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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2014-CP-30-0291

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

v.

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

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The McCords and the Sherfields ("Petitioners") have attempted to frame their petition as presenting a novel question about whether "if presented with the doctrine of hospital corporate negligence, would the South Carolina Supreme Court accept or reject the doctrine?" Under this theory, some states have permitted hospitals to be held liable for the medical negligence of independent treating physicians. In essence, the claim would be one for negligent credentialing.

Quite simply, this case does not present this issue. Petitioners did not allege the treating physician was negligently credentialed at the time of treatment, and they have conceded that they do not seek to hold the hospital vicariously liable for the treating physician's medical negligence. They instead alleged contract and tort theories against Respondents stemming from the treating physician's failure to maintain medical malpractice coverage for the Petitioners' claims *after* he treated the Petitioner patients. Given the foregoing, this case does not warrant discretionary review by this Court pursuant to Rule 242, SCACR.

QUESTION PRESENTED

1. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE GRANT OF SUMMARY JUDGMENT TO THE RESPONDENTS IN THIS CASE, WHICH 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?"

COUNTER-STATEMENT OF THE CASE AND FACTS[1]

This case does not allege claims for medical negligence. Rather, Petitioners seek to hold Respondents responsible for default judgments they each obtained in prior, separate lawsuits alleging medical malpractice against Dr. Byron Brown.

[1] The following facts were set forth in Respondents' Motion for Summary Judgment and have not been contested by Plaintiffs. (ROA at 8-10, 61-63). In addition, Petitioners have not challenged the facts as set forth by the Court of Appeals in its opinion.

Dr. Brown performed surgeries on Petitioners Chris Katina McCord and Janice Sherfield at Laurens County Hospital ("Hospital"), part of Laurens County Health Care System, between December 2008 and May 2009.[2] At that time, Dr. Brown had surgical privileges at the Hospital, but he was not a Hospital employee.[3]

When he performed the surgeries on the Petitioner patients, Dr. Brown had a claims-made medical malpractice insurance policy through Joint Underwriting Association ("JUA"), together with an excess policy through the Patients' Compensation Fund. In July 2009 (after he operated on the Petitioner patients and before he was on notice of any potential claims), Dr. Brown changed 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. At that time, 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.

On July 29, 2011, a Notice of Intent ("NOI") was filed on behalf of Mrs. McCord, and a NOI mediation followed on December 1, 2011. Petitioners admit that as of that mediation, their attorney was aware of the possibility that Dr. Brown did not have medical malpractice insurance coverage for the Petitioners' claims. Despite knowledge that Dr. Brown lacked medical malpractice insurance coverage for their claims, the McCords and Sherfields initiated suit against Dr. Brown and his practice on December 9, 2011 and September 25, 2012, respectively. Neither complaint named the Hospital or asserted any claims against the Hospital.

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[2] Laurens County Health Care System was later acquired by Greenville Health System.

[3] There was a February 14, 2002 Agreement between Dr. Brown and Hospital whereby Hospital agreed to subsidize Dr. Brown's practice for three years ("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.

While those actions were pending, Dr. Brown left the country. As a result, both the McCords and Sherfields obtained default judgments against Dr. Brown and his practice. Plaintiffs have been unable to collect on those judgments.

Petitioners filed this separate and new action against Respondents on March 26, 2014. The Respondents incorporate by reference Section I of the opinion of the Court of Appeals as a concise statement of the case and facts. As recited there,

> [Petitioners] 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 [Petitioners] contend was part of the "services to be rendered" to them as patients. [Petitioners] also alleged Hospital failed to exercise due care in its "special relationship" with [Petitioners] by failing to ensure Dr. Brown complied with the Bylaws and Subsidy Contract requiring him to maintain medical malpractice insurance to cover their claims.

McCord v. Laurens Cty. Health Care Sys., 429 S.C. 286, 291, 838 S.E.2d 220, 222-23 (Ct. App. 2020); *see* ROA at 134-156 (Second Amended Complaint).

The trial court granted summary judgment as to both claims, and the Court of Appeals affirmed that decision.[4] In reaching this result, the Court of Appeals mused about the doctrine of hospital corporate negligence but did not make any ruling on that basis. Petitioners sought rehearing based solely on the doctrine of hospital corporate negligence.

