SUPREME COURT OF KENTUCKY
CASE NO. 2010-SC-000532

LINDA SUE GRUBB and LAYMON GRUBB,
Co-Administrators of the Estate of Krystal D. Meredith
And LINDA S. GRUBB AND LAYMON GRUBB,
Grandparents and Next Friend of
ALYSSA B. MEREDITH, A Minor — **APPELLANTS**

v.

NORTON HOSPITAL, INC.,
LUIS M. VELASCO, M.D., and
JAMES B. HAILE, M.D. — **APPELLEES**

APPEAL FROM KENTUCKY COURT OF APPEALS
2009-CA-00021 AND
JEFFERSON CIRCUIT COURT 07-CI-003983

BRIEF FOR APPELLEE JAMES B. HAILE, M.D.

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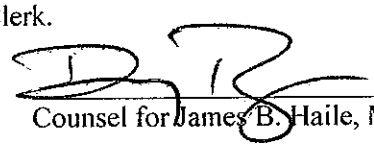
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the following Brief for Appellee, James B. Haile, M.D., was served via U.S. mail, first-class, postage pre-paid, on this the 11th day of September 2012, to Chadwick N. Gardner, 1916 Kentucky Home Life Building, 239 South Fifth Street, Louisville, KY 40202, F. Thomas Conway, 1800 Kentucky Home Life Building, 239 S. Fifth Street, Louisville, KY 40202, and Scott Roby, 600 W. Main Street, Suite 100, Louisville, KY 40202, Counsel for Appellants, Beth H. McMasters, 200 S. Fifth Street, Suite 200N, Louisville, KY 40202, Counsel for Norton Hospital, Inc., Craig L. Johnson, 11901 Brinley Ave., Louisville, KY 40243,Counsel for Luis M. Velasco, M.D., Hon. Susan Schultz Gibson, Jefferson Circuit Court, Division 12, 700 West Jefferson Street, Louisville, KY 40202, and Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601. I further certify that the record on appeal was not removed by or on behalf of Appellee Dr. Haile from the office of the Jefferson Circuit Court Clerk.



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STATEMENT CONCERNING ORAL ARGUMENT

Appellee James B. Haile, M.D., respectfully submits that oral argument is not necessary in resolving this appeal. The facts and legal arguments underlying the issues herein are adequately presented in the record and in the respective briefs filed by the parties hereto. Moreover, as those facts and legal arguments are neither complex nor novel and involve the simple exercise of the Jefferson Circuit Court's discretion in issues pertaining to jury selection and evidentiary issues, the decisional process will not be significantly aided by oral argument.

POINTS AND AUTHORITIES

FACTUAL BACKGROUND

This medical malpractice action arose out of care and treatment rendered to Krystal Meredith by obstetricians James B. Haile, M.D., and Luis Velasco, M.D., at Norton Hospital in early January 2007. In particular, Ms. Meredith, who was in her 38th week of pregnancy, presented to Norton Hospital on January 5th with complaints of nausea, diarrhea, and weakness.[1] Physical examination revealed that she was one-and-a-half centimeters dilated. As Ms. Meredith's obstetrician, Dr. Velasco, was not on call during this visit, Norton Hospital staff contacted his on-call coverage, Dr. Haile. Importantly, Drs. Haile and Velasco undisputedly were not partners and did not practice medicine together. Instead, they were solo practitioners, each with his own separate and distinct medical practice, who (along with one other physician) simply took turns rotating on-call coverage on their respective weekends off.[2]

Accordingly, Dr. Haile received information about Ms. Meredith's condition and ordered that she be given fluids and an anti-nausea medication.[3] Concerned about the possibility of a placental abruption, Dr. Haile additionally ordered a medical work-up of that possibility which included an ultrasound examination. The results of that test were negative, meaning no abruption could be seen, and Ms. Meredith went home later that evening.[4]

Ms. Meredith again returned to Norton Hospital's obstetrical triage unit the following day complaining of uterine contractions and abdominal pain. Nurses promptly contacted Dr. Haile and he evaluated Ms. Meredith – in person – on two separate occasions that same day.[5] He thereafter ordered medications to alleviate Ms. Meredith's pain and to stop her contractions.

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[1] *See* Plaintiffs' trial exhibit 2.
[2] VR 9/12/08 10:16:00 – 10:17:40, 03:00:000 – 03:00:07, 03:01:08 – 03:01:26.
[3] VR 9/12/08 10:25:00 – 10:25:25.
[4] *Id.* at 10:24:20 – 10:25:53.
[5] *Id.* at 10:18:45, 10:19:30, 10:19:50.

Those palliative efforts were successful and Dr. Haile then discharged Ms. Meredith with instructions to return to the hospital if her symptoms worsened or returned.

And indeed, in the evening of January 07, 2007, Ms. Meredith again presented to the Norton Hospital labor and delivery unit at approximately 7:00 p.m. Nurses paged Dr. Haile and informed him that Ms. Meredith had returned.[6] Dr. Haile ordered that the patient be admitted and that his routine standing orders be implemented.[7]

Dr. Haile later called back to the L&D unit at approximately 10:18 p.m. inquiring about the results of blood work drawn earlier that evening.[8] He ordered an abdominal ultrasound and repeat blood work at that time.[9] Upon learning that the ultrasound results were negative, Dr. Haile intended for Ms. Meredith to be given additional antibiotics, to be followed by the nursing staff and to be seen the following morning with the expectation that Dr. Velasco, as her primary obstetrician, would be able to resume care and deliver her child at that time. Nevertheless, Dr. Haile instructed the nursing staff to keep him advised as to Ms. Meredith's condition.

Dr. Velasco, in fact, resumed Ms. Meredith's care at approximately 7:30 the following morning and assisted her in the delivery of her daughter, Alyssa, without complication. But after that delivery, Ms. Meredith became very weak and complained of pain in her left side. She was transferred to the ICU where a CT scan appeared to be normal but for a tiny bubble of air in her abdomen.[10] Dr. Christine Landry, a general surgeon, saw Ms. Meredith in consultation and

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[6] VR 9/12/08 10:58:35 – 10:59:00.
[7] *Id.* at 10:59:00 – 10:59:35, 11:06:02, 11:08:17; Plaintiffs' Trial Exhibit No. 9.
[8] *Id.* at 11:08:17.
[9] *Id.* at 11:08:10.
[10] *See, e.g.*, Plaintiffs' Trial Exhibit 13; trial testimony of Dr. Jorge Rodriquez, 9/16/08.

an exploratory abdominal surgery was planned as no clear diagnosis could be made at that time.[11]

During that surgery the following morning, Dr. Jorge Rodriquez discovered that Ms. Meredith's appendix had ruptured; he also found that she had developed a walled off abscess behind her until-recently-gravid uterus.[12] Dr. Rodriquez advised Ms. Meredith's family that he believed the rupture had occurred somewhere between four and seven days earlier.[13] Despite Dr. Rodriquez's surgical efforts, Ms. Meredith ultimately developed a systemic infection which led to acute respiratory distress syndrome (ARDS). As a result of complications associated with that process, Ms. Meredith passed away on February 01, 2007.

This litigation ensued.

Appellants brought claims against Norton Hospital, Inc. (a subsidiary of Norton Healthcare, Inc.), Dr. Velasco and Dr. Haile sounding in medical negligence. Appellants later sued Community Medical Associates, Inc. (also a subsidiary corporation of Norton Healthcare, Inc.) but later voluntarily dismissed their claims against it. Importantly, though, Appellants never sued Norton Healthcare, Inc.

Throughout litigation, Appellants alleged that Dr. Haile had negligently failed to diagnose and treat Ms. Meredith's ruptured appendix in a timely fashion. Although her complaints of nausea, vomiting and abdominal pain on the 5th, 6th and 7th of January, respectively, were entirely consistent with her late stage pregnancy, Appellants claimed that they were, instead, clear indications of a ruptured appendix such that Dr. Haile should have diagnosed and initiated treatment for that condition before the delivery of her child.

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[11] VR 09/16/08 10:58:03.
[12] VR 09/16/08 10:57:21, 11:20:30.

