THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LAURENS COUNTY

Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Trial Case No. 2011-CP-30-1137

Appellate Case No. 2014-002509

RECEIVED
JUL 06 2015
SC Court of Appeals

Pamela Neighbors and Carroll Neighbors.....Respondents

v.

Byron A. Brown, MD and
Laurens County Obstetrics and Gynecology, LLC .....Appellants

INITIAL BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is a medical negligence action for damages arising out of negligence of Byron A. Brown, MD in the performance of female surgery on Pamela Neighbors at Laurens Hospital on November 24, 2009. Mrs. Neighbors incurred numerous complications from the surgery. The lawsuit resulted in a jury verdict of $2,450,000 for Pamela Neighbors and $10,000 for her husband, Carroll Neighbors. After adjustments for the cap on noneconomic damages and prejudgment interest, judgment was entered for Pamela Neighbors in the amount of $1,115,464.35 and Carroll Neighbors in the amount of $10,000. (Verdict and Judgment)

II. FACTUAL BACKGROUND

A. Byron A. Brown, MD Negligence – Deviations from the Standard of Care

Elizabeth Mueller, MD, a board-certified physician in female pelvic medicine and reconstructive surgery and the medical/fellowship director of the division of female pelvic medicine and reconstructive surgery at Loyola University Medical Center in Chicago, Illinois, testified on behalf of Mr. and Mrs. Neighbors. The testimony concerning the background of Dr. Mueller demonstrates that she is imminently qualified. (Tr. page 100, l 11 to page 104, l 8)

Dr. Mueller testified that Dr. Brown was negligent and deviated from the standard of care in several respects:

1. the surgery was not necessary (Tr. Page 107, l 13 to page 119, l 22);

2. the failure of Dr. Brown to obtain consent for implantation of synthetic mesh and the failure to inform Mrs. Neighbors of the risks, benefits, or alternative treatments to synthetic mesh (Tr. Page 121, l 15 to page 126, l, 18);

3. the implantation of the bladder sling was not indicated, was a deviation from the standard of care, and constituted negligence on the part of Dr. Brown (Tr. Page 126, l 19 to page 129, l 4); and

4. the failure of Dr. Brown to address the leaking urine from the vagina of Mrs. Neighbors during the six days following surgery (Tr. page 129, l 10 to page 133, l 8).

Donald Ostergard, MD, a gynecologist with a subspecialty of urogynecology, was teaching interns, residents, and fellows in urogynecology at Harber, USC Medical Center in Torrance, California, at the time of trial. (Tr. page 192, l 23 to page 193, l 10). Dr. Ostergard is one of the leading experts on the

use of mesh implantation and is also imminently qualified in his field. (Tr. page 193, l 11 to page 196, l 2).

Dr. Ostergard testified that Dr. Brown was negligent and deviated from the standard of care in several respects:

1. the surgery performed by Dr. Brown was unnecessary (Tr. page 197, l 20 to page 199, l 23);

2. the surgical procedures performed by Dr. Brown were below the standard of care (Tr. page 199, l 24 to page 200, l 4);

3. the implantation of synthetic mesh by Dr. Brown was not indicated and was a deviation from the standard of care (Tr. page 200, ll 9-14);

4. the failure of Dr. Brown to obtain consent for implantation of synthetic mesh and the failure to inform Mrs. Neighbors of the risks, benefits, or alternative treatments to synthetic mesh (Tr. page 200, l 15 to page 205, l 1; page 205, l 17 to page 206, l 24);

5. the surgical technique employed by Dr. Brown did not meet the standard of care (Tr. page 206, l 25 to page 207, l 23; page 211, l 16 to page 212, l 6);

6. the implantation of the bladder sling was not necessary nor did Dr. Brown obtain an appropriate informed consent to implant the sling (Tr. page 207, l 24 to page 210, l 19);

7. the removal of the ovaries of Mrs. Neighbors by Dr. Brown was unnecessary and a deviation from the standard of care (Tr. page 213, l 7 to page 215, l 2); and

8. the failure by Dr. Brown to repair the hole that was causing the leaking urine was a deviation from the standard of care (Tr. page 215, l 3 to page 219, l 15).

B. Expert Opinions Given by Dr. Brown

The videotape deposition of Byron A. Brown, MD was taken by counsel for Mr. and Mrs. Neighbors on December 10, 2012. (Court's Exhibit No. 3 ID).

