

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM YORK COUNTY  
COURT OF COMMON PLEAS  
THE HONORABLE R. SCOTT SPROUSE  
CIRCUIT COURT JUDGE

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**RECEIVED**

MAR 26 2019

APPELLATE CASE NO. 2016-002008  
CIVIL ACTION NO. 2015-CP-46-00882

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SC Court of Appeals

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

APPELLANT,

versus

Carolina Cardiology Associates, PA and  
Naresh Mori, MD,

RESPONDENTS.

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**Return to Petition for Rehearing**

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Respondents Carolina Cardiology Associates, PA and Naresh Mori, MD file this Return to Appellant Lorrie Dibernardo's Petition for Rehearing of this Court's Opinion No. 2019-UP-067 and state as follows:

Appellant brought this medical malpractice action individually and as the personal representative of the estate of Anthony Dibernardo against Respondents alleging that Mr. Dibernardo suffered a fatal injury during a pericardiocentesis, a procedure whereby fluid is drained to remove a build-up of fluid around the heart through a tube or catheter. The

case proceeded to trial where for approximately three days a jury heard and considered the evidence which is more fully described in the Counterstatement of Facts of the Final Respondents' Brief.

In summary, the evidence showed that Mr. Dibernardo was born with Noonan's syndrome, a genetic disorder which caused him to have an extremely enlarged heart as well as other physical abnormalities such as a caved-in chest bone deformity. He had a longstanding history of heart problems and was eventually diagnosed with a massive pericardial effusion, a build-up of fluid in the sac surrounding the heart, which made it very difficult for Mr. Dibernardo to breathe.

Mr. Dibernardo was admitted to the hospital by Dr. Shah of Carolina Cardiology who believed Mr. Dibernardo needed a surgical evaluation for his worsening of fluid around the heart. Mr. Dibernardo refused to undergo any surgical procedure and thereafter met with Dr. Mori of Carolina Cardiology who recommended that Mr. Dibernardo undergo a pericardiocentesis to attempt to remove the fluid around his heart in light of Mr. Dibernardo's refusal to undergo surgery.

The evidence presented at trial was replete with testimony that known complications can occur during a properly performed pericardiocentesis. The most common and prominent complication from a pericardiocentesis is bleeding, particularly because a pericardiocentesis involves the insertion of a needle and catheter or other tube into the space surrounding the heart which contains a risk of striking veins, vessels, or the heart muscle itself. [R.pp. 131, l. 22 – 132, l. 7; 142, ll. 16-23; 261, l. 18 – 262, l. 5; 367, l. 19 – 368, l. 16; 431, l. 21 – 432, l. 15.] Dr. Mori and Respondents' experts explained that even if a physician properly performs a pericardiocentesis and all

precautions are taken, complications can still occur. A pericardiocentesis is never 100 percent fool proof and injury can occur to a patient despite a physician following all appropriate steps and procedures. A complication can occur even if a physician meets the standard of care, and injury is not indicative of a physician's departure from the standard of care. [R.pp. 315, ll. 12-18; 316, ll. 10-20; 344, ll. 7-17; 347, ll. 1-15; 369, ll. 2-15; 413, ll. 23-24; 417, l. 23 – 418, l. 4; 420, ll. 12-15; 431, l. 21 – 432, l. 25; 465, ll. 5-1.]

Appellant's expert agreed that a pericardiocentesis involves a number of risks and complications and that an occurrence of an injury during the procedure, whether from the use of needles or equipment, is not indicative of a physician's negligence or malpractice:

Q: Performing a pericardiocentesis on a patient has a number of risks associated with it; is that true?

A: That's true.

Q: And bleeding is one of those risks; is that true?

A: Yes.

Q: And bleeding can occur even when the procedure is performed within the standard of care, can it not?

A: Yes, sir.

Q: And the fact that bleeding – a bleeding complication occurred by itself doesn't mean the physician did something wrong, does it?

A: In general, no.

....

Q: Needle injuries, equipment injuries, any kind of an injury will cause bleeding with this procedure; is that true?

A: In general, yes,

Q: And just because there's bleeding that doesn't mean somebody's committed a malpractice?