Appellants likewise alleged that Dr. Velasco had negligently failed to diagnose the ruptured appendix before proceeding with delivery on January 08, 2007. They additionally claimed that Dr. Velasco had improperly missed signs of this developing process in an office visit on January 04, 2007, the day before Dr. Haile first saw her. Appellants were similarly critical of the nursing care provided to Ms. Meredith, contending, at least in part, that the nurses failed to initiate the "chain of command" after Dr. Haile's supposedly inappropriate responses to his patient's condition.

Not surprisingly, Dr. Haile, Dr. Velasco and Norton Hospital each differed significantly with Appellants regarding the propriety of their respective care. Indeed, throughout the course of this litigation, obstetrical and maternal/fetal medicine experts staunchly defended the treatment provided by Dr. Haile. Indeed, those experts – as did the Defendant Physicians themselves – testified that it is not at all uncommon for first-time-pregnant patients to experience nausea, vomiting, and diarrhea in the later months of gestation.

Accordingly, Dr. Haile defended his care and treatment by pointing out that Ms. Meredith's complaints were absolutely consistent with her stage of pregnancy and that they should not have led him to suspect or diagnose a ruptured appendix. Dr. Haile's position was further supported by the fact that her complaints were relieved by purely palliative interventions which, again, made them inconsistent with a ruptured appendix.[14] In turn, Dr. Haile argued that Ms. Meredith's pregnancy had actually "masked" the ruptured appendix thereby making it all-but-impossible to diagnose. Put simply, ample testimony -- both factual and expert in nature --

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[13] *Id.* at 11:22:39.

[14] *See, e.g.,* VR 9/12/08 11:50:00 – 11:51:47.

established that Dr. Haile had at all times met the standard of care expected of him in his management and evaluation of Ms. Meredith.

And upon the conclusion of an extremely contentious and hard-fought, *nine-day-long trial*, the jury ultimately agreed that Dr. Haile, Dr. Velasco and Norton Hospital had each met the standard of care expected of them in their respective care and treatment of Ms. Meredith. The Jefferson Circuit Court then entered Judgment accordingly.

Following post-trial Motions, this appeal ensued. Reduced to its essentials, Appellants' arguments focus primarily on the Jefferson Circuit Court's exercise of discretion in refusing to strike three jurors – none of whom actually deliberated or ultimately participated in the decision of this case – for cause; the routine exercise of the trial court's inherent discretion to preclude evidence of liability insurance; and in ruling, as a matter of law, that Drs. Haile and Velasco were not agents of Norton Hospital.

As demonstrated below, however, none of Appellants' arguments has any merit. The Jefferson Circuit Court properly found, as a matter of law, that there was no principal/agent relationship between Norton Hospital, Inc., Dr. Velasco and/or Dr. Haile. Moreover, the Court properly exercised its discretion in denying Appellants' various motions to strike a number of jurors for cause. The long and the short of the matter is that, considering their answers given in *voir dire* in their totality and in the appropriate context, none of those jurors harbored any actual or presumed bias for or against any party to this case. Indeed, and despite their protests now to this Court, Appellants failed woefully in making a proper record in regard to either presumed or actual bias of any of the jurors in question. Thus, the Circuit Court appropriately refused to strike any of those jurors for cause.

And, finally, Judge Gibson likewise appropriately exercised her discretion in denying evidence of liability insurance as any conceivable relevance it might have had, if any, was substantially outweighed by the dangers of undue prejudice, confusion of the issues and misleading the jury.

The upshot is that Appellants received an imminently fair trial. The jury simply disagreed with their claims and found in favor of Dr. Haile and the other Appellees. Because there was no error below, the appeal should be denied and the Judgment entered in this case affirmed in all respects.

ARGUMENT

As with evidentiary decisions, the decision to strike a potential juror for cause is one left to the wide discretion of the trial court.[15] Accordingly, this Court should not disturb those rulings unless the trial court abused that discretion; that is, "unless the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles."[16] And in deciding whether a prospective juror should be stricken for cause, the "central inquiry is whether [he/she] can conform his or her views to the requirements of the law, and render a fair and impartial verdict based solely on the evidence presented at trial."[17]

But just as importantly, in reviewing the trial court's exercise of discretion in ruling on a juror's impartiality, appropriate deference is to be afforded the fact that the lower court had a unique "opportunity to observe the demeanor of the prospective juror, and therefore [was] in the best position to interpret the substance and nature of that person's responses to voir dire

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[15] *See, e.g., Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (evidentiary issues); *Bowman v. Perkins*, 135 S.W.3d 399, 404 (Ky. 2004) (juror selection).
[16] *Goodyear Tire & Rubber Co.*, 11 S.W.3d at 581; *Grooms v. Commonwealth*, 756 S.W.2d 131 (Ky. 1988).
[17] *Wood v. Commonwealth*, 178 S.W.3d 500, 515 (Ky. 2005).

questioning."[18] For this very reason, it has long been recognized that the trial court "is in a far better position than [appellate courts] to determine whether a juror should be excused for cause."[19] As a result, a trial court's decision refusing to strike a juror should not be set aside by a reviewing Court unless the error is "manifest."[20] And in the present case, it is abundantly clear that the Jefferson Circuit Court's denial of various motions seeking to strike jurors for cause was grounded soundly in her direct observations and impressions of the jurors, the facts elicited during *voir dire* and the law of this state.

But perhaps just as importantly, the trial court's decisions were made in light of evidence it did not have; to wit, a record of presumed or actual bias which was completely undeveloped by Appellants in this case. Kentucky law is unequivocally clear that the relationships upon which Appellants base their claims of "presumed" bias were not present here. Nor was there any evidence of any "actual" bias by any of the jurors as Appellants simply made no effort to ask any questions necessary to develop a record of such bias. To the contrary, they simply asked the trial court – and now this Court – to speculate, and wildly so, that the jurors in question were prejudiced against them. Such speculation, of course, cannot serve as the basis for reversing a well-considered verdict rendered by a jury after a nine-day-long trial.

Quite simply, the Jefferson Circuit Court properly exercised its discretion based upon the record before it. As a result, no basis either in law or fact exists for reversing the Judgment entered in favor of Dr. Haile or the other Appellees.

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[18] *Grooms*, 756 S.W.2d at 134 (brackets added).
[19] *Mackey v. Greenview Hosp.*, , *Inc.*, 587 S.W.2d 249, 254 (Ky. App. 1979).
[20] *Id.*

I. In the absence of a current and active relationship sufficient to justify a finding of "implied bias," the only basis upon which a trial court can determine "actual bias" is a fully and completely developed record affirmatively demonstrating a juror's prejudice in favor of one party versus another.

Trial courts do not need talismanic formulas or quasi-mathematical-appearing equations to determine whether a potential juror should be stricken for cause based upon "implied" or "actual" bias in favor of or against any particular party. This Court and the Kentucky Court of Appeals have provided more-than-sufficient guidance in that regard. The cases are abundantly clear that the trial court's approach to determining bias is a simple two-step process. First, they are to assess whether there is a relationship between the prospective juror and one of the parties or witnesses upon which it may automatically presume the juror is likely to be biased against one party or the other. Failing such a relationship, they are to consider the record of "actual" bias by a juror in favor of one party or the other – a record which must be fully developed through the "comprehensive efforts" of counsel to explore all potential areas of such "actual" bias.

In regard to a trial court's inquiry into "implied bias," without exception, the relationships justifying such imposition have a defining characteristic; they are active and on-going and are based upon a unique level of trust and confidence between the juror and the party, his counsel or a witness. When that heightened degree of trust and confidence is absent, however, the relationship simply is not sufficient to justify the implication of bias.

For example, the relationship between a physician and her patient is one based upon the extraordinary level of trust and confidence placed in the physician to ensure his patient's health, safety and welfare to the best of her ability. Similarly, clients place an inordinate amount of

trust in their attorneys to protect their interests and to keep confidential their communications. Both are fiduciary relationships. And the degree of trust and confidence necessary to sustain either such relationship provides a trial court with good and sufficient indicia that the patient or client will inherently and, perhaps even subconsciously, be inclined to side with the person in whom he or she has placed that extraordinary level of trust and confidence. Consequently, if the relationship remains an active one, it only makes sense to strike the juror based upon "presumed" or "implied" bias even if he proclaims an ability to be fair and impartial.

