

STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

Chris Katina McCord, Christopher McCord,
Janice Sherfield, and Jerry Sherfield,

Plaintiffs,

v.

Laurens County Health Care System and
Greenville Health System,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2014-CP-30-250

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SC Court of Appeals

**ORDER GRANTING SUMMARY
JUDGMENT**

LAURENS COUNTY
CLERK OF COURT

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This matter came before the Court on January 6, 2016 for oral argument on Plaintiffs' motion to amend their complaint and Defendants' motion for summary judgment. After carefully reviewing the entire factual record, the memoranda of law submitted by the parties, listening to oral arguments, and reading the salient case law, for the reasons more fully explained below, the Court hereby grants Defendants' motion for summary judgment on the grounds that the Court finds that there is no material question of fact to be presented to a jury and Defendants owed no duty to Plaintiffs to ensure that Plaintiffs' physician had medical malpractice liability insurance coverage for their claims against him.¹

¹ At the hearing, the Court heard Plaintiffs' motion to amend first and orally granted leave for Plaintiffs to file their Second Amended Complaint; however, there are a couple of reasons why that does not affect the Court's ruling on Defendants' motion for summary judgment. First, when faced with a properly supported motion for summary judgment, as is the case here, Rule 56(e), SCRPC, expressly provides that Plaintiffs may not rest on the allegations in their pleadings. See e.g., Humana Hospital Bayside v. Lightle, 305 SC 214, 216, 407 S.E.2d 637, 638 (1991); Klippel v. Mid-Carolina Oil Inc., 303 S.C. 127, 129, 399 S.E.2d 163, 164 (Ct. App. 1990). In other words, on a motion for summary judgment, what matter is not what is alleged in the underlying complaint, but whether there are any facts in the record which create a genuine issue of material fact. Hayes v. City of Charlotte, 10 F.3d 210, 215 (4th Cir. 1993) (the non-moving party is "required at the summary judgment stage to go beyond its pleadings and come forward with specific facts in support of its claim"). Second, the court has carefully considered the facts alleged in the Second Amended Complaint, and they simply do not create a genuine issue of material fact or change the Court's determination that no duty was owed.

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Introduction

While Plaintiffs' Complaint contains numerous allegations, the crux of their claim is they contend that Laurens and/or GHS² should be liable for default judgments they obtained in separate medical malpractice actions filed against Dr. Byron Brown and his OB/GYN practice. Plaintiffs have been unable to collect on those judgments, because Dr. Brown no longer resides in the country and his medical malpractice carriers denied coverage. Plaintiffs allege that Laurens should be held liable for those judgments on the theory that Laurens owed them a duty to ensure there was medical malpractice coverage for their claims against Dr. Brown.

Facts

This case arises out of surgeries that were performed on Plaintiffs Chris Katina McCord and Janice Sherfield at Laurens County Hospital ("Hospital") from December 2008 to May 2009 by Dr. Byron Brown. It is undisputed that at the time of the surgeries, Dr. Brown had surgical privileges at the Hospital, but he was not employed by the Hospital.³ Dr. Brown had his own practice with an office located offsite from the Hospital. It is undisputed that pursuant to the Hospital Medical Staff Bylaws ("Bylaws"), Dr. Brown had to maintain medical malpractice insurance in order to retain privileges at the Hospital. And, it is undisputed that at the time of the surgeries, he was in compliance with the Bylaws, as Dr. Brown had a claims-made medical malpractice liability insurance policy through Joint Underwriting Association ("JUA") with coverage limits of \$200,000 per claim and \$600,000 annual aggregate. In addition, Dr. Brown

² GHS is named as a defendant solely upon the basis that Plaintiffs allege that subsequent to the acts giving rise to the causes of action, Laurens entered into an agreement of consolidation or merger with GHS in which GHS may have assumed Laurens's liabilities. (Sec. Am. Compl. ¶ 3.)

³ There was a February 14, 2002 Agreement between Dr. Brown and Laurens whereby Laurens agreed to subsidize Dr. Brown's practice for three years (hereinafter "Subsidy Contract), because the Hospital felt there were an insufficient number of OB/GYN physicians in the area. However, the Subsidy Contract made clear that Dr. Brown was an independent contractor who was free to admit patients at any hospital and maintain privileges to perform surgeries at any hospital.

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had excess coverage through Patients' Compensation Fund, which pushed his total coverage up to \$1,000,000 per claim and \$3,000,000 annual aggregate.

