

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-03827

RECEIVED

MAR 14 2013

John R. Sexton and
Patricia Sexton Appellants

v.

Alex R. Espinal, M.D.
and Palmetto Surgery,
LLC Respondents.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court erred in admitting evidence suggesting Ricky Sexton's smoking habit caused the damages the Sextons claimed in their suit against Dr. Espinal and Palmetto
2. Whether the circuit court erred in excluding evidence of Ricky Sexton's oxygen saturation reading collected on the day of trial to rebut testimony offered by Dr. Espinal's witnesses

STATEMENT OF THE CASE

John Richard Sexton ("Ricky") underwent a colonoscopy in February 2007 that revealed several colon polyps. (R. p. 185 lines 9-15). Most of the polyps were removed during the colonoscopy but one could be removed only by an elective surgical procedure. Ricky met with Dr. Alex R. Espinal of Palmetto Surgery, LLC ("Palmetto") regarding the potential surgery. (R. p. 186, lines 3-14). Ricky's surgery was scheduled for March 7, 2007, five days after Ricky's initial meeting with Dr. Espinal. One day before surgery (March 6, 2007), Ricky fell ill. He developed flu-like symptoms including a runny nose and coughing. (R. p. 189, line 20 – p. 190, line 8). Ricky left work and came home early because of his illness. (R. p. 234, lines 16-20). Concerned about her husband's ability to withstand surgery while ill, Patricia Sexton ("Trish") called Piedmont Medical Center ("PMC") to see if the surgery would go on as planned. (R. p. 190, lines 14-20). Hospital personnel told Trish that Ricky's surgery was likely to be postponed but Ricky should come in anyway. Id.

Ricky went to PMC on March 7, 2007, still feeling "terrible." (R. p. 190, line 21 – p. 191, line 5). Ricky and Trish told hospital personnel that Ricky was quite ill. (R. p. 191, lines 6-8). PMC personnel approached Ricky and told him his surgery would be postponed. Ricky called concerned family members, including sister Glynnis Beard, to tell them not to come to the hospital. (R. p. 191, lines 11-23). While Ricky was on the phone with Glynnis, PMC personnel interrupted and whisked Ricky away into surgery. (R. p. 191, line 24 – p. 192, line 4). Ricky did not see Dr. Espinal during this time.

Dr. Espinal chose to perform Ricky's elective surgery despite Ricky's flu-like symptoms. Dr. Espinal also chose to perform the surgery even though Ricky was having abnormal lung functions before the surgery. Ricky's oxygen saturation reading was only

85% when he was admitted to PMC for surgery. (R. p. 130). An average person's oxygen saturation ranges from 94-100%. Ricky's pre-op reading was "highly abnormal" and presented a "pretty serious" situation. (R. p. 120, lines 21-25; R. p. 131, line 1). Dr. Susan Lupo, the anesthesiologist assigned to Ricky's surgery, was concerned by Ricky's condition and ordered a chest x-ray. (R. p. 410, lines 2-11). Dr. Espinal admits he did not perform a full exam on Ricky on Mary 7th before choosing to perform the surgery. (R. p. 368). During the surgery, Dr. Espinal eliminated the polyp by removing a small portion of Ricky's colon. Dr. Espinal completed the surgery by creating an anastomosis, i.e. reconnecting the two ends of Ricky's colon at the point where the polyp-covered portion was removed.

Ricky's condition deteriorated quickly after surgery. His oxygen saturation fell to a dangerous level. Ricky required a respirator, was placed in intensive care, and was finally examined by a pulmonologist. (R. p. 66, lines 10-20). Decreased oxygen saturation levels inhibit normal healing at the anastomosis site. In the wake of Dr. Espinal's original surgery, Ricky suffered an anastomotic leak. The contents of his colon began seeping into Ricky's abdomen, and Ricky was urgently returned to surgery on March 10th. Id. Ricky was hospitalized for nearly five weeks following the second surgery, incurred hundreds of thousands of dollars in medical expenses, and missed six months of work as a pipe fitter.

