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214 Va. 405

IN THE

SUPREME COURT OF VIRGINIA

At Richmond

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Record No. 8219
8219

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JULIA LAWHORNE,
Personal Representative of
ELMER R. LAWHORNE, deceased,

Appellant

v.

JOHN F. HARLAN, JR.

ALEX H. SAWYER

and

ANDREW R. PULITO, M. D.,

Appellees

---

APPENDIX

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John C. Lowe
F. Guthrie Gordon, III
Counsel for Appellant
1111 West Main Street
Charlottesville, Virginia
22903

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VIRGINIA

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

JULIA LAWHORNE
Personal Representative
of ELMER R. LAWHORNE, Deceased,

Plaintiff

v.

UNIVERSITY OF VIRGINIA HOSPITAL
Charlottesville, Virginia

JOHN F. HARLAN, JR.
Hospital Director
M 4 Main Hospital Building
University of Virginia Hospital
Charlottesville, Virginia

ALEX H. SAWYER
Assistant Director
Ground Floor Outpatient Department
University of Virginia Hospital
Charlottesville, Virginia

MOTION FOR
JUDGMENT

ANDREW R. PULITO, M. D.
Veteran's Hospital
Salem, Virginia,

Defendants

TO THE HONORABLE DAVID F. BERRY, JUDGE OF SAID COURT:

Now comes your Plaintiff, Mrs. Julia Lawhorne, Personal Representative of Elmer R. Lawhorne, deceased, and represents unto the Court as follows:

1) Your Plaintiff is the mother and duly qualified personal representative of Elmer R. Lawhorne, having been so qualified in Nelson County Circuit Court on March 15, 1971.

2) Elmer R. Lawhorne, died at the University of Virginia Hospital on March 24, 1970.

3) The University of Virginia Hospital is located in Albemarle County, Virginia.

4) John F. Harlan, Jr., is and was at all times relevant to this matter, chief administrator for the University of Virginia Hospital, and as such is responsible for its practices and procedures.

5) Alex H. Sawyer is, and was at all times relevant to this matter, Assistant Director of the University of Virginia Hospital for Emergency Room practices, and as such is responsible for its practices and procedures.

6) Andrew R. Pulito is a medical doctor, a member of the staff at the University of Virginia Hospital and serving temporarily at the Veterans Hospital, Salem, Virginia.

7) On March 8, 1970, Elmer R. Lawhorne received a serious blow to his head and was carried to the Emergency room of the University of Virginia Hospital.

8) While at the Emergency room of the University of Virginia Hospital, Elmer R. Lawhorne was seen by Dr. Andrew R. Pulito, treated and released on early March 9, 1970. At that time x-rays of Elmer R. Lawhorne's skull were taken which showed a fracture, but Mrs. Julia Lawhorne, to whose care Elmer R. Lawhorne was released was not so advised.

9) Elmer R. Lawhorne and Mrs. Julia Lawhorne were advised by agents of the University of Virginia Hospital that there was nothing seriously wrong with Elmer R.

Lawhorne had suffered a fractured skull.

11) From the time that Mrs. Julia Lawhorne retrieved Elmer R. Lawhorne from the University of Virginia Hospital until the evening of March 10, 1970, Elmer R. Lawhorne never left his bed at his home in Tyro, Nelson County, Virginia.

12) On the evening of March 10, 1970, Elmer R. Lawhorne's condition worsened to such a point that Mrs. Lawhorne had him returned to University of Virginia Hospital.

13) Between the time of his release from the University of Virginia Hospital on early March 9, 1970, until Mrs. Julia Lawhorne had him returned to said hospital late March 10, 1970, neither Andrew R. Pulito nor the University of Virginia Hospital made any effort whatever to have Elmer R. Lawhorne returned to the University of Virginia Hospital for further treatment or examination.

14) On being returned to University of Virginia Hospital on March 10, 1970, it was discovered that Elmer R. Lawhorne had suffered a fractured skull on March 8, 1970, and he was treated at once.

15) Between March 10, 1970, and March 24, 1970, Elmer R. Lawhorne's condition deteriorated; he developed meningitis and died.

16) The delay of two days in diagnosing and treating the factured skull was the proximate cause of the death of Elmer R. Lawhorne.

17) Dr. Andrew R. Pulito was negligent in that he did not properly determine that Elmer R. Lawhorne suffered from a fractured skull before releasing him early on March 9, 1970.

18) Dr. Andrew R. Pulito was negligent in that he did not summon Elmer R. Lawhorne back to University of Virginia Hospital after determining that he had suffered a skull fracture or possible skull fracture, or, in the alternative, in that he once again failed to ascertain from the x-rays that Elmer R. Lawhorne had suffered a skull fracture or possible skull fracture.

19) The University of Virginia Hospital was negligent in that through its facilities, agents, employees and representatives, Elmer R. Lawhorne was negligently diagnosed and was not summoned to the hospital for treatment when the error of diagnosis had been discovered.

20) John F. Harlan, Jr., chief administrator for the University of Virginia Hospital, was negligent in that the staff and procedures of the University of Virginia Hospital were inadequate properly to diagnose and treat Elmer R. Lawhorne's wound, and inadequate to summon him to said hospital when error was discovered.

21) Alex H. Sawyer, chief administrator for the Emergency Room of the University of Virginia Hospital was negligent in that the staff and procedures of the Emergency Room of the University of Virginia Hospital were inadequate

properly to diagnose and treat Elmer R. Lawhorne's wound, and inadequate to summon him to said hospital when error was discovered.

22) Julia Lawhorne is a widow of over 60 years of age, living alone in Tyro, Nelson County, Virginia.

23) Elmer R. Lawhorne was 32 years old when he died, was Julia Lawhorne's sole companion in her aging, was the joy and only interest in her life, and cared for her in her infirmity.

24) Through the death of her sole companion, Julia Lawhorne has suffered irreparable loss of aid and companionship in her declining years.

25) Elmer R. Lawhorne is also survived by a brother, Raymond Lawhorne, who lived near Elmer R. Lawhorne, and has been deprived of his brother and companion.

WHEREFORE, Plaintiff prays this Honorable Court that she be awarded damages in the amount of $50,000 to be shared between her and Raymond Lawhorne in such proportion as to this Honorable Court seem fair and appropriate, against defendants in that their negligence was a proximate cause of the wrongful death of Elmer R. Lawhorne, for whose estate your Plaintiff is personal representative.

MRS. JULIA LAWHORNE
Personal Representative of
ELMER R. LAWHORNE, Deceased

By Counsel

Lowe, Dwoskin & Gordon
1111 West Main Street
Charlottesville, Virginia

VIRGINIA:

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

JULIA LAWHORNE, Personal Representative
of ELMER R. LAWHORNE, Deceased,

Plaintiff

v.

UNIVERSITY OF VIRGINIA HOSPITAL,

JOHN F. HARLAN, JR.,

ALEX H. SAWYER,

and

ANDREW R. PULITO, M. D.,

Defendants

PLEA OF IMMUNITY AND MOTION TO DISMISS

Comes now the Defendant, Andrew R. Pulito, M. D., and moves the Court to dismiss this action for lack of jurisdiction on the following grounds:

1. That on the 8th day of March, 1970, and at all other times relative to the allegations contained in the Motion for Judgment herein, he was an employee and agent of the University of Virginia Hospital, an institution and agency of the Commonwealth of Virginia.

2. That he was on the 8th day of March, 1970, and at all other times relative to the matters alleged in the Motion for Judgment herein, performing his official duties and acting within the scope of his employment as an agent of the Commonwealth of Virginia in the care and treatment of the Plaintiff's decedent, Elmer R. Lawhorne, while a

patient at the University of Virginia Hospital as alleged in the Motion for Judgment herein.

