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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-001986

Shon Turner, as Personal Representative of the Estate of Charles Mikell, Deceased.....Appellant

v.

The Medical University of South Carolina.....Respondent

RESPONDENT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA'S REPLY IN SUPPORT OF PETITION FOR REHEARING

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REPLY IN SUPPORT OF PETITION FOR REHEARING

AND NOW COMES Respondent/Defendant The Medical University of South Carolina ("MUSC"), by and through its undersigned counsel, and files this Reply in Support of Petition for Rehearing:

INTRODUCTION

MUSC incorporates by reference, as if set forth at length herein, its Petition for Rehearing ("Petition") previously filed with the Court in this matter. On or about June 1, 2020, Plaintiff filed his Return to Petition for Rehearing ("Return"). MUSC submits this timely[1] Reply to address certain arguments Plaintiff raised in his Return. For the reasons set forth herein (in addition to those set forth in the original Petition), this Court should grant rehearing and reconsider the portion of its Opinion reversing the trial court's entry of a directed verdict/summary judgment for MUSC as to Dr. Nelson's negligence.

ARGUMENTS

A. Contrary to Plaintiff's Arguments, Any Error by the Trial Court in Entering Directed Verdict or for Summary Judgment as to Dr. Nelson's Alleged Negligence Was Harmless and Did Not Impact the Verdict Here.

Defendant MUSC has asked the Court to reconsider its Opinion because it fails to address the argument that — even if the trial court erred in entering judgment against Plaintiff with regard to any claims of negligence by Dr. Nelson — any trial court error was harmless. As the Court knows, the jury returned a verdict in favor of Defendant MUSC after a full and complete trial on the merits, where the trial judge did not prohibit Plaintiff from presenting any evidence with regard to Dr. Nelson's alleged negligence. Plaintiff has not shown that, if the trial court had not ruled against him as to this issue, the jury's verdict would have been different.

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[1] Plaintiff served his Return on June 1, 2020. Under South Carolina Rule of Appellate Procedure 240(f), MUSC had five (5) days to reply to the Return. However, the Supreme Court's Order Re: Operation of the Appellate Courts During the Coronavirus Emergency (as Amended May 29, 2020) provides that "due dates for all Appellate Court filings due during the period of March 20, 2020, thru June 8, 2020, are automatically extended for twenty (20) days." As a result, this Reply is due on June 26, 2020 (June 1 +5 days +20 days).

1. **The Motion Was Intended to Ensure That the Proper Statutory Cap Applied in the Event of a Verdict in Favor of Plaintiff.**

Plaintiff queries in his Return: "If the relief sought by MUSC's serial motions for directed verdict and partial summary judgment made no difference to the outcome of the trial, why was so much time and energy expended in repeatedly moving the trial court to end the Appellant's claims of physician negligence?" (*See* Pl.'s Return, at 3). This question is easily answered.

The record reflects that MUSC's counsel plainly stated that the request for a directed verdict would only "have consequences under the Tort Claims Act *should there be a recovery*." (See R. p. 1472:16-20 (emphasis added)). The trial judge agreed that the motion "basically *won't affect your liability on MUSC, but it would affect the caps* under the state Tort Claim Act." (See R. p. 1479:19-22 (emphasis added)). The trial judge also noted that his ruling "would only affect the monetary terms *if they get a verdict* based on the Tort Claims Act." (See R. p. 1644:8-12 (emphasis added)). In other words, MUSC and the trial judge made clear that the directed verdict motion would only limit the ultimate amount of recovery, in the event the jury entered a large verdict for Plaintiff.

There is no evidence that the directed verdict had any impact on what the jury considered or did. Instead, the trial judge focused that ruling on what would occur *in the event of a verdict awarding damages to Plaintiff.* MUSC wished to have that issue determined prior to the jury's verdict in order to avoid any potential prejudice to that argument in the event the jury returned a very large verdict against it. MUSC expended time and energy fighting for this relief because, if the jury returned a large verdict, it would substantially limit and cap such a verdict. As a result, the trial judge's granting of that relief did not impact the jury verdict in any way.

2. **Plaintiff Has Not Shown Any Reversible Error With Regard to the Jury Charge.**

In an effort to argue that the trial court's alleged error in granting a directed verdict was reversible, Plaintiff contends that the grant of directed verdict prejudiced him because "the trial court refused the Appellant's requested jury instructions about Dr. Nelson's obligation to

supervise the anesthesia provided to Mr. Mikell." (*See* Pl.'s Return, at 3). As a result, he argues, "[t]he trial court's erroneous ruling left the jury without the guidance of important standards to which Dr. Nelson's conduct was to be compared." (*See id.*). Plaintiff's argument is wholly without merit.

Plaintiff does not identify any specific request for a jury charge that the trial judge denied because of this ruling. In fact, the record is devoid of any requested jury charges by Plaintiff. The only portion of the record cited by Plaintiff in his Return is this vague statement by the trial judge: "Now, that changes this charge somewhat, as far as a request for charge. I will add in the medical definition of medical malpractice. Okay." (*See* R., at p. 1507:10-12). However, Plaintiff does not specifically identify *anything* that actually "change[d]" to his detriment in the final jury charge as a result of the trial court's ruling with regard to Dr. Nelson.

