

'LESSONS' IN CHARITABLE IMMUNITY: GEORGE v. JRMC¹

by Morgan E. "Chip" Welch²

[Writer's note: some of the hard legal lessons I've learned have been through an 'educational process' I can only describe as...well... colonic! The following case was an all-round appellate 'bad trip!']:

Following the delivery of her baby via Caesarian section on September 3, 1994, Gina George was prescribed a drug called Parlodel by her obstetrician to dry up her breast milk. The prescription was filled for her by the hospital pharmacy at Jefferson Regional Medical Center in Pine Bluff. She was discharged the next day and, almost immediately, began suffering excruciating headaches which ultimately caused her to go temporarily blind for a few days.

Re-admitted to the hospital on September 5, 1994, Gina was treated with anti-seizure medications and her blindness cleared. She continued, however, to suffer the headaches ["migraines"] over the next year and was continued with anti-seizure meds for two years. Gina suffered side effects from the medications and eventually lost much of her hair before the symptoms [which she had never had before] cleared in 1996. By that time, Ms. George had been treated by two neurologists for the pain.

It turned out that Sandoz, the drug's manufacturer, had issued an advisory to physicians and hospitals about two weeks earlier [in mid August] warning that the drug should not be used for retarding the production of milk. The drug house's warning stated that there was a danger of serious seizure from such a use. Unfortunately, according to the physician and the hospital, the warning hadn't yet been received.³

Following her experience of the last almost two years, Gina sought counsel and filed suit August 29, 1996. As it was alleged that Jefferson was a for profit hospital, the insurance company, St. Paul, was not an original defendant, though it was undisputed the carrier was on notice of the suit and provided the defense for the hospital.

When St. Paul raised a charitable immunity defense [after the statute had run], George 'hedged' her allegation, responding that, if the Court found Jefferson to be a charity, she prayed leave to amend and substitute the carrier as the proper party. George sought to avail herself of the 'relation-back doctrine' seemingly permitted in ARCP 15 [c].

¹ 337 Ark. 206, 987 S.W.2d 710 (1999).

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³ Sandoz alleged it had notified all hospitals and physicians through its newsletters and detail representatives.

Long story-short: the Court found Jefferson Regional to be a 'charity' [*see: discussion, infra*] and denied leave to amend. In short, Ms. George was out of Court as to a primary defendant. To make matters worse, the Court denied her request to take an immediate interlocutory appeal. She took a non-suit as to the remaining defendants and sought to appeal the ruling to salvage the claim.

On appeal⁴, George had every reason to expect relief. The Arkansas Supreme Court instead, however, veered away-- far way!

CHARITIES AND MULTI-MILLION DOLLAR HOSPITAL CORPORATIONS--ARE THEY THE SAME?

The dichotomy comes about because Arkansas still recognizes the doctrine of "charitable immunity" which is an archaic concept followed in few other states.⁵ Until recently, our Courts had seemed to be bent on joining the Majority of states.

a. Marion Hospital

In Marion Hospital Association v. Lanphier, 15 Ark.App. 14, 688 S.W.2d 322 (1985), the Court of Appeals had held the hospital in question was a charity only after approving the following test:

...[T]he Commission listed the following factors it believed should be allowed in determining whether or not a particular hospital is an institution "maintained and operated wholly as" a public charity:

- (1) Do the articles of incorporation provide that the purpose of the hospital is charitable in nature?
- (2) Is the corporation maintained for the private gain, profit or advantage of its organizers, officers or owners either directly or indirectly?
- (3) Does the hospital have capital stock or does it have provisions for distributing dividends or making a profit?
- (4) Does the hospital derive its funds from public and private charity as well as those who are able to pay?
- (5) Do all 'profits' go toward maintaining the hospital and extending and enlarging its charity?
- (6) Is the hospital open to all who are not pecuniarily able?
- (7) Are those patients who are unable to pay received into the hospital without charge, without discrimination on account of race, creed or color and are they given the same care as those who are able to pay?
- (8) Is the hospital exempt from the payment of both state and federal taxes?

⁴ The ATLA Amicus Committee filed a brief in the appeal.