3. That the acts of the Defendant, Andrew R. Pulito, M. D., in the performance of such care and treatment were the acts of the Commonwealth of Virginia.

4. That the Motion for Judgment is in substance an action against the Commonwealth of Virginia insofar as the Defendant, Andrew !. Pulito, M. D., is concerned, although the Commonwealth of Virginia be not named as a party.

5. That the Commonwealth, as well as its agents, officers, and employees, is immune from suit for negligence or other tortious action without its consent.

6. That the General Assembly of Virginia has not consent to this suit or any other action sounding in tort against the officers, agents, and employees of the Commonwealth of Virginia, and as a result thereof, the Defendant, Andrew R. Pulito, M. D., is immune to the type action herein pending.

WHEREFORE, it is respectfully suggested that this Court is without jurisdiction to enter judgment in this action and it is, accordingly, moved that this Court take no further cognizance of this action and that the Defendant, Andrew R. Pulito, M. D., be dismissed as a party Defendant.

ANDREW R. PULITO, M. D.

By Jack B. Russell
Counsel

Jack B. Russell
BROWDER, RUSSELL LITTLE & MORRIS
1510 Ross Building
Richmond, Virginia 23219

VIRGINIA

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

JULIA LAWHORNE,
Personal Representative of
Elmer R. Lawhorne, Deceased,
Plaintiff

v.

UNIVERSITY OF VIRGINIA et al,
Defendants

PLEA OF IMMUNITY AND MOTION TO DISMISS
OF JOHN F. HARLAN, JR. AND ALEX H. SAWYER

Come now the Defendants, John F. Harlan, Jr. and Alex H. Sawyer, and for their special plea of immunity and motion to dismiss this action for lack of jurisdiction say as follows:

1. They are and were at all times relative to the allegations contained in the motion for judgment herein, employees and agents of The Rector and Visitors of the University of Virginia, a corporation, which is an institution and agency of the Commonwealth of Virginia.

2. They were, at all times relative to the allegations contained in the motion for judgment herein, performing their official duties and acting within the scope of their employment as agents of the Commonwealth of Virginia in organizing the staff and procedures of the University of Virginia Hospital and the Emergency Room thereof and in all other acts performed in connection with operation of such hospital and all components thereof.

3. The acts of these Defendants as Director and Assistant Director of the University of Virginia Hospital were the acts of the Commonwealth of Virginia.

4. The motion for judgment is in substance an action against the Commonwealth of Virginia insofar as the defendants John F. Harlan, Jr. and Alex H. Sawyer are concerned, although the Commonwealth of Virginia is not named as a party.

5. The Commonwealth of Virginia, as well as its agents, officers, and employees, is immune to an action for negligence or other tortious action without its consent.

6. The General Assembly of Virginia has not consented to this action or any other action sounding in tort against the officers, agents and employees of the Commonwealth of Virginia, and as a result thereof the Defendants, John F. Harlan, Jr. and Alex H. Sawyer, are immune to the type of action herein pending.

WHEREFORE, it is respectfully suggested that this Court is without jurisdiction to enter judgment in this action and it is accordingly moved that this Court take no further cognizance of this action unless the Defendants, John F. Harlan, Jr. and Alex H. Sawyer, be dismissed as parties Defendant.

Respectfully submitted,

JOHN F. HARLAN, JR.
and
ALEX H. SAWYER
By Counsel

Counsel:

MCGUIRE, WOODS and BATTLE
Court Square Building
By Edward R. Slaughter, Jr.

VIRGINIA

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

JULIA LAWHORNE
Personal Representative of
ELMER R. LAWHORNE, deceased

v.

UNIVERSITY OF VIRGINIA, et al.

MEMORANDUM OF LAW IN OPPOSITION TO PLEA OF IMMUNITY AND MOTION TO DISMISS

***

## II. THE ADMINISTRATORS

As to the administrators, plaintiff urges this Court to follow the Wisconsin rule, in the absence of any specific Virginia authority on the question. Wisconsin holds the administrators liable for negligent acts of practitioners in the hospital. Drefahl v. Connell 85 Wis. 109 (1893)

## III. LIABILITY OF AN INTERN

The issue of Dr. Pulito's liability calls for finer analysis, however.

At Common law, even in the presence of immunity, the doctor himself is liable for his own negligence in treating patients. Schloendorff v. Society of New York Hospital, 24 N. Y. 125 (1914); Maia's Administrator v. Eastern State Hospital, 97 Va. 507 514 (1898).

But in the case at bar, the treating physician is not a doctor in private practice, but a hospital in-

tern. The Court is faced with the problem of determining whether the intern in this case is to be treated as a doctor or as something less.

It has been suggested that the inquiry focus on the issue of whether a doctor-patient relationship has been entered into.

As the first index of such a relationship, it should be noted that the surgical intern was acting pursuant to a special state license. This certainly indicates

the state and hospital feel it is necessary to make sure that their interns have achieved a recognized level of proficiency. This special license is extremely important. By insisting upon it, the state and the hospital must assume that the intern will be dealing with patients.

Secondly, at the University of Virginia Hospital the surgical intern has broad, and in fact, ultimate authority in dealing with emergency room patients. The intern can have the patient kept in the hospital, can send him home, can perform minor operations, or consult further to determine the appropriate course of action.

Plainly, in the eyes of the hospital, while he is in the emergency room, an emergency room patient is under the sole care of the surgical intern. Even after the patient has been admitted to the hospital, it is not necessary for the surgical intern to consult any one else to determine what course should be taken with the patient.

Once a person has been admitted to the hospital, he is, by definition, a patient. It is only logical to assert that one who solely treats him, is his doctor. Especially is this so when the doctor is an M. D. and specially licensed by the state to treat patients under circumstances such as those of the emergency room.

Another important indicator is the fact that the radiologist assists the surgical intern in making his diagnosis. It would be extraordinary to hold that the

entire Radiology Department of the University of Virginia Hospital is assisting in the diagnosis of an admitted patient someone whom they do not consider a doctor in every accepted sense of the word. The surgical intern is the captain of a very expensive and proven ship.

Finally, the admitted patient clearly looks to the surgical intern as his doctor. The patient is ignorant of the ways of medicine and is not likely to question the surgical intern's judgment, even if the patient is conscious. The surgical intern is called "doctor", is treated with deference by staff and nurses, and he is in plain charge of the disposition of the patient. The patient believes the surgical intern is his doctor. If the hospital does not, it has been intentionally deceiving the patient in this regard.

Every factor, from state licensing to hospital procedure, points very clearly to the fact that the hospital considers the surgical intern the patient 's doctor.

And indeed, since the surgical intern does treat the patient and determine his future treatment, it is undeniable that the surgical intern as the sole physician treating the patient is his doctor. Clearly, no one else can be. If the surgical intern is not the doctor, the patient has not been treated by a doctor even though he believes he has been and the hospital wants him to believe it.

There is one more improtant test, however. That is the presence of liability insurance must necessarily imply a waiver of the defense of sovereign immunity for the purchaser. 1957-58 Attorney General's Opinions 49. Although it is not in evidence as to whether Defendant Dr. Pulito had liability insurance, the court should permit plaintiff to propound interrogatories to Defendant to determine the issue.

CONCLUSION

Plaintiff respectfully request that the Court deny defendant's Motions to Dismiss and require the Defendants to answer within 21 days, or, in the alternative, deny the Motion to Dismiss of the administrators and Dr. Pulito and require them to answer within 21 days, or, in the alternative, deny Dr. Pulito's Motion to Dismiss and require him to answer within 21 days, or in the alternative, permit Plaintiff to propound interrogatories or seek a stipulation concerning the possession of liability insurance by Dr. Pulito at the time of the act complained of in plaintiff's Motion for Judgment.