But when such relationships have terminated, they simply do not carry with them the same indicia of trust, confidence or, in turn, the potential for bias in favor of the relationship's other half. After all, there has to be some reason for the termination. It could be as innocent as the patient or client moved across town and simply found a doctor or lawyer closer to home – something which would not be an indictment on his or her trust and confidence in the physician or attorney.

But it could something far worse than that; something which destroyed the trust and confidence necessary to sustain the relationship and justify the presumption of bias. By way of example, a client may have failed to receive the settlement he thought he deserved in a case, or lost at trial. The doctor or lawyer could have over-billed or over-charged for their services or had some other falling out over money. The patient or client may have fired her doctor or lawyer after becoming unhappy with the quality of services being provided or because they felt like their complaints or calls were being ignored. Conversely, the doctor or lawyer may have fired the patient or client for non-compliance with his orders, or for being untruthful about her case or complaints. Worse yet, the lawyer or doctor could have committed malpractice and the

relationship ended in a lawsuit, with hard-feelings on both ends of the relationship.[21] In any of those circumstances, of course, the trust and confidence necessary to sustain the relationship is gone and there would be no justifiable reason to presume or imply bias in favor of the physician or the lawyer.

Consequently, when presented with a terminated doctor/patient or attorney/client relationship between juror and party, counsel, or witness, the Courts of this state recognize that there can be circumstances accounting for the dissolution which simply do not justify an automatic finding of implied bias. Thus, Courts will therefore not necessarily presume bias in the presence of a former doctor/patient relationship between a woman and her obstetrician/gynecologist.[22] Nor will they automatically presume bias from a former client/attorney relationship.[23]

Accordingly, in the absence of an active relationship which in and of itself provides reliable indicia of an active and on-going level of trust and confidence sufficient to justify the presumption of "implied" bias, trial courts are, instead, to look at whether the juror has otherwise answered questions in a way which demonstrates some "actual" bias in favor of one party or the other. And it is not at all a difficult showing to make. Indeed, since the

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[21] This very case is illustrative of that point. Indeed, assume that Ms. Meredith had survived but sustained some permanent injury as a result of the alleged delay in diagnosing her ruptured appendix. Given the allegations in this case, all parties can no doubt agree that she would not have continued in the care and treatment of Dr. Velasco or Dr. Haile. Nor would she have gone back to Norton Hospital as a patient. But under Appellants' theory, if Ms. Haile were later to be on a jury in a case in which any of these Defendants were parties, she would have to be automatically excluded because the Court would be required to presume she was biased *in their favor* simply because of their prior relationship. Such a notion, of course, is nonsensical. And that is the very reason why trial courts simply cannot presume automatic bias in favor of or against any particular party based upon a terminated relationship. The parties absolutely must sufficiently develop the record as to the circumstances of the relationship and the reasons for its termination to demonstrate in whose favor the former patient or client would be biased; or even if he or she were to be biased at all.

[22] *Altman v. Allen*, 850 S.W.2d 44, 45 (Ky. 1992).

[23] *Riddle v. Commonwealth*, 864 S.W.2d 308 (Ky. App. 1993).

attorney/client relationship is not one which is always constant, a party need only ask the potential juror if he intends to or otherwise would use the attorney again, if necessary, in the future.[24] That simple fact in and of itself provides the Court with adequate assurances that the juror still has the required degree of trust and confidence in what the attorney does or says in a trial sufficient to serve as the basis for disqualifying the juror from sitting on cases in which his attorney is a party or is counsel for a party.

For other discontinued relationships where bias cannot simply be presumed, it is incumbent upon *the parties* – not the Court – to undertake a "comprehensive effort to explore or develop the … relationship … to the extent necessary to determine bias."[25] In other words, the party seeking to strike a juror for cause must at the very least ask some questions about the relationship and/or about why it dissolved to aid the Court in determining whether the patient would be biased for – or against – her former physician. If the questions are asked, a record is made. The decision for the trial court then becomes an easy one indeed.

But if the questions are not asked or a "comprehensive effort" not otherwise made to explore the potential for actual bias based upon the terminated relationship, the trial court need not resort to pen, paper or calculator to begin working equations as Appellants argue. To the contrary, Kentucky law is already sufficiently clear on how things are to work: It is for the parties – and the parties alone – to make a sufficient record for the Court's consideration; that is, it is the parties' job to "show their work" in solving the problem for the Court, not the other way around. And there can be no unknowns left in the equation. The Court cannot be left with any variables not solved; no questions unanswered, or worse yet, simply unasked.

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[24] *Id.*
[25] *Altman*, 850 S.W.2d at 45.

But as demonstrated below, Appellants, here, fell woefully short of making the needed record with respect to each of the challenged jurors. They demonstrated only a discontinued physician/patient relationship between one juror and an expert witness. They did not bother to ask the juror what she meant when she said she would not be biased so long as her doctor was not "involved." Similarly, they demonstrated only the bare potential of a terminated relationship between one juror's partners and some entity potentially sharing an affiliation with Norton Hospital with not a single question thereafter about that juror's potential for actual bias. They then demonstrated nothing more than a three-steps-removed relationship between another juror whose son worked for a non-party entity which simply shared the same corporate tree as Norton Hospital and, then left unasked, whether he would be for one side or the other despite another identically situated juror just moments before saying his daughter's employment with another Norton Healthcare-owned hospital would make him inclined to find against the Hospital in this case.

In short, in absolutely none of those instances did Appellants make the required effort to "comprehensively explore" the nature of the challenged relationships or the circumstances surrounding their respective dissolutions for purposes of demonstrating actual bias for or against any particular party. Thus, and as the Jefferson Circuit Court expressly noted, Appellants did nothing to "flesh out" the details of the relationships in a fashion which would allow her to conclude there had been actual bias expressed for any particular Defendant. Given the absence of a fully and completely developed record in that regard, the Jefferson Circuit Court appropriately exercised its broad discretion in determining whether any particular juror ought to be stricken for cause. Its decisions should therefore be affirmed in all respects.

II. On the under-developed record before it, the Jefferson Circuit Court appropriately found that Jurors Guelda, Deshazer and Pacanowski harbored no actual bias against Appellants and that there was otherwise no basis either in fact or law for presuming such bias.

The center-piece of Appellants claim for relief is their argument that the Jefferson Circuit Court erred in failing to exclude three jurors for cause. Primarily because the answers given to the less-than-handful of questions posed specifically to those jurors flatly failed to establish they were "actually" biased in favor of any party to this action, Appellants claim that each of them should have been "presumed" to have had such a bias because of ostensibly "close relationships" with someone connected to this case. Nevertheless, and aside from the fact that their arguments as to each respective relationship run directly contrary to established Kentucky law, Appellants' claims necessarily fail for the simple reason that they did not make an adequate record or otherwise establish the required foundation that any sufficiently "close relationships" actually existed.

Juror 215397 (Ms. Guelda)[26]

During *voir dire*, Appellants' counsel learned that Juror 215397, Ms. Guelda, was a former patient of Dr. Larry Griffin, one of the expert witnesses for the defense in this case. In particular, Ms. Guelda volunteered that Dr. Griffin had "delivered" – past tense – her two children.[27] But other than learning that both of those children had been delivered by means of a caesarian section, quite literally no other details were elicited about Ms. Guelda's past

[26] Dr. Haile submits that Appellants should not be heard to complain about Ms. Guelda and/or the failure to strike her as a juror since they did not use a peremptory strike on her. *See Stopher v. Commonwealth*, 57 S.W.3d 787, 796 (Ky. 2001) (holding that, before the failure to strike a juror for cause can be shown to be reversible error, a party must show that he exercised a peremptory strike on that juror and otherwise utilized all of his peremptory challenges). Despite that failure, Ms. Guelda did not participate in the decision of this case as she was ultimately selected by random draw to be one of the two alternate jurors who were excused before deliberations began.

