

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
ORANGEBURG COUNTY) 1ST JUDICIAL CIRCUIT

Malcolm E. Livingston, Jr. as the Personal) Case No. 2018-CP-38-01036
Representative of the Estate of) Case No. 2018-CP-38-01038
Rebecca E. Livingston and personally,) Case No. 2018-CP-38-01039

Plaintiff,

v.

The Regional Medical Center of
Orangeburg and Calhoun Counties

Defendant,

Order
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SC Court of Appeals

This matter came before the Plaintiff's Motion for Partial Summary Judgment on the issue of whether Defendant can reduce its liability cap under the South Carolina Tort Claims Act ("TCA") by claiming that the acts and omissions that allegedly caused the injury to the Plaintiff were committed by physician's assistant rather than a licensed physician. The matter was heard by the undersigned on November 1, 2021. Marion C. Fairey, Jr. appeared and argued on behalf of the Plaintiff. Michael Tanner appeared and argued on behalf of the Defendant.

The undisputed facts relevant to this motion are that on August 12, 2016, Rebecca Livingston was involved in an automobile accident. She was taken from the scene of the wreck by ambulance to the Emergency Department at the Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC"). Although there were licensed physicians present in the Emergency Department on August 12, 2016, while in the Emergency Department, Ms. Livingston's care was managed by a physician's assistant employed by TRMC. There is no licensed physician listed or identified anywhere in Ms. Livingston's medical record for August

12, 2016. After being treated and evaluated, Ms. Livingston was discharged home from the TRMC Emergency Department by the physician's assistant.

In the early morning hours of August 13, 2016, Ms. Livingston returned to the TRMC Emergency Department because she could not move her legs. This time, she was seen by a licensed physician who determined that Ms. Livingston was suffering from a spinal hematoma. Ms. Livingston was emergently transferred to the nearest Level I trauma center, Palmetto Richland Memorial. Unfortunately, by the time she arrived there, she had already lost all sensation below her T-8 vertebra. She was diagnosed with paraplegia, secondary to spinal cord injury. She passed away twenty months later.

Plaintiff, Malcolm Livingston, brought these three actions (Loss of Consortium – 2018-CP-38-01036; Survival – 2018-CP-38-01038; and Wrongful Death – 2018-CP-38-01039) against TRMC on his own behalf and as the personal representative of his deceased wife, Rebecca Livingston, alleging that Ms. Livingston was paralyzed and ultimately perished as a result of TRMC's failure to diagnose and timely treat the spinal hematoma when Ms. Livingston presented at the TRMC Emergency Department on August 12, 2016. TRMC denies these allegations and contends that the employees in its Emergency Department acted within the applicable standard of care. Additionally, TRMC alleges that it is a governmental entity whose liability for medical negligence exists solely under the South Carolina Tort Claims Act. Further, TRMC alleges that because Ms. Livingston's care was provided by a non-physician (physician's assistant) on August 12, 2016, rather than a physician, its liability in this case is capped at \$300,000.00 per claim and \$600,000.00 per occurrence.

Under the Tort Claims Act ("TCA"), governmental entities enjoy a general liability cap of \$300,000.00 per claim with a \$600,000.00 liability cap per occurrence, regardless of the

number of agencies or claims involved. S.C. Code Anno. §15-78-120(a)(1) and (2). However, recognizing that medical malpractice cases involve “significantly higher damages” the legislature raised the liability limits for government employed physicians and dentists, effective on January 1, 1989. S.C. Code Anno. §15-78-20(g). Accordingly, the liability limit under the TCA is \$1,200,000.00 for the tort of a “licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession.” S.C. Code Anno. §15-78-120(a)(3) and (4).

In this case, TRMC takes the position that because they staffed their Emergency Department with a physician’s assistant and Ms. Livingston was only seen by that physician’s assistant (and not a physician), that its liability in this case is limited to \$300,000.00 per claim and \$600,000.00 for all claims arising from that occurrence rather than the \$1,200,000.00 medical malpractice cap. In other words, TRMC asserts that because it provided a physician’s assistant rather than a physician to care for Ms. Livingston in its Emergency Department, its liability under the TCA is limited to \$600,000.00.

