

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
S. Jackson Kimball, Special Circuit Court Judge

Case No. 2014-CP-46-0508

RECEIVED

FEB 13 2017

SC Court of Appeals

Patricia A. Craig, Appellant,

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, Respondents.

JOINT BRIEF OF RESPONDENTS

Andrew F. Lindemann
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Julius W. McKay, II
Kelli L. Sullivan
THE MCKAY FIRM
1303 Blanding Street
Post Office Box 7217
Columbia, South Carolina 29202
(803) 256-4645

*Counsel for Respondents E. Earl Jenkins, Jr., M.D.
and York Pathology Associates, LLC*

WILLIAM U. GUNN
J. HOLLIS INABINET
HOLCOMBE BOMAR, P.A.
100 Dunbar Street - Suite 200
Post Office Drawer 1897
Spartanburg, South Carolina 29304
(864) 594-5300

*Counsel for Respondent
Amisub of South Carolina, Inc. d/b/a
Piedmont Medical Center*

TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Case	1
Arguments	5
I. The lower court correctly ruled that the Appellant had a full and fair opportunity to complete discovery and that the court's consideration of the summary judgment motions was not premature.	5
II. The lower court correctly ruled that the Appellant failed to present any evidence that the Respondents violated the applicable standard of care in the reading and interpretation of the thyroid biopsies.	8
III. As an additional sustaining ground, the record demonstrates that the alleged breach of the standard of care in the reporting of the biopsy results did not proximately cause any injuries claimed by the Appellant.	17
Conclusion	20

TABLE OF AUTHORITIES

Cases

<i>Bayle v. South Carolina Dept. of Transportation</i> , 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001).	6
<i>CEL Products, LLC v. Rozelle</i> , 357 S.C. 125, 591 S.E.2d 643 (Ct. App. 2004).	6
<i>David v. McLeod Regional Medical Center</i> , 367 S.C. 242, 626 S.E.2 1 (2006).	17
<i>Dawkins v. Fields</i> , 354 S.C. 58, 580 S.E.2d 433 (2003).	6
<i>Doe v. Batson</i> , 345 S.C. 316, 548 S.E.2d 854 (2001).	6
<i>Fletcher v. Medical University of South Carolina</i> , 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010).	16
<i>Forest Dunes Associates v. Club Carib, Inc.</i> , 301 S.C. 87, 390 S.E.2d 368 (Ct. App. 1990).	10
<i>Gooding v. St. Francis Xavier Hospital</i> , 326 S.C. 248, 487 S.E.2d 596 (1997).	11
<i>Guinan v. Tenet Healthsystems of Hilton Head, Inc.</i> , 383 S.C. 48, 677 S.E.2d 32 (Ct. App. 2009).	6
<i>Hoard v. Roper Hospital, Inc.</i> , 387 S.C. 539, 694 S.E.2d 1 (2010).	18
<i>Jones v. Lott</i> , 387 S.C. 339, 692 S.E.2d 900 (2010).	9
<i>Larry's Wheel and Rim, Inc. v. Citizens & Southern National Bank</i> , 271 S.C. 198, 246 S.E.2d 860 (1978).	10

<i>Martasin v. Hilton Head Health System, L.P.</i> , 364 S.C. 430, 613 S.E.2d 795 (Ct. App. 2005).	17
<i>Masters v. Rodgers Dev. Group</i> , 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984).	12
<i>Odom v. County of Florence</i> , 258 S.C. 480, 189 S.E.2d 293 (1972).	10
<i>Smith v. South Carolina Department of Social Services</i> , 284 S.C. 469, 327 S.E.2d 348 (1985).	10
<i>State v. Richardson</i> , 278 S.C. 262, 294 S.E.2d 422 (1982).	10

Statutes and Rules

Rule 56(f), SCRCP.	5
Rule 59(e), SCRCP.	4, 5
Rule 208(b)(1)(B), SCACR.	9

STATEMENT OF THE CASE

This appeal arises from a medical malpractice action. On August 18, 2013, the Appellant Patricia Craig consulted Dr. Christopher Jones, a surgeon, regarding a nodule that had been discovered in her thyroid gland. As a result of that consultation and her previous radiological studies, Dr. Jones ordered a fine needle aspiration of the nodule, which was performed on September 30, 2010. (R. 70-71). A fine needle aspiration is a procedure in which a needle is inserted into the nodule, and a sample of fluid is removed and sent for microscopic analysis.

