

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)

Appellate Case No. 2013-001903

Barbara Roehm.....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 REPLY BRIEF

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SC Court of Appeals

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I. ARGUMENT

- a. A doctor/patient relationship is implied when a physician either makes a diagnosis or provides treatment to another individual

Although not yet expressly addressed in South Carolina, state courts in several other jurisdictions have held that a doctor/patient relationship can be implied when a physician, while in his or her professional capacity, takes affirmative action towards treating or diagnosing a patient. Mead v. Legacy Health Systems and Adler, 352 Or 267; 283 P.3d 904 (2012). Once the physician undertakes to treat or diagnose a patient, the physician is under an affirmative duty to exercise reasonable care in rendering treatment or a diagnosis. *Id.* at 279.

In Mead, an on-call physician was contacted by an emergency room physician. The on-call physician rendered a diagnosis of the patient during the phone consult, but, up to that point, had never treated or had contact with the patient. The Mead Court relied upon cases from other jurisdictions in its analysis, including a Texas case that recognized “the fact that a physician does not deal directly with a patient does not necessarily preclude the existence of a physician-patient relationship.” *St. John v. Pope*, 901 S.W.2d. 420, 424 (Tex. 1995). The Mead court cited McKinney v. Schlatter, 118 Ohio App. 3d 328, 692 N.E.2d 1045, 1050-1051 (1997) and Lownsbury v. VanBuren, 94 Ohio St. 3d 231, 762 N.E.2d 354, 362 (2002) to support its ruling that a doctor/patient relationship can be implied from the circumstances of each case.

The Mead Court specified that the relevant inquiry should be:

“ . . . whether a physician who has not personally seen a patient either knows or reasonably should know that he or she is diagnosing a patient’s condition or treating the patient. If the jury finds that, in light of the factors identified . . . the physician either knew or reasonably should have known that he or she was diagnosing the patient’s condition or providing treatment to the patient, then an implied physician-patient relationship exists and the physician owes the patient a duty of reasonable care.” *Mead* at _____. (emphasis added).279, 283

The holding in the Mead case is not inconsistent with South Carolina law. In Roberts v. Hunter, 310 S.C. 364; 426 S.E.2d 797 (1993), the court found that, as a matter of law, no doctor/patient relationship existed because the Appellant Roberts left the hospital before he could be examined by the doctor. This case was improperly relied upon by the trial court in the case at bar for the strict proposition that a doctor/patient relationship can only be formed by the express actions and consent of the parties. The Roberts case was, in fact, intended to be a more narrowly applied holding, specific to the facts of that case.

The Fourth Circuit of the United States District Court specifically addressed the narrow holding of Roberts and reviewed South Carolina law in general regarding the formation of a doctor/patient relationship. Hord v. United States of America, 178 F.3d 1283 (4th Cir. 1999). The Hord Court noted that Roberts v. Hunter, 310 S.C. 364; 426 S.E.2d 797 (1993) “is best understood as stating a very narrow holding that a mere agreement to examine a patient, absent an agreement to benefit the patient, does not constitute a doctor/patient relationship.” (emphasis added). The Court distinguished the situation in Roberts where no doctor/patient relationship is formed (i.e. when the physician “neither offer[s] nor intends[s] to treat, care for, or otherwise benefit the individual”) . . . “in contrast to the situation in which ‘the physician . . . assume[s] the role of treating the patient’” (citing Tumblin v. Bal-Incon Glass Packaging Corp., 324 S.C. 359; 478 S.E.2d 81 (Ct. App. 1996)). The Hord Court then confirmed that “[a]ccordingly, *Roberts* need not be read as holding that only an examination or treatment of a patient can give rise to a doctor/patient relationship. . . . to say that the existence of a doctor/patient relationship is dependent upon a physician’s examination of the patient or his records – would render the opinion internally inconsistent” Hord v. United States, 178 F.3d 1283, 1285 (4th Cir. 1999).

Roberts can be distinguished from the case at bar and from Mead. In the instant case and in Mead, the doctor actually rendered a diagnosis in a professional capacity.¹ This alone is sufficient to establish a duty, not to mention the other evidence that exists in this case to show that Respondent undertook to provide family counseling to Appellant and actually billed Appellant's insurance company for those services. (R. at ____).

