COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2010-SC-0356-DG

DIANNE TURNER — APPELLANT

V.

BROOKE NELSON, INDIVIDUALLY;
AND BROOKE NELSON, AS NEXT FRIEND OF
F. B., A MINOR — APPELLEES

REPLY BRIEF OF APPELLANT, DIANNE TURNER

FROM KENTUCKY COURT OF APPEALS
CASE NOS. 2007-CA-000489 and 2008-CA-001588
FAYETTE CIRCUIT COURT NO. 06-CI-00976
HONORABLE SHEILA R. ISAAC, JUDGE

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing ***Reply Brief of Appellant*** was served by U.S. mail, first-class postage prepaid, on Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; J. Dale Golden, Esq., Diane R. Conley, Esq., GOLDEN & WALTERS, PLLC, 771 Corporate Drive, Suite 905, Lexington, Kentucky 40503, *Counsel for Appellees*; Guy R. Colson, Esq., Barry M. Miller, Esq., Christina M. Vessels, Esq., FOWLER, MEASLE & BELL, LLP, 300 West Vine Street, Suite 600, Lexington, Kentucky 40507-1660, *Counsel for Kentucky School Boards Insurance Trust*; on this 7th day of March, 2011.

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STATEMENT OF POINTS AND AUTHORITIES

Appellant, Dianne Turner, hereby submits the following Reply Brief in response to points raised in Appellees' Brief in this Court.

ARGUMENT

A. There Is No Duty To Report Suspected Abuse Pursuant to KRS 620.030 Where The Undisputed Facts Do Not Constitute Abuse In The First Place.

This Court should find as a matter of law that Ms. Turner could not be liable for failure to report alleged "abuse" because the undisputed facts do not constitute "abuse" under KRS 620.030. Appellees' arguments begin with an inaccurate assumption fatal to their case. They assume that "abuse," as statutorily defined, was reported to Ms. Turner. To the contrary, what was reported to her was that a five-year-old girl was "up the butt" of another five-year-old girl while both girls were in the classroom supervised by two adults. These facts, no matter how Appellees rhetorically exaggerate the situation, do not constitute "abuse," and no reporting requirement was ever triggered. Simply put, without an allegation of "abuse," there is no obligation to report that "abuse" has occurred.

Appellees do not argue that the statutory framework of the reporting statute does not apply. That is because they cannot avoid the fact that a plain reading of KRS 620.030 and its applicable definitions do not apply to the facts of this case. For purposes of Chapter 620, the definition of an "**[a]bused** or neglected child" is:

> a child whose health or welfare is harmed or threatened with harm when ***his parent, guardian, or other person exercising custodial control or supervision of the child***:
>
> (a) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
>
> (b) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means; . . . . . .
>
> (e) Commits or allows to be committed an act of sexual abuse, sexual

exploitation, or prostitution upon the child;

(f) Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child . . .

KRS 600.020(1) (emphasis added). Appellees claim that this statutory definition does not apply because it defines "abused" child rather than "abuse." However, it is contained in the definitions section of KRS Chapter 620 and in fact states that it contains the definition of "abused" child "[a]s used in KRS Chapters 600 to 645." It is disingenuous to claim that it does not apply to the reporting statute, KRS 620.030(1).

"Sexual abuse" is statutorily-defined consistent with the meaning of "abuse" set forth in KRS 600.020 as well":

> "Sexual abuse" includes, but is not necessarily limited to, any contacts or interactions in which *the parent, guardian, or other person having custodial control or supervision of the child or responsibility for his welfare*, uses or allows, permits, or encourages the use of the child for the purposes of the sexual stimulation of the perpetrator or another person.

KRS 600.020(54) (emphasis added). Courts "construe statutes within their context and strive to give consistent meaning to related statutory provisions." *Maies v. Croan*, 977 S.W.2d 22, 23 (Ky. App. 1998), *citing Combs v. Hubb Coal Corp.*, 934 S.W.2d 250 (Ky. 1996). Chapters 600 to 645 should be read together and consistently.

