

IN THE CIRCUIT COURT, THIRD
JUDICIAL CIRCUIT, IN AND FOR
COLUMBIA COUNTY, FLORIDA

CASE NUMBER: 04-352-CA
DIVISION:

CONNIE ANDREW and WILLIAM ANDREW,
Individually, and CONNIE ANDREW as
Personal Representative of the Estate of
Dustin Andrew, deceased

Plaintiffs,

v.

SHANDS AT LAKE SHORE, INC., a Florida
Corporation, and the UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,

Defendants

THIRD AMENDED COMPLAINT

COMES NOW Plaintiff CONNIE ANDREW, as Personal Representative of the Estate of Dustin Andrew, a minor, deceased, by and through her undersigned attorneys, and demands judgment against Defendants SHANDS AT LAKE SHORE, INC., a Florida Corporation and the UNIVERSITY OF FLORIDA BOARD OF TRUSTEES, and avers:

ALLEGATIONS COMMON TO ALL COUNTS

1. This is an action for damages in excess of \$15,000.00.
2. This is a claim for damages pursuant to the Florida Wrongful Death Act, Section 768.21, *et seq.*, Florida Statutes, for the wrongful death of Dustin Andrew, a minor.
3. This is an action for medical and hospital negligence pursuant to Chapter 766, Florida Statutes. Plaintiffs have complied with all conditions precedent to the filing of this action including the presuit notice and investigation requirements of Chapter 766 and Section

768.28, Florida Statutes. Compliance with the presuit notice and screening procedures of Chapter 766 has extended the statute of limitations beyond that provided in Section 95.11, Florida Statutes.

4. **Certificate of reasonable investigation.** The undersigned attorneys certify that a reasonable investigation has been conducted and that as a result of their investigation a good faith belief developed that grounds exist that Defendants were negligent which caused the death of Dustin Andrew.

5. Plaintiff CONNIE ANDREW has been appointed as Person Representative of the Estate of Dustin Andrew. At the time of his death, Dustin Andrew was 15 years old and resided with Plaintiff and his father William Andrew in Welborn, Suwannee County, Florida.

6. At all times material, Defendant SHANDS AT LAKE SHORE, INC. (hereinafter "SHANDS") was and is a Florida Corporation licensed to conduct business in the State of Florida with its office and agents in Columbia County, Florida.

7. At the time of the accrual of this cause of action, Defendant UNIVERSITY OF FLORIDA BOARD OF TRUSTEES (hereinafter "UFBOT") was a governmental entity organized and existing under the laws of the State of Florida for the purpose of operating state educational facilities, including the University of Florida in Alachua County, Florida. At all times material, UFBOT has maintained a substantial presence for the transaction of its customary business in Columbia County, Florida, such that venue is proper in Columbia County. The University of Florida is under the control of the UFBOT. The UFBOT is legally responsible and liable (although not solely responsible and liable) for claims in this action arising out of the negligence of University of Florida employees acting within the course and scope of their employment with UFBOT.

8. On or about August 21, 2002, Dustin Andrew went to the emergency room at

SHANDS. His chief complaint was abdominal pain and blood in the urine. A CT scan of his abdomen was performed and read by radiologists, including Ghulam Dastgir, M.D., and possibly other radiologists on call for interpreting diagnostic radiological exams performed at Shands. The radiologists who interpreted the abdominal CT scan reported the results of their interpretation of the CT scan to the healthcare providers who were attempting to diagnose and treat Dustin Andrew's medical condition.

9. The radiologists who interpreted Dustin Andrew's abdominal CT scan of August 21, 2002, deviated from the acceptable standard of care and thus were negligent by failing to identify a mass or tumor located in or adjacent to Dustin Andrew's bladder. The mass visible on the CT scan of August 21, 2002, was subsequently diagnosed as a malignant tumor. The radiologists were further negligent in failing to diagnose the mass apparent on the August 21, 2002, CT scan and in failing to take or recommend appropriate steps to rule out a tumor. As a direct and proximate result of the radiologist to properly read, identify and investigate the mass apparent on the August 21, 2002 CT scan, the malignant tumor continued to grow, eventually metastasized and caused the death of Dustin Andrew.

