COMMONWEALTH OF KENTUCKY
SUPREME COURT
2007-SC-0389; 2007-SC-0414; 2008-SC-0134

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

APPELLANTS

v.

APPEAL FROM
COURT OF APPEALS NO. 2006-CA-00585
JEFFERSON CIRCUIT COURT
CIVIL ACTION NO. 05-CI-2182

MELANIE L. PEARSON

APPELLEE

BRIEF ON BEHALF OF APPELLANTS, ROBERT E. SOLINGER, M.D., CHRISTOPHER JOHNSRUDE, M.D., MICHAEL RECTO, M.D., AND PEDIATRIC CARDIOLOGY ASSOCIATES, P.S.C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via U.S. Mail, on this the 16th day of June, 2008 to the following: Hon. Alan S. Rubin, 231 S. Fifth Street, Suite 200, Louisville, KY 40202; Beth McMasters, Bradley R. Hume, Thompson, Miller & Simpson, 600 West Main Street, Suite 500, Louisville, KY 40202; Hon. Judith McDonald-Burkman, Jefferson Circuit Court, Division Nine, Jefferson Judicial Center, 700 West 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 It is further certified that Appellants have not withdrawn the record on appeal.

Katherine Kerns Vesely
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INTRODUCTION

This is a medical malpractice case. The trial court dismissed it when, despite no objection to the deadline, requested extensions of time granted, and trial but four months away, Pearson failed to disclose any experts when ordered to do so. Thus, Pearson could not satisfy her burden to produce expert testimony sufficient to create a genuine issue of material fact as to the liability of any of the defendant/health care providers. The Court of Appeals perceived this as a discovery sanction and remanded the case back to the trial court for additional fact findings as to the appropriate remedy.

STATEMENT CONCERNING ORAL ARGUMENT

Oral arguments are welcome but not necessary as the controlling facts – noncompliance with a court order, complete absence of material evidence – are straightforward, as is the controlling law – *Reams v. Stutler*.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

1. The Parties

Melanie Pearson treated with Robert Solinger, M.D., and his practice, Pediatric Cardiology Associates, P.S.C., since she was a child suffering from a permanent cardiac defect. In this case, she sued Dr. Solinger, his P.S.C., and two of Dr. Solinger's partners for medical malpractice. We will refer to them all as "Dr. Solinger" for purposes of this brief. Pearson also sued Norton Hospital, Inc.

2. Medical Conditions and Attempts at Treatment

Melanie Pearson had treated with Dr. Solinger for several years for various medical conditions. She has a medical history not given to easy summation. Dr. Solinger has attached a KRE 1006 summary of a portion of that history. (Exhibit A).[1] Pearson's concern in this case had to do with the side effects of her medications. The risk of *different* medications at *different* doses in the face of Pearson's complex presentation could not be resolved without the aid of expert testimony at the trial court. Both the trial court and Court of Appeals determined that this is not a *res ipsa loquitur* case, and Pearson was required to have expert witnesses to maintain her claim.

3. Procedural History

a. Standard Work Up of the Case

Upon receipt of this medical malpractice case against him, Dr. Solinger served written discovery requests seeking the name and opinion of anyone who believed malpractice had occurred. Dr. Solinger wanted to know who would so testify and how Dr.

[1] Originally filed in the trial court with Dr. Solinger's supplemental memorandum opposing plaintiff's Rule 59.05 motion, filed 2/23/06.

Solinger was to have malpracticed. Pearson responded with bravado: she had experts, but could not decide which ones to use.

With that, the trial court entered the standard jury trial order issued in nearly every civil jury case. The trial order set the trial date for April 25, 2006. Pearson's experts were to be disclosed no later than October 1, 2005.

Pearson lodged no objection to this order. In fact, Pearson represented to the trial court that experts had already been retained.

b. **Extension of time afforded Pearson**

The trial court was liberal in granting extensions of time to Pearson. In fact, the trial court granted every extension Pearson requested.[2] At a status conference on July 27, 2005, the trial judge announced and reiterated to Pearson the need for expert witnesses and her discovery deadlines. (Transcript, 7/25/05 Status Conference, p. 3-4). Pearson never objected to her deadlines. At that same status conference, the trial judge also advised the parties that she would review the pending motions for summary judgment.

