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

# REPLY BRIEF OF APPELLANTS LINDA SUE GRUBB AND LAYMAN GRUBB

Submitted by:

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

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

SCOTT ROBY
600 W. Main Street
Suite 100
Louisville, Kentucky 40202
(502) 540-5700
Counsel for Appellants

## 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, First Trust Center, 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 10th day of October, 2012. It is further certified that the record on appeal was not removed from the Clerk of the Circuit Court.

CHADWICK N. GARDNER

## STATEMENT OF POINTS AND AUTHORITIES

## ARGUMENT

Dr. Haile portrays this trial as "staunchly defended" by OB/GYN and fetal medicine experts. (Haile Brief 4). Norton describes the defenses as containing "extensive expert testimony." (Norton Brief 7). There was only one expert OB/GYN witness who testified live for the defense, and it was Dr. Larry Griffin. He was good; he was local; and he delivered by Cesarean section the children of one of the jurors at issue.

Somewhat less important to the issues before the Court, but inaccurate, is Dr. Velasco's claim that the record contains no evidence that Dr. Velasco was unaware of Krystal Meredith's history up to the point of delivery. (Velasco Brief 2). Appellant Grubbs' Brief at page 5 explains, with citations, that when Dr. Velasco came to see Krystal Monday morning, he was unaware of her weekend hospital course and never knew anything about her hospital presentations on Friday or throughout the weekend until her exploratory surgery Monday night, which occurred well after Dr. Velasco delivered her baby. (Velasco, 9-12-08, 3:20:37-3:25).

Without citation, Dr. Haile claims he followed Krystal and told the nursing staff to keep him advised, but at trial, he testified that the lab results he ordered showed signs of infection, but were not reported to him until he actually called the nurse's desk to obtain the results five hours and thirty-five minutes later. (Plaintiff's Exhibit 8; 9-12–08, 11:17. Haile). He acknowledged it was important for him to get the lab results back as soon as possible, as did Norton's own nursing expert. (9-12-08, 11:14:51, Haile; 9-17-08, 3:10:28, Kelley-Moran). The case against Norton was broader than failing to follow the chain of command.

Krystal Meredith did not want to return home, as confirmed by her repeated visits to the hospital to obtain relief. Laymon Grubb actually called–and kept calling–Dr. Haile to ask why he kept sending his daughter home. Dr. Haile finally picked up the phone and told Laymon there was nothing wrong with Krystal and that "she wants us to take that baby early, and we're not going to do it." (9-17-08, 9:55:40, Mr. Grubb).

With respect to the legal issues, the facts of record sufficiently merited excusal for cause of three jurors. The law does not require the Grubbs to use peremptory strikes on all of them; they simply must use all of their strikes. The Physician Employment Agreement between Norton and Dr. Velasco reached far beyond Norton's Community Medical Associates, as confirmed by the person Norton designated to testify about it. Norton did provide insurance for the physicians at issue, and the jury should have known that.

## I. THE GRUBBS LOST THEIR FUNDAMENTAL RIGHT TO A FAIR AND IMPARTIAL JURY WHEN THE TRIAL COURT FAILED TO EXCLUDE THREE JURORS FOR CAUSE.

Though trial judges enjoy discretion, the court will not hesitate to find an abuse of discretion when doubts about impartiality are patent on the record. *Rankin v. Commonwealth*, 227 S.W.3d 492, 497 (Ky. 2010). Reasonable grounds to excuse the juror exist when he or she cannot act with ***"entire*** impartiality." *Id.* at 496 (emphasis added).

The parties' discussions about how the present facts do or do not fit within existing case law illustrate the benefit of a guiding framework for analysis. While trial judges have discretion on this issue, as they should, they look to published precedent based upon specific facts, reviewed under an abuse of discretion standard. This Court can assist by providing a guiding analytical framework indicating that when implied bias factors combine with

expressed reservations, the trial judge, while having discretion, would be hard-pressed to keep the juror. It can provide guidance by holding that when a juror openly professes he "probably" would have difficulty being fair in a close call, the wiser course is to exclude the juror. Such a holding does not eliminate discretion, but it does refine when that discretion approaches abuse by clarifying its bounds when faced with measurable factors or clearly expressed reservations. A more identifiable standard may serve to reduce the number of appeals on this issue that appear to have somewhat inconsistent results when one attempts to compare factual scenarios.

