THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2019-000359

David Miller,.....Appellant,

v.

ENT & Face PA, and Brian Wilson, MD,.....Respondents.

Initial Brief

McGowan, Hood & Felder, LLC

Whitney B. Harrison
1517 Hampton Street
Columbia, SC 29201

Chad A. McGowan
Eve S. Goodstein
1539 Healthcare Drive
Rock Hill, SC 29732

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial court erred in failing to grant a directed verdict as to breach.

STATEMENT OF THE CASE

Appellant David Miller filed a medical malpractice action against Respondents ENT & Face PA, and Brian Wilson, MD alleging his Stage IV cancer developed as a result of Respondents' failure to order the necessary test to rule out cancer. (Complaint). Respondents answered, denying allegations of medical malpractice. (Answer). The case proceeded to a jury trial before the Honorable Daniel D. Hall. After a four-day trial, the jury returned a verdict in favor of Respondents. (Verdict). Appellant filed a motion for a judgment notwithstanding the verdict, which was denied. (JNOV motion; Return, Form 4 Order). Appellant timely filed a notice of appeal.

STATEMENT OF FACTS

In 2013, Appellant, a Marine Corp veteran, found a spot in the back of his throat above his right tonsil. (Tr. 150). The spot looked like the end of a cigar, and was firm and spongy to touch. (Tr. 161). While the spot was not painful, Appellant felt like something was caught in the back of his throat when he ate. (Tr. 160-61). Concerned because of his family history of cancer, Appellant wanted to be seen quickly, and made an appointment outside of the Veteran Affairs (VA) network with Respondent Wilson, an ear, nose, and throat specialist (ENT) at Respondent ENT & Face PA. He was seen within three weeks of first noticing the spot. (Tr. 68-69,161-62).

At the first appointment, on March 23, 2013, Appellant shared with Respondent Wilson his symptoms and family medical history. (Tr. 163; Ex 1-ENT at 1-2). Respondent Wilson attempted a physical exam of the spot and was able to touch the spot. (Tr. 163). Respondent Wilson could not properly visualize the spot by merely looking into Appellant's mouth. (Tr. 163). Respondent tried to use a mirror to examine the spot, but Appellant began to gag. (Tr. 163-54; Ex 1 ENT at 7). Respondent then performed a flexible laryngoscopy, which involved placing a thin fiber optic camera through Appellant's nose to access the throat and tonsil region. (Tr. 163-64). At that time, Respondent Wilson identified the spot and marked it in his medical notes. (Ex. 1-ENT at 2).

Respondent Wilson believed the spot could be cancerous and included malignant neoplasm—meaning cancer—in his deferential diagnosis. (Tr. 70, 164; Ex 1- ENT). Because of cancer concerns, Respondent Wilson ordered an MRI, listing malignant neoplasm as an issue for the radiologist to consider and prescribed Appellant antibiotics. (Tr. 164; Ex 1-ENT at 6).

Two days later, Appellant underwent an MRI. (Ex 1-ENT at 4-5). On April 2, 2013, Appellant had a follow-up appointment with Respondent Wilson, which revealed the spot was still

inflamed, and he was instructed to follow up in three weeks. Notably, at this visit Respondent Wilson did not examine the spot with a mirror or a flexible laryngoscopy. (Tr.165).

On April 23, 2013, Appellant returned to Respondent ENT Face, meeting with Respondent Wilson in his office to review the MRI results. Respondent Wilson informed Appellant that the MRI detected no mass, and Appellant had no cancer. Specifically, Respondent Wilson explained, as recounted by Appellant:

> I don't see anything that concerns me about the C word. And I said, the C word? And he said, yes, he said cancer. He specifically said cancer. And at that point in time, I'm just fat, dumb and happy and just that is exactly what I like to hear.

(Tr. 168; *see also* Tr. 204-05).

Significantly, the spot was still present above Appellant's right tonsil despite being undetected by an MRI. At this third appointment, Respondent did not examine the spot by touching it, using a mirror, or a flexible laryngoscopy. (Tr. 170). Respondent Wilson did not inform Appellant that an MRI would not rule out cancer and a biopsy was the only test that could. Nor did he instruct Appellant that a biopsy was needed, and cancer remained on his deferential diagnosis. In sum, when Appellant left his appointment with Respondent Wilson, he had no concern of cancer. (Tr.170).

Two and half years later, in October 2015, Appellant presented with throat pain and swelling of his right tonsil at a VA facility to see a primary care provider. (Tr.171). Unable to visualize Appellant's tonsils, the VA referred Appellant in January and February 2016 to an ENT, who suspected squamous cell carcinoma and ordered a computerized tomography (CT) scan. (Tr. 175-76). The CT scan revealed a tumor on the right-side of Appellant's neck and a biopsy was ordered, which revealed Stage IV basaloid squamous cell carcinoma. (Tr. 176-77). Cancer was detected in two of the three lymph nodes in Appellant's neck. (Tr. 179).

