THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2015-000331
Case No. 12-CP-22-1004

Nadene Holliday, Individually and as Personal Representative of the Estate of David Holliday, ... Appellant,

vs.

Waccamaw Community Hospital and Kent M. McGinley, M.D., ... Defendants,

of whom

Waccamaw Community Hospital is the..Respondent.

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STATEMENT OF ISSUE ON APPEAL

Does a hospital owe a duty to its patients to carefully select and review the qualifications of physicians using their facilities?

STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, dismissing Respondent Waccamaw Community Hospital on the grounds that South Carolina does not recognize a cause of action for negligent credentialing arising out of a corporate negligence theory. (Order filed 2/3/15.)

On September 24, 2012, David Holliday and Appellant Nadene Holliday filed a Summons and Complaint in the Georgetown County Court of Common Pleas alleging negligence and loss of consortium against Waccamaw Community Hospital ("Hospital"), Kent. M. McGinley, M.D. ("McGinley"), Winyah Surgical Specialists, P.A., Anthony H. deHaas, M.D., and Matthew J. Metz, M.D.[1] The claims stem from the missed diagnosis of David Holliday's gallbladder cancer by Defendant McGinley, who as a member of the medical staff was granted privileges at the Hospital where he was working as an independent contractor pathologist. The Hospital served its Answer on October 11, 2012, denying any negligence on its part.

An Amended Complaint was filed on February 13, 2013, following the death of David Holliday and the appointment of Appellant as the Personal Representative of his estate. The Amended Complaint states causes of action for wrongful death, survival, and loss of consortium for the same conduct alleged in the original Complaint. On February

[1] Winyah Surgical Specialists, P.A., Anthony H deHaas, M D, and Matthew J Metz, M D were later voluntarily dismissed

19, 2013, the Hospital served its Answer to the Amended Complaint. The Hospital once again denied any negligence on its part.

On April 28, 2014, the Hospital served Appellant with a motion for summary judgment on the grounds that no actionable negligence had been established by Appellant as to any agent, servant, or employee of the Hospital. At the summary judgment hearing on June 13, 2014, counsel for Appellant conceded that Defendant McGinley was an independent contractor, and not an employee or agent, of the Hospital. Summary judgment was granted to the Hospital solely on that issue.

During the summary judgment hearing, counsel for Appellant moved to amend the Amended Complaint to conform to the evidence pursuant to Rule 15(b), SCRCP. Counsel for the Hospital objected; therefore, a hearing on the Motion to Amend to Conform to the Evidence was held on July 24, 2014. The circuit court granted the motion during the hearing.

Appellant filed her Second Amended Complaint on July 24, 2014, which contained the same causes of action as previously alleged, but included more detailed allegations about certain criminal and professional disciplinary actions taken against Defendant McGinley[2] and the specific duties owed by the Hospital pursuant to state law. The Hospital served its Answer to Appellant's Second Amended Complaint on August 7, 2014, again

[2] In October 2005, Defendant McGinley was arrested and charged with fraud and forgery for using false and fraudulent forms of identification to obtain prescription narcotics (Board of Medical Examiner's Order of June 29, 2006) The criminal charges were prosecuted by the Horry County Solicitor's Office After completing the Pretrial Intervention Program, Defendant McGinley sought expungement of his criminal charges The criminal charges were expunged in an Order dated January 3, 2007 Following the second amendment to Appellant's Complaint, Defendant McGinley filed a Motion to Strike, seeking an order prohibiting any reference to Defendant McGinley's arrest in the pleadings In a hearing held on November 7, 2014, the Honorable Larry B Hyman, Jr, granted the motion and ruled that, in light of Defendant McGinley's criminal charges having been expunged, no party was permitted to reference McGinley's arrest in either the pleadings or before the jury

denying any negligence on its part and asserting, as an affirmative defense, that Appellant had failed to state a viable cause of action against it for corporate negligence.

The trial of this case began on January 12, 2015. During jury selection, the Hospital moved to be dismissed pursuant to Rule 12(b)(6), SCRCP, on the grounds that Appellant had failed to allege facts sufficient to state a cause of action against it. The circuit court granted the Hospital's motion during oral argument, ruling that South Carolina does not recognize a cause of action for negligent credentialing arising out of a corporate negligence theory. A written Order followed and was filed on February 3, 2015. (Order filed 2/3/15.)

On February 6, 2015, Appellant received notice of the entry of the Order. Appellant timely served her Notice of Appeal on February 12, 2015.

STATEMENT OF THE FACTS

The following factual allegations are all set forth in the Second Amended Complaint (cited hereinafter as "Compl."). Because Waccamaw Community Hospital ("Hospital") was dismissed from this action on a motion pursuant to Rule 12(b)(6), SCRCP, these allegations must be taken as true for purposes of this appeal.

Prior to and during the month of October 2005, McGinley unlawfully obtained prescription narcotics by creating false identifications and prescribing those narcotics to his aliases. (Compl., ¶ 14.) McGinley obtained prescription narcotics by using false identities on 10-20 occasions. (Compl., ¶ 14; Depo. of McGinley, p.16, ln. 13-25.) As a result of that conduct, McGinley's medical license was suspended by the South Carolina Board of Medical Examiners ("Medical Board"). (Compl., ¶ 14.)

