

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**SC Court of Appeals**

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2010-CP-10-3410

Dr. Cynthia Holmes, M.D.

Appellant,

v.

East Cooper Community Hospital, Inc.;  
Tenet HealthSystem Medical, Inc.,

Respondents.

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**INITIAL BRIEF OF APPELLANT**

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## STATEMENT OF ISSUES ON APPEAL

1. Do the opinions from *Strauss v. Marlboro County General Hospital* and its progeny preclude subject matter jurisdiction of The Circuit Courts where the Plaintiff is pursuing a cause of action other than a request for a due process review of a private hospital's credentialing decisions or bylaws?
  
2. Does *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986), limit the immunity granted to private hospitals regarding credentialing decisions, *Strauss v. Marlboro County General Hospital*, 185 S.C. 425, 194 S.E. 65 (1937) and its progeny to cases in which the Plaintiff seeks only a due process review of credentialing decisions of a private hospital and not other claims?
  
3. Does the South Carolina Circuit Court have jurisdiction over a claim for breach of a contract, where the contract was made, partially performed, and breached in South Carolina, and where the parties have opted, as a condition of the contract, to have disputes governed by South Carolina law?
  
4. Where the issue of subject matter jurisdiction had been decided by a Judge in a case, with finality, has that decision on that particular issue and argument become the law of the case or may the unsuccessful party raise the identical issue and argument at a later date before another Judge?

### STATEMENT OF THE CASE

The Appellant, Dr. Holmes, initiated this case on April 26, 2010, by filing and Serving a Summons and Complaint upon the Respondents, East Cooper Community Hospital, Inc.; Tenet HealthSystem Medical, Inc., (hereinafter referred to as ECCH). (Complaint) ECCH timely answered on September 17, 2010, (Answer) and thereafter filed an amended answer and motion to dismiss based on : 1) Lack of subject matter jurisdiction (On the grounds that this Court lacks subject matter jurisdiction to address a private hospital's staffing or privileging decisions" (Amended Answer/ Motion to Dismiss, Paragraph 49), 2) Failure to state a cause of action recognizable under S.C. law. "South Carolina law does not recognize a cause of action against a private hospital for its credentialing decisions concerning its medical staff." (Amended Answer, paragraph 50), 3) Collateral Estoppel (Amended Answer, Paragraph 51), 4) Res Judicata (Amended Answer, Paragraph 52), 5) Immunity under the SC statute and the Health Care Quality Improvement Act, "Plaintiff's claims are barred under S.C. Code ann. 40-71-10 and the Health Care Quality Improvement Act which provide immunity to the Defendants under the circumstances herein." (Amended Answer, Paragraph 56). The Answer included an attachment of hundreds of pages of copies of documents from prior litigation between the parties. ECCH filed a memorandum in support of its motions to dismiss (ECCH Memorandum in support of Motion to Dismiss). Holmes filed a responsive memorandum. (Plaintiff's Response to Defendant's Motion to Dismiss). Judge Dennis held a hearing on December 16, 2010, during which he denied ECCH's motions, finding that they would be better considered by the Court further into the case. (Hearing

Transcript December 16, 2010) December 22, 2010, ECCH filed a motion for reconsideration as to Judge Dennis' decision to deny the motion to dismiss based on subject matter jurisdiction. (ECCH's Motion for Reconsideration, 12-22-10) In the motion for reconsideration, ECCH specifically raised the argument that "It is improper for the Courts to review decisions of governing boards of private hospitals concerning the staff privileges of practitioners" (ECCH's Motion for Reconsideration 12-22-10). Judge Dennis held a hearing on this motion on March 8, 2011. Whereas, in the December hearing, the Court found that the issues raised called for review of material outside of the pleadings, Judge Dennis reconsidered his position, and gave what can only be interpreted as a final ruling on the issue of jurisdiction, stating to ECCH's Attorney:

THE COURT: I can help you. You've got a ground for appeal. Mr. Johnson, I assume you want me to deny the Motion to reconsider?

MR. JOHNSON: That's correct, Your Honor.

