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
APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal From Laurens County Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2017-001064

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

v.

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

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1) The trial judge failed to find that the contracts between Plaintiffs and Laurens County Health Care System ("Laurens County Hospital or Hospital") were ambiguous.

2) The trial judge failed to find that a reasonable interpretation of "services to be rendered to the patient" is for Laurens County Hospital to require privileged physicians, including Byron A. Brown, MD ("Dr. Brown"), to comply with Hospital Bylaws and the Subsidy Contract.

3) The trial judge failed to find that Laurens County Hospital breached the contract with Plaintiffs by failing to require Dr. Brown to comply with Hospital Bylaws and the Subsidy Contract.

4) The trial judge failed to find that a special relationship arose between Laurens County Hospital and Plaintiffs which created a duty to exercise due care on the part of the hospital.

5) The trial judge failed to find that Laurens County Hospital breached the duty to exercise due care in monitoring, supervising or requiring Dr. Brown to comply with Hospital Bylaws and the Subsidy Contract.

STATEMENT OF THE CASE

Plaintiffs filed a complaint on March 26, 2014, alleging a cause of action for breach of contract and a cause of action for breach of the duty to exercise due care in the special relationship between Laurens County Hospital and patients who underwent surgery at Laurens County Hospital. The Amended Complaint was filed June 16, 2014, and the Second Amended Complaint was filed January 11, 2017. Defendants answered the complaint, admitted the existence of the contracts between Laurens County Hospital and patients who underwent surgery at Laurens County Hospital; but, denied that the contracts were breached and denied that a special relationship existed between Laurens County Hospital and patients who underwent surgery at Laurens County Hospital.

On February 28, 2017, the court granted Defendants' motion for summary judgment. On April 4, 2017, the court denied Plaintiffs' motion to alter or amend the judgement. On April 27, 2017, Plaintiffs filed a Notice of Appeal.

ARGUMENTS

A. STANDARD OF REVIEW

In a motion for summary judgment, the evidence and inferences which can be drawn therefrom are to be viewed in a light most favorable to the nonmoving party. Summary Judgment is a drastic remedy, it should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed facts. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E. 2d 69 (1999).

Summary judgment is improper where the motion presents a question as to the construction of a written contract, and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the contract. Where a contract is unclear, or is ambiguous, and capable of more than one construction, the parties' intentions are matters of fact to be submitted to the jury. If a contract is ambiguous, parole evidence is admissible to ascertain the true meaning and intent of the parties. *H.K. New Plan Exchange Property Owner 1, LLC v. Cohen*, 375 S.C. 18, 649 S.E.2d 181, 184 (Ct. App. 2007), citing *Bishop v. Benson*, 297 S.C. 14, 374 S.E.2d 517, 518-519 (Ct. App. 1988); *Wheeler v. Globe Rutgers Fire Ins. Co. of City of N.Y.*, 125 S.C. 320, 118 S.E. 609, 610 (1923); *Penton v. J.F. Cleckly Co.*, 326 S.C. 275, 486 S.E.2d 742, 745 (1997).

B. SALIENT FACTS

This case is an action against Laurens County Health Care System ("Laurens County Hospital") and Greenville Healthcare System ("GHS") for breach of contract and an action for breach of the duty to exercise due care in the special relationship between Laurens County Hospital and patients who underwent surgery at Laurens County Hospital. The patients are Chris Katina McCord ("Mrs. McCord") and Janice Sherfield ("Mrs. Sherfield") (sometimes collectively referred to as "Patients") and their spouses who are Christopher McCord ("Mr. McCord") and Jerry Sherfield ("Mr. Sherfield"), respectively. The Patients allege in the First Cause of Action that they entered into several contracts with Laurens County Hospital and Laurens County Hospital breached the contracts by failing to fully perform the services it provided. (R. pp. 150-152 - paragraphs 70, 71, 72, and 73 of the Second Amended Complaint). Also, the Patients allege in the Second Cause of Action that there was a special relationship between Laurens County Hospital and its patients undergoing surgery and that Laurens County Hospital was negligent in exercising due care which resulted in damages to the Patients. (R. pp. 153-155 - paragraphs 80, 81, 82, and 83 of Second Amended Complaint).

The Laurens County Hospital Medical Staff Bylaws require the medical staff "to initiate and maintain rules and regulations for the proper functioning of the staff". (R. p. 206 - Article II PURPOSES AND RESPONSIBILITIES 2.1.6). One of the rules and regulations is a "requirement for initial and continuing appointment to the Medical Staff ..... LIPs (licensed individual practitioners)

shall maintain valid professional liability insurance coverage in the amounts deemed necessary by the Board from time to time ...." (R. p. 208 - Article III STAFF APPOINTMENT 3.2.1(e))

Laurens County Hospital also entered into a Subsidy Contract with Dr. Brown which mandated compliance with "all provisions of the medical staff bylaws of the Hospital" and the "policy shall cover professional liability in a minimum amount of $1,000,000 per claim/$3,000,000 aggregate or JUA/PCF coverage." (R. p. 213 - Article II: PHYSICIAN OBLIGATION A.1; R. p. 216 - ARTICLE VI: PROFESSIONAL LIABILITY INSURANCE).

The sole expert witness for defendants, James W. Weiss, MHA, MBA, FACHE, testified that in 2008 and 2009 it was common practice for the governing body to require physicians practicing in hospitals in the United States to carry and maintain medical malpractice insurance. It was also "a requirement standard in the industry that the governing body require the medical staff .... to mandate that the .... that the practitioners have medical malpractice (insurance)". (R. pp. 311-312 - Weiss deposition, 58:4-8; 62:23 to 63:2). The expert witness for plaintiffs, John C. Hyde, II, PhD, testified that reports from federal agencies, such as the Institute of Medicine (R. p. 222) document in 1999 that between 44,000 and 98,000 people die each year from preventable medical errors. The Institute of Medicine labeled this level of deaths "the nation's epidemic of medical errors." This research was later confirmed in 2010 by the report from the Office of the Inspector General Department of Health and Human Services entitled *Adverse Events in Hospitals: National Incidence Among Medicare Beneficiaries* (R. pp.

223-260). Thus, Dr. Hyde confirmed and supported the testimony of the expert witness for the defendants that the common practice and prevailing standard of hospitals in the United States has been to require physicians to carry and maintain professional liability insurance. (R. p. 199 - Hyde deposition, 195:23 to 198:8.)

Mrs. McCord underwent three surgeries at Laurens County Hospital on December 18, 2008, February 19, 2009, and April 17, 2009. Mrs. Sherfield underwent surgery at Laurens County Hospital on May 29, 2009.

The surgeries on Mrs. McCord and Mrs. Sherfield were performed by Dr. Brown who was an obstetrician/gynecologist granted privileges to perform the surgeries by Laurens County Hospital. It has been judicially determined that Dr. Brown committed medical malpractice during each surgery and the following are verdicts and judgments rendered against Dr. Brown:

*	Chris Katina McCord	$1,740,392.75;
*	Christopher McCord (loss of consortium)	$ 58,789.40;
*	Janice Sherfield	$1,468,580.00;
*	Jerry Sherfield (loss of consortium)	$ 50,000.00.

(R. pp. 181-190)

Dr. Brown also committed medical malpractice on other patients after July 9, 2009.[1]

At the time of each McCord and Sherfield surgery, Dr. Brown had insurance under a claims made insurance policy issued by Joint Underwriting

[1] A jury verdict was returned for $2,960,000 in favor of Pamela and Carroll Neighbors against Dr. Brown on July 25, 2014 which was reduced because of noneconomic damages caps and prejudgment interest added for a net judgment of $1,125,464.35, which was later settled for an undisclosed amount; a jury verdict was returned for $2,000,000 in favor of Lisa and Jeffrey Dennie against Dr. Brown on August 29,2014 which was reduced because of noneconomic damages caps and prejudgment interest added for a net judgment of $1,609,445.44, which was later settled for an undisclosed amount. The cases of Dixie Mitchell and Betty and Donald Ward against Dr. Brown were settled for undisclosed amounts.

Association ("JUA"). (R. pp. 269-283). The coverage under a claims made policy terminates when the insurance policy is not renewed unless the expiring policy provides Extended Reporting Period Endorsement or the replacement policy includes Prior Acts Coverage. Although the JUA policy covering Dr. Brown ended on July 9, 2009, an Extended Reporting Period Endorsement was available for Dr. Brown to purchase at any time prior to January 15, 2010. (R. p. 284). The replacement policy was also a claims made policy issued by MAG Mutual Insurance Company ("MAG Mutual"). The MAG Mutual policy was issued effective July 9, 2009 but did not include Prior Acts Coverage. Prior Acts Coverage was made available; but, was declined by Dr. Brown. (R. p. 287 - paragraph 4 of Affidavit).

During the time period from July 9, 2009 to January 15, 2010, no action was taken by Laurens County Hospital to require Dr. Brown to comply with the Medical Staff Bylaws to maintain his professional liability insurance coverage for Mrs. McCord and Mrs. Sherfield by purchasing Extended Reporting Period Endorsement from JUA. Nor did Laurens County Hospital require Dr. Brown to continue coverage by purchasing Prior Acts Coverage from MAG Mutual. For the reasons detailed later, Plaintiffs contend that Laurens County Hospital failed to comply with and enforce the Medical Staff Bylaws and failed to enforce the contractual obligations of Dr. Brown under the Subsidy Contract to maintain valid professional liability insurance for patients who had undergone surgery at Laurens County Hospital. Also, Laurens County Hospital breached the duty of

due care in the patient/hospital special relationship by failing to exercise due care as will be fully shown in Section E – Breach of Duty in a Special Relationship.

Defendants admit to entering into a separate contract with the Patients for each of the four surgeries performed by Dr. Brown at Laurens County Hospital. (R. pp. 172-173 - Defendant's Supplemental Response to Request for Admission #5). The written documents state "services to be rendered" by Laurens County Hospital; however, the "services to be rendered" are not listed or identified. (R. pp. 191-194). The parties dispute what "services" are to be rendered by Laurens County Hospital. Patients submit that the "services to be rendered" include, but are not limited to, Laurens County Hospital complying with state law and DHEC regulations relating to the operation of the hospital, complying with its own Medical Staff Bylaws promulgated in accordance with state law and DHEC regulations, and complying with contracts that Laurens County Hospital entered into with physicians, specifically, Dr. Brown, that affect the health, safety, and legal rights of the Patients.

As a result of Laurens County Hospital breaching the contracts and negligently failing to exercise due care, there was no insurance coverage to pay the judgments rendered against Dr. Brown. Dr. Brown is judgment proof and has permanently left the United States to reside in New Zealand, (R. pp. 307-308 - MAG Mutual memo; R. pp. 151-155 - Second Amended Complaint, paragraphs 73, 74, 75, 76, 81, 82, and 83).

After the breach of contract with the Patients, Laurens County Hospital entered into an agreement with Greenville Healthcare System ("GHS"). The

agreement between Laurens County Hospital and GHS was effective July 1, 2013 whereby GHS agreed to assume, perform, and discharge any and all obligations of Laurens County Hospital related to the hospital which existed as of July 1, 2013. The liabilities and obligations of Laurens County Hospital to Plaintiffs for breach of contract and negligence related to the operations of the hospital that existed as of July 1, 2013, and were thus assumed by GHS. (R. pp. 179-180 - portion of Greenville Health System and Laurens County Health Care System agreement effective July 1, 2013, **Section 2.3 Assumption of Liabilities**) (R. p. 135 - Second Amended Complaint, paragraph 4).

C. PREVAILING PRACTICE

The Institute of Medicine, which acts under the responsibility of the National Academy of Sciences that was established by Congress in 1863 as an advisor to identify issues of medical care in the United States, published a report in 1999 entitled "To Err is Human". This was a sentinel report on health care in U.S. hospitals that noted "at least 44,000 people, and perhaps as many as 98,000 people, die in hospitals each year as a result of medical errors that could have been prevented. This death total exceeds the deaths from motor-vehicle wrecks and breast cancer. (R. p. 222). The total does not include patients who survived, but who are harmed by preventable errors and suffer substantial medical bills together with physical and psychological discomfort. (R. p. 199 - Hyde deposition, 195:23 to 196:8). The Institute of Medicine termed the situation in our nation's hospitals as an "epidemic of medical errors".

In 2010, the Office of Inspector General of the United States Department of Health and Human Services published a report entitled *"Adverse Events in Hospitals: National Incidences Among Medicare Beneficiaries"*. The report noted as follows:

* an estimated 13.5 percent of hospitalized Medicare beneficiaries experienced adverse events during their hospital stay;[2]
* an estimated 15,000 Medicare patients die each month from adverse events that contribute to their death; and
* 44 percent of adverse and temporary harm events were clearly or likely preventable.

(R. pp. 223-225).

The expert witness for the plaintiffs, who is a professor at the University of Mississippi Medical Center in the Department of Health Services and Family Medicine and has considerable experience teaching and working for private institutions in hospital management, issued the following opinions in his deposition that:

* there is and has been an epidemic of medical negligence causing serious injuries and deaths to patients in hospitals in the United States;
* because of this epidemic of medical negligence, it is both the common practice and a prevailing requirement for hospitals to require its physicians to carry and maintain professional liability insurance;
* the purpose of the hospitals requiring surgeons that operate in the hospitals to carry and maintain professional liability insurance is so patients injured due to the negligent conduct of surgeons have a means to recover damages for injuries wrongly inflicted in the hospital; and
* the professional liability insurance is for the benefit of the injured patient in addition to the benefit of the hospitals.

(R. pp. 199-200 - Hyde deposition, 197:16 to 198:18).

[2] Adverse event is defined as harm to a patient as a result of medical care.

As earlier noted, the expert witness for the Defendants, James Weiss, also acknowledged it was common practice for the governing body of the hospital to require physicians practicing in hospitals in the United States to carry and maintain medical malpractice insurance. (R. pp. 311-312 – Weiss deposition 58:4-8; 62:23 to 63:2).

The expert witness testimony clearly established that the prevailing practice of hospitals in the United States in 2008 and 2009 was for the medical staff of the hospital to require physicians privileged to practice in hospitals to have and maintain valid professional liability insurance coverage.