In its June 2006 Final Order, the Medical Board determined that McGinley violated multiple laws, regulations, and principles of medical ethics. (Compl., ¶ 15; Medical Board

Order of 6/29/06) The Medical Board further found that McGinley was "not dedicated to providing competent medical service with compassion and respect for human dignity," that he "did not respect the law," and that he was "guilty of engaging in dishonorable, unethical, or unprofessional conduct that is likely to deceive, defraud, or harm the public." (Compl., ¶ 15; Medical Board Order of 6/29/06.) All of the allegations made against him by the Medical Board were admitted by McGinley. (Compl., ¶ 16; Medical Board Order of 6/29/06; Depo. of McGinley, p. 20, ln. 24-25 – p. 21, ln. 1-16.)

Despite being aware of McGinley's criminal, fraudulent, and unethical conduct, the Hospital reappointed McGinley to its medical staff and continued its contractual relationship with him and his pathology practice. (Compl., ¶ 17.) Rather than terminate his appointment to the medical staff and his privileges at the Hospital, he was permitted instead to take a personal leave of absence for a short period of time before coming back to work. His qualifications for privileges and appointment to the medical staff were not considered upon his return. (Depo. of Bruce Bailey, p. 56, ln. 17-p. 57, ln. 3, p. 94, ln. 7-14.)

The Hospital held itself out to the public, including Mr. Holliday, as a modern medical facility and well-staffed hospital that included trained and skilled physicians. (Compl., ¶ 5.) It held each of its physicians responsible for the care, supervision, and protection of Mr. Holliday out to the public and to Mr. Holliday as qualified physicians licensed to practice under the laws of the State of South Carolina. (Compl., ¶ 6.) At all times relevant hereto, McGinley held privileges to practice pathology at the Hospital. (Compl., ¶ 13.)

The Hospital had a duty to provide Mr. Holliday with competent medical care by ethical physicians. (Compl., ¶ 22.) It was required to exercise ordinary and reasonable care

in the selection and retention of its physicians, contractors, and medical staff. (Compl., ¶ 7.) The Hospital also had a duty to appoint to its medical staff only those physicians that were "competent in [their] respective field[s], worthy in character and in matters of professional ethics, and [met] the requirements of the hospital's bylaws." (Compl., ¶ 23; see 24A S.C. Code Ann. Regs. 61-16, § 504(B).) The Hospital had an additional duty to use reasonable and ordinary care in determining whether a physician met these criteria prior to both the physician's initial appointment and any later periodic reappointments. (Compl., ¶ 24; see 24A S.C. Code Ann. Regs. 61-16, § 504(A).)

The Hospital's own Medical Staff Bylaws address its duties as well. "Every practitioner who seeks or enjoys Medical Staff membership must, at the time of application and continuously thereafter, demonstrate to the satisfaction of the Medical Staff and the Board [of Trustees]" . . . "[a]dherence to applicable ethical codes of conduct. . . ." (Waccamaw Community Hospital Medical Staff Bylaws, pp. 4-5, § 2H.) "Personal conduct, whether verbal or physical, that negatively affects or that potentially may affect patient care . . . constitutes disruptive behavior." (Waccamaw Community Hospital Medical Staff Bylaws, pg. 37, § 2.) Examples of punishable disruptive conduct include, but are not limited to, . . . [l]ying, cheating, and knowingly making false accusations, [and] altering or falsifying any patient's medical records or hospital documents." (Waccamaw Community Hospital Medical Staff Bylaws, pg. 37, § 3D.)

The Hospital's duties are further defined in its Appointment and Reappointment Procedures for Medical Staff Membership and Clinical Privileges. "In conducting the Medical Staff application review, the [Medical Executive Committee] shall initially examine the Medical Staff application for evidence of character, professional competence,

qualifications, prior experience, and ethical standing of the practitioner." (Waccamaw Community Hospital Appointment and Reappointment Procedures for Medical Staff Membership and Clinical Privileges, pg. 6, § 1G(1)(a).)

> "Requests for Clinical Privileges shall be evaluated on the basis of the Practitioner's background, education, training, experience, health, ability, and judgment, demonstrated competence, adherence to professional ethics, reputation, ability to work well with others, references and other relevant information, including an appraisal by the Department to which the Practitioner is or would be assigned. . . . All criteria set forth in the applicable qualifications of the Medical Staff Bylaws shall also be considered for determination of Clinical Privileges."

(Waccamaw Community Hospital Appointment and Reappointment Procedures for Medical Staff Membership and Clinical Privileges, pg. 13, § 2B.) "The Board [of Trustees] is ultimately responsible for all decisions regarding Medical Staff appointment and reappointment, and the determination of Clinical Privileges, taking into consideration the documents and information concerning the [Medical Executive Committee's] preliminary recommendations and other supporting documentation or information." (Waccamaw Community Hospital Appointment and Reappointment Procedures for Medical Staff Membership and Clinical Privileges, pg. 7, § 1H(1).)

