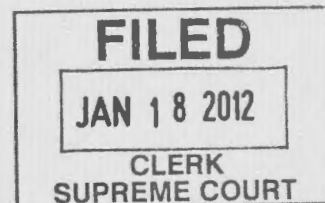


SUPREME COURT OF KENTUCKY

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



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

APPELLANT

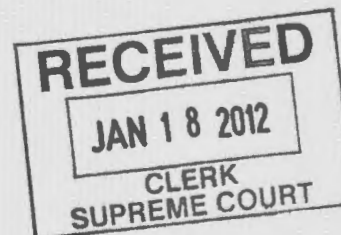
vs.

BRANDI PEYTON

APPELLEE

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

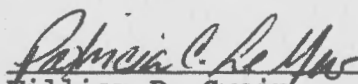
REPLY BRIEF FOR APPELLANT,
NORTON HOSPITALS, INC. d/b/a NORTON SUBURBAN HOSPITAL



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It is hereby certified that copies of the within brief were served by mail this 16th day of January, 2012 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.



William P. Swain
Patricia C. Le Meur

Appellant, Norton Hospitals, Inc. d/b/a Norton Suburban Hospital (hereinafter "Suburban Hospital") is entitled to immunity from Appellee Brandi Peyton's claims against it, and the trial court's dismissal of those claims should be affirmed. The plain language of KRS §620.030(1) required Peyton's medical providers to report any instance of suspected child abuse, and the immunity provisions contained in KRS §620.050 preclude liability for such good faith reports. The statutory interpretation urged by Peyton would require Kentucky courts to disregard language contained in the statute and would render the immunity provisions a nullity. Correct application of the child protection statutes, informed by applicable case law, required dismissal of Peyton's claims in this matter.

I. The report of suspected child abuse to CPS was made in good faith and based on reasonable cause, entitling Suburban Hospital to statutory immunity from civil and criminal liability.

A good faith report of abuse made pursuant to KRS §620.030(1), even if later shown to be factually incorrect, cannot form the basis for civil or criminal liability. *See* KRS §620.050(1); Hazlett v. Evans, 943 F.Supp. 785, 787-88 (E.D. Ky.1996). However, Peyton, urges this Court to entirely ignore the "good faith" provision of KRS §620.050(1) and to instead base immunity solely on whether her medical providers had "reasonable cause" to report suspected child abuse to CPS. Not only does this strained interpretation contradict well-established rules of statutory construction, it does not provide Peyton with a viable means to defeat immunity.

Pursuant to KRS §620.030(1), Peyton's medical providers had an affirmative obligation to report any suspected child abuse to Child Protective Services ("CPS) or other appropriate authority. Resolving all fact issues in Peyton's favor, such a report was made to CPS based on a mistaken interpretation of the written laboratory report generated as part of a blood alcohol test. There is no question that the test itself was appropriately performed or that the written laboratory

report correctly reflected Peyton's blood alcohol level at the time the sample was taken. The alleged negligence is that Peyton's medical care providers misinterpreted the test results in conveying them to CPS, although Peyton specifically acknowledged that no one intentionally provided false information.

The sincerely-held but mistaken belief that Peyton's blood alcohol level was significantly elevated provided reasonable cause to believe that child abuse had occurred and triggered the reporting requirement. *See* KRS §620.030(1). Thus, whether the "good faith" or the "reasonable cause" provision of KRS §620.050(1) is applied to the facts of this case, Suburban Hospital is entitled to immunity for the report to CPS regarding Peyton's blood alcohol level.

II. Suburban Hospital is entitled to statutory immunity regardless of whether the blood alcohol test was performed based on Peyton's hospital admission, CPS's request, or both.

Suburban Hospital is entitled to immunity under either subsection (1) or subsection (14) of KRS §620.050, and there is no need for a determination of the reason the blood alcohol test was performed. Regardless of whether CPS's request or Peyton's condition and history upon admission was the impetus for performing the blood alcohol test, it was correctly performed and the results interpreted in good faith. The interpretation of the test was the reasonable cause for suspecting potential child abuse and was the basis for reporting to CPS. As discussed above, Suburban Hospital is entitled to immunity under KRS §620.050(1) under both the "reasonable cause" and the "good faith" provisions.

If it were determined that KRS §620.050(14) applies, Suburban Hospital is entitled to immunity from liability because it was not negligent in the medical care provided to Peyton. Subsection (14) provides immunity for liability in performing and reporting medical diagnostic

procedures but does not provide protection against liability for negligence. Peyton wishes to read out the immunity provision. However, a plain reading of the statute, giving meaning to all of the words contained therein, precludes such a result.

