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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

Daniel D. Hall., Circuit Court Judge

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Appellate Case No. 2015-002653

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Johnnie Mae Reed, as the Personal Representative of  
The Estate of Sandra Gilbert,

Appellant,

vs.

CareNet, Inc. of Lancaster and Nimal A. Perera, M.D.

Respondents.

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APPELLANT'S FINAL BRIEF

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## **STATEMENT OF JURISDICTION**

This appeal arises out of an Order of the Circuit Court denying Appellant's Motion for a New Trial. (R. p. 4). The underlying case went to trial and the jury returned a defense verdict for the Respondents on August 27, 2015. (R. p. 214, lines 14-25). The Circuit Court's Order on the Motion for a New Trial was filed on December 8, 2015. (R. p. 4). This Court has jurisdiction to entertain this appeal and correct errors of law pursuant to S.C. Code Ann. § 14-3-330(2)(b).

## **STATEMENT OF ISSUES ON APPEAL**

- I. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL IN THIS MEDICAL MALPRACTICE ACTION ON THE BASIS THAT THE TRIAL COURT DENIED THE APPELLANT'S OFFER OF EVIDENCE AT TRIAL THAT DEFENDANT CARENET, INC. OF LANCASTER TERMINATED DEFENDANT NIMAL A. PERERA, M.D., DUE IN PART TO HIS CONDUCT IN THE CARE OF THE DECEDENT?

## **STATEMENT OF THE CASE**

The decedent, Sandra Gilbert, filed this medical malpractice action against Respondents CareNet, Inc. of Lancaster (hereinafter "CareNet") and Nimal A. Perera, M.D. (hereinafter "Perera") in her own name while she was still alive on October 17, 2013. (R. pp. 5-8). Ms. Gilbert passed away on March 1, 2014, and an Amended Complaint was filed on June 11, 2014, naming Ms. Gilbert's sister and personal representative of her estate, Johnnie Mae Reed (hereinafter "Appellant"), as the Plaintiff in the converted wrongful death and survival action. (R. pp. 12-16; R. p. 264). The Amended Complaint alleged that the Respondents failed to diagnose the presence of colorectal cancer or a pre-cancerous condition during the time the Respondents provided medical treatment to Ms. Gilbert from February 2008 until July 2011. (R. p. 14, ¶¶ 12-

13). After conducting discovery and failing to settle at mediation, this lawsuit was called to trial in Lancaster County on August 24, 2015. The jury returned a defense verdict for the Respondents on August 27, 2015. (R. p. 214, lines 14-25).

Prior to trial, on August 17, 2015, the Respondents filed a Motion in Limine requesting the exclusion of five matters of anticipated testimony and documents: (1) any reference to prior cases against Dr. Perera/CareNet by other Plaintiffs; (2) any reference to changes made to a medical record in a prior unrelated case; (3) any reference to Dr. Perera's reprimand by the North Carolina Medical Board for his failure to supervise a physical assistant; (4) any reference to the circumstances surrounding Dr. Perera's resignation from CareNet; and (5) any reference to Dr. Perera's attempt to have a nurse fill a prescription for his son and his allegedly improper attempt to fill a second prescription. (R. pp. 222-223). The trial court granted the Respondents' Motion in Limine as to topics 1, 2, and 5. (R. pp. 2-3). The Appellant agreed not to argue topic 3, and the trial court denied Respondents' Motion in Limine as to topic 4. (R. pp. 2-3).

At trial, the Respondents renewed their objection to the anticipated testimony and documents related to topic 4 of the Motion in Limine. (R. p. 41, line 1 – R. p. 49, line 10). The trial court agreed with the Respondents and restricted the Appellant from discussing the circumstances surrounding Respondent Perera's resignation from Respondent CareNet. (R. p. 50, lines 10-25; R. p. 51, line 1). Following the jury verdict for the Respondents, Appellant served Respondents with its Motion for a New Trial on September 3, 2015, pursuant to Rule 59(a), SCRCP, arguing that she was entitled for the jury to hear the testimony regarding Respondent Perera's resignation from Respondent CareNet. (R. pp. 256-258). The trial court denied the Plaintiff's Motion for a New Trial

and the Notice of Appeal was filed with the Court of Appeals on December 30, 2015. (R. p. 4). The Appellant requested a partial copy of the trial transcript from the court reporter, Michael Watkins, on January 7, 2015. On January 28, 2016, Appellant received a letter from the Court of Appeals instructing that a full copy be requested of the trial transcript within ten (10) days of the letter. Appellant requested a formal copy of the full trial transcript via letter to Michael Watkins on February 1, 2016. Appellant received a copy of the trial transcript on February 26, 2016.