Respectfully submitted,

JULIA LAWHORNE, Personal Representative of ELMER R. LAWHORNE deceased

By Counsel

F. Guthrie Gordon, III
Lowe and Gordon
1111 West Main Street
Charlottesville, Virginia 22903

VIRGINIA

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

JULIA LAWHORNE,
Personal Representative of
ELMER R. LAWHORNE, Deceased,

Plaintiff

v.

UNIVERSITY OF VIRGINIA HOSPITAL et al,

Defendants

JUDGMENT ORDER

This day came the Plaintiff and the Defendants in the foregoing action, all by counsel, upon the special pleas of sovereign immunity filed on behalf of all Defendants. And the Court having considered the evidence introduced herein, heard arguments of counsel, and having maturely considered the issues raised, doth find that such pleas should be sustained.

Accordingly, the Court doth ADJUDGE and ORDER that the pleas of sovereign immunity heretofore filed herein be, and they hereby are, sustained, and the Court doth further ADJUDGED and ORDER that the Plaintiff recover nothing of the Defendants herein and that each party shall be responsible for his own costs.

ENTER: David F. Berry
Judge

Date: September 1, 1972

We ask for this:

Leigh B. Middledithc, Jr.
LEIGH B. MIDDLEDITCH, JR.
Counsel for University of
Virginia Hospital

MCGUIRE, WOODS & BATTLE

by Edward R. Slaughter, Jr.

Counsel for John F. Harlna, Jr.
and Alex H. Sawyer

BROWDER, RUSSELL, LITTLE & MORRIS

By Jack B. Russell

Counsel for Andrew R. Pulito, M. D.

Seen:

LOWE, DWOSKIN & GORDON

By F. Guthrie Gordon, III

Counsel for Plaintiff

VIRGINIA

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

JULIA LAWHORNE,
Personal Representative of Elmer
R. Lawhorne deceased

v.

NOTICE OF APPEAL AND
ASSIGNMENTS OF ERROR

UNIVERSITY OF VIRGINIA, et al

Kindly take notice that the Plaintiff, Julia Lawhorne, personal representative of Elmer R. Lawhorne deceased intends to appeal the final order of dismissal entered in the above case on September 1, 1972. The Plaintiff would ask that a transcript of testimony taken before the Circuit Court of Albemarle County on the 21st day of September 1971 be made a part of the record hereof.

ASSIGNMENTS OF ERROR

Plaintiff assigns the following as errors in the above matter:

1. It was error for the Court to rule that an intern at the University of Virginia hospital is protected by the role of sovereign immunity.

2. It was error for the Court to rule that the Defendants in the above matter are not liable to the Plaintiff by reason of sovereign immunity, which doctrine is in violation of the Constitution of Virginia and the Constitution of the United States in that it violates Due Process of Law and Equal Protection of the Laws as guaranteed by the Constitution of Virginia and the Fourteenth Amendment to the

Constitution of the United States.

3. It was error for the Court to rule that administrators of the University of Virginia Hospital are not liable for torts committed by employees of the University of Virginia Hospital.

JULIA LAWHORNE
Personal Representative of
ELMER R. LAWHORNE, deceased

F. Guthrie Gordon, III
Lowe and Gordon
1111 West Main Street

IN THE
SUPREME COURT OF VIRGINIA
At Richmond

JULIA LAWHORNE, Personal representative of Elmer R. Lawhorne, deceased. — Plaintiff in Error

v.

UNIVERSITY OF VIRGINIA HOSPITAL

JOHN F. HARLAN, JR.

ALEX H. SAWYER, — Defendants in Error

ANDREW R. PULITO, M. D.,

MOTION TO DISMISS

To The Honorable Chief Justice and Associate Justices of The Supreme Court of Virginia:

Defendant, Andrew R. Pulito, M.D., hereby moves this Honorable Court to dismiss the appeal for which Plaintiff in error has petitioned on the grounds that at the time the final order was entered by the court below dismissing the action against all Defendants, plaintiff did not make known to the court her objections to such action or her grounds therefor, nor were any objections and grounds therefor noted in such order which counsel for plaintiff endorsed; and, pursuant to §8-225.1 of the Code of Virginia of 1950, as amended, and Rule 5:7 of the Rules of this Court, as amended, the plaintiff thereby waived all such objections as are cited as error in her Notice of Appeal and Assignments of Error, heretofore submitted to this Court; and furthermore, has shown no good

cause why her failure to so state her objections in the order of the court below should not result in dismissal by this Court of her Petition for Appeal.

ANDREW R. PULITO, M.D.

By Jack B. Russell
Counsel

IN THE SUPREME COURT OF VIRGINIA
At Richmond

JULIA LAWHORNE,
Personal Representative of
ELMER R. LAWHONRE, deceased

v.

RESPONSE TO MOTION
TO DISMISS

UNIVERSITY OF VIRGINIA HOSPITAL

JOHN F. HARLAN, JR.

ALEX H. SAWYER

ANDREW R. PULITO, M. D.

TO THE HONORABLE JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Plaintiff respectfully requests that Defendants' Motion to Dismiss be overruled. Section 8-224.1 of the Code of Virginia 1950 as amended and Rule 5:7 of the Rules of this Court, as amended, far from imposing technical requirements of order drafting, simply demand that Plaintiff in error express his objections to the ruling of the court specifically in the record and the Notice of Appeal and Assignments of Error. The record reflects quite fully that counsel for plaintiff made known to the court his objection to the court's rulings, and even went so far as to submit a memorandum of law in support of his position. Neither the statute nor the rules impose any requirement with respect to the order.

JULIA LAWHORNE
Personal Representative
of Elmer R. Lawhorne,
deceased

F. Guthrie Gordon, III
Lowe and Gordon
1111 West Main Street
Charlottesville, Virginia

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

JULIA LAWHORNE, personal representative of Elmer R. Lawhorne, deceased, — Plaintiff in Error

v.

UNIVERSITY OF VIRGINIA HOSPITAL,

JOHN F. HARLAN, JR.,

ALEX H. SAWYER,

ANDREW R. PULITO, M. D. — Defendants in Error

MOTION TO DISMISS

To The Honorable Chief Justice and Associate Justices of the Supreme Court of Virginia:

Defendants, John F. Harlan, Jr. and Alex H. Sawyer, hereby move this Honorable Court to dismiss the appeal for which plaintiff in error has petitioned on the grounds that at the time the final order was entered by the court below dismissing the action against all defendants, plaintiff did not make known to the court her objections to such action or her grounds therefor, nor were any objections and grounds therefor noted in such order which counsel for plaintiff endorsed; and, pursuant to §8-255.1 of the Code of Virginia of 1950 as amended, and Rule 5:7 of the Rules of this Court, as amended, the plaintiff thereby waived all such objections as are cited as error in her Notice of Appeal and Assignments of Error,

heretofore submitted to this Court; and furthermore, has shown no good cause why her failure to so state her objections in the order of the court below should not result in dismissal by this Court of Petition for Appeal.

JOHN F. HARLAN, JR.