A: In general, that's correct.

[R.pp. 212, l. 21 – 213, l. 10; 224, ll. 4-10.]

In this case, Mr. DiBernardo's physical condition also raised the risk of complications during a properly performed pericardiocentesis. Mr. DiBernardo's massively enlarged, moving, and beating heart increased the difficulty of inserting a needle into a tight space with little room available for the insertion of the needle. [R.pp. 264, ll. 1-19; 266, ll. 19-23; 274, ll. 5-15; 315, l. 20 – 316, l. 4; 368, l. 10 – 369, l. 1.] The fluid into which the needle was to be inserted was not evenly distributed and most of the fluid was located behind the left ventricle, not around the right ventricle near where the needle was to be inserted. The narrow amount of fluid located at the needle insertion site left little room for the needle insertion with no risk of injury. [R.pp. 265, ll. 1-19; 273, l. 13 – 274, l. 5; 274, l. 16 – 275, l. 8; 315, ll. 20-25.] Mr. DiBernardo's abnormal anatomy and deformity in his chest area causing it to cave in also made access to his heart area difficult. [R.pp. 260, ll. 17-21; 264, ll. 20-23; 512, ll. 15-16.]

At the close of the evidence, the Trial Court instructed the jury on the applicable law, including that to recover in a medical malpractice action, the plaintiff must prove the standard of care owed by the defendant to the patient and must prove the defendant negligently departed from that standard of care in treating the patient. [R.pp. 471, l. 13 – 472, l. 14.] The Trial Court correctly charged the jury that a "doctor is not an insurer of a cure or even of a positive result; therefore, the mere fact that a treatment does not benefit the patient or that it even harms the patient does not in and of itself mean that the defendant was negligent. A bad result, injury, death or failure to cure is not by itself

enough to show that the defendant was negligent.” [R.p. 472, ll. 15-22.] Finally, the Trial Court instructed the jury on the use of circumstantial evidence. [R.pp. 468, l. 9 – 469, l. 2.]

After weighing and considering the evidence, the jury returned a verdict for the defense, finding that Dr. Mori did not violate the generally accepted standards of medical care in his treatment of Mr. Dibernardo. [R.pp. 1-3.]

At trial and on appeal, Appellant contended that the Trial Court erred by declining to give the following jury charge even though such a charge contradicts the longstanding principle that an adverse result does not equal medical malpractice:

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.pp. 540, l. 8 – 541, l. 11; 602.]

After consideration of the briefs filed by the parties, this Court affirmed the defense verdict in an unpublished per curiam opinion. Appellant has now filed a petition for rehearing, challenging this Court’s reliance upon sound and well-established principles of law that a plaintiff must present evidence of a defendant’s breach of the generally accepted standards, practices, and procedures in a medical malpractice action and that an unfortunate result alone cannot establish a failure to meet the applicable standard of care.

As an initial matter, Appellant has not shown any points overlooked or misapprehended by this Court, largely repeating the arguments previously made to this Court in her Reply Brief.

Second, Appellant opens her Petition for Rehearing with the spurious claim that the evidence at trial was undisputed that if the procedure was performed correctly, the injury would not have occurred. In making this false claim, Appellant ignores the copious amount of evidence establishing the known complications of the procedure even when properly performed. As Appellant did in her previously filed briefs, she erringly takes the testimony of Dr. Mori and Respondents' expert out of context. While Dr. Mori testified that the goal of a pericardiocentesis is that injury should not occur if the procedure is done properly, this testimony should be construed against the backdrop of Dr. Mori's repeated explanation of the known complications which can occur during a properly performed pericardiocentesis. [R.pp. 314, l. 16 – 316, l. 20; 341, l. 15 – 345, l. 22.] Dr. Story explained that while the intent of a proper pericardiocentesis is not to cause an injury to the patient, including the patient's heart, complications and injuries can occur even with the best standard of care and techniques used,. [R.pp. 412, l. 4 – 413, l. 24.]

Appellant also contends that the trial testimony showed there was no explanation for Mr. Dibernardo's injury but for an improper control of the procedure. Once again, in making such an outlandish allegation, Appellant neglects to account for all of the evidence regarding the known complications of the procedure.

