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

LINDA SUE GRUBB AND LAYMON GRUBB
CO-ADMINISTRATORS OF THE ESTATE OF KRYSTAL DENISE MEREDITH AND LINDA S. GRUBB AND LAYMON GRUBB, GRANDPARENTS AND NEXT FRIEND OF ALYSSA B. MEREDITH, A MINOR — APPELLANTS

v.

NORTON HOSPITAL, INC., ET. AL. — APPELLEES

APPEAL FROM KENTUCKY COURT OF APPEALS
2009-CA-000021

BRIEF OF APPELLANTS LINDA SUE GRUBB AND LAYMAN GRUBB

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed, first class, postage prepaid, to Bradley Hume, 734 W. Main St., Suite 400, Louisville, KY 40202, Beth McMasters, 200 S. 5th St., Suite 200N, Louisville, KY 40202,Counsel for Norton Hospital; Craig L. Johnson, 11901 Brinley Ave., Louisville, KY 40243, Counsel for Dr. Luis M. Velasco; David B. Gazak, DARBY & GAZAK, P.S.C., 3220 Office Pointe Place, Suite 200, Louisville, KY 40220, Counsel for Dr. James B. Haile; Mr. Sam Givens, Clerk of the Court of Appeals, Commonwealth of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601; and Hon. Susan Schultz Gibson, Circuit Court Judge, Jefferson Circuit Court, Division Twelve, 700 West Jefferson Street, Louisville, KY 40202, this 17th day of July, 2012. It is further certified that the record on appeal was not removed from the Clerk of the Circuit Court.

CHADWICK N. GARDNER

INTRODUCTION

This is a medical negligence case in which the Appellants allege error in the trial court's failure to exclude jurors for cause, failure to hold the physicians agents of the hospital, and failure to admit evidence of insurance. The trial resulted in a defense verdict.

STATEMENT REGARDING ORAL ARGUMENT

Appellants Grubb request an oral argument due to the magnitude of the case and the complexity of the issues involved.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This is a medical negligence case tried before a Jefferson Circuit Court jury September 9-19, 2008. Linda and Laymon Grubb, parents of Krystal Meredith, and guardians of Alyssa Brooke Meredith, Krystal's infant daughter, brought suit against Norton Hospitals, Inc., Luis Velasco, M.D., and James Haile, M.D. for the wrongful death and loss of parental consortium of Krystal Meredith. The jury exonerated all defendants. (Judgment attached Exhibit 2). The trial court denied post trial relief. (Order attached Exhibit 1). The Grubbs appeal seeking reversal of the trial court's failure to exclude jurors for cause, denial of motions for summary judgment regarding agency of the physicians, and the exclusion of evidence that Norton insured the doctors.

Krystal's Course of Treatment

Krystal Meredith, age twenty, was thirty seven weeks pregnant on Thursday, January 4, 2007, when she presented to her obstetrician/gynecologist, Dr. Luis Velasco. She complained of excruciating pain when she presented to Norton Hospital the following three days, Friday, Saturday, and Sunday, January 5-7. She never saw a doctor on Friday or Sunday, and saw Dr. James Haile, who covered for Dr. Velasco that weekend, just briefly on Saturday the 6th. (Plaintiffs' Exhibits 2, 3, & 4).

On Monday the 8th, she delivered Alyssa Brook Meredith at 1:41 p.m., and after several more hours of unrelenting pain, underwent exploratory surgery that revealed an appendix that had been burst between four and seven days and an abdomen full of infectious pus that measured one liter. (Plaintiffs' Exhibit 14; 9-17-09, 10:59:55, Mr. Grubb). She was admitted to intensive care where she remained another twenty four days before her family

removed life support. She died on February 1, 2007, as a result of the massive infection process caused by the undiscovered burst appendix. (9-15-08, 2:37, Duboe).

Krystal lived with her parents in the Portland neighborhood of Louisville. (9-17-08, 10:30:05, Mrs. Grubb). She had become very sick Wednesday evening, January 3. The next day her mother, Linda, accompanied her to see Dr. Velasco. Krystal complained of right side abdominal pain in Dr. Velasco's office on Thursday the 4th, and Linda Grubb told him that Krystal had been vomiting. Dr. Velasco performed a vaginal exam, but not an abdominal exam. He determined that she was not in labor and would go full term until January 27th. He sent her home. Krystal could not sleep and complained of pain constantly that evening and throughout the night. (9-17-08, 10:33:08, Mrs. Grubb).

On Friday, January 5, Krystal remained in severe abdominal pain and experienced nausea, vomiting and diarrhea. (Plaintiffs' Exhibit 2; 9-17-08, 10:35:30, Mrs. Grubb). Krystal presented to Norton Hospital. (9-12-08, 10:20:20, Haile). She arrived around 5:11 p.m. and was discharged about 9:40 p.m. (Plaintiffs' Exhibit 2, Intrapartum Flow Sheet (IFS)). Dr. James Haile assumed responsibility for Dr. Velasco's patients that weekend. Nurses told Dr. Haile she had severe abdominal pain and had experienced nausea, vomiting and diarrhea for 18 hours prior to her 5:11 p.m. admission. (9-10-08, 3:44:22, Philpot; Plaintiffs' Exhibit 2, IFS). Her abdominal pain was rated a 10 and was continuous and severe. (Plaintiffs' Exhibit 2, IFS). Despite Krystal's complaints, Dr. Haile did not see Krystal or conduct a personal, hands-on exam on Friday. (9-12-08, 10:25:25, Haile). Instead, he gave telephone orders for pain medication and discharged her home. (9-12-09, 10:41:40, Haile).

On Saturday, January 6, Krystal was screaming and crying with pain. The pain was so bad that her mother called an ambulance to take her to Norton Hospital, just a few short miles from her home in Portland. (9-17-08, 9:53:40, Mr. Grubb). She arrived at 6:00 a.m. and remained at Norton approximately six (6) hours. (Plaintiffs' Exhibit 3). Dr. Haile was rounding in the hospital. He examined Krystal after he ordered Demerol for Krystal's pain and Terbutaline to slow contractions. Her pain was a 10 and strong when she presented, but a 4 and mild after Dr. Haile medicated her before his exam. (Plaintiffs' Exhibit 3). Nurse Gullet recorded four separate times from 8:06 a.m. to 11:00 a.m. that Krystal was "all over the bed" or would not stay still in bed. (Plaintiffs' Exhibit 3, IFS; 9-11-08, 10:47:18, Gullett). Dr. Haile, for the second day in a row, discharged Krystal home. (9-12-08, 10:19:40, Haile).

After returning home, Krystal continued to wail. She was screaming and hollering in pain, and her mom gave her five baths that night. (9-17-08, 10:47:15, Mrs. Grubb). Laymon Grubb wanted answers. He wanted to know why they kept sending his daughter home in pain. He called several times for Dr. Haile without a return call. Dr. Haile finally picked up the phone, and Laymon asked why he kept sending his daughter home in pain. Dr. Haile told Laymon there was nothing wrong with his daughter, "she wants us to take that baby early, and we're not going to do it." Dr. Haile was rude, but Laymon Grubb thanked him, hung up the phone and assumed he knew what he was talking about because he was a doctor. (9-17-08, 9:55:40, Mr. Grubb).

After a miserable Saturday night, Krystal went back to Norton Hospital, again by ambulance, on Sunday. She complained of severe pain. (9-17-08, 9:57:56, Mr. Grubb). They admitted her, ordered labs, and finally decided to keep her overnight. (Plaintiffs' Exhibit 4, 7, & 8). She saw no doctor on Sunday the 7th.

When admitted on the 7th, Dr. Haile's standard orders included an order for CBC labs. These labs revealed a dangerously high white blood count and a shift of segs and bands to the left, which indicate an ongoing infectious process in the body. (9-12-08, 10:57:35, 11:02, Haile). A normal white blood cell count is between 4.5 and 12.5. (Plaintiffs' Exhibit 7). At 16:56, 4:56 p.m., Krystal's WBC was 30.8, which represents 30,800 white blood cells. (Plaintiffs' Exhibit 7). Dr. Velasco and some of the nurses with decades of experience never have seen a count so high. (9-12-08, 3:23:28, Velasco; 9-11-08, 4:39:38, Robey).

Despite the fact that Dr. Haile ordered the test at 4:56 p.m. and the results were available at 5:05 p.m., no Norton nurse called to advise Dr. Haile of the finding, and instead, he called the nurse's desk to obtain the results 5 hours and 35 minutes after the labs were drawn. (Plaintiffs' Exhibit 8; 9-12-08, 11:17, Haile). Dr. Haile said it was important for him to get lab results back as soon as possible. (9-12-08, 11:14:51, Haile). Norton's own nursing expert said nurses have a duty to timely and accurately relay information, and that if lab results are not back in four hours, something is wrong with the labs. (9-17-08, 3:10:28, Kelley-Moran). Upon learning of the elevated counts, Dr. Haile ordered another white blood count, which returned the second time with a count of 27.4 or 27,400, still more than twice the high range limit. (Plaintiffs' Exhibit 7).