[27] VR 9/09/08, 11:49:20.

relationship with Dr. Griffin. Hence, the record demonstrated only that Ms. Guelda at one point in time had a physician/patient relationship with Dr. Griffin; it did not in any form or fashion establish that he was still her physician, that she ever intended to see him again as a patient for any reason or, just as importantly, it did not establish why she no longer had a doctor/patient relationship with him. And just as importantly, Appellants did not establish – or even so much as ask – why Ms. Guelda had opted to discontinue her relationship with Dr. Griffin or whether there was some reason she did not to return to him for her routine gynecologic care after he delivered her last child.

Despite that absolute failure in proof, though, Appellants nevertheless claim that the mere fact of a prior obstetrician/patient relationship was a sufficiently "close relationship" which automatically called for the Circuit Court to strike Ms. Guelda as a juror on the basis of "presumed bias". But Kentucky law already expressly rejects that notion. Indeed, no less an authority than this very Court has unequivocally held that the relationship between a woman and her obstetrician is not such a "close relationship" that prejudice must be presumed:

> No court should speculate so as to presume a special bond between a woman and her obstetrician.[28]

Having followed the clear and unmistakable precedent of this Court in refusing to imply prejudice from the existence of a former doctor/patient relationship, the Jefferson Circuit Court did not err in refusing to strike Ms. Guelda as a juror on that basis.

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[28] *Altman v. Allen*, 850 S.W.2d 44, 45 (Ky. 1992).

Instead, and in the absence of a "comprehensive effort to explore or develop the doctor/patient relationship … to the extent necessary to determine bias,"[29] the Jefferson Circuit Court could not automatically "speculate so as to presume" that Ms. Guelda would be biased simply because Dr. Griffin was once her obstetrician. The "comprehensive effort" to develop Ms. Guelda's potential bias consisted, literally, of learning the method by which her children were delivered (by caesarian section). Respectfully, that does nothing to establish bias for or against any party to this action.

Given Appellants' absolute lack of effort to make even the barest of showings that Ms. Guelda and Dr. Griffin enjoyed a current or on-going physician/patient relationship or why she had chosen not to continue her post-delivery gynecologic care with him, *Bowman v. Perkins*[30]-- the lone case upon which they rely in support of striking Ms. Guelda -- is readily distinguishable and therefore of no moment to this Court's review:

> In our view, *a current and ongoing* physician-patient relationship is such a close relationship where a trial court should presume the possibility of bias. For that reason, we hold that a prospective juror who is *a current patient* of a defendant physician in a medical malpractice action should be discharged for cause.[31]

But as this Court's decision in *Altman* and other cases makes abundantly clear, failing any evidence of a current and on-going physician/patient relationship indicative of a heightened level of trust and confidence between Ms. Guelda and Dr. Griffin, the Jefferson Circuit Court simply could not be so bold as to speculate or presume that Ms. Guelda was inherently biased; there was thus no error in refusing to engage in such speculation.[32]

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[29] *Altman*, 850 S.W.2d at 45.
[30] 135 S.W.3d 399 (Ky. 2004).
[31] *Id.* at 402 (distinguishing *Altman*) (emphasis added).
[32] *See also Mackey v. Greenview Hospital, Inc.*, 587 S.W.2d 249 (Ky. App. 1979).

Further still, the minimal number of questions actually posed to her in no way, shape or form amounted to a "comprehensive effort" to explore whether Ms. Guelda was "actually" biased for or against any particular person or party. Though Appellants protest that Ms. Guelda essentially confessed that she could not be fair and impartial if Dr. Griffin was "involved" in this case and that, by virtue of his testifying at trial, he was "involved," Judge Gibson – who obviously paid extremely close and detailed attention to all aspects of jury selection – disagreed.

Instead, and rather than taking her comments entirely out of context as Appellants do, the Court relied on her unique ability to observe Ms. Guelda's demeanor and to assess her answers to the less-than-handful of questions actually asked of her. [33] And applying that invaluable real-time, first-person perspective – as opposed to the cold review of a videotape in which the juror can barely even be seen, much less carefully observed – the trial court rightly found that, "in context," Ms. Guelda clearly meant that she could, indeed, be fair and impartial as long as Dr. Griffin was not involved *as a party*;[34] to wit, so long as he was not one of the Defendants – which, of course, he was not.

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[33] *Grooms*, 756 S.W.2d at 134 (brackets added).

[34] VR 9/09/08 03:30:00.

In sum, the Jefferson Circuit Court appropriately refused to strike Ms. Guelda solely on the basis of a *former* physician/patient relationship with a witness in the case. That decision was entirely consistent with this Court's directive in *Altman*.[35] There was no error in that decision. Similarly, and especially in light of the deference to be afforded its unique opportunity and ability to personally observe and assess Ms. Guelda's demeanor and to place her answers in their appropriate context, the Jefferson Circuit Court appropriately exercised its discretion in finding that she had not demonstrated an inability to be fair and impartial in hearing this matter. As a result, there was no basis for striking Ms. Guelda "for cause" or any other reason and, hence, no error in denying Appellants' request to excuse her from further service.

The decision of the Jefferson Circuit Court and the unanimous affirmation of that decision by the Court of Appeals should therefore be sustained in all respects.

Juror 201435 (Mr. Deshazer)

Appellants next take aim at the trial court's refusal to strike Juror 201435, Mr. Deshazer, based upon the alleged existence of an attorney/client relationship. In particular, Appellants argue that because Mr. Deshazer's firm – but not Mr. Deshazer himself – had at some point in time in the past represented Norton (Appellants never made any effort to determine whether Mr. Deshazer was referring to Norton Hospital, Inc., the actual party to this case, or Norton

[35] Appellants' statement on page 17 of their Brief that this Court should recognize that "the unique bond between expecting mother and obstetrician is a relationship of such closeness that the integrity of our jury system is better preserved by excusing these jurors for cause when the physician plays any role in the case, and especially in cases like this" is a strange one, indeed. First, and perhaps foremost, Ms. Guelda was not an "expecting mother." Second, Dr. Griffin was no longer her obstetrician. Nor did the record reveal that he was even her gynecologist. Third, the Court has already recognized that the bond between an affirmatively "expecting mother" and her obstetrician is a relationship which requires automatic exclusion. Indeed, an "expectant mother" and her obstetrician is an active, current physician-patient relationship which falls squarely within this Court's decision in *Bowman*. As previously discussed, however, a terminated relationship between a "formerly expectant mother" and her obstetrician cannot serve as the basis for automatically presuming the "formerly expectant mother" will be biased *in favor* of her past obstetrician without some comprehensive effort to explore the relationship and/or the

Healthcare, an altogether separate and distinct entity which had never been a party to this action), he should have automatically been excused from further service. But this argument, too, misses the mark.

Initially, Mr. Deshazer's answer to the question posed to him revealed simply that *his firm* "has done some work for Norton's."[36] By Plaintiffs' own admission, Mr. Deshazer was never asked and did not otherwise volunteer or establish, first, that he, personally, had ever had any kind of professional relationship with Norton or, second, that his firm had a current and continuing relationship with Norton Hospital.[37] But just as in the case of a physician and patient, the existence of an on-going attorney/client relationship (or at least the tangible prospect of one) is exactly what Kentucky law requires before any potential bias can be "presumed."[38]

Indeed, in *Riddle v. Commonwealth*,[39] the Kentucky Court of Appeals applied this Court's decision in *Altman* and declared that a prior attorney-client relationship does not automatically result in a juror being excluded for cause under a presumed bias theory:

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circumstances underlying its termination.

[36] VR 9/09/08 11:16:58. Note that Mr. Deshazer did not say his firm "is doing" or "will be doing" or "expects to be doing" work for Norton's presently or in the future.

[37] *See* Appellants' Brief, p. 21, n.8 admitting that the record is "unclear" as to the existence of a current or former attorney/client relationship.

