SUPREME COURT OF KENTUCKY
CASE NO. 2010-SC-00532

LINDA S. GRUBB, ET AL. APPELLANTS

v.

NORTON HOSPITALS, INC., ET AL. APPELLEES

APPEAL FROM KENTUCKY COURT OF APEALS
2009-CA-000021

BRIEF OF APPELLEE LUIS M. VELASCO, M.D.

Submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that ten (10) originals of the foregoing Brief of Appellee, Luis Velasco, M.D., was mailed to: **Clerk, Supreme Court of Kentucky**, Room 209, State Capitol, 700 Capital Avenue, Frankfort, KY 40601-3488, and copies of the foregoing have been served on **Clerk, Kentucky Court of Appeals**, 360 Democrat Drive, Frankfort, Kentucky 40601; **Hon. Susan Schultz Gibson,** Judge, Jefferson Circuit Court, Judicial Center, 9th Floor, 700 West Jefferson Street, Louisville, KY 40202; **F. Thomas Conway, Esq.**, 1800 Kentucky Home Life Bldg., 239 S. Fifth Street, Louisville, KY 40202; **Chadwick N. Gardner, Esq.**, 1916 Kentucky Home Life Bldg., 239 S. Fifth Street, Louisville, KY 40202; **Scott Roby**, 600 W. Main Street, Suite 100, Louisville, KY 40202; **Beth H. McMasters, Esq.**, 200 South Fifth Street, Suite 200N, Louisville, KY 40202; **Bradley R. Hume,** 734 W. Main Street, Suite 400, Louisville, KY 40202; **David B. Gazak, Esq.**, Darby & Gazak, P.S.C., 3220 Office Pointe Place, Suite 200, Louisville, KY 40220, on this 14th day of September, 2012. It is further certified that the record on appeal has not been withdrawn by the party filing this brief.

CRAIG L. JOHNSON

STATEMENT CONCERNING ORAL ARGUMENT

Since the issues presented for appellate review have been fully briefed herein and are not issues of first impression, the Appellee does not believe that oral argument is necessary for this Court to determine whether the trial court committed reversible error.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellee does not accept Appellants' Statement of the Case and, therefore, hereby sets forth the matters Appellee considers essential to a fair and adequate chronological summary of the facts and procedural events necessary to understanding the issues on appeal.

CHRONOLOGICAL SUMMARY OF FACTS

Appellants allege that Luis Velasco, M.D., James Haile, M.D., and Norton Hospitals, Inc. negligently failed to diagnose a ruptured appendix that Krystal Meredith suffered in the late stages of her first pregnancy.

Krystal Meredith was a 20-year old woman who initially presented to obstetrician Dr. Velasco's office on June 28, 2006, for prenatal care. Ms. Meredith's prenatal course was generally uneventful leading toward her due date of January 23, 2007. (VR 9/15/08; 9:56:12 Velasco and Velasco Exhibit 2). As her due date approached, Ms. Meredith attended a regularly scheduled prenatal visit with Dr. Velasco on January 4, 2007. (VR 9/15/08; 10:00:01 Velasco).

Appellants contend that during this office visit, Ms. Meredith provided Dr. Velasco with a history of "right side abdominal pain" and vomiting. (Appellant's Brief, p. 2). Contrary to the Appellant's assertion, the medical record is void of any such complaints on January 4, 2007. (VR 9/15/08; 10:00:51, Velasco and Velasco Exhibit 2). Moreover, Ms. Meredith's medical records from January 5, 2007, indicate that her complaints of nausea and vomiting began after her January 4, 2007, visit with Dr. Velasco. Appellants also contend that Dr. Velasco did not perform an abdominal examination on January 4, 2007. (Appellant's Brief, p. 2). Dr. Velasco has denied this contention and referenced the medical record in support of his testimony that an abdominal exam was performed on that day. (VR 9/15/08; 10:07:09, Velasco).

Ms. Meredith presented to Norton Hospital on Friday, January 5, 2007, Saturday, January 6, 2007, and Sunday, January 7, 2007. On those dates, Dr. James Haile provided weekend call coverage of Dr. Velasco's patients according to a prior arrangement with Dr. Velasco and another obstetrician. (VR 9/15/08; 10:09:50 Velasco). Sharing call and arranging for weekend coverage with obstetricians is customary in a medical practice. (VR 9/15/08; 10:10:19 Velasco) and (VR 9/15/08; 4:25:41 Duboe). Because Dr. Haile was on call from Friday, January 5, 2007, through approximately 7:00 a.m. on Monday, January 8, 2007, communications from the hospital nurses regarding Ms. Meredith were directed to Dr. Haile.

On Monday morning, January 8, 2007, Dr. Velasco resumed care of Ms. Meredith. Dr. Velasco was advised by nurse, Kristy Peavey, that Ms. Meredith had been seen by Dr. Haile over the weekend, was in labor, had an elevated white count, was on an antibiotic, and had been leaking fluid since the previous day. (VR 9/15/08; 10:10:45 Velasco). While Appellants deny the fact that Dr. Velasco was aware of these facts within their Brief, there is no evidence to the contrary. Dr. Velasco examined Ms. Meredith that morning and did not find any abdominal abnormalities, or any signs or symptoms of nausea, vomiting, diarrhea or severe abdominal pain. Instead, he found Ms. Meredith's presentation to be consistent with that of a first time laboring mother. (VR 9/15/08; 10:16:16 Velasco and VR 9/11/08; 1:27:48 Peavey).

Ms. Meredith's labor and the delivery of her daughter, Alyssa Meredith, – which occurred at 13:41 on Monday, January 8, 2007 – were uneventful. (VR 9/15/08; 10:27:51 Velasco). The medical records indicate that Ms. Meredith recovered well after delivery until approximately two hours later, when her condition began to deteriorate. Nursing staff contacted Dr. Velasco and advised him that Ms. Meredith was in pain and had a high heart rate. In response, Dr. Velasco ordered labs, medication, and that Ms. Meredith be taken back to the labor

and delivery unit. (VR 9/15/08; 10:29:06 Velasco). When Dr. Velasco arrived to assess Ms. Meredith a few minutes later, he found her sick and presenting like a completely different patient than when he last saw her at the time of delivery. (VR 9/15/08; 10:32:06 Velasco). Of note, Ms. Meredith complained of left side abdominal pain and not right side pain – where the appendix is located. (VR 9/15/08; 10:34:00 Velasco).

Given Ms. Meredith's presentation, Dr. Velasco ordered a consultation from vascular surgeon, Dr. Lipski, and a CT scan. (VR 9/15/08; 10:36:14 Velasco). Dr. Velasco accompanied Ms. Meredith to the radiology department for the CT scan. Dr. Cliff Tatum interpreted the CT scan and determined that it was not diagnostic because it showed only a tiny amount of fluid and one small air bubble. (VR 9/15/08; 10:36:57 Velasco, VR 9/18/08 10:21:40 Rodriguez and Plaintiff Exhibit 13). Indeed, this interpretation was consistent with an ultrasound performed earlier that day by Dr. Velasco. Dr. Velasco also ordered a general surgery consult, which was performed by Dr. Christine Landry and Dr. Jorge Rodriguez. (VR 9/15/08; 10:38:31 Velasco).

None of the physicians involved in Ms. Meredith's care (including Dr. Velasco, Dr. Haile, Dr. Tatum, Dr. Lipski, Dr. Landry, and Dr. Rodriguez) suspected any problem with Ms. Meredith's appendix. (VR 9/15/08; 10:39:13 Velasco and VR 9/18/08 10:21 Rodriguez). Approximately 5-6 hours after his consultation, Dr. Rodriguez performed an exploratory laparotomy in order to determine the source of Ms. Meredith's complaints. (VR 9/16/08; 10:53 Rodriguez). During that procedure, Dr. Rodriguez found a perforation in Ms. Meredith's appendix and an abscess. (Plaintiff Exhibit 14). Ms. Meredith subsequently developed Adult Respiratory Distress Syndrome and expired on February 1, 2007.

PROCEDURAL HISTORY

Appellants initiated this matter in the Jefferson Circuit Court, Division 12, asserting claims for wrongful death and loss of parental consortium against Dr. Velasco, Dr. Haile, and Norton Hospitals, Inc. Appellants alleged that Dr. Velasco and Dr. Haile negligently failed to diagnose Ms. Meredith's appendix rupture prior to delivery. Appellants also alleged that Norton Hospital nurses should have challenged Dr. Haile's decision-making and orders over the weekend that he provided treatment to Ms. Meredith. During the course of this litigation, Appellants also amended their Complaint to add claims against Dr. Velasco's employer, Community Medical Associates, Inc., but later voluntarily dismissed those claims.