In addition to the elevated white blood counts, Krystal's vital signs were significantly elevated. Her heart rate was tachycardic, meaning consistently higher than 120 beats per minute. On the 7th it ranged between 129 and went as high as 188. (9-11-08, 5:01:40, Peavy). Her blood pressure was elevated. She now had been complaining of severe pain for four (4) days. Krystal was "all over the bed." (9-11-08, 10:47:18, Gullet; Plaintiffs' Exhibit 3, IFS). Nurse Gullett's charting suggested Krystal was writhing in pain. Despite this information,

Dr. Haile never came to the hospital to see her on the 7th, and he never intended to. He stated: "God would have had to tap me on my shoulder and tell me to come in." (9-12-08, 11:47:40-53:40, Haile). He left Krystal there overnight, with severely high white blood counts, tachycardia and elevated blood pressures for Dr. Velasco to take over the next morning.

Dr. Velasco came to see Krystal on Monday morning, January 8. He started Pitocin to expedite labor. (9-12-08, 3:10:40, Velasco). Amazingly, when he assumed Krystal's care Monday morning, ***he was unaware of her weekend hospital course.*** He never knew she was at the hospital on Friday until her exploratory surgery Monday night around 11 p.m. (Id. at 3:20:37). He never looked at her chart before delivering! He was unaware of Krystal's prior tachycardia, her blood counts, or elevated segs and bands. (Id. at 3:21:55). He never spoke to Dr. Haile until after Krystal's delivery, and he had not communicated with him at all throughout the weekend of Krystal's hospital visits. (Id. at 3:24:38).

Krystal had not been in labor. Dr. Velasco had to induce labor Monday morning. These providers faced signs that Krystal was not in labor, yet had severe excruciating pain. No one appeared interested in finding out why. After Dr. Velsaco delivered Alyssa, Krystal's pain became worse. (Plaintiffs' Exhibit 19). Her pain should have subsided after the birth. When it did not, the physicians believed something else may be wrong. Id.

Dr. Velasco called in Dr. Jorge Rodriquez, a general surgeon, to determine why Krystal's pain persisted. A CT scan revealed likely free air in Krystal's abdomen, giving rise to suspicions of a ruptured bowel. (Plaintiffs' Exhibit 13). Physicians should have ordered a CT upon the first complaints of pain without labor, which had a 90% chance of discovering the one liter of pus in Krystal's abdomen. (9-15-08, 1:23:30-1:35, 2:22:20 Duboe). At a

minimum, Dr. Haile should have come to see Krystal during her hospital presentations and consulted a general surgeon. Id.

Dr. Rodriquez performed exploratory surgery to discover the problem, and he discovered a big problem. Her abdomen was full of infectious pus. He drained it, and it measured approximately one (1) liter. Dr. Rodriquez diagnosed that Krystal had suffered a ruptured appendix. (Plaintiffs' Exhibit 13). He removed the appendix, admitted her to ICU, and approximately six days later, drained another two liters of pus from Krystal's abdomen. (Plaintiffs' Exhibit 16).

Every party in the case had pathology experts, and all, including Dr. Rodriquez, agreed that Krystal's appendix had been burst for between four and seven days before it was discovered. (9-12-08, 3:58:38, Velasco; 9-15-08, 11:30:28, Velasco; 9-18-08, 10:26, Rodriquez). Going back seven days would have made January 2 the possible date of rupture; going back four days would make it January 5. *Every day Krystal presented to Dr. Velasco and Norton Hospital she presented with a ruptured appendix.* Not appendicitis, but an appendix that already had ruptured. Krystal presented to Norton the 5th, 6th and 7th, with a ruptured appendix that caused excruciating pain and went completely undetected because Dr. Haile and the Norton nursing staff dismissed her complaints.

Krystal had no quality of life the 24 days after she gave birth to Alyssa. She was on a ventilator and slobbering out of a trach tube. She was able to see and hold Alyssa twice, but only for a minute or two. (9-17-08, 11:00:45, 11:05:50, 11:24; Plaintiffs' Exhibit 11). Krystal communicated with her mother by writing notes. (Plaintiffs' Exhibit 33).

After Drs. Velasco and Haile learned of the unfortunate outcome, a couple of suspicious things occurred. First, Dr. Velasco recorded in his discharge summary that he

asked one of his fellow physicians, Dr. Jeffrey Goldberg, to review the case to determine if everything was conducted according to accepted standards. Dr. Goldberg concurred they were, and Dr. Velasco recorded in his final discharge summary:

> I asked Dr. Jeffrey Goldberg to see her also to reveal [sic] the whole chart to see if there was anything that had been done was missing on her treatment and he referred that treatment was in standard care. (Plaintiffs' Exhibit 19).

After one of the discovery depositions, Dr. Haile and counsel claimed he issued telephone orders to admit Krystal one of the days he never saw her, *if* she complained of additional pain. (9-12-08, 10:44:35, Haile). These orders appeared nowhere in Krystal's chart. Dr. Haile testified they should have because they were his orders. (9-12-08, 10:47, Haile). The nurse who allegedly took them claimed to have shredded them. (9-11-08, 11:16:42, Gullett).

The Norton-Physician Contract

At trial, the Grubbs brought their claims against a seeming army of medical defendants and defense counsel. Behind the scenes, all of them were connected. Norton literally owned Dr. Velasco's practice and patients. (Physician Employment Agreement, RA 951-72, attached as Exhibit 6). Dr. Velasco is an employee of Community Medical Associates. Id. Community Medical Associates is a group of physicians owned and operated by Norton Healthcare. Id. The trial court did not let this fact before the jury, which is one of the issues on this appeal.

The contract between Community Medical Associates and Norton defines "Norton patients" as patients of Norton Hospital, Inc., among other things. (Id., RA 951). It provides that all of the patients belong to Norton. All of the charts belong to Norton. If a patient needs hospital care, the physician has no choice but to send the patient to a Norton Hospital

for treatment unless a Norton Hospital does not render the service the patient needs. Id. One of the benefits Dr. Velasco received was insurance under the Norton Healthcare Self Retention Trust. (RA 966, attached Exhibit 6; Self Retention Trust filed in record under seal.) Dr. Velasco never has to worry about any personal exposure from a lawsuit or any defense costs. Because all patients–*including Norton Hospitals, Inc. patients like Krystal*–belong to Norton. Norton provides the defense and indemnity for these physicians in any litigation.

The Grubbs argued that because this contractual agreement specified that the patients were not Dr. Velasco's but Norton's, and they had to receive treatment at a Norton Hospital, Krystal Meredith was a Norton patient, and Norton simply used its agent, Dr. Velasco, to render treatment. Similarly, because Dr. Haile was covering for Dr. Velasco and stood in his shoes, he likewise was a Norton agent. (RA 1312-1350). The trial court rejected both arguments. (RA 1492, Amended Order RA 1798, attached Exhibit 3). The trial court also refused to admit evidence that Norton's self insurance trust provided Drs. Velasco and Haile indemnity and a defense. (RA 1496, attached Exhibit 4).

Jury Selection

The trial court sat fourteen jurors. There were sixteen peremptory strikes among four parties and sixty jurors in the venire. The venire contained several medical professionals, including two physicians. (Jury List Sealed in Record). It contained three individuals who expressed improper connections with the defendants or their witnesses, and whom the trial judge refused to excuse for cause,[1] which is a primary subject of this appeal.

[1]Detailed citations regarding these three jurors are contained in the Argument.

One testified his son was a controller for Norton, which likely would cause him to lean toward Norton in a close call. Another testified that his law firm did work for Norton, and that he was familiar with "standards of care" in the medical context because his firm did medical malpractice defense. A third testified that Dr. Larry Griffin, the only defense OB/GYN expert who testified live, delivered all of her children and that she only could be fair and impartial if Dr. Griffin was "not involved." There were plenty of jurors, but the trial judge denied the Grubbs' motions to strike these three jurors for cause.

The Grubbs used two of their peremptory strikes to eliminate the lawyer and father of the Norton manager. This left the Grubbs' with two strikes, while the defendants had a collective twelve. The jury selected included a commercial insurance biller for Baptist Healthcare System (213688); a registered nurse employed by Jewish Hospital (213987), and; a juror whose spouse was a transporter for Norton Suburban Hospital (223772). (Sealed Jury List in Record). This severely prejudiced the Grubbs.

