Plaintiffs' Response in Opposition to Defendant Memorial Hospital's Motion for Judgment Notwithstanding the Verdict on Plaintiffs' Survival ACT Claim or, in the Alternative, for New Trial or, in the Second Alternative, for Remittitur and for an Order Vacating the Rule 137 Sanctions Imposed"

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Come now Plaintiffs, by their attorneys, Judy L. Cates and Candice C. Kusmer, and for Plaintiffs' Response In Opposition To "Defendant Memorial Hospital's Motion For Judgment Notwithstanding The Verdict On Plaintiffs' Survival Act Claim Or, In The Alternative, For New Trial Or, In The Second Alternative, For ***Remittitur*** And For An Order Vacating The Rule 137 Sanctions Imposed," state as follows:

1. Judgment Notwithstanding The Verdict On Plaintiffs' Survival Act Count Is Unwarranted.

The defendant hospital alleges that the verdict and damages awarded against Memorial were the result of "passion and prejudice" on the part of the jury. Although the plaintiffs concede that the facts of this particular case demonstrated gross misconduct by the hospital, the defendant unfortunately, has no one to blame but itself. As demonstrated below, over the course of almost two weeks of testimony and evidence during this trial, the jury was provided with more than enough relevant, admissible evidence with which to find that Joyce Cretton suffered a brain injury when she was transferred by the hospital's nursing staff. The jury was clearly justified in finding against the defendant hospital on plaintiffs' Survival Count.

A trial such as this does not warrant a judgment notwithstanding the verdict, regardless of the complications which arose as a result of the defendant's own misconduct and the misconduct of its attorneys. In deciding whether to direct a verdict or to enter a judgment n.o.v., it is incumbent upon the trial court to apply the standard enunciated by our Supreme court in *Pedrick v. Peoria Eastern R.R. Co., Brooke Inns, Inc. v. S & R Hi-Fi And TV,* 249 I11.App.3d 1064, 1074, 618 N.E.2d 734, 741, 188 I11.Dec. 164, 171 (1st Dist. 1993). The Pedrick court originated the strict standard which states that "verdicts ought to be directed and judgments n.o.v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence should *ever* stand." (Emphasis added.) *Pedrick v. Peoria Eastern R.R. Co.,*37 I11.2d 494,510, 229 N.E.2d 504, 513-514 (111. 1967).

"Where there is a conflict in the testimony, a reviewing court may not substitute its judgment for that of the jury in passing on the weight of the evidence and on the credibility of the witnesses." (Citation omitted.) *Brook Inns,* 618 N.E.2d at 744. Further, verdicts are not considered against the manifest weight of the evidence "unless a conclusion opposite to that reached by the jury is clearly evident or the jury's verdict is palpably erroneous." *Didier v. Jones,* 61 Ill.App.3d 22, 27, 377 N.E.2d 572, 575, 18 Ill.Dec. 283, 286 (2nd Dist. 1978).

"Manifest weight' as applied in determining whether a verdict or judgment is against the

manifest weight of the evidence is that weight which is clearly evident, plain and indisputable." *Id.*

A. The jury's assessment of damages for plaintiffs' Survival Count was reasonable in light of the evidence presented at trial.

The Illinois Supreme Court gives strong deference to juries in making the factual determination of damages, especially in personal injury cases such as this. In fact, a judge may only tamper with jury's award for damages in very limited cases:

Illinois courts have repeatedly held that the amount of damages to be assessed is peculiarly a question of fact for the jury to determine and that great weight must be given to the jury's decision. **The very nature of personal Injury cases makes it impossible to establish a precise formula to determine whether a particular award is excessive or not.** Additionally, judges are not ree to reweigh the evidence simply because they may have arrived at a different verdict than the jury. Indeed, a court reviewing a jury's assessment of damages should not interfere unless a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bears no reasonable relationshi to the loss suffered.

(Emphasis added; citations omitted.) *Snelson v. Kamm,* 204 I11.2d 1, 36-37, 787 N.E.2d 796, 816 III.Dec. 610, 630 (I11. 2003). Further, where, as in this case, "the jury has been correctly instructed upon the measure of damage, and it is not claimed nor shown that the size of the verdict clearly indicates it was the result of prejudice or passion on the part of the jury, [the verdict] should not be disturbed upon review." (Emphasis added.) *Ford v. Friel,* 330 I11.App. 136, 140, 70, N.E.2d 626, 627 (1st Dist. 1947).

In reviewing a question as to the adequacy of damages, the court must take into consideration the record as a whole.*Snelson,* 204 I11.2d at 37. In this case, the jury was presented with evidence and testimony regarding the existence of Joyce Cretton's fall on the night of February 24, 1999, and subsequent pain and suffering therefrom. Specifically, plaintiffs offered the testimony of defendant's nursing employee, Joyce Tomlinson. On cross-examination as an adverse witness, Tomlinson testified to the following scenario of the transfer:

Q. Okay. At any rate, you called Cheryl Cretton], but what was Important is what you did after the transfer. After the transfer you did speak with Cheryl?

A. Yes, I did.

Q. And you told her that you sat her mom down a little harder on the bottom than you would have liked?

A. That is correct.

Plaintiffs' nursing expert, Karen Krooswyk, next testified regarding the deviation from the standard of care in Joyce Cretton's bed-to-bed transfer. On questioning with regard to Joyce Cretton's ability to assist in her own transfer, Krooswyk stated the following:

A. It's Impossible, because a patient like Mrs. Cretton' from what I'm taking from the nursing notes, took three people to lift the day before, and physically if someone can't stand dead weight and there's no way a person can hold onto this person adequately. The person is

very, very limp. It's just Impossible to hold on very very good like one person. So I'm thinking this is a 180 degree pivot in the bed, but when I see the picture there my concern was the way the bed was positioned that she did not have enough room to get her properly into that bed.
(Tr.737)
Krooswyk further testified to a reasonable degree of nursing certainty that Joyce Tomlinson, employee of Memorial Hospital, deviated from accepted standards of nursing care when she attempted to transfer Joyce Cretton on February 24, 1999. (Tr. 739.) Taking into consideration Joyce Tomlinson's own testimony concerning the “rough” transfer (see Tr. 600) and Philip Schorfheide's notation that her legs “buckled” (*see* Trial Exhibit 12), Krooswyk testified that the facts were “consistent with the allegation of a fall.” (Tr. 743-744.)
Moreover, on cross-examination by Mr. Bott, nurse expert Krooswyk testified to the signs and symptoms of a subdural hematoma injury in the following exchange:
Q. Specifically, what you think to be a sign and symptom of the subdural hematoma what entry?
A. Where It says, “Patient more anxious than (sic) respiratory problem. Passing lungs well.”
Q. So, “Patient more anxions than (sic) respiratory proble.” And the anxiety is something that you would typically find with someone who's suffering from a subdural hematoma?
A. It could be one of, sign, a very subtle sign. We know that Mrs. Cretton has been anxious in the past but
Q. I mean, she's been anxious to the hospital?
A. Right, but when Nurse Sedam charted that she was passing air very well in her lungs I looked at that as a very sign.
Q. And how is that a subtle sign?
A. It's just one of the things that people can exhibit, that sometimes they have an impending fear that something is going to happen to them and they get a little anxious.
(*See* Tr. 775, citing Trial Exhibit 1, p. 425.)
Certainly the testimony of Dr. Harry Parks, the coroner, medical examiner and pathologist who conducted the autopsy on Joyce Cretton's body, was devastating to Memorial and contributed to plaintiffs' evidence of pain and suffering following a fall or drop at Memorial Hospital on the night of February 24,1999. Although Dr. Parks died prior to the Cretton trial, his deposition testimony was read into evidence. His testimony confirmed the evidence of a fall or drop:
Q. Okay. Doctor, with this individual and the autopsy that you performed on March 1 of 1999, did you after performing the autopsy and reviewing the microscopic samples, did you come to an opinion to a reasonable degree of medical certainty in your field that the immediate cause of death for Joyce Cretton was closed head injury with acute occipital subdural hematoma?

