

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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JUL 15 2013

Civil Action No. 2008-CP-10-07380
Appellate Case No. 2012-212771

SC COURT OF APPEALS

Tasha Murphy and Steven MurphyAppellants

v.

Palmetto Lowcountry Behavioral Health,
LLC; and Steven G. Lopez, M.D.....Defendants

Of whom Steven G. Lopez, M.D. is Respondent

INITIAL REPLY BRIEF OF APPELLANTS

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Argument

I. The Murphys provided at least a scintilla of evidence on the proximate cause issue.

In his brief, Dr. Lopez continues to misconstrue Dr. Martin's testimony. Dr. Lopez states that "the [Murphys'] own expert, Dr. Martin, readily admitted the failure to draw [Tasha's] Lithium level 'had nothing to do' with her eventual Lithium toxicity." (Lopez Br. 10–11 (quoting Martin Dep. p. 125, lines 16–25).) Dr. Martin's full testimony on this question is as follows:

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

A: It resulted in them not seeing that she was toxic, yes. It didn't cause her – I mean, the test had nothing to do [with] the toxicity. That's just how you measure whether or not there's lithium in someone's system. If they had measured the lithium on day one and, let's say, it was zero, as I stated earlier, starting her on a lithium regimen would be very appropriate.

And I would have done—as they would have suggested in their records, then I would have waited four to five days and found out what the level is before I dispositioned the person to make sure that they were at a steady state and they were at a therapeutic level. The thing is, though, they did not do that. And it didn't appear—and I believe I'm being fair about this, is that

she also didn't seem to be tuning up mentally very well while she was there. She remained reclusive, not a participant is what a lot of the notes said, that she was not very forthcoming and—although she would say, I'm not hallucinating, I'm not suicidal, and all those kinds of things, which are the right things to say if you want to get out, it appeared that she still was not doing well because she was shaky when she was going out the door, which sounded like it was definitely the lithium definitely causing her problems. And so that was never picked up until the last minute on discharge, and that is not the standard of care that you should have in terms of lithium. You don't find out what the lithium level is for the first time when you're sending them out the door.

(Martin Dep. p. 125, line 16–p. 127, line 7.) Reading Dr. Martin's entire answer, rather than just a four-word snippet, shows that he was simply saying that while the failure to conduct the test, in and of itself, did not result in Tasha's toxicity, it resulted in the doctors at Palmetto not discovering that she was toxic until she was about to be discharged. The Murphys are not arguing that performing a lithium level test would have, by itself, somehow prevented Tasha from becoming toxic. Rather, the failure to conduct the test resulted in them not discovering that she was toxic, which was the entire point of the test. (Martin Dep. p. 125, lines 22–23.)

Dr. Lopez also relies on Dr. Martin's testimony that he does not know for certain how Tasha became toxic while at Palmetto. (Lopez Br. 11.) It should not be surprising that Dr. Martin could not say with certainty how she

became toxic, as he was not at Palmetto when she was being treated and did not evaluate her until five years after the incident.

Furthermore, absolute certainty is not the standard. An expert's testimony "is sufficient if the testimony represents his professional judgment as to the most likely one among possible causes." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991). Dr. Martin's testimony met that standard. He testified that Tasha "probably came in with lithium onboard and more was added." (Martin Dep. p. 75, lines 21-22.) He further testified that, based on "[h]er presentation of severe mental health status changes" while at Palmetto, "she could have been toxic the entire time." (Martin Dep. p. 138, lines 3-16.) Additionally, when asked whether there was an alternative explanation for how she could have become toxic, Dr. Martin discussed the possibility of impaired kidney function resulting in toxicity, but he dismissed that as a possibility because her kidneys were functioning properly. (Martin Dep. p. 87, lines 17-25.) Based on this testimony and the testimony discussed in the Murphys' primary brief, there is at least a scintilla of evidence that Dr. Lopez's negligence¹ was the