THE COURT: It's denied. Thank you. Thank you very much. Have a great day. (Transcript of Hearing, 3-8-22, Exhibit # 1)

ECCH filed a motion for Summary Judgment on June 6, 2011 without supporting memorandum. (ECCH's Motion for Summary Judgment) Dr. Holmes filed a responsive memorandum (Dr. Holmes Response), including affidavits from her expert, Dr. Shershow Plaintiff's Response to Defendant's Motion for Summary Judgment, with exhibits), and an affidavit from Dr. Holmes (Affidavit of Holmes July 5, 2011). ECCH filed a memorandum in support of its motion for Summary Judgment (ECCH Memorandum in support of Summary Judgment). A hearing was held before Judge Harrington. (Transcript of hearing July 8, 2011) At the hearing, the Court took the parties' arguments and

submissions under advisement, and asked the parties to submit proposed orders.

(Transcript, p. 35) Both parties timely submitted proposed orders, as requested.

(Proposed Order of ECCH; Proposed Order of Dr. Holmes) On July 26, 2011, Judge Harrington signed the Order proposed by ECCH without any changes. It was filed on July 29<sup>th</sup>. (Order of July 29, 2011) Dr. Holmes timely filed a notice of appeal dated August 24, 2011. (Notice of Appeal)

### **FACTS**

The only issue before the Court in this appeal is whether the trial judge for Charleston County Circuit Court (Judge Harrington) erred in determining that existing South Carolina law deprived the Circuit Court of subject matter jurisdiction in this case. Thus the facts herein presented will be restricted to those relevant to the issues raised regarding subject matter jurisdiction.

The Complaint in this case specifically brings a claim for a breach of the covenant of good faith and fair dealing, which is inherent in all contracts. There is only one cause of action. The relevant portion of the Complaint reads:

#### **FOR A FIRST CAUSE OF ACTION BREACH OF CONTRACT/ BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**

11. Paragraphs one (1) through ten (10) are hereby incorporated verbatim.
12. The Plaintiff and Defendant were and are parties to a contractual agreement, the terms of which are set forth as part of a settlement agreement.
13. As with every contractual relationship, this contract involved an implied covenant of good faith and fair dealing.
14. That the Defendant breached this duty by attempting (successfully to date) to block Plaintiff from being able to seek review of its decision to deny her application for advancement in staff privileges in violation of the letter and the spirit of the applicable bylaws.
15. In 2006-2007 and 2008-2009 (in each of the two years), Plaintiff submitted an application for advancement in staff privileges, which was

- complete on its face.
16. The Credentials Committee then denied the Plaintiff's application, an act which should have given Plaintiff the right to pursue an appeal, under the applicable bylaws.
  17. When Plaintiff did timely pursue an appeal, the Defendants, in bad faith, denied her access to a complete, fair and full review.
  18. The Defendant's actions were taken in bad faith, and in willful and knowing violation of the implied covenant of good faith and fair dealing, with the purpose of denying the Plaintiff access to the administrative process, and in an attempt to restrict Plaintiff from seeking a judicial remedy for the denial of her application for advancement in staff privileges through appropriate litigation.
  19. That, as a direct and proximate result of the Defendants' breach of contract, the Plaintiff has suffered actual damages and special damages, in the form of lost income, and loss of business to her practice, as she has been unable to admit any patients to the hospital to perform medical procedures from 2007 through the date of the filing of this Complaint, and continuing presently.
  20. The damages and injury suffered by Plaintiff were the foreseeable result of the Defendants' willful and knowing breach of contract, and breach of the covenant of good faith and fair dealing.

(Complaint April 26, 2010)

Dr. Holmes' sole claim before the Circuit Court was essentially a simple one. She did not seek a Court review of whether the hospital denied her due process, or whether By-laws were necessarily "fair." Instead, her claim clearly focuses on the conduct of ECCH after her 2003 settlement with ECCH. Dr. Holmes claims that, taken as a whole, a jury could find that the ECCH's actions in finding ways to deny her access to the application process shows that they were not really giving her a fair chance for a change in status at the hospital. Dr. Holmes has always asserted that, if the Jury was allowed to consider this case on its merits, reasonable minds could find that, overall, ECCH has, again and again, found excuses to make sure that Dr. Holmes never had access to the process for a change in status.

