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S.C. SUPREME COURT

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. 2020-001231

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

v.

The Medical University of South Carolina.....Petitioner.

PETITIONER THE MEDICAL UNIVERSITY OF SOUTH CAROLINA'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Defendant Medical University of South Carolina ("MUSC") has filed the instant Petition for Writ of *Certiorari* ("Petition") seeking the review of the Court of Appeals' opinion, to the extent it grants a new trial to Plaintiff Shon Turner ("Plaintiff"), as Personal Representative of the Estate of Charles Mikell ("Mr. Mikell"). On October 14, 2020, Plaintiff filed his Return to Petition for Writ of Certiorari ("Return").

Plaintiff's Return does not address a key issue raised in MUSC's Petition. In particular, he does not rebut the critical point that — even if the trial judge erred in entering judgment against Plaintiff as to any alleged negligence of Dr. Nelson — the record does not show any actual harm as a result of that error. Any mistake in that regard was irrelevant to the ultimate outcome of this case. Given the important issues in this case, and the fact that the Court of Appeals has essentially ignored a jury's verdict, this Court should exercise its discretion to grant a writ of *certiorari* and reverse, in part, the Court of Appeals' Opinion.

ARGUMENTS

A. Plaintiff Has Not Addressed the Harmless Error Issue.

1. Neither Plaintiff nor the Court of Appeals Have Shown Any Way in Which the Partial Directed Verdict Changed the Jury's Verdict.

Much of Defendant MUSC's Petition is devoted to demonstrating that even if the Court of Appeals agreed that there was sufficient evidence of Dr. Nelson's negligence to require sending the claim against him to the jury, any error was utterly harmless and could not have contributed in any way to a different result. The jury concluded that MUSC was not negligent, relying on the same evidence, arguments, and instructions that it would have considered against MUSC's agent, Dr. Nelson. Plaintiff has not properly raised any errors in the jury charge. The jury never learned of the directed verdict. At most, Plaintiff argues that his counsel self-censored in his closing argument. There is nothing to support that claim. Had the court denied MUSC's motion, the verdict would have been the same.

Because the directed verdict did not come until after the close of evidence, Plaintiff cannot possibly contend that he was prevented from offering or presenting any evidence concerning Dr. Nelson's alleged negligence. (See R. p. 1472:13-21). The trial court did not limit or constrain the jury's deliberations; in fact, the jury *never learned* of the directed verdict. Additionally, Plaintiff never identified any evidence or arguments relating to Dr. Nelson's conduct that it otherwise would have presented. Plaintiff has not identified any particular jury instruction that was denied (and properly preserved for appellate review) because of the partial directed verdict. In fact, Plaintiff has not identified *anything* that occurred differently at trial because of the partial directed verdict. Plaintiff presented the same case to the jury that he would have presented if the trial court had not granted MUSC a partial directed verdict.

Given the timing of the partial directed verdict, the only way it could have changed Plaintiff's presentation of his case would have been in his closing argument. However, nothing in the record suggests that the trial judge prohibited Plaintiff's counsel from making any particular arguments in his closing or that counsel forbore from making any arguments that he would have made if the claim against Dr. Nelson were still in the case. Indeed, as will be shown below Plaintiff tried and argued the case as though the jury was to consider the alleged negligence both of both Nurse Embrey and Dr. Nelson. Defendant never requested that any limitations be placed on Plaintiff's closing argument. Moreover, Plaintiff cannot show that some magic words in his closing would have led the jury to a different result. To the contrary, after a long and hard-fought trial, the jury considered all the evidence and found no basis for liability.

The Court of Appeals seriously erred because it never squarely addressed the issue of harmless error. Instead, it presumed that the trial judge's claimed error must have been prejudicial. The harmless error rule is firmly established in South Carolina jurisprudence and is consistently applied in the decisions of this Court. The Court of Appeals did not even consider that question, even though it clearly applies. This Court should grant *certiorari* to consider and address (at the very least) this controlling issue.

In his Return to Petition for Writ of Certiorari, Plaintiff argues — with regard to his claim for Dr. Nelson's alleged negligence — that MUSC should be liable because Dr. Nelson failed to properly supervise Nurse Embrey:

> By way of obvious example, the jury in this case could have exonerated the nurse anesthetist because the anesthesiologist failed to properly supervise her. Negligence does not necessarily consist in being unsupervised, but it does consist in failing to supervise when a duty to do so exists. In other words, the duty of supervision falls upon the superior, not the subordinate. So a lack of proper supervision could stand alone as a legitimate basis for imputing physician negligence to the Medical University.

