COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2010-SC-0819-D

NORTON HOSPITAL, INC. D/B/A NORTON SUBURBAN HOSPITALS, NEONATAL INTENSIVE CARE EXPERTS II, PLLC, AND KETAN MEHTA, M.D. — **APPELLANT**

v.

BRANDI PEYTON — **APPELLEE**

*** *** ***

On Review From Court of Appeals No. 2009-CA-001411-MR and
Jefferson Circuit Court, Division 12
Civil Action No. 08-CI-04132
Hon. Susan Schultz Gibson, Judge, Presiding

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Brief for Appellee, Brandi Peyton

*** *** ***

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It is hereby certified that true and correct copies of this Brief of the Appellee were mailed this 16th day of December, 2011 to: Hon. William P. Swain, III, Hon. Joseph M. Effinger, and Hon. Patricia C. Le Meur of Phillips, Parker, Orberson, & Arnett, PLC, 716 West Main Street, Suite 300, Louisville, Kentucky 40202; and Hon. Beth H. McMasters and Hon. Sara Clark Davis, McMasters Keith, Inc., 200 South Fifth Street, Suite 200N, First Trust Centre, Louisville, Kentucky 40202; Hon. Susan Schultz Gibson, Judge, Jefferson Circuit Court, Division 12, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202, Trial Judge; and Samuel Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601.

Jeremy J. Nelson

INTRODUCTION

This is a simple medical negligence claim against Dr. Ketan Mehta, Norton Hospital, Inc. d/b/a Suburban Hospitals ("Norton"), and Neonatal Intensive Care Experts II, PLLC ("NICE"). Appellee/Plaintiff has alleged (i) Dr. Mehta, individually and as an agent of NICE and Norton, is directly liable for negligently reporting erroneous medical information to child protective services ("CPS"); (ii) NICE and Norton are vicariously liable for Dr. Mehta's negligence, and (iii) Norton is directly liable for reporting erroneous medical information to CPS.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee does not request oral argument because it is believed that the Circuit Court correctly reversed the decision of the trial court.

STATEMENT OF POINTS AND AUTHORITIES

STATUTORY LAW

CASE LAW

LAW REVIEWS & TREATISES

OTHER DOCUMENTS

STATEMENT OF THE CASE

On April 14, 2007 at approximately 11:30 p.m. Brandi Peyton, pregnant, checked herself into Norton for a scheduled induction to be performed the following morning. At the intake desk Peyton provided the nurse with a detailed medical history, read, and executed all necessary admission paperwork including a number of legal documents. Minutes later, when she reached the obstetrics ward, Peyton provided even more detailed medical information to the nurse on duty. (Exhibit A) At no time, during either of these intake interviews, did any hospital staff note the appearance of intoxication in Peyton's demeanor. Neither did Peyton make any statement which would have alerted hospital staff to a situation imminently threatening the health or wellbeing of her unborn son.

Despite the absolute absence of any evidence of any threat to her unborn son, Dr. Mehta (hereinafter Dr. Mehta and NICE shall be individually and collectively referred to as "Appellant"), the attending neonatologist on duty who ***never***, during her hospital stay, laid eyes on Peyton, and Norton authorized reporting to CPS that Peyton's blood alcohol tested for intoxicants. Dr. Mehta's report indicated Peyton was ***4 times above*** the legal limit for alcohol intoxication when, in fact, the results actually revealed she was ***266 times below*** the legal limit. Notably, Dr. John Penta, who delivered Kameron, testified in the family court case related to this matter that he never noticed Peyton to exhibit any signs of intoxication. Had Peyton been intoxicated to the degree reported by Appellant it is unlikely she would have been conscious at the moment she entered Norton, let alone able and of sound mind sufficient to execute legal documents without raising an eyebrow.

Notably Peyton voluntarily admitted past drug and alcohol use. However, and it bears stating emphatically, ***she denied any current use*** and no medical record, including the record at

the center of this issue indicated otherwise. It was, by all accounts, this voluntary admission which triggered a toxicology screening request from CPS, not any suspicion (reasonable or otherwise) by Appellant of intoxication.[1] (Exhibit B) The next morning Peyton gave birth to a healthy baby boy, Kameron.

