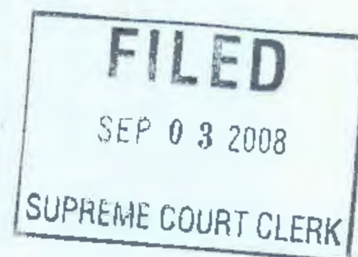
COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2007-SC-000414-DG
CASE NO. 2007-SC-000389-DG
CASE NO. 2008-SC-000134-DG



MELANIE LYNN PEARSON. APPELLEE/CROSS APPELLANT

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

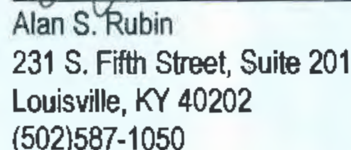
JEFFERSON CIRCUIT COURT CASE NO. 05-CI-002182

NORTON HOSPITAL, INC APPELLANT/CROSS APPELLEE

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 It is further certified that Appellee/Cross Appellant has not withdrawn the record on appeal.



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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).

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I. INTRODUCTORY COMMENT

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

II. STATEMENT OF FACTS

On March 7, 2005, Pearson filed her pro-se Complaint for Medical Malpractice. (Record at 1-7) (Hereinafter R.) Pearson alleged the Defendants below overdosed her on Coumadin, an anticoagulant, while treating her for, a heart condition. Defendants Recto and Johnsrude, who were staff physicians an Norton Hospital, prescribed Coumadin at a level 2-3 times the maximum dosage recommended in Coumadin's FDA approved product insert and the Physicians Desk Reference. 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).

1. Specific Allegations Of Negligence

On February 18, 2004, Pearson was hospitalized for atrial fibrillation at Norton Hospital 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** (2004 Physicians Desk Reference pg. 1051-1052). Coumadin should be started at a 2-5mg dose. (R. at 110 and Uniform Reply Brief Exhibits, Ex. 3 Herafter 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 rates 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. *Id.* 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 <u>when it should have been stopped altogether</u>.

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" (URBE ex.3).

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]). When Pearson was diagnosed by ER Dr. Steven Richards as suffering from Coumadin Toxicity on February 24, 2004, 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. Pearson was discharged from Norton Hospital ER on February 24, 2004; she was sent home with an INR of 7.5 which is "critically high". 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)

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 <u>is the most feared</u> 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 <u>all</u> 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, managed and monitored Pearson's Coumadin anticoagulation therapy. Dr. Johnsrude and PCA 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 interaction almost always occurs [in 3-4 days] when these drugs are use concomitantly and, further, the interaction can cause life threatening bleeding if an empiric 30-50% dose reduction of Coumadin is not utilized. (MVCO ex.3, 4) (2004 Physicians Desk Reference, pg. 3248). 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 interaction as a "severe drug interaction".

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.[1]

It remains undisputed that prior to, during and after her anticoagulation, neither Norton

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

Hospital nor any of its employees or agents informed Pearson of the risk of cerebral bleed while taking Coumadin. The paperwork given to Pearson, upon her **discharge** from Norton Hospital on February 19, 2004, said nothing specifically about cerebral bleed being a complication or side effect of Coumadin. (See, Pearson's July 2, 2005 Interrogatory Responses pg. 54)

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). Norton's pharmacy and nurse manager, despite being aware of the dangerous interaction of Coumadin and Amiodarone, provided the potentially lethal dose of Coumadin. Both Federal and Kentucky law requires accredited hospitals, their pharmacies and nurses to prevent well known interactions. See, ***American Law of Medical Malpractice First Edition***, pg. 220-221 (citing *Accreditation Manual for Hospitals, Joint Commission on Accreditation of Hospitals, 1981 Edition: Pharmaceutical Services, Standards III*, pp 137-139 and pp 140-142) See also, KRS 315.010(10)(a), and 201 KAR 2:074 Section 3(2) (pertaining to Hospitals and pharmacies); and KRS 314.011(6)(c) and Subdivision (4) of KRS 314.011(6)(c) (pertaining to nurses)

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, and 63). Alternatively, Pearson alleged she should have been told by Norton physicians/nurses that she was toxic on Coumadin so she could have had the option of having the Coumadin toxicity reversed or could have sought medical treatment elsewhere. (See, URBE ex. 5, July 2, 2005 Interrogatory Responses pg. 4-19, and MVCO ex. 1, Pearson's August 25, 2005 Interrogatory Responses at pg. 3-6) Norton Hospital admitted Pearson's discharge papers from her ER visit on February 24, 2004 stated Pearson was toxic on Coumadin. (See, R.