Next, Appellees claim that a clear reading of the reporting statute with its applicable definitions does not adequately protect abused children. If Appellees do not believe that the statute adequately addresses child abuse, they should appeal to the General Assembly for other, different statutory language. Until the General Assembly decides otherwise, Ms. Turner did not have a duty to report the allegations that were reported to her under the statutes and definitions in existence, KRS 620.030(1) and KRS 600.020(1).

B. This Court Must Interpret The Reporting Statute As Written And Cannot Add Language Not Contained Within The Statutory Definition Of "Abused" Child.

Appellees claim that because part of KRS 620.030(1) provides for a duty by *the Cabinet* to make a report of any abuse or neglect to the proper authorities if the alleged perpetrator is someone "other than a parent, guardian or person exercising custodial control or supervision," Ms. Turner had a duty to report that one five-year-old girl said another five-year-old girl in her class was "up her butt" during reading circle. This sentence specifically sets forth the duty of the **Cabinet**, not "any person." Ms. Turner is not the Cabinet. This Court must interpret the statute as written and cannot, as Appellees contend, add or imply language not contained in the statute.

The fact that the General Assembly added a reporting requirement specifically for the Cabinet to include an instance in which a person other than a parent or custodian is the perpetrator indicates that the General Assembly recognized that the definition of "abused" child does *not* include a situation in which a parent, guardian or person exercising custodial care is the alleged abuser. If "abuse" included a perpetrator who was someone other than a parent or custodian, there would be no reason to add this language.

The General Assembly specifically added this language to the duty of the Cabinet but omitted it with respect to the duty of "any person" such as Ms. Turner. We must assume that the General Assembly acted intentionally in omitting this language in subsection (1) as courts have noted "where the legislation includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that the legislature acted intentionally and purposefully in the disparate inclusion or exclusion." *Palmer v. Com.*, 3 S.W.3d 763, 764-5 (Ky. App. 1999), *citing* Keene Corp. v. U.S., 508 U.S. 200 (1993); *Russello v. U.S.*, 464 U.S. 16 (1983).

C. There Is No Implied Private Cause Of Action In KRS 620.030.

The Court only has to examine the plain language of KRS 620.030 to conclude that the General Assembly did not actually create or intend to provide an implied private cause of action for a reporting statute violation. Legislatures speak through their statutes. *See, e.g., Ky. State Fair Bd. v. Fowler*, 310 Ky. 607, 221 S.W.2d 435, 439 (1949) ("Where the Constitution is silent, the public policy of the State is to be determined by the Legislature on subjects which it has seen fit to speak."). The General Assembly clearly spoke as to the extent of a person's liability for violating KRS 620.030 - criminal liability only. KRS 620.030(5)(a)-(c). The statute does not subject a violator to any civil liability or implied private cause of action resulting from a violation. KRS 620.030(1)-(5). Such a statutory remedy is solely in the purview of the General Assembly.

Appellees raise a number of baseless arguments to the contrary. First, they invoke KRS 446.070 as the basis for their "private right of action" claim. This Court cannot consider such an argument; Appellees failed to bring that claim in their Amended Complaint. CR 8.01; *Dalton v. First Nat'l Bank of Grayson*, 712 S.W.2d 954, 956 (Ky. App. 1986); *Cincinnati, Newport & Covington Transp. Co. v. Fischer*, 357 S.W.2d 870, 872 (Ky. App. 1962) (a complaint must provide fair notice and identification of claim). The Appellees cannot use the appellate process to "plead" a KRS 446.070 claim.[1]

Second, Appellees argue, with no supporting authority or legislative history, that if there is no implied private cause of action then enforcement of the statute would be "eviscerated." Appellees purposefully ignore the plain language of the statute. Assuming Appellees are correct that the "purpose of the statute is to stop abuse of

[1] If KRS 446.070 applied to Appellee F.B.'s claim (it is not), Appellee Brooke Nelson has no individual claim. An adult is not part of the class of persons intended to be protected by KRS 620.030.

children," it does so by establishing mandatory reporting duties and providing misdemeanor and felony penalties for failure of those duties. KRS 620.030(5)(a)-(c).