ALEX H. SAWYER

By Counsel

Counsel:

McGUIRE, WOODS and BATTLE
Court Square Building
Charlottesville, Virginia

By_____
Edward R. Slaughter, Jr.
Counsel for Defendants in Error
John F. Harlan, Jr. and Alex H. Sawyer

1 Gordon, do you wish to be heard at this time on the matter of
2 immunity, or would you prefer to be heard at the conclusion of
3 the evidence?
4 GORDON: I think it would be most appropriate for me
5 to be heard at the end of the evidence. We haven't really gotten
6 into the argument of what, who is protected by governmental immunity
7 or if anyone is at this time, I think it's most appropriate
8 if I allow the moving parties to present their authorities, or
9 may I add at this time, Your Honor, that I think it is clear that
10 I have nothing before me as far as their motions go at this time,
11 except their allegation that they are covered. So, I would cer-
12 tainly request at this time that after argument today that we
13 be permitted to submit memoranda on the issues that are raised.
14 COURT: Well, you don't seriously contend that the
15 University of Virginia Hospital as an agency of the State, would
16 not be entitled to the sovereign immunity?
17 GORDON: Well, we take the position, Your Honor, that
18 sovereign immunity in Virginia is as delineated through the
19 Courts an unconstitutional proposition. We would at least like
20 it of record that we have opposed the granting of immunity to
21 a hospital for the grounds that Virginia does, but we certainly
22 don't strongly urge that the University is not covered by the
23 doctrine as it exists today in Virginia, sir.
24 COURT: Yes sir. Our real inquiry here today, if we
25 are going to take evidence, should be directed to the position

1 the doctor defendant occupies, it seems to me.

2 GORDON: I think there are issues concerning adminis-
3 trators, too, Your Honor, that we should get into, but the
4 University is most clearly under the umbrella.

5 COURT: Well, it may not have a direct bearing in this
6 case, but there is another case pending in which the Court has
7 heard in detail the chain of command explained as to the various
8 positions within the administration, but that question did not
9 involve a member of the staff in the same way that Doctor Pulito's
10 position is involved in this one, so unless you want it for the
11 purpose of the record, I don't think it needs any further clarifi-
12 cation for the Court, but the other case that we have pending
13 involves a resident trainee who was also a defendant in the suit
14 and I think the position of that resident was without a doubt a
15 different one from what it seems to be with Doctor Pulito in
16 this case. That resident had been in practice, had been an Army
17 surgeon in fact and was back for further training in the hospital,
18 and there may be a considerable distinction in the facts, here.
19 Although that case is still pending and I think Mr. Slaughter
20 has reserved the right to submit additional authority, the
21 preliminary ruling made by the Court in that case was that
22 Doctor Williams was not entitled to the doctrine, although the
23 hospital and its staff, the administrative staff were.

24 GORDON: Yes sir.

25 COURT: Now you may want to introduce evidence to bear

1 further on the question of Mr. Harlan's and Mr. Sawyer's in-
2 dividual liability, but I think it's pretty well laid to rest as
3 far as this Court is concerned, that the University Hospital
4 and its staff members,non-medical, that is those who are not
5 practicing medicine as such, would certainly come under the
6 doctrine.

7 GORDON: Yes sir, if I may just reserve argument on
8 that particular point until the end.

9 COURT: Yes sir.

10 GORDON: Thank you, sir.

11 COURT: So, we'll go ahead with the evidence at this
12 time, if you all wish to present testimony on the position of
13 Doctor Pulito and any other matter you want to consider at this
14 point.

15 RUSSELL: Well, my indication from all counsel -
16 and the other parties, I assume the Court is not - does not
17 as far as its concerned, dssire to have any evidence introduced
18 with respect to Mr. Harlan and Mr. Sawyer, you're satisfied
19 as far as that's concerned?

20 COURT: Yes sir.

21 RUSSELL: You do not want to go into the question of
22 whether or not...

23 COURT: Unless Mr. Gordon wishes to put it in the
24 record, the Court is prepared to rule on that on the basis of
25 what is already known about the hospital staff arrangement, but
Mr. Gordon may wish to put evidence in the record, to preserve that.

1 GORDON: I don't believe that's necessary, Your Honor,
2 I think we can certainly agree here as to what those positions
3 are and I don't think anyone has any serious contention as to
4 the position, we take the position that these are administrators..
5 COURT: Yes sir.
6 GORDON: ...involved in the chain of command in the
7 hospital and make no...
8 COURT: You probably could stipulate that.
9 GORDON: Yes sir. I think we should be straight on
10 that. Perhaps we can discuss it before we adjourn today, but
11 I don't believe there's any problem.
12 RUSSELL: Well, in light of that statement, then Your
13 Honor, I will proceed with the evidence as to Doctor Pulito
14 and call Doctor Muller, first.
15 COURT: Fine.
16
17 DOCTOR WILLIAM HENRY MULLER, JR., having been duly
18 sworn, testified as follows:
19
20 DIRECT EXAMINATION
21 BY: Mr. Russell
22 Q For the record, Doctor, will you state your full
23 name, sir?
24 A William Henry Muller, Jr.
25 Q And what is your occupation?

A I am a surgeon.

Q And are you presently connected with the University of Virginia in any capacity?

A I am as Professor and Chairman of the Department of Surgery and Surgical Chief of the hospital.

Q And how long have you held that position, Doctor Muller?

A Nearly 17 years.

Q And as Chief and Chairman of the Department of Surgery, does the training of surgical residents or does the surgical residency training program come under your jurisdiction?

A It does in general surgery, yes.

Q Now, in March of 1970, would you tell us whether Andrew R. Pulito was at that time in the Department of Surgery in any capacity? And if so, in what capacity?

A Doctor Pulito was a surgical intern, having been appointed July 1, 1970.

Q And generally speaking.....he was appointed July '69, I believe...

A I beg your pardon, July '69, yes.

Q At the time he was appointed were you as Chairman of the Department responsible for his appointment in some way?

A Yes, I and a committee selected him and we recommended him to the medical policy committee of the hospital, that he

be appointed and it was the hospital director and the medical policy committee that appointed him.

Q And as a surgical intern was he, well, now, let me ask you this, what is the capacity of a surgical intern as far as the University of Virginia Hospital is concerned?

A Well, a surgical intern comes to an institution usually after his receiving his M.D. degree and it's his first year of post-doctral training and he is there for education and to provide health services. And, in order to receive his education he must provide health services and in order to do this, he spends a period of time in a number of areas in the department of surgery and other departments. One of these was the emergency room.

Q Now, at the time that we are speaking of, which was March 1970, was Doctor Pulito as a surgical intern, did he receive any compensation from the University of Virginia Hospital?

A His entire compensation was derived from the University of Virginia Hospital.

Q And as a surgical intern was he permitted by the hospital to engage in the private practice of medicine in any way?

A No, not outside of the hospital or actually in the hospital, except to provide services to those patients who came under his purview.

Q Do you know, Doctor Muller, whether Doctor Pulito

was on March 8, 1970, licensed or qualified to practice surgery?

A Doctor Pulito did not have a permanent license in the State of Virginia, but the State provides or the Board of Health provides temporary licenses for those men who are not licensed in the State for a period of up to five years after they receive their M.D. degree, and Doctor Pulito was in this category.

Q And what is the purpose of this temporary license?

A Well, we receive interns from a wide geographic area all over the country and many of them are not eligible for licensure in that many, and I think Doctor Pulito falls into this group, have taken the National Board Examination, the last part of which is not given until well into the intern year, the first year, the first post-M.D. year.

Q And as a medical student up to the time that he received his degree at the institution..at the medical school where he went, or when he finished that training...put it this way...would he or any other surgical intern have been qualified on the basis of that training alone to do surgery?

A Not as we here today, no.

Q Then the training which he was here to receive was then essential to his practicing surgery?

A Right, yes sir.

Q And the surgical internship, I believe, is the first year of this training program?

