

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No.: 2011-CP-46-00683

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SC Court of Appeals

Samantha Jamison, as Personal Representative of the
Estate of Jayden Joenelle Jamison-Barber, deceased.....Respondent,

v.

Ansley L. Hilton, MD, individually and as agent,
servant or employee of Rock Hill Gynecological
and Obstetrical Associates, PA; Christopher B.
Benson, MD, as agent, servant or employee of Rock
Hill Gynecological and Obstetrical Associates, PA;
and Rock Hill Gynecological and Obstetrical Associates,
PA, Defendants,

Of whom,

Rock Hill Gynecological and Obstetrical Associates, PA, is the.....Appellant.

FINAL REPLY BRIEF

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ARGUMENT

I. The issues on appeal are preserved for review because the Practice's directed verdict motion properly raised those issues.

The Respondent ("Jamison") claims the Appellant Rock Hill Gynecological & Obstetrical Associates, P.A. ("the Practice") failed to raise the issues currently on appeal in its directed verdict motion and thus did not preserve those issues for review. That assertion is inaccurate. The Practice raised the issues with sufficient specificity in its directed verdict motion, and for that reason, all of the Practice's arguments on appeal are properly before this Court.

At the outset, it is important to understand the essential nature of the Practice's appellate position. The Practice contends there was no basis for imposing direct liability on it in light of the defense verdicts for the only agents of the Practice who were named as defendants (*i.e.* Drs. Hilton and Benson). Although Jamison's experts tried to assert breaches of the standard of care by other employees, those experts never established a causal link between those alleged acts of negligence and the death of Jamison's baby. This is crux of the current appeal, and the record demonstrates it was the basis for the Practice's direct verdict motions.

At the close of Jamison's case-in-chief, the Practice's trial counsel made the following motion:

Yes, Your Honor, we would like to make a motion for a directed verdict based on the grounds that the plaintiff has not proved her case. **Basically, Dr. Phillips, while he testified to the standard of care, ultimately on cross-examination opined under oath here in court that anything [sic] that they did or didn't do caused the baby to die, so on that basis of the fact that he had – ultimately had no opinion that the defendants, any of**

the defendants cause [sic] the baby's death is subject for a directed verdict and on that – on that ground.

[R. p. 246, lines 8-17 (emphasis added).] The judge denied that motion. When the defendants rested their case and Jamison presented no rebuttal evidence, the Practice's trial counsel renewed the directed verdict motion "on the same basis." [R. p. 728, line 13.] The judge again denied the motion, basing his decision on the same grounds as earlier.

The Practice's motion asserted the absence of an expert opinion that any acts or omissions by the defendants caused the baby's death as a basis for judgment in the defendants' favor. Although the oral motion did not go into the kind of detail found in the Appellant's Brief, the same level of comprehensiveness was not necessary. The requirement in Rule 50(a), SCRCP, that the moving party state "specific grounds" does not obligate an attorney at trial to give an expansive oral account of every conceivable authority or nuance implicated by the grounds for the motion. Rather, "specificity" under the rule requires the moving party only to express the motion in such a way that the trial judge can identify and understand the supporting grounds. *See Connolly v. People's Life Ins. Co.*, 299 S.C. 348, 350-51, 384 S.E.2d 738, 739-40 (1989). In other words, the specificity requirement is not meant to be an issue preservation trap. It is intended to let the trial judge know the basis for the motion so that he or she can make an informed ruling on the issue presented.

Here, the Practice's motion served that intended purpose. The motion identified a specific flaw in Jamison's case – *i.e.* the lack of expert testimony establishing causation. It thus gave the trial judge a basis for a ruling. The trial transcript does not support any argument that the judge could not understand the basis for the directed verdict motion or

that he needed (or wanted) a more specific statement of the grounds. The judge was able to identify the issues and rule on the motion, and thus, the Practice's motion satisfied the requirements of Rule 50(a), SCRCP.

