COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2007-SC-000414-DG
CASE NO. 2008-SC-000134-DG

NORTON HOSPITAL, INC. — APPELLANT/CROSS-APPELLEE

vs.

COMBINED REPLY BRIEF/RESPONSE BRIEF FOR APPELLANT/CROSS-APPELLEE, NORTON HOSPITAL, INC.

MELANIE PEARSON — APPELLEE/CROSS-APPELLANT

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

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was mailed this 17th day of November, 2008, to: Alan S. Rubin, Esq., 231 South Fifth Street, Suite 200, Louisville, Kentucky 40202; James Grohmann, O'Bryan, Brown & Toner, 455 South Fourth Avenue, 1500 Starks Bldg, Louisville, Kentucky 40202; Hon. Judith McDonald-Burkman, Judge Jefferson Circuit Court, Division 9, 700 West Jefferson Street, Louisville, Kentucky 40202; and Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. It is further certified that Appellant has not withdrawn the record on appeal.

Counsel for Appellant/Cross-Appellee,
Norton Hospital, Inc.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

This is a medical malpractice case. Jefferson Circuit Judge Judith McDonald-Burkman granted Plaintiff (Appellee/Cross-Appellant herein; hereafter "Pearson") numerous extensions of time, including a 60-day extension of time for identification of experts, yet Pearson never complied with the Court's original or extended expert witness disclosure deadlines. Thereafter Judge McDonald-Burkman entered a finding that, given the absence of any experts on the issue of standard of care, it would be impossible for Pearson to prevail on her medical malpractice claims; accordingly, she granted Motions For Summary Judgment filed earlier by both Defendants (Appellants/Cross-Appellees herein; hereafter "Norton Hospital" and "the Physician Defendants"). She also determined that this was not a case where *res ipsa loquitur* applies, given the complexity of the subject matter.

On appeal, the Kentucky Court of Appeals reversed, holding that the Trial Court needed to make more explicit findings pursuant to *Ward v. Housman*, 809 S.W. 2nd 717 (Ky. App. 1991). However, the Court of Appeals also agreed with Judge McDonald-Burkman that the doctrine of *res ispsa loquitur* is not applicable to this case, and therefore, that Pearson needed experts to establish her claims.

COUNTERSTATEMENT OF THE CASE

Norton Hospital does not accept the "Statement of Facts" tendered by Pearson in her Brief to the Court, for the reason that her submission contains lengthy recitations of medical authorities and excerpts from various medical literature, as well as Pearson's interpretation of her own medical records, much of which interpretation is not part of the evidence of record below. Respectfully, Norton Hospital submits that a substantial portion of Pearson's Statement of Facts represents her own contentions to as to what her medical records mean, or should mean. However, the central issue before this Court is whether Pearson had complied sufficiently with the Trial Court's Order requiring timely identification of expert witnesses, or that failing, whether this case might properly stand submitted without the need for experts under the doctrine of *res ipsa loquitur*.

Other than the above, Norton Hospital adopts as if stated verbatim herein its earlier-submitted Statement of the Case from its original Brief to this Court. (*See* Brief for Appellant, Norton Hospital, Inc. at 1-5).

ARGUMENT

I.

SUMMARY JUDGMENT WAS PROPERLY GRANTED TO THE DEFENDANTS BECAUSE PEARSON COULD NOT PREVAIL WITHOUT AN EXPERT.

Appellee's protestations to the contrary notwithstanding, the simple fact is that Pearson failed to identify her expert witnesses in this case in a timely fashion, in spite of a very patient Trial Court Judge. In her Brief to this Court, Pearson contends that the indulgence of the Trial Judge was overstated by Norton in its original Brief; indeed, she accuses this party of "an attempt to mislead this Court concerning Pearson's diligence in the Trial Court." (Pearson's Brief, at 9). She further argues that "there was not a pattern of dilatory conduct by Pearson" in the trial court; however, she then readily concedes, as if this fact were relatively insignificant, that she "*asked for and was granted a total of (7) seven extensions of time*. (*Id.*; emphasis added.) She attempts to excuse her need for those numerous extensions by citing health and financial difficulties, and emphasizes to this Court that she "asked for and was granted only **one** extension concerning the expert witness disclosure deadline...." (*Id.*; emphasis original.) Nevertheless, after admitting that she received seven extensions of time, including a 60-day extension of time in which to identify her expert witnesses, Pearson fails to acknowledge the central fact of this case, namely, that Summary Judgment was entered against her by the Trial Judge only *after*: (1) she failed to meet the Court's extended expert witness deadline; (2) she failed to timely request a second extension of time; (3) she failed to timely advise the Court why she was unable to meet the extended deadline, and (4) she otherwise failed to timely excuse or explain her noncompliance. In short, Pearson simply let the expert witness deadline run, even after she had obtained a 60-day extension of time, then sought to excuse her noncompliance **retrospectively**.

