COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE 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**

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

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v. **BRIEF FOR APPELLEE, NORTON HOSPITALS, INC.**

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

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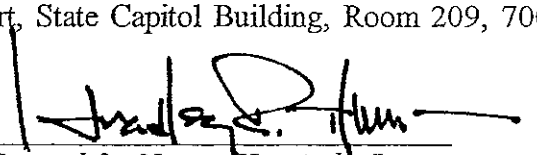
CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief for Appellee, Norton Hospitals, Inc., was served via U.S. mail this 17th day of September, 2012, to Chadwick N. Gardner, 1916 Kentucky Home Life Building, 239 S. Fifth Street, Louisville, KY 40202, F. Thomas Conway, 1800 Kentucky Home Life Building, 239 S. Fifth Street, Louisville, KY 40202, and Scott Robey, 600 W. Main Street, Suite 100, Louisville, KY 40202, Counsel for Appellants; to Craig L. Johnson, 6011 Brownsboro Park Blvd., Suite E, Louisville, KY 40207, Counsel for Luis M. Velasco, M.D.; David B. Gazak, DARBY & GAZAK, 3220 Office Point Place, Suite 200, Louisville, KY 40220, Counsel for James B. Haile, M.D.; Samuel Givens, Jr., Clerk of the Court of Appeals, Commonwealth of Kentucky, 360 Democrat Drive, Frankfort, KY 40601; Hon. Susan Schultz Gibson, Jefferson Circuit Court, Div. 12, 700 W. Jefferson Street, Louisville, KY 40202; and via FedEx to Susan Cleary, Clerk of the Supreme Court, State Capitol Building, Room 209, 700 Capital Avenue, Frankfort, KY 40601.



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INTRODUCTION

In this medical malpractice case, Appellants, Plaintiffs below, alleged at trial that Norton Hospitals, Inc., Dr. James B. Haile and Dr. Luis M. Velasco engaged in separate and independent acts of medical negligence in not timely diagnosing Krystal Meredith's ruptured appendix. Although Plaintiffs also originally claimed that Drs. Haile and Velasco were agents of Norton Hospitals, such that any negligence on their part should be imputed to the hospital, the trial court granted Norton's motion for summary judgment on these agency claims prior to trial. Following a nine-day trial, the jury returned a verdict in favor of all Defendants, including a unanimous verdict for Norton Hospital. Appellants appealed this verdict to the Kentucky Court of Appeals, which affirmed. Appellants now claim that the trial committed reversible error in failing to strike three jurors for cause, granting Norton's motion for summary judgment on Appellants' agency claims and excluding evidence of insurance.

STATEMENT CONCERNING ORAL ARGUMENT

Norton Hospital, Inc. does not request oral argument because there are no novel or particularly complicated issues of fact or law in this case and the issues raised by Appellants have been adequately briefed by the parties herein.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF FACTS

A.

Summary of Procedural Facts

This is a medical negligence case originally filed in Jefferson Circuit Court by the co-administrators of the Estate of Krystal Meredith against four Defendants: Norton Hospitals, Inc. d/b/a Norton Hospital (hereafter, "Norton Hospital" or "the hospital"), James B. Haile, M.D. ("Dr. Haile"), Luis M. Velasco, M.D. ("Dr. Velasco"), and Community Medical Associates, Inc. d/b/a Norton Medical Associates ("CMA"), which employed Dr. Velasco. (Certification of Record, hereafter, "C.R.", at 1 – 7, 32 – 40 and 606 – 638). Plaintiffs (Appellants herein) claimed separate and independent acts of negligence on the part of Norton Hospital, Dr. Haile and Dr. Velasco, vicarious liability on the part of CMA, and also alleged that Drs. Haile and Velasco were agents of Norton Hospital, such that any negligence on their part should be imputed to the hospital. *Id.* However, prior to trial Plaintiffs voluntarily dismissed CMA from the case, with prejudice (C.R. 705 – 706). Moreover, Jefferson Circuit Judge Susan Schultz Gibson granted Norton Hospital's Motion for Summary Judgment on Plaintiffs' claim that Drs. Haile and Velasco were acting as Norton Hospital's agents. (C.R. 1492 – 95).

During *voir dire*, two potential jurors at issue in this appeal informed the parties that they had a connection to Norton Hospital. Juror 222785 (Mr. Pacanowski) informed the parties that his son is a manager at Norton. (Video Record, hereafter, "V.R.", 09/09/08 at 11:17:58). When it was Mr. Pacanowski's turn to elaborate on this connection, Mr. Pacanowski stated "My son is a purchasing manager over there for about 10 years and if it was a close call like I said I'd

probably have problems with it." *Id.* at 12:10:08 – 12:10:19.[1] Appellants did not ask Mr. Pacanowski any follow up questions regarding his alleged "problems" with the case.

Juror 201435 (Mr. Deshazer) also informed the parties that he "practice[s] law and my law firm has done some work for Norton." *Id.* at 11:16:58. Appellants did not ask any follow-up questions of Mr. Deshazer regarding this legal work for Norton. In addition, when the jurors were asked if they had "heard the term 'standard of care,'" Mr. Deshazer stated that his firm "does medical malpractice defense." *Id.* at 2:47:50. Appellants asked, "What firm is that?" Mr. Deshazer replied, "Hall Render." *Id.* Appellants did not ask any other questions of Mr. Deshazer regarding his legal work.

Lastly, Appellants' counsel informed the jury that they would "be hearing from an obstetrician/gynecologist for the defense, Dr. Larry Griffin," and asked whether anyone knew him. *Id.* at 11:49:20. Juror 215397 (Ms. Guelda) responded that she knew him because "he delivered [her] children." *Id.* at 11:49:40. Appellants' counsel asked, "The fact that he delivered your children, would that cause you to give any more credence to this testimony on this matter?" *Id.* Ms. Guelda responded, "It may." Appellants' counsel then asked two follow up questions:

> Mr. Conway: How many children has Dr. Griffin delivered?
> Ms. Guelda: Both of them were c-sections.
> Mr. Conway: The fact that Dr. Griffin is here testifying for Norton Hospital, Dr. Velasco, would that cause you…
> Ms. Guelda: No. Not as long as he's not involved.

Id. at 11:50:30. Appellants did not ask any other follow-up questions regarding this issue.

Subsequently, Appellants asked the entire jury panel whether, "if the evidence supported it," they could return a verdict in favor of Appellants and award damages for Ms. Meredith's pain and suffering, her loss of enjoyment of life and the destruction of her power to labor and earn money. *Id.* at 12:34:10 – 12:35:15. Appellants also inquired whether, "if the evidence

[1] Copy and paste footnote from later.

supported it," the potential jurors could return a verdict for hundreds of thousands of dollars in medical bills and could award damages to Ms. Meredith's daughter for the loss of love and affection of her mother. *Id.* at 12:35:20 – 12:35:40. At no time did Mr. Pacanowski, Ms. Guelda or Mr. Deshazer voice any reservation or concern about their ability to return a verdict in favor of Appellants and award damages for Appellants if the evidence supported it. Moreover, Norton's counsel later asked the potential jurors whether they could be fair and impartial to both sides in deciding this case. *Id.* at 1:47:03. Although numerous jurors then proceeded to approach the bench individually over the course of the next 45 minutes to express various personal or professional reasons why they might not or would not be impartial (*Id.* at 1:47:25 – 2:31:15), Mr. Pacanowski, Ms. Guelda and Mr. Deshazer voiced no such problem or concern. *Id.* at 1:47:20.

Although Appellants moved to strike Mr. Pacanowski, Ms. Guelda and Mr. Deshazer for cause, the trial judge denied these motions. With regard to Mr. Pacanowski, the trial judge stated, "in the course of the conversation I don't think that it rose to the level that he could not listen to the evidence and weigh the evidence." *Id.* at 3:41:01. With regard to Ms. Guelda, the trial judge stated, "listening to her, I took her comments to mean as long as [Dr. Griffin] wasn't being sued. Again, I don't think her expressions could possibly distort the case." *Id.* at 3:30:00. With regard to Mr. Deshazer, the trial judge stated, "I think all of the points that are raised here may be valid but the thing of it was they were simply not flushed out in voir dire one way or the other . . . I just think the record does not support it." *Id.* at 3:48:15.

Although Appellants used two of their peremptory strikes against Mr. Pacanowski and Mr. Deshazer, they did not use a peremptory strike on Ms. Guelda. Even though Ms. Guelda sat on the jury during trial, she did not participate in deliberations because she was randomly

selected to be an alternate and was excused before deliberations began. Thus, none of the jurors complained of in this appeal participated in deliberations or had any role in the outcome of this case.

This case was tried before a jury for nine days. On September 19, 2008, the jury returned a verdict in favor of all Defendants, including a unanimous verdict for Norton Hospital. On October 13, 2008, Plaintiffs moved the Trial Court to alter, amend, or vacate the Judgment and to grant Plaintiffs a new trial. Judge Gibson denied these motions, and Plaintiffs took an appeal to the Kentucky Court of Appeals, which affirmed by a majority of 2-1. Judge Stumbo dissented and because she believed that Juror 222785 (Mr. Pacanowski) and Juror 201435 (Mr. Deshazer) should have been excused for cause. This appeal followed.

B.

Summary of Substantive Facts

Krystal Meredith was 37 weeks pregnant with complaints of nausea, vomiting, and diarrhea when she presented at Norton Hospital late in the afternoon on Friday, January 5, 2007. Upon her arrival, fluids were started and Ms. Meredith was placed on fetal heart rate and contraction monitors. The nurses then called and spoke with Dr. Haile, a solo practice obstetrician, who was "on call" for Dr. Velasco, Ms. Meredith's regular obstetrician, for the weekend. (For reasons of convenience and practical necessity, Dr. Velasco and Dr. Haile periodically covered one another's patients; however, the evidence established that they practiced separately and had no contractual or business relationship.) (V.R. 9/12/08 at 10:16:00 – 10:17:40). Upon being advised of the details of Ms. Meredith's condition, Dr. Haile ordered that she be given Phenergan for her nausea, along with an ultrasound to rule out placental abruption. The results of the ultrasound were negative for any such problems or complications.

