THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

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SC Court of Appeals

Case No. 2011-CP-46-4508
Appellate Case No. 2013-002058

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

v.

The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center, South Carolina Department of Social Services, and Bruce Bryant, as the Constitutional Office of the Sheriff of York County, The York County Sheriff's Department, and York County ..... Respondents.

FINAL BRIEF OF RESPONDENT, THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY D/B/A CAROLINAS MEDICAL CENTER

Monteith P. Todd
Robert E. Horner
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211
(803) 929-1400
Counsel for Respondents, The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center

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2. As an additional sustaining ground, is the Charlotte-Mecklenburg Hospital Authority entitled to immunity for its participation in the investigation into the December 4, 2009 injuries suffered by Owen pursuant to South Carolina Code section 63-7-390?

STATEMENT OF THE CASE

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

Following this CT scan, Levine Children's Hospital notified the York County Department of Social Services ("DSS") of the possibility that Owen may have been a victim of a non-accidental trauma. Upon notification of the suspicion, DSS began its investigation regarding Owen. While DSS was conducting its investigation, the admitting physician at Levine Children's Hospital ordered and performed additional tests and diagnostic studies on Owen, including consults from ophthalmology and neurosurgery. The results of these consults and studies revealed essentially normal findings. (Deposition of Dr. Courtlandt, pp. 35-36; 41-42) (R. pp. 695-696, 701-702).

Additionally, Owen's family members were interviewed. Neither the plaintiff's mother nor his maternal grandparents suspected that anyone had abused, or would abuse, Owen. (Deposition of Kayla Lythgoe [mother] p. 144, l. 19 to p. 146, l. 8 (R. pp. 813-814); Deposition of Charlotte Williams [maternal grandmother] p. 49, ll. 2-22; p. 52, l. 19 to p. 53, l. 1 (R. pp. 887-888); Deposition of Larry Williams [step maternal grandfather] p. 32, l. 16 to p. 34, l. 2 (R. S-9 - S-10)) . Levine Children's Hospital advised DSS that physicians evaluating Owen could neither rule in nor rule out non-accidental trauma as

the cause of Owen's injury. (Deposition of Dr. Cheryl Courtlandt, p. 61, l. 25 to p. 65, l. 21 (R. pp. 633-635); p. 137, ll. 16-20 (R. p. 653)).

After four days in the hospital, Levine Children's Hospital advised DSS that Owen was medically stable and ready for discharge. DSS instructed Levine Children's Hospital to discharge Owen to custody and care of his parents. DSS indicated it had investigated, entered into a safety plan with Owen's parents, and would conduct a home study/investigation. (Deposition of DSS employee Krista Hinnant, p. 26, l. 6 to p. 27, l. 22 (R. pp. 686-687); p. 31, l. 22 to p. 33, l. 15 (R. pp. 691-695); p. 80, l. 17 to p. 81, l. 5 (R. pp. 740-741)); (Deposition of DSS employee Divondra Hill, p. 71, l. 21 to p. 74, l. 23) (R. pp. S-42 – S-45). Pursuant to DSS's directives, Levine Children's Hospital discharged Owen to his parents on December 8, 2009. (Deposition of Laura Newmark [social worker at Levine Children's Hospital] p. 133, l. 21 to p. 140, l. 7)(R. pp. 866-867)

On January 11, 2010, approximately five weeks after discharge, Owen returned to Levine Children's Hospital with a significant brain injury. His father, Michael Carduff, later pled guilty to abusing Owen and causing his January 2010 brain injury.

The Appellant, Elizabeth Hope Rainey, as the Appointed Guardian ad Litem to Owen, ("Rainey") subsequently filed this lawsuit against multiple parties, including CMHA. After discovery, CMHA moved for summary judgment on the ground that it did not owe Owen a duty. CMHA additionally moved for summary judgment on the ground that it was immune from civil liability pursuant to South Carolina Code section 63-7-390. The court subsequently granted the motion for summary judgment on the basis that no duty was owed by CMHA to Owen. The court denied CMHA's motion as it relates to the immunity argument.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); Rule 56(c), SCRCP. In ruling on a summary judgment motion, the Court should consider the pleadings, depositions, interrogatory answers, admissions, and affidavits in determining whether there is a genuine issue of fact for trial. See Thomas v. Waters, 315 S.C. 524, 526, 445 S.E.2d 659 (Ct. App. 1994). "A motion for summary judgment on the basis of the absence of a duty is a question of law for the court to determine." Oblachinski v. Reynolds, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011).

