STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Michael J. Baxley, Circuit Court Judge

Case No. 2007-CP-10-1553
Appellate Case No. 2010-173247
Ct. App. Opinion No. 2014-UP-055 – Filed February 5, 2014

Jamesetta Washington, as Guardian ad Litem for Jayden W., a minor,

Appellant,

v.

Edmund Rhett, Jr., M.D., Low County Obstetrics and Gynecology, P.A.; Tenet South Carolina, Inc. d/b/a East Cooper Regional Medical Center and AMN Services, Inc. f/k/a Nurses RX Inc.,

Defendants,

OF WHOM Edmund Rhett, Jr., MD is

Respondent.

Return to Petition for Rehearing

After a two and a half week trial in this medical malpractice case, the jury rendered its verdict finding that the Defendant Dr. Rhett had not breached the standard of care. On appeal, the Plaintiff raised seven issues which included attacks on the Trial Court's evidentiary rulings and challenges to the Trial Court's refusal to give certain requests to charge. This Court affirmed, finding, in pertinent part, that the Trial Court did not err in charging the jury on informed consent, and declining to address the evidentiary issues relating to causation because the jury found that Dr. Rhett did not breach his duty of due care.

Now in her Petition for Rehearing, the Appellant asserts that:

I. "The Court overlooked or misapprehended that the trial court erred and abused its discretion by admitting testimony regarding the maternal use of alcohol as a possible contributing cause of Jayden W's brain damage, and that such testimony was prejudicial to petitioner." [Petition, p. 6.]

II. "The Court overlooked or misapprehended that the trial court erred and abused its discretion by admitting testimony regarding theoretical genetic factors as a possible contributing cause of Jayden W's brain damage, and that such testimony was prejudicial to petitioner." [Petition, p. 24]

III. "The Trial Court overlooked or misapprehended that the trial court erred and abused its discretion by refusing to charge the correct law regarding an emergency exception to informed consent." [Petition, p. 33.]

First, the Defendant would note that the Plaintiff has submitted a 37-page petition which includes an extensive "Statement of the Case," restating a detailed procedural history that is not necessary at this stage. Defendant relies upon the Statement of the Case and Statement of the Facts in his Respondent's Brief as to the relevant and accurate procedural and factual history of this case. Most significantly, as relates to the only two evidentiary issues Plaintiff is pursuing in her Petition for Rehearing, the decisive fact is that the jury in this case rendered its verdict for the Defendant with the answer of NO to the special interrogatory: "Did the Plaintiff prove by the greater weight or preponderance of the evidence that the Defendant Dr. Rhett deviated from the standard of care?" [ROA 3714.]

I. II. The Court properly declined to consider the Appellant's complaints about the Trial Court's admission of expert opinion testimony by Dr. Milunsky as to the Plaintiff's use of alcohol during her pregnancy and a genetic condition as contributing causal factors in the Child's conditions.

Much of the Plaintiff's argument is devoted to restating her arguments from her brief as to why the Trial Court supposedly erred in allowing expert opinion testimony from Dr. Milunsky. The Respondent will not restate his arguments, but directs the Court's attention to the discussion in his briefs as to why the Trial Court acted within its discretion under Rule 702 and *State v. Council* in admitting the expert opinion testimony from Dr. Milunsky regarding the Plaintiff's use of alcohol during her pregnancy and the Child's genetic conditions as a contributing causal factor in the child's conditions.

However, this Court declined to reach the merits of the Trial Court's evidentiary rulings allowing Dr. Milunsky's opinion testimony, stating:

> Because the jury determined Dr. Rhett did not breach his duty of due care, and thus, did not reach subsequent questions related to causation, this court need not address any issue raised by Jamesetta that relates to causation. *See Stephens ex rel. Lillian C. v. CSX Transp., Inc.*, 400 S.C. 503, 520, 735 S.E.2d 505, 514 (Ct. App. 2012) ("Because the jury's verdict [that neither defendant breached its duty of reasonable care] made it unnecessary for the jury to reach the other issues in the case, it is not necessary that we address any ruling . . . unless it relates to breach of [the defendants'].duty of reasonable care."). On this basis, we decline to address issues related to the admissibility of testimony showing that maternal use of alcohol or genetics may have caused the child's problems because we find these issues relate exclusively to the causation element.

[Opinion, p. 3.]

For the purposes of the Plaintiff's Petition as it relates to this Court's reasons for declining to address these issues, the Plaintiff argues that the Court overlooked that the prejudicial testimony tainted the entire trial, including the jury's consideration of the standard of care issue, and therefore the jury's finding that Dr. Rhett did not deviate from

the standard of care should not preclude consideration of her evidentiary issues. More specifically, the Plaintiff argues: "Disallowing testimony regarding causation cannot prejudice a plaintiff who loses on the standard of care issue; but allowing prejudicial causation testimony to be heard by the jury taints their deliberations regarding all issues, including the standard of care issue." [Petition, p. 7 (emphasis in original).] The Plaintiff further argues that this Court failed to consider case precedent that: "[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is presumed to be prejudicial. *S.C. State Hwy. Dep't v. Graydon*, 246 S.C. 509, 511, 144 S.E.2d 485 (1965)." Also citing *Cooper Corp. v. Jeffcoat*, 217 S.C. 489, 495, 61 S.E.2d 53 (1950). [Petition, p. 22.]