341-355, Norton Hospitals, Responses to Pearson's First Requests for Admission, at pg.7-8)

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).** Any person that has an INR of 2.8 **in less than 48 hours** has an INR that is more than a little high and this 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 Algha 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)

III. PROCEDURAL HISTORY OF THE CASE

1. Norton Hospital's Rush To Have Pearson's Case Dismissed

On March 22, 2005, just fifteen (15) days after the Complaint was filed, both Norton Hospital and the Cardiology Defendants (hereinafter "Solinger") filed frivolous Motions to Dismiss based on a Statute of Limitations Defense. (R. 20-22, 50-54). Norton **erroneously claims,** in its Brief, Pearson moved the Court for an Extension of Time to Respond to the Motion. In reality, Norton had

filed the Motion on March 22, 2005 and sought to have the Motion heard on April 4, 2005 (only 14 days after the Motion was served by mail). JRP Local Rule 401(a) specifically provided for a (20) twenty day response period to the Motion and provided that Dispositive Motions were not be heard at Motion Hours. Pearson never received an Extension of Time, as she responded in the time permitted by the Local Rules. Norton was seeking to have Pearson's Complaint Dismissed and was going to give her very little opportunity to file a meaningful Response

to the Motion, all in violation of the Local Rules.[2]

Norton's motion was denied (R. 61-63) and the Cardiology Defendants never submitted an AOC 280 form after Norton's Motion based upon the same grounds was denied. In Pearson's response to the Cardiology Defendants' Motion to Dismiss, Pearson set forth 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. Additionally, as part of her response to these Motions, Pearson attached a lengthy Affidavit to each. (R. at 73-80 and 103-113).

Pearson specifically stated, in her affidavit, in Response to Solingers Motion to Dismiss **"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 April 18, 2005 Affidavit).

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[2] Pearson advised the Court of this fact after Norton refused to comply with the Local Rules and simply Amended the Motion on March 28, 2005 (R. 55-60), then Re-noticed the Motion to be heard On April 11, 2005. (R. 81-86) (April 11, 2005 correspondence of Pearson to Judge Judith McDonald-Burkman) Pearson also advised the Court that she had been ill and would not be attending the Motion Hour on a Motion that was not supposed be noticed for a hearing and which did not allow an adequate time to respond.

On March 22, 2005, Norton Hospital served Plaintiff with Requests for Admission, Requests for Production of Documents. (R. 23-45) Pearson was asked approximately (82) eighty-two 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 (96) ninety-six pages of responses to Norton's Interrogatories. (See, MVCO, Ex. 1, July 2, 2005 Interrogatory Responses pg. 1-80, and August 25, 2005, Interrogatory Responses, pg. 1-18)

While Norton claims, at p. 2 of its Brief, that Pearson's Interrogatory Answers did not disclose expert witnesses, this contention is patently false. Pearson listed numerous treating physician experts in response to the above Interrogatories, 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. Pearson alleged these physicians' opinions and medical records supported both causation and deviation from the accepted standard of care.

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 arrhythmias (atrial fibrillation) and would be hospitalized. (R. 134-135). On May 9, 2005, Pearson underwent heart valve surgery where her mitral valve, aortic valve and ascending aorta was 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, Norton Hospital claims Pearson received numerous extensions of time on all types of matters and that these Extensions of Time prove a pattern of dilatory conduct. (Norton Brief pg. 14-15) There was no pattern of dilatory conduct by Pearson. Pearson asked for and was granted a total of (7) seven extensions of time. Moreover, three of the requested extensions of time amounted to a grand total of (10) days.[3] 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 because Pearson could not pay $12,000.00 to her hired medical experts in such a short period of time. (R. 670-672)

Norton 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", this was acknowledged by the trial court on July 27, 2007 at the Status Conference. The case was set for trial only four (4) months and seventeen (17) days after it was filed. (R. 331-334).

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[3] 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.

