THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2015-CP-46-00882
Appellate Case No. 2016-002008

Lorrie Dibernardo, individually and as the Personal Representative of the Estate of Anthony Dibernardo, deceased,.....Appellant,

V.

Carolina Cardiology Associates, PA and Naresh Mori, MD,..... Respondents.

Appellant's Brief

McGowan, Hood & Felder, LLC

Whitney B. Harrison
1517 Hampton Street
Columbia, South Carolina 29201
Phone: (803) 779-0100

Chad McGowan
1539 Health Care Drive
Rock Hill, South Carolina 29732

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities ----------ii

Statement of Issue on Appeal ----------1

Statement of the Case ----------2

Statement of Facts ----------3

Standard of Review ----------9

Argument ---------- 10

Appellant is Entitled to a New Trial Because the Trial Court Erred in Failing to Include the Requested Jury Charge and Appellant was Prejudiced by this Exclusion----------10

Conclusion ---------- 19

TABLE OF AUTHORITIES

CASES

South Carolina State Court Cases

Ardis v. Sessions, 383 S.C. 528, 682 S.E.2d 249 (2009).....11

Bramlette v. Charter-Med.-Columbia, 302 S.C. 68, 393 S.E.2d 914(1990).....14

Burns v. South Carolina Commission for Blind, 323 S.C. 77, 448 S.E.2d 589 (Ct. App.1994)..11

Childers v. Gas Lines, Inc., 248 S.C. 316, 149 S.E.2d 761 (1966).....*passim*

Cole v. Raut, 378 S.C. 398, 663 S.E.2d 30 (2008).....10

Green v. Lilliewood, 272 S.C. 186, 249 S.E.2d 910 (1978).....14

Hennes v. Shaw, 397 S.C. 391, 725 S.E.2d 501 (Ct. App. 2012).....10,11

In re Estate of Pallister, 363 S.C. 437, 611 S.E.2d 250 (2005).....10

Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys., Inc., 397 S.C. 348, 725 S.E.2d 112, (Ct. App. 2012).....9

Pittman v. Stevens, 364 S.C. 337, 613 S.E.2d 378 (2005).....11

Ross v. Paddy, 340 S.C. 428, 532 S.E.2d 612 (Ct. App. 2000).....11

Sheperd v. United States Fidelity & Guaranty Company, 233 S.C. 536, 106 S.E.2d 381 (1958).13

Stephens v. CSX Transp., Inc., 415 S.C. 182, 781 S.E.2d 534 (2015).....11

State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987).....17

State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010).....10

Wells v. Halyard, 341 S.C. 234, 533 S.E.2d 341 (Ct. App. 2000).....11

SECONDARY SOURCES

Trial Handbook for South Carolina Lawyers § 34:1.....17

STATEMENT OF ISSUE ON APPEAL

Appellant was prejudiced by the trial court's error in declining to give the requested charge and is therefore entitled to a new trial.

STATEMENT OF THE CASE

Appellant Lorrie Dibernardo, individually and as the Personal Representative of the Estate of Anthony Dibernardo, filed a medical malpractice action against Respondents Carolina Cardiology Associates, PA and Naresh Mori, MD alleging Mr. Dibernardo suffered a fatal heart injury during a pericardiocentesis. (R. 4, 29, 180-81). Respondents answered, denying allegations of medical malpractice. (R.50). The case proceeded to a jury trial before the Honorable R. Scott Sprouse in September 2016. (R.54). After a four-day trial, the jury returned a verdict in favor of Respondents. Appellant timely filed a notice of appeal.

STATEMENT OF FACTS

Mr. Dibernardo was a long-time patient of Respondent Carolina Cardiology Associates. (R.85). He was born with Noonan syndrome, a genetic condition that caused him to have a larger than normal heart. (R.85, 241). Because of his larger heart, Mr. Dibernardo had regular cardiac appointments, and over the course of eight years had been a patient of Dr. Jay K. Shah, a doctor at Respondent Carolina Cardiology Associates. (R.85, 125, 130, 179, 219, 242). During that time, Dr. Shah monitored Mr. Dibernardo's heart and adjusted medications accordingly.

