SUPREME COURT OF KENTUCKY

File No. 2010-SC-0818-D
(2009-CA-001411)

NORTON HOSPITALS, INC. d/b/a
NORTON SUBURBAN HOSPITAL — APPELLANT

vs.

BRANDI PEYTON — APPELLEE

Appeal from Jefferson Circuit Court, Division 12
Civil Action No. 08-CI-04132
Hon. Susan Schultz Gibson, Judge, Presiding

BRIEF FOR APPELLANT, NORTON HOSPITALS, INC. d/b/a NORTON SUBURBAN HOSPITAL

Submitted by:

WILLIAM P. SWAIN
JOSEPH M. EFFINGER
PATRICIA C. LE MEUR
PHILLIPS PARKER ORBERSON & ARNETT, PLC
716 West Main Street, Suite 300
Louisville, Kentucky 40202
(502) 583-9900
COUNSEL FOR APPELLANT,
NORTON HOSPITALS, INC.
d/b/a NORTON SUBURBAN HOSPITAL

It is hereby certified that copies of the within brief were served by mail this 14th day of October, 2011 upon: Hon. Jeremy J. Nelson, 450 South Third Street, Fourth Floor, Louisville, KY 40202, Counsel for Appellee; Hon. Beth H. McMasters and Hon. Sara Clark Davis, McMasters Keith, Inc., 200 South Fifth Street, Suite 200N, First Trust Centre, Louisville, KY 40202, Counsel for Neonatal Intensive Care Experts II PLLC and Ketan Mehta, M.D.; Hon. Susan Schultz Gibson, Judge, Jefferson Circuit Court, Division 12, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, Trial Judge; and Samuel Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601.

W. B.

William P. Swain

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vs. **BRIEF FOR APPELLANT**

BRANDI PEYTON — APPELLEES

May it Please the Court:

INTRODUCTION

This is an action which seeks monetary damages for emotional distress allegedly arising out of the placement of the infant child of the Plaintiff Brandi Peyton in foster care following various reports generated by healthcare providers which are suggestive of child abuse. The plaintiff does not allege nor suggest that the defendants acted in bad faith - but merely that there are genuine issues of material fact pertaining to their negligence. (Complaint, Transcript of Record, 1-6).

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Nature of the Proceedings

The trial court granted summary judgment (Transcript of Record, 397) (Exhibit 2) in favor of the defendants on the grounds that there was no showing of bad faith, thereby entitling them to statutory immunity from liability for the plaintiff's claims of emotional distress. [1]

The Court of Appeals reversed and remanded for "a determination of whether Peyton's admissions triggered the screening or whether Child Protective Services requested that the screening be conducted based on a prior report of abuse." (Court of Appeals Opinion, 8) (Exhibit 1). In a Concurring Opinion, Judge Keller agreed to the remand for a determination of "whether the Appellees performed the diagnostic testing based on a report of suspected abuse or neglect and whether they have immunity under KRS 620.050(14) for performing that testing." (Court of Appeals Opinion, 10). Judge Keller further noted that, on remand, even if the trial court finds that the appellees have immunity from criminal and civil liability under KRS 620.050(14), that immunity does not extend to any liability they may have for negligence in performing the testing.

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[1] In addition to this movant, other parties named as defendants in the trial court and appellees in the Court of Appeals are Neonatal Intensive Care Experts II, PLLC and Ketan Mehta, M.D. Those parties also filed a motion for discretionary review, which has been granted by this Court.

We observe that there is no suggestion of negligence in the plaintiff's Complaint with regard to performance of the testing. (Ibid.) The results were accurately obtained and correctly reported. More importantly, there is no allegation in the Complaint that the reporters acted in bad faith. In fact, the plaintiff acknowledged in her deposition that they did not so act.