The Court of Appeals affirmed in a split decision. The majority appeared to give little weight to two of the jurors' reservations about their ability to remain fair and impartial. It distinguished the relationships that would imply bias from the case law and held there was none. (Court of Appeals Opinion, attached Exhibit 5). Judge Stumbo dissented and would have excused for cause the father of the Norton employee (Juror 222785) and the lawyer whose firm represented Norton (Juror 201435) and granted a new trial. Id. at 21.

ARGUMENT

Appellants Grubb allege three errors: (1) The trial court erred by failing to strike three jurors for cause. This Court should establish two clear guideposts in addressing "for cause" exclusion. First, when factors that suggest implied bias combine with reservations or qualifications about impartiality, the trial court should strike for cause. Second, when a juror confesses with probability that he or she cannot be fair and impartial in a "close call," the trial court should strike for cause. (2) The trial court erred by refusing to hold as a matter of law that Drs. Velasco and Haile were agents of Norton Hospital, and; (3) The trial court erred by failing to admit evidence that all defendants were insured by the Norton self insurance trust.

I. THE TRIAL COURT SHOULD HAVE STRICKEN THREE JURORS FOR CAUSE, AND THIS CASE INVITES THE COURT TO ESTABLISH TWO GUIDING PRINCIPLES ON THAT ISSUE.

Appellants preserved this error by making Motions to Strike for Cause. (9-9-08, 3:28:12 (215397–Ms. Guelda[2]), 3:39:49 (222785–Mr. Pacanowski), 3:44:10 (201435–Mr. DeShazer)), and by filing a Motion for a New Trial. (RA 1581).

A. The lower courts erroneously failed to exclude three jurors for cause.

The trial court should have stricken jurors 222785, 201435, and 215397 for cause. Dissenting Judge Stumbo would have stricken 222785 and 201435 and ordered a new trial. (Court of Appeals Opinion 21, attached Exhibit 5). **Juror 222785** had a son who worked for Norton and testified he could not be fair and impartial in a close call:

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2 Appellants refer to these jurors by name once because they are called by name on the video record.

Judge: And the one on the back row?
222785: Uh, I have a son that's a manager at Norton. (9-9-08, 11:17:58-11:18:03).

* * *

222785: 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.*** (9-9-08, 12:10:08-12:10:19) (emphasis added).

Juror 201435 is a member of a law firm that represented Norton:

Judge: Third row on this end?
Juror 201435: Uh 201435. I practice law and my law firm has done some work for Norton. (9-9-08, 11:16:58-11:17:08).

He understood the phrase "standard of care" because his firm defends malpractice cases:

Mr. Johnson: Some of you all mentioned that you have heard the term standard of care before.
Mr. Johnson: Where have you heard that phrase?
Juror 201435: Our law firm does medical malpractice defense.
Mr. Johnson: What firm is that?
Juror 201435: Hall Render. (9/9/08, 2:47:50).

Juror 215397 indicated she may not be fair if defense expert Dr. Griffin was involved because he delivered her children:

Mr. Conway: You will be hearing from an obstetrician/gynecologist for the defense, Dr. Larry Griffin. Do any of you know Dr. Griffin? (9-9-08, 11:49:20).

* * *

Juror 215397: He delivered my children.
Mr. Conway: The fact that he delivered your children, ***would that cause you to give any more credence to his testimony on this matter?***
Juror 215397: ***It may.***
Mr. Conway: It may? (9-9-08, 11:49:45) (emphasis added).

* * *

Mr. Conway: How many children has Dr. Griffin delivered?
Juror 215397: 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...?***
Juror 215397: No. ***Not as long as he's not involved.*** (9-9-08, 11:50:30).

Few things are more fundamental than a litigant's right to a fair and impartial jury. "In Kentucky, the right to an impartial jury is protected by §11 of the Kentucky Constitution, as well as the Sixth and Fourteenth Amendments to the U.S. Constitution." Fugett v. Commonwealth, 250 S.W.3d 604, 612 (Ky. 2008). It is a substantial right, and its violation cannot be harmless error. Shane v. Commonwealth, 243 S.W.3d 336, 341 (Ky. 2008). Our courts have sought to preserve its sacred integrity. See Fugett, 250 S.W.3d 612-616; Shane, 243 S.W.3d at 338-41.

Whether to strike jurors for cause rests within the trial judge's discretion. Altman v. Allen, 850 S.W.2d 44, 46 (Ky. 1992). If the trial judge errs, however, one is entitled to an automatic new trial, regardless of how he uses his peremptory challenges. "An error affecting the fundamental right of an unbiased proceeding goes to the integrity of the entire trial process." Shane, 243 S.W.3d at 340; see also Thomas v. Commonwealth, 864 S.W.2d 252, 259 (Ky. 1993).

In determining whether to strike for cause, "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); see also Thompson v. Commonwealth, 147 S.W.3d 22, 51 (Ky. 2004); Mabe v. Commonwealth, 884 S.W.2d 668, 671 (Ky. 1994). A litigant is entitled to jurors who "are disinterested and free from bias and prejudice, *actual or implied or reasonably inferred.* This principle of justice is as old as the history of the jury system." Riddle v. Commonwealth, 864 S.W.2d 308, 310 (Ky. App. 1993) (quoting Tayloe v. Commonwealth, 335 S.W.2d 556, 558 (Ky. 1960)) (original emphasis in Riddle).

In cases where relationships form a basis for bias, Kentucky long has held that "once that close relationship is established, ***without regard to protestations of lack of bias***, the court should sustain a challenge for cause and excuse the jurors." Ward v. Commonwealth, 695 S.W.2d 404, 407 (Ky. 1985) (emphasis added). In Ward, the trial court failed to excuse three jurors for cause who were related to the Commonwealth's Attorney. The jurors were an ex-brother-in-law, a distant cousin, and another whom the Commonwealth's Attorney thought of as an uncle. Citing Commonwealth v. Stamm, 429 A.2d 4, 7 (Pa. 1981), this Court stated:

> 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 situational, with any of the parties, counsel, victims or witnesses.

Id. (Emphasis added). "The possibility of empaneling a prejudiced jury is too great if a prospective juror, who has a close relationship with a party, is allowed to sit." Bowman v. Perkins, 135 S.W.3d 399, 403 (Ky. 2004).

Davenport v. Ephriam McDowell Memorial Hosp., Inc., 769 S.W.2d 56, 59 (Ky. App. 1988) held it reversible error in a medical malpractice case for the trial court not to strike two jurors from the panel for cause "after those jurors' own statements called their impartiality seriously into question." Id. One potential juror's spouse worked at the hospital, and the juror was a former employee. Citing Ward's presumption of prejudice irrespective of voir dire answers, Davenport held:

> We believe this precedent roundly resolves the issue of the jurors' disqualification in favor of the appellants. The Ward holding renders immaterial the trial court's subsequent attempts to rehabilitate the first juror's impartiality by questioning her a second time.

Id. at 60.

The other juror in Davenport was married to a doctor on the hospital staff, and she was a member of the hospital auxiliary. She socially knew one of the defendants and some hospital employees, but gave the magic answer that these relationships would not affect her ability to weigh the evidence fairly. The trial court refused to strike her for cause, and the court of appeals reversed. Id.

The lower courts failed to ***presume*** bias in the context of these jurors' relationships, but more importantly, it insufficiently weighed the statements of two jurors that expressed reservations, qualifications and admissions that they likely could not be fair and impartial.

1. ***Juror 222785***

Montgomery v. Commonwealth, 819 S.W.2d 713 (Ky. 1992) reversed the trial court for failing to exclude several jurors for cause. Id. at 717-18. One juror claimed his concern that prisoners were out of prison "might influence" his ability to be fair and impartial. Id. at 717. Another ran an ambulance service that contracted with the Board for whom the prosecutor was the attorney. Id. Montgomery also cautioned against relying upon the veracity of a juror's claim to be fair and impartial when the question is asked of the entire panel. Id. at 716.

Juror 222785's son was a purchasing manager for Norton Healthcare. Parent-child relationships are among the strongest, and they often outlast spousal relationships, which Davenport held warranted excusal for cause. That close relationship aside, Juror 222785 plainly said he would have problems being fair and impartial in a close call because his son

was a manager at Norton.[3] This case was a close call. The jury's deliberation was lengthy and divided. Furthermore, as discussed below, this juror's expression that he "probably" would have difficulty being fair and impartial were sufficient grounds to strike him for cause even without a close relationship to imply bias.

2. Juror 215397

Bowman held that "a current and ongoing physician-patient relationship is such a close relationship where a trial court should presume the possibility of bias," *despite* "protestations of lack of bias." Bowman, 135 S.W.3d at 402. In this case, defense expert, Dr. Larry Griffin, delivered all of Juror 215397's children. She qualified her impartiality upon her doctor's lack of involvement.[4] The relationship alone proved bias, but when the

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[3]

Judge: And the one on the back row?
222785: Uh, I have a son that's a manager at Norton. (9-9-08, 11:17:58-11:18:03).

