COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2007-SC-000414-DG
CASE NO. 2008-SC-0134-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

REPLY BRIEF ON BEHALF OF APPELLEE/ CROSS APPELLANT MELANIE LYNN PEARSON

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing Reply Brief was mailed this, the 16th day of December, 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 It is further certified that Appellee/Cross Appellant has not withdrawn the record on appeal.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

Norton's Brief misses the mark on all issues raised by Pearson in her Appellee/Cross Appellant Brief. For instance, Norton argues that Pearson's case should not have been designated as a "Complex Track" medical malpractice case pursuant to Jefferson Rule of Practice 707(b) (Norton Brief, pg. 13), yet contrarily argues that Pearson's case *was too complex to be considered under a res ipsa loquitur theory*. (Norton Brief, pg. 1) According to Norton's logic, Pearson's case was so complex that it could not be litigated under a res ipsa loquitur theory, yet it was not complex enough to be covered by the clear language of JRP 707(b). While it is true that the allegations that Pearson was overdosed on Coumadin when she was prescribed a dose well in excess of the manufacturer's own recommendations and the Physician's Desk Reference (PDR), it is respectfully submitted that the balance of this medical negligence case involving a critically ill pro-se Plaintiff, five (5) Defendants, 4100 pages of medical records, and thirty (30) years of medical treatment was sufficiently complex to require if be prosecuted under the guidelines set forth in JRP 707(b). This Court should not forget that Norton's orchestrated game of judicial beat the clock benefited Norton, not Pearson.

This medical negligence case was set for trial only four months and seventeen days after it was filed. Counsel has been practicing in the Jefferson Circuit Court for more than twenty years and cannot recall even so much as a minor automobile accident case prosecuted so rapidly, much less a medical negligence case. Norton Hospital is asking this Court to, *sub silento,* **(1)** overturn at least forty (40) years of summary judgment case law, and **(2)** that the seminal case of Ward v. Housman, 809 S.W. 2d 717 (Ky. App. 1991) be overruled. This Court should decline Norton's invitation on both counts.

While Pearson strongly agrees that Court Orders and Discovery Deadlines serve legitimate purposes, and a trial court's goal to move it's docket along expeditiously is a laudable goal, trial courts must not be permitted to use the CR 56 "Summary Judgment" standard interchangeably and in place of the sanctions standard as set forth in CR 37.01-3702. The "death penalty" should be used only in rare cases and then only as a last resort.

As both this Court and the Court of Appeals have noted, the need for an expert, the opinions of the expert and the identity of an expert is a procedural matter and Summary Judgment standards should not be used to decide such issues **except in rare cases**. Baptist Healthcare Systems Inc. v. Miller, 177 S.W. 3d 676 (Ky. 2005); Poe v. Rice, 706 S.W. 2d 5 (Ky. App. 1986); Ward v. Housman, 809 S.W. 2d 717 (Ky. App. 1991). Curiously, Norton's Reply Brief contained no discussion of Baptist, Poe, or Ward even though Pearson cited these cases at length in her Brief and relied upon the holdings in these cases to support her contention that the trial court's Summary Judgment was used as an improper sanction. The Court of Appeals also relied heavily on these cases. (Court of Appeals Opinion, pgs.6-9)

In the case at bar, the trial court used its Summary Judgment as a draconian sanction in a case, which was a mere nine months old. Pearson, through affidavits and Interrogatory Responses, had set forth both the basis for and the substance of the opinions of her treating physicians and hired expert witness. This is a clear case of the trial court deciding that form was more important than substance, and the Court of Appeals had no problem in recognizing the trial court's improper rush to judgment.

