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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Case Tracking No. 2012-213231

APPEAL FROM KERSHAW COUNTY
Civil Action No. 2011-CP-28-1170
Alison Renee Lee, Circuit Court Judge

Patricia Brouwer .... Appellant

vs.

Sisters of Charity Providence Hospitals d/b/a Providence Hospital and Providence Hospital Northeast; South Carolina ENT, Allergy and Sleep Medicine, P.A.; Robert Puchalski, M.D.; Francine K. Moring, M.D.; Jane Does (1-5); and John Does (1-5) .... Defendants

Of Whom Defendants South Carolina ENT, Allergy and Sleep Medicine, P.A.; Robert Puchalski, M.D.; and Francine K. Moring, M.D. are .... Respondents

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FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in the initial brief, the Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondents.

I. An absurd result would occur if an expert affidavit is required for a Notice of Intent to File Suit, but not required for the actual lawsuit.

Prior to the Tort Reform Act of 2005, traditionally, expert testimony was required to succeed in a medical malpractice lawsuit. Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978) (Quoting Jarboe v. Harting, 397 S.W.2d 775, 778 (Ky. 1965)). An exception to this rule was recognized "in situations where the common knowledge or experience of laymen is extensive enough to recognize or to infer negligence from the facts." Id.; See also Cox v. Lund, 286 S.C. 410, 334 S.E.2d 116 (1985); King v. Williams, 276 S.C. 478, 279 S.E. 2d 618 (1981). Green involved the failure to remove an intrauterine device. The court determined there was common knowledge to infer negligence that when tubal ligation occurs, the intrauterine device should be removed. Green, 272 S.C. at 192-93, 249 S.E.2d at 913.

After the passage of the Tort Reform Act of 2005, courts of this state continue to recognize the common knowledge exception to the requirement of an expert witness. See Melton v. Medtronic, Inc., 389 S.C. 641, 663, 698 S.E.2d 886, 897-98 (Ct. App. 2010) (Stating that an expert "is not required if the subject matter lies within the ambit of common knowledge so that no special learning is

required to evaluate the conduct of the defendants."); See also Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 55-56, 677 S.E.2d 32, 37 (Ct. App. 2009); Thomas v. Dootson, 377 S.C. 293, 296, 659 S.E.2d 253, 255 (Ct. App. 2008); David v. McLeod Regional Medical Center, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006). In Thomas, the court held that a "claim arising from a surgical drill that burns skin on contact would fall well within the common knowledge or experience of laymen." Thomas, 377 S.C. at 296, 689 S.E.2d at 255.

Court rulings after the Tort Reform Act of 2005 indicate that the common knowledge exception is still applicable to medical malpractice lawsuits. There has been no case after the passage of the Tort Reform Act of 2005 that has stated that the common knowledge exception no longer applies to medical malpractice lawsuits. However, if an expert affidavit is required in all Notices of Intent to File Suit, there would be no need for a common knowledge exception pertaining to medical malpractice lawsuits. Logically, by the broad reading of S.C. Code. Ann Section 15-79-125 advanced by the Respondents, every plaintiff in a medical malpractice case would already have an expert affidavit and therefore, the common knowledge exception would no longer be applicable in medical malpractice cases.

The Supreme Court of South Carolina stated that statutes should not be applied in a manner that would yield patently absurd results. Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 695-96 (2012) (citing Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011)). By the broad interpretation posited by the Respondents, pre-litigation

requires an expert witness affidavit, but actual litigation does not require an expert witness affidavit. The facts of this lawsuit involve a woman with an allergy to latex, being exposed to latex. The facts further detail that the woman had a large red bracelet that read 'latex allergy' and she was still exposed to latex. This medical malpractice claim fits within the narrow exception of common knowledge, but according to the Respondents, an expert witness affidavit was required in the Notice of Intent to File Suit. The Respondents claim that the requirement of an expert witness affidavit would prevent pre-suit mediation being rendered ineffective and fruitless. In a lawsuit with facts like these, and similar cases where the common knowledge exception applied, such an argument is baseless. The lack of an expert affidavit did not render the mediation ineffective or fruitless as the short and plain statement of facts included within the Notice of Intent to File Suit gave the defense more than adequate information to proceed in an informed mediation, which occurred on April 26, 2012.