Ricky and Trish sued Dr. Espinal and Palmetto in August 2009 for all injuries suffered in the wake of the March 7, 2007 surgery. The case was tried before the Honorable John C. Hayes, III beginning on August 1, 2011. During the trial, Judge Hayes permitted over objection Dr. Espinal and Palmetto to introduce evidence of Ricky's

smoking habit. Judge Hayes also refused to allow Ricky to introduce evidence of his oxygen saturation level at time of trial to rebut testimony of Dr. Espinal and his expert witness. The jury returned a defense verdict. Judge Hayes denied the Sextons' motion for a new trial and this appeal followed.

STANDARD OF REVIEW

An evidence admission decision is “a matter addressed to the sound discretion of the trial court.” Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 146, 719 S.E.2d 703, 707 (Ct. App. 2011). A trial court has “wide discretion” in determining the relevancy of evidence. Wright v. Craft, 372 S.C. 1, 33, 640 S.E.2d 486, 503 (Ct. App. 2006). A trial court’s evidentiary ruling is subject to reversal if it was “an abuse of discretion amounting to an error of law.” Judy v. Judy, 384 S.C. 634, 682 S.E.2d 836, 839 (Ct. App. 2009). An “abuse of discretion” occurs “when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.” Altman v. Griffith, 372 S.C. 388, 400, 642 S.E.2d 619, 625 (Ct. App. 2007)(quoting Fields v. Reg’l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)). In addition to proving error, a party challenging the trial court’s admission or exclusion of evidence must prove prejudice. Wright, 372 S.C. at 33, 640 S.E.2d at 503. Prejudice is established where “there is a reasonable probability the jury’s verdict was influenced by the challenged evidence or lack thereof.” Id. (quoting Fields, 363 S.C. at 26, 609 S.E.2d at 509).

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE SUGGESTING RICKY SEXTON’S SMOKING HABIT CAUSED THE DAMAGES THE SEXTONS CLAIMED IN THEIR SUIT AGAINST DR. ESPINAL AND PALMETTO

A. Dr. Espinal and Palmetto failed to present evidence that smoking “most probably” caused the Sextons’ damages.

Dr. Espinal attempted to produce evidence regarding Mr. Sexton’s tobacco use several times during trial. Mr. Sexton was asked about his smoking on several occasions during cross-examination. (R. p. 199, line 11 – p. 202, line 21). Plaintiff raised a

contemporaneous objection that Judge Hayes overruled. (R. p. 202, line 24 – p. 203, line 6). Dr. Espinal’s reason for seeking introduction of this evidence is clear from his attorney’s closing argument. When discussing Mr. Sexton’s decreased oxygen saturation, Dr. Espinal’s attorney wondered aloud, “is it caused by the smoking? Perhaps.” (R. p. 528:9). It is clear Dr. Espinal introduced evidence of smoking for the purpose of showing something other than Dr. Espinal’s alleged negligence caused the series of events leading to the damages the Sextons claimed.

Since the cause of most damages claimed in medical malpractice cases is beyond the ordinary knowledge of lay jurors, causation must be established by the testimony of a witness qualified as an expert in the particular medical field. Melton v. Medtronic, Inc., 389 S.C. 641, 663, 698 S.E.2d 886, 897 (Ct. App. 2010). Expert testimony on the cause of damages claimed in medical malpractice suits is subject to the “most probably” rule of causation. Jones v. Owings, 318 S.C. 72, 74, 456 S.E.2d 371, 372 (1995). This rule simply requires a medical malpractice party to meet the same requirement for causation evidence that all other negligence parties face. Id. A party must provide evidence of more than a possible link between a potential causative factor and the plaintiff’s damages. The expert’s testimony “must provide a significant causal link” between the alleged causative factor and the injury. Martasin v. Hilton Head Health System, 364 S.C. 430, 438, 613 S.E.2d 795, 800 (Ct. App. 2005).