Turning to the medical care received by David Holliday, Mr. Holliday's gallbladder was surgically removed by Dr. Anthony deHaas at the Hospital on July 19, 2007, after having gone to the emergency room complaining of pain in his abdomen. (Compl., ¶ 25.) During removal, the gallbladder was placed in an endoscopic retrieval bag and sent to McGinley, a pathologist, for processing. (Compl., ¶ 25.) McGinley did not include any diagnosis of or concern about a potential malignancy, nor did he require or suggest any additional testing. (Compl., ¶ 26.) Although the specimen contained evidence of malignancy, McGinley failed to detect or diagnose the condition (Compl., ¶ 26.)

On December 28, 2010, Mr. Holliday presented to Dr. deHaas, the surgeon that removed his gallbladder in 2007, complaining of pain in his upper abdomen. (Compl., ¶¶ 25, 31.) Dr. deHaas recommended removal of the abnormal tissue and scheduled surgery for January 13, 2011, at the Hospital. (Compl , ¶ 31.) During the surgery, Dr. deHaas removed part of the tumor and sent the tissue to the Hospital's Pathology Department for processing. (Compl., ¶ 32.) The pathology examination revealed cancer, caused by undiagnosed cancer from Mr. Holliday's gallbladder. (Compl., ¶¶ 33, 36, 37.)

On March 9, 2011, Mr. Holliday began chemotherapy at MUSC in Charleston and continued with this treatment until approximately August 2012. (Compl., ¶ 40.) In addition, he underwent approximately thirty radiation treatments. (Compl., ¶ 40.)

The Hospital negligently failed to provide Mr. Holliday with a pathologist who was competent in the field of pathology, worthy in character and in matters of professional ethics, and that met the requirements of the Hospital's bylaws. (Compl , ¶ 56.) The Hospital was further negligent in:

- failing to independently monitor McGinley following his discipline by the Medical Board and upon his return to work at the Hospital;
- failing to revoke McGinley's hospital privileges and appointment to the medical staff when it learned of his unethical, fraudulent, criminal actions and unfitness of character;
- reappointing McGinley to the medical staff and renewing his hospital privileges after learning of his unethical, fraudulent, criminal actions and unfitness of character; and
- continuing its contractual relationship with McGinley and his pathology practice after learning of his unethical, fraudulent, criminal actions and unfitness of character.

(Compl., ¶ 56.)

As a result of the Hospital's negligence, Mr. Holliday's cancer went undiagnosed and untreated for approximately three-and-a-half years, causing the cancer to spread to his abdominal wall and liver and develop into a Stage IV disease, ultimately causing his death. (Compl., ¶¶ 41, 57.)

Mr. Holliday died on November 13, 2012. (Compl., ¶ 42.) His autopsy reported the cause of death as metastatic biliary carcinoma. (Compl., ¶ 42)

ARGUMENT

I. SOUTH CAROLINA COURTS SHOULD RECOGNIZE A CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING.[3]

A. Summary of Appellant's argument.

By asking that this Court join the overwhelming majority of states and recognize a cause of action for negligent credentialing, Appellant is seeking to hold the Hospital directly liable for its failure to exercise reasonable care in the selection and retention of McGinley as a member of its medical staff. To be clear, the liability that is imposed by a negligent credentialing cause of action is not a type of vicarious liability nor is Appellant asking the Court to extend the application of the non-delegable duty doctrine. Negligent credentialing is often described as a form of corporate negligence. "Corporate negligence, which literally means holding a corporation liable for its negligent acts, is a form of direct

[3] The credentialing process involves both the appointment to a hospital's medical staff and the granting of privileges The distinction has been described as follows· "[S]taff membership is a prerequisite for a physician to admit patients to the hospital and provide health care services in the hospital Individual members of the medical staff are granted specific 'clinical privileges' according to their license, education, training, experience, competence, health status, and judgment These delineated privileges are authorization for 'a practitioner to provide specific care services within well-defined limits.' Staff membership and clinical privileges are related but separate concepts. The grant of medical staff membership does not assure the grant of any particular requested clinical privileges Different staff members are entitled to different clinical privileges; a member of a medical staff who is a radiologist may be granted clinical privileges in radiology but not, for example, in anesthesiology " Craig W Dallon, Understanding Judicial Review of Hospitals' Physician Credentialing and Peer Review Decisions, 73 Temp L Rev 597, 607-08 (2000)

liability." Simmons v. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 123, 498 S.E.2d 408, 412 (Ct. App. 1998) ("Simmons I") aff'd as modified, 341 S.C. 32, 533 S.E.2d 312 (2000) (distinguishing between the direct liability of corporate negligence in the context of a hospital's duty to monitor the competency of its staff physicians and non-delegable duty). "Corporate negligence," in the context of a hospital's duty to exercise reasonable care in granting privileges to a physician, is "nothing more than an application of negligence principles." Blanton v. Moses H. Cone Memorial Hosp., Inc., 354 S.E.2d 455 (N.C. 1987) ("In light of the position we have taken in this opinion that the case is governed by common law principles of negligence and that what has previously been called corporate negligence is nothing more than an application of negligence principles").