Third, Appellees rely on two cases for the proposition that "Kentucky courts have already recognized private rights of action under similar circumstances." Neither case is on point nor supports Appellees' argument. In *Lomayestewa v. Our Lady of Mercy Hosp.*, 589 S.W.2d 885 (Ky. 1979), the plaintiff brought a common law negligence claim against defendant hospital after she was injured from falling out of a hospital window. The subject of the Court's opinion was not whether a statutory implied private cause of action existed. There is no mention of that issue in the opinion. Rather, "the critical issue in the case is whether the defense of contributory negligence, including the element of assumption of risk, is available to the hospital under the factual situation presented." *Id.* at 887. The Court's analysis of defendant's violation of a state hospital regulation related to establishing the hospital's violation of a duty to plaintiff under common law negligence, not whether plaintiff had a private cause of action. *Id.* at 886-887.

In *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328 (Ky. 1987), the plaintiff brought a common law negligence action for physical injuries resulting from the defendant dram shop's overserving of alcohol to a person who was already drunk and who injured plaintiff in a drunk driving accident. Once again, the Court's opinion did not discuss whether a specific statute provided an implied private cause of action. The issue was whether a person could bring a negligence claim based on a dram shop overserving a patron who drove away and injured a third party. *Id.* at 329. The issue was common law dram shop liability, *not* statutory liability, because Kentucky had no dram shop statute. *Id.* at 334; *see also, DeStock No. 14, Inc. v. Logsdon*, 993 S.W.2d 952, 955 (Ky. 1999).

Moreover, the Court's finding of liability in relation to KRS 446.070 and KRS 244.080 (criminal penalties for retail licensees overserving patrons) related to "civil liability under the negligence principle," not a stand-alone, implied private cause of action under a dram shop-related statute. *Id.* at 334. Finally, it must be noted that the Court has acknowledged that much of *Claywell* is no longer good law as it has been superseded by statute (*DeStock*, 993 S.W.2d at 955-58) and, more importantly, that "our language in *Claywell* did not speak of creating new causes of action." *Morgan v. Scott*, 291 S.W.3d 622, 631 (Ky. 2009).

Finally, Appellees try to explain away the persuasive authority from other states cited in Appellant's Brief which establishes that the majority of states have ruled that their mandatory reporting statute does not provide an implied private cause of action. For starters, Appellees raise a red herring that seven states (Arkansas, Colorado, Iowa, Michigan, Montana, New York, and Rhode Island) provide for implied civil liability for a mandatory reporter's failure to comply with the applicable reporting statute. The seven identified states do provide for civil liability. What Appellees fail to tell this Court is that each of those states has a *specific* statute that sets forth civil liability.[2] Other state jurisdictions which do not have such a specific civil liability statute, like Kentucky, have ruled that an implied private cause of action is not provided for or implied by their specific reporting statute. *See, e.g., C.B. v. Bobo*, 659 S.2d 98, 102 (Ala. 1995); *Reece v. Turner*, 643 S.E.2d 814, 818 (Ga. Ct. App. 2007); *C.T. v. Gammon*, 928 N.E.2d 847, 853-854 (Ind. Ct. App. 2010); *Berry v. Watchtower Bible and Tract Soc'y of N.Y., Inc.*, 879 A.2d 1124, 1128 (N.H. 2005); *Arbaugh v. Bd. of Educ., County of Pendleton*, 591 S.E.2d

[2] *See* Ark. Code Ann. § 12-18-206; Colo. Rev. Stat. § 19-3-304(4); Iowa Code § 232.75; Mich. Comp. Laws § 722.633; Mont. Code Ann. § 41-3-207; N.Y. Soc. Serv. Law § 420; R.I. Gen. Laws §40-11-6.1.

