

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Nov 03 2020

SC Court of Appeals

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2019-001145 / Lower Case No. 2017-CP-40-00517

Jackie Eadon Chalfant,
Individually and as Personal
Representative of the Estate of
Michael Dallas Chalfant,

Appellant,

v.

Carolinas Dermatology
Group, P.A., a South Carolina
Professional Association, and
Mark G. Blaskis, M.D.,
Individually.

Respondents.

FINAL INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING DIRECTED VERDICT AGAINST THE PLAINTIFF FOR FAILURE TO ESTABLISH ALL ELEMENTS OF MEDICAL MALPRACTICE CLAIMS BY EXPERT WITNESS TESTIMONY WHEN THE COMMON KNOWLEDGE EXCEPTION WAS APPLICABLE BECAUSE THE EVIDENCE INTRODUCED AT TRIAL ESTABLISHED THE DEFENDANTS FAILURE TO PROVIDE PLAINTIFF WITH AFTER-HOURS CONTACT INFORMATION AND POST-SURGERY INSTRUCTIONS?
2. DID THE TRIAL COURT ERR IN GRANTING DIRECTED VERDICT AGAINST THE PLAINTIFF AS THERE EXISTED CONFLICTING TESTIMONY REGARDING BREACH OF STANDARD OF CARE RELATED TO POST-SURGERY INSTRUCTIONS?
3. DID THE TRIAL COURT ERR IN GRANTING DIRECTED VERDICT AGAINST THE PLAINTIFF WHEN CONFLICTING TESTIMONY BY DEFENDANT'S EXPERT WITNESS CREATED A QUESTION OF FACT REGARDING DEFENDANTS' BREACH AS TO STANDARD OF CARE WHERE THE DEFENDANTS' EXPERT TESTIFIED THAT HE WOULD NOT HAVE OPERATED ON THE DECEDENT BECAUSE DECEDENT'S TACHYCARDIA WAS A CONTRAINDICATION TO PERFORMING SAID SURGERY ON MAY 12, 2015 WITHOUT PROPER CARDIAC FOLLOW-UP?

STATEMENT OF THE CASE

The Appellant, Jackie Eadon Chalfant, Individually and as Personal Representative of the Estate of Michael Dallas Chalfant seeks to appeal and reverse the Direct Verdict against Plaintiff in Jackie Eadon Chalfant, Individually and as Personal Representative of the Estate of Michael Dallas Chalfant v. Mark G. Blaskis, MD and Carolinas Dermatology Group, PA, Court of Common Pleas of Richland County, South Carolina, Civil Action Number 2017-CP-40-00517.

All conditions precedent to bringing the underlying action were met. Plaintiff filed her Notice of Intent (Case Number 2016-CP-40-00033) to all parties in the Court of Common Pleas of Richland County, South Carolina, obtained qualified expert review and Corroborating Affidavit of Medical Expert, attended a pre-suit medical malpractice mediation conference on September 22, 2015 and served Plaintiff's Answers to Standard Interrogatories upon Defendants pursuant to S. C. Code Ann. §15-79-120 and §15-79-125 (1976).

On January 30, 2017, the Plaintiff, Jackie Eadon Chalfant, Individually and as Personal Representative of the Estate of Michal Dallas Chalfant (hereinafter "Plaintiff" or "Appellant") filed her two (2) count Complaint and Demand for Jury Trial against the Defendants, Mark G. Blaskis, M.D. (hereinafter "Dr. Blaskis"), Individually, and Carolinas Dermatology Group, P.A. ("CDG") (collectively hereinafter "Defendants" or "Appellees"), for (1) Medical Malpractice – Wrongful Death Negligence/Gross Negligence against Defendants, and (2) Medical Malpractice – Wrongful Death Negligence/Gross Negligence against CDG. On March 3, 2017, the Defendants' filed their Answer to Complaint, alleging thirteen (13) Affirmative Defenses, including but not limited to comparative negligence, negligence by Third Party, Intervening Causes by Third Party, and Physical Infirmities. On Mach 17, 2017, Plaintiff filed her Reply to Affirmative Defenses, denying each affirmative defense (R. pp. 8-51).

On June 4, 2019, the case was set for a four (4) day jury trial. On June 6, 2019, after the Plaintiff had rested its case, the parties argued their respective Motions for Directed Verdict.

On June 6, 2019, the Court denied Plaintiff's motion and granted a directed verdict in favor of the Defendants on the basis that the Plaintiff did not establish by Expert Testimony that the Defendants breached the standard of care and that breach was the causation of Plaintiff's damages (R. pp. 296-304).

On June 7, 2019, the Court entered its Order granting directed verdict in favor of Dr. Blaskis. On June 21, 2019, the Court entered its Amended Order to include an order granting directed verdict in favor of CDG, which was inadvertently omitted from the Form 4 Order filed on June 7, 2019 (R. pp. 2-4).

On July 8, 2019, the Plaintiff/Appellant timely filed its Notice of Appeal. On July 18, 2019, the Plaintiff/Appellant filed its Amended and Second Amended Notice of Appeal to correct the case number and to add an additional attorney of record (R. pp. 52-57).

On July 26, 2019, the Appellants received a correspondence from the South Carolina Court of Appeals requesting a letter showing that the Appellant timely ordered the transcript from the court reporter and the status of the transcript within ten (10) days (R . p p . 5 8 - 5 9). On July 29, 2019, the Appellant sent a correspondence which was never received by the Court that confirmed order of the transcript with the Court Reporter. On July 30, 2019, the Appellant submitted its Notice of Filing and Compliance with Rule 207 SCACR and with the Clerk's directives dated July 26, 2019, providing all communications with the Court Reporter. Unbeknownst to the undersigned, neither submission was received by the Court.

On August 12, 2019, the Court entered its Order dismissing Appellant's appeal for failure to order the transcript as required by Rule 207 SCACR and the Court's correspondence dated July

26, 2019 (R. p. 6).

On August 29, 2019, the Appellant filed its Motion to Reinstate on the grounds as stated above (R. pp. 60-94). On November 7, 2019, the Court entered its Order Reinstating Appellant's Appeal (R. p. 7).

STANDARD OF REVIEW

When reviewing the trial court's ruling on a directed verdict or JNOV motion, this court must apply the same standard as the trial court "by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Crenshaw v. College*, 424 S.C. 287, 295, 818 S.E. 2d, 218, 222 (S.C. Ct. App 2018) citing *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27-28, 602 S.E.2d, 772, 782 (S.C. 2004). "The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt." *Id.* citing *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E. 2d 439, 440 (S.C. 1994).

““In deciding such motions, “neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.”” *Creech v. S.C. Wildlife and Marine Resources Dept*, 328 S.C. 24, 491 S.E.2d 571 (S.C. 1997). “In essence, the appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor.” *Guffey v. Columbia/Colleton Reg. Hosp.*, 612 S.E.2d 695, 364 S.C. 158 (S.C. 2005) citing *Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (S.C. 2002) (citation omitted).

The appellate court “will reverse the trial court's rulings on these motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law.” *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (S.C. 2003). “As to questions

of law, this court's standard of review is de novo." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (S.C. Ct. App. 2009).

FACTS

I. GENERAL FACTS APPLICABLE TO ALL ARGUMENTS RAISED ON APPEAL

On March 30, 2015, Michael Dallas Chalfant (hereinafter "Decedent") was seen by his family physician, Peter J. Stahl, M.D., at Woodhill Family Medicine, who noted that Decedent was severely underweight. He documented Decedent's height 68 inches, weight 103 lbs., BMI 15, blood pressure 110/60, pulse 120, and respirations 16. Decedent had a long history of chronic obstructive pulmonary disease, coronary artery disease and failure to thrive and was a chronic smoker. Decedent also had a significant social history of alcohol consumption (R. pp. 308-352).

