THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal From Laurens County Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2017-001064

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

v.

Laurens County Health Care System and
Greenville Health System ********** Respondents

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1) The trial judge failed to find that the contracts between Plaintiffs and Laurens County Health Care System ("Laurens County Hospital or Hospital") were ambiguous.

2) The trial judge failed to find that a reasonable interpretation of "services to be rendered to the patient" is for Laurens County Hospital to require privileged physicians, including Byron A. Brown, MD ("Dr. Brown"), to comply with Hospital Bylaws and the Subsidy Contract.

3) The trial judge failed to find that Laurens County Hospital breached the contract with Plaintiffs by failing to require Dr. Brown to comply with Hospital Bylaws and the Subsidy Contract.

4) The trial judge failed to find that a special relationship arose between Laurens County Hospital and Plaintiffs which created a duty to exercise due care on the part of the hospital.

5) The trial judge failed to find that Laurens County Hospital breached the duty to exercise due care in monitoring, supervising or requiring Dr. Brown to comply with Hospital Bylaws and the Subsidy Contract.

STATEMENT OF THE CASE

Plaintiffs filed a complaint on March 26, 2014, alleging a cause of action for breach of contract and a cause of action for breach of the duty to exercise due care in the special relationship between Laurens County Hospital and patients who underwent surgery at Laurens County Hospital. The Amended Complaint was filed June 16, 2014, and the Second Amended Complaint was filed January 11, 2017. Defendants answered the complaint, admitted the existence of the contracts between Laurens County Hospital and patients who underwent surgery at Laurens County Hospital; but, denied that the contracts were breached and denied that a special relationship existed between Laurens County Hospital and patients who underwent surgery at Laurens County Hospital.

On February 28, 2017, the court granted Defendants' motion for summary judgment. On April 4, 2017, the court denied Plaintiffs' motion to alter or amend the judgement. On April 27, 2017, Plaintiffs filed a Notice of Appeal.

ARGUMENTS

A. STANDARD OF REVIEW

In a motion for summary judgment, the evidence and inferences which can be drawn therefrom are to be viewed in a light most favorable to the nonmoving party. Summary Judgment is a drastic remedy, it should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed facts. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E. 2d 69 (1999).

Summary judgment is improper where the motion presents a question as to the construction of a written contract, and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the contract. Where a contract is unclear, or is ambiguous, and capable of more than one construction, the parties' intentions are matters of fact to be submitted to the jury. If a contract is ambiguous, parole evidence is admissible to ascertain the true meaning and intent of the parties. *H.K. New Plan Exchange Property Owner 1, LLC v. Cohen*, 375 S.C. 18, 649 S.E.2d 181, 184 (Ct. App. 2007), citing *Bishop v. Benson*, 297 S.C. 14, 374 S.E.2d 517, 518-519 (Ct. App. 1988); *Wheeler v. Globe Rutgers Fire Ins. Co. of City of N.Y.*, 125 S.C. 320, 118 S.E. 609, 610 (1923); *Penton v. J.F. Cleckly Co.*, 326 S.C. 275, 486 S.E.2d 742, 745 (1997).

B. SALIENT FACTS

This case is an action against Laurens County Health Care System ("Laurens County Hospital") and Greenville Healthcare System ("GHS") for breach of contract and an action for breach of the duty to exercise due care in the special relationship between Laurens County Hospital and patients who underwent surgery at Laurens County Hospital. The patients are Chris Katina McCord ("Mrs. McCord") and Janice Sherfield ("Mrs. Sherfield") (sometimes collectively referred to as "Patients") and their spouses who are Christopher McCord ("Mr. McCord") and Jerry Sherfield ("Mr. Sherfield"), respectively. The Patients allege in the First Cause of Action that they entered into several contracts with Laurens County Hospital and Laurens County Hospital breached the contracts by failing to fully perform the services it provided. (See paragraphs 70, 71, 72, and 73 of the Second Amended Complaint). Also, the Patients allege in the Second Cause of Action that there was a special relationship between Laurens County Hospital and its patients undergoing surgery and that Laurens County Hospital was negligent in exercising due care which resulted in damages to the Patients. (See paragraphs 80, 81, 82, and 83 of Second Amended Complaint).

The Laurens County Hospital Medical Staff Bylaws require the medical staff "to initiate and maintain rules and regulations for the proper functioning of the staff". (ROA, Attachment 8, Article II PURPOSES AND RESPONSIBILITIES 2.1.6). One of the rules and regulations is a "requirement for initial and continuing appointment to the Medical Staff ..... LIPs (licensed individual

practitioners) shall maintain valid professional liability insurance coverage in the amounts deemed necessary by the Board from time to time ...." (ROA, Attachment 8, Article III STAFF APPOINTMENT 3.2.1(e))

Laurens County Hospital also entered into a Subsidy Contract with Dr. Brown which mandated compliance with "all provisions of the medical staff bylaws of the Hospital" and the "policy shall cover professional liability in a minimum amount of $1,000,000 per claim/$3,000,000 aggregate or JUA/PCF coverage." (ROA, Attachment 9, Article II: PHYSICIAN OBLIGATION A.1 and ARTICLE VI: PROFESSIONAL LIABILITY INSURANCE).