Consequently, Plaintiffs submit that a reasonable interpretation of the term "services to be rendered" in the contract between Laurens County Hospital and Patients is for Laurens County Hospital to require Dr. Brown to comply with the Medical Staff Bylaws to maintain valid professional liability insurance coverage for Mrs. McCord and Mrs. Sherfield.

D. BREACH OF CONTRACT

There is a dispute regarding the intent of the parties. Plaintiffs submit that the contract is reasonably susceptible to interpretation that included in the "services to be rendered" for Laurens County Hospital to require physicians who are privileged to practice in the hospital to comply with the medical staff bylaws and terms of contracts which affect the health, safety, and legal rights of patients. Defendants, on the other hand, contend that the intent of the parties is to limit the hospital's "services to be rendered" to only those services separately billed, i.e., room charges, medications, and meals.

The contracts between Patients and Laurens County Hospital are set forth, in part, by the document entitled "Conditions of Admission" which was executed prior to each of the surgeries performed on Mrs. McCord and prior to the surgery performed on Mrs. Sherfield. (R. pp. 191-194)[3]. The operative language is as follows:

> The undersigned (patient) agrees .... That in consideration of the **services to be rendered to that patient**, he hereby individually obligates himself to pay the account of the hospital, in accordance with the regular rates and terms of the hospital.
> (emphasis supplied).

Laurens County Hospital billed Mrs. McCord $56,962 and billed Mrs. Sherfield $51,269 for services rendered and was paid an agreed upon price for these services. (R. pp. 175-178; R. pp. 163-165 - paragraphs 28 and 34 of Answer to Second Amended Complaint).

The trial court in its order, held, in part, that the terms of the contract were unambiguous:

> First, taking the terms in their plain, ordinary and popular sense, the purpose of the sentence is unambiguous. It simply obligates patients to pay the bills they receive for the services rendered them by the Hospital. "Services to be rendered," in the context of that paragraph, refers to those services that the Hospital actually provides and bills for, such as room charges, medications, and meals, not ensuring that an independent physician has medical malpractice insurance.
>
> Plaintiffs contend that the "services to be rendered" include: compliance with state and federal laws and regulations; compliance with the Bylaws, and; compliance with the contracts between the Hospital and privileged physicians. However, those things aren't actually services rendered by the Hospital. At most, they go toward

[3] The Conditions of Admission for the McCord December 18, 2006 surgery cannot be located; however, Sandra Thompson, the Manager of Quality Resources which includes Risk Management, testified that the document was probably executed, but can't be located. (R. p. 197 - Thompson deposition, 49:17-25).

the standard of care for how services should be rendered by the Hospital.

(R. pp. 11-12)

The Order sets forth the intent of Laurens County Hospital; however, Plaintiffs contend their intent is different. Plaintiffs submit that their intent is based upon a recognition of the operational environment of a hospital. A hospital is not a Motel 6 which has published rates for rooms and items purchased from the room bar. The hospital is required by state and federal law to establish an environment that has as its primary purpose the health and safety of its patients. There are vital services performed by the hospital for which the hospital does not bill separately. South Carolina law requires each hospital to have a "single organized medical staff that has overall responsibility for the quality of medical care provided to patients". (*§44-7-260(D) S.C. Code; S.C. Code Ann. Regs. 61-16, § 301*). Further, the medical staff shall "with the approval of the hospital governing body, adopt bylaws, rules and regulation to govern its operation as an organized medical staff." (*S.C. Code Ann. Regs. 61-16, § 301*).

It should be recognized that a hospital performs many services to patients – not all of these services have separate rate schedules. The room rate charged to Mrs. McCord and Mrs. Sherfield was $815.00 per night. (R. pp. 176-178). The rate for one night at Motel 6 is probably around $100 with AAA discount. Can anyone seriously argue that the rooms at Laurens County Hospital are eight times better than rooms at Motel 6? A logical conclusion is that the costs of numerous other services are included in the hospital room rate including the cost of services of Laurens County Hospital ensuring that physicians privileged to

perform surgery in the hospital comply with the hospital bylaws and comply with the terms of contracts with physicians that relate to the health, safety, and legal rights of the patients.

Neither the "services to be rendered" nor the services that were rendered by Laurens County Hospital can be determined from the four corners of the contract. The CEO of Laurens County Hospital agreed when he testified as follows:

> Q. ... the conditions of admission state that services are to be rendered by the hospital to the patient?
> A. Right.
> Q. my question to you, quite simply, is the range of services to be rendered to the patient is not listed in this document, correct?
> A. Yes
> Q. Is that correct?
> A. Yes

(R. p. 322 - D'Alberto deposition 44:19-24)

Mrs. McCord testified that it was her intent and understanding that part of the "services to be rendered" by the hospital was the compliance by the hospital with legal requirements which directly or indirectly affected her medical care and legal rights. (R. p. 331 - McCord deposition 105:19 to 106:18).

The testimony of Mrs. Sherfield was similar. She also testified that it was her intention that the hospital would comply with all state and federal laws, for the hospital to require that all its privileged surgeons, specifically Dr. Brown, comply with the hospital rules and regulations, for the hospital to require its surgeons to comply with any contract they may have with the hospital about patient protection, and that she considers the hospital requirement that doctors maintain

professional liability insurance is protection to her. (R. p. 333 - Sherfield deposition 67:20 to 68:12). Also, Mrs. Sherfield knew, at the time of execution of the contract, that Laurens County Hospital required any doctor privileged there to have professional liability insurance. (R. p. 334 - Sherfield Deposition 71:5 to 72:9).

The CEO of Laurens County Hospital further testified that monitoring physicians compliance with that portion of the medical staff bylaws that requires physicians practicing in the hospital to maintain valid professional liability insurance would be a function of medical staff leadership. (R. p. 320 - D'Alberto deposition 32:5-17). As noted above, both Mrs. McCord and Mrs. Sherfield testified that part of their decision in choosing to undergo their elective procedures at Laurens County Hospital instead of another institution was their understanding that the Hospital would follow its own rules set up to protect the health and safety of its patients.

The intent of the Patients was that they would be protected during this hospital stay by all means available – the South Carolina law, rules and regulations of the hospital, bylaws governing the operation of the hospital, and contracts with physicians which have requirements to protect the patients.

Another issue raised by the Order is that the trial judge characterizes this action as a third party action. Plaintiffs respectfully disagree. For example, the Order states "At most, Plaintiffs would be incidental beneficiaries of the Medical Staff Bylaws and Subsidy Contract, but that would not give them standing to bring an action to enforce those documents." (R. p. 14). The Order cites in

support the Virginia case *Hesse v. Long and Foster Real Estate, Inc.*, 2012 WL 1427793 (E.D. Va. 2012) "noting that no jurisdiction recognizes a theory of liability whereby a third-party to a contract can sue the non-breaching party for failure to enforce the contract." (R. p. 14).

In response, Plaintiffs point out that the complaint does not allege a third party action, but alleges a direct action against a party to the contract, Laurens County Hospital, for breach of the contract in seven separate particulars for failures of Laurens County Hospital employees. (R. pp. 151-152 - paragraph 73, Second Amended Complaint). There is no allegation of an action for a third-party claim.

Another issue raised by the Order is that "It is undisputed that at the time of the surgeries on Plaintiffs, Dr. Brown had the required insurance." (R. p. 13). This statement is correct; however, the inquiry does not stop there because, as the Order notes, "It is undisputed that pursuant to the Hospital Medical Staff Bylaws Dr. Brown had **to maintain** (emphasis added) medical malpractice insurance in order to retain privileges at the Hospital." (R. p. 8). So, the requirement was for Dr. Brown to have and to maintain valid professional liability insurance. It is true that Dr. Brown had the insurance; but, it is also true that he did not maintain the insurance. It is undisputed that during the six months from July 9, 2009 to January 14, 2010, Dr. Brown was privileged at Laurens County Hospital; but, he did not "maintain professional liability insurance" covering the claims of Mrs. McCord and Mrs. Sherfield. Further, Laurens County Hospital

took no action to require Dr. Brown to comply with the Medical Staff Bylaws or the Subsidy Contract to maintain the required professional liability insurance.

Plaintiffs submit that Laurens County Hospital breached the contract with Plaintiffs by failing to require Dr. Brown to comply with the Medical Staff Bylaws to maintain valid professional liability insurance covering the claims of Plaintiffs during the time that Dr. Brown was continuously privileged by Laurens County Hospital. At the very least, a factual issue is presented as to the intentions of the parties in applying the requirement "to maintain professional liability insurance" to the contracts between the parties. Since the scope of the services language in the contract, i.e., "services to be rendered", cannot be determined within the four corners of the contract, then the term "services" is ambiguous. *Carolina Ceramics, Inc. v. Caroline Pipeline Co.*, 251 S.C. 151, 161 S.E.2d 179, 181 (1968) (holding that a contract is ambiguous if it is capable of being understood in more senses than one, if the agreement is obscure in meaning, or has indefiniteness of expression, or has a double meaning.)

The ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity. Any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for its verbiage. *Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 649 S.E.2d 494, 499 (Ct. App. 2007) citing *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423, 426 (1981) (quoting 17A C.J.S. Contracts §324).

The construction of an ambiguous contract is a question of fact to be determined by the jury. *Café Associates, Ltd. V. Gerangross*, 305 S.C. 6, 406 S.E.2d 162 (1991); *Peeples v. South Carolina Power Co*, 166 S.C. 150, 164 S.E. 605 (1932).

The *Rule 30(b)(6), SCRCP* designee for Laurens County Hospital, Sandra Thompson, testified that the Conditions of Admission forms were prepared by Laurens County Hospital, that the document in this form had been used by Laurens County Hospital for at least 15 years prior to the surgeries, and was used in all the McCord and Sherfield surgeries. (R. pp. 196-197 - Thompson deposition, 48:19 to 50:17). Additionally, it is apparent that Laurens County Hospital is the sophisticated party in this transaction and prepared this standard contract. Thus, the terms of the contract are to be liberally construed in favor of plaintiffs and any reasonable interpretation of "services" favorable to patients would be mandated. *Restatement (Second) of Contracts §206.*

Plaintiffs submit that for the reasons stated, a reasonable construction of the contract term "services to be rendered" is for Laurens County Hospital to require the physicians it permits to practice in the hospital to comply with state law and regulations, comply with its Medical Staff Bylaws, and comply with their contracts, specifically the portions that affect the health, safety, and legal rights of the patient.

Plaintiffs submit that Laurens County Hospital breached the contract with Plaintiffs by failing to require Dr. Brown to maintain valid professional liability

insurance covering the claims of Plaintiffs during the time that Dr. Brown was continuously privileged by Laurens County Hospital.

E. BREACH OF DUTY IN SPECIAL RELATIONSHIP

The Order sets forth that the trial judge assumed, without deciding, that there was a special relationship between the parties. (R. p. 13). Even so, Plaintiffs believe it would be appropriate to briefly discuss the law regarding special relationships and the facts which support a special relationship in this case.

The South Carolina Supreme Court in *Meddin v. Southern Ry-Carolina Division, et al.*, 218 S.C. 155, 62 S.E.2d 109 (1950), quoted with approval the United States Supreme Court, *Atlantic & Pacific R. Co. v. Laird*, 164 U.S. 393 (1896) as follows:

> If the relation of the plaintiff and defendants be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort.
> *Id.* 62 S.E. at 112

Further, the court held that "the negligent and willful failure to perform certain legal duties, not arising out of the particular contract between the plaintiffs and this defendant, but arising out of the relationship created by the contract...." *Id.* 62 S.E.2d at 113.

The South Carolina Supreme Court, in a case presenting a certified question from the Fourth Circuit Court of Appeals, held that a consulting firm owed a duty to the South Carolina State Ports Authority to exercise due care to accurately report objective factual data concerning the Charleston Port if it knew

or should have known that the report was to also be used by a competitor. The duty of the tort-feasor arises from the relationship to the injured party. *South Carolina Ports Authority v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324, 325-326 (1986).

The court further held that a cause of action is met if the following are proved:

1) the existence of a duty on the part of the defendant to protect the plaintiff (because of the special relationship);
2) the failure of defendant to discharge that duty; and
3) injury to the plaintiff resulting from the defendant's failure to perform.

Id. 436 S.E.2d at 325

The South Carolina Supreme Court issued an opinion in *Tommy L. Griffin Plumbing and Heating Co. v. Jordan, Jones and Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995) to a novel question in South Carolina – whether design professionals incur tort liability to a contractor for purely economic loss. At the time, a tort action for economic loss was not recognized. However, the South Carolina Supreme Court noted:

> In the last few years, a growing number of states have refused to apply the "economic loss" rule to actions against design professionals when there is a "special relationship" between the design professional and the contractor.
> (*Id*, 320 S.C. 49, 463 S.E.2d 85)

Also, the Supreme Court noted:

> applying these concepts (i.e., a special relationship creating a duty of care outside the terms of the contract) to professional liability, we have long held lawyers and accountants liable in tort for malpractice (citations omitted). These professionals owe a duty to the client ... which arises separate and distinct from the contract for services. (citations omitted). We see no logical reason to insulate

> design professionals from liability when the relationship between design professionals and the plaintiff is such that the design professional owes a professional duty to the plaintiff arising separate and distinct from any contractual duties between the parties or with third parties. (citations omitted). Whether such duty exists will depend on the facts and circumstances of each case. (*Id.* 320 S.C. 49, 463 S.E.2d 85)

Subsequently, the South Carolina Supreme Court cited *Tommy L. Griffin* favorably by reversing a lower court order of summary judgment and stating "Further, we noted that whether the design professional owes a duty depends on the facts and circumstances of each case and holding "also, we find it is a factual issue whether these circumstances give rise to a special relationship between Architect and Cullum." *Cullum Mechanical Construction, Inc. v. South Carolina Baptist Hospital,* 344 S.C. 426, 544 S.E.2d 838, 842 (2001).