[38] It bears noting that each of the cases which has addressed the attorney/client relationship as a basis for "presumed bias" has dealt with the situation in which the prospective juror was the client of one of the attorneys litigating the case. In those situations, the concern has been that, since the attorney/client relationship is one founded on the client's trust in the attorney, the prospective juror is presumed to have implicit faith and trust in the attorney which, in turn, would make it more likely that he would give more credence and/or be more receptive to that attorneys' representations and arguments throughout the trial. This case, of course, presents the opposite side of that coin in that an attorney who had not himself done any work for or otherwise gained any special trust or belief in the corporation formerly represented by others in his law firm (and who likewise demonstrated that he did not know any of the witnesses or other Norton's employees involved in the litigation), was asked to participate as a juror. Given those circumstances, the rationale underlying the presumed-bias-based-on-implicit-trust theory is inapposite to Mr. Deshazer's particular case just as a general principle.

[39] 864 S.W.2d 308 (Ky. App. 1993).

> Does a prior attorney-client relationship automatically disqualify a venire person when challenged for cause under a presumed bias theory? It would be too presumptive of us to answer affirmatively in light of *Altman v. Allen*....[40]

Put simply, the mere existence of a former attorney/client relationship -- with nothing more -- does not mandate the exclusion of a juror for cause under a "presumed bias" theory.

Instead, the party seeking the juror's dismissal is required to establish that the prospective juror and counsel have a current relationship or, at an absolute bare minimum, that the juror expects to utilize the services of the attorney in the future. Appellants here, however, admittedly failed to establish -- or even so much as ask about -- either point. Consequently, they flatly did not demonstrate a sufficiently "close and continuing relationship" or the simple prospect of one which automatically required Mr. Deshazer's dismissal from the jury under an "implied bias" theory.

And just as importantly, Appellants point to absolutely no reservations or hesitations actually expressed by Mr. Deshazer that he could not be fair and impartial to either party because of that past relationship. Thus, there was no indicia whatsoever of *actual* bias against them by Mr. Deshazer.

Because of those combined failures, Appellants creatively attempt an end-run around the rules of *Riddle*, *Fugate*, and *Altman* by imputing an ethical conflict of interest to Mr. Deshazer. The argument follows that, given that imputed conflict of interest, Mr. Deshazer should nevertheless have been disqualified under the "presumed bias" theory. But even assuming that those ethical rules were otherwise somehow relevant to the matter in question on this appeal -- a notion with which Dr. Haile vehemently disagrees[41] -- it bears noting first, that

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[40] *Id.* at 310; *see also Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999).

[41] For example, Appellants cite SCR 3.130 (1.7) which prohibits lawyers from representing one client when that

absolutely none of those rules precludes an attorney from serving on a jury in any case involving a former client.[42] Moreover, and perhaps even more importantly, Kentucky's conflict-of-interest rules specifically provide that any such conflict can be waived *by the client*.[43]

Of course, Mr. Deshazer's firm's former client, Norton (assuming that Norton Hospital, Inc., was his firm's actual client – a fact which was never established) was present and represented at trial and throughout jury selection by both counsel and a corporate representative.[44] And as is abundantly clear from a review of the record, Norton Hospital and its counsel gave thoughtful consideration to Mr. Deshazer's ability to serve as a juror. Ultimately,

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representation would be adverse to another client or a lawyer's personal interests. Mr. Deshazer was representing no one in this case. Thus, his non-representation of a non-client could impute no conflict of interest to him. Similarly, it is ludicrous to suggest that Mr. Deshazer's service on a jury panel would amount to a "personal interest" sufficient to impute some kind of ethical conflict to him.

Appellants then cite SCR 3.130(1.9) as standing for the idea that Mr. Deshazer's service on a jury is prohibited because he would have completely disregarded the evidence and found in favor of an entity others in his firm *may* have done some work for in the past because he is ethically prohibited from taking actions which would adversely affect a former client (this assumes, of course, that Norton Hospital, Inc., was his firm's former client, a fact which was never established). Serving on a jury, determining the truth and rendering a verdict accordingly is not adversely affecting a former client; it is deciding the truth and ensuring that justice is done. Under no set of circumstances can that be considered an "adverse action" if the evidence sustains it. After all, as a member of the Bar and officers of the Court, a lawyer's responsibility is to see that justice is carried out; nothing more, nothing less. Doing justice is not an "adverse action;" it is a lawyer's absolute responsibility; and one Mr. Deshazer would no doubt have undertaken in the utmost of good faith.

And finally, Appellants cite to SCR 3.13(1.10) as imputing a conflict of interest to Mr. Deshazer. Again, that Rule assumes Norton Hospital, Inc., was his firm's former client – a fact which was never established. And even then, it only precludes an attorney from representing a client when others in his firm would otherwise be prohibited from representing that client. Again, as a juror, Mr. Deshazer would have been representing no one. Nor is there any basis for saying that any member of Mr. Deshazer's firm was otherwise prohibited from representing any Norton entity in the future. There is thus no basis for imputing any conflict of interest to Mr. Deshazer.

Quite simply, Dr. Haile strongly believes that even so much as accusing Mr. Deshazer of even considering the subversion of his overarching professional and ethical duties and obligations as an officer of the Court, member of the Kentucky Bar or even as a juror simply doing his civic duty, is patently offensive -- especially when Appellants did not even so much as bother to ask of him a single question intended to elicit whether he might harbor some actual bias for or against any party to this action or whether the actual Norton entity involved had ever been – or still was – his firm's client. Such rank speculation simply should not be tolerated.

[42] *See, e.g.*, SCR 3.130(1.8) (prohibited transactions), SCR 3.130(1.10) (imputed disqualification).

[43] *See* SCR 3.130(1.7)(a)(2), SCR 3.130(1.8)(a)(3), SCR 3.130(1.9)(a), (b)(2), SCR 3.130(1.10)(c).

[44] VR 09/09/08 01:45:40 – 01:45:50.

and after weighing what was and what was not elicited from Mr. Deshazer as to any knowledge he might or might not have about whatever Norton entity his firm may have actually represented at some point in the past, Norton had no objection to Mr. Deshazer continuing to serve on the jury if he were ultimately to be selected.

Stated otherwise, to the extent that Mr. Deshazer may possibly have had a potential conflict of interest, Norton Hospital affirmatively waived it thereby removing any potential ethical constraints and freeing him to vote his conscience based upon whatever he believed the evidence showed. Thus, and only assuming that the conflict of interest rules were otherwise relevant to the issue at hand, the waiver by Norton Hospital obviates any further discussion of those rules and/or their impact on Mr. Deshazer's ability to serve on the jury in this case.

Quite simply, Appellants did not establish an on-going attorney/client relationship, the mere prospect of any such relationship in the future or any other "close relationship" between Mr. Deshazer, his firm and Norton Hospital, Inc., sufficient to have mandated the legal presumption that he harbored some hidden and undisclosed bias in favor of the Hospital. Nor was there any other basis for challenging his service under an "actual bias" theory. Indeed, in considering Appellants' request to strike Mr. Deshazer, the Circuit Court specifically noted that Appellants had done absolutely nothing to "flesh out" the details regarding any potential relationship between his firm and Norton Hospital![45]

And on this appeal, Appellants neither argue nor cite this Court's attention to any portion of the record in which Mr. Deshazer affirmatively demonstrated that he held actual, tangible bias for or against any party to this action. The reason, of course, is simple: He was never

[45] VR 09/09/08 03:48:30 – 03:49:00.

asked any questions to elicit the possibility of such bias! And because of that wholly undeveloped record, the Jefferson Circuit Court concluded -- and rightly so -- that "we did not get there" in terms of establishing any actual bias by Mr. Deshazer.[46]

In short, the refusal to strike Mr. Deshazer was therefore entirely proper. There was no evidence of an active, or even contemplated, attorney/client relationship with the actual party to this case. Nor was any evidence of actual bias elicited. Refusing to excuse Mr. Deshazer simply does not merit the reversal of the verdict in favor of Dr. Haile or any other Appellee.