1 A It's the first year of a graduated, progressive
2 program of increasing responsibility.
3 Q And how many years would it take to progress through
4 the program?
5 A A minimum of five.
6 Q So a resident would be in his fifth year of training?
7 A At least.
8 Q And with respect to the emergency room at the
9 University of Virginia Hospital, Doctor Muller, what does the
10 surgical intern do?
11 A The surgical intern is the first physician to see
12 emergency patients as they enter the emergency room. He makes
13 a diagnosis, provides treatment and in his judgment disposes
14 of them as he believes is for their best benefit. This may be
15 to return them home and advise them to return to the clinic, to
16 go to their local physician or to return to a clinic in the
17 University of Virginia Hospital.
18 Q If they require further hospitalization at that
19 particular time, can he enter them into the hospital?
20 A He can.
21 Q Once they are admitted to the hospital, does he
22 have any further connection with them?
23 A No, his primary duty is in the emergency room and
24 once admitted they are assigned to other physicians.
25 Q Now, as far as the medical care in the emergency

1 room is concerned, you say the surgical intern is the first
2 one to see them. Under whom does he...
3 A The first physician to see them.
4 Q Yes, the first physician...under whom does he
5 work or are his duties performed?
6 A Well, he....his immediate supervisor is a resident
7 surgeon and then the chief resident surgeon and if necessary
8 he has on call an attending physician, attending surgeon, who
9 he may call.
10 Q And when the surgical interns begin their training
11 program as a surgical intern are they given any instructions as
12 to what they can and cannot do, how ....under what circumstances
13 they should call another physician?
14 A Generally, yes. It's very difficult to lay down
15 concrete, specific instructions because each patient is an
16 individual problem, but they are given general instructions and
17 they are advised to call on someone more senior for consultation
18 if the....if they're uneasy about the problem and if they are not
19 entirely sure about the problem or in their own judgment.
20 Q If a patient comes into the emergency room and
21 in the judgment of the surgical intern needs X-rays, who actually
22 or what department of the hospital, handles the taking of the
23 X-rays, the reading of them and interpretation?
24 A The Radiology Department handles this aspect of the
25 patients care, diagnosis and care, and the surgical intern usually

1 requests that a radiologic examination be made and the staff of
2 the Department of Radiology carries this out.
3 Q Under normal circumstances at 11 to 12 o'clock at
4 night, once an X-ray is taken how is the reading of the X-ray
5 transmitted to the surgical intern?
6 A The surgical intern usually follows up on them
7 personally. He may or may not, depending upon how busy he is
8 with other problems, but it is the responsibility of a physician
9 in the Department of Radiology to interpret the films and/provide to
10 this interpretation to the intern.
11 Q Is the intern then, shall we say, obligated to
12 use the interpretation as given to him by the Radiology Depart-
13 ment?
14 A I think he is obligated unless he again might dis-
15 agree, which I think would be very unusual, in which case it
16 would be taken to a high echelon in the Department of Radiology.
17 Q Would he have any authority to disregard it and
18 make his own diagnosis?
19 A Well, the surgical intern is in charge of the
20 diagnosis of the patient, but ...and the disposition of the patient
21 is the surgical intern's responsibility, but I think that the
22 surgical intern would virtually in every instance rely on the
23 interpretation that was given to him.
24 Q Just a second, Your Honor. Doctor Muller, have you
25 had occasion to become familiar with the case involving Elmer R.

Lawhorne?

A To some degree, yes.

Q Have you had occasion to review the emergency room records and the care and treatment that was given to Mr. Lawhorne on the evening of March 8, 1970, and also the care and treatment rendered to him up through the 10th of March when he was admitted to the hospital?

A Yes.

Q And based upon your knowledge and experience as Chairman of the Department and Chief of Surgery, did Doctor Pulito in the performance of his duties as surgical intern do any act or perform any function that was beyond the scope of his responsibility, as a surgical intern?

A No, I do not think so, no.

Q And as far as you could determine, did he follow the instructions and duties that were set forth for him as a surgical intern?

A Yes, he did.

Q I have no other questions to ask Doctor Muller.

COURT: Mr. Gordon.

CROSS EXAMINATION

BY: Mr. Gordon

Q Doctor Muller, you described a condition or a status known as temporary licensee?

A Yes.

Q Is that system prescribed by statute do you know?

A I don't know.

Q Is there anything in the licensee, temporary licensee status, that requires the licensee to practice at only one location?

A I believe and I'm not entirely certain of this, but I believe that the licensee is required to practice at the location of the hospital where he was appointed or one of its affiliate hospitals.

Q When the radiologist is examining the X-ray of an emergency patient , is he within the structure of client... or of doctor-patient relationship....is he helping the surgical intern to diagnose the case?

A Yes, he's helping the intern diagnose the case.

Q So that it is, even while the radiologist is working on the X-rays, it is still the surgical interns patient as such?

A Right.

Q And you did indicate there is certainly no question that the surgical intern would have the authority at least to question the radiologist's determination?

A Well, I think anyone has that authority, yes.

Q And he certainly wasn't bound by it, there was no question that what the radiologist said, had to go?

A No, but I think he would be ill advised to ...not to

1 abide by it, unless he got the opinion of someone higher up in
2 the Radiology Department.
3 Q You indicated that you have become familiar some-
4 what with the file in this particular matter, the matter of
5 Elmer Lawhorne. Do you know who was the resident surgeon on
6 the evening of March 8, 1970?
7 A No.
8 Q Do you know who the chief surgeon would have been?
9 A No.
10 Q You've indicated there was another official whom
11 I believe you indicated was visiting surgeon, is that the name?
12 A No, it would be either a resident surgeon or the
13 chief surgeon or one of the attending surgeons would have been
14 the. . .
15 Q And do you know who an attending surgeon might have
16 been?
17 A I know within a small number who it might have
18 been, yes.
19 Q Can you tell me what that number is? Or who com-
20 prises that number?
21 A Five people.
22 Q And who?
23 A Dr. Alrich.
24 Q Alrich?
25 A Alrich, Horsley, Wangensteen, Rudolf, Sandusky.

Q Is it that it must be one of those, or rather that that group more or less generally is responsible for that function?

A It was probably one of those.

Q The hospital records would reflect would they not, who the resident surgeon and chief surgeon would have been on that evening?

A Yes.

Q And under what...under whose aegis in terms of records would that be held?

A That would probably be in the Director's Office.

Q Do you know who the chief radiologist would have been on the evening of March 8, 1970?

A The chief radiologist would have been Doctor Theodore Keats.

Q Normally at that time of night would Doctor Keats have been responsible for this particular...or would he have come in personal contact with this particular X-ray?

A Not directly, no.

Q Do you know who would have been in charge of the radiology operation on March 8, 1970?

A Doctor Keats was in charge, but I don't know who would have been directly responsible for it.

Q What training requirements would have been necessary for Doctor Pulito to have moved from temporary licensee to permanen

licensee or whatever is the permanent status?

A No further training requirements except to complete his National Board Examination.

Q Is there any question of residency requirements or anything of that sort?

A Not for that examination.

Q What else is left in the test or in the examination process?

A There is a third part which is taken during the internship year.

Q I have no further questions.

REDIRECT EXAMINATION

BY: Mr. Russell

Q Just one other one. As I understand it Doctor Muller the temporary license that Doctor Pulito held would not have entitled him to practice privately apart from the training program at the University of Virginia Hospital?

A That's correct.

Q That's all.

A I believe that's correct...that is correct.

COURT: Doctor Muller, would it be asking too much for you to define at what stage the person involved in training ceases to become a student trainee and becomes more of a practitioner, or is that too fine a line to draw?

