COMMONWEALTH OF KENTUCKY
SUPREME COURT
~~CASE NO. 2010-SC-0818-D~~
CASE NO. 2010-SC-0819-D

NORTON HOSPITALS, INC., d/b/a
NORTON SUBURBAN HOSPITAL,
NEONATAL INTENSIVE CARE EXPERTS II, PLLC,
and KETAN MEHTA, M.D. APPELLANTS

vs.

BRIEF FOR APPELLANTS, NEONATAL INTENSIVE CARE EXPERTS II, PLLC AND KETAN MEHTA, M.D.

BRANDI PEYTON APPELLEE

On Review from Court of Appeals No. 2009-CA-001411-MR
and from Jefferson Circuit Court, Action No. 08-CI-04132

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was mailed this 14th day of October, 2011, to: Jeremy J. Nelson, Esq., Sampson & Slechter, PLLC, 450 South Third Street, 4th Floor, Louisville, Kentucky 40202; Joseph M. Effinger, Esq., William P. Swain, Esq. and Patricia C. Le Meur, Esq., Phillips, Parker, Orberson & Arnett, PLC, 716 West Main Street, Suite 300, Louisville, Kentucky 40202; Hon. Susan Schultz Gibson, Judge Jefferson Circuit Court, Division 12, 700 West Jefferson Street, Louisville, Kentucky 40202; and Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. It is further certified that Appellants have not withdrawn the record on appeal.

Counsel for Appellants, Neonatal Intensive Care Experts II, PLLC and Ketan Mehta, M.D.

INTRODUCTION

This is a medical malpractice case in which the trial court, after hearing arguments of counsel, granted Appellants' Motions For Summary Judgment pursuant to KRS §§ 620.030 and 620.050, upon the trial court's determination that there was no evidence of bad faith in the reporting of toxicology results by Appellants to Child Protective Services and that the Appellants were entitled to statutory immunity from liability for Appellee's claims of emotional distress. The Kentucky Court of Appeals reversed, concluding that there were genuine issues of material fact that precluded summary judgment, and this Court granted Discretionary Review.

STATEMENT CONCERNING ORAL ARUGMENT

Appellants, Neonatal Intensive Care Experts II, PLLC and Ketan Mehta, M.D., do not request oral argument because it is believed that there are no novel or complicated issues of fact or law, and because the trial court's Memorandum and Order granting the Motions for Summary Judgment is adequately explained and supported by the record below, and the briefs filed herein.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Plaintiff Brandi Peyton (hereinafter referred to as "Appellee") entered Norton Suburban Hospital (hereinafter referred as "Appellant Hospital") on April 14, 2007 for an induction of labor scheduled to occur the following morning. She executed the necessary documentation for her admission and gave a medical history, during which she advised the nurse on duty that she had a history of drug and alcohol abuse but denied any current usage. (In point of fact, in the Reply Brief that Appellee submitted to the Court of Appeals, Appellee conceded that she is a recovering drug addict and has had a nearly life-long struggle with addiction.) Prior to Appellee's admission to the Appellant Hospital, Child Protective Services (hereinafter referred to as "CPS") had requested that a toxicology screen be performed on both Appellee and her infant, given Appellee's lengthy history of drug abuse, as well as the fact that she had an open CPS matter involving an older child who had been previously removed from her custody. (See Exhibit 1 to Motion for Discretionary Review filed by Appellants Dr. Mehta and Neonatal Intensive Care Experts II, PLLC). The request made by CPS was noted in the obstetric admitting record as "NEEDS TOX SCREEN PER SOCIAL SERVICES." (Transcript of Record, hereinafter, "T.R", at 307).

