

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR FAIRFAX COUNTY**

<b>VERNIQUE L. KIPOLIONGO, et al.,</b>	:	
	:	
<b>Plaintiffs,</b>	:	
	:	
<b>v.</b>	:	<b>Case No. CL-2010-7881</b>
	:	
<b>JEAN-GILLES TCHABO, M.D., et al.,</b>	:	
	:	
<b>Defendants.</b>	:	

**PLAINTIFFS’ MOTION TO COMPEL PRODUCTION OF DOCUMENTS  
FROM DEFENDANT VIRGINIA HOSPITAL CENTER ARLINGTON HEALTH SYSTEM**

Plaintiffs hereby move for an order compelling defendant Virginia Hospital Center Arlington Health System (“VHC”) to produce documents in response to Plaintiffs’ Third Request for Production of Documents.

**Statement of Facts**

This is a medical negligence case. On July 10, 2008, Mrs. Kipoliongo went as instructed to VHC for the induction of labor to deliver her twin girls. After induction with Pitocin and hours of contractions, one of her daughters died *in utero*. Plaintiffs allege that one of the causes of this tragedy is that the VHC nurses assigned to monitor Mrs. Kipoliongo’s labor were negligent and failed to recognize and respond appropriately to signs of fetal distress. Plaintiffs allege the standard of care for Mrs. Kipoliongo’s high risk labor required 1-to-1 nursing care. See Plaintiffs’ Supplemental Interrogatory Responses & Nursing care requirements, attached as Exhibits A & B. Plaintiffs have requested documents that will identify the health care providers that were present in VHC’s labor and delivery unit at the relevant time and what the nurses,

including Nurse Julie (Bates) Gilpin, R.N., were doing during Mrs. Kipoliongo's labor. VHC has refused to disclose this information.

Discovering the whereabouts and activities of the nurses during the overnight period is critical. Discovery in the case to date has disclosed that most of the nursing assessments in Mrs. Kipoliongo's records were entered into the computer *after the fact* and make it appear that VHC's medical staff was monitoring her closely during critical times. See Audit trail attached as Exhibit C. For example, Julie (Bates) Gilpin, R.N., admitted in her deposition that she made entries into the computer records after the fact, but claims the entries were merely transcriptions of notes she had made by hand and then destroyed. See Bates Deposition, pp. 21-24, 184-186 & 14-15, attached as Exhibit D. Nurse Bates claims that she made and documented fetal heart rate assessments precisely every 15 minutes while she was Mrs. Kipoliongo's primary nurse. Bates Deposition, pp. 23-24 & 184-186, attached as Exhibit D. There is, however, evidence that Nurse Bates was not contemporaneously observing and recording fetal assessments as she now claims:

- 1) Nurse Kelly Scott's testified that the nursing assessments entered into the computer were reconstructions based on a single sitting and retrospective review of the fetal monitoring strips. See Scott Deposition, pp. 43-44, attached as Exhibit E;
- 2) Nurse Bates acknowledged the fetal heart alarm only once out of the twelve times the fetal alarm was activated during the time she was the primary nurse. See Audit trail attached as Exhibit C;
- 3) Nurse Bates delayed the advancement of the dosage of Pitocin; her only explanation was she was busy attending to other patients. See Bates Deposition, pp. 113- 114 & 121, attached as Exhibit D;
- 4) Nurse Bates testified she might have been assigned to multiple other patients and "doubted Mrs. Kipoliongo was her only patient." See Bates Deposition, pp. 18-19, 79-80 & 121, attached as Exhibit D;
- 5) Nurse Scott reported on the fetal heart tracings from 6:00 a.m. until 7:00 a.m., while Nurse Bates was still the primary nurse for Mrs. Kipoliongo. See Audit trail attached as Exhibit C; and

- 6) Nurse Bates speculates that she may have been involved in another delivery during the time she was Mrs. Kipoliongo's nurse. See Bates Deposition, pp. 116 & 127, attached as Exhibit D.

Plaintiffs are entitled to test the veracity of Nurse Bates and VHC's assertion that Mrs. Kipoliongo was being contemporaneously assessed. The only way to do so is to determine the VHC medical staff's claimed whereabouts with other patients. Plaintiffs believe the documents requested in their Third Request for Production will show that VHC personnel were attending to other patients at the very times they now allege they were attending to Mrs. Kipoliongo. To obtain the records that would test VHC's assertions, on December 23, 2010, plaintiffs served their Third Request for Production of Documents. On January 13, 2011, VHC served its response, in which it objected to every request as "overly broad, unduly vague and would place an undue burden on defendant." VHC also objected to every request on the ground that providing the requested documents would violate "physician/patient confidentiality and HIPAA." VHC also objected to Requests 37 and 39 as irrelevant. A copy of VHC's response, which quotes each request, is attached as Exhibit F. On January 14, 2011, plaintiffs' counsel wrote to VHC's attorney in an effort to resolve this discovery dispute. Exhibit G. On February 7, 2011, VHC served a "Supplemental Response" that merely restated its earlier objections and then referred plaintiffs generally to the transcripts of depositions of two VHC nurses. See Exhibit H. VHC did not produce any documents with its initial or supplemental responses.