A. That's correct.

Q. And did you also come to an opinion to a reasonable degree of medical certainty that this closed head injury with acute occipital subdural hematoma was due to or as a consequence of a right frontal contusion consistent with a contrecoup injury?

A. No, it was the other way around. I found a right frontal contusion consistent with a contrecoup Injury from a blow to the back of the head. The primary injury was the left occiptal part of the brain

Q. So it was your opinion based upon everything that you reviewed and the actual autopsy and you examinations of this individual, Joyce Cretton, had sustained a blow to the left occipital or rear area of her head?

A. That's correct

(Tr. 858.)

Further, Dr. Parks also testified to the appearance of Joyce Cretton's brain upon autopsy:

Q. Doctor, when you were performing your autopsy, did you find any Indications of swelling or edema of the brain

A. The brain showed some swelling of the gyri which are the folds of the brain and the obliteration of the sulci which are the spaces between the gyri. That was the gross evidence of swelling or edema of the brain.

Q. All right. And did you notice swelling of the cerebellum in the formation of a cone?

A. The cerebellum did show a cone deformity where it entered the superior opening of the spinal canal at the base of the brain.

Q. Okay. Just to make sure I have this right, Doctor. Are you saying that the -you had seen that the brain had swollen to such a point that the brain or brain matter was penetrating into the area where the spinal canal and the base of the skull meet?

A. The cerebellum and the part of the spinal cord just below it, that which is called the medulla oblongata is shoved down Into the spinal canal, it gets squeezed and damaged, and the usual mechanism of death is respiratory arrest.

(Tr. 860-861.)

Dr. Douglas Dothager, Joyce Cretton's treating pulmonologist in the hours before her death, testified that based on what he knew as a physician and Joyce Cretton's medical history, he "would not expect that kind of woman to be in end stage chronic obstructive pulmonary disease." (Tr. 1089.) Dr. Dothager also acknowledged that head injury can be a cause of respiratory failure. (Tr. 1109.) Joyce Cretton's appearance and demeanor in the hours before her death were also telling of pain and suffering:

Q. Did you see [fright] on Mrs. Cretton's face?

A. Yes

Q. You knew, you knew that she was aware what was going on, didn't you?

A. I got a very uncomfortable feeling when I walked in the room, yes.

Q. And you did that partially by looking at her?

A. Correct.

Q. She was frightened?

A. True.

Q. Do you believe she was frightened for her own life end whether she would make it at the time you saw her at 9:00?

A. Trus.

(Emphasis added; Tr. 1115.)

Even defendant's own expert neurologist, Dr. Mary Case, testified that Joyce Cretton suffered a "significant jarring" which created the subdural hemorrhage found in her brain:

Q. Okay, so Dr. Case agrees with this. Now, you agree, Dr. Case, that the only way a patient In a hospital could have a subdural hemorrhage is either a blow on the head or some - think you put significant jarring of the head, is that true?

A. It could be Jarring of the body, that something caused the head to move.

Q. Okay, jarring of the body?

A. Yes, and I stand by that

Q. So the only way this could happen is to fall, have a blow to the head. Which do you prefer, a blow to the head, fall

A. A fall is one mechanism.

(Tr. 1361-1362.)

In spite of the compelling testimony from the witnesses, defendant hospital makes much out of the fact that plaintiffs' counsel mentioned in her closing argument the respiratory distress suffered by Joyce Cretton just prior to her death. Memorial Hospital suggests that the respiratory distress was the "only" evidence of pain and suffering offered at trial.

Counsel is afforded wide latitude in making a dosing argument. *Elligt v. Bilsel,* 255 III. App.3d 233, 238,626 N.E.2d 386, 389,193 III 353, 356 (5th Dist. 1993). In this instance, plaintif's counsel was only allowed to highlight the massive amount of evidence and testimony presented duing the course of the trial. The evidence before the jury which was developed over the course of a two week trial was much more developed than a time-limited closing argument. For the defendant hospital to pick and choose which testimony favored the hospital and request a judgment notwithstanding the verdict based on their own selections of testimony is inappropriate. Likewise, it would be inappropriate for this Court to interfere with the jury's damages award based on a reweighing of the evidence presented by defendant.

B. *Remittitur* Or The Ordering Of A New Trial Is Inappropriate On The Survival Act Damages

Alternatively, defendant hospital argues that the jury's verdict of $950,000.00 on plaintiffs' Survival Count was not rationally related to the evidence presented. Defendant hospital requests this Court to enter ***remittitur*** or grant the hospital a new trial based on its assertion. However, the amount of a verdict is generally left to the discretion of the jury. *Velarde v. Illinois Cent. R.R. Co.,* 354 Ill.App.3d 523, 540, 820 N.E.2d 37, 54, 289 III.Dec. 529, 546 (1st Dist. 2004). "A damage award is not subject to scientific computation." *Id.* Therefore, a court must not "lightly substitute its opinion for the judgment rendered in the trial court." *Richardson v. Chapman,* 175 III 98, 113, 676 N.E.2d 621, 628, 221 III.Dec. 818, 825 (Ill.1997). "An award of damages will be deemed excessive if it falls outside the range of fair

and reasonable compensation or results from passion or prejudice, or if it is so large that it shocks the judicial conscience." *Id.*

Here, much like in *Richardson,* it was the jury's function to consider the credibility of the witnesses and to determine an appropriate amount of damages. This was a case with conflicting evidence and testimony - a case with evidence produced during the trial which contradicted the medical records themselves. This was the kind of case upon which a jury should have made a determination as the trier of fact. The mere fact that plaintiffs' counsel only suggested a $500,000.00 damage award to the jury for the Survival Count is of no matter. (Tr. 1465.) In fact, plaintiffs' counsel suggested to the jury in her closing argument that they award $500,000.00 on the Survival Count - but "didn't have to put in that amount." They could put in more - or they could put in less. *Id.*

Following their deliberations, the jury observed almost two weeks of testimony which included: 1) evidence of a head injury to a hospital patient during patient transfer, 2) a hospital cover-up, 3) an incomplete if not *tainted* medical record, 4) and the physical and emotional suffering of the decedent following the injury. Accordingly, the jury awarded an amount of damages of no more than one million dollars. This is not evidence of a runaway jury award. This case was not even a multimillion dollar verdict. The jury was free to award as it saw appropriate on the Survival Count in light of the evidence presented at trial.

Additionally, the defendant Hospital makes little mention of the fact that ***the jury found in the hospital's favor*** on the Wrongful Death Count of plaintiffs' Amended Complaint. Actually, counsel for plaintiffs also suggested that the jury award the Cretton family 1.5 million dollars on the Wrongful Death Count (Tr. 1466) which the jury refused to do. Had the jury been so influenced by "passion and prejudice," as alleged by defendant hospital, it clearly would not have ruled in favor of defendant on the Wrongful Death count. The fact that this jury was able to distinguish between the claims made and reject the Wrongful Death claim is clear and convincing evidence that the jury made rational, informed decisions based on the evidence.