Shortly thereafter, still in the evening of January 5, the nurses called Dr. Haile once more and told him that Ms. Meredith was feeling better, and wished to go home. Accordingly, Dr. Haile discharged her. *Id.* at 10:25:00 – 10:25:30; 10:26:50 – 10:27:30.

Ms. Meredith presented to Norton Hospital again at 4:00 the following morning, Saturday, January 6, now complaining of contractions and abdominal pain. Hospital nurses took the patient's vital signs and the fetal heart tones, measured the extent of her dilatation and effacement (which were minimal), and timely notified Dr. Haile, who remained on call for Dr. Velasco. In response, Dr. Haile visited and evaluated Ms. Meredith at the hospital twice that day, including personally administering abdominal and pelvic exams, and ordered medications to stop her contractions. *Id.* at 10:18:00 – 10:20:00. Later on the afternoon of January 6 he discharged her home with instructions to return to the hospital if her condition changed.

On the early evening of Sunday, January 7, 2007, Ms. Meredith presented at the hospital once more, this time clearly in labor. As before, Dr. Haile was promptly notified of Ms. Meredith's arrival, whereupon he ordered that she be admitted and that routine admitting orders be initiated, including comprehensive blood work. (V.R. 9/18/08 at 11:06:29 – 11:06:42; 11:08:00 – 11:08:30 and Plaintiff's Trial Exhibit No. 9). Thereafter, Ms. Meredith was regularly monitored and assessed through the remainder of the evening by the nursing staff, who in turn communicated their findings to Dr. Haile and kept him apprised of the patient's condition. In response, Dr. Haile ordered a second round of blood work, a modification to her fluid regimen, and an abdominal ultrasound, all of which were duly carried out and reported back to him. (V.R. 9/12/08 at 10:59:20 – 11:00:20; 11:07:34 – 11:08:16).

Ms. Meredith's labor continued throughout the night, and she was seen the following day, Monday, January 8, at approximately 7:30 a.m. by her regular obstetrician, Dr. Velasco, who

oversaw her care until she vaginally delivered, without incident or complication, a healthy baby girl at 1:41 p.m. that same day. (V.R. 9/15/08 at 10:27:15 – 10:27:28). However, following the delivery, and upon Ms. Meredith's transfer to the postpartum unit, her condition deteriorated. Dr. Velasco was notified of her increased complaints of abdominal pain and deteriorating vital signs, and ordered her returned to the labor and delivery unit. *Id.* at 10:31:15 – 10:31:46.

Upon recognition of the patient's complications, laboratory tests were initiated and a general surgery consult by Dr. Christine Landry and Dr. Jorge Rodriguez was obtained (*Id.* at 10:38:30); however, neither Dr. Landry nor Dr. Rodriguez was able to make a definitive diagnosis, so exploratory abdominal surgery was scheduled for, and undertaken, the following morning. (V.R. 9/16/08 at 10:58:03). In the course of that surgery, Dr. Rodriguez was able to determine that Ms. Meredith had suffered a ruptured appendix with a walled-off abscess located directly behind her uterus. *Id.* at 10:57:21 – 11:20:30. Shortly thereafter, Ms. Meredith developed a systemic infection which led to Adult Respiratory Distress Syndrome. She died from complications of that condition on February 1, 2007.

At trial, Plaintiffs alleged that Drs. Haile and Velasco were negligent in not diagnosing Ms. Meredith's ruptured appendix earlier, and that this delayed diagnosis caused her death. As to Norton Hospital, Plaintiffs claimed that the nurses should have recognized that Dr. Haile's responses to Ms. Meredith's presentations were inappropriate, and therefore, the nurses should have initiated a "chain of command" so as to challenge Dr. Haile's orders. In response, all three Defendants contended that the signs of her ruptured appendix and walled-off abdominal abscess were hidden or "masked" by symptoms which were entirely consistent with, and reflective of, a woman in late pregnancy and early labor; accordingly, failure to earlier diagnose her ruptured appendix was understandable and did not reflect a departure from accepted

standards of medical and hospital care. At trial, extensive expert testimony was offered to the jury on both sides of this issue, and at the conclusion of a nine-day trial, the jury found in favor of all Defendants, including a unanimous verdict in favor of Norton Hospital. Judge Gibson then entered Judgment on the jury's verdict, and subsequently denied Plaintiff's post-trial motions. (C.R. 1579 and 1651).

ARGUMENT

I.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING TO STRIKE CERTAIN JURORS FOR CAUSE

A.

A Trial Judge Has Broad Discretion in Exercising Strikes for Cause, and Her Decisions Should be Overturned Only Where There is a Clear Abuse of Discretion

Appellants contend that three jurors should have been stricken for cause, and that the trial court's failure to do so constitutes reversible error. Respectfully, there is no merit to Appellants' contention. It is well settled in Kentucky that a trial judge is to be given "great deference" in the exercise of strikes for cause. *Mills v. Commonwealth*, 95 S.W.3d 838, 842 (Ky. 2003); *Murphy v. Commonwealth*, 50 S.W.3d 173, 177 (Ky. 2001) ("considerable discretion"); *Commonwealth, Department of Highways v. Devillez*, 400 S.W.2d 520, 520 (Ky. 1966) ("wide discretion"); *Gould v. Charlton Co. Inc.*, 929 S.W.2d 734, 736 (Ky. 1996) ("broad discretion"). Given this degree of latitude, a trial judge's ruling in that regard is reviewed only for a "clear abuse of discretion." *Soto v. Commonwealth*, 139 S.W.3d 827, 849 (Ky. 2004). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Commonwealth v. English*, 933 S.W.2d 941, 945 (Ky. 1999).

This Court very recently explained that where the decision to strike or not to strike a juror for cause "is a classic 'close call'" and more than one permissible choice exists, the trial judge must be given his due discretion "to choose among those 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." *Elery v. Commonwealth*, 326 S.W.3d 78, 96 (Ky. 2012) (emphasis added); *see also Parker v. Commonwealth*, 291 S.W.3d 647, 664 (Ky. 2009) (no abuse of discretion even where "reasonable minds could have differed").

This standard of review is appropriate because it is the trial judge who has the opportunity to observe personally the demeanor of the prospective juror, and therefore is in the best position to interpret the substance and nature of that person's responses to voir dire questioning" and to determine whether that juror most likely can or cannot be impartial. *Grooms v. Commonwealth*, 756 S.W.2d 131, 134 (Ky. 1988). In determining whether the trial court has abused its discretion, "the central inquiry is whether a prospective juror can conform his or her views to the requirement of the law, and render a fair and impartial verdict based solely on the evidence presented at trial." *Wood v. Commonwealth*, 178 S.W.3d 500, 507 (Ky. 2005). If "substantial doubts about a prospective juror's impartiality" exist, Kentucky law holds that the motion to strike "should be decided against the juror." *Rankin v. Commonwealth*, 327 S.W.3d 492, 497 (Ky. 2010). However, those doubts should be "patent on the record" in order to support a conclusion that the trial court's discretion has been abused. *Id.*

B.

Absent Evidence of Actual Bias, Bias Will be Implied Only Where the Juror's Relationship Is So Close as to Indicate Probably Partiality

RCr 9.36 states that "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." This Court has explained that "[r]easonable grounds to excuse a prospective juror exist whenever the juror expresses or shows an inability or unwillingness to act with entire impartiality." *Rankin v. Commonwealth*, 327 S.W.3d 492, 496 (Ky. 2010). In determining whether this admitted or actual bias exists, a trial court is to consider the potential juror's entire voir dire responses as well as the juror's demeanor throughout the voir dire process. *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007). "It is the totality of those circumstances and not the response to any single question that reveals impartiality or the lack of it." *Rankin*, 327 S.W.3d at 496.

In the absence of professed or admitted biased, a potential juror could also be deemed to have an "implied bias" by virtue of a close "familial, financial or situational" relationship with the parties, attorneys or the witnesses, even if that juror protests that the relationship would not cause him to be partial. *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985). This Court has previously cautioned that this relationship must be a close one, and that the "definition [of a close relationship] does not encompass a mere social acquaintanceship in the absence of other indicia of a relationship so close as to indicate *the probability of partiality*" (emphasis added). *Ratliff v. Commonwealth*, 194 S.W.3d 258, 266 (Ky. 2006).

C.

The Trial Court Did Not Abuse Her Discretion in Failing to Excuse for Cause the Three Jurors Challenged by Appellants

1.

Juror 222785 (Mr. Pacanowski)

The record on *voir dire* reveals that because Mr. Pacanowski's son works as a purchasing manager at Norton Healthcare, he would "probably have problems" with the case if it were a "close call." (V.R. 09/09/08 at 12:10:08 – 12:10:19). Appellants contend that because of Mr. Pacanowski's son's relationship with Norton, this Court should imply a bias and automatically assume that, without any additional testimony exploring Mr. Pacanowski's own relationship with Norton or his own feelings about Norton, Mr. Pacanowski would not be able to render a fair and impartial verdict. Appellants also contend that Mr. Pacanowski's isolated statement that he would probably have problems with this case if it were a close call should have required his exclusion. Lastly, Appellants also argue that at a minimum, the presence of Mr. Pacanowki's alleged relationship with Norton plus his expressed reservation should have mandated his excusal for cause.

First, because Mr. Pacanowski himself had no relationship with a party, attorney or witness in this case, he had no close relationship as defined by Kentucky law on which to base an implied bias. Second, Mr. Pacanowski's expressed reservation about the case cannot be considered without also considering why he had the reservation. Taking into account that his concern about the case was only because of his son's employment with Norton, and according to the sparse record, nothing more, there is not enough evidence to create substantial doubts as to Mr. Pacanowski's ability to remain impartial, and the trial judge did not abuse her discretion in failing to refuse him for cause.

a.

Bias Cannot be Implied Automatically to Mr. Pacanowski Because He Had No Direct Relationship with Norton and Because Any Connection to Norton Was Not Explored by Appellants' Counsel.

