

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Elizabeth McCullar and J.W. McCullar,

Docket No.: 2005-CP-40-04191

Plaintiffs,

vs.

Joanne Dukes Campbell, as Personal  
Representative of the Estate of William  
Cox Campbell, M.D.

Defendant.

**ORDER**

MAY 13 2013 11 2:24 AM  
CLERK OF COURT  
RICHLAND COUNTY

This matter came before me on the Defendant's Motion for Summary Judgment. Argument on the motion was heard on March 4, 2013, at the Richland County Judicial Center. The Plaintiffs were represented by Kevin Sinnick, while the Defendant was represented by Kay Gaffney Crowe of Barnes, Alford, Stork & Johnson, LLP. Based on the arguments of the parties and the reasons herein, the Defendant's Motion for Summary Judgment is **GRANTED**.

**RECEIVED**

MAY 13 2013

**SC Court of Appeals**

**FACTUAL BACKGROUND**

Plaintiff Elizabeth McCullar was a patient of Dr. William Cox Campbell, who performed breast reconstructive surgery on the Plaintiff on November 6, 2001, and a follow-up surgery on December 3, 2001. Dr. Campbell died shortly thereafter on December 24, 2001. Ms. McCullar underwent further surgery and debridement of the surgical site on December 27, 2001, by another physician not part of Dr. Campbell's practice.

On December 21, 2004, McCullar and her husband filed suit against "The Estate of Dr. William Cox Campbell" and other defendants in the Court of Common Pleas for



the Fifth Judicial Circuit in Richland County ("the first action," Civil Action No. 04-CP-40-5897). The Plaintiffs' primary allegation was for medical negligence. On January 26, 2005, the Estate moved to dismiss based on the grounds that the Probate Court, not the Circuit Court, had exclusive original subject matter jurisdiction. In an order dated June 30, 2005, the Circuit Court agreed, finding that South Carolina law required the Plaintiffs to commence their lawsuit in the probate court by petitioning the Probate Court to reopen Dr. Campbell's Estate.

On July 18, 2005, the Plaintiffs filed a Motion to Alter or Amend the Order on the Motion to Dismiss, which was denied. The Plaintiffs appealed, and on September 20, 2006, in an unpublished opinion, Op. No. 2006-UP-332, the Court of Appeals reversed the dismissal. The Defendant Estate's petitioned for a writ of certiorari to the South Carolina Supreme Court was granted on October 19, 2007. In an opinion published January 27, 2009, the Supreme Court reversed the Court of Appeals, holding that "an action brought against a nonexistent defendant is a nullity." McCullar v. Campbell, 381 S.C. 205, 207, 672 S.E.2d 784, 785 (2009).

After the Circuit Court's order dismissing the case had been entered, but before the Circuit Court denied the Plaintiffs' Motion to Alter or Amend, the Probate Court issued an order on August 19, 2005, reopening the Estate of Dr. Campbell to the extent of insurance coverage and for the sole purpose of allowing this suit to be brought. Plaintiffs filed a complaint in the Court of Common Pleas in Richland County on August 22, 2005 ("the Complaint," Civil Action No. 2005-CP-40-04191) asserting the same allegations of negligence against the Estate of Dr. Campbell: medical malpractice.



negligence per se, and loss of consortium. The Complaint does not contain an allegation of deficient charting, negligence in charting, or spoliation of evidence.

The Defendant filed her Answer to the Complaint denying the material allegations therein. Discovery has been conducted and the Defendant now moves for summary judgment on the grounds that the Plaintiff cannot show that Dr. Campbell breached a duty owed to the Plaintiffs or was a proximate cause of the Plaintiffs' injury and the applicable statute of limitations expired before the Complaint was filed on August 22, 2005.

### STANDARD OF REVIEW

Summary judgment is proper where there is "no genuine issue of material fact" and "the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCF; Conner v. City of Forest Acres, 348 S.C. 454, 462, 560 S.E. 2d 606, 610 (2002). "In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Conner, 348 S.C. at 462, 560 S.E.2d at 610. "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Cl. App. 2005). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Id. at 220, 616 S.E.2d at 729.