This rule applies just as much to defendants as it does to plaintiffs. In other words, if a defendant intends to offer evidence of a cause for the plaintiff’s damages that differs from the plaintiff’s causation evidence, then the defendant must present evidence that the alternative cause most probably caused the damages. Without limiting the rule’s

application to plaintiff experts, the South Carolina Supreme Court has concluded that “[i]t is not sufficient for the expert to testify merely that the ailment might or could have resulted from the alleged cause.” Baughman v. Am. Tel. & Tel., Co., 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991). For example, in Payton v. Kearse, 391 S.C. 188, 460 S.E.2d 220 (Ct. App. 1995), the Court considered a defense expert’s testimony on a possible alternative cause of the plaintiff’s ear condition. The defense expert testified only that a particular illness “had the potential to produce” the injury from which the plaintiff suffered. Payton, 391 S.C. at 210, 460 S.E.2d at 233. Since the defense expert “could not testify to a reasonable degree of certainty” on the alternative cause, the testimony was inadmissible.” Id. at 210, 460 S.E.2d at 233 n. 7. The Payton result was reversed by the South Carolina Supreme Court but the Supreme Court’s reasoning makes clear that the “most probably” rule of causation applies to both plaintiff and defense experts. See Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998).¹ Discussing the defense expert mentioned above, the Supreme Court held, “[b]efore expert testimony is admissible on the question of causation between the plaintiff’s injuries and the acts of the defendant, the testimony must satisfy the ‘most probably’ rule.” Payton, 329 S.C. at 61, 495 S.E.2d at 211 (citing Baughman, 306 S.C. at 111, 410 S.E.2d at 543).

Accordingly, Dr. Espinal and Palmetto could only present evidence of smoking for the purpose of establishing a causal link to the Sextons’ damages if that evidence indicated that smoking most probably caused the damages. Due to medical malpractice

¹ Other jurisdictions have also held that the same admissibility standard for causation testimony applies to plaintiffs and defendants. See e.g., Stinson v. England, 633 N.E.2d 532, 538 (Ohio 1994) (“expert opinion regarding a causative event, including alternative causes, must be expressed in terms of probability irrespective of whether the proponent of the evidence bears the burden of persuasion with respect to the issue” and “[w]hile the probability standard arises most frequently in the context of testimony by an expert witness on behalf of the plaintiff, it is not limited to those circumstances”).

litigation's "highly technical nature," the law does not permit parties to casually suggest possible reasons for the plaintiff's injuries. Ellis v. Oliver, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996). Neither the plaintiff nor the defendant is permitted to engage in such speculation. Dr. Espinal and Palmetto failed to offer any evidence that smoking most probably caused the Sextons' damages. As defense counsel made clear in his closing argument, the best the defense could offer was that smoking "perhaps" caused Mr. Sexton's medical condition. Under South Carolina law, "perhaps" simply is not good enough to admit causation testimony, and the trial court erred in admitting evidence of smoking on the causation issue.

B. Evidence of Ricky's smoking habit had no probative value and it presented a substantial danger of undue prejudice and confusion of the issues.

Evidence must not be admitted if it is not relevant. Rule 402, SCRE. Since Dr. Espinal and Palmetto failed to meet the standard for use of smoking evidence to establish or dispute causation, this evidence was not relevant and should have been excluded. Alternatively, even if evidence is relevant, it may be excluded if its probative value is substantially outweighed by "the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE. Ricky's smoking should not have been admitted to establish a causative factor for the Sextons' damages. Beyond this impermissible causative connection, smoking evidence has no probative value on the issues relevant to the Sextons' negligence claims. As presented to the jury, the relevant issues were (1) whether Dr. Espinal's pre-operative examination was sufficient; (2) whether Dr. Espinal's decision to perform an elective procedure on an ill patient admitted with an 85% oxygen saturation reading was reasonable; and (3) whether Ricky's abnormally low

oxygen saturation before, during, and after the initial surgery was a proximate cause of the anastomotic leak which caused sepsis and the Sextons' claimed damages. Ricky's past and current smoking is not probative on these issues.

As such, the smoking evidence presented a substantial danger of confusing the issues by introducing a non-probative variable for the jury's consideration. Additionally, the prejudicial value of repeatedly calling Ricky a smoker is significant. Smoking is a value-laden characteristic, i.e. the public ascribes certain values to a person simply because the person smokes. Researchers have recently branded smoking as a "stigmatized social status." Jennifer Stuber et al., *Smoking and the Emergence of a Stigmatized Social Status*, 67 SOCIAL SCIENCE & MEDICINE 420 (2008). This stigmatization is commonly applied toward smokers by non-smokers and smokers alike. The public tends to fear smoking's health consequences (including second-hand smoke) and this fear contributes to stigmatization of individuals who perpetuate those consequences on themselves and others. *Id.* at 421. The study also reported a statistically substantial percentage of survey respondents "believe smoking is a sign of personal failure" and a similar percentage "think less of a person who smokes." *Id.* at 424. The risk that jurors ascribed negative character traits to Ricky because of his smoking habit is real and significant, especially given the dearth of probative value this evidence carried.

