THE STATE OF SOUTH CAROLINA
In The 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,

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.

REPLY BRIEF

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ARGUMENTS

I. The Appellant did not have a fair opportunity to complete discovery and name a new expert so Summary Judgment should not have been granted.

While the Appellant does not deny that discovery could have been taken in a more expeditious manner, the time line and facts show that it was improper for the Court to grant Summary Judgment without allowing additional discovery. The action was initiated on February 21, 2014, by the Appellant. Discovery was conducted and the defendants undertook depositions. The Appellant had retained an expert witness, who the Appellant continues to allege his testimony was sufficient to create a geniune issue of material fact, who testified as a surgeon, he had to rely up on the pathologist to properly read the test and provide him with the correct information in his report. He testified in this instance this was not done. [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]. This was enough to prevent the court from granting the summary judgment.

On May 6, 2015, the Respondents took the deposition of the expert witness, Dr. Kovacs. In that deposition they asked him certain technical questions regrading the test and other matters which he admitted he did not ordinarily address in his practice. And, at that time, the slides and other information were not provided to him to use in his testimony. Subsequently to that deposition, the Appellant began searching for a pathologist to also testify in the case. Additionally, on May 9, 2015, the Appellant served Interrogatories and Requests to Produce on the Respondents. The Respondents served responses to the written discovery on June 24, 2015 and June 29, 2015. [R pp 123-124].

Respondents Jenkins and York Pathology moved for Summary Judgment on July 7, 2015. [R pp 46-119]. Respondent Amisub filed a Motion for Summary Judgment on July 10, 2015. [R pp

120-122]. The Appellant filed a Memorandum in Opposition. [R pp 123-142]. The Summary Judgment hearing was held on August 13, 2015, less than two months after the inadequate discovery responses were received by the Appellant.

During the trial, the attorney for the Appellant made a Motion for Continuance on the grounds that sufficient time for discovery had not been afforded and that some of the discovery responses were not readable. [R pp 153 l 15- 156 L 15]. Pursuant to Rule 7 of the SCRCP, such a Motion can be made in open court when a court reporter is present. The Judge expressly stated that he was not going to "rule in this case based on the claim of inadequate time for discovery. So let's move on to the mertis of the Motion." [R p 156 l 13-15]. The Court also discussed this and stated "There has been adequate time for discovery.. ." [R p 155 l 14-16].

Thus even though no written order was issued, the Motion was made and was ruled upon. In light of the fact that the Court granted the Motion for Summary Judgment on September 17, 2015, there was no point in filing a Rule 59 Motion as the Court had ruled on all the issues before it. While it is clear that an issue not raised and ruled upon may not be raised on appeal, this issue was raised and ruled upon. "Where a matter is not ruled on by the Circuit Court, the issue is not preserved for appellate review unless the complaining party moves to amend the judgment pursuant to Rule 59(e), SCRCP". Vespazianni v. McAlister, 307 S.C. 411, 415 S.E.2d 427 (S.C. App., 1992). Thus the issue was raised and ruled upon and is properly preserved for review.

The courts have discussed the purpose of discovery in a number of a cases. Discovery rights afford a trial attorney the opportunity to prepare for trial. *Samples v. Mitchell,* 329 S.C. 105, 113-14, 495 S.E.2d 213, 217 (Ct.App.1997). Where these rights are not accorded, prejudice is presumed and unless the party that failed to comply establishes a lack of prejudice, reversal is required. *Id.* at 114,

495 S.E.2d at 217. In this instance the Appellant has shown prejudice because she was not afforded the opportunity to properly address the issues raised by the deposition of her expert witness and Summary Judgment was granted despite the fact the Appellant was seeking to obtain an additional witness and to obtain legible and readable copies of the discovery responses.

The ruling of the Court and the argument by the Respondent essentially is based on the fact that a significant time had lapsed between the time the case was filed and the Motion for Summary Judgment was held. However, there was no evidence of any docket or impending trial which required this Motion be heard. It was just simply that the Summary Judgment hearing was held. Appellant argues that the court's granting of Summary Judgment was improper pursuant to the case of *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (S.C., 1990). In this case discovery had been ongoing for more than three years before the Summary Judgment was entered and the Plaintiffs had not yet received satisfactory responses to their interrogatories. *Id.* 410 SE2d at 544. It is also similar in that the Motion was granted while the Plaintiffs were seeking to hire an expert witness on the question of personal injury.

The court ruled that because summary judgment is a drastic remedy it should not be invoked in a way that prohibits a party from developing all disputed issues:

> Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Watson v. Southern Ry. Co., 420 F.Supp. 483, 486 (D.S.C.1975); see also Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 10A Wright & Miller, Federal Practice and Procedure § 2741, p. 543 (1983).

Baughman v. American Tel. and Tel. Co., at 410 S.E.2d 543 (some citations omitted). The instant

case is similar to *Baughman* in that it involved proof on a medical issue which was not properly and fully explored prior to the summary judgment motion being granted. Counsel for the Appellant specifically argued to the Court the need for time to allow the retention of a new medical expert and that failure to do so might be fatal to the Appellant's case. [R p 154 l 19-25].

In this case, the granting of Summary Judgment was premature as discovery was ongoing and the Appellant was in the process of obtaining an additional expert to refute the arguments by the Respondents. Appellant should have been afforded a reasonable time period to retain the new expert and complete discovery. Therefore, the granting of the Motion for Summary Judgment should be reversed and the case remanded to allow the completion of discovery and affording the Appellant the opportunity to name a new expert witness.

II. It is premature to rule that the Appellant could not provide evidence the standard of care was not met.

The Respondent make two additional arguments that the proof presented by the Appellant was insufficient to support the claims of the Appellant because a failure to present evidence of a breach of the standard of care. In response to those arguments the Appellant submits that the testimony of its expert witness was sufficient to create an issue of material fact. [R pp 123-142; 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]]. The crux of all of the arguments is that the evidence submitted was sufficient, and if not, the Appellant should have been allowed additional time to retain and present an additional expert witness. Had the Appellant been granted an appropriate right to discovery, these issues would not be relevant. Therefore, the Appellant asserts either that the testimony of Kovacs is sufficient or that its argument above and in the Brief show that she was prevented from developing this proof and that

the case should be reversed. As stated in *Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 609 S.E.2d 838 (S.C. App., 2005) at 363 S.C. at 308:

> Discovery rights afford a trial attorney the opportunity to prepare for trial. *Samples v. Mitchell*, 329 S.C. 105, 113-14, 495 S.E.2d 213, 217 (Ct.App.1997). Where these rights are not accorded, prejudice is presumed and unless the party that failed to comply establishes a lack of prejudice, reversal is required. *Id.* at 114, 495 S.E.2d at 217.

In this instance, the Appellant was denied her fair opportunity to prepare for trial.

CONCLUSION

In conclusion, the Appellant argues that she did submit proof of the breach of the duty of due care. Additionally, she asserts that if the Court finds sufficient proof was not presented, that the lower court erred in granting Summary Judgment prior to the completion of discovery. Adequate discovery is a keystone to our litigation system and the Appellant was denied that right.

Respectfully submitted, this the 16th day of February, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 16th, 2017, he served the Final Reply 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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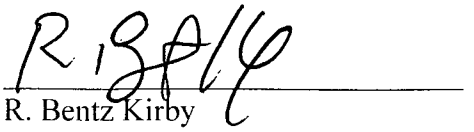
CERTIFICATE OF COUNSEL

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

Glenn Walters, Attorney at Law, PA

February 16, 2017



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