The instant case and Mead are also distinguishable from Tumblin v. Bal-Incon Glass Packaging Corp., 324 S.C. 359; 478 S.E.2d 81 (Ct. App. 1996), which is relied upon by Respondent and the trial court. In Tumblin, the physician was engaged by Tumblin's employer to conduct a physical examination of Tumblin to determine whether or not Tumblin could perform her job duties. The court noted that there was no doctor/patient relationship because the physician neither showed an intention to treat Tumblin (he advised her to follow-up with her regular doctor), nor was Tumblin injured during the examination.

It follows that if the physician in Tumblin had rendered a diagnosis, harmed Tumblin in any way, or showed an intent to otherwise treat her, a duty would have arisen under South Carolina law.

In the case at bar, Respondent's express act of diagnosing Appellant with multiple serious psychiatric disorders and syndromes, alone, not to mention Respondent's actions in billing Appellant's insurance company for "parent training," and her actions which show she was conducting therapeutic sessions involving Appellant, gives rise to a duty of Respondent to use reasonable care in rendering that opinion in her professional capacity.

¹ In Respondent's Affidavit, she concludes that "... it is my professional opinion that Barbara Roehm [Appellant] suffers from Borderline Personality Disorder, and she inflicts psychological pain and suffering on Jonathan on a regular basis in addition to Munchausen by Proxy ... " Respondent further states that "[her] professional opinion is based upon [among other things] ... interviews with Barbara Roehm [Appellant]. ... "

The trial court erred in placing too much emphasis on the on the Roberts case. Roberts does not preclude a finding of a doctor/patient relationship by implication.

b. There is Ample Evidence to Show that a Doctor/Patient Relationship Between Appellant and Respondent was implied from the circumstances presented

Respondent cites numerous cases from other jurisdictions standing for the proposition that a parent is not a patient of her adolescent child's psychiatrist. Appellant has never claimed that she was Respondent's patient by virtue of Respondent's relationship with Appellant's son. This issue is a red herring.

Respondent further argues and the trial court found that no doctor/patient relationship existed between Respondent and Appellant because the parties did not enter into a formal doctor/patient relationship, and Appellant admitted that she was never personally treated by Respondent. This argument also misses the point.

Appellant claims, consistent with the laws of this state and those of other jurisdictions who have addressed the issue of an implied doctor/patient relationship, that she became Respondent's patient, hence Respondent owed her a duty of reasonable care, when Respondent: 1) undertook affirmative acts towards providing family therapy to Appellant, Appellant's ex-husband and his wife, even if the therapy was meant to benefit Appellant's then minor son; (2) when Appellant assented to that role by continuing to participate in and actually pay for the therapy; or, in the alternative, (3) when Respondent took affirmative action in her professional capacity, of diagnosing Appellant with a series of debilitating psychiatric disorders and syndromes.

The following undisputed facts in this case demonstrate conduct that implies the formation a doctor/patient relationship:

- Appellant initially requested that her ex-husband began therapy with their then minor child to try and improve their father/son relationship (R. at ____).
- Appellant's then minor child and his father attended their first therapy session with Respondent in October of 2004. In March of 2005, at Respondent's request, Appellant began attending the therapy sessions with Jonathan and his father. (R. ____)
- Appellant participated in and paid for multiple therapy sessions with her ex-husband, her then minor child and sometimes with her ex-husband's new wife (R. at ____).
- During the therapy sessions, Respondent offered therapeutic advice to Appellant and her ex-husband, including confronting the parents about their issues (R. at ____).
- The therapy notes wherein Respondent confronted the parents about their issues, was submitted to Appellant's insurance company by Respondent to seek reimbursement for the parent training session. (R. at ____).
- Appellant and her ex-husband were engaging in heated discussions about various points of contention between them while they were in sessions with the Respondent (R. ____).
- Respondent admits that "[her] main thrust was to get the parents moving in the right direction." (R. at ____).
- Respondent billed Appellant's insurance company for Jonathan's individual therapy and for "parent training," for the therapy she was providing to the family, including Appellant and Appellant's ex-husband. (R. at ____).
- In April of 2005, Respondent referred Appellant, Appellant's son and her ex-husband to her partner, Charla McEachin, for additional therapy so that she and Ms. McEachin could work together as a team to assist in stabilizing family issues (R. at ____).
- In February of 2006, Respondent recommended that Appellant and the other family members begin seeing Respondent's partner more frequently to assist in "clarifying expectations" and "stabilizing issues." (R at ____).
- The focus of all of the therapy sessions conducted by Respondent were purportedly to help Jonathan with his anxiety and to adjust to his parent's divorce. (R. at ____).
- Despite the fact that Respondent never treated Appellant individually, never evaluated her and never obtained a medical history from Appellant, Respondent diagnosed

Appellant with having multiple psychiatric illnesses, including borderline personality disorder and Munchausen's syndrome by proxy (R. _____).