Jamison argues the motion was not "specific" for purposes of the rule because it did not use the precise term "speculative" when addressing the expert opinions and did not expressly refer to the "most probably" standard for medical testimony. However, this argument improperly focuses on what was excluded and ignores the crucial point of what was included. As previously discussed, the Practice based the directed verdict motion on Jamison's failure to establish causation by expert testimony. This was the ground for the directed verdict motion and the issue for the trial judge to consider. The precise flaws in the expert testimony (*i.e.* its speculative nature and its failure to adhere to the "most probably" standard) were subsets of that supporting ground. They were fairly and necessarily subsumed in the trial counsel's oral motion. Any finding to the contrary would create an unprecedented, unduly harsh Rule 50(a) standard that would, in turn, lead to unnecessary complexity and time delays during trials.¹

The cases finding non-compliance with Rule 50(a) have involved situations in which the moving party made no mention of any specific supporting grounds in the directed verdict motion. For example, in *Becker v. Wal-Mart Stores, Inc.*, this Court found an issue was not preserved when the directed verdict motion consisted of only the

¹ If Rule 50(a) required a party to identify not only the specific "ground" for the motion, but also every conceivable argument, authority and language that could support that ground, the length of trials would increase exponentially. Attorneys would have to focus on the minutiae of every ground they raised, even if the trial judge did not need or want it. As a result, directed verdict motions would transform from relatively brief proceedings into long, drawn-out hearings that would delay the rest of the trial. This is not the current practice in South Carolina, nor should it be. Yet, this would be the practical effect of the interpretation of Rule 50(a) that Jamison urges.

following statement: “Your Honor, I’d like to make a motion for directed verdict.” 339 S.C. 629, 634, 529 S.E.2d 758, 761 (Ct. App. 2000). Similarly, in *Sierra v. Skelton*, the defendant made a directed verdict motion that mentioned one of the plaintiff’s causes of action but did not give any reason why that claim failed as a matter of law. 307 S.C. 217, 414 S.E.2d 169, 172 (Ct. App. 1992). And in the lone case cited by Jamison, *Holly Woods Assoc. of Residence Owners v. Hiller*, the directed verdict motion apparently² failed to make any reference to the lack of a legal duty, which the party later attempted to raise as a separate issue on appeal. 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011). None of those cases involved scenarios in which the issue on appeal could fairly and reasonably be discerned from the directed verdict motions. This was the reason for a finding of non-compliance with Rule 50(a).

This present situation is distinguishable from those cases because the Practice’s motion stated a specific supporting ground. The motion asserted that Jamison failed to prove her case because she did not establish causation for the baby’s death through expert testimony. This is the same issue the Practice is now pursuing in this Court, although the arguments in favor of that issue are understandably more detailed in the appellate briefs than in the oral directed verdict motion. Therefore, the issue is properly preserved for appellate review, and the Court should reject the first argument set forth in the Respondent’s Brief. Any other result would raise the bar for directed verdict motions to a level that our courts have not previously been willing to set and would alter trial practice in significant and undesirable ways.

² This Court’s opinion does not quote the exact language of the directed verdict motion, but it does reveal that the motion did not assert the absence of a legal duty.

II. The Practice did not waive its challenge to the adverse verdict.

Jamison also argues the Practice waived any appeal of the verdict because it did not object to the verdict form the court submitted to the jury. As discussed below, however, there are at least three flaws in that argument. A consideration of those flaws demonstrates that Jamison's position is without merit.

First, while the Practice did not object to the verdict form, its directed verdict motions challenged the very submission of the case to the jury. This was not a situation in which the Practice conceded that a verdict against it was legally possible. The Practice moved for a directed verdict based on Jamison's failure to prove her case, and it contended the case should not go to the jury in any form whatsoever. The trial judge denied that motion, however, and his decision prevented any further argument on that issue. Any objection to the verdict form (*i.e.* an assertion that one or more of the defendants should not be listed) would have amounted to nothing more than a request that the judge reconsider his denial of the directed verdict motion. Because the judge had previously ruled on that issue, there was no point and no need for the Practice to revisit it when discussing the verdict form. *Cf. State v. Grant*, 275 S.C. 404, 272 S.E.2d 169 (1980) (when a legal issue has previously been raised and ruled upon during trial, it is unnecessary to object to the portion of the jury charge that addresses that legal issue). Thus, the directed verdict motion was the functional equivalent of an objection to the verdict form.

Second, the issue on appeal does not involve the verdict form itself, but rather the legal inconsistency of the actual verdict.³ In other words, the wording and format of the verdict form were not the problem. Indeed, there was no basis for an objection to the language of the verdict form because it merely listed all three of the named defendants, who remained in the case after the denial of the directed verdict motion. Although the Practice disagreed with the trial judge's decision to submit the case to the jury as to any of the defendants, once the judge made that ruling, the phrasing of the verdict form was not in dispute. The verdict form simply reflected the judge's decision, which the Practice had already challenged. For that reason, the wording of the verdict form was not properly the target of any objection. It logically follows that no such objection was required.