Juror 222785 (Mr. Pacanowski)

Appellants next question the Circuit Court's refusal to strike Juror 222785, Mr. Pacanowski, because he had a son who worked for Norton Healthcare (not Norton Hospital). And just as they have done with the other jurors, Appellants argue that Mr. Pacanowski should have been stricken because of a "close relationship". But the relationship at issue with Mr. Pacanowski was not even one between himself and a party or witness. It was instead based on the idea that Mr. Pacanowski has a son who, in turn, worked as a purchasing manager for one of the Norton Healthcare corporate entities which, in turn, was affiliated with Norton Hospital (the actual Defendant in this case). As a result of that three-steps-removed "relationship" to the Hospital, Appellants suggest the Circuit Court should have automatically presumed that Mr. Pacanowski would be so biased against them that he could not be fair and impartial.

Unfortunately for Appellants, though, that argument fails for multiple reasons. First, Mr. Pacanowski's son did not work for Norton Hospital, Inc., the actual party Defendant in this case. Instead, he worked for Norton Healthcare, Inc. The two entities simply share the same corporate

[46] VR 09/09/08 03:48:30 – 03:49:00.

tree. If they were legally one and the same, Appellants most assuredly would have sued both. They did not. They are different entities with different interests, businesses and functions. In this day and age of complex corporate and business structures, this Court should not adopt a blanket rule automatically precluding jurors from service based upon relationships with legally separate and distinct entities whose only connection is corporate lineage. Such a rule would no doubt prove too complicated, unworkable, time-consuming and inefficient.

Secondly, Kentucky law does not require that a juror automatically be stricken under a "presumed bias" theory simply because a family member is or has been employed by a party or a witness to the case. For example, in *Stopher v. Commonwealth*,[47] the defendant appealed the trial court's refusal to strike a juror whose father had been a police officer. *Stopher*, of course, was a criminal matter in which police officers testified and obviously played a significant role in determining the outcome of that trial. As a result of the juror's relationship with his police-officer father, the defendant argued that the trial court should have stricken him for cause. The trial court disagreed and refused to strike the juror.

Finding neither presumed nor actual bias based upon the father-son-employer relationship, this Court affirmed the refusal to excuse the juror. Hence, the simple fact that a juror has a family member who may work for one of the parties is not enough in and of itself to justify the presumption of bias based upon a "close relationship." There was thus no basis for excusing Mr. Pacanowski solely as a result of his relationship with his son and his son's employment relationship with an entity which had an affiliation with an actual party.

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[47] 57 S.W.3d 787 (Ky. 2001).

Thirdly, and giving due deference to its ability to observe the demeanor of the prospective jurors, to consider the entirety of the conversation, to understand the substance of their answers and to place those answers in the context of the moment, the Jefferson Circuit Court properly exercised its discretion in finding that Mr. Pacanowski had not otherwise demonstrated actual bias for or against any party. Indeed, the Court recognized that Mr. Pacanowski initially indicated that he "might" (which necessarily means that he "might not) lean one way or another in a close call.[48] Nevertheless, the Court then expressly considered the remainder of the *voir dire* process and determined that, throughout the "course of the conversation," Mr. Pacanowski's answers never indicated that he would not be able to listen to and weigh the evidence in a fair and impartial manner.[49] And it is indeed clear that the Jefferson Circuit Court was absolutely correct in that assessment.

In particular, Mr. Pacanowski never once indicated or so much as intimated that he would lean "toward the hospital" (or conversely, against Appellants) in this case. Although he did say that he might have a problem if there was a close call,[50] he never specifically said for whom it would have been a problem; that is, whether it would have been troubling for Appellants because he would favor the Hospital or whether it would have been problematic for the Hospital because he would have favored Appellants.

And while it may seem a matter of common sense that a parent would tend to favor his child's employer, that is an altogether unjustified assumption which should have been explored

[48] VR 9/09/08 03:41:00 – 03:41:43; 03:43:00 – 03:43:06.
[49] *Id.*
[50] VR 9/09/08 12:10:08-12:10:20.

in much further detail. And this very case proves exactly why the record must be developed in regard to actual bias. More specifically, just prior to Mr. Pacanowski's answer, another juror on this very same panel volunteered that he had a daughter who worked for Kosair Children's Hospital which, just like Norton Hospital, Inc., is also within the Norton Healthcare corporate tree! But that previous juror openly and unabashedly declared that, even though his daughter worked for a hospital, he disliked hospitals, that he was inclined to lean against hospitals and that he would admittedly be biased against Norton Hospital in this particular trial.[51] Thus, the record in this very case proved that a parent whose child works for a Norton Healthcare owned entity would affirmatively and actively be biased against the entity for whom his child worked.

Given that real and tangible demonstration of why such an assumption is so dangerously unjustified and dangerous, the Jefferson Circuit Court simply could not take it for granted that Mr. Pacanowski's having a child who worked for a related entity was automatically a good thing for Norton Hospital. Instead, the juror's feelings should have been probed, in-depth, to determine the existence and/or the extent of his potential prejudice or at least determined who that bias would run toward or against. But that simply did not happen.

Indeed, an examination of the record of Mr. Pacanowski's *voir dire* reveals that, despite his initial answer, he never said – nor was he ever asked – what it meant and/or who he would favor. And in the absence of a properly developed record in regard to his supposed bias – especially in the face of another similarly-situated juror on this same panel who apparently hated and was extremely biased against his own daughter's employer – the Jefferson Circuit Court

[51] VR 09/09/08 12:06:10 – 12:06:53.

could not simply *assume* that Mr. Pacanowski would have automatically been biased in favor of Norton and against Appellants.

Rather, Appellants should have made at least a minimal effort to affirmatively demonstrate that Mr. Pacanowski liked Norton Hospital, that his son had had good experiences there and/or that he had been treated well during his employment with them. Otherwise, it remains just as possible that Mr. Pacanowski's son was unhappy in his job and/or disliked his employer but had nevertheless remained there because he could not find anything better (especially in these economic times), was resentful of his employer because he felt as though he had been passed over for promotions or given inadequate pay raises, felt as though he had been unfairly disciplined or reprimanded, subject to disparate or discriminatory treatment or otherwise felt like he had been treated unfairly for any variety of reasons.

The point, of course, is that this Court should not simply assume, without at least some affirmative evidence, that Mr. Pacanowski would have been prejudiced *in favor* of Norton Hospital simply because of where his son worked. Instead, it should recognize the myriad reasons why Mr. Pacanowski – like the other juror admittedly inclined against his child's employer in this very case – might tend to lean *against* Norton Hospital. Appellants' failure to develop the record accordingly is fatal to Appellants' challenge to Mr. Pacanowski's service on this basis.[52]

In short, although Mr. Pacanowski may have initially expressed some thought that he might have a problem deciding this case in a close call, he never indicated or was asked for

[52] *See e.g., Altman*, 850 S.W.2d at 45 (finding no abuse of discretion in refusing to strike a juror given an absence of proof tending to establish actual bias where, among other things, there had been no comprehensive effort to explore or develop the close relationships of the jurors to the extent necessary to determine bias, and where there had been no evidence that the jurors had even had a good relationship with the defendant doctors).

whom it would be problematic. He never once said that he could not be fair and impartial in hearing this case. He never indicated that he would be biased or prejudiced in favor of Norton Hospital in this case, his acquiescence to later myriad questions about his impartiality and ability to award damages is not at all inconsistent with his earlier answer to the question posed to him. Indeed, for all anyone knows, he, just like the other juror whose child worked for a different Norton-owned hospital, was biased against the Hospital and was simply acknowledging that he could, in fact, consider all of the evidence in this case and would, in turn, be willing and able to return a verdict for pain and suffering, loss of enjoyment of life, hundreds of thousands of dollars of medical bills, lost earning capacity and the loss of love and affection of a mother – so long as "the evidence supported it."[53]

And it was this additional "course of conversation" which the Jefferson Circuit Court expressly considered in denying Appellants' motion to strike Mr. Pacanowski as being biased against them. Having thus observed his demeanor throughout the entirety of the course of conversation in *voir dire*, the consistency of his answers, and having had the "real time" opportunity to understand and place all of his answers in their appropriate context, the Jefferson Circuit Court concluded that Mr. Pacanowski had not demonstrated an inability to be fair and impartial to Appellants in deciding this case. Accordingly, and especially when considering the Court's unique position to assess the entire context and situation of the *voir dire* process and the multitude of variables left unsolved and utterly unknown, there was no abuse of discretion in refusing to strike Mr. Pacanowski.[54] There was, thus, no error and, thus, no basis for reversing the verdict returned in favor of Dr. Haile and the other Appellees.