The Respondents make an argument that the common knowledge exception could not be challenged at pre-suit stage. The Respondents fail to recognize S.C. Code Ann. Section 15-79-125(D) as a method to challenge the common knowledge exception. Section 15-79-125(D) grants the circuit court with "jurisdiction to enforce the provisions of [15-79-125]." A defendant, who believes an expert affidavit is required, can file a motion with the circuit court arguing this point, as can be done under S.C. Code Section 15-36-100(F). There is no substantive difference as to how a defendant would raise this issue in the

language relied on by Respondents in their cited portion of Section 15-36-100(F) and Section 15-79-125(D).

The requirement of an expert affidavit when the claim is within the ambit of common knowledge is patently absurd because, not only does South Carolina still recognize the common knowledge exception, but also forcing a plaintiff to get an expert affidavit in a case like this does not further the goals of stopping frivolous lawsuits or render the mediation process ineffective and fruitless. It only increases the cost for plaintiffs to gain access to the courts in these cases without any valid basis whatsoever.

II. Miscellaneous

Respondents recognize, at page 10 of their Brief, the South Carolina Supreme Court's holding in Grier that the goal of Section 15-79-125(A) is to allow plaintiffs to pursue "...colorable claims" and yet argue that exposing a patient to latex who has plainly disclosed her being allergic to latex and is wearing a red bracelet, again disclosing the allergy, is not a colorable claim. Such a position is both hypocritical and absurd.

Respondents make two claims that Appellant has abandoned an issue because of a conclusory statement. See Respondents Initial Brief pp. 10 and 13. The arguments are in regards to the absurd result of Respondents' reading of Section 15-79-125 and that the issue is moot since mediation occurred. These arguments have not been abandoned by the Appellant, and have been further elaborated in this reply brief. The fact that little needs to be said to prove a point does not render it abandoned.

III. S.C. Code Ann. Section 15-79-125(A) is to be strictly construed.

In Grier, The South Carolina Supreme Court confirmed that "section 15-79-125(A) is to be strictly construed, and imposing requirements which are not clearly intended to be in it violates this rule." Grier, 393 S.C. at 540, 725 S.E.2d at 698. In strictly construing Section 15-79-125(A), the court should factor prior case law which granted an exception to the requirement of an expert if the claim involved something under the ambit of common knowledge. The General Assembly needs to be clear when passing a statute that is in derogation of the common law. Id. at 536, 725 S.E.2d at 696 (Citing Epstein v. Coastal Timber Co., 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011); Crosby v. Glasscock Trucking Co., 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)).

If the General Assembly intended for affidavits to be required in all medical malpractice Notices of Intent to File Suit, they could have easily written Section 15-36-100(A) to state, "...subject to the affidavit requirements established in Section 15-36-100 (A) and (B)." The fact they chose to reference, "...the affidavit requirements in Section 15-36-100..." without any limiting language, should be interpreted as their clear indication to include all of Section 15-36-100 and not some limited portion. The South Carolina Supreme Court, in Grier, noted that a statute restricting common law must not be extended beyond the clear intent of the General Assembly. Grier, 393 S.C. at 536, 725 S.E.2d at 696. Mandating an expert affidavit in all medical malpractice cases is extending the statute beyond the clear intent of the General Assembly.

IV. The lack of an expert affidavit became moot once mediation occurred.

Some of the main purposes of Section 15-79-125 are to allow litigants "to identify likely causes of action, gather information, and pursue a resolution of their medical malpractice disputes through mediation." Ranucci v. Crain, 397 S.C. 168, 178, 723 S.E.2d 242, 247 (Ct. App. 2012). Neither party can deny that mediation took place. The Respondents cannot deny that they were informed of the relevant information regarding the claim. The addition of an expert affidavit would not have made the Respondents more informed regarding the facts and applicable causes of action. No information in the record suggests there would have been a change in how the mediation occurred had an expert affidavit been attached to the Notice of Intent to File Suit. However, the Respondents claim that the Notice of Intent to File Suit was inadequate. They further contend that they had to participate in mediation or face possible sanctions under Section 15-79-125(D), but they could have asked for an extension based upon good cause, such as contesting the adequacy of the Notice of Intent to File Suit. See S.C. Code Ann. Section 15-79-125(C).