To the extent that these cases discuss such a presumption – it is not conclusive, and can be rebutted. *Mali v. Odom*, 295 S.C. 78, 84, 367 S.E.2d 166, 170 (Ct. App. 1988). And here, the jury's answer to the special interrogatory clearly rebuts any possible presumption of prejudice and demonstrates that the jury never reached the causation question. Notably, in *Mali v. Odom*, the Court found that the erroneous admission of incompetent evidence on damages, could not have affected the jury's findings as to liability, and ordered a new trial on damages only. *Id.* at 171.

Plaintiff argues the evidence of her alcohol use prejudiced the jury against her and influenced their finding that Dr. Rhett did not deviate from the standard of care, stating: "It is hard to imagine what could be more prejudicial than accusations that a mother caused her own child's damage by abusing alcohol...." [Petition, p. 22.] And, she cites to *Templeton v. C. & W. Ry. Co.*, 117 S.C. 44, 55, 108 S.E.2d 363, 367 (1921), for the proposition that "there may be instances where such a strong impression has been made

upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission." [Petition, p. 23.]

However, the Plaintiff's argument has no merit in view of the facts that (1) Plaintiff's own counsel opened the door on the issue of her prenatal alcohol use, and (2) Dr. Milunsky never testified at trial that the Plaintiff Mother *abused* alcohol. The medical records irrefutably show that the Plaintiff gave a medical history of using alcohol in the first trimester, and Dr. Milunsky gave his opinion based on that medical history without characterizing her alcohol use as abuse. [ROA 1491-92.]. Moreover, the Plaintiff herself raised the issue of alcohol use during her opening statement and by eliciting expert medical opinions on the causal connection of alcohol use from her own experts. [ROA 343-44 (opening statement); ROA 697-98 (Dr. Katz); ROA 826-27 (Dr. Adler); (ROA 900 (Dr. Zimmerman); (ROA 2485 (Dr. Burton).]

III. The Trial Court charged the jury on the correct, applicable law of informed consent in emergencies.

The Plaintiff submitted a request to charge literally photocopied from Judge Anderson's charge book, but the Trial Court refused to give the entire charge as submitted, and instead, charged the jury in its own language, virtually quoting from the correct law on informed consent as set forth in Melton v. Medtronic, Inc., 389 S.C. 641, 698 S.E.2d 886 (Ct. App. 2010) and Hook v. Rothstein, 281 S.C. 541, 316 S.E.2d 690 (Ct.App.1984). [ROA 2202, l. 5 – 2206, l. 11.]

The Plaintiff objected to the jury charge on emergency situations because the Trial Court did not charge the exact language from Judge Anderson's charge book. [ROA 3666-67; Plaintiff's Request #12; see objection and ruling at ROA 2236, l. 7 – 2237, l.

14.] However, this Court found that the Plaintiff's requested charge contained statements that were "inapplicable to the facts of this case, and incorrect statements of the law:"

> Specifically, (1) the statement, "a physician must respect a competent patient's refusal of treatment, even in an emergency," is inapplicable because there is no evidence Jamesetta refused any treatment; (2) the statement, "If a competent patient refuses treatment, any medical treatment is a battery, even in an emergency," is legally incorrect, *see Linog v. Yampolsky*, 376 S.C. 182, 187, 656 S.E.2d 355, 358 (2008) ("[N]o independent cause of action for medical battery exists in South Carolina."); and (3) the statement, "if the patient is incapable of providing consent, the consent of a family member [should be sought], before administering treatment" is legally inaccurate, *see Harvey v. Strickland*, 350 S.C. 303, 311, 566 S.E.2d 529, 534 (2002) (rejecting doctor's argument he was under a duty to obtain patient's mother's consent for blood transfusion when patient was unconscious), as well as inapplicable to the facts of this case because there is no evidence Jamesetta was incapable of providing consent. As to all other statements in the requested jury charge, we find the trial court's charge correctly and adequately covered those points of law.

In her Petition, the Plaintiff argues that she does not object to Trial Court's failure to charge the first paragraph of her request, but complains that the jury was not charged the second paragraph in its entirety. Notwithstanding, that the request comes from Judge Anderson's charge book, the authorities cited with the proposed charge do not support the language about any requirement that a physician seek consent from family members or "impracticability of conferring with the patient" as prerequisite to the emergency exception as presented. There was much testimony from experts for both parties about informed consent and whether an emergency was presented. Based on the evidence presented, the trial court's charge to the jury, as a whole, was correct and their verdict should be affirmed.

CONCLUSION

Wherefore, based on the foregoing, the Defendant Dr. Edmund Rhett, Jr. respectfully submits that this Court properly considered all the correct legal standards as applied to the evidence and proceedings in the trial of this case and properly affirmed the judgment entered on the jury's verdict. Accordingly, the Petition for Rehearing should be denied.

Respectfully submitted,

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March 12, 2014

Certificate of Service

I certify that on this 12th day of March 2014, a copy of the foregoing Return was served on Appellant by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed to her Counsel of Record as listed below:

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