

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Unpublished Opinion No. 2015-UP-209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. 2015-001388

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JUL 27 2015

S.C. Supreme Court

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

v.

The 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

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

Monteith P. Todd
Robert E. Horner
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211
(803) 929-1400
Attorneys for Respondent

STATEMENT OF THE CASE

On December 4, 2009, the parents of Owen C. (“Child”) took him to Piedmont Medical Center for medical attention. On December 5, 2009, the physicians at Piedmont Medical Center transferred the Child to Levine Children’s Hospital at the Charlotte-Mecklenburg Hospital Authority (hereinafter “CMHA”) for further medical attention. On December 6, 2009, physicians at CMHA ordered a CT scan. The CT scan revealed a subdural hematoma that raised a suspicion of a non-accidental injury.

Following this CT scan, CMHA notified the York County Department of Social Services (“DSS”) of the possibility that the Child may have been a victim of a non-accidental trauma. Upon notification of the suspicion, DSS began its investigation regarding the Child. While DSS was conducting its investigation, the admitting physician at CMHA ordered and performed additional tests and diagnostic studies on the Child, including consults from ophthalmology and neurosurgery. The results of these consults and studies revealed essentially normal findings. (R. pp. 695-696, 701-702).

Additionally, several of the Child’s family members were interviewed. Neither the Child’s mother nor his maternal grandparents suspected that anyone had abused, or would abuse, the Child. (R. pp. 813-814); (R. pp. 887-888); (R. S-9 - S-10). CMHA last advised DSS that the physicians evaluating the Child could neither rule in nor rule out non-accidental trauma as the cause of the Child’s injury. (R. pp. 633-635); (R. p. 653).

After four days in the hospital, the Child became medically stable and ready for discharge. CMHA advised DSS of this fact. DSS instructed CMHA to discharge the Child to the custody and care of his parents. DSS reported it had investigated the

incident, entered into a safety plan with the Child's parents, and would conduct a home study/investigation. (R. pp. 686-687); (R. pp. 691-695); (R. pp. 740-741); (R. pp. S-42 – S-45). Pursuant to DSS's directives, CMHA discharged the Child to his parents on December 8, 2009. (R. pp. 866-867).

On January 11, 2010, approximately five weeks after discharge, the Child returned to CMHA with a significant brain injury. His father, Michael Carduff, later pled guilty to abusing the Child and causing his January 2010 brain injury.

The Appellant, Elizabeth Hope Rainey, as the Appointed Guardian ad Litem to the Child, ("Rainey") subsequently filed this lawsuit against multiple parties, including CMHA. After discovery, CMHA moved for summary judgment on the grounds that it did not owe the Child a duty and that it was immune from civil liability pursuant to South Carolina Code §63-7-390. The trial court granted the motion for summary judgment on the basis that no duty was owed by CMHA to the Child and that CMHA did not assume a duty to act. The trial court denied CMHA's motion as it relates to the immunity argument. The South Carolina Court of Appeals, in an unpublished opinion, affirmed the trial court's ruling.

ARGUMENT

I. A Writ Of Certiorari Is Not Warranted Under South Carolina Law Based Upon The Facts And Circumstances Of This Case.

The South Carolina Court of Appeals correctly analyzed the law relating to duty in South Carolina in reaching its conclusion that CMHA did not owe a duty to the Child so as to impose liability under the facts of this case, and did not assume such a duty,

under the facts of this case. Accordingly, the Supreme Court should exercise its sound judicial discretion and deny the Petitioner for Writ of Certiorari in this case.

Pursuant to Rule 242(b) of the South Carolina Appellate Court Rules, “[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR. While Petitioner attempts to portray this as a novel issue of law, it is anything but, as there is no statute, no common law rule, and no judicial opinion of any state that has acknowledged or created the duty on a hospital or any other health care professional that is alleged in this case.