At the time of the diagnosis, the spot was the same size and in the same location as when Appellant first presented to Respondent Wilson in 2013. *See* Tr. 169-70 (Appellant explaining that the spot never went away, and when he did look at the spot over the years "it never got bigger, it never hurt more and it never changed, the part that I could see"); Tr. 205 (Appellant explaining the spot stayed in his throat the same way).

Given the progressed stage of cancer and a cure rate of less than fifty percent, Appellant underwent aggressive treatment.[1] He had six rounds of chemotherapy and roughly thirty-five consecutive days of radiation treatment. (Tr.186). As a result of these treatments, Appellant's neck, tongue, and saliva glands were burned, and his tonsils were intentionally burned out instead of being removed. (Tr. 185-87, 189). Appellant described this process as feeling as "if you had a very large branding iron and you stuck it to your neck." (Tr.188). Appellant's body reacted to these treatments by continuously secreting mucus. For nearly three months, Appellant was constantly coughing, choking, throwing up, and unable to swallow. (Tr.186-87).

In the aftermath of treatment, Appellant lost his ability to produce saliva and his sense of taste. (Tr.192). He is still unable to chew most foods, and it is difficult for Appellant to eat with others because of the dietary restrictions and his constant coughing through his attempts at eating. (Tr.192-93). In turn, this has impacted his friendships and ability to date. (Tr.193-94). In addition to these everyday changes, Appellant still faces a chance of reoccurrence, along with heightened risks of other forms of cancer derived from chemotherapy and radiation treatments.

In February 2017, Appellant filed this medical malpractice lawsuit. During litigation, Appellant's counsel deposed Respondent Wilson. (Tr.330, 362; Deposition of Wilson).

[1] Appellant also underwent tooth removal to proactively address jaw deterioration of the jawbone as a result of radiation, which prohibits him from having any tooth removed or dental implant for the remainder of his life. (Tr. 180-81).

Appellant's counsel focused extensively on the standard of care and a doctor's obligations to a patient after placing cancer on a deferential diagnosis.

At his deposition, Respondent Wilson testified he had a conscious concern at Appellant's first appointment that he had a malignancy or cancer on his tonsil. (Wilson Depo. at 33). Based on that concern, he placed cancer on the deferential diagnosis. Respondent Wilson agreed that by placing cancer on the deferential diagnosis he had an obligation to rule out cancer. (Wilson Depo. at 26-27). Additionally, he confirmed the only way to rule out cancer is having tissues directly examined, i.e. a biopsy. (Wilson Depo. at 34).

Respondent Wilson further agreed that the standard of care requires an ENT to both inform his patient that (1) cancer is on the deferential diagnosis and (2) that an MRI does not rule out cancer. (Wilson Depo. at 51). Respondent Wilson confirmed the tests he conducted did not rule out cancer and he never ordered a biopsy. (Wilson Depo. at 29 & 56).

This matter proceeded to trial in January 2019. During Appellant's case-in-chief, he offered the expert testimony of Dr. David Myssiorek and Dr. Ronald Blum, along with his own testimony. Appellant presented evidence tending to show Respondents were negligent for Respondent Wilson's failure (1) to rule out cancer once he placed cancer on the deferential diagnosis, (2) to perform a biopsy of the spot, (3) to inform Appellant that cancer remained on the deferential diagnosis at the third appointment, and (4) to inform Appellant that an MRI does not rule out cancer. Dr. Myssiorek stated to a reasonable degree of medical certainty, more probably than not, that Respondent Wilson's actions and inactions were deviations from the standard of care and the proximate cause of the injuries suffered. (Tr. 101).[2]

[2] In support of his opinions, Dr. Myssiorek explained that the standard of care for an ENT requires that when there is a differential diagnosis a biopsy is required to rule out cancer. (Tr. 100, 110-11). Additionally, Dr. Blum, an expert in the field of medical oncology, opined that

During Respondents' case-in-chief, Respondent Wilson testified that he had no memory of Appellant and would be relying solely on his chart. (Tr. 275). Respondent Wilson attempted to retreat from his prior deposition testimony that the standard of care requires him to inform the patient that there is cancer on the differential diagnosis and that the MRI did not rule out cancer. However, during cross-examination, after being shown his deposition testimony he deferred to his prior answers and relied on his chart. (Tr. 298-300). In so doing, Respondent Wilson testified that he did not inform Appellant that cancer was on the differential diagnosis and the MRI did not rule out cancer—in violation of his own previously articulated standard of care. (Tr.312-314; 315-316).