"There exists in every contract an implied covenant of good faith and fair dealing." *Parker v. Byrd*, 309 S.C. 189, 193-94, 420 S.E.2d 850, 853 (1992) (internal

citations omitted). Furthermore: [N]either law nor equity requires every term or condition to be set forth in a contract. Where an implied term is necessary to effectuate the intention of the parties, the law will supply it. The unexpressed provision may be inferred from the language of the contract itself, or by looking to the external facts and circumstances surrounding the bargain, or by proving a general custom and usage of including certain terms as part of similar contracts. *Maccaro v. Andrick Dev. Corp.*, 280 S.C. 96, 100, 311 S.E.2d 91, 94 (Ct.App.1984) (internal citations omitted). In support of this argument, Dr. Holmes submitted her own testimony, the affidavit of Dr. Majeski, and the affidavit of her expert witness, Dr. Shershow. She also took the deposition of a former administrator of the hospital. Dr. Holmes has presented a genuine issue of material fact as to whether ECCH has been acting in bad faith by denying Dr. Holmes access to the rights that she should have under the hospital's bylaws by baselessly rejecting her application before consideration. To clarify, ECCH wrongfully designated the application as incomplete in order to avoid consideration in violation of the express terms of the contract (the 2002/2003 settlement agreement). If the application is not "considered" then it can not be "rejected." If it is not "rejected" then Dr. Holmes' access to fair hearing rights, any kind of appeal within the by-laws and, ultimately, to a proper court review, is denied. ECCH thereby breached the covenant of good faith and fair dealing, violating the 2003 settlement agreement between Dr. Holmes and ECCH.

**A. Affidavit of Dr. Shershow**

Dr. Shershow (Affidavit of Dr. Shershow) is an expert witness who has been qualified as an expert in Courts to testify on matters involving all aspects of hospital administration, staffing, Joint Commission accreditation, and physician credentialing and

privileging. (Affidavit of Shershow) Dr. Shershow has reviewed the documentation concerning Dr. Holmes' applications to participate in the 2008 credentialing process. His expert opinion is that:

“Based on review of Dr. Holmes' credentialing file, the reappointment applications, the ECCH Medical Staff Bylaws, and a letter from Janie Sinacore-Jaberg to Dr. Holmes on December 19, 2008, it is my expert opinion that Dr. Holmes' 2008 application for re-appointment and change in medical staff status was not properly responded to by ECCH.” (Affidavit of Shershow)

Dr. Shershow also opines:

“it is my opinion that Dr. Holmes was denied fair hearing rights as explicitly required by these bylaws and by the joint commission standards.”

He goes on to support Dr. Holmes' allegations that the denial of her access to the process has resulted in a denial of the due process rights she would have been afforded under the applicable by-laws:

“Further, by denying Dr. Holmes fair hearing rights, per the applicable provisions of the ECCH Medical Staff Bylaw, ECCH prevented Dr. Holmes from her due process rights, mandated by both the joint commission, and the EECCG[sic] Medical Staff By-Laws.”

(Affidavit of Shershow)

**B. Affidavit of Dr. Majeski**

Dr. Majeski is a doctor, recently retired, who was a surgeon on staff at the ECCH's hospital in 2006, when Dr. Holmes applied for a change in staff status. (Affidavit of Majeski) As a staff surgeon at ECCH, Dr. Majeski was frequently asked to fill out peer reference forms, recommending physicians who were seeking reappointment at the hospital. In 2006, Dr. Holmes asked Dr. Majeski to complete one of these recommendations to accompany her reappointment application. Dr. Majeski, who apparently thought well of Dr. Holmes and supported her reappointment, gave a positive recommendation. Shortly thereafter, Dr. Majeski was contacted by John Langley, an administrator with the hospital, who questioned the doctor about the form. Dr. Majeski testifies that this was out of the ordinary and was "not the usual procedure for processing reappointment applications." (Affidavit of Majeski)