II. STATEMENT OF POINTS AND AUTHORITIES

REPLY TO NORTON HOSPITAL'S COUNTERSTATEMENT OF THE CASE

Norton, at pg. 2 of its Brief, states that it does not accept the Statement of Facts tendered by Pearson in her Brief to the Court. Norton claims this submission contains lengthy recitations of medical authorities and excerpts from various medical literature, as well as Pearson's interpretation of her own medical records, which Norton claims is not part of the evidence of record. This is inaccurate as Pearson's medical records are part of the record. Norton subpoenaed Pearson's medical records pursuant to CR 45 and, under Kentucky law, these records are official "Court records". While KRS 422.305(2) allows delivery to the party subpoenaing medical records, the party subpoenaing medical records must deliver the records to the clerk of the court after the records are no longer needed for a pretrial proceeding or deposition. (See, KRS 422.320 and KBA Ethic's Opinion, KBA E-423, January 2004, pg. 4)

Significantly, Norton **did not ever file** Pearson's subpoenaed medical records with the clerk of the Jefferson Circuit Court, even though the law required Norton to do so. Pearson filed a Motion requesting that these records be placed in the trial court's record and is available for the Appellate Court. (See, R. 838- 841, Motion to Compel Filing of Medical Records, Appendix 1 hereto). However, the trial court Overruled Pearson's Motion without any authority to do so and in apparent violation of KRS 422.320.

Norton, while criticizing Pearson for commenting on her medical records, chose not to depose Pearson's treating physicians nor do they point to any errors in her interpretation of the records. It is disingenuous for Norton to imply Pearson did not accurately relate the substance of her medical records, while at the same time refusing to place the certified medical records in the trial court's record and even opposing Pearson's efforts to have the records placed in the Court's file. Pearson's Affidavits, Interrogatory Responses and medical records are plainly part of the record and Norton's claim to the contrary is frivolous. Pearson cited the specific pages of the record in her opening Brief where her

Interrogatory Responses can be found. (For the Court's convenience, selected portions of Pearson's Interrogatory Responses are submitted as Appendix 2-3 herewith.) By failing to specify any alleged inconsistencies between Pearson's synopsis of her records and the actual records Norton should be construed as having waived any objection they may have thereto.

III. ARGUMENT

A. Pearson's Treating Physician Expert Witness Disclosures Complied With Paragraph 16 Of The Trial Court's Pretrial Order Which Required Disclosure Of Pearson's Treating Physician Expert Opinions Sixty Days Prior To Trial.

Norton argues, at pg.11 of its Brief, that Pearson's disclosure of her treating physician medical experts was not sufficient compliance with paragraph 16 of the trial court's Pretrial Order. The Pretrial Order required disclosure of Pearson's treating physicians' opinions sixty (60) days prior to trial (the trial date was April 25, 2006). (R. 331-334, Trial Order) This means that Pearson's treating physician expert disclosures were not due to be made by Pearson until late January 2006. It is undisputed that Pearson disclosed the opinions of these treating physicians in April 2005 via affidavit and, again, in July 2005 via Interrogatory Responses and, again, in August 2005 via Interrogatory Responses. (See, Appendix 2, 3, and 4 hereto)

Norton interprets the trial court's Pretrial Order as requiring the Pearson to differentiate between treating physician experts who would testify concerning diagnosis, causation, treatment and permanency of Pearson's injuries, and medical experts who would testify concerning deviation in the applicable standard of care. However, the trial court's Order is certainly not as clear as Norton claims.

A treating physician is certainly competent to testify as to the breach of the applicable standard of care in a medical malpractice case. Under the Court's pretrial order disclosure of such treating/testifying physician is not due until 60 days before trial..

B. Under CR 26.02, Kentucky Case Law Does Not Require Extensive Disclosure Of Non- Retained Treating Physician Expert Witnesses.

CR 26.02(4), pertaining to **trial preparation experts**, provides as follows:

> Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (a) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) After a party has identified an expert witness in accordance with paragraph (4)(a)(i) of this rule or otherwise, any other party may obtain further discovery of the expert witness by deposition upon oral examination or written questions pursuant to Rules 30 and 31. The court may order that the deposition be taken, subject to such restrictions as to scope and such provisions, pursuant to paragraph (4)(c) of this rule, concerning fees and expenses as the court may deem appropriate.

As the Court can plainly see, the clear language of Rule 26.02(4) applies only to expert opinions which were **acquired or developed** in anticipation of litigation or for trial. Pearson's treating physician expert witnesses and their opinions were not acquired or developed in anticipation of litigation or for trial. Rather, Pearson's treating physicians' opinions were based solely upon the physician's treatment of Pearson's injuries/illness. The opinions expressed by Pearson's treating physicians were based upon her physicians' knowledge, experience and training as physicians. This being the case, there is no Kentucky Civil Rule or case law which required Pearson to disclose the opinions of her treating physician expert witnesses. See, Rippetoe v. Feese, 217 S.W. 3d 887 (Ky. App.2007).