Today's hospitals are big business. They are plentiful, they are profitable, and they compete for the public's business. They market their services through billboards, commercials, and printed advertisements that boast that they have the most skilled physicians, the most advanced technology, and the most comfortable facilities.

The public is generally unaware that most physicians practicing at any given hospital are not, in fact, employees of that hospital. They are independent contractors that have been given permission, or "credentials," by the hospital to practice medicine at the hospital's facility. The credentialing process is regulated by the law of this state, by the hospitals' own bylaws, and, in some cases, by national accreditation standards. Credentials and privileges may only be granted to those physicians who have been vetted by a hospital's governing body and which it determines meet the criteria set forth by state law and the hospital's bylaws.

The public is forced to rely on a hospital to use care in the credentialing process. When a hospital fails to do so, the public is exposed to substantial risk of injury.

The existence of a negligent credentialing cause of action is supported by the laws, regulations, and public policy of this State. It is time for South Carolina to join the overwhelming majority of jurisdictions which recognize the existence of a duty on the part of a hospital to use reasonable care in the selection and retention of members of its medical staff.

B. A negligent credentialing cause of action is consistent with established hospital duties and existing general negligence principles.

It is well-established that hospitals owe their patients a duty of care in the provision of health care and related services and in the operation of their facilities. See Doe by Doe v. Greenville Hosp Sys., 323 S.C. 33, 448 S.E 2d 564 (Ct. App. 1994) (hospital held liable for negligent hiring and supervision of employee); Sloan v Edgewood Sanatorium, Inc , 225 S.C. 1, 80 S.E.2d 348 (1954) (a psychiatric hospital owes a duty of care to properly supervise and treat a suicidal patient); Henderson v. St. Francis Cmty. Hosp., 303 S.C. 177, 399 S.E.2d 767 (1990) (hospital has a duty to maintain its premises in reasonably safe condition); Dawkins v. Union Hosp Dist., 408 S.C. 171, 758 S.E.2d 501 (2014) (slip-and-fall case against hospital sounded in ordinary negligence rather than medical malpractice wherein supreme court noted that "claims against a hospital for injuries caused by falling ceiling tiles or improperly maintained hallways or parking lots sound in ordinary negligence, and specifically in premises liability.") (citations omitted); Force v. Richland Memorial Hosp., 322 S.C. 283, 471 S.E.2d 714 (Ct. App. 1996) (premises liability claim against hospital for negligently maintained automatic sliding doors in emergency room)

As recognized by the South Carolina Supreme Court, "[t]he 'practice of medicine' encompasses a much broader range of actions than those specific directives" and "includes innumerable decisions regarding the type and quality of medical equipment, staffing levels, and the renovation or addition of facilities." Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 49-50, 533 S.E.2d 312, 321 (2000) ("Simmons II"). These decisions, which "intimately affect the 'practice of medicine' all day, every day" are often made by hospitals and their administrators. Id. (citing Jeannie Pinkston, Negligence: Strubhart v. Perry Memorial Hospital, 48 Okla. L Rev. 797, 804 (1995) (stating the oft-quoted adage that "hospitals don't practice medicine, physicians do" no longer reflects public perception of a modern hospital, which has assumed the role of a profit-producing business and aggressively markets itself as an administrator and provider of comprehensive health care)).

The process by which physicians are granted membership to the medical staff of a hospital is one means by which hospitals provide health care services to their patients and which certainly affects the practice of medicine. See Garland Comm. Hosp. v. Rose, 156 S.W 3d 541, 545 (Tex. 2004) ("[A] hospital's credentialing of doctors is necessary to that core function and is, therefore, an inseparable part of the health care rendered to the patient."). The credentialing process has an enormous potential to harm the public when done negligently. The term "negligent credentialing" may not have expressly been recognized and approved by this Court before now, but the underlying principles are not novel and have long been in existence. No justification exists for shielding a hospital from liability for such negligence, and the recognition of such a duty is fully consistent with existing common law of South Carolina.

C. The duty to conduct the credentialing process and the specific criteria that must be met are already imposed upon hospitals by State law.

Hospitals have a duty, imposed by the regulations of this State, to provide competent and appropriate medical care. 24A S.C. Code Ann. Regs. 61-16, § 501 ("Every facility shall be organized, equipped, staffed and administered in order that adequate care may be provided for each person admitted."). The governing body of a hospital is "ultimately accountable for the safety of patients and staff and the quality of care, treatment, and services provided." 24A S.C. Code Ann. Regs. 61-16, § 501(B). Every hospital in this State is required to have an organized medical staff, appointed by, and accountable to, the hospital's governing body. 24A S.C. Code Ann. Regs. 61-16, § 504(A). In order to be eligible for membership on a hospital's medical staff, a physician must be "licensed to practice in his profession in the State of South Carolina[,] competent in his respective field, worthy in character and in matters of professional ethics, and meet the requirements of the hospital's bylaws." 24A S C. Code Ann. Regs. 61-16, § 504(B).

Before a physician may be appointed to a hospital's medical staff, and before any reappointment, "the governing body shall assure itself that the physician is qualified and competent to practice in his profession." 24A S.C. Code Ann. Regs. 61-16, § 504(A).