The Respondent E. Earl Jenkins, Jr., M.D., a board-certified pathologist, examined the specimen drawn from Craig's thyroid. He issued a report on October 1, 2010. In examining the specimen, Dr. Jenkins found cells that were consistent with papillary carcinoma. (R. 72). The report specifically stated: "category 4 lesion, suspicious for malignancy, excision is indicated." (R. 70). The report categorized the specimen as a category "4" lesion on the Bethesda Scale, which means that the lesion has a 65 to 75 percent chance of being malignant. (R. 72). The report was transmitted to Dr. Jones, who was Craig's treating physician. (R. 71). Dr. Jones discussed the findings with Craig and recommended the removal of her thyroid gland. (R. 78-79).

On November 2, 2010, Craig had her thyroid gland removed by Dr. Jones. (R. 72). During the surgery, Dr. Jones sent a specimen from the thyroid gland for an intraoperative reading by a pathologist. (R. 72). The specimen was read by Dr. James Maynard, who like Dr. Jenkins practiced with the Respondent York Pathology Associates, LLC. Dr. Maynard concluded that the frozen section of thyroid that he examined was inconclusive for cancer. (R. 72). Dr. Jones noted in the operative note as follows: "Frozen section revealed similar atypia to the needle biopsy. No definitive diagnosis could be made." (R. 86). Dr. Jones then made the decision to proceed with the removal of the entire thyroid. (R. 80). Following surgery, the thyroid was sent for a pathological examination and was found to be benign. (R. 72, 80).

After meeting the pre-suit Notice of Intent to Sue requirements, Patricia Craig filed a Complaint on February 21, 2014, which named the following Defendants: Dr. Jenkins, York Pathology Associates, and Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center ("Amisub"). York Pathology Associates contracts with Amisub to be the exclusive provider for pathology services at Piedmont Medical Center. The Complaint included medical negligence claims against the three Respondents. The medical negligence claim against the Respondent Amisub was premised entirely on vicarious liability.

Prior to and during the litigation, Craig identified Dr. Gabor Kovacs, a general surgeon, as her sole expert witness in the case. Dr. Kovacs had submitted an affidavit dated November 4, 2013, which had been filed with the Notice of Intent to Sue. (R. 20-22). He was later deposed on May 6, 2015. Dr. Kovacs has never practiced as a pathologist, and with the exception of his medical school training in the early 1980s, he has had no training in pathology. (R. 179-180). Dr. Kovacs does about two or three thyroid removal cases per year on people who have suspicious biopsies. In those cases, he never reviews the pathology slides. (R. 190, 193). The hospital privileges that he has in Georgia do not allow him to read pathology slides or specimens, and he relies on pathologists for pathological interpretations. (R. 193). Dr. Kovacs admittedly is unfamiliar with the Bethesda Scale. (R. 197).

On July 7, 2015, the Respondents Jenkins and York Pathology Associates filed a motion for summary judgment, together with a detailed supporting memorandum. (R. 46-59). On July 10, 2015, the Respondent Amisub also filed a motion for summary judgment which referenced and incorporated the motion filed by its co-Defendants. (R. 120-121). Amisub specifically stated the following grounds: "[T]he claims made by Plaintiff against Amisub are purely vicarious, with no independent negligence being pled or alleged. In the event summary judgment is granted as to Co-Defendants, then as a matter of law the Court should

grant summary judgment to Amisub inasmuch as the liability of Amisub would rest solely upon [the] negligence of Co-Defendants and in absence thereof, there would no liability as to Amisub." (R. 121).

Those motions for summary judgment were heard by Special Circuit Judge S. Jackson Kimball on August 13, 2015, which was almost eighteen months after Craig filed her Complaint. After hearing arguments from counsel, Judge Kimball granted the Respondents' motions. He issued an Order for Summary Judgment filed September 17, 2015, dismissing the claims against all Respondents, including the vicarious liability claim brought against Amisub. (R. 1-6).

The Appellant Craig subsequently filed a timely appeal. No Rule 59(e) motion, however, was filed.