In Sloan v. Friends of Hunley, 369 S.C. 20, 630 S.E.2d 474 (2006), the Supreme Court of South Carolina determined that the causes of action brought by the plaintiff were moot as the defendant had already disclosed the information requested. As admitted by the Respondents, mediation occurred on April 26, 2012; therefore, nothing further is required under the process of Section 15-79-125. All of the goals of Section 15-79-125 were accomplished, nothing more was necessary. Once the Respondents freely attended the mediation, they cannot

complain of the inadequacy of the Notice of Intent to File Suit after a Complaint has been filed and the controversy goes beyond pre-litigation matters.

CONCLUSION

The Appellant has established the standard in this case, as no doctor would ever expose a patient to latex when that patient has an allergy to latex and all of the defendants knew, or should have known, of the allergy. All they had to do was review, even briefly, the pre-anesthesia evaluation, the Consent to Operation, Anesthetic and Other Medical Services, and pay attention to the patients red warning bracelet.

Based on the foregoing, in addition to the arguments made in the initial brief, the Appellant respectfully submits that S.C. Code Ann. Section 15-79-125 does not require an affidavit when the acts or inactions that brought the suit fall within the ambit of common knowledge or experience. Additionally, the issue of the affidavit became moot once mediation occurred. Further, failure to obtain informed consent cause of action does not require the procedure outlined in Section 15-79-125.

Wherefore, based on the foregoing, the Appellant respectfully requests that the Order of the trial court granting Defendants' Motion to Dismiss the Notice of Intent to File Suit for the failure to file an affidavit be overruled.

[Signature Page to Follow]

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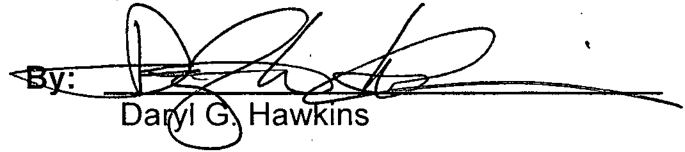

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March 11, 2013

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Of Whom Defendants South Carolina ENT, Allergy and Sleep Medicine, P.A.; Robert Puchalski, M.D.; and Francine K. Moring, M.D. are .... Respondents

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CERTIFICATION OF COUNSEL FOR APPELLANT REGARDING FINAL REPLY BRIEF

Counsel for Appellant hereby certifies that the Final Reply Brief complies with Rule 211(b) and has been served upon all parties of record.

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PROOF OF SERVICE

I certify that I have served the Record on Appeal, Certification of Counsel, Final Initial Brief of Appellant and Final Reply Brief of Appellant on South Carolina ENT, Allergy and Sleep Medicine, P.A.; Robert Puchalski, M.D. and Francine K. Moring, M.D., by depositing a copy of it in the United States Mail, postage prepaid, addressed to their attorney of record, William H. Davidson II, Esquire and Andrew F. Lindemann, Esquire, Davidson & Lindemann, PA , PO Box 8568, Columbia, SC 29202 on March 18, 2013.

I certify that I have served the Record on Appeal, Certification of Counsel, Final Initial Brief of Appellant and Final Reply Brief of Appellant on Francine K. Moring, M.D. by depositing a copy of it in the United States Mail, postage prepaid, addressed to her attorney of record, Benson H. Driggers, Esquire, Sweeny Wingate & Barrow, PA, PO Box 12129, Columbia, SC 29211 on March 18, 2013.

I certify that I have provided a courtesy copy of the Record on Appeal, Certification of Counsel, Final Initial Brief of Appellant and Final Reply Brief of Appellant upon Defendant Sisters of Charity Providence Hospitals d/b/a Providence Hospital and Providence Hospital Northeast who is not a Respondent in the appeal by depositing a copy of it in the United States Mail, postage

prepaid, addressed to its attorney of record, Weldon R. Johnson, Esquire, Barnes, Alford, Stork & Johnson, LLP, PO Box 8448, Columbia, SC 29202-8448 on March 18, 2013.

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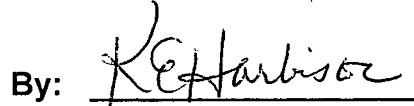
By: 
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March 18, 2013