

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
R. Markley Dennis Jr., Circuit Court Judge

Civil Action No. 2008-CP-10-07380
Appellate Case No. 2012-212771

Tasha Murphy and Steven Murphy..... Appellants

v.

Palmetto Lowcountry Behavioral Health,
LLC; and Steven G. Lopez, M.D.Defendants

Of whom Steven G. Lopez, M.D. is..... Respondent

BRIEF OF APPELLANTS

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Statement of Issues on Appeal

- I. Did the circuit court err in granting Dr. Lopez's motion for summary judgment on the proximate cause issue when the Murphys' expert testified that the failure to conduct an initial lithium level test on Tasha led to her developing lithium toxicity while at Palmetto?

- II. Did the circuit court err in granting Dr. Lopez's motion for summary judgment on the punitive damages issue when the Murphys' expert testified that she should have been given an initial lithium level test and her physicians failed to notice that she had developed lithium toxicity until she was about to be discharged?

Statement of the Case

On November 21, 2005, Tasha and Steven Murphy filed this action against Palmetto Lowcountry Behavioral Health, LLC (“Palmetto”); Ricardo J. Fermo, M.D.; and Steven G. Lopez, M.D.¹ (R. pp. 14–20.) The Murphys’ Complaint set forth claims for medical malpractice and loss of consortium. (R. pp. 14–20.) On January 11, 2006, Dr. Lopez answered the Complaint. (R. pp. 21–28.)

After the parties engaged in discovery, Dr. Lopez filed a motion for summary judgment on September 3, 2010. (R. pp. 29–30.) After a hearing, the circuit court granted Dr. Lopez’s motion in an order dated April 5, 2011 and filed April 13, 2011. (R. pp. 4–10.) The Murphys filed a Motion to Alter or Amend on April 25, 2011. (R. pp. 31–33.) The circuit court denied the Murphys’ motion in an order dated and filed June 21, 2012. (R. p. 13.) The Murphys filed their Notice of Appeal on July 23, 2012. (R. p. 34.)

¹ The Murphys settled with Palmetto and Dr. Fermo and they have been dismissed. (R. pp. 1, 11.)

Statement of the Facts

Tasha Murphy is in her mid-40s and has had a bipolar disorder since her late-20s. (R. p. 66, line 20–p. 67, line 10; p. 99, lines 23–24.) She has a mania and a very severe depression. (R. p. 67, lines 1–3.) Hers is a particularly severe case that is difficult to treat. (R. p. 68, lines 6–10.) She will need treatment for these conditions for the rest of her life. (R. p. 67, lines 11–18.)

Lithium is a widely-used medication used to treat these conditions. (R. p. 68, lines 11–13.) However, it is a very toxic medication that must be closely monitored. (R. p. 69, lines 20–21.) Tasha had been on lithium for about six years at the time of the incident that forms the basis of this action. (R. p. 70, lines 11–15.)

On November 19, 2002, Tasha was in a bipolar crisis. (R. p. 71, lines 19–20.) She was suicidal and severely depressed, so she went to MUSC, where she had previously been hospitalized, but they were unable to admit her at that time, so they referred her to Palmetto. (R. p. 71, lines 1–12.) She had never previously been a patient at Palmetto. (R. p. 73, lines 3–9.)

When Tasha was admitted at Palmetto, they failed to do a complete evaluation of her metabolic state. (R. p. 63, lines 14–19.) On admission,

she told them that she had not been taking her medication for a week, but she was confused, disoriented, suffered from thought blocking, and was therefore an unreliable historian. (R. p. 63, lines 20–23; p. 72, lines 3–6.) Because she was an unreliable historian, they should not have relied on her history and should have done an initial lithium level test. (R. p. 73, line 24–p. 74, line 9; p. 88, line 1–p. 89, line 4.) However, they did not do such a test until her date of discharge six days later, on November 25, 2002. (R. p. 74, lines 3–13; p. 88, lines 14–17.)

When Tasha was admitted at Palmetto, she was placed back on her prior dosage of lithium. (R. p. 72, lines 13–20.) It is not within accepted standards to start a patient on their pre-incident dosage of lithium and doctors should instead use a starting dosage. (R. p. 94, line 19–p. 95, line 21.) While at Palmetto, she developed lithium toxicity, which was not discovered until she was about to be discharged six days later. (R. p. 63, line 23–p. 64, line 3.)

It is not known for certain how Tasha became toxic, though she probably came to Palmetto with lithium onboard and then more was added while she was there. (R. p. 71, line 21–p. 72, line 2; p. 76, lines 10–22.) She may have been toxic the entire time that she was at Palmetto. (R. p. 96, line 24–p. 97, line 4.) Additionally, she was given medications at Palmetto for

anxiety and headaches, which may have masked the toxicity symptoms. (R. p. 74, line 22–p. 75, line 6.) The failure to order the initial lithium level test resulted in them not discovering that she was toxic until she was about to be discharged. (R. p. 92, lines 16–23.)

