

RECEIVED
Oct 21 2021
SC Court of Appeals

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

In the Court of Common Pleas for the
State of South Carolina, County of Anderson

Case No.: 2020CP0400008

Wanda Human, as Personal Representative
for the estate of Evelyn Marie Wood,
Plaintiff(s),

vs. Transcript of Record
AnMed Health,
Defendant(s).

June 3, 2021

Anderson, South Carolina

BEFORE:

The Honorable Lawton McIntosh

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES

REPRESENTING PLAINTIFF(S) :
Fred W. Suggs, III, Esquire
864-349-2616

REPRESENTING DEFENDANT(S) :
Vanisa Tamar Siler, Esquire
843-614-8888

1 PROCEEDINGS

2 THE COURT: All right. Human. And this is a
3 Motion to Amend?

4 MR. SUGGS: Yes, sir. The defense has a
5 Motion to Amend answer and plaintiff's have a
6 Motion to Compel Your Honor.

7 THE COURT: Okay. Let's go ahead and do the
8 Motion to Amend and then we will do your Motion to
9 Compel next. That is the order that I have them
10 under.

11 MR. SUGGS: Okay. I may remove, correct?

12 THE COURT: Please, yes.

13 MR. SUGGS: Judge, may it please the Court, I
14 represent AnMed Health on this premises liability
15 case that arises out of a fall. This nice lady,
16 Ms. Wood, was coming in the entrance that you -- it
17 is that kind of short entrance right there on Fant
18 (ck) Street that goes to the inpatient.

19 And when they pulled up to that entranceway on
20 the driveway, she was using her walker to come out
21 of the rear, around the rear of the car, walker
22 gets away from her, she falls, and sadly she
23 strikes her head and dies.

24 THE CLERK: Oh gosh.

25 MR. SUGGS: And, essentially, the allegation

1 has been fleshed out to be that the slope of that
2 entranceway was out of code. It was either not
3 designed correctly or it was not graded and paved
4 correctly. And that's all come out through
5 discovery.

6 Judge, the case does date back to January of
7 2020 when they filed the complaint. We answered in
8 February. It was funny, I was out there talking to
9 Johnston a minute ago about it. My practice -- I
10 came up at Galvin guardian ad litem SREUPB White
11 body where you Light Boyd (ck) where you kind of
12 learn, oh, you just put, put all of the affirmative
13 defenses in your answer. You know, 15 affirmative
14 defenses and maybe some will stick. I got away
15 from that in my own practice.

16 I only plead initially what I think the
17 initial information bears out. I'm not going to
18 list 15 affirmative defenses if I don't think that
19 I have evidence to support them. I know we permit
20 those in pleading, but that is just my practice.
21 So, I don't -- I rarely ever start out answering
22 the complaint by including affirmative defenses
23 like comparative or assumption of risk or
24 intervening, or any of that kind of stuff. I wait
25 and see what happens.

1 Well, we deposed the plaintiff in July of
2 2020. That is about all that we got accomplished
3 during this COVID epidemic, if you will.
4 Everything, you know Judge, was pretty slow, people
5 were not moving cases all that much. But we
6 deposed her in July, and then at the very end of
7 September we received a couple of reports from the
8 plaintiff's experts. And in those reports the
9 experts laid out the deficiency that they claim,
10 what I have already mentioned, regarding slope,
11 signage, saying there was inadequate markings, et
12 cetera. So, they fleshed out what they contend to
13 be failure to comply with both code as well as ADA.

14 And they have a human factors expert who
15 brought up the issue of -- related to the behavior
16 of both the decedent and the driver of the vehicle.
17 Kind of a hedging against what they perceive may be
18 coming with respect to either comparative or an
19 intervening negligence kind of argument. So, they
20 saw that that was potentially on the horizon. At
21 least the experts did.

22 Based upon the deposition testimony of the
23 plaintiff, as well as these reports from the
24 experts, and then our initial work, or later
25 investigation figuring out who did what. The guy

1 at AnMed who managed the construction was a guy
2 named Rick Barnhart. And I don't know if you knew
3 Rick. Rick died. Rick was the one with the body
4 of knowledge.