ARGUMENT

I. APPELLANT RAINEY FAILED TO ESTABLISH THAT CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY OWED OWEN A DUTY.

A. The CMHA did not owe a duty to Owen to refuse to discharge him to his parents when he was medically cleared for discharge and after DSS instructed Levine Children's Hospital to discharge Owen to his parents.

Rainey, both at the hearing before the trial court and in her brief to this Court, alleges that Levine Children's Hospital should not have discharged Owen into the custody of his parents on December 8, 2009, surmising that had he not been discharged into the custody of his parents at that time, his father would not have injured him on January 11, 2010. The crux of Appellant's claim is that Levine Children's Hospital was legally required (i.e. owed a duty) to take some action to prevent Own from being discharged into the custody of his parents. This argument is without merit, however, as the trial court properly found that CMHA is not vested with any authority to keep or remove a child from the custody of his parents or to refuse to discharge a child to his parents when the child is medically cleared and ready for discharge from the hospital. Accordingly, the trial court's decision granting summary judgment must be affirmed.

In order to prove negligence, a plaintiff must show first that a defendant owes a duty of care to the plaintiff. Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). The determination of the existence of a duty is one of law for the court. See Doe ex rel Doe v. Wal-mart Stores, Inc., 393 S.C. 240, 246, 711 S.E.2d 908, 911 (2011). "The existence of a duty owed is not incidental to a cause of action for negligence; it is an indispensable element of the plaintiff's case. The question of liability for negligence cannot arise at all until it is established that the one who has been negligent owed some duty to the person who seeks to make him liable for

his negligence." Sharpe v. South Carolina Dept. of Mental Health, 292 S.C. 11, 354 S.E.2d 778 (Ct. App. 1987)(Bell, J., concurring) (citation omitted).

The breach of a legal duty is essential to negligence and such legal duty is that which the law requires to be done or forborne with respect to a particular individual or the public at large. Without a violation of such a legal duty, there is no negligence. South Carolina Electric & Gas Co. v. Utilities Construction Co., 244 S.C. 79, 88, 135 S.E.2d 613, 617 (1964). See also Brown v. South Carolina Insurance Co., 284 S.C. 47, 324 S.E.2d 641 (Ct. App. 1984), cert. dismissed, 290 S.C. 154, 348 S.E.2d 530 (1986) (negligent conduct becomes actionable only when it violates some specific legal duty owed to the plaintiff)

"Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another." Moore v. Weinberg, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007). A legal duty can be created by statutes, a contractual relationship, status, property interest, or some other special circumstance. Madison ex rel Bryant v. Babcock Cntr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656-57 (2006) (citations omitted). Foreseeability of injury, in the absence of a duty to prevent that injury, is an insufficient basis on which to rest liability. South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986) (citations omitted). Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002).

In the present case, the trial court correctly found that CMHA did not owe a duty to Owen to complete a home study or home evaluation and did not owe Owen a duty to

refuse to discharge him to his parents when ordered to do so by DSS. This decision by the trial court was based upon the fact that the duties to perform such assessments and make decisions regarding custody of minors who may be abused or neglected lies with DSS, with the assistance of law enforcement and the family court system.