H. Jury's Survival Act Verdict Is Consistent With Wrongful Death Verdict

As stated previously, this was not a "slam-dunk" case for the plaintiffs. Because the medical records were devoid of any reference to a fall or drop, plaintiffs faced a big challenge. After all, Joyce Cretton suffered from COPD, a severe respiratory illness which also compromised her ability to breathe. In fact, the reality of decedent's COPD lingered through trial to closing arguments. (See Plaintiffs' Closing Argument, Tr. 1467.) This jury signed a verdict in favor of plaintiffs on the Survival Count and in favor of the defendant hospital on the Wrongful Death count. Again, their decision to split the counts is evidence that the jury weighed the testimony of each party and made its determination based on the evidence presented.

The fact that some of the respiratory symptoms from which Joyce Cretton suffered caused her death (at least in the eyes of this jury) does not undermine a damages award under the Survival Count. The evidence presented at trial demonstrated that Joyce Cretton was dropped during a bed transfer on the night of February 24,1999. She lived -following that injury. Her COPD did not diminish the brain injury she suffered.

III. Plaintiffs' Counsel Did Not "Lawyer-Bash" Defense Counsel In The Presence Of The Jury

Counsel for defendant next allege that they suffered from "lawyer-bashing" by plaintiffs' counsel akin to that which occurred in the Illinois Supreme Court case, *Holton v. Memorial Hospital,* 176 Ill.2d 95, 679 N.E.2d 1202, 223 Ill.Dec. 429 (Ill. 1997). It should be noted that in *Holton,* the plaintiff's attorney stated in his closing argument that "the rules of the trial had been 'shamelessly ignored' by the defense, including the rule that attorneys should not 'counsel or assist a witness to testify falsely.'" *Id.* at 128. Plaintiff's counsel also suggested that some witnesses were "nice people" who "had been encouraged to 'modify their testimony.'" *Id.* According to plaintiff's counsel:

...[H]is was the profession of Abraham Lincoln and Daniel Webster and the Declaration of Independence while the defense attorneys' profession was that of 'John Dean, John Erlichmann, people who were so interested in winning that they violated the rules.' [Plaintiff's counsel] told the jury that the probable reason for the 'lawyer misconduct in this case' was that Mrs. Holton sustained terrible damages. He further informed the jury that it had been the victim of 'distortion of the truth' by named partner in a large St. Louis law firm.

Id. The comments cited in *Holton* were nothing like the words used by plaintiffs' counsel in this trial. In fact, plaintiffs' counsel was very careful to plead her case honestly with Moreover, unlike *Holton,* in this case the trial had been fraught with the misconduct of the defense counsel. To the extent the Court cautioned the parties during a pre-trial conference on making "bold claims of fraud [and] misrepresentation" (July 24, 2003, Tr. 7-8), the Court did so in good faith reliance upon the fact that all parties had complied with the rules of discovery. At the time this statement was made, neither the Court nor plaintiffs' counsel had any idea of what was contained and falsely deemed protected by the Medical Studies Act in the decedent's medical record. Just prior to trial and continuing throughout, it became more and more clear that the defense for the hospital was aware of the damaging notes buried under the protection of a "Privilege Log" which the defens' counsel had known about *for years.* To the extent plaintiffs' counsel commented on defense counsel's conduct (Tr. 131, 259-261, 760, 798, 1457-58 and 1499), such comments were not without cause. By the time the jury heard the closing argument of plaintiffs' counsel, the jury was well aware of the hospital's misconduct and the misconduct of its attorneys.

In that regard, the very same case which defendant hospital cites for the proposition that plaintiffs' counsel was "lawyer-bashing" also states that in trials where, as here, counsel's misconduct was apparent, opposing counsel is permitted to comment:

It is true that where there is record of evidence in support of a claim that opposing counsel or parties falsified evidence or encouraged witnesses to change their trial testimony, counsel may fairly comment upon such evidence. If a witness' trial testimony significantly differs from his or her deposition testimony, opposing counsel may exploit such changes by traditional means of impeachment.

(Emphasis added) *Id.* Taking into consideration all that was discovered during the course of this trial, surely a "record of evidence" existed that counsel for defendant hospital improperly

withheld evidence under the guise of the Medical Studies Act and had previously failed to correct the deceitful testimony of Philip Schorfheide in his deposition prior to trial. Unfortunately, it was defense counsel who put counsel for plaintiffs in the position to be able to comment on this kind of conduct.

IV. Plaintiffs Did Not Violate Illinois Supreme Court Rule 213

Preliminarily, plaintiffs note that "a trial judge's determination on the admissibility of expert testimony is a decision left to that judge's sound discretion." *Southwestern Illinois Development Authority v. Al-Muhajirum,* 348 Ill.App.3d 398, 401,809 N.E.2d 730, 733, 284 I.Dec. 164, 167 (5th Dist. 2004).

However, defendant hospital first argues that plaintiffs elicited an undisclosed standard of care opinion from Memorial Hospital Vice President of Nursing, Nancy Weston. In its post-trial motion, defendant hospital cites a portion of the questioning and Ms. Weston's answer, but does not put the objection in context.

On Ms. Cates' cross-examination of Weston as an adverse witness, defense counsel objected to the following line of questioning:

Q. Do you believe that patients in a hospital such as Memorial in order to comply with national standards in 1999 deserved to - the high quality, cost-effective services to people residing in Southwest Illinois which promote health, prevent disease and treat and manage illness?

MR.BOTT: And just for the record, Your Honor, I'm going to make a 213 objection to any opinion testimony of standard of care from this witness as not disclosed.

THE COURT: Overruled.

MR. BOTT: And may I then have a continuing objection to such opinions?

THE COURT: Sure

MR. BOTT: Thank you.

Q. (By Ms. Cates) Do you believe that in 1999 a patient in this country in the United States under JCAHO standard was entitled to high-quality, cost-efective services if you resided in Southwest Ilinois which promoted health, prevented disease and treated and managed illness?

A. Yes, I do.

Q. And that would be a standard of care, wouldn't it

A. That's not how I interpret a standard of care. A standard of care is an action or an intervention evidence-based.

Q. Okay. Well, the judge will instruct the jury on standard of care.

A. Okay. But I agree with your statement.

(Tr. 185-186.)

Therefore, Ms. Cates' questioning was on the general entitlement of patients under the Joint Commision on Accreditation of Healthcare Organizations standard Ms. Weston did not comment on standard of care for Memorial Hospital - she even stated that Ms. Cates' statement was not how she interpreted the "standard of care." The line of questioning

concluded with Ms. Cates stating that the jury would be instructed on standard of care by the Judge in this matter.

Similarly, on questioning of Kathleen Schmidt, Nursing Director of Memorial Hospital, plaintiffs' counsel questioned with regard to whether a nurse's failure to investigate a bruise on a patient was a deviation from the standard of care. (Tr. 367.) Defense counsel objected on the basis of Rule 213, apparently for failure to disclose the opinion. This nurse was an employee of the defendant at the time Joyce Cretton was a patient at Memorial Hospital. Rule 213 did not require the kind of disclosure sought by defendant.

Moreover, plaintiffs offered the following disclosure of the witness in “Plaintiffs' 213(0 Disclosure” submitted before trial:

Kathleen Schmidt Evansville, Illinois

Kathleen Schmidt may testify and give opinions regarding the medical care and treatment rendered to Joyce Cretton at Memorial Hospital in February, 1999. See medical records and other documents produced in discovery to date and November 9, 2001 deposition of Kathleen Schmidt, for additional opinions and subjects of testimony.