Concerning the toxicology report generated by Norton's toxicology laboratory, the report indicated Peyton had a Blood Alcohol Concentration ("BAC") of 0.3 mg/dL. (Exhibit C) For purposes of comparison, the report also provided the threshold value for legal intoxication in Kentucky directly below the reported BAC: 80 mg/dL – a value which Peyton's results indicated she was *266 times* below.

It is important to understand, while reporting BAC in terms of grams per deciliter (gm/dL) is not uncommon, blood alcohol is more commonly understood in terms of the related value of blood alcohol percentage ("BAP"). The conversion from BAC to BAP requires simple division of the BAC value by 1000 – this too was clearly noted on the toxicology report attached as Exhibit C. To summarize, the toxicology report listed Peyton's BAC as 0.3 gm/dL or (after performing the elementary division by 1000) .0003 gm%. In Kentucky the threshold value for legal intoxication is 80 gm/dL or .08 gm%.[2]

With the understanding that the BAP number is vastly more common in our vernacular than is the BAC number, Appellant authorized a report to CPS: Peyton's results revealed a " '0.3

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[1] This is directly contrary to the recital of the case in the Memorandum and Order: Jefferson Circ. Ct. and this misunderstanding of the facts of this case was foundational to the Circuit Court's decision. Granting immunity to Norton, Dr. Mehta, and NICE, the Circuit Court stated, "the record reflects that the test was performed before the abuse report was filed." Memorandum and Order: Jefferson Circ. Ct., p. 5. This is **wrong**; but for CPS's request – "NEEDS TOX SCREEN PER SOCIAL SERVICES!!!!!!!!!!!!!!!!!!!!" – the toxicology screen would not have been performed. It was on this issue the Kentucky Court or Appeals overruled the Circuit Court.

[2] A consulted, but un-deposed expert, Dr. Sayeed Jortani will testify, if allowed, that such a miniscule amount of alcohol is present in every individual at any given time and is no indication of recent alcohol use.

Ethyl Alcohol level as high' on the [blood] test." (Exhibit D) That report to CPS was wrong on two counts. First, Norton and Appellant failed to make a critical distinction between BAC and BAP in their communication with CPS and any reasonable person would have assumed that the report was of a BAP of 0.3 gm% not the correct BAC of 0.3 gm/dL. Second, any contention by Appellant that the BAC was correctly communicated to CPS is inaccurate; Appellant was careful to communicate to CPS that the value was "high." Brief of Appellant, p. 1. Appellant failed to either accurately read and understand the report or effectively communicate its contents to CPS.

In reliance on the grossly inaccurate information provided by Norton and Appellant, CPS removed Kameron from Peyton's custody prior to Peyton's discharge from the hospital. Two days after giving birth to a healthy son, she was forced to leave the hospital without him. Instead, the two-day old infant was discharged to foster care. To date, Peyton has been unable to regain custody of her son[3]; custody that would not have been taken from her had Appellant correctly read a simple toxicology report.

On April 14, 2008 Peyton filed suit in the Jefferson Circuit Court alleging, among other things, medical malpractice on the part of Appellant and Norton for negligence in generating, interpreting, and reporting the results of the toxicology report.

On February 19, 2009 Appellant filed a Motion for Summary Judgment on the basis that Dr. Mehta, individually and as an agent of NICE, was immune from civil prosecution under KRS 620.030 (1) and (2) and KRS 620.050 (1). On February 27, 2009, Norton filed a Motion for Summary Judgment asserting identical immunity issues as well a lack of vicarious liability for

[3] The Jefferson County Family Court matter lingered for more than six months – a matter predicated on Dr. Mehta and Norton's error. The foster parents applied for and were granted permanent custody after the six month period for doing so expired. Peyton desires the return of her son but lacks the resources to achieve that goal.

the actions of Appellant. On May 18, 2009, the Jefferson County Circuit Court sustained both Motions for Summary Judgment. This case was dismissed with prejudice.

Following an appeal by Peyton to the Kentucky Court of Appeals the matter was reversed and remanded to the Jefferson County Circuit Court for further proceedings on November 19, 2010.