As an example, assume that there was a patient situation identical in every way to Peyton's except that a contaminated needle was used during performance of the blood alcohol test and that the patient contracted hepatitis C as a result. Further assume that this hypothetical patient sued her medical providers for two counts of negligence, one for reporting a misinterpretation of her correctly tested blood alcohol level, and the second for failing to meet the medical standard of care in obtaining the blood sample. Pursuant to KRS §620.050(14), she would be able to go forward on her medical negligence claim regarding use of the contaminated needle, but her claim with respect to the reporting of the requested test results would be subject to the immunity provision.

This construction gives full meaning to all parts of the statute. Subsection (14) permits medical diagnostic testing to be conducted based upon a report of suspected child abuse. Consistent with the clear legislative intent to encourage reporting and investigation of abuse, individuals involved in performing those diagnostic tests are afforded immunity from liability for their participation in the abuse investigation. For this to be meaningful, the protection must extend to both the performance of the test and the communication of the results. Test results that are not communicated to the investigator cannot assist with the determination of whether abuse or neglect has occurred and will not move an investigation forward. Further, an immunity provision that applies only where there has been no otherwise actionable conduct provides only the illusion of protection and is a sham. Finally, the legislature weighed the interests of all

potential actors in a child abuse investigation and has clearly determined that those actions which further child protection, even if later determined to be incorrect or unsubstantiated, are appropriately entitled to immunity from liability. Such immunity in the investigative and reporting process furthers the intent of the entire statutory scheme and comports with the plain language of the statute.

Equally consistent with the legislative intent, subsection (14) does not provide blanket immunity against all negligence. Medical negligence in performing the test, such as use of a contaminated needle in our hypothetical, would not fall within the protection against liability. That negligence was not part of the investigative and reporting process, and any harm arising from it would not have been included in the legislative balance favoring reporting of suspected abuse.

This application of KRS §620.050(14) comports with the plain language of the statute and furthers the legislative intent to protect children from abuse. Because the only claimed negligence against Suburban Hospital pertains to the investigation of potential child abuse rather than to medical care itself, Suburban Hospital is entitled to immunity from liability under KRS §620.050(14) as well. Thus, regardless of whether subsection (1) or subsection (14) is applied, the claims against Suburban Hospital were appropriately dismissed as a matter of law.

III. There is no internal inconsistency within the Kentucky Unified Juvenile Code requiring use of a balancing test in applying the immunity provisions.


Notwithstanding Peyton's arguments to the contrary, the immunity provisions contained in KRS §620.050 are not inconsistent with the legislative purposes set out in KRS §600.010. Within the context of state action taken to protect children from abuse and neglect and to provide

treatment and support to children and their families, KRS §600.010(g) articulates a policy of providing judicial procedures in which all parties' rights are recognized and in which all parties are entitled to fair and prompt hearings. This policy is not at odds with the immunity provisions contained in KRS §620.050(1) and (14). As discussed at length in Appellants' briefs and conceded in Appellee's brief, the legislature has balanced the interests of all parties to a potential abuse situation and has provided greater protections for the interests of children than for the interests of parents who may have been falsely accused. Thus, immunity provisions were created to encourage reporting of suspected abuse and participation in investigations of suspected abuse. Unlike the cases cited by Peyton, this is not a situation where competing public policies must be construed. See, e.g., Preston v. Meigs, 464 S.W.2d 271 (Ky.App. 1971); S.J.L.S. v. T.L.S., 265 S.W.3d 804 (Ky.App. 2008). Rather, the Juvenile Code is a comprehensive and cohesive statutory scheme, and the immunity provisions must be applied without resort to the convoluted "balancing test" proposed by Peyton.

IV. Conclusion

The claims against Suburban Hospital were appropriately dismissed by the trial court below. There was reasonable cause to suspect child abuse, and the report to CPS was made in good faith. Further, the claimed negligence occurred in connection with the investigative process and did not implicate any medical treatment provided to Peyton. Thus, Suburban Hospital is entitled to immunity from Peyton's claims under either KRS §620.050(1) or KRS §620.050(14). Accordingly, Appellant, Norton Hospitals, Inc. d/b/a Norton Suburban Hospital, by counsel, respectfully urges this Court to reverse the decision below and to reinstate the trial court's order granting summary judgment in favor of Suburban Hospital.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Patricia C. Le Meur", written over a horizontal line.

Joseph M. Effinger

William P. Swain

Patricia C. Le Meur