Editorial

Physician Health Program (PHP) Nightmare: The Case of Dr. John Mitchell Farmer

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In the mid-evil village of Medico in the land of La La, a subject by the name of Daniel DoGood paused before a sign displaying the decree by the king. He scratched his head a few times and moved on. Ms. Beulah Busybody, who disliked Daniel, went immediately to the head of the king's council and reported that Daniel likely was questioning the king's decree and was harboring treasonous thoughts against the king. Why else would he be scratching his head in front of the posted decree?

The head of the king's council retreated to a special room in the castle that had stars painted on the ceiling and met with other members of the king's council. Following a brief discussion behind closed doors, and without asking Daniel for his side of the story, they declared him guilty and referred him to the Potentate's Healing Project. The Potentate's Healing Project was tasked with evaluating the loyalty of subjects and, if found to be disloyal to the king, they would administer "rehabilitative measures."

Members of the king's council had a special arrangement with the Potentate's Healing Project. The Potentate's Healing Project would be paid a handsome fee from the king's treasury for administering "rehabilitative measures." In return, the Potentate's Healing Project would pay a referral fee to the king's council. Evidence-based measures, based on a "pain first model," were designed to help the subject regain his loyalty to the king, and typically included "educational sessions" at the whipping post, application of thumb screws and some quality time on the rack. Unfortunately, Daniel was unable to survive the "helpful educational efforts," and he died.

Daniel's family complained to the king that the king's council had wrongfully declared Daniel guilty of harboring treasonous thoughts and had caused his death. The members of the king's council who had referred Daniel to the Potentate's Healing Project responded that they were not responsible for Daniel's wrongful death. They said it was the Potentate's Healing Project that killed him. The king's council was merely trying to help him by referring him to the Potentate's Healing Project so he could safely return to the community. It was a safety-sensitive issue. There was no bad faith or malice involved.

Ordinary Day Turns into Disaster

It was an ordinary day for Dr. Farmer who was seeing patients in a clinic in his family residency program in Madisonville, Kentucky. According to the recitation of the facts by the Supreme Court of Kentucky:[1]

> On November 4, 2019, around 4:15 pm, Dr. Farmer was treating a minor patient who was prescribed Adderall to manage her attention deficit disorder. Dr. Farmer determined that the dosage of the child's prescription should be lowered.
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> Afterward, the child's mother asked to see the Practice Manager, Stephanie Crick. Crick is a Registered Nurse of twenty-three years' experience in nursing at the time of trial in 2024. She was an RN at the time of the November 4 incident….
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> [S]he frequently interacted with Dr. Farmer and generally testified to her opinion that Dr. Farmer is a good doctor. She testified the complaining mother informed her that Dr. Farmer was perhaps "on something," that he was rubbing his nose a lot, and shifting his weight from side to side. Crick testified she did not credit the mother's complaint as anything to be worried about, as the behavior described by her was normal for Dr. Farmer. Dr. Farmer has been diagnosed and treated for attention deficit hyperactivity disorder (ADHD) since 2005. Crick testified the behavior described in the complaint is, contrary to the mother's belief, consistent with ADHD symptoms and with Dr. Farmer's typical behavior. Since Crick was not in charge of the physicians in the office, she believed she had to report the complaint to Dr. Diana Nims, Residency Program Director for Baptist Health at the time.
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> Dr. Diana Nims' relationship with Dr. Farmer was a subject of dispute at trial. Dr. Farmer testified to his belief that Dr. Nims had a romantic interest in him, which he did not reciprocate towards her. Dr. Nims denied this, although Crick did testify Dr. Nims once told her Dr. Farmer had a crush on her, Dr. Nims, that is….
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> Dr. Nims spoke with Dr. Hargrove and Dr. Hatler about Dr. Farmer on November 4. Dr. Hargrove has forty years' experience in emergency and family medicine and testified to treating hundreds of patients for drug and alcohol abuse. He affirmed to Dr. Nims that he was "100% sure" Dr. Farmer was not impaired on November 4. Dr. Hatler, who was supervising Dr. Farmer that day and was in the room with Dr. Farmer for part of the time while he treated the mother and child that precipitated the complaint. Dr. Hatler informed Dr. Nims he noticed nothing unusual about Dr. Farmer on November 4. He testified if he had suspected any impairment, he would have sent Dr. Farmer for testing. Both doctors told Dr. Nims in no uncertain terms that they did not believe Dr. Farmer was impaired.
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> At approximately 5:00 pm, Dr. Nims met with Dr. Wayne Lipson, the Chief Medical Officer of Baptist Health at the time, Dr. Armstrong, President of Baptist Health Madisonville's Medical Staff at the time, Robert Ramey, President of the hospital at the time, and Rhonda Florida, head of the Medical Staff office, whom we will collectively refer to as "the leadership." Dr. Nims told the leadership that Dr. Farmer was the subject of a complaint which raised a concern about an impairment. She told the leadership Dr. Farmer had a "history of alcohol abuse," which Dr. Lipson confirmed was solely based on a DUI conviction Dr. Farmer received in 2013 during medical school, and which Baptist Health was informed about when it hired him. Dr. Nims told the leadership Dr. Farmer had suicidal ideation a year prior. She told the leadership that Dr. Farmer was receiving treatment from a psychiatrist.
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> What Dr. Nims did *not* tell the leadership was the "suicidal ideation" episode from a year prior had resulted in Dr. Farmer being sent to a Dr. Laird, a mental health professional, who concluded Dr. Farmer's statement was a joke taken out of context. Dr. Laird did not conclude

Dr. Farmer suffered from suicidal ideation and did not recommend any further treatment whatsoever. Dr. Nims did not tell the leadership that Dr. Farmer's treatment with a psychiatrist was solely related to his ADHD diagnosis, although the leadership was aware of that diagnosis according to Dr. Lipson. She did not tell the leadership that she had interacted with Dr. Farmer that day and her own opinion from that interaction was that he was "not acutely impaired." Dr. Nims did not tell the leadership about Drs. Hargrove's and Hatler's opinions that Dr. Farmer was not impaired in any way.