The case was tried before Judge Susan Schultz Gibson from September 9, 2008, through September 19, 2008. After considering the evidence presented, the jury returned a verdict in favor of Appellees. A judgment consistent with the verdict was entered by the Court on October 2, 2008. (ROA 1579-80). The Jefferson Circuit Court denied Appellants' Motion to Alter, Amend or Vacate and/or Motion for a New Trial and for Judgment Notwithstanding the Verdict. (ROA 1651-59).

A Notice of Appeal was then filed by the Appellants with the Court of Appeals. On appeal, Appellants asserted that the trial court made various errors. First, Appellants claimed that the court should have excused three particular jurors for cause. Juror 215397 had once been a patient of a defense expert physician. Juror 222785's son worked for Norton Healthcare, Inc. (not a party to this action). Juror 201435 was an attorney whose firm had performed some work for Norton. Second, Appellants decried the trial court's decision to grant Norton Hospital, Inc.'s motion for partial summary judgment on agency issues; specifically Appellants maintained that Dr. Velasco and Dr. Haile acted as agents of Norton Hospital and that Dr. Haile was an agent of

Dr. Velasco. Third, Appellants argued that the trial court erroneously excluded malpractice insurance-related evidence that they claimed would have shown that Norton Healthcare insured Dr. Velasco and Dr. Haile and was therefore biased toward asserting a common defense. The Court of Appeals disagreed with all of Appellants' arguments and affirmed the trial court's judgment. (Opinion Affirming at EXHIBIT 1).

As to juror strikes, the Court of Appeals noted that the trial judge enjoys substantial discretion as he or she is in a better position to determine whether jurors should be excused for cause. (Opinion Affirming, p. 4). The Court of Appeals held that the trial court did not err in refusing to excuse Juror 215397 because that juror expressly stated that she would not be biased or impartial merely because her former physician would be testifying as a witness. (Opinion Affirming, pp. 4-5). The trial court did not err in refusing to excuse Juror 222785 because that juror never stated that he could not be fair and impartial and because he did not have an impermissibly "close relationship" with Appellees because it was his son (rather than the juror himself) who was employed by Norton Healthcare, Inc. (which was not a party to this action). (Opinion Affirming, pp. 6-8) The trial court did not err in refusing to excuse Juror 201435, the attorney, because nothing in the record indicated whether that juror's relationship with Norton Hospital was ongoing or was expected to continue in the future and that juror did not indicate that he would be unable to remain fair and impartial. (Opinion Affirming, pp. 9-10).

The Court of Appeals also held that the trial court correctly granted Appellees' partial summary judgment because Appellants' agency arguments are without merit. Determining that Appellants' largely premise their agency arguments on a "misinterpretation of the plain language" of a Physician Employment Agreement between Dr. Velasco and Community Medical Associates, the Court of Appeals held that neither Dr. Velasco nor Dr. Haile treated Ms.

Meredith as agents of Norton Hospital. (Opinion Affirming, pp. 10-17). In addition, Norton Hospital had never represented to Ms. Meredith (or the general public, for that matter) that Dr. Velasco or Dr. Haile was a Norton Hospital employee. The Court of Appeals also determined that Dr. Haile, in providing weekend call coverage of Ms. Meredith, was not acting as an agent of Dr. Velasco because Dr. Velasco exercised no control over Dr. Haile and the two doctors did not participate in any joint diagnosis. (Opinion Affirming, pp. 16-17).

Because there was no agency relationship amongst Appellees, the Court of Appeals also held that the trial court properly excluded evidence of the Physician Employment Agreement's medical malpractice insurance provision. (Opinion Affirming, pp. 17-19). Appellants had sought to introduce the provision to show bias, control, or motivation to assert common defense. The Court of Appeals approved of the trial court's application of KRE 411 and the KRE 403 "balancing test," under which the trial court had concluded that any probative value to evidence of the provision was outweighed by the risk of undue prejudice that would result from its introduction. (Opinion Affirming, pp. 17-19).

Appellants reiterate these arguments in their Brief to this Court. For the reasons cited by the Court of Appeals and set forth herein, this Court should affirm the Opinion of the Court of Appeals and that of the Jefferson Circuit Court.

ARGUMENT

The Court of Appeals' July 16, 2010, Opinion Affirming should be affirmed in all respects. The Court of Appeals correctly deferred to the trial court's considerable discretion in refusing to excuse three jurors who the trial court determined could be fair and impartial. The appellate court came to the same correct conclusion as the trial court in determining that Appellants' agency arguments were non-meritorious and based on misinterpretation of Dr.

Velasco's Physician Employment Agreement with Community Medical Associates. Lastly, the Court of Appeals approved the trial court's exclusion of evidence related to Appellees' medical malpractice insurance under the Kentucky Rules of Evidence.

Appellants present no legitimate reason why this Court should reverse the trial court and the Court of Appeals. The purported errors identified by Appellants involve well-established legal principles and matters delegated to sound judicial discretion. The rationale underpinning both lower courts' decisions is supported by Kentucky law and the facts of this case. Accordingly, the Court of Appeals' Opinion should be affirmed.

A. THE COURT OF APPEALS CORRECTLY APPLIED SETTLED KENTUCKY LAW WHEN APPROVING THE TRIAL COURT'S REFUSAL TO EXCUSE CERTAIN VENIREPERSONS FOR CAUSE.

Appellants attempt to convince this Court that Kentucky law provides trial court judges with insufficient guidance on their role in the jury selection process. The Appellants go so far as promulgating the need for a bright-line formula to apply when deciding whether to strike venirepersons for cause. Appellees do not share Appellants' lack of faith in trial judges' ability to do their job or in Appellants' contention that the current law is inadequate. As it is so vital to our trial process, the parameters of jury selection have been well-described and are long established.

Prospective jurors are presumed to be fair and impartial. See, Hicks v. Commonwealth, 805 S.W.2d 144 (Ky. App. 1990). To presume them otherwise would be foolish in today's complexly-networked society. Justice Holmes recognized a century ago that, "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain a jury trial under the conditions of the present day." Holt v. U.S., 218 U.S. 245, 251

(1910). If a venireperson is determined to be biased, he or she should be excused for cause. See, Hunt v. Commonwealth, 304 S.W.3d 15 (Ky. 2009); Mabe v. Commonwealth, 884 S.W.2d 668 (Ky. 1994).

The test for impermissible bias is whether, after having heard all of the evidence, the prospective juror can conform his or her views to the requirements of the law and render a fair and impartial verdict. Mabe, 884 S.W.2d at 671. Because bias is generally not presumed, the parties are charged with the task of adequately probing venirepersons for bias during voir dire. See, Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001); Hicks v. Commonwealth, 805 S.W.2d 144 (Ky. App. 1990). Evidence of bias is measured in the context of the totality of voir dire examination and not from particular responses to any "magic questions." See, Hunt v. Commonwealth, 304 S.W.3d 15 (Ky. 2009); Fugett v. Commonwealth, 250 S.W.3d 604 (Ky. 2008); Allen v. Commonwealth, 278 S.W.3d 649 (Ky. App. 2009).

As voir dire examinations are conducted, trial judges are in the best position to observe "the demeanor of the prospective jurors and understand the substance of their answers to voir dire questions." Allen, 278 S.W.3d at 652; Also see, Stopher v. Commonwealth, 57 S.W.3d 787 (Ky. 2001); Mabe, 884 S.W.2d at 671. Because they directly witness and evaluate the totality of voir dire examinations, trial judges enjoy considerable discretion in deciding whether to excuse a venireperson for cause. See, Adkins v. Commonwealth, 96 S.W.3d 779 (Ky. 2003); Pendleton v. Commonwealth, 83. S.W.3d 522 (Ky. 2002); Murphy v. Commonwealth, 50 S.W.3d 173 (Ky. 2001); Mackey v. Greenview Hospital, Inc., 587 S.W.2d 249 (Ky. App. 1979). A trial judge's decision to excuse (or refuse to excuse) a venireperson is reviewed for clear abuse of that discretion. Whittle v. Com., 352 S.W.3d 898, 901 (Ky. 2011). That standard is designed to

invalidate decisions that are arbitrary, unreasonable, unfair, or unsupported by sound legal principles. See, Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000).

Appellants argue that trial judges cannot be trusted to determine (using current legal standards and their eyewitness view of voir dire examinations) whether a venireperson is impermissibly biased to serve on a jury. They urge this Court to promulgate a bright-line formula that would require trial judges to excuse venirepersons who demonstrate "indicia of implied bias plus reservations and qualifications that indicate actual bias." (Appellants' Brief, p. 23). Appellants fail to explain why such a bright-line formula is necessary and fail to establish that its application would have changed the selection of the jury that sat for this case.