* * *

222785: 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. (9-9-08, 12:10:08-12:10:19).

[4]

Mr. Conway: You will be hearing from an obstetrician/gynecologist for the defense, Dr. Larry Griffin. Do any of you know Dr. Griffin? (9-9-08, 11:49:20).

* * *

Juror 215397: He delivered my children.
Mr. Conway: The fact that he delivered your children, ***would that cause you to give any more credence to his testimony on this matter?***
Juror 215397: It may.
Mr. Conway: It may? (9-9-08, 11:49:45). (emphasis added).

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Mr. Conway: How many children has Dr. Griffin delivered?
Juror 215397: 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...?***
Juror 215397: No. ***Not as long as he's not involved.*** (9-9-08, 11:50:30).

juror qualified her fairness upon the lack of Dr. Griffin's "involvement," striking for cause should have been an easy choice.

Dr. Griffin ***was*** involved in the case. He was the only OB/GYN who testified live for the defense, and there were three defendants. All of them relied upon his testimony. Once she revealed bias by saying she "may" give Dr. Griffin more credence, and by qualifying her impartiality upon his lack of involvement, her bias alone mandated exclusion. Her bias combined with this relationship of trust, made the choice even more clear.

Juror 215397's bias stood to affect how she weighed the evidence in a case that hinged upon the credibility of experts. The elimination of bias is essential when it goes to the very heart of the evidence the juror must weigh. In a medical negligence case, expert testimony arguably is the most important evidence. The entire case fails without it.

Dr. Griffin was a very effective witness. (See footnote 5 below). He testified that both Drs. Velasco and Haile met the standards of care, (9-18-08, 1:48:13, Griffin), and he had kind comments to throw in regarding Norton's nurses. Had these jurors been excused for cause, the dynamic of what jurors ultimately were selected changes entirely.

The Court of Appeals relied upon Altman's holding that the physician-patient relationship must be "ongoing" before exclusion is automatic. It is time to extend Altman, as Justice Leibson urged in his dissent. Altman, 850 S.W.2d at 47. The relationship between a woman and her obstetrician is a close one. It is an especially prejudicial relationship in a pregnancy/childbirth case for whichever side does not have the juror's doctor, regardless of whether the relationship is ongoing.

The capable obstetrician guides the expecting mother through every step of the process, month by month, and later week by week, until the point of delivery. It is a process rarely forgotten, even after regular office visits cease. The obstetrician delivers a child that arguably forms the closest relationship known to mankind. The obstetrician accesses physical, and often emotional, places within a woman where few, if any, go.

There is no human in whom the expectant mother places more trust than the obstetrician she chose to bring forth her very own children. She trusts her obstetrician to keep her and her baby healthy and out of harms' way. When the ultimate question in a pregnancy/childbirth case is whom do you trust to tell you the truth about what happened and what is expected, the testifying doctor's patient has no business deciding that question when her own doctor is giving the answer. This Court should recognize that the unique bond between expecting mother and obstetrician is a relationship of such closeness that the integrity of our jury system is better preserved by excusing these jurors for cause when the physician plays any role in the case, and especially in cases like this.

Notwithstanding the relationship, Juror 215397 expressed reservations and qualifications absent in Altman. In Altman, "[a]ll three of the prospective jurors indicated on *voir dire* that their prior relationships as patients would not affect their ability to render a fair and impartial verdict or a verdict against these physicians." Altman, 850 S.W.2d at 45. Justice Lambert concurred in the result because there was no voir dire response "indicating discomfort, reluctance or reservation about sitting in judgment of the physicians." Id. at 46. Had there been, his opinion apparently would have been different. In this case, there was.

Juror 215397 confessed she "may" give more credence to Dr. Griffin and reserved her bias only "as long as he's not involved."

The Court of Appeals *assumed* this juror's statement she could be fair and impartial if her doctor "was not involved" meant if he was not involved as a *party*. (Court of Appeals 6). She never said that. Even if she did, the law should not split legal hairs over something as fundamental as an impartial jury when the relationship is this close. Dr. Griffin's testimony was crucial evidence that affected the outcome,[5] and this juror expressed reservations about her impartiality if he was involved. She did not say, "if he is being sued," or "if he is a party." She said "as long as he's not involved." He was involved. If courts must look beyond the "magic answer," Ward, 695 S.W.2d at 407; Shane, 243 S.W.3d at 338.

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Perhaps the best demonstration that "witnesses" are as important as parties are the following statements from Dr. Haile's Court of Appeals Brief:

Indeed, throughout the course of this litigation, obstetrical and maternal/fetal medicine ***experts*** staunchly defended the treatment provided by Dr. Haile. Indeed, those ***experts testified*** that it is not at all uncommon for first-time pregnant patients to experience nausea, vomiting and diarrhea in the later months of gestation.

Accordingly those physicians agreed that Ms. Meredith's complaints on both January 5 and 6 were absolutely consistent with her stage of pregnancy. This position was supported, in part, by the fact that her complaints were relieved by purely palliative interventions which, again, made them inconsistent with a ruptured appendix. In turn, those same ***experts testified*** that Ms. Meredith's pregnancy had actually "masked" the ruptured appendix thereby making it all-but-impossible to diagnose. Put simply, ample ***expert testimony*** established that ***Dr. Haile had at all times met the standard of care*** expected of him in his management and evaluation of Ms. Meredith.

And upon the conclusion of an extremely contentious and hard-fought, nine-day trial the jury ***ultimately agreed with those experts*** and found that Dr. Haile, Dr. Velasco and Norton Hospital had each met the standard of care expected of them in their respective care and treatment of Krystal Meredith. (Emphasis added).

("there is no 'magic question' that can rehabilitate a juror as impartiality is not technical question but a state of mind"), they cannot turn a blind eye to a close relationship with a witness whose involvement *admittedly* "may" prevent impartiality.

3. Juror 201435

The Court of Appeals split on whether to disqualify this juror. The majority held the record did not show his firm's relationship with Norton was ongoing. Citing Riddle and Fugate v. Commonwealth, 993 S.W.2d 931 (Ky. 1999), the majority required evidence the juror would seek a relationship with the lawyer in the future to strike for cause and found that omission fatal in this case. (Court of Appeals Opinion 9). Riddle reversed the trial court for failing to disqualify jurors who were potential clients of the Commonwealth Attorney. Id. at 310-311. Bowman v. Perkins noted "[j]ust as a person seeks the professional judgment of an attorney in personal legal matters, a person seeks the professional judgment of a physician in matters related to his or her personal health and wellness." Id. at 402.

The Court of Appeals in Riddle hesitated to hold an attorney-client relationship an automatic disqualifier based upon Altman, but proceeded to disqualify the jurors at issue because (1) they said they would hire the lawyer in the future, and (2) the relationship of attorney-client "is one of trust and confidence, and it is the duty of the courts to preserve it upon a high plane of moral responsibility for the protection of the public." Riddle, 864 S.W.2d at 311 (quoting In re: Gilbert, 118 S.W.2d 535, 537 (Ky. 1938)). Riddle could not transgress Altman directly, but this Court can extend it, and in the interest of preserving this fundamental right, it should.

The attorney-client relationship is a contractual one. Riddle, 864 S.W.2d at 311. (quoting Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. App. 1978). It vests attorneys with superior powers because of the attorney's quasi-judicial status as a court officer and responsibility to administer justice in the public interest. Id. It is a fiduciary relationship wherein the attorney "has the duty to exercise in all his relationships with his client-principal ***the most scrupulous*** honor, good faith and ***fidelity*** to his client's interest." Id. (Emphasis added).

Juror 201435 acknowledged that his law firm did work for Norton.[6] His firm indeed defended medical malpractice cases.[7] The trial court excluded Juror 214908, Dr. Klein, because one of Norton's attorneys represented him. (9-9-08, 3:33:20). There is no significant distinction between an attorney representing a juror and a juror whose law firm represents a defendant. Wildman represented Klein. Juror 201435's firm represented Norton. It is the flip side of the same coin. Juror 201435's relationship arguably is more significant because his firm represents a *party*. He as a juror would have the power to vote, and sway others to vote, in favor of his own client.

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Judge: Third row on this end?
Juror 201435: Uh 201435. I practice law and my law firm has done some work for Norton. (9-9-08, 11:16:58-11:17:08)

7

Mr. Johnson: Some of you all mentioned that you have heard the term standard of care before.
Mr. Johnson: Where have you heard that phrase?
Juror 201435: Our law firm does medical defense malpractice.
Mr. Johnson: What firm is that?
Juror 201435: Hall Render. (9/9/08, 2:47:50)

Honor, good faith, and fidelity to a client's interest is recognized not only by this Court and its cases, but also in its ethical rules. SCR 3.130(1.7), **Conflict of interest: current clients**, prohibits lawyers from representing clients when the representation poses a conflict of interest that will be adverse to another client, or when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, ***a former client***, or a third person, or by a ***personal interest of the lawyer***." SCR 3.130(1.7)(a)(1)(2) (emphasis added).

