THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2014-CP-42-0508

Patricia Craig. . . . . .Appellant,

vs.

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

BRIEF OF APPELLANT

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DID THE TRIAL JUDGE ERR IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT?

STATEMENT OF THE CASE

This is a complex medical malpractice case. Appellant Patricia Craig (sometimes referred to as "Appellant", "Plaintiff", or "Craig") filed the statutorily required Notice of Intent to File Suit, with supporting affidavit, on November 8, 2013, in the Court of Common Pleas, County of York. The parties were unable to resolve the case during the mediation period. Plaintiff filed the Summons and Complaint on February 21, 2014. [R pp 7-32] The parties engaged in discovery which was never completed. [R pp 123-124; pp 154 l 4-156 l. 15]. Defendants filed a Motion for Summary Judgment on July 10, 2015. [R pp 47- 122] Despite the fact discovery had not yet been completed by the parties, and over the objection of Appellant's attorney, the Court granted the Defendants' Motion for Summary Judgment by written order dated September 17, 2015. [R pp 1- 8; pp 167 l. 16 - 169 l. 7] Appellant filed timely Notice of Appeal on October 16, 2015.

FACTS

General Facts

On or about August 18, 2013, Plaintiff consulted Dr. Christopher T. Jones for medical services and advice because a PETSCAN had discovered a nodule in her throat, on the right side. Before the discovery of the PETSCAN, Plaintiff was not having any clinical signs of problems with her throat. [R pp 7-32] As a result of this consultation, Dr. Jones ordered a fine needle aspiration ("FNA") [R pp 273-274] and ultrasound of the nodule that he found in the Plaintiff's neck on August 18, 2010. The thyroid ultrasound

was done on August 26, 2010, and the fine need aspiration ("FNA") was performed on September 30, 2010. Defendant Jenkins performed the FNA pathologic diagnosis and issued a report dated October 1, 2010 (hereinafter referred to as the "FNA Report") [R pp 273-274]. The FNA Report stated, in part, that Plaintiff had a "[c]ategory 4 lesion, suspicious for malignancy, excision is indicated." The FNA Report bears the heading "Piedmont Healthcare". [R pp 7-32; 273-274].

On October 12, 2010, Plaintiff returned to Dr. Jones' office for a follow-up consultation concerning the nodule in her throat. During this visit, Dr. Jones specifically advised the Plaintiff that she had papillary carcinoma (hereinafter referred to as "thyroid cancer"). Based upon his medical conclusion that Plaintiff had thyroid cancer, Dr. Jones recommended that Plaintiff undergo a total thyroidectomy. Based upon the information she received from Dr. Jones, Appellant consented to the total thyroidectomy. Dr. Jones recommended a total thyroidectomy based upon, in part, the FNA Report that was prepared by Defendant Jenkins. On November 2, 2010, Dr. Jones, with others within his medical team, performed a total thyroidectomy on the Plaintiff, with the medical opinion that the Plaintiff had thyroid cancer. [R pp 7-32]

During the November 22, 2010 surgery, Dr. Jones prepared a sample of the thyroid known as a "frozen section" and submitted it to Defendant Amisub's Piedmont Medical Center for pathologic evaluation. Upon information and belief, the frozen section was analyzed pathologically by Defendant York Pathology for Piedmont Medical Center. Although Defendant Hospital claims that its relationship with the pathologists are based upon an independent contract, Defendant Hospital claim ownership of the frozen slides. As a result of analyzing the frozen section, Defendant York Pathology

failed to provide Dr. Jones a definitive diagnosis concerning Plaintiff's thyroid. Therefore, Dr. Jones proceeded to complete a total thyroidectomy on the Plaintiff. The FNA Report, as issued by Defendant Jenkins, caused Dr. Jones to conclude that Plaintiff had a suspicion of thyroid cancer and Defendant's York Pathology's failure to provide a definitive diagnosis of the frozen section of Plaintiff's thyroid caused Dr. Jones to perform a total thyroidectomy on the Plaintiff. The specimen from thyroidectomy surgery was sent to a lab for evaluation. Sometimes after November 10, 2010, Plaintiff returned to Dr. Jones' office for a medical consultation, and she learned that the post-surgery reports established that she did not have thyroid cancer. In other words, Dr. Jones had erroneously concluded that Plaintiff had thyroid cancer, in substantial part, based upon the incorrect FNA Report and the misinterpretation of the frozen section as performed by Defendants. [R pp 7-32; pp 124-131].