Regarding this last point, Dr. Lipson testified to being unaware of the opinions of Drs. Hargrove and Hatler on November 4. Nonetheless, he repeatedly testified those opinions were irrelevant. According to Dr. Lipson, the issue was not about alcohol in particular but about impairment….

When confronted with why the leadership did not consider whether the reported behavior was consistent with typical behavior of Dr. Farmer; did not consider whether the reported behavior was consistent with a person suffering from ADHD; or why the opinions of two other doctors as to the lack of impairment were irrelevant, Dr. Lipson would then revert back to the contention that the leadership was focused on "a concern brought forth regarding Dr. Farmer." This "concern" was identified by Dr. Lipson as "the concern the patient's mother had[,]" and that the leadership were focused on "evaluat[ing] what had taken place."

Suffice it to say, the leadership did make two decisions of consequence that evening. First, they decided not to have Dr. Farmer tested for drugs and alcohol at Baptist Health. Second, they decided to prohibit Dr. Farmer from seeing patients unless he went to the KPHF [Kentucky Physicians Health Foundation—a Physician Health Program (PHP)] for testing and treatment. As to the first decision, Dr. Lipson testified foregoing [*sic*] drug and alcohol testing was because it was not in the best interest of Dr. Farmer. When informed the next morning, that he could not see patients, Dr. Farmer disagreed with the leadership's assessment of his best interest, and did insist on being tested at Baptist Health which Dr. Lipson refused to allow.

The failure to perform a drug or alcohol test on site forms the basis for Dr. Farmer's breach of contract claim. Baptist Health had a "Fitness for Duty & Drug Testing Policy" applicable "for any employee." The procedure mandated by this policy under the heading "General" requires the Department Manager upon a report of impairment to 1) investigate the situation; 2) interview the employee and initiate a "Fitness for Duty" Evaluation; and 3) document the actions taken. Under the more specific heading of "Suspicion of Being under the Influence of Substances (Alcohol or Drugs)" the policy requires the manager, upon "reasonable suspicion" to remove the employee from the immediate work area to a private room; then escort the employee to Employee Health, the Emergency Department, or any other appropriate medical office; "obtain the employee's consent for the test and ensure appropriate documentation is completed;" and ensure the "specimen will be collected by a healthcare professional per chain of custody guidelines[.]" Baptist Health argues this policy is not applicable to Dr. Farmer as he was not an employee but a physician.

Assuming *arguendo* that is true, Baptist Health had a "Medical Staff/Allied Health Practitioner Health Policy." This policy was the only one discussed at the November 4 leadership meeting. The policy requires, under the heading "Investigation and Report of Findings," that if, upon receiving a report of impairment, the Hospital President or President of the Medical Staff believes there is enough information to warrant an investigation, that an investigation will take place. The policy allows Baptist Health to designate who will conduct the investigation, including outside consultants. Secondly, the policy allows the investigation to "be conducted by whatever means deemed appropriate by the investigator(s) and should include a meeting with the affected physician." Third, the policy requires that "[u]pon receipt of the investigation report the Hospital President, acting in consultation with the President of the Medical Staff, will determine whether sufficient evidence of impairment exists."

Dr. Nims testified she was not responsible for conducting an investigation and did not have any obligation to discuss the report with Dr. Farmer or to interview any of his colleagues to substantiate the report prior to informing the leadership. Dr. Lipson testified multiple times, "[t]here was not an investigation. There was a concern brought forth regarding Dr. Farmer." The following morning, November 5, 2019, a meeting took place between Dr. Farmer, Dr. Lipson, and Dr. Nims. Dr. Farmer was presented with a fait accompli in which he was told he was prohibited from treating patients and would have to report to the KPHF and comply with whatever it recommended before being allowed to treat patients again. Dr. Lipson testified Dr. Farmer could have refused to go to the KPHF, therefore, his choice was "voluntary." He testified that if Dr. Farmer had refused to go to the KPHF then a meeting of the Executive Committee would have occurred, and appropriate action would have been determined. He testified he did not inform Dr. Farmer of this secondary course of action prior to Dr. Farmer's "voluntary" acquiescence to report to the KPHF.

Related to this, Dr. Lipson repeatedly testified he never made a referral to KPHF regarding Dr. Farmer. He testified his initial emails to the KPHF were merely seeking consultation and Dr. Farmer was not named. It was only after the November 5 meeting when Dr. Farmer "agreed" to report to the KPHF that the KPHF was then contacted by phone and informed about Dr. Farmer explicitly. This testimony, however, is belied by the email Dr. Lipson sent the Kentucky Board of Medical Licensure on November 15, 2019, in which he stated: "Based on the anonymous complaint, Dr. Farmer was referred to the Kentucky Physicians Health Foundation ('KPHF') by myself and Dr. Nims." The contradictory evidence between Dr. Lipson's testimony at trial and his statements in the email only eleven days after November 4 makes this an issue of fact for the jury to determine, and we are compelled to view the evidence in a light most favorable to Dr. Farmer according to its verdict.

