THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM LAURENS COUNTY COURT OF COMMON PLEAS
Frank R. Addy, Jr., Circuit Court Judge

Civil Action No. 2011-CP-30-1137

Appellate Case No. 2014-002509

Pamela Neighbors and Carroll Neighbors ..... Respondents,

v.

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

REPLY BRIEF OF APPELLANTS

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FACTS

Dr. Brown did not appear at trial. Plaintiffs played a portion of Brown's videotaped discovery deposition for the jury, and the defense in their case played the majority of his deposition.[1] In his deposition, Brown did not testify about his education, training, or qualifications to practice medicine other than to answer questions regarding the status of his medical license and hospital privileges. There was no voir dire, and he was not qualified as an expert witness in any field of medicine. Rather, he testified as a fact witness, an eyewitness. He testified about his treatment of Mrs. Neighbors, his observations, considerations, diagnoses, recommendations, conversations, and surgical procedure.[2]

The defense offered only the expert testimony of Dr. Norman Taylor. Over Plaintiffs' objection, the court qualified Dr. Taylor as an expert in gynecology and gynecologic surgery[3], and he testified that Brown met the standard of care and did not negligently cause injury to Mrs. Neighbors.[4]

ARGUMENT

1. Respondents failed to show that Brown gave expert opinion testimony.

"Where a physician sued for malpractice testifies as an expert, evidence as to his age, practice, and like matters going to his qualifications as an expert is admissible."[5] However, there is no rule in South Carolina which dictates that the testimony of a defendant physician must always be

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[1] Tr. at 270-71, 608-12, ROA __; Court's Ex. 14 (list of deposition excerpts), ROA ___.

[2] Court's Ex. 8 (Brown Dep.), ROA __; Court's Ex.14 (list of excerpts), ROA __.

[3] Tr. at 442, ROA __.

[4] *Id.* at 446-47, 529-31, ROA __.

[5] *Ward v. Epting*, 290 S.C. 547, 556, 351 S.E.2d 867, 872 (Ct. App. 1986).

considered expert opinion testimony under Rule 702. A defendant physician may testify only to the facts known to him or her as an eyewitness and elect not to render expert opinions. That is what Brown did here.

Respondents wrongly contend that Brown gave numerous opinions on the standard of care and causation.[6] Respondents list 15 such opinions but misstate and mischaracterize Brown's testimony using words such as "not necessary", "properly", "appropriate", and "in compliance with the standard of care." A fair reading of Brown's testimony reveals that he answered factual questions about what he observed, found, concluded (diagnosed), discussed with Mrs. Neighbors (or generally discussed with patients experiencing similar problems), recommended, and did. In short, he testified to historical facts, not opinions. Below, Appellants briefly show that the 15 supposed opinions enumerated by Respondents (see Resp. Br. at 4-5) were instead statements of fact.

1) When asked whether Mrs. Neighbors had endometriosis (a factual question), Brown answered that he did not diagnose her with endometriosis but rather with ovarian cyst and pain in the area of the ovaries. (Brown Dep. 52:12-13, 53:10-13 (Court's Ex. 8), ROA __.)

2) Brown answered the (factual) question "What did you discuss with Mrs. Neighbors?" by explaining what treatment options he generally would discuss with patients who had presenting problems like those of Mrs. Neighbors. Understandably, he could not recall his exact words to Mrs. Neighbors. (Brown Dep. 87:18-88:1, ROA __.)

3) When asked what he discussed (or would have discussed) with Mrs. Neighbors about the benefits of the surgery he performed, Brown explained the expected benefits, including correction of her urinary tract problems, chiefly urinary retention. (Brown Dep. 88:24-89:19, ROA __.)

4) Brown answered the (factual) question of why he chose not to order any urodynamic testing in her preoperative workup. (Brown Dep. 90:2-13, ROA __.)

5) When asked the (factual) question of what problems were caused by her cystocele, Brown answered that the cystocele "appeared to be causing frequent UTI's and trouble urinating." When asked whether the "pain" Brown had noted in his record was related to the cystocele,

[6] Resp. Br. at 4-5.

he answered that her cystocele is one thing among others (ovarian cyst, uterine prolapse, rectocele) that could have caused the pain. This is more a statement of historical fact (regarding what Brown found when he evaluated Mrs. Neighbors and what he concluded at that time) than opinion. (Brown Dep. 90:14-91:18, ROA __.)

6) Brown answered the (factual) question of what he noted in his records about the problems related to her rectocele. (Brown Dep. 92: 4-12, ROA __.)