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 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 backwards. Appellant's 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 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. Indeed, it took **one year** for Norton Hospital to supply Pearson with her medical records and ten separate letters from Pearson to obtain these records, yet Pearson was expected to prove her entire case in nine months.[4] (R. 79, Affidavit

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[4] It is obvious by its actions that Norton 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, Norton

of Melanie Pearson, pg. 7)

4. Norton Hospital Files A Frivilous Motion For Summary Judgment Based Upon Non Existent CR 36 Judicial Admissions

Norton filed a Motion For Summary Judgment on May 20, 2005, predicated on an allegation that Pearson had failed to timely respond to their Requests For Admissions. (R.154) Ostensibly, Norton served its Motion three (3) days after Plaintiff **timely moved** the Court for an extension of time to respond to the Requests For Admissions. (R.149-153, Pearson's Motion for Extension of Time) Pearson was in the Hospital recovering from major open heart surgery and this was the basis for the Extension of Time. The record is perfectly clear Norton Hospital's Motion for Summary Judgment was also based solely upon alleged CR 36 judicial admissions. Counsel for Norton Hospital **admitted this fact** at the June 6, 2005 Motion Hour, held just days after the Motion had been filed, wherein counsel stated:

> Leslie Cronen: Yes Your Honor, Leslie Cronen on behalf of Nortons, we do have an objection because **we have a motion for summary judgment pending**. I understand the health concerns... I know she can't foresee that and this wasn't foreseeable for her to have to go back in the hospital **but we did have the motion for summary pending based on non response, no responses to discovery...**
>
> (June 6, 2005 Video 30-11-05, VCR-034 at 14:07:10-14:07:36)

Norton's argument was based **entirely** on the false allegation that Plaintiff had failed to timely respond to the Requests for Admissions. Based upon these alleged admissions, Norton claimed Pearson could not meet her burden of establishing that Norton Hospital deviated from the accepted standard of care. Norton alleged, in the Introduction to its May 19, 2005 Memorandum, that:

"The Request for Admissions is now deemed admitted as a matter of law, pursuant to

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was aware of Pearson's fragile heath conditions (which they allegedly caused) and yet Norton was still intent to proceed at rocket speed while Pearson was still in the hospital recovering from major open heart surgery.

Overruled the submission of the Motion for Summary Judgment by inscribing "Extension Granted" and checking the Overruled box on the AOC 280. (R.227)

5. Pearson Files A Response To Norton Hospital's Motion For Summary Judgment

On June 20, 2005, Plaintiff filed lengthy responses to the Motions For Summary Judgment pointing out that **(1)** the Motions were moot since Plaintiff timely responded to the Defendants' discovery requests, **(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. Plaintiff also pointed out that **JRP 707 provided for 545 days of discovery, if necessary, in a medical malpractice action**. (See Rule 56.06 of the Kentucky Rules of Civil Procedure) (R. 230-247 and R. 266-280)( ).

6. Norton Hospital Files A Reply To Pearson's Response To Norton's Summary Judgment Motion

On June 30, 2005, Norton filed a Motion to file a Reply Brief. (R. 287-289). Norton's proposed Reply Brief was filed in support of the previously filed Motion for Summary Judgment. On July 5, 2005, Pearson filed a Response in Opposition to the Motion to file a Reply Brief because the proposed Reply Brief can only be described as a "sham pleading". (295-301)

Norton reiterated, in its (2) **paragraph** Reply, that the basis for their motion was **"Plaintiff's failure to respond to Requests For Admissions"** and the alleged failure to support her claim with expert testimony. (R. 285-286) Norton also maintained that Pearson's claims were barred by the Statute of Limitations, even though the trial court had rejected that argument previously by Order dated May 11, 2005. (R. 61-63) This reply was filed on June 30, 2005, well before the trial court

had even set expert disclosure dates for Plaintiff, but after the above referenced affidavits of Pearson (which essentially contain expert disclosures, but not the actual names of her experts).