After Dr. Farmer reported to the KPHF, he was sent to a third-party testing facility. The results of this test, identified as a PEth [phosphatidyl ethanol, an alcohol metabolite] test, were not disclosed at trial by court order. The only mention of the results is an email from Dr. Greg Jones, the Medical Director of the KPHF, stating, "The alcohol metabolic marker is very high and not at all consistent with the history he provided, it's a blood test."[1]

PEth, however, is not specific for or necessarily a reliable quantitative measure of alcohol consumption. A number of

incidental exposures can result in a positive alcohol metabolite test. Repeated use of an alcohol-based hand sanitizer, repeated use of an alcohol-based mouthwash, and use of some inhalers that use an alcohol propellant can also result in a positive PEth test.[2,3] Moreover, after drinking a single glass of wine with dinner, a PEth test can remain positive for one to two weeks.[4]

Alcohol-based hand sanitizers are the preferred hand sanitizers used in healthcare settings such as clinics and hospitals. They are widely used in hospitals.

So, a busy physician who is repeatedly using an alcohol-based hand sanitizer between patient encounters, as is the standard practice, could certainly have a positive PEth test.

False diagnoses provided by PHP-approved treatment centers based solely on a positive PEth test are unfortunately common. PHP-approved treatment centers have a conflict of interest and incentive to use false diagnoses to justify further expensive, unwarranted treatment/monitoring.

The Kentucky Supreme Court went on to state:

> Thus, the PEth test cannot tell whether Dr. Farmer was in fact impaired on November 4, 2019. At this point in our recitation, it is necessary to detail that there is no evidence in the record whatsoever that Dr. Farmer was ever impaired by drugs or alcohol while at work, or that his alcohol consumption, to the extent it exists, ever interfered with his ability to practice medicine.
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> After KPHF received these test results, Dr. Farmer was sent to a third-party treatment center, called MARR Addiction Treatment Center. MARR produced a report, which the trial court did not allow Baptist Health to discover from the KPHF, diagnosing Dr. Farmer with Alcohol Use Disorder (AUD)-Mild. A copy of the DSM-5's standards for this diagnosis is included in the record. Therein it is explained that AUD-Mild is the lowest degree of AUD and is warranted when a person reports experiencing two symptoms at least **ONCE** in the past year.
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> To return to our narrative, on November 15, 2019, Dr. Lipson reported Dr. Farmer to the KBML [Kentucky Board of Medical Licensure] based on the mother's complaint of November 4 and the information he received from Dr. Jones regarding the PEth test. Dr. Lipson included no other information. He testified he believed he had a legal duty to report Dr. Farmer to the KBML after receiving the information from Dr. Jones. On November 22, a KBML investigator came to Baptist Health to interview Dr. Farmer. Dr. Lipson was present. Dr. Farmer testified when the investigator asked him if there were any other persons he believed he should interview, he answered in the affirmative and intended to give the investigator the names of Drs. Hargrove and Hatler, but Dr. Lipson intervened and prevented him from doing so. Dr. Lipson testified he never obstructed the KBML investigation in any way. This was corroborated by the investigator at trial. On that same day, the investigator for the KBML presented Dr. Farmer with an interim agreed order prohibiting him from practicing medicine until approved to do so by the KBML. Dr. Farmer signed the agreed order four days later.
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> Subsequently, the KBML required Dr. Farmer to enter into a five-year monitoring agreement in order to practice medicine, although he could not see patients for the remainder of his residency. This agreement included a provision that prevented Dr. Farmer from taking any drugs or alcohol including his ADHD medication. Dr. Farmer did not sign the agreement until February 18, 2020, just under a month after he received it. He was required to see a therapist monthly and submit to random drug and alcohol tests.
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> Donna Lillie, Dr. Farmer's therapist, was the Chemical Dependency Coordinator at Deaconness Crosspoint, with 17 years of experience. Prior to retirement, she was a licensed clinical social worker and licensed clinical addiction counselor. She did not testify that Dr. Farmer suffered from alcohol abuse disorder…. The only diagnosis she gave to Dr. Farmer was Adjustment Disorder—a short-term disorder caused by major stress events in a person's life; death of a loved one being a typical example. Lillie attributed the cause of his Adjustment Disorder to his employment problem with Baptist Health and future employment prospects. Dr. Farmer eventually completed his residency at Baptist Health on September 3, 2020, rather than the anticipated date of June 30, 2020.
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> The jury eventually returned a verdict totaling $3.5 million in favor of Dr. Farmer. Baptist Health filed a JNOV [judgement notwithstanding the verdict] which was denied, and the trial court entered a judgement in accordance with the verdict.[1]

Dr. Farmer's ordeal, however, was not over at that point.

Baptist Health appealed. The decision rendered by the Court of Appeals on November 15, 2024, reversing the jury's verdict, and the reasoning behind it was shocking.[6]

Supreme Court of Kentucky

The Court of Appeal's decision was so shocking that Justice Conley wrote[1] at the very beginning of the Kentucky Supreme Court decision:

> Typically, our opinions begin with a recitation of the facts and then proceed to discuss principles of law. The Court of Appeals' opinion in this case, however, is so discordant with and contrary to the facts as the jury believed them to be that it is necessary to remind the reader that
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> > [u]pon review of the evidence supporting a judgement entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for a directed verdict. *All evidence which favors the prevailing party must be taken as true* and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence.
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> *Louisville & Jefferson Cnty. Metro. Sewer Dist. V. T+C Contracting, Inc.*, 570 S.W.3d 551, 576 (Ky. 2018))(emphasis added).
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> As to how the Court of Appeals came to disregard this standard, it will be discussed below….
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> At the Court of Appeals, the judgment was reversed. The Court of Appeals concluded the trial court erred in excluding evidence of the PEth test results and MARR Report. Based on its own understanding of this excluded evidence, the Court of Appeals discounted the facts as the jury believed them to be and concluded the trial court had effectively allowed Dr. Farmer to present a one-sided story to the jury, denying Baptist Health the full opportunity to defend itself. According to the Court of Appeals' factual

recitation, Baptist Health was nothing more than a noble actor seeking to help Dr. Farmer, a confirmed alcoholic, from himself and prevent him from potentially harming any patients….