Plaintiffs allege that the providing of services by Laurens County Hospital to the Patients created a special relationship. The Patients elected to undergo surgery that could have serious consequences to their health and life expectancy. The hospital provides certain services such as independently determining the scope of practice, types of surgeries and competency to perform each surgery that the physician can perform in the hospital. These services and others protect patients by operating the hospital in accordance with state law and regulations. (R. pp. 138, 144, 153 - paragraphs 13, 41, and 80 of Second Amended Complaint). The patient is virtually putting his life in the hands of the hospital employees. It is difficult to imagine anyone arguing that the relationship between a hospital and a patient does not constitute a special relationship. The

relationship is much more than economic – it is potentially life changing, resulting in living a life with or without pain, and either life or death.

The person Laurens County Hospital assigned to monitor the physicians to ensure compliance with the requirement to maintain professional liability insurance was Lynn Reaves who was manager of medical staff services. Ms. Reaves was the person solely responsible on behalf of the hospital for requiring physicians to maintain the proper insurance according to the Medical Staff Bylaws; however, as she pointed out in her testimony "ultimately our board was responsible for making sure physicians adhered to our bylaws". (R. p. 291 - Reaves deposition, 17:6-12). It is apparent that the Manager of Medical Staff Services had not been properly trained or educated concerning professional liability insurance policies, as partially evidenced by the following:

* she did not know the insurance coverage differences between a claims made policy and an occurrence policy because no one from Laurens County Hospital ever explained or informed her of the difference;
* she did not know the necessity of Extended Coverage Reporting (Tail Coverage) nor the necessity of Prior Acts Coverage when insurance companies were changed under a claims made policy;
* she did not know when Extended Coverage Reporting (Tail Coverage) or Prior Acts Coverage needed to be purchased or the amount of the cost to purchase;
* she did not know the effect of change in insurance companies on existing potential claims of patients injured at Laurens County Hospital by the malpractice of Dr. Brown;
* she never asked insurance companies to explain coverage even though the insurance policies advised interested persons to contact the company for further information;
* she did not know what the retroactive date meant in the MAG Mutual insurance certificate nor the steps to determine its meaning; and
* she did not inquire about restrictive endorsements contained in the insurance policy although the insurance certificate stated to contact insurance company for further information.

(R. pp. 295, 293, 294, 292 - Reaves deposition, 41:7-10; 25:20 to 26:2; 37:6-10; 23:19-25; 24:8-12; 24:13-18).

Additionally, it was known by the hospital staff during the period of July 9, 2009 to January 14, 2010, (i.e., the period during which Dr. Brown could purchase Tail insurance) that Dr. Brown was probably committing malpractice on numerous occasions.

The Affidavit of Sandra Thompson, who was Risk Manager, confirms that:

* concerns arose regarding the October 27, 2009 surgery by Dr. Brown on Dixie Mitchell as being malpractice;
* concerns were raised by Rufus Watkins, MD and Dr. Brown himself about Dr. Brown properly performing surgeries;
* in early December 2009, eleven charts of patients of Dr. Brown were sent for independent review by Dr. Madis who submitted his report to the hospital;
* Dr. Stribling, the Chief of Surgery of Laurens County Hospital, raised concerns about a surgical complication caused by Dr. Brown that occurred on December 11, 2009;
* Dr. Stribling raised concerns to Dr. Brian Weaver, Chief of Staff, on December 14, 2009 that resulted in Dr. Brown voluntarily relinquishing certain privileges on a temporary basis on December 15, 2009.

(R. pp. 296-299)

The memo dated January 22, 2010 by Dr. R.W. Watkins sets forth that it was common knowledge among all eleven Scrub Techs that Dr. Brown injured numerous patients during surgeries. The memo stated, in part, that:

> There was a general concern that there were an inordinate number of inadvertent injuries to the bladder, bowel, and ureters, especially with the sling procedure. There was (sic) concerns that when performed by this MD the procedure was dangerous and it was stated there were injuries in "almost every case" and that the procedures "caused more harm than good."

(R. p. 301)

The December 2009 letter from the Chief of Surgery, Dr. Stribling, to the Chief of Staff, Dr. Weaver, sets forth the gravity of concern the medical staff had about the surgical performance of Dr. Brown. Dr. Stribling states "a situation that is of great concern to me. I worry greatly about what appears to be a continuing pattern of surgical misadventures by Dr. Byron Brown. ..... Because of what appears to me to me (sic) a worrisome pattern of complications, I will, as Chief of Surgery, respectfully ask Dr. Brown to temporarily relinquish his privileges to do all pelvic surgery..." (R. p. 303).

The next day, Dr. Brown relinquished his privileges at Laurens County Hospital to perform hysterectomies, anterior and posterior repairs, and urethral slings until the beginning of 2010. (R. p. 289). Two months later, Dr. Brown voluntarily entered into an agreement with Laurens County Hospital to significantly reduce the gynecological surgeries he was allowed to perform and agreed to take a leave of absence from the hospital staff positions he held. (R. pp. 304-306).

The September 15, 2011 Memorandum of MAG Mutual documents that Dr. Brown self-reported ten separate claims (two for Mitchell for separate surgeries) against his insurance policy. Eight claims were covered, two were not, which were McCord and Sherfield. (R. pp. 307-308).

The foregoing is substantial evidence that officials at Laurens County Hospital knew that Dr. Brown was causing serious injuries to patients during surgeries at Laurens County Hospital. The injuries were occurring during the time period from July 9, 2009 to January 14, 2010. Laurens County Hospital kept

the privileges of Dr. Brown active to allow him to perform surgeries at Laurens County Hospital from which both Dr. Brown and Laurens County Hospital benefited financially. Dr. Brown also continued to receive a reduction of $5370 per month forgiveness of debt to the hospital. (R. p. 219). During this six month period, Dr. Brown could obtain Tail coverage from JUA. Since the Tail coverage was not obtained by Dr. Brown from JUA nor Extended Coverage from MAG Mutual, the professional liability coverage was not maintained in compliance with the Medical Staff Bylaws and Subsidy Contract.

The plaintiffs submit that a factual issue presents as to whether Laurens County Hospital, which was in a special relationship with McCord and Sherfield and with its patients undergoing surgery, negligently breached the duty of care to Mrs. McCord and to Mrs. Sherfield by failing to require Dr. Brown to comply with the requirements of the Medical Staff Bylaws and Subsidy Contract to maintain the professional liability insurance while Laurens County Hospital had financial leverage over Dr. Brown; and by failing to train, instruct, or employ employees knowledgeable in insurance matters; and by failing to monitor physicians committing malpractice and requiring these physicians to maintain professional liability insurance.

F. ADDITIONAL ISSUES

The trial judge briefly raised several additional issues which have not yet been addressed; but, will be addressed herein.

The Order states that "there is no law in South Carolina that requires doctors to maintain medical malpractice insurance much less any law that puts

the burden on hospitals to ensure that doctors maintain medical malpractice insurance." (R. p. 15). This is an accurate statement and Plaintiffs do not allege there is such a law. The hospital required, as a condition of being privileged to perform surgery, that the doctors must have and maintain professional liability insurance. (R. p. 207-208 - Article III STAFF APPOINTMENT 3.2.1(e)). Further, the hospital required Dr. Brown, as a condition of receiving a cash subsidy of $644,447, to execute a contract that required him to comply with the Medical Staff Bylaws and have professional liability insurance in a minimum amount of $1,000,000 per claim/$3,000,000 aggregate of JUA/PCF coverage. (R. p. 213 - ARTICLE II: PHYSICIAN OBLIGATIONS A.1; R. p. 216 - ARTICLE VI. PROFESSINAL LIABILITY INSURANCE).

Even though there is no law requiring hospitals to ensure doctors maintain medical malpractice insurance, the hospital can accept such a burden on their own – either because it is the prevailing practice of hospitals in the United States or because of contracts with its patients. ("parties may bind themselves as they see fit by contract, unless the contract would violate the law or is contrary to public policy". *South Carolina Department of Transportation v. M&T Enterprises of Mt. Pleasant, L.L.C.*, 379 S.C. 645, 656, 667 S.E. 2d 7, 14 (2008)).

And last, the Order also states that "Pursuant to the Act (South Carolina Tort Claims Act), a governmental entity cannot be held liable for the acts or omissions of an independent contractor." (R. p. 15). Again, this is an accurate statement; but, not relevant to this case. The allegations in this case are breach of contract by Laurens County Hospital through actions of its employees and

negligent breach of duty to exercise due care by employees of Laurens County Hospital. The allegations of breach of contract and negligence relate solely to the actions or inactions of employees of Laurens County Hospital. Consequently, the allegations of failure to exercise due care by employees of Laurens County Hospital are not excluded by the Tort Claims Act.

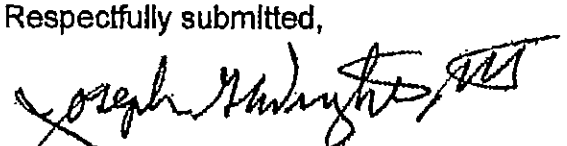
CONCLUSION

Plaintiffs request that the Court find that material terms of the contracts are ambiguous and capable of more than one construction. Thus, a factual issue is presented as to the true meaning and intent of the parties.

Plaintiffs also request that the Court find that a special relationship existed between Plaintiffs and Laurens County Health Care System and find that a factual issue is presented whether Defendants breached the duty to exercise due care in the special relationship.

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

Respectfully submitted,



September 7, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2017-001064

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

v.

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

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err in holding that Respondents/Defendants owed no legal duty to ensure there was medical malpractice liability insurance available to cover the default judgments Appellants/Plaintiffs received in separate medical malpractice actions they previously brought against their physician who was not a servant/employee of Respondents/Defendants?
2. Though not ruled on by the circuit court, was summary judgment also appropriate on the basis that Defendants' alleged acts or omissions did not proximately cause Plaintiffs' injuries and/or Plaintiffs' claims were barred by the statute of limitations?

STATEMENT OF THE CASE

Appellants/Plaintiffs Chris Katina McCord and Janice Sherfield each underwent surgical procedures performed by Dr. Byron Brown at Laurens County Hospital between December 2008 and May 2009. In subsequent civil actions (*McCord v. Brown*, C.A. 11-CP-30-1141 and *Sherfield v. Brown*, C.A. No. 12-CP-30-753), both women alleged they suffered injuries as a result of Dr. Brown's alleged negligence during their surgeries. Neither Laurens County Health Care System ("Laurens") nor Greenville Health System ("GHS") (collectively referred to hereinafter as "Defendants") were parties to either of those actions. Ultimately, on March 11, 2014, the McCords and Sherfields were both able to obtain default judgments against Dr. Brown and his practice, but Plaintiffs have been unable to collect those judgments.

On March 26, 2014, Plaintiffs filed the instant action against Laurens and GHS[1], essentially alleging that it was Laurens's fault that Plaintiffs have been unable to collect the judgments they received against Dr. Brown. More specifically, Plaintiffs alleged that Laurens breached a contractual

1 There were no allegations that GHS was independently liable to Plaintiffs. GHS was named as a defendant solely upon the basis that Plaintiffs alleged that subsequent to the acts giving rise to the causes of action, Laurens entered into an agreement of consolidation or merger with GHS whereby GHS assumed the existing liabilities of Laurens. Sec. Am. Compl. ¶ 4 (R. p. 135).

duty and/or an independent duty arising from the "special relationship" between the parties to ensure that Dr. Brown had medical malpractice insurance coverage for their claims against him. Defendants denied that any such legal duty was owed to Plaintiffs and, after extensive discovery, moved for summary judgment on that basis. The court heard Defendants' motion on January 6, 2017 and granted summary judgment by way of an order dated February 28, 2017 ("Order"). Plaintiffs filed a motion to alter or amend the judgment, which was denied by the court by way of an order dated April 4, 2017. Plaintiffs filed notice of the instant appeal on April 27, 2017.

STATEMENT OF FACTS[2]

This case arises out of surgeries that were performed on Appellants/Plaintiffs Chris Katina McCord and Janice Sherfield at Laurens County Hospital ("Hospital"), part of Laurens County Health System, from December 2008 to May 2009 by Dr. Byron Brown. It is undisputed that at the time of the surgeries, Dr. Brown had surgical privileges at the Hospital, but he was not employed by Laurens.[3] Dr. Brown had his own practice with an office located offsite from the Hospital. It is undisputed that pursuant to the Hospital Medical Staff Bylaws ("Bylaws"), Dr. Brown had to maintain medical malpractice insurance in order to retain privileges at the Hospital. And, it is undisputed that at the time of the surgeries, he was in compliance with the Bylaws, as Dr. Brown had a claims-made medical malpractice liability insurance policy through Joint Underwriting Association

2 The following facts were set forth in Defendants' Motion for Summary Judgment and have never been contested by Plaintiffs. See Defs.' Mot. Summ. J. (R. pp. 61-63); see generally Pls.' Mem. Opp'n. Summ. J. (R. pp. 96-122) Likewise, the circuit court found the facts were undisputed (see Order, R. p. 8-10) and Plaintiffs have not challenged that finding in their Initial Brief. See Brown v. Gurney, 201 U.S. 184, 189 (1906)(a fact assumed as true in the trial court cannot be contested in the appellate court)

3 There was a February 14, 2002 Agreement between Dr. Brown and Laurens whereby Laurens agreed to subsidize Dr. Brown's practice for three years (hereinafter "Subsidy Contract"), because the Hospital felt there were an insufficient number of OB/GYN physicians in the area. However, the Subsidy Contract made clear that Dr. Brown was an independent contractor who was free to admit patients at any hospital and maintain privileges to perform surgeries at any hospital.

("JUA") with coverage limits of $200,000 per claim and $600,000 annual aggregate. In addition, Dr. Brown had excess coverage through Patients' Compensation Fund, which pushed his total coverage up to $1,000,000 per claim and $3,000,000 annual aggregate.

A few months after the surgeries on Mrs. McCord and Mrs. Sherfield, in July, 2009, Dr. Brown decided to switch his medical malpractice insurance carrier from JUA to MAG Mutual. He bought a claims-made policy from MAG Mutual, which covered claims arising on or after July 9, 2009. When he made the change he declined to purchase either "tail" or "prior bad acts" coverage, which meant there would be no coverage for previously unreported claims that occurred prior to July 9, 2009. As a result, since neither Mrs. McCord nor Mrs. Sherfield put Dr. Brown, or anyone else, on notice that they planned to file a claim against him until well after July 9, 2009, there was no insurance coverage for either of their claims.

