

HEARING PURSUANT TO ARTICLE 10 OF UK HEALTHCARE
MEDICAL STAFF BYLAWS FOR PAUL KEARNEY, M.D.,

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HEARING BEFORE UK BOARD OF TRUSTEES

APPELLATE REVIEW PANEL

DATE: July 31, 2015

TIME: 2:00 P.M.

PLACE: University of Kentucky
Patterson Office Tower
West Board Room
120 Patterson Drive
Lexington, Kentucky 40536

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APPEARANCES:

Hon. Bryan Beauman
Hon. Joshua M. Salsburey
STURGILL, TURNER, BARKER & MOLONEY, PLLC
333 West Vine Street, Suite 1400
Lexington, Kentucky 40507

ATTORNEYS FOR UNIVERSITY OF KENTUCKY

Hon. Bernard Pafunda
PAFUNDA LAW OFFICE
175 East Main Street, Suite 600
Lexington, Kentucky 40507
ATTORNEYS FOR PAUL KEARNEY, M.D.

APPELLATE REVIEW PANEL:

Trustee Robert D. Vance

Trustee Cammie DeShields Grant

Trustee Kelly Sullivan Holland

1 TRUSTEE VANCE: I call the meeting to
2 order.

3 TRUSTEE GRANT: I would like to move
4 that Trustee Vance serve as our
5 chair of the Appellate Review Panel.

6 TRUSTEE HOLLAND: I second that motion.

7 TRUSTEE VANCE: Any discussion? If not,
8 all in favor say "aye."

9 TRUSTEE GRANT: Aye.

10 TRUSTEE HOLLAND: Aye.

11 TRUSTEE VANCE: It's unanimous.

12 Dr. Paul Kearney has requested an
13 appellate review of the hearing
14 panel's July 6, 2015,
15 recommendation. Specifically the
16 hearing panel affirmed the Medical
17 Staff's Executive Committee's
18 recommendation that the University
19 of Kentucky permanently revoke
20 Dr. Kearney's clinical privileges.
21 Pursuant to Section 10.21, the
22 Medical Staff Bylaws, the grounds
23 for appeal from an adverse
24 recommendation shall be that,
25 10.21.1, "There was substantial

1 failure on the part of the hearing
2 panel, the Medical Staff Executive
3 Committee, or the University
4 HealthCare Committee to comply with
5 the Fair Hearing Plan so as to deny
6 due process of a fair hearing."
7 Secondly, 10.21.2, "The
8 recommendations of the hearing panel
9 or University HealthCare Committee
10 were either arbitrarily,
11 capriciously or with prejudice."
12 Third, 10.21.3, "The recommendations
13 of the hearing panel or University
14 HealthCare Committee were not
15 supported by the evidence."
16 Ms. Barbara Young, Trustee Barbara
17 Young, chair of the University
18 HealthCare Committee of the Board of
19 Trustees, ordered as follows:
20 First, pursuant to Section 10.23 of
21 the Medical Staff Bylaws, Trustees
22 Grant, Holland and Vance were
23 appointed to the Appellate Review
24 Panel. The Appellate Review Panel
25 is to consider the record upon which

1 the hearing panel made its
2 recommendation and recommended final
3 action to the University HealthCare
4 Committee. Second, pursuant to
5 Section 10.22 of the Medical Staff
6 Bylaws, the Appellate Review Panel's
7 meeting was set for Friday, July
8 31st, 2015. This will be an open
9 meeting, but the Appellate Review
10 Panel may choose to go into closed
11 session under applicable law as
12 appropriate. Third, pursuant to
13 Section 10.23 of the Medical Staff
14 Bylaws, both Dr. Kearney and the
15 University have the right to submit
16 written statements to support their
17 positions. Both parties have done
18 so. Fourth, pursuant to Section
19 10.23 of the Medical Staff Bylaws,
20 the Appellate Review Panel may
21 accept additional oral or written
22 evidence, subject to the same rights
23 of cross-examination provided at the
24 hearing panel's proceedings. Such
25 additional evidence shall be

1 accepted only if the party seeking
2 to admit it can demonstrate that he
3 or she was deprived of the
4 opportunity to admit it at the
5 hearing, and then only at the
6 discretion of the review panel.
7 Neither party submitted additional
8 oral or written evidence. Fifth,
9 pursuant to Section 10.23 of the
10 Medical Staff Bylaws, the Appellate
11 Review Panel in its sole discretion
12 may allow each party's attorney or
13 representative to appear personally
14 and present oral argument. If a
15 party wishes to present oral
16 argument, the party should submit a
17 written request for oral argument.
18 Both parties have done so, which
19 leads us up to this meeting. The
20 panel is now ready to proceed with
21 oral arguments. Dr. Kearney.