Dr. Stahl's physical examination of Decedent revealed significant skin lesions on his forehead and left ear which Dr. Stahl described as "definite cancer," and he therefore referred the Decedent to Defendant, Mark G. Blaskis, M.D. regarding the skin cancers (R. pp. 308-352).

On April 2, 2015, Decedent presented to Defendant, Mark G. Blaskis, M.D. ("Dr. Blaskis") at the offices of Defendant, Carolinas Dermatology Group P.A., located at 1706 St. Julian Place, Columbia, South Carolina 29204 ("CDG" or "Carolinas Dermatology Group") regarding his skin lesions (R. pp. 308-352).

On or about April 2, 2015, the Defendant, Dr. Blaskis examined two small areas of concern or lesions located on Decedent's left cheek and left ear and scheduled him for surgery on May 12, 2015 for the purpose of removing the lesions using the Mohs Micrography Surgery procedure, which involves removing multiple layers of the suspected cancerous tissue incrementally with contemporaneous pathological examination of each section or layer so as to permit the surgeon to more precisely remove all of the cancerous tissue extending to the non-cancerous margins of

healthy tissue, removing as little of the patient's healthy tissue as possible (R. pp. 308-352).

On May 12, 2015 at 1:00 p.m., Defendant, Mark G. Blaskis, M.D performed a Mohs Micrography Surgical procedure to remove the two cancerous lesions from the Decedent's left cheek and left ear. Following the surgery, the surgical wound located on the left cheek measured 2.1 x 1.3 cm, while the surgical wound located on the left ear measured a much larger 3 x 2.1 cm.

Importantly, the surgery to the left ear resulted in not only a larger wound, but a wound which was actually a "through and through" hole defect involving the left concha (R. pp. 308-352).

The Defendant, Dr. Blaskis made the decision not to suture the Decedent's left ear surgical wound, but, instead, elected to electrosurgery to achieve hemostasis. He did not include the Decedent in this decision and did not inform the Decedent of the increased risk of post-surgical bleeding associated with leaving the wound open and without sutures. Dr. Blaskis made the decision to leave the wound unsutured and to refer the Decedent to a plastic surgeon, Dr. Brett Carlin, to repair the wound, and scheduled the Decedent to be seen by Dr. Carlin the following day, May 13, 2015 at 3:00 p.m. for repair of the left ear wound (R. pp. 308-352).

Following the surgery and during check out, the Defendants failed to give the Decedent and his caregiver wife sufficient verbal and written postsurgical wound care instructions and information, including but not limited to, what to do in the event of postsurgical bleeding. Instead, the Defendants only gave the Chalfants instructions "not to touch or remove the bandage" under any circumstances, eliminating the possibility that the Chalfants would apply pressure to the bandage in the event of postsurgical bleeding. The Defendants also failed to give any instructions and information regarding abstaining from consuming alcohol for any postsurgical period of time (R. p. 236, line 8 - p. 241, line 14; R. p. 242, line 5 - p. 250, line 5; R. p. 257, line 4 - p. 263, line

8).

The Defendants instructed the Decedent and his wife to call (803) 771-7506 ext. 209 if they had any problems or questions. The only written instructions and information provided to Decedent are set forth on the separate information sheet which has a “star” on one section and an “X” striking the subsequent section as inapplicable but leaving the telephone contact information and instructions to follow-up in one week (R. p. 127, line 16-24; R. p. 134, line 19 - p. 138, line 14; R. p. 236, line 8 - p.241, line 14; R. p. 242, line 5 - p. 250, line 5; R. p. 257, line 4 - p. 263, line 8; R. p. 305).

The Decedent departed the Defendants’ medical offices around 3:45 p.m. after his surgery on May 12, 2015.

At around 7:00 p.m., Plaintiff checked on the Decedent and discovered that he was bleeding from below the left ear wound bandage. While concerned, she was not alarmed. She got her husband some paper towels and wiped the blood away. She stressed to her husband that the doctor’s office had specifically instructed them not to touch the bandage or remove the bandage. She believed based upon the instructions stressed by the Defendants that she and her husband were not supposed to apply any pressure to the ear wound and bandage. She was led to believe that it was a special bandage due to the “through and through” wound and steadfastly followed the Defendants’ primary instruction not to touch the bandage. Had she been told to apply pressure or perform any other act in response to the bleeding, Plaintiff would have followed those instructions to the letter. Had Plaintiff been told that any significant bleeding constituted an “emergency”, she would have demanded that her husband go to the emergency room or called 911 (R. p. 236, line 8 - p. 241, line 14; R. p. 242, line 5 - p. 250, line 5; R. p. 257, line 4 - p. 263, line 8).

Following the Defendants’ instructions to call them if they had any questions or problems,

Plaintiff called the Defendants at (803) 771-7506 and dialed the extension 209 as indicated on the written instructions at approximately 7:10 p.m. to notify them of the bleeding, but there was no answer. She left a message (R. p. 244, line 6 - p. 247, line 11). Although Defendants did have an after-hours answering service, the Defendants had no answering service or procedures to check their messages or calls from post-surgery patients (R. p. 135, line 3 - p. 136, line 2; R. p. 368-509). After calling and leaving a message with the Defendants, Decedent ate dinner and watched television while waiting for the Defendants to return his call (R. p. 244, line 9 - p. 247, line 23).

The Decedent's left ear wound had continued to bleed, on and off, after dinner, but not to the extent deemed to be an "emergency" in light of the instructions and information provided by the Defendants (R. p. 242, line 14 - p. 252, line 2). The Defendants failed to return Plaintiff's call or respond to her message and failed to follow-up with Decedent regarding his post-surgery status and condition (R. p. 244, line 9 - p. 247, line 11).

At around 10:30 p.m. in the evening of May 12, 2015 following the surgery by the Defendants, Decedent and Plaintiff went to bed (R. p. 246, line 23-25).

At about 4:30 a.m., he got up and walked to the bathroom. Plaintiff heard an object fall loudly to the bathroom floor and got up to check on him. When Plaintiff turned on the light she saw that Decedent's pillow was covered with blood. After locating Decedent's inhaler and giving it to him while he was still in the bathroom, he claimed it was the wrong one, so Plaintiff went back into the bedroom to look for another inhaler. Unable to find another inhaler, she returned to the bathroom to tell him there was no other inhaler and found him unresponsive and slumped down and to the side. She grabbed her husband's face in her hands and begged him to respond. But he did not respond. Plaintiff immediately called 911 (R. p. 252, line 19 - p. 256, line 3).

At about 5:10 a.m. Emergency Medical Services arrived at the Chalfant residence and tried

to revive the Decedent. They immediately loaded him and left for the hospital with the Plaintiff following behind. On May 13, 2015, shortly before dawn, Michael Dallas Chalfant was pronounced dead at the V.A. Hospital in Columbia, South Carolina (R. p. 253, line 22 - p. 254, line 12; R. p. 306).

The coroner's investigation conducted by Amy M. Durso, M.D. determined that Michael Dallas Chalfant died as a result of blood loss or exsanguination due to hemorrhage from the left ear surgery site performed by the Defendant, Mark G. Blaskis, M.D. (R. p. 167, line 19-23; R. p. 171, line 10-17; R. pp. 510-514).

For all these reasons and as further addressed herein, the circuit court's directed verdict should be reversed.