The chief error committed by the Court of Appeals, and advocated for before this Court by Baptist Health, concerns the interpretation of KRS 311.6191 [Nonliability of persons who furnish information to program]. The Court of Appeals concluded Dr. Farmer needed to show that Baptist Health acted both with bad faith and with actual malice to defeat the qualified privilege contained in the statute. Its opinion subsequently, and almost exclusively, focuses on the lack of actual malice. We disagree with this interpretation….

The qualified privilege will prevail for furnishers of information to the program so long as they act both with good faith and without actual malice. Contrary to the Court of Appeals' reasoning, if the General Assembly intended that actual malice had to be shown in every case, then adding a good faith condition to the second class of persons, is superfluous. The conjunctive "and" imposes a two-prong test for the qualified privilege. The absence of either prong defeats the qualified privilege. "The qualified privilege operates to allow defendants the necessary latitude to communicate freely while maintaining accountability when the defendant operates outside of or contrary to the privilege." *Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276, 283 (Ky. 2014). We fail to see why the General Assembly would extend the privilege to those furnishers of information who do so in bad faith or with actual malice. That neither achieves nor protects the legislative policy….

Whether the privilege will prevail, however, is generally a question for the jury when there is evidence to put the question in dispute. *Weinstein v. Rhorer*, 42 S.W.2d 892, 895 (Ky. 1931). For example, if there is a genuine issue of material fact whether a member of an impaired physicians program took an action within the scope of his duties, then that will be a question of fact for the jury to resolve, not a question of law for the court. Or, as in this case, if there is a genuine issue of material fact as to whether Baptist Health acted in good faith when it referred Dr. Farmer to the KPHF, then that issue was properly submitted to the jury for factual resolution; it was not a legal question for the trial court….

There was a genuine issue of material fact as to whether Baptist Health acted in good faith. Dr. Farmer's argument relied upon the unsubstantiated nature of the mother's complaint; the contemporaneous opinions of Drs. Hatler and Hargrove that he was not impaired on November 4; and Dr. Nims' exaggeration and falsehoods which she told the leadership on November 4 that influenced their decision to refer Dr. Farmer to the KPHF. It is well-recognized in other areas of law which also require a good faith component that the lack of a reasonable basis in fact will defeat an assertion of good faith.[1]

A tactic that was employed in this case is a well-known tactic characteristic of sham peer review. Namely, seeking to use events from the remote past or findings obtained after a summary suspension, for instance, to justify a summary suspension (post hoc justification).

As to the facts justifying the jury's conclusion that Baptist Health did not act in good faith, we need only refer to the testimony of Dr. Lipson and Dr. Nims. Dr. Lipson identified in his testimony two bases as to why Baptist Health took the actions that it did. On one hand, the leadership was concerned solely with what happened at the doctor visit which gave rise to the complaint, and that complaint was solely related to an allegation of impairment that Dr. Farmer was "on something." But Dr. Lipson unequivocally testified several times that the opinions of two doctors who worked with Dr. Farmer frequently, and specifically on that day, were irrelevant to the question of whether Dr. Farmer was impaired. That is an absurd contention. So, on the other hand, the historical "data points" reported by Dr. Nims must come in to help justify actions based on an otherwise unsubstantiated allegation….

Thus, the decision was not solely concerned with the events of November 4 but was rather based on a holistic evaluation of Dr. Farmer's past. When confronted with the exaggerations and, frankly, untruth of these past "data points," Dr. Lipson had to then discount them—"we weren't concerned about what was in the past"—and bring the discussion back around to the specifics of November 4. This in turn would then lead back to why the opinions of Drs. Hargrove and Hatler were not considered, and so on and so forth in a vicious, nonsensical circle….[1]

Dr. Nims also sought to introduce information that Dr. Farmer suffered from suicidal ideation.

[T]he question to determine [whether] Dr. Farmer suffers from suicidal ideation [is] based on Dr. Nims' assertion that Dr. Farmer suffered from suicidal ideation. That was never a diagnosis rendered by the treating physician, Dr. Laird, or any other treating mental health professional for that matter, and thus constitutes a false statement.

Lastly, Baptist Health argues in its brief that the reason they did not drug or alcohol test Dr. Farmer either on November 4 or November 5 was their concern Dr. Farmer had left work and potentially had a drink, which would skew any results of a blood test. Maybe. But Dr. Lipson testified "no one ever said anything about alcohol," "that wasn't the question," and "we weren't sitting there thinking he was drunk." Either the leadership was concerned about alcohol, or it was not, but it cannot be both. Whatever the merits of Baptist Health's contention about an alcohol test, it fails to explain why it did not administer a drug test. The complaint was specifically about "jittery" behavior and Dr. Farmer rubbing his nose a lot….

There was no reasonable justification offered as to why a drug test could or should not have been administered on November 4.

