

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
CIRCUIT COURT

Honorable R. Markley Dennis, Jr., Circuit Court Judge
(Circuit Court Case No.: 2009-CP-10-4943)

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SC Court of Appeals

Appellate Case No. 2013-001903

Barbara Röehm....., Appellant,

vs.

Leigh M. McKenzie, MD, Ira Rosenshein, MD, Charla McEachin Napier, LMFT, Coastal
Psychiatry, LLC, Defendants, Of Whom Leigh McKenzie, MD, Coastal Psychiatry, LLC and
Charla McEachin Napier, LMFT
are..... Respondents.

APPELLANT'S INITIAL BRIEF

Appellant, Barbara Roehm ("Appellant") hereby submits her initial brief relating to
her appeal of the following orders of the Honorable R. Markley Dennis, Jr.: 1) Order
Granting Respondent Leigh McKenzie's Motion for Summary Judgment in Part, Dated
6/18/2013; and 2) Order Denying Motion for Reconsideration, filed 8/2/2013.

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I. STATEMENTS OF ISSUES ON APPEAL

A. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT WHEN RESPONDENT FAILED TO PRESENT EVIDENCE TO SUPPORT ITS MOTION AT THE TIME OF FILING FOR SUMMARY JUDGMENT?

B. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT BY DECIDING A FACTUAL ISSUE THAT IS PROPER FOR A JURY TO DECIDE?

C. DID APPELLANT PRESENT A SCINTILLA OF EVIDENCE THAT A DOCTOR/PATIENT RELATIONSHIP EXISTED?

E. IS RESPONDENT ESTOPPED FROM DENYING THE EXISTENCE OF A DOCTOR-PATIENT RELATIONSHIP BY HAVNG BILLED HER INSURANCE COMPANY FOR PARENT TRAINING AND BY GIVING APPELLANT A MEDICAL DIAGNOSIS.?

II. STATEMENT OF CASE

Appellant, Barbara Roehm ("Appellant") was formerly married to Louis Roehm ("Lou" or "ex-husband"). Appellant and Lou adopted their grandson, Jonathan Roehm ("Jonathan"), when he was three (3) years old. Jonathan is currently 19 years old. Appellant separated from Lou and moved out of the family home with Jonathan in 2003. Jonathan remained in Appellant's exclusive custody until the parties divorced in February of 2005. Appellant and Lou agreed to joint custody and Lou was granted regular visitation as part of the divorce settlement. Prior to the divorce and during Appellant and Lou's separation, Lou exercised sporadic, daytime visitations with Jonathan. Lou started dating his current wife, Elizabeth Roehm ("step-mother") during his separation from Appellant. After he began dating his current wife, Lou began requesting more visitation with Jonathan. (See Affidavit of Barbara T. Roehm in Support of Opposition to Motion for Summary Judgment, filed on November 26, 2012, Page 1-3; Para. 1-14 (hereinafter "Appellant's Affidavit").

In around 2004, Jonathan started exhibiting anger, fear and anxiety relating to exercising visitation with his father, Lou and step-mother. Jonathan would disclose these emotions to Appellant, but was afraid to express his feelings to Lou. To try and help Jonathan, Appellant asked Lou if he would be willing to enter into therapy with Jonathan. Lou agreed and made an appointment with Respondent, Leigh McKenzie, MD ("Respondent McKenzie). Lou made appointment to see Respondent McKenzie who, at that time, was partners with Lou's psychiatrist and former Defendant in this case, Charla McEachin ("McEachin") under Coastal Psychiatry, LLC ("Respondent Coastal"). (See Appellant's Affidavit, Page 3, Para. 15).

Lou and Jonathan had their first appointment with Respondent McKenzie for therapy on October 30, 2004. They had a second appointment on around January 20, 2005. At the second appointment, Respondent Mckenzie requested through Lou that he bring

Appellant to their next session. At the request of Respondent McKenzie, on March 28, 2005, Appellant came to the next therapy appointment with Respondent McKenzie, along with Lou and Jonathan. After the March 28, 2005 session, Appellant began regularly attending the sessions with Respondent McKenzie, along with Jonathan, Lou, and sometimes Jonathan's step-mother. See Affidavit of Barbara T Roehm, (See Appellant's Affidavit, Page 3, Para. 16).

