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.

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

I. A negligent credentialing cause of action is envisioned, and not barred, by S.C. Code Ann. § 44-7-390.

Respondent Waccamaw Community Hospital ("Hospital") asserts that, by enacting S.C. Code Ann. § 44-7-390, the General Assembly has "rejected" a cause of action for negligent credentialing. Even if this statute was applicable to this matter,[1] its plain language compels the opposite conclusion reached by the Hospital.

Despite the sweeping immunity granted to hospitals by S C. Code Ann § 44-7-390, there are important exceptions. If a hospital acts with malice, it is not immune If a hospital fails to make a "reasonable effort to obtain the facts" before taking an action, such as credentialing a member of its medical staff, or if its action is not "taken [with] the belief that it is warranted by the facts known," it is not immune. Finally, with regard specifically to the medical staff credentialing process, a hospital is granted immunity only if the credentialing process is conducted "pursuant to written bylaws that have been approved by the governing body of the hospital." See S.C. Code Ann. § 44-7-390(4).

Appellant's Second Amended Complaint (hereinafter the "Complaint"), on which the lower court's Rule 12(b)(6) dismissal was necessarily premised, makes allegations that compel the conclusion that the Hospital's conduct falls outside of the immunity granted by S.C. Code Ann. § 44-7-390. It alleges that the Hospital failed to provide the Decedent with a pathologist that "met the requirements of the hospital's bylaws " (R. p. 33, ¶ 56(a)). As such, Appellant has alleged that the Hospital failed to follow its bylaws in its appointment

[1] S C Code Ann § 44-7-390 became effective on June 26, 2012, and pursuant to the Act enacting the statute, it "applies to any investigative action undertaken as provided herein where the underlying event giving rise to the investigation occurs on or after the effective date " See 2012 S C Laws Act 275, § 3 (H B 4008) The events giving rise to this lawsuit occurred before the effective date of the statute and therefore it is inapplicable

and reappointment of Dr. McGinley. The Complaint alleges that the Hospital failed to revoke Dr. McGinley's privileges at the Hospital and, instead, reappointed Dr. McGinley to the medical staff when it learned of his unethical, fraudulent, criminal actions and unfitness of character (R. p 33, ¶ 56(c)-(e)) It is for the jury to decide whether or not the Hospital's actions, in failing to revoke and then reappointing Dr. McGinley to its medical staff, were taken with the belief that such actions were warranted by the facts known. It is also alleged that the Hospital failed to independently monitor Dr. McGinley, putting at issue whether or not the Respondent's efforts to obtain the necessary facts before reappointing Dr. McGinley to its medical staff were reasonable. (R. p. 33, ¶ 56(b)). Finally, Appellant has alleged that, in taking these actions, the Hospital acted with malice and that its conduct resulted in the death of Appellant's husband (R. p. 34, ¶ 57) Thus, even if the events giving rise to this action occurred on or after the effective date of S.C. Code Ann. § 44-7-390, making it applicable to this matter, it would not constitute a basis for dismissal because Appellant has alleged facts that remove the immunity granted by that statute.

Appellant submits that not only is her action against the Hospital not barred by this statute, it is specifically contemplated by this statute. Had the General Assembly wished to make hospitals fully immune for any and all injuries caused by their credentialing decisions, regardless of how malicious, unreasonably uninformed, or contrary to their own bylaws, it would not have carved out those very exceptions in the reach of this statute. See Riverwoods, LLC v. Cty. of Charleston, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative. The enumeration of exclusions from the operation of a statute

indicates that the statute should apply to all cases not specifically excluded Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed.'") (citations omitted).

II. This is an appeal of a Rule 12(b)(6) dismissal and therefore the only issue before the Court is whether Appellant's Complaint states facts sufficient to constitute a cause of action.

The lower court dismissed Appellant's action against the Hospital pursuant to Rule 12(b)(6), SCRCP, on the basis that South Carolina does not yet recognize the duty Appellant alleges was breached by the Hospital. No evidence was entered into the record and the Motion to Dismiss was not treated as a Motion for Summary Judgment The Hospital has nonetheless argued throughout its brief that the lower court's dismissal of this action was proper because there is insufficient evidence of causation Specifically, it submits that, because there is no evidence that Dr. McGinley was taking narcotics at the time of the medical negligence, this matter must be dismissed. To clarify, it is not Appellant's position that Dr. McGinley committed medical negligence due to his being under the influence of drugs Rather, it is Dr. McGinley's fraudulent character, his numerous lies, and his deceit, all of which were grounds for the disciplinary action brought against him by the Board of Medical Examiners, that rendered him unfit, and unqualified, to be appointed to the medical staff of the Hospital. This is what Appellant's Complaint alleges. Appellant believes that Dr. McGinley lied about reading the slide and falsified a pathology report, just as he had forged numerous prescriptions and identification cards. In other words, it is his flawed character, not his addiction, that Appellant submits rendered him unfit to be a member of the Hospital's medical staff without further investigation into whether he could be trusted.