Dr. Brown did not attend the trial and his videotape deposition was played to the jury by the defense except for a few excerpts. During the deposition, Dr. Brown issued a number of opinions on the standard of care, surgical techniques he used, and causation of the injuries to Mrs. Neighbors. Some of the opinions are as follows:

1. the diagnosis of Mrs. Neighbors before surgery was ovarian cyst, pain in location of ovaries, and no diagnosis of endometriosis (Brown Depo Tr. page 53, ll 10-13);

2. the treatment options were discussed and explained to Mrs. Neighbors by Dr. Brown (Brown Depo Tr. page 87, ll 23-25);

3. the benefits of surgery would correct retention problems, eliminate urinary tract infections and expedite the treatment (Brown Depo Tr. page 89, ll 14-19; Brown Depo Tr. page 90, ll 9-129-12);

4. the urodynamic testing was not necessary because there was an obvious cystocele and a kinked urethra (Brown Depo Tr. page 90, ll 5-6);

5. the pain experienced by Mrs. Neighbors and the urinary tract infections could have been caused by the cystocele (Brown Depo Tr. page 91, ll 10-18);

6. the rectocele could cause a potential problem of constipation which may end up causing bowel problems (Brown Depo Tr. page 92, ll 7-10);

7. the anterior portion of the Myopathy graft was properly stitched since it does not have arms (Brown Depo Tr. page 113, ll 3-5);

8. the mesh was put to the appropriate tension by a hemostat or some other instrument between the bladder neck and graft (Brown Depo Tr. page 113, ll 11-25);

9. a leak going between the bladder through the vaginal wall and urine entering the vagina could have potentially shown up in the packing by the fluid being blue (Brown Depo Tr. page 200, ll 2-6);

10. the synthetic mesh used in Mrs. Neighbors was not defective (Brown Depo Tr. pages 94-101);

11. the FDA Public Health Notification (Exhibit 10) was specific to the Bard products and did not apply across the entire mesh field or to mesh used in Mrs. Neighbors (Brown Depo Tr. pages 75-85);

12. Dr. Brown discussed the risks, benefits, and alternative treatments for implantation of mesh with Mrs. Neighbors in compliance with standard of care (Brown Depo Tr. pages 78-80);

13. Mrs. Neighbors had significant cystocele with fairly mobile bladder neck-type issue that was probably kinking the urethra and likely that was cause of retention (Brown Depo Tr. page 20, ll 2-12);

14. Mrs. Neighbors had a 3 level on the Baden-Walker scale because there was a significant amount of prolapse that was kinking the urethra so Mrs. Neighbors could not urinate (Brown Depo Tr. page 35, l 23 to page 36, l 20); and

15. the removal of the ovaries of Mrs. Neighbors was appropriate because of the presence of an ovarian cyst, pain level she was experiencing, and hormone replacement therapy (Brown Depo Tr. pages 48-56).

The opinions given by Dr. Brown involved scientific, technical, or other specialized knowledge that are beyond the realm of common experience and which require special skill and knowledge of an expert witness (*Rule 702 SCRE*). The defense presented the testimony of Dr. Brown giving these and other opinions that require specialized knowledge; however, the defense argues that Dr. Brown "testified as a fact witness, not an expert witness". (Initial Brief of Appellants page 12). The general rule is that expert testimony is required in a malpractice case to show that the defendant failed to conform to the regional standard, which is, such reasonable and ordinary knowledge, skill and diligence as physicians in similar neighborhoods and surroundings ordinarily use under like circumstances. *Green v. Lilliewood*, 272 S.C. 186, 192 (1978), 249 S.E.2d 910, 913 (SC 1978). Likewise, the opinions that the physician conformed to the

required standard of care are a matter of specialized knowledge that require expert testimony.

There is no exception in *Rule 702* to allow a witness or medical doctor to render opinions based on specialized knowledge without being treated as an expert witness. (See *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (S.C. 1986) where the position of Dr. Epting that she was not testifying as an expert, but as a fact witness, was rejected by the court when she testified and gave medical opinions. The court held that cross-examination on issues relating to her credibility is proper.)

In summary, the defense presented the testimony of Dr. Brown which included numerous opinions of a specialized knowledge that required expert testimony under *Rule 702, SCRE*. Further, there is no exception for a physician issuing opinions of a specialized knowledge regarding treatment the physician rendered without being qualified as an expert witness.

III. CROSS-EXAMINATION ALLOWED OF EXPERT'S LIMITED KNOWLEDGE, EXPERIENCE, SKILL AND QUALIFICATIONS

The expert's testimony and opinions can be properly attacked by impeaching the expert on his limited knowledge, experience, skill and qualifications in the area about which he has testified. Any defect in the amount and quality of education or experience goes to the weight to be accorded to the expert's testimony but not to admissibility. *Fields v. Regional Medical Center Orangeburg*, 354 S.C. 445, 452, 581 S.E.2d 489, 493 (Ct. App. 2013).