Certainly questioning defendant's own employee regarding a nurse's treatment or failure to treat cannot be deemed a surprise to the defendant hospital. Furthermore, defendant was put on notice that Ms. Schmidt would give opinions through the above disclosure related to the “the medical care and treatment rendered to Joyce Cretton at Memorial Hospital” in February of 1999.

Additionally, the use of the *Neurology in Clinical Practice* and other similar texts iin cross-examination of expert witnesses is supported by Illinois case law:

The unsatisfactory quality of expert testimony has been the subject of frequent comment, and it has induced judicial action. (Citations omitted.) An individual becomes an expert by studying and absorbing a body of knowledge. To prevent cross-examination upon the relevant body of knowledge serves only to protect the ignorant or unscrupulous expert witness. In our opinion expert testimony will be a more effective tool in the attainment of justice if cross-examination is expressed in treatises or periodicals written for professional colleagues. (Citation omitted.) The author's competence is established if the judge takes judicial notice of it, or if it is established by a witness expert in the subject.

Darling v. Charleston Community Memorial Hospital, 33 Ill.2d 326, 335, 211 N.E.2d 253259 (II 1965)

The defendant cites *Jager u Libretti,* 273 Ill.App.3d 960, 652 N.E.2d 1120, 210 Ill Dec. 144 (1st Dist. 1995), for the proposition that plaintiffs improperly attempted to read into evidence a patient's emergency room records containing another doctor's opinion of the case at hand. The emergency room records scenario cited by defendant

However, in the second “colloquy,” the court stated that the examination “provides an example of what the supreme court said was permissible, namely, allowing [counsel] to test the expert's opinion by asking if other facts, data, or opinions would alter his opinion.” *Id.* at 966. Further, just as in the Cretton matter where plaintiffs' counsel attempted to impeach defendant's expert witness:

Essentially, an expert may be cross-examined with respect to reports he did not review and did not rely upon, if those reports are truly used as tools for impeachment, rather than a Trojan Horse used to sli hearsay evidence into the trial.
Id Therefore, plaintiffs' counsel in this instance properly cross-examined the witness in that respect

V. The Use Of Dr. Harry Parks' Discovery Deposition Was Proper

Plaintiffs' originally took the deposition of Dr. Harry Parks on February 13,2002. However, quite unexpectedly prior to trial, Dr. Harry Parks died. Because plaintiffs intended to call Dr. Parks as an expert witness in the Cretton trial, plaintiffs were forced to read into evidence the discovery deposition of Dr. Parks as though taken as an evidence deposition.
“Illinois is unique in that it distinguishes between discovery depositions and evidence depositions; that difference is significant in that discovery depositions are primarily used to obtain information, to commit witnesses to particular stories, and to obtain admissions whereas evidence depositions are fully admissible as to what an unavailable witness would testify if present in the courtroom.” *Ainsworth Corp. v. Cenco, Inc.,* 158 Ill.App.3d 639, 646, 511 N.E.2d 1149, 1153-1154, 110 III.Dec. 829, 833-834 (1st Dist. 1987). “The decision to allow or exclude expert testimony is a matter committed to the sound discretion ofthe circuit court.” *Huelsmann v. Berkowitz,* 210 Ill.App.3d 806, 810, 568 N.E.2d 1373,1376,154 I11.Dec. 924,927 (5th Dist. 1991). In so doing, the circuit court may properly consider the following factors: 1) surprise to the adverse party, 2) the prejudicial effect of the testimony, 3) the nature of the testimony, 4) the diligence of the adverse party, 5) the timely objection to the testimony and 6) the good faith of the party calling the witness. *Id.*
The use of a discovery deposition in cases where the deponent has died prior to trial is further permitted by Illinois Supreme Court Rule 212. Section (a)(5) of the rule clearly states:
[A discovery deposition may be used] upon reasonable notice to all parties, as evidence at trial or hearing against a **party who appeared at the deposition or was given proper notice thereof, if the court finds that the deponent is neither a controlled exert witness nor a party, the deponent's evidence deposition has not been taken, and the deponent is unable to attend or testify because of death or infirmity,** and if the court, based on its sound discretion, further finds such evidence at trial or hearing will do substantial justice among the parties. (Emphasis added.)
In this case, defendant hospital appeared at Dr. Parks' discovery deposition. Dr. Parks' had not been retained as plaintiffs' controlled expert witness and his evidence deposition had not been taken. Plaintiffs had no intention of reading Dr. Parks' deposition at trial. His death was a surprise to both parties. The defendant was no more prejudiced by Dr. Parks' death than the plaintiffs were - in fact, if anyone was prejudiced by being forced to read his testimony it was the plaintiffs. Moreover, plaintiffs informed both the Court and opposing counsel as soon as they learned their intended expert had unexpectedly died. Plaintiffs certainly used the deposition in good faith as a “last resort.”

VI. The Court Did Not Err In Admitting Unredacted Coroner's Death Certificate

Contrary to defendant's assertions, the Coroner's Death Certificate was properly admitted into evidence under Illinois law. The applicable statute on “Records of the coroner's medical or laboratory examiner as evidence” states:

In any civil or criminal action the records of the coroner's medical or laboratory examiner summarizing and detailing the performance of his or her official duties in performing medical examinations upon deceased persons or autopsies, or both, and kept in the ordinary course of business of the coroner's office, duly certified by the county coroner or chief supervisory coroner's pathologist or medical examiner, shall be received as competent evidence in any court of this State, to the extent permitted by this Section.

These reports, specifically including but not limited to the pathologist's protocol, autopsy reports and toxicological reports, shall be public documents and thereby may be admissible as prima facie evidence of the facts, findings, opinions, diagnoses and conditions stated therein.

A duly certified coroner's protocol or autopsy report, or both, complying with the requirements of this Section may be duly admitted into evidence as an exception to the hearsay rule as prima facie proof of the cause of death of the person to whom it relates. The records referred to in this Section shall be limited to the records of the results of post-mortem examinations of the findings of autopsy and toxicological laboratory examinations.

725 ILCS 5/115-5.1. Further, Fifth District case law reinforces the statute. In *People v. Kennedy,* 150 Ill.App.3d 319, 501 N.E.2d 1004, 103 Ill.Dec. 687 (5th Dist. 1986), the court held that a certified copy of a death certificate is admissible as prima facie evidence of the facts, findings, opinions, diagnosis and conditions stated therein. Id. at 322.

Finally, the probative value of Joyce Cretton's death certificate was not outweighed by its prejudice. As a result of the coroner's autopsy, the death certificate contained a statement that the cause of death resulted from an injury occurring on February 24, 1999. However, there was no evidence in the medical record of a reported injury. Additionally, the hospital had consistently taken the position that they were not aware of an injury and that an injury had not, in fact, occurred. Because of the lack of evidence otherwise, the coroner's death certificate was probative of the contested issues in this case and was not prejudicial to Memorial Hospital.

VII. The Court's Trial Sanctions Were Appropriate In Light of Defendant and Defense Counsel Misconduct

Defendant hospital improperly withheld admissible evidence by burying it under the guise of protected information by the Medical Studies Act, 735 ILCS 5/8-2101. This Court appropriately stated early on in the trial that “the Medical Studies Act is not designed to be a shell game of the truth.” (Tr. 50.)

Illinois case law also makes clear that the Medical Studies Act is not an instrument hospitals may use in an effort to hide relevant information. For instance, information that was obtained before peer review, or information that was acquired before peer review and was later furnished to a peer review committee is *not* privileged information protected by the Medical Studies Act. During the course of this trial, the Court noted handwritten dating and

descriptions of documents pre-dating the March 3 - March 11, 1999, Cretton peer review committee formed at Memorial Hospital. The Court properly released documents #21 and #22.