Pearson stated, in objection to the Reply, that Norton had previously lost the Statute of Limiations argument but was seeking yet another bite at the apple. Pearson further objected because she had had never made any CR 36 judicial admissions. Pearson pointed out that the case was only four (4) months old and she had been given no opportunity to conduct discovery in a complex medical malpractice case and four months time was "clearly insufficient as a matter of law". Pearson reminded the Court that she was still recovering from major open heart surgery and during her recovery had prepared and served (200) pages of discovery responses. Pearson complained that Norton was again attempting to mislead the Court concerning the alleged judicial admissions and the frivolous Statute of Limitations defense. Finally, Pearson pointed out that she was consulting with expert witnesses. (R.295-301)

Additionally, Norton's motion simply avoided the fact that, **prior to the expiration of the time permitted for Pearson to respond to the Requests For Admissions, Pearson sought an extension of time to respond**. (R.149-152) Pearson was hospitalized and had open heart surgery during this period of time. (R.149-152) This extension was granted on June 6, 2005, well before Norton's Reply Brief was filed. (R. 152).

7. 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 March 22, 2005, Norton Hospital served Pearson with approximately eighty-two (82) Interrogatories (including discrete subparts). (R. 23-45) Pearson was questioned at length about what witnesses substantiated her claims against the Defendants. Pearson responded with a total of ninety-six (96) pages of responses to Norton's Interrogatories. (Motion To Vacate Court's Order

Plaintiff instituted this action against Defendants. 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 or about June 30, 2005, in a timely fashion, Pearson responded to all Requests For Admissions, under oath. (URBE ex. 2). At that time, Pearson:

- Denied that no physician or registered nurse had been critical of the care rendered to her;
- Denied that she did not suffer complications as a result of Norton employees' treatment of her;
- Denied (with objections) that she did not seek expert medical or nursing review of the case prior to filing suit;
- Denied Norton's nurses complied with appropriate standards of care.

8. Pearson Attempts, On Numerous Occasions, To Have The Court Clarify Its Intentions Concerning Norton Hospital'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. 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)

9. 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) Norton claims, throughout its Brief, that the trial court was very accommodating to Pearson and took extraordinary measures to accommodate Pearson's situation. This assertion is inaccurate as Pearson was held to expert disclosure deadlines that were unreasonable and unattainable.

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.[5] The Court took this action at

[5] Jefferson Rule of Practice 707, in effect at the time this litigation was prosecuted, provided that

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 (was entered prior to Appellant Solinger filing an Answer to Pearson's Complaint) and 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.

10. 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

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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 Norton's rush to have

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) Norton Hospital 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 <u>should have been cut in half</u> 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.) Norton's contention that Pearson never disclosed any expert

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Pearson's case dismissed, it is obvious the trial court was in a rush to judgment as well.

witnesses to support her claims is in contradiction of the above facts. More significantly, Norton has never disputed one word or claim made in Pearson's under oath Interrogatory Responses.

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

Pearson's Motion for Extension of Time to Disclose her hired expert witnesses was based upon the fact that her income was a mere $762.00 per month (all of which was Social Security disability benefits). (R. 679-683) 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 obtain 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.[6] (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

[6] All Pearson's difficulties with regard to hired expert witnesses in this case resulted from the unusual manner and rocket 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 thousands of dollars barely more than six months after the Complaint had been filed.

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...

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. The record clearly and convincingly establishes Norton's Summary Judgment Motion was solely about judicial admissions. The Motion's text states JUDICIAL ADMISSIONS is the only basis for the Motion.

The above cited statement by the Court demonstrates the Court's confusion on this <u>seminal</u> 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 <u>were not</u> due until October 1, 2005, but that she <u>could rule</u> on the Motions in a month or so. 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. Suddenly, 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).

13. Norton Hospital Files A Motion On Ruling For Motion For Summary Judgment Which Was A New Motion And No Response Is Permitted By The Trial Court

On December 7, 2005, Norton filed a separate "Motion For Ruling On Defendant's Motion For Summary Judgment" rather than file an AOC 280 form. (R. 695-698) This Motion was a new motion raising a new issue. The new 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**. At the time of Norton's filing, the deadline had only passed (6) six days previous. The Motion was not filed until **two days prior** to the scheduled December 9, 2005 Status Conference. As set forth in detail below, the Trial Court Granted Norton's new Motion for Summary Judgment on December 12, 2005, just five (5) days after it was filed. (R. 704-705) This was a patent violation of JRP 401(a) which permits a twenty (20) day response period before the motion stands submitted. Likewise, CR 56.03 requires at least ten (10) 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)

14. 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, 2005. 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.

