

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
R. Markley Dennis, Jr., Circuit Court Judge

CASE NO. 2008-CP-10-7380
APPELLATE CASE NO. 2012-212771

RECEIVED

JUL 05 2013

SC Court of Appeals

Tasha Murphy and Steven Murphy,.....Appellants

v.

Palmetto Lowcountry Behavioral Health, LLC, Ricardo Fermo, M.D., and Steven G.
Lopez, M.D.....Respondent

INITIAL BRIEF OF RESPONDENT STEVEN G. LOPEZ, M.D.

Todd W. Smyth, Esquire
Joshua S. Whitley, Esquire
Smyth Whitley, LLC
234 Seven Farms Drive
BB&T Plaza, Suite 215
Charleston, South Carolina 29492
843-606-5635

Attorneys for Respondent Steven G. Lopez,
M.D.

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES.....3

II. STATEMENT OF ISSUES ON APPEAL.....4

III. FACTS.....5

IV. ARGUMENTS.....8

 A. The Appellants failure to provide any evidence demonstrating that Dr. Lopez proximately caused the injury sustained by the Appellant requires the Circuit Court’s judgment be affirmed.

 B. Plaintiffs did not produce any evidence, much less clear and convincing evidence, to sustain a claim for punitive damages, as there was no evidence of reckless, willful or wanton conduct by Dr. Lopez in his treatment of the Appellant.

V. CONCLUSION.....15

TABLE OF AUTHORITIES

CASES

Celotex v. Catrett, 477 U.S. 317, 322 (1986) ----- 7, 8
David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006) ----- 8
Ellis v. Oliver, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996)----- 9
Goewey v. United States, 886 F.Supp. 1268, 1279 (D.S.C. 1995)-----10
Hainer v. American Medical Intern, Inc., 328 S.C. 128, 135, 492 S.E.2d 103, 107 (1997) -----14
Hallman v. Cushman, 196 S.C. 402, 406, 13 S.E.2d 498, 500 (1941)-----13
Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009) ----- 7
Hughes v. Children's Clinic, P. A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977)-----10
Humana Hospital Bayside v. Lightle, 305 S. C. 214, 216, 407 S.E.2d 637, 638 (1991) ----- 15
McCourt v. Abernathy, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995) -----13
Messier v. Adicks, 251 S.C. 268, 161 S.E.2d 845, 846 (1968)-----10
Nesbitt v. Lewis, 335 S.C. 441, 448, 517 S.E.2d 11, 15 (Ct. App. 1999)-----13
Thompkins v. Festival Centre Group, 306 S.C. 193, 410 S.E.2d 593 (Ct. App. 1991) ----- 7

RULES

Rule 220(c), SCACR-----10
Rule 56(c), SCRCPP----- 7
Rule 56(e), SCRCPP----- 8

STATEMENT OF ISSUES ON APPEAL

- A. Whether the Appellants' failure to produce the required expert evidence of proximate cause in a medical malpractice action mandates summary judgment, when the Appellant's sole expert admitted that the sole, alleged deviation from the standard of care, i.e., a failure to test the Appellant's Lithium level, "had nothing to do" with her Lithium toxicity and, further, he did not know how the Appellant reached a toxic Lithium level.

- B. Whether the Appellants' failure to produce any evidence of reckless, willful, wanton, or malicious conduct on the part of the Respondent to support a claim for punitive damages mandates summary judgment?

FACTS

This is a medical malpractice action arising out of Appellant Tasha Murphy's (hereinafter referred to as "Appellant" or "the Patient") treatment at Palmetto Lowcountry Behavioral Health (hereinafter referred to as "Palmetto") from November 19, 2002 to November 25, 2002. Compl. p. 4-5. The Appellants alleged that the Defendants failed to exercise the appropriate standard of care in their diagnosis, care and treatment of the Appellant during the aforementioned time period.¹ *Id.* at 5-6., The Appellants alleged that the Defendants were negligent in failing to determine the amount of Lithium in Tasha Murphy's body at the time of admission before resuming her regular dosage, ultimately resulting in a toxic level of the drug Lithium 5 days later. *Id.* at 5.

Upon admission to Palmetto, the Appellant presented as being off her medications, depressed, suffering from bipolar affective disorder, and suicidal with a plan to shoot herself. Order Granting Summary Judgment at p. 2 (April 5, 2011). The Appellant was admitted by a non-Defendant physician Dr. Jenkins. *Id.* Dr. Jenkins immediately started her back on her previous Lithium dosage. *Id.* Dr. Lopez did not examine or treat the Appellant until the day after Dr. Jenkins' admission. *Id.* Upon his examination, Dr. Lopez concurred with the admitting

¹ The Murphys settled their claims against Palmetto Lowcountry Behavioral Health, LLC and Dr. Ricardo Fermo prior to the Summary Judgment hearing in this matter.

physician's diagnosis and treatment recommendations, including the continuation of her regular dosage of Lithium. *Id.* In subsequent days, Mrs. Murphy was treated and evaluated by Drs. Ricardo Fermo and Peter Sukan, both of whom also continued the Appellant on Dr. Jenkins' admission orders, including continuing her on her Lithium regular dosage. Per standard protocol with Lithium, no subsequent treating physician ordered that Lithium levels be drawn until the fifth day because that is when the medication reaches a steady state in the body. *Id.*

On November 25, the Respondent Dr. Lopez found the Appellant to be suffering from a urinary tract infection, noted she was depressed and lethargic, and felt she was not showing improvement on that day. *Id.* Further, consistent with standard procedure, the Appellant's Lithium levels were checked on this date because it takes five days for this medication to reach a steady state in the body. *Id.* That evening, Dr. Lopez noted that Mrs. Murphy's condition changed significantly and she exhibited jerky movements that possibly indicated Lithium toxicity. *Id.* The Appellant was taken to St. Francis Hospital where she was evaluated and treated. *Id.*

At his deposition, the Appellant's sole medical expert, Dr. Thomas Martin, testified that the failure to draw the Appellant's Lithium level "had nothing to do" with Mrs. Murphy's eventual Lithium toxicity. Depo. Martin 125:16-25. Dr. Martin further testified that he does not know how Mrs. Murphy reached a toxic Lithium level while at Palmetto. *Id.* at 68:21-69:2. The

only violation of the standard of care that he testified occurred was that he believed that a lithium level should have been taken on admission. *Id.* at 119:6-9. Dr. Martin opined that “a lithium level, along with the rest of the labs that were drawn, should have been done on admission, and that was not done.” *Id.* at 14-17 (emphasis added). It is undisputed that Dr. Lopez was not the admitting physician.

STANDARD OF REVIEW

Rule 56(c), SCRPC provides for judgment as a matter of law where “there is no genuine issue as to any material fact for trial.” The purpose of summary judgment is to dispose of factually unsupported claims. Celotex v. Catrett, 477 U.S. 317, 322 (1986). “Summary judgment is appropriate in those cases in which plain, palpable and indisputable facts exist on which reasonable minds cannot differ.” Thompkins v. Festival Centre Group, 306 S.C. 193, 410 S.E.2d 593 (Ct. App. 1991).

Although the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment, Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009), the “[Appellant] may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Rule 56(e), SCRPC. The

Appellant's failure to prove an essential element of a case renders all other facts immaterial.