22 **MR. PAFUNDA:** Mr. Vance, panel members,
23 to put it into context, I think it's
24 necessary to take a step back.
25 Number one, I don't know if the

1 panel has read the Lexington Herald
2 article of July 22nd, but in that
3 article the Lexington Herald noted
4 that the University hospital is no
5 longer the number one hospital even
6 in this city. That's been taken
7 over by another hospital, and this
8 hospital's ranking has been dropping
9 slowly over the years. Now, why is
10 that important? Why place it in
11 that context, especially in view of
12 the fact that we have doctors back
13 here who have dedicated their lives
14 to this hospital? Because it raises
15 one red flag, and it raises a big
16 question, and it raises a question
17 about the management of this
18 health care hospital facility. And
19 what red flag does it raise?
20 Somewhere along the line the job's
21 not being well done. And as we step
22 back into April of 2014, what do we
23 have? We have an Executive Vice
24 President of Health Affairs who's in
25 a faculty council meeting, attended

1 that meeting along with general
2 counsel, Bill Thro, and when
3 Dr. Kearney questions Dr. Karpf's
4 violation of administrative
5 regulations and as well as calls for
6 an audit of Kentucky Medical
7 Services Foundation, what's the
8 response from the Executive Vice
9 President of Health Affairs? He
10 threatens to fire him on the spot.
11 That's the working environment. And
12 a few months later, those
13 disciplinary actions are placed in
14 motion on the basis of a single
15 patient complaint against
16 Dr. Kearney, the sole patient
17 complaint in 27 years, despite the
18 fact that he's treated over hundreds
19 of thousands of patients, one of
20 whom including [REDACTED], [REDACTED]
21 [REDACTED]
22 [REDACTED]. And if I'm not mistaken, he's
23 the only active faculty member who
24 has and enjoys an [REDACTED]. So
25 where has he been deprived of due

1 process? He was deprived of due
2 process on April 14th when the
3 Executive Vice President, Dr. Karpf,
4 threatened to fire him when he
5 exercised his academic freedom to
6 question Dr. Karpf, not just
7 question him but question his
8 actions that avoided and violated
9 administrative regulations, and he
10 called for an audit of Kentucky
11 Medical Services Foundation.
12 Where's the money going? How is it
13 being spent? And how is it being
14 returned to the hospital? Second
15 place, he then has a complaint about
16 a student election. Is he ever able
17 to face [REDACTED], the patient?
18 Never, not at the fair hearing, at
19 no place and time. He's not given
20 any information to locate [REDACTED]
21 [REDACTED], and the University never
22 produces him as a witness. Then we
23 have a student complaint, the only
24 student complaint in 27 years about
25 a lecture that Dr. Kearney gave, a

1 lecture at which he received a
2 standing ovation at the end. But
3 he's faced at the hearing panel with
4 that student complaint. The
5 student's never identified. He's
6 noted as an anonymous student, and
7 Dr. Kearney, who has been awarded 26
8 teaching awards and the highest
9 teaching awards in the history of
10 this university, has to face that
11 complaint, along with a complaint
12 from a [REDACTED], who no longer
13 works here, doesn't appear at the
14 hearing, and he has no way to
15 confront [REDACTED]. So has he
16 been denied due process? Of course
17 the University says no, but it's a
18 shell game. And let me tell you
19 where the shell game began. It
20 began at the Medical Staff Executive
21 Committee. They were presented by
22 Dr. Fred Zachman with a picture of
23 Dr. Kearney as a dangerous person, a
24 man who presented a substantial and
25 imminent danger to patients and

1 staff. There's no history of that
2 in the entire record, but that's the
3 picture that was painted. Then the
4 Medical Staff Executive Committee
5 assigned two doctors to investigate.
6 The two doctors get some
7 cherry-picked records from general
8 counsel's office. Amongst those
9 records are false documents. At
10 this point in time Dr. Kearney has
11 no ability whatsoever to address the
12 charges. His privileges have been
13 suspended, and more egregious, as a
14 tenured professor, he's been
15 banished from campus and placed
16 under a gag order. He can't talk to
17 medical staff; he can't talk to
18 patients; he can't talk to
19 colleagues; can't talk to students.
20 So Dr. Kearney's on two rails at
21 this university: One as a clinician
22 and the other as a tenured
23 professor. All those rights at that
24 moment in time were stripped from
25 him. Now, the University says,

1 "Let's go by the bylaws."
2 Mr. Vance, you just read those
3 bylaws. In the bylaws, under
4 Article 9.4 -- under 9.2, Subsection
5 A, you will find that the Medical
6 Staff Executive Committee is to
7 conduct a hearing at the end of the
8 investigation. It doesn't say
9 meeting; it doesn't say closed
10 session. It mandates a hearing.
11 And why is that hearing important?
12 Because at that point Dr. Kearney
13 could have addressed the charges
14 that were placed against him. But
15 he wasn't given that hearing, and
16 the response from the University is,
17 "Well, he got his due process."
18 Well, here's how he got his
19 University due process. The Medical
20 Staff Executive Committee, based on
21 the information, only that
22 information -- they didn't get to
23 hear from Dr. Kearney -- voted to
24 take away his clinical privileges,
25 which Dr. Boulanger had already

1 taken away in January. But the
2 Medical Staff Executive Committee,
3 like Dr. Boulanger, took another
4 step, an egregious step and a
5 deliberate step. They also stripped
6 Dr. Kearney, as a tenured professor,
7 of his ability to talk to anybody on
8 this campus, and they also banned
9 him from campus. Now, the words
10 that placed all this in effect --
11 it's kind of curious. You've got
12 Dr. Fred Zachman, who is the acting
13 president at the time, who presented
14 Dr. Kearney as a dangerous person to
15 patients and staff, and as
16 Dr. Zachman told the hearing panel,
17 when it came to his [REDACTED],
18 who did he pick out of all the
19 surgeons? He picked out
20 Dr. Kearney. Wasn't too dangerous
21 to work on Dr. Zachman's [REDACTED]. So
22 where does the due process rub come
23 in? Well, he was deprived of that
24 hearing. The University says,
25 "Well, he got a hearing in front of