At the close of Respondents' case, Appellant's counsel moved for a directed verdict on the element of breach, arguing Respondent Wilson's admission of the standard of care and the breach of that standard by failing to inform Appellant of the differential diagnosis and the limitations of the MRI as a diagnostic tool satisfied the element of breach. (Tr.428-29). Respondents' counsel argued the standard of care remained a question of fact, with which the trial court agreed and denied the motion. (Tr.4-29-31). The jury subsequently returned a verdict in favor of Respondents. (Tr. 531).

Appellant filed a motion for JNOV, which the trial court denied. This appeal followed.[3]

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in March 2013, Appellant presented to Respondent Wilson with Stage I cancer and it continuously grew through the 2016 diagnosis of Stage IV. (Tr. 239). He explained there was a "failure to do further diagnostic tests and a failure to treat the established diagnosis, which was a direct consequence to Appellant's advanced cancer." (Tr. 226-27).

[3] Appellant's counsel also moved for a directed verdict as to all of negligence, along with requesting an instruction to the jury as a matter of law as to gross negligence, recklessness, and misrepresentation.

STANDARD OF REVIEW

When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). On appeal from an order denying a directed verdict, an appellate court views the evidence and all reasonable inferences in a light most favorable to the non-moving party. *Swinton Creek Nursery v. Edisto Farm Credit,* 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999). "The appellate court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor." *Jones v. Gen. Electric Co.,* 331 S.C. 351, 356, 503 S.E.2d 173, 176 (Ct. App. 1998).

ARGUMENT

This appeal concerns whether a treating doctor's admission that he failed to abide by the applicable standard of care satisfies the element of breach as a matter of law. This Court should hold that it does.

As this Court is well-aware, medical malpractice occurs when a doctor fails to exercise the degree of skill ordinarily possessed and exercised by doctors in the same or similar circumstances. *Melton v. Medtronic, Inc.*, 389 S.C. 641, 652, 698 S.E.2d 886, 892 (Ct. App. 2010). In asserting a medical negligence claim, the plaintiff follows the customary rubric of negligence with the additional requirement of offering expert testimony to establish both the duty owed to the patient and the breach of that duty. *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176–77, 758 S.E.2d 501, 504 (2014); *Willis v. Wu*, 362 S.C. 146, 154, 607 S.E.2d 63, 67 (2004) (explaining "the analysis in a medical malpractice action tracks the familiar duty-breach-causation-damages analysis employed in a typical tort action").

Our Courts have previously recognized that in professional negligence cases a defendant may establish the standard of care and breach thereof through an admission during litigation. *See generally*, *Sims v. Hall*, 357 S.C. 288, 298, 592 S.E.2d 315, 320 (2003) (finding in a legal malpractice case that a lawyer's admission formed both the standard of care and breach). While this issue has only been addressed a handful of times, our appellate courts' analysis on the impact of an admission has turned on the breadth of the admission. *See Mail v. Odom*, 295 S.C. 78, 367 S.E.2d 166 (1988) (finding a practicing lawyer established the standard of care, but conflicting evidence left open whether there was a breach); *Stallings v. Ratliff*, 292 S.C. 349, 356 S.E.2d 414 (Ct. App. 1987) (holding the defendant physician's admission that he had a duty to disclose established the standard of care, but left open the issue of breach because of disputed facts).

In *Sims v. Hall*, the Court of Appeals held that a professional's admission addressed both the standard of care and the breach. In that legal malpractice case, the defendant took the position in a motion for summary judgment that the counsel of record had a duty to advise the plaintiff on an issue of disclaimer. At the time of the motion, defendant took the position that he was not counsel of record, but after losing the motion conceded that point. Defendant objected to admission of the standard and in turn the breach, contending that he should not be bound by his position in a prior motion and as to the merit of the duty to inform he was uninformed about the substantive material that he had a duty to inform the client on. The Court of Appeals upheld the lower court's finding that the defendant admitted both the standard of care and breach because ignorance could not overcome the admission that he did not advise the client as required by the standard of care. In sum, breach may be satisfied based on the admission of a duty and the failure to act.

Unlike in *Mail v. Odom*, and S*tallings v. Ratliff*, where issues of fact remained for the jury to determine, Respondent Wilson squarely admitted both the standard of care and his breach by acknowledging his failure to inform Appellant that an MRI did not rule out cancer and that cancer was on the differential diagnosis. Like the attorney in *Sims*, he failed to advise his patient as the standard required, and this failure inarguably breached the standard of care. Significantly, Respondent Wilson established throughout his testimony that his chart accurately noted his action/inaction. (Tr.275).