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[53] *See, e.g.*, VR 9/09/08 12:34:10 – 12:35:15; 12:34:10 – 12:36:00; 01:47:03 – 01:50:30.

[54] *See, e.g., Wood v. Commonwealth*, 178 S.W.3d at 515-517 (noting that, despite indicating some initial

III. The Jefferson Circuit Court appropriately exercised its discretion in excluding evidence of liability insurance.

Because of the inherently dangerous nature of evidence that a defendant is insured against liability and because of the near-certainty that such evidence will be misused by a jury, Kentucky law has long precluded its introduction except in the most unusual of circumstances. And to be certain,

> This rule "is founded on the premise that it is irrelevant to the issue of whether insureds tend to be less careful than uninsureds, and more importantly, that knowledge of insurance coverage might cause the jury to impose liability without regard to fault.[55]

Hence, by its very terms, KRE 411 necessarily precludes evidence that a person was or was not insured against liability except when that evidence is offered for some other very specific and limited purpose. And even then, Kentucky's trial courts still have the inherent discretion to refuse to admit any such evidence whenever it determines that the potential for undue prejudice, confusion of the issues and misleading the jury substantially outweighs whatever probative value that evidence might otherwise have.[56]

Indeed, this rule is so zealously guarded that, in ordinary circumstances, the mere mention of liability insurance justifies the granting of a new trial unless the proponent of that

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reservations, a juror who ultimately agrees that he could consider all of the evidence in deciding the case need not be stricken for cause); *Young v. Commonwealth*, 50 S.W.3d 148 (Ky. 2001) (same); *Soto v. Commonwealth*, 139 S.W.3d 827 (Ky. 2004) (affirming the refusal to strike, for cause, a juror who said he might give more weight to a police officer's testimony but otherwise felt he could consider all of the evidence and be fair and impartial in rendering a verdict).

[55] *Robinson v. Lansford*, 222 S.W.3d 242 (Ky. App. 2006) *quoting White v. Piles*, 589 S.W.2d 220, 222 (Ky. App. 1979).

[56] *See KRE 403; Wallace v. Leedhanachoke*, 949 S.W.2d 624 (Ky. App. 1997) (affirming the exclusion of evidence of liability insurance ostensibly offered for the purpose of establishing bias of a witness upon the Court's conclusion that the dangers of undue prejudice, confusion of the issues and misleading the jury outweighed its probative value as to bias); *Bayless v. Boyer*, 180 S.W.3d 439, 447 (Ky. 2005) (affirming the use of KRE 403 as a basis for excluding evidence of liability insurance even when offered for other purposes); *Baker v. Kammerer*, 187 S.W.3d 292 (Ky. 2006) (re-affirming the trial court's wide discretion in excluding evidence of liability insurance for other purposes under KRE 403 but requiring that the court submit the evidence to a balancing testing in which its

evidence can affirmatively demonstrate that there was, in fact, no prejudice to the defendant.[57] Thus, the clear presumption is that evidence of liability insurance should ordinarily and routinely be excluded in negligence cases.

And that is exactly what the Jefferson Circuit Court did in the present case. Relying on KRE 411, the Court initially held that evidence of Appellees' liability insurance was inadmissible as it was irrelevant to any issue in this case.[58] That conclusion can hardly be called shocking and is not itself the focus of Appellants' argument in this appeal. Instead, they argue that Norton Hospital was insured against liability and that that insurance, at least in theory, likewise afforded coverage to both Dr. Haile and Dr. Velasco. In turn, they argued that that allegedly common insurance interest was the only reason Appellees were not pointing fingers and attacking one another throughout this trial.

Given its rulings that, as a matter of law, neither Dr. Velasco nor Dr. Haile were agents of Norton Hospital, Inc., the Jefferson Circuit Court concluded that evidence of Norton Hospital's liability insurance still was not relevant to any of the issues in this case. Nevertheless, the Court proceeded to engage in the very balancing test envisioned by KRE 403 and held that its probative value in terms of establishing bias of the parties was insufficient to permit its introduction: "[I]ts relevance is substantially outweighed by the prejudice [KRE 411] is designed to prevent."[59] Thus, unlike the lone Kentucky case cited by Appellants in support of this argument,[60] there is an affirmative indication that the Circuit Court, in this case,

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probative value is weighed against its potential for prejudice and/or misuse).

[57] *Streutker v. Neiser*, 290 S.W.2d 781, 782 (Ky. 1956) (emphasis added).

[58] Order, September 05, 2008.

[59] Order, September 05, 2008.

[60] *Baker*, 187 S.W.3d 292 (the trial court's decision was reversed solely because the trial court had not engaged in any KRE 403 type of inquiry but, instead, had applied KRE 411 as a "per se" exclusion).

affirmatively balanced the competing interests at issue but nonetheless found that the danger of misusing the evidence, confusing the jury and unduly prejudicing the rights of the Appellees outweighed the probative value for which it was offered.

Given that it expressly weighed probative value with the potential for undue prejudice, the Jefferson Circuit Court's decision was absolutely appropriate exercise of its broad discretion in evidentiary matters.. It was, thus, solidly grounded in both the facts of this case and the law of this state. There is therefore no basis for reversing the well-considered verdict in favor of Appellees or the Judgment entered thereon.

And, finally, it bears noting that Appellants' position that the claimed (but utterly unproven) commonality of insurance coverage was the only reason Appellees did not turn on each other at trial is palpably absurd. There is, of course, another more fundamental and factually plausible reason that no guns were turned by the Defendants; namely, each legitimately and honestly believed the other exercised appropriate care for Ms. Meredith. Consequently, there was no one to blame. Indeed, this was not a *res ipsa loquitur* case where her death would not have happened in the absence of negligence and the only question to be determined was whose negligence caused it.

It was, instead, a case in which the parties staunchly defended their own respective care and treatment as being within the standards of care applicable to each. It was likewise a case in which each reasonably believed that Ms. Meredith's death, while undeniably tragic, was not the result of negligence by anyone else. She was sick. Her appendix ruptured through the fault of no one. The rupture was actively masked by a late-stage pregnancy which made it completely reasonable and appropriate for everyone involved to believe that her complaints and positive

reactions to purely palliative measures were entirely consistent with that pregnancy. Thus, and as the jury determined, everyone acted reasonably, appropriately and within the standard of care. No one pointed fingers because no one did anything wrong; it really is as plain and simple as that.

IV. Summary judgment in favor of Norton Hospital against Appellants' claims of agency was appropriate.

Appellants finally challenge the Circuit Court's decision to grant summary judgment in favor of Norton Hospital, Inc., on the question of whether Drs. Velasco and/or Haile were agents of Norton Hospital, Inc. Given the rock-solid strength of its ruling on this issue and given, further, the fact that Appellants have yet to offer any disputed issues of material fact as to that topic or otherwise to offer any authority sufficient to overcome the Court's conclusions on pure questions of law,[61] Dr. Haile adopts and incorporates by reference as if set forth herein in full the Circuit Court's Memorandum and Order granting Norton Hospital's Motion and the Court of Appeals' Opinion rejecting that Appellants' position.[62]

It does bear noting, however, that even if Dr. Velasco could somehow have been found to be the agent of Norton Hospital as asserted by Appellants, such a finding would nevertheless be insufficient to bind Dr. Haile to any obligations imposed by the contract between Dr. Velasco and Norton Hospital, Inc. Indeed, it is and always has been undisputed that Dr. Haile was not a signatory to that contract. It therefore had no impact on him as contracts between physicians

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[61] *See* David J. Leibson, Kentucky Practice: Tort Law, Vol. 13 § 11.6 *citing Clark v. Young*, 692 S.W.2d 285 (Ky. App. 1985) ("In Kentucky, whether a person is an agent or independent contractor is a question of law for the court").

