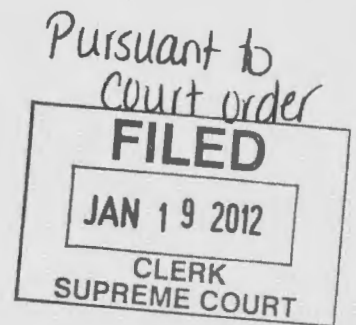


COMMONWEALTH OF KENTUCKY
SUPREME COURT
~~CASE NO. 2010-SC-0818-D~~
CASE NO. 2010-SC-0819-D



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

APPELLANTS

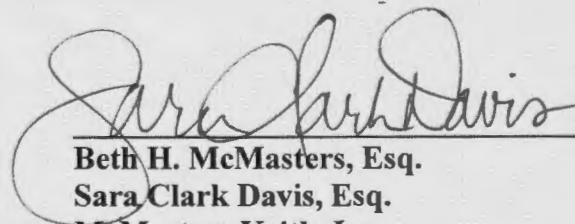
vs.

REPLY BRIEF OF 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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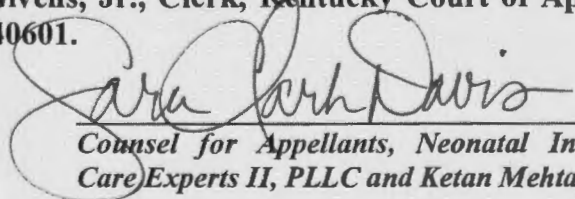
(502) 813-3600

Counsel for Appellants, Neonatal Intensive

Care Experts II, PLLC and Ketan Mehta, M.D.

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was mailed this 13th day of January, 2012, 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.



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

ARGUMENT

I. THERE IS NO EVIDENCE IN THE RECORD WHICH ESTABLISHES THAT APPELLANT MEHTA WAS NEGLIGENT IN CONVEYING THE RESULTS OF THE TOXICOLOGY SCREEN TO CHILD PROTECTIVE SERVICES.

The crux of Appellee's claims against the Appellants in this litigation is that the Appellants negligently reported erroneous information to Child Protective Services ("CPS"). Appellants Mehta and Neonatal Intensive Care Experts II, PLLC ("NICE") adamantly refute any allegations of negligence, noting that all of the information contained in the toxicology report is correct and was properly reported. There has been no evidence offered in this lawsuit of negligence in the performance of the actual testing itself, only that the results of the toxicology screen were reported erroneously. The written toxicology report generated as a result of the toxicology screen correctly noted Appellee's blood alcohol concentration (BAC) as 0.3 mg/dl. This concentration was revealed by the test and was correctly reported to CPS. As conceded by Appellee in her brief, the reporting of BAC in terms of milligrams per deciliter is not uncommon, though blood alcohol is sometimes reported in terms of blood alcohol percentage (BAP). As such, the toxicology report clearly noted that the BAC result of milligrams per deciliter, when divided by 1000, would provide the patient's BAP, or gram percentage. Stated differently for purposes of the underlying lawsuit, Appellee's BAC was 0.3 mg/dl, or 0.0003 gm%. Furthermore, the toxicology report for Appellee notes that the benchmark value for legal intoxication in the Commonwealth of Kentucky is 80 mg/dl. Quite simply put, all of the information contained within the written toxicology report that was forwarded to CPS is correct, and Plaintiff's claims that Appellant Mehta reported erroneous information are baseless.

II. EVEN IF THERE WAS EVIDENCE THAT APPELLANTS WERE NEGLIGENT IN THE REPORTING OF THE TOXICOLOGY RESULTS TO CPS, APPELLANTS ARE STILL IMMUNE FROM LIABILITY UNDER APPLICABLE KENTUCKY LAW.

Pursuant to KRS § 620.030(1), any resident of the Commonwealth of Kentucky who has reasonable cause to suspect child abuse has a duty to report that abuse to the proper authorities. This includes physicians, who must file with the appropriate law enforcement agency a written report which addresses the suspected abuse. KRS § 620.030(3). Failure to abide by this duty results in criminal penalties. In an effort to encourage individuals to report suspected child abuse or neglect and assuage any fear of civil liability to the individual suspected of committing the abuse, the Kentucky Legislature has conferred immunity to those individuals who, upon reasonable cause, report the suspected abuse in good faith. KRS § 620.050(1). Every one of the 50 states has a statute in place similar to KRS §§ 620.030 and 620.050 which requires child abuse reporting and also grants immunity.

