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SUPREME COURT OF KENTUCKY
2009-SC-000289 AND 2009-SC-000839

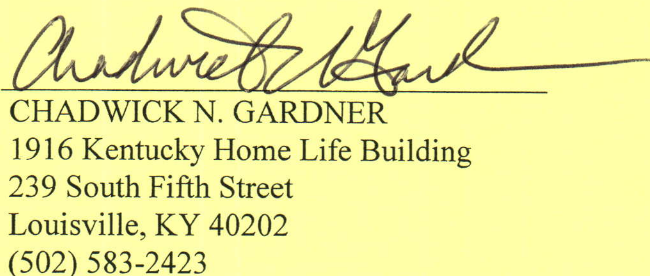
UNIVERSITY MEDICAL CENTER, INC.
D/B/A UNIVERSITY OF LOUISVILLE
HOSPITAL APPELLANT/CROSS-APPELLEE

v.

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

APPEAL FROM COURT OF APPEALS OF KENTUCKY
2007-CA-000018 AND 2007-CA-000133

**REPLY BRIEF OF APPELLEE/CROSS APPELLANT
MICHAEL G. BEGLIN, EXECUTOR OF THE
ESTATE OF JENNIFER G. BEGLIN**



F. THOMAS CONWAY
CONWAY & CONWAY
239 South Fifth St., Ste. 1800
Louisville, KY 40202
(502) 583-4433

CHADWICK N. GARDNER
1916 Kentucky Home Life Building
239 South Fifth Street
Louisville, KY 40202
(502) 583-2423

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed, first class, postage prepaid, to Edward H. Stopher, Raymond G. Smith, Matthew B. Gay, Aegon Center, Suite 2300, Louisville, KY 40202, Carol Dan Browning, Stites and Harbison, 400 W. Market St., Suite 1800, Louisville, Kentucky, 40202, Hon. Charles Cunningham, Jr., Jefferson Circuit Judge, Division 4, 700 West Jefferson Street, Louisville, KY 40202, Samuel P. Givens, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Wesley R. Butler, BARNETT BENVENUTI & BUTLER, 489 East Main Stree, Suite 300, Lexington, KY 40507; Josh M. Kantrow, Lori S. Nugent, WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP, 120 N. LaSalle St., Chicago, IL 60602, Counsel for Amicus Kentucky Hospital Association; and, Virginia Hamilton Snell, WYATT, TARRANT & COMBS, LLP, 500 W. Jefferson St., Suite 2800, Louisville, KY 40202, Counsel for Amicus Kentucky Chamber of Commerce, this 12th day of October, 2010.

CHADWICK N. GARDNER

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I. BEGLIN PRESERVED HIS CLAIM THAT THE ORIGINAL DISCHARGE SUMMARY WAS ADMISSIBLE.

The parties raised the issue of the exclusion of the original discharge summary at the pretrial hearing on Motions in Limine, and the trial court ruled upon it as a matter in dispute. Item 19 of the Court's 6-29-06 Order, attached as Exhibit B to Beglin's Appellee Brief, reflects it was a matter in dispute, and the trial court denied its admission.

UMC does not dispute that the discharge summary was UMC's hospital record. Nor does UMC dispute that Dr. Galandiuk re-dictated the discharge summary and substituted a new one for the original. Importantly, the record was not altered until *after* UMC and Dr. Galandiuk were sued. If UMC desires to explain this was Dr. Galandiuk's decision for various reasons, that is a matter for cross-examination. However, it was a patient's hospital record that contained impressions of an important fact witness. UMC was responsible for the record and for insuring it was not altered or tampered.

The summary Dr. Shirley dictated indicated something went wrong during surgery. In this appeal, UMC claims the incident report was irrelevant because the Hospital did not know anything went wrong. The report impeaches this claim.

II. EXCLUDING LOST ENJOYMENT OF LIFE AS AN ELEMENT OF PAIN AND SUFFERING WAS NOT HARMLESS ERROR.

UMC takes no issue with the holdings in Westfield Ins. Co v. Hunt, 897 S.W.2d 604 (Ky. App. 1995) and Gossage v. Roberts, 904 S.W.2d 246 (Ky. App. 1995) that lost enjoyment of life is a compensable element of pain and suffering. UMC instead claims the error is harmless because the jury awarded zero for pain and suffering. Both arguments fail.

It is ironic that UMC claims harmless error when it repeatedly claims instruction errors are not harmless when discussing the missing evidence instruction. Beglin tendered

an instruction that included the language requested,[1] and the trial court initially allowed it, but for some reason changed her mind as the instructions were being read to the jury.[2] The trial court's directive to omit the lost enjoyment of life language as she read the instructions highlighted the error and solidified the jury's inability to consider this issue.

The jury's award of zero demonstrates prejudice. UMC incorrectly states "the jury unanimously determined that Jennifer never had any conscious awareness or pain perception following surgery."[3] The jury simply awarded zero. No one knows why or whether it made a determination of conscious awareness or pain perception. Jennifer Beglin lost enjoyment of life by lying in a comatose, vegetative state even if she was unconscious. Lost enjoyment differs from "pain and suffering" in that aspect. Who knows what the jury may have awarded had it been allowed to consider this issue.

III. THE TRIAL COURT SHOULD HAVE ADMITTED THE MAXIMUM SURGICAL BLOOD ORDER SCHEDULE. (MSBOS)

UMC denies any control or responsibility for blood ordering decisions, claiming those decisions rest "solely with the surgeon and anesthesiologist."[4] Nevertheless, this *hospital* developed a blood ordering schedule for elective surgeries. UMC relies upon KRE 401, 403, and most heavily on KRE 407, for exclusion. The evidence is relevant because the policy specifically included Beglin's type of surgery. It does not violate KRE 403. It is a simple blood ordering policy. Exclusion by KRE 407 has two fatal flaws: (1) the measure is not remedial, and, (2) the control, impeachment and feasibility exceptions apply.