A few months after the surgeries on Mrs. McCord and Mrs. Sherfield, in July, 2009, Dr. Brown decided to switch his medical malpractice insurance from JUA to MAG Mutual. He bought a claims-made policy from MAG Mutual, which covered claims arising on or after July 9, 2009. When he made the change he declined to purchase either "tail" or "prior bad acts" coverage, which meant there would be no coverage for previously unreported claims that occurred prior to July 9, 2009. As a result, since neither Mrs. McCord nor Mrs. Sherfield put Dr. Brown, or anyone else, on notice that they planned to file a claim against him until well after July 9, 2009, there was no insurance coverage for either of their claims.

Following their surgeries, both Mrs. McCord and Mrs. Sherfield continued to experience incontinence issues and both had to seek additional medical care in an attempt to resolve those issues. As a result, they both decided to pursue legal actions against Dr. Brown. The McCords filed their Complaint against Dr. Brown and his practice on December 9, 2011. They did not name Laurens as a defendant in that action or assert any allegations against Laurens. The Sherfields filed their Complaint against Dr. Brown and his practice on September 25, 2012. Like the McCords, they did not name Laurens or assert any allegations against Laurens.

While those actions were pending, Dr. Brown moved out of the country and refused to continue participating in the defense of the actions. As a result, both the McCords and Sherfields were ultimately able to obtain default judgments against Dr. Brown and his practice. (See C.A. No. 11-CP-30-1141, March 11, 2014 Judgment in the amount of \$1,480,457 for Chris Katina McCord and \$50,000 for Christopher McCord and C.A. No. 12-CP-30-753, March 11, 2014 Judgment in the amount of \$1,468,580 for Janice Sherfield and \$50,000 for Jerry Sherfield.)

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Shortly thereafter on March 26, 2014, Plaintiffs filed the instant action.

Summary Judgment Standard

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. Calvert v. House Beautiful Paint and Decorating Ctr., Inc., 313 S.C. 494, 443 S.E.2d 398 (1994). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). When a plaintiff cannot establish facts to meet all the elements of the cause of action, summary judgment is appropriate. Bessinger v. Bi-Lo, Inc., 329 S.C. 617, 496 S.E.2d 33 (Ct. App. 1997); Hunter v. Dixie Home Stores, 101 S.E.2d 262, 232 S.C. 139 (1957). A party may not rely upon an issue of fact that is not genuine or an inference which is not reasonable to rebut a motion for summary judgment. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984).

In order to prevail on either of their causes of action, Plaintiffs must establish that Defendants breached a legal duty owed to them. "A legal duty is that which the law requires to be done or forbore with respect to a particular individual or the public at large." Byerly v. Connor, 301 S.C. 441, 443 415 S.E.2d 796, 798 (1992). A legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. Madison v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2007). The court must determine, as a matter of law, whether the law recognizes a particular duty. Id. If there is no duty, then the defendant is entitled to summary judgment as a matter of law. Id.

Legal Analysis

I. No Contractual Duty Owed

Plaintiffs' first cause of action is breach of contract. In ruling on a motion for summary

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judgment, it is the court's duty to interpret and enforce the contract the parties actually made for themselves and the court cannot, under the guise of interpretation, create a better or different contract than the one the parties actually made. See Sphere Drake Ins. Co. v. Litchfield, 313 S.C. 471, 438 S.E.2d 275, 277 (Ct. App. 1993) (court "is limited to interpretation of the contract made by the parties" and "is without authority to alter a contract by construction or to make a new contract for the parties"); Chan v. Thompson, 302 S.C. 285, 395 S.E.2d 731, 734 (Ct. App. 1990) ("The rights of the parties must be measured by the contract which the parties themselves made, regardless of its wisdom, reasonableness, or failure of the parties to guard their rights carefully") (citations omitted). If the contract is unambiguous, it must be construed according to the terms the parties have used, and the terms are to be interpreted in their plain, ordinary, and popular sense. Litchfield, supra.

The document that Plaintiffs contend forms the basis of their breach of contract claim is the Conditions of Admission form which they executed prior to each of their surgeries (hereinafter "the Contract"). Specifically, Plaintiffs point to the first sentence of the paragraph titled "Financial Agreement" which states,

"The undersigned agrees he signs as agent or as patient that in consideration of the services to be rendered to that patient, he hereby individually obligates himself to pay the account of the hospital, in accordance with the regular rates and terms of the hospital."