On October 3, 2005, two days after her expert disclosure was due, Pearson moved for a 60-day extension to disclose her experts. The trial court granted Pearson's motion in its entirety, thereby making December 1, 2005 Pearson's expert disclosure deadline. Experts

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[2] 4/09/05 - Motion for Extension of Time to File Response to Norton's Motion to Dismiss Complaint
4/21/05 - Motion for Extension of Time to File Response to Norton's 1st Set of Interrogatories
5/16/05 - Motion for Extension of Time to Serve Response to Defendant Norton Hospital's 1st Set of Interrogatories, Request for Production of Documents, and Requests for Admissions
5/24/05 - Motion for Extension of Time to Respond to Defendants' [Physicians'] First and Second Set of Interrogatories and First Request for Production of Documents
6/13/05 - Motion for Extension of Time to Respond to Defendant Norton Hospital's Motion for Summary Judgment
6/13/05 - Motion for Extension of Time to Respond to Defendants' [Physicians'] Motion for Summary Judgment
6/20/05 - Motion for Extension of Time to Serve Responses to Defendant Norton's First Set of Interrogatories
10/3/05 - Motion for Extension of Time to Disclose Expert Witnesses

(Docket Sheet, 05-CI-002182; Order, 2/24/06).

against Dr. Solinger (actually, three pediatric cardiologists and their P.S.C.) were now to be disclosed less than five months from trial. Deposing Pearson's experts, retaining defense experts, and preparing for trial would have been a hardship for the defense, not for Pearson.

At a status conference on October 11, 2005, the trial court again reminded Pearson of the need for expert witnesses, the court's order mandating strict compliance with CR 26.02, and her deadline for expert disclosures. The trial court also advised all parties once again that she would review the defendants' pending motions for summary judgment based on Pearson's inability to support her claims with medical experts. (Transcript, 10/11/05 Status Conference, p. 5-8).

December 1, 2005 came and went. Pearson failed to comply with the trial court's order to comply with CR 26.02 by disclosing the names, information, and opinions of her expert witnesses by the extended deadline Pearson herself requested. Pearson asked neither the trial court nor opposing counsel for another extension of time to disclose her experts.

At a long-scheduled status conference on December 9, 2005, the trial court took under advisement the pending motions for summary judgment. At that point, the deadline for Pearson's disclosure of experts had already been extended, and had already passed. Pearson had made no additional request for extension as she had done as part of her practice eight other times in the past.[3] The evidence of record as of December 12, 2005 reflected that there was no medical expert willing to support Pearson's claims of medical negligence.

In its order granting summary judgment, the trial court made the following determinations: (1) the trial order required Pearson to disclose her expert witnesses and comply with CR 26.02 by October 1, 2005; (2) Pearson moved for an extension of time in

[3] *See* Pearson's motions for extensions of time, *supra* note 2.

which to name her experts and comply with the trial order; (3) this motion was granted and Pearson had until December 1, 2005 to comply with the trial order; (4) expert testimony was required in a medical malpractice case to show deviation from the accepted standard of care and the deviation proximately caused Pearson's injuries; (5) Pearson is "unable to sustain her burden of proof against any of the defendants without competent medical testimony"; (5) Pearson has not complied with the trial order as she had not identified experts or supplied CR 26.02 information; and, (6) there were no genuine issues of material fact. As such, Dr. Solinger and Norton were entitled to summary judgment as a matter of law. (Order, 12/12/05, attached as Exhibit B).

On December 22, 2005, Pearson filed a Motion to Vacate Order Granting Summary Judgment. On January 17, 2006, over a month after her case had been dismissed, Pearson requested leave to disclose her expert witnesses. The trial court denied the motion determining the following: (1) none of the grounds proffered by Pearson had merit to justify vacating the summary judgment; (2) "[n]o genuine issue of material fact existed on December 12, 2005 or on December 22, 2005 when this motion [Pearson's motion to vacate] was filed"; (3) this medical malpractice case "requires the support of expert opinions to prove a *prima facie* case of negligence"; (4) "this is not a *res ipsa loquitur* case as confirmed by a review of the Complaint"; (5) the deadlines set by the trial court were not met by Pearson "despite numerous (and never denied) extensions of time"; and, (6) as a matter of law, Pearson could not sustain her burden to produce expert witnesses to support her claims of medical negligence. (Order, 2/24/06, p. 3; attached as Exhibit C) (emphasis in original).

