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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY COURT OF COMMON PLEAS

Honorable Edgar J. Dickson, Circuit Court Judge

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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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# RECORD ON APPEAL

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INDEX

Orangeburg Common Pleas

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|---|---|
| **Case Caption:** | Malcolm E Livingston VS The Regional Medical Center Of Orangeburg And Calhoun Counti |
| **Case Number:** | 2018CP3801036 |
| **Type:** | Order/Summary Judgment |

So Ordered

s/ Edgar W. Dickson #2153

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| ORANGEBURG COUNTY | ) | 1ST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally, | ) | Case No. 2018-CP-38-01036<br>Case No. 2018-CP-38-01038<br>Case No. 2018-CP-38-01039 |
| Plaintiff, | ) | |
| v. | ) | **Order** |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant, | ) | |

This matter came before the Plaintiff's Motion for Partial Summary Judgment on the issue of whether Defendant can reduce its liability cap under the South Carolina Tort Claims Act ("TCA") by claiming that the acts and omissions that allegedly caused the injury to the Plaintiff were committed by physician's assistant rather than a licensed physician. The matter was heard by the undersigned on November 1, 2021. Marion C. Fairey, Jr. appeared and argued on behalf of the Plaintiff. Michael Tanner appeared and argued on behalf of the Defendant.

The undisputed facts relevant to this motion are that on August 12, 2016, Rebecca Livingston was involved in an automobile accident. She was taken from the scene of the wreck by ambulance to the Emergency Department at the Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC"). Although there were licensed physicians present in the Emergency Department on August 12, 2016, while in the Emergency Department, Ms. Livingston's care was managed by a physician's assistant employed by TRMC. There is no licensed physician listed or identified anywhere in Ms. Livingston's medical record for August

12, 2016. After being treated and evaluated, Ms. Livingston was discharged home from the TRMC Emergency Department by the physician's assistant.

In the early morning hours of August 13, 2016, Ms. Livingston returned to the TRMC Emergency Department because she could not move her legs. This time, she was seen by a licensed physician who determined that Ms. Livingston was suffering from a spinal hematoma. Ms. Livingston was emergently transferred to the nearest Level I trauma center, Palmetto Richland Memorial. Unfortunately, by the time she arrived there, she had already lost all sensation below her T-8 vertebra. She was diagnosed with paraplegia, secondary to spinal cord injury. She passed away twenty months later.

Plaintiff, Malcolm Livingston, brought these three actions (Loss of Consortium – 2018-CP-38-01036; Survival – 2018-CP-38-01038; and Wrongful Death – 2018-CP-38-01039) against TRMC on his own behalf and as the personal representative of his deceased wife, Rebecca Livingston, alleging that Ms. Livingston was paralyzed and ultimately perished as a result of TRMC's failure to diagnose and timely treat the spinal hematoma when Ms. Livingston presented at the TRMC Emergency Department on August 12, 2016. TRMC denies these allegations and contends that the employees in its Emergency Department acted within the applicable standard of care. Additionally, TRMC alleges that it is a governmental entity whose liability for medical negligence exists solely under the South Carolina Tort Claims Act. Further, TRMC alleges that because Ms. Livingston's care was provided by a non-physician (physician's assistant) on August 12, 2016, rather than a physician, its liability in this case is capped at $300,000.00 per claim and $600,000.00 per occurrence.

Under the Tort Claims Act ("TCA"), governmental entities enjoy a general liability cap of $300,000.00 per claim with a $600,000.00 liability cap per occurrence, regardless of the

number of agencies or claims involved. S.C. Code Anno. §15-78-120(a)(1) and (2). However, recognizing that medical malpractice cases involve "significantly higher damages" the legislature raised the liability limits for government employed physicians and dentists, effective on January 1, 1989. S.C. Code Anno. §15-78-20(g). Accordingly, the liability limit under the TCA is $1,200,000.00 for the tort of a "licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession." S.C. Code Anno. §15-78-120(a)(3) and (4).

In this case, TRMC takes the position that because they staffed their Emergency Department with a physician's assistant and Ms. Livingston was only seen by that physician's assistant (and not a physician), that its liability in this case is limited to $300,000.00 per claim and $600,000.00 for all claims arising from that occurrence rather than the $1,200,000.00 medical malpractice cap. In other words, TRMC asserts that because it provided a physician's assistant rather than a physician to care for Ms. Livingston in its Emergency Department, its liability under the TCA is limited to $600,000.00.

In South Carolina, physician's assistants' authority to practice medicine is governed by the South Carolina Physician Assistant's Act. S. C. Code Anno. §40-47-905, et seq. Under the Physician's Assistants Act, a physician's assistant must be supervised by a licensed physician and may only perform those medical acts contained in a written scope of practice. S. C. Code Anno. §40-47-935(1). Additionally, a physician's assistant is only authorized to provide medical services under the supervision of a licensed physician who has expressly accepted responsibility for the medical services rendered by the physician's assistant. Under State law, the physician's assistant who provided services to Ms. Livingston was only able to do so because he or she was acting under a physician's supervision and under a written scope of practice.

Specifically, under the South Carolina Physician' Assistants Practice Act (in effect in August of 2016), a physician assistant

> may perform: (1) medical acts, tasks, or functions with written scope of practice guidelines under physician supervision; (2) those duties and responsibilities, including the prescribing and dispensing of drugs and medical devices, that are lawfully delegated by their supervising physicians. However, only physician assistants holding permanent license may prescribe drug therapy as provided in this article.
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> **A physician assistant is an agent of his or her supervising physician in the performance of all practice related activities including, but not limited to, the ordering of diagnostic, therapeutic, and other medical services."**

(Emphasis supplied).

Under the Act, a "Physician supervisor" is a "South Carolina licensed physician currently possessing an active, unrestricted permanent license to practice medicine in South Carolina who is approved to serve as a supervising physician for no more than three full-time equivalent physician assistants. The physician supervisor is the individual who is responsible for supervising a physician assistant's activities." S.C. Code Anno. §40-47-910(7). "Supervising means overseeing the activities of, **and accepting responsibility for**, the medical services rendered by a physician assistant as part of a physician-led team in a manner approved by the board." S.C. Code Anno. §40-47-910(8) (emphasis supplied). Under the plain language of the statute, 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.

Courts of this state have long held that a principal is independently liable to third parties for the negligence of an agent that occur within the scope of the agent's employment. *Spence v. Spence,* 368 S.C. 106, 628 S.E.2d 869, 879-880 (2006). This rule of liability is

> founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every case, the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity

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*Id, 628 S.E.2d at 880; citing, Service Life & Health Ins. Co.,* 220 S.C. 198, 66 S.E.2d 816, 817 (1951); *see also, Jones v. Elbert,* 211 S.C. 553, 558, 34 S.E.2d 796, 798 (1945).

The South Carolina Physician Assistants Practice Act clearly and unambiguously establishes an agency relationship between a supervising physician and a physician's assistant. A physician's assistant cannot practice unless a supervising physician has accepted responsibility for the medical services rendered by the physician assistant. Where an agency relationship exists, the principal is independently responsible for the acts and omissions of the agent. Accordingly, the TRMC supervising physician on duty on August 12, 2016 is responsible for the medical care Ms. Livingston received and TRMC cannot reduce its liability cap by claiming that the acts and omissions that injured Ms. Livingston were conducted by a physician's assistant rather than a licensed physician. The very authority that permits a physician assistant to practice in TRMC's emergency room requires that he or she only do so as the agent of a supervising physician who as accepted responsibility for the medical services rendered. Because the supervising physician is 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. S.C. Code Anno. §15-78-120(a)(3)[1] and (4)[2]. Accordingly, the Plaintiff's Motion for Partial Summary Judgment is GRANTED.

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[1] "No person may recover in any action or claim brought hereunder against any governmental entity and caused by the tort of any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, a sum exceeding one million two hundred thousand dollars because of a loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved."

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IT IS SO ORDERED.

Entered this ____ day of February, 2022
Orangeburg, South Carolina

Edgar W. Dickson
Circuit Court Judge, 1st Judicial Circuit



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Orangeburg Common Pleas

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| **Case Caption:** | Malcolm E Livingston, Jr. VS Regional Medical Center Of Orangeburg And Calhoun Counties |
| **Case Number:** | 2018CP3801038 |
| **Type:** | Order/Summary Judgment |

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Orangeburg Common Pleas

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| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant, | ) | |

This matter is before the Court on the Motion of the Defendant, the Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC") to Reconsider the Court's February 9, 2022 Order which granted partial summary judgment to the Plaintiff.

**Standard of Review**

Rule 59(e), SCRCP provides a mechanism for a party to request that a court review a prior order. In clarifying Rule 59(e), SCRCP, the South Carolina Supreme Court stated that

> it is proper to view a Rule 59(e), SCRCP Motion not only as a vehicle to request the trial court "alter or amend the judgement," but also as a vehicle to seek "reconsideration" of issues and arguments. A Motion under Rule 59(e) long has been viewed as a "Motion for Reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its prior decision even if it means rehashing all or part of an argument previously presented.

*Elam v. S. C. Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-779 (2004). A party may wish to raise issues in a Rule 59(e) motion that they feel the court may have misunderstood or failed to fully consider. *Elam*, 361 S.C. at 25, 602 S.E.2d at 780. However, a party must file a Rule 59(e) motion to preserve for appeal an issue or argument that has been raised but not ruled on. *Id.*

**Discussion**

The Defendant's Motion to Reconsider this Court's February 9, 2022 Order raises the same arguments previously raised in opposition to the underlying summary judgment motion. Specifically, the Defendant argues that because there are questions of material fact as to (1) whether the attending physician must be present in the Emergency Department under the Physician Assistant Practice Act ("the Act"), and (2) whether the Defendant breached the standard of care, the Plaintiff is not entitled to partial summary judgment.

The Court's February 9, 2022 Order decided a simple legal issue: whether under the Physician Assistant's Practice Act (hereinafter the "Act"), a supervising physician is vicariously liable for the negligence of a physician's assistant that is practicing under their supervision. If so, is the $1,200,000 liability cap for physicians under the Tort Claims Act applicable in this case?

This Court ruled that under the Act, a physician's assistant is only allowed to practice if a supervising physician has "accepted responsibility" for the physician's assistant (*see*, S.C. Code Ann. § 40-47-910(8)) and has agreed that the physician's assistant is the agent of the supervising physician "in the performance of all practice related activities . . ." S. C. Code Ann. § 40-47-935 (Supp. 2016). Because the statutory scheme required a principal/agent relationship between a supervising physician and his physician's assistant, the Court ruled that the principal was independently responsible for the acts and omissions of the agent. The facts necessary to reach this conclusion are that (1) the Plaintiff was treated by a physician's assistant in the Defendant's Emergency Room; (2) the physician's assistant was properly licensed under the Act and had a supervising physician; (3) the negligent act or omissions as alleged by the Plaintiff occurred during this treatment. None of these facts are disputed by TRMC.

Vicarious liability means that a party who owes a nondelegable duty remains liable for the negligent acts of others. *Simmons v. Tuomey Regional Medical Center*, 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000) (holding hospital vicariously liable for alleged negligence of independent contractor providing medical services in the emergency department). In this case, this nondelegable duty is further bolstered by the unambiguous language in the Act. Whether a supervising physician must be present in the Emergency Department under the Physician Assistant Practice Act is irrelevant to whether the supervising physician (or in this case, the Governmental Hospital that employs the supervising physician) is vicariously liable for the alleged negligence of the physician's assistant they are supervising.

Vicarious liability does not require the presence of the principal at the locus of the negligent act. *See Wesley v. Holly Hill Lumber Co.*, 211 S.C. 40, 48, 43 S.E.2d 619, 622 (1947) (employer liable for faulty cable); *Conner v. Farmers and Merchants Bank*, 243 S.C. 132, 139-40, 132 S.E.2d 385, 388-89 (1963) (landlord vicariously liable to tenant for fall caused by floor negligently repaired by contractor); *Jenkins v. E. L. Long Motor Lines, Inc.*, 233 S.C. 87, 95-100, 103 S.E.2d 2d 523, 527-29 (1958) (common carrier vicariously liable for injuries caused when an unsecured load shifted during transport). The physical presence of the supervising physician in the emergency room is not required to establish the vicarious liability of TRMC's physician.

Similarly, whether the standard of care was breached or not is not germane to the legal question raised in the Plaintiff Motion for Partial Summary Judgment or the Court's ruling. In the February 9, 2022 Order, this Court simply held that:

> The South Carolina Physician Assistants Practice Act clearly and unambiguously establishes an agency relationship between a supervising physician and a physician's assistant. A physician's assistant cannot practice unless a supervising physician has accepted responsibility for the medical services rendered by the physician assistant. Where an agency relationship exists, the principal is independently responsible for the acts and omissions of the agent. Accordingly, the TRMC supervising physician on duty on August

> 12, 2016 is responsible for the medical care Ms. Livingston received and TRMC cannot reduce its liability cap by claiming that the acts and omissions that injured Ms. Livingston were conducted by a physician's assistant rather than a licensed physician. The very authority that permits a physician assistant to practice in TRMC's emergency room requires that he or she only do so as the agent of a supervising physician who as accepted responsibility for the medical services rendered. Because the supervising physician is 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. S.C. Code Ann. §15-78-120(a)(3) and (4). Accordingly, the Plaintiff's Motion for Partial Summary Judgment is GRANTED.

(February 9, 2022 Order, p. 5 – footnotes omitted).

In making this ruling, the Court did not find, nor did it need to find, that there was no question of fact regarding the standard of care. The Court merely held that if the Plaintiff can prove that the standard of care was breached by TRMC's physician's assistant, then under the unambiguous terms of the Act, the supervising physician would be vicariously liable for the acts of his agent and the applicable liability cap in the Tort Claims Act would be governed by S.C. Code Ann. §15-78-120(a)(3) and (4).

The purpose of Rule 59(e), SCRCP to alter or amend a judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); *Collins Music Col, Inc. v. IGT*, 353 S.C. 559, 562, 579 S.E.2d 524, 525 (Ct. App. 2002). The Court has considered all arguments raised by TRMC in its original memorandum of law and made at oral argument, as well as the arguments raised in TRMC's Rule 59(e), SCRCP motion and after due consideration of all, denies the arguments made and denies this Rule 59(e), SCRCP motion.

**IT IS SO ORDERED.**

Entered this This ___ day of May, 2022
Orangeburg, South Carolina

Edgar W. Dickson
Circuit Court Judge
1st Judicial Circuit

Orangeburg Common Pleas

| | |
|---|---|
| **Case Caption:** | Malcolm E Livingston, Jr. VS Regional Medical Center Of Orangeburg And Calhoun Counties |
| **Case Number:** | 2018CP3801038 |
| **Type:** | Order/Summary Judgment |

So Ordered

s/ Edgar W. Dickson #2153

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>ORANGEBURG COUNTY | ) | IN THE COURT OF COMMON PLEAS<br>1ST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally,<br><br>Plaintiff,<br><br>v.<br><br>The Regional Medical Center of Orangeburg and Calhoun Counties<br><br>Defendant, | ) | Case No. 2018-CP-38-01036<br>Case No. 2018-CP-38-01038<br>Case No. 2018-CP-38-01039<br><br>**Order Denying Defendant's Motion for Reconsideration or To Alter or Amend the Court's February 9, 2022 Order** |

This matter is before the Court on the Motion of the Defendant, the Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC") to Reconsider the Court's February 9, 2022 Order which granted partial summary judgment to the Plaintiff.

**Standard of Review**

Rule 59(e), SCRCP provides a mechanism for a party to request that a court review a prior order. In clarifying Rule 59(e), SCRCP, the South Carolina Supreme Court stated that

> it is proper to view a Rule 59(e), SCRCP Motion not only as a vehicle to request the trial court "alter or amend the judgement," but also as a vehicle to seek "reconsideration" of issues and arguments. A Motion under Rule 59(e) long has been viewed as a "Motion for Reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its prior decision even if it means rehashing all or part of an argument previously presented.

*Elam v. S. C. Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-779 (2004). A party may wish to raise issues in a Rule 59(e) motion that they feel the court may have misunderstood or failed to fully consider. *Elam*, 361 S.C. at 25, 602 S.E.2d at 780. However, a party must file a Rule 59(e) motion to preserve for appeal an issue or argument that has been raised but not ruled on. *Id.*

**Discussion**

The Defendant's Motion to Reconsider this Court's February 9, 2022 Order raises the same arguments previously raised in opposition to the underlying summary judgment motion. Specifically, the Defendant argues that because there are questions of material fact as to (1) whether the attending physician must be present in the Emergency Department under the Physician Assistant Practice Act ("the Act"), and (2) whether the Defendant breached the standard of care, the Plaintiff is not entitled to partial summary judgment.

The Court's February 9, 2022 Order decided a simple legal issue: whether under the Physician Assistant's Practice Act (hereinafter the "Act"), a supervising physician is vicariously liable for the negligence of a physician's assistant that is practicing under their supervision. If so, is the $1,200,000 liability cap for physicians under the Tort Claims Act applicable in this case?

This Court ruled that under the Act, a physician's assistant is only allowed to practice if a supervising physician has "accepted responsibility" for the physician's assistant (*see*, S.C. Code Ann. § 40-47-910(8)) and has agreed that the physician's assistant is the agent of the supervising physician "in the performance of all practice related activities . . ." S. C. Code Ann. § 40-47-935 (Supp. 2016). Because the statutory scheme required a principal/agent relationship between a supervising physician and his physician's assistant, the Court ruled that the principal was independently responsible for the acts and omissions of the agent. The facts necessary to reach this conclusion are that (1) the Plaintiff was treated by a physician's assistant in the Defendant's Emergency Room; (2) the physician's assistant was properly licensed under the Act and had a supervising physician; (3) the negligent act or omissions as alleged by the Plaintiff occurred during this treatment. None of these facts are disputed by TRMC.

Vicarious liability means that a party who owes a nondelegable duty remains liable for the negligent acts of others. *Simmons v. Tuomey Regional Medical Center*, 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000) (holding hospital vicariously liable for alleged negligence of independent contractor providing medical services in the emergency department). In this case, this nondelegable duty is further bolstered by the unambiguous language in the Act. Whether a supervising physician must be present in the Emergency Department under the Physician Assistant Practice Act is irrelevant to whether the supervising physician (or in this case, the Governmental Hospital that employs the supervising physician) is vicariously liable for the alleged negligence of the physician's assistant they are supervising.

Vicarious liability does not require the presence of the principal at the locus of the negligent act. *See Wesley v. Holly Hill Lumber Co.*, 211 S.C. 40, 48, 43 S.E.2d 619, 622 (1947) (employer liable for faulty cable); *Conner v. Farmers and Merchants Bank*, 243 S.C. 132, 139-40, 132 S.E.2d 385, 388-89 (1963) (landlord vicariously liable to tenant for fall caused by floor negligently repaired by contractor); *Jenkins v. E. L. Long Motor Lines, Inc.*, 233 S.C. 87, 95-100, 103 S.E.2d 2d 523, 527-29 (1958) (common carrier vicariously liable for injuries caused when an unsecured load shifted during transport). The physical presence of the supervising physician in the emergency room is not required to establish the vicarious liability of TRMC's physician.

Similarly, whether the standard of care was breached or not is not germane to the legal question raised in the Plaintiff Motion for Partial Summary Judgment or the Court's ruling. In the February 9, 2022 Order, this Court simply held that:

> The South Carolina Physician Assistants Practice Act clearly and unambiguously establishes an agency relationship between a supervising physician and a physician's assistant. A physician's assistant cannot practice unless a supervising physician has accepted responsibility for the medical services rendered by the physician assistant. Where an agency relationship exists, the principal is independently responsible for the acts and omissions of the agent. Accordingly, the TRMC supervising physician on duty on August

> 12, 2016 is responsible for the medical care Ms. Livingston received and TRMC cannot reduce its liability cap by claiming that the acts and omissions that injured Ms. Livingston were conducted by a physician's assistant rather than a licensed physician. The very authority that permits a physician assistant to practice in TRMC's emergency room requires that he or she only do so as the agent of a supervising physician who as accepted responsibility for the medical services rendered. Because the supervising physician is 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. S.C. Code Ann. §15-78-120(a)(3) and (4). Accordingly, the Plaintiff's Motion for Partial Summary Judgment is GRANTED.

(February 9, 2022 Order, p. 5 – footnotes omitted).

In making this ruling, the Court did not find, nor did it need to find, that there was no question of fact regarding the standard of care. The Court merely held that if the Plaintiff can prove that the standard of care was breached by TRMC's physician's assistant, then under the unambiguous terms of the Act, the supervising physician would be vicariously liable for the acts of his agent and the applicable liability cap in the Tort Claims Act would be governed by S.C. Code Ann. §15-78-120(a)(3) and (4).

The purpose of Rule 59(e), SCRCP to alter or amend a judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); *Collins Music Col, Inc. v. IGT*, 353 S.C. 559, 562, 579 S.E.2d 524, 525 (Ct. App. 2002). The Court has considered all arguments raised by TRMC in its original memorandum of law and made at oral argument, as well as the arguments raised in TRMC's Rule 59(e), SCRCP motion and after due consideration of all, denies the arguments made and denies this Rule 59(e), SCRCP motion.

**IT IS SO ORDERED.**

Entered this This ___ day of May, 2022
Orangeburg, South Carolina

Edgar W. Dickson
Circuit Court Judge
1st Judicial Circuit

Orangeburg Common Pleas

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|---|---|
| **Case Caption:** | Malcolm E Livingston, Jr. VS Regional Medical Center Of Orangeburg And Calhoun Counties |
| **Case Number:** | 2018CP3801039 |
| **Type:** | Order/Summary Judgment |

So Ordered

s/ Edgar W. Dickson #2153

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| ORANGEBURG COUNTY | ) | 1ST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally, | ) | Case No. 2018-CP-38-01036<br>Case No. 2018-CP-38-01038<br>Case No. 2018-CP-38-01039 |
| Plaintiff, | ) | **Order Denying Defendant's Motion for Reconsideration or To Alter or Amend the Court's February 9, 2022 Order** |
| v. | ) | |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant, | ) | |

This matter is before the Court on the Motion of the Defendant, the Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC") to Reconsider the Court's February 9, 2022 Order which granted partial summary judgment to the Plaintiff.

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(February 9, 2022 Order, p. 5 – footnotes omitted).

In making this ruling, the Court did not find, nor did it need to find, that there was no question of fact regarding the standard of care. The Court merely held that if the Plaintiff can prove that the standard of care was breached by TRMC's physician's assistant, then under the unambiguous terms of the Act, the supervising physician would be vicariously liable for the acts of his agent and the applicable liability cap in the Tort Claims Act would be governed by S.C. Code Ann. §15-78-120(a)(3) and (4).

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**IT IS SO ORDERED.**

Entered this This ___ day of May, 2022
Orangeburg, South Carolina

Edgar W. Dickson
Circuit Court Judge
1st Judicial Circuit

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | IN THE FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., | ) | Case No. 2018-CP-38-_____ |
| | ) | |
| | ) | **SUMMONS** |
| Plaintiff, | ) | |
| | ) | (LOSS OF CONSORTIUM) |
| v. | ) | (TORT CLAIMS ACT) |
| | ) | (JURY TRIAL DEMANDED) |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

TO THE ABOVE-NAMED DEFENDANT:

**YOU ARE HEREBY SUMMONED** and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Plaintiff upon the subscriber at the law offices of The Fairey Law Firm, LLC, Post Office Box 661, Hampton, South Carolina, 29924, within thirty (30) days after the service hereof, exclusive of the date of service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in said Complaint, including the rendering of judgment by default against you.

**<signature page to follow>**

Respectfully submitted.

s/Marion C. Fairey, Jr.
Marion C. Fairey, Jr.
THE FAIREY LAW FIRM, LLC
4985 Savannah Highway
Post Office Box 661
Hampton, South Carolina 29924
(803) 943-6444
bfairey@faireylaw.com

s/Clyde C. Dean, Jr.
Clyde C. Dean, Jr.
THE DEAN LAW FIRM
146 Centre Street
Post Office Box 1405
Orangeburg, South Carolina 29116-1405
(803) 534-5091

August 9, 2018
Hampton, South Carolina

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | IN THE FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., | ) | Case No. 2018-CP-38-_____ |
| | ) | |
| | ) | **COMPLAINT** |
| Plaintiff, | ) | |
| | ) | LOSS OF CONSORTIUM |
| v. | ) | TORT CLAIMS ACT |
| | ) | (JURY TRIAL DEMANDED) |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

COMES NOW THE PLAINTIFF AND ALLEGES AS FOLLOWS:

1. The Plaintiff, Malcolm E. Livingston, Jr., is a resident of Orangeburg County.

2. The Plaintiff's wife, Rebecca E. Livingston, was a resident of Orangeburg County during her life and at the time of her death and her estate is pending in Orangeburg County, South Carolina.

3. The Defendant, the Regional Medical Center of Orangeburg and Calhoun Counties (hereinafter "TRMC") is a licensed healthcare facility, organized and existing under the laws of South Carolina, that provides health care services including emergency room services in Orangeburg, South Carolina.

4. TRMC is a quasi-governmental entity which is subject to suit under the South Carolina Tort Claims Act, S.C. Code Anno. §15-78-10, et seq.

5. The most substantial acts complained of herein occurred in Orangeburg County, South Carolina.

6. Pursuant to S.C. Code Anno. §15-36-100(C)(1), the Plaintiff alleges that he has a good faith belief that the statute of limitations may expire within ten (10) days of filing this complaint and because of time constraints, the affidavit of an expert could not be prepared.

7. At all times relevant, TRMC, its physicians and health care workers, had a doctor-patient relationship with the Decedent.

8. On August 12, 2016, the Plaintiff's wife was involved in an automobile wreck on Chestnut Street in Orangeburg County, South Carolina.

9. The Decedent was transported by ambulance from the scene of the wreck to TRMC, where she was admitted to the Emergency Department at 12:45 p.m.

10. The Decedent was examined by an employee of TRMC.

11. Orders were given for Computed Tomography without contrast of her head, cervical spine and lumbarsacral spine.

12. The Decedent was diagnosed with back and neck sprain.

13. Prior to her discharge, the Decedent complained of numbness in her lower extremities and her family reported those complaints to TRMC personnel.

14. The Decedent never ambulated while she was a patient in the TRMC Emergency Department.

15. The Decedent was removed from the hospital in a wheelchair and had to be physically lifted into a vehicle upon discharge because she could not stand or ambulate on her own.

16. Once at home, the Decedent's numbness increased.

17. In the middle of the night, the Decedent returned to the Emergency Department at TRMC complaining of bi-lateral numbness in her lower extremities.

18. The attending physician ordered a MRI of the thoracic spine at 3:18 a.m.

19. The Radiologist's preliminary report, completed at 6:56 a.m. of the MRI of the thoracic spine noted extensive fluid collection compatible with hematoma throughout the thoracic canal causing severe compression of the thoracic cord and diffuse cord signal abnormality.

20. Emergent neurosurgical consultation and follow-up was recommended.

21. The Decedent was transported by ambulance to a Level I trauma center in Columbia on August 13, 2016 where she underwent emergent decompression surgery.

22. Despite emergent decompression surgery, the Decedent underwent physical therapy but never regained sensation in her lower extremities.

23. The Decedent's final diagnosis was paraplegia secondary to spinal cord injury.

24. The Decedent's health continued to deteriorate and on May 7, 2018, Mrs. Livingston died from her injuries.

25. At all times relevant, the Defendant and its employees owed the Decedent the following duties:

a. The duty to diagnose and treat in accordance with the applicable standard of care;

b. The duty to protect the safety of their patients;

c. The duty to order appropriate tests or examinations and to consider those tests and examinations in making a proper diagnosis;

d. The duty to ensure patients are medically stable prior to their discharge;

e. The duty to inform patients (and their care providers) of test and exam results;

f. The duty to act with professional competence;

g. The duty to do no harm to their patients;

h. The duty to act without delay in diagnosing and treating their patients,

i. The duty to rule out or treat injuries or diseases that are serious or life threatening,

j. Other duties which may come to light during discovery in this case.

26. TRMC and its employees breached one or more of these duties in the care and treatment of the Decedent.

27. The Defendant's acts or omissions as alleged herein were negligent, grossly negligent and negligent *per se*.

28. As a direct and proximate result of the acts or omissions as alleged herein, the Decedent suffered bodily injury and death.

29. As a further direct and proximate result of the Defendant's breach of duties, the Plaintiff has been deprived of the support and services, love, companionship, affection, comfort, solace and guidance of his spouse.

**Jury Trial Demanded**

30. The Plaintiff demands a jury trial on all issues so triable.

WHEREFORE, the Plaintiff respectfully prays that this Honorable Court enter judgment in his favor, that said judgment include the fees and costs incurred in having to bring and prosecute this action to the extent they may be recoverable; and that said judgment further include any such other, further or different relief in his favor as may be deemed just and proper.

**<signature page to follow>**

Respectfully submitted,

s/Marion C. Fairey, Jr.
Marion C. Fairey, Jr.
THE FAIREY LAW FIRM, LLC
4985 Savannah Highway
Post Office Box 661
Hampton, South Carolina 29924
(803) 943-6444
bfairey@faireylaw.com

s/Clyde C. Dean, Jr.
Clyde C. Dean, Jr.
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August 9, 2018
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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | IN THE FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston | ) | Case No. 2018-CP-38-01038 |
| Plaintiff, | ) | **AMENDED SUMMONS** |
| v. | ) | SURVIVAL ACTION<br>TORT CLAIMS ACT<br>(JURY TRIAL DEMANDED) |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

TO THE ABOVE-NAMED DEFENDANT:

**YOU ARE HEREBY SUMMONED** and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Plaintiff upon the subscriber at the law offices of The Fairey Law Firm, LLC, Post Office Box 661, Hampton, South Carolina, 29924, within thirty (30) days after the service hereof, exclusive of the date of service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in said Complaint, including the rendering of judgment by default against you.

