

RALPH BROWN AND LORA BROWN

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APPELLANTS

DELTA REGIONAL MEDICAL CENTER,  
MICHAEL LAST, M.D., ROBERT L. CURRY, IV, M.D.,  
MARILYN MCLEOD, M.D., AND JOHN DOES 1-5

V.

DELTA REGIONAL MEDICAL CENTER,  
MICHAEL LAST, M.D., ROBERT L. CURRY, IV, M.D.,  
MARILYN MCLEOD, M.D., AND JOHN DOES 1-5

APPELLEES

CERTIFICATE

The undersigned counsel of record  
the outcome of this case. These representations  
may evaluate potential disqualification

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Plaintiffs Ralph Brown

Board of Trustees

Dr. Robert Curry

Greenville Emergency

APPEALED FROM THE CIRCUIT COURT OF WASHINGTON COUNTY  
CASE NO. CI2003-258

BRIEF OF APPELLEE

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<b>CERTIFICATE OF INTERESTED PERSONS</b> .....	i
<b>TABLE OF CONTENTS</b> .....	ii
<b>TABLE OF AUTHORITIES</b> .....	iii
<b>STATEMENT OF ISSUES</b> .....	1
<b>I.    COURSE OF PROCEEDING BELOW</b> .....	2
<b>II.   FACTS</b> .....	2
<b>III.  SUMMARY OF ARGUMENT</b> .....	3
<b>IV.   ARGUMENT</b> .....	3
<b>A.    STANDARD OF REVIEW</b> .....	3
<b>B.    ARGUMENT</b> .....	4
<b>V.    CONCLUSION</b> .....	7
<b>CERTIFICATE OF SERVICE</b> .....	8
<b>CERTIFICATE OF FILING</b> .....	8

<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 322 (1986) .....	4
<i>Brown v. J.J. Ferguson Sand &amp; Gravel Co.</i> , 858 So. 2d 129, 130 (Miss. 2003) .....	3
<i>Chisolm v. MDOT</i> , 942 So. 2d 136, 144 (Miss. 2006) .....	6
<i>Conley v. Warren</i> , 797 So. 2d 881, 885 (Miss. 2001) .....	6
<i>Galloway v. Travelers Ins. Co.</i> , 515 So. 2d 678, 683 (Miss.1987) .....	4
<i>Hardy v. Brantley</i> , 471 So. 2d 358 (Miss. 1985) .....	6, 7
<i>Marcum v. Hancock Co. School Dist.</i> , 741 So. 2d 234, 236 (Miss. 1999) .....	4
<i>Miller v. Meeks</i> , 762 So. 2d 302 (Miss. 2000) .....	5
<i>UMMC v. Robinson</i> , 876 So. 2d 337, 339 (Miss. 2004) .....	4
<i>Wilbourn v. Stennett, Wilkinson &amp; Ward</i> , 687 So.2d 1205, 1214 (Miss.1996) .....	4

## STATUTES AND RULES

MISS. CODE ANN. § 11-46-1, et seq. ....	1, 4, 5
MISS. R. CIV. P. 56(c) .....	4

Delta Regional Medical Center is a community hospital, and thus entitled to the immunities, privileges and immunity afforded to community hospitals under the Mississippi Tort Claims Act. The claim asserted against Delta Regional Medical Center was that its emergency room physician was negligent in the care and treatment rendered to Plaintiff, and thus Delta Regional Medical Center was vicariously liable for the alleged negligence of its emergency room physician. The emergency room physician had a contract to provide emergency room coverage for Delta Regional Medical Center and was an independent contractor. The status of Dr. Corkern as an independent contractor is not in question. Thus, under the Mississippi Tort Claims Act, a community hospital such as Delta Regional Medical Center should not be liable for the alleged negligence of an emergency room physician since the act specifically provides that political subdivisions can only be held liable for the torts of their "employees." MCA § 11-46-5(1) provides that the term "employee" shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the state or political subdivision.