This matter is now before this Court due to the granting of Appellant's Motion for Discretionary Review.

ARGUMENT

This is a medical negligence action centering on the question as to whether immunity from civil liability exists despite a breach of the duty of care owed by a physician and hospital, leading to significant harm.

A. THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT WAS AN ABUSE OF DISCRETION.

Appellant takes the position that the Court of Appeals shold not have overturned the decision of the Circuit Court unless the Circuit Court abused its discretion in granting summary judgment. To that point, Appellant states, "the test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Brief of Appellant, p. 5. It was the fourth prong by which the Circuit Court was overturned. Plainly put, the Court of Appeals determined that the trial court erred in granting summary judgment on the basis of a decision unsupported by sound legal principles.

As this Court is aware, the decision of the Court of Appeals was based on the premise that for Appellant and Norton to inure to the benefit of the immunity statute, there must have been some independent reason for their belief that Peyton had abused or neglected Kameron. It is clear from the record that no such belief – reasonable or unreasonable, in good or bad faith – existed to motivate Appellant to make the report to CPS. In other words, Appellant simply made the report because CPS asked him to and in doing so he (contrary to Appellant's assertions) did so negligently. As a result of Appellant's lack of any independent suspicion of abuse, Appellant did not act according to KRS § 620.030 (1) and cannot be immune according to KRS § 620.050 (1). Alternatively, KRS 620.050 (14) eliminates any alleged immunity as Appellant acted negligently and with reckless disregard for Peyton's maternal rights.

It is this wrong interpretation of Kentucky law, wherein the Circuit Court made a decision unsupported by sound legal principles that was the basis for the Court of Appeals decision.

B. THIS MATTER IS ONE OF BASIC STATUTORY INTERPRETATION AND THIS COURT'S DECISION WILL NECESSARILY REST ON WELL SETTLED MAXIMS OF STATUTORY INTERPRETATION.

Affording Appellant immunity pursuant to KRS 620.050(1) is against legislative intent and will lead to an absurd result.

It is a well settled axiom of the law that 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 by Justice Stevens*). Moreover, "giving each phrase its own meaning [is] consistent with established principles of statutory interpretation." *Carcieri v. Salazar*, 129 S. Ct. 1058, 1071 (2009). "The legislature is presumed to intend that a statute be given a reasonable construction so as to avoid unreasonable or absurd results." *Commonwealth v. Whitlow*, 223 S.W.2d 100 (1949). "All statutes are presumed to be enacted for the furtherance of the stated purpose of the legislature, and they should be construed so as to accomplish that end rather than to render them nugatory." *Reyes v. Hardin County*, 55 S.W.3d 337 (Ky. 2001). This brief will show that applying these simple maxims of statutory interpretation require this court to uphold the decision of the Kentucky Court of Appeals.

At issue in this case are the following statutes:

Kentucky Revised Statute § 600.010 (g):

> It shall further be the policy of this Commonwealth to provide judicial procedures in which rights and interests of all parties, including the parents and victims, are recognized and all parties are assured prompt and fair hearings.

Kentucky Revised Statute § 620.030 (1), in pertinent part:

> Any person who ***knows*** or ***has reasonable 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 or the Department of Kentucky State Police; the cabinet or its designated representative; the Commonwealth's attorney or the county attorney; by telephone or otherwise.[4]

(*emphasis added*)

Kentucky Revised Statutes § 620.050 (1):

> 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.

(*emphasis added*)

Kentucky Revised Statutes § 620.050 (14):

> As a result of any report of suspected child abuse or neglect, photographs and X-rays or other appropriate medical diagnostic procedures may be taken or caused to be taken, without the consent of the parent or other person exercising custodial control or supervision of the child, as a part of the medical evaluation or investigation of these reports. These photographs and X-rays or results of other medical diagnostic procedures may be introduced into evidence in any subsequent judicial proceedings. The person performing the diagnostic procedures or taking photographs or X-rays shall be immune from criminal or civil liability for having performed the act. ***Nothing herein shall limit liability for negligence.***

(*emphasis added*)

C. KRS § 620.050 (1) Does Not Confer Immunity on This Appellant; Such a Result Would Thwart Legislative Intent.

Appellant has asserted – at every level – it is immune from both direct and indirect liability as it was acting pursuant to KRS 620.030 (1) in reporting the falsely suspected abuse.