1 A That's a very fine line to draw ...throughout the
2 period of graduate education in surgery, well it is graduate
3 education by definition, the student or the trainee is learning...
4 it's a learning experience and I should hope it would continue
5 after that, but I think it's the assignement - it's during
6 the intern year. The problems, the magnitude of the problems
7 and whether he has the total responsibility and complete respon-
8 sibility are probably greater.
9 COURT: Well, let me ask you this, as between an
10 intern and a resident, is the resident more of a practitioner
11 than a student, or would he be more of a student than a prac-
12 titioner?
13 A I can't answer that.
14 COURT: Well, apparently you would say the intern
15 would definitely be more of a student than he would be a prac-
16 tioner?
17 A If I implied that, I think it's a ...I didn't
18 entirely do that.
19 COURT: Well, I may not have...
20 A My opening statement was that he was there for
21 education.
22 COURT: Yes sir.
23 A That he also rendered health services, that his
24 education was dependent upon rendering these health services,
25 and the intern actually is very much of a practitioner in this

1 sense....

2 COURT: In Virginia, isn't it true that having an
3 M.D. degree does not entitle you to practice medicine until
4 you've served an internship?

5 A I was under the impression that in Virginia you
6 could practice medicine without it, just so you passed your
7 boards.

8 COURT: I see. Now, what is the practice though as
9 far as the medical training and the profession itself?

10 A Well, certainly so far as surgery is concerned,
11 virtually all of the men go through a complete program with
12 surgical education before they practice.

13 COURT: Now, Doctor Pulito in this case was in a
14 five year internship program, isn't it customary for the ordinary
15 practitioner to spend two years of internship in some hospitals?

16 A The two year internship is virtually non-existent
17 now and there are very few of them, but I think almost none.
18 Practitioners today, those going into family practice or general
19 practice have a variety of training programs or training situa-
20 tions that they can be in, but all of them do serve an intern -
21 ship.

22 COURT: Well the normal course for a graduate M.D.
23 would be to go into an internship program of some kind, would it
24 not?

25 A Yes.

1 COURT: And what would be the range of years in that
2 program, one to five or two to five?
3 A Well, most who go into one field of medicine or
4 another, go into it with the idea of ultimately becoming quali-
5 fied by an examining board in that field and this includes
6 family practice now. These vary from three years, including
7 the internship, up to five or six years.
8 COURT: You would say Doctor Pulito was not certified
9 by virtue of examination in any field, at that time?
10 A Yes.
11 COURT: He was not certified in any field at all?
12 A He was not certified in any field....by examina-
13 tion.
14 COURT: All right, now, yet you say as far as you
15 know under Virginia law and practice, he could have gone into
16 practice, but not in the field he was .....
17 A He could have gone into practice only after passing
18 the examination. An internship is not required, but he could
19 go into practice after passing the examination and after he is
20 licensed. He must be licensed.
21 COURT: So that the bar in this case was the failure
22 to have taken and passed the third part of the examination?
23 A I'm not sure exactly when that is given, it's given
24 some time about that time of the year, and this is well recognized
25 all over the country and I might say that I think most medical

1 students now or a high percentage of them do take the National
2 Board, which is a National instead of a State Board.
3 COURT: I see.
4 A It has reciprocity in virtually every state.
5 COURT: Does that supplant the State Board examination?
6 A Yes, it supplants the State Board, yes sir. Some
7 still take the State Boards, but I think more and more the
8 students are taking the National Boards, and the third part of
9 this is given during the internship year.
10 COURT: Any further questions, gentlemen?
11 Q Just a couple more I'd like to make further to shed
12 some light on this, Your Honor. Doctor Muller, as a medical
13 established custom or practice in the medical profession, don't
14 almost all the graduates take at least one year of training
15 beyond the four years of medical school? Before they go into
16 practice?
17 A I think virtually all of them do if they are planning
18 to go into practice, yes.
19 Q And this would be what generically in layman's
20 language is referred to as the internship, as opposed to a
21 residency itself?
22 A That is correct.
23 Q And at the time that this took place, Doctor Pulito
24 was in that year of internship?
25 A He was.

1 Q And I believe that in some hospitals this used to
2 be referred to as the rotating internship before they actually
3 began a residency program itself?
4 A That's correct. There are straight and rotating
5 and mixed internships even today. This was...the one he was
6 in was a straight surgical internship preparatory for surgery.
7 Q And he had his choice of taking that or a rotating
8 internship before he went into the surgical residency or does
9 the University require a straight surgical internship?
10 A It's not required, but the great majority do.
11 Q There is some choice at that point?
12 A Yes.
13 Q It is a basic first year of training in preparation
14 for practicing medicine?
15 A That's right or continuing education and then your
16 graduate education.
17 Q And he was in fully a training capacity?
18 A He was in a training capacity, yes.
19 COURT: Mr. Gordon?
20
21 RECROSS EXAMINATION
22 BY: Mr. Gordon
23 Q I do have just a couple of more questions. I take
24 from your remarks to Judge Berry that there is a kind of twilight
25 zone between early in your medical studies and the day when a

1 shingle is hung or the day that there is...if there could ever
2 be a time when there is no question that one is a doctor, is
3 that correct? That twilight zone.....
4 A Well, essentially one is a doctor when he receives
5 his M.D. degree, that is the doctrate.
6 Q Right.
7 A Doctor of Medicine.
8 Q But as far as this line that we've been trying to
9 draw between status of student and status of non-student there
10 is a vast range of shifting...
11 A Yes....
12 Q ...responsibilities or of....
13 A I don't think it's shifting responsibilities. Most
14 programs in most disciplines I know of are programs of gradually
15 increasing responsibility.
16 Q Correct. And among those various programs, we
17 discussed the intern is one, that...
18 A Well, the intern is part of the program.
19 Q Right.
20 A Whether it be in surgery or medicine or pediatrics
21 or ....
22 Q Uh-huh...and there ....but there is certainly no
23 question that Doctor Pulito was in the early part of 1970 within
24 this twilight zone of gradually increasing responsibility. He
25 was no longer merely a student he was moving quickly toward a

1 non-student status?

2 A Well, five years from then, yes.

3 Q And certainly persons whom he treated, for instance,

4 in the emergency room, were as far as the hospital was concerned

5 his patients?

6 A Well, they come to the hospital and the emergency

7 room as part of the institution, Doctor Pulito is assigned to

8 the emergency room to provide care, initial care for these

9 patients.

10 Q And they are..during the time that he is treating

11 them, his patients then?

12 A He is responsible for them for that time.

13 Q Fine, thank you.

14 COURT: Doctor Muller, could you tell us a little

15 bit more about the make-up of the emergency room staff, who

16 would be the highest in the hierarchy of practice in that room?

17 Would the intern be the one who would normally be in control or

18 in charge of the emergency room? In this case, Doctor Pulito?

19 A The intern, as I mentioned is the one who first

20 sees the patient, and you have interns from surgery and from

21 medicine, the Department of Internal Medicine, assigned to the

22 emergency room. Now, there are also residents from those depart-

23 ments assigned to the emergency room, these are junior residents.

24 There are nurses, there are attendants and so on, who are staff

25 in the emergency room. The intern and the junior resident have

a chief resident on call and usually within the confines of the institution, whom they may call if in their judgment his opinion is required, and in the vast majority of instances it is not necessary to call another individual, but he is there. In turn an attending surgeon is on call and he may be called if it seems necessary.

COURT: But normally he would not be in the emergency room unless called?

A That's right. In addition there are consultants in all the specialties who may be called, if it appears that this individual falls into one of these categories.

COURT: All right, any further questions, gentlemen? Thank you, Doctor Muller. You may stand down.

RUSSELL: May Doctor Muller be excused if he has to go, sir?

COURT: Any objection, Mr. Gordon?

GORDON: No indeed, Your Honor.

COURT: Thank you, Doctor Muller, you may be excused.