Around 2009, Dr. Shah diagnosed Mr. Dibernardo with a large pericardial effusion. A pericardial effusion occurs when there is a build-up of fluid between the heart and pericardium, an area commonly known as the heart sac. (R.84, 169, 174, 550-53). For Mr. Dibernardo, this build up occurred chronically, and was something that Dr. Shah kept an eye on. (R.174, 550-53). If left unmonitored and untreated, extensive fluid build-up can compress the heart and prevent it from functioning normally. (R.169). Thus, Mr. Dibernardo kept regular appointments with Dr. Shah to avoid an emergency or fatal situation. (R.174).

In July 2013, Mr. Dibernardo began experiencing some swelling in his legs and shortness of breath when walking. (R.85, 550-53). These problems had presented in years prior and were not unexpected given Mr. Dibernardo's large pericardial effusion, despite the fact the fluid levels had been closely monitored for years. (R.84-85, 112, 130, 174, 176). At this time, Mr. Dibernardo was maintaining his normal lifestyle and routine, and Dr. Shah and Mr. Dibernardo recognized in order for him to continue doing so, the fluid around his heart needed to be removed. (R.251-52, 551).

Dr. Shah admitted Mr. Dibernardo to Piedmont Medical Center on July 19, 2013, for two scheduled procedures. (R.29, 242, 251, 550-52, 548-59). First, Mr. Dibernardo needed the fluid around his heart to be drained, by a surgeon within the practice group—Respondent Mori. Second,

Dr. Shah recommended a left and right heart catheterization to confirm the overall health of Mr. Dibernardo's heart to determine if there was any blockage. (R.553).

By way of background and for context, during a pericardiocentesis—which is the process of aspirating fluid from the pericardial space[1]—a hollow needle is inserted in the lower part of the sternum and is positioned towards the shoulder. (R.175, 370, 434). The needle is directed to the fluid in the sac, not the heart itself. An echocardiogram and a fluoroscopy (a video x-ray) are used so the doctor can have a visual of where the fluid and the instrument are located within the patient's pericardial sac throughout the procedure. (R.88, 177-79).

Prior to insertion of the needle, an EKG[2] clip (connected to an EKG machine[3]) is attached to the needle as a safeguard. The EKG creates a short circuit so that if the needle touches the heart it will alarm before any damage can be done to the heart.[4] (R.89, 176, 178). The needle is then placed in the patient while a syringe, placed in the hollow portion of the needle, is used to extract the fluid—this act is known as aspiration. (R.179-80). During this initial aspiration, the fluid color can appear clear, tan, yellow, or a pinkish color; however concern only arises if there is bright red blood in the syringe.[5] (R.180). Assuming blood is not detected, the surgeon removes the syringe from the needle and uses the needle to insert saline into the patient. (R.90, 180). Saline is visible with the echocardiogram, and allows confirmation that the needle is correctly

---

[1] For visual purposes, the heart is covered by a sac—known as the pericardial sac. The sac is made up of two layers of tissue, the pericardium (outer and inner), and is surrounded by pericardial fluid that is used to cushion the heart as it expands and contracts. The pericardial space targeted in this procedure is comprised of the pericardium and pericardial sac. In Mr. Dibernardo's case too much fluid had gathered around the pericardium layers around the heart, which is why the fluid needed to be removed. (R.114).

[3] An EKG machine operates the test that checks for problems with the electrical activity of the heart. An EKG shows the heart's electrical activity as line tracings on paper.

[4] Practically, this short circuit can be likened to the game Operation. (R.89). The doctor will be alerted if the needle is misplaced. (R.89).

[5] If that were to occur, it would signify that the heart had been damaged. (R.180).

placed in the pericardial sac by the fluid. (R.90, 180). After determining proper placement, a guide wire, known as a J wire, is inserted through the needle. (Flash drive—Picture of J-wire). The guide wire is essentially a soft, pliable spring that cannot hurt any tissue. (R.180-82). This wire protects the pericardial space throughout the procedure to ensure nothing harms the heart. Once the wire is in, the needle is removed. (R.183).