ARGUMENTS

- I. The lower court correctly ruled that the Appellant had a full and fair opportunity to complete discovery and that the court's consideration of the summary judgment motions was not premature.**

The Appellant Patricia Craig complains that the Respondents' summary judgment motions were premature because she had additional discovery to complete. In particular, Craig argues that she had only received the Respondents' answers to written discovery on June 24, 2015 and June 29, 2015. Moreover, she claims that she still needed to have an "additional expert" review the pathology slides.

During the hearing, Craig's counsel orally argued that the summary judgment motions were premature; however, she never made a motion for continuance nor raised the need for time to complete additional discovery with the administrative judge. Craig likewise made no attempt to file an affidavit as required by Rule 56(f), SCRCP. Based on what was argued, Special Circuit Judge S. Jackson Kimball orally ruled that there had been adequate time for discovery. (R. 155-156). Judge Kimball never addressed the issue in his written order, and Craig never filed a Rule 59(e) motion to seek any written ruling on this issue.

"The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion." *Bayle v.*

South Carolina Dept. of Transportation, 344 S.C. 115, 542 S.E.2d 736, 742 (Ct. App. 2001). "An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support." *Id.*

Craig cannot show that Judge Kimball abused his discretion in concluding that she had been afforded a full and fair opportunity to complete discovery. In order to show that she had not been afforded adequate time to complete discovery, Craig needed in part to show "the likelihood that further discovery will uncover additional evidence and that the party is not merely engaged in a 'fishing expedition.'" *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433, 439 (2003). *See also, CEL Products, LLC v. Rozelle*, 357 S.C. 125, 591 S.E.2d 643 (Ct. App. 2004). In other words, "[a] party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 677 S.E.2d 32, 36 (Ct. App. 2009). Finally, and perhaps most importantly, Craig needed to show that she was not dilatory in her pursuit of discovery. *Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001).

As Judge Kimball addressed during the hearing, Craig's lawsuit had been pending since February 21, 2014. (R. 11). Therefore, at the time of the August 13, 2015 motion hearing, the case had been pending for almost eighteen months, which was sufficient time to provide Craig a full and fair opportunity to conduct the discovery needed to present her case. Craig complains that the Respondents had not answered written discovery until June 24, 2015 and June 29, 2015, which she claims is "prima facie" evidence that she had not been given a full and fair opportunity to complete discovery. But Craig fails to mention that she had not even served any written discovery requests until May 9, 2015, which was more than fourteen months after suit was filed. Craig has not shown that the delay in receiving written discovery responses was precipitated by anything other than her own lack of diligence in timely pursuing such discovery. While the Respondents had taken three depositions including Craig's only named expert, Dr. Gabor Kovacs, as well as the surgeon, Dr. Christopher T. Jones, Craig's counsel had not taken any depositions. (R. 156). In short, this refutes Craig's unsubstantiated claim that "the record will not show that the Plaintiff has been dilatory in pursuing discovery." *See*, Appellant's Brief, p. 9.

Craig has failed to show that the eighteen months that she had to conduct discovery was insufficient to be in a position to defend the summary judgment motions. She claims that the case is complex, but that is not borne out by the

allegations or the medical issues presented. Moreover, Craig has not made any showing that her proposed additional discovery would uncover additional relevant evidence or disclose a genuine issue of material fact. While she claims the need for an "additional expert," Craig never explained what type of expert witness she was seeking, what steps she had undertaken to engage such an expert and what opinions such an expert would have offered.

For these reasons, Craig's argument that she was not afforded a full and fair opportunity to complete discovery should be rejected. Certainly, given the narrow standard of review, this Court cannot conclude on this record that Judge Kimball abused his discretion in proceeding to hear and grant the Respondents' motions for summary judgment.

II. The lower court correctly ruled that the Appellant failed to present any evidence that the Respondents violated the applicable standard of care in the reading and interpretation of the thyroid biopsies.

On the merits, the Appellant Craig contends that there is a genuine issue of material fact as to whether Dr. Jenkins and York Pathology Associates violated the applicable standard of care.¹ In reviewing Craig's arguments, it appears that she

¹ As previously mentioned, the Appellant Craig's medical negligence claim against the Respondent Amisub is premised solely on vicarious liability for Dr. Jenkins and York Pathology Associates. Judge Kimball correctly determined that "[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."

addresses rulings that were never made by Judge Kimball, and in actuality, she fails to address the actual crux of his grant of summary judgment to the Respondents.