In April of 2005, Respondent McKenzie recommended that the family also begin seeing, her partner Ms. McEachin at Coastal Psychiatry for family therapy. (See Appellant's Affidavit, Page 4, Para. 19).

Respondent McKenzie told Appellant that she and Ms. McEachin could work together as a team to assist in stabilizing family issues. (See Appellant's Affidavit, Page 4, Para. 19).

In February of 2006, Respondent McKenzie recommended that Lou, Jonathan and Appellant have more frequent family therapy sessions with Ms. McEachin to "clarify expectations" regarding the minor child and to stabilize co-parenting issues. (See Appellant's Affidavit, Page 4, Para. 20).

Appellant was unaware that during the period of therapy with Dr. McKenzie and Ms. McEachin, Beth and Lou were both reporting negative things about Appellant to them. Neither Dr. McKenzie nor Ms. McEachin ever discussed any of the allegations about her with Appellant and neither of them met with Appellant alone at any time. (See Appellant's Affidavit, Pages 4-5, Para. 21).

At some point during the time Respondent McKenzie was conducting therapy sessions, involving Jonathan, Lou, Stepmother and Appellant, Respondent McKenzie came to the conclusion, based upon her conversations with Lou and step-mother (outside of the presence of Appellant), her conversations with Jonathan (while Lou and stepmother were present in the room) and her conversations and observations of Barbara; that Appellant suffered from Munchausen's by Proxy, Borderline Personality Disorder and was possibly sexually abusing Jonathan. (See Appellant's Affidavit, Page 5, Para. 22, Exhibit E - Affidavit of Leigh J. McKenzie, MD).

The sexual abuse allegation arose because "some people" were saying this. The therapy notes in the Coastal Psychiatry record contain several comments from either Lou or Beth, stating negative remarks about Appellant. (See Appellant's Affidavit, Pages 4-5, Paras. 21-22.; Appellant's Affidavit, Exhibit E, Affidavit of Leigh J. McKenzie, MD, Para. 6).

On August 15, 2007 Lou Roehm filed an emergency action in Charleston County Family Court for a change of custody. The request for an emergency hearing was supported by Respondent McKenzie's Affidavit, stating that Appellant suffered from Munchausen's by Proxy, Borderline Personality Disorder and was possibly sexually abusing Jonathan. (See Appellant's Affidavit, Page 5, Paras. 23-24). Appellant was served with notice of the emergency hearing at approximately 3:45 p.m. on August 15, 2007 for an emergency hearing at 9:00 a.m. on August 16, 2007. (See Appellant's Affidavit, Page 5, Para. 24). At the emergency hearing on August 16, 2007, the Family Court judge granted custody of Jonathan to Lou and ordered that Appellant have supervised visitation with the child, only one time per week for 4 hours. She was allowed to have 1 telephone call per night for a maximum of 15 minutes per call. (Id at Para. 24.)

A Department of Social Services ("DSS") report was made on August 15, 2007. It was later discovered, by court ordered release of the identity of the reporter, that Lou's new wife made the DSS report. The DSS case was ultimately unfounded as a Category I case, and the abuse was "ruled out" by the investigation. (See Appellant's Affidavit, Page 6, Para. 25).

After DSS unfounded its case, Appellant filed a Motion to Disclose the name of the reporter in the DSS case alleging that the report was made in bad faith. The Court granted Appellant's motion and Appellant thereafter learned that step-mother, not Respondent Dr. McKenzie was the DSS reporter. (See Appellant's Affidavit, Page 7, Para. 29).

In around November of 2007, the guardian ad litem from the family court case, Denise Harris, met with Respondent McKenzie, and her partner, Ms. McEachin to tell them that she would recommend that Jonathan be returned to his mother at the next hearing, scheduled for November 27, 2007. (See Appellant's Affidavit, Page 6, Para. 27, Exhibit G; Also See Exhibit B to Plaintiff's Supplemental Return to Defendant Leigh J. McKenzie's Memorandum in Support of Motion for Summary Judgment – Deposition of Leigh J. McKenzie, Pages 142-144).

On November 27, 2007, a hearing was held in the Family Court case. The minor child was returned to Appellant with supervised visits ordered as to Lou. (See Appellant's Affidavit, Page 6, Para. 28). Eventually, the case settled with Appellant getting sole custody of the child and a no contact order being put in place against Lou and Beth as to Jonathan. The family court case ended on July 9, 2009, by settlement agreement. Lou and Beth ultimately were restrained from contact with the minor child. (See Appellant's Affidavit, Page 7, Para. 30).

