

**SALLY MCCULLUM and  
CHRISTOPHER MCCULLUM,  
Individually and as Co-Administrators  
of the Estate of FINNLEY MCCULLUM**

**PLAINTIFFS**

v. **ANSWER TO FIRST AMENDED AND RESTATED COMPLAINT**

**NORTON HEALTHCARE, INC.**

**DEFENDANT**

\* \* \* \* \*

Comes the Defendant, Norton Healthcare, Inc., by counsel, improperly sued as the entity caring for plaintiffs’ decedent, and for its Answer to Plaintiffs’ Complaint and First Amended and Restated Complaint, previously filed herein, states as follows:

**FIRST DEFENSE**

1. Plaintiffs’ Complaint and First Amended and Restated Complaint fail to state a claim or cause of action upon which relief can be granted and should, therefore, be dismissed.

**SECOND DEFENSE**

2. Plaintiffs’ claims may be barred by the applicable statutes of limitation, and to the extent the claims are time barred, they should be dismissed.

**THIRD DEFENSE**

3. As to the allegations in Paragraphs 1 and 2: This defendant admits plaintiffs’ decedent was 8 years old when he died at Norton Children’s Hospital. It is denied the decision to withdraw care was unilaterally made. It is admitted plaintiffs’ decedent was awake and conscious earlier on the date of his death; however, it is denied he was awake or conscious at the time care was withdrawn. This Defendant lacks knowledge but defers to the medical record as to DOB of Plaintiffs’ decedent.

4. This Defendant admits Norton Hospitals, Inc. d/b/a Norton Children's Hospital is a wholly-owned subsidiary of Norton Healthcare, Inc.

5. This Defendant admits the allegations contained in Paragraph 3, 5, 6.

6. As to the allegations contained in Paragraph 4: this Defendant denies Plaintiffs' decedent was ever on the heart transplant list after rejection of his initial transplant. This Defendant lacks knowledge regarding Plaintiffs' mindset. It is admitted that Plaintiffs' decedent was maintained physiologically with dual Berlin Heart devices, which may serve as a bridge to transplant in some cases.

7. The allegations contained in Paragraph 7 are admitted as to dialysis, ventilator dependence, Berlin Heart device, and tracheostomy, to the extent "life sustaining treatment" is defined as "treatment that serves to prolong life without reversing the underlying medical condition."

8. As to the allegations contained in Paragraph 8 of the Amended Complaint: this Defendant denies that Plaintiffs' decedent was ever on the transplant list or a candidate for transplant since the rejection of his prior transplant. It is admitted that Plaintiffs were advised on or around April 4, 2023, that Finnley's condition precluded being listed at any point.

9. The allegations contained in Paragraphs 9, 10, and 11 misstate the process and involvement of physicians within and outside the Norton system, including multiple cardiac surgeons and medical ethicists. It is admitted that day after the stated date, Plaintiffs were advised that the policy on delivery of non-beneficial care would be followed. It is denied that the ethics committee or "Norton" recommended withdrawal of non-beneficial care within 24 hours. Norton is without knowledge sufficient to admit or deny the remaining allegations in paragraphs 9, 10 and 11, and therefore deny same.

10. Paragraph 12 is denied.

11. Norton lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 13 and therefore denies those allegations.

12. Paragraph 14 is denied.

13. Paragraph 15 is denied.

14. Paragraph 16 cites personal impressions of Plaintiffs, about which this Defendant lacks knowledge. It is denied that this Defendant acted improperly medically or ethically in all care and treatment of Plaintiffs' decedent. This Defendant affirmatively states that it acted within all standards of medical and ethical care.

15. It is admitted that the plan in place had been for Plaintiffs' decedent to be sedated and unaware of the withdrawal process in response to Paragraphs 17 and 18. It is further stated that, had Plaintiffs allowed administration of the ordered sedating medications, per the physicians' plan, their decedent would not have had any awareness of any of the process. It is expressly stated that sedating medications were given and effective prior to withdrawal of life-sustaining implements, including the Berlin heart device(s) and ventilator. It is denied that any staff member or physician at Norton Children's Hospital caused Plaintiffs' decedent to know anything or be aware about withdrawal of care.

16. Paragraphs 19 and 20 are denied, as there were multiple physicians in the room at the time care was withdrawn. These physicians had been involved in Finnley's care and Plaintiffs knew they were physicians. While this specific set of devices being withdrawn and circumstances of withdrawal were different, the physicians in the room were experienced in end-of-life care and withdrawal of care. This Defendant reiterates that none of its agents, servants, or employees acted in any way to cause fear, pain, etc. in Plaintiffs' decedent. It is further unequivocally denied that Plaintiffs' decedent was awake, conscious, or in fear/pain or agony at the time care was withdrawn.