II. FACTS SPECIFIC TO APPELLANT'S ARGUMENT THE COMMON KNOWLEDGE EXCEPTION WAS APPLICABLE BECAUSE THE EVIDENCE INTRODUCED AT TRIAL ESTABLISHED THE DEFENDANTS FAILURE TO PROVIDE PLAINTIFF'S WITH AFTER-HOURS CONTACT INFORMATION AND POST-SURGERY INSTRUCTIONS

During arguments on Defendants' Motions for Directed Verdict, the Plaintiff argued that the "common knowledge exception" applied to the discharge instructions provided by Defendants by including instructions on the discharge form provided to Plaintiff / Decedent which instructed the Plaintiff / Defendant to use a telephone number and extension which would not connect the Plaintiff / Decedent to the Defendants' after-hours answering service (R. p. 288, line 16 - p. 291, line 12).

According to Defendant Carolinas Dermatology Group P.A.'s policy and procedures related to After-Hours Telephone, "Each physician/provider is on call for themselves and their patients during after-hours. Carolinas Dermatology has an after-hours service that takes call for any patients who choose the after-hours option. When call our office, our automated options tell

the patients that an after-hours service is available and instructs them on how to reach the after-hours service. The staff at Answer Carolina takes call for all after-hour phone call and has contact information for all providers. The phone system automatically transfer to Answer Carolina at 430pm Monday-Thursday and 1230pm on Fridays. This is a 24/7 after-hours telephone service until the next business working day for Carolinas Dermatology” (R. p. 515). The telephone is answered by a live person during working business hours, and transfers to an automated prompt during after-hours, as further described above (R. p. 132, line 21 - p. 136, line 2).

Interrogatory No. 24 of Plaintiff’s First Set of Interrogatories and Carolinas Dermatology Group, P.A.’s Answer thereto dated May 17, 2017, is as follows:

Interrogatory No. 24 – State the name(s), addresses and phone numbers of each person on behalf of Carolinas Dermatology Group, P.A. who had the duty or responsibility to establish and implement policies, procedures, rules, standing orders and/or protocols which Carolinas Dermatology Group, PA had in place regarding the recognition, management and prevention of post-operative complications on or about May 12, 2015.

Answer - Debbie Clarke and Angela Grant.

(R. p. 160, line 19 - p. 161, line 7; R. pp. 105-106)

Debbie Clarke and Angela Grant are the office managers for Defendant, Carolinas Dermatology Group, P.A. Neither Debbie Clarke nor Angela Grant have any medical training (R. p. 115, line 6-22).

On June 5, 2014, Carolinas Dermatology Group, P.A., changed the after-hours prompt to the prompt which was in effect and subsequently heard by the Plaintiff on May 12, 2015. Helen Le was responsible for changing and re-recording the prompt on June 5, 2014 (R. p. 261). Helen

Le was the assistant office manager at the time, working beneath Angela Grant and Debbie Clarke, all of whom were overseen by Dr. Zhang, President of Carolinas Dermatology Group, P.A. Dr. Zhang had no information as to why the prompt was changed on June 5, 2014 (R. p. 120, line 10 - p. 123, line 21).

Defendant, Carolinas Dermatology Group, P.A.'s After-Hours Outgoing Phone Messaging system prompt, are as follows:

October 2013 After-Hours Script: “You have reached Carolinas Dermatology After-Hours. If this is an emergency, please hang up and dial 911 or press 9 now for our answering service (emphasis added). If you know your party’s extension, you may dial it at any time during this message. To hear our automated options, press 1. To leave us a message in our general voice mailbox, press 2. To hear these options again, press the * key.”

May 2015 After-Hours Script (Day of Decedent’s Surgery): “You have reached Carolinas Dermatology After-Hours. If this is a true emergency, please hang up now and dial 911. If you know your party’s extension, you may dial it now (emphasis added). To hear our automated options press 1. For a prescription refill or to leave a message to be returned on the next business day, please press 2. For all other serious medical concerns, dial 9 now for our answering service. To hear these options again, press the * key.”

June 2017 After-Hours Script (after lawsuit filed): “You have reached Carolinas Dermatology After-Hours. If this is a true medical emergency, please hang up now and dial 911. For all other serious medical concerns, press 9, and you will be directed to our answering service (emphasis added). If you know your party’s extension, you may dial it now or any time during this message. To hear our automated options, press 1. If you

would like to leave a refill request, or leave a message for your physician to be returned the next day, press 2.”

(R. p. 307)

On May 12, 2015, the only written instruction provided by the Defendant, Dr. Blaskis to the Plaintiff and the Decedent states “Please call us with any questions at (803) 771-7506 ext. 209” (R. p. 236, line 8 - p. 241, line 14; R. p. 242, line 5 - p. 250, line 5; R. p. 257, line 4 - p. 263, line 8; R. p. 307).

At around 7:00 p.m., Plaintiff checked on the Decedent and discovered that he was bleeding from below the left ear wound bandage. While concerned, she was not alarmed. She got her husband some paper towels and wiped the blood away. She stressed to her husband that the doctor’s office had specifically instructed them not to touch the bandage or remove the bandage. She believed based upon the instructions stressed by the Defendants that she and her husband were not supposed to apply any pressure to the ear wound and bandage. She was led to believe that it was a special bandage due to the “through and through” wound and steadfastly followed the Defendants’ primary instruction not to touch the bandage. Had she been told to apply pressure or perform any other act in response to the bleeding, Plaintiff would have followed those instructions to the letter. Had Plaintiff been told that any significant bleeding constituted an “emergency”, she would have demanded that her husband go to the emergency room or called 911 (R. p. 236, line 8 - p. 241, line 14; R. p. 242, line 5 - p. 250, line 5; R. p. 257, line 4 - p. 263, line 8).

Following the Defendants’ instructions to call them if they had any questions or concerns, Plaintiff called the Defendants at (803) 771-7506. She listened to the prompt, and when it stated “If you know your party’s extension, you may dial it now”, she entered the

extension 209 as instructed on the written instructions at approximately 7:10 p.m. to notify them of the bleeding, but there was no answer. She left a message and expected a call back. Although Defendants did have an after-hours answering service, the Defendants had no answering service or procedures to check their messages or calls from post-surgery patients (R. p. 132, line 21 -p. 136, line 2; R. p. 244, line 6 - p. 247, line 11; R. p. 305; R. p. 368 - p. 509).

The coroner's investigation conducted by Amy M. Durso, M.D. determined that Michael Dallas Chalfant died as a result of blood loss or exsanguination due to hemorrhage from the left ear surgery site performed by the Defendant, Mark G. Blaskis, M.D. (R. p. 167, line 19 - 23; R. p. 171, line 10-17; R. pp. 510-514).

The testimony is undisputed from Plaintiff's Expert, Dr. Sean Christensen, and Defendant, Dr. Blaskis that, had the Plaintiff been able to contact Dr. Blaskis or another medical professional to stop the bleeding on May 12, 2015, that Decedent would have been saved and Decedent would not have died on May 13, 2015 (R. p. 149, line 9-17; R. p. 156, line 3-7; R. p. 214, line 19 - p. 215, line 4; R. p. 225, line 12 - p. 226, line 8; R. p. 226, line 24 - p. 227, line 5).

Defendant, Dr. Blaskis' Relevant Testimony at Trial

Defendant, Dr. Blaskis, admits in his testimony that he is aware that if you dial the extension as instructed on his discharge form, that a patient will not be connected to the answering service, but that the extension will lead you to a voicemail which would not be checked after-hours (R. p. 132, line 21 - p. 136, line 2). Dr. Blaskis also admits that the Discharge Form was the only written instruction provided on May 12, 2015 to the Plaintiff. Dr. Blaskis only provides post-operative instructions verbally (R. p. 130, line 8 - p. 138, line 14).

Plaintiff never received any verbal instructions related to bleeding, after-hours services or

otherwise. The only verbal instruction she was given repeatedly was to not remove or touch the bandage under any circumstances (R. p. 236, line 8 - p. 241, line 14; R. p. 242, line 5 - p. 250, line 5; R. p. 257, line 4 - p. 263, line 8).