SCR 3.130(1.9), **Duties to former clients**, prohibits a lawyer from actions and representations that adversely would affect a *former* client. Both rules apply to lawyers and their law firms. SCR 3.130(1.10) **Imputation of conflicts of interest: general rule**, provides with limited exception that, "while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7 or 1.9 . . ." SCR 3.130(1.10)(a).

These rules are relevant discourse because they establish an inherent conflict between a lawyer's ethical responsibilities to a client/former client (Norton in this case) and his constitutional responsibilities to conform his views to the law's requirements and render a fair and impartial verdict based solely on the evidence. Wood, 178 S.W.3d at 516.

This Court's ethical rules charge a lawyer to act as an advocate for his (or his firms') present or past clients' interests,[8] and they prohibit actions to a present or past client's

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[8] The record is unclear whether Juror 201435's firm held Norton as a current or former client, but there is marginal distinction between the two in the rules, and if the courts desire to hold lawyers to a higher moral plane, it should make no difference when other jurors are available, and other cases are available in which this juror could have served.

detriment, with very limited exceptions. Juror 201435's selection in this case potentially would require him to render a verdict against his client's interest and his personal interest, or alternatively, to violate his sworn oath to act as an impartial juror. It puts him in an awkward position. It would have been against this juror's "personal interest" to impose a multi-million dollar judgment against Norton Hospital knowing that, through his law firm, Norton was responsible for putting food on his table.

B. As a matter of law and legal principle, courts should strike for cause when implied bias factors combine with reservations about impartiality, or when a juror confesses probable bias in a "close call."

In this case, the Court of Appeals heavily focused upon implied bias based on relationships and overlooked confessions of actual bias by the jurors. When a juror's responses indicate both actual and implied bias, or when a juror confesses with probability that he or she could not be fair and impartial in a close call, the juror should not sit. This Court should make both rules clear in the holding of this case.

Implied bias cases are usually fact specific because the relational factors are unique. As a result, trial judges try to determine whether a juror's relationship to a party or witness merits exclusion based upon how that relationship fits within the case law. It can be confusing and difficult. The focus of juror bias can shift away from fairness and focus more upon precedential pigeon-holing.

The implied bias cases are less clear and consistent because if the juror admits bias, there is no need to imply it. These cases tend to follow a pattern in which jurors typically claim to be fair and impartial, but the courts infer bias based on a "close relationship," regardless of the juror's professed impartiality. See e.g. Bowman, 135 S.W.3d at 402;

Altman, 850 S.W.2d at 45 (jurors indicated relationships as patients would not affect fairness or impartiality); Sholler v. Commonwealth, 969 S.W.2d 706, 709 (Ky. 1998); Stopher v. Commonwealth, 57 S.W.3d 787, 797 (Ky. 2001) (fact father was police officer would in no way affect ability to decide case.); Soto v. Commonwealth, 139 S.W.3d 827 (Ky. 2004).

This case presents an opportunity for the court to clarify that when a close relationship of questionable implied bias is combined with reservation or qualification about being impartial, the integrity of our jury system compels the courts to strike for cause.

1. Implied bias factors + impartiality reservations = strike for cause.

Indicia of implied bias plus reservations and qualifications that indicate actual bias should equal excusal for cause. Several cases have followed this formula, but our courts have not articulated it as a clear rule. Fugate excluded a former high school classmate and little league playmate of a prosecution witness (implied bias) that stated he "probably" would give that witness a "head start" (actual bias). Fugate 993 S.W.2d at 939. Davenport reversed because a juror's husband worked at the hospital and she was a former employee (implied bias), which caused her to admit she "probably" would be better to excuse herself (actual bias). Davenport 760 S.W.2d at 59. Shane reversed when the trial court failed to strike a juror who was acquainted with two detectives (implied bias) but further stated he had "an inside point of view" and was pro police (actual bias). Shane 243 S.W.3d at 337-38. His responses "indicated a ***probability*** that he could not enter the trial giving both sides a level playing field." Id. at 338 (emphasis added). The emerging pattern from these cases is that when implied bias combines with reservations about impartiality to indicate a ***"probability"***

that the juror cannot be fair and impartial, the appellate courts have found the trial court abused its discretion and ordered a new trial.

The Court of Appeals below insufficiently weighed the fact that two of these jurors questioned their own impartiality. In analyzing Juror 215397, whose children were delivered by Dr. Larry Griffin, the Court emphasized that the expert doctor was a witness instead of a party and that he was her former doctor, not her current doctor, which was not clear. (Court of Appeals 6). The combination of the implied bias factor of the relationship, plus this juror's reservations and qualifications about her impartiality, should result in striking her for cause.

The majority below focused on relationships more than impartiality in its evaluation of Juror 222785, whose son worked for Norton. The court stated:

> [A]side from the juror's indication that he "probably" would have a problem with a "close call," our review of voir dire does not reveal the existence of a "close relationship" between this juror and Appellees so as to mandate excusal for cause. Rather, in terms of degree, this juror's relationship with Appellees was relatively distant, considering that his son, rather than the juror, was employed by Norton Healthcare and that Norton Healthcare was not a party to this lawsuit. (Court of Appeals Opinion 9).

Should it matter that the technical party was Norton Hospitals, Inc. instead of the corporation that owns it? The juror drew no distinction; he simply said his son worked for Norton. To him there was no difference, and when he sits in the seat of judgement, that is all that matters. Should it matter that the juror's son worked for Norton instead of the juror himself, when the juror said it would cause him difficulty? It should not.

The Court of Appeals analyzed Ward, Davenport, and Soto, but declined to fit the facts of this case into any of their "close relationship" molds. The distinction that makes the

difference, however, is that in those cases most jurors at issue claimed an ability to remain fair and impartial. Ward 695 S.W.2d at 938-39; Davenport, 769 S.W.2d at 60; Soto, 139 S.W.3d at 849-850. Conversely, Juror 222785 said he would have problems if the case was a close call. This confessed difficulty, coupled with the fact that his son made his living from Norton, is decisive. Admitted bias plus implied bias should equal exclusion.

The Court of Appeals dismissed his confessed difficulty because "when the entire jury venire was asked whether they could remain fair and impartial, this juror did not indicate otherwise." (Court of Appeals Opinion 6-7). Consideration of a substantial constitutional right deserves a closer evaluation than to say he never indicated otherwise. A juror's simple agreement to a leading question does not pass the test. Montgomery, 819 S.W.2d at 716. "'No doubt each juror was sincere when he said he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father . . . .' Id. (quoting Irvin v. Dowd, 366 U.S. 717, 728 (1961). Montgomery referred to the idea that a juror could be rehabilitated after otherwise giving answers that would disqualify him as "[o]ne of the myths arising from the folklore surrounding jury selection." Montgomery, 819 S.W.2d at 717. Jurors' "'statements, given in response to leading questions, that they would disregard all previous information, opinions and relationships *should not have been taken at face value.*'" Id. at 718. (original emphasis) (quoting Marsch v. Commonwealth, 743 S.W.2d 830, 834 (Ky. 1988)).

Specific prevails over general in matters of the law, and this juror's answer was specific and revealing. Once spoken, no reasonable juror would recognize a need to revisit the issue in response to a generic question of the panel.

2. *The court should strike a juror for cause upon admission he or she could not be fair and impartial in a close call.*

A legal system that regards an impartial jury as a substantial, fundamental right must excuse a juror who confesses personal circumstances or beliefs probably would prevent impartiality if the evidence came down to a close call. "It is the *probability* of bias or prejudice that is determinative in ruling on a challenge for cause." Pennington v. Commonwealth, 316 S.W.2d 221, 224 (Ky. 1958); Shane, 243 S.W.3d at 338 (applying "probability" standard). Montgomery reversed when a juror indicated he may give a police officer more credibility and another said his concern that the prisoners were out of prison "might" influence his ability to be fair and impartial. Montgomery, 819 S.W.2d at 717.

Evidence in many cases presents a close call. It can hinge upon a single witness or exhibit. It can hinge upon a single juror's evaluation of a single witness or exhibit, including the witness's credibility. Resolution of the "close call" can determine freedom or imprisonment, life or death, payment or recovery. It can lead to victory or defeat for either side on any given day.