In any event, Plaintiff has not properly preserved any objection to the jury charge. "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection." S.C.R. Civ. P. 51. This rule "requires an objection on the record, opportunity for discussion, and a specific ruling by the trial court on the jury charge issue." *See Dixon v. Ford*, 362 S.C. 614, 625, 608 S.E.2d 879, 885 (Ct. App. 2005) (*citing Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 494-95, 514 S.E.2d 570, 573-74 (1999)). The record is devoid of any evidence that Plaintiff objected on the record with regard to the denial of a particular requested jury charge because of the directed verdict. To the contrary, Plaintiff's arguments are premised on unsupported speculation and generalities. He has never argued in this appeal that the directed verdict led to the denial of *any* requested jury charge and has never preserved such an issue for appellate review.

3. Plaintiff Has Made No Showing of Any Impact on His Presentation of Evidence, Closing Argument or the Jury's Ultimate Verdict.

Plaintiff next argues that because his "closing argument to the jury was affected" by the directed verdict, any error in granting the directed verdict "should not be considered harmless."

(*See* Pl.'s Return, at 4). In support of this contention, he rhetorically asks: "While it may be true Plaintiff's counsel was free from fear of contempt and could argue whatever he liked to the jury, why would trial counsel spend time arguing physician liability to the jury when the trial court had ruled no such liability exists?" (*See id.*). These arguments do not support the conclusion that any claimed error by the trial court was harmless.

First, there is nothing in the record to even suggest that the directed verdict prevented Plaintiff from presenting a single piece of evidence or from proffering any witness testimony. To the contrary, Plaintiff has not disputed that the trial judge did not enter the directed verdict until *after* Plaintiff had already delivered his opening and presented his entire case to the jury. The directed verdict did not impact a single evidentiary ruling at trial and did not prejudice, in any way, Plaintiff's ability to present his evidentiary case. Plaintiff has not identified any witness testimony or documentary evidence that the trial judge excluded because of his ruling on the directed verdict motion regarding Dr. Nelson's negligence.

Moreover, the directed verdict did not impact the verdict form presented to the jury in any way. To the contrary, the verdict form broadly asked the jury to decide whether "Defendant was negligent in its care of Mr. Mikell." (*See* R., at 111). It did not specifically reference any agent or employee of Defendant MUSC. It did not specifically limit the jury to deciding whether someone other than Dr. Nelson acted negligently. It did not reference Nurse Embry or limit the jury to consideration of her negligence. As a result, the broad verdict form further demonstrates that any alleged error by the trial judge in ruling on MUSC's potential liability for Dr. Nelson's professional negligence did not prejudice Plaintiff.

Additionally, Plaintiff has not identified anything in the record to support his contention that the trial judge's ruling on the directed verdict motion was harmful because of its impact on his closing argument to the jury (after days of evidence had been presented without any limitation). He does not identify anything that the trial court prohibited him from saying to the jury in his closing that would have influenced the jury so profoundly that it would have altered its verdict. He does not identify anything that the trial judge prevented him from saying or even

anything that MUSC objected to in his closing. In fact, Plaintiff concedes in his Return that it "may be true Plaintiff's counsel was free from fear of contempt and could argue *whatever he liked* to the jury." (*See* Return, at 4 (emphasis added)). More importantly, Plaintiff has not identified any specific argument he could not make that would have resulted in a different verdict. Because there is no evidence whatsoever that the trial judge prevented Plaintiff from making a closing argument to the jury that would have changed the verdict, it is apparent that any error was harmless. *See Kalchthaler v. Workman*, 316 S.C. 499, 502, 450 S.E.2d 621, 622–23 (Ct. App. 1994) ("[W]e are satisfied any failure by the trial judge to give curative instructions to the jury and to admonish opposing counsel after opposing counsel made the offending comments did not so affect the jury as to amount to prejudicial error and require a new trial.").

Plaintiff argues that "MUSC's argument leads to an absurd result: the jury was authorized to render a verdict based upon Dr. Nelson's conduct, but MUSC was entitled to have the verdict limited to the amount of the non-physician cap." (*See* Pl.'s Return, at 4). However, this misapprehends the nature of the question before the Court now. Any perceived "absurd[ity]" is not relevant to the issue of harmless error. At the end of the day, irrespective of what the parties or the judge said or did outside of the hearing of the jury, nothing changed from the jury's perspective. It considered exactly the same evidence that it would have considered if the trial judge denied the motion. It completed a generic verdict form that did not prohibit it from considering Dr. Nelson's negligence. There is nothing "absurd" about MUSC's current argument that any error was harmless, since any error did not impact the case ultimately presented to the jury in any demonstrable, prejudicial way.