The State, through the passage of Title 63 (the Children's Code), has legislatively determined what roles law enforcement, the judiciary, the Department of Social Services, and private individuals play in allegations of abuse or neglect of minor children that protects both the rights of the children and the parents. With the exception of a reporting requirement, however, the Legislature has sought to make various governmental entities responsible for the intervention into families for the protection of minors who may be abused or neglected. See South Carolina Code Ann. § 63-7-10(A) (2010) ("Any *intervention by the State* into family life on behalf of children must be guided by law, by strong philosophical underpinnings, and by sound professional standards for practice.) (emphasis added); see also S.C. Code Ann. § 63-7-10(A)(12) ("*Should removal of a child become necessary, the state's foster care system* must be prepared ...") (emphasis added); S.C. Code Ann. § 63-7-10(A)(13) ("*The Department of Social Services staff who investigates serious child abuse and neglect reports with law enforcement* must be competent in law enforcement procedures, fact finding, evidence gathering, and effective social intervention and assessment.") (emphasis added).

DSS, law enforcement agencies, and the family court system are the only entities empowered with the ability to seize custody of a child, investigate child abuse/neglect allegations, prosecute such cases when warranted, and adjudicate issues which may result in the temporary or permanent removal of children from their home. See S.C. Code Ann.

§ 63–7–660 (2010) (DSS may remove a child from his or her home and has legal custody of the child thereafter if there is probable cause to believe abuse or neglect has occurred); see also South Carolina Dept. of Social Services v. Randy S., 390 S.C. 100, 700 S.E.2d 250 (Ct. App. 2010) (noting that Section 63–7–1660(A) grants DSS, and only DSS, the authority to petition the family court to remove a child from custody of a parent if DSS "determines by a preponderance of evidence that the child is an abused or neglected child"); see also South Carolina Department of Social Services v. Pritchard, 329 S.C. 242, 246, 495 S.E.2d 242, 244 (Ct. App. 1997) (same); Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (same).

Contrary to the assertions of Rainey, the immediate and temporary removal of a child from the custody of his parents is generally allowed only by law enforcement personnel. See S.C. Code Ann. § 63-7-610(A) (2010) ("A law enforcement officer investigating a case of suspected child abuse or neglect or responding to a request for assistance by the department as it investigates a case of suspected child abuse or neglect has authority to take emergency protective custody of the child pursuant to this subarticle in all counties and municipalities."); S.C. Code Ann. § 63-7-620(A) (2010) ("A law enforcement officer may take emergency protective custody of a child ...."). Once a law enforcement officer has taken custody of the child, he must immediately notify the local Department of Social Services office so that an investigation can begin. See S.C. Code Ann. § 63-7-610(B) ("Immediately upon taking emergency protective custody, the law enforcement officer shall notify the local office of the department responsible to the county in which the activity under investigation occurred."); S.C. Code Ann. § 63-7-630 (2010) ("When an officer takes a child into emergency protective custody under this

subarticle, the officer immediately shall notify the department."). After DSS receives this report from law enforcement, it has twenty-four hours to investigate whether grounds exist for it to seek custody of the child from the family court system. See S.C. Code Ann. § 63-7-640 (2010) ("The department shall conduct within twenty-four hours after the child is taken into emergency protective custody by law enforcement or pursuant to ex parte order a preliminary investigation to determine whether grounds for assuming legal custody of the child exist ....."). Even then, if DSS finds that it should take custody of the child, it must seek an order from the family court justifying its position that such intervention is warranted. See S.C. Code Ann. § 63-7-660 (2010) ("If the department determines after the preliminary investigation that there is probable cause to believe that by reason of abuse or neglect the child's life, health, or physical safety is in imminent and substantial danger, the department may assume legal custody of the child .... The department may exercise the authority to assume legal custody only after a law enforcement officer has taken emergency protective custody of the child or the family court has granted emergency protective custody by ex parte order, and the department has conducted a preliminary investigation pursuant to Section 63-7-640."); see also S.C. Code Ann. § 63-7-740 (2010) (defining the family court's role in *ex parte* orders); S.C. Code Ann. § 63-7-1610 et seq. (2010) (setting forth in detail the judiciary's role in child abuse and neglect cases).

Though the State is heavily involved in the evaluation and protection of abused or neglected children, the involvement of private individuals or entities in suspected child abuse and neglect cases is limited. The duties owed by private individuals under the

State's comprehensive scheme is limited to an obligation to report, and even then, the duty to report is imposed upon a small group of designated people.