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[4] This brief will not discuss KRS§ 620.030 (2) as that section (i) addresses clerical issues not pertinent to this matter and (ii) was not addressed by the Court of Appeals.

Accordingly, it argues, KRS 620.050 (1) confers immunity on it and its agents rendering this action a nullity.

i. KRS § 600.010 Requires Recognition of the Rights of All Parties.

Certainly KRS § 620.050 (1) affords immunity in certain circumstances. However, that immunity is simply not as broad as Appellant suggests. Appellant would have this Court believe, in the absence of bad faith, anyone making a report of abuse or neglect, no matter how unfounded, is immune from all prosecution. Simply put, that proposition is contrary to the clear language of Kentucky's Juvenile Justice Code, KRS § 600 through § 645. What is more, under the circumstances of this case, conferring such immunity only visits grave injustice on Peyton, thwarting clear legislative intent to the contrary.

KRS § 600.010 (g) [5] addresses the whole of the Kentucky Unified Juvenile Code and is pertinent to a just and clear interpretation of all of KRS § 620, especially KRS § 620.050 and the immunity rules enumerated in that section.

The language of KRS § 600.010 (g) is clear: ***all*** proceedings are to be designed to protect the interests of ***all*** parties involved. This logically extends to the judicial recognition of immunity for an individual or group when a report of abuse or neglect is made over and above the right of an injured party. Thus, prior to granting immunity under KRS § 620.050 (1) Kentucky's courts must take steps to recognize the rights and interests of all parties. In this case, that means recognizing the grievous injustice visited upon Peyton by Appellant's negligent and careless production and interpretation of the toxicology report. Even without a statutory carve-out from immunity, conferring immunity in the face of such an egregiously negligent act would only serve to thwart justice and fly in the face of KRS § 600.010 (g).

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[5] KRS § 600.010 is incorporated by reference into KRS § 620 by KRS § 620.010.

No doubt public policy ought to favor reporting suspected abuse as the goal of protecting children should be of paramount importance in any society. However, any policy consideration must be subject to a balancing test and this is profoundly important where individual liberty is at stake. *See generally, Preston v. Meigs*, 464 S.W.2d 271, 273 (1971) and *S.J.L.S.* v. *T.L.S.*, 265 S.W.3d 804, 832; (Ky. App. 2008). To be clear, Appellee is not advocating balancing the interest of an apparently abused child against the interest of a suspected abusive or neglectful parent. Rather, Appellee asks this Court to recognize the already statutorily required balance between (i) the potential damage caused by the proffering of an erroneous report of abuse, dependency, or neglect against (ii) the simple task of making a responsible investigation into those suspicions.

In this case, Peyton and Kameron were confined to the hospital for two more days after the issuance of the toxicology report; Kameron was in no immediate danger. Appellant had ample time to (i) reread the report prior to issuing the results, (ii) consult with anyone as to the results contained in the report, (iii) consult with anyone else on Peyton's medical team regarding their impressions, (iv) meet with and perform his own evaluation of Peyton, or (v) simply review her medical chart to see if his flawed understanding of the report was supported by any other evidence. Appellant did none of those things; he simply, yet incorrectly, read the report and relayed their flawed understanding of its contents to CPS.

ii. KRS §§ 620.030 (1) and 620.050 (1) Require the Reporter to Act with Reasonable Cause.

Appellant repeats its theme that "immunity statutes are not predicated on 'reasonable cause,' but rather on 'good faith.' " *Hazlett v. Evans*, 943 F.Supp. 785, 787-88 (E.D. Ky. 1996). However, that position flies in the face of the clear language of both KRS § 620.030 (1) and §

620.050 (1), both of which require an abuse report only where the reporter is making the report with some "reasonable cause." *See* KRS § 620.030 (1) and 620.050 (1).

