THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III

Case No. 2017-CP-26-1571
Appellate Case No. 2019-001665

David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer,.....Respondent,

v.

Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D. and Rachel Ash-Bernal M.D. ..... Defendants,

Of which
Southern Myrtle Inpatients Services, LLC is.....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

Robert L. Widener
BURR & FORMAN, LLP
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY ARGUMENT

I. Assuming the law would ever impose the corporate training duties alleged by the Plaintiff, he must the establish existence and breach of those duties with expert testimony, and he failed to do so.

It is axiomatic that whenever a "matter [is] outside the common knowledge and experience of most lay persons," the law requires expert testimony to establish a duty or breach, and this includes cases with medical related issues that are not medical malpractice claims. *E.g., Spartanburg Reg'l Med. Ctr. v. Bulsa*, 417 S.E.2d 648 (S.C. App. 1992). It is beyond dispute that the regulations and statutes at issue here, and the resulting interplay between medicine and the law, requires special knowledge, skill, experience, or education not possessed by most lay persons. Plaintiff presented two experts, but the trial court did not qualify either of them as an expert on any corporate duty to train. (R. 118; 248). Indeed, the trial court specifically ruled that Dr. Robinson was not an expert on any corporate duty to train. (R. 165-166). Thus, as a matter of law, the Plaintiff failed to prove any direct corporate duty owed or breached by SMIS. (See App. Br., Arg. I(C)).

The Plaintiff responds by first mischaracterizing SMIS's argument as applying medical malpractice law and its requirement of expert testimony. (Init. Resp. Br. at 19). SMIS makes no such argument. (App. Br., *passim*). Rather, SMIS argues that the alleged corporate duties to train on involuntary detention and permissible HIPAA disclosures is not a matter within most layperson's knowledge and experience. Thus, the law requires expert testimony.

The Plaintiff also argues that Dr. Robinson's testimony was sufficient to satisfy the requirement of expert testimony. This argument fails, because the trial judge specifically and correctly ruled that Dr. Robinson was not an expert on corporate training duties. (R. 165-166). The Plaintiff blithely ignores this in relying on Dr. Robinson's "expert" testimony.

In sum, the law required the Plaintiff to present expert testimony on the existence and breach of SMIS's alleged corporate duties to train the defendant doctors. He did not and, therefore, this Court should reverse and remand for the entry of judgment in favor of SMIS.

II. Any assumed breach by SMIS of any assumed independent corporate duty to train the defendant doctors on involuntary detention or permissible HIPAA disclosures did not and could not cause the Plaintiff's injuries.

Every person who becomes a medical patient retains his legal right to control his medical treatment and medical information. Here, the Patient exercised those rights by leaving the Hospital against medical advice and refusing the offer to call his Father (the Plaintiff). The Plaintiff claims injury caused by SMIS failing to train Dr. Ash-Bernal on the power of a doctor to deny the Patient of his legal right to make these decisions.

The gateway to any power of any doctor to deprive any patient of his legal rights is an independent medical judgment that there is a medical reason to interfere with the patient's exercise of his legal rights. This gateway question is a purely medical question, so the only possible gatekeeper is a physician. Here, Dr. Ash-Bernal was this gatekeeper and, in her independent medical judgment, there was no medical reason to interfere with the Patient's legal right to control his medical treatment and information. As a result, and as a matter of law, even if she had received comprehensive training resulting in a clarity of understanding possessed only by legal scholars, she did not and could not interfere with the Patient's exercise of his legal rights. Therefore, and again as a matter of law, any assumed negligent training by SMIS did not and could not cause the Plaintiff's injuries.

The Plaintiff seems to argue or imply that "proper" training on involuntary detention and permissible HIPAA disclosures would have changed Dr. Ash-Bernal's decision, and she would have therefore interfered with the Patient's legal rights. This argument fails as a matter

of law. The power to deprive a patient of his legal rights cannot influence the physician's exercise of her independent medical judgment on whether there is a medical reason to do so. This is a purely medical inquiry. It would be unlawful and unethical for a physician to alter her medical judgment to justify seizing control of a patient's legal rights.