On this topic, there is only one necessary bright-line rule: to account for the infinite variance of voir dire circumstances, trial judges must wield considerable discretion in appraising the jury-fitness of venirepersons. Specific rules for dealing with certain situations are promulgated from time to time, but adopting Appellants' pseudo-mathematical formula would only circumscribe trial judges' discretion and hamper the jury selection process. Kentucky law provides trial judges with adequate guidance on how to respond to motions to excuse venirepersons for cause.

Here, Appellants claim that the trial judge committed reversible error in denying their requests to excuse Jurors 215397, 222785, and 201435 for cause. The Court of Appeals correctly applied Kentucky law in approving the trial judge's denial of those requests and, in that regard, its Opinion Affirming should be affirmed.

1. The trial judge did not abuse her discretion in denying Appellants' motion to excuse Juror 215397 for cause.

During voir dire, Juror 215397 disclosed that Dr. Larry Griffin, a defense expert physician, had delivered two of her children. After learning that Dr. Griffin's role in the trial was limited to testifying as an expert witness, Juror 215397 stated that she could remain fair because Dr. Griffin was "not involved," as Juror 215397 put it:

> APPELLANTS' COUNSEL: The fact that Dr. Griffin is here testifying for Norton Hospital, Dr. Velasco, would that cause you... ?
>
> JUROR 215397: No. Not as long as he's not involved.

(VR 09/09/2008; 11:50:30). Having witnessed Juror 215397's voir dire examination, the trial judge declined to excuse Juror 215397 for cause as requested by Appellants. Appellants did not use a peremptory strike on Juror 215397, though she was later randomly excused as an alternate and did not deliberate or participate in the rendering of the verdict in this case.

The Court of Appeals reviewed the trial court's denial of Appellants' motion to excuse under the proper "abuse of discretion" standard. (Opinion Affirming, p. 6). In the court's opinion, the voir dire transcript supported the trail judge's conclusion that Juror 215397 could remain fair and impartial because Dr. Griffin was not a party to the case. Moreover, the Court of Appeals noted that Juror 215397 was never asked whether she was a current patient of Dr. Griffin. For these reasons, the Court of Appeals determined that the trial judge had not abused her discretion in refusing to excuse Juror 215397 for cause.

In their Brief to this Court, Appellants levy two arguments to challenge the trial court's refusal to excuse Juror 215397. First, they assert that the Court of Appeals (and the trial court) misinterpreted Juror 215397's remark that she said that she could remain fair as long as Dr. Griffin was "not involved." Second, they argue that Juror 215397's relationship with Dr. Griffin

was such a "close relationship" as to require the trial judge to presume that Juror 215397 would be impermissibly biased. Neither argument is compelling.

Appellants chide the Court of Appeals for "assuming" to understand what Juror 215397 meant when she said that she could remain fair as long as Dr. Griffin was "not involved." (Appellants' Brief, p. 18). This represents a basic misunderstanding of appellate review. As has been discussed, trial judges enjoy considerable discretion in deciding whether to excuse a venireperson for cause. The Court of Appeals was not tasked with substituting its judgment for that of the trial court, but with reviewing the transcript for evidence that the trial judge had abused her discretion in concluding that Juror 215397 could remain fair. In executing that task, the Court of Appeals found no evidence of abuse of discretion.

The trial judge's interpretation of Juror 215397's comment (subsequently approved by the Court of Appeals) was based upon the voir dire examination that the trial judge directly witnessed. The trial court recognized that, in the context of her examination, Juror 215397's response clearly meant that she could be fair as long as Dr. Griffin was not involved as a *party* in the case. Appellants' counsel had already told Juror 215397 that Dr. Griffin would be involved in the case and revealed the expert witness role he would play. When Appellant's counsel asked her if Dr. Griffin's appearance as an expert witness would cause her to be biased, her response – "No. Not as long as he's not involved" – only makes sense if interpreted to mean that she would only be biased if Dr. Griffin was a party. The trial judge recognized this after witnessing the examination first-hand, from the best position to appraise Juror 215397's attitude, demeanor, and inflection.

Appellants repeatedly argue that Dr. Griffin was "involved" in the case, baldly supplanting their general definition of the word for Juror 215397's contextually specific

definition. Appellants ask this Court to discard the trial judge's contemporaneous interpretation of Juror 215397's remark, discard the appellate court's approval of that interpretation, and supplant both with a nonsensical interpretation. Appellants propose that Juror 215397 intended to say that she could not remain fair if Dr. Griffin was an expert witness. If that were so, the proposed exchange could be transcribed:

> APPELLANTS' COUNSEL: The fact that Dr. Griffin is here testifying for Norton Hospital, Dr. Velasco, would that cause you ... ?
>
> JUROR 215397: No[, *I will not be biased if Dr. Griffin is an expert witness*]. Not as long as he's not involved [*as an expert witness*].

This ridiculous example illustrates the flaw in Appellant's argument and emphasizes the reasonableness of the trial judge's interpretation. There is no reason to reverse the Court of Appeals' finding that the trial judge did not abuse her discretion in concluding that Juror 215397's statement meant that she could remain fair and impartial if Dr. Griffin's role at trial was as expert witness.[1]

Appellants' second argument with regard to Juror 215397 is that her OB/GYN – patient relationship with Dr. Griffin was such a "close relationship" as to require the trial judge to presume that she would be a biased juror. The Supreme Court of Kentucky rejected this argument in Altman v. Allen, 850 S.W.2d 44 (Ky. 1992).

In Altman, the plaintiff alleged negligence on the part of two OB/GYNs in the treatment of a premature baby in the weeks following birth. The trial jury included former patients of the

[1] Appellants argue, in the alternative, that the courts need not "should not split legal hairs" over the different interpretations of Juror 215397's remark. Appellee submits that the difference between, "I will be fair unless he's involved as a party" and "I will be fair unless he's an expert witness" is not a fine line – especially in light of case law precedent and the fact that Dr. Griffin played only the role of expert witness.

defendant doctors, three of whom had been challenged for cause. Altman, 850 S.W.2d at 45. After trial in the Pike Circuit Court, the jury rendered a defense verdict. On appeal, the plaintiff argued that the trial judge should have excused the defendants' former patients and the Court of Appeals agreed. Id. at 45. The Court of Appeals determined that the defendants' former patients were biased as a matter of law because the relationship between a woman and her obstetrician/gynecologist is so close as to necessarily destroy juror impartiality. Id.

However, this Court reversed the Court of Appeals. This Court noted that the voir dire examination yielded no evidence on which to base a presumption of juror bias; e.g., no comprehensive effort to explore the doctor/patient relationships, no evidence that the jurors were frequent patients, no evidence that they had a good or bad relationship with the doctors. Id. at 45. Moreover, the Court had been presented no scientific treatises or other expert testimony to support the theory of obstetrician-patient bonding. Id. In fact, two of the defendant doctors' former patients had voted *against* the doctors in deliberation. Id. at 46. The Court concluded,

> No court should speculate so as to presume a special bond between a woman and her obstetrician. Similar and equally unwarranted presumptions could be made about psychiatrists, psychologists, clergy and other counsel-type relationships. It is best to leave such decisions in the hands of the trial judge who must properly exercise discretion. When such discretion is properly exercised, it must be given great weight. Support for such a proposition does not require lengthy citation. The trial judge has always been recognized as the person in the best position to determine whether a prospective juror exhibits bias or partiality which would require exclusion from the panel. There is no reason to disturb the discretion of the trial judge. There is no basis for an automatic presumption of bias on the part of jurors toward a former physician. The law cannot be expanded to such a degree. Convincing evidence must be presented to the trial judge to support such an argument.

Id. at 46, internal citation omitted.

Twelve years later, this Court acknowledged that current and ongoing physician-patient relationships are generally relationships of trust and clarified,

> 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.

Bowman ex rel. Bowman v. Perkins, 135 S.W.3d 399, 402 (Ky. 2004) (emphasis added). The rule set forth in Altman and Bowman was well-established at the time of trial of this matter.

Following this precedent here, the Court of Appeals held that the trial judge had not abused her discretion in deciding that Juror 215397's relationship with an expert witness (Dr. Griffin) was not so close as to require her excusal. (Opinion Affirming, pp. 5-6). Just as in Altman, the actual relationship between Juror 215397 and Dr. Griffin was not comprehensively probed. There was no evidence of how often she had seen Dr. Griffin, how much time she had spent with him, or whether she liked or disliked him. Most importantly, there was no evidence to suggest that her physician-patient relationship with Dr. Griffin was current and ongoing. (Opinion Affirming, pp. 5-6). Moreover, the Court of Appeals noted that Dr. Griffin was not a defendant in this case, but only an expert witness. (Opinion Affirming, pp. 5-6). Juror 215397 expressly stated that Dr. Griffin's involvement in that regard would not cause her to be biased. Thus, the Court of Appeals correctly applied Kentucky law in upholding the trial judge's denial of Appellants' request to excuse Juror 215397 for cause.