Celotex, 477 U.S. at 322.

In South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. Id.

ARGUMENT

A. THE APPELLANTS FAILURE TO PROVIDE ANY EVIDENCE DEMONSTRATING THAT DR. LOPEZ PROXIMATELY CAUSED THE INJURY SUSTAINED BY THE APPELLANT REQUIRES THE CIRCUIT COURT'S JUDGMENT BE AFFIRMED.

In South Carolina, medical malpractice lawsuits have specific requirements that must be satisfied in order for a genuine factual issue to exist. David, supra, 626 S.E.2d 1, 3 (2006). Specifically, a plaintiff alleging medical malpractice must provide evidence showing (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the defendant's field of medicine under the same or similar circumstances, and (2) that the defendant departed from the recognized and generally accepted standards. Id., 367 S.C. at 247-248, 626 S.E.2d at 4 (citing Pederson v. Gould, 288 S.C. 141, 143-144, 341 S.E.2d 633, 634 (1986); Cox v. Lund, 286 S.C. 410, 414, 334 S.E.2d 116, 118 (1985)). Moreover, the plaintiff must show that the defendant's departure from such generally

recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages. Id., 367 S.C. at 248, 626 S.E.2d at 4 (citing Green v. Lilliewood, 272 S.C. 186, 193, 249 S.E.2d 910, 913 (1978)). The plaintiff must provide expert testimony to establish these elements unless the subject matter lies within the ambit of common knowledge so that no special learning is required to evaluate the conduct of the defendants. Id. (citing Pederson, 288 S.C. at 143, 341 S.E.2d at 634). In South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture. Id. The failure to establish proximate cause is the crux of the Circuit Court's decision granting summary judgment in favor of Dr. Lopez and the trial court's ruling must be affirmed due to the complete absence of evidence on this element.

It is axiomatic that the Appellant must establish proximate cause as well as the negligence of the physician." Ellis v. Oliver, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996) (citing Armstrong v. Weiland, 267 S.C. 12, 225 S.E.2d 851 (1976)). "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." Id. at 125, 473 S.E.2d at 795. When expert testimony is the only evidence of proximate cause relied upon, as is the case here, the testimony "must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and

hypothetical connection." Id. "Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided." Hughes v. Children's Clinic, P. A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977) (citing Gunnels v. Roach, 243 S.C. 248, 133 S.E.2d 757 (1963)).

Proximate causation is only present where the injury "most probably" came from the cause alleged." Goewey v. United States, 886 F.Supp. 1268, 1279 (D.S.C. 1995) (quoting Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991)), *aff'd*, 106 F.3d 390 (4th Cir. 1997), *cert. denied*, 522 U.S. 1945 (1998). Similarly, proximate cause is absent "where the cause of plaintiff's injury may be as reasonably attributed to an act for which defendant is not liable as to one which he is liable." Messier v. Adicks, 251 S.C. 268, 161 S.E.2d 845, 846 (1968).

The lack of evidence concerning proximate cause is clear from the record in this case and is fatal to the Appellants claims against Dr. Lopez.² First, the Appellant's own expert, Dr.

² The Respondent believes the Appellants failed to meet their burden of proof with regard to the element of proof of a deviation from the standard of care as well, but because that issue was not a basis for the Circuit Court's decision, Respondent does not address that issue specifically herein. However, pursuant to Rule 220(c), SCACR, this Court may affirm the grant of Summary Judgment Order below upon any ground appearing in the Record on Appeal. As such, the Record demonstrates that the Appellant was treated by numerous physicians throughout her stay at Palmetto, and the Appellants' expert limited his opinion to the fact that the admitting physician should have ordered a Lithium level analysis. *See Depo. Thomas Martin, M.D. 119:6-120:4 (July 16, 2008)* (opining that the standard of

Martin, readily admitted the failure to draw the Appellant's Lithium level "had nothing to do" with her eventual Lithium toxicity. Depo. Martin 125:16-25 (emphasis added). Therefore, even assuming for argument's sake it was a breach of the standard of care to not order a test, Appellants' sole expert concedes it did not proximately cause the damages sustained by the Appellant. That admission is fatal to the Appellants' claims and the analysis need go no further. However, Dr. Martin further underscored the lack of proximate cause when he testified that he does not know how Mrs. Murphy reached a toxic Lithium level while at Palmetto. Id. 68:21-69:2. Based on this testimony alone, it is clear that the Appellants' expert cannot state with the requisite reasonable degree of medical certainty that in his professional opinion the injuries complained of most probably resulted from the Respondent's alleged negligence. The

care was breached when Appellant's Lithium levels were not tested at the time of admission and stating "I believe he should have drawn a lithium level on admission and I believe that is essentially the biggest problem in Mrs. Murphy's case"). Dr. Martin also testified he does not believe that it was negligent for physicians who treated the Appellant after she was initially admitted to fail to order Lithium levels. Id. 121:9-122:5. As Dr. Lopez was not the admitting physician, he necessarily did not breach the standard of care in his treatment of the Appellant. *Id.* Furthermore, Respondent's expert, James C. Ballenger, M.D., has testified that for Dr. Lopez to have drawn Mrs. Murphy's Lithium levels the morning after she had already taken a dose of Lithium would be a "clear mistake." Depo. James C. Ballenger, M.D. 44:5-16 (March 4, 2011). Dr. Ballenger reasons that drawing such a level at that point would produce a level that nobody would know how to interpret and would lead to confusion in the record and in the Appellant's care. Id. Therefore, Dr. Ballenger agreed the standard of care is to measure Lithium levels 5 days after starting it and testified that Dr. Lopez did not breach the standard of care for psychiatry in his treatment of the Appellant. Accordingly, no expert testimony has been provided that Dr. Lopez deviated from the generally accepted standard of care in his treatment of the Appellant, and Dr. Lopez is entitled to judgment as a matter of law on this alternative ground.

Appellant's failure to prove an essential element of a case renders all other facts immaterial. Celotex, 477 U.S. at 322.

At the hearing on Dr. Lopez's motion for summary judgment, the Circuit Court correctly inquired on at least eight (8) occasions where the Appellants' expert opined at his deposition that Dr. Lopez's actions proximately caused the Appellant's injury. *See* Transc. of Summary Judgment Hearing, p. 10 ("Just tell me what you believe refutes that position stated by Mr. Smyth"); *see also Id.* at p. 13 ("Tell me about – when did the doctor say that it meets the probable cause aspect. In a medical malpractice case, we have to have both"); *Id.* at 14 ("just tell me what he says when he says – because Mr. Smyth pointed out that he said 'I can't tell you that' . . . Therein lies the problems. Without him saying, 'yes, I think that was the proximate cause,' that his departure was the proximate cause of the damage and injury – where does he say that"); *Id.* ("All of that goes to a departure from the standard of care. Where is it that he says that it proximately the – the departure proximately caused her injury or damage"); *Id.* at 15 ("Where does he say that?"); *Id.* ("No, I just want you to – you don't have to walk through it. Just tell me where he says that. Read it to me. His testimony"); *Id.* ("Again, I am not quarreling with that [issue of standard of care]. Go on to – just talk about the probable – get me to the bottom line. . . The part I want you to tell me is where he says that 'I think all of these proximately caused her injury'"). Appellant was unable to identify any. He never identified the proximate cause link

and, therefore, the Court correctly determined Appellants could not survive summary judgment. There simply is no evidence that causally links Mrs. Murphy's lithium toxicity to any action or inaction of Dr. Lopez. Taken in the light most favorable to the Appellants, they failed to produce any evidence linking the alleged breach in standard of care to her claimed injuries and none exists. Accordingly, the Circuit Court's ruling should be affirmed.

