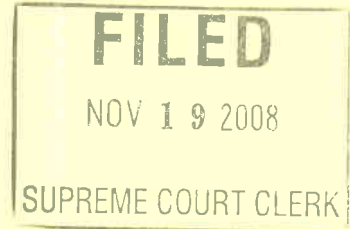


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2007-SC-000389
CASE NO. 2007-SC-000414
CASE NO. 2008-SC-000133



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

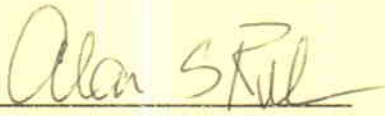
ROBERT E. SOLINGER, MD.,
CHRISTOPHER JOHNSRUDE, M.D.,
MICHAEL RECTO, M.D., and
PEDIATRIC CARDIOLOGY
ASSOCIATES, P.S.C.

APPELLANTS/CROSS APPELLEES

REPLY 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 Reply Brief was mailed this, the 18th day of November, 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 It is further certified that Appellee/Cross Appellant has not withdrawn the record on appeal.


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I. INTRODUCTION

Dr. Solinger et. al. have filed a Reply Brief to Appellee/Cross Appellant Pearson's Appellee/Cross Appellant Brief. Despite Solinger's ostensible efforts to mislead this Court concerning the procedural history of this case, as well as the so called "Summary Judgment" that was improperly rendered against Pearson by the trial court, Solinger's Brief is remarkable more for what it does not say rather than the partisan arguments it does contain. Solinger essentially argues that a plaintiff in a medical negligence case must have a "hired medical expert witness" review a potential medical negligence case before the case can be filed against a defendant health care provider.

Under Solinger's strained interpretation of existing Kentucky law, a treating physician's expert opinions, which are disclosed by a plaintiff via Affidavits and sworn Interrogatory Responses, are insufficient as a matter of law to create a genuine issue of material fact in a medical negligence case. (Solinger Reply Brief pg 1-2). Solinger makes this argument even though Solinger **admits** his three (3) paragraph Summary Judgment Motion was based *solely upon non-existent CR 36 judicial admissions*. (Solinger Reply Brief, pg. 8) Solinger's Motion was not properly supported, the Motion cited **no valid evidence** of any kind and had absolutely no factual or legal support. Moreover, the treating physician expert opinions disclosed under oath by Pearson, concerning causation of her injuries and deviation in the standard of care, were uncontradicted. Solinger had months to dispute the treating physician disclosures made by Pearson but he made a conscious decision not to do so. The Court of Appeals correctly reviewed the record and determined, based upon the evidence submitted by Pearson, that Solinger had not demonstrated the non-existence of a genuine issue of material fact.

As will be demonstrated below, Solinger's contention that Pearson's treating physician expert disclosures were not sufficient to defeat an unsupported Motion for Summary Judgment has no basis in fact or law. Under CR 56, for purposes of a Summary Judgment Motion, this Court **must accept as true** the allegations contained in Pearson's Affidavits and sworn Interrogatory Responses. Solinger, by his specious arguments regarding the supposed expert witness requirements in a medical negligence action, is attempting to have this Court change the law and to require all medical malpractice Plaintiffs to have retained hired expert witnesses prior to filing a medical negligence action against a healthcare provider. Solinger's argument invites this Court to legislate from the bench and accomplish, via judicial fiat, what he and other healthcare providers have been unable to obtain from the Kentucky legislative branch.

Indeed, under Solinger's logic every medical malpractice plaintiff in Kentucky must be prepared to make extensive CR 26.02 expert witness disclosures before the Complaint is filed. (Solinger Reply Brief pg. 4) This was precisely Solinger's strategy in the trial court, i.e. force a critically ill pro-se Plaintiff to prove her entire case in just a few months, a case involving five (5) Defendants, 4100 pages of medical records and thirty 30 years of medical treatment. It should be remembered that Solinger did not even Answer Pearson's Complaint until August 15, 2005 (R. 356-358), yet Pearson's expert witness disclosures were due to be served on October 1, 2005, less than sixty 60 days from the date Solinger filed his Answer. Solinger has failed to explain why he and, for that matter the trial court, were insistent upon trying this case at rocket speed and, further, why the normal discovery deadlines as set forth in Jefferson Rule of Practice 707(b) were not complied with. At the time Pearson's case was prosecuted in the Jefferson Circuit Court, all medical negligence actions were subject to the **Complex Litigation Track** as delineated by JRP 707.