**<signature page to follow>**

Respectfully submitted,

s/Marion C. Fairey, Jr.
Marion C. Fairey, Jr.
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(803) 534-5091

August 16, 2018
Hampton, South Carolina

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | IN THE FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., | ) | Case No. 2018-CP-38-01036 |
| | ) | |
| | ) | **AMENDED COMPLAINT** |
| Plaintiff, | ) | |
| | ) | LOSS OF CONSORTIUM |
| v. | ) | TORT CLAIMS ACT |
| | ) | (JURY TRIAL DEMANDED) |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

COMES NOW THE PLAINTIFF AND ALLEGES AS FOLLOWS:

1. The Plaintiff, Malcolm E. Livingston, Jr., is a resident of Orangeburg County.

2. The Plaintiff's wife, Rebecca E. Livingston, was a resident of Orangeburg County during her life and at the time of her death and her estate is pending in Orangeburg County, South Carolina.

3. The Defendant, the Regional Medical Center of Orangeburg and Calhoun Counties (hereinafter "TRMC") is a licensed healthcare facility, organized and existing under the laws of South Carolina, that provides health care services including emergency room services in Orangeburg, South Carolina.

4. TRMC is a quasi-governmental entity which is subject to suit under the South Carolina Tort Claims Act, S.C. Code Anno. §15-78-10, et seq.

5. The most substantial acts complained of herein occurred in Orangeburg County, South Carolina.

6. The Plaintiff has attached the affidavit of Bruce Janiak, MD, FACEP, FAAP, pursuant to S. C. Code Anno. §15-36-100 as Exhibit 1 which is incorporated herein by reference.

7. At all times relevant, TRMC, its physicians and health care workers, had a doctor-patient relationship with the Decedent.

8. On August 12, 2016, the Plaintiff's wife was involved in an automobile wreck on Chestnut Street in Orangeburg County, South Carolina.

9. The Decedent was transported by ambulance from the scene of the wreck to TRMC, where she was admitted to the Emergency Department at 12:45 p.m.

10. The Decedent was examined by an employee of TRMC.

11. Orders were given for Computed Tomography without contrast of her head, cervical spine and lumbarsacral spine.

12. The Decedent was diagnosed with back and neck sprain.

13. Prior to her discharge, the Decedent complained of numbness in her lower extremities and her family reported those complaints to TRMC personnel.

14. The Decedent never ambulated while she was a patient in the TRMC Emergency Department.

15. The Decedent was removed from the hospital in a wheelchair and had to be physically lifted into a vehicle upon discharge because she could not stand or ambulate on her own.

16. Once at home, the Decedent's numbness increased.

17. In the middle of the night, the Decedent returned to the Emergency Department at TRMC complaining of bi-lateral numbness in her lower extremities.

18. The attending physician ordered a MRI of the thoracic spine at 3:18 a.m.

19. The Radiologist's preliminary report, completed at 6:56 a.m. of the MRI of the thoracic spine noted extensive fluid collection compatible with hematoma throughout the thoracic canal causing severe compression of the thoracic cord and diffuse cord signal abnormality.

20. Emergent neurosurgical consultation and follow-up was recommended.

21. The Decedent was transported by ambulance to a Level I trauma center in Columbia on August 13, 2016 where she underwent emergent decompression surgery.

22. Despite emergent decompression surgery, the Decedent underwent physical therapy but never regained sensation in her lower extremities.

23. The Decedent's final diagnosis was paraplegia secondary to spinal cord injury.

24. The Decedent's health continued to deteriorate and on May 7, 2018, Mrs. Livingston died from her injuries.

25. At all times relevant, the Defendant and its employees owed the Decedent the following duties:

a. The duty to diagnose and treat in accordance with the applicable standard of care;

b. The duty to protect the safety of their patients;

c. The duty to order appropriate tests or examinations and to consider those tests and examinations in making a proper diagnosis;

d. The duty to ensure patients are medically stable prior to their discharge;

e. The duty to inform patients (and their care providers) of test and exam results;

f. The duty to act with professional competence;

g. The duty to do no harm to their patients;

h. The duty to act without delay in diagnosing and treating their patients,

i. The duty to rule out or treat injuries or diseases that are serious or life threatening,

j. Other duties which may come to light during discovery in this case.

26. TRMC and its employees breached one or more of these duties in the care and treatment of the Decedent.

27. The Defendant's acts or omissions as alleged herein were negligent, grossly negligent and negligent *per se*.

28. As a direct and proximate result of the acts or omissions as alleged herein, the Decedent suffered bodily injury and death.

29. As a further direct and proximate result of the Defendant's breach of duties, the Plaintiff has been deprived of the support and services, love, companionship, affection, comfort, solace and guidance of his spouse.

**Jury Trial Demanded**

30. The Plaintiff demands a jury trial on all issues so triable.

WHEREFORE, the Plaintiff respectfully prays that this Honorable Court enter judgment in his favor, that said judgment include the fees and costs incurred in having to bring and prosecute this action to the extent they may be recoverable; and that said judgment further include any such other, further or different relief in his favor as may be deemed just and proper.

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Respectfully submitted,

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August 16, 2018
Hampton, South Carolina

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | IN THE FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., | ) | Case No. 2018-CP-38-01036 |
| Plaintiff, | ) | **AMENDED SUMMONS** |
| v. | ) | (LOSS OF CONSORTIUM)<br>(TORT CLAIMS ACT)<br>(JURY TRIAL DEMANDED) |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

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| COUNTY OF ORANGEBURG | ) | IN THE FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., | ) | Case No. 2018-CP-38-01036 |
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| Plaintiff, | ) | |
| | ) | LOSS OF CONSORTIUM |
| v. | ) | TORT CLAIMS ACT |
| | ) | (JURY TRIAL DEMANDED) |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

COMES NOW THE PLAINTIFF AND ALLEGES AS FOLLOWS:

1. The Plaintiff, Malcolm E. Livingston, Jr., is a resident of Orangeburg County.

2. The Plaintiff's wife, Rebecca E. Livingston, was a resident of Orangeburg County during her life and at the time of her death and her estate is pending in Orangeburg County, South Carolina.

3. The Defendant, the Regional Medical Center of Orangeburg and Calhoun Counties (hereinafter "TRMC") is a licensed healthcare facility, organized and existing under the laws of South Carolina, that provides health care services including emergency room services in Orangeburg, South Carolina.

4. TRMC is a quasi-governmental entity which is subject to suit under the South Carolina Tort Claims Act, S.C. Code Anno. §15-78-10, et seq.

5. The most substantial acts complained of herein occurred in Orangeburg County, South Carolina.

6. The Plaintiff has attached the affidavit of Bruce Janiak, MD, FACEP, FAAP, pursuant to S. C. Code Anno. §15-36-100 as Exhibit 1 which is incorporated herein by reference.

7. At all times relevant, TRMC, its physicians and health care workers, had a doctor-patient relationship with the Decedent.

8. On August 12, 2016, the Plaintiff's wife was involved in an automobile wreck on Chestnut Street in Orangeburg County, South Carolina.

9. The Decedent was transported by ambulance from the scene of the wreck to TRMC, where she was admitted to the Emergency Department at 12:45 p.m.

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11. Orders were given for Computed Tomography without contrast of her head, cervical spine and lumbarsacral spine.

12. The Decedent was diagnosed with back and neck sprain.

13. Prior to her discharge, the Decedent complained of numbness in her lower extremities and her family reported those complaints to TRMC personnel.

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17. In the middle of the night, the Decedent returned to the Emergency Department at TRMC complaining of bi-lateral numbness in her lower extremities.

18. The attending physician ordered a MRI of the thoracic spine at 3:18 a.m.

19. The Radiologist's preliminary report, completed at 6:56 a.m. of the MRI of the thoracic spine noted extensive fluid collection compatible with hematoma throughout the thoracic canal causing severe compression of the thoracic cord and diffuse cord signal abnormality.

20. Emergent neurosurgical consultation and follow-up was recommended.

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22. Despite emergent decompression surgery, the Decedent underwent physical therapy but never regained sensation in her lower extremities.

23. The Decedent's final diagnosis was paraplegia secondary to spinal cord injury.

24. The Decedent's health continued to deteriorate and on May 7, 2018, Mrs. Livingston died from her injuries.

25. At all times relevant, the Defendant and its employees owed the Decedent the following duties:

a. The duty to diagnose and treat in accordance with the applicable standard of care;

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c. The duty to order appropriate tests or examinations and to consider those tests and examinations in making a proper diagnosis;

d. The duty to ensure patients are medically stable prior to their discharge;

e. The duty to inform patients (and their care providers) of test and exam results;

f. The duty to act with professional competence;

g. The duty to do no harm to their patients;

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i. The duty to rule out or treat injuries or diseases that are serious or life threatening,

j. Other duties which may come to light during discovery in this case.

26. TRMC and its employees breached one or more of these duties in the care and treatment of the Decedent.

27. The Defendant's acts or omissions as alleged herein were negligent, grossly negligent and negligent *per se*.

28. As a direct and proximate result of the acts or omissions as alleged herein, the Decedent suffered bodily injury and death.

29. As a further direct and proximate result of the Defendant's breach of duties, the Plaintiff has been deprived of the support and services, love, companionship, affection, comfort, solace and guidance of his spouse.

**Jury Trial Demanded**

30. The Plaintiff demands a jury trial on all issues so triable.

WHEREFORE, the Plaintiff respectfully prays that this Honorable Court enter judgment in his favor, that said judgment include the fees and costs incurred in having to bring and prosecute this action to the extent they may be recoverable; and that said judgment further include any such other, further or different relief in his favor as may be deemed just and proper.

**<signature page to follow>**

Respectfully submitted,

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August 16, 2018
Hampton, South Carolina

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | IN THE FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston | ) | Case No. 2018-CP-38-_____ |
| Plaintiff, | ) | **SUMMONS** |
| v. | ) | SURVIVAL ACTION<br>TORT CLAIMS ACT<br>(JURY TRIAL DEMANDED) |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

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August 9, 2018
Hampton, South Carolina

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | IN THE FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston | ) | Case No. 2018-CP-38- |
| Plaintiff, | ) | **COMPLAINT** |
| v. | ) | SURVIVAL ACTION<br>TORT CLAIMS ACT<br>(JURY TRIAL DEMANDED) |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

COMES NOW THE PLAINTIFF AND ALLEGES AS FOLLOWS:

1. The Plaintiff, Malcolm E. Livingston, Jr., is the personal representative of the Estate of Rebecca E. Livingston.

2. The Decedent, Rebecca E. Livingston, was a resident of Orangeburg County during her life and at the time of her death and her estate is pending in Orangeburg County, South Carolina.

3. The Defendant, the Regional Medical Center of Orangeburg and Calhoun Counties (hereinafter "TRMC") is a licensed healthcare facility, organized and existing under the laws of South Carolina, that provides health care services including emergency room services in Orangeburg, South Carolina.

4. TRMC is a quasi-governmental entity which is subject to suit under the South Carolina Tort Claims Act, S.C. Code Anno. §15-78-10, et seq.

5. The most substantial acts complained of herein occurred in Orangeburg County, South Carolina.

6. Pursuant to S.C. Code Anno. §15-36-100(C)(1), the Plaintiff alleges that he has a good faith belief that the statute of limitations may expire within ten (10) days of filing this complaint and because of time constraints, the affidavit of an expert could not be prepared.

7. At all times relevant, TRMC, its physicians and health care workers, had a doctor-patient relationship with the Decedent.

8. On August 12, 2016, the Decedent was involved in an automobile wreck on Chestnut Street in Orangeburg County, South Carolina.

9. The Decedent was transported by ambulance from the scene of the wreck to TRMC, where she was admitted to the Emergency Department at 12:45 p.m.

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12. The Decedent was diagnosed with back and neck sprain.

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23. The Decedent's final diagnosis was paraplegia secondary to spinal cord injury.

24. The Decedent's health continued to deteriorate and on May 7, 2018, Mrs. Livingston died from her injuries.

25. At all times relevant, the Defendant and its employees owed the Decedent the following duties:

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j. Other duties which may come to light during discovery in this case.

26. TRMC and its employees breached one or more of these duties in the care and treatment of the Decedent.

27. The Defendant's acts or omissions as alleged herein were negligent, grossly negligent and negligent *per se*.

28. As a direct and proximate result of the acts or omissions as alleged herein, the Decedent suffered bodily injury, conscious pain and suffering, mental anguish, funeral expenses, administration expenses and other recoverable damages.

29. The Plaintiff is the appointed personal representative and executor of the Estate of the Decedent, and is empowered to prosecute a civil action for all injuries and damages sustained by the Decedent prior to her death pursuant to S.C. Code Anno. §15-5-90.

**Jury Trial Demanded**

30. The Plaintiff demands a jury trial on all issues so triable.

WHEREFORE, the Plaintiff respectfully prays that this Honorable Court enter judgment in his favor, that said judgment be for the amount of general, special, consequential or other recoverable damages that have been determined to have been sustained by the Decedent; that said judgment include the fees and costs incurred in having to bring and prosecute this action to the extent they may be recoverable; and that said judgment further include any such other, further or different relief in his favor as may be deemed just and proper.

<signature page to follow>

Respectfully submitted,

s/Marion C. Fairey, Jr.
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30. The Plaintiff demands a jury trial on all issues so triable.

WHEREFORE, the Plaintiff respectfully prays that this Honorable Court enter judgment in his favor, that said judgment be for the amount of general, special, consequential or other recoverable damages that have been determined to have been sustained by the Decedent; that said judgment include the fees and costs incurred in having to bring and prosecute this action to the extent they may be recoverable; and that said judgment further include any such other, further or different relief in his favor as may be deemed just and proper.

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s/Clyde C. Dean, Jr.
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THE DEAN LAW FIRM
146 Centre Street
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(803) 534-5091

August 16, 2018
Hampton, South Carolina

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | IN THE FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston | ) | Case No. 2018-CP-38-_____ |
| Plaintiff, | ) | **SUMMONS** |
| v. | ) | (WRONGFUL DEATH)<br>(TORT CLAIMS ACT)<br>(JURY TRIAL DEMANDED) |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

TO THE ABOVE-NAMED DEFENDANT:

**YOU ARE HEREBY SUMMONED** and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Plaintiff upon the subscriber at the law offices of The Fairey Law Firm, LLC, Post Office Box 661, Hampton, South Carolina, 29924, within thirty (30) days after the service hereof, exclusive of the date of service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in said Complaint, including the rendering of judgment by default against you.

**<signature page to follow>**

Respectfully submitted,

s/Marion C. Fairey, Jr.

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August 9, 2018
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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | IN THE FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston | ) | Case No. 2018-CP-38-_____ |
| Plaintiff, | ) | **COMPLAINT** |
| v. | ) | WRONGFUL DEATH (TORT CLAIMS ACT) (JURY TRIAL DEMANDED) |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

COMES NOW THE PLAINTIFF AND ALLEGES AS FOLLOWS:

1. The Plaintiff, Malcolm E. Livingston, Jr., is the personal representative of the Estate of Rebecca E. Livingston.

2. The Decedent, Rebecca E. Livingston, was a resident of Orangeburg County during her life and at the time of her death and her estate is pending in Orangeburg County, South Carolina.

3. The Defendant, the Regional Medical Center of Orangeburg and Calhoun Counties (hereinafter "TRMC") is a licensed healthcare facility, organized and existing under the laws of South Carolina, that provides health care services including emergency room services in Orangeburg, South Carolina.

4. TRMC is a quasi-governmental entity which is subject to suit under the South Carolina Tort Claims Act, S.C. Code Anno. §15-78-10, et seq.

5. The most substantial acts complained of herein occurred in Orangeburg County, South Carolina.

6. Pursuant to S.C. Code Anno. §15-36-100(C)(1), the Plaintiff alleges that he has a good faith belief that the statute of limitations may expire within ten (10) days of filing this complaint and because of time constraints, the affidavit of an expert could not be prepared.

7. At all times relevant, TRMC, its physicians and health care workers, had a doctor-patient relationship with the Decedent.

8. On August 12, 2016, the Decedent was involved in an automobile wreck on Chestnut Street in Orangeburg County, South Carolina.

9. The Decedent was transported by ambulance from the scene of the wreck to TRMC, where she was admitted to the Emergency Department at 12:45 p.m.

10. The Decedent was examined by an employee of TRMC.

11. Orders were given for Computed Tomography without contrast of her head, cervical spine and lumbarsacral spine.

12. The Decedent was diagnosed with back and neck sprain.

13. Prior to her discharge, the Decedent complained of numbness in her lower extremities and her family reported those complaints to TRMC personnel.

14. The Decedent never ambulated while she was a patient in the TRMC Emergency Department.

15. The Decedent was removed from the hospital in a wheelchair and had to be physically lifted into a vehicle upon discharge because she could not stand or ambulate on her own.

16. Once at home, the Decedent's numbness increased.

17. In the middle of the night, the Decedent returned to the Emergency Department at TRMC complaining of bi-lateral numbness in her lower extremities.

18. The attending physician ordered a MRI of the thoracic spine at 3:18 a.m.

19. The Radiologist's preliminary report, completed at 6:56 a.m. of the MRI of the thoracic spine noted extensive fluid collection compatible with hematoma throughout the thoracic canal causing severe compression of the thoracic cord and diffuse cord signal abnormality.

20. Emergent neurosurgical consultation and follow-up was recommended.

21. The Decedent was transported by ambulance to a Level I trauma center in Columbia on August 13, 2016 where she underwent emergent decompression surgery.

22. Despite emergent decompression surgery, the Decedent underwent physical therapy but never regained sensation in her lower extremities.

23. The Decedent's final diagnosis was paraplegia secondary to spinal cord injury.

24. The Decedent's health continued to deteriorate and on May 7, 2018, Mrs. Livingston died from her injuries.

25. At all times relevant, the Defendant and its employees owed the Decedent the following duties:

a. The duty to diagnose and treat in accordance with the applicable standard of care;

b. The duty to protect the safety of their patients;

c. The duty to order appropriate tests or examinations and to consider those tests and examinations in making a proper diagnosis;

d. The duty to ensure patients are medically stable prior to their discharge;

e. The duty to inform patients (and their care providers) of test and exam results;

f. The duty to act with professional competence;

g. The duty to do no harm to their patients;

h. The duty to act without delay in diagnosing and treating their patients,

i. The duty to rule out or treat injuries or diseases that are serious or life threatening,

j. Other duties which may come to light during discovery in this case.

26. TRMC and its employees breached one or more of these duties in the care and treatment of the Decedent.

27. The Defendant's acts or omissions as alleged herein were negligent, grossly negligent and negligent *per se*.

28. As a direct and proximate result of the wrongful acts or omissions as alleged herein, the Decedent died on or about May 7, 2018.

29. Pursuant to S.C. Code Anno. §15-51-10, this action is brought on behalf of the statutory beneficiaries of the Decedent for the pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of the Decedent's society which was directly and proximately caused by the Defendant's acts or omissions alleged herein.

30. The Plaintiff is the appointed personal representative and executor of the Estate of the Decedent, and is empowered to prosecute a civil action for the wrongful death of the Decedent pursuant to S.C. Code Anno. §15-51-20.

**Jury Trial Demanded**

31. The Plaintiff demands a jury trial on all issues so triable.

WHEREFORE, the Plaintiff respectfully prays that this Honorable Court enter judgment in his favor, that said judgment be for the amount of general, special, consequential or other recoverable damages that have been determined to have been sustained by the Decedent; that said judgment include the fees and costs incurred in having to bring and prosecute this action to

the extent they may be recoverable; and that said judgment further include any such other, further or different relief in her favor as may be deemed just and proper.

Respectfully submitted,

s/Marion C. Fairey, Jr.
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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | IN THE FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston | ) | Case No. 2018-CP-38-01038 |
| Plaintiff, | ) | **AMENDED SUMMONS** |
| v. | ) | SURVIVAL ACTION<br>TORT CLAIMS ACT<br>(JURY TRIAL DEMANDED) |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

TO THE ABOVE-NAMED DEFENDANT:

**YOU ARE HEREBY SUMMONED** and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Plaintiff upon the subscriber at the law offices of The Fairey Law Firm, LLC, Post Office Box 661, Hampton, South Carolina, 29924, within thirty (30) days after the service hereof, exclusive of the date of service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in said Complaint, including the rendering of judgment by default against you.

**<signature page to follow>**

Respectfully submitted,

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | IN THE FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston | ) | Case No. 2018-CP-38-01039 |
| Plaintiff, | ) | **AMENDED COMPLAINT** |
| v. | ) | WRONGFUL DEATH (TORT CLAIMS ACT) (JURY TRIAL DEMANDED) |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

COMES NOW THE PLAINTIFF AND ALLEGES AS FOLLOWS:

1. The Plaintiff, Malcolm E. Livingston, Jr., is the personal representative of the Estate of Rebecca E. Livingston.

2. The Decedent, Rebecca E. Livingston, was a resident of Orangeburg County during her life and at the time of her death and her estate is pending in Orangeburg County, South Carolina.

3. The Defendant, the Regional Medical Center of Orangeburg and Calhoun Counties (hereinafter "TRMC") is a licensed healthcare facility, organized and existing under the laws of South Carolina, that provides health care services including emergency room services in Orangeburg, South Carolina.

4. TRMC is a quasi-governmental entity which is subject to suit under the South Carolina Tort Claims Act, S.C. Code Anno. §15-78-10, et seq.

5. The most substantial acts complained of herein occurred in Orangeburg County, South Carolina.

6. The Plaintiff has attached the affidavit of Bruce Janiak, MD, FACEP, FAAP, pursuant to S. C. Code Anno. §15-36-100 as Exhibit 1 which is incorporated herein by reference.

7. At all times relevant, TRMC, its physicians and health care workers, had a doctor-patient relationship with the Decedent.

8. On August 12, 2016, the Decedent was involved in an automobile wreck on Chestnut Street in Orangeburg County, South Carolina.

9. The Decedent was transported by ambulance from the scene of the wreck to TRMC, where she was admitted to the Emergency Department at 12:45 p.m.

10. The Decedent was examined by an employee of TRMC.

11. Orders were given for Computed Tomography without contrast of her head, cervical spine and lumbarsacral spine.

12. The Decedent was diagnosed with back and neck sprain.

13. Prior to her discharge, the Decedent complained of numbness in her lower extremities and her family reported those complaints to TRMC personnel.

14. The Decedent never ambulated while she was a patient in the TRMC Emergency Department.

15. The Decedent was removed from the hospital in a wheelchair and had to be physically lifted into a vehicle upon discharge because she could not stand or ambulate on her own.

16. Once at home, the Decedent's numbness increased.

17. In the middle of the night, the Decedent returned to the Emergency Department at TRMC complaining of bi-lateral numbness in her lower extremities.

18. The attending physician ordered a MRI of the thoracic spine at 3:18 a.m.

19. The Radiologist's preliminary report, completed at 6:56 a.m. of the MRI of the thoracic spine noted extensive fluid collection compatible with hematoma throughout the thoracic canal causing severe compression of the thoracic cord and diffuse cord signal abnormality.

20. Emergent neurosurgical consultation and follow-up was recommended.

21. The Decedent was transported by ambulance to a Level I trauma center in Columbia on August 13, 2016 where she underwent emergent decompression surgery.

22. Despite emergent decompression surgery, the Decedent underwent physical therapy but never regained sensation in her lower extremities.

23. The Decedent's final diagnosis was paraplegia secondary to spinal cord injury.

24. The Decedent's health continued to deteriorate and on May 7, 2018, Mrs. Livingston died from her injuries.

25. At all times relevant, the Defendant and its employees owed the Decedent the following duties:

a. The duty to diagnose and treat in accordance with the applicable standard of care;

b. The duty to protect the safety of their patients;

c. The duty to order appropriate tests or examinations and to consider those tests and examinations in making a proper diagnosis;

d. The duty to ensure patients are medically stable prior to their discharge;

e. The duty to inform patients (and their care providers) of test and exam results;

f. The duty to act with professional competence;

g. The duty to do no harm to their patients;

h. The duty to act without delay in diagnosing and treating their patients,

i. The duty to rule out or treat injuries or diseases that are serious or life threatening,

j. Other duties which may come to light during discovery in this case.

26. TRMC and its employees breached one or more of these duties in the care and treatment of the Decedent.

27. The Defendant's acts or omissions as alleged herein were negligent, grossly negligent and negligent *per se.*

28. As a direct and proximate result of the wrongful acts or omissions as alleged herein, the Decedent died on or about May 7, 2018.

29. Pursuant to S.C. Code Anno. §15-51-10, this action is brought on behalf of the statutory beneficiaries of the Decedent for the pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of the Decedent's society which was directly and proximately caused by the Defendant's acts or omissions alleged herein.

30. The Plaintiff is the appointed personal representative and executor of the Estate of the Decedent, and is empowered to prosecute a civil action for the wrongful death of the Decedent pursuant to S.C. Code Anno. §15-51-20.

**Jury Trial Demanded**

31. The Plaintiff demands a jury trial on all issues so triable.

WHEREFORE, the Plaintiff respectfully prays that this Honorable Court enter judgment in his favor, that said judgment be for the amount of general, special, consequential or other recoverable damages that have been determined to have been sustained by the Decedent; that said judgment include the fees and costs incurred in having to bring and prosecute this action to

the extent they may be recoverable; and that said judgment further include any such other, further or different relief in her favor as may be deemed just and proper.

Respectfully submitted,

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| STATE OF SOUTH CAROLINA | ) | |
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| COUNTY OF ORANGEBURG | ) | IN THE FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston | ) | Case No. 2018-CP-38-01039 |
| Plaintiff, | ) | **AMENDED SUMMONS** |
| v. | ) | (WRONGFUL DEATH)<br>(TORT CLAIMS ACT)<br>(JURY TRIAL DEMANDED) |
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| Defendant. | ) | |

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| v. | ) | WRONGFUL DEATH (TORT CLAIMS ACT) (JURY TRIAL DEMANDED) |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

COMES NOW THE PLAINTIFF AND ALLEGES AS FOLLOWS:

1. The Plaintiff, Malcolm E. Livingston, Jr., is the personal representative of the Estate of Rebecca E. Livingston.

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3. The Defendant, the Regional Medical Center of Orangeburg and Calhoun Counties (hereinafter "TRMC") is a licensed healthcare facility, organized and existing under the laws of South Carolina, that provides health care services including emergency room services in Orangeburg, South Carolina.

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6. The Plaintiff has attached the affidavit of Bruce Janiak, MD, FACEP, FAAP, pursuant to S. C. Code Anno. §15-36-100 as Exhibit 1 which is incorporated herein by reference.

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23. The Decedent's final diagnosis was paraplegia secondary to spinal cord injury.

24. The Decedent's health continued to deteriorate and on May 7, 2018, Mrs. Livingston died from her injuries.

25. At all times relevant, the Defendant and its employees owed the Decedent the following duties:

a. The duty to diagnose and treat in accordance with the applicable standard of care;

b. The duty to protect the safety of their patients;

c. The duty to order appropriate tests or examinations and to consider those tests and examinations in making a proper diagnosis;

d. The duty to ensure patients are medically stable prior to their discharge;

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i. The duty to rule out or treat injuries or diseases that are serious or life threatening,

j. Other duties which may come to light during discovery in this case.

26. TRMC and its employees breached one or more of these duties in the care and treatment of the Decedent.

27. The Defendant's acts or omissions as alleged herein were negligent, grossly negligent and negligent *per se*.

28. As a direct and proximate result of the wrongful acts or omissions as alleged herein, the Decedent died on or about May 7, 2018.

29. Pursuant to S.C. Code Anno. §15-51-10, this action is brought on behalf of the statutory beneficiaries of the Decedent for the pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of the Decedent's society which was directly and proximately caused by the Defendant's acts or omissions alleged herein.

30. The Plaintiff is the appointed personal representative and executor of the Estate of the Decedent, and is empowered to prosecute a civil action for the wrongful death of the Decedent pursuant to S.C. Code Anno. §15-51-20.

**Jury Trial Demanded**

31. The Plaintiff demands a jury trial on all issues so triable.

WHEREFORE, the Plaintiff respectfully prays that this Honorable Court enter judgment in his favor, that said judgment be for the amount of general, special, consequential or other recoverable damages that have been determined to have been sustained by the Decedent; that said judgment include the fees and costs incurred in having to bring and prosecute this action to

the extent they may be recoverable; and that said judgment further include any such other, further or different relief in her favor as may be deemed just and proper.

Respectfully submitted,

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| STATE OF SOUTH CAROLINA )<br>)<br>COUNTY OF ORANGEBURG ) | IN THE COURT OF COMMON PLEAS<br>FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston,<br><br>Plaintiff,<br><br>-vs-<br><br>The Regional Medical Center of Orangeburg and Calhoun Counties,<br><br>Defendants. | C/A No.: 2018-CP-38-01036<br><br>ANSWER OF DEFENDANT |

The Defendant, The Regional Medical Center of Orangeburg and Calhoun Counties hereinafter (TRMC), answers the Complaint of plaintiff as follows:

1. TRMC denies all allegations contained in the Complaint unless specifically admitted, qualified, or explained.

2. The allegations contained in paragraphs 1, and 2 of the Complaint are not directed toward this defendant and are denied.