Following the insertion of the wire, the doctor confirms the wire is placed deep enough into the pericardial space to adequately protect the heart from any other device[6] that may be employed throughout the procedure.

Once the doctor has confirmed the correct placement, a dilator/introducer is placed over the wire and it is slid down to the patient's pericardium. (R.90, 181, 183, 186; Flash drive—Picture of dilator/introducer). The purpose of the dilator/introducer is to create the necessary space in the tissue to advance a catheter, sheath, or other tube that will be used in draining the fluid out of the pericardium sac. (R.182, 185). Unlike the wire, the dilator and the sheath (which may be inserted later on) are very sharp. (R. 183; Flash drive—Picture of dilator and sheath). The only way to protect the heart from being harmed by a dilator or sheath during the procedure is for the doctor to maintain a good wire position. (R. 183, 185, 190).

Once the dilator has created the space, it is removed so a catheter/sheath/other tube can be inserted over the wire. The wire is then removed and the chosen drainage device remains in the pericardium. The doctor verifies placement using a fluoroscopy. (R.185-86). The doctor inserts a dye and confirms the device is properly placed within the pericardial sac by observing the dye

[6] As a point of reference the other devices that may be inserted are a dilator (a sharp device that creates space for the draining devices), a catheter (a mechanism that drains the fluid), and a sheath (a hard/sharp plastic tube). Practically, the wire needs to extend a further distance within the pericardial space than any other device used in the procedure to protect the heart.

circulating around the heart. (R. 91, 183, 186). Following that confirmation, the doctor begins draining the desired amount of fluid. (R. 91, 186, 436).

Returning to the specifics of this case, on July 22, 2013, Mr. Dibernardo was taken to the cardiac cath lab around 8:00 a.m. to begin heart monitoring and to receive sedation drugs for the procedure. (R. 93, 245, 433, 597). Around 10:30 a.m., Respondent Mori arrived and was later joined by the echocardiogram technician, who operates the EKG equipment. (R.93, 563). At the time of the procedure, Mr. Dibernardo had about an inch and half of thick fluid around his heart. (R.88). The procedure went according to plan with the insertion of the needle, then the wire through the hollow needle, then the placement of the dilator, then the insertion of the catheter with confirmation of correct placement by inserting dye by 10:50 a.m. with a fluoroscopy (hereinafter "Fluro #1"). (R.206, 213, 307, 371, 434; Flash drive- Fluro #1). Around 11:00 a.m., Respondent Mori began draining the fluid from Mr. Dibernardo's pericardium space. (R.95, 564-65). Mr. Dibernardo's vital signs, including blood pressure, were stable and during the next fifteen minutes, a quarter of the fluid, more than a liter to be exact, was removed. (R. 95, 186-95, 603).

Respondent Mori then decided, with no stated reason in the medical records, to change the equipment in Mr. Dibernardo's heart and switch from the catheter to a sheath.[7] (R. 95-96, 335-337, 603). As noted *supra* a catheter is a mechanism that drains the fluid and a sheath is a hard/sharp plastic tube. (R. 187). To make the switch from the catheter to the sheath, the J-wire had to be re-inserted to withdraw the catheter, leaving just the wire in the pericardial space.

[7] Respondent Mori's reasoning for removing the catheter was highly debated over the course of trial. At various points during litigation and trial Respondent Mori's reason ranged from the speed of the fluid, the coloring of the fluid, finding a clot, and arguable concerns about proper placement of the first catheter. For the purposes of the issue on appeal, Respondent Mori's reason is of no consequence.

(R.190-91, 603). However, the J-wire was not inserted far enough into the pericardium, leaving it unable to perform its function of protecting the heart. (R. 194).

