

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James C. Williams, Jr., Circuit Court Judge

On Certiorari

Appellate Case No. 2011-199566

SAMUEL G. SMITH, SR., MELISSA SMITH, and
SAMUEL G. SMITH, JR., an infant under the age
of fourteen (14) years, by and through his next
friend, SAMUEL G. SMITH, SR.....Petitioners,

v.

THE REGIONAL MEDICAL CENTER OF
ORANGEBURG AND CALHOUN COUNTIES, ELIZABETH A.
LEWIS, D.O., and AMN HEALTHCARE, INC. d/b/a STAFF CARE,

of whom THE REGIONAL MEDICAL CENTER OF ORANGEBURG
AND CALHOUN COUNTIES is Respondent.

APPENDIX

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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of whom THE REGIONAL MEDICAL CENTER OF ORANGEBURG
AND CALHOUN COUNTIES is Respondent.

APPENDIX

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CARE

Table of Contents

Record on Appeal.....	1
Index.....	3
Order.....	4
Amended Complaint.....	10
Answer.....	16
Motion for Summary Judgment.....	21
Memorandum in Support of Motion for Summary Judgment.....	23
Hearing transcript, March 24, 2009.....	35
Deposition of Elizabeth Lewis, D.O. (excerpts).....	44
Deposition of David Griesemer, M.D. (excerpts).....	57
Deposition of Mark R. Zulkey, D.O. (excerpts).....	60
Affidavit of Ronald Katz, MD.....	64
Agreement between Staff Care and Elizabeth Lewis, D.O., August 17, 2000.	67
Agreement between Staff Care and TRMC, June 9, 2000.....	71
Certificate of Redaction.....	76
Certificate of Counsel.....	77
Brief of Appellant.....	78
Final Brief of Respondent.....	95
Opinion of the Court of Appeals, June 22, 2011.....	112
Petition for Rehearing.....	119
Order Denying Petition for Rehearing.....	125
Certificate of Service	127

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James C. Williams, Jr., Circuit Court Judge

Case No. 2007-CP-38-295

SAMUEL G. SMITH, SR., MELISSA SMITH, and
SAMUEL G. SMITH, JR., an infant under the age
of fourteen (14) years, by and through his next
friend, SAMUEL G. SMITH,.....Appellants,

v.

THE REGIONAL MEDICAL CENTER OF
ORANGEBURG AND CALHOUN COUNTIES, ELIZABETH A.
LEWIS, D.O., and AMN HEALTHCARE, INC. d/b/a STAFF CARE,

of whom THE REGIONAL MEDICAL CENTER OF ORANGEBURG
AND CALHOUN COUNTIES is the Respondent.

RECORD ON APPEAL

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CARE

Index

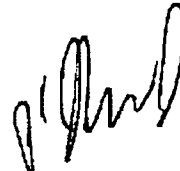
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	FIRST JUDICIAL CIRCUIT
Samuel G. Smith, Sr., Melissa Smith, and	)	Civil Action No.: 07-CP-38-295 formerly
Samuel G. Smith, Jr., an infant under the	)	04-CP-38-1597
age of fourteen (14) years, by and through	)	
his next friend, Samuel G. Smith,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	ORDER GRANTING PARTIAL
	)	SUMMARY JUDGMENT AS TO
The Regional Medical Center of	)	DEFENDANT THE REGIONAL
Orangeburg and Calhoun Counties,	)	MEDICAL CENTER OF
Elizabeth A. Lewis, D.O., and AMN	)	ORANGEBURG AND CALHOUN
Healthcare, Inc. d/b/a Staff Care,	)	COUNTIES
	)	
Defendants.	)	
	)	

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 CLERK OF COURT
 ORANGEBURG, SC

This matter came before me at a scheduled hearing, on March 24, 2009, upon motion of the Defendant, The Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC") for summary judgment as to all causes of action asserted in the Amended Complaint. At the hearing, the Plaintiffs were represented by attorney Charles L. Henshaw, Jr.; Defendant TRMC was represented by its attorney, Richard B. Ness; and the Defendants, Elizabeth A. Lewis, D.O., and AMN Healthcare, Inc. d/b/a Staff Care, were represented by their attorney, Richard C. Thomas. After considering the pleadings on file, the arguments of counsel, the Defendant TRMC's motion and memorandum in support of the motion, and the applicable law, I grant partial summary judgment for Defendant TRMC.

I find that the facts and procedural history relevant to the motion for summary judgment are as follows. This case relates to an emergency room visit by the minor



Plaintiff, Samuel Smith, Jr., on November 2, 2000. The emergency department physician, an employee of TRMC, was having difficulty controlling the child's intractable seizures, and an independently contracting anesthesiologist came to the emergency department from another area of the hospital, to assist with intubation. The Plaintiffs allege medical negligence in the child's intubation by that independently contracted anesthesiologist caused harm to the minor. TRMC moved for summary judgment, asserting the anesthesiologist who intubated the child was not an employee of TRMC, and further asserting the plaintiff's expert had not in his deposition opined that any TRMC employee was negligent. Prior to the hearing, plaintiffs obtained and furnished to counsel and the Court an Affidavit from plaintiffs' expert witness, implicating TRMC's non-physician employees in the negligence which he says was attendant in the intubation process. Therefore, this Order denies TRMC's motion as it concerns non-physician employees.

TRMC is a governmental entity, a healthcare provider created and funded by Orangeburg and Calhoun counties. As such, it is a political subdivision of the State of South Carolina, and tort actions against it are governed by the *South Carolina Tort Claims Act*, §15-78-10, *et seq.* Being in derogation of sovereign immunity, the *Act* is to be strictly construed against liability. §15-78-20(f). Therefore, I find that TRMC may only be subject to suit for those causes of action provided for within the *South Carolina Tort Claims Act*. §15-78-20(a). *Code of Laws of South Carolina*.

The employment relationship of the governmental entity to the negligent actor is central to the *Tort Claims Act*. The *Act* functions to provide immunity to governmental employees for their torts, and imputes liability to the government in their stead. Yet the

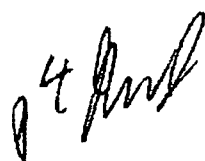
Act provides no liability to the government for the torts of those not employed by it, but expressly excludes independent contractors from the definition of "employee." §15-78-30(c), *Code of Laws of South Carolina*, provides, "... the term ['employee'] **does not include an independent contractor** doing business with the State or a political subdivision of the State."

The unrefuted evidence in this case reveals Dr. Lewis, who intubated the child, was not an employee of TRMC, but was an independent contractor. The Plaintiffs, citing *Simmons v. Tuomey Regional Medical Center*, 341 S.C. 32, 533 S.E.2d 312 (2000) ("*Simmons II*"), posit that a nondelegable duty exists between hospitals and their emergency room patients. The plain language of *Simmons II*, states otherwise. Rather, *Simmons II* addresses a nonabsolute duty, based on ostensible agency. The Plaintiffs further argue that *Simmons II* should apply to governmental entities despite the clear mandate found within the *South Carolina Tort Claims Act* insulating governmental entities from liability for the torts of non-employee independent contractors. In addition to a literal reading of the Act, I find the rulings of many other states with similar Acts persuasive. Oregon (*Giese v. Bay Area Health District*, 101 Or. App. 410, 790 P.2d 1198 (Ct. App. 1990), review den., 310 Or. 281, 796 P.2d 1206 (1990)), Pennsylvania (*Moser v. Heistand*, 168 Pa.Cmwlth, 649 A.2d 177 (Commonwealth Court of Pennsylvania, 1995)), Mississippi (*Brown v. Delta Regional Medical Center*, 997 So.2d 195 (Sup. Ct., 2008), reh. den. 2009), and Texas (*Dumas v. Muenster Hospital District*, 859 S.W.2d 648 (Ct. App. 1993); *Brown v. Montgomery County Hospital*, 905 S.W.2d 481 (Ct. App. 1995)) have all held that ostensible agency does not apply to create governmental entity liability for nonemployees where the state's tort claims act precludes such liability. The

South Carolina Tort Claims Act also specifically excludes independent contractors from the definition of "employee," and preserves governmental entity immunity for conduct of non-employees. §§15-78-30 and 15-78-60(20), *Code of Laws of South Carolina*.

TRMC, as a matter of law, retains sovereign immunity for Dr. Lewis's acts in this instance. "It is declared to be the public policy of the State of South Carolina that the State and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein." §15-78-20(a), *Code of Laws of South Carolina*.

In *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006), the South Carolina Supreme Court recognized that a governmental entity might be liable for its own conduct in evaluating and supervising its contractors, but declined to impose vicarious liability on a governmental entity for the acts of an independent contractor. "Although the Department is **not liable for the acts or omissions of its independent contractor**, Department remains under a duty to provide reasonable care and treatment to its clients. If Department is negligent in its duty, which may include 1) adequately supervising the provision of services by another entity, or 2) its own conduct in relation to prior notice of inappropriate care of its clients by such entity, Department may be held liable for breach of its common law duty provided such negligence creates a foreseeable risk of and causes injury."(emphasis added) There has been no evidence or testimony presented to this Court to establish that TRMC was negligent in supervising any independent contractor, nor that it had any prior notice of any prior inappropriate care of any patient by any independent contractor. Thus, no liability has been



established on the part of TRMC with regard to its own conduct related to independent contractor physicians.

A party is entitled to summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Rule 56(c), SCRPC; Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005).

In this case, Dr. Lewis was an independent contractor working at TRMC as an anesthesiologist. She was not a TRMC employee, and TRMC cannot be vicariously liable for any negligence proven on her part. Additionally, there is no evidence of direct negligence by TRMC in its own conduct related to any independent contractor or physician care. I find that there is no genuine issue as to this, or any other, material fact. As such, I find that, as a matter of law, TRMC retains sovereign immunity for Dr. Lewis's and AMN Healthcare's conduct, and I grant partial summary judgment to TRMC, and find it is not liable, as a matter of law, for any physician negligence alleged in this action. As concerns alleged non-physician employee negligence, TRMC is not entitled to summary judgment, based on plaintiffs' expert witness's affidavit implicating TRMC's non-physician employee (a respiratory therapist) in the allegedly negligent taping of an endotracheal tube.

IT IS THEREFORE ORDERED, the Defendant, TRMC, is granted partial summary judgment, and is not liable for any allegations of physician negligence in this

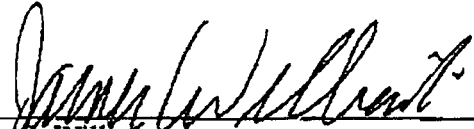
PS [Signature]

action.

AND IT IS SO ORDERED.

_____, 2009

_____, South Carolina



James C. Williams, Jr.
Presiding Judge, First Judicial Circuit



STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

SAMUEL G. SMITH, SR.,
MELISSA SMITH, and SAMUEL
GRAHAM SMITH, JR., an infant
under the age of fourteen (14) years,
by and through his next friend,
SAMUEL G. SMITH,

Plaintiffs,

vs.

THE REGIONAL MEDICAL
CENTER OF ORANGEBURG &
CALHOUN COUNTIES;
ELIZABETH A. LEWIS, D.O.; and
AMN HEALTHCARE, INC., d/b/a
STAFF CARE

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No. 07-CP-38-295

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**AMENDED COMPLAINT
(Jury)**

The plaintiffs complaining of the defendants above-named would allege
as follows:

1. That the plaintiffs are residents of Calhoun County, South Carolina.
2. That Samuel G. Smith, Sr. and Melissa Smith are the parents of
Samuel Graham Smith, Jr., an infant under the age of fourteen (14) years; that
Samuel Graham Smith, Jr., pursues this action by and through Samuel G. Smith,
Sr., as his next friend.
3. That plaintiffs are informed and believe that defendant Elizabeth
Lewis, D.O., is a resident of West Virginia.

COUNTY OF ORANGEBURG
SOUTH CAROLINA

4. That plaintiffs are informed and believe that The Regional Medical Center of Orangeburg & Calhoun Counties is a governmental entity organized and existing under the laws of South Carolina and located in Orangeburg County, South Carolina.

5. That plaintiffs are informed and believe that AMN Healthcare, Inc., is a business corporation organized and existing under the laws of Nevada and was doing business in Orangeburg County, South Carolina as Staff Care, a wholly-owned corporate subsidiary of AMN Healthcare, Inc.

6. That at all times mentioned herein The Regional Medical Center of Orangeburg & Calhoun Counties was acting by and through its employees and agents and it was responsible for the acts and omissions of its employees and agents pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-200, et. seq., and the law of respondeat superior; that plaintiffs are informed and believe that The Regional Medical Center of Orangeburg & Calhoun Counties also held a non-delegable duty that made it responsible for the acts and omissions of its emergency room physicians and personnel and its anesthesia personnel.

7. That plaintiffs are informed and believe that at all times mentioned herein defendant Lewis was an employee or agent of AMN Healthcare, Inc., and Staff Care, and was acting within the course and scope of her employment or agency; that AMN Healthcare, Inc., and Staff Care were responsible for the acts and omissions of its employees and agents pursuant to the law of respondeat superior.

8. That at all times mentioned herein defendant Lewis was licensed to practice medicine in South Carolina and held herself out as a specialist in anesthesia.

9. That beginning on November 2, 2000, the defendants, jointly and severally, undertook to render emergency and anesthesia care to Samuel Graham Smith, Jr. at The Regional Medical Center of Orangeburg & Calhoun Counties near Orangeburg, South Carolina.

10. That the defendants administered anesthetic agents to Samuel Graham Smith, Jr. that paralyzed him and rendered him unable to breathe on his own; and, consequently, the defendants became responsible for managing Samuel Graham Smith's airway.

11. That plaintiffs are informed and believe that on November 2, 2000, Samuel Graham Smith suffered deprivation of oxygen resulting in severe and debilitating brain injury that could have been prevented or mitigated had the defendants exercised standard medical, nursing, and hospital care.

12. That plaintiffs are informed and believe that the defendants, jointly and severally, were negligent, careless, wanton, willful, reckless, and grossly negligent in at least one or more of the following ways:

- (a) Failing to adequately manage Samuel Graham Smith's airway;
- (b) Failing to timely realize that an endotracheal tube was misplaced;
- (c) Failing to adequately check the placement of the endotracheal tube;
- (d) Failing to timely reposition the endotracheal tube.

Any and all of which were outside generally recognized and accepted standards, practices and procedures of medicine, nursing, and hospital care, and each of which the defendants knew or should have known was detrimental to Samuel Graham Smith's health and well being.

FOR A FIRST CAUSE OF ACTION

**(On Behalf of SAMUEL G. SMITH, SR. AND MELISSA SMITH,
individually as parents of SAMUEL GRAHAM SMITH.)**

13. The plaintiffs incorporate the allegations of paragraphs 1-12 as if stated herein verbatim.

14. That plaintiffs are informed and believe that as a direct and proximate result of the acts and omissions of defendants, jointly and severally, Samuel Graham Smith suffered deprivation of oxygen and brain injury and other physical, debilitating trauma for which his parents have been and will be caused to incur medical, hospital, therapy, caretaking and other expenses and costs for the maintenance of Samuel Graham Smith that are above and beyond the usual and expected parental obligations owing to a child.

15. That plaintiffs are informed and believe that they are entitled to recover compensation from the defendants, jointly and severally, for their actual damages and losses and to recover punitive damages from any non-governmental defendant for wanton, willful and reckless acts.

FOR A SECOND CAUSE OF ACTION

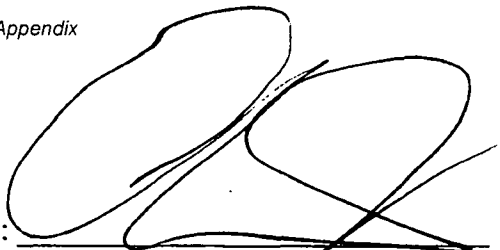
(On Behalf of Samuel Graham Smith, by and through Samuel G. Smith, Sr., as his best friend)

16. That plaintiffs incorporate the allegations of paragraphs 1-12 as if stated herein verbatim.

17. That plaintiffs are informed and believe that as direct and proximate result of the acts and omissions of the defendants, jointly and severally, Samuel Graham Smith suffered deprivation of oxygen and brain injury and other physical, debilitating trauma and has been caused to endure unnecessary physical pain and suffering, mental anguish and emotional distress, permanent physical and mental disability, lost earnings and earnings capacity, and will be caused to endure unnecessary medical hospital, caretaking, and special education expenses as an adult.

18. That plaintiffs are informed and believe that Samuel Graham Smith is entitled recover compensation from the defendants, jointly and severally, for his actual damages and losses and to recover punitive damages from any non-governmental defendant for their wanton, willful and reckless acts.

WHEREFORE, the plaintiffs demand a jury trial and pray for judgment against the defendants, jointly and severally, for actual and punitive damages as allowed by law and for the costs of this action and for such further relief as the Court deems them entitled.

By: 

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March 14, 2007

Of counsel:

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
Samuel G. Smith, Sr., Melissa	)	
Smith, and Samuel Graham Smith,	)	
Jr., an infant under the age of	)	
fourteen (14) years, by and through	)	
his next friend, Melissa Smith,	)	ANSWER
	)	
v.	)	C/A No.: 2002-CP-38-1336
	)	
Plaintiffs,	)	
	)	
Mark R. Zulkey and The Regional	)	
Medical Center of Orangeburg &	)	
Calhoun Counties,	)	
	)	
Defendants.	)	

The Defendants, Mark R. Zulkey and The Regional Medical Center of Orangeburg and Calhoun Counties, by and through the undersigned attorneys, hereby answer the Plaintiffs' Complaint as follows:

1. All allegations contained in the Plaintiffs' Complaint not expressly admitted, or qualified are hereby denied, and the defendants demand strict proof thereof.
2. Defendants admit the allegations of Paragraphs 1, 2, 3, and 4.
3. The allegations of Paragraph 5 are denied and Defendants demand strict proof thereof.
4. The allegations of Paragraph 6 are admitted in so far as Defendant Zulkey is licensed to practice medicine in South Carolina.
5. The allegations of Paragraph 7 are admitted to the extent that the plaintiff, Samuel Graham Smith, Jr., presented to The Regional Medical Center of Orangeburg and Calhoun Counties on November 1, 2000, and received treatment at that time. The remaining allegations contained in

Paragraph 7 are denied, and defendants demand strict proof thereof.

6. The allegations of Paragraphs 8, 9, 10, 11, 12, 13, 14, 15, and 16 are denied, and defendants demand strict proof thereof.

FOR A SECOND DEFENSE
(S.C. Code Ann., §15-78-60(25))

7. The Defendants hereby reiterate and reallege the allegations contained in Paragraphs 1 through 6 as if repeated verbatim herein.

8. The Defendants assert this action is governed by the South Carolina Torts Claims Act, S.C. Code Ann., §15-78-10, et seq. Pursuant to §15-78-60(25), defendants are not liable for the supervision, custody, or care of a patient, namely the plaintiffs.

FOR A THIRD DEFENSE
(S.C. Code Ann., §15-78-120(a))

9. The Defendants hereby reiterate and reallege the allegations contained in Paragraphs 1 through 8 as if repeated verbatim herein.

10. The Defendants assert this matter is governed by the South Carolina Torts Claims Act, S.C. Code Ann., §15-78-10, et seq. Plaintiffs, if entitled to any judgment against Defendants, which is specifically and emphatically denied, are entitled to no more than the statutory caps contained in S.C. Code Ann., §15-78-120(a).

FOR A FOURTH DEFENSE
(S.C. Code Ann., §15-78-120(b))

11. The Defendants hereby reiterate and reallege the allegations contained in Paragraphs 1 through 10 as if repeated verbatim herein.

12. The Defendants assert this matter is governed by the South Carolina Torts Claims Act, S.C. Code Ann., §15-78-10, et seq. Plaintiffs, if entitled to any damages, which is specifically and

emphatically denied, are not entitled to punitive or exemplary damages against defendants pursuant to S.C. Code Ann., §15-78-120(b), and defendants are entitled to an order of the Court pursuant to SCRCF Rule 12(f), striking punitive damages from the Complaint.

FOR A FIFTH DEFENSE
(No Deviation From the Standard of Care)

13. The Defendants hereby reiterate and reallege the allegations contained in Paragraphs 1 through 12 as if repeated verbatim herein.

14. The Defendants assert that the care administered to the plaintiff, Samuel Graham Smith, Jr., was in full compliance with the applicable standard of care. All care and treatment administered by defendants was within acceptable medical standards and methods and, at no time pertinent thereto, did defendants deviate from any medical standard while caring for or treating the plaintiff, Samuel Graham Smith, Jr. Consequently, the plaintiffs are barred from recovery against defendants.

FOR A SIXTH DEFENSE
(No Proximate Cause)

15. The Defendants hereby reiterate and reallege the allegations contained in Paragraphs 1 through 14 as if repeated verbatim herein.

16. The Defendants assert that even if they were negligent as alleged in plaintiffs' Complaint, which is specifically and emphatically denied, the alleged acts and/or admissions of defendants were not the direct and proximate cause of plaintiffs' injuries, if any. Consequently, plaintiffs are barred from recovery against defendants.

FOR A SEVENTH DEFENSE
(S.C. Code Ann. §15-78-60(20))

17. The Defendants reiterate and reallege the allegations of Paragraphs 1 through 16, above, as if repeated verbatim herein.