### **STATEMENT OF FACTS**

The underlying lawsuit for this appeal was a medical malpractice case arising from the death of Sandra Gilbert, who passed away from metastasized colon cancer on March 1, 2014. (R. p. 264). Respondent Perera was a family practice physician employed by Respondent CareNet, Inc. of Lancaster, who treated Ms. Gilbert in the years preceding her death, beginning in February 2008 and continuing intermittently until July 2011. (R. p. 265; R. p. 278). The Appellant argued at trial that the Respondents failed to timely diagnose and treat Ms. Gilbert's colon cancer by not properly making a colonoscopy referral that would have identified the colon cancer at an earlier point in time (R. p. 91, lines 20-25; R. p. 92, lines 1-24; R. p. 136, lines 16-25; R. p. 137, lines 1-3). Ms. Gilbert was diagnosed with metastasized Stage 3B colon cancer at the William Jennings Bryan Dorn VA Medical Center in Columbia, South Carolina in November 2011. (R. pp. 345-347).

Prior to Ms. Gilbert's cancer diagnoses, on August 29, 2010, Ms. Gilbert was diagnosed with microcytosis and diabetes after a visit to Springs Memorial Hospital in Lancaster, South Carolina, in which she complained of blurred vision, dry mouth, and weight loss. (R. pp. 329-330). The discharge summary from Springs Memorial Hospital,

dated August 30, 2010, instructed Ms. Gilbert to follow up with her primary care provider, Respondent Perera at Respondent CareNet, who was sent a copy of the records from Springs Memorial Hospital. (R. pp. 343-344). Ms. Gilbert immediately returned to seeing Dr. Perera at CareNet on September 1, 2010. (R. p. 267). A colonoscopy referral was not made at this time.

On May 16, 2011, Ms. Gilbert presented to Springs Memorial Hospital complaining of rectal bleeding and general weakness/dizziness. (R. pp. 295-296). The impression from this visit was that Ms. Gilbert had significant profound anemia, gastrointestinal bleeding, and ketoacidosis. (R. p. 292). Ms. Gilbert initially underwent an Upper-GI endoscopy while at Springs Memorial Hospital in order to examine whether the blood loss was originating from the upper part of the colon, which was negative. (R. pp. 289-290). Springs Memorial Hospital made a note to follow-up with Ms. Gilbert regarding an outpatient colonoscopy and an appointment for a colonoscopy was made for July 2, 2011. (R. p. 198, lines 5-19; R. p. 294). Ms. Gilbert returned to Dr. Perera and CareNet on July 5, 2011, as a follow-up visit to her anemia-related hospital discharge in May. (R. pp. 265-266). Respondent Perera did not order a colonoscopy referral at this time despite the fact that Ms. Gilbert had not undergone the scheduled colonoscopy on July 2, 2011.

In October 2011, Ms. Gilbert was informed that she qualified for Veterans' Affairs benefits based on her prior employment in the military. On October 21, 2011, Ms. Gilbert presented to the William Jennings Bryan Dorn Veterans Affairs Medical Center in Columbia, SC, complaining of dark red bleeding from her bowels. (R. p. 345). A colonoscopy was ordered for the first time and it was administered on October 24, 2011,

with the results indicating an obstructing circumferential mass lesion descending throughout Ms. Gilbert's colon, leading Ms. Gilbert to be formally diagnosed with advanced Stage 3B colon cancer. (R. pp. 345-347). On November 3, 2011, Ms. Gilbert's colon cancer was noted to have metastasized to other segments of her body. (R. p. 346). Ms. Gilbert would continue to deal with the painful complications from metastatic colon cancer until her death on March 1, 2014. (R. p. 264). Appellants' expert witnesses, Dr. Mark Yoffe, M.D., and Dr. Carol Rupe, M.D., testified at trial that the presence of microcytosis in the August 2010 medical records from Springs Memorial Hospital warranted follow-up testing of the colon upon receipt of the medical records by Respondent Perera at Respondent CareNet that would have identified the earlier presence of colon cancer in Ms. Gilbert at a more successfully treatable stage. (R. p. 91, lines 20-25; R. p. 92 lines 1-24; R. p. 136, lines 17-25; R. p. 137 lines 1-3).

Prior to trial, Respondent CareNet testified through its Rule 30(b)(6), SCRCF, corporate representative, Stewart Barre, M.D., in a deposition that Dr. Perera resigned under pressure in part due to his actions in both the present case and an unrelated medical malpractice:

Q: Why is [Dr. Perera] no longer employed?

A: He resigned in January of 2014.

Q: Was he – did he resign under pressure, for him to resign, by CareNet?

