be Continued 23

14. Solinger Files A New Motion For Summary Judgment On December 12, 2005 And The Trial Court Grants The Motion On The Same Day It Is Filed 25

15. Pearson Timely Moves The Trial Court, Under CR 59.05, To Vacate The Court's December 12, 2005 Summary Judgment 26

16. The Trial Court's February 24, 2006 Order Denying Pearson's CR 59.05 Motion... 27.

17. Pearson Appeals The Trial Court's Summary Judgment To The Court Of Appeals And The Court Of Appeals Reverses And Remands The Trial Court's Summary Judgment 28

18. Solinger Files A Motion For Discretionary Review Which Is Granted By This Court And Pearson Files A Cross Motion For Discretionary Review Which Is Also Granted

VII. COMPLIANCE WITH CR 76.12(c)(v) ..... .29

VIII. ARGUMENT 29

A. STANDARD OF REVIEW 29

Pearson ex. Rel. Trent v. National Feeding Systems, Inc., 90 S.W. 3d 46, 49 (Ky. 2002) 29

Lewis v. B & R Corporation, 56 S.W. 3d 432, 436 (Ky. App. 2001) 29

Scifres v. Kraft, 916 S.W. 2d 779, 781 (Ky. App. 1986) 29

Palmer v. International Ass'n of Machinists & Aerospace Workers, 822 S.W. 2d 117, 120 (Ky. 1994) ..... .29

3D Enterprises Contracting Corp. v. Louisville & Jefferson County Metropolitan Sewer District, 174 S.W. 3d 440, 445 (Ky. 2005) ..... .29

Blevins v. Moran, 12 S.W. 3d 698, 700 (Ky.App. 2000) 29

Goldsmith v. Allied Building Components, Inc., 833 S.W. 2d 378, 381 (1992) 30

Scifres v. Kraft, 916 S.W. 2d 779, 781 (Ky.App.1996) 30

Estate of Wheeler v. Veal Realtors and Auctioneers, Inc., 997 S.W. 2d 497 498 (1999) . 30

Morton v. Bank of the Bluegrass & Trust Co., 18 S.W. 3d 353, 358 (1999) 30

Perkins v. Hausladen, 828 S.W. 2d 652, 654(Ky. 1992) 30

Bank One, Kentucky, N.A. v. Murphy, 52 S.W.3d 540, 545 (Ky. 2001) 30

B. THE CIRCUIT COURT ABUSED ITS DISCRETION BY GRANTING SUMMARY JUDGMENT WHEN PEARSON WAS A MERE 11 DAYS LATE IN DISCLOSING THE NAMES OF HER HIRED EXPERT WITNESSES 30

1. Standard for Summary Judgment 30

Steelvest Inc. v. Scan Steel Services Center Inc, 807 S.W.2d 476 (Ky. 1991) 30

Hill v. Alvery, 558 S.W. 2d 613 (1977) 30

Poe v. Rice, 706 S.W. 2d 5, 6 (Ky. App.1986) 30

Perkins v. Hausladen, 828 S.W. 2d 652 (Ky. 1992) 31

Tillery v. Louisville & Nashville R.R. Co., 433 S.W.2d 623, 624 (Ky. 1968) 31

Estell v. Barrickman, 571 S.W.2d 650, 653 (Ky. App. 1978) 31

James Graham Brown Foundation v. St. Paul Fire & Marine Ins. Co., 814 S.W. 2d 273, 276 (Ky. 1991) 31

Commonwealth v. Thomas Heavy Hauling Inc., 889 S.W.2d 807 (Ky. 1994) 31

Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985) 31

Barton v. Gas Service Co., 423 S.W. 2d 902, 904 (Ky.1968) 31

2. Solinger's Claim That Pearson Did Not Have Any Medical Experts To Support Claims Of Medical Malpractice Is False And Is Not Supported By The Record. 31

CR 56.03 31

Commonwealth Transportation Cabinet, Dept. of Highways v. R.J. Corman Railroad Co./Memphis Line, 116 S.W. 3d 488, 498 (Ky.2003) 32

3. It Was Undisputed Pearson Had An Unnamed Hired Expert Well Before The Deadline For Disclosing An Expert's Name 35

Ward v. Housman, 809 S.W. 2d 717 (Ky. App. 1991) 36

CR 56.03 36

Baptist Health Care Systems Inc.v. Miller, 177 S.W.3d 676 (Ky. 2005) 36

CR 41.02(1) 37

Toler v. Rapid American, 190 S.W.3d 348 (Ky.App. 2006) 37

Jaroszewski v. Flege, 204 S.W. 3d 148 (Ky.App. 2006) 37

Equitania Ins. Co. v. Slone & Garrett P.S.C., 191 S.W. 3d 552, 556 (Ky. 2006) 39

CR 59.05 39

Gullion v Gullion, 163 SW 3d 888 (Ky. 2005) 39

4. The Appellants Were Not Prejudiced By The Non-Disclosure Of Expert Witnesses As Of The Date They Sought Summary Judgment 40

Poe v. Rice, 706 S.W. 2d 5 (Ky. App. 1986) 40

C. THE CIRCUIT COURT ABUSED ITS DISCRETION BY GRANTING SUMMARY JUDGMENT WHEN APPELLANTS FILED NO AFFIDAVITS AND SUBMITTED NO EVIDENCE OR TESTIMONY IN SUPPORT OF THEIR BARE BONES MOTIONS 41

Ferguson v. Utilities Elkhorn Coal Co., 313 S.W.2d 395 (Ky. 1958) 41

State Street Bank v. Heck's Inc., 963 S.W. 2d 626, 630-31 (1998). 41

D.H. Overmyer Co. v. Hirsh Bros. & Co., 459 S.W. 2d 598, 600 (1970) 41

Steelvest, Inc. v. Scansteel Service Center Inc., 807 S.W.2d 476 at 482 (Ky. 1991)
Hubble v. Johnson, 841 S.W. 2d 169, 171 (Ky.1992) 41

Williams v. City of Hillview, 831 S.W. 2d 181, 183 (Ky. 1992) 41

Hibbitts v. Cumberland Valley Nat'l Bank & Trust Co., 977 S.W. 2d 252, 253 (Ky. App. 1998) 41

Smith v. Higgins 819 S.W. 2d 710, 712 (Ky. 1991) 41

Davis v. Dever 617 S.W.2d 56 (Ky. App. 1981) 42

Robert Simmons Const. Co. v Powers Regulator Co., 390 S.W.2d 901, 905 (Ky. 1965). 42

Roberts v. Davis, 422 S.W. 2d 890, 894 (Ky. 1968) 42

Goff v. Justice, 120 S.W. 3d 716, 724 (Ky.App. 2002) 42

White v. Rainbo Baking Co. 765 S.W. 2d 26 (Ky. App. 1988) 42

D. THE CIRCUIT COURT ABUSED ITS DISCRETION BY NOT TREATING THE "MOTION FOR RULING ON MOTION FOR SUMMARY JUDGMENT" AS A NEW MOTION AND GIVING PEARSON NO OPPORTUNITY TO RESPOND . 43

1. Solinger's New Motions For Summary Judgment Raised, As A New Ground, That Pearson Was Not In Compliance With The Court's Trial Order 43

CR 56.03 44

Old Mason's Home of Kentucky, Inc. v. Mitchell, 892 S.W. 2d 304 (Ky.App. 1995) 44

Equitable Coal Sales Inc. v. Duncan Machinery Movers Inc., 649 S.W.2d 415 (Ky. App. 1983) 44

Hay v. Hayes, 564 S.W.2d 224 (Ky. App. 1978) 44

Bowdidge v. Lehman, 252 F.2d. 366, 368 (6th Cir. 1958) 44

Conley v. Hall, 395 S.W.2d 575, 580 (Ky. 1965) 44

E. THE CIRCUIT COURT ABUSED ITS DISCRETION BY REFUSING TO PERMIT PEARSON TO FILE THE AFFIDAVITS OF HER EXPERTS LATE . .45

CR 26.02 . . . . . **45**

CR 56 . . . . . **45**

Baptist Health Care Systems Inc v. Miller, 177 S.W.3d 676 (Ky. 2005) . . . . . **.45**

Bridwell v. City of Dayton, 763 S.W. 2d 151, 152 (Ky. App. 1988) . . . . . **.45**

CR 6.02(b) . . . . . **.45**

1. The Drug Manufacturer's Package Insert For Coumadin, As Published In The Physicians Desk Reference, Provided The Applicable Standard Of Care 46

2004 Physicians Desk Reference, Page 1051 . . . . . **47**

2004 Physicians Desk Reference, Page 1052 . . . . . **47**

American College of Chest Physicians Sixth Consensus Conference on Antithrombotic Therapy, Chest 2001; 119/1/ January 2001 Supplement pg.198-99 . . . . . **47**

2. As Pearson's Treating Cardiology Group, Solinger Had A Duty To Use Reasonable Care In Prescribing, Administering And Monitoring Pearson's Coumadin Anticoagulation Therapy 49

3. Solinger Was Aware Of The Well Known Coumadin/Amiodarone Drug/Drug Interaction But Failed To Reduce Pearson's Initiation Dose Of Coumadin By 30-50 Percent 49

E-Medicine October 2002) Medical Article "Ventricular Fibrillation" . . . . . **.49**

Coumadin Pharmacy Monograph From Norton Hospital **49**

Norton Hospital *Drug Checker/Drug Interaction Tool* **50**

2004 Physicans Desk Reference, Page 3248 . . . . . **.50**

Thompson v. Carter, 518 So. 2d. 609 (Miss. 1987) **51**

Haught v. Maceluch, 681 F.2d 291 n. 12, *reh'g denied*, 685 F.2d 1385 (5th Cir 1982) . . . **51**

Mulder v. Parke Davis & Co, 181 N.W. 2d 882 (1970) . . . . . **.52**

Fournet v. Roule-Graham, 783 So. 2d 439 (La. Ct. App. 2001) . . . . . **.52**

Terrebonne v. Floyd, 767 So. 2d 758 (La. Ct. App. 2000) **52**

Salgo v. Leland Stanford Jr. Univ. Bd. Of Trustees, 317 P. 2d 170 (Cal. Ct. App. 1957) **52**

Riffey v. Tonder, 375 A. 2d 1138 (Md. App. 1977) **52**

Witherell v. Weimer, 499 N.E. 2d 46 (Ill. App. 1986) **52**

Nolan v. Dillon, 276 A.2d 36 (Md. App. 1971) **52**

Perkins v. Hausladen, 828 S.W.2d 652, 655-56 (Ky. 1992) **53**

4. Movants Did Not Warn Pearson About The Risk Of Cerebral Bleeding Prior To, During Or After Her Coumadin Anticoagulation Therapy And This Was A Patent Violation Of Kentucky's Informed Consent Statute KRS 304.40-320 ..... **53**

Holton v. Pfingst, 534 S.W. 2d 787, 788 (Ky. 1975) **53**

Keel v. Saint Elizabeth Medical Center, 842 S.W. 2d 860, 861 (Ky. 1992) **54**

Louisell and Williams, Medical Malpractice, Vol 2, Sec. 22.04 ..... **54**

Vitale v. Henchey, 24 S.W. 3d 651 (Ky. 2000) **54**

KRS 304.40-320 ..... **54**

2004 Physicians Desk Reference pg. 1049 ..... **54**

American College of Chest Physicians Sixth Consensus Conference on Antithrombotic Therapy, Chest 2001; 119/1/January 2001 Supplement pg.198-99 ..... **54**

F. It Was An Abuse Of Discretion For The Trial Court To Permit Solinger To Raise The Non-Disclosure Of An Expert Witness For The First Time In A Motion For Ruling On Summary Judgment And This Error Improperly Shifted The Burden Of Proof On Summary Judgment From Solinger To Pearson 55

CR 36 55

White v. Rainbo Baking Co., 765 S.W. 2d 26 (1989) 56

Conley v. Hall, 395 S.W. 2d 575 (Ky. 1965) 56

Goff v. Justice, 120 S.W. 3d 716 (Ky. App.2002) 56

American Ins. Co. v. Horton, 401 S.W. 2d 758 (Ky. 1966) 57

1. The Trial Court Abused Its Discretion By Failing To Continue The December 9, 2005 Status Conference 57

2. Under Kentucky Law, Continuances Of Summary Judgment Proceedings Are To Be Liberally Granted 58

Perkins v. Hausladen, 828 S.W.2d 652 (Ky.1992) 58

CR 56.03 58

Rexing v. Doug Evans Auto Sales, Inc., 703 S.W.2d 491 (Ky.App.1986) 59

Hay v. Hayes, 564 S.W.2d 224 (Ky.App.1978) 59

3. The Trial Court Violated JRP 401(a), CR 56.03 And The Pre-Trial Order By Granting Solinger's New Motion For Summary Judgment 59

Jefferson Local Rule of Practice Rule 401(a) 59

CR 56.03 59

4. The Trial Court Committed Palpable Error Under CR 61.02 By Allowing A Medical Records Summary To Be Filed Without Any Prior Notice To Pearson 60

Kentucky Rule of Evidence 1006 61

Davenport v. Ehpraim McDowell Memorial Hospital, Inc., 769 S.W. 2d 45 (Ky. App. 1988) .

Municipal Paving Co. v. Farmer, 255 S.W.2d 618 (1953) 61

Texas Gas Transmission Corportaion v. Board of Education of Ballard County, 502 S.W.2d 82, 87 (Ky. 1973) 61

Elden v. Muir, 163 Ky. 685, 174 S.W. 474, 476 (1915) 61

KRS 422.320 62

IX. **CONCLUSION** 62

Ward v. Housman, 809 S.W. 2d 717 (Ky. App 1991) 63

Equitania Ins. Co. v. Slone & Garrett P.S.C., 191 S.W. 3d 552, 556 (Ky. 2006) 63

IV. INTRODUCTORY COMMENT

Pearson has separated the factual history and procedural history in this complex case into two sections for ease of reading and clarity.

V. STATEMENT OF FACTS

On March 7, 2005, Pearson filed her pro-se Complaint for Medical Malpractice. (Record at 1-7) (Hereinafter R.) (Hereinafter App.). Pearson alleged the Defendants below overdosed her on Coumadin, an anticoagulant, while treating her for a heart condition. Defendants Recto and Johnsrude prescribed Coumadin at a level 2-3 times the maximum dosage recommended in Coumadin's FDA approved product insert and the Physicians Desk Reference (PDR). Pearson alleged the Defendants overdosed her on the anticoagulation drug Coumadin by giving her an excessive 10mg initiation/loading dose which caused a Coumadin toxicity leading to a cerebral bleed and cerebral aneurysm. (R. 1-7 and 112).

Defendants Recto, Solinger and Johnsrude (Cardiology Defendants) failed to properly monitor and treat Pearson's longstanding congenital and acquired heart defects and failed to treat these conditions emergently when these conditions deteriorated to the point Pearson suffered irreversible injury in the form of significant dilatation of her left atrium, ventricle and destruction of her native heart valves. (R. 3-6).

1. Specific Allegations Of Negligence

On February 18, 2004, Pearson was hospitalized for atrial fibrillation and was prescribed 10mg of Coumadin by Dr. Johnsrude. **This was a dose greatly in excess of the written standard of care set forth in the Package Insert for the drug and in the Physician's Desk Reference** (PDR). Coumadin should be started at a 2-5mg dose. (R. at 110 and Uniform Reply Brief Exhibits, Ex. 3 Hereafter URBE ex. 3). According to the Coumadin Package Insert and PDR, Coumadin does

not dissolve existing blood clots and a large initiation dose (such as 10 milligrams) does not provide any greater protection against new clot formation than does a smaller dose, but a larger dose does **increase risk of bleeding**. Thus, from a risk vs. reward criteria (the standard by which all medical treatments are judged), there was no rational basis for using such a large dosage of Coumadin.

Upon her discharge from Norton Hospital on February 19, 2004, Pearson's anticoagulation therapy was monitored by Norton Hospital laboratory. Upon discharge, Pearson was told by Dr. Johnsrude to increase her Amiodarone to 300mg per day and to take an additional 10mg of Coumadin that evening. On February 20, 2007, Dr. Recto reduced the dose to 5mg because her INR was "a little high" at 2.8. (URBE Ex. 3) INR is a measurement of blood's ability to clot

When Pearson's INR became abnormal (INR 2.8) on February 20, 2004, which was **less than 48 hours after beginning Coumadin**, Defendant Recto reduced her Coumadin dosage by half to 5 mg when it should have been stopped altogether.