**V.**

**DELTA REGIONAL MEDICAL CENTER,  
MICHAEL LAST, M.D., ROBERT L. CURRY, IV, M.D.,  
MARILYN MCLEOD, M.D., AND JOHN DOES 1-5**

**APPELLEES**

**BRIEF OF APPELLEE**

**NOW COMES** Delta Regional Medical Center, Appellee/Defendant, by and through counsel, and files this its Brief of Appellee and would show unto the Court the following:

**I.**

**COURSE OF PROCEEDING BELOW**

On or about December 12, 2003, the Browns filed their Complaint, and on or about December 17, 2003, the Browns filed their Amended Complaint. Delta Regional Medical Center (DRMC) filed its Answer on or about January 6, 2004. Thereafter, DRMC filed a Motion for Summary Judgment, and on April 27, 2007, the trial court granted DRMC's Motion for Summary Judgment from which the Browns appealed.

**II.**

**FACTS**

This appeal arises from a medical malpractice claim the Browns filed against DRMC, Dr. Michael Last, Dr. Robert Curry, Dr. Marilyn McLeod and others. Drs. Last, Curry and McCleod have been dismissed from the action. The Browns alleged that DRMC, by and through its emergency room physician, failed to properly diagnose and treat Ralph Brown for priapism. (*See,*

On January 8, 2003, Dr. Robert Corkern was an employee of Greenville Emergency Physicians, P.A. Greenville Emergency Physicians, P.A. contracted with DRMC to perform certain emergency services. (See, DRMC's MSJ, R.E.3, C.R.S. pp. 7-73; and Order Granting Defendant DRMC's MSJ, R.E.4, C.R. pp.79-83). In the Emergency Medical Services Agreement between DRMC and Greenville Emergency Physicians, P.A., the status of the Greenville Emergency Physicians, P.A., is defined as "an independent contractor of Hospital." *Id.* The status of Dr. Corkern as an independent contractor is not in dispute.

### **III.**

#### **SUMMARY OF ARGUMENT**

The trial court correctly found that Dr. Corkern was an independent contractor for DRMC; and therefore, DRMC is immune from liability.

### **IV.**

#### **ARGUMENT**

#### **A.**

#### **STANDARD OF REVIEW**

The Court employs the de novo standard in reviewing a trial court's grant of summary judgment. *Brown v. J.J. Ferguson Sand & Gravel Co.*, 858 So. 2d 129, 130 (Miss. 2003). The moving party shall be granted judgment "if the pleadings, depositions, answers to interrogatories and

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<sup>1</sup>Record Excerpt (R.E.) references DRMC's record excerpts submitted with this brief; Court Record (C.R.) and Court Record Supplemental (C.R.S.) reference the page numbers from the Court's record.

material fact and that the moving party is entitled to judgment as a matter of law.” Miss. R. Civ. P. 56(c). “Summary judgment is mandated where the respondent has failed ‘to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.’” *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1214 (Miss.1996) (citing *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 683 (Miss.1987) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986))).

## **B.**

### **ARGUMENT**

State sovereign immunity shields the State of Mississippi and its political subdivisions, such as DRMC, from liability in the state’s own courts, absent a statutory waiver. Mississippi partially waived immunity from suit by and through the Mississippi Tort Claims Act (MTCA) (Miss. Code Ann. § 11-46-1 et seq.) “The MTCA was enacted in 1993 to create a limited waiver of sovereign immunity of the state and its political subdivisions.” *UMMC v. Robinson*, 876 So. 2d 337, 339 (Miss. 2004) (citing *Marcum v. Hancock Co. School Dist.*, 741 So. 2d 234, 236 (Miss. 1999)). The limited waiver of state sovereign immunity is very specific; that if a claim is not permitted, then Mississippi’s constitutional right to sovereign immunity applies. DRMC, as a state entity, is generally immune from suit in the courts of Mississippi. The only lawsuits proper against DRMC are those brought within the limited provisions of the MTCA.

The State of Mississippi has not waived its sovereign immunity for allegations of vicarious liability for the actions or inactions of an independent contractor. The limited waiver of immunity applicable to this suit is as follows:

claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting without the course and scope of their employment is hereby waived....

MISS. CODE ANN. § 11-46-5(1). The specific limited waiver found in MISS. CODE ANN. § 11-46-5 states that political subdivisions can only be liable for the torts of their “employees,” and then only when they are acting within the course and scope of their employment. MISS. CODE ANN. § 11-46-5(1). In the case sub judice, Dr. Corkern is an independent contractor, rather than an employee of DRMC.

