

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
CASE NO: 2014-CP-46-00508

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OCT 16 2015

SC Court of Appeals

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CLERK OF COURT
SOUTH CAROLINA

Patricia Craig,)
)
Plaintiff,)

v.)

E. Earl Jenkins, Jr., M.D.,)
also known as Everett Earl Jenkins,)
Jr., M.D., Amisub of South)
Carolina, Inc. d/b/a Piedmont)
Medical Center, and York Pathology)
Associates, LLC,)
Defendants.)

ORDER FOR SUMMARY JUDGMENT

This matter came before me on August 13, 2015, upon the motion of the Defendant Jenkins ("Jenkins") and his medical practice, York Pathology Associates, LLC, ("York") for summary judgment. Representing Dr. Jenkins and York was Kelli L. Sullivan. Plaintiff was represented by Glenn Walters. Defendant Amisub of South Carolina d/b/a/ Piedmont Medical Center ("Amisub") also filed a motion for summary judgment. Amisub was represented by J. Hollis Inabinet.

Based on the briefs of the parties, deposition testimony and exhibits presented, and the arguments of counsel, I find and conclude as follows.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004).

A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. *Anthony v. Padmar, Inc.*, 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992). The party seeking summary judgment has the burden of clearly establishing by the record properly before the court, the absence of a triable issue of fact. *Owens v. Magill*, 308 S.C. 556, 419 S.E.2d 786 (1992).

The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment,

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after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party bears the burden of proof at trial. *Etheredge v. Richland School Dist. I*, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998); *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). In such a situation, there can be no genuine as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Etheredge, supra*.

DISCUSSION

At the outset, the only allegations of negligence made against Amisub are vicarious in nature. Plaintiff attempts to impute the alleged negligence of Jenkins to Amisub, based upon a theory of either apparent agency, or a non-delegable duty. Plaintiff makes no allegations of independent negligence against Amisub. Accordingly, if summary judgment is granted as to Jenkins and York, it must also be granted to Amisub.

This case involves the reading and interpretation by Jenkins of fine needle aspirate cells from a biopsy of Plaintiff's thyroid gland. Jenkins is a board certified pathologist. Jenkins categorized the specimen he analyzed as suspicious for papillary cancer, rating it a "4" on the "Bethesda Scale." A rating of "4" on the Bethesda Scale, according to the affidavit of Jenkins, means that a specimen has a 65-75% chance of being malignant. Based on Jenkins' report, Plaintiff's entire thyroid gland was removed by the operating surgeon. Upon full pathological examination, the thyroid was determined to be benign.

Plaintiff asserts that Jenkins' reading and interpretation of the specimen was incorrect, resulting in the unnecessary removal of Plaintiff's entire thyroid gland. Jenkins' and York's motion asserts that Plaintiff has failed to provide any evidence that Jenkins violated the applicable standard of care in his reading and interpretation of the fine needle aspirate cells from the thyroid biopsy, or that he erroneously interpreted the biopsy.

Plaintiff's claim is based entirely on an affidavit and deposition of Dr. Gabor Kovacs ("Kovacs"), a general surgeon, who is named as Plaintiff's only expert. Kovacs opines that Jenkins must have violated the standard of care because his classification of the lesion as cancerous was not confirmed by the ultimate pathology examination of the entire thyroid gland after removal.

However, in his deposition, Kovacs admitted that he had not reviewed the pathology slides in the case, and that he was unable to disagree with Jenkins' conclusion that the specimen



was suspicious for cancer. Kovacs was not familiar with the Bethesda Scale by which Jenkins classified the biopsy, and could not disagree that the specimen rated a "4" on the scale. He further agrees that the safest course of action for this patient was the removal of her thyroid. Kovacs bases his opinion of negligence on the fact that the pathology examination of the whole thyroid was found it to be benign. He seemingly asserts that since the entire thyroid was benign, then Jenkins' classification that there was a 65-75% chance of cancer must have been incorrect, and that Jenkins' interpretation of the biopsy was in error.

Plaintiffs in medical malpractice actions must provide evidence showing the following: (1) the generally recognized and accepted practices and procedures that would be followed by the average, competent physician in the defendant's field of medicine under the same or similar circumstances; (2) that the defendant departed from the recognized and generally accepted standards; and, (3) that the departure from the recognized practices and procedures proximately cause the Plaintiff's alleged injuries and damages. *Jones v. Doe* 372 S.C. 53, 61, 640 S.E.2d 514, 518 (Ct. App. 2006); and, *David v. McLeod Regl. Med. Ctr.*, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006).

Even if it is assumed for the purposes of this motion that Kovacs is a qualified expert to testify as to the standard of care for pathologists, he did not testify with any specificity as to how, or in what way, Jenkins violated a standard of care, or that he misread the biopsy. He assumes that just because the ultimate pathology examination proved the thyroid to be benign, Jenkins must have been incorrect in his original opinion, based on the aspirate cell biopsy, of a 65-75% chance of cancer. Obviously, if there is a 65-75% chance of cancer, there is, conversely, a 25-35% chance that the lesion is benign. The fact that the removed gland proved to be benign was within the parameters of the rating that Jenkins gave to the specimen he reviewed. Further, Plaintiff has presented no evidence through expert testimony that Jenkins was in error in his reading and interpretation of the cells gathered from the fine needle aspiration.

After reviewing the pleadings, and by admission of Plaintiff's counsel at the hearing, Plaintiff's only cause of action against Amisub is premised on vicarious liability for the actions of Jenkins. A failure of proof as to Jenkins and York Pathology eliminates the basis of any claim against Amisub. Thus, to the extent Defendants Jenkins and York are entitled to summary judgment, Defendant Amisub is as well.

In summary, based on the record presented, there is no genuine issue of fact for trial on the issue of Jenkins' negligence, and all Defendants are entitled to summary judgment.

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Therefore, it is ordered as follows:

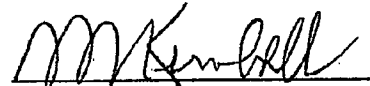
1. The motion of Defendants York Pathology and Earl Jenkins for summary judgment is granted.

2. Defendant Amisub d/b/a/Piedmont Medical Center's motion for summary judgment is granted.

3. Plaintiff's Complaint is dismissed with prejudice.

AND IT IS SO ORDERED.

September 16, 2015



S. Jackson Kimball
Special Circuit Court Judge
York County

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STATE OF SOUTH CAROLINA
 COUNTY OF YORK
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

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CASE NO. 2014 CP-42-00508

OCT 16 2015

Patricia Craig

E. Earl Jenkins, Jr., M.D., et al

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: William U. Gunn and J. Hollis Inabinet

Attorney for : Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE FOR):**
 Affirmed; Reversed; Remanded; Other

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 YORK COUNTY
 SOUTH CAROLINA

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

Per the attached order, summary judgment is granted in favor of the Defendants.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

W. U. Gunn
 Spec. Circuit Court Judge

3063
 Judge Code

9/17/15
 Date

This judgment was entered on September 17, 2015, and a copy mailed first class or placed in the appropriate attorney's box on September 17, 2015, to attorneys of record or to parties (when appearing pro se) as follows:

Glenn Walters Sr. PO Box 1346 Orangeburg, SC 29116-1346

Julius W. McKay II PO Box 7217 Columbia, SC 29202
William U. Gunn PO Box 1897 Spartanburg, SC 29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
