THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

CASE NO. 2008-CP-10-7380
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

FINAL BRIEF OF RESPONDENT STEVEN G. LOPEZ, M.D.

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STATEMENT OF ISSUES ON APPEAL

A. Whether the Appellants' failure to produce the required expert evidence of proximate cause in a medical malpractice action mandates summary judgment, when the Appellant's sole expert admitted that the sole, alleged deviation from the standard of care, i.e., a failure to test the Appellant's Lithium level, "had nothing to do" with her Lithium toxicity and, further, he did not know how the Appellant reached a toxic Lithium level.

B. Whether the Appellants' failure to produce any evidence of reckless, willful, wanton, or malicious conduct on the part of the Respondent to support a claim for punitive damages mandates summary judgment?

FACTS

This is a medical malpractice action arising out of Appellant Tasha Murphy's (hereinafter referred to as "Appellant" or "the Patient") treatment at Palmetto Lowcountry Behavioral Health (hereinafter referred to as "Palmetto") from November 19, 2002 to November 25, 2002. (R. pp. 17-18). The Appellants alleged that the Defendants failed to exercise the appropriate standard of care in their diagnosis, care and treatment of the Appellant during the aforementioned time period.[1] (R. pp. 18-19). The Appellants alleged that the Defendants were negligent in failing to determine the amount of Lithium in Tasha Murphy's body at the time of admission before resuming her regular dosage, ultimately resulting in a toxic level of the drug Lithium 5 days later. (R. p. 18).

Upon admission to Palmetto, the Appellant presented as being off her medications, depressed, suffering from bipolar affective disorder, and suicidal with a plan to shoot herself. (R. p. 5). The Appellant was admitted by a non-Defendant physician Dr. Jenkins. (R. p. 5). Dr. Jenkins immediately started her back on her previous Lithium dosage. (R. p. 5). Dr. Lopez did not examine or treat the Appellant until the day after Dr. Jenkins' admission. (R. p. 5). Upon his examination, Dr. Lopez concurred with the admitting physician's diagnosis and treatment recommendations, including the continuation of her regular dosage of Lithium. (R. p. 5). In

[1] The Murphys settled their claims against Palmetto Lowcountry Behavioral Health, LLC and Dr. Ricardo Fermo prior to the

subsequent days, Mrs. Murphy was treated and evaluated by Drs. Ricardo Fermo and Peter Sukan, both of whom also continued the Appellant on Dr. Jenkins' admission orders, including continuing her on her Lithium regular dosage. (R. p. 5). Per standard protocol with Lithium, no subsequent treating physician ordered that Lithium levels be drawn until the fifth day because that is when the medication reaches a steady state in the body. (R. p. 5).

On November 25, the Respondent Dr. Lopez found the Appellant to be suffering from a urinary tract infection, noted she was depressed and lethargic, and felt she was not showing improvement on that day. (R. p. 5). Further, consistent with standard procedure, the Appellant's Lithium levels were checked on this date because it takes five days for this medication to reach a steady state in the body. (R. p. 5) That evening, Dr. Lopez noted that Mrs. Murphy's condition changed significantly and she exhibited jerky movements that possibly indicated Lithium toxicity. (R. pp. 5-6). The Appellant was taken to St. Francis Hospital where she was evaluated and treated. (R. p. 6).

At his deposition, the Appellant's sole medical expert, Dr. Thomas Martin, testified that the failure to draw the Appellant's Lithium level "had nothing to do" with Mrs. Murphy's eventual Lithium toxicity. (R. p. 92, lines 16-25). Dr. Martin further testified that he does not know how Mrs. Murphy reached a toxic Lithium level while at Palmetto. (R. p. 71, line 21- p. 72, line 2). The only violation of the standard of care that he testified occurred was that he

believed that a lithium level should have been taken **on admission.** (R. p. 88, lines 6-9) emphasis added). Dr. Martin opined that "a lithium level, along with the rest of the labs that were drawn, should have been done **on admission**, and that was not done." (R. p. 88, lines 14-17) (emphasis added). It is undisputed that Dr. Lopez was not the admitting physician.