The sole expert witness for defendants, James W. Weiss, MHA, MBA, FACHE, testified that in 2008 and 2009 it was common practice for the governing body to require physicians practicing in hospitals in the United States to carry and maintain medical malpractice insurance. It was also "a requirement standard in the industry that the governing body require the medical staff .... to mandate that the .... that the practitioners have medical malpractice (insurance)". ROA, Attachment 28 – 58:4-8; 62:23-63:2). The expert witness for plaintiffs, John C. Hyde, II, PhD, testified that reports from federal agencies, such as the Institute of Medicine (ROA, Attachment 11) document in 1999 that between 44,000 and 98,000 people die each year from preventable medical errors. The Institute of Medicine labeled this level of deaths "the nation's epidemic of medical errors." This research was later confirmed in 2010 by the report from the Office of the Inspector General Department of Health and Human Services entitled *Adverse Events in Hospitals: National Incidence Among Medicare Beneficiaries* (ROA,

Attachment 12). Thus, Dr. Hyde confirmed and supported the testimony of the expert witness for the defendants that the common practice and prevailing standard of hospitals in the United States has been to require physicians to carry and maintain professional liability insurance. (ROA, Attachment 7, 195:23 to 198:8.)

Mrs. McCord underwent three surgeries at Laurens County Hospital on December 18, 2008, February 19, 2009, and April 17, 2009. Mrs. Sherfield underwent surgery at Laurens County Hospital on May 29, 2009.

The surgeries on Mrs. McCord and Mrs. Sherfield were performed by Dr. Brown who was an obstetrician/gynecologist granted privileges to perform the surgeries by Laurens County Hospital. It has been judicially determined that Dr. Brown committed medical malpractice during each surgery and the following are verdicts and judgments rendered against Dr. Brown:

*	Chris Katina McCord	$1,740,392.75;
*	Christopher McCord (loss of consortium)	$ 58,789.40;
*	Janice Sherfield	$1,468,580.00;
*	Jerry Sherfield (loss of consortium)	$ 50,000.00.

(ROA, Attachment 4)

Dr. Brown also committed medical malpractice on other patients after July 9, 2009.[1]

At the time of each McCord and Sherfield surgery, Dr. Brown had insurance under a claims made insurance policy issued by Joint Underwriting

[1] A jury verdict was returned for $2,960,000 in favor of Pamela and Carroll Neighbors against Dr. Brown on July 25, 2014 which was reduced because of noneconomic damages caps and prejudgment interest added for a net judgment of $1,125,464.35, which was later settled for an undisclosed amount; a jury verdict was returned for $2,000,000 in favor of Lisa and Jeffrey Dennie against Dr. Brown on August 29,2014 which was reduced because of noneconomic damages caps and prejudgment interest added for a net judgment of $1,609,445.44, which was later settled for an undisclosed amount. The cases of Dixie Mitchell and Betty and Donald Ward against Dr. Brown were settled for undisclosed amounts.

Association ("JUA"). (ROA, Attachment 15). The coverage under a claims made policy terminates when the insurance policy is not renewed unless the expiring policy provides Extended Reporting Period Endorsement or the replacement policy includes Prior Acts Coverage. (ROA, Attachment 16). Although the JUA policy covering Dr. Brown ended on July 9, 2009, an Extended Reporting Period Endorsement was available for Dr. Brown to purchase at any time prior to January 15, 2010. (ROA, Attachment 17). The replacement policy was also a claims made policy issued by MAG Mutual Insurance Company ("MAG Mutual"). The MAG Mutual policy was issued effective July 9, 2009 but did not include Prior Acts Coverage. Prior Acts Coverage was made available; but, was declined by Dr. Brown. (ROA, Attachment 20 – paragraph 4 of Affidavit).

During the time period from July 9, 2009 to January 15, 2010, no action was taken by Laurens County Hospital to require Dr. Brown to comply with the Medical Staff Bylaws to maintain his professional liability insurance coverage for Mrs. McCord and Mrs. Sherfield by purchasing Extended Reporting Period Endorsement from JUA. Nor did Laurens County Hospital require Dr. Brown to continue coverage by purchasing Prior Acts Coverage from MAG Mutual. For the reasons detailed later, Plaintiffs contend that Laurens County Hospital failed to comply with and enforce the Medical Staff Bylaws and failed to enforce the contractual obligations of Dr. Brown under the Subsidy Contract to maintain valid professional liability insurance for patients who had undergone surgery at Laurens County Hospital. Also, Laurens County Hospital breached the duty of

due care in the patient/hospital special relationship by failing to exercise due care as will be fully shown in Section E – Breach of Duty in a Special Relationship.

Defendants admit to entering into a separate contract with the Patients for each of the four surgeries performed by Dr. Brown at Laurens County Hospital. (ROA, Attachment 1 – Defendant's Supplemental Response to Request for Admission #5). The written documents state "services to be rendered" by Laurens County Hospital; however, the "services to be rendered" are not listed or identified. (ROA, Attachment 5). The parties dispute what "services" are to rendered by Laurens County Hospital. Patients submit that the "services to be rendered" include, but are not limited to, Laurens County Hospital complying with state law and DHEC regulations relating to the operation of the hospital, complying with its own Medical Staff Bylaws promulgated in accordance with state law and DHEC regulations, and complying with contracts that Laurens County Hospital entered into with physicians, specifically, Dr. Brown, that affect the health, safety, and legal rights of the Patients.

