THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2014-CP-30-291
Appellate Case No. 2017-001064
Opinion No. 5705 (Ct. App. filed January 8, 2015)

Christina Katina McCord, Christopher McCord, Janice Sherfield, Jerry Sherfield .... Petitioner

v.

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

PETITION FOR A WRIT OF CERTIORARI

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Appellants respectfully request that the Petition for Writ of Certiorari to review the decision of the South Carolina Court of Appeals be granted.

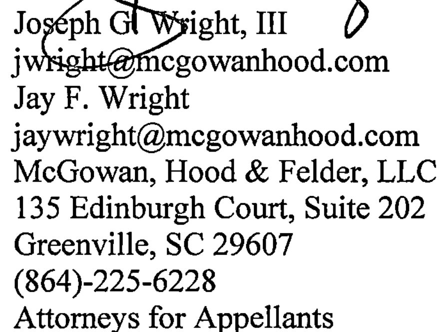

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TABLE OF AUTHORITIES

CASES

Foster v Greenville County Medical Society,
367 S.E. 2d, 468 S.C. (Ct. App. 1988) Page 1
Johnson v Misercordia Community Hospital, Page 1
301 N.W. 2d 156 (Wis. 1981)
Strickland v Madden,
448 S.E. 2d, 581 (Ct. App. 1944) Page 1

STATUTES AND REGULATIONS

S.C. Code Ann. § 44-7-260(d) Page 12
S.C. Code Ann. § 44-7-750 Page 12
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A) <u>Question Presented for Review</u>

This is a case involving a novel question of law.

The novel question of law is, if presented with the doctrine of hospital corporate negligence, would the South Carolina Supreme Court accept or reject the doctrine?

The South Carolina Court of Appeals noted in the Opinion that the "theory of hospital corporate negligence, a doctrine that has been accepted in numerous states, imposes a duty of due care on hospitals based on the reality of their responsibility for patient safety and well-being, despite whatever intricate personnel structures and contractual barriers hospitals may have created. *Johnson v Misericordia County Hosp.*, 301 N.W.2d 156, 164-165 (Wis. 1981) (collecting cases and discussing corporate negligence doctrine)." *McCord v Laurens County Health Care System and Greenville Health System, (Ct. App. 2020)*

The Court of Appeals also noted that "(W)e have considered the corporate negligence doctrine for hospitals before but passed on the invitation to recognize it" citing *Strickland v Madden,* 323 S.C. 63, 71-72, 448 S.E.2d 581, 586 (Ct. App. 1994) and *Foster v Greenville County Medical Society,* 295 S.C. 190, 193-94, 367 S.E.2d 468, 470 (Ct. App. 1988).

The Court of Appeals further held that "even if we were inclined to agree with the hospital corporate negligence doctrine, such a declaration of public policy is the function of the legislature or perhaps our supreme court."

Appellants submit that a special and important reason for the South Carolina Supreme Court to grant the writ of certiorari is so that it can be determined whether or not the doctrine of hospital corporate negligence is a valid doctrine in South Carolina. Specifically, in this case, whether or not the hospital has a duty to exercise due care to its patients in performing "the responsibilities" of the hospital medical staff that are contained in the Medical Staff Bylaws approved by both the hospital Board of Trustees and by the hospital Medical Staff.

B) Concise Statement of the Case

Appellants allege a special relationship existed between Laurens County Health Care System ("Hospital") and Appellants, as follows:

The providing of services by Hospital to Mr. and Mrs. McCord and Mr. and Mrs. Sherfield created a special relationship. This is the same relationship that exists between patients and hospitals throughout the United States. The patients elect to undergo surgery that could have serious consequences to their health and life expectancy. The patients elect to use the hospital and pay the hospital fees. The hospital agrees to provide the services to operate the hospital according to state and federal laws and regulations and to protect the patient, in part, by requiring the physicians to comply with the hospital policies and procedures, medical staff by-laws, and any contracts between the hospital and physicians. (Paragraph 41 Second Amended Complaint, page 144 ROA)

The trial judge in the Order Granting Summary Judgement assumed, without deciding, that "there was a special relationship between the parties." (Order Granting Summary Judgement, page 13 ROA).