Pearson has maintained all along that she also requested a continuance of the Status Conference at this time and **this has never been disputed**. (URBE ex. 10, February 20, 2005 Affidavit of Melanie Pearson, pg. 1-3) At the beginning of the hearing, the Court acknowledges that "the Court has been informed Ms. Pearson is in the hospital this morning, obviously won't be with us ... (Transcript December 9, 2005 Status Conference pg. 1)

Norton Hospital's new Motion had been filed only two days before the Status Conference. (R. 695-698) 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 (the cardiology Defendants' counsel 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. Appellants clearly took advantage of Pearson's illness to gain a tactical advantage with the Trial Court.

The Court appeared confused at the Status Conference concerning the time frame of Pearson's failure to disclose her hired expert witnesses, stating that "the Motion was filed back in the spring or summer". (In reality, the failure to disclose a hired expert witness dated back until only December 1, 2005.) Predictably, counsel for Norton Hospital did nothing to dispel this confusion. (Transcript of December 9, 2005 Status Conference, pg. 1)

Because Plaintiff had not heard from the Court concerning said continuance, Plaintiff corresponded with the Court on December 14, 2005 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 also advised the Court that she did have 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 Monday, December 12, 2005. (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)

15. The Trial Court Grants Norton's New Motion For Summary Judgment

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 "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 Norton as the party moving for Summary Judgment. This is especially true in this case, as Norton never filed any proof or evidence in support of a new Motion for Summary Judgment and Norton's 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 <u>not</u> the alleged admissions but the claim that the Plaintiff did not disclose her experts in a timely fashion.

16. 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)

17. 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 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; URBE 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).

18. 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). 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)

19. Norton Hospital Filed 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 12, 2007, Norton filed a timely 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 Norton'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-000134) By Order dated April 16, 2008, this Court granted Pearson's Cross Motion for Discretionary Review in Case No. 2008-SC-000134 and combined the case with case No. 2007-SC-000414.

IV. 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, 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

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 Defendants**. 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

physicians names and addresses. She disclosed both the basis for the opinions and the substance of these opinions. (MVCO, Ex. 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 currently possess. 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 concomitantly. 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

In the case at bar, the record could not be clearer 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 pg. 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, as will be shown infra, 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 factors** the Ward Court indicated **must be considered** before a case is given the "death penalty". 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 <u>subarachnoid hemorrhage</u>. (Affvidavit of JJ Patel at 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 SW 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. 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)

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, bears 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, Appellant 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, a staff physician employed by Norton Hospital, admitted prescribing Coumadin at a dosage that was 2-3 times greater 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

On December 7, 2005, Norton filed a "Motion For Ruling On Defendant's Motion For Summary Judgment" rather than file a new AOC 280 form. (R. 695-698) This Motion was a new motion raising a new issue. The new 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**. At the time of Norton's filing, the deadline had only passed (6) six days previous. The Motion was not filed until **two days prior** to the scheduled December 9, 2005 Status Conference. As set forth in detail below, the Trial Court Granted Norton's new Motion for Summary Judgment on December 12, 2005, just five (5) days after it was filed. (R. 704-705) This was a patent violation of JRP 401(a) which permits a twenty (20) day response period before the motion stands submitted. Likewise, CR 56.03 requires at least ten (10) 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)

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 Norton's new December 5, 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 Norton's Motion (which was granted only (5) five days after 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.[7] 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

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[7] 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).

> **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 dose was the cause of the Coumadin toxicity and resulting cerebral bleed. When a patient's INR[8] exceeds 4.0, a patient's risk of cerebral bleed rises dramatically.[9] 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.

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

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

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 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. Norton Hospital Had A Duty Under Both State And Federal Law To Prevent Well Known Coumadin/Amiodarone Interaction

