COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 20XX-XX-1XX

ROSE ANNETTE CAMPBELL, Individually and as Administratrix of the Estate of DAVID ALAN CAMPBELL, and WARREN LEE CAMPBELL,

APPELLANTS

vs.

RUSSELL "RUSTY" THOMPSON, *et al.*,

APPELLEES

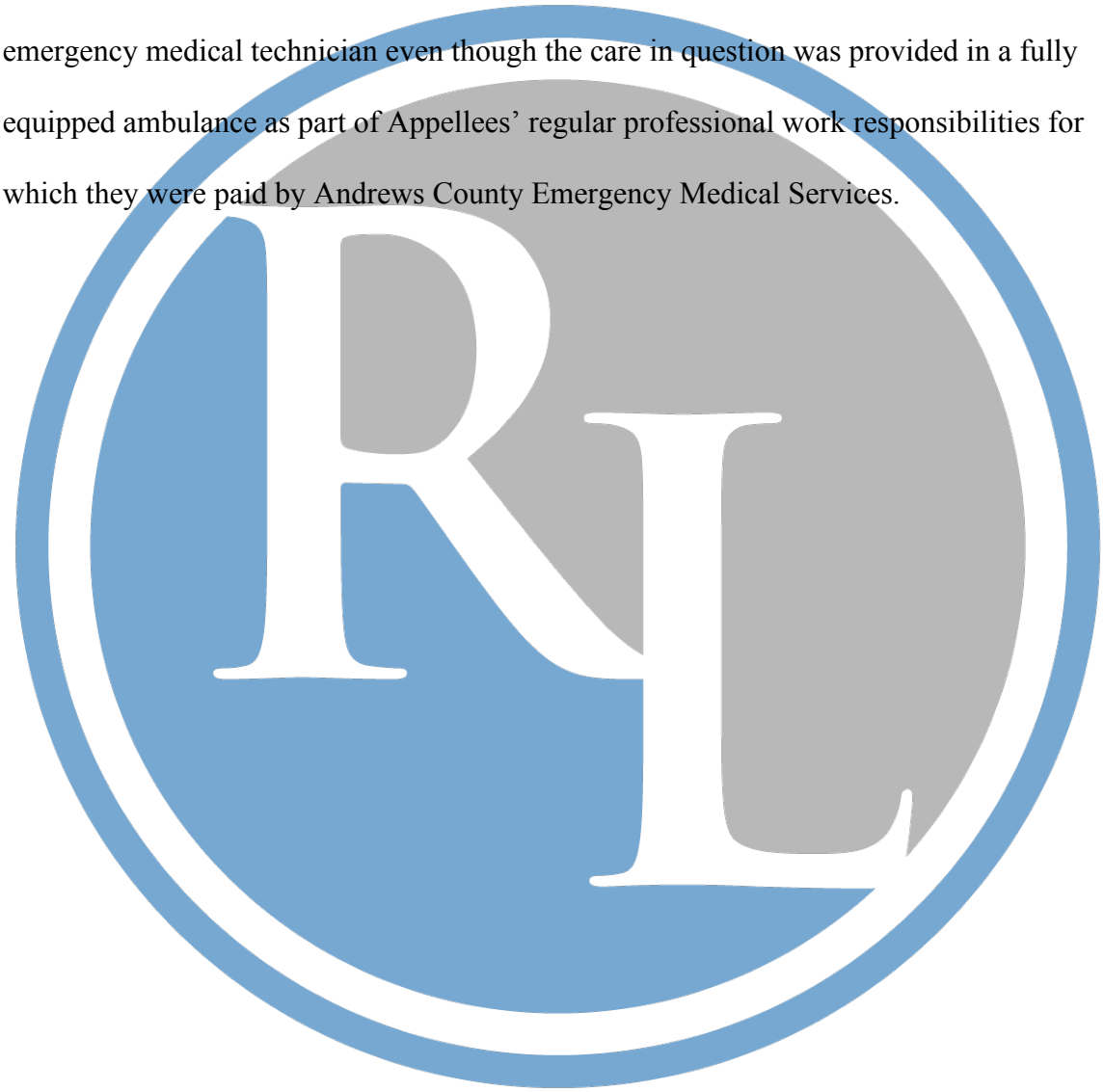
BRIEF OF APPELLANTS

ON APPEAL FROM THE XYZ CIRCUIT COURT
HON. CHARLES JUDGE
CIVIL ACTION NO. XX-CI-00XXX

INDEX TO APPENDIX

INTRODUCTION

This is a wrongful death medical malpractice action in which the central issues on appeal are the applicability and constitutionality of KRS 411.148, Kentucky's "Good Samaritan" Act. The Trial Court found the Act provided immunity to a paramedic and emergency medical technician even though the care in question was provided in a fully equipped ambulance as part of Appellees' regular professional work responsibilities for which they were paid by Andrews County Emergency Medical Services.