This case involves issues relating to potential duties that exist under South Carolina law as it relates to the protection of children from abuse—an issue that the South Carolina Legislature has addressed and codified in Title 63 of the South Carolina Code. Title 63 of the South Carolina Code deals extensively with the duties and obligations related to child abuse, or suspected child abuse. A thorough review of Title 63 reveals only one section that creates a duty on any person not affiliated with the

Department of Social Services, a law enforcement agency, or the Family Courts. This section, South Carolina Code §63-7-310, requires certain individuals to report suspected child abuse or neglect. However, neither this statute nor any common law rule imposes a duty on an individual to take any action regarding suspected child abuse other than reporting the suspected child abuse to DSS or to law enforcement. Once the suspected child abuse has been reported, the duty to investigate and to take action falls to DSS, to law enforcement, and the Family Court, exclusively. See S.C. Code An. §63-7-10 *et seq.*

Despite the clear delineation of the duties regarding the reporting of and investigation of suspected child abuse in the Children's Code, the Petitioner seeks to impose a duty on the Respondent well beyond the obligation to report suspected child abuse, which it did, but rather to investigate the suspected child abuse. This would include a duty to conduct home studies and extensive interviews of extended family and friends, even after being directed by DSS to discharge a minor into the care and control of his parent(s).

There is simply no basis for such a duty or obligation found in the common law or the statutory law, and in fact, to impose such a duty would invade the province of DSS, law enforcement and the Family Court system. If Petitioner's argument is followed to its logical end, a defendant would be required to refuse to discharge a child into the custody of his parents when the child has been medically cleared for discharge by DSS after its evaluation and investigation. This Court should not create a duty on the Petitioner because (1) the Legislature elected to not impose any such duty of medical care providers but rather delegated that authority to DSS and law enforcement, (2) neither this Court nor

any other court in the country has recognized such a duty, (3) this Petitioner has no authority to perform or compel the actions the Petitioner asserts it has a duty to perform, and (4) such a duty would undermine the public policy of the reporting statute, as well as undermine the statutory scheme created by the Legislature in the Children's Code and replace it with chaos.

II. The Trial Court And Court Of Appeals Correctly Held That The Charlotte-Mecklenburg Hospital Authority Did Not Owe Any Due To The Child.

For the reasons set forth herein in the order of the trial court, in this Respondent's Brief, and in the opinion of the Court of Appeals, the Respondent did not owe a duty to the Child to refuse to discharge him to his parents when he was medically cleared for discharge after DSS instructed the Respondent to discharge the Child to his parents.

Petitioner frames this argument as a novel issue. However, the law of duty and obligation are well established in South Carolina. "Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another." Moore v. Weinberg, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007). A legal duty can be created by statutes, a contractual relationship, status, property interest, or some other special circumstance. Madison ex rel Bryant v. Babcock Cntr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656-57 (2006) (citations omitted). Foreseeability of injury, in the absence of a duty to prevent that injury, is an insufficient basis on which to rest liability. South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986) (citations omitted).

The duty imposed by law on CMHA with respect to suspected child abuse and neglect is well defined by South Carolina Code § 63-7-310, which requires various healthcare professionals to report suspected child abuse or neglect to the county Department of Social Services or to a law enforcement agency in the county where the child resides. It is uncontested that CMHA, in accordance with its obligations under South Carolina Code § 63-7-310, reported the suspected child abuse to DSS.

Once the duty to report was satisfied, CMHA had no further duty to the Child regarding the investigation of suspected abuse. It had done all it was required to do by law. Petitioner, however, seeks to create a duty where one does not otherwise exist by arguing that a special relationship existed between Child and CMHA and therefore a “social work duty” should be deemed to exist due to the provider-patient relationship. Petitioner’s argument, however, ignores the fact that the South Carolina Code § 63-7-310, the reporting statute, already envisions a relationship between a healthcare provider and its minor patient when it created a duty upon healthcare providers to report in the first place. In other words, the Legislature recognized a provider-patient relationship and determined the only duty that should arise out of that relationship would be to report. Contrary to the Petitioner’s argument, the healthcare provider-patient relationship is not sufficient to create an obligation to create a “social work” duty, as the Legislature did not see fit to impose such a duty even in the presence of this relationship.

Petitioner’s arguments for the imposition on a duty in this case are further weakened by the facts of this case and the practical implications of her argument. While Petitioner has repeatedly alleged that every court has mischaracterized the duty the

Petitioner seeks to impose, this Court cannot examine this sought-after duty in a vacuum, but rather must look at the practical implications of what said duty would require or lead to in this case or any other case.