17. Paragraphs 21 and 22 are denied.

18. Paragraphs 23 and 24 are denied.

19. While this Defendant admits Plaintiffs will live with the sadness anyone feels when they have lost a child to untreatable illness, the entire characterization of the withdrawal of non-beneficial treatment contained in Paragraph 25 is denied.

20. Paragraphs 26, 27, 28, and 29 are denied.

21. This Defendant lacks knowledge regarding the allegations contained in Paragraphs 30, 31, and 32, and therefore denies these allegations.

22. In response to Paragraphs 33 and 34: It is denied that “Norton Healthcare, Inc.” provided care to Plaintiffs’ decedent. It is admitted he received care at Norton Children’s Hospital. Norton Hospitals, Inc. is a Kentucky Corporation authorized to do business in the state, as is Norton Healthcare, Inc. It is admitted Norton Hospitals, Inc. does business as Norton Children’s Hospital that specialized medical, pediatric, intensive care, and palliative care are provided at the facility, including to Plaintiffs’ decedent. The issues of agency are questions of law for the Court and do not require responsive pleading. To the extent it would be required, they are denied.

23. It is denied that Norton Healthcare, Inc. acted as stated in Paragraph 35 and 36. Further, the Paragraph contains questions of law, not proper for a complaint. It is affirmatively stated that the nurses were employees of Norton Hospitals, Inc. and the physicians were employees of Community Medical Associates, Inc. and/or Norton Children’s Medical Group.

24. The statements contained in Paragraphs 37, 39 and 40 do not require an answer. This Defendant affirmatively denies liability under any theory. Exhibit B was attached.

25. In response to Paragraph 38, this Defendant states that no valid certificate of merit could have been obtained because Plaintiffs and Plaintiffs’ counsel do not possess a complete

copy of the medical record; therefore, no medical expert could have provided appropriate review to satisfy the obligations of KRS 411.167. This Defendant disagrees with the characterization of the claims.

26. This Defendant adopts and incorporates by reference its responses to the corresponding Paragraphs as if set forth fully and verbatim herein in response to Paragraphs 41, 46, 48, 52 and 54.

27. In response to paragraph 42, it is admitted a duty of care was owed to Plaintiffs' decedent by all care providers.

28. Paragraphs 43, 44, 45, 47, 50, 51, 53, 55, 56, 57, 58, 59 and 60 are denied.

29. In response to Paragraph 49: This Defendant denies it owed a *duty of care* to persons who are not its patients. It is affirmatively stated that Norton's employees and the physicians in attendance all acted within ethical and medical standards of care in treating Plaintiffs' decedent and in interacting with Plaintiffs.

30. This Defendant denies each and every allegation not specifically admitted herein.

31. This Defendant affirmatively denies all allegations of negligence, gross negligence, negligent infliction of emotional distress, and Plaintiffs' assertions as to punitive damages.

#### **FOURTH DEFENSE**

32. Without waiving its denial of liability to Plaintiff, this Defendant states that all damages to Plaintiff that are alleged in the Complaint may have been caused in whole or in part by Plaintiffs own negligence, intentional acts, and/or failed to mitigate damages, and as such Plaintiffs' claims are barred in whole or in part.

#### **FIFTH DEFENSE**

33. Without waiving denial of liability to Plaintiff, this Defendant states the Plaintiffs'

injuries and damages may have been caused in whole or in part by the acts, omissions and/or negligence or intentional acts of other persons, non-parties and/or parties not under the direction and control of this Defendant and said acts, omissions or negligence constitute either a complete or partial bar to recovery herein.

**SIXTH DEFENSE**

34. Without waiving the denial of liability to Plaintiff, this Defendant states any injuries and damages to Plaintiff may have resulted in whole or in part from an intervening act and/or superseding causes, including acts of God, over which this Defendant had no control or to which this Defendant had no responsibility or liability.

**SEVENTH DEFENSE**

35. Plaintiff may have failed to join the real party in interest to at least some of her claims. In that event, that real party in interest should be joined or the claims belonging to that party should be dismissed in their entirety, with prejudice.

**EIGHTH DEFENSE**

36. Plaintiff may have failed to name a necessary, indispensable party pursuant to CR 19, if so their complaint should be dismissed.

**NINTH DEFENSE**

37. Plaintiffs' claims are or may be barred by the equitable doctrines of waiver, laches, and/or estoppel.

**TENTH DEFENSE**

38. Plaintiffs' claims for prejudgment interest, joint liability, and agency fail to state a claim upon which relief can be granted.