However, the fact remains that, because this is an appeal of a Rule 12(b)(6) dismissal, there was no "evidence" in the record that was weighed by the lower court or a jury. The question for the lower court was whether, in the light most favorable to the plaintiff, and with every doubt resolved in her behalf, the allegations set forth on the face of the complaint state any valid claim for relief. Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). This is the same standard of review to be applied by this Court. Doe v Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

The only argument that could be made by the Hospital at this juncture as to causation is that Appellant's Complaint fails to adequately allege that the acts complained of caused Appellant's injuries This argument has not been made, nor would it be successful if made given that the allegations of Appellant's Complaint specifically allege that the Hospital's actions, and inactions, caused her husband's death.

III. The Court's recognition of a cause of action for negligent credentialing should be applied retroactively.

Recognition of this cause of action would not create new substantive rights, it would only create a remedy to vindicate the public's existing right to seek compensation when a hospital's negligence causes it harm. Appellant's claims sound in simple negligence. As such, this Court's official recognition of such a duty would be nothing more than a clarification of the common law of this State and must be applied retroactively. See Carolina Chloride, Inc. v. S.C. Dep't of Transp., 391 S.C. 429, 433, 706 S E.2d 501, 503 (2011) (in South Carolina, the general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retroactively).

In Simmons v. Tuomey Reg. Med Ctr., 341 S.C. 32, 533 S.E.2d 312 (2000) ("Simmons II"), the South Carolina Supreme Court was called upon to decide "the novel issue of whether a hospital owes a common law nondelegable duty to render competent service to its emergency room patients " Id. at 35, 533 S.E.2d at 314. The Court held that such a duty would be imposed, it set forth the elements that a plaintiff must prove to establish liability in the emergency room and potentially other settings, and it then remanded the matter "for further proceedings consistent with [that] opinion " Id. at 53, 533 S E 2d at 323.

In Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001), the South Carolina Supreme Court explained that the Simmons II decision "did not create a new cause of action or abolish any existing immunity, but merely recognized a new remedy to vindicate existing rights." Id. at 13, 550 S.E.2d at 324. In Osborne, the plaintiff sought to hold the defendant hospital liable for the alleged negligence of the independent-contractor physicians who treated her daughter in the hospital's NICU through application of the ostensible agency doctrine adopted in Simmons II. The events giving rise to the lawsuit occurred before the Simmons II decision was rendered and the hospital argued that Simmons II should be applied prospectively only. The Court disagreed, explaining that "Simmons II did not abolish an immunity, it merely clarified the common law of this State." Id. at 12, 550 S.E.2d at 323.

Here, just as in Simmons II, the recognition of a hospital's duty to use reasonable care in the credentialing of its medical staff is not the creation of a new cause of action, it is simply a clarification of the common law of this State and therefore should be applied retroactively.

However, even if it is determined that the Court's recognition of a duty owed by hospitals to use reasonable care in the credentialing of its medical creates a new substantive right and remedy where formerly none existed, Appellant submits that there is ample foreshadowing of this ruling to eliminate any unfairness and to justify the application of "selective" or "modified" prospectivity. A court uses selective or modified prospectivity when it applies a rule to the case at bar and to all future cases See Davenport v Cotton Hope Plantation, 333 S.C. 71, 508 S.E.2d 565 (1998) (finding revised view of assumption of the risk applied to that case and to all causes of action that arose or accrued after the date of the opinion); Ludwick v. This Minute of Carolina, 287 S.C. 219, 222, 337 S.E.2d 213, 215 (1985) (recognizing the tort of wrongful discharge of an employee in violation of public policy and applying the decision in that case and prospectively, noting that "language in recent opinions of this Court and our Court of Appeals reflects both an awareness of this erosion [of the employment at-will doctrine] and the likelihood that the doctrine will be reviewed in an appropriate South Carolina case"); Kinard v. Augusta Sash & Door Co., 286 S C 579, 581, 336 S E 2d 465, 466 (1985) (recognizing a cause of action for negligent infliction of emotional distress and applying it to that case, noting that its decision was foreshadowed by virtue of the "modern trend recogniz[ing] that emotional tranquility is an interest worthy of protection"); McCall v. Batson, 285 S C. 243, 329 S.E.2d 741 (1985) (prospectively abolishing sovereign immunity, noting that the immunity did not apply in that case or in any case filed before July 1, 1986, in which the government defendant had liability insurance coverage); Brown v. Anderson Cnty. Hosp. Ass'n, 268 S.C. 479, 234 S.E.2d 873 (1977) (revising the doctrine of charitable immunity to make charitable hospitals liable for heedless and reckless acts, and applying the decision in that

