IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

_____

APPEAL FROM THE ORANGEBURG
COURT OF COMMON PLEAS

Edgar J. Dickson, Circuit Court Judge

_____
Case Number:

Case No. 2022-000809

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

v.

The Regional Medical Center of Orangeburg and Calhoun Counties Appellant.

FINAL BRIEF OF REPSPONDENT

Counsel for Respondent:

Marion C. Fairey, Jr.
4985 Savannah Highway
Post Office Box 661
Hampton, South Carolina 29924
(803) 943-6444

Clyde C. Dean, Jr.
Post Office Box 1405
Orangeburg, South Carolina 29116
(803) 534-5091

November 10, 2022
Hampton, South Carolina

Table of Contents

Table of Cases, Statutes and Regulations

Statutes

Regulations

Statement of Issues on Appeal

I. WHETHER UNDER THE PHYSICIAN ASSISTANTS PRACTICE ACT A SUPERVISING GOVERNMENTAL PHYSICIAN IS LIABLE FOR THE ALLEGED NEGLIGENCE OF A GOVERNMENTAL PHYSICIAN ASSISTANT PRACTING UNDER THEIR SUPERVISION, THUS TRIGGERING THE PHYSICIAN LIABILITY CAP UNDER THE SOUTH CAROLINA TORT CLAIMS ACT

Statement of the Case

On August 12, 2016, seventy-two-year-old Rebecca Livingston was involved in an automobile accident. (R. p. 2). She was taken from the wreck by ambulance to the Emergency Department at the Regional Medical Center of Orangeburg and Calhoun Counties (hereinafter "TRMC"). Id. Although there was a licensed physician present in the Emergency Department on that day, Ms. Livingston's care was managed by a licensed Physician's Assistant employed by TRMC. (R. p. 263, lines 5-12). There is no licensed physician listed or identified in Ms. Livingston's August 12, 2016 medical record. Id. Instead, the medical record indicates that Ms. Livingston's care was managed by a physician assistant. After being treated and evaluated by the physician assistant, Ms. Livingston was discharged and sent home. (R. p. 3).

In the early morning hours of August 13, 2016, Ms. Livingston was brought back to the TRMC Emergency Department because she could not move her legs. Id. This time, she was seen by a licensed physician who determined that Ms. Livingston was suffering from a spinal hematoma. Id. Ms. Livingston was emergently transferred to the nearest Level I Trauma Center, but by the time she arrived there, she had lost all sensation below her T-8 vertebra. Id. She was diagnosed with paraplegia, secondary to spinal cord injury. Id. She passed away twenty months later due to complications related to her paraplegia. Id.

Ms. Livingston's husband brought these three actions (loss of consortium, wrongful death and survival) against TRMC on his own behalf and as the personal

representative of his deceased wife on August 9, 2018. In these complaints, Mr. Livingston alleges that his wife was paralyzed as a result of TRMC's failure to diagnose and timely treat the spinal hematoma and that her paralysis ultimately led to her death on May 7, 2018. (R. p. 41).

In its Answer, TRMC denies these allegations and contends that its employees acted within the applicable standard of care in its treatment of Ms. Livingston. (R. p. 3). Additionally, TRMC alleges that it is a governmental entity whose liability for medical negligence exists solely under the South Carolina Tort Claims Act. Id. Further, TRMC alleges that because Ms. Livingston's care was provided solely by a licensed physician assistant rather than a licensed physician, its liability under the Tort Claims Act is capped at $300,000 per claim and $600,000 per incident. Id.

After discovery and an impasse at mediation, the Plaintiff filed a Motion for Partial Summary Judgment on September 10, 2021. (R. pp. 135-136) (R. pp. 137-144). This motion sought partial summary judgment on the issue of whether TRMC could avoid the higher caps for medical malpractice actions under S.C. Code Anno. §15-78-120 because it staffed its Emergency Department with a physician assistant who managed Ms. Livingston's care. (R. p. 2). The Plaintiff's Motion was heard by Circuit Court Judge Edgar Dickson on November 1, 2021 and on February 9, 2022, an Order was entered granting Plaintiff's Motion for Partial Summary Judgment. (R. pp. 2-7). Specifically, the Circuit Court 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 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 has 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. . . . Accordingly, the Plaintiff's Motion for Partial Summary Judgment is GRANTED.

(R. p. 6) (Citations omitted).