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III. Standard Of Review Which Applies To Appellate Court Review Of Summary Judgments Granted By Trial Courts.

a. De Novo Review

As a preliminary matter, Pearson respectfully points out that the Court of Appeals and this Court are not required to defer to the trial court's Summary Judgment. Both the Court of Appeals and this Court are free to review the evidence of record under a de novo standard and reach a different conclusion than did the trial court. Schmidt v. Leppert, 214 S.W. 3d 309, 311 (2007). Solinger strongly criticizes the Court of Appeals for reaching the opposite conclusion than did the trial court, however, he offers no valid reason why the Court of Appeals was not perfectly free to do so under the facts of this case.

b. Under Prior Precedent From This Court, The Court Must Accept The Factual Allegations Contained In Pearson's Affidavits And Interrogatory Responses As True

Solinger, without citation to any decisional case law or other authority, claims in his Reply Brief that the expert witness disclosures made by Pearson in her Affidavits and under oath Interrogatory Responses were not sufficient to create a genuine material issue of fact. Solinger erroneously claims Pearson's expert disclosures are unsubstantiated and were not contained in the record. (Solinger Reply Brief, pg. 1-2) Solinger is incorrect as Pearson's Affidavits and Interrogatory Responses are contained in the record on appeal. This evidence is largely what led the Court of Appeals to conclude that Solinger had not met his burden of establishing the non-existence of a genuine issue of material fact. (Court of Appeals Opinion, pg. 8)

For purposes of Solinger's Motion for Summary Judgment, this Court **must accept as true** the factual allegations contained in Pearson's Affidavits and Interrogatory Responses. McCollum v. Garrett, 880 S.W. 2d 530, 531, note 2 (Ky. 1994). Under Perkins v. Hausladen, 828 S.W. 2d 652, 654 (Ky. 1992), for the purposes of a Summary Judgment Motion, this Court must accept Plaintiff's version of how the injury occurred as true as gleaned from the Pre-Trial record and all reasonable inferences there from. *Id.* at 654 See also, Bank One, Kentucky, NA v. Murphy 52 S.W. 3d 540, 545 (Ky. 2001). Even though Solinger and

the trial court ignored Pearson's expert disclosures, the facts contained in these disclosures must be accepted as true. Accepting Pearson's allegations as true, there was simply no basis for the trial court to grant summary judgment against Pearson.

Solinger, halfheartedly criticizes the content of Pearson's expert disclosures by labeling these meticulous disclosures as unsubstantiated and as *her* interpretation of her medical records, yet, Solinger waived any objection to Pearson's affidavits and expert disclosures by not objecting to the content of these materials in the trial court. (See, *Kurt A. Phillips Kentucky Practice, Volume 7, Rule 56.05 comment 5*; and *Wright & Miller, Federal Practice and Procedure (2d Ed.)*, Civil 2738)

Moreover, Solinger himself filed an alleged KRE 1006 Summary of Pearson's medical records (which **was filed after the trial court granted summary judgment against Pearson**) and none of the medical records or treating physician expert witness opinions disclosed by Pearson were contained in Solinger's alleged summary. Furthermore, Pearson was given no prior notice that Solinger was going to submit this summary as evidence, and Pearson was not permitted access to the subpoenaed medical records which were summarized until long after Solinger filed his summary with the trial court on February 23, 2006. (R. 838-841, Motion to Compel Filing of Medical Records)

c. Definition Of A Genuine Issue Of Material Fact

Solinger, throughout his Reply Brief, mistakenly confuses the evidence which a party must submit in order to defeat a Motion for Summary Judgment, with evidence that a party must present in order to prevail at trial. CR 43.01(1) provides, (at trial) "The party holding the affirmative on an issue must produce evidence to prove it". While Pearson does not believe that she was required to produce any evidence to defeat Solinger's three (3) paragraph Motion for Summary Judgment, even assuming *arguendo* Pearson was required to produce evidence, the burden on Pearson was "quite low". Commonwealth Transportation Cabinet, Dept. of Highways v. R.J. Corman Railroad Co./ Memphis Line, 116 S.W. 3d 488, 498 (Ky. 2003).