18. The Defendants assert this matter is governed by the South Carolina Torts Claims Act, S.C. Code Ann., §15-78-10, et seq., and that at all times pertinent herein, any and all anesthesiologists and personnel which allegedly undertook the medical treatment of plaintiff, Samuel Graham Smith, Jr., were independent contractors, and, therefore, defendants are not liable for any acts or omissions of said anesthesiologists and personnel.

FOR AN EIGHTH DEFENSE
(S.C. Code Ann. §15-78-60(5))

19. The Defendants reiterate and reallege the allegations of Paragraphs 1 through 18, above, as if repeated verbatim herein.

20. The Defendants assert this action is governed by the South Carolina Torts Claims Act, S.C. Code Ann., §15-78-10, et seq. Pursuant to §15-78-60(5), defendants are not liable for exercise of discretion or judgment by defendants or their employees or for failure to perform any act or service which is in the discretion or judgment of defendants or their employees.

FOR A NINTH DEFENSE
(S.C. Code Ann. §15-78-70)

21. The Defendants reiterate and reallege the allegations of Paragraphs 1 through 20, above, as if repeated verbatim herein.

22. The Defendants assert this action is governed by the South Carolina Torts Claims Act, S.C. Code Ann., §15-78-10, et seq. Pursuant to §15-78-70, if defendant Mark Zulkey, as an employee of defendant The Regional Medical Center of Orangeburg and Calhoun Counties, committed a tort, which is specifically and emphatically denied, he is not liable because he was acting within the scope of his official duty.

23. Defendant, The Regional Medical Center of Orangeburg and Calhoun Counties,

should be substituted for Defendant Mark R. Zulkey.

FOR A TENTH DEFENSE
(S.C. Code Ann. §15-78-10, et seq.)

24. The Defendants reiterate and reallege the allegations of Paragraphs 1 through 23, above, as if repeated verbatim herein.

25. The Defendants assert this matter is governed by the South Carolina Torts Claims Act, S.C. Code Ann., §15-78-10, et seq., and assert all defenses contained therein, in addition to those specifically set forth above.

WHEREFORE, having fully answered plaintiffs' Complaint, defendants request the Court inquire into these matters herein, and dismiss the plaintiffs' Complaint with prejudice and with costs, or in the alternative, to issue an Order striking punitive damages from the Complaint and substituting defendant, The Regional Medical Center of Orangeburg and Calhoun Counties, for defendant Mark R. Zulkey, and for such other and further relief as this Court may deem just and proper.

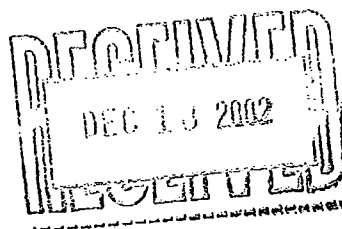
EARLY & NESS

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December 11, 2002



STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

Samuel G. Smith, Sr., Melissa Smith,)
Samuel Graham Smith, Jr., an infant)
under the age of fourteen (14) years,)
by and through his next friend,)
Melissa Smith,)

NOTICE OF MOTION AND
MOTION OF DEFENDANT TRMC
FOR SUMMARY JUDGMENT

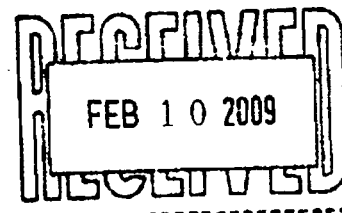
Plaintiffs,

Case Number 07-CP-38-295

vs.

The Regional Medical Center of)
Orangenburg and Calhoun Counties,)
Elizabeth A. Lewis, D.O., and AMN)
Healthcare, Inc., dba Staff Care,)

Defendants.)



TO: CHARLES L. HENSHAW, JR., ATTORNEY FOR PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE the defendant, The Regional Medical Center of Orangenburg and Calhoun Counties ("TRMC") hereby moves this Court, and will move before the Court on the tenth day after service hereof or as soon thereafter as counsel may be heard, for an Order granting this defendant summary judgment, pursuant to *Rule 56, SCRPC*, on the grounds there is no genuine issue of material fact which would preclude judgment for this defendant and this defendant is entitled to judgment as a matter of law, as plaintiffs cannot establish, by expert medical testimony, any negligence, nor causation of injury, on the part of this defendant and its employees; and, on the further ground that this defendant is not liable for the conduct of persons not employed by it, pursuant to §15-78-60(20), *Code of Laws of South Carolina*.

This motion is supported by the deposition testimony to date in this action, including but not limited to the depositions of Ronald Katz, M.D., Daniel Clayton Brown, M.D., David Griesemer, M.D., Charles Thornwell Wallace, M.D., Robert Hubbard, M.D., Elizabeth

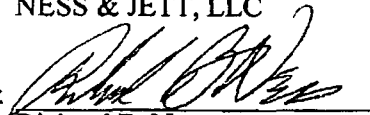
Lewis, D.O., Robert Mesrobian, M.D., and Edmond Anderson Hooker, M.D.

February 9, 2009
Bamberg, SC

Respectfully submitted,

NESS & JETT, LLC

By:



Richard B. Ness
Post Office Box 909
Bamberg, South Carolina 29003
(803)245-5178
ATTORNEY FOR DEFENDANT TRMC

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
Samuel G. Smith, Sr., Melissa	)	
Smith, and Samuel F. Smith, Jr.,	)	
an infant under the age of fourteen	)	MEMORANDUM IN SUPPORT OF MOTION
years, by and through his next friend,	)	BY DEFENDANT TRMC
Samuel G. Smith,	)	FOR SUMMARY JUDGMENT
	)	
Plaintiffs,	)	
	)	Case Number 07-CP-38-295
v.	)	
	)	
The Regional Medical Center of	)	
Orangeburg and Calhoun Counties;	)	
Elizabeth A. Lewis, D.O.; and	)	
AMN Healthcare, Inc., dba Staff	)	
Care,	)	
	)	
Defendants.	)	
	)	

INTRODUCTION

In this action, the plaintiffs allege the minor, Samuel G. Smith, Jr., sustained permanent brain injury as a proximate result of the negligence of the defendants in providing his medical care. The defendant, The Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC"), has moved for summary judgment, on the following grounds: (1) the plaintiffs cannot establish negligence on the part of this defendant and its employees; (2) this defendant is not liable for the acts of defendants Lewis and AMN Healthcare, Inc.; and, (3) that the plaintiffs cannot establish that the brain injury sustained by the minor was proximately caused by the negligence, if any, of this defendant and its employees, as it was more likely than not a result of his underlying medical condition.

Child's Background

Samuel Smith, Jr., was born with a condition known as tuberous sclerosis ("TS"), a genetic disorder characterized by mental retardation, seizures, abnormalities of the skin, and the propensity to grow tumors in various organs, including the brain and heart. Samuel's treating neurologist, Dr. David Griesemer, testified that, by seventeen months of age, Samuel had experienced tumors in his heart, and had nodules in the brain. He was developmentally delayed, and was expected to continue toward at least mild mental retardation. Brain surgery was not deemed to be an option for the eradication of his seizures, due to the widespread area of seizure source. Deposition of David Griesemer, p. 6, line 16, through p. 10, line 7; p. 13, line 13, through p. 14, line 3. Dr. Griesemer testified the child had a pattern of seizures that often became status epilepticus, which he defined as "a medical emergency in which seizures continue without stopping." By definition, "status epilepticus" indicates seizure activity has continued for at least thirty minutes. Griesemer Deposition, p. 15, lines 22 - 25; p. 16, lines 11 - 17. Intubation is often necessary in the treatment of seizures, particularly status epilepticus, not only because the seizures can lower the oxygen saturation in a patient and interfere with airway, but because the stronger medications which would be necessary for seizure control can suppress respiration. Griesemer deposition, p. 23, line 3, through p. 26, line 21. Griesemer testified prolonged seizures can lead to brain damage, decrease in intelligence, and mental retardation. P. 25, line 8, through p. 27, line 4.

November 2, 2000

On November 2, 2000, Melissa Smith carried Samuel into the TRMC Emergency Department at approximately 7:30 a.m. She informed the ED staff that Samuel had been seizing

since approximately 7:10 a.m. Ronald Katz deposition, p. 57, lines 19 - 24; p. 80, lines 7 - 25. At the time of his arrival, the ED chart notes the child was in status epilepticus, and was observed to be cyanotic and was not breathing. Dr. Griesemer testified this indicates lack of oxygenation or perfusion. P. 33, line 2, through p. 34, line 3. Dr. Robert Hubbard, a pediatric critical care specialist at Richland Memorial Hospital, who was consulted about the child's transfer to Richland Memorial and treated the child after arrival at the Richland Memorial Intensive Care Unit, described in detail the impact of status epilepticus on oxygenation and perfusion of the brain. Hubbard deposition, p. 6, p. 27, lines 4 - 6, p. 13 through 14.

Resuscitative efforts began immediately upon the child's arrival, including bagging to provide oxygen. Numerous doses of medications (phenobarbital, versed, valium, cerebyx, ativan, rocephin, and tylenol) were administered in an effort to stop the seizure activity, without success. Intubation was performed by Elizabeth Lewis, D.O., who was, at that time, contracting with a local anesthesiology practice to provide coverage while one of its members was on vacation. Deposition of Elizabeth Lewis, D.O., p. 19, lines 6 - 11. After the child's oxygen saturation diminished, the child's endotracheal tube was assessed, found to be out of place, and repositioned and taped. The oxygen saturation then increased, but, even after administration of several doses of several seizure control medications at TRMC, in the ambulance en route to Richland Memorial, and upon arrival at Richland Memorial, Samuel was continuing to experience seizure activity at 11:40 a.m. in the Richland Memorial ICU, more than four hours after his seizure started. Hubbard deposition, p. 16, line 3, through p. 17, line 9. Dr. Hubbard assessed him on the afternoon of November 2, 2000, as having respiratory failure, which he opined was caused by the seizure activity. Hubbard deposition, p. 24, lines 5 - 24. The child who

had arrived at TRMC dusky in color and poorly oxygenated, continued over the next three to four days at Richland Memorial to have episodes of decreased oxygenation and biting on his endotracheal tube. Hubbird deposition, pp. 17 - 22.

Dr. Hubbird and the other physicians treating Samuel Smith, Jr., at Richland Memorial Hospital, diagnosed him as having experienced anoxic brain injury. No one disputes the child's condition after his discharge from Richland Memorial Hospital was markedly different and deteriorated from his condition prior to November 2, 2000. What is in dispute is the origin and cause of that deterioration.

NO TESTIMONY OF NEGLIGENCE OR CAUSATION AGAINST TRMC

There has been no expert witness testimony TRMC or its employees were negligent, nor that any act of TRMC or its employees caused injury to Samuel Smith, Jr. Dr. Hubbird testified the child's brain injury was caused by his prolonged status epilepticus. He further stated the brain injury occurs during the seizure activity. Hubbird deposition, pp. 14 through 15, p. 24, lines 4 - 6. He testified that, "Historically the association has been a significant portion of children with refractory status epilepticus will expire, and those that do not expire a significant portion of those will have neurological deficits as a result. This, even when they receive appropriate medical care in a timely fashion. Hubbird deposition, p. 15, line 20, through p. 15, line 1. While Hubbird opined the brain injury was caused by the seizure, he testified that there are a number of causes and reasons endotracheal tubes may migrate out of desired placement, and that a tube found to be in the wrong position does not indicate that it was initially placed or taped in the wrong position. Hubbird deposition, pp. 38 - 42. Dr. Robert Mesrobian, an expert in pediatric anesthesiology, testified to his opinion that any anoxic brain injury sustained by the child was in a setting of

prolonged seizure and hypoxia, and was totally unrelated to any issues with his intubation. Mesrobian deposition, pp. 88 - 90. He further testified that migration of the tube, from placement to taping, was not indicative of negligence on the part of any person. Mesrobian deposition, pp. 60 - 64. Similarly, Edmond Hooker, M.D., an expert in emergency medicine, testified to the various reasons a properly placed endotracheal tube may migrate. Hooker deposition, pp. 66 - 76. Daniel Brown, M.D., an expert in emergency medicine, testified to his opinion that a malpositioned endotracheal tube could not account for the child's decreased oxygen saturation. He testified that purposeful intubations of only one lung are performed in surgeries where a collapsed lung is desired, and even those purposeful one-lung intubations do not produce such a low oxygen saturation. Brown deposition, p. 100 - 102.

Despite the opinions of the child's own treating physicians, Hubbard and Griesemer, plaintiffs assert Samuel's anoxic brain injury was proximately caused by a malpositioned endotracheal tube during intubation at TRMC. Plaintiff's only expert witness, Dr. Ronald Katz, however, testified he had no criticisms nor opinions of negligence concerning TRMC and its employees, that it was appropriate to call in an anesthesiologist to assist with the intubation, and that the anesthesiologist performing the intubation was responsible for ensuring proper position and taping of the endotracheal tube. Katz deposition, p. 75, line 15, through p. 77, line 25; p. 84, lines 14 - 19; p. 79, lines 5 - 14. *Also see Hooker deposition, p. 81 - 82.* The deposition excerpts of Dr. Katz which are cited in plaintiffs' memorandum are further supportive of this defendant's position. At worst, Dr. Katz says that if the respiratory therapist is the person who taped the tube at the 19 centimeter mark, then he "would be critical of that." He goes on to state it is ultimately the anesthesiologist's responsibility to ensure proper placement. "Critical" is insufficient to

establish a deviation from the standard of care. Katz never testified that the respiratory therapist or any other TRMC employee deviated from the standard of care, nor that such a deviation caused injury to the child. Indeed, he placed responsibility for the placement of the tube on the anesthesiologist, who was not a TRMC employee. Thus, even plaintiff's expert, Dr. Katz, the only physician who has testified to any role of intubation in this child's brain injury, had no criticism of TRMC's employees, nor did he offer any testimony that TRMC's employees' conduct contributed in any way to the injury.

In a medical negligence action, the plaintiff must establish by expert witness testimony not only negligence, but proximate causation as well. Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided. *Martasin v. Hilton Head Health System*, 364 S.C. 430, 613 S.E.2d 795 (Ct. App. 2005); *Ellis v. Oliver*, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996); *Hanselmann v. McCardle*, 275 S.C. 46, 267 S.E.2d 531 (1980); *Hughes v. The Children's Clinic, P.A.*, 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977); *Gunnels v. Roach*, 243 S.C. 248, 133 S.E.2d 757 (1963).

NO TRMC LIABILITY FOR NON-EMPLOYEES

While TRMC denies that any health professional was negligent in caring for Samuel Smith, Jr., it asserts it is not liable for any negligence of persons not employed by it. The anesthesiologist, Elizabeth Lewis, D.O., identified by plaintiff's expert, Dr. Katz, as responsible for the proper intubation of the patient, was never an employee of TRMC, and the plaintiffs cannot establish an employment relationship between TRMC and Dr. Lewis. Dr. Lewis was contracting with an anesthesia group to cover for Dr. Delaney, a physician who had privileges at

TRMC, but was not an employee of TRMC. TRMC had no contractual arrangement with Dr. Delaney, nor with Dr. Lewis. *See Affidavit of Thomas Dandridge*. TRMC had a contractual relationship with Staff Care, Inc., according to the records filed by AMN Healthcare, Inc., in this matter. Assuming, however, for this argument, that TRMC is deemed to have had a contractual relationship with Dr. Lewis, which is denied, she would still be an **independent** contractor, charged with using her own independent medical judgment, and not subject to TRMC control in that aspect. TRMC is not liable for the conduct of an independent contractor, nor can it control the independent medical judgment of any physician.

TRMC is a governmental entity, a healthcare provider created and funded by Orangeburg and Calhoun Counties. As such, it is a political subdivision of the State of South Carolina, and tort actions against it are governed by the *South Carolina Tort Claims Act*. See §15-78-30(h) and (j), *Code of Laws of South Carolina*. Being in derogation of sovereign immunity, it is to be strictly construed against liability, and liberally construed in favor of immunity or limiting liability for the governmental entity. See §15-78-20(f), *Code of Laws of South Carolina*. See also *Jeff Hunt Mach. Co. v. State Highway Department*, 217 S.C. 423, 60 S.E.2d 859 (1950). The Act strictly limits the liability of governmental entities. “Consequently, it is declared to be the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein.” §15-78-20(a), *Code of Laws of South Carolina*.

The Tort Claims Act is often said to provide immunity to governmental entities. Not so. The Tort Claims Act reinstated by legislation the sovereign immunity that South Carolina, its departments and agencies, and its political subdivisions always enjoyed until the decision of

McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985), wherein the South Carolina Supreme Court declared absolute sovereign immunity to be contrary to public policy. Recognizing that absolute immunity was against public policy, but also recognizing the dangers of unlimited liability for governmental entities, the Legislature reinstated sovereign immunity, but allowed liability as limited by the Act. The Legislature recognized and noted that government must, in some ways, be different from private citizens, in that governmental entities have broad, burdensome duties to many, with unlimited needs and wants, yet limited resources and a duty to be a good steward of those resources. See §15-78-20, *Code of Laws of South Carolina*. Thus, the Legislature determined it was prudent and proper that governmental entities be special, set apart to some degree from private persons and entities.

The employment relationship of the governmental entity to the actor is central to the *Tort Claims Act*. §15-78-70, *Code of Laws*, provides immunity to employees of a governmental entity and requires that the governmental entity be substituted as a defendant in the stead of its employee. Conversely, the Act provides no liability of the entity for those not employed by it. Under the *Tort Claims Act*, "... the term ['employee'] **does not include an independent contractor** doing business with the State or a political subdivision of the State." §15-78-30(c), *Code of Laws of South Carolina*. Under §15-78-60(20), *Code of Laws of South Carolina*, a political subdivision or governmental entity is not liable for the acts of persons who are not its employees.

In *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006), the South Carolina Supreme Court recognized that a governmental entity might be liable for its own conduct in evaluating and supervising its contractors, but declined to impose vicarious

liability on a governmental entity for the acts of an independent contractor. "Although the Department is not liable for the acts or omissions of its independent contractor, Department remains under a duty to provide reasonable care and treatment to its clients. If Department is negligent in its duty, which may include 1) adequately supervising the provision of services by another entity, or 2) its own conduct in relation to prior notice of inappropriate care of its clients by such entity, Department may be held liable for breach of its common law duty provided such negligence creates a foreseeable risk of and causes injury."(emphasis added) *Madison* does not, as commonly misperceived, impose a nondelegable duty on a governmental entity, nor does it diminish the immunity of a governmental entity, preserved by the *Tort Claims Act*, for conduct of an independent contractor. *Madison* merely reiterates that a governmental entity cannot turn a blind eye to events putting it on notice of a problem with its contractors. Plaintiffs' reliance on *Madison* in this case is misplaced.

There has been no evidence presented in this case of any notice to TRMC of any problem with the anesthesia group, with Staff Care, Inc., or with Dr. Lewis, nor any evidence of any negligence by TRMC or its employees. There is no authority for imposing liability on TRMC for the torts, if any, of Dr. Lewis.

NONDELEGABLE DUTY AND APPARENT AGENCY ARE NOT APPLICABLE

To circumvent the Tort Claims Act's provisions that immunity is not waived for the conduct of nonemployees, the plaintiff has urged the Court to impose upon TRMC a nondelegable duty, to make TRMC liable for the acts of Dr. Lewis, who is not its employee. Alternatively, the plaintiff has urged a theory of apparent agency as the basis of liability of TRMC for Dr. Lewis's acts. Such theories have never been applied to governmental entities in

South Carolina since the advent of the *Tort Claims Act*. The case of *Simmons v. Tuomey Regional Medical Center*, 341 S.C. 32, 533 S.E.2d 312 (2000) (“*Simmons II*”), is often cited for a theory of nondelegable duty of hospitals to emergency room patients. Indeed, the plaintiffs have cited it in this action for that proposition. *Simmons II*, however, actually stands for a nonabsolute duty, based on **ostensible agency**. The *Simmons II* opinion adopts the *Restatement (Second) of Torts: Employers of Contractors* §429: “One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.” There is no testimony in this action, however, that Dr. Lewis had any contractual arrangement with TRMC. Nor is there any evidence or testimony that Melissa Smith would have left TRMC or declined the services rendered her child had she know they were rendered by a non-employee. Moreover, *Simmons II* has never been applied by our appellate courts to a governmental entity in South Carolina.