3. Defendant admits the allegations contained in paragraphs 3 and 4 of the Complaint and asserts TRMC is a governmental healthcare facility.

4. The allegations contained in paragraph 5 of the Complaint state legal conclusions to which no response is required.

5. Defendant denies the allegations contained in paragraph 6 of the Complaint and demands strict proof thereof.

6. The allegations contained in paragraph 7 of the Complaint state legal conclusions to which

no response is required.

7. Defendant denies the allegations contained in paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29 of the Complaint and demands strict proof thereof.

8. The allegations contained in paragraph 30 the Complaint state legal conclusions to which no response is required.

**FOR A SECOND DEFENSE**

9. The defendant reiterates and realleges the allegations of paragraphs 1 through 8 above as if repeated herein verbatim.

10. Defendant asserts that all times relevant to the Complaint its employees were in compliance with the applicable standard of care and defendant asserts its employees did not deviate at any time from the standard of care and the treatment of plaintiff. Defendant further asserts that all supervision, staffing, training and medical equipment available to staff fully conformed to and was in full compliance with the applicable standard of care. Therefore, plaintiff is barred from recovery against the defendant for the allegations contained in the Complaint.

**FOR A THIRD DEFENSE**

11. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 10 of this Answer as if realleged herein verbatim.

12. Defendant is a governmental entity as contemplated by the South Carolina Tort Claims Act, and it hereby asserts all defenses afforded it by the South Carolina Tort Claims Act, §15-78-10, et seq., Code of Laws of South Carolina, whether or not specifically or separately pleaded herein, including §15-78-60 and all subparts.

**FOR A FOURTH DEFENSE**

13. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 12 of this Answer as if realleged herein verbatim.

14. Defendant asserts it is not liable for any conduct constituting the exercise of judgement or discretion, pursuant to §15-78-60(5) Code of Laws of South Carolina.

**FOR A FIFTH DEFENSE**

15. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 14 of this Answer as if realleged herein verbatim.

16. Defendant asserts it is entitled to an Order of this Court limiting plaintiff's recovery, if any, to those actual damages set forth in §15-78-120(a)(1), Code of Laws of South Carolina. Plaintiff is not entitled to punitive damages as to this defendant.

**FOR A SIXTH DEFENSE**

17. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 16 of this Answer as if realleged herein verbatim.

18. Defendant asserts that plaintiff's injuries and damages were proximately caused by the sole negligence of the plaintiff, including; failing to give a proper medical history, failure to exercise due care, failing to follow medical/health advice and in other acts proven through discovery, which serves as a complete bar to recovery in this action.

**FOR A SEVENTH DEFENSE**

19. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 18 of this Answer as if realleged herein verbatim.

20. Defendant asserts any injuries or damages sustained by the plaintiff, which are denied, were a direct and proximate result of the negligence, gross negligence, recklessness, wilfulness, and wantonness of the plaintiff, which is greater than any negligence of the defendant (which is

specifically denied). Defendant asserts that if it was equally or more negligent than plaintiff, which is denied, the amount of damages, if any, must be reduced in proportion to the amount of plaintiff's negligence.

**FOR AN EIGHTH DEFENSE**

21. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 20 of this Answer as if realleged herein verbatim.

22. Plaintiff is barred from recovery for the responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity pursuant to S. C. Code Ann. §15-78-60 (25).

**FOR A NINTH DEFENSE**

23. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 22 of this Answer as if realleged herein verbatim

24. Defendant asserts plaintiff's injuries, if any, were the direct and proximate result of the natural disease process and defendant, therefore, is not liable to plaintiff.

**FOR A TENTH DEFENSE**

25. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 24 of this Answer as if realleged herein verbatim.

26. Defendant is not liable for the actions of a non-employee pursuant to S. C. Code Ann. §15-78-60 (20).

**FOR AN ELEVENTH DEFENSE**

27. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 26 of this Answer as if realleged herein verbatim.

28. Defendant asserts to the extent plaintiff's decedent suffered a compensable injury from

a course of medical treatment that was in any way negligent, that Plaintiff was at least equally negligent as Defendant, which is denied and as such is barred from recovery under the doctrine of comparative negligence.

**FOR A TWELFTH DEFENSE**

29. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 28 of this Answer as if realleged herein verbatim.

30. Plaintiff asserts that in his complaint that third parties, not under the control of the defendant caused plaintiff's decedent's injuries leading up to death. To the extent plaintiff may prove this negligence at trial, defendant asserts it cannot be liable for any negligence of the third party not under its control.

**FOR A THIRTEENTH DEFENSE**

31. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 30 of this Answer as if realleged herein verbatim.

32. Defendant asserts it is entitled to a special verdict pursuant to S.C. Code of Laws Ann. § 15-78-100 ( c).

**FOR A FOURTEENTH DEFENSE**

33. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 32 of this Answer as if realleged herein verbatim.

34. Defendant asserts plaintiff's claims are barred by the defenses of intervening cause and superseding cause not under the control of defendant TRMC

**FOR A FIFTEENTH DEFENSE**

35. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 34 of this Answer as if realleged herein verbatim.

36. Defendant TRMC denies liability based upon a lack of foreseeability.

**FOR A SIXTEENTH DEFENSE**

37. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 36 of this Answer as if realleged herein verbatim.

38. Defendant denies liability to plaintiff in this action. Plaintiff has also made allegations against third parties not under the control or direction of defendant. Defendant while asserting it is not at any fault in this matter, asserts it is less than fifty (50%) fault if determined by the apportioning jury. Defendant asserts it is not subject to joint and several liability. Defendant asserts it is entitled to all remedies, special verdicts and rights as contained in S.C. Code of Laws. Ann. Section 15-38-10, et. seq., specifically including Section 15-38-15.

**FOR A SEVENTEENTH DEFENSE**

39. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 38 of this Answer as if realleged herein verbatim.

40. Defendant asserts that it is entitled to an Order dismissing this action pursuant to S.C. Code § 15-36-100, for the failure of the plaintiff to file an affidavit of an expert with the Complaint attesting to negligence on the part of defendant

**FOR AN EIGHTEENTH DEFENSE**

41. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 40 of this Answer as if realleged herein verbatim.

42. Defendant asserts that plaintiff's claims may be time-barred as being brought outside the applicable statute of limitations contained in S. C. Code Ann., §15-78-110 as plaintiff has not filed a verified claim.

WHEREFORE, defendant requests the Court inquire into the matters herein, dismiss

plaintiff's Complaint with prejudice and with costs and grant such other and further relief as this Court may deem just and proper.

MICHAEL C. TANNER, L. L.C.

By: *s/Michael C. Tanner*
Michael C. Tanner, SC Bar 12424
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Attorney for defendant TRMC

Bamberg, S.C.

September 19, 2018

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| STATE OF SOUTH CAROLINA<br>)<br>COUNTY OF ORANGEBURG | ) | IN THE COURT OF COMMON PLEAS<br>FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr.,<br><br>Plaintiff,<br><br>-vs-<br><br>The Regional Medical Center of Orangeburg and Calhoun Counties,<br><br>Defendants. | ) | C/A No.: 2018-CP-38-01036<br><br><br><br>AMENDED<br>ANSWER OF DEFENDANT |

The Defendant, The Regional Medical Center of Orangeburg and Calhoun Counties hereinafter (TRMC), answers the Complaint of plaintiff as follows:

1. TRMC denies all allegations contained in the Complaint unless specifically admitted, qualified, or explained.

2. The allegations contained in paragraphs 1, and 2 of the Complaint are not directed toward this defendant and are denied.

3. Defendant admits the allegations contained in paragraphs 3 and 4 of the Complaint and asserts TRMC is a governmental healthcare facility.

4. The allegations contained in paragraph 5 of the Complaint state legal conclusions to which no response is required.

5. Defendant denies the allegations contained in paragraph 6 of the Complaint and demands strict proof thereof.

6. The allegations contained in paragraph 7 of the Complaint state legal conclusions to which no response is required.

7. Defendant denies the allegations contained in paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29 of the Complaint and demands strict proof thereof.

8. The allegations contained in paragraph 30 the Complaint state legal conclusions to which no response is required.

**FOR A SECOND DEFENSE**

9. The defendant reiterates and realleges the allegations of paragraphs 1 through 8 above as if repeated herein verbatim.

10. Defendant asserts that all times relevant to the Complaint its employees were in compliance with the applicable standard of care and defendant asserts its employees did not deviate at any time from the standard of care and the treatment of plaintiff. Defendant further asserts that all supervision, staffing, training and medical equipment available to staff fully conformed to and was in full compliance with the applicable standard of care. Therefore, plaintiff is barred from recovery against the defendant for the allegations contained in the Complaint.

**FOR A THIRD DEFENSE**

11. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 10 of this Answer as if realleged herein verbatim.

12. Defendant is a governmental entity as contemplated by the South Carolina Tort Claims Act, and it hereby asserts all defenses afforded it by the South Carolina Tort Claims Act, §15-78-10, et seq., Code of Laws of South Carolina, whether or not specifically or separately pleaded herein, including §15-78-60 and all subparts.

**FOR A FOURTH DEFENSE**

13. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 12

of this Answer as if realleged herein verbatim.

14. Defendant asserts it is not liable for any conduct constituting the exercise of judgement or discretion, pursuant to §15-78-60(5) Code of Laws of South Carolina.

**FOR A FIFTH DEFENSE**

15. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 14 of this Answer as if realleged herein verbatim.

16. Defendant asserts it is entitled to an Order of this Court limiting plaintiff's recovery, if any, to those actual damages set forth in §15-78-120(a)(1), Code of Laws of South Carolina. Plaintiff is not entitled to punitive damages as to this defendant.

**FOR A SIXTH DEFENSE**

17. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 16 of this Answer as if realleged herein verbatim.

18. Defendant asserts that plaintiff's injuries and damages were proximately caused by the sole negligence of the plaintiff, including; failing to give a proper medical history, failure to exercise due care, failing to follow medical/health advice and in other acts proven through discovery, which serves as a complete bar to recovery in this action.

**FOR A SEVENTH DEFENSE**

19. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 18 of this Answer as if realleged herein verbatim.

20. Defendant asserts any injuries or damages sustained by the plaintiff, which are denied, were a direct and proximate result of the negligence, gross negligence, recklessness, wilfulness, and wantonness of the plaintiff, which is greater than any negligence of the defendant (which is specifically denied). Defendant asserts that if it was equally or more negligent than plaintiff, which

is denied, the amount of damages, if any, must be reduced in proportion to the amount of plaintiff's negligence.

**FOR AN EIGHTH DEFENSE**

21. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 20 of this Answer as if realleged herein verbatim.

22. Plaintiff is barred from recovery for the responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity pursuant to S. C. Code Ann. §15-78-60 (25).

**FOR A NINTH DEFENSE**

23. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 22 of this Answer as if realleged herein verbatim

24. Defendant asserts plaintiff's injuries, if any, were the direct and proximate result of the natural disease process and defendant, therefore, is not liable to plaintiff.

**FOR A TENTH DEFENSE**

25. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 24 of this Answer as if realleged herein verbatim.

26. Defendant is not liable for the actions of a non-employee pursuant to S. C. Code Ann. §15-78-60 (20).

**FOR AN ELEVENTH DEFENSE**

27. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 26 of this Answer as if realleged herein verbatim.

28. Defendant asserts to the extent plaintiff's decedent suffered a compensable injury from a course of medical treatment that was in any way negligent, that Plaintiff was at least equally

negligent as Defendant, which is denied and as such is barred from recovery under the doctrine of comparative negligence.

**FOR A TWELFTH DEFENSE**

29. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 28 of this Answer as if realleged herein verbatim.

30. Plaintiff asserts that in his complaint that third parties, not under the control of the defendant caused plaintiff's decedent's injuries leading up to death. To the extent plaintiff may prove this negligence at trial, defendant asserts it cannot be liable for any negligence of the third party not under its control.

**FOR A THIRTEENTH DEFENSE**

31. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 30 of this Answer as if realleged herein verbatim.

32. Defendant asserts it is entitled to a special verdict pursuant to S.C. Code of Laws Ann. § 15-78-100 ( c).

**FOR A FOURTEENTH DEFENSE**

33. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 32 of this Answer as if realleged herein verbatim.

34. Defendant asserts plaintiff's claims are barred by the defenses of intervening cause and superseding cause not under the control of defendant TRMC

**FOR A FIFTEENTH DEFENSE**

35. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 34 of this Answer as if realleged herein verbatim.

36. Defendant TRMC denies liability based upon a lack of foreseeabilty.

FOR A SIXTEENTH DEFENSE

37. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 36 of this Answer as if realleged herein verbatim.

38. Defendant denies liability to plaintiff in this action. Plaintiff has also made allegations against third parties not under the control or direction of defendant. Defendant while asserting it is not at any fault in this matter, asserts it is less than fifty (50%) fault if determined by the apportioning jury. Defendant asserts it is not subject to joint and several liability. Defendant asserts it is entitled to all remedies, special verdicts and rights as contained in S.C. Code of Laws. Ann. Section 15-38-10, et. seq., specifically including Section 15-38-15.

**FOR A SEVENTEENTH DEFENSE**

39. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 38 of this Answer as if realleged herein verbatim.

40. Defendant asserts that it is entitled to an Order dismissing this action pursuant to S.C. Code § 15-36-100, for the failure of the plaintiff to file an affidavit of an expert with the Complaint attesting to negligence on the part of defendant

**FOR AN EIGHTEENTH DEFENSE**

41. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 40 of this Answer as if realleged herein verbatim.

42. Defendant asserts that plaintiff's claims may be time-barred as being brought outside the applicable statute of limitations contained in S. C. Code Ann., §15-78-110 as plaintiff has not filed a verified claim.

WHEREFORE, defendant requests the Court inquire into the matters herein, dismiss plaintiff's Complaint with prejudice and with costs and grant such other and further relief as this

Court may deem just and proper.

MICHAEL C. TANNER, L. L.C.

By: *s/Michael C. Tanner*
Michael C. Tanner, SC Bar 12424
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Bamberg, S.C.

October 12, 2018

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| STATE OF SOUTH CAROLINA<br>)<br>COUNTY OF ORANGEBURG | IN THE COURT OF COMMON PLEAS<br>FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr.,<br><br>Plaintiff,<br><br>-vs-<br><br>The Regional Medical Center of Orangeburg and Calhoun Counties,<br><br>Defendants. | C/A No.: 2018-CP-38-01036<br><br><br><br>ANSWER OF DEFENDANT TO AMENDED COMPLAINT |

The Defendant, The Regional Medical Center of Orangeburg and Calhoun Counties hereinafter (TRMC), answers the Complaint of plaintiff as follows:

1. TRMC denies all allegations contained in the Complaint unless specifically admitted, qualified, or explained.

2. The allegations contained in paragraphs 1, and 2 of the Complaint are not directed toward this defendant and are denied.

3. Defendant admits the allegations contained in paragraphs 3 and 4 of the Complaint and asserts TRMC is a governmental healthcare facility.

4. The allegations contained in paragraph 5 of the Complaint state legal conclusions to which no response is required.

5. Defendant denies the allegations contained in paragraph 6 of the Complaint and demands strict proof thereof.

6. The allegations contained in paragraph 7 of the Complaint state legal conclusions to which no response is required.

7. Defendant denies the allegations contained in paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29 of the Complaint and demands strict proof thereof.

8. The allegations contained in paragraph 30 the Complaint state legal conclusions to which no response is required.

**FOR A SECOND DEFENSE**

9. The defendant reiterates and realleges the allegations of paragraphs 1 through 8 above as if repeated herein verbatim.

10. Defendant asserts that all times relevant to the Complaint its employees were in compliance with the applicable standard of care and defendant asserts its employees did not deviate at any time from the standard of care and the treatment of plaintiff. Defendant further asserts that all supervision, staffing, training and medical equipment available to staff fully conformed to and was in full compliance with the applicable standard of care. Therefore, plaintiff is barred from recovery against the defendant for the allegations contained in the Complaint.

**FOR A THIRD DEFENSE**

11. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 10 of this Answer as if realleged herein verbatim.

12. Defendant is a governmental entity as contemplated by the South Carolina Tort Claims Act, and it hereby asserts all defenses afforded it by the South Carolina Tort Claims Act, §15-78-10, et seq., Code of Laws of South Carolina, whether or not specifically or separately pleaded herein, including §15-78-60 and all subparts.

**FOR A FOURTH DEFENSE**

13. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 12

of this Answer as if realleged herein verbatim.

14. Defendant asserts it is not liable for any conduct constituting the exercise of judgement or discretion, pursuant to §15-78-60(5) Code of Laws of South Carolina.

**FOR A FIFTH DEFENSE**

15. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 14 of this Answer as if realleged herein verbatim.

16. Defendant asserts it is entitled to an Order of this Court limiting plaintiff's recovery, if any, to those actual damages set forth in §15-78-120(a)(1), Code of Laws of South Carolina. Plaintiff is not entitled to punitive damages as to this defendant.

**FOR A SIXTH DEFENSE**

17. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 16 of this Answer as if realleged herein verbatim.

18. Defendant asserts that plaintiff's injuries and damages were proximately caused by the sole negligence of the plaintiff, including; failing to give a proper medical history, failure to exercise due care, failing to follow medical/health advice and in other acts proven through discovery, which serves as a complete bar to recovery in this action.

**FOR A SEVENTH DEFENSE**

19. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 18 of this Answer as if realleged herein verbatim.

20. Defendant asserts any injuries or damages sustained by the plaintiff, which are denied, were a direct and proximate result of the negligence, gross negligence, recklessness, wilfulness, and wantonness of the plaintiff, which is greater than any negligence of the defendant (which is specifically denied). Defendant asserts that if it was equally or more negligent than plaintiff, which

is denied, the amount of damages, if any, must be reduced in proportion to the amount of plaintiff's negligence.

**FOR AN EIGHTH DEFENSE**

21. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 20 of this Answer as if realleged herein verbatim.

22. Plaintiff is barred from recovery for the responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity pursuant to S. C. Code Ann. §15-78-60 (25).

**FOR A NINTH DEFENSE**

23. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 22 of this Answer as if realleged herein verbatim

24. Defendant asserts plaintiff's injuries, if any, were the direct and proximate result of the natural disease process and defendant, therefore, is not liable to plaintiff.

**FOR A TENTH DEFENSE**

25. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 24 of this Answer as if realleged herein verbatim.

26. Defendant is not liable for the actions of a non-employee pursuant to S. C. Code Ann. §15-78-60 (20).

**FOR AN ELEVENTH DEFENSE**

27. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 26 of this Answer as if realleged herein verbatim.

28. Defendant asserts to the extent plaintiff's decedent suffered a compensable injury from a course of medical treatment that was in any way negligent, that Plaintiff was at least equally

negligent as Defendant, which is denied and as such is barred from recovery under the doctrine of comparative negligence.

**FOR A TWELFTH DEFENSE**

29. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 28 of this Answer as if realleged herein verbatim.

30. Plaintiff asserts that in his complaint that third parties, not under the control of the defendant caused plaintiff's decedent's injuries leading up to death. To the extent plaintiff may prove this negligence at trial, defendant asserts it cannot be liable for any negligence of the third party not under its control.

**FOR A THIRTEENTH DEFENSE**

31. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 30 of this Answer as if realleged herein verbatim.

32. Defendant asserts it is entitled to a special verdict pursuant to S.C. Code of Laws Ann. § 15-78-100 ( c).

**FOR A FOURTEENTH DEFENSE**

33. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 32 of this Answer as if realleged herein verbatim.

34. Defendant asserts plaintiff's claims are barred by the defenses of intervening cause and superseding cause not under the control of defendant TRMC

**FOR A FIFTEENTH DEFENSE**

35. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 34 of this Answer as if realleged herein verbatim.

36. Defendant TRMC denies liability based upon a lack of foreseeabilty.

FOR A SIXTEENTH DEFENSE

37. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 36 of this Answer as if realleged herein verbatim.

38. Defendant denies liability to plaintiff in this action. Plaintiff has also made allegations against third parties not under the control or direction of defendant. Defendant while asserting it is not at any fault in this matter, asserts it is less than fifty (50%) fault if determined by the apportioning jury. Defendant asserts it is not subject to joint and several liability. Defendant asserts it is entitled to all remedies, special verdicts and rights as contained in S.C. Code of Laws. Ann. Section 15-38-10, et. seq., specifically including Section 15-38-15.

**FOR A SEVENTEENTH DEFENSE**

39. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 38 of this Answer as if realleged herein verbatim.

40. Defendant asserts that it is entitled to an Order dismissing this action pursuant to S.C. Code § 15-36-100, for the failure of the plaintiff to file an affidavit of an expert with the Complaint attesting to negligence on the part of defendant

**FOR AN EIGHTEENTH DEFENSE**

41. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 40 of this Answer as if realleged herein verbatim.

42. Defendant asserts that plaintiff's claims may be time-barred as being brought outside the applicable statute of limitations contained in S. C. Code Ann., §15-78-110 as plaintiff has not filed a verified claim.

WHEREFORE, defendant requests the Court inquire into the matters herein, dismiss plaintiff's Complaint with prejudice and with costs and grant such other and further relief as this

Court may deem just and proper.

MICHAEL C. TANNER, L. L.C.

By: *s/Michael C. Tanner*
Michael C. Tanner, SC Bar 12424
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Attorney for defendant TRMC

Bamberg, S.C.

November 1, 2018

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| STATE OF SOUTH CAROLINA )<br>)<br>COUNTY OF ORANGEBURG ) | IN THE COURT OF COMMON PLEAS<br>FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston,<br><br>Plaintiff,<br><br>-vs-<br><br>The Regional Medical Center of Orangeburg and Calhoun Counties,<br><br>Defendants. | C/A No.: 2018-CP-38-01038<br><br>ANSWER OF DEFENDANT |

The Defendant, The Regional Medical Center of Orangeburg and Calhoun Counties hereinafter (TRMC), answers the Complaint of plaintiff as follows:

1. TRMC denies all allegations contained in the Complaint unless specifically admitted, qualified, or explained.

2. The allegations contained in paragraphs 1, and 2 of the Complaint are not directed toward this defendant and are denied.

3. Defendant admits the allegations contained in paragraphs 3 and 4 of the Complaint and asserts TRMC is a governmental healthcare facility.

4. The allegations contained in paragraph 5 of the Complaint state legal conclusions to which no response is required.

5. Defendant denies the allegation contained in paragraph 6 of the Complaint and demands strict proof thereof.

6. The allegations contained in paragraph 7 of the Complaint state legal conclusions to which

no response is required

7. Defendant denies the allegations contained in paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26,, 27, 28, and 29 of the Complaint and demands strict proof thereof.

8. The allegations contained in paragraph 30 of the Complaint state legal conclusions to which no response is required.

**FOR A SECOND DEFENSE**

9. The defendant reiterates and realleges the allegations of paragraphs 1 through 8 above as if repeated herein verbatim.

10. Defendant asserts that all times relevant to the Complaint its employees were in compliance with the applicable standard of care and defendant asserts its employees did not deviate at any time from the standard of care and the treatment of plaintiff. Defendant further asserts that all supervision, staffing, training and medical equipment available to staff fully conformed to and was in full compliance with the applicable standard of care. Therefore, plaintiff is barred from recovery against the defendant for the allegations contained in the Complaint.

**FOR A THIRD DEFENSE**

11. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 10 of this Answer as if realleged herein verbatim.

12. Defendant is a governmental entity as contemplated by the South Carolina Tort Claims Act, and it hereby asserts all defenses afforded it by the South Carolina Tort Claims Act, §15-78-10, et seq., Code of Laws of South Carolina, whether or not specifically or separately pleaded herein, including §15-78-60 and all subparts.

**FOR A FOURTH DEFENSE**

13. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 12 of this Answer as if realleged herein verbatim.

14. Defendant asserts it is not liable for any conduct constituting the exercise of judgement or discretion, pursuant to §15-78-60(5) Code of Laws of South Carolina.

**FOR A FIFTH DEFENSE**

15. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 14 of this Answer as if realleged herein verbatim.

16. Defendant asserts it is entitled to an Order of this Court limiting plaintiff's recovery, if any, to those actual damages set forth in §15-78-120(a)(1), Code of Laws of South Carolina. Plaintiff is not entitled to punitive damages as to this defendant.

**FOR A SIXTH DEFENSE**

17. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 16 of this Answer as if realleged herein verbatim.

18. Defendant asserts that plaintiff's injuries and damages were proximately caused by the sole negligence of the plaintiff, including; failing to give a proper medical history, failure to exercise due care, failing to follow medical/health advice and in other acts proven through discovery, which serves as a complete bar to recovery in this action.

**FOR A SEVENTH DEFENSE**

19. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 18 of this Answer as if realleged herein verbatim.

20. Defendant asserts any injuries or damages sustained by the plaintiff, which are denied, were a direct and proximate result of the negligence, gross negligence, recklessness, wilfulness, and wantonness of the plaintiff, which is greater than any negligence of the defendant (which is

specifically denied). Defendant asserts that if it was equally or more negligent than plaintiff, which is denied, the amount of damages, if any, must be reduced in proportion to the amount of plaintiff's negligence.

**FOR AN EIGHTH DEFENSE**

21. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 20 of this Answer as if realleged herein verbatim.

22. Plaintiff is barred from recovery for the responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity pursuant to S. C. Code Ann. §15-78-60 (25).

**FOR A NINTH DEFENSE**

23. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 22 of this Answer as if realleged herein verbatim

24. Defendant asserts plaintiff's injuries, if any, were the direct and proximate result of the natural disease process and defendant, therefore, is not liable to plaintiff.

**FOR A TENTH DEFENSE**

25. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 24 of this Answer as if realleged herein verbatim.

26. Defendant is not liable for the actions of a non-employee pursuant to S. C. Code Ann. §15-78-60 (20).

**FOR AN ELEVENTH DEFENSE**

27. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 26 of this Answer as if realleged herein verbatim.

28. Defendant asserts to the extent plaintiff's decedent suffered a compensable injury from

a course of medical treatment that was in any way negligent, that Plaintiff was at least equally negligent as Defendant, which is denied and as such is barred from recovery under the doctrine of comparative negligence.

**FOR A TWELFTH DEFENSE**

29. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 28 of this Answer as if realleged herein verbatim.

30. Plaintiff asserts that in his complaint that third parties, not under the control of the defendant caused plaintiff's decedent's injuries leading up to death. To the extent plaintiff may prove this negligence at trial, defendant asserts it cannot be liable for any negligence of the third party not under its control.

**FOR A THIRTEENTH DEFENSE**

31. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 30 of this Answer as if realleged herein verbatim.

32. Defendant asserts it is entitled to a special verdict pursuant to S.C. Code of Laws Ann. § 15-78-100 ( c).

**FOR A FOURTEENTH DEFENSE**

33. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 32 of this Answer as if realleged herein verbatim.

34. Defendant asserts plaintiff's claims are barred by the defenses of intervening cause and superseding cause not under the control of defendant TRMC

**FOR A FIFTEENTH DEFENSE**

35. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 34 of this Answer as if realleged herein verbatim.

36. Defendant TRMC denies liability based upon a lack of foreseeability.

**FOR A SIXTEENTH DEFENSE**

37. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 36 of this Answer as if realleged herein verbatim.

38. Defendant denies liability to plaintiff in this action. Plaintiff has also made allegations against third parties not under the control or direction of defendant. Defendant while asserting it is not at any fault in this matter, asserts it is less than fifty (50%) fault if determined by the apportioning jury. Defendant asserts it is not subject to joint and several liability. Defendant asserts it is entitled to all remedies, special verdicts and rights as contained in S.C. Code of Laws. Ann. Section 15-38-10, et. seq., specifically including Section 15-38-15.

**FOR A SEVENTEENTH DEFENSE**

39. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 386 of this Answer as if realleged herein verbatim.

40. Defendant asserts that it is entitled to an Order dismissing this action pursuant to S.C. Code § 15-36-100, for the failure of the plaintiff to file an affidavit of an expert with the Complaint attesting to negligence on the part of defendant

**FOR AN EIGHTEENTH DEFENSE**

41. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 40 of this Answer as if realleged herein verbatim.

42. Defendant asserts that plaintiff's claims may be time-barred as being brought outside the applicable statute of limitations contained in S. C. Code Ann., §15-78-110 as plaintiff has not filed a verified claim.

WHEREFORE, defendant requests the Court inquire into the matters herein, dismiss

plaintiff's Complaint with prejudice and with costs and grant such other and further relief as this Court may deem just and proper.

MICHAEL C. TANNER, L. L.C.

By: *s/Michael C. Tanner*
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michaeletannerllc@bellsouth.net
Attorney for defendant TRMC

Bamberg, S.C.

September 19, 2018

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| STATE OF SOUTH CAROLINA )<br>)<br>COUNTY OF ORANGEBURG ) | IN THE COURT OF COMMON PLEAS<br>FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston,<br><br>Plaintiff,<br><br>-vs-<br><br>The Regional Medical Center of Orangeburg and Calhoun Counties,<br><br>Defendants. | C/A No.: 2018-CP-38-01039<br><br>ANSWER OF DEFENDANT |

The Defendant, The Regional Medical Center of Orangeburg and Calhoun Counties hereinafter (TRMC), answers the Complaint of plaintiff as follows:

1. TRMC denies all allegations contained in the Complaint unless specifically admitted, qualified, or explained.

2. The allegations contained in paragraphs 1, and 2 of the Complaint are not directed toward this defendant and are denied.

