

2011-199566

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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OCT 24 2011

S.C. Supreme Court

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

James C. Williams, Jr., Circuit Court Judge

Case No. 2007-CP-38-295

SAMUEL G. SMITH, SR., MELISSA SMITH, and  
SAMUEL G. SMITH, JR., an infant under the age  
of fourteen (14) years, by and through his next  
friend, SAMUEL G. SMITH,.....Petitioners,

v.

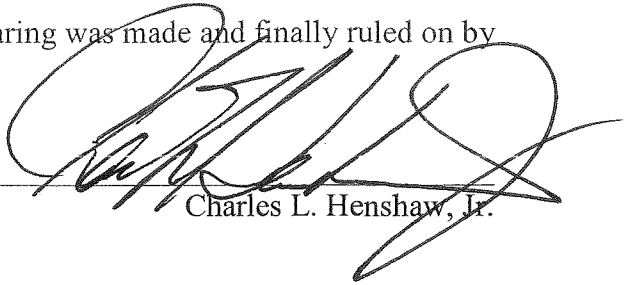
THE REGIONAL MEDICAL CENTER  
OF ORANGEBURG AND CALHOUN COUNTIES,  
ELIZABETH A. LEWIS, D.O., and AMN  
HEALTHCARE, INC. d/b/a STAFF CARE,  
of whom THE REGIONAL MEDICAL CENTER  
OF ORANGEBURG AND CALHOUN COUNTIES  
is the .....Respondent.

PETITION FOR WRIT OF CERTIORARI

CHARLES L. HENSHAW, JR.  
FURR & HENSHAW  
1534 Blanding Street  
Columbia, South Carolina 29201  
Telephone (803) 252-4050  
ATTORNEY FOR PETITIONERS

## **Certification**

The petitioners seek writ of certiorari to review the final decision of the Court of Appeals. As counsel for petitioners, I certify that a petition for rehearing was made and finally ruled on by the Court of Appeals.



Charles L. Henshaw, Jr.

## **Questions Presented For Review**

Can a governmental hospital be held liable under a nondelegable duty of care?

## **Statement of the Case**

### *Procedural History*

This is a medical malpractice case arising from an alleged failure to properly place and maintain a breathing tube in a young child at The Regional Medical Center of Orangeburg and Calhoun Counties. Samuel G. Smith Sr. and Melissa Smith, the parents of Samuel G. Smith, Jr., commenced this lawsuit on behalf of themselves and their child on November 1, 2002. The Regional Medical Center and Dr. Mark R. Zulkey were named defendants, but eventually The Regional Medical Center was substituted for Zulkey, who was found to be an employee of the governmental facility. On March 3, 2007, the court ordered that Dr. Elizabeth Lewis be added as a party defendant on allegations that she was an independent contractor who treated Samuel G. Smith Jr. as an anesthesiologist in the emergency department where the alleged negligence occurred.

The amended complaint alleged that on November 2, 2000, Dr. Lewis and employees of The Regional Medical Center jointly undertook to render emergency and anesthesiology care to

Samuel G. Smith, Jr. The amended complaint alleged that the defendants administered anesthetic agents to Samuel Graham Smith, Jr. that paralyzed him and rendered him unable to breathe on his own; and, consequently, the defendants became responsible for managing Samuel Graham Smith's airway. See Amended Complaint, ¶ 10 (R. p. 12). The plaintiffs alleged that the defendants were specifically negligent in failing to adequately manage Samuel Graham Smith's airway; in failing to timely realize that an endotracheal tube was misplaced; in failing to adequately check the placement of the endotracheal tube; and in failing to timely reposition the endotracheal tube. See Amended Complaint, ¶ 12 (R. pp. 12-13). They alleged that the child suffered brain damage and other personal injuries from inadequate oxygenation. See Amended Complaint, ¶ 11 (R. p. 12).

In their complaint, the plaintiffs asserted that The Regional Medical Center was responsible for the acts and omissions of its emergency room physicians and personnel and its anesthesia personnel because of the requirements of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-200, et. seq.; respondeat superior; and a non-delegable duty. See Amended Complaint, ¶ 6 (R. p. 11).

On February 9, 2009, The Regional Medical Center moved for summary judgment. The first ground was that "plaintiffs cannot establish, by expert medical testimony, any negligence, nor causation of injury, on the part of this defendant and its employees." See Motion for Summary Judgment (R. p. 21). The second ground was that The Regional Medical Center "is not liable for the conduct of persons not employed by it, pursuant to § 15-78-60(20), Code of Laws of South Carolina." See Motion for Summary Judgment (R. p. 21). At hearing, The Regional Medical Center withdrew the first ground, but went forward with its motion on the second ground.

