THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY COURT OF COMMON PLEAS

Honorable Edgar J. Dickson, Circuit Court Judge

Case No. 2022-000809

Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally,..... Respondent

v.

The Regional Medical Center of Orangeburg and Calhoun Counties,.....Appellant

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REPLY BRIEF OF THE REGIONAL MEDICAL CENTER OF ORANGEBURG AND CALHOUN COUNTIES

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

Whether the Court erred in granting Respondent's Motion for Partial Summary Judgment as to the issue of whether a supervising physician is vicariously liable for negligent acts of a physician's assistant under the South Carolina Physician' Assistants Practice Act.

Whether the Court erred in finding that the applicable South Carolina Torts Claim cap for liability in this matter is $1,200,000 for licensed physicians and dentists as prescribed by S.C. Code Ann. §15-78-120(a)(3)-(4), rather than $300,000.00 per occurrence/$600,000.00 aggregate for all others/non-physicians as prescribed by S.C. Code Ann. §15-78-120(a)(1)-(2).

STATEMENT OF THE CASE

This matter arises out of alleged medical malpractice matter which occurred on or about August 12, 2016, following Respondent being seen and treated by a physician's assistant ("PA") at The Regional Medical Center ("TRMC") Emergency Department. Respondent filed a Motion for Partial Summary Judgment as a matter of law on September 10, 2021, arguing a supervising physician is vicariously liable for negligent acts of a physician's assistant under the South Carolina Physician' Assistants Practice Act (in effect of August 2016). Respondent then cited, "A Physician Assistant may perform (1) medical acts, tasks, or functions with written scope of practice under physician supervision; (2) those duties and responsibilities, including by prescribing and dispensing drugs and medical devices, that are lawfully delegated by their

supervising physicians." Essentially, the Respondent was seeking a ruling as to whether the applicable South Carolina Tort Claim's Act ("SCTCA" or "TCA") liability cap in this matter is $1,200,000.00 physicians and dentists or the liability cap of $300,000.00 per occurrence/$600,000.00 aggregate for all others/non-physicians. Mot. Hearing transcript 6:2-6, Nov. 1, 2021; Pltf's Memo. in Opp. to Alter/Amend 2.

The decedent was seen in the TRMC Emergency Department by Michael Carothers, P.A. He is not a licensed physician. TMRC is a governmental health facility as defined by the Tort Claims Act. *See Smith v. TRMC*, 713 S.E.2d 656 (Ct. App. 2011). The decedent was not seen or treated by a licensed physician on August 12, 2016.

In opposition to Respondent's motion, Appellant argued the existence of a genuine issue as to the matter of facts, the determination of which are relevant to the issue of law that Respondent sought summary judgment in this matter. Specifically, Appellant argued that the issues at dispute are 1) whether the attending physician must be physically present in the emergency department under the South Carolina Statutes, and 2) whether the Appellant breached the standard of care. It is Appellant's position that these are relevant issues that the trial judge will have to hear in determining which TCA cap is applicable. It is Appellant's position that given the plain language of S.C. Code Ann. §15-78-120, the legislative intent of the SCTCA, and caselaw as determined in *Knox v. US*, C/A No. 0:17-cv-36-CMC (D.S.C. 2018), fn. 4, the applicable liability cap is $300,000/$600,000 because the Respondent was seen solely by a physician's assistant, not a licensed physician, and no licensed physician participated in any way in the care and treatment of the Respondent.

The matter was heard before the court on November 1, 2021, and this Court entered an order on February 9, 2022, granting Respondent's Motion for Partial Summary Judgment. The Court ruled that a physician's assistant is an agent of a supervising physician and that a supervising physician has accepted responsibility for services rendered by its agent/physician

assistant and therefore is liable for the physician assistant/agent's acts and omissions. The Court further ruled that the $1,200,000.00 liability cap for physicians and dentists under the SCTCA is applicable.

On February 18, 2022, Appellant filed a Rule 59(e) motion. Appellant argued that a Rule 59(e) motion was appropriate and/or necessary because it appeared that in its Order & Opinion, this Court failed to fully consider or rule on all of Defendants' arguments in opposition to Respondent's motion and the genuine issues of material facts pursuant to the standards for summary judgment and medical malpractice lawsuits in this state: specifically, 1) whether the attending physician must be present in the emergency department under the South Carolina Statutes, and 2) whether the Appellant breached the standard of care. Appellant maintained its argument that summary judgment should not have been granted, as there are genuine issues of material facts in dispute as it pertains to this matter. Appellant further argued that the Court's ruling is in contravention to the Tort Claims Act.