Therefore, this Court should grant the Petition for Rehearing as to its ruling on the directed verdict/summary judgment on Plaintiff's claims concerning negligence by Dr. Nelson.

B. <u>Contrary to Plaintiff's Arguments, There is No Evidence of Proximate Causation.</u>

Plaintiff admits that the claimed evidence of causation in "largely circumstantial," but argues that "the conclusion that Nurse Embry was unable to establish a patent airway springs

from undeniable facts: her patient went into cardiac arrest as the result of a failed airway. If she were able to manage Mr. Mikell's airway all by herself, then why didn't she?" (*See* Return, at 9). He concludes that "[n]one of these questions would have any meaning unless Nurse Embry had been unable to establish a patent airway by herself." (*See id.*, at 9). However, aside from rhetorical questions and speculation, Plaintiff has not directed the Court to *any* evidence that Dr. Nelson's alleged absence from the procedure room actually caused any injury.

"When expert testimony is not relied upon to establish proximate cause, the plaintiff must offer evidence that 'rises above mere speculation or conjecture.'" *See Carver v. Medical Soc. of S.C.*, 286 S.C. 347, 350, 334 S.E.2d 125, 127 (Ct. App. 1985) (*quoting Carter v. Anderson Mem. Hosp.*, 284 S.C. 229, 325 S.E.2d 78 (1985); *Armstrong v. Weiland*, 267 S.C. 12, 16, 225 S.E.2d 851, 853 (1976)). On the other hand, "when opinions of medical experts are relied upon to establish causal connection of negligence to injury, the proper test to be applied is that the expert must, with reasonable certainty, state that in his professional opinion the injuries complained of most probably resulted from the alleged negligence of the defendant." *Billups v. Leliuga*, 303 S.C. 36, 40, 398 S.E.2d 75, 77 (Ct. App. 1990). In this matter, Plaintiff has presented no evidence that, if Dr. Nelson had been in the procedure room at all times, the result actually would have been different in any way. Instead, Plaintiff blindly assumes causation in the absence of a scintilla of evidence (expert or otherwise) supporting that conjecture.

To the contrary, MUSC's expert, Dr. Berry, testified that Mr. Mikell's arrest was not the result of any breach of a duty by Dr. Nelson:

> Q. Have you formed an opinion about whether any deviations from the standard of care by Dr. Nelson or Donna Embrey proximately caused Mr. Mikell's arrest on October 1, 2010, during his colonoscopy?
>
> A. I also have an opinion on that. And it is that I don't see any deviations from the standard of care. *What caused the arrest is still probably going to remain a mystery.* I have some opinions on that, but I don't think that Ms. Embrey or Dr. Nelson really did anything that I wouldn't have done.

(R., at p.1420:14-23 (emphasis added)). Plaintiff does not proffer or identify any evidence refuting this testimony.

Plaintiff cites no evidence of anything that Nurse Embrey did incorrectly. He does not direct the Court to any evidence of anything specific that nurse Embrey was unable to do. He does not cite any evidence of specifically what would have prevented any injuries. He does not provide any evidence to show that Dr. Nelson was more than a few seconds away at all times. He presents no evidence that anyone tried, unsuccessfully, to contact him when he was out of the room. He presents no evidence that Dr. Nelson was unable to quickly return to the procedure room. He does not provide any evidence at all on causation regarding Dr. Nelson. Instead, he speculates that Dr. Nelson's alleged absence from the room at certain times *must have* caused the injuries complained of. Such rank speculation is not a substitute for evidence of causation.

CONCLUSION

For the foregoing reasons, the Court should grant partial rehearing in this matter, limited to its reversal of the grant of a directed verdict to MUSC as to claims of professional negligence by Dr. Nelson. In all other respects, the Opinion should remain in full force and effect.

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June 11, 2020

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Shon Turner, as Personal Representative of the Estate of Charles Mikell, Deceased.....Appellant

v.

The Medical University of South Carolina.....Respondent

PROOF OF SERVICE

I certify that I have served the Respondent The Medical University of South Carolina's Reply in Support of Petition for Rehearing on the above-referenced Appellant by depositing a copy of it in the United States Mail, postage prepaid, on June 11, 2020, addressed to his attorneys of record:

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June 11, 2020

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

RE: Shon Turner v. MUSC
Appellate Case No.: 2016-001986

Dear Ms. Kitchings:

Please find enclosed for filing Respondent The Medical University of South Carolina's Reply in Support of Petition for Rehearing in this matter. Pursuant to the March 20, 2020 Order and May 29, 2020 Amended Order of the South Carolina Supreme Court, we are sending only one unbound original to the Court for filing.

As indicated in the enclosed Proof of Service, we are also serving a copy of the Reply in Support of Petition for Rehearing on counsel for the Appellant.

Very truly yours,

John W. Fletcher

JWF/jgc
Enclosures

cc: Rob Ransom, Esquire
Alex Apostolou, Esquire

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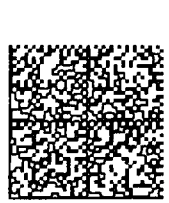

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