Simply holding a medical license, or being a member of a professional organization, or being certified by any clinical examining board, or holding clinical privileges or staff membership at another hospital does not automatically entitle a physician to medical staff membership – the governing body must determine whether or not a physician meets the criteria it has established for membership. 24A S.C. Code Ann. Regs. 61-16, § 504(B).

The duty which this Court is asked to recognize is one which already exists by virtue of these regulations as well as a hospital's bylaws, such as those described above.

D. The public policy of South Carolina favors the recognition of a duty owed by hospitals to its patients to use due care in the credentialing of medical staff.

A hospital, through its medical staff, has the responsibility of reviewing physicians' applications for membership on the staff and selecting those individuals which it deems to be qualified In order to attract patients, hospitals frequently advertise that their medical staff is comprised of the best and brightest physicians. For example, on its website, the Respondent Hospital represents:

> At Georgetown Memorial Hospital and Waccamaw Community Hospital, our trained professionals adopt a team approach in providing care for you and your family. Whether you are having outpatient testing or are an inpatient, a skilled, caring interdisciplinary team of healthcare providers coordinates the evaluation and administration of your care and treatment.
>
> ...
>
> Georgetown Hospital System is committed to providing high quality healthcare to the citizens of Georgetown County and surrounding areas...Georgetown Hospital System expects the very highest standard in human behavior...Our integrity and ethics will not be compromised.

(see http://www.georgetownhospitalsystem.org/about (accessed 3/5/15); http.//www.georgetownhospitalsystem.org/oth/Page.asp?PageID=OTH000052 (accessed 3/6/15).)

It would be illogical, and against the public policy of this State, to allow a hospital to represent to the public that it carefully selects its medical staff and then prevent the public from seeking redress for injuries sustained as a result of the hospital's negligence in selecting and retaining that medical staff. It is beyond question that a hospital's failure to use reasonable care and diligence in its selection and retention of physicians endangers the public at large.

The law of South Carolina not only imposes upon hospitals a duty to provide competent and appropriate medical care, it goes so far as to assign responsibility for the quality of medical care provided and sets forth the minimum qualifications that a physician must demonstrate in order to be eligible for membership on a hospital's medical staff. See 24A S.C. Code Ann. Regs. 61-16, §§ 501, 502, 504. These regulations embody the public policy of this State.

In fact, the appellate courts of this state have already considered these duties and the related public policy concerns. Likewise, at least one trial court in this state has already expressly recognized a negligent credentialing cause of action.

In Strickland v. Madden, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994), the plaintiff alleged the hospital was negligent in failing to withdraw the physician's staff privileges prior to the patient's injury. Noting that other jurisdictions have adopted the doctrine of corporate negligence to impose a duty on hospitals, owed directly to patients, to carefully select and review the competency of physicians using their facilities, the Strickland court assumed that South Carolina would likewise recognize the doctrine. Id. at 71-72, 448 S.E.2d at 586. The Strickland court explained that a plaintiff bringing such a claim would, consistent with traditional negligence standards, be required to establish the applicable standard of care and gave the examples of national hospital accreditation standards and a hospital's own bylaws as a means by which this standard of care could be recognized and measured. Id.

The import of the Strickland decision was recognized by the court in Simmons I, supra. The defendant hospital in Simmons I argued that Strickland did not impose the doctrine of corporate negligence on hospitals. Id. at 123, 498 S.E.2d at 412. The court

explained that this argument was a misstatement of the rule resulting from the Strickland decision.

> First, Strickland deals with corporate negligence in the context of a hospital's duty to monitor the competency of its staff physicians. Corporate negligence, which literally means holding a corporation liable for its negligent acts, is a form of direct liability.
>
> ....
>
> Second, Strickland is not dispositive of the corporate negligence issue in South Carolina. The most definitive statement Strickland makes about corporate negligence is, "Assuming South Carolina would likewise recognize the doctrine of corporate negligence, its application would nonetheless require a standard of care to be established, for example, pursuant to national hospital accreditation requirements or the hospital's own bylaws." 323 S.C. at 72, 448 S.E.2d at 586. The court then found that the plaintiff did not establish the requisite standard of care. Thus, [defendant hospital's] conclusion that Strickland does not impose the doctrine of corporate negligence on hospitals is an assumption which is not supported by the language of the case.

Id at 123-24, 498 S.E.2d at 412 (Ct. App. 1998).

In the matter of Person v. Carolina Pines Reg. Med. Ctr., C/A No. 2004-CP-16-322 (Darlington Cty. Ct. of Common Pleas, Nov. 14, 2006), the plaintiff alleged the defendant hospital was negligent in its credentialing of the defendant doctor. The defendant hospital moved for summary judgment, arguing that South Carolina did not recognize a corporate negligence cause of action. The trial court disagreed, holding that Strickland and Simmons I signify South Carolina's acceptance of a negligent credentialing cause of action under the corporate negligence theory. (Order Denying Defendant's Motion for Summary Judgment, pp. 9-10 (Nov. 14, 2006).)