Plaintiffs contend that sentence created a duty on the part of the Hospital to ensure that Dr. Brown had medical malpractice insurance coverage for their claims against him; however, the Court finds Plaintiffs' contentions unavailing.

First, taking the terms in their plain, ordinary and popular sense, the purpose of the sentence is unambiguous. It simply obligates patients to pay the bills they receive for the services rendered to them by the Hospital. "Services to be rendered," in the context of that

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paragraph, refers to those services that the Hospital actually provides and bills for, such as room charges, medications, and meals, not ensuring that an independent physician has medical malpractice insurance.

Plaintiffs contend that the "services to be rendered" include: compliance with state and federal laws and regulations; compliance with the Bylaws, and; compliance with the contracts between the Hospital and privileged physicians. However, those things aren't actually services rendered by the Hospital. At most, they go toward the standard of care for how services should be rendered by the Hospital. In essence, Plaintiffs seem to be contending that the Contract implies that services will be rendered in a certain manner; however, South Carolina does not recognize a cause of action for breach of an implied contract in the context of medical care. Banks v. Medical Univ., 314 S.C. 376, 444 S.E.2d 519 (1994).

In addition, Plaintiffs' interpretation is unreasonable, because it requires one to ignore the plain and unambiguous language contained in other parts of the Contract. The paragraph entitled "Medical and Surgical Consent" states,

The patient's care is under the direction of the attending physicians and the hospital is not responsible for any act or omission of the physicians.... The undersigned recognizes that most medical staff members furnishing services to the patient, including the radiologists, pathologist, anesthesiologists, and the like (are) independent contractors and not employees of the hospital.

That paragraph should have made it clear to Plaintiffs that the Hospital was not responsible for any acts or omissions of Dr. Brown. To the extent that Dr. Brown's failure to purchase tail coverage could be construed as a violation of the Bylaws, it would be his violation of the Bylaws, not the Hospitals'. It cannot be reasonably argued that the Hospital promised to ensure that Dr. Brown maintained medical malpractice insurance when the Hospital clearly stated that it was not responsible for anything Dr. Brown did or failed to do.

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II. No Other Basis for a Duty Owed

Plaintiffs also assert a negligence cause of action against Defendants, but to the extent Plaintiffs are alleging the duty owed to them arose under contract, their claims must be redressed under the terms of the contract, and a tort action will not lie. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones, & Goulding, Inc.*, 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995). In an effort to sustain both their contract and negligence causes of action, Plaintiffs' argue that the Contract created a "special relationship" between the parties and that distinct and separate tort duties arose from that relationship (Pl. Mem. In Opp., pp. 16-21); however, the Court finds that assuming, without deciding, that there was a special relationship between the parties, the relationship did not create a duty on the part of Laurens to ensure that Dr. Brown had medical malpractice insurance to cover Plaintiffs' claims.

Plaintiffs contend that Laurens owed them a duty to ensure that Dr. Brown complied with the terms and conditions of the Bylaws and the Subsidy Contract. As an initial matter, there is no evidence in the record that Dr. Brown failed to comply with the requirements of the Bylaws and/or the Subsidy Contract. It is undisputed that at the time of the surgeries on Plaintiffs, Dr. Brown had the required insurance. Plaintiffs contend that he fell out of compliance when he switched policies in July of 2009 and failed to purchase tail coverage; however, there is nothing in the Bylaws or the Subsidy Contract that specifically required Dr. Brown to purchase tail coverage, nor is there any evidence in the record that Laurens considered Dr. Brown to be in violation of the Bylaws or in breach of the Subsidy Contract by his failure to purchase tail coverage.

Nevertheless, even if the Bylaws and/or the Subsidy Contract required Dr. Brown to purchase tail coverage, that requirement would not inure to the benefit of Plaintiffs. Plaintiffs contend they were intended beneficiaries of the requirement that Dr. Brown maintain insurance,

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but there is nothing in either the Bylaws or the Subsidy Contract that states that the insurance requirement is there for the benefit of patients, and Plaintiffs' contention is inconsistent with South Carolina law. See Trancik v. USAA Ins. Co., 354 S.C. 549, 581 S.E.2d 858 (Ct. App. 2003) ("Third-party-liability-insurance contracts are generally indemnity contracts whereby the insurer, or the first party, agrees to pay the insured, or the second party, the amount of any damages the insured may become legally liable to pay a third party; thus, the third party, or the incidental beneficiary, does not have a contractual relationship with the insurer and cannot maintain an action against the insurer for breach of the insurance contract.") At most, Plaintiffs would be incidental beneficiaries of the Medical Staff Bylaws and Subsidy Contract, but that would not give them standing to bring an action to enforce those documents. Id.