"A material fact is one which has the power to alter the outcome of the case under existing law if the controversy surrounding that fact is decided in favor of non-Movant". See, *73 Am. Jur. 2d Summary*

Judgment Section 48 (2001). According to a leading commentator on the Kentucky Rules of Civil Procedure, an issue of fact is "genuine" if the evidence is significantly probative or more than merely colorable such that a jury could reasonably return a verdict for the nonmoving party. An issue of fact is "material" if proof might affect the outcome of the lawsuit as assessed by controlling substantive law. (See, *Kurt A. Phillips Kentucky Practice, Volume 7, Rule 56.03 comment 4*)

Applying the above principles to the case at bar, it is clear as a matter of law that Pearson sufficiently alleged facts in her Affidavits and Interrogatory Responses which, if accepted as true, certainly demonstrated that there were numerous genuine issues of material fact present when the trial court granted Summary Judgment against Pearson as a discovery sanction. Moreover, Solinger presented no evidence, nor pointed to any evidence of record, which established as a matter of law that it would be impossible for Pearson to produce evidence at trial warranting a judgment in her favor. Under Steelvest, Inc. v. Scansteel Service Ctr., 807 S.W. 2d 476, 483 (Ky. 1991), Solinger was required to establish, by evidence of record, that it would be impossible for Pearson to produce evidence at trial warranting a judgment in her favor. Steelvest, 807 S.W. 2d at 482-483.

IV. ARGUMENT

A. Dr. Solinger Submitted No Evidence In Support Of His Summary Judgment Motion, Which Was Based Solely Upon Non-Existent CR 36 Judicial Admissions.

At the outset, Pearson would respectfully point out that Solinger, in an effort to confuse the Court, has omitted critical language from at least two of the lead Opinions from this Court which are cited in his Reply Brief. Solinger cites this Court's landmark Summary Judgment case, Steelvest, Inc. v. Scansteel Serv. Ctr., 807 S.W. 2d 476, (Ky. 1991). Solinger also cites Wymer v. JH Properties, Inc., 50 S.W. 3d 195 (Ky. 2001). (Solinger Reply Brief pg. 2) Solinger cites Steelvest and Wymer for the proposition that "a party opposing Summary Judgment has an obligation to do more than rely upon the mere allegations of the pleadings and must, by counter affidavit or other testimony in the record, produce evidence or testimony presenting some evidence that there is a genuine material issue of fact". (Solinger Reply Brief, pg. 2). The

summary judgment cases cited by Solinger, Steelvest and Wymer, contain a very significant caveat which is: "a party cannot defeat a **properly supported motion for summary judgment** without presenting some evidence that there is a genuine material issue of fact." Steelvest, 807 S.W. 2d at 482. While Wymer uses the term well-supported motion, the impetus is the same. Wymer, 50 S.W. 3d at 199. The term "**properly supported motion**" must have meaning and when Justice Reynolds wrote the Opinion in Steelvest, he must have used this term for more than window-dressing.

Nonetheless Pearson did not just rely upon the allegations contained in her pleadings, Pearson submitted both Affidavits and under oath Interrogatory Responses disclosing the existence of numerous disputed issues of material fact which Solinger simply does not like so he ignores these disputed issues of material fact in his Reply Brief.

Common sense and (40) years of Kentucky case law indicates that the term "properly supported motion" means a motion for Summary Judgment must have both evidentiary and legal support. Under Kentucky law, the rule is that, "The motion for summary judgment must convince the circuit court *from evidence in the record* of the nonexistence of a genuine issue of material fact." Hubble v. Johnson, 841 S.W. 2d 169, 171 (Ky. 1992). In Hubble, the defendant filed a properly supported summary judgment motion which was granted by the trial court. Indeed, the defendant, by affidavit and other evidence submitted with his summary judgment motion, established that a genuine issue of fact did not exist. This Court, in affirming the trial court's summary judgment rendered against the plaintiff, noted that:

It has long been recognized that **a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.** Steelvest, Inc. v. Scan Steel Service Center, Inc., Ky. 807 S.W. 2d 476 (1991). That case indicated that ruling on summary judgment is a very difficult and delicate matter and requires great judicial determination and discretion because the case is taken away from the trier of fact before evidence is actually heard. A Movant should not succeed in a motion for summary judgment unless the right to judgment is shown with such clarity that there is no room left for controversy and it appears impossible for a nonmoving party to produce evidence at trial warranting judgment in his favor. Summary judgment is to be cautiously granted and should not be used as a substitute for trial or merely for the sake of efficiency or expediency. Steelvest, supra. The motion for summary judgment must convince the circuit court from evidence in the record of the nonexistence

of a genuine issue of material fact.