Nevertheless the unfortunate (and incorrect) *Hazlett* decision only served to complicate the issue. Despite the U.S. District Court's best intentions, that court incorrectly interpreted Kentucky law. Moreover, such a reading is a clearly in opposition to the statutory intent. The phrase "reasonable cause" is both present in the statute and has a clear meaning. By reading out that language, the Federal District Court deemed any report of abuse, ***regardless of its merits***, valid so long as the one making the report acted in with intentions somewhere between good and neutral. Such a reading of the statute is ludicrous.

As addressed by the Kentucky Court of Appeals, *Garrison v. Leahy-Auer*, 220 S.W.3d 693 (Ky. App. 2006) also created significant confusion wherein that court adopted a position similar to the *Hazlett* court. Specifically, the *Garrison* court stated:

> Under KRS 620.030 (1) any person who knows or has reasonable cause to believe a child has been abused shall immediately report the matter to the proper authority...If a person is "acting upon reasonable cause in the making of a report or acting under KRS 620.030 to 620.050 in good faith[,]" KRS 620.050 (1) provides that person with "immunity from liability, civil or criminal, that might otherwise be incurred or imposed." In this case there is no allegation that [the Defendant physician] acted in bad faith.

Garrison, 220 S.W.3d at 699-700. This is, of course, a particularly troubling result as the *Garrison* court simply ignored the phrase "reasonable cause." It is this sort of flawed thinking that the Appellant would have this court adopt, despite clear statutory language to the contrary.

Moreover other outside sources clearly underscore the need for reasonable cause to be a significant factor in a reporter's decision to report:

> When a reporter demonstrates that he or she had a reasonable cause to suspect or believe that the child had been abused, the reporter will generally have met the burden of establishing that

> there is no genuine issue of material fact as to whether he or she acted in good faith when making the report.

MATTHEW BENDER'S, *Family Law and Practice*, Chapter 66, Sect. 66.06[3][a]. Clearly the language above recognizes reasonable cause as the linchpin to the question of good faith. The converse of Bender's statement is that failure to establish reasonable cause creates a question of material fact as to the question of good faith. This is wholly in line with the statutes at issue in this matter as KRS § 620.030 (1) states, "Any person who ***knows*** or ***has reasonable cause to believe*** that a child is dependent, neglected, or abused..." and KRS § 620.050 (1), reads, "Anyone acting upon ***reasonable cause*** in the making of a report ..." Certainly the legislature of Kentucky did not intend the phrase "reasonable cause" to be superfluous, but used that phrase and its attendant conceptual framework as the gate keeper to immunity.

Again, the "necessary starting point of any exercise in statutory interpretation [is] the plain language of the statute." *Reno*, 528 U.S. at 373. This Kentucky Supreme Court has said, "[t]he general rule of statutory interpretation is that effect must be given where possible to every word in a statute." *Wilkins v. Bax*, 262 S.W.2d 663, 664 (1953) (emphasis added). Thus, inasmuch as the phrase "reasonable cause" is written into the statute, consideration of "reasonable cause" is vital.

Any decision failing to recognize reasonable cause is simply erroneous. In this case the trial court erred when it failed to consider reasonable cause in its determination regarding Appellant's immunity as allegedly conferred by KRS § 620.050 (1).[6] Even a cursory analysis of the existence of reasonable cause, as required under the statute, reveals Appellant acted in the absence of any such reasonable cause.

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[6] Though the trial court cannot bear all of the blame; it was bound by the flawed precedent of *Garrison*. It is incumbent on this Court to undo the damage of *Garrison* and *Hazlett* and clearly underscore that all of the language of the statute must be read with the importance intended by its very inclusion in the statute.

iii. KRS § 620.050 (1) is Inapplicable; Appellant Were Not Acting Pursuant to KRS § 620.030 (1).

According to the plain language of KRS 620.030 (1), that section only applies where a "person who knows or has reasonable cause to believe that a child is dependent, neglected, or abused." KRS § 620.030 (1). The Kentucky Court of Appeals correctly determined Appellants simply do not inure to the benefit of KRS § 620.050 (1) as that section only affords immunity to individuals acting pursuant to KRS § 620.030 (1). Stated differently, Appellant has argued, pursuant to KRS § 620.030 (1) that it and its agents were statutorily required to make a report of suspected child abuse as they had reason to believe Peyton was intoxicated at the time of the administration of the toxicology screen. However, at no level of the proceedings related to this matter has anyone on behalf of any Appellant asserted a belief that the toxicology screening was the result of suspected abuse, dependency, or neglect on the part of Peyton. In fact, but for the notation in Ms. Peyton's file, "NEEDS TOX SCREEN PER SOCIAL SERVICES!!!!!!!!!!!!!!!!!!!!," no such toxicology screen would have been performed.