STATEMENT CONCERNING ORAL ARGUMENT

Appellants request oral argument because this case involves two issues of first impression before this Court: (1) the applicability of Kentucky's "Good Samaritan" Act, not to a situation in which emergency aid was provided voluntarily, but to care provided in the back of an Advanced Life Support ambulance by a paramedic and EMT as part of their regular professional work responsibilities for Andrews County Emergency Medical Services; and (2) the constitutionality of the Act in light of the protections guaranteed the citizens of the Commonwealth by the "Open Courts" provisions of the Kentucky Constitution. Appellants believe that resolution of these issues will impact the provision of emergency medical care to citizens across the Commonwealth and, thus, oral argument is important.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

FACTS

On May 11, 2005, David Alan Campbell ("Mr. Campbell") became lightheaded while driving home from work. Mr. Campbell pulled his vehicle off the road and a friend, who happened upon him, called Andrews County Emergency Medical Services ("Andrews Co. EMS"). Paramedic Russell "Rusty" Thompson ("Paramedic Thompson") and Emergency Medical Technician Gary Rice, Jr. ("EMT Rice") were dispatched by their employer, Andrews Co. EMS, to answer the call for medical help for Mr. Campbell. Paramedic Thompson and EMT Rice responded to the scene in an Advanced Life Support ambulance. (R. at 3-4).

At the scene, Mr. Campbell was placed in the back of the ambulance for evaluation and treatment. An EKG was performed. The EKG showed Mr. Campbell was having a heart attack. However, Paramedic Thompson diagnosed Mr. Campbell as suffering from dehydration and treated Mr. Campbell with an I.V. of normal saline. Based upon Paramedic Thompson's representation to Mr. Campbell that he was merely dehydrated and would be fine with fluids and rest, Mr. Campbell refused transport to the hospital. (R. at 4).

Mr. Campbell's family was called and told to come to the scene to pick up Mr. Campbell. Upon their arrival, Mr. Campbell's wife and son were told by Paramedic Thompson that he had checked Mr. Campbell's heart and it was fine. Paramedic Thompson also told Mr. Campbell's family that Mr. Campbell was suffering from

dehydration and that he should go home and drink a lot of water. Mr. Campbell was left to the care of his family and was taken to the family home. (R. at 4).

Within five hours of arriving home, Mr. Campbell suffered a cardiac arrest. He was unable to be resuscitated and was emergently transported to the hospital where he was pronounced dead upon arrival. Mr. Campbell was 42 years old. (R. at 5).

After Mr. Campbell's death, Paramedic Thompson altered the official EMS record in an attempt to cover up the substandard treatment provided by the Appellees. Paramedic Thompson also attempted to destroy part of the original EMS record and the original EKG strips to hide evidence of Appellees' substandard care. (R. at 5).

PROCEDURAL HISTORY

On January 19, 2006, Appellants filed this action.[1] Appellants alleged that the Appellees were "negligent, reckless and/or violated recognized standards of acceptable professional practice" in their treatment of Mr. Campbell and were responsible for his death. Appellants further alleged the conduct of Appellee Thompson, in attempting to alter and destroy evidence of the substandard care provided to Mr. Campbell, was "fraudulent, intentional, and/or reckless." Appellants requested compensatory and punitive damages. (R. at 1; 5-7).

On February 8, 2006, the defendants filed a "Motion to Dismiss Pursuant to CR 12.02(F)." As one of the grounds for dismissal, Appellees averred they were subject to immunity pursuant to the "Good Samaritan Act," KRS 411.148. Appellants filed a response in which they challenged the applicability and constitutionality of the Act. In

[1] In addition to the Appellees, the original defendants included Andrews County Fiscal Court and Andrews County Emergency Medical Services. (R. at 1).

their reply, Appellees averred that Appellants' constitutional challenge should be rejected by the Trial Court because the Attorney General had not been notified of the constitutional challenge. (R. at 16; 33-36; 62-71; 115-16).

Oral argument on the Motion to Dismiss was heard on April 18, 2006. Following oral argument, Appellants filed a Motion asking the Court to rule on the applicability of the Good Samaritan Act before ruling on its constitutionality. In the alternative, Appellants asked the Court to delay ruling on the Motion to Dismiss until the Attorney General could be served and respond to the constitutional challenge. However, before this motion was heard, the Trial Court entered an Order and Opinion on May 23, 2006, ruling partially on the Motion to Dismiss. (R. at 138-39; 140-47).

In the May 23, 2006, Order and Opinion, the Trial Court refused to find that the Good Samaritan Act barred Appellants' claims because the Attorney General had not been notified of the constitutional challenge prior to the hearing. Accordingly, the Trial Court refused to enter judgment in favor of the Appellees until the Attorney General had an opportunity to intervene.[2] (R. at 146).

On May 26, 2006, the Attorney General was served with notice of the constitutional challenge to the Act. On August 1, 2006, the Attorney General served his Notice of Intention Not to Intervene. (R. at 148-50; 265-66).

The following day, Appellants filed a motion requesting that the Court defer ruling on the applicability of the Good Samaritan Act. As grounds for their motion, Appellants argued that according to the plain language of KRS 411.148, the Act did not apply if the emergency care was provided in a "place having proper medical equipment."

[2] The Trial Court dismissed Appellants' claims against Andrews County Fiscal Court and Andrews Co. EMS finding they were subject to governmental immunity. (R. at 142-44).

Appellants sought supplementation of the record to establish whether the care in question was provided in a "place having proper medical equipment" and was thus, not within the ambit of the statute. In response, Appellees filed a "Motion For Ruling On Motion To Dismiss" in which they averred the Trial Court had ruled on the applicability of the Act and that the constitutional challenge was the only issue remaining before the Court. However, the Trial Court disagreed with Appellees and granted Appellants' motion to supplement the record in order to allow the Court to rule on the applicability of the Act. (R. at 267-68; 269-72; TAPE 8/8/06, 13:50:00).