Material Facts

The plaintiff, Brandi Peyton, who was 20 years of age at the time her deposition was taken on April 4, 2009, is the mother of three children: Calvin (age five), Kameron, the subject of this litigation (age two), and Cheyenne (age six months). The father of the three children is Charles Ward. Calvin lives with the plaintiff's grandmother; Kameron with plaintiff's father; and Cheyenne with Mr. Ward (her father). (Peyton depo., 9-11). At the time of her deposition, the plaintiff was living with her boyfriend, Joseph Stewart. (Peyton depo., 7).

When Ms. Peyton presented at Norton Hospital on April 14, 2007, for Kameron's induction, the obstetric admitting record indicates that she was a user of "Street Drugs" and comments: "NEEDS TOX SCREEN PER SOCIAL SERVICES." (Transcript of Record, 310). (Exhibit 3). Equally foreboding is the admission of plaintiff's counsel in their reply brief to Norton's brief in the Court of Appeals that: "Appellant is a recovering drug addict; she

has had a nearly life-long struggle with addiction." (Reply Brief, 5).

A subsequent meconium test performed on Kameron's first stool was positive for traces of marijuana, indicating child abuse via maternal marijuana use during pregnancy. The plaintiff does not deny the veracity of this test, and the defendant maintains this test alone would have necessitated Kameron's removal by CPS. (Reply Brief, 4).

With regard to these drug tests, the plaintiff acknowledged that her third child (Cheyenne, age six months at the time of plaintiff's deposition) also had a positive meconium test, and that child also was removed from the plaintiff's custody after the tests were interpreted and the results obtained 18 days after her birth. (Peyton depo., 80, 85). Cheyenne initially went to live with the plaintiff's aunt, Roletta. (Peyton depo., 85-86).

Child Protective Services has taken action to ensure that the plaintiff does not have custody of any of her children. During her deposition, the plaintiff acknowledged her constant drug dependency (p. 83); arrests involving shoplifting and marijuana (p. 19); use of cocaine and Valium (pp. 82-83); outpatient treatment at the Morton Center (pp. 33-34); and in-house treatment at Lincoln Trail (pp. 51-52).

The plaintiff's reliance upon the alleged significance of a toxicology screen, which determined her blood alcohol concentration (BAC) to be 0.3 MG/DL is a red herring. The test did reveal

that concentration, and it is that concentration which was reported to Child Protective Services (CPS). (Exhibit 4). While the level of alcohol would not constitute legal intoxication, it was correctly reported.

The alcohol screen and the positive meconium test for marijuana use were reported to Child Protective Service. In addition to reporting the plaintiff's ethyl alcohol level to be 0.3 MG/DL, the laboratory report provides that this result must be divided by 1,000 to equal the GM percentage (GM%) and that the Kentucky State Intoxication Level is 80 MG/DL, or 0.08 GM%. The blood alcohol level was correctly reported to Child Protective Services, and the conclusions drawn by Child Protective Services are not relevant to any alleged negligence on the part of the technicians who prepared the correct report.

Equally important is the fact that the meconium test was positive for marijuana.

The record does reflect Ms. Peyton's ongoing problems with drug addiction. That aspect of the case is touched upon above. However, in addition, Ms. Peyton testified as follows in her deposition, wherein she acknowledged that she <u>was</u> and <u>is</u> a drug addict:

> Q. You acknowledge that today in '09 you're a drug addict, correct?
>
> A. Yes.

Q. And you were at the time you gave birth to Kameron, agreed?

A. I take full responsibility for my actions with my drugs, yes, I do.

Q. So that's a yes?

A. Yes.

(Peyton depo., 83).