To this end, the Petitioner's alleged duty expands the reporting obligation owed by CMHA into a duty to perform a home study, to complete a social work assessment on a child's parents, interview a child's extended family, create its own treatment plan and possibly even attempt to remove a child from his parents. The trial court and the Court of Appeals properly examined the practical implications of Petitioner's argument and rejected it, as neither the common law nor any statutory law imposes such a duty on CMHA or any medical care provider, or allows any such actions to be taken. Rather, the duty to assess and seek judicial custody of a child is solely that of DSS. See S.C. Code Ann. § 63-7-920 (2010) (setting forth the authority of DSS to conduct an investigating child abuse and neglect cases and setting for the statutory requirements for such investigation).

Further, there is no statutory authority for CMHA to perform a home study, interview parents, or even petition the court for an *ex parte* order preventing the return of a child, and the Petitioner has pointed to none. At most under South Carolina law, a hospital *may* retain custody of a child for 24 hours *if* the hospital believes that the child has been neglected *and* that they are waiting for a law enforcement officer to arrive and determine whether the officer should take the child into emergency protective custody.

See South Carolina Code Ann. § 63-7-750 (2010).¹ In the present case, DSS had been contacted, had begun its investigation, and had concluded that CMHA should discharge the medically-cleared Child to his parents while they pursued further investigation and a treatment plan.

In the present case, CMHA did not, and could not, have legal standing to challenge DSS's opinion to discharge the child to the parents. In order to create a duty under the facts of this case between a provider and its patient, the Court would have to bestow legal standing upon all healthcare providers to challenge the evaluation, investigation, and decisions of DSS, as the failure to challenge these decisions could result in the imposition of liability on a healthcare provider. If a healthcare provider were to determine that a child was medically cleared to be discharged but had not completed its own, common-law imposed social work investigation, including home studies and interviewing family members, neighbors, church members, co-workers, etc., but DSS ordered the child discharged, a healthcare provider would have to petition the Family Court for an order preventing DSS from carrying out its directives and requiring the child to stay elsewhere until such an investigation could be conducted. Such actions are not allowed by the Children's Code, and would implicate serious constitutional issues raised by such an intrusion into a parent-child relationship, a healthcare provider would not be acting on behalf of the State but rather against it.

¹ Any argument that CMHA could have used the authority granted by N.C. Gen. Stat. § 7B-308(2005) to retain custody of the Child is without merit. N.C. Gen. Stat. § 7B-308 only allows a hospital to retain a child for 12 hours if further medical treatment is required and the parents attempt to leave with the child or more time is needed to notify DSS. Moreover, under that section, if the child is not in his county of residence, DSS must transfer the case to the child's county of residence. In this case, that would have been York County DSS, which was already involved in the case.

Finally, the imposition of a duty and corresponding creation of legal standing to challenge DSS on its orders would create an adversarial relationship between two entities that the State has determined should work together to protect children through the reporting requirement of providers and the investigation powers and duties of DSS. The statutory scheme created by Title 63 establishes without any doubt what the Legislature believes are the appropriate roles of DSS, law enforcement, the family court, and a very select group of private citizens that can include healthcare professionals. The goal of the statutory scheme is not to create an adversarial relationship between any of these actors in trying to prevent child abuse and neglect. This is no more evident than in South Carolina Code section 63-7-390 which encourages participation in an investigation resulting from a report of child abuse or neglect, as it provides such participants immunity from both civil and criminal liability for its good faith involvement. See S.C. Code Ann. § 63-7-390 (2010). The statute does not provide immunity for *interference* in a DSS investigation, which is what a healthcare provider would be doing if it sought to intervene in a DSS investigation so that it could fulfill its “social work” duty. This would run afoul of the public policy of South Carolina, as is discussed more fully in Section IV.

III. The Court Of Appeals Correctly Held That The Restatement (Second) Of Torts § 323 Did Not Apply When A Hospital Voluntarily Provides Social Services To A Patient.

For the reasons set forth in the trial court's order, Respondent's Brief, and the opinion of the Court of Appeals, the Court of Appeals correctly held that the Respondent did not voluntarily assume a duty under the Restatement (Second) of Torts § 323.