Appellees criticize the Grubbs for asking the Court to consider what Appellees mock as a "formulaic approach." Though the Grubbs have described it as a simple formula, it is nothing more than a common sense approach mirrored, though not succinctly stated, by the case law. As discussed in the Grubbs' Brief on pages 23-24, several cases appear to follow a formula resulting in excusal for cause where both implied bias factors and professed actual bias exist. *See Fugate v. Commonwealth,* 933 S.W.2d 931, 933 (Ky. 1999); *Shane v. Commonwealth,* 243 S.W.3d 336, 337-38 (Ky. 2008); *Davenport v. Ephriam McDowell Memorial Hosp. Inc.*, 769 S.W.2d 56, 59 (Ky. App. 1988).

Appellees formulate many unanswered questions to claim the Grubbs did not develop a record; however, two jurors expressed reservations about their ability to remain impartial due to relational factors with a party and a witness. The other possessed a fiduciary relationship, via his law firm, with a party. These statements in the record, combined with the law's insistence on impartiality, compelled excusal for cause.

### A. Juror 222785, Mr. Pacanowski

This juror's son was a purchasing manager at Norton for about ten years and testified "if it was a close call like I said I probably have problems with it." (9-9-08, 12:10:08-12:10:19). Appellees state that the juror did not have a direct relationship with a party, but his son did instead, and it was unclear what branch of Norton employed his son.

That the relationship involved his son instead of the juror makes no difference when he plainly confessed that because of that relationship he would "probably have problems" in a close call. Familial relationships long have been a basis to strike for cause. *Davenport* reversed a failure to exclude when a juror's spouse worked at the hospital. *Id.* at 59. The parent-child relationship is at least equally close. Appellees' implication that he more likely would have difficulty if the juror himself worked for Norton, or that he would be less willing to create problems for himself than his son by a potentially awarding a multi-million dollar verdict against his son's employer, defies common sense and the juror's statement.

Norton argues reversal would require the Court to hold a trial court must strike a juror any time a juror's family member has a relationship to the case. That is not true, and it is not what the Grubbs urge. However, if a potential juror or family member has a relationship with a party, ***and*** professes a reservation or difficulty about being fair and impartial to a degree of probability, then the court should exclude for cause to preserve the fundamental right to an impartial jury. It is not necessarily the relationship alone, but a professed difficulty being fair and impartial because of it that creates the problem.

Any failure to identify specifically which branch of "Norton" employed this juror's son makes no difference because the juror made no distinction. When the trial court

presented the parties, she identified them and their counsel. In response, this juror associated Norton Hospitals, Inc., with his son's employer, and for good reason. Few people in Jefferson County distinguish between the multiple corporate entities of the Norton Healthcare system. The only thing that matters is that this juror made a close association between his son and one of the Defendants that "probably" would cause him difficulty. The focus should not be upon the technicality of which Norton entity may control his son's work or sign his paycheck, but instead, upon whether the affiliation itself was sufficient to create admitted bias in the juror. This man said it "probably" would.

**B. Juror 215397, Ms. Guelda**

Dr. Haile's Brief appears to acknowledge "an extraordinary level of trust and confidence" between a physician-patient and attorney-client that is sufficient to imply bias, but submits it apparently evaporates when the relationship is over. Dr. Haile acknowledged implied bias during active physician-patient relationships because they are "based upon a unique level of trust and confidence between the juror and the party, his counsel or witness." (Haile Brief 8). His Brief explains:

> For example, the relationship between a physician and her patient is one based upon the extraordinary level of trust and confidence placed in the physician to ensure his patient's health, safety and welfare to the best of her ability. Similarly, clients place an inordinate amount of trust in their attorneys to protect their interests and to keep confidential their communications. Both are fiduciary relationships. And the degree of trust and confidence necessary to sustain either such relationship provides a trial court with good and sufficient indicia that the patient or client will inherently and, perhaps even subconsciously, be inclined to side with the person in whom he or she has placed that extraordinary level of trust and confidence. Consequently, if the relationship remains an active one, it only makes sense to strike the juror based upon "presumed" or "implied" bias even if he proclaims an ability to be fair and impartial.