3. Defendant admits the allegations contained in paragraphs 3 and 4 of the Complaint and asserts TRMC is a governmental healthcare facility.

4. The allegations contained in paragraphs 5, 6, and 7 of the Complaint state legal conclusions to which no response is required.

5. Defendant denies the allegations contained in paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30 of the Complaint and demands strict proof thereof.

6. The allegations contained in paragraph 31 of the Complaint state legal conclusions to which no response is required.

**FOR A SECOND DEFENSE**

7. The defendant reiterates and realleges the allegations of paragraphs 1 through 6 above as if repeated herein verbatim.

8. Defendant asserts that all times relevant to the Complaint its employees were in compliance with the applicable standard of care and defendant asserts its employees did not deviate at any time from the standard of care and the treatment of plaintiff. Defendant further asserts that all supervision, staffing, training and medical equipment available to staff fully conformed to and was in full compliance with the applicable standard of care. Therefore, plaintiff is barred from recovery against the defendant for the allegations contained in the Complaint.

**FOR A THIRD DEFENSE**

9. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 8 of this Answer as if realleged herein verbatim.

10. Defendant is a governmental entity as contemplated by the South Carolina Tort Claims Act, and it hereby asserts all defenses afforded it by the South Carolina Tort Claims Act, §15-78-10, et seq., Code of Laws of South Carolina, whether or not specifically or separately pleaded herein, including §15-78-60 and all subparts.

**FOR A FOURTH DEFENSE**

11. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 10 of this Answer as if realleged herein verbatim.

12. Defendant asserts it is not liable for any conduct constituting the exercise of judgement or discretion, pursuant to §15-78-60(5) Code of Laws of South Carolina.

**FOR A FIFTH DEFENSE**

13. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 12 of this Answer as if realleged herein verbatim.

14. Defendant asserts it is entitled to an Order of this Court limiting plaintiff's recovery, if any, to those actual damages set forth in §15-78-120(a)(1), Code of Laws of South Carolina. Plaintiff is not entitled to punitive damages as to this defendant.

**FOR A SIXTH DEFENSE**

15. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 14 of this Answer as if realleged herein verbatim.

16. Defendant asserts that plaintiff's injuries and damages were proximately caused by the sole negligence of the plaintiff, including; failing to give a proper medical history, failure to exercise due care, failing to follow medical/health advice and in other acts proven through discovery, which serves as a complete bar to recovery in this action.

**FOR A SEVENTH DEFENSE**

17. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 16 of this Answer as if realleged herein verbatim.

18. Defendant asserts any injuries or damages sustained by the plaintiff, which are denied, were a direct and proximate result of the negligence, gross negligence, recklessness, wilfulness, and wantonness of the plaintiff, which is greater than any negligence of the defendant (which is specifically denied). Defendant asserts that if it was equally or more negligent than plaintiff, which is denied, the amount of damages, if any, must be reduced in proportion to the amount of plaintiff's negligence.

**FOR AN EIGHTH DEFENSE**

19. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 18 of this Answer as if realleged herein verbatim.

20. Plaintiff is barred from recovery for the responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity pursuant to S. C. Code Ann. §15-78-60 (25).

**FOR A NINTH DEFENSE**

21. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 20 of this Answer as if realleged herein verbatim

22. Defendant asserts plaintiff's injuries, if any, were the direct and proximate result of the natural disease process and defendant, therefore, is not liable to plaintiff.

**FOR A TENTH DEFENSE**

23. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 22 of this Answer as if realleged herein verbatim.

24. Defendant is not liable for the actions of a non-employee pursuant to S. C. Code Ann. §15-78-60 (20).

**FOR AN ELEVENTH DEFENSE**

25. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 24 of this Answer as if realleged herein verbatim.

26. Defendant asserts to the extent plaintiff's decedent suffered a compensable injury from a course of medical treatment that was in any way negligent, that Plaintiff was at least equally negligent as Defendant, which is denied and as such is barred from recovery under the doctrine of comparative negligence.

**FOR A TWELFTH DEFENSE**

27. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 26 of this Answer as if realleged herein verbatim.

28. Plaintiff asserts that in his complaint that third parties, not under the control of the defendant caused plaintiff's decedent's injuries leading up to death. To the extent plaintiff may prove this negligence at trial, defendant asserts it cannot be liable for any negligence of the third party not under its control.

**FOR A THIRTEENTH DEFENSE**

29. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 28 of this Answer as if realleged herein verbatim.

30. Defendant asserts it is entitled to a special verdict pursuant to S.C. Code of Laws Ann. § 15-78-100 ( c).

**FOR A FOURTEENTH DEFENSE**

31. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 30 of this Answer as if realleged herein verbatim.

32. Defendant asserts plaintiff's claims are barred by the defenses of intervening cause and superseding cause not under the control of defendant TRMC

**FOR A FIFTEENTH DEFENSE**

33. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 32 of this Answer as if realleged herein verbatim.

34. Defendant TRMC denies liability based upon a lack of foreseeabilty.

**FOR A SIXTEENTH DEFENSE**

35. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 34 of this Answer as if realleged herein verbatim.

36. Defendant denies liability to plaintiff in this action. Plaintiff has also made allegations against third parties not under the control or direction of defendant. Defendant while asserting it is not at any fault in this matter, asserts it is less than fifty (50%) fault if determined by the apportioning jury. Defendant asserts it is not subject to joint and several liability. Defendant asserts it is entitled to all remedies, special verdicts and rights as contained in S.C. Code of Laws. Ann. Section 15-38-10, et. seq., specifically including Section 15-38-15.

**FOR A SEVENTEENTH DEFENSE**

37. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 36 of this Answer as if realleged herein verbatim.

38. Defendant asserts that it is entitled to an Order dismissing this action pursuant to S.C. Code § 15-36-100, for the failure of the plaintiff to file an affidavit of an expert with the Complaint attesting to negligence on the part of defendant

**FOR AN EIGHTEENTH DEFENSE**

39. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 38 of this Answer as if realleged herein verbatim.

40. Defendant asserts that plaintiff's claims may be time-barred as being brought outside the applicable statute of limitations contained in S. C. Code Ann., §15-78-110 as plaintiff has not filed a verified claim.

WHEREFORE, defendant requests the Court inquire into the matters herein, dismiss plaintiff's Complaint with prejudice and with costs and grant such other and further relief as this Court may deem just and proper.

MICHAEL C. TANNER, L. L.C.

By: *s/Michael C. Tanner*
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Attorney for defendant TRMC

Bamberg, S.C.

September 19, 2018

| | |
|---|---|
| STATE OF SOUTH CAROLINA )<br>)<br>COUNTY OF ORANGEBURG ) | IN THE COURT OF COMMON PLEAS<br>FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston,<br><br>Plaintiff,<br><br>-vs-<br><br>The Regional Medical Center of Orangeburg and Calhoun Counties,<br><br>Defendants. | C/A No.: 2018-CP-38-01039<br><br>ANSWER OF DEFENDANT TO AMENDED COMPLAINT |

The Defendant, The Regional Medical Center of Orangeburg and Calhoun Counties hereinafter (TRMC), answers the Complaint of plaintiff as follows:

1. TRMC denies all allegations contained in the Complaint unless specifically admitted, qualified, or explained.

2. The allegations contained in paragraphs 1, and 2 of the Complaint are not directed toward this defendant and are denied.

3. Defendant admits the allegations contained in paragraphs 3 and 4 of the Complaint and asserts TRMC is a governmental healthcare facility.

4. The allegations contained in paragraphs 5, 6, and 7 of the Complaint state legal conclusions to which no response is required.

5. Defendant denies the allegations contained in paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30 of the Complaint and demands strict proof thereof.

6. The allegations contained in paragraph 31 of the Complaint state legal conclusions to which no response is required.

**FOR A SECOND DEFENSE**

7. The defendant reiterates and realleges the allegations of paragraphs 1 through 6 above as if repeated herein verbatim.

8. Defendant asserts that all times relevant to the Complaint its employees were in compliance with the applicable standard of care and defendant asserts its employees did not deviate at any time from the standard of care and the treatment of plaintiff. Defendant further asserts that all supervision, staffing, training and medical equipment available to staff fully conformed to and was in full compliance with the applicable standard of care. Therefore, plaintiff is barred from recovery against the defendant for the allegations contained in the Complaint.

**FOR A THIRD DEFENSE**

9. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 8 of this Answer as if realleged herein verbatim.

10. Defendant is a governmental entity as contemplated by the South Carolina Tort Claims Act, and it hereby asserts all defenses afforded it by the South Carolina Tort Claims Act, §15-78-10, et seq., Code of Laws of South Carolina, whether or not specifically or separately pleaded herein, including §15-78-60 and all subparts.

**FOR A FOURTH DEFENSE**

11. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 10 of this Answer as if realleged herein verbatim.

12. Defendant asserts it is not liable for any conduct constituting the exercise of judgement or discretion, pursuant to §15-78-60(5) Code of Laws of South Carolina.

**FOR A FIFTH DEFENSE**

13. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 12 of this Answer as if realleged herein verbatim.

14. Defendant asserts it is entitled to an Order of this Court limiting plaintiff's recovery, if any, to those actual damages set forth in §15-78-120(a)(1), Code of Laws of South Carolina. Plaintiff is not entitled to punitive damages as to this defendant.

**FOR A SIXTH DEFENSE**

15. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 14 of this Answer as if realleged herein verbatim.

16. Defendant asserts that plaintiff's injuries and damages were proximately caused by the sole negligence of the plaintiff, including; failing to give a proper medical history, failure to exercise due care, failing to follow medical/health advice and in other acts proven through discovery, which serves as a complete bar to recovery in this action.

**FOR A SEVENTH DEFENSE**

17. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 16 of this Answer as if realleged herein verbatim.

18. Defendant asserts any injuries or damages sustained by the plaintiff, which are denied, were a direct and proximate result of the negligence, gross negligence, recklessness, wilfulness, and wantonness of the plaintiff, which is greater than any negligence of the defendant (which is specifically denied). Defendant asserts that if it was equally or more negligent than plaintiff, which is denied, the amount of damages, if any, must be reduced in proportion to the amount of plaintiff's negligence.

**FOR AN EIGHTH DEFENSE**

19. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 18 of this Answer as if realleged herein verbatim.

20. Plaintiff is barred from recovery for the responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity pursuant to S. C. Code Ann. §15-78-60 (25).

**FOR A NINTH DEFENSE**

21. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 20 of this Answer as if realleged herein verbatim

22. Defendant asserts plaintiff's injuries, if any, were the direct and proximate result of the natural disease process and defendant, therefore, is not liable to plaintiff.

**FOR A TENTH DEFENSE**

23. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 22 of this Answer as if realleged herein verbatim.

24. Defendant is not liable for the actions of a non-employee pursuant to S. C. Code Ann. §15-78-60 (20).

**FOR AN ELEVENTH DEFENSE**

25. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 24 of this Answer as if realleged herein verbatim.

26. Defendant asserts to the extent plaintiff's decedent suffered a compensable injury from a course of medical treatment that was in any way negligent, that Plaintiff was at least equally negligent as Defendant, which is denied and as such is barred from recovery under the doctrine of comparative negligence.

**FOR A TWELFTH DEFENSE**

27. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 26 of this Answer as if realleged herein verbatim.

28. Plaintiff asserts that in his complaint that third parties, not under the control of the defendant caused plaintiff's decedent's injuries leading up to death. To the extent plaintiff may prove this negligence at trial, defendant asserts it cannot be liable for any negligence of the third party not under its control.

**FOR A THIRTEENTH DEFENSE**

29. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 28 of this Answer as if realleged herein verbatim.

30. Defendant asserts it is entitled to a special verdict pursuant to S.C. Code of Laws Ann. § 15-78-100 ( c).

**FOR A FOURTEENTH DEFENSE**

31. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 30 of this Answer as if realleged herein verbatim.

32. Defendant asserts plaintiff's claims are barred by the defenses of intervening cause and superseding cause not under the control of defendant TRMC

**FOR A FIFTEENTH DEFENSE**

33. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 32 of this Answer as if realleged herein verbatim.

34. Defendant TRMC denies liability based upon a lack of foreseeabilty.

**FOR A SIXTEENTH DEFENSE**

35. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 34 of this Answer as if realleged herein verbatim.

36. Defendant denies liability to plaintiff in this action. Plaintiff has also made allegations against third parties not under the control or direction of defendant. Defendant while asserting it is not at any fault in this matter, asserts it is less than fifty (50%) fault if determined by the apportioning jury. Defendant asserts it is not subject to joint and several liability. Defendant asserts it is entitled to all remedies, special verdicts and rights as contained in S.C. Code of Laws. Ann. Section 15-38-10, et. seq., specifically including Section 15-38-15.

**FOR A SEVENTEENTH DEFENSE**

37. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 36 of this Answer as if realleged herein verbatim.

38. Defendant asserts that it is entitled to an Order dismissing this action pursuant to S.C. Code § 15-36-100, for the failure of the plaintiff to file an affidavit of an expert with the Complaint attesting to negligence on the part of defendant

**FOR AN EIGHTEENTH DEFENSE**

39. Defendant reiterates and realleges the allegations contained in paragraphs 1 through 38 of this Answer as if realleged herein verbatim.

40. Defendant asserts that plaintiff's claims may be time-barred as being brought outside the applicable statute of limitations contained in S. C. Code Ann., §15-78-110 as plaintiff has not filed a verified claim.

WHEREFORE, defendant requests the Court inquire into the matters herein, dismiss plaintiff's Complaint with prejudice and with costs and grant such other and further relief as this Court may deem just and proper.

MICHAEL C. TANNER, L. L.C.

By: *s/Michael C. Tanner*
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Bamberg, S.C.

November 1, 2018

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| ORANGEBURG COUNTY | ) | 1ST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally, | ) | Case No. 2018-CP-38-01036<br>Case No. 2018-CP-38-01038<br>Case No. 2018-CP-38-01039 |
| Plaintiff, | ) | **Plaintiff's Motion for Summary Judgment** |
| v. | ) | |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant. | ) | |

TO THE ABOVE-NAMED DEFENDANT AND YOUR ATTORNEYS:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff respectfully moves pursuant to Rule 56(a), SCRCP, for partial summary judgment establishing as a matter of law that a supervising physician is vicariously liable for the negligent acts of a physician's assistant. Specifically, under the South Carolina Physician' Assistants Practice Act (in effect in August of 2016), a Physician Assistant

> may perform: (1) medical acts, tasks, or functions with written scope of practice guidelines under physician supervision; (2) those duties and responsibilities, including the prescribing and dispensing of drugs and medical devices, that are lawfully delegated by their supervising physicians. However, only physician assistants holding permanent license may prescribe drug therapy as provided in this article.
>
> **A physician assistant is an agent of his or her supervising physician[1] in the performance of all practice related activities including, but not limited to, the ordering of diagnostic, therapeutic, and other medical services."**

[1] Under the Act, a "Physician supervisor" is a "South Carolina licensed physician currently possessing an active, unrestricted permanent license to practice medicine in South Carolina who is approved to serve as a supervising physician for no more than three full-time equivalent physician assistants. The physician supervisor is the individual who is responsible for supervising a physician assistant's activities." S.C. Code Anno. §40-47-

(emphasis supplied).

This motion is based upon the pleadings, depositions, discovery, any memorandum of law that the Plaintiff may submit and the South Carolina Physician Assistants Practice Act. S.C. Code Anno. §40-47-905 (2016).

Respectfully submitted,

s/Marion C. Fairey, Jr.
Marion C. Fairey, Jr.
THE FAIREY LAW FIRM LLC
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and

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910(7). "Supervising means overseeing the activities of, **and accepting responsibility for**, the medical services rendered by a physician assistant as part of a physician-let team in a manner approved by the board." S.C. Code Anno. §40-47-910(8) (emphasis supplied).

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>ORANGEBURG COUNTY | )<br>)<br>) | IN THE COURT OF COMMON PLEAS<br>1ST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally,<br><br>Plaintiff,<br><br>v.<br><br>The Regional Medical Center of Orangeburg and Calhoun Counties<br><br>Defendant, | ) | Case No. 2018-CP-38-01036<br>Case No. 2018-CP-38-01038<br>Case No. 2018-CP-38-01039<br><br>**Plaintiff's Memorandum in Support of Motion for Summary Judgment** |

The Plaintiff respectfully submits this Memorandum in Support of his Motion for Summary Judgment.

**Background**

Plaintiff, Malcolm Livingston, brought these three actions (Loss of Consortium – 2018-CP-38-01036; Survival – 2018-CP-38-01038; and Wrongful Death – 2018-CP-38-01039) against The Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC") on his own behalf and as the personal representative of his deceased wife, Rebecca Livingston, alleging that Ms. Livingston was paralyzed and ultimately perished as a result of TRMC's failure to diagnose and treat a spinal hematoma when Ms. Livingston presented at the TRMC Emergency Department on August 12, 2016.

On August 12, 2016, Rebecca Livingston was involved in an automobile wreck in Orangeburg. At the scene, she was ambulatory, but was nevertheless transported to the Regional

Medical Center by ambulance. Ms. Livingston did not choose TRMC, but was transported there because it was the closest hospital with an emergency department.

She was admitted for neck and low back pain at 12:45 pm. At the time of her admission, she could not recall if she had lost consciousness or struck her head. She was seen by a physician assistant in the Emergency Department 1:02 pm and sent for a CT scan of her head, cervical and lumbar spine. At 1:21 pm, Ms. Livingston's vitals were assessed by the ED Nurse who noted that he was "unable to assess" her gait. The scans were all performed and read by 2:11 pm that day and were largely unremarkable. Although the differential diagnosis included spinal injury, the physician assistant made a diagnosis of neck and back strain. There is no evidence in the record that Ms. Livingston was seen by any physician during this initial admission to the TRMC Emergency Department or that the Livingston's were even aware that their care was being provided by a physician assistant as opposed to licensed physician.

As the afternoon progressed, Ms. Livingston's reported pain increased. She was unable to walk on her own or urinate. Since her admission, she had not stood or walked on her own. She was given narcotic pain medication to address the increasing pain in her back. When she felt the need to urinate, she had to be carried to the bathroom by family members. She complained of numbness and tingling in her lower legs. She remained under observation and was given additional pain medication. She remained in the ED until 4:37pm, when a nurse came into her room with a wheelchair and advised that she had been discharged home. When she was wheeled to her son's vehicle, she had to be lifted by her son to get into the truck. There is no evidence in the medical record that she walked during her stay at TRMC on August 12, 2016.

When she got home, she had to be carried from the truck into the house, about 40 minutes from the Hospital. She was unable to walk and could not move her legs. She urgently needed to

urinate but was unable to do so. She continued to have numbness and tingling in her legs. After she did not improve, she and her husband called her son back to take her back to TRMC. Upon admission, she was evaluated by a physician. The ED physician immediately ordered an MRI of her thoracic and lumbar spine. Upon review of the images, the Radiologist reported an extensive collection of fluid compatible with a hematoma throughout the thoracic canal causing severe compression of the thoracic cord and diffuse signal abnormality.

The ED physician immediately sought a Level I neurological consult and helicopter transport to Palmetto Richland Memorial. However, due to weather, the helicopter was grounded and Ms. Livingston had to be transported to Palmetto Richland via ambulance. She did not leave TRMC until 7:30 am the next morning. Upon arrival at Palmetto Richland, she underwent emergent decompression surgery. The next day a second surgery was conducted to place a drain to evacuate fluid from her spine. Physical therapy was attempted but Ms. Livingston never regained sensation below T-8. She was discharged from Palmetto Richland on September 15, 2016 with a diagnosis of paraplegia, secondary to spinal cord injury.

Ms. Livingston lived for the next 20 months as a paraplegic. She died on May 7, 2018. Ms. Livingston was 74 years old.

***Discussion***

This malpractice action was brought under the South Carolina Tort Claims Act by Ms. Livingston's husband of fifty years, Malcolm Livingston. Under the Tort Claims Act, governmental entities enjoy a liability cap of $300,000.00 per occurrence with a $600,000.00 liability cap regardless of the number of agencies or claims involved. S.C. Code Anno. §15-78-120(a)(1) and (2). However, the legislature recognized that medical malpractice cases involved

"significantly higher damages in cases of medical malpractice" when it raised the liability limits for government employed physicians and dentist in 1988. S.C. Code Anno. §15-78-20(g). That is why the liability limit was raised to $1,200,000.00 for the tort of a "licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession." S.C. Code Anno. §15-78-120(a)(3) and (4).

In this case, TRMC takes the position that because they staffed their Emergency Department with a physician's assistant rather than an actual physician, that its liability to Ms. Livingston's estate is limited to $300,000.00 per occurrence and $600,000.00 for all claims arising from that occurrence rather than the $1,200,000.00 cap for torts committed by licensed physicians employed by governmental entities. In other words, TRMC has asserted that its liability is limited to $600,000.00 rather than $1,200,000.00 because it chose to provide emergency medical care to Ms. Livingston with a physician assistant and not a licensed physician. As a result, the mediation broke down due to the disagreement between the parties over the liability limits applicable to this case.

In South Carolina, physician's assistants must be supervised by a licensed physician. By state law, a physician assistant is only authorized to provide medical services under the supervision of a licensed physician who as expressly accepted responsibility for the medical services rendered by the physician assistant. The physician assistant who provided services to Ms. Livingston was only able to do so because he was acting under a physician's supervision and under a specific scope of practice.

Specifically, under the South Carolina Physician' Assistants Practice Act (in effect in August of 2016), a physician assistant

> may perform: (1) medical acts, tasks, or functions with written scope of practice guidelines under physician supervision; (2) those duties and responsibilities, including the prescribing and dispensing of drugs and medical devices, that are lawfully delegated by their supervising physicians. However, only physician assistants holding permanent license may prescribe drug therapy as provided in this article.
>
> **A physician assistant is an agent of his or her supervising physician in the performance of all practice related activities including, but not limited to, the ordering of diagnostic, therapeutic, and other medical services.**"

(Emphasis supplied).

Under the Act, a "Physician supervisor" is a "South Carolina licensed physician currently possessing an active, unrestricted permanent license to practice medicine in South Carolina who is approved to serve as a supervising physician for no more than three full-time equivalent physician assistants. The physician supervisor is the individual who is responsible for supervising a physician assistant's activities." S.C. Code Anno. §40-47-910(7). "Supervising means overseeing the activities of, **and accepting responsibility for**, the medical services rendered by a physician assistant as part of a physician-let team in a manner approved by the board." S.C. Code Anno. §40-47-910(8) (emphasis supplied).

Under the plain language of the statute, a physician 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.

Courts of this state have long held that a principal is liable to third parties for the negligence of an agent that occur within the scope of the agent's employment. *Spence v. Spence,* 368 S.C. 106, 628 S.E.2d 869, 879-880 (2006). This rule of liability is

> founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every case, the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency . . . Seeing that some one

> must be loser by the deceit, it is more reasonable that he who employs and confides in the deceiver should be the loser than a stranger.

*Id, 628 S.E.2d at 880; citing, Service Life & Health Ins. Co.,* 220 S.C. 198, 66 S.E.2d 816, 817 (1951); *see also, Jones v. Elbert,* 211 S.C. 553, 558, 34 S.E.2d 796, 798 (1945).

Here, the very Act that gives the physician assistant the authority to act in a professional capacity requires that those actions are governed by an agency relationship. Accordingly, as a matter of law, the supervising physician must be liable for the acts and omissions committed by his agent.

*Lopez v. Ledesma,* 46 Cal.App.5th 980, 260 Cal.Rptr.3d 386 (2020), is instructive. In *Lopez,* the plaintiff brought suit on behalf of her deceased daughter alleging that two different physician assistants employed by a dermatology clinic failed to properly diagnose and treat metastatic malignant melanoma. After a trial, the jury returned a verdict in the amount of $11,200 in economic damages and $4.25 million in non-economic damages.

After the trial, the defendants moved under §3333.2 of the California Civil Code, which limits the recovery of non-economic damages for negligence of a licensed health care provider to $250,000.00. The Plaintiff opposed the motion, arguing that the physician assistants were legally limited to practice only under the supervision of a licensed physician, and so if, in practice, they were not actually supervised by a physician in the care of her daughter, they were practicing outside the scope of their permissible practice. Because the non-economic damage cap only applied to "professional negligence," the unsupervised actions of the physician assistants did not meet the definition of "professional negligence" and therefore, the $250,000.00 liability cap did not apply. The trial judge disagreed and granted the defendant's motion and reduced the $4.25 million verdict to $250,000.00.

On appeal, the court of appeals affirmed. In so doing, they recognized that presence of a legal agency relationship between the physician assistant and a supervising physician is the dispositive factor in determining whether the physician assistant is acting within the scope of services of the physician. 46 Cal.App.5th 980, 995, 260 Cal.Rptr.3d 386, 396 (noting that the trial court ruled that the supervising physicians were liable for the negligence of the physician assistant on agency principals). Accordingly, the California statutory limitation on medical malpractice damages was held to apply a physician assistant, even when they were not directly supervised, because of the legal agency relationship agreed to by the supervising physician and the physician assistant.

This result tracks perfectly with S.C. Code Anno. §40-47-935, which clearly states that a physician assistant is an agent of the supervising physician and §40-47-938 which clearly requires that a supervising physician affirmatively "accept responsibility" for the physician assistant's activities. States with similar statutory schemes have expressly held that a supervising physician stands in an agency relationship with his or her supervising physician and that the physician is vicariously liable for the physician assistant's negligence, if proven. *Cox v. M.A. Primary Urgent Care Clinic*, 313 S.W.3d 240, 254 (Tenn.2010).

***Conclusion***

The South Carolina Physician Assistants Practice Act clearly establishes an agency relationship between a supervising physician and a physician assistant. A physician assistant cannot practice unless a supervising physician has accepted responsibility for the medical services rendered by the physician assistant. Where an agency relationship exists, the principal independently responsible for the acts and omissions of the agent. Accordingly, the TRMC supervising physician is responsible for the medical care Ms. Livingston received and TRMC

cannot reduce its liability cap by claiming that the acts and omissions that injured Ms. Livingston were conducted by a non-physician. The very authority that permits a physician assistant to practice in TRMC's emergency requires that he or she only do so as the agent of a supervising physician who as accepted responsibility for the medical services rendered.

Respectfully submitted,

s/Marion C. Fairey, Jr.
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October 27, 2021
Hampton, South Carolina

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG )

Malcolm E. Livingston, Jr., ) Case No.: 2018-CP-38-01036
)
Plaintiff, )
)
v. ) **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**
)
The Regional Medical Center of )
Orangeburg and Calhoun Counties, )
)
Defendant. )

Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston, ) Case No.: 2018-CP-38-01038
)
Plaintiff, )
)
v. )
)
The Regional Medical Center of Orangeburg and Calhoun Counties, )
)
Defendant. )

Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston, ) Case No.: 2018-CP-38-01039
)
Plaintiff, )
)
v. )
)
The Regional Medical Center of Orangeburg and Calhoun Counties, )
)
Defendant. )

Defendant The Regional Medical Center ("TRMC"), responds to Plaintiff's Motion for Summary Judgment as follows:

## SUMMARY JUDGMENT STANDARD

When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRCP, and summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is a drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues. *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008).

"[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"). 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.

In determining whether a triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). If evidentiary facts are not disputed but the conclusions or inferences to be drawn from them are, summary judgment should be denied. *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Summary judgment is properly granted when:

> [T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(c), SCRCP.

## ARGUMENT

"Medical malpractice lawsuits have specific requirements that must be satisfied in order for a genuine factual issue to exist." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Specifically, a plaintiff alleging medical malpractice must provide evidence showing: (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the defendant's field of medicine under the same or similar circumstances, and (2) the defendant departed from the recognized and generally accepted standards. *Jones v. Doe*, 372 S.C. 53, 61, 640 S.E.2d 514, 518 (Ct. App. 2006). Additionally, the plaintiff must demonstrate the defendant's departure from such generally recognized practices and procedures proximately caused the plaintiff's alleged injuries and damages. *David*, 367 S.C. at 248, 626 S.E.2d at 4.

If the subject matter does not lie within common knowledge but requires special learning to evaluate the conduct of the defendant, then the plaintiff must offer expert testimony to establish both the required standard of care and the defendant's failure to conform to that standard. Id. Because "many malpractice suits involve ailments and treatments outside the realm of ordinary lay knowledge, expert testimony is generally necessary." *Ellis v. Oliver*, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996). When plaintiffs rely solely upon medical expert testimony as the only evidence of proximate cause, the medical expert must, with reasonable certainty, state it is their opinion the injuries complained of most probably resulted from the defendant's negligence. *Id.* The testimony "must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." *Id.*

In the current case, Plaintiff has filed a Motion for Partial Summary Judgment as a matter of law on September 10, 2021, arguing 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), Plaintiff 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."