In the case at bar, Dr. Brown issued expert opinions on standard of care, causation and scientific/medical issues in his videotape deposition; but, he did

not attend trial. In his deposition, Dr. Brown was questioned about his summary suspension of surgical privileges by Laurens Hospital on January 8, 2010. (Brown Depo Tr. page 166, l 10 to page 174, l 11). Counsel for Dr. Brown acknowledged that the results of the change in privileges was discoverable as follows:

> ..... I think if there is a material change to your privileges, the results .... Whether it has to do with the peer review or is just for any other matter that isn't peer review, is disclosable .... and I think you have to answer that question.
> (Brown Depo Tr. page 166, ll 10-25)

Dr. Brown was not completely forthcoming in his deposition response to the privileges that were suspended. (Brown Depo Tr. page 167, l 2 to page 168, l 12). Subsequently, Dr. Brown voluntarily agreed to surrender almost all of his clinical privileges in the Agreement with Laurens Hospital dated February 17, 2010. (Exhibit 17).

This Agreement references the summary suspension of Dr. Brown's clinical privileges except for C-Sections, Post-Partum Tubal Ligation, Endometrial Ablations and Dilations and Curettages. The Agreement was heavily redacted by the trial judge. (Exhibit 17 and Court Exhibit 10 ID showing the language redacted).

Dr. Brown was further questioned about his voluntary resignation of clinical privileges in the Addendum dated May 21, 2010. Dr. Brown again was not completely forthcoming in his description of the clinical privileges that were surrendered. (Exhibit 18 [redacted Addendum] and Court Exhibit 11 ID [un-redacted Addendum]).

Both the Agreement and the Addendum contained significant suspensions of clinical privileges and subsequent voluntary suspension of clinical privileges which were not disclosed in the deposition testimony of Dr. Brown. Further, included in the clinical privileges that were relinquished were the clinical privileges for the surgeries performed on Mrs. Neighbors, i.e., laparoscopic assisted vaginal hysterectomy, A&P repair, and repair of rectocele. This relinquishment of clinical privileges occurred less than a month after the surgery performed on Mrs. Neighbors by Dr. Brown on November 24, 2009. (See Exhibit 36 dated 12/14/09 marked for ID, but not introduced).

The reasons given by the trial judge for admitting the redacted Exhibit 17 and Exhibit 18 were as follows:

> MR. WRIGHT: ... We just want to get the information to the jury that privileges of Dr. Brown were summarily suspended and that he is finally, has no privileges at the hospital or any other hospital in America.
>
> THE COURT: And that is not an unreasonable request for the reasons that are on the record. This goes directly to his competency to offer the opinions in the videotape deposition that he offers. It goes directly to that, directly to the question of his qualifications and the fact that that he had privileges suspended. This is not a minor thing. This is a substantial thing to happen to a doctor. I will be allowing 17 and 18 into evidence for those reasons.
>
> (Tr. page 403, ll 5-17)

The Agreement entered into by Dr. Brown and Laurens Hospital substantially limited the clinical privileges of Dr. Brown. These clinical privileges included the same surgeries that Dr. Brown performed on Mrs. Neighbors less than a month prior to the clinical privileges being suspended.

The videotape deposition testimony of Dr. Brown did not fully disclose the extent of the privileges suspended and relinquished. Since Dr. Brown did not attend trial, then it was necessary to introduce Exhibit 17 and Exhibit 18 which set forth the clinical privileges suspended.

The South Carolina Supreme Court in *McGee v. Bruce Hosp. System*, 312 S.C. 58, 63, 439 S.E. 2d 257, 260 (1993) held as follows:

> Furthermore, we conclude that the privilege provided by section 40-71-20 protects documents acquired by the committee as part of its decision-making process. However, we find that the outcome of the decision-making process is not protected. Permitting discovery of the effect of the committee proceedings does not inhibit open discussion. (citations omitted). In our view, the confidentiality statute was intended to protect the review process, but not restrict the disclosure of the result of the process. (citations omitted). Accordingly, the plaintiff is entitled to a listing of clinical privileges either granted or denied by Bruce Hospital.

Thus, evidence of the suspension and relinquishment of clinical privileges of Dr. Brown is admissible evidence.