Similarly, other states with tort claims acts which exclude “independent contractors” from the definition of “employee” or “agent” have held that ostensible agency does not give rise to liability for the acts of independent contractors. A few examples are: Oregon (*Giese v. Bay Area Health District*, 101 Or. App. 410, 790 P.2d 1198(Ct. App. 1990), review den., 310 Or. 281, 796 P.2d 1206(1990)); Pennsylvania (*Moser v. Heistand*, 168 Pa. Cmwlth, 649 A.2d 177 (Commonwealth Court of Pennsylvania, 1995); Mississippi (*Brown v. Delta Regional Medical Center*, 997 So.2d 195 (Sup. Ct., 2008), reh. den. 2009; Alabama (*Brown v. Montgomery County Hospital*, 905 S.W.2d 481 (Ct. App. 1995); and Texas (*Dumas v. Muenster Hospital District*,

859 S.W.2d 648 (Ct. App. 1993).

NO JOINT AND SEVERAL LIABILITY/APPORTIONMENT OF LIABILITY REQUIRED

TRMC, as a governmental entity, is entitled to a special verdict, apportioning its liability, if any. §15-78-100(c), *Code of Laws of South Carolina*, provides, “In all actions brought pursuant to this chapter when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity, the trier of fact must return a special verdict **specifying the proportion of monetary liability of each defendant against whom liability is determined.**” (emphasis added). The clear, plain, language of the statute makes it clear there is to be no shared liability, but the jury is required to determine specifically whether each defendant is liable, and, if so, its proportion of monetary liability. The statute clearly separates the liability, if any, of Dr. Lewis, AMN Healthcare, and TRMC. This statute, coupled with §15-78-60(20), clearly shows the intention of the legislature that the liability, if any, of a governmental entity should be separately determined, and that entity should not share in the liability of those not employed by it. The Act, as a whole, clearly precludes liability, joint and several or otherwise, of a governmental entity for the acts of another not employed by it. To hold otherwise would lead to a verdict irreconcilable with the special verdict provisions of the act, and would be inconsistent with the clear language of the Act as a whole.

The public policy rationale for this special treatment of a governmental entity is made clear in §15-78-20(a), *Code of Laws of South Carolina*, wherein the legislature noted the competing concerns of avoiding absolute immunity while preserving the limited resources of governmental entities faced with enormous public burdens. The only logical construction to be made of the provisions of §15-78-100(c), *Code of Laws of South Carolina*, is that TRMC’s liability, if any, is

separate from the liability, if any, of its co-defendants, and it is not vicariously liable for any conduct of Dr. Lewis.

CONCLUSION

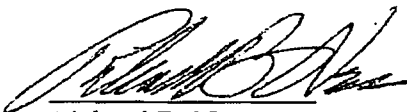
No expert witness testimony has been provided in this case as to any negligence or proximate causation by TRMC or its employees in the care of Samuel Smith, Jr., or its supervision and monitoring of Dr. Lewis, who was not employed by TRMC. TRMC is not liable, under law, for the conduct of a non-employee. TRMC cannot be jointly and severally liable, nor vicariously liable, for the tortious conduct, if any, of Dr. Lewis. TRMC is entitled to judgment as a matter of law in this action, and should be granted summary judgment.

 2009

Bamberg, South Carolina

Respectfully submitted,

NESS & JETT, LLC

By: 

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ATTORNEY FOR DEFENDANT
TRMC

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG

FIRST JUDICIAL CIRCUIT

CASE NO. 07-CP-38-295

SAMUEL G. SMITH, SR., MELISSA)
 SMITH, AND SAMUEL GRAHAM SMITH)
 JR., AN INFANT UNDER THE AGE)
 OF FOURTEEN (14) YEARS, BY AND)
 THROUGH HIS NEXT FRIEND,)
 MELISSA SMITH,)

PLAINTIFFS,)

versus)

THE REGIONAL MEDICAL CENTER OF)
 ORANGEBURG & CALHOUN COUNTIES)
 ELIZABETH A. LEWIS, D.O.; AND)
 AMN HEALTHCARE, INC., D/B/A)
 STAFF CARE E,)

DEFENDANT)

SUMMARY JUDGEMENT
 MOTIONS HEARING

TRANSCRIPT OF RECORD

DATE:

MARCH 24, 2009

BEFORE:

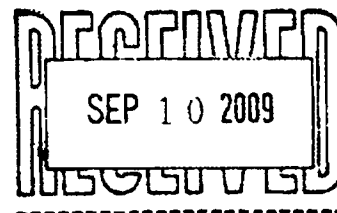
HONORABLE JAMES C. WILLIAMS, JR., PRESIDING JUDGE

APPEARANCES:

CHARLES L. HENSHAW, JR., ESQUIRE
 ATTORNEY FOR PLAINTIFFS

RICHARD B. NESS, ESQUIRE
 ATTORNEY FOR DEFENDANT,
 REGIONAL MEDICAL CENTER OF
 ORANGEBURG & CALHOUN COUNTIES

RICHARD C. THOMAS, ESQUIRE
 ATTORNEY FOR DEFENDANTS,
 ELIZABETH . LEWIS, D.O. AND
 AMN HEALTHCARE, INC., D/B/A
 STAFF CARE



HARRY A. WALKER (MRS.)
 COURT REPORTER, FIRST JUDICIAL CIRCUIT
 POST OFFICE BOX 127
 ROWESVILLE, SOUTH CAROLINA 29133

1 OF SOUTH CAROLINA HAVE NOT DECIDED WHETHER OR NOT A
2 TORT CLAIMS ACT HOSPITAL CAN BE RESPONSIBLE FOR THE
3 ACTS OF ITS INDEPENDENT CONTRACTORS. SO - - -

4 THE COURT: IS THAT BECAUSE TOUMEY
5 WAS NOT A PUBLIC HOSPITAL? IS IT A PRIVATE HOSPITAL,
6 OR WHAT'S THE DISTINCTION?

7 MR. NESS: MY UNDERSTANDING, IT'S
8 A PRIVATE HOSPITAL.

9 THE COURT: ALRIGHT. THAT'S THE
10 DISTINCTION. OKAY.

11 MR. NESS: THAT'S A HUGE
12 DISTINCTION, WE BELIEVE, IN THIS CASE.

13 THE COURT: ALRIGHT.

14 MR. NESS: AND THE SUPREME COURT
15 IN THE TOUMEY CASE DECIDED THAT THE RESTATEMENT OF
16 TORTS THROUGH ITS OSTENSIBLE AGENCY DEFINITION WOULD
17 BRING A DOCTOR WITHIN THE PARAMETERS OF BEING
18 RESPONSIBLE -- BRING THE HOSPITAL WITHIN THE PARAMETER
19 OF BEING RESPONSIBLE FOR THE DOCTOR'S ACTS. IN THIS
20 CASE WE HAVE A DOCTOR WHO, AT BEST, IS AN INDEPENDENT
21 CONTRACTOR, AND, BUT WE HAVE A TORT CLAIMS HOSPITAL.
22 AND WE DON'T BELIEVE THAT IN THIS CASE THAT THE TORT
23 CLAIMS HOSPITAL CAN BE RESPONSIBLE CAN BE RESPONSIBLE
24 FOR THE ACTS OF A PHYSICIAN WHO IS NOT ITS EMPLOYEE.
25 AND THERE ARE SEVERAL REASONS FOR THAT. ONE, THE TORT

1 CLAIMS ACT ITSELF SAYS THAT THE, A TORT CLAIM OR A
2 GOVERNMENTAL ENTITY SHALL NOT BE RESPONSIBLE FOR THE
3 ACTS OF SOMEONE WHO IS NOT ITS EMPLOYEE. AND THAT'S
4 SPECIFICALLY WHAT THE PLAINTIFF IN THIS CASE IS TRYING
5 TO ASSERT.

6 ESSENTIALLY ALSO THE TORT CLAIMS
7 ACT PROVIDES THAT WE ARE NOT RESPONSIBLE FOR THE ACTS
8 OF AN INDEPENDENT CONTRACTOR. SO, IF YOU ASSUME FOR
9 THE PURPOSES OF THIS ARGUMENT THAT DR. LEWIS, WHO IS A
10 NAMED DEFENDANT IN THIS HOSPITAL, I THINK THAT'S A BIG
11 ISSUE HERE, IF YOU ASSUME SHE IS AN INDEPENDENT
12 CONTRACTOR, THEN BY THE ACT ITSELF, WE ARE NOT
13 RESPONSIBLE FOR HER ACTS.

14 NOW, THERE ARE A COUPLE OF HUGE
15 REASONS, YOUR HONOR; ONE, THAT THE EMPLOYEE -- YOU
16 HAVE TO BE AN EMPLOYEE FOR THE HOSPITAL TO BE
17 RESPONSIBLE. THAT'S SPECIFIC LANGUAGE WITHIN THE ACT.
18 I'VE CITED IT IN MY BRIEF. ALSO, THE ACT EXCLUDES
19 ACTS OF INDEPENDENT CONTRACTORS JUST BY VIRTUE OF THE
20 DEFINITION OF THE FACT THAT WE ARE ONLY RESPONSIBLE
21 FOR THE ACTS OF AN EMPLOYEE. IT ALSO SAYS WE ARE NOT
22 RESPONSIBLE FOR THE ACTS OF AN INDEPENDENT CONTRACTOR.

23 YOUR HONOR, ANOTHER BIG ISSUE
24 WITHIN THIS CASE IS THE, THE THEORY OF MADISON VERSUS
25 BABCOCK, WHICH WE'VE BOTH CITED IN OUR BRIEFS. WE

1 BELIEVE THAT MR. HENSHAW ON BEHALF OF THE PLAINTIFF
2 HAS MISCHARACTERIZED THAT, THE HOLDING OF THAT CASE.
3 WE THINK THAT CASE DOES NOT APPLY IN THIS PARTICULAR
4 SITUATION BECAUSE YOU'VE GOT, UNDER THE HOLDING OF THE
5 MADISON CASE, YOU'VE GOT A PRINCIPLE THAT THE, IT
6 SAYS, IS NOT IMPOSING NON-DELEGABLE DUTY ON A
7 GOVERNMENTAL ENTITY, NOR DOES IT DIMINISH THE IMMUNITY
8 OF A GOVERNMENTAL ENTITY PRESERVED BY THE TORT CLAIMS
9 ACT. THE MADISON CASE MERELY HOLDS THAT A
10 GOVERNMENTAL ENTITLE CANNOT TURN A BLIND EYE TO EVENTS
11 PUTTING IT ON NOTICE OF A PROBLEM WITH ITS
12 CONTRACTORS. IN THIS CASE THERE IS NO INFORMATION
13 THAT DR. LEWIS HAD ANY PROBLEMS, ANY BLEMISHES IN HER
14 RECORD OR ANY REASONS THAT WE SHOULD BE ON NOTICE THAT
15 SHE IS NOT A GOOD, REPUTABLE DOCTOR. IN THE MADISON
16 CASE THEY HAD SOME ISSUES WITH THE BABCOCK CENTER
17 WHERE THE BABCOCK CENTER HAD HAD SOME PROBLEMS, THE
18 STATE APPARENTLY KNEW IT HAD SOME PROBLEMS, AND THE
19 COURT SAID, WELL, WHEN YOU KNOW THESE KIND OF THINGS
20 YOU CAN'T JUST TURN YOUR BLIND EYE AND HIDE BEHIND THE
21 TORT CLAIMS ACT AND SAY, WE'RE NOT RESPONSIBLE FOR
22 THIS INDEPENDENT CONTRACTOR, EVEN THOUGH WE KNOW THAT
23 INDEPENDENT CONTRACTOR HAD PROBLEMS. IN THIS CASE
24 THERE'S NO TESTIMONY, EVIDENCE OR ANYTHING ELSE THAT
25 DR. LEWIS HAS ANY PROBLEMS. SO, THE TRMC, EVEN IF DR.

1 LEWIS IS AN INDEPENDENT CONTRACTOR, IS NOT RESPONSIBLE
2 FOR THE ACTS UNDER THE MADISON CASE. MR. HENSHAW
3 WOULD ASSET THAT TRMC IS RESPONSIBLE BUT MERELY BY
4 SAYING, USING THE TERM THAT INDEPENDENT CONTRACTORS
5 UNDER THE MADISON CASE CAN CAUSE LIABILITY FOR A TORT
6 CLAIMS ACT OF THE HOSPITAL. AND THAT'S NOT WHAT WE
7 HAVE IN THIS CASE. THERE'S A BIG DISTINCTION IN THE
8 FACTS OF THE MADISON CASE AND HOW THE COURT HELD THE
9 STATE SOMEWHAT RESPONSIBLE FOR THE ACTS OF ITS
10 INDEPENDENT CONTRACTORS AND IN THIS CASE. WE DON'T
11 HAVE ANY EVIDENCE THAT DR. LEWIS HAS ANY PROBLEMS THAT
12 THE STATE SHOULD HAVE BEEN, OR THAT TRMC SHOULD HAVE
13 BEEN AWARE OF HER PROBLEMS.

14 YOUR HONOR, ANOTHER BIG ISSUE THAT
15 I THINK IN THIS CASE THAT AGAIN POINTS TO THE FACT
16 THERE SHOULD NOT BE ANY LIABILITY OF TRMC FOR THE ACTS
17 OF AN INDEPENDENT CONTRACTOR, UNDER THE TORT CLAIMS,
18 AND I'VE CITED THIS STATUTE IN OUR BRIEF, IF YOU GO TO
19 TRIAL BETWEEN A TORT CLAIMS ENTITY AS A DEFENDANT AND
20 A NON-TORT CLAIMS ENTITY AS A DEFENDANT, THE TORT
21 CLAIMS ENTITY IS ENTITLED TO A SPECIAL INTERROGATORY
22 TO GET THE JURY TO MORE OR LESS APPORTION LIABILITY
23 BETWEEN THE NON-ENTITY AND THE ENTITY THAT'S COVERED
24 BY THE TORT CLAIMS ACT. THE ACT, WITHIN THAT
25 TERMINOLOGY, SAYS, WELL, THE STATE'S NOT RESPONSIBLE

1 FOR THE ACTS OF A NON-TORT CLAIMS ENTITY. SO, IF
2 WE'RE -- IF THE COURT'S REQUIRED TO PROVIDE TO THE
3 JURY A SPECIAL INTERROGATORY AND TO DIVIDE THAT, LET
4 THE JURY DIVIDE THAT LIABILITY IN WHATEVER APPORTION
5 THEY THINK IS APPROPRIATE, THEN IN A CASE WHERE YOU
6 HAVE LIKE THIS, WHERE YOU HAVE A TORT CLAIM ENTITY AND
7 A NON-TORT CLAIM ENTITY, WE'RE ENTITLED TO THAT
8 SPECIAL INTERROGATORY TO THE JURY. BUT MR. HENSHAW IS
9 TRYING TO STRETCH THE RULE UNDER TOUMEY AND BRING IN
10 THE FACT THAT, AND SAY, WE ARE RESPONSIBLE FOR THE
11 INDEPENDENT CONTRACTOR. WELL, THAT WOULD TURN THE ACT
12 UPSIDE DOWN ON THE APPORTIONMENT AND SPECIAL
13 INTERROGATORY ISSUE. SO, THE INTENT OF THE ACT ITSELF
14 UNDER THAT THEORY INDICATES THAT WE ARE NOT
15 RESPONSIBLE, OR NOT SUPPOSED TO BE RESPONSIBLE FOR ANY
16 ACT OF THE INDEPENDENT CONTRACTOR, THE JURY IS
17 SUPPOSED TO DIVIDE THAT.

18 YOU ALSO HAVE THE LANGUAGE IN THE
19 TORT CLAIMS ACT THAT SAYS THAT THE COURT SHOULD
20 CONSTRUE THE TORT CLAIMS LAW TO BASICALLY MINIMIZE THE
21 LIABILITY OF THE STATE OF SOUTH CAROLINA, BECAUSE
22 AFTER THE MCCALL CASE AND THE ENACTMENT OF A TORT
23 CLAIMS ACT THE LEGISLATURE PUT BACK IN CERTAIN --
24 SOVEREIGNTY IMMUNITY WITH EXCEPTIONS, AND THE
25 EXCEPTIONS ARE WHAT THEY ENUMERATE. AND ONE OF THE

1 REASONS YOU BASE SOME TORT CLAIM LIABILITY ON AN
2 ENTITY IS TO -- YOUR HONOR, IS TO MINIMIZE THE
3 LIABILITY OF THE STATE, WHICH IS WHAT, YOU KNOW, IS --
4 THE SOVEREIGN IMMUNITY DOCTRINE PROHIBITED ANY
5 LIABILITY OF THE STATE. IN THIS CASE THE TORT CLAIMS
6 ACT ITSELF, THEY ASK THE, DIRECTS THE COURTS NOW TO
7 MINIMIZE THE LIABILITY OF TORT CLAIM ENTITIES. SO, WE
8 BELIEVE THAT THE HOLDING OF THIS COURT IN THIS CASE,
9 WHICH WE THINK IS A NOVEL ISSUE, SHOULD BE THAT THE
10 ACTS OF THE INDEPENDENT CONTRACTOR ARE NOT -- TRMC
11 SHOULD NOT BE HELD LIABLE FOR THE ACTS OF DR. LEWIS.
12 AND THERE'S ANOTHER DEFENDANT WHO THE, I GUESS,
13 ANOTHER INDEPENDENT CONTRACTOR WITH DR. LEWIS AND
14 THAT'S STAFF CARE. AND WE DIDN'T, WE DON'T HAVE ANY
15 CONNECTION WITH STAFF CARE BECAUSE THEY HIRED AND
16 BROUGHT IN DR. RUSE. SO, WE WOULD ASK THE COURT TO
17 DIRECT -- BECAUSE THIS IS A NOVEL ISSUE, TO ISSUE AN
18 ORDER SAYING THAT WE ARE NOT RESPONSIBLE FOR ANY ACTS
19 OF DR. LEWIS UNDER THE VARIOUS POINTS I'VE MADE AND
20 THOSE THAT I'VE SET FORTH IN MY MEMORANDUM.

21 AND YOUR HONOR, FINALLY, I'VE
22 CITED IN MY MEMORANDUM A NUMBER OF OUT OF STATE CASES
23 FOR STATES THAT HAVE TORT CLAIMS ACTS, AND I'LL
24 MENTION THREE OR FOUR OF THEM. ONE, I THINK ONE TO ME
25 SEEMS TO BE THE CLOSEST TO THE SOUTH CAROLINA TORT

1 CLAIMS ACT, IS A MISSISSIPPI TORT CLAIMS ACT. AND
2 THAT WAS THE CASE IN BROWN VERSUS DELTA REGIONAL
3 MEDICAL CENTER, AND THAT WAS AN E.R. CASE WHICH IS
4 SIMILAR TO THE TOUMEY CASE, EXCEPT WE HAVE A TORT
5 CLAIMS ENTITY IN MISSISSIPPI, AND TOUMEY IS NOT A TORT
6 CLAIMS ENTITY. AND IN THAT CASE THE MISSISSIPPI
7 SUPREME COURT HELD THAT THE CLEAR LANGUAGE OF THE TORT
8 CLAIMS ACT IN MISSISSIPPI PROVIDES IMMUNITY TO THE
9 STATE AND ITS SUBDIVISIONS FOR THE NEGLIGENCE OF AN
10 INDEPENDENT CONTRACTOR. AND YOU HAVE THE TEXAS TORT
11 CLAIMS ACT, OREGON AND PENNSYLVANIA, ALL THAT HOLD
12 ESSENTIALLY THE SAME THING, AND THE LANGUAGE IN THOSE
13 ACTS IS SOMEWHAT DIFFERENT BUT NOT DIFFERENT TO THE
14 EXTENT THAT I THINK I NEED IT TO BRING IT TO THE
15 COURT'S ATTENTION. THE STATES THAT HAVE ADDRESSED
16 THIS ISSUE WITH TORT CLAIMS ACTS AND RESPONSIBILITY OF
17 A TORT CLAIMS ENTITY FOR THE ACTS OF ITS INDEPENDENT
18 CONTRACTORS THE BEST I CAN FIND HAVE ALL HELD THAT THE
19 STATE'S NOT RESPONSIBLE FOR THE ACTS OF ITS
20 INDEPENDENT CONTRACTORS. AND SO, THIS CASE IS TOTALLY
21 DIFFERENT FROM THE TOUMEY CASE WHICH YOU HAVE A
22 PRIVATE ENTITY, SO WE WOULD ASK THE COURT TO INTERPRET
23 THE TORT CLAIMS ACT AND PROVIDE THAT WE ARE NOT
24 RESPONSIBLE FOR THE ACTS OF DR. LEWIS. IF THE COURT
25 HELD OTHERWISE, YOUR HONOR, WE'RE ALMOST BACK TO THE

1 SAME TYPE ISSUE THAT DR. LEWIS WOULD THEN BE DEEMED AN
2 EMPLOYEE, AND SHE WOULDN'T EVEN NEED TO BE A DEFENDANT
3 IN THIS CASE. AND I DON'T THINK THAT'S WHAT THE TORT
4 CLAIMS ACT HOLDS AT ALL, AND I DON'T THINK THE COURTS
5 WANT TO SAY THAT EVERY INDEPENDENT CONTRACTOR THAT
6 WORKS IN A HOSPITAL SHOULD BE ABSORBED INTO THE
7 EMPLOYEE UMBRELLA OF A HOSPITAL. AND THAT'S
8 ESSENTIALLY WHAT MR. HENSHAW IS ASSERTING IN THIS
9 CASE. SO, WE WOULD ASK THE COURT TO GRANT SUMMARY
10 JUDGEMENT AS TO THE ISSUE OF DR. LEWIS AND SAY SHE'S
11 NOT OUR -- WE'RE NOT RESPONSIBLE FOR HER ACTS AS AN
12 INDEPENDENT CONTRACTOR.

