

COMMONWEALTH OF KENTUCKY  
SCOTT CIRCUIT COURT  
DIVISION II  
CIVIL ACTION NO: 16-CI-0028

SONITA F. FRYMAN

PLAINTIFF

vs.

**PLAINTIFF’S TRIAL MEMORANDUM**

ERIN W. JOHNSON, M.D., *et al.*

DEFENDANTS

*Electronically Filed*

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Comes the Plaintiff, Sonita Fryman, by counsel, for her compliance with the Court’s Trial Order, respectfully submits this Trial Memorandum for this action set for trial beginning June 19, 2023, and states as follows:

**INTRODUCTION**

This case arises from medical negligence that caused serious harm to Plaintiff, Sonita Fryman. At issue is the misdiagnosis of cancer by Dr. Erin Johnson, an agent of Bluegrass Pediatrics & Internal Medicine, LLC, and the failure to appreciate and correlate a malignancy in a mammogram and ultrasound by Dr. Richard Scalf. Ms. Fryman seeks damages for her past medical expenses, past and future mental and physical pain, suffering anguish, and inconvenience, and loss of chance of survival.

**STATEMENT OF FACTS**

On October 3, 2014, Sonita Fryman visited Dr. Erin Johnson at Bluegrass Pediatrics & Internal Medicine for a breast exam. Ms. Fryman found a lump while performing a self-exam and, within a day, called to schedule an appointment. Dr. Johnson performed a physical examination on Ms. Fryman’s left breast and noticed a two-centimeter (2cm) palpable mass. Dr. Johnson referred Ms. Fryman for an ultrasound and mammogram.

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On October 15, 2014, Ms. Fryman visited Georgetown Community Hospital for her mammogram and ultrasound. Dr. Scalf, the radiologist, reported that Ms. Fryman's breasts were heterogeneously dense, which lowered the sensitivity for the detection of cancer. Dr. Scalf reported that what he found was consistent with a BIRADS score of 3. Based on the BIRADS scoring, his report communicated that Ms. Fryman's lump was probably benign, and her risk of cancer was less than two percent. In addition, the radiology technician told Ms. Fryman that the results of the mammogram did not show cancer.

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In October 2014, Dr. Johnson told Ms. Fryman that she believed Dr. Scalf's report and that the lump was probably just a cyst. Ms. Fryman asked Dr. Johnson whether she still needed to get a biopsy, and Dr. Johnson told her no. Dr. Johnson then told Ms. Fryman that she wanted Ms. Fryman to come back for a six-month follow-up mammogram.

In March of 2014, Ms. Fryman moved her care to Dr. Wechman. Ms. Fryman told Dr. Wechman that she preferred to be checked by a female gynecologist for her annual physical examination. Dr. Wechman referred Ms. Fryman to Dr. Beaven. Ms. Fryman saw Dr. Beaven on June 24, 2015. Ms. Fryman reported that she had a palpable mass in her left breast and the pain had been there for several months. Dr. Beaven immediately set up a referral appointment at the University of Kentucky for Ms. Fryman because she knew something was wrong. Imaging, an ultrasound, and a biopsy were all performed approximately two weeks later on July 10, 2015.

On July 10, 2015, a radiologist at the University of Kentucky informed Ms. Fryman that she had cancer in her left breast. The tumor was now five and a half centimeters. The CAT scan from the University of Kentucky also revealed tiny nodules approximately three millimeters in size on Ms. Fryman's lungs. A biopsy showed that Ms. Fryman's tumor was

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an Estrogen Receptor-Positive form of breast cancer.

Because of the advanced stage of Ms. Fryman's breast cancer, she underwent a mastectomy. Ms. Fryman also received chemotherapy and post-mastectomy radiation treatment. Given the biomarkers of her tumor, doctors informed Ms. Fryman that she needed to reduce the estrogen produced by her body. Because of this, Ms. Fryman subsequently had a partial hysterectomy to prevent her body from producing estrogen.