Respondent filed a memorandum in opposition to Appellant's motion on April 20, 2022. On April 29, 2022, the Court ruled via email that Appellant's Rule 59(e) motion was denied, as it found there to be no evidence presented indicating an intervening change in controlling law, new evidence, a clear error of law or manifest injustice. An Order with the Court's ruling was entered and filed on May 16, 2022. This appeal follows.

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Watson v. Underwood*, 407 S.C. 443, 756 SE 2d 155 (Ct. App. 2014) (citing *Fleming v. Rose,* 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). "In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it

must be viewed in the light most favorable to the nonmoving party." *Id.* (citing *Sauner v. Pub. Serv. Auth. of S. C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003)). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.*, 381, S.C. 326, 330, 673 S.E.2d 801 (2009). This standard requires merely "the slightest amount of relevant evidence" on an issue to warrant denial of summary judgment. Black's Law Dictionary 635 (3d pocket ed. 2006). *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 294-95, 701 S.E.2d 742, 752 (2010) concurring in part, dissenting in part, Hearn, J.

ARGUMENT

The Court in its Order granting Respondent's motion for partial summary judgment, relied on the South Carolina Physician Assistant's Act, S.C. Code Ann. §40-47-905 et seq. to find that "a physician's assistant is the agent of his or her supervising physician and the supervising physician has 'accepted responsibility' for the services rendered by the physician assistant." Ct. Order, Feb. 9, 2022, p. 5. The court's order determined that, "Because the supervising physician liable for the acts and omissions committed by his agent, under the plain terms of the TCA, the $1,200,000.00 liability cap is applicable to this case." *Id.* at p. 6.

Respondents brief argues that the only dispositive issue in this appeal is the South Carolina Physician Assistant's Practice Act, S.C. Code Ann. §40-47-935. This narrow view ignores the presence of genuine issues of material fact which exist at the current summary judgment posture of this case. Specifically, the issue of whether or not a physician/patient relationship existed in this matter to trigger the physician liability caps of the Tort Claims Act was not addressed by the trial court or Respondent.

The starting point in a medical malpractice case is the determination of the existence of a physician/patient relationship. "The establishment of a doctor/patient relationship is a prerequisite to a claim of medical malpractice. *Easter v Lexington_Memorial Hospital*, 303 N.C. 303, 278 S.E.2d 253 (1981). "The relation is a consensual one wherein the patient knowingly seeks the assistance of a physician and the physician knowingly accepts him as a patient." 61 Am. Jur.2d Physicians Surgeons Section 158 ar 290 (1981). *Roberts v Hunter*, 426 S.E.2d 797 (1993). Respondent have offered no evidence to overcome the existence of a genuine issue of material fact, namely that a physician in the TRMC ED had such a relationship with Rebecca Livingston on August 12, 2016. This position is in direct contravention to the medical record and evidence provided to the trial court that the only provider who Rebecca Livingston saw and was treated by was a physician assistant, Michael Carrothers, PA. No licensed physician evaluated and treated the patient on that date, nor was one required by law to do so.

The situation is similar to the once cited by the Supreme Court in *Roberts v Hunter*. Our Supreme Court cited the case of *Mozingo by Thomas v Memorail Hospital*, 101 N.C. App. 578, 400 S.E.2d 747, rev.den. 329 N.C. 498, 407 S.E..2d 537, (1991) aff'd 331 N.C. 182, 415 S.E. 2d 341 (1992), where the appellate court held that no relationship was established between an obstetrics patient and a physician who supervised the patient's treating physician. "In *Mozingo*, the treating physician, a resident doctor, had called the supervising physician reporting complications with the patient. When the supervising physician arrived at the hospital, the baby was already born with disabilities. The court held that the absence of any contact with the patient prior to the alleged malpractice negated any doctor/patient relationship." *Roberts, infra.* As in *Mozingo*, there is no evidence in the record that any physician had any contact with the patient in this matter to create such a physician/patient relationship.