13 THANK YOU, YOUR HONOR.

14 THE COURT: MR. HENSHAW.

15 MR. HENSHAW: THANK YOU, YOUR
16 HONOR. YOUR HONOR, JUST TO BE SURE THAT WE'RE ALL ON
17 THE SAME PAGE, BECAUSE I THINK THAT PROCEDURALLY THAT
18 MR. NESS AND I ARE EXACTLY ON THE SAME PAGE. WHAT WE
19 HAVE DONE HERE IS, WE HAVE CONCEDED THAT THE EVIDENCE
20 WOULD NOT SUPPORT A CLAIM AGAINST THE ACTIONS OF DR.
21 ZULKEY, AND SO THE HOSPITAL, TO THE EXTENT HE IS AN
22 EMPLOYEE, COULD NOT BE HELD RESPONSIBLE FOR HIS ACTS
23 OR OMISSIONS. AND SINCE HE IS A DOCTOR THE HOSPITAL
24 COULD NOT BE HELD UP TO ONE POINT TWO MILLION DOLLARS
25 FOR HIS ACTS OR OMISSIONS. THE EMPLOYEE THAT WE DO

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

SAMUEL G. SMITH, SR.,	)	
MELISSA SMITH and	)	COURT OF COMMON PLEAS
SAMUEL GRAHAM SMITH, JR.)	)	
an infant under the age	)	C/A 2000-CP-1336
of 14 years, by and	)	
through his next friend	)	
MELISSA SMITH,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
MARK R. ZULKEY,	)	
et al.,	)	
	)	
Defendants.	)	

ELIZABETH LEWIS, DO,

a witness herein, called by the Plaintiffs for
 examination, taken pursuant to the South
 Carolina Rules of Civil Procedure, by and
 before Sheila Stauffer, a Registered
 Professional Reporter and a Notary Public in
 and for the Commonwealth of Pennsylvania, at
 the law offices of Flaherty, Sensabaugh &
 Bonasso, 965 Hartman Run Road, Suite 1105,
 Morgantown, West Virginia, on Thursday, April
 27, 2006, at 9:00 a.m.



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1 Dr. Lewis - by Mr. Henshaw

2 Q. Was the position in South Carolina your
3 first practice in medicine other than your
4 training?

5 A. That's correct.

6 Q. And where did you practice in South
7 Carolina?

8 A. Hilton Head Medical Center and Clinics.

9 Q. You started that about 1995?

10 A. That is correct.

11 Q. And how long were you there?

12 A. Through the year 2000.

13 Q. Until the year 2000?

14 A. That's correct.

15 Q. And what was your position while you
16 were at that hospital?

17 A. I was a staff anesthesiologist.

18 Q. And then following that, where did you
19 locate?

20 A. Brownsville, Pennsylvania.

21 Q. How long were you there?

22 A. One year.

23 Q. Then following that?

24 A. At my present location.

25 Q. Now, at some point, did you perform

1 Dr. Lewis - by Mr. Henshaw
2 anesthesiology at the Orangeburg/Calhoun
3 Regional Medical Center?

4 A. Yes, that's correct.

5 Q. What was your relationship with that
6 particular hospital?

7 A. I was a locum tenens anesthesiologist.

8 Q. Explain what locum tenens means to you?

9 A. It is a temporary filling of a position
10 by an anesthesiologist.

11 Q. Were you at the Regional Medical Center
12 of Orangeburg & Calhoun Counties for any
13 particular time?

14 A. Approximately 10 days only.

15 Q. Was that in or around November of the
16 year 2000?

17 A. That would be correct.

18 Q. Do you know specifically what day you
19 actually started the locum tenens there?

20 A. I do not.

21 Q. Do you know which day you specifically
22 finished the locum tenens there?

23 A. I do not.

24 Q. Were you attached or associated with
25 any type of service that would place a

1 Dr. Lewis - by Mr. Henshaw
2 physician in a hospital?

3 A. Can you give me some clarification on
4 that question?

5 Q. I will try to. I am really trying to
6 understand how you came to be in the Orangeburg
7 Regional Medical Center at or about November
8 2000?

9 A. I was placed.

10 Q. In a locums tenens position?

11 A. I was placed there by an agency called
12 Staff Care.

13 Q. Staff Care is located where?

14 A. I don't know.

15 Q. Do you remember any of the names of any
16 of the persons you worked with at Staff Care to
17 make these arrangements?

18 A. No, I don't.

19 Q. Had you ever been placed by Staff Care
20 at any other hospital in a locum tenens
21 arrangement?

22 A. No, I have not.

23 Q. Is this your one and only time at
24 Orangeburg?

25 A. Yes, it was.

1 Dr. Lewis - by Mr. Henshaw

2 Q. Do you know how Orangeburg would have
3 contacted Staff Care to request such an
4 arrangement?

5 A. No, I don't.

6 Q. Was it ever expressed to you what their
7 particular needs were to have an
8 anesthesiologist come in in a locum tenens
9 arrangement?

10 A. For vacation coverage of one of the
11 permanent anesthesiologists.

12 Q. Okay. The fact that this is your one
13 and only time in a locum tenens situation, is
14 there a reason this is the only time for you?

15 MS. MARUNICH: Objection to the
16 form of the question. Do you mean at this
17 facility?

18 Q. In terms of offering services in a
19 locum tenens arrangement, is there a reason
20 that the doctor has only done this one time.

21 A. I'm not sure I understand what you are
22 asking me.

23 Q. Okay. Have you ever offered your
24 services in locum tenens to anyone else?

25 A. Yes, I have.

1 Dr. Lewis - by Mr. Henshaw

2 Q. Oh, okay. Tell me with whom else you
3 have done so?

4 A. Are you speaking particularly about the
5 agency; is that what you are asking me?

6 Q. Yes, ma'am.

7 A. I have used locums services, and I have
8 provided locums services with a number of
9 different agencies.

10 Q. That's been throughout your career?

11 A. Yes.

12 Q. Do you continue to do so even now?

13 A. No, I don't.

14 Q. When was it approximately that you
15 either offered or used locums services?

16 A. Approximately 2002.

17 Q. When you say you've used locums
18 services, has that been for coverage for you?

19 A. Or for people within my group, correct.

20 Q. And approximately how many different
21 locations have you been placed when you
22 actually offered locums services? Orangeburg
23 obviously is one.

24 A. Three.

25 Q. Where were the other two locations?

1 Dr. Lewis - by Mr. Henshaw

2 A. Brownsville, Pennsylvania, and
3 Morgantown, West Virginia.

4 Q. At Brownsville, Pennsylvania,
5 approximately how long were you there?

6 A. Under the guise of locums tenens
7 approximately one month.

8 Q. What was the name of the institution
9 where you were there?

10 A. Brownsville General Hospital.

11 Q. I am sorry, the other location was
12 Ohio?

13 A. No, it was Morgantown, West Virginia.

14 Q. I am sorry. I apologize. In
15 Morgantown, what was the institution?

16 A. Monongalia General Hospital.

17 Q. Approximately how long were you there
18 under locum tenens?

19 A. Approximately a year and a half.

20 Q. Would it be correct to say, Dr. Lewis,
21 in Orangeburg when you were placed there by
22 this agency, your contractual arrangements were
23 with the agency and not the hospital?

24 MS. MARUNICH: Objection to the
25 form of the question but go ahead.

1 Dr. Lewis - by Mr. Henshaw

2 A. My contract was signed with the agency.

3 Q. And what do you understand about the
4 relationship you had with the hospital at that
5 time? Do you know whether you -- do you know
6 whether you were considered an independent
7 contractor or would you have been considered an
8 employee of the hospital at that time?

9 A. I do not know in the strictest
10 definition what the legal terminology would
11 have been as it related to my employment there.

12 Q. But is it correct that as far as a
13 contract was concerned, you had no specific
14 contract naming you as a party and naming
15 Orangeburg Regional Medical Center as a party?

16 MR. NESS: Object to the form of
17 the question, but you can go ahead and answer
18 it, Doctor.

19 Q. Do I need to repeat?

20 A. You need to rephrase it.

21 Q. In terms of any contract that existed,
22 do you know whether it ever included Orangeburg
23 Regional Medical Center as a party?

24 MR. NESS: Object to the form of
25 the question but go ahead and answer it.

1 Dr. Lewis - by Mr. Henshaw

2 A. The contract was to place me at
3 Orangeburg Regional Medical Center.

4 Q. I see. Do you continue to have a copy
5 of that contract?

6 A. I do not.

7 Q. Do you know whether a copy of the
8 contract still exists in anyone's possession?

9 A. I do not have knowledge of that.

10 Q. When you were paid for the time you
11 were at Orangeburg Regional Medical Center, do
12 you know who made the payments to you?

13 A. Staff Care. The check came from Staff
14 Care to me.

15 Q. Did you receive any direct payments
16 from Orangeburg Regional Medical Center?

17 A. No.

18 Q. Did the contract -- do you recall
19 whether the contract provided any
20 specifications about how much time you would be
21 in the hospital or how many hours you would be
22 there?

23 A. No, I don't recall.

24 Q. And --

25 A. Excuse me. Let me clarify. The

1 Dr. Lewis - by Mr. Henshaw

2 Q. And are your recollections independent
3 of the medical records?

4 A. Yes, they are.

5 Q. If you can, Doctor, I would just like
6 you tell me what you remember about this child
7 and being in the emergency room on either of
8 those two days.

9 A. I recall that I presented to the
10 emergency room with the child being in status
11 epilepticus.

12 Q. Okay. Anything else you remember?

13 A. I recall intubating the child.

14 Q. Anything else?

15 A. I recall the child's seizures, gross
16 motor seizures ceasing and --

17 Q. Okay.

18 A. The child being ventilated. Having
19 some semblance of stabilizing vital signs and
20 departing from the emergency room.

21 Q. Do you recall receiving any additional
22 information about this child that morning after
23 you left the emergency room?

24 A. No, I do not.

25 Q. Did you ever learn of any other events

1 Dr. Lewis - by Mr. Henshaw

2 intubation on this child?

3 A. That's typically not the way things are
4 handled.

5 Q.. What about the -- did you have an
6 understanding as to why the emergency room
7 physician was not performing an intubation on
8 this child?

9 A. At the time that I entered the room I
10 had no knowledge as to whether or not attempts
11 had been made before I got there or whether or
12 not I was the first responder for his airway.

13 Q. Okay. And do you know -- did you
14 participate in the decision-making process that
15 the child would need intubation or did you
16 simply carry out a decision that had already
17 been made.

18 A. The assumption is that once you've been
19 called into a setting such as that, that the
20 child does need artificial airway maintenance,
21 there are -- there are no verbal cues
22 necessary.

23 Q. Okay. So is it fair to say that the
24 fact that you were called at all was you were
25 going to be in the emergency room, once you

1 Dr. Lewis - by Mr. Henshaw

2 realized it was in regard to a particular
3 pediatric patient, you were going to be there
4 for airway management?

5 MR. NESS: Object to the form of
6 the question. You can go ahead and answer it.

7 A. I viewed my position as gaining airway
8 control of this child, that's correct.

9 Q. All right. Now, the term airway
10 control as you've just utilized it can include
11 what methods for airway control? Is it a
12 spectrum or is it one particular type of
13 method?

14 A. There are a myriad of different ways to
15 gain control of a patient's airway. The
16 definitive method is by endotracheal intubation
17 which was performed on this patient.

18 Q. And endotracheal intubation can be done
19 either through a nasal route or through the
20 mouth; is that correct?

21 A. There are other routes available as
22 well. But those two are correct and the most
23 common.

24 Q. All right. Do you know whether you
25 gave consideration at any point to performing

1 Dr. Lewis - by Mr. Henshaw

2 Q. Did you go about trying to determine
3 each of those differentials?

4 A. Correct.

5 Q. Were you able to rule any of them out?

6 A. Yes. With the first -- with an initial
7 maneuver of auscultating the child's lungs.

8 Q. Explain what you did there?

9 A. I listened to both sides of his chest.

10 Q. What do you recall hearing?

11 A. We are only ventilating on the right
12 side, so we pulled the tube back. I pulled the
13 tube back, excuse me.

14 Q. So were you able to rule out or come to
15 a conclusion as to what most probably had
16 occurred to cause the decrease in oxygen
17 saturation?

18 A. Well, most probably it was a
19 combination of the three situations I just
20 described.

21 Q. Was there aspiration?

22 A. I did not see any gross sign of
23 aspiration. However, there was blood in the
24 oral pharynx, and it was most possible that he
25 aspirated some blood.

STATE OF SOUTH CAROLINA)

: IN THE COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG) CASE NO.: 02-CP-38-1336

SAMUEL G. SMITH, SR.,)
 MELISSA SMITH, and SAMUEL)
 GRAHAM SMITH, JR., an)
 infant under the age of)
 fourteen (14) years, by)
 and through his next friend)
 MELISSA SMITH,)

Plaintiffs,)

) DEPOSITION OF:

-vs-

) DAVID GRIESEMER, M.D.

THE REGIONAL MEDICAL CENTER)
 OF ORANGEBURG and CALHOUN)
 COUNTIES,)

Defendant.)

Given before, Court Reporter and Notary Public, at
 Medical University of South Carolina, Department of
 Neuroscience, Clinical Science Building, Room 324, 96
 Jonathan Lucas Street, Charleston, South Carolina, on
 Monday September 25th, 2006, commencing at 9:07, o'clock,
 a.m.

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1 good choice because it will terminate the
2 seizure without causing as much sedation.
3 Dilantin given quickly, however can cause
4 cardiac arrhythmias. Cerebyx is a new version
5 of Dilantin that can be given more safely and
6 more frequently. And so I was recommending
7 Cerebyx as an emergency intervention. It's not
8 available for daily oral use.

9 Q.Now, make sure the court reporter has got
10 Cerebyx spelling right, because it's a very
11 similar name to some other drugs.

12 A.Sure.

13 Q.Would you spell it correctly?

14 A.Yes. It's C-E-R-E-B-Y-X.

15 Q.In one of your notes I saw that you had actually
16 had a letter typed for the mother to use if she
17 went to the ER with the child in a seizure; do
18 you recall that?

19 A.I don't have an independent recollection. But,
20 that's something I do with patients from time to
21 time.

22 Q.Typically, what is the purpose of the letter?

23 A.The purpose of the letter is to provide the
24 emergency room physician with clear guidance as
25 to which medications to use and in what doses.

1 In my experience, some emergency room physicians
2 are uncomfortable in treating seizures in
3 children. And they tend to use too little
4 medication, or respond too slowly, or too
5 indecisively to this emergency situation.

6 Q.What is status epilepticus?

7 A.Status epilepticus is a medical emergency in
8 which seizures continue without stopping. The
9 formal definition specifies that the seizure
10 must continue for thirty minutes, or that
11 seizures are intermittent, but allow no return
12 to baseline consciousness for that thirty minute
13 period.

14 In reality, treatment for status
15 epilepticus begins as soon as we can get to the
16 child, because we'd like to have stopped by the
17 time the thirty minute window is reached. We
18 begin to observe adverse effects of the seizure,
19 certainly by sixty minutes.

20 Q.Sixty minutes?

21 A.Sixty minutes of ongoing seizure activity, yes.

22 Q.Would a child, like Samuel Smith, have suffered
23 from status epilepticus with his seizures? Is
24 that something by history when you were seeing
25 him?

1 STATE OF SOUTH CAROLINA)
 2 : IN THE COURT OF COMMON PLEAS
 2 COUNTY OF ORANGEBURG) Case No. 04-CP-38-1597

3 Samuel G. Smith, Sr., Melissa)
 4 Smith, and Samuel Graham Smith,)
 4 Jr. an infant under the age of)
 5 fourteen (14) years, by and)
 5 through his next friend,)
 6 Melissa Smith,)

6 Plaintiffs,)

7 -vs-)

8 The Regional Medical Center of)
 9 Orangeburg & Calhoun Counties)

10 Defendants,)

COPY

DEPOSITION OF:
 Mark R. Zulkey, D.O.

12 Given before Janet B. Green, Court Reporter and
 13 Notary Public, at The Regional Medical Center of
 14 Orangeburg & Calhoun Counties, on March 31, 2006,
 15 commencing at 4:30 p.m.
 16

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1 reviewed it and asked them - the
2 transcriptionist to make any changes to it?

3 A. I never make changes to charts.

4 Q. So this document reflects your dictation, your
5 review of it and your signature, that's all I'm
6 asking. In this - on TRM - page TRM 19, which
7 is the second page of your dictation, it states
8 that the patient was given Cerebyx, 500 mg. IV.
9 I think you explained this earlier, but just
10 specific to this case, what was the reason that
11 Cerebrix was given in that amount?

12 A. Cerebyx is an anti-seizure medicine that
13 patients can be kept on chronically and it has a
14 different mechanism of action than the Valium,
15 that being a benzodiazepine and it's very
16 common. Some people use Dilantin and some
17 people use Cerebyx, it's specifically
18 equivalent.

19 Q. In this same page you indicated the patient was
20 also given Ativan...

21 A. Uh huh.

22 Q. Is that the same as Dilantin or is that
23 different?

24 A. No, Ativan is in the same class of drugs as
25 Valium, it has a longer half-life.

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1 Q. What was the reason that was administered, the
2 same reason that the Valium had been given?

3 A. Yes and again, it has a longer half-life. The
4 problem - well, not problem, but to me the
5 mother clearly knew this child's medical history
6 well and I tried to adhere to her allegiance to
7 the Valium because she clearly went through this
8 before and clearly, from the history that I got,
9 I was under the impression that that was the
10 only drug that would stop the seizure and so
11 that's why I gave very large doses of Valium.

12 Q. You also indicate you gave Versaid. What was
13 the reason for that?

14 A. Again, Versaid is a benzodiazepine, it's anti-
15 seizure medicine and that actually was a
16 recommendation from the doctor in Columbia.

17 Q. So that was done after you had talked with him?

18 A. Right, and it's an IV drip, in other words, they
19 get continuous low dose to suppress seizures.

20 Q. In your - near the last line of TRM 19 you say
21 the patient was subsequently transported in
22 stable but guarded condition. Explain to me
23 what you meant by those terms stable but guarded
24 in this context.

25 A. Well, stable meant that the vital signs were not

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1 such that they required immediate intervention.
2 Guarded means that they are clearly requiring
3 heavy observation and further treatment. This
4 child was seizing even after more medicine than
5 I have ever given any adult was seizing and
6 despite paralysis and tons of medicine continued
7 to have intermittent seizures. This is a very
8 sick child and so clearly, that's what I mean by
9 guarded, is that this was going to require very
10 extensive care.

11 Q. If you look at page TRM-20 you indicate triage
12 category red there. Please explain what that
13 means.

14 A. Well, when patients come to the emergency
15 department they are broken up into groups based
16 on need to be seen. Red is emergent. In other
17 words, the patients that are classified red they
18 are to have their chart given directly to a
19 physician immediately and that physician is to
20 go immediately and see that patient. Yellow is
21 urgent, blue is non-urgent and orange is fast-
22 track - what we consider fast-track or minor
23 injuries and colds and things like that.

24 Q. In November 2000, were there any - what was
25 available to you by way of a consult for

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Appendix

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

SAMUEL G. SMITH, SR., MELISSA SMITH, and SAMUEL GRAHAM SMITH, JR., an infant under the age of fourteen (14) years, by and through his next friend, MELISSA SMITH,

Plaintiffs,

vs.

THE REGIONAL MEDICAL CENTER OF ORANGEBURG & CALHOUN COUNTIES, ELIZABETH A. LEWIS, D.O.; and AMN HEALTHCARE, INC., d/b/a STAFF CARE,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No. 07-CP-38-295

AFFIDAVIT OF RONALD KATZ, M.D.

APPEARING BEFORE ME AND BEING DULY SWORN, RONALD A. KATZ, M.D. stated the following:

1. My name is Ronald Katz.
2. I am a medical doctor licensed by the State of California. I specialize in anesthesiology.
3. A component of anesthesiology is airway management, including the introduction and placement of an endotracheal tube into a patient. As an anesthesiologist I have placed and maintained endotracheal tubes; I have trained medical personnel in the placement and maintenance of endotracheal tubes; and I have directed and supervised

Appendix

medical personnel, including respiratory therapists, in the placement and maintenance of endotracheal tubes.

4. By virtue of my experience, training, and knowledge, I know the generally recognized and accepted standards of care for placement and maintenance of an endotracheal tube into a pediatric patient in the year 2000 by anesthesiologists, respiratory therapists, or other medical personnel.
5. I have been asked to give my opinion as to whether standard care was rendered to Samuel Smith Jr. on or about November 2, 2000, when he was intubated with an endotracheal tube in the emergency department of The Regional Medical Center of Orangeburg and Calhoun Counties (TRMC).
6. In my deposition, I stated that I was "critical" of the anesthesiologist, and that I would be "critical" of the respiratory therapist who assisted the anesthesiologist, if the respiratory therapist taped the endotracheal tube in Samuel Smith Jr. at 19 cm.
7. By further explanation, I mean that any healthcare provider who taped the endotracheal tube at 19 cm, whether anesthesiologist or respiratory therapist, would have acted outside generally recognized and accepted standards of professional care and would not have acted in a manner of a generally competent and skilled anesthesiologist or respiratory therapist under the same or similar circumstances. The basis of my opinion is that the anesthesiologist knew or should have known that the proper length of placement of the endotracheal tube for this child was 14 cm. Taping the tube at 19 cm unnecessarily endangered the child by pushing the tip of endotracheal tube into a bronchial stem and obstructing the child's airway.