Appellants alleged that Hospital failed to exercise due care to require Dr. Brown to comply with the Medical Staff Bylaws and the Subsidy Contract;

specifically, the requirement for physicians with privileges to maintain current, valid professional liability insurance coverage, as follows:

a) failure to require Dr. Brown to comply with the Medical Staff Bylaws which require the physicians privileged to perform surgery to maintain current, valid professional liability insurance coverage in an amount satisfactory to Laurens County Hospital;
b) failure to require Dr. Brown to comply with the Subsidy Contract requirement of maintaining professional liability insurance in the minimum amount of $1,000,000 per occurrence and $3,000,000 aggregate;
c) failure to require Dr. Brown, as a condition of having continuing privileges to perform surgery at Laurens County Hospital, to purchase Extended Reporting Endorsement Coverage (Tail) from JUA under a claims-made policy upon change to another insurance company;
d) failure to require Dr. Brown, as a condition of having continuing privileges to perform surgery at Laurens County Hospital, to purchase Prior Acts Endorsement Coverage from MAG Mutual under a claims-made policy upon change to another insurance company;
e) failure to train, instruct, or employ employees who were knowledgeable about the differences between Occurrence and Claims-Made policies, and who were knowledgeable about Extended Reporting Endorsement Coverage (Tail) and who were knowledgeable about Prior Acts Endorsement Coverage.. (Paragraph 81 Second Amended Complaint, page 153-154 ROA)

Mrs. McCord and Mrs. Sherfield suffered complications following surgeries performed by Dr. Brown, a local OB/GYN, at Hospital between December 2008 and May 2009. Concerns about Dr. Brown's competency arose when another of his surgical patients was re-admitted to Hospital with complications in October 2009. (Affidavit of Risk Manager, pages 296-299 ROA). Hospital medical staff reviewed

charts of Dr. Brown's patients in early December 2009, and Dr. Brown relinquished some surgical privileges on December 15, 2009. Hospital suspended him in January 2010 (Letter of Dr. Brown, page 289 ROA; Agreement, pages 304-306 ROA).

In 2014, Mrs. McCord and Mrs. Sherfield obtained default judgements against Dr. Brown for malpractice for $1,740,692.75 and $1,468,580, respectively; their spouses, Mr. McCord and Mr. Sherfield, obtained default judgements against Dr. Brown for loss of consortium for $58,789.04 and $50,000, respectively. (pages 181-190 ROA) Hospital was not a party to those actions. Appellants were unable to collect the judgements because there was no insurance covering their claims and Dr. Brown had moved to New Zealand. At the time of Mrs. McCord and Mrs. Sherfield's surgeries, Dr. Brown had a "claims-made" medical malpractice insurance policy through Joint Underwriting Association (JUA) with coverage limits of $200,000 per claim and $600,000 annual aggregate coverage, and excess coverage. (pages 269-283 ROA) In July 2009, Dr. Brown switched his medical malpractice insurance from JUA to MAG Mutual, but he declined to purchase either "prior acts" coverage from MAG Mutual or "tail" coverage from JUA that would have covered claims based on acts or omissions occurring before the effective date of the MAG policy.

Hospital's medical staff bylaws required the medical staff "shall maintain valid professional liability insurance coverage in the amounts deemed necessary by the Board from time to time and shall provide a current certificate of insurance as recommended." (Paragraph 3.2.1 (e) Medical Staff Bylaws, page 208 ROA)

Based on Hospital's interest in having OB/GYNs practicing locally, Hospital subsidized Dr. Brown's practice, though he was free to admit patients at other hospitals. The Subsidy Contract between Hospital and Dr. Brown provided:

> The physician shall furnish to the Hospital proof of insurance. Said policy shall cover professional liability in a minimum amount of $1,000,000 per claim/$3,000,000 aggregate or JUA/PCF coverage. Physician shall furnish to the Hospital evidence that the premium on said policy is prepaid and that said policy is in full force and effect. Further, Physician shall notify his insurance company that if said policy is canceled for any reason, notice of cancellation shall be provided by insurance company to the C.E.O. of the Hospital.
> (Article VI: Professional Liability Insurance, page 216 ROA)

C) <u>Argument in Support of Petition</u>

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. (pages 199-200 ROA- Hyde deposition, 197:16 to 198:18; pages 311-312 ROA- 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. (page 222 ROA) 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. (pages 223-225 ROA)

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 Hospital specifically require physicians practicing in the hospital to "maintain valid professional liability insurance coverage" (Medical Staff Bylaws §3.2.1 (e), page 208 ROA) and state "The responsibilities of the staff are... 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." (§2.2.7 Medical Staff Bylaws, page 207 ROA)

The medical staff of Hospital adopted the following 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.
> (§ 3.2.1(e) Medical Staff Bylaws R 208)