On February 18, 2022, the Defendant filed a motion under Rule 59(e), SCRCP seeking reconsideration of the February 9, 2022 Order. The Plaintiff filed its Memorandum in Opposition on April 20, 2022. (R. pp. 193-197). The Defendant's Motion was denied on May 16, 2022. (R. p. 23-26). The Defendant's Notice of Appeal was filed on June 10, 2022.

Standard of Review

An appellate court reviewing the grant of summary judgment applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Fleming v. Rose,* 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "Summary Judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* In determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. 350 S.C. at 494, 567 S.E.2d at 860 (citations omitted).

Argument

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 physicians S.C. Code Anno. §15-78-120(a)(3) and (4).

South Carolina regulations require that TRMC maintain a licensed physician in its Emergency Department.[1] Nevertheless, Ms. Livingston's medical record indicates that her care in the TRMC Emergency Department on August 12, 2016 was managed by a physician assistant. TRMC asserts that because a licensed physician was not involved in Ms. Livingston's care, its liability for the alleged negligence in Ms. Livingston's care is limited to $300,000.00/$600,000.00 for governmental employees rather than $1,200,000.00 for licensed physicians. S.C. Code Anno. §15-79-120.

The problem with TRMC's argument is that it is based upon the fiction that a licensed physician had no involvement in nor responsibility for Ms. Livingston's care.

[1] See S.C. Code S. C. Reg. 61-16 §1214(B)(3) requires as a minimum standard the requirement that a licensed physician "shall be available and on call at all times" for emergency services.

As the South Carolina Physician Assistants Practice Act (S.C. Code Anno. §40-47-910, et seq.) makes clear, a physician assistant is only allowed to practice as the agent of a supervising licensed physician who has expressly agreed to accept responsibility for the medical services rendered by the physician's assistant.

I. UNDER THE PHYSICIAN ASSISTANTS PRACTICE ACT A SUPERVISING GOVERNMENTAL PHYSICIAN IS LIABLE FOR THE ALLEGED NEGLIGENCE OF A GOVERENMENTAL PHYSICIAN ASSISTANT PRACTING UNDER THEIR SUPERVISION, THUS TRIGGERING THE PHYSICIAN LIABILITY CAP UNDER THE SOUTH CAROLINA TORT CLAIMS ACT

In South Carolina, a physician assistant may only practice as an agent of a licensed physician. S.C. Code Anno. §40-47-935. Under the version of the South Carolina Physician Assistants Practice Act (hereinafter "the Act") that was in effect on August 12, 2016, a physician 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 assistant.[2] S.C. Code Anno. §§40-47-910(8) and 40-47-938. The physician assistant who provided services to Ms. Livingston was only able to do so because he was acting under a physician's supervision who had expressly agreed to accept responsibility for the medical services provided by the physician assistant under a specific scope of practice.

[2] The South Carolina Physician Assistant Practice Act was initially enacted by the South Carolina Legislature in 2000. 2000 S.C. Acts 359 (S.B.1169). The Act was amended in 2006, 2006 S.C. Acts 244 (H.B.4015), and again in 2013. 2013 S.C. Acts 28 (S.B. 448). It is the 2013 version of the Act that was in effect on August 12, 2016.

Specifically, under the 2013 version 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.**"

S.C. Code Anno. §40-47-935. (Emphasis supplied).[3]

In addition to specifically establishing a principal/agent relationship between a supervising physician and a physician assistant, the Legislature expressly defined the terms "Physician Supervisor" and "Supervising" under the Act. A "Physician supervisor" is statutorily defined as 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

[3] The language contained in S.C. Code Anno. §40-47-935 that mandates that a physician assistant is an agent of his or her supervising physician was unchanged from the original Physician Assistant Practices Act of 2000 or the 2006 and 2013 amendments to the Act.

in a manner approved by the board." S.C. Code Anno. §40-47-910(8) (emphasis supplied).

Moreover, if this was not already clear enough, in the 2013 Amendment to the Physician Assistants Practice Act (2013 S.C. Acts 28 (S.B. 448)), the Legislature added S.C. Code Anno. §40-47-938(A) titled "Supervisory Relationships," which expressly stated:

> A physician currently possessing an active, unrestricted permanent license to practice medicine under the provisions of this chapter, **who accepts the responsibility to supervise a physician assistant's activities**, must enter into a supervisory relationship with a physician assistant licensed pursuant to this article, subject to approval of scope of practice guidelines by the board. The physician must notify the board, in writing, of the proposed supervisory relationship and include the proposed scope of practice guidelines for the relationship. Upon receipt of board approval, the physician assistant may begin clinical practice with the named supervising physician and alternate physicians.