5 We have had to spend a lot of time sorting
6 through things to figure out exactly what was the
7 scope of AnMed's responsibilities with respect to
8 the project, who was -- who did the paving, who did
9 the grading, who did the design work, what was the
10 scope of the design work, who was responsible for
11 the signage, who was responsible for the markings.
12 And that was just taking time to sort out.

13 When we did sort out both what we thought was
14 a potential comparative negligence argument, which
15 is of course a question of fact for the jury, as
16 well as potential intervening negligence argument
17 or defense, which will be to the driver of the
18 vehicle, which unfortunately is also now dead, as
19 well as potentially as it relates to whoever
20 designed and graded out the driveway. We realized
21 that we needed to amend our answer and made such a
22 request in March.

23 As the Court well knows, 15A is what governs
24 amendments, both from the complaint as well as from
25 the answer standpoint. And leave shall be freely

1 given to AnMed to amend, as justice requires and
2 when the plaintiff would be prejudiced, Judge. The
3 party opposing the motion, as you know, is the one
4 with the burden to show that they would be
5 prejudiced.

6 In considering the potential prejudice, the
7 Court should consider whether opposing party had
8 the opportunity to prepare for the issue and
9 whether it has an opportunity now to prepare a
10 defense to those affirmative defenses.

11 Judge, Hardaway appears to be the primary
12 decision. That is 374 S.C. 216. It lays out six
13 factor analyses regarding whether prejudice exists.
14 Those factors include how long a lawsuit has been
15 pending, the amount of discovery that has been
16 conducted, as well as how much needs to be
17 conducted; when the moving party became aware of
18 the facts giving rise to the amendment; when the
19 non-moving party became aware of the proposed
20 amendment; and then, finally, the viability of the
21 proposed defenses.

22 We believe that going through those factors,
23 as I will briefly, establishes that, one, justice
24 would permit an amendment. Two, that the
25 plaintiffs cannot establish that they would be

1 unfairly prejudiced by an amendment of the answer
2 at this stage.

3 Judge, the first factor is how long the case
4 has been pending. I have already mentioned that.
5 It's got, it's got some age, I am not denying that.
6 I was filed on January 2020. We filed this motion
7 in March. That would be 14 months. But I think
8 that it's fair to consider that time period in
9 context with respect to how fast things were
10 moving, the courts availability, that sort of
11 thing.

12 So, while it has been 14 months since filing,
13 it is a little bit different given COVID. And also
14 I would point out that only one deposition has been
15 taken in that 14 months. The plaintiff has not
16 taken a single deposition. The defendants have not
17 identified an expert. No experts have been deposed
18 by anyone. So, it's relatively immature, not from
19 so much a time standpoint, but as far as how much
20 has been accomplished from a discovery standpoint.

21 But the second factor is very similar. How
22 much discovery has been done -- and one deposition.
23 How much lacks to be done -- we will need to depose
24 their experts, which we have scheduled. They got
25 postponed, so they are rescheduled. They were

1 supposed to take place a couple of weeks ago. And
2 then they need to depose our experts. And we would
3 need to depose some of the folks that were involved
4 in the design work as well as the grading, to try
5 to further flesh out the responsibilities and what
6 was done. So, that is the second factor.

7 The third factor is when AnMed learns the
8 facts giving rise to the amendment. I have already
9 addressed that comment at the very beginning as it
10 relates to the comparative. I think we can make
11 the argument that we should or shouldn't -- we
12 should have conceived that potential when we
13 deposed the plaintiff, and I concede that. That is
14 when it got on our radar.

15 Then we have their experts kind of proactive,
16 or getting out in front of it made us realize,
17 okay, there is clearly a potential there that we
18 need to further investigate. You have got
19 intervening negligence issues that came about
20 primarily through an expert's reports, as well as
21 our own investigation into the responsibilities of
22 AnMed, as well as the folks it contracted with.

23 I have already mentioned the difficulties we
24 had trying to track that information down. We
25 really didn't sort that out until the spring, about

1 the time that we filed this motion.

