IN THE SUPREME COURT

STATE OF GEORGIA

CASE NO. _________

TENET HEALTHSYSTEM GB, INC.
d/b/a ATLANTA MEDICAL CENTER,

Petitioner,

v.

LORRINE THOMAS,

Respondent.

PETITION FOR CERTIORARI

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I. INTRODUCTION

Today, most physicians work in group practice settings in the United States.[1] In the instant case, the Georgia Court of Appeals construed part of a 12-year-old statute enacted as part of the 2005 tort reform law, and by its construction ignored the contractual rights of those physicians working in a group practice. The issue presented is whether Petitioner, Tenet HealthSystem GB, Inc., d/b/a Atlanta Medical Center ("AMC"), is vicariously liable for certain actions of Drs. Robin Lowman and Clifford Grossman under *respondeat superior* principles.

Drs. Lowman and Grossman provided services to patients at AMC pursuant to contracts between their respective practice groups and AMC. These contracts contained identical terms which provided: "3. **Independent Contractors**. In performing the services hereunder specified, [Group], and Physicians are acting as independent contractors and shall not be considered employees or agents of [AMC]."

In light of this clear and unambiguous language, the Superior Court determined that under O.C.G.A. § 51-2-5.1(f), Drs. Grossman and Lowman should be deemed independent contractors of AMC.

The Georgia Court of Appeals ignored the clear and unambiguous language of these contracts, and reversed, concluding that O.C.G.A. § 51-2-5.1(f) did not

[1] Kash, B. and Tan, D., *Physician Group Practice Trends: A Comprehensive Review*, Journal of Hospital and Medical Management, Vol. 2, Issue 2 (2016).

apply because the two doctors were not parties to contracts directly with AMC. *Thomas v. Tenet HealthSystem GB, Inc. d/b/a Atlanta Medical Center*, Case No. A16A2160 (decided January 19, 2017).

This case presents an important issue which has yet to be decided by this Court, an issue involving the construction of O.C.G.A. § 51-2-5.1(f). A proper construction of that statute impacts all hospitals that contract with medical groups as contracts between hospitals and medical practice groups are quite common. Petitioner respectfully requests that this Court grant certiorari.

II. ISSUE PRESENTED

Does O.C.G.A. § 51-2-5.1(f) apply when a hospital's contract with a medical group expressly defines the physicians practicing in that group as independent contractors of the hospital?

III. BACKGROUND

Ms. Thomas filed a complaint alleging professional negligence against Drs. Lowman and Grossman. She also included in her Complaint claims against AMC for imputed liability, alleging that Drs. Lowman and Grossman had acted as the agents of AMC.

Dr. Grossman was an employee and shareholder of Diagnostic Imaging Specialists, P.A. ("DIS"). DIS had a contract with AMC to provide radiology services. AMC's contract for radiology services stated the following:

> 3. **Independent Contractors**. In performing the services hereunder specified, [DIS], and Physicians are acting as independent contractors and shall not be considered employees or agents of [AMC].

(R. 482, 1232).

Dr. Lowman had a contractual relationship with ACS Primary Care Physicians-Southeast, P.C. ("ACS"). ACS had a contract with AMC to provide physicians to treat emergency room patients. That contract stated the following:

> 3. **Independent Contractors**. In performing the services hereunder specified, [ACS], and Physicians are acting as independent contractors and shall not be considered employees or agents of [AMC].

(R. 470, 1245).

The Superior Court granted summary judgment to AMC in April 2016 on Respondent's claims of imputed liability, concluding as a matter of law that Drs. Lowman and Grossman were independent contractors of AMC. The Georgia Court of Appeals reversed and concluded that O.C.G.A. § 51-2-5.1(f) did not apply because Drs. Lowman and Grossman did not have direct contractual relationships with AMC.

IV. ARGUMENT AND CITATION OF AUTHORITY

Certiorari is appropriate in cases of great concern, gravity or importance to the public. Rule 40, Rules of the Georgia Supreme Court. This is such a case. This case presents an issue of first impression that impacts all hospitals that

contract with medical practice groups to provide services in those hospitals. It raises an important and far-reaching issue regarding the interpretation of part of Georgia's 2005 tort reform law.