**C. Affidavit of Dr. Holmes**

Dr. Holmes disputes ECCH's claim that the application she submitted in 2008 was not complete. ECCH's expert, Pocock, pointed to a form called the "delineation of privileges" to argue that the application was incomplete because Dr. Holmes did not mark one of the prepared boxes showing which privileges she was seeking. Pocock states that Dr. Holmes, instead, attached a "laundry list" of documents and simply dismisses the attachment as irrelevant. (Affidavit of Pocock)

Dr. Holmes explains that the form which ECCH claims was not complete actually allows for the applicant to alternatively attach a separate written request with supporting documents if the candidate is seeking a position not specifically delineated on the form. She explains that she did follow these instructions, and that, therefore, the application was complete. The Delineation of Privileges form, which ECCH claims was incomplete

asked the candidate to mark a box indicating the privileges sought, but “If the condition/privilege you are interested in is not included on this form, please provide a separate written request and appropriate documentation of training/or experience.”

(Delineation form, exhibit to Dr. Holmes’ affidavit) Dr. Holmes testifies that this is what she did. Pocock refers to this attachment as a “laundry list,” acknowledging, in doing so, that Dr. Holmes did submit attachments, but simply disingenuously dismissing them as irrelevant. Where, on the face of the application, a document calls for an attachment without specifying, in any way, the format for the attachment, any format would be acceptable, at least in determining whether the application was “complete” and whether it should be submitted for consideration. One need not have an expert to see and acknowledge the plain language on the face of the application. Combining Dr. Holmes’ testimony with the expert opinion of Dr. Shershow, and adding Pocock’s glaring off-hand dismissal without addressing the plain language of the instructions on the delineation of privileges form, it is clear that there is a genuine issue of material fact as to whether the 2008 application was complete. Evidence that ECCH refused to read Dr. Holmes’ submissions with her application, and that ECCH claims, disingenuously, to be unable to understand the simple instructions on its own delineation form gives credence to Dr. Holmes’ ultimate claim in this case, that the ECCH has continuously engaged in bad faith and unfair dealing by refusing to allow her participation in the reappointment process when they were contractually obligated to do so under the settlement agreement.

## ARGUMENT

### **I. Standard of Review**

Although ECCH's proposed order, which Judge Harrington signed without any alteration, is stylized as an Order granting Summary Judgment, it is clear both from the content of the Order, and from the title of the one and only subsection, "**I. This Court lacks subject matter jurisdiction to review the actions of private hospitals concerning medical staff privileges**," that the case was dismissed by Judge Harrington for lack of subject matter jurisdiction, and not pursuant to Rule 56(c) (summary judgment). Therefore, the appropriate standard of review in this case is the standard of review for a trial court's dismissal for lack of subject matter jurisdiction. " The question of subject matter jurisdiction is a question of law." *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct.App.2007) (citations omitted). " The issue of interpretation of a statute is a question of law for the court." *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006) (citation omitted). An appellate court may decide questions of law with no particular deference to the trial court. *In re Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008) (citation omitted).

### **II. The Trial Court erred in finding that *Strauss v. Marlboro County General Hospital*, 185 S.C. 425, 194 S.E. 65 (1937) and its progeny deprived the Circuit Court of subject matter jurisdiction in this case.**

Existing South Carolina law, beginning more or less, with a case called *Strauss v. Marlboro County General Hospital*, 185 S.C. 425, 194 S.E. 65 (1937), grants a limited immunity to private hospitals, immunizing them from suit by a Plaintiff seeking a due process review of the private hospital's credentialing process. The issue in this appeal

asks the Court to assess how a line of cases, which grants immunity from suit in the Courts to private hospitals in cases where the Plaintiff is seeking a due process review of credentialing decisions is limited or defined in scope by a case called *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986).

Dr. Holmes' case was dismissed by Judge Harrington at the Summary Judgment stage because the Judge disagreed with Appellant's interpretation of *Lee v. Chesterfield*. Appellant will argue that the meaning of *Lee v. Chesterfield* clearly precludes the application of *Strauss* and its progeny to deny subject matter jurisdiction in cases where the Plaintiff is pursuing any claim or cause of action OTHER than a request for a due process review. Judge Harrington has interpreted the *Lee* case much more narrowly. Beyond a reading of the *Lee* opinion itself, there is no appellate authority to guide us as to whether the Court issuing the *Lee* opinion intended to carve out a narrow exception to a broad immunity for private hospitals, or whether *Lee* was intended to point out that the immunity created by *Strauss* and its progeny was limited to cases in which the Plaintiff was specifically seeking a due process review of the bylaws or a credentialing decision. At least, at the time of the Order on appeal, the Trial Court was unable to articulate any reasoning behind its interpretation, or point to any appellate authority supporting its point of view. On the other hand, as is argued below, the facts and legal reasoning from the *Lee* case are on point with Dr. Holmes' position.