IV. THE CONFIDENTIALITY STATUTE DOES NOT APPLY TO EXHIBIT 17 AND EXHIBIT 18

Early on in discovery, Judge Addy issued a discovery order dated December 31, 2012. Among other things, the order addressed the South Carolina Confidentiality Statute, *S.C. Code Ann. § 40-71-10 to 30 (1976)*, and the requirement that if a party asserts a claim of confidentiality of any document under the statute, then the party must file the document with the court under seal along with filing and serving a privilege log. The Order also addressed the Consent Confidentiality Order filed in the Richland County lawsuit between Dr. Brown and Laurens County Hospital, et al. (Order of Judge Addy 12/31/12)

The counsel for Dr. Brown in the Richland County lawsuit introduced numerous documents during depositions. Additionally, documents were filed with the Clerk of Court for Richland County as attachments to motions and briefs that were not marked confidential.

Dr. Brown did not identify any documents produced or received by Dr. Brown in discovery in the Richland County lawsuit as requested in Interrogatory 51, nor produce any documents as requested in Request for Production 22

Additionally, Dr. Brown did not file any documents with the court under seal nor file and serve a privilege log.

Since the records of the Clerk of Court of Richland County are public records, counsel for Neighbors obtained numerous documents from the Clerk of Court including Exhibit 17 and Exhibit 18. During discovery in this case, counsel for Dr. Brown objected to the use of documents obtained from the public records. The objections were heard by Judge Addy who issued several pretrial orders on the use of these documents.

The pretrial Order dated September 6, 2013 held, in part, as follows:

> Concerning the Peer Review documents obtained by Plaintiff, it appears that the documents were obtained by reviewing the file in the Richland County litigation and by other means which are not suspect. The court finds that the witnesses may be questioned concerning these documents during depositions, however, no ruling has been had concerning whether these documents, or any questions related to these documents, may be used at trial or for impeachment. (Order of Judge Addy 9/6/13)

The pretrial Order dated November 17, 2013 held that Plaintiff could use certain documents during depositions although the ruling "is not a final ruling concerning whether said documents would be admissible at trial." The Court set

forth the reasons for permitting the documents to be used during discovery as follows:

> First, the Peer Review Statute provides that documents generated during the course of peer review are "not subject to discovery, subpoena, or introduction into evidence in any civil case ..." This statute, however, governs or restricts how the documents can be obtained and used. In this case, (the designated documents) were obtained by Plaintiff through the public records in Richland County and were not subject to any subpoena or discovery in the present case. Plaintiff and Defendants in the Richland Litigation had obtained a confidentiality order after the litigation was concluded. Having made their way to the clerk of court's file, and no attempt at sealing the file having taken place post-litigation, Plaintiff was entitled to obtain these documents from a source which is, by definition, open and available to any member of the public. Accordingly, the manner in which Plaintiff obtained the records is apparently legitimate and was not subject to "discovery or subpoena" in the present case. (Order of Judge Addy 11/17/13)

The trial judge additionally ruled that Exhibit 17 and Exhibit 18 were not confidential because the documents were filed in the Office of the Clerk of Court in the Richland County litigation brought by Dr. Brown. The ruling of the trial judge on this issue was as follows:

> THE COURT: It may be confidential but the confidentiality, like I said, he has got these documents fair and square. He got them fair and square. They may have been confidential, they were confidential. They were under a confidential order in Richland County. Somebody dropped the ball on that one because a whole bunch of stuff that should have been confidential ain't anymore. So, I can't help that. I am not unringing that bell, I am not going to even try to unring the bell.
>
> (Tr. page 404, ll 3-10)

Also, Exhibit 17 and Exhibit 18 were documents executed by Dr. Brown; thus, Dr. Brown was an original source. *S.C. Code Ann. § 40-71-20* provides as follows:

> Information, documents, or records which are available from original sources are not immune from discovery or use in a civil proceeding merely because they were presented during the committee proceedings.

For the foregoing reasons, Exhibit 17 and Exhibit 18 were not subject to the confidentiality statute.

V. THE ADMISSION OF EXHIBIT 17 AND EXHIBIT 18 WERE PROPER UNDER *RULE 402 AND RULE 403, SCRE*

Counsel for Dr. Brown argues that "the Agreement and Addendum were irrelevant and should have been excluded under Rule 402." (Initial Brief of Appellants page 11). However, as noted earlier, the summary suspension by Laurens Hospital of surgical privileges of Dr. Brown which included the same surgeries performed on Mrs. Neighbors less than a month earlier is relevant to the experience and skill to perform the surgery and relevant to the credibility of Dr. Brown's opinions he gave on surgical technique, causation, and other medical issues.

