COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2009-SC-000289
(CONSOLIDATED WITH 2009-SC-000839)

UNIVERSITY MEDICAL CENTER, INC. D/B/A UNIVERSITY OF LOUISVILLE HOSPITAL — APPELLANT/CROSS-APPELLEE

V.

Appeal from the Kentucky Court of Appeals
Original Action Nos. 2007-CA-000018 and 2007-CA-000133

MICHAEL G. BEGLIN, EXECUTOR OF THE ESTATE OF JENNIFER W. BEGLIN, INDIVIDUALLY, AND AS PARENT AND NEXT FRIEND OF THE MINORS, WILLIAM PATRICK BEGLIN AND KELLY ANN BEGLIN — APPELLEE/CROSS-APPELLANT

BRIEF OF *AMICUS CURIAE* KENTUCKY HOSPITAL ASSOCIATION

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of this brief have been served via First Class U.S. mail on this 26th day of May, 2010 to the following: F. Thomas Conway, 238 South Fifth Street, 18th Floor, Louisville, Kentucky 40202; Chadwick N. Gardner, 1916 Kentucky Home Life Building, 239 South Fifth Street, Louisville, Kentucky 40202; and Edward H. Stopher and Raymond G. Smith, Boehl, Stopher & Graves, LLP., Aegon Center, Suite 2300, 400 West Market Street, Louisville, Kentucky 40202. Honorable Charles I. Cunningham, Jr., Division Four, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, KY 40202; and Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. The undersigned also certifies that the record on appeal was not withdrawn by Kentucky Hospital Association.

COUNSEL FOR *AMICUS CURIAE*, KENTUCKY HOSPITAL ASSOCIATION

STATEMENT OF POINTS AND AUTHORITIES

Purpose and Issues

The facts of the case underlying the appeal are indisputably tragic. Yet under a rule of law justice is found not solely in a conclusion, but in the process of justice correctly administered. Matters of law transcend any one case to assure that the administration of justice is not only fair, but consistently so. In the matter on appeal Appellant provides several persuasive arguments in favor of overturning the lower courts. The KHA, however, seeks to focus primarily on one specific ground that deserves this Court's particular attention – the trial court committed reversible error by permitting a "missing evidence" instruction without first concluding as a matter of law that the alleged evidence was missing as a result of bad faith.

The KHA submits that the issue surrounding the "missing evidence" instruction is not whether the trial court erred in its judgment; rather, the issue is whether the trial court's failure to exercise judgment resulted in the jury receiving a prejudicial instruction. With respect to the case on appeal, the "missing evidence" instruction denied both parties the opportunity for a fair and objective verdict. With respect to the law in Kentucky concerning "missing evidence" instructions, the consequences of the Court of Appeals' Opinion will have an immeasurably negative impact on discovery, liability and punitive damages. The effect of the Court of Appeals' Opinion cannot be understated.

The KHA has a legitimate and practical concern that the Court of Appeals' Opinion will impose unwarranted liability and punitive damages upon hospitals for otherwise good faith conduct. The accidental loss of documents and the planned, permissible destruction of documents occur in the ordinary course of business. Such good faith events, however, will carry unreasonable liability as a result of the Court of Appeals' Opinion. The KHA submits

that hospitals will feel the consequences of the Opinion more acutely than others given the document requirements and litigious environments in which hospitals operate.

The treatment of patients produces an extraordinary number of documents as required for the provision of quality care. Hospitals must comply with numerous laws, regulations, professional standards and requirements from accrediting bodies concerning the maintenance and appropriate preservation of medical records and administrative documents as a component of providing health care services. The management of documents, in both electronic and physical forms, poses a significant challenge even in the ordinary course of business. These document management responsibilities are amplified by current government initiatives that require even more documentation and the implementation of electronic record keeping.

Yet the practical consequence of the Court of Appeals' Opinion is that the good faith absence of a document may turn any claim of disputed liability into an admission of liability and opens the door to punitive damages. The arguments presented by Appellant underscore the harsh consequences and heavy burden that will be caused by the allowance of "missing evidence" instructions without a finding of bad faith by the trial judge.

