THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Unpublished Opinion No. 2015-UP-209
Appellate Case No. 2013-002058

Elizabeth Hope Rainey, as the
Appointed Guardian ad Litem to
Owen C., a minor ..... Petitioner,

v.

Charlotte-Mecklenburg Hospital
Authority d/b/a Carolinas Medical
Center; South Carolina Department of
Social Services and Bruce Bryant, as
the Constitutional Office of the Sheriff
of York County, the York County
Sheriff's Department, and York County

Of whom

Charlotte-Mecklenburg Hospital Authority
d/b/a Carolinas Medical Center is..... Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies the Petition for Rehearing was made and ruled upon by the Court of Appeals on June 2, 2015.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the court of appeals erred in failing to acknowledge the existence of a special relationship between hospitals, social workers, and patients in South Carolina.

II. Whether the court of appeals erred in finding Restatement (Second) of Torts § 323 does not apply when a hospital voluntarily provides social services to a patient.

III. Whether the Supreme Court should grant a writ of certiorari because determining if a duty is owed to South Carolina citizens by hospitals offering and providing social services is a question of significant consequence.

STATEMENT OF THE CASE

This petition for writ of certiorari seeks a review of the court of appeals' decision finding that a hospital owes no duty to a patient when the hospital renders social services as part of the patient's treatment plan. On December 5, 2009, Owen C. was admitted to CMC's Levine Hospital (hereinafter Respondent) for injuries he sustained at home under the supervision of his father. (App. p. 436, 475). Tests revealed that Owen C. had a subdural hematoma, i.e. bleeding on the brain. (App. p. 475, 505). Upon admission, Respondent initiated internal social work policies. First, Respondent contacted the York County division of the South Carolina Department of Social Services (DSS). Second, Respondent's staff sought consults from Respondent's social workers to determine whether Owen C. was being abused or neglected. (App. p. 369-390).

During Owen C.'s hospitalization from December 5-8, 2009, Owen C.'s family was contacted by social workers Katie Harrison and Laura Newmark, both employed by Respondent. (App. pp. 863, 901). Medical records reveal that Respondent's staff was concerned about suspected child abuse and posted a sitter in Owen C.'s hospital room. (App. pp. 559, 608). These concerns stemmed from the fact that after the subdural hematoma was diagnosed, Owen C.'s parents could not explain how the injury occurred. (App. p. 302).

Once Respondent's officials have a concern about abuse, internal policies dictate that there be both a medical discharge and social discharge in order for a patient to be cleared to go home. (App. p. 370). The night before Owen C. was discharged from Respondent's facility, Owen C.'s neurosurgeon found the child was medially cleared for discharge, but made no assessment on his social discharge. Despite evidence suggesting abuse and an incomplete

assessment by Respondent's social workers, Owen C. was discharged from the hospital to his father, the abuser.

In a matter of weeks, Owen C. was left alone with his abuser. He was hurt again and sustained life altering injuries as a result. When he arrived at Respondent's facility for a second time, he was diagnosed with a new subdural hematoma, retinal hemorrhaging, and persistent seizures. (App. p. 505). It was determined that Owen C. suffered an anoxic brain injury, causing permanent blindness and deafness.

Before the trial court, Petitioner's counsel presented medical records, six inadequate reports generated by Respondent's social workers, Respondent's policies and procedures for social workers, national standards for social workers, and expert testimony as to the duty Respondent and its staff owed Owen C. during his December 2009 hospitalization. *See* Dr. Saverse, (App. pp. 59, 234, 264, 556); Kevin Moore, (App. p. 556); National Standards, (App. pp. 276, 294, 319, 379); Juvenile Abuse Policy, (App. pp. 368-390). In sum, these materials support that Respondent and Respondent's social workers had both a special relationship with Owen C. and that Respondent voluntarily undertook to provide social work care to Owen C. in the hospital setting.