The trial court's erroneous admission of smoking evidence prejudiced the Sextons' case. Prejudice requires only "a reasonable probability that the fact-finder's determination was influenced by the challenged evidence." Hill v. S.C. Dep't of Health & Env't'l Control, 389 S.C. 1, 14, 698 S.E.2d 612, 619 (2010). Dr. Espinal and Palmetto lacked the requisite evidentiary foundation to admit smoking evidence on causation. Yet,

by admitting the evidence on the causation issue, the trial court allowed the jury to consider a possible alternative reason why Ricky suffered a post-surgical injury and all damages flowing from that injury. Causation was an element of the Sextons' claim against Dr. Espinal and Palmetto. The jury's deliberation on this element was made in the context of smoking evidence that should never have been admitted.

There is more than a reasonable probability the jury acted on this improperly admitted evidence in concluding the Sextons failed to meet all required elements to prevail. This is not an instance of harmless error, e.g. where the claimant's case (absent the improperly admitted evidence) fails to meet the required elements of the asserted cause of action. See e.g. Conner v. City of Forest Acres, 363 S.C. 460, 476, 611 S.E.2d 905, 913 (2005). The Sextons presented evidence that Dr. Espinal breached the standard of care by conducting an insufficient pre-operative examination and choosing to proceed with an elective surgery on an ill patient with abnormal pre-operative lung functions. (R. p. 116, line 20 – P. 118, line 11). The Sextons presented evidence that the decreased oxygen saturation from which Ricky was suffering before, during, and after the operation was detrimental to healing and caused the anastomotic leak and other damages. (R. p. 141:20 – P. 142, line 10). The Sextons met their evidentiary burden and Dr. Espinal was permitted to present inadmissible evidence of smoking to confound the lay jury on the causation issue. The Sextons were severely prejudiced by the erroneously admitted evidence and reversal based on this error is appropriate.

III. THE CIRCUIT COURT ERRED IN EXCLUDING EVIDENCE OF RICKY'S OXYGEN SATURATION READING MEASURED ON THE DAY OF TRIAL

Dr. Espinal called Dr. Lupo to testify on his behalf at trial. At one point during her direct examination, Dr. Lupo discussed her beliefs on Ricky's normal oxygen saturation. According to Dr. Lupo, a person in Ricky's position "is going to run oxygen saturation on room air of 89, 90, maybe 91." (R. p. 412, line 20-21). In Dr. Lupo's estimation, Ricky constantly maintains oxygen saturation readings in the upper 80s and, as a result, an 85% pre-operative reading was only "a little bit low." (R. p. 412, line 21). Dr. Espinal also called general surgeon Dr. Eric Bour to testify as an expert on his behalf. During his testimony, Dr. Bour reviewed Ricky's hospital admission records, and remarking on the 85% oxygen saturation at admission, concluded that the low reading was "not unusual" for Ricky. (R. p. 447, line 12). Dr. Bour also testified that Dr. Espinal acted within the standard of care by proceeding with the surgery on March 7, 2007. (R. p. 449, lines 18-20). Dr. Bour reached this conclusion only after agreeing that even if surgery had been delayed "for a day, a week, or whatever" Ricky's medical condition (including the 85% oxygen saturation) was not going to change. (R. p. 449, lines 14-17).

The Sextons' counsel attempted to challenge Dr. Bour's testimony on cross-examination by posing a hypothetical in which Dr. Bour was asked to assume Ricky had an oxygen saturation reading of 92% on the day of trial. (R. p. 477, lines 3-13). Dr. Espinal objected and the court sustained the objection on the ground that "[w]hat his oxygen level is today saturation is not an issue." (R. p. 478, lines 1-3). After a proffer was made and the court excluded the evidence, counsel stated his intent to recall Ricky Sexton to the stand to rebut the testimony of Dr. Lupo and Dr. Bour. (R. p. 481, lines 2-9). On rebuttal, Ricky was to testify that his oxygen saturation was measured at 92% on

two different days during the trial. Tr. of Record 476:8-20. The court excluded Ricky's rebuttal testimony. (R. p. 488, lines 7-8).