South Carolina Code § 63-7-310 requires certain persons to report suspected child abuse or neglect. Under this section, physicians, nurses, healthcare professionals, and other designated people are required to report suspected child abuse or neglect to the county Department of Social Services or to a law enforcement agency in the county where the child resides. This section states, in relevant part:

> A physician, nurse, . . . or any other ... health professional . . . must report in accordance with this section when in the person's professional capacity the person has received information which gives the person reason to believe that a child has been or may be abused or neglected as defined in Section 63-7-20.
>
> . . .
>
> (D) Reports of child abuse or neglect may be made orally by telephone or otherwise to the county department of social services or to a law enforcement agency in the county where the child resides or is found.

South Carolina Code Ann. § 63-7-310 (Supp. 2012). It is uncontested that CMHA, in accordance with its obligations under South Carolina Code § 63-7-310, reported the suspected child abuse to DSS. No other statute, however, imposes a duty on CMHA to do anything other than report the suspected abuse. Accordingly, once the duty to report was satisfied, CMHA had no further duty to Owen regarding the investigation of suspected abuse.[1] Moreover, even if CMHA had failed to report the suspected abuse, it still could not be held liable, as the statute does not create a private right of action. Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007) (upholding dismissal of an action against

[1] CMHA owed Owen a duty to render medical care to him in accordance with the standard of care, but there is no allegation that was not done in this case.

a physician for failure to report under S.C. Code Ann. § 63-7-310 and holding that violation of this statute does not create a private cause of action).

Rainey attempts to expand the reporting obligation owed by CMHA by arguing that CMHA was required to perform a home study and required to complete a social work assessment on Owen's parents. The trial court properly rejected such attempts, as neither the common law nor any statutory law imposes such a duty on CMHA or any medical care provider. Rather, the duty to assess and seek judicial custody of a child is solely that of DSS. See S.C. Code Ann. § 63-7-920 (2010) (setting forth the authority of DSS to conduct an investigating child abuse and neglect cases and setting for the statutory requirements for such investigation).

There is no statutory authority for CMHA to perform a home study, interview parents, or petition the court for an *ex parte* order preventing the return of a child, and Rainey has pointed to none. At most under the law, a hospital *may* retain custody of a child for 24 hours if the hospital believes that the child has been neglected and that they are waiting for a law enforcement officer to arrive and determine whether the officer should take the child into emergency protective custody. See South Carolina Code Ann. § 63-7-750 (2010). This statute, however, is inapplicable to the facts of this case. DSS was already involved, and DSS had already made the determination that the child could be returned to his parents upon discharge.

Moreover, any argument that CMHA could have used the authority granted by N.C. Gen. Stat. § 7B-308(2005) to retain custody of Owen is without merit. N.C. Gen. Stat. § 7B-308 only allows a hospital to retain a child for 12 hours if further medical treatment is required and the parents attempt to leave with the child or more time is

needed to notify DSS. Moreover, under that section, if the child is not in his country of residence, DSS must transfer the case to the child's county of residence. In this case, that would have been York County DSS, who was already involved in the case.

In an effort to get around the fact that CMHA had no authority to retain Owen after being told by DSS to discharge him and no authority to conduct a home study, Rainey submitted an expert's affidavit which alleges that Levine Children's Hospital "abrogated a duty or responsibility to Owen." The expert's conclusions are based on the expert's interpretation of hospital accreditation standards and internal hospital policies. The trial court properly rejected the affidavit because the existence of a duty is a matter of law for the court and cannot be created through affidavit.