Facts Supported by Expert Testimony

Appellant retained Garbor Kovacs, M.D. ("Kovacs") as an expert witness in the case. Dr. Kovacs's testimony was introduced in two forms: (a) by Affidavit dated November 4, 2013, filed in the matter with the Summons and Complaint on February 21, 2014 [R pp 20-24] and (b) by his deposition taken by Defendant Jenkins on May 6, 2015, a copy of which was filed in the matter using the United States Postal Service on or about August 10, 2015. [R pp 174-271]. Dr. Kovacs is a board certified surgeon with almost 40 years of experience as a surgeon. His extensive vitae is attached as Exhibit 1 to his deposition. [R pp 23-24; 252-253]. Dr. Kovacs sworn in his affidavit or testified at his deposition as follows:

1. "It is my opinion, to a reasonable degree of medical certainty, that Dr. E.

Earl Jenkins, Jr, named in the Complaint, breached the standard of medical care owed to Patricia Craig by failing to properly analyze and interpret the fine needle aspiration results (sic) that was taken . . .and submitted to him for evaluation on September 30, 2010. . ." [R p 21 paragraph 6];

2. "In my opinion, to a reasonable degree of medical certainty, the only way Mrs. Craig could have received a false-positive for papillary carcinoma is that the fine need aspiration results were not probably (sic)("properly") interpreted and that the frozen section was also misinterpreted. To a reasonable degree of medical certainty, Dr. Jenkins breached the standard of care by failing to properly interpret the fine need aspiration results, and whoever interpreted the frozen section likewise breached the standard of care by failing to properly interpret the frozen section." [R p 21 paragraph 7];
3. "The aforementioned breaches of the standard of care cause serve injury to the Plaintiff, including having her to undergo an unnecessary surgery and total thyroidectomy." [R p 21 paragraph 8];
4. "I am not a Pathologist but I work closely with pathologists who are instrumental to my surgical practice." [R p 20 paragraph 2];
5. "I am familiar with the applicable standard of care relative to the allegations contained in the Complaint." [R p 21 paragraph 5];

Further, Dr. Kovacs testified as follows at his deposition:

Q. Let me ask you this: Do you know where in the range of suspicious 4 would fall?

A. No. Again as a surgeon, we look at the words. I mean when a pathologist tells us that the tissue removed is suspicious for carcinoma, whether it is papillary carcinoma, and then they tell you that the cells are characteristic of papillary carcinoma, that's what gets our attention. Category 4 or category 3, which is pathological classifications. I mean, we really look for the diagnosis in the sense of is it benign or malignant, that is what we want to know.

Q. Do you take this report as saying this specimen was benign or malignant?

A. It was malignant according to the report.

Q. Well, the report says "suspicious for malignancy."

A. Yes, it is suspicious for papillary carcinoma, but then it goes on to make it sound even more malignant by saying, "follicular epithelial cells are accompanied by those with nuclear folds and nuclear inclusions which are characteristic of papillary carcinoma." That puts a little extra emphasis on the malignant portion of the report.

[R pp 197 l. 23 - 198 l, 21]. Dr. Kovacs also testified as follows:

Q. Okay. You agree that with me that even the frozen section that was intraoperatively was inclusive.

A. It was inconclusive but still leaning towards malignancy.

Q. Well, ultimately the surgeon makes that decision, correct?

A. Yes, but it is heavily based on—matter of fact, it is totally based on the pathologist's report. It is pretty much based on that. We rely on the pathologist to tell us whether we are dealing with something benign or malignant. When the pathologist is leaning toward malignancy, then you have to go ahead and proceed with the procedure. Especially when excision is recommended. . .

[R pp 206 l. 12 - 207 l. 1]. According to the index to Dr. Kovacs deposition, opposing counsel only used the phrase "standard of care" one time. Dr. Kovacs responded to the "standard of care" question as follows:

Q. Now, is it your opinion that a biopsy needs to be completely definitive to be within the standard of care?

A. I mean, you like to have it definitive, but sometimes a pathologist will tell you that he is not totally definite, he may want to do different cuts or different staining on the tissue. Again, I mean, these things, whether it's definitive or not, we are dependent on the pathologist's decision as to how definite he is or whether he wants any further testing done on the tissue that has been submitted to him.