Dr. Quan's Discharge Instruction Form

Dr. Long Quan is another physician at Defendant, Carolinas Dermatology Group, P.A.'s Columbia Office, and he is the only other physician, along with Dr. Blaskis, who performs Mohs surgery (R. p. 116, line 22 - p. 117, line 6). Dr. Quan's Wound Care Discharge Instructions states in bold under the "HOW TO REACH US" section, "After hours if an emergency ONLY, call Dr. Quan at 803-414-5590. If he does not answer or call back within 5 minutes, call the answering service at 803-771-7506." Dr. Quan's phone number takes you directly to his cell phone. The other phone number is the Practice's mainline, without providing an extension to his nurse's station (R. p. 142, line 6 - p. 143, line 10; R. p. 356).

Defendants' Expert Witness, Dr. Pearson Lang's Relevant Testimony at Trial

Dr. Pearson Lang testifies that a physician has a duty to provide a clear method, a reasonable method for a patient to reach the physician after hours regarding complications, such as bleeding. Dr. Lang also testified that it would be ideal if the prompt directed the parties straight to an answering service and that the answering service as the first option is preferable. At Dr. Lang's office, the after-hours telephone number goes directly to the answering service, so that patient does not have to worry about trying to navigate the prompts. Dr. Lang's discharge instruction form provides the patients with a telephone number to call if any bleeding continues, with the telephone number connecting them directly to the answering service (R. p. 184, line 5 - p. 185, line 18; R. pp. 363-367).

Plaintiff's Expert Witness, Dr. Sean Christensen's Relevant Testimony at Trial

Plaintiff's Expert, Dr. Sean Christensen, takes issue with an instruction to dial the party's extension, 209 in this case, because it is common sense that people would dial the extension provided by their surgeon (R. p. 228, line 7-23). At Plaintiff Expert's place of business, if a patient calls after-hours, the call will automatically be connected with the answering service, and the answering service immediately calls the on-call physician. They do not have a means for a patient to leave a voicemail (R. p. 220, line 16 - p. 221, line 24; R. pp. 516-523).

III. FACTS SPECIFIC TO APPELLANT'S ARGUMENT THAT THERE EXISTED CONFLICTING TESTIMONY REGARDING BREACH OF STANDARD OF CARE RELATED TO POST-SURGERY INSTRUCTIONS

On the date of surgery, May 12, 2015, it is undisputed that Dr. Blaskis' only written, post-operative instruction was the discharge sheet provided to the Plaintiff and Decedent, which fails to provide any post-operative instructions other than instruction as to the pressure bandage (R. p. 127, line 16-24; R. p. 134, line 19 - p. 138, line 14; R. p. 145; R. p. 236, line 8 - p. 241, line 14; R. p. 242, line 5 - p. 250, line 5; R. p. 257, line 4 - p. 263, line 8; R. p. 305).

Both Plaintiff's Expert Witness and Defendant's Expert Witness establish that it is the standard of care to provide post-operative instructions to patients, and that providing verbal post-operative instructions were within the standard of care (R. p. 189, line 19 - p. 190, line 2; R. p. 218, line 14 - p. 219, line 12). Defendant's Expert Witness testified that a major concern after Mohs surgery is bleeding (R. p. 177, line 12-24).

Dr. Blaskis testified that he provides all of his patients with extensive verbal instructions about post-operative instructions related to risks and care (R. p. 130, line 8 - p. 132, line 20; R. p. 136, line 9 - p. 137, line 10). There was significant concern related to the Decedent's risk of bleeding given the Decedent's comorbidities, to wit: Decedent had a long history of chronic obstructive pulmonary disease, coronary artery disease and failure to thrive and was a chronic

smoker. Decedent also had a significant social history of alcohol consumption (R. pp. 308 -352). Dr. Blaskis testified that he warned that bleeding was a significant risk, and that the Plaintiff / Decedent should call Dr. Blaskis immediately if there was any bleeding (R. p. 139, line 4-24; R. p. 142, line 21 - p. 144, line 10).

Plaintiff testified unequivocally that she, nor the Decedent, were told by either Dr. Blaskis or his staff that bleeding was a risk. The only post-operative instruction which was given was to not touch the bandage under any circumstances (R. p. 236, line 8 - p. 241, line 14; R. p. 242, line 5 - p. 250, line 5; R. p. 257, line 4 - p. 263, line 8). If she was told that bleeding was significant risk and she could not have contacted Dr. Blaskis, she would have gone to the emergency room (R. p. 249, line 16 - p. 250, line 5).

Plaintiff's Expert testified that there was no indication in Decedent's medical records that indicated that Dr. Blaskis gave post-operative instructions related to bleeding, whether in writing or not (R. p. 218, line 14 - p. 219, line 12; R. pp. 308-352).

Plaintiff's Expert and Defendant, Dr. Blaskis agree that if the Decedent / Plaintiff had been able to contact Dr. Blaskis and/or a medical professional, the Decedent would still be alive on May 13, 2015 (R. p. 149, line 9-17; R. p. 156, line 3-7; R. p. 214, line 19 - p. 215, line 4; R. p. 225, line 12 - p. 226, line 8; R. p. 226, line 24 - p. 227, line 5).

IV. FACTS SPECIFIC APPELLANT'S ARGUMENT THAT CONFLICTING TESTIMONY BY DEFENDANT'S EXPERT WITNESS CREATED A QUESTION OF FACT REGARDING DEFENDANTS' BREACH AS TO STANDARD OF CARE WHERE THE DEFENDANTS' EXPERT TESTIFIED THAT HE WOULD NOT HAVE OPERATED ON THE DECEDENT BECAUSE DESCENDANT'S TACHYCARDIA WAS A CONTRAINDICATION TO PERFORMING SAID SURGERY ON MAY 12, 2015 WITHOUT PROPER CARDIAC FOLLOW-UP

On the date of surgery, May 12, 2015, the Decedent had a heart rate of 116 beats per minute, which is considered tachycardic (R. p. 178, line 7-21; R. pp. 308-352). Both expert witnesses

testified that if a patient presented with a heart rate over 100, there would be concerns and they would want further cardiac evaluations or assessments prior to surgery (R. p. 178, line 7 - p. 183, line 14; R. p. 204, line 18 - p. 205, line 6; R. p. 206, line 3-14; R. p. 210, line 4 - p. 211, line 1).

Dr. Pearson Lang, Defendant's expert witness, and Dr. Sean Christensen, Plaintiff's expert witness, established the standard of care for a doctor was to provide their patient with a thorough and careful examination before subjecting the patient to surgery, and that it would be breach if a doctor failed to provide a thorough and careful examination before surgery (R. p. 204, line 18 - p. 205, line 6; R. p. 206, line 3-14; R. p. 210, line 4 - p. 211, line 1).

During the deposition of Dr. Pearson Lang taken on April 3, 2019, approximately 60 days prior to trial, and almost 3 years after the case commenced, Dr. Lang testified as follows:

Q: So if on May 12, 2015, Mr. Chalfant had a heart rate of greater than 100 beats per minute, you would not perform the Mohs surgery, you would send him out for assessment, correct?

A: Correct.

Q: And so he would not have had surgery by you on May 12, 2015, correct?

A: Correct

(R. p. 179, line 17 - p. 181, line 10)

At trial, Dr. Lang unexpectedly and materially changed his previous testimony, stating instead that he was "misinformed" at the deposition and did not have all of Decedent's medical records from the referring Doctor, Dr. Stahl, which was the sole basis for his new position. At the time of Dr. Lang's original deposition testimony, Dr. Lang did have the exact same records that Dr. Blaskis had in his possession on the date of surgery (R. p. 178, line 11 - p. 183, line 18; R. p. 198, line 6 - p. 200, line 20; R. p. 233, line 3 - p. 234, line 21).