The trial court also denied Pearson's motion for leave to file her expert disclosures because the documents were filed *after* final judgment had already been rendered and they were not relevant to the motion to vacate. Id.

Pearson appealed. The Court of Appeals vacated the trial court's order granting summary judgment and remanded the case on a single issue. The Court of Appeals interpreted the trial court's summary judgment as a discovery sanction or as an involuntary dismissal under CR 41.02(1). It vacated and remanded the case because the trial court had not commented on a six-factor analysis adopted by the Court of Appeals in Ward v. Housman, 809 S.W.2d 717, 719 (Ky. App. 1991). (Opinion, 5/11/2007, attached at Exhibit D).

ARGUMENT

I. WITH NO EXPERT EVIDENCE TO ESTABLISH BREACH OR CAUSATION, THE TRIAL COURT DID NOT ERR IN FINDING THAT IT WAS LEGALLY IMPOSSIBLE FOR PEARSON TO PROVE HER MALPRACTICE CLAIM.

Pearson offered no expert medical testimony from which a trier of fact could conclude that Dr. Solinger breached the standard of care. Pearson had many opportunities to secure expert witnesses to establish the standard of care expected of a pediatric cardiologist and a hospital. Yet, she could not do so. There was *no* evidence before the trial court when summary judgment was granted that could support Pearson's allegations.

Pearson cannot escape the fact that the law requires her to have a supportive expert in a medical negligence case, yet she has none. Pearson has had more than adequate time to produce an expert who could testify in support of her case. Without an expert medical witness to establish a deviation from the applicable standard of care, Pearson could not prevail on her medical malpractice claim under any circumstance. Steelvest, Inc. v.

Scansteel Serv. Ctr., 807 S.W.2d 476, 480 (Ky. 1991). Having failed to introduce evidence sufficient to establish the respective standards of care, it was a legal impossibility for Pearson to prove the essential element of any breach thereof. The trial court properly granted summary judgment.

A. When Summary Judgment is Appropriate.

This Court has previously concluded that trial courts are not required to try a litigant's case:

> Contrary to the view of some, our decision in *Steelvest, Inc. v. Scansteel Service Ctr.*, Ky., 807 S.W.2d 476 (1991), does not preclude summary judgment. Provided litigants are given the opportunity to present evidence which reveals the existence of disputed material facts, and upon the trial court's determination that there are no such disputed material facts, summary judgment is appropriate.

Hoke v. Cullinan, 914 S.W.2d 335, 337 (Ky. 1995). "The inquiry should be whether, *from the evidence of record*, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record *rather than what might be presented at trial.*" Welch v. American Pub. Co. of Ky., 3 S.W.3d 724, 730 (Ky. 1999) (emphasis added). It is not necessary to show that the non-moving party has actually completed discovery, but only that she has had an opportunity to do so. Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co., 579 S.W.3d 628, 630 (Ky. 1979).

Thus, to defeat summary judgment, a party cannot merely rely on its own claims or arguments without significant evidence. *See* Wymer v. JH Properties, Inc., 50 S.W.3d 195, 199 (Ky. 2001). Instead, 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 supporting the existence of a genuine issue of material fact. Continental Gas Co. v. Belknap Hardware & Mfg. Co., 281 S.W.2d

914 (Ky. 1955) (emphasis added). In a medical malpractice action, except in rare instances, expert testimony is required. Reams v. Stutler, 642 S.W.2d 586, 588 (Ky. 1982).

B. Pearson Failed to Support Her Claims of Medical Malpractice With Any Expert Opinions.

As both the trial court and Court of Appeals concluded, expert testimony is required in this case to show a deviation of the accepted standard of care and that the deviation proximately caused Pearson's injuries. Reams, 642 S.W.2d at 588; Blair v. Eblen, 461 S.W.2d 370, 373 (Ky. 1970); Opinion, p. 9-10; Orders, 12/12/05, 2/24/06. Expert testimony is necessary in these types of cases "because the nature of the inquiry is such that jurors are not competent to draw their own conclusions from the evidence without the aid of such expert testimony." Baylis v. Lourdes Hospital, Inc., 805 S.W.2d 122, 124 (Ky. 1991) (*citing* Jarboe v. Harting, 397 S.W.2d 775 (Ky. 1965), Johnson v. Vaughn, 370 S.W.2d 591 (Ky. 1963)). The failure to provide supporting expert medical proof is generally held to be fatal to a plaintiff's cause of action and such a case is appropriate for summary judgment. Simmons v. Stephenson, 84 S.W.3d 926 (Ky. App. 2002).