Because no physician/patient relationship existed, the physician limitations of liability contained in the Tort Claims Act cannot be triggered. Respondent has relied on the Physician Assistant's Act to argue that the $1,200.000.00 cap applies because according to the Act, the physician's assistant is an agent of the supervising physician. However, as the Appellant is a governmental entitiy, this matter is governed by and limited to the provisions of the South Carolina Tort Claims Act, S.C. Code Ann §15-78-10 et seq. Pursuant to S.C. Code Ann. §15-78-200, the "South Carolina Tort Claims Act [] is the ***exclusive and sole remedy*** for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." (emphasis added).

Respondent also dismissed the posture of this case which involves completing expert opinions as to whether PA Carothers complied with the standard. As stated in Appellant's Initial Brief, Appellant's expert, Dr. Coleman, opined that "supervision: does not mean a physician has to go over the treatment plan, the diagnosis the PA makes, the decision of the PA to order tests, or the decision of the PA to either admit or discharge the patient. "Summary Judgment is a drastic remedy to be invoked cautiously and must be denied if Appellants demonstrate a scintilla of evidence in support of their claims. *Jericho State Ccp Corp. Of Fla v Chicago Title Ins. Co.*, 431 S.C. 437, 848 S.E.2d 572 (Ct. App. 2010). More than such a scintilla exists regarding the issue of the physician/patient relationship and TRMC's expert testimony regarding the standard of care was complied with by its employee.

Moreover, the TCA provides limitations and exemptions on liability and favors limiting the liability of the governmental entity. S.C. Code Ann. §15-78-200 ("The provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and must be *liberally construed* in favor of limiting the liability of the governmental entity." (emphasis added)). S.C. Code Ann. §15-78-120 provides for such limitations of liability. For

non-physicians the statute provides for a liability cap of $300,000.00 for a loss arising from a single occurrence and $600,000.00 aggregate cap. S.C. Code Ann. §15-78-120(a)(1) & (a)(2). The statute provides for an increased liability cap of $1,200,000.00 for torts "caused by the tort of any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession." S.C. Code Ann. §15-78-120(a)(3) & (a)(4) (emphasis added).

This matter involves the alleged tort of a physician's assistant, not a licensed physician. Without a physician/patient relationship, there can be no physician liability under the Tort Claims Act. The South Carolina District Court in *Knox* acknowledged that a physician's assistant is not a "licensed physician" and therefore damages available for a physician's assistant alleged negligent acts are limited to $300,000 per occurrence. *Knox v. US*, C/A No. 0:17-cv-36-CMC (D.S.C. 2018), fn. 4. The Court in *Knox* did not go into analysis of agency with regard to the physician's assistant. Rather, it simply looked to the plain and direct language of S. C. Code Ann. §15-78-120 and ruled that the $300,000/$600,000 cap was applicable for the PA. Therefore, in accordance with the *Knox*, the applicable liability cap in this matter, which also involves the treatment and care rendered by a physician's assistant and not a physician, should be $300,000/$600,000.

This is a matter of statutory construction and legislative intent. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language used must be construed in the light of the intended purpose of the statute." *Eagle Container Co., LLC v. County of Newberry*, 666 S.E.2d 892, 895 (S.C. 2008). "Legislative intent is best determined by examining the language of the statute itself." *Doe v. American Red Cross Blood Svcs.*, 377 S.E.2d 323, 437 (S.C. 1989).

Contrary to Respondent's arguments, S. C. Code Ann. §15-78-120(a)(3) and (4) do not state that the $1,200,000 cap applies to all medical malpractice cases. Rather, the statute unambiguously limits its application to solely matters involving torts committed by licensed

physicians and dentists. Fundamentally, this means there has to be a doctor-patient relationship, which in this case there was not, for this physician cap to apply. Mot. hearing transcript 11:24-12:5. This case involves a physicians' assistant-patient relationship: no physician saw, treated, or laid hands on the Respondent and nothing regarding the PA's care and treatment of the Respondent was approved by any physician. No physician was involved for any part of the Respondent's care and treatment. Mot. hearing transcript 11:24-12:5; 14:8-12. Given the plain language of the statute, it would reasonably follow that the legislative intent would be that an alleged tort committed by a physician's assistant, which is not a licensed physician or dentist, would fall within the $300,000/$600,000 cap. Moreover, this would be consistent with the legislative intent to limit liability in favor of the governmental entity. S.C. Code Ann. §15-78-200 ("The provisions of this chapter . . . must be *liberally construed* in favor of limiting the liability of the governmental entity."). Therefore, Appellant argues that the Court's ruling constitutes a clear error of law as it contravenes the plain language of §15-78-120(a), legislative intent of the SCTCA, and the courts ruling in *Knox*, and to prevent injustice, this matter should be limited to the $300,000/$600,000 liability cap as provided in the SCTCA.