[R pp 207 l. 18 - 208 l. 4]. Dr. Kovacs also testified as follows:

Q. So if I am a surgeon, and I have a pathology report in front of me that says it is positive for carcinoma, and I go take the thyroid out and it turns out, you know what, it I one of those false-positives, does that make me as a surgeon wrong?

A. No, it doesn't. As a surgeon, you are really relying on the pathologist's report.

Q. Does it make the pathologist wrong?

A. Well, if he told the surgeon there was malignant (sic) or most likely to be malignant and it turns out to be benign, it does make him wrong.

Q. So it sounds like to me in the absence of a definitive diagnosis—it sounds like to me what you are saying is in the absence of a definitive diagnosis, the pathologist is always wrong or—

A. No.

Q. - - likely to be wrong.

A. He can say, look, I cannot give you any definitive idea. I mean, he can say that I really can't come to any conclusion, I will need to do further stains, further cuts, you know - -

[R pp 219 l. 14 - 220 l. 10].

In addition to Dr. Kovacs' deposition testimony, Plaintiff encouraged the trial Court to take judicial notice of the following information. Appellant requests this Court do the same:

"Surgical pathologists have the definitive role in tumor diagnosis. No matter how high the index of clinical suspicion, the diagnosis of cancer is not conclusively established nor safely assumed in the absence of a tissue diagnosis . . . It is the task of the surgical pathologist to provide an accurate, specific, and sufficiently comprehensive diagnosis to enable the clinician to develop an optimal plan of

treatment and, to the extent possible, estimate prognosis. There was a time not many years ago when the simple designation 'benign' or 'malignant' provided the clinician with all of the information necessary to provide appropriate care for the patient. This is no longer the case."

Excerpt taken from Cancer Medicine, Vol 2, 6th Edition, Holland, Frei et. al., (2003).[1]

Facts Supported by Answer to Pleadings

Plaintiff tenders the following facts from the answer, the pleadings and the discovery requests in opposition to Defendants' Motions for Summary Judgment:

1. Defendant Jenkins stated in the October 1, 2010 Fine Need Aspiration ("FNA") report that the Plaintiff has a "category 4 lesion, suspicious for malignancy" and recommended excision because "[t]here were cells present that were suspicious for malignancy. . .' [R p 125; p 130; pp 272-273].
2. The FNA Report was issued by Defendant Jenkins under the authority of the Defendant Hospital be "York Pathology was that the time, the sole provider of pathology services f Piedmont Medical Center." [R p 27 paragraph 14, R pp 124-125; p 130].
3. Dr. James Maynard analyzed the frozen section slides on November 2, 2010, and Dr. Maynard is a member of Defendant York Pathology Associates, LLC. [R. pp 123- 126; p 130].
4. Defendant Amisub "is the owner of the frozen section done during the procedure that is that is the subject of the lawsuit. However, care and custody and control of the physical slides remains with York Pathology as part of their responsibilities as the provider of pathology services to the hospital. [R pp

[1]A link to the portion of the book can be found at the following link: http://www.ncbi.nlm.nih.gov/books/NBK13237/

125-126; p 130].

5. Jenkins was working within the scope of his employment for Defendant York Pathology. [R. p 42 paragraph 24; p 130].

ARGUMENTS

A. SUMMARY JUDGMENT WAS PREMATURE AT THE TIME AND SHOULD HAVE BEEN DISMISSED WITHOUT PREJUDICE BECAUSE THE PARTIES HAD NOT COMPLETED DISCOVERY IN THE COMPLEX MEDICAL MALPRACTICE CASE.

The case before the Court for consideration is a complex medical malpractice case. The Summons and Complaint were filed on February 21, 2014, almost eighteen months before the trial court considered the Defendants' Motion for Summary Judgment. The parties participated in discovery, to include answering each other's interrogatories and request for production of documents and taking of depositions by the Defendant. Plaintiff's expert was deposed on May 6, 2015. [R pp 174 - 271]. Moreover, on June 24, 2015 and June 29, 2015, Defendants served their discovery responses on the Plaintiff. At the time the Defendants' Motion for Summary Judgment came before trial court for hearing, Plaintiff's counsel had participated in three depositions, which were noticed by the Defendants. One day after serving their responses to discovery requests on the Plaintiff, Defendants moved this Court for summary judgment. [R 132 - 134].