Experts were required for Pearson to carry her burden in this case because Pearson's medical history was complex and the standard of care relating to the administration of an anticoagulation drug is not within the common knowledge of jurors. (Court of Appeals' Opinion, p. 9-10). Yet, Pearson did not produce the necessary expert witnesses to support her claim. As of December 12, 2005, when the trial court granted summary judgment, Pearson made no disclosure of a single expert, nor did she advance any reason why an expert had not been presented in some form.

The Court of Appeals even conceded that the evidence of record "does not establish the existence of a genuine issue of material fact[.]" (Opinion, p. 6-7). However, it then erred

in proposing that Dr. Solinger and Norton were required to prove their innocence when there was nothing for them to rebut. How could Dr. Solinger and Norton demonstrate the "non-existence of any genuine issue of material fact" without Pearson's experts' opinions as to standard of care and causation? Again, as the Court of Appeals acknowledged, the record had already established that no genuine issue of material fact existed. Id. at 6-7.

This circular logic serves no purpose except to build an insurmountable wall for medical providers to climb when proving summary judgment is warranted in medical malpractice cases. The Court of Appeals stated that Dr. Solinger and Norton should have averred not only that Pearson did not have medical experts, but that "it was impossible for Pearson to obtain expert testimony." (Opinion, p. 8). This "impossibility" had been demonstrated by Pearson herself. Pearson could not establish a genuine issue of material fact because she could not produce medical experts to support her case. The Court of Appeals has assumed that she would at some point be able to produce experts to support her claim; yet, how can a trial court be expected to make rulings on mere speculation or a party's unsupported promises?

Moreover, this Court held that a summary judgment analysis should focus on "*what is of record* rather than *what might be presented at trial.*" Welch, 3 S.W.3d at 730 (emphasis added). At the time summary judgment was granted, the record reflected that there was no genuine issue of material fact as to the liability of any of the defendant/healthcare providers.

> The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue of material fact does not exist. If this were not so, there could never be a summary judgment since "hope springs eternal in the human breast." The hope or bare belief . . . that something will "turn up" cannot be made the basis of showing that a genuine issue of material fact exists.

Neal v. Welker, 426 S.W.2d 476, 477 (Ky. 1968) (*citing* Conley v. Hall, 395 S.W.2d 575 (Ky. 1965)).

Pearson argued that the trial court's order dismissing her action was a discovery sanction. This case had nothing to do with discovery; instead, it was controlled by court orders and by Pearson's failure to carry her burden to support her allegation with expert testimony in a *prima facie* case of medical negligence.

Without objection, the trial court's order required that Pearson disclose her experts by October 1, 2005. Without objection, that same order provided that compliance was "mandatory." When Pearson requested an extension two days after this deadline had passed, the trial court extended the deadline by an additional sixty days. Pearson did not comply with the deadline. Pearson did not comply with the trial court's order. Pearson did not comply with the requirements of CR 26.02. Pearson did not request another extension of time. Pearson did not provide the trial court with any reason as to why she was unable to comply with the court's order and her expert disclosure obligations.

Dismissal had nothing to do with Pearson's failure to answer interrogatories or appear for her deposition (although dismissal can be appropriate under such cases). Rather, Pearson failed to comply with the trial court's order. The trial court's order is not some lesser rule. Its enforcement is no harsher than enforcing statutes of limitations or the deadline for filing a motion for discretionary review. Trial courts are vested with the power to enforce their orders. When a trial court's orders are disobeyed on *material* matters, the trial court must have discretion to enforce its orders, or its orders will be rendered meaningless.

Any information adequate for a Rule 26.02 disclosure should have been accessible to the trial court before Pearson filed her complaint. The trial court's order mandated formal disclosure of such information less than five months before trial. Yet, Pearson had no experts to create a genuine issue of material fact as to the liability of any of the defendant/healthcare providers; thus, summary judgment was appropriate. Rules of procedure and court orders do have a legitimate purpose. Trial courts should be empowered with autonomy and discretion in enforcing their orders on *material* matters.