- A. ***Strauss v. Marlboro County General Hospital* and its progeny do not preclude subject matter jurisdiction of the Courts where the Complaint pleads causes of action other than a request for a due process review of a private hospital's credentialing decisions or bylaws.**

The Trial Court found that it lacked subject matter jurisdiction in this case, based on a line of cases beginning with *Strauss v. Marlboro County General Hospital*, 185 S.C. 425, 194 S.E. 65 (1937). In *Strauss v. Marlboro County General Hospital*, the Court finds that a private hospital does not owe the due process rights to a doctor in regards to privileges that a public hospital does. In case after case, the Court reiterates that the by-laws of a hospital which is a private entity can not be reviewed, judicially, for fairness, as could the same by-laws if set forth by a public institution. This makes sense, as the due process right does not come into play unless the entity seeking to deprive a citizen of a property right is a public entity. The line of cases culminates, so to speak, with *Gowan v. St. Francis Community Hospital*, 275 S.C. 203, 268 S.E.2d 580 (1980), and *Wood v. Hilton Head Hospital, Inc.* 292 S.C. 403, 356 S.E.2d 841 (S.C. 1987), where the Court reiterates the finding: "we affirmed our view that the implementation of the regulations of a private hospital which are initiated to restrict a practitioner's practices are not subject to judicial review. We stated that we would not depart from the longstanding principle that such action [by the hospital] is not subject to judicial review. (citations omitted)." *Id.*

In this case, Dr. Holmes' complaint does not put the Court or a jury in the position of reviewing a credentialing decision based on a private hospital's bylaws for due process. Based on the cause of action set forth in the Complaint (the cause of action and the particulars of the Complaint and evidence supporting Dr. Holmes' claim are set forth above, as part of the facts of the case), the finder of fact would have been asked to determine whether a private settlement agreement constituted a contract, and whether the Defendants' (ECCH) refusal to allow the Plaintiff to participate in the reappointment process, constituted a breach of the settlement agreement (as opposed to a breach the

bylaws). This is not the kind of claim to which *Strauss v. Marlboro County General Hospital* and its progeny apply. Thus the immunity granted by those cases should not apply to deprive Plaintiff of her right to pursue a breach of contract claim against ECCH in the circuit court.

- B. Dr. Holmes' case is on point with *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986), which defines the limits of the immunity granted to private hospitals by *Strauss v. Marlboro County General Hospital*, 185 S.C. 425, 194 S.E. 65 (1937) and its progeny.**

The Respondent, Tenet HealthSystem Medical, Inc. owns and operates East Cooper Hospital, it alleges, as a privately-owned, for-profit business. In order to allow ECCH this status, one would have to ignore the fact that that it operated more or less as a monopoly in its geographic area as a result of a State granted "Certificate of Need" and enjoyed substantial revenue from Medicare and other public funds. Assuming then, that ECCH is not a quasi public entity, the by-laws, therefore, would not subject to a judicial, due process review, if we apply *Strauss v. Marlboro County General Hospital*. Using a "slippery slope" method of thinking, one could argue that the immunity granted in this case, extends to grant immunity from suit in any case where the Plaintiff's claims come into contact, evidentiary/wise, at all, with a hospital's bylaws even if consideration of the bylaws are only tangential to the Plaintiff's claim. One South Carolina opinion discusses and, in the opinion of the undersigned, clearly defines the limits of this immunity. In *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986)., the Court addresses *Strauss*, the *Gowan* case and its line. The Court eloquently explains why a doctor's claim challenging whether the by-laws have been followed as a tangential

part of another cause of action is not the same thing as a due process challenge, requesting a judicial review of the fairness of the rules or their application, overall. The controlling case law, therefore, as to whether the Court has subject matter jurisdiction in this case is *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986), which is on point, factually, with Dr. Holmes' case against ECCH.

