

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

MD ELTON R. KERR,

Plaintiff,

:

Case No. 3:07-cv-297

-vs-

:

Magistrate Judge Michael R. Merz

MD WILLIAM W. HURD, et al.,

Defendants.

DECISION AND ORDER

This case came on for hearing on April 22, 2009 on Plaintiff's Motion for Extension of Time for Plaintiff to submit to a psychological examination (Doc. No. 50) and Plaintiff's Motion for Reconsideration of the Court's denial of Plaintiff's Motion to file his lay witness list late (Doc. No. 51).

Plaintiff was represented at the hearing by attorneys John Folkerth, Jr., and Kenneth Heisele; Defendant Hurd was represented by attorney Timothy Lecklider; Defendant Wright State Physicians was represented by Attorney Jonathan Hollingsworth.

Procedural History

The Complaint was filed in this case on August 10, 2007 (Doc. No. 1). The initial scheduling order in the case had to be amended in light of the substitution of Dr. Kerr's Chapter 7 trustee as the real party in interest. Following that substitution, the Court entered an Amended Scheduling Order (Doc. No. 33), again adopting the dates requested by the parties in their revised

Rule 26(f) Report (Doc. No. 32). These included a lay witness identification date of September 30, 2008, and a discovery deadline of April 30, 2009. On March 13, 2009, Plaintiff filed a Motion for Leave to Identify Lay Witnesses and to Extend the Discovery Deadline (Doc. No. 42). On March 19, 2009, the Court denied that Motion (Doc. No. 47) and expressly provided that any motion seeking relief from that Order must be

accompanied by

1. A list identifying any witness Plaintiff desires to call at trial with an address and telephone number and an actual synopsis of the facts Plaintiff expects to elicit from that witness; and
2. A showing of cause as to why each of said witnesses was not timely identified.

Id. at 4. The instant Motions followed.

Plaintiff's Psychological Evaluation

Plaintiff has been dilatory in presenting himself for psychological evaluation although he admits his obligation to submit to the examination. Although the Court would be within its discretion to deny the extension and preclude any claim for emotional distress damages, the Court finds that it can accommodate Defendant's need for the examination with Plaintiff's schedule. Accordingly, the Motion to Reschedule is GRANTED insofar as Plaintiff is ordered to present himself for the evaluation in Dayton, Ohio, on May 26, June 2, or June 12, 2009. Dr. Kerr shall elect one of these three dates not later than the commencement of his deposition on April 24, 2009.

Plaintiff's Document Production

The Court finds that Plaintiff's production of documents to date in response to Defendant's First Request for Production of Documents does not comply with Fed. R. Civ. P. 34. It is

accordingly ordered that, prior to the commencement of his deposition on April 24, 2009, Plaintiff shall identify by Bates number which of the documents he has produced is responsive to which of the paragraphs of Defendant's document request.

Plaintiff's Motion for Relief from Order

On March 13, 2009, Plaintiff sought leave to file his list of lay witnesses almost six months later than the date on which they were due. In denying leave to file late, the Court noted that the "purported identification of witnesses is grossly deficient" in that it failed to identify witnesses as to location and only identified the subject matter of testimony for seventy-nine of the eighty-one proposed witnesses as "Facts within the personal knowledge of the witness establishing the liability of Defendants as alleged in the Amended Complaint." (Order, Doc. No. 47, at 3.) The Court also noted that no good cause for late filing had been shown. *Id.* The Order was filed March 19, 2009. The instant Motion was filed a month later, ten days before discovery cut-off.

The prejudice to Defendant from allowing witness identification at this late date is obvious. Plaintiff responds that he would not object to allowing Defendant to depose these witnesses after the discovery cut-off. As good cause for the delay, Plaintiff's counsel asserts he mistakenly believed that the witness list had been filed. Counsel does not say how he came to have this mistaken belief and why it continued for months. Because of the electronic docket in this Court, the actual state of the docket – what has been filed and what has not been filed – is available to counsel twenty-four hours a day. Anyone who looked at the docket any time between September 30, 2008, and March 13, 2009, could readily have determined that Plaintiff's witness list had not been filed. This was the period of time during which, according to their own Rule 26(f) Report and the Amended Scheduling Order, the parties should have been conducting discovery (See Doc. Nos. 32, 33). Failing to look

at the docket for six months is not good cause.