A. O.C.G.A. § 51-2-5.1(f) Was Part of Georgia's 2005 Tort Reform Law and Was Intended to Clarify the Law and Reduce Medical Malpractice Liability

The General Assembly adopted O.C.G.A. § 51-2-5.1 in 2005 as a part of a law that revised many aspects of Georgia civil practice and, in particular, many matters related to medical malpractice claims. Ga. Laws 2005, pp. 13-14, § 11. Properly interpreting that statute requires an understanding of the legal landscape prior to 2005 relating to the *respondeat superior* liability of hospitals for physicians.

Prior to 2005, the *respondeat superior* liability of hospitals for the actions of physicians was defined by O.C.G.A. § 51-2-5. Applying that statute prior to 2005, this Court had developed the following rule for determining the status of a doctor working at a hospital.

> The rule is that for the hospital to be liable it must be shown that the doctor was an employee of the hospital and not an independent contractor. The true test of whether the relationship is one of employer-employee or employer-independent contractor is whether the employer, under the contract either oral or written, assumes the right to control the time, manner and method of executing the work, as distinguished from the right merely to acquire definite results in conformity to the contract.

Allrid v. Emory Univ., 249 Ga. 35, 39-40 (1982) (internal citations and quotations omitted). In attempting to apply that standard, the Georgia Court of Appeals developed a multi-factor test for analyzing whether a physician was acting as an independent contractor. *See Cooper v. Binion*, 266 Ga. App. 709, 710-13 (2004). Applying that multi-factor test leads to inevitable disagreements about the weight to be given the different factors and whether the existence or nonexistence of certain factors would lead to a conclusion that a physician was acting as an independent contractor for a hospital. That complicated the determination of whether physicians were independent contractors and, therefore, increased the liability risks of hospitals.

In cases in which a physician provided services in a hospital pursuant to an agreement between that hospital and a medical group that employed the physician, Georgia courts had looked to the terms of the agreement between the hospital and the medical group to determine whether the physician was an independent contractor or an agent of the hospital. In *Overstreet v. Doctors Hospital*, the Georgia Court of Appeals affirmed the grant of summary judgment to a hospital on the issue of whether a physician had acted as an independent contractor for a hospital. 142 Ga. App. 895, 896-98 (1977). In examining whether the physician was an independent contractor of the hospital, the Court of Appeals focused on the terms of the contract between the hospital and the Director of Emergency Room

Services who was required to employ and provide the physicians. *Id.* at 896. The opinion mentions no contract between the hospital and the physician. In *Pogue v. Hospital Auth. of DeKalb County*, the Georgia Court of Appeals also considered a case in which the issue was the liability of a physician who worked at a hospital pursuant to an agreement between the hospital and a physicians group. 120 Ga. App. 230 (1969). That Court determined that the grant of summary judgment in favor of the hospital on the issue of *respondeat superior* liability should be affirmed based on the terms of the agreement between the hospital and the medical group. *Id.* at 230-31. The opinion mentions no contract directly between the physician and the hospital.

Consequently, prior to 2005, to determine whether a physician who provided services to a hospital pursuant to a contract with a group of physicians was an independent contractor of the hospital, Georgia courts looked to the terms of the agreement between the hospital and the medical group. Also, Georgia courts were applying a complicated multi-factor test to evaluate whether a physician was acting as an independent contractor.

In enacting the statute at issue in 2005, the General Assembly made findings noting "a crisis affecting the provision and quality of health care services in this state." Ga. Laws 2005, p. 1 § 1. In enacting that law, the General Assembly

described its actions as "needed reforms." *Id.* A part of those reforms was O.C.G.A. § 51-2-5.1(f) which provided as follows:

> Whether a health care professional is an actual agent, an employee, or an independent contractor shall be determined by the language of the contract between the health care professional and the hospital. In the absence of such a contract, or if the contract is unclear or ambiguous, a health care professional shall only be considered the hospital's employee or actual agent if it can be shown by a preponderance of the evidence that the hospital reserves the right to control the time, manner, or method in which the health care professional performs the services for which licensed, as distinguished from the right to merely require certain definite results.

In light of the findings made by the General Assembly when it adopted the 2005 law, the General Assembly believed it was clarifying the law and reducing the liability risks faced by health care providers. By focusing on the terms of the relevant contract that defined the physician's status, the Georgia Legislature reduced the number of cases that would be governed by the application of a multi-factor test. If the terms of a contract clearly define the relationship between a physician and a hospital, those contract terms would determine whether the physician was an independent contractor for the hospital.