As noted by the Simmons II Court, patients generally do not decide from which hospital to seek care based on the relationship between the hospital and its physicians. 341 S.C. at 50, 533 S.E.2d at 321-22. Rather, patients make those decisions based on the reputation of the hospital, which hospitals frequently and aggressively promote. Id. "In

such situations, patients understandably and correctly expect to be cared for by physicians and other staff members carefully selected and approved by the hospital." Id.

It is essential to the public good that hospitals function at the highest level of performance. Brown v. Anderson Cnty. Hosp. Ass'n, 268 S.C. 479, 487, 234 S.E.2d 873, 876 (1977). Recognition of a negligent credentialing cause of action will fulfill what has been described as an "important aspect of tort law: the desire to give parties with crucial duties a keen incentive to do everything possible to avoid violating those duties." Simmons II, 341 S.C. at 49, 533 S.E.2d at 321; see also Brown, 268 S.C. at 487, 234 S.E.2d at 877 ("Immunity fosters neglect and irresponsibility, while liability encourages the exercise of due care.").

As aptly stated by the Supreme Court of Florida in recognizing a negligent credentialing cause of action:

> The public policy which justifies placing the expanded responsibility and duty of care on a hospital is based on the present day view that a hospital is a multifaceted health care facility that should be responsible for proper medical treatment on its premises. This view is justified because the hospital is in a superior position to supervise and monitor physician performance and is, consequently, the only entity that can realistically provide quality control.

Insinga v. LaBella, 543 So. 2d 209, 214 (Fla. 1989).

The regulations and public policy of this State compel a determination that a hospital owes a duty to its patients to use reasonable care in selecting and retaining the physicians that form its medical staff and practice medicine within its facilities.

E. The overwhelming majority of this nation's jurisdictions have recognized a negligent credentialing cause of action.

Approximately 35 states, from as far back as 1965, have recognized a common law cause of action for negligent credentialing. See Humana Med. Corp. of Ala v. Traffanstedt,

597 So. 2d 667 (Ala. 1992); Fletcher v. Peninsula Hosp ,71 P.3d 833 (Alaska 2003); Purcell v. Zimbelman, 500 P.2d 335 (Ariz. Ct. App. 1972); Tucson Med. Ctr., Inc. v. Misevch, 545 P.2d 958 (Ariz. 1976); Elam v. Coll. Park Hosp., 183 Cal. Rptr. 156 (Cal. Ct. App. 1982); Kitto v. Gilbert, 570 P.2d 544 (Colo. Ct. App. 1977); Register v Wilmington Med. Ctr., Inc., 377 A.2d 8 (Del. 1977); Insinga v. LaBella, 543 So. 2d 209 (Fla. 1989); Mitchell Cnty. Hosp. Auth. v. Joiner, 189 S.E.2d 412 (Ga. 1972); Domingo ex rel. Domingo v. Doe, 985 F. Supp. 1241 (D. Haw. 1997) (concluding that Hawaii Supreme Court would recognize); Darling v. Charleston Cmty. Mem'l Hosp., 211 N.E.2d 253 (Ill. 1965), cert. denied, 383 U.S. 946 (1966); Winona Memorial Hosp., LP v. Kuester, 737 N.E.2d 824 (Ind. Ct. App. 2000); Sibley v. Bd. of Sup'rs of La. State Univ., 477 So. 2d 1094 (La. 1985); Copithorne v. Framingham Union Hosp., 520 N.E.2d 139 (Mass. 1988); Ferguson v. Gonyaw, 236 N.W.2d 543 (Mich. Ct. App. 1976); Larson v. Wasemiller, 738 N.W.2d 300 (Minn. 2007); Taylor v. Singing River Hosp., 704 So. 2d 75 (Miss 1977); Gridley v. Johnson, 476 S.W.2d 475 (Mo. 1972); Hull v. N. Valley Hosp., 498 P.2d 136 (Mont. 1972); Foley v. Bishop Clarkson Mem'l Hosp., 173 N.W.2d 881 (Neb. 1970); Corleto v Shore Mem'l Hosp., 350 A.2d 534 (N.J. Super. Ct. Law Div. 1975); Diaz v. Feil, 881 P.2d 745 (N.M Ct. App. 1994); Raschel v. Rish, 110 A D.2d 1067 (N.Y. App. Div. 1985); Bost v. Riley, 262 S.E.2d 391 (N.C. Ct. App. 1980); Benedict v. St. Luke's Hosps., 365 N.W.2d 499 (N.D. 1985); Albain v Flower Hosp., 50 Ohio St. 3d, 553 N.E.2d 1038 (Ohio 1990), Strubhart v Perry Mem'l Hosp. Trust Auth., 903 P.2d 263 (Okla. 1995), Thompson v. Nason Hosp., 591 A.2d 703 (Pa. 1991); Rodrigues v Miriam Hosp., 623 A.2d 456 (R.I. 1993); Crumley v. Mem'l Hosp., Inc , 509 F. Supp. 531 (E.D. Tenn. 1978) aff'd, 647 F.2d 164 (6th Cir. 1981); Denton Reg'l Med. Ctr. v. LaCroix, 947 S.W.2d 941 (Tex. App. 1997);

Garland Cmty. Hosp. v. Rose, 156 S.W.3d 541 (Tex. 2004); Wheeler v. Cent. Md. Med. Ctr., Inc., 582 A.2d 165 (Vt. 1989); Pedroza v Bryant, 677 P.2d 166 (Wash. 1984); Roberts v. Stevens Clinic Hosp., Inc., 345 S.E.2d 791 (W. Va. 1986); Johnson v. Misericordia Cmty. Hosp., 301 N.W.2d 156 (Wis. 1981); Greenwood v. Wierdsma, 741 P.2d 1079 (Wyo. 1987).