Hubble v. Johnson, 841 S.W. 2d at 171

Curiously, Solinger's opening Brief never cites the true basis for his original Motion for Summary Judgment, which was Pearson's alleged "judicial admissions". Solinger claimed his Motion was based upon Pearson's lack of an expert witness to support her claims. (Solinger Brief, pg. 13) Significantly, Solinger's opening Brief glossed over the basis for his Summary Judgment Motion because Pearson never made any "judicial admissions". This omission by Solinger should serve as a glaring beacon to this Court; Solinger's Motion for Summary Judgment lacked factual or legal support and was not properly supported. The sole basis for Solinger's original three (3) paragraph Motion for Summary Judgment was that Pearson had made judicial admissions under CR 36. (R. 142) The Court of Appeals, at pg. 3 of its Opinion, found that both Solinger and Norton Hospital's original Motions for Summary Judgment were based upon alleged judicial admissions. The Court of Appeals stated:

"Norton Hospital and the doctors filed motions for summary judgment on May 20 and May 23, respectively, asserting that the request for admissions were deemed admitted pursuant to CR 36 by Pearson's failing to respond, and that as a matter of law, Pearson was unable to establish a deviation from the accepted standard of care. By separate orders entered on June 15, the trial court granted Pearson an extension until June 30 to respond to the outstanding discovery requests." (Court of Appeals' Opinion, pg. 3)

Solinger admits in his Reply Brief that his May 2005 Motion for Summary Judgment was based upon alleged judicial admissions. (Solinger Reply Brief pg. 8) Of course, the record is clear that Pearson never made any such judicial admissions as Pearson timely responded to the Requests for Admissions on June 30, 2005. It is no accident that Solinger does not cite the true basis for Motion for Summary Judgment in his opening Brief, because the Motion had absolutely no valid factual or legal support. Solinger's May 2005 Motion for Summary Judgment was **not** based upon Pearson's supposed lack of an expert witness, but was based upon **non-existent judicial admissions**. As will be clearly demonstrated below, the trial court put the cart before the horse in requiring Pearson to carry the burden of proof on Solinger's unsupported Motion for Summary Judgment.

B. The Trial Court Improperly Shifted The Burden Of Proof To Pearson Based Upon Solinger's Filing Of An Unsupported Motion For Summary Judgment

As set forth above, Solinger's Motion for Summary Judgment had no factual or legal support. The Motion did not rely upon evidence of record as CR 56.03 clearly mandates. The trial court, in its December 12, 2005 Summary Judgment, improperly shifted the burden of proof to Pearson. (R. 704-705) In essence, the trial court required Pearson to prove her case, despite the fact that Solinger was the party moving for summary judgment and he bore the burden of proof. Under the facts of this case, the trial court, in placing the burden of proof upon Pearson, violated CR 56.03 as well as a long line of Kentucky Appellate Opinions which place the burden of proof on the party moving the trial court to grant a summary judgment. Solinger, as the party seeking summary judgment in this case, bears the burden to demonstrate the non-existence of genuine issues of material fact. Smith v. Higgins, 819 S.W. 2d 710, 712 (Ky. 1991). "Simply by moving for summary judgment, a defendant cannot force a plaintiff to come forward with evidence to defeat the motion." Smith, 819 S.W. 2d at 712. In Smith v. Higgins, the issue was whether the plaintiff had sustained a permanent injury under the Motor Vehicle Repairs Act. The defendant filed an **unsupported motion for summary judgment** alleging the plaintiff's injury was not permanent. The trial court granted summary judgment for the defendant and the plaintiff appealed to the Court of Appeals which affirmed the trial court's summary judgment. In reversing the trial court's summary judgment, this Court noted that:

As this case was resolved by summary judgment in the trial court, it is appropriate to comment upon the standard to be applied and which party bears the burden of going forward. The party moving for summary judgment on grounds that the injury does not constitute permanent disfigurement will be the defendant. As with other motions for summary judgment, the moving party bears the burden of meeting the requirements of CR 56.03. Simply by moving for summary judgment, a defendant cannot force a plaintiff to come forward with evidence to defeat the motion. To prevail the defendant must produce evidence that the injury is not permanent disfigurement, and only then must the plaintiff come forward with evidence to defeat the motion. Davis v. Dever, Ky. App., 617 S.W. 2d 56 (1981).