In Rippetoe, the plaintiff was injured in an automobile collision in which an automobile driven by another individual rear-ended a vehicle being driven by Rippetoe. Rippetoe ultimately brought suit against the driver of the at fault vehicle. The at fault driver admitted that he had caused the accident but denied he had caused Rippetoe's injuries. The case went to trial on the issue of whether the defendant had caused the plaintiff's injuries. The jury, after hearing all the evidence, returned a zero damages verdict. Rippetoe appealed the jury's zero damages verdict to the Court of Appeals claiming, among other things, that she had been surprised by the fact that the defendant had called her treating

physician to testify as an expert witness via deposition. The defendant, in his pre-trial compliance, stated simply that "he did not anticipate calling any expert witnesses other than providers who may have treated the plaintiff in the past". Rippetoe, 217 S.W. 3d at 890-191 the plaintiff listed a treating physician as an expert witness and stated that "he (the treating physician) has not been retained for the purpose of evaluating the plaintiff or testifying in this case. Plaintiff expects that Dr. Jestus may testify at trial of this action regarding the care and treatment, including diagnosis and prognosis, given the plaintiff as a result of the injuries from the automobile accident". Id. at 891. The Court of Appeals, in affirming the trial court, held that the plaintiff's disclosure of her treating physician (as an expert witness) was sufficiently broad to encompass the physician's testimony concerning diagnosis and prognosis of Rippetoe's injuries. The Court noted that Rippetoe could not claim unfair surprise even though the defendant's expert disclosure was very minimal. The Court noted that:

> The parties have not cited us to, and we have not found, any Kentucky authority as to whether treating physicians and their opinions are required to be disclosed under CR 26.02(4). . .

Id. 217 S.W. 3d at 891, note 3.

It is undisputed that in April 2005, via Affidavits, and again in July and August 2005 via Interrogatory Responses, Pearson disclosed that her treating physicians had advised her that her Coumadin toxicity and resulting cerebral bleed were caused by an inappropriate initiation/loading dose of Coumadin.[1] In response to Interrogatories propounded to Pearson by Norton Hospital, specifically

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[1] Paragraph (38) of Pearson's April 18, 2005 Affidavit stated: "That since Affiant was first diagnosed with cerebral aneurysms and or brain bleeding on March 5, 2004, Affiant's treating physicians have indicated to Affiant that her cerebral bleeding and/or rupture were caused by Coumadin toxicity and that an inappropriate loading dose of 10 milligrams of Coumadin, which was administered by Defendant Norton Hospital and their servants/employees/agents, was excessive and was twice the recommended initiation/loading dose. Affiant states, further, that the manufacturer of Coumadin, at the time Affiant was started on Coumadin, recommended that patients be started on between 2 and 5 milligrams of Coumadin and warned physicians about starting patients on large loading doses of Coumadin (such as a 10 milligram dose) because of an increased risk of bleeding." Paragraph (39) of Pearson's April 18, 2005 Affidavit stated: "That since Affiant was first diagnosed with cerebral aneurysms and or brain bleeding on March 5, 2004, Affiant's

asking Pearson what physicians had advised Pearson that Norton had provided inappropriate care to Pearson, Pearson disclosed that her treating physician, Dr. Brendan O'Cochlain, had advised her that her 10 mg. dosage of Coumadin should have been, but was not, reduced by 50%.[2]

While Norton criticizes Pearson's disclosure as inadequate, it is clear that Pearson's disclosures of her treating/testifying physician's opinions were substantially in compliance with a typical CR 26.02 expert witness disclosure. Pearson's disclosure regarding her being overdosed on Coumadin, when viewed in the light most favorable to the Pearson clearly support a breach of the applicable standard of care which therefore precluded summary judgment.