Given this Court's more recent holdings that closely safeguard the right to an impartial jury, see Fugett, Shane, supra, the Court should issue a clear holding that whenever a juror confesses that a personal fact or relationship "probably" would stand in the way of rendering a fair and impartial verdict in a close call, it is wiser, if not essential, to strike that juror and select another. That is what should have occurred with Juror 222785 in this case, whose son worked for Norton. Krystal Meredith's Estate and her infant daughter were deprived of their Constitutional rights because that did not occur.

This jury deliberated over eight (8) hours. The verdict for the two physicians was a 9/3 verdict. (RA 1572-78). The Grubbs had to use two of their strikes to exclude jurors the court should have excused for cause when the defendants exercised twelve strikes. This deprived the Grubbs of their right to peremptory strikes, leaving some jurors the Grubbs would have stricken. The jury ultimately seated included a commercial insurance biller for Baptist Healthcare System (213688); a registered nurse employed by Jewish Hospital (213987), and; a juror who's spouse was a transporter for Norton Suburban Hospital (223772). (Sealed Jury List in Record).

The dynamic of properly excluding jurors for cause is unpredictable, which is why it is automatic reversible error. Failure to exclude a single juror can constitute reversible error. In this case, the trial court should have excluded three.

II. THE TRIAL COURT IMPROPERLY DENIED THE GRUBBS' MOTION FOR SUMMARY JUDGMENT THAT DRS. HAILE AND VELASCO WERE AGENTS OF NORTON HOSPITAL.

The Grubbs preserved this issue in their Response to Norton's Motion for Summary Judgment on agency and their cross-motion on the issue. (RA 1312-1350).

Interpretation of a contract is a matter of law subject to *de novo* review. Cumberland Valley Contr. Inc., v. Bell Co. Coal Corp., 238 S.W.3d 644, 647 (Ky. 2007). Important to this case is the principle that a contract is construed against its drafter, which in this case is Norton. Spurlock v. Begley, 657 S.W.3d 657, 660-61 (Ky. 2010).

The contract at issue was a Physician Employment Agreement (attached Exhibit 6) between Community Medical Associates, Inc., d/b/a Norton Medical Associates, and Dr. Velasco. As seen below, for all practical purposes it was a contract between Norton

Healthcare, of which Norton Hospitals, Inc., is a subsidiary, and Dr. Velasco. In it, Norton claimed complete ownership of Krystal Meredith as a patient, and it dictated that Dr. Velasco, or his designee, provide care for "Norton patients." To a degree, it imposed restrictions on how and where that care could take place. The Grubbs contend that when Norton took ownership of Krystal as *its* patient, it undertook responsibility for her care, and those it entrusted to render that care, Drs. Velasco and Haile, became its agents.

A. Norton took ownership of Krystal Meredith under its Physician Employment Agreement and thereby was responsible for caring for her.

When a party creates a contractual duty, he is bound to make it good. Rogers Bros. Coal Co. v. Day, 1 S.W.2d 540 (Ky. 1927). In this contract, Norton stripped Dr. Velasco of Krystal Meredith as his patient and assumed ownership of her. In defining Dr. Velasco's duties, the Agreement claims exclusive ownership of all patients of Norton, which it specifically defines to include patients of Norton Hospital's, Inc.:

> For purposes of this Agreement, **"Norton patients"** (original emphasis) shall refer to all patients of Physician, Community Medical Group, PSC, or medical practices of **"Norton Hospitals, Inc."** existing prior to this Employment Agreement and any patient seen by any Norton-employed physician or **"Norton Hospitals, Inc."**-employed physician during the term of this agreement. . . .

(See attached Exhibit 6, page 1; RA 951; emphasis added).

One of the definitions of "Norton patients," and the one applicable here, is a patient of the "medical practices of Norton Hospitals, Inc." Krystal Meredith fits that definition, for she was a "Norton patient," as defined by the Agreement, by virtue of her presentation to the downtown Norton Hospital. When Norton brought her within the definition of patients Dr. Velasco was obligated to treat, it thereby imposed a contractual duty upon Dr. Velasco to

render care to this "Norton patient," and as such, made Dr. Velasco an agent of Norton Hospitals, Inc.

The Court of Appeals noted "'Norton patients' refers to patients of CMS d/b/a/ Norton Medical Associates," (Court of Appeals Opinion 14), but the language above makes this patently untrue. When Krystal sought care from Dr. Velasco as a Norton physician, and particularly when she sought care at its hospital, Norton assumed full responsibility for her and her care.

This assumption of responsibility becomes more clear given the control Norton exercised over its patient, while restricting Dr. Velasco's rights and responsibilities. Agency is defined as a fiduciary relationship in which one agrees that another can act on his behalf, but subject to his control. Phelps v. Louisville Water Co., 103 S.W.3d 46, 50 (Ky. 2003). "Under Kentucky law, the right to control is considered the most critical element in determining whether an agency relationship exists." Id. If the control element is paramount, these facts make clear that Norton controlled Dr. Velasco, and hence, his designee, Dr. Haile.

The "Duties" section quoted above provides that Dr. Velasco does not care for Norton's patients at his own direction, but at Norton's:

> At the direction of Norton, Physician shall provide services as a physician, as defined in Exhibit A hereto, on a full-time basis.....and shall render services to Norton patients.

The "Duties" section prohibits him from working for anyone else. He was not allowed to see or treat patients at any non-Norton facility:

> During Physician's employment and except as otherwise permitted by Norton, such employment shall be Physician's only employment or engagement and physician shall not perform medical services of any type,

> with or without remuneration, whether as principal, employee, agent or independent contractor, for any third party or at any **"Non-Norton"** location.....

(See attached Exhibit 6, page 1; RA 951).

On page 4, paragraph 8, **Patients and Records**, the Agreement provides that all Norton patients (including patients of Norton Hospitals, Inc. like Krystal Meredith) are the property of Norton. Paragraph 8 provides in relevant part:

> All patient files, financial records and other records, pertaining to Norton Patients and all personnel records pertaining to compensation and expenses of Physician within the scope of Physician's employment shall at all times be the property of Norton.....Physician acknowledges that (except as otherwise agreed in writing) ***all patients seen by Physician during the term of Physician's employment with Norton are patients of Norton and are not patients of Physician.*** (Emphasis added).

The contract provides Dr. Velasco must participate in a call schedule, and a later contract Addendum reaffirms that obligation, imposed by Norton. (RA 969).

In Exhibit B of the Agreement, **COMPENSATION AND BENEFITS**, paragraph 3, Norton agrees to insure Dr. Velasco as follows:

> Physician may also participate in Norton's pension plan on terms available to other physician employees of Norton. Medical malpractice insurance will be provided with coverage limits of not less than that required by the Board of Trustees of Norton Healthcare for members of its Medical Staff, with coverage furnished by Norton through Physician's current professional liability insurance carrier, another selected by Norton, or Norton's self-insured trust, such that Norton shall pay any applicable premiums for such coverage.

(See Exhibit B to Agreement, attached hereto as Exhibit 6, RA 966, Emphasis added).

The agreement indicates that Krystal Meredith was not Dr. Velasco's patient, but a patient of Norton Hospital. Norton was responsible for caring for her, and for insuring that

a doctor saw her because she was Norton's patient. Norton exercised complete control over Dr. Velasco, ***and*** agreed to put its money where its mouth was by insuring him for his treatment of their patients. This rendered Krystal Meredith a Norton Hospital patient and Velasco and Haile Norton Hospital agents.

William Ritchie, employed by Norton Healthcare and designated by Norton to testify by deposition about the subject contract, testified that Norton Healthcare provides Dr. Velasco's malpractice insurance. (Ritchie 9). Norton Healthcare writes his payroll check. (Ritchie 9-10). Dr. Velasco cannot practice anywhere other than Norton's without Norton's written consent. (Ritchie 16). Physicians like Dr. Velasco make this agreement knowing that they will be bound to any contracts Norton's has with medical providers, insurance companies, HMOs, etc. (Ritchie 17).

Norton took full ownership of the patient, all matters incident to the patient, *and* the doctor, to the exclusion of any other medical corporation. Dr. Velasco would not have been allowed to deliver Krystal's child at Louisville's Baptist Hospital East or any other non-Norton facility. Norton owned him. More importantly, Norton owned Krystal.

B. The contract was not simply between Community Medical Associates and Velasco, but Norton Healthcare in general, which includes the Defendant Norton Hospitals, Inc.

One of the confusing questions has been, "who is Norton?" The Court of Appeals held the Grubbs misinterpreted the agreement because "Norton" referred to CMA d/b/a/ Norton Medical Associates, and the contract was between that entity and Dr. Velasco. While true on its face, the lower courts failed to recognize that (1) the critical component of the Agreement was not so much who owned Dr. Velasco as much as it was about who owned

Krystal Meredith, and (2) Norton's own designee to testify about the Agreement, William Ritchie, said the Agreement really was made on behalf of and for the benefit of Norton Healthcare.