In summarily dismissing the plaintiff's claim, the trial court ruled in part:

> The record reflects that neither Dr. Mehta nor Norton's agent were Cabinet employees or designated agents of a children's advocacy center. Likewise the record reflects that the test was performed before the abuse report was filed, not as a result of it. As such, it does not appear that the alleged negligence of either Dr. Mehta or Norton's agent comes within the exceptions to immunity set out in KRS 620.050(2) and (14). Additionally, the record is devoid of any evidence that shows "bad faith" on the part of Dr. Mehta in reporting the suspected abuse. Accordingly, it appears that Dr. Mehta and Norton's agent are granted immunity from liability under KRS 620.030(1) and KRS 620.050(1) for any alleged negligence they committed.
>
> In light of the fact that Dr. Mehta has immunity from liability, NICE in its *respondeat superior* capacity also has immunity from liability for his alleged actions as a matter of law. Norton would likewise be immune for liability in its respondeat superior capacity.

(Memorandum and Order, 5-6, Transcript of Record, 397, et seq.)

ARGUMENT

THE EVIDENCE, INCLUSIVE OF THE PLAINTIFF'S OWN ADMISSIONS, CLEARLY ESTABLISHES GOOD FAITH ON THE PART OF SUBURBAN HOSPITAL AND THE OTHER DEFENDANTS IN REPORTING THE RESULTS OF THE TOXICOLOGY SCREEN AND THE SUBSEQUENT MECONIUM TEST.

The applicable Kentucky statutes conferring good faith immunity to persons, including healthcare providers, who, acting upon reasonable cause, report child abuse are:

KRS 620.030:

> (1) **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 . . ..
>
> * * *
>
> (2) **Any person** ... 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 . . ..

(Emphasis added).

KRS 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.

* * *

(2) **Any employee or designated agent of a children's advocacy center** shall be immune from any civil liability arising from performance within the scope of the person's duties as provided in KRS 620.030 to 620.050. * * * Nothing in this subsection shall limit liability for negligence.

* * *

(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 . . .. * * * 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).

This legislation was enacted pursuant to the Child Abuse Prevention and Treatment Act (42 USC §§ 5101-5106 (1974)), which requires state legislation mandating the reporting of child abuse or suspected child abuse to various authorities. Such legislation is necessary for the states to qualify for federal grants; and all 50 states and the territories have enacted statutes which mandate such reporting. Annot., Validity, construction, and application of state statute requiring doctor or other person to report child abuse, 73 A.L.R.4th 782 (2009).

Kentucky extends the mandate not only to healthcare providers, but to any person.

The benefits to society from the mandatory reporting of child abuse by the granting of immunity far outweigh any individual emotional harm which may arise from inaccurate reports. It is significant that this action does not seek custody of Kameron, but rather financial damages for the child's removal.

If immunity does not apply to misdiagnosis of child abuse, healthcare providers would face a dilemma. By reporting the suspected abuse, they would open themselves up to civil actions; but by declining to make a report, they could be guilty of criminal conduct. This result cannot be what our legislature intended. 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, 311 Ky. 274, 223 S.W.2d 100 (1949).

All of the states require physicians to report suspected abuse, and many jurisdictions make the requirement universal by providing that all citizens must report cases of suspected abuse. Annot., supra, 73 A.L.R.4th 782, et seq. Kentucky requires everyone to report cases of suspected abuse. KRS 620.030; KRS 620.050. Also, in all proceedings pursuant to KRS Chapter 620 "the court is required to render decisions in the best interest of the child." KRS 620.023.

For statutory listings of the various state immunity statutes, see Note, Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments, 51 Vand. L. Rev. 183, fn. 63 (1998).

The immunity provisions are part of the Kentucky Unified Juvenile Code, which is contained in KRS Chapters 600-645. The legislative purpose is set forth in KRS 620.010 as follows:

> In addition to the purposes set forth in KRS 600.010, this chapter shall be interpreted to effectuate the following express legislative purposes regarding the treatment of dependent, neglected and abused children. Children have certain fundamental rights which must be protected and preserved, including but not limited to, the rights to adequate food, clothing and shelter; the right to be free from physical, sexual or emotional injury or exploitation; the right to develop physically, mentally and emotionally to their potential; and the right to educational instruction and the right to a secure, stable family. It is further recognized that upon some occasions, in order to protect and preserve the rights and needs of children, it is necessary to remove a child from his or her parents.