case and prospectively); McCormick v. England, 328 S C. 627, 494 S.E.2d 431 (Ct. App. 1997) (recognizing a cause of action for breach of a physician's duty of confidentiality, and applying the decision in that case and prospectively).

The foreshadowing of this Court's and the South Carolina Supreme Court's recognition of a hospital's duty to use reasonable care in the selection of its medical staff can be found in South Carolina regulations and case law.

As fully set forth in Appellant's Initial Brief, pp 17-18, and incorporated herein, regulations promulgated by the S.C. Department of Health and Environmental Control ("DHEC") impose upon every hospital the duty to have an organized medical staff, appointed by the hospital's governing body, and mandates that only a physician "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 [who] meet[s] the requirements of the hospital's bylaws" may be appointed. See 24A S C. Code Ann. Regs. 61-16, §§ 501, 504. Those regulations specifically require that "the governing body shall assure itself that the physician is qualified and competent to practice in his profession" before being appointed to the hospital's medical staff, and before any reappointment. See 24A S.C. Code Ann. Regs. 61-16, § 504(A). A hospital found to be noncompliant with these regulations is subject to monetary penalties and/or the suspension or revocation of its license to operate. See 24A S.C. Code Ann. Regs. 61-16, § 401; S.C. Code Ann. § 44-7-320(A)(1). Given that regulations already require hospitals to perform the very duties Appellant seek to have recognized by this Court, it works no unfairness on the Hospital to apply this Court's recognition of such duties to the case at hand. The Court's recognition would require the Hospital to do no more than it is already required, by state law, to do.

Additionally, such recognition should come as no surprise to the Hospital given the fact that, "[a]s the function of hospitals [have] changed," the courts of South Carolina have "joined other states in re-examining the prudence of permitting institutions to evade legal liability." Simmons v. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 118, 498 S.E.2d 408, 409 (Ct. App. 1998) ("Simmons I") aff'd as modified, 341 S.C. 32, 533 S E.2d 312 (2000); see also Simmons II, 341 S.C. at 50, 533 S.E.2d at 322 (noting a "fundamental shift in the role that a hospital plays in our health system" and recognizing that "patients understandably and correctly expect to be cared for by physicians and other staff members carefully selected and approved by the hospital").

As far back as 1994, in the case of Strickland v. Madden, 323 S.C. 63448 S.E.2d 581 (Ct. App. 1994), the Court of Appeals took note of the other jurisdictions that had adopted the doctrine of corporate negligence, imposing upon hospitals the duty to use care when credentialing physicians The Strickland Court assumed that, when properly before the Court, South Carolina would likewise recognize this duty. Id. at 72, 448 S.E.2d at 596

Given the plentiful foreshadowing provided by case law and the regulations of this state, this Court's recognition of a duty owed by hospitals to use reasonable care in the credentialing of physicians, and the application of that duty prospectively and to the case at bar, would not constitute any unfair surprise or work any injustice on the Hospital See Charleston Cnty Sch Dist. v. State Budget & Control Bd., 313 S.C. 1, 8, 437 S.E.2d 6, 10 (1993) (retroactive application of the recognition of a "new tort" is appropriate when "clearly foreshadowed" by earlier cases)

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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PROOF OF SERVICE

I do hereby certify that I have served all counsel of record in this action with a copy of the documents herein below specified by mailing a copy of the same by United States mail, postage prepaid, to the following addresses:

Documents: **Appellant's Final Brief and Appellant's Final Reply Brief**

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The Honorable Jenny Abbott Kitchings
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Re Nadene Holliday v Waccamaw Community Hospital
Appellate Case No 2015-000331

Dear Ms. Kitchings:

Enclosed please find an original and fifteen copies of the Appellant's Final Brief and Appellant's Final Reply Brief, along with our Proof of Service, for the above-referenced matter. We would appreciate it if you please file the original and return a clocked copy to us in the enclosed self-addressed, stamped envelope.

Sincerely yours,

Beth Palmer

Elizabeth J. Palmer

EJP/lem
Enclosures

cc. William D Doar, Jr , Esquire
John B. McCutcheon, Jr , Esquire