As a result of Laurens County Hospital breaching the contracts and negligently failing to exercise due care, there was no insurance coverage to pay the judgments rendered against Dr. Brown. Dr. Brown is judgment proof and has permanently left the United States to reside in New Zealand, (ROA, Attachment 21, MAG Mutual memo; Second Amended Complaint, paragraphs 73, 74, 75, 76, 81, 82, and 83).

After the breach of contract with the Patients, Laurens County Hospital entered into an agreement with Greenville Healthcare System ("GHS"). The

agreement between Laurens County Hospital and GHS was effective July 1, 2013 whereby GHS agreed to assume, perform, and discharge any and all obligations of Laurens County Hospital related to the hospital which existed as of July 1, 2013. The liabilities and obligations of Laurens County Hospital to Plaintiffs for breach of contract and negligence related to the operations of the hospital that existed as of July 1, 2013, and were thus assumed by GHS. (ROA, Attachment 3 – portion of Greenville Health System and Laurens County Health Care System agreement effective July 1, 2013, **Section 2.3 Assumption of Liabilities**) (ROA, Second Amended Complaint, paragraph 4).

C. PREVAILING PRACTICE

The Institute of Medicine, which acts under the responsibility of the National Academy of Sciences that was established by Congress in 1863 as an advisor to identify issues of medical care in the United States, published a report in 1999 entitled "To Err is Human". This was a sentinel report on health care in U.S. hospitals that noted "at least 44,000 people, and perhaps as many as 98,000 people, die in hospitals each year as a result of medical errors that could have been prevented. This death total exceeds the deaths from motor-vehicle wrecks and breast cancer. (ROA, Attachment 11). The total does not include patients who survived, but who are harmed by preventable errors and suffer substantial medical bills together with physical and psychological discomfort. (ROA, Attachment 7 – Hyde deposition, 195:23 to 196:8). The Institute of Medicine termed the situation in our nation's hospitals as an "epidemic of medical errors".

In 2010, the Office of Inspector General of the United States Department of Health and Human Services published a report entitled "*Adverse Events in Hospitals: National Incidences Among Medicare Beneficiaries*". The report noted as follows:

* an estimated 13.5 percent of hospitalized Medicare beneficiaries experienced adverse events during their hospital stay;[2]
* an estimated 15,000 Medicare patients die each month from adverse events that contribute to their death; and
* 44 percent of adverse and temporary harm events were clearly or likely preventable.

(ROA, Attachment 12).

The expert witness for the plaintiffs, who is a professor at the University of Mississippi Medical Center in the Department of Health Services and Family Medicine and has considerable experience teaching and working for private institutions in hospital management, issued the following opinions in his deposition that:

* there is and has been an epidemic of medical negligence causing serious injuries and deaths to patients in hospitals in the United States;
* because of this epidemic of medical negligence, it is both the common practice and a prevailing requirement for hospitals to require its physicians to carry and maintain professional liability insurance;
* the purpose of the hospitals requiring surgeons that operate in the hospitals to carry and maintain professional liability insurance is so patients injured due to the negligent conduct of surgeons have a means to recover damages for injuries wrongly inflicted in the hospital; and
* the professional liability insurance is for the benefit of the injured patient in addition to the benefit of the hospitals.

(ROA, Attachment 7 – Hyde deposition, 197:16 to 198:18).

[2] Adverse event is defined as harm to a patient as a result of medical care.

As earlier noted, the expert witness for the Defendants, James Weiss, also acknowledged it was common practice for the governing body of the hospital to require physicians practicing in hospitals in the United States to carry and maintain medical malpractice insurance. (ROA, Attachment 28 – 58:4-8; 62:23 to 63:2).

The expert witness testimony clearly established that the prevailing practice of hospitals in the United States in 2008 and 2009 was for the medical staff of the hospital to require physicians privileged to practice in hospitals to have and maintain valid professional liability insurance coverage.

Consequently, Plaintiffs submit that a reasonable interpretation of the term "services to be rendered" in the contract between Laurens County Hospital and Patients is for Laurens County Hospital to require Dr. Brown to comply with the Medical Staff Bylaws to maintain valid professional liability insurance coverage for Mrs. McCord and Mrs. Sherfield.

D. BREACH OF CONTRACT

There is a dispute regarding the intent of the parties. Plaintiffs submit that the contract is reasonably susceptible to interpretation that included in the "services to be rendered" for Laurens County Hospital to require physicians who are privileged to practice in the hospital to comply with the medical staff bylaws and terms of contracts which affect the health, safety, and legal rights of patients. Defendants, on the other hand, contend that the intent of the parties is to limit the hospital's "services to be rendered" to only those services separately billed, i.e., room charges, medications, and meals.

The contracts between Patients and Laurens County Hospital are set forth, in part, by the document entitled "Conditions of Admission" which was executed prior to each of the surgeries performed on Mrs. McCord and prior to the surgery performed on Mrs. Sherfield. (ROA, Attachment 5)[3]. The operative language is as follows:

> The undersigned (patient) agrees .... 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.
> (emphasis supplied).

Laurens County Hospital billed Mrs. McCord $56,962 and billed Mrs. Sherfield $51,269 for services rendered and was paid an agreed upon price for these services. (ROA, Attachment 2; ROA, paragraphs 28 and 34 of Answer to Second Amended Complaint).