William Ritchie testified references to "Norton" referred to "Norton Healthcare," not Community Medical Associates. Norton Hospitals is part of Norton Healthcare. Several key facts illustrate that the contract really is for the preservation, protection, and benefit of Norton Healthcare, not just Community Medical Associates:

1. The Norton Healthcare legal department is a signatory to the contract, and the contract requires their approval. This is true for the original contract dated 8-16-2005 (contract page 11, RA 961) and the addenda. (RA 970 and 972).

2. All notices required under the contract shall be copied to Norton Healthcare, Inc.'s general counsel at the Norton Healthcare Inc. address. (Contract page 9, RA 959).

3. The "Rules, Regulations; Medical Staff Membership" section subjects the physician to all "Norton Healthcare" policies and rules and states that no rules, regulations or handbook issued by "Norton Healthcare" creates any rights in favor of the physician. (Contract page 3, 4a).

4. The contract requires the physician to procure and maintain membership and privileges at "Norton Healthcare Louisville Hospitals Medical Staff." (Id. at 4c).

5. Section 11, "Restrictive Covenants and Confidentiality of Information," contains provisions to benefit all Norton affiliates by stating that the physician signatory should not disrupt any relationship or "recruit any person who is an employee of Norton or any Affiliate of Norton." That same paragraph defines "**Affiliate**" (original emphasis) as

"any entity which controls, is controlled by, or is under common control with Norton." (Contract page 7, paragraph 11a). This includes Norton Hospitals, Inc.

6. The contract regulates the physician's access and treatment of "Proprietary Information" regarding the operations of "Norton and/or its Affiliates," which it collectively refers to as "Protected Parties." (Contract page 7, paragraph 11b).

7. The contract makes "Protected Parties," such as ***Norton Hospitals***, third party beneficiaries: "The parties further acknowledge and agree that the protected parties not parties to this Agreement ***are hereby specifically made third-party beneficiaries*** of this section 11 ***and shall have the power to enforce the provisions hereof as if a party to this Agreement."*** In this provision, the contract actually confers rights upon Norton Healthcare and any and all Norton affiliates that fall under that umbrella, such as Norton Hospitals, Inc. This goes far beyond Community Medical Associates. (Contract page 8, paragraph 11c, emphasis added).

8. Exhibit B to the contract, "Compensation and Benefits," interchanges Norton and Norton Healthcare where it provides:

> Medical malpractice insurance will be provided with coverage limits of not less than that required by the Board of Trustees of ***Norton Healthcare*** for members of its Medical Staff with coverage furnished by Norton through physician's current professional liability insurance carrier, another carrier selected by Norton, or Norton's self-insured trust, such that Norton shall pay any applicable premiums for such coverage during the term hereof at the current rate... (Emphasis added).

Mr. Ritchie is employed by Norton Healthcare. (Ritchie 4). Norton Healthcare is the holding company or parent company of all Norton subsidiary corporations. Id. Community Medical Associates entered into Physician's Employment Agreements as a wholly owned

subsidiary of Norton Healthcare. Id. at 5. Norton Healthcare owns Norton Hospitals, Inc. Id. at 8. Norton Healthcare pays Dr. Velasco. Id. at 9. Community Medical Associates does NOT pay Dr. Velasco's medical negligence insurance; Norton Healthcare does. Id. at 11. When asked to interpret the contract provision at issue, Dr. Ritchie repeatedly said it referred to Norton Healthcare.[9]

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[9] Q. "Whereas, Norton desires to engage the services of a physician" – "of physician as a physician licensed to practice in the Commonwealth of Kentucky or the state of Indiana." What Norton is it referring to?
A. Norton Healthcare.
(Ritchie 13)

* * *

Q. And again, anytime I use the word "Norton," we're referring to Norton's Healthcare.
A. Yes.
(Ritchie Page 14)

* * *

Q. Okay. And Under paragraph number 1 it says, "Norton employs physician to perform the duties associated with the medical care operations of Norton, and physician hereby accepts such employment upon all the terms and conditions setforth in this agreement," again referring to Norton Healthcare?
A. Yes.
Q. Under number 2, "At the directions of Norton, physicians shall provide services as a physician on a full-time basis and shall work in the medical office building located at 234 Gray Street, or at such locations as Norton shall direct, and shall render services to Norton's patients." That's what that states, isn't it?
A. Yes.

* * *

Q. Paragraph 2 continues to say, "For purposes of this Agreement, Norton's 'patients'" and that's referring to Norton Healthcare patients, correct?
A. Yes.

* * *

Q. "Patients and records: All patients' files financial records and other records pertaining to Norton's patients and all personnel records pertaining to compensation and expenses of physician within the scope of physician's employment shall at all times be the property of Norton" is that what it says?
A. Yes.

* * *

The salary and benefit section on page 16 refers to Norton Healthcare's benefits. (Ritchie 28). The malpractice liability coverage is furnished by Norton Healthcare for Dr. Velasco. (Id. at 29). Attached to Mr. Ritchie's deposition are two insurance policies that Norton Hospitals, Inc. furnished. In both, Norton Healthcare, Inc. is the named insured, and Community Medical Associates and Norton Hospitals, Inc. appear on the amendatory endorsement. (See Ritchie deposition Exhibit 2, Bates Stamps NH-00307, NH-00339; Ritchie deposition Exhibit 3 NH-00349, NH-00375).

This was the sworn testimony of the individual Norton produced to testify about the contract at issue. In virtually every instance, Mr. Ritchie affirmed that the intent of the contract was used interchangeably between Norton Healthcare and all its subsidiaries and Dr. Velasco, not just Community Medical Associates (Norton Hospitals, Inc.) and Dr. Velasco.

Whether these interchangeable uses of "Norton" occurred as a result of inartful drafting or a clever legal design to reap broader protections, while simultaneously attempting to minimize liability, Norton as drafter of the contract used the term "Norton" interchangeably at times, and even more clearly, intended the benefit of the contract to inure to Norton Healthcare and all of its affiliates, including Norton Hospitals, Inc. as a whole. As drafter of the contract, the law construes it against them.

When Norton Healthcare imposed duties upon Dr. Velasco to "provide services as a physician" to all "Norton patients," specifically including all patients of Norton Hospital, Inc., it became more than a simple agreement between Community Medical Associates and

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Q. And we're talking about Norton's Healthcare?
A. Yes.
(Ritchie 20-21); (See also page 22).

Dr. Velasco. It imposed a duty upon Dr. Velasco to care for Krystal Meredith on behalf of Norton Hospitals because she was a patient of Norton Hospitals, Inc.

The Court of Appeals noted that even if the Agreement's reference to "Norton" meant "Norton Healthcare," which it clearly does, the Grubbs never sued Norton Healthcare. That should make no difference. As shown above, particularly in item 7 on page 34 where the hospital becomes a third-party beneficiary, there is great interchangeability among all Norton affiliates when it comes to this contract. Norton Hospitals, Inc. was a Defendant in this case. It is owned by Norton's Healthcare, (Ritchie 8), and it was Krystal's presentation to their hospital where the negligence occurred that brought her within Norton's responsibility under this agreement.

C. Dr. Haile, as a delegee of Norton and Dr. Velasco, is Norton's agent.

Physicians who act jointly in patient care are answerable for their own negligence and vicariously liable for the acts of the other. Coon v. Dryden, 46 S.W.3d 81, 89 (Mo. App. 2001) (quoting 70 C.J.S. *Physicians and Surgeons* § 84 (1987)). Because patients look to their own doctor or hospital to provide care, alleged independent contractors brought in by either can result in a finding of agency and liability. Parker v. Freilich, 803 A.D.2d 738, 746 (Pa. Super. 2002). Using ostensible agency principles, and borrowing from the Restatement (Second) of Agency, Section 267 and the Restatement (Second) of Torts, Section 429, the courts have imposed liability when one reasonably believes the services are being performed on behalf of another. In this case, both the hospital and Dr. Velasco selected Dr. Haile to care for Krystal Meredith. The hospital's voice was stronger because the contract makes clear Meredith was not Dr. Velasco's patient.

Kentucky undisputedly acknowledges the theory of ostensible agency and holds an apparent principal responsible for the acts of an actual or apparent agent in a case such as this. Williams v. St. Claire Med. Ctr., 657 S.W.2d 590, 595 (Ky. App. 1983); Paintsville Hospital Co. v. Rose, 683 S.W.2d 255 (Ky., 1985); Waddle v. Galen, 131 S.W.3d 361 (Ky. App. 2004). Norton 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. Norton otherwise may not have this duty, but it specifically assumed it pursuant to the contract and by claiming ownership of Krystal Meredith. Dr. Haile had no power or ability to frustrate that agreement. He is and was bound by the terms imposed upon Dr. Velasco because he acted on Dr. Velasco's behalf, covered for him, and jointly participated in Krystal's care.