The Illinois Supreme Court has stated that "where the [peer review] committee is one comprised of the hospital's medical staff, the committee must be involved in the peer-review process before the privilege will attach." *Roach v. Springfield Clinic,* 157 Ill.2d 29, 40, 623 N.E.2d 246, 251, 191 Ill. Dec. 1, 6 (Ill. 1993). In Roach, the Court looked to the following similar factors when determining the records at issue where outside of the protection of the Medical Studies Act:

As our prior review of the facts indicated, the only 'committee mentioned in the record was Memorial's department of anesthesiology, and Draper's conversations with Dentinger and Funk took place before the monthly meeting at which the department was apprised of the delay in providing [the plaintiff] with adequate anesthesia.

The information obtained by Draper and Dentinger in the course of his conversations was not transformed into 'information of the anesthesiology department merely because Draper reported the incident to that body sometime later.

Id. at 41. As properly noted by this Court, the recorded notes of Phillip Schortheide were prepared prior to the date on which the Quality Assurance Committee was initiated. The Roach court cautioned against this type of improper shielding of information:

If the simple act of furnishing a committee with earlier-acquired information were sufficient to cloak that information with the statutory privilege, a hospital could effectively insulate from disclosure virtually all adverse facts known to its **medical** staff; with the exception of those matters actually contained in the patient's records. As a result, it would be substantially more difficult for patients to hold hospitals their wrongdoing

through **medical malpractice** litigation. So protected, those institutions would have scant incentive for advancing the goal of improved care. The purpose of the act would be completely subverted.

Id. at 41-42.

The defendant hospital alleges that contrary to the Court's sound judgment, the documents revealed to plaintiffs just prior to trial and during the course thereof were actually prepared at the bequest of the Cretton peer review committee formed at Memorial Hospital. But as *Chicago Trust Company v. Cook County Hospital* (cited by defendant) points out, blanket conclusions that information was generated at the bequest of a reviewing committee is not enough to invoke the protection of the **Medical** Studies Act. *Id.* at 298 III.App.3d 396, 404, 698 N.E.2d 641, 647, 232 Ill. 556 (1st Dist. 1998). Even where, as in this case, an affidavit filed in support of the privilege, the affidavit is ineffective when the statement contained therein is "pure conclusion, bereft of facts." *Id.*

Taking into account the defendant hospital's action concerning its improper withholding of information, it was not unfairly prejudiced by the Court's sanctions in this regard. Further, the defendants are no less guilty of an improper withholding because the misconduct was not discovered until the eve of trial. As the Court stated, plaintiffs did not waive a challenge to

hospital's privilege log. Rather, the misconduct involving the Privilege Log "[took] the shape of a discovery fraud in the deposition of Schortheide." (Tr. 51.) In sum, cumulatively both before and during trial, the defendant's conduct and that of its counsel warranted the Court's appropriate sanctions.

VIII. Defendant Hospital Received A Fair Trial Despite its Own Actions Which Elicited Unfavorable Media Coverage

Defendant hospital next argues that it was denied a fair trial due to the "adverse media coverage" which was published during the course of the trial. Defendant refers to the August 9, 2003, *St. Louis Post-Dispatch* article entitled "Lawyer alleges hospital cover-up in patient's death." It alleges that this Court improperly denied their motion for mistrial on Monday morning, August 11, 2003. (Tr. 1047-1049.)

To begin, the adverse publicity generated by the Court proceedings was the result of the defendant's own misconduct in this case. To say that they were unfairly prejudiced by publicity the hospital and its counsel created is disingenuine. Additionally, defendant glosses over the fact that Harry Meier, CEO of Memorial Hospital, wrote his own, personal*manifesto* on the Cretton facts, published in the *Belleville News-Democrat* with an accompanying article on August 8, 2003 one day before the Post article. In response to plaintiffs' objections to the Meier letter and article, the Court noted that his "observations were that nobody's carrying any newspaper, whether it's the *News-Democrat* or the Post or the Monitor of whatever."[1] (Tr. 826.) Though the News-Democrat article was certainly poor "publicity" for plaintiffs, they did not request a mistrial.[2] (Tr. 828-829.) Moreover, defense counsel further claimed he did not want a mistrial in light of the *News-Democrat* article. (Tr. 838.) The defense in this case was therefore no more adversely affected by one newspaper article than were plaintiffs by another newspaper article. The Court properly denied a mistrial.

IX. Plaintiffs' Counsel's Closing Argument Was Proper

In response to defendant's many allegations of improper comment during closing arguments, plaintiffs again restate the proposition cited above that "counsel is afforded wide latitude in making a closing argument." (Emphasis added.)Ellington v. Bilsel, 255 Ill.App.3d 233, 238, 626 N.E.2d 386, 389, 193 Ill.Dec. 353, 356 (5th Dist. 1993). Therefore, the comments of plaintiffs' counsel in her closing argument were proper. However, plaintiffs will nonetheless address defendant's comments.

First, to the extent that defendant criticizes plaintiffs' counsel's reference to the hospital as a company, plaintiffs point out that the Protestant Memorial **Medical** Center, INC., d/b/a Memorial Hospital of Belleville, is in fact a corporation. (Emphasis added.) Second, the criticisms of plaintiffs' counsel's supposed "lawyer-bashing" are addressed in this response, supra, and apply to this section as well. Third, plaintiffs' counsel did not "draw attention" to defendant's failure to call Dr. West as a witness. His name was mentioned in closing argument in reference to Joyce Cretton's COPD -a question of fact with regard to both the Survival and Wrongful Death counts. (Tr. 1051.) Fourth, plaintiffs' counsel offered an apology to the jurors in her closing due to the sometimes contentious and heated exchanges during the trial. (Tr. 1445-1446.) As this Court was able to distinguish, plaintiffs' counsel was merely

explaining her conduct in the course of the trial rather than imparting “her personal feelings” about the case to the jury. (Tr. 1446.)

Lastly, plaintiffs' counsel did not make a “deliberate misrepresentation” of Dr. Parks' staff member status at Memorial Hospital. (Tr. 1499-1500.) Rather, it is defendant hospital who makes the misrepresentation in its Post-Trial Motion. In fact, the testimony of Dr. Parks that was read into evidence at trial demonstrated the following:

Q. So Memorial has certainly never questioned your veracity?

A. No. My relationship has been good there. I was on the staff and even after I left as director of laboratories, I held a position on the staff.

Q. What position

A. I was just one of the attending doctors.

Q. Do you still have privileges there?

A. No, not anymore.

(Tr. 913.) Therefore, Dr. Parks' testimony indicates that he was on staff at Memorial Hospital at the time of his examination of Joyce Cretton, but not at the time of the deposition in 2001. Plaintiffs' counsel did not misrepresent the testimony nor “was she aware it was false” as defendant hospital boldly asserts. Consequently, defendant was not prejudiced by such a statement Plaintiffs' counsel stands by her comments made in closing argument and recognizes the wide latitude she is offered in making her closing remarks.

X. The Court Did Not Improperly Comment In The Presence Of The Jury

Though defendant asserts that it was prejudiced by comments made by the judge in this trial, those comments cited by the defendant were in response to defendant's own misconduct throughout the trial. The Court was not indicating bias or prejudicing defendant in the presence of the jury. In fact, the Court's comments in this trial were more along the lines of those made by the judge in *People v. Garrett,* 276 Ill.App.3d 702, 658 N.E.2d 1216, 213 Ill.Dec. 195 (1st Dist. 1995).