Our appellate courts have held that "summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Baughman v. American Tel. & Tel. Co., 306 S.C. 101,113, 410 S.E.2d 832 (1991).* As a first response to Defendants' Motions for Summary Judgment, Plaintiff asserted and

contended at the trial court level that Defendants' Motion for Summary Judgment should have been dismissed without prejudice in order to give her a full and fair opportunity to conduct discovery. Indisputedly, Defendants served the Motion for Summary Judgment just one day after they answered Plaintiff's discovery. Plaintiff submits that this fact is a prima facie showing that she has not had a fair and full opportunity to complete discovery in this case. For example, Plaintiff learned the name of the person who conducted the interpretation on the frozen slides that were done intraoperatively on June 24, 2015 and June 29, 2015. [R pp 71-73; pp 132-134; pp 153 l. 15 - 154 l. 25].

The hearing on Defendant's Motion for Summary Judgment was held on August 13, 2015. [R p. 143]. Unreadable paper copies of the pathology slides were provided in the discovery materials by the Defendants. [R p 133]. Plaintiff deserves the full and fair opportunity to have an expert examine the pathology slides that are in possession by the Defendants. Plaintiff should have been afforded the opportunity to have an additional expert review the pathological slides. A review by an expert may produce additional evidence in favor of the Appellant to consider if discovery had been completed prior to Summary Judgment being granted. [R pp 133-134].

Plaintiff is aware that this case has been pending almost 18 months. However, Plaintiff contends that 18 months, given the nature of this case, is not an exorbitant amount of time and that the record will not show that that Plaintiff has not been dilatory in pursuing discovery. Moreover, Plaintiff reminds the court that in the *Baughman v. American Tel. & Tel. Co, supra,* the case had been pending for over three years, and our State Supreme Court still reversed the lower court, in part, on the grounds that summary

judgment was prematurely granted without giving the party opposing the summary judgment a full and fair opportunity to conduct discovery. Admittedly, additional complexities existed in the *Baughman* case; however, in the case now before the Court, Plaintiff should not have been forced to answer a Motion for Summary Judgment in less than 60 days after receiving her responses to discovery requests from the Defendants. Therefore, pursuant to *Baughman*, the trial court erred in considering the Defendants' Motion for Summary Judgment before discovery had been completed. The trial court should have dismissed the Defendants' Motion for Summary Judgment without prejudice and establish a definitive timetable in order for the parties to complete discovery. [R pp 123-134].

B. THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER DR. JENKINS AND PATHOLOGY ASSOCATES, LLC VIOLATED THE STANDARD OF CARE OF THE PLAINTIFF.

1. Standard of Review.

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure; 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. *Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).* In determining whether any triable issue of fact exists, the evidence and all inferences, which can reasonably be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. *Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 324, 566 S.E.2d 536, 540 (2002).* "If triable issues exist, those issues must go to the jury." *Young v. S.C. Dep't of Corr., 333 S.C. 714, 717, 511 S.E.2d 413, 415 (Ct. App. 1999).* "Summary

judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Vermeer Carolina's Inc. v. Wool/Chuck Chipper Corp., 336 S.C. 53, 59, 518 S.E.2d 301, 305 (Ct. App. 1999).* Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. *Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).* Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Id.*

2. Plaintiff's expert is qualified to render an expert opinion.

The gravamen of the Defendants'/Respondents' Motion for Summary Judgment is that "there is no genuine issue of material fact as to whether Dr. Jenkins violated the standard of care in his treatment of the Plaintiff."[2] [R p. 47]. Even under the current discovery posture, Plaintiff submits that the evidence overwhelmingly creates a genuine issue of material fact concerning whether Dr. Jenkins and Defendant Pathology Associates, LLC[3] violated the standard of care and committed medical malpractice. However, before addressing the genuine issue of material facts that exist in this case, Plaintiff will address the issue regarding the qualifications of Plaintiff's expert to render an expert opinion in this case. The Defendant's Memorandum argues this is a threshold issue. [R pp 54 - 57; p 134]

Plaintiff's expert is Garbor Kovacs, M.D. Dr. Kovacs is a board certified surgeon with almost 40 years of experience as a surgeon. His extensive vitae is attached as Exhibit 1 to his deposition. Dr. Kovacs is not a pathologist. However, this fact is not an

[2]As a point of clarification, Plaintiff notes that Dr. Jenkins role in treating her was limited to providing the pathological support to her treating physician, Dr. Jones.