In his deposition on August 25, 2021, Plaintiff's expert witness Dr. Bruce Janiak, MD, stated that "the standard of care is for every mid-level provider. . . the attending physician must be available, physically in the emergency department, working with the PA, with one exception, which is not true in this case." ( Pg. 30, ln. 10-17). Dr. Janiak further affirmed his position in the direct examination by the Plaintiff's counsel stating " in the emergency department, it is physical presence that is required so that mid-level provider can consult on an almost instantaneous basis with the emergency physician attending." (Pg. 35, ln. 6-9). However, when asked, Dr. Janiak stated that he has not reviewed the South Carolina Physician Practice Act recently. (Pg. 27 ln. 16-17). Contrary to Dr. Janiak's testimony that an attending physician must be present mid-level health care facilities, S.C. Code Ann. 47-40-955 (A) states, " The Supervising Physician is responsible for the all aspects of PA's practice. . ." however, the statute goes on to say, "Supervision . . . must not be construed as necessarily requiring the physical presence of supervising physician at the time and place where the services are rendered . . ." TRMC's expert witness, Dr. Thomas H. Coleman, MD, FACEP, stated in his affidavit that in South Carolina, PA supervision must not be construed to necessarily require the physical presence of the supervising physician at the time and place where the services are rendered. (Dr. Coleman Affidavit # 5-j).

Moreover, TRMC asserts that in South Carolina, a physician does not "supervise" a PA to the degree that the PA must report to the physician prior to a diagnosis being made and/or prior to the treatment being implemented, including the ordering of labs and tests and determining the need for admission or discharge, per Dr. Coleman's Affidavit (#5-k). "The mere fact that the plaintiff's expert may use a different approach . . . is not considered a deviation from the recognized standard of medical care . . . Nor is the standard violated because an expert disagrees with a defendant as to what is best or better approached in treating a patient. Medicine is an inexact science and eminently qualified physicians may differ as to what constitutes a preferable course of treatment. Such differences as to preferences as to preference do not amount to malpractice." *Todd v. United States*, 570 F. Supp. 670 (D.S.C. 1983).

Mr. Michael Carothers, PA was the attending Physician's Assistant at the time of Ms. Livingston's treatment at TMRC on August 12, 2016. Mr. Carothers, PA stated in his deposition that while there were available physicians on duty at the time of the examination, he did not recall their names. (Pg. 9, ln 10-14). He also recalled that while he was under supervision of a physician at the time of Ms. Livingston's care, he did not recall who it was on that day (Pg. 9, ln. 19-25). While Mr. Carothers, PA affirmed he did not consult to any physician regarding Ms. Livingston's care (Pg. 16, ln 13, 16), he testified that South Carolina laws do not require an emergency department to have the physician's name anywhere on the record later in his deposition. (Pg. 62-63, ln. 23-25; 1-4).

Furthermore, South Carolina Physician's Assistants Practice Act states "only physicians assistants holding permanent license may prescribe drug therapy as provided in this article." In his deposition, Mr. Carothers, PA testified he is licensed in Pennsylvania and South Carolina (Pg. 57, ln. 13) and has been the main provider of TRMC Urgent Care at Santee since 2017. (Pg.

56, ln. 23). He testified he gave Ms. Livingston Zofran and Dilaudid to counteract nausea in her treatment (Pg. 18, ln. 17-19). Dr. Coleman stated in his affidavit that Ms. Livingston had received Dilaudid and Benadryl to prevent distonic reaction that often accompanies the Reglan she was given. (#5-d). Dr. Coleman further states that while Dilaudid and Benadryl are very sedating, and they can cause a risk of fall in elder people, Ms. Livingston did not have any neurological complaints reported in her HPI or noted on her exam in the Emergency Department. (#5-e). Therefore, this did not breach the standard of care, per Dr. Coleman.

Dr. Janiak testified that Ms. Livingston should have had an MRI for a possibility of a neurological damage to the spinal cord that may have been happening at the time (Pg. 21 ln. 1-4), and while he was not aware that TRMC does not have any neurosurgeon to access hematoma for neurosurgery (Pg. 22, ln. 8), he stated that Ms. Livingston should have been intervened and transported to another hospital sooner than a day. (Pg. 23, ln 3-6). However, this assertion is contradicted by the fact that Ms. Livingston did not have any neurological complaints, per Dr. Coleman and Mr. Carother's affidavits. Dr. Janiak also testified that he has not seen anything documented in the record as to whether on August 12, Ms. Livingston communicated her complaints to the nursing staff or Mr. Carothers, PA about her numbness. Nor were there any documented records that Ms. Livingston complained about inability to ambulate or lack of movement or feeling in her leg. (Pg. 30 ln. 8-20).

Mr. Carothers, PA testified in his deposition that Ms. Livingston was moving all four extremities without any numbness or tingling during the physical exam and she did not exhibit and numbness at the time of the exam ( Pg. 50, ln. 11-15). This was also affirmed by Dr. Coleman in his affidavit, stating that Ms. Livingston did have help from the medical staff given

that she had received Dilaudid for her pain and Benadryl to prevent dystonic reaction that often accompanies the Reglan she was given. (#5-d)

Ms. Livingston's family stated Ms. Livingston did ambulate to the bathroom prior to discharge . (Dr. Coleman Affidavit #5 f.) Furthermore, the fact that Ms. Livingston did not complain about worsening symptoms such as numbness or weakness in her evaluation on August 12, 2016 at Emergency Department shows there is no breach in the standard of care in this regard. (Dr. Coleman Affidavit #5-k). Mr. Carothers, PA also confirmed in his deposition that Ms. Livingston was ambulated to the bathroom. (Pg. 39-40 ln. 25: 1-2).

## CONCLUSION

Based on the findings hereinabove and pursuant to the Summary Judgment standard of this State, the standard of care as to whether attending physician must be present in the emergency department under the South Carolina Statutes and the fact that whether the Defendant TMRC has breached the standard of care are at dispute. Therefore, there is a genuine issue as to the matter of facts and TRMC shall not be improperly deprived of trial on disputed factual issues per *Cunningham ex rel. Grice*. Moreover, the Defendant TRMC believes, it has shown a mere scintilla of evidence and/or the slightest amount of relevant evidence in order to withstand a motion for summary judgment as required by *Harris Teeter, Inc.* For the reasons hereinabove, Defendant TRMC respectfully requests this Court to deny Plaintiff's Motion for partial Summary Judgment.

MICHAEL C. TANNER LLC

By: *s/ Michael C. Tanner*

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Bamberg, SC
October 27, 2021

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS
)
COUNTY OF ORANGEBURG )

| | |
|---|---|
| Malcolm E. Livingston, Jr.,<br><br>Plaintiff,<br><br>v.<br><br>The Regional Medical Center of Orangeburg and Calhoun Counties,<br><br>Defendant. | Case No.: 2018-CP-38-01036<br><br>**DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** |
| Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston,<br><br>Plaintiff,<br><br>v.<br><br>The Regional Medical Center of Orangeburg and Calhoun Counties,<br><br>Defendant. | Case No.: 2018-CP-38-01038 |
| Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston,<br><br>Plaintiff,<br><br>v.<br><br>The Regional Medical Center of Orangeburg and Calhoun Counties,<br><br>Defendant. | Case No.: 2018-CP-38-01039 |

Defendant The Regional Medical Center ("TRMC"), responds to Plaintiff's Motion for Summary Judgment as follows:

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Rule 56(c), SCRCP.

## ARGUMENT

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Ms. Livingston's family stated Ms. Livingston did ambulate to the bathroom prior to discharge . (Dr. Coleman Affidavit #5-f.) Furthermore, the fact that Ms. Livingston did not complain about worsening symptoms such as numbness or weakness in her evaluation on August 12, 2016 at Emergency Department shows there is no breach in the standard of care in this regard. (Dr. Coleman Affidavit #5-k). Mr. Carothers, PA also confirmed in his deposition that Ms. Livingston was ambulated to the bathroom. (Pg. 39-40 ln. 25; 1-2).

## CONCLUSION

Based on the findings hereinabove and pursuant to the Summary Judgment standard of this State, the standard of care as to whether attending physician must be present in the emergency department under the South Carolina Statutes and the fact that whether the Defendant TMRC has breached the standard of care are at dispute. Therefore, there is a genuine issue as to the matter of facts and TRMC shall not be improperly deprived of trial on disputed factual issues per *Cunningham ex rel. Grice*. Moreover, the Defendant TRMC believes, it has shown a mere scintilla of evidence and/or the slightest amount of relevant evidence in order to withstand a motion for summary judgment as required by *Harris Teeter, Inc.* For the reasons hereinabove, Defendant TRMC respectfully requests this Court to deny Plaintiff's Motion for partial Summary Judgment.

MICHAEL C. TANNER L.L.C.

By: /s/ *Michael C. Tanner*

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Bamberg, SC
October 27, 2021

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS
)
COUNTY OF ORANGEBURG )

Malcolm E. Livingston, Jr.,

Plaintiff,

v.

The Regional Medical Center of Orangeburg and Calhoun Counties,

Defendant.

Case No.: 2018-CP-38-01036

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

---

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

Plaintiff,

v.

The Regional Medical Center of Orangeburg and Calhoun Counties,

Defendant.

Case No.: 2018-CP-38-01038

---

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

Plaintiff,

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The Regional Medical Center of Orangeburg and Calhoun Counties,

Defendant.

Case No.: 2018-CP-38-01039

Defendant The Regional Medical Center ("TRMC"), responds to Plaintiff's Motion for Summary Judgment as follows:

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In his deposition on August 25, 2021, Plaintiff's expert witness Dr. Bruce Janiak, MD, stated that "the standard of care is for every mid-level provider. . . the attending physician must be available, physically in the emergency department, working with the PA, with one exception, which is not true in this case." ( Pg. 30, ln. 10-17). Dr. Janiak further affirmed his position in the direct examination by the Plaintiff's counsel stating " in the emergency department, it is physical presence that is required so that mid-level provider can consult on an almost instantaneous basis with the emergency physician attending." (Pg. 35, ln. 6-9). However, when asked, Dr. Janiak stated that he has not reviewed the South Carolina Physician Practice Act recently. (Pg. 27 ln. 16-17). Contrary to Dr. Janiak's testimony that an attending physician must be present mid-level health care facilities. S.C. Code Ann. 47-40-955 (A) states, " The Supervising Physician is responsible for the all aspects of PA's practice. . ," however, the statute goes on to say, "Supervision . . . must not be construed as necessarily requiring the physical presence of supervising physician at the time and place where the services are rendered . . ." TRMC's expert witness, Dr. Thomas H. Coleman, MD, FACEP, stated in his affidavit that in South Carolina, PA supervision must not be construed to necessarily require the physical presence of the supervising physician at the time and place where the services are rendered. (Dr. Coleman Affidavit # 5-j).

Moreover, TRMC asserts that in South Carolina, a physician does not "supervise" a PA to the degree that the PA must report to the physician prior to a diagnosis being made and/or prior to the treatment being implemented, including the ordering of labs and tests and determining the need for admission or discharge, per Dr. Coleman's Affidavit (#5-k). "The mere fact that the plaintiff's expert may use a different approach . . . is not considered a deviation from the recognized standard of medical care . . . Nor is the standard violated because an expert disagrees with a defendant as to what is best or better approached in treating a patient. Medicine is an inexact science and eminently qualified physicians may differ as to what constitutes a preferable course of treatment. Such differences as to preferences as to preference do not amount to malpractice." *Todd v. United States*, 570 F. Supp. 670 (D.S.C. 1983).

Mr. Michael Carothers, PA was the attending Physician's Assistant at the time of Ms. Livingston's treatment at TMRC on August 12, 2016. Mr. Carothers, PA stated in his deposition that while there were available physicians on duty at the time of the examination, he did not recall their names. (Pg. 9, ln 10-14). He also recalled that while he was under supervision of a physician at the time of Ms. Livingston's care, he did not recall who it was on that day (Pg. 9, ln. 19-25). While Mr. Carothers, PA affirmed he did not consult to any physician regarding Ms. Livingston's care (Pg. 16, ln 13, 16), he testified that South Carolina laws do not require an emergency department to have the physician's name anywhere on the record later in his deposition. (Pg. 62-63, ln. 23-25; 1-4).

Furthermore, South Carolina Physician's Assistants Practice Act states "only physicians assistants holding permanent license may prescribe drug therapy as provided in this article." In his deposition, Mr. Carothers, PA testified he is licensed in Pennsylvania and South Carolina (Pg. 57, ln. 13) and has been the main provider of TRMC Urgent Care at Santee since 2017. (Pg.

56, ln. 23). He testified he gave Ms. Livingston Zofran and Dilaudid to counteract nausea in her treatment. (Pg. 18, ln. 17-19). Dr. Coleman stated in his affidavit that Ms. Livingston had received Dilaudid and Benadryl to prevent distonic reaction that often accompanies the Reglan she was given. (#5-d). Dr. Coleman further states that while Dilaudid and Benadryl are very sedating, and they can cause a risk of fall in elder people, Ms. Livingston did not have any neurological complaints reported in her HPI or noted on her exam in the Emergency Department. (#5-e). Therefore, this did not breach the standard of care, per Dr. Coleman.

Dr. Janiak testified that Ms. Livingston should have had an MRI for a possibility of a neurological damage to the spinal cord that may have been happening at the time (Pg. 21 ln. 1-4), and while he was not aware that TRMC does not have any neurosurgeon to access hematoma for neurosurgery (Pg, 22, ln. 8), he stated that Ms. Livingston should have been intervened and transported to another hospital sooner than a day. (Pg. 23, ln 3-6). However, this assertion is contradicted by the fact that Ms. Livingston did not have any neurological complaints, per Dr. Coleman and Mr. Carother's affidavits. Dr. Janiak also testified that he has not seen anything documented in the record as to whether on August 12, Ms. Livingston communicated her complaints to the nursing staff or Mr. Carothers, PA about her numbness. Nor were there any documented records that Ms. Livingston complained about inability to ambulate or lack of movement or feeling in her leg. (Pg. 30 ln. 8-20).

Mr. Carothers, PA testified in his deposition that Ms. Livingston was moving all four extremities without any numbness or tingling during the physical exam and she did not exhibit and numbness at the time of the exam ( Pg. 50, ln. 11-15). This was also affirmed by Dr. Coleman in his affidavit, stating that Ms. Livingston did have help from the medical staff given

that she had received Dilaudid for her pain and Benadryl to prevent distonic reaction that often accompanies the Reglan she was given. (#5-d).

Ms. Livingston's family stated Ms. Livingston did ambulate to the bathroom prior to discharge . (Dr. Coleman Affidavit #5-f.) Furthermore, the fact that Ms. Livingston did not complain about worsening symptoms such as numbness or weakness in her evaluation on August 12, 2016 at Emergency Department shows there is no breach in the standard of care in this regard. (Dr. Coleman Affidavit #5-k). Mr. Carothers, PA also confirmed in his deposition that Ms. Livingston was ambulated to the bathroom. (Pg. 39-40 ln. 25; 1-2).

## CONCLUSION

Based on the findings hereinabove and pursuant to the Summary Judgment standard of this State, the standard of care as to whether attending physician must be present in the emergency department under the South Carolina Statutes and the fact that whether the Defendant TMRC has breached the standard of care are at dispute. Therefore, there is a genuine issue as to the matter of facts and TRMC shall not be improperly deprived of trial on disputed factual issues per *Cunningham ex rel. Grice*. Moreover, the Defendant TRMC believes, it has shown a mere scintilla of evidence and/or the slightest amount of relevant evidence in order to withstand a motion for summary judgment as required by *Harris Teeter, Inc.* For the reasons hereinabove, Defendant TRMC respectfully requests this Court to deny Plaintiff's Motion for partial Summary Judgment.

MICHAEL C. TANNER, LLC

By: /s/ *Michael C. Tanner*

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Bamberg, SC
October 27, 2021

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| STATE OF SOUTH CAROLINA<br>COUNTY OF ORANGEBURG | IN THE COURT OF COMMON PLEAS<br>FIRST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca e. Livingston,<br><br>Plaintiff,<br><br>v.<br><br>The Regional Medical Center Of Orangeburg and Calhoun Counties,<br><br>Defendant, | Case No.: 2018-CP-38-01036<br>2018-CP-38-01038<br>2018-CP-38-01039<br><br>**DEFENDANT'S MOTION TO RULE 59(e)** |

This Court entered an order on February 9, 2022, granting Plaintiff's Motion for Partial Summary Judgment. Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendant moves this Court to reconsider the Order & Opinion granting Plaintiff's Motion for Partial Summary Judgment, withdraw said order, enter an order denying Plaintiff's Motion for Partial Summary Judgment, and allow these disputed factual issues to proceed to trial.

In its Motion for Partial Summary Judgment as a matter of law, Plaintiff argued a supervising physician is vicariously liable for the negligent acts of a physician's assistant under the South Carolina Physician' Assistants Practice Act. In response to Plaintiff's motion, Defendant filed a motion in opposition, arguing a genuine issue as to the matter of facts. Specifically, Defendant argued that the issues at dispute are 1) whether the attending physician must be present in the emergency department under the South Carolina Statutes, and 2) whether the Defendant breached the standard of care. In this Court's Order & Opinion, the Court granted Plaintiff's Motion for Partial Summary Judgment, ruling that a physician assistant is the agent of a supervising physician, thus making the supervising physician liable for the acts and omissions committed by the agent. The Court therefore ruled that the $1,200,000.00 liability cap for

physicians and dentists under the South Carolina Torts Claims Act was applicable, rather than, as Defendant argued, the $300,000.00 per claim and $600,000.00 per occurrence liability caps for non physicians/non-dentists. The Tort Claims Act is to be construed to limit the liability of the state. Defendant asserts this ruling is in contravention to the Tort Claims Act.

Rule 59(e) of the South Carolina Rules of Evidence provides, "A Motion to Alter or Amend the Judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." In clarifying this rule, the Court in Elam v. South Carolina Department of Transportation stated,

> it is proper to view a Rule 59(e) Motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A Motion under Rule 59(e) long has been viewed as "Motion for Reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.

Elam v. S.C. Dept. of Transp., 361 S.C. 9, 21, 602 SE 2d 772 (2004). The Court continued, "There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity."Id. at 22.

Additionally, the Court considered when the filing of a Rule 59 (e) motion was appropriate and even necessary:

> A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Id. at 361 S.C. at 24. Defendants argue that that in its Order & Opinion, this Court failed to fully consider or rule on all of Defendants' arguments in opposition to Plaintiff's Motion and the genuine issues of material facts pursuant to the standards for summary judgment and medical malpractice lawsuits in this state.

Summary judgment is proper only when there is *no genuine issue as to any material fact* and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E. 2d 857, 860 (2002). In determining whether a triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). If evidentiary facts are not disputed but the conclusions or inferences to be drawn from them are, summary judgment should be denied. Baughs v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991).

Moreover, "[m]edical malpractice lawsuits have specific requirements that must be satisfied in order for a genuine factual issue to exist." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247 626 S.E.2d 1,3 (2006). Specifically, a plaintiff alleging medical malpractice must provide evidence showing: (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the defendant's field of medicine under the same or similar circumstances, and (2) the defendant departed from the recognized and generally accepted standards. Jones v. Doe, 372 S.C. 5361, 640 S.E. 2d 514, 518 (Ct. App. 2006). Further, this departure must have proximately caused the plaintiff's injuries and damages. David, 367 S.C. at 248, 626 S.E 2d at 4.

Although summary judgment requires both (1) no genuine issue as to any material fact and (2) the moving party is entitled to judgment as a matter of law, this Court, in its Order & Opinion, only addressed and ruled on, as a matter of law, whether a supervising physician is vicariously liable for a physician assistant under the principles of agency. Defendant argues that it appears the Court failed to rule on or fully consider the issues of material facts at dispute that were raised by Defendant in its motion in opposition: 1) whether the attending physician must be present in the emergency department under the South Carolina Statutes, and 2) whether the Defendant breached the standard of care.

As to issue (1), in his deposition of August 25, 2021, Plaintiff's expert witness Dr. Bruce Janiak, MD. testified that the "standard of care is for every mid-level provider . . . the attending physician must be available, physically in the emergency department, working with the PA, with one exception, which is not true in this case" and that "in the emergency department, it is physical presence that is required so that

mid-level provider can consult on an almost instantaneous basis with the emergency physician attending." However, Dr. Janiak testified that he has not reviewed the South Carolina Physician Practice Act recently. Contrary to his testimony, S.C. Code Ann. 47-40-955 (A) states, "The Supervising Physician is responsible for all the aspects of a PA's practice;" however, "[s]upervision must not be construed as necessarily requiring the physical presence of a supervising physician at the time and place where the services are rendered." This was further corroborated by Defendant's expert, Dr. Thomas H. Coleman, MD, FACEP. Thus, there is a dispute in this matter as to the standard of care regarding whether the attending physician must be physically present in the emergency department under the South Carolina Statutes. The Court should have ruled on and fully considered this issue, and the Plaintiff's Motion for Summary Judgment should have been denied.

As to issue (2), Defendant asserts there is a genuine issue as to whether Defendant breached the standard of care. Defendant asserts that in South Carolina, a physician does not "supervise" a PA to the degree that the PA must report to the physician prior to a diagnosis being made and/or treatment being implemented, including the ordering of labs and tests and determining the need for admission and discharge. Nor does South Carolina law require an emergency department to have the physician name anywhere on the record. Plaintiff offered no evidence of a physician/patient relationship in this matter.

As authorized by the South Carolina Physician's Assistants Practice Act, Mr. Carothers, PA, a licensed South Carolina PA, administered drug therapy (Zofran and Dilaudid) for Ms. Livingston to counteract nausea in her treatment. Dr. Coleman stated in his affidavit that Ms. Livingston received Dilaudid and Benadryl to prevent distonic reaction that often accompanies the Reglan that she was given. Dr. Coleman states that while Dilaudid and Benadryl are sedating and can cause risk of fall in elderly patients, Ms. Livingston did not have any neurological complaints reported in her HPI or noted on her exam in the Emergency Department, and therefore, the administration of drug therapy did not constitute a breach of the standard of care.

Moreover, there are no documented records indicating that Ms. Livingston complained about the inability to ambulate, lack of movement or feeling in her leg, or that she was experiencing worsening

symptoms such as numbness or weakness in her evaluation. On the contrary, Mr. Carothers, PA testified in his deposition that Ms. Livingston was moving all four extremities without numbness or tingling during the physical exam and she did not have exhibit numbness at the time of the exam. In addition, Ms. Livingston ambulated to the bathroom prior to discharge. Thus, this, as well, goes to show that there was no breach in standard of care.

The "mere fact that the plaintiff's expert may use a different approach" or that "an expert disagrees with the defendant as to what is best or better approached in treatment a patient" does not constitute a breach or deviation from the recognized standard of medical care. Todd v. United States, 570 F. Supp. 670 (D.S.C. 1983). "Medicine is an inexact science and eminently qualified physicians may differ as to what constitutes a preferable course of treatment. Such differences as to preference do not amount to malpractice."Id. Therefore, there is a genuine issue as to whether Defendant breached the standard of care in this matter.

As argued above and in its Motion in Opposition to Plaintiff's Motion for Partial Summary Judgment, Defendant has provided a "mere scintilla of evidence,"Hancock v. Mid-South Management Co., Inc., 381, S.C. 326, 330, 673 S.E.2d 801 (2009), and/or "slightest amount of relevant evidence, "Black's Law Dictionary 635 (3d pocket ed. 2006), as to why granting Plaintiff's motion was improper. Defendant argues that the granting of Plaintiff's motion "improperly deprived [it] of trial on disputed factual issues."Cunningham v. Helping Hands, Inc., 352 S.C. 485, 491, 575 SE 2d 549 (2003). Furthermore, given that in its Order & Opinion, the Court did not rule on or, seemingly, fully consider all of Defendant's arguments regarding the disputed factual issues, a necessary component to be considered and ruled on in a Motion for Summary Judgment, Defendants' Rule 59(e) Motion is not only proper but also necessary and required in order to preserve its arguments and issues for appellate review.

For the reasons set forth above, in Defendant's Motion in Opposition to Plaintiff's Motion for Partial Summary Judgment, and in a supporting memorandum of law to be supplemented, Defendant respectfully requests this Court to reconsider the Order & Opinion granting Plaintiff's Motion for Partial

Summary Judgment, withdraw said order, enter an order denying Plaintiff's Motion for Partial Summary Judgment, and allow those disputed factual issues to proceed to trial.

WHEREFORE, Defendant requests relief contained herein.

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Bamberg, SC
February 18, 2022

STATE OF SOUTH CAROLINA )
COUNTY OF ORANGEBURG )

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Case No.: 2018-CP-38-01036
2018-CP-38-01038
2018-CP-38-01039

Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca e. Livingston,

Plaintiff,

v.

The Regional Medical Center Of Orangeburg and Calhoun Counties,

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**DEFENDANT'S MOTION TO RULE 59(e)**

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physicians and dentists under the South Carolina Torts Claims Act was applicable, rather than, as Defendant argued, the $300,000.00 per claim and $600,000.00 per occurrence liability caps for non-physicians/non-dentists. The Tort Claims Act is to be construed to limit the liability of the state. Defendant asserts this ruling is in contravention to the Tort Claims Act.

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February 18, 2022

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Id. at 361 S.C. at 24. Defendants argue that that in its Order & Opinion, this Court failed to fully consider or rule on all of Defendants' arguments in opposition to Plaintiff's Motion and the genuine issues of material facts pursuant to the standards for summary judgment and medical malpractice lawsuits in this state.

Summary judgment is proper only when there is *no genuine issue as to any material fact* and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRP; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E. 2d 857, 860 (2002). In determining whether a triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). If evidentiary facts are not disputed but the conclusions or inferences to be drawn from them are, summary judgment should be denied. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991).

Moreover, "[m]edical malpractice lawsuits have specific requirements that must be satisfied in order for a genuine factual issue to exist." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247 626 S.E.2d 1,3 (2006). Specifically, a plaintiff alleging medical malpractice must provide evidence showing: (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the defendant's field of medicine under the same or similar circumstances, and (2) the defendant departed from the recognized and generally accepted standards. Jones v. Doe, 372 S.C. 5361, 640 S.E. 2d 514, 518 (Ct. App. 2006). Further, this departure must have proximately caused the plaintiff's injuries and damages. David, 367 S.C. at 248, 626 S.E.2d at 4.

Although summary judgment requires both (1) no genuine issue as to any material fact and (2) the moving party is entitled to judgment as a matter of law, this Court, in its Order & Opinion, only addressed and ruled on, as a matter of law, whether a supervising physician is vicariously liable for a physician assistant under the principles of agency. Defendant argues that it appears the Court failed to rule on or fully consider the issues of material facts at dispute that were raised by Defendant in its motion in opposition: 1) whether the attending physician must be present in the emergency department under the South Carolina Statutes, and 2) whether the Defendant breached the standard of care.

As to issue (1), in his deposition of August 25, 2021, Plaintiff's expert witness Dr. Bruce Janiak, MD. testified that the "standard of care is for every mid-level provider . . . the attending physician must be available, physically in the emergency department, working with the PA, with one exception, which is not true in this case" and that "in the emergency department, it is physical presence that is required so that

mid-level provider can consult on an almost instantaneous basis with the emergency physician attending." However, Dr. Janiak testified that he has not reviewed the South Carolina Physician Practice Act recently. Contrary to his testimony, S.C. Code Ann. 47-40-955 (A) states, "The Supervising Physician is responsible for all the aspects of a PA's practice;" however, "[s]upervision must not be construed as necessarily requiring the physical presence of a supervising physician at the time and place where the services are rendered." This was further corroborated by Defendant's expert, Dr. Thomas H. Coleman, MD, FACEP. Thus, there is a dispute in this matter as to the standard of care regarding whether the attending physician must be physically present in the emergency department under the South Carolina Statutes. The Court should have ruled on and fully considered this issue, and the Plaintiff's Motion for Summary Judgment should have been denied.

As to issue (2), Defendant asserts there is a genuine issue as to whether Defendant breached the standard of care. Defendant asserts that in South Carolina, a physician does not "supervise" a PA to the degree that the PA must report to the physician prior to a diagnosis being made and/or treatment being implemented, including the ordering of labs and tests and determining the need for admission and discharge. Nor does South Carolina law require an emergency department to have the physician name anywhere on the record. Plaintiff offered no evidence of a physician/patient relationship in this matter.

As authorized by the South Carolina Physician's Assistants Practice Act, Mr. Carothers, PA, a licensed South Carolina PA, administered drug therapy (Zofran and Dilaudid) for Ms. Livingston to counteract nausea in her treatment. Dr. Coleman stated in his affidavit that Ms. Livingston received Dilaudid and Benadryl to prevent distonic reaction that often accompanies the Reglan that she was given. Dr. Coleman states that while Dilaudid and Benadryl are sedating and can cause risk of fall in elderly patients, Ms. Livingston did not have any neurological complaints reported in her HPI or noted on her exam in the Emergency Department, and therefore, the administration of drug therapy did not constitute a breach of the standard of care.

Moreover, there are no documented records indicating that Ms. Livingston complained about the inability to ambulate, lack of movement or feeling in her leg, or that she was experiencing worsening

symptoms such as numbness or weakness in her evaluation. On the contrary, Mr. Carothers, PA testified in his deposition that Ms. Livingston was moving all four extremities without numbness or tingling during the physical exam and she did not have exhibit numbness at the time of the exam. In addition, Ms. Livingston ambulated to the bathroom prior to discharge. Thus, this, as well, goes to show that there was no breach in standard of care.

The "mere fact that the plaintiff's expert may use a different approach" or that "an expert disagrees with the defendant as to what is best or better approached in treatment a patient" does not constitute a breach or deviation from the recognized standard of medical care. Todd v. United States, 570 F. Supp. 670 (D.S.C. 1983). "Medicine is an inexact science and eminently qualified physicians may differ as to what constitutes a preferable course of treatment. Such differences as to preference do not amount to malpractice."Id. Therefore, there is a genuine issue as to whether Defendant breached the standard of care in this matter.