Accordingly, the Court of Appeals erred in reversing the trial court because it believed Dr. Farmer had to show both bad faith and actual malice to defeat KRS 311.6191" qualified privilege. He did not have to make such a showing. Dr. Farmer only had to show either prong was not met to defeat the privilege. The Court of Appeals' opinion, which focused almost entirely on the actual malice component and the lack of evidence for it, failed to properly consider the good faith prong and the evidence, which was certainly sufficient, that justified the jury's conclusion that Baptist Health did not refer Dr. Farmer to the KPHF in good faith because it lacked an objectively reasonable basis in fact to conclude he may have been impaired on November 4….

The Court of Appeals agreed with Baptist Health and repeatedly chided and rebuked the trial court for its decisions. We disagree with the Court of Appeals and affirm

the trial court's rulings based on the conclusion that the MARR Report and PEth test results were irrelevant to KRS 311.6191….[1]

With regard to the MARR Report being excluded from evidence by the trial court at the trial and Baptist Health indicating it did not intend to rely on the MARR Report anyway to justify actions it took on November 4, the Kentucky Supreme Court stated:

> Baptist Health thus renounced any intention to use the MARR Report as evidence to justify its decision on November 4, and it cannot now argue on appeal that the trial court erred in this regard. A party is not permitted "to feed one can of worms to the trial judge and another to the appellate court." *Hopewell v. Commonwealth*, 641 S.W.2d 744, 745 (Ky. 1982). *Hopewell* explicitly applied this rule to a question of admissibility of evidence, where the defendant at trial took one position, then embraced a different argument on appeal….
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> Once again, Baptist Health will not be permitted to advocate one position in trial court and then adopt another position in the appellate courts….
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> Baptist Health only desired the fact of PEth testing occurring and that the results, regardless of what they actually were, were a substantial factor in the subsequent actions taken by the KPHF, KBML, and Baptist Health for the purposes of damages, Therefore, the trial court did not abuse its discretion in concluding the results of the PEth testing would not be admitted at trial.
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> Baptist Health received what it asked for at trial. It lost at trial, proving the age-old adage "be careful what you wish for"….
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> Finally, the MARR Report, its diagnosis, and the PEth test results are irrelevant to the qualified privilege of KRS 311.6191….

There were no PEth tests available on November 4 to justify taking any action against Dr. Farmer. PEth testing was done after the fact and used by Baptist Health in an attempt to provide justification for their referral to the KPHF on November 4. The Kentucky Supreme Court noted:

> Good faith cannot be established post hoc….
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> This is well-recognized in other areas of the law. For example, whether probable cause exists at the time a search warrant is issued cannot be affected by the actual subsequent discovery of incriminating evidence. *United States v. Eisner*, 297 F.2d 595, 597 (6th Cir. 1962)….
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> The good faith of a furnisher of information to the KPHF can only be assessed based upon the facts and circumstances as they existed and were known or should have been known to the actor at the time he furnished the information.
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> Thus, the PEth test and MARR Report are irrelevant. This irrelevance is further underscored by Baptist Health's argument already addressed above regarding the purposes for which it desired the MARR Report and PEth tests to be admitted, which had no relation to the November 4 decision to refer Dr. Farmer to the KPHF. Dr. Lipson strenuously testified alcohol intoxication was not the concern of the leadership at the November 4 meeting. He testified Dr. Hatler's and Dr. Hargrove's opinions that Dr. Farmer was not under the influence were irrelevant, and even if he had known about them at the time he would not have considered them. How then could the MARR Report and PEth tests vindicate Baptist Health? "We didn't think he had an alcohol problem, but it turns out he might therefore good faith." If that is a good argument, then good faith can be established on nothing more than taking a shot in the dark so long as one manages to hit something. That is not what good faith means under any reasonable definition of that phrase.
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> Lastly, there is precious little scientific evidence in this record to judge the significance of the PEth test in answering whether Dr. Farmer was impaired on November 4; whether he was an alcoholic under the statutory definition; or even whether his drinking, to the extent it exists, rendered him unsafe to practice medicine. There was no *Daubert* hearing [to challenge expert testimony] conducted by the trial court, and Baptist Health does not point us to where one was requested and denied in the record. Instead, Baptist Health has consistently referred to the PEth test results in vague terms such as "very high" or even, at oral argument, "astronomically high"….

The Kentucky Supreme Court emphasized the necessity that referrals to the KPHF be made in good faith and without actual malice:

> In a word, for the KPHF to function properly the people who report information concerning a physician must do so in good faith and without actual malice. The KPHF does not have the resources or ability to investigate claims and verify them, or to make medical diagnoses or treatments. It functions very much like an honor system. Therefore, the law does not protect those who furnish information in bad faith or with actual malice because when they do so, the KPHF is unwittingly dragooned into being the means by which some improper end is obtained, or some unfounded report is considered and wastes resources.[1]

With regard to Dr. Farmer's tortious interference claim, the Kentucky Supreme Court stated:

> The animating principle of tortious interference with prospective business relations since its first precedents in the fourteenth century has been: "he that [improperly] hinders another in his trade or livelihood is liable to an action for so hindering him[.]" *Keeble v. Hickeringill*, 103 Eng. Rep. 1127, 11 East 574 (1707) (Holt, C.J.)….
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> [R]egarding KRS 311.6191, "malice may be inferred in an interference action by proof of lack of justification." *Id*. at 859; see also Comments, Restatement (Second) of Torts § 766 ("what is meant is not malice in the sense of ill will but merely intentional interference without justification")….
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> Thus, Baptist Health bore the full weight of demonstrating good faith. The question presented here is whether Dr. Farmer's relationship with the KBML is protected by the law of tortious interference. There is no other argument. We conclude an actor can be held liable for tortious interference with prospective business relations when the improper interference concerns a state licensing agency's relationship with its licensee….