In order to trigger the application of the physician liability cap contained in S.C. Code of Laws, Ann. §15-78-120 (a)(3) and (a)(4), a physician must have caused the tort. As set forth above, before the physician can be proven to have caused the tort, the fundamental physician/patient relationship must be established. This is not established by Respondent. This also comports with the legislative mandate that the Tort Claims Act must be lieberally construed in favor of limiting the liability of the governmental entity. S.C. Code Ann. §15-78-200. None of the cases cited by Respondent for the proposition of imposing physician liability limits on a physician for the acts of a Physician Assistant are governmental tort claim type actions. Specifically, the *Lopez v Ledesma*, 46 Cal. App. 5th 980, 260 Cal. Rprt. 3d 386 (Cal. App. 5th 2020), aff'd, 46 P3d 212, 290 Cal. Rptr. 3d 532 (2022) is not a California tort claims act case and

involves a different statutory framework. Likewise, in *Cox v MA Primary and Urgent Care Clinic*, 313 seq, 2d 240 (2010), the Tennessee Supreme Court held the professional standard of care applicable to physician assistants to distinct from that and applicable to physicians. Plaintiff's expert in *Cox* was unfamiliar with the use of physician assistants and statutory provisions similar to Plaintiff's expert in this appeal. *Cox* was also not brought pursuant to Tennessee's tort claims statute and did not involve a governmental healthcare facility. Similarly, the *Behr* case from Washington cited by Respondent did not involve any governmental tort claims statutory applications. Likewise Plaintiff's reliance of *Simmons v Tuomey* for the proposition of a non-delegible duty in an emergency department scenario is misplaced as that case is inapplicable to the Tort Claims Act. The TCA specifically excludes liability for acts a third party, non-employee. § S.C. Code Ann. §15-78-60 (20) and *Smith v TRMC, infra.* To hold that the limitations of liability contained in the licensed physician section of the Tort Claims Act applies would defeat the statutory goal of liberally construing the Tort Claims Act to limit the liability of TRMC in this action.

CONCLUSION

For the reasons stated, Appellant respectfully requests the Appellate Court to reverse the decision of the Trial Court, deny the Respondent's Motion for Partial Summary Judgment, and rule that the applicable South Carolina Torts Claim liability cap for this matter is $300,000 per occurrence/$600,000 aggregate total, and allow this to proceed to trial.

Respectfully submitted,

September 26, 2022

s/Michael C. Tanner

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY COURT OF COMMON PLEAS

Honorable Honorable Edgar J. Dickson, Circuit Court Judge

Case No. 2018-CP-38-01036

Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally,..... Respondent

v.

The Regional Medical Center of Orangeburg and Calhoun Counties,.....Appellant

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PROOF OF SERVICE

I certify that I have served the Designation of Matter and the Reply Brief on Malcolm E. Livingston, Jr., by depositing a copy of it in the United States Mail, postage prepaid, on September 26, 2022, addressed to his attorneys of record Marion C. Fairey, Jr., Esquire, Post Office Box 661, Hampton, S.C., 29924 and Clyde C. Dean, Jr., Esquire, Post Office Box 1405, Orangeburg, S.C., 29116.

September 26, 2022

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September 26, 2022

(Via U. S. Mail and e-mail ctappfilings@sccourts.org)
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RE: Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally v. The Regional Medical Center of Orangeburg and Calhoun Counties
Case No.: 2018-CP-38-01036, 2018-CP-38-01038, 2018-CP-38-01039
Appellate Case No.: 2022-000809

Dear Ms. Kitchings:

Enclosed for filing, please find the Reply Brief of The Regional Medical Center, Designation of Matter and Proof of Service in this matter.

Yours Truly,

Michael C. Tanner

MCT/bi
enclosures
cc: Marion C. Fairey, Jr. Esquire
Clyde C. Dean, Jr., Esquire