On September 6, 2006, Appellants supplemented the record with the CR 30.02(6) deposition testimony of Bart Price, the quality assurance/quality improvement officer of Andrews Co. EMS, regarding whether the involved ambulance was a "place having proper medical equipment." Mr. Price was designated by Andrews Co. EMS to testify as to the medical equipment, medications, or other diagnostic and/or treatment materials available to Appellees during their evaluation and treatment of Mr. Campbell. Pursuant to subpoena, Andrews Co. EMS also produced a document showing the equipment available to the Appellees in their evaluation and treatment of Mr. Campbell. This document included a list of the medical equipment the Commonwealth of Kentucky required Andrews Co. EMS to carry on the ambulance in question. (R. at 289-94 including the deposition of Bart Price plus exhibits, which has been designated as "Exhibit A" in the Record on Appeal; 287; 288).

Of the equipment mandated by the Commonwealth to be carried on the ambulance, Mr. Price identified the following which typically would be used to evaluate a person with a suspected heart attack: blood pressure cuff, stethoscope, pulse oximetry,

oxygen therapy, cardiac monitor, EKG, and possibly blood sugar monitors. The following medications which may be used in patients having a heart attack were also on the ambulance: Aspirin, Atropine, Cardizem, D50, Dopamine, Epinephrine, Furosemide, Lidocaine, Nitroglycerine, Sodium Bicarb, Valium, Morphine, Adenocard, and Amiodarone. Additionally, if the person suspected of having a heart attack had difficulty breathing, the ambulance carried the following equipment which could have been used: ambu bag, auto vent, the BAAM device (Beck Airway Air Flow Monitor), combitubes, endotracheal tubes, laryngoscopes, Magill forceps, nasal cannula, nebulizer mask, neb pipe, non-rebreather masks, oral airways, stylettes, suction tubing, syringes, and three means of delivering oxygen. (R. at Exhibit A-Price Dep. 10:19 – 11:9; 12:8 -13:11; 14:25 –16:14).

The involved ambulance also had a Life Pak 12 cardiac monitor. The Life Pak 12 is a "state of the art" device that allows the EMS personnel to determine a patient's heart rate and heart rhythm. The Life Pak 12 also allows the EMS providers to perform a 12-lead EKG which can show myocardial infarction or ischemia. The Life Pak 12 can also be used to defibrillate (shock) a patient's heart back to a normal rhythm. (R. at Exhibit A-Price Dep. 7:10-21; 18:1-6; 18:13-17; 18:18 –19:9).

The ambulance also contained medical equipment for highly specialized invasive procedures. It was equipped with many types of intravenous catheters and fluids. The ambulance was also equipped to allow the EMS personnel to perform endotracheal intubation. Endotracheal intubation is the insertion of a tube through the mouth and into the trachea (wind pipe) to allow oxygen to be passed directly to the lungs. Once the endotracheal tube is inserted into the patient, the ambulance had monitoring devices

including pulse oximetry and end tidal CO2 monitors to determine if the patient was being adequately ventilated. The ambulance was further equipped with a cricothyrotomy kit. Cricothyrotomy is the process of surgically inserting a breathing tube through the neck into the trachea. (R. at Exhibit A-Price Dep.). Finally, the ambulance was equipped with multiple communications devices which would have allowed the Appellees to communicate directly with a physician. These devices included two-way radio and cellular telephones. (R. at Exhibit A-Price Dep. 21:17 – 22:4; 22:13-23; 24:11-22; Ex. 2 to Price Dep.; 19:14 – 21:13).

After hearing oral argument on the applicability of the Act, the Trial Court issued an Order and Opinion which was entered on December 19, 2006. The Trial Court found:

> It is the opinion of the Court that the Good Samaritan statute applies to the [Appellees] and the circumstances set out in the current action. While the ambulance herein was well-equipped, the fact remains that the purpose of an ambulance is to respond to medical emergencies in the field and sustain individuals during their transport to the hospital to receive medical care. The fact that the General Assembly specifically provided protection for civil liability to EMTs or paramedics, individuals who most commonly work with ambulance services, clearly shows that the legislature intended for the Good Samaritan statute to apply to EMTs or paramedics rendering aid in ambulance vehicles.

Accordingly, the Trial Court granted Appellees' Motion to Dismiss. While the constitutional challenge was mentioned in its opinion, the Trial Court did not directly address that issue. Appellants have assumed that the Trial Court has implicitly ruled that the Act was constitutional, otherwise the Motion to Dismiss would not have been granted. (R. at 317-19).

ARGUMENT

The Trial Court erred in finding Appellees were subject to "Good Samaritan" immunity because KRS 411.148 does not apply to (1) care provided in an ambulance as it is a "place having proper medical equipment"; (2) the regular professional work responsibilities of Appellees for which they were paid; and (3) willful or wanton misconduct. The Trial Court also erred in granting Appellees' Motion to Dismiss because KRS 411.148 violates Sections 14, 54, and 241 of the Kentucky Constitution. These issues were properly preserved for review in Appellants' Response to Motion to Dismiss (R. at 62-91), Appellants' Supplemental Response to Motion to Dismiss (R. at 289-94 including Exhibit A) and Appellants' oral arguments in response to the Motion to Dismiss (TAPE 4/18/06, TAPE 8/8/06, TAPE 12/5/06).

I. THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION TO DISMISS ON "GOOD SAMARITAN" GROUNDS

Good Samaritan laws are designed to provide immunity from civil liability to persons who voluntarily provide emergency treatment at the scene of an accident. See Eric A. Brandt, Note, Good Samaritan Laws—The Legal Placebo: A Current Analysis, 17 Akron L. Rev. 303, 303 (1983); Danny R. Veilleux, Annotation, Construction and Application of "Good Samaritan" Statutes, 68 A.L.R. 4th 294 §2[a] (1989). At common law, there is no duty to provide aid at the scene of an emergency absent a special relationship between the parties. See James v. Wilson, 95 S.W.3d 875, 890 (Ky. Ct. App. 2002); Grimes v. Hettinger, 566 S.W.2d 769, 775 (Ky. Ct. App. 1978). However, if a

person voluntarily undertakes to provide such aid, he assumes a duty to exercise ordinary care, and in the case of trained healthcare providers, the person assumes a particular and higher duty. See Clayton v. Kelly, 357 S.E.2d 865, 867-68 (Ga. Ct. App. 1987). The Good Samaritan statutes attempt to "eliminate the perceived inadequacies[3] of the common-law rules, under which a volunteer, choosing to assist an injured person although having no duty to do so, was liable for failing to exercise reasonable care in providing the assistance." 68 A.L.R. 4th at §2[a]. Thus, the purpose of the Good Samaritan statutes is "to induce voluntary rescue by removing the fear of potential liability which acts as an impediment to such rescue." Clayton, 357 S.E.2d at 868 (citation omitted).

In 1959, recognizing the need to encourage highly trained medical personnel to voluntarily assist at the scene of accidents without the fear of incurring liability for their efforts, California became the first state to pass Good Samaritan legislation. See Frank B. Mapel, III and Charles J. Weigel, II, Good Samaritan Laws—Who Needs Them?: The Current State of Good Samaritan Protection in the United States, 21 S. Tex. L.J. 327, 330 (1981). Every state in the union has since enacted some form of Good Samaritan legislation granting civil immunity to certain healthcare providers for voluntarily assisting at the scene of an accident. See id. at 327. In 1972, Kentucky followed suit enacting KRS 411.148, which attempts to provide Good Samaritan immunity under specific circumstances to licensed physicians, nurses, emergency medical technicians and others qualified to render first aid. See KRS § 411.148(1). In 2002, KRS 311A.150

[3] Prosser, for example, found the common law rule troubling because "the Good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing." See W. Prosser, Handbook of the Law of Torts, § 56, at 341-42 (4th ed. 1971).

added licensed paramedics to the class of persons to whom KRS 411.148 applies. See id. § 311A.150.

The Good Samaritan Act is limited in scope. KRS 411.148 states:

> (1) No physician licensed under Chapter 311, registered or practical nurse licensed under KRS Chapter 314, person certified as an emergency medical technician by the Kentucky Cabinet for Health Services, person certified by the American Heart Association or the American Red Cross to perform cardiopulmonary resuscitation, or employee of any board of education established pursuant to the provision of KRS 160.160, who has completed a course in first aid and who maintains current certification therein in accordance with the standards set forth by the American Red Cross shall be liable in civil damages for administering emergency care or treatment at the scene of an emergency outside of a hospital, doctor's office, or other place having proper medical equipment excluding house calls, for acts performed at the scene of such emergency, unless such acts constitute willful or wanton misconduct.
>
> (2) Nothing in this section applies to the administration of such care or treatment where the same is rendered for remuneration or with the expectation of remuneration.
>
> (3) The administering of emergency care or treatment at the scene of an emergency by employees of a board of education shall not be considered to be rendered for remuneration or with the expectation of remuneration because such personnel perform such care as part of their regular professional or work responsibilities for which they receive their regular salaries from the school board which is their employer.

Id. § 411.148. Thus, by its plain language, the Good Samaritan immunity of the Act is restricted to (1) specially trained personnel; (2) who voluntarily; (3) provide emergency care and treatment; (4) at the scene of an emergency; (5) in a place without proper medical equipment; and (6) when said care does not constitute willful or wanton misconduct. Accordingly, KRS 411.148 does not apply to every emergency situation in which a person qualified to render first aid does so, but only to those circumstances that meet the strict parameters of the statute.

A. APPELLEES ARE NOT ENTITLED TO IMMUNITY BECAUSE KRS 411.148 DOES NOT APPLY TO CARE PROVIDED IN A PLACE HAVING PROPER MEDICAL EQUIPMENT

The Good Samaritan immunity of KRS 411.148 attaches to emergency care provided "outside of a hospital, doctor's office, or other place having proper medical equipment excluding house calls." See id. On the other hand, immunity does not attach to emergency care provided in a "hospital, doctor's office, or other place having proper medical equipment." See id. The reason places having proper medical equipment are excluded from the ambit of the statute is to prevent extension of Good Samaritan immunity to the work of healthcare providers in places where emergencies are commonly treated. See Mapel and Weigel, supra, at 341. Thus, emergency care provided by healthcare workers in places having the medical equipment necessary to properly deal with emergencies is not subject to Good Samaritan immunity.

Ambulances are equipped to allow emergency medical technicians and paramedics to provide emergency care and treatment. In the present case, the Appellees provided emergency care to Mr. Campbell in the back of an ambulance with state of the art medical equipment at their disposal. This Advanced Life Support vehicle carried all of the medical equipment required by the Commonwealth to allow Appellees to properly provide emergency care to Mr. Campbell. (R. at Exhibit A-Price Dep. 7:10-21; 10:19 – 11:9; 12:8 -13:11; 14:25 –16:14; 18:1-6; 18:13-17; 18:18 –19:9; 19:14 – 21:13; 21:17 – 22:4; 22:13-23; 24:11-22; Ex. 2 to Price Dep.). Thus, the care at issue was provided in a "place having proper medical equipment."