The Kentucky Supreme Court took note of the fact that even though Dr. Farmer prevailed at trial, he is forever saddled with a highly damaging report in the National Practitioner Data Bank (NPDB).

> In the case of Dr. Farmer, it [the NPDB Report] has served to brand him with the proverbial scarlet letter. Every potential employer will now see the National Practitioner's

Data Bank report stating Dr. Farmer is "unable to practice safely by reason of alcohol or other substance abuse" despite no evidence whatsoever that Dr. Farmer's drinking, to the extent it exists, ever interfered with his practice. Every potential employer will have to factor that into their decision-making regarding hiring him. Every malpractice claim against Dr. Farmer for the rest of his career, decade after decade, will include renewed inquiries into what happened at Baptist Health on November 4, 2019. All such claims will also potentially give rise to a negligent credentialing claim against his employer, and there will be *prima facie* evidence for it by virtue of the KBML's branding; all of which will have been precipitated by Baptist Health's decision to refer him to the KPHF.

It is admitted that there is nothing that Dr. Farmer can do to remove the notation in the National Practitioner's Data Bank. "The days of the far-off future [will] toil onward, still with the same burden for [him] to take up, and bear along with [him], but never to fling down; for the accumulating days, and added years, [will] pile up their misery upon the heap of shame." Nathaniel Hawthorne, *The Scarlet Letter* 91 (Houghton, Mifflin and Company 1892). Such emotional distress and reputational harm are recognized in the damage calculation for a claim of tortious interference. Restatement (Second) of Torts § 774(A)(1)(c)….[1]

With respect to Dr. Farmer's breach of contract claim, the Court of Appeals held that Baptist Health was entitled to immunity under KRS 311.616. The Kentucky Supreme Court disagreed.

We conclude the Court of Appeals erred. The lower court's decision was based on its determination that the statute applies to "all claims arising from the referral [to KPHF], including for breach of contract." This fundamentally misconstrues Dr. Farmer's breach of contract claim which did not arise from the referral but to Baptist Health's refusal to test him for drugs or alcohol prior to the referral. Equally true is the decision to refuse testing was not an action "taken by the program, or by any individual member of the program[,]" so the statute cannot apply to Baptist Health's failure to drug/alcohol test him prior to making the referral.

Accordingly, Dr. Farmer did not have to demonstrate bad faith or actual malice, as those terms are used in KRS 311.6191, to succeed on his breach of contract claim. Although there was some dispute at trial as to whether the "Fitness for Duty & Drug Testing Policy" was applicable "for any employee[,]" or the "Medical Staff/ Allied Health Practitioner Health Policy" applied to Dr. Farmer's case, the distinction is immaterial. Under either policy, Baptist Health breached. It manifestly failed to test for drugs or alcohol, and it failed to conduct an investigation prior to concluding there was sufficient evidence of impairment. Dr. Lipson twice testified there was no investigation, and Dr. Nims affirmed that she was not tasked with investigating the mother's complaint and had no obligation to interview Dr. Farmer or any of his colleagues.[1]

With regard to causation, like the king's council in the fictional story at the beginning of this editorial, Baptist Health argued that it was not the proximate cause of injuries suffered by Dr. Farmer. Moreover, a party cannot make an argument for the first time at an appellate level. The argument must be preserved by making it at trial.

The Supreme Court held that the causation argument is unpreserved:

Baptist Health contends this issue is preserved through its proposed jury instructions. We disagree. Objections to jury instructions take two forms: sufficiency, or lack thereof, of evidence at trial, or to misstating the law in the text of the instruction….

Baptist Health's argument regarding causation does not fall into either of these two categories. Rather than being based on an alleged insufficiency of evidence or a misstatement of the law, Baptist Health's argument regarding causation is that its referral to the KPHF was not a proximate cause of Dr. Farmer's injuries because the KPHF and KBML took independent action after the referral which were superseding causes to any injury Dr. Farmer may have suffered….

Baptist Health's motion for directed verdict did not include the issue of superseding cause or a lack of proof for proximate causation. Its motion at trial concerned only an alleged insufficient showing for bad faith or actual malice….

Therefore, the Kentucky Supreme Court found that the causation objection was not preserved.

We have previously defined "but-for" causation as "the existence of a direct, distinct, and identifiable nexus between the defendant's breach of duty (negligence) and the plaintiff's damages such that the event would not have occurred 'but for' the defendant's negligent or wrongful conduct in breach of duty." *Patton v. Bickford*, 529 S.W.3d 717, 730 (Ky. 2016)….

As such, we have held that an actor's conduct is a "legal cause of harm to another if

(a) his conduct is a *substantial factor in bringing about the harm*, and

(b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in harm"….

The fact that the harm may have been "brought about through the intervention of another force is not, in and of itself, enough to absolve liability. *NKC Hospitals*, 849 S.W.2d at 569 (quoting Restatement (Second) of Torts §442B)). Thus, "substantial factor" in bringing about the *harm* is the proper, articulable standard, not "as a direct result of"….

Lastly, we briefly note that any objection to the $3.5 million award as excessive was also unpreserved. Baptist Health did not advance this argument in its briefing before this Court….

Baptist Health did not make a specific objection to the jury instructions regarding the calculation of damages, and its own tendered instructions did not provide an alternative amount. The issue is unpreserved, and we will not address it further.