B. <u>The Decision Below Interpreted O.C.G.A. § 51-2-5.1(f) in a Way That Made the Law Less Clear and Makes It More Difficult for Hospitals to Establish That Physicians Are Independent Contractors</u>

In this case, the Georgia Court of Appeals concluded that O.C.G.A. § 51-2-5.1(f) did not control the analysis of whether Drs. Lowman and Grossman acted as

independent contractors for AMC because there was no contract directly between the doctors and AMC. AMC contracts were with the physician groups that employed the doctors. The Court concluded that to determine whether the doctors were independent contractors, the lower court needed to look to O.C.G.A. § 51-2-5.1(g), which identified a number of specific factors that needed to be examined. Opinion, p. 7.

The construction of O.C.G.A. § 51-2-5.1(f) adopted by the Court of Appeals significantly limits the statute's intended beneficial effects by ignoring the way in which many doctors practice in hospitals. They do not sign contracts directly with the hospitals; their practice groups sign the contracts. Nevertheless, the conditions under which the doctors practice in the hospitals are set by the terms of those contracts. Those contracts define a doctor's relationship with a hospital no differently from a contract directly with the hospital. By focusing on who signs the contract rather than whose rights and obligations are defined by the contract; the Court of Appeals too narrowly read O.C.G.A. § 51-2-5.1(f) and deprived it of the remedial impact it was designed to have.

The Court of Appeals' interpretation of the phase of "the contract between the health care professional and the hospital" is too narrow. The contracts between AMC and the two physician groups at issue expressly defined Drs. Lowman and Grossman as independent contractors of AMC and defined how the physicians

would provide services at AMC. Therefore, those contracts qualified as contracts "between the health care professional and the hospital" because they expressly defined the contractual relationship between the physicians and AMC.

The decision in the Georgia Court of Appeals ignores its own prior authorities regarding where to look to define the relationship between a hospital and a doctor in a practice group. In *Overstreet* and *Pogue*, the Court of Appeals looked at the contract between the hospital and the physician's group to determine the status of an individual physician as an independent contractor. In this case, the Court of Appeals, applying the 2005 law designed as a "reform," held that such a contract was not controlling.

The decision of the Court of Appeals effectively limits the reach of O.C.G.A. § 51-2-5.1(f) and implicitly overruled decisions such as *Overstreet* and *Pogue*. Instead of relying on the language of the contract that defines the relationship between the physician group and the hospital, the hospital would be able to establish the independent contractor status of a physician by applying the multi-factor test now codified in O.C.G.A. § 51-2-5.1(g). The General Assembly designed the statute as a reform to reduce liability and add clarity to the laws addressing medical malpractice claims. The decision below makes it difficult than the General Assembly intended for a hospital contracting with the practice group to establish a physician's status as an independent contractor.

Contractual relationships between hospitals and medical practice groups are common. Any decision interpreting O.C.G.A. § 51-2-5.1(f) affects all such relationships. That statute should be interpreted in a way that respects the 2005 statute's text and the General Assembly's intent and does not increase the liability risk of hospitals.

V. CONCLUSION

Petitioner respectfully requests that this Court grant its Petition for Certiorari.

Respectfully submitted,

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v.	)	CASE NO. ________
LORRINE THOMAS,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within PETITION FOR CERTIORARI by first-class, U.S. mail, with sufficient postage to ensure delivery to the following:

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This 8th day of February, 2017.

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FOURTH DIVISION
ELLINGTON, P. J.,
BRANCH and MERCIER, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed.
http://www.gaappeals.us/rules

January 19, 2017

In the Court of Appeals of Georgia

A16A2160. THOMAS v. TENET HEALTHSYSTEM GB, INC. d/b/a ATLANTA MEDICAL CENTER.

MERCIER, Judge.

Lorrine Thomas appeals the trial court's partial grant of summary judgment to Atlanta Medical Center (AMC). She argues that the trial court erred when it found that two physicians were independent contractors, and when it concluded that AMC was not a joint venturer with its co-defendants. We affirm in part and vacate in part, and the case is remanded.

In May 2012, Thomas was involved in a car accident. At the scene of the accident, Thomas was placed on a backboard by paramedics, and taken by ambulance to AMC. Dr. Robin Lowman was Thomas's physician when she arrived at AMC's emergency room, and he ordered that a cervical CT scan and other tests be performed

on Thomas. When completed, the CT scan was sent to Dr. Clifford Grossman who read it at his home. After reviewing the CT scan, Dr. Grossman concluded that there were no fractures in Thomas's cervical spine, and communicated this to Dr. Lowman. Dr. Lowman instructed a nurse at AMC to remove a cervical spine collar that had been placed on Thomas, and to discharge her from the hospital. The nurse then removed the collar from Thomas's neck.