STANDARD OF REVIEW

Rule 56(c), SCRCP provides for judgment as a matter of law where "there is no genuine issue as to any material fact for trial." The purpose of summary judgment is to dispose of factually unsupported claims. Celotex v. Catrett, 477 U.S. 317, 322 (1986). "Summary judgment is appropriate in those cases in which plain, palpable and indisputable facts exist on which reasonable minds cannot differ." Thompkins v. Festival Centre Group, 306 S.C. 193, 410 S.E.2d 593 (Ct. App. 1991).

Although the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment, Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009), the "[Appellant] may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), SCRCP. The Appellant's failure to prove an essential element of a case renders all other facts immaterial. Celotex, 477 U.S. at 322.

In South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. Id.

ARGUMENT

A. THE APPELLANTS FAILURE TO PROVIDE ANY EVIDENCE DEMONSTRATING THAT DR. LOPEZ PROXIMATELY CAUSED THE INJURY SUSTAINED BY THE APPELLANT REQUIRES THE CIRCUIT COURT'S JUDGMENT BE AFFIRMED.

In South Carolina, medical malpractice lawsuits have specific requirements that must be satisfied in order for a genuine factual issue to exist. David, supra, 626 S.E.2d 1, 3 (2006). 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 defendant's field of medicine under the same or similar circumstances, and (2) that the defendant departed from the recognized and generally accepted standards. Id., 367 S.C. at 247-248, 626 S.E.2d at 4 (citing Pederson v. Gould, 288 S.C. 141, 143-144, 341 S.E.2d 633, 634 (1986); Cox v. Lund, 286 S.C. 410, 414, 334 S.E.2d 116, 118 (1985)). Moreover, the plaintiff must show that the defendant's departure from such generally recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages. Id., 367 S.C. at 248, 626 S.E.2d at 4 (citing Green v. Lilliewood, 272 S.C. 186,

193, 249 S.E.2d 910, 913 (1978)). The plaintiff must provide expert testimony to establish these elements unless the subject matter lies within the ambit of common knowledge so that no special learning is required to evaluate the conduct of the defendants. Id. (citing Pederson, 288 S.C. at 143, 341 S.E.2d at 634). In South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture. Id. The failure to establish proximate cause is the crux of the Circuit Court's decision granting summary judgment in favor of Dr. Lopez and the trial court's ruling must be affirmed due to the complete absence of evidence on this element.

It is axiomatic that the Appellant must establish proximate cause as well as the negligence of the physician." Ellis v. Oliver, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996) (citing Armstrong v. Weiland, 267 S.C. 12, 225 S.E.2d 851 (1976)). "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. at 125, 473 S.E.2d at 795. When expert testimony is the only evidence of proximate cause relied upon, as is the case here, the testimony "must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." Id. "Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury

would not have occurred or could have been avoided." Hughes v. Children's Clinic, P. A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977) (citing Gunnels v. Roach, 243 S.C. 248, 133 S.E.2d 757 (1963)).

Proximate causation is only present where the injury "most probably" came from the cause alleged." Goewey v. United States, 886 F.Supp. 1268, 1279 (D.S.C. 1995) (quoting Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991)), *aff'd*, 106 F.3d 390 (4th Cir. 1997), *cert. denied*, 522 U.S. 1945 (1998). Similarly, proximate cause is absent "where the cause of plaintiff's injury may be as reasonably attributed to an act for which defendant is not liable as to one which he is liable." Messier v. Adicks, 251 S.C. 268, 161 S.E.2d 845, 846 (1968).

The lack of evidence concerning proximate cause is clear from the record in this case and is fatal to the Appellants claims against Dr. Lopez.[2] First, the Appellant's own expert, Dr.