Here, the very Act that gives the physician assistant the authority to act in a professional capacity and obtain a license to practice requires that those actions are governed by an agency relationship with a physician. The Act requires that a physician expressly "accept responsibility" and importantly, to "notify the board [of medical examiners], in writing, of the proposed supervisory relationship and include the proposed scope of practice guidelines for the relationship." S.C. Code Anno. §40-47-938. This court has previously held that the Legislature has the power to prescribe legal definitions by statute and those definitions are binding upon the courts. *Purvis v. State Farm Mutual Automobile Ins. Co.,* 304 S.C. 283, 288, 403 S.E.2d 662, 665 (Ct.App.1991). Under the statutory language of the Act and the definitions that are established therein, a licensed

physician assistant is the agent of his or her supervising physician and the supervising physician has expressly "accepted responsibility" for the services rendered by the physician assistant.

In South Carolina,

> A principal may be held liable to a third person in a civil lawsuit for the fraud, deceit, concealment, misrepresentation, negligence and other omissions of duty of his agent which occur within the scope of the agent's employment, even when the principal did not authorize, participate in, or know of such misconduct or even when the principal forbade or disapproved of the act in question. This rule is founded upon the 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 such 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 the agency. . . . Seeing that some one must be loser by deceit, it is more reasonable that he who employs and confides in the deceiver should be the loser than a stranger.

Spence v. Spence, 368 S.C. 106, 126-7, 628 S.E.2d 869, 879-80 (2006) (citations omitted). Accordingly, the Circuit Court correctly determined 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 only do so as the agent of a supervising physician who as accepted responsibility for the 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)[4] and (4).[5]

(R. p. 20).

Nevertheless, TRMC argues that the Circuit Court was in error because the alleged negligence in the case occurred under the care of a non-physician (physician assistant) rather than a licensed physician, TRMC's liability is limited to $300,000.00 per claim and $600,000 per occurrence under S.C. Code Anno. §15-78-120(a)(1) and (2). In support of its position, TRMC cites a district court decision in *Knox v. United States, et al.,* 2018 WL 3241931 (D.S.C., July 7, 2018).

Knox was a medical malpractice action brought against a number of medical providers, including a provider called the North Central Family Medical Clinic ("NCFMC") for which the United States was substituted as a Defendant under the Federal Tort Claims Act. 28 U.S.C.A. §2671, et seq. The Federal Tort Claims Act is the exclusive remedy for claims against torts committed by employees of the United States who were acting within the scope of their office or employment. 28 U.S.C.A. §2679(b)(1). When an employee of the United States is sued in their own name for torts

[4] "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."

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

allegedly committed within the scope of their employment, the Department of Justice steps in to defend the action. 28 U.S.C.A. §2679(c). If the Department of Justice certifies that the employee was acting within the scope of their office or employment with the United States government, the civil proceeding "shall be deemed an action against the United States under the provisions of this title . . . and the United States shall be substituted as the party defendant." 28 U.S.C.A. §2679(d)(1). Accordingly, prior to rendering the decision in *Knox*, it had been determined that NCFMC employees were employees of the United States such that the United States had been substituted as the proper party. *Knox v. United States,* n. 1.

Further, the matter before the court in *Knox* was the "motion of the United States' for partial summary judgment on the issue of damages" and specifically, whether under South Carolina law, NCFMC, which was a tax-exempt charitable organization providing medical care to underserved populations, was entitled to cap its liability under the South Carolina charitable immunity cap. *Knox v. United States,* p. 1. In its analysis, the district court noted in a footnote that an NCFMC employee who was a "physician's assistant, not a 'licensed physician,'" was limited to $300,000 per occurrence under the charitable immunity cap. *Knox,* n. 4. The opinion does not address the applicability of the Act or whether the physician assistant referred to in the footnote was acting independently or as the agent of a licensed physician. Nevertheless, TRMC cites this footnote as authority that its liability for the alleged negligence of a physician assistant is limited to $300,00.00 per occurrence under S.C. Code Anno. §15-78-120(a)(1).