Smith v. Higgins, 819 S.W. 2d at 712.

Solinger's Reply Brief ignored every Summary Judgment case cited by Pearson in her Appellee/Cross Appellant Brief. Furthermore, Solinger erroneously contends that there were no material

issues of fact present at the time the trial court granted Summary Judgment against Pearson, yet the Court of Appeals specifically found 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, pg. 8) Based upon Smith v. Higgins and several other Opinions from this Court, Solinger not Pearson had the burden of proof and he utterly failed to meet this burden.

C. Pearson Timely Raised And Properly Preserved For Appellate Review Each And Every Issue Raised In Her Appellee/Cross Appellant Brief

Solinger, at pg. 1 of his Reply Brief, erroneously claims that, "Several of the grounds argued in Pearson's brief are argued for the first time, have not been preserved for appeal, and must be disregarded by this Court". The above statement by Solinger is simply incredible and finds not a scintilla of support in the record. Solinger does not even attempt to identify which of Pearson's arguments "are argued for the first time in her brief". Solinger's intentional lack of specificity concerning Pearson's supposed failure to preserve issues for review speaks volumes to the veracity of this dubious assertion.¹

D. By Failing To Address The Substantive Issues Raised In Pearson's Cross Appellant Brief, Solinger Has Admitted The Trial Court And The Court Of Appeals Committed Reversible Error

Significantly, there are several omissions in Solinger's Brief. Solinger does not respond to any of the arguments made by Pearson in the sections of her brief pertaining to her protective Cross Appeal. Specifically, Solinger ignored the substantive arguments made at pg. 46-65 of Pearson's Brief. The arguments ignored by Solinger are: (a) Pearson alleged in her Brief that the Package Insert for Coumadin and the 2004 Physicians Desk Reference provided the applicable standard of care for prescribing, administering and monitoring Coumadin anticoagulation therapy; Solinger did not address this argument in

¹ The truth of the matter is that all of Pearson's arguments contained in her Appellee/Cross Appellant Brief were meticulously preserved for review as set forth in her Response to Solinger's Motion for Discretionary Review, as set forth in her Cross Motion for Discretionary Review (which was Granted by this Court) and as set forth at pg. 28-29 of her Appellee/Cross Appellant Brief. CR. 76.12(c)(v) required Pearson to disclose where, how and when she raised the issues in her Brief, and Pearson succinctly complied with this Rule.

any substantive manner in his Brief. (b) Solinger's Brief ignored Pearson's informed consent argument. Solinger did not dispute the fact that Pearson was not warned of the risk of cerebral bleeding prior to, during or after her Coumadin anticoagulation therapy. Solinger did not dispute the fact that cerebral bleed is the most feared and dreaded complication of Coumadin anticoagulation therapy. Under these facts, Pearson has stated a prima facie case of lack of informed consent. (c) Solinger did not explain how his new Motion for Summary Judgment, filed on December 12, 2005, was not a new Motion; Solinger admitted in his Reply Brief that his original Motion filed in May 2005 was based upon alleged judicial admissions (Solinger Reply Brief, pg 8), yet Solinger admits that his second Summary Judgment Motion was based upon non-compliance with the trial court's Order. (Solinger Reply Brief, pg. 9). How can a new Motion raising non-compliance with a Court Order (an issue that did not exist at the time the first Motion was filed) not be considered a new Motion for purposes of CR 56.03? (d) Solinger did not dispute the fact that prior to the time the trial court granted Summary Judgment, Pearson requested a continuance of the Summary Judgment proceedings because she was hospitalized. The trial court simply ignored this request even though the Court was aware that Pearson was in the hospital. (e) Solinger's Reply Brief did not discuss or distinguish the case of Goff v. Justice, 120 S.W. 3d 716, 724 (Ky. App. 2002), even though this case is directly on point to the issues raised by Pearson in her Cross Appeal. Pearson cited Goff in both her Cross Motion for Discretionary Review (pg. 17-18) and in her Appellee/ Cross Appellant Brief (pgs. 42-43, pgs. 56-57). Solinger ignored Goff because Goff clearly demonstrates that the trial court cannot force a plaintiff in a legal or medical negligence case to prove their case on a Motion for Summary Judgment, when the defendant has produced no expert evidence of his own which establishes the lack of a genuine issue of material fact.