Indeed, she tendered a list of expert witnesses only well **after** Summary Judgment had already been entered by the Court, then attempted to "turn back the clock" by tendering a substantially tardy expert witness compliance.

In her Brief, Pearson makes much ado of her contention that the Trial Court imposed unrealistic "unreasonable and unattainable" deadlines. (Brief of Pearson, at p. 197) However, what she fails to acknowledge is that these deadlines were entered with her knowledge and approval, and were entered only after the Trial Judge on several occasions patiently explained to her that the deadlines were "*mandatory*" and that these deadlines specifically included an obligation on her part to identify expert witnesses by a given date. (Transcript of 7/27/05 Status Conference, at pp. 4-5.) For example, at the July 27, 2005 Status Conference, the following exchange occurred:

> 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: Right....**

(Transcript July 27, 2005 Status Conference, at 5; emphasis added.) There was no reason for the Trial Judge to believe that this deadline was unrealistic, unattainable or otherwise inappropriate, especially because Pearson had already informed the Court that she was "in consultation with" expert witnesses (*infra*, page 6, quoting from Pearson's Answer to Defendant Physicians' Interrogatory No. 8). In fact, as admitted in her Brief, in the Status Conference Statement she filed with the Trial Court several months before the expert witness deadline, Pearson advised Judge McDonald-Burkman that "she had both treating physician experts and was consulting with

experts which supported her claims against the Defendants" (Pearson Brief, at 16); *nonetheless, she declined to identify those experts*. This statement notwithstanding, on the very next page of her Brief, Pearson argues that she was held to expert disclosure deadlines that were "unreasonable and unattainable." (Pearson Brief, at 17).

Plaintiff argues in her Brief to this Court that she identified the medical and legal theories under which she was proceeding in her discovery responses filed with the Trial Court. While it is true that Pearson argued or at least recounted a voluminous summary of her medical history in some of her responses, she did not identify her experts, or what opinions those experts held on the issue of whether the Defendants met or breached the applicable standard of care. In fact, in response to Defendants' Interrogatories, Pearson was evasive and non-specific regarding who her experts would be. In response to Interrogatories posed by Norton Hospital, Pearson initially responded as follows:

> INTERROGATORY NO 21. State the following information for each expert whom you anticipate will testify at the trial of the case: name, address, title, professional specialty, educational background, and employer of each expert, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify; and a summary of the grounds for each opinion.
>
> ANSWER: Plaintiff objects to Interrogatory No. 21 and all subsequent Interrogatories because the Defendant has exceeded the limit of Interrogatories which are permitted to be propounded to Plaintiff pursuant to Rule 33.01 (3) of the Kentucky Rules of Civil Procedure. By Plaintiff's calculations, Defendant has, including subparts, propounded at least 90 Interrogatories to Plaintiff. Plaintiff corresponded with counsel for Defendant, Ms. Beth McMasters, on March 25, 2005 and advised Ms. McMasters that the Defendant had far exceeded the mandates of Rule 33.01 of the Kentucky Rules of Civil Procedure, which limits a party's Interrogatories to 30 without seeking permission from the Court. Plaintiff sought to get at mutual agreement with the Defendant to expand the number of Interrogatories allowed but, to date, the Defendant's counsel has not responded to Plaintiff's correspondence of March 25, 2005.

(*See* Respondent's Index to Appendices, Tab 1, at 73-74.) Later Pearson filed a Supplemental Response which specifically acknowledged her October 1, 2005 deadline for disclosure of experts, but which again declined to identify who her experts might be:

> INTERROGATORY NO. 21: State the following information for each expert whom you anticipate will testify at the trial of this case: name, address, title, professional specialty, educational background, and employer of each expert; the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; and a summary of the grounds for each opinion.
>
> ANSWER: **Pursuant to the Court's Pre-trial Order of July 27 2005, Plaintiff's expert disclosures are due by October 1, 2005. At this time, it is unknown as to which expert/experts will testify at trial.** However, Plaintiff reserves the right to and may call any and all treating physicians as well as all Defendant physicians in this action, depending upon what stipulations of facts the parties can agree to prior to trial. Thus, stipulations of facts will largely dictate what experts will need to be called. The name and address of all treating physicians was previously provided to Defendant in response to Interrogatory No. 6. Discovery is continuing.