In *Garrett,* the defendant argued that the judge's comments prejudiced defendant by showing bias in favor of the plaintiff. The judge had questioned defense counsel upon his examination of a witness and asked, “Are you prepared to say that this witness is a liar? Are you going to prove it? *Id.* at 712. The judge also reprimanded defense counsel during lengthy closing arguments by saying, “Close out your argument, sir. You're wasting your time.” *Id.*

The appellate court stated the judge's comments were not in error:

Reviewing the comments that the defendant cites, it is clear that the judge was attempting to control the trial rather than disparage defense counsel. Each of the comments had a valid basis and did not display a specific bias or prejudice against defense counsel.

Id. at 713. Much like in *Garrett,* this Court was forced to comment on the incomplete **medical** record and defendant's persistent attempts to take advantage of the tainted chart The comments cited by the defendant were clearly made in order to maintain control of the course of the trial as defense counsel continued to violate Court orders and attempt to withhold admissible evidence.

XI. Plaintiffs Were Properly Permitted To Amend Their Complaint According To The Proofs

Illinois statutes afford parties wide latitude in making amendments to pleadings. The following sections of the Illinois statute on "Amendments" state:

At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant dismissing any party, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill, of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim. 735 ILCS 5/2-616(a).

A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just. 735 ILCS 5/2-626(c).

Defendant hospital states that it was prejudiced and surprised by a "significant departure from plaintiffs' theory of injury." (Defendant Post-Trial Motion, p. 52.) Defendants state the "departure" in theories is based on plaintiffs' change in the nature of injury from contre-coup injury through blunt force trauma to "significant jarring" or other injury as testified by defendant's expert, Dr. Mary Case. (Tr. 1329 and 1330.) However, as stated above, plaintiffs may amend a pleading at any time to conform the pleading to the proofs. Moreover, in this instance, defendant cannot claim unfair surprise and prejudice when the complaint was amended to contain the statements of defendant's own controlled expert witness. Defendant itself states that Dr. Case's opinion regarding the "jarring" was disclosed nine (9) months*before trial.* (Defendant Post-Trial Motion, p. 55.)

XII. Rule 137 Sanction Imposed On Defendant Hospital Were Warranted And Appropriate In Regard To Defendant And Defense Counsel Misconduct

For reasons unclear to plaintiffs, defendant hospital has chosen to request a judgment notwithstanding the verdict on the Court's Rule 137 sanctions imposed on the hospital. Though it is plaintiffs' belief that such a request is inappropriate, plaintiffs will respond to defendant's submission on this issue.

Ironically, defendant refers to the history of its misconduct and the ensuing consequences at trial and post-trial as "tortured." Plaintiffs will again recite the facts that lead to defendant's characterization of the sequence of events.

As this Court is well aware, plaintiffs filed a **medical** negligence complaint against Memorial Hospital of Belleville and eight hospital nurses on February 3, 2000. The event out of which the lawsuit arose occurred on the night of February 24, 1999, when the decedent, Joyce Cretton, was transferred from Memorial Hospital's ICU unit to the IMCU unit. Plaintiffs alleged that Memorial Hospital, by and through its agents, servants and employees, deviated from the standard of care: 1) in negligently and carelessly transferring Joyce Cretton to her IMCU bed; 2) in negligently and carelessly failing to afford adequate assistance for the transfer, 3) in negligently and carelessly allowing Joyce Cretton to fall during the transfer;

and 4) in negligently and carelessly failing to inform anyone of Joyce Cretton's fall during the transfer.

Attorney Doreen Graham and the law firm of Moser and Marsalek. P.C., filed their entry of appearance for all named defendants on March 6, 2000. On April 3, 2001, plaintiffs served their First Interrogatories To Defendants and First Request For Production To Defendants. At that time, plaintiffs submitted the following interrogatory:

25. Please Identify by full name, current (or last known) residence address and current employer of the nursing supervisor at defendant hospital known as Phil (last name unknown) who discussed the problems encountered during the transfer of decedent from the ICU to the IMCU on February 24, 1999 with plaintiff, Cheryl Cretton.

This interrogatory was specifically crafted in an effort to determine the identity of a nursing supervisor. Plaintiff, Cheryl Cretton, had spoken with this supervisor shortly after her mother, Joyce Cretton, reported having been dropped during the transfer process. This conversation, as reported by Cheryl Cretton, was well known to the hospital even at the outset of the litigation.

Memorial Hospital answered plaintiffs' interrogatories on July 19, 2001. In response to plaintiffs' interrogatory number 25, Memorial Hospital answered as follows:

Memorial denies that the substance of the conversation was as described in this interrogatory and the**only nursing supervisor** named “Phil” is Phillip Schoreide who is no longer employed at Memorial. His last known address is 9801 Roanoke Parkway, Kansas City MO 64112. His current employer is Truman**Medical** Center. (Emphasis added.)

The Answers To Plaintiffs' First Interrogatories were signed by Doreen Graham, the attorney of record for the hospital. More importantly, the pleading was *verified under oath* by Terry Walther, an authorized agent of Memorial Hospital.

Accompanying Memorial Hospital's July 19, 2001 interrogatory answers was a privilege log. The pleading was signed by Margaret Lowery, General Counsel for Memorial Hospital. This privilege log purported to identify several documents claiming a privilege under the **Medical** Studies Act.[3]

Of special note for this are documents 21-22 of the privilege log.[4] These documents were not disclosed by Ms. Lowery and were described by counsel for Memorial Hospital as follows:

QMCS request for information & typewritten notes from unknown author.

The deposition of Cheryl Cretton was taken on July 24, 2001. In her deposition, Cheryl Cretton described the conversation with the nursing supervisor named “Phil.” Ms. Cretton described that conversation in detail and testified that she told “Phil” about the allegation of the fall during the transfer process.

On August 14, 2001, Greensfelder, Hemnker & Gale, P.C. and Edward S. Bott, Jr. entered their appearance for all named defendants. Plaintiffs filed a Motion To Compel the production of the privileged documents on August 31, 2001.[5] A hearing was held on September 6,2001 pursuant to plaintiffs' Motion. The judge assigned to the case at that time, Stephen Kemam, ordered, in part, that Memorial Hospital submit further documentation to plaintiffs in support of the privilege log.

In the meantime, the deposition of Phillip Schorfheide was taken on September 25, 2001.[6] Although Phillip Schorfheide was no longer employed by Memorial Hospital, Mr. Bott and Ms. Lowery met privately with Phillip Schorfheide prior to the deposition. Mr. Bott and Ms. Lowery prepared Mr. Schorfheide for his deposition. Mr. Bott defended Mr. Schorfheide at the deposition.

When plaintiffs' counsel initially questioned Phillip Schorfheide regarding the conversation which Cheryl Cretton claimed to have had with Mr. Schorfheide, Mr. Bott directed him to the privilege log. This is proof that Mr. Bott was well aware of the documents contained within that file. When specifically asked whether Cheryl Cretton had ever made an allegation that her mother had been dropped during the transfer process. Phillip Schorfheide repeatedly stated, throughout his deposition, that he was never informed of an allegation that Joyce Cretton had fallen or been dropped.

On October 9, 2001, pursuant to the Order previously entered by Judge Keman regarding supplemental information, Mr. Bott, on behalf of Memorial Hospital, filed the affidavit of hospital employee, Kerry Wrigley. This affidavit stated that the Quality Management Council Subcommittee which conducted the peer review process related to the death of Joyce Cretton was initiated “on or about March 3, 1999.” That affidavit also specifically stated, *inter alia,* that “documents Bates numbered PL 21-22... are handwritten notes by an unknown author.”