Regardless, even if Plaintiffs were intended beneficiaries, such status would only give them standing to sue Dr. Brown as the promisor, not Laurens as the promisee. Under the terms of both the Bylaws and the Subsidy Contract, the obligation to maintain insurance belonged to Dr. Brown. To the extent his failure to purchase tail coverage meant he had not fulfilled his obligations, Plaintiffs would, at best, have been able to sue Dr. Brown for breach of the Bylaws and Subsidy Contract, but that would not give them the right to sue Laurens. See Sullivan v. U.S., 625 F.3d 1378 (Fed. Cir. 2010) (holding plaintiffs could not maintain a breach of contract action against Postal Service for failing to enforce a contract with a transportation company, and noting that the contract provision requiring the contractor to purchase liability insurance for its vehicles was intended to protect the Postal Service from potential risk and plaintiffs were at best incidental beneficiaries); Hesse v. Long and Foster Real Estate, Inc., No. 1:11cv506, 2012 WL 1427793 (E.D.Va.2012) (noting that no jurisdiction recognizes a theory of liability whereby a third party to a contract can sue the non-breaching party for failure to enforce the contract).

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Finally, Plaintiffs make several allegations regarding medical malpractice incidents in the United States, (Sec. Am. Compl. ¶¶ 5-8), and essentially make a public policy argument for the Court to find a duty in this case; however, it is the job of the legislature, not the judiciary, to consider such arguments and enact laws accordingly. Holman v. Bulldog Trucking Co., 311 S.C. 341, 348, 428 S.E.2d 889, 893 (Ct. App. 1993) (“When the Legislature has enacted a rule embodying a particular policy choice, the courts have no power to annul the Legislature’s judgment by substituting their own views of sound public policy.”); see also Henderson v. Evans, 268 S.C. 127, 232 S.E.2d 331 (1977) (It is not the province of the courts to perform legislative functions.) Plaintiffs’ contentions in this case are inconsistent with the public policy of South Carolina as currently set forth by the legislature. Plaintiffs argue that Laurens is mandated by South Carolina law to comply with certain requirements for licensing and operating a hospital (Pl. Mem. In Opp. to Sum. J., pp. 8-11); however, there is no law in South Carolina that requires doctors to maintain medical malpractice insurance, much less any law that puts the burden on hospitals to ensure that doctors maintain medical malpractice insurance.

Further, Laurens and GHS are both governmental entities subject to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq. (1976, as amended), and they and their agents and employees are, therefore, entitled to all rights, privileges, defenses, limitations, and immunities afforded by the Act and afforded by the doctrine of sovereign immunity, as is retained by the Act. See Murphy v. Richland Mem. Hosp., 317 S.C. 560, 455 S.E.2d 688 (1995) (citing Benton v Roger C Peace, 313 S.C. 520, 443 S.E.2d 537 (1994)). Pursuant to the Act, a governmental entity cannot be held liable for the acts or omissions of an independent contractor. S.C. Code § 15-78-60(20); see also Smith v. Reg’l Med. Ctr., 394 S.C. 110, 713 S.E.2d 656 (Ct. App. 2011) (holding governmental hospital could not be held liable for the negligent acts of an

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independent contractor physician). Therefore, it is the public policy of this State and the intent of the legislature that Laurens cannot be held liable for Dr. Brown's failure to have insurance coverage for Plaintiffs' claims. To hold otherwise under the facts of this case would be an unreasonable expansion of the law. See *Huggins v. Citibank*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003) ("The concept of duty in tort liability will not be extended beyond reasonable limits.")

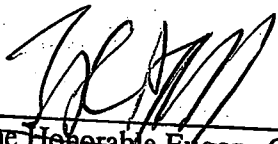
CONCLUSION

The Court finds that Defendants owed no legal duty to Plaintiffs regarding Dr. Brown's medical malpractice insurance. Defendants also set forth proximate cause and statute of limitations arguments in favor of summary judgment; however, in light of the Court's finding that no duty was owed, the Court need not address those arguments.

For the reasons stated herein,


IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' motion for summary judgment is granted, and all of Plaintiffs' claims against Defendants are hereby dismissed with prejudice.

AND IT IS SO ORDERED.



The Honorable Eugene C. Griffith, Jr.
Eighth Judicial Circuit

Feb. 28th, 2017

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Lynn W. Lancaster
Laurens County COCP & GS

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