The Plaintiff also argues at length about the terminology in statutes and regulations allowing doctors to interfere with patients' legal right to control medical care and information. At times, the Plaintiff contends that SMIS misuses or misunderstands the terminology. SMIS disagrees, but call it what you will, every statute and every regulation allowing a doctor to deprive a patient of his legal rights is triggered by a doctor's gateway determination that, in her independent medical judgment, there is a medical reason for depriving the patient of his legal rights. Tellingly, the Plaintiff never challenges this controlling principle of law – he just complains about terminology. Also tellingly, the Plaintiff ignores the testimony from his own experts that, if a doctor determines the patient is competent, the patient has the right to control his medical treatment and information. (Tr. 192; 308-309, 311-312).

In sum, the gateway question for depriving any patient of his right to control his medical treatment and information is whether there a medical reason to do so. Answering this question requires the application of independent medical judgment by a physician. If, *but only if*, the physician answers this gateway question affirmatively, then, *but only then*, the physician can deprive the patient of his legal right to control his medical treatment and information. If the physician answers this baseline question negatively, then the patient remains in control of his medical treatment and information. Here, it is undisputed that Dr. Ash-Bernal, in her independent and professional medical judgment, concluded that there was no medical reason to deprive the Patient of his legal rights. As a result, she was duty-bound

to honor the Patient's decisions. Thus, any assumed failure to train by SMIS was not and could not be a cause of the Plaintiff's injuries. Therefore, this Court should reverse and remand for entry of judgment in favor of SMIS.

III. Absent reversal and remand for a defense judgment, SMIS is entitled to a new trial on the Plaintiff's corporate duty to train claims, because the Plaintiff did not plead his HIPAA disclosure claim in his complaint and SMIS did not consent to the trial of this claim expressly or impliedly.

This issue involves the trial court's admission of evidence on and submission of the Plaintiff's claim that SMIS breached an independent corporate duty to train the defendant doctors on when HIPAA permits disclosure of a patient's protected healthcare information, *i.e.*, the HIPAA disclosure claim. SMIS objected to this claim and evidence on the ground that the Plaintiff did not plead this claim. The trial court overruled SMIS's objection and later denied SMIS's post-verdict motion for a new trial.

The Plaintiff does not deny that his Amended Complaint did **not** allege an independent corporate duty and breach by SMIS to train the defendant doctors on permissible HIPAA disclosures. (Resp. Br., *passim*). It is axiomatic that a party cannot pursue an un-pleaded claim at trial absent express or implied consent. *E.g., Woods v. Rabon*, 368 S.E.2d 471, 473-474 (S.C. 1988). It is uncontested that the Plaintiff's HIPAA disclosure claim was not tried by express or implied consent. (Resp. Br., *passim*).

The erroneous admission of evidence requires a new trial if there is a reasonable probability that it influenced the jury's verdict. *Fields v. Regional Med. Ctr. of Orangeburg*, 609 S.E.2d 506, 509 (S.C. 2005). If the challenged evidence has some probative value on a material issue of fact, it is ordinarily presumed to be prejudicial. *Mali v. Odom*, 367 S.E.2d 166, 170 (S.C. App. 1988). Here, it is indisputable that the HIPAA disclosure claim was the centerpiece of the Plaintiff's direct corporate claims against SMIS. Thus, if the trial court

erred in allowing and admitting the HIPAA disclosure claim and evidence, then SMIS is entitled to a new trial on all corporate claims against it. Indeed, the Plaintiff does not dispute that SMIS should receive a new trial if the trial court erred in allowing the HIPAA disclosure claim and evidence. He simply argues the trial court did not err in allowing it.[1]

The Plaintiff seems to make three arguments. First, the Plaintiff correctly notes, as did SMIS in its Brief of Appellant, that his amended complaint alleged a failure to train the defendant doctors on involuntary detention of a patient. The Plaintiff seems to argue that any "failure to train" claim was therefore available at trial. This is nonsensical. One specific claim cannot support a different specific claim, nor can it support a universe of general claims.

Second, the Plaintiff seems to argue that any claim of any nature against SMIS was available at trial based on the following allegation of negligence: "in such other and further particulars as discovery or evidence at trial may reveal." This is not notice of anything. It does not and cannot cure the failure to plead a claim based on an independent corporate duty by SMIS to train the defendant doctors on permissible HIPAA disclosures. That arises, if at all, under a finding of trial by implied or express consent, which did not occur here.[2]

Third, the Plaintiff argues that SMIS had notice of his HIPAA disclosure claim based on a few discovery requests cherry-picked from a multitude of discovery requests and mashed together to give "notice" that he was making a new claim not pleaded in his complaint. This argument fails for the reasons set forth below.

