THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
R. Keith Kelly, Circuit Court Judge

Case No. **2019-001145**

Jackie Eadon Chalfant,
Individually and Personal
Representative of the Estate of
Michael Dallas Chalfant.…….....…….Appellant,

v.

Carolinas Dermatology
Group, P.A., a South Carolina
Professional Association, and
Mark G. Blaskis, M.D.,
Individually…….…….....……Respondents.

RESPONDENTS' PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondents Carolinas Dermatology Group, P.A., a South Carolina Professional Association (CDG), and Mark G. Blaskis, M.D., Individually (Dr. Blaskis), respectfully petition the Court for rehearing and a new order with regard to Court of Appeals Opinion No. 5977 (S.C. Ct. App., Filed April 12, 2023) (Op. No. 5997).

On appeal, Appellant presented three issues. As to these three issues, this Court (1) affirmed the trial court's grant of directed verdict for CDG and Dr. Blaskis as to the one-page telephone discharge instructions and the phone prompt because no expert testified that Dr. Blaskis or CDG breached the standard of care and because the standard of care and breaching the standard of care did not lie within the ambit of common knowledge (Op. No. 5997 at pp. 8-10); (2) reversed the trial court's grant of directed verdict for CDG and Dr. Blaskis because this Court found that there existed conflicting testimony regarding the breach of the standard of care related to post-surgery instructions (Op. No. 5997 at pp. 10-12); and (3) affirmed the trial court's grant of directed verdict for CDG and Dr. Blaskis because Appellant failed to present expert testimony to establish Dr. Blaskis breached the duty of care by proceeding with surgery despite Decedent's tachycardia (Op. No. 5997 at pp. 12-13).

CDG and Dr. Blaskis request a rehearing and new order as to the Court's reversal on the second issue on appeal. As set forth below, in reversing the trial court as to the second issue on appeal, the Court overlooked that there was not competent evidence from which the jury could have inferred a causal connection between Dr. Blaskis' post-surgical instructions and Mr. Chalfant's death. Further, the controlling portion of the Court's order indicates the Court

overlooked that Mr. Chalfant's own negligence, as a matter of law, exceeded any possible negligence by Dr. Blaskis.

I. This Court Should Affirm the Trial Court's Grant of Directed Verdict as to Dr. Blaskis' Post-Surgical Instructions Because No Competent Evidence Exists to Show Proximate Cause.

Appellants have failed to establish proximate cause because the cornerstone of their argument relies on a speculative answer to a hypothetical question. "When expert testimony is not required, the plaintiff must offer evidence that rises above mere speculation or conjecture." Op. no. 5997 at p. 12, citing *Hickman v. Sexton Dental Clinic, P.A.*, 295 S.C. 164, 168, 367 S.E.2d 453, 455 (Ct. App. 1988). Moreover, while the trial court is required at the directed verdict stage to view the evidence and reasonable inferences in the light most favorable to the party opposing the motion, "this rule does not authorize submission of speculative, theoretical, or hypothetical views to the jury." *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008).

Here, as this Court's Order articulates, Appellants' proximate cause argument—that Dr. Blaskis' alleged failure to offer post-surgical bleeding instructions caused Mr. Chalfant's death—hinges on a single piece of testimony from Mrs. Chalfant. *See* Op. No. 5997 at p. 12. This testimony arose after Mrs. Chalfant was asked a hypothetical: "… if Doctor Blaskis had told you that, if there's bleeding, take Mike to the emergency room, would you have insisted that he go?" R. p. 596-97. Mrs. Chalfant answered the question "[y]es", and then went on to answer a further hypothetical that was not even asked, stating "[w]ell, he would have also. If, if he heard it from Doctor Blaskis, he would certainly have done what the doctor said." R. p. 597. Appellants' counsel failed to develop any foundation for this statement, instead leaving this response to a hypothetical question as pure conjecture and speculation. Mrs. Chalfant's testimony regarding what the deceased person "would have done," is thus not competent evidence under South Carolina law,

nor should it be. If such speculation and conjecture were permissible, unsupported and self-serving answers to hypotheticals would become the magical key to defeating otherwise well-deserved directed verdict motions.

It is Appellants' burden to prove proximate cause, and Appellants have attempted to satisfy their burden through speculation and conjecture, offering a hypothetical scenario and conjecture as the unlikely keystone to an already incredible argument. The trial court is tasked with determining competency of evidence, which it properly did. As a result, the trial court properly granted directed verdict and prevented Appellants' case from going to the jury supported by conjecture, speculation, and hypotheticals, in contravention of South Carolina law. *See Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008).