On the morning of April 15, 2007, Appellee gave birth as scheduled to a male infant (hereinafter referred to as "K.P."); the delivery was overseen by Appellee's obstetrician, Dr. John Penta. The toxicology screen was completed pursuant to the request made by CPS, and the laboratory report generated as a result of the screen noted Appellee's blood alcohol concentration (BAC) as .3 mg/dl. (T.R. at 310). This concentration was revealed by the test and was correctly reported to CPS. The report also included the legal limit for intoxication in the Commonwealth of Kentucky as a value of 80 mg/dl. While Appellee's BAC of .3 mg/dl did not qualify as legal

intoxication per the laws of the Commonwealth of Kentucky, it is evidence of Appellee's alcohol ingestion during the course of her pregnancy. A meconium screen was also performed following the delivery and was positive for traces of marijuana, supporting a finding of child abuse as Appellee abused illegal drugs during her pregnancy. (T.R. at 310).

Dr. Ketan Mehta (hereinafter referred to as "Appellant Physician"), an attending neonatologist and agent of Neonatal Intensive Care Experts II, PLLC who was on duty on the morning of April 15, 2007, assumed care of K.P. once the infant was received in the neonatal intensive care unit. At all relevant times, Appellant Physician was providing medical care to K.P., and not to Appellee. Upon his review of the aforementioned toxicology report, Appellant Physician authorized the reporting of the results to CPS in terms of blood alcohol percentage (BAP). It is alleged by Appellee in the underlying lawsuit that Appellant Physician was negligent in that he did not perform the task of dividing the blood alcohol concentration, or BAC, to generate the blood alcohol percentage, or BAP, prior to the report being released to CPS. The toxicology report noted that the BAC result, when divided by 1000, gives the BAP. To convert BAC (mg/dl) to BAP (gm%), the amount of milligrams per deciliter is divided by 1000. Stated differently for purposes of the underlying lawsuit, Appellee's BAC was 0.3 mg/dl, or 0.0003 gm%. The benchmark value for legal intoxication in the Commonwealth of Kentucky is 80 mg/dl or 0.08gm%. Appellee has alleged that Appellant Physician incorrectly reported her BAP as 0.3 gm%, so that CPS was incorrectly informed that she exceeded the legal limit for alcohol intoxication. Upon receipt of the report, CPS used the information contained therein to obtain an emergency custody order and remove K.P. from Appellee's custody and place him in foster care. The family court action to remove Appellee's infant son from her custody, which removal was

predicated upon this report, was subsequently voluntarily dismissed by CPS. However, as of the date of the filing of this Brief, Appellee has not retained custody of her son, K.P., now age 4.

Appellee filed this medical malpractice lawsuit in Jefferson Circuit Court on April 17, 2008, suing Appellant Neonatal Intensive Care Experts II, PLLC, Appellant Physician and Appellant Hospital. In her Complaint, Appellee alleged that the Appellant Physician and Appellant Hospital were negligent in interpreting and reporting the results of a toxicology screen to Child Protective Services (hereinafter referred to as "CPS"). (T.R. at 1-6). It is crucial to note that Appellee claims that the Appellant Physician and Appellant Hospital acted negligently in interpreting and reporting the toxicology results, **not** that they acted in bad faith in doing so.

Subsequent to the filing of her Complaint, Appellant Physician and Appellant Hospital filed Motions for Summary Judgment, arguing that there was no evidence of bad faith in the reporting of the toxicology results to CPS and that they were therefore entitled to statutory immunity from liability for the claims of emotional distress made by Appellee in her Complaint, pursuant to KRS §§ 620.030 and 620.050. (T.R. at 178, et seq. and T.R. at 192, et seq.). After hearing arguments of counsel, the trial court, the Hon. Susan Schultz Gibson presiding, entered a Memorandum and Order on May 21, 2009, sustaining the Motions for Summary Judgment. (T.R. at 397, et seq., also attached hereto under Tab 2 to the Appendix). The court determined that as there was no proof of bad faith by Appellant Physician and Appellant Hospital in reporting the toxicology results, that the Appellant Physician and Appellant Hospital were entitled to statutory immunity. (T.R. at 397). The trial court further held that the alleged negligence of the Appellant Physician and Appellant Hospital did not come within the exceptions to immunity set forth in KRS § 620.050(2) and (14). (T.R. at 397).