In this regard, it is difficult to determine precisely what the specific issues on appeal may be. In fact, as her only issue on appeal, Craig simply states as follows: "Did the trial judge err in granting Defendants' motion for summary judgment?" Rule 208(b)(1)(B), SCACR, requires the statement of issues on appeal to be "concise and direct." In *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), the Supreme Court explained that "broad general statements of issues may be disregarded by this Court." 692 S.E.2d at 903. The Supreme Court reaffirmed the well-established rule of appellate law that "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." *Id.* Likewise, the Court reiterated that "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Id.*

The statement of issues on appeal proffered by Craig in this case is precisely the type of general statement that the appellate courts typically disregard and refuse to address. The Court and the Respondents are left to "grope in the dark" to ascertain the precise point at issue. Craig merely states that the lower court erred

(R. 3). As a result, on appeal, Craig contends that Amisub is not entitled to summary judgment for the same reasons that she contends summary judgment was incorrectly entered for Dr. Jenkins and York Pathology Associates.

in granting summary judgment without providing any specific basis for the error.² The Respondents are doing their best to address what appears to be argued in Craig's opening brief. Yet, given the non-specific and clearly improper statement of issues on appeal, the Court is urged to dismiss the appeal on the authority of *Jones v. Lott* and numerous other cases, or at a minimum, the Court should strictly construe the issues as briefed.

As indicated, the Appellant Craig spends a considerable portion of her brief arguing that her expert witness, Dr. Gabor Kovacs, as a surgeon, is qualified to testify as an expert on the standard of care owed by a pathologist. However, in his Order, Judge Kimball never ruled that Dr. Kovacs was not qualified to render opinions on the standard of care owed by a pathologist. Instead, he "assumed for the purposes of this motion that Kovacs is a qualified expert to testify as to the standard of care for pathologists." (R. 3). Moreover, during the hearing, Judge Kimball assured Craig's counsel that "I'm not questioning the possibility he [Dr.

² The Supreme Court as well as this Court have addressed this very preservation problem in many cases and have approved the dismissal of the appeal as the appropriate remedy. In *Smith v. South Carolina Department of Social Services*, 284 S.C. 469, 327 S.E.2d 348 (1985), the Supreme Court recognized that a broad and unspecific statement of the issue on appeal where the appellant simply expresses a general dissatisfaction with the decision below warrants dismissal. The Court explained that "[s]uch a predicament has often been deplored by our State's highest court and used by that tribunal as a basis for the dismissal of an appeal." 327 S.E.2d at 349. Similarly, in *Larry's Wheel and Rim, Inc. v. Citizens & Southern National Bank*, 271 S.C. 198, 246 S.E.2d 860 (1978), the Supreme Court dismissed an appeal on this same basis. See also, *Odom v. County of Florence*, 258 S.C. 480, 189 S.E.2d 293 (1972) (appeal dismissed); *Forest Dunes Associates v. Club Carib, Inc.*, 301 S.C. 87, 390 S.E.2d 368 (Ct. App. 1990) (appeal dismissed); *State v. Richardson*, 278 S.C. 262, 294 S.E.2d 422 (1982) (appeal dismissed).

Kovacs] could be qualified as an expert." (R. 164). Accordingly, whether Dr. Kovacs is a qualified expert witness is a non-issue for this appeal.³

The Appellant Craig next argues that Dr. Kovacs' opinions create a genuine issue of material fact as to whether Dr. Jenkins and York Pathology Associates violated the standard of care owed by a pathologist. South Carolina law requires a plaintiff in a medical malpractice case to present: "(1) evidence of the generally recognized practice and procedures that would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances; and (2) evidence that the defendant doctor departed from the recognized and generally accepted standards, practices, and procedures in the manner alleged by the plaintiff." *Gooding v. St. Francis Xavier Hospital*, 326 S.C. 248, 487 S.E.2d 596, 599 (1997).

Strangely, Craig argues in her brief that Dr. Kovacs testified that the standard of care for a *surgeon* is "to rely upon the pathologist to tell him, the surgeon, whether a sample is benign or malignant" and that "the surgeon relies totally on the pathologist report." *See*, Appellant's Brief, pp. 14-15. From that testimony, Craig then *infers* that the standard of care for a *pathologist* requires that the slides be interpreted to a "reasonable degree of accuracy," that information be

³ In the event of a remand, the Respondents do not waive their right to challenge the qualifications of Dr. Kovacs.

communicated to the surgeon in a "reasonably clear manner," and that the surgeon be provided an "accurate, specific and sufficiently comprehensive diagnosis." *See*, Appellant's Brief, p. 15. Of course, Dr. Kovacs never says this in his affidavit or deposition testimony. Instead, Craig insists this recitation of the applicable standard of care may be *inferred*.