On the following day, February 21, 2005, Pearson became nauseous and began vomiting. Dr. Recto, when told of these symptoms, advised Pearson to cease the Coumadin and to come in for INR testing the next day, which was February 22, 2004. Later that afternoon, Dr. Recto advised Pearson that her INR was high and to be careful not to become involved in an accident, hit her head or cut herself. He did not advise Pearson she was at significant risk for spontaneous bleeding because of her "critically high INR at 8.6". *Id.*

Six days after the Coumadin overdose began Pearson presented to Norton Hospital with various symptoms and was **diagnosed by a Norton Emergency Room doctor as suffering from "Coumadin Toxicity,"** as her INR was still Critically High at 7.5. This was admitted to by Norton's, although they contended the "Coumadin Toxicity" was not a diagnosis but rather a "clinical impression". (R. at 345)(URBE ex. 3 [ex. D to request #1]). Pearson was still not told she was toxic

on Coumadin, nor was she advised that she was at substantial risk for a cerebral bleed in the 14 days after her INR reached a level of 6.0.

Despite the fact that Pearson was toxic on Coumadin in late February 2004, for at least five days she was never advised of this fact by any of the Defendants. (R. at 79). During this entire period of time, Pearson's INR was above 6.0, and she was at significant risk for cerebral hemorrhage. (See, *American College of Chest Physicians Sixth Consensus Conference on Antithrombotic Therapy, Chest* 2001; 119/1/ January 2001 Supplement pg.198-99.)

On March 5, 2004, because of continuing severe headaches, Pearson had further diagnostic testing done via CT and MRI and Pearson was informed she had an aneurysm in her left middle cerebral artery, as well as a cerebral bleed, and that Coumadin could be responsible for these injuries. (R. at 77-78)

In April 2004, Pearson was advised by a treating neurosurgeon and nurse that blood anticoagulation levels as high as 8.6 and 7.5 (as Pearson's were on February 22-24) could cause a spontaneous cerebral bleed and that her cerebral aneurysm was caused by the inappropriate loading dose of Coumadin which was at least **twice** the recommended starting dose. (R. at 110) (App. to Pearson's Response to Motion for Discretionary Review).

Norton Hospital did not take appropriate steps to reduce Pearson's Coumadin Toxicity. (Affidavit of Algha Lodwick, p. 11). As a result of these deviations from the appropriate standards of care, Pearson developed symptomatic bleeding, symptomatic cerebral aneurysm and a cerebral bleed in her brain.

2. Lack of Informed Consent / Breach In The Applicable Standard Of Care For Prescribing, Monitoring And Managing Pearson's Coumadin Anticoagulation Therapy

Pearson was not warned of the serious side effects of Coumadin, nor was she advised in

any manner of the risk of a cerebral bleed while taking Coumadin. Cerebral bleed is the most feared complication of Coumadin anticoagulation therapy, yet Pearson was not informed of this risk. Pearson's physicians, the Defendants herein, did not tell her of the well-known dangerous interaction between Coumadin and Amiodarone, a drug all Appellants knew she was taking since July 2002. (R. at 108-110, 112-113).

The interaction between Coumadin and Amiodarone was well known to all Defendants in this case. Years before the Defendants prescribed and monitored Pearson's Coumadin anticoagulation therapy. Dr. Johnsrude and PCA even edited a medical article (in October 2002) titled "Ventricular Fibrillation" which stated Amiodarone increases the blood levels and anticoagulation effects of, among other things, Coumadin. The PDR and Product Insert standards of care for these medications call for Coumadin's 2-5mg initial dose to be **further reduced by 30-50%** when taken while on Amiodarone. The PDR contains a **Black Letter Warning** stating that this drug interaction almost always occurs [in 3-4 days] when these drugs are use concomitantly and, this interaction can cause life threatening bleeding if an empiric 30-50% dose reduction of Coumadin is not utilized. (Motion to Vacate Courts Order, Hereafter MVCO ex.3, 4). Just as the PDR warning predicts, Pearson's INR became toxic [3-4] days after she started Coumadin while taking Amiodarone.

Norton's own website's *Drug Checker/Drug Interaction Tool* broadcasts to the public that when Amiodarone and Coumadin are taken concomitantly, **an empiric 30-50% reduction in the dosage of Coumadin is required, or serious or life threatening bleeding can occur**. (URBE ex. 3, Plaintiff's Request for Admissions No. 1g-h)(App. 19). Norton's website rates this a "severe drug interaction".

Pearson's Interrogatory Responses clearly set forth these deviations and that Dr. Johnsrude

prescribed her 10mg of Coumadin initially, a dose which led to the Coumadin toxicity. Appellant Johnsrude admitted to prescribing this massive initial dose. (URBE collective ex. 4, pgs. 2-3).

Pearson also responded, in her Interrogatory Responses, that when her INR reading was known by Appellants to have been dangerously high, it should have been medically reversed with a simple and inexpensive oral dose of vitamin K or administration of Fresh Frozen Plasma. (URBE ex. 5, pgs. 12, 19; MVCO ex. 1, pgs. 56,57).

The *American College of Chest Physicians Sixth Conference on Antithrombotic Therapy*, **Chest 2001;119: at 22, (Suppl)** states that most patients commencing with an average dose of 5 milligrams of Coumadin will obtain an INR of 2.0 in 4-5 days. The *American College of Chest Physicians* also stated, in this same practice guideline, that the practice of using loading doses of Coumadin to initiate anticoagulation therapy is unnecessary. **Chest 2001; 119: at 22, (Suppl).** An INR of 2.8 **in less than 48 hours** is more than a little high and was a clear sign that Pearson's INR was going to become critically high. Two (2) days later her INR was **critically** high at 8.6. (R. at 109) (App.12, 13, 14, 15 and 18). Pharmacist and Anticoagulation Manager Algha Lodwick cited the above quote from the *American College of Chest Physicians* in support of his finding that Pearson was being overdosed on Coumadin when her INR was 2.8, in less than 48 hours, and that this overdose was a breach in the standard of care which resulted in Pearson suffering a cerebral bleed. (Affidavit of Alpha Lodwick at pgs. 3-6).

The above circumstances set forth the facts and opinions which support Pearson's proof of a deviation from the appropriate standard of care and were known to the Appellants as of at least August 25, 2005. Pearson responded, in her Interrogatories, that the above information came from diagnosis made by treating physicians contained in her medical records, medical literature and statements made by her current and past treating physicians. (MVCO ex. 1, 2; URBE ex. 5).

Pearson also alleged that despite Dr. Solinger's promise that he would present her case to the heart board for review of the necessity of heart surgery, he did not do so for over nine (9) months, and that Norton's own records document this. (URBE ex.5). Had Pearson's heart care been properly monitored, her heart valves would not have deteriorated to the point that they had to be replaced with bovine tissue valves. *Id.*

In response to the Cardiology Defendants' Interrogatories, Pearson stated:

Dr. Solinger, despite being aware of Pearson's condition since at least December 1999, failed to take any steps to prevent her congestive heart failure by referral for appropriate heart surgery and he failed to timely present her case to the heart board. In November 1999, Pearson was treated at Norton Hospital (which Dr. Solinger was aware of) and she was found to be suffering from **right sided heart failure, cardiomegaly (an enlarged heart), pulmonary nodules, a low normal ventricular ejection fraction and thickening of both her mitral valve and tricuspid valve leaflets**. (R. MVCO ex 1, p.50-53; URBE ex.5, p.23) Despite these significant findings and abnormalities, Pearson was never advised of these conditions or findings by Norton Hospital, Pediatric Cardiology Associates, or Dr Solinger. As a result of Dr. Solinger's delay, Pearson's heart condition significantly worsened over the next five years with numerous hospitalizations. (URBE ex. 5, pgs. 3-4 and 23).

Dr. Johnsrude overdosed Pearson on Coumadin, as established by his clear deviation for prescribing Coumadin, from what is set forth in the product insert and in the Physician's Desk Reference. Dr. Johnsrude did not warn Pearson of the risks of Coumadin, especially the risks when started at 2-3 times the maximum recommended dose. (URBE ex. 5, pgs. 6-12).

Dr. Johnsrude did not properly monitor Pearson's anticoagulation therapy (Coumadin medication), which "was clearly a deviation from accepted medical practice". Dr. Johnsrude and Dr.

Recto ignored Pearson's high INR level when they could have and should have taken steps to reverse it. (URBE ex. 5, pgs. 6-14)

Dr. Recto told Pearson to continue taking 5mg of Coumadin rather than stopping it when her INR level was already high only two days after beginning therapy. Dr. Recto failed to warn Pearson how critically high her INR level was on February 24, 2004 and that she was at risk for spontaneous bleeding. He failed to properly warn her of the risks involved with being supratherapeutic on Coumadin. (R. 73-78, 112).

VI. PROCEDURAL HISTORY OF THE CASE

1. Solinger's Rush To Have Pearson's Case Dismissed

Almost immediately after Pearson's Complaint was filed on March 22, 2005, Solinger filed a frivolous Motion to Dismiss Pearson's Complaint alleging the Complaint was barred by the Statute of Limitations (R. 50-54). Solinger never submitted an AOC 280 form as required by JRP 401(a) to have his Motion to Dismiss ruled upon and, after Norton Hospital's Motion to Dismiss based upon the same grounds was denied (R. 61-63), Solinger abandoned his Motion.

It is important to note that Solinger did not file an Answer to Pearson's Complaint for more than (5) five months.[1] This fact is very significant because the trial court set a trial date when the case was barely four months old, and the Court issued a Trial Order that called for Pearson's original expert disclosure on October 1, 2005 less than sixty (60) after Solinger Answered the Complaint). The trial date was set for April 25, 2006, only (13) thirteen months after this complex case was filed.

In Pearson's response to the Cardiology Defendants' Motion to Dismiss, Pearson set forth,

---

[1] Solinger's failure to Answer the Complaint was important because for more than (5) five months Pearson did not know what facts Solinger was admitting or denying. Thus, Pearson did know what discovery was necessary because she did not know what facts Solinger was contesting. Pearson raised this issue in her July 27, 2005 Status Conference Statement and asked the Court to intervene to force Solinger to Answer the Complaint. (R. 322-323) Without the Court's intervention, on August

in great detail, the negligence of the Cardiology Defendants alleging that they knew or reasonably should have known, over the many years they treated her, of the deterioration of her heart condition and that they should have referred her to a heart surgeon no later than May of 2003. As part of her response to these Motions, Pearson attached a lengthy Affidavit to the response. (R. 103-113)

Pearson specifically stated, in her affidavit, **"that since [she] was first diagnosed with a cerebral aneurysm and/or brain bleeding, [her] treating physicians have indicated to [her] that her cerebral bleeding and/or rupture were caused by Coumadin toxicity and an inappropriate initiation/loading dose of Coumadin**..." (R. at 112).

On or about April 7, 2005, Defendants Johnsrude, Solinger, Recto and Pediatric Cardiology Associates, PSC (hereafter PCA) submitted Requests for Admissions asking Pearson to admit, among other things, that she had no expert witness which advised her these Defendants deviated from their respective standards of care and that each Defendant did not deviate from the appropriate standard of care. These requests were timely denied after Pearson received an extension of time to respond to these Requests. (URBE ex. 1).

2. Pearson Develops Congestive Heart Failure And Undergoes Major Open Heart Surgery

In mid April 2005, just over a month after her Complaint was filed, Pearson became very ill, suffering from severe heart arrhythmias and headaches related to her cerebral bleed (while toxic on Coumadin). Pearson advised the Court of this fact when she sought an Extension of Time to respond to discovery. (R. 130, para. 2) During the next five weeks, from April 25, 2005 until May 31, 2005, Pearson was hospitalized because she was suffering from congestive heart failure. (R. 136,-139, R.149-153) Pearson advised the Court and the parties, by correspondence dated April 25, 2005, that she was ill with heart arrhythmia (atrial fibrillation) and would be hospitalized. (R. 134-

---

15, 2005 Solinger finally Answered the Complaint. (R.356-358)

135). On May 9, 2005, Pearson underwent heart valve surgery where her mitral valve, aortic valve and ascending aorta were replaced. During this period of time, Pearson was hospitalized in three different states - Kentucky, Ohio, and Missouri. (R. 136-139,R.149-153)

3. Extensions Of Time Sought By Pearson During The First Three Months Of This Case

In an attempt to mislead this Court concerning Pearson's diligence in the trial court, Solinger claims Pearson received a total of (8) eight extensions of time. (Solinger Brief, pg. 2) This assertion is incorrect; Pearson asked for and was granted a total of (7) seven extensions of time. Solinger mistakenly counts Pearson's May 16, 2005 Motion for Extension of Time twice (R. 136-139) This Motion pertained to Norton Hospital's discovery requests and Solinger cites a June 20, 2005 Motion for Extension of Time to Serve Responses to Defendant Norton's First Interrogatories. Counsel was unable to locate this June 20th Motion cited by Solinger and suggests it does not exist and was never filed by Pearson. Moreover, three of the requested extensions of time amounted to a grand total of (10) days.[2] These extensions of time occurred during the first (3) months of the litigation at a time when Pearson **was suffering from congestive heart failure, recovering from heart surgery and complications which arose from the heart surgery**. After Pearson recovered from her open-heart surgery, Pearson requested only one additional extension of time. Pearson asked for and was granted **only one** extension concerning the expert witness disclosure deadline; this occurred

---

[2] Pearson received a (3) day extension of time to Respond to Solinger's Motion to Dismiss. Pearson sought (2) extensions of time to respond to Norton's Interrogatories and Requests for Admission (this occurred while Pearson was suffering from congestive heart failure and was having heart surgery). Pearson asked for one extension of Time to Respond to Solinger's Interrogatories and Requests for Admission (this also occurred while Pearson was suffering from heart failure and having heart surgery). Pearson asked for and was granted (7) seven additional days to respond to both Norton Hospital and Solinger's Summary Judgment Motions. These (7) day extensions of time were required because Pearson was suffering from heart failure after her surgery and was re-hospitalized from May 19, 2005 until June 1, 2005.

because Pearson could not pay $12,000.00 to her hired medical experts in such a short period of time. (R. 670-672)

Solinger implies the trial court bent over backwards to accommodate Pearson, this implication is inaccurate. The trial court, **at Norton Hospital's urging**, set the expert disclosure deadlines "quickly", and this was acknowledged by the trial court on July 27, 2007 at the Status Conference. The case was set for trial only (4) four months and (17) seventeen days after it was filed. (R. 331-334). The case involved four Defendants, 4100 pages of medical records and was being prosecuted by a pro-se Plaintiff suffering from heart failure, recovering from a cerebral bleed and a major open-heart surgery. Appellants herein are alleged to have caused Pearson's injuries, yet Appellants are the ones that benefited from an orchestrated game of judicial beat the clock that was perpetrated upon Pearson. All of the trial court's actions (in setting swift deadlines) were in direct conflict with JRP 707, which provided for up to 545 days of discovery in a medical malpractice action. The trial court also attempted to force Pearson to sign a blank medical authorization in clear violation of the case of Geary v. Schroering, 979 S.W. 2d 134 (Ky. App. 1998). Pearson was forced to file a Writ of Prohibition to stop this abuse. This was hardly a case of the Court "bending over backward".

Appellants hounded Pearson from day one by filing frivolous Motions to Dismiss almost immediately after the case was filed. When the Motions to Dismiss were denied, both Solinger and Norton almost immediately filed Summary Judgment Motions (nine days later) which were based upon non-existent judicial admissions. Pearson was advised by the trial court that if she needed to miss court because of her physical infirmities, all she need do is call the Court and nothing would happen in her absence, yet Summary Judgment was granted against Pearson when she missed the Status Conference on December 9, 2005. Far from bending over backwards, the trial court insisted

on deadlines which the most seasoned trial attorney could not possibly meet in a case involving 4100 pages of medical records, four defendants and (30) years worth of medical treatment.

While Solinger claims in his Brief, at pg. 1, that his counsel did the standard work up of the case, as soon as it was filed Solinger's defense of this case was hardly standard. It is obvious by his actions that Solinger was in a huge hurry to run the clock out on Pearson before the battle ever began. It is hardly standard to file a frivolous Motion to Dismiss and Motion for Summary Judgment based upon non- existent judicial admissions in a period of only **two months from the filing of the Complaint**. Moreover, Solinger was aware of Pearson's fragile heath conditions (which he allegedly caused) and he was still intent to proceed at rocket speed while Pearson was still in the hospital recovering from major open-heart surgery.