Of course, as the Court noted in its prior Order, the lay witness list actually tendered in March, 2009, did not comply with this Court's General Order No. 1 which requires a list of proposed trial witnesses and a summary of their proposed testimony. Instead, Plaintiff filed the extremely conclusory list of eight-one mentioned above. As explanation for this, Mr. Folkerth believed that when Mr. Heisele told him no witness list had been filed, he mistakenly believed that he had failed to make a Fed. R. Civ. P. 26(a)(1) disclosure and then provided that list to Mr. Heisele to file. Apparently Mr. Folkerth was unable to tell from his file that he had in fact disclosed the eighty-one possible witnesses in his 26(a)(1) disclosure, but why he would have thought that list would satisfy the trial lay witness list requirement he does not tell the Court.

The consequence of these cumulative mistaken beliefs and failure to monitor the docket as that Plaintiff has tendered a lay witness list of twenty witnesses ten days before the discovery cut-off. Ten of those witnesses are medical doctors; doctors' depositions are notoriously difficult to schedule. Four of those witnesses are beyond the subpoena range of the Court and Plaintiff could not commit to making them available for deposition in Dayton. In fact, Plaintiff has done nothing to make these witnesses available for deposition, apparently believing it is enough at this late date to identify them and not object to more time for discovery.

The Court concludes Plaintiff has not shown good cause for the delay in identifying witnesses. Plaintiff does not suggest that any of the names of witnesses now disclosed was unknown to Plaintiff at any time in the past; none of them are shown to be recently discovered. The only cause offered is counsel's neglect in managing this case and that neglect is not excusable, particularly when counsel waited a month after the prior striking of the lay witness list to tender a list which actually conforms to General Order No. 1. The Supreme Court held in *Pioneer Inv. Services v. Brunswick Associates*, 507 U.S. 380 (1993), that inadvertence, ignorance of the rules,

or mistakes construing the rules do not usually constitute 'excusable' neglect; failure to notice for almost six months that a witness list has not been filed, attempting to correct that with a list which does not comply, and then failure to correct that mistake for a month, in the face of explicit Court notice of what it would take to correct the mistake, is not excusable neglect.

It does not suffice for counsel to say that it is his fault and his client should not be penalized. Clients continue to be responsible for their attorneys' neglect: "... the proper focus is upon whether the neglect of [the parties] *and their counsel* was excusable." *Id.* (emphasis sic).

Nor is it a sufficient cure for prejudice to Defendant to allow more time for discovery. This controversy was initially filed in the Montgomery County Common Pleas Court in 2004 and litigated there extensively for more than two years before Plaintiff took advantage of Ohio Civ. P. 41(A) to dismiss without prejudice in October, 2006. This case was not filed until ten months later. By the time this case reaches trial on the present schedule, the controversy will have been pending between the parties for more than five years. Very little discovery has occurred since re-filing, although apparently some limited discovery occurred in the Common Pleas case¹.

Since Plaintiff has not shown good cause for his delay in identifying lay witnesses, his request for relief from the Court's Order of March 19, 2009, is DENIED except that he may present at trial the witnesses whose depositions have been set for the period between now and April 30, 2009, to wit, himself, Dr. Hurd, Dr. Gary Ventolini, Dr. Margaret Dunn, Dr. Lawrence Amesse, Jocelyn Piccone, and Gail Smith. He may also present his wife Marga Kerr provided she presents herself for deposition in Dayton, Ohio, not later than April 30, 2009.


















April 22, 2009.



















s/ **Michael R. Merz**
United States Magistrate Judge

¹The docket in the Common Pleas case is attached hereto as an exhibit.



















**Montgomery County Ohio
Clerk Of Courts
Gregory A. Brush
Public Records Online System Version II
2004 CV 04784- ELTON R KERR Vs WILLIAM W HURD**