Moreover, in defining the standard of care in that manner, Craig asks this Court to take judicial notice of an excerpt from a purported treatise entitled "Cancer Medicine," which is evidence that was never admitted in the trial court. This, however, constitutes an improper use of judicial notice. As this Court has held, "[j]udicial notice takes the place of proof." *Masters v. Rodgers Dev. Group*, 283 S.C. 251, 321 S.E.2d 194, 196 (Ct. App. 1984). "For a fact to be subject to judicial notice, it must be so notorious that the court may properly assume its existence without proof." *Id.* "Unless the fact is either of such common or general knowledge that it is accepted by the public without qualification or contention, or its accuracy is capable of verification by reference to readily available sources of indisputable reliability, it is not subject to judicial notice." *Id.* The excerpt from "Cancer Medicine" does not meet that standard for judicial notice.⁴

⁴ This Court in *Masters* further explained that "[a]ppellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable." *Masters v. Rodgers Dev. Group*, 283 S.C. 251, 321 S.E.2d 194, 197 (Ct. App. 1984). This Court recognized that:

After inferring the standard of care from Dr. Kovacs' testimony, Craig then argues in a conclusory manner that Dr. Kovacs found a breach of the standard of care. She claims that Dr. Kovacs opined that Dr. Jenkins and the "other pathologist" did not accurately interpret the slides from the biopsies.⁵

In actuality, and as determined by Judge Kimball, Dr. Kovacs "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." (R. 3). Judge Kimball further explained:

[Dr. Kovacs] 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.

Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. Finally, appellate courts, limited to the "cold" record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. For the foregoing reasons we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.

Id. (Citations omitted).

⁵ The reference to the "other pathologist" is to Dr. James Maynard.

(R. 3).

Dr. Jenkins categorized the specimen he analyzed as "suspicious for malignancy" and gave it a rating of "4" on the Bethesda Scale. A rating of "4" on the Bethesda Scale, according to Dr. Jenkins, means the specimen has a 65 to 75 percent chance of being malignant and that conversely means the specimen has a 25 to 35 percent chance of being benign. (R. 72). Dr. Kovacs, however, was entirely unfamiliar with the Bethesda Scale or the significance of a rating of "4." (R. 197).

Moreover, as Judge Kimball correctly recognized, Dr. Kovacs was unable to specifically state how the standard of care for a pathologist was breached. The following excerpt from Dr. Kovacs' deposition is most pertinent:

Q: Where did Dr. Jenkins go wrong in his read of the slides?

A: By calling it potentially malignant.

Q: No, I understand that. What I am saying is: Did he look for a certain shape of cell that wasn't there, did he look for a certain color of cell that wasn't there, did he find ... can you tell me that?

A: No ma'am, you would have to ask a pathologist that.

(R. 216). Therefore, by his own admission, Dr. Kovacs was unable to testify as to what actions or inactions by Dr. Jenkins were in violation of the standard of care, or what the specimen should look like on the slide for Dr. Jenkins to have arrived

at his opinion. Dr. Kovacs could not say that Dr. Jenkins saw a certain shape of cell that is not on the slide, or that he failed to recognize hallmarks of another type of cell, for example. He was simply incapable of telling what actions by Dr. Jenkins were in violation of the standard of care, and instead he claimed that a pathologist would have to be the one to provide that information.

Furthermore, Dr. Kovacs testified that he cannot disagree with Dr. Jenkins' interpretation of the slides. In his deposition, the following exchange occurred:

Q: Now, do you have any way to disagree with Dr. Jenkins rating of this as a category 4 lesion?

A: Like I said, I am not familiar with the categories so there is no way for me to disagree with him.

Q: So you have no disagreement with the fact that this sample that was submitted to him was suspicious for malignancy?

A: No, I have no reason to disagree with him.

(R. 200).