III. ARGUMENT AND RELEVANT LAW

A. **Respondent McKenzie's Motion for Summary Judgment lacked Evidentiary Support and Should have been Dismissed.**

South Carolina Rules of Civil Procedure ("SCRPC"), Rule 6 (d) states that: "[w]hen a motion is to be supported by affidavit, the affidavit shall be served with the motion . . ."

Respondent did not file any affidavits or deposition testimony with its initial motion for summary judgment. Respondent filed Appellant's deposition testimony for the first time, along with its reply to Appellant's Opposition to Motion for Summary Judgment. Based upon SCRPC, Rule 6, Respondent cannot submit evidence to support its motion for the first time with its Reply. Respondents' Motion should have been dismissed on the basis that it lacked evidentiary support.

B. **The Trial Court Erred in Granting Summary Judgment As a Genuine Issue of Material Fact Exists.**

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, ~~354 S.C. 58~~, 69, ~~580 S.E.2d 433~~, 438 (2003). "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRPC." *Bovain v. Canal Ins.*, ~~383 S.C. 100~~, 105, ~~678 S.E.2d 422~~, 424 (2009). "Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting Rule 56(c), SCRPC). To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla

of evidence. *Hancock v. Mid-South Mgmt. Co., Inc.*, ~~381 S.C. 326, 330, 673 S.E.2d 801, 803~~ (2009) " The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Miller v. Blumenthal Mills, Inc.*, ~~365 S.C. 204, 220, 616 S.E.2d 722, 730~~ (Ct.App.2005). " Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, ... the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* (citation omitted).

1. The Question of Whether a Doctor/Patient Relationship Exists Is a Genuine Issue of Material Fact and is a Question for the Jury to Decide:

South Carolina recognizes that the existence of a doctor-patient relationship is a **question of fact** for the jury to decide. *Ellis by Ellis v. Niles*, 450 S.E.2d 631, 316 S.C. 516 (S.C. App. 1994); *see also* Am.Jur.2d Physicians, Surgeons, and Other Healers § 159 (1981) (existence of physician-patient relationship is a question of fact).

The burden of proof relating to whether or not a doctor/patient relationship exists is part of the burden of establishing a physician's duty of care and is reviewable under a preponderance of the evidence. *Ardis v. Sessions*, 633 S.E.2d 905, 909; 370 S.C. 229 (S.C.App. 2006)

Thus Appellant is only required to present a scintilla of evidence to defeat a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co., Inc.* 381.S.C. 326, 330, 673 S.E. 2d 801, 803 (2009). Appellant presented a scintilla of the evidence and the trial court erroneously decided a disputed factual issue that was proper for a jury to decide.

2. The Trial Court improperly Weighed the Evidence to Reach its Conclusion that No Material Issue of Fact Existed Relating to a Doctor/Patient Relationship..

After a scintilla of evidence is demonstrated, the judicial function relative to fact-analysis on a motion for summary judgment is 'limited to ascertaining whether any factual issue pertinent to the controversy exists; it does not extend to resolution of any such issue.' A 'finding of fact' by the district court in a summary judgment proceeding thus constitutes only a finding that no genuine, material issue exists as to the fact; by the nature of summary judgment, it cannot be an indication that the trial court has weighed the evidence and found a fact in the traditional sense. *Bowen v. Lee Process Systems*, 536 S.E. 2d 86, 342 S.C. 232 (SC App. 2000). A court considering summary judgment neither makes factual [398 S.C. 542] determinations nor considers the merits of competing testimony. *Davis V. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250; 626 S.E. 2d 1, 5 (2006). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378; 534 S.E. 2d 688, 692 (2000).

In the instant case, the trial court improperly weighed the evidence that a doctor/patient relationship existed and substituted its judgment for that of a jury to reach the conclusion that Appellant's evidence of the doctor/patient relationship was insufficient. (See Record on Appeal). According to *Bowen v. Lee Process Systems, Id.*, the trial court exceeded its authority in acting as a fact finder in the traditional sense.