Plaintiffs' counsel has actively litigated **medical** negligence cases since 1982. In that time period, plaintiffs' counsel had never had reason to believe that the personnel at the Memorial Hospital of Belleville would engage in any form of dishonesty. In fact, throughout the years, plaintiffs' counsel was familiar with Terry Walther and had been involved in cases with both Doreen Graham and Edward S. Bott, Jr. Therefore, plaintiffs' counsel did not challenge any of the affidavits filed on behalf of Memorial Hospital. Instead, plaintiffs' counsel relied on the sworn affidavits and representations

Plaintiffs' counsel continued to prepare this case for trial during the following two years. As the Court aptly notes in its March 17,2004 Order: “[Plaintiffs were preparing their case without knowledge of the false early disclosures and unaware of the lies told by Schorfheide in deposition.” Additionally, “there were no red flags that would alert the

At the July 17, 2003 pre-trial conference, the issue of the Cheryl Cretton/Phil conversation was raised in pretrial motions. The hospital filed a motion in limine to keep out the alleged statements which Cheryl Cretton made to Phil. At the July 17, 2003, hearing, Judge LeChien (the judge who was assigned to the case after Judge Kernan retired) specifically asked Mr. Bott whether Memorial Hospital disputed the statements made by Cheryl Cretton to Phil Schorfheide with regard to whether her mother “fell or was dropped or was injured.” In response, Mr. Bott replied, “Yes.” Moreover, Judge LeChien then specifically inquired whether Mr. Bott had read the QMCS file to support his representations. When the Court asked Mr. Bott if he had looked at the QMCS documents related to his question, Mr. Bott also replied, “Yes.” (*See* July 17, 2003, Report of Proceedings, page 16, lines 23-24 and page 17, lines 1-20.)

As this Court is aware, plaintiffs requested an in camera review ofthe documents claimed as privileged. The Court, as a part of the pretrial process, ordered the in camera review of the documents claimed as privileged. It was during that document production that this Court "exposed the hospital's

Once the Court reviewed documents #21 and #22, which had been described in the Privilege Log, the Court immediately determined that the hospital "knew the testimony of [Phillip Schorfheide] was a lie and [the hospital had] failed in its obligation [to] correct the perjury." More specifically, the Court found that certain portions of documents #21 and #22 were not privileged by the **Medical** Studies Act and released those portions to the plaintiffs. The Court also determined that the name "Phil" appeared on document #22. When considered with the other documents contained in the file, as well as the reported conversation which Cheryl Cretton had described from early on in the litigation, the Court could easily conclude that "Phil" was the author of documents #21 and #22. In other words, the representation that these documents were by an "unknown author" was absolutely false. Upon revelation of the truth, plaintiffs' counsel immediately moved for sanctions. In an attempt to "undue" the prejudice to plaintiffs, the Court imposed sanctions against the hospital.

Trial commenced on August 4, 2003. During trial, Phillip Schorfheide's testimony had to be corrected from his prior deposition. Additionally, plaintiffs' counsel was never quite sure whether the hospital witnesses would continue with the testimony given during their depositions, or change their testimony to reflect the "corrected" account of Phillip Schorfheide. At the conclusion of the evidence, the jury returned a verdict in favor of the plaintiffs on the survival action only, awarding plaintiffs $950,000.00.

Prior to the jury's verdict, plaintiffs filed their Motion For Sanctions Pursuant to Illinois Supreme Court Rules 137 and219(c). Pursuant to that motion, this Court has held numerous hearings. At the conclusion of the hearings, this Court entered its Order on March 17, 2004 and has allowed plaintiffs leave to supplement the record in support of plaintiffs' request for attorneys' fees and expenses.

Illinois Supreme Court Rule 137 provides, in pertinent part:

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may ***include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper including a reasonable attorney fee.*** [Emphasis added.]

Rule 137 "serves to penalize the litigant or attorney who pleads false or frivolous matters, or who brings suit without any basis in the law." *In Re Marriage of Schneider,* 298 Ill.App.3d 103, 697 N.E.2d 1161, 232 Ill.Dec. 231 (1st Dist. 1998). When making a determination of monetary sanctions pursuant to Rule 137, the trial court must consider the following: 1) the degree of bad faith by the opposing party, 2) whether an award of fees could deter others from acting under similar circumstances; and 3) the relative merits of the positions. *See Penn v. Gerig,* 334 Ill.App.3d 345, 354, 778 N.E.2d 325, 333, 268 Ill.Dec. 339, 347 (4th Dist. 2002). Plaintiffs had the burden of presenting sufficient evidence from which the Court can

render a decision as to the reasonableness of the requested fees and expenses. *See*Chicago Title & Trust Co. Trustee Under Trust No. 89-044884 v. Chicago Title & Trust Co Trustee No. 1092636, 248 Ill.App.3d 1065, 1072, 618 N.E.2d 949, 954, 188 Ill Dec. 379,384 (1st Dist. 1993).

This Court specifically found that short of conscious disregard and utter indifference for the truth explains how the hospital could make the connection between Cheryl Cretton and Phil Schorfheide but fail to associate him with his notes. The Order entered by this Court on March 17, 2004 further describes the violation of Rule 137 as "unvarnished fabrication," "a meritless privilege objection," "corruption of the self-evaluation process," "perpetuation] the chaos of the early discovery censorship," "discovery subterfuge," and "perjury," to name a few. Clearly, the degree of bad faith in this case went far beyond mere mitake and was an intentional act of misconduct

Finally, there can be no doubt about the relative merits of the parties' positions. Plaintiffs reiterate that the sanctionable misconduct of the Memorial Hospital attorneys began as far back as the initial discovery stages of this litigation, when plaintiffs first propounded the interrogatory inquiring about Cheryl Cretton's conversation with nursing supervisor "Phil." As stated above, Memorial Hospital's false pleading in response to plaintiffs' interrogatory was filed on July 19, 2001 -almost three years ago, and only three months after counsel Doreen Graham entered her appearance for Memorial Hospital. Also accompanying Memorial Hospital's discovery responses at that time was **the false privilege log, signed by Margaret Lowery, in-house general counsel for Memorial Hospital, and verified under oath by a hospital representative. In essence, there was utter disregard for the rules.** Moreover, Edward S. Bott, Jr. entered his appearance on behalf of Memorial Hospital just one month after the false discovery responses were filed. Nevertheless, in the ensuing period of time between August 2001 and August 2003, Mr. Bott never sought to correct the fraudulent pleadings. Instead, Mr. Bott joined the conspiracy, accepting the party-line that the Cretton/Schorfheide conversation never occurred.

When considering whether to award attorneys' fees, the "reasonableness" of attorneys' fees is generally determined by several factors. "In assessing the reasonableness of fees, the trial court should consider a variety of factors, including the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation." *Clay v. County of Cook,* 325 Ill.App.3d 893, 902, 759 N.E.2d 6, 13, 259 Ill.Dec. 526, 533 Dist. 2001). (Citation omitted.) The trial court is permitted to use its own knowledge and experience to assess the time required to complete particular activities." *Olsen v. Stanlak,* 260 Ill.App.3d 856, 866, 632 N.E.2d 168, 176, 198 Ill.Dec. 109, 117 (1st Dist. 1994). "When imposing sanctions, a court has several options, including a 'warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances." *Heckinger v. Welsh,* 339 Ill.App.3d 189, 192, 790 N.E.2d 904, 906, 274 Ill.Dec. 131,133 (2003).