Following their surgeries, both Mrs. McCord and Mrs. Sherfield continued to experience issues and both had to seek additional medical care in an attempt to resolve those issues. As a result, they both decided to pursue legal actions against Dr. Brown. They both retained Joseph G. Wright, III of McGowan, Hood & Felder, LLC as their counsel. Mrs. McCord had retained Mr. Wright by July, 2010, while Mrs. Sherfield retained him in May 2011. A Notice of Intent ("NOI") was filed on behalf of Mrs. McCord on July 29, 2011. The NOI mediation took place on December 1, 2011. Plaintiffs have admitted that as of that mediation, Mr. Wright was aware of the possibility that Dr. Brown did not have medical malpractice insurance coverage for the claims being brought by both the McCords and Sherfields.

Despite knowledge of the fact that Dr. Brown lacked insurance coverage for their claims, the McCords and Sherfields continued their legal actions against him. The McCords filed their Complaint against Dr. Brown and his practice on December 9, 2011. They did not name Laurens as

a defendant in that action or assert any allegations against Laurens. The Sherfields filed their Complaint against Dr. Brown and his practice on September 25, 2012. Like the McCords, they did not name Laurens or assert any allegations against Laurens.

While those actions were pending, Dr. Brown moved out of the country and refused to continue participating in the defense of the actions. As a result, both the McCords and Sherfields were ultimately able to obtain default judgments against Dr. Brown and his practice. (See C.A. No. 11-CP-30-1141, March 11, 2014 Judgment in the amount of $1,480,457 for Chris Katina McCord and $50,000 for Christopher McCord and C.A. No. 12-CP-30-753, March 11, 2014 Judgment in the amount of $1,468,580 for Janice Sherfield and $50,000 for Jerry Sherfield.) To date, however, Plaintiffs have been unable to collect on those judgments.

ARGUMENT

I. Standard of Review

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. Calvert v. House Beautiful Paint and Decorating Ctr., Inc., 313 S.C. 494, 443 S.E.2d 398 (1994). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). When a plaintiff cannot establish facts to meet all the elements of the cause of action, summary judgment is appropriate. Bessinger v. Bi-Lo, Inc., 329 S.C. 617, 496 S.E.2d 33 (Ct. App. 1997); Hunter v. Dixie Home Stores, 101 S.E.2d 262, 232 S.C. 139 (1957). A party may not rely upon an issue of fact that is not genuine or an inference which is not reasonable to rebut a motion for summary judgment. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984).

Plaintiffs contend that Laurens breached a legal duty owed to them. "A legal duty is that which the law requires to be done or forborne with respect to a particular individual or the public at large." Byerly v. Connor, 301 S.C. 441, 443 415 S.E.2d 796, 798 (1992). A legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. Madison v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2007). The court must determine, as a matter of law, whether the law recognizes a particular duty. Id. If there is no duty, then the defendant is entitled to summary judgment as a matter of law. Id.

II. The Circuit Court Correctly Ruled that Laurens Did Not Owe a Duty to Plaintiffs, Either in Contract or Tort, to Ensure that Dr. Brown Had Medical Malpractice Insurance Coverage for Their Claims Against Him.

In the instant action, the circuit court correctly ruled as a matter of law that Defendants owed Plaintiffs no legal duty to ensure that Dr. Brown had medical malpractice insurance to cover the default judgments they received against him.

A. Defendants Did Not Owe Plaintiffs a Contractual Duty to Ensure that Dr. Brown Had Medical Malpractice Insurance

In all phases of a claim based on breach of contract, it is the court's duty to interpret and enforce the contract the parties actually made for themselves and the court cannot, under the guise of interpretation, create a better or different contract than the one the parties actually made. See Sphere Drake Ins. Co. v. Litchfield, 313 S.C. 471, 438 S.E.2d 275, 277 (Ct. App. 1993) (court "is limited to interpretation of the contract made by the parties" and "is without authority to alter a contract by construction or to make a new contract for the parties"); Chan v. Thompson, 302 S.C. 285, 395 S.E.2d 731, 734 (Ct. App. 1990) ("The rights of the parties must be measured by the contract which the parties themselves made, regardless of its wisdom, reasonableness, or failure of the parties to guard their rights carefully") (citations omitted). If the contract is unambiguous, it must be construed

according to the terms the parties have used, and the terms are to be interpreted in their plain, ordinary, and popular sense. Litchfield, supra. The court's duty is to enforce the contract made by the parties regardless of the hardship that may create for one of the parties. Gamble, Givens & Moody by Gamble v. Moise, 288 S.C. 210, 218, 342 S.E.2d 147, 151 (Ct. App. 1986).

Plaintiffs contend that Laurens owed them a contractual duty; however, they have been unable to produce a single document wherein Laurens directly promised to ensure that Dr. Brown would have medical malpractice insurance coverage. Rather, Plaintiffs are seeking to read into a contract terms and conditions that simply are not there.

1) **The Conditions of Admission form did not create a duty**

The document that Plaintiffs contend forms the basis of their breach of contract claim is the Conditions of Admission form which they executed prior to each of their surgeries (hereinafter "the Contract"). Specifically, Plaintiffs point to the first sentence of the paragraph titled "Financial Agreement", which states,

> *"The undersigned agrees he signs as agent or as patient that in consideration of the services to be rendered to that patient, he hereby individually obligates himself to pay the account of the hospital, in accordance with the regular rates and terms of the hospital."* (emphasis added)

Plaintiffs contend this sentence, and specifically the highlighted language, is ambiguous because it does not define what services are to be rendered. They thus argue it should be read to create a duty on the part of Laurens to ensure that Dr. Brown had medical malpractice insurance coverage for their claims against him; however, such an interpretation is completely unreasonable.

As an initial matter, the mere fact that "services to be rendered" is not specifically defined does not render the contract ambiguous. See Stribling v. Stribling, 369 S.C. 400, 404, 632 S.E.2d 291, 293 (Ct. App. 2006)(lack of clarity on casual reading is not enough to render a contract ambiguous). Regardless, taking the terms in their plain, ordinary and popular sense, the purpose of

the sentence is unambiguous. It obligates patients to pay the bills they receive for the services rendered to them by the Hospital. "Services to be rendered," in the context of that paragraph, simply refers to those services that the Hospital actually provides and bills for, such as room charges, medications, and meals. The Hospital has never billed a patient for ensuring that an independent physician had medical malpractice insurance coverage, and it did not bill Plaintiffs for any such "service" in this case; therefore, that could not reasonably be considered a "service to be rendered."

Plaintiffs contend that "services to be rendered" should be interpreted to include an obligation on the part of Laurens to ensure privileged physicians comply with the Medical Staff Bylaws and any contracts those physicians may have with the Hospital, as well as any laws and regulations. However, those things are not actually "services" rendered. At most, they go toward the standard of care for how services should be rendered at the Hospital. In essence, Plaintiffs seem to be contending that the Contract implies that services will be rendered in a certain manner; however, South Carolina does not recognize a cause of action for breach of an implied contract in the context of medical treatment. Banks v. Medical Univ., 314 S.C. 376, 444 S.E.2d 519 (1994).

Second, Plaintiffs' interpretation is unreasonable, because it requires one to ignore the plain and unambiguous language contained in other parts of the Contract. See McGill v. Moore, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009) (When considering whether or not a contract is ambiguous, the contract is "read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause."); see also Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007) ("The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof."). The paragraph entitled "Medical and Surgical Consent" states,

"The patient's care is under the direction of the attending physicians and the

hospital is not responsible for any act or omission of the physicians.... The undersigned recognizes that most medical staff members furnishing services to the patient, including the radiologists, pathologist, anesthesiologists, and the like (are) independent contractors and not employees of the hospital."

While Plaintiffs apparently want to ignore it, this paragraph should have made it very clear to them that the Hospital was not responsible for any acts or omissions of Dr. Brown. To the extent that Dr. Brown's failure to purchase tail or prior bad acts coverage could be construed as a violation of the Bylaws, it would be his violation of the Bylaws, not Laurens's. Plaintiffs cannot reasonably argue that Laurens promised to ensure that Dr. Brown maintained medical malpractice insurance when Laurens clearly stated that it was not responsible for anything Dr. Brown did or failed to do.

2) Plaintiffs' subjective interpretation of the Contract is irrelevant

Regardless of whether a contract is unambiguous or ambiguous, the court's role in either instance is to interpret the contract based on the parties' intent at the time they entered into the agreement. Klutts Resort Realty , Inc. v. Down'Round Development Corp., 268 S.C. 80, 89, 232 S.E.2d 20, (1977); Mattox v. Cassady, 289 SC 57, 60-61, 344 SE2d 620, 622 (1986). Even assuming the Conditions of Admission form could be considered ambiguous, which it is not, summary judgment was nevertheless appropriate because there is no admissible evidence in the record that, at the time the parties entered into the contract, there was any agreement concerning or even a discussion of Dr. Brown's malpractice insurance.

In their brief, Plaintiffs contend that the circuit court erred in failing to consider their intent when they entered into the Contract with the Hospital. Plaintiffs contend "that their intent is based upon a recognition of the operational environment of a hospital." (Appellants' Initial Brief, p. 12.) They contend that Mrs. McCord testified that it was her intent and understanding that part of "services to be rendered" included compliance by the Hospital with legal requirements which

directly or indirectly affected her medical care and legal rights.[4] (Id., p. 13.) They claim that it was Mrs. Sherfield's intent that the Hospital would comply with state and federal laws, as well as the Hospital rules and regulations and any contracts the physicians may have with the Hospital. They claim that Mrs. Sherfield knew at the time she executed the Contract that the Hospital required any doctor privileged there to have professional liability insurance. (Id. 13-14.) These claims by Plaintiffs are not supported by the facts in the record.

Plaintiffs' current subjective interpretation of the unambiguous language of the Conditions of Admission form is irrelevant. The law in South Carolina is well settled that one party's subjective interpretation of a contract is irrelevant when a court is constructing the contract's terms. M & M Group, Inc. v. Holmes, 379 S.C. 468, 476-77, 666 S.E.2d 262, 266 (Ct. App. 2008) (stating "[p]arties are governed by their outward expressions and the court is not free to consider their secret intentions"); Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 593, 658 S.E.2d 539, 543 (Ct. App. 2008) (party to contract "is not permitted to reinterpret written contract terms midstream because he is unhappy with the contract he executed"); Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007) ("Parties [to a contract] are governed by their outward expressions and the court is not at liberty to consider their secret intentions."); Bannon v. Knauss, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984) ("Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract was made. It does not depend on the subjective, after the fact meaning one party assigns to it.") (internal citations omitted).

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4 In support of their arguments, Plaintiffs cite to their deposition testimony; however, their deposition transcripts were not part of the record prior to summary judgment being granted. Rather, Plaintiffs submitted thetranscripts for the first time in support of their Motion to Alter or Amend Judgment. It is well established that a party cannot use a motion to reconsider, alter or amend a judgment to present evidence that could have been raised prior to the judgment but was not. Gartside v. Gartside, 383 S.C. 35, 43, 677 S.E.2d 621, 625 (Ct. App. 2009).

Plaintiffs have put forth no objective admissible evidence that either party outwardly expressed an intention at the time the Contracts were executed that "services to be rendered" would include Laurens ensuring that Dr. Brown would have medical malpractice insurance coverage for any claims Plaintiffs made against him. See North Am. Rescue Prods., Inc. v. Richardson, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015) (Intent is determined by looking at the "objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it."). While it is highly doubtful that either Mrs. McCord or Mrs. Sherfield gave any thought as to what "services to be rendered" meant prior to the filing of the instant action, it is undisputed that neither one of them discussed the language with anyone at the Hospital prior to their surgeries. (McCord Dep., R. p. 331), Sherfield Dep., R. pp. 333-34.) Further, neither discussed whether Dr. Brown had medical malpractice insurance with anyone at the Hospital. (Pls.' Resps. to Defs.' Req. for Admis., ¶ 9, R. pp. 88-90.) Neither one of them had ever seen the Medical Staff Bylaws or had any knowledge of what the Bylaws required. (Id., ¶¶ 6-7.) Neither one of them knew about the Subsidy Contract between Dr. Brown and Laurens prior to the filing of the instant lawsuit. (Id., ¶ 8.)

In their brief, Plaintiffs contend that Mrs. Sherfield knew at the time she executed the Conditions of Admission form that Laurens required doctors privileged there to have insurance. (App. Brief p. 14.) That is a mischaracterization of Mrs. Sherfield's actual testimony. While she initially stated that she knew about the insurance requirement, Mrs. Sherfield later confirmed that her belief was not based on any knowledge she had of the hospital Bylaws or the Subsidy Contract, but rather her erroneous belief, based upon what her aunt had told her, that there was a law in South Carolina which required physicians to maintain medical malpractice insurance. (Sherfield dep. pp. 71:10 – 72:13, R. p.334.) Mrs. Sherfield's erroneous belief based upon her aunt's statement is

insufficient to create a genuine issue of material fact. See Yarborough and Co. v. Schoolfield Furniture Industries, Inc., 275 S.C. 151, 268 S.E.2d 42 (1980) (excluding affidavits based almost entirely on hearsay); James F. Flanagan, South Carolina Civil Procedure (second edition), at p. 450 ("dispute of fact must be established by evidence that would be admissible at trial"). Regardless, it would still only be evidence of her subjective intent, which, as previously noted, is irrelevant.

Again, there is simply no objective, admissible evidence that, at the time Plaintiffs executed the Conditions of Admission forms, either party outwardly expressed an intention that "services to be rendered" would include anything regarding Dr. Brown's medical malpractice insurance. To the contrary, as previously noted, Plaintiffs admitted under oath that the issue of Dr. Brown's insurance was never discussed. The only objective evidence is the express language in the Contract that Laurens was not responsible for any acts or omissions of Dr. Brown, which would include his failure to maintain insurance coverage for Plaintiffs' claims against him. Richardson, 411 S.C at 377-78, 769 S.E.2d at 240 (the "primary concern" of a court interpreting a contract is to look at the intent of the parties, and the best evidence of the parties' intent is the contract's plain language).