Respondent Mori fed a dilator/introducer down the wire into the pericardium space, and then added the sheath. (R. 195). Once those items were in place, Respondent Mori fed the same catheter into the sheath. (R. 191, 195). To confirm its placement, a visual was done using a fluoroscopy (hereinafter "Fluro #2"). (Flash drive-Fluro # 2; R.603-04). During Fluro #2 it became apparent that there was an injury/abrasion to the heart. (R.195). Specifically, as the dye was inserted for contrast purposes, the dye flowed towards the heart creating a stain, thereby demonstrating an injury had occurred. (R.98, 194, 196-97; Flash drive-Fluro # 2). Fluro # 2 showed the catheter had become improperly "tethered" to the heart. (R.402). The injury was further indicated in a third fluoroscopy (hereinafter "Fluro#3"). (Fluro#3).

After Respondent Mori improperly inserted the sheath and injured Mr. Dibernardo's heart, his blood pressure dropped significantly, putting him at risk of brain damage. (R. 115, 189, 200, 341, 597-98). The heart injury damaged the surface of Mr. Dibernardo's heart, and caused it to bleed. (R. 83, 572). Respondent Mori accordingly called for a cardiac surgeon, but he was occupied with another patient. (R. 572, 603). However, the bleeding and potential health risks became so severe that Respondent Mori could not wait and initiated autotransfuses, in which Mr. Dibernardo's blood was taken from around his heart and placed back into him through a line placed in his groin while he waited for an emergency surgery. (R. 83, 114, 372, 438, 603-04).

During the surgery, the surgeon found the area in the heart that has been scraped by the sheath, and a clot was located and removed. (R.103, 202-03, 572, 553, 604). When Mr. Dibernardo came out of surgery he was placed on a ventilator and admitted to the intensive care unit (ICU). (R.104, 236, 597). Mr. Dibernardo was briefly removed from the ventilator, but was

placed back on because his body could not function or maintain requisite levels of stability without the assistance of the ventilator. (R.236, 251, 589, 593). Ultimately, his family made the difficult decision to remove the ventilator and Mr. Dibernardo passed away. (R. 82, 238-40, 391, 597, 599).

Because of Mr. Dibernardo's injuries, Appellant brought this lawsuit alleging Respondents were negligent, careless, reckless, willful, and wanton in their care of Mr. Dibernardo by failing to exercise medical treatment within the standard of care. (R.29). Specifically, Appellant alleged Respondents breached the standard of care by removing and replacing the catheter with a sheath; failing to document the repositioning of the catheter and replacement of the sheath; and improperly manipulating and repositioning the catheter resulting in the trauma to Mr. Dibernardo's heart. (R.29).

At trial, no one disputed the fact that Mr. Dibernardo's heart was injured during the procedure conducted by Respondent Mori.[8] (R.553-54). More importantly, it was undisputed that if the procedure had been performed correctly, this injury would not have occurred. (R. 191, 193-94, 197, 314-15, 321, 342, 343,400). While the parties disagree on whether the sheath or the needle caused the injury during the pericardiocentesis, Respondent Mori, and both experts testified in accord that when the procedure is done properly no injury occurs. (R. 191, 193-94, 197, 314-15, 321, 342, 343, 400). Further during cross examination of Respondent Mori and his experts,

[8] Specifically, Respondent Mori; Dr. Shah; Appellant's expert, Dr. Alan Schob; and Respondents' expert, Dr. Jim Story, all agreed an abrasion/injury to the heart occurred during the pericardiocentesis performed by Respondent Mori. (R.199, 205, 400). In fact, Dr. Shah testified that "but for the injury" to Mr. Dibernardo's heart during the pericardiocentesis, Mr. Dibernardo "would not have died when he did." (R. 132). The injury was further supported by the fluoroscopy recordings and echocardiogram images, along with the medical records. (R. 196-97; Fluro # 1, Fluro # 2, Fluro # 3).

Appellant elicited there was no explanation for Mr. Dibernardo's injury, but for improper control of the procedure.

Based on the testimony and evidence presented, Appellant requested a jury charge regarding the control of an instrumentality pursuant to *Childers v. Gas Lines, Inc.*, 248 S.C. 316, 323–24, 149 S.E.2d 761, 764 (1966). The requested charge stated:

> When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have management use proper care, it affords a reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.