RUSSELL: Now, Your Honor, we don't want to belabor this hearing with repetitious evidence and I think to my view, we have covered all the basic facts with Doctor Muller. If there is any question in the Court's mind as to any of the basic facts, we'll be delighted to put on any additional evidence that be necessary. I'm asking that the Court tell us what to do. I don't want to take up time putting on repetitious evidence.

1 Doctor Pulito was under contract at the University of Virginia
2 and his only remuneration came from that source and what his
3 duties were and what he was doing at the time is the essentials
4 to this plea.
5 COURT: That seems to complete it as far as the
6 medical responsibility might be involved, unless Mr. Gordon
7 wishes to inquire into it further, I think that's enough to
8 establish the facts that we need to make a ruling on this plea.
9 GORDON: No sir, I have no requirement of further
10 evidence, Your Honor.
11 COURT: All right, sir.
12 RUSSELL: The only thing we could add, the only other
13 thing we could add, Your Honor, would be to put on somebody
14 from administration who would certainly confirm that he was
15 under contract...
16 COURT: Yes sir.
17 RUSSELL: Just what Doctor Muller said and this was
18 why I was saying there is no point in...as far as...unless the
19 Court wants it, why...
20 COURT: I have no desire for my own enlightment, be-
21 cause I remember from the testimony in the other case, how that
22 is set-up and unless it's needed for the record itself, there
23 wouldn't be any need to go into it at this point, but if anyone
24 wishes to put it in the record, you may stipulate it or call
25 additional witnesses at this time.

1 RUSSELL: Well, for the sake of brevity I assume
2 counsel for the plaintiff doesn't question the fact that, of
3 what Doctor Muller said, that Doctor Pulito was under full-
4 time contract at the University of Virginia, receiving his only
5 remuneration from them.
6 GORDON: We have no quarrel with that at all, Your
7 Honor.
8 COURT: All right, sir.
9 RUSSELL: All right, sir. We have no other evidence
10 to offer and...
11 COURT: All right...
12 SLAUGHTER: I think Mr. Gordon has made it clear, sir,
13 at the first, and to save time perhaps I will speak for Mrs.
14 Kincannon who is representing the University that as present
15 rulings exist the University Hospital is an agency of the State
16 and that the two defendants, Messrs. Harlan and Sawyer are hospital
17 administrators, assist hospital administrators, respectively
18 employees of the State of Virginia.
19 GORDON: We have no trouble with that at all, Your Honor.
20 COURT: All right, sir. Now is the evidence complete
21 then as far as the motion thatis pending or the plea that has been made?
22 RUSSELL: I want to check one more time.
23 COURT: All right, sir.
24 RUSSELL: I think it is Your Honor. I don't think
25 this is necessary evidence on this Your Honor, but just to be sure,

1 we envelop hospitals with the mantle of sovereign immunity be-
2 cause we think it's more important that our State doctors be
3 able to treat the poor than that they go begging in the streets,
4 crying for help and unable to afford doctors. We think that
5 with the advent of easily available medical-hospital insurance
6 and whatnot, and liability insurance for the hospital, we think
7 it's unconscionable that the State adhere to that rule, that it
8 would be so easy for the State to be able to provide assistance
9 with insurance for its own employees for the poor, that to con-
10 tinue along this course is to discriminate against the poor,
11 to leave the poor without remedy if they would be negligently
12 treated by doctors at a State hospital, that this runs directly
13 afoul of new constitutional rules developing for the protection
14 of the poor, particularly as I recall the Shapiro v. Thompson
15 case decided by the Supreme Court, involving residency requirements
16 for welfare recipients, in which the Supreme Court of the United
17 States declared very clearly that discriminations against the
18 poor, while the poor are unconstitutional as a violation of
19 the equal protection of the law. As I read Virginia law at this
20 time, sovereign immunity in the hospital field is aimed solely
21 at the poor and in fact what it does in effect is deprive them
22 of any remedy, if they are negligently treated and I believe
23 that rule does run afoul with that constitional requirement. I
24 can appreciate the Court's position that it's bound by Virginia
25 precedent, but I would at least like to make it of record that

1 we are objecting to it and continuing to do so as the case
2 develops. As far as the two administrators go, there is authority
3 for the proposition not in Virginia, and I defer to the Court's
4 understanding of the recent case, it supercedes mine which I
5 have not seen this issue raised, the issue of administrators
6 within the administrative chain of the hospital command, how
7 their liability is affected by sovereign immunity, etc. There
8 is authority for the proposition that administrative are liable.
9 It is not Virginia authority. It is from Wisconsin, a case
10 called Drafahl v. Connell and in my memorandum I would ask
11 the Court's permission at least to submit it to the Court,
12 so that it would be of record. In that case it is held and
13 I hastily add that it is the only one in its field, but it is
14 good Wisconsin law, that administrators directly responsible for
15 the acts of physicians within a hospital are liable through
16 the theory of respondeat superior for the tort committed
17 by their - - by those below them in the chain of command.
18 I would at least urge that Virginia adopt this sane and
19 rational policy in dealing with its administrators - - - I
20 again am not familiar with Virginia law settled by the Supreme
21 Court of Virginia, that has declared Virginia's position on
22 this matter. I think there is good policy on both sides. I would
23 urge the Court to accept the Wisconsin position, although the Court
24 again advises me that recent cases indicate Virginia will take
25 the position that the administrators are not liable. The impor-

1 tant issue really and the most ticklish one is that of ...or
2 at least concerns Doctor Pulito in this case and the actual
3 practicing, the individual, we can't even give him a name in
4 this case at this time, we would normally call him a doctor,
5 well, he is a doctor, but the individual at least who treats
6 the patient. I don't think there's any question that the rule
7 is well established in the matter.....firmly established in common
8 law from 19th century English cases, especially in New York
9 and New England, where the rule has been delineated much more
10 clearly than in Virginia. The rule is yes, the hospital is
11 free by the theory of sovereign immunity, the only person who...
12 against whom the individual has recourse is the doctor who treats
13 him. The issue of residency and internship had been brought up
14 in the New York cases certainly, which have again dealt most
15 articulately with the issue, have very clearly come down and
16 said, we find no distinction....the individual who does the treat-
17 ing, whose hands touch the patient, he is the man to whom the
18 patient must look if there is negligence in his treatment, if
19 there is an action it lies there with the hands that treated him,
20 not with the hospital. Yes, the hospital is cut-off by the doctri
21 of sovereign immunity, foul as that may be, we add in parenthesis.
22 Yes, the hospital is cut-off, but the only recourse that the
23 injured patient has is against the doctor. I think the rule is
24 very very clear. Mr. Russell has indicated there are recent
25 cases that continue to hold that the individual acting within his

There is no contradiction to that. The law is clear that governmental officials in Virginia are immune from suit, immune from any action where they are in such positions. If I may take the most extreme possibility, if the Court please, to point out what I mean, shall we assume going back to the discussion that we had at the last hearing, Mr. Tucker arranged - started out by saying, of course, the Court is immune from any decision that is made - any negligent decision that is made. Let us assume that there were an action against the Chief Justice of the Supreme Court of Appeals and the theory was that he had erred because he had affirmed a judgment that was erroneous and made by a lower court Judge, thus the allegation would be that he was negligent himself in his own decision and negligent in having affirmed the action of the lower court Judge. It is perfectly clear, the Court sees that on either theory the Chief Justice of the Supreme Court of Appeals would be immune and thus, I submit, sir, that these officials who are immune - are immune regardless of whether the plaintiff chooses to say that they themselves were negligent or that they were simply persons in authority over others who were negligent. Thank you, Your Honor.

COURT: Thank you, Mr. Slaughter. Gentlemen, if we get two or three more cases we're going to finally narrow this down to just where this responsibility does attach. We've got a case pending right now on the question of resident physicians.