Argument

A. The Trial Judge Must Make an Evidentiary Finding of Bad Faith before Giving a "Missing Evidence" Instruction to a Jury

Unless this Court overturns the lower courts in this appeal, trial judges will have grounds to give juries a "missing evidence" instruction without a prior evidentiary finding of bad faith. Without a threshold finding of bad faith, a trial judge's submission of a "missing evidence" instruction will set in motion a circular logic that will ultimately prejudice a jury. The trial judge has the critical responsibility of safeguarding the jury from improper and prejudicial instructions and interrogatories intending to guide the jury in its verdict.

Appellant's brief clearly and persuasively establishes that the law in Kentucky is that a "missing evidence" instruction is improper unless the trial judge first finds that the evidence in question is missing as a result of a party's bad faith and that the missing evidence itself was prejudicial to the party responsible for the evidence. *See Estep v Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002). In the recently published opinion of *Adams v Lexington-Fayette Urban County Government*, 2009 Ky. App. LEXIS 27, *29 (Ky. App. February 13, 2009), the Court of Appeals cited *Estep*, *supra*, and correctly noted that a finding of bad faith was a condition precedent to giving a "missing evidence" instruction:

> However, before a "missing evidence" instruction can be given, there must be some intentional conduct to hinder discovery on the part of the party who is unable to produce the requested evidence.

The finding of bad faith is required because a "missing evidence" instruction is a powerful instruction to a jury. A "missing evidence" instruction allows the jury to infer that missing evidence would have been adverse to one party and favorable to the other party had the evidence been available at trial. Ordinarily juries are not permitted to presume anything not presented as evidence during the trial, but a "missing evidence" instruction is not a typical jury instruction. It is a punishment upon a party. A "missing evidence" instruction punishes a party for the intentional, bad faith destruction of evidence. *See Tamme v Commonwealth*, 759 S.W.2d 51, 54 (Ky. 1988). The penalty upon the party acting in bad faith is that a jury is permitted to deviate from the trial evidence and to pretend that the missing evidence was adverse to a party. If a party is penalized with a "missing evidence" instruction it is because the trial judge has made a finding of bad faith against a party.

Despite permitting the negative inference by allowing the "missing evidence" instruction, the trial judge did not make a finding of bad faith. As the Court of Appeals notes:

> Simply put, the court left the decision as to whether the Hospital acted in bad faith up to the jury.

(Slip Op. at p. 7.) Moreover, one may not reasonably argue that the trial judge made a finding that the evidence was missing due to bad faith conduct because no evidence of bad faith was alleged or presented by Appellee. As Court of Appeals Judge Wine states in his dissent:

> More importantly, no one accuses the Hospital or any agent of intentionally destroying the report or exercising bad faith in making the report unavailable.

(Slip Op. at p. 19.) The Court of Appeals has lowered the threshold for trial judges to mere acquiescence in permitting a "missing evidence" instruction.

A "missing evidence" instruction is, in essence, an evidentiary ruling. A trial judge would not allow a jury to decide on the admissibility of evidence. Similarly, a trial judge should not give a "missing evidence" instruction as a means of allowing the jury to determine whether the "missing evidence" instruction was appropriate.

B. A "Missing Evidence" Instruction Is Unquestionably Prejudicial

This Court held in *Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997), that a "missing evidence" instruction is a remedy:

> Where the issue of destroyed or missing evidence has arisen, we have chosen to remedy the matter through evidentiary rules and "missing evidence" instructions. (Emphasis added.)

Id. at 815 (*citing Tinsley v. Jackson*, 771 S.W.2d 331 (Ky. 1989) and *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988)). Remedies apply to wrongs and herein lies the prejudice. The trial judge made no finding of a wrong to justify the "missing evidence" instruction. As Judge Wine notes in his dissenting opinion, no wrong is even alleged by Appellee. (Slip Op. at p. 19.) Yet, by giving the jury a "missing evidence" instruction the trial judge insinuated a wrong and punished Appellant as if a wrong had occurred.

A "missing evidence" instruction sends two separate, but equally damaging, messages to the jury. First, the "missing evidence" instruction notifies the jury that a party has acted in bad faith with respect to evidence material to the case. A "missing evidence" instruction informs a jury that a party has violated the most valuable commodity in a trial – evidence. The prejudices that follow a "missing evidence" instruction strike at the integrity of a party's case and create doubt as to whether a party can be trusted.