Solinger, by his silence, has admitted to several substantive errors made by the trial court and, by his conscious silence, has admitted the Court of Appeals was in error by failing to address the numerous errors made by the trial court when granting Summary Judgment against Pearson.

E. Green v. Owensboro Medical Health System Does Not Require Reversal Of The Court Of Appeals' Opinion

Solinger cites Green v. Owensboro Medical Health System, 231 S.W. 3d 781 (Ky. App. 2007) in his Reply Brief for the proposition that the trial court's Summary Judgment should be affirmed because Pearson allegedly did not make any expert witness disclosures despite being ordered to do so by the trial court. (Solinger Reply Brief pg. 4-5) As has been repeatedly demonstrated by Pearson in both her Appellee/Cross Appellant Brief and in this Brief, Solinger's contention concerning Pearson's lack of expert disclosures is erroneous. Pearson disclosed numerous treating physician experts which supported both causation of her injuries and deviation in the applicable standard of care. To this day, Pearson's expert disclosures remain uncontradicted. Moreover, the facts in Green are completely dissimilar to the facts in the case at bar.

First of all, the most significant difference between Green and the facts in Pearson's case is that Green had from October 14, 2003 (the date the Complaint was filed) until June 16, 2005 (the date Summary Judgment was entered) to support her claims with medical experts. See, Green, 231 S.W. 3d at 783. Thus, the plaintiff in Green had (20) twenty months to support her claims with medical experts prior to summary judgment being rendered against her. Unlike Green, Pearson was given a mere nine (9) months from the date the Complaint was filed to make her hired expert witness disclosures. For the first four months of Pearson's case, she was critically ill with injuries allegedly caused by Solinger. The trial court in Pearson's case ignored the Local Rule JRP 707(b) which provided for up to 545 days of discovery in a medical negligence case. The trial court demanded that Pearson try this rather complex case only (13) months after the case were filed (a case involving a critically ill pro-se Plaintiff, which involved 30 years of medical treatment, five (5) Defendants and 4100 pages of medical records). Unlike the plaintiff in Green, Pearson disclosed treating physician experts who supported both legal causation and deviation in the applicable standard of care, and these disclosed opinions were never contradicted by Solinger. Unlike the defendants in Green, Solinger never filed a Motion to Compel Pearson to disclose the identity of her hired expert

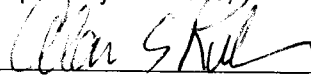
witnesses. There was certainly no rush to judgment by the trial court in Green as there was by the trial court in Pearson's case. The facts in Green are simply not analogous to the facts in the case at bar and, certainly, the Court of Appeals' Opinion in Green does not require the trial court's Summary Judgment to be affirmed.

III. CONCLUSION

For all of the reasons set forth in detail above, as well as the reasons set forth in Pearson's Appellee/Cross Appellant Brief, this Court should affirm the Court of Appeals' Opinion which reversed the trial court's Summary Judgment. In Munday v. Mayfair Diagnostic Laboratory, 831 S.W. 2d 912 (Ky.1992), the late Justice Charles Leibson suggested in a concurring Opinion that, "**Summary Judgment should not be used by the trial court as a form of docket control.**" *Id* at 916. The facts in the case at bar are clear - the trial court improperly used Summary Judgment in this case as a form of "docket control" and this was improper.²

Despite Solinger's claims to the contrary (Solinger Reply Brief pg. 4), the trial court **never warned** Pearson that her case would be dismissed if she did not disclose her hired medical expert witnesses by December 1, 2005 or any other date. Curiously, Solinger does not cite any reference to the record where this mystery warning was given to Pearson.

Respectfully submitted,



Alan S. Rubin

² See, Suter v. Mazyck, 226 S.W. 3d 837, 841 (Ky. App. 2007) ("A summary judgment is a final order and, therefore, should not be entered as a form of penalty for failure of plaintiff to prove his case quickly enough."); Conley v. Hall, 395 S.W. 2d 575, 580 (Ky.1965); Roberson v. Lampton, 516 S.W. 2d 838 (Ky.1974)