The trial court in its order, held, in part, that the terms of the contract were unambiguous:

> 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 them by the Hospital. "Services to be rendered," in the context of that 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

[3] The Conditions of Admission for the McCord December 18, 2006 surgery cannot be located; however, Sandra Thompson, the Manager of Quality Resources which includes Risk Management, testified that the document was probably executed, but can't be located. (ROA, Attachment 6 – Thompson deposition, 49:17-25).

the standard of care for how services should be rendered by the Hospital.
(ROA, Order, pages 5 to 6)

The Order sets forth the intent of Laurens County Hospital; however, Plaintiffs contend their intent is different. Plaintiffs submit that their intent is based upon a recognition of the operational environment of a hospital. A hospital is not a Motel 6 which has published rates for rooms and items purchased from the room bar. The hospital is required by state and federal law to establish an environment that has as its primary purpose the health and safety of its patients. There are vital services performed by the hospital for which the hospital does not bill separately. South Carolina law requires each hospital to have a "single organized medical staff that has overall responsibility for the quality of medical care provided to patients". (*§44-7-260(D) S.C. Code*; S.C. Code Ann. Regs. 61-16, § 301). Further, the medical staff shall "with the approval of the hospital governing body, adopt bylaws, rules and regulation to govern its operation as an organized medical staff." (*S.C. Code Ann. Regs. 61-16, § 301*).

It should be recognized that a hospital performs many services to patients – not all of these services have separate rate schedules. The room rate charged to Mrs. McCord and Mrs. Sherfield was $815.00 per night. (ROA, Attachment 2). The rate for one night at Motel 6 is probably around $100 with AAA discount. Can anyone seriously argue that the rooms at Laurens County Hospital are eight times better than rooms at Motel 6? A logical conclusion is that the costs of numerous other services are included in the hospital room rate including the cost of services of Laurens County Hospital ensuring that physicians privileged to

perform surgery in the hospital comply with the hospital bylaws and comply with the terms of contracts with physicians that relate to the health, safety, and legal rights of the patients.

Neither the "services to be rendered" nor the services that were rendered by Laurens County Hospital can be determined from the four corners of the contract. The CEO of Laurens County Hospital agreed when he testified as follows:

> Q. ... the conditions of admission state that services are to be rendered by the hospital to the patient?
> A. Right.
> Q. my question to you, quite simply, is the range of services to be rendered to the patient is not listed in this document, correct?
> A. Yes
> Q. Is that correct?
> A. Yes
> (ROA, Attachment 32 – D'Alberto deposition 44:19-23)

Mrs. McCord testified that it was her intent and understanding that part of the "services to be rendered" by the hospital was the compliance by the hospital with legal requirements which directly or indirectly affected her medical care and legal rights. (ROA, Attachment 35 - McCord deposition 105:19 to 106:18).

The testimony of Mrs. Sherfield was similar. She also testified that it was her intention that the hospital would comply with all state and federal laws, for the hospital to require that all its privileged surgeons, specifically Dr. Brown, comply with the hospital rules and regulations, for the hospital to require its surgeons to comply with any contract they may have with the hospital about patient protection, and that she considers the hospital requirement that doctors maintain professional liability insurance is protection to her. (ROA, Attachment 36 -

Sherfield deposition 67:20 to 68:12). Also, Mrs. Sherfield knew, at the time of execution of the contract, that Laurens County Hospital required any doctor privileged there to have professional liability insurance. (ROA, Attachment 36 - Sherfield Deposition 71:5 to 72:9).

The CEO of Laurens County Hospital further testified that monitoring physicians compliance with that portion of the medical staff bylaws that requires physicians practicing in the hospital to maintain valid professional liability insurance would be a function of medical staff leadership. (ROA, Attachment 32 - D'Alberto deposition 32:5-17). As noted above, both Mrs. McCord and Mrs. Sherfield testified that part of their decision in choosing to undergo their elective procedures at Laurens County Hospital instead of another institution was their understanding that the Hospital would follow its own rules set up to protect the health and safety of its patients.

The intent of the Patients was that they would be protected during this hospital stay by all means available – the South Carolina law, rules and regulations of the hospital, bylaws governing the operation of the hospital, and contracts with physicians which have requirements to protect the patients.

Another issue raised by the Order is that the trial judge characterizes this action as a third party action. Plaintiffs respectfully disagree. For example, the Order states "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." (ROA, Order, page 8). The Order cites in support the Virginia case *Hesse v. Long and Foster Real Estate, Inc.,*

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." (ROA, Order, page 8).

In response, Plaintiffs point out that the complaint does not allege a third party action, but alleges a direct action against a party to the contract, Laurens County Hospital, for breach of the contract in seven separate particulars for failures of Laurens County Hospital employees. (ROA, paragraph 73, Second Amended Complaint). There is no allegation of an action for a third-party claim.