B. Plaintiffs did not produce any evidence, much less clear and convincing evidence, to sustain a claim for punitive damages, as there was no evidence of reckless, willful or wanton conduct by Dr. Lopez in his treatment of the Appellant.

Although the Appellants' allege in their pleading there was reckless, willful or wanton conduct, *see* Compl. pp. 5-7, ¶¶ 29 and 32, they have failed to present any evidence to support such a claim as to Respondent.³ "In order for a plaintiff to recover punitive damages, there must be evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights." McCourt v. Abernathy, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995). "A tort is characterized as reckless, willful, or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights." Nesbitt v. Lewis, 335 S.C. 441, 448, 517 S.E.2d 11, 15 (Ct.

³ Affirming the Circuit Court on the issue of proximate cause should make a decision regarding punitive damages unnecessary. *See Hallman v. Cushman*, 196 S.C. 402, 406, 13 S.E.2d 498, 500 (1941) (holding "punitive damages may not be allowed unless the alleged reckless, willful or wanton act of the defendant is a proximate cause of some injury to the plaintiff").

App. 1999). There must be clear and convincing evidence of actual malice to warrant an award for punitive damages. Hainer v. American Medical Intern, Inc., 328 S.C. 128, 135, 492 S.E.2d 103, 107 (1997). The record before the Court is devoid of any such evidence.

Appellants had the opportunity to present and develop such evidence, but produced nothing to indicate reckless, willful or wanton conduct on the part of Dr. Lopez or to warrant the imposition of punitive damages. During the Appellant's treatment at Palmetto, four different physicians treated her for her various medical conditions. All four of these physicians, including Dr. Lopez, continued the Appellant on her previously prescribed Lithium dosage. Furthermore, none of these physicians ordered a test to measure Mrs. Murphy's Lithium levels until November 25, 2002, presumably because they all know it takes five days for the medication to reach a steady state in the body and that is the standard of care for this testing this drug. Moreover, according to Appellants' own expert Dr. Martin, none of the other physicians who treated Mrs. Murphy at Palmetto violated the standard of care. Depo. Martin 120:5-8. Therefore, to suggest that Dr. Lopez, who did not admit the patient and whose conduct was admittedly appropriate, acted intentionally, willfully, or recklessly in regards to the Appellant's care is disingenuous at best.

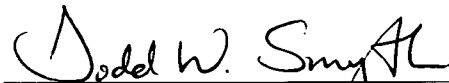
Because the Appellants and the their expert have all failed to offer any testimony that Dr. Lopez's treatment of the Appellant was reckless, willful or wanton, the Appellants have not and

cannot produce any evidence in any form, much less clear and convincing evidence, of reckless or actual malice on the part of Dr. Lopez. “Where the plaintiff relies solely upon pleadings, files no counter-affidavits and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment if, under the facts presented by the defendant, he was entitled to judgment as a matter of law. “ Humana Hospital Bayside v. Lightle, 305 S. C. 214, 216, 407 S.E.2d 637, 638 (1991). Therefore, Dr. Lopez is entitled to judgment as a matter of law on the issue of punitive damages.

CONCLUSION

For the foregoing reasons, the decision of the Circuit Court should be affirmed in its entirety.

Respectfully submitted,



Todd W. Smyth (SC Bar No. 5380)
Joshua S. Whitley (SC Bar No. 77824)
Smyth Whitley, LLC
234 Seven Farms Drive
BB&T Plaza, Suite 215
Charleston, SC 29492
(843) 606-5635 (w)
(843) 654-4095 (f)

Attorneys for Respondent Steven G. Lopez,
M.D.

July 1 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
R. Markley Dennis, Jr., Circuit Court Judge

CASE NO. 2008-CP-10-7380
APPELLATE CASE NO. 2012-212771

Tasha Murphy and Steven Murphy,.....Appellants

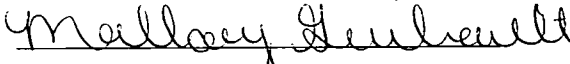
v.

Palmetto Lowcountry Behavioral Health, LLC, Ricardo Fermo, M.D., and Steven G. Lopez,
M.D.....Respondent

PROOF OF SERVICE

I certify that I am a legal assistant at Smyth Whitley, LLC and on July 1, 2013, I placed a copy of Respondent Steven G. Lopez, M.D.'s Initial Brief in the United States Mail, with first-class postage prepaid, and addressed as follows:

Marshall H. Waldron, Jr., Esquire
Matthew D. Cavender, Esquire
Griffith, Sadler & Sharp, P.A.
600 Monson Street
Beaufort, SC 29901


Mallory L. Guibault

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
R. Markley Dennis, Jr., Circuit Court Judge

CASE NO. 2008-CP-10-7380
APPELLATE CASE NO. 2012-212771

RECEIVED

JUL 05 2013

SC Court of Appeals

Tasha Murphy and Steven Murphy,.....Appellants

v.

Palmetto Lowcountry Behavioral Health, LLC, Ricardo Fermo, M.D., and Steven G. Lopez, M.D.....Respondent

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

In addition to the documents designated in Appellants' Designation of Matter, Respondent Steven G. Lopez, M.D. proposes the following be included in the Record on Appeal:

1. Deposition of Thomas Martin, M.D., pp. 14-17, 68:21-69:2, 119:6-120:4, 119:6-9, 120:5-8, 121:9-122:5, 125:16-25;
2. Deposition of James C. Ballenger, M.D., p. 44:5-16; and
3. Transcript of Summary Judgment Hearing, pp. 10, 13 – 15.

I certify that this designation contains no matter which is irrelevant to this appeal.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Todd W. Smyth". The signature is written in a cursive style and is positioned above a horizontal line.

Todd W. Smyth (SC Bar No. 5380)
Joshua S. Whitley (SC Bar No. 77824)
Smyth Whitley, LLC
234 Seven Farms Drive
BB&T Plaza, Suite 215
Charleston, SC 29492
(843) 606-5635 (w)
(843) 654-4095 (f)

Attorneys for Respondent Steven G. Lopez,
M.D.

July 1, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
R. Markley Dennis, Jr., Circuit Court Judge

CASE NO. 2008-CP-10-7380
APPELLATE CASE NO. 2012-212771

Tasha Murphy and Steven Murphy,.....Appellants

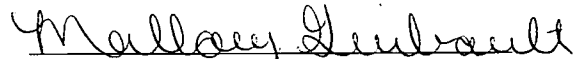
v.