⁵ Arkansas is unique now in the *George* application of 'immunity' as a complete defense. *See*: 25 A.L.R.4th 517; *Tort Immunity Of Nongovernmental Charities--Modern Status* (Sept. 2000 Supplement).

...[T]he Commission found that appellant met all of the above enumerated factors with the exception of part of (7) which provides that non-paying patients must be given the same care as those who are able to pay.

...[I]n view of the above testimony as well as appellant's articles of incorporation, we cannot say that fair-minded persons with the same facts before them could reach the conclusion that appellant failed to sustain its burden of proving that it was an institution maintained and operated wholly as a public charity so as to come within the exception contained in Ark.Stat.Ann. § 81-1302(c)(1). Accordingly, we reverse and remand with directions to the Commission to enter an order dismissing the claim.

[688 S.W.2d 322 @ pp.324-25]

The Arkansas Supreme Court later adopted the same 8-point analysis in Masterson v. Stambuck, 321 Ark. 391, 902 S.W.2d 803 (1995).

These decisions had followed a recognizable historical evolution where the Supreme Court had also held charitable immunity inapplicable on a case-by-case basis: Crossett Health Center v. Crosswell, 221 Ark. 874, 256 S.W.2d 548 (1953); J.W. Resort, Inc. v. First American National Bank, 3 Ark.App. 290, 625 S.W.2d 557 (1981); Ouachita Wilderness Institute v. Mergen, 329 Ark. 405, 947 S.W.2d 780 (1997).⁶

Previous cases were clear in the approach to ostensible 'charities' in that immunity was doled out sparingly. The entity so claiming had to satisfy the 8 tests. Failure of a single element could defeat immunity.

b. *Doe v. BMC [Hagaman]*

Emboldened by the seeming trend, this writer had earlier successfully utilized the Marion analysis in a case tried in Pulaski County in 1993 styled Doe v. Robin Hagaman and Baptist Medical Center, et. al. [settled before verdict].

In that case, a hospital administrator was accused of sexually abusing several teenaged boys who were inpatients at the Baptist Rehab Institute in Little Rock. The Administrator was criminally charged and had pleaded to a felony. Evidence was adduced that the management of the system was on notice of his predatory activities.

The Baptist System moved for summary judgment. It averred it was a charity, entitled to 'charitable immunity'.

⁶ See also: W. Prosser, *Handbook of the Law of Torts* 996 (4th ed. 1971) (proclaiming charitable immunity in a state of full retreat and predicting the doctrine's eradication in American law within twenty years).

Plaintiff presented an analysis of the hospital system's financial activities, its for-profit subsidiaries and the fact the hospital paid administrators bonuses based on "surplus" [or profit] retained. Dr. Charles Venus, a local economist, testified to a point-by-point examination of the hospital's activities under the *Marion and Stambuck* 8-pronged test and concluded the hospital was no 'not-for-profit' charity.

Then-Judge Morris Thompson denied summary judgment and held the issue was for the jury to decide. The hospital, rather than risk a jury decision on the issue, then stipulated 'for the purpose of the case at bar only' that the Hospital would agree to be tried as a for profit entity, a fact which no doubt helped hasten the ultimate settlement of the case before its conclusion.

Then came the Gina George case.

c. George v. JRMC and the "modern" charity

George was approached in the identical fashion as was the *Doe* sex abuse case settled in 1993. The same expert performed the same analysis and the same facts were found to exist.⁷ JRMC clearly did not satisfy the 8-factor test. The dissent, by Justice Brown, fairly summarizes the facts, which Gina George asserted should be sufficient to create a jury question about whether Jefferson was a 'charity':