IMAGE DATE ENTRY

	10/24/2006	THIRD AMENDED FINAL PRETRIAL ORDER: FINAL PRETRIAL CONFERENCE FOR 4/26/07 @ 9:00 AM & TRIAL DATE OF 5/7/07 @ 8:30 AM FILED SIGNED BY JUDGE SINGER
	10/06/2006	COST STATEMENT SENT: KERR, ELTON R was sent bill for \$8.00. Printed on 10/06/2006 14:36:45.
	10/05/2006	NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE FILED Attorney: FOLKERTH JR, JOHN R. (0016366) Receipt: 500680 Date: 10/06/2006
	10/05/2006	NOTICE OF FILING RETURN OF SERVICE Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	10/05/2006	NOTICE OF FILING RETURN OF SERVICE Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	09/19/2006	NOTICE OF VIDEO DEPOSITION OF DEFT, WILLIAM HURD MD FILED Attorney: FOLKERTH JR, JOHN R. (0016366)
	09/19/2006	NOTICE OF VIDEO DEPOSITION OF DEFT, UNIVERSITY MEDICAL SERVICES ASSOC FILED Attorney: FOLKERTH JR, JOHN R. (0016366)
	09/05/2006	ORDER & ENTRY GRANTING DEFTS' MOTION FOR LEAVE TO REPLACE PAGE 17 OF DEFTS' PRETRIAL STATEMENT NUNC PRO TUNC FILED SIGNED BY JUDGE SINGER Receipt: 500680 Date: 10/06/2006
	09/05/2006	MOTION OF DEFENDANT FOR LEAVE TO REPLACE PAGE 17 OF DEFTS' PRETRIAL STATEMENT NUNC PRO TUNC FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	08/30/2006	ENTRY SETTING TELEPHONE STATUS CONFERENCE ON 09.26.06 AT 930AM-SIGNED BY JUDGE SINGER Receipt: 500680 Date: 10/06/2006
	07/31/2006	ENTRY VACATING 08.07.06 TRIAL DATE AND SETTING IN-CHAMBERS SCHEDULING CONFERENCE -SIGNED BY JUDGE SINGER Receipt: 500680 Date: 10/06/2006
	07/26/2006	PLTFS' OBJECTIONS TO DEFTS' SUPPLEMENTAL LIST OF PROPOSED TRIAL EXHIBITS FILED Attorney: FOLKERTH JR, JOHN R. (0016366)
	07/26/2006	PLTF'S REPLY TO DEFTS' MEMORANDUM IN OPPOSITION PLTF'S MOTION FOR PROTECTIVE ORDER CONCERNING THE INDEPENDENT MEDICAL EXAMINATION SCHEDULED FOR 7/21/06 FILED Attorney: FOLKERTH JR, JOHN R. (0016366)
	07/25/2006	ORDER AND ENTRY GRANTING DEFTS' MOTION FOR APPOINTMENT OF SPECIAL PROCESS SERVER-SIGNED BY JUDGE LANGER Receipt: 500680 Date: 10/06/2006
	07/25/2006	DEFTS' MOTION FOR DESIGNATION OF SPECIAL PROCESS SERVER Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/24/2006	MEMORANDUM IN OPPOSITION TO PLTF'S MOTION FOR CONTINUANCE OF TIME TO FILE A JOINT PRETRIAL STATEMENT FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/24/2006	MEMORANDUM IN OPPOSITION TO PLTF'S MOTION TO COMPEL DISCLOSURE OF DOCUMENTS FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/21/2006	PLTF'S MOTION FOR CONTINUANCE OF TIME TO FILE A JOINT PRETRIAL STATEMENT Attorney: FOLKERTH JR, JOHN R. (0016366)