What TRMC's argument fails to address is whether the NCFMC physician assistant employed by the United States Government is subject to the South Carolina Physician Assistant Practice Act whose practice is expressly limited to acting as the agent of a supervising physician. It is clear from the Act that she was not. Specifically, S.C. Code Anno. §40-47-915 provides that the Act" does not apply to a person: (1) who is employed as a physician assistant by the United States Government, where such services are provided solely under the direction or control of the United States Government." Unlike TRMC's physician assistant, the physician assistant in *Knox* would not have been required to obtain a South Carolina license and would not have been limited to practicing as the agent of a supervising physician who had accepted responsibility for medical services provided by her. Accordingly, *Knox* is inapposite because the physician assistant at issue was exempt from the Act and its requirements.

TRMC next argues that summary judgment was erroneously entered against it because there are questions of material fact. The Circuit Court correctly addressed this contention in its May 16, 2022 Order denying TRMC's Motion to Alter or Amend. Specifically, the Circuit Court noted:

> 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 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 or omissions as alleged by the Plaintiff occurred during this treatment. None of these facts are disputed by TRMC.

(R. pp. 24-25).

The question posed by TRMC of whether the standard of care requires that an attending physician be present in the Emergency Department under the Act is a red herring. First, the Circuit Court’s finding that the physician assistant is an agent of the supervising physician under the Act does not depend upon whether the supervising physician is present or not. Indeed, S.C. Code Anno. §40-47-955 provides that

> The supervising physician is responsible for all aspects of the physician assistant’s practice. Supervision must be continuous but **must not be construed as necessarily requiring the physical presence of the supervising physician at the time and place where the services are rendered**, except as otherwise required for limited licensees.

(Emphasis supplied). So, while the Act explicitly creates the agency relationship and imputes responsibility on the supervising physician for “all aspects of the physician assistant’s practice,” it does so without regard for whether the supervising physician is physically present or not. Id. Accordingly, whether the supervising physician is present or not is not material to the supervising physician’s liability under the Act.

Finally, regardless of whether this factual issue is material to the Circuit Court’s ruling, there is no dispute of material fact as to whether a licensed physician was present

in the TRMC Emergency Department on August 12, 2016. Indeed, TRMC has admitted that there was a licensed physician present in the Emergency Department on August 12, 2016 (R. p. 263, line 7). Had a licensed physician not been available in the Emergency Department on August 12, 2016, TRMC would have been in violation of the minimum standards for the licensing of hospitals by the South Carolina Department of Health and Environmental Control (hereinafter "SCDHEC"). SCDHEC specifically requires that

> B. Each hospital shall provide emergency services which include life-saving resuscitative and life-support procedures pending transfer of the critically ill or injured to other hospitals. . . .
>
> > 1. Equipment and services shall be provided to render emergency resuscitative and life-support procedures pending transfer of the critically ill or injured to other hospitals. . . . .
> >
> > 3. A licensed physician shall be available and on call at all times. A registered nurse and ancillary personnel trained in emergency procedures shall be on duty within the hospital who are available 24 hours a day subject to call to assist in providing emergency services.

S. C. Reg.61-16, §1214(B)(1-3).

Nevertheless, the presence or absence of the supervising physician TRMC's Emergency Department on August 12, 2016 is irrelevant to the ruling of the Circuit Court that under the Act, the supervising physician is vicariously liable for the acts and omissions of the physician assistant. (R. p. 6; R. p. 24). As the Circuit Court properly noted

> 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 contract 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.

(R. p. 25).

Similarly, TRMC argues that summary judgment was inappropriate because there are questions of fact as to whether Ms. Livingston had a physician/patient relationship with the supervising physician. Again, this conflates the facts that are generally necessary to prevail at trial in a medical malpractice case with the facts that are material to the Circuit Court's ruling. The Act establishes as a matter of law that a physician assistant may only practice as the agent of a supervising physician. Accordingly, any relationship established between the agent and the patient is binding on the supervising physician. *See, R & G Construction, Inc. v. Lowcountry Regional Transportation Authority,* 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct.App.2000) (where principal knowingly permitted another to appear to be his agent, he will be estopped to deny such agency to the injury of third persons).