3. The Trial Court Failed to View the Evidence in a Light Most Favorable to Appellant, the Non-Moving Party.

" In determining whether any triable issues of fact exist, the evidence and all inferences [389 S.C. 651] which can be reasonably drawn from the evidence **must be viewed in the light most favorable to the nonmoving party.**" (*emphasis added*). *Hancock v. Mid-*

South Mgmt. Co., ~~381 S.C. 326~~, 329-30, ~~673 S.E.2d 801~~, 802 (2009). The trial court reviewed the evidence presented by Appellant and Respondent regarding the existence of a doctor/patient relationship and incorrectly weighed the evidence in the favor of Respondent McKenzie.

C. Appellant presented a Scintilla of Evidence to Show the Existence of a Doctor/Patient Relationship between herself and Respondent McKenzie.

A patient/therapist relationship existed between Respondent McKenzie and Appellant from March of 2005 through approximately June of 2006. (See Affidavit of Plaintiff Barbara T. Roehm in Opposition to Motion for Summary Judgment, filed concurrently herewith (hereinafter, Para. 11, (hereinafter sometimes referred to as "Plaintiff's Affidavit"; and Plaintiff's First Amended Complaint, Paras. 42, 48, 54, 58, 77, 85, and 101).

There is ample evidence that Respondent McKenzie undertook to counsel Appellant as a patient so that she could train Appellant, Appellant's Ex-husband and Jonathan's Stepmother about how to parent Jonathan. This is an undisputed fact. Respondent McKenzie signed and submitted claim forms to Appellant's insurance company in which she billed for "Parent Training," for the therapy sessions involving Appellant, Appellant's Ex-husband and Step-mother. (See Appellant's Affidavit, Para. 16 and Exhibit A to Appellant's Affidavit). Respondent McKenzie admits that in at least one of the therapy sessions. . . "my main thrust was to get the parents moving in the right direction.. ." (Plaintiff's Supplemental Return to Defendant, Leigh McKenzie's Memorandum In Support of Her Motion for Summary Judgment, Exh. B, McKenzie Depo. 36:10-12; 40:1-A). Respondent

offered therapeutic parenting advice and intentionally created an environment for the parties to vent their frustrations about the other parent. Id.

Respondent McKenzie's therapy notes indicate that Respondent McKenzie was, in fact, offering therapeutic advice to Appellant and her ex-husband during the therapy sessions. In a family therapy session on February 7, 2006, Respondent McKenzie notes:

M + F confronted about the new therapist is from issues betw them not being resolved rather than Jonathan's issues. . . Jonathan asked to leave the room. . . Anxious about parental difficulties." [sic]

(See Appellant's Affidavit, Para. 17 and Exh. B)

This quote represents the "treatment plan" or the "treatment report" that was submitted by Respondent McKenzie to Appellant's insurance company for payment. (See Supplemental Return, Exhibit B, McKenzie Depo. Pages 26-29). Respondent McKenzie's form shows that she was billing Appellant's insurance company for "parent training," among other things, and that she submitted the "treatment plan" or "treatment report" "showing that therapy between the parents and the doctor was, in fact, occurring. (Id.)

Moreover, Respondent McKenzie testifies in her deposition that Appellant would argue with her ex-husband whenever they were in her office together. (Supp. Return, Exh. B: McKenzie Depo. Transcript at 111:6-22; 115:8-25; 116:1-25; 117:1-11). Dr. McKenzie notes that:

Q. What did she say when she raised her voice? Do you recall anything in particular?

A. It was addressed to Mr. Roehm.

Q. Okay. And do you recall anything that was said?

A. I know they had disagreements about a magazine that she gave Jonathan and she – I don't know that she had issue with any of the activities he had planned for Jonathan.

Q. An so he, Mr. Roehm, also got upset in those sessions.

A. Yes.

Id at McKenzie Depo. Transcript at 116:7-18

Not only did Respondent McKenzie's billing statements to Appellant's insurance company include "parent training," as part of the therapy services being offered, the parents were actually dealing with issues between them during these sessions. There is ample evidence that a doctor/patient relationship existed between Appellant and Respondent McKenzie. This issue is appropriately decided by a jury.

Additionally, the very mission statement of Coastal Psychiatry, LLC is "[s]erving the needs of Families." (See Plaintiff's Affidavit, Para. 18, and Exhibit C to Plaintiff's Affidavit: Defendant Leigh McKenzie, M.D.'s Answers to Plaintiff's First Interrogatories). This mission statement is prominently displayed on the letterhead for Coastal Psychiatry, LLC. (See Appellant's Affidavit, Para. 18 and Exhibit D).