(*See* Respondent's Index to Appendices, Tab 4, at 13.) In response to a similar Interrogatory by the Defendant Physicians below, Pearson provided the following response:

> 8. Please list each person that you expect to call as an expert witness at the trial or by deposition stating as to each person:
>
> (a) Full name, business address, and telephone number.
> (b) Educational background and professional qualifications.
> (c) Subject matter or area in which each such person is expected to testify.
> (d) Detailed statement of the substance of the facts and opinions on which each such person is to testify.
> (e) Summary of the grounds for each such opinion.
> (f) List each and every publication that the expert has written or relied upon that is pertinent to the subject matter of your Complaint.
> (g) In what medical malpractice or negligence actions has each expert testified, either at trial or by deposition.
>
> ANSWER: **Plaintiff has not yet made a decision as to which expert witnesses she will call to testify in this matter at trial or by deposition. Plaintiff is currently in consultation with expert witnesses and is deciding which experts she wants to retain and use as consultants and which experts she wants to use as testifying experts.** Plaintiff will also be calling all the Defendant physicians as

> expert witnesses in their various fields: Dr. Robert Solinger, Dr. Christopher Johnsrude, Dr. Michael Recto. Plaintiff also may be calling her current and past treating physicians as expert witnesses. Plaintiff will timely supplement her response to Interrogatory No. 8 when she decides which experts she will be calling to testify.

(*See* Respondent's Index to Appendices-Volume I, Tab 2, at Pages 33-34; emphasis added.) Even though she mentioned the names of the Defendant Physicians in her response, she gave no indication as to how they would testify as to the issue of standard of care, or how she might establish even a *prima facie* case against them on the basis of their own testimony. Instead, she simply stated that she "will also be calling all the Defendant physicians as expert witnesses in their various fields," and that she "also may be calling her current and past treating physicians as expert witnesses." *(Id.)* Respectfully, Norton Hospital submits that such a disclosure falls far short of an adequate expert witness disclosure. This conclusion is particularly compelling in light of the Trial Court's Civil Jury Trial Order, which stated that "[there] must be literal compliance with the requirements of CR 26.02(4)(1)(i)," and that Pearson "must identify" each expert by the deadline dates set out in the Order.

The Trial Court's Civil Jury Trial Order, which was entered on July 27, 2005, specifically stated that, as Plaintiff, Pearson "must identify each person whom the party expects to call as an expert witness at trial, no later than October 1." The Order itself warned that the expert witness disclosure deadlines were "mandatory" and that "failure to comply with the letter and spirit of the aforesaid civil rule may result in the suppression of the expert's testimony." As if that Order were not sufficiently plain, the record below further establishes that the Trial Judge took pains to explain the importance of the deadline to Pearson at the July 27 hearing, and she voiced no objection to it. (Transcript of 7/27/05 Status Conference, Pages 4-5.)

Notwithstanding the above deadline, On October 1, 2005 Pearson moved for, and was granted, a 60-day extension of time in which to identify her expert witnesses; therefore, her new deadline became December 1, 2005. In filing that Motion, she represented to the Court and opposing counsel that she "has retained an anticoagulation expert and has made arrangement to obtain a neurologist...." Nevertheless, she declined to disclose the identity of any such expert or expert (s), either then or anytime prior to the extended December 1.

At a Status Conference only 11 days later (i.e. on October 11, 2005) Judge McDonald-Burkman again reminded Pearson of the expert witness deadline. (Transcript of 10/11/05 Status Conference, Pages 5-8.) Nonetheless, in spite of the clear language of the Civil Jury Trial Order that the expert witness deadline was "mandatory," along with the Judge's several reminders to Pearson regarding the importance of the deadline, as well as the Court's 60-day extension of time for her to identify her expert witnesses, Pearson failed to timely identify any expert witnesses nor offer any explanation for that failure. Further, she sought no additional extension of time to identify her expert witnesses. Accordingly, on December 12, 2005, with Plaintiff having failed to identify any expert witnesses, the Trial Court granted Defendants' earlier Motions for Summary Judgment, finding that Pearson's claim must fail as a matter of law, given that she was "unable to sustain her burden of proof against any of the Defendants without competent expert testimony." (T.R. at 704-705).

