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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

FINAL REPLY BRIEF OF APPELLANTS

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SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities	ii
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Arguments:

1. Incorporate Positions and Arguments Set Forth In Brief of Appellants	1
2. Breach of Contract and Negligence by Employees of Laurens County Hospital.....	2
3. Intent of the Parties – Compliance with State Law and Regulations.....	3
4. Respondents' Defense of Impossibility of Performance Is Not Applicable.....	6
5. Response to Respondents Contention of Additional Sustaining Grounds for Summary Judgment	
A. Contention that Plaintiffs' Injuries Were Not Proximately Caused by Defendants' Acts or Omissions	8
B. Contention that Plaintiffs' Claims are Barred by Statute of Limitations	11
C. Contention that Plaintiffs' Grievances are Mis-Directed to the Courts	12
Conclusion	15

TABLE OF AUTHORITIES

CASES

<i>Hawkins v. Greenwood Development Corporation</i> , 328 S.C. 585, 593, 493 S.E. 2d 875, 879 (1997).....	7
<i>Maher v. Tietex Corp.</i> , 500 S.E.2d 204 (S.C. Ct. App. 1998).....	11
<i>McAlhany v. Carter</i> , 781 S.E.2d 105 (S.C. Ct. App. 2015).....	12
<i>The Opera Company of Boston, Inc. v. The Wolf Trap Foundation for the Performing Arts</i> , 817 F.2d 1094, 1102 (4 th Cir.1987)	7

STATUTES & REGULATIONS

S.C. Code §15-3-530(1).....	11
S.C. Code §15-78-10	12
S.C. Code Ann. §44-7-260(D)	3, 5, 13, 14
S.C. Code Ann. §44-7-750	3
S.C. Code Ann. Regs. 61-16, § 301.....	3, 13, 14

OTHER AUTHORITIES

Williston on Contracts §77:6(4 th Edition).....	7
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Appellants (sometime collectively referred to as "Patients") respectfully show unto the Court the following:

1. Incorporate Positions and Arguments Set Forth In Brief of Appellants

Patients incorporate the positions and arguments set forth in the Brief of Appellants specifically to emphasize that the action against Laurens County Hospital and Greenville Health System is an action for breach of contract and an action for breach of duty to exercise due care in the special relationship between Laurens County Hospital and patients who underwent surgery at Laurens County Hospital. Patients do not allege an action based upon breach of contract nor upon negligence of Dr. Brown even though stated, or at least implied, at several points in Respondents' Brief.

Patients further emphasize that Laurens County Hospital is alleged to have breached the contract because of acts and derelicts of employees of Laurens County Hospital. (R. pp. 151-152, paragraph 73 of Second Amended Complaint) Also, Patients emphasize that employees of Laurens County Hospital are alleged to have failed to exercise due care in the special relationship between patients and Laurens County Hospital. (R. pp. 153-154, paragraph 81 of Second Amended Complaint).

2. Breach of Contract and Negligence by Employees of Laurens County Hospital

It is acknowledged that Section 3.2.1 of the Medical Staff Bylaws sets forth "requirements for initial and **continuing** appointment to the Medical Staff:

3.2.1(e) "LIP's shall **maintain** valid professional liability insurance coverage in the amount deemed necessary from time to time..."
(emphasis added)

(R. p. 208)

The Bylaws required Dr. Brown to maintain valid professional liability insurance which covered claims of the patients as a condition of practicing medicine in the hospital. It is undisputed that during the six months from July 9, 2009 to January 14, 2010, Dr. Brown was privileged at Laurens County Hospital and allowed to perform surgeries and furnish medical care; but, he did not maintain valid professional liability insurance covering the claims of Mrs. McCord and Mrs. Sherfield. (R. pp. 269-283; R. p. 284; R. pp. 304-306; R. pp. 296-299).

The person solely responsible for "credentialing and privileging of physicians" was Mrs. Lynn Reaves. (R. pp. 290-291, 294 - Reaves deposition 4:17-18, 17:6-12, 37:3-5). Unfortunately, she was not aware of the difference between an occurrence policy and a claims made policy, nor was she aware of the effect on the insurance coverage of McCord/Sherfield of a change from JUA/PCF to MAG Mutual, nor was she familiar with tail insurance nor extended coverage. (R. pp. 293-295 - Reaves Deposition 41:7-10, 25:20 to 26:2, 37:6-10).

