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Aug 07 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Maite Murphy
Circuit Court Judge

Case No.: 2018-CP-10-02109
Appellate Case No. 2023-000029

Rebecca Turisk, Appellant,

v.

Dennis K. Schimpf, M.D. and
Sweetgrass Plastic Surgery, LLC, Respondents.

FINAL REPLY BRIEF OF APPELLANT

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REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents' Statement of the Case misconstrues the facts and takes liberties with the record. Contrary to Respondents' claim, it is not "undisputed that the inferior pedicle wise technique selected by Dr. Schimpf is considered the 'gold-standard' technique for breast reduction." (Resp. Initial Brief, p. 3). Appellant's expert, Dr. Hultman—a board examiner for plastic surgeons—specifically testified, "I would not call this the gold standard for this patient whatsoever. I would call this a wrong operation and a contraindicated operation." (Trial Tr., R. p. 354:17-19). Dr. Hultman explained, "[I]t would not be used at all for this particular situation. This would be extremely rare to use this particular operation with the knowledge ahead of time that there were serious risks to the nipple and to the breast tissues." (Trial Tr., R. 354:13-16). Indeed, even the jury in this case unanimously found that Defendants had deviated from the standard of care. (Verdict Form, R. p. 16).

Respondents' brief also falsely states that, "Dr. Schimpf informed Appellant on multiple occasions that there was a real risk that she would need a mastectomy or similar breast loss surgery if complications arose." (Resp. Return, p. 4, incorrectly referring to Plaintiff's Exh. 25, which refers to Dr. Herrera's notes, which have nothing to do with Dr. Schimpf's examinations or the pre-operative record). In fact, there are no references to the terms "mastectomy" or "breast loss" in Dr. Schimpf's pre-operative chart or in the consent form, which was *drafted by Dr. Schimpf's office*, and which Respondents now asks this Court to misconstrue in their favor. (Consent Form, Def. Exh. 2, R. p. 908).

Respondents' brief also incorrectly argues that Appellant did not present evidence that the practice or any of its employees violated the standard of care at any time. (Resp. Initial

Brief, p. 8, FN). Respondents ignore the undisputed evidence that Dr. Schimpf is an owner and agent of Sweetgrass Plastic Surgery, LLC. As the Circuit Court correctly determined, "[I]n looking at evidence, there has been evidence presented that the care provided by Dr. Schimpf in his capacity as an agent of Sweetgrass Plastic Surgery, with two of the documents which are in evidence, the informed consent form, and along with the discharge instruction, this creates a question of fact that is proper for the jury to consider as to whether or not an agency-physician relationship has been established." (Trial Tr., R. p. 404:18-24; Def. Exhs. 1 and 2, pp. 907-909). Additionally, Sweetgrass employee and Nurse Practitioner, Jordan Harper, made no distinction between being an employee of Sweetgrass Plastic Surgery and working for Dr. Schimpf, the owner of the practice, testifying that Sweetgrass Plastic Surgery, LLC is Dr. Schimpf. (Harper Tr., R. p. 795:11-21).

Respondents' brief also erroneously contends that "not everyone agreed that the blood supply to Appellant's breasts was disrupted as a result of Dr. Schimpf's surgical technique as Appellant now posits." (Resp. Return, p. 10). This is incorrect. Even Respondents' own medical expert, Dr. Lefkowitz, upon being reminded of his earlier deposition testimony, begrudgingly conceded that the disruption of blood supply occurred *during* Dr. Schimpf's performance of the surgery, not afterwards, stating "it [the blood supply] was disrupted during the surgery." (Trial Tr., R. pp. 568:1—570:7, citing Lefkowitz Depo. Tr., p. 854:18-24, 855:3-6). This is undisputed. Dr. Schimpf's self-serving and speculative references to venous congestion have no basis in fact, and are wholly unsupported by the medical record.

Respondents also incorrectly contend that Appellant presented two separate and distinct theories of liability. (Resp. Return, p. 8). She did not. As Appellant's expert, Dr. Hultman, testified, application of an antibiotic could have potentially prevented "***further*** necrosis and loss

of tissues" ***resulting from*** the disruption of blood supply, stating, "if there's no blood supply to help fight this bacteria, then they will eventually result in a mastitis or some type of severe breast infection, so this is a situation where I would put topical antibiotics on this area." [Emphasis added] (Trial Tr., R. p. 389:8-13). Respondent's failure to properly administer an antibiotic is not a separate and distinct theory of liability, it is an aggravating factor. The damage was already done when Dr. Schimpf disrupted the blood supply *during* surgery—an undisputed fact, which Respondent's own medical experts could not escape during trial. (Trial Tr., R. pp. 568:1 - 570:7; 553:7-12; 516:15-25). Even Dr. Schimpf acknowledged that it was the lack of blood flow to the nipple, which resulted in the infection, stating, "And the tissues been damaged. There's no blood flow going into that nipple at that moment, so all of the IV antibiotics in the world are not going to get into that because antibiotics are carried through blood." (Trial Tr., R. p. 457:20-23).