Appellee appealed the Summary Judgment to the Court of Appeals, which reversed and remanded to the trial court for further proceedings. (Opinion of the Court of Appeals, attached hereto under Tab 1 of the Appendix). In its November 19, 2010 Opinion, the Court of Appeals determined that there were genuine issues of material fact as to whether Appellee's statements of past drug and alcohol abuse triggered the urine and meconium screening, or whether the screening was done at the request of CPS based upon a prior report of abuse of another child. In his concurring opinion, Justice Keller stated that even if the trial court found on remand that Appellant Physician and Appellant Hospital have immunity from criminal and civil liability under KRS § 620.050, that immunity does not extend to any liability they may have for negligence in performing the testing. It is crucial to note that there has been no evidence offered in this lawsuit of negligence in the performance of the actual testing itself.

Appellant Physician and Appellant Neonatal Intensive Care Experts II, PLLC now appeal to this Court on the grounds that the Kentucky Court of Appeals erred in its holding that there existed genuine issues of material fact which precluded summary judgment and required a determination by the jury as to the application of statutory immunity.

ARGUMENT

I.

APPELLANTS' SUMMARY JUDGMENTS SHOULD HAVE BEEN AFFIRMED.

A.

Summary Judgment Should be Reversed Only When the Trial Court Has Abused Its Discretion.

Kentucky Civil Rule 56.03 provides that Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file,

together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party if entitled to a judgment as a matter of law." While it is sometimes said that the movant's burden is to demonstrate that it would be "impossible" for a respondent to produce evidence warranting a judgment in his favor, the Kentucky courts have recognized that the impossibility standard is to be understood "in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). As long as litigants are afforded the opportunity to present evidence which reveals the existence of disputed material facts, and upon the trial court's determination that there are no such disputed facts, summary judgment is appropriate. *Hoke v. Cullinan*, 914 S.W.2d 335, 337 (Ky. 1996).

The standard of review on appeal of a Summary Judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the opposing party was afforded a fair opportunity to file evidence to the contrary. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Appellate courts should not second-guess lower court decisions unless those decisions constitute an abuse of discretion. *Medley v. Board of Education, Shelby County*, 168 S.W.3d 398 (Ky. App. 2004). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004). The appellate court should not substitute its opinion for that of the trial court, absent clear error. *Phillips v. Akers*, 103 S.W.3d 705 (Ky. App. 2002). Indeed, the question is not whether the reviewing court would have decided the issue differently, but whether the opposite result is compelled, or the trial court has abused its discretion. *ARA Services, Inc. v. Pineville Community Hospital*, 2 S.W.3d 104 (Ky. App. 1999).

B.

Dr. Mehta is Immune from Liability Under Applicable Kentucky Law.

Pursuant to the laws of the Commonwealth of Kentucky, ***all*** residents of the Commonwealth have a statutory duty to report suspected cases of child abuse to the proper authorities. This includes Appellant Physician and other health care providers. In pertinent part, KRS § 620.030 provides as follows:

> (1) Any person who knows or has reasonably cause to believe that a child is dependent, neglected, or abused shall immediately cause an oral or written report to be made to a local law enforcement agency . . . Nothing in this section shall relieve individuals of their obligations to report.
>
> . . .
>
> (2) Any person, including but not limited to a physician . . . who knows or has reasonable cause to believe that a child is dependent, neglected, or abused, . . . shall, if requested, in addition to the report required in subsection (1) of this section, file with the local law enforcement agency . . . within forty-eight (48) hours of the original report a written report . . .
>
> . . .
>
> (5) Any person who intentionally violates the provisions of this section shall be guilty of a:
>
> (a) Class B misdemeanor for the first offense;
>
> (b) Class A misdemeanor for the second offense; and
>
> (c) Class D felony for each subsequent offense.

The Kentucky General Assembly has conferred immunity to those individuals, including physicians, who act in good faith in reporting suspected child abuse upon reasonable cause. KRS § 620.050 provides that "anyone acting ***upon reasonable cause*** in the making of a report or acting under KRS §§ 620.030 to 620.050 ***in good faith*** shall have immunity from any liability,

civil or criminal, that might otherwise be incurred or imposed." KRS § 620.050(1)(emphasis added).