(*See* Pl.'s Ret. to Pet. for Writ of Cert., at 5). However, to the extent Plaintiff now relies on Dr. Nelson's alleged negligent supervision, the jury's verdict that Nurse Embrey was not negligent would preclude such a claim.

"An employer cannot be liable for negligent hiring, retention, or supervision *unless the employee has committed an actionable tort.*" *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 860 (D.S.C. 2015) (emphasis added) (*citing Sabb v. South Carolina State Univ.,* 350 S.C. 416, 431–32, 567 S.E.2d 231, 238–39 (2002) (Pleicones, J., dissenting) (noting that "the torts of negligent hiring, supervision, or training must include as an element an underlying tort or wrongful act committed by the employee")). This is consistent with the position that courts throughout the country have taken. *See e.g. Hays v. Patton–Tully Transp. Co.*, 844 F. Supp. 1221 (W.D. Tenn. 1993) (negligent supervision claim lies only where supported by viable claim of tortious conduct by offending employee); *Mulhern v. City of Scottsdale*, 165 Ariz. 395, 799 P.2d 15 (Ct. App. 1990) (for employer to be liable for negligent supervision, employee must have committed actionable tort); *Schoff v. Combined Ins. Co. of America*, 604 N.W.2d 43 (Iowa 1999) (negligent supervision must include underlying tort or wrongful act by employee); *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116 (1986) (for employer to be liable for negligently hiring or retaining an employee, plaintiff must prove offending employee committed a tort); *Gonzales v. Willis*, 995 S.W.2d 729 (Tex. Ct. App. 1999) (negligent hiring, retention, and supervision claims failed where plaintiff-employee failed to show actions of

offending employee amounting to actionable tort); *Haverly v. Kaytec, Inc.,* 169 Vt. 350, 738 A.2d 86 (1999) (negligent supervision must include underlying tort or wrongful act by employee); *accord Acadia Const., Corp. v. ZHN Contracting Corp.*, 144 A.D.3d 1059, 1061, 42 N.Y.S.3d 264, 266 (2016) ("Since the Supreme Court should have granted summary judgment dismissing the plaintiff's underlying negligence cause of action, it also should have granted summary judgment dismissing the plaintiff's remaining causes of action, which alleged negligent hiring, negligent supervision, and the violation of unspecified laws and regulations.").

Even accepting Plaintiff's contentions in his return, he cannot dispute that the jury conclusively determined, at the very least, that Nurse Embrey's actions did *not* constitute a tort. The jury's verdict in that regard also conclusively forbids any action against MUSC for Dr. Nelson's alleged negligent supervision. In other words, because Nurse Embrey's conduct was not tortious, MUSC cannot be secondarily liable for Dr. Nelson's alleged failure to supervise her.

2. Plaintiff's Return Demonstrates How He Argued Dr. Nelson's Negligence to the Jury.

In his Return, Plaintiff concedes that — notwithstanding the entry of a directed verdict — he was fully able to argue Dr. Nelson's negligence to the jury. Specifically, as Plaintiff admits, he presented in evidence at trial MUSC's "Policies and Basic Standards of Anesthesia Care" policy manual, which mandates that the provision of anesthesia by nurse anesthetists be performed under the "direction and supervision" of an anesthesiologist and that the patient's condition "will be the responsibility of a qualified physician member of the medical staff." (*See* R., at 231-39).

In his Return, Plaintiff noted that he was able to present evidence, in relation to this policy manual, *that Dr. Nelson was negligent:*

> The policy manual was entered into evidence and discussed at length during the testimony of Dr. Reeves, the Chairman of the Medical University's Department of Anesthesia. Dr. Reeves testified, inter alia, that the policy manual was developed in order for the Medical University to comply with the physician supervision

> requirements of State law. Dr. Reeves also testified the policy manual requires all equipment to be checked for proper functioning before a patient is given an anesthetic.

(*See* Pl.'s Return to Pet. For Writ of Cert., at 8). This further supports MUSC's contention that this Court should grant *certiorari* to correct the Court of Appeals' erroneous refusal to address the meritorious argument that any claimed error was harmless.

3. Plaintiff Has Not Presented Any Issues Regarding the Jury Charge.

Plaintiff also argues in his Return that "[a]s a consequence of its erroneous directed verdict ruling, the trial court also declined to charge several of Mr. Turner's other requested jury instructions relating to how a duty of care can arise from a statute, regulation, or internal policy manual." (*See* Ret. to Pet. for Cert., at 8).

However, "a bald assertion, without supporting argument, does not preserve an issue for appeal." *In re McCracken,* 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001), *holding modified by Matter of Chapman,* 419 S.C. 172, 796 S.E.2d 843 (2017). Moreover, "[j]ury instructions must be considered as a whole, and if, as a whole, they are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." *See Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 498, 514 S.E.2d 570, 575 (1999) (citation and quotation marks omitted).