2 Four is when the non-moving party became aware
3 of the amendment. Technically, Judge, it would
4 have been when we reached out to them in March.
5 But I would suggest that, based upon their own
6 experts getting out in front of the issue,
7 including in their report a section on basically
8 disclaiming that the decedent herself was
9 responsible and disclaiming that driver had any
10 responsibility suggests that the plaintiffs were
11 well aware that that was a potential defense. And
12 they were prepared to head that off as early as
13 September.

14 So, we would submit that they have been aware
15 of these potential claims since the outset of
16 litigation, at least in the summertime. Finally,
17 five, whether we are on the trial roster, and the
18 answer is no. Simply put.

19 Six is the viability of the defenses. I saw
20 the memorandum filed today by the plaintiff in
21 opposition to our motion, and they appeared to
22 concentrate on that element, arguing that, well,
23 they should, they shouldn't be allowed to amend
24 because these are not meritorious defenses.

25 One, first and foremost, the case law is

1 clear, the comparative and intervening negligence
2 are questions of fact for the jury. So I don't
3 think anybody here can declare whether or not they
4 are meritorious. But I would say, taking the light
5 in favor to the non-mover, with respect to the
6 merits, absolutely there is merits, Judge.

7 For the intervening negligence, we now know
8 that other parties were responsible for all of the
9 deficiencies the plaintiffs contend existed. AnMed
10 was responsible for nothing. As for the
11 intervening negligence as to the driver, it may
12 show, feel a little bad to pick on someone who is
13 no longer here to explain themselves, but the
14 bottom line is, he had all of the room in the world
15 to pull up into a flat area of this entranceway.

16 And for some reason he took to the grade, he
17 decided to park on the slope. We would submit that
18 a jury can at least consider whether that was a
19 factor that contributed to the fall.

20 Finally, Judge, the comparative negligence
21 argument, again, we will have to tread lightly.
22 And I am not intending to just beat up an old lady
23 who fell and hit her head and died. That is
24 obviously a sensitive subject, but the fact of the
25 matter is, she could have easily gone around the

1 front of the vehicle. She could have gotten out on
2 the same side of the vehicle. She could have --
3 even her daughter's warning, Hey, be careful, it is
4 unstable here; and she didn't, and she fell. And I
5 am sorry for that, but I think it's something that
6 the jury should at least be allowed to consider.

7 So, we would submit, Judge, that there is
8 ample time for the plaintiff to prepare whatever
9 defense they need to as to the intervening and
10 comparative negligence defenses. That they are
11 meritorious defenses. There is adequate time, not
12 a whole lot has been done. And that justice should
13 permit, and AnMed should be permitted to amend its
14 answer at this time.

15 THE COURT: Thank you. All right. Ms. Siler.

16 MS. SILER: May it please the Court, Your
17 Honor.

18 THE CLERK: Yes, ma'am.

19 MS. SILER: Now, regarding thus far --

20 THE COURT: Can you come around? I'm having a
21 hard time hearing you.

22 MS. SILER: Is this better?

23 THE COURT: Just speak louder for me, or come
24 around.

25 MS. SILER: Okay. Regarding the Hardaway

1 factors that opposing counsel just discussed, we
2 are willing to concede to the first five factors.
3 We really won't take issue with that. We
4 understand, as far as how long the case has been
5 pending. COVID really slowed things down, so we
6 are willing to concede that, despite the amount of
7 time that the case has been pending. We don't have
8 any issues with them amending their answer in that
9 respect.

10 Now, when it comes to the other factors, as
11 far as regular old discovery being done, we agree
12 with all of that. Essentially, it is that sixth
13 factor, the viability of the defenses that are
14 being asserted.

15 When it comes to the comparative negligence,
16 just some of the things stated in defendant's
17 memoranda, one for instance, as he just mentioned,
18 how he (SIC), the decedent, chose to walk in --
19 walk toward the rear of the vehicle instead of
20 walking toward the back, toward the back of the
21 vehicle.

22 We don't necessarily believe that something of
23 that nature is really of consequence, because the
24 decision that is normally associated with what
25 direction to walk around the vehicle, that is

1 typically premised upon whether or not the person
2 is going to get struck by a vehicle, and not
3 necessarily whether or not they are going to fall
4 while they are walking around that vehicle.
5 Generally speaking.