C. After a Case Has Been Dismissed, a Trial Court May Not Consider Any Evidence That Was Not Present in the Record at the Time the Final Judgment was Entered.

After a judgment was rendered against her, Pearson filed a CR 59.05 motion and weeks later disclosed experts.

"A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings *before* the entry of judgment." Gullion v. Gullion, 163 S.W.3d 888, 893 (Ky. 2006) (emphasis added) (*citing* Hopkins v. Ratliff, 957 S.W.2d 300 (Ky. App. 1997); Kurt A. Phillips, Jr. 7 KENTUCKY PRACTICE, *Rules of Civil Procedure Annotated*, CR 59, cmt. 6, at 406 (5th ed. 1995)).

Contrary to the Court of Appeals' Opinion, Ward v. Housman, 809 S.W.2d 717 (Ky. App. 1991), does not save Pearson. There, the plaintiff disclosed experts *before* her case was dismissed, not afterwards as here. Id. at 719. The plaintiff actually had experts but was prevented from using the experts' testimony as a sanction for missing a deadline. Id. Here, Pearson had no experts, summary judgment was granted, and the case was dismissed. Only then did Pearson attempt to disclose her experts. Every judgment, every verdict would be subject to alteration if evidence could be added *after* dismissal. If Pearson *should* have disclosed her experts within the reasonable, extended, court-ordered deadline for doing so,

then making the disclosure thirty days *after* the case has already been dismissed provides no grounds for relief.

II. DISMISSAL OF PEARSON'S CLAIMS BY SUMMARY JUDGMENT WAS NOT A DISCOVERY SANCTION OR AN INVOLUNTARY DISMISSAL; THUS, THE SIX-FACTOR WARD ANALYSIS DOES NOT APPLY.

The argument that summary judgment was premised solely upon Pearson's noncompliance with discovery deadlines is without merit. As is evidenced in the trial court's order granting summary judgment, its admonitions at status conferences for Pearson to produce an expert supporting her allegations, and its liberal granting of time extensions for Pearson when requested, the trial court had little option but to conclude that Pearson had failed to introduce evidence sufficient to establish the standard of care and that is was a legal impossibility for Pearson to prove any breach thereof. *See, e.g.*, Green v. Owensboro Medical Health Sys., Inc., 231 S.W.3d 781, 784 (Ky. App. 2007).

The trial court's dismissal was not a discovery sanction. It was recognition that, after repeated delays and extensions of time, Pearson simply could not find an expert willing to offer a critique of the care rendered to her.

The Court of Appeals' reliance on Baptist Healthcare Sys., Inc. v. Miller, 177 S.W.3d 676 (Ky. 2005), is misplaced. In Miller, the plaintiff was given 30 days to produce a medical expert to support her claims after it was determined that expert testimony was necessary. Id. at 681. Unlike the plaintiff here, the plaintiff in Miller actually complied with the trial court's order and identified her expert within the time allotted by the court's order, and the parties then proceeded to trial. Id. The Court of Appeals found no error in this.

As in Miller, Pearson was put on notice that experts were required to advance her case and was provided an extension of time to do so. Yet, unlike the plaintiff in Miller,

Pearson did not produce a single expert (unless one accepts experts disclosed 30 days after a final judgment has been entered).

Similarly, Pearson's reliance on Poe v. Rice, 706 S.W.2d 5 (Ky. App. 1986), is misplaced. In Poe, the trial court granted summary judgment to the defendants after the plaintiff objected to producing the names of his experts in his answers to interrogatories. Id. at 6. No court-ordered deadlines were in place. No trial date was approaching. No extension of time had been granted.

Here, the trial court instituted a trial order compelling Pearson to produce such information within a specific and reasonable period of time and told Pearson of potential dismissal of the case if she did not comply.

Pearson's actions are tantamount to cases where a plaintiff does not obtain an expert even after being ordered to do so by the trial court. If a plaintiff refuses to obtain an expert, gambling on her convictions that an expert is not necessary in her case and decides not to call one, even after the trial court has determined that an expert is necessary, summary judgment is appropriate. *See, e.g.*, Green, 231 S.W.3d at 784.

