No. 30008 – Sandra K. Hicks, Administratrix of the Estate of Charles R. Hicks, deceased, v. David A. Ghaphery, M.D., and Wheeling Hospital

FILED
July 9, 2002
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, Justice, concurring, in part, and dissenting, in part:

I write to concur with the majority opinion's decision to grant the plaintiff/appellant a new trial, but I dissent to that part of the decision affirming the granting summary judgment to Wheeling Hospital.

In Syllabus Point 2 of *Thomas v. Raleigh General Hospital*, 178 W.Va. 138, 358 S.E.2d 222 (1987), this Court held that:

> Where a patient goes to a hospital seeking medical services and is forced to rely on the hospital's choice of physician to render those services, the hospital may be found vicariously liable for the physician's negligence.

In the instant case, Charles Hicks did not choose to go to Wheeling Hospital; he was admitted on an emergency basis, and remained there for his continued treatment. He did not pick and choose his treating physicians, but rather the doctors just showed up on an "as needed" basis and treated his ailments.

These treating physicians were in the Wheeling Hospital, using the hospital's facilities, presumably at the request – or certainly at the sufferance – of the hospital. Normal thinking would suggest that the physicians were "staff" at the hospital. Wheeling Hospital would rather have us believe these physicians were interlopers or trespassers, roaming the halls

at will to make money from patients who showed up at the hospital requesting medical services. Any patient – and, had not a summary judgment been granted, any juror – would have believed these physicians were working *for* the hospital, not just *at* the hospital.

This Court has gradually expanded hospital liability for malpractice by doctors practicing in the hospital's facilities using numerous legal theories. Hospitals are vicariously liable for doctors who are directly employed by the hospital. *Thomas v. Raleigh General Hospital*, 178 W.Va. 138, 358 S.E.2d 222 (1987). Agency liability has been imposed upon hospitals for doctors who provide essential or emergency services for the hospital. *Torrence v. Kusminsky*, 185 W.Va. 734, 408 S.E.2d 684 (1991). And hospitals have been found to be directly liable for negligently giving "privileges" or "credentials" to, and thereafter monitoring, its physicians. *See, e.g., Roberts v. Stevens Clinic Hospital, Inc.*, 176 W.Va. 492, 345 S.E.2d 791, 797 (1986) ("Whether the hospital allowed a known incompetent to continue to enjoy hospital privileges was a major point to be decided in determining the hospital's negligence.")

I believe the time has come to dispose of these multiple legal theories for medical malpractice liability. Instead, some other mechanism – either based in statute or in the common law – should be developed to impose liability upon hospitals, rather than the individual doctors and nurses who happen to work there. A likely mechanism would be the doctrine of *respondeat superior*, a doctrine which focuses "legal responsibility for personal injury on the enterprise in the best position to make risk/safety tradeoffs[.]" Kenneth S. Abraham and Paul C. Weiler, "Enterprise Medical Liability and the Evolution of the American Health Care System," 108 Harv.L.R. 381, 384 (1994). By making the enterprise or

organization liable, the hospital – not the negligent "employee" – would be liable for the malpractice. Doctors would be treated as employees, even if the hospital characterizes them as independent contractors.

The result would be that doctors would not have to be named as individual defendants for malpractice committed in a hospital – or, if they were, the hospital would be responsible for any judgment and the doctor would be sued in name only. Doctors would therefore never need to buy individual malpractice insurance to cover medical services rendered in hospitals.[1] And hospitals are better equipped than doctors to pass along the costs of malpractice insurance to patients, and better equipped to construct systems of overall patient care which will prevent future incidents of malpractice.

If a truck driver[2] causes an accident, we allow a lawsuit against the trucking company that employed the driver because the trucking company is better equipped to spread the cost of the accident, and the trucking company is better positioned to ensure that future truck drivers do not cause similar accidents. The truck driver is not expected to carry

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[1]Remarkably, it appears that doctors have, in the past, lobbied against a system that would impose liability upon hospitals:

> Practicing physicians, while pleased with the idea of getting the lawyers off their backs, worried that this reform would simply put hospital administrators in the lawyers' place. Throughout the summer of 1993, organized medicine pleaded with the government – "don't take our malpractice liability away from us."

Paul C. Weiler, "Fixing the Tail: The Place of Malpractice in Health Care Reform," 47 Rutgers L.Rev. 1157, 1192 (1995).

[2]"Truck driver" was an avocation chosen at random. Other professions work just as well – a pilot working for an airline, a chemical engineer working for a chemical company, etc.

insurance, and regardless of the technical legal rights of the trucking company, it simply would not seek indemnity from a negligent truck driver. Why should doctors and hospitals be treated differently?

The current system wastes an enormous amount of resources. The focus is too often on the legal relationships between the defendant doctors, hospitals, nurses and hospital staff workers, and not on the basic question that is at the root of the matter: was the plaintiff injured as a proximate cause of someone's carelessness? Massive amounts of time and money are spent, lots of finger pointing is done, lots of egos and friendships are bruised, and all too often the doctor is left holding the bag. Doctors must spend thousands of dollars buying malpractice insurance to protect against claims which would be much more efficiently covered by one, hospital-bought policy.

I concur in the majority opinion's decision to send this case back for trial – but I would have also included the defendant hospital in that trial. I therefore respectfully dissent.