Third, the basis for the Practice's appeal did not arise until after the jury returned its verdict. The Practice could not possibly have known about this issue on appeal before the jury exonerated Drs. Hilton and Benson but imposed liability on the Practice. Only then did the improper nature of the verdict come to light. At that point, the Practice raised the issue in a timely manner. Given the nature of the issue, this was all the Practice was required to do. Indeed, any objection before that point would have been premature. The verdict form included not only the Practice, but also its agents, Drs. Hilton and Benson. A finding of liability as to one or both of those doctors would have entitled Jamison to a verdict against the Practice under agency principles. The problem

³ The Practice has not made any argument that the specific wording of the verdict form played any role in creating the improper verdict. This appeal challenges the viability of the jury's decision itself, not the format in which the jury rendered that decision.

did not arise until the jury found in favor of the doctors) but against the Practice. Before the jury returned that verdict, the issue currently on appeal simply did not exist.

Jamison's reliance on *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995), is misplaced. In that case, a large group of plaintiffs brought claims against the defendant for alleged contamination of their respective properties. The defendant's conduct did not affect all of the properties equally, however, and for that reason the parties divided the plaintiffs into five separate categories. This created a possibility that some plaintiffs would recover damages while others would not. In order to assist the jury in making those determinations, the trial judge instructed the parties' attorneys to create a demonstrative exhibit showing the locations of the different categories of plaintiffs with respect to the areas and levels of contamination. A verdict form was also created to reflect the categories of plaintiffs shown on the exhibit. Both the exhibit and the verdict form went to the jury without any objections, and the jury returned verdicts for only some of the plaintiffs.

Three of the unsuccessful plaintiffs moved for a new trial, arguing that the exhibit placed them in the wrong category. They claimed they would have recovered damages had they been put in the correct category because the plaintiffs whom the exhibit did list in that specific category all received awards. The trial judge denied the motions, and this Court affirmed the decision, concluding the plaintiffs had not made timely objections to the exhibit and verdict form. The Court concluded the appellants had received an opportunity to review the exhibit and verdict form and should have detected the errors and brought them to the trial judge's attention before the case went to the jury.

Johnson is distinguishable from the present case. For one thing, the exhibit and verdict form in *Johnson* were erroneous in and of themselves. The exhibit map placed a creek in the wrong location, which resulted in the three plaintiffs being put into a different category than they should have been. The verdict form then reinforced that error by listing the plaintiffs in the wrong category. This meant the exhibit and verdict form were flawed from the outset, and the plaintiffs could have discovered the error before the judge ever submitted those materials to the jury. Indeed, that was essentially the basis for this Court's decision.

Here, on the other hand, the verdict form was not facially erroneous. As previously discussed, it merely listed all three defendants that remained in the case after the trial judge denied the directed verdict motion. No problem existed until the jury returned a verdict that violated principles of agency law. Thus, the Practice, unlike the plaintiffs in *Johnson*, had no ability to detect or object to any errors until the jury's verdict came back.

A second and related distinguishing factor is that the materials in *Johnson* were, to a large degree, outcome-determinative. By putting the plaintiffs in one category as opposed to another, the materials affected the likelihood of a recovery by those plaintiffs. In a case where placement in the different categories was a crucial factor, the errors in the exhibit and verdict form had a direct and significant impact on the verdict. And again, the plaintiffs had every opportunity to find and correct the errors in those materials before the jury received them. This was why a contemporaneous objection was required.

In the present case, however, nothing about the wording of the verdict form could have influenced the jury or affected the likelihood of any particular outcome. This means

there was no reason for the Practice to object to the verdict form. It was perfectly reasonable for the Practice (or anyone else) to view the verdict form as a standard request for findings as to the named agents and their principal. Indeed, had the jury found against Drs. Hilton and/or Benson and against the Practice, the current issue would not have arisen. Similarly, if the jury had found in favor of the Practice after clearing the two doctors, no problems would have existed. This demonstrates that the verdict form itself was neither erroneous nor outcome-determinative, and it distinguishes the verdict form from the materials at issue in *Johnson*. Consequently, *Johnson* is not controlling here, and it does not support Jamison's position.

