THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2021-000838
Case No. 2018-CP-26-5438

Tara Gurry,..... Appellant,

v.

Myrtle Beach Dermatology, LLC, Shannon Hussey,
and Richard Hussey, M.D.,..... Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is an appeal from a medical malpractice action. On or about January 27, 2016, the Appellant Tara Gurry had a malignant melanoma on her right thigh excised by dermatologist, Joseph Masessa, M.D. The surgical procedure, in which a 7.5 centimeter wide and one centimeter deep mass was excised, left her with a significant 16 centimeter scar on her right leg. The Appellant came to the office of the Respondent Myrtle Beach Dermatology, LLC on May 3, 2016, for further routine follow-up where the Respondent Shannon Hussey, who is a nurse practitioner (NP), examined the scar and described the hypertrophic area of the scar as being seven centimeters long. NP Hussey also documented that the Appellant reported a pulling sensation in the scar and the feeling of stitches being in it. NP Hussey injected the scar with one cc of 3.3 mg of Kenalog, an intralesional steroid used by dermatologists for this type of scar to reduce the appearance of the scar by thinning and flattening it and to alleviate the pulling sensation.

After this visit and as an alleged result of the Kenalog injection, the Appellant alleges that she became very ill for 72 hours, but that the illness lasted for two weeks and has been prolonged. The illness allegedly included nausea, chills, racing heartbeat, cramps, body aches, headaches, insomnia, and a three-week menstrual cycle. The Appellant also alleges that her leg began to atrophy within 24 hours and got worse over several months. She alleges that this caused her to have to stop doing activities due to leg pain.

On September 27, 2018, the Appellant filed a Complaint against the Respondents alleging a cause of action for medical malpractice. She later filed an Amended Complaint which added a cause of action for the alleged negligent hiring, supervision, and retention of Shannon Hussey. That cause of action was later dismissed by the Appellant on April 13, 2021.

To support her allegations, the Appellant identified dermatologist, Schield M. Wikas, D.O., as her sole medical expert witness. Dr. Wikas was deposed by defense counsel on June 28, 2019, and he then provided *de bene esse* videotaped trial testimony on June 21, 2021.

The case was scheduled for a date-certain trial to begin on June 28, 2021. On that date, Circuit Court Judge Benjamin H. Culbertson heard pre-trial in limine motions from both parties before the start of the date-certain trial. The Appellant was proceeding *pro se*. Among the motions, the trial court heard extensive argument on the Respondents' Motion in Limine to Challenge, Limit, and/or Exclude Dr. Schield Wikas's Testimony. In addition, the trial court took a lengthy recess to read the trial testimony of Dr. Wikas. Ultimately, the trial court granted the Respondents' motion and excluded Dr. Wikas's trial testimony. (Tr. 52-59).

Based on the trial court's in limine ruling, the Respondents' counsel then made a motion for summary judgment because the Appellant lacked expert medical testimony to prove each of the elements of the medical malpractice claim, including proximate cause. The Appellant had not identified any other medical expert. The trial court was willing to allow the Appellant to proceed with the trial and then address the causation issue at the directed verdict stage. However, as the hearing transcript shows, the Appellant made the choice not to proceed forward to trial and rather looked for the trial court to grant judgment to the Respondents to allow her to proceed with an appeal. (Tr. 60). The Appellant thus consented to the procedure that was followed, in particular, the trial court's entry of summary judgment rather than waiting until the directed verdict stage to hear a dispositive motion. As a result, the trial court granted summary judgment to the Respondents.

The trial court entered a Form Order on June 28, 2021. Thereafter, on July 1, 2021, the trial court entered a formal Order Granting Defendants' Motion in Limine to Exclude Dr. Schield

Wikas's Testimony, and a separate formal Order Granting Defendants' Motion for Summary Judgment. The action was dismissed with prejudice.

The Appellant did not file a motion pursuant to Rule 59(e), SCRCP, or any request for reconsideration. She instead filed a Notice of Appeal on August 6, 2021.

STANDARD OF REVIEW

The standard of review for an in limine evidentiary ruling, including an order excluding expert testimony, is an abuse of discretion standard. The Supreme Court has held that "[a] trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 676 S.E.2d 684, 686 (2009). "An abuse of discretion occurs when the circuit court's rulings either lack evidentiary support or are controlled by an error of law." *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 735 S.E.2d 650, 655 (2012).

"A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 662 S.E.2d 40, 41 (2008). "An appellate court reviews the grant of summary judgment under the same standard applied by the trial court." *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826, 829 (Ct. App. 2009). "The trial court should grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.*

ARGUMENTS

I. The Appellant did not appeal each of the trial court's rulings on the motion in limine or the subsequent summary judgment order, and as a result, appellate review is barred by the "two-issue" rule.