Palmetto Lowcountry Behavioral Health, LLC, Ricardo Fermo, M.D., and Steven G. Lopez,
M.D.....Respondent

PROOF OF SERVICE

I certify that I am a legal assistant at Smyth Whitley, LLC and on July 1, 2013, I placed a copy of Respondent Steven G. Lopez, M.D.'s Designation of Matter to be Included in the Record of Appeal in the United States Mail, with first-class postage prepaid, and addressed as follows:

Marshall H. Waldron, Jr., Esquire
Matthew D. Cavender, Esquire
Griffith, Sadler & Sharp, P.A.
600 Monson Street
Beaufort, SC 29901


Mallory L. Guibault

1

Copy of Transcript

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

TASHA MURPHY AND STEVEN MURPHY,

Plaintiffs,

vs.

CASE NO. 05-CP-10-4734

PALMETTO LOWCOUNTRY BEHAVIORAL
HEALTH, LLC, RICHARD J. FERMO, M.D.,
AND STEVEN G. LOPEZ, M.D.,

Defendants.

DEPOSITION OF

THOMAS VICTOR MARTIN, M.D.

July 16, 2008
2:11 p.m.

Martin Psychiatric Services, PC
1330 Richland Street
Columbia, South Carolina

Angela D. Zuver, Court Reporter



setdepo

Streamlined • Centralized • Standardized
The Evolution of Deposition Management

Nationwide Scheduling

Toll Free: 1.800.451.3376

Facsimile: 1.888.451.3376

www.setdepo.com

1 assessment, treatment of people with fantasies,
2 behaviors and mental illness disorders with
3 the interface of the legal system.

4 Q. And does that often involve serving
5 as an expert witness?

6 A. Yes, it does.

7 Q. And I'm going to talk to you more
8 in a little bit in more detail about your
9 expert witness work, but I want to get a
10 little more background from you. Have you
11 ever been arrested for anything?

12 A. No.

13 Q. Ever been treated for any drug,
14 alcohol or other addictive problems?

15 A. Absolutely not.

16 Q. In terms of your employment
17 history, where did you work after you
18 finished your medical education?

19 A. After medical school?

20 Q. Right.

21 A. I worked in Maryland at Andrews
22 Air Force Base until 1999, and there I worked
23 inpatient and day program treatment. Then
24 from there, when I left the Air Force, I
25 came down here for the fellowship. And then



Nationwide Scheduling
Toll Free: 1.800.451.3376
Toll Free Fax: 1.888.451.3376
www.setdepo.com

1 I started working with the Department of
2 Mental Health here in South Carolina. I
3 worked with the Department of Mental Health
4 as well as started a private practice. I
5 was permanent part time in the Department of
6 Mental Health and then I also had a private
7 practice on the side. And then when I left
8 the Department of Mental Health, I went full
9 time in private practice.

10 Q. At any point, have you had any
11 partners in private practice?

12 A. No.

13 Q. Has it always been known as the
14 current name --

15 A. Yes.

16 Q. -- Martin Psychiatric Services?

17 A. That's correct.

18 Q. In what year did you form that
19 entity?

20 A. I believe in August of 2000.

21 Q. Do you belong to any civic
22 organization, clubs, churches, et cetera, in
23 the Columbia area?

24 A. Sure. I belong to St. Peter's
25 Catholic Church. I'm an active member there.



setdepo

The Evolution of Deposition Management

Nationwide Scheduling
Toll Free: 1.800.451.3376
Toll Free Fax: 1.888.451.3376
www.setdepo.com

1 I'd say that's the primary one. I belong to
2 a number of organizations, but nothing
3 necessarily in the local area.

4 Q. More professional organizations?

5 A. And vocational. Like I'm an
6 airplane pilot, so I belong to that
7 association, AOPA, and I also belong to a
8 number of professional organizations.

9 Q. Which ones are those?

10 A. I belong the American Psychiatric
11 Association, the American Academy of Psychiatry
12 and the Law, the -- let's see. The
13 Association for the Treatment of Sexual
14 Abusers. Those are the primary professional
15 organizations I belong to.

16 Q. Association for Treatment of Sexual
17 Abusers?

18 A. That's correct.

19 Q. As I looked through your CV I
20 noticed that there were a lot of articles and
21 references to treatment of sexually violent
22 predators or sexual abusers. Is that a
23 specialty of yours?

24 A. Probably about a third of my
25 practice has been the assessment, risk



setdepo
The Evolution of Deposition Management

Nationwide Scheduling
Toll Free: 1.800.451.3376
Toll Free Fax: 1.888.451.3376
www.setdepo.com

1 assessment and treatment of sex offenders.

2 Q. Is that where the bulk of your
3 legal work comes from as well?

4 A. No.

5 Q. You said that was about a third of
6 your practice. How would you break down the
7 remainder of your practice?

8 A. I'd probably say about maybe 20 to
9 25 percent I actually see patients for
10 therapy or medication management, but it's
11 usually therapy and medication management
12 together. The remainder is other forensic
13 work that could be anywhere from working with
14 the federal system as a collaborator, or with
15 the state system, or with the family court
16 system in anything from child custody, murder,
17 competency to stand trial, criminal
18 responsibility. That is quite a large spectrum
19 of forensic.

20 Q. That would be over half of your
21 work?

22 A. I would say that's about right,
23 yes.

24 Q. And when you're retained in those
25 cases, who are you typically retained by?



setdepo

The Evolution of Deposition Management

Nationwide Scheduling
Toll Free: 1.800.451.3376
Toll Free Fax: 1.888.451.3376
www.setdepo.com

1 Murphy's admission to Palmetto Behavioral. What
2 is your understanding of what prompted her to
3 seek that admission? This is, again,
4 referring to November 19, 2002.

5 A. Well, she was going -- she was
6 suffering from a depressive condition and, I
7 believe, the report was suicidal. She'd gone
8 to her previous facility that hospitalized her
9 before during 2002, which was MUSC, and for
10 whatever reason, they were unable to admit
11 her at that time and she was referred to
12 Palmetto Lowcountry. She was seen there, and
13 according to the records, I saw several
14 reasons why she was admitted. One was that
15 she was suicidal. She was also severely
16 depressed. The discharge summary from that
17 admission stated that she'd also overdosed on
18 her medication, and also that she required
19 mood stabilization. So the big picture was
20 that she was in a bipolar crisis.

21 Q. Do you have an opinion as to how
22 it is that Ms. Murphy registered these toxic
23 readings on the lithium levels? How did she
24 get to a toxic level?

25 A. I don't know for certain. I do



sd setdepo
The Evolution of Deposition Management

Nationwide Scheduling
Toll Free: 1.800.451.3376
Toll Free Fax: 1.888.451.3376
www.setdepo.com

1 know that she received lithium on admission
2 to the Palmetto Lowcountry facility.

3 Q. After having reported to the
4 doctors there that she hadn't taken her
5 medication for a week; is that right?

6 A. That is my understanding, yes.

7 Q. And that's a fact that was
8 consistently reported by not only Ms. Murphy
9 but also by her husband to the doctors and
10 nurses; is that correct?

11 A. He may have said the same thing
12 too.

13 Q. And she was placed back on the
14 same dose that she'd been taking for the last
15 six plus years; is that right?

16 A. I believe she was placed on 600
17 milligrams twice a day.

18 Q. And that was the same dosage she'd
19 been on for at least a year or more?

20 A. I believe so, yes.

21 Q. Do you believe it was appropriate
22 to put her back on the medication that she'd
23 been taking as prescribed by Dr. Robbins?