The failure of employees of Laurens County Hospital to require Dr. Brown to maintain valid professional liability insurance covering the claims of McCord and Sherfield during a six month period that he was allowed to be privileged was

a breach of the contract between the Patients and Laurens County Hospital. (R. pp. 151-152, paragraph 73, Second Amended Complaint). Also, Laurens County Hospital failed to exercise due care in the special relationship with the Patients. (R. pp. 153-154, paragraph 81, Second Amended Complaint).¹

3. Intent of the Parties – Compliance with State Law and Regulations

Patients submit that in order to evaluate the intent of the parties to the contract it would be helpful to understand the purpose for establishing the hospital and the legal requirements governing the operation of the hospital.

The stated purpose for establishing a county hospital is that the “hospital established under the provisions of this article shall be for the benefit of the inhabitants of such county and any persons falling sick or being injured or maimed within its limits” (*S.C. Code Ann. 44-7-750 (1976)*)

In addition to being established under state law for the benefit of the inhabitants of the county, the 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.” (*S.C. Code Ann. 44-7-260 (D) (1976)*; *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 regulations to govern its operation as an organized medical staff.” (*S.C. Code Ann. Regs. 61-16, Section 301*).

¹ “It is undisputed that pursuant to Hospital Medical Staff Bylaws (“Bylaws”), Dr. Brown had to maintain medical malpractice insurance in order to retain privileges at the Hospital.” (R. p. 8; Order, page 2; Brief of Respondents, page 2).

Accordingly, since the South Carolina statute and DHEC regulations impose affirmative duties upon the governing body for the operation of the hospital, Patients submit that "compliance with state law and regulations" constitute a part of the contract between the parties. The Medical Staff Bylaws, which govern the operation of the hospital, require the medical staff to ensure that the physicians privileged to practice in Laurens County Hospital "maintain valid professional liability insurance coverage" during their appointment to the medical staff. (R. p. 208 - Article III STAFF APPOINTMENT 3.2.1(e)).

Patients further submit that it would be helpful in evaluating intent of the parties to examine why the requirement for maintaining liability insurance is imposed and the general acceptance of this requirement in the industry.

As noted in the Brief of Appellants, the expert witness for Laurens County Hospital, James W. Weiss, MHA, confirmed that "it was common practice for the governing body, in 2008 and 2009, to require physicians practicing in the hospital to carry and maintain medical malpractice insurance." (R. p. 311, Weiss deposition 58:4-8). The reason it was common practice for hospitals to require physicians to maintain professional liability insurance was because the Institute of Medicine reported in its sentinel report, entitled "To Err is Human", in 1999 that the situation in our nation's hospitals was an "epidemic of medical errors." The report estimated that "at least 44,000 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 toll exceeds the deaths from motor-vehicle wrecks and cancer." (R. p. 222).

Following the Institute of Medicine report, the 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;
- * 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.

(R. pp. 223-225)

For good reason, Laurens County Hospital and most other American hospitals have agreed to require physicians practicing in the hospital to maintain valid professional liability insurance. This is obviously a service provided by Laurens County Hospital that is beneficial to its patients. It is also a requirement adopted by the Medical Staff of Laurens County Hospital as part of its "overall responsibility for the quality of medical care provided to patients." (*S.C. Code Ann. 44-7-260(D)*). Thus, Patients submit that the requirement is a part of the contract, or, at least, it is a reasonable construction of the contract term "services to be rendered."

Additionally, Patients gave deposition testimony regarding their intent and their understanding regarding "services to be rendered". (Brief of Appellants pages 13-14; R. p. 331- McCord deposition 105:19 to 106:18; R. p. 333 - Sherfield deposition 67:20 to 68:12).

Mrs. McCord testified 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. (R. p. 331 - McCord deposition 105:19 to 106:18). The testimony of Mrs. Sherfield was similar. It was her intention that the hospital would comply with all state and federal laws, especially to require its privileged surgeons to comply with the hospital rules and regulations for doctors to maintain professional liability insurance. (R. p. 333 - 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. (R. p. 334 - Sherfield deposition 71:5 to 72:9).²

The intent of the Patients was that they would be protected during their hospital stay by all means available – 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 patient.

