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SUPREME COURT

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DEC 8 2006

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

20060261

Supreme Court No. 20060261

William Chamley
Appellant

FILED
IN THE OFFICE OF THE
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DEC 8 2006

v.

Inder V. Khokha, M.D.
and
Mercy Medical Center
Appellees

STATE OF NORTH DAKOTA

APPEAL FROM SUMMARY JUDGMENTS DATED AUGUST 16, 2006
AND ORDERS GRANTING SUMMARY JUDGMENT OF DISMISSAL
DATED MAY 19, 2006 AND JULY 17, 2006
OF THE DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT,
WILLIAMS COUNTY, NORTH DAKOTA
THE HON. DAVID W. NELSON, PRESIDING

REPLY BRIEF OF APPELLANT

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ARGUMENT

Introduction

This Reply Brief is intended to briefly respond to certain arguments made by the hospital and Khokha and, in particular, issues regarding Khokha's responsibility to provide emergency care to humans and whether Khokha "expected" to be compensated for his services.

Emergency medical treatment.

Appellees argue that Khokha was not credentialed in "emergency room" medicine, and that his contract with Mercy did not require him to provide treatment to those who were other physician's patients. (Mercy Appellee Brief page 14) It is thus argued that since he was not employed to provide emergency medical aid to humans, he is immune pursuant to N.D.C.C. 32-03.1-05. (Mercy Appellee Brief pages 15-16)

This argument is a total distortion of Khokha's employment contract and assumes facts not found in the record. Whether or not Khokha worked in the "emergency room" is irrelevant and independent of his obligation to provide emergency services to hospital patients. Khokha was a salaried employee of Mercy. Nowhere in his contract does it state that he was not hired to treat hospital patients with emergent medical problems or that he could not treat other doctor's patients. In point of fact, the contract states, without reservation or limitation, that Khokha was required to "attend to patients in hospitals...whenever they are admitted for care in such facilities." (App. p. 42) Additionally, his privileges included the treatment of multiple traumatic injuries, including injuries to the arteries, veins and vena cava (App. P. 51), which were the same anatomical structures involved in Khokha's treatment of Rosie. One would assume that

if the hospital truly intended to prevent Khokha from treating hospital patients with emergent conditions such as Rosie's, or restrict the type of patients he could or could not treat (patients of this doctor or that doctor); it could have easily done so. No such restrictions existed in this hospital-doctor employment contract. Khokha was contractually required to treat all hospital patients. This obligation created not only a hospital-patient relationship, but a physician-patient relationship as well. The argument that neither the doctor nor the hospital owed a duty to Rosie is without merit.

No expectation of remuneration?

In spite of the fact that Khokha was a salaried employee contractually required to treat all hospital patients, the hospital and doctor continue to argue that Khokha was a "bystander," or a "volunteer," performing an act of "charity" and that he had no expectation of remuneration and should be therefore immune from suit. (Mercy Appellee Brief pages 9-11) It is suggested that since Khokha testified he "wasn't thinking about anything other than getting the patient off the table alive" (Mercy Appellee Brief page 18) there likewise can be no argument that he had any expectation of payment for his services. This is not only an illogical conclusion from the quoted testimony, but an argument totally ignorant of the evidence. As stated earlier in our brief, Khokha was simply providing medical services he was contractually obligated to perform, for payment, pursuant to the compensation provisions of the contract. It would be impossible for Khokha to have not expected remuneration since he was continuously being paid for such services on a monthly basis. Payment was expected the moment Rosie entered the hospital. One could genuinely argue that Khokha had already been paid to treat Rosie before he stepped into the operating room. At the very least, might not

the question of expectation of payment for services be a question of fact for jury determination, precluding summary judgment?

CONCLUSION

If the argument of the hospital and Dr. Khokha is adopted, then every hospital employee providing medical services in the ordinary course and scope of their employment is a "Good Samaritan," and thus immune from responsibility for their conduct. Furthermore, the hospital and doctor would advance the proposition that if the employee simply testifies that at the time of the event he or she subjectively did not expect or anticipate compensation, even though they were actually being paid to do their job, they are also immune because they are "Good Samaritans." To argue in the alternative that the same position is a question of fact does not seem to be a responsible legal conclusion either.

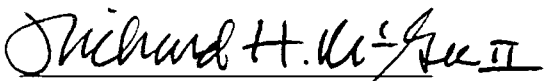
This court should conclude that the Good Samaritan law does not apply to hospital employees treating hospital patients in the course and scope of their employment. Furthermore, to simply label the issue as one of fact, results in every judge or jury having to decide, from the employee's subjective state of mind, whether the employee was aware they were being compensated for performing their job responsibilities, despite the obvious fact that they had to know as much, having received a monthly pay check.

Finally, the conclusion suggested by the doctor and the hospital would result in utter hospital chaos with doctors, nurses and technical employees being cloaked with the legal authority to refuse to follow orders to treat patients, leaving the patient without life saving medical care. If that is to be the case, then the "Good Samaritan" law will have

come "full circle," having been first enacted to encourage road side assistance to the injured to, in the end, sanctioning a refusal to treat even when contractually obligated to do so.

This court should reverse the Summary Judgment of dismissal and remand the matter for trial, with directions to the lower court to strike both the doctor's and hospital's claims of "Good Samaritan" immunity.

Respectfully submitted this 7th day of December, 2006.

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CERTIFICATE OF SERVICE

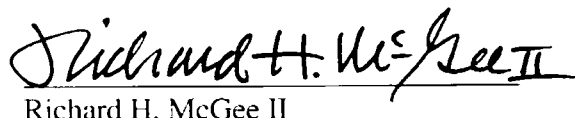
I certify that on the 7th day of December, 2006, I mailed a true and correct copy of foregoing Brief of Appellant and the Appendix to:

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