[3]Dr. Jenkins and Dr. James Maynard are member and agents for Defendant York Pathology Associates, LLC. Liability against the limited liability company is alleged to vicarious liability.

impediment to him serving as an expert witness in this case that involves the specialty field of pathology. As he testified, surgeon's must rely upon the reports of pathologists. [R pp 20-22;pp 134-137; pp 160 l. 2 - 161 l. 4; pp 197 l. 23- 198 l. 14].

The qualification of an expert is governed by Rule 702, SCRE. A person may be qualified as an expert in a particular area based upon knowledge, skill, experience, training or education. Rule 702, SCRE. In determining a witness's qualifications as an expert, the trial court should not have a solitary focus, but rather, should make an inquiry broad in scope. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008). The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. *Wilson v. Rivers*, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004). The qualification of a witness as an expert is within the trial court's discretion *Fields*, 376 at 555, 658 S.E.2d at 85. [R pp 135].

As to medical experts, our appellate courts have expressly held that a medical practitioner's experience interacting with persons in the applicable specialty are sufficient to support his qualification as an expert. Qualification depends on the particular witness' reference to the subject. *Lee v. Suess, 318 S.C. 283, 457 S.E.2d 344 (1995).* A doctor need not practice in the particular area of medicine as the defendant doctor to be qualified to testify as an expert. *Creed v. City of Columbia, 310 S.C. 342, 345, 426 S.E.2d 785, 786. (1993).* Our appellate courts have further held that "[a]n expert is not limited to any class of persons acting professionally." *Botlicio v. Bycura, 282 S.C. 578, 586, 320 S.E.2d 59, 64 (Ct. App. 1984); see also, McGee v. Bruce Hospital System, 439 S.E.2d 257 (1993)* (although the physician was not a surgeon, he could testify as an expert on the standard of care in the placement of a catheter by a surgeon); *Howle v. PYA Monarch,*

Inc., 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986) (a psychologist was qualified as an expert witness to testify as to diagnosis, prognosis, and causation of mental and emotional disturbance in a personal injury action); *Daniels v. Bernard, 270 S.C. 51, 240 S.E.2d 518 (1978)*(in a personal injury action, a chiropractor was competent to testify as a medical expert to the extent of his knowledge and experience); *Sanford v. Howard, 161 Ga. App. 495, 288 S.E.2d 739 (1982)*(an orthopedist was competent to testify against a podiatrist where the orthopedic and pediatric methods of treatment were the same and the witness had knowledge of the procedure used by the podiatrist); *Avret v. McCormick, 246 Ga. 401, 271 S.E.2d 832 (1980)*(a nurse was competent to testify in a medical malpractice action against a physician as to the standard of care in keeping sterile a needle used to draw blood). Defects in an expert witness' education and experience go to the weight, rather than the admissibility, of the expert's testimony. *Lee v. Suess, supra* [R 135 - 137].

Applying the above-stated principles of law to the facts in this case leads to one inescapable conclusion -- Dr. Kovacs is qualified to render opinions concerning the standard of care a pathologist must following in performing the tasks of the profession. To support this conclusion, Dr. Kovacs testified in his affidavit to the following: "I am not a Pathologist but I work closely with pathologists who are instrumental to my surgical practice." [R. p 20 paragraph 2]; "I am familiar with the applicable standard of care relative to the allegations contained in the Complaint." [R p 21 paragraph 5]. Additionally, throughout his depositions, Dr. Kovacs consistently testified that as a surgeon he works and interacts with pathologists. Defendants have offered absolutely no evidence to rebut the announced qualifications of Dr. Kovacs. As a matter of fact, neither Defendant has retained an expert in order to counter the opinions of Dr. Kovacs, the

Defendants have taken a calculated risk of attacking Dr. Kovacs qualifications and opinion—an attack that must fail as a matter of law at this procedural stage because the law clearly supports that Dr. Kovacs is qualified to render the necessary opinions in this matter, and Plaintiff asks the Court to find accordingly in order to remove the elephant from the room. [R pp 134-139; pp 197 l. 23- 198 l 21; p 202 l. 5-24; pp 204 l. 15- 205 l. 7; pp 206 l. 12 - 209 l 2; pp 219 l. 14 - 220 l. 21].