Having unsuccessfully moved for a directed verdict on liability, the Practice had no reason and no obligation to object to the verdict form. The use of that form (as opposed to some differently worded form) was not the error that the Practice now challenges. Rather, the error was not correcting the jury's unsupported and legally inconsistent verdict. For this reason, the Practice did not waive any of its arguments on appeal, and the second argument in the Respondent's Brief must fail.

III. Jamison's medical experts did not establish a causal link between the alleged breaches of the standard of care and the baby's death.

As noted in the Respondent's Brief, Jamison's primary expert claimed employees of the Practice other than Drs. Hilton and Benson breached the applicable standards of care in their treatment of her. Specifically, the expert said Dr. Miller should have ordered certain medical tests on August 25, 2008, and he also said employees of the Practice did not ensure that Jamison received timely care on September 5, 2008. What the expert did not do, however, was establish a causal link between those alleged negligent acts and Jamison's damages (*i.e.* the death of the baby). The Practice fully discussed the

significance of that failure of proof in its Appellant's Brief, and for the sake of brevity it will not repeat that full argument here. Nevertheless, the Practice will respond to the few substantive arguments in Jamison's brief below.

Jamison cites two passages in which she suggests her main expert (Dr. Phillips) testified the alleged negligence of employees other than Drs. Hilton and Benson caused or contributed to the baby's death. [See Respondent's Brief, pp. 7-8.] Upon examination, those passages do not meet the standards for establishing causation by expert testimony. The expert expressed at most only a general opinion without any explanation or support, and that was not sufficient under South Carolina law. Therefore, the passages cited in the Respondent's Brief support neither the verdict against the Practice nor Jamison's position on appeal.

Jamison first cites the expert's answer to a question about whether Dr. Miller caused the baby's death by not ordering additional medical tests when he saw Jamison on August 25, 2008. The relevant part of the question and the entire answer were as follows:

Q: ... you agree that Dr. Miller did not cause Ms. Jamison's baby to die. True?

A: Not directly, but if Dr. Miller ordered a non-stress biophysical profile on the 25th or a week later, certainly that contributed to the fetal demise.

[R. p. 239, lines 4-8.]⁴ The expert never elaborated on that answer or explained how the tests Dr. Miller did not order would (or even could) have saved the baby's life. He could not even specify what, if anything, those tests would have revealed. Those important questions remained unanswered throughout the trial.

⁴ As discussed in the Appellant's Brief, the expert tempered that statement a moment later by agreeing with his previous deposition testimony that Dr. Miller had not caused the baby's death. [R. p. 239, lines 9-16.]

The same flaw exists with regard to Dr. Phillips' testimony about the delay in conducting certain medical tests on the morning of September 5, 2008 (*i.e.* the day of the baby's death). Dr. Phillips testified as follows:

Q: ... And Doctor, is it your conclusion to a reasonable degree of medical certainty that the delay was a breach in the standard of care?

A: Yes, it was.

Q: Doctor, do you have a conclusion to a reasonable degree of medical certainty as to whether or not that delay in treatment caused or contributed to Jayden's death, the death of [Jamison's] son?

A: Yes, it did.

[R. p. 195, lines 16-24.] Again, though, the expert failed to give any medical explanation or support for this opinion. He merely agreed with the opinion prompted by the attorney's question and went into no further detail.

The testimony by Dr. Phillips was insufficient to establish causation because he did not explain how or why the alleged acts of negligence resulted in the baby's death, or even how they could have done that. He merely made conclusory statements that they did cause the death. That tactic failed to satisfy the applicable legal standards. Indeed, South Carolina's courts have recently expressed criticism and disapproval of that kind of self-supporting, "ipse dixit" opinion. For example, in *Watson v. Ford Motor Co.*, Justice Pleicones stated that expert testimony is inadequate when it lacks any support other than the opinion itself. 389 S.C. 434, 457-58, 699 S.E.2d 169, 181 (2010) (Pleicones, J., concurring in part) (citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). This is exactly the kind of opinion that Dr. Phillips offered, and it could not serve as a legitimate basis for any finding that negligence by the Practice's other employees caused

the baby's death.⁵ Dr. Phillips' stated opinion was not enough. He needed some medical science to bolster and explain that opinion, and he never provided any.