### **VHC's Objections to Requests**

VHC objected to every one of plaintiffs' requests on grounds of breadth, undue burden and vagueness. Every request is limited to documents identifying the medical staff on duty in the labor and delivery at the time of the critical failures of care in this case and the duties they were assigned to perform. The time for which information is sought is limited to a few hours.

The burden on VHC to identify the medical personnel on duty and their assignments in one section of the hospital for a few hours is not excessive. The limits of each request are clear and narrow.

VHC also has objected to every request on the grounds that to supply the requested documents would require the hospital to breach physician/patient confidentiality and violate HIPAA. This objection is meritless because in formulating the requests plaintiffs expressly instructed that patient information for patients other than the plaintiff was to be redacted before the documents are produced: “Any responsive document should be redacted to remove patient information for patients other than Mrs. Kipoliongo.” This instruction eliminates any patient confidentiality or HIPAA objection.

**Request No. 35.** Request No. 35 seeks documents and related audit trails that identify the total number of patients in labor and delivery and the attending level obstetrician, resident and nurse assigned to each such patient. Plaintiffs agreed to limit the period in this request from 12:30 a.m. to 8:30 a.m. on July 10, 2008. Exhibit G. The request is not burdensome. It simply asks defendant to identify its staff and the total number of patients in the labor and delivery. This request is narrowly tailored to help identify whether the hospital staff was stretched too thin to appropriately care for Mrs. Kipoliongo.

**Request No. 36.** Request No. 36 requests documents that provide the identities of attending level obstetricians and residents physically present at VHC between midnight and 9:00 a.m. on July 10, 2008. There is nothing vague about this request. It is not overbroad because it asks specifically for the identities of those individuals who would have been in a position to observe relevant events and thus are potential witnesses. There is no rational danger that

identifying the presence of a physician on the hospital premises within an 8-hour time frame constitutes a violation of any patient's physician/patient confidentiality or HIPAA.

**Request No. 37.** Request No. 37 seeks documents that identify the whereabouts and activities of VHC's Nurse Bates during the eight hours from midnight to 8:00 a.m. on July 10, 2008. It is not vague or overly burdensome, and concerns a core factual issue to be litigated in this case. The redacted audit trails will provide specific information about where Nurse Bates was and what she was doing when she was assigned to monitor Mrs. Kipoliongo. This information is plainly relevant to the issues in this action.

**Request No. 38.** Request No. 38 seeks documents concerning a single, simple issue: why did Nurse Kelly Scott begin reporting on the fetal heart assessment of Mrs. Kipoliongo's twins starting at 6:00 a.m.? Neither Nurse Bates nor Nurse Scott was able to answer this question at their depositions.

**Request No. 39.** Request No. 39 is equally narrow and specific. It requests documents that establish the total number of patients assigned to Nurse Bates during the 8-hour period from midnight to 8:00 a.m. on July 10, 2008. Again, this request concerns the duties of a single hospital employee during a short, defined period. The objection that providing responsive documents to this simple, clear request is unduly burdensome appears disingenuous. As with Request No. 37, what Nurse Bates was doing and where she was at the time she was supposed to be attending to Mrs. Kipoliongo is relevant to the issues in this case.

### **Conclusion**

Plaintiffs request that the Court overrule VHC's objections to Requests 35-39 of Plaintiffs' Third Request for Production of Documents and order defendant VHC to produce all responsive documents within ten (10) days of the date of the order.

Veronique L. Kipoliongo  
By counsel

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Michele Bartoli Cain (VSB #69763)  
BARTOLI CAIN LAW, PLLC  
908 King Street, Suite 350  
Alexandria, VA 22314  
Tel: (703) 548-3577  
Fax: (703) 548-1991

Patrick A. Malone (VSB #025718)  
Leonard W. Dooren (VSB #38285)  
PATRICK MALONE & ASSOCIATES, P.C.  
1331 H Street, NW, Suite 902  
Washington, DC 20004  
Phone: 202-742-1500  
Fax: 202-742-1515  
*Plaintiffs' Attorneys*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of February 2011, a true copy of the foregoing was sent to the following:

Richard L. Nagle, Esq.  
Tracie M. Dorfman, Esq.  
HANCOCK, DANIEL, JOHNSON & NAGLE, P.C.  
3975 Fair Ridge Drive, Suite 475 South  
Fairfax, VA 22033-2911  
*Counsel for Virginia Hospital Center*

Stephen L. Altman, Esquire  
Hamilton, Altman, Canale & Dillon, LLC  
10306 Eaton Place, Suite 200  
Fairfax, Virginia 22030  
*Counsel for Rodney A. McLaren, M.D.*

Mark M. Jones, Esquire  
Kathryn A. Grace, Attorney At Law  
8444 Westpark Drive – Suite 510  
McLean, Virginia 22102  
*Counsel for Jean-Gilles Tchabo, M.D.*

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Michele Bartoli Cain