Appellants argue that because Mr. Pacanowski's son was a purchasing manager for Norton Healthcare, he had a "close relationship" with a party that established an implied bias and required his exclusion. First and foremost, Mr. Pacanowski did not have a close relationship with any party in this case. Although Mr. Pacanowski's son had an employment relationship with Norton Healthcare, Mr. Pacanowski himself had no direct relationship with Norton. Kentucky law states that bias can be implied "because the potential juror has such a close relationship, be it familial, financial or situational, with any of the parties, counsel or witnesses." *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985) (internal citation omitted). Kentucky law does not hold that such bias should be implied when the potential juror's family member has a close relationship with any of the parties.

On the contrary, at least two Kentucky cases specifically hold that a juror is not required to be stricken for cause under an implied bias theory simply because a family member is employed by a party or witness in the case. In *Stopher v. Commonwealth*, 57 S.W.3d 787, 797 (Ky. 2001), a criminal case involving police officer witnesses, this Court affirmed the trial judge's decision not to strike a potential juror for cause whose father had been a police officer. In *Soto v. Commonwealth*, 139 S.W.3d 827, 849-50 (Ky. 2004), an Oldham County criminal case also involving police officer witnesses, this Court affirmed a trial judge's decision not to strike a potential juror for cause whose daughter and son-in-law were both police officers, whose daughter was friends with several of the officers at the Oldham County Sheriff's Department, and whose son-in-law had previously worked with the Oldham County Commonwealth's Attorney's office on a capital case. Based on these holdings, the mere fact that a juror's son is employed by a party or witness in the case in and of itself does not automatically imply a bias and does not require the juror's exclusion for cause.

Although Appellants rely on *Davenport v. Ephriam McDowell Memorial Hospital, Inc.*, 769 S.W.2d 56 (Ky. App. 1988), to support their implied bias theory, the potential jurors in that case had direct relationships with the hospital defendant. In *Davenport*, one potential juror was a former employee of the hospital, and the other was on the hospital's auxiliary board.[2] *Id.* at 59-60. In addition, Appellants reliance on *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999), and *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985), is misplaced because the jurors' relationships in those case were also direct relationships with either an attorney or a witness in the case.

In *Fugate*, the trial court refused to strike two jurors who had professional relationships with the prosecuting attorney and one juror who had a prior relationship with a witness for the prosecution. *Id.* at 938-39. The two jurors who had previously been represented by the prosecuting attorney stated that they were satisfied with his representation and might use him again for future legal matters. *Id.* The other juror played Little League baseball and went to high school with a witness for the prosecution. *Id.* This juror also stated that this former relationship with the witness would "probably" cause him to give the witness a "head start." *Id.* at 939. Although the *Fugate* Court found that these jurors should have been stricken for cause, the distinguishing factor is that these jurors had direct relationships, which were shown to be "close relationships," with an attorney or witness directly involved in the case.

In *Ward*, the trial court refused to strike three potential jurors for cause who had a familial relationship with the prosecuting attorney involved in the case. *Ward*, 695 S.W.2d at

[2]In addition to these direct relationships, both jurors' spouses had employment relationship with the hospital defendant. Moreover, the former hospital employee knew the doctor and nurses involved in the case and acknowledged during voir dire that it would probably better if she excused herself from the jury; and the auxiliary member knew the doctor involved and other doctors and employees at the hospital. *Davenport*, 769 S.W.2d at 59-60.

407. One potential juror was an ex-brother-in-law of the Commonwealth's Attorney, one was a distant cousin of the attorney, and one was described as "sort of an uncle" of the attorney. *Id.* The *Ward* Court held that the trial court did not err with regard to the ex-brother-in-law or the distant cousin because that relationship is not "close enough" to presume a bias. *Id.* However, because the *Ward* Court was reversing and remanding the case on other grounds, it noted that on retrial, an uncle of the prosecuting attorney should not survive a challenge for cause. *Id.* Again, although the *Ward* opinion only found fault with the trial court's failure to strike the pseudo-uncle, all these potential jurors had a direct, familial relationship with the prosecuting attorney involved in the case.

In this case, there is no close or direct relationship with any party, witness or attorney on which to base an implied bias. Mr. Pacanowski has a relationship with his son, and his son has an employment relationship with Norton, but under current Kentucky law, that does not mean that Mr. Pacanowski has "such a close relationship" with Norton to automatically imply that he would be biased in this case. Thus, Mr. Pacanowski's indirect connection to Norton is wholly unlike any of the relationships present in the above mentioned cases, and his connection to Norton cannot be said to be "such a close relationship" to support an implied bias and or an automatic excusal for cause.

If, however, this Court agrees with Appellant that Mr. Pacanowski arguably had a close relationship with Norton through his son's employment with Norton, which Appellee wholly disputes, this Court should not imply a bias from this alleged relationship because Appellants failed to develop or explore this relationship on the record. Currently, Kentucky law identifies two types of direct relationships that automatically imply a bias without any additional evidence on the record: a current and ongoing physician-patient relationship, *Bowman v. Perkins*, 135

S.W. 3d 399, 402 (Ky. 2004), and an attorney-client relationship where the juror states "that they would seek such a relationship in the future," *Fugate v. Commonwealth*, 993 S.W.2d 931, 938 (Ky. 1999). However, outside of these specific relationships, Kentucky case law implies an obligation on the part of counsel to explore the relationship at issue in order to determine whether it is, in-fact, close enough to indicate the probability of partiality.

The majority in *Altman v. Allen*, 850 S.W.2d 44 (Ky. 1992), refused to grant a new trial because appellant's counsel had failed to develop evidence to show whether an arguably close relationship was close enough to create substantial doubts about the juror's ability to remain impartial. In *Altman, supra*, the issue was whether three jurors who had been former patients of the physician-defendants should have been struck for cause. *Id.* at 45. In concluding that the trial court did not abuse its discretion in refusing to strike these jurors for cause, the *Altman* Majority explained:

> A careful review of the record in this case indicates there is no basis for a 'presumed bias' theory. There is no foundation to establish a per se exclusion and no proof has been presented to establish bias. During the *voir dire* examination, there was no comprehensive effort to explore or develop the doctor/patient relationships of the three jurors to the extent necessary to determine bias. There is no evidence that the jurors were frequent patients or that they even had a good relationship with the doctors...Consequently, the trial judge did not abuse his discretion in refusing to excuse the jurors for cause.

Id. In other words, the first hurdle in a successful challenge for cause based on an implied bias theory is establishing on the record that the relationship is close. *Id*; *see also Lemon v. Commonwealth*, 2007 WL 4462365, * 4 (Ky. December 20, 2007)[3]; *Ward*, 695 S.W.2d at 407 (a court should sustain a challenge for cause based on an implied bias theory only "once that close relationship is established").

[3] Attached as Exhibit 1.

In this case, Appellants' counsel made no effort to establish that Mr. Pacanowski had a close relationship with Norton Hospital. No testimony was elicited to reveal Mr. Pacanowski's own feelings about Norton or the extent and nature of his son's relationship with Norton. Appellants should not be permitted to argue on appeal that this indirect relationship was close enough to imply bias when they did nothing during the *voir dire* process to show the trial court why this particular connection to Norton Hospital constituted a "close relationship" under Kentucky law. Unless this Court is prepared to hold that a trial judge is required to strike a potential juror for cause anytime the juror has a family member who is employed by an entity affiliated with a party in the case, Appellants' argument must fail. Kentucky law does not allow this Court to automatically imply a bias based solely on the unexplored, indirect relationship between Mr. Pacanowski and Norton Hospital in this case.

b.

The Totality of Mr. Pacanowski's Responses, Including His Expressed Reservation, the Reason Behind His Reservation, and the Entire *Voir Dire* Conversation, Did Not Create Substantial Doubts that He Would Be Unable to Render a Fair and Impartial Verdict Based Only on the Evidence Presented at Trial.

Appellants contend that Mr. Pacanowski's isolated statement that "if it was a close call" he would "probably have problems with it," provided enough evidence to require his automatic exclusion. In addition, Appellants argue that this Court should articulate a new rule or principle that should apply anytime certain factors are present during jury selection. Appellants argue that when a potential juror confesses that he probably would have problems with the case, or when a potential juror has "implied bias factors" and expresses a reservation about the case, the juror should automatically be stricken for cause. Respectfully, Norton asserts that adopting such a legal principle ignores the trial judge's discretion in determining whether substantial doubts exist

regarding the juror's ability to remain impartial and whether a reasonable ground exists to believe that the juror could not render a fair and impartial verdict based only on the evidence.

First, Appellants argue that anytime a juror confesses that he would probably have problems with the case if it were a close call, that juror should be stricken for cause. Appellants complain that the Court of Appeals focused too much on Mr. Pacanowski's alleged relationship, or lack thereof, with Norton instead of his expressed reservation that he probably would have a problem with the case if it were a close call. However, the Court of Appeals, and the trial judge alike, focused on this connection to Norton because this was the reason for Mr. Pacanowski's reservation. Appellants' argument ignores that a trial judge considers not only the expressed reservation, but also the reason behind the reservation in determining whether they juror could remain impartial. For example, when a potential juror indicates that he might have a problem with the case, the first question asked of that juror is "why." If the juror responds, "no reason, I just would," surely it is within a trial judge's discretion to determine that such a reason, or the lack thereof, is not a reasonable ground to support a strike for cause.

If, however, the juror responds that he probably would have a problem with the case because he is closely related to a key witness in the case, or because he is employed by one of the parties, or because one of the attorneys in the case is also his attorney, then the trial judge would take this close relationship into consideration and would be more likely to find that juror would, in fact, have a difficult time being impartial in the case. The point is that a trial judge does not and cannot consider a potential juror's reservation about a particular case by itself without also considering why the juror has that reservation.[4] The reason behind the juror's

[4] A reservation about a particular case is different from the type of general bias expressed in *Shane v. Commonwealth*, *infra*, where the potential juror stated that he was absolutely pro-police and believed police were less likely to lie on the stand because they took the oath more seriously than lay witnesses. Although one could assume that the potential juror in *Shane* had his pro-police bias because he was a police officer himself, the point is

reservation is informative of the juror's ability to remain impartial, and the trial judge must be able to consider not only a juror's statement that he probably would have a problem with the case, but also why the juror thinks he may have a problem. Therefore, Appellants' argument that anytime a juror states that he would probably have a problem with the case if it were a close call warrants his excusal for cause must fail.

