THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Civil Court

Robert E. Hood, Circuit Court Judge

Case No. 2013-CP-40-01259
Appellate Case No. 2016-000429

Phillip Durrett, Appellant

v.

Palmetto Health Alliance d/b/a Palmetto Richland Memorial and W. Ross, M.D., Respondents.

Final Appellants' Brief

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STATEMENT OF CASE

The appellant (Plaintiff), Phillip Durrett filed a Notice of Intent to File Suit, with supporting documentation, against the respondent (Defendant) Palmetto Health Alliance, d/b/a Palmetto Richland Memorial and W. Ross, M.D. Defendant Ross was subsequently dismissed from the action. The pleadings were filed with the Richland County Clerk of Court on August 5, 2009. (2009-CP-40-5568) The Plaintiff in the Statement of the Case alleged a cause of action for medical malpractice. A Motion to Dismiss was filed on behalf of the Defendants on or about September 22, 2009. A hearing on the Motion was held before the Honorable L. Casey Manning on March 2, 2010. An Order granting the dismissal of the action was filed on May 25, 2010. Plaintiff filed a Motion for Reconsideration on June 6, 2011. A hearing on the Motion for Reconsideration was held on August 25, 2011. An Order Granting Plaintiff's Motion for Reconsideration was filed on January 8, 2013. Pursuant to the terms of the said Order, Plaintiff filed a Summons and Complaint on February 28, 2013 (2013-CP-40-1259). The Defendants filed a Motion for Summary Judgment. A hearing on the Defendants' Motion for Summary Judgment was held before the Honorable Robert E. Hood on July 17, 2014 and July 22, 2014. An Order Denying Motion for Summary Judgment was filed on December 3, 2014. Defendants filed a Motion for Reconsideration. A hearing on Defendants' Motion for Reconsideration was held on January 25, 2016. An Order granting Defendants' Motion and ordering Summary Judgment was filed on January 27, 2016. It is from this Order, which the Plaintiff appeals.

STATEMENT OF ISSUES ON APPEAL

DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT AS TO APPELLANT'S CAUSE OF ACTION FOR MEDICAL MALPRACTICE.

ARGUMENT

Allegations of a complaint in an action must be taken as true for the purpose of consideration of demurrer (Summary Judgment). Timmons v. The News & Press, Inc., 232 S.C. 639, 103 S.E.2d 277 (1958). The complaint is sufficient if it states any cause of action or if it appears Plaintiff is entitled to any relief whatsoever. Williams v. Streb, 270 S.C. 650, 243 S.E.2d 926 (1978). The Court is not concerned with the weight of the evidence, but whether there is any evidence from which the jury is warranted in making a finding. Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994). Further, a directed verdict is properly denied where there is any evidence, *direct or circumstantial (emphasis added)*, justifying submission of the issue to the jury. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998); Washington, *supra.* For the Court to grant Summary Judgment the moving party must demonstrate an absence of a genuine issue of material fact. Richardson v. State-Record Company, Inc.330 S.C. 562, 499 S.E. 2d 822 (Ct. App. 1998).

In filing the Motion to Dismiss the Plaintiff's Notice of Intent to File Suit, the Defendants based their Motion on Sections 15-79-125 and 15-36-100 and the failure of the Plaintiff to file an expert witness affidavit in conjunction with the Notice of Intent to File Suit. (Motion to Dismiss) Judge Manning initially ruled in

favor to the Defendants in his Order of Dismissal on May 25, 2010. (Order of Dismissal) However, Judge Manning vacated the Order of Dismissal based, in part, because an affidavit of an expert witness affidavit was not required under South Carolina Code of Laws, section 15-36-100 (C) (2). The Plaintiff argued under section 15-36-100 (C) (2) "The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." (Transcript, August 25, 2011, ROA, pp. 32,33) It should be noted that the Plaintiff filed an Affidavit, in which he stated that he had informed the Defendants that he was allergic to anesthetic and sedative drugs, to not treat him with said drugs, and, if said drugs were to be administered, that the Plaintiff would go to another hospital. The Defendants ignored the Plaintiff's specific instructions. The Plaintiff alleged other acts of negligence on behalf of the Defendants. (Affidavit of Plaintiff, ROA, pp. 122-124) (Notice of Intent to File Suit, ROA, p. 66) It should be noted that Judge Manning's Order Granting Plaintiff's Motion for Reconsideration (and a denial of Defendants' Motion to Dismiss), did not require the Plaintiff to file an expert witness affidavit. (Order Granting Plaintiff's Motion for Reconsideration, ROA, pp. 1-5)