Appendix

8. In my opinion to a reasonable degree of medical certainty, taping the tube at 19 cm most probably pushed the tip of the endotracheal tube into Samuel Smith Jr.'s right main stem, thereby reducing the flow of oxygen into his lungs, and caused him to suffer deprivation of oxygen resulting in hypoxic brain injury. The basis of my opinion is that after the endotracheal tube was placed and taped at 19 cm, the child's oxygen saturation levels became extremely low from 8 a.m. until 8:05 a.m., when they began to rise after the tube was retracted and taped at 14 cm. The period in which the oxygen saturation levels were sufficiently low to cause hypoxic brain damage.

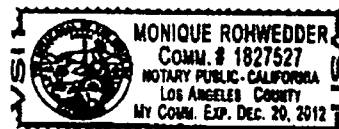
FURTHER AFFIANT SAYETH NOT.

Ronald Katz M.D.
RONALD KATZ, M.D.

SWORN TO AND SUBSCRIBED BEFORE ME

This 19 day of March, 2009

Monique Rohwedder (L.S.)
NOTARY FOR THE STATE OF California
My commission expires: Dec. 20, 2012



PHYSICIAN SERVICES AGREEMENT

This Agreement made this 17 day of April, 2000, by and between Staff Care, Inc., a Texas Corporation ("Staff Care") and Elizabeth Lewis, D.O. ("Physician").

WITNESSETH:

WHEREAS, Staff Care contracts with clients to accept medical services on a Locum Tenens Basis; and

WHEREAS, Physician desires to provide medical services on a Locum Tenens basis to clients of Staff Care; and

WHEREAS, Staff Care accepts the responsibility to provide Locum Tenens opportunities to Physician.

NOW, THEREFORE, the parties agree as follows:

2.01 Compensation:

All rates to be negotiated on a case-by-case basis		
ANES	\$100.00-118.75	per hour
Overtime	\$120.00	per hour after 40 hours
Weeknight Call	\$100.00	Beeper
Weekend Call	\$400.00	Sat/Sun includes first two hours of patient contact

2.02 Holiday Call and Work: If a Physician remains in a community on the following holidays: New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving, or Christmas Day, Physician will be compensated for one-half of the daily pay rate. If Physician is required to be on call during one of these holidays, the Physician will be compensated at the full daily rate. Should the Physician be required to see patients or go into the hospital, the Physician will be compensated the full daily rate plus 1/2-day premium.

2.03 Travel: Staff Care will ensure that client provides for round trip transportation (in most instances prepaid airline tickets) and lodging to and from the assignment, as well as en route lodging. Other travel arrangements must be pre-approved by Staff Care.

2.04 Housing: Physician will be provided with reasonable and pleasant living accommodations and local transportation while on assignment. Physician will be responsible for personal expenses, such as meals, telephone calls, laundry, etc.

2.05 Insurance: When providing services to clients of Staff Care, Inc. pursuant to this Agreement, Physician shall be insured under the terms of Staff Care's group malpractice insurance policy. Our malpractice insurance will cover you, if necessary, for any claim arising out of the rendering of, or failure to render professional services occurring during the certificate period. The coverage is contingent upon the information submitted to Staff Care being accurate and complete.

2.06 Licensure: Staff Care will pay for and assist Physician in obtaining necessary State licenses. Physician agrees to provide timely and accurate information to Staff Care and to complete required applications. The Client will be required to pay for any costs relating to Physician's obtaining any necessary staff privileges relating to an assignment.

3.01 Standard of Care: Physician shall provide medical services according to the standards of practice among members of the same health care professional with similar training and experience situated in the community in which Physician provides such services, and Physician will, to the extent possible, provide the same medical services and

Physician's Initials EL

adhere to the same schedule and responsibilities as a Physician on the Active Staff in the department of Physician's specialty or practicing with the contracting client.

3.02 Records: Physician shall maintain customary medical records in accordance with the standards and with in the time period set by the medical facility or facilities at which Physician performs services pursuant to this Agreement and agrees that such records shall be and remain the property of such facility or facilities. Physician agrees to complete all dictation for all progress notes, histories, physicals, and chart documentation prior to leaving the assignment.

3.03 Billings: During the term of this Agreement Physician assigns all billings for services rendered by Physician to the medical facility or facilities at which Physician performs services and agrees that all billings for services rendered by Physician shall be and remain the property of and shall be solely processed and handled by the medical facility or facilities at which Physician performs services. In connection with the processing and handling of such billings by such a medical facility, Physician hereby irrevocably grants to such facility for the term of this Agreement the authority to endorse and deposit as appropriate all checks and other instruments or items that may be payable to Physician with respect to services rendered by Physician. In addition, Physician agrees to deliver to any bank or other financial institution designated by any such facility written evidence of the endorsement authority granted herein.

3.04 Full Time Service: Physician agrees to devote full professional efforts while on assignment to providing medical services for client. Physician will not compete with Staff Care interests while on assignment.

3.05 Exclusivity: NOT APPLICABLE

3.06 Notification of Litigation: During the term of this Agreement, Physician shall notify Staff Care in writing of any threatened or actual malpractice claims in which Physician is or may be named as a defendant, whether the situation giving rise to such claims took place before or during this Agreement; Physician also agrees to notify Staff Care of any situation involving Physician relating to services provided under this Agreement which Physician has reason to believe may lead to a malpractice claim. Physician understands and accepts that failure by Physician to comply with the terms of this paragraph may invalidate the malpractice liability insurance provided to Physician by Staff Care under this Agreement.

3.07 Notification of Disciplinary Action: Physician agrees to notify Staff Care of any disciplinary or quality assurance proceedings involving Physician (e.g., with licensing boards, quality assurance committees, hospital, medical societies, or of claims of suits), and Physician agrees to promptly notify Staff Care in the event any such proceedings are pending or are instituted, whether they are related to work performed through Staff Care or not.

GENERAL

4.01 Term: The term of the Agreement shall be from July, 2000 through July, 2001 during which Physician agrees to provide medical services on a mutually agreed basis to clients of Staff Care in the specialty of Physician. *Agreement will automatically renew on a yearly basis unless Physician notifies Staff Care, Inc. in writing to terminate his contract upon renewal.

4.02 Voluntary Termination: Either party may terminate this Agreement with or without cause for any reason by giving thirty (30) days written notice during the term of this Agreement. Physician agrees to provide locum tenens services as directed by Staff Care, Inc. during the entire thirty (30) day notice period.

4.03 Involuntary Termination: This agreement may be terminated immediately and without further payment by Staff Care upon any of the following occurrences:

- a) Physician becomes disqualified to practice medicine in any State or Physician's license or hospital privileges are revoked, suspended or restricted, voluntarily or involuntarily.
- b) Staff Care clients for whom Physician provides services requests Physician be removed for reasons relating to competence or professional conduct.
- c) Physician fails or refuses to faithfully or diligently perform the duties contained in this Agreement or violates any terms of this Agreement.

Physician's Initials 

4.04 Non-Solicitation: During the term of this Agreement and for a period of two years after this Agreement is terminated for any reason, Physician shall not solicit or make any offer to become employed by, or to become involved, associated or affiliated with, directly or indirectly, any client of Staff Care whose need for coverage was discussed with Physician by Staff Care or to whom Physician provided services pursuant to this Agreement, or to any affiliate of such client, unless otherwise agreed to in writing by Staff Care. In addition, Physician will not practice within * (12) miles of any location where he/she worked an assignment through Staff Care for period of two years from the date the assignment ended. * The number of miles is negotiable on a case to case basis.

4.05 Permanent Placement: If recruitment by a Client of Physician occurs, Client is responsible for paying a recruitment fee to Staff Care. Physician agrees to notify Staff Care immediately in the event Physician accepts an offer of a permanent position with Client. Staff Care will seek from Physician the full amount of the recruitment fee due plus liquidated damages equal to the amount of the recruitment fee and any and all expenses incurred in the collection of such damages should Client and Physician attempt to circumvent the payment of such fees.

4.06 Independent Contractors: The relationship of Physician to Staff Care shall be that of an independent contractor providing services, and Physician shall not be, for any purpose, treated as an employee or agent of Staff Care. Staff Care shall not in any way attempt to influence or direct Physician's professional medical judgment or Physician's relationship with patients. Physician acknowledges the relationship to be that of an independent contractor. Since the Physician is not an employee, Staff Care, Inc. does not provide health insurance, purchase Worker's Compensation, provide unemployment for Physician, and Staff Care, Inc. does not make payments or deductions for state or federal entities. Staff Care, Inc. is not responsible to make any required payments to state compensation funds that are applicable.

4.07 Indemnification: As an independent contractor, Physician is responsible for his/her own medical decisions and actions and hereby indemnifies Staff Care, and shall hold harmless, from any losses, damages, liabilities and expenses not covered by the insurance referred to in Section 2.03 hereof which are incurred by Staff Care arising out of, in connection with, or as a result of Physician rendering medical services pursuant to this Agreement.

4.08 Governing Law: This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas applicable to contracts made and to be performed wholly within said State without giving effect to conflict of laws and principles.

4.09 Notice: All communications hereunder shall be in writing and shall be sent by registered or certified mail, return receipt requested, to the addresses listed below the signatures of the parties to this Agreement shall constitute the entire Agreement between them.

4.10 Entire Agreement: All prior or contemporaneous agreements, representations and statements, if any, between the parties hereto, or their representatives, are merged into this Agreement, and this Agreement shall constitute the entire Agreement between them.

4.11 Amendment: No waiver or modification of the terms hereof shall be valid unless in writing signed by the party to be charged and only to the extent therein set forth.

4.12 Assignment: This agreement may not be assigned, in whole or in part, by Physician without the prior written approval of Staff Care. This agreement shall be binding upon and inure to the benefit of the successors and assigns of Staff Care.

4.13 Delay: Neither party hereto shall be liable in damages for any delay or default in performing its or his/her respective obligations under this Agreement if such delay or default is caused by conditions beyond its or his/her control, including, but not limited to, acts of God, government restrictions, strikes, fires, floods, or work stoppages, or acts or failure to act of third parties. So long as any delay or default continues, the party affected by the conditions beyond its or his/her control shall keep the other party at all times fully informed concerning the matters causing the delay or default and the prospects of their ending.

4.14 Headings: The captions appearing in this Agreement are intended only as a matter of convenience and for reference and in no way define, limit or describe the scope and intent of this Agreement or any of its provisions.

Physician's Initials 

IN WITNESS WHEREOF, the parties below have executed this Agreement.

STAFF CARE, INC.

By
Staff Care, Inc.

Irving, TX 75039

By
Elizabeth Lewis, D.O.

Hilton Head, SC 29929

SS# Tax ID#

Date

Physician's Initials

SAL

5274

**AGREEMENT FOR LOCUM TENENS COVERAGE**

This AGREEMENT (the "AGREEMENT") is executed on June 1, 2000 by and between Staff Care, Inc., ("SCI") and Regional Medical Center of Orangeburg ("CLIENT") for the purpose of providing locum tenens physician(s) ("PHYSICIAN") to the CLIENT for the times and rates specified in one or more SERVICE ORDER(s) ("ORDER") issued under this AGREEMENT. The AGREEMENT shall commence on the day first listed above ("EFFECTIVE DATE") and shall continue until June 1, 2001, unless terminated earlier as provided herein. At the end of this initial term, the AGREEMENT shall automatically be extended for additional one-year terms unless written notice is provided by either party regarding the non-renewal of this AGREEMENT within thirty (30) days prior to the end of the initial Term or any subsequent renewal.

The terms and conditions of this AGREEMENT are set forth below:

A. DUTIES OF STAFF CARE:

- A.1 Use our best efforts to provide Locum Tenens Physician candidate(s) acceptable to CLIENT;
- A.2 Screen and reference all Locum Tenens candidates, including verification of licensure;
- A.3 Arrange a complete travel and accommodation itinerary in conjunction with CLIENT;
- A.4 Pay for occurrence based malpractice insurance coverage through SCI's insurance carrier for any and all Physicians provided by SCI;
- A.5 Allow CLIENT to bill for and retain professional fees generated by services furnished by Locum Tenens Physicians provided by Staff Care;
- A.6 Provide physician's compensation directly.

B. DUTIES OF CLIENT:

- B.1 Provide Locum Tenens Physician(s), according to the required specialty, with a reasonable work schedule, reasonably maintained, usual and customary equipment and supplies, a suitable practice environment complying with acceptable ethical and procedural standards, and, as necessary, appropriately trained support staff, all so as to enable the Physician to perform medical services;
- B.2 Provide for cost of housing outside the hospital, local transportation, en route lodging, en route meals, and reasonable transportation costs to and from CLIENT's location, and if applicable, CLIENT agrees to pay a travel expense deposit not to exceed \$1500;
- B.3 Comply with AMA, Federal, State and Local standards relating to patient care and related activities;
- B.4 Establish and pay for all fees associated with hospital privileges;
- B.5 Pay SCI a deposit equal to the number of days the Physician is scheduled in the first two (2) weeks of the assignment times (X) the daily rate, not to exceed 10 days. The deposit is payable prior to the actual start date of the assignment and is **ONLY APPLICABLE WHEN A PHYSICIAN HAS BEEN ACCEPTED AND SCHEDULED BY CLIENT**. The deposit amount will be applied to the final invoice;
- B.6 CLIENT agrees to pay SCI all daily, overtime, call and weekend call rates as specified in the ORDER. Invoices are due upon receipt. Any invoice that becomes past due shall bear interest at the rate of one and one-half percent (1 and 1/2%) per month.
- B.7 If a PHYSICIAN presented to CLIENT in the course of this AGREEMENT provides locum tenens coverage for CLIENT for a period of two (2) years after the term of this AGREEMENT, CLIENT agrees such services must be arranged through SCI;
- B.8 **PERMANENT RECRUITMENT:** Pay SCI the recruitment fee of \$25,000 for each PHYSICIAN or person presented to CLIENT or any organization affiliated with CLIENT for a period of two (2) years after the term of this AGREEMENT. Fees for locum tenens services, as provided herein, shall continue until the recruitment fee is paid in full. The recruitment fee is due for any PHYSICIAN whose services or curriculum vitae were made available to CLIENT orally or in writing by SCI. For purposes of this section, an affiliate of the CLIENT includes, but is not limited to, an organization or person that has any form of direct or indirect business relationship with CLIENT.

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P.03

C. CANCELLATION

- C.1 SCI reserves the right to terminate this AGREEMENT at any time. In the event such termination results from CLIENT's misrepresentations herein, or from CLIENT's breach of any obligations herein, no prior notice will be necessary;
- C.2 CLIENT may terminate this AGREEMENT at any time, provided that CLIENT sends prior notice of termination to SCI in writing. However, once a Physician has been accepted by CLIENT through verbal or written communication, cancellation by CLIENT will be effective 30 days from the date notice was received by SCI. CLIENT will be charged, in accordance to the rates agreed upon in the order, for all scheduled time during that thirty- (30) day period. Upon termination, CLIENT also remains obligated for any and all fees and expenses that remain due and owing under this AGREEMENT, as well as any other fees, expenses or other charges in connection with services performed by a Physician;
- C.3 If the CLIENT terminates this Agreement, in accordance to Section C.2, due to any Physician's poor performance, including, but not limited to intentional or unintentional dereliction of duties, gross negligence, or loss of hospital privileges, CLIENT remains obligated to pay Staff Care for the time and expenses incurred while Physician worked for CLIENT.

D. GENERAL PROVISIONS

- D.1 CLIENT shall exercise independent judgment as to the professional qualifications of PHYSICIAN;
- D.2 SCI shall have no control over the quality of medical services furnished by any PHYSICIAN provided by SCI to CLIENT and SCI shall have no liability for any injury or any loss to any party relating to or in any way arising out of the failure of any such PHYSICIAN who fails to meet the professional standard of care expected of physicians with similar training, specialization, experience and practice in the same or similar communities;
- D.3 CLIENT expressly represents that it is not currently under any investigation by any State or Federal Government agency for Medicare or Medicaid false claims, fraud or abuse. CLIENT further expressly represents that its current practicing physicians and staff have not been sanctioned by a State or Federal Government Agency, that both CLIENT and its current practicing physicians and staff are not excluded from participating in the Medicare or Medicaid programs and that no proceeding involving such sanctions or exclusion is pending at this time. CLIENT further expressly represents that in the event any such investigation is initiated it will notify SCI immediately;
- D.4 CLIENT acknowledges that neither SCI nor its employees are engaged in any fashion in the practice of medicine;
- D.5 Independent Contractors: Client acknowledges the relationship of the PHYSICIAN with SCI is that of an Independent Contractor. Since the PHYSICIAN is not an employee, SCI does not provide health insurance, purchase Workers Compensation, provide unemployment for physician, or make payments or deductions for state or federal entities. CLIENT is responsible to make any required payments to state patient compensation funds that are applicable;
- D.6 If, at any time during the course of this AGREEMENT or any assignments or placements hereunder, CLIENT does not reasonably find the performance of any PHYSICIAN to be appropriate, CLIENT shall provide written notice of such determination to SCI and SCI shall attempt to replace such PHYSICIAN;
- D.7 This AGREEMENT is executed in the State of Texas and is enforceable pursuant to and in accordance with the laws of the State of Texas. This AGREEMENT is performable in Dallas County, Texas and CLIENT consents to the jurisdiction of the courts in that county;
- D.8 Sections B.6, B.7, B.8 and all of Section D shall survive the expiration or cancellation of this AGREEMENT.

STAFF CARE, INC.
BY: Christy Cannon
TITLE: anesthesiologist
DATE: 6/9/02

REGIONAL MEDICAL CENTER OF ORANGEBURG
BY: Thomas M. Mudd
TITLE: PRES/CEO
DATE: JUNE 9, 2000

IRVING, TX 75039

ORANGEBURG, SC 29118

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Staff Care

The Leader in Locum Tenens Staffing

ORDER**REGIONAL MEDICAL CENTER OF ORANGEBURG****Orangenburg, SC****ANESTHESIOLOGY**

Daily Rate: \$1150-1250/Day
Overtime Hours: \$190/Hour
Weeknight Call: \$185/Night
Weekend Call: \$545/Day (hours worked will be compensated at overtime rate)

no Per Diem

Holiday Rate: A premium of one half of the daily rate will be charged for New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving, Christmas, or any holiday that is recognized by the facility, regardless of whether these holidays occur on a weekday or a weekend, or whether services are actually provided on those days. If Physician is required to take call, Client will be charged a full day. If Physician is required for any patient contact, Client will be charged the daily rate plus the 1/2 day holiday premium to include four hours of work. Client will be charged overtime for all hours worked after four.

Client agrees to pay Staff Care, Inc. \$185/night when physician is on call. If the physician is required to go into either the hospital or clinic while on call, the overtime rate becomes effective.

Client agrees to pay Staff Care, Inc. \$545/day for weekend call. All hours worked by the physician while on call shall be compensated at the overtime rate.

Client agrees to provide a complete 40-hour workweek for contracted physician.

CLIENT agrees to pay SCI a deposit equal to the number of days the Physician is scheduled in the first two (2) weeks of the assignment times (X) the daily rate, not to exceed 10 days. The deposit is payable prior to the actual start date of the assignment and is ONLY APPLICABLE WHEN A PHYSICIAN HAS BEEN ACCEPTED AND SCHEDULED BY CLIENT. The deposit amount will be applied to the final invoice. Refer to clause B.2 in the AGREEMENT FOR LOCUM TENENS COVERAGE regarding applicable travel expense deposit.

Staff Care reserves the right to change its rate schedule at its discretion and shall give Client at least thirty (30) days notice of any change.

I understand that this order is a part of the Agreement for Locum Tenens Coverage and by signing this ORDER, I agree to its terms and condition.

(Client) THE REGIONAL MEDICAL CENTER

(Name) THOMAS C. MADRIDGE

(Title) PRES / CEO

(Date) JUNE 9, 2000

Per Diem

NOV-17-2000 16:28 FROM MEDICAL STAFF SERVICES TO 3-9728682277-297458 P.02



AGREEMENT FOR LOCUM TENENS COVERAGE

This AGREEMENT (the "AGREEMENT") is executed on November 17, 2000 by and between Staff Care, Inc., ("SCI") and Regional Medical Center of Orangeburg and Calhoun Counties ("CLIENT") for the purpose of providing locum tenens physician(s) ("PHYSICIAN") to the CLIENT for the times and rates specified in one or more SERVICE ORDER(s) ("ORDER") issued under this AGREEMENT. The AGREEMENT shall commence on the day first listed above ("EFFECTIVE DATE") and shall continue until November 17, 2001, unless terminated earlier as provided herein. At the end of this Initial term, the AGREEMENT shall automatically be extended for additional one-year terms unless written notice is provided by either party regarding the non-renewal of this AGREEMENT within thirty (30) days prior to the end of the Initial Term or any subsequent renewal.

The terms and conditions of this AGREEMENT are set forth below:

A. DUTIES OF STAFF CARE:

- A.1 Use our best efforts to provide Locum Tenens Physician candidate(s) acceptable to CLIENT;
- A.2 Screen and reference all Locum Tenens candidates, including verification of licensure;
- A.3 Arrange a complete travel and accommodation itinerary in conjunction with CLIENT;
- A.4 Pay for occurrence based malpractice insurance coverage through SCI's insurance carrier for any and all Physicians provided by SCI;
- A.5 Allow CLIENT to bill for and retain professional fees generated by services furnished by Locum Tenens Physicians provided by Staff Care;
- A.6 Provide physician's compensation directly.