Since no Kentucky Appellate decision has directly addressed the issue of whether a treating physician expert disclosure is required by CR 26.02(4), it is appropriate for this Court to examine decisions from Federal Courts interpreting analogous Federal Rules. See, Taylor v. Morris, 62 S.W. 3d 377, 379 (Ky.2001) Numerous Federal Courts have decided this issue and the majority rule is that treating physicians are not retained in anticipation of litigation and for purposes of trial testimony, therefore, the plain meaning of the comparable Federal Rule, Fed.R.Civ.Proc. 26(a)(2)(b), does not require the party to submit an expert report of a treating physician (outlining the treating physicians'

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treating physicians have indicated to Affiant that Affiant's 10 milligram initiation/loading dose of Coumadin given by Defendant Christopher Johnsrude should have been halved/reduced by half because Affiant was also taking the antiarrhythmic drug Amiodarone at the time Affiant was started on Coumadin on February 18, 2004, and that Amiodarone strongly enhances the anticoagulation effects of Coumadin. Defendants Norton Hospital, Christopher Johnsrude, Michael Recto, and Pediatric Cardiology Associates were all aware of the fact that Affiant was taking Amiodarone at the time Affiant was first started on Coumadin, despite these facts Affiant was started on twice the recommended initiation/loading dose of Coumadin." (R. 112-113, Affidavit of Melanie L. Pearson)

[2] In response to Interrogatory 11(g) Pearson stated: "Brendan O'Cochlain, MD, 250 E. Liberty Street, Louisville, KY 40202, Coumadin dose of 10 milligrams should have been halved because Plaintiff was also concomitantly taking Amiodarone 200 milligrams per day. Statement made to Plaintiff 1/25/05." (See, Memorandum in Support of Motion to Vacate Order Granting Summary Judgment, Ex. 2, Interrogatory Response No. 11g, pg. 5-6) (Certified as separate exhibit by the Clerk, Appendix 3 hereto)

opinions and anticipated testimony).[3] In addition to the well reasoned opinions espoused in the above cases, there are decisions from both State and Federal Courts which recognize it is an error to dismiss a plaintiff's case for lack of an expert witness where the plaintiff has reserved the right to call his treating physicians as expert witnesses (or if the defendants are in possession of the treating physician's medical records and are aware or should be aware of the physician's opinions. See, Boice v. Marble, 982 P.2d 565 (Utah 1999); McCloughan v. City of Springfield, 208 F.R.D. 236, 232 (D.C.Ill. 2002). Both of these scenarios are true in the case at bar. Even so Pearson disclosed the substance of her treating physician's opinions which indicated a breach in the applicable standard of care.

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

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

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[3] See, Fielden v. CSX Transportation Inc., 482, F.3d 866 (6th Cir. 2007); Gomez v. Rivera, Rodriguez, 344 F. 3d 103, 113 (1st Cir. 2003); Hawkins v. Gauland, 210 F.R.D. 210 (W.D. Tenn 2002); Martin v. CSX 215 F.R.D. 554, 557 (S.D. Ind. 2003); McCloughan v. City of Springfield, 208 208 F.R.D. 236, 232 (C.D.Ill. 2002); Starling v. Union Pacific, 203 F.R.D. 468, 479 (D. Kan2001); Prater v. Consolidated Rail Corp., 272 F.Supp2d 712 (N.D.Ohio 2003); Garcia v. City of Springfield Police Department, 230 F.R.D. 247, 249 (D Mass. 2005); Wreath v. United States, 161 F.R.D. 448,450 (D. Kan 1995); Sullivan v. Glock, Inc., 175 F.R.D. 497, 500-501 (D.Md.1997); Riddick v.Washington Hosp Ctr., 183 F.R.D. 327, 330 (D.D.C. 1998); Sharpton v. West Beach Estates, 172 F.R.D. 415, 416-417 (D.Haw.1997).