Appellants argue that the rule from Altman should be extended to include former OB/GYN-patient relationships. One can only imagine the floodgates that such a rule would open. The Court would next be asked to appraise and interpret the closeness of the bond between patients and physicians of a cascade of other clinical specialties. Moreover, it is difficult to conceive of how such an "extension" could be accomplished without overruling Altman and Bowman. Like the appellant in Altman, these Appellants present no evidence to suggest that a former OB/GYN-patient relationship results in such a "unique bond" as to merit

special treatment in the eyes of the law and no evidence that Juror 215397 perceived her relationship with Dr. Griffin to be particularly close.

Nothing justifies the establishment of a special jury selection rule concerning OB/GYN–patient relationships. This Court has addressed and rejected Appellants' argument and promulgated a workable rule: a trial judge should excuse a venireperson who is currently a patient of a defendant physician in a medical malpractice case, but base the decision on whether to excuse former patients on his or her appraisal of the former patient's ability to remain fair and impartial as probed during voir dire. The Altman and Bowman cases together provide trial courts with this ample guidance to make the right decisions. That guidance is sensible and practical as it concerns the *presumption* of bias. If an OB/GYN-patient relationship between a venireperson and a defendant physician is ongoing or expected to continue, it makes sense to presume that the venireperson will be unable to maintain an attitude of appropriate indifference when reviewing trial evidence. If that relationship is confined to the past, then such bias (if any) will not be presumed, but rather left to be revealed during voir dire – when the attorney seeking to establish bias can inquire into the nature of the relationship, the duration of representation, the amount of time from the end of the representation and the trial at hand, the closeness of the relationship, etc. The Court of Appeals correctly reviewed the trial judge's decision in light of those authorities.

Appellants bore the burden of establishing that Juror 215397 was biased and unable to serve on the jury.[2] Instead, voir dire yielded answers that permitted the trial judge to reasonably conclude that Juror 215397 could remain fair and impartial: she had no relationship with Appellees, she disavowed any bias caused by Dr. Griffin's participation as an expert witness, and

[2] Appellants did not use a peremptory strike on Juror 215397.

the question of whether she was a current patient of Dr. Griffin was never asked. The trial judge's refusal to exclude Juror 215397 was not an abuse of discretion, but an evaluation of the circumstances of voir dire that is supported by the record. That evaluation should not be disturbed by this Court.

2. The trial judge did not abuse her discretion in denying Appellants' motion to excuse Juror 222875 for cause.

During voir dire, Juror 222785 disclosed that his son worked as a purchasing manager for Norton Healthcare, Inc. – an entity not involved in the lawsuit as a party. Juror 222875 never indicated that he had discussed this case or was otherwise aware of this case by virtue of his relationship with his son. He remarked that, "if it was a close call, like I said, I'd probably have problems with it," but when all venirepersons were asked to advise the court and attorneys of any reservations about their ability to remain fair and impartial, Juror 222785 said nothing. In addition, Juror 222785 did not respond with any negative comment or opposition when the venirepersons were asked whether they could return a verdict in favor of Appellants if the evidence supported it. (VR 9/9/08; 12:34:10). Having witnessed Juror 222875's voir dire examination, the trial judge refused to excuse him for cause as requested by Appellants.

The Court of Appeals reviewed this decision under the proper "abuse of discretion" standard. (Opinion Affirming, pp, 6-8). In the court's opinion, the voir dire transcript supported the trial judge's conclusion that Juror 222785's relationship with the defendants in this case was "relatively distant" because it was the Juror's son (and not the Juror) who had a relationship with Norton Healthcare, Inc. (which was not a party). (Opinion Affirming, pp, 6-8). Moreover, the Court of Appeals noted that Juror 222875, when asked to advise the court and attorneys that he could not be fair and impartial, did not do so. (Opinion Affirming, pp, 6-8). For these reasons,

the Court of Appeals determined that the trial judge had not abused her discretion in refusing to excuse Juror 222875 for cause. (Opinion Affirming, pp, 6-8).

In their Brief to this Court, Appellants levy two arguments to challenge the trial court's refusal to excuse Juror 222875. First, they assert that Juror 222875's relationship with the defendants was such a "close relationship" as to require excusal for cause. (Appellants' Brief, pp. 14-15). Second, they argue that Juror 222875's remark that he would probably "have problems with it" if the trial were a close call so clearly expressed bias as to require his excusal for cause. (Appellants' Brief, pp. 22-27). Neither argument is compelling.

Kentucky's "close relationship" mandate, traceable to Ward v. Com., 695 S.W.2d 404 (Ky. 1985), requires a trial judge to presume bias and excuse a venireperson for cause if he or she "has such a close relationship, be it familial, financial or situational, with any of the parties, counsel, victims or witnesses." Ward, 695 S.W.2d at 407. Kentucky courts have returned to this proposition from time to time, notably in Davenport By & Through Davenport v. Ephraim McDowell Mem'l Hosp., Inc., 769 S.W.2d 56 (Ky. App. 1988) and Soto v. Com., 139 S.W.3d 827 (Ky. 2004). These cases illustrate that Juror 222785's relationship with Appellees was relatively distant.

In Davenport, the trial judge refused to excuse two particular venirepersons from the venire in a medical malpractice action. The first was a woman who had once been employed by the defendant hospital and whose husband was currently employed by the defendant hospital. Davenport, 769 S.W.2d at 59. She admitted that the interests of fairness would probably be served by her excusing herself. Id. The second was a woman who was a member of the defendant hospital auxiliary and who was married (at the time of trial) to a doctor on the defendant hospital staff. Id. at 60. She admitted that she was socially acquainted with the

defendant physician. Id. The Court of Appeals held that both venirepersons' professional and marital relationships with the defendants required the trial judge to presume bias and excuse them for cause. Id.

Soto was a criminal case pending in Oldham County. One venireperson was a man whose daughter and son-in-law were police officers. Soto, 139 S.W.3d at 849. He had met several Oldham County police officers and his son-in-law had previously worked with the Oldham County Commonwealth's Attorney's office on a capital case. Id. The venireperson clarified that he had not had personal contact with the Oldham County deputies for a few years. Id. at 850. This Court held that the venireperson's acquaintance, through his daughter and son-in-law, with Oldham County deputies did not result in him knowing any facts of the case and did not approach the kind of "close relationship" described in Ward. Id. In addition, the juror worked at the same company as one of the victims and his wife worked at the same hospital where another victim was also employed. Id. at 849-50. This Court held that neither the juror's employment relationship nor his wife's employment relationship with the victims was such a "close relationship" as to require the presumption of impermissible bias.

Here, the Court of Appeals acknowledged that the Davenport and Soto opinions illustrate why it was within the trial judge's discretion to not presume that Juror 222875 was biased due to his relationship with his son. (Opinion Affirming, pp. 6-8). In Davenport, both challenged jurors were professionally associated with and married to employees of the defendant. In comparison, Juror 222875's relationship with the Appellees was distant: he was not an employee or former employee of any Appellee, nor was his son. Instead, his son was an employee of a non-party entity related to Appellee Norton Hospitals, Inc. via corporate structure. It was never discussed whether the son's job (as purchasing manager) was in any way related to clinical

services, entailed any relationship with any Appellee, or resulted in Juror 222875 knowing anything about the facts of this case. In Soto, the challenged juror's daughter and son-in-law were both police officers through whom the juror had met police officers from the forum county. The Soto juror's wife worked at the same hospital as the victim of the crime, but this Court decided that such a relationship was not impermissibly "close" even though the juror's wife may have come into incidental work-related contact with the victim. Here, Juror 222785's son may have come into incidental work-related contact with employees of Appellees, but actually worked for a different entity. Citing the precedent established in Davenport and Soto, the Court of Appeals held that the entirety of voir dire confirmed that the trial judge in this case was within her discretion to conclude that Juror 222785's relationship with the Appellees was not so close as to require her to presume that he was too biased to serve on the jury.