B. DUTIES OF CLIENT:

- B.1 Provide Locum Tenens Physician(s), according to the required specialty, with a reasonable work schedule, reasonably maintained, usual and customary equipment and supplies, a suitable practice environment complying with acceptable ethical and procedural standards, and, as necessary, appropriately trained support staff, all so as to enable the Physician to perform medical services;
- B.2 Provide for cost of housing outside the hospital, local transportation, en route lodging, en route meals, and reasonable transportation costs to and from CLIENT's location, and if applicable, CLIENT agrees to pay a travel expense deposit not to exceed \$1500;
- B.3 Comply with AMA, Federal, State and Local standards relating to patient care and related activities;
- B.4 Establish and pay for all fees associated with hospital privileges;
- B.5 Pay SCI a deposit equal to the number of days the Physician is scheduled in the first two (2) weeks of the assignment times (X) the daily rate, not to exceed 10 days. The deposit is payable prior to the actual start date of the assignment and is ONLY APPLICABLE WHEN A PHYSICIAN HAS BEEN ACCEPTED AND SCHEDULED BY CLIENT. The deposit amount will be applied to the final invoice;
- B.6 CLIENT agrees to pay SCI all daily, overtime, call and weekend call rates as specified in the ORDER. Invoices are due upon receipt. Any invoice that becomes past due shall bear interest at the rate of one and one-half percent (1 and 1/2%) per month;
- B.7 If a PHYSICIAN presented to CLIENT in the course of this AGREEMENT provides locum tenens coverage for CLIENT for a period of two (2) years after the term of this AGREEMENT, CLIENT agrees such services must be arranged through SCI;
- B.8 PERMANENT RECRUITMENT: Pay SCI the recruitment fee of \$25,000 for each PHYSICIAN or person presented to CLIENT or any organization affiliated with CLIENT for a period of two (2) years after the term of this AGREEMENT. Fees for locum tenens services, as provided herein, shall continue until the recruitment fee is paid in full. The recruitment fee is due for any PHYSICIAN whose services or curriculum vitae were made available to CLIENT orally or in writing by SCI. For purposes of this section, an affiliate of the CLIENT includes, but is not limited to, an organization or person that has any form of direct or indirect business relationship with CLIENT.

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C. CANCELLATION

- C.1 SCI reserves the right to terminate this AGREEMENT at any time. In the event such termination results from CLIENT's misrepresentations herein, or from CLIENT's breach of any obligations herein, no prior notice will be necessary;
- C.2 CLIENT may terminate this AGREEMENT at any time, provided that CLIENT sends prior notice of termination to SCI in writing. However, once a Physician has been accepted by CLIENT through verbal or written communication, cancellation by CLIENT will be effective 30 days from the date notice was received by SCI. CLIENT will be charged, in accordance to the rates agreed upon in the order, for all scheduled time during that thirty- (30) day period. Upon termination, CLIENT also remains obligated for any and all fees and expenses that remain due and owing under this AGREEMENT, as well as any other fees, expenses or other charges in connection with services performed by a Physician;
- C.3 If the CLIENT terminates this Agreement, in accordance to Section C.2, due to any Physician's poor performance, including, but not limited to intentional or unintentional dereliction of duties, gross negligence, or loss of hospital privileges, CLIENT remains obligated to pay Staff Care for the time and expenses incurred while Physician worked for CLIENT.

D. GENERAL PROVISIONS

- D.1 CLIENT shall exercise independent judgment as to the professional qualifications of PHYSICIAN;
- D.2 SCI shall have no control over the quality of medical services furnished by any PHYSICIAN provided by SCI to CLIENT and SCI shall have no liability for any injury or any loss to any party relating to or in any way arising out of the failure of any such PHYSICIAN who fails to meet the professional standard of care expected of physicians with similar training, specialization, experience and practice in the same or similar communities;
- D.3 CLIENT expressly represents that it is not currently under any investigation by any State or Federal Government agency for Medicare or Medicaid false claims, fraud or abuse. CLIENT further expressly represents that its current practicing physicians and staff have not been sanctioned by a State or Federal Government Agency, that both CLIENT and its current practicing physicians and staff are not excluded from participating in the Medicare or Medicaid programs and that no proceeding involving such sanctions or exclusion is pending at this time. CLIENT further expressly represents that in the event any such investigation is initiated it will notify SCI immediately;
- D.4 CLIENT acknowledges that neither SCI nor its employees are engaged in any fashion in the practice of medicine;
- D.5 Independent Contractor: CLIENT acknowledges the relationship of the PHYSICIAN with SCI is that of an independent Contractor. Since the PHYSICIAN is not an employee, SCI does not provide health insurance, purchase Workers Compensation, provide unemployment for physician, or make payments or deductions for state or federal entities. CLIENT is responsible to make any required payments to state patient compensation funds that are applicable;
- D.6 If, at any time during the course of this AGREEMENT or any assignments or placements hereunder, CLIENT does not reasonably find the performance of any PHYSICIAN to be appropriate, CLIENT shall provide written notice of such determination to SCI and SCI shall attempt to replace such PHYSICIAN;
- D.7 This AGREEMENT is executed in the State of Texas and is enforceable pursuant to and in accordance with the laws of the State of Texas. This AGREEMENT is performable in Dallas County, Texas and CLIENT consents to the jurisdiction of the courts in that county;
- D.8 Sections B.6, B.7, B.8 and all of Section D shall survive the expiration or cancellation of this AGREEMENT.

STAFF CARE, INC.

The Regional Medical Center

BY: [Signature]
 TITLE: Marketing Consultant
 DATE: 11-21-00

BY: [Signature]
 TITLE: President - CEO
 DATE: 11/17/00

IRVING, TX 76039

ORANGEBURG, SC 29118

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Certificate of Redaction

The undersigned certifies that he has reviewed the Record on Appeal and found no personal identifiers requiring redaction as required by order of the Supreme Court, August 13, 2002.

Charles L. Henshaw, Jr.

CERTIFICATE OF COUNSEL

The undersigned counsel for appellant certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Charles L. Henshaw, Jr.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED
JUL 26 2007
SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James C. Williams, Jr., Circuit Court Judge

Case No. 2007-CP-38-295

SAMUEL G. SMITH, SR., MELISSA SMITH, and
SAMUEL G. SMITH, JR., an infant under the age
of fourteen (14) years, by and through his next
friend, SAMUEL G. SMITH,.....Appellants,

v.

THE REGIONAL MEDICAL CENTER
OF ORANGEBURG AND CALHOUN COUNTIES,
ELIZABETH A. LEWIS, D.O., and AMN
HEALTHCARE, INC. d/b/a STAFF CARE,
of whom THE REGIONAL MEDICAL CENTER
OF ORANGEBURG AND CALHOUN COUNTIES
is the Respondent.

BRIEF OF APPELLANT

CHARLES L. HENSHAW, JR.
FURR, HENSHAW & OHANESIAN
1534 Blanding Street
Columbia, South Carolina 29201
Telephone (803) 252-4050
ATTORNEY FOR APPELLANTS

Table of Contents

Table of Contents	2
Table of Cases, Statutes, Authorities	3
Statement of Issues on Appeal	5
Statement of the Case	6
Statement of Facts	8
Argument.....	9
Standard of Review	9
Issue.....	10
Can a governmental hospital have a nondelegable duty for which it can be liable if the duty has been breached by the acts or omissions of an independent contractor?	10
Conclusion.....	15
Certificate of Compliance	16
Certificate of Service.....	17

Table of Cases, Statutes, Authorities

Cases

<u>Arthurs ex rel. Estate of Munn v. Aiken County</u> , 346 S.C. 97, 103-105, 551 S.E.2d 579, 582-83 (2001).....	14
<u>Baughman v. American Tel. and Tel. Co.</u> , 306 S.C. 101, 410 S.E.2d 537 (1991) ..	9
<u>Clark v. Cantrell</u> , 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000).....	10
<u>Dolan v. City of Camden</u> , 233 S.C. 1, 103 S.E.2d 328 (1958)	13
<u>I'On, L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000)	10
<u>Madison v. Babcock Ctr., Inc.</u> , 371 S.C. 123 (2006).....	13, 14
<u>Manning v. Quinn</u> , 294 S.C. 383, 365 S.E.2d 24 (1988)	9
<u>Osborne v. Adams</u> , 346 S.C. 4 (2001)	10
<u>Osprey, Inc. v. Cabana Ltd. Partnership</u> , 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000)	10
<u>Simmons v. Toumey Med. Center</u> , 341 S.C. 32, 533 S.E.2d 312 (2000)11, 12, 13, 15	
<u>Tupper v. Dorchester County</u> , 326 S.C. 318, 487 S.E.2d 187 (1997)	9
<u>Williams v. Chesterfield Lumber Co.</u> , 267 S.C. 607, 230 S.E.2d 447 (1976).....	10

Statutes

S.C. Code Ann § 14-8-200	10
S.C. Code Ann. § 14-3-320	10
S.C. Code Ann. § 15-78-30(c)	10, 14

S.C. Code Ann. § 15-78-40	13
S.C. Code Ann. § 15-78-60	13
S.C. Code Ann. § 15-78-60(20)	14
S.C. Code Ann. §§ 15-78-120(a)(2) &(3)	11

Other Authorities

Restatement (Second) of Torts: Employers of Contractors § 429 (1965)	11, 12
W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 71, at 511-12 (5th ed. 1984)	13

Rules

Rule 56(c), SCRCF	9
-------------------------	---

Constitutional Provisions

S.C. Const. art. V, §§ 5 & 9	10
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Statement of Issues on Appeal

Can a governmental hospital have a nondelegable duty for which it can be liable if the duty has been breached by the acts or omissions of an independent contractor?

Statement of the Case

This is a medical malpractice case arising from an alleged failure to properly place and maintain a breathing tube in a young child at The Regional Medical Center of Orangeburg and Calhoun Counties. Samuel G. Smith Sr. and Melissa Smith, the parents of Samuel G. Smith, Jr., commenced this lawsuit on behalf of themselves and their child on November 1, 2002. The Regional Medical Center and Dr. Mark R. Zulkey were named defendants, but eventually The Regional Medical Center was substituted for Zulkey, who was found to be an employee of the governmental facility. On March 3, 2007, the court ordered that Dr. Elizabeth Lewis be added as a party defendant on allegations that she was an independent contractor who treated Samuel G. Smith Jr. as an anesthesiologist in the emergency department where the alleged negligence occurred.

The amended complaint alleged that on November 2, 2000, Dr. Lewis and employees of The Regional Medical Center jointly undertook to render emergency and anesthesiology care to Samuel G. Smith, Jr. The amended complaint alleged that the defendants administered anesthetic agents to Samuel Graham Smith, Jr. that paralyzed him and rendered him unable to breathe on his own; and, consequently, the defendants became responsible for managing Samuel Graham Smith's airway. See Amended Complaint, ¶ 10 (R. p. 12). The plaintiffs alleged that the defendants were specifically negligent in failing to adequately manage Samuel Graham Smith's airway; in failing to timely realize that an endotracheal tube was misplaced; in failing to adequately check the placement of the endotracheal tube; and in failing to timely reposition the endotracheal tube. See Amended Complaint, ¶ 12 (R. pp. 12-13). They alleged that the child suffered

brain damage and other personal injuries from inadequate oxygenation. See Amended Complaint, ¶ 11 (R. p. 12).

In their complaint, the plaintiffs asserted that The Regional Medical Center was responsible for the acts and omissions of its emergency room physicians and personnel and its anesthesia personnel because of the requirements of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-200, et. seq.; respondeat superior; and a non-delegable duty. See Amended Complaint, ¶ 6 (R. p. 11).

On February 9, 2009, The Regional Medical Center moved for summary judgment. The first ground was that “plaintiffs cannot establish, by expert medical testimony, any negligence, nor causation of injury, on the part of this defendant and its employees.” See Motion for Summary Judgment (R. p. 21). The second ground was that The Regional Medical Center “is not liable for the conduct of persons not employed by it, pursuant to § 15-78-60(20), Code of Laws of South Carolina.” See Motion for Summary Judgment (R. p. 21). At hearing, The Regional Medical Center withdrew the first ground, but went forward with its motion on the second ground.

The motion for summary judgment was heard by the Hon. James C. Williams, Jr., on March 24, 2009. On June 3, 2009, Judge Williams granted partial summary judgment to The Regional Medical Center. See Order, June 3, 2009 (R. p. 4-9). The court ruled as a matter of law that The Regional Medical Center had sovereign immunity from the acts and omissions of Dr. Lewis, who was an independent contractor. See Order, June 3, 2009 (R. p. 4-9). The order was mailed by defense counsel on June 16, 2009, and received by plaintiff’s counsel on June 18, 2009.

The plaintiffs served notice of appeal on July 6, 2009.

Statement of Facts

On November 2, 2000, Melissa Smith and Samuel Smith Sr. carried their young son, Samuel, into the The Regional Medical Center Emergency Department at approximately 7:30 a.m. Mrs. Smith informed the emergency department personnel that Samuel had been seizing since approximately 7:10 a.m. According to emergency department records, the child was in status epilepticus at the time of his arrival, and was observed to be cyanotic and not breathing. Resuscitative efforts began soon after the child's arrival, but those efforts were complicated by continuing seizure activity. When it was decided that the child should have an endotracheal tube for oxygenation, an anesthesiologist was called to the emergency department to perform the task. See Deposition of Elizabeth Lewis, D.O. (R. p. 53, lines 5-16).

Dr. Elizabeth Lewis, D.O. was in the hospital's surgery unit and responded to the call. At that time, she was under contract to provide anesthesia coverage in the hospital on a temporary basis. See Lewis Deposition (R. p. 48, lines 6 - 11. Dr. Lewis inserted an endotracheal tube and determined it should be in the child's airway for a length of 14 cm. Instead of being at 14 cm, the endotracheal tube was inserted and taped in place at a length of 19 cm. Instead of increasing, Samuel's oxygen saturation level declined and stayed dramatically low for at least five minutes. According to plaintiff's airway management expert, Dr. Ronald Katz, taping the tube at 19 cm unnecessarily endangered the child by pushing the tip of the endotracheal tube into a bronchial stem and obstructed the child's airway. See Affidavit of Ronald A. Katz, M.D. (R. pp. 64-66). By reducing the flow of oxygen, the misplaced tube caused Samuel Smith Jr. to be deprived of oxygen and suffer hypoxic brain injury. See id.

Dr. Lewis was at The Regional Medical Center for a 10-day locum tenens assignment by a staffing agency known as Staff Care. See Deposition of Elizabeth Lewis, D.O. (R. p. 45, line 25 – p. 47, line 12). The Regional Medical Center had an agreement for Staff Care to place physicians in the hospital on a temporary basis. See Agreement between Staff Care and The Regional Medical Center, June 9, 2000 (R. pp. 71-75). In turn, Dr. Lewis had a contract with Staff Care to accept the assignments and she was paid by Staff Care, see Lewis Depo. (R. p. 52, lines 10-14); Agreement between Staff Care and Elizabeth Lewis, D.O., Aug. 17, 2000 (R. pp. 67-70).

Argument

Standard of Review

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988). Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

On appeal from an order granting summary judgment, the appellate court applies the same standard that governs the trial court. The appellate court will review all

ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001); Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 & 9, S.C. Code Ann. § 14-3-320 and -330, and S.C. Code Ann § 14-8-200; Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000).

Issue

Can a governmental hospital have a nondelegable duty for which it can be liable if the duty has been breached by the acts or omissions of an independent contractor?

In granting summary judgment, the lower court focused on whether Dr. Lewis was an "employee" of the hospital and found that an independent contractor is specifically excluded from the statutory definition of 'employee' by S.C. Code Ann. § 15-78-30(c).

"(E)mployee" means any officer, employee, agent, or court appointed representative of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty including, but not limited to, technical experts whether with or without compensation, but the term does not include an independent contractor doing business with the State or a political subdivision of the State.

S.C. Code Ann. § 15-78-30(c).

Since an independent contractor cannot be an “employee,” the court held that The Regional Medical Center retained sovereign immunity from liability for the acts and omissions of Dr. Lewis. See Order, June 3, 2009 (R. pp. 6-7). The ruling affects the potential recovery from the hospital, since a governmental hospital’s limitation on liability arising from the misconduct of a physician is \$1.2 million, but is only \$300,000 when arising from the misconduct of non-physicians. See S.C. Code Ann. §§ 15-78-120(a)(2) &(3).

The court was wrong because it rejected the nondelegable duty that every hospital has in providing emergency department services. The nondelegable duty issue had been raised by plaintiffs in their pleadings, based on Simmons v. Toumey Med. Center, 341 S.C. 32, 533 S.E.2d 312 (2000). See Amended Complaint ¶ 6 (R. p. 11). In Simmons, the South Carolina Supreme Court held that a hospital cannot delegate away its liability to independent contractors for emergency department services.

We adopt the approach expressed in Restatement (Second) of Torts: Employers of Contractors § 429 (1965). That section, sometimes described as ostensible agency, provides: One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

Simmons at 50-51. The court explained that under the principles of non-delegable duty a person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It is the liability, not the duty, which is not delegable. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor. Simmons at 42.

Simmons involved the conduct of physicians in an emergency department. After evaluating the many instances in which the nondelegable duty doctrine had been imposed and recognizing “the fundamental shift in the role that a hospital plays in our health care system, the commercialization of American medicine, and the public perception of the unity of a hospital and its emergency room,” the court established that “a hospital owes a nondelegable duty to render competent service to its emergency room patients.” Simmons at 49.

While the duty is not absolute, the court ruled that “(o)ne who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.” Id. at 51 (quoting Restatement (Second) of Torts, Employers of Contractors § 429 (1965)).

Simmons involved a non-governmental hospital, but gave no indication that the court-established duty would not apply to government hospitals, as well. Consumers have no reason to view the modern county-owned hospital differently from private or charitable hospitals. The government hospital plays the same role that other hospitals play in the health care system, competes likewise in the commercial markets of medicine, and is subject to the same public perception of a hospital and its emergency room. Whether the entity is governmental or non-governmental, the criterion for determining which duties are non-delegable is that “the responsibility is so important to the community that the employer should not be permitted to transfer it to another.” See W.

PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 71, at 511-12 (5th ed. 1984)(reflecting that a municipality, for example, has a nondelegable duty to keep its streets in repair.). See also Dolan v. City of Camden, 233 S.C. 1, 103 S.E.2d 328 (1958) (cited by Simmons and holding that municipalities, which have full and complete control over streets and highways within their corporate limits, are liable for injuries caused by failure to use reasonable care to keep them in a reasonably safe condition for public travel).

Consequently, the lower court should have held that a governmental hospital, like any other, owes a nondelegable duty to render competent service to its emergency room patients. Instead the court wrongly rejected the precedent of Madison v. Babcock Ctr., Inc., 371 S.C. 123 (2006), holding that as to common law duties, a governmental entity is liable for its torts "in the same manner and to the same extent as a private individual under like circumstances," subject to limitations upon and exemptions from liability and damages contained in the Tort Claims Act. See Madison, 371 S.C. at 142 (citing S.C. Code Ann. § 15-78-40).

Though Madison did not involve a non-delegable duty, it directs how a court should determine whether a common law duty is limited or abrogated by the Tort Claims Act.

When a governmental entity owes a duty of care to a plaintiff under the common law and other elements of negligence are shown, the next step is to analyze the applicability of exceptions to the waiver of immunity contained in S.C. Code Ann. § 15-78-60 (2005 & Supp. 2005) which are asserted by the governmental entity. The governmental entity claiming an exception to the waiver of immunity under the Tort Claims Act has the burden of establishing any limitation on liability.

See Madison, 371 S.C. at 143 (citations omitted). The nondelegable duty imposed by Simmons is a common law duty. See Simmons, 341 S.C. at 35.

Madison involved alleged negligent care to a patient in a facility of the Department of Disabilities and Special Needs. The Department had contracted with an independent contractor to provide the services to the patient. Consequently, the Department sought and obtained summary judgment on grounds that it was not responsible for the conduct of the contractor, who was not an employee of the Department. See Madison, 371 S.C. at 132. The Supreme Court reversed, holding that the common law duty to protect mentally retarded or disabled clients applied to a government entity, as well as, a private person or business entity.

[W]hen duty is based on common law, then its existence is analyzed as it would be with a private defendant which is not a government entity pursuant to Tort Claims Act. -

See Madison, 371 S.C. at 142 (citing Arthurs ex rel. Estate of Munn v. Aiken County, 346 S.C. 97, 103-105, 551 S.E.2d 579, 582-83 (2001)).

As here, the governmental entity in Madison asserted it could not be liable for the torts of its independent contractor pursuant to S.C. Code Ann. § 15-78-60(20), which provides that a governmental entity is not liable for an "act or omission of a person other than an employee including but not limited to the criminal actions of third persons." The government also asserted S.C. Code Ann. § 15-78-30(c) (2005), which provides that the term "employee" "does not include an independent contractor doing business with the State." See Madison, 371 S.C. at 143. In each instance, the Supreme Court disagreed.

We find this position unpersuasive because Department owes a common law duty of care directly to Appellant. The fact an independent contractor provided services to Appellant or the fact a third party may have committed a criminal act in harming Appellant does not affect the existence of Department's duty.

Id.