In South Carolina it is well settled that expert testimony on issues of law is inadmissible. Dawkins v. Fields, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) (citations omitted); Hermitage Indus. v. Schwerman Trucking Co., 814 F. Supp. 2d 484, 486 (D.S.C. 1993). Because the determination of the existence of a duty is a legal question, the plaintiff cannot create a duty through expert testimony or internal policies and procedures when the duty does not exist at law. See Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 480, 377 S.E.2d 343, 351 (1988) (opinion testimony cannot create a duty that does not exist at law); Citizens and Southern National Bank of South Carolina v. Lanford, 313 S.C. 540, 443 S.E.2d 549 (1994) (Supreme Court summarily affirmed trial court ruling that internal policies and procedures do not create a duty between the parties where one does not exist at law); Johnson v. Robert E. Lee Academy, Inc., 401 S.C. 500, 737 S.E.2d 512 Ct. App. 2012 (rejecting expert affidavit as it pertained to existence of a duty). See also, e.g., Nat'l Convenience Stores, Inc. v. Matherne, 987

S.W.2d 145, 149 (Tex. Ct. App. 1999) ("expert testimony is insufficient to create a duty where one does not exist at law"); Richter v. Van Amberg, 97 F. Supp.2d 1255 (D.N.M. 2000) (even where expert testimony is necessary in legal malpractice case, expert cannot create a legal duty); Hi-Tech Eng'g, Inc. v. Buiten, 2002 WL 31928573 at *4 (Mich. Ct. App. Nov. 12, 2002) ("the testimony of an expert cannot create a factual question concerning a duty where the law has not recognized one"). Thus, the Appellant may not create or expand the legal duties of CMHA through submission of expert testimony or an internal policy and the trial court correctly rejected such attempts.

Moreover, the trial court properly applied the rules of statutory construction to conclude that no duty was owed by CMHA in this case. In South Carolina, courts "must presume that the legislature did not intend a futile act, but rather intended its statutes to accomplish something." Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2003) (citing TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 1998). If broad duties to report and prevent child abuse existed at common law as contended, the Legislature's passing of a statute creating only a duty to report would be futile, as such a duty would have already existed. Additionally, had the Legislature wanted to create an obligation on the part of hospitals to perform home studies, it could have done so.[2]

The argument that CMHA had a duty to conduct an assessment of Owen's home environment and report its findings to DSS is erroneous. CMHA's only duty was to report suspected child abuse, as set forth by statute. By statute, the duty to investigate the suspected child abuse and to take action where appropriate is charged to DSS. Had the

[2] Of course, such a statute would be constitutionally suspect, since parents have a constitutional right to raise their children absent a compelling governmental interest. It is doubtful the determination of whether such interest existed in a case by case basis could be granted to a private entity.

Legislature sought to impose the duty on hospitals to investigate child abuse or withhold children from their parents who were suspected of neglect or abuse, it could have passed a statute stating including hospitals as being those entities which were allowed to remove a child from his parents' custody, petition the family court, conduct home studies, and given them the authority to do everything the Legislature empowered DSS to do. However, under the comprehensive statutory scheme enacted by the Legislature, those obligations are imposed upon DSS, law enforcement, and the family court system.

While Rainey claims that CMHA breached a duty of care to Owen by discharging him into the custody of his parents, CMHA had no right to refuse to discharge Owen to the care of his parents. Because it did not have the right to withhold the child, it could not have had the duty to refuse to do so. Rather, CMHA complied with the only duty imposed upon it by reporting its suspicion of a non-accidental trauma to the DSS. The decision on whether or not Owen should be discharged to his parents was a decision for DSS, not for Levine Children's Hospital.

B. CMHA did not have the duty or authority to assess Owen's home environment.

In an effort to get around CMHA's lack of duty or authority to retain Owen once it was ordered to discharge him into the care of his parents, Rainey asserts that CMHA should have adequately considered whether Owen could be discharged into the care of his parents, considered Owens' earlier injuries, assess Owen's home environment, and to determine whether Owen's parents were qualified to assume his care. Rainey further claims that a social worker at Levine Children's Hospital's conducted an incomplete assessment because she did not include an assessment of Owen's home environment.

(See Appellant's Initial Brief, pp. 8-9) The argument that CMHA owed a duty to do these things is without merit.