Relying upon her distorted view of the evidence, Appellant argues that her requested jury charge should have been given by the Trial Court. The requested charge, however, does not accurately state the law and the burden of proof for a medical malpractice case in South Carolina which requires a plaintiff to present evidence that the defendant departed from the recognized and generally accepted standard, practices, and

procedures in the defendant's field of medicine. Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 546, 694 S.E.2d 1, 4-5 (2010). Appellant's requested charge is irreconcilable with the burden of proof in a medical malpractice case because the requested charge eliminates the requirement that the plaintiff prove a defendant's departure from the applicable standard of care and instead would permit an inference, based upon the occurrence of an injury or adverse result during a medical procedure, that the defendant must have failed to properly adhere to the standard of care. Rather than having to present evidence and prove the standard of care and departure therefrom, the requested charge would permit a plaintiff in a medical malpractice action to elude those elements of a medical malpractice claim when a plaintiff could not prove them with properly admitted direct or circumstantial evidence.

In her effort seeking to reverse this Court's decision affirming the defense verdict and the Trial Court's refusal to give the requested charge, Appellant argues that this Court has confused the doctrines of *res ipsa loquitur* and circumstantial evidence. While Appellant's argument is somewhat difficult to discern and contradictory (in that she claims to not be relying on the fact of injury to prove negligence but then argues that negligence should be inferred when an injury occurs during a medical procedure), Appellant seems to argue that she is not seeking to prove negligence by the fact of injury alone and rather only wants a charge that permits an inference of negligence based upon the admitted circumstantial evidence. The Trial Court gave such a charge to the jury:

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.

...

The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.

[R.pp. 521, ll. 9-25; 522, ll. 3-7; 7.] Accordingly, Appellant's purported concerns about the use of circumstantial evidence are unfounded.

Appellant further challenges this Court's reliance on Fletcher v. Med. Univ. of South Carolina, 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010) and attempts to create a conflict in the law where none exists. In Fletcher, the patient filed suit against a university hospital for medical malpractice after the patient suffered complications following subclavian bypass surgery. Id. at 461-62, 702 S.E.2d at 373-74. The plaintiff's expert, while testifying that he believed the hospital's physicians deviated from the standard of care, also conceded that he did not find any evidence in the medical records which indicated the hospital's physicians used any improper techniques during the operation. The plaintiff's expert further acknowledged that complications could occur during the procedure in the absence of any surgical negligence. Because the plaintiff presented no evidence of negligence in the performance of the procedure, the trial court directed a verdict in favor of the hospital on the medical malpractice claim. Id. at 462-63, 702 S.E.2d at 374.

In affirming the directed verdict on appeal, this Court observed that the patient was in essence asking the Court “to conclude that the occurrence of a complication [was] itself evidence of negligence.” Id. at 463-65, 702 S.E.2d at 374-75. Noting South Carolina’s rejection of *res ipsa loquitur*, this Court held it was “not permitted to speculate that misfortune was the result of negligence in the absence of any evidence as to how the physicians deviated from the standard of care.” Id. at 464, 702 S.E.2d at 374.

In stressing the requirement that a plaintiff cannot rely on the fact of injury to establish a physician’s negligence or departure from the standard of care in a medical malpractice case, the Fletcher court relied upon Bowie v. Hearn, 292 S.C. 223, 355 S.E.2d 550 (Ct. App. 1987) (Bowie I) which also addressed this very principle. In Bowie I, the plaintiff sued the physician who delivered him via cesarean section because he was cut on the cheek during the procedure, resulting in a scar. at 224–25, 355 S.E.2d at 551. The plaintiff’s expert testified the standard of care required the physician not to cut the baby. Id. at 226, 355 S.E.2d at 552. In analyzing the sufficiency of this testimony, the court referenced another oft-cited medical malpractice case and stated:

Under the plaintiff’s reasoning in this case [Bowie I] the doctors in [Cox v. Lund, 286 S.C. 410, 334 S.E.2d 116 (1985)<sup>1</sup>] could simply have testified that normally colons are not perforated during colonoscopies, the standard of care, therefore, is a doctor should not perforate the colon, and to do so violates the standard of care. Such reasoning would, in effect,