(R.602). The trial court declined to give the charge, finding it did not reflect the medical malpractice burden of proof. (R.541). Appellant's counsel noted his objection for the record and the requested charge was marked as a court's exhibit. (R.541-42, 602). The jury subsequently returned a verdict in favor of Respondents. (R.1). This appeal followed.

STANDARD OF REVIEW

"The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law." *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys., Inc.*, 397 S.C. 348, 358, 725 S.E.2d 112, 117 (Ct. App. 2012).

ARGUMENT

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT ERRED IN FAILING TO INCLUDE THE REQUESTED JURY CHARGE AND APPELLANT WAS PREJUDICED BY THIS EXCLUSION.

Appellant is entitled to a new trial based on the trial court's failure to charge the jury with the requested charge. The trial court's belief that the requested charge changed the burden of proof was an error of law. As explained herein, South Carolina law allows an inference of negligence in medical malpractice cases, including the inference of negligence when the factors for the control of the instrumentality are satisfied. Appellant was entitled to the requested charge based on Respondent Mori's admission, along with circumstantial evidence presented at trial— including the testimony of Dr. Shah, Dr. Schob, Dr. Story; the fluoroscopy recordings; the echos; and medical records. This error prejudiced Appellant because it prohibited the jury from contextualizing the evidence, testimony, and admission by Respondent Mori as it relates to the inference of negligence that can be made. Accordingly, this Court should reverse and grant Appellant a new trial.

"A trial court must charge the current and correct law." *In re Estate of Pallister*, 363 S.C. 437, 451, 611 S.E.2d 250, 258 (2005). "The law to be charged must be determined from the evidence presented at trial." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). "The substance of the law is what must be charged to the jury, not any particular verbiage." *Id.* An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. *Hennes v. Shaw*, 397 S.C. 391, 402, 725 S.E.2d 501, 507 (Ct. App. 2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). In reviewing an alleged error in charging, an appellate court will consider the trial

court's jury charge as a whole in light of the evidence and issues presented at trial. *Hennes*, 397 S.C. at 402, 725 S.E.2d at 507. "Ordinarily, a trial [court] has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." *Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000). The Court of Appeals in *Burns v. South Carolina Commission for Blind*, explained:

> If the requested charge states a sound principle of law that is applicable to the case, and not otherwise covered by the charge, refusal to charge it is error and requires a new trial. Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error.

323 S.C. 77, 80, 448 S.E.2d 589, 591 (Ct. App. 1994) (internal citations omitted).

To warrant reversal, the party seeking the requested jury charge must demonstrate error and prejudice. *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005). "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." *Wells v. Halyard*, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000); *see also Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 197–98, 781 S.E.2d 534, 542 (2015) ("If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. This holistic approach to jury instructions is linked to the principle of appellate procedure that '[a]n error not shown to be prejudicial does not constitute grounds for reversal.'" (quoting *Ardis v. Sessions*, 383 S.C. 528, 532, 682 S.E.2d 249, 250 (2009))).

Appellant requested the following charge with respect to the control of instrumentality:

> When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have management use proper care, it affords a reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.

(R.541, 602). This requested charge is based on *Childers*. 248 S.C. at 323–24, 149 S.E.2d at 764. (R.541). The trial court refused to charge the requested language because it reasoned the charge "establishes a different standard, a different burden of proof that is not in accordance with our medical malpractice burden of proof that the plaintiff has." (R.541). However, the requested charge represents an accurate and correct statement of the law. The requested charge does not shift the burden; rather, it clarifies that the jury may draw an inference of negligence under circumstances like that presented by Appellant—where evidence has been adduced that had the instrument that caused the injury been managed with proper care, no injury would have occurred.