> But when such relationships have terminated, they simply do not carry with them the same indicia of trust, confidence or, in turn, the potential for bias in favor of the relationship's other half. After all, there has to be some reason for the termination. (Haile Brief pp. 8-9)

Dr. Haile's statement about this "extraordinary level of trust and confidence" precisely explains why this Court should imply bias. Dr. Haile's argument that this relationship he describes as having a "unique level of trust and confidence," a "heightened degree of trust and confidence" and an "extraordinary level of trust and confidence" evaporates upon termination is simply unfounded. Were that true, the juror at issue would have lost her extraordinary trust after Dr. Griffin delivered her first baby, but suddenly regained it when she presented for him to monitor and deliver her second. Dr. Haile's suggestion that the lack of trust and confidence in the relationship is lost upon termination because "there has to be some reason for the termination" is implausible.

Nevertheless, there was more with this juror. She gave no indication her trust and confidence in this only live defense expert had disappeared. Instead, when asked whether that relationship would cause the fact that he delivered her children to give more credence to his testimony, she said "it may." (9-9-08, 11:49:45). When pressed further and asked if his testimony would cause her . . ., she interrupted and said, "No. Not as long as he's not involved." (9-9-08, 11:50:30). The parties have quibbled about what this "involvement" means and whether it meant as a party or a witness, but it really does not matter. There is qualification in this answer, and even if there was not, the case law overlooks claims of lack of bias when it is apparent it exists. *See Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985); *Bowman v. Perkins*, 135 S.W.3d 399, 402 (Ky. 2004).

Appellees have not disputed that expert testimony is a quintessential element of medical malpractice cases. Their factual statements certainly emphasize the importance of expert testimony to justify the result in this case. A case like this cannot get to a jury without expert testimony, and the ultimate question of liability hinges upon whose expert the jury believes. When the ultimate question is whom do you trust to tell you the truth about what happened and what was expected, the testifying doctor's patient should not decide that question when her own doctor is giving the answer.

When this juror said she "may" give Dr. Griffin more credence simply because he delivered her children, she professed that she may consider something beyond the evidence in the case. When she further elaborated that her impartiality was qualified on his lack of involvement, the court, in the interest of preserving impartiality, should recognize she falls short of "entire" impartiality, *see Rankin, supra,* based upon the understanding of the physician–patient bond (acknowledged by Dr. Haile) and the potential juror's expressed reservations. The issue with this juror does not concern implied bias alone. It concerns implied bias, ***plus*** professed reservations.

Attempting to distinguish Justices Leibson and Lambert's dissenting and concurring opinions in *Altman*, Norton argues the "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." (Norton 27-28). A relationship with a witness merits excusal. *See Ratliff v. Commonwealth*, 194 S.W.3d 258 (Ky. 2006); *Fugate*, 933 S.W.3d at 938-39. Elsewhere, Norton inconsistently states that when a juror expresses a problem, the court's first question should be "why" and that if

> 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.***

(Norton Brief 16, emphasis added). Norton concedes a plausible likelihood that a juror "closely related to a key witness in the case," would be more likely to have a difficult time being impartial. This is precisely what the Grubbs are arguing. The argument that the patient may not currently see the doctor, or that the juror's child rather that himself works for one of the Defendants, or that the attorney's firm rather than himself has represented the client, are implausible when they are what connect the juror to the case he or she will decide. These distinctions are too subtle to have significance in a case where jurors professed reservations and difficulty like those here. When weighed against the fundamental right to an impartial jury, these subtle distinctions, accompanied by expressed reservation, must fail.