On September 10, 2013, Petitioner timely filed her Notice of Appeal. After briefing and oral argument, the court of appeals entered an Unpublished Opinion on April 22, 2015, affirming the trial court finding (1) no special relationship existed between Respondent and Owen C. and (2) no evidence of an increased risk of harm or actual harm to Owen C. to satisfy the elements of a voluntary undertaking under Restatement (Second) of Torts § 323. (App. pp. 4-6). As to the special relationships, the court of appeals explained "[o]ur supreme court has not spoken on this precise issue, and we may not create such a common law duty." (App. pp. 3-4) (*citing* Chief

Justice Toal's book for the proposition that the court of appeals is an "error-correction court."). Petitioner filed a Petition for Rehearing, which was denied on June 2, 2015. (App. p. 7).

ARGUMENTS

This case presents a novel issue. This appears to be the first time South Carolina's appellate courts have addressed whether social workers providing care in a hospital setting owe a common law duty to patients based on their special relationship to patients.

In a larger sense, this case is representative of the broader shift in healthcare not only in South Carolina, but nationally. Medical professionals commonly frame, advertise, and provide social care as an integral aspect of interdisciplinary care for hospital patients. The interdisciplinary model of health care provides a collaborative health care system that promotes an all-encompassing treatment plan for medical and social needs in a way that is consistent with the public's general understanding of hospital care.

This expansion of medical and social services through interdisciplinary care far surpasses the traditional notions of healthcare recognized by our laws. Because of this, current case law fails to acknowledge the essential services provided in the hospital setting by social workers in hospitals throughout South Carolina—services that in this instance were negligently provided. This case provides the Court with the opportunity to affirmatively recognize that the care rendered by social workers in the hospital setting is subject to duties derived from the special relationship between the hospital, the social workers, and the patient.

Furthermore, the care provided by these social workers is subject to one of the most fundamental components of our tort common law—voluntary duty. Hospitals, including Respondent, market their facilities as institutions dedicated to providing both medical and

social services to meet the demands of modern health care. Respondent and other hospitals voluntarily provide social services. Yet up to present, even though they market and provide these services, they refuse to acknowledge that such an undertaking invokes the well-established duty to render those services within the standard of care.

As the law stands in this state, citizens in the most vulnerable circumstances are without recourse to address medical social worker negligence, necessitating review by this Court.

I. The Court of Appeals' Opinion Addressing the Special Relationship between Hospitals, Social Workers, and Patients Involves a Novel Application of Law.

A legal duty may arise from a number of different sources including a "statute, a contractual relationship, status, property interest, or some other *special circumstance*." *Jensen v. Anderson County Dep't of Soc. Servs.*, 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991) (emphasis added). South Carolina courts have long recognized that special circumstances can form a legal duty. *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006); *Jensen*, 304 S.C. at 199, 403 S.E.2d at 617. This duty is one separate and distinct from a statutory duty, but entails the same legal significance and responsibility. The duty is based on circumstances, relationships, and reliance.

Our courts have explained the key element in establishing a duty arising under special circumstances is demonstrating a close relationship between the parties. *Andrade v. Johnson*, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003); *S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324 (1986). A close relationship is one in which the plaintiff looks to the defendant for assistance. *Ravan v. Greenville County*, 315 S.C. 447, 457, 434 S.E.2d 296, 301-02 (Ct. App. 1993) (quoting *S.C. State Ports Auth.*, 289 S.C. at 377, 346 S.E.2d at 326).

Social workers and hospitals develop a close relationship with their patients that is rooted in the vulnerable patient's trust and dependence on the quality of the services and care being rendered. Patients rely on both the hospital and its social workers for assistance. Through this relationship an independent duty is formed, which is evidenced by the patient's reliance on the services being rendered by the hospital and social workers as its agents. This Court anticipated that relationships not yet qualified by case law as a defined "special relationship" can be formed based on special circumstances. As such, this Court instructed lower courts to examine a plaintiff's reliance on the defendant in a close relationship.