4. Solinger Files A 3 Paragraph Motion For Summary Judgment Based Upon Non-Existent Judicial Admissions

On May 20, 2005, Solinger filed a 3 paragraph Motion For Summary Judgment. The Motion alleged Pearson had failed to timely respond to the previously propounded Requests For Admissions. (R.142-148) Solinger's 3 paragraph Motion was filed without a memorandum and specifically relied on the nonexistent judicial admissions. No affidavits, depositions, other sworn testimony, or evidence of any kind was offered in support of the Motion. (R. at 142-148).

Solinger's May 20, 2005 Motion for Summary Judgment **was based solely upon judicial admissions** which Pearson never made. (R. 142-143, Solinger Motion for Summary Judgment) Solinger's entire three (3) paragraph Motion for Summary Judgment stated as follows:

> Come the defendants, Robert E. Solinger, M.D., Christopher Johnsrude, M.D., Michael Recto, M.D., and Pediatric Cardiology Associates, P.S.C., by counsel and move the Court to enter the attached order dismissing plaintiff's claims against them pursuant to Rule 56.
>
> In support of said motion, defendants **rely upon their prior memorandum and upon plaintiff's judicial admissions that these defendants neither deviated**

from standards of care nor contributed to any alleged injury. (Exhibit 1)

These admissions, pursuant to CR 35, establish the lack of any genuine issue of material fact. Accordingly, summary judgment is appropriate.

As the Court can see, there is no mention of medical experts anywhere in the three (3) paragraph Motion. Solinger attached to his Motion for Summary Judgment a copy of (6) Six Requests to Admit that he had allegedly served upon Pearson. The pertinent Request for Admissions were: Admit that you have not had an expert witness review of the facts and medical records of this case prior to filing your complaint against these defendants; Admit that no expert witness has advised you that defendants in this action caused or contributed to any alleged injury; Admit that each of these defendants did not deviate from standards of care; Admit that each of these defendants did not cause or contribute to any alleged injury. The Motion also referenced and relied upon a prior Memorandum filed by Solinger. (R.142) The only prior Memorandum filed by Solinger was in Support of his Motion to Dismiss, based upon a statute of limitations argument (R. 50-54) Interestingly, Solinger's prior Memorandum states that, "The motion to dismiss is based upon the statute of limitations and **accepts as true** the allegations set forth in plaintiff's complaint." (R. 53)

On June 6, 2005, during a Motion Hour, the trial court Granted Pearson an Extension of Time to Respond to these CR 36 Requests until June 30, 2005 (R. 149-153).

5. Pearson Responds To Solinger's 3 Paragraph Motion For Summary Judgment

On June 20, 2005, Pearson filed an under oath Response to Solinger's Motion for Summary Judgment which stated that she did not ever receive Solinger's Requests to Admit, and that she would be supporting her claims with both treating physician experts and hired experts. (R. 266-280)

Pearson's lengthy response to Solinger's Motion For Summary Judgment pointed out that **(1)** the Motions were moot since Plaintiff timely denied the offending Requests for Asmisisons, **(2)**

that the state of the record would not support the grant of summary judgment because Plaintiff had not had an opportunity to conduct discovery in support of her claims, and **(3)** if the Court were going to consider granting summary judgment based upon non-existent judicial admissions that the Court, at a minimum, allow Plaintiff an opportunity to obtain affidavits or depositions from her expert witnesses. (See Rule 56.06 of the Kentucky Rules of Civil Procedure) (R. , 273-274, and 323-324) Plaintiff also pointed out that **JRP 707 provided for 545 days of discovery, if necessary, in a medical malpractice action**. (R. 274)

Pearson also requested that if and when the Summary Judgment Motion was denied, that she be permitted at least one hundred twenty (120) days to conduct fact discovery. This was extremely important because Solinger had not Answered Pearson's Complaint, and she did not know what fact discovery or expert evidence would be required (based upon his Answer to the Complaint). (R. 273-74, and 323-24)

6. Pearson Discloses That She Has Both Treating Physician And Hired Expert Witnesses To Support Her Claims And Discloses The Substance And Basis Of The Experts' Opinions

On April 20, 2005, Dr. Solinger served Pearson with approximately thirty (30) Interrogatories requesting detailed information concerning Pearson's allegations of negligence and deviation in the applicable standard of care. (R. 119-129). Pearson responded to Dr. Solinger's Interrogatories with ninety-seven (97) pages of detailed Responses. (URBE ex. 5, pgs. 1-97) Pearson clearly answered, in her Interrogatory Responses, that she was in consultation with expert witnesses and was deciding which such experts she was to retain. **She further listed her past and treating physicians as expert witnesses**. (MVCO ex. 2, pgs.9-10; URBE ex. 5, pgs. 33-36). She never denied having an expert. More importantly, the identity of Pearson's treating physicians and the substance of their opinions regarding causation and deviation were set forth in Pearson's discovery responses. In

Pearson's responses to the Interrogatories, Pearson disclosed that she may call and reserved the right to call any and all treating physicians as experts. (URBE ex. 5, pgs. 33-36)

Moreover, Pearson disclosed the treating physicians who had information concerning her injuries, and listed the physicians names and addresses. She disclosed both the basis for the opinions and the substance of these opinions. Pearson was asked by Dr. Solinger to "Admit that you have not had an expert witness review of the facts of this case and the medical records in this case prior to filing your complaint against these defendants." Pearson responded, under oath, to Solinger's Request to Admit as follows:

> Plaintiff objects to Request No. 1 on the grounds the request is ambiguous as to who constitutes an expert witness. Plaintiff submits that a treating physician can constitute an expert witness under the Kentucky Rules of Evidence and Kentucky case law. The request does not define the term expert witness and is therefore subject to many interpretations. It is Plaintiff's position that an expert witness can be a treating physician, who has reviewed the medical records which are pertinent to Plaintiff's claims against the Defendants. **Plaintiff did, in fact, have treating physicians review pertinent medical records, during the course of the physician's treatment of Plaintiff, prior to her filing her Complaint against Defendants. Based upon statements made by Plaintiff's treating physicians and medical findings and diagnoses made by Plaintiff's treating physicians, Plaintiff instituted this action against Defendant**s. Without waiving Plaintiff's objection to Request No. 1, Plaintiff denies the Request as phrased because it is ambiguous.
>
> (URBE, Exhibit 1, Response No. 1, to Solinger's Request For Admission)

On June 30, 2005, Pearson timely denied, under oath, each and every Request for Admission and stated affirmatively that she would be supporting her claims with both treating physician experts and hired experts.

In regards to the Cardiology Defendants' Requests For Admissions, Pearson:

- Denied (with objection) that no expert witness had advised her that each of the named doctors in this action deviated from their respective standards of care;
- Denied (with objections) that no expert witness advised her that each of the doctors in this

action caused or contributed to any alleged injury;

- Denied specifically "each of these doctors did not deviate from standards of care.

Pearson also specifically alleged that she was relying on the doctrine of Res Ipsa Loquitor. (URBE ex. 1,) ().

7. Pearson Attempts, On Numerous Occasions, To Have The Court Clarify Its Intentions Concerning Solinger's Summary Judgment Motion

During the June 6, 2005 Motion Hour, the Court set the case for a Status Conference. Prior to the Status Conference, Pearson filed a lengthy Status Conference Statement pursuant to JRP 709(a). In this Status Conference Statement, Pearson set forth her theories of liability and listed a summary of the disputed factual and legal issues. Pearson also pointed out, once again, that she had both treating physician experts and was consulting with experts which supported her claims against the Defendants. Significantly, Dr. Solinger did not file a Status Conference Statement. (R. 309-328) Pearson also asked the Court to clarify what the Court's intentions were concerning the Defendants' Summary Judgment Motions. Pearson made this inquiry because she had never made any judicial admissions and she believed the Motions were moot, given the fact the Motions were based solely upon non-existent judicial admissions. (R. 323-24, July 22, 2005 Status Conference Statement of Melanie L. Pearson, pg. 15)

During the Status Conference, Pearson again raised this issue of the Court's intention regarding the Motions for Summary Judgment. The record reveals that the following colloquy occurred between Pearson and the Court:

> Pearson: As far as the motion for summary judgment, I had a question because it seemed to me that it was mostly based on the fact that I had admitted in my requests for admissions is what the summary judgment was based on, because I had failed to respond to them, which wasn't true because I had sought and received a request for extension of time so therefore they weren't late.

Judge: Well as far as an actual disclosure of an expert that, at this point, is not required by you, it will be as of October 1. [*Pearson wasn't even required to have an expert yet so if that was an issue in summary judgment it was irrelevant at that time.]*

Pearson: Right and the rest of it was based on...

Judge: I of course will review that.

Pearson So, the motion for summary judgment, does that just stay, is it just outstanding?

Judge: No, I will consider it submitted.

Pearson: Okay, I just wasn't sure how, that if it just stayed through - ok.

Judge: No, I would, I will rule on that ...

Pearson: Okay

(Transcript July 27, 2005 Status Conference pg. 5)

8. The Trial Court, In Contravention Of JRP Local Rule 707, Enters A Civil Jury Trial Order And Sets The Case For Trial Only Four Months And Seventeen Days After The Complaint Is Filed

On July 27, 2005, the trial court entered a "Civil Jury Trial Order". (R. 331-334) Solinger claims, at pg. 2 of his Brief, that "the trial court entered the standard jury trial order issued in nearly every civil jury case."

While the content of the Order may have been standard, the rapidity of the Order's issuance, and the expert disclosure deadlines required by the Order were not.[3] The Court took this action at

[3] Jefferson Rule of Practice 707, in effect at the time this litigation was prosecuted, provided that medical malpractice actions were to be placed on *Complex Track Assignment* with a goal of Disposition within twenty-four (24) months of filing the action. JRP 707 (B)(3) further provided that **a trial date was to be set at the second status conference in the medical malpractice case which was to occur 365 days after the filing of the complaint or at the next motion docket after the discovery cut-off date**. In the case at bar, **the pre-trial order was entered just 4 months and 17 days after the action was filed** and a trial date was set for April 25, 2006, which was just slightly more than 13 months after the Complaint was filed. JRP 707 (B) (4) provided for 545 days of fact discovery in a medical malpractice action. In addition to Solinger's rush to have Pearson's case dismissed it is obvious the trial court was in a rush to judgment as well.

the request of Norton Hospital's counsel who stated "if we could do experts sooner than later that would be great". The trial court (when setting these unrealistic deadlines) acknowledged the expert disclosure deadlines were set to occur quickly. (Transcript July 27, 2005 Status Conference pg. 4)

The trial court's Order (entered prior to Solinger even filing an Answer to Pearson's Complaint) required Pearson to disclose her hired expert witnesses on October 1, 2005, less than sixty (60) days after Solinger finally Answered Pearson's Complaint on August 15, 2005. (R. 332, Trial Order para. 16) This fact was in and of itself prejudicial to Pearson.

9. The Trial Court's Civil Jury Trial Order Requires Disclosure Of Pearson's Treating Physician Experts Sixty Days Prior To Trial

This Court should also take note of the language of paragraph 16 of the July 27, 2005 Pre-Trial Order titled "**Expert Disclosure,**" as it stated:

> "To the extent a physicians testimony is limited to opinions developed while treating the Plaintiff (**diagnosis, causation, treatment, permanency**), no expert disclosure is required. The treating physician's anticipated testimony shall be provided in accordance with Paragraph 4 of this Order."

Paragraph 4 of the Pretrial Order required documentary evidence of any kind to be supplied to opposing counsel at least 60 days before trial. Pursuant to the Pre-Trial Order, treating physicians, who's testimony was limited to diagnosis, causation, treatment or permanency, opinions were not required to be disclosed until 60 days prior to trial. (R. 332, Trial Order, para. 4) Thus, according to the Trial Order, Pearson was not even required to disclose the opinions of her treating physicians until 60 days prior to trial. Despite the fact she was not required to do so, Pearson **disclosed** her treating physicians' opinions in July and August 2005 via her approximately two hundred (200) pages of under oath discovery responses. (MVCO Exhibit 1, Pearson's Interrogatory Responses to Norton Hospital's First Interrogatories URBE Exhibit 5, Pearson's Interrogatory Responses to Robert E. Solinger et. al. First Interrogatories) Solinger simply ignores the treating physician expert

disclosures made by Pearson in her Interrogatories.

During discovery, Pearson disclosed that she was relying upon her treating physicians opinions, medical records and statements made by these physicians to support causation and breach in the standard of care. With regard to causation, Pearson relied upon Norton ER Dr. Steven Richards. On February 24, 2004, Dr. Richards diagnosed Pearson as suffering from "**Coumadin Toxicity**". Dr. Richards also found Pearson's symptoms to be **coagulopathic** (meaning Pearson was suffering from a bleeding disorder caused by the Coumadin). To further support causation, Pearson also relied upon Dr. Miodrag Stikovac, Pearson's treating cardiologist. In January, April and May 2005, Dr. Stikovac diagnosed Pearson with "**subarachnoid hemorrhage secondary to Coumadin Toxicity, INR 8.6 at the time**". Dr. Stikovac's final diagnosis was over-anticoagulation with a remote bleed. [MVCO ex. 1, 2, pgs. 28, 44)]

With regard to proving a deviation from the accepted standard of care, Pearson relied up cardiologist Dr. Brendan O'Cochlain. On January 25, 2005, (while treating Pearson), Dr. O'Cochlain told Pearson that the acceptable standard dose of Coumadin should have been cut in half due to her concurrent use of Amiodarone, which enhances the blood levels and anticoagulation effects of Coumadin. (MVCO ex. 2, Interrogatory Response No. 11g, pgs. 5-6) Dr. O'Cochlain opined that Pearson's 10 mg dose of Coumadin should have been reduced by 50%. These interrogatory responses were served in July and August of 2005. (MVCO ex. 2, July 2, 2005 Interrogatory Responses of Melanie L. Pearson.) Solinger's claim that Pearson never disclosed any expert witnesses to support her claims is a plainly inaccurate. More, significantly Solinger has never disputed one word or claim made in Pearson's under oath Interrogatory Responses.

10. Pearson Propounds Interrogatories And Requests For Admission To Dr. Johnsrude And Dr. Johnsrude's Answers To These Discovery Requests Are Evasive And Non Responsive

In early July 2005, Pearson propounded extensive discovery requests to Dr. Johnsrude in the form of Interrogatories and Requests for Admissions. After seeking an Extension of Time to respond to Pearson's discovery, (R.306-308), Dr. Johnsrude partially responded to the said discovery. Dr. Johnsrude's responses to Pearson's discovery were very evasive, non-responsive in many instances, and the said responses in and of themselves created numerous material issues of fact. (R. 514-536) Pearson attempted, in numerous Interrogatories and Requests for Admissions, to have Dr. Johnsrude state what the applicable standard of care was for starting a patient on Coumadin anticoagulation therapy. However, Dr. Johnsrude refused to identify any medical literature or practice guidelines which he considered to adequately state the standard of care, and he continued to maintain steadfastly that the Package Insert and PDR for Coumadin did not provide the standard of care.

Dr Johnsrude was asked numerous questions about the Coumadin/Amiodarone interaction and the propensity of Amiodarone to increase the blood levels and effects of Coumadin in patients concomitantly taking these drugs. Dr. Johnsrude admitted that there was a known interaction between Coumadin and Amiodarone that can increase the effect and blood levels of anticoagulants. However, he claimed the interaction occurs only when a patient has been chronically taking Coumadin and begins Amiodarone. However, Dr. Johnsrude cannot and did not cite a single source of information, medical or otherwise, which supports this assertion. Moreover, this assertion is in direct conflict with the October 2, 2002 **E-Medicine** article titled "**Ventricular Fibrillation**" (which Dr. Johnsrude and Pediatric Cardiology Associates edited) which stated Amiodarone increases the blood levels and anticoagulation effects of, among other things, Coumadin.

Some of the pertinent Interrogatories propounded to Johnsrude were as follows:

1. In your experience and career as a licensed physician, state in detail what experience or training you have had in prescribing anticoagulation therapy for your

patients and, specifically, what experience or training you have prescribing Coumadin/Warfarin to your patients.

ANSWER: There is no single class that prepares a physician for prescribing anticoagulation therapy. Dr. Johnsrude's " experience or training" began with his earliest course work and his judgment has been informed, since then, by training, experience, and review of varied medical articles.

2. In your experience as a licensed physician, state in detail what publications, medical literature and/or medical practice guidelines you have read or consulted when prescribing the drug Coumadin/Warfarin to your patients.

ANSWER: See Answer to Interrogatory No. 1.

3. On February 18, 2004, please state in detail by title, date and author what publications, medical literature or medical practice guidelines, in your capacity as a licensed physician, you considered to adequately state the medical standard of care to initiate and/or manage Coumadin/Warfarin therapy.