The result is clear: Appellant did not act under a reasonable suspicion of abuse, dependency, or neglect. Appellants acted only at the behest of CPS. As a result, neither Appellant was acting pursuant to the plain language of KRS § 620.030 (1). And, since KRS § 620.030 (1) was not the basis of their actions, KRS § 620.050 (1) was not triggered and can offer no protection.

iv. KRS § 620.050 (14) Plainly Excepts Medical Negligence from Immunity.

Assuming, *arguendo*, Appellant was acting pursuant to KRS § 620.030 (1), neither Appellant can qualify for statutory immunity. Appellant makes much of the fact that immunity for reporting abuse, etc. is fundamental to encouraging reporting.

Kentucky's legislature recognized qualified, not unfettered immunity. Certain ***specific*** exceptions to statutory immunity were carved out under KRS 620.050. In addition to the carve-outs for bad faith and maliciousness in KRS § 620.050 (1), the legislature also carved out immunity under KRS 620.050 (14) for, among other things, negligence: ***"Nothing herein shall limit liability for negligence."*** KRS §620.050 (14) (*emphasis added*). Again, there is no question "Qualified immunity from civil liability is usually granted to one who reports, even where the statute expressly creates civil liability for failing to report. Qualified immunity also commonly shields a reporter from any civil liability that may arise from tort actions brought by the abuser against the reporter, such as invasion of privacy or libel." Steven J. Singley, *Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters*, 19 J. Juv. L. 236, 271 (1998). To that point, Kentucky's statute necessarily provides the exact sort of immunity described above, but intentionally and unequivocally goes one step further specifically excluding negligence.

Moreover, Appellant makes much of its belief that it and its agents were required to report. However, there was no basis for any suspicion of abuse and, as such, no requirement. Additionally, as the author of the law review article above points out, "Because immunity is given for reporting, and liability is imposed for failing to report, an obvious temptation for reporters to simply report to shield themselves from liability is created." *Id.* at 246. This reasoning begs the question: Where do we draw the line, is the Commonwealth comfortable with the negligent character assignation of any random Kentucky parent because of overly skittish physicians, even overly skittish physicians who cannot perform simple third grade mathematics?

In summarily dismissing this case, the Trial Court quoted *Garrison v. Leahy-Auer*, 220 S.W.3d 693 (Ky. App. 2006): "Subsection (14) of KRS 620.050 specifically provides an exception to immunity if the person acted negligently in performing medical diagnostic procedures at the

request of the Cabinet based upon a report of abuse." Memorandum and Order of Jefferson Circuit Court, Division 12 *citing Garrison*, 220 S.W.3d at 700. Although KRS § 620.050 (14) generally regards the gathering of diagnostic evidence in conjunction with suspected abuse, the statute must be read in both in its entirety with appropriate weight given to the plain language of each clause. Thus, the negligent act extends beyond mere gathering to the actual interpretation of that evidence.

The first three sentences speak only to the issues of (i) evidence gathering without otherwise necessary consent, (ii) procedural issues regarding the presentation of evidence, and (iii) immunity to medical providers or other individual for the mere act of collecting the evidence. Nothing in the first three sentences grants immunity for medical negligence; immunity is only granted "for having performed the act," nothing more. *Id.* If each phrase is to be read according to its own meaning, then the last phrase says exactly what it purports to say: "Nothing herein shall limit liability for negligence." *Id.* The statement can be no clearer.

In the event a person has gathered medical or other diagnostic information pursuant to the first clause in KRS § 620.050 (14) and has turned over that evidence pursuant to the second clause, that individual may be immune for civil or criminal prosecution "for having performed the act" under the third clause. *Id.* However, nothing in KRS § 620.050 (14) limits liability for negligence. *Id.* Any other reading would yield the absurd result wherein a physician or other medical personnel could gather evidence and commit a medically negligent act, but continue to be immune from any consequence. This is the exact sort of absurdity Appellant would have this court support.