In summary, Pearson had numerous opportunities to identify her experts or otherwise request additional time from the Trial Court; instead, she identified no experts and allowed the expert witness deadline to run without requesting an additional extension of time to disclose her experts. Under those circumstances the Trial Judge correctly concluded that Pearson's cause of action failed as a matter of law for lack of a supporting expert witness.

The case of *Green v. Owensboro Medical Health Systems, Inc.*, 231 S.W. 3rd 781 (Ky. App. 2007) is strikingly similar to the case at hand. In *Green*, the Trial Judge entered Summary Judgment against Plaintiff in a medical malpractice case after the Plaintiff failed to identify any experts in response to Defendants' written discovery, and thereafter failed to respond to an Order from the Court requiring Plaintiff to respond to "all discovery requests" by a given date. Eventually, after an extension of the deadline, Plaintiff did identify her own dentist as an expert witness. However, that dentist's testimony was limited to the diagnosis of Plaintiff's condition, and did not help Plaintiff on issues involving standard of care. When Plaintiff failed to identify additional experts, Defendants moved for Summary Judgment. The Trial Court sustained the Motion, dismissing Plaintiff's Complaint.

On appeal, the Plaintiff in *Green* contended that Summary Judgment had been prematurely entered, and that she did not need an expert witness under the doctrine of *res ipsa loquitur*. In affirming that Summary Judgment, the Kentucky Court of Appeals stated:

> Finally, having affirmed the trial court's decision requiring expert medical testimony, it necessarily follows, contrary to Green's second contention, that we find no error in the granting of summary judgment to each of the appellees. Summary Judgment is appropriate when a party is given the opportunity to present evidence showing a disputed material fact exists and the court ultimately finds no such dispute exists. *Hoke v. Cullinan,* 914 S.W.2d 335 (Ky. 1995) Green had many opportunities, spanning well over one year, to secure expert witnesses to establish the respective standard of care expected of an anesthesiologist, an orthopedic surgeon, and a health care facility. The only expert witness Green named was her own general practice dentist. However, her family dentist was never listed as an authority regarding any applicable standard of care. Thus, even if Green 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. **Without an expert medical witness to establish deviation from the applicable standard of care, Green could not prevail on her medical malpractice claim under any circumstances.** *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W. 2nd 476, 479 (Ky. 1991). **In short, having failed to introduce evidence sufficient to establish the respective applicable standards of care, it was legal impossibility for Green to prove the essential element of any alleged breach thereof. Thus, the trial court**

properly granted summary judgment in favor of Dr. Westfield, OSMO, and OMHS.

231 S.W. 3rd at 784 (emphasis added).

The standard of review on appeal of a Summary Judgment is whether the Trial Court Correctly found that there were no genuine issues of material fact, and that the opposing party was afforded a fair opportunity to file evidence opposing the motion. *Scifres v. Kraft*, 916 S.W. 2d 779, 781 (Ky. App. 1996). As long as litigants are afforded the opportunity to present evidence which reveals the existence of disputed material facts, and upon the trial court's determination that there are no such disputed facts, Summary Judgment is appropriate. *Hoke v. Cullinan*, 914 S.W. 2d 335, 337 (Ky. 1996). As further stated by this Court in *Welch v. American-Publ. Co. of State*, 3 S.W. 3rd 724, 730 (Ky. 1990; emphasis added): "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 of what is of record rather than what might be presented at trial*." Moreover, it is insufficient for a plaintiff to attempt to overcome a Motion for Summary Judgment merely by presenting her own opinions, claims or arguments, in the absence of any supporting expert testimony. *Wymer v. J. H. Properties, Inc.*, 50 S. W. 3rd 195, 199 (Ky. 2001).

Here the facts are clear: Pearson was given several opportunities and an equal number of helpful reminders by Judge McDonald-Burkman to identify expert witnesses on the issue of standard of care, yet she failed to do so in a timely fashion. It must surely be that a Trial Court has the inherent authority to set and enforce reasonable deadlines; otherwise, the Court's Orders mean little or nothing at all. Moreover, where, as here, Defendants had Motions for Summary Judgment pending for many months, it should be within the accepted discretion and control of

B.