Plaintiff's expert opined that there was no medical contraindication to postponing the

surgery, and that was made within reasonable degree of medical certainty (R. p. 207, line 6-16; R. p. 210, line 4 - p. 211, line 1). Plaintiff's expert further opined that the fact that he's referred by doctor does not mean it is appropriate to proceed with surgery (R. p. 213, line 14 - p. 214, line 18).

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING DIRECTED VERDICT AGAINST THE PLAINTIFF FOR FAILURE TO ESTABLISH ALL ELEMENTS OF MEDICAL MALPRACTICE CLAIMS BY EXPERT WITNESS TESTIMONY WHEN THE COMMON KNOWLEDGE EXCEPTION WAS APPLICABLE BECAUSE THE EVIDENCE INTRODUCED AT TRIAL ESTABLISHED THE DEFENDANTS' FAILURE TO PROVIDE PLAINTIFF AFTER-HOURS CONTACT INFORMATION AND POST-SURGERY INSTRUCTIONS

The Trial Court erred in granting directed verdict against the Plaintiff for failure to establish all elements of medical malpractice claims by expert witness testimony when the common knowledge exception was applicable because the evidence introduced at trial established the Defendants failure to provide Plaintiff with after-hours contact information and post-surgery instructions, such that all facts taken in light most favorable to the Plaintiff, there was sufficient evidence to warrant submission to the jury.

“A plaintiff in a medical malpractice case must establish by expert testimony both the standard of care and the defendant's failure to conform to the required standard, unless the subject matter is of common knowledge or experience so that no special learned is needed to evaluate the defendant's conduct.” *Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 763 S.E.2d 200 (S.C. 2014) *citing Carver v. Med. Soc'y of S.C.*, 286 S.C. 347, 350, 334 S.E. 2d 125, 127 (S.C. Ct. App. 1985); *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 248, 626 S.E. 2d 1, 4 (S.C. 2006). “Expert testimony is not required, however, in situations where the common knowledge or experience of laymen is extensive enough for them to be able to recognize or infer negligence on the part of the doctor and also to determine the presence of the required causal link between the

doctor's actions and the patient's medical problems." *Melton v. Medtronic, Inc.*, 389 S.C. 641, 698 S.E.2d 886 (S.C. Ct. App. 2010) *citing* *Pederson v. Gould*, 288 S.C. 141, 142, 341 S.E.2d 633, 634 (SC. 1986). "In a medical malpractice action the plaintiff must establish by expert testimony 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 or experience, so that no special learning is needed to evaluation the defendant's conduct. *Gass v. Haines*, 381 S.E.2d 923, 298 S.C. 549 (S.C. Ct. App. 1989).

"The application of the common knowledge exception in proving negligence in a case involving medical malpractice depends on the particular facts of the case." *Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 763 S.E.2d 200 (S.C. 2014) *citing* *Hickman v. Sexton Dental Clinic, P.A.*, 295 S.C. 164, 168, 367 S.E.2d 453, 455 (SC. Ct. App. 1988). "When expert testimony is not required, the plaintiff must offer evidence that rises above mere speculation or conjecture." *Id.*

The common knowledge exception was applicable in this case because the evidence introduced at trial established the Defendants failed to provide Plaintiff with after-hours contact information and post-surgery instructions. The discharge instructions provided to the Plaintiff / Decedent was one (1) page of written instructions, instructing the patient that if they had any questions or concerns, to call the phone number listed and dial extension 209. The Defendant, Dr. Blaskis, failed to include any information or instruction that the Defendants have an after-hours answering service that will connect the patient with their physician after-hours. By dialing the extension 209 as instructed, the Plaintiff / Decedent were not made aware that an answering service existed. They left a message, which was not returned. Dr. Blaskis was aware that dialing the extension would connect a patient to his nurses station, which would not be answered or

forwarded to him if made after-hours, and included it on his discharge form provided to the Decedent nonetheless (R. p. 127, line 16-24; R. p. 134, line 19 - p. 138, line 14; R. p. 145; R. p. 236, line 8 -p. 241, line 14; R. p. 242, line 5 - p. 250, line 5; R. p. 257, line 4 - p. 263, line 8; R. p. 305). The facts as stated above, lies within the ambit of common knowledge or experience, so that no special learning is needed to evaluate the Defendants' conduct, to permit the jury to recognize or infer a breach of duty without the aid of expert testimony.

In today's society, it is commonplace to interact with automated telephone prompts. Whether a layperson is contacting a banking institution, a utility department, a school teacher, a child-care provider, the clerk of court, or similar to this case, a medical care provider, the layperson will most likely be connected to an automated messaging service, which triggers several automated prompts. A layperson will have common knowledge or experience, whether in a medical context or not, in understanding and appreciating that when an individual is first connected to the automated service and the automated service lists the prompts, that an individual will select the prompt most relevant to them and will not wait to listen to the entirety of the message. A layperson will also have common knowledge or experience, whether in a medical context or not, in understanding and appreciating that when the individual with whom you are attempting to contact provides you with a specific extension, that an individual will dial the extension when instructed by the prompt without waiting to listen to the entirety of the message. A layperson will also have common knowledge or experience, whether in a medical context or no, in understanding and appreciating that when you are attempting to communicate with an individual, and that individual provides you with an extension, and you reach that individual's voicemail, that you will not call back to listen to the entirety of the automated message system. A layperson, regardless of whether specific facts are medically related or not, has common knowledge or experience in navigating

through an automated telephone prompt based upon instructions provided. This is common sense.

In this particular case, Defendant, Dr. Blaskis provided the Plaintiff / Decedent with one (1) page of discharge instructions. On that discharge instruction form, it states, “Please call us with any questions at (803) 771-7506 ext. 209” (R. p. 305). When the Plaintiff had questions or concerns for Dr. Mark Blaskis related to the Decedent bleeding from the surgical site, she dialed the number (803) 771-7506, as instructed. The call was made at 7:10p.m., after-hours, which triggered the after-hours prompt. The after-hours prompt stated the following:

“You have reached Carolinas Dermatology After-Hours. If this is a true emergency, please hang up now and dial 911. If you know your party’s extension, you may dial it now. (emphasis added).”

(R. p. 307)

The Plaintiff dialed extension 209 as instructed on the discharge form provided by Dr. Blaskis. The Plaintiff left a voicemail on the telephone prompt for Dr. Blaskis that the Decedent’s ear was bleeding and she did not know what to do. The Plaintiff expected a call back, which she never received (R. p. 236, line 8 - p. 241, line 14; R. p. 242, line 5 - p. 250, line 5; R. p. 257, line 4 - p. 263, line 8; R. p. 305). She did not listen to the remainder of the message, which goes on to state “To hear our automated options press 1. For a prescription refill or to leave a message to be returned on the next business day, please press 2. For all other serious medical concerns, dial 9 now for our answering service. To hear these options again, press the * key” (R. p. 307).

Defendant, Dr. Blaskis was acutely aware that dialing the extension would connect a patient to his nurses station, which would not be answered or forwarded to him if made after-hours, and included it on his discharge form nonetheless (R. p. 135, line 3 - p. 136, line 2).

On the singular issue of whether Defendants’ committed medical malpractice by providing a discharge form which included instructions to dial an extension if the patient had any questions,

when the Defendant practice in fact had a live answering service available after-hours who would immediately connect the patient with their physician, lies within the ambit of common knowledge or experience of a layperson.