In making the argument that a home study should have been done and that Owen's parents should have been evaluated for their fitness as parents, Rainey cites no statute or case law to support a claim that such a duty exists on behalf of CMHA. Rainey cites no statute or case law that would give CMHA the right to enter Owen's home for an assessment or any right to interview Owen's parents or any other relative to determine their fitness. Rainey cites no statute or case law that allows a social worker or any other employee of a North Carolina hospital to exercise the statutory rights given to DSS to intrude upon a parent-child relationship in South Carolina in order to conduct home studies and reach custody decisions. Rainey cites no statute or case law that allows *any* private entity to petition a family court for custody in contravention of DSS's statutory authority to make such decisions as it pertains to potentially abused or neglected children. Finally, regardless of how Rainey wishes to portray the alleged duty, Rainey contends without any citation of authority that CMHA should not have returned the child to his parents upon being ready for medical discharge.

As outlined extensively above, the Legislature has placed the duty of investigating suspected child abuse with DSS. DSS staffed this case with an attorney and multiple case workers, conducted an investigation, and conducted a home inspection. (See deposition of Krista Hinnant, pp. 32-36) (R. pp. 692-696) Divondra Hill, a case worker for DSS, performed a home inspection of Owen's home on December 21, 2009, prior to the second incident between Owen and his father. Neither Owen's mother, Kayla Lythgoe, nor his maternal grandparents, Charlotte and Larry Williams, who spent considerable time in

Owen's home, suspected that anyone had or would abuse Owen prior to his father admitting to such abuse in January of 2010. DSS did not seek emergency protective custody of Owen following this December 21, 2009 home study by DSS. It was certainly within DSS's right; however, no one else had the right to seek such custody. Rainey never explains what information a Levine Children's Hospital's social worker could have uncovered that was not revealed to DSS in its investigation. Even if Rainey could point to some additional information that Levine Children's Hospital may have uncovered that DSS did not, the law does not impose a duty to conduct such an inspection or assessment.

C. Levine Children's Hospital did not assume a duty.

Finally, Rainey argues that CMHA voluntarily assumed a duty to perform a full social work evaluation including home assessments and custody determinations when Levine Children's Hospital assessed Owen's physical condition and the possibility that his injuries were caused by non-accidental trauma. The trial court correctly rejected this argument.

Rainey cites the Restatement (Second) of Torts § 323 and Johnson v. Robert E. Lee Academy, Inc., 401 S.C. 500, 737 S.E.2d 512 (Ct. App. 2012), in support of her argument that CMHA assumed a duty. Neither Johnson nor the Restatement (Second) of Torts § 323 are applicable to this case because Levine Children's Hospital (1) did not assume any duty to do an assessment of Owen's home environment, (2) did not increase the risk of harm to Owen, and (3) no one relied on Levine Children's Hospital to do a home assessment.

"An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." Hendricks v. Clemson

Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003). "Ordinarily, the common law imposes no duty on a person to act." Id. at 456–57, 578 S.E.2d at 714. However, under certain situations, the law may impose a duty to act where one has voluntarily undertaken a duty. This proposition is set forth in Restatement (Second) of Torts § 323. This section states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
> (a) his failure to exercise such care increases the risk of such harm, or
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323.

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

his parents to retain custody. Accordingly, the argument that CMHA assumed a duty is untenable.

Rainey argues that a social worker at Levine Children's Hospital, Ms. Laura Newmark, acknowledged that she and another social worker, Katy Harrison, undertook a duty to assess Owen's home situation. While the social worker at Levine Children's Hospital suggested to DSS that DSS should conduct a home study of Owen's home environment, Levine Children's Hospital never undertook to conduct the assessment of Owen's home environment and never represented to DSS or anyone else that it would conduct such an assessment. (See Deposition of Laura Newmark, pp. 10-11) (R. p. 835) Rather, Newark testified that her role was to share information with DSS about Owen's medical work-up and trust DSS to complete its investigation and do a home assessment that the hospital social workers cannot do, as they have no authority to enter someone's home or compel interviews. (See Deposition of Laura Newmark, pp. 10-11 (R. p. 835); p. 69, ll. 4-23 (R. p. 850)). Rainey's argument that CMHA assumed a duty is a mischaracterization of the record in this case, as what Rainey actually contends is that because the hospital did any social work evaluation or assessment, they were required to do all of the social work evaluations or assessments, even when they did not volunteer to undertake a duty and had no authority to conduct such an investigation. This is not the law.