In *Lee v. Chesterfield General Hosp., Inc.*, the Plaintiffs were a Physician's assistant and a medical doctor, licensed to practice medicine in South Carolina. Dr. Holmes, who is the Plaintiff in this case, is also a licensed physician in South Carolina. The Plaintiffs in *Lee* enjoyed privileges at Chesterfield General Hospital for some time. *Id. At 380*, as had Dr. Holmes. The Plaintiffs in *Lee* applied for reappointment. *Id. At 380* Dr. Holmes applied as well. After reviewing Lee's application, the hospital granted Lee privileges, but restricted him from performing procedures he had asked to be able to perform, stating that the hospital's rules prohibited it. *Id. 380-381* In Dr. Holmes' case, her reappointment application in 2008 was simply rejected as incomplete and not afforded further consideration. There is an issue of fact as to whether the by-laws were properly followed in doing so (affidavits from Dr. Holmes and Dr. Shershow, an expert, so attest). (Affidavit of Shershow, Dr. Holmes)

In *Lee v. Chesterfield*, the Plaintiffs, Lee and Newsome, filed suit. In their complaint, they alleged the restrictions in question were imposed as part of a conspiracy to restrict their ability to compete with other medical professionals in the Chesterfield County area. In the Complaint, Lee proposed that the object of the conspiracy was "to dominate the practice of medicine by licensed physicians in Chesterfield County." *Id. At 381* The hospital in the *Lee* case demurred, citing a lack of subject matter jurisdiction

under *Strauss v. Marlboro County General Hospital*, 185 S.C. 425, 194 S.E. 65 (1937), the Circuit Court denied the demurrers. The Hospital appealed and the Appellate Court affirmed the denial of the demurrers. In doing so, the Appellate Court reasoned that because the Plaintiffs were not asking the Court to determine whether the by-laws were sound but rather alleged the rules were applied in such a way as to further a civil conspiracy, *Strauss v. Marlboro County General Hospital* and its progeny did not deprive the Court of subject matter jurisdiction:

The Hospital first argues the demurrers should have been sustained because internal rules governing the practice of a physician's assistant in a private hospital are not subject to judicial review.

1, 2 We agree that a private hospital is free, in the absence of controlling legislation or regulatory provisions, to decide the nature and extent of medical practice permitted to persons it grants staff privileges. Ordinarily, such decisions involve matters of expert medical judgment not subject to judicial review. *See Gowen v. St. Francis Community Hospital*, 275 S. C. 203, 268 S. E. (2d) 580 (1980), *cert. denied*, 449 U. S. 1062, 101 S. Ct. 786, 66 L. Ed. (2d) 605 (1980); *Hoffman v. Garden City Hospital-Osteopathic*, 115 Mich. App. 773, 321 N. W. (2d) 810 (1982). A medical professional has no right, simply because he is licensed by state authority to perform certain procedures, to claim unrestricted staff privileges in a hospital. *See Yeargin v. Hamilton Memorial Hospital*, 225 Ga. 661, 171 S. E. (2d) 136 (1969), *cert. denied*, 397 U. S. 963, 90 S. Ct. 997, 25 L. Ed. (2d) 255 (1970). Within the confines of the law, a hospital may set professional standards for staff according to its own conception of good medical practice.

These principles are not dispositive of the present cases, however. In ruling on the demurrers, the circuit court did not conduct a judicial review of internal hospital rules. **The question to be decided is not whether the rules are valid or reasonable or medically sound, but whether the rules were imposed in furtherance of a conspiracy, the primary purpose of which was to injure the plaintiffs. If the complaints, liberally construed, allege such a conspiracy, it is irrelevant that the Hospital has the legal right to restrict staff privileges and that its rules are not subject to judicial review.**

*Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 344 S.E.2d 379, 383 (Ct. App. 1986). (Emphasis added)