### C. Juror 201435, Mr. DeShazer

As quoted above, Norton admits an attorney-client relationship, or employment by one of the parties, may lead a trial judge to recognize bias. Appellees distinguish this juror's relationship because he said "his firm" instead of himself has done work for Norton. (9-9-08, 11:16:58-11:17:08). They attempt to distinguish this juror by claiming his relationship is indirect and perhaps past. Under our ethical rules, it makes no difference. Dr. Haile attacks the Grubbs, calling their invocation of the ethical rules to question this juror's ability to serve "patently offensive." (Haile Brief 20, n. 41). Respectfully, Dr. Haile misses the point. The Grubbs make no accusations against this juror, but cite the ethical rules to illustrate that if they make little or no distinction between a lawyer and his firm, or past and present

representations, the case law should not either.

When it comes to conflicts of interest, our ethical rules make only limited distinctions between lawyers and their firms, primarily treating them as one. SCR 3.130(1.10)(a). They impose duties on former clients almost as stringently as current ones, and they prohibit actions that adversely would affect former clients. SCR 3.130(1.9); SCR 3.130(1.7)(a)(1)(2).

Our courts have recognized the relationship of attorney-client as one of "trust and confidence," and sought to "preserve it upon a high plane of moral responsibility." *Riddle v. Commonwealth*, 864 S.W.2d 308, 311 (Ky. App. 1993). It is a fiduciary relationship in which 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.* This language comes from case law, but the ethical rules seek to preserve these objectives. *Riddle* states the duty is not simply in the relationship of representation, but in "***all*** his relationships with his client-principal." *Id.* (Emphasis added).

The point in referring to the ethical rules is to demonstrate that the case law should be consistent with them in the courts' endeavor to hold this sacred relationship upon a higher moral plane. If the ethical rules do not distinguish between a lawyer or his firm, or a past or former client, then the case law that assesses bias in those relationships striving to preserve the sacred impartiality of the jury system should not either. The Court should treat them consistently when possible. In this case, a lawyer whose firm had represented Norton should have been stricken, as Judge Stumbo opined. (Court of Appeals Opinion 19).

Appellees reliance upon these jurors' silence when the entire panel was asked whether it could remain fair and impartial is not an acceptable acknowledgment of

impartiality in the face of the specific comments made. See Appellants' Brief 25; *Montgomery v. Commonwealth*, 919 S.W.2d 713, 716 (Ky. 1992); *Irvin v. Dowd* 366 U.S. 717, 728 (1961); *Marsch v. Commonwealth*, 743 S.W.2d 830, 834 (Ky. 1988).

## II. THE ERROR RESULTS IN AN AUTOMATIC NEW TRIAL, REGARDLESS OF THE USE OF PEREMPTORY CHALLENGES.

Norton cites an unpublished Memorandum Opinion of the Court in a matter of right appeal to stand for the proposition that the Grubbs had to use a peremptory strike to complain of error. CR 76.28(4)(c) admonishes counsel not to cite unpublished opinions unless published opinions do not adequately address the issue. Citation of *Stark v. Commonwealth*, 2010 WL 252248 (Ky. 2010) is an inappropriate cite and not binding authority.[1] Published decisions address the same issues. *Shane* and *Allen v. Commonwealth*, 276 S.W.3d 768, 773 (Ky. 2008) indicate the use of peremptory strikes is irrelevant if a trial judge erroneously failed to excuse a juror for cause, as long as the party uses all of his or her strikes. *Shane* summarized the analysis as follows:

> Thus, the correct inquiry is not whether using a peremptory strike for a juror who should have been excused for cause had a reasonable probability of affecting the verdict (harmless error), but whether the trial court who abused its discretion by not striking that juror for reasonable cause deprived the defendant of a substantial right. Harmless error analysis is simply not appropriate where a substantial right is involved, and is indeed logically best suited to the effect of evidence on a verdict, though some procedural errors may also be reviewed in this light. Here, the defendant did not get the trial he was entitled to get. For these reasons, the holding in *Morgan* must be overturned.