“Ordinarily, the common law imposes no duty on a person to act.” Id. at 456-57, 578 S.E.2d at 714. However, under certain situations, the law may impose a duty to act where one has voluntarily undertaken a duty. This proposition is set forth in Restatement (Second) of Torts § 323. This section 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 upon the undertaking.

Restatement (Second) of Torts § 323.

CMHA did not undertake to provide an assessment of the Child's home environment. It did not volunteer to determine the fitness of Child's parents, and it did not volunteer to investigate the Child's home environment. CMHA, as it is required by statute to do, reported that the Child may have been the victim of child abuse when a CT scan revealed that the Child had suffered a subdural hematoma. The hospital social workers interviewed the parents to determine how the subdural hematoma may have occurred; the parents, however, did not have an explanation. CMHA reported its findings and suspicions to DSS which conducted its own investigation which continued after the Child's discharge into the custody of his parents. At no time did CMHA assume a duty to conduct or attempt to conduct an investigation of the Child's home situation or the

fitness of his parents to retain custody. Accordingly, the argument that CMHA assumed a duty is without merit.

Furthermore, in order for a duty to exist under Restatement (Second) of Torts § 323, CMHA's alleged assumption of a duty would have had to *increase* the risk of harm to the Child. Restatement (Second) of Torts § 323. There is no evidence that CMHA or its employees did anything to increase the risk of harm to the Child. The Child would have been in the same position if CMHA had performed absolutely no social services efforts at all, as DSS performed its own investigation, required the parents to enter into a safety plan, and conducted a home study two weeks later. As noted by the Court of Appeals, there is no evidence that CMHA's social worker caused DSS or law enforcement to undertake a less thorough investigation.

Moreover, under Restatement (Second) of Torts § 323, one must show reliance upon the assumption of a duty. There is no evidence that anyone relied upon CMHA to conduct a home study or a social services evaluation of the Child and his family. DSS opened its own investigation and entered into a safety plan with the Child's parents. DSS conducted its own home inspection of the Child's home. The Child's parents were aware of DSS's involvement in the case and that DSS would be continuing to investigate and be involved after discharge. CMHA did nothing to create any reliance in the Child's family or DSS that it was taking over the investigation into the Child's home environment. Nothing CMHA did caused DSS to perform its investigation in any manner different than it otherwise would have and nothing CMHA lead the family to believe that DSS would not be handling the investigation.

Finally, under the Restatement (Second) of Torts § 323, an actor is free to cease rendering aid at any point in time unless his acts have put the other person in a worse position. See Restatement (Second) of Torts § 323, cmt c. (“The fact that the actor gratuitously starts in to aid another does not necessarily require him to continue his services. He is not required to continue them indefinitely, or even until he has done everything in his power to aid and protect the other. The actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position than he was in before the actor attempted to aid him. . . .”); see also Underwood v. Coponen, 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006); Staples v. Duell, 329 S.C. 503, 506, 494 S.E.2d 639, 641 (Ct. App. 1997). Even if the Court were to find that CMHA assumed a duty, the same of which is denied, nothing CMHA did put the Child in a worse position than it was before CMHA’s involvement, as DSS was conducting its assessment in accordance with its own protocols.

IV. This Court Should Deny The Petitioner's Petition For Certiorari Because Recognizing The Duty Advocated By The Petitioner Would Violate The Public Policy Of South Carolina By Discouraging The Reporting Of Suspected Child Abuse.

While focusing on her legal arguments in urging this Court to grant a Writ of Certiorari, the Petitioner has overlooked the serious public policy ramifications of creating a duty in the situation at bar. Public policy weighs against finding CMHA voluntarily assumed to a duty to the Child merely because it cooperated with, and provided information to, the authorities.

The public policy of not imposing a duty outlined in Johnson v. Robert E. Lee Academy, Inc., 401 S.C. 500, 737 S.E.2d 512 (Ct. App. 2012), Underwood v. Coponen, 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006), and Staples v. Duell, 329 S.C. 503, 494 S.E.2d 639 (Ct. App. 1997) is applicable to this case just as it was in those cases. In not imposing a duty in each of those cases, the Court noted the failure to impose a duty actually promoted good public policy. The Court noted in Underwood and Staples that to impose a duty in those cases would create “the highly undesirable precedent” of encouraging people to never inspect their land, thus potentially creating a greater harm. In Johnson, the Court noted that “contorting the Restatement to create a precedent that may have a chilling effect on cooperation with the authorities or other conduct that inures to the public good is ill-advised and poor public policy.” Johnson, 401 S.C. at 505, 737 S.E.2d at 514. Such is the situation here.