	07/21/2006	DEFTS' PRE-TRIAL STATEMENT FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/21/2006	DEFTS' OBJECTIONS TO PLTF'S TRIAL MATERIAL AND MOTION IN LIMINE TO BAR PLTF FROM INTRODUCING DOCUMENTARY EVIDENCE AND CALLING WITNESSES NOT TIMELY IDENTIFIED IN ACCORDANCE WITH THIS COURT'S SCHEDULING ORDER Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/21/2006	MEMORANDUM IN OPPOSITION TO PLTF'S MOTION FOR EXTENSION OF TIME TO EXCHANGE TRIAL MATERIALS FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/20/2006	PLTF'S OBJECTIONS TO DEFTS' LIST OF PROPOSED TRIAL EXHIBITS Attorney: FOLKERTH JR, JOHN R. (0016366)
	07/19/2006	DEFTS' FIRST SUPPLEMENTAL LIST OF PROPOSED TRIAL EXHIBITS & SECOND SUPPLEMENTAL LIST OF PROPOSED WITNESSES FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/19/2006	DEFTS' MEMORANDUM IN OPPOSITION TO PLTF'S MOTION FOR PROTECTIVE ORDER CONCERNING THE INDEPENDENT MEDICAL EXAMINATION SCHEDULED FOR 7/21/06 FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/17/2006	REPLY TO PLTF'S MEMORANDUM IN OPPOSITION TO DEFTS' MOTION FOR PROTECTIVE ORDER AND MOTION TO QUASH SUBPOENAS Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/17/2006	PLTF'S MOTION FOR EXTENSION OF TIME TO EXCHANGE TRIAL MATERIALS Attorney: FOLKERTH JR, JOHN R. (0016366)
	07/17/2006	MOTION OF DEFENDANT MOTION FOR LEAVE TO FILE AFFIDAVITS NUNC PRO TUNC IN SUPPORT OF MEMORANDUM IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/17/2006	PLTF'S REPLY TO DEFTS' MEMORANDUM IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT Attorney: FOLKERTH JR, JOHN R. (0016366)
	07/14/2006	DEFTS' SUPPLEMENTAL LIST OF PROPOSED WITNESSES FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/14/2006	REPLY TO PLTF'S MEMORANDUM IN OPPOSITION TO DEFTS' MOTION FOR ORDER DISMISSING PLTF'S CASE FOR FAILURE TO ALLOW DISCOVERY & FAILURE TO PROSECUTE CLAIMS FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/14/2006	REPLY TO PLTF'S MEMORANDUM IN OPPOSITION TO DEFTS' MOTION FOR CONTINUANCE OF TRIAL & REQUEST FOR EXPEDITED HEARING ON MOTION FOR CONTINUANCE FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/13/2006	DEFTS' LIST OF PROPOSED TRIAL EXHIBITS & PROPOSED WITNESSES FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/10/2006	PLTF'S MOTION FOR PROTECTIVE ORDER EXCUSING DR ELTON KERR FORM THE INDEPENDENT MEDICAL EXAMINATIONS SCHEDULED FOR 07.21.06 Attorney: FOLKERTH, JOHN R (0016366)
	07/10/2006	DEFTS' SETTLEMENT REPORT Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	07/10/2006	MOTION TO COMPEL DISCLOSURE OF DOCUMENTS Attorney: FOLKERTH, JOHN R (0016366)
	07/10/2006	PLTF'S MEMORANDUM IN OPPOSITION TO DEFTS MOTION FOR CONTINUANCE OF TRIAL AND REQUEST FOR EXPEDITED HEARING ON THE MOTION FOR CONTINUANCE Attorney: FOLKERTH, JOHN R (0016366)

