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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Appellant Case No. 2015-002174

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.

MOTION FOR REHEARING

The Court issued its opinion on May 9, 2018, affirmed the lower court decision in Opinion 2018-UP-206. The Appellants, by and through their undersigned attorneys, hereby make the following Motion for Rehearing in accord with Appellate Rule 221 and respectfully represent unto this Honorable Court as follows:

1. The Appellant advanced a good reason why discovery was insufficient and a reason why further discovery was relevant. The Court of Appeals addressed the issue of the granting of the Summary Judgment being premature briefly in its opinion. Citing *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 677 S.E.2d 32, 36 (S.C. App., 2009), the court summarily stated:

A party claiming summary judgment is premature because they have not been

provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact. Citing *Dawkins v. Fields*, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003).

In *Guinan* the Court pointed out that the information sought by the Appellant, how long a blood thinner was administered, was not relevant as the time the blood thinner was administered had no adverse condition on the Plaintiff in that case. *Guinan*, 677 S.E.2d at page 36. The Appellant asserts that this is an improper application of the facts to the law.

In *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (S.C., 2001), the Supreme Court addressed a similar factual situation and ruled that "We conclude the trial court acted hastily in granting summary judgment based on a technical deficiency on the part of Doe's counsel, when there clearly existed some confusion regarding whether the hearing was pursuant to Rule 12(b)(6) or Rule 56." *Id.* at 345 S.C. 321. While there is no similar factual situation regarding Rule 12(b)(6) versus Rule 56 here, there was a technical deficiency which was not addressed by the Court. As set forth below, the deposition of Dr Kovacs had been taken but the Respondents had not provided legible copies of the evidence for Dr Kovacs to review. The Appellant also was in the process of retaining an expert pathologist to address the gap in the testimony of Dr Kovacs. Thus, unlike *Guinan* it is not a fact additional time for discovery would not have yielded additional evidence which would create an issue of material facts. The trial court refused to allow the discovery to be completed and there was no finding as in *Guinan* that the information sought was not relevant.

The action was initiated on February 21, 2014, by the Appellant. Discovery was conducted and the defendants undertook depositions. The Appellant retained an expert witness, Dr. Kovacs, and the Appellant asserts his testimony is sufficient to create a genuine issue of material fact. He

was a surgeon, who testified that as a surgeon he has to rely up on the pathologist to properly read any tests 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, when the Respondents took the deposition of the expert witness, Dr. Kovacs they asked him certain technical questions regarding the tests. He admitted he did not ordinarily address those questions in his practice. At the time of the deposition, the slides and other information were not available to be reviewed for use in his testimony.¹ Subsequent 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 provided 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 provided by the Respondents.

During the hearing, 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

¹ The fact that the Appellant was not allowed time to obtain legible copies of the slides and other information supports the conclusion that the Appellant was entitled to additional time for discovery.

responses were not readable. [R pp 153 l 15- 156 L 15]. Pursuant to Rule 7 of the SCRCRCP, 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 merits of the Motion.” [R p 156 l 13-15]. The Court also discussed this argument and stated “There has been adequate time for discovery.. .” [R p 155 l 14-16].

Thus even though no written order was issued regarding the Appellant’s Motion for a Continuance based upon a failure to comply adequately with discovery requests, the Motion was made. The Court ruled on the Motion by simply stating it was not going to consider whether there was an inadequate time for discovery. This is insufficient.

The case of *Gary v. Askew*, 417 S.C. 232, 789 S.E.2d 94 (S.C. App., 2016) vacated and remanded in *Gary v. Askew*, Appellate Case No 2016-001937, Opinion No. 27791 (S.C., April 25, 2018), is instructive on the issues in this case. In *Gary* the trial court granted summary judgment prior to the completion of discovery ruling that a defendant owed a nondelegable duty to the Plaintiff. The Court of Appeals reversed this ruling and concluded there was no such duty. The Court of Appeals then refused to address the issue regarding the opportunity to conduct discovery. *Gary* at 789 S.E.2d at 105. Subsequent to granting the Writ of Certiorari the Supreme Court ruled that “the record contains minimal evidence about the nature of the collision and the parties have not had an opportunity to conduct significant discovery, we find summary judgment is premature.” Citing *Helena Chem. Co. v. Allianz Underwriters Ins. Co*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). It then vacated the order of the Court of Appeals.

The Appellant argues that the result in *Gary* controls in this case. 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 nor was she provided with certain evidence which was legible. 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.² The trial court did not have to prevent further discovery simply because a 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

² See *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (S.C., 2001) and the *Gary* cases.

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 raised 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.

2. The Appellant could have developed evidence of a dispute to a material fact if further discovery would have been allowed. 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]]. If the evidence was not sufficient, the Appellant should have been provided legible copies of the discovery provided by the

Respondent and allowed additional time to retain and present an additional expert witness. Therefore, the Appellant asserts either that the testimony of Kovacs is sufficient. Additionally, she argues above and in the Brief that she was prevented from developing this proof and that the trial court in this 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

The Court of Appeals incorrectly applied the law to these facts. The Appellant has met her burden of showing that additional discovery would have yielded sufficient disputed material facts to avoid the entry of the Order granting summary judgment had she been permitted appropriate discovery time. The Appellant is entitled to a Rehearing in order to address these errors of law and the application to the facts.

Respectfully submitted, this the 24th day of May, 2018, at Orangeburg, South Carolina.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 24th, 2018, he served the Motion for a Rehearing of the Appellant on all attorneys of record listed as counsel for the Respondents by placing a copy in the United States Mail, postage fully paid and addressed to the following:

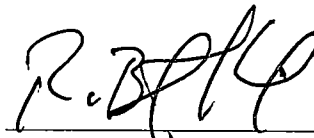
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A handwritten signature in black ink, appearing to read "R. Bentz Kirby". The signature is stylized and written above a horizontal line.

R. Bentz Kirby
Attorney for Appellant

**GLENN WALTERS
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Glenn Walters, Sr.
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May 23, 2018

The Hon. Jenny Abbott Kitchings
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P.O. Box 11629
Columbia, SC 29211

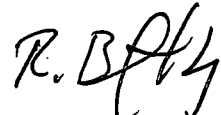
Re: Craig vs Jenkins, et al
Appellant Case No. 2015-002174

Dear Ms Kitchings:

Please find enclosed the Motion for a Rehearing of the Appellant, together with six copies, the Certificate of Service and the \$25.00 filing fee. Please file the originals and return the copy to us in the stamped, self-addressed envelope provided for your convenience. Also, please indicate the date and time of filing. You may call me at 803-413-5676 with any questions.

With kind regards, we are

Yours very truly,



Glenn Walters
R. Bentz Kirby

cc: Andrew F Lindemann
J. Hollis Inabinet
William U. Gunn
Julius W. McKay, II
Kelli L. Sullivan