In 1996, Jefferson Hospital Association, Inc., d/b/a Jefferson Regional Medical Center ("JRMC"), had a positive **five-year surplus in excess of \$5 million**. It **paid its chief executive officer a quarter of a million dollars in salary plus a bonus based on job performance**. It **owned outright or invested in several for-profit businesses**, including a collection agency and management agency for physicians known as Jefferson Management Services, a managed care organization known as Arkansas Preferred Provider Organization, a diagnostic imaging center named Jefferson Health Affiliates, and a business for selling, leasing, and managing office space for physicians named Jefferson Regional Medical Development. **It carried liability insurance** for potential medical malpractice with St. Paul Fire & Marine Insurance Company. **It did not have established guidelines for free care until two years after the negligence alleged by Gina George occurred**. Based on the above, **JRMC failed to satisfy several of the eight factors** relied upon by the majority to determine charitable immunity. At the very least, **there were fact questions raised by Gina George's economist, Dr. Charles Venus**, who filed an affidavit in this case in opposition to summary judgment. He questioned the amount of profit earned by JRMC and charitable care

⁷ An excellent source of information about hospitals in Arkansas and their financial condition [taken direct from public records] is the annual summary of hospitals published in *Arkansas Business*. Back issues are available for at least the last 8 years.

offered, both of **which go to the very heart of whether charitable immunity should be afforded.**

We are one of a distinct minority of states that still cling to the defense of charitable immunity, even though the original justification for charitable immunity--protection of funds given to the charity from judgments--has long since become outmoded. See Restatement of Torts Second § 895E, p. 420; "The Quality of Mercy: 'Charitable Torts' and their Continuing Immunity." 100 Harvard Law Review 1382 (1987).

[987 S.W.2d 710 @ pp. 715-17, *emphasis added*]

Though conceding much of the preceding, the majority, led by Justice Lavenski Smith, discounted the factors. The holding was summed up in the following:

...[T]he undisputed fact in the instant case is that JRMC does not depend for its existence exclusively on donations. Its financial obligations met by **donation is in the range of 6%.** However, as previously stated, **a modern hospital, with rare exception, would find it extremely difficult to operate wholly or predominately on charitable donations.** While we recognize that if JRMC did so operate this would be an even clearer case of charitable immunity, its financial and organizational structure as presented do not negate its overriding charitable purpose.

[987 S.W.2d 710 @ p. 714, *emphasis added*]

Thus, the "charitable immunity" doctrine for the "modern" Arkansas hospital was broadened from 'non-profit' to *not too much profit!* Suffice it to say that, in this approach, Arkansas is in a clear minority of states: a minority of one.⁸

Hopefully, the right case will reverse the aberration that is *George*, but the analysis must obviously be conducted while 'hedging' one's bet and suing the carrier--just in case. In reversing its slow but steady evolution towards the modern view, the Court left many questions unanswered including how many of the 8 factors must exist (and in what magnitude) to defeat a claim of 'charity'.

George did NOT overrule the 8-factor analysis. Perhaps this single fact will allow the Court to revisit 'charitable immunity'--and put it [and its victims] out of its misery! If not, ATLA members must encourage the legislature to act before all 'modern' hospitals in Arkansas decide they are multi-million dollar "charities", uninsured and unaccountable.⁹

⁸ 25 A.L.R.4th 517; *supra*.

⁹ For an exhaustive overview on the topic, see also: Christa S. Clark, *Tort Law-Tort Immunity For Non-Profits-Is The Charitable Immunity Defense Becoming An Offense For Arkansas Hospitals?* 22 U. Ark. Little Rock L. Rev. 125 (Fall 1999).

To do otherwise puts victims in the position of 'subsidizing' immunity to benefit Arkansas' charitable hospitals. As Judge Smith stated, there were laudable reasons for establishing the doctrine such as protecting true charities which could not afford to fight for and defend themselves. With the recognition of the realities of the finances of the 'modern hospital', must also come the simple truths about the so-called 'non-profit' charitable hospitals of today—they no longer resemble classical charities so much as they look and act like General Motors!

What ever the good sought to be perpetuated by a sweeping grant of immunity designed for true charities, its time has past. We must recognize the realities discussed by an earlier commentator who recognized the dangers taking responsibility away from the 'charitable tortfeasor' in the name of protecting the good works of charities:

*"[T]he victim of a tort should not be made to bear the whole social cost of this good."*¹⁰

¹⁰ Id., citing: *The Quality of Mercy: 'Charitable Torts' and Their Continuing Immunity*, 100 Harv. L. Rev. 1382, 1398 n.31 (1987)