6 Now, as far as another thing that was
7 mentioned was that the incline that he spoke of
8 earlier was open and obvious. We do agree that, at
9 least to the fact that there was an incline and the
10 ground was going upward. We do agree that that can
11 be seen; however, the exact sharpness of the
12 incline is not, is not clearly obvious.

13 Really to gauge exactly how sharp an incline
14 is, one would have to calculate the slope of such
15 incline. Just as it meets the eye, it can -- one
16 may assume automatically that whatever incline they
17 are going up, especially if it is a man-made
18 incline, they are going to assume that it's
19 conducive to pedestrian traffic. So, we don't
20 agree that the incline was open and obvious,
21 because the sharpness, the exact sharpness, which
22 would heighten the danger of the incline, wasn't
23 open and obvious. So, those are just a few of the
24 things that we don't find really go -- really have
25 merit when it comes to comparative negligence

1 defense.

2 Now, as far as the intervening negligence, as
3 far as the other entity that may be involved that
4 actually constructed the entranceway in front of
5 the -- in front of AnMed, we are willing to concede
6 that, okay, there may be a factor there, especially
7 since it's not up to building code and AnMed did
8 not build or have any role in constructing the
9 entranceway. And we tend to agree that there would
10 be intervening negligence on the part of the
11 construction company.

12 Now, as far as the driver of the -- the
13 deceased driver of the vehicle is concerned, when
14 it comes to that individual playing a role in
15 intervening negligence, as far as his decision to
16 park on that slope, there were no signs indicating
17 that parking right there in that particular area
18 was something that shouldn't be done or posed a
19 danger to anyone.

20 So, we are not going to accept that the driver
21 played a role when it comes to comparative
22 negligence, but we will accept that there may be
23 other individuals or entities who played a role as
24 far as the construction goes of the entranceway.

25 THE COURT: Okay. Anything further on that?

1 I'll go ahead and allow the amendment. How long do
2 you need? You have already got it?

3 MR. SUGGS: If you can Form 4 in ten days.

4 THE COURT: Well, I have got the amended
5 version here, do I not?

6 MR. SUGGS: Yes, sir, we can just file it.
7 Yes, sir.

8 THE COURT: Okay. What is today, Wednesday?

9 MR. SUGGS: The 23rd, yes, sir.

10 THE COURT: Ten days will be fine.

11 MR. SUGGS: Thank you, Judge.

12 THE COURT: All right. Thank you. Does
13 anybody need a formal order on that, or a Form 4
14 will be okay?

15 MR. SUGGS: Form 4 is fine with us, Judge.

16 MS. SILER: Form 4.

17 THE COURT: Form 4, thank you. All right.
18 Now, let's go over to the plaintiff's Motion to
19 Compel. Which problems do you have a problem with,
20 Ms. Siler?

21 MS. SILER: I am sorry?

22 THE COURT: Which numbers are you having
23 problems with? Have they not answered anything?

24 MS. SILER: No, the only thing that we wish to
25 have is there is a witness, a nurse, who witnessed

1 the fall right after it happened. We would like
2 her statement. However, it was produced but her
3 statement was redacted under the work product
4 doctrine.

5 THE COURT: Right, that is right. How are you
6 withholding the statement? I think that she is a
7 fact witness to this case. I don't necessarily
8 think that falls under work product.

9 MR. SUGGS: Judge, it is two-fold. But the
10 more important protection is not work product. The
11 most important protection is the 44-73-92, peer
12 review statute. If you look at A(1), all
13 information provided -- prepared by a hospital
14 relating to the fall are confidential incident or
15 occurrence reports and related investigations.
16 Section A(2) of 44-73-92 states, Proceedings, data,
17 documents, and information are not subject to
18 discovery. If I may hand up to you.

19 You will see if you look at this risk -- I
20 mean, it is called risk management worksheet. It
21 is an incident or occurrence report. It states
22 across the top that it's constitutional. It has
23 got the --

24 THE COURT: I don't care what they put on top
25 of it, they are going to do that anyway. But the

1 statutes that you are talking about has to do with
2 the medical care, does it not?

3 MR. SUGGS: I thought the same thing, but it
4 doesn't. That is not how it reads.

5 THE COURT: I think it -- the hospital may be
6 having its own expansive reading of it. But, do
7 you have a copy of the statute that you can hand to
8 me?