The *Accreditation Manual for Hospitals, Joint Commission on Accreditation of Hospitals, 1981 Edition: Pharmaceutical Services, Standards I II, pp 137-139* requires a hospital to keep up to

date information for pharmaceutical, medical and nursing personnel. See, ***American Law of Medical Malpractice First Edition***, pg. 220-221 (citing *Accreditation Manual for Hospitals, Joint Commission on Accreditation of Hospitals, 1981 Edition: Pharmaceutical Services, Standards III*, pp 137-139 and pp 140-142); See also, KRS 315.010(10)(a), and 201 KAR 2:074 Section 3(2) (pertaining to Hospitals and pharmacies); and KRS 314.011(6)(c) and Subdivision (4) of KRS 314.011(6)(c) (pertaining to nurses) The manual requires hospital pharmacists to be aware of and take action to prevent all known interactions. The mandatory elements are the name, weight and age of each patient; the current diagnosis; the current drug therapy; any drug allergies or sensitivities, and any other pertinent information relating to the patient's drug regimen [a review of the patient's regimen for any potential interactions, interferences, or incompatibilities], **prior to dispensing the drugs to the patient**. *Id.* at *Standards III*, pp 140-142. Likewise, Kentucky law requires a hospital pharmacist to take steps to prevent all well known interactions. See, KRS 315.010(10)(a) and 201 KAR 2:074 Section 3(2). Nurses have the same duty under Kentucky law. KRS 314.011(6)(c) and Subdivision (4) of KRS 314.011(6)(c).

From evidence produced by Pearson in this case, we know Norton knew or should have known about the interaction between Coumadin and Amiodarone. This has been conclusively established by the Coumadin Pharmacy Monograph given to Pearson and by Norton Hospital's website Drug Checker/Drug Interaction Tool. The problem lies in the human element, i.e. the pharmacist, the nursing staff and the prescribing staff physician.

The Coumadin Pharmacy Monograph given to Pearson upon her discharge from Norton Hospital on February 19, 2004, presumes the patient is taking Amiodarone and is starting Coumadin anticoagulation therapy. The Coumadin Monograph 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**." Norton was aware Pearson was taking Amiodarone since July 2002, as Pearson initiated her chronic Amiodarone therapy during a July 2002 hospitalization at Norton Hospital. 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**. Norton's website rates this interaction as a "severe drug interaction"

The 2004 Physicians Desk Reference contained a **Black Letter Warning** concerning the concomitant use of Amiodarone and Coumadin:

> "**Anticoagulants**: Potentiation of warfarin-type (CYP2C9 and CYPA4 substrate) anticoagulation response is almost always seen in patients receiving amiodarone and can result in serious or fatal bleeding. Since the concommitant administration of warfarin [Coumadin] with amiodarone increases the prothrombin time by 100% after 3-4 days, **the dose of anticoagulant should be reduced by one-third to one-half, and prothrombin times should be monitored closely**. "

Norton admitted that Pearson's INR was measured at 8.6 on February 22, 2004 and 7.5 again on February 24, 2004, both levels were **critically high** and Norton's own Emergency room physician diagnosed Pearson as having a "Coumadin toxicity" on February 24, 2004, just as the PDR warning indicated would happen (when Amiodarone/Coumadin are taken concomitantly), Pearson's INR was critically high at 8.6 on February 22, 2004, just (4) four days after Pearson's anticoagulation therapy was begun.

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.

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

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, 276* A. 2d 36 (Md. App. 1971)

In the case at bar, Norton claimed it did not deviate from the applicable standards of care concerning Coumadin anticoagulation therapy, yet they offered no alternative standard of care for prescribing, administering or monitoring Coumadin anticoagulation therapy. Given the deviation from the written standards, when coupled with Pearson's Coumadin toxicity, Norton was not entitled

to Summary Judgment.

During discovery in the trial court, Pearson propounded the following CR 36 Request for Admission to Norton Hospital, Request No. 21:

> Admit that the 10 milligram initiation/loading dose of Warfarin/Coumadin given to Plaintiff on February 18, 2004 was twice the maximum dose recommended by Coumadin's manufacturer, Brystol-Myers Squibb, in the June 2002 Package Insert distributed for Coumadin by Bristol-Myers Squibb.

Defendant Norton Hospital's Response to Request for Admission No. 21 was as follows:

> RESPONSE: Objection, this request seeks an expert medical opinion. This Defendant is not a medical doctor and is not an expert in these matters.

(R. 349-350, Norton Responses to Pearson's request for Admissions)

If Norton Hospital can not admit or deny that Pearson was given twice the recommended maximum dose of Coumadin (because the Hospital is not an expert in these matters, then certainly, Norton never met its burden of proof on Summary Judgment. Pearson alleged the Package Insert and the PDR provided the standard of care for prescribing Coumadin, and Norton did not even attempt to dispute this allegation with medical evidence or otherwise. Perhaps Norton should have consulted with its own physician, Dr. Steven Richards who, on February 24, 2004, diagnosed Pearson as suffering from Coumadin toxicity.