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[1]RA 3327

[2]VR, B18, 12:57:40-13:04:15

[3]UMC Reply Brief 21.

[4] UMC Reply Brief at 21; UMC states:

UMC adopted the MSBOS policy 21 months after Beglin's surgery and claims that under it "physicians still retain the right to decide whether pre-ordered blood is appropriate."[5] Essentially, UMC claims the new procedure changed nothing because doctors made blood ordering decisions before its enactment, and they do now. If so, the measure is not remedial. The 21 month delay further indicates it was not a response to Beglin's death.

Hospitals scrutinize physicians for pre-ordering blood in arguably unwarranted circumstances, including surgeries like Jennifer Beglin's, and therefore exercise some "control" over the process. Otherwise, such a policy has no meaning. UMC claims doctors alone make blood ordering decisions. The policy's existence impeaches that claim. The new policy's specific description of acceptable advance blood ordering procedures implies that the hospital did not approve of advance blood ordering in procedures like Beglin's under the old policy. The new policy let physicians know it was acceptable, and it illustrates why the control, impeachment and feasibility exceptions to KRE 407 apply–if 407 applies at all. See Phelps v Water Co., 103 S.W.3d 46 (Ky. 2003) (control exception); Davenport v. Ephraim McDowell Memorial Hosp. Inc., 769 S.W.2d 56 (Ky. App. 1988) (impeachment exception). The MSBOS was a *hospital* enactment, a *hospital* issue, and a *hospital* policy, amidst clams that only the doctors make such decisions.

IV. THE ROOT CAUSE ANALYSIS WAS DISCOVERABLE.

The law is clear that claims of privilege or work product do not apply simply because an attorney is involved. Reliance upon the work product privilege requires the evidence to contain some thoughts or mental impressions of the attorney. Park v. Vinson, 703 S.W.2d 482, 486 (Ky. App. 1985). While the attorney-client privilege is strong, the law limits it to

[5] UMC Reply Brief at 21.

attorneys and clients. It covers only "communications." Disclosure to a third party waives the privilege. Lexington Public Library v. Clark, 90 S.W.3d 53, 61 (Ky. 2002).

No "self-critical analysis" privilege applies. It is a limited privilege, and "does not protect materials sought for use in medical malpractice cases." *Lawson's Kentucky Evidence Law*, § 5.25, p.392 (4th ed. 2003). Reyes v. Meadowlands Hosp. Med. Ctr., 809 A.2d 875 (N.J. App. 2001) considered this very issue in a medical negligence case and held sentinel event reports are not protected by a "self-critical analysis" because JCAHO membership is voluntary and root causes analyses are not required for accreditation. Id. at 877. It noted JCAHO had been unsuccessful in obtaining Congressional recognition of the privilege through legislation. Id.

UMC *voluntarily* belongs to the Joint Commission on Accreditation of Hospitals. Membership is not a legal requirement. UMC admits the report is prepared pursuant to JCAHO guidelines. Because UMC voluntarily belongs to JCAHO, and JCAHO is a third party, there is no privilege. UMC did not file the root cause analysis "in anticipation of litigation." UMC never met its burden of showing the analysis contained counsel's mental thoughts or impressions.

UMC shredded a blood triplicate form with vital information;[6] it destroyed the incident report; it claimed a code sheet was part of the record,[7] but there was not one; and, Beglin's medical record contained no indication that anything went wrong during her surgery. It provided no indication there was a delay getting blood, no documentation of physicians repeated orders for blood, and no assessment or reassessment of Beglin's

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[6] Cantrell, VR B11, 11:44:00.

[7] Cantrell, VR B11, 11:56:55

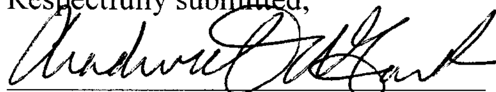
condition as it deteriorated. UMC claims it never knew there was a problem or delay getting blood because no doctor complained.

Beglin and the Court do not know when the root cause analysis was performed. Because that fresh incident report, code sheet, and blood triplicate form were unavailable, and because UMC's "investigation" failed to interview any of the central actors, the root cause analysis report constitutes the only other recording and exploration of what occurred.

UMC's Reply Brief argues that self appraisals permit "individuals or businesses to candidly assess their compliance with regulatory and legal requirements" and that "[t]he purpose of a root cause analysis is to permit health care facilities to implement plans to identify and reduce future risks."[8] The subtle message in UMC's arguments is that the law should allow it to conceal its revelation of the truth to an accrediting body, but should excuse the discovery of that truth in legal proceedings. That concealment forces a party to engage in a "catch me if you can" cat and mouse game in search of truths voluntarily admitted to a third party. Proceedings in the courts of justice have at least an equal desire to uncover the truth as a voluntary accreditation body. The rule of law must prevail.

Beglin asks this Honorable Court first to affirm the trial court's judgment. If reversed, Beglin asks the Court to reverse the trial court's rulings on these issues.

Respectfully submitted,



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1916 Kentucky Home Life Building
239 South Fifth Street
Louisville, KY 40202
(502) 583-2423

F. THOMAS CONWAY
1800 Kentucky Home Life Building
239 South Fifth Street
Louisville, KY 40202
(502) 583-4433

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[8]UMC's Reply Brief 24.