The Trial Court recognized Appellees provided care to Mr. Campbell in a place having "proper medical equipment." This is apparent from the Trial Court's findings that the ambulance was "well-equipped" and "the equivalent to a mobile emergency room." (R. at 318-19). Despite these findings, the Trial Court held KRS 411.148 granted immunity to Appellees. (R. at 319). The Trial Court found that because emergency medical technicians and paramedics were among the class potentially immunized by the Act, "the legislature intended for the Good Samaritan statute to apply to EMTs or paramedics rendering aid in ambulance vehicles." (R. at 319). The Trial Court further surmised that "if the General Assembly intended for the Good Samaritan statute not to apply to ambulance services that it could have stated as much in the statute." (R. at 319). To reach its ruling, the Trial Court ignored the plain language of the statute excluding emergency care administered in a place having "proper medical equipment." This was error.

"To determine legislative intent, a court must refer to the words used in enacting the statute rather than surmising what may have been intended but was not expressed. Similarly, a court may not interpret a statute at variance with its stated language." Commonwealth v. Allen, 980 S.W.2d 278, 280 (Ky. 1998) (citations omitted). The Trial Court concluded that the Legislature intended the Act to apply whenever a paramedic or EMT provides emergency aid in an ambulance. (R. at 319). However, the stated language of the Act shows the intent of the Legislature was just the opposite. According to the statute, the Legislature intended the Act to apply only when emergency care was provided "outside of a . . . place having proper medical equipment." See KRS 411.148(1). The General Assembly did not intend the Act to apply to care rendered in

places having "proper medical equipment." Therefore, because Appellees provided care to Mr. Campbell in a place having "proper medical equipment," i.e., the back of an ambulance, they are not subject to immunity.

The Trial Court's supposition that the General Assembly did not intend to exclude care provided in ambulances because there was no specific exclusion also ignores the statutory language. While ambulances are not specifically enumerated in the Act, the statute does contain general language excluding care provided in places having "proper medical equipment." The General Assembly recognized that, in addition to hospitals and doctor's offices, there are many places with proper medical equipment where emergency healthcare is provided. Instead of making an exhaustive list of these places, the Legislature simply added the phrase "or other place having proper medical equipment" to the statute. See id. This general phrase prohibits immunity from attaching to care administered in any place properly equipped to allow healthcare workers to provide emergency care. The back of an Advanced Life Support ambulance is such a place. Appellees are therefore not subject to the immunity offered by KRS 411.148. Accordingly, it was error for the Trial Court to grant Appellees' Motion to Dismiss.

B. APPELLEES ARE NOT ENTITLED TO IMMUNITY BECAUSE KRS 411.148 DOES NOT APPLY TO CARE PROVIDED DUE TO A PRE-EXISTING DUTY FOR WHICH THE APPELLEES WERE REMUNERATED

The Trial Court erred in granting Appellees' Motion to Dismiss because KRS 411.148 does not apply to those with pre-existing duties to provide care in an emergency. Good Samaritan immunity is intended to encourage skilled healthcare providers to voluntarily provide aid at the scene of an emergency. See Clayton, 357 S.E.2d at 868. However, if an emergency care provider has an employment duty to respond to the person in need, then the provider needs no special inducement of Good Samaritan immunity to offer aid. See id. "The Good Samaritan statute immunity is intended to facilitate good medical care by professionals as well as the assistance of wayside travelers; therefore, it is not available to insulate from liability for failure to exercise their duty of care those persons whose express or customary employment duties require them to administer aid." Id. "Courts in other states have uniformly held the law is not meant to exempt all medical personnel in every emergency situation, but only those personnel who happen across an emergency outside the normal course of their work and who otherwise have no duty to assist." Hirpa v. IHC Hospitals, Inc., 948 P.2d 785, 790 (Utah 1997) (citations omitted). See also James v. Rowe, 674 F.Supp. 332 (D. Kan. 1987); Deal v. Kearney, 851 P.2d 1353 (Alaska 1993); Burciaga v. St. John's Hosp., 232 Cal. Rptr. 75 (Cal. Ct. App. 1986); Higgins v. Detroit Osteopathic Hospital Corp., 398 N.W.2d 520 (Mich. Ct. App. 1986); Tiedeman v. Morgan, 435 N.W.2d 86 (Minn. Ct. App. 1989); Praet v. Sayreville, 527 A.2d 486 (N.J. Super. Ct. App. Div. 1987); Markman v. Kotler, 382 N.Y.S.2d 522 (N.Y. App. Div. 1976); Lindsey v. Miami Dev.

Corp., 689 S.W.2d 856 (Tenn. 1985); Hovermale v. Berkeley Springs Moose Lodge No. 1483, 271 S.E.2d 335 (W.Va. 1980) (all denying "Good Samaritan" immunity due to pre-existing duty to act). But see Tatum v. Gigliotti, 583 A.2d 1062 (Md. 1989). Thus, the aid offered by the provider with a pre-existing duty is not voluntary in the sense of a Good Samaritan and public policy would be ill-served if the provider were relieved of the usual duty of care by being given immunity. See Clayton, 357 S.E.2d at 868.