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[2] The Respondent believes the Appellants failed to meet their burden of proof with regard to the element of proof of a deviation from the standard of care as well, but because that issue was not a basis for the Circuit Court's decision, Respondent does not address that issue specifically herein. However, pursuant to Rule 220(c), SCACR, this Court may affirm the grant of Summary Judgment Order below upon any ground appearing in the Record on Appeal. As such, the Record demonstrates that the Appellant was treated by numerous physicians throughout her stay at Palmetto, and the Appellants' expert limited his opinion to the fact that the admitting physician should have ordered a Lithium level analysis. *See* (R. p. 88, line 6 – p. 89, line 4) (opining that the standard of care was breached when Appellant's Lithium levels were not tested at the time of admission and stating "I believe he should have drawn a lithium level on admission and I believe that is essentially the biggest problem in Mrs. Murphy's case"). Dr. Martin also testified he does not believe that it was negligent for physicians who treated the Appellant after she was initially admitted to fail to order Lithium levels. (R. p. 90, line 9 – p. 91, line 5). As Dr. Lopez was not the

Martin, readily admitted the failure to draw the Appellant's Lithium level **"had nothing to do"** with her eventual Lithium toxicity. (R. p. 92, lines 16-25) (emphasis added). Therefore, even assuming for argument's sake it was a breach of the standard of care to not order a test, Appellants' sole expert concedes it did not proximately cause the damages sustained by the Appellant. That admission is fatal to the Appellants' claims and the analysis need go no further.

However, Dr. Martin further underscored the lack of proximate cause when he testified that he does not know how Mrs. Murphy reached a toxic Lithium level while at Palmetto. (R. p. 71, line 21 – p. 72, line 2). Based on this testimony alone, it is clear that the Appellants' expert cannot state with the requisite reasonable degree of medical certainty that in his professional opinion the injuries complained of most probably resulted from the Respondent's alleged negligence. The Appellant's failure to prove an essential element of a case renders all other facts immaterial. Celotex, 477 U.S. at 322.

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admitting physician, he necessarily did not breach the standard of care in his treatment of the Appellant. (R. p. 90, line 9 – p. 91, line 5). Furthermore, Respondent's expert, James C. Ballenger, M.D., has testified that for Dr. Lopez to have drawn Mrs. Murphy's Lithium levels the morning after she had already taken a dose of Lithium would be a "clear mistake." (R. p. 53. lines 5-16). Dr. Ballenger reasons that drawing such a level at that point would produce a level that nobody would know how to interpret and would lead to confusion in the record and in the Appellant's care. (R. p. 53. lines 5-16). Therefore, Dr. Ballenger agreed the standard of care is to measure Lithium levels 5 days after starting it and testified that Dr. Lopez did not breach the standard of care for psychiatry in his treatment of the Appellant. Accordingly, no expert testimony has been provided that Dr. Lopez deviated from the generally accepted standard of care in his treatment of the Appellant, and Dr. Lopez is entitled to judgment as a matter of law on this alternative ground.

At the hearing on Dr. Lopez's motion for summary judgment, the Circuit Court correctly inquired on at least eight (8) occasions where the Appellants' expert opined at his deposition that Dr. Lopez's actions proximately caused the Appellant's injury. *See* (R. p. 44, lines 22-23). ("Just tell me what you believe refutes that position stated by Mr. Smyth"); *see also* (R. p. 47, lines 21-24). ("Tell me about – when did the doctor say that it meets the probable cause aspect. In a medical malpractice case, we have to have both"); (R. p. 48, lines 2-10). ("just tell me what he says when he says – because Mr. Smyth pointed out that he said 'I can't tell you that' . . . Therein lies the problems. Without him saying, 'yes, I think that was the proximate cause,' that his departure was the proximate cause of the damage and injury – where does he say that"); (R. p. 48, lines 16-20). ("All of that goes to a departure from the standard of care. Where is it that he says that it proximately the – the departure proximately caused her injury or damage"); (R. p. 49, lines 1-2). ("Where does he say that?"); (R. p. 49, lines 5-8). ("No, I just want you to – you don't have to walk through it. Just tell me where he says that. Read it to me. His testimony"); (R. p. 49, lines 13-19). ("Again, I am not quarreling with that [issue of standard of care]. Go on to – just talk about the probable – get me to the bottom line. . . The part I want you to tell me is where he says that 'I think all of these proximately caused her injury'"). Appellant was unable to identify any. He never identified the proximate cause link and, therefore, the Court correctly determined Appellants could not survive summary judgment. There simply is no evidence that

causally links Mrs. Murphy's lithium toxicity to any action or inaction of Dr. Lopez. Taken in the light most favorable to the Appellants, they failed to produce any evidence linking the alleged breach in standard of care to her claimed injuries and none exists. Accordingly, the Circuit Court's ruling should be affirmed.