ANSWER: See Answer to Interrogatory No. 1

4. On February 18, 2004, please state in detail by title, date and author which medical publications, medical literature or medical practice guidelines, concerning initiation or management of anticoagulation therapy with Coumadin/Warfarin, that you, in your capacity as a licensed medical physician agreed with.

ANSWER: There is no single publication which defendant would, adopt wholesale, in his care of patients needing anticoagulation therapy.

5. On February 18, 2004, please state in detail by title, date and author which medical publications, medical literature or medical practice guidelines, concerning initiation or management of anticoagulation therapy with Coumadin/Warfarin, that you, in your capacity as a licensed medical physician, did not agree with or took issue with.

ANSWER: Defendant is unaware of any singular publication which should be rejected.

(R. 514-524, Johnsrude Responses to Request for Admissions)

11. Pearson Timely Moves The Trial Court For A 60 Day Extension Of Time To Disclose The Identity Of Her Hired Expert Witnesses

Solinger, at page 2 of his Brief, alleges that Pearson did not move the trial court for an

Extension of Time to disclose her hired expert witnesses until two days after the deadline had expired. This allegation is **patently false**. October 1, 2005 was a Saturday and, pursuant to CR 6.01, Pearson's hired expert disclosures were due to be served on Monday, October 3, 2005. (R. 679-683). This is just another example of Solinger's relentless attempts to make Pearson appear dilatory when, in fact, she was not.[4] Pearson's Motion was based upon the fact that her income was a mere $762.00 per month (all of which was Social Security disability benefits). Pearson explained that she had no other disposable income and because of financial hardship she had not been able to secure the $12,000.00 she needed to secure her expert witness reports. Pearson stated she had retained an anticoagulation expert and was desirous of retaining a neurologist, cardiologist and life planner/registered nurse. Pearson indicated, based upon the preliminary information she had provided her proposed experts, that said experts indicated the Defendants were negligent in their care and treatment of her medical conditions. Pearson indicated she had made arrangements to borrow $12,000.00 from a family member to secure the anticipated expert witness reports she had been seeking. Pearson stated she believed the funds would be available in the next 30-45 days. (R. 680-681)

12. The Hearing On The Motion For Extension Of Time And The October 2005 Status Conference

On October 11, 2005, Pearson's Motion for Extension of Time was heard. The trial court also held a Status Conference on the same date. The following colloquy between the Court and

---

[4] All Pearson's difficulties with regard to hired expert witnesses in this case resulted from the unusual manner and rapid speed in which Defendants and the trial court were insisting upon Pearson's expert disclosures. The rapidity of these discovery deadlines were certainly far from standard. (See, JRP 707) This rush to judgment was in fact intentional by Defendants as Defendants were aware of Pearson's income via her Interrogatory Responses and simply played a calculated game of "beat the clock" knowing full well a person with an income of $762.00 per month can not come up with the sums necessary for an expert to provide a sworn Affidavit.

parties occurred when Plaintiff was seeking an extension of time to disclose her paid medical expert witnesses:

> Judge: Well, the motions for summary have been pending since May are based on this issue so those are sort of on, they are on hold...
>
> Pearson: *Well, those were based on the fact that I didn't that I didn't respond to the discovery on, in a timely manner...*
>
> Judge: I think those also are on, with respect to...
>
> Leslie Cronen: They're also, they're also based on the fact that she doesn't have an expert and the fact that her deadline has now passed and she's asking for an extension that does affect our ability to prosecute those motions and for you to rule on those motions on the basis that there is no expert supporting her claim.
>
> Pearson: Well I thought, in my understanding of the motion for summary judgment, it was because I hadn't answered and so therefore I was admitting that I don't have an expert. *I'm saying I do have an expert, its contra, its opposite, I have an expert. I'm not, that was based on the fact I was admitting I didn't have an expert but I had timely filed for that extension* ***so the whole motion for summary judgment was based on, ya know, an irrelevant circumstance.***

(Transcript October 11, 2005 Status Conference pg. 7-8)

The October 11, 2005 Hearing demonstrates the Judge simply misunderstood Pearson's argument (and the record) that the Motions for Summary Judgment were based upon judicial admissions, not a missed filing deadline. Solinger never adopted or incorporated any of Norton Hospital's arguments in support of his Summary Judgment Motion. The record clearly and convincingly establishes Solinger's Summary Judgment Motion was solely about judicial admissions. The Motion's text states JUDICIAL ADMISSIONS is the only basis for the Motion. The Motions were also not "sort of on hold". (R. 142)

The above cited statement by the Court demonstrates the Court's confusion on this seminal issue, and contradicts the court's prior statements on the issue. The Judge had previously indicated, in July 2005, that **she would rule on these Motions in the next month or so** and the Judge acknowledged, at that time, that Plaintiff's expert disclosures were not due until October 1, 2005,

but that she could rule on the Motions now. Obviously, if the Motions had really been about disclosing the expert witnesses in July 2005, the Judge would not have stated that she could rule on the Motions **months before the expert witness disclosure was required.** More importantly, counsel for Norton Hospital had stated in open court, on June 6, 2005, that the Motion for Summary Judgment was based upon Plaintiff's alleged failure to answer discovery and, at the October 11, 2005 hearing, the Motion had morphed into a Motion for Summary Judgment based upon the fact that Plaintiff supposedly had no expert (even though Plaintiff continued to maintain she did have expert witnesses).

Solinger erroneously claims, at pg. 3 of his Brief, that the trial court stated at the October 11, 2005 Status Conference that the Court would again review the Defendant's pending motions for summary judgment. Solinger cites pgs. 5-8 of the Transcript of this Hearing to support this contention. However, what the Court said was that the Motion was now "on hold". The Court should not be misled by Solinger's error.

13. Pearson Is Unable To Attend The December 9, 2005 Status Conference And Requests The Status Conference Be Continued

During the October 11, 2005 Status Conference, the Court set the case for another Status Conference which was to occur on December 9, 2005. Pearson was due to disclose her hired expert witnesses on December 1, 2008. Unfortunately, on the date this deadline expired, Pearson unexpectedly still had not obtained the funds to secure the written opinions/reports of her expert witnesses. Pearson had explained to the Court, on October 11, 2005, that her experts were not going to give her formal opinions without being paid in full. (Transcript, October 11, 2005 Status Conference, pg. 6) Pearson was aware that the Court was going to hold a Status Conference on December 9, 2005 (only 8 days after the expert deadline had passed). Pearson intended to appear at the Status Conference on December 9, 2005 and advise the Court of the situation and request an

additional Enlargement of Time under CR 6.02(b) to disclose her hired expert witnesses.

On the morning of December 9, 2005, Pearson was hospitalized with severe chest pain related to her long standing cardiovascular disease. Prior to the scheduled Status Conference, Plaintiff had her fiancée, Mr. Kris Whittington, telephone the Court and advise the Court that Plaintiff could not attend because of her medical condition. Mr. Whittington spoke to the Clerk for Division No. 9 at approximately 8:25 a.m. and advised the clerk that Plaintiff was in the hospital and would like a continuance because she had numerous issues to discuss with the Court. The clerk advised Mr. Whittington that she would notify Plaintiff of a future date. Because Plaintiff had not heard from the Court concerning said continuance, Plaintiff corresponded with the Court on December 14, 2004, inquiring about a new date and advising the Court of the reason for her failure to make her CR 26.02 disclosures and requested that the failure to disclose be remedied by the Court under CR 6.02(b), excusable neglect. Plaintiff again advised the Court that she had experts to support her claims. (See, R. 706-722, Plaintiff's December 14, 2005 correspondence to Judge Judith McDonald-Burkman) Unbeknownst to Plaintiff, at the time she corresponded with the Court on December 14, 2005, the Court had already Granted Summary Judgment to all Defendants on just two days previous. (R. 704-705)

The precise circumstances which precipitated Plaintiff missing the CR 26.02 expert disclosure deadline of December 1, 2005 were that Plaintiff was not able to obtain the funds for her expert witnesses until late December 2005. Plaintiff had consulted with experts, retained her anticoagulation expert, and advised the Court on numerous instances that she had expert witnesses to support her claims. Plaintiff was counting on a home refinance (of her fiancée, Kris Whittington) to obtain these funds, however, the home refinance was eventually denied and Mr. Whittington was forced to sell real estate to obtain these funds (this sale did not occur until late December 2005).

(See, URBE ex. 10 at pg.2-3, February 20, 2006, Affidavit of Melanie L. Pearson)

14. Solinger Files A New Motion For Summary Judgment On December 12, 2005 And The Trial Court Grants The Motion On The Same Day It Is Filed

Dr. Solinger et. al., on December 12, 2005, filed their "Second" Motion for Summary Judgment. The Motion was styled as a "Motion For Ruling On Motion For Summary Judgment" but this was, in fact, a new Summary Judgment Motion based upon a new ground, i.e. that Pearson was (11) eleven days late in disclosing her hired expert witnesses. Solinger's new Summary Judgment Motion was granted on the same day it was filed, December 12, 2005. Solinger's new Motion was, in essence, a motion seeking the ultimate discovery sanction, i.e. dismissal with prejudice. After discounting the allegations concerning the admission issue, Defendant doctors did not allege in their December Motion the non-existence of any material fact, nor did they support their Motion with any expert opinion of their own. They sought dismissal simply because Pearson was 11 days late in disclosing the names of her hired experts. (R. 699-703). As set forth in detail above, the Trial Court Granted Solinger's new Motion for Summary Judgment on December 12, 2005, the very day the Motion was filed. (R. 704-705) this was a patent violation of JRP 401(a) which permits a (20) twenty-day response period before the motion stands submitted. Likewise, CR 56.03 requires at least (10) ten full days' notice before a summary judgment motion can be heard. Finally, the Pre-Trial Order issued in this case at paragraph 11 required the submission of an AOC 280 before a dispositive Motion was heard. (R. 331-334) Solinger never filed an AOC 280, therefore, his Motion for Summary Judgment should never have been submitted much less granted.

The Judge, in her Order Granting Summary Judgment, held the basis for dismissal was the fact that "expert testimony is required in a medical malpractice case," and that the "Plaintiff has not complied with the trial order as she has not identified any experts nor supplied CR 26.02 information." (R. at 704-705). This Order was factually erroneous as the substance of Pearson's

hired expert witnesses had been previously disclosed. Moreover, the opinions of Pearson's treating physicians had been previously disclosed (in April, July, and August 2005). The opinions of Pearson's treating physicians, along with the medical records subpoenaed by Norton Hospital, clearly supported causation and deviation in the standard of care. Furthermore, the trial court's Order granting Summary Judgment was erroneous as a matter of law because the Order placed the burden of proof on Pearson, when in reality the burden of proof was on Solinger as the party moving for Summary Judgment. This is especially true in this case, as Solinger never filed any proof or evidence in support of a new Motion for Summary Judgment and his May 20, 2005 Motion for Summary Judgment was based upon non- existent judicial admissions.

The Plaintiff was deprived of the opportunity to file a response to these second Motions for Summary Judgment. The Defendants lie in wait until the Discovery landscape has changed after which they filed a "new" Motion for Summary Judgment calling it, instead, a Motion for Ruling on the Motion for Summary Judgment. The basis for the "new" motion is not the alleged admissions but the claim that the Plaintiff did not disclose her experts in a timely fashion.

15. Pearson Timely Moves The Trial Court, Under CR 59.05, To Vacate The Court's December 12, 2005 Summary Judgment

On December 22, 2005, Pearson filed a timely CR 59.05 Motion seeking to have the trial court Vacate its December 12, 2005 Summary Judgment. Pearson advised the Court, at the time she filed her CR 59.05 Motion, that she would be filing her expert disclosures in the next 14-21 days. (MVCO at pg. 24) Pearson's Motion alleged that **(1)** the Court had committed error by granting Summary Judgment because there were material issues of fact in dispute; **(2)** that the Court had erred by not continuing the December 9, 2005 Status Conference; **(3)** that the Court's discovery deadlines were too short and in patent conflict with Jefferson Local Rule of Practice 707; **(4)** that the Defendants had not met their burden under the facts of establishing by a preponderance of the

evidence that Plaintiff could not produce expert medical testimony at trial to support her claims of medical malpractice; and **(5)** that pursuant to CR 56.03 the Court committed error by failing to hold a hearing on the Defendants' Motions for Summary Judgment.

Pearson filed a Memorandum In Support of the Motion to Vacate, which set forth in explicit detail the basis for the above allegations of error (See, MVCO 1-53) Pearson also filed a lengthy Reply Brief after the Defendants responded to her CR 59.05 Motion (See, URBE 1-34)

16. The Trial Court's February 24, 2006 Order Denying Pearson's CR 59.05 Motion

On February 24, 2006, the trial Court denied Pearson's CR 59.05 Motion. The trial court held, in its Order, that Pearson's expert witness Affidavits were irrelevant for purposes of Appellant's timely CR 59.05 Motion. The trial Court, without citation to any case law, held these Affidavits irrelevant because they came some 36 days after the December 12, 2005 Summary Judgment, which was entered **without prior notice or an opportunity to be heard**. (R. 834-837) Pearson argued that the Court could consider the Affidavits because the time limits under CR 56.03 can be liberally extended and also that under CR 6.02(b), on the basis of excusable neglect, the trial Court should have permitted the late filing of the Affidavits. (MVCO at 24; URB at pgs. 25-30) CR 59.05, on its face, does not require Affidavits to be filed at the time the Motion is filed. The only requirement being that the facts relied upon in any Affidavit filed in support of a CR 59.05 Motion must have existed at the time judgment was rendered. The trial court ignored all of Pearson's arguments in support of her CR 59.05 Motion with the exception of the claim by Pearson that there were material issues of fact present at the time the trial court granted Summary Judgment. (R., February 24, 2006 Order at 836).

17. Pearson Appeals The Trial Court's Summary Judgment To The Court Of Appeals And The Court Of Appeals Reverses And Remands The Trial Court's Summary Judgment.

Pearson Appealed the trial court's summary judgment to the Kentucky Court of Appeals and, on May 11, 2005, a unanimous panel of the Court of Appeals Reversed and Remanded the trial Court's Summary Judgment. The Court of Appeals held that, "After reviewing the record in a light most favorable to Pearson, resolving all doubts in her favor, we conclude that the Appellees did not meet their burden of demonstrating the non-existence of any genuine issue of material fact. Summary Judgment was prematurely granted". (Opinion pg. 8). The Court of Appeals also treated the trial Court's "Summary Judgment" as an involuntary dismissal under CR 41.02 (Opinion pg. 8), and Remanded the case to the trial court with instructions for the trial court to conduct a six factor analysis as is required under Ward v. Housman, 809 S.W. 2d 717, 719 (Ky. App.1991). The Court specifically held that the responsibility to make findings under the six factors enumerated in Ward falls "soley upon the trial court." The Court of Appeals cited the very recent case of Toler v. Rapid America, 190 S.W. 3d 348, 351 (Ky. App. 2006), for this proposition. (Opinion pg. 8)

18. Solinger Files A Motion For Discretionary Review Which Is Granted By This Court And Pearson Files A Cross Motion For Discretionary Review Which Is Also Granted

On June 5, 2007, Dr. Solinger filed a timely filed Motion for Discretionary Review with this Court seeking review of the Opinion rendered by the Court of Appeals. On February 13, 2008, this Court Granted Solinger's Motions for Discretionary Review. On February 25, 2008, Pearson timely filed a protective Cross Motion for Discretionary Review pursuant to CR 76.21. (Case No. 2008-SC-000389) By Order dated April 16, 2008, this Court granted Pearson's Cross Motion for Discretionary Review in Case No. 2008-SC-000389, and combined the case with case No. 2007-SC-000389.

VII. COMPLIANCE WITH CR 76.12(c)(v)

Pursuant to CR 76.12(c)(v), Pearson respectfully states that she timely raised each and

every issue argued below and preserved these issues for Appellate review in her Responses to Defendant's Motions for Summary Judgment (R. 230-247, R. 266-280), July 27, 2005 Status Conference Statement, (R. 309-328), December 22, 2005 Motion to Vacate (R. 725-728) and Memorandum filed in support thereof (MVCO pgs. 1-52). Pearson's counsel also orally raised these issues during the February 10, 2006 hearing that was held on her Motion to Vacate. (Video 30-09-06-VCR-008 at 11:20:40-12:02:15) Additionally, these issues were timely raised by Pearson in her February 20, 2006 Unified Reply Brief. R. 781-814). Pearson also raised the same issues in her Civil Appeal Pre Hearing Statement, filed with the Court of Appeals and in her Opening Brief and Reply Briefs filed with the Court of Appeals.