235, 241 (W. Va. 2003).[3] Those state courts did not substitute themselves for their respective state legislatures which had not provided for civil liability for violations of the state's reporting statute; neither should this Court.

Appellees also cite three cases to argue that other jurisdictions have found implied civil liability for failing to make a report under a mandatory reporting statute. The New York case (*Kimberly S.M. v. Bradford Cent. Sch.*, 226 A.D.2d 85 (N.Y. 1996)) made its finding based on New York's specific civil liability statute (N.Y. Soc. Serv. Law § 420). The California case (*Landers v. Flood*, 551 P.2d 389 (Cal. 1976)) is not a reporting statute claim case, but rather a medical malpractice action based on a doctor's failure to correctly diagnose and report battered child syndrome. Only the Tennessee case (*Ham v. Hosp. of Morristown, Inc.*, 917 F. Supp. 531 (E.D. Tenn. 1995)) determined that an implied private cause of action existed under Tennessee law for a violation of the reporting statute. This one outlier does not negate the clear weight of authority counseling against finding an implied private cause of action under KRS 620.030.

Finally, Appellees argue that three out of the thirteen cases cited by Appellants, indicating that the majority of states have ruled that there are no implied private causes of action created by mandatory reporting statutes, "clearly do not fully support Appellant's argument." In response, Appellees will let those courts speak for themselves:

1. "D'Agostino and the Arlington Defendants are correct that section 51A does not provide a private right of action against mandatory reporters who fail to report an incident of child abuse." *Doe v. D'Agostino*, 367 F.Supp.2d 157, 176 (D.Mass. 2005), citing *Loffredo v. Ctr. for*

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[3] *See, also, Doe v. D'Agostino*, 367 F.Supp.2d 157, 176 (D. Mass. 2005) (applying Massachusetts law); *Doe v. Nevada*, 356 F. Supp.2d 1123, 1125 (D. Nev. 2004) (applying Nevada law); *Doe 1 ex rel. Tanya S. v. N. Cent. Behavioral Health Sys., Inc.*, 816 N.E.2d 4, 8 (Ill. Ct. App. 2004); *Kan. State Bank & Trust Co. v. Specialized Transp. Servs. Inc.*, 819 P.2d 587, 604 (Ks. 1991); *Becker v. Mayo Found.*, 737 N.W.2d 200, 207-209 (Minn. 2007); *Bradley v. Ray*, 904 S.W.2d 302, 313-314 (Mo. Ct. App. 1995); *Paulson v. Sternlof*, 15 P.3d 981, 984 (Okla. Civ. App. 2000); *Doe v. Marion*, 645 S.E.2d 245, 248-250 (S.C. 2007).

Addictive Behaviors, 689 N.E.2d 799, 801 (Mass. 1998) ("Many of our decisions support the proposition that a clear legislative intent is necessary to infer a private cause of action from a statute.").

2. "Accordingly we conclude that West Virginia Code § 49-6A-2 does not give rise to an implied private civil cause of action, in addition to criminal penalties imposed by the statute, for failure to report suspected child abuse where an individual with a duty to report under the statute is alleged to have had reasonable cause to suspect that a child is being abused and has failed to report suspected abuse." *Arbaugh v. Bd. of Educ., County of Pendleton*, 591 S.E.2d 235, 241 (W.Va. 2003).

3. "Our review of § 26-14-1 et seq. persuades us that the legislature did not intend to confer a private right of action for any breach of the duty to report imposed by the statute. Rather, our review reveals that the primary thrust of the legislation is to help those who are abused or neglected by establishing child protection services and a method of conducting investigations. While the Act imposes a duty on an individual to make such a report, there is no indication of any legislative intent to impose civil liability for failure to report." *C.B. v. Bobo*, 659 So.2d 98, 102 (Ala. 1995).