Another issue raised by the Order is that "It is undisputed that at the time of the surgeries on Plaintiffs, Dr. Brown had the required insurance." (ROA, Order, page 7). This statement is correct; however, the inquiry does not stop there because, as the Order notes, "It is undisputed that pursuant to the Hospital Medical Staff Bylaws Dr. Brown had **to maintain** (emphasis added) medical malpractice insurance in order to retain privileges at the Hospital." (ROA, Order, page 2). So, the requirement was for Dr. Brown to have and to maintain valid professional liability insurance. It is true that Dr. Brown had the insurance; but, it is also true that he did not maintain the insurance. It is undisputed that during the six months from July 9, 2009 to January 14, 2010, Dr. Brown was privileged at Laurens County Hospital; but, he did not "maintain professional liability insurance" covering the claims of Mrs. McCord and Mrs. Sherfield. Further, Laurens County Hospital took no action to require Dr. Brown to comply with the Medical Staff Bylaws or the Subsidy Contract to maintain the required professional liability insurance.

Plaintiffs submit that Laurens County Hospital breached the contract with Plaintiffs by failing to require Dr. Brown to comply with the Medical Staff Bylaws to maintain valid professional liability insurance covering the claims of Plaintiffs during the time that Dr. Brown was continuously privileged by Laurens County Hospital. At the very least, a factual issue is presented as to the intentions of the parties in applying the requirement "to maintain professional liability insurance" to the contracts between the parties. Since the scope of the services language in the contract, i.e., "services to be rendered", cannot be determined within the four corners of the contract, then the term "services" is ambiguous. *Carolina Ceramics, Inc. v. Carolina Pipeline Co.*, 251 S.C. 151, 161 S.E.2d 179, 181 (1968) (holding that a contract is ambiguous if it is capable of being understood in more senses than one, if the agreement is obscure in meaning, or has indefiniteness of expression, or has a double meaning.)

The ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity. Any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for its verbiage. *Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 649 S.E.2d 494, 499 (Ct. App. 2007) citing *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423, 426 (1981) (quoting 17A C.J.S. Contracts §324).

The construction of an ambiguous contract is a question of fact to be determined by the jury. *Café Associates, Ltd. V. Gerangross*, 305 S.C. 6, 406

S.E.2d 162 (1991); *Peeples v. South Carolina Power Co*, 166 S.C. 150, 164 S.E. 605 (1932).

The *Rule 30(b)(6), SCRCP* designee for Laurens County Hospital, Sandra Thompson, testified that the Conditions of Admission forms were prepared by Laurens County Hospital, that the document in this form had been used by Laurens County Hospital for at least 15 years prior to the surgeries, and was used in all the McCord and Sherfield surgeries. (ROA, Attachment 6 – Thompson deposition, 48:19 to 50:17). Additionally, it is apparent that Laurens County Hospital is the sophisticated party in this transaction and prepared this standard contract. Thus, the terms of the contract are to be liberally construed in favor of plaintiffs and any reasonable interpretation of "services" favorable to patients would be mandated. *Restatement (Second) of Contracts §206.*

Plaintiffs submit that for the reasons stated, a reasonable construction of the contract term "services to be rendered" is for Laurens County Hospital to require the physicians it permits to practice in the hospital to comply with state law and regulations, comply with its Medical Staff Bylaws, and comply with their contracts, specifically the portions that affect the health, safety, and legal rights of the patient.

Plaintiffs submit that Laurens County Hospital breached the contract with Plaintiffs by failing to require Dr. Brown to maintain valid professional liability insurance covering the claims of Plaintiffs during the time that Dr. Brown was continuously privileged by Laurens County Hospital.

E. BREACH OF DUTY IN SPECIAL RELATIONSHIP

The Order sets forth that the trial judge assumed, without deciding, that there was a special relationship between the parties. (ROA, Order, page 7). Even so, Plaintiffs believe it would be appropriate to briefly discuss the law regarding special relationships and the facts which support a special relationship in this case.

The South Carolina Supreme Court in *Meddin v. Southern Ry-Carolina Division, et al.,* 218 S.C. 155, 62 S.E.2d 109 (1950), quoted with approval the United States Supreme Court, *Atlantic & Pacific R. Co. v. Laird*, 164 U.S. 393 (1896) as follows:

> if the relation of the plaintiff and defendants be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort.
> *Id.* 62 S.E. at 112

Further, the court held that "the negligent and willful failure to perform certain legal duties, not arising out of the particular contract between the plaintiffs and this defendant, but arising out of the relationship created by the contract...." *Id.* 62 S.E.2d at 113.

The South Carolina Supreme Court, in a case presenting a certified question from the Fourth Circuit Court of Appeals, held that a consulting firm owed a duty to the South Carolina State Ports Authority to exercise due care to accurately report objective factual data concerning the Charleston Port if it knew or should have known that the report was to also be used by a competitor. The duty of the tort-feasor arises from the relationship to the injured party. *South*

Carolina Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324, 325-326 (1986).

The court further held that a cause of action is met if the following are proved:

1) the existence of a duty on the part of the defendant to protect the plaintiff (because of the special relationship);
2) the failure of defendant to discharge that duty; and
3) injury to the plaintiff resulting from the defendant's failure to perform.