Secondly, Appellants also argue that anytime "implied bias factors" plus an expressed reservation exist, trial courts should automatically strike that potential juror for cause. Appellants' "implied bias factors" refer to some connection or relationship the potential juror has with the particular litigation. Again, this formulaic approach precludes trial judges from having any discretion in answering the central question as issue: does the juror's expressed reservation and the juror's alleged connection to the litigation create a substantial doubt that the juror could remain impartial?[5] If this Court adopts Appellants' formulaic approach, then anytime a potential juror expresses a reservation or hesitation about a case because the juror has some type of connection to the litigation, no matter how remote, the trial judge will be required to excuse that juror for cause. A trial judge must have the opportunity to use his discretion to determine whether the juror's expressed reservation and the reason behind the reservation, as well as all the other relevant circumstances, create substantial doubts regarding the juror's impartiality. When Mr. Pacanowski's expressed reservation, the reason behind his reservation, and the entire course of the *voir dire* converstaion are considered together, Kentucky law favors affirming the trial

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that his reason behind such a general bias is not as informative of an ability to remain impartial as the reason behind an expressed reservation about a particular case.

[5] There could certainly be circumstances where the juror expresses a reservation or concern about the case but the reason behind the reservation or the juror's alleged connection to the litigation does not rise to the level to warrant an excusal for cause. *See Lemon v. Commonwealth*, 2007 WL 4462365, * 3-4 (Ky. December 20, 2007) (holding that the trial court did not abuse its discretion in failing to strike a juror for cause whose children had played with the victim's children in the past, and who stated that this connection to the case "could weigh on her mind" and that she "might" be embarrassed or feel bad if she had to acquit the defendant) (See Attached Exhibit 1).

court's decision that sufficient grounds did not exist to believe Mr. Pacanowski would be unable to render a fair and impartial verdict based on the evidence presented.

In *Lemon v. Commonwealth*, 2007 WL 4462365, * 4 (Ky. December 20, 2007), this Court affirmed the trial court's decision not to strike a juror for cause who had expressed some concern about the case because her children had been playmates with the victim's children in the past. During *voir dire*, this juror was asked whether this connection to the case would affect her ability to listen to the evidence, and she responded "not necessarily." *Id.* at * 3. When asked whether this connection would "weigh on her mind, she acknowledged that it could." *Id.* When asked whether this connection would "make her feel bad or embarrassed if she had to find Lemon not guilty…", she responded that "it might." *Id.* Lastly, she also responded that she "did not think" this connection would "make her change her mind about the evidence." *Id.* On appeal, Lemon argued that this juror's relationship with the victim's family was sufficiently close to require her exclusion, and that her *voir dire* responses alone should have also required her excusal for cause. *Id.* at * 4.

Disagreeing with Lemon's argument, this Court stressed that the juror at issue was not related to any of the parties and was not involved in the case. *Id.* Moreover, "Lemon failed to develop any evidence which would suggest that the juror and the [victim's] family had any type of relationship at the time their children knew each other, much less that such a relationship continued to the present time." *Id.* This Court also recognized that in spite of this juror's responses indicating some concern about the case, Lemon failed to acknowledge that "the relationship consisted of nothing more than her children playing with [the victim's] children." *Id.* Lastly, *Lemon* Court acknowledged key evidence missing from the *voir dire* record: "Lemon failed to demonstrate that the juror could not render a fair and impartial verdict on the evidence."

Id. This case reiterates that when a juror's concerns about a particular case combined with the reason behind the concern do not create substantial doubts about that juror's impartiality, and when no other evidence demonstrates that the juror would be unable to be impartial, then the trial court has the discretion to refuse to strike that juror for cause in spite of the expressed reservation about the case.

The case at hand shares three very important facts with *Lemon, supra.* First, like the alleged close relationship in *Lemon*, Mr. Pacanowski's alleged connection to Norton in and of itself is not sufficiently close to imply an automatic bias, and Appellants failed to develop any evidence to establish that this relationship was in fact close enough to create substantial doubts as to Mr. Pacanowski's impartiality. Second, like in *Lemon*, Appellants focus on Mr. Pacanowski's expressed reservation without acknowledging that his connection to the case consists of nothing more than his son being employed by Norton Healthcare, an entity technically distinct from Norton Hospital and not even involved as a party in this case. In addition, although Appellants focus on Mr. Pacanowski's expressed reservation and argue that it surely indicates an inability to remain impartial, Appellants failed to develop any evidence about whether Mr. Pacanowski's "problems" with the case would actually affect his ability to render a fair and impartial verdict based on the evidence. In *Lemon, supra*, the juror at issue was asked whether her connection to the case would affect her ability to weigh the evidence, would "weigh on her mind," and would cause her to feel bad if she had to find against the victim. *Id.* at * 3. In this case, however, not a single follow up question was posed directly to Mr. Pacanowski to determine whether his connection to the case would actually affect his ability to weigh the evidence.

Third, like in *Lemon, supra*, Appellants have failed to demonstrate that Mr. Pacanowski would not have been able to render a fair and impartial verdict on the evidence. Because Appellants never asked Mr. Pacanowski whether he could consider the evidence and render a verdict based only on the evidence, there is no testimony from him or direct evidence that he would not have been able to perform this task. The most Appellants can say is that his statement that he would "probably" have problems with the case implies an inability to be impartial. Although there is no testimony showing that Mr. Pacanowski would be unable to weigh the evidence impartially, there is evidence in the record indicating that he would be able to perform this task: when the entire jury panel was asked whether they could render a verdict for the Appellants if the evidence supported it, and when the entire jury panel was asked whether they could be fair and impartial to both sides in this case, Mr. Pacanowski remained silent and never once voiced a concern about weighing the evidence and remaining impartial. (V.R. 09/09/08 at 12:34:10 – 12:35:15; 12:35:20 – 12:35:40; 1:47:25 – 2:31:15).

This Court cannot ignore the entire *voir dire* that occurred subsequent to Mr. Pacanowski's isolated reservation about the case, particularly because this conversation is the only time when Mr. Pacanowski was actually asked whether he could weigh the evidence and be impartial. In denying Appellants' motion to strike Mr. Pacanowski for cause, the trial judge properly considered Mr. Pacanowski's demeanor and responses during the entire *voir dire* conversation, rather than focusing exclusively on his initial statement. The trial judge stated,

> I have down that his oldest son was a manager. That if it was a close call he may lean toward the hospital. But in the course of conversation I don't think that it rose to the level that he could not listen to the evidence and weigh the evidence. So I'm going to deny the motion for cause.

(V.R. 3:41:01 – 3:41:15). After Appellants responded to the trial judge's ruling, the judge reiterated again that "in the follow up conversation with that I did not believe that that rose to the level of cause." *Id.* at 3:41:33. The trial judge's statements indicate that consistent with Kentucky law, she thoughtfully considered the entire *voir dire* process in determining whether there was a substantial doubt as to Mr. Pacanowski's ability to consider the evidence and remain impartial. In the face of Mr. Pacanowski repeated silence when asked whether he could be fair to both sides, and in the absence of any actual testimony to the contrary, she concluded that the totality of the circumstances did not create substantial doubts about his ability to be impartial and did not require his excusal for cause. There is no evidence in this case that the trial judge's decision in this regard was arbitrary, unreasonable or unsupported by Kentucky law.

Appellants rely strongly on *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1991), for the proposition that Mr. Pacanowski's expressed reservation alone required his automatic excusal for cause and that his subsequent responses, or lack thereof, during the *voir dire* process could not rehabilitate his admitted bias. However, Appellants' reliance on *Montgomery*, *supra*, is misplaced. *Montgomery* did not include mere reservations about a case because of some connection to the litigation; that case included at least five potential jurors who expressly stated during *voir dire* that they had already formed an opinion about the defendants' guilt due to pre-trial publicity.

The criminal defendants in *Montgomery* were convicted of second-degree escape and of being second-degree persistent felony offenders after they escaped from the Kentucky State Penitentiary. The *Montgomery* Court first discussed four jurors who actually sat on the defendants' jury even though they had "answered questions acknowledging not only familiarity with the pretrial publicity surrounding the case, but also that they had formed opinions as to the

appellants' guilt." *Montgomery*, 819 S.W.2d at 716. The trial court apparently declined to excuse these jurors for cause because they had also asserted that they could put their preconceived notions aside and be impartial in the case. *Id.* Out of this particular context, the *Montgomery* Court stated:

> Mere agreement to a leading question asking whether the jurors will be able to disregard what they have previously read or heard is not enough to discharge the court's obligation to provide a neutral jury.

Id. This context is simply not present in this case.

The *Montgomery* Court also discussed numerous other jurors who did not sit on the jury but who were also not excused for cause by the trial judge. These jurors either had a close relationship with one of the parties, witnesses or attorneys; expressed an additional actual bias about the case; and/or acknowledged that they had already formed an opinion about the defendants' guilt. Thomas Spicer was a former employee of the Penitentiary; Ernest Jones acknowledged that he would give more credibility to law enforcement officers[6]; Adrian Owen acknowledged that the prosecutor was his cousin's son-in-law; and Wayne Aldridge's son worked as a correctional officer at the Penitentiary and was involved in the search for the escapees. *Id.* at 717. Moreover, these four jurors all stated that they had already formed an opinion regarding the appellants' guilt, but believed they could still remain impartial.

Again, out of this particular context, the *Montgomery* Court acknowledged that:

> Irrespective of the answers given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has such a close relationship, be it familial, financial or situation, with any of the parties, counsel, victims or witnesses.

[6] Appellants represent that this juror in *Montgomery* stated that he "may give a police officer more credibility." Appellants' Brief, p. 26 (emphasis added). However, the *Montgomery* Court clearly states that this juror "acknowledged he would give more credibility to law enforcement officers' testimony." *Montgomery*, 819 S.W.2d at 717 (emphasis added).