1 Maybe I can point out what I think the direction of the Court's
2 opinion will be without making it final. I think it's to the
3 advantage of the Court and everyone else that some opinion be
4 rendered at the conclusion of the brief evidence here and the
5 summations that have been given, because frankly our attention
6 is better directed toward it right now, than it probably will be
7 later, but subject to the opportunity of counsel to submit
8 additional memoranda on this point, I'm going to announce tentative
9 ly the decision of the Court, and within the limits it might be
10 prescribed as to the time to submit those memoranda, I will be
11 open to a change. Now, I don't think it's appropriate for this
12 Court to change the doctrine of sovereign immunity as such.
13 In spite of the direction which the Courts of other States
14 have taken, that's taken at the level of the Court of Appeals and
15 that seems to be the direction in which modern case law is going,
16 but as Mr. Russell has pointed out the State of Virginia has not
17 indicated any contention to go that far, so that we almost of
18 necessity have to leave the doctrine of sovereign immunity undisturb
19 ed, and that being the case, I think it goes without further state-
20 ment that the University of Virginia Hospital, John F. Harlan,
21 Jr., and Alex H. Sawyer, would all be dropped under the motion
22 and the pleas made as to the doctrine of sovereign immunity.
23 If in fact that doctrine does apply and the Court so holds the
24 University of Virginia Hospital and its administrative staff
25 would certainly be covered by that mantle. Now, as I understand

1 the liability aspect of these cases, once you enter an area
2 of either charitable or sovereign immunity you must find some
3 other basis of attaching liability, and as I understand it,
4 that area comes within the doctor-patient relationship. Now,
5 this is what I've been trying to search for in both of these
6 cases. When you can establish that a relationship of doctor
7 and patient exists, then you're opening up a further degree of
8 responsibility which has nothing to do necessarily with chari-
9 table or sovereign immunity. The question is where does that
10 separate relationship begin. Now, I think we could all agree that
11 it would not begin for a medical student and it certainly would
12 seem to have attached itself already when a doctor reaches the
13 position of staff physician, and the question where does it
14 become apparent from the standpoint of the patient, for instance,
15 where is the patient entitled to expect that he's protected by
16 that relationship? For instance, suppose a patient disclosed
17 something of a confidential nature to a medical student, to an
18 intern, to a resident, and to a staff physician, where does the
19 confidential relationship exist and where does it not exist?
20 The same with a ministerial student or a lawyer or law clerk, a
21 law student, somewhere along the line the private obligation
22 arises and I think that arises when you can establish that there
23 is a degree of professional responsibility which is shown to be
24 separate and apart from anything that might have to do with
25 the parent institution. That's why I think we may be in the

1 critical area when you're distinguishing between a resident on
2 one hand and an intern on the other. A resident from my
3 understanding has reached the point where he is licensed to
4 practice and probably does engage in a more direct patient
5 and doctor relationship, from what Doctor Muller has indicated
6 under the facts of this case and under the general practice an
7 intern has not reached that status. He is more of a student,
8 although he wouldn't go so far, this Court believes that the
9 intern is more of a student than he is a practitioner and if
10 that's the case then there could be no doctor-patient relation-
11 ship. And Mr. Gordon has pointed out that the person who places
12 the hand on the patient incurs a degree of personal responsibility,
13 Well, that could also involve the other members of the hospital
14 staff who occupy a non-professional status and that's what
15 troubles this Court in attaching this relationship or the
16 liability to any person than a doctor, any administrative staff.
17 They don't occupy a professional status with regard to the
18 public or to the patient, so that unless the administrator ex-
19 ceeds his authority he's under the protection of the doctrine.
20 Unless the student exceeds his authority, he's under the protec-
21 ion, but if the doctor who is professionally responsible to the
22 patient commits negligence then I think he may be individually
23 liable aside from the doctrine of sovereign immunity or chari-
24 table immunity and the question would really resolve itself into
25 the issue on the facts of when is it a doctor and when is it a

1 patient...doctor-patient relationship. Now, under the facts
2 in this case, my conclusion is that Doctor Pulito, who was not
3 licensed, except under a special license and who had yet 1/3
4 portion of his examination to complete before he could engage
5 in practice, even though he carried the designation M.D.. A
6 lawyer may have an L.L.B. degree, but is not entitled to practice a
7 he occupies no position of responsibility to a client, until he
8 is certified to practice and until he is engaged in a client-
9 lawyer relationship, he owes no responsibility. He may be a
10 law student advising somebody, but that person cannot look to
11 that law student for any degree of professional responsibility
12 as a private contractural relationship. Now, I have held tentativ
13 ly and it's still pending, of course, that the resident physician
14 does occupy that, I may be wrong, but it seems that I have drawn
15 a distinction here by virtue of this ruling, that the intern
16 is a student and the resident is a practitioner. I don't know
17 whether doctors would agree with that or not, but I believe that's
18 where the critical area lies, and I'm looking at it from the
19 standpoint of the patient. I don't believe it has to do as much
20 with the treatment of the poor as it does to the patient's right
21 to look for a degree of professional responsibility. Now, he may
22 not be qualified to make that judgment but somewhere along the
23 line its got to be drawn and that may be as good a place as any
24 for the rule to be applied and let somebody examine it closely
25 and announce the doctrine at a higher level, but in this case,

1 my conclusion is that Doctor Pulito had not reached the level
2 of professional competence which would render him liable in a
3 doctor-patient relationship. Had he been engaged in practice for
4 a longer period and had he passed his professional requirements
5 as far as licensing, we may have had a different situation.
6 And I think the hospital by its own practice distinguishes
7 between certain types of patients and certain types of activities,
8 private patients, clinic patients, emergency room patients,
9 whether or not that reflects any problem with regard to a person's
10 economic status I'm not sure, but that's notwhat the Court is
11 undertaking to rule on in this case, the desirability or
12 lack of desirability of that doctrine, because I think the doc-
13 trine of sovereign immunity applies without regard to economic
14 status in all the other fields. It was not enunciated either
15 as a protection or as a hardship against any particular class
16 of people, but as one of the doctrines of the principle that
17 the king could do no wrong and only as we've progressed in to
18 a more insurance conscious society, I think have we gotten away
19 from that. We may get to it when we get a different type of
20 liability insurance coverage, but I don't believe we have it
21 at this time. Now, Mr. Slaughter may consider that this
22 Court has made rather inconsistent rulings, but the distinction
23 in my opinion lies within the degree of professional competence
24 of the doctor on the one hand in this case and or...the intern on
25 the case with Doctor Pulito and the staff or resident physician

in the other. And, I'm trying to make that determination strictly on the degree of responsibility existing between the doctor and the patient. I don't know of any other basis that you could attach liability when you have a charitable...other than the negligence in the selection of the servants and employees, but I don't think that would necessarily exist in the plea of sovereign...so the plea of sovereign immunity is sustained as to all defendants, well, as to all defendants, including Doctor Pulito in this case, because as a non-professional trainee, I think he would come under that mantle. Had he been a doctor at a different level it may have resulted in a different finding. Now, that tentatively is the conclusion of the Court and if counsel wish to submit additional authority on that point or any other, I will be glad to consider it, but I believe that that represents about the best that we can do with the situation as the evidence now discloses.

GORDON: Would the Court choose to set a deadline on the submission of memoranda?

COURT: Yes, I think we ought to anticipate the calling of the docket again in this case, which would be October 4. Now, I'm not sure whether....has this case been scheduled or is it mature to the point where it would be called on the docket?

SLAUGHTER: May it please the Court, no answers have been filed . . .

COURT: Well, I don't know that the docket call would

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