3. Dr. Kovacs' opinions create a genuine issue of material fact as to whether Dr. Jenkins and Pathology Associates violated the standard of care owed to the Plaintiff.

In this medical malpractice case, Plaintiff's evidentiary burden is very well established. Plaintiff must establish "(1) 'the generally recognized practices and procedures which would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances,' and (2) a departure by the defendant 'from the recognized and generally accepted standards, practices and procedures . . . .'" *Jones v. Doe, 372 S.C. 53, 61, 640 S.E.2d 514, 518 (Ct. App. 2006)* (*quoting Cox v. Lund, 286 S.C. 410, 414, 334 S.E.2d 116, 118 (1985)*). Additionally, the plaintiff must present evidence that the Defendant's failure to adhere to the standard of care proximately caused the complained of injury. *Id.* At this procedural juncture, the Plaintiff must produce enough evidence to establish at that a genuine of material fact exists on the above-stated essential elements.

Dr. Kovacs testimony, standing alone, creates a genuine issue of material fact as to whether Dr. Jenkins and Pathology Associates violated the standard of care owed to the Plaintiff. As to the first requirement concerning the applicable standard, Dr. Kovacs testified at his deposition that it is the standard for a surgeon to rely upon the pathologist to tell him, the surgeon, whether a sample is benign or malignant. He further stated that

the surgeon relies totally on the pathologist report. [R. pp 126-129; pp 206 l. 12 - 207 l. 1]. The reasonable inference from Dr. Kovacs testimony is that the pathologist must interpret the slides to a reasonable degree of accuracy and that such information must be communicated to the surgeon is reasonably clear manner. Reasonably inferred from his affidavit and deposition testimony, Dr. Kovacs establishes that the standard of care requires the pathologist to provide the surgeon accurate, specific, and sufficiently comprehensive diagnosis in order to allow the surgeon to make informed decisions concerning surgery. This standard of care for the pathologist is supported by the following treatise entitled Cancer Medicine. In this text, it is stated as follows:

> Surgical pathologists have the definitive role in tumor diagnosis. No matter how high the index of clinical suspicion, the diagnosis of cancer is not conclusively established nor safely assumed in the absence of a tissue diagnosis . . . It is the task of the surgical pathologist to provide an accurate, specific, and sufficiently comprehensive diagnosis to enable the clinician to develop an optimal plan of treatment and, to the extent possible, estimate prognosis. There was a time not many years ago when the simple designation 'benign' or 'malignant' provided the clinician with all of the information necessary to provide appropriate care for the patient. This is no longer the case.

Excerpt taken from Cancer Medicine, Vol 2, 6th Edition, Holland, Frei et. al., (2003).[4] In sum, the standard of care and generally recognized practices and procedures which would be exercised by competent pathologist under same or similar circumstances required Dr. Jenkins and all pathologists working for Defendant York Pathology Associates to provide Dr. Jones, the surgeon, with accurate, specific, and sufficiently comprehensive diagnosis in order to allow Dr. Jones to make an informed decision concerning surgery.

Having established the standard of care, Dr. Kovacs opined in his affidavit and in his deposition testimony that Dr. Jenkins and the other pathologist who interpreted the

[4]A link to the portion of the book can be found at the following link: *http://www.ncbi.nlm.nih.gov/books/NBK13237/*

frozen slides for Dr. Jones departed from the recognized and generally accepted standards, practices and procedures for pathologists by "failing to properly analyze and interpret the fine needle aspiration results (sic) that was taken . . .and submitted to him for evaluation on September 30, 2010. . ." and by failing to accurately interpret the frozen slides that were submitted intraoperatively. [R p 21; pp 126-129 Affidavit, paragraph 6 and 7]. The excerpts from Dr. Kovacs deposition as referenced in the Facts above articulates in clear terms that it is the standard and duty of the pathologist to make an accurate interpretation.

Based upon the above analytical assessment of Dr. Kovacs affidavit and deposition testimony, a genuine issue of material fact exists as to whether Dr. Jenkins and Pathology Associates violated the standard of care owed to the Plaintiff.