**RECEIVED**

MAY 13 2013

**SC Court of Appeals**

ER  
43

## ANALYSIS

The Defendant is entitled to Summary Judgment because the Plaintiff has not presented the necessary expert evidence to show that Dr. Campbell breached the applicable standard of care or that his actions were the proximate cause of the Plaintiffs' injuries. "To prevail in a negligence action, a plaintiff must demonstrate: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." McKnight v. South Carolina Dept. of Corrections, 385 S.C. 380, 386, 684 S.E.2d 566, 569 (Ct. App. 2009). Furthermore, a necessary element of any medical malpractice cause of action is demonstrating that there was a breach of the applicable standard of care. "A physician commits malpractice by not exercising that degree of skill and learning that is ordinarily possessed and exercised by members of the profession in good standing acting in the same or similar circumstances." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "[T]he general rule is that expert testimony is required in a malpractice case to show that the defendant failed to conform to the required standard . . . ." Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978).

In the instant case, the only expert witness who has been identified by the Plaintiffs, Dr. John D. Newkirk opined that Dr. Campbell did not breach the standard of care. Deposition of Dr. John D. Newkirk 51:15-25 & 52:1-3 (June 21, 2012). The Plaintiffs have not submitted any affidavits from additional experts and offered no additional expert testimony in response to the Defendant's Motion.

Even if the Plaintiffs could show that Dr. Campbell breached the applicable standard of care, there is no evidence that his actions caused the Plaintiffs damage. The court in Hoard v. Roper Hospital, Inc. explained:

In a medical malpractice action, it is incumbent on the plaintiff to establish proximate cause as well as the negligence of the physician. When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence.

387 S.C. 539, 556, 694 S.E.2d 1, 5 (2010). "Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991). In the instant case, the Plaintiffs cannot show a causal connection between the actions of Dr. Campbell and the damages they suffered, through expert testimony or otherwise. Dr. Newkirk did testify that Dr. Campbell's charting was substandard, but did not testify to any resulting harm. Furthermore, Dr. Carlin, who treated the Plaintiff after the death of Dr. Campbell, testified in his deposition that from the available records, he had all the records he needed to treat the Plaintiff. Deposition of Dr. Brett Carlin 40:24-25 & 41:1-5 (April 25, 2012). In other words, any substandard charting on the part of Dr. Campbell did not cause the Plaintiff harm.

Dr. Carlin also testified that Dr. Campbell's treatment met the standard of care. Deposition of Dr. Brett Carlin 14:1-11 (April 25, 2012).

Like the facts in Hoard, the Plaintiffs in the instant case have not provided evidence that Dr. Campbell caused them injury. The Plaintiffs' expert witness could not say "with reasonable certainty, [that] the injuries complained of most probably resulted

from the defendant's negligence." Hoard, 387 S.C. at 556, 694 S.E.2d at 5. Therefore, as in Hoard, the Defendant's motion for summary judgment should be granted.

The Complaint also alleges that Dr. Campbell was under the influence of alcohol or drugs at the time he treated Ms. McCullar in violation of S.C. Code Ann. § 40-47-112, and therefore, the Defendant is liable for negligence per se. However, the Plaintiffs have provided no evidence that Dr. Campbell was under the influence of alcohol or drugs when he provided treatment to Ms. McCullar. Furthermore, even if he was under the influence, the Plaintiffs have not satisfied the elements of negligence per se because S.C. Code Ann. § 40-47-112 does not give rise to a private right of action and the Plaintiffs cannot show proximate cause.

Title 40 of the South Carolina Code regulates professions and occupations; Chapter 47 under this title regulates physicians and miscellaneous health care professionals. S.C. Code Ann. § 40-47-112 is designed to regulate the practice of medicine rather than the imposition of civil liability to private individuals. This is made clear by Section 40-47-210, which states that "[t]he *department*, in addition to instituting a criminal proceeding, may institute a civil action through the Administrative Law Court for injunctive relief against a person or entity violating this chapter, a regulation promulgated pursuant to this chapter, or an order of the board." S.C. Code Ann. § 40-47-210 (emphasis added). It does not provide for a private cause of action. Because the Plaintiffs cannot show the statute was designed to protect them, instead of regulating the profession, the Plaintiffs cannot satisfy the first prong of a negligence *per se* action.