Plaintiff's briefs in this appeal have *not* substantively argued that the trial judge erred in failing to instruct the jury on negligence *per se* or by violations of regulations/policies. In his primary appellate brief, Plaintiff only mentioned the question of jury instructions in passing in a couple of sentences: "But the trial court did not charge the jury any of the Plaintiff's requested instructions on a physician's duty to supervise a CRNA's provision of anesthesia care. It is hard to envision how the jury would have found physician fault in the absence of receiving instructions about the pertinent law." (*See* Pl.'s Br., at 15). However, he never argues in detail why the trial court's jury instruction, *taken as a whole*, was improper or deficient.

Moreover, Plaintiff did not preserve the question of the trial court's jury instructions for appellate review. With regard to negligence *per se*, the following discussion occurred before the trial judge compiled his jury instructions:

> Is there anything else you think I need to add in from the plaintiff's standpoint, based upon your request or the defense's request? Or the negligent *per se*, that would apply to Dr. Nelson only; right?
>
> MR. RANSOM: I'm sorry, Your Honor?
>
> THE COURT: Negligent per se would just apply to Dr. Nelson only; right? Not the nurse?
>
> MR. RANSOM: I think if she violated -- I think if she violated any of the hospital's own policies, that would be negligence per se.
>
> THE COURT: Okay. All right. I'll get a charge together.

(*See* R., at 1507:13-24). However, Plaintiff never objected to the jury charge that the trial judge prepared. While he did request a couple of charges that were not included, there is nothing in the record to support that this issue was preserved for Plaintiff to raise in this appeal.

In any event, the trial transcript makes clear that Plaintiff had the opportunity to present evidence of Dr. Nelson's alleged negligence in supervising Nurse Embrey to the jury. For example, Plaintiff's expert testified to the jury about the requirement of supervision in MUSC's policies:

> Q. And so what we see here is, it says that the certified registered nurse anesthetist -- that's commonly abbreviated CRNA?
>
> A. That's correct.
>
> Q. Okay. And in Mr. Mikell's case, Donna Embrey was the CRNA?
>
> A. Correct.
>
> Q. Okay. So the CRNA and house staff will be under his/her direction and supervision -- that's under the direction and supervision of the anesthesiologist?
>
> A. Correct.
>
> Q. And in this case that was Eric Nelson?

A. That's correct.

Q. Okay. On page 2 of Exhibit 8, we also see up here, it says these standards apply for any administration of anesthesia involving the Department of Anesthesia personnel and it includes the DDC locations where Mr. Mikell's colonoscopy took place?

A. That's correct.

Q. And there's another section here that sort of restates what we have already seen, "Anesthesia care will be provided by the attending anesthesiologist and the nurse anesthetist may perform anesthesia under the supervision of an attending anesthesiologist."

A. That's correct.

(*See* R., at pp. 1135:18-1136:17).

Additionally, on cross-examination, Plaintiff pressed Dr. Nelson on his duty to supervise the CRNA during the administration of anesthesia:

Q. Okay. And you also understood that with a patient like Mr. Mikell, who is -- if I can use the word "fragile" from an anesthesia standpoint, that it made sense to be more careful rather than less, and to be paying more attention rather than less?

A. Yes.

Q. Okay. And you said that your general practice is that you're in a supervisory role; correct?

A. Yes.

Q. And that means that you're responsible for what takes place?

A. Uh-huh.

Q. And that means that you're the one who is directing everyone else's conduct; right?

A. Meaning -- by "everyone", you mean the CRNAs?

Q. Well, it -- that's right. The anesthesia care providers, they are under your authority? Donna is?

A. Yeah, I mean, I don't know that I'm directing all of her conduct. But her duty is to carry out the anesthetic plan that we come up with that -- that I formulated, so.

Q. But it's also your responsibility to make sure that the way that Mr. Mikell's care is provided is safe?

A. Yes.

(*See* R., at pp. 1372:5-1373:4). Dr. Nelson further testified that he was "the one who's charged with maintaining the patient's safety" and "the one who's charged with supervising the nurse anesthetist." (*See* R., at p. 1373:10-15). Dr. Nelson further agreed that he was "the one who's ultimately responsible for all the decisions that are made." (*See* R., at p. 1373:16-18).

In sum, the record makes clear that Plaintiff actually presented his "negligent supervision" case to the jury and that the jury was never told not to consider that theory.

CONCLUSION

For the foregoing reasons, the Court should grant MUSC's Petition for Writ of *Certiorari* and review the Court of Appeals' reversal of the grant of a partial directed verdict to MUSC with respect to claims of Dr. Nelson's alleged professional negligence.

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