7) Brown explained the meaning of a paragraph in his operative note referring to the placement of the Mpathy graft (mesh). (Brown Dep. 112:12-114:2, ROA __.)

8) Same as 7 above. Brown explained the meaning of a paragraph in his operative note referring to the placement of the Mpathy graft (mesh). (Brown Dep. 112:12-114:2, ROA __.)

9) Brown admitted the (factual) possibility that, had Mrs. Neighbors developed a vesicovaginal fistula (leak between bladder and vaginal wall), the blue dye he injected into her bladder during the surgery could have leaked and appeared on the vaginal packing that was placed at the conclusion of the surgery and removed before she was discharged from the hospital. (Brown Dep. 198:25-200:6, ROA __.)

10) Plaintiffs' counsel asked Brown whether he had an opinion whether or not the mesh that he used in Mrs. Neighbors' case was defective. Brown was confused by the question and repeatedly stated and explained that at the time of the surgery in 2009 *he did not know of any defect* in the mesh. He testified that to his knowledge, it was not defective. He also testified that since 2009, it had become known in the medical community that mesh-related complications were more common than previously thought, and that he no longer used mesh. (Brown Dep. 92:13-93:18, 94:14-100:20, ROA __.)

11) Brown testified that *he understood* the FDA Public Health Notification applied only to mesh manufactured by Bard. (Brown Dep. 75:22-76:25, ROA __ ("...But at the time my understanding was this was a particular reaction to a – a specific product.").)

12) Brown could not independently recall what risks he discussed with Mrs. Neighbors before her surgery, but he testified about what risks he generally discussed with patients undergoing the same procedures. He did *not* render an expert opinion that his disclosures met the standard of care. (Brown Dep. 77:8-80:2, ROA __.)

13) Brown answered the (factual) question "What were your recommendations?" by reviewing the problems he noted on physical exam, including "cystocele with a fairly mobile bladder neck", rectocele, enlarged and prolapsing uterus, and some pain and left adnexal mass. He simply testified to what he observed. His answer was interrupted by another question. (Brown Dep. 20:2-12, ROA __.)

14) Brown testified that, based on his exam findings, her cystocele (or prolapse) was, by definition (not opinion), a "grade 2" on the Baden-Walker scale (or may have been a grade 3

had she been examined in a standing position, due to the effect of gravity). (Brown Dep. 35:19-36:20, ROA __.) Again, this testimony concerns his objective findings and how those findings are characterized medically, and does not constitute an expert opinion about standard of care or causation.

15) When he was asked the (factual) question of what he discussed with Mrs. Neighbors regarding the removal of her ovaries, Brown answered that he could not recall verbatim what he said in that conversation but that it was his general practice to discuss with patients who had an ovarian cyst the possibilities of removing the cyst or removing the ovary, and the possibility of hormone replacement. He did *not* give an expert opinion that what he said was "appropriate" or complied with the standard of care. (Brown Dep. 47:24-49:7, ROA __.) Brown explained the reasons why he recommended that her ovaries be removed, but did *not* give an expert opinion that what he recommended or did was "appropriate" or complied with the standard of care. (Brown Dep. 49:8-54:8, ROA __.)

Citing *Ward v. Epting*, Plaintiffs argued below that the agreements between Brown and the hospital (Pl. Ex. 17 and Pl. Ex. 18), which both stipulated that Brown voluntarily resigned certain surgical privileges, were relevant to the issue of Brown's "credibility" as an expert witness.[7] Judge Addy ruled that the agreements were relevant to the issue of Brown's "qualifications" or "competency" (not credibility) to render expert opinion testimony.[8] As Appellants have shown above, Brown gave only factual testimony, not expert opinions, hence the trial court erred in ruling that he gave expert opinions and was thus subject to cross-examination on his "qualifications" to give such opinions.

In *Ward*, Dr. Epting testified about her qualifications as an anesthesiologist on direct examination, and she testified "as to routine surgical and recovery room procedures in addition to her own actions in the circumstances of this case."[9] She also, on direct examination, "gave her opinion to a reasonable degree of medical certainty as to how air got into Mrs. Ward's stomach, and

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[7] Tr. at 45-46, 400, ROA __.

[8] Tr. at 400-03, ROA __.

[9] 290 S.C. at 556, 351 S.E.2d at 872.

when the tube moved into the esophagus."[10] On cross-examination, she opined that "Mrs. Ward had a bronchospasm in the lower part of the lungs."[11] *Ward* is readily distinguishable from this case, where Brown gave no such standard of care or causation opinions.

2. Plaintiffs' exhibits 17 and 18 were not relevant to Brown's experience and skill to perform the surgery and would be inadmissible under Rule 404, SCRE.