---

[1] The Plaintiff argues that any new trial due to an inconsistent verdict must be against all defendants. (Init. Resp. Br. 36-37). SMIS does not argue the verdict is inconsistent. SMIS's new trial argument arises from the Plaintiff not pleading his HPPA disclosure claim, which relates to SMIS only.

[2] The Plaintiff asserts that SMIS argues the failure to train on involuntary detention was made against the Hospital only. (Init. Resp. Br. 32, n.19). SMIS did not make this argument – it simply noted (correctly) that the only other assertion of any failure to train claim was another involuntary detention claim made specifically against the hospital only. (See App. Br. at Arg. II(B)).

First, the Plaintiff quotes two interrogatories from his **Third** Interrogatories.[3] One interrogatory inquired about "any and all" HIPAA training that the defendant doctors had received in the twenty (20) years between 1996 and 2016.[4] The other inquired about any efforts by SMIS in the same twenty (20) years to ensure that these doctors were educated on and familiar with HIPAA.[5] These interrogatories related to HIPAA, but nothing hints at a direct claim against SMIS for an independent corporate duty to train the defendant doctors on when HIPAA permits the disclosure of protected patient information without the patient's consent and/or over the patient's objection.[6]

Notably, the Plaintiff knew how to make new claims in his discovery requests. In Request Nos. 3 and 4 of his First Requests to Admit, he requested the following admissions:

> 3. Admit that in order for [Patient's Father] to be provided approximately 30 pages of [Patient's] medical records, the provisions of [HIPAA] required that [Patient] would have to first give his permission for his health information to be provided to [Patient's Father].
>
> 4. Admit that you or your agents *violated the provisions of [HIPAA]* by providing approximately 30 pages of [Patient's] medical records to [Patient's Father].

(Pl. Memo. Opposing Post-Trial Motions, Ex. 5 at R. ___) (emphasis added). Nothing in the discovery requests argued by the Plaintiff alleges SMIS "violated" anything by failing to train

---

[3] *Compare* Init. Resp. Br. 33-34 *with* Pl. Memo. Opposing Post-Trial Motions, Ex. 5 at R. ___.

[4] *Id.*

[5] *Id.*

[6] The Plaintiff complains that SMIS did not object to these interrogatories as irrelevant but now claims the same issues are irrelevant and "feigns" prejudice from the admission of evidence on the un-pleaded HIPAA disclosure claim. (Init. Resp. Br. 34, n. 20). This is another nonsensical argument. As this Court knows, relevancy for discovery purposes is far different from and far broader than relevancy for the purpose of admissible trial evidence. Relevancy objections to discovery are seldom appropriate and seldom succeed. Moreover, the Plaintiff misses the point. The HIPAA disclosure matter was objectionable, because the Plaintiff did not plead it, and there was no trial of that claim by express or implied consent.

the defendant doctors on permissible HIPAA disclosures. If the Plaintiff wanted his discovery requests to serve as a substitute for actually pleading his HIPAA disclosure claim, it was incumbent upon him to do so specifically and expressly. He did not.

Second, the Plaintiff quotes the third question from his **Fourth** Set of Interrogatories, seeking the identity of any "sessions/seminars/classes/courses/etc." that the defendant doctors had attended in the past eight (8) years that dealt with permissible disclosures under HIPAA.[7] Here again, this interrogatory does not hint at any claim that SMIS had or breached an independent corporate duty to train the defendant doctors on permissible HIPAA disclosures. As noted earlier, the Plaintiff knew how to allege HIPAA violations in a discovery request if he intended to give "notice" of a new, un-pleaded claim.

Third, the Plaintiff quotes his second request to produce from his **Ninth** Request for Production, seeking the production of all materials related to a training presentation referenced in a deposition of SMIS.[8] Nothing hints at some claim against SMIS that it breached an independent corporate duty to train the defendant doctors on permissible HIPAA disclosures. Nothing alleges a "violation" of anything by SMIS or anyone else.

Fourth, the Plaintiff relies on his first request to admit in his **Third** Set of Requests to Admit, wherein he sought an admission that the Hospital had a system in place to get answers to questions about permissible disclosures under HIPAA.[9] Again, there is no hint of any independent corporate duty or breach by SMIS to train the defendant doctors on permissible HIPAA disclosures, and no alleged "violation" of anything by SMIS.