1 the Fair Hearing Panel." That's a
2 whole different hearing, and here's
3 why it is. It's upside down.
4 Dr. Kearney had to go in front of
5 the hearing panel under the burden
6 to prove that the Medical Staff
7 Executive Committee -- that their
8 findings were either unreasonable or
9 unfounded. Well, the hearing panel
10 went out of its way to say, "Well,
11 Dr. Karpf, who threatened to fire
12 him, is nowhere involved in this,"
13 even though he's an ex-officio
14 member of the Medical Staff
15 Executive Committee, even though
16 he's Executive Vice President and
17 Dr. Boulanger's immediate boss.
18 What's curious is, in order to
19 effectuate the removal of
20 Dr. Kearney's clinical privileges,
21 here's a finding by the hearing
22 panel: "As viewed by the committee,
23 multiple warnings, leaves of
24 absence, remediation programs,
25 written reprimands and action plans

1 have done little to eliminate the
2 problem. Our controversial
3 physician has a problem." The
4 problem with that finding is, is it
5 arbitrary? That's the burden I have
6 to face. Has he been deprived of
7 due process? Well, number one,
8 there's not a shred of evidence
9 that, prior to September 5th,
10 Dr.Kearney ever had a leave of
11 absence. He didn't have numerous
12 written reprimands. He had one in
13 an entire 27-year career. He didn't
14 have any remediation programs. So
15 my question becomes: Where was the
16 evidence for that finding? But even
17 the broader question and the bigger
18 question is: Who wrote this?
19 Because it couldn't have been the
20 hearing panel, and it couldn't have
21 been at the hearing that I attended
22 because there was no evidence in
23 this regard. So why deprive
24 Dr. Kearney of his due process? Why
25 make false findings to support that?

1 It's a cover-up. And the cover-up's
2 in the hearing panel. And the
3 cover-up is, well, there's not a
4 shred of evidence that Dr. Karpf's
5 involved. I'd ask for an additional
6 five minutes for rebuttal,
7 Mr. Vance.

8 TRUSTEE VANCE: Okay. Okay.

9 MR. PAFUNDA: Is that fine?

10 TRUSTEE VANCE: Sure.

11 MR. PAFUNDA: But before I conclude at
12 this point, the Board of Trustees is
13 now on notice that Dr. Kearney blew
14 the whistle on Dr. Karpf's
15 wrongdoing. The Board of Trustees
16 is now on notice through you three
17 that there may and, in fact, is
18 something amiss with the Kentucky
19 Medical Services Foundation. This
20 is not to be taken lightly. Not
21 only this July 22nd article but the
22 one that came out this morning, some
23 of those people who spoke out that
24 are employed at this university have
25 already been reprimanded. We all

1 want a flagship university. This
2 should be the number one hospital in
3 this entire area. It's not. And
4 it's because management in the
5 person of Dr. Karpf has poisoned the
6 well.

7 TRUSTEE VANCE: Thank you.

8 MR. BEAUMAN: Thank you, Mr. Vance.

9 Good afternoon. My name is Bryan
10 Beauman. We are outside counsel,
11 and our role in this matter has been
12 to pursue these disciplinary
13 proceedings against Dr. Kearney on
14 behalf of the University. I
15 appreciate the summary that you've
16 given today, and I know that
17 everyone here appreciates your time
18 and effort. I'm sure there are
19 other things you would rather be
20 doing on a Friday afternoon, and
21 everyone feels that way. It is a
22 shame we are here, and we'll talk
23 about why we are here. You know,
24 the University has rules, and we've
25 followed those in this situation.

1 The rules are set forth in the UK
2 HealthCare Medical Staff Bylaws.
3 These rules give certain rights to
4 Dr. Kearney and assign specific
5 roles to members of the University
6 community, a part of that role and a
7 part of that bigger process that now
8 falls upon you. You have honed in
9 on it exactly for what it is because
10 you have a limited role. Before we
11 get to the details of that, let's go
12 back and look at how we got here.
13 The Chief Medical Officer at the
14 University determined that
15 Dr. Kearney needed to be suspended.
16 That decision did not come lightly,
17 and it came after his investigation
18 of the complaint and his face-to-
19 face interview with a patient who
20 reported things. We'll go through
21 those facts in just a second. After
22 that process it proceeds to the
23 Medical Staff Executive Committee, a
24 committee of about a dozen
25 physicians at the University. The