(Emphasis added).

Good faith immunity is analyzed and discussed in MATTHEW BENDER'S publication Family Law and Practice, Chapter 66, Section 66.06[3][a], wherein the authors state:

> All states specifically grant immunity from civil and criminal liability to persons who report. The majority of states require that for the immunity to attach, the report must be made in good faith. "Good faith" has been described as "that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being

faithful to one's duty or obligation ... a subjective standard of honesty of fact in the conduct or transaction concerned, taking into account the person's state of mind, actual knowledge and motives. [Citing Kendzierski v. Goodson, 21 Conn. App. 424, 574 A.2d 249 (1990)].

When a reporter demonstrates that he or she had 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. [Citing Parisi v. Johnsky, 2007 Conn. Super. LEXIS 516 (2007); O'Heron v. Blaney, 276 Ga. 871, 583 S.E.2d 834 (2003)].

* * *

In general, the immunity statutes have been broadly interpreted across the country. A statute may even protect a psychologist when he or she violates the patient-psychologist privilege to report child abuse admitted by a patient. The Supreme Court of Alabama held that the privilege must yield to the immunity. [Citing Marks v. Tenbrunsel, 910 So.2d 1255 (Ala. 2005)]. The Pennsylvania, Supreme Court has held likewise. [Citing Fewell v. Besner, 444 Pa. Super. 559, 664 A.2d 577 (1995)].

Reporters of suspected child abuse have been protected from liability in actions ranging from slander and defamation to intentional infliction of emotional distress and negligence claims. [Regarding negligence claims, citing O'Heron v. Blaney, 276 Ga. 871, 583 S.E.2d 834 (2003); S.G. v. City of Monroe, 843 So.2d 657 (La. App. 2 Cir. 2003); Rohskopf v. Summit Therapy Ctr., 2001 Ohio App. LEXIS 3570 (Ohio Ct. App. 2001)].

The author of the Vanderbilt Law Review Note referenced

above reveals that "courts thus far have granted or upheld summary judgment for defendant reporters in nearly every case to reach the appellate level . . .." Note, supra, at 193. The author further reasons: "[T]he primary effect of immunity provisions, whether "good faith" or "absolute" is probably to justify disposition of cases on summary judgment." Note, supra, at 197.

In F.A. v. W.J.F., 656 A.2d 43 (N.J. Super. Ct. App. Div. 1995), the Court reversed a trial court's denial of summary judgment in a case against reporters where malice was alleged. Justifying its holding, the Court quoted the purpose clause of the New Jersey statute and concluded that this clause of encouraging reporting would be frustrated if reporters were repeatedly subject to "costly and protracted civil litigation." 656 A.2d at 46-47.

In reviewing all of the authorities prior to its publication, the author of the Vanderbilt Law Review Note concluded:

> Ultimately, regardless of how courts have interpreted good faith, they have generally found defendants' behavior to fall within the necessary parameters, and they have almost unanimously relied on expressions of legislative purpose to support grants of summary judgment in favor of defendant reporters.

Note, supra, at 199.

Increasing the risk of liability for physicians and hospitals does nothing to further the goals of the legislative purpose, *i.e.*, decreasing numerous incidents of child abuse. Such

an approach would result in a decrease in the number of substantiated reports. Anything less than absolute immunity for physicians and hospitals who report suspected child abuse would stifle reporting.

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).

We have referred to plaintiff's suggestion of negligence on behalf of the defendants as a red herring since the toxicology results were correctly obtained and correctly reported. Other courts have dealt with this approach. The Georgia court, in Michaels v. Gordon, 211 Ga. App. 470, 439 S.E.2d 722, 725 (Ga. Ct. App. 1993), held that mere negligence on the part of a doctor is not bad faith and that bad faith is the only thing that conquers immunity.