[62] Amended Memorandum and Order, September 08, 2008 (Exhibit 3 to Appellants' Brief). Out of an abundance of caution, and in similar fashion, Dr. Haile likewise adopts and incorporates by reference as if set forth herein the appellate briefs and arguments therein filed on behalf of Norton Hospital, Inc., and Dr. Velasco with respect to this particular issue.

providing on-call coverage and healthcare entities – even when they provide that the patients "belong" to the entity – do not make the on-call physicians agents of the entity.[63]

Nor does the existence of an "ostensible agency" (even if one were to be found) change that conclusion. More to the point, an "ostensible" agent is, in fact, a legal fiction in which no *actual* agency relationship exists; rather it is nothing more than a mere matter of appearances in which the putative principal (Norton Hospital) would held responsible for the ostensible agent's (Drs. Velasco and/or Haile) because the principal has either intentionally or by want of ordinary care induced a third person to believe and, in turn, rely upon the principal's representation that an agency relationship existed.[64] Hence, the focus is on the *principal's* representations; not on anything that the supposed agent did or said.

Thus, at least in terms of establishing whether an ostensible agency exists, the putative agent is wholly blameless. And because he has done nothing improper in terms of giving rise to an ostensible agency, and because no actual agency exists, there is absolutely zero basis either in law, fact or sound public policy, for imposing the contractual obligations, rights or responsibilities of others to or on the ostensible agent; and Appellants have cited no authority in support of that position. To the contrary, their argument is nothing more than an unsupported leap of both faith and logic which they absolutely must have this Court take if they are to have any hope of prevailing.

In short, Appellants have shown no facts which gave rise either to an actual agency relationship between Dr. Haile and Norton Hospital, Inc., because there was no such relationship

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[63] *See, e.g., Emtel, Inc. v. LipidLabs, Inc.*, 583 F. Supp. 2d 811 (S.D. Tex. 2008).

[64] *See, e.g., Paintsville Hospital*, 683 S.W.2d 255 (Vance, J., dissenting) ("the ostensible principal must have engaged in conduct of such a nature as to cause a reasonable person to believe that an agency relationship existed, although actually there was no agency").

as a matter of law or fact.[65] Similarly, Appellants have shown no facts which give rise to an ostensible agency, again, because none existed.[66] That fact notwithstanding, even if Norton Hospital had inappropriately misrepresented the particulars of its relationship with Dr. Haile, their actions would nevertheless provide no legal basis for investing Dr. Haile with rights to which he was not contractually entitled or imposing on him burdens which he had not contractually assumed; that is, it does not make him a party to a contract to which he was otherwise a complete stranger. Thus, any issue pertaining to the employment contract between Dr. Velasco and Community Medical Associates is necessarily irrelevant to Dr. Haile.

Finally, it bears noting that the decision to grant summary judgment on the agency question, even if erroneous, was harmless. Indeed, Appellants fail to show how the failure to submit the issue to the jury (or, conversely, to grant summary judgment in their favor) resulted in any tangible prejudice to their rights or how it otherwise tainted the jury's verdict. Indeed, even if Drs. Velasco and Haile had been found to be the agents of Norton Hospital, Inc., the jury nevertheless found that each of them had met the standard of care expected of them in their respective care and treatment of Ms. Haile. Thus, there was no vicarious liability to impute to

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[65] *See, e.g., City of Winchester v. King*, 266 S.W.2d 343, 345 (Ky. 1954) (an individual is the agent of another if the principal has the power or responsibility to control the method, manner, and details of the agent's work); *Pancake v. Cull*, 338 S.W.2d 391, 392 (Ky. 1960) (If an individual is free to determine how work is done and the principal cares only about the end result, then that individual is an independent contractor); *Ruane v. Stillwell*, 600 N.Y.S.2d 803 (N.Y. App. 1993) (refusing to impose vicarious liability on physicians engaged in an on-call coverage arrangement); *Graddy v. New York Medical College*, 243 N.Y.S.2d 940, 942, 945 (N.Y. App., 1963) (noting sound public policy reasons for refusing to impose vicarious liability against doctors based upon an agreement to provide on-call coverage for each other); *Reed v. Gershweir*, 160 Ariz. 203, 772 P.2d 26, 27 (Ariz. Ct. App. 1989) (the fact that a physician uses a cover physician does not alone establish an agency relationship sufficient for vicarious liability); *Rossi v. Oxley*, 269 Ga. 82, 495 S.E.2d 39, 40 (Ga. 1998) (on-call arrangements without more do not a create joint venture between attending and cover physician as a matter of public policy); *McCay v. Mitchell*, 62 Tenn. App. 424, 463 S.W.2d 710, 714-15 (Tenn. Ct. App. 1970) (other than in a partnership situation, an attending physician is not liable for the professional negligence of a covering physician absent actual agency or negligent selection).

[66] In similar fashion, Kentucky law does not support Appellants' argument that Dr. Haile was the "dual servant" of either Dr. Velasco or Norton Hospital. *See, e.g., City of Somerset v. Hart*, 549 S.W.2d 814 (Ky. 1977); *Reffitt v.*

Norton Hospital even if there had been an actual or ostensible agency. The Jefferson Circuit Court's grant of summary judgment therefore had no effect whatsoever on the outcome of this case.

In short, Appellants can demonstrate absolutely no errors by the Jefferson Circuit Court in any regard – much less any error that negatively impacted their right to a fair trial. There is thus no basis for overturning either the verdict or the Judgment entered in favor of Dr. Haile. That conclusion notwithstanding, Dr. Haile has cross-appealed a number of rulings which are all-but-certain to adversely affect his rights in the unlikely event of a re-trial of this action. They are addressed below.

V. In the unlikely event the Court rules in Appellants' favor, this matter should be remanded to the Court of Appeals for determination of the issues raised on cross-appeal which were not decided or otherwise addressed by the appellate court.

At the Court of Appeals level, Dr. Haile and all other Appellees raised numerous issues on cross-appeal. In light of the decision affirming the Jefferson Circuit Court in all respects, those issues were not addressed by the Court of Appeals' Opinion. Accordingly, in the event this Court ultimately concludes that Appellants are entitled to a new trial, Dr. Haile requests that the matter first be remanded to the Court of Appeals for determination of whether the trial court erred in limiting Appellees' cross examination of Appellants' expert, Dr. Missun, and in excluding evidence directly relevant to Ms. Meredith's earning power and loss of consortium claims asserted on behalf of her daughter, in limiting the cross-examination of Appellant Linda Grubb by excluding evidence of Ms. Meredith's use of narcotic medications – medications appropriately prescribed and by all indications used by Ms. Meredith incidental to an automobile

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Hajjar, Ky. App., 892 S.W.2d 599, 604 (1994); *Massey v. Heine*, Ky., 497 S.W.2d 564 (1973).

accident shortly before the events at issue in this action,[67] in denying a Motion in Limine regarding the personal opinions and practices of Appellants' expert witnesses – irrespective of applicable standards of care – as being completely irrelevant to the issues in this case and/or that it was misleading, confusing and unduly prejudicial such that it should be excluded in the event that this matter has to be tried again.

[67] Evidence of her appropriate use of those medications was for the sole purpose of establishing that Ms. Meredith was likely on pain medications which would have further affirmatively masked the signs and symptoms of a developing appendicitis thereby complicating Dr. Haile's ability to diagnose a ruptured appendix. The evidence was not to be offered for any other purpose.

CONCLUSION

The Jefferson Circuit Court's decisions refusing to strike certain jurors for cause, in finding that Drs. Haile and Velasco were not agents of Norton Hospital, Inc., as a matter of law, and in excluding evidence of liability insurance were fundamentally sound in all respects. They were fully supported by the facts of this case. They were fully supported by the evidence elicited during the *voir dire* process. And just as importantly, they were fully supported by the law of this state. There was no abuse of discretion in any respect and Appellants have provided this Court with absolutely no good reason for reversing the Judgment of the Jefferson Circuit Court.

Respectfully submitted,

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