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THE STATE OF SOUTH CAROLINA

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In The Court of Appeals

JAN 23 2020

SC Court of Appeals

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

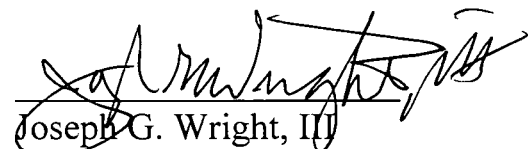
v.

Laurens County Health Care System and Greenville Health System, Respondents.

PETITION FOR REHEARING

Appellants, Chris Katina McCord, Christopher McCord, Janice Sherfield and Jerry Sherfield, respectfully petition the Court of Appeals for a Rehearing of the above-captioned matter based upon the points that Appellants contend the Court of Appeals overlooked or misapprehended in the Opinion filed January 8, 2020 as follows:

The Court of Appeals erred by not holding Laurens County Hospital responsible to Appellants for failure to comply with or exercise due care in complying with its responsibilities set forth in the Laurens County Hospital Medical Staff Bylaws.



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TABLE OF AUTHORITIES

CASES

<i>Johnson v Misericordia Community Hospital</i> , 301 N.W.2d 156, 164-65 (Wis. 1981)	Page 6
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STATUTES AND REGULATIONS

S.C. Code Ann. § 44-7-260(D)	Page 2
S.C. Code Ann. Regs 61-16, §301	Page 2
S.C. Code Ann. §44-7-750	Page 2

Chris Katina McCord, Christopher McCord, Janice Sherfield,
And Jerry Sherfield, Appellants,

V

Laurens County Health Care System and Greenville Health
System, Respondents.

MEMORANDUM

A) Introduction

In South Carolina, “Each hospital must have a single organized medical staff that has overall responsibility for the quality of medical care provided to patients.” (44-7-260(d); DHEC Reg 61-16 §301). The medical staff is also directed, “with the approval of the hospital governing body, (to) adopt bylaws, rules and regulations to govern its operation as an organized medical staff.” (DHEC Reg 61-16 §301).

Every hospital established under the provisions of South Carolina law is “for the benefit of the inhabitants of such county.. and any persons falling sick or being injured or maimed within its limit.” (§44-7-750). Thus, the logical conclusion is that the responsibilities undertaken by the medical staff in the operation of the hospital are for the benefit of the patients.

If the medical staff fails to exercise due care in the execution of its responsibilities under the medical staff bylaws and such failure causes damage to the patients, then the issue is whether the hospital is liable under the theory of corporate negligence (special relationship) or is not liable at all for the damage caused to its patients.

B) Relevant Responsibilities of Medical Staff

The medical staff of Laurens County Hospital adopted this requirement for initial and **continuing appointment** (emphasis added) of physicians to the medical staff:

- e) LIP's (licensed individual practitioners) shall **maintain** (emphasis added) valid professional liability insurance coverage in the amount deemed necessary by the Board from time to time and shall provide a current certificate of insurance as needed.
(Medical Staff Bylaws §3.2.1(e); R208)

The Medical Staff Bylaws require the medical staff “to develop and monitor compliance with the Bylaws, the Rules and Regulations of the Staff, and other hospital policies, all as may be in effect and may be from time to time amended.”
(Medical Staff Bylaws §2.2.7; R. 207)

The Laurens County Hospital medical staff and Board of Trustees made an independent decision to require physicians practicing in Laurens County Hospital to maintain professional liability insurance. This decision was incorporated into the medical staff bylaws which is a public document available to any patient at Laurens County Hospital. To ensure compliance by physicians with the professional liability insurance requirements, the person Laurens County Hospital assigned to monitor compliance was the manager of medical services. Unfortunately, she was not properly trained or educated concerning professional liability insurance policies; specifically, not understanding the difference between

an Occurrence and Claims-Made Policy. (R. 295, 293, 294, 292- Reaves deposition 41:7-10; 25:20 to 26:2; 37:6-10; 23:19-25; 24:8-18).

The decision to impose the professional liability insurance requirement on physicians practicing at Laurens County Hospital and to impose the requirement to monitor compliance on the medical staff was solely a decision made by the Laurens County Hospital Board of Trustees and medical staff. Such decisions were not judicially or legislatively mandated. The decision was made because the expert witnesses for both parties clearly established that the prevailing practice of hospitals was for the medical staff to require physicians privileged to practice in hospitals to have and maintain valid professional liability insurance coverage. (R. 199-200- John Hyde deposition 197:16 to 198:18; R. 311-312- James Weiss deposition 58: 4-8; 62:23 to 63:2). Obviously, the hospitals nationwide consider the requirement for physicians to have and maintain professional liability insurance as a part of the delivery of modern medicine. (See: Appellate Brief, C. Prevailing Practice, pp 8-10).

Dr. Brown was a member of the medical staff of Laurens County Hospital and subject to the bylaws. Thus, the medical staff was required to ensure Dr. Brown maintained professional liability insurance as long as he remained a member of the medical staff. Dr. Brown initially obtained professional liability insurance which he maintained during the surgeries of Mrs. McCord and surgery of

Mrs. Sherfield during which the malpractices occurred; however, the insurance ceased as to these claims on July 9, 2009, when the Joint Underwriting Association Claims-Made policy was not renewed. (R. 269-283)

From July 9, 2009 to January 28, 2010, Dr. Brown remained a member of the medical staff of Laurens County Hospital performing surgeries until the Laurens County Hospital Medical Executive Committee summarily suspended most of Dr. Brown's clinical privileges. (R. 304-306). During this six-month period, there were numerous instances of concerning medical acts by Dr. Brown. (See: Affidavit of Risk Manager Sandra Thompson, R. 296-299; December 14, 2009 letter from Michael Stribling, Chief of Surgery regarding continuing pattern of surgical misadventures by Dr. Brown, R. 303; January 22, 2010 letter by R.W. Watkins, MD regarding evaluations by eleven scrub techs of patient injuries caused by Dr. Brown (R. 301-302)).