Appellants also argue that Juror 222785 revealed actual bias when he said that he would probably "have problems with it" if the case were a "close call." Of course, one would presume that every juror would have problems deciding facts in a "close call" case. The question is whether the trial judge abused her discretion in deciding that this statement, considered along with the totality of voir dire examination, did not rise to the level of establishing that Juror 222785 was incapable of conforming his views to the requirements of the law and rendering a fair and impartial verdict. On this more precise point, the Court of Appeals acknowledged that when the entire venire was asked whether they could remain fair and impartial, Juror 222785 did not indicate otherwise.[3] (Opinion Affirming, p. 6).

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[3] Counsel for Norton Hospitals, Inc. asked the entire venire, "You've heard quite a bit of questioning thus far, and given everything you've heard thus far, do you all agree that you could be fair to both sides at this point?" Juror 222785 did not indicate that he could not be fair and impartial. (VR 09/09/2008: 07:27- 07:36).

Appellants cite Montgomery v. Com., 819 S.W.2d 713 (Ky. 1991) for the proposition that jurors' responses to questions asked of entire panels are unreliable. (Appellants' Brief, p 14). Montgomery was a criminal case that arose from a highly publicized prison escape. Montgomery, 819 S.W.2d at 715. Due to concerns related to the degree of pre-trial publicity, the judge permitted broad voir dire to identify venirepersons who had been exposed to the facts of the case. Id. at 716. Four jurors acknowledged familiarity with pretrial publicity and even admitted that they had formed opinions as to the escapees' guilt. Id. Each juror nevertheless asserted that he could put aside his preconceived opinions and be impartial. Id. This Court decided that it was an abuse of discretion for the trial judge to determine that those venirepersons could be rehabilitated with "magic questions" about their partiality. Id. at 718. However, Montgomery does not say that responses to questions put to the entire panel are less reliable than responses to questions asked of specific jurors.

Appellants treat Juror 222785's remark as if it were a "magic answer" that required the trial judge to automatically excuse him for cause. As the party alleging that Juror 222785 should have been excused, Appellants bear the burden of proving his bias. See, Cook v. Com., 129 S.W.3d 351 (Ky. 2004). They cannot do so because nothing in the record concretely establishes that Juror 222785 was incapable of remaining fair and impartial. Aside from equivocally stating that he could probably have problems with a close call, Juror 222785 refused multiple opportunities to categorize himself as biased and, importantly, the trial judge concluded that he was capable of serving on the jury based on the entirety of voir dire.

Appellants ask this Court to adopt their evaluation of Juror 222785's fitness to serve and substitute it for that of the trial court. In so arguing, Appellants eschew any deference to the trial judge, who was charged with considering the entirety of Juror 222785's voir dire responses and

demeanor rather than his response to any single question – but deference is owed. Again, the trial judge's evaluation is reviewed under the abuse of discretion standard aimed at invalidating decisions that are arbitrary, unreasonable, unfair, or unsupported by sound legal principles. See, Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000).

The record does not support a determination that the trial judge abused her discretion, but rather chose between options. As this Court recently stated,

> Much of the point of allowing a trial judge discretion in this type of decision making is to recognize that there may be more than one permissible decision. In a case like this, where the decision is a classic "close call," the trial judge is given sound discretion to choose among those multiple permissible options, guided by his own experience, the law, and the facts of the case before him. The abuse-of-discretion standard defers to the trial court's choice among those possibilities, even where the appellate court might have chosen differently. The trial judge acted on more than a hunch or suspicion in excusing the juror; his decision was the product of intentional deliberation.

Elery v. Com., 368 S.W.3d 78, 96 (Ky. 2012). Here, the trial judge declined to excuse Juror 222785, not based on a hunch or suspicion, but on intentional deliberation over the entirety of voir dire.

The trial court's decision to deny Appellants' motion to strike for cause was based on that observation and appraisal of Juror 222785's fitness to sit on the jury. Appellants bore the burden of proving that Juror 222785 was biased and unable to serve on the jury. However, voir dire examination and the totality of circumstances permitted the trial court to reasonably conclude that the juror could remain fair and impartial: his relationship with Appellees was relatively distant at best, his remark about "close call" cases was equivocal, and he refused multiple opportunities to advise the attorneys and the trial judge that he had concrete reservations about any partiality. The trial judge's denial of Appellants' motion to excuse Juror 222785 was not an abuse of discretion, but an evaluation of the circumstances of voir dire that is supported by the record. That evaluation should not be disturbed by this Court.

3. The trial judge did not abuse her discretion in denying Appellants' motion to excuse Juror 201435 for cause.

During voir dire, Juror 201435 disclosed that he was an attorney whose firm, Hall Render Killian Heath & Lyman, PSC, "has done some work for Norton." (VR 09/09/08; 11:16:58 – 11:17:08). Juror 201435 never indicated that he had worked on any "Norton" cases or whether he worked in a division that handled medical malpractice litigation. He did not indicate what entity he meant to call "Norton." Importantly, he never stated that the attorney-client relationship between his firm and "Norton" was ongoing or expected to continue in the future and, as noted, spoke of the relationship in the past tense (e.g., "has done some work for Norton"). Juror 201435 never expressed any reservations whatsoever about his ability to remain fair and impartial. Having witnessed Juror 201435's voir dire examination, the trial judge refused to excuse him for cause as requested by Appellants.

The Court of Appeals reviewed this decision under the proper "abuse of discretion" standard. (Opinion Affirming, pp. 8-10). In the court's opinion, the voir dire transcript fails to provide sufficient evidence that Juror 201435's law firm had an ongoing or anticipated future relationship with Appellees. (Opinion Affirming, pp. 8-10).

Citing Riddle v. Com., 864 S.W.2d 308 (Ky. App. 1993), the Court of Appeals noted that Kentucky law does not require trial judges to automatically excuse a venireperson on the basis of a past attorney-client relationship with an attorney representing a party at trial, but does require the excusal of a venireperson who had a past attorney-client relationship and would seek to continue that relationship in the future. (Opinion Affirming. p. 9). This Court expressly endorsed that rule in Fugate v. Com., 993 S.W.2d 931 (Ky. 1999), writing,

> We agree with the opinion of the Court of Appeals expressed in Riddle v. Commonwealth, 864 S.W.2d 308 (Ky. App. 1993), that a trial court is required to disqualify for cause prospective jurors who had a prior professional relationship

with a prosecuting attorney and who profess that they would seek such a relationship in the future.

Fugate, 993 S.W.2d at 938; Also see, Bowman ex rel. Bowman v. Perkins, 135 S.W.3d 399, 403 (Ky. 2004) ("We expressly agreed with Riddle in Fugate"). Appellants concede that nothing in the record establishes that Juror 201435's law firm had such a relationship with "Norton."

In addition, Juror 201435 never expressed any reservations about his partiality and did not take the opportunity to advise the attorneys or trial judge of any bias when such a question was posed to the entire venire. For these reasons, the Court of Appeals determined that the trial judge had not abused her discretion in refusing to excuse Juror 201435 for cause. (Opinion Affirming, pp. 8-10).

The rule espoused in Riddle and Fugate is sensible and practical. Moreover, it is analogous to and consistent with the rule from Bowman and Altman, discussed above, distinguishing venirepersons with current physician-patient relationships with defendants from venirepersons who are former patients of defendant physicians. The rule provides guidance as to the *presumption* of bias; if an attorney-client relationship between a venireperson and a trial attorney is ongoing or expected to continue, it makes sense to presume that the venireperson will be unable to maintain an attitude of appropriate indifference when reviewing trial evidence. If that relationship is confined to the past, then such bias (if any) will not be presumed, but rather left to be revealed during voir dire – when the attorney seeking to establish bias can inquire into the nature of the representation, the duration of representation, the amount of time from the end of the representation and the trial at hand, the closeness of the relationship, etc. The rule of Riddle and Fugate provides clear guidance to trial judges while not encroaching upon their wide discretion in deciding whether to excuse venirepersons for cause.

In their Brief before this Court, Appellants essentially propose (because they must) that this Court overrule Riddle and Fugate and promulgate a rule that trial judges must excuse any venirepersons whose law firm ever had an attorney-client relationship with any attorneys representing a party at trial. Their rationale seems to be that the Supreme Court Rules of Professional Conduct generally prohibit attorneys from taking any action that might adversely affect the interests of a former client. (Appellants' Brief, p. 21). Appellants cite SCR 3.130(1.7), which is limited to providing guidance to attorneys deciding whether *to represent* clients in light of possible conflicts of interests and says nothing about jury service. Next, Appellants cite SCR 3.130(1.9), which conditionally limits an attorney's ability to use information from past representation to the disadvantage of a former client. Of course, Juror 201435 never stated that he worked on any "Norton" cases or knew any information that could be used to "Norton's" disadvantage. Lastly, Appellants cite SCR 3.130(1.10), which imputes conflicts of interests between individual attorneys and their firms or former firms, but only in the context of client representation – the rule says nothing about jury service. Indeed, none of the Supreme Court Rules of Professional Conduct prohibit an attorney from serving on a jury in a case in which a former client of his firm is a party.