¹ Dr. Lopez also believes that the Murphys did not meet their burden of proof regarding the departure from the standard of care element and ask this Court to affirm based on Rule 220(c), SCACR. (Lopez Br. 10-11 n.2.) He

proximate cause of the Murphys' damages, and summary judgment was

states that this "issue was not a basis for the Circuit Court's decision." (Lopez Br. 10 n.2.) That is quite an understatement. In fact, not only was this "not a basis" for granting summary judgment, the circuit court specifically found that there was sufficient evidence of a departure from the standard of care to withstand summary judgment. (Hearing Tr. p. 17, lines 3-10 ("[G]iven the testimony, in the light most favorable to the [Murphys], there is evidence of departure from the standard. I don't quarrel with that part of it from a summary judgment standpoint. Whether or not it meets the test for directed verdict, I don't know. But certainly at this stage there is a scintilla as to the departure.").)

Dr. Lopez has not cited any case, nor are the Murphys aware of any, where the circuit court, in ruling on a summary judgment motion, specifically found that a particular fact question presented a jury issue, but the appellate court found that the particular fact question did not present a jury issue. Because this argument has not been supported by "any statute, rule, or legal authority," it has been abandoned. *Potter v. Spartanburg Sch. Dist.* 7, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011).

Furthermore, the circuit court was correct in finding that the Murphys presented at least a scintilla of evidence on the standard of care question. In addition to the testimony discussed above and in the Murphys' primary brief, Dr. Lopez made the decision to continue Tasha on the plan put in place by Dr. Jenkins, the admitting physician. (Lopez Dep. p. 48, lines 14-23.) However, Dr. Lopez does not think that Dr. Jenkins even saw Tasha, as it appeared that he was on call when she arrived at Palmetto in the early morning hours and he merely called in the initial order of medication. (Lopez Dep. p. 50, lines 13-22.) Dr. Lopez made the decision to continue giving lithium to Tasha even though her levels had never been checked and she had never actually been evaluated by a doctor until he met with her. Based on this testimony, as well as the testimony previously discussed, the circuit court was correct in finding that the Murphys presented at least a scintilla of evidence on the standard of care issue. This Court should not reverse the denial of summary judgment on this ground, as the denial of summary judgment is not directly appealable. *Olsen v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003).

therefore improper.

II. The question of whether the Murphys are entitled to punitive damages is a question for the jury.

In his brief, Dr. Lopez fails to address the fact that “the question of recklessness, willfulness, or wantonness is ordinarily a question for the jury.”² *Cooper v. County of Florence*, 306 S.C. 408, 411, 412 S.E.2d 417, 418–19 (1991). Notably, he has not cited a single case where a South Carolina appellate court held that a defendant was entitled to summary judgment on the issue of punitive damages, but not on the issue of negligence. Because the deposition testimony discussed above and in the Murphys’ primary brief provided at least some evidence from which the jury could infer recklessness, the circuit court erred in granting Dr. Lopez’s motion for summary judgment on the punitive damages issue.

Conclusion

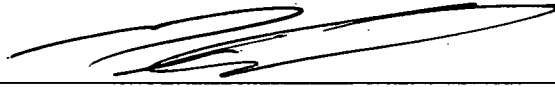
For the reasons stated above and in the Murphys’ primary brief, the circuit court erred in granting Dr. Lopez’s motion for summary judgment.

² The Murphys concede that if this Court finds for Dr. Lopez on the proximate cause issue, they cannot recover punitive damages.

Accordingly, the Murphys ask this Court to reverse and remand this case for trial.

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APPELLANTS' SECOND DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

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In addition to those documents previously designated, the Appellants designate the following to be included in the Record on Appeal:

1. Dr. Lopez Deposition Transcript pp. 1, 48, 50
2. Dr. Martin Deposition Transcript pp. 87, 126

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

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CERTIFICATE OF SERVICE

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I certify that on July 11, 2013, I placed a copy of the *Initial Reply Brief of Appellants and Appellants' Second Designation of Matter to be Included in the Record on Appeal* in the US Mail; with first-class postage prepaid, and addressed as follows:

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