No. COA 12-1071 25-A JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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THE ESTATE OF DONNA S. RAY, by THOMAS D. RAY AND ROBERT A. WILSON, IV, Administrators of the Estate of Donna S. Ray, and THOMAS D. RAY, Individually,	)	
Plaintiffs/Appellants,	)	
v.	)	From Burke County No. 04 CVS 1291
B.KEITH FORGY, M.D., P.A., GRACE HOSPITAL, INC., GRACE HEALTHCARE SYSTEM, INC., BLUE RIDGE HEALTHCARE SYSTEMS, INC., CAROLINAS HEALTHCARE SYSTEM, INC., and MOUNTAIN VIEW SURGICAL ASSOCIATES,	)	
Defendants/Appellees.		

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BRIEF OF AMICUS CURIAE
NORTH CAROLINA ADVOCATES FOR JUSTICE

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BRIEF OF AMICUS CURIAE
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QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO THE CORPORATE DEFENDANTS ON THE ISSUE OF NEGLIGENCE?

II. IS A HOSPITAL'S GRANT OF STAFF PRIVILEGES A SUFFICIENT PREDICATE FOR AN APPARENT AGENCY RELATIONSHIP BETWEEN THE HOSPITAL AND THE PHYSICIAN?

STATEMENT OF FACTS

Amicus curiae North Carolina Advocates for Justice adopts the statement of facts in Plaintiffs-Appellants' Brief.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE CORPORATE DEFENDANTS ON THE ISSUE OF NEGLIGENCE.

Twenty-five years ago, in Blanton v. Moses H. Cone Memorial Hospital, Inc., 319 N.C. 372, 354 S.E.2d 455 (1987), the Supreme Court articulated the principles that govern this case. Citing Rabon v. Hospital, 268 N.C. 1, 152 S.E.2d 485 (1967), the Court reaffirmed that "hospitals in this state owe a duty of care to patients." Id. at 375, 354 S.E.2d at 457. In particular, a "hospital owes a duty of care to its patients to ascertain that a doctor is qualified to perform an operation before granting him the privilege to do so." Id. at 376, 354 S.E.2d at 458. Moreover, a hospital has "a duty to monitor on an ongoing basis the performance of physicians on its staff." Id. at 377, 354 S.E.2d at 458. If the hospital knows that a surgeon is

unqualified to perform an operation, it has a duty to provide supervision or assistance by a qualified member of its medical staff. Id. at 377, 354 S.E.2d at 458-59.

Under Blanton, the facts are sufficient to support Plaintiffs' claims against the Corporate Defendants for negligently renewing Dr. Forgy' staff privileges in 2001, and negligently failing to monitor his performance from that date until Mrs. Ray's surgeries in 2003. In their brief as appellee, the Corporate Defendants will undoubtedly present conflicting evidence. Those evidentiary conflicts must be resolved by the jury at trial, not by the court in a motion for summary judgment.

No purpose would be served by repeating Plaintiffs' discussion of the evidence of corporate negligence, which this amicus adopts by reference. See Plaintiffs' Brief at 7-8, 11. Instead, we highlight a few facts that make summary judgment especially inappropriate. When the hospital renewed Dr. Forgy's staff privileges in 2001, **eleven** malpractice claims had been filed against him. Three of those claims occurred in 2001, precisely when agents for the hospital should have been thoroughly investigating Dr. Forgy's record. Yet no one from the hospital ever spoke with Dr. Forgy about any of the

malpractice claims, and the hospital produced no evidence that it conducted even a cursory investigation of this extraordinary string of surgical mishaps.

In 2004, the Corporate Defendants finally identified Dr. Forgy as a problematic surgeon who required additional supervision. That was too late for Mrs. Ray. The jury should be permitted to determine whether the Corporate Defendants should have acted earlier and more effectively to fulfill their duty of care to patients.

II. A HOSPITAL'S GRANT OF STAFF PRIVILEGES IS A SUFFICIENT PREDICATE FOR AN APPARENT AGENCY RELATIONSHIP BETWEEN THE HOSPITAL AND THE PHYSICIAN.

In Diggs v. Novant Health, Inc., 177 N.C. App. 290, 307, 628 S.E.2d 851, 862 (2006), this Court articulated a three-part test for a claim that a physician was the apparent agent of a hospital:

> [A] plaintiff must prove that (1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees.