Respondent's brief also attempts to walk back Dr. Schimpf's testimony demonstrating that he considered Ms. Turisk a high-risk candidate given the complex nature of the case, which required specialized skill and experience. Dr. Schimpf specifically testified, "And so I agree with him [Dr. Hultman], I don't -- this is a complex breast case, very complex. In fact, you know, my junior surgeons, their first year in practice, we keep complex cases away from them because you don't want those in your collection period." [Emphasis added] (Trial Tr., R. p. 413:5-8). It is undisputed that Dr. Schimpf never advised Ms. Turisk that her condition was any more complex than the standard case. Certainly, there is no indication in the medical record that he advised Ms. Turisk that her case was "complex" or "very complex" or that she had an increased risk of "mastectomy" or "necrosis."

Additionally, Respondents' intimation that Appellant sought to establish liability "from a bad result alone" runs in direct contravention to the jury's finding that Respondents deviated

from the standard of care. Every single expert in this case, ***including*** Defendants' plastic surgery expert, Dr. Lefkowitz, and Defendants' infectious disease expert, Dr. Joseph, testified that Dr. Schimpf disrupted the blood supply to Ms. Turisk's breasts during surgery and that the disruption of blood supply caused the necrosis and infection. (Trial Tr., R. p. 371:1-19; p. 568:1-570:7, citing Lefkowitz Depo. Tr., R. p. 854:18-24 and 855:3-6; Trial Tr., R. 553:7-12; 507:9-16; 514:22-25; 516:15-25; and 357:5-15). As stated in Appellant's brief, the jury's finding as to proximate cause in this case is contrary to the preponderance of the evidence, if not all the evidence, and clearly indicates the jury was confused with regard to the Assumption of Risk charge it received. "A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial." *Berberich v. Jack,* 392 S.C. 278, 709 S.E.2d 607 (2011).

Respondents' Brief also appears to misrepresent case law to this Court. For example, Respondent states, "In *Cole* [*v. Raut*], the plaintiff plainly did not sign a consent form for a C-section delivery, which was the basis of the plaintiffs' medical malpractice claim. […]. Instead, she signed a consent form for an entirely separate procedure (i.e., a VBAC). (Resp. Brief, p. 18). Even an ancillary review of *Cole* reveals Respondents' representations are not true. To the contrary, the decision in *Cole* specifically states that Plaintiff did sign a consent form for a C-section delivery, stating, "The consent form documented Cole's consent to a VBAC delivery, induction of labor through medication, and augmentation of labor with medication, and <u>also indicated Cole's authorization to delivery by C-section if necessary</u>." *Cole v. Raut*, 378 S.C. 398, 402, 663 S.E.2d 30, 32 (2008). Respondent should be precluded from misconstruing the record and applicable case law.

Finally, in an effort to draw attention away from the Circuit Court's misapplication of Assumption of the Risk defense to the present medical malpractice case—ignoring that a patient cannot voluntarily assume the risk of medical malpractice—Respondents now falsely state, "assumption of the risk was not a central tenant [sic] of Respondents' case." (Respondents' Return, p. 26). This is the exact opposite of what counsel for Respondents argued at trial, when he stated that Assumption of the Risk "is the central tenet of our defense in this case." [Emphasis added] (Trial Tr., R. p. 166:2-3). Again, Respondents cannot and should not be allowed to misconstrue the record and take contrary positions than the ones they took at trial.

ARGUMENT

I. Assumption of the Risk is inapplicable in the context of nearly all Medical Negligence actions, including the present case. Respondents' Return misconstrues the law and conflates the defenses available in Medical Negligence actions with those available in actions for Lack of Informed Consent.

The facts and legal questions presented in the instant Medical Negligence action mirror those encountered by the Maryland Court of Special Appeals in *Schwartz v. Johnson,* 206 Md. App. 458, 49 A.3d 359 (Md. App. 2012), a seminal case, wherein the Court examined how jurisdictions across this country, including South Carolina, have overwhelmingly addressed the use of assumption of the risk defense in medical malpractice cases.