Dr. Haile became a Norton agent by virtue of his care of Norton's and/or Dr. Velasco's patient. Exhibit A to the Norton contract states one of Dr. Velasco's duties is to appropriately refer Norton patients to other physicians. This encompasses Dr. Haile. Exhibit A provides in relevant part:

> As used in the Physician Employment Agreement to which this document is an exhibit, the phrase "essential functions of employment" refers to the following duties of Physician:
>
> * * *
>
> 4. Appropriately referring the patient to other physicians, including specialists and other health care providers, when and if needed;

(See Exhibit A to Agreement, Paragraph 4, attached hereto as Exhibit 6, RA 962).

The Court of Appeals noted that the admissions forms the Grubbs signed contained language to indicate its physicians were independent contractors, which in some cases has

precluded a finding of ostensible agency. See Floyd v. Humana of Virginia, Inc., 787 S.W.2d 267 (Ky. App. 1989); Roberts v. Galen of Virginia, Inc., 111 F.3d 405 (6th Cir. 1997); Vandevelde v. Poppens, 552 F. Supp.2d 662 (W.D. Ky 2008). These cases do not apply given the control and ownership secured by the Physician Employment Agreement. Viewing Dr. Velasco as an independent contractor creates a legal fiction that is completely untrue.

The law does not favor legal fictions. In the insurance context, our courts repeatedly have held that an insurer cannot hide behind another party when it has a contractual relationship with the insured. Wheeler v. Creekmore, 469 S.W.2d 559, 563 (Ky. 1971); Coots v. Allstate Ins. Co., 853 S.W.2d 895, 903 (Ky. 1993); Earle v. Cobb, 156 S.W.3d 257, 261-62 (Ky. App. 2005).

While perhaps true that some of the physician and staff within the hospital may be independent contractors, the Physician Employment Agreement relevant to this case proves the direct opposite. The courts should not allow a hospital to rest upon boilerplate fine print in its admission agreement, which usually is signed under dire circumstances and not read, when behind the scenes it owns the patient and doctor pursuant to a contract it procured. The Grubbs argue ostensible agency as an alternative theory, but in truth the Physician Employment Agreement makes actual agency clear.

D. Dr. Haile was a dual agent.

An agent may serve two (2) masters if both consent. Thompson-Starrett Co. v. Mason's Adm'rs, 201 S.W.2d 876, 880 (Ky. 1947). Knowledge can imply consent. Id. More specifically in the hospital context, City of Somerset v. Hart, 549 S.W.2d 814 (Ky. 1977)

"comes into play when interns, nurses or other hospital personnel assist a physician or surgeon as he treats a patient." Id. at 816. In that case, someone left a scalpel blade in the plaintiff, and she sued the surgeon and hospital. The hospital claimed its nurse was following the orders of the surgeon and not liable, and the court held the nurse was an agent of both. The High Court rejected the assumption "that only one of them could have been liable because the hospital employee could not simultaneously have been the servant of both," and held: "This is to ignore the legal principle that a person may be the servant of two masters, not joint employers." Id. at 817.

The Restatement Second of Agency Section 226, cited by City of Somerset, states in Comment b:

> *b Where two masters share services.* Two persons may agree to employ a servant together or to share the services of a servant. If there is one agreement with both of them, the actor is the servant of both at such times as the servant is subject to joint control. If, however, it is agreed that control shall alternate, the actor is the servant only of the one for whom he is acting at the moment.

Dr. Velasco and Dr. Haile both participated in Krystal's treatment. Dr. Haile acted on behalf of and as a substitute for Dr. Velasco. The two were in joint concert.

Several things are clear: (1) Krystal was Norton Hospital Inc.'s patient by virtue of the duties it undertook in its contract. (2) Dr. Velasco only could delegate Krystal's care to Dr. Haile with Norton's consent pursuant to that contract. (3) Krystal presented to both Drs. Velasco and Haile, and both cared for her. (4) Norton employees called both doctors to render care to *its* patient. (5) Dr. Haile cared for Krystal on behalf of Dr. Velasco and Norton. Based on the foregoing, the trial court should have denied Norton's Motion for Summary Judgment on agency and granted the Grubbs' Motion for Summary Judgment.

III. THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE THAT NORTON INSURED DRS. VELASCO AND HAILE.

Norton Hospital has a self insurance trust that insures the hospital and "Affiliates" that would include Dr. Velasco and Dr. Haile. The fact that all three Defendants share the same insurance trust/coverage is relevant to prove bias, agency and control. KRE 411 is not an absolute exclusion of evidence of liability insurance. It has exceptions that apply here. See Robert G. Lawson, Kentucky Evidence Law Handbook, § 2.60 (4th ed. 2003). The rule provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. ***This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.*** (emphasis added).

Kentucky allows evidence of bias. Nunnellee v. Nunnellee, 415 S.W.2d 114 (Ky. 1967) (proper to show relationship between witness and insurance company, and fact that defendant covered by insurance not reversible error in car wreck case). Baker v. Kammerer, 187 S.W.3d 292 (Ky. 2006) emphasized the "fundamental importance of the ability to cross examine as to bias." Id. at 296 (new trial because counsel prohibited from introducing evidence that witness was insurance investigator.) "The law favors the admission of evidence that is relevant to a jury's determination of a witness's credibility." Id. at 295. According to Lawson, "[t]he crucial inquiry . . . is whether evidence tends to show the kind of relationship between the witness and one of the parties (or the dispute) that might cause his or her testimony to be slanted one way or the other." Lawson, § 4.10[1].

Bias or prejudice of a witness is an enumerated exclusion to KRE 411, See also Mitchell v. Glimm, 819 So. 2d 548 (Miss. App. 2002) (reversible error to exclude evidence of liability insurance to prove bias on part of expert witness employed by company deriving ten percent of income from driver's insurer; traditional rule of exclusion must yield to prove bias or prejudice of a witness). Pantaleo v. Our Lady of Resurrection Med. Center, 696 N.E.2d 717 (Ill. App. 1998) (evidence of insurance admissible to show hospital insured emergency room physician; limiting instruction given).

The list of exceptions to Rule 411 regarding insurance is not exclusive, but simply bars admission of insurance evidence as an independent fact. Carrier v. Starnes, 463 S.E.2d 393 (N.C. App. 1995). "The Rule 411 bar against insurance evidence does not come into play if the evidence is offered to achieve a collateral purpose." Id at 516. The agency and control exceptions to KRE 411 apply because of this unanimity of defense.

The Physician Employment Agreement shows Norton insured Dr. Velasco and Dr. Haile by virtue of his assumption of Dr. Velasco's duties. The Self Insurance Retention Trust sealed of record covers these physicians as "Affiliates." The three defendants were unified in their defense that none of them did anything wrong. They did not criticize one another for any action or inaction, and the unanimity of their common defense was underscored by the presence of a common insurer, which is relevant to the issues of bias, agency and control.

Norton's nurses delayed getting Dr. Haile the labs by over five and a half hours. (Plaintiffs' Exhibit 8; 9-12-08, 11:17, Haile). Dr. Haile never criticized them for it, even though Norton's nurse expert indicated such a delay was unacceptable. (9-17-08, 3:10:28,

Kelley-Moran). When three parties are united in their defense, yet viewed as sufficiently antagonistic to receive peremptory strikes and unite against the plaintiffs without ever criticizing each other when there were grounds to do so, the jury should know the truth. The law does not favor legal fictions, and the truth is that pursuant to the Physician Employment Agreement and the Norton Insurance Trust, the doctors did not bear responsibility for an adverse judgment. Norton did.

CONCLUSION

WHEREFORE, The Appellants Grubb ask this Court to reverse the judgment below and to grant a new trial with instructions to correct the errors alleged herein on retrial.

Respectfully submitted,

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APPENDIX

1. **Order Denying the Motion to Alter, Amend or Vacate and Order Denying the Motion for a New Trial entered December 2, 2008. (RA 1651-1659)**

2. **Judgment entered September 24, 2008. (RA 1579-1580)**

3. **Order granting Norton Hospital's Motion for Partial Summary Judgment regarding Agency entered September 5, 2008, (RA 1492-1495), and Amended Memorandum and Order entered September 8, 2008.[1] (RA 1498-1506)**

4. **Order Granting Defendants' Motions in Limine to preclude introduction of common insurance entered September 5, 2008. (RA 1496-1497)**

5. **Court of Appeals' Opinion, July 16, 2010.**

6. **Physician Employment Agreement. (RA 951-972)**

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[1] The sole purpose of the Amended Order was to correct conclusory language regarding Norton's continued presence in the case and at trial.