While he was unable to specifically identify anything Dr. Jenkins or Dr. Maynard did incorrectly or in breach of the standard of care, Dr. Kovacs was only able to opine that the interpretation of the biopsies must have been in error because following surgery the thyroid was found to be benign. In this regard, Dr. Kovacs testified as follows:

Q: If the specimen was suspicious, not definitive, and then later on we learn that the entire thyroid, once

the exam was done, was benign, are you saying that kind of the end result forms your opinion on the first read?

A: Well, the end result forms my opinion on the whole case because the fine needle aspiration as well as the frozen section that was done intraoperatively, both were interpreted as leaning towards a malignant lesion.

(R. 202).

The case of *Fletcher v. Medical University of South Carolina*, 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010), is instructive on the point of establishing violations of the standard of care. In that case, the plaintiff sued a physician who performed a subclavian bypass, alleging that the injury to her phrenic nerve and thoracic duct were the result of the physician's negligence. The plaintiff's expert testified that the physician was negligent, but then proceeded to say that he could not point to any technique in the procedure that was deficient. In affirming a directed verdict, this Court held that the plaintiff was responsible for showing how the physician deviated from the standard of care, and that the occurrence of a complication is not evidence of negligence. This Court relied on the fact that South Carolina law does not recognize *res ipsa loquitur*.

Dr. Kovacs' testimony in this case is akin to the testimony of the plaintiff's expert in *Fletcher*, who opined that since the complication resulted after the surgery, the physician must have been negligent. Dr. Kovacs was unable to point

to any error by Dr. Jenkins or Dr. Maynard in the reading of the slides or in the reporting of the results. Thus, as Judge Kimball correctly ruled, Craig failed to present any evidence that the Respondents violated the standard of care in the reading and reporting of the specimens. As a result, it is clear that summary judgment was correctly granted and should be affirmed on appeal.

III. As an additional sustaining ground, the record demonstrates that the alleged breach of the standard of care in the reporting of the biopsy results did not proximately cause any injuries claimed by the Appellant.

Nonetheless, even if the testimony of Dr. Kovacs was sufficient to demonstrate that Dr. Jenkins and Dr. Maynard breached the standard of care by failing to properly or clearly communicate the results of the biopsies, the Respondents are still entitled to summary judgment based upon the absence of proof of proximate cause. Under South Carolina law, "the plaintiff must show that the defendants' departure from such generally recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages." *David v. McLeod Regional Medical Center*, 367 S.C. 242, 626 S.E.2d 1, 4 (2006). "[T]he expert testimony as to proximate cause must provide a *significant causal link* between the alleged negligence and the injuries suffered, rather than a tenuous and hypothetical connection." *Martasin v. Hilton Head Health System, L.P.*, 364 S.C. 430, 613 S.E.2d 795, 800 (Ct. App. 2005). (Emphasis added).

In the case at bar, the surgeon, Dr. Christopher Jones, testified that he was aware of the Bethesda Scale and the meaning of a category "4" lesion suspicious for malignancy, as was reported by Dr. Jenkins. Dr. Jones understood that "a Category 4 lesion, as this is interpreted, has about a 65 to 75 percent chance of being malignant" and that conversely there was a 25 to 35 percent chance that it was not cancerous. (R. 78-79). He likewise confirmed that he knew "suspicious" did not mean the lesion was definitely cancerous. (R. 79). Finally, Dr. Jones testified that during the surgery, he "received word back in the operating room that the findings on the frozen section were similar to the fine needle aspiration specimen and that there was not definite evidence of malignancy in the right lobe." (R. 80). That is also reflected in the operative note where Dr. Jones wrote: "Frozen section revealed similar atypia to the needle biopsy. No definitive diagnosis could be made." (R. 86). Therefore, even if Dr. Kovacs as a surgeon lacked knowledge of the Bethesda Scale, Dr. Jones had that knowledge and understood the pathologists' findings as they were reported.