24 A. The way she was put on it, no.
25 I don't agree with the way she was put on



setdepo

The Evolution of Deposition Management

Nationwide Scheduling
Toll Free: 1.800.451.3376
Toll Free Fax: 1.888.451.3376
www.setdepo.com

1 time to think. With regard to my client, Dr.
2 Lopez, do you have any opinions about whether
3 he violated the standard of care? I don't
4 think I asked you that question point blank
5 yet.

6 A. I believe he should have drawn a
7 lithium level on admission and I believe that
8 that is essentially the biggest problem in
9 Ms. Murphy's case, because everything that
10 followed after that, as you've gone through
11 very nicely, was methodically executed except
12 for the fact that she was wasn't getting very
13 much better and they had actually totally
14 missed that she was lithium toxic. So yes, a
15 lithium level, along with the rest of the
16 labs that were drawn, should have been done
17 on admission, and that was not done.

18 Q. Do you believe the failure to do
19 that was a violation of the standard of care
20 for a psychiatrist?

21 A. Yes, I do.

22 Q. Is that the only violation of
23 standard of care that you believe Dr. Lopez
24 committed in this case?

25 A. Yes, because if everything else was



setdepo
The Evolution of Deposition Management

Nationwide Scheduling
Toll Free: 1.800.451.3376
Toll Free Fax: 1.888.451.3376
www.setdepo.com

1 fine -- if it was fine, her lithium level
2 was fine, I think that the course of her
3 care at Palmetto seemed to have been
4 appropriate.

5 Q. Do you believe that any of the
6 other physicians involved in Ms. Murphy's care
7 violated the standard of care?

8 A. No. I haven't noticed anything.

9 Q. We've been using the term standard
10 of care. What do you understand that to
11 mean?

12 A. That what is accepted in my field
13 of practice of general psychiatry in the
14 treatment of a bipolar individual who has
15 decompensated, who has been known to be
16 taking psychotropic medications and can be
17 actively suicidal, who presents in a deranged,
18 confused, potentially psychotic manner, that a
19 complete metabolic workup to include toxic --
20 in fact, if you want my honest -- total
21 honest opinion, I would have run a drug
22 screen on her too, but I wasn't going to
23 make a big deal out of that, to find out why
24 there is a change in mental status as
25 dramatic as hers. Knowing that she was on



setdepo

The Evolution of Deposition Management

Nationwide Scheduling
Toll Free: 1.800.451.3376
Toll Free Fax: 1.888.451.3376
www.setdepo.com

1 lithium, that should have been drawn
2 immediately and followed throughout her
3 hospital stay. They did have a follow-up
4 that would be five days later, like we talked
5 about earlier, of a lithium level, but the
6 original baseline was never checked. And so
7 that would have been the standard of care of
8 assessment and treatment.

9 Q. Do you believe it was negligent
10 for any of the subsequent physicians not to
11 order a baseline?

12 A. No. Having been one of those
13 follow-up physicians as well as a primary
14 physician on an inpatient unit, you generally
15 have faith in the primary physician who's
16 done the complete evaluation as the broadest
17 scope to have passed on any concerns that may
18 have been needed to be examined further to
19 follow-up physicians who might cover. I
20 think that's who you're referring to, like a
21 weekend staff or whatever.

22 Q. Right.

23 A. That I would not have presumed
24 that other people would have to reinvent the
25 wheel, reassess and do what should have been



setdepo

The Evolution of Deposition Management

Nationwide Scheduling
Toll Free: 1.800.451.3376
Toll Free Fax: 1.888.451.3376
www.setdepo.com

1 done on admission. So no, I'm not citing
2 that anybody else should have gone back and
3 reexamined whether or not the primary
4 psychiatrist had done all the work he was
5 supposed to do.

6 Q. To what degree does a physician's
7 subjective observations, I guess, of a patient
8 play into the decision whether or not to
9 order a lithium level on a patient? In
10 other words, can you look at a patient,
11 observe their behaviors, list responses from
12 them and say, I think a lithium test is
13 warranted here or not warranted here, or is
14 it your opinion that if somebody says, I've
15 been on lithium before, that it's mandated
16 that you check the lithium level no matter
17 what? Does that make sense?

18 A. Yes, and the latter is the most
19 appropriate. I've been on lithium before in
20 the recent past. I've been noncompliant with
21 it; that's all they need to hear. But would
22 anybody else notice anything? If you look at
23 her admission signature on day one when she
24 came in, she has a lithium tremor in her
25 signature. You can look at that and that is



setdepo

The Evolution of Deposition Management

Nationwide Scheduling
Toll Free: 1.800.451.3376
Toll Free Fax: 1.888.451.3376
www.setdepo.com

1 that time. Somebody who was very coherent
2 and said, I just went off my lithium. They
3 have absolutely no abnormal mental status
4 exam, they're not demonstrating anything
5 physical or mental that would make me
6 suspicious of the history given, I would be
7 less likely to be aggressive with a lithium
8 level.

9 Q. So if they come from another
10 facility, if they appear coherent. Any other
11 exceptions?

12 A. And let's say I know them really
13 well too, so I would know their mannerisms, I
14 would know the way they think and I would
15 know whether or not I could trust them.

16 Q. Since we don't know what caused
17 her toxicity for sure, are you able to say
18 to a reasonable degree of medical certainty
19 that the failure to order that test caused
20 her to become toxic or resulted in her
21 toxicity?

22 A. It resulted in them not seeing
23 that she was toxic, yes. It didn't cause
24 her -- I mean, the test had nothing to do
25 the toxicity. That's just how you measure



setdepo

The Evolution of Deposition Management

Nationwide Scheduling
Toll Free: 1.800.451.3376
Toll Free Fax: 1.888.451.3376
www.setdepo.com

2

1 STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
2 COUNTY OF CHARLESTON) CASE NO. 08-CP-10-7980

3 TASHA MURPHY AND STEVEN MURPHY,)
4)
) Plaintiff,)

5 vs.)

6 PALMETTO LOWCOUNTRY BEHAVIORAL)
7 HEALTH, LLC, AND STEVEN G. LOPEZ,)
) M.D.,)
8)
) Defendants.)

9 * * * * *

10 DEPOSITION OF: JAMES C. BALLENGER, M.D.

11 DATE TAKEN: Friday, March 4, 2011

12 TIME: 9:00 a.m.

13 PLACE: 134 Meeting Street
14 3rd Floor
Charleston, SC

15 REPORTED BY: TERI L. SAMPSON, RPR,
16 Notary Public and Certified
Live Note Reporter

17 * * * * *

18
19
20
21
22
23
24

POST OFFICE BOX 21784
CHARLESTON, SOUTH CAROLINA 29413-1784

25

Page 42

1 quickly, swiftly, accurately, can be confused about who
 2 they are and where they are in the severe state. That
 3 cleared up. The next day she was better, the day after
 4 that better and the day after that better. And she,
 5 within two or three days, started saying things like,
 6 "I'm better, the medicine is working like it always
 7 does." The people evaluating her were saying her
 8 thoughts were now becoming organized and clear.
 9 So she had some signs of not doing well, but
 10 that's why she was admitted in the hospital. But I
 11 believe those were signs of illness, not toxicity.
 12 Q The first opinion you said that you held was
 13 that there was no violation of the standard of care by
 14 Dr. Lopez. Define for me, please, the standard of care
 15 to which you're referring.
 16 A Well, the standard of care is generally
 17 thought of as the standard of carefulness and
 18 scientific knowledge that is shared by similar
 19 practitioners, either in the locale where the doctor
 20 works or sometimes nationally. And his care of her, in
 21 my opinion, didn't violate it anywhere.
 22 Q Is there a difference between the standard of
 23 care for Dr. Lopez in his locale as opposed to the
 24 standard of care nationally?
 25 A You know, in this particular instance, I