In O'Heron v. Blaney, 276 Ga. 871, 583 S.E.2d 834 (2003), a subsequent Georgia decision, the plaintiffs' daughter-in-law raised questions about possible abuse of her two small daughters after they had spent the weekend with the plaintiffs, their paternal grandparents. The local sheriff advised the parents to take the children to the defendant physician for examination. Following her report, the physician made a verbal report of suspected abuse to the Sheriff's Office. The verbal report was

supplemented four days later with a written report. The plaintiffs were arrested and indicted for various offenses, including child molestation, sodomy, incest, etc.

A new Assistant District Attorney was later assigned the case, and upon presenting it to a second grand jury, that jury returned a "no bill." The case was then dropped, and the plaintiffs sued the examining doctor for malicious prosecution, professional malpractice, and ordinary negligence.

The trial court granted summary judgment based on immunity, and the Court of Appeals reversed. The Supreme Court of Georgia reversed the Court of Appeals on the grounds that the immunity statute should be liberally construed in order to carry out its purposes. The Georgia court concluded that immunity may be established either by a showing of "reasonable cause" or "good faith."

The Georgia court resolved that the relevant question is whether the reporter honestly believed she had a duty to report and acted in good faith, and that, if so, she is immune from liability even if she were negligent or exercised bad judgment.

The Court concluded:

> Under the court of appeals standard, even if a reporter has reasonable cause to believe that child abuse has occurred, a jury question could still exist on the issue of bad faith. This interpretation chills the reporting requirement and fails to honor the legislative goal of protecting children by encouraging the reporting of suspected child abuse. It

> furthermore would require a mandatory reporter to make a detailed investigation before making a report. Such an investigation is contrary to the statutory scheme that places the job of investigation on child welfare authorities and the criminal justice system.

583 S.E.2d at 837.

In D.L.C. v. Walsh, 908 S.W.2d 791, 799 (Mo. Ct. App. 1995), the Missouri court held:

> If immunity did not apply to the negligent misdiagnosis of child abuse, health care providers would face a dilemma. By reporting suspected abuse, they would open themselves up to malpractice actions, but by declining to make a report, they could be guilty of a misdemeanor. This result cannot be what the Kansas legislature intended. "The legislature is presumed to intend that a statute be given a reasonable construction, so as to avoid unreasonable or absurd results."

The Iowa court, in Maples v. Siddiqui, 450 N.W.2d 529, 530 (Iowa 1990), stated:

> When the legislature undertakes to grant immunity from civil liability, we must assume that this is intended to apply to those situations where liability would otherwise exist because of some negligent act or other breach of legal duty.

Applying Kentucky law as well as West Virginia law to avoid a conflict of law question, Judge Hood, in Hazlett v. Evans, 943 F.Supp. 785 (E.D. Ky. 1996), interpreted our statutory scheme in a admittedly mistaken diagnosis and reporting of "Shaken Baby Syndrome." However, there was no bad faith, and Judge Hood

concluded that in the absence of bad faith, statutory immunity applied to any negligent diagnosis. Immunity statutes are not predicated on "reasonable cause," but rather on "good faith," which is a question for the court. Judge Hood further reasoned:

> Although Kentucky courts have not addressed this particular issue, several courts across the country have addressed whether a physician can be held liable for misdiagnosis of a child which resulted in a report of suspected child abuse. These courts have determined that the intent of the immunity statutes are to ensure that health care professionals and others who work with children will not be stifled and unwilling to report such abuse for fear of reprisal . . .. [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); Criswell v. Brentwood Hospital, 49 Ohio App. 3d, 163, 551 N.E.2d 1315 (Ohio Ct. App. 1989)].

943 F.Supp. at 787-88.

Hazlett is discussed at length by Professor Leibson in 13 KENTUCKY PRACTICE, Leibson, Tort Law, §10:55 (2d ed. 2008).