II. This Court Should Affirm the Trial Court's Grant of Directed Verdict as to Dr. Blaskis' Post-Surgical Instructions Because the Trial Court Correctly Found that Mr. Chalfant's Negligence Exceeded Any Negligence of Dr. Blaskis.

While comparison of the plaintiff's negligence with that of the defendant is ordinarily a question of fact for the jury to decide, "judgment as a matter of law" should be granted "if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." *Bloom v. Ravoira,* 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000). Moreover, "a court 'cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.'" *Id.* at 424, 529 S.E.2d at 713.

Noting these issues, and noting the many facts showing the plaintiff in *Bloom* was negligent, the Supreme Court there found that judgment as a matter of law was proper because the plaintiff's negligence exceeded any potential negligence by the defendant. *Id. Id.* at 424, 529 S.E.2d at 713-14. The Supreme Court noted the possibility that the defendant's attention may have

been diverted and that he may not have been keeping a proper lookout. *Id.* Yet, it found that even in the face of these possible acts of negligence, there was no reasonable possibility that a jury could render a verdict for the plaintiff on the facts before the Court. *Id.*

This is similar to the Court of Appeals' ruling in *Hopson v. Clary*, 321 S.C. 312, 468 S.E.2d 305 (Ct. App. 1996), which is cited in *Bloom*. There, a motorist attempted a U-turn when the defendant struck plaintiff from behind. There was speculation offered that the defendant may have been speeding in a school zone, and the plaintiff had the "instinction" that the defendant crossed the yellow lines before the collision. *Id.* at 315–16, 468 S.E.2d at 308. The Court of Appeals determined this was not competent evidence and, moreover, even if the defendant's negligence was assumed, the plaintiff's own negligence was greater and "the more determinative factor" causing the accident. *Id.* at 316, 468 S.E.2d at 308.

Here, as in *Bloom* and *Hopson*, there is no competent evidence of negligence by Appellants, and there is ample evidence of the Appellants' negligence. In fact, the opportunities for the Appellants to take action, and the information in their possession that they needed to take action, was far greater than the opportunities for the plaintiffs in *Bloom* and *Hopson*, where the plaintiffs had little time to take action and no input from other parties that they needed to take action. Moreover, there is no competent evidence of negligence by Dr. Blaskis or CDG, and even if their alleged negligence were assumed, no reasonable juror could find anything except that Appellants' own negligence was greater and the more determinative factor in Mr. Chalfant's death.

While judgment as a matter of law on the issue of comparative negligence may not be the ordinary course, that does not prevent South Carolina courts from properly rendering judgment as a matter of law on the issue of comparative negligence, even where potential negligence of a defendant might exist.

To the extent the Appellants have argued that the record must reflect *no* negligence of the defendant for judgment of law to be proper, this cannot be. Such a ruling would not be a ruling as to comparative negligence but rather a ruling that there was no negligence at all on the part of the defendant. A ruling on comparative negligence would not be necessary in such a scenario. The very fact that South Carolina law allows the court to find that the plaintiff's negligence exceeds, as a matter of law, the negligence of the defendant, indicates that directed verdict may be appropriate even where some negligence may have been alleged as to the defendant.

In addition, the standard set forth by the South Carolina Supreme Court is a reasonableness determination: if the sole reasonable inference that the Plaintiff's negligence exceeded 50%, judgment as a matter of law should be granted. As it was stated in another way by the *Bloom* court, the issue is whether there is a *reasonable* possibility that a jury could render a verdict for the plaintiff. The standard is not whether there is "any" possibility.

Here, without exception, the evidence and witness testimony indicate that all who were aware of or who later became aware of Mr. Chalfant's condition knew he needed emergency care. This included Mr. Chalfant himself, who was personally aware of his condition and, moreover, was told by at least three people to seek emergency care. In contrast, no competent evidence exists to show proximate cause that CDG or Dr. Blaskis proximately caused Mr. Chalfant's death, and without proximate cause, there is no negligence on the part of Respondents. Moreover, even if there were some "potential" negligence by Dr. Blaskis, the overwhelming evidence shows only one reasonable conclusion, that Appellants' negligence exceeds that of Respondents.

Thus, the Court erred in reversing the trial court as to the second issue on appeal.

CONCLUSION

In summary, Respondents seek rehearing of and a revised order on the Court's ruling as to the second issue on appeal because the Court erred in reversing the trial court and the trial court properly granted directed verdict to Respondents, including for the reasons found by the trial court and for all the reasons set forth above.

April 27, 2023

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