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<sup>1</sup> In Cox, the patient died because his colon was perforated during a colonoscopy, performed by the defendant-doctor. The decedent’s administratrix, who brought the action, produced expert testimony detailing the appropriate measures in preparing the colon for the procedure and in conducting the procedure. The expert witnesses also detailed exactly how the defendant-doctor deviated from the standard of care; namely in not properly preparing the colon and in persisting with the procedure when he knew or should have known to stop.

make a doctor an insurer of perfect result in every surgical procedure. *A doctor is not an insurer of health and negligence may not be inferred.*

Bowie I, 292 S.C. at 227, 355 S.E.2d at 552 (emphasis added).

Bowie I was reversed by the Supreme Court in Bowie v. Hearn, 294 S.C. 344, 364 S.E.2d 469 (1988) (Bowie II) on the particular facts presented in that case, namely that the plaintiff had in fact presented evidence at trial that the physician deviated from the standard of care for a caesarean procedure by making three or four swipes with a scalpel in order to incise the uterine wall. The Supreme Court in Bowie II made no commentary on the legal analysis of the Court of Appeals in Bowie I and only reversed the case on the basis of the particular facts presented by the plaintiff relating to the standard of care. In relying upon Bowie I for its reasoning in Fletcher, this Court specifically recognized the reversal of Bowie I but noted that the reasoning employed by the court in Bowie I remained instructive. Fletcher, 390 S.C. at 464, 702 S.E.2d at 374. The Supreme Court denied certiorari of Fletcher on May 25, 2012. Fletcher remains good law.

There is no conflict between Bowie II and Fletcher as Appellant insinuates. Fletcher is based upon the well-established burden of proof in medical malpractice cases that a plaintiff must present evidence of the standard of care and a departure from that standard of care by the defendant and that where a plaintiff does not do so, the plaintiff cannot rely upon the injury or adverse result as proof of any negligence. The Supreme Court in Bowie II merely found that in that case, the plaintiff had presented such evidence sufficient to go before a jury.

Appellant further contends that Fletcher somehow limits the use of inferences of negligence from circumstantial evidence in medical malpractice cases. Fletcher does no such thing. Inferences as to whether injuries are due to the negligence of a defendant can

still be made from properly admitted evidence on the issue of standard of care and breaches of that standard of care. What cannot be done is reliance upon the fact of injury occurring during a medical procedure to prove that a defendant did in fact depart from the standard of care. A plaintiff's burden to prove the standard of care and the departure therefrom cannot be met by simply relying on the fact that an injury or adverse result occurred during the procedure. This is what Appellant seeks to do with her requested jury charge, and it is contrary to the well-established principles set forth in the arena of medical malpractice law.

Even if the requested jury charge could ever be appropriate in a medical malpractice action, the charge would not have been proper in this case because it was repeatedly shown at trial that the procedure performed on Mr. Dibernardo carried with it a number of known potential complications. Appellant's requested charge required Appellant to show at trial (1) that the thing which caused injury was shown to be under the management of the defendant; (2) the accident was such as in the ordinary course of things does not happen if proper care is used; and (3) there was no other explanation by defendant of how the injury could have occurred. A failure of Appellant to meet even one of these elements defeats the charge.

Dr. Mori and all experts at trial, including Appellant's expert, agreed there were a number of known complications of a pericardiocentesis even when properly performed. Therefore, Appellant cannot show that Mr. Dibernardo's injury was one that would not have occurred in the ordinary course if proper care was used.

Further, the requested charge would only be applicable if the defendant could not explain why the injury or accident occurred. Dr. Mori and Respondents' experts

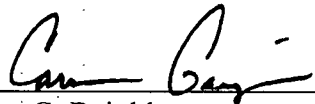
thoroughly explained how Mr. Dibernardo's injury could have occurred even with the use of proper care. At trial, they discussed the known complications of the procedure and how Mr. Dibernardo's physical condition increased the risk of injury from the procedure. See supra, pp. 2-4.