B. Plaintiffs did not produce any evidence, much less clear and convincing evidence, to sustain a claim for punitive damages, as there was no evidence of reckless, willful or wanton conduct by Dr. Lopez in his treatment of the Appellant.

Although the Appellants' allege in their pleading there was reckless, willful or wanton conduct, *see* (R. pp. 18, 20), they have failed to present any evidence to support such a claim as to Respondent.[3] "In order for a plaintiff to recover punitive damages, there must be evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights." McCourt v. Abernathy, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995). "A tort is characterized as reckless, willful, or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights." Nesbitt v. Lewis, 335 S.C. 441, 448, 517 S.E.2d 11, 15 (Ct. App. 1999). There must be clear and convincing evidence of actual malice to warrant an award for punitive

[3] Affirming the Circuit Court on the issue of proximate cause should make a decision regarding punitive damages unnecessary. *See* Hallman v. Cushman, 196 S.C. 402, 406, 13 S.E.2d 498, 500 (1941) (holding "punitive damages may not be allowed unless the alleged reckless, willful or wanton act of the defendant is a proximate cause of some injury to the plaintiff").

damages. Hainer v. American Medical Intern, Inc., 328 S.C. 128, 135, 492 S.E.2d 103, 107 (1997). The record before the Court is devoid of any such evidence.

Appellants had the opportunity to present and develop such evidence, but produced nothing to indicate reckless, willful or wanton conduct on the part of Dr. Lopez or to warrant the imposition of punitive damages. During the Appellant's treatment at Palmetto, four different physicians treated her for her various medical conditions. All four of these physicians, including Dr. Lopez, continued the Appellant on her previously prescribed Lithium dosage. Furthermore, none of these physicians ordered a test to measure Mrs. Murphy's Lithium levels until November 25, 2002, presumably because they all know it takes five days for the medication to reach a steady state in the body and that is the standard of care for this testing this drug. Moreover, according to Appellants' own expert Dr. Martin, none of the other physicians who treated Mrs. Murphy at Palmetto violated the standard of care. (R. p. 89, lines 5-8). Therefore, to suggest that Dr. Lopez, who did not admit the patient and whose conduct was admittedly appropriate, acted intentionally, willfully, or recklessly in regards to the Appellant's care is disingenuous at best.

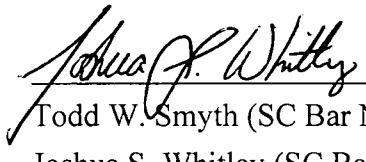
Because the Appellants and the their expert have all failed to offer any testimony that Dr. Lopez's treatment of the Appellant was reckless, willful or wanton, the Appellants have not and cannot produce any evidence in any form, much less clear and convincing evidence, of reckless

or actual malice on the part of Dr. Lopez. "Where the plaintiff relies solely upon pleadings, files no counter-affidavits and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment if, under the facts presented by the defendant, he was entitled to judgment as a matter of law. " Humana Hospital Bayside v. Lightle, 305 S. C. 214, 216, 407 S.E.2d 637, 638 (1991). Therefore, Dr. Lopez is entitled to judgment as a matter of law on the issue of punitive damages.

CONCLUSION

For the foregoing reasons, the decision of the Circuit Court should be affirmed in its entirety.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I am a legal assistant at Smyth Whitley, LLC and on August 28, 2013, I placed a copy of the Final Brief of Respondent and Certificate of Counsel in the United States Mail, with first-class postage prepaid, and addressed as follows:

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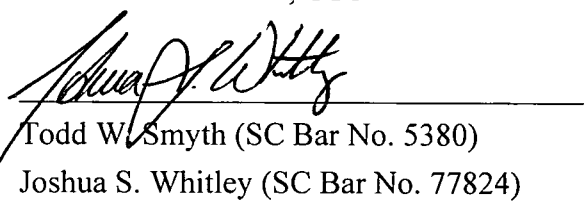
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the South Carolina Supreme Court's Order dated August 13, 2007, regarding personal data identifiers and other sensitive information in appellate court filings.

SMYTH WHITLEY, LLC



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