Petitioner urged the court of appeals to rely on the framework of *Madison* and *Jensen* to find a special relationship. While this Court has not directly addressed this scenario, it has found that circumstances can create a special relationship and a finding of a duty is appropriate in those instances. Petitioner asked the court of appeals to find the relationship between a hospital, social workers, and a patient to create a duty to provide services within the standard of care. The court of appeals explained "[o]ur supreme court has not spoken on this precise issue, and we may not create such a common law duty," (App. pp. 3-4) (*citing* Chief Justice Toal's book for the proposition that the court of appeals is an "error-correction court.").

The court of appeals' opinion erroneously found hospitals and social workers, employed by the hospital, owe no duty to patients in South Carolina when providing social services. The court of appeals mischaracterized Petitioner's argument when it held, "[Petitioner] is essentially asking this court to impose on all hospitals a common law duty to protect a juvenile patient from third persons who might harm him after he has been discharged from a hospital's care." (App. p. 3). This statement by the court of appeals sidestepped and confused the issue before it by suggesting Petitioner was extending liability for hospitals and social workers for the actions of

third persons following discharge of a patient. That is simply wrong. The breach occurred while Owen C. was under Respondent's care even though the injury and damages only became evident weeks later.

As this Court is well aware, a tort duty is simply "the obligation to conform to a particular standard of conduct toward another." *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 391, 701 S.E.2d 776, 781 (Ct. App. 2010) (quoting *Moore v. Weinberg*, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007)). Social workers have a duty defined by a standard of care in the same way doctors and nurses do in a hospital setting. A social worker's duty is established by the special relationship, and the standard of care merely outlines the contours of the duty. Whether it be for doctors or social workers, a standard of care provides the scope of the duty based on national guidelines, along with internal policies and procedures.

The court of appeals' opinion, however, suggests that the existence of a duty is dependent on the type of professional. This ruling ignores the fact that medical care is rendered in an interdisciplinary manner. The court of appeals' reasoning allows for inconsistent outcomes among professionals who are team actors. For example, if a nurse or doctor had allegedly breached the standard of care in treatment to Owen C. and then several weeks later signs of such breach became evident Owen C. could pursue a claim. Yet, when social workers breached the standard of care and signs of such breach were exhibited several weeks later, no negligence claim could be brought because no duty exists. This position is contrary to the general principles of tort law in South Carolina. *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 251, 734 S.E.2d 161, 163 (2012). This ruling disregards discovery rules, the purpose of the statute of limitations, along with basic sense that aspects of causation flow beyond the discharge of a patient.

Specifically, this medical malpractice action was based on the social workers' and hospital's negligence while providing care to Owen C. Petitioner alleged in the Complaint and argued before the trial court and court of appeals that had the social workers not breached the standard of care Owen C. would never have been returned to his abuser and thereby been inflicted with injuries causing him to sustain life altering injuries resulting in permanent blindness, an inability to ever walk again, and permanent mental incapacity. (App. pp. 1-6, 42, 212, 1157). The defining legal question that has been raised throughout this litigation is whether there is a duty based upon the relationship between the parties. (App. pp. 212, 1157-1196). Under the existing legal framework, a duty can and does exist because of the closeness of the parties' relationship and the reliance by patients in a hospital setting.

Other state supreme courts have found that this type of relationship establishes a duty based on these special circumstances. *See Niece v. Elmview Group Home*, 929 P.2d 420, 424 n. 2 (Wash. 1997) ("the relationship between a hospital and its vulnerable patients is a recognized special relationship"); *Henderson v. Gunther*, 931 P.2d 1150, 1155 (Colo. 1997) (en banc) ("special relationships such as . . . a hospital and a patient have been found to impose a duty of care"). The court of appeals suggests that this case is distinguishable from other state appellate courts because Petitioner has not challenged the quality of care provided to Owen C. *See* Unpublished Opinion No. 2015-UP-209 ("However, all of these cases are distinguishable from the present case because Appellant does not challenge the quality of care Respondent provided to Child during his four-day hospitalization in December 2009."). That is incorrect. The crux of this case is that the quality of care provided by Respondent and Respondent's social workers was unacceptable. Respondent provided both medical and social care. The care that was provided for Owen C.'s social needs fell well below the standard of care. As written, the court of appeals