The MTCA defines an employee as follows:

‘Employee’ means any officer, employee or servant of the State of Mississippi or a political subdivision of the state...the term ‘employee’ shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the state or a political subdivision.

MISS. CODE ANN. § 11-46-1(f).

In *Miller v. Meeks*, 762 So. 2d 302 (Miss. 2000), the Mississippi Supreme Court handed-down a list of five (5) factors the trial court must weigh in determining whether or not a physician is an independent contractor or an employee under the MTCA, namely:

- (1) the nature of the function performed by the employee;
- (2) the extent of the state’s interest and involvement in the function;
- (3) the degree of control and direction exercised by the state over the employee;
- (4) whether the act complained of involved the use of judgment and discretion; and
- (5) whether the physician receives compensation, either directly or indirectly, from the patient for professional services rendered.



Corkern was an independent contractor. The court found that Dr. Corkern's primary duty was to provide medical care as a doctor, not as a teacher for the state. *See Conley v. Warren*, 797 So. 2d 881, 885 (Miss. 2001). Next, the court found that DRMC's interest and control over Dr. Corkern was slight. Although the court pointed out that DRMC offered Dr. Corkern the opportunity to treat Plaintiff, it also noted that any control over Dr. Corkern's actions was minuscule. Additionally, the court found that Dr. Corkern's decisions were medical judgments and not in furtherance of any DRMC policy or under the control of DRMC. Finally, the court found that Dr. Corkern received compensation from the patient for the services rendered because the Employment Agreement provided that the Practice would bill the patient directly. After analyzing Dr. Corkern's status under the Miller test, the court correctly concluded that Dr. Corkern was acting as an independent contractor.

Further, because Dr. Corkern is an independent contractor for DRMC, not an employee of DRMC, DRMC is immune from liability for any alleged actions or inactions, if any, that he may have committed. *See Chisolm v. MDOT*, 942 So. 2d 136, 144 (Miss. 2006)("[P]laintiffs may not hold MDOT liable for the negligence of its independent contractors.") Under the Mississippi Tort Claims Act, immunity is not waived unless the actor is an employee of the governmental entity and not an independent contractor. In this case, Dr. Corkern was an independent contractor, and therefore, DRMC is immune from liability for any alleged actions or inactions, if any, that Dr. Corkern may have committed.

Plaintiffs rest their position on the *Hardy* line of cases, which held that when a patient arrives at a hospital with an emergency room facility, and does not select the emergency room doctor, the

ne has a separate contract with the hospital which purports to make him an independent contractor with the hospital. *Hardy v. Brantley*, 471 So. 2d 358 (Miss. 1985). However, this case and its progeny are pre-MTCA actions and look to the relationship between the patient and the health care provider, not the hospital and physician. The doctrine enunciated in *Hardy v. Brantley* as to a community hospital has been preempted by the Mississippi Tort Claims Act.

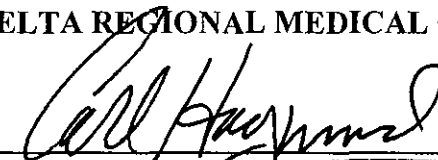

### **CONCLUSION**

The trial court did not err in finding that Dr. Corkern was an independent contractor for DRMC and therefore, DRMC was immune from liability.

**RESPECTFULLY SUBMITTED**, this, the 28 day of April, 2008.

**DELTA REGIONAL MEDICAL CENTER**

BY:

  
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I, L. Carl Hagwood, one of the attorneys of record for Defendant DRMC herein, certify that

I have this day mailed, postage prepaid, a true and correct copy of the foregoing document to:

Honorable Richard A. Smith  
Circuit Court Judge  
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Ralph E. Chapman, J.D.  
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THIS, the 28 day of April, 2008.

  
\_\_\_\_\_  
L. CARL HAGWOOD

**CERTIFICATE OF FILING**

I, L. CARL HAGWOOD, certify that I have this day delivered via U.S. Mail, postage prepaid, the original and three copies of, and a floppy disc containing, Brief of Appellee on April 28, 2008, to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, P. O. Box 117, Jackson, Mississippi 39205.

  
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L. CARL HAGWOOD