

**IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM YORK COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Appellate Case No.: 2017-001271
Case No.: 2015-CP-46-2454

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DEC 14 2017
SC Court of Appeals

Wayne H. Copeland as the PR of the Estate of
Dorothy H. Copeland, deceased.....Appellant,

-v-

Carolina Pulmonary Physicians, P.A.....Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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REPLY ARGUMENTS

I. Plaintiff did set forth evidence from which the jury could reasonably infer that defendant deviated from the standard of care and caused injury to patient Dorothy Copeland and was not based on mere speculation and conjecture.

In ruling on motions for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. Huffines Co., LLC v. Lockhart, 365 S.C. 178, 187, 671 S.E. 2d 231, 236 (2006). If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied. Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995).

This being a matter of medical negligence, the Plaintiff must provide evidence of (1) a generally recognized and accepted standard of care, and (2) a departure from that standard of care. David v McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 4 (2006). In this regard, a plaintiff “must provide expert testimony to establish both the required standard of care and the defendant[‘s] failure to conform to that standard [].” Id. At 248.

At the trial, Plaintiff tendered Susan Davies, R.N. as its Standard of Care (SOC) expert. Ms. Davies. Ms. Davies was qualified as an expert in medical assistant triage without objection:

Q. And do you feel comfortable in terms of testifying as what the standards of care for a registered medical assistant would be in an office setting?

A. Yes.

Mr. Manzi: Your honor, at this time we would tender Ms. Davies as an expert in medical assistant triage,

for lack of a better word.

The Court: Any further voir dire of the expert – proposed expert?

Ms. Chesley: No, your Honor.

The Court: All right. So qualified.

[R.pp. ____; Trial Tr. pp. 256, l. 13 - 19.

As a qualified expert, Ms. Davies testified to the following opinions:

Q. ... But would you agree that once the patient crosses that threshold into the doctor's office, whether it be a triage room or an exam room, that hte obligations and responsibilities of the medical professional take over?

A. Absolutely. One hundred percent.

...

Q. ... Based upon the documents that you reviewed in this matter, do you have an opinion to whether or not Joan Edge, as the registered medical assistant in that triage room on May 17, 2012, adhered to the standard of care?

A. She did not adhere to the standard.

Q. Okay. And in what manner did she not adhere to the standard of care?

A. Joan Edge was not at the patient's side. She was at the nurses' station, putting down the chart. So she was not at the patient's side to assist her up onto – up on the scale, and to help her come down, as well.

...

Q. let's assume, for the sake of argument that the Defense is making, that Deborah did begin to put her mother on the scale. Should Joan Edge have intervened?

A. Absolutely.

....

Q. Now, did you have an opinion as to whether or not that Joan Edge's failure to adhere to the standard of care was the reason Dorothy fell off the scale?

A. Absolutely.

Q. And that's because Dorothy was left unsupported on the scale?

A. Absolutely.

[R.pp. ____; Trial Tr. pp. 261, l. 7-11; 265 l. 19 - 25; 266 l. 1-4; 267 l. 18-21; 268 l. 25; 269 l. 1-6.

As previously discussed in Appellant's Brief, there was conflicting testimony as to what happened in the triage room, with Joan Edge testifying that Deborah Copeland put Dorothy Copeland on the weighing scale and Deborah Copeland testifying she did not. However, the Jury was not being asked to "speculate" as to which story was true. Looking at the evidence as a whole, the Jury could reasonably infer as to which account is more credible. Ms. Davies uncontroverted testimony established the SOC that Joan Edge was responsible for Dorothy Copeland the moment Dorothy Copeland entered the triage room. By her own testimony, Joan Edge collaborated this SOC:

Q. Okay. And also, if you had a ninety-year-old frail woman, and while she was on the scale, given her condition, that some would have to stand by her to support her, or to at least make sure she doesn't fall or the other.

A. Right.

...

Q. You wouldn't want to hold onto her, but you would want your arms there, just to catch her, in case she begins to fall.

A. Right.

Q. And that would be standard procedure, would it not?

A. Yes, it would.

...

Q. Well, let me put it this way. You wouldn't leave – if you had a ninety-year-old frail woman that you know had a history of falls, you wouldn't leave her standing alone in a room, would you?

A. No, I wouldn't.

Q. Okay, Because that wouldn't be the right thing to do?

A. Right.

[R.pp. ____; Id. at pp. 51, l. 18-23; 52, l. 1-6.

Based on the testimony presented, Plaintiff proved its burden of a prima facie case for medical negligence against the Defendant, by establishing the SOC and by presenting evidence that Defendant, through its employee, deviated from that SOC causing Dorothy Copeland to fall. It was a jury question as to resolve any conflicting testimony as to how it happened.

Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. The jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. Montgomery v. CSX Transp., Inc. 362 S.C. 529, 546, 608 S.E.2nd 440 (S.C. App. 2004) *citing*, Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed 916

(1946).