10. As a direct and proximate result of negligence of the radiologists who interpreted the August 21, 2002, CT scan and the resulting death of Dustin Andrew, CONNIE ANDREW, as Personal Representative of the Estate of Dustin Andrew demands judgment from Defendants for all damages recoverable by Dustin Andrew's Estate and survivors pursuant to Section 768.21, Florida Statutes.

11. As a direct and proximate result of the negligence of Defendants, the Estate of Dustin Andrew has sustained the loss of medical and funeral expenses, or both, which were incurred due to the decedent's injury and subsequent death which have become a charge against his Estate or that were paid by or on behalf of the decedent, excluding the amounts recoverable

by the decedent's father, William Andrew, as well as the loss of net accumulations.

12. WILLIAM ANDREW, surviving parent of Dustin Andrew, has in the past suffered and will continue to suffer the following damages:

- a. Mental pain and suffering from the date of the injury;
- b. The value of lost services from the date of the decedent's injury until the date of his death;
- c. Medical expenses; and
- d. Funeral expenses.

**COUNT I
LIABILITY OF SHANDS FOR NEGLIGENCE OF RADIOLOGIST THROUGH
MASTER-SERVANT RELATIONSHIP**

13. Plaintiff realleges the allegations contained in paragraphs 1 through 12.

14. At all times material hereto, the radiologists who negligently interpreted the decedent's CT scan of August 21, 2002, were the employees or servants of Defendant SHANDS which controlled, or retained the right to control, the radiologists with respect to the quality, safety and effectiveness of their medical care, including the ultimate right of termination. At all times material, the radiologists were acting within the course and scope of their master servant relationship with Defendant SHANDS.

WHEREFORE, Plaintiff demands judgment against Defendant SHANDS AT LAKE SHORE, INC., and demands a jury trial on all issues triable as of right by jury.

**COUNT II
LIABILITY OF SHANDS FOR NEGLIGENCE OF RADIOLOGIST UNDER APPARENT
AGENCY DOCTRINE**

15. Plaintiff realleges the allegations contained in paragraphs 1 through 12.

16. At all times material hereto, the radiologists who negligently interpreted the

decedent's CT scan of August 21, 2002, were the apparent agents of SHANDS.

17. Plaintiff Dustin Andrew and his parents came to Shands because of SHANDS' name and reputation as a hospital and allowed Dustin to undergo radiological examination and interpretation by the radiologists in the reasonable belief that the radiology services were being rendered by SHANDS or its employees or servants. Through its advertising and through the appearances created by the relationship of the radiologists and the hospital, SHANDS represented that the radiologists were its employees or servants and thereby caused Plaintiff to justifiably rely upon the care and skill of the radiologists.

WHEREFORE, Plaintiff demands judgment against Defendant SHANDS AT LAKE SHORE, INC., and demands a jury trial on all issues triable as of right by jury.

COUNT III
LIABILITY OF SHANDS FOR NEGLIGENCE OF RADIOLOGISTS THROUGH NON-DELEGABLE DUTY IMPOSED BY CONTRACT

18. Plaintiffs reallege the allegations contained in paragraph 1 through 12.

19. SHANDS undertook by implied contract to provide hospital and medical care to decedent, including diagnostic radiology examination and interpretation, in consideration for payment. SHANDS held itself out as providing non-negligent diagnostic radiological services. Plaintiffs were not offered the opportunity to select a radiologist other than the radiologists provided by SHANDS. SHANDS had the duty and the ability to ensure that the radiologists providing services to its patients followed the prevailing standard of care in providing radiological examination and interpretation. Having undertaken a duty to provide diagnostic radiology interpretation, SHANDS cannot escape its liability to Plaintiffs by delegating performance under a contract to an independent contractor. Although as a general rule, hospitals are not liable for the negligence of independent contractor physicians, an exception to that

general rule provides that SHANDS is liable for the negligence of the radiologists under the non-delegable duty doctrine.