By way of example, if Appellant's position is correct, if a physician who negligently inserted a dirty needle into an individual – in an effort to draw blood for evidence of drug or alcohol use by that individual – caused the individual to contract a life threatening illness that

physician would be immune from civil liability. Certainly the Legislature could not have intended such an absurd result. Again the language of KRS § 620.050 (14) is clear: "***Nothing*** herein shall limit liability for negligence." *Id.* (emphasis added)

D. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON AN INCOMPLETE RECORD.

Kentucky Rule of Civil Procedure 56.03, the relevant rule concerning Motions for Summary Judgment states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no *genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law. Ky. R. Civ. P. 56.03 (*emphasis added*)

Additionally, *Steelvest v. Scansteel* held, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a *genuine issue of material fact* for trial." *Steelvest v. Scansteel Ser. Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991) (*emphasis added*). Both the rule set forth in the Civil Rules and that of *Steelvest* are correct, a genuine issue of material fact must be asserted.

However, *Steelevest* also specifically held that, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Id.* at 480. Thus, even the slightest issue of disputed material fact must be viewed in a manner most favorable to the nonmovant and judgment rendered in the nonmovant's favor. Otherwise, the *Steelvest* court's mandate that "summary judgment is to be cautiously applied" and "only be used 'to terminate litigation when, as a matter of law, it appears that it would be *impossible* for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant' " is for naught. *Id.* at 483 (*emphasis added*).

Further the Kentucky Supreme Court has held that "[a] party moving for summary judgment bears the burden of demonstrating entitlement to such relief. *When the record is incomplete and the Court would be required to draw inferences or find facts, summary judgment is inappropriate.* This Court has long applied a stringent standard to motions for summary judgment, stating that the motion should not be granted unless it appears to be 'impossible' for the non-moving party to prevail at trial." *Bank One, Kentucky, N.A., v. Murphy*, 52 S.W.3d 540, 545 (2001) (*citing Hubble v. Johnson*, 841 S.W.2d 169, 171 (1992) and *Steelvest, Inc. v. Scan Steel Service Center, Inc.*, 807 S.W.2d 476 (1991).

Such is the case here. Acquiring relevant evidentiary information has been a laborious and lengthy task. As such, Appellee has not had an opportunity to take the deposition of any representative of any Appellant nor has Appellant taken the deposition of Appellee's expert witness, Saeed Jortani, Ph.D. (Exhibit D) As such, the issue of whether Appellant acted in good faith and upon reasonable cause has yet to be determined. If evidence does exist that would call into question the motivation of any Appellant, it would be possible for Appellee to prevail at trial.

Further, to the extent that reasonable cause is an issue necessary to be determined, whether as a factual or legal question, the testimony of Dr. Jortani would be vital to establishing the egregiousness of the negligently produced and interpreted toxicology report. In short, Appellant believes Dr. Jortani's testimony would be sufficient to call into question the reasonableness of Dr. Mehta's actions.

Appellee recognizes that protecting children from neglect and abuse is vital to a healthy Commonwealth. However, even in light of that goal, medical providers cannot be allowed to make haphazard decisions and diagnoses that are clearly negligent and arguably reckless under the guise of statutory immunity.

CONCLUSION

Appellant made and authorized the reporting of results of a clean toxicology screen as indicating Peyton had a blood alcohol level 4 times the legal limit. This reporting to CPS of Peyton's blood alcohol in terms of BAP rather than BAC, without performing the simple task of dividing the result by 1000 prior to making the report resulted in Peyton's son being removed from her custody prior to leaving the hospital with him. Moreover, Appellant never actually laid eyes on Peyton. His only "interaction" with her consisted of a misdiagnosis that no one has disputed. He had no personal belief that Peyton was under the influence nor that Kameron was abused or neglected.

Based upon the foregoing, Appellee respectfully requests this Court uphold the decision of the Kentucky Court of Appeals and remand this matter to the Jefferson County Circuit Court for further proceedings.

Respectfully submitted,

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