Id. 436 S.E.2d at 325

The South Carolina Supreme Court issued an opinion in *Tommy L. Griffin Plumbing and Heating Co. v. Jordan, Jones and Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995) to a novel question in South Carolina – whether design professionals incur tort liability to a contractor for purely economic loss. At the time, a tort action for economic loss was not recognized. However, the South Carolina Supreme Court noted:

> In the last few years, a growing number of states have refused to apply the "economic loss" rule to actions against design professionals when there is a "special relationship" between the design professional and the contractor.
> (*Id*, 320 S.C. 49, 463 S.E.2d 85)

Also, the Supreme Court noted:

> applying these concepts (i.e., a special relationship creating a duty of care outside the terms of the contract) to professional liability, we have long held lawyers and accountants liable in tort for malpractice (citations omitted). These professionals owe a duty to the client ... which arises separate and distinct from the contract for services. (citations omitted). We see no logical reason to insulate design professionals from liability when the relationship between design professionals and the plaintiff is such that the design professional owes a professional duty to the plaintiff arising separate and distinct from any contractual duties between the

> parties or with third parties. (citations omitted). Whether such duty exists will depend on the facts and circumstances of each case. (*Id.* 320 S.C. 49, 463 S.E.2d 85)

Subsequently, the South Carolina Supreme Court cited *Tommy L. Griffin* favorably by reversing a lower court order of summary judgment and stating "Further, we noted that whether the design professional owes a duty depends on the facts and circumstances of each case and holding "also, we find it is a factual issue whether these circumstances give rise to a special relationship between Architect and Cullum." *Cullum Mechanical Construction, Inc. v. South Carolina Baptist Hospital,* 344 S.C. 426, 544 S.E.2d 838, 842 (2001).

Plaintiffs allege that the providing of services by Laurens County Hospital to the Patients created a special relationship. The Patients elected to undergo surgery that could have serious consequences to their health and life expectancy. The hospital provides certain services such as independently determining the scope of practice, types of surgeries and competency to perform each surgery that the physician can perform in the hospital. These services and others protect patients by operating the hospital in accordance with state law and regulations. (See paragraphs 13, 41, and 80 of Second Amended Complaint). The patient is virtually putting his life in the hands of the hospital employees. It is difficult to imagine anyone arguing that the relationship between a hospital and a patient does not constitute a special relationship. The relationship is much more than economic – it is potentially life changing, resulting in living a life with or without pain, and either life or death.

The person Laurens County Hospital assigned to monitor the physicians to ensure compliance with the requirement to maintain professional liability insurance was Lynn Reaves who was manager of medical staff services. Ms. Reaves was the person solely responsible on behalf of the hospital for requiring physicians to maintain the proper insurance according to the Medical Staff Bylaws; however, as she pointed out in her testimony "ultimately our board was responsible for making sure physicians adhered to our bylaws". (ROA, Attachment 22 – Reaves deposition, 17:6-12). It is apparent that the Manager of Medical Staff Services had not been properly trained or educated concerning professional liability insurance policies, as partially evidenced by the following:

* she did not know the insurance coverage differences between a claims made policy and an occurrence policy because no one from Laurens County Hospital ever explained or informed her of the difference;
* she did not know the necessity of Extended Coverage Reporting (Tail Coverage) nor the necessity of Prior Acts Coverage when insurance companies were changed under a claims made policy;
* she did not know when Extended Coverage Reporting (Tail Coverage) or Prior Acts Coverage needed to be purchased or the amount of the cost to purchase;
* she did not know the effect of change in insurance companies on existing potential claims of patients injured at Laurens County Hospital by the malpractice of Dr. Brown;
* she never asked insurance companies to explain coverage even though the insurance policies advised interested persons to contact the company for further information;
* she did not know what the retroactive date meant in the MAG Mutual insurance certificate nor the steps to determine its meaning; and
* she did not inquire about restrictive endorsements contained in the insurance policy although the insurance certificate stated to contact insurance company for further information.

(ROA, Attachment 22 – Reaves deposition, 41:7-10; 25:20 to 26:2; 37:6-10; 23:19-25; 24:8-12; 24:13-18).

Additionally, it was known by the hospital staff during the period of July 9, 2009 to January 14, 2010, (i.e., the period during which Dr. Brown could purchase Tail insurance) that Dr. Brown was probably committing malpractice on numerous occasions.

The Affidavit of Sandra Thompson, who was Risk Manager, confirms that:

* concerns arose regarding the October 27, 2009 surgery by Dr. Brown on Dixie Mitchell as being malpractice;
* concerns were raised by Rufus Watkins, MD and Dr. Brown himself about Dr. Brown properly performing surgeries;
* in early December 2009, eleven charts of patients of Dr. Brown were sent for independent review by Dr. Madis who submitted his report to the hospital;
* Dr. Stribling, the Chief of Surgery of Laurens County Hospital, raised concerns about a surgical complication caused by Dr. Brown that occurred on December 11, 2009;
* Dr. Stribling raised concerns to Dr. Brian Weaver, Chief of Staff, on December 14, 2009 that resulted in Dr. Brown voluntarily relinquishing certain privileges on a temporary basis on December 15, 2009.

(ROA, Attachment 23 – Affidavit of Thompson)

The memo dated January 22, 2010 by Dr. R.W. Watkins sets forth that it was common knowledge among all eleven Scrub Techs that Dr. Brown injured numerous patients during surgeries. The memo stated, in part, that:

> There was a general concern that there were an inordinate number of inadvertent injuries to the bladder, bowel, and ureters, especially with the sling procedure. There was (sic) concerns that when performed by this MD the procedure was dangerous and it was stated there were injuries in "almost every case" and that the procedures "caused more harm than good."