- Respondent specifically states that she is rendering the diagnosis of Munchausen's by proxy and Borderline Personality Disorder to Appellant in her professional capacity (R. _____).
- It is outside of the standard of practice to formally diagnose individuals who are not patients of the doctor making the diagnosis (R. at _____).
- Respondent held herself out as a psychiatrist who treats the entire family, using the motto: "Caring for the Needs of the Entire Family," on her business letterhead, fax cover sheets and other business materials. (R. at _____).

The above facts demonstrate much more than a scintilla of evidence that a doctor/patient relationship was created and these facts are properly presented to a jury for a final factual determination on that issue. 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).

These facts were simply ignored or overlooked by the trial court and the trial court erroneously concluded that "Plaintiff has produced no evidence to indicate she was a patient of Dr. McKenzie . . ." The trial court's decision in this case was in error.

c. Appellant's Change in Legal Theories After Having Changed Legal Counsel Did Not Represent an About Face' as Argued by Respondent

In around 2011, Appellant obtained new counsel to represent her in the underlying action. As is often the case, Appellant's new counsel amended her pleadings to assert claims based on alternative legal theories. The amended claims for professional negligence are based upon Respondent providing Appellant with a diagnosis as well as the other facts showing that Respondent was providing family therapy. Respondent argues that Appellant's testimony in

the family court case and in her deposition, indicating that that she had never treated with Respondent is legally inconsistent with her current position. Respondent argument is misleading. The point is that Respondent, acting in her professional capacity, affirmatively diagnosed Appellant with multiple serious mental illnesses and disorders, without conducting an independent evaluation of Appellant. Appellant's testimony, both before and after she amended her pleadings, is consistent. Appellant has never claimed that she treated with Respondent for her individual mental health, nor was such treatment necessary based upon Respondent's erroneous diagnoses. It is and has always been her position that she participated in the therapy sessions for Jonathan's benefit, and specifically at Respondent's request, and that she listened to the advice of Respondent during the therapy sessions. (R. at ____). It is, in fact, Respondent who blatantly contradicts herself by claiming now that she never interviewed or treated Appellant when she admits in her Affidavit filed in the underlying family court case, that she formed the basis for her diagnosis of Appellant, in part, on interviews she had with Appellant (R. at ____), during the sessions in question.

Respondent also argues that since Appellant does not maintain that a doctor/patient relationship existed with a different psychiatrist who treated her son, and where Appellant had been present during some of the counseling sessions, that this somehow discredits her position against Respondent. The glaring difference, glibly overlooked by Respondent, is that the prior psychiatrist did not diagnose Appellant; he did not offer therapeutic advice to her and her ex-husband in the sessions; nor did he bill her insurance company for "parent training." (R. ____).

Neither the law, nor public policy of this State can condone a medical doctor's use of her capacity and professional credentials to render and publish a sweeping professional opinion and diagnosis, which was relied upon by not only the court, but other medical practitioners, and then be permitted to hide by the facade that Appellant was not her patient. This, when coupled with the fact that Respondent benefitted financially from the therapy she provided and billed as "parent training" and the fact that she inflicted significant harm to Appellant by her recklessness, compels the conclusion that Respondent should be subject to legal scrutiny and accountability as urged by Appellant.

d. Appellant's Alternative Theory of Medical Malpractice in this Case Does Not Amount to Judicial Estoppel

Respondent's argument that Appellant should be judicially estopped from asserting that a doctor/patient relationship existed is misplaced. Appellant is entitled by the SC Rules of Court to plead alternative theories of relief in her case. SC Rule of Civil Procedure, ("SCRCP"), Rule 8(a). Rule 8, SCRCP expressly states that "[r]elief in the alternative or of several different types may be demanded. . . ." Appellant is not even stating alternative theories of relief in the same pleading, but simply amended her pleadings to assert an alternative theory of relief. Appellant's position that she never independently engaged in therapy with Respondent and that she was never evaluated by Respondent is not inconsistent with her current position that a doctor/patient relationship between she and Respondent is implied from the circumstances and facts of the case.