VIII. ARGUMENT

A. STANDARD OF REVIEW

The standard of review on appeal from summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Pearson ex. Rel. Trent v. National Feeding Systems, Inc., 90 S.W. 3d 46, 49 (Ky. 2002); Lewis v. B & R Corporation, 56 S.W. 3d 432, 436 (Ky. App. 2001); Scifres v. Kraft, 916 S.W. 2d 779, 781 (Ky. App. 1986); Palmer v. International Ass'n of Machinists & Aerospace Workers, 822 S.W. 2d 117, 120 (Ky. 1994).

Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, there is no requirement that the appellate court defer to the trial court's decision and will review the issue *de novo,* 3D Enterprises Contracting Corp. v. Louisville & Jefferson County Metropolitan Sewer District, 174 S.W. 3d 440, 445 (Ky. 2005); Blevins v. Moran, 12 S.W. 3d 698, 700 (Ky. App. 2000) "Because Summary Judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court".

Id. 700. "There is no requirement that the appellate court defer to the trial court since factual findings are not at issue". Goldsmith v. Allied Building Components , Inc., 833 S.W. 2d 378, 381 (1992); Scifres v. Kraft, 916 S.W. 2d 779, 781 (Ky.App.1996); Estate of Wheeler v. Veal Realtors and Auctioneers, Inc., 997 S.W. 2d 497 498 (1999); Morton v. Bank of the Bluegrass & Trust Co., 18 S.W. 3d 353, 358 (1999).

This case involves an appeal from a summary judgment rendered against Pearson, therefore this Court must accept Pearson's version of the facts as true, concerning the manner in which she was injured. Perkins v. Hausladen, 828 S.W. 2d 652, 654(Ky. 1992); Bank One, Kentucky, N.A. v. Murphy, 52 S.W.3d 540, 545 (Ky. 2001).

It is respectfully submitted, based upon the above facts, law and the arguments set forth in detail below, that the trial court abused its discretion in granting summary judgment to the Defendants. The Court of Appeals was entirely correct in reviewing the trial court's so called Summary Judgment under a *de novo* standard and concluding, as it did based upon evidence of record, that the Defendants did not meet their burden of establishing the non-existence of any genuine issue of material fact. (Court of Appeals Opinion, pg. 8)

B. THE CIRCUIT COURT ABUSED ITS DISCRETION BY GRANTING SUMMARY JUDGMENT WHEN PEARSON WAS A MERE 11 DAYS LATE IN DISCLOSING THE NAMES OF HER HIRED EXPERT WITNESSES

1. Standard for Summary Judgment

Summary Judgment is to be used sparingly (especially in negligence actions) and then only when it would be impossible, as a matter of law, for the non-moving party to prevail at trial. Steelvest Inc. v. Scan Steel Services Center Inc, 807 S.W.2d 476 (Ky. 1991); Hill v. Alvery, 558 S.W. 2d 613 (1977); Poe v. Rice, 706 S.W. 2d 5, 6 (Ky. App.1986). The tendency must be avoided to try

negligence cases (such as complex medical malpractice cases) on a motion for summary judgment contrary to the purpose of CR 56.03. Perkins v. Hausladen, 828 S.W. 2d 652 (Ky. 1992).

The record must be viewed in a light most favorable to the respondent and **all doubts are to be resolved in respondent's favor**. That includes all doubts as to the existence of questions of fact. Tillery v. Louisville & Nashville R.R. Co., 433 S.W.2d 623, 624 (Ky. 1968); Estell v. Barrickman, 571 S.W.2d 650, 653 (Ky. App. 1978). In ruling on a motion for Summary Judgment, it is the role of the judge to determine whether issues of fact exist, not to resolve them. James Graham Brown Foundation v. St. Paul Fire & Marine Ins. Co., 814 S.W. 2d 273, 276 (Ky. 1991) Summary Judgment is simply not appropriate when there are material issues of fact. Summary Judgment is also inappropriate when the facts are not in dispute but the conclusions that can be drawn there from are. Commonwealth v. Thomas Heavy Hauling Inc., 889 S.W.2d 807 (Ky. 1994). Summary Judgment is **inappropriate** where, "although the facts and evidence thus far developed do not establish the existence of a genuine issue of material fact, . . .neither do they establish the non-existence of such an issue." Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985); Barton v. Gas Service Co., 423 S.W. 2d 902, 904 (Ky.1968).

2. Solinger's Claim That Pearson Did Not Have Any Medical Experts To Support Claims Of Medical Malpractice Is False And Is Not Supported By The Record

Solinger, in his Brief, claims that Pearson failed to support her claims of medical malpractice with any expert opinions. (Solinger Brief pg. 7) Of course, this statement is a complete fabrication and is flatly contradicted by the record. Pearson disclosed that she had both treating physician experts and hired expert witnesses prepared to testify at trial in this matter. Pearson disclosed that her medical records supported both causation and deviation, and these certified records were in both Defendant's possession months before Summary Judgment was granted. Summary Judgment is

appropriate only if the record reveals that it would be **impossible for the non-Movant to produce evidence at trial** warranting a judgment in favor of non-Movant. Solinger mistakenly believes that the non-Movant must prove their case at this early stage of the proceedings, however, in defending a Summary Judgment motion, a non-Movant is merely required to demonstrate, via evidence of record, that there are material issues of fact in dispute, or that the conclusions which can be drawn from the evidence are in dispute.

Under Kentucky law, this proof can be supplied by Affidavits and under oath Discovery Responses (demonstrating there are material issues of fact in dispute). CR 56.03. A non-Movant's burden on Summary Judgment is "quite low." Commonwealth Transportation Cabinet, Dept. of Highways v. R.J. Corman Railroad Co./Memphis Line, 116 S.W. 3d 488, 498 (Ky.2003). In the case at bar, Pearson disclosed that her treating physicians' opinions and her medical records supplied both causation and deviation from the accepted standard of care. During discovery, Pearson was asked by Solinger to "Admit that you have not had an expert witness review of the facts of this case and the medical records in this case prior to filing your complaint against these defendants." Pearson responded, under oath, to Solinger's Request to Admit as follows:

> Plaintiff objects to Request No. 1 on the grounds the request is ambiguous as to who constitutes an expert witness. Plaintiff submits that a treating physician can constitute an expert witness under the Kentucky Rules of Evidence and Kentucky case law. The request does not define the term expert witness and is therefore subject to many interpretations. It is Plaintiff's position that an expert witness can be a treating physician, who has reviewed the medical records which are pertinent to Plaintiff's claims against the Defendants. **Plaintiff did, in fact, have treating physicians review pertinent medical records, during the course of the physician's treatment of Plaintiff, prior to her filing her Complaint against Defendants. Based upon statements made by Plaintiff's treating physicians and medical findings and diagnoses made by Plaintiff's treating physicians, Plaintiff instituted this action against Defendant**s. Without waiving Plaintiff's objection to Request No. 1, Plaintiff denies the Request as phrased because it is ambiguous.
>
> (Response No. 1, to Solinger's Request For Admission)

Pearson was asked approximately eighty-two (82) Interrogatories by Norton Hospital (including discrete subparts), wherein Pearson was asked what witnesses substantiated her claims against the Defendants. Pearson responded with a total of ninety-six (96) pages of responses to Norton's Interrogatories. Likewise, Dr. Solinger served Pearson with approximately thirty (30) Interrogatories requesting detailed information concerning Pearson's allegations of negligence and deviation in the applicable standard of care. Pearson responded to Solinger's Interrogatories with ninety-seven (97) pages of Responses. In Pearson's responses to the Interrogatories, Pearson disclosed that she may call and reserved the right to call any and all treating physicians as experts. Pearson disclosed the physicians who had information concerning her injuries, and listed the physician's names and addresses. She disclosed both the basis for the opinions and the substance of these opinions. (R. MVCO, ex. 2, Pearson's August 25, 2005 Interrogatory Response No. 21 to Norton Hospital's First Interrogatories)

Norton Hospital Interrogatory No. 8 stated:

> State every alleged act or omission on the part of employees of Norton Hospital that you are claiming constitutes negligence or failure to exercise the degree of care and skill ordinarily exercised by others in their profession(s) in Kentucky and for each act or omission please state the date of the alleged act or omission

Pearson responded that Norton staff physicians Dr. Johnsrude, Dr. Solinger, Dr. Recto, Norton ER Dr. Steven Richards, and the nursing staff at Norton Hospital were negligent in their care and treatment of Pearson. Pearson set forth, in great detail, eight (8) pages of acts by Norton and its employees which constituted negligence and a deviation in the accepted standard of care.

Norton Hospital's Interrogatory No. 9 stated:

> State all facts upon which you base your answer to the preceding interrogatory and the allegations of negligence in your Complaint and state the source of these facts, listing the name and address of every doctor or other person from whom you obtained these facts.

Pearson listed numerous physicians in response to the above Interrogatory, and specifically listed Drs. Miodrag Stikovac, Brendan O'Cochlain, and Steven Richards (Norton Hospital ER physician) Pearson stated that she would be relying on these physicians, as well as the medical records created by these physicians during her medical care and treatment.

With regard to causation, Pearson relied upon Norton ER Dr. Steven Richards. On February 24, 2004, Dr. Richards diagnosed Pearson as suffering from "Coumadin Toxicity". Dr. Richards also found Pearson's symptoms to be **coagulopathic** (meaning Pearson was suffering from a bleeding disorder caused by the Coumadin). To further demonstrate causation, Pearson relied upon her treating cardiologist, Dr Miodrag Stikovac. Pearson disclosed that Dr Stikovac had diagnosed her as suffering an SAH (subarachnoid hemorrhage) secondary to Coumadin toxicity, "INR 8.6 at the time". This medical opinion and diagnosis provides proof that the Coumadin caused Pearson's injuries. Dr. Stikovac made this diagnosis (three separate times) in January 2005, April 2005 and May 2005, and this information (in the form of medical diagnosis) is contained in Pearson's "certified medical records" which Defendants subpoenaed and are in possession of. The substance of Dr Stikovac's opinion was that Pearson suffered a subarachnoid hemorrhage while receiving Coumadin anticoagulation therapy. The basis for Dr Stikovac's opinion was clearly that Pearson was toxic on Coumadin with an INR of 8.6, and that this toxicity resulted in a subarachnoid hemorrhage.

Turning now to Pearson's disclosure concerning a deviation in the accepted standard of care for prescribing Coumadin. Pearson relied upon a treating cardiologist, Dr. Brendan O'Cochlain. The basis for Dr. Brendan O'Cochlain's opinion was that (at the time Pearson's Coumadin anticoagulation therapy was initiated) Pearson was taking Amiodarone and Coumadin concommitantly. The substance of Dr O'Cochlain's opinion was that because Pearson was taking Amiodarone at the time her Coumadin anticoagulation therapy began, her dosage of Coumadin

should have been, but was not, reduced by 50%.

While Dr. O'Cochlain did not use the magic word negligence when he advised Pearson that her dose of Coumadin should have been reduced by 50%, only one conclusion can be reached by this statement - Pearson should not have been given a 10 mg initiation/loading dose of Coumadin. Moreover, Dr. O'Cochlain's opinion is entirely consistent with the 2004 PDR, it is consistent with Norton Hospital's website and, finally, it is consistent with the *Coumadin Pharmacy Monograph* given to Pearson upon her discharge from Norton Hospital on February 19, 2004. All these pieces of evidence point to but one undeniable fact, starting a patient on a 10 mg dose of Coumadin, when the patient has been chronically taking Amiodarone, is a patent breach in the applicable standard of care. No Defendant in this case has been able to explain this wild deviation in the applicable standard of care while repeatedly being asked by Pearson to do so, nor have they been able to give any alternative standard of care applicable under these facts. Pearson respectfully submits that the above expert witness disclosures were more than adequate to meet her "very low" burden in responding to Appellant's Summary Judgment Motions which were based upon non-existent judicial admissions. Commonwealth Transportation Cabinet, Dept. of Highways v. R.J. Corman Railroad Co./Memphis Line, 116 S.W. 3d 488, 498 (Ky.2003)

3. It Was Undisputed Pearson Had An Unnamed Hired Expert Well Before The Deadline For Disclosing An Expert's Name

It is indisputable that Pearson maintained that she had expert witnesses who supported her claims. Indeed, her Interrogatory Responses (and numerous other pleadings) are quite clear that Pearson had experts prepared to testify as to causation and the deviations in the standard of care by all of the Defendants below. (R. 230-265,266-280,295-301, 309-328, 537-542, 679-683)(MVCO 23-24). These numerous disclosures were later confirmed by Pearson's Expert Witnesses' Affidavits.

(Affidavit of Cardiologist J. J. Patel certified as a separate exhibit by the Clerk) (App. 17). (Affidavit of Algha Lodwick Pharmacist and Certified Anticoagulation Manager, certified as a separate exhibit by the Clerk).

The only issue at that time was the names of these experts. This does not establish the lack of a genuine issue of material fact nor the right to judgment as a matter of law.

The Appellants below could not and did not meet their burden of establishing that Pearson would be unable to present evidence at trial upon which a jury could, under no circumstances, return a verdict in her favor. The Appellants submitted no Affidavits nor any expert opinions to controvert Pearson's prima facie case, which was meticulously set forth in her 200 pages of Interrogatory responses and Request for Admission responses. (MVOC ex. 1,2; URBE ex. 1,2,5). Additionally, Appellants cannot controvert the clear and admitted deviation from the standard of care for prescribing Coumadin as set forth in the product insert and the Physicians Desk Reference which, when viewed in the light most favorable to Pearson constitutes a clear showing of **Res Ipsa Loquitor**.

This Court has recently reaffirmed the holding in Ward v. Housman, 809 S.W. 2d 717 (Ky. App. 1991) that it is improper to use CR 56 as a sanction for a party's failure to make CR 26.02 disclosures in a medical malpractice case, Baptist Health Care Systems Inc.v. Miller, 177 S.W.3d 676 (Ky. 2005). Indeed, this Court stated that the need for an expert, the opinions of the expert, and the identity of the expert is a procedural matter, which should not be resolved by Summary Judgment procedure, **except in rare cases**. Summary Judgment is not to be used as a sanction tool for a party's non-compliance with a pretrial order. *Id.* at 681. Ward v. Housman, *supra.* In Ward, the Court held that the trial court should not prohibit the late filing of an expert witness disclosure and thereafter grant Summary Judgment for lack of an expert. Judge McDonald writing for the Court

found:

> "In reality, however the case was dismissed for Ward's Counsel's failure to timely supply the names of an expert witness. The dismissal by Summary Judgment for this reason causes us concern."

In Ward the disclosures were due by October 31, 1988 but were not actually filed until July 24, 1989 some nine (9) months later.

In this case, Pearson sought leave to file her expert witness names in January, a little over one month beyond the trial Court's disclosure date. (R.777-779). Pearson has two hired experts and numerous treating physician experts. She clearly indicated, throughout her Interrogatories, that she had experts prepared to testify as to the Defendant's deviations; she only failed to actually present their names. "[T]he case in hand was not one where the dismissed party had no expert but was prevented from using the expert's testimony as a sanction technique... CR 56, Summary Judgments, is not to be used as a sanctioning tool of the trial court." Ward at 719. The Court concluded this was an improper CR 41.02(1) involuntary dismissal. The dismissal was an abuse of discretion for a one time dilatory act of Counsel when no other alternative sanctions were considered. In considering whether dismissal is appropriate, Courts were instructed to look to six (6) factors:

1. The extent of the party's personal responsibility;
2. The history of dilatoriness;
3. Whether the attorney's conduct was willful and in bad faith;
4. Meritoriousness of the claim;
5. Prejudice to the other party; and
6. **Alternative sanctions**.

The trial court **did not consider** any of the above factors; if it had, it would have weighed in favor of a less serious sanction than the "death penalty". The Court of Appeals recently reversed and

remanded a case because of the trial Court's "failure to make any findings" with regard to **six Ward factors**. See Toler v. Rapid American, 190 S.W.3d 348 (Ky.App. 2006). *Id.* at 351; Jaroszewski v. Flege, 204 S.W. 3d 148 (Ky.App. 2006), holding that a trial court's involuntary dismissal pursuant to CR 41.02 must be reversed and remanded because the trial court failed to consider the six factors specifically enumerated in Ward and again enumerated in Toler. The result should be the same in the case at bar, as the trial Court should have but did not consider the six factors set forth in Ward, and this was an abuse of discretion.