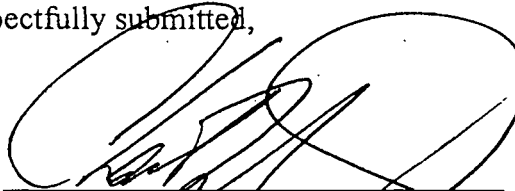
A hospital cannot escape liability by shifting its responsibilities for proper conduct to a contractor. Rather, duties undertaken in the course of its performance to the public as a hospital are nondelegable. See Simmons. The Regional Medical Center had a nondelegable duty in the performance of its emergency department. It was not entitled to summary judgment as a matter of law simply on showing that Dr. Lewis was an independent contractor.

Conclusion

The summary judgment should be reversed and the case remanded.

Respectfully submitted,

By:



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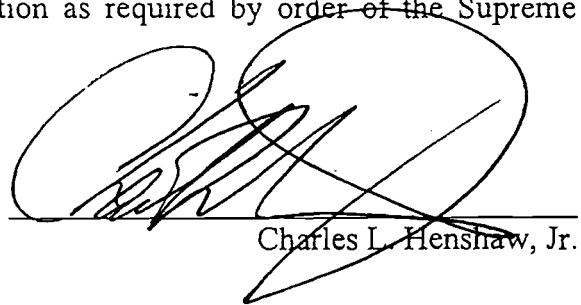
April 27, 2010

Certificate of Compliance

The undersigned counsel for appellant certifies pursuant to Rule 211 that the final brief is identical to the brief previously served under Rule 208, except for the following:

- (1) References to the record have been revised to indicate where the material appears in the Record on Appeal.
- (2) Typographical errors and misspellings have been corrected.
- (3) One erroneous reference has been deleted after notice to opposing counsel and without objection.
- (4) A certificate of compliance and a certificate of service have been added to the index.

Further, the undersigned certifies that he has reviewed the brief and found no personal identifiers requiring redaction as required by order of the Supreme Court, August 13, 2002.



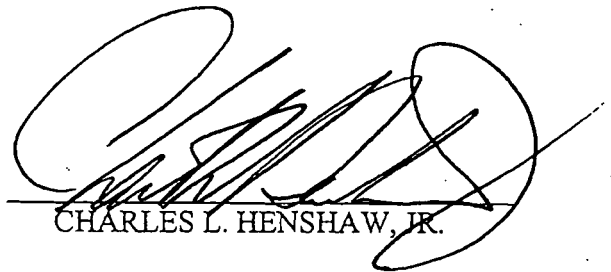
Charles L. Henshaw, Jr.

April 27, 2010

Certificate of Service

I hereby certify that on this date I caused to be served a copy of the foregoing final BRIEF OF APPELLANT upon the individual whose name and address are listed below by placing a copy of it in the United States Mail with proper first-class postage affixed thereon.

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April 28, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James C. Williams, Jr., Circuit Court Judge

Case No. 2007-CP-38-295

Samuel G. Smith, Sr., Melissa Smith, and Samuel G. Smith, Jr., an infant under the age of
fourteen (14) years, by and through his next friend, Samuel G. Smith, Sr.,.....Appellants,

v.

The Regional Medical Center of Orangeburg and Calhoun Counties, Elizabeth A. Lewis, D.O.,
and AMN Healthcare, Inc., d/b/a Staff Care, of whom The Regional Medical Center of
Orangeburg and Calhoun Counties is the Respondent.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Issues on Appeal.....	1
Statement of the Case	1
Arguments.....	1
1. The lower court ruled correctly that TRMC may not be held liable under the Tort Claims Act for the negligent acts or omissions of an independent contractor.....	3
A. The Employment relationship of the governmental entity to the tortfeasor is central to the Tort Claims Act analysis, and Independent Contractors are expressly excluded from its scope.....	3
B. Recent case law expanding liability for private employers of Independent Contractors is inapplicable to governmental hospitals.....	5
1. Reliance on <i>Simmons</i> is misplaced.....	6
2. Reliance on <i>Madison</i> is misplaced.....	8
C. Foreign states with Tort Claims Acts comparable to South Carolina's have refused to allow liability for governmental entities based on the actions of Independent Contractors.....	9
D. Express provisions of the South Carolina Tort Claims Act providing for proportional liability clearly show the intention of the legislature that a governmental entity not share liability with those not employed by it.....	9
Conclusion.....	10

TABLE OF AUTHORITIES

Cases:

<i>Brown v. Delta Regional Medical Center</i> , 997 So.2d 195 (Miss. Sup. Ct., 2008), reh. den. January 8, 2009.....	9
<i>Brown v. Montgomery County Hospital</i> , 905 S.W.2d 481(Tex. Ct. App. 1995).....	9
<i>Dumas v. Muenster Hospital District</i> , 859 S.W.2d 648 (Tex. Ct. App. 1993).....	9
<i>Edwards v. Lexington County Sheriff's Department and County of Lexington</i> , Opinion No. 26758, Heard October 7, 2009, Filed January 11, 2010.....	6
<i>Giese v. Bay Area Health District</i> , 101 Or. App. 410, 790 P.2d 1198 (Ct. App. 1990), review den., 310 Or. 281, 796 P.2d 1206 (Or. 1990).....	9
<i>Jeff Hunt Mach. Co. v. State Highway Department</i> , 217 S.C. 423, 60 S.E.2d 859 (1950).....	4
<i>Madison ex rel. Bryant v. Babcock Center, Inc.</i> , 371 S.C. 123, 638 S.E.2d 650 (2006).....	3, 5, 6, 8, 9
<i>Moser v. Heistand</i> , 545 Pa 554, 681 A.2d 1322, (Pa. 1996).....	9
<i>O'Hagan v. Fraternal Aid Union</i> , 144 S.C. 84, 88, 141 S.E.893, 894 (1928).....	7
<i>Osborne v. Adams</i> , 346 S.C. 4, 550 S.E.2d 319 (2001).....	7
<i>Simmons v. Toumey Regional Medical Center</i> , 341 S.C. 32, 533 S.E.2d 312 (2000).....	3, 5, 6, 7, 8
<i>Young v. S.C. Department of Disabilities</i> , 374 S.C. 360, 649 S.E.2d 488 (2007).....	6

Statutes and Rules

S.C. Code Ann. §14-1-50.....	7
S.C. Code Ann. §15-78-10, et. seq.....	1
S.C. Code Ann. §15-78-20(a).....	4
S.C. Code Ann. §15-78-20(f).....	4
S.C. Code Ann. §15-78-30(c).....	4, 7, 10
S.C. Code Ann. §15-78-30(h).....	4

S.C. Code Ann. §15-78-30(j).....	4
S.C. Code Ann. §15-78-60(20).....	7, 10
S.C. Code Ann. §15-78-70.....	4
S.C. Code Ann. §15-78-100(c).....	9, 10

Other Authorities

Restatement (Second) of Torts; Employers of Contractors §429 (1965).....	6, 9
Sutherland Statutory Construction §§50.01 and 50.05 (1984).....	7

STATEMENT OF ISSUES ON APPEAL

Can a governmental hospital be held vicariously liable for the acts or omissions of an Independent Contractor despite clear statutory language to the contrary?

STATEMENT OF THE CASE

This is an appeal from the June 3, 2009, Order of the Court of Common Pleas for Orangeburg County, James C. Williams, Jr., presiding, which granted partial summary judgment to The Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC") in an action alleging negligence in medical care. The Amended Complaint in this action was filed on November 1, 2002, against several defendants including TRMC, a governmental entity as defined in the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-10, et. seq. *R. p. 10*. TRMC timely answered, and, on February 10, 2009 served its Motion for Summary Judgment on several grounds, including provisions of the South Carolina Tort Claims Act excluding liability for the acts or omissions of independent contractors. *R. pp. 21-34*. The motion was heard on March 24, 2009. During the hearing Respondent raised several arguments supporting the contention that a governmental hospital like TRMC cannot be held liable for the alleged negligent acts of its independent contractors. *See Transcript of Record, March 24, 2009, pp. 7-14; R. pp. 35-43*.

On June 3, 2009 the Court issued its Order finding defendant Lewis was an independent contractor and granting partial summary judgment to TRMC for her alleged negligent acts. *R. pp. 4-9*. The Appellants timely appealed.

ARGUMENTS

Factual Background

The Appellants, parents of minor child Samuel G. Smith, Jr., allege that Elizabeth Lewis,

D.O., improperly intubated their child while he was suffering from a seizure on November 2, 2000, limiting oxygen intake and causing brain injury. On November 2, 2000, Dr. Lewis was providing coverage for one of TRMC's permanent anesthesiologists, having been placed at TRMC by AMN Healthcare d/b/a Staff Care, a placement agency. *Deposition of Elizabeth Lewis, D.O., p. 19, line 6-11; R. p. 48, line 6-11.* TRMC had no contractual arrangement with Dr. Lewis, nor did TRMC have any control over the independent medical judgment of Dr. Lewis. Dr. Lewis was an independent contractor, and was never an employee of TRMC. *Deposition of Elizabeth Lewis, D.O., pp. 22-23; R. pp. 51-52.*

The appellant child has a congenital medical condition known as tuberous sclerosis ("TS"), a genetic disorder characterized by mental retardation, seizures, abnormalities of the skin, and the propensity to grow tumors in various organs, including the brain and heart. On November 2, 2000, he was brought by his mother to the TRMC Emergency Department, unconscious and seizing. He was assessed by the Emergency Department, Dr. Zulkey, as being in status epilepticus, defined as seizure activity has continued for at least thirty minutes. *Dr. David Griesemer Deposition, pp. 15, lines 22 - 25; 16, lines 11 - 17; R. pp. 58, lines 22-25; 59, lines 11-17.* Attempts by Dr. Zulkey to stop the child's seizures were unsuccessful. *Deposition of Dr. Mark Zulkey, p. 70, line 4 - p. 72, line 10; R. p. 61, line 4 - R. p. 63, line 10.* As part of the Emergency Department's effort to bring the child's seizure activity under control, Dr. Lewis was called to the Emergency Department from the operating room to assist by intubating the child. *Deposition of Elizabeth Lewis, D.O., p. 31, line 13 - p. 32, line 8; R. p. 54, line 13- R. p. 55, line 8.* It is undisputed that shortly after the endotracheal tube was taped, a chest x-ray taken to confirm placement revealed that the tube was somewhat misplaced. The tube was then repositioned and re-taped. *Deposition of Elizabeth Lewis, D.O., p. 63, lines 10-13;*

R. p. 56, lines 10-13. The appellants assert the tube's improper position caused the child to be deprived of oxygen and to suffer brain injury. The defendants, including respondent, dispute those allegations, and assert that there was no harm caused to the child by the tube being briefly in an improper position. The defendants assert the child's underlying disorder, frequent seizures, and the prolonged seizure on November 2, 2000, caused the child's brain dysfunction.

The disputed facts related to causation, however, are not central to this appeal. Rather, this appeal concerns the liability, if any, of a governmental entity for the alleged negligence of a physician who was undisputedly an independent contractor.

I. The lower court ruled correctly that TRMC may not be held liable under the Tort Claims Act for the negligent acts or omissions of an independent contractor.

The Appellants Smith contend that Judge Williams erred in concluding that a governmental hospital cannot be held liable for the negligent acts or omissions of an independent contractor, despite clear language in the South Carolina Tort Claims Act supporting this proposition. Appellants argue that governmental hospitals cannot maintain immunity by hiring independent contractors to perform medical services, citing a nondelegable duty of care owed by a governmental hospital, here TRMC, to its emergency room patients. Appellants base this argument on a misunderstanding of the South Carolina Tort Claims Act and a misapplication of recent South Carolina case law, namely *Simmons v. Toumey Regional Medical Center*, 341 S.C. 32, 533 S.E.2d 312 (2000), and *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006). A proper reading of precedent and the statutes supports the lower court ruling that TRMC cannot be held liable for the torts of a non-employee under the South Carolina Tort Claims Act.

A. The Employment relationship of the governmental entity to the tortfeasor is central to the Tort Claims Act analysis, and Independent Contractors are expressly excluded from its scope.

TRMC is a governmental entity, a healthcare provider created and funded by Orangeburg and Calhoun Counties. As such, tort actions against it are governed by the *South Carolina Tort Claims Act*. See §15-78-30 (h) and (j), *Code of Laws of South Carolina*. Being in derogation of common law sovereign immunity, it is to be strictly construed against liability, and liberally construed in favor of immunity or limiting liability for the governmental entity. See §15-78-20(f), *Code of Laws of South Carolina*. See also *Jeff Hunt Mach. Co. v. State Highway Department*, 217 S.C. 423, 60 S.E2d 859 (1950). The Act strictly limits the liability of governmental entities: “Consequently, it is declared to be the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein.” §15-78-20(a), *Code of Laws of South Carolina*.

The employment relationship of the governmental entity to the actor is central to the South Carolina Tort Claims Act. Its protection only extends to governmental employees, providing immunity to those employees by requiring that the governmental entity be substituted as a defendant in the stead of its employee. See §15-78-70, *Code of Laws of South Carolina*. Section 15-78-30 (c) of the Tort Claims Act expressly excludes Independent Contractors from the definition of “employee”: “The term does not include an Independent Contractor doing business with the State or a political subdivision of the State.”

In this case, Elizabeth Lewis, D.O. was substituting for a vacationing private practice anesthesiologist, under a contract with AMN Healthcare, Inc. which provides physicians for locum tenens assistance. *Deposition of Elizabeth Lewis, D.O., p.19, line 6-11; R. p. 48, line 6-11*. TRMC had no contractual arrangement with Dr. Lewis, nor did TRMC have any control over the independent medical judgment of Dr. Lewis. Dr. Lewis was an independent contractor, and was

never an employee of TRMC. In fact, Dr. Lewis went to the Emergency Department to assist with an intubation in which the Emergency Department Dr. Zulkey was faced with the crisis of intractable seizures which he had not been able to bring under control. *Deposition of Dr. Mark Zulkey*, p. 70, line 4 - p. 72, line 10; R. p. 61, line 4 - R. p. 63, line 10.

As TRMC is a governmental entity, the plain language of the Tort Claims Act excludes the hospital from any liability for the negligent acts of its independent contractors.

B. Recent case law expanding liability for private employers of Independent Contractors is inapplicable to governmental hospitals.

Appellants Smith do not dispute that Dr. Lewis was an independent contractor. Instead, they contend that Judge Williams should have found that the hospital may be held liable for the negligence of Dr. Lewis under the holdings in *Simmons v. Toumey Regional Medical Center*, 341 S.C. 32, 533 S.E.2d 312 (2000), and *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006).

In *Simmons*, the Supreme Court held that a non-governmental hospital may be held vicariously liable for the negligent acts of a physician where the plaintiff can show the following three elements: “(1) that the hospital held itself out to the public by offering to provide services; (2) the plaintiff looked to [or relied on] the hospital [or its representations], rather than an individual physician, for care; and (3) that a person in similar circumstances reasonably would have believed that the physician who treated him or her was a hospital employee.” *Simmons*, 533 S.E.2d at 323. If the above test is satisfied, then a non-government hospital has a nondelegable duty of care to patients based on ostensible agency.

In *Madison*, the Supreme Court held that the South Carolina Department of Disability and Special Needs owes a common law duty of care to its clients to provide reasonable care and

treatment. This common law duty creates liability for the Department based on the acts of independent contractors for failure to supervise and failure to address conduct of such independent contractors after notice of inappropriate care. *See Madison*, 638 S.E.2d at 660.

While at first blush these holdings seem to suggest that TRMC might owe a nondelegable duty to its patients, a closer reading reveals that this is not the case. Each holding is based on a common law duty that simply does not apply in this instance.¹

1. Reliance on *Simmons v. Toumey Medical Center* is misplaced.

In *Simmons*, the Supreme Court adopted the *Restatement (Second) of Torts*, §429, described as “ostensible agency,” outlining the test described above. If plaintiffs can prove the three factors described above, then the non-governmental hospital may not eschew liability by employing independent contractors: “The hospital will be held vicariously liable for any negligent or wrongful acts committed by the treating physician,” regardless of the doctor’s status as an independent contractor. *Simmons*, 533 S.E.2d at 51. In this instance, Appellants Smith have not pled in their amended complaint nor presented any evidence to prove the three elements required to satisfy the *Simmons* Test for ostensible agency. There is simply no evidence of any of the three elements, and on that basis alone, Appellants’s reliance on *Simmons* should be rejected. There can be no nondelegable duty based on ostensible agency under *Simmons*, where ostensible agency is not first proven by satisfying the test described above. *See Young v. S.C. Dept. Of Disabilities*, 374 S.C. 360, 649 S.E.2d 488 (2007)(where no evidence was submitted to support the reliance prong of the

¹A recent decision by the South Carolina Supreme Court may suggest that a governmental entity may have a duty of care toward individuals when the governmental entity creates a situation that they know or should know poses a substantial risk of injury to that individual. *See Edwards v. Lexington County Sheriff’s Department and County of Lexington*, Opinion No. 26758, Heard October 7, 2009, Filed January 11, 2010. This decision is distinguishable as it does not address the Tort Claims Act immunity for acts of non-employees.

Simmons Test, no agency can be found and no nondelegable duty can arise).

While *Simmons* does not create a nondelegable duty where ostensible agency is not first proven, it is also necessary to consider that *Simmons*, which addresses only the common law, directly conflicts with statutory law when applied to a governmental entity like TRMC. In *Osborne v. Adams*, 346 S.C. 4, 550 S.E.2d 319 (2001), the Supreme Court stated that *Simmons* “merely clarified the common law of this State.” *Osborne*, 550 S.E.2d at 323. The Court further explained that *Simmons* “did not create a new cause of action or abolish any existing immunity.” *Id.*, at 324.

To hold that *Simmons* can be used to impose a nondelegable duty based on ostensible agency for governmental entities like TRMC would be to directly abrogate a statutory mandate of the South Carolina Tort Claims Act. Section 15-78-60(20) provides that as a governmental entity, TRMC is entitled to sovereign immunity for “an act or omission of a person other than an employee.” *See S.C. Code Ann. §15-78-60(20)*. In accordance with Section 15-78-30(c), the term “employee” expressly excludes independent contractors like Dr. Lewis, who are only doing business with the State or its political subdivisions. *See S.C. Code Ann. § 15-78-30(c)*.

Where there is a conflict between the common law holding in *Simmons* and the statutory law of the South Carolina Tort Claims Act, the statutory law always governs. *See O’Hagan v. Fraternal Aid Union*, 144 S.C. 84, 88, 141 S.E. 893, 894 (1928) (the common law is in force “until there has been some repeal or modification by the law-making body”). *See also S.C. Code Ann § 14-1-50* (providing that common law is in effect “where it is not altered by the Code...or laws of this State”). *See also Southerland Statutory Construction, Vol. 2A, §50.01* (1984) (“In cases of conflict between legislation and the common law, legislation will govern because it is the latest expression of the law.”); and *§50.05* (“But general and comprehensive legislation, where course of conduct, parties,

things affected, limitations and exceptions are minutely described, indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter”).

As the legislature took care to describe in minute detail the limits of liability for governmental actors in the South Carolina Tort Claims Act, it is clear that the statute was intended to totally supersede and replace the common law on sovereign immunity. This means that *Simmons* cannot be used to impose a nondelegable duty based on ostensible agency against a governmental hospital, since the Tort Claims Act specifically excludes the hospital from liability for the acts or omissions of its independent contractors. Appellants’ reliance on *Simmons* for the creation of a duty is misplaced.

2. Reliance on *Madison v. Babcock Center, Inc.*, is misplaced.

In *Madison*, the Supreme Court found that the Department of Disabilities and Special Needs owed a common law duty of care directly to its mentally or physically disabled clients independent of the duty owed by its independent contractors who might be providing that care. Significantly, however, the Supreme Court did not find that the Department was vicariously liable for the acts or omissions of its independent contractors. Neither did the Court find that the Department owed its clients a nondelegable duty. Rather, *Madison* stands for the proposition that in the unique case of mentally or physically disabled persons, “a private person or business entity, which accepts responsibility of providing care, treatment, or services to [such persons] has a duty to exercise reasonable care in supervising the client and providing appropriate care and treatment.” *Madison*, 638 S.E.2d at 658. This common law duty is independent and freestanding, and is not created or terminated by the acts or omissions of an independent contractor. Specifically, the Court held, “Although the Department is **not liable for the acts or omissions of its independent contractor**,

Department remains under a duty to provide reasonable care and treatment to its clients.” *Id.*, at 660 (emphasis added).

Thus the common law duty described in *Madison* is not relevant to this case. Further, *Madison* does not stand for the proposition advanced by Appellant, that a governmental entity may be held vicariously liable under the Tort Claims Act for the acts or omissions of an independent contractor.

C. Foreign states with Tort Claims Acts comparable to South Carolina’s have refused to allow liability for governmental entities based on the actions of Independent Contractors.

While perhaps a novel issue in South Carolina, several other states with Tort Claims Acts that also specifically exclude “independent contractors” from the definition of “employee” or “agent” have addressed this question. Many have held that ostensible agency, as described in *Simmons* and the *Restatement (Second) of Torts* §429, cannot impute liability to a governmental entity for the acts of its independent contractors. A few examples on point are: Oregon (*Giese v. Bay Area Health District*, 101 Or. App. 410, 790 P.2d 1198 (Ct. App. 1990), review den., 310 Or. 281, 796 P.2d 1206 (1990)); Pennsylvania (*Moser v. Heistand*, 545 Pa. 554, 681 A.2d 1322 (Sup Ct., 1996)); Mississippi (*Brown v. Delta Regional Medical Center*, 997 So.2d 195 (Sup. Ct., 2008), reh. den. 2009); and Texas (*Brown v. Montgomery County Hospital*, 905 S.W.2d 481 (Ct. App. 1995), *Dumas v. Muenster Hospital District*, 859 S.W.2d 648 (Ct. App. 1993)).