On this case's first trip to the Court of Appeals, the Corporate Defendants and their amici sought to add a fourth

element to the Diggs test. They argued that the Diggs test for apparent agency is applicable only in situations in which the hospital has contracted for services to be provided. This Court should reject the invitation to revise the Diggs test.

Apparent agency, in contrast to actual agency, focuses not on the parties' contractual relationship but instead on what is apparent to an outsider. The crux of the doctrine is that third parties are led to believe there is an agency relationship between the apparent agent and principal when no such relationship exists:

> It is well-established that even in the absence of an agency relationship, "'[w]here a person, by words or conduct, represents or permits it to be represented that another is his agent, he will be estopped to deny the agency as against third persons, who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency exists in fact.'"

Diggs, 177 N.C. App. at 301, 628 S.E.2d at 858 (quoting University of North Carolina v. Shoemate, 113 N.C. App. 205, 215, 437 S.E.2d 892, 898 (1994) (quoting, in turn, Barrow v. Barrow, 220 N.C. 70, 72, 16 S.E.2d 460, 461 (1941))).

Contrary to the arguments of Corporate Defendants and their amici, the contract in Diggs to provide anesthesia services is not a dispositive distinction between the two cases. Apparent

agency does not hinge on whether the hospital and the physician contracted to provide certain services, but instead on whether "the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees." Id. at 307, 628 S.E.2d at 862.

In its 2008 brief, amicus North Carolina Association of Defense Attorneys (NCADA) warned that, unless apparent agency is limited to physicians having a contract with the hospital to provide certain services, hospitals will become "potentially liable for any health care provider who walks in its doors." 2008 NCADA Brief at 5. The prospect of vagrant physicians prowling hospital corridors is an implausible notion, to put it mildly. But a hospital could and should be responsible if it knowingly permits the interloper to don a white coat and practice medicine using the hospital's facilities. Cf. Shoemate, 113 N.C. App. at 205, 437 S.E.2d at 892 (hospital responsible for fraudulent resident). Of course, the hypothetical vagabond physician cannot, merely by entering the hospital doors, unilaterally impose liability on the hospital. Rather, it is the hospital's own actions, in allowing patients to believe the physician is acting as its agent, that result in apparent agency.

Dr. Forgy did not surreptitiously gain access to Grace Hospital's operating room. Instead, when he twice performed surgery on Mrs. Ray, he did so as a member of the hospital's medical staff, pursuant to an agreement granting him surgical privileges. Like every non-employee physician on Grace Hospital's medical staff, Dr. Forgy was, by virtue of his staff privileges, an independent contractor for the hospital.

In the previous appeal, the Corporate Defendants and their amici cited Plummer v. Community General Hospital of Thomasville, Inc., 155 N.C. App. 574, 573 S.E.2d 596 (2002), for the proposition that hospital admitting privileges do not create a contract between the physician and the hospital. But Plummer held nothing of the sort and, in fact, the case implies just the opposite. Plummer held that a hospital's termination of a contract with the plaintiff anesthesiologist's professional corporation, and entering into an exclusive contract with another company, did not breach the hospital's contract with the plaintiff because he continued to maintain his privileges at the hospital. See id. at 579, 573 S.E.2d at 600. Implicit in the Court's rationale is the recognition that a unilateral termination of the plaintiff's hospital privileges could have breached the parties' contract.

Common sense and settled law refute Defendants' theory. Physicians do not seek, and hospitals do not grant, admitting privileges for charitable motives. Each stands to benefit financially. The arrangement is a classic quid pro quo which, as this Court observed in Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 71, 488 S.E.2d 284 (1997), does result in a contract:

> When . . . a hospital offers to extend a particular physician the privilege to practice medicine in that hospital . . . [and] the offer is accepted by the physician, the physician receives the benefit of being able to treat his patients in the hospital and the hospital receives the benefit of providing care to the physician's patients. If the privilege is offered and accepted, each confers a benefit on the other and these benefits constitute sufficient and legal consideration for the performance of the agreement.

Id. at 76-77, 488 S.E.2d at 288.

Dr. Forgy was an independent contractor who Grace Hospital granted the privilege of using its facilities for the care and treatment of patients. Whether Dr. Forgy was also an apparent agent of the hospital depends on whether Mrs. Ray can satisfy the three-part test under Diggs. That issue must be resolved based on the facts, not on the new version of the Diggs test that Corporate Defendants propose.

Respectfully submitted, this 21st day of November, 2012.

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CERTIFICATE OF SERVICE

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