## **AFFIRMATIVE DEFENSES**

Defendant, Norton Healthcare, Inc., asserts the following affirmative defenses to Plaintiffs' claims for punitive damages:

1. Plaintiffs' Complaint fails to state a cause of action against this Defendant for punitive damages;

2. Plaintiffs' claim for punitive damages against this Defendant cannot be sustained because an award of punitive damages under Kentucky law, without proof of every element beyond a reasonable doubt, would violate this Defendant's due process rights under the Fourteenth Amendment of the United States Constitution and under Section 2 of the Kentucky Constitution;

3. Alternatively, unless this Defendant's liability for punitive damages and the appropriate amount for punitive damages are required to be established by clear and convincing evidence, then the award of punitive damages would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment of the United States Constitution and by Section 2 of the Kentucky Constitution;

4. The claim of Plaintiffs for punitive damages against this Defendant cannot be sustained because any award of punitive damages under Kentucky law without bifurcating the trial of all punitive damages issues would violate these Defendant's due process rights guaranteed by the Fourteenth Amended of the United States Constitution and by Section 2 of the Kentucky Constitution;

5. Plaintiffs' claim for punitive damages against this Defendant cannot be sustained because an awarded of punitive damages under Kentucky law subject to no predetermined limit, such as a maximum multiple of compensatory damages or a maximum amount of the punitive damages that a jury could impose, would violate this Defendant's due process rights guaranteed

by the Fourteenth Amended of the United States Constitution and by Section 2 of the Kentucky Constitution;

6. Plaintiffs' claim for punitive damages against this Defendant cannot be sustained because an award of punitive damages under Kentucky law by a jury that (a) is not provided a standard of sufficient clarity for determining the appropriateness, or the appropriate size of a punitive damages award, (b) is not instructed on the limits of punitive damages imposed by the applicable principles of the terms and punishment, (c) is not expressly prohibited from awarding punitive damages, in whole or in part, on the basis of invidiously discriminatory characteristics, including the corporate status of this Defendant, (d) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes punitive damages permissible, and (e) is not subject to judicial review on the basis of objective standards, would violate this Defendant's due process and equal protection rights guaranteed by the Fourteenth Amended of the United States Constitution and by the double jeopardy clause of the Fifth Amendment as incorporated into the Fourteenth Amendment and by Sections 2, 3, 13 and 17 of Kentucky Constitution;

7. Plaintiffs' claims for punitive damages against this Defendant cannot be sustained because an award for punitive damages under Kentucky law for the purpose of compensating plaintiffs for elements of damages not otherwise recognized by Kentucky law would violate these Defendant's due process rights guaranteed by the Fourteenth Amendment of the United States Constitution and by Section 2 of the Kentucky Constitution;

8. Plaintiffs' claims for punitive damages against this Defendant cannot be sustained because an award for punitive damages under Kentucky law, without the same protections that are afforded to all criminal defendants, including protection against unreasonable searches and



seizures, double jeopardy and self-incrimination, and the right to confront adverse witnesses, a speedy trial and the effective assistance of counsel, would violate these Defendant's process rights under the Fourteenth Amendment of the United States Constitution and the 2, 10, 11, 13 and 14 of the Kentucky Constitution;

9. Any award of punitive damages based on anything other than this Defendant's alleged conduct regarding the subject of this lawsuit would violate the due process clause of the Fourteenth Amendment of the United States Constitution and the Fifth Amendment as incorporated into the Fourteenth Amendment by Sections 2 and 13 of the Kentucky Constitution which prohibit multiple punishment for the same wrong;

10. Alternatively, this Defendant relies on KRS 411.184, as modified by *Williams v. Wilson*, Ky., 972 S.W.2d 260 (1998), and the United States Supreme decision of *State Farm v. Campbell*, (2003);

11. This Defendant denies that any of its agents, servants or employees, by act or omission, was oppressive, fraudulent, malicious or grossly negligent, but in the event that it is adjudged to the contrary, this Defendant specifically pleads that it has not authorized nor ratified any such conduct nor should it have anticipated the conduct, if any, and this Defendant specifically pleads and relies upon such facts as a complete bar to plaintiffs' claims for punitive damages.

12. Any allegations not specifically admitted hereinabove are hereby denied.

13. This Defendant reserves the right to amend this Answer to assert additional or different defenses, including affirmative defenses as they may become known.

**WHEREFORE**, having responded to Plaintiffs' Complaint and First Amended and Restated Complaint, Defendant, Norton Healthcare, Inc., by counsel, respectfully demands as follows:

1. That Plaintiffs' Complaint and First Amended and Restated Complaint be dismissed with prejudice;
2. That Defendant recovers costs herein expended;
3. That it be awarded any and all other relief to which it may appear entitled, including leave to amend the Answer to Plaintiffs' Complaint and First Amended and Restated Complaint.

Respectfully submitted,

Stoll Keenon Ogden PLLC

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*Counsel for Defendant,  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and exact copy of the foregoing document was served upon the following parties or counsel via electronic mail this 7<sup>th</sup> day of August, 2023.

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