While it is accurate that Pearson is ultimately responsible for submitting her expert's opinions in her case, her responsibility is attenuated first by the fact that she disclosed the essence of her experts' opinions in her discovery responses and Affidavits. Further, her ability to prosecute her case was hampered by her serious health problems, which included her open-heart surgery and other hospitalizations, as well as very limited financial resources.

Despite her critical heath and financial hardship, Pearson, with the exception of the December 1, 2005 disclosure date, timely moved for extensions when she was unable to respond to various deadlines. Thus, there is really but **a single instance of missing a filing deadline**. Pearson explained the reason for the late disclosure as being due to yet another hospitalization (as a result of her fragile heart condition) and financial hardship. There was certainly no history of dilatoriness and the short delay was minimal and explained by Pearson's undisputed poor health and multiple hospitalizations during the nine (9) months this case was pending. There is no suggestion of willful or bad faith conduct and to suggest otherwise is to imply (without any proof) that Pearson's documented and long standing heart problems are of her own creation, and that her claim of financial hardship was fabricated.

Pearson's claims are meritorious. Her experts' Affidavits on the Coumadin issue indicate the

well-established interaction of Coumadin and Amiodarone and that medical standards dictate a reduction in the Coumadin dosage from what she was given. Cardiologist Dr. JJ Patel, in his expert Affidavit, opined that a failure to decrease the dosage "**would certainly be below the standard of care**..." as would the failure to reverse Pearson's extremely high INR. Dr. Patel found these deviations resulted in Pearson suffering a subarachnoid hemorrhage. (Affidavit of JJ Patel p.3)

The amounts of Coumadin prescribed for Pearson by the Defendant Doctors was "**a patent breach in the acceptable standard of care**." (Affidavit of Algha Lodwick Pharmacist and Certified Anticoagulation Manager certified as a separate exhibit by the Clerk, at pg. 3)(App. 18). Lodwick found "a direct link between [Appellant's] having been given an excessive dose of Coumadin and the subarachnoid hemorrhage" (SAH) she suffered.

The Appellants have not claimed prejudice other than having to defend a case of a clear deviation from the appropriate standard of care. Such prejudice cannot be the type of factor which supports dismissal, as there is a presumption that cases should be decided on the merits. This Court has recently stated that a party seeking to exclude expert testimony must **show prejudice**, otherwise there is no valid basis to exclude or limit testimony, Equitania Ins. Co. v. Slone & Garrett P.S.C., 191 S.W. 3d 552, 556 (Ky. 2006). In *Equitania,* the Court cited Ward v. Housman, *supra* in support of the proposition that if there is no prejudice to the opposing party the evidence cannot be limited or excluded.

The trial Court did not consider any alternative sanctions. When Pearson missed the disclosure deadline by less than two weeks and was not present at the Status Conference, her case was given the death penalty. The trial Court simply abused its discretion by applying a death penalty discovery sanction when Pearson was 11 days late in disclosing her expert. The trial Court further abused its discretion when it held, in its February 24, 2006 Order, that Pearson's expert

witness Affidavits were irrelevant for purposes of Pearson's timely CR 59.05 Motion. The trial Court, without citation to any case law, held these Affidavits irrelevant because they came some 36 days after the December 12, 2005 Summary Judgment, which was entered **without prior notice or an opportunity to be heard**. (R. 834-837) (App.3)

CR 59.05, on its face, does not require Affidavits to be filed at the time the Motion is filed. The only requirement being that the facts relied upon in any Affidavit filed in support of a CR 59.05 Motion must have existed at the time judgment was rendered. See, Gullion v Gullion, 163 S.W. 3d 888 (Ky. 2005), at 892. Pearson's expert witness Affidavits did not rely on any facts that did not exist at the time judgment was rendered, but were based entirely on facts and medical records that existed long before judgment was rendered. The trial court simply misinterpreted CR 59.05 which, according to this Court's recent opinion in Gullion, *supra,* does not require affidavits to be filed at the time a CR 59.05 motion is made. The erroneous holding by the trial Court was an abuse of discretion.

4. The Appellants Were Not Prejudiced By The Non-Disclosure Of Expert Witnesses As Of The Date They Sought Summary Judgment

In Poe v. Rice, 706 S.W. 2d 5 (Ky. App. 1986), the Court of Appeals held it was error to grant a Defendant Summary Judgment against a Plaintiff who objected to providing the names of his experts yet continued to maintain that they existed. The Court found the trial Court "erroneously attempted to substitute the Summary Judgment standard of care CR 56.03 for the procedures of CR 37.02 and CR 37.01." *Id. at 6.* The Poe Court further noted that the so called Summary Judgment had the flavor of a dismissal for failure to prosecute. *Id* at 6.

Throughout Pearson's affidavits and discovery responses, it is abundantly clear that she had experts prepared to testify to the deviation from the accepted standards of care, and as to causation. She denied a request specifically asking her to admit, "No expert witness had advised you that each

of the named Defendants in this action deviated from their respective standards of care." Pearson specifically denied a request for her to admit, "that each Defendant did not deviate from standards of care." (URBE ex. 1, 2) (App. 5 and 6).

In response to the Defendant doctors' 26.02 Interrogatory 8(g), Pearson stated that she was in consultation with the expert witnesses and she specifically stated she would be calling her current and past treating physicians as expert witnesses. Pearson agreed to supplement her responses upon deciding exactly which experts would be called upon to testify. (URBE ex. 5, No. 8g, p. 33-34) The finding that there are no material issues of fact is "an erroneous adjudication of the facts." Poe at 6. Not only did Pearson repeatedly claim she had experts, she provided the substance of their opinions in her 200 pages of discovery responses. There is no prejudice. This is not a situation where there are undisputed material facts. Granting Summary Judgment in this scenario is erroneous and an abuse of discretion.

C. THE CIRCUIT COURT ABUSED ITS DISCRETION BY GRANTING SUMMARY JUDGMENT WHEN APPELLANTS FILED NO AFFIDAVITS AND SUBMITTED NO EVIDENCE OR TESTIMONY IN SUPPORT OF THEIR BARE BONES MOTIONS

The burden of proof for Summary Judgment falls on the moving party, in this case the Appellants. The **movant must produce something** that shows there is no material issue of fact. Ferguson v. Utilities Elkhorn Coal Co., 313 S.W.2d 395 (Ky. 1958). "The duty remains to place before the Court sufficient facts to enable him to apply appropriate principles of law." *Id.* at 399. When summary judgment is sought, **the party opposing the summary judgment is not required to produce any evidence** until the moving party first establishes a prima facie case, State Street Bank v. Heck's Inc., 963 S.W. 2d 626, 630-31 (1998) (citing D.H. Overmyer Co. v. Hirsh Bros. & Co., 459 S.W. 2d 598, 600 (1970). The burden of proof is on the party seeking summary judgment, and only a properly supported motion for summary judgment shifts the burden of proof from the movant

to the respondent of a CR 56 motion. Steelvest, Inc. v. Scansteel Service Center Inc., 807 S.W.2d 476 at 482 (Ky. 1991); Hubble v. Johnson, 841 S.W. 2d 169, 171 (Ky.1992); Williams v. City of Hillview, 831 S.W. 2d 181, 183 (Ky. 1992); and Hibbitts v. Cumberland Valley Nat'l Bank & Trust Co., 977 S.W. 2d 252, 253 (Ky. App. 1998). (Footnote 6 in original).

Defendants, as the parties seeking summary judgment in this case, bear the burden showing the non-existence of genuine issues of material fact. In Smith v. Higgins 819 S.W. 2d 710, 712 (Ky. 1991), this Court opined that a Plaintiff, as the non moving party, **has no duty to produce evidence** to defeat a Motion For Summary Judgment which has no evidentiary support. "Simply by moving for summary judgment, a defendant cannot force a plaintiff to come forward with evidence to defeat the motion." Smith *Id.* 819 S.W. 2d at 712.

In Davis v. Dever 617 S.W.2d 56 (Ky. App. 1981), the Court of Appeals held a Plaintiff has "no duty to make any showing whatsoever to defeat the Motion For Summary Judgment [when] the movant failed entirely to establish a prima facie case". *Id.* at 57. The issue in Davis was whether a Plaintiff sustained a permanent injury under the Motor Vehicle Reparations Act. It was incumbent on the Defendant to show prima facie that the Plaintiff did not have a permanent injury. Because the Defendant in Davis did nothing to establish a prima facie case, the grant of Summary Judgment had to be reversed.

"[U]nless and until the moving party has properly shouldered the initial burden of establishing the apparent non-existence of any issue of material fact," the non-Movant is not required to offer evidence of the existence of a genuine issue of material fact. Robert Simmons Const. Co. v Powers Regulator Co., 390 S.W.2d 901, 905 (Ky. 1965). "If the moving party does not sustain his burden, ... then summary judgment should not be granted." Roberts v. Davis, 422 S.W. 2d 890, 894 (Ky. 1968) See, also Goff v. Justice, 120 S.W. 3d 716, 724 (Ky.App. 2002); and White v. Rainbo

Baking Co. 765 S.W. 2d 26 (Ky. App. 1988). The above line of cases applies to negligence actions such as **legal or medical malpractice cases** regardless of whether the non-movant would be required to produce expert testimony at trial to meet their burden of proof in order to survive a motion for a directed verdict. The Court of Appeals Opinion in Goff v. Justice makes it perfectly clear that in cases where expert testimony is required, so long as there is **no** evidence of record that indicates expert testimony will not be available at trial, and the movant has not presented any expert evidence of his own which would indicate the non- movant could not produce such evidence at trial, Summary Judgment is improper. *Id.* 120 S.W. at 724-25.

Here, Appellants did not submit any evidence, Affidavits, or deposition testimony to counter the theories of liability and facts set forth in Pearson's Complaint, Affidavits and discovery responses, nor did they produce any evidence to counter the clear violation of the written standards for prescribing Coumadin as set forth in the PDR and product insert. (R. 46-49, 142-148, 154-203, 356-358).

Dr. Johnsrude admitted prescribing Coumadin at a dosage that was 2-3 times more than the maximum recommended dosage, and this was a clear and unexplained deviation from the written standard. (URBE collective ex. 4, pgs. 2-6). This evidence, when viewed in the light most favorable to Pearson, precludes Summary Judgment under a Res Ipsa Loquitor theory when **no evidence** was introduced which counters this written standard, and Defendants did not produce evidence of a different standard of care. To grant Summary Judgment under these facts is erroneous as it is an attempt to substitute the standards for Summary Judgment for the procedures required by CR 37.01 and 37.02.

D. THE CIRCUIT COURT ABUSED ITS DISCRETION BY NOT TREATING THE "MOTION FOR RULING ON MOTION FOR SUMMARY JUDGMENT" AS A NEW MOTION AND GIVING PEARSON NO OPPORTUNITY TO RESPOND

1. Solingers' New Motions For Summary Judgment Raised, As A New Ground, That Pearson Was Not In Compliance With The Court's Trial Order

Solinger was clear that his original Motion for Summary Judgment was based on the alleged "judicial admissions" rather than any facts, affidavits or testimony. (R. 142-148). In her timely Response, Pearson responded to the issues raised by Solingers' motions. Pearson clearly pointed out that no such judicial admissions existed because they had been **timely denied** after the Court granted Pearson an extension of time to respond. (R. 266-280)

On December 12, 2005, Solinger filed a "Motion For Ruling On Defendant's Motion For Summary Judgment" rather than file an AOC 280 form. (R. 699-703) Solinger's Motion was a new motion. Solinger's motion relied on the prior memorandums concerning the now mooted admissions issue and, furthermore, **raised as a new issue Pearson's failure to disclose her experts by the trial Court's deadline**. Solinger's new motion was filed December 12, 2005, a mere 11 days after the disclosure deadline and on the very date the trial Judge granted Summary Judgment. (R.704-705, Order Granting Summary Judgment)

Pursuant to CR 56.03, an adverse party has the right to file Affidavits in opposition to a Motion For Summary Judgment. Pearson was denied this basic right. Further, a Motion for Summary Judgment should be served on the adverse party at least 10 days before the hearing date. Clearly this did not occur with Solinger's new December 12, 2005 Motion which was granted the very day it was filed. Pearson was deprived of her rights to *a full evidentiary hearing* pursuant to CR 56.03 and cases such as Old Mason's Home of Kentucky, Inc. v. Mitchell, 892 S.W. 2d 304 (Ky.App. 1995)

While it is true the hearing can be waived, such waivers must be voluntary. Equitable Coal Sales Inc. v. Duncan Machinery Movers Inc., 649 S.W.2d 415 (Ky. App. 1983). Here, Pearson did

not voluntarily waive the hearing. She was too ill to attend the December 9, 2005 Status Conference (**and requested a continuance prior to the hearing occurring**). (R.706-722; MVCO ex. 6; URBE ex. 10, pgs.2-3) Not only did the trial Court not continue the matter, Pearson was never even given an opportunity to object to Solinger' Motion (which was granted the same day it was filed).

Hay v. Hayes, 564 S.W.2d 224 (Ky. App. 1978) cited Bowdidge v. Lehman, 252 F.2d. 366, 368 (6th Cir. 1958) for the proposition that when a litigant "**was given neither notice nor opportunity to be heard** upon the questions of Summary Dismissal the Judgment was erroneous." *Id.* at 225.

Summary Judgment "is not a trick device for premature termination of litigation". Conley v. Hall, 395 S.W.2d 575, 580 (Ky. 1965). A Litigant should be permitted to submit her evidence, "Summary Judgment should not be entered **as a form of penalty for failure of the Plaintiff to prove his case quickly enough**." *Id.*

Had the Court allowed a response and set this matter for a hearing pursuant to CR 56.03, Pearson could have submitted expert Affidavits or, at a minimum, an expert witness disclosure containing all the information supplied in the affidavits she filed in January 2006.

E. THE CIRCUIT COURT ABUSED ITS DISCRETION BY REFUSING TO PERMIT PEARSON TO FILE THE AFFIDAVITS OF HER EXPERTS LATE

Courts have clearly held it is an abuse of discretion to grant Summary Judgment to a Litigant simply because a party has failed to make CR 26.02 expert witness disclosures in a medical malpractice case, *accord*, Baptist Health Care Systems Inc v. Miller, 177 S.W.3d 676 (Ky. 2005) *cited supra*. In Baptist Healthcare Systems, Justice Lambert, writing for the majority, reiterated **that it is improper to use CR 56 to resolve a procedural dispute**. *Id.* at 681-82. The Court, in its well-reasoned Opinion, cited approvingly both Ward v. Housman and Poe v. Rice, *supra*. It is clear that,

except in rare cases, a trial court is not authorized to use CR 56 to give a case the death penalty. Likewise, the Court of Appeals has held that it was improper to dismiss an action because a party was 30 days late in answering interrogatories, Bridwell v. City of Dayton, 763 S.W. 2d 151, 152 (Ky. App. 1988). Under CR 6.02(b), the trial Court should have permitted the late filing of the Affidavits. (MVCO at 24; URB at pgs. 25-30).

If it is an abuse of discretion to dismiss a case for a late disclosure of an expert, and it is an abuse of discretion to dismiss a case for being 30 days late in answering interrogatories, it must also be an abuse of discretion to refuse to permit the late filing of an expert disclosure. This is especially true when, as here, Defendants never filed a "Motion to Compel" this information. Pearson's CR 6.02(b) Motion for Enlargement of Time to file her Expert Affidavits was only 45 days after the disclosure deadline, where no Motions for sanctions for late disclosure were ever sought, where the substance of the experts' opinions were disclosed (but not the names) and no claims of prejudice (other than having to defend a meritorious action) were made. Moreover, the Defendants did not and could not argue that the delay was intentional, and the trial court did not find otherwise. It was an abuse of discretion to grant Summary Judgment in a case that was only nine months old under the circumstances of this case.

1. The Drug Manufacturer's Package Insert For Coumadin, As Published In The Physicians Desk Reference, Provided The Applicable Standard Of Care

Pearson asked the Court of Appeals to hold, as a matter of law, that the Package Insert and the Physicians Desk Reference (PDR) for Coumadin, under the unique facts of this case, provided for the applicable standard of care for prescribing, administering and monitoring Coumadin. This issue was raised in Pearson's Civil Pre-Hearing Statement, Opening Brief and Reply Briefs. The Court of Appeals' Opinion addressed Pearson's argument that no hired expert witness was required under the facts of this case. The Opinion appears to focus solely on a *res ipsa loquitur* theory that

Pearson would argue at trial, and on the fact that Pearson's medical history, prior to the Coumadin overdose, was complex.[5] Pearson meticulously set forth her treating cardiologists' opinions concerning her Coumadin overdose in her interrogatory responses. However, Pearson's argument before the Court of Appeals was that, for purposes of Summary Judgment, she did not need an expert witness (under res ipsa loquitur or any other theory) to defeat the Appellants' Motion for Summary Judgment because Appellants did not sustain their burden of proof. Appellants **filed nothing** to controvert Pearson's affidavits, interrogatory responses, nor could Appellants state what the standard of care for prescribing Coumadin was when asked by Pearson. The written standards contained in the Physicians Desk Reference established a prima-facie albeit rebuttable standard of care.