The Supreme Court of Illinois is credited with being the first to expressly adopt the doctrine of "corporate negligence" in the case of Darling v. Charleston Cmty. Mem'l Hosp., 211 N.E.2d 253 (Ill. 1965). In that case, the plaintiff went to the defendant hospital after he broke his leg. Ultimately, his leg had to be amputated below the knee. The plaintiff brought an action against the physician and the hospital alleging that the hospital committed negligence by allowing the physician to do orthopedic work, not requiring the physician to review operative procedures, failing to adequately supervise the plaintiff's treatment, and not requiring a consultation. The hospital defended the action by asserting that it could not control the physician's treatment of the plaintiff and that, as a corporation, it was unable itself to practice medicine. The court found the argument unpersuasive, holding that a hospital, despite its corporate existence, assumes certain responsibilities for patient care:

> The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment.

Id. at 257.

Numerous courts have followed Darling and imposed liability on hospitals for injuries resulting from their own negligence under the "corporate negligence" theory. The

"theory" was characterized by the Pennsylvania Supreme Court in Thompson v. Nason Hosp., 591 A.2d 703 (Pa. 1991), as imposing liability where a hospital "fails to uphold the proper standard of care owed its patient." Id. at 707. The Thompson court identified four distinct duties:

> (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients.

Id. at 707 (citing Chandler Gen. Hosp. Inc. v. Purvis, 181 S.E.2d 77 (Ga. Ct. App. 1971); Johnson, supra; Darling, supra; Wood v. Samaritan Inst., 161 P.2d 556 (Cal. 1945)).

Often quoted is the reasoning of the Supreme Court of Wisconsin concerning the foreseeability of harm:

> The failure of a hospital to scrutinize the credentials of its medical staff applicants could foreseeably result in the appointment of unqualified physicians and surgeons to its staff. Thus, the granting of staff privileges to these doctors would undoubtedly create an unreasonable risk of harm or injury to their patients. Therefore, the failure to investigate a medical staff applicant's qualifications for the privileges requested gives rise to a foreseeable risk of unreasonable harm and we hold that a hospital has a duty to exercise due care in the selection of its medical staff.

Johnson, 301 N.W.2d at 164.

In Bost v. Riley, supra, the Court of Appeals of North Carolina noted that, while the "doctrine of corporate negligence" had not been expressly adopted by that state, it had nonetheless been implicitly accepted and applied in a number of decisions, such as those imposing: the duty to make a reasonable inspection of equipment used in the treatment of patients and to remedy any defects discoverable by such inspection; the duty to provide equipment reasonably suited for the use intended; the duty not to obey instructions of a physician that are obviously negligent or dangerous; the duty to promulgate adequate safety

rules relating to the handling, storage, and administering of medications; and the duty to adequately investigate the credentials of a physician selected to practice at the facility. Id at 396 (citations omitted). Because each of those duties flow directly from the hospital to the patient, the court acknowledged that "a breach of any such duty may correctly be termed corporate negligence." Id

Just as in our neighboring State of North Carolina, South Carolina already recognizes a variety of duties, owed directly by entities, including hospitals, to their patrons Joining the majority of the nation's jurisdictions in expressly recognizing a negligent credentialing cause of action is appropriate and in line with the existing negligence doctrines found in our common law.

II. THE FORM AND SUBSTANCE OF A NEGLIGENT CREDENTIALING CAUSE OF ACTION REQUIRES NO MORE THAN THE APPLICATION OF STANDARD NEGLIGENCE PRINCIPLES.

A. The applicable standard of care is that of a reasonably prudent person and can be established without the need for expert testimony through a hospital's bylaws, state regulations, and national accreditation standards.

In the context of negligent credentialing claims, the appropriate standard of care to be applied in assessing negligence is that of a reasonably prudent person. In Estate of Waters v. Jarmin, 547 S.E.2d 142 (N.C. Ct App. 2001), the North Carolina Court of Appeals explained that "there are fundamentally two kinds of [corporate negligence] claims: (1) those relating to negligence in clinical care provided by the hospital directly to the patient, and (2) those relating to negligence in the administration or management of the hospital." Id at 144. Cases alleging a failure by the hospital to adequately monitor and oversee a physician or which contend the hospital was negligent in granting privileges to unqualified physicians are examples of the latter, and require the court to apply the

reasonably prudent person standard of care in assessing negligence. Id. at 145 (discussing Blanton, 354 S.E.2d at 457).