Jamison attempts to remedy this shortcoming by citing testimony from one of her other experts, Dr. Karotkin. In the cited passage, Dr. Karotkin expressed an opinion that the baby would have survived if a C-section had been performed between 11:00 am and 11:45 am on September 5, 2008. [R. p. 143, lines 5-11.] He also stated, in very general terms, the reason for that opinion. [R. p. 143, line 12 – p. 144, line 5.] The gist of that explanation was that he believed the baby was still alive during at least some of that timespan. However, Dr. Karotkin never took the critical "next step" of relating the generalities from the "body of literature"⁶ to the specifics of this case, or explaining exactly why he believed those generalities applied. Dr. Karotkin merely stated that fetal heartbeats "tend" to slow gradually rather than suddenly, thus leaving time for medical intervention. [R. p. 143, lines 16-22.]

The problem with Dr. Karotkin's testimony (and indeed, largely the problem with Jamison's entire case) is that he could not say what caused the baby's death. This is significant because it reveals the speculative nature of his opinion that faster action on September 5, 2008, would have saved the baby. Without a known (or at least highly suspected) cause of death, neither Dr. Karotkin nor any other medical expert could truly say that an emergency C-section performed before 11:45 am would have prevented the

⁵ In addition, even if Dr. Phillips' testimony had otherwise been adequate with regard to causation, he did not comply with the "most probably" rule under South Carolina law. [See Appellant's Brief, pp. 14-19.]

⁶ This is the term Dr. Karotkin used when giving his purported explanation. He did not specify what "literature" he was referring to, or whether it was generally accepted in the relevant medical community. This vague reference was not fundamentally different than Dr. Phillips' ipse dixit opinion.

death. While that outcome might have been possible, it was equally possible that the baby died for reasons that no medical intervention would have stopped. The absence of a cause of death made it impossible for anyone to say that one of those possible outcomes was more likely than the other. Under those circumstances, Jamison's case failed. *See generally Anderson v. Green Bull, Inc.*, 322 S.C. 268, 272, 471 S.E.2d 708, 711 (Ct. App. 1995) ("where the cause of a plaintiff's injuries may be as reasonably attributed to an act for which the defendant is not liable as to one for which it is liable, the plaintiff has not met his burden of proof"). Therefore, Dr. Karotkin's purported opinion as to proximate cause was inherently speculative and could not serve as the basis for a verdict against the Practice.

Jamison has not cited any testimony or authorities to overcome the absence of a cause of death. She did not present any evidence showing the cause of death at trial, and she still cannot make that showing in this appeal. There is simply no expert testimony or other evidence in the record showing that any negligence by employees of the Practice other than Drs. Hilton and Benson caused Jamison's baby to die. All of the opinions Jamison relies on for that point are inherently speculative and, thus insufficient to support her claims. This was the flaw in her case at trial, and it remains the reason why the verdict against the Practice cannot stand.

Granted, this might have been a heavy burden for Jamison to carry in this case, but that fact does not justify a verdict against the Practice based on the current record. The law does not impose strict liability on medical professionals. Rather, the law requires plaintiffs asserting medical malpractice claims to satisfy a heightened standard to prove that the medical professionals' alleged negligence proximately caused the damages

being claimed. This requirement prevents doctors from becoming insurers of good results for their patients in all circumstances. It also protects doctors in cases like this one, where a tragic event occurred for reasons that remain a mystery even now, almost six years after the fact. The trial judge erred in failing to apply that standard to correct the jury's legally erroneous verdict, and this Court should reverse.

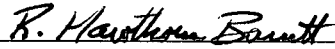
CONCLUSION

The jury was clearly sympathetic to Jamison, who experienced an undeniable tragedy. While that sympathy is understandable, it was not a sufficient basis for a verdict against the Practice in the absence of sufficient causation evidence. Jamison was required to prove by expert testimony that negligence by the Practice's employees proximately caused the baby's death, and she failed to meet that burden. As a result of that absence of proof, the Practice was entitled to judgment as a matter of law. The trial judge erred in failing to grant that relief after seeing the jury's verdict, especially in light of the defense verdicts in favor of the only employees named as defendants.

The Practice properly preserved this issue for appellate review during and after the trial, and it did not waive any challenges to the jury's verdict. Jamison's arguments to the contrary should not distract this Court from examining the record and discovering the lack of sufficient causation evidence. Accordingly, the Court should reach the merits and correct the trial judge's error.

Therefore, based on the arguments and authorities cited above and in the Appellant's Brief, this Court should reverse the verdict against the Practice and remand with instructions for the trial court to enter judgment in the Practice's favor.

Respectfully submitted,



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RULE 211(b), SCACR, CERTIFICATION

The undersigned, an attorney in this matter for the Appellant, certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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