Hospital medical staff and Hospital Board of Trustees made an independent decision to require physicians practicing in 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 Hospital. To ensure compliance by physicians with the professional liability insurance requirements, the person 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. (pages 292-295 ROA, Reaves deposition 23: 19-25; 24: 8-18; 25:20-26:2; 37:6-10; 41:7-10)

The decision to impose the professional liability insurance requirement on physicians practicing at Hospital and to impose the requirement to monitor compliance on the medical staff was solely a decision made by Hospital Board of Trustees and Hospital medical staff. Such decision was not judicially or legislatively mandated. The decision was made because the expert witnesses for both parties clearly established that the prevailing practice of hospitals in America was to require physicians privileged to practice in hospitals to have and maintain valid professional liability insurance coverage. (pages 199-200, ROA-John Hyde deposition 197:16 to 198:18; pages 311-312, ROA-James Weiss deposition 58:4-8; 62:63 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, pages 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 Mrs. Sherfield during which the acts of malpractice occurred; however, the insurance ceased as to these claims on July 9, 2009, when the Joint Underwriting Association Claims-Made policy was not renewed.

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

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

Hospital received compensation. Dr. Brown also received $5,370 each month he was a member of the medical staff for forgiveness of the $644,447 subsidy payment given by Hospital. (pages 212-219, ROA).

During this six-month period, Dr. Brown was allowed to treat patients at Hospital without maintaining insurance on the malpractice acts committed on Mrs. McCord and Mrs. Sherfield. 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. (page 284 ROA) The Tail Insurance would have reinstated the insurance for Mrs. McCord and Mrs. Sherfield per testimony from the 30 (b)(6) designee of JUA. (pages 285-286 ROA- Davison deposition 32:11-25)

Dr. Brown was allowed to remain a member of the medical staff of Hospital from July 9, 2009 to January 28, 2010 without maintaining insurance covering the claims of Mrs. McCord and Mrs. Sherfield. During this six-month period, 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.

D) Legal Analysis

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.

The Medical Staff Bylaws sets forth the purpose of the medical staff to include "To initiate and maintain rules and regulations for the proper functioning of the staff." (§2.1.6 Medical Staff Bylaws, page 206 ROA)

The Medical Staff Bylaws also set forth the responsibilities of the medical staff to include "to develop and monitor compliance with the Bylaws, its Rules and Regulations of the Staff, and other Hospital polices, all as may be in effect and as may be from time to time amended." (§2.2.7

Medical Staff Bylaws, page 207 ROA)

The responsibility of the Medical Staff, which includes Dr. Brown, to use due care to comply with the Medical Staff Bylaws inures to the patients since the hospital 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)

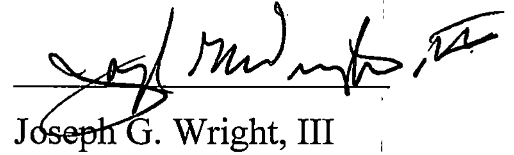
Appellants submit that the "Responsibilities" imposed on the Medical Staff as contained in the Medical Staff Bylaws, specifically Section 2.2 Responsibilities, are responsibilities to the patients for whose benefit the hospital exists. If the Medical Staff fails to exercise due care in the performance of its Responsibilities and a hospital patient suffers damage, then the patient should be allowed to recover damages against the hospital under the doctrine of hospital corporate negligence. Applying the doctrine to this case raises the factual question: did Hospital (through its medical staff) exercise due care in its responsibilities to require Dr. Brown to "maintain valid professional liability insurance" covering his surgeries on Mrs. McCord and Mrs. Sherfield during the entire time Dr. Brown was a member of the Hospital medical staff? If not, Hospital was a direct, contributing cause of the damage suffered by Mrs. McCord and Mrs. Sherfield.

E) **Conclusion**

Appellants respectfully request the South Carolina Supreme Court to grant the Writ of Certiorari and recognize the doctrine of hospital corporate negligence.

CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Petitioner's counsel certifies that a Petition for Rehearing was made on January 23, 2020 and denied on February 20, 2020.



Joseph G. Wright, III

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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

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari by depositing a copy in the United States Postal Service, on March 17, 2020 to the following:

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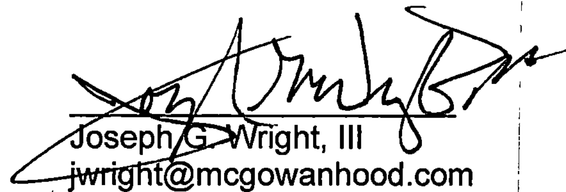

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