In this case, just as with Lee's claim for civil conspiracy, Dr. Holmes' cause of action for breach of contract is **not** a challenge to ECCH's right to create and impose

rules and regulations, nor it a request for a due process review. Rather, in her Complaint, Dr. Holmes has alleged that, pursuant to a settlement agreement struck in 2003, she was entitled to apply for and be considered for a change in staff category under the by-laws. A review of the Complaint supports the assertion by Dr. Holmes' Counsel, that it was specifically and pointedly drafted to pursue a claim for a breach of the implied covenant of good faith and fair dealing by the hospital, not a breach of the bylaws, and not a request for review of the due process or fairness of a decision. (Transcript of hearing pp. 30-35) Because Dr. Holmes is pursuing a breach of contract claim based on an existing contract, and not a due process review of ECCH's bylaws, the Trial Court erred in finding that the immunity granted to hospitals under *Strauss v. Marlboro County General Hospital* and its progeny applied in this case.

**C. The Trial Court's interpretation of *Lee v. Chesterfield*, as being restricted only to cases in which the Plaintiff has pursued a cause of action for civil conspiracy is not supported by the *Lee* Opinion, nor by any other existing South Carolina appellate law.**

In the Order under appeal in this case, Judge Harrington granted the ECCH's motion to dismiss for lack of subject matter jurisdiction, finding that *Lee v. Chesterfield* did not apply. The Trial Court stated, in the Order, that, in *Lee v. Chesterfield*, the plaintiff's cause of action was for conspiracy rather than breach of contract, as the sole explanation for the decision not to apply the holding from the *Lee* Opinion (Order of July 29, 2011) However, nowhere in the *Lee v. Chesterfield* opinion, or in any other case mentioning the *Lee* opinion does any Court ever even imply that the *Lee* ruling would be limited to cases in which the Plaintiff claims civil conspiracy. The *Lee* Opinion has been cited in Appellate and Supreme Court opinions at least twelve (12) times, and has never been overturned, modified, curtailed, or challenged on the subject matter jurisdiction

issue. (See *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (S.C.App. 2010); *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (S.C. 2006); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (S.C.App. 2004); *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (S.C.App. 2004); *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 538 S.E.2d 15 (S.C.App. 2000); *Bivens v. Watkins*, 313 S.C. 228, 437 S.E.2d 132 (S.C.App. 1993); *Mendelsohn v. Whitfield*, 312 S.C. 17, 430 S.E.2d 524 (S.C.App. 1993); *Vaught v. Waites*, 300 S.C. 201, 387 S.E.2d 91 (S.C.App. 1989); *Allen v. Columbia Financial Management, Ltd.*, 297 S.C. 481, 377 S.E.2d 352 (S.C.App. 1988); *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (S.C. 1988); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (S.C.App. 1987); *Yaeger v. Murphy*, 291 S.C. 485, 354 S.E.2d 393 (S.C.App. 1987)).

The Trial Court's Order, dismissing this case for lack of subject matter jurisdiction, circumvents the clear ruling of the *Lee* Court by interpreting the opinion as making a narrow exception to a broad rule of immunity created by *Strauss* and its progeny rather than reading the case to be an illustration of the limits of the LIMITED immunity granted to hospitals under *Strauss v. Marlboro County General Hospital*. The Order under appeal in this case fails to articulate any reasoning for this conclusion and cites no authority, legal or otherwise in support of its conclusion. ECCH never raised this argument (that *Lee* is restricted to civil conspiracy allegations) in its extensive briefing of the subject, or at oral argument. The fact that Plaintiff's claims were and are still supported by existing South Carolina law should have precluded a dismissal for lack of subject matter jurisdiction in this case.

**III. The Circuit Court has jurisdiction over the cause of action alleged in the Complaint because the claim is for breach of a contract, which specifically grants the Court jurisdiction to adjudicate claims for breach of the contract.**