In Green, the plaintiff discovered that her top four front teeth were loose, misaligned, and bloody after undergoing hand surgery and she sued her surgeon, the hospital, and the anesthesiologist. Id. at 783. The trial court ordered the plaintiff to disclose her experts by a certain deadline. Id. The plaintiff named her family dentist as her only expert, but this witness could not comment on the standard of care of the respective disciplines of the defendant/healthcare providers. Id. The trial court initially denied defendants' respective motions for summary judgment and granted the plaintiff an additional ninety days to produce an expert. Id. The extension expired without further disclosure, and summary judgment was

granted. The Court of Appeals held that even if the plaintiff could prove she suffered dental trauma, she failed to produce any evidence to establish that such trauma resulted from negligence by any or all of the defendants. Id. at 784. Without an expert medical witness to establish deviation from the applicable standard of care, the plaintiff could not prevail on her medical malpractice claim under any circumstance. Id. The court held that summary judgment was properly granted because "having failed to introduce evidence sufficient to establish the respective applicable standards of care, it was a legal impossibility for Green to prove the essential element of any alleged breach thereof." Id.

As in Green, the trial court afforded Pearson multiple extensions and Pearson has had ample opportunity to acquire medical experts to support her claim, but could not do so. Like the plaintiff in Green, Pearson could not establish a deviation from the standard of care or causation without medical expert testimony. Finally, summary judgment was appropriate because without expert evidence, it was a legal impossibility for Pearson to prosecute her medical malpractice claim.

Pro se litigants may be afforded some leeway; however, litigants who proceed without counsel must still comply with court orders. McNeil v. U.S., 508 U.S. 106 (1993); Haines v. Kerner, 404 U.S. 519 (1972). The trial court made every accommodation requested of the *pro se* litigant Pearson. The trial court granted every extension ever requested by Pearson. The trial court took the time to explain the rules of civil procedure to Pearson at several status conferences to ensure Pearson's understanding of the trial court's expectations as to following its orders. The trial court provided Pearson with every opportunity to request additional extensions and accommodations should Pearson require them to prosecute her claim.

The result in this case was not a discovery sanction and it is not an involuntary dismissal for failure to prosecute. The result in this case was summary judgment based on the fact that Pearson did not support her case with medical experts.

III. IF THE SIX-FACTOR WARD ANALYSIS APPLIES, THEN THE TRIAL COURT ADEQUATELY ADDRESSED THE WARD FACTORS.

The Court of Appeals reasoned in Ward v. Housman, 809 S.W.2d 717 (Ky. App. 1997), that an involuntary dismissal for a litigant's failure to timely disclose his expert witness was improper because the act of the attorney was one-time dilatory conduct and no alternative sanctions were considered before the dismissal of his case. Id. at 720. Instead, the Court of Appeals instructed that such conduct should be analyzed under CR 41.02. Id. at 719-20.

In this case, however, summary judgment was appropriate under both CR 41.02 and CR 56.

The power of involuntary dismissal for failure to prosecute and comply with court orders is an inherent power in the courts and necessary to preserve the judicial process. Gill v. Gill, 455 S.W.2d 545, 546 (Ky. 1970). Dismissal of actions for the failure to prosecute is a useful practice intended to keep court dockets as clear as possible. It is incumbent on the trial court to consider each case in light of the particular circumstances involved. Id.

The failure to prosecute in the present case is Pearson's repeated failure to come forward with any expert testimony to support her claims after being ordered to do so multiple times, and being granted liberal extensions of time in which to do so. Moreover, Pearson violated the direct orders of the trial court. These were not orders compelling production; they were direct orders of the court to provide the materials plainly required to prosecute a case under CR 26.02.

The Court of Appeals has created guidelines for determining whether a case should be dismissed for dilatory conduct under Rule 41.02. Ward, 809 S.W.2d at 719. Under Ward, courts should consider: (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) the meritoriousness of the claim; (5) prejudice to the other party; and (6) the availability of alternative sanctions. Id. The six-factor test espoused in Ward has never been approved by this Court.

Even if this Court believes dismissal in this case had anything to do with discovery, the trial court adequately addressed all six (6) factors in the Ward analysis.

