THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
James C Williams, Jr , Circuit Court Judge

Case No 08- CP-38-826

Kareem J Graves and Tara Graves, individually and as duly appointed personal representatives of the Estate of India Iyanna Graves — Appellants,

vs

CAS Medical Systems, Inc — Respondent

REPLY BRIEF OF APPELLANTS

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ARGUMENT

I CAS HAS FAILED TO SHOW THAT THE SUMMARY JUDGMENT CAN BE UPHELD, GIVEN THE CIRCUIT COURT S USE OF THE WRONG STANDARDS TO EXCLUDE THE EXPERTS

The Plaintiffs pointed out in their Initial Brief that the Circuit Court committed reversible error by using the unique gate keeping standards for *scientific* expert testimony to exclude the purely technical testimony of the software experts In reply, CAS lamely insists that the testimony was "scientific in nature" but points to no scientific theory, or any novel principle outside the realm of established computer science used by the experts that would support this contention Recognizing that the Circuit Court s use of the wrong standards is fatal to its ruling, CAS attempts to deflect this problem by arguing that the Plaintiffs have somehow waived this error on appeal Although CAS admits that the Plaintiffs made this precise argument in a supplemental memorandum filed October 23, 2009, CAS contends that they abandoned it because Plaintiffs' counsel at a hearing at one point referred to the experts as "scientific experts, ' and, in a memorandum, chastised the defense for not understanding ' the science involved' in the case In the Supplemental Memorandum, however, the Plaintiffs squarely argued that the gate keeping factors listed in State v Council, 335 S C 1, 19-21, 515 S E 2d 508 (1999) did not apply because the testimony was not scientific in nature and explained why *The Plaintiffs never withdrew this memorandum or this position* Although Plaintiffs counsel did make some gratuitous references to "scientific experts' and the memorandum referred to the "science involved," these statements by no means waived their formal legal position

In any event, the characterization of the testimony by Plaintiffs' counsel is not what is important All the court need do is look at the methodology used by Dr

Daugherity and the other experts as set forth in pages 9-11 of the Initial Brief There is not a single step used that can be characterized as involving "scientific testimony" By the reasoning of CAS, any expert testimony concerning software would be 'scientific testimony" This reasoning is nonsensical on its face Thus, CAS erroneously asserts that the Plaintiffs failed to show that the testimony was not scientific They made this precise showing in their Initial Brief, and it is CAS that has utterly failed to show otherwise

CAS fares no better by arguing that the Plaintiffs never raised their "reasoning the best inference' argument to the Circuit Court This argument is ethically troubling because **CAS well knows that this is a misrepresentation of the arguments presented below** The Plaintiffs argued that they could prove a defect by proving a malfunction and eliminating all causes of the malfunction but a product defect Although the Plaintiffs did not at this time label this methodology "reasoning to the best inference," that is precisely the methodology described to the Circuit Court In the Initial Brief, the Plaintiffs simply explained that this methodology is similar to differential diagnosis as used in the medical field, and is sometimes described as "reasoning to the best inference" in the non-medical field But the Plaintiffs have argued that this methodology, however labeled, is proper from Day One

Not amiss to making self-serving statements, CAS proclaims that the Council factors still "fit" the opinions offered and insist that the Plaintiffs have not shown otherwise But as explained in the Initial Brief, reasoning to the best inference *has its own reliability factors for consideration* An expert is not allowed to simply stand up and say 'the product malfunctioned and a defect is the most likely cause of the malfunction' To

the contrary, the expert's reasoning to the best inference opinion passes Rule 702 s reliability test *only* if it meets the following demanding five standards

> [1] Experts must provide objective reasons for eliminating alternative causes when employing a "differential analysis " Furthermore, [2] the inference to the best explanation must first be in the range of possible causes, [3] there must be some independent evidence that the cause identified is of the type that could have been the cause But more than mere possibility, [4] an inference to the best explanation for the cause of an accident must eliminate other possible sources as highly improbable, and [5] must demonstrate that the cause identified is highly probable

Bitler v A O Smith, 400 F 3d 1227, 1237-38 (10th Cir 2004)

The foregoing methodology is the precise one used by the Plaintiffs' defect experts These factors do *not* include the published opinion, peer review, rate of error, and reproduction by testing factors of Council Obviously, if these factors were applied every time an engineer explained that a flat tire had caused an accident, technical expert testimony *would never be admitted* because no one writes papers about well-established technical principles In this case, the experts simply used well-established principles of computer science and then employed a reasoning to the best inference methodology to conclude that the software was defective The Council factors have nothing to do with the reliability of this methodology, and the summary judgment – which was based on the exclusion of the defect experts under Council – must be reversed for this reason alone

II CAS HAS FAILED TO SHOW THAT THE CIRCUIT COURT PROPERLY EXCLUDED THE CAUSATION TESTIMONY OF DR WILKINS

CAS continues to insist that Dr Wilkins was not qualified to give expert testimony on causation because she is not a self-proclaimed expert on sudden infant death (SIDS) But the real question is whether Dr Wilkins is qualified to give an opinion as to whether India would have survived had the alarm timely sounded In this regard, Rule

702, SCRE, permits an expert to qualify based on her knowledge, education, or experience Dr Wilkins actually qualifies on all three bases as explained in the Plaintiffs Initial Brief CAS has offered no rebuttal to this argument beyond insisting that only a "SIDS expert ' could opine as to whether India would have survived had the alarm timely sounded CAS thus has failed to show any reason why Dr Wilkins' knowledge, education, and experience collectively are inadequate to qualify her as an expert in this case