As is clear from the face of the Complaint in this case, Dr. Holmes is claiming that the ECCH has breached a settlement agreement which was entered into between the parties in 2003. The settlement agreement between Dr. Holmes and ECCH was read into the record on October 29, 2002, and consummated by written agreement in 2003. (Settlement Agreement 2003) The settlement agreement, itself, was read into the record in open court. The Charleston County Circuit Court had subject matter jurisdiction to enforce the terms of the agreement. "Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 192 Conn. 447, 472 A.2d 21, 22 (1984)). "Subject matter jurisdiction is met if the case is brought in the court which has the authority and power to determine the type of action at issue." *Washington v. Whitaker*, 317 S.C. 108, 115, 451 S.E.2d 894, 898 (1994). There is only one circuit in South Carolina and it has uniform subject matter jurisdiction throughout the State. *Dove v. Gold Kist*, 314 S.C. 235, 442 S.E.2d 598, 600 (1994); see also S.C. Const. art V, section 1. The circuit court has subject matter jurisdiction to adjudicate the breach of contract dispute. *TTCI Media, Inc. v. NuVox Communications, Inc.*, 2009-UP-004 (SSCA). The settlement agreement was clearly the settlement of a case brought in South Carolina. The terms of the settlement agreement were to be carried out in South Carolina. This court has held South Carolina has jurisdiction over a party who entered into a contract that was to be partly performed within the State. *Atl. Wholesale Co., Inc. v. Solondz*, 283 S.C. 36, 320 S.E.2d 720

(Ct.App.1984). Furthermore, the settlement agreement, which Dr. Holmes has alleged was breached specifically indicates that the proper forum for any actions or claims for breach of the settlement agreement is in the South Carolina Courts. "This Settlement Agreement & General Release in Full shall be construed and interpreted in accordance with the laws of the State of South Carolina." (Affidavit of Holmes, Exh # 4) Because the sole cause of action in this case alleges a breach of an identifiable contract, which was entered into in South Carolina, read into the record before the Charleston County Court of Common Pleas, pursuant to Rule 43(k), SCRPC, to be performed in South Carolina, and specifically designated South Carolina law as controlling law, the South Carolina Circuit Court has subject matter jurisdiction over the cause of action at issue in this case. The Trial Court erred in finding otherwise.

**IV. The issue of subject matter jurisdiction had been decided by Judge Dennis in Dr. Holmes' favor prior to the issue being brought before Judge Harrington at Summary Judgment, and was therefore the "law of the case."**

As set forth above, in the "STATEMENT OF THE CASE," the Court has already decided the issue of subject matter jurisdiction in this case in a final decision, specifically indicated by the Judge's statement to the Defendant that, by denying their motion, he had now given them a ground for appeal. Dr. Holmes recognizes the existing law, that the Court may consider the issue of subject matter jurisdiction at any time. However, the fact that the issue may be considered *at any time* does not necessarily mean that the identical argument regarding subject matter jurisdiction can be heard over and over again by different judges at different times during the litigation. It does not override the rule of "the law of the case." *Judy v. Martin*, 381 S.C. 455, 459, 674 S.E.2d 151, 153 (2009) ("[A]n unappealed ruling becomes the law of the case and precludes further

consideration of the issue on appeal."). The purpose behind the "law of the case" doctrine is to avoid having one issue and one argument argued over and over again during litigation. If there was actually new information or a change in the argument or the law, one could fathom a Court revisiting a decided issue, but raising identical arguments over and over in front of different judges hoping to get a more palatable decision should not be allowed. In this case, the particular issue of whether *Strauss v. Marlboro County General Hospital* and its progeny precluded the Court from exercising subject matter jurisdiction in this case was decided by Judge Dennis early on in this case. Judge Harrington should not have allowed ECCH to bring the **identical** arguments and evidence which had been presented to Judge Dennis and rejected months before. This violates the "law of the case" doctrine and is directly counter to established South Carolina law. *Charleston County DSS v. Father*, 317 S.C. 283, 454 S.E.2d 307 (1995) (one judge may not overrule another judge of the same court).

**CONCLUSION**

The Trial Court erred in finding that it was deprived of subject matter jurisdiction in this case. The evidence in the record to date presents a genuine issue of material fact as to whether ECCH has breached the covenant of good faith and fair dealing implied and inherent in its 2002/2003 settlement agreement with Dr. Holmes. The Trial Court was in error to dismiss this case for lack of subject matter jurisdiction. Dr. Holmes, as Appellant, therefore respectfully requests that this Honorable Court reverse the Trial Court's dismissal of this case.



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