The most significant difference between Green and the facts in Pearson's case is that Green had from October 14, 2003 (the date the Complaint was filed) until June 16, 2005 (the date Summary Judgment was entered) to support her claims with medical experts. See, Green, 231 S.W. 3d at 783. Thus, the plaintiff in Green had (20) twenty months to support her claims with medical experts prior to summary judgment being rendered against her. Unlike Green, Pearson was given a mere nine (9) months from the date the Complaint was filed to make her hired expert witness disclosures. For the first four months of Pearson's case, she was critically ill with injuries allegedly caused by Norton. The trial court in Pearson's case ignored the Local Rule JRP 707(b) which provided for up to 545 days of discovery in a medical negligence case. The trial court demanded that Pearson try this rather complex case only (13) months after the case were filed (a case involving a critically ill pro-se Plaintiff, which involved 30 years of medical treatment, five (5) Defendants and 4100 pages of medical records). Unlike the plaintiff in Green, Pearson disclosed treating physician experts who **supported both** legal causation and deviation in the applicable standard of care, and these disclosed opinions were never contradicted by Norton. Unlike the defendants in Green, Norton never filed a Motion to Compel Pearson to disclose the identity of her hired expert witnesses. Moreover, the plaintiff in Green (unlike Pearson) had not disclosed treating physician experts which supported deviation/breach in the standard of care. The plaintiff in Green did not maintain, as Pearson did, that she had an expert witness to testify at trial concerning the standard of care. Pearson maintained all along that her treating physicians could, if necessary, testify at trial regarding the standard of care concerning her anticoagulation therapy. Pearson also maintained that she had hired expert witnesses who could testify at trial. There was certainly no rush to judgment by the trial court in Green as there was by the trial court in Pearson's case. The facts in Green are simply not analogous to the facts in the case at bar.

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

Significantly, there are several omissions in Norton's Brief. Norton does not respond to any of the arguments made by Pearson in the sections of her brief pertaining to her protective Cross Appeal. Specifically, Norton ignored the substantive arguments made at pgs. 45-65 of Pearson's Brief. The arguments ignored by Norton are: (**a**) Pearson alleged in her Brief that the Package Insert for Coumadin and the 2004 Physicians Desk Reference provided the applicable standard of care for prescribing, administering and monitoring Coumadin anticoagulation therapy; Norton did not address this argument in any substantive manner. (**b**) Norton's Brief ignored Pearson's informed consent argument. Norton did not dispute the fact that Pearson was not warned of the risk of cerebral bleeding prior to, during or after her Coumadin anticoagulation therapy. Norton did not dispute the fact that cerebral bleed is the most feared and dreaded complication of Coumadin anticoagulation therapy. Under these facts, Pearson has stated a prima facie case of lack of informed consent. (**c**) Norton did not explain how the new Motion for Summary Judgment, filed on December 7, 2005, was not a new Motion. Norton has previously admitted that the original Motion for Summary Judgment was based entirely upon alleged judicial admissions (June 6, 2005 Video 30-11-05, VCR-034 at 14:07:10-14:07:36) and that the second Summary Judgment Motion was based upon non-compliance with the trial court's Order. How is it that a new Motion raising non-compliance with a Court Order (an issue that did not exist at the time the first Motion was filed) cannot be considered a new Motion for purposes of CR 56.03? (**d**) Norton did not dispute the fact that prior to the time the trial court granted Summary Judgment, Pearson requested a continuance of the Summary Judgment proceedings because she was hospitalized. The trial court simply ignored this request even though the Court was aware that Pearson was in the hospital. (**e**) Norton's Reply Brief did not discuss or distinguish the case of Goff v. Justice, 120 S.W. 3d 716, 724 (Ky. App. 2002), even though this case is directly on point to the issues raised by Pearson in her Cross Appeal. Pearson cited Goff in both her Cross Motions for Discretionary Review (pg. 18-20) and in her

Appellee/ Cross Appellant Brief (pgs. 41-42, pgs. 57-59). Norton ignored Goff because Goff clearly demonstrates that the trial court cannot force a plaintiff in a legal or medical negligence case to prove their case on a Motion for Summary Judgment when the defendant has produced no expert evidence of his own which establishes the lack of a genuine issue of material fact.

IV. CONCLUSION

For all of the reasons set forth in detail above, as well as the reasons set forth in Pearson's Appellee/Cross Appellant Brief, this Court should affirm the Court of Appeals' Opinion which reversed the trial court's Summary Judgment. In Munday v. Mayfair Diagnostic Laboratory, 831 S.W. 2d 912 (Ky.1992), the late Justice Charles Leibson suggested in a concurring Opinion that, "**Summary Judgment should not be used by the trial court as a form of docket control.**" *Id* at 916. The facts in the case at bar are clear - the trial court improperly used Summary Judgment in this case as a form of "docket control" and this was improper.[4]

Respectfully submitted,

Alan S. Rubin

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