The application of judicial estoppel "is an equitable concept, depending on the facts and circumstances of each individual case, [and] application of the doctrine is discretionary." Carigg v. Cannon, 347 S.C. 75, 83-84; 552 S.E.2d 767, 772 (Ct. App. 2001) (citation omitted). For the doctrine to apply, generally courts look to the following factors: 1. A party's later position

must be clearly inconsistent with its earlier position; 2. The party has succeeded in persuading a court to accept the earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that the party either misled the first court or the second court; and 3. the party asserting an inconsistent position would derive an unfair advantage or impose an unfair detriment to the opposing party if not estopped. Cothran v. Brown, 566 S.E.2d 548, 350 S.C. 352 (S.C. App. 2002).

In this case, none of the elements of judicial estoppel are present. Appellant's earlier position is not inconsistent with her current position. Appellant still claims that she has never treated individually with Respondent, but that Respondent undertook to provide family counseling to her and a doctor/patient relationship is implied from the circumstances. (R. at ___) Appellant, in the interest of her minor son, continued to attend and participate in counseling sessions at Respondent's instance and request (R. at ___). The issues in Appellant's original complaint and in her amended complaint have not been litigated and there has not been an adjudication of the merits of her position, hence the second element of judicial estoppel cannot be met. Finally, Appellant has not derived an unfair advantage by changing the legal theory of her case. Respondent has had ample opportunity to conduct discovery and defend the allegations contained in Appellant's amended pleadings. Respondent's claim that Appellant should be judicially estopped from bringing her claims is without merit.

e. Appellant suffered Emotional Distress Due to Respondent's reckless conduct.

Appellant submitted evidence to the trial court that Respondent's conduct was reckless and that she was harmed as a result of Respondent's actions. (R. ____). Respondent unreasonably relied upon the hearsay representations of Plaintiff's ex-husband and new wife, both of whom

have serious and complicated psychiatric histories which were known, or should have been known to Respondent. (R. ____). Respondent failed to conduct an independent evaluation of Plaintiff and was reckless in diagnosing Appellant with serious psychiatric illnesses. (R. ____). Despite Respondent's allegations of severe abuse and neglect to the minor child by Appellant, Respondent did not question the minor child about the purported abuse and did not make a report to child protective services. The above facts are sufficient to prove the elements of infliction of emotional distress and Appellant are properly put before a jury to decide.

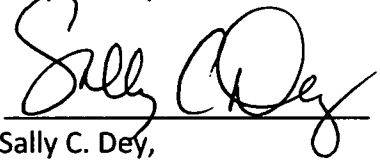
Cummings v. Tweed, 10 S.E.2d 322; 195 S.C. 173 (S.C. 1940).

II. CONCLUSION

For the foregoing reasons, Appellant respectfully request that the trial court's order granting summary judgment should be overturned and the case remanded to the trial court for the jury to decide

the threshold issue of whether a doctor/patient relationship was formed in this case.

Respectfully submitted,



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PROOF OF SERVICE

I, Sally C. Dey, certify that on July 18, 2014 I caused Appellant's Initial Reply Brief to be served upon the following parties, by dropping a true and exact copy in the US Mail, with proper postage affixed thereto.

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July 18, 2014

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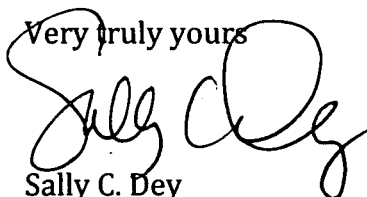
Re: Barbara Roehm v. Leigh McKenzie, MD, et al.
Appellate Case No. 2013-001903

Dear Ms. Kitchings:

Enclosed please find Appellant's Initial Reply Brief for filing in the above-entitled matter. By copy of this letter with enclosures, I am supplying all counsel of record with the same.

Thank you in advance for your time and consideration in this regard.

Very truly yours



Sally C. Dey

SCD/hs

cc: D. Gary Lovell, Jr., Esq.
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