4. Respondents' Defense of Impossibility of Performance is Not Applicable.

Respondents argue at several points in their brief that Laurens County Hospital "could not force Dr. Brown to do anything", "there was nothing anyone – besides Dr. Brown – could do to rectify the situation", "Laurens had no direct

² Respondents object to the deposition testimony of Mrs. McCord and Mrs. Sherfield on the grounds that the deposition transcripts were not part of the record prior to summary judgment being granted. (See: Brief of Respondents, page 9). The sealed original transcripts of depositions taken by Patients were forwarded for filing prior to the hearing on January 6, 2017. The sealed original transcripts of McCord and Sherfield were, and maybe still are, in the possession of Respondents. The sealed originals were not filed by Respondents prior to the hearing. Subsequent to the Summary Judgment hearing, on February 27, 2016, Patients forwarded copies of the deposition transcripts of McCord and Sherfield for filing. The Summary Judgment Order of Judge Griffith was executed February 28, 2017.

control over him” and “there is no evidence that doing either of those things would have prompted Dr. Brown to purchase tail insurance.” (Brief of Respondents, pages 17-18).

These positions are in the nature of the defense of impossibility of performance which “should be raised as an affirmative defense in the first responsive pleading.” 30 Williston on Contracts §77:6 (4th Edition). Respondents did not raise impossibility of performance as an affirmative defense in Answer to Second Amended Complaint. (R. pp. 159-170, Answer to Second Amended Complaint).

The party claiming impossibility of performance has the burden of proving the defense. *Hawkins v. Greenwood Development Corporation*, 328 S.C. 585, 593, 493 S.E. 2d 875, 879 (1997). In order to show impossibility of performance as a defense to breach of contract, party must establish unexpected occurrence of intervening act, that such occurrence was of character that its nonoccurrence was basic assumption of parties agreement, and that occurrence made performance impossible. *The Opera Company of Boston, Inc. v. The Wolf Trap Foundation for the Performing Arts*, 817 F.2d 1094, 1102 (4th Cir.1987). The issue of application of the defense of impossibility of performance is a question of fact requiring determination by the jury.

Thus, the issue of defense of impossibility of performance is not preserved as an affirmative defense since it was not raised in the pleadings. Also, if the defense of impossibility of performance was allowed as a defense, it would raise a jury issue whether or not the defense was applicable to this case.

5. Respondents' Contention of Additional Sustaining Grounds for Summary Judgment

A. Contention that Plaintiffs' Injuries Were Not Proximately Caused by Defendants' Acts or Omissions.

It appears that the contention of Defendants of "no proximate cause" is based upon the defense that it was Plaintiffs' fault because Dr. Brown was not put on notice of their claims in a timely manner, that Laurens County Hospital was not at fault because Dr. Brown "failed to purchase tail insurance", and it "was not Laurens' fault that Dr. Brown decided to move out of the country." (Brief of Respondents page 17.)

Respondents further argue that after Dr. Brown "failed to purchase tail coverage or prior acts coverage", "the damage had been done and there was nothing anyone – besides Dr. Brown – could do to rectify the situation", and that "Laurens could not force Dr. Brown to do anything." Plaintiffs do not agree that there was nothing Laurens County Hospital could or should have done.

The Claims-Made Policy issued by JUA/PCF terminated 7/9/2009. (R. p. 269). The Extended Reporting Period Endorsement, i.e. tail insurance, could have been purchased on, or before, 1/14/2010. (R. p. 284). During this six month period from 7/9/2009 to 1/14/2010, Dr. Brown remained a member of the Medical Staff of Laurens County Hospital performing surgeries until he temporarily relinquished surgical privileges to perform "hysterectomies, anterior and posterior repairs, and urethral slings." (R. p. 289).

As a member of the Medical Staff and an LIP ("Licensed Individual Practitioner"), the Bylaws mandated that Dr. Brown "maintain valid professional

liability insurance coverage" to retain "continuing appointment to the Medical Staff", i.e. privileges to perform surgery.

Further, Dr. Brown was allowed to receive a monthly forgiveness of debt owed to Laurens County Hospital for previously provided subsidy payments as set forth in the Subsidy Contract. (R. p. 215, Article IV: Repayment). However, Dr. Brown was required to keep the professional liability insurance in full force and effect or the Hospital could terminate the Subsidy Contract and require the unpaid subsidy to immediately become due and payable. (R. p. 216, Article VI: Professional Liability Insurance).

During the six month period from 7/9/2009 to 1/14/2010, Dr. Brown was privileged to perform surgery as a member of the Medical Staff but had not purchased the tail insurance. Dr. Brown was receiving a monthly reduction of the subsidy payment of \$5370 per month. If Dr. Brown was in violation of the contract, he faced a potential demand for over \$250,000 for the portion of the subsidy not forgiven. (R. p. 219).