The Fifth District has held that for purposes of determining statutory attorney fees, "the term 'reasonable' applies regardless of the nature of the client's contractual relationship with his attorney." *Blankenship v. Dialist International Corp.,* 209 Ill.App.3d 920, 927, 568 N.E.2d 503, 507, 154 III.Dec. 503, 507 (5th Dist. 1991). However, courts are to consider the contractual foe arrangement between the attorney and client as only one factor in the determination. *Id.* In other cases awarding attorneys' fees, the court's reliance on contingency fee contracts was not considered to be arbitrary. *See e.g. Dunn v. Illinois Central Gulf Railroad Co.,* 215 Ill.App.3d 190, 202, 574 N.E.2d 902, 910, 158 Ill Dec. 789, 797 (4th Dist. 1991). "In those instances where a contingency fee represents the standard remuneration for the type of case involved, the contingency fee may adequately serve as the final award." *Renken v. Northern Illinois Water Co.,* 191 Ill.App.3d 744, 750, 547 N.E.2d 1376, 1380, 138 Ill.Dec. 755, 759 (4th Dist. 1989).

Fees may be recoverable under Rule 137 when they are "lumped" and even for unaccounted time entries. *Riverdale Bank v. Papastratakos,* 266 Ill.App.3d, 203 Ill.Dec. 180, 639 N.E.2d 219 (1994). A party's counsel is not required to record every minute of time spent on a case. Rather, a party should identify the general subject matter involved.Ashley v. Scott, 266 Ill.App.3d 302, 306, 203 Ill.Dec. 757, 640 N.E.2d 677. 680 (1994). Fees incurred in prosecuting the motions for sanctions are also recoverable. *Bosch Die Casting Co. v. Lunt Manufacturing Co.,* 236 Ill.App.3d 18, 33, 177 Ill.Dec. 476, 603 N.E.2d 546, 556 (1992).

Plaintiffs filed several submissions in support of their fees including: Plaintiffs Submission In Support Of Motion For Sanctions Pursuant To Illinois Supreme Court Rule 137; Plaintiffs' Petition For Attorney's Fees And Expenses Pursuant To Illinois Supreme Court Rule 137; Plaintiff's Amended Petition For Attorney's Fees And Expenses Pursuant To Illinois Supreme Court Rule 137 as well as corresponding affidavits, records and time logs.

As the Court initially noted in it March 17, 2004 Order that the "pervasiveness" of Memorial Hospital's misconduct "had its genesis in the July, 1999 discovery fraud and falsity." Therefore, after taking into consideration the extensive brief and attachments filed by both parties and after a Court hearing on the matter, this Court awarded reasonable attorneys' fees in its March 7, 2005, Order in the amount of $125,000.00 and costs in the amount of $4,089.90. The total award of sanctions was therefore $129,089.90.

The Court looked to several factors, "including the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation." *Clay v. County of Cook,* 325 III.App.3d 893, 902, 759 N.E.2d 6, 13, 259 Ill.Dec. 526, 533 (1" Dist. 2001). (Citation omitted.) "The trial judge is permitted to use his own knowledge and experience to assess the time required to complete particular activities...." *Id.* Plaintiffs' counsel is one of a handful of practitioners in southern Illinois who has the experience and expertise in handling these kinds of matters. Such litigation, in and of itself, is more complicated and requires a higher level of litigation experience. Special rules enacted by the Illinois legislature require expert review prior to filing the litigation.**The political**

climate for medical malpractice cases over the past few years has made successful prosecution of the claims more difficult.

More importantly, in this case, there were significant obstacles regarding proof of the event claimed to have occurred by Joyce Cretton, i.e. the fall during transfer. Cretton, the victim who claimed she had been dropped, had died. By the time plaintiffs were able to determine the name of the roommate who allegedly reported the incident to Cheryl Cretton, that roommate had also died. The hospital personnel claimed no knowledge of the incident. More importantly, the**medical** record did not contain any mention of such an incident. Therefore, plaintiffs' counsel was left with the problem of proving that Joyce Cretton had been dropped or had fallen during the transfer from ICU to IMCU based on the statement of Cheryl Cretton and the finding of a subdural hematoma at autopsy.

The plaintiffs' task was even more difficult as a result of the hospital's cover up of the evidence. As the Court noted in its March 17, 2004 Order, “[t]he impact on the case was massive.” Plaintiffs' counsel undertook a significant responsibility in preparing the case for trial and faced reat risk in losing the litigation.

More than two years of work on this case went by from the time the discovery responses and privilege log were filed to the time of trial, when plaintiffs first became aware that a violation had occurred. As a result, the false discovery responses filed by Memorial Hospital became so *inextricably connected* to the way in which this litigation advanced to trial, that an effort to single out plaintiffs' counsel's efforts related *solely* to the hospital's conduct was extremel difficult.

Like most attorneys that handle **medical malpractice** cases, counsel for plaintiffs represented the Cretton family based on a contingency fee agreement. Unlike other attorneys that may keep their time records so that clients may be billed for services rendered, plaintiffs' attorneys do not generally keep a record of time spent on a case - as they are only compensated if they succeed in obtaining a favorable result for their client(s), not on time spent. This type of arrangement is the common business practice of counsel for plaintiffs and was the practice in this case.

Although Illinois law sets a presumptive fee in **medical malpractice** cases, 735 ILCS 5/2-1114 allows the Court certain discretion to review the attorney fees. Specifically, when an attorney provides ‘extraordinary’ services involving more than usual time and participation, the attorney may apply to the Court for an amount in addition to the statutory formula. As the Court has aptly noted, such “extraordinary” services were provided to plaintiffs in this extraordinary case:

In conclusion, the false pleadings filed by the hospital are the cornerstone of the hospital's defense and arc attached on the bottom and the top by a course of conduct employed by the hospital and its attorneys. At the bottom, there is the inadequate investigation into the Cretton complaint and diversion of the truth from the **medical** record. Attached to the top, is a continuing course of conduct to hide evidence document prepared by Schorfheide and machination of that evidence at trial. Since the verdict, enormous effort has been expended

in post-trial proceedings that eventually let the sun shine on hospital's Rule 137 violations and laid bare the darker territory hidden below the surface and behind the facade. (See March 7, 2005, Order, p. 4.)

Without even factoring in the sanctionable conduct by the hospital's counsel, the Cretton case was, as noted previously, not a simple, clear-cut case of negligence where all parties agree on the facts but dispute causation or breach of duty. Rather, plaintiffs **had to prove that the triggering event even occurred. Again, there was no report of a "drop" or "fall" in Joyce Cretton's hospital records' Plaintif had nothing in the patient's own record to substantiate such an allegation. Only the autopsy port of Dr. Harry Parks was available to indicate that Joyce Cretton died as a result of a subdural hematoma, consistent with a drop or fall-type of injury. During the discovery deposition of Dr. Parks, taken by Mr. Bott, the hospital's questioning was aimed at disputing the allegation of the fall. This effort by the hospital's counsel ignored the information kept secret only by the conspiracy of the lawyers representing the hospital. More importantly, this effort exacerbated the impact of the discovery abuse.**

Additionally, as a direct consequence of the hospital's misconduct, plaintiffs' counsel have spent months arguing over this post-trial motion. This effort included a post-trial deposition and filing supporting submissions to this Court. Therefore, the costs and fees awarded by this Court were reasonable and appropriate.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny defendant Memorial Hospital's motion for judgment notwithstanding the verdict deny the motion for a new trial on Plaintiffs' Survival Act claim, deny the motion for **remittitur** or a new trial on damages for Plaintiffs' Survival Act claim, and deny the request for an order vacating the Rule 137 sanctions issued by this Court.