Thomas, who was heavily medicated at the time, was placed in a wheelchair and taken to the curb to await her ride, but when her brother arrived to pick her up, Thomas was slumped over and unresponsive in the wheelchair. Thomas was readmitted to the hospital, and upon re-examination, it was discovered that Thomas did in fact have a fracture in her cervical spine. When the cervical spine collar was removed, the fracture in Thomas's spine was displaced, which caused a compression of Thomas's spinal cord and neurological damage. As a result of the neurological damage, Thomas was rendered a quadriplegic.

In May 2014, Thomas filed a complaint alleging professional negligence against Dr. Lowman and Dr. Grossman, as well as against AMC for imputed liability. Thomas alleged inter alia, that both Dr. Lowman and Dr. Grossman were employees or agents

of AMC, and that both doctors and their practice groups were joint venturers with AMC.

In November 2014, AMC filed a motion for summary judgment, and Thomas filed a response in August 2015. The trial court entered an order granting AMC's motion for summary judgment in part in April 2016. This appeal followed.

1. In her first enumeration of error, Thomas argues that the trial court erred when it granted summary judgment to AMC, based on its finding that Dr. Grossman and Dr. Lowman were independent contractors. "It is well established that on appeal of a grant of summary judgment, the appellate court must determine whether the trial court erred in concluding that no genuine issue of material fact remains and that the party was entitled to judgment as a matter of law. This requires a de novo review of the evidence." *Rubin v. Cello Corp.*, 235 Ga. App. 250 (510 SE2d 541) (1998) (citations omitted). Furthermore, "[s]ummary judgment is appropriate when the court, viewing all the facts and evidence and reasonable inferences from those facts in a light most favorable to the non-movant, concludes that the evidence does not create a triable issue as to each essential element of the case." *Zeller v. Home Fed. Sav. & Loan Ass'n of Atlanta*, 220 Ga. App. 843 (471 SE2d 1) (1996) (citation omitted).

In addition to the traditional analysis conducted by this court on the appeal of a grant of summary judgment, this case also implicates a specific statutory scheme. OCGA § 51-2-5.1 (f) states:

> [w]hether a health care professional is an actual agent, an employee, or an independent contractor shall be determined by the language of the contract between the health care professional and the hospital. In the absence of such a contract, or if the contract is unclear or ambiguous, a health care professional shall only be considered the hospital's employee or actual agent if it can be shown by a preponderance of the evidence that the hospital reserves the right to control the time, manner, or method in which the health care professional performs the services for which licensed, as distinguished from the right to merely require certain definite results.

"Health care professional" is pertinently defined by the statute as "a professional licensed as a . . . medical doctor." OCGA § 51-2-5.1 (a) (1). It is not disputed that both Dr. Lowman and Dr. Grossman are medical doctors. Thus, we must first determine whether a contract existed between either Dr. Lowman or Dr. Grossman, and AMC.

Dr. Grossman had a contract with his physician group, Diagnostic Imaging Services, Inc. (DIS), pursuant to which he provided radiology services at AMC. That

contract bound Dr. Grossman by all terms of the contract between DIS and AMC, and was in effect during the time Thomas was a patient of AMC. Dr. Lowman had a contract with her physician group, ACS Primary Care Physicians, P.C. (ACS). Similar to Dr. Grossman, this contract required Dr. Lowman to be bound by terms of the contract between ACS and AMC, and was in effect while Thomas was a patient at AMC.

In determining that both doctors were independent contractors, the trial court relied on language in both contracts that stated "Independent Contractors. In performing the services herein specified, Group and Providers [or Physicians, per the contract between AMC and DIS] are acting as independent contractors, and shall not be considered employees or agents of Hospital." The trial court found that because this language in the contracts (between the physician groups and AMC) was clear and unambiguous, both doctors were independent contractors, and so AMC could not be held vicariously liable for their actions. While the language of these contracts is assuredly clear and unambiguous, the contracts fail to meet the standard for determining whether an agency relationship existed between the physicians and the hospital, as established by OCGA § 51-2-5.1 (f).