A plaintiff "has the right to open and close" at trial. Rule 43(j), SCRPC. A plaintiff also has the right to offer evidence "in reply" to a defendant's case-in-chief to "respond in full" to evidence a defendant has presented to the fact finder. Id.; McGaha v. Mosley, 283 S.C. 268, 276, 322 S.E.2d 461, 466 (Ct. App. 1984)("after the defendant has offered all of his evidence, the plaintiff may reply"). The only additional limitation on reply evidence stated by the rule is that such evidence "may not introduce any new matter." Id.; see also McGaha, 283 S.C. at 276, 322 S.E.2d at 466 (noting reply evidence may not be used to "complete plaintiff's case in chief"). The trial court has discretion in admitting reply evidence. Kramer v. Kramer, 323 S.C. 212, 217, 473 S.E.2d 846, 848 (Ct. App. 1996).

Through the testimony of Dr. Bour and Dr. Lupo, Dr. Espinal introduced evidence that Ricky's normal oxygen saturation hovers in the mid to upper 80s. The Sextons attempted only to produce evidence tending to negate these assertions. Ricky's testimony on his day-of-trial oxygen saturation reading spoke directly to these assertions. This rejected reply evidence was crucial to the issues in this litigation. Dr. Bour was offered as an expert witness to testify that Dr. Espinal met the standard of care in all respects and breached no duty to the Sextons. Dr. Bour endeavored to make this showing by claiming Dr. Espinal was reasonable in proceeding with surgery on March 7th. Dr. Bour grounded his opinion that Dr. Espinal was justified in proceeding on the assertion that waiting would not have mattered. Waiting would not have mattered, Dr. Bour claimed, because Ricky's oxygen saturation hovers in the 80s and would not increase over time. Testimony

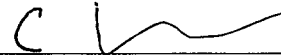
tending to show Ricky's oxygen saturation at 92% directly rebuts Dr. Espinal's assertions on the duty and breach elements of the Sextons' negligence claim.

In excluding the Sextons' reply testimony, Judge Hayes ruled that Ricky's current oxygen saturation "is not an issue." (R. p. 478, lines 3). In the abstract, this conclusion may be accurate. In other words, if the Sextons' offered evidence of Ricky's current oxygen saturation during his direct testimony, then the evidence may have been inadmissible. However, reply evidence stands on different ground than a plaintiff's case-in-chief. When a defendant offers evidence during its case, the plaintiff "is entitled to explain it or rebut it, even if the [reply] evidence would have been incompetent or irrelevant had it been offered initially." State v. Jackson, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005)(citing State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003)). As a reply, Ricky's current oxygen saturation was relevant and important in that it tended to negate key building blocks of Dr. Espinal's defense strategy. The circuit court erred in excluding this reply evidence on relevance grounds.

Dr. Espinal's counsel cited the span of time between Ricky's surgery and the trial in objecting to the reply testimony. Counsel argued that Dr. Lupo and Dr. Bour's testimony were confined to a time frame of "several weeks" after March 7, 2007 (R. p. 490, line 10) and Ricky's proffered testimony would not actually reply to the defense witnesses' testimony. However, while counsel attempted to limit the scope of the doctors' testimony to a short time span, the doctors made no such distinction in presenting their conclusions to the jury. Dr. Lupo testified that Ricky "is going to run oxygen saturation on room air of 89, 90, maybe 91." (R. p. 412, lines 19-20). This testimony provided no time parameters for Dr. Lupo's broad pronouncement of Ricky's normal oxygen

Additionally, evidence of Ricky Sexton's smoking habit presented a risk of prejudice that substantially outweighed any probative value it carried. Finally, the circuit court erred in excluding evidence of Ricky's day-of-trial oxygen saturation reading as this evidence was admissible as a reply to Dr. Espinal's case-in-chief.

Respectfully submitted,



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CERTIFICATION OF COUNSEL

Counsel certifies that Appellants' Final Brief complies with Rule 211(b), SCACR.


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PROOF OF SERVICE

The undersigned hereby certifies that on this 7th day of March, 2013, he served counsel for the Defendants with a copy of the Final Brief of Appellant and Certificate of Appellant in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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