3) **Neither Bylaws nor Subsidy Contract Created a Duty Owed to Plaintiffs**

Plaintiffs argue that "services to be rendered" included ensuring that Dr. Brown complied with the insurance requirements in the Bylaws and Subsidy Contract. As an initial matter, there is no evidence that Dr. Brown failed to comply with the requirements of the Bylaws and/or the Subsidy Contract. It is undisputed that, at the time of the surgeries on Plaintiffs, Dr. Brown had the required insurance. Plaintiffs contend that he fell out of compliance when he switched policies in July of 2009 and failed to purchase tail coverage or prior bad acts coverage; however, there is nothing in the Bylaws or the Subsidy Contract that specifically required Dr. Brown to purchase tail coverage or prior bad acts coverage, nor is there any evidence in the record that Laurens considered Dr. Brown to

be in violation of the Bylaws or in breach of the Subsidy Contract by his failure to purchase tail or prior bad acts coverage.

Nevertheless, even if the Bylaws and/or the Subsidy Contract could somehow be interpreted to have put a requirement on Dr. Brown to purchase tail or prior bad acts coverage, it is unclear why Plaintiffs believe that somehow created a duty owed to them by Laurens. Since Defendants first moved for summary judgment, Plaintiffs have continually argued that they are not attempting to make a third-party beneficiary claim. (*see i.e.* App. Brief pp. 14-15.) However, Plaintiffs appear to be talking out of both sides of their mouths. Plaintiffs point to their Second Amended Complaint and say the never alleged a third-party action, but rather alleged "breach of the contract in seven separate particular failures..." (App. Brief p. 15.) [5] However, those first two particulars are allegations that Laurens failed to require Dr. Brown to comply with requirements of the Bylaws and the Subsidy Contract. (Sec. Am. Compl. ¶ 73(a) and (b).) If Plaintiffs are not claiming to be third-party beneficiaries, then they have no basis for claiming those documents created a duty owed to them.

While Plaintiffs say they are not making a third-party beneficiary claim, they specifically argue the insurance requirements in the Bylaws and Subsidy Contract exist for their benefit. (see i.e. App. Brief p. 9.) However, there is no evidence that Laurens intended the insurance requirement to inure to the benefit of patients. Plus, Plaintiffs' contention is inconsistent with South Carolina law. See Trancik v. USAA Ins. Co., 354 S.C. 549, 581 S.E.2d 858 (Ct. App. 2003) ("Third-party-liability-insurance contracts are generally indemnity contracts whereby the insurer, or the first party, agrees to pay the insured, or the second party, the amount of any damages the insured may become legally

5 Statements in a party's pleadings are generally binding on the party. See Johnson v. Alexander, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015)(citing Elrod v. All, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964)).

liable to pay a third party; thus, the third party, or the incidental beneficiary, does not have a contractual relationship with the insurer and cannot maintain an action against the insurer for breach of the insurance contract.") At best, Plaintiffs would be incidental beneficiaries of the Medical Staff Bylaws and Subsidy Contract, but that would not give them the right to sue to enforce those documents. Id.

Regardless, even if Plaintiffs could be considered intended beneficiaries, such status would only give them standing to sue Dr. Brown as the promisor, not Laurens as the promisee. Under the terms of both the Bylaws and the Subsidy Contract, the obligation to maintain insurance belonged to Dr. Brown. To the extent his failure to purchase tail coverage meant he had not fulfilled his obligations, Plaintiffs would, at best, have been able to sue Dr. Brown for breach of the Bylaws and Subsidy Contract, but that would not give them the right to sue Laurens. See Sullivan v. U.S., 625 F.3d 1378 (Fed. Cir. 2010) (holding plaintiffs could not maintain a breach of contract action against Postal Service for failing to enforce a contract with a transportation company, and noting that the contract provision requiring the contractor to purchase liability insurance for its vehicles was intended to protect the Postal Service from potential risk and plaintiffs were at best incidental beneficiaries); Hesse v. Long and Foster Real Estate, Inc., No. 1:11cv506, 2012 WL 1427793 (E.D.Va.2012) (noting that no jurisdiction recognizes a theory of liability whereby a third party to a contract can sue the non-breaching party for failure to enforce the contract).

And to the extent that Plaintiffs may be contending as much (see App. Brief p. 25), the Bylaws and/or the Subsidy Contract did not create a duty owed to Plaintiffs as the result of a voluntary undertaking on the part of Laurens. First, a voluntary undertaking exists when one undertakes to render services to another which he should recognize as necessary for the protection of someone else. See *Restatement (Second) of Torts* § 323(a) (1965). In regards to the Bylaws and/or

the Subsidy Contract, Laurens did not undertake to render any services. Again, pursuant to both those documents, it was Dr. Brown who undertook to render OB/GYN services and agreed to maintain medical malpractice insurance while rendering those services. Nowhere in either of those documents does Laurens state that it will ensure that Dr. Brown will maintain insurance.

But regardless, even if Laurens had undertaken the responsibility to ensure that Dr. Brown maintained insurance, it would not have created a duty owed to Plaintiffs, because the undertaking did not make Plaintiffs situation worse, nor did Plaintiffs rely on the undertaking to their detriment. See Staples v. Duell, 329 S.C. 503, 494 S.E.2d 639 (Ct. App. 1997) (holding defendant's failure to follow an internal policy which voluntarily undertook to conduct inspections of rural property was not actionable). It is admitted that Plaintiffs had never seen or read the Medical Staff Bylaws or the Subsidy Contract prior to their surgeries, and they had no knowledge of the terms and conditions of those documents. (See Plaintiffs' Responses to Defendants' Requests for Admissions, ¶¶ 6-8, R. p. 89.) They did not discuss those documents or the requirement that Dr. Brown have medical malpractice insurance with anyone at the Hospital prior to their surgeries. (Id.) They simply knew nothing about the medical malpractice insurance requirement, and thus could not have relied on that requirement to their detriment.

B. A "Special Relationship" Did Not Create a Duty in Tort

Plaintiffs also contend the "special relationship" between the parties created a duty aside and apart from any duty that may have been created by the Contract; however, it is unclear what separate duty Plaintiffs are referring to. They appear to be arguing that the special relationship created the same duty they also argued was a contractual duty – a duty on the part of Laurens to comply with all laws and regulations and to ensure that Dr. Brown complied with insurance requirements in the Bylaws and the Subsidy Contract. The law does not allow Plaintiffs to argue a breach of the same

duty under both a contract and tort theory. See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones, & Goulding, Inc., 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995).

Regardless, the "special relationship," to the extent there even was one, did not create a duty on the part of Laurens to ensure that Dr. Brown had medical malpractice insurance coverage for Plaintiffs' claims. Plaintiffs continually argue that Laurens had an obligation to comply with all state and federal laws and regulations, but Plaintiffs have been unable to point to a single law or regulation which required Laurens to ensure that Dr Brown maintained medical malpractice insurance. In fact, under South Carolina law, doctors are free to forego medical malpractice insurance coverage if they so choose. And, as fully argued above, the insurance requirements in the Bylaws and Subsidy Contract did not create a duty owed to Plaintiffs. Again, Plaintiffs were at most incidental beneficiaries of those requirements, which would not give them standing to sue to enforce those requirements, and would certainly not give them grounds to sue Laurens.

In addition, Plaintiffs rely on several cases in support of their "special relationship" argument that are distinguishable from the instant case. In South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986), the Court held that a duty of care ran from a consultant to the commercial competitor the consultant was hired to critique when the consultant undertook to objectively analyze and compare the attributes of the commercial competitors for the purpose of giving one a market advantage over the other. 289 S.C. at 376-77. In Tommy L. Griffin Plumbing & Heating Co., the Court held the economic loss rule and lack of privity did not prevent a contractor from maintaining a tort action against a design engineer. 320 S.C. 49. In both cases, the Court held the defendants owed a duty to the plaintiffs to perform their contractual duties owed to a third party with due care. That is not what Plaintiffs are arguing should be done in this case. Rather, Plaintiffs are seeking to have Defendants held liable for Dr. Brown's failure to exercise due care in

performing his contractual duty to maintain insurance.

Finally, it would be contrary to public policy and the intentions of the Legislature in South Carolina to hold that Laurens owes a duty to its patients to ensure that independent physicians maintain medical malpractice insurance. As previously mentioned, there is no law in South Carolina that requires doctors to maintain medical malpractice insurance. In addition, Laurens and GHS are both governmental entities subject to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq. (1976, as amended), and it and its agents and employees are, therefore, entitled to all rights, privileges, defenses, limitations, and immunities afforded by the Act and afforded by the doctrine of sovereign immunity, as is retained by the Act. See Murphy v. Richland Mem. Hosp., 317 S.C. 560, 455 S.E.2d 688 (1995) (citing Benton v Roger C Peace, 313 S.C. 520, 443 S.E.2d 537 (1994)). Pursuant to the Act, a governmental entity cannot be held liable for the acts or omissions of an independent contractor. S.C. Code § 15-78-60(20); see also Smith v. Reg'l Med. Ctr., 394 S.C. 110, 713 S.E.2d 656 (Ct. App. 2011) (holding governmental hospital could not be held liable for the negligent acts of an independent contractor physician). Therefore, it is the public policy of this State and the intent of the Legislature that Laurens cannot be held liable for Dr. Brown's failure to have insurance coverage for Plaintiffs' claims. Further, the Act retains immunity for governmental entities for failing to enforce written policies, S.C. Code § 15-78-60(4); therefore, even if it could be said that Laurens failed to enforce its Bylaws, it would have immunity for failing to do so.

Plaintiffs were allegedly injured both physically and financially by Dr. Brown's acts and omissions. To the extent they seek to recover for those injuries, they must look to Dr. Brown, and Dr. Brown alone, for recovery.

III. Additional Sustaining Grounds for Summary Judgment

While granting summary judgment on the basis that Defendants did not owe a duty to

Plaintiffs to ensure Dr. Brown had medical malpractice coverage for their claims, the circuit court chose not to address Defendants' proximate cause and statute of limitations arguments in favor of summary judgment. (Order, p. 10, R. p. 16.) However, those arguments do set forth additional grounds for why the circuit court's order granting summary judgment should be sustained.

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

Plaintiffs' inability to collect their judgments has not been the result of any act or omission on the part of Laurens. Their current predicament can be blamed on several things, but none of those things are Laurens's fault. First, had Plaintiffs put Dr. Brown on notice of their claims at the time they first became aware of the injuries he allegedly caused them, there would have been coverage through Dr. Brown's JUA policy. It was not Laurens's fault that they each decided to wait so long to tell anyone that they felt they had been injured by Dr. Brown's negligence. Second, it was not Laurens's fault that Dr. Brown switched insurance carriers and failed to purchase tail coverage. And finally, it was not Laurens's fault that Dr. Brown decided to move out of the country.

In their Second Amended Complaint, Plaintiffs appear to argue that Laurens should have informed them that Dr. Brown had a claims-made policy in sufficient time for them to make a claim (Sec. Am. Compl. ¶¶ 66-68, R. pp. 149-50); however, their own "hospital expert" refuted that contention and stated that, in his opinion, Laurens had no duty to do anything until it found out that Dr. Brown had switched policies and failed to purchase tail coverage or prior bad acts coverage. (See Hyde Dep., R. p. 92.) But at that point, the damage had been done and there was nothing anyone - besides Dr. Brown - could do to rectify the situation.

Plaintiffs contend that Laurens should have done something to force Dr. Brown to purchase tail coverage, but Laurens could not force Dr. Brown to do anything. Dr. Brown was not an

employee of Laurens. Laurens had no direct control over him. The most Laurens could have done was terminate his privileges and require him to repay the amounts forwarded under the Subsidy Contract, but there is no evidence that doing either of those things would have prompted Dr. Brown to purchase tail coverage. In fact, Laurens ultimately did both of those things, and it did not have any impact on Dr. Brown's decision to not purchase tail coverage.

Plaintiffs' "hospital expert" conceded that Laurens could not have forced Dr. Brown to purchase tail coverage, but argued that Laurens had a duty to purchase tail coverage on Dr. Brown's behalf since he refused. However, Plaintiffs' insurance expert conceded that in order for a company to be able to purchase liability insurance coverage for a person, it must have an insurable interest in that person. (See Carson, Dep., R. pp. 94-95.) Therefore, for Laurens to have had an insurable interest in Dr. Brown, there had to be a possibility that Laurens could be held vicariously liable for Dr. Brown's actions, but as noted above, that was not a possibility under the Tort Claims Act. See Smith, supra. Accordingly, under the law, Laurens could not have purchased tail coverage on Dr. Brown's behalf even if it wanted to.

The fact is that once Dr. Brown made the decision to switch carriers and declined to purchase tail coverage or prior bad acts coverage, there was nothing anyone, other than Dr. Brown, could do to ensure that Plaintiffs would be compensated for the injuries he allegedly caused them. It was solely Dr. Brown's fault that Plaintiffs were injured and it was Dr. Brown's fault (not withstanding Plaintiffs' failure to timely file their claims) that Plaintiffs have been unable to collect any money for their alleged injuries.

B. Plaintiffs' Claims are Barred by the Statute of Limitations

Under the Tort Claims Act, the applicable statute of limitations is two years. S.C. Code Ann. § 15-78-110. South Carolina applies the discovery rule to claims for negligence. Republic Contr.

Corp. v. South Carolina Dep't of Highways & Pub. Transp., 332 S.C. 197, 503 S.E.2d 761 (Ct. App. 1998). Under the discovery rule, the statutory period begins to run when a person knew or by the exercise of reasonable diligence should have known that he had a cause of action. S.C. Code Ann. § 15-3-535 (2008); Smith v. Smith, 291 S.C 420, 426, 354 S.E.2d 36, 40 (1987). The test is objective and is based upon when a person could or should have known that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto. Burgess v. American Cancer Soc., South Carolina Div., Inc., 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989).; see also Austin v. Conway Hosp., Inc., 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct. App. 1987) (quoting Rogers v. Efird's Exterminating Co., Inc., 284 S.C. 377, 379, 325 S.E.2d 541, 542 (1985)). Further, the Supreme Court of South Carolina held in Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994):

> *"The focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer: The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer. If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury." (emphasis added).*

Applying the law to the facts of this case, it is clear that Plaintiff's claims are barred as matter of law. Plaintiffs are trying to recover damages sustained when they were allegedly injured by Dr. Brown; therefore, the statute of limitations for all claims based on those injuries began to run when those injuries occurred. Mrs. McCord felt she had been injured by Dr. Brown following her second surgery on February 19, 2009; therefore, all of her claims began to accrue on February 19, 2009. Mrs. Sherfield was told immediately following her surgery on May 29, 2009 that there had been complications; therefore, all of her claims began to accrue on May 29, 2009. Plaintiffs did not file this action until March of 2014, nearly three years beyond the statute of limitations.