The motion for summary judgment was heard by the Hon. James C. Williams, Jr., on March 24, 2009. On June 3, 2009, Judge Williams granted partial summary judgment to The Regional Medical Center. See Order, June 3, 2009 (R. p. 4-9). The court ruled as a matter of law that The Regional Medical Center had sovereign immunity from the acts and omissions of Dr. Lewis, who was an independent contractor. See Order, June 3, 2009 (R. p. 4-9). The order was mailed by defense counsel on June 16, 2009, and received by plaintiff's counsel on June 18, 2009.

The plaintiffs served notice of appeal on July 6, 2009.

On June 22, 2011, the South Carolina Court of Appeals affirmed the partial summary judgment, holding that a governmental hospital subject to the Tort Claims Act cannot be liable for alleged negligent acts or omissions committed by an independent contractor. On July 22, 2011, the petitioners requested rehearing. The petition for rehearing was denied on August 23, 2011.

### *Statement of Facts*

On November 2, 2000, Melissa Smith and Samuel Smith Sr. carried their young son, Samuel, into The Regional Medical Center Emergency Department at approximately 7:30 a.m. Mrs. Smith informed the emergency department personnel that Samuel had been seizing since approximately 7:10 a.m. According to emergency department records, the child was in status epilepticus at the time of his arrival, and was observed to be cyanotic and not breathing. Resuscitative efforts began soon after the child's arrival, but those efforts were complicated by continuing seizure activity. When it was decided that the child should have an endotracheal tube for oxygenation, an anesthesiologist was called to the emergency department to perform the task. See Deposition of Elizabeth Lewis, D.O. (R. p. 53, lines 5-16).

Anesthesiologist Elizabeth Lewis, D.O., was in the hospital's surgery unit and responded to the call. At that time, she was under contract to provide anesthesia coverage in the hospital on a temporary basis. See Lewis Deposition (R. p. 48, lines 6 - 11). Dr. Lewis inserted an endotracheal tube and determined it should be in the child's airway for a length of 14 cm. Instead of being at 14 cm, the endotracheal tube was inserted and taped in place at a length of 19 cm. Instead of increasing, Samuel's oxygen saturation level declined and remained dramatically low for at least five minutes. According to plaintiff's airway management expert, Dr. Ronald Katz, taping the tube at 19 cm unnecessarily endangered the child by pushing the tip of the endotracheal tube into a bronchial stem and obstructed the child's airway. See Affidavit of Ronald A. Katz, M.D. (R. pp. 64-66). By reducing the flow of oxygen, according to Katz, the misplaced tube caused Samuel Smith Jr. to be deprived of oxygen and suffer hypoxic brain injury. See id.

Dr. Lewis was at The Regional Medical Center for a 10-day *locum tenens* assignment by a staffing agency known as Staff Care. See Deposition of Elizabeth Lewis, D.O. (R. p. 45, line 25 – p. 47, line 12). The Regional Medical Center had an agreement for Staff Care to place physicians in the hospital on a temporary basis. See Agreement between Staff Care and The Regional Medical Center, June 9, 2000 (R. pp. 71-75). In turn, Dr. Lewis had a contract with Staff Care to accept the assignments and she was paid by Staff Care, see Lewis Depo. (R. p. 52, lines 10-14); Agreement between Staff Care and Elizabeth Lewis, D.O., Aug. 17, 2000 (R. pp. 67-70).

## Argument

The Regional Medical Center sought and obtained partial summary judgment on the sole ground that it was not liable for the conduct of an independent contractor, who was not an employee of the defendant governmental hospital of Orangeburg and Calhoun counties. See Motion for Summary Judgment (R. p. 21). The decision of the Court of Appeals is in conflict with the prior decision of the Supreme Court in Madison v. Babcock Center, 371 S.C. 123 (2006). Whether a governmental hospital can be liable for breach of a nondelegable duty is a novel question.

In affirming the decision of the lower court for partial summary judgment, the Court of Appeals overlooked and misapprehended the following points:

- (a) The Regional Medical Center of Orangeburg and Calhoun Counties, as a governmental entity, can be held liable under a nondelegable duty of care owed by a hospital.
- (b) The nondelegable duty of a hospital is not merely “a form of vicarious liability,” but is an independent duty of care that runs from the hospital directly to its patients.
- (c) When a hospital owes a nondelegable duty of care to a patient, the hospital is liable for the breach of duty whether the breach was caused by an “employee” or an “independent contractor.”
- (d) A governmental hospital, which is liable for its torts “in the same manner and to the same extent as a private individual under like circumstances” cannot delegate its liability to an independent contractor and, thereby, avoid the liability.
- (e) In Madison v. Babcock Center, the Supreme Court expressly rejected the notion that the government can have summary judgment based solely on the ground that it is not

responsible for the conduct of an independent contractor, who is not a government employee. The Supreme Court said where there is an established common law duty owed to the plaintiff, the government is not entitled to judgment as a matter of law on that basis. See Madison, 371 S.C. at 132.