The second message communicated by a "missing evidence" instruction is the obvious message intended by the adverse inference the jury is permitted to make of the missing evidence. *See, e.g., Peak v Commonwealth*, 197 S.W.3d 536 (Ky. 2006). As previously stated, juries are not permitted to presume evidence not presented at trial. In fact, it is impossible to draw any inference from evidence that, in the jury's awareness, does not exist. The distinction with the "missing evidence" instruction is that a trial judge makes an evidentiary finding that certain evidence would have been presented at trial had it not been for a party's bad faith conduct. Because the evidence is missing and not available to the jury, the trial judge may remedy the circumstances through a "missing evidence' instruction that not only acknowledges the existence of the evidence, but also allows the jury to infer the worst from the evidence.

The prejudice from a "missing evidence" instruction is amplified when the allegedly missing evidence is argued to be, in effect, an admission of liability. The evidence allegedly missing in the underlying case was an incident report. Appellee argued to the Court of Appeals that the incident report, if it had been found, would show Appellant's liability. In effect, the trial judge's submission of a "missing evidence" instruction to the jury was the equivalent of allowing the jury to infer liability based upon nothing more than the Appellee's argument of what the incident report could have said. Argument is not evidence, but the

trial judge allowed the jury to give Appellee's argument the same weight as evidence. The KHA submits there may be no greater prejudice than this in the conduct of a trial.

C. Discovery Will Turn into a Litigation Strategy Focusing More on Evidence that Does Not Exist

The KHA fully concurs with Appellant's prediction that the Court of Appeals' opinion will turn discovery into "... a contest whose only purpose is to unearth a single missing document...." (Appellant's Brief, p. 45.) A litigant's reward for such a contest may be nothing short of a favorable verdict because the value and meaning of the missing document may be limited only by the attorney's imagination and argument. This scenario will no doubt lead to "scorched earth" pre-trial discovery processes that will further increase already substantial litigation costs with no benefit to the search for justice. Hospitals work diligently to serve their communities in the face of a litigation-friendly environment and burdensome documentation obligations. If the Court of Appeals' Opinion is allowed to modify prior law, medical liability litigation will become an educated gamble based solely on the odds that a heavily regulated hospital will have difficulty producing one of the thousands of documents that may be generated for a single patient.

A more troubling consequence of the Court of Appeals' Opinion may be the potential for liability for documents destroyed in good faith. As hospitals struggle to manage the volumes of documents produced in the ordinary course of business, while endeavoring to protect patient's personal healthcare information from inadvertent disclosure, documents are frequently prone to digitization and planned destruction. Nothing prevents the Court of Appeals' Opinion from empowering a trial judge to take even good faith actions and allow a jury to infer the worst. As a practical matter, the Court of Appeals' Opinion will now cause ordinary document management activities to take on extraordinary liability. Hospitals will find themselves facing liability and punitive damages regardless of whether the alleged

document ever existed, whether it was misplaced in good faith, or destroyed pursuant to a reasonable document management policy designed in part to protect patients' personal healthcare information from inadvertent disclosure.

D. The Opinion Subjects Hospitals to an Undefined, Arbitrary Standard for Punitive Damages Liability

The Court of Appeals found support for an award of punitive damages against Appellant based on a theory that Appellant ratified the conduct of another:

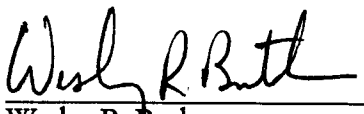
> Further, the jury could have believed that the hospital ratified the conduct by failing to perform an adequate investigation following Beglin's surgery, as evidenced by the fact that the hospital did not uncover in its investigation that there was a delay in getting blood to the operating room. [Emphasis added.]

(Slip Op. at p. 11-12.) The Court of Appeals' Opinion provides absolutely no guidance to Kentucky hospitals as to what constitutes an "adequate" investigation. The above quoted language seems to imply that a hospital can be assessed punitive damages if it fails to discover all issues in a subsequent investigation. The consequence of the "adequacy" standard is that litigants will be permitted to make a factual issue of a hospital's investigation merely by asserting that the investigation was "inadequate." Given the undeniable ambiguity of the standard enunciated by the Court of Appeals, the KHA urges the Court to overturn the Court of Appeals' Opinion to prevent such an amorphous standard from being clothed with precedential effect.

Conclusion

For the foregoing reasons, the Kentucky Hospital Association respectfully submits this *amicus curiae* brief in support of the Appellant/Cross-Appellee University Medical Center, Inc., d/b/a University of Louisville Hospital and requests this Court to reverse the Court of Appeals' Opinion.

Respectfully submitted,



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