Additionally, Dr. Rosenchein, who was Dr. McKenzie's former partner at Coastal Psychiatry, opined that although he had no personal knowledge of whether or not family therapy was occurring between Respondent McKenzie and the Roehms, if all parties are present and are being addressed during therapy sessions, it would appear to him to in fact be family therapy. (See Opposition to Defendant Leigh McKenzie's Motion for Summary Judgment, Exhibit B, deposition excerpt from Deposition of Ira Rosenschein, MD, Page 56 Lines 2 through 22). Dr. Rosenchein also testified that it is not within the standard of practice in the psychiatry field to make a diagnosis of someone who is not a patient. (Id. at Page 31, Lines 16 through 20). If Appellant was not Respondent McKenzie's patient, then it would have been highly unusual and a clear deviation from standard practice for

Respondent McKenzie to have diagnosed Appellant as having multiple psychiatric disorders.
(Id.)

In conclusion, there is ample, undisputed evidence, including evidence in the form of Dr. McKenzie's own records, to demonstrate that Respondent McKenzie undertook the role as family counselor for Appellant in this case. To the extent that Respondent McKenzie claims that she did not owe Appellant a duty of confidentiality, a fiduciary duty and/or that she could not have committed negligent and/or intentional emotional distress or outrage because there was no doctor-patient relationship, these arguments also fail as the threshold issue of the doctor-patient relationship is a question of fact. This disputed factual issue is properly brought to a jury to decide.

D. Respondent is Estopped From Denying that a Doctor/Patient Relationship Exists.

The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel. *Kelley*, 368 S.C. at 608, 629 S.E.2d at 392. The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party [375 S.C. 85] estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped. *Boyd v. Bellsouth Tel. Tel. Co., Inc.*, ~~369 S.C. 410, 422, 633 S.E.2d 136~~, 142 (2006) . As the ele-

ments exhibit, equitable estoppel is based on affirmative conduct between the parties.

Strickland v. Strickland, 650 S.E.2d 465, 375 S.C. 76 (S.C. 2007)

In the instant case, Appellant was being told that the purpose of the family counseling sessions were to help Jonathan make adjustment to his parent's divorce, and to "stabilize issues" and "clarify expectations." (See Appellant's Affidavit, Page 3, Para. 15).

Relying upon these representations, Appellant continued to show-up for and to pay for these sessions believing that the true purpose for them was to help Jonathan. (See Appellant's Affidavit, Pages 5, Para. 22).

Appellant later learned that Lou, step-mother, the Respondent McKenzie and Ms. McEachin were having frequent secret conversations, without Appellant's knowledge, in an effort to find evidence to support removal of Jonathan from Appellant's custody. (See Appellant's Affidavit, Pages 4-5, Para. 21).

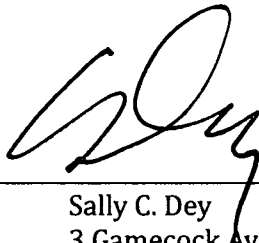
Appellant was never confronted with any of the alleged concerns raised by Respondent McKenzie regarding the allegations of child abuse, nor was she aware that she was being evaluated during the sessions for purposes of Respondent giving her a psychiatrist diagnosis. (See Appellant's Affidavit, Pages 4-5, Para. 21-22). In other words, until Respondent McKenzie prepared her affidavit accusing Appellant of multiple hideous forms of child abuse. Appellant did not know that these beliefs were being formed or that she was being evaluated by Respondent McKenzie until she was served with the Motion for Emergency Relief in the underlying Family Court case. (See Appellant's Affidavit, Pages 4-5, Para. 21-23).

Respondent McKenzie cannot, on the one hand, bill her insurance company for therapy she provided to Appellant (See Supplemental Return, Exhibit B, McKenzie Depo.

WHEREFORE, Appellant respectfully requests that the Court issue the following relief:

1. That the Court reverse the trial court's order granting summary judgment for Respondent;
2. That the Court remand this matter to the trial court so that the matter may be tried by a jury; and
3. For such other and further relief as the Court deems just and proper.

4-17-14



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