1 existing Chair of the Trauma Center,
2 Dr. Andrew Bernard, who testified in
3 this matter, called by Dr. Kearney
4 to testify on behalf of Dr. Kearney,
5 who said that "I see him as my
6 mentor." And Dr. Bernard has done
7 wonderful things at this university.
8 He was on the Medical Staff
9 Executive Committee; recused himself
10 from the process. The hearing panel
11 asked -- they had the right to ask
12 questions, and as you've seen from
13 the record, they asked many
14 questions of many witnesses. So
15 Dr. Williams asked Andrew Bernard,
16 at page 355 in the hearing
17 transcript, "Why did you recuse?"
18 And Dr. Bernard explained that he
19 had the utmost faith in the Medical
20 Staff Executive Committee that they
21 would do the right thing. As he
22 said, "I felt like the structure of
23 the medical staff was adequate to
24 adjudicate whatever decision had to
25 be made independent of me." So the

1 chief trauma physician at the
2 University places his faith and
3 trust in the process and in the
4 physicians that were on the Medical
5 Staff Executive Committee. After
6 that it went to a two-day hearing,
7 with three physicians who, I promise
8 you, would rather have been doing
9 something else in those two days
10 than listen to two lawyers and one
11 of the most accomplished professors
12 of law speak that day as our hearing
13 officer. Dr. Wendy Hansen is the
14 Chair of Obstetrics and Gynecology
15 at this university, Dr. Lisa Tannock
16 in Endocrinology, Dr. Mark Williams,
17 head of Internal Medicine, heard
18 from dozens of witnesses and they
19 heard the testimony. You've seen
20 their lengthy written report, and
21 you've seen the details that they've
22 gone through. And so what is before
23 you is there was a -- was there a
24 substantial failure on the part of
25 the physicians on the Medical Staff

1 Executive Committee that Dr. Bernard
2 trusts or on the part of these three
3 highly regarded physicians on the
4 hearing panel? Or second, did the
5 panel act arbitrarily, capriciously,
6 with prejudice or without any
7 substantial evidence? So to review
8 that, we must review the evidence.
9 There's a litany of transgressions
10 from Dr. Kearney's behavior. This
11 case is not about his skill as a
12 surgeon. That has been clear from
13 day one. It is about his treatment
14 and belittling of others that spills
15 over into the workforce and in the
16 care of patients. I'm going to have
17 to use language today I would never
18 use in this setting. I think you
19 all understand that. You've seen
20 the record. But this begins,
21 really, in 1992, but more recently
22 in 2014, with a quadriplegic patient
23 admitted at the University who was
24 undergoing [REDACTED]
25 [REDACTED]. I'll talk on

1 our level. Every physician in the
2 room may giggle at me for the
3 language that I use. We would have
4 difficulty understanding all of the
5 highly technical medical terms.
6 He's having a [REDACTED]
7 [REDACTED], so an [REDACTED]
8 [REDACTED]. And
9 throughout the entire procedure,
10 there's a lot of difficulty. These
11 are medical students in training
12 attempting these procedures, and
13 they're struggling to accomplish the
14 procedure quickly or without
15 discomfort to the patient.
16 Dr. Kearney is supervising the
17 entire procedure. He is yelling,
18 and he is cussing. And this
19 quadriplegic patient, who was awake,
20 complains that it's uncomfortable.
21 And Dr. Kearney looks at this
22 quadriplegic patient and says, "Just
23 be still, dumb ass, you fucking
24 idiot," a litany of those things.
25 Now, there's a dispute about what

1 was said. The patient will tell you
2 he called him a "fucking idiot."
3 Dr. Kearney will tell you he called
4 him a "dumb ass." It doesn't
5 matter. That conduct to a
6 quadriplegic patient in the middle
7 of a procedure violates a number of
8 behavioral standards at this
9 university. So when the patient
10 complains, an investigation is
11 started, and in the midst of that
12 investigation a letter comes out
13 from a medical tech, who is no
14 longer serving this university. And
15 she writes a letter that during a
16 procedure there was an error with
17 the machine, yet Dr. Kearney blamed
18 her for the error and called her a
19 "fucking moron." Mr. Pafunda
20 earlier mentioned the lecture that
21 had gone on. There was no need to
22 interview students in the lecture.
23 The tape was available. So the
24 Associate Dean for Medical
25 Education, Dr. Charles Griffith,

1 reviews the recording of the tape
2 and reports back to the dean, to
3 Dean de Beer. Here are some of the
4 things Dr. Kearney says. When
5 discussing post World War II era
6 influences in life today,
7 Dr. Kearney says "We don't bomb Japs
8 and Germans anymore." He asks a
9 somewhat rhetorical question to the
10 audience, "Who has thoracic outlet
11 syndrome? Ladies with large,
12 pendulous breasts." And it
13 continues. He refers to children
14 with birth defects as "freaks," and
15 there are a number of items listed
16 on pages 16 and 17 of what we had
17 submitted to you. This was his
18 conduct through 2014. Was it
19 isolated? No. Was it new? No.
20 Let me briefly review the history.
21 In 1992, when Dr. Byron Young was
22 Chair of the Surgery Department, was
23 Dr. Kearney's first write-up and
24 infraction. He had started at the
25 University in 1988. It was directed