Turning first to the MRI, Respondent Wilson testified at trial that the standard of care requires an ENT to inform his patient that an MRI does not rule out cancer. Relying solely on his chart, Respondent Wilson admitted he did not inform Appellant. The following exchange occurred:

Q: Does the standard of care require an ENT to inform his patient that an MRI does not rule out cancer?

A: I'll say yes to that.

. . .

Q: Does the chart reflect that you informed the patient that the MRI did not rule out cancer?

A: The word cancer is not in this chart. It's in your part of the deposition a lot, but it's not in my chart.

Q: All right, fine. Does your chart reflect that you informed Mr. Miller that the MRI did not rule out malignant neoplasm of the tonsil?

A: No, the chart doesn't say that.

Q: Okay. And therefore, you didn't do it because we're going by your chart, right?

A: I am going by the chart because I don't have an independent recollection of Mr. Miller.

(Tr. 315-16)

Second as to the deferential diagnosis, Respondent Wilson testified at trial that the standard of care requires an ENT to inform his patient that cancer is on the differential diagnosis. (Tr.312). Specifically, the questioning consisted of the following:

Q: Does the standard of care require an ENT to inform his patient that cancer is on the differential diagnosis? And your answer was, I'll say yes. Is that correct?

A: That's correct, that's what this says.

. . ..

Q: Is it your testimony today—does the standard of care require an ENT to inform his patient that cancer is on the differential diagnosis? Is your answer today still yes?

A: I'll go with what my deposition says.

Q: So the standard of care does require you to tell him that cancer is on the differential, right?

A: Yes.

Q: Based on your chart, you never informed Mr. Miller that cancer was on your differential diagnosis, true?

A: I have to go with what the chart says.

Q: So is that correct that your chart does not reflect that you informed him cancer was on the differential?

A: I'll say yes.

Either of these admissions satisfies the element of breach and warranted a directed verdict, along with an instruction to the jury. Respondent Wilson unequivocally acknowledges he was required to inform his patient that an MRI does not rule out cancer, and that cancer is part of his differential diagnosis. He then freely admits he performed neither of those acts. The jury has no inquiry left on that issue and should only have been left to consider the question of proximate cause and damages. *Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984) (holding the question of damages is ordinarily left for the jury); *McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009) (explaining proximate cause is ordinarily a question for the jury). For these reasons, Appellant requests this Court find the trial court erred in denying his motion for a directed verdict.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2019-000359

David Miller,.....Appellant,

v.

ENT & Face PA, and Brian Wilson, MD,.....Respondents.

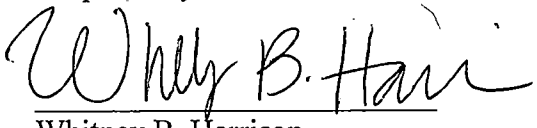
PROOF OF SERVICE

The undersigned hereby certifies that on August 13, 2019, she served counsel for Respondents with the *Initial Brief and Designation of Matter* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

Hutson S. Davis, Jr.
S. Harrison Williams
10 Pinckney Colony Road, Ste. 200
Bluffton, SC 29909

Andrew Lindemann
Lindemann, Davis & Hughes, P.A.
5 Calendar Court, Suite 202
P.O. Box 6923
Columbia, SC 29250

Respectfully submitted,



Whitney B. Harrison
McGowan, Hood & Felder, LLC
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100

McGowan, Hood & Felder, LLC

Chad A. McGowan (SC,GA,NC)
S. Randall Hood
John G. Felder, Jr.
W. Jones Andrews, Jr.
Russell T. Burke
Jordan C. Calloway
Susan F. Campbell
Deborah Casey (NC)*
Ashley White Creech
Shawn B. Deery
Chance M. Farr (SC,NC)
Eve S. Goodstein

Whitney B. Harrison
Richard A. "Trey" Jones III
Patrick M. Killen
Anna S. Magann
Robert V. Phillips
Ranee Saunders
James L. Ward, Jr. (SC,NC)
James Stephen Welch (SC,OK)*
Jay F. Wright
Joseph G. Wright, III*
*Of Counsel

writers email: wharrison@mcgowanhood.com

August 13, 2019

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: David Miller v. ENT & Face PA et al
Appellate Case No. 2019-000359

Dear Ms. Kitchings,

Please find enclosed for filing the original and one (1) copy of the *Initial Brief of Appellant* and *Designation of Matter to be included in the Record on Appeal* in regards to this case. I have also enclosed a proof of service of this document on counsel for Respondents. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you need any additional information, please do not hesitate to contact me.

With kind regards,

Sincerely,

Whitney B. Harrison

cc: Hutson S. Davis, Jr.
S. Harrison Williams
Andrew Lindemann