In its Conclusion, the Kentucky Supreme Court noted the novel issues presented in this case. Indeed, the findings with respect to bad faith and malice may set an important guide for other courts to follow. Likewise, the well-reasoned findings with respect to causation should serve as a guide for other courts to follow when a hospital argues that *they* were not the cause of harm; it was those at the PHP, third-party evaluation and treatment centers that caused the harm. And, last but not least, the Kentucky Supreme Court urged extreme caution in a court interfering with the verdicts of juries. In its Conclusion the Kentucky Supreme Court stated:

This case presented several novel issues. We as jurists must resist the temptation to neatly compartmentalize everything into one legal rule or another, especially in novel circumstances, because society and human relations all too often defy such neat categorization. "The tendency of a given act to cause harm under given circumstances must be determined by experience. And experience either at first hand or *through the voice of the jury* is continually working out concrete rules[.]" *Holmes, Oliver Wendell Jr, The Common Law* 162 (The Lawbook Exchange Ltd., 2010 (1881) (emphasis added).

The jury has spoken and found in favor of Dr. Farmer. We "exercise extreme caution in interfering with the verdicts of juries, and…an appellate court should hesitate not only because of the delicacy of undertaking to set aside the finding of the constitutional triers of fact, but because of the concurrence with the jury of the judge presiding at the trial." *Louisville & N.R. Co. v. Fox*, 74 Ky. 495, 516 (1874).

Discerning no legal error or abuses of discretion, and mindful that conflicting testimony presents an issue of fact for the jury to resolve, we cannot say this verdict was palpably and flagrantly against the evidence. *Bledsoe Surface Min. Co.*, 798 S.W.2d at 461-62. For the aforementioned reasons we reverse the Court of Appeals. The trial court's judgment, including the [$3,736,044] million award, is reinstated.[1]

Dissenting Opinion

The Dissenting Opinion by three justices, Bisig, Goodwine, and Keller, was deeply disturbing, especially considering the narrow 4:3 victory in favor of Dr. Farmer. The reader is encouraged to review it in its entirety.

The dissenting justices gave great weight to a mother's complaint that Dr. Farmer might be "on something" because he was touching his nose a lot while giving little or no weight to the supervising physician who was present that day and others who were working with Dr. Farmer at the time and who indicated there were no signs of impairment whatsoever.

They were impressed by a remote history of DUI as a "substance-related problem that may impair the ability to practice medicine."[1]

They found post hoc justification for the hospital's action based on a questionable PEth test performed after the fact to be acceptable.

The dissenting justices firmly believed Dr. Farmer's claim of damages suffered as a result of Baptist Health referring him to the KPHF lacked causation. Incredibly, they essentially blamed Dr. Farmer for all the harm he suffered!

> Baptist Health's actions were not the cause of Dr. Farmer's damages…. The very problems he undoubtedly suffered were a direct result of the positive testing [PEth] and diagnosis [which did not follow the standard set forth by DSM-5], not Baptist Health's act of referral.[1]

They stated: "With minimal investigation Baptist Health referred Dr. Farmer to the KPHF." [1] But the facts as recited by the Kentucky Supreme Court majority opinion demonstrate beyond any doubt that there was no investigation at all! In the majority opinion, it stated: "Dr. Lipson twice testified there was no investigation, and Dr. Nims affirmed that she was not tasked with investigating the mother's complaint and had no obligation to interview Dr. Farmer or any of his colleagues."[1]

The dissenting justices were impressed and persuaded by a diagnosis of "mild alcohol use disorder" [which did not follow DSM-5 standards][1, footnote 4] provided by the MARR and based on a questionable PEth test. It is noted that PHPs typically claim that they are not engaged in the practice of medicine and, therefore, cannot be held liable for malpractice for providing false diagnoses.

They also stated that "Dr. Farmer failed to show that Baptist Health acted with bad faith or actual malice."[1]

However, the majority opinion noted:

> Lastly, there is precious little scientific evidence in the record to judge the significance of the PEth test in answering whether Dr. Farmer was impaired on November 4; whether he was an alcoholic under the statutory definition; or even whether his drinking, to the extent it exists, rendered him unsafe to practice medicine.[1]

Neither an isolated remote history of DUI nor a questionable diagnosis of mild alcohol use disorder should be equated with impairment.

The dissenting justices also believed that the hospital was entitled to immunity because "Dr. Farmer failed to show that Baptist Health acted with bad faith or actual malice."[1]

They would have affirmed the Court of Appeal's decision, a court that opined: "Baptist Health was nothing more than a noble actor seeking to help Dr. Farmer, a confirmed alcoholic, from himself and prevent him from potentially harming any patients."[1]

They also stated that KBML is not an employer and, therefore, tortious interference does not apply.[1]

Interview With Dr. Farmer

Journal: Prior to this ordeal, had you heard of Physicians Health Programs (PHPs), and if so, what was your understanding of what they did and how they worked?

Dr. Farmer: I was generally aware of PHPs through my medical training. I understood them to be a helpful resource for physicians who were struggling. I was not aware of the relationship between state boards and the PHPs and how these relationships can vary drastically between states.

Journal: Upon referral to the PHP, what was the immediate impact and continuing impact on your life?