Our appellate courts have held that in medical malpractice actions, the Plaintiff must use expert testimony to establish both the required standard of care and the defendant's failure to conform to that standard unless the subject matter lies within the ambit of common knowledge and experience, so that no special

learning is needed to evaluate the conduct of the defendant. Where the evidence permits the jury to recognize or infer a breach of duty without the aid of expert testimony, such testimony is not required in order for the case to go to the jury. Hickman v. Sexton Clinic, P.A., 295 S.C. 164, 367 S.E.2d 453 (Ct.App. 1988), Stallings v. Ratliff, 292 S.C. 349, 356 S.E.2d 414 (Ct.App. 1987), Welch v. Whitaker, 282 S.C. 251, 317 S.E.2d 758 (Ct.App. 1984)

(Transcript, August 25, 2011, ROA, pp. 32, 33)

A plaintiff in a medical malpractice case must prove the proximate cause as well as negligence and proof of proximate cause must be established by expert testimony where the origin of the injury is obscure and not readily apparent to a layman, or there are several equally probable causes of the condition. When expert testimony is not relied upon to establish proximate cause, the plaintiff must offer evidence that rises above mere speculation or conjecture. And when considering whether to direct a verdict in favor of the defendant in a medical malpractice case, the court must view the evidence and all reasonable inferences arising therefrom in the light most favorable to the plaintiff. Stallings v. Ratliff, 292 S.C. 349, 356 S.E.2d 414 (Ct.App. 1987), Welch v. Whitaker, 282 S.C. 251, 317 S.E.2d 758 (Ct.App. 1984)

In the Hickman case the Court held that allowing an unsupervised dental assistant to ram a sharp object into her mouth is evidence rising above mere speculation or conjecture.

In the present case the Defendants failed to monitor the Plaintiff before administering lethal doses of medication. (Medication list, Medication information, ROA, pp. 72-106)

In particular, succinylcholine was contraindicated, due to Plaintiff's multiple traumas, including a gash on Plaintiff's arm and his broken leg. (Hancock depo. ROA, p. 236, Plaintiff's exhibit, ROA, p. 239; Clodfelter depo. pages 7-8, Plaintiff's exhibit 5) The literature indicates that a complication of cardiac arrest may result. The Plaintiff went into cardiac arrest. Further, over-dosage may be manifested by skeletal muscle weakness, decreased respiratory reserve, low tidal volume, or apnea. Plaintiff also went into pulmonary arrest. (Medication list, Medication information)

Further, succinylcholine should not be administered before unconsciousness has been induced. (Medication list, Medication information) The Plaintiff was also provided Norcuron. The literature states that the administration of Norcuron should be delayed until the succinylcholine effect shows signs of wearing off. (Medication list, Medication information, ROA, pp. 72-106) Midazolam was also infused to the Plaintiff. The warning is given in the literature: BECAUSE SERIOUS AND LIFE-THREATENING CARDIORESPIRATORY ADVERSE EVENTS HAVE BEEN REPORTED, PROVISION FOR MONITORING, DETECTION AND CORRECTION OF THESE REACTIONS MUST BE MADE FOR EVERY PATIENT TO WHOM MIDAZOLAM HYDROCHLORIDE INJECTION IS ADMINISTERED, REGARDLESS OF AGE OR HEALTH STATUS, Excessive single doses or rapid intravenous

administration may result in respiratory depression, airway obstruction and/or arrest. The potential for these latter effects is increased in debilitated patients, those receiving concomitant medications capable of depressing the CNS. (Medication list, Medication information, ROA, pp. 72-106)

The usual dosage requested is 1 to 5 mg/hr. The Plaintiff received 5 mg and a second dose of 5 mg only 12 minutes later. As stated above, the Plaintiff suffered from cardiac arrest and pulmonary arrest. (Medication list, Medication information, ROA, pp. 72-106)

In the Stallings case the court held that the failure of the doctor (defendant) to inform the plaintiff of the possible risks of a procedure prior to obtaining the plaintiff's consent was a violation of the standard of care.

In the present case, not only did the Defendants fail to inform the Plaintiff of the possible risks of cardiac arrest, respiratory arrest, coma, or any other possible side effects, after the Plaintiff gave the Defendants specific instructions not to provide any sedative or anesthetic drugs to the Plaintiff the Defendants ignored the Plaintiff's specific instructions. The Plaintiff further informed the Defendants that he was allergic to said drugs. He further stated that if any said drugs were to be administered, he would go to another hospital. (Affidavit of Plaintiff, ROA, pp. 122-124)

(It should be noted that the EMS personnel complied with the Plaintiff's instructions and did not treat the Plaintiff with any said drugs.) (Defendants' EMS Run Sheet, ROA, p. 239; Deposition of Matt Hancock, ROA, pp. 233-238)

Prior to his arrival at the Defendants' Emergency Room, the Plaintiff was alert, blood pressure and pulse rates were normal and regular, and his pupils were equal and reactive. (Deposition of Matt Hancock, ROA, pp. 234-236)

