

IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2007-CA-00867

RALPH BROWN AND LORA BROWN

APPELLANTS

V.

CAUSE NO. 2007-CA-00867

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

APPELLEES

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

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or refusal.

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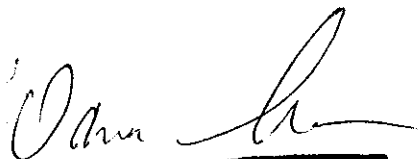


Dana J. Swan, 

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BRIEF OF APPELLANT

COMES NOW THE APPELLANT/PLAINTIFF, by and through counsel, and files this their Brief of Appellant and would show unto the Court that the trial court was in error in granting the Defendant Delta Regional Medical Center's summary judgment.

I.

COURSE OF PROCEEDING BELOW

This cause of action arises out of a Complaint which was filed on or about December 12, 2003. An Amended Complaint was filed on or about December 17, 2003. Defendant Delta Regional Medical Center, (hereinafter referred to as "Delta") filed their Answer on or about January 6, 2004. A Motion for Summary Judgment was filed by Delta on or about January 16, 2007. On April 27, 2007, the lower court granted Delta's Motion for Summary Judgment, from which the Plaintiffs Ralph Brown and Lora Brown (hereinafter referred to as the "Browns") filed their appeal.

II.

FACTS

This appeal arises from a medical malpractice cause which was filed, *inter alia*, against Delta Regional Medical Center and other physicians and employees of Delta. (R. 7-11). The Browns alleged that Delta, by and through its emergency room employees failed to properly diagnose and treat Ralph Brown for priapism, a painful and potentially dangerous swelling of the penis

According to the Browns, on or about January 8, 2003, Plaintiff, Ralph Brown, presented to the Emergency Room at the Defendant Hospital for sickle cell crisis and priapism. He reported pain to his penis, lower back and legs. He was initially treated by Marilyn K. McLeod, M.D. and later transferred to Dr. Robert Corken, M.D. *Id.* Both Drs McLeod and Corken were emergency room physicians at Delta and provided their services to Delta through an Emergency Medical Services Agreement, entered into on August 1, 2003. (S. R. 58-73). He was later discharged home that day with pain medication. He returned to the Emergency Room at the Defendant Hospital on January 9, 2003 with persistent unrelieved pain and was treated by and was admitted to the hospital under the care of Michael Last, M.D. and Robert Curry, M.D. His symptoms were treated with oxygenation, hydration and alkalization of his blood, pain medication and ice packs.

On January 10, 2003, Mr. Brown's condition had not improved and he requested a transfer to St. Dominic's Hospital in Jackson, Mississippi. He was transferred to St. Dominic's Hospital by ambulance that day and underwent corporal evacuation and irrigation and a shunt procedure on January 11, 2003. He was transferred to University Medical Center on January 12, 2003 for red cell exchange transfusion and remained a patient there until January 23, 2003. (R. 7-11).

III. .

SUMMARY OF ARGUMENT

Delta Regional Medical Center is liable for the actions of the physicians in their Emergency Room through well established case law in Mississippi. Hardy v. Brantley, 471 So. 2d 358 (Miss. 1985). The emergency room personnel are not subject to the independent contractor exception of Miss Code Ann § 11-46-1(f).

IV.

ARGUMENT

The judgment by the trial court is contrary to the well established law of Mississippi. In contrast to the law of this Court, the trial court relied on Miss Code Ann § 11-46-1(f) and held that Dr. Corken and the Emergency Room Physicians were independent contractors and, therefore, Delta

was not liable under the doctrine of *respondeat superior*. Miss Code Ann § 11-46-1(f) exempts independent contractors from being state employees by providing, in part: 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.

This defense has repeatedly been rejected by the Mississippi Supreme Court when it is applied to emergency room physicians. The leading case on this point is Hardy v. Brantley, 471 So. 2d 358 (Miss. 1985). In Hardy, the Mississippi Supreme Court held that when a patient arrives at a hospital with an emergency room facility, and does not select the emergency room doctor, the hospital is vicariously liable for any treatment of the emergency room physician, despite the fact that he has a separate contract with the hospital with purports to make him an independent contractor with that hospital. Hardy rejected this analysis and stated that, under these circumstances, the emergency room physician will be considered to be an employee of the hospital.

Hardy has been affirmed on numerous occasions. The case of Gatlin v. Methodist Medical Center, Inc., 772 So. 2d 1023 (Miss. 2000) affirms this point. In quoting Hardy, Gatlin noted:

where a hospital holds itself to the public as providing a given service, in this instance, emergency services, and when a hospital enters into a contractual arrangement with one or more physicians to direct and provide the service, and where the patient engages the services of the hospital without regard to the identity of a particular physician and where as a matter of fact the patient is relying upon the hospital to deliver the desired health care and treatment, the doctrine of *respondeat superior* applies and the hospital is vicariously liable for damages approximately resulting from the neglect, if any, of such physicians.

Id. at 1027.

Therefore, it is clear that Dr. Corkern is considered to be the employee of DRMC. It matters not whether the hospital is a government entity or not. The doctrine of *respondeat superior* applies in a master servant or employer/employee situation, and not that of an independent contractor. The doctrine of *respondeat superior* is a derivative claim arising **solely** out of the negligent contract of its employee within the scope of his or her employment. J & J Timber Co. v. Broome, 932 So. 2d 1, 5 (Miss. 2006). Therefore, DRMC cannot claim that Corkern is an independent contractor, but

rather under Mississippi law he is their employee. The trial court was in error in concluding otherwise.

V.


CONCLUSION

The trial court was in error in concluding that the Emergency Room Physicians of Delta were independent contractors and, therefore, not the employees of Delta. This is contrary to Hardy v. Brantley supra, which is still the law of this State. The independent contractor exception to the Mississippi Tort Claim act simply does not apply to Emergency Room personnel and physicians.

RESPECTFULLY SUBMITTED this the 3rd day of April, 2008.

Respectfully submitted,
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By: 

Dana J. Swan 


CERTIFICATE OF SERVICE

I Dana J. Swan, do hereby certify that I have this day served via U.S. Mail, postage paid, a true and correct copy of the above and foregoing document to the following:

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THIS, the 3rd day of April, 2008.


Dana J. Swan