Despite Appellee's contentions to the contrary, KRS §§ 620.030 and 620.050 are absolutely applicable to Appellant Mehta. Appellee claims that Appellant Mehta did not have reasonable cause for reporting suspected abuse because he had no reason to suspect that Appellee was intoxicated at the time that Appellee's blood was drawn for the toxicology screen. Rather, Appellee insists that the only reason that a toxicology screen was performed in this instance was because the obstetrical admitting record bore the statement, "NEEDS TOX SCREEN PER SOCIAL SERVICES!!!!!!!!!!!!!!!!!!!!!!!!!" and that such a stated reason does not establish reasonable cause. Furthermore, Appellee maintains that Appellant Mehta had a duty to further investigate this matter by meeting and performing his own evaluation of Appellee to determine if she

appeared to be under the influence of alcohol at the time that the blood was drawn for the toxicology screen.

Appellee's argument that the reporting and immunity provisions contained in KRS §§ 620.030 and 620.050 are inapplicable because the toxicology screen was performed at the behest of CPS is absurd. CPS had requested a toxicology screen be conducted in context with Appellee's past history of substance abuse and the removal of one of her older children from her custody as a result of that abuse. Appellee Mehta had no stronger reason to suspect potential abuse than a request made by CPS, a state agency whose duty it is to investigate suspected child dependency, neglect and abuse cases. The agency's request for a toxicology screen in and of itself established sufficient reasonable cause to suspect potential abuse and order the toxicology screen. Furthermore, Appellant Mehta had no duty, statutory or otherwise, to make further inquiry as to whether Appellee was intoxicated at the time that the toxicology screen was conducted. Dr. Mehta, as a neonatologist, was responsible for caring for Appellee's infant son only; his duties as a physician were owed to the infant only, not Appellee. Additionally, there was no requirement that Appellant Mehta meet with the members of Appellee's medical team and inquire as to what their perception of her was at the time of admission.

These Appellants and Appellee agree on one point and one point only – that this matter is one of basic statutory interpretation. As noted by Appellee in her brief, the “necessary starting point of any exercise in statutory interpretation [is] the plain language of the statute.” *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 373 (2000)(*dissent authored by Justice Stevens*). The applicable statutes in this instance state that “any person who knows or has reasonable cause to believe that a child is neglected or abused shall immediately cause an oral or written report to be

made to a local law enforcement agency ...”, and that “anyone acting upon reasonable cause in the making of [such] 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 § 620.030, KRS § 620.050. In the matter presently before the Court, Appellants acted both upon reasonable cause and in good faith in forwarding to CPS the results of Appellee’s toxicology screen and the subsequent meconium screen which was positive for marijuana. This is precisely the type of situation to which KRS § 620.050 is applicable. The legislative intent behind this statute is to ensure that the Commonwealth’s residents, including healthcare professionals and other individuals who work directly with children, will not be stifled and unwilling to report suspected abuse for fear of reprisal or civil liability. *Hazlett v. Evans*, 943 F.Supp. 785, 788 (E.D.Ky. 1996). As noted in *Hazlett* by the U.S. District Court for the Eastern District of Kentucky, the first court to interpret the immunity provision set forth in KRS § 620.050, “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.” *Id.* at 788.

Kentucky’s appellate courts have already determined that 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. The plaintiff claimed that a false report was made to authorities that the infant's meconium tested positive for cocaine and marijuana. The Kentucky Court of Appeals held that the physician was immune from liability for the erroneous report under KRS §§ 620.030(1) and 620.050(1), as there was no allegation that the physician in that case acted in bad faith. *See also 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).

The most recent occasion where the Kentucky judiciary has revisited the immunity provision set forth in KRS § 620.050(1) was in the case of *Morgan v. Bird*, 289 S.W.3d 222 (Ky.App. 2009), wherein the Kentucky Court of Appeals stated that "[T]he 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". *Id.* at 226-27. Appellee herself has conceded in sworn testimony provided in the trial court action that Appellants did not act in bad faith when the report of the toxicology screening results was forwarded to CPS. In her discovery deposition on April 9, 2009, Appellee acknowledged that she had absolutely 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.

(Deposition of Brandi Peyton, pp. 61-62).

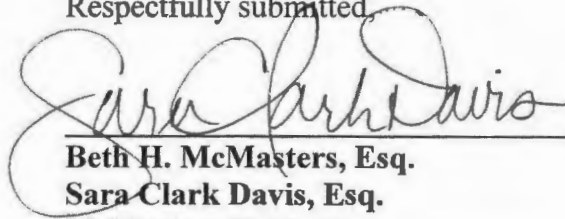
In this matter, Appellant Mehta was simply complying with his statutory obligation to report suspected abuse of his patient, Appellee's infant son. This is precisely the type of reporting activity that the Kentucky legislature intended to protect with the immunity statute that

is KRS § 620.050(1). Appellee alleges that Appellant Mehta was negligent in reporting the toxicology screening results (which were, in fact, reported correctly), 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. 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.

CONCLUSION

Appellant Dr. Ketan Mehta, individually and as an agent of Appellant 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 free 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,

A handwritten signature in cursive script, reading "Sara Clark Davis". The signature is written in black ink and is positioned above a horizontal line.

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