---

[7] *Compare* Init. Resp. Br. 34 *with* Pl. Memo. Opposing Post-Trial Motions, Ex. 5 at R. ___.

[8] *Compare* Init. Resp. Br. 34 *with* Pl. Memo. Opposing Post-Trial Motions, Ex. 5 at R. ___.

[9] *Compare* Init. Resp. Br. 34 *with* Pl. Memo. Opposing Post-Trial Motions, Ex. 5 at R. ___.

Fifth, the Plaintiff quotes Dr. Patel's deposition answer that he attended numerous continuing education programs on "the dos and do not's" of HIPAA provided by various sources, including "employers." (Emphasis added).[10] Nothing in the question or answer hints at a new, un-pleaded claim against SMIS that it had an independent corporate duty to train the defendant doctors on when HIPAA permits the disclosure of protected patient information without the patient's consent and/or over the patient's objection. Nothing in Dr. Patel's deposition alleges a "violation" of anything by SMIS or anyone else.

The Plaintiff also quotes two requests to admit from his **First** set of requests to admit, both of which summarize HIPAA provisions on permissible disclosures.[11] SMIS denied both requests "as written." Oddly, the Plaintiff does not argue that these requests were notice of a new, un-pleaded claim for breach of an independent corporate duty to train the defendant doctors. Rather, he argues that SMIS's response "demonstrated a lack of knowledge regarding when disclosure of patient information is permissible." (Init. Resp.Br. 35 & n. 21). Notably, the requests were mere assertions of law and therefore improper under Rule 36(a), SCRCP, which limits requests to admit to "statements or opinions of fact or the application of the law to fact, including the genuineness of documents." In any event, nothing in either request hints at a new, un-pleaded claim against SMIS based on an independent corporate duty to train the defendant doctors on permissible HIPAA disclosures, and neither request alleges a "violation" of anything by SMIS.

In summary, the Plaintiff did not plead the HIPAA disclosure claim that was the centerpiece of his trial strategy against SMIS. His "mash-up" of a few discovery responses

---

[10] *Compare* Init. Resp. Br. 34 *with* Pl. Memo. Opposing Post-Trial Motions, Ex. 5 at R. ___.

[11] *Compare* Init. Resp. Br. 35 *with* Pl. Memo. Opposing Post-Trial Motions, Ex. 5 at R. ___.

cherry picked from a multitude of separate discovery requests and instruments did not and cannot cure his failure to plead his HIPAA disclosure claim. Every plaintiff has a duty to plead the claims that he intends to pursue at trial. It is not the duty of any defendant to sift through a multitude of discovery requests made in a multitude of discovery instruments to divine whether the plaintiff is attempting to add a new, un-pleaded claim to his intended trial strategy. At the very least, to charge a defendant with notice of a new, un-pleaded claim by virtue of discovery requests, that notice must be clear and obvious rather than the product of divine inference gathered from sifting through, studying, analyzing, and piecing together a few requests from a multitude of discovery instruments and requests. Accordingly, absent a reversal and remand for judgment in favor of SMIS, this Court should reverse and remand for a new trial on the independent corporate duty to train claims made against SMIS only.

IV. The Remaining Issues

SMIS did not owe any duty to the Patient. There is no evidence that any additional training by SMIS would have altered Dr. Ash-Bernal's treatment of the Patient given her actual knowledge of the standards for detaining patients and disclosing medical information. Any assumed failure by SMIS to train the defendant doctors did not cause the Patient's suicide or accidental death. (See App. Br. at Args. I(B), I(D)(1), and I(D)(4)). The Plaintiff simply disagrees with SMIS on the law applicable to these issues. As to these issues, SMIS relies on the Record and its Brief of Appellant.

As to Plaintiff's "negligent undertaking" theory, the cases cited by the Plaintiff demonstrate that the would-be defendant must undertake to render a service to the would-be plaintiff, and the would-be plaintiff must show some reliance on the undertaking. *Wright v. PRG Real Estate Mgmt.*, 826 S.E.2d 285, 290-292 (S.C. 2019); *Russell v. City of Columbia*,

406 S.E.2d 338, 340 (S.C. 1991). SMIS did not provide any service to the Patient or the Plaintiff, and there is no evidence that the Patient or the Plaintiff was aware of or relied upon SMIS or any training that SMIS may or may not have afforded the doctors. Thus, there can be no "negligent undertaking." In any event, this issue does not affect the other arguments on the non-duty issues, such as causation.