Respondents now argue—but did not argue in the trial court below—that Plaintiffs' exhibits 17 and 18 (in particular, their references to the "summary suspension" of Brown's privileges) were "relevant to [Brown's] experience and skill to perform the surgery."[12] In essence, Respondents argue that the hospital's temporary suspension of Brown's privileges approximately one month after Mrs. Neighbors' surgery indicates that Brown did not possess and exercise the degree of skill required to perform surgery on Mrs. Neighbors—in other words, that he was negligent on the occasion when he performed surgery on Mrs. Neighbors.

The problem with this argument (other than that it was not raised below) is that it runs afoul of Rule 404(a) and (b), SCRE. Rule 404(a) precludes Respondents from introducing evidence that Brown was an incompetent surgeon to prove that he was negligent in performing Mrs. Neighbors' surgery, and Rule 404(b) precludes them from introducing evidence of other surgical complications (which led to the temporary suspension of his privileges) to prove that he was negligent on this occasion. Respondents' argument reveals with remarkable transparency that they were not content to try this case on its own merits but rather were intent on introducing every shred of evidence they

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[10] *Id.*

[11] *Id.*

[12] Resp. Br. at 12.

could muster to show that Brown was generally an incompetent surgeon and could not possibly have met the standard of care on the occasion when he performed Mrs. Neighbors' surgery.

3. **Regardless of the fact that Respondents obtained a copy of the agreements from a source other than a hospital peer review committee, the agreements fall within the ambit of section 40-71-20, which bars their admission into evidence.**

The "proceedings and all data and information acquired by" a hospital peer review committee are "confidential" and "not subject to discovery, subpoena, or *introduction into evidence in any civil action* except upon appeal from the committee action."[13] All documents generated or acquired by a hospital peer review committee are protected under this law.[14]

Judge Addy essentially ruled that because Respondents obtained a copy of the agreements (Plaintiffs' exhibits 17 and 18) by means other than discovery from or subpoena to the hospital or peer review committee, section 40-71-20 did not apply and did not bar their admission into evidence. Yet the plain language of the statute contradicts that conclusion. No matter how these documents were obtained or discovered, because they were documents generated by the Medical Executive Committee (MEC) at Laurens Hospital, they were "not subject to...introduction into evidence in any civil action..."

CONCLUSION

Because the trial court erred in admitting the two agreements and this error deprived Defendants of a fair trial, this Court should grant Brown and LCOG a new trial.

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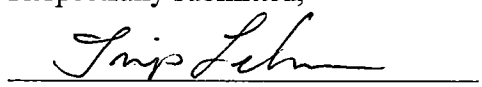
[13] S.C. Code § 40-71-20 (emphasis added). This section applies to hospital peer review proceedings and documents pertaining to incidents predating June 26, 2012, the effective date of 2012 South Carolina Laws Act 275 (H.B. 4008), which amended section 40-71-20 and added section 44-7-392 to govern the hospital peer review process.

[14] *McGee v. Bruce Hospital System*, 312 S.C. 58, 62, 439 S.E.2d 257, 260 (1993).

July 13, 2015

Respectfully submitted,



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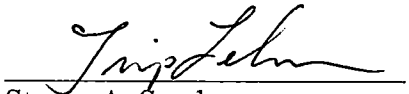
PROOF OF SERVICE

I certify that I have served Appellants' Reply Brief and Designation of Matter to be Included in the Record on Appeal on Pamela and Carroll Neighbors by depositing a copy of same in the United States Mail, postage prepaid, on July 13, 2015, addressed to their attorney of record, Joseph G. Wright, III, Post Office Drawer 1778, Anderson, South Carolina 29622-1778.

July 13, 2015



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July 13, 2015

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Re: Pamela Neighbors v. Byron A. Brown
Civil Action No. 2011-CP-30-1137
Appellate Case No. 2014-002509

Dear Ms. Kitchings:

Enclosed for filing is the original and one copy of the Reply Brief of Appellants, Designation of Matter to be Included in the Record on Appeal, and Proof of Service. Please return a clocked-in copy to me. Thank you for your assistance.

Sincerely,

Trip Lehn

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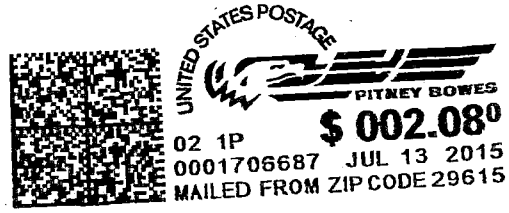

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