Page 43

1 don't really think there is any difference between
 2 those two. It is sometimes, but I don't in this
 3 particular instance -- Lithium has been used so widely
 4 and for so long and is so relatively simple that every
 5 psychiatrist ought to know it and, in my opinion, it
 6 would be a sign of a really poor psychiatrist if they
 7 really don't know how to use Lithium correctly.
 8 Q For a patient who -- let me withdraw that.
 9 Does the standard of care applicable to
 10 Dr. Lopez change when there is some question whether
 11 the patient has been compliant with her medication?
 12 A To the sense I understand your question, I
 13 think it does not. I mean, part of what a doctor has
 14 to do, particularly with suicidal patients, is evaluate
 15 what he or she thinks is the truth and the range of
 16 possible truths with the person, because when somebody
 17 is suicidal, they are not necessarily on the same team
 18 with the doctor. They could be hiding the fact that
 19 they want to die and the doctor is obviously committed
 20 to keeping them alive. So sometimes they just frankly
 21 lie to us and we have to do the best we can to figure
 22 that out. And so the standard of care is to think
 23 about that, try to get corroborative information, try
 24 to figure out what the truth about compliance is. And
 25 since -- you almost have to assume that a suicidal

Page 44

1 patient is not compliant, sort of start with that
 2 skepticism.
 3 Q Would corroborative information include
 4 getting a blood -- a Lithium blood level?
 5 A It could be one of the things that -- if
 6 there were reason to think that that was a possibility,
 7 it would, but Dr. Lopez, when he saw the patient on the
 8 morning of the 20th, she was already on Lithium. And
 9 to draw a blood level at that point would be a clear
 10 mistake, because all it would produce is a level that
 11 nobody would know how to interpret and it would lead to
 12 confusion in the record and in her care. So as soon as
 13 she was given a Lithium tablet the night before by
 14 Dr. Jenkins, Dr. Lopez, if he's going to practice good
 15 psychiatry and the standard of care, had no choice but
 16 to go for it.
 17 The other thing is that all of the other
 18 corroborative evidence that he needed to evaluate as a
 19 competent psychiatrist says she's not Lithium toxic.
 20 She had had more Lithium and -- but she was better.
 21 She was clearer the next morning, more oriented,
 22 thinking better. Now, she was still sick, you don't
 23 cure somebody with one Lithium pill, but she was
 24 better, not worse. Now, if she had been Lithium toxic
 25 the night before and they gave her more Lithium, which

Page 45

1 they did, that would make her worse, not better.
 2 So what he was presented with the next
 3 morning was a patient who had already gotten it, so he
 4 didn't have any choice about -- I mean, he could have
 5 gotten it, but it wouldn't have helped. It would have
 6 confused things. As you said earlier, we have to draw
 7 Lithium after a trough, and so his choices at that
 8 point are do I draw and get a confusion into the record
 9 or I just proceed based on my clinical judgment that
 10 this woman is not toxic, she's actually better. She's
 11 clearly credibly, she and her husband, presenting that
 12 I haven't taken any Lithium for quite a long time and
 13 that was his judgment, it was his opinion that that's
 14 true.
 15 Q He trusted what Tasha Murphy told the
 16 admitting folks?
 17 A I wouldn't put it that way. He evaluated the
 18 totality of the evidence and made a judgment that the
 19 most likely truth is that she was telling the truth
 20 when she and her husband said she hadn't been taking it
 21 because it fit all the clinical facts, and it didn't
 22 matter because if she was given more Lithium and was
 23 better the next morning, it was resolving.
 24 Q Why not wait until the next trough and then
 25 do a blood draw and check for her Lithium level?

3

STATE OF SOUTH CAROLINA)	
)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)	
Tasha Murphy and Steven Murphy,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 08-CP-10-7890
)	
Palmetto Lowcountry Behavioral)	
Health LLC et al,)	
)	
Defendants.)	

TRANSCRIPT OF HEARING

The within Hearing was held the above-captioned action on March 10, 2011, before The Honorable R. Markley Dennis, Jr. in Courtroom 3B of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

Marshall H. Waldron, Jr., Esq.
 GRIFFITH SADLER & SHARP, P.A.
 Post Office Box 570
 Beaufort, SC 29901
 Appearing for Plaintiffs

Todd W. Smyth, Esq.
 HAYNSWORTH SINKLER BOYD
 134 Meeting Street, 3rd Floor
 Charleston, SC 29401
 Appearing for Defendants

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
 Post Office Box 901
 Johns Island, South Carolina 29457
dGarrison@sccourts.org

1 THE COURT: Are there two motions for
2 summary judgment or just one?

3 MR. SMYTH: I am the last of the
4 Mohicans, Your Honor. I believe the rest have
5 settled out.

6 THE COURT: All right. If you will,
7 please identify yourselves for the record and
8 the parties that you are representing.

9 MR. SMYTH: Your Honor, Todd Smyth
10 for Defendant Dr. Steven Lopez.

11 MR. WALDRON: I am Marshall
12 Waldron and I represent the plaintiffs.

13 THE COURT: Thank you. Mr. Smyth,
14 your Motion, sir.

15 MR. SMYTH: Your Honor, good morning.

16 THE COURT: Good morning.

17 MR. SMYTH: As I mentioned to you,
18 procedurally where we are in this case is that
19 we are the last defendant remaining in the case.
20 The two other defendants have now resolved their
21 issues with the plaintiff. We are here before
22 you to ask for summary judgment this morning.

23 THE COURT: Okay.

24 MR. SMYTH: We feel like we've got
25 three good basis to do that. I will give you a

1 brief background of the case just in case you
2 haven't had a chance to look at the briefs yet.

3 THE COURT: Thank you. Excuse me for
4 interrupting, but all briefs are incorporated
5 fully for the purposes of review and you are
6 certainly entitled to rely on those for future
7 review. Please feel free to summarize whatever
8 portions you think you need to cover.

9 MR. SMYTH: I will try to be brief,
10 Your Honor.

11 THE COURT: No problem.

12 MR. SMYTH: Tasha Murphy is the
13 plaintiff in this case. She unfortunately
14 suffers from two very serious psychiatric
15 conditions; one of which is bipolar disease and
16 the other is severe depression. She's been
17 managed by her physician since the early 1990s
18 on a drug called Lithium; specifically for the
19 bipolar disease. She's done well with it, been
20 on the same dose, had no particular problems.