*Id.* at 341. The thrust of *Shane* is that the trial judge's ruling on motions for cause must be correct to preserve the right to an impartial jury and a litigant's right to challenge a certain

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[1] Likewise, Norton's citation of *Lemon v. Commonwealth*, 2007 WL 4462365, another Memorandum Opinion in a matter of right appeal, is not proper or authoritative.

number of jurors without showing cause. *Id.*

*Allen* interpreted *Shane* to hold that "if a trial court abuses its discretion in failing to grant a challenge for cause, and the challenging party uses all of his available peremptory challenges, the trial court's error is grounds for reversal." *Allen*, 276 S.W.3d at 773. In other words, a party must exhaust all peremptory challenges to complain of error. Otherwise, if a party sought to excuse five jurors for cause, but only had three or four strikes to exercise, the party would be unable to complain. Peremptory strikes are a substantial right, and if a party is forced to use all strikes on jurors a judge should have removed, that right is lost. Nothing in the law forces a party to use all peremptory strikes on "for cause" jurors instead of other undesirable jurors the party has a right to strike.

The trial court sat 14 jurors and narrowed the venire to 30 to make allowance for the subtraction of 16 peremptory strikes among the four parties. The court randomly pulled jurors to narrow the venire to 30. Had these jurors been stricken for cause, it entirely would have changed the dynamic of the random draws to reduce the jury to 30. It entirely would have changed the dynamic of how peremptory strikes would have been exercised.

The Grubbs used every peremptory strike they had. The Appellees had a cumulative twelve strikes; the Grubbs had four. They used two of them to strike the father of a Norton manager and a lawyer whose firm did work for Norton. The used two others on jurors that made counsel uncomfortable. The jury ultimately seated nevertheless 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).

In a twelve vs. four strikes posture with all of these individuals *remaining* in the venire, the Grubbs were prevented from having a fair trial by losing two peremptory strikes on individuals the trial court should have stricken for cause, and by having Defense expert Griffin's patient remain on the panel until she randomly was pulled. The Grubbs' right to an impartial jury was compromised and cannot be harmless error. *Shane*, 243 S.W.3d at 341; *Fugett v. Commonwealth,* 250 S.W.3d 604, 612 (Ky. 2008).

## III. THE NORTON-PHYSICIAN CONTRACT APPLIES BASED UPON NORTON'S OWN STATEMENTS AND INTERPRETATIONS.

Appellants admit the preamble to the contract at issue was between Community Medical Associates and Dr. Velasco. However, Norton was the drafter of that contract and attempts to ignore that its entire creation and application was for the benefit of Norton Healthcare in general, despite what the preamble says. As discussed in the Grubbs' Brief, particularly pages 32-36, Norton's designee to testify about the meaning of this agreement made clear that it was made on behalf of and for the benefit of Norton Healthcare. In fact, Community Medical Associates' identification in the preamble was somewhat rare and surprising given the fact that the Norton Healthcare legal department is a signatory to the contract and must approve it; all notices go to Norton Healthcare at its counsel's address; it incorporates and enforces all "Norton Healthcare" policies and rules; it makes all Norton Healthcare companies third party beneficiaries; and the payments, benefits, and assurances in the contract come from Norton Healthcare. (See Appellants' Brief 32-36).

Norton fails to address the truth of all of these statements, as confirmed by William Ritchie, its corporate designee to explain and interpret the Agreement. Although Community Medical Associates may have been mentioned in the preamble, the contract language itself

and Norton's own affirmation of its meaning makes clear that the identification of Community Medical Associates as the only contracting party is a nominal inaccuracy.

The Grubbs have created no "fictitious definition of the word 'Norton'" as used in the contract. (Norton Brief 37). They have cited the Court to specific testimony from Norton itself and the contract at issue. Granted, corporate entities can be viewed separately, but in this circumstance, Norton itself blended them and incorporated significant crossover in its own drafting of the agreement.