As our jurisprudence has acknowledged inferences are appropriate based on control of an instrumentality and, additionally, are certainly allowed in medical malpractice cases. In *Childers*, the respondent sustained injuries when his motorcycle overturned after colliding with debris from a wooden traffic sign that was lying in his traffic lane. It was undisputed that the appellant's crew had been working on the shoulder of the traffic lane the entire day, and blocked off the lane because material was thrown into the lane as the crew completed its ditch digging. 248 S.C. at 320–21, 149 S.E.2d at 763. During the day, the appellant's crew placed this traffic sign into the lane; however, the appellant contended an employee removed the sign from the lane at the end of the work day, well before the respondent's accident. *Id.* A jury found the appellant was negligent for the respondent's injuries and the trial court denied appellant's post-trial motion. On appeal, the appellant argued the respondent could not prove negligence because there was no evidence that the appellant was the proximate cause of the injury. *Id.* at 322, 149 S.E.2d at 763. Further appellant suggested the only inference that could be drawn from the evidence presented at trial was that an unknown automobile had struck the sign that the appellant's crew placed in the shoulder, serving as an intervening independent act; thereby arguing no inference of negligence could be made. *Id.*

The Supreme Court disagreed and explained "negligence may be inferred from all of the facts and attendant circumstances in the case, and where the circumstances are such as to take the case out of the realm of conjecture and into the realm of legitimate inferences from established facts, a prima facia case is made." *Id.* at 322, 149 S.E.2d at 764. In reviewing the facts of the case, the Court found there was sufficient evidence "to support a legitimate inference of negligence" by the appellant. *Id.* Despite the testimony of the crew's foremen that the sign had been removed from the lane and placed on the shoulder with lights, one witness testified that when he passed the area around 10:00 p.m. the traffic sign was in the lane, not on the shoulder. *Id.* Further, he stated when he passed the scene an hour later around 11:00 p.m. the sign had been broken and was lying in the road. *Id.* A second witness near the scene did not see the sign being struck but heard the event occur around 10:30 p.m. *Id.* Moreover, the witness who past the scene both times testified that there was no light around the sign when he passed at 10:00 p.m. *Id.* The Court explained that in construing the evidence together, a reasonable inference could be drawn that the appellant's work crew failed to move the sign. *Id.*

In support of its holding, the Court relied on *Sheperd v. United States Fidelity & Guaranty Company*, 233 S.C. 536, 106 S.E.2d 381 (1958), in which it previously acknowledged a prima facie inference of negligence is sufficient to satisfy the burden of proof for proximate cause. *Id.* The Court block quoted the control of the instrumentality language, now requested by Appellant as a jury charge. *Id.* In applying that language to the facts of *Childers*, the Court explained the appellant was the entity with the management and control of the sign. *Id.* at 316, 149 S.E.2d 765. While the appellant had witnesses that said the sign was not left in the street, the Court found that the position of the sign at the time of the injury and the testimony offered at trial were "strong circumstantial evidence that the appellant's witnesses were mistaken." *Id.* As such, the Court

found that an inference of negligence properly satisfies the burden of proof in establishing proximate cause.

Additionally, South Carolina appellate courts have held an admission by the defendant doctor along with circumstantial evidence is sufficient to infer proximate cause in medical malpractices cases. In *Green v. Lilliewood*, then-Justice Ness reversed the grant of a directed verdict, explaining that an inference of negligence could satisfy proximate cause when there was an admission of error by the defendant doctor and circumstantial evidence of the doctor's culpability. 272 S.C. 186, 191, 249 S.E.2d 910, 912 (1978). In reaching this decision, then-Justice Ness noted the Court could not ignore the admission by the defendant doctor and there was "strong circumstantial evidence" of the defendant doctor's negligence in reviewing the chain of events in the defendant doctor's treatment of the plaintiff.[9] *Id.* In sum, the Court held there was sufficient evidence to allow the inference of negligence and for the matter to be submitted to the jury. *Id.* Thus, an inference of negligence, when properly supported by evidence and testimony, satisfies the plaintiff's burden of proof as to proximate cause in a medical malpractice case.