KRS 411.148 recognizes that those with a preexisting duty to respond to an emergency are not covered by the Act. The Act requires that the care take place "at the scene of an emergency outside of a hospital, doctor's office or other place having proper medical equipment excluding house calls." See KRS § 411.148(1). The General Assembly understood that the persons who typically respond to an emergency in "a hospital, doctor's office, or other place having proper medical equipment" are those who have pre-existing duties to do so, either by virtue of their employment status or due to a provider-patient relationship with the person in need. Therefore, by excluding emergencies occurring at "a hospital, doctor's office, or other place having proper medical equipment," the General Assembly recognized that a person with a pre-existing duty is required to assist in an emergency and does not need the added incentive of immunity to do so.

The intent of the Legislature to exclude persons with pre-existing duties is made even clearer by the language of the statute excluding "house calls" as places where immunity may attach. See id. Significantly, persons making house calls are not subject to immunity even though the house calls are "outside . . . a place having proper medical equipment." See id. A house call is defined as "[a] professional visit made to a home,

especially by a physician." The American Heritage Dictionary of the English Language (4th ed.), available at http://dictionary.reference.com/browse/house call. By definition, house calls only occur when a provider has a professional relationship with a person. The provider making the house call, by virtue of his professional relationship with the person in need, owes a duty of care to that person that pre-exists the emergency. The house call exclusion is, therefore, proof that the General Assembly did not intend for the Act to apply to emergency situations in which the person seeking immunity had a pre-existing duty to the person in need.

KRS 411.148 also makes it clear that in order for a person to be subject to Good Samaritan immunity, the care must have been rendered voluntarily. The statute does not apply to situations in which care is "rendered for remuneration or with the expectation of remuneration." See KRS § 411.148(2). The no remuneration requirement of the statute shows the intent of the General Assembly to have the statute apply only to persons who gratuitously, that is, voluntarily, render aid at the scene of an emergency. See Mapel and Weigel, supra, 21 S. Tex. L.J. at 339 n.41; Brandt, supra, 17 Akron L. Rev. at 324 (both interpreting KRS 411.148 to apply to gratuitous aid). No paid providers of emergency care are entitled to immunity under the statute with one important exception--employees of a board of education who provide emergency care "as part of their regular professional or work responsibilities for which they receive their regular salaries from the school board." See KRS § 411.148(3). If the General Assembly wished to exclude other persons who provide emergency care as part of their regular professional or work responsibilities such as emergency medical technicians and paramedics, it would have

done so. However, it did not. Therefore, the Good Samaritan Act[4] does not apply to those persons who are paid or expect to be paid for providing emergency care because these persons generally have a pre-existing duty to respond to the person in need.

In the present case, the Appellees were under a pre-existing duty to provide emergency care to Mr. Campbell. The Appellees' aid to Mr. Campbell was not voluntary. As employees of Andrews Co. EMS, the Appellees were dispatched to care for Mr. Campbell as part of their customary job duties. The Appellees were under an employment obligation to provide care to Mr. Campbell and upon their arrival at the scene, undertook to treat him. (R. at 49; 53). There was thus a healthcare provider-patient relationship between the Appellees and Mr. Campbell. Due to the special nature of this relationship, the Appellees had a duty to care for Mr. Campbell and to do so within the standard of care. Thus, their actions were not voluntary, but obligatory. Accordingly, the Good Samaritan Act does not apply because of the Appellees' pre-existing duty to Mr. Campbell.

Furthermore, the Appellees were remunerated for the care they provided to Mr. Campbell. As employees of Andrews Co. EMS, it was Appellees' job to provide emergency care to those who needed it, including Mr. Campbell. Although the Appellees were not paid in addition to their normal salaries, they were remunerated nonetheless for the care they provided to Mr. Campbell. (R. at 50; 54). Therefore, pursuant to KRS 411.148(2), Appellees are not subject to immunity because they received remuneration

[4] "Even the statute's popular name indicates that the scope of its coverage is limited to those who happen upon an emergency and otherwise would have no duty to act. The parable of the Good Samaritan told the story of the man who, during a journey, came upon a victim of a robbery. He treated the man's wounds, then transported him to an inn where he could be cared for." James v. Rowe, 674 F. Supp. 332, 334 n. 2 (D. Kan. 1987) (citing Luke 10:30-37).

for the care they provided. Accordingly, it was error for the Trial Court to grant Appellees' Motion to Dismiss.

C. APPELLEES ARE NOT ENTITLED TO IMMUNITY BECAUSE KRS 411.148 DOES NOT APPLY TO WILLFUL OR WANTON MISCONDUCT

The Trial Court erred in granting Appellees' Motion to Dismiss because KRS 411.148 does not apply to acts that "constitute willful or wanton misconduct." See KRS § 411.148(1). Wanton misconduct is the equivalent of recklessness that warrants punitive damages. See Phelps v. Louisville Water Co., 103 S.W.3d 46, 52 (Ky. 2003); Horton v. Union Light, Heat & Power Co., 690 S.W.2d 382, 388-90 (Ky. 1985). In their complaint, Appellants alleged that both Appellees were "reckless" in the care and treatment they rendered to Mr. Campbell. (R. at 5). Appellants further alleged the conduct of Appellee Thompson, in attempting to alter and destroy evidence of the substandard care provided Mr. Campbell, was "fraudulent, intentional, and/or reckless." (R. at 5). Appellants requested punitive damages as a result of this willful or wanton conduct. (R. at 7).