Id. at 717 *quoting Commonwealth v. Stamm*, 286 Pa.Super. 409, 429 A.2d 4, 7 (1981) (emphasis added). Only after "that close relationship is established" should the trial court sustain a challenge for cause. *Id.* The *Montgomery* Court concluded that the *voir dire* record was "replete with circumstances establishing an inference of bias or prejudice on the part of the jurors so pervasive that the jurors were beyond being rehabilitated." *Id.* at 718.

In Appellants' brief, they mention only two of the potential jurors in *Montgomery*. (Appellants' Brief, p. 26). Not only do Appellants completely ignore all the other biased jurors in *Montgomery*, but also, when describing the two jurors mentioned in their brief, they leave out a key fact common to both these jurors: both of these jurors acknowledged during *voir dire* that due to the pretrial publicity, they had already formed an opinion as to the defendants' guilt. *Id.* at 716-17. Moreover, the only two jurors in *Montgomery* who did not previously state that they had already formed an opinion about the case clearly had a direct, close relationship to either a party, witness or attorney in the case: Robert Harris was being represented at the time of trial by the prosecutor, and George Richard was currently employed by the Penitentiary. *Id.* at 717.

Likewise, Appellants reliance on *Shane*, *supra*, is misplaced because the juror's statements and relationships in that case did create a substantial doubt regarding his impartiality. *Shane* involved a defendant who was convicted in the Jefferson Circuit Court for burglary and for being a persistent felony offender. *Shane*, 243 S.W.3d at 337. The potential juror in *Shane* was a current Louisville Metro police officer who worked for the same agency involved in the investigation involving the defendant, who knew the two detectives who were involved in the investigation, and who had previously worked in the same district as these two detectives. *Id.* at 337. Even though this juror declared that these relationships would not affect his ability to be impartial, he nonetheless stated that he had "an inside point of view," was "absolutely" pro-

police, and believed police officers would not lie under oath because they took the oath more seriously than lay witnesses. *Id.* The *Shane* Court concluded that these responses "in their entirety indicated a probability that he could not enter the trial giving both sides a level playing field," and found that it was an abuse of discretion for the trial court not to have excused this juror for cause. *Id.* at 338.

Even if this Court assumes that Mr. Pacanowski's response indicated that he may lean towards Norton in a close call[7], that response is significantly different from being "absolutely" pro-police or from already having formed an opinion about the case, particularly when Mr. Pacanowski's unexplored problem with the case is due to his son's employment relationship with Norton as opposed to any direct relationship he had with a party, attorney or witness in the case. Compared with the facts present in *Shane*, *supra*, and *Montgomery*, *supra*, Mr. Pacanowski's reservation did not require his automatic excusal. Neither Mr. Pacanowski's indirect connection to Norton nor his expression of reservation established an inference of bias or prejudice "so pervasive" that he was "beyond being rehabilitated." *Montgomery*, 819 S.W.2d at 718. The trial court correctly relied on Mr. Pacanowski's participation in the entire voir dire process and thoughtfully determined that the "course of conversation" indicated that Mr. Pacanowski could "listen to the evidence and weigh the evidence." (V.R. 09/09/08 at 3:41:01). Thus, the trial court's decision not to strike him for cause cannot be said to be unreasonable, arbitrary or unfair.

2.

Juror 215397 (Ms. Guelda)

Appellants next argue that Ms. Guelda should have been disqualified because she was a patient of one of the defense experts, Dr. Larry Griffin, and because she "qualif[ied] her

[7] Norton reminds this Court that Mr. Pacanowski himself never specifically stated, nor did Appellants inquire as to which way he would lean or what type of problems he would probably have with this case if it were a close call.

impartiality upon [Dr. Griffen's] lack of involvement" in the case. (Appellants' Brief, p. 16). Although Appellants' argument fails for several reasons, one being that Appellants did not use a peremptory strike to exclude Ms. Guelda, it is important to first inform this Court of exactly what Ms. Guelda did and did not say during *voir dire* in order to correct Appellants' inaccurate representation of her testimony.

a.

Ms. Guelda's Testimony Does Not Reveal Any Actual or Admitted Bias

It is a misrepresentation to state that Ms. Guelda qualified her impartiality on Dr. Griffin's lack of involvement because such a statement implies that Ms. Guelda expressed an actual bias or impartiality in this case. After considering the specific question to which Ms. Guelda was responding, it is clear that she never expressed an actual bias or an inability to remain impartial in this particular case.

After Ms. Guelda responded that she knew Dr. Griffin, Appellants' counsel asked Ms. Guelda whether the fact that Dr. Griffin had delivered her children would cause her "to give any more credence to his testimony on this matter. *Id.* at 11:49:45. She responded, "It may." *Id.* The following question and answer then occurred:

> Mr. Conway: The fact that Dr. Griffin is here testifying for Norton Hospital, Dr. Velasco, would that cause you...[8]
> Ms. Guelda: No. Not as long as he's not involved.

Id. at 11:50:30. Appellants focus so exclusively on the last phrase uttered by Ms. Guelda that they completely ignore the fact that her first response was an unequivocal, "No." Moreover, Appellants' ignore the contents of the question to which Ms. Guelda was responding: the specific question was whether Dr. Griffin's presence as a testifying expert for Norton and/or Dr.

[8] Ms. Guelda interrupted Mr. Conway and answered before he was able to finish his sentence, but Appellants' argument as well as Norton's presumes that Mr. Conway was asking her whether it would cause her to be biased or partial in the case.

Velasco would cause her to be biased. It was in response to this specific question that she answered, "No. Not as long as he's not involved." Her unequivocal "no" indicated that Dr. Griffin's presence testifying for Norton and/or Dr. Velasco would not cause her to be biased. Her use of her phrase, "not as long as he's not involved" can only refer to Dr. Griffin not being involved as a party because the question already informed her that he would be involved as an expert witness.

Although Norton contends that Ms. Guelda's response indicates no actual or admitted bias in the case, if Appellants were confused from her response or wanted further clarification, they had plenty of opportunity to ask follow up questions of her during *voir dire*. However, they chose not to develop the record further or explore this alleged bias that is now a central aspect of their appeal. In arguing for a new trial, an appellant should not be able to rely on an undeveloped record of alleged juror bias when the appellant had every opportunity to explore the alleged bias and make the record clear for both the trial and appellate courts. *See Altman v. Allen*, 850 S.W.2d 44, 45 (Ky. 1992).

b.

Bias Cannot be Implied Automatically to Ms. Guelda Under Kentucky Law Because Dr. Griffin Was Not a Party to this Case and Because There Is No Evidence to Establish that Her Relationship with Dr. Griffin Constituted a Close Relationship.

As stated previously, Kentucky law currently recognizes that a potential juror's current and ongoing physician-patient relationship with physician-defendant automatically implies bias and warrants an excusal for cause. *Bowman v. Perkins*, 135 S.W. 3d 399, 401-02 (Ky. 2004). Kentucky law also indicates that if a potential juror previously had a physician-patient relationship with a physician-defendant, that former relationship in and of itself is not sufficient to automatically warrant a strike for cause. *Altman v. Allen*, 850 S.W.2d 44, 45 (Ky. 1992).

Rather, Kentucky law holds such a former relationship should be explored on the record in order to develop evidence regarding whether the former relationship was, or still is, sufficiently close to indicate that the potential juror would be unable to consider the evidence and render an impartial verdict. *Id*; *see also Lemon v. Commonwealth*, 2007 WL 4462365, * 4 (Ky. December 20, 2007).

In this case, the physician-patient relationship at issue is between Ms. Guelda and an expert witness in the case, Dr. Griffin. This relationship is different from the relationships in *Altman, supra*, or *Bowman, supra*, which were between potential jurors and the physician-defendants whose medical care was at issue. This relationship is even more distinct from the relationship in *Bowman, supra*, because there is no evidence that Ms. Guelda has a current or ongoing physician-patient relationship with Dr. Griffin. The only testimony of record is that Ms. Guelda was Dr. Griffin's patient at some unspecified time in the past, and that he delivered her children. (V.R. 09/09/08 at 11:49:45). Although Appellants argue strongly that *Altman, supra*, should be extended to cover former physician-patient relationships, Appellants ignore that because the relationship at issue in this case is between a potential juror and a witness, the same concerns set forth *Altman* are not as significant in this case.

For example, Appellants imply that Justice Leibson's dissenting opinion in *Altman, supra*, supports their argument to extend *Altman* to include Mr. Guelda's relationship at issue in this case. However, Appellants ignore that Justice Leibson's primary concern in *Altman* was the strong likelihood that the potential jurors would be sitting in judgment of someone who used to be their physician. Justice Leibson wrote, "we are confronted here with the trial judge's refusal to excuse jurors whose babies had been successfully delivered by the same doctors now defending themselves against a charge of mistreating someone else's baby." *Altman*, 850

S.W.2d at 47 (Leibson, J. dissenting) (emphasis added). If the potential juror had no relationship at all with the doctors who were defending themselves, like in this case, Justice Leibson would arguably not have the same type of concern.

Likewise, Appellants imply that Justice Lambert's concurring opinion in *Altman*, *supra*, supports their position because, according to Appellants, the record in this case includes Ms. Guelda's expression of reservation. First and foremost, as explained previously, Ms. Guelda's unequivocally indicated that Dr. Griffin's involvement in this case as an expert witness would not cause her to be impartial in the case. Second, like Justice Leibson, Justice Lambert's primary concern in *Altman* was the potential jurors ability to be impartial when their former doctor was on trial. Justice Lambert wrote, "[i]n the absence of some voir dire response indicating discomfort, reluctance or reservation about sitting in judgment of the physicians, there was simply no 'cause' for exclusion of the jurors." *Id.* at 46 (Lambert, J., concurring) (emphasis added). Again, if the potential juror was not being asked to sit in judgment of her former physician, the concerns expressed by Justices Lambert and Leibson would not be so significant. While this Court may be convinced that any patient-physician relationship, whether former or current, should justify an excusal for cause when the potential juror's physician is actually a party on trial, it must recognize that the same concerns and doubts regarding a juror's ability to remain impartial are not as significant when the physician is a witness in the case rather than a defendant.