Pearson propounded the following Request for Admission to Norton Hospital:

> Admit that on February 18, and 19, 2004, Norton Hospital was aware of the fact that a patient who had been taking Amiodarone 200 milligrams daily since July 2002, then started Coumadin/Warfarin anticoagulation therapy on February 18, 2004, required a reduction in Coumadin/Warfarin dosage by 30% to 50%
>
> RESPONSE: Objection, this call for expert opinion. This Defendant is not an expert medical doctor

(R. 346 Response 14)

Once again, Norton's Answer clearly creates a genuine issue of material fact, because

Pearson alleged that there was a interaction between Coumadin and Amiodarone which required a patient chronically taking Amiodarone and starting Coumadin to have their dose of Coumadin reduced by 30 to 50 %. Pearson cited Norton's own website as one of many sources of proof. Norton admitted, in Request for Admission No. 32 propounded by Pearson, that its Drug Interaction tool recommended an emperic 30 to 50 % reduction in the dosage of Coumadin when Amiodarone was used concomitantly with Coumadin. (R. 354, Norton Response No. 32) Pearson attached a copy of the Drug Checker/Drug Interaction Tool concerning Amiodarone 200 mg tablets and Warfarin/Coumadin 10mg tablets and Norton admitted this was a true copy of the printout. (R.342, Norton Response 1(h).

> Admit that the drug interaction between Warfarin/Coumadin and Amiodarone has been well known by licensed physicians and licensed medical care providers since at least the year 1982.
>
> RESPONSE: Objection, this request seeks an expert medical opinion. This Defendant is not a medical doctor and is not an expert in these matters.
>
> (R. 354, Norton Response No. 33)
>
> Admit that on February 18, 2004, it was a deviation of the accepted medical standard of care for Norton Hospital, or its agents, servants or employees, to direct Melanie Lynn Pearson to ingest a 10 milligram initiation/loading dose of Coumadin/Warfarin on February 18, 2004.
>
> RESPONSE: Denied. This Defendant through its employees complied with the standard of care in all respects.
>
> (R. 350, Response 25)

Ostensibly, Norton claimed in Response to all Requests except No. 25, (which concerned the proper standard of care) that it was not a medical expert in these matters. Suddenly, Norton has the medical expertise in Response to No. 25 to know, as a matter of law, that Norton through its employees complied with the standard of care in all respects.

Certainly, based upon Norton's incredible Responses to Pearson's Request for Admissions, there were numerous material issues of fact and, since Norton could not admit or deny any of these requests, (except No. 25) how can Norton claim, in good faith, that its employees nor it deviated from the accepted standard of care when prescribing Amiodarone and Coumadin to Pearson?

Pearson disclosed 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%, because she had been chronically taking Amiodarone. 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%. Norton's violation of its own internal policies as published on its website is the equivalent of violation of a hospital rule and 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.

3. Norton Hospital 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.

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.[10]

It remains undisputed that prior to, during and after her anticoagulation, neither Norton Hospital nor any of its employees or agents informed Pearson of the risk of cerebral bleed while taking Coumadin. The paperwork given to Pearson, upon her **discharge** from Norton Hospital on February 19, 2004, said nothing specifically about cerebral bleed being a complication or side effect of Coumadin. (See, URBE Ex. 3, Pearson's Request for Admissions, No. 1(e) **Coumadin Pharmacy Monograph**) During discovery in the trial court, Pearson propounded the following CR

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

36 Request for Admission to Norton:

Hospital, Request No. 22:

> Admit that Melanie Lynn Pearson was not advised by Norton Hospital, any agent, servant or employee of Norton Hospital, or any other person or physician working for or affiliated with Norton Hospital on, before or after February 18th or 19th, 2004, that one of the known side affects of Coumadin/Warfarin can cause headache and/or cerebral bleeding.

Norton Responded as follows:

> RESPONSE: Denied. Please see attachment to this request for admission set 1E that advises specifically that bleeding is a potential complication of Coumadin therapy.