D. Express provisions of the South Carolina Tort Claims Act providing for proportional liability clearly show the intention of the legislature that a governmental entity not share liability with those not employed by it.

TRMC, as a governmental entity, is entitled to a special verdict, apportioning its liability, if any. §15-78-100(c), *Code of Laws of South Carolina*, provides, “In all actions brought pursuant to

this chapter when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity, the trier of fact must return a special verdict **specifying the proportion of monetary liability of each defendant against whom liability is determined.**" (emphasis added). The clear, plain language of the statute makes it clear there is to be no shared liability, but the jury is required to determine specifically whether each defendant is liable, and, if so, its proportion of monetary liability. The statute clearly separates the liability, if any, of Dr. Lewis, AMN Healthcare, and TRMC. This statute, coupled with §15-78-60(20), clearly shows the intention of the legislature that the liability, if any, of a governmental entity should be separately determined, and that entity should not share in the liability of those not employed by it. To adopt Appellant's assertions of vicarious liability of an independent contractor would effectively deem Dr. Lewis' conduct to be the same as the conduct of an employee, and would preclude any jury determinations of proportional liability under §15-78-100(c). Dr. Lewis' conduct would be treated as if she were an employee. Clearly this result flies in the face of the provisions of §15-78-60(20), §15-78-30(c), and §15-78-100(c).

The Act, as a whole, clearly precludes liability, joint and several or otherwise, of a governmental entity for the acts of another not employed by it. This supports the conclusions above, that TRMC's liability, if any, must be separate from the liability, if any, of its co-defendants. TRMC, therefore, cannot be vicariously liable for any acts or omissions by Dr. Lewis, its independent contractor.

Conclusion

Based on the foregoing discussion and analysis, the Respondent respectfully requests that this Court affirm the Order granting it partial summary judgment.

Respectfully submitted,

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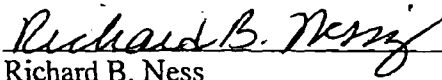
April 23
~~January~~, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused to be served a copy of the foregoing FINAL BRIEF OF RESPONDENT upon the individual whose name and address are listed below by placing a copy of it in the United States mail with proper first-class postage affixed thereon.

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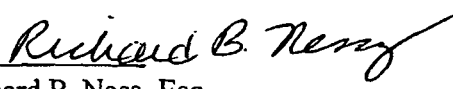

Richard B. Ness

April 23, 2010

STATE OF SOUTH CAROLINA)
)
COUNTY OF BAMBERG)

I, Richard B. Ness, Esq., attorney for the Respondent in the appeal of *Samuel G. Smith, Sr., Melissa Smith, and Samuel G. Smith, Jr., an infant under the age of fourteen (14) years, by and through his next friend, Samuel G. Smith, Sr., v. The Regional Medical Center of Orangeburg and Calhoun Counties, et al.*, Docket No. 2007-CP-38-295, do hereby certify the foregoing Respondent's Final Brief complies with Rule 211(b), SCACR.

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April 23, 2010

Z:\TRMC (Smith, Samuel)\APPEAL, FINAL CERT 211(b).wpd

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Samuel G. Smith, Sr., Melissa
Smith, and Samuel G. Smith,
Jr., an infant under the age of
Fourteen (14) years, by and
through his next friend, Samuel
G. Smith, Appellants,

v.

The Regional Medical Center
of Orangeburg and Calhoun
Counties, Elizabeth A. Lewis,
D.O., and AMN Healthcare,
Inc. d/b/a Staff Care, Defendants,

Of whom The Regional
Medical Center of Orangeburg
and Calhoun Counties is the Respondent.

Appeal From Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4847
Heard March 9, 2011 – Filed June 22, 2011

AFFIRMED

Charles L. Henshaw, Jr., of Columbia, for Appellant.

Richard B. Ness, of Bamberg, for Respondent.

KONDUROS, J.: The parents of Samuel G. Smith, Jr., brought a negligence claim on behalf of themselves and their minor child (collectively the Smiths) for the treatment Smith received from The Regional Medical Center of Orangeburg and Calhoun Counties (TRMC), a governmental entity under the Tort Claims Act (TCA).¹ The Smiths appeal the trial court's granting of partial summary judgment to TRMC based on its finding that a governmental hospital cannot be held liable for the negligent acts or omissions of an independent contractor, as prescribed by the TCA. The Smiths argue TRMC should be held liable under a nondelegable duty of care owed by a hospital. We affirm.

FACTS

On November 1, 2000, Smith was taken to TRMC for emergency services. Smith had a previous medical history of seizures related to his genetic disorder, tuberous sclerosis. Upon his arrival to the emergency room, Smith was observed to be cyanotic and not breathing. After several attempts

¹ TRMC qualifies as a governmental entity because it is a governmental health care facility within the definition of section 15-78-30(j) of the South Carolina Code (2005), which states a "governmental health care facility" means one which is operated by the State or a political subdivision through a governing board appointed or elected pursuant to statute or ordinance and which is tax-exempt under state and federal laws as a governmental entity and from which no part of its net income from its operation accrues to the benefit of any individual or nongovernmental entity." Specifically, TRMC is funded by Orangeburg and Calhoun counties.

to revive him, it was decided that an endotracheal tube for oxygenation was needed and Dr. Elizabeth Lewis was called to the emergency room to administer the placement of the tube.

Dr. Lewis placed the tube into Smith's airway; however, his condition did not improve. It was determined that the tube was not functioning properly because it was misplaced. The Smiths offered testimony from an expert that the tube was five centimeters longer than it needed to be and the length "unnecessarily endangered" Smith because it obstructed his airway. The Smiths further asserted that because of the misplacement, he was deprived of oxygen and suffered hypoxic brain injury.

At the time of this event, Dr. Lewis was providing anesthesia coverage at TRMC on a temporary basis through Staff Care, which had an agreement to place physicians in the hospital. Dr. Lewis had an employment contract with Staff Care.

The Smiths commenced this lawsuit on November 1, 2002. The trial court ordered that Dr. Lewis be added as a defendant on the allegations that she was an independent contractor. The Smiths allege Dr. Lewis and TRMC jointly undertook to render emergency services and anesthesiology care. Through that care, the Smiths argue Smith suffered deprivation of oxygen resulting in a brain injury that could have been prevented or mitigated had Dr. Lewis exercised due care. Specifically, they contend Dr. Lewis was negligent in failing to (1) manage Smith's airway, (2) timely realize the misplacement of the endotracheal tube, and (3) timely reposition the tube.

The trial court granted partial summary judgment in favor of TRMC. The trial court indicated under a plain reading of the TCA, TRMC could not be held vicariously liable for any negligence on the part of Dr. Lewis, because she was an independent contractor. This appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a

summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCF; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citations omitted). "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

LAW/ANALYSIS

The Smiths contend the trial court erred in concluding a governmental hospital cannot be held liable for the negligent acts or omissions of an independent contractor. They argue governmental hospitals cannot maintain immunity by hiring independent contractors to perform medical services, citing a nondelegable duty of care owed by a hospital to emergency room patients. We disagree.

"The doctrine of nondelegable duty has traditionally been used to describe a form of vicarious liability." Martin C. McWilliams, Jr. & Hamilton E. Russell, III, Hospital Liability for Torts of Independent Contractor Physicians, 47 S.C. L. Rev. 431, 452 (1996). "The real effect of finding a duty to be nondelegable is to render not the duty, but the liability, not delegable" Id.

A person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the liability, not the duty that is not delegable. The party which owes the nondelegable duty is vicariously liable for the negligent acts of the independent contractor.

Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000) (citations omitted) (emphasis added). Thus, "the doctrine of nondelegable duty is an exception to the general rule of nonliability for the

torts of independent contractors." McWilliams & Russell, 47 S.C. L. Rev. at 453.

On appeal, the Smiths do not contend that the trial court erred in its determination that Dr. Lewis was an independent contractor. Rather, they cite Simmons for the proposition that TRMC is liable for the negligence of Dr. Lewis despite the fact that she does not meet the definition of "employee" under the TCA. The Smiths argue the nondelegable duty of a hospital to render emergency services, recognized in Simmons, permits a governmental hospital to be liable for the negligence of an independent contractor. However, the duty discussed in Simmons does not necessarily apply to an independent contractor of a government hospital. Simmons merely found a nongovernmental hospital could not delegate its duty to render competent emergency room services to its patients and, therefore, may be vicariously liable for the negligence of an independent contractor. 341 S.C. at 50-51, 533 S.E.2d at 322. In this case, we are presented with whether a governmental hospital subject to the TCA may be liable for alleged negligent acts or omissions committed by an independent contractor. We find it cannot.

Unlike the private hospital analyzed in Simmons, TRMC is a governmentally funded hospital that is statutorily governed by the TCA. The TCA "governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity" Flateau v. Harrelson, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003). The Legislature has stated its intent to "grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived." S.C. Code Ann. § 15-78-20(b) (2005). "The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages" contained in the TCA. S.C. Code Ann. § 15-78-40 (2005). Furthermore, the code provides the provisions of the TCA "must be liberally construed in favor of limiting the liability of the State." S.C. Code Ann. § 15-78-20(f) (2005).

Specifically excluded from the definition of "employee," however, are independent contractors:

"Employee" means any officer, employee, agent, or court appointed representative of the State or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty including, but not limited to, technical experts whether with or without compensation, but the term does not include an independent contractor doing business with the State or a political subdivision of the State.

S.C. Code Ann. § 15-78-30(c) (Supp. 2010) (emphasis added). Therefore, the entity is not liable for a loss resulting from "an act or omission of a person other than an employee including but not limited to the criminal actions of third persons." S.C. Code Ann. § 15-78-60(20) (2005).

Because TRMC is a governmental entity, the TCA governs the civil claims and remedies to which TRMC is subject. The TCA codifies qualified and limited liability and shields the state and its political subdivisions, like TRMC, from liability for certain acts and omissions. The Legislature, through the TCA, has (1) stated its intention for independent contractors to be excluded from the definition of employee, (2) mandated strict construction of statutory language, (3) developed a policy of liberally construing the TCA in favor of immunity and limiting liability, and (4) declared that the TCA is the public policy of South Carolina.

Nevertheless, Smith argues Madison v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (2006), requires a finding that TRMC may be liable as a government entity for the acts of its independent contractor. We disagree. Madison specifically held that a governmental entity to which the immunity exemptions of the TCA applied is not liable for the acts or omissions of its independent contractor. Id. at 142-43, 638 S.E.2d at 660. However, the court found a governmental entity could be liable for a duty directly owed, independent of any acts or omission of the independent contractor. Id.

(stating this duty "may include (1) adequately supervising the provision of services by another entity or (2) its own conduct in relation to prior notice of inappropriate care of its clients by such entity"). Essentially, if the duty breached is one owed directly by the governmental entity to the client, the TCA's immunity may not insulate the entity from liability.

Here, the trial court order and briefs on appeal discuss only the alleged negligent breach of Dr. Lewis's duty and TRMC's vicarious liability for that breach. The TCA and Madison foreclose a finding of liability against TRMC on that basis.

CONCLUSION

The TCA provides immunity to governmental entities, such as TRMC, from the negligence of its independent contractors. Accordingly, the judgment of the trial court is

AFFIRMED.

FEW, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED

JUL 22 2011

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

SC Court of Appeals

James C. Williams, Jr., Circuit Court Judge

Case No. 2007-CP-38-295

SAMUEL G. SMITH, SR., MELISSA SMITH, and
SAMUEL G. SMITH, JR., an infant under the age
of fourteen (14) years, by and through his next
friend, SAMUEL G. SMITH,.....Appellants,

v.

THE REGIONAL MEDICAL CENTER
OF ORANGEBURG AND CALHOUN COUNTIES,
ELIZABETH A. LEWIS, D.O., and AMN
HEALTHCARE, INC. d/b/a STAFF CARE,
of whom THE REGIONAL MEDICAL CENTER
OF ORANGEBURG AND CALHOUN COUNTIES
is the Respondent.

PETITION FOR REHEARING

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ATTORNEY FOR APPELLANTS

Pursuant to Rule 221, SCRAP, the appellants petition for rehearing and ask the court to review, reconsider, and modify its opinion of June 22, 2011.

The Regional Medical Center sought and obtained partial summary judgment on the sole ground that it was not liable for the conduct of an independent contractor, who was not an employee of the hospital. See Motion for Summary Judgment (R. p. 21).

In affirming the decision of the lower court for partial summary judgment, the Court of Appeals overlooked and misapprehended the following points:

- (a) The Regional Medical Center of Orangeburg and Calhoun Counties, as a governmental entity, can be held liable under a nondelegable duty of care owed by a hospital.
- (b) The nondelegable duty of a hospital is not merely “a form of vicarious liability,” but is an independent duty of care that runs from the hospital directly to its patients.
- (c) When a hospital owes a nondelegable duty of care to a patient, the hospital is liable for the breach of duty whether the breach was caused by an “employee” or an “independent contractor.”
- (d) A governmental hospital, which is liable for its torts “in the same manner and to the same extent as a private individual under like circumstances” cannot delegate its liability to an independent contractor and, thereby, avoid the liability.
- (e) In Madison v. Babcock Center, 371 S.C. 123 (2006), the Supreme Court has expressly rejected the notion that the government can have summary judgment based solely on the ground that it is not responsible for the conduct of an independent contractor, who is not a government employee. The Supreme Court said where there

is an established common law duty owed to the plaintiff, the government is not entitled to judgment as a matter of law on that basis. See Madison, 371 S.C. at 132.

Memorandum

The analysis for determining the liability of governmental entities that utilize the services of independent contractors was set out by the Supreme Court in Madison v. Babcock Center, 371 S.C. 123 (2006).

- (a) Does the defendant owe a duty of care to the plaintiff?
- (b) Did the defendant breach the duty by a negligent act or omission?
- (c) Was the defendant's breach the actual and proximate cause of the plaintiff's injury?
- (d) Did the plaintiff suffer an injury or damages?
- (e) What is the applicability of exceptions to the waiver of immunity contained in S.C.Code Ann. § 15-78-60 (2005 & Supp.2005) which are asserted by the governmental entity?

The Regional Medical Center owed a duty to Samuel Smith because "a hospital owes a nondelegable duty to render competent service to its emergency room patients" Simmons v. Toumey Med. Center, 341 S.C. 32, 533 S.E.2d 312 (2000). The fact that an independent contractor provided services to Appellant does not affect the existence of the hospital's duty. See Madison.

The plaintiffs showed that the duty of competent service was breached when an endotracheal tube that was to be inserted 14 cm into Samuel Smith's airway instead was inserted 19 cm and compromised the airway. See Affidavit of Ronald A. Katz, M.D. (R. pp. 64-66).

The plaintiffs showed that breach of the duty of was the proximate cause of Samuel Smith's injury. According to plaintiff's airway management expert, Dr. Ronald Katz, taping the tube at 19 cm unnecessarily endangered the child by pushing the tip of the endotracheal tube into a bronchial stem and obstructed the child's airway. See id. By reducing the flow of oxygen, the misplaced tube caused Samuel Smith Jr. to be deprived of oxygen. See id.

The plaintiffs showed that they suffered injury and damages. Specifically, as a result of oxygen deprivation, Samuel Smith suffered hypoxic brain injury. See id.

The status of the anesthesiologist as an independent contractor was undisputed, and The Regional Medical Center asserted that it "is not liable for the conduct of persons not employed by it, pursuant to § 15-78-60(20), Code of Laws of South Carolina." Applying this exception to deny liability for the government's breach of a common law duty to a patient, however, has been specifically rejected by the Supreme Court in in Madison.

We find this position unpersuasive because Department owes a common law duty of care directly to Appellant. The fact an independent contractor provided services to Appellant or the fact a third party may have committed a criminal act in harming Appellant does not affect the existence of Department's duty.

See Madison, 371 S.C. at 143. A nondelegable duty is an independent duty of care that runs from the hospital directly to its emergency room patients. Part of that independent duty is to see to it that the independent contractors do not act negligently. That is the hospital's duty – and not simply liability for the doctor breaching her own separate duty of care. See Simmons, v. Toumey, 341 S.C. at 42, 533 S.E.2d at 317.

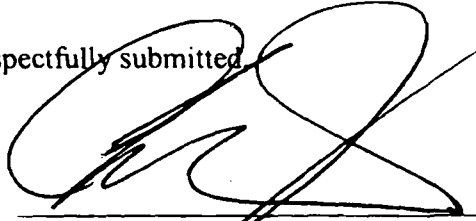
Where the government seeks summary judgment solely on grounds that it was not responsible for the conduct of an independent contractor, who was not an employee of the government, the government is not entitled to judgment as a matter of law where there is an established common law duty owed to the plaintiff. See Madison, 371 S.C. at 132.

Conclusion

Rehearing should be granted and the decision of the court reviewed, reconsidered, and modified. The summary judgment should be reversed and the case remanded.

Respectfully submitted

By:

A large, stylized handwritten signature in black ink, appearing to read 'CHLH', is written over a horizontal line.

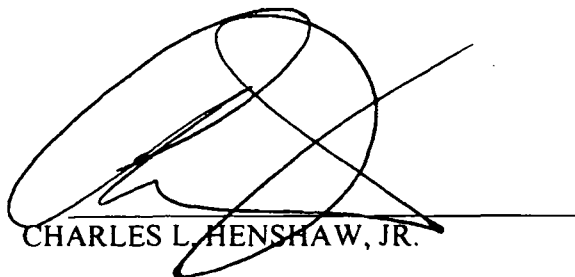
CHARLES L. HENSHAW, JR.
FURR & HENSHAW
1534 Blanding Street
Columbia, South Carolina 29201
Telephone (803) 252-4050
ATTORNEY FOR APPELLANTS

July 22, 2010

Certificate of Service

I hereby certify that on this date I caused to be served a copy of the foregoing final PETITION FOR REHEARING upon the individual whose name and address are listed below by placing a copy of it in the United States Mail with proper first-class postage affixed thereon.

RICHARD B. NESS
NESS & JETT, LLC
2878 MAIN HIGHWAY
P.O. BOX 909
Bamberg, SC 29003



CHARLES L. HENSHAW, JR.

July 22, 2011

The South Carolina Court of Appeals

Samuel G. Smith, Sr., Melissa Smith,
and Samuel G. Smith, Jr., an infant
under the age of Fourteen (14) years, by
and through his next friend, Samuel G.
Smith,

Appellants,

v.

The Regional Medical Center of
Orangeburg and Calhoun Counties,
Elizabeth A. Lewis, D.O., and AMN
Healthcare, Inc. d/b/a Staff Care,

Defendants,

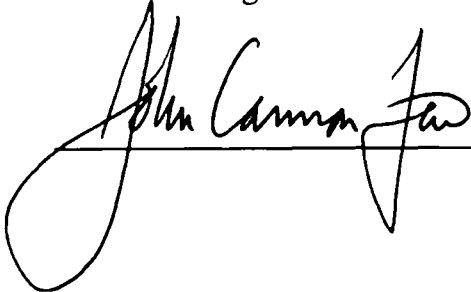
Of whom The Regional Medical Center
of Orangeburg and Calhoun Counties is
the

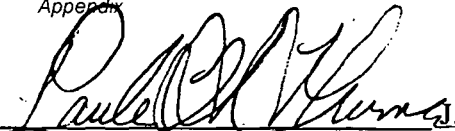
Respondent.

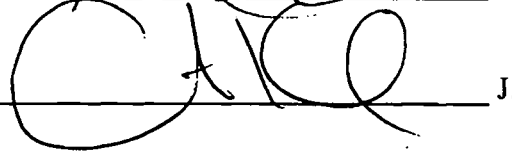
The Honorable James C. Williams, Jr.
Orangeburg County
Trial Court Case No. 2007-CP-38-00295

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is
unable to discover that any material fact or principle of law has been either overlooked or
disregarded and hence, there is no basis for granting a rehearing.
It is, therefore, ordered that the Petition for Rehearing be denied.

 C. J.



 J.

Columbia, South Carolina

cc: Charles L. Henshaw, Jr, Esquire
Richard B. Ness, Esquire
Weldon R. Johnson, Esquire

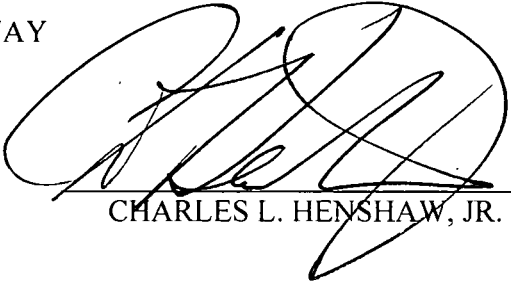
FILED

AUG 23 2011

Certificate of Service

I hereby certify that on this date I caused to be served a copy of the foregoing
APPENDIX upon the individual whose nam e and address are liste d below by placing a
copy of it in the United States Mail with proper first-class postage affixed thereon.

RICHARD B. NESS
NESS & JETT, LLC
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Bamberg, SC 29003



CHARLES L. HENSHAW, JR.

December 6, 2012