In spite of these reduced concerns, a relationship between a potential juror and a witness in the case could arguably still be close enough to justify an excusal for cause according to Kentucky law. This Court has held that a juror should be excused for cause "because the potential juror 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 (emphasis added). It is undisputed that Ms. Guelda had a physician-patient relationship with a witness in the case; however, Appellants have utterly failed to establish that this relationship was "such a close relationship" to require Ms. Guelda's excusal for cause.

In this case, the only testimony concerning Ms. Guelda's relationship with Dr. Griffin is that he delivered two of her children by a caesarean section. (V.R. 09/09/08 at 11:49:45 – 11:50:30). Appellants never asked Ms. Guelda how long ago these deliveries were, whether Ms. Guelda was satisfied with Dr. Griffin's care of her and/or her children, or whether she has sought treatment from Dr. Griffin since the deliveries of her children. Appellants must be able to point to some evidence in the record showing that Ms. Guelda would not have been able to consider the evidence and render an impartial verdict, and based on the sparse testimony elicited from her, there is no such evidence. *See Lemon v. Commonwealth*, 2007 WL 4462365, * 4 (Ky. December 20, 2007). Rather, the remainder of the *voir dire* conversation confirms that Ms. Guelda had no concerns about her ability to render a verdict in favor of the Appellants if the evidence supported it and her ability to be fair and impartial to both sides. Thus, there is no evidence on which to base a conclusion that substantial doubts existed regarding Ms. Guelda's ability to consider all the evidence presented and render a fair and impartial verdict, and the trial judge's decision regarding Ms. Guelda should be affirmed.

If this Court is persuaded to agree with Appellants that Kentucky law should be extended to cover Ms. Guelda's relationship with Dr. Griffin, this Court must not only extend it to cover former as well as current physician-patient relationships, but also, it must extend it to cover physician-patient relationships with witnesses as well as defendants. Adopting this approach would again remove the discretion afforded to trial judges to determine whether an arguably

close relationship is indeed close enough to create substantial doubts about a juror's ability to remain impartial. A trial judge must be able to have the discretion to conclude that a completely unexplored and undeveloped physician-patient relationship between a potential juror and an expert witness in and of itself does not create substantial doubts about the jurors ability to remain impartial, particularly when that juror expressly states that the physician's involvement as a testifying witness would not cause her to be bias in the case.

c.

Appellants Cannot Rely on *Shane v. Commonwealth* to Claim Reversible Error with Regard to Ms. Guelda Because Appellants Did Not Use a Peremptory Strike to Exclude Her.

According to *Thomas v. Commonwealth*, *infra*, *reinstated by Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007), if a party has to use a peremptory challenge to strike a juror who should have been stricken for cause, that party is entitled to a new trial. *Thomas v. Commonwealth*, 864 S.W.2d 252, 259 (Ky. 1993); *see also Stopher v. Commonwealth*, 57 S.W.3d 787, 796 (Ky. 2001). Although these cases imply that a party cannot rely on *Shane*, *supra*, to claim reversible error unless they used a peremptory strike to exclude the juror who they claim on appeal should have been excused for cause, the unpublished case of *Stark v. Commonwealth*, 2010 WL 252248 (Ky. January 21, 2010)[9], expressly sets forth this requirement. The *Stark* Court expressly held that "Appellant's failure to use a peremptory strike on [the juror] undermines his claim that he was denied a fair trial." *Id.* at * 4. According to current Kentucky law, Appellants are prohibited from claiming that the trial court's failure to strike Ms. Guelda for cause denied them a fair trial, and this Court cannot grant Appellants a new trial on this basis. [10]

[9] Attached as Exhibit 2.

[10] Despite Appellants decision not to use a peremptory strike against Ms. Guelda, she still did not participate in deliberations. Although she sat on the jury during trial, she was randomly selected to be one of the two alternate jurors to be excused prior to deliberations, so she did not participate in the verdict in this case.

3.

Juror 201435 (Mr. Deshazer)

Finally, Appellants challenge the trial judge's refusal to strike Mr. Deshazer, who identified himself as a local attorney whose law firm has done work for Norton Hospital, and whose firm has also done medical malpractice defense litigation. In this respect, it is important to note carefully what Mr. Deshazer did and did not say. First, he did say that his firm "has done" some work for Norton Hospital. (V.R. 09/09/08 at 11:16:58 – 11:17:08). Second, he did not say that Norton Hospital is a current client of his law firm, that his firm has a continuing professional relationship with Norton Hospital or that his firm is likely to do more work for Norton in the future. Third, Mr. Deshazer said nothing about the type of work or how much work his firm has done for Norton Hospital. Fourth, he never said that he, personally, has done any work for Norton Hospital, or that he himself had any professional or social ties to any of the Defendants. Fifth, Mr. Deshazer did not say that his firm's medical malpractice litigation included Norton as a client, only that his firm does medical malpractice litigation. In other words, his firm's work for Norton could have been an isolated legal transaction many years ago. Finally, Appellants' counsel never attempted to ask Mr. Deshazer whether he could render a fair or impartial verdict, or whether his firm's past association with Norton might cause him to be biased or otherwise influenced in its favor.

a.

Bias Cannot be Implied Automatically to Mr. Deshazer Under Kentucky Law Because No Current Attorney-Client Relationship Existed and Because There Is No Evidence to Establish that He Had A Close Relationship with Norton Hospitals, Inc.

It is quite clear that under Kentucky law, the existence of a past attorney-client relationship is not enough to disqualify a juror from sitting on a case:

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

Riddle v. Commonwealth, 864 S.W.2d 308, 310 (Ky. App. 1993) (emphasis added). Appellant acknowledges this current state of Kentucky law, but urges this Court to extend *Altman, supra*, and *Riddle*, *supra*, to cover the unexplored, undeveloped relationship between Mr. Deshazer and Norton in this case. However, like Appellants' argument with regard to Ms. Guelda, extending *Altman* and *Riddle* to cover the alleged attorney-client relationship in this case would remove the trial judge's discretion to determine that a completely unexplored and undeveloped relationship between a juror's law firm and a party is not sufficiently close in and of itself to automatically create a substantial doubt about the juror's ability to remain impartial in the case.

In *Riddle*, *supra*, the Court of Appeals declined to hold that all prior attorney-client relationships should automatically disqualify a potential juror, but nonetheless, held that due to the testimony procured by fourteen potential jurors regarding their relationship with the two prosecutors involved in the case, the trial court abused its discretion in not striking them for cause. *Id.* at 311. The *Riddle* Court explained that "each challenged venire person affirmed that he/she would seek a future attorney/client relationship with the two prosecutors." *Id.* Given this evidence on the record, the Court of Appeals concluded that these potential jurors were beyond saving and they should have been stricken for cause. *Id.* However, such evidence creating a substantial doubt regarding Mr. Deshazer's ability to render a fair and impartial verdict based only on the evidence is notably absent from this case.

As noted above, Appellants made no effort to establish whether Mr. Deshazer's law firm had a long-term relationship with Norton, whether Norton is a current or ongoing client of his firm, or whether Mr. Deshazer himself ever even participated on matter involving Norton.

Without any evidence in the record to establish that this alleged relationship between Mr. Deshazer and Norton was close, or that the relationship between his law firm and Norton was current and on-going, there is no evidence on which to claim that Mr. Deshazer should have automatically been excused for cause. The trial judge noted this absence in denying Appellants' challenge for cause, stating that "I think all of the points that are raised here may be valid but . . . they were simply not flushed out in voir dire one way or the other." (V.R. 09/09/08 at 3:48:12 – 3:48:25). The trial judge recognized that Mr. Deshazer's statements indicated only that "his firm may have done some legal work for Norton which is in fact a large group of corporations." *Id.* Coupled with the fact that Mr. Deshazer also never indicated that he would have a problem rendering a verdict in favor of Appellants if the evidence supported it or that he could not be fair and impartial to both sides in this case, it cannot be said that substantial doubts existed regarding his ability to be impartial or that the trial judge clearly abused her discretion in this instance.

Appellants also argue that Mr. Deshazer should have been excluded by the same logic the trial judge used to exclude Dr. Klein, another prospective juror who stated that he was currently being represented by one of the attorneys representing Norton, Allison Wildman. Appellants contend in their brief that there "is no significant distinction" between Mr. Deshazer and Dr. Klein. (Appellants' Brief, p. 20). However, Appellants ignore two key distinctions. First, Ms. Wildman herself was Dr. Klein's attorney. Appellants never elicited testimony from Mr. Deshazer to determine whether he personally performed any legal work for Norton. Second, and even more importantly, Dr. Klein was currently represented by Ms. Wildman in a pending medical negligence case. The only testimony elicited from Mr. Deshazer indicates that his law firm had performed some work for Norton in the past.

Lastly, Appellants also contend that because of the prohibition in the Rules of Professional Conduct that lawyers cannot represent future clients who are adverse to their former clients, Mr. Deshazer was placed in "an awkward position" by not being stricken for cause (Appellants' Brief, p. 22). Appellants contend that if Mr. Deshazer's upheld his ethical obligations under the Rules of Professional Conduct as it related to Norton, he would have possibly violated his sworn oath to be an impartial juror. On the other hand, if he upheld his oath to be an impartial juror, it may have required him to impose a verdict against Norton knowing that "Norton was responsible for putting food on his table." *Id.* Appellants' argument in this regard makes two significant presumptions that cannot be supported by the record in this case.

First, Appellants' argument presumes that Norton is a current, on-going client at Mr. Deshazer's law firm, and that Norton is responsible for "putting food on his table." As has been made abundantly clear, no evidence supports this presumption. In fact, the only evidence on this issue indicates that Mr. Deshazer's law firm did some work for Norton in the past. Second, this argument presumes that Mr. Deshzer would allow his professional obligation not to represent a future client adverse to Norton affect his ability to be an impartial juror in a case involving Norton. The Rules of Professional Conduct discussed by Appellants are triggered when the attorney's representation of one client would be adverse to another client. It is pure speculation to argue that Mr. Deshazer would let his professional obligation not to represent a client adverse to Norton interfere with his ability to be an impartial juror on a case involving Norton.