Appellants admit that the record does not reflect whether "Norton" was a former or current client of Juror 201435's firm, but suggest that the distinction between the two relationships is "marginal." (Appellants' Brief, p. 21, n. 8). However, according to Riddle and Fugate, the distinction means the difference between presuming bias and not; those opinions had been the law for approximately 15 and 9 years, respectively, at the time of trial in this matter. The voir dire examination of Juror 201435 yielded only scant information about his firm's attorney-client relationship with "Norton," and most notably failed to reveal whether said

relationship was ongoing or expected to continue. In addition, Juror 201435 never indicated that his firm's relationship with "Norton" caused him to doubt his ability to remain fair and impartial. For these reasons, the Court of Appeals correctly determined that the trial judge had not abused her discretion in refusing to excuse Juror 201435. There is no reason to disturb that determination.

B. ON DE NOVO REVIEW, THE COURT OF APPEALS ADHERED TO LONGSTANDING PRINCIPLES OF CONTRACT INTERPRETATION AND AGENCY LAW IN AGREEING WITH THE TRIAL COURT THAT DR. VELASCO WAS NOT AN ACTUAL OR OSTENSIBLE AGENT OF APPELLEE, NORTON HOSPITALS, INC.

It is undisputed that a company named Norton Healthcare, Inc. (not a party this action) is parent to two subsidiaries: Community Medical Associates d/b/a Norton Medical Associates ("CMA")[4] and Norton Hospitals, Inc. Appellants initially asserted claims against CMA and Norton Hospitals, Inc., but later voluntarily dismissed CMA. Appellants also asserted that Norton Hospitals, Inc., was vicariously liable for any negligent acts or omissions of Dr. Velasco and Dr. Haile. (ROA 1-7). This assertion was based on the theory that Drs. Velasco and Haile were either actual agents or ostensible agents of Norton Hospitals, Inc. when providing care to Ms. Meredith.

The focus of Appellants' actual and ostensible agency allegations is a Physician Employment Agreement (the "Agreement"). (Physician Employment Agreement at EXHIBIT 2). By its terms, the Agreement is between Dr. Velasco and CMA; i.e., Dr. Velasco is an

[4] CMA was added as a party Defendant to this action pursuant to an Amended Complaint filed by Appellants. (ROA 609-17). Appellants subsequently voluntarily dismissed CMA. (ROA 705-06).

employee of CMA. Indeed, the trial court found that the Agreement "was exclusively between Dr. Velasco and Community Medical Associates." (ROA 1498-1501, p 3).

The Agreement expressly provides that it refers to CMA as "Norton." Appellants have consistently used this fact to manufacture confusion over the parties to the Agreement – even at this stage in litigation do Appellants refer to it as a "contract between CMA and Norton" (Appellants' Brief, p. 7) and assert that, "for all practical purposes it was a contract between Norton Healthcare, of which Norton Hospitals, Inc. is a subsidiary, and Dr. Velasco." (Appellants' Brief, p. 27). In fact, an entire section of Appellants' Brief appears under the heading "The contract was not simply between CMA and Velasco, but Norton Healthcare in general." (Appellants' Brief, p. 31).[5] Beneath this heading, Appellants assert that, "Who is Norton?" is a "confusing question" but concede that the trial judge's and the Court of Appeals' finding that "Norton" refers to CMA in the Agreement is "true on its face." (Appellants' Brief, p. 31). Despite this concession, Appellants boldly assert that the word "Norton," as it appears in the Agreement, clearly means "Norton Healthcare" rather than CMA. (Appellants' Brief, p. 36). Whether real or designed, Appellants' confusion – not accurate contract interpretation – has always underpinned their agency arguments.

Before trial, Norton Hospitals, Inc. filed a Motion for Partial Summary Judgment on Appellants' claim that there was any agency relationship between Dr. Velasco or Dr. Haile and Norton Hospitals, Inc. (ROA 995-96). Appellants responded and filed a "Cross-Motion for Summary Judgment Holding That Krystal Meredith Was A Patient For Which Norton Hospitals Inc. Was Responsible." (ROA 1312-1350). Appellants' arguments were (and remain) primarily based on their essentially flawed interpretation of the Agreement.

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[5] One wonders what entities Appellants refer to as "Norton Healthcare in general" and whether contracts can be made between a party and a party "in general."

The trial court found that "nothing in the terms of the Agreement reflects any connection" between CMA and Norton Hospitals, Inc. (ROA 1498-1501, p. 3). The trial court also found that there was no evidence that Dr. Velasco or Dr. Haile were actual or ostensible agents of Norton Hospitals, Inc., or that Dr. Haile was an agent of Dr. Velasco. (ROA 1498-1501, pp. 3-4). Accordingly, the trial court granted partial summary judgment in favor of Norton Hospitals, Inc. (ROA 1489-1501).

The Court of Appeals appropriately conducted a de novo review of the trial court's interpretation of the Agreement. (Opinion Affirming, p. 11); See, Hallahan v. Courier-Journal, 138 S.W.3d 699 (Ky. App. 2004). The Court of Appeals also concluded that neither Dr. Velasco nor Dr. Haile was an actual or ostensible agent of Norton Hospitals, Inc., and that Dr. Haile was not a "dual agent" of Dr. Velasco and Norton Hospitals, Inc. There is no reason to reverse the holdings of the trial court and Court of Appeals on this issue.

1. Neither Dr. Velasco nor Dr. Haile was an "actual agent" of Norton Hospitals, Inc.

As to Appellants' actual agency argument, the Court of Appeals found, like the trial court, that Appellants' position is based on "a misinterpretation of the plain language of the Agreement." (Opinion Affirming, p. 13). Specifically, the Court of Appeals addressed the paragraph at the center of Appellants' argument:

> **1. Duties.**
>
> At the direction of Norton, Physician shall ... render services to Norton Patients. For purposes of this Agreement, "**Norton patients**" shall refer to all patients of Physician, Community Medical Group, PSC, or medical practices of Norton Hospitals, Inc. existing prior to this Employment Agreement and any patients seen by any Norton-employed physician or Norton Hospitals, Inc. employed physician employed during the term of this Agreement.

Appellants' argue that, by virtue of the definition of "Norton patients" in the paragraph quoted above, CMA made Dr. Velasco an agent of Norton Hospitals, Inc.

In addressing Appellants' argument on this point, however, the Court of Appeals aptly referenced the Agreement's introductory paragraph:

> **THIS AGREEMENT** is effective as of the 1st day of August, 2005, by and between **COMMUNITY MEDICAL ASSOCIATES, INC. d/b/a NORTON MEDICAL ASSOCIATES**, a nonprofit corporation organized under the laws of the Commonwealth of Kentucky ("Norton") and **LUIS M. VELASCO, M.D.**, a physician who is duly licensed to practice medicine in the Commonwealth of Kentucky, and/or the state of Indiana (the "Physician").

The Agreement specifies, in its first sentence, that the word "Norton" refers to CMA – the entity that employed Dr. Velasco. The Court of Appeals concluded that Appellants' argument that Norton Hospitals, Inc. commanded ownership of Ms. Meredith and that Dr. Velasco was obligated by the Agreement to act as Norton Hospital, Inc.'s agent was simply "without merit." (Opinion Affirming, p. 13).

This Court should reach the same conclusion.

2. Neither Dr. Velasco nor Dr. Haile was an "ostensible agent" of Norton Hospitals, Inc.

Appellants assert, in the alternative, that Dr. Velasco and Dr. Haile were ostensible agents of Norton Hospitals, Inc. An apparent or ostensible agent is one whom the principal, either intentionally or by want of ordinary care, induces third persons to believe to be his agent, although he has not, either expressly or by implication, conferred authority upon him. See, Middleton v. Frances, 77 S.W.2d 425 (Ky. 1934). In the context of hospitals and physicians, Kentucky law provides that courts only infer that patients believe physicians to be hospital agents "absent evidence that the patient knew or should have known that the treating physician was not a hospital employee when the treatment was performed (not afterwards)." Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985).