Finally, the requested jury charge requires "the thing" which causes injury to be under the management of the defendant. In any procedure involving a patient such as Mr. Dibernardo, who has numerous pre-existing conditions complicating a physician's performance of the procedure, a physician does not have full control and management over the conditions of the patient's physical anatomy which contributes to the injury.

The requested charge sought by Appellant would have permitted a jury to find negligence and medical malpractice by Respondents based upon the occurrence of Mr. Dibernardo's injury during the medical procedure alone. The requested charge not only would have invoked the inapplicable doctrine of *res ipsa loquitur* into a medical malpractice action and relieved the plaintiff from its burden of proof in such an action, but was also not supported by the evidence presented at trial. Dr. Mori and Respondents' experts testified that bleeding was a known complication during the performance of a pericardiocentesis and the risks from the procedure were heightened by Mr. Dibernardo's difficult anatomy, massively enlarged heart, and large pericardial effusion with uneven fluid distribution. While any injury to a patient during a medical procedure is unfortunate and undesired, the fact of an injury does not indicate malpractice by the physician. This Court correctly affirmed the Trial Court's rejection of Appellant's requested jury charge on the control of the instrumentality.

**CONCLUSION**

For the reasons set forth herein, Respondents respectfully request that this Court deny Appellant's Petition for Rehearing.



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George C. Beighley  
Carmen V. Ganjehsani  
RICHARDSON, PLOWDEN & ROBINSON, PA  
1900 Barnwell Street (29201)  
Post Office Drawer 7788  
Columbia, South Carolina 29202  
(803) 771-4400  
**ATTORNEYS FOR RESPONDENTS  
CAROLINA CARDIOLOGY ASSOCIATES,  
PA AND NARESH MORI, MD**

March 25, 2019.

**CERTIFICATE OF SERVICE**

I, the undersigned, attorney for Respondents, Carolina Cardiology Associates, PA and Naresh Mori, MD, do hereby certify that I have this date served the foregoing Return to Petition for Rehearing, dated March 25, 2019, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

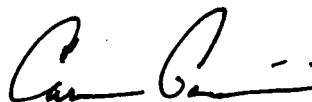
Whitney B. Harrison  
MCGOWAN, HOOD & FELDER, LLC  
1517 Hampton Street  
Columbia, SC 29201

Chad A. McGowan  
MCGOWAN, HOOD & FELDER, LLC  
1539 Health Care Drive  
Rock Hill, SC 29732  
Attorneys for Appellant

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**MAR 26 2019**

**SC Court of Appeals**



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Carmen V. Ganjehsani  
RICHARDSON, PLOWDEN & ROBINSON, PA  
1900 Barnwell Street (29201)  
Post Office Drawer 7788  
Columbia, South Carolina 29202  
(803) 771-4400  
**ATTORNEYS FOR RESPONDENT  
CAROLINA CARDIOLOGY ASSOCIATES,  
PA AND NARESH MORI, MD**

Dated: March 25, 2019.

Reply to: **Carmen V. Ganjehsani**  
Direct Dial: 803-253-8692  
cganjehsani@richardsonplowden.com

March 25, 2019

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**MAR 26 2019**

**SC Court of Appeals**

The Honorable Jenny Abbott Kitchings  
Clerk of Court, S.C. Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

**Re: *Lorrie Dibernardo, individually and as the Personal Representative of the Estate of Anthony Dibernardo, Deceased v. Carolina Cardiology Associates, PA and Naresh Mori, MD***  
**Appellate Case No. 2016-002008**  
**RPR File No.: 4180-162**

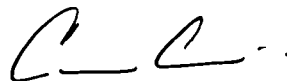
Dear Ms. Kitchings:

I am enclosing for filing the original and six copies of the Respondents' Return to the Appellant's Petition for Rehearing in the above referenced matter, along with our Certificate of Service.

By copy of this letter, I am serving a copy of this Return on opposing counsel of record.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,



Carmen V. Ganjehsani

Encs.

cc: Chad A. McGowan, Esq. (w/enc.)  
Whitney B. Harrison, Esq. (w/enc.)  
George C. Beighley, Esq. (FYI)