Counsel for Dr. Brown also referenced a letter from Dr. Stribling which is alleged to have initiated a peer review process in December 2009. (Initial Brief of Appellants page 11). Not only is there no evidence that the letter of Dr. Stribling initiated a peer review process; but, even more important is that the letter was not introduced into evidence so there could be no apparent error. (Exhibit 36 ID).

The trial judge went through an extensive *Rule 403, SCRE* evaluation whether the probative value of Exhibit 17 and Exhibit 18 was substantially outweighed by the danger of unfair prejudice. A comparison of Exhibit 17 and Exhibit 18 with Court's Exhibit 10 (Exhibit 17) and Court's Exhibit 11 (Exhibit 18)

indicates the degree of evaluation by the trial judge. Also, the trial judge specified the basis for this decision as follows:

> THE COURT: And I have reviewed his deposition, Mr. Snyder. He talks at length about the way the surgery was performed, he offered his opinion testimony and then there was places where he explains collateral consequences of the surgery and possible issues that could arise as a result of the surgery. It seemed relevant to his ability to offer those opinions. As far as the document relating to his credentials being suspended and the fact that he was not allowed to perform certain services at Laurens County Healthcare System a few weeks after this particular surgery was performed. How is that not relevant to his qualifications as a physician and the testimony he gives by virtue of the videotape deposition?
>
> (Tr. page 400, l 24 to page 401, l 11)

Additionally, the trial judge either did not admit the following exhibits or the exhibits were withdrawn by counsel for the plaintiffs:

> Exhibits 19, 21, 22, 23, 36, 43, 47, 48, 49, 54, 55, 58, and 77 (marked for identification
>
> (Tr. page 413, ll 13-21)

The respondents submit that a fair reading of the exhibits that were not introduced and the redacted portions of Exhibit 17 and Exhibit 18 is that the trial judge performed a proper 403 analysis.

The recent case of *Johnson v. Sam English Grading, Inc.* (2015 WL 2088824) contains an excellent statement on the trial court's discretion for admission of evidence, as follows:

> "The admission of evidence is within the trial court's discretion." (citation omitted). "The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." (citation omitted) "The trial court has broad discretion in the admission or rejection of evidence and will not be overturned unless it abuses that discretion." (citation omitted). "An abuse of discretion occurs when the ruling is based

on an error of law or factual conclusion that is without evidentiary support." (citation omitted). "To warrant reversal based on admission of evidence, the appellant must show both error and resulting prejudice." (citations omitted).

The trial court has wide discretion in determining the relevancy of evidence. (citation omitted). "Evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue." (citation omitted). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." (citation omitted).

VI. CONCLUSION

It is submitted that the un-redacted portions of Exhibit 17 and Exhibit 18 are relevant under *Rule 402, SCRE* and that the trial judge properly performed a *Rule 403, SCRE* analysis for the reasons set forth. Further, the trial judge did not abuse his discretion in the admission of redacted Exhibit 17 and Exhibit 18 into evidence nor did such admission cause any prejudice to Dr. Brown.

Accordingly, Respondents request that the judgment of the court be AFFIRMED.

Respectfully submitted,

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July 1, 2015

THE STATE OF SOUTH CAROLINA

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents on Byron A. Brown, MD and Laurens County Obstetrics and Gynecology, LLC, a South Carolina Limited Liability Corporation by depositing a copy in the United States Mail, postage prepaid, on July 1, 2015, addressed to their attorney of record, Collie W. "Tripp" Lehn, Jr., Davis, Snyder & Williford, PA, #5 Hawthorne Park Court, Greenville, SC 29615.

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The Honorable Jenny Abbot Kitchings
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Re: Pamela Neighbors v. Byron A. Brown, MD
Appellate Case No. 2014-002509

Dear Madam Clerk:

Enclosed for filing is the Initial Brief of Respondents with Proof of Service.

Also, enclosed for filing is the Designation of Matter to be Included in the Record on Appeal with Proof of Service.

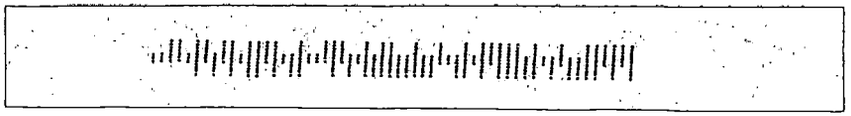
Thank you in advance for your cooperation.

Very truly yours,

McGowan, Hood & Felder, LLC

Joseph G. Wright, III

JGWIII/tda
Enclosures as Noted
Cc: Collie W. "Trip" Lehn, Jr., Esq.



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