If this Court were to impose liability on CMHA for performing any aspect of a social work assessment, the decision would result in healthcare providers refusing to interview parents or relatives or cooperating with DSS and law enforcement to avoid even the appearance of the creation of any duty and corresponding liability. It would not only discourage the lack of information flowing from a healthcare provider to DSS or law enforcement, it would also discourage *the reporting of* suspected child abuse.

In Doe v. Marion, 373 S.C. 390, 399, 645 S.E.2d 245, 250 (2007), this Court held that the failure to report suspected child abuse under S.C. Code §63-7-310 does not give rise to a private cause of action. If individuals or entities could be held liable for not conducting a thorough “social work” investigation into suspected child abuse, but could

not be held liable for the failure to actually report a suspicion of abuse, they could easily decide that it is better to avoid all civil liability by not reporting the suspect abuse and avoid voluntarily creating a duty rather than report suspected abuse and create a voluntary duty to provide thorough and extensive social services to the child. The duty advocated by Petitioner would likely discourage individuals from reporting suspected child abuse to DSS or law enforcement, resulting in greater harm to the goals that Title 63 and society seeks to eradicate, the abuse and neglect of children.

Finally, imposing liability under any theory in this case would also violate the public policy that the Legislature has sought to promote within Title 63—cooperation among those entities whose mission it is to protect child subject to abuse or neglect in conjunction with those entities who are likely to suspect child abuse, including healthcare providers. This public policy is evidenced by the Legislature's passing of South Carolina Code section 63-7-390 which provides civil and criminal immunity to those who participate in any investigation into abuse or neglect under Title 63. As noted above, creating an adversarial position between DSS, law enforcement, the Family Courts, and any reporter of child abuse would only serve to diminish the ultimate goal in these cases, which is protect child from abuse and neglect. Any imposition of a duty that would impose liability in the face of the statute which provides immunity would violate the Legislature's stated public policy is with respect the issues of abuse and neglect.

CONCLUSION

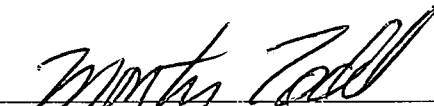
For the reasons set forth herein, the Respondent respectfully submits that the trial court and the South Carolina Court of Appeals both properly analyzed the arguments

made by Petitioner, and reached a decision that is sound as to the law and the public policy of this State. Therefore, the Court should deny petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

SOWELL GRAY STEPP & LAFFITTE, LLC

BY:



Monteith P. Todd

Robert E. Horner

1310 Gadsden Street

Post Office Box 11449

Columbia, SC 29211

Tel: 803-929-1400

Fax: 803-231-7887

Email: mtodd@sowellgray.com

Counsel for Respondent

Columbia, South Carolina

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PROOF OF SERVICE

I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Respondent, The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center, do hereby certify that I have served counsel in this action with a copy of the Return to Petition for Writ of Certiorari by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

Counsel Served:

S. Randall Hood, Esquire
Deborah G. Casey, Esquire
Lara Pettis Harrell, Esquire
Jordan C. Calloway, Esquire
McGowan Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732

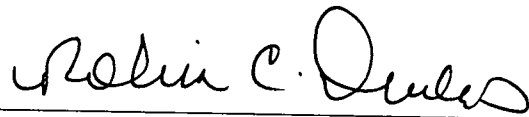
Duane M. Shaw, Esquire
Nathan J. Sheldon, Esquire
Shaw Law Firm
1169 Ebenezer Road
Rock Hill, SC 29732

Whitney B. Harrison, Esquire
McGowan Hood & Felder, LLC
1517 Hampton Street
Columbia, SC 29201

Patrick J. Frawley, Esquire
Davis, Frawley Law firm
Post Office Box 489
Lexington, SC 29071

7/27

, 2015



Robin C. Owens
Legal Assistant