ADOBE	07/10/2006	PLTF'S MEMORANDUM IN OPPOSITION TO DEFTS MOTION FOR PROTECTIVE ORDER AND MOTION TO QUASH SUBPOENAS Attorney: FOLKERTH, JOHN R (0016366)
ADOBE	07/07/2006	PLTF'S MEMORANDUM IN OPPOSITION TO DEFTS' MOTION FOR ORDER DISMISSING PLTF'S CASE FOR FAILURE TO ALLOW DISCOVERY PROCEDURES AND FAILURE TO PROSECUTE CLAIMS Attorney: FOLKERTH, JOHN R (0016366)
ADOBE	07/07/2006	MEMORANDUM IN OPPOSITION TO PLTF'S MOTION FOR PARTIAL SUMMARY JUDGMENT Attorney: HOLLINGSWORTH, JONATHAN (0022976)
ADOBE	06/30/2006	MOTION FOR PROTECTIVE ORDER AND MOTION TO QUASH SUBPOENAS Attorney: HOLLINGSWORTH, JONATHAN (0022976)
ADOBE	06/30/2006	AFFIDAVIT OF JONATHAN HOLLINGSWORTH IN SUPPORT OF DEFTS' MOTION FOR PROTECTIVE ORDER Receipt: 500680 Date: 10/06/2006
ADOBE	06/27/2006	NOTICE OF FILING CASE INADVERTENTLY OMITTED FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
ADOBE	06/26/2006	MOTION OF DEFENDANT FOR CONTINUANCE OF TRIAL & REQUEST FOR AN EXPEDITED HEARING ON THE MOTION FOR CONTINUANCE FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
ADOBE	06/26/2006	AFFIDAVIT OF JONATHAN HOLLINGSWORTH IN SUPPORT OF DEFTS' MOTION FOR CONTINUANCE OF TRIAL CURRENTLY SCHEDULED FOR HE WEEK OF 8/7/06 FILED Receipt: 500680 Date: 10/06/2006
ADOBE	06/23/2006	DEFTS' MOTION FOR ORDER DISMISSING PLTF'S CASE FOR FAILURE TO ALLOW DISCOVERY AND FAILURE TO PROSECUTE CLAIMS Attorney: HOLLINGSWORTH, JONATHAN (0022976)
ADOBE	06/23/2006	PLTF'S MEMORANDUM IN OPPOSITION TO DEFT'S MOTION FOR PROTECTIVE ORDER Attorney: FOLKERTH, JOHN R (0016366)
ADOBE	06/22/2006	DEFTS' MOTION FOR PROTECTIVE ORDER CONCERNING THE DEPOSITION OF DEFT HURD Attorney: HOLLINGSWORTH, JONATHAN (0022976)
ADOBE	06/20/2006	NOTICE OF INDEPENDENT MEDICAL EXAMINATION Attorney: HOLLINGSWORTH, JONATHAN (0022976)
ADOBE	06/19/2006	MOTION OF PLAINTIFF FOR PROTECTIVE ORDER DR ELTON KERR FORM THE DEPOSITION SCHEDULED FOR 6/20/06 FILED Attorney: FOLKERTH, JOHN R (0016366)
ADOBE	06/16/2006	ENTRY GRANTING MOTION FOR LEAVE TO WITHDRAW FILED SIGNED BY JUDGE SINGER Receipt: 500680 Date: 10/06/2006
ADOBE	06/15/2006	ENTRY OVERRULING DEFT'S MOTION FOR EXTENSION OF TIME FILED SIGNED BY JUDGE SINGER Receipt: 500680 Date: 10/06/2006
ADOBE	06/13/2006	ORDER & ENTRY GRANTING DEFTS' MOTION FOR PROTECTIVE ORDER FILED SIGNED BY JUDGE SINGER Receipt: 500680 Date: 10/06/2006
ADOBE	06/13/2006	PROTECTIVE ORDER GOVERNING THE CONFIDENTIALITY OF INFORMATION EXCHANGED IN DISCOVERY FILED SIGNED BY JUDGE SINGER Receipt: 500680 Date: 10/06/2006 Receipt: 502795 Date: 10/19/2006
ADOBE	06/12/2006	MOTION OF PLAINTIFF TO FILE MEMORANDUM IN OPPOSITION TO DEFT'S MOTION FOR PROTECTIVE ORDER OUT OF TIME FILED Attorney: FOLKERTH, JOHN R (0016366)
ADOBE	06/12/2006	MOTION OF PLAINTIFF FOR LEAVE TO WITHDRAW FILED Attorney: DANCING, TARA C (0077277)
ADOBE	06/12/2006	NOTICE OF SUBSTITUTION OF COUNSEL FILED Attorney: FOLKERTH, JOHN R (0016366)