C. THIS IS NOT A RES IPSA LOQUITUR CASE.

Defendants Jenkins and Pathology Associates ["Defendants"] assert this case is controlled by *Fletcher v. MUSC, 390 S.C. 458 (Ct. App. 2010).* *Fletcher* basically recognizes that a malpractice plaintiff cannot use a *res ipsa loquitur* argument in order to prove the causation element of his/her claim. "*Res ipsa loquitur* (hereinafter referred to as "res ipsa") is a rebuttable presumption that the defendant was negligent where an accident is one which ordinarily does not occur in the absence of negligence. " *Watson v. Ford Motor Co., 389 S.C. 434, 453 n.7, 699 S.E.2d 169, 179 n.7 (2010).* "Res ipsa loquitur means 'the thing speaks for itself.' *O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 349, 638 S.E.2d 96, 101 (Ct. App. 2006)(citing* W. Page Keeton et al., Prosser and Keeton on Torts §39, at 243 (5th ed. 1984). "According to the doctrine of res ipsa loquitur:

> There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from lack of care.

Id. In other words, a malpractice Plaintiff cannot ask the court to conclude that the occurrence of a complication, i.e. the injury, is itself evidence of negligence.

For several reasons, *res ipsa* does not apply to Dr. Kovacs conclusions or this case. First, in the ordinary course of things a total thyroidectomy does occur when a pathologist inaccurately communicates to a surgeon that one has cancer. Second, in order for res ipsa to apply there must be an absence of explanation concerning the injury. In other words, there must *be an absence of explanation as to why Dr. Jones performed a total thyroidectomy on the* Plaintiff. This requirement for res ipsa is not present in this case because we know why Dr. Jones performed the total thyroidectomy -- he received faulty information from the pathologist. There is not an absence of explanation in this case.

The *O'Leary Case*, *supra*, is instructive in when not to apply res ipsa. In *O'Leary*, the plaintiff slipped and fell on a metal that was protruding from the side walk. *Id.* She sued the Defendant for negligence. The jury returned a substantial verdict for O'Leary. On appeal, the defendant argued "the trial court erred in failing to grant its directed verdict motion because O'Leary-Payne relied on the doctrine of res ipsa loquitur. The Court disagreed. *Id.* Of great significance, in rejecting the defendant's res ipsa argument, the Court noted that "Charter [the defendant] mischaracterizes O'Leary-Payne's argument as being 'the rod speaks for itself.' Why is this simple sentence so significant? It is significant because the Court concluded that in a res ipsa argument

the "thing" that speaks for itself is the thing that produced the injury—in the O'Leary case it was the rod.

In the case before this Court, the "thing" that did the injury was Dr. Jones' surgery that completed a total thyroidectomy, which was proximately caused by the pathologist deviation from the standard of care in accurately interpreting and communicating his findings to the doctor. Contrary to Defendants' contention, Plaintiff is not relying upon *res ipsa loquitur* to argue that the pathologists were negligence. Dr. Kovacs is stating that the standard of care requires the pathologist to communicate with the surgeon with accurate, specific, and sufficiently comprehensive diagnosis, and that a failure to do so is a deviation from the standard of care. Defendants may not agree with the standard of care articulated by Dr. Kovacs, but at this point, no other expert has established a standard of care in this care. Therefore, at this juncture, Dr. Kovacs' articulation of the standard of care should prevail.

D. DEFENDANT AMISUB'S MOTION FOR SUMMARY JUDGMENT IS CONTINGENT UUPON THE OUTCOME OF THE MOTION FOR SUMMARY JUDGMENT FILED BY ITS CO-DEFENDANTS.

Defendant Amisub filed a separated Motion for Summary Judgment. Defendant Amisub basically asserts that it is entitled to a judgment as a matter of law if the co-defendants Motions are granted. In that Defendant Amisub is "piggy backing" off the Motions filed by its co-defendants, Plaintiff asserts that Amisub is not entitled to a summary judgment for the same reasons advanced against its co-defendants. Therefore, the arguments articulated against the co-defendants are hereby incorporated by reference against Amisub.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand the matter to the trial court for a jury trial.

Dated: February 16, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL YORK COUNTY
Court of Common Pleas

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FEB 16 2017
SC Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2014-CP-42-0508

Patricia 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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 16, 2017, he served the Final Brief and Certificate of Counsel on all attorneys of record listed on counsel for the Respondents by placing a copy in the United States Mail, postage fully paid and addressed to the following:

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCAR.

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February 16, 2017

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