The Kentucky Court of Appeals, in Garrison v. Leahy-Auer, 220 S.W.3d 693, 700 (Ky. App. 2007), held in favor of a physician's immunity because "there was no allegation that Dr. Leahy-Auer acted in bad faith." (Emphasis added).

In the case at bar, there are absolutely no allegations of bad faith, and in addition the plaintiff herself testified that she did not believe the reporters so acted.

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.

Brandi Peyton depo., 61-62.

Bad faith is defined in BLACK'S LAW DICTIONARY (6th ed. 1990) as follows:

> Term "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will. [Quoting from Stath v. Williams, 367 N.E.2d 1120, 1124 (Ind. App. 1977)].

Our Court of Appeals, in another case involving reporting of child abuse, held in Morgan v. Byrd, 289 S.W.3d 222, 227 (Ky. App. 2009):

> The real issue in the instant case, however,

> is whether Gladys acted in bad faith as alleged by the Morgans. Unless the Morgans can show that Gladys had bad intent when she reported the suspected child neglect to the police, Gladys is afforded the immunity granted by the statute and is entitled to dismissal under CR 12.02 for failure to state a claim for which relief can be granted.

The Morgan court also noted: "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." 298 S.W.2d at 228.

The distinction that the Court of Appeals seeks to make in the case sub judice between whether the tests resulted from the plaintiff's admissions as opposed to a request for testing from Child Protective Services is based upon dicta of the Court of Appeals' Opinion in Garrison v. Leahy-Auer, supra. It makes no difference whether Child Protective Services requested the testing or whether the doctor found reasonable cause to conduct it. In either event, immunity is applicable, and Judge Johnson's dicta in that decision is unfortunate.

CONCLUSION

Both the plaintiff and her counsel acknowledge that the plaintiff has had a nearly lifelong struggle with addiction to alcohol and street drugs. It does not matter whether the tests were performed at the request of Child Protective Services or as a result of plaintiff's revelations during her hospital admission.

Her revelations alone gave the providers reasonable cause to perform tests for both alcohol and marijuana.

The plaintiff's third child was removed from her custody following positive meconium tests 18 days after the child's birth. No suit has been filed for that removal. In the case at bar, her child was removed after an alcohol test was believed to reveal the presence of a certain amount of alcohol in her system prior to delivery. The subsequent meconium test was positive - as it was in the case of her third child - and Kameron could have been removed for that reason as well as for her damaging statements upon admission about "street drugs."

The stated purpose of legislation enacted in all states and territories following the federal Child Abuse Prevention and Treatment Act of 1974 is the protection of innocent children from all types of abuse. Such legislation is to be liberally construed to carry out its purposes. The societal benefits of protecting children trumps any negligence or mistake in false reporting. Misdiagnosis of child abuse (including negligence) should not stifle reporting of such cases by conferring liability upon the reporters for emotional damage to the alleged abusers. Every act of negligent misdiagnosis by healthcare providers is not actionable.

With all due respect to Judge Keller's Concurring Opinion, we would suggest that the legislature intended the negligence exception to immunity to apply only where the medical

providers, through negligent conduct, cause injury to the person examined. Otherwise, the entire purpose of the immunity provided would be defeated.

It is therefore respectfully submitted that the decision of the Court of Appeals be reversed and the case remanded to the trial court with instructions to reinstate its summary judgment in favor of all defendants.

Respectfully submitted,

PHILLIPS PARKER ORBERSON & ARNETT, P.L.C.

By _____

William P. Swain
Joseph M. Effinger
Patricia C. Le Meur
716 West Main Street, Suite 300
Louisville, KY 40202
Phone: (502) 583-9900
Fax: (502) 587-1927

COUNSEL FOR APPELLANT,
NORTON HOSPITALS, INC.
d/b/a NORTON SUBURBAN HOSPITAL