A. Personal Responsibility, History of Dilatoriness, and Willful Conduct

The trial court recognized that Pearson was the sole party responsible for her compliance with the court's trial order and the requirements of CR 26.02. (Orders, 12/12/05, 2/24/06, p. 1-2). It also detailed Pearson's history of dilatoriness. (Orders, 12/12/05, 2/24/06, p. 1-2). The law demands the exercise of due diligence by the client as well as by her attorney in the prosecution of litigation. Modern Heating & Supply Co. v. Ohio Bank Bldg. & Equip. Co., 451 S.W.2d 401, 403 (Ky. 1970). By failing to exercise due diligence in securing expert witnesses and disclosing their opinions consistent with CR 26.02(4) and the direct orders of the trial court, Pearson demonstrated such willful dilatoriness. Unreasonable delay which harasses the defendant may constitute sufficient grounds for dismissal under CR 41.02. Gill, 455 S.W.2d at 546.

The trial court made efforts at several status conferences to explain the civil rules, court procedures, and the trial court's expectations as to Pearson's compliance with trial

orders.[4] Unlike the one-time dilatory conduct of the plaintiff in Ward, Pearson had a distinct pattern of noncompliance. Pearson knew of her expert disclosure deadlines, was reminded by the trial court of these deadlines, had previously requested extensions for compliance with the trial court's orders when needed, and did not request an extension or continuance for her expert disclosure on or before December 1, 2005.

B. Meritoriousness of the Claim, Prejudice to Parties, and Alternative Sanctions

The lack of merit of Pearson's claim was demonstrated by the lack of any medical experts to support her claims. Not a single retained expert or subsequent treater had come forward by deposition, affidavit, or simple correspondence to state that the claims had merit.

The trial court explicitly addressed the prejudice Pearson's dilatoriness had on the other parties when she explained to Pearson why it was necessary for her to meet the trial court's deadlines for expert disclosure in light of the upcoming trial just over four months away.[5]

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[4] On several occasions, the trial court explained the deadlines to Pearson and admonished her to adhere to them:

> Judge: Well, **the motions for summary [judgment that] have been pending since May are based on this issue [Plaintiff's failure to disclose expert witnesses]** 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 . . .
>
> Cronen [Counsel for Norton]: 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.

(Transcript, 7/27/05 Status Conference, p. 4-5).

[5] Pearson was warned again of the need to disclose expert witnesses to support her case at the October 11, 2005 Status Conference:

Lastly, the trial court may have considered alternative sanctions for Pearson's failures. Practically speaking, however, what alternative sanctions could have remedied or addressed Pearson's transgressions? *See* CR 37.02(2)(a)-(c), 37.02(3). Had the trial court stricken Pearson's claim or refused to allow Pearson to support her medical malpractice claim with experts, her claims would have been moot. Within this context, a dismissal with prejudice was warranted.

CONCLUSION

When called upon to do so, Pearson presented the trial court with no expert opinion that the treatment was below the standard of care or caused any injury. These facts are undisputed.

Due to the nature of the medical issues involved in this case, expert testimony had been required. After extensions and court orders requiring this necessary expert testimony, Pearson offered none. It was not lateness but a complete lack of expert opinions that supported the trial court's judgment.

Judge:	**I want to make sure that if there is no expert who's going to find care below the standard. I want to make sure that has been exhausted . . . , I'll grant you that extension for disclosure of [experts] and report and . . . the answering of 26.02 information until 12/1,** however, in the interim, without disclosing names or whatever I need you to . . . correspond with counsel so that you all can set up a deposition date for 12/5, 12/6, early December . . . . [S]o in other words, if the deposition of your experts can be taken by Dec. 10th say, the defenses' expert disclosure will be due sixty days from the taking of those experts.
Pearson:	Oh, I didn't under, in the original trial order, I didn't understand . . . .
Judge:	The original trial order that is not how it works . . . now . . . I don't want to box the defense into having 25 days to disclose an expert following the deposition of your expert alright [,] **so you have until 12/1 to comply with rule 26.02 and all the information required thereunder**, the defense has sixty days from the taking of the depositions of these experts . . . .

(Transcript, 10/11/05 Status Conference, p. 7-8).

As such, Dr. Solinger respectfully requests that this Court reverse the Court of Appeals' Opinion and affirm the trial court's order granting summary judgment in favor of Dr. Solinger.

Respectfully submitted,

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