Again, Appellants never once asked Mr. Deshazer if he felt awkward about sitting on this jury, if his firm's prior relationship with Norton would affect his ability to weigh the evidence, or whether this prior relationship would even cause him to favor Norton at all. Because Appellants failed to develop any evidence to show that Mr. Deshazer's alleged relationship with Norton

created substantial doubts about his ability to remain impartial, Appellants should not be able to claim on appeal that this unexplored relationship should have justified his excusal for cause. Based on the testimony provided, including the absence of any concern regarding Mr. Deshazer's ability to consider the evidence and render a fair and impartial verdict, the trial judge's decision not to excuse him for cause should be upheld.

II.

NEITHER DR. VELASCO NOR DR. HAILE WAS NORTON'S AGENT

A.

Dr. Velasco Was An Employee and Agent of Community Medical Associates, Inc., not Norton Hospitals, Inc. or Norton Healthcare, Inc.

Appellants argue that this Court should reverse both the trial court's and Court of Appeals' conclusion that Dr. Velasco was not an agent of Norton Hospitals, Inc. In support of their argument, Appellants rely upon but misinterpret the clear language of the contract between Community Medical Associates and Dr. Velasco (hereinafter "Agreement"); moreover, they make several flawed assumptions that are unsupported by the evidence and Kentucky law.

First, Appellants incorrectly assume that this Agreement is, "for all practical purposes . . . a contract between Norton Healthcare and Dr. Velasco." (Appellants' Brief, p. 27-28). Second, Appellants incorrectly assume that if Dr. Velasco was employed by Norton Healthcare, Inc., he was thereby also automatically employed by and an agent of Norton Hospitals, Inc. Third, and most importantly, Appellants incorrectly assume that the entity referred to in the Agreement as "Norton" is Norton Hospitals, Inc. This incorrect assumption allows Appellants to argue that Norton Hospitals, Inc., "claimed complete ownership of Krystal Meredith" through this contract *even though Norton Hospitals, Inc. was not a party to this contract* and had no role in its creation. Lastly, Appellants misinterpret the provision of the Agreement that defines "Norton

patients" and the provision prohibiting Dr. Velasco from disclosing confidential business information regarding the operation of CMA and its affiliates.

Appellants' entire argument is based upon a flawed understanding of the Agreement they purport to rely upon. Even though this misinterpretation of the language of the contract was recognized and explained by the trial court and Court of Appeals, Appellants now repeat this mistaken argument to this Court. As the Agreement itself makes clear from the outset, "Norton" refers to "Community Medical Associates, Inc. d/b/a Norton Medical Associates" (hereinafter "CMA"), **not** to Norton Hospitals, Inc. d/b/a Norton Hospital and **not** to Norton Healthcare, Inc. Indeed, the first paragraph of the Agreement states that, thereafter, "Community Medical Associates, Inc. d/b/a Norton Medical Associates," will be referred to informally as "Norton":

> **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 **LOUIS 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**").[11]

In other words, references to "Norton" in the Agreement *are a shorthand reference to CMA, a physician group,* ***not*** *to Norton Hospitals, Inc.,* the Appellee in this case.

Although CMA and Norton Hospitals, Inc. d/b/a Norton Hospital are both subsidiaries of Norton Healthcare, Inc., they are nonetheless **separate and distinct corporate entities** for legal purposes. As the Court of Appeals properly recognized, Kentucky law upholds the legal separation between corporate entities even in situations where the subsidiaries of a parent corporation may be engaged in similar or related business. *See Square D Co. v. Kentucky Bd. of Tax Appeals*, 415 S.W.2d 594, 601 (Ky. 1967). Unless the separation between the corporate

[11] Physicians Employment Agreement, attached as Exhibit 3.

entities is a "mere sham" or the subsidiaries lose their independent identity due to exceptional integrated business relationships, the separateness of these corporate entities must be recognized and honored. *Id*; *see also Big Four Mills, Ltd. V. Commercial Credit Co.*, Ky., 211 S.W.2d 831, 834 (1948).

In this case, there is no evidence, nor is there any claim by Appellants, that the legal and corporate separation between CMA, Norton Hospitals, Inc., and Norton Healthcare, Inc. is a mere sham. Therefore, the Agreement unequivocally created an employee and agency relationship *between only Dr. Velasco and CMA*, and it is improper to assert, as Appellants do, that being employed by CMA is the same as employed by Norton Healthcare, Inc., or that being employed by Norton Healthcare is the same as being employed by Norton Hospitals, Inc. Appellants' unsupported contention that this Agreement is really between Dr. Velasco and Norton Healthcare, Inc., and thus also Norton Hospitals, Inc., misstates the facts and ignores the distinction between separate corporate entities as required by Kentucky law.

By incorrectly assuming that Norton Hospitals, Inc. is the "Norton" referred to in the Agreement, Appellants cobble together an argument that Norton Hospitals, Inc.: (1) defined the pool of patients Dr. Velasco was obligated to treat; (2) "took ownership" of these patients, and (3) imposed a duty on Dr. Velasco to treat them. This argument misinterprets the language of the Agreement by creating a fictitious definition of the word "Norton" as that word is used and intended in the Agreement. In discussing the section of the Agreement that defines "Norton patients," Appellants state that "Norton stripped Dr. Velasco of Krystal Meredith as his patient and assumed ownership of her," with the implication that this action was undertaken by Norton Hospital, Inc. (Appellants' Brief, p. 28). In fact, Norton Hospitals, Inc., the Appellee in this case, did nothing of the sort **because it was not even a party to the Agreement**. Although

Appellants' could have argued that **CMA:** (1) required Dr. Velasco to treat Krystal Meredith[12], (2) "took ownership" of her, and (3) imposed a duty on Dr. Velasco to treat her, no such argument can validly be made as to Norton Hospitals, Inc. In fact, it is worth noting that Appellants originally sued CMA as a separate defendant in this case, but chose to voluntarily dismiss CMA from the lawsuit prior to trial.

Lastly, Appellants also misinterpret and take out of context the provision in the Agreement that allows CMA's affiliates to be third-party beneficiaries to one section of the contract. Appellants ignore that this provision makes CMA's affiliates third-party beneficiaries **only to Section 11,** *i.e.*, the provision related to confidential business and proprietary information owned by CMA and its affiliates, such as trade secrets, procedures, policy manuals, and copyrightable materials. Giving CMA's affiliates the protection of this confidentiality provision in no way changes the fact that this employment agreement is between Dr. Velasco and CMA, and that any duties set forth in the contract are prescribed by CMA, not Norton Healthcare, Inc. or Norton Hospitals, Inc.

B.

Drs. Haile and Velasco Were Not Ostensible Agents of the Hospital

Finally, Appellants argue that Dr. Haile and Dr. Velasco are ostensible agents of Norton Hospital. Clearly, they are not. An apparent or ostensible agent is not an actual agent but one whom "the principle, either intentionally or by want of ordinary care, induces third persons to

[12] Appellants also incorrectly state that Dr. Velasco was required to treat Ms. Meredith "by virtue of her presentation to the downtown Norton Hospital." (Appellants' Brief, p. 28). However, this conclusion again misinterprets the language of the Agreement. Patients of "medical practices of Norton Hospitals, Inc. existing prior to this Employment Agreement" does not mean patients who present to the downtown Norton Hospital. It means patients of physician or practice groups affiliated with Norton Hospitals, Inc. that existed prior to 2005, which does not include CMA because it is not affiliated with Norton Hospitals, Inc. Rather, Dr. Velasco was obligated to treat Ms. Meredith because she was one of his regular patients. Dr. Velasco did not even see Ms. Meredith when she first presented at the downtown Norton Hospital because Dr. Haile was covering Dr. Velasco's on-call shift. Dr. Haile treated Ms. Meredith on January 5, 6, and 7 at the downtown Norton Hospital, and she was not treated by Dr. Velasco, her regular obstetrician, until January 8.

believe to be his agent, although he has not, either expressly or by implication, conferred authority upon him." *Middleton v. Francis*, 257 Ky. 42, 77 S.W.2d 425 (1934). Similarly, the Restatement (Second) of Agency § 267 (1958) (emphasis added), which Kentucky follows, provides:

> *One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent* is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

In *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), Kentucky extended the ostensible agency doctrine to allow hospitals to be held vicariously liable for the negligence of physicians who are not the hospital's employees unless the patient "knew or should have known that the treating physician was not a hospital employee when the treatment was performed." *See also Floyd v. Humana of Virginia, Inc.*, 787 S.W.2d 267 (Ky. App. 1990). In determining whether hospitals are liable under an ostensible agency theory, Kentucky courts rely heavily on the manner in which the hospital holds itself out to the public. *Roberts v. Galen of Virginia, Inc.*, 111 F.3d 405, 411 (6th Cir. 1997). The reasoning underlying the reliance on the hospital's conduct, as this Court explained, is that ostensible authority is "a matter of appearances, fairly chargeable to the principal and by which persons dealt with are deceived, and on which they rely." *Williams v. St. Claire Medical Center*, 657 S.W.2d 590, 595 (Ky. App. 1983).

There is *no* evidence in this case that shows that Norton Hospital held out Drs. Haile and Velasco as its employees or agents, that Norton Hospital took steps to inform the public and its patients that Drs. Haile and Velasco were its agents, or that Norton Hospital made any representation to Kristal Meredith that Drs. Haile and Velasco were its agents. On the other

hand, there is affirmative evidence that Norton Hospital engaged in conduct that sought to adivse the public that Drs. Haile and Velasco were not hospital employees, but rather independent contractors. Specifically, Norton Hospital clearly states in its standard consent form—*which Kristal Meredith signed on three separate occasions*—that patients may receive "the services of physicians, groups of physicians or other practitioners (such as nurses and physicians assistants) who are *not employees of the hospital*" (emphasis added). Such evidence is determinative of the hospital's "holding out" of its physicians as independent contracts and is sufficient evidence to defeat an ostensible agency argument under controlling Kentucky authority. *See Roberts v. Galen*, 111 F.3d at 411; *Floyd v. Humana of Virginia*, 787 S.W.2d at 270.

C.

Dr. Haile Was Not a "Dual Agent" of Dr. Velasco and Norton Hospitals, Inc.