ARGUMENT

The petition must be viewed in light of the Petitioners' actual claims as presented in their Complaint and to the trial court. The sole question presented in the petition is "hospital corporate

[4] Petitioners have not raised their contract theory in either their petition for rehearing or in this petition. It has therefore been abandoned. *See* Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."); *Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000).

negligence." Petitioners did not plead that as a cause of action in their Complaint, did not raise it at the summary judgment stage, and did not argue it in their briefs at the Court of Appeals. As such, it is not properly before this Court. Generally, an issue may not be raised for the first time on appeal. *Pye v. Estate of Fox*, 369 S.C. 555, 564–65, 633 S.E.2d 505, 510 (2006). Moreover, "[t]he appeal must be considered in the light of the general rule that the theory pursued in the trial Court with respect to the relief sought and grounds therefor, must be adhered to in the appellate Court." *Bramlett v. Young*, 229 S.C. 519, 533, 93 S.E.2d 873, 880 (1956) (quotation omitted); *Troutman v. Facetglas, Inc.*, 281 S.C. 598, 600–01, 316 S.E.2d 424, 425–26 (Ct. App. 1984) ("While Troutman labels his cause of action as one for wrongful discharge and the trial judge characterized it as a cause of action for 'economic duress,' Troutman argues that the label is unimportant; the question is whether a tort has been alleged. We disagree. This Court does not have the time nor the inclination to sift through a catalog of torts to determine if Troutman's factual allegations establish the elements of any tort. Troutman has the obligation to apprise the trial court of the theory of his cause of action and that theory must be adhered to by this Court on review.").

This lack of preservation is further illustrated by *Platt v. CSX Transportation, Inc.*, 388 S.C. 441, 697 S.E.2d 575 (2010). There, Platt appealed from a grant of summary judgment in favor of the South Carolina Department of Transportation ("SCDOT"). Platt's complaint alleged two theories: statutory and common law negligence. However, the basis for Platt's common law negligence theory was not presented to the trial court at the summary judgment stage and was not fully asserted until her reply brief before the Court of Appeals. The trial court and the Court of Appeals found that Platt's claims were barred by the public duty rule. On petition for certiorari to this Court, Platt tried to argue SCDOT had "a common law duty to properly repair and maintain the state highway system, which [Platt] contends the court of appeals erroneously failed to consider

when it affirmed the trial court's grant of summary judgment." *Id.* at 446, 697 S.E.2d at 577. This Court found the issue was not preserved, as follows:

> While [Platt] pleaded common law negligence in her complaint, the trial court did not rule on that issue, and [Platt] did not file a motion to alter or amend the judgment. In fact, [Platt] did not fully assert a common law basis for SCDOT's duty until her reply brief to the court of appeals. For these reasons, we hold [Platt] did not properly preserve the issue of a common law duty for appellate review.

Id. at 446–47, 697 S.E.2d at 578 (citations omitted). Here there is even less basis for consideration of the new issue than there was in *Platt*, since the issue on which Petitioners seek review was merely mentioned by the Court of Appeals and was not argued by the Petitioners until their petition for rehearing. This issue was not implicated in the pleadings or in the summary judgment arguments before the trial court. As such, it is unpreserved and does not present a basis for review by this Court.

The sole case cited by Petitioners in support of the "hospital corporate negligence doctrine" is *Johnson v. Misericordia Comm. Hosp.*, 301 N.W.2d 156 (Wisc. 1981). That case, and the two referenced South Carolina cases that declined to reach the issue, *Strickland v. Madden*, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994) and *Foster v. Greenville County Med. Soc.*, 295 S.C. 190, 367 S.E.2d 468 (Ct. App. 1988), all arise in the context of the credentials of the treating physician at the time of treatment. In *Johnson*, *Strickland*, and *Foster*, the plaintiff sought to hold the hospital liable for the medical malpractice of an independent treating physician on the theory that the hospital was negligent in investigating the physician's background and in granting the physician credentials *prior to* the alleged medical malpractice.

As evidenced by the pleadings in this case and the petition itself (excluding Section A, "Question Presented for Review"), this case was not pursued as and in no way resembles a negligent credentialing case. Instead, Petitioners claim they were injured because the Hospital did

not ensure that Dr. Brown maintained medical malpractice insurance coverage as to any potential claims they might bring *after* they received treatment leaving them unable to collect on the default judgments they hold against Dr. Brown. They are not seeking to recover for medical negligence, but rather for economic damage caused by Dr. Brown's failure to maintain medical malpractice insurance covering their potential claims.