Dr. Farmer: The immediate practical impact was a sudden halt in my ability to see patients and continue in my residency. I was left with a lot of uncertainty and fear for my future career. I had put so much into becoming a doctor to that point and was left without knowing whether I would ever get to practice medicine on my own. If I wanted to continue in my residency, I had to agree to a five-year monitoring contract. If I had not agreed, my medical career would have ended. The monitoring contract required me to report for hundreds of monitored drug screens where a stranger literally had to watch urine leave my body. Often, I had to leave work to comply with these drug tests, each time requiring me to sign out to a coworker to cover patients while I was out of the hospital. During this monitoring period I also broke my ankle in a manner that required surgical intervention. Under the monitoring contract, I was required to provide paperwork regarding what anesthesia had been used. I was required to obtain permission to take pain medications after surgery and during physical therapy. I was banned from taking prescription ADHD medication, which I had been taking for more than a decade under the care of a physician, negatively affecting my ability to complete tasks and study for boards. The most lasting impact, however, has been the report placed on the National Practitioner Data Bank. The NPDB report is permanent. It will be stapled to every application I ever complete in medicine. It will forever add additional issues in obtaining employment and will cause delays in any applications for credentialing with a healthcare system or to obtain a new state license.

Journal: After graduating from the residency program what was

your experience as far as obtaining employment?

Dr. Farmer: Obtaining employment after residency was difficult. I graduated later than my peers, which put me at a disadvantage, and additionally I did not have an exact graduation date until within a month of finishing, which made it difficult to communicate with possible future employers. I had to explain to each potential employer why I had graduated late as well as explain the NPDB report. There were some opportunities that said no simply because the report existed. I spent my first 6 months as an attending underemployed and when I was finally able to obtain full employment in Tennessee, the process took an extended amount of time due to delays with credentialing and obtaining a Tennessee state medical license because of the NPDB report and residency issues.

Journal: Prior to this ordeal, had you heard of the National Practitioner Data Bank (NPDB) and if so, what was your understanding of its function?

Dr. Farmer: My father was an Ob/Gyn, so I was vaguely aware of the NPDB but did not understand its function. I mistakenly believed the NPDB only pertained to medical malpractice findings.

Journal: One of the most frustrating things for physicians who have been subjected to false allegations is that even when they win their case at trial, they are still left with a false and damaging permanent NPDB report, which they will have to explain to prospective employers for the rest of their life. What are your thoughts on that?

Dr. Farmer: The outcome of my trial was overwhelmingly positive for me. But the fact that the NPDB report from a false accusation is permanent is worrisome because I know it will have a lasting negative impact on my career. I would support having a mechanism by which a physician could petition to change an inaccurate NPDB report when the evidence clearly supports that change.

Journal: In summary, what was the impact of this whole ordeal, including years of litigation, on your life?

Dr. Farmer: I was in limbo for months not knowing whether I would be able to complete my residency and practice medicine. I was unable to graduate with my peers and instead finished off-cycle causing issues with full employment right after residency.

I eventually secured employment, but, given my experience in Kentucky, chose to do so out of state. This was delayed due to issues with credentialing and obtaining a medical license caused by the NPDB report. Now that the legal battle is completed, I have obtained a job back in my home state near family.

The litigation was an ever-present stress factor that I wouldn't wish on anyone. Even after a unanimous victory at trial, the appeals process drug the process on for years with no reasonable offer ever presented by Baptist Health. Ultimately, I feel it was worth going through the process for me to stand up for myself and gain vindication through the legal system.

Journal: What advice or recommendations do you have for physicians who may be going through a similar situation involving PHPs and false/unsubstantiated allegations?

Dr. Farmer: First and foremost, I would say know what your particular institution's policies are and make sure they are followed. Baptist Health had excellent, well-written policies in place. Had they been followed by staff at Baptist Health Madisonville this ordeal would have been over in 48–72 hours without issue. Also, do not do anything without getting good legal advice first. Do not unnecessarily "voluntarily" self-report to a PHP. Insist on immediate testing for drugs and alcohol. Do not be bullied out of that. Do not sign anything that waives your legal rights.

Conclusions

The Kentucky Supreme Court decision in this case is, of course, authoritative in Kentucky. But beyond that its well-reasoned findings may be helpful and persuasive in other jurisdictions. The following are important conclusions drawn from this case.

1. An objectively reasonable effort to obtain the facts of the matter should be made before making a decision to refer a physician to a PHP. If there is not an objectively reasonable basis in fact for the referral, that is evidence of bad faith.

2. A hospital's official written policy for investigating concerns related to impairment should be followed before making a decision to refer a physician to a PHP.

3. Referring a physician to a PHP without doing a proper investigation and failing to follow official policy causes irreparable harm and moral injury to the physician victim.

4. When a hospital negligently and recklessly refers a physician to a PHP without doing a proper investigation and following official written policy, that is a substantial factor and proximate cause of all harm and injury that follows thereafter.

5. Equating a remote history or any diagnosis with current impairment is invalid.

6. Post hoc justification is a tactic which hospitals have used in sham summary suspensions and is a tactic characteristic of sham peer review. Post hoc justifications offered in support of a PHP referral are invalid.

7. Equating a questionable PEth test after the fact with impairment is invalid.

8. "Good faith cannot be established post hoc."[1] Probable cause for a PHP referral must exist prior to making the referral.

9. New diagnoses made by a PHP/treatment center, not supported by the physician's treating physician or which fail to follow accepted standards for making the diagnosis, should be viewed with skepticism given the conflicts of interest that exist for PHP/treatment centers to establish diagnoses that will result in further expensive treatment/monitoring.

10. Intentional interference in a physician's career (e.g., false accusations leading to an NPDB report and reputational damage) is evidence of malice.

11. Tortious interference should apply when a hospital's unjustified referral to a PHP and subsequent report to a medical board results in interference in the physician's relationship with a medical board.

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