In Floyd v. Humana of Virginia, Inc., 787 S.W.2d 267 (Ky. App. 1989), the Court of Appeals considered it determinative of the question of ostensible agency that a hospital patient had read and signed admission forms that explained that the physicians were independent contractors and not agents of the hospital. Floyd, 787 S.W.2d at 270. In addition, the court found that there was no representation or other action to induce the patient to believe that the physicians were employees or agents of the hospital. Id. The Sixth Circuit, applying Kentucky law, cited similar evidence in Roberts v. Galen of Virginia, Inc., 111 F.3d 405 (6th Cir. 1997), *rev'd on other grounds*, 525 U.S. 249 (1999) as did the United States District Court for the Western District of Kentucky in Vandevelde v. Poppens, 552 F. Supp. 2d 662 (W.D. Ky. 2008).

Fully aware of Kentucky law on this issue, the Court of Appeals pointed to the same kind of evidence in this case. (Opinion Affirming, p. 15). The court noted that Ms. Meredith had signed, on three separate occasions, admission forms that explained that she might receive treatment from physicians who are not employees of the hospital. (Opinion Affirming, p. 15). In addition, Appellants presented no evidence indicating that Norton Hospitals, Inc. ever represented to Ms. Meredith or the public that the physicians providing services in its hospital building were agents or employees of the hospital. (Opinion Affirming, p. 15). Accordingly, the Court of Appeals held that Appellants' ostensible agency claims fail as a matter of law. (Opinion Affirming, p. 15).

Appellants have not and do not now dispute these critical facts. Instead, they argue that the Agreement bestowed upon Norton Hospitals, Inc. some measure of "control and ownership" over Dr. Velasco and, for that reason, cases like Paintsville Hosp. Co., Floyd, Roberts, and Vandevelde "do not apply." (Appellants' Brief, p. 38). This misguided argument continues to rely on Appellants' misinterpretation of the plain language of the Agreement and wholly fails to

touch on the question of ostensible agency, which is whether Norton Hospitals, Inc. either intentionally or by want of ordinary care, induced Ms. Meredith to believe that either Dr. Velasco or Dr. Haile was its agent. Appellants avoid this question because it can only be answered in the way that the trial court and Court of Appeals answered it: Ms. Meredith knew or should have known that Dr. Velasco and Dr. Haile were not hospital employees. For that reason, there is no support for Appellants' ostensible agency arguments.

3. Dr. Haile was not a "dual agent" of Dr. Velasco and Norton Hospitals, Inc.

Appellants also assert that Dr. Haile was a dual agent of Dr. Velasco and Norton Hospitals, Inc. Appellants' attempt to connect all three defendants is based on an unsupported and convoluted contention: that Dr. Velasco and Dr. Haile provided care to Ms. Meredith in "joint concert" as dictated by Norton Hospitals, Inc. pursuant to Dr. Velasco's employment contract with CMA. (Appellants' Brief, p. 39). Appellants' argument regarding this issue is tenuous at best.

Finding little support in Kentucky law for their dual agency contention, Appellants travel to Missouri and Pennsylvania in an effort to find some morsel of legal authority. Appellants cite Coon v. Dryden, 46 S.W.3d 81 (Mo. App. 2001), and Parker v. Freilich, 803 A.2d 738 (Pa.Super. 2002) for the general proposition that two doctors who care for the same patient must be vicariously liable for one another. Unfortunately for Appellants, their citations to outside jurisdictions ultimately leave them empty-handed. Coon and Parker are not supportive of Appellants' position and are distinguishable from the circumstances presented herein.

In Coon v. Dryden, 46 S.W.3d 81 (Mo. App. 2001), the plaintiff sued Drs. Dryden and Fotopoulos for various acts of medical malpractice. Central to her complaint was the allegation that Dr. Dryden (who was employed by Dr. Fotopoulos) had performed a pelvic laparotomy with

right oophorectomy and left ovarian wedge resection on her despite the fact that the plaintiff had planned, required, and had been told she would be undergoing a total hysterectomy. Coon, 46 S.W.3d at 86. Dr. Fotopoulos assisted with the surgery. Id. Plaintiff succeeded at trial, but Dr. Fotopoulos alleged error in the trial court's denial of his motion for directed verdict and JNOV. Id. at 88. Dr. Fotopoulos argued that plaintiff had failed to establish that he had committed any negligence in his sole role as surgical assistant. Id.

The Missouri Court of Appeals agreed with Dr. Fotopoulos, reversed, and directed the trial court to enter a JNOV in his favor. Coon, 46 S.W.3d at 90. The court was persuaded to do so by evidence that Dr. Fotopoulos was not involved in diagnosing the plaintiff's condition or recommending the appropriate surgery, did not examine the plaintiff or talk with her prior to the surgery, and did not know that the plaintiff desired a total hysterectomy. Id. at 89-90. In fact, Dr. Fotopoulos was only recruited to assist so shortly before surgery was to commence that he was unaware of the plaintiff's identity. Id. Given these circumstances, Dr. Fotopoulos had no authority to contravene Dr. Dryden's decision as to what surgery to perform. Id. The court concluded that Dr. Fotopoulos should have only been held to the standard of care applicable to the role he played – as surgical assistant. Id. The plaintiff had made no allegation that the surgery actually performed had been negligently performed. Id.

The Coon court was unwilling to hold Dr. Fotopoulos vicariously liable for Dr. Dryden's negligence because the two doctors did not jointly diagnose and treat the plaintiff's case together without withdrawal by or discharge of either. Coon, 46 S.W.3d at 89. The same is true here. Though Dr. Velasco and Dr. Haile both provided care to Ms. Meredith, they did not act in joint concert, nor did they jointly diagnose or treat Ms. Meredith. Instead, Dr. Velasco was off for the weekend and Ms. Meredith's care was handled by Dr. Haile, who later withdrew and returned

that obligation to Dr. Velasco on Monday morning. Just like in Coon, the trial court and Court of Appeals decided that Drs. Velasco and Haile should only be liable, if at all, for the roles they played in the care of Ms. Meredith.

Likewise, Parker v. Freilich, 803 A.2d 738 (Pa. Super. 2002) is simply not applicable here. In Parker, the plaintiff discovered an anesthetist's catheter in her arm after she returned home from a colonoscopy performed in her doctor's office. Parker, 803 A.2d at 742. The doctor had never told the patient anything about whether the nurse anesthetist was an employee or an independent contractor (though the latter was true). Id. at 749. The Superior Court of Pennsylvania determined that ostensible agency is applicable when a physician performs an in-office procedure using the assistance of an independent contractor nurse anesthetist. Id. at 749. Thus, Parker is factually distinguishable from the case at hand, in which two doctors exchanged general patient coverage duties over a weekend in a hospital setting.

Appellants also assert that City of Somerset v. Hart, 549 S.W.2d 814 (Ky. 1977) supports their agency argument. However, Hart is factually distinguishable. In Hart, a scalpel blade was left protruding from a patient's bladder stone. Hart, 549 S.W.2d at 815. The only question before this Court was the hospital's argument that it was not liable for nurses' negligent acts committed while they were acting as "borrowed servants" of the surgeon. Id. at 816. The Court noted that hospital policy required operating room nurses to make a post-operation instrument count when instruments were cleaned, to keep count of scalpel blades used, and to report any deficiency in that figure. Id. No such report was made. Id. Such negligence, the Court found, was "as chargeable to the hospital as it is to the surgeon." Id. at 817. Thus, Hart concerns the application of "dual agency" to hospital nurses acting under the concurrent control of their employer hospital and the practicing surgeon. It does not concern the question of whether

vicarious liability should connect an independent on-weekend-call physician to the patient's attending physician and the hospital at which treatment is provided.

If this court finds it necessary to review other jurisdictions' handling of this particular issue, Kavanaugh by Gonzales v. Nussbaum, 523 N.E.2d 284 (N.Y. 1988) is an on-point opinion. In Kavanaugh, a female experiencing a complicated pregnancy presented to the emergency room at a time when her obstetrician, Dr. Caypinar, was attending a meeting at another hospital. Kavanaugh, 523 N.E.2d at 285. While there was no employer-employee relationship, Dr. Caypinar had arranged for another doctor, Dr. Swenson, to provide coverage in such situations. Id. The emergency room contacted Dr. Swenson regarding the woman's condition. Id. The woman's child was eventually delivered with significant complications and the jury found that both doctors were negligent. Id. at 286. The jury also found that the coverage arrangement between Dr. Caypinar and Dr. Swenson was such as to impute to Dr. Caypinar any negligence on the part of Dr. Swenson. Id. at 286.