Even with the numerous instances of serious injuries inflicted upon patients at Laurens County Hospital during this six-month period, Dr. Brown was allowed to remain a member of the medical staff without maintaining professional liability insurance covering the claims of Mrs. McCord and Mrs. Sherfield. He was allowed to perform surgeries for which both Dr. Brown and Laurens County Hospital received compensation and Dr. Brown received \$5,370 per month forgiveness of the \$644,447 subsidy payment given by Laurens County Hospital. (R. 212-219).

Further, during this six-month period from July 9, 2009 to January 15, 2010, Dr. Brown had the right to purchase Extended Reporting Period Endorsement (“Tail Insurance”) for \$28,023.00. The Tail Insurance would have reinstated the insurance for Mrs. McCord and Mrs. Sherfield. (R. 284)

Dr. Brown was allowed to remain a member of the medical staff of Laurens County Hospital from July 9, 2009 to January 28, 2010 without maintaining insurance covering the claims of Mrs. McCord and Mrs. Sherfield. Laurens County Hospital did not properly monitor Dr. Brown’s compliance nor require Dr. Brown to maintain this insurance coverage while he was a member of the medical staff during this six-month period.

C) Hospital Corporate Negligence

The Court of Appeals accurately states in the opinion that Appellants urge the Court to “extend the special relationship concept and recognize the theory of hospital corporate negligence, a doctrine accepted in numerous states, that imposes a duty of due care on hospitals based on the reality of their responsibility for patient safety and well-being, despite whatever personnel structures and contractual barriers hospitals may have created.” (citing *Johnson v Misericordia Cmty Hosp.*, 301 N.W.2d 156, 164-65 (Wis. 1981).

The operation of a hospital is a business- usually one of the largest businesses in a South Carolina county. Hospitals are in competition with other

health delivery services, as well as, other hospitals. Thus, to remain competitive, hospitals must provide services comparable to their competition. One such service is to require physicians practicing in the hospital to maintain professional liability insurance which, as testified to by the experts presented by the parties, John Hyde, PhD and James Weiss, is the common practice and prevailing requirement for hospitals in America. (R. 199-200- Hyde deposition, 197:16 to 198:18; R. 311-312- Weiss deposition 58:4-8; 62:23 to 63:2).

The Institute of Medicine recognized in its sentinel 1999 report “To Err is Human” that the number of deaths and serious injuries caused by preventable medical errors in America had reached “an epidemic” with at least 44,000 and perhaps as many as 98,000 people dying each year in American hospitals due to preventable errors. (R. 222) Also, the 2010 report from the Office of the Inspector General of the United States Department of Health and Human Services documented that 15,000 Medicare patients die each month from adverse events that contribute to their deaths of which 44% were clearly or likely preventable. (R. 223-225)

The response of the medical field, in part, to this epidemic has been to require the physicians that practice in hospitals to maintain a required level of professional liability insurance. The Medical Staff Bylaws of Laurens County Hospital specifically require physicians practicing in the hospital to “maintain

valid professional liability coverage” (R. 208, Medical Staff Bylaws §3.2.1 (e)) and state “The responsibilities of the staff are.... To develop and monitor compliance with the Bylaws, the Rules and Regulations of the Staff. (R. 207 Medical Staff Bylaws §2.2.7)


It is important to note that both the requirement for the physicians practicing at Laurens County Hospital to maintain professional liability insurance and the requirement for the medical staff to be responsible to monitor compliance with the Bylaws were decisions made by the Laurens County Hospital Board of Trustees and Medical Staff. The Court is not being asked to impose any requirement or obligation on Laurens County Hospital other than to exercise due care in performing the responsibilities to the patients which the hospital accepted in this special relationship.

D) Relief Requested

Appellants respectfully request the Court to grant the Petition for Rehearing, overrule the Order of Summary Judgment, and remand the case for a jury determination of whether Laurens County Hospital exercised due care in performing its responsibilities under the Medical Staff Bylaws.

Signature on separate page

Respectfully submitted,



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In The Court of Appeals

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

v.

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

Appellate Case No. 2017-001064

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JAN 23 2020

PROOF OF SERVICE

SC Court of Appeals

I certify that I have served the Petition for Rehearing and Memorandum of Appellants by depositing a copy in the United States Postal Service, on January 23, 2020 to the following:

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SC Court of Appeals

VIA HAND DELIVERY

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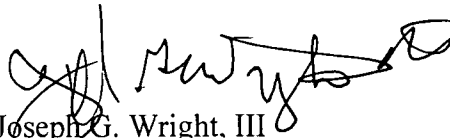
RE: Chris Katina McCord v Laurens County Healthcare System, et al.
Appellate Case No. 2017-001064

Dear Madam Clerk:

Please find enclosed for filing the original and six copies of the Petition for Rehearing and Memorandum of Appellants and check for filing fee.

Thank you in advance for your cooperation.

Very Truly Yours,



Joseph G. Wright, III

JGW/ap

Enclosures

cc: Kenneth N. Shaw, Esquire
H. Sam Mabry, Esquire
J. Ben Alexander, Esquire