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### **ISSUES OF LAW & FACT IN DISPUTE**

#### **I. Liability of Dr. Erin Johnson and Bluegrass Pediatrics & Internal Medicine, LLC**

Defendants Dr. Johnson and Bluegrass Pediatrics & Internal Medicine, LLC will contest liability at the trial of this action. Plaintiff will call Dr. Jeffrey Kopin and Dr. Rebecca Aft to testify to Dr. Johnson's breach of the standard of care. Dr. Kopin will opine that Dr. Johnson acted appropriately when, after feeling a palpable 2-centimeter mass in Ms. Fryman's left breast, she ordered a diagnostic mammogram.

However, Dr. Kopin will say that upon receiving the diagnostic imaging report, Dr. Johnson failed to act as a reasonably prudent physician acting under the same or similar circumstances. Specifically, Dr. Kopin would say that, upon receiving the report, Dr. Johnson should have done one of four things: (1) sent Ms. Fryman to a breast specialist, (2) ordered a biopsy for Ms. Fryman, (3) called Dr. Scalf to try and coordinate and answer for her lack of correlation between her physical examination and his imaging, or (4) ordered additional imaging, including but not limited to, an MRI of her breast to further delineate the anatomy and try to find an explanation for the 2-centimeter mass that she palpated in Ms. Fryman's left breast.

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Dr. Aft will testify that, upon receiving the diagnostic imaging report, Dr. Johnson should have referred Ms. Fryman to a breast specialist.

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## **II. Liability of Dr. Richard Scalf**

Defendant Dr. Richard Scalf will contest liability at the trial of this action. Plaintiff's expert, Dr. Catherine Young, will testify to Dr. Scalf's breach of the standard of care. Dr. Young has already testified via a recorded trial deposition. She will testify that Dr. Scalf violated the standard of care of a reasonably prudent radiologist acting under the same or similar circumstances when he failed to appreciate the suspicious findings in Ms. Fryman's mammogram and ultrasound. She will also testify that Dr. Scalf breached the standard of care when he miscategorized Ms. Fryman on the Breast Imaging-Reporting and Data System as a 3, instead scoring her appropriately at 4.

## **III. Liability of Sonita Fryman**

Plaintiff expects that Defendants will seek an apportionment instruction for Plaintiff's comparative fault. Defendants argue that Plaintiff did not return for a follow-up mammogram in six-months and Plaintiff is responsible for further delay in her diagnosis. However, experts for the defendants opine that Ms. Fryman had an aggressive form of breast cancer. Dr. Simpson, a pathologist retained by Dr. Scalf, is expected to testify that Ms. Fryman's course of treatment would not have changed had she returned for a follow-up visit after six months.

## **IV. Causation**

Dr. Rebecca Aft will also testify to causation. She will generally testify that the delay in diagnosis and treatment eliminated Ms. Fryman's treatment options in July 2015.

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**V. Damages**

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Plaintiff will seek damages for her past medical expenses, past and future mental and physical pain and suffering and emotional distress. Plaintiff will call Dr. Rebecca Aft, Dr. Ricky Myhand, Sonita Fryman, and Kayla Fryman to discuss damages at trial.

**ISSUES OF LAW TO BE RESOLVED BY THE COURT BEFORE TRIAL****I. Deposition Designations**

Plaintiff expects the Court to address deposition designations and objections at the Pre-Trial conference on June 8, 2023, at 2:30 p.m.

**II. Motions *in Limine***

Plaintiff expects the Court to address the Motions *in Limine* filed by the parties at the Pre-Trial conference on June 8, 2023, at 2:30 p.m.

**III. Damages**

The Court ruled, in its Order Denying, in part, and Granting, in part, Defendants' Motions for Summary Judgment, that Plaintiff cannot seek damages for Loss of Chance of Survival. Plaintiff expects the Court to address its Motion for Clarification concerning Plaintiff's intention to seek damages for mental pain and suffering related to increased risk of future harm.

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Respectfully submitted,

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/s/Frederick W. Moore III

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I certify that on the 1<sup>st</sup> day of June 2023, service of a true and complete copy of the above and foregoing pleading was served via U.S. regular mail, electronic mail, or the Court's electronic notification system, where applicable, upon the following:

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