Further, the Supreme Court, relying on *Childers*, explained in *Bramlette v. Charter-Med.-Columbia* that in a medical malpractice action a defendant "may be held liable for anything which appears to have been a natural and probable consequence of his negligence." 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990) (citing *Childers).* Thus, "a plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the

[9] In *Green*, after the defendant doctor performed the medical procedure to insert an intrauterine device (IUD), the plaintiff developed varying problems and symptoms. *Id.* at 191-92, 249 S.E.2d at 913. The plaintiff returned to the defendant doctor a year later to have the IUD removed and have a tubal ligation performed. *Id.* The plaintiff's pain continued and months later plaintiff learned defendant doctor never removed the IUD. The plaintiff eventually underwent three painful procedures to remove the IUD, and two significant surgeries to remove her uterus and an ovary to abate the pain caused by defendant doctor's actions and inaction. *Id.*

defendant's negligence." *Id.* Notably, in order for the *Childers*' Court to reach the conclusion relied on by the *Bramlette* Court in a medical malpractice case, the factors of instrumentality of control had to be satisfied. Similarly, in the instant case, the lack of care in the control of the instrumentality caused the injury and it is therefore the natural and probable consequence of that negligence.

Accordingly, Appellant's requested charge reflects a correct and current statement of the law that is applicable to this case. Contrary to the trial court's ruling, the burden of proof remained with Appellant. To be entitled to this inference Appellant had to put forth sufficient evidence and testimony to show that (1) the pericardiocentesis was under the management of Dr. Mori at the time of the injury, (2) if the procedure was performed with the requisite care the injury sustained by Mr. Dibernardo would not have occurred, and (3) no other explanation could justify the injury. Therefore, Appellant had to satisfy the above elements in order to receive the charge and had to satisfy those elements to the jury's satisfaction to allow them to even make this inference. Moreover, this is only one aspect of negligence; Appellant was still required to put forth the requisite evidence and testimony to also demonstrate duty, breach, and damages.

A review of the testimony and evidence presented at trial shows the factors of the charge were satisfied. First, it is undisputed that Respondent Mori was in charge of the procedure and control of the instrumentality when the injury occurred. (R. 1995, 205, 400). In fact, Respondent Mori admitted at trial that an abrasion occurred during his procedure. (R.314).[10]

---

[10] Additionally, the echocardiograms and fluoroscopy recordings provide further proof of the injury that occurred under the control of Respondent Mori. (Fluro # 1, Fluro # 2, Fluro # 3,); *see also* (R. 197) ("This picture proves that the insertion of this sheath and catheter damaged the heart to sufficient capacity to cause bleeding which resulted in the patient's blood pressure dropping, subsequent events having to go to emergency surgery."); (R.198-99) (describing the staining or dye was not normal; "It's indicative of injury to the heart"). The parties' experts also testified that Mr. Dibernardo's heart was injured during the procedure. Dr. Schob, Appellant's expert,

Second, trial testimony established that, if the procedure had been done properly, Mr. Dibernardo's injury would not have occurred. Importantly, Respondent Mori repeatedly agreed that if he had performed the pericardiocentesis properly, by either correctly inserting the sheath or needle, the injury would not have occurred. (R.314, 343). He agreed, "If you do all of those things properly, you should not cause an injury to the heart" and "you should not tear up the heart tissue" if you are performing the procedure correctly. (R.315). Additionally, he testified Mr. Dibernardo's injury is the exact injury "doing the procedure properly is meant to avoid." (R.315). Respondent Mori also agreed that improperly inserting the sheath is the only way a sheath can cause Mr. Dibernardo's injury, and if he had put the sheath in properly it would not injure the patient. (R.341-42).

This is further supported by the testimony of both parties' experts. Dr. Schob, testified if the sheath and dilator/introducer is inserted properly, pursuant to the normal standard, this type of injury does not occur. (R.191, 197). Similarly, Dr. Story testified that if the widely accepted standards are followed in the insertion of either a sheath or needle there is no injury to the heart. (R.412-13).