opinion suggests that the type of services rendered dictate whether or not a special relationship can be formed. (App. p. 1-6). This reasoning fails to recognize the interdisciplinary nature of care provided in a hospital setting. Respondent offered and inadequately rendered social services as part of the hospital's overall services and treatment. The quality of the social services provided by Respondent was deficient and the failure to properly provide those services was negligent.

This case necessitates review by this Court as a novel issue. As it stands, patients are without recourse to address medical negligence arising from social services in the hospital setting. Lower courts are unwilling to apply the expressed principles outlined by this Court, and as such, Petitioner respectfully requests this Court to reconcile antiquated law with interdisciplinary care provided in the twenty-first century.

II. The Court of Appeals Erred in Finding Restatement (Second) of Torts § 323 does not apply when a Hospital Voluntarily Provides Social Services to a Patient.

The formation of a tort duty is generally limited to those sources stated in *Jensen*. However, a party can face liability even without reference to a duty created by these sources if the party voluntarily undertakes a service and fails to exercise reasonable care in performing the service. *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 115, 512 S.E.2d 510, 520 (Ct. App. 1998) ("A person who voluntarily undertakes to perform an act must use due care in the performance of that act"). A party "assumes" a duty he otherwise would not have if he voluntarily engages in some service on behalf of another. *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997).

A voluntarily assumed duty has long been recognized in South Carolina. *Johnson v. Robert E. Lee Acad., Inc.*, 401 S.C. 500, 504, 737 S.E.2d 512, 514 n. 3 (Ct. App. 2012)(collecting cases). Restatement (Second) of Torts § 323 states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if
>
> (a) His failure to exercise such care increases the risk of such harm; *or*
> (b) The harm is suffered because of the other's reliance on the undertaking.

Id. at 504, 737 S.E.2d at 514 (quoting Restatement (Second) of Torts § 323) (emphasis added).

Respondent voluntarily assumed a duty to provide reasonable social services, pursuant to Restatement (Second) of Torts § 323. Respondent marketed its facility as one that provides premier healthcare for children. Included within that healthcare are social services. As such, Respondent voluntarily undertook a duty to provide social services within the standard of care. Evidence in the record supports a finding that Restatement (Second) of Torts § 323 was satisfied under subsection (a) or (b).

First, if Respondent's social workers had properly completed their assessment, as outlined by Respondent's policies and procedures and national standards, Owen C. would not have been sent back to his abuser. *See* Dr. Saverse, (App. pp. 59, 234, 264, 556); Kevin Moore, (App. p. 556); National Standards, (App. pp. 276, 294, 319, 379); Juvenile Abuse Policy, (App. pp. 368-390). For example, Respondent's social workers took a minimal psychological assessment. (App. pp. 407-413). Respondent's social workers failed to explore and probe, and their questioning of Owen C.'s family members lacked the breadth and rigor necessitated in this type of social work case. (App. p. 242). If the standard questions had been asked, then a finding of abuse would have been made. For example, if Respondent's social workers asked the right questions, then they would have discovered: (1) Father admitted his relationship with Mother had been strained since Owen C.'s birth; (2) Mother acknowledged that Father had poor parenting skills; and, (3) the maternal grandmother reported stress between the grandparents and Mother

over Father's dangerous conduct. A proper assessment in December 2009 would have revealed pertinent facts that would have alerted Respondent's staff that Owen C. was not safe returning to his home. Respondent's policies and procedures outline when Respondent should retain a child that the staff believes is not safe to return home. (App. p. 370). The policy specifically states:

> When a physician determines that a juvenile should remain in the hospital for medical reasons, *or that it is unsafe for the juvenile to return to his or her parent, guardian, or caretaker, the physician or administrator* should first contact the director of [DSS] to determine if [DSS] will take emergency custody and authorize the hospital to retain the physical custody of the juvenile.
>
> In the event [DSS] is unwilling to take custody or cannot be contacted, the local District Court has authorized *the physician or administrator to retain physical custody of the juvenile whenever the physician determines that (1) the juvenile should remain for medical treatment or (2) according to his or her medical evaluations, it is unsafe for the juvenile to return to his parent, guardian, custodian, or caretaker.* (See Administrative Order, Attachment C).

(App. p. 370) (emphasis added).

The risk of harm increased to Owen C. when Respondent failed to follow internal policies and procedures, as well as national standards. Owen C. was sent home because pertinent and easily ascertainable information was not uncovered. Had this information been discovered, as expected and required by guidelines, the physicians and administrator would have been able to make an educated assessment regarding Owen C's safety. An increased risk of harm occurred when Respondent's social workers decided to breach the standard of care.

Second, there is no question that Owen C. suffered harm because of this undertaking. While the hematoma he presented with on his second visit to Respondent's facility has healed, the lifelong harm Owen C. sustained because he was returned to his abuser will never heal. Owen C will never walk or see again. He will never exceed the mental capacity of a one year

old. Owen C. suffered severe and lasting harm when Respondent's social workers were negligent. A social worker exercising the normal standard of care would have seen factor after factor that demonstrated an abusive home and would not have allowed for Owen C.'s return. Owen C. was harmed because Respondent's social workers didn't fulfill their duty. Evidence in the record establishes that a voluntary undertaking occurred.

Owen C. is just one example of hospitals voluntarily undertaking a duty to provide services in South Carolina. Hospitals provide a critical function in our society. However, it's important to not forget that hospitals are also corporations, in the business of marketing and providing services for economic gain. Hospitals use their social services as a part of interdisciplinary care to generate business. As a private actor in the market, hospitals are subject to the same rules of tortious liability as any other actor. Respondent should be held accountable.

III. The Supreme Court Should Grant Certiorari Because Determining the Duty Owed to South Carolina Citizens by Hospitals Offering and Providing Social Services is a Question with Significant Consequence.

Pursuant to Rule 242, SCACR, this Court has the discretion to grant a writ of certiorari for "special and important reasons." In this case, a determination of the duty owed to patients receiving social services through interdisciplinary care is a question of significant consequence. This issue is critical not only to Owen C. and his guardian, but to all persons who receive social care as an aspect of their treatment plans in a hospital setting. Addressing this issue will add indispensable clarity by explicitly stating the responsibility and liability owed to hospital patients.

Without this Court's review, the advances in modern medicine through interdisciplinary care will continue to outpace the law. Our negligence laws exist to provide accountability and recourse for injured persons. Neither of these goals has yet been achieved because intermediate

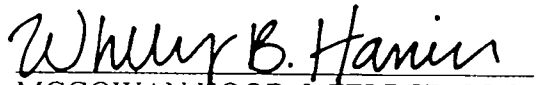
courts have declined to apply the law. The imperative role social workers play in interdisciplinary treatment is concealed, thereby leading to the diminution of medical advocacy. Review by this Court will allow families, guardians, lawyers, and our judicial system to better protect individuals who are injured during negligent medical treatment.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully asks this Court to grant her writ of certiorari and review the Court of Appeals' decision to affirm the trial court.

Respectfully submitted,

June 29, 2015



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Of whom

Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center is..... Respondent.

Proof of Service

I, Whitney B. Harrison, Attorney with McGowan, Hood & Felder, LLC do hereby certify that on June 29, 2015, I served a copy of the Petition for a Writ of Certiorari and Appendix by hand delivering these materials to:

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