(ROA, Attachment 24 – report of R.W. Watkins)

The December 2009 letter from the Chief of Surgery, Dr. Stribling, to the Chief of Staff, Dr. Weaver, sets forth the gravity of concern the medical staff had

about the surgical performance of Dr. Brown. Dr. Stribling states "a situation that is of great concern to me. I worry greatly about what appears to be a continuing pattern of surgical misadventures by Dr. Byron Brown. ..... Because of what appears to me to me (sic) a worrisome pattern of complications, I will, as Chief of Surgery, respectfully ask Dr. Brown to temporarily relinquish his privileges to do all pelvic surgery..." (ROA, Attachment 25 – letter from Dr. Stribling).

The next day, Dr. Brown relinquished his privileges at Laurens County Hospital to perform hysterectomies, anterior and posterior repairs, and urethral slings until the beginning of 2010. (ROA, Attachment 21 – letter from Dr. Brown resigning certain privileges). Two months later, Dr. Brown voluntarily entered into an agreement with Laurens County Hospital to significantly reduce the gynecological surgeries he was allowed to perform and agreed to take a leave of absence from the hospital staff positions he held. (ROA, Attachment 26 – Agreement between Laurens County Hospital and Dr. Brown).

The September 15, 2011 Memorandum of MAG Mutual documents that Dr. Brown self-reported ten separate claims (two for Mitchell for separate surgeries) against his insurance policy. Eight claims were covered, two were not, which were McCord and Sherfield. (ROA, Attachment 27 – memo of MAG Mutual).

The foregoing is substantial evidence that officials at Laurens County Hospital knew that Dr. Brown was causing serious injuries to patients during surgeries at Laurens County Hospital. The injuries were occurring during the time period from July 9, 2009 to January 14, 2010. Laurens County Hospital kept

the privileges of Dr. Brown active to allow him to perform surgeries at Laurens County Hospital from which both Dr. Brown and Laurens County Hospital benefited financially. Dr. Brown also continued to receive a reduction of $5370 per month forgiveness of debt to the hospital. (ROA, Attachment 10). During this six month period, Dr. Brown could obtain Tail coverage from JUA. Since the Tail coverage was not obtained by Dr. Brown from JUA nor Extended Coverage from MAG Mutual, the professional liability coverage was not maintained in compliance with the Medical Staff Bylaws and Subsidy Contract.

The plaintiffs submit that a factual issue presents as to whether Laurens County Hospital, which was in a special relationship with McCord and Sherfield and with its patients undergoing surgery, negligently breached the duty of care to Mrs. McCord and to Mrs. Sherfield by failing to require Dr. Brown to comply with the requirements of the Medical Staff Bylaws and Subsidy Contract to maintain the professional liability insurance while Laurens County Hospital had financial leverage over Dr. Brown; and by failing to train, instruct, or employ employees knowledgeable in insurance matters; and by failing to monitor physicians committing malpractice and requiring these physicians to maintain professional liability insurance.

F. ADDITIONAL ISSUES

The trial judge briefly raised several additional issues which have not yet been addressed; but, will be addressed herein.

The Order states that "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." (ROA, Order, page 9). This is an accurate statement and Plaintiffs do not allege there is such a law. The hospital required, as a condition of being privileged to perform surgery, that the doctors must have and maintain professional liability insurance. (ROA, Attachment 8, Article III STAFF APPOINTMENT 3.2.1(e)). Further, the hospital required Dr. Brown, as a condition of receiving a cash subsidy of $644,447, to execute a contract that required him to comply with the Medical Staff Bylaws and have professional liability insurance in a minimum amount of $1,000,000 per claim/$3,000,000 aggregae of JUA/PCF coverage. (ROA, Attachment 9, ARTICLE II: PHYSICIAN OBLIGATIONS A.1 and ARTICLE VI. PROFESSINAL LIABILITY INSURANCE).

Even though there is no law requiring hospitals to ensure doctors maintain medical malpractice insurance, the hospital can accept such a burden on their own – either because it is the prevailing practice of hospitals in the United States or because of contracts with its patients. ("parties may bind themselves as they see fit by contract, unless the contract would violate the law or is contrary to public policy". *South Carolina Department of Transportation v. M&T Enterprises of Mt. Pleasant, L.L.C.*, 379 S.C. 645, 656, 667 S.E. 2d 7, 14 (2008).

And last, the Order also states that "Pursuant to the Act (South Carolina Tort Claims Act), a governmental entity cannot be held liable for the acts or omissions of an independent contractor." (ROA, Order, page 9). Again, this is an accurate statement; but, not relevant to this case. The allegations in this case are breach of contract by Laurens County Hospital through actions of its

employees and negligent breach of duty to exercise due care by employees of Laurens County Hospital. The allegations of breach of contract and negligence relate solely to the actions or inactions of employees of Laurens County Hospital. Consequently, the allegations of failure to exercise due care by employees of Laurens County Hospital are bit excluded by the Tort Claims Act.

CONCLUSION

Plaintiffs request that the Court find that material terms of the contracts are ambiguous and capable of more than one construction. Thus, a factual issue is presented as to the true meaning and intent of the parties.