Despite its awareness of the claim of reckless or wanton misconduct[5], the Trial Court granted the Motion to Dismiss finding KRS 411.148 provided Appellees with immunity. (R. at 319). In reaching this decision, the Trial Court ignored the plain language of KRS 411.148 which excludes acts that constitute willful or wanton misconduct. The standard the Trial Court was required to use in deciding the Motion to

[5] As part of their Motion to Dismiss, Appellees sought to have the punitive damages claim dismissed. (R. at 23; 126-28). However, the Trial Court denied this part of the Motion finding: "The question of an award of punitive damages is clearly an issue for the jury and will not be dismissed as a matter of law." (R. at 147). Thus, the Trial Court recognized that Appellants have stated a viable claim for punitive damages as a result of the willful, wanton or reckless misconduct of the Appellees.

Dismiss demanded that the record be reviewed in a light most favorable to the Appellants and all doubts be resolved in their favor. See Steelvest, Inc. v. Scansteel Serv. Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). A cursory reading of the Complaint evidences a claim of willful or wanton misconduct by Appellees. Without having to look any further than the Complaint, the Trial Court should have found that KRS 411.148 does not apply to this case. Therefore, it was error for the Trial Court to grant Appellees' Motion to Dismiss.

II. THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION TO DISMISS BECAUSE KRS 411.148 VIOLATES SECTIONS 14, 54 AND 241 OF THE KENTUCKY CONSTITUTION--THE "OPEN COURTS" PROVISIONS

The Kentucky Constitution guarantees a person the right to a day in court to prove he or she was wronged and to the recovery of damages. See Ludwig v. Johnson, 49 S.W.2d 347, 351 (Ky. 1932). This right is protected specifically by the "Open Courts" provisions of the Kentucky Constitution, Sections 14, 54 and 241. These provisions "prohibit the abolition or diminution of legal remedies for personal injuries and wrongful death, . . . a theme that has appeared in Kentucky's constitution since 1792." McCollum v. Sisters of Charity of Nazareth Health Corp., 799 S.W.2d 15, 18 (Ky. 1990) (citation omitted). Specifically, the Kentucky Constitution prohibits the Legislature from abolishing common law rights of action for injuries or death caused by negligence. See Saylor v. Hall, 497 S.W.2d 218, 222 (Ky. 1973).

Section 14, which is the oldest of the "Open Courts" provisions, is part of the Bill of Rights of the Kentucky Constitution dating back to 1792. See Perkins v. Northeastern Log Homes, 808 S.W.2d 809, 811 (Ky. 1991). Section 14 states: "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Ky. Const. § 14. This section of the Constitution applies not only to the judicial branch, but to the legislative branch of government as well. McCollum, 799 S.W.2d at 18.

Section 54 was added to the Kentucky Constitution as a new provision in the Fourth (and last) Constitution of 1891. See Perkins, 808 S.W.2d at 811. Section 54

states: "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." Ky. Const. § 54. Section 54, along with Section 241, was enacted "to limit the power of the General Assembly, which was then widely perceived as abusing its power with the grant of privileges and immunities to railroads and other powerful corporate interests." Perkins, 808 S.W.2d at 811-12.

Section 241, also enacted in 1891, deals with wrongful death and states:

> Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.

Ky. Const. § 241. "It was the manifest intention of [Section 241] to allow an action to be maintained whenever the death of a person was caused by the negligent or wrongful act of another and it is not within the power of the Legislature to deny this right of action." Ludwig, 49 S.W.2d at 349 (citation omitted). Thus, when Sections 14, 54, and 241 are read together, "the conclusion is inescapable that the intention of the framers of the Constitution was to inhibit the Legislature from abolishing the rights of action for damages for death or injuries caused by negligence." Id. at 350.

An examination of whether a statute offends the Open Courts provisions begins with an inquiry as to whether the cause of action affected was a "jural right," or part of the common law, at the time the Kentucky Constitution was adopted in 1891. See McCollum, 799 S.W.2d at 18-19. The statute in question, KRS 411.148, relieves the

person named therein from liability arising from death or physical injury caused by negligence. See KRS § 411.148(1). In certain cases, the provider of emergency care may be a healthcare provider and thus, the statute attempts to provide immunity for acts of medical malpractice. See id. Therefore, the question of whether KRS 411.148 is constitutional turns on whether a cause of action for negligence, in general, or medical malpractice specifically, existed at the time the Constitution was adopted.

It cannot be disputed that a cause of action for negligence preexisted the Kentucky Constitution. See Williams v. Wilson, 972 S.W.2d 260, 262-64 (Ky. 1998); Perkins, 808 S.W.2d at 816; McCollum, 799 S.W.2d at 19; Gould v. O'Bannon, 770 S.W.2d 220, 222 (Ky. 1989); Tabler v. Wallace, 704 S.W.2d 179, 187 (Ky. 1986); Saylor, 497 S.W.2d at 224; Happy v. Erwin, 330 S.W.2d 412, 414 (Ky. 1959); Ludwig, 49 S.W.2d at 351. Furthermore, it is without question that a common law cause of action for medical malpractice existed long before the Kentucky Constitution was enacted. McCollum, 799 S.W.2d at 19 (citing Piper v. Menifee, 51 Ky. (12 T.B.Mon.) 465, 468 (1851)). KRS 411.148 provides immunity to persons for negligence or medical malpractice. See KRS § 411.148(1). Due to its abolition of liability for civil damages, the Act is in violation of Sections 14, 54, and 241 of the Kentucky Constitution. Accordingly, the Act is unconstitutional and should be declared void.