Plaintiffs have argued that their claims against the hospital did not begin to accrue until they

discovered that Dr. Brown did not have medical malpractice insurance coverage for their claims against him (see Pl. Mem. in Opp. to Sum. J., R. p. 118-19), but that position is inconsistent with the damages Plaintiffs are seeking to recover. Plaintiffs have alleged that they are entitled to recover the full amount of the judgments they received against Dr. Brown.[6] (See Sec. Am. Compl. ¶¶ 83-85, R. p. 154-55.) Those judgments were compensation for the injuries allegedly caused by Dr. Brown during the aforementioned surgeries. Therefore, in this case, Plaintiffs are again seeking to be compensated for the injuries they sustained during those surgeries, and, as previously stated, all claims to recover for those injuries began to accrue at the time of the injuries in 2009. Wiggins, supra.

Nevertheless, even assuming that Plaintiffs claims did not accrue until they knew about the problem with Dr. Brown's insurance, their claims against Defendants would still be barred by the applicable statute of limitations. It is admitted that as of December 1, 2011 Plaintiffs, through their attorney, were aware of the possibility that Dr. Brown did not have medical malpractice insurance coverage for their claims against him. (See Plaintiffs' Response to Defendants' Requests for Admission, ¶ 5, R. p. 89) Therefore, even assuming the lack of insurance caused a distinct and separate injury, which again would be inconsistent with Plaintiffs' claimed damages in this case, Plaintiffs were aware of that injury as of December 1, 2011, which means they were still several months beyond the applicable statute of limitations when they filed this action on March 26, 2014.

In an attempt to get around the statute of limitations, Plaintiffs have argued they did not

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6 Plaintiffs have been inconsistent in how much they claim they are entitled to recover in this case. In their Second Amended Complaint they alleged they were entitled to recover the full amounts of the default judgments that they received in the actions against Dr. Brown (¶¶ 83-85). They have repeated that claim in their Initial Brief (p. 3); however, in their Memorandum in Support of their Rule 59(e) Motion, Plaintiffs acknowledged for the first and only time that the most they could recover would be the amount of insurance coverage that possibly would have been available to them had Dr. Brown purchased tail coverage or prior bad acts coverage. It is clear from Dr. Brown's policy that would have been at most $1,000,000 per claim. (See JUA Policy, R. pp. 57-59.)

suffer a loss until judgments were rendered against Dr. Brown, which they argue would have been covered by insurance but for Laurens's failure to ensure Dr. Brown had insurance. (see Pl. Mem. in Opp. to Sum. J., R. pp. 119-20.) Again, that argument contradicts their damages claims, since they are claiming the full amount of the damages they received in the default judgments, as opposed to the amounts that would have been covered by insurance. This argument by Plaintiffs highlights many of the fallacies of this case. First, it proves that Plaintiffs are essentially contending that Laurens should indemnify Dr. Brown when there is no evidence that Laurens ever agreed to do so. Second, it emphasizes how speculative their claims are. Despite what Plaintiffs contend, even if Dr. Brown had purchased tail coverage or prior bad acts coverage, they would not have recovered the entirety of their judgments. Dr. Brown had a $1M/$3M policy, so Plaintiffs would have received at most $1M each. And it is certainly a possibility that, given the fact that several other claims were made against Dr. Brown in 2009 (see App. Initial Brief, p. 5, fn 1), he may have already exceeded his $3M annual aggregate, which would have precluded Plaintiffs from receiving any insurance proceeds. In addition, the testimony from Plaintiffs' insurance expert confirmed that Dr. Brown's move out of the country and subsequent refusal to participate in the defense of the case could have provided grounds for his carrier to deny coverage for the claims altogether. (see Carson Dep., R. pp. 132-33). Finally, if Plaintiffs' claims are truly dependent upon their inability to collect the judgments, then their claims still have not ripened, as they have at least five more years in which they could enforce the judgments against Dr. Brown. See S.C. Code § 15-35-810.

C. While Plaintiffs may be in an Unfortunate Situation, Their Grievances are Misdirected to the Courts

Much of Plaintiffs' Brief is dedicated to putting forward "facts" and policy arguments as to why physicians and/or hospitals should be required to carry medical malpractice insurance. (see e.g.,

Appellants' Initial Brief at 8-10.) However, under our State Constitution and the case law, these policy considerations are for the Legislature, not this Court. The question of whether a physician should be required to purchase malpractice insurance and, more particularly, whether a hospital has any duty to ensure that a physician with privileges at the hospital has purchased such insurance, should be left to the Legislature, which is empowered by our State Constitution to make all of the policy decisions surrounding this issue and is best positioned to create and fund a regulatory scheme on this question going forward.

A fundamental underpinning of our system of government, found in both the United States and the South Carolina Constitutions, is the basic, core concept that there are three distinct branches of government, each with separate and distinct functions and roles in the operation of government. One branch does not and cannot perform any function of the other two branches of government. See S.C. Const. Art. I, § 8; Hampton v. Haley, 403 S.C. 395, 743 S.E.2d 258 (2013); Condon v. Hodges, 349 S.C. 232, 244, 562 S.E.2d 623, 630 (2002); McLeod v. McInnis, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

It is fundamental to the separation of powers mandate that "legislative and judicial powers are entirely separate." State v. Bates, 198 S.C. 430, 436, 18 S.E.2d 346, 348 (1941). The courts in South Carolina "[have] no legislative powers; it is [the court's] province to construe laws, not make them." Santee Cooper Resort, Inc. v. South Carolina Pub. Svc. Comm'n, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989); see also Am. Petroleum Inst. v. South Carolina Dep't of Revenue, 382 S.C. 572, 579, 677 S.E.2d 16, 20 (2009). The judicial branch shall not act in a way that infringes either directly or indirectly on any legislative function. See Brown v. State, 198 S.C. 430, 436, 18 S.E.2d 346, 348-49 (1941); see also Smith v. Wallace, 295 S.C. 448, 452, 369 S.E.2d 657, 659 (Ct. App. 1988) (stating "[t]his Court has no legislative powers").

Article III, § 1 of the South Carolina Constitution confers all legislative powers and functions solely on the South Carolina General Assembly. See Hampton, 403 S.C. at 403, 743 S.E.2d at 262; Calhoun Life Ins. Co. v. Gambrell, 245 S.C. 406, 411, 140 S.E.2d 774, 776 (1965). As stated in Hampton, "[i]ncluded in the legislative power is the sole prerogative to make policy decisions; to exercise discretion as to what the law will be." 403 S.C. at 403, 743 S.E.2d at 262 (internal citation omitted). According to our Supreme Court, "while non-legislative bodies may make policy determinations when properly delegated such power by the Legislature, absent such delegation, policy making is an intrusion upon the legislative power." Id. at 404, 743 S.E.2d at 262. Similarly, in Amisub of S.C., Inc. v. S.C. Dept. of Health and Envtl. Control, 407 S.C. 583, 596, 757 S.E.2d 408, 415 (2014), our Supreme Court stated that "we agree with the Supreme Judicial Court of Massachusetts that a 'principle of great importance in our triparte form of government is "that it is for the Legislature . . . to determine finally which social objectives or programs are worthy of pursuit." ' " (internal citations omitted).

Beyond policymaking, the legislative powers conferred to the General Assembly also include "the police power" of the State, which is the power to make laws for the general benefit of the public or for the benefit of a specific group. Sammons v. City of Beaufort, 225 S.C. 490, 499, 83 S.E.2d 153, 157 (1954); Gasque, Inc. v. Nates, 191 S.C. 271, 277-78, 2 S.E.2d 36, 39 (1939). The appellate courts of this State have routinely held that the regulation of hospitals and medical care providers is a legislative function. E.g., Dantzler v. Callison, 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956) (requirements for who is to diagnose and find out what is the cause and treatment of an illness is a legislative one; "it is not a judicial question"); Law v. City of Spartanburg, 148 S.C. 229, 238, 146 S.E. 12, 15 (1928) (holding the General Assembly has the constitutional power to create and regulate hospitals in South Carolina); State v. Barnes, 119 S.C. 213, 217-18, 112 S.E. 62, 63-64 (1922)

(determining licensing requirements for chiropractors is a legislative function, not a judicial one); Myrtle Beach Hosp. v. City of Myrtle Beach, 333 S.C. 590, 595, 510 S.E.2d 439, 441 (Ct. App. 1998), *aff'd as modified by* 341 S.C. 1, 532 S.E.2d 868 (2000) (holding whether city should be required to pay for the hospital services rendered to pre-trial detainees was "for the legislature to decide and not the court system").

The South Carolina Legislature has enacted legislation making insurance mandatory in certain circumstances. See, e.g., S.C. Code § 56-9-10, *et seq.* ("Motor Vehicle Financial and Responsibility Act"); S.C. Code § 42-5-20 (requiring insurance or proof of financial ability to pay under the South Carolina Workers' Compensation Law). Over the years, the South Carolina Legislature has passed various laws regulating medical malpractice claims,[7] but it has never required that a physician or medical care provider have medical malpractice insurance, let alone imposed a requirement on a third party, such as a hospital, to ensure that physicians have medical malpractice coverage. This policy choice must be honored by this Court. Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479, 485 (2017) ("in honoring separation of powers, we adhere to the principle that a court must not reject the legislature's policy determinations merely because the court may prefer what it believes is a more equitable result"); Scholtec v. Estate of Reeves, 327 S.C. 551, 559, 490 S.E.2d 603, 607 (Ct. App. 1997) (holding that, if the legislature intended a certain result, "we believe that it would have expressly stated so . . .").

To that end, no appellate court in this State has ever held that a physician has a duty to purchase medical malpractice insurance to provide benefits to a patient in the event the patient is injured by the alleged negligence of the physician. And certainly, no court in this State has imposed a requirement that a hospital ensure that physicians with privileges at the hospital have medical

7 See e.g. The Medical Malpractice Reform Act of 2005, S.C. Code § 15-79-110, et. seq.

malpractice coverage in place. "In the exercise of proper judicial self-restraint, the courts should leave it to the people, through their elected representatives in the General Assembly, to say whether or not [a longstanding common law principle] should be revised or discarded." Page v. Winter, 240 S.C. 516, 519, 126 S.E.2d 570, 572 (1962); Rogers v. Florence Printing Co., 233 S.C. 567, 574, 106 S.E.2d 258, 261-62 (1958).

Even if the Court sympathizes with Plaintiffs' policy arguments, it would violate the separation of powers mandate in our State Constitution for this Court to turn that sympathy into the result requested by Plaintiffs. See Gallman v. Springs Mills, 201 S.C. 257, 260, 22 S.E.2d 715, 716 (1942) (noting that "it is not within [the court's] power to translate [the court's] sympathy and conviction into law. That is a strictly legislative function."). While Dr. Brown's failure to obtain tail or prior bad acts coverage may result in an unfortunate financial outcome for Plaintiffs here, their policy concerns should be addressed to their elected state representatives, not this Court. See Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 81, 753, 846, 853 (2014). The Legislature is best positioned to make the policy decisions about whether medical malpractice insurance should be required, what type of insurance would be best, who, if anyone, should be required to ensure that the physician or medical care provider has such insurance, and to create and fund a regulatory scheme, through the appropriate agency, to regulate the terms and conditions of any such insurance coverage, including whether purchasing tail coverage for claims made policies should be required.

CONCLUSION

Plaintiffs have submitted "voluminous" amounts of information and set forth a litany of "facts" in an attempt to confuse the issue and create a question of fact, but this case is not nearly as complicated as Plaintiffs would have this Court believe. It is really quite simple. Plaintiffs were

allegedly injured by Dr. Brown and they each brought medical malpractice claims against him. His medical malpractice insurance carriers denied coverage for their claims. Dr. Brown moved out of the country while the claims were pending, which allowed Plaintiffs to obtain default judgments against him. They have been unable to collect those judgments. Plaintiffs correctly chose not to name Defendants in their actions against Dr. Brown, because they apparently recognized that Defendants could not be held vicariously liable for Dr. Brown's alleged medical malpractice, yet they now want Defendants to pay judgments rendered in actions Defendants were not parties to. It makes no sense that Defendants could somehow be vicariously liable for Dr. Brown's failure to pay the judgments rendered against him when everyone agrees they were not and could not have been vicariously liable for the underlying medical malpractice, yet that is what Plaintiffs are essentially arguing. While Plaintiffs are in a difficult position, they have known since they signed the Conditions of Admission forms that Defendants were not responsible for any acts or omissions of Dr. Brown, which would include his current failure to pay the judgments rendered against him.

Wherefore, for the reasons stated herein, Respondents Laurens County Health System and Greenville Health System respectfully request that this Court affirm the Order issued by Circuit Judge Eugene Griffith, Jr. granting summary judgment in favor of Respondents.

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September 13, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal From Laurens County Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2017-001064

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

v.

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

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STATUTES & REGULATIONS

OTHER AUTHORITIES

Appellants (sometime collectively referred to as "Patients") respectfully show unto the Court the following:

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

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

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

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

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

> 3.2.1(e) "LIP's shall **maintain** valid professional liability insurance coverage in the amount deemed necessary from time to time..." (emphasis added)
> (ROA, Attachment 4A, Page 12)

The Bylaws required Dr. Brown to maintain valid professional liability insurance which covered claims of the patients as a condition of practicing medicine in the hospital. It is undisputed that during the six months from July 9, 2009 to January 14, 2010, Dr. Brown was privileged at Laurens County Hospital and allowed to perform surgeries and furnish medical care; but, he did not maintain valid professional liability insurance covering the claims of Mrs. McCord and Mrs. Sherfield. (ROA, Attachment 15; ROA, Attachment 17; ROA, Attachment 26; ROA, Attachment 23).