Dr. Long Quan is another physician at Defendant, Carolinas Dermatology Group, P.A.'s Columbia Office, and he is the only other physician, along with Dr. Blaskis, who performs Mohs surgery (R. p. 116, line 22 - p. 117, line 6). Dr. Quan's Wound Care Discharge Instructions states in bold under the "HOW TO REACH US" section, "After hours if an emergency ONLY, call Dr. Quan at 803-414-5590. If he does not answer or call back within 5 minutes, call the answering service at 803-771-7506". Dr. Quan's phone number takes you directly to his cell phone. The other phone number is the Practice's mainline, without providing an extension to his nurse's station. (R. p. 142, line 6 - p. 143, line 10; R. p. 356).

Dr. Pearson Lang testifies that a physician has a duty to provide a clear method, a reasonable method for a patient to reach the physician after hours regarding complications, such as bleeding. Dr. Lang also testified that it would be ideal if the prompt directed the parties straight to an answering service and that the answering service as the first option is preferable. At Dr. Lang's office, the after-hours telephone number goes directly to the answering service, so that patient does not have to worry about trying to navigate the prompts. Dr. Lang's discharge instruction form provides the patients with a telephone number to call if any bleeding continues, with the telephone number connecting them directly to the answering service (R. p. 184, line 5 - p. 185, line 18; R. pp. 363-367).

Plaintiff's Expert, Dr. Sean Christensen, takes issue with an instruction to dial the party's extension, 209, in this case because it is common sense that people would dial the extension provided by their surgeon (R. p. 228, line 7-23). At Plaintiff Expert's place of business, if a patient

calls after-hours, the call will automatically be connected with the answering service, and the answering service immediately calls the on-call physician. They do not have a means for a patient to leave a voicemail (R. p. 220, line 16 - p. 221, line 24; R. pp. 516-523).

Lastly, further evidence that the common knowledge exception applies in this context is that Angela Grant, Debbie Clarke, and Helen Le, Office Managers within Carolinas Dermatology Group, P.A., were responsible for changing and recording the after-hours telephone prompts (R. p. 160, line 19 - p. 161, line 7; R. pp. 105 - 106; R. p. 261).

The prompts were as follows:

October 2013 After-Hours Script: “You have reached Carolinas Dermatology After-Hours. If this is an emergency, please hang up and dial 911 or press 9 now for our answering service (emphasis added). If you know your party’s extension, you may dial it at any time during this message. To hear our automated options, press 1. To leave us a message in our general voice mailbox, press 2. To hear these options again, press the * key.”

May 2015 After-Hours Script: “You have reached Carolinas Dermatology After-Hours. If this is a true emergency, please hang up now and dial 911. If you know your party’s extension, you may dial it now (emphasis added). To hear our automated options press 1. For a prescription refill or to leave a message to be returned on the next business day, please press 2. For all other serious medical concerns, dial 9 now for our answering service. To hear these options again, press the * key.”

June 2017 After-Hours Script (after lawsuit filed): “You have reached Carolinas Dermatology After-Hours. If this is a true medical emergency, please hang up now and dial 911. For all other serious medical concerns, press 9, and you will be directed to our answering service (emphasis added). If you know your party’s extension, you may dial it now or any time during this message. To hear our automated options, press 1. If you would like to leave a refill request, or leave a message for your physician to be returned the next day, press 2.”

(R. p. 307)

It is undisputed by both Plaintiff’s expert witness and the Defendant himself, Dr. Blaskis, that if Plaintiff / Decedent was able to contact Dr. Blaskis on May 12, 2015, the Decedent would not have died as a result of blood loss or exsanguination due to hemorrhage from the left ear surgery site performed by the Defendant, Mark G. Blaskis, M.D. (R. p. 149, line 9-17; R. p. 156,

line 3-7; R. p. 214, line 19 - p. 215, line 4; R. p. 225, line 12 - p. 226, line 8; R. p. 226, line 24 - p. 227, line 5). Plaintiff was clearly attempting to contact Dr. Blaskis by following the written instructions. By following the written discharge instructions exactly, the Decedent was not able to get the help he needed and died.

The facts as recited above, by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party, fall squarely within the ambit of common knowledge or experience of a layperson, so that no special learning is needed to evaluate the Defendants conduct, to permit the jury to recognize or infer a breach of duty without the aid of expert testimony. The written discharge sheet was inadequate in instructing the Plaintiff how to contact Dr. Blaskis after-hours, and actively prevented the Plaintiff / Decedent from doing so. On the day of the surgery, the after-hours telephone prompt immediately states "If you know your party's extension, you may dial it now". Dr. Blaskis knew that if a patient dialed the extension, it would not go to the answering service (R. p. 132, line 21 - p. 136, line 2). The prompts of CDG from October 2013 and June 2017, at the beginning of the message, both immediately notified the caller that an answering service was available. Dr. Quan, a doctor in the same clinic notified his patients of the answering service. Both expert witnesses' offices immediately connect you with the answering service, skipping extensions or other prompts altogether. Dr. Blaskis' written discharge instructions, the only instructions provided to Plaintiff as it relates to communicating with Dr. Blaskis, clearly lies within the ambit of common knowledge or experience of the layperson, so that no special learning is needed to evaluate the Defendants conduct, and to permit the jury to recognize or infer a breach of duty (R. p. 236, line 8 - p. 241, line 14; R. p. 242, line 5 - p. 250, line 5; R. p. 257, line 4 - p. 263, line 8; R. p. 305).

To the extent Appellant was required to plead with specificity the intent to rely upon the

common knowledge exception as it related to this singular issue (wherein all remaining issues did admittedly require expert opinion and appropriately sought expert testimony in support), the Appellant did move to amend to conform with the evidence on that issue, which was denied (R. p. 291, line 20 - p. 294, line 20). Pursuant to Rule 15(b) SCACR “When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.” “Ordinarily, amendments to conform to proof should be liberally allowed.” *Myat v. Tuomey Reg’l Med. Ctr.* (S.C. Ct. App. 2019), citing *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 442 S.E.2d 620 (S.C. Ct. App. 1995). “However, if late amendment of the pleadings would cause prejudice to the opposing party...prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action. *Id.* To the extent Appellant is required to plead the common knowledge exception within its Complaint and the Court rules that the failure to plead the exception is a requirement on appeal, the Appellee could not argue that it would be prejudiced by the amendment at the time of trial. The issues related to phone message, the telephone number on the discharge form, and the failure to provide proper after-hours patient communication was included in the Complaint, and were tried by express and/or

implied consent of the parties, as it was litigated throughout the case, including through trial, and did not and would not include additional or different evidence to prevail which was not already introduced at trial.

The Trial Court erred in granting directed verdict against the Plaintiff for failure to establish all elements of medical malpractice claims by expert witness testimony when the common knowledge exception was applicable to this singular portion of the case, as it is well within the ambit of common knowledge or experience of the layperson, so that no special learning is needed to evaluate the Defendants conduct as it relates to the discharge instruction form as it relates to the instruction to dial the extension when answering service was available after-hours, and to permit the jury to recognize or infer a breach of duty. Sufficient evidence exists, in light most favorable to the Plaintiff/Appellant, to warrant submission to the jury.

II. THE TRIAL COURT ERRED IN GRANTING DIRECTED VERDICT AGAINST THE PLAINTIFF AS THEIR EXISTED CONFLICTING TESTIMONY REGARDING BREACH OF STANDARD OF CARE RELATED TO POST-SURGERY INSTRUCTIONS

The trial Court erred in granting Defendants' Motions for Directed Verdict against the Plaintiff as their existed conflicting testimony regarding breach of standard of care related to post-surgery instructions.