The analysis for determining the liability of governmental entities that utilize the services of independent contractors was set out in Madison v. Babcock Center as follows:

- (a) Does the defendant owe a duty of care to the plaintiff?
- (b) Did the defendant breach the duty by a negligent act or omission?
- (c) Was the defendant's breach the actual and proximate cause of the plaintiff's injury?
- (d) Did the plaintiff suffer an injury or damages?
- (e) What is the applicability of exceptions to the waiver of immunity contained in S.C.Code Ann. § 15-78-60 (2005 & Supp.2005) which are asserted by the governmental entity?

The Regional Medical Center owed a duty to Samuel Smith because “a hospital owes a nondelegable duty to render competent service to its emergency room patients.” Simmons v. Toumey Med. Center, 341 S.C. 32, 533 S.E.2d 312 (2000). The fact that an independent contractor provided services to Appellant does not affect the existence of the hospital's duty. See Madison.

The plaintiffs showed that the duty of competent service was breached when an endotracheal tube that was to be inserted 14 cm into Samuel Smith's airway instead was inserted 19 cm and compromised the airway. See Affidavit of Ronald A. Katz, M.D. (R. pp. 64-66).

The plaintiffs showed that breach of the duty of was the proximate cause of Samuel Smith's injury. According to plaintiff's airway management expert, Dr. Ronald Katz, taping the tube at 19 cm unnecessarily endangered the child by pushing the tip of the endotracheal tube into a bronchial stem and obstructed the child's airway. See id. By reducing the flow of oxygen, the misplaced tube caused Samuel Smith Jr. to be deprived of oxygen. See id.

The plaintiffs showed that they suffered injury and damages. Specifically, as a result of oxygen deprivation, Samuel Smith suffered hypoxic brain injury. See id.

The status of the anesthesiologist as an independent contractor was undisputed, and The Regional Medical Center asserted that it "is not liable for the conduct of persons not employed by it, pursuant to § 15-78-60(20), Code of Laws of South Carolina." Applying this exception to deny liability for the government's breach of a common law duty to a patient, however, was specifically rejected by the Supreme Court in Madison.

We find this position unpersuasive because Department owes a common law duty of care directly to Appellant. The fact an independent contractor provided services to Appellant or the fact a third party may have committed a criminal act in harming Appellant does not affect the existence of Department's duty.

See Madison, 371 S.C. at 143. A nondelegable duty is an independent duty of care that runs from the hospital directly to its emergency room patients. Part of that independent duty is to see to it that the independent contractors do not act negligently. That is the hospital's duty and not simply liability for the doctor breaching her own separate duty of care. See Simmons, v. Toumey, 341 S.C. at 42, 533 S.E.2d at 317.

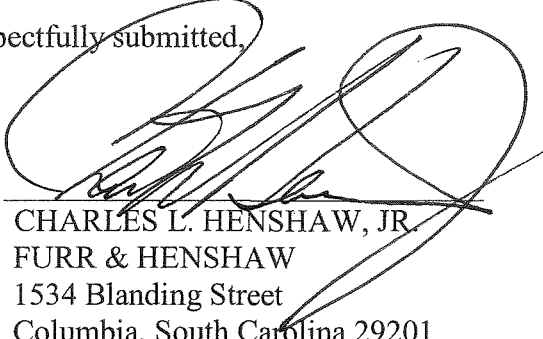
Where the government seeks summary judgment solely on grounds that it was not responsible for the conduct of an independent contractor, who was not an employee of the government, the government is not entitled to judgment as a matter of law where there is an established common law duty owed to the plaintiff. See Madison, 371 S.C. at 132.

## Conclusion

Certiorari should be granted, the final decision of the Court of Appeals should be reviewed, and the summary judgment should be reversed and the case remanded.

Respectfully submitted,

By:



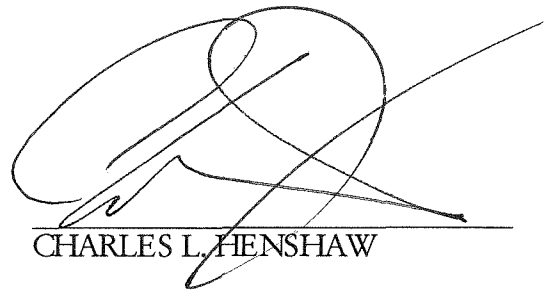
CHARLES L. HENSHAW, JR.  
FURR & HENSHAW  
1534 Blanding Street  
Columbia, South Carolina 29201  
Telephone (803) 252-4050  
ATTORNEY FOR PETITIONERS

October 24, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused to be served a copy of the foregoing **PETITION OF WRIT OF CERTIORARI**, upon the individuals whose names and addresses are listed below by placing a copy in the United States Mail with proper first-class postage affixed thereon.

Mr. Richard B. Ness  
Ness Jett & Tanner  
Post Office Box 909  
Bamberg, SC 29003



CHARLES L. HENSHAW

October 29, 2011