The parties also disagree on the novel legal question of holding a corporation liable for negligently training its employees when the employee does nothing wrong. The Plaintiff cites two distinguishable cases. The Plaintiff principally relies on the Supreme Court's decision in *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 773 S.E.2d 144 (S.C. 2015), which is distinguishable for the following reasons:

1. The dispositive issue was whether an immediate appeal from order bifurcating the trial was proper. This Court dismissed the appeal. The Supreme Court found that an immediate appeal was proper and remanded the appeal back to this Court for a merits decision. Thereafter, the parties voluntarily dismissed the appeal without prejudice, so this Court never addressed the merits.[12]

2. Assuming the Supreme Court's decision in *Morrow* is nevertheless instructive here, it is distinguishable because:

    (a) The defendant was a nursing home that exercised daily control over patient care in a facility housing patients in constant need of medical care. Here, SMIS had no such control or right to control patient care.

    (b) The Supreme Court relied on hospital cases to decide whether direct corporate liability might extend to other types of "comprehensive healthcare providers" that arranged and coordinated patient care and were involved in daily decisions regarding patient care. Here, SMIS is not a "comprehensive healthcare provider," and it was not involved in patient care in any manner whatsoever.

The Plaintiff also cites the Supreme Court's decision in *James v. Kelly Trucking Co.*, 661 S.E.2d 329 (S.C. 2008), which is distinguishable for the following reasons:

[12] See Order dated August 14, 2015 in this Court's file for the *Morrow* appeal.

1. The decision involved a wreck case in federal court against a truck driver and his employer, with a direct negligence claim against the employer based on the truck driver's poor driving record. Here, there is no claim that SMIS knew of or had notice of any poor performance record by anyone, nor is there any claim or evidence of any past performance by either of the defendant doctors.

2. The employer admitted liability for the employee's negligence under the doctrine of respondeat superior, and then argued that a direct claim against it was therefore not available under South Carolina law. The district court certified this question to the Supreme Court, which held that the admission did not preclude a direct action against the employer based on the employee's poor driving record. Again, there is no claim or evidence here that SMIS had any reason to doubt the doctors' performance.

In short, the decisions in *Morrow* and *James* did not address or answer the novel legal question presented here: Assuming the existence and breach of an independent corporate duty to train the defendant doctors on involuntary detention and permissible HIPAA disclosures, can SMIS be liable for negligent training if the doctors did nothing wrong? As shown in SMIS's Brief of Appellant, the answer to this question is "no" because, *inter alia*, if the doctors did nothing wrong, then any assumed failure to train did not cause the doctors to do anything wrong.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in SMIS's Brief of Appellant, this Court should reverse and remand for entry of judgment in favor of SMIS or, in the alternative, for a new trial on the direct corporate claims made against SMIS only.

Respectfully Submitted,

Robert L. Widener
BURR & FORMAN, LLP
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

ATTORNEYS FOR APPELLANT

July 29, 2020
Columbia, SC

Initial THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III

Case No. 2017-CP-26-1571
Appellate Case No. 2019-001665

David L. Scheer, as Personal Representative of the
Estate of Matthew J. Scheer,.....Respondent,

v.

Southern Myrtle Inpatient Services, LLC, Nirlep A.
Patel, M.D. and Rachel Ash-Bernal M.D. ..... Defendants,

Of which
Southern Myrtle Inpatients Services, LLC is.....Appellant.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of Burr & Forman, LLP, hereby certify that a true and correct copy of the **Appellant's Initial Reply Brief** was served upon counsel for the Respondent in the above-captioned matter, via email at the email addresses listed below, and by causing a copy of same to be deposited in the United States Mail, first class postage prepaid, this 29th day of July, 2020, addressed as follows:

Francis M. Hinson IV, Esquire
Finkel Law Firm, LLC
Post Office Box 1799
Columbia, SC 29202
Bhinson@finkellaw.com

Nicholas D. Mermiges, Esquire
Law Offices of Nick Mermiges, LLC
1720 Main Street, Suite 202
Columbia, SC 29201
nick@NDMLaw.com

Columbia, SC

Ann Shuler