In analyzing the meaning of a statute, we as an appellate court must "presume that the General Assembly meant what it said and said what it meant." *In the Interest of L.T.*, 325 Ga. App. 590, 591 (754 SE2d 380) (2014). See also *Deal v. Coleman*, 294 Ga. 170, 172 (1) (a), (751 SE2d 337) (2013) citing *Arby's Restaurant Group, Inc. v. McRae*, 292 Ga. 243, 245 (1) (734 SE2d 55) (2012). Where the language of a statute is plain and susceptible to only one natural and reasonable construction appellate courts must construe the statute accordingly. *Deal*, supra at 172-173 (1) (a).

OCGA § 51-2-5.1 (f) states clearly that "[w]hether a health care professional is an actual agent, an employee, or an independent contractor shall be determined by the language of the contract *between the health care professional and the hospital*." (Emphasis supplied). "Health care professional" is defined as a professional who possesses a license from an enumerated list of professions. OCGA § 51-2-5.1 (a) (1). OCGA § 51-2-5.1 (f) makes no mention of physician groups or contracts that exist between physician groups and physicians, but only mentions those that are between health care professionals and hospitals. Accordingly, because Dr. Grossman and Dr. Lowman had contracts with their physician groups who in turn had contracts with AMC, these contractual relationships do not fall under OCGA § 51-2-5.1 (f). Thus,

it was error for the trial court to grant summary judgment to AMC based on the contractual language between AMC and both DIS and ACS.

However, this does not mean that AMC is not entitled to summary judgment. OCGA § 51-2-5.1 (g) states: "[i]f the court finds that there is no contract or that the contract is unclear or ambiguous as to the relationship between the hospital and health care professional, the court shall apply the following." OCGA § 51-2-5.1 (1) - (2) then lists a variety of factors that a court may and shall not consider when determining whether an agency relationship exists. Because the lower court determined there was no agency relationship based on the contractual language quoted above, it did not conduct such an analysis. Therefore, we vacate the trial court's finding that no agency relationship existed between AMC and Dr. Grossman and/or Dr. Lowman, and remand the case so that the trial court may make a proper analysis pursuant to OCGA § 51-2-5.1. (g).

2. In her second enumeration of error, Thomas contends that the trial court erred when it found that no joint venture existed between AMC and its co-defendants.

> A joint venture arises where two or more parties combine their property or labor, or both, in a joint undertaking for profit, with rights of mutual control. There must be not only a joint interest in the objects and purposes of the undertaking, but also a right, express or implied of each

> member of the joint venture to direct and control the conduct of the other. Thus, it is the right of mutual control, rather than its actual exercise, which must be shown.

Kelleher v. Pain Care of Georgia, Inc., 246 Ga. App. 619, 620 (540 SE2d 705) (2000) (punctuation and footnotes omitted).

Thomas argues that because the contracts between AMC and both DIS and ACS contained provisions calling for mutual operation, they were joint venturers. Under the contract between AMC and DIS, the DIS physicians were to cooperate with the AMC employee health plan, and perform duties requested by the hospital. DIS and AMC were to agree on the number of physicians in the radiology department, and the schedule of those physicians. The contract between ACS and AMC contained similar provisions. However, while these contracts show some interdependency between the parties, these provisions fail to establish that the parties to the contracts had the right of mutual control. Stated succinctly "there is simply no evidence that [AMC] had a right of mutual control of the manner in which [DIS or ACS] provided [medical] services." *Kitchens v. Brusman*, 280 Ga. App. 163, 167 (3) (633 SE2d 585) (2006). Accordingly, it was not error for the trial court to grant summary judgment to AMC on this issue.

Thomas also argues that because AMC did not move for summary judgment regarding its relationship with the individual physicians, it was error for the trial court to find that no joint venture existed. "Although a trial court may, sua sponte, grant summary judgment on an issue not raised by the parties, in so doing the trial court must ensure that the party against whom summary judgment is rendered is given full and fair notice and opportunity to respond prior to entry of summary judgment." *McClendon v. 1152 Spring Street Associates-Georgia, Ltd. III*, 225 Ga. App. 333, 334 (484 SE2d 40) (1997) (punctuation and citation omitted). The record does not reflect that any steps were taken by the trial court to give Thomas proper notice and an opportunity to respond to the entry of summary judgment on the issue of whether AMC had a right to control the manner in which Dr. Grossman and Dr. Lowman provided medical services. See *McClendon*, supra. Accordingly, the trial court's grant of summary judgment to AMC on this issue is vacated.

Judgment vacated in part, affirmed in part, and case remanded. Ellington, P. J., and Branch, J., concur.