The case of *Hoard v. Roper Hospital, Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010), is instructive on the issue of proximate cause. In that case, the plaintiffs argued that a radiologist breached the standard of care by failing to properly report that a catheter inserted in an infant was "malpositioned" or use some language in his report to indicate that the placement of the catheter was incorrect. There was

no evidence that the radiologist misread the chest x-ray. The plaintiffs' theory was simply that the radiologist should have done a better job of communicating his findings. However, the undisputed evidence showed that the neonatologist fully understood that the placement of the catheter was not optimal, but he made a clinical decision not to move it. In affirming summary judgment for the radiologist, the Supreme Court explained:

Dr. Smith correctly contends the record fails to establish that a genuine question of material fact exists regarding whether his alleged failure to act within the standard of care could have been a proximate cause of Jamia's cardiac arrest and subsequent injuries. This is so because the record demonstrates that Dr. Goldstein was aware of the standard of care concerning UVC placement and he made an intentional and independent decision not to move the UVC based on numerous factors.

694 S.E.2d at 5. The Supreme Court thus concluded that the plaintiffs had failed to present any evidence that the radiologist's alleged breach of the standard of care in his reporting was a proximate cause of the infant's injuries.

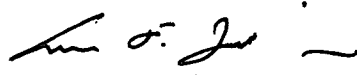
The same is true in the present case. Even if Dr. Kovacs did offer the opinion that the reporting of biopsy results was somehow in breach of the standard of care, the evidence nonetheless reflects that Dr. Jones, like the neonatologist in *Hoard*, understood the results of those biopsies and the significance of the results. There is no evidence that Dr. Jones would have taken any different action. For this additional reason, the Respondents were correctly granted summary judgment.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents respectfully request that this Court affirm the Order issued by Special Circuit Judge S. Jackson Kimball granting summary judgment to all Respondents.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

JULIUS W. MCKAY, II
KELLI L. SULLIVAN
THE MCKAY FIRM
1303 Blanding Street
Post Office Box 7217
Columbia, South Carolina 29202-7217
(803) 256-4645

*Counsel for Respondents
E. Earl Jenkins, Jr., M.D. and
York Pathology Associates, LLC*

CERTIFICATE OF COUNSEL

RECEIVED

FEB 13 2017

SC Court of Appeals

The undersigned counsel for the Respondents certifies that the Final Joint Brief of Respondents complies with Rule 211(b), SCACR.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

JULIUS W. MCKAY, II
KELLI L. SULLIVAN
THE MCKAY FIRM
1303 Blanding Street
Post Office Box 7217
Columbia, South Carolina 29202-7217
(803) 256-4645

*Counsel for Respondents
E. Earl Jenkins, Jr., M.D. and
York Pathology Associates, LLC*

WILLIAM U. GUNN
J. HOLLIS INABINET
HOLCOMBE BOMAR, P.A.
100 Dunbar Street - Suite 200
Post Office Drawer 1897
Spartanburg, South Carolina 29304
(864) 594-5300

*Counsel for Respondent
Amisub of South Carolina, Inc. d/b/a
Piedmont Medical Center*

February 13, 2017

CERTIFICATE OF COMPLIANCE

RECEIVED

FEB 13 2017

SC Court of Appeals

The undersigned counsel for the Respondents certifies that the Final Joint Brief of Respondents complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

JULIUS W. MCKAY, II
KELLI L. SULLIVAN
THE MCKAY FIRM
1303 Blanding Street
Post Office Box 7217
Columbia, South Carolina 29202-7217
(803) 256-4645

*Counsel for Respondents
E. Earl Jenkins, Jr., M.D. and
York Pathology Associates, LLC*

WILLIAM U. GUNN
J. HOLLIS INABINET
HOLCOMBE BOMAR, P.A.
100 Dunbar Street - Suite 200
Post Office Drawer 1897
Spartanburg, South Carolina 29304
(864) 594-5300

*Counsel for Respondent
Amisub of South Carolina, Inc. d/b/a
Piedmont Medical Center*

February 13, 2017

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents E. Earl Jenkins, Jr., M.D. and York Pathology Associates, LLC, does hereby certify that service of the **Joint Brief of Respondents** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelope this the 13th day of February 2017:

Glenn Walters, Esquire
R. Bentz Kirby, Esquire
GLENN WALTERS, ATTORNEY AT LAW, P.A.
Post Office Box 1346
Orangeburg, South Carolina 29116

J. Hollis Inabinet, Esquire
HOLCOMBE BOMAR, P.A.
Post Office Drawer 1897
Spartanburg, South Carolina 29304

Kelli L. Sullivan, Esquire
THE MCKAY FIRM
Post Office Box 7217
Columbia, South Carolina 29202-7217

RECEIVED

FEB 13 2017

SC Court of Appeals