Kentucky is not alone in its strict requirement for the reporting of suspected child abuse and its grant of immunity to those who act in good faith in so reporting. Indeed, all 50 states have very similar statutes that require child abuse reporting and also grant immunity. Individuals must report any reasonable suspicion of child abuse or face criminal penalties. Immunity for those individuals is vital as otherwise, they potentially face civil litigation from those reported to be suspected abusers. This clearly was not the intent of the Kentucky legislature as the immunity provision contained in KRS § 620.050(1) is unambiguous and not subject to interpretation. "Allowing doctors to be held civilly liable . . . would be to stifle doctors from reporting suspected cases [of abuse] and would lead to a double edged sword; on the one hand, the doctors would not want to report for fear of misdiagnosis, but on the other hand, if they did not report and their diagnosis was correct, then they would be faced with criminal liability." *Hazlett v. Evans*, 943 F.Supp. 785, 788 (E.D.Ky. 1996). Other state courts which have addressed the issue of immunity for an individual who in good faith reports suspected child abuse have held that the legislative intent behind these statutes is to ensure that healthcare professionals and other individuals who work with children will not be stifled and unwilling to report suspected abuse for fear of reprisal or civil liability. *See Hazlett, id.* at 788, *citing D.L.C. v. Walsh*, 908 S.W.2d 791 (Mo. Ct. App. 1995); *Maples v. Siddiqui*, 450 N.W.2d 529 (Iowa 1990); and *Criswell v. Brentwood Hospital*, 49 Ohio App. 3d 163, 551 N.E.2d 1315 (Ohio Ct. App. 1989).

Whether the report of suspected abuse ultimately is found to be incorrect is inconsequential, so long as the individual who makes the report acts in good faith. In *Garrison v. Leahy-Auer*, 220 S.W.3d 693 (Ky.App. 2006), *reh'g denied* (Dec. 4, 2006), *review denied*

(May 16, 2007), a patient's husband filed suit against the defendant hospital, physician and drug testing laboratory, alleging negligence in the handling of a meconium sample which resulted in the patient and her husband losing custody of their infant child due to suspected drug abuse. It was claimed by the plaintiff in *Garrison* that a false report was made to authorities that their infant child's meconium tested positive for cocaine and marijuana. The Kentucky Court of Appeals held that the doctor was immune from civil liability for the false report under KRS §§ 620.030(1) and 620.050(1), as there was no allegation that she acted in bad faith. *See also Morgan v. Bird*, 289 S.W.3d 222, 227 (Ky.App. 2009)("The Kentucky legislature has effectuated a policy giving great value to the societal benefits of protecting children at the risk of falsely accusing the parent."); and *Hazlett, supra* at 787 ("Because doctors are required to report for fear of criminal charges in failing to do so, it is reasonable to conclude that the legislature felt a responsibility to ensure that if doctors reported a suspected case of child abuse which ***ultimately turned out to be unfounded***, they would not be held liable for their misdiagnosis ***unless it was done with bad intent***.")(Emphasis added).

There was no evidence produced at the trial court level that Appellant Physician acted in bad faith in making the report of the toxicology screening results to CPS. In point of fact, Appellee herself testified in her discovery deposition on April 9, 2009, at pages 61-62, that she has no reason to believe that the Appellants intentionally reported incorrect information to CPS:

> Q: As I understand it, you're not making a claim that either Dr. Mehta or anybody at Suburban Hospital intentionally reported to CPS incorrect information, right?
>
> A: I don't know. All I know is they came in there and said that I was under a blood alcohol level of .30. That's all I know. I don't know how it was there, what was the mistake.

Q: And you assume it was a mistake as opposed to somebody out to get you, right?

A: No.

Q: Somebody doing something intentional, right?

A: No.

Q: You don't have any reason to believe that anyone at the hospital intentionally reported wrong information to CPS?

A: No.

Q: Right?

A: Right.

Q: And you don't have any reason to believe that Dr. Mehta intentionally reported anything to CPS that was incorrect?

A: Right.

Q: And you're not aware of any information or evidence in this case that anybody did anything intentionally; is that correct?

A: Correct.