The Defendants ignored the Plaintiff's instructions and administered a minimum of 3 different drugs over a period of time, without monitoring the Plaintiff. The administration of the said drugs caused the Plaintiff to suffer cardiac and respiratory arrest and to induce a coma for the Plaintiff, which lasted at least 8 days. (Medication list, medication information, ROA, pp. 72-106)

Also considered by the trial judges, Manning and Hood, was a copy of the Plaintiff's medication, doses, and times of administration and a description of the medications, warnings, side effects, dosages, and administration instructions. The Defendants were aware of the possible, and in this case probable, consequences of the administration of the said drugs. (Medication list, Medication information, ROA, pp. 72-106)

In comparing the present case to the Welch case, it is clear that the Plaintiff has evidence, which this Court must view and all the reasonable inferences arising therefrom in the light most favorable to the Plaintiff in determining whether an expert witness is required in this case.

It is clear that the Court and/or jury will not need expert testimony to use their common knowledge and experience to determine the medical malpractice of the Defendants and the injuries caused to the Plaintiff. (S.C. Code of Laws, Section 15-36-100 (C) (2)

In Judge Hood's Order Denying Motion for Summary Judgment, filed December 3, 2014 (Order Denying Motion for Summary Judgment, ROA, pp. 10-16) he agreed that South Carolina jurisprudence makes clear that in medical malpractice actions such as this, summary judgment "is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." David v. McLeod Regional Medical Center, 367 S.C. 242, 626 S.E.2d 1 (2006). Therefore, when there is a material issue of material fact, then Summary Judgment is inappropriate.

The Defendants' amended motion for summary judgment is based mainly on Defendants' argument that Plaintiff was required under S.C. Code Ann. 15-79-125 (A) ("prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, **subject to the affidavit requirements established in Section 15-36-100...** " emphasis added)

Section 15-36-100 states in pertinent part: "(C)(2) The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special training is needed to evaluate the conduct of the defendant." S.C. Code Ann. 15-36-100(C)(2).

Recently in *Brouwer v. Sisters of Charity Provicence Hosps.* 409 S.C. 514. 763 S.E.2d 200 (2014), the Supreme Court agreed that section S.C. Code Ann. 15-79-125 (A) incorporates section 15-36-100 in its entirety, including the common-knowledge and experience exception codified in 15-36-100(C)(2).

Judge Hood found that the Plaintiff herein has successfully invoked this exception and, thus, was not required to file an expert witness affidavit. (Order Denying Motion for Summary Judgment, ROA, pp. 10-16)

In Brouwer the plaintiff was admitted to the (Providence Hospital). She was treated and suffered an allergic reaction. She attributed the reaction to her latex allergy that was disclosed to medical personnel on her forms for Pre-Anesthesia Evaluation.

In the present case, plaintiff asserts in his affidavit, which was previously filed with the Court, that he informed Defendants that he was allergic to anesthetic drugs and that he should not be given any such drugs. (Affidavit of Plaintiff, ROA, pp. 122-124) The Defendants disregarded his instructions. The same instructions were given to Richland County EMT personnel upon their arrival at the accident scene. The EMT personnel followed his instructions and did not supply any medications to the plaintiff. (Affidavit of Plaintiff, ROA, pp. 122-124) (Defendants' Exhibit 2-EMS Run Sheet, ROA, p. 239; Deposition of Matt Hancock, ROA, pp. 233-238)

The Plaintiff further contends that the Defendants were not aware of the material/instructions for the provision of certain drugs to the Plaintiff, or the material/instructions were ignored.

The Plaintiff has alleged negligence on the part of the Defendants in providing to the Plaintiff certain drugs, against his instructions, failing to monitor the Plaintiff in the provision of certain drugs, providing drugs which were contra-indicated, and overdosing the Plaintiff.

Where the evidence permits the jury to recognize or infer a breach of duty without the aid of expert testimony, such testimony is not required in order for the case to go to the jury. *Hickman v. Sexton Clinic, P.A.*, 295 S.C. 164, 367 S.E.2d 453 (Ct.App. 1988), Stallings v. Ratliff, 292 S.C. 349, 356 S.E.2d 414 (Ct.App. 1987), Welch v. Whitaker, 282 S.C. 251, 317 S.E.2d 758 (Ct.App. 1984)

In the present case the Defendants failed to monitor the Plaintiff before administering lethal doses of medication. The Defendants' failure to monitor is shown on the medical records, which were submitted to the Court by the Plaintiff. In particular, the additional provision(s) of the drugs, which were given at different times and which were administered by different individuals, indicates that the Plaintiff was not monitored. (Medication list, Medication information, ROA, pp. 72-106) Further, in the present case, the Defendants rammed a sharp object (needle) into the Plaintiff and provided medications, which caused the Plaintiff to go into cardiac and respiratory arrest and to go into a coma for several days.