1 to Dr. Young's secretary.
2 Dr. Kearney was rude, offensive,
3 impolite, arrogant, and loud. In
4 1995 -- excuse me. I'll just run
5 through these very fast with you.
6 In 1995, there's an incident with a
7 young woman in a motor vehicle
8 accident who is pregnant at 20 weeks
9 and unfortunately loses her child as
10 a result of the injuries in the
11 automobile accident. Dr. Kearney is
12 challenging and questioning the
13 treatment that she received and
14 announced to anyone who would hear
15 that the obstetrician on duty was
16 too lazy to get up in the middle of
17 the night. Dr. Milligan was
18 concerned because these comments
19 were unprofessional and detracted
20 from patient care and undermines
21 cooperation and presents a poor
22 standard. In the year 2003,
23 operating room nurses report
24 Dr. Kearney's inappropriate
25 behavior. I think we have described

1 this in our papers as locker
2 room-esque. There are some sexual
3 comments, grabbing of the crotch and
4 saying, "I've got something here for
5 you." Those types of issues were
6 raised. A litany of remedial
7 measures was attempted at that time:
8 attendance at training seminars,
9 sensitivity conferences, apologies
10 to each member of the team, a
11 five-day vacation from medical staff
12 duties, and specifically in that
13 item noting that further infractions
14 may include termination. In 2005,
15 the then Dean of the College of
16 Medicine, Dr. Perman, issues a
17 letter to Dr. Kearney again
18 complaining of profanity-laced
19 outbursts in the course of caring
20 for trauma patients. Dean Perman
21 notes that "Dr. Kearney was told
22 that there is zero tolerance for
23 this continued inappropriate
24 behavior which demeans the entire
25 institution." Let's flash forward

1 to 2009. Dr. Jay Zwischenberger is
2 now Chair of the Department of
3 Surgery. He testified in this
4 matter. You have his testimony in
5 the transcript before you. He
6 explains that when he took office in
7 2007, he had a stack of complaints
8 about Dr. Kearney on his desk, and
9 as he testified at the hearing, "I
10 didn't know anything about those. I
11 thought, to be fairest to
12 Dr. Kearney, we need to start fresh
13 and to start anew." But
14 unfortunately, he would soon be
15 disappointed because what you will
16 see is Dr. Kearney can't change his
17 behavior. In 2009, there was a
18 letter issued signed by
19 Dr. Zwischenberger as Chair of the
20 Department of Surgery; Dr. Pat
21 McGrath, Dr. Kearney's very good
22 friend, who was his immediate
23 supervisor and Chair of General
24 Surgery; Dr. Paul DePriest, who was
25 then Chief Medical Officer; and

1 Colleen Swartz, who was the Chief
2 Nurse Executive, complaining that
3 Dr. Kearney's behavior has a
4 negative impact on the teaching
5 environment, that he continues to
6 exhibit aggressive and humiliating
7 behavior. There have been numerous
8 complaints which are serious and
9 require intervention. His attitude
10 toward colleagues is derogatory and
11 impacts on student education. As
12 Dr. Zwischenberger explained in his
13 testimony, "We recognize that what
14 we have been doing so far wasn't
15 working. This was an attempt at a
16 behavioral change. How can we
17 effect this behavioral change that
18 would really be effective for
19 Dr. Kearney?" And page 195 of his
20 testimony, "All this was an effort
21 on behalf of Dr. DePriest,
22 Dr. McGrath, and my part to see a
23 valued colleague change behaviors.
24 We were hoping really hard it was
25 going to work." But

1 Dr. Zwischenberger would be
2 disappointed because Paul Kearney
3 can't change. In 2012 you have what
4 eventually results in a reprimand
5 and is executed at the very end of
6 2012, January of 2013, three nurse
7 complaints. I apologize again for
8 my language. One nurse is scrubbing
9 into the operating room in the
10 middle of a procedure. She walks to
11 the table, and Dr. Kearney doesn't
12 greet her with a command of
13 something he needs, doesn't greet
14 her with a pleasantry. He looks at
15 her and says, "Hey, bitch." A
16 second nurse in 2012 was supposed to
17 be charged with replacing someone
18 during the middle of a procedure,
19 wasn't able to do that. After the
20 surgery is over, Dr. Kearney comes
21 out of the operating room,
22 approaches her in the presence of
23 two other employees and one of those
24 employees' father and looks at her
25 and says, "You need to wear a

1 colostomy bag over your head because
2 you have shit for brains." And by
3 the way, interestingly, the
4 testimony at this, that was
5 apparently something that a lot of
6 the residents and many of the
7 physicians would joke about. And I
8 think you'll see the hearing panel
9 note that they are concerned that
10 there's this culture of this ongoing
11 joke and gag to demean the nurses
12 with this comment. As the hearing
13 panel found, there's no place on
14 this campus to treat your colleagues
15 and others that you supervise in
16 this manner. In September of that
17 year, another nurse in the middle of
18 a procedure immediately --
19 originally announced a wrong
20 procedure, immediately corrected
21 herself. Dr. Kearney's response was
22 to smack her on the shoulder with
23 his open hand. She responded that
24 she was pregnant, and what does he
25 say? "Well, whose fault is that?"