The evidence and all reasonable inferences which can be drawn therefrom, viewed in the light most favorable to the nonmoving party, establish that their was conflicting testimony by Defendant, Dr. Blaskis, and the Plaintiff, that Dr. Blaskis provided verbal post-operative instructions related to bleeding, which creates a question of fact as to the breach of standard of care. Viewing this testimony in the light most favorable to the Plaintiff, Plaintiff presented sufficient testimony to submit the issue to the jury on breach of the standard of care and causation.

“The issues of breach of duty does not turn on a ritual incantation of certain magic words

by an expert witness. Breach of duty is a fact question to be decided by the jury on the evidence presented in each case. *Stallings v. Ratliff*, 356 S.E.2d 414, 292 S.C. 349 (S.C. Ct. App. 1987) citing *Sharpe v. South Carolina Department of Mental Health*, --- S.C. ----, 354 S.E.2d 778 (S.C. Ct.App.1987) (Bell, J., concurring) (whether defendant failed to observe the standard of care required by law in a particular case is a question of fact for the trier of fact).

Both Plaintiff Expert and Defendants' Expert witnesses establish that it is within the standard of care to discuss before, during, and after surgery about the risks associated with the surgery, in this case, the risk of bleeding, which is a major concern following Mohs surgery (R. p. 177, line 12-24; R. p. 189, line 19 - p. 190, line 2; R. p. 218, line 14 - p. 219, line 12). Both expert witnesses admit that it is within the standard of care to provide these post-operative instructions verbally (R. p. 189, line 19 - p. 190, line 2; R. p. 218, line 14 – p. 219, line 12).

Plaintiff's expert witness was not able to testify that Dr. Blaskis breached the standard of care as to his failure to provide post-surgery instructions related to the risks of bleeding, as it was unclear whether the instructions were given verbally or not. There was no indication in the medical records whatsoever that Dr. Blaskis provided post-operative instructions related to bleeding, whether verbally or in writing. Although he had concerns whether Dr. Blaskis adequately educated the patient as to the risks of bleeding, he was not able to establish whether it was a breach of the standard of care with the records before him (R. p. 208, line 2 - p. 210, line 3; R. p. 218, line 14 -p. 219, line 12; R. pp. 308-352). Notwithstanding, it is undisputed by both expert witnesses that failure to provide post-operative instructions related to bleeding would be a breach of the standard of care (R. p. 189, line 19 - p. 190, line 2; R. p. 218, line 14-25).

““In deciding such [directed verdict] motions, “neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the

evidence.”” *Creech v. S.C. Wildlife and Marine Resources Dept*, 328 S.C. 24, 491 S.E.2d 571 (S.C. 1997). “In essence, the appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor.” *Guffey v. Columbia/Colleton Reg. Hosp.*, 612 S.E.2d 695, 364 S.C. 158 (S.C. 2005) *citing Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (S.C. 2002) (citation omitted).

In this case, there is unequivocal, conflicting testimony as to whether Defendant, Dr. Blaskis, provided the Decedent / Plaintiff post-operative instructions related to the risks of bleeding.

Dr. Blaskis alleges he provided extensive post-operative instructions to the Plaintiff / Decedent verbally related to bleeding from the surgical site, and if that occurred, to call him immediately. Dr. Blaskis admits that he did not provide any written, post-operative instructions related to bleeding (R. p. 127, line 16-24; R. p. 130, line 8 - p. 132, line 20; R. p. 134, line 19 -p. 138, line 14; R. p. 136, line 9 - p. 137, line 10; R. p. 139, line 4-24; R. p. 142, line 21 - p. 144, line 10; R. p. 305).

Plaintiff was with the Decedent the entire time he was at Carolinas Dermatology Group, P.A., both pre-surgery, during surgery, and post-surgery. Plaintiff heard everything that was said to the Decedant. Plaintiff and Decedent were not provided with any post-operative instructions, whether verbal or written, related to bleeding by either Dr. Blaskis or his staff. The only post-operative instruction given to the Plaintiff / Decedent was to not touch the bandage under any circumstances (R. p. 236, line 8 - p. 241, line 14; R. p. 242, line 5 - p. 250, line 5; R. p. 257, line 4 - p. 263, line 8; R. p. 305).

The coroner’s investigation conducted by Amy M. Durso, M.D. determined that Michael Dallas Chalfant died as a result of blood loss or exsanguination due to hemorrhage from the left

ear surgery site performed by the Defendant, Mark G. Blaskis, M.D. (R. p. 167, line 19-23; R. p. 171, line 10-17; R. pp. 510-514).

Both Plaintiff's Expert and Defendant, Dr. Blaskis himself, testified that if the Decedent had been able to communicate with Dr. Blaskis or any medical professional related to bleeding, a medical professional could have stopped the bleeding and saved his life.(R. p. 149, line 9-17; R. p. 156, line 3-7; R. p. 214, line 19 - p. 215, line 4; R. p. 225, line 12 - p. 226, line 8; R. p. 226, line 24 - p. 227, line 5).

When both expert testimony and circumstantial evidence of a physician's culpability are presented, the inquiry need only be whether there was sufficient competent evidence from which the jury may have inferred a causal connection. *Green v. Lilliewood*, 249 S.E.2d 910, 272 S.C. 186 (S.C. 1978). According to 70 C.J.S. Physicians and Surgeons §62, p. 1006: "A departure from established standards of practice, unless justified by circumstances, often makes out a prima facie case of malpractice." Strong circumstantial evidence of respondent's negligence rise from the causal sequence of events in this case. In light most favorable to the Plaintiff, the Plaintiff / Decedent was not given post-operative instructions related to the emergent nature of bleeding in his case. The Plaintiff / Decedent went home and followed the after-hours instructions to call Dr. Blaskis if they had any questions, because they were not aware whether bleeding was a serious medical concern or not. Plaintiff would have gone to the emergency room if she was told that bleeding was an emergency (R. p. 127, line 16-24; R. p. 134, line 19 - p. 138, line 14; R. p. 236, line 8 - p. 241, line 14; R. p. 242, line 5 - p. 250, line 5; R. p. 257, line 4 - p. 263, line 8; R. p. 305). Decedent died in his sleep from bleeding from the surgical site (R. p. 167, line 19-23; R. p. 171, line 10-17; R. pp. 510-514).

"In considering the sufficiency of circumstantial evidence, the facts and circumstances

should be assessed in light of ordinary experience and common sense.” *Green v. Lilliewood*, 249 S.E.2d 910, 272 S.C. 186 (S.C. 1978) *citing* Prosser, *Law of Torts*, p. 242 (1971); Dooley, *Modern Tort Law*, §34.108(1977); *Barnwell v. Elliott, et al.*, 225 S.C. 62, 80 S.E.2d 748 (S.C. 1954); *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521 (S.C. 1965). This general proposition of tort law has been applied in medical malpractice cases as an exception to the general rule requiring expert medical testimony to establish proximate cause. *Id.* “...there is an Exception to the rule in situations where the common knowledge or experience of laymen is extensive enough to recognize or to infer negligence from the facts.” *Id.*

Appellant argues that it is clear that both experts established the standard, and failure to provide instructions as to post-surgery risks is a breach of the standard. To the extent that the testimony of Plaintiff’s expert, Sean Christensen, and the testimony of the Defendant, Dr. Blaskis, whom both state that if Plaintiff was able to get ahold of Dr. Blaskis or a medical professional related to bleeding from the surgical site, the Decedent would have been saved and would not have died on May 13, 2015, does not establish proximate cause of Plaintiff’s damages in this case, that circumstantial evidence that is within the common knowledge of the jury based on the sequence of events which followed Defendant, Dr. Blaskis’ breach of the standard of care, to wit: his failure to provide post-operative instruction related to bleeding, and his subsequent death due to bleeding from the surgical site presents sufficient evidence to establish proximate cause.