As argued above and in its Motion in Opposition to Plaintiff's Motion for Partial Summary Judgment, Defendant has provided a "mere scintilla of evidence,"Hancock v. Mid-South Management Co., Inc., 381, S.C. 326, 330, 673 S.E.2d 801 (2009), and/or "slightest amount of relevant evidence, "Black's Law Dictionary 635 (3d pocket ed. 2006), as to why granting Plaintiff's motion was improper. Defendant argues that the granting of Plaintiff's motion "improperly deprived [it] of trial on disputed factual issues."Cunningham v. Helping Hands, Inc., 352 S.C. 485, 491, 575 SE 2d 549 (2003). Furthermore, given that in its Order & Opinion, the Court did not rule on or, seemingly, fully consider all of Defendant's arguments regarding the disputed factual issues, a necessary component to be considered and ruled on in a Motion for Summary Judgment, Defendants' Rule 59(e) Motion is not only proper but also necessary and required in order to preserve its arguments and issues for appellate review.

For the reasons set forth above, in Defendant's Motion in Opposition to Plaintiff's Motion for Partial Summary Judgment, and in a supporting memorandum of law to be supplemented, Defendant respectfully requests this Court to reconsider the Order & Opinion granting Plaintiff's Motion for Partial

Summary Judgment, withdraw said order, enter an order denying Plaintiff's Motion for Partial Summary Judgment, and allow these disputed factual issues to proceed to trial.

WHEREFORE, Defendant requests relief contained herein.

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February 18, 2022

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| STATE OF SOUTH CAROLINA<br>COUNTY OF ORANGEBURG | IN THE COURT OF COMMON PLEAS<br>FIRST JUDICIAL CIRCUIT |
| | Case No.: 2018-CP-38-01036<br>2018-CP-38-01038<br>2018-CP-38-01039 |
| Malcolm E. Livingston, Jr., as the Personal Representative of the Estate of Rebecca e. Livingston.<br><br>Plaintiff,<br><br>v.<br><br>The Regional Medical Center Of Orangeburg and Calhoun Counties,<br><br>Defendant, | **DEFENDANT'S MOTION TO RULE 59(e)** |

This Court entered an order on February 9, 2022, granting Plaintiff's Motion for Partial Summary Judgment. Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Defendant moves this Court to reconsider the Order & Opinion granting Plaintiff's Motion for Partial Summary Judgment, withdraw said order, enter an order denying Plaintiff's Motion for Partial Summary Judgment, and allow these disputed factual issues to proceed to trial.

In its Motion for Partial Summary Judgment as a matter of law, Plaintiff argued a supervising physician is vicariously liable for the negligent acts of a physician's assistant under the South Carolina Physician' Assistants Practice Act. In response to Plaintiff's motion, Defendant filed a motion in opposition, arguing a genuine issue as to the matter of facts. Specifically, Defendant argued that the issues at dispute are 1) whether the attending physician must be present in the emergency department under the South Carolina Statutes, and 2) whether the Defendant breached the standard of care. In this Court's Order & Opinion, the Court granted Plaintiff's Motion for Partial Summary Judgment, ruling that a physician assistant is the agent of a supervising physician, thus making the supervising physician liable for the acts and omissions committed by the agent. The Court therefore ruled that the $1,200,000.00 liability cap for

physicians and dentists under the South Carolina Torts Claims Act was applicable, rather than, as Defendant argued, the $300,000.00 per claim and $600,000.00 per occurrence liability caps for non-physicians/non-dentists. The Tort Claims Act is to be construed to limit the liability of the state. Defendant asserts this ruling is in contravention to the Tort Claims Act.

Rule 59(e) of the South Carolina Rules of Evidence provides, "A Motion to Alter or Amend the Judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." In clarifying this rule, the Court in Elam v. South Carolina Department of Transportation stated,

> it is proper to view a Rule 59(e) Motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A Motion under Rule 59(e) long has been viewed as "Motion for Reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.

Elam v. S.C. Dept. of Transp., 361 S.C. 9, 21, 602 SE 2d 772 (2004). The Court continued, "There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity."Id. at 22.

Additionally, the Court considered when the filing of a Rule 59 (e) motion was appropriate and even necessary:

> A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

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As to issue (2), Defendant asserts there is a genuine issue as to whether Defendant breached the standard of care. Defendant asserts that in South Carolina, a physician does not "supervise" a PA to the degree that the PA must report to the physician prior to a diagnosis being made and/or treatment being implemented, including the ordering of labs and tests and determining the need for admission and discharge. Nor does South Carolina law require an emergency department to have the physician name anywhere on the record. Plaintiff offered no evidence of a physician/patient relationship in this matter.

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For the reasons set forth above, in Defendant's Motion in Opposition to Plaintiff's Motion for Partial Summary Judgment, and in a supporting memorandum of law to be supplemented, Defendant respectfully requests this Court to reconsider the Order & Opinion granting Plaintiff's Motion for Partial

Summary Judgment, withdraw said order, enter an order denying Plaintiff's Motion for Partial Summary Judgment, and allow these disputed factual issues to proceed to trial.

WHEREFORE, Defendant requests relief contained herein.

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Bamberg, SC
February 18, 2022

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| ORANGEBURG COUNTY | ) | 1ST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally, | ) | Case No. 2018-CP-38-01036<br>Case No. 2018-CP-38-01038<br>Case No. 2018-CP-38-01039 |
| Plaintiff, | ) | **Plaintiff's Memorandum in Opposition to Motion to To Alter or Amend the Court's February 9, 2022 Order** |
| v. | ) | |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant, | ) | |

The Plaintiff respectfully submits this Memorandum in Opposition to the Defendant's Motion to Alter or Amend the Court's February 9, 2022 Order which granted partial summary judgment in favor of the Plaintiff, finding as a matter of law that because a supervising physician is liable for the acts and omissions committed by his agent, the $1,200,000.00 liability cap in S. C. Code Anno. §15-78-120(a)(3) and (4) would be applicable to this case.

The Defendant's Motion raises the same arguments previously raised in opposition to the underlying summary judgment motion. Specifically, the Defendant argues that because there are questions of material fact as to whether (1) the attending physician must be present in the Emergency Department under the Physicians Assistant Practice Act ("the Act"), (2) whether the Defendant breached the standard of care, the Plaintiff is not entitled to partial summary judgment. In other words, TRMC argues that because there are questions of fact on some issue in the case, the Plaintiff is not entitled to summary judgment on any issue on the case. This is not the law and is merely an attempt to bootstrap factual issues into the court's analysis where

they do not belong. This misses the point of the Plaintiff's Motion and the Court's February 9, 2022 Order.

The Plaintiff's Motion sought a ruling on a simple legal issue: whether under the Act, a supervising physician is vicariously liable for the negligence of a physician's assistant that is practicing under their supervision. If so, is the $1,200,000 liability cap for physicians under the Tort Claims Act applicable in this case?

The Court properly ruled that under the Act, a physician's assistant is only allowed to practice if a supervising physician has "accepted responsibility" for the physician's assistant (see, S.C. Code Anno. §40-47-910(8)) and has agreed that the physician's assistant is the agent of the supervising physician "in the performance of all practice related activities . . ." S. C. Code Anno. §40-47-935 (Cum.Supp.2016). Because the statutory scheme required a principal/agent relationship between a supervising physician and his physician's assistant, the Court ruled that the principal was independently responsible for the acts and omissions of the agent. The facts necessary to reach this conclusion are that (1) the Plaintiff was treated by a physician's assistant in the Defendant's Emergency Room; (2) the physician's assistant was properly licensed under the Act and had a supervising physician; (3) the negligent act as alleged by the Plaintiff allegedly occurred during this treatment. None of these facts are disputed by TRMC.

Vicarious liability means that a party who owes a nondelegable duty remains liable for the negligent acts of others. *Simmons v. Tuomey Regional Medical Center,* 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000) (holding hospital vicariously liable for alleged negligence of independent contractor providing medical services in the emergency department). In this case, this nondelegable duty is further bolstered by the unambiguous language in the Act. Whether a supervising physician must be present in the Emergency Department under the Physican's

Assistant Practice Act is irrelevant to whether the supervising physician (or in this case, the Governmental Hospital that employs the supervising physician) is vicariously liable for the alleged negligence of the physician's assistant they are supervising.

Vicarious liability does not require the presence of the principal at the locus of the negligent act. *See, Wesley v. Holly Hill Lumber Co.*, 211 S.C. 40, 48, 43 S.E.2d 619, 622 (1947) (employer liable for faulty cable); *Conner v. Farmers and Merchants Bank,* 243 S.C. 132, 139-40, 132 S.E.2d 385, 388-89 (1963) (Landlord vicariously liable to tenant for fall caused by floor negligently repaired by contractor); *Jenkins v. E. L. Long Motor Lines, Inc.*, 233 S.C. 87, 95-100, 103 S.E.2d 2d 523, 527-29 (1958) (common carrier vicariously liable for injuries caused when an unsecured load shifted during transport). The physical presence of the supervising physician in the emergency room is not required to establish the vicarious liability of TRMC's physician.

Similarly, whether the standard of care was breached or not is not germane to the legal question raised in the Plaintiff Motion for Partial Summary Judgment or the Court's ruling. This is also a red herring. The Court simply held that:

> The South Carolina Physician Assistants Practice Act clearly and unambiguously establishes an agency relationship between a supervising physician and a physician's assistant. A physician's assistant cannot practice unless a supervising physician has accepted responsibility for the medical services rendered by the physician assistant. Where an agency relationship exists, the principal is independently responsible for the acts and omissions of the agent. Accordingly, the TRMC supervising physician on duty on August 12, 2016 is responsible for the medical care Ms. Livingston received and TRMC cannot reduce its liability cap by claiming that the acts and omissions that injured Ms. Livingston were conducted by a physician's assistant rather than a licensed physician. The very authority that permits a physician assistant to practice in TRMC's emergency room requires that he or she only do so as the agent of a supervising physician who as accepted responsibility for the medical services rendered. Because the supervising physician is 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. S.C. Code Anno. §15-78-120(a)(3) and (4). Accordingly, the Plaintiff's Motion for Partial Summary Judgment is GRANTED.

(February 9, 2022 Order, p. 5 – footnotes omitted).

In making this ruling, the Court did not find, nor did it need to find, that there was no question of fact regarding the standard of care. The Court merely held that if the Plaintiff can prove that the standard of care was breached by TRMC's physician's assistant, then under the unambiguous terms of the Act, the supervising physician would be vicariously liable for the acts of his agent and the applicable liability cap in the Tort Claims Act would be governed by S.C. Code Anno. §15-78-120(a)(3) and (4).

The purpose of Rule 59(e), SCRCP to alter or amend a judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. *Arnold v. State,* 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); *Collins Music Col, Inc. v. IGT,* 353 S.C. 559, 562, 579 S.E.2d 524, 525 (Ct.App.2002). The issues raised by TRMC in its motion are not necessary or germane to the merits of the Court's February 9, 2022 ruling. Accordingly, TRMC's Rule 59(e), SCRCP should be denied.

***<signature page to follow>***

Respectfully submitted,

s/Marion C. Fairey, Jr.

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| STATE OF SOUTH CAROLINA | ) | |
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(February 9, 2022 Order, p. 5 – footnotes omitted).

In making this ruling, the Court did not find, nor did it need to find, that there was no question of fact regarding the standard of care. The Court merely held that if the Plaintiff can prove that the standard of care was breached by TRMC's physician's assistant, then under the unambiguous terms of the Act, the supervising physician would be vicariously liable for the acts of his agent and the applicable liability cap in the Tort Claims Act would be governed by S.C. Code Anno. §15-78-120(a)(3) and (4).

The purpose of Rule 59(e), SCRCP to alter or amend a judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. *Arnold v. State,* 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); *Collins Music Col, Inc. v. IGT,* 353 S.C. 559, 562, 579 S.E.2d 524, 525 (Ct.App.2002). The issues raised by TRMC in its motion are not necessary or germane to the merits of the Court's February 9, 2022 ruling. Accordingly, TRMC's Rule 59(e), SCRCP should be denied.

***<signature page to follow>***

Respectfully submitted,

s/Marion C. Fairey, Jr.

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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| ORANGEBURG COUNTY | ) | 1st JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally, | ) | Case No. 2018-CP-38-01036<br>Case No. 2018-CP-38-01038<br>Case No. 2018-CP-38-01039 |
| Plaintiff, | ) | **Plaintiff's Memorandum in Opposition to Motion to To Alter or Amend the Court's February 9, 2022 Order** |
| v. | ) | |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant, | ) | |

The Plaintiff respectfully submits this Memorandum in Opposition to the Defendant's Motion to Alter or Amend the Court's February 9, 2022 Order which granted partial summary judgment in favor of the Plaintiff, finding as a matter of law that because a supervising physician is liable for the acts and omissions committed by his agent, the $1,200,000.00 liability cap in S. C. Code Anno. §15-78-120(a)(3) and (4) would be applicable to this case.

The Defendant's Motion raises the same arguments previously raised in opposition to the underlying summary judgment motion. Specifically, the Defendant argues that because there are questions of material fact as to whether (1) the attending physician must be present in the Emergency Department under the Physicians Assistant Practice Act ("the Act"), (2) whether the Defendant breached the standard of care, the Plaintiff is not entitled to partial summary judgment. In other words, TRMC argues that because there are questions of fact on some issue in the case, the Plaintiff is not entitled to summary judgment on any issue on the case. This is not the law and is merely an attempt to bootstrap factual issues into the court's analysis where

they do not belong. This misses the point of the Plaintiff's Motion and the Court's February 9, 2022 Order.

The Plaintiff's Motion sought a ruling on a simple legal issue: whether under the Act, a supervising physician is vicariously liable for the negligence of a physician's assistant that is practicing under their supervision. If so, is the $1,200,000 liability cap for physicians under the Tort Claims Act applicable in this case?

The Court properly ruled that under the Act, a physician's assistant is only allowed to practice if a supervising physician has "accepted responsibility" for the physician's assistant (see, S.C. Code Anno. §40-47-910(8)) and has agreed that the physician's assistant is the agent of the supervising physician "in the performance of all practice related activities . . ." S. C. Code Anno. §40-47-935 (Cum.Supp.2016). Because the statutory scheme required a principal/agent relationship between a supervising physician and his physician's assistant, the Court ruled that the principal was independently responsible for the acts and omissions of the agent. The facts necessary to reach this conclusion are that (1) the Plaintiff was treated by a physician's assistant in the Defendant's Emergency Room; (2) the physician's assistant was properly licensed under the Act and had a supervising physician; (3) the negligent act as alleged by the Plaintiff allegedly occurred during this treatment. None of these facts are disputed by TRMC.

Vicarious liability means that a party who owes a nondelegable duty remains liable for the negligent acts of others. *Simmons v. Tuomey Regional Medical Center,* 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000) (holding hospital vicariously liable for alleged negligence of independent contractor providing medical services in the emergency department). In this case, this nondelegable duty is further bolstered by the unambiguous language in the Act. Whether a supervising physician must be present in the Emergency Department under the Physican's

Assistant Practice Act is irrelevant to whether the supervising physician (or in this case, the Governmental Hospital that employs the supervising physician) is vicariously liable for the alleged negligence of the physician's assistant they are supervising.

Vicarious liability does not require the presence of the principal at the locus of the negligent act. *See, Wesley v. Holly Hill Lumber Co.,* 211 S.C. 40, 48, 43 S.E.2d 619, 622 (1947) (employer liable for faulty cable); *Conner v. Farmers and Merchants Bank.* 243 S.C. 132, 139-40, 132 S.E.2d 385, 388-89 (1963) (Landlord vicariously liable to tenant for fall caused by floor negligently repaired by contractor); *Jenkins v. E. L. Long Motor Lines, Inc.,* 233 S.C. 87, 95-100, 103 S.E.2d 2d 523, 527-29 (1958) (common carrier vicariously liable for injuries caused when an unsecured load shifted during transport). The physical presence of the supervising physician in the emergency room is not required to establish the vicarious liability of TRMC's physician.

Similarly, whether the standard of care was breached or not is not germane to the legal question raised in the Plaintiff Motion for Partial Summary Judgment or the Court's ruling. This is also a red herring. The Court simply held that:

> The South Carolina Physician Assistants Practice Act clearly and unambiguously establishes an agency relationship between a supervising physician and a physician's assistant. A physician's assistant cannot practice unless a supervising physician has accepted responsibility for the medical services rendered by the physician assistant. Where an agency relationship exists, the principal is independently responsible for the acts and omissions of the agent. Accordingly, the TRMC supervising physician on duty on August 12, 2016 is responsible for the medical care Ms. Livingston received and TRMC cannot reduce its liability cap by claiming that the acts and omissions that injured Ms. Livingston were conducted by a physician's assistant rather than a licensed physician. The very authority that permits a physician assistant to practice in TRMC's emergency room requires that he or she only do so as the agent of a supervising physician who as accepted responsibility for the medical services rendered. Because the supervising physician is 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. S.C. Code Anno. §15-78-120(a)(3) and (4). Accordingly, the Plaintiff's Motion for Partial Summary Judgment is GRANTED.

(February 9, 2022 Order, p. 5 – footnotes omitted).

In making this ruling, the Court did not find, nor did it need to find, that there was no question of fact regarding the standard of care. The Court merely held that if the Plaintiff can prove that the standard of care was breached by TRMC's physician's assistant, then under the unambiguous terms of the Act, the supervising physician would be vicariously liable for the acts of his agent and the applicable liability cap in the Tort Claims Act would be governed by S.C. Code Anno. §15-78-120(a)(3) and (4).

The purpose of Rule 59(e), SCRCP to alter or amend a judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. *Arnold v. State,* 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); *Collins Music Col, Inc. v. IGT,* 353 S.C. 559, 562, 579 S.E.2d 524, 525 (Ct.App.2002). The issues raised by TRMC in its motion are not necessary or germane to the merits of the Court's February 9, 2022 ruling. Accordingly, TRMC's Rule 59(e), SCRCP should be denied.

***<signature page to follow>***

Respectfully submitted,

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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. 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



NOTICE OF APPEAL

Appellant, The Regional Medical Center of Orangeburg and Calhoun Counties, appeals the attached Orders of the Honorable Edgar J. Dickson: 1) Order Granting Plaintiff's Motion for Partial Summary Judgment, dated February 8, 2022, and filed February 9, 2022, and 2) Order Denying Defendant's Motion for Reconsideration or To Alter or Amend the Court's February 9, 2022 Order, dated and filed on May 16, 2022. Appellant received written notice of entry of the latter on May 16, 2022.

June 9, 2022

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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



PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Malcolm E. Livingston, Jr., by depositing a copy of it in the United States Mail, postage prepaid, on June 9, 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.

June 9, 2022

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Orangeburg Common Pleas

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|---|---|
| **Case Caption:** | Malcolm E Livingston VS The Regional Medical Center Of Orangeburg And Calhoun Counti |
| **Case Number:** | 2018CP3801036 |
| **Type:** | Order/Summary Judgment |

So Ordered

s/ Edgar W. Dickson #2153

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|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| ORANGEBURG COUNTY | ) | 1ST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally, | ) | Case No. 2018-CP-38-01036<br>Case No. 2018-CP-38-01038<br>Case No. 2018-CP-38-01039 |
| Plaintiff, | ) | |
| v. | ) | **Order** |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant, | ) | |

This matter came before the Plaintiff's Motion for Partial Summary Judgment on the issue of whether Defendant can reduce its liability cap under the South Carolina Tort Claims Act ("TCA") by claiming that the acts and omissions that allegedly caused the injury to the Plaintiff were committed by physician's assistant rather than a licensed physician. The matter was heard by the undersigned on November 1, 2021. Marion C. Fairey, Jr. appeared and argued on behalf of the Plaintiff. Michael Tanner appeared and argued on behalf of the Defendant.

The undisputed facts relevant to this motion are that on August 12, 2016, Rebecca Livingston was involved in an automobile accident. She was taken from the scene of the wreck by ambulance to the Emergency Department at the Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC"). Although there were licensed physicians present in the Emergency Department on August 12, 2016, while in the Emergency Department, Ms. Livingston's care was managed by a physician's assistant employed by TRMC. There is no licensed physician listed or identified anywhere in Ms. Livingston's medical record for August

12, 2016. After being treated and evaluated, Ms. Livingston was discharged home from the TRMC Emergency Department by the physician's assistant.

In the early morning hours of August 13, 2016, Ms. Livingston returned to the TRMC Emergency Department because she could not move her legs. This time, she was seen by a licensed physician who determined that Ms. Livingston was suffering from a spinal hematoma. Ms. Livingston was emergently transferred to the nearest Level I trauma center, Palmetto Richland Memorial. Unfortunately, by the time she arrived there, she had already lost all sensation below her T-8 vertebra. She was diagnosed with paraplegia, secondary to spinal cord injury. She passed away twenty months later.

Plaintiff, Malcolm Livingston, brought these three actions (Loss of Consortium – 2018-CP-38-01036; Survival – 2018-CP-38-01038; and Wrongful Death – 2018-CP-38-01039) against TRMC on his own behalf and as the personal representative of his deceased wife, Rebecca Livingston, alleging that Ms. Livingston was paralyzed and ultimately perished as a result of TRMC's failure to diagnose and timely treat the spinal hematoma when Ms. Livingston presented at the TRMC Emergency Department on August 12, 2016. TRMC denies these allegations and contends that the employees in its Emergency Department acted within the applicable standard of care. Additionally, TRMC alleges that it is a governmental entity whose liability for medical negligence exists solely under the South Carolina Tort Claims Act. Further, TRMC alleges that because Ms. Livingston's care was provided by a non-physician (physician's assistant) on August 12, 2016, rather than a physician, its liability in this case is capped at $300,000.00 per claim and $600,000.00 per occurrence.

Under the Tort Claims Act ("TCA"), governmental entities enjoy a general liability cap of $300,000.00 per claim with a $600,000.00 liability cap per occurrence, regardless of the

number of agencies or claims involved. S.C. Code Anno. §15-78-120(a)(1) and (2). However, recognizing that medical malpractice cases involve "significantly higher damages" the legislature raised the liability limits for government employed physicians and dentists, effective on January 1, 1989. S.C. Code Anno. §15-78-20(g). Accordingly, the liability limit under the TCA is $1,200,000.00 for the tort of a "licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession." S.C. Code Anno. §15-78-120(a)(3) and (4).

In this case, TRMC takes the position that because they staffed their Emergency Department with a physician's assistant and Ms. Livingston was only seen by that physician's assistant (and not a physician), that its liability in this case is limited to $300,000.00 per claim and $600,000.00 for all claims arising from that occurrence rather than the $1,200,000.00 medical malpractice cap. In other words, TRMC asserts that because it provided a physician's assistant rather than a physician to care for Ms. Livingston in its Emergency Department, its liability under the TCA is limited to $600,000.00.

In South Carolina, physician's assistants' authority to practice medicine is governed by the South Carolina Physician Assistant's Act. S. C. Code Anno. §40-47-905, et seq. Under the Physician's Assistants Act, a physician's assistant must be supervised by a licensed physician and may only perform those medical acts contained in a written scope of practice. S. C. Code Anno. §40-47-935(1). Additionally, a physician's assistant is only authorized to provide medical services under the supervision of a licensed physician who has expressly accepted responsibility for the medical services rendered by the physician's assistant. Under State law, the physician's assistant who provided services to Ms. Livingston was only able to do so because he or she was acting under a physician's supervision and under a written scope of practice.

Specifically, under the South Carolina Physician' Assistants Practice Act (in effect in August of 2016), a physician assistant

> may perform: (1) medical acts, tasks, or functions with written scope of practice guidelines under physician supervision; (2) those duties and responsibilities, including the prescribing and dispensing of drugs and medical devices, that are lawfully delegated by their supervising physicians. However, only physician assistants holding permanent license may prescribe drug therapy as provided in this article.
>
> **A physician assistant is an agent of his or her supervising physician in the performance of all practice related activities including, but not limited to, the ordering of diagnostic, therapeutic, and other medical services."**

(Emphasis supplied).

Under the Act, a "Physician supervisor" is a "South Carolina licensed physician currently possessing an active, unrestricted permanent license to practice medicine in South Carolina who is approved to serve as a supervising physician for no more than three full-time equivalent physician assistants. The physician supervisor is the individual who is responsible for supervising a physician assistant's activities." S.C. Code Anno. §40-47-910(7). "Supervising means overseeing the activities of, **and accepting responsibility for**, the medical services rendered by a physician assistant as part of a physician-led team in a manner approved by the board." S.C. Code Anno. §40-47-910(8) (emphasis supplied). Under the plain language of the statute, 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.

Courts of this state have long held that a principal is independently liable to third parties for the negligence of an agent that occur within the scope of the agent's employment. *Spence v. Spence,* 368 S.C. 106, 628 S.E.2d 869, 879-880 (2006). This rule of liability is

> founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every case, the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity

> and good conduct in all matters within the scope of his agency . . . Seeing that some one must be loser by the deceit, it is more reasonable that he who employs and confides in the deceiver should be the loser than a stranger

*Id.* 628 S.E.2d at 880; *citing, Service Life & Health Ins. Co.*, 220 S.C. 198, 66 S.E.2d 816, 817 (1951); *see also, Jones v. Elbert*, 211 S.C. 553, 558, 34 S.E.2d 796, 798 (1945).

The South Carolina Physician Assistants Practice Act clearly and unambiguously establishes an agency relationship between a supervising physician and a physician's assistant. A physician's assistant cannot practice unless a supervising physician has accepted responsibility for the medical services rendered by the physician assistant. Where an agency relationship exists, the principal is independently responsible for the acts and omissions of the agent. Accordingly, the TRMC supervising physician on duty on August 12, 2016 is responsible for the medical care Ms. Livingston received and TRMC cannot reduce its liability cap by claiming that the acts and omissions that injured Ms. Livingston were conducted by a physician's assistant rather than a licensed physician. The very authority that permits a physician assistant to practice in TRMC's emergency room requires that he or she only do so as the agent of a supervising physician who as accepted responsibility for the medical services rendered. Because the supervising physician is 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. S.C. Code Anno. §15-78-120(a)(3)[1] and (4)[2]. Accordingly, the Plaintiff's Motion for Partial Summary Judgment is GRANTED.

---

[1] "No person may recover in any action or claim brought hereunder against any governmental entity and caused by the tort of any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, a sum exceeding one million two hundred thousand dollars because of a loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved."

[2] "The total sum recovered hereunder arising out of a single occurrence of liability of any governmental entity for any tort caused by any licensed physician or dentist, employed by a governmental entity and acting within

IT IS SO ORDERED.

Entered this ____ day of February, 2022
Orangeburg, South Carolina

Edgar W. Dickson
Circuit Court Judge, 1st Judicial Circuit



the scope of his profession, may not exceed one million two hundred thousand dollars regardless of the number of agencies or political subdivisions involved."

Orangeburg Common Pleas

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|---|---|
| **Case Caption:** | Malcolm E Livingston VS The Regional Medical Center Of Orangeburg And Calhoun Counti |
| **Case Number:** | 2018CP3801036 |
| **Type:** | Order/Summary Judgment |

So Ordered

s/ Edgar W. Dickson #2153

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| ORANGEBURG COUNTY | ) | 1ST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally, | ) | Case No. 2018-CP-38-01036<br>Case No. 2018-CP-38-01038<br>Case No. 2018-CP-38-01039 |
| Plaintiff, | ) | **Order Denying Defendant's Motion for Reconsideration or To Alter or Amend the Court's February 9, 2022 Order** |
| v. | ) | |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant, | ) | |

This matter is before the Court on the Motion of the Defendant, the Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC") to Reconsider the Court's February 9, 2022 Order which granted partial summary judgment to the Plaintiff.

**Standard of Review**

Rule 59(e), SCRCP provides a mechanism for a party to request that a court review a prior order. In clarifying Rule 59(e), SCRCP, the South Carolina Supreme Court stated that

> it is proper to view a Rule 59(e), SCRCP Motion not only as a vehicle to request the trial court "alter or amend the judgement," but also as a vehicle to seek "reconsideration" of issues and arguments. A Motion under Rule 59(e) long has been viewed as a "Motion for Reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its prior decision even if it means rehashing all or part of an argument previously presented.

*Elam v. S. C. Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-779 (2004). A party may wish to raise issues in a Rule 59(e) motion that they feel the court may have misunderstood or failed to fully consider. *Elam*, 361 S.C. at 25, 602 S.E.2d at 780. However, a party must file a Rule 59(e) motion to preserve for appeal an issue or argument that has been raised but not ruled on. *Id.*

**Discussion**

The Defendant's Motion to Reconsider this Court's February 9, 2022 Order raises the same arguments previously raised in opposition to the underlying summary judgment motion. Specifically, the Defendant argues that because there are questions of material fact as to (1) whether the attending physician must be present in the Emergency Department under the Physician Assistant Practice Act ("the Act"), and (2) whether the Defendant breached the standard of care, the Plaintiff is not entitled to partial summary judgment.

The Court's February 9, 2022 Order decided a simple legal issue: whether under the Physician Assistant's Practice Act (hereinafter the "Act"), a supervising physician is vicariously liable for the negligence of a physician's assistant that is practicing under their supervision. If so, is the $1,200,000 liability cap for physicians under the Tort Claims Act applicable in this case?