Furthermore, in order for a duty to exist under Restatement (Second) of Torts § 323, CMHA's alleged assumption of a duty would have had to increase the risk of harm to Owen. Restatement (Second) of Torts § 323. There is no evidence that Levine Children's Hospital or its employees did anything to increase the risk of harm to Owen,

as DSS was performing its own investigation, required the parents to enter into a safety plan, and two weeks later conducted its own home study.

Moreover, under Restatement (Second) of Torts § 323, one must show reliance upon the assumption of a duty. There is no evidence that anyone relied upon CMHA to conduct a home study or a social work evaluation of Owen and his family. DSS opened its own investigation and entered into a safety plan with Owen's parents. DSS conducted its own home inspection of Owen's home. Owen's parents were aware of DSS's involvement in the case and that DSS would be continuing to investigate and be involved after discharge. Levine Children's Hospital did nothing to create any reliance in Owen's family or DSS that it was taking over the investigation into Owen's home environment.

Finally, even if it could be argued that CMHA undertook a duty to Owen because it interviewed his parents in an effort to determine the cause or origin of the subdural hematoma, CMHA was free to cease an alleged social work role in Owen's case at any time because nothing it did increased the risk of harm to Owen. DSS not only conducted its own investigation, DSS is the only entity given legal authority to conduct such an investigation and remove Owen from custody of his parents. See Restatement (Second) of Torts § 323, cmt c. ("The fact that the actor gratuitously starts in to aid another does not necessarily require him to continue his services. He is not required to continue them indefinitely, or even until he has done everything in his power to aid and protect the other. The actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position than he was in before the actor attempted to aid him. . . . He may without liability discontinue the services through mere caprice, or because of personal dislike or enmity toward the other. Where, however, the actor's

assistance has put the other in a worse position [because the other] has been induced to forego other opportunities of obtaining assistance, the actor is not free to discontinue his services where a reasonable man would not do so."); see also Underwood v. Coponen, 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006) (noting that landowners occasional trimming of his tree did not create a duty for which he can be held liable, as even if he had assumed a duty to trim the trees, he could have abandoned the duty at any time so long as his actions did not increase any risk that might have existed) (citing Staples v. Duell, 329 S.C. 503, 506, 494 S.E.2d 639, 641 (Ct. App. 1997) (noting that landowner's patrolling the area for dead trees did not increase the risk of harm, as it did not hasten the decay of trees or affect when or where the trees would fall). Rather, CMHA merely aided the authorities in determining how Owen came to suffer a subdural hematoma. Owen did not miss other opportunities of assistance, as he was being assisted by DSS, the entity charged with assisting him.

Moreover, public policy weighs against finding CMHA voluntarily assumed to a duty to Owen merely because it cooperated with the authorities. The public policy of not imposing a duty outlined in Johnson, *supra*, Underwood, *supra*, and Staples, *supra*, is likewise applicable to this case. In not imposing a duty in each of those cases, the court noted the failure to impose a duty actually promoted good public policy. The court noted that to impose a duty in those cases would create "the highly undesirable precedent" of encouraging people to never inspect their land, thus potentially creating a greater harm. In Johnson, the Court noted that "contorting the Restatement to create a precedent that may have a chilling effect on cooperation with the authorities or other conduct that inures to the public good is ill-advised and poor public policy." Johnson, 401 S.C. at 505, 737

S.E.2d at 514. Such is the situation here. If this Court were to impose liability on CMHA for not conducting what Rainey alleges was a complete social work assessment and home study, the decision would result in hospitals refusing to interview the parents or relatives at all to avoid any liability. No acts which could be labeled by a plaintiff as "social work" would be done by hospitals in an effort to avoid liability. The better public policy is to encourage hospitals to provide as much additional information as possible to DSS.

II. AS AN ADDITIONAL SUSTAINING GROUND, THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THE CHARLOTTE-MECKLEBURG HOSPITAL AUTHORITY IS IMMUNE FROM LIABILITY.