Appellant Physician was simply complying with his statutory obligation to report suspected abuse of his patient. This is precisely the type of reporting activity that the Kentucky legislature intended to protect with the immunity statute that is KRS § 620.050(1). Appellee alleges that Appellant Physician was negligent in interpreting and reporting the toxicology screening results, but negligence does not amount to bad faith. Allegations of mere negligence on the part of a defendant physician in reporting suspected abuse does not equate to bad faith, and bad faith is the only thing that will defeat immunity for the physician under the mandatory abuse reporting statutes. *See Morgan v. Bird*, 289 S.W.3d 222, 226-27 (Ky.App. 2009) ("The real issue … is whether [the reporting individual] acted in bad faith…The Kentucky legislature has effectuated a

policy giving great value to the societal benefits of protecting children at the risk of falsely accusing the parent.).

II.

THE COURT OF APPEALS ERRED IN ITS REASONS FOR REVERSING THE TRIAL COURT.

A.

How the Toxicology Screen Came About Is Not a Genuine Issue of Material Fact Precluding Summary Judgment.

The Kentucky Court of Appeals, in reversing and remanding this matter back to the trial court, has focused its attention on the issue of fact it believes to exist as to whether the toxicology screening resulted from the Appellee's admissions of past drug and alcohol abuse to Appellant Hospital employees, or if it was done at the request of CPS. This is not a genuine issue of ***material*** fact that precluded summary judgment in favor of the Appellants. How the toxicology screening came about is not the real issue here. KRS § 620.050(1) predicates its grant of immunity on good faith alone, not reasonable cause or anything else. There are two exceptions to the grant of immunity under the statute, but neither is applicable to this case. The Kentucky Court of Appeals' opinion is based upon dicta contained in the case of *Garrison v. Leahy-Auer, supra*, and is contrary to the Court of Appeals' previous interpretations of KRS §§ 620.030 and 620.050 in *Garrison v. Leahy-Auer, supra*, and *Morgan v. Bird, supra.* The Appellants received toxicology results which they believed, in good faith, to be indicative of child abuse. In turn, the Appellants reported the suspected abuse to CPS, as required to do so by KRS § 620.030, again in good faith. That is all that is required by KRS § 620.050 in order for the Appellants to be entitled to immunity.

B.

Failure to Grant Immunity to Physicians and Hospitals Who Report Suspected Abuse In Good Faith Will Stifle the Reporting of Child Abuse, Contrary to the Intention of the Kentucky General Assembly In Enacting the Reporting Statute.

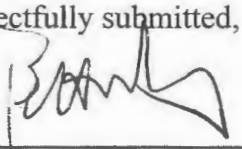
The increasing risk of potential liability for physicians and hospitals who report suspected child abuse in good faith is in direct contradiction to the Kentucky General Assembly's intent in enacting the reporting statute, and will result in a decrease in the number of substantiated reports of child abuse due to fear of liability. If a physician or hospital is not granted immunity in the face of incorrectly reporting suspected child abuse, the physician and/or hospital is placed in a precarious position. If the physician or hospital reports suspected abuse, they would open themselves up to malpractice actions, such as the one presently filed against the Appellant Physician and Appellant Hospital. If they opt to not file a report out of fear of liability, they could be found guilty of a misdemeanor. This certainly cannot be the intention of the Kentucky General Assembly in enacting KRS §§ 620.030 and 620.050.

CONCLUSION

Appellant Physician, Dr. Ketan Mehta, individually and as an agent of Neonatal Intensive Care Experts II, PLLC, has an affirmative statutory duty to report suspected cases of child dependency, neglect, and abuse under KRS 620.030(1) and (2). In fulfilling this duty, individuals who report suspected abuse are from civil and criminal liability so long as they act in good faith. Therefore, Dr. Mehta, who indisputably acted in good faith, is immune from civil prosecution under KRS 620.050(1) for allegedly incorrectly reporting Appellee's blood alcohol test results to CPS, and Summary Judgment was warranted under the circumstances. The

Opinion of the Court of Appeals should be reversed, and the Summary Judgments entered by the Trial Court should be reinstated.

Respectfully submitted,



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