21 However, in the Fall of 2002, she
22 stopped taking her medications and began to
23 become symptomatic. She experienced some
24 symptoms of severe depression as well as bipolar
25 disease and unfortunately made a threat to take

1 her own life.

2 At that point she was taken to a former
3 codefendant's hospital, Palmetto Behavioral
4 Hospital, which is a psychiatric hospital here
5 in town. She was evaluated by a Dr. Jenkins on
6 admission. Dr. Jenkins got the information
7 about her conditions and symptoms and put her
8 back on the same medication that she had been
9 taking for the last decade and a half: same
10 dose, same strength, everything.

11 The next day, my client, Dr. Lopez,
12 makes rounds and see the plaintiff. He agrees
13 with Dr. Jenkin's diagnosis and assessment. He
14 didn't make any changes to Dr. Jenkin's order.
15 Notes that she has improved a little bit since
16 she's been on the medication again.

17 The next day she is seen by a different
18 doctor, Dr. Fermo, who was also a former
19 defendant in this case. He again agrees with
20 the recommendations and treatment recommended by
21 Dr. Jenkins.

22 Then over the weekend, she was sent by
23 a fourth doctor, Dr. Sukin, who saw her on
24 Saturday and Sunday and continued the same
25 treatment recommendations that were put in place

1 by Dr. Jenkins.

2 However, on that follow Monday she
3 began to exhibit symptoms that are consistent
4 with getting too much Lithium. Her hands
5 started to shake and she became a little bit
6 comatose. So she was taken to the hospital
7 where, indeed, she was found to have too much
8 Lithium in her system.

9 So far we've done all the depositions,
10 we've done all the discovery in this case and
11 thus far nobody has been able to say with any
12 real certainty what caused her to reach this
13 toxic level. She was receiving the same dosage
14 that she had been taking for the last decade and
15 a half during her hospitalization and the notes
16 indicate that she was improving gradually.

17 She also over the course of the weekend
18 developed a urinary tract infection, which may
19 have had some effect on this.

20 But our basis before Your Honor are
21 three-fold today.

22 THE COURT: Okay.

23 MR. SMYTH: First, we are going to
24 assert that there is no evidence that Dr. Lopez
25 breached the standard of care. Now, Lithium is

1 one of these drugs that is very effective. It
2 is referred to as the gold standard for treating
3 bipolar disease. It's got what they call a very
4 narrow therapeutic index. In other words there
5 is a certain amount of that medication in your
6 bloodstream that is effective. Too little
7 doesn't work, too much can be problematic. So
8 it is a very effective medicine. It just needs
9 to be monitored.

10 THE COURT: Correct.

11 MR. SMYTH: The way that they do that
12 is that they check the -- they start the
13 medication and they wait five days for it to get
14 to what's call a steady state in your body,
15 where your body is taking in and excreting the
16 right amounts so that you have a balance on that
17 therapeutic index that we talked about. So
18 that's exactly what was done here. She was
19 brought in, she was put on her medications, they
20 ordered tests to be taken that Monday when she
21 actually became toxic. So everything was done
22 according to the standard of care.

23 Now, plaintiffs have hired an expert
24 named Dr. Thompson Martin from Columbia. Dr.
25 Martin has a little bit different opinion on

1 this, but we're not convinced that his opinion
2 carries the day with regards to a breach of the
3 standard of care.

4 His opinion -- and I think that it was
5 basically largely on a misunderstanding as to
6 who admitted the patient. Dr. Jenkins is the
7 one who show her on admission and put her back
8 on the medication. She actually took a dose the
9 day that she was admitted to the hospital; which
10 our expert has testified that once you've had
11 that dose, running a test on how much Lithium is
12 in your system really isn't going to be helpful
13 or determinative. In fact, it would be
14 misleading because you'd get a false indicator.

15 Dr. Martin seems to believe that if
16 they had taken this test earlier they could have
17 found out whether she had Lithium in her system.
18 However, he pins that on the admitting doctor,
19 which Dr. Lopez was not. Dr. Jenkins was the
20 admitting doctor. She was seen by three other
21 subsequent physicians after Dr. Jenkins, all of
22 whom were of the same mindset, that this Lithium
23 needed to be tested on Monday.

24 So argument one is that there was no
25 breach of the standard of care by Dr. Lopez,

1 because he wasn't the one who put her back on
2 the medication. We have cited in our memo some
3 of the deposition testimony of Dr. Martin. That
4 is really the only thing that he alleges that
5 Dr. Lopez did inappropriately, was not to order
6 Lithium be tested.

7 But interestingly, he says that none of
8 the other treating physicians were outside the
9 standard of care in not ordering -- just Dr.
10 Lopez. So for some reason we have been singled
11 out in this particular case and I don't believe
12 that makes a whole lot of sense. From a
13 standard of care perspective, everybody should
14 be held to the same standard of care. So it is
15 inconsistent in that regard. Plus it doesn't
16 line up with his opinion that the admitting
17 doctor should have done it, and not Dr. Lopez.

18 The second argument that we put forward
19 and I think that this is probably the strongest
20 one of the three; that there is a lack of
21 proximate cause. When we deposed Dr. Martin or
22 asked him, and I'll paraphrase:

23 *'Q. Since we don't know what caused*
24 *this lady to be toxic, how can you say that a*
25 *failure to run this Lithium level test at any*

1 *point caused that injury?'*

2 And he said, *'Well, it really had*
3 *nothing to do with it, running that Lithium*
4 *test. All it would have told them was what she*
5 *had in her system when she came in. It had*
6 *nothing to do with her becoming toxic.'*

7 He can't say what caused her to become
8 toxic. Therefore, if that's the case, then even
9 if you assume that we've breached the standard
10 of care there's no cause of action here because
11 there is proximate cause to link it. So, you
12 know, his verbatim testimony was that it had
13 nothing to do with her being toxic.

14 Those are our two main arguments on
15 liability. The third one has to do with
16 punitive damages. This case is scheduled to
17 come before you or before this court in two
18 weeks, April 4th, date certain. The Complaint
19 alleges conduct sufficient to rise to the level
20 of punitive conduct. There has been no
21 evidence, no testimony of anybody saying that
22 Dr. Lopez did anything that was reckless,
23 willful or wanton, so we also think that there
24 is a failure to carry the burden of proof in
25 that regard.

1 THE COURT: Okay. Thank you.

2 MR. SMYTH: Yes, sir.

3 THE COURT: I will be happy to hear
4 from you.

5 MR. WALDRON: May it please the
6 Court?

7 THE COURT: Yes, sir.

8 MR. WALDRON: My name is Marshall
9 Waldron and I represent the plaintiffs in this
10 action. If I might approach, I would like to
11 hand the court -- I've got a copy of Dr.
12 Martin's transcript if it would help you.

13 THE COURT: I don't -- you can refer
14 to whatever you want me to rely on out of that
15 transcript. Unless I find it necessary to read
16 it, I am not going to -- I am not going to read
17 it unless you -- if you want me to, I'll be
18 happy to.

19 MR. WALDRON: No, sir. I just
20 thought if you wanted to follow along.

21 THE COURT: That's fine. I don't
22 need to. Just tell me what you believe refutes
23 that position stated by Mr. Smyth.