A review of the Court's analysis is instructive. In *Schwartz*, the Court noted that assumption of the risk was a recognized affirmative defense, but that it is "a rare situation" where it is relevant or applicable to a medical malpractice case. *Id*., 206 Md. App at 474, 49 A.3d at 368. Looking outside of its own jurisdiction, the Court provided examples of rare, isolated situations where assumption of the risk might be an applicable defense in a medical malpractice case, such as when a patient refuses the treatment suggested by a physician or elects to follow an

unconventional medical treatment. *Id*., 206 Md. App at 475-479, 49 A.3d at 369-371. Neither of those factors are present in the instant case.

Another such rare circumstance involved a South Carolina case, which Respondent cites in his Return, and which is clearly distinguishable from the present action. The *Schwartz* Court noted, "In *Baxley v. Rosenblum,* 303 S.C. 340, 400 S.E.2d 502 (Ct. App. 1991), the Court of Appeals of South Carolina held that, based on the particular facts of the case, the trial judge had a duty to submit the defense of assumption of risk to the jury in a medical malpractice action. *Id.* at 507. [In that case,] [t]he appellant was the appellee's patient *and* was a doctor himself." *Id.* The Court reasoned that the patient, as a physician, was in a better position to understand the risk associated with his actions, including his willful disregard of the doctor's recommendations. *Id.* Ms. Turisk, by contrast, is not a physician, and had no way of knowing that the technical approach Dr. Schimpf employed was contraindicated for someone in her condition. As a non-physician, she had no appreciation for the heightened risks associated with this particular approach. Accordingly, she could not have assumed the risk the way the patient-physician did in *Baxley*.

The *Schwartz* Court found that outside of the aforementioned rare circumstances, including the one found in *Baxley*, the Assumption of the Risk defense is not an appropriate defense to present to a jury. The Court reasoned, "The rationale for the limited viability of the assumption of risk defense in a medical malpractice action may be explained by the elements of the defense itself; for a person to 'assume the risk,' he or she must have had knowledge of the risk of the danger, appreciated that risk, and voluntarily accepted that the risk could occur. [internal citations omitted]. Therefore, in the healthcare context, for a patient to have 'assumed the risk' of a negligent medical procedure, he or she must have voluntarily accepted the risk that

the doctor would negligently complete the procedure. Such a factual scenario, however, will almost never occur." *Schwartz v. Johnson,* 206 Md. App. 458, 49 A.3d 359, 371 (Md. App. 2012).

The Court further reasoned, "for a court to hold that a patient assumed the risk of a physician acting negligently in a medical procedure is 'tantamount to a finding that the [physician] owed no duty' to the patient." *Id*. citing, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 880 (Del. Super. Ct. 2005). **"[T]here is virtually no scenario in which a patient can consent to allow a healthcare provider to exercise less than 'ordinary care' in the provision of services.** Even if given, a patient's consent to allow a healthcare provider to exercise less than ordinary care would be specious when considered against the strict legal, ethical and professional standards that regulate the healthcare profession. **Regardless of whether the patient elects to have healthcare or requires it, the patient appropriately expects that the treatment will be rendered in accordance with the applicable standard of care. This is so regardless of how risky or dangerous the procedure or treatment modality might be."** *Id.,* [Emphasis in original]

Here, the arguments presented by the parties in *Schwartz* are identical to the arguments in the instant case. In *Schwartz*, the defendant doctor argued that the patient had "voluntarily assumed the risk of bowl perforation" during performance of a colonoscopy, and that a bowel perforation "is a normal and usual complication associated with the performance of a colonoscopy, and thus can occur without any negligence on the part of the physician." *Id*. 206 Md. App. at 483, 49 A.3d at 373. Similarly, Dr. Schimpf claims that the necrosis and subsequent mastectomies suffered by Ms. Turisk are normal and usual complications associated with a

breast reduction, which occurred without any negligence on his part. He further claims that Ms. Turisk voluntarily assumed the risk of said so-called non-negligent complications.