As previously noted, Laurens County Hospital employees were responsible to require Dr. Brown to comply with the Bylaws and maintain professional liability insurance for claims prior to 7/9/2009 which included McCord and Sherfield claims. Further, Laurens County Hospital had leverage to force Dr. Brown to comply with the Medical Staff Bylaws provisions requiring members of the Medical Staff to maintain professional liability insurance. The leverage included 1) allowing Dr. Brown to retain privileges performing surgeries at Laurens County Hospital to earn money from his profession, 2) continuing

monthly forgiveness of subsidy payments of \$5370 per month, and 3) not triggering the acceleration of over \$250,000 in outstanding subsidy payments.

Apparently, the reason Laurens County Hospital did not require Dr. Brown to maintain professional liability insurance coverage on the claims of McCord and Sherfield is because the person responsible for physician compliance did not know the reason for Extended Reporting Period Endorsement ("tail") or Prior Acts Coverage insurance. (R. pp. 291-294 - Reaves deposition 17:6-12, 23:23-25, 25:20 to 26:2, 37: 6-10)

Plaintiffs submit that the responsibility for Laurens County Hospital to require Dr. Brown to maintain valid professional liability insurance coverage for all his patients was significantly enhanced because of the numerous sources of potential medical negligence being committed by Dr. Brown during the six month period from July 9, 20098 to January 14, 2010, to wit:

- * Affidavit of Sandra Thompson – Administrator for Quality and Compliance summarizing medical negligence events of Dr. Brown (R. pp. 296-297, paragraph 4);
- * MAG Mutual Memorandum regarding 8 medical malpractice claims submitted by Dr. Brown (R. pp. 307-308);
- * Letter of Michael Stribling, MD, Chief of Surgery – regarding continuing pattern of surgical misadventures by Dr. Brown (R. p. 303); and
- * Memo of Rufus W. Watkins, MD – regarding eleven Scrub Techs concern for the inordinate number of inadvertent injuries to the bladder, bowel, and uterus, especially with the sling procedure (R. pp. 301-302).

Based upon the foregoing, Plaintiffs submit that the issue of causation is an issue of fact to be decided by the jury and is not, in this case, a question of law.

B. Contention that Plaintiffs' Claims are Barred by Statute of Limitations

1. Breach of Contract

An action for breach of contract must be brought within three years of the date the action accrues. *S.C. Code §15-3-530(1)*. The discovery rule determines the date of accrual for a breach of contract cause of action. Pursuant to the discovery rule, a breach of contract accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach or could or should have discovered the breach. *Maier v. Tietex Corp*, 500 S.E.2d 204 (S.C. Ct. App. 1998).

The pre-suit mediation in McCord was held December 1, 2011 and it was discovered that MAG Mutual Insurance Company was not providing insurance coverage for the claim. Subsequently, it was learned in discovery that JUA/PCF did not issue tail insurance. Thereafter, McCord and Sherfield obtained judgments on March 11, 2014 against Dr. Brown for his acts of medical negligence. (R. pp. 181-190).

The failure of Dr. Brown to maintain professional liability insurance was discovered at, or around, the mediation held December 1, 2011. The action at bar was filed March 29, 2014 which was within three years of discovery of the breach so there is no violation of the statute of limitations for the breach of contract action.

2. Negligent Breach of Duty of Care

An action for negligence under the South Carolina Tort Claims Act must be "commenced within two years after the date the loss was or should have been

discovered.” S.C. Code §15-78-10. It is clear that a cause of action for negligence cannot accrue until there is an injury. An injury must first occur before a party can maintain an action to enforce it since injury is an element of a cause of action in tort. *McAlhany v. Carter*, 781 S.E.2d 105 (S.C. Ct. App. 2015).

The plaintiffs did not suffer a loss by the actions of Laurens County Hospital nor have a right to sue Laurens County Hospital until judgment was rendered against Dr. Brown. At that point, the negligent acts of Laurens County Hospital employees resulted in a loss to Patients, i.e., judgments which would have been covered by professional liability insurance but the insurance coverage was not available due to the negligence of employees of Laurens County Hospital. The judgments in favor of McCord and Sherfield were rendered March 11, 2014. (R. pp. 181-190). The action against Laurens County Hospital was filed 15 days later on March 26, 2014, well within the two year time period.