	06/09/2006	MEMORANDUM IN OPPOSITION TO PLTF'S MOTION TO FILE OUT OF TIME HIS MEMORANDUM IN OPPOSITION TO DEFTS' MOTION FOR PROTECTIVE ORDER AND REPLY TO MEMORANDUM IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	05/23/2006	ORDER SETTING TELEPHONE STATUS CONFERENCE ON 06.13.06 AT 1115AM-SIGNED BY JUDGE SINGER Receipt: 500680 Date: 10/06/2006
	05/10/2006	DEFTS' MOTION FOR PROTECTIVE ORDER Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	05/09/2006	DEFTS' MOTION TO EXTEND SUMMARY JUDGMENT DEADLINE AND EXTEND DEADLINE IN WHICH TO RESPOND TO PLTF'S MOTION FOR PARTIAL SUMMARY JUDGMENT Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	03/20/2006	SECOND AMENDED FINAL PRETRIAL ORDER-FINAL PRETRIAL CONFERENCE ON 07.27.06 AT 1030AM-TRIAL DATE WEEK OF 08.07.06 AT 830AM-SIGNED BY JUDGE SINGER Receipt: 500680 Date: 10/06/2006
	03/03/2006	ENTRY & DECISION OVERRULING PLTF'S OBJECTIONS & OVERRULING DEFTS' OBJECTIONS & ADOPTING MAGISTRATE'S DECISION FILED SIGNED BY JUDGE SINGER Receipt: 500680 Date: 10/06/2006
	01/26/2006	DEFENDANTS' OBJECTIONS TO MAGISTRATE'S DECISION GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL DISCOVERY FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	01/25/2006	MAGISTRATE'S DECISION & ENTRY GRANTING, IN PART, & OVERRULING IN PART, DEFTS' MOTION TO COMPEL FILED SIGNED BY MAGISTRATE O'CONNELL Receipt: 500680 Date: 10/06/2006
	01/20/2006	ELTON R KERR'S OBJECTIONS TO THE MAGISTRATE'S PARTIAL OVERRULING OF PLTF'S MOTION TO COMPEL FILED Attorney: FOLKERTH, JOHN R (0016366)
	01/17/2006	DEFENDANTS' RULE 56(F) MOTION FOR EXTENSION OF TIME IN WHICH TO RESPOND TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND REQUEST FOR STATUS CONFERENCE FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	01/17/2006	AFFIDAVIT OF JONATHAN HOLLINGSWORTH IN SUPPORT OF DEFENDANTS' RULE 56(F) MOTION FILED Receipt: 500680 Date: 10/06/2006
	01/12/2006	MAGISTRATE'S DECISION & ENTRY GRANTING IN PART & OVERRULING IN PART PLTF'S MOTION TO COMPEL FILED SIGNED BY MAGISTRATE O'CONNELL Receipt: 500680 Date: 10/06/2006
	01/07/2006	(FAXED) NOTICE OF PRODUCTION OF DOCUMENTS FILED Attorney: FOLKERTH, JOHN R (0016366)
	01/03/2006	MOTION OF PLAINTIFF FOR PARTIAL SUMMARY JUDGMENT FILED Attorney: FOLKERTH, JOHN R (0016366)
	12/07/2005	DESIGNATION OF EXPERTS Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	09/28/2005	AMENDED FINAL PRETRIAL ORDER FILED: FINAL PRETRIAL CONFERENCE ON 3/23/06 @ 9:00 AM & TRIAL DATE ON 4/3/06 @ 8:30 AM FILED SIGNED BY JUDGE SINGER Receipt: 500680 Date: 10/06/2006
	08/16/2005	DEFENDANTS' MOTION TO EXTEND SUMMARY JUDGMENT DEADLINE FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
	08/16/2005	MOTION TO COMPEL Attorney: FOLKERTH, JOHN R (0016366)