An individual with common knowledge and experience is aware that medications have possible side effects. An individual will see numerous advertisements on the television, newspapers, magazines, mail, and on the internet. The advertisements will list possible side effects. The advertisers are required by federal law to inform the public of the possible side effects. The Plaintiff in this case was aware of the possible side effects; therefore, he instructed the Defendants not to provide the medications. (Affidavit of Plaintiff, ROA, pp. 122-124)

Judge Hood found that it is clear that no special learning is needed to evaluate the conduct of the defendants: in particular, the Defendants' failure to abide by the Plaintiff's specific instructions, in providing the medications to the Plaintiff without monitoring the Plaintiff, and in failing to consider the possible lethal side effects of the medications to the Plaintiff. (Order Denying Summary Judgment, ROA, pp. 10-16)

Judge Hood found that the Court and/or jury will not need expert testimony to use its common knowledge and experience to determine the medical malpractice of the Defendants and the injuries caused to the Plaintiff.

In filing the Motion for Summary Judgment and the Motion to Reconsider (Judge Hood's Order) (ROA, pp. 126-129) the Defendants are attempting to re-litigate the decision of the Honorable Casey Manning. (Order Granting Reconsideration, ROA, pp. 8, 9) As noted in the Defendants' Amended Notice of Motion and Amended Motion for Summary Judgment, the Plaintiff filed a Notice of Intent to File Suit on or about August 5, 2009. On September 22, 2009, the Defendants filed a Motion to Dismiss Plaintiff's Notice of Intent to File, based upon the failure of the Plaintiff to file an expert witness affidavit. (Motion to Dismiss, ROA, pp. 70, 71)

It should be noted that Judge Manning issued a written Order, and not a Form 4 Order, as argued by Defendants' counsel. (Transcript of January 25, 2016 hearing, ROA, p. 54). Therefore, the question as to whether Summary Judgment and/or Reconsideration of the Denial to Grant Summary Judgment should be granted is moot. (Order Granting Plaintiff's Motion for Reconsideration

(ROA, pp. 8, 9), Order Denying Motion for Summary Judgment (ROA, pp. 10-16), Order on Motion to Reconsider by Defendant Palmetto Health Alliance d/b/a Richland Memorial and W. Ross, M.D.(ROA, pp. 17-29) A court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2000); Jackson v. State, 331 S.C. 486, 489 S.E.2d 915 (1997) A case becomes moot when judgment, if rendered, will have no practical effect upon the existing controversy. Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 195 S.E.2d 713 (1973)

Judge Manning informed the parties of their rights to appeal his decision. He stated: "In making this decision, everybody's rights still preserved, even yours for purposes of appeal. I hate to put anybody in the position when you think you've won, you didn't win, but I think these issues should be flushed out at another level. That's the reason for me changing my decision in this case." (Transcript of hearing, August 25, 2011, ROA, p. 34) **The Defendants did not appeal Judge Manning's decision. (emphasis added).**

Judge Manning's Order, which ultimately denied Defendants' motion to dismiss the action based upon the failure of the Plaintiff to file an expert witness affidavit, was and is the law of the case. (Order Granting Plaintiff's Motion for Reconsideration, ROA, pp. 30-35; Defendant's Motion to Dismiss, ROA, pp. 70-71) An un-appealed ruling is the law of the case and requires affirmance. Dreher v. S.C. Dep't of Health & Envtl. Control, 412 S.C. 244, 772 S.E.2d 505 (2015); Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778.

Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case. Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (2009)

Lastly, Judge Hood in making his decision to reverse his ruling and grant Defendants' Motion for Reconsideration, and ultimately granting Defendants' Motion for Summary Judgment, considered facts and evidence, which were not of record. He stated: **"Okay. All right. I'll – I'm gonna go discuss what I'm going to do with Judge Lee and we'll let you all know quickly because I know you –all are up on the trial docket." (emphasis added)** (Transcript of Hearing, January 25, 2016, ROA, p. 64)

CONCLUSION

In conclusion, it is clear that the Court and/or jury will not need expert testimony to use their common knowledge and experience to determine the medical malpractice of the Defendants and the injuries caused to the Plaintiff.

It is clear that the Plaintiff has evidence, which this Court must view and all the reasonable inferences arising therefrom in the light most favorable to the Plaintiff in determining whether there are issues of fact related to the medical malpractice of the Defendants.

Therefore, the trial court, the Honorable Robert Hood, erred in granting Summary Judgment against the Appellant on behalf of Respondents (Defendants) for the cause of action.

Therefore, taking the evidence in a light most favorable to the Appellant, Summary Judgment should not have been granted and the verdict should be reversed.

Respectfully submitted,

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