(R. 341, Response No. 22)

Norton's response was misleading because the Pharmacy Monograph given to Pearson upon discharge on February 19, 2004 does not list headache or **cerebral** bleed as a side effect or as a sign or symptom of overdose. Norton's **Drug Checker Drug Interaction Tool** lists headache as a sign of excessive anticoagulation, but does not list **cerebral** bleed as a complication of Coumadin anticoagulation therapy. (R. URBE Ex. 3, Request No. 1, attached document 1 (e) Norton Pharmacy Monograph for Coumadin)

> Admit that Melanie Lynn Pearson was not advised by Norton Hospital, any agent, servant or employee of Norton Hospital, or any other person or physician working for or affiliated with Norton Hospital on, before or after February 18th or 19th, 2004, that one of the known side affects of Coumadin/Warfarin can cause headache and/or cerebral bleeding.

Norton Responded as follows:

> RESPONSE: Denied. Please see attachment to this request for admission set 1E that advises specifically that bleeding is a potential complication of Coumadin therapy.

> (R. 349, Response No. 22)

Norton's response was misleading because the Pharmacy Monograph given to Pearson upon discharge on February 19, 2004 does not list headache or **cerebral** bleed as a side effect or

as a sign or symptom of overdose. Norton's Drug Checker Drug Interaction tool lists headache as a sign of excessive anticoagulation, but does not list **cerebral** bleed as a complication of Coumadin anticoagulation therapy. However, 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, p. 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, Norton Hospital's decision to keep quiet about 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 as a matter of law that Norton Hospital 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, Norton kept quiet about this risk. Based upon these facts, an expert witnesses is not necessary in order for Pearson to defeat a Motion for Summary Judgment and the Trial Court abused its discretion in requiring an expert witness on this issue.

4. It Was An Abuse Of Discretion For The Trial Court To Permit Norton Hospital To Raise The Non Disclosure Of An Expert Witness For The First Time In A Reply Brief And This Error Improperly Shifted The Burden Of Proof On Summary Judgment From Norton Hospital To Appellee Pearson.

Norton Hospital 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 Reply Brief. (R. 285-86). This issue was not raised in Norton's original Motion for Summary Judgment. (R. 230-247). The sole issue originally raised by Norton was Pearson's alleged CR 36 admissions. Pearson filed an objection to Norton's Motion to file a Reply Brief which pointed out that (1) Pearson did have expert witnesses to support her claim, (2) Norton had lost the issue of Pearson's alleged judicial admissions when the Court granted Pearson an Extension of Time to respond to the CR 36 Requests to Admit, and (3) Norton was

attempting to force Pearson to try a complex medical negligence case in four months (R.295-299).

Under prior precedent from the Court of Appeals, it was clearly improper for the trial court to allow Norton Hospital to raise the issue of an expert witness in a Reply Brief. 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. Norton Hospital submitted no evidence in support of its Motion for Summary Judgment and it is clear that the trial court improperly shifted the burden of proof from Norton Hospital to Pearson. However, the June 2002 Package Insert for Coumadin, as well as the 2004 PDR, list cerebral hemorrhage as a complication of Coumadin anticoagulation therapy. (R. MVOC Ex. 3, 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, Norton Hospital's conscious decision to keep quiet about 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, as a matter of law, that Norton Hospital 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, Norton kept quiet about this risk. Based upon these facts, an expert witnesses is not necessary in order for Pearson to defeat a Motion for Summary Judgment and the Trial Court abused its discretion in requiring an expert witness on this issue.

5. Norton Hospital's New Motion For Summary Judgment Raised As A New Ground That Pearson Was Not In Compliance With The Court's Trial Order

(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 Norton's Motion.

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.

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

Pearson advised the 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 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) 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

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.

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 5 days before the trial court granted Summary Judgment** 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 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.

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

As set forth in detail above, the Trial Court heard Norton Hospital's new Motion for Summary Judgment on December 9, 2005; the Motion was filed only two days before the hearing. (R. 695-698) 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) Norton's Original AOC 280 was overruled by the Court. (R. 227)

V. 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, was 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, why would a (6) six factor Ward hearing be 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, at least another year of fact 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 Appellants have shown no prejudice from Pearson's late disclosure of her hired expert witnesses.

Respectfully submitted,

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