This Court ruled that under the Act, a physician's assistant is only allowed to practice if a supervising physician has "accepted responsibility" for the physician's assistant (*see*, S.C. Code Ann. § 40-47-910(8)) and has agreed that the physician's assistant is the agent of the supervising physician "in the performance of all practice related activities . . ." S. C. Code Ann. § 40-47-935 (Supp. 2016). Because the statutory scheme required a principal/agent relationship between a supervising physician and his physician's assistant, the Court ruled that the principal was independently responsible for the acts and omissions of the agent. The facts necessary to reach this conclusion are that (1) the Plaintiff was treated by a physician's assistant in the Defendant's Emergency Room; (2) the physician's assistant was properly licensed under the Act and had a supervising physician; (3) the negligent act or omissions as alleged by the Plaintiff occurred during this treatment. None of these facts are disputed by TRMC.

Vicarious liability means that a party who owes a nondelegable duty remains liable for the negligent acts of others. *Simmons v. Tuomey Regional Medical Center*, 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000) (holding hospital vicariously liable for alleged negligence of independent contractor providing medical services in the emergency department). In this case, this nondelegable duty is further bolstered by the unambiguous language in the Act. Whether a supervising physician must be present in the Emergency Department under the Physician Assistant Practice Act is irrelevant to whether the supervising physician (or in this case, the Governmental Hospital that employs the supervising physician) is vicariously liable for the alleged negligence of the physician's assistant they are supervising.

Vicarious liability does not require the presence of the principal at the locus of the negligent act. *See Wesley v. Holly Hill Lumber Co.*, 211 S.C. 40, 48, 43 S.E.2d 619, 622 (1947) (employer liable for faulty cable); *Conner v. Farmers and Merchants Bank*, 243 S.C. 132, 139-40, 132 S.E.2d 385, 388-89 (1963) (landlord vicariously liable to tenant for fall caused by floor negligently repaired by contractor); *Jenkins v. E. L. Long Motor Lines, Inc.*, 233 S.C. 87, 95-100, 103 S.E.2d 2d 523, 527-29 (1958) (common carrier vicariously liable for injuries caused when an unsecured load shifted during transport). The physical presence of the supervising physician in the emergency room is not required to establish the vicarious liability of TRMC's physician.

Similarly, whether the standard of care was breached or not is not germane to the legal question raised in the Plaintiff Motion for Partial Summary Judgment or the Court's ruling. In the February 9, 2022 Order, this Court simply held that:

> The South Carolina Physician Assistants Practice Act clearly and unambiguously establishes an agency relationship between a supervising physician and a physician's assistant. A physician's assistant cannot practice unless a supervising physician has accepted responsibility for the medical services rendered by the physician assistant. Where an agency relationship exists, the principal is independently responsible for the acts and omissions of the agent. Accordingly, the TRMC supervising physician on duty on August

> 12, 2016 is responsible for the medical care Ms. Livingston received and TRMC cannot reduce its liability cap by claiming that the acts and omissions that injured Ms. Livingston were conducted by a physician's assistant rather than a licensed physician. The very authority that permits a physician assistant to practice in TRMC's emergency room requires that he or she only do so as the agent of a supervising physician who as accepted responsibility for the medical services rendered. Because the supervising physician is 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. S.C. Code Ann. §15-78-120(a)(3) and (4). Accordingly, the Plaintiff's Motion for Partial Summary Judgment is GRANTED.

(February 9, 2022 Order, p. 5 – footnotes omitted).

In making this ruling, the Court did not find, nor did it need to find, that there was no question of fact regarding the standard of care. The Court merely held that if the Plaintiff can prove that the standard of care was breached by TRMC's physician's assistant, then under the unambiguous terms of the Act, the supervising physician would be vicariously liable for the acts of his agent and the applicable liability cap in the Tort Claims Act would be governed by S.C. Code Ann §15-78-120(a)(3) and (4)

The purpose of Rule 59(e), SCRCP to alter or amend a judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); *Collins Music Col, Inc. v. IGT*, 353 S.C. 559, 562, 579 S.E.2d 524, 525 (Ct. App. 2002). The Court has considered all arguments raised by TRMC in its original memorandum of law and made at oral argument, as well as the arguments raised in TRMC's Rule 59(e), SCRCP motion and after due consideration of all, denies the arguments made and denies this Rule 59(e), SCRCP motion.

**IT IS SO ORDERED.**

Entered this This ___ day of May, 2022
Orangeburg, South Carolina

Edgar W. Dickson
Circuit Court Judge
1st Judicial Circuit

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. 2018-CP-38-01038

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

# NOTICE OF APPEAL

Appellant, The Regional Medical Center of Orangeburg and Calhoun Counties, appeals the attached Orders of the Honorable Edgar J. Dickson: 1) Order Granting Plaintiff's Motion for Partial Summary Judgment, dated February 8, 2022, and filed February 9, 2022, and 2) Order Denying Defendant's Motion for Reconsideration or To Alter or Amend the Court's February 9, 2022 Order, dated and filed on May 16, 2022. Appellant received written notice of entry of the latter on May 16, 2022.

June 9, 2022

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Attorneys for Respondent

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-38-01038

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



**PROOF OF SERVICE**

I certify that I have served the Notice of Appeal on Malcolm E. Livingston, Jr., by depositing a copy of it in the United States Mail, postage prepaid, on June 9, 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.

June 9, 2022

Michael C. Tanner

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(803) 245-9153
Attorneys for The Regional Medical Center of Orangeburg and Calhoun Counties

Orangeburg Common Pleas

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|---|---|
| **Case Caption:** | Malcolm E Livingston, Jr. VS Regional Medical Center Of Orangeburg And Calhoun Counties |
| **Case Number:** | 2018CP3801038 |
| **Type:** | Order/Summary Judgment |

So Ordered

s/ Edgar W. Dickson #2153

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| ORANGEBURG COUNTY | ) | 1ST JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally, | ) | Case No. 2018-CP-38-01036<br>Case No. 2018-CP-38-01038<br>Case No. 2018-CP-38-01039 |
| Plaintiff, | ) | |
| v. | ) | **Order** |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant, | ) | |

This matter came before the Plaintiff's Motion for Partial Summary Judgment on the issue of whether Defendant can reduce its liability cap under the South Carolina Tort Claims Act ("TCA") by claiming that the acts and omissions that allegedly caused the injury to the Plaintiff were committed by physician's assistant rather than a licensed physician. The matter was heard by the undersigned on November 1, 2021. Marion C. Fairey, Jr. appeared and argued on behalf of the Plaintiff. Michael Tanner appeared and argued on behalf of the Defendant.

The undisputed facts relevant to this motion are that on August 12, 2016, Rebecca Livingston was involved in an automobile accident. She was taken from the scene of the wreck by ambulance to the Emergency Department at the Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC"). Although there were licensed physicians present in the Emergency Department on August 12, 2016, while in the Emergency Department, Ms. Livingston's care was managed by a physician's assistant employed by TRMC. There is no licensed physician listed or identified anywhere in Ms. Livingston's medical record for August

12, 2016. After being treated and evaluated, Ms. Livingston was discharged home from the TRMC Emergency Department by the physician's assistant.

In the early morning hours of August 13, 2016, Ms. Livingston returned to the TRMC Emergency Department because she could not move her legs. This time, she was seen by a licensed physician who determined that Ms. Livingston was suffering from a spinal hematoma. Ms. Livingston was emergently transferred to the nearest Level I trauma center, Palmetto Richland Memorial. Unfortunately, by the time she arrived there, she had already lost all sensation below her T-8 vertebra. She was diagnosed with paraplegia, secondary to spinal cord injury. She passed away twenty months later.

Plaintiff, Malcolm Livingston, brought these three actions (Loss of Consortium – 2018-CP-38-01036; Survival – 2018-CP-38-01038; and Wrongful Death – 2018-CP-38-01039) against TRMC on his own behalf and as the personal representative of his deceased wife, Rebecca Livingston, alleging that Ms. Livingston was paralyzed and ultimately perished as a result of TRMC's failure to diagnose and timely treat the spinal hematoma when Ms. Livingston presented at the TRMC Emergency Department on August 12, 2016. TRMC denies these allegations and contends that the employees in its Emergency Department acted within the applicable standard of care. Additionally, TRMC alleges that it is a governmental entity whose liability for medical negligence exists solely under the South Carolina Tort Claims Act. Further, TRMC alleges that because Ms. Livingston's care was provided by a non-physician (physician's assistant) on August 12, 2016, rather than a physician, its liability in this case is capped at $300,000.00 per claim and $600,000.00 per occurrence.

Under the Tort Claims Act ("TCA"), governmental entities enjoy a general liability cap of $300,000.00 per claim with a $600,000.00 liability cap per occurrence, regardless of the

number of agencies or claims involved. S.C. Code Anno. §15-78-120(a)(1) and (2). However, recognizing that medical malpractice cases involve "significantly higher damages" the legislature raised the liability limits for government employed physicians and dentists, effective on January 1, 1989. S.C. Code Anno. §15-78-20(g). Accordingly, the liability limit under the TCA is $1,200,000.00 for the tort of a "licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession." S.C. Code Anno. §15-78-120(a)(3) and (4).

In this case, TRMC takes the position that because they staffed their Emergency Department with a physician's assistant and Ms. Livingston was only seen by that physician's assistant (and not a physician), that its liability in this case is limited to $300,000.00 per claim and $600,000.00 for all claims arising from that occurrence rather than the $1,200,000.00 medical malpractice cap. In other words, TRMC asserts that because it provided a physician's assistant rather than a physician to care for Ms. Livingston in its Emergency Department, its liability under the TCA is limited to $600,000.00.

In South Carolina, physician's assistants' authority to practice medicine is governed by the South Carolina Physician Assistant's Act. S. C. Code Anno. §40-47-905, et seq. Under the Physician's Assistants Act, a physician's assistant must be supervised by a licensed physician and may only perform those medical acts contained in a written scope of practice. S. C. Code Anno. §40-47-935(1). Additionally, a physician's assistant is only authorized to provide medical services under the supervision of a licensed physician who has expressly accepted responsibility for the medical services rendered by the physician's assistant. Under State law, the physician's assistant who provided services to Ms. Livingston was only able to do so because he or she was acting under a physician's supervision and under a written scope of practice.

Specifically, under the South Carolina Physician' Assistants Practice Act (in effect in Arcina of 2016), a physician assistant

> may perform: (1) medical acts, tasks, or functions with written scope of practice guidelines under physician supervision; (2) those duties and responsibilities, including the prescribing and dispensing of drugs and medical devices, that are lawfully delegated by their supervising physicians. However, only physician assistants holding permanent license may prescribe drug therapy as provided in this article.
>
> **A physician assistant is an agent of his or her supervising physician in the performance of all practice related activities including, but not limited to, the ordering of diagnostic, therapeutic, and other medical services.**"

(Emphasis supplied).

Under the Act, a "Physician supervisor" is a "South Carolina licensed physician currently possessing an active, unrestricted permanent license to practice medicine in South Carolina who is approved to serve as a supervising physician for no more than three full-time equivalent physician assistants. The physician supervisor is the individual who is responsible for supervising a physician assistant's activities." S.C. Code Anno. §40-47-910(7). "Supervising means overseeing the activities of, **and accepting responsibility for**, the medical services rendered by a physician assistant as part of a physician-led team in a manner approved by the board." S.C. Code Anno. §40-47-910(8) (emphasis supplied). Under the plain language of the statute, 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.

Courts of this state have long held that a principal is independently liable to third parties for the negligence of an agent that occur within the scope of the agent's employment. *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869, 879-880 (2006). This rule of liability is

> founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every case, the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity

> and good conduct in all matters within the scope of his agency . . . Seeing that some one must be loser by the deceit, it is more reasonable that he who employs and confides in the deceiver should be the loser than a stranger

*Id, 628 S.E.2d at 880; citing, Service Life & Health Ins. Co.*, 220 S.C. 198, 66 S.E.2d 816, 817 (1951); *see also, Jones v. Elbert,* 211 S.C. 553, 558, 34 S.E.2d 796, 798 (1945).

The South Carolina Physician Assistants Practice Act clearly and unambiguously establishes an agency relationship between a supervising physician and a physician's assistant. A physician's assistant cannot practice unless a supervising physician has accepted responsibility for the medical services rendered by the physician assistant. Where an agency relationship exists, the principal is independently responsible for the acts and omissions of the agent. Accordingly, the TRMC supervising physician on duty on August 12, 2016 is responsible for the medical care Ms. Livingston received and TRMC cannot reduce its liability cap by claiming that the acts and omissions that injured Ms. Livingston were conducted by a physician's assistant rather than a licensed physician. The very authority that permits a physician assistant to practice in TRMC's emergency room requires that he or she only do so as the agent of a supervising physician who as accepted responsibility for the medical services rendered. Because the supervising physician is 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. S.C. Code Anno. §15-78-120(a)(3)[1] and (4)[2]. Accordingly, the Plaintiff's Motion for Partial Summary Judgment is GRANTED.

[1] "No person may recover in any action or claim brought hereunder against any governmental entity and caused by the tort of any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, a sum exceeding one million two hundred thousand dollars because of a loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved."

[2] "The total sum recovered hereunder arising out of a single occurrence of liability of any governmental entity for any tort caused by any licensed physician or dentist, employed by a governmental entity and acting within

IT IS SO ORDERED.

Entered this ____ day of February, 2022
Orangeburg, South Carolina

Edgar W. Dickson
Circuit Court Judge, 1st Judicial Circuit

the scope of his profession, may not exceed one million two hundred thousand dollars regardless of the number of agencies or political subdivisions involved."

Orangeburg Common Pleas

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| **Case Caption:** | Malcolm E Livingston, Jr. VS Regional Medical Center Of Orangeburg And Calhoun Counties |
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So Ordered

s/ Edgar W. Dickson #2153

Electronically signed on 2022-05-16 10:38:53 page 5 of 5

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| ORANGEBURG COUNTY | ) | 5TH JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally, | ) | Case No. 2018-CP-38-01036<br>Case No. 2018-CP-38-01038<br>Case No. 2018-CP-38-01039 |
| Plaintiff, | ) | **Order Denying Defendant's Motion for Reconsideration or To Alter or Amend the Court's February 9, 2022 Order** |
| v. | ) | |
| The Regional Medical Center of Orangeburg and Calhoun Counties | ) | |
| Defendant, | ) | |

This matter is before the Court on the Motion of the Defendant, the Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC") to Reconsider the Court's February 9, 2022 Order which granted partial summary judgment to the Plaintiff.

**Standard of Review**

Rule 59(e), SCRCP provides a mechanism for a party to request that a court review a prior order. In clarifying Rule 59(e), SCRCP, the South Carolina Supreme Court stated that

> it is proper to view a Rule 59(e), SCRCP Motion not only as a vehicle to request the trial court "alter or amend the judgement," but also as a vehicle to seek "reconsideration" of issues and arguments. A Motion under Rule 59(e) long has been viewed as a "Motion for Reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its prior decision even if it means rehashing all or part of an argument previously presented.

*Elam v. S. C. Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-779 (2004). A party may wish to raise issues in a Rule 59(e) motion that they feel the court may have misunderstood or failed to fully consider. *Elam*, 361 S.C. at 25, 602 S.E.2d at 780. However, a party must file a Rule 59(e) motion to preserve for appeal an issue or argument that has been raised but not ruled on. *Id.*

**Discussion**

The Defendant's Motion to Reconsider this Court's February 9, 2022 Order raises the same arguments previously raised in opposition to the underlying summary judgment motion. Specifically, the Defendant argues that because there are questions of material fact as to (1) whether the attending physician must be present in the Emergency Department under the Physician Assistant Practice Act ("the Act"), and (2) whether the Defendant breached the standard of care, the Plaintiff is not entitled to partial summary judgment.

The Court's February 9, 2022 Order decided a simple legal issue: whether under the Physician Assistant's Practice Act (hereinafter the "Act"), a supervising physician is vicariously liable for the negligence of a physician's assistant that is practicing under their supervision. If so, is the $1,200,000 liability cap for physicians under the Tort Claims Act applicable in this case?

This Court ruled that under the Act, a physician's assistant is only allowed to practice if a supervising physician has "accepted responsibility" for the physician's assistant (*see*, S.C. Code Ann. § 40-47-910(8)) and has agreed that the physician's assistant is the agent of the supervising physician "in the performance of all practice related activities . . ." S. C. Code Ann. § 40-47-935 (Supp. 2016). Because the statutory scheme required a principal/agent relationship between a supervising physician and his physician's assistant, the Court ruled that the principal was independently responsible for the acts and omissions of the agent. The facts necessary to reach this conclusion are that (1) the Plaintiff was treated by a physician's assistant in the Defendant's Emergency Room; (2) the physician's assistant was properly licensed under the Act and had a supervising physician; (3) the negligent act or omissions as alleged by the Plaintiff occurred during this treatment. None of these facts are disputed by TRMC.

Vicarious liability means that a party who owes a nondelegable duty remains liable for the negligent acts of others. *Simmons v. Tuomey Regional Medical Center*, 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000) (holding hospital vicariously liable for alleged negligence of independent contractor providing medical services in the emergency department). In this case, this nondelegable duty is further bolstered by the unambiguous language in the Act. Whether a supervising physician must be present in the Emergency Department under the Physician Assistant Practice Act is irrelevant to whether the supervising physician (or in this case, the Governmental Hospital that employs the supervising physician) is vicariously liable for the alleged negligence of the physician's assistant they are supervising.

Vicarious liability does not require the presence of the principal at the locus of the negligent act. *See Wesley v. Holly Hill Lumber Co.*, 211 S.C. 40, 48, 43 S.E.2d 619, 622 (1947) (employer liable for faulty cable); *Conner v. Farmers and Merchants Bank*, 243 S.C. 132, 139-40, 132 S.E.2d 385, 388-89 (1963) (landlord vicariously liable to tenant for fall caused by floor negligently repaired by contractor); *Jenkins v. E. L. Long Motor Lines, Inc.*, 233 S.C. 87, 95-100, 103 S.E.2d 2d 523, 527-29 (1958) (common carrier vicariously liable for injuries caused when an unsecured load shifted during transport). The physical presence of the supervising physician in the emergency room is not required to establish the vicarious liability of TRMC's physician.

Similarly, whether the standard of care was breached or not is not germane to the legal question raised in the Plaintiff Motion for Partial Summary Judgment or the Court's ruling. In the February 9, 2022 Order, this Court simply held that:

> The South Carolina Physician Assistants Practice Act clearly and unambiguously establishes an agency relationship between a supervising physician and a physician's assistant. A physician's assistant cannot practice unless a supervising physician has accepted responsibility for the medical services rendered by the physician assistant. Where an agency relationship exists, the principal is independently responsible for the acts and omissions of the agent. Accordingly, the TRMC supervising physician on duty on August

> 12, 2016 is responsible for the medical care Ms. Livingston received and TRMC cannot reduce its liability cap by claiming that the acts and omissions that injured Ms. Livingston were conducted by a physician's assistant rather than a licensed physician. The very authority that permits a physician assistant to practice in TRMC's emergency room requires that he or she only do so as the agent of a supervising physician who as accepted responsibility for the medical services rendered. Because the supervising physician is 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. S.C. Code Ann. §15-78-120(a)(3) and (4). Accordingly, the Plaintiff's Motion for Partial Summary Judgment is GRANTED.

(February 9, 2022 Order, p. 5 – footnotes omitted).

In making this ruling, the Court did not find, nor did it need to find, that there was no question of fact regarding the standard of care. The Court merely held that if the Plaintiff can prove that the standard of care was breached by TRMC's physician's assistant, then under the unambiguous terms of the Act, the supervising physician would be vicariously liable for the acts of his agent and the applicable liability cap in the Tort Claims Act would be governed by S.C. Code Ann. §15-78-120(a)(3) and (4).

The purpose of Rule 59(e), SCRCP to alter or amend a judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); *Collins Music Col, Inc. v. IGT*, 353 S.C. 559, 562, 579 S.E.2d 524, 525 (Ct. App. 2002). The Court has considered all arguments raised by TRMC in its original memorandum of law and made at oral argument, as well as the arguments raised in TRMC's Rule 59(e), SCRCP motion and after due consideration of all, denies the arguments made and denies this Rule 59(e), SCRCP motion.

**IT IS SO ORDERED.**

Entered this This ___ day of May, 2022
Orangeburg, South Carolina

Edgar W. Dickson
Circuit Court Judge
1st Judicial Circuit

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. 2018-CP-38-01039

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

NOTICE OF APPEAL

Appellant, The Regional Medical Center of Orangeburg and Calhoun Counties, appeals the attached Orders of the Honorable Edgar J. Dickson: 1) Order Granting Plaintiff's Motion for Partial Summary Judgment, dated February 8, 2022, and filed February 9, 2022, and 2) Order Denying Defendant's Motion for Reconsideration or To Alter or Amend the Court's February 9, 2022 Order, dated and filed on May 16, 2022. Appellant received written notice of entry of the latter on May 16, 2022.

June 9, 2022

Michael C. Tanner

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Attorneys for The Regional Medical Center of Orangeburg and Calhoun Counties

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-38-01039

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**



**PROOF OF SERVICE**

**I certify that I have served the Notice of Appeal on Malcolm E. Livingston, Jr., by depositing a copy of it in the United States Mail, postage prepaid, on June 9, 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.**

June 9, 2022

Michael C. Tanner

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Orangeburg and Calhoun Counties

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Clyde C. Dean, Jr.
Post Office Box 1405
Orangeburg, SC 28115

Attorneys for Respondent

Orangeburg Common Pleas

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So Ordered

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| Defendant, | ) | |

This matter came before the Plaintiff's Motion for Partial Summary Judgment on the issue of whether Defendant can reduce its liability cap under the South Carolina Tort Claims Act ("TCA") by claiming that the acts and omissions that allegedly caused the injury to the Plaintiff were committed by physician's assistant rather than a licensed physician. The matter was heard by the undersigned on November 1, 2021. Marion C. Fairey, Jr. appeared and argued on behalf of the Plaintiff. Michael Tanner appeared and argued on behalf of the Defendant.

The undisputed facts relevant to this motion are that on August 12, 2016, Rebecca Livingston was involved in an automobile accident. She was taken from the scene of the wreck by ambulance to the Emergency Department at the Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC"). Although there were licensed physicians present in the Emergency Department on August 12, 2016, while in the Emergency Department, Ms. Livingston's care was managed by a physician's assistant employed by TRMC. There is no licensed physician listed or identified anywhere in Ms. Livingston's medical record for August

12, 2016. After being treated and evaluated, Ms. Livingston was discharged home from the TRMC Emergency Department by the physician's assistant.

In the early morning hours of August 13, 2016, Ms. Livingston returned to the TRMC Emergency Department because she could not move her legs. This time, she was seen by a licensed physician who determined that Ms. Livingston was suffering from a spinal hematoma. Ms. Livingston was emergently transferred to the nearest Level I trauma center, Palmetto Richland Memorial. Unfortunately, by the time she arrived there, she had already lost all sensation below her T-8 vertebra. She was diagnosed with paraplegia, secondary to spinal cord injury. She passed away twenty months later.

Plaintiff, Malcolm Livingston, brought these three actions (Loss of Consortium – 2018-CP-38-01036; Survival – 2018-CP-38-01038; and Wrongful Death – 2018-CP-38-01039) against TRMC on his own behalf and as the personal representative of his deceased wife, Rebecca Livingston, alleging that Ms. Livingston was paralyzed and ultimately perished as a result of TRMC's failure to diagnose and timely treat the spinal hematoma when Ms. Livingston presented at the TRMC Emergency Department on August 12, 2016. TRMC denies these allegations and contends that the employees in its Emergency Department acted within the applicable standard of care. Additionally, TRMC alleges that it is a governmental entity whose liability for medical negligence exists solely under the South Carolina Tort Claims Act. Further, TRMC alleges that because Ms. Livingston's care was provided by a non-physician (physician's assistant) on August 12, 2016, rather than a physician, its liability in this case is capped at $300,000.00 per claim and $600,000.00 per occurrence.

Under the Tort Claims Act ("TCA"), governmental entities enjoy a general liability cap of $300,000.00 per claim with a $600,000.00 liability cap per occurrence, regardless of the

number of agencies or claims involved. S.C. Code Anno. §15-78-120(a)(1) and (2). However, recognizing that medical malpractice cases involve "significantly higher damages" the legislature raised the liability limits for government employed physicians and dentists, effective on January 1, 1989. S.C. Code Anno. §15-78-20(g). Accordingly, the liability limit under the TCA is $1,200,000.00 for the tort of a "licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession." S.C. Code Anno. §15-78-120(a)(3) and (4).

In this case, TRMC takes the position that because they staffed their Emergency Department with a physician's assistant and Ms. Livingston was only seen by that physician's assistant (and not a physician), that its liability in this case is limited to $300,000.00 per claim and $600,000.00 for all claims arising from that occurrence rather than the $1,200,000.00 medical malpractice cap. In other words, TRMC asserts that because it provided a physician's assistant rather than a physician to care for Ms. Livingston in its Emergency Department, its liability under the TCA is limited to $600,000.00.

In South Carolina, physician's assistants' authority to practice medicine is governed by the South Carolina Physician Assistant's Act. S. C. Code Anno. §40-47-905, et seq. Under the Physician's Assistants Act, a physician's assistant must be supervised by a licensed physician and may only perform those medical acts contained in a written scope of practice. S. C. Code Anno. §40-47-935(1). Additionally, a physician's assistant is only authorized to provide medical services under the supervision of a licensed physician who has expressly accepted responsibility for the medical services rendered by the physician's assistant. Under State law, the physician's assistant who provided services to Ms. Livingston was only able to do so because he or she was acting under a physician's supervision and under a written scope of practice.

Specifically, under the South Carolina Physician' Assistants Practice Act (in effect in August of 2016), a physician assistant

> may perform: (1) medical acts, tasks, or functions with written scope of practice guidelines under physician supervision; (2) those duties and responsibilities, including the prescribing and dispensing of drugs and medical devices, that are lawfully delegated by their supervising physicians. However, only physician assistants holding permanent license may prescribe drug therapy as provided in this article.
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> **A physician assistant is an agent of his or her supervising physician in the performance of all practice related activities including, but not limited to, the ordering of diagnostic, therapeutic, and other medical services.**"

(Emphasis supplied).

Under the Act, a "Physician supervisor" is a "South Carolina licensed physician currently possessing an active, unrestricted permanent license to practice medicine in South Carolina who is approved to serve as a supervising physician for no more than three full-time equivalent physician assistants. The physician supervisor is the individual who is responsible for supervising a physician assistant's activities." S.C. Code Anno. §40-47-910(7). "Supervising means overseeing the activities of, **and accepting responsibility for**, the medical services rendered by a physician assistant as part of a physician-led team in a manner approved by the board." S.C. Code Anno. §40-47-910(8) (emphasis supplied). Under the plain language of the statute, 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.

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*Id, 628 S.E.2d at 880; citing, Service Life & Health Ins. Co.*, 220 S.C. 198, 66 S.E.2d 816, 817 (1951); *see also, Jones v. Elbert*, 211 S.C. 553, 558, 34 S.E.2d 796, 798 (1945).

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[1] "No person may recover in any action or claim brought hereunder against any governmental entity and caused by the tort of any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, a sum exceeding one million two hundred thousand dollars because of a loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved."

[2] "The total sum recovered hereunder arising out of a single occurrence of liability of any governmental entity for any tort caused by any licensed physician or dentist, employed by a governmental entity and acting within

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Edgar W. Dickson
Circuit Court Judge, 1st Judicial Circuit

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| | ) | IN THE COURT OF COMMON PLEAS |
| ORANGEBURG COUNTY | ) | 5TH JUDICIAL CIRCUIT |
| Malcolm E. Livingston, Jr. as the Personal Representative of the Estate of Rebecca E. Livingston and personally,<br><br>Plaintiff,<br><br>v.<br><br>The Regional Medical Center of Orangeburg and Calhoun Counties<br><br>Defendant, | ) | Case No. 2018-CP-38-01036<br>Case No. 2018-CP-38-01038<br>Case No. 2018-CP-38-01039<br><br>**Order Denying Defendant's Motion for Reconsideration or To Alter or Amend the Court's February 9, 2022 Order** |

This matter is before the Court on the Motion of the Defendant, the Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC") to Reconsider the Court's February 9, 2022 Order which granted partial summary judgment to the Plaintiff.

**Standard of Review**

Rule 59(e), SCRCP provides a mechanism for a party to request that a court review a prior order. In clarifying Rule 59(e), SCRCP, the South Carolina Supreme Court stated that

> it is proper to view a Rule 59(e), SCRCP Motion not only as a vehicle to request the trial court "alter or amend the judgement," but also as a vehicle to seek "reconsideration" of issues and arguments. A Motion under Rule 59(e) long has been viewed as a "Motion for Reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its prior decision even if it means rehashing all or part of an argument previously presented.

*Elam v. S. C. Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-779 (2004). A party may wish to raise issues in a Rule 59(e) motion that they feel the court may have misunderstood or failed to fully consider. *Elam*, 361 S.C. at 25, 602 S.E.2d at 780. However, a party must file a Rule 59(e) motion to preserve for appeal an issue or argument that has been raised but not ruled on. *Id*

**Discussion**

The Defendant's Motion to Reconsider this Court's February 9, 2022 Order raises the same arguments previously raised in opposition to the underlying summary judgment motion. Specifically, the Defendant argues that because there are questions of material fact as to (1) whether the attending physician must be present in the Emergency Department under the Physician Assistant Practice Act ("the Act"), and (2) whether the Defendant breached the standard of care, the Plaintiff is not entitled to partial summary judgment.