The Wisconsin court's ruling in *Johnson* has nothing to do with medical malpractice insurance or a requirement that doctors have medical malpractice insurance. *Johnson* holds that "a hospital owes a duty to its patients to exercise reasonable care in the selection of its medical staff and in granting specialized privileges" and that the governing body of the hospital has a "duty to appoint only qualified physician and surgeons to its medical staff and periodically monitor and review their competency." 301 N.W.2d at 174. Even if this Court were inclined to follow *Johnson*, Petitioners have not made any argument or presented any evidence that would give rise to liability under this theory, such as evidence of prior misconduct at other hospitals by Dr. Brown or expert testimony that Hospital acted negligently in its investigation of Dr. Brown's background or in giving him privileges.

Petitioners have not cited any authority supporting tort liability for the actual claims raised here—imposing liability in tort based on a "special relationship" because the Hospital failed to require a non-employee physician to maintain medical malpractice insurance coverage *after the fact* to address any possible future patient claim. It is undisputed that Dr. Brown had medical malpractice insurance coverage at the time he treated the Petitioner patients. As previously argued by the Respondents, there is simply no such duty in South Carolina.

Petitioners' entire argument stems from the misguided position that medical malpractice insurance coverage exists to benefit and protect the party who was allegedly injured by the

insured's conduct. That is not the law of South Carolina. This Court has said repeatedly "that the purpose of insurance is to protect the insured, the person who takes [the insurance] out and pays for it". *Gentry v. Yorkshire Ins. Co.*, 192 S.C. 221, 225, 5 S.E.2d 565, 568 (1939); *see also Trancik v. USAA Ins. Co.*, 354 S.C. 549, 581 S.E2d 858 (Ct.App. 2003) (holding injured third party "does not have a contractual relationship with the insurer and cannot maintain an action against the insurer for breach of the insurance contract"). If this longstanding law is to be changed, it should be by legislative act. *See Irwin v. Michelin Tire Corp.*, 288 S.C. 221, 225, 341 S.E.2d 783, 785 (1986).

Moreover, to the extent Petitioners are implying as much on page 9 of their petition, there was not a voluntary undertaking by the Hospital under its Bylaws or the Subsidy Contract.[5] As stated by this Court,

> The recognition of a voluntarily assumed duty in South Carolina jurisprudence is rooted in section 323 of the Restatement (Second) of Torts (1965), which provides:
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.
>
> Under section 323, the voluntary undertaking does not create a duty of care unless (a) the undertaker's failure to exercise reasonable care in performing the undertaking increased the risk of harm to the plaintiff, or (b) the plaintiff suffered harm because she relied upon the undertaking.

Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 213, 826 S.E.2d 285, 290–91 (2019). Here,

[5] Respondents note that the existence of a duty in negligence based on a voluntary undertaking was not addressed by the Court of Appeals and was not presented as a separate basis for either rehearing or discretionary review by this Court. As such, it is unpreserved. Rule 242(d)(2) & (4), SCACR;

the Hospital did not agree to render any services under the Bylaws or the Subsidy Contract. Instead, Dr. Brown was to provide services, and he agreed to maintain medical malpractice insurance coverage while doing so. Nowhere in either of those documents does the Hospital state that it will ensure that Dr. Brown will maintain medical malpractice insurance coverage. Moreover, any failure did not cause physical harm to the Petitioners and there was no reliance on the alleged undertaking by the Petitioners. (Plaintiffs' Responses to Defendants' Requests for Admissions, ¶¶ 6-8, ROA at 89); *see Doe 2 v. Citadel*, 421 S.C. 140, 147, 805 S.E.2d 578, 582 (Ct. App. 2017) (finding fact that defendant had an internal policy which was allegedly not followed did not preclude summary judgment in defendant's favor where there was no evidence the policy increased the risk of harm to the plaintiff and plaintiff did not know about and rely on the policy); *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).

Respondents incorporate here by reference their brief filed in the Court of Appeals together with the supplemental authority letter sent on September 25, 2019, including proposed alternate sustaining grounds relating to lack of causation, the applicable statute of limitations, and general separation of powers concerns. For all of these reasons, this case was correctly decided at the summary judgment stage and correctly affirmed by the Court of Appeals on basic contract and duty principles. Although it is unfortunate that Dr. Brown has not made the Petitioners whole, there is no basis for Petitioners to look to the Respondents instead based on Dr. Brown's unilateral decisions relating to his medical malpractice insurance coverage that occurred *after* the Petitioner patients were treated.

CONCLUSION

Simply put, this case does not present the novel question that Petitioners have asked this Court to consider. As a result, Petitioners have failed to present any argument that implicates the considerations listed in Rule 242(b), SCACR. Nothing about the opinion of the Court of Appeals is inconsistent with binding precedent, nor does this case present any question of exceptional importance. Therefore, the petition must be denied.

Respectfully submitted,

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