C. Contention that Plaintiffs’ Grievances are Mis-Directed to the Courts.

Respondents begin their argument under this heading as “Much of the Plaintiffs’ Brief is dedicated to putting forward “facts and policy arguments as to why physicians and/or hospitals should be required to carry medical malpractice insurance.” (see, e.g., Brief of Appellants at 8-10).

Actually, the reason for putting forth these facts is to describe the facts that affect the state of mind and intent of the parties to the contract. In evaluating the intent of these parties, it is important to recognize the operational environment of the hospital. (Brief of Appellants, page 12).

For example, Respondents argue in support of the Order that "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. (R. pp. 11-12). Patients point out that although the Order recognizes meals as a service, the hospital does not bill separately for this service. (R. pp. 176, 178). Nor does the hospital bill separately for nursing care although it should be acknowledged that this is a service provided by the hospital. Further, the record is devoid of any schedule of services which are to be separately billed by the hospital.

Plaintiffs point out that Laurens County Hospital is required by state law and DHEC regulations to provide other services on behalf of patients, namely, "maintaining a single organized medical staff that has overall responsibility for the quality of medical care provided to patients" (*S.C. Code Ann. §44-7-260(D)*) and "the medical staff shall, with the approval of the hospital governing body, adopt bylaws, rules and regulations to govern its organized medical staff." (*S.C. Code Ann. Regs. 61-16, §301*). To carry out the requirements mandated by South Carolina law, Laurens County Hospital promulgated the Medical Staff Bylaws. These Bylaws set forth the Purposes and Responsibilities of the Staff which include, among other things, the responsibility for privileging physicians to perform surgery in Laurens County Hospital. (R. pp. 205-208).

As part of its responsibility, the Medical Staff imposed requirements for initial continued appointment to the Medical Staff for the physicians to maintain

valid professional liability insurance coverage. (R. p. 208 - Article III STAFF APPOINTMENT 3.2.1(e)). Plaintiffs point out that the requirement for physicians practicing in the hospital to have valid professional liability insurance was the prevailing practice of hospitals in America during 2008 and 2009. This was acknowledged by the expert witness for Respondents, James Weiss, MPH, (R. pp. 311-312 - Weiss deposition 58:4-8, 62:23 to 63:27) and the expert witness for the Plaintiffs, John Hyde, PhD, (R. pp. 199-200 - Hyde deposition 197:16 to 198:18). It was also acknowledged that hospitals across the country adopted similar requirements because of the "epidemic of medical errors" occurring in hospitals as reported by the Institute of Medicine and as confirmed in the report of the Inspector General of the Department of Health and Human Services. (R. p. 222; R. pp. 223-260).

The requirement that physicians maintain valid professional liability insurance was adopted by the Laurens County Hospital Medical Staff – the imposition of this requirement was not a violation of the State Constitution, not a violation of the constitutional separation of powers, nor a violation of the "police powers" of the State as referenced by Respondents. (Brief of Respondents, pages 21 to 24). The authority of the Medical Staff to require valid professional liability insurance for physicians performing surgery in the hospital was adopted as part of its statutory requirement for "overall responsibility for the quality of medical care provided to the patient" (S.C. Code Ann. §44-7-260(D)) and DHEC regulations to "adopt bylaws, rules and regulations to govern its operations as an organized medical staff." (S.C. Code Ann. Regs. 61-16, §301)).

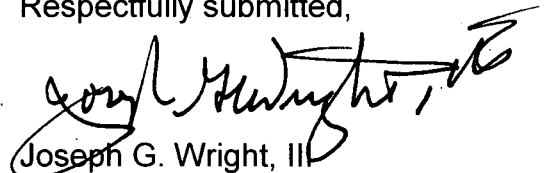
In summary, Patients submit that it is a question of fact whether or not the parties intended for the additional services provided by the hospital, but not separately billed, to be part of the contract for the consideration paid by the Patients.

CONCLUSION

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

September 7, 2017

Respectfully submitted,



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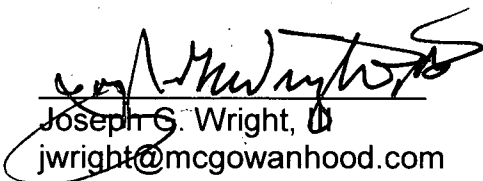
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with *Rule 211(b), SCACR*.

September 7, 2017


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