1 So as a result of those complaints,
2 you now have Dr. Boulanger, who's
3 the Chief Medical Officer, and he
4 tries again to address this. That
5 agreement that you see signed, by
6 the way, the terms were negotiated.
7 There was a back and forth between
8 Dr. Kearney and the University in
9 order to reach the terms of that
10 last-chance agreement, as we call
11 that. Now, Dr. Boulanger testified
12 at the hearing. "What was your hope
13 about this agreement?" Well, it was
14 that once it was signed and agreed
15 to -- this is on page 168, if you'd
16 like to read it: "The hope was that
17 once the agreement was signed and
18 agreed to by Dr. Kearney that we
19 wouldn't hear any more about him
20 except for the positive things that
21 he's been able to do as a physician.
22 We had hoped that he would end his
23 career in a peaceful and classy
24 manner. And it was shared" -- this
25 is very important from Dr.

1 Boulanger's testimony -- "it was
2 shared with Dr. Kearney he needs to
3 change because he's putting himself
4 at risk and he's putting the
5 University at risk." Can
6 Dr. Kearney change? Here's his
7 testimony from the hearing, talking
8 about going to see -- some of the
9 counseling that he did over the
10 years. He's referring to a
11 counselor who asked Dr. Kearney,
12 "How long have you been this way?"
13 "And I said, 'First grade, since
14 first grade. It's my first
15 recollection of being alive.'" He
16 cannot change. It is who he is. So
17 why is this important? Why does it
18 matter if you have a foul-mouthed
19 doctor who is dropping F-bombs and
20 cursing at his colleagues and
21 cursing at those on the medical
22 staff that are there to help him?
23 Well, let's look at some of the
24 testimony that you have from the
25 record. As Dr. Zwischenberger says

1 repeatedly, "Paul had a way of
2 cussing directly at people and
3 making them feel personally
4 responsible for whatever was
5 happening in terms of patient
6 outcomes or care or complications.
7 He would personalize it." As time
8 evolves, nurses, students, residents
9 and coworkers tend to be so offended
10 by that type of behavior that they
11 don't perform well or they shut down
12 or they can't perform their duty.
13 Dr. Susan McDowell led the
14 investigation on behalf of the
15 Medical Staff Executive Committee.
16 She works in rehabilitation medicine
17 here at the Medical Center. And
18 what she says is, through her review
19 of the literature and through her
20 personal experiences, that good
21 interpersonal communication with
22 staff increases the likelihood of
23 patient satisfaction, lowers the
24 risk of medical error, lowers the
25 likelihood of staff turnover, but

1 unprofessional behavior like telling
2 a nurse she should wear a colostomy
3 bag because she has you-know-what
4 for brains will block that nurse's
5 ability to speak up when needed in
6 order to prevent an adverse patient
7 event. Colleen Swartz is the
8 Director of Nursing for UK
9 HealthCare. She was called and
10 testified in this case about
11 Dr. Kearney's berating behavior.
12 Here's how she described it on page
13 217: "It can become a distraction,
14 creating an environment where staff
15 are doing everything they can to
16 stay unnoticed, and sometimes that
17 activity takes precedence over
18 focusing on clinical care of
19 patients." Julie Hudson, who's a
20 Director of Nursing for the OR at
21 Chandler, testified that
22 Dr. Kearney's humiliating behavior
23 sucks the smarts right out of the
24 staff. Those are coming from your
25 supervisors and your administrators

1 at the hospital. So the health care
2 culture is at a crossroads. Sixteen
3 physicians have looked at this case.
4 They've heard the testimony. They
5 reviewed the records. They
6 unanimously have all reached the
7 same decision. Dr. Kearney has been
8 given ample, multiple opportunities
9 to change his behavior since 1992,
10 but Dr. Kearney can't change. Let's
11 go to what's before you. The
12 grounds for appeal aren't just
13 whether there was a technical
14 violation of the rules. There must
15 be a substantial failure to comply
16 with the -- that is an incredibly
17 high standard that is before you.
18 The only argument that you've heard
19 is that there was not another
20 hearing before the Medical Staff
21 Executive Committee. Dr. McDowell
22 testified in this case how they
23 conducted the interviews. You
24 didn't hear it earlier: Dr. Kearney
25 met with the investigators on behalf

1 of the Medical Staff Executive
2 Committee. Dr. McDowell explained,
3 "We asked open-ended questions to
4 everyone, including Dr. Kearney. We
5 wanted everyone to have the
6 opportunity to explain in full their
7 view of the items." You know what
8 Dr. Kearney never mentioned to
9 Dr. McDowell or the Medical Staff
10 Executive Committee? All this
11 mantra about retaliation. That
12 never came up. He had the
13 opportunity to defend himself before
14 the Medical Staff Executive
15 Committee and among his colleagues,
16 and that was never raised. Finally,
17 Dr. Kearney doesn't get two trial
18 types of hearings. When we had the
19 two days of testimony, retiring
20 Professor of Law Robert Lawson
21 presides over the hearing. It's
22 intimidating, even though I've been
23 out of law school almost 20 years,
24 to try a case in front of your
25 former law professor who wrote the

1 Rules of Evidence. Put that aside.
2 He presided over the hearing. You
3 know the three accomplished
4 physicians. They heard two days of
5 testimony. They wrote a nearly
6 dozen-page report. There is just no
7 merit to a claim that there was some
8 sort of a substantial breach. Did
9 Dr. Williams and Dr. Hansen and
10 Dr. Tannock act arbitrarily or
11 capriciously when they heard the
12 evidence, they heard the testimony,
13 and they reviewed the record?
14 Absolutely no. There's no chance.
15 And you have that before you. Now,
16 you've heard a lot in the papers
17 that have been submitted to you by
18 the parties that Dr. Kearney
19 basically built this highly
20 recognized Level 1 Trauma Center
21 from scratch. And certainly in his
22 conduct as a highly skilled surgeon,
23 he does deserve credit for that.
24 But as we saw through the witnesses,
25 mostly medical students that were