In this matter, Respondent is arguing that Plaintiff is asking the Jury to “merely” speculate as how Dorothy Copeland fell. There is ample evidence in the record for the Jury to draw reasonable inferences as to what happened in the triage room. The majority of Respondent’s argument centers on the credibility of the witnesses, which is always a jury question. There is no speculation as to the applicable SOC as established by Plaintiff’s expert. Respondent has failed to establish that as a matter of law, this matter should not have gone to the jury.

Respondent has all made a point that the allegations in Plaintiff’s Complaint differ from the evidence presented at trial. Appellant contends that any differences are insignificant as to the essence of Plaintiff’s allegations that Defendant did not adhere to the applicable SOC and caused injury to Dorothy Copeland. Of note, Plaintiff’s Complaint was unverified. [R.pp. ____]. Additionally, it is not uncommon that evidence presented at trial may differ from the allegations in a complaint. SCRCF Rule 15 specifically accommodates this situation:

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

SCRCF Rule 15(b).

In this matter, Respondent did not raise the issue of the difference in the allegations in the Complaint and the evidence presented during Appellant's case in chief until it made its motion for a Directed Verdict. The evidence present by Appellant was not a surprise to Respondent, as the evidence presented was totally consistent with the evidence disclosed during discovery. As such, Respondent implicitly consented to the Appellant's presentation of evidence. Amending the Complaint to conform to the evidence was specifically raised during the argument of the Direct Verdict motion:

The Court: You're arguing, whether she's on the scale or not —

Mr. Manzi: Whether she's on the scale or not —

The Court: — the CM – the –

Mr. Manzi: — she – that's what – that's what she testified to. She had that duty of care, and she failed. She wailed away from her. She – she turned her back on her and she fell. They put her on the scale themselves. You know, so, she may have been on the scale, she may not. That's an argument, I think, a factual argument that can be made to the jury which way. But there's no – there's no argument that she fell. She fell. And there's no argument that we prevented (sic presented) the standard of care would have been that the RMA was not to have abandoned the patient at that particular point in time.

It's – it's not unusual for an RMA for sometimes the evidence to – will — we'll say we can amend the complaint to conform to the evidence as presented...

[R.pp. _____; Trial Tr. pp. 285, l. 11-25; 286, l. 1-3 (emphasis added.).

This was also argued at the hearing on Plaintiff's Motion for Reconsideration and for a New Trial:

Mr. Manzi: Yes. Just a few points, Your Honor. One, I think it's well established in the law that that (sic) the implied amendment to the Complaint to conform to the evidence at trial and the only thing that we should be considering here is the evidence in the case presented at trial.

[R.pp. _____; Motion Tr. pp. 15, l. 23-25, pp. 16, l-3.

Respondent's arguments, in both the trial and in its appellate brief, concern the "facts" of this case far more than points of law. Most of Respondent's argument is on the "merits" of Plaintiff's claim, which is not a subject for a Directed Verdict. This case centers around factual disputes as to whether or not Defendant's employee or Deborah Copeland had control of Dorothy Copeland when she entered the triage room. The jury did not have to "speculate" on this issue as the evidence presented at trial was sufficient for them to reasonably infer either scenario. Plaintiff's presentation of evidence at trial was more than sufficient to establish the SOC and Defendant's failure to adhere to that standard. This whole case centers on "credibility" which is solely the domain of the jury. It is also the sole responsibility of the jury to determine who was at fault here, even to the extent that the jury might find both parties at fault under comparative negligence. Looking at the Plaintiff's presentation of evidence in its totality, there is nothing as a "matter of law" that should have prevented a full adjudication of the merits by the jury.

CONCLUSION

Based on the foregoing, this Court should reverse the Judgment(s) of the Trial Court and remand this matter for a new trial

Respectively submitted.

December 12, 2017.



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he has served a copy of the foregoing **Initial Reply Brief of Appellant** upon all parties required to be served by this date, mailing same enclosed in a first class, postage paid, properly addressed envelope, in an official depository under the exclusive care and custody of the United States Postal Service, to the parties' counsel whose name and address follows:

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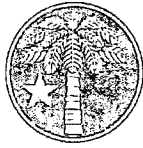
This is 12th day of DEC., 2017.

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December 12, 2017

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SC Court of Appeals

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Re: **Wayne H. Copeland as the Personal Representative of the Estate of
Dorothy H. Copeland, deceased v. Carolina Pulmonary Physicians, P.A.
Appellate Case No.: 2017-001271**

Dear Ms. Allen:

Enclosed please find the original and one copy each of the Initial Reply Brief of Appellant and Certificate of Service for filing. Please return the Filed copies in the SASE provided.

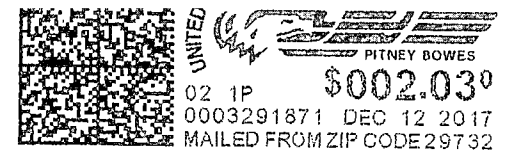
Contact me if you have any questions or concerns.

Sincerely,

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