As an additional sustaining ground, CMHA is immune from civil liability under this statute because it reported and participated in the investigation into the possible abuse of Owen. South Carolina has provided immunity for those who report or participate in investigations under Title 63. South Carolina Code section 63-7-390 provides:

> A person required or permitted to report pursuant to Section 63-7-310 or *who participates in an investigation or judicial proceedings resulting from the report, acting in good faith, is immune from civil and criminal liability* which might otherwise result by reason of these actions. In all such civil or criminal proceedings, good faith is rebuttably presumed. Immunity under this action extends to full disclosure by the person of facts which gave the person reason to believe that the child's physical or mental health or welfare had been or might be adversely affected by abuse or neglect. (emphasis added)

S.C. Code Ann. § 63-7-390 (2010).

Rainey alleges that CMHA should be liable to Owen because the Levine Children's Hospital's investigation into the home environment of Owen was not adequate and that though Levine Children's Hospital undertook some investigation, it should have

done more. Rainey, therefore, admits that CMHA participated in a DSS investigation that started after a report of possible abuse under Title 63. Under section 63-7-390, anyone "who participates in an investigation" is immune from civil liability. Thus, if Levine Children's Hospital participated in the investigation with DSS, but did not perform a sufficient investigation as alleged by the plaintiff, Levine Children's Hospital and CMHA are entitled to immunity under this statute nonetheless. To hold otherwise ignores the plain language of the statute and would inhibit the sharing of information obtained by medical providers with DSS.

The statute in question does not provide immunity if someone has acted in bad faith. The South Carolina Supreme Court has defined bad faith as follows:

> The opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to [fulfill] some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.

Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc., 379 S.C. 31, 664 S.E.2d 83 (Ct. App. 2008) quoting State v. Griffin, et al., 100 S.C. 331, 84 S.E. 876 (1915). See also Hoskins v. Aetna Life Ins. Co., 452 N.E.2d 1315 (Ohio 1983) ("A lack of good faith is the equivalent of bad faith, and bad faith . . . embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud."). The burden to establish bad faith is on the plaintiff.

In the case at bar, Levine Children's Hospital reported to DSS that Owen might have been a victim of child abuse. Levine Children's Hospital cooperated with DSS in its investigation. There is no allegation in the plaintiff's Complaint nor is there any proof in

the record that Levine Children's Hospital or its employees acted with a dishonest purpose, with conscious wrongdoing, or was motivated by an ulterior motive or ill will. Rather, the only evidence is that Levine Children's Hospital reported that Owen may have been a victim of child abuse and then cooperated with DSS in its investigation of the matter by sharing the findings of the medical team with DSS. Thus, not only can Rainey not show that CMHA breached any duty of care to Owen, CMHA is immune from liability under S.C. Code Ann. §63-7-390.

CONCLUSION

The crux of the plaintiff's case is that CMHA should have refused to discharge Owen to his parents after being advised to do so by DSS. CMHA had neither the authority or duty to take such action nor did it have the duty or authority to conduct an investigation of Owen's home environment. Because the plaintiff cannot establish any duty which CMHA breached, the trial court's Order should be affirmed.

SOWELL GRAY STEPP & LAFFITTE, LLC

BY: Monty Todd

Monteith P. Todd
Robert E. Horner
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211
(803) 929-1400
Counsel for Respondent, The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center

Columbia, South Carolina

January 24, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

RECEIVED
JAN 24 2014
SC Court of Appeals

Case No. 2011-CP-46-4508
Appellate Case No. 2013-002058

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

v.

The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center, South Carolina Department of Social Services, and Bruce Bryant, as the Constitutional Office of the Sheriff of York County, The York County Sheriff's Department, and York County ..... Respondents.

CERTIFICATE OF COUNSEL FOR FINAL BRIEF OF RESPONDENT

Counsel for Respondent certifies that the Final Brief of Respondent, The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center, complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted,

SOWELL GRAY STEPP & LAFFITTE, LLC

By: _____

Monteith P. Todd
Robert E. Horner
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211
(803) 929-1400
Counsel for Respondents, The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center

Columbia, South Carolina

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