Once Tasha was finally discovered to be toxic, she was transferred by ambulance to Roper St. Francis. (R. p. 78, line 15–p. 79, line 6; R. p. 100, lines 16–18.) The treatment for toxicity is a saline bolus (for rehydration), activated charcoal (an absorption device), and hemodialysis (to cleanse the blood). (R. p. 79, lines 7–20.) At Roper St. Francis, she was treated with the saline bolus and activated charcoal. (R. p. 79, line 21–p. 80, line 1.) Hemodialysis was not used, though it was entertained. (R. p. 79, line 21–p. 80, line 1.) After this treatment, her levels returned to normal. (R. p. 80, lines 2–7.) She was at Roper St. Francis for a couple of weeks. (R. p. 101, lines 16–19.)

As a result of her experience, which she described as “frightening” and “horrifying,” she is more reclusive and anti-social, and she is not functioning day-to-day as well as she was previously. (R. p. 64, line 24–p. 65, line 2; p. 83, line 20–p. 84, line 8; p. 85, lines 3–17.) Since this incident, she has also found it very difficult to seek psychiatric treatment and is afraid to report any decompensation in her mental status because she fears that she

will be admitted again to a psychiatric facility as an inpatient. (R. p. 64, line 10–p. 65, line 6; p. 86, line 15–p. 87, line 8.) This is particularly important in her case because she needs to have an alliance with a psychiatrist who can intervene early so she does not decompensate to a point of where she could be harmful to herself or others. (R. p. 81, lines 17–23.) Additionally, her illness is also now being managed with electroconvulsive therapy (“ECT”), rather than lithium. (R. p. 82, lines 12–25.) As a result of the ECT treatments, she has short-term and long-term memory loss, which makes her unable to work. (R. p. 102, lines 12–18; p. 103, lines 10–13; p. 104, lines 11–21.)

Standard of Review

Summary judgment is only proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *BPS, Inc. v. Worthy*, 362 S.C. 319, 324, 608 S.E.2d 155, 158 (Ct. App. 2005). Summary judgment is improper “even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts.” *Id.* at 325–26, 608 S.E.2d at 159. “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009).

“[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Id.* at 330, 673 S.E.2d at 802. “A scintilla is defined as ‘a trace’ of evidence.” *Rogers v. Norfolk S. Corp.*, 356 S.C. 85, 95, 588 S.E.2d 87, 92 (2003) (Burnett, J., dissenting) (quoting Black’s Law Dictionary 1347 (7th ed. 1999)); *see also* *Bethea v. Floyd*, 177 S.C. 521, 529, 181 S.E.2d 721, 724 (1935) (defining “scintilla” as “a gleam,” “a glimmer,” “a spark,” “the least particle,” “the

smallest trace”).

Argument

I. The Murphys provided at least a scintilla of evidence on the proximate cause issue.

The circuit court’s order should be reversed because the Murphys provided sufficient evidence to withstand Dr. Lopez’s motion for summary judgment.

[M]edical malpractice lawsuits have specific requirements that must be satisfied in order for a genuine factual issue to exist. Specifically, a plaintiff alleging medical malpractice must provide evidence showing (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the defendants’ field of medicine under the same or similar circumstances, and (2) that the defendants departed from the recognized and generally accepted standards. Also, the plaintiff must show that the defendants’ departure from such generally recognized practices and procedures was the proximate cause of the plaintiff’s alleged injuries and damages.

David v. McLeod Reg’l Med. Ctr., 367 S.C. 242, 247–48, 626 S.E.2d 1, 3–4 (2006) (citations omitted). A doctor’s negligence is the proximate cause of a patient’s injury “when without such negligence the injury would not have occurred or could have been avoided.” *Ellis v. Oliver*, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996).

“When one relies solely upon the opinion of medical experts to

establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence." *Id.* However, "it is not necessary that the expert actually use the words 'most probably.'" *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991). It is sufficient if the testimony represents his professional judgment as to the most likely one among possible causes. *Id.*

Here, summary judgment was granted solely on the issue of proximate cause. (R. p. 51, lines 1–18.) In its order, the circuit court held that the Murphys "failed to produce any evidence that establishes [the Murphys'] damages were proximately caused by Dr. Lopez's alleged negligence." (R. p. 8.) That is incorrect.