New York's highest court did not approve of this result. The high court noted that the doctrine of vicarious liability is generally based upon the aspect of control. Kavanaugh, 523 N.E.2d at 287-88. Accordingly, New York law provided that the imposition of liability on one doctor for the negligence of another was largely limited to situations of joint action in diagnosis or treatment or some control of the course of treatment of one by the other. Id. at 288. On this point, the Kavanaugh court found that, "[by] taking turns covering for each other, the doctors did not become partners or even joint venturers ... [n]or is this a case of concerted treatment, where the original physician participated in or exercised some degree of control over the acts of the treating physician." Id. at 288-89 (internal citations omitted). The court also remarked upon the

pivotal policy considerations in deciding whether to apply the doctrine of vicarious liability in on-call coverage situations, writing,

> [T]he implications of such an enlarged liability would tend to discourage a physician from arranging to have another care for his patients on his illness or absence and thus curtail the availability of medical service. Covering arrangements were common for sole practitioners in Dr. Caypinar's community, as they must be generally today; while it is in the nature of the medical profession that a patient's emergency can arise at any moment, surely no person expects that his or her regular physician will *always* be there to respond. If liability were now to be imposed vicariously on physicians for the independent negligence of their covering doctors, some would doubtless be discouraged from making arrangements for the continuous care of their patients, but those who chose to or had to—if they are now to be made insurers of their colleagues' independent acts—would be compelled to insure themselves accordingly. In either event, the public interest would ultimately be disserved.

Id. at 289 (citing and quoting Graddy v. New York Med. Coll., 19 A.D.2d 426 (N.Y. App. 1963)). The court held that "[A] physician who designates another doctor to 'cover' for him, in the circumstances presented, is not liable for the covering doctor's own negligence in treating the regular physician's patient." Id. at 285.[6]

Here, the Court of Appeals cited Kavanaugh as persuasive and noted that Dr. Velasco exercised no actual or legal control over Dr. Haile, that no evidence suggested that Dr. Velasco was negligent in referring patients to Dr. Haile, or that the two doctors participated in any "joint diagnosis." (Opinion Affirming, p. 16.). On the basis of these facts and the policy considerations described in Kanavanaugh, the Court of Appeals concluded that Dr. Haile was not an agent of Dr. Velasco. (Opinion Affirming, pp. 16-17). This is obviously the correct decision.

One can only speculate about the consequences if this Court held that Kentucky physicians can be vicariously liable for the negligence of covering physicians who are not their employees and over whom they exercise no control. Coverage arrangements aimed at ensuring

[6] The same result was reached by the Illinois Court of Appeals in Steinberg v. Dunseth, 631 N.E.2d 809 (Ill. App. 1994).

that patient care is always available should be encouraged rather than transformed into serious liability risks. This Court should affirm the Court of Appeals' and trial court's conclusions that Dr. Haile was not acting as a "dual agent" of Dr. Velasco and Norton Hospitals, Inc.

C. THE TRIAL COURT'S DECISION TO EXCLUDE EVIDENCE RELATIVE TO MEDICAL MALPRACTICE INSURANCE WAS NOT AN ABUSE OF DISCRETION.

Before trial, Appellees filed motions in limine to preclude references to liability or malpractice insurance. See, ROA 1065-69. Appellants argued, as they do before this Court, that such evidence should have been admitted to prove bias, agency, and control. The trial court granted Appellees' motions in limine and excluded insurance coverage evidence under KRE 411 and KRE 403. (ROA 1496-97).

A trial court's ruling to admit or exclude evidence under the KRE is reviewed under the "abuse of discretion" standard. See, Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000). KRE 411 prohibits courts from admitting evidence that a person was or was not insured against liability upon the issue whether the person acted negligently or otherwise wrongfully. The rule does provide for the use of such evidence for other purposes, including the establishment of ownership, or control, or bias. KRE 403 provides that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. On this point, it is within the discretion of the trial court to determine whether the probative value of proffered evidence is substantially outweighed by undue prejudice. See, Kroger Co. v. Willgruber, 920 S.W.2d 61 (Ky. 1996).

Appellants' argument for the admissibility of insurance-related evidence is based on the false premise that Norton Healthcare maintains a self insurance trust that insures Norton Hospital, Dr. Velasco, and Dr. Haile. (Appellants' Brief, p. 40); (Appellants' Brief, p. 8, "One of the benefits Dr. Velasco received was insurance under the Norton Healthcare Self Retention Trust."). Appellants represent to this Court that the Agreement between Dr. Velasco and CMA "shows Norton insured Dr. Velasco and Dr. Haile by virtue of his assumption of Dr. Velasco's duties." (Appellants' Brief, p. 41). Accordingly, they argue that they should have been able to introduce evidence that "the unanimity of their defense was underscored by the presence of a common insurer." (Appellants' Brief, p. 41).

These are flagrant misrepresentations. There is no common insurer. Dr. Velasco was not insured under Norton Healthcare's Trust; he was insured by Health Underwriters Group, who retained undersigned counsel. Dr. Haile was also not insured under Norton Healthcare's Trust; he was insured by Hudson. That Appellants continue to submit pleadings stating otherwise is merely an effort to mislead this Court.

Appellants suggest that a provision within Dr. Velasco's employment Agreement with CMA establishes a common insurer arrangement among Dr. Velasco, Dr. Haile, and Norton Hospitals, Inc. (Appellants' Brief, pp. 40-42). That provision reads, in pertinent part,

> Medical malpractice insurance will be provided with coverage limits of not less than that required by the Board of Trustees of Norton Healthcare for members of its Medical Staff, with coverage furnished by Norton through Physician's current professional liability insurance carrier, another carrier selected by Norton, or Norton's self-insured trust...

(emphasis added). This provision clearly provided CMA three mutually exclusive options for obtaining insurance coverage for Dr. Velasco. The first option is for CMA to pay the premium to Dr. Velasco's current professional liability carrier; the second is for CMA to purchase an

insurance policy for Dr. Velasco from a company of its choice; the third is to elect to insure Dr. Velasco through Norton Healthcare's self-insured trust. CMA chose to secure insurance for Dr. Velasco through Healthcare Underwriters Group. Thus, Dr. Velasco's employment Agreement with CMA does not establish that he, Dr. Haile, and Norton Hospitals, Inc. share a common insurer.

Further, the trial court based its decision to exclude insurance-related evidence because it had already found (as discussed otherwise herein) that neither Dr. Velasco nor Dr. Haile was an employee or agent of Norton Hospitals, Inc. (ROA 1496-97). To the trial court, this finding, coupled with the fact that Drs. Velasco and Haile were not actually insured by the Norton Healthcare Trust, rendered discussion of malpractice insurance irrelevant to the question of bias or control. In light of significant doubts as to relevance, the trial court concluded – after conducting a balancing test under KRE 403 – that the evidence's probative value was substantially outweighed by the risk of prejudice that would result from admitting it. (ROA 1496-97).

The Court of Appeals reviewed the trial court's decision to exclude references to malpractice insurance under the correct "abuse of discretion" standard. (Opinion Affirming, pp. 17-18). After distinguishing the cases cited by Appellants for obvious reasons,[7] the Court of Appeals agreed with the trial court in deciding that Dr. Velasco's employment Agreement with CMA did not establish any agency relationship amongst Appellees and that any reference to malpractice insurance would be more prejudicial than probative. (Opinion Affirming. p. 19). For those reasons, the Court of Appeals concluded that the trial court had not abused its

[7] Appellants cited, and cite before this Court, Nunnellee v. Nunnellee, 415 S.W.2d 114 (Ky. 1967) and Baker v. Kammerer, 187 S.W.3d 292 (Ky. 2006). Nunnellee was decided before the adoption of the KRE and the Baker court's decision was largely based on the fact that the trial judge had not engaged in a KRE 403 analysis of the evidence in question.

discretion in excluding evidence of malpractice insurance. (Opinion Affirming, p. 19). This is the correct decision.

Appellants hoped Appellees would present blameshifting and fingerpointing defenses at trial – but that did not happen. Incredulous, Appellants attempt to explain this by arguing that Appellees were compelled to concoct a common defense out of desire to protect a common insurer. However, Appellees were not insured by a common entity, were not agents of one another, and were entitled to exclude evidence that would mislead, confuse, or prejudice the jury otherwise. The trial court properly exercised its discretion in excluding liability and malpractice insurance evidence and the Court of Appeals found that such a decision was not an abuse of discretion. There is no reason to reverse the judgment of the lower courts.

CONCLUSION

Appellants' allegations of error on the part of the Jefferson Circuit court are unfounded. The Court of Appeals conducted an appropriate review of the record and affirmed the trial court's decisions. Appellants have presented no reason to reverse either lower court. This Court should affirm the opinion of the Court of Appeals.

Respectfully Submitted,

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APPENDIX

EXHIBIT 1	Opinion Affirming; entered by Court of Appeals on July 16, 2010.
EXHIBIT 2	Physician Employment Agreement between Community Medical Associates, Inc. d/b/a Norton Medical Associates and Luis Velasco, M.D.