The Court in *Schwartz*, however, quickly dispensed with this faulty line of reasoning, noting, "The defense of assumption of risk, however assumes that the defendants, i.e., a doctor in a malpractice case was negligent. […] Dr. Schwartz did not concede in the trial court, nor does he in this appeal, that he was negligent in the performance of the colonoscopy on Johnson. What Dr. Schwartz is arguing, in essence, is that Johnson voluntarily assumed the risk of a *non-negligent* complication of a colonoscopy. That can be raised only as a defense to a claim of a breach of informed consent, which claim was not brought by Johnson in the instant case. In other words, a patient's voluntary assumption of a risk normally associated with a particular medical treatment or procedure, after having been properly informed of the same, occurs in virtually every case and does not relieve the physician of compliance with the applicable standard of care. To hold otherwise would mean that Johnson consented to allow Dr. Schwartz to exercise less than ordinary care when Dr. Schwartz conducted the colonoscopy. Accordingly, we hold that the trial court did not err in ruling that the defense of assumption of risk was not available to Dr. Schwartz." [Emphasis added] *Id*. 206 Md. App. at 483, 49 A.3d at 373.

This well-reasoned analysis is equally applicable to the current case. Like the Plaintiff in *Schwartz*, Ms. Turisk filed an action against Respondents for Medical Negligence. She did not file an action for Lack of Informed Consent. Dr. Schimpf should not have been allowed to mislead the jury by invoking Assumption of the Risk as a defense to an action for Medical Negligence. "It is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial." *Miller v. Schmid Labs., Inc.*, 307 S.C. 140, 142-43, 414 S.E.2d 126, 127 (1992). "A jury charge consisting of irrelevant and inapplicable

principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial." *Berberich v. Jack,* 392 S.C. 278, 709 S.E.2d 607 (2011).

Here, the Court's erroneous jury charge clearly affected the outcome of the trial, particularly when one considers that (a) the jury found that Respondents deviated from the standard of care, and (b) it was uncontroverted by every expert in this case that Dr. Schimpf disrupted the blood supply to Ms. Turisk's breasts during the course of surgery and that this disruption caused the necrosis and infection. (Trial Tr., R. p. 371, lines 1-19; pp. 568:1—570:7, citing Lefkowitz Depo. Tr., R. p. 854:18-24 and p. 855:3-6; Trial Tr., R. p. 553:7-12; p. 507:9-16; p. 516:15-25; p. 357:5-15; and p. 514:22-25). Contrary to Respondents' contention, the Court's erroneous jury instruction was not harmless error and clearly affected the outcome of the trial. Accordingly, this Honorable Court should reverse the Circuit's orders and remand this case for a new trial on the merits.

II. Respondents misconstrue *Faile v. Bycura*, which is clearly distinguishable from the present case.

Contrary to Respondents' contention, *Faile v. Bycura* is clearly distinguishable from the present case. The issue of informed consent was relevant in that case simply because Plaintiff had acknowledged in her consent form that surgery "*would probably result in* [certain side effects]," namely stiff toes. *Faile v. Bycura*, 289 S.C. 398, 399, 346 S.E.2d 528, 529 (1986). Although Ms. Turisk acknowledged the existence of certain risks and complications associated with surgery, she was never advised, nor did she acknowledge, that these general risks "would probably" occur in her case. That is materially different from what the Plaintiff in *Faile* acknowledged. There is a clear distinction to be made between acknowledging that a certain subset of outcomes – in the event that complications were to arise – tend to be the "most likely material risks and complications" associated with a procedure as Appellant acknowledged when

signing Respondents' consent form, as opposed to acknowledging that said outcomes were most likely and probable to occur, as was the case in *Faile*. (Consent Form, Def. Exh. 2, R. p. 908). In the present case, the form did not even list mastectomy as a potential risk of surgery. (R. at Id.) As noted in Appellant's brief, it is difficult to fathom a situation where someone would voluntarily undergo (or even perform) an elective procedure with the understanding that it "would probably result in" necrosis, infection, debridement, and mastectomy. Certainly, Ms. Turisk did not consent to Respondents' deviation from the standard of care.

CONCLUSION

For the foregoing reasons, and those set forth in Appellant's [Initial] Brief, Appellant respectfully requests that this Honorable Court grant her appeal, reverse the trial court, and remand this case for a new trial on the merits. It was error for the trial court to charge the jury as to assumption of the risk. The charge was prejudicial to Appellant, confusing to the jury, and affected the outcome of the trial. It was also error for the trial court to deny Appellant's post-trial motion for a new trial, or in the alternative for judgment notwithstanding the verdict, where the verdict as to proximate cause was contrary to the weight of the evidence at trial, indicating that the jury was confused.

[Signature on following page]

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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