In Strickland, supra, the Court noted that a plaintiff bringing a negligent credentialing claim will, consistent with traditional negligence standards, be required to establish the applicable standard of care. By way of example, the Strickland Court noted that the standard of care could potentially be established by national accreditation requirements or a hospital's own bylaws. Id. at 72, 448 S.E.2d at 586. This is a position that has been adopted by a large number of courts defining the applicable standard of care after recognizing a negligent credentialing cause of action. See Pedroza, 677 P.2d at 171 (holding that because hospitals are required by law to adopt bylaws with respect to medical staff activities, and because bylaws are generally based on national standards, their use in defining a standard of care for hospitals is appropriate); Mills v. Angel, 995 S.W.2d 262, 268 (Tex App. 1999) ("In determining the standard of care, we look to not only what an ordinary hospital would do under the circumstances, but we may also look to the hospital's internal policies and bylaws.").

The guiding light of a hospital's bylaws, the State regulations cited above, and national accreditation standards are the appropriate benchmark and conform with the existing, standard negligence law of this State. See e.g., Steinke v. S.C. Dept. of Labor, Licensing & Regulation, 336 S.C. 373, 387-89, 520 S E 2d 142, 149-50 (1999) (affirmative legal duty may be created by statute which establishes the standard of care); Peterson v. Natl R.R. Passenger Corp., 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005) (although federal regulations provided standard of care, company's and railroad's deviation from own internal policies was admissible as evidence they deviated from standard of care);

Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002) (general rule is that evidence of industry safety standards is relevant to establishing the standard of care in a negligence case); Caldwell v. K-Mart Corp., 306 S.C. 27, 31-32, 410 S.E.2d 21, 24 (Ct. App. 1991) (when defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, jury may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages); Steeves v. U.S., 294 F.Supp. 446, 455 (D.S.C.1968) (violation of a rule or regulation which is designed primarily for the safety of hospital patients will constitute negligence if the violation proximately results in the injury).

Furthermore, a claim that a hospital failed to use due care in credentialing a physician is not a "medical malpractice" claim but is one that sounds in ordinary negligence. After all, not every injury sustained by a patient in a hospital results from medical malpractice or requires expert testimony to establish the claim. Dawkins, 408 S.C. at 177, 758 S.E.2d at 504. "The plaintiff in ordinary negligence cases does not need to produce expert testimony to establish his claim because the jurors can easily understand and evaluate the relevant facts and law merely by exercising their common knowledge." Id.

Even in cases in which it has been held that expert testimony is required, it should be noted that such an expert need not be a physician but must only be shown to be familiar with the standard of care for credentialing by virtue of training and experience. Mills, supra (an expert witness in a negligent credentialing case need not be a physician, but must be someone familiar with the standard of care for credentialing by virtue of training and experience); Johnson, supra (the testimony of two experts on hospital administration

regarding the need to investigate the applicant's past associations, as well as the testimony of one medical doctor regarding the process used by hospitals to which he had been admitted to practice, and the defendant hospital's own staff coordinator's testimony, held to be sufficient); Garland Cmty Hosp., supra (a credentialing expert need not be a physician).

B. Causation in a negligent credentialing claim can be established without expert testimony and upon a showing that, but for the hospital's lack of care in properly credentialing the physician, the physician would not have been granted privileges and the plaintiff would not have been injured.

A fundamental element of any negligence claim is causation. Under South Carolina law, the primary wrongdoer's action is a legal cause of an injury if either the intervening act or the injury itself was foreseeable as a natural and probable consequence of that action. Benford v. Berkeley Heating Co., 258 S.C. 357, 188 S E.2d 841 (1972). To prove a negligent credentialing claim, a plaintiff injured by the negligence of a member of a hospital's medical staff must show that but for the lack of care in the selection or retention of the physician, the physician would not have been granted staff privileges, and the plaintiff would not have been injured. Schelling v. Humphrey, 916 N.E.2d 1029 (Ohio 2009); Purcell, 500 P.2d at 343 ("We believe it reasonably probable to conclude that had the hospital taken some action against Dr. Purcell, whether in the form of suspension, remonstration, restriction or other means, the surgical procedure utilized in this case would not have been undertaken by the doctor and Mr. Zimbelman would not have been injured.").

Generally, expert testimony is required to establish proximate cause in a medical malpractice case. Green v Lilliewood, 272 S.C. 186, 249 S.E.2d 910 (1978). However, as

set forth above, a negligent credentialing cause of action is not a "medical malpractice case." Because the common knowledge or experience of laypersons is extensive enough to determine the presence of the required causal link between a hospital's negligent credentialing and a plaintiff's injury, no expert testimony should be required. See Bramlette v. Charter-Med.-Columbia, 302 S.C. 68, 72-73, 393 S.E.2d 914, 916-17 (1990) (holding that, even in a traditional medical malpractice action, expert testimony is not required to establish causation where it is a matter of common knowledge).

CONCLUSION

Appellant respectfully requests that this Court: (1) reverse the lower court and recognize a common law cause of action for negligent credentialing; (2) remand this matter for further proceedings consistent with its opinion; and (3) grant such other relief as it deems just and appropriate.

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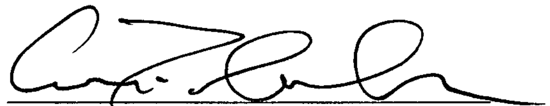

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