Norton Hospital Did Not File a "New" Motion for Summary Judgment, and Therefore the Trial Court Did Not Violate JRP 401(a), CR 56.03 or the Court's Own Pretrial Order

Pearson claims to have been surprised or otherwise unduly prejudiced by the Court's entry of Summary Judgment, and asserts in her Brief that Norton Hospital effectively filed a "new" Motion for Summary Judgment, to which the trial court permitted no response. (Pearson Brief, at 22, 42-43 and 59-61.) In her Brief she claims that the Trial's Court's decision to grant this "new" Motion violated JRP 401(a), which permits a 20-day response period to a Motion for Summary Judgment, as well as CR 56.03, which permits a 10-day advance notice of a Summary Judgment hearing, as well as the Court's own Pretrial Order, calling for the submission of an AOC 280 form. (Id., at 63-64.) These arguments are also without merit. Norton Hospital had filed its Motion for Summary Judgment many months earlier, and had clearly advanced the argument in its Motion that Pearson's claims failed for lack of substantiation or validation by an expert witness. (T.R. at 154-203 and T.R. 142-148.) Pearson had an opportunity, and exercised that opportunity, to file a Response to those Motions. Indeed, in obvious recognition of Norton Hospital's argument that Pearson's claim must fail for lack of an expert witness, Pearson responded that she "has retained a medical expert which supports her contentions in this matter." (T.R. at 230-265.) However, once again, and notwithstanding that representation, Pearson failed to disclose the identity of her "retained medical expert," although she had every opportunity to do so.

Later, the Defendants did not file new Motions for Summary Judgment, but rather reminded the Trial Court that their earlier Motions for Summary Judgment were still pending, had merit, and should be granted. Indeed, when the Court did grant those Motions, Summary Judgment was entered for the same reason as advanced by Defendants in their original Motions

for Summary Judgment, namely, that Pearson's Complaint should be dismissed for lack of an expert to support it. Under these circumstances, there was no error and no prejudice.

C.

The Trial Court Did Not Violate Jefferson Rule of Practice 707

Pearson complains that the Trial Court violated Jefferson Rule of Practice 707, which speaks of placing certain "complex" cases on something called a "complex track assignment." (Pearson Brief, at 17-18). Her reliance upon Rule 707 is misplaced for several reasons. First, there is no indication that this particular medical malpractice case was designated as a "complex track case." While Rule 707A does speak of medical malpractice cases as being eligible, or "typical" of the types of cases designated for the "complex track," nowhere does it state that all medical malpractice cases shall be so designated. In fact, the case *sub judice* was never designated as a "complex track" case.

Second, Rule 707 speaks in terms of "guidelines" and "goals," and there is nothing in the Rule which sets forth specific timelines which must be met by the trial court, or by the parties involved. Rule 707, like so many of the other local rules, is intended to provide guidance to the Court and to the parties.

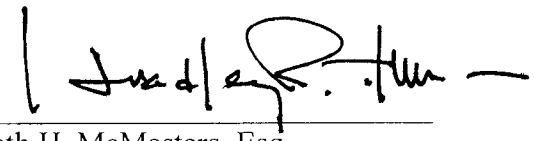
Third, there is nothing in Rule 707 or the other local rules which provide foundation for an argument that the timelines set forth in the Rule are somehow mandatory, as opposed to discretionary. Certainly, it has not been the practice of the Courts in Jefferson County to measure the progress of medical malpractice cases against the guidelines set forth in Rule 707. If indeed that were to be the case, it would seem only fair and appropriate that all parties were first placed on notice that the medical malpractice case in question was designated for the "complex track," which this one was not.

III.

CONCLUSION

In the instant case Pearson was challenged as to whether she had a submissible medical malpractice case. The Trial Court established a reasonable deadline for the identification of her expert witnesses, to which Pearson agreed. Subsequently, the Trial Court extended that deadline by another 60 days, yet Pearson allowed that deadline to expire without complying or requesting further extensions. At that point it was fair for the Trial Court to determine, based upon the record before it, whether it would be possible for Pearson to prevail at trial. Judge McDonald-Burkman recognized, correctly, that Pearson could not prevail because she lacked the an expert to substantiate or validate her claim; accordingly, Defendants' Motions for Summary Judgment were granted. Under these circumstances, the Trial Judge was correct in granting Summary Judgment; accordingly, the Court of Appeals' decision should be reversed.

Respectfully submitted,



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