9 MR. SUGGS: I can get you one. I didn't bring
10 a copy of the statutes.

11 THE COURT: You are trying to say that by
12 virtue of this statute, anything that happens out
13 there on one of their campuses is non-discoverable.
14 Basically everything.

15 MR. SUGGS: Well, just the incident report.

16 THE COURT: And I don't agree with that.

17 MR. SUGGS: No, I am not saying that
18 everything, I am saying that just the incident
19 report.

20 THE COURT: Well, it is the witness' fact
21 statement about what happened, right?

22 MR. SUGGS: Correct. Which is --

23 THE COURT: Do you have a copy of that
24 statement?

25 MR. SUGGS: I do, I brought it.

1 THE COURT: Let me see it.

2 MR. SUGGS: And, Judge, unless I have already
3 pulled it out. Hold on one second. I can give it
4 to you? May I approach?

5 THE COURT: Yes, sir. Is that all, just the
6 statement that you are looking for, Ms. Siler?

7 MS. SILER: Yes, Your Honor.

8 MR. SUGGS: And, Judge, one of the -- from the
9 work product standpoint, in order to overcome the
10 work product -- I guess, if you decide that it's
11 not work product, then you don't have to worry
12 about whether you have to overcome the need to get
13 it. But the whole thing here, Judge, take her
14 deposition. I mean, you don't need a protected
15 document, just take her -- she didn't even see the
16 fall.

17 We have got a videotape -- I will get back to
18 my desk -- we have got a videotape of the incident.
19 So we see what happened to this lady as she falls.

20 Christy Shorebridge, this witness, shows up in
21 the aftermath and sees her on the ground. We see
22 her on video run inside and bring people back out.
23 I mean, frankly that statement doesn't have any
24 real value. But because I can't waive her
25 protection here and then show up in Court in

1 another case in a month and stand by the same
2 protection I have waived.

3 I mean, maybe technically I could. But I
4 would lose face with the Court, as well as with
5 opposing counsel if I did so. I have got to take
6 consistent positions as it relates to 44-7-392, as
7 well as what we regard to be work product.

8 THE COURT: Okay. Hang on.

9 MR. SUGGS: Okay.

10 (Pause.)

11 THE COURT: So the highlighted part is what
12 you are talking about?

13 MR. SUGGS: Yes, sir. I highlighted Page 1
14 that just shows you what it is. And then the
15 statement that they are talking about is on 2-3,
16 and then the protection language that I will
17 reference is on the very last page. And I
18 highlighted that for you as well. That
19 confidential statement. Bona fide quality
20 assurance peer review or risk management function,
21 explicitly states in statutes can protect the
22 document.

23 THE COURT: I am going to order that you give
24 Ms. Siler just the portion of the highlighted
25 witness statement in here.

1 MR. SUGGS: Two to three?

2 THE COURT: Sir?

3 MR. SUGGS: On Pages 2 and 3?

4 THE COURT: The end of Page 2 and the top of
5 Page 3. That is all you need to give out. The
6 rest of it can be part of your internal work, okay.
7 All right. Thank you. For what good it is going
8 to do. But anyway, there you go. All right. Ms.
9 Siler, anything further?

10 MS. SILER: No, Your Honor. Thank you.

11 THE COURT: Did you drive up from Charleston
12 today?

13 MS. SILER: Yes, I did.

14 THE COURT: Golly, okay.

15 MR. SUGGS: Judge, I know that it is
16 completely up to the Court as to whether it is Form
17 4 or not. Could we get an order on that one? Do
18 you mind having them prepare a proposed order?

19 THE COURT: No. Would you prepare me an order
20 on this, please, for me?

21 MS. SILER: Certainly.

22 THE COURT: All right, guys.

23 (The hearing concluded.)

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

STATE OF SOUTH CAROLINA:

COUNTY OF OCONEE:

I, MONA L. MANLEY, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 7th day of October, 2021.

Mona L. Manley /s/
MONA L. MANLEY
Official South Carolina Court Reporter
Circuit Reporter for the 10th Circuit
(850) 893-6662
mmanley@sccourts.org