The June 2002 Package Insert for Coumadin, as reprinted and published in the 2004 Physicians Desk Reference, states in relevant part as follows:

> **It is recommended that Coumadin (Warfarin Sodium) therapy be initiated with a dose of 2 to 5 mg per day** with dosage adjustments based upon the results of PT/INR determinations. (2004 PDR pg. 1051)
>
> **INITIAL DOSAGE**: The dosing of COUMADIN (Warfarin Sodium) must be individualized according to patient's sensitivity to the drug as indicated by the PT/INR. **Use of a large loading dose may increase the incidence of hemorrhagic and other complications, does not offer more rapid protection against thrombi formation, and is not recommended**. Lower initiation and maintenance doses are recommended for elderly and/or debilitated patients and patients with potential to exhibit greater than expected PT/INR responses to Coumadin (Warfarin Sodium). (2004 PDR pg.1052)

While Pearson intended to call expert witnesses at trial, under the facts of this case a lay juror is perfectly capable of understanding that prescribing Coumadin at 2-3 times the recommended

---

[5] The Opinion states that "Pearson's medical history was quite complex prior to the alleged February 2004 overdose of Coumadin, and the standard of care relating to the administration of an anticoagulation drug is not within common knowledge of jurors." (Opinion pg 9-10).

dose was the cause of the Coumadin toxicity and resulting cerebral bleed. When a patient's INR[6] exceeds 4.0, a patient's risk of cerebral bleed rises dramatically.[7] When a patient's INR exceeds 6.0 the patient is at significant risk of a spontaneous cerebral bleed for 14 days after the INR exceeds 6.0. A patient taking Coumadin for atrial fibrillation should have an INR of 2.0-3.0; Pearson's was measured critically high at 8.6 and 7.5. It is easy to understand how a large loading dose (10 mg) of Coumadin can have disastrous consequences early in anticoagulation therapy. Solinger continued to provide Pearson with Coumadin in excess of the written standard and she suffered a toxicity which caused a cerebral bleed.

On February 18, 2004, Pearson was started on 10 mg of Coumadin at Norton Hospital. On February 19, 2004, Pearson was instructed by staff physicians at Norton Hospital to take an additional 10 mg of Coumadin. On February 20, 2004, because Pearson's INR was a little high at 2.8, Pearson was advised by staff physicians of Norton Hospital to take only 5 mg of Coumadin. Additionally, Pearson's treating cardiologists diagnosed her as suffering from a subarachnoid hemorrhage secondary to over-anticoagulation. Under these facts, a jury is certainly capable of understanding that administering Coumadin at a level in excess of the manufacturer's directives would cause an overdose and that the Coumadin overdose was the cause of Pearson's injuries. Likewise, a jury is capable of understanding that a healthcare provider who deviates from explicit instructions (from the drug manufacturer) concerning the use of a dangerous drug, is guilty of medical negligence, especially where the healthcare provider never attempts to explain the deviation from the manufacturer's explicit instructions. Coumadin does not dissolve existing blood clots and a large initiation dose does not provide any greater protection from clot formation than does a smaller

---

[6] A measure of the blood's ability to clot

[7] *American College of Chest Physicians Sixth Consensus Conference on Antithrombotic Therapy, Chest* 2001; 119/1/ January 2001 Supplement pg.198-99

dose, but a larger dose does increase rates of bleeding.

Whether Pearson's medical history was complex prior to the time she was prescribed Coumadin has absolutely nothing to do with the fact that she was overdosed on Coumadin. All that jurors would be required to understand are three basic facts: (1) the dosage of Coumadin was excessive; (2) that an injury occurred to Pearson (this medical evidence was provided by the diagnosis of Coumadin toxicity and cerebral bleed made by Pearson's treating physicians); and (3) that it is a violation of the written standard of care to prescribe and administer a dosage of Coumadin in the manner Appellants did. It is respectfully submitted that the Court of Appeals misunderstood Pearson's argument and that, based upon the above facts as well as the facts set forth below, the Package Insert for Coumadin did provide the applicable standard of care and, therefore, *res ipsa loquitur* is applicable in this case.

2. As Pearson's Treating Cardiology Group, Solinger Had A Duty To Use Reasonable Care In Prescribing, Administering And Monitoring Pearson's Coumadin Anticoagulation Therapy

On February 18, 2004, Pearson was hospitalized for atrial fibrillation and was prescribed 10mg of Coumadin by Appellants as an anticoagulant. **This was a dose greatly in excess of the written standard of care set forth in the product insert for the drug and in the Physician's Desk Reference** (PDR). Coumadin should be started at a 2-5mg dose. (R. at 110 and URBE ex. 3)

Pearson was not warned of the serious side effects of Coumadin, nor was she advised in any manner of the risk of a cerebral bleed while taking Coumadin. Appellants did not tell her of the well-known dangerous drug interaction between Coumadin and Amiodarone, a drug Appellants knew she was taking since July 2002. (R. at 108-110, 112-113)

3. Solinger Was Aware Of The Well Known Coumadin/Amiodarone Interaction But Failed To Reduce Pearson's Initiation Dose Of Coumadin By 30-50 Percent

The interaction between Coumadin and Amiodarone was well known by Appellants, as both Pediatric Cardiology Associates and Dr. Johnsrude edited a medical treatise paper (in October 2002) titled "Ventricular Fibrillation" which stated Amiodarone increases the blood levels and anticoagulation effects of, among other things, anticoagulants (Coumadin). The Coumadin Pharmacy Monograph given to Pearson upon her discharge from Norton Hospital on February 19, 2004, stated in relevant part as follows: "**BEFORE USING THIS MEDICATION**: Some medicines or medical conditions may interact with this medicine. **INFORM YOUR DOCTOR OR PHARMACIST** of all prescription and over-the-counter medicine that you are taking. **ADDITIONAL MONITORING OF YOUR DOSE OR CONDITION** may be needed if you are taking **Amiodarone**." This Pharmacy Monograph presumes the patient has been taking Amiodarone and is starting Coumadin anticoagulation therapy. Solinger was aware Pearson was taking Amiodarone since July 2002, as Solinger was responsible for authorizing refills for the Amiodarone prescription and also increased Pearson's dose of Amiodarone from 200-300 mg per day on February 19, 2004. This fact was also noted in the medical records obtained from Norton Hospital. Norton's own website's *Drug Checker/Drug Interaction Tool* warns the public that when Amiodarone and Coumadin are taken concomitantly, **a 30-50% reduction in the dosage of Coumadin is required, or serious or life threatening bleeding can occur**.

The PDR and Product insert standards of care for these medications call for Coumadin's 2-5mg initial dose to be **further reduced by 30-50%** when taken while on Amiodarone. The PDR contains a **Black Letter Warning** that using these drugs concomitantly can cause life threatening bleeding if an empiric 30-50% dose reduction of Coumadin is not utilized. (MVCO ex.3, 4)

Upon her discharge from Norton Hospital on February 19, 2004, Pearson was told to increase her Amiodarone to 300mg per day and to take an additional 10mg of Coumadin that

evening. When her INR became abnormal (INR 2.8) on February 20, 2004, which was **less than 48 hours after beginning Coumadin**, Appellants reduced her Coumadin dosage by half to 5 mg when it should have been stopped altogether. Two (2) days later her INR was **critically** high at 8.6. (R. at 109)

Six days after Appellants started overdosing Pearson on Coumadin, she presented to Norton Hospital with various symptoms and was **diagnosed by a Norton Emergency Room doctor as suffering from "Coumadin Toxicity"**, as her INR was still Critically High at 7.5. As a result of these deviations from the appropriate standards of care, Pearson suffered a cerebral bleed and cerebral aneurysm.

Several Courts, in cases with facts very similar to the case at bar, have held that the FDA Approved Package Insert standing alone can be used as the applicable standard of care in a medical malpractice case. These Courts have correctly reasoned that when a physician or medical care provider deviates from explicit warnings contained in the Package Insert, the burden of proof on the standard of care is shifted to the physician or medical care provider. This does not mean that the physician or medical care provider cannot rebut the explicit warnings contained in the Package Insert for deviating from the manufacturer's instructions, but the physician or medical care provider must explain their deviation from the manufacturer's written instructions for proper use of the medication.

In Ohligschlager v. Proctor Community Hospital, 55 Ill. 2d. 411, 303 N.E.2d 392 (1973), the Illinois Supreme Court allowed the manufacturer's instructions regarding the use of a drug to establish the professional standards ordinarily established by expert testimony. In the case of Garvey v. O'Donoghue, 530 A.2d 1141 (D.C. App.1987), the D.C. Court of Appeals held that the Package Insert for the drug Tobramycin was probative evidence as to the medical standard of care in a case in which a physician was alleged to have deviated from the standard of care as set forth in

the Package Insert. The Court stated in a medical malpractice case, alleging improper administration, dosage, and monitoring of the drug, the Package Insert was admissible as both prima facie evidence of the standard of care and physician's notice of their contents. Id. 530 A.2d. 9th 1146.

In the case of Thompson v. Carter, 518 So. 2d. 609 (Miss. 1987), the Mississippi Supreme Court held that the Package Insert can be given weight as authoritative published compilation by a pharmaceutical manufacturer. It is some evidence of the standard of care, but is not conclusive evidence. The prescribing physician can be permitted to rebut this implication and explain its deviation from the manufacturer's recommended use on dosage. The holding will shift the burden of persuasion to the physician to provide a sound reason for his deviating from the directions and will require corroborative evidence to determine whether the physician met or violated the appropriate standard. Id. 518 So. 2d at 613.

In Haught v. Maceluch, 681 F.2d 291 n. 12, *reh'g denied*, 685 F.2d 1385 (5th Cir 1982), a Fifth Circuit medical malpractice case originating in Texas, the Court held that the PDR warnings applied and constituted the applicable standard of care alleging improper administration of the drug Pitocin. The Court noted that the deviation in the manufacturer's instructions, along with the physician's violation of a hospital rule concerning the administration of Pitocin, was sufficient evidence that the physician had violated the applicable standard of care. In Mulder v. Parke Davis & Co, 181 N.W. 2d 882 (1970), the Minnesota Supreme Court stated that where a drug manufacturer recommends to the medical profession **(1)** the conditions under which its drug should be prescribed, **(2)** the disorders it is designed to relieve, **(3)** the precautionary measures which should be observed, and **(4)** warns of the dangers which are inherent in its use, a doctor's deviation from such recommendation is prima facie evidence of negligence. In such circumstances, it is incumbent on

the doctor to disclose his reasons for departing from the procedures recommended by the manufacturer. Id. 181 N.W. 2d at 887. The cases set forth below hold that a deviation from the manufacturer's instructions is prima facie evidence of negligence. Fournet v. Roule-Graham, 783 So. 2d 439 (La. Ct. App. 2001), and Terrebonne v. Floyd, 767 So. 2d 758 (La. Ct. App. 2000); Salgo v. Leland Stanford Jr. Univ. Bd. Of Trustees, 317 P. 2d 170 (Cal. Ct. App. 1957); Riffey v. Tonder, 375 A. 2d 1138 (Md. App. 1977); Witherell v. Weimer, 499 N.E. 2d 46 (Ill. App. 1986); Nolan v. Dillon, A.2d 36 (Md. App. 1971)

All decisions concerning medical treatment or therapy which involve risk to a patient are supposed to be based upon a risk vs. reward analysis. Appellants have never even attempted to explain their reckless deviation from the applicable standard of care in providing anticoagulation therapy to Pearson.

Pearson disclosed, under oath, in her August 25, 2005 Interrogatory responses that her treating physician, cardiologist Brendan O'Cochlain, advised her on January 25, 2005 that the 10 mg dosage of Coumadin should have been reduced by 50%. Under Kentucky law, a plaintiff in a medical malpractice action can rely upon a defendant physician's admissions during discovery, or medical evidence obtained by other treating physicians. This includes even alleged statements made to a plaintiff, by a treating physician, which support a plaintiff's claims See, Perkins v. Hausladen, 828 S.W.2d 652, 655-56 (Ky. 1992).

Moreover, Norton's own website states that serious **or life threatening bleeding can occur,** when Amiodarone and Coumadin are used concomitantly, if the dosage of Coumadin is not reduced by 30-50%. Soligner's violation of the PDR is prima facie evidence of a deviation in the standard of care. At a minimum, the above facts presented a factual question that was improperly decided against Pearson on Summary Judgment. If the record had been viewed in a light most

favorable to Pearson and all doubts resolved in her favor, Summary Judgment could not have been properly Granted and the Court of Appeals' Opinion reversing the trial court's Summary Judgment was proper.

Pearson submits that, based upon all the facts and law as set forth above, the Court of Appeals should have held that (under the facts of this case) the Package Insert and the PDR provide the applicable standard of care for prescribing Coumadin anticoagulation therapy. Pearson respectfully requests that the Court of Appeals Opinion to the contrary be reversed.

4. Movants Did Not Warn Pearson About The Risk Of Cerebral Bleeding Prior To, During Or After Her Coumadin Anticoagulation Therapy And This Was A Patent Violation Of Kentucky's Informed Consent Statute KRS 304.40-320.

Pearson asked the Court of Appeals to hold, under the facts of this case, that Pearson did not need a hired expert witness to state a claim against Appellants for informed consent, and to defeat Appellants' Motions for Summary Judgment. The Court of Appeals Opinion did not address this argument in its Opinion of May 11, 2007.

Under Kentucky law, an action for "lack of informed consent," regardless of its form, is, in reality, one for negligence in failing to conform to a proper professional standard. Holton v. Pfingst, 534 S.W. 2d 787, 788 (Ky. 1975); Keel v. Saint Elizabeth Medical Center, 842 S.W. 2d 860, 861 (Ky. 1992). The late Justice Charles Leibson, in his concurring Opinion in Keel, noted that "lack of informed consent" is not, per-se, a tort, but rather a legal term or theory of liability. Justice Leibson wisely stated that:

> "Lack of informed consent" is not, per-se, a tort. It is only a term useful in analyzing medical malpractice claims involving two different torts: (a) the type of assault and battery which occurs when a physician performs an unauthorized procedure, ie., "where a patient *has not consented* to the particular medical treatment which was given"; and (b) the type of negligence which occurs when a physician has not made a *"proper disclosure* of the risks inherent in a treatment." Louisell and Williams, Medical Malpractice, Vol 2, Sec. 22.04. (Emphasis original.)

In the case of Vitale v. Henchey, 24 S.W. 3d 651 (Ky. 2000), this Court stated that an action for a physician's failure to disclose a risk or hazard of a proposed treatment or procedure is one of negligence and brings into question professional standards of care and KRS 304.40-320 Kentucky's Informed Consent Statute. It is undisputed that Pearson was not warned prior to, during or after her Coumadin anticoagulation therapy that cerebral bleed was a risk. Not only is cerebral bleed a risk of anticoagulation therapy, it is the most feared and dreaded complication of Coumadin anticoagulation therapy.[8]

Both the June 2002 Package Insert for Coumadin, as well as the 2004 PDR, list cerebral hemorrhage as a complication of Coumadin anticoagulation therapy. (2004 PDR pg. 1049). If a healthcare provider gives patients incomplete information, oral or written, this is certainly a prima facie violation of KRS 304.40-320. Furthermore, Appellants' failure to disclose the risk of cerebral bleed does not comport with prior Kentucky cases such as Holton v. Pfingst, 534 S.W. 2d 787, 788 (Ky. 1975); Keel v. Saint Elizabeth Medical Center, 842 S.W. 2d 860, 861 (Ky. 1992). It is clear that Appellants knew or should have known, for several years prior to February 2004, that cerebral bleed was the most significant risk faced by a patient starting Coumadin anticoagulation therapy, yet, this was never disclosed to Pearson. Based upon these facts, an expert witnesses is not necessary in order for Pearson to submit her case to a jury and the trial court abused its discretion in requiring an expert witness on this claim.