Third, and closely tied to the second factor, through the course of trial Appellant elicited testimony that there is no other explanation for the injury. Respondent Mori's admission in and of itself is enough to demonstrate the injury should not have occurred and there is no reason for the injury. While Respondents discussed other possible complications to the procedure, this testimony merely reflects why the decision is rightly left for the jury and does not negate the fact

---

explained that "the x-ray images clearly without a doubt demonstrate . . . the point where the heart was damaged" under the control of Respondent Mori. (R.208). Dr. Story, Respondent's expert, testified "the injury to the heart was either caused by the needle or the sheath" both of which were under the sole control of Respondent Mori. (R.408).

that Respondent Mori and two experts acknowledged that the injury sustained by Mr. Dibernardo is not one that occurs if the sheath or the needle is properly inserted. This is analogous to *Childers* in which the Court found the foreman and crew were mistaken about their belief that they properly moved their instrument. Notably, proving the absence of explanation was Appellant's burden, which was achieved through setting forth the standard of care, the correct method to perform the procedure, expert testimony in support of Appellant's position, and cross-examination of Respondent Mori and his experts. At no point did the burden shift to Respondents. For these reasons, the trial court erred in not providing the requested charge.

The trial court's failure to charge the jury pursuant to *Childers* prejudiced Appellant by failing to inform the jury that it may infer causation. This thwarted the underlying rationale of giving jury charges—which is to assist the jury in its role as a fact-finder and advise it on how it may distill the evidence to determine whether the required party has satisfied its burden. *Trial Handbook for South Carolina Lawyers* § 34:1 ("The purpose of jury instructions is to enlighten the jury and aid it in arriving at a correct verdict.") (citing *State v. Leonard*, 292 S.C. 133, 355 S.E.2d 270 (1987)). Reviewing the charge as a whole, the trial court failed to adequately apprise the jury that the evidence adduced could allow it to infer negligence.

As to circumstantial evidence, the trial court charged:

> Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. *Circumstantial evidence is based on inference* and not on personal knowledge or observation. It is proof that does not actually establish the fact in question but that *asserts or describes something else from which you may either reasonably infer the truth about the fact or at least reasonably infer an increase in the probability that the fact is true.* For circumstantial evidence to be sufficient to warrant the finding of a fact the circumstances must lead to that fact with reasonable certainty. *The facts and circumstances should be considered in light of ordinary experience and common sense.*

(R.521). As to proximate cause, the trial court charged:

> [T] he plaintiff must prove that the defendant's negligence proximately caused the plaintiff's damages. *Proximate cause is something that produces a natural chain of events which in the end brings about the injury.* It is a direct cause of the injury. To prove that the defendant's negligence proximately caused the plaintiff's injury the plaintiff must first prove causation in fact. This is proven by showing that the injury would not have occurred but for the defendant's negligence. The plaintiff must also prove legal cause. Legal cause is proven by showing that the injury was foreseeable. This means that *the injury occurred as a natural and probable consequence of the defendant's negligence.*

(R.527-28) (emphasis added). While these two charges refer to inference and natural consequence, they fail to sufficiently connect the legal proposition advanced by Appellant's requested charge. Appellant's requested charge not only bridges the concepts of inference and natural consequence, but also sets forth the correct statement that an inference can be made based on the three elements of control being satisfied. The charges as a whole never instructed the jury that it was allowed to make such a connection.

This inference was vital to Appellant's case. Given the complexity of the underlying procedure, the fact that both experts and Respondent Mori agreed that proper care with the instrument would avoid injury needed to be highlighted as a basis for drawing the inference that it was the lack of care and control of the instrumentality which proximately caused this injury. More succinctly put, a procedure involving invading the area surrounding the heart sounds eminently and inherently perilous to a layman; therefore, a charge clarifying that this injury could have been avoided simply by using proper care was essential to the jury's consideration of the evidence. As such, the jury was never told that under South Carolina law evidence and testimony presented by Appellant allows them to infer Respondent Mori was negligent based on circumstantial evidence. This prejudicial error requires and warrants a new trial.

CONCLUSION

Based on the foregoing, the trial court erred in failing to charge the jury with the control of instrumentality charge. For the reasons stated herein, reversal and a new trial are warranted.

Respectfully submitted,

McGowan, Hood & Felder, LLC

Whitney B. Harrison
1517 Hampton Street
Columbia, South Carolina 29201
(803) 779-0100
wharrison@mcgowanhood.com

Chad McGowan
1539 Health Care Drive
Rock Hill, South Carolina 29732
cmcgowan@mcgowanhood.com

ATTORNEYS FOR APPELLANT