Plaintiffs also request that the Court find that a special relationship existed between Plaintiffs and Laurens County Health Care System and find that a factual issue is presented whether Defendants breached the duty to exercise due care in the special relationship.

Plaintiffs respectfully request that the Court reverse the summary judgment of the circuit court and remand this case for a jury trial on the merits.

Respectfully submitted,

May 25, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal From Laurens County Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2017-001064

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

v.

Laurens County Health Care System and
Greenville Health System ********** Respondents

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants on Laurens County Health Care System and Greenville Health System by depositing a copy in the United States Postal Service, postage prepaid, on May 25, 2017 addressed to their counsel of record, Kenneth N. Shaw, Esq., Haynsworth Sinkler Boyd, PA, P.O. Box 2048, Greenville, SC 29602.

May 25, 2017

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May 25, 2017

The Honorable Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Chris Katina McCord v. Laurens County Health Care System
Appellate Case No. 2017-001064

Dear Ms. Kitchings:

Enclosed for filing are the following:

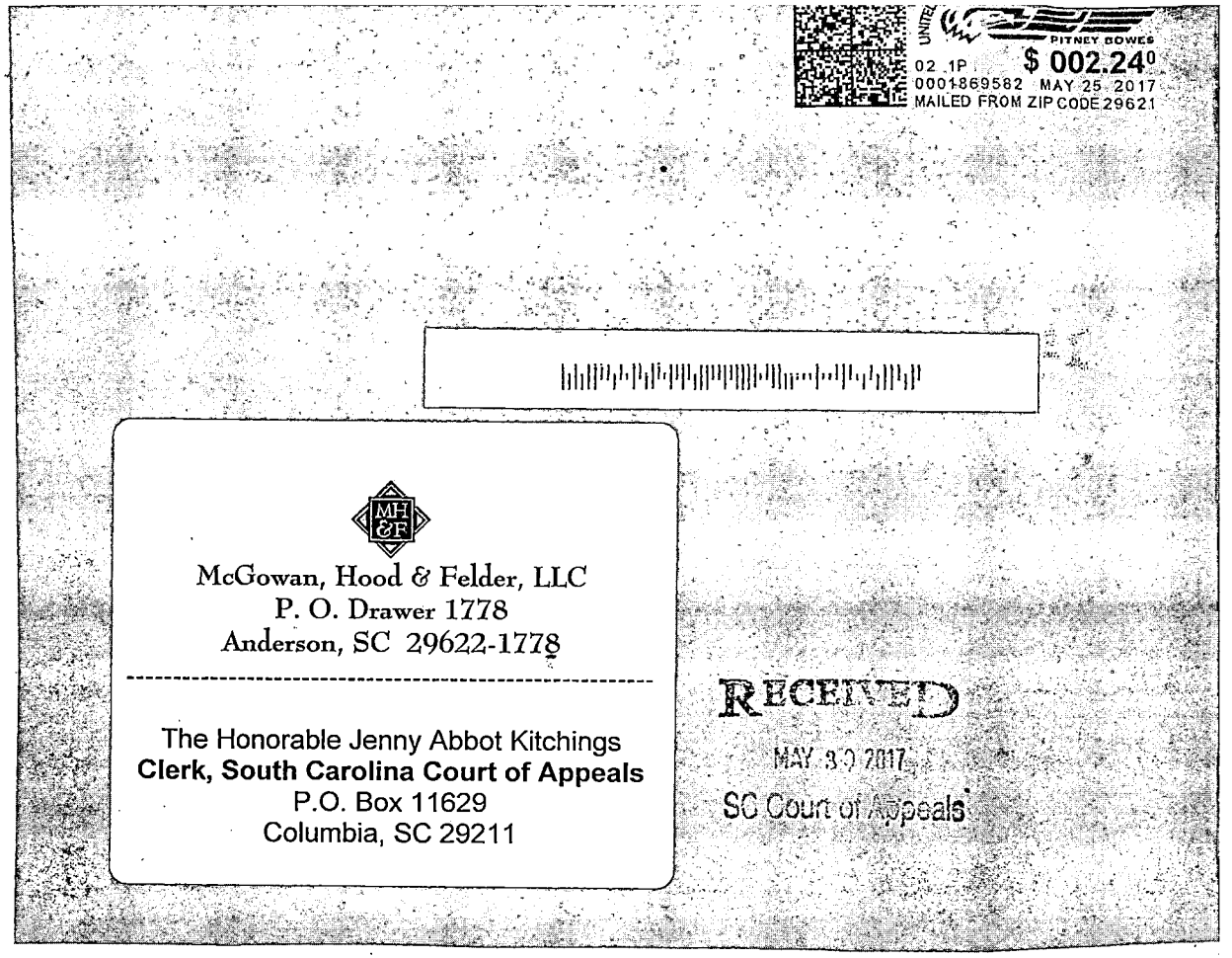
(1) Initial Brief of Appellants;
(2) Proof of Service of the Initial Brief of Appellants on the respondents;
(3) Appellants Designation of Matter to Be Included in the Record On Appeal; and
(4) Proof of Service of the Appellants Designation of Matter to Be Included on the Record on Appeal.

Very truly yours,

McGowan, Hood & Felder, LLC

Joseph G. Wright, III
Attorney for Appellants

JGWIII/tda
cc: Kenneth N. Shaw, Esq.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