WHEREFORE, Plaintiff demands judgment against Defendant SHANDS AT LAKE SHORE, INC., and demands a jury trial on all issues triable as of right by jury.

COUNT IV
LIABILITY OF SHANDS FOR NEGLIGENCE OF RADIOLOGISTS THROUGH NON-DELEGABLE DUTY IMPOSED BY FEDERAL REGULATIONS

20. Plaintiffs reallege the allegations of paragraphs 1 through 12.

21. At all times material hereto, Defendant SHANDS operated a hospital and held itself out as offering medical care including diagnostic radiology services.

22. At all times material hereto, Dustin Andrew was a beneficiary of the Federal Medicaid Program.

23. At all times material hereto, Defendant SHANDS participated in the Federal Medicaid Program and received reimbursement under the Social Security Act, 42 USC, §1396, *et seq.*

24. Pursuant to the authority contained in Title XIX of the Social Security Act, the Department of Health and Human Services has established conditions for participation that hospitals must meet to participate in the Medicare program, at 42 CFR Part 482, *Conditions for Participation for Hospitals*. Hospitals participating in the Medicaid program must meet the Medicare conditions for participation, 42 CFR 440.10, 440.20. Included in these conditions for participation is 42 CFR §482.12(e), which states:

Standard: Contracted Services. The governing body must be responsible for services furnished in the hospital whether or not they are furnished under contracts. The governing body must ensure that a contracted service, including one for shared services and joint ventures, furnishes services that permit the hospital to comply with all applicable conditions of participation

and standard for the contracted services.

The governing body must ensure that the services performed under a contract are provided in a safe and effective manner.
(emphasis added)

25. As a further condition of participation, hospitals participating in the Medicare program must maintain or have available diagnostic radiologic services according to the needs of the patients. 42 CFR 482.26.

26. Plaintiffs are not attempting to assert a private right of action under the Medicare Act; however, the statute and regulations impose a non-delegable duty upon SHANDS to provide non-negligent medical care, including diagnostic radiology interpretation by physicians, to beneficiaries of the Act whether the radiologists are employees or as contractors. Although SHANDS is permitted to use independent contractor physicians to provide the radiology services for SHANDS' patients, the Medicare and Medicaid conditions for participation impose a non-delegable legal liability for the quality of care provided by the radiologists.

WHEREFORE, Plaintiff demands judgment against Defendant SHANDS AT LAKE SHORE, INC., and demands a jury trial on all issues triable as of right by jury.

COUNT V
LIABILITY OF SHANDS FOR NEGLIGENCE OF RADIOLOGISTS THROUGH NON-DELEGABLE DUTY IMPOSED BY STATE REGULATIONS

27. Plaintiffs reallege the allegations contained in paragraphs 1 through 22.

28. At all times material hereto, SHANDS was licensed as a hospital by the State of Florida. Patient care, including diagnostic radiology services, may only be performed by a hospital pursuant to such a license. State regulations require, as a condition of licensure, that SHANDS provide diagnostic radiology interpretation by a radiologist for its patients. 59A-3.2085(10) Florida Administrative Code. Because decedent's diagnostic radiologic interpretation

could be performed only pursuant to the license issued to SHANDS by the State of Florida, SHANDS remains liable for any negligence during the interpretation of the CT scan of August 21, 2002, regardless of whether SHANDS delegated the performance of the radiology services to independent contractors.

WHEREFORE, Plaintiff demands judgment against Defendant SHANDS AT LAKE SHORE, INC., and demands a jury trial of all issues triable as of right by jury.