The Court's February 9, 2022 Order decided a simple legal issue: whether under the Physician Assistant's Practice Act (hereinafter the "Act"), a supervising physician is vicariously liable for the negligence of a physician's assistant that is practicing under their supervision. If so, is the $1,200,000 liability cap for physicians under the Tort Claims Act applicable in this case?

This Court ruled that under the Act, a physician's assistant is only allowed to practice if a supervising physician has "accepted responsibility" for the physician's assistant (*see*, S.C. Code Ann. § 40-47-910(8)) and has agreed that the physician's assistant is the agent of the supervising physician "in the performance of all practice related activities . . ." S. C. Code Ann. § 40-47-935 (Supp. 2016). Because the statutory scheme required a principal/agent relationship between a supervising physician and his physician's assistant, the Court ruled that the principal was independently responsible for the acts and omissions of the agent. The facts necessary to reach this conclusion are that (1) the Plaintiff was treated by a physician's assistant in the Defendant's Emergency Room; (2) the physician's assistant was properly licensed under the Act and had a supervising physician; (3) the negligent act or omissions as alleged by the Plaintiff occurred during this treatment. None of these facts are disputed by TRMC.

Vicarious liability means that a party who owes a nondelegable duty remains liable for the negligent acts of others. *Simmons v. Tuomey Regional Medical Center*, 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000) (holding hospital vicariously liable for alleged negligence of independent contractor providing medical services in the emergency department). In this case, this nondelegable duty is further bolstered by the unambiguous language in the Act. Whether a supervising physician must be present in the Emergency Department under the Physician Assistant Practice Act is irrelevant to whether the supervising physician (or in this case, the Governmental Hospital that employs the supervising physician) is vicariously liable for the alleged negligence of the physician's assistant they are supervising.

Vicarious liability does not require the presence of the principal at the locus of the negligent act. *See Wesley v. Holly Hill Lumber Co.*, 211 S.C. 40, 48, 43 S.E.2d 619, 622 (1947) (employer liable for faulty cable); *Conner v. Farmers and Merchants Bank*, 243 S.C. 132, 139-40, 132 S.E.2d 385, 388-89 (1963) (landlord vicariously liable to tenant for fall caused by floor negligently repaired by contractor); *Jenkins v. E. L. Long Motor Lines, Inc.*, 233 S.C. 87, 95-100, 103 S.E.2d 2d 523, 527-29 (1958) (common carrier vicariously liable for injuries caused when an unsecured load shifted during transport). The physical presence of the supervising physician in the emergency room is not required to establish the vicarious liability of TRMC's physician.

Similarly, whether the standard of care was breached or not is not germane to the legal question raised in the Plaintiff Motion for Partial Summary Judgment or the Court's ruling. In the February 9, 2022 Order, this Court simply held that:

> The South Carolina Physician Assistants Practice Act clearly and unambiguously establishes an agency relationship between a supervising physician and a physician's assistant. A physician's assistant cannot practice unless a supervising physician has accepted responsibility for the medical services rendered by the physician assistant. Where an agency relationship exists, the principal is independently responsible for the acts and omissions of the agent. Accordingly, the TRMC supervising physician on duty on August

> 12, 2016 is responsible for the medical care Ms. Livingston received and TRMC cannot reduce its liability cap by claiming that the acts and omissions that injured Ms. Livingston were conducted by a physician's assistant rather than a licensed physician. The very authority that permits a physician assistant to practice in TRMC's emergency room requires that he or she only do so as the agent of a supervising physician who as accepted responsibility for the medical services rendered. Because the supervising physician is 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. S.C. Code Ann. §15-78-120(a)(3) and (4). Accordingly, the Plaintiff's Motion for Partial Summary Judgment is GRANTED.

(February 9, 2022 Order, p. 5 – footnotes omitted).

In making this ruling, the Court did not find, nor did it need to find, that there was no question of fact regarding the standard of care. The Court merely held that if the Plaintiff can prove that the standard of care was breached by TRMC's physician's assistant, then under the unambiguous terms of the Act, the supervising physician would be vicariously liable for the acts of his agent and the applicable liability cap in the Tort Claims Act would be governed by S.C. Code Ann. §15-78-120(a)(3) and (4).

The purpose of Rule 59(e), SCRCP to alter or amend a judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); *Collins Music Col, Inc. v. IGT*, 353 S.C. 559, 562, 579 S.E.2d 524, 525 (Ct. App. 2002). The Court has considered all arguments raised by TRMC in its original memorandum of law and made at oral argument, as well as the arguments raised in TRMC's Rule 59(e), SCRCP motion and after due consideration of all, denies the arguments made and denies this Rule 59(e), SCRCP motion.

**IT IS SO ORDERED.**

Entered this This ___ day of May, 2022
Orangeburg, South Carolina

Edgar W. Dickson
Circuit Court Judge
1st Judicial Circuit

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| STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | |
| MALCOLM E. LIVINGSTON, JR., et al | NO. 2018-CP-38-01038 |
| VS. | TRANSCRIPT OF RECORD |
| REGIONAL MEDICAL CENTER OF ORANGEBURG and CALHOUN COUNTIES | |

B E F O R E:

The Honorable Edgar W. Dickson, Judge

Orangeburg, South Carolina

DATE: Monday, November 1, 2021

10:04 A.M.

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Official Court Reporter

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INDEX TO WITNESSES

(No witnesses called.)

INDEX TO EXHIBITS

(No exhibits marked.)

-- P R O C E E D I N G S --

THE COURT: It looks like the next one on my list is Malcolm Livingston v. the Regional Medical Center. And since I see Mr. Tanner here, I feel like it must still be going on.

Mr. Fairey.

ATTORNEY FAIREY: Yes, Your Honor.

THE COURT: How are you?

ATTORNEY FAIREY: Good morning, Your Honor.

THE COURT: And this is a motion to compel?

ATTORNEY FAIREY: The motion to compel, Your Honor, has been resolved.

THE COURT: Okay.

ATTORNEY FAIREY: We just have the motion for summary judgment, partial summary judgment.

THE COURT: So motion to compel has been resolved. And this is the plaintiff's motion for summary judgment?

ATTORNEY FAIREY: For partial summary judgment.

THE COURT: Partial summary judgment.

ATTORNEY FAIREY: It's a legal issue in the case.

THE COURT: Always an interesting thing to have in a lawsuit.

ATTORNEY FAIREY: It is. May it please ---

THE COURT: Bare with me just one second, Mr. Fairey.

ATTORNEY FAIREY: Certainly.

THE COURT: And this is case no. 2018-CP-38-01038. And,

Mr. Fairey, this is your motion?

ATTORNEY FAIREY: It is, Your Honor.

THE COURT: Yes, sir.

ATTORNEY FAIREY: The motion was filed in that case. There are actually two other companion cases that go with this. And the other issue, I want to raise before we get started. We had asked for a continuance on this and a status conference. We need to set a date certain for this and wanted to just bring that to Your Honor's attention.

THE COURT: You want a continuance on?

ATTORNEY FAIREY: No, no, no. We had asked for a continuance, I think, back in September.

THE COURT: Okay.

ATTORNEY FAIREY: And there was an order that was signed, and it said for the purpose of having a status conference. And that ---

THE COURT: Okay. So we still need to set that?

ATTORNEY FAIREY: We need that, yes, sir, to get a date certain set.

THE COURT: All right. And Mr. Tanner is becoming my expert in dates certains in 2022.

ATTORNEY TANNER: Yes, sir. I briefly talked to Bud, and I told him that Your Honor has set a few more for me. And what I can do is share -- get with Ms. Cathy and confirm the dates that we've already set, and the other dates. And then if it suits the

Court, do like we did in the other ones, and just Bud and I agree after we confer with our expert and pass them up to Your Honor.

THE COURT: Yeah, if y'all will do that. You've got the dates. And I think if y'all will just check with Cathy. She's not in this week, so good luck. But other than that, no. If y'all will do that, we can go ahead and set the date. I mean, I think we set one in January and one in February. Is that right?

ATTORNEY TANNER: And then one in April. Yes, sir.

THE COURT: And one in April.

ATTORNEY TANNER: So I think you set three.

THE COURT: It seems like it was three.

ATTORNEY TANNER: It seems like every time I turn around, it keeps going.

THE COURT: It will be a busy 2022 for you.

ATTORNEY TANNER: Yes, sir. Yes.

THE COURT: Okay. So we'll do that.

ATTORNEY FAIREY: Yes, Your Honor. I think we'll probably need an amended scheduling order, too, because we're still trying to take some depositions.

ATTORNEY TANNER: Yeah. I'm happy -- we can put all those in there.

THE COURT: Y'all do that. If you run into an argument about the date, y'all can just call me, and we'll have a status conference. But usually Cathy can resolve it.

ATTORNEY FAIREY: Thank you, Your Honor.

THE COURT: Thank y'all. All right, Mr. Fairey.

ATTORNEY FAIREY: May it please the Court. Your Honor, the question that we're raising in this motion for partial summary judgment is whether, in a nutshell, whether a tort claim entity can limit its liability cap to 300/600 by using a physician's assistant in its emergency room rather than a licensed physician.

As Your Honor, I'm sure, knows, Tort Claims Act has a general liability cap and then a special one for medical malpractice actions. And I think the sticking point here is that the medical malpractice one refers specifically to licensed physicians. Licensed physicians have a separate cap of 1.2 million per incident and per occurrence.

In this case, Mrs. Livingston, who is deceased, was in a car wreck. She was brought by ambulance to the TRMC Emergency Room, and the only provider that saw her was a physician's assistant, an employed-by-the-hospital physician's assistant.

At his deposition, the physician's assistant said he was solely responsible for her care, and he cannot remember who the doctor was in the emergency department that day. And, of course, a physician's assistant has to have been a doctor present, especially in the emergency room.

Mrs. Livingston checked in complaining of neck and back pain after a car wreck. The complaint alleges that when she was discharged she had not been able to walk; she had complained of pain, and her family complained of pain; she was removed from the

hospital in a wheelchair and lifted into a truck; that the pain increased and got worse; that she had numbness in her legs.

She reported back to the hospital hours later and, of course, at that point it was discovered that she had a spinal hematoma. She was taken by ambulance to Columbia. They tried to do emergency surgery up there, but by that time it was too late and she became a paraplegic, below T8.

There are disputes in this case, certainly, about the standard of care; about causation; but everyone, I think, agrees that the injury that Mr. Ms. Livingston suffered was catastrophic; it was devastating. And that's why this issue about which liability cap applies, and so forth.

And, quite frankly, Your Honor, if the hospital's position on this is correct, it's just a great injustice. But that's what they want to do. They want to say because she was only seen by a physician's assistant in the emergency room, that they can reduce their liability to her family by 75 percent.

The key component of this, Your Honor, is the South Carolina Physician Assistants Act. That is what gives a physician's assistant the authority to provide medical services in South Carolina. And under the South Carolina Physician Assistants Act, as it existed at this time, which was in 2016, it specifically says that "a physician's assistant is an agent of his or her supervising physician in the performance of all practice-related activities." The Act, 40-47-910(7) and (8), defines a

supervising physician as "a South Carolina licensed physician approved to serve as a supervising physician who is responsible for the physician assistant's activities." It goes on to define supervising as "overseeing the activities of, and accepting responsibility for, the medical service rendered by a physician's assistant." So not only does the statute specifically say that a physician assistant is an agent of the supervising physician, it goes on to say that the supervising physician must accept responsibility for the actions of the physician's assistant.

So we think that it's set out clearly in the act that there would be liability on the physician in this case. Even though the physician's not identified in the medical record and the hospital, to date -- that's one of the issues we resolved, but to date -- the hospital hasn't told me who the physician was in the emergency room.

But under South Carolina Agency Law, clearly a principal is liable for the acts and omissions of his agent. I think that's pretty straightforward. In this case, the statute specifically says that the physician assistant is the agent of the physician.

And additionally, Your Honor, we think that in 1988 when the legislature changed the liability caps for medical malpractice actions, they specifically had in mind that it needed to have a higher cap in medical malpractice cases because of the -- certainly the higher range of damages that can occur because of medical malpractice.

In this case, Your Honor, it would just be egregious for the hospital to say "We are going to staff our emergency room with someone who's less qualified than a physician even though they're licensed with the state and DEHEC requires them to have a physician in their emergency room, but we're going to staff it with a PA, and then whatever the PA does, he can do on his own without -- you know, he can basically do everything a doctor can do, but if he does it wrong, then he's only responsible for 25 percent of the liability."

Your Honor, in this case, Ms. Livingston didn't choose to be treated by a physician assistant. She was in a car wreck. She showed up in an ambulance on a board. They provided care to her. They chose to do it with a physician's assistant. They can't do that under the statute without there being a doctor responsible for it. And we're just simply asking, Your Honor, that the hospital recognize that a doctor has to be responsible for this.

THE COURT: Okay. Thank you, Mr. Fairey.

Mr. Tanner.

ATTORNEY TANNER: May it please the Court, Your Honor.

THE COURT: Yes, sir.

ATTORNEY TANNER: We had filed our affidavit of our expert, Dr. Thomas Coleman, last week, as well as our memorandum in all three.

THE COURT: Yes, I've got that.

ATTORNEY TANNER: Okay. Respectfully, Your Honor, these are

issues that the trial judge will have to hear. And here, after all of the testimony, there's definitely a dispute of fact here. There's dispute of how the statute is written versus how it's enacted in real life. Obviously, as you know, for summary judgment, all inferences are geared towards the nonmoving party.

In this case, we also have the application of the Tort Claims Act, which the legislature said needs to be construed liberally to limit the liability of the state.

THE COURT: Isn't that an interesting phrase that they came up with, "construed liberally" to reduce the coverage? I like that.

ATTORNEY TANNER: I do, too.

THE COURT: I've got legislatures here. We'll start to call him as an expert. Go ahead.

ATTORNEY TANNER: Your Honor, obviously first and foremost, there is no South Carolina appellate court case saying that the statute, that supervision under the statute means "X." However, my expert has opined that supervision is not what Mr. Fairey means. And, in particular, in Paragraph 5(K) of Dr. Coleman's affidavit, he says it does not mean that a physician has to go over the treatment plan, the diagnosis that the PA makes, the decision of a PA to order some tests, not other tests; and then finally, ultimately, the decision of a PA to either admit or discharge a patient.

The whole reason that we have PAs in the country, and not

just in this state, is because, frankly, there's not enough physicians. And this is not a case where, kind of akin to a lawyer and a paralegal, a paralegal can't act independently. Here, a PA can.

And the way they have it in Orangeburg, which is not different than most other hospitals, is there is a supervising physician listed. There was an M.D. present in the ED that day. It just happened that the PA, Mr. Carothers, didn't run anything by the M.D., which is certainly his prerogative. He testified that there was no physician involved with the care and treatment of Ms. Livingston. And that certainly is what the legislature has allowed by having PAs practice.

And so plaintiff's expert said he's not really familiar and hadn't read our statute in a while, so that's sort of another difference.

I think in order to enact the plaintiff's meaning of what this supervision requirement would mean, literally it would defeat the whole purpose of having midlevel providers, physician's assistants/nurse practitioners, because literally they would have to run everything through an M.D. before they were able to do anything which, again, the whole reason we have them in the first place is there's not enough physicians around.

So there's certainly nothing improper about the hospital having a physician. Again, the way that the tort claim's physician piece is triggered under 15-78-120 for liability

insurance is fundamentally there has to be a doctor-patient relationship, and we don't have that in this case. We have a PA-patient relationship. And so that coverage that Mr. Fairey cited in 15-78-120 cannot be triggered because, again, no physician actually laid hands on the patient; was involved.

I know Mr. Fairey has a case from California that he cited. And it's factually different. There was actually an M.D. there that was involved in the individual's treatment plan and in their care. It actually signed off on the PA's notes. So we certainly have a different situation. That's also not a governmental or tort claim type case like we have here.

So based on the facts as we have them -- and again, my expert, I think, clearly has a mere scintilla, if not more, that there's a factual dispute. And again, I think the trial judge, whoever that may be, is going to have to hear all that and then make a ruling as a matter of law based on the evidence that he or she hears whether or not the PA statute is triggered to the degree that it creates some sort of agency doctrine on the hospital under the Tort Claims Act.

But we feel, based -- at this time, respectfully, clearly that's a murky issue; clearly that's an issue of law; that, after hearing the testimony of the parties and evaluating the credibility, the trial judge is going to have to factor all that in mind.

THE COURT: You're basically saying that this just needs to

be heard by the trial judge?

ATTORNEY TANNER: Yes, sir. You made it more succinct than I was able to do but, essentially, yes.

THE COURT: Let me ask you, just because I'm curious. A doctor hires a physician's assistant in his office. Somebody comes in; the physician's assistant does something, you know, orders medication or whatever, and and then something goes wrong. Isn't doctor liable for that?

ATTORNEY TANNER: It depends if they're, again, a governmental owned practice or a private practice.

THE COURT: Let's say it's a governmental owned practice.

ATTORNEY TANNER: I would say not unless they have personal involvement or signing off on the chart or interacting with the PA. Again, some of these PAs will share more with the doctor, will run things by them, and there's more of a relationship between the physician and the PA about the treatment plan for a patient.

THE COURT: So your argument is, I've got a friend of mine who is in private practice but he works at MUSC, so he would be, I guess, a government?

ATTORNEY TANNER: Yes. And the way I understand, they'll have to have their practice group at MUSC.

THE COURT: Right. And so if he's going to have to actually come into contact with that patient of his at that time that the physician's assistant deals with it. I mean, if it was his

regular patient, if the physician's assistant handled it at that time without signing off, he'd be out of it; he'd be safe.

ATTORNEY TANNER: I believe so, unless, again, he had some personal involvement for that day in question. Now, again, if they allege that he had done something wrong earlier and he signed off on it.

THE COURT: Okay.

ATTORNEY TANNER: But, again, what we have in this case is no physician saw the patient critically in the ED, and no patient signed off on any chart. So, again, there's nothing that can start a physician-patient relationship to trigger the higher cap under the Tort Claims Act.

THE COURT: The factual statements that you and Mr. Fairey make in your briefs, is there anything inaccurate in the factual statements that y'all made offhand that you can think of?

ATTORNEY TANNER: Not that I can think.

THE COURT: Okay. Let me just ask another side question. I know that -- and do not get me wrong, I love the argument for me to punt it, okay; let the trial judge handle it, which could end up being me. But, we'll see. My other question about that is, wouldn't it be better -- or, obviously you don't think it would be, but if I make the decision on this, then both of y'all would have the right to appeal it; correct?

ATTORNEY TANNER: That's certainly correct. Yes, sir. If you grant his wish, I can tell you where our next juncture will

be.

THE COURT: Yeah, yeah, yeah. So then I don't need to worry about putting it down for a trial certain, date certain anytime; right?

ATTORNEY TANNER: That would be correct also.

THE COURT: Okay. I just want to make sure I got it all in hand. Okay. Thank you, Mr. Tanner.

ATTORNEY TANNER: Thank you, Your Honor.

THE COURT: Mr. Fairey, he wants me to punt it and and let you just take this up with a trial judge, which ---

ATTORNEY FAIREY: Your Honor, I appreciate that. The problem is, if we punt it, however it's decided, six months from now, eight months from now, whenever we have a date certain, it's still going to the same place. You know, eventually it will be up on appeal, but at that point we will have spent money to travel experts in here, you know, all the jury stuff we have to do, all the exhibits and all that kind of stuff.

And it's a very simple, I think, legal question. And it doesn't matter what his expert thinks supervision means, and it doesn't matter what my expert thinks what supervision means, because the statute tells us what supervision means.

Supervision means, under the statute, "A physician's supervisor" -- and I'm reading from 40-47-910(7), means "a South Carolina licensed physician currently possessing an active, unrestricted permanent license to practice medicine in South

Carolina who is approved to serve as a supervising physician for no more three full-time equivalent physician assistants. Physician's supervisor is the individual who is responsible for supervising the physician assistant's activities."

And then the next definition it supervising. It tells us what it means. "Supervising means overseeing the activities of, and accepting responsibility for, the medical services rendered by a physician's assistant as part of a physician-led team in a manner approved by the board." So the statute's telling us what supervision means in this context.

And then it goes on to specifically state that a physician's assistant is the agent of his or her supervising physician in the care that they render.

Now, I understand the hospital wants to say, "But we'll just throw a physician assistant out there, and as long as they do what they do, they're the only one responsible. There's no doctor-patient relationship." Your Honor, that's just not so. The statute specifically creates an agency relationship. And certainly if there is a relationship with the agent, you know, under the law, the agency, black-letter law, there is also a relationship with the principal.

One other thing I would just throw out here. You know, we're talking about this. This is the American College of Emergency Physicians Guidelines Statement on the use of PAs in the emergency room. "Physician's supervision: PAs, NPs,

midlevel providers, should not perform independent, unsupervised care in the emergency department. This holds true regardless of state laws or hospital regulations. In the case of rural and underserved areas, supervision may require tele-health services or realtime offsite emergency physician consultations."

So the American College of Emergency Physicians is telling us, apart from all that that it doesn't matter what you can get away with under state law or what a hospital regulation might be, but the standard of care here is that the doctor has to provide supervision.

And just one last thing, Your Honor, briefly, about punting this down the road. This issue came up at a mediation. We were in a mediation, and obviously the difference between the caps shut that down. And so if we punt it down the road, we still have the problem of having to figure out it what the case might ultimately be worth or not worth.

If we have it now, at least we have something. Maybe we can talk some more, and maybe they'll be dead-set on taking it up and seeing what one of the appellant courts wants to do.

In this issue, on this very unique -- I guess it's not that unique but, you know, as far as I can tell, a unique situation as far as South Carolina law goes. The statute should govern. But if they don't think it does then, you know, we need to take that up and see what's going on. And I do think it is an absolute matter of law, just the application of the statutes to the case.

THE COURT: Okay. Thank you, Mr. Fairey. Okay. Y'all have actually given me an interesting issue, and I appreciate that.

ATTORNEY TANNER: We're here to help, Your Honor.

THE COURT: I know. I know. And I know you saw Jessica smiling at the thought of me having an interesting file.

ATTORNEY TANNER: I'm sure it made her day, too.

THE COURT: I made her day, too. Let me take this under advisement, and I'll get back to y'all. Thank y'all so much. I appreciate it.

(End of Transcript of Record)

CERTIFICATE OF REPORTER

I, Cathy J. Provost, Official Court Reporter for the Fourteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial/proceedings of the captioned case in the Court of Common Pleas for Orangeburg County, South Carolina, on the 1st day of November, 2021.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Date: March 8, 2022

/s/ Cathy J. Provost
Cathy J. Provost, RMR
Official Circuit Reporter

provider ask or should the triage criteria demand that the emergency physician see the patient.

Q And have you worked in facilities in the states you've practiced where you've had mid-level providers?

A All the time in my last ten years at the Toledo Hospital in Toledo, a hundred percent of the time at my 15 years or so at the Medical College of Georgia in Augusta. I cannot remember if -- I think we had mid-level providers at -- at the Fayette Memorial Hospital near Atlanta, but I just don't remember for sure.

Q Okay. Have you reviewed the South Carolina Physician Practice Act that the legislature had -- had in place at this time?

A I think maybe long ago, for another case, but certainly not recently.

Q Do you intend that -- to testify on any -- any part of the law to support your opinions?

MR. FAIREY: Object to the form.

THE WITNESS: I don't have any intent to do that now, but I guess if somebody wants me to review it and -- and opine about it I would be happy to do so.

BY MR. TANNER:

Q And, again, that was the evaluation by Mr. Caroothers, correct?
A Correct.
Q Anything that you saw in the record from August 12th where Mrs. Livingston complained to any of the nursing staff or Mr. Caroothers about any numbness in her legs?
A No, I didn't see anything documented in the record. There was actually not many nurse's notes about the repeated evaluations or anything on the patient's condition. So I didn't see anything documented.
Q Anything that you've seen documented in the record on August 12th about complaints of her inability to ambulate or walk?
A I did not see any complaints like that.
Q Anything you saw on the 12th documented about lack of movement or feeling in her legs?
A No. There's no documentation about that.
Q And, again, we know she came back early, I think in the morning of the next day, August 13th. Again, you don't have any criticism that Dr. Zulkey breached the standard of care in his work on the patient that day, correct?
A I do not.
Q The imaging that he ordered you feel was

able to act alone, or do they have to act under a specific scope of practice?

A Well, they act under a supervisory agreement. So I think there are some instances in which there is a long-distance supervisory agreement for office space practice, but in the emergency department it is physical presence that is required so that the mid-level provider can consult on an almost instantaneous basis with the emergency physician attending.

Q And in your experience as the emergency physician who is attending, are they responsible for the -- for the PAs that are working under them?

A Yes.

MR. TANNER: Object to form.

You can answer.

BY MR. FAIREY:

Q And you -- and your answer was yes?

A Yes.

Q Okay. And is that a legal relationship or a practical relationship or both?

MR. TANNER: Object to form.

You can answer.

THE WITNESS: I think it's definitely both. You know, an issue of -- of very, very minor problems, you have to weigh the -- the inner

Plaintiff,

v.

AFFIDAVIT OF THOMAS H. COLEMAN, MD, FACLP

The Regional Medical Center of Orangeburg and Calhoun Counties,

Defendant.

---

Malcolm L. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston,

Case No.: 2018-CP-38-01038

Plaintiff,

v.

The Regional Medical Center of Orangeburg and Calhoun Counties,

Defendant.

---

Malcolm L. Livingston, Jr., as the Personal Representative of the Estate of Rebecca E. Livingston,

Case No.: 2018-CP-38-01039

Plaintiff,

v.

Personally appeared before me, Thomas H. Coleman, MD, FACEP, who is my duly sworn deposes and states following to be true and correct:

1. My name is Thomas H. Coleman, MD, FACEP. I am over the age of 21, of sound mind and otherwise competent to this Affidavit, which I make based upon my background, education, training, and experience.

2. I am a Board-Certified Physician licensed in the State of South Carolina since 2011, and was temporarily licensed in the State of Illinois between 2008 and 2011. My further qualifications and background are set forth in the attached CV which is incorporated by reference.

3. I have actual knowledge and experience in the specialty and area of practice in which this opinion is given, as a result of my having been regularly engaged in the practice or clinical teaching of PA students during their rotations in the emergency department at The Regional Medical Center ("TRMC") between 2013 – 2015 as well as being Assistant Clinical Professor of Emergency Medicine for Virginia College of Medicine between 2014 – 2019. As of the date, I am an Emergency Physician at my own practice, Coleman Emergency Medicine, LLC.

4. I have reviewed the available records and/or documents relating to care and treating of Rebecca L. Livingston from TRMC and based upon my knowledge, training, and experience, it is my opinion, TRMC did not breach the accepted standard of care in their encounter with Ms. Livingston on 08/12/2016.

5. The following opinions expressed attain the level of beyond a reasonable degree of medical certainty:

a. On August 12, 2016, the Plaintiff's wife was involved in an automobile wreck on Chestnut Street in Orangeburg, South Carolina. The decedent was transported by ambulance from the scene of wreck to TRMC, where she was admitted to the Emergency Department ("ED") at around 12:45 p.m.

b. There, she was examined and diagnosed with back and neck sprain by PA Michael Carothers.

c. Ms. Livingston's family confirms that Ms. Livingston did ambulate in the ED prior to being discharged.

d. It appears Ms. Livingston did have help from the medical staff given that she had received Dilaudid for her pain and Benadryl to prevent distonic reaction that often accompanies the Reglan she was given.

e. Both Dilaudid and Benadryl are very sedating, and they can cause a risk of fall in elder people. Ms. Livingston did not have any neurologic complaints reported in her HPI or noted on her exam in the ED.

f. There is no record that Ms. Livingston complained about worsening symptoms such as numbness or weakness during her evaluation in the ED on August 12 or that there had been any change in her symptoms prior to being discharged. Ms. Livingston's family reports that Ms. Livingston ambulated to the bathroom just prior to discharge. So, Dr. Janiak's assertion that TRMC breached the standard of care by not having the patient ambulate prior to discharge is incorrect, as supported by the family. Thus, there is no breach in standard of care in this regard.

g. Further, it appears neither Ms. Livingston, nor the family informed the medical of any developing weakness or numbness prior to discharge to alert

[illegible] standard of care.

[illegible] constitutes a breach of standard of care.

i. Moreover, it appears Ms. Livingston was given an appropriate discharge instruction that informed her she should return immediately to the ED if she develops any weakness or numbness etc.

j. In South Carolina, PA supervision must not be construed necessarily requiring the physical presence of the supervising physician at the time and place where the services are rendered. See American Medical Association (AMA) Advocacy Resource Center, Physician assistant scope of practice, p.18 (2018) *referencing* PA Pract. Act 40-47-910, 955.

k. In South Carolina, a physician does not "supervise" a PA to the degree that the PA must report to the physician prior to a diagnosis being made and/or prior to the treatment being implemented, including the ordering of labs and tests and determining the need for admission or discharge.

6. For the reasons hereinabove, it is my opinion that TRMC did not breach the accepted standard of care in their encounter with Ms. Livingston. These opinions are expressed beyond a reasonable degree of medical certainty, more probable than not.

FURTHER AFFIANT SAYETH NOT.

Thomas H. Coleman MD, FACEP

Thomas H. Coleman, MD,

FACEP

Sworn to me before this 26 day
of October, 2021.

Notary Public for [illegible]
My Commission Expires: 2/8/22

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Oct 25 2022
SC Court of Appeals

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record of Appeal complies with Rule 210(g), SCACR.

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October 26, 2022