Appellees' arguments concerning why this Court should find an implied private cause of action in KRS 620.030 are unavailing. There is nothing in KRS 620.030 or Kentucky case law supporting such a ruling. Moreover, the vast majority of states who have examined the issue involving a similar statute in similar circumstances have concluded no implied private cause of action exists. This Court should do the same.

D. Ms. Turner's Decision Making At Issue Was Discretionary.

In response to Ms. Turner's entitlement to qualified governmental immunity from any negligence claim, Appellees rely upon two cases involving a police officer's duties to investigate and report crimes as defined by statutes very different from the reporting statute. For example, *Pile v. City of Brandenburg*, 215 S.W.3d 36 (Ky. 2007), involved an allegation that a police officer violated KRS 189.540, which prohibits leaving ignition keys in unattended police vehicles, when he left his vehicle's engine on and the keys in

the ignition, which resulted in a suspect driving off with the vehicle. A police officer's duty not to leave keys in an unattended vehicle is not one involving decision making nor is it "largely subjective" like a discretionary function. Supervising children in a classroom and deciding how to respond to a parent's report that her child said another child was "up her butt" is discretionary: "supervising the conduct of others is a duty often left to a large degree—and necessarily so—to the independent discretion and judgment of the individual supervisor." *Haney v. Monsky*, 311 S.W.3d 235, 244 (Ky. 2010).

Bramble v. Graham, No. 2003-CA-001755-MR, 2004 WL 2151071, * 1-2 (Ky. App. Sept. 24, 2004) (unpublished) is also distinguishable. In *Bramble*, there was a duty to report the alleged abuse because the abuser was a stepfather living with the child. In this case, Ms. Turner had no legal duty to report under KRS 620.030(1). The statute applies only where the complained-of abuse was done by a parent, guardian or other person exercising custodial control or supervision over the child. That is not the allegation in this case and, therefore, the reporting statute does not apply. Only where there is reasonable cause to believe that abuse, as statutorily defined, has occurred does a duty attach.

E. The Issue Of Whether Ms. Turner Is Entitled To Qualified Governmental Immunity From Appellees' Negligence Claims Is Before This Court.

Appellees incorrectly argue that this Court cannot decide the issue of whether Ms. Turner is entitled to qualified immunity from the negligent supervision claim. The negligent supervision claim was raised and briefed by the parties in both appeals to the Kentucky Court of Appeals. Ms. Turner also raised the issue of qualified immunity in her Motion for Discretionary Review. She stated that the Questions of Law to be decided included the following:

(3) Whether the actions taken by a teacher in response to a report of alleged inappropriate touching of a minor child by a minor child are ministerial or discretionary?

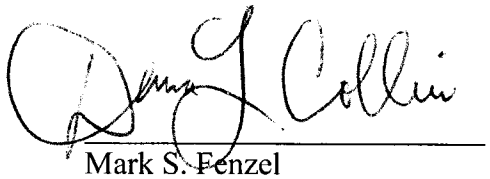
(4) Whether a state actor is entitled to qualified official immunity from a negligence claim that he or she failed to take the appropriate remedial action in response to a report of alleged inappropriate touching of a minor child by a minor child?

Motion for Discretionary Review, p. 8. These questions relate to whether Ms. Turner responded appropriately to the allegations and whether she can be liable for negligent supervision. The Court accepted discretionary review of these questions.

Finally, although it is not relevant to the underlying decision of this Court, for the record it should be noted that although Appellees state in their Brief that F.B. was "physically and emotionally injured," there is absolutely no evidence of any physical or emotional injury despite extensive fact witness and expert testimony.

For the reasons set forth herein and in Appellant's Brief, this Court should affirm the summary judgment granted to Ms. Turner in this case on all of Appellees' claims.

Respectfully submitted,



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