The trial Court erred in granting Defendants’ Motions for Directed Verdict against the Plaintiff as their existed conflicting testimony regarding whether Defendants’ breached the standard of care related to post-surgery instructions. Dr. Blaskis states that he gave post-operative instructions related to bleeding verbally. Plaintiff states that Dr. Blaskis never gave any post-operative instructions, whether written or verbal, related to the risks of bleeding. Given these facts

and taken in light most favorable to the Plaintiff / Appellant, a verdict for the Plaintiff was reasonably possible to warrant submission to the jury.

III. THE TRIAL COURT ERRED IN GRANTING DIRECTED VERDICT AGAINST THE PLAINTIFF WHEN CONFLICTING TESTIMONY BY DEFENDANT'S EXPERT WITNESS CREATED A QUESTION OF FACT REGARDING DEFENDANTS' BREACH AS TO STANDARD OF CARE WHERE THE DEFENDANTS' EXPERT TESTIFIED THAT HE WOULD NOT HAVE OPERATED ON THE DECEDENT BECAUSE DESCENDANT'S TACHYCARDIA WAS A CONTRAINDICATION TO PERFORMING SAID SURGERY ON MAY 12, 2015 WITHOUT PROPER CARDIAC FOLLOW-UP.

The Trial Court erred in granting directed verdict against the Plaintiff when conflicting testimony by Defendants' expert witness created a question of fact regarding Defendants' Breach as to Standard of Care where the Defendants' Expert testified that he would not have operated on the Decedent because Decedent's tachycardia was a contraindication to performing said surgery on May 12, 2015 without proper cardiac follow-up. Viewing Dr. Lang's testimony in the light most favorable to the Plaintiff, Plaintiff presented sufficient expert testimony to warrant submission to the jury.

"The issues of breach of duty does not turn on a ritual incantation of certain magic words by an expert witness. Breach of duty is a fact question to be decided by the jury on the evidence presented in each case. *Stallings v. Ratliff*, 356 S.E.2d 414, 292 S.C. 349 (S.C. Ct. App. 1987) citing *Sharpe v. South Carolina Department of Mental Health*, --- S.C. ----, 354 S.E.2d 778 (S.C. Ct.App.1987) (Bell, J., concurring) (whether defendant failed to observe the standard of care required by law in a particular case is a question of fact for the trier of fact).

"In deciding [directed verdict] motions, "neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Creech v. S.C. Wildlife and Marine Resources Dept*, 328 S.C. 24, 491 S.E.2d 571 (S.C. 1997). "In essence, the appellate court must determine whether a verdict for a party opposing the motion

would be reasonably possible under the facts as liberally construed in his favor. *Guffey v. Columbia/Colleton Reg. Hosp.*, 612 S.E.2d 695, 364 S.C. 158 (S.C. 2005) citing *Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (S.C. 2002) (citation omitted).

The Appellant argues that there was clear conflict as to Defendants' breach of the standard of care, to wit: Dr. Blaskis' failure to recognize Decedent's tachycardia was a contraindication to performing said surgery on May 12, 2015 without proper cardiac follow-up (R. p. 178, line 7 - p. 183, line 14; R. p. 204, line 18 - p. 205, line 6; R. p. 206, line 3-14; R. p. 210, line 4 - p. 211, line 1).

On the date of surgery, May 12, 2015, the Decedent had a heart rate of 116 beats per minute, which is considered tachycardic (R. p. 178, line 7-21; R. pp. 308-352). Both expert witnesses testified that if a patient presented with a heart rate over 100, you would have concerns and would want further evaluations or assessments prior to surgery (R. p. 178, line 7 - p. 183, line 14; R. p. 204, line 18 - p. 205, line 6; R. p. 206, line 3-14; R. p. 210, line 4 - p. 211, line 1).

Dr. Pearson Lang, Defendant's expert witness, and Dr. Sean Christensen, Plaintiff's expert witness, established the standard of care for a doctor was to provide their patient with a thorough and careful examination before subjecting the patient to surgery, and that it would be breach if a doctor failed to provide a thorough and careful examination before surgery (R. p. 178, line 7 - p. 183, line 14; R. p. 204, line 18 - p. 205, line 6; R. p. 206, line 3-14; R. p. 210, line 4 - p. 211, line 1).

The Defendant's own expert witness, Dr. Pearson Lang, stated in his deposition, a mere 60 days prior to trial, that the Decedent was tachycardic, that he would not perform the surgery on the Decedent, that he would send him out for further cardiac assessment, and that he unequivocally would not have performed the surgery on the Decedent on May 12, 2015 (R. p. 179, line 17 - p.

181, line 10).

At trial, Dr. Lang unexpectedly and materially changed his previous testimony, stating instead that he was “misinformed” at the deposition and did not have all of Decedent’s medical records from the referring Doctor, Dr. Stahl, which was the sole basis for his new position. At the time of Dr. Lang’s original deposition testimony, Dr. Lang did have the exact same records that Dr. Blaskis had in his possession on the date of surgery (R. p. 178, line 11 - p. 183, line 18; R. p. 198, line 6 - p. 200, line 20; R. p. 233, line 3 - p. 234, line 21).

Plaintiff’s expert opined that there was no medical contraindication to postponing the surgery, and that was made within reasonable degree of medical certainty (R. p. 207, line 6-16; R. p. 210, line 4 - p. 211, line 1). Plaintiff’s expert further opined that the fact that he’s referred by doctor does not mean it is appropriate to proceed with surgery, they simply don’t have enough knowledge about (R. p. 213, line 14 - p. 214, line 18).

Consequently, if the Decedent did not have surgery on May 12, 2015, Decedent would not have died as a result of blood loss or exsanguination due to hemorrhage from the left ear surgery site performed by the Defendant, Dr. Blaskis.

In conclusion, when viewed in the light most favorable to the nonmoving party, the conflicting testimony by Defendants’ expert witness, Dr. Pearson Lang, along with the testimony of Dr. Christen, taken as a whole and in light most favorable to the Plaintiff / Appellant, there was sufficient evidence to warrant is submission to the jury.

The Trial Court erred in granting directed verdict against the Plaintiff when conflicting testimony by Defendants’ expert witness created a question of fact regarding Defendants’ Breach as to Standard of Care where the Defendants’ Expert testified that he would not have operated on the Decedent because Decedent’s tachycardia was a contraindication to performing said surgery

on May 12, 2015 without proper cardiac follow-up. Dr. Pearson Lang clearly had conflicting testimony related to Decedent's tachycardia and whether he would perform surgery on May 12, 2015. Dr. Lang attempted to change his testimony at trial based on being provided with medical records from the referring doctor, which was proven that Defendant Dr. Blaskis did not have on May 12, 2015. Given these facts and taken in light liberally construed in favor of Plaintiff / Appellant, a verdict for the Plaintiff was reasonably possible to warrant submission to the jury.

CONCLUSION

Based upon the foregoing, the Court is obliged to reverse the Trial Court's entry of Directed Verdict against the Plaintiff.

Dated: November 2, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2019-001145 / Lower Case No. 2017-CP-40-00517

Jackie Eadon Chalfant, Individually and as Personal Representative of the Estate
of Michael Dallas Chalfant.....Appellant

v.

Carolinas Dermatology Group, P.A., as South Carolina Professional Association,
and Mark G. Blaskis, M.D., Individually.....Respondents

CERTIFICATE OF COUNSEL

The undersigned, on behalf of Appellant, Jackie Eadon Chalfant, Individually and as
Personal Representative of the Estate of Michael Dallas Chalfant, certified that the Final Briefs filed
in this cause comply with Rule 211(b), SCACR.

Dated: November 2, 2020

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