Finally, Appellants assert that Dr. Haile was a "dual agent" of both Dr. Velasco and Norton Hospitals, Inc. This argument is unavailing for several reasons. First, there is no evidence that Dr. Haile was subject to the control of either Dr. Velasco or Norton Hospitals, Inc., such as to be considered the agent of either of them. Dr. Haile and Dr. Velasco did not diagnose or treat Ms. Meredith jointly or in concert; rather, Dr. Haile took over the care of Ms. Meredith during a time when Dr. Velasco was unavailable. Dr. Velasco did not supervise or manage Dr. Haile's medical work in any fashion, but each treated Ms. Meredith separately and independently of the other. Their roles in her care were separate and distinct.

The Court of Appeals properly cited and adopted the seminal New York case of *Kavanaugh v. Nussbaum*, 71 N.Y. 2d 535, 523 N.E. 2d 284 (N.Y. Ct. App., 1988) in support of its conclusion that "on call" physicians are not agents of one another, absent evidence of control by one over the other, or evidence of joint treatment of the patient. As the Court of Appeals

noted, the facts of that case closely mirror the facts of the instant case. In *Kavanaugh*, Plaintiff was a pregnant woman of 31 weeks gestation, and was being regularly seen by Dr. Erol Caypinar, her obstetrician. On the evening in question, Dr. Caypinar arranged for Dr. Albin Swenson to cover his patients, should any of them require medical attention. Plaintiff experienced vaginal bleeding, and Dr. Swenson, while covering for Dr. Cavanaugh, declined to admit her to the hospital. Shortly after returning home, Plaintiff's bleeding increased, and she had to be rushed to the hospital, where an emergency C-section was performed. However, before the C-section could be accomplished, the unborn child experienced fetal distress, and was later born with brain damage. In the lawsuit that followed, Plaintiff alleged that Dr. Caypinar should be held responsible for any negligence on the part of Dr. Swenson, who was covering for him on the night in question. The trial judge submitted the question of Dr. Caypinar's vicarious liability to the jury, which decided that Dr. Swenson's negligence could be imputed to Dr. Caypinar.

However, on appeal, the New York Court of Appeals (New York's highest court) reversed and ordered Judgment as a matter of law for Dr. Caypinar. In so holding, the New York Court wrote that the mere fact of one physician covering for another was insufficient to justify imputed or shared liability, even if the "on call" arrangement was for the mutual economic benefit of both physicians. The Court emphasized that "in the absence of some recognized traditional legal relationship such as a partner, master and servant or agency, between physicians in the treatment of patients, the imposition of liability on one for the negligence of the other has been largely limited to situations of joint action in diagnoses or treatment or some control of the course of treatment of one by the other." *Id.* at 288.

In rejecting Plaintiff's argument that Dr. Caypinar might be held legally responsible for Dr. Swenson's negligence, the Court stated that "vicarious liability ought not to be extended to rest on a situation where there is neither a legal nor an actual control of the treating physician by the other physician...;" moreover, "by taking turns for each other, the doctors did not become partners or even joint venturers...." *Id.* Finally, the Court noted that its decision was in accord with public policy considerations. To hold otherwise *would "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."* *Id.* at 289 (emphasis added). While the Court did acknowledge that there were occasions in which one physician might be responsible for the negligence of his "on-call" physician, it made plain that those circumstances were limited, being confined to circumstances where the Plaintiff was successful in proving that the referral itself was a negligent one, or where the referring physician collaborated in or knowingly condoned the negligent conduct of the "on-call" physician. *Id.*

Other states have reached the same conclusion under similar facts. *See, e.g., Reed v. Bacon*, 530 N.E. 2d 417, 421 (Illinois 1988) ("The general rule is that a referring physician will not be liable for the other physician's negligence unless there is some control of the course of treatment of one by the other, agency or concert of action, or negligence in the referral"); *Manno v. McIntosh*, 519 N.W. 2d 815, 823 (Iowa App. 1994) ("A physician who calls in or recommends another physician or surgeon is not liable for the other's malpractice, at least where there is no agency or concert of action, or no negligence in the selection of the physician or surgeon"); *see also Reed v. Gershweir*, 772 P. 2d 26 (Ariz. Ct. App. 1989); *Mincey v. Blando*, 655 S. W. 2d 609 (Mo. App. 1983); *Powers v. Scutchfield*, 205 N.E. 2d 326 (Ind. 1965); *Dymburt v. Rao*, 881 F. Supp. 942 (D.C.N.J. 1995).

Second, even if one were to *assume* that Dr. Haile was an agent of Dr. Velasco (which he was not), that does not thereby make him an agent of Norton Hospitals, Inc., for the simple reason that Dr. Velasco was an employee or agent of CMA, and *not* an agent of Norton Hospitals, Inc., for all the reasons articulated in Section II.B., *supra*. Any other interpretation is simply a misreading of his Employment Agreement.

Appellants' contentions that Dr. Velasco and Dr. Haile were acting jointly or in concert with one another, or that Norton Hospitals, Inc. "commanded assumption, control, and care of Krystal Meredith as its own patient, and the individuals it called upon to render that care (Velasco and Haile) are its agents," are simply unsupported by the record in this case. (*See* Appellant's Brief, p. 37). Indeed, in advancing the argument that Norton Hospitals, Inc. somehow controlled the actions of Drs. Velasco and Haile, or that those physicians were the hospital's agents or employees, Appellants continue to rely upon the misguided notion that Norton Hospitals, Inc. was not only a party to the earlier-discussed Physician Employment Agreement, but was indeed Dr. Velasco's employer under that Agreement. Both of these contentions are without any basis and are patently incorrect. As the language of the Agreement itself makes clear, the word "Norton" as used in the Agreement refers to Community Medical Associates (or "CMA"), d/b/a Norton Medical Associates, *not* Norton Hospitals, Inc.

III.

EVIDENCE REGARDING THE DEFENDANTS' INSURANCE WAS PROPERLY EXCLUDED

Appellants' contention that the trial judge erred by excluding evidence of Defendants' liability insurance is without merit, was properly rejected both by the trial judge and the Court of Appeals, and those rulings should not be disturbed. Absent a special reason for admission, evidence of liability insurance on the part of the defendant(s) is generally excluded. KRE 411.

Kentucky courts have long recognized that evidence of liability insurance might improperly influence the jury's decision against the defendant, and specifically, "might cause the jury to impose liability with regard to fault." *White v. Piles*, 589 S. W.2d 220, 222 (Ky. App. 1979); *see also* Lawson, *The Kentucky Law Evidence Handbook*, Sec. 2.60, p. 209 (4th Ed., 2003)("[F]ear of prejudice . . . is the predominant motivation for excluding such evidence").

Appellants argue that the general rule of exclusion is inapplicable here because KRE 411 permits the introduction of evidence of a Defendant's insurance to prove agency, control or bias. Specifically, Appellants assert that Norton Hospital "has a self insurance (sic) trust that insures the hospital and 'Affiliates' that would include Dr. Velasco and Dr. Haile." (Appellant's Brief, at 40). They then assert that "[t]he fact that all three Defendants share the same insurance trust/coverage is relevant to prove bias, agency and control." *Id.*

Appellant's argument is flawed for numerous reasons. First, it is factually inaccurate. Contrary to Appellant's assertion, Dr. Velasco and Dr. Haile are *not* "Affiliates" under the self-insurance trust, nor do the Defendants share the same "insurance trust/coverage." Although the self-insurance trust does afford coverage to "Affiliates," individual physicians are not "Affiliates" under the terms of the trust agreement, as Appellants claim. Furthermore, under the terms of Dr. Velasco's Employment Agreement, direct funding of a physician's liability coverage through the self-insured trust was only one option. Another option was for Dr. Velasco's employer, CMA (*not* Norton Hospitals, Inc.) to purchase liability coverage for its physicians from an outside liability carrier. In fact, CMA did exactly that, purchasing a liability policy through Healthcare Underwriters Group, which in turn hired counsel to defend Dr. Velasco, and if necessary, stood ready to indemnify him for any loss (C.R. 163). Dr. Velasco's loss exposure was not borne by the self-insured trust, or by any other entity that provided loss

coverage to Norton Hospitals, Inc. Furthermore, Dr. Haile, like Dr. Velasco, was not covered by the self-insurance trust, and also had his own policy.

In light of the above facts, Appellants' argument that "all three Defendants share the same trust/coverage" is simply unfounded and incorrect, and once those facts are made clear, any basis for an argument that their liability insurance should be mentioned to the jury simply disappears. Recognizing this, in her September 5, 2008 Order Judge Gibson correctly found that Dr. Velasco and Dr. Haile were not covered "by the same insurance arrangements," as neither physician was an employee or agent of Norton Hospitals, Inc., and therefore she prohibited mention of insurance coverage. (C.R. 1496).

Second, the evidence of Defendants' insurance was not relevant. Judge Gibson had already ruled that Drs. Velasco and Haile were neither employees nor agents of Norton Hospitals, Inc., so agency and control issues were not before the jury. Appellants contend that the absence of any criticism between and among the Defendants at trial can be traced to the fact of common insurance, but given the absence of common insurance among these Defendants, that argument fails. Even if common insurance did exist, it is mere speculation on Appellants' part to postulate that the Defendants chose not to criticize one another because of that. To the contrary, there was no reason for the Defendants to point the finger at one another because Krystal Meredith's death was a tragic but unforeseeable and unavoidable event which was not the fault of any of the Defendants, as the jury's verdict ultimately confirmed.

Finally, even in situations where liability insurance is admissible for collateral reasons such as agency, control or bias, the trial judge may, in the exercise of her discretion, exclude the evidence "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury. . . ." KRE 403. In this case Judge Gibson did

just that, and made a specific finding on the record that any "relevance [of mentioning Defendant's insurance] is substantially outweighed by the prejudice the rule is designed to prevent." (C.R. 1496.) That finding was supported by the evidence in this case, and was well within the ambit of the trial judge's discretion. Accordingly, the ruling below regarding the exclusion of Defendants' liability insurance should not be disturbed.

CONCLUSION

For the reasons stated above, the Judgment of the trial court below, and the Opinion of the Court of Appeals, should be affirmed.

Respectfully submitted,

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