The person solely responsible for "credentialing and privileging of physicians" was Mrs. Lynn Reaves. (ROA, Attachment 22, Deposition of Lynn Reaves; pages 4:17-18, 17:6-12, 37:3-5). Unfortunately, she was not aware of the difference between an occurrence policy and a claims made policy, nor was she aware of the effect on the insurance coverage of McCord/Sherfield of a change from JUA/PCF to MAG Mutual, nor was she familiar with tail insurance nor extended coverage. (ROA, Deposition of Lynn Reaves, pages 41:7-10, 25:20 to 26:2, 37:6-10).

The failure of employees of Laurens County Hospital to require Dr. Brown to maintain valid professional liability insurance covering the claims of McCord and Sherfield during a six month period that he was allowed to be privileged was a breach of the contract between the Patients and Laurens County Hospital. (ROA, paragraph 73, Second Amended Complaint). Also, Laurens County Hospital filed to exercise due care in the special relationship; with the Patients. (ROA, paragraph 81, Second Amended Complaint).[1]

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

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

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

In addition to being established under state law for the benefit of the inhabitants of the county, the South Carolina law requires each hospital to have a "single organized medical staff that has overall responsibility for the quality of medical care provided to patients." (*S.C. Code Ann. 44-7-260 (D) (1976); S.C. Code Ann. Regs. 61-16, §301*). Further, the medical staff shall "with the approval of the hospital governing body, adopt bylaws, rules and regulations to govern its

[1] "It is undisputed that pursuant to Hospital Medical Staff Bylaws ("Bylaws"), Dr. Brown had to maintain medical malpractice insurance in order to retain privileges at the Hospital." (ROA, Order, page 2; ROA, Brief of Respondents, page 2).

operation as an organized medical staff." (*S.C. Code Ann. Regs. 61-16, Section 301*).

Accordingly, since the South Carolina statute and DHEC regulations impose affirmative duties upon the governing body for the operation of the hospital, Patients submit that "compliance with state law and regulations" constitute a part of the contract between the parties. The Medical Staff Bylaws, which govern the operation of the hospital, require the medical staff to ensure that the physicians privileged to practice in Laurens County Hospital "maintain valid professional liability insurance coverage" during their appointment to the medical staff. (ROA, Attachment 8, Section 3.2.1).

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

As noted in the Brief of Appellants, the expert witness for Laurens County Hospital, James W. Weiss, MHA, confirmed that "it was common practice for the governing body, in 2008 and 2009, to require physicians practicing in the hospital to carry and maintain medical malpractice insurance." (ROA, Attachment 28; page 58:4-8). The reason it was common practice for hospitals to require physicians to maintain professional liability insurance was because the Institute of Medicine reported in its sentinel report, entitled "To Err is Human", in 1999 that the situation in our nation's hospitals was an "epidemic of medical errors." The report estimated that "at least 44,000 and perhaps as many as 98,000 people, die in hospitals each year as a result of medical errors that could have been

prevented. This death toll exceeds the deaths from motor-vehicle wrecks and cancer." (ROA, Attachment 11).

Following the Institute of Medicine report, the Inspector General of the United States Department of Health and Human Services published a report entitled "Adverse Events in Hospitals: National Incidences Among Medicare Beneficiaries."

The report noted as follows:

* an estimated 13.5 percent of hospitalized Medicare beneficiaries experienced adverse events during their hospital stay;
* an estimated 15,000 Medicare patients die each month from adverse events that contribute to their death; and
* 44 percent of adverse and temporary harm events were clearly or likely preventable.
(ROA), Attachment 12)

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

Additionally, Patients gave deposition testimony regarding their intent and their understanding regarding "services to be rendered". (pages 13-14 Brief of

Appellants; ROA, Attachment 35, McCord deposition pages 105:19 to 106:18; ROA, Attachment 36, Sherfield deposition pages 67:20 to 68:12).

Mrs. McCord testified it was her intent and understanding that part of the "services to be rendered" by the hospital was the compliance by the hospital with legal requirements which directly or indirectly affected her medical care and legal rights. (ROA, Attachment 35, McCord deposition pages 105:17 to 106:18). The testimony of Mrs. Sherfield was similar. It was her intention that the hospital would comply with all state and federal laws, especially to require its privileged surgeons to comply with the hospital rules and regulations for doctors to maintain professional liability insurance. (ROA, Attachment 36, Sherfield deposition pages 67:20 to 68:12). Also, Mrs. Sherfield knew, at the time of execution of the contract, that Laurens County Hospital required any doctor privileged there to have professional liability insurance. (ROA, Attachment 36, Sherfield deposition pages 71:5 to 72:9). [2]

The intent of the Patients was that they would be protected during their hospital stay by all means available – South Carolina law, rules and regulations of the hospital, bylaws governing the operation of the hospital, and contracts with physicians which have requirements to protect the patient.

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

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

Respondents argue at several points in their brief that Laurens County Hospital "could not force Dr. Brown to do anything", "there was nothing anyone – besides Dr. Brown – could do to rectify the situation", "Laurens had no direct control over him" and "there is no evidence that doing either of those things would have prompted Dr. Brown to purchase tail insurance." (pages 17-18, Brief of Respondents).

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

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

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

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

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

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

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

The Claims-Made Policy issued by JUA/PCF terminated 7/9/2009. (ROA, Attachment 15). The Extended Reporting Period Endorsement, i.e. tail insurance, could have been purchased on, or before, 1/14/2010. (ROA, Attachment 17). During this six month period from 7/9/2009 to 1/14/2010, Dr. Brown remained a member of the Medical Staff of Laurens County Hospital

performing surgeries until he temporarily relinquished surgical privileges to perform "hysterectomies, anterior and posterior repairs, and urethral slings." (ROA, Attachment 27).

As a member of the Medical Staff and an LIP ("Licensed Individual Practitioner"), the Bylaws mandated that Dr. Brown "maintain valid professional liability insurance coverage" to retain "continuing appointment to the Medical Staff", i.e. privileges to perform surgery.

Further, Dr. Brown was allowed to receive a monthly forgiveness of debt owed to Laurens County Hospital for previously provided subsidy payments as set forth in the Subsidy Contract. (ROA, Attachment 9, Article IV: Repayment). However, Dr. Brown was required to keep the professional liability insurance in full force and effect or the Hospital could terminate the Subsidy Contract and require the unpaid subsidy to immediately become due and payable. (ROA, Attachment 9, Article VI: Professional Liability Insurance).

During the six month period from 7/9/2009 to 1/14/2010, Dr. Brown was privileged to perform surgery as a member of the Medical Staff but had not purchased the tail insurance. Dr. Brown was receiving a monthly reduction of the subsidy payment of $5370 per month. If Dr. Brown was in violation of the contract, he faced a potential demand for over $250,000 for the portion of the subsidy not forgiven. (ROA, Attachment 10).

As previously noted, Laurens County Hospital employees were responsible to require Dr. Brown to comply with the Bylaws and maintain professional liability insurance for claims prior to 7/9/2009 which included

McCord and Sherfield claims. Further, Laurens County Hospital had leverage to force Dr. Brown to comply with the Medical Staff Bylaws provisions requiring members of the Medical Staff to maintain professional liability insurance. The leverage included 1) allowing Dr. Brown to retain privileges performing surgeries at Laurens County Hospital to earn money from his profession, 2) continuing monthly forgiveness of subsidy payments of $5370 per month, and 3) not triggering the acceleration of over $250,000 in outstanding subsidy payments.

Apparently, the reason Laurens County Hospital did not require Dr. Brown to maintain professional liability insurance coverage on the claims of McCord and Sherfield is because the person responsible for physician compliance did not know the reason for Extended Reporting Period Endorsement ("tail") or Prior Acts Coverage insurance. (ROA, Attachment 22, Lynn Reeves deposition, pages 17:6-12, 23:23-25, 25:20 to 26:2, 37: 6-10)

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

* Affidavit of Sandra Thompson – Administrator for Quality and Compliance summarizing medical negligence events of Dr. Brown (ROA, Attachment 23, paragraph 4);
* MAG Mutual Memorandum regarding 8 medical malpractice claims submitted by Dr. Brown (ROA, Attachment 23);
* Letter of Michael Stribling, MD, Chief of Surgery – regarding continuing pattern of surgical misadventures by Dr. Brown (ROA, Attachment 25); and

* Memo of Rufus W. Watkins, MD – regarding eleven Scrub Techs concern for the inordinate number of Inadvertent injuries to the bladder, bowel, and uterus, especially with the sling procedure.

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

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

1. Breach of Contract

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

The pre-suit mediation in McCord was held December 1, 2011 and it was discovered that MAG Mutual Insurance Company was not providing insurance coverage for the claim. Subsequently, it was learned in discovery that JUA/PCF did not issue tail insurance. Thereafter, McCord and Sherfield obtained judgments on March 11, 2014 against Dr. Brown for his acts of medical negligence. (ROA, Attachment 4 – Exhibit 5 and Exhibit 6).

The failure of Dr. Brown to maintain professional liability insurance was discovered at, or around, the mediation held December 1, 2011. The action at bar was filed March 29, 2014 which was within three years of discovery of the

breach so there is no violation of the statute of limitations for the breach of contract action.

2. Negligent Breach of Duty of Care

An action for negligence under the South Carolina Tort Claims Act must be "commenced within two years after the date the loss was or should have been discovered." *S.C. Code §15-78-10.* It is clear that a cause of action for negligence cannot accrue until there is an injury. An injury must first occur before a party can maintain an action to enforce it since injury is an element of a cause of action in tort. *McAlhany v. Carter*, 781 S.E.2d 105 (S.C. Ct. App. 2015).

The plaintiffs did not suffer a loss by the actions of Laurens County Hospital nor have a right to sue Laurens County Hospital until judgment was rendered against Dr. Brown. At that point, the negligent acts of Laurens County Hospital employees resulted in a loss to Patients, i.e., judgments which would have been covered by professional liability insurance but the insurance coverage was not available due to the negligence of employees of Laurens County Hospital. The judgments in favor of McCord and Sherfield were rendered March 11, 2014. (Attachment 4 – Exhibits 5 and Exhibit 6). The action against Laurens County Hospital was filed 15 days later on March 26, 2014, well within the two year time period.

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

Respondents begin their argument under this heading as "Much of the Plaintiffs' Brief is dedicated to putting forward "facts and policy arguments as to

why physicians and/or hospitals should be required to carry medical malpractice insurance." (see, e.g., Appellants' Brief at 8-10).

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

For example, Respondents argue in support of the Order that "Services to be Rendered" in the context of that paragraph, refers to those services that the Hospital actually provides and bills for, such as room charges, medications, and meals, not ensuring that an independent physician has medical malpractice insurance. (ROA, Order, pages 5 to 6). Patients point out that although the Order recognizes meals as a service, the hospital does not bill separately for this service. (ROA, Attachment 2). Nor does the hospital bill separately for nursing care although it should be acknowledged that this is a service provided by the hospital. Further, the record is devoid of any schedule of services which are to be separately billed by the hospital.

Plaintiffs point out that Laurens County Hospital is required by state law and DHEC regulations to provide other services on behalf of patients, namely, "maintaining a single organized medical staff that has overall responsibility for the quality of medical care provided to patients" (*S.C. Code Ann. §44-7-260(D)*) and "the medical staff shall, with the approval of the hospital governing body, adopt bylaws, rules and regulations to govern its organized medical staff." (*S.C. Code Ann. Regs. 61-16, §301*). To carry out the requirements mandated by South

Carolina law, Laurens County Hospital promulgated the Medical Staff Bylaws. These Bylaws set forth the Purposes and Responsibilities of the Staff which include, among other things, the responsibility for privileging physicians to perform surgery in Laurens County Hospital. (ROA, Attachment 4, pages 5 to 7).

As part of its responsibility, the Medical Staff imposed requirements for initial continued appointment to the Medical Staff for the physicians to maintain valid professional liability insurance coverage. (ROA, Attachment 4, page 6). Plaintiffs point out that the requirement for physicians practicing in the hospital to have valid professional liability insurance was the prevailing practice of hospitals in America during 2008 and 2009. This was acknowledged by the expert witness for Respondents, James Weiss, MPH, (ROA, Attachment 28 – Weiss deposition, pages 58:4-8, 62:23 to 63:27) and the expert witness for the Plaintiffs, John Hyde, PhD, (ROA, Attachment 7 – Hyde deposition, pages 197:16 to 198:18). It was also acknowledged that hospitals across the country adopted similar requirements because of the "epidemic of medical errors" occurring in hospitals as reported by the Institute of Medicine and as confirmed in the report of the Inspector General of the Department of Health and Human Services. (ROA, Attachment 11, ROA, Attachment 12).

The requirement that physicians maintain valid professional liability insurance was adopted by the Laurens County Hospital Medical Staff – the imposition of this requirement was not a violation of the State Constitution, not a violation of the constitutional separation of powers, nor a violation of the "police powers" of the State as referenced by Respondents. (ROA, Brief of

Respondents, pages 21 to 24). The authority of the Medical Staff to require valid professional liability insurance for physicians performing surgery in the hospital was adopted as part of its statutory requirement for "overall responsibility for the quality of medical care provided to the patient" (*S.C. Code Ann. §44-7-260(D)*) and DHEC regulations to "adopt bylaws, rules and regulations to govern its operations as an organized medical staff." (*S.C. Code Ann. Regs. 61-16, §301*)).

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

CONCLUSION

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

Respectfully submitted,

August 3, 2017

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THE STATE OF SOUTH CAROLINA
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

Appeal From Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5705
Heard October 22, 2019 – Filed January 8, 2020

AFFIRMED

Joseph Grady Wright, III, and Jay Franklin Wright, both of McGowan Hood & Felder, LLC, of Greenville, for Appellants.

H. Sam Mabry, III, J. Ben Alexander, and Kenneth Norman Shaw, all of Haynsworth Sinkler Boyd, PA, of Greenville, for Respondents.