1 presented at the hearing by
2 Dr. Kearney and his attorney, look
3 at the house that he built. Newly
4 minted physicians going out into the
5 world, when I questioned them about
6 these comments, "Would you ever call
7 a patient a dumb ass?" their answer,
8 "I might." "Would you ever tell a
9 nurse she has" -- excuse me -- "shit
10 for brains?" "I might." Those are
11 the physicians who have been trained
12 and are sending out by this
13 university. As Dr. Williams,
14 Dr. Tannock, Dr. Hansen,
15 Dr. Boulanger, Dr. McDowell, all the
16 other physicians have said, that
17 must stop. The only thing
18 unreasonable, as the hearing panel
19 noted, would be not to act in this
20 case as they did. Thank you for
21 your time.

22 TRUSTEE VANCE: Thank you. Rebuttal?
23 Five minutes.

24 MR. PAFUNDA: Let me read you something.
25 I'll direct it to you, Mr. Vance,

1 since you're a lawyer because we're
2 talking about due process. We're
3 not talking about practice. We're
4 talking about due process. And due
5 process is really simple, can be
6 simply put. In every setting where
7 important decisions on factual
8 issues must be made, one must be
9 afforded the opportunity to confront
10 and cross-examine witnesses. Take a
11 look at the record and see if
12 Dr. Kearney was ever given the
13 opportunity to cross-examine Patient
14 [REDACTED], [REDACTED], the
15 anonymous student. In fact, go back
16 over the 20 years and see if
17 Dr. Kearney, other than one written
18 reprimand, was ever given the
19 opportunity to address many of the
20 things that were put in his
21 personnel file. In violation of
22 these university regulations, he was
23 not given that opportunity. The
24 most glaring example is the June
25 5th, 2009, letter.

1 DR. KEARNEY: January.

2 MR. PAFUNDA: January -- excuse me --

3 5th, 2009, letter that he never got

4 that is authored by Dean Perman.

5 And as Dr. Kearney said, he never

6 got it that day because -- and he

7 never got it at all, and somehow it

8 ended up in his personnel file

9 because it was on that day that his

10 [REDACTED]. Why now? Nobody's

11 answered that question. Why all of

12 a sudden? Why does the University

13 have to go back 20 years? Is this a

14 whitewash? Is this a cover-up? Why

15 deprive him of his due process where

16 he can't confront his -- can't

17 confront his accusers and present a

18 case? Why ban him from campus? Why

19 place him under a gag order? And

20 then stand up and say: You know

21 what? He swears a lot. He told a

22 nurse she must have a colostomy bag

23 on her forehead because she's got

24 shit for brains. You know, when I

25 make a mistake, for example, a

1 typing mistake in this case, I have
2 a bad day. When Dr. Kearney makes a
3 mistake, as one of his nurses said,
4 "A two-year-old dies." So his staff
5 in the operating room, they have to
6 perform. This isn't an academic
7 exercise in an English class
8 conducted in a classroom, where you
9 get to do it over and over and over
10 again. This is a one-time
11 opportunity. In fact, Mr. Vance, I
12 think you've received an e-mail
13 today from [REDACTED] because he
14 copied a bunch of people, including
15 myself, where Dr. Kearney met with
16 [REDACTED] at Saint Joe East and
17 brought him over here and, according
18 to [REDACTED], saved his life,
19 and he wanted you to know that.
20 Apparently he wanted me to know it
21 too because he sent out an e-mail to
22 a number of people, grateful for
23 Dr. Kearney's skill. As the
24 University said in its brief, "We've
25 now entered the 21st Century."

1 Well, if this is the 21st Century,
2 take me back to the 20th because
3 we're now in a world of form over
4 substance. Your university
5 president received letters from all
6 over the country, including the
7 President of the American College of
8 Surgeons, and when people asked for
9 those letters under the Open Records
10 Act, general counsel's office
11 redacted their names so their
12 identities would be hidden.
13 University of Virginia,
14 Pennsylvania, all in support of
15 Dr. Kearney. Now we're going to
16 kick him to the curb, and it's no
17 accident. He was threatened to be
18 fired because he had the temerity,
19 for the University he's served for
20 27 years, to raise his voice and say
21 "Dr. Karpf, what you're doing is
22 wrong, and I'm going to bring it to
23 people's attention." And it doesn't
24 stop here. You're on notice.

25 TRUSTEE VANCE: Thank you.

1 TRUSTEE GRANT: Mr. Chairman, I move
2 that the Appellate Review Panel go
3 into closed session per Kentucky
4 Regulation Section 61.8101(f). This
5 closed session shall be limited to
6 discussions which might lead to the
7 discipline of a university employee.
8 The panel's decision regarding this
9 recommendation to the full
10 University HealthCare Committee will
11 take place in open session.