A: Yes, sir. I believe so.

Q: And what was the reason for the concern that CareNet had? What – I mean, what, specifically, factual basis?

A: Specifically, the – the current lawsuit and the other lawsuit that we've already discussed, the board felt like had – or his actions, rather had put the organization at risk. And – and this the timing of this coincided with a goal that Dr. Perera had set out, probably two years before, saying that he wanted to retire when he turned 65 during the year 2013, and he had been telling the prior administrator at CareNet that he wanted to practice part-time; he

wanted to cut down, and he was going to do that, no matter what, and, so, I think that the board felt like with, you know, Dr. Perera's professional goals and – and the fact that, you know, they like a lot of this stuff had sort of put the organization at risk. And they wanted to move to some permanent, you know, full-time employees; that it was time to – to part ways.

30(b)(6) of CareNet, Inc., of Lancaster (Stewart Barre) Dep. 35:4-25; 36:1-4. (R. p. 218, lines 4-25; R. p. 219, lines 1-4).

Respondent Perera and Respondent CareNet each voiced their particular objections to the introduction of this testimony at trial that, as interpreted by the Appellant, was two-fold: (1) Respondent Perera was not partially pressured to resign over a perceived standard of care violation but was instead pressured to resign in part based on the insurance coverage issues created for Respondent CareNet as a result of the allegations involving Respondent Perera; and (2) even if there was a standard of care violation implication in Respondent Perera's resignation, testimony establishing that fact is unduly prejudicial to the Respondents in light of its probative value. (R. p. 41, line 1 – R. p. 49, line 10).

Counsel for the appellant argued that interpreting the Respondents' arguments in this manner required the trial court to assume that Respondent Perera was terminated in part because of what Respondent CareNet believed was a frivolous lawsuit, as that is the only way to reconcile the deposition testimony that Respondent CareNet felt Respondent Perera's actions had put the organization at risk but were not a standard of care violation (R. p. 47, lines 12-24). This above-cited section of deposition testimony formed the initial basis of the Motion in Limine, which later ripened into the formal renewed objection at trial and resulted in the trial court ruling that Appellant was not allowed to discuss the circumstances surrounding Respondent Perera's resignation from Respondent CareNet (R. p. 50, lines 10-25; R. p. 51, line 1).

## STANDARD OF REVIEW

If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial court must grant a new trial absolute. Weir v. Citicorp Nat. Services, Inc., 312 S.C. 511, 518, 435 S.E.2d 864, 868 (1993). The decision to grant or deny a new trial motion rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Burke v. AnMed Health, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011).

## ARGUMENT

- I. **THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL IN THIS MEDICAL MALPRACTICE ACTION; THE ERROR BEING THAT THE TRIAL COURT'S DENIAL OF THE APPELLANT'S OFFER OF EVIDENCE THAT RESPONDENT CARENET, INC. OF LANCASTER TERMINATED RESPONDENT NIMAL A. PERERA, M.D., DUE IN PART TO HIS CONDUCT IN THE CARE OF THE DECEDENT WAS RELEVANT TO THE ISSUE OF THE STANDARD OF CARE PROVIDED BY RESPONDENT PERERA.**

In South Carolina, the elements that a plaintiff must prove to establish a medical malpractice claim are: the recognized and generally accepted standards and procedures which would be exercised by competent physicians under similar circumstances; that the physician and/or hospital personnel negligently deviated from the generally accepted standards and procedures; and that such negligent deviation from the generally accepted standards and procedures was a proximate cause of the plaintiff's injury. Smith v. U.S., 119 F.Supp.2d 561, 573-74 (D.S.C. 2000). A medical malpractice plaintiff must

generally prove by expert testimony what the medical standard of care is and whether the defendants failed to conform to that standard. Carver v. Medical Soc’y of S.C., 286 S.C. 347, 334 S.E.2d 125, 127 (Ct. App. 1985). With regards to failure to diagnose cases, specifically, the question of whether a physician in making a diagnosis deviated from the applicable standard of care either by not employing a particular procedure or by not ordering a particular test is to be determined by what an ordinary, careful, and prudent physicians would have done under the same or similar circumstances. Durr v. McElrath, 299 S.C. 30, 33, 382 S.E.2d 20, 22 (Ct. App. 1989).