Pearson respectfully requests that the Court of Appeals' Opinion ignoring Pearson's claim for lack of informed consent be reversed and that this Court hold, as a matter of law, that Pearson does not need expert testimony to defeat a Motion for Summary Judgment under the undisputed

---

[8] American College of Chest Physicians Sixth Consensus Conference on Antithrombotic Therapy, Chest 2001; 119/1/January 2001 Supplement pg.198-99.

facts of this case.

F. It Was An Abuse Of Discretion For The Trial Court To Permit Solinger To Raise The Non-Disclosure Of An Expert Witness For The First Time In A Motion For Ruling On Summary Judgment And This Error Improperly Shifted The Burden Of Proof On Summary Judgment From Solinger To Pearson.

Pearson argued, in the Court of Appeals, that Solinger was allowed to raise Pearson's supposed lack of an expert for the first time in his second Motion for Summary Judgment filed December 12, 2005. The Court of Appeals, while acknowledging that this did in fact occur, did not hold this was a basis for reversing the trial court's Summary Judgment. (Opinion pg. 3) Solinger was permitted by the trial court to raise the issue of Pearson's supposed lack of an expert witness for the first time in a Motion for Ruling on Defendant's Motion for Summary Judgment. (R. 699-703) This Motion was really a new Motion for Summary Judgment. This issue was not raised in Solinger's original Motion for Summary Judgment. (R. 142) The sole issue originally raised by Solinger was Pearson's alleged CR 36 admissions.

Under prior precedent from the Court of Appeals, it was clearly improper for the trial court to allow Solinger to raise the issue of an expert witness in a new Summary Judgment Motion. This is especially true since the trial court did not permit Pearson to respond to the Motion. In *White v. Rainbo Baking Co.*, 765 S.W. 2d 26 (1989), the Court of Appeals held that it was improper to allow a party to raise an issue for the first time in a reply brief because, in effect, the trial court had shifted the burden on summary judgment from the Movant to the non-Movant. *Id.* at 30. The burden of establishing that no material issue of fact exists rests upon the party moving for summary judgment. Conley v. Hall, 395 S.W. 2d 575 (Ky. 1965). In Goff v. Justice, 120 S.W. 3d 716 (Ky. App.2002), the Court of Appeals held that a trial court, in considering a summary judgment motion, cannot require the party opposing a summary judgment motion to bear the burden of proof upon the motion unless and until the moving party has properly shouldered the initial burden of establishing the apparent

non-existence of any issue of material fact. Goff v. Justice involved a legal malpractice claim filed by a client against her former attorney. The trial court had granted summary judgment against the Goffs on their legal malpractice claims against their former attorney because of the Goffs alleged lack of expert testimony to support the legal malpractice claim.

In reversing the trial court's summary judgment, the Court of Appeals noted that, (1) the Goffs were not required to prove the existence of a disputed issue of material fact unless and until the Movant had met his initial burden of proof on the motion, (2) the Goffs were not required to produce expert testimony to defeat the Movant's summary judgment motion because the motion did not point to any evidence of record, nor presented any expert evidence that would indicate the Goffs could not produce such expert evidence, and (3) the Movant alleged in his Reply Brief merely that, as of the time the reply was filed, the Goffs had failed to produce such expert testimony. The Court noted that the Goffs had claimed all along, in interrogatory responses and in correspondence to the defendant's counsel, that they had experts which supported their claims. Goff v. Justice, 120 S.W. 3d at 724-26.

Finally, the Court of Appeals noted that summary judgment is proper when it is manifest that the party against whom the judgment is sought could not strengthen his case at trial. See, American Ins. Co. v. Horton, 401 S.W. 2d 758 (Ky. 1966)

In the case at bar, Pearson maintained from day one that she had experts to support her claims; these would be both treating physician experts and hired experts. Pearson made these disclosures in her under oath Interrogatory Responses, in her Response to the Summary Judgment Motions, in her Response to Norton's Motion to file a Reply in her Status Conference Statement and in open Court on July 27, 2005 and October 11, 2005. Solinger submitted no evidence in support of his Motion for Summary Judgment and it is clear that the trial court improperly shifted the burden

of proof from Solinger to Pearson. If it is improper to allow a party to raise the lack of an expert witness in a reply brief, then certainly it must be improper for the trial Court to allow a new Motion for Summary Judgment to be filed when it raises a new issue and the Court allows no response.

1. The Trial Court Abused Its Discretion By Failing To Continue The December 9, 2005 Status Conference

Pearson asked the Court of Appeals to hold that it was an abuse of discretion to fail to continue the December 9, 2005 Status Conference because Pearson had sought a Continuance of the Status Conference as Pearson was in the hospital. The Court of Appeals did not address this argument. Pearson advised the trial court she was hospitalized with heart problems prior to the Status Conference of December 9, 2005. The transcript of the Status Conference indicates the Court was aware that Pearson was in the hospital. (Transcript December 12, 2005 Status Conference pg. 1-2) Pearson has maintained all along that she also requested a continuance of the Status Conference at this time and **this has never been disputed**. (December 14, 2005 correspondence of Melanie L. Pearson to Hon. Judith McDonald Burkman, R., 706-722 and February 20, 2006 Affidavit of Melanie L. Pearson, URBE Ex. 10) On September 6, 2005, during a prior Motion Hour before the trial court, Judge McDonald-Burkman specifically advised Pearson that if she ever needed to miss Court due to her physical infirmities, she need only call the Court and nothing would occur in her absence. (Video 30-09-05 VCR-012 at 14:17:08-14:17:18). Despite the prior assurance from the Court, the Court heard oral argument in Pearson's absence and Granted a Summary Judgment against Pearson just (3) days later.

Solinger's new Motion had been filed on December 12, 2005, three days after the Status Conference. The trial court failed, in its duty as the gatekeeper of the proceedings, to faithfully and diligently exercise its search for the truth as is required under CR 56. The trial court **heard ex-parte arguments** from counsel for Norton Hospital (counsel for Solinger did not attend the Status

Conference) and took the matter under advisement despite the fact that, prior to the Status Conference, a continuance had been requested because of a hospitalization.

There is no reason, with the trial date still 4 1/2 months away, that the original trial date could not have still been honored. Indeed, even with Pearson not submitting her expert's affidavits until January 17, 2006, the trial date was still more than three months away and her experts could have been deposed in late January or early February, leaving well in excess of 60 days for Defendants to disclose their experts. The hypothetical fact that a trial date may have to be moved to a later date (in a case that is nine or ten months old) does not outweigh the presumption that cases should be decided on their merits. This is not a case that had languished for years or one where trial dates had been previously moved to accommodate the parties.

2. Under Kentucky Law, Continuances Of Summary Judgment Proceedings Are To Be Liberally Granted

This Court ruled, in the case of Perkins v. Hausladen, 828 S.W.2d 652 (Ky.1992), that it was an abuse of discretion for a trial court to hear a defendant physician's Motion for Summary Judgment on the day of trial. The motion was based upon failure of plaintiff to have an expert witness regarding the standard of care. CR 56.03 requires at least 10 days notice that a summary judgment motion will be heard in order to permit an adverse party a chance to respond. The Court's Opinion notes that extensions of time to respond to Summary Judgment Motions are to be liberally granted by trial courts, *Id. at 656.* The Court further noted the plaintiff was prejudiced by not being able to **put on any affidavits, additional legal research, or other evidence to contradict the motion**. *Id.* at 657. Pearson was severely prejudiced by not being able to put on any affidavits, additional legal research or other evidence to contradict Solinger's **new Motion**.

Similarly, in the case at bar, it was an abuse of discretion for the trial court to grant a Summary Judgment based upon a **new argument not raised until the very day summary**

judgment was granted. See, Rexing v. Doug Evans Auto Sales, Inc., 703 S.W.2d 491 (Ky.App.1986), holding that it was a violation of CR 56.03 to grant a summary judgment with less than 10 full days notice to the respondent of a motion for summary judgment.

The Court in Rexing also held that it was an error not to grant a continuance of the summary judgment motion:

> "**We see no reason to permit Appellee to circumvent the notice requirements of our Civil Rules by ambushing appellants with last minute motions and early morning hearings.**" *Id.* 703 S.W.2d at 494.

The purpose of these procedural safeguards is to ensure that reasonable notice of, and opportunity to be heard, on a summary judgment motion, will be given prior to rendition of a "final judgment" Accord, Hay v. Hayes, 564 S.W.2d 224 (Ky.App.1978). *Id* at 225.

3. The Trial Court Violated JRP 401(a), CR 56.03 And The Pre-Trial Order By Granting Solinger's New Motion For Summary Judgment.

Pearson asked the Court of Appeals to hold, as a matter of law, that Appellants violated JRP Local Rule 401(a) and CR 56.03 when the trial court Granted Solinger's new Motion for Summary Judgment on the day it was filed. The Court of Appeals did not address this argument. As set forth in detail above, the Trial Court Granted Solinger's new Motion for Summary Judgment on December 12, 2005, the very day the Motion was filed. (R. 704-705) This was a patent violation of JRP 401(a) which permits a (20) twenty day response period before the motion stands submitted. Likewise, CR 56.03 requires at least (10) ten full days' notice before a summary judgment motion can be heard. Finally, the Pre-Trial Order issued in this case at paragraph 11 required the submission of an AOC 280 before a dispositive Motion was heard. (R. 331-334) Solinger never filed an AOC 280 as was required by JRP 401(a) and paragraph 11 of the Pre-Trial Order and, therefore, his original Motion for Summary Judgment should never have been submitted much less granted.

4. The Trial Court Committed Palpable Error Under CR 61.02 By Allowing A

Medical Records Summary To Be Filed Without Any Prior Notice To Pearson

Solinger, on page 1 of his Brief, asks this Court to consider evidence in the form of a "Medical Summary". (See Ex-A to Solinger's Brief) This evidence, according to Solinger, demonstrates that Pearson's medical care was not easily managed and that a lay jury could not understand this evidence without assistance of a medical expert. This so called "summary" is a sham and is nothing more than an attempted character assassination of Pearson. It was compiled and submitted to the trial court **with no prior notice to the Pearson.**

On February 23, 2006, Solinger filed an unsworn Medical Summary (in the trial court) purportedly summarizing Pearson's medical records. This summary was filed **one day** before the trial court entered an Order Denying Plaintiff's CR 59.05 Motion to Vacate. The Summary was filed without prior notice to Pearson as is required by KRE 1006, and the records upon which the summary were based were not produced to Pearson until March 14, 2006.

Pearson does not know what extent the trial Court relied upon this so called summary, but it **hardly seems coincidental** that the trial Court Denied the CR 59.05 Motion the very day the Summary was filed. The very fact Solinger cites the Summary as evidence in a Motion for Discretionary Review before this Court is an indication he believes the document is probative (and illustrates the undue prejudice the document has created). The Summary is littered with inaccurate and prejudicial information which Pearson was never given an opportunity to refute prior to its filing. Indeed, KRE 1006 provides that:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. **A party intending to use such a summary must give timely written notice of his intention to use the summary, proof of which shall be filed with the court.** The originals or duplicates shall be made available for examination or copying, or both by other parties at reasonable time and place. The court may order that they be produced in court.

Clearly, under KRE 1006, a party is entitled to reasonable notice and the opportunity to inspect the records upon which the summary is based, prior to the summary being filed with the court. See, Davenport v. Ehpraim McDowell Memorial Hospital, Inc., 769 S.W. 2d 45 (Ky. App. 1988); Municipal Paving Co. v. Farmer, 255 S.W.2d 618 (1953); Texas Gas Transmission Corportaion v. Board of Education of Ballard County, 502 S.W.2d 82, 87 (Ky. 1973). *See, also* Elden v. Muir, 163 Ky. 685, 174 S.W. 474, 476 (1915), holding that summaries of voluminous facts may be admitted into evidence "where the summary has been placed at disposal of the opposite party before the trial and he has been given reasonable time and opportunity to examine the summary and determine its accuracy".

In the case at bar, this was not done, as the summary was filed without any prior notice to Pearson, without the opportunity to verify the accuracy of the summary, and without the "certified medical records" being available for Pearson's inspection prior to the filing of the summary. Pearson also would respectfully point out that, while criticizing Pearson for submitting evidence after the trial court Granted Summary Judgment (i.e. Pearson's hired expert witness affidavits and disclosures), Solinger's introduction of supposed evidence, in the form of an unsworn partisan regurgitation of their selected facts, is a palpable error which should not have been permitted by the trial court. If the record was closed to Pearson to submit additional evidence, after judgment was rendered, it certainly should be closed to Solinger as well.

This summary is unsworn, unverified and does not contain the medical records which purport to comprise the summary. The Summary is riddled with factual errors and contains numerous dates of treatment which are incorrect. Significantly, for example the medical records from Pearson's February 24, 2004 ER visit to Norton Hospital (for Coumadin Toxicity as diagnosed by Norton ER Dr. Steven Richards) are not summarized; Pearson's medical records from

cardiologist Dr. Miodrag Stikovac, created January, April, and May of 2005 and which diagnose Plaintiff as suffering from a cerebral bleed secondary to Coumadin Toxicity INR 8.6 are not summarized; and Pearson's records from the Cleveland Clinic, created in March, April and May 2005, which diagnose Pearson as suffering from a cerebral bleed while on Coumadin, are not summarized.

Interestingly, none of the medical records created by Solinger (during 30 years of medical treatment) have been summarized either. It is no accident that Defendants, while subpoenaing all the above records under CR 45, and while in possession of these records, have left these records and facts out of their summary. Solinger is claiming in court filings Pearson has no case, but the very "certified medical records" which were intentionally withheld from the summary support both causation and standard of care in this case. This Court is respectfully urged not to give any credence whatsoever to this self serving document which was created and submitted with absolutely no notice to Pearson prior to its filing. Finally, KRS 422.320 required Appellants to file Pearson's subpoenaed medical records with the clerk of the Jefferson Circuit Court.

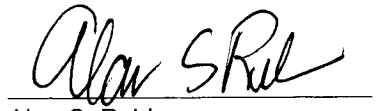
IX. CONCLUSION

Based upon all the above facts and law, Pearson respectfully requests this Court to Affirm the Court of Appeals Opinion which Reversed the trial court's "so called Summary Judgment". Pearson would also request that this honorable Court reverse the Court of Appeals' Opinion which held that Pearson could not use the Package Insert and PDR to establish the standard of care for prescribing Coumadin. This Court should hold, for purposes of Summary Judgment, Pearson stated a prima facie case of lack of informed consent against Appellants. This Court should also hold that the numerous issues raised by Pearson concerning the Summary Judgment rendered against her, without proper notice and a proper hearing, were an abuse of discretion by the trial court.

The Court of Appeals Reversed and Remanded the trial court's Summary Judgment and instructed the trial court to consider its dismissal in light of the (6) factors enumerated in Ward v. Housman, 809 S.W. 2d 717 (Ky. App 1991) (Opinion pg 9) However, this issue should have been moot as the Court of Appeals also found that, "After reviewing the record in a light most favorable to Pearson, resolving all doubts in her favor, we conclude that the Appellees did not meet their burden of demonstrating the non-existence of any genuine issue of material fact. Summary Judgment was prematurely granted". (Opinion pg. 8).

Since both Solinger et. al. and Norton Hospital failed to meet their burden of proof under CR 56, the (6) six factor Ward hearing is not necessary. After all, the case was a mere nine months old at the time it was dismissed by the trial court. The Appellants never alleged they were prejudiced by this short delay, nor did they express that this delay caused legitimate concerns such as stale or lost evidence, fading memories or any other valid concerns. As set forth above, this Court has recently stated that a party seeking to exclude expert testimony must **show actual prejudice**, otherwise there is no valid basis to exclude or limit testimony, Equitania Ins. Co. v. Slone & Garrett P.S.C., 191 S.W. 3d 552, 556 (Ky. 2006). The only argument ever advanced by Appellants was a trial date was approaching on April 25, 2006 (more than four months away) at the time the trial court granted Summary Judgment on December 12, 2005. Trial dates are moved every day in Courts of this Commonwealth and, in a case that is only nine months old, what was the possible prejudice in continuing the trial date so that this case could be decided upon the merits not based upon a "rush to judgment"? Upon Remand, additional discovery in the form of Depositions will be required before the case could be set for trial and it seems non-sensical to have a Ward hearing when Appellants failed to meet their burden of proof in the first place, and have shown no prejudice from Pearson's late disclosure of her hired expert witnesses.

Respectfully submitted,



Alan S. Rubin
Attorney for Respondent/Cross Movant Melanie Pearson
231 S. Fifth Street, Suite 201
Louisville, KY 40202
(502) 587-1050