24 MR. WALDRON: I will do so. The
25 difference of opinion that we have -- it's not

1 really a difference of opinion. We believe that
2 it's contained in the evidence as testified by
3 both Tasha Murphy and her husband as well as the
4 expert, Dr. Thomas Martin, which also supports
5 the -- the theory in this case, which is not
6 that the doctor caused her to become toxic, not
7 that Dr. Lopez is responsible for the initial
8 toxicity.

9 The theory is that he failed to do a
10 baseline check. Nobody at the hospital did a
11 baseline check before administering Lithium to
12 this woman. As a result, she ---

13 THE COURT: But according to the
14 recitation and according to the fact finder,
15 as I understand it, it had already been
16 administered to her at that time that he saw
17 her.

18 MR. WALDRON: That's correct, by
19 the time that he saw her.

20 THE COURT: All right.

21 MR. WALDRON: However, he is her
22 chief physician, her primary treating physician
23 while she's in the hospital. As she -- and Dr.
24 Martin testified that she got worse and worse,
25 she already -- when she checked in, before she

1 had any Lithium in her system, she had such a
2 severe tremor that she not only spelled her name
3 wrong, it's almost illegible. That should have
4 been a sign to anybody who'd actually look at
5 her. Dr. Martin's testimony will be at the
6 trial that had Dr. Lopez actually spent time
7 enough to look at her, talk to the people around
8 her, that he would have see her getting
9 progressively worse and worse and worse.

10 The testimony from Dr. Martin is that
11 in those times that he did see that -- that Dr.
12 Lopez did see her, that he failed to do a
13 baseline and failed to -- he failed to ever do a
14 blood test until she was on her way out the
15 door, at which point -- the therapeutic range
16 can be anywhere from .3 to a 1.4, and I think
17 all the experts have agreed on that. By the
18 time that she was going out the door, she had
19 between two to three times the amount of Lithium
20 in her system that she was supposed to have.
21 That's when they got the baseline or that's when
22 they got the amount.

23 Mr. Smyth talks about the fact that it
24 would have been a misleading test the next day.
25 Dr. Martin, in his testimony, talked about how

1 to draw a draw on the morning of administration
2 or after administration of the medication and
3 what they would tell you. If they had done
4 that, they perhaps would have seen -- I can't
5 say perhaps. They would have seen the actual
6 level in her system. If she was toxic at that
7 point, then we would have known that, we would
8 have known to stop her. That never happened.

9 That failure to verify a baseline, that
10 failure to follow up is what Dr. Martin
11 testifies to throughout his deposition. That is
12 -- that actually goes to the last point, the
13 recklessness. That's a jury question.

14 THE COURT: I disagree with you on
15 that issue. I think you've got to have an
16 expert that says that it is reckless to make him
17 -- because it is clear and convincing evidence,
18 it's not a -- I think that could be the case --
19 and this is certainly not a layperson's ability.
20 So, no, I disagree with you on that.

21 Tell me about -- when did the doctor
22 say that it meets the probable cause aspect.
23 In a medical malpractice case, we have to have
24 both.

25 MR. WALDRON: Well, Your Honor, if

1 I could walk through both ---

2 THE COURT: No, just tell me what he
3 says when he says -- because Mr. Smyth pointed
4 out that he said 'I can't tell you that.'
5 Basically was what he was saying.

6 Therein lies the problems. Without him
7 saying, 'yes, I think that was the proximate
8 cause', that his departure was the proximate
9 cause of the damage and injury -- where does he
10 say that?

11 MR. WALDRON: In his deposition,
12 at Page 46, he talks about the failure to get
13 the history, the failure to complete the
14 evaluation, the fact that they knew that she was
15 ---

16 THE COURT: All of that goes to a
17 departure from the standard of care. Where is
18 it that he says that it proximately the -- that
19 the departure proximately caused her injury or
20 damage?

21 MR. WALDRON: He doesn't use the
22 words "proximate cause".

23 THE COURT: Does he say probably,
24 does he say 'I think it did cause it.'

25 MR. WALDRON: Yes.

1 THE COURT: All right. Where does he
2 say that?

3 MR. WALDRON: If you will let me
4 walk through here, Your Honor. I ---

5 THE COURT: No, I just want you to --
6 you don't have to walk through it. Just tell me
7 where he says that. Read it to me. His
8 testimony.

9 MR. WALDRON: On Page 73 of his
10 deposition he was asked whether Dr. Lopez is
11 ordering a Tranzine into Tenormin (phonetic) for
12 something that fell below the standard of care.

13 THE COURT: Again, I am not
14 quarreling with that. Go on to -- just talk
15 about the probable -- get me to the bottom line.
16 I don't want to hear about this testimony. The
17 part I want you to tell me is where he says that
18 'I think all of these proximately caused her
19 injury.'

20 MR. WALDRON: Your Honor, I'm
21 trying to get there.

22 THE COURT: Well, don't waste the
23 time to read what more he's told you that I
24 agree with.

25 MR. WALDRON: In answer to that

1 question, he testified "*I believe that it*
2 *worsened the situation for the providing staff*
3 *because it inadvertently masked some of the*
4 *early signs of Lithium toxicity.*"

5 He then talks about the problem that
6 she has because of the Lithium toxicity,
7 throughout his testimony. His testimony is that
8 "Because of this incident, she is afraid to go
9 back to her doctor. She is afraid to report the
10 problems that she is having. She will not go
11 for further hospitalization..." ---

12 THE COURT: So that is your damage?

13 MR. WALDRON: Yes, sir. She
14 doesn't come out of the house anymore, she
15 doesn't socialize.

16 THE COURT: All right. Anything
17 else?

18 MR. WALDRON: No, sir.

19 THE COURT: Mr. Smyth?

20 MR. SMYTH: Your Honor, I think
21 you've got a good grasp of the problem and of
22 the gap that still remains in terms of the
23 toxicity.

24 THE COURT: It's gigantic. It's like
25 the ocean. Thank you. Motion is granted. And,

1 please, -- I think it is granted, primarily, Mr.
2 Smyth, because there is no connection. I think
3 that the problem with it -- given the testimony,
4 in the light most favorable to the plaintiffs,
5 there is evidence of departure from the
6 standard. I don't quarrel with that part of it
7 from a summary judgment standpoint. Whether or
8 not it meets the test for directed verdict, I
9 don't know. But certainly at this stage there
10 is a scintilla as to the departure. The
11 connection is the problem. Please draft the
12 Order. Thank you.

13 I want that clear, because I think
14 you're correct. I don't disagree with you that
15 all of the testimony that you referenced in your
16 deposition -- clearly he's testifying as to a
17 departure from the standard. I don't quarrel
18 with that.

19 (HEARING CONCLUDED)

20

21

22

23

24

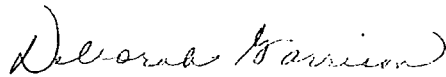
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete transcript of the hearing
held before The Honorable R. Markley Dennis,
Jr., on March 10, 2011;

I further certify that I am neither kin nor
counsel to any of the parties and have no
interest in the outcome of this action.



Deborah Garrison
Circuit Court Reporter
9th Judicial Circuit

Charleston, South Carolina
March 31, 2013