CAS contends that the Plaintiffs described Dr Wilkins' methodology as one of differential diagnosis This is simply wrong The differential diagnosis discussion in the Initial Brief was solely with reference to the software defect experts

CAS attacks the reliability of Dr Wilkins opinion by again returning to State v Council, 335 S C 1, 19-21, 515 S E 2d 508 (1999) and complaining that Dr Wilkins testimony does not pass muster under the standards for scientific testimony But Dr Wilkins simply gave non-scientific medical testimony based on her knowledge, education, and experience and Council simply does not apply

CAS also challenges Dr Wilkins' opinion on the merits Relying on an affidavit submitted by Dr Hunt, CAS insists that SIDS babies are non-resuscitable CAS also challenges Dr Wilkins opinion on the merits Relying on an affidavit submitted by Dr Hunt, CAS insists that SIDS babies are non-resuscitable Unfortunately, what CAS fails to explain is that SIDS is a lack of diagnosis for the *death* of a child A SIDS cause of death on a death certificate is the lack of an explainable diagnosis for the death, it is the use of circumstantial evidence to label the death Much like in this case, if a medical

examiner has labeled a death SIDS, they have used direct and circumstantial evidence to rule out every other possible cause of death As Dr Wilkins is testifying to whether this child would have survived a apnea event and not survived a undiagnosed event, the testimony is reliable and relevant The Circuit Court, however, did not use Dr Hunt's opinion as a basis for either excluding Dr Wilkins or granting summary judgment The Circuit Court, however, did not use Dr Hunt s opinion as a basis for either excluding Dr Wilkins or granting summary judgment In any event, these differing opinions on causation merely show that a material question of fact existed that compelled the Circuit Court to deny the summary judgment motion The summary judgment accordingly cannot be upheld on grounds that the Plaintiffs failed to present evidence of causation, as the Circuit Court clearly abused its discretion in excluding Dr Wilkins

III THE CIRCUMSTANTIAL EVIDENCE ALONE WAS SUFFICIENT TO ESTABLISH THAT AN UNREASONABLY DANGEROUS DEFECT EXISTED IN THE MONITOR

In response to the Plaintiffs' argument that the circumstantial evidence presented established an unreasonably dangerous defect in the monitor, CAS contends that the Plaintiffs cannot prove a defect in the monitor by circumstantial evidence According to CAS, ' [a]s our Supreme Court held recently, Watson v Ford Motor Co , Op No 27686 (re-filed September 13, 2010, a defect must be proven and cannot be shown by circumstantial evidence (Respondents Initial Brief at 27)

The Plaintiffs can find no holding in this case that a defect in a product may not be proven by circumstantial evidence In fact, the majority opinion simply fails to address this part of the case The Watson Plaintiffs have filed a Petition for Rehearing asking the

Watson majority to rule whether the judgment entered on the jury verdict can be upheld basely solely on the circumstantial evidence presented

Regardless of whether the South Carolina Supreme Court agrees the circumstantial evidence presented by the Watson plaintiffs was sufficient to prove a defect, the principle argued in the instant case – that a plaintiff need not prove a specific defect in a product and may prove a defect relying of circumstantial evidence - is now established beyond dispute in light of the opinion of Justice Pleicones, concurring in part and dissenting in part in Watson Justice Pleicones adopted the Circuit Court opinion as the law of South Carolina

> "Accordingly, even if the jury rejected the expert's testimony, the circumstantial evidence was sufficient to support the verdict [Respondents] were not require to prove a specific defect in the vehicle and could properly prove that the vehicle was defective and unreasonably dangerous using circumstantial evidence St Paul Fire and Marine Ins Co v American Ins Co , 251 S C 56, 59-60 159 S E 2d 921, 923 (1968) ("[a]ny fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts), McQuillen v Dobbs, 262 C 386, 391-92, 204 S E 2d 732 (1974) ("negligence may be proved by circumstantial evidence as well as direct evidence), Restatement (Third) of Torts Product Liability § 3 Comment c (1998) ("*No requirement that plaintiff prove what aspect of the product was*

defective The inference of defect may be drawn under this Section without proof of the specific defect)

(Sl Op at 14-15) At least unless and until the Watson majority says differently, this concurrence best describes the current law of South Carolina on this issue The Circuit Court accordingly was required to consider whether the circumstantial evidence – the malfunction of the monitor in ordinary use, the elimination of all non-defect causes of the malfunction, the experts identification of a possible cause of the malfunction- viz , a defect in the software- and their opinion that this was most probably the cause of the failure on the night of India' death – required that the summary judgment motion be denied

CONCLUSION

For the reasons stated, the Plaintiffs renew their request that the summary judgment entered by the Circuit Court be reversed and the case be remanded for trial

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November 22, 2010

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCAR

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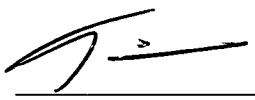
PROOF OF SERVICE

I certify that I have served one (1) copy of the Appellants Final Reply Brief, by depositing a copy of it in the United States Postal Service, shipping prepaid, on December 3, 2010, addressed to their attorney of record Clarke W Dubose, Esquire, Haynsworth Sinkler Boyd, P A , Post Office Box 11889, Columbia, South Carolina 29211-1889



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