Importantly, in this case, Ms. Livingston did not choose TRMC's Emergency Department. She was transported there emergently by EMS after she was involved in a motor vehicle accident. TRMC admitted her and provided her with emergency medical services. Unbeknownst to her, her care was provided by a physician assistant who, by law, could only practice as the agent of a licensed physician who had expressly accepted responsibility for the physician assistant.

Moreover, as an employee of governmental hospital, both the individual physician assistant and the individual supervising physician are immune from liability under the South Carolina Tort Claims Act for acts and omissions carried out in the scope of their employment. S.C. Anno. §15-78-70(1). Only TRMC has liability for the negligence of its employees under the Tort Claims Act and TRMC is the only proper party to this suit. Id. Accordingly, Mr. Livingston need only establish the physician/patient relationship with TRMC, not with any specific employee. Having provided a medical professional whose practice was specifically limited to that of an agent of a licensed physician, TRMC cannot be heard to deny the existence of a physician/patient relationship because the medical record does not indicate that a supervising physician actually laid hands on Ms. Livingston.

Other jurisdictions have similarly found the agency relationship between a supervising physician and a physician assistant sufficient to establish a physician/patient relationship. In *Cox v. MA Primary and Urgent Care Clinic,* 313 S.W.2d 240 at 253 (2010), the Tennessee Supreme Court relied on its own statutory provisions regarding the practice of physician assistants (which it noted was similar to the South Carolina Physician Assistant Practice Act) to hold that "a physician assistant stands in an agency relationship with his or her supervising physician when the physician assistant is providing authorized medical services within the scope of the party's joint protocol." The court went on to hold that under these circumstances, a supervising physician as well

as the practice that employs them could be vicariously liable for the physician assistant's negligence, if proven. Id.

Similarly, in *Lopez v. Ledesma,* 46 Cal.App.5th 980, 995-96, 260 Cal.Rprt.3d 386, 396 (Cal.App.5th 2020), *aff'd,* 46 505 P.3d 212, 290 Cal.Rptr.3d 532 (2022), a California appellate panel held that "once a supervisory relationship is established, the physician assistant acts as the agent of the supervising physician." *See also, Behr v. Anderson,* 491 P.3d 189, 204, 18 Wash.App.2d 341, 371 (Wash. Ct. App. 2021) (holding that under the Washington statutory scheme, an agency relationship is created between a supervising physician and a physician assistant).

Finally, TRMC argues that summary judgment was improper because there is a question of fact as to the proper standard of care. Again, this argument conflates facts necessary to generally prevail at trial with the material facts necessary to resolve this motion. The Circuit Court properly rejected this contention when it correctly noted that in making its 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)." (R. p. 26).

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 is 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 committed by a non-physician. The very authority that permits a physician assistant to practice in TRMC's emergency department requires that he or she only do so as the agent of a supervising physician who has accepted responsibility for the medical services rendered. The Circuit Court's Order granting partial summary judgment to the Plaintiff should be affirmed.

<signature page to follow>

Respectfully submitted,

s/Marion C. Fairey, Jr.

Marion C. Fairey, Jr. (SCB#64998)
THE FAIREY LAW FIRM
4985 Savannah Highway
Post Office Box 661
Hampton, South Carolina 29924
(803) 943-6444

s/Clyde C. Dean, Jr.

Clyde C. Dean, Jr. (SCB#1606)
THE DEAN LAW FIMR
146 Centre Street
Post Office Box 1405
Orangeburg, South Carolina 29116

November 10, 2022
Hampton, South Carolina

RECEIVED
Nov 14 2022
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

_____

APPEAL FROM THE ORANGEBURG
COURT OF COMMON PLEAS

Edgar J. Dickson, Circuit Court Judge

_____
Case Numbers:

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 Livingston and personally . . . . . Respondent,

v.

The Regional Medical Center of Orangeburg and Calhoun Counties Appellant.

Certification of Counsel – Rule 211(b),
SCACR

Th undersigned counsel certifies that the Respondent's Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

Marion C. Fairey, Jr. (SCB#64998)
THE FAIREY LAW FIRM
4985 Savannah Highway
Post Office Box 661
Hampton, South Carolina 29924
(803) 943-6444

Clyde C. Dean, Jr. (SCB#1606)
THE DEAN LAW FIRM
146 Centre Street
Post Office Box 1405
Orangeburg, South Carolina 28116
(803) 534-5091

November 11, 2022
Hampton, South Carolina