ADOBE	08/11/2005	DEFENDANTS' MOTION TO COMPEL DISCOVERY Attorney: HOLLINGSWORTH, JONATHAN (0022976)
ADOBE	06/02/2005	ORDER AND ENTRY EXTENDING THE DEADLINE FOR FILING MOTION FOR SUMMARY JUDGMENT -SIGNED BY JUDGE SINGER Receipt: 500680 Date: 10/06/2006
ADOBE	05/31/2005	NOTICE OF ADDRESS CHANGE Attorney: FOLKERTH, JOHN R (0016366)
ADOBE	05/24/2005	FINAL PRETRIAL ORDER JURY TRIAL SET PRETRIAL CONFERENCE ON 11/02/05 AT 8:30 AM AND JURY TRIAL 11/14/05 AT 9:00 AM SIGNED BY JUDGE SINGER Receipt: 500680 Date: 10/06/2006
ADOBE	05/16/2005	MOTION OF DEFENDANT FOR EXTENSION OF THE SUMMARY JUDGMENT FILING DEADLINE Attorney: HOLLINGSWORTH, JONATHAN (0022976)
ADOBE	12/20/2004	DISCLOSURE OF EXPERT WITNESSES OF DEFENDANTS, UNIVERSITY MEDICAL SERVICES ASSOCIATIONS INCORPORATED AND WILLIAM W HURD MD Attorney: HOLLINGSWORTH, JONATHAN (0022976)
ADOBE	10/15/2004	FINAL PRETRIAL ORDER FILED FINAL PRETRIAL CONFERENCE ON 08-09-05 AT 8:45 AM; TRIAL DATE ON 08-15-05 AT 9 AM; SIGNED BY JUDGE DONOVAN Receipt: 500680 Date: 10/06/2006
ADOBE	09/20/2004	ORDER SETTING TELEPHONE PRETRIAL SCHEDULING CONFERENCE ON 10-05-04 AT 9:15 AM; SIGNED BY JUDGE DONOVAN Receipt: 500680 Date: 10/06/2006
ADOBE	08/31/2004	ANSWER OF WILLIAM W HURD FILED Attorney: PENNEY, TODD D (0059076)
ADOBE	08/31/2004	ANSWER OF UNIVERSITY MEDICAL SERVICES ASSOCIATION INC FILED Attorney: HOLLINGSWORTH, JONATHAN (0022976)
ADOBE	08/17/2004	AGREED ENTRY EXTENDING TIME TO 08-31-04 TO MOVE, PLEAD, OR OTHERWISE RESPOND; SIGNED BY JUDGE DONOVAN Receipt: 500680 Date: 10/06/2006
	07/21/2004	CIVIL RETURN OF SERVICE Method : CIVIL AREA 2 CERTIFIED MAIL Issued : 07/19/2004 Service : CIVIL INITIAL SERVICE Served : 07/18/2004 Return : 07/21/2004 On : UNIVERSITY MEDICAL SERVICES ASSOCIATION INC Signed By : BONNIE HOWARD Reason : G-CIVIL SUCCESSFUL Comment : Tracking #: 7104223016901708224
	07/19/2004	CIVIL CERTIFIED MAIL Issue Date: 07/19/2004 Service : CIVIL INITIAL SERVICE Method : CIVIL AREA 2 CERTIFIED MAIL Cost Per :\$ 5.00 HURD M.D., WILLIAM W 128 APPLE STREET SUITE 3800 DAYTON, OH 45409 Tracking No: 7104223016901708223 UNIVERSITY MEDICAL SERVICES ASSOCIATION INC 5100 SPRINGFIELD PIKE SUITE 400 DAYTON, OH 45431 Tracking No: 7104223016901708224 Receipt: 500680 Date: 10/06/2006
ADOBE	07/16/2004	CIVIL CASE INFORMATION SHEET FILED
ADOBE	07/16/2004	COMPLAINT FILED Receipt: 372493 Date: 07/16/2004
	07/16/2004	CIVIL DEPOSIT Receipt: 372493 Date: 07/16/2004
ADOBE	07/16/2004	INSTRUCTIONS FOR SERVICE - CERTIFIED MAIL FILED
ADOBE	07/16/2004	INSTRUCTIONS FOR SERVICE - CERTIFIED MAIL FILED

Case: 2004 CV 4784
2009/10/05
DR: DERB

FILED
COURT OF COMMON PLEAS

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DAN FOLEY
CLERK OF COURTS
MONTGOMERY CO., OHIO

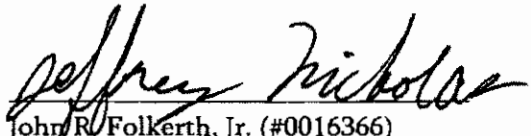
IN THE COURT OF COMMON PLEAS FOR MONTGOMERY COUNTY, OHIO

ELTON R. KERR, M.D., :
 :
 Plaintiff, : CASE NO. 2004 CV 4784
 :
 v. :
 : JUDGE GREGORY F. SINGER
 WILLIAM W. HURD, M.D., et al., :
 :
 Defendants. :

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

Now comes the Plaintiff, Elton R. Kerr, M.D., by and through counsel, and pursuant to Civil Rule 41(A), hereby dismisses all claims, and the entire action herein, without prejudice to further action/actions on the same claim/claims.

Respectfully submitted,
WEPRIN, FOLKERTH & ROUTH, LLC

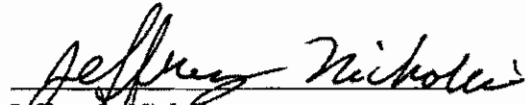


John R. Folkerth, Jr. (#0016366)
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109 N. Main St., Suite 500
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(937) 260-4200
Fax (937) 260-4201

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served by hand delivery on the party listed below on Oct. 5, 2006.

Jonathan Hollingsworth, Esq.
J. Hollingsworth, LLC
137 N. Main St., Ste 1002
Dayton, OH 45402-1772



Jeffrey L. Nicholas