The Murphys' expert, Dr. Thomas V. Martin, testified extensively about the effect the failure to take an initial lithium level test had on Tasha. He testified that the failure to order the test resulted in them not discovering that she was toxic until she was about to be discharged:

Q: Since we don't know what caused her toxicity for sure, are you able to say to a reasonable degree of medical certainty that the failure to order that test caused her to become toxic or resulted in her toxicity?

A: It resulted in them not seeing that she was toxic, yes. It didn't cause her – I mean, the test had nothing to do [with] the toxicity. That's just how you measure whether or not there's lithium in someone's system.

(R. p. 92, lines 16–23.)²

He also testified that this experience caused her to not function day-to-day as well as she was previously:

Q: And I guess what I intended to ask you is, is she back to baseline, where she was before this incident?

A: Well, she's – when she saw me in August,³ she was more reclusive. She was having more of the neurovegetative symptoms of depression. She didn't call them depression, but she wouldn't come out of her house much. She's not socializing much anymore. She's more withdrawn, not very conversive. I spent a while with her. Usually I can get a lot of history in just a half hour or 45 minutes. I could have gone on for hours try to help her become more comfortable.

....

Q: Is she back to where she was before this hospitalization, I guess is what I'm asking.

² The circuit court misconstrued this testimony by focusing on Dr. Martin's out-of-context statement that the test "had nothing to do" with the toxicity. (R. p. 8.) Of course, conducting or failing to conduct a lithium level test, standing alone, does have any effect on one's actual lithium level, but that was not Dr. Martin's point. His point was that, because they did not do the test, they did not discover that she was toxic until she was about to be discharged. (R. p. 92, lines 16–23.)

³ Dr. Martin evaluated Tasha in August 2007. (R. p. 62, lines 4–21.)

A: Well, according to her and her husband, she's not as social as she used to be before. She used to be better functioning. Maybe that's what you're asking, is what's her functioning like now. Her activities of daily living are not suboptimal to what she was before she went in. She doesn't come out now. Again, in August. After that I don't know. But she was more – she was more shut in now, and that was part of my concern, that she would not go back to treatment, and definitely not go back for hospitalization. Which might not be an unusual thing in her – and her illness is recurrent or what I call revolving door hospitalizations because that's not unusual in some severe cases. But now, she is – her activities of daily living, when I saw her, were more impaired than before she had gone in, when she was more stable.

(R. p. 83, line 20–p. 84, line 8; p. 85, lines 3–24.)

He further testified that this experience has caused her to be more hesitant about seeking psychiatric treatment for her illness:

A: The second issue is that since this time, she has found it very difficult to even seek psychiatric treatment. She has, at least in August of 2007, held onto her relationship with Dr. Robbins, who is her outpatient psychiatrist, but yet even with him she and her husband both state that she's very reluctant to reveal any difficulties, from a psychiatric perspective, changes in mood. She is, I think fair to say, deathly fearful of reporting any decompensation in her mental status for fear that she will be admitted again to a psychiatric facility as an inpatient.

And the treatment which she reports was frightening, difficult to remember; however, what she does remember was horrifying. My concern on that issue is that she will be very reluctant to be honest with treatment and therefore she will not be compliant with treatment or recommendations in treatment because of the incident.

....

Q: I want to make sure I'm clear because I'm not sure I completely understand. As far as the cause of her desire to be more shut in, are you able to say to a reasonable degree of medical certainty whether it was due to this incident versus a progression or a natural evolution of her depressive disorder?

A: Well, I'm going to say it's a combination of both. Depression – you're right. It does have elements of reclusiveness, asocial behavior, but there's an identifiable factor that she, in her state of mind, in August of 2007, has identified that I'm afraid to actually go to my doctor to tell him – and this is the one that she likes – that I'm actually doing poorly because I'm afraid he's going to admit me. And yes, I think that that does have something to do with the Palmetto incident because she directly relates it to that.

(R. p. 64, line 10–p. 65, line 6; p. 86, line 13–p. 87, line 8.)

He also testified that Tasha's condition is now being treated with ECT, rather than lithium:

A: She was not restarted on lithium, which I think was absolutely correct. She had actually been managed in the past, before the Palmetto hospitalization, with ECT, and that was restarted as well

(R. p. 82, lines 12–16.) While ECT is an appropriate treatment, Tasha testified that it has resulted in short-term and long-term memory loss, making her unable to work:

Q: You made some reference in your earlier testimony about memory problems.

A: Yes, sir.

Q: Can you elaborate on that?

A: I have memory loss from the ECT.

Q: Is it short-term or long-term?

A: Short-term.

....

Q: As far as your long-term memory –

A: It had some effects on my long-term memory, as far as my kids bringing up things that happened in the past and I don't remember them.

....

Q: What is it about your condition right now that prevents you from working?

A: The ECT that I go to every four weeks affects my memory.