In South Carolina, physician’s assistants’ authority to practice medicine is governed by the South Carolina Physician Assistant’s Act. S. C. Code Anno. §40-47-905, et seq. Under the Physician’s Assistants Act, a physician’s assistant must be supervised by a licensed physician and may only perform those medical acts contained in a written scope of practice. S. C. Code Anno. §40-47-935(1). Additionally, a physician’s assistant is only authorized to provide medical services under the supervision of a licensed physician who has expressly accepted responsibility for the medical services rendered by the physician’s assistant. Under State law, the physician’s assistant who provided services to Ms. Livingston was only able to do so because he or she was acting under a physician’s supervision and under a written scope of practice.

Specifically, under the South Carolina Physician' Assistants Practice Act (in effect in August of 2016), a physician assistant

may perform: (1) medical acts, tasks, or functions with written scope of practice guidelines under physician supervision; (2) those duties and responsibilities, including the prescribing and dispensing of drugs and medical devices, that are lawfully delegated by their supervising physicians. However, only physician assistants holding permanent license may prescribe drug therapy as provided in this article.

A physician assistant is an agent of his or her supervising physician in the performance of all practice related activities including, but not limited to, the ordering of diagnostic, therapeutic, and other medical services.”

(Emphasis supplied).

Under the Act, a “Physician supervisor” is a “South Carolina licensed physician currently possessing an active, unrestricted permanent license to practice medicine in South Carolina who is approved to serve as a supervising physician for no more than three full-time equivalent physician assistants. The physician supervisor is the individual who is responsible for supervising a physician assistant’s activities.” S.C. Code Anno. §40-47-910(7). “Supervising means overseeing the activities of, **and accepting responsibility for**, the medical services rendered by a physician assistant as part of a physician-led team in a manner approved by the board.” S.C. Code Anno. §40-47-910(8) (emphasis supplied). Under the plain language of the statute, a physician’s assistant is the agent of his or her supervising physician and the supervising physician has “accepted responsibility” for the services rendered by the physician assistant.

Courts of this state have long held that a principal is independently liable to third parties for the negligence of an agent that occur within the scope of the agent’s employment. *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869, 879-880 (2006). This rule of liability is

founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every case, the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity

and good conduct in all matters within the scope of his agency . . . Seeing that some one must be loser by the deceit, it is more reasonable that he who employs and confides in the deceiver should be the loser than a stranger.

Id., 628 S.E.2d at 880; citing, *Service Life & Health Ins. Co.*, 220 S.C. 198, 66 S.E.2d 816, 817 (1951); see also, *Jones v. Elbert*, 211 S.C. 553, 558, 34 S.E.2d 796, 798 (1945).

The South Carolina Physician Assistants Practice Act clearly and unambiguously establishes an agency relationship between a supervising physician and a physician's assistant. A physician's assistant cannot practice unless a supervising physician has accepted responsibility for the medical services rendered by the physician assistant. Where an agency relationship exists, the principal is independently responsible for the acts and omissions of the agent. Accordingly, the TRMC supervising physician on duty on August 12, 2016 is responsible for the medical care Ms. Livingston received and TRMC cannot reduce its liability cap by claiming that the acts and omissions that injured Ms. Livingston were conducted by a physician's assistant rather than a licensed physician. The very authority that permits a physician assistant to practice in TRMC's emergency room requires that he or she only do so as the agent of a supervising physician who has accepted responsibility for the medical services rendered. Because the supervising physician is liable for the acts and omissions committed by his agent, under the plain terms of the TCA, the \$1,200,000.00 liability cap is applicable to this case. S.C. Code Anno. §15-78-120(a)(3)¹ and (4)². Accordingly, the Plaintiff's Motion for Partial Summary Judgment is GRANTED.

¹ "No person may recover in any action or claim brought hereunder against any governmental entity and caused by the tort of any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, a sum exceeding one million two hundred thousand dollars because of a loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved."

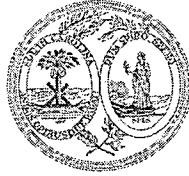
² "The total sum recovered hereunder arising out of a single occurrence of liability of any governmental entity for any tort caused by any licensed physician or dentist, employed by a governmental entity and acting within

IT IS SO ORDERED.

Entered this ____ day of February, 2022
Orangeburg, South Carolina

Edgar W. Dickson
Circuit Court Judge, 1st Judicial Circuit

the scope of his profession, may not exceed one million two hundred thousand dollars regardless of the number of agencies or political subdivisions involved.”



Orangeburg Common Pleas

Case Caption: Malcolm E Livingston VS The Regional Medical Center Of
Orangeburg And Calhoun Counti
Case Number: 2018CP3801036
Type: Order/Summary Judgment

So Ordered

s/ Edgar W. Dickson #2153