A finding that KRS 411.148 is unconstitutional would be in accord with other decisions of the Supreme Court of Kentucky. In Happy v. Erwin, the Court was faced with the question of whether a statute that provided immunity to certain city officers and employees violated Sections 14, 54 and 241. In defense of the statute, the defendants argued that the jural rights doctrine did not apply because the statute only immunized

public servants. See Happy, 330 S.W.2d at 414. The Court disagreed, finding: "[i]t was the manifest purpose of the framers of [the Constitution] to preserve and perpetuate the common-law right of a citizen injured by the negligent act of another to sue and recover damages for his injury." Id. (citation omitted). In language that impacts the present case, the Court found:

> It is argued that the liability of public servants is a matter of public policy for the legislature to determine. However, the public policy of the legislature cannot supersede the public policy of the people of the Commonwealth expressed in their Constitution. If this theory were sound, there would be no reason why the legislature could not exempt all public officers and employees from any type of liability. Such exception logically could be extended even to particular private groups which the legislature determined it was in the public interest to immunize from suit. That is exactly what the constitutional provisions above quoted were designed to prevent.

Id. (emphasis added). Thus, the Court found that the purpose of the Open Courts provisions was to prevent the Legislature from granting immunity to persons, public or private. See id. Accordingly, the Court held the statute in question was unconstitutional. See id.

The Happy decision stands for the proposition that the Legislature cannot offer immunity from civil liability without offending the Constitution. The protection of the Open Courts provisions trumps any public policy concerns the Legislature may have regarding the civil liability of certain persons. See id. It is this protection of the rights of the individual citizen from special interest legislation that makes the Kentucky Constitution such an effective guardian of the people. See Perkins, 808 S.W.2d at 818 ("we can only commiserate with the citizens of other states who do not enjoy similar protection."). KRS 411.148, as an attempt by the General Assembly to limit the civil

liability of certain persons, clearly runs afoul of the Open Courts provisions. Accordingly, it should be declared unconstitutional.

Declaring KRS 411.148 unconstitutional would also be consistent with the result reached in McCollum v. Sisters of Charity of Nazareth Health Corp.. In McCollum, the Court was faced with deciding whether a five-year medical malpractice statute of repose violated Sections 14, 54 and 241. See 799 S.W.2d at 18-19. Finding that the statute purported to cut off negligence and malpractice actions against physicians, surgeons, dentists and hospitals, the Court held the statute to be unconstitutional. See id. at 19. Importantly, the Court found: "While there may be certain salutary effects from limiting to five years the period in which suits can be brought, these cannot outweigh a plaintiff's constitutional right to have his or her day in court." Id.

McCollum reemphasizes the importance the framers of the Constitution and our Courts place on an individual's right to his or her day in court. Even if the legislation in question has beneficial effects, these effects will not outweigh the rights guaranteed by the Open Courts provisions of the Constitution. Thus, no matter how commendable the purpose of the General Assembly was in passing the Good Samaritan Act, the Act is still unconstitutional because it transgresses the rights of the individual who is deprived of his or her day in court due to the statute's immunity. Accordingly, KRS 411.148 should be declared unconstitutional and void.

In Gould v. O'Bannon, the Supreme Court rejected another claim of immunity on constitutional grounds. In Gould, medical doctors attempted to invoke sovereign immunity to escape civil liability for a charge of medical malpractice. See 770 S.W.2d at 221. The physicians averred that, as agents of a governmental agency, they were entitled

to immunity for acts of medical malpractice. See id. The Court disagreed, finding that "individuals must be accountable for their conduct." See id. Citing Sections 14, 54 and 241, the Court stated: "Our Constitution specifically prohibits the abolition or diminition [sic] of legal remedies for personal injuries. The legislature may not abolish an existing common law right or action for personal injury." Id. at 222 (citations omitted). Thus, the Court found the immunity sought by the physicians to be a violation of the Kentucky Constitution. See id.

The Appellees, like the physicians in Gould, are trying to avoid accountability for their conduct by claiming immunity from civil liability for acts of medical malpractice. KRS 411.148, the source of this purported immunity, is an attempt by the Legislature to abolish a legal remedy for negligence. As in Gould, the Appellees should be held accountable for their conduct. Accordingly, KRS 411.148 should be found to be in violation of the Constitution and declared void.

Finally, the Attorney General of Kentucky has opined on multiple occasions that the KRS 411.148 is unconstitutional. See OAG 77-47 (January 25, 1977); OAG 78-258 (April 7, 1978); OAG 79-71 (January 31, 1979); and OAG 79-535 (October 17, 1979). Appellants find the reasoning of the Attorney General in OAG 79-535 thorough and compelling. Although it is recognized that opinions of the Attorney General are not binding on this honorable Court, Appellants urge the Court to consider the rationale of OAG 79-535. Therefore, Appellants respectfully request that the Court declare KRS 411.148 unconstitutional and void.

CONCLUSION

The Trial Court erred in finding that KRS 411.148 applied to this case because (1) the care in question was provided in a "place having proper medical equipment"; (2) the Appellees had a pre-existing duty to aid Mr. Campbell and were paid to do so; and (3) Appellees' care constituted willful or wanton misconduct. KRS 411.148 is also unconstitutional and should be declared void because it violates Sections 14, 54 and 241 of the Kentucky Constitution. Accordingly, it is respectfully requested that this honorable Court reverse the judgment entered in favor of the Appellees and remand this cause to the Trial Court.

Respectfully submitted,