Being a patient of Norton Hospitals, Inc., which Krystal Meredith undisputedly was, brings her within the auspices of this Agreement that ultimately was drafted by, and for the benefit of, Norton Healthcare which controlled Dr. Velasco's practice. (See Exhibit 6 of Appellant Brief, p. 1; RA 951). When Norton sought to exert control over all of Dr. Velasco's patients, including those presenting to the named Defendant in this case, Norton Hospitals, Inc., it concomitantly obligated itself, through Dr. Velasco, to bear responsibility for this patient. It cannot command control of the patient via the contract, but simultaneously disown control or responsibility when the same agent is to be held responsible.

The cases Norton relies upon to defeat ostensible agency do not apply because they concern a hospital's representations to the public in the absence of any behind the scenes agreement. *See Floyd v. Humana of Virginia, Inc.*, 787 S.W.2d 267 (Ky. App. 1990); *Roberts v. Galen of Virginia, Inc.*, 111 F.3d 405 (6th Cir. 1997). Regardless of whether Norton's admissions agreement advised that physicians may not be hospital agents, it cannot use it as a defense if the Court interprets the contract at issue to hold that the doctors at issue are. To represent, or misrepresent, to the public that Norton bears no relationship to Dr.

Velasco, when in truth, it has executed an agreement with him that professes to own his practice, his patients, reserves approval for referring doctors, and compels him to send his patients to a Norton facility exclusively, countenances, at minimum, a known falsehood.

The Agreement encompasses Dr. Haile with the provision in Exhibit A that imposes a duty upon Dr. Velasco to make appropriate referrals of patients like Krystal Meredith to other physicians and specialists when and if needed. (See Exhibit A to Agreement, ¶4, attached to Appellants' Brief as Exhibit 6, RA 962). Curiously, Drs. Velasco and Haile argue they do not fall within an agreement that ultimately would provide protection and indemnity for them. Their somewhat illogical argument illustrates why the trial court should have allowed evidence of Norton's obligation to provide indemnity before the jury.

## IV. THE RECORD INDICATES THESE PHYSICIANS WERE PROVIDED INDEMNITY BY NORTON, AND THE JURY SHOULD HAVE KNOWN ABOUT IT.

The Grubbs rely upon the cases cited in their Brief for the proposition that the trial court should have admitted evidence of Norton's obligation to indemnify Drs. Haile and Velasco. Norton alleges it is factually inaccurate to say the Trust covers them. The record indicates Norton had an obligation to insure or indemnify Dr. Velasco. By virtue of Dr. Velasco's referral of Krystal Meredith to Dr. Haile, Norton was obligated to cover him as well. Exhibit B of the agreement, paragraph three, clearly states that Norton agrees to insure Dr. Velasco by providing malpractice insurance coverage through its self insurance trust or by paying any premiums. (See Exhibit B to agreement, attached to Appellants' Brief as Exhibit 6, RA 966; See also Appellants' Brief 30). The relevant point is that Norton provides the indemnity, and the physician bears no risk.

Community Medical Associates does not cover Dr. Velasco. Norton Healthcare does. (William Ritchie Depo. 11, 29). Attached to Mr. Ritchie's deposition are two insurance policies Norton furnished in this litigation that appear to cover Dr. Velasco. (See Ritchie Depo. Exhibit 2, Bates Stamps NH-00307, NH-00339; Ritchie Depo. Exhibit 3 NH-00349, NH-00375). The ultimate issue of importance, established by the above documents and testimony, is that Norton insured Dr. Velasco through its trust or paid his insurance premiums. Norton's additional statements about who covered whom did not contain appropriate citations to the record. Norton cannot refute the clear testimony of Norton's corporate designee, William Ritchie, that, whether directly or indirectly, Norton provided Dr. Velasco indemnity. If Exhibit A brings Dr. Haile within it, he is covered too. The jury was entitled to know how much Norton controlled these physicians and to consider whether their complete unity at trial, despite reasons to blame one another, may have been in part due to Norton being responsible for insuring them all.

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

Respectfully submitted,

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

SCOTT ROBY
600 W. Main Street
Suite 100
Louisville, KY 40202
(502) 540-5700

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