COUNT VI
LIABILITY OF SHANDS THROUGH JOINT VENTURE

29. Plaintiffs reallege the allegations contained in paragraphs 1 through 12.

30. At all relevant times, Defendants SHANDS and UFBOT were engaged in a joint venture to provide medical care to patients of SHANDS, including Dustin Andrew. Defendants shared a community of interest in the performance of medical care and services to patients such as Dustin Andrew; shared control and the right of control over such medical care and services; shared a joint interest in the financial benefits and profits generated by the contribution of their resources and services; and shared financial benefits, profits and losses resulting from the joint venture. These Defendants had a duty to follow the prevailing professional standard of care for similar health care providers in the care and treatment of Dustin Andrew. The details of the joint venture are within the exclusive knowledge of Defendants, but include the following:

a. SHANDS pays a sum of money annually to the College of Medicine to pay physicians' salaries; and the College of Medicine furnishes residents to SHANDS to provide medical care at SHANDS.

b. The UFBOT owns the hospital building, and SHANDS leases the building as a hospital. SHANDS has assumed operational and management responsibility for the

hospital.

c. Facilities encompassed within the hospital include in-patient facilities where patient beds are housed, support facilities for the delivery of patient care, anesthesiology departments, surgery departments, laboratories, radiology, etc.

d. Physicians are obligated to deliver patient care at SHANDS by virtue of accepting privileges at SHANDS, and being available to be on call for patients. Only radiologists employed by UFBOT may practice at SHANDS.

e. SHANDS provides the majority of the equipment used in the hospital by the physicians, including surgical and anesthesia equipment.

f. SHANDS receives money from the State of Florida pursuant to a contract for SHANDS to provide indigent care. When SHANDS provides services for an indigent patient, SHANDS submits the unreimbursed bill to the State of Florida, and SHANDS is reimbursed for the net unreimbursed component by the State.

g. SHANDS needs physicians, because a hospital would not have patients if physicians did not put patients in the hospital. The College of Medicine physicians are the only physicians who admit patients to SHANDS. SHANDS charges a facility charge or room charge, performs the diagnostic radiology imaging such as radiology and CT scans, provides equipment, supplies and support staff, provides a number of treatment protocols, and provides treating rooms, all of which generate charges and revenue.

h. Faculty-generated physician fees from the College of Medicine, and fees generated by SHANDS are used for joint building projects.

i. If SHANDS stopped earning fees, and the faculty physicians stopped earning fees, the hospital would fail.

j. If SHANDS stopped operating, the UFBOT faculty physicians would lose

a substantial part of their practice, and would thus lose income from patients who are normally placed in SHANDS.

k. The UFBOT Medical Faculty are critical to SHANDS' success.

l. SHANDS benefits financially from its relationship with the College of Medicine.

m. Defendants' CT scan and interpretation could only be provided pursuant to licenses granted to SHANDS by the State of Florida. SHANDS provided its facilities, licenses, nurses, and technicians to the joint venture, while UFBOT provided physician services to the joint venture.

n. The hospital and the radiologists formed a team which functioned as part of a joint venture to provide care to decedent. Each member of the team shared responsibility and control for positioning and monitoring for proper positioning, and the members of the team combined their resources in an effort to prevent positioning injuries.

31. The radiologists who provided medical care to Plaintiff were, at all material times, acting within the course and scope of their employment by the joint venture formed by SHANDS and UFBOT.

WHEREFORE, Plaintiff demands judgment against Defendant SHANDS AT LAKE SHORE, INC., and demands a jury trial on all issues triable as of right by jury.

**COUNT VII
LIABILITY OF UNIVERSITY OF FLORIDA BOARD OF TRUSTEES FOR
NEGLIGENCE OF RADIOLOGISTS THROUGH MASTER SERVANT
RELATIONSHIP**

31. Plaintiffs reallege the allegations contained in paragraphs 1 through 30.

32. In addition to or in the alternative to the allegations above, at all times material hereto the radiologists who negligently interpreted the CT scan of August 21, 2002, were the

employees of UFBOT and were acting within the course and scope of their employment.

WHEREFORE, Plaintiff demands judgment against Defendant UFBOT, and demands a jury trial on all issues triable as of right by jury.

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been furnished via U.S. Mail to Eric P. Gibbs, HANNAH, ESTES & INGRAM, P.A., P.O. Box 4874, Orlando, Florida 32802-4974 this _____ day of _____, 2006.

Alan E. McMichael