HILL, J.: This appeal presents the question of whether a hospital, by virtue of either the language in its admission contract or an alleged special relationship with its patients, owes a duty to ensure a doctor practicing at the hospital maintains

malpractice insurance coverage. Because we hold under these specific facts that Laurens County Health Care System and its successor Greenville Health System (collectively, Hospital) had no such duty to Appellants in contract or tort, we affirm the trial court's grant of summary judgment to Hospital.

I.

Mrs. McCord and Mrs. Sherfield suffered complications following surgeries performed by Dr. Byron 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. 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. The Hospital suspended him in January 2010, and he relinquished all privileges in May 2011.

In 2014, Mrs. McCord and Mrs. Sherfield obtained default judgments against Dr. Brown for malpractice for $1,740,692.75 and $1,468,580, respectively; their spouses, Mr. McCord and Mr. Sherfield, obtained default judgments against Dr. Brown for loss of consortium for $58,789.04 and $50,000, respectively. Hospital was not a party to those actions. Appellants were unable to collect their judgments 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. 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 or "tail" coverage from JUA that would have covered claims based on acts or omissions occurring before the effective date of the MAG policy.

Before their surgeries, Mrs. McCord and Mrs. Sherfield signed a form entitled "Conditions of Admission" (the Admission Contract), which provided, "The undersigned agrees he signs as agent or as patient that in consideration of the *services to be rendered* to that patient, he hereby individually obligates himself to pay the account of the hospital, in accordance with the regular rates and terms of the hospital." (emphasis added). The Admission Contract also provided, "[T]he hospital is not responsible for any act or omission of the physicians. . . . The

undersigned recognizes that most medical staff members furnishing services to the patient, including the radiologists, pathologist, anesthesiologists, and the like (are) independent contractors and not employees of the hospital."

Hospital's medical staff bylaws (the Bylaws) provided 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."

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.

Appellants alleged in their complaint Hospital breached the Admission Contract when it failed to ensure Dr. Brown complied with the Bylaws and Subsidy Contract by maintaining medical malpractice insurance to cover their claims, which Appellants contend was part of the "services to be rendered" to them as patients. Appellants also alleged Hospital failed to exercise due care in its "special relationship" with Appellants by failing to ensure Dr. Brown complied with the Bylaws and Subsidy Contract requiring him to maintain medical malpractice insurance to cover their claims.

In granting summary judgment to Hospital, the trial court found the meaning of "services to be rendered" in the Admission Contract was unambiguous and referred "to those services that the Hospital actually provides and bills for, such as room charges, medications, and meals, not ensuring that an independent physician has medical malpractice insurance."

As to Appellants' negligence cause of action, the trial court found that even assuming there was a special relationship between the parties, Hospital had no duty to ensure Dr. Brown had medical malpractice insurance to cover Appellants' claims because (1) there was no evidence Dr. Brown failed to comply with the requirements of the Bylaws or Subsidy Contract, as it was undisputed he had the required insurance at the time of Appellants' surgeries, and (2) even if Dr. Brown were required to purchase tail or other coverage, Appellants were not the intended beneficiaries of such a requirement.

This appeal followed.

II.

In reviewing a grant of summary judgment, we apply the same standard as the trial court under Rule 56(c), SCRCP: we view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Gibson v. Epting*, 426 S.C. 346, 350, 827 S.E.2d 178, 180 (Ct. App. 2019). The moving party is entitled to summary judgment only if "there is no genuine issue as to any material fact." Rule 56(c), SCRCP. However, a genuine issue of material fact exists—and summary judgment must be denied—if the non-moving party submits at least a scintilla of evidence supporting each element of its claim. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "[A] scintilla is a perceptible amount. There still must be a verifiable spark, not something conjured by shadows." *Gibson*, 426 S.C. at 352, 827 S.E.2d at 181.

III. Breach of Contract

To prove a breach of contract, the burden is on the plaintiff to establish the contract, its breach, and proximate damages. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). Our role in interpreting a contract is to enforce the parties' intent. We look first to the language of the contract. If that language is clear and unambiguous, "the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect." *Beaufort Cty. Sch. Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011). In such instances, we must enforce the language as written, for it is the objective expression of what the parties meant to agree upon when they made their contract, not the secret, subjective meaning one party later reveals. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603, 799 S.E.2d 912, 917–18 (2017).

"Ambiguity of a contract is a question of law, which we review de novo." *Gibson*, 426 S.C. at 351, 827 S.E.2d at 181. To be ambiguous, contract language must be susceptible to two different but plausible meanings. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation."). "[U]nambiguous terms of a written contract may not be altered by parol evidence." *Gibson*, 426 S.C. at 352, 827 S.E.2d at 181.

The term at issue—"services to be rendered"—is not defined by the Admission Contract. It appears under the heading "Financial Agreement." Hospital interprets the phrase to mean tangible services it provides and bills for, such as room charges, medications, and meals. Appellants argue an equally reasonable interpretation is that the "services" Hospital agreed to provide included a guarantee the treating physicians would be covered by malpractice insurance sufficient to pay for any medical negligence committed during Appellants' treatment.

Appellants also say the term "services to be rendered" may be reasonably interpreted to include a promise by Hospital that doctors it credentialed and privileged were in compliance with the Bylaws and the Subsidy Contract. Appellants point to South Carolina Department of Health and Environmental Control (DHEC) regulations requiring hospitals to have an organized medical staff that operates pursuant to bylaws. S.C. Code Ann. Regs. 61-16 § 504 (Supp. 2019) ("The hospital shall have a medical staff organized in accordance with the facility's by-laws and accountable to the governing body including, but not limited to the quality of professional services provided by individuals with clinical privileges."). In essence, Appellants contend that because statutory law is implicitly incorporated into every contract, the Bylaws became part of Hospital's contracts with Appellants. *Inabinet v. Royal Exch. Assur. of London*, 165 S.C. 33, 36, 162 S.E. 599, 600 (1932) ("Every contract entered into in this state embodies in its terms all applicable laws of the state just as completely as if the contract expressly so stipulated."). The Bylaws required Dr. Brown to "maintain" malpractice coverage to keep his privileges. Appellants claim the term "maintain" is ambiguous and can reasonably be understood as requiring Dr. Brown to keep coverage in place adequate to respond to his patients' loss, regardless of when the malpractice occurred. Therefore, according to Appellants, a jury issue existed as to the meaning of "maintain," precluding summary judgment.

Accepting Appellants' argument would require us to discover two material ambiguities: one as to the meaning of "services to be rendered"; another as to the meaning of "maintain." We cannot follow Appellants to where their argument leads. Even if the DHEC regulations became part of the Admission Contract by operation of law, Appellants are asking us to go several steps further and not only incorporate the specific terms of the Bylaws themselves into the Admission Contract but also the terms of a contract authorized by the Bylaws.

This is a bridge too far. We conclude as a matter of law that the phrase "services to be rendered" was plain and unambiguous. No reasonable contracting party would contemplate that "services to be rendered" by a hospital would include the monitoring of the treating doctors' compliance with malpractice insurance requirements imposed by the hospital and the board. The plausibility of such a reading dwindles further when it is remembered the parties agreed that Hospital was "not responsible for any act or omission of the physicians." And the Admission Contract never references the Bylaws or the Subsidy Contract.

Because the Admission Contract was unambiguous, the parties' intentions must be determined from the contract language itself. *See Beaufort Cty. Sch. Dist.*, 392 S.C. at 516, 709 S.E.2d at 90. Considering the phrase "services to be rendered" in its plain, ordinary, and popular sense, we conclude it meant tangible services Hospital billed for, such as medical care, room charges, and medications. Although Mrs. McCord and Mrs. Sherfield assert their subjective intent when executing the Admission Contract was for Hospital to require Dr. Brown to have medical malpractice insurance covering their claims, no language in the Admission Contract resembled such a requirement. *See Rodarte*, 419 S.C. at 603, 799 S.E.2d at 917–18.

Appellants deny they are seeking to be third party beneficiaries of Hospital's Bylaws and the Subsidy Contract. Instead they insist their theory is a "direct" action based on the Admission Contract. Accordingly, because that language is not ambiguous, we affirm summary judgment.

IV. Tort Duty Based on Special Relationship/Hospital Corporate Negligence

We next address Appellants' argument that their status as patients imposed a duty on Hospital to use due care in granting and monitoring hospital privileges. Appellants assert Hospital breached this duty by continuing to grant Dr. Brown privileges when they knew or should have known he had declined prior acts and tail coverage that

would have covered claims based on malpractice occurring before July 2009 and by failing to require Dr. Brown to purchase the coverage. Appellants note Hospital knew of Dr. Brown's competency issues before January 2010, when it could have purchased these coverages directly from the insurer.

The threshold problem we see with this argument is that South Carolina law does not require a physician to carry malpractice insurance. Appellants in essence believe Hospital's duty of care extended to forcing Dr. Brown to purchase or be covered by tail or other malpractice insurance sufficient to cover medical negligence claims for all treatment he administered at Hospital, regardless of when a claim is made. Appellants are not asking us to hold a hospital, by virtue of its special relationship with its patients, has a duty to ensure physicians practicing at hospital facilities be insured for malpractice; they are asking us to hold that because Hospital granted Dr. Brown privileges in return for his promise to carry malpractice insurance while practicing and comply with Hospital Bylaws, Hospital had a duty to ensure the insurance coverage extended to their loss. Hospital responds that Dr. Brown's contractual obligation only went as far as requiring him to be insured at the time of the treatment, and it is undisputed he was. Appellants counter that this proves Hospital's negligence, for a reasonable hospital would have known the vagaries of malpractice policy language, claims practice, and coverage, and made sure physicians practicing in their facilities had adequate insurance to cover any malpractice committed regardless of when the claim arose or was made. They point to evidence in the record demonstrating the Hospital employee overseeing the insurance verification was ignorant of basic insurance principles. While Appellants' argument is creative, we cannot create liability against Hospital under the circumstances here, as sympathetic as we are to Appellants' loss.

In tort law, the existence of a duty is a question of law. *See Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010). Even if a party acts negligently and injures another, he will not be liable under the law of negligence unless his actions violated a specific legal duty owed to the other party. *See Brown v. S.C. Ins. Co.*, 284 S.C. 47, 51, 324 S.E.2d 641, 644 (Ct. App. 1984) ("Negligent conduct becomes actionable only when it violates some specific legal duty owed to the plaintiff."), *overruled on other grounds by Charleston Cty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). In general, our common law recognizes no affirmative duty to control the conduct of another or to warn a third person of danger. *See Johnson v. Jackson*, 401 S.C. 152, 160, 735 S.E.2d 664, 668 (Ct. App. 2012) ("Under South Carolina common law, there is no

general duty to control the conduct of another or to warn a third person or potential victim of danger"); Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* at 106 (4th ed. 2011) ("Although there is no general duty to aid or protect others, such a duty does exist where the defendant has a special relationship to the victim."); *see also* William L. Prosser & W. Page Keeton, *The Law of Torts*, § 56 at 384 (5th ed. 1984) (discussing special relationship doctrine and noting a hospital "may be liable for permitting an unqualified doctor to treat a patient on its premises"). "An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or other special circumstance." *See Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656–57 (2006); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995) (engineer owed special duty in tort to contractor based on engineer's professional duties despite lack of contract between engineer and contractor).

Here, Appellants claim they have a special relationship with Hospital, as the providing of health care entails more than a mere economic transaction. By entrusting their health care to Hospital, Appellants contend Hospital implicitly assumed a duty of due care toward them to allow hospital privileges only to doctors who could financially respond to any damages.

What Appellants are urging us to do is 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 intricate personnel structures and contractual barriers hospitals may have created. *See, e.g., Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164–65 (Wis. 1981) (collecting cases and discussing corporate negligence doctrine).

We have considered the corporate negligence doctrine for hospitals before but passed on the invitation to recognize it. *See Strickland v. Madden*, 323 S.C. 63, 71–72, 448 S.E.2d 581, 586 (Ct. App. 1994). There, a patient injured by Dr. Madden's medical negligence sought to hold the hospital liable for negligently failing to revoke Dr. Madden's hospital privileges given nurses' reports that they had twice smelled alcohol on Dr. Madden's breath. *Id.* at 72, 448 S.E.2d at 586. We affirmed the grant of summary judgment to the hospital, declining to recognize the hospital owed a duty based on a corporate negligence theory, reasoning the plaintiff failed to provide a proposed standard of care that had been breached and, further, that no evidence

indicated Dr. Madden's patient care had been compromised. *Id.* Likewise, in *Foster v. Greenville County Medical Society*, we refused to hold a medical society that knew of a physician member's probable alcohol abuse owed a duty to warn the doctor's patients. 295 S.C. 190, 193–94, 367 S.E.2d 468, 470 (Ct. App. 1988). We noted the society had no role in determining hospital privileges or disciplining doctors and had no agreement with the hospital to provide information about the society's members or their competence. *Id.* at 194, 367 S.E.2d at 470.

Other courts have rejected attempts to saddle hospitals with a duty to verify its treating physicians are covered by adequate malpractice insurance. In Florida, where by statute doctors are required to be financially able to pay malpractice claims, the supreme court has held hospitals have no affirmative duty to condition the grant of staff privileges on the doctor's proof of compliance with the financial responsibility statute. *Horowitz v. Plantation Gen. Hosp. Ltd. P'ship*, 959 So. 2d 176, 186–87 (Fla. 2007).

We decline to find Hospital owed such a duty under the specific circumstances here. 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. We therefore affirm summary judgment to Hospital.

AFFIRMED.

LOCKEMY, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA

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.

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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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,

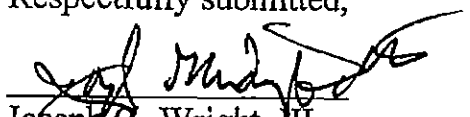

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TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

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Chris Katina McCord, Christopher McCord,
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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 Rehearing and Memorandum of Appellants by depositing a copy in the United States Postal Service, on January 21, 2020 to the following:

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The South Carolina Court of Appeals

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

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

Appellate Case No. 2017-001064

ORDER

After 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. Accordingly, the petition for rehearing is denied.

C.J.

J.

J.

Columbia, South Carolina

FILED

February 20, 2020

cc:
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Jay Franklin Wright, Esquire
Kenneth Norman Shaw, Esquire

H. Sam Mabry, III, Esquire
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