Stewart Barre’s cited deposition testimony was significant to the Appellant’s motion for a new trial because it established that Respondent CareNet believed that Dr. Perera’s actions in “the current lawsuit” had “put the organization at risk” and that Respondent CareNet was concerned with the present action in pressuring Respondent Perera to resign (R. p. 218, lines 4-25; R. p. 219, lines 1-4). Appellant argues that this implied a standard of care issue in Respondent CareNet’s actions despite later assertions by Dr. Barre such that the jury was entitled to hear this relevant testimony. The trial court initially denied the Respondents’ Motion in Limine to the extent the Respondents sought to prevent Appellant from discussing Dr. Perera’s resignation at trial, but eventually agreed upon a renewed objection at trial to bar the Appellant from discussing Dr. Perera’s resignation and the above-cited deposition testimony of Stewart Barre. (R. p. 2; R. p. 50, lines 10-25; R. p. 51, line 1). Appellant responded at trial that the deposition testimony clearly stated that the present lawsuit was a factor in pressuring Respondent Perera to resign and, furthermore, accepting the arguments presented by Respondents as to the absence of a standard of care violation required the trial court to assume that

Respondent Perera was pressured to resign, in part, because of what Respondent CareNet perceived to be a frivolous lawsuit. (R. p. 47, lines 12-24).

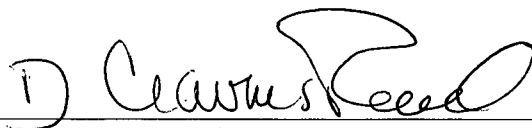
This issue on appeal requires the Court of Appeals to reconcile the deposition statements of Dr. Barre that, first, Respondent Perera was pressured to resign in part because Respondent CareNet felt Respondent Perera's actions in "the current lawsuit" had "put the organization at risk[.]" and, second, that Dr. Barre did not believe Respondent Perera committed any standard of care violation. (R. p. 218, lines 4-25; R. p. 219, lines 1-4). Appellant maintains its argument from trial that the jury had a right to hear about the circumstances surrounding Dr. Perera's resignation as they are relevant to whether a standard of care violation had occurred and were directly relevant to this lawsuit.

According to Rule 401, SCRE, "[r]elevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence." Rule 402, SCRE, further provides that "[a]ll relevant evidence is admissible, except as otherwise provided by . . . these rules[.]" Appellant contends that the deposition testimony from Respondent CareNet, through its corporate deponent Dr. Stewart Barre, was relevant evidence that sufficiently implied a belief of a standard of care violation on the part of Respondent CareNet, and that the jury was entitled to hear this testimony. This testimony was important to Appellant's case in chief in that it corroborated the testimony of Appellant's expert witnesses that additional follow-up testing should have been conducted by Respondent Perera following the production of medical records to him which contained a finding of microcytosis. Although Dr. Barre later testified that he did not believe a

standard of care violation had occurred, this argument again requires the trial court to assume that Respondent Perera was under pressure to resign in part by his employer, Respondent CareNet, over the filing of a lawsuit that Respondent CareNet believed was frivolous and which involved no standard of care violation. Appellant contends it was for the jury to weigh these conflicting statements in determining whether a standard of care violation had occurred in the treatment of Ms. Gilbert. Respondent Perera's resignation from Respondent CareNet, under pressure and in relation to this lawsuit, was highly relevant to Appellant's case in chief and a new trial should have been granted allowing the jury to hear the full scope of this testimony.

#### **CONCLUSION**

For the foregoing reasons and upon the foregoing authorities, Appellant submits that the judgment of the circuit court should be reversed and a new trial should be granted in which the Appellant is allowed to present evidence regarding the full circumstances surrounding Dr. Perera's forced resignation from CareNet.



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APPEAL FROM LANCASTER COUNTY  
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Case No. 2013-CP-29-1339

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Johnnie Mae Reed, as the Personal Representative of the Estate of Sandra Gilbert,  
Appellant

vs.

CareNet, Inc. of Lancaster and Nimal A. Perera, M.D., Respondents

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**CERTIFICATE OF COUNSEL**

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Pursuant to Rule 210(g), SCACR the undersigned hereby certifies that the Final Brief contains all material proposed to be included by any of the parties and does not contain any other material.

*Don Deal for DCR*

*I am not making an appearance in this case.*

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**PROOF OF SERVICE OF A NOTICE OF APPEAL**

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APPEAL FROM LANCASTER COUNTY  
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**PROOF OF SERVICE**

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I, D. Cravens Ravenel, an employee of Baker, Ravenel & Bender, L.L.P., Attorneys for Appellant Johnnie Mae Reed, as the Personal Representative of the Estate of Sandra Gilbert, deceased, hereby certify that I have on this 7<sup>th</sup> day of July 2016, served counsel below Appellant Johnnie Mae Reed, as the Personal Representative of the Estate of Sandra Gilbert's Final Brief and Certificate of Counsel by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope to counsel at the following addresses:

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