12 TRUSTEE HOLLAND: I second that.

13 MR. PAFUNDA: Mr. Vance, just a minute.

14 TRUSTEE VANCE: Yes.

15 MR. PAFUNDA: Pursuant to KRS 810, I
16 believe, Mr. Vance, that we have the
17 right to request that the meeting
18 stay open.

19 TRUSTEE VANCE: I don't think so. I
20 think we'll come back into open
21 session. All decisions will be
22 here; we just want to discuss it.
23 To both sides of this issue, we've
24 been very diligent in reading all
25 the information. I think, you know,

1 we want to be able to talk about it
2 among ourselves, and there'll be no
3 decision made. We'll come back in
4 here and vote and make the decision.

5 MR. PAFUNDA: Thank you. I just wanted
6 to make that for the record. Thank
7 you.

8 TRUSTEE VANCE: No problem. All in
9 favor, say "aye."

10 TRUSTEE GRANT: Aye.

11 TRUSTEE HOLLAND: Aye.

12 (BREAK TAKEN FOR CLOSED SESSION.)

13 TRUSTEE VANCE: Call the meeting back to
14 order. We have a quorum.

15 TRUSTEE HOLLAND: This matter is before
16 the Appellate Review Panel on an
17 appeal from Dr. Paul Kearney
18 pursuant to Section 10.23 of the
19 Medical Staff Bylaws. The Appellate
20 Review Panel must recommend final
21 action to the University HealthCare
22 Committee. The Medical Staff
23 Executive Committee recommended the
24 University permanently revoke
25 Dr. Kearney's clinical privileges.

1 Following a two-day hearing, the
2 hearing panel affirmed the
3 recommendation. Dr. Kearney filed a
4 timely request for appellate review,
5 and the Chair of the University
6 Healthcare Committee appointed the
7 Appellate Review Panel. Pursuant to
8 Sections 10.22 and 10.23 of the
9 Medical Staff Bylaws, the Appellate
10 Review Panel met in an open meeting
11 on Friday, July 31st, 2015, to
12 consider the appeal. Before that
13 meeting the individual members of
14 the Appellate Review Panel reviewed
15 statements from Dr. Kearney and the
16 University, as well as the entire
17 record of proceedings before the
18 Medical Staff Executive Committee
19 and the hearing panel. Under the
20 terms of Section 10.21 of the
21 Medical Staff Bylaws, the Appellate
22 Review Panel's inquiry is limited to
23 whether, one, there was substantial
24 failure on the part of the hearing
25 panel or the Medical Staff Executive

1 Committee to comply with this Fair
2 Hearing Plan so as to deny due
3 process or a fair hearing; or number
4 two, the recommendations of the
5 hearing panel were made arbitrarily,
6 capriciously or with prejudice; or
7 number three, the recommendations of
8 the hearing panel were not supported
9 by the evidence. Dr. Kearney raised
10 all three issues in his request for
11 appellate review. In answering
12 these issues, the Appellate Review
13 Panel has relied on the entire
14 record, the written statements of
15 the parties, the presentations made
16 during the July 31st meeting, and
17 the deliberations between the
18 Appellate Review Panel members
19 during the July 31st meeting. The
20 Appellate Review Panel recommends
21 the University Healthcare Committee
22 accept the recommendation of the
23 hearing panel and the Medical Staff
24 Executive Committee to revoke the
25 clinical privileges of Dr. Kearney.

1 TRUSTEE GRANT: I second that motion.

2 TRUSTEE VANCE: We have a motion and a
3 second to accept the recommendations
4 of the hearing panel and the Medical
5 Staff Executive Committee to revoke
6 the clinical privileges of
7 Dr. Kearney. Is there any other
8 discussion? Hearing none, all in
9 favor say "aye."

10 TRUSTEE HOLLAND: Aye.

11 TRUSTEE GRANT: Aye.

12 TRUSTEE VANCE: Opposed? It's
13 unanimous. I will accept a motion
14 we adjourn.

15 TRUSTEE GRANT: I move that we adjourn.

16 TRUSTEE VANCE: Second?

17 TRUSTEE HOLLAND: Second.

18 TRUSTEE VANCE: Any discussion? All in
19 favor say "aye."

20 TRUSTEE GRANT: Aye.

21 TRUSTEE HOLLAND: Aye.

22 TRUSTEE VANCE: Here, sign this.

23 * * * * *

24 THEREUPON, the hearing was concluded at 3:04 p.m.

25 * * * * *

1 STATE OF KENTUCKY)

2 COUNTY OF FAYETTE)

3 I, ROBYN RICHARDSON, CCR, the undersigned
4 Notary Public in and for the State of Kentucky at
5 Large, certify that the facts stated in the caption
6 hereto are true; that at the time and place stated in
7 the caption said hearing was taken down in stenotype
8 by me and later reduced to computer transcription
9 under my direction, and the foregoing is a true record
10 of said hearing.

11 My Commission Expires: January 17, 2016.

12 IN TESTIMONY WHEREOF, I have hereunto set my
13 hand and seal of office on this the 6th day of August,
14 2015.

15

16

17 -----
18 ROBYN RICHARDSON, CERTIFIED
19 COURT REPORTER, NOTARY PUBLIC,
20 STATE AT LARGE, KENTUCKY
21 CERTIFICATE ID: 249421

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