Q: That's what I was going to ask you. Is it the fact that you have to go to the appointments regularly or the side effects of the memory loss?

A: The side effects of the memory loss.

Q: So other than that you don't have anything that would prevent you from working?

A: No, sir.

(R. p. 102, lines 12–18; p. 103, lines 10–13; p. 104, lines 11–21.)

As this testimony makes clear, the circuit court committed reversible error in holding that the Murphys “failure to produce any evidence that

establishes [the Murphys'] damages were proximately caused by Dr. Lopez's alleged negligence." (R. p. 8.) As discussed above, this case is governed by the "scintilla" standard. *Hancock*, 381 S.C. at 330, 673 S.E.2d at 802. It cannot be said that this testimony cited above did not provide even "a gleam, a glimmer, a spark, the least particle, [or] the smallest trace" of evidence supporting the Murphys' claim that their damages were proximately caused by Dr. Lopez's negligence. *Bethea*, 177 S.C. at 529, 181 S.E.2d at 724 (internal quotation marks omitted). "[S]ince it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). Because Dr. Lopez cannot show that "there is no genuine issue as to any material fact," the circuit court's grant of summary judgment should be reversed. Rule 56(c), SCRCP.

II. The question of whether the Murphys are entitled to punitive damages is a question for the jury.

Dr. Lopez is not entitled to summary judgment on the question of punitive damages because this presents a jury question. "[T]he question of recklessness, willfulness, or wantonness is ordinarily a question for the jury.

The question rarely becomes a matter for the court to decide.” *Cooper v. County of Florence*, 306 S.C. 408, 411, 412 S.E.2d 417, 418–19 (1991) (citations omitted). “The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton.” *Martasin v. Hilton Head Health Sys., LP*, 364 S.C. 430, 443, 613 S.E.2d 795, 802 (Ct. App. 2005) (reversing circuit court’s grant of a directed verdict on punitive damages based on the same evidence used to reverse the grant of a directed verdict on negligence in a medical malpractice case).

The cases cited by the circuit court on the punitive damages issue also provide no comfort to Dr. Lopez. In the medical malpractice case cited, the Supreme Court held that the issue of recklessness presented a jury question. *See McCourt v. Abernathy*, 318 S.C. 301, 308–09, 457 S.E.2d 603, 607–08 (1995) (holding that there was sufficient evidence in the record to support the jury’s award of punitive damage against two doctors, despite their claim that there was no evidence of recklessness). In the intentional tort case (abuse of process and intentional infliction of emotional distress) cited, the Supreme Court held that the issue of malice presented a jury question. *See Hainer v. Am. Med. Int’l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997) (holding that a jury question was presented where “there was some

evidence from which the jury could infer malice”).

The other case cited by the circuit court, *Nesbitt v. Lewis*, 335 S.C. 441, 517 S.E.2d 11 (Ct. App. 1999), is a dog bite case, governed by South Carolina’s strict liability dog bite statute, S.C. Code Ann. § 47-3-110 (1987). There, the court held that because the victim was lawfully on the property when she was bitten, she was entitled to actual damages under the statute, but that because there was no evidence that the dog owners did anything wrong other than owning the dogs, the victim was not entitled to punitive damages. *See Nesbitt*, 335 S.C. at 448–49, 517 S.E.2d at 15–16. Because that was a strict liability case where there was no evidence that the dog owner actually did anything wrong, it is distinguishable from the instant case and does not support Dr. Lopez’s argument.

Because the deposition testimony discussed above provided at least some evidence from which the jury could infer recklessness, the circuit court erred in granting Dr. Lopez’s motion for summary judgment on the punitive damages issue.

Conclusion

For the reasons stated, the circuit court erred in granting Dr. Lopez’s motion for summary judgment. Accordingly, the Murphys ask the Court to

reverse and remand this case for trial.

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CERTIFICATE OF COUNSEL

I certify that the Brief of Appellants and Reply Brief of Appellants comply with Rule 211(b), SCACR. I also certify that the Brief of Appellants, Reply Brief of Appellants, and Record on Appeal comply with the South Carolina Supreme Court's Order dated August 13, 2007, regarding personal data identifiers and other sensitive information in appellate court filings.

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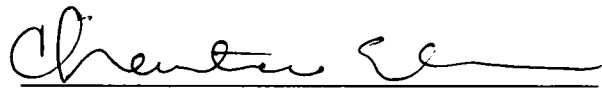
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I certify that I am a legal assistant at Griffith, Sadler & Sharp, P.A., and on August 15, 2013 I placed a copy of the *Brief of Appellants, Reply Brief of Appellants*, and *Certificate of Counsel* in the US Mail, with first-class postage prepaid, and addressed as follows:

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