Finally, the Defendant cannot be liable for loss of consortium where the Plaintiffs' negligence claim fails. "Our supreme court has recognized that a loss of

*GR-6*

consortium claim is not derivative, but is a distinct, independent cause of action. However, there must be some intentional or tortious conduct for a loss of consortium claim to stand.” Williams v. Lancaster County School Dist., 369 S.C. 293, 307, 631 S.E.2d 286, 294 (Ct. App. 2006). In other words, “[i]n order to prevail in an action for loss of consortium, a plaintiff must prove the defendant’s liability for the spouse’s injuries, as well as damages to the plaintiff resulting from the spouse’s injury.” Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 121, 512 S.E.2d 510, 523 (Ct. App. 1998). Having failed to prove Ms. McCullar’s claims, Mr. McCullar’s loss of consortium claim must also fail.

As an additional sustaining ground, I find that the Plaintiffs’ claim is barred by the statute of limitations. S.C. Code Ann. § 15-3-530 “sets forth a three-year statute of limitations for negligence actions. Under the discovery rule, the statutory period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence.” Cline v. J.F. Faulkner Homes, Inc., 359 S.C. 367, 370-371, 597 S.E.2d 27, 29 (Ct. App. 2004). “The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party may exist.” Knox v. Greenville Hospital System, 362 S.C. 566, 570, 608 S.E.2d 459, 462 (Ct. App. 2005) (quoting Snell v. Columbia Gun Exch., Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981)). “The date on which discovery should have been made is an objective, not subjective question.” Id. (quoting

Joubert v. South Carolina Dept. of Soc. Services, 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Cl. App. 2000).

In the instant case, the Plaintiffs discovered the claim more than three years before they filed the Complaint on August 22, 2005. It is conceded that a person of reasonable diligence would have known of a potential claim by December 27, 2001. Therefore, the statute of limitations began to run on this date and expired before the Complaint was filed.

The Plaintiffs argue that provisions of the probate code provide an extension of time to file, such that their claims are not time-barred. The statute provides that "[t]he running of any statute of limitations measured from some other event than death or the giving of notice to creditors is suspended during the eight months following the decedent's death but resumes thereafter[.]" S.C. Code Ann. § 62-3-802. The Plaintiff interprets this as a tacking provision, and argues that the eight month period is added onto the applicable statute of limitations, which in this case is three years from the date of discovery.

There is no definitive case law that interprets how this provision should be calculated, however the language indicates that the *running* is *suspended* for eight months after death. This would mean that the statute of limitations is prevented from expiring during this eight month period. Case law interpreting the previous version of the statute (former Section 21-3-70) indicates that it applies only to cases where the statute commenced to run in the lifetime of decedent and the statutory period expired before administration. Here, the date of discovery was after the death of Dr. Campbell and, accordingly, the statute had not commenced to run in his lifetime.

**RECEIVED**


MAY 13 2013

SC Court of Appeals

Courts in South Carolina interpreting suspension periods for statutes of limitation in conjunction with the probate code have found them applicable "only to those cases where no administration is taken out until after the expiration of the statutory period; the statute having commenced in the life-time of the decedent." Strain v. Babb, 30 S.C. 342, 9 S.E. 271, 272 (1889). In this case, the statutory period had not expired even when the estate had been administered and closed. The purpose of the statute cited by the Plaintiffs is to prevent the expiration of the statute before or during administration, of which there was no danger in the present situation.

**IT IS, THEREFORE, ORDERED** that the Defendant's Motion for Summary Judgment is **GRANTED**.

**AND IT IS SO ORDERED.**

  
\_\_\_\_\_  
G. Thomas Cooper, Jr., Judge  
Fifth Judicial Circuit

March 19, 2013  
Columbia, South Carolina

**RECEIVED**  
MAY 13 2013  
SC Court of Appeals