The Appellant contends generally on appeal that the trial court erred in finding that the opinions offered by her medical expert witness, Schield Wikas, D.O., were unreliable and hence inadmissible, which then led to the trial court's grant of summary judgment in favor of the Respondents. In ruling in limine on the admissibility of Dr. Wikas's *de bene esse* deposition testimony, the trial court made several rulings, not all of which have been appealed by the Appellant, which thereby bars this appeal from being heard on the merits. Principally, the trial court ruled that "Dr. Wikas offered no opinion on how the Defendants' alleged breach in the standard of care was the proximate cause of Plaintiff's alleged damages, thereby rendering his testimony unreliable and inadmissible." (Order, p. 5). However, as an alternative basis for excluding Dr. Wikas's testimony, the trial court also applied a Rule 403, SCRE, analysis and concluded that "his opinions are inadmissible on the basis that any probative value is substantially outweighed by the danger of unfair prejudice and would only confuse or mislead the jury as he testified that he gives the exact same injection which was used in this case without any problem; yet when NP Hussey gave the injection, it inexplicitly [sic] caused Plaintiff's alleged atrophy with no basis for his reasoning other than that an injury occurred." (Order, pp. 19-20). The trial court further found that Dr. Wikas's testimony on causation demonstrated that the injuries sustained by the Appellant were not legally foreseeable, resulting in no liability. (Order, p. 13).

A careful review of the Appellant's opening brief and her Statement of Issues for Appeal do not reflect that she has appealed the two alternative rulings set forth above. She clearly did not

appeal the exclusion of Dr. Wikas's testimony based on a Rule 403 analysis. Likewise, she did not appeal the ruling that Dr. Wikas's testimony did not support a finding of legal foreseeability, which is a necessary component of proximate cause. Those alternative bases for judgment in favor of the Respondents are, therefore, the law of the case, and appellate review is barred by the "two-issue" rule. In applying this rule, the Supreme Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845.

In short, it is not necessary for this Court to even reach any of the issues raised by the Appellant. Instead, this Court may affirm the exclusion of Dr. Wikas's causation testimony as well as the summary judgment based on the trial court's unappealed rulings.

II. The trial court correctly excluded as unreliable and inadmissible the causation testimony offered by the Appellant's sole medical expert witness.

South Carolina law requires a plaintiff in a medical malpractice case to present: "(1) evidence of the generally recognized practice and procedures that would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances; and (2) evidence that the defendant doctor departed from the recognized and generally accepted standards, practices, and procedures in the manner alleged by the plaintiff." *Gooding v. St. Francis Xavier Hospital*, 326, S.C. 248, 487 S.E.2d 596, 599 (1997). In addition, "the plaintiff must show

that the defendants' departure from such generally recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages." *David v. McLeod Regional Medical Center*, 367 S.C. 242, 626 S.E.2 1, 4 (2006).

In the case at bar, the Appellant relied on expert testimony of Schield Wikas, D.O., who is a dermatologist, to establish the standard of care owed by NP Shannon Hussey.[1] As a result, it was incumbent on the Appellant to present expert testimony to show that any alleged breach of the standard of care proximately caused harm to her. On this critical issue of proximate cause, the trial court ruled that "Dr. Wikas offered no opinion on how the Defendants' alleged breach in the standard of care was the proximate cause of Plaintiff's alleged damages, thereby rendering his testimony unreliable and inadmissible." (Order, p. 5). In fulfilling its gatekeeper role under Rule 702, SCRE, the trial court's causation rulings in limine are three-fold. First, the trial court found that Dr. Wikas improperly relied on the doctrine of *res ipsa loquitor*, which is not recognized under South Carolina law. (Order, p. 16). Second, the trial court found that "Dr. Wikas did not once testify to a reasonable degree of medical certainty that the Kenalog injected by the Defendant Nurse Practitioner Hussey was most probably the cause of the Plaintiff's atrophy or other alleged side-effects." (Order, p. 7). And third, the trial court found "Dr. Wikas's opinions regarding the occurrence of Plaintiff's alleged injury from an intralesional Kenalog injection are not based upon reliable medicine or science making them unreliable." (Order, p. 18). The trial court did not abuse its discretion in making these separate and independent causation rulings which support the summary judgment as entered by the court below.

[1] Dr. Wikas was the only medical expert witness to be offered by the Appellant.

A. Law on Admissibility of Expert Opinions

The admission of expert testimony is governed by Rule 702, SCRE, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. The South Carolina Supreme Court has recognized that "expert testimony receives additional scrutiny relative to other evidentiary decisions." *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169, 175 (2010). In fulfilling its "gatekeeping" duties, a trial court is required to make "three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." *Id*. The third of those findings requires the trial court to "evaluate the substance of the testimony and determine whether it is reliable." *Id*. In other words, "[a]ll expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009).

The Supreme Court has stressed that "[r]eliability is a central feature of Rule 702 admissibility." *Id*. The Court has explained as follows:

> [T]he trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

White, 676 S.E.2d at 689. As the Supreme Court stated in *White*, the case of *State v. Council*,

335 S.C. 1, 515 S.E.2d 508 (1999), is the leading case that addresses "the gatekeeping role of the trial court with regard to expert testimony under Rule 702, as well as the standard reliability factors for scientific evidence." 676 S.E.2d at 688. In evaluating the reliability of scientific expert testimony, the Court considers factors which include: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Council*, 515 S.E.2d at 517.

In sum, as the Supreme Court reaffirmed in *Watson*, "[t]he trial court serves as the gatekeeper in the admission of all evidence presented at trial, and in making admissibility determinations, the trial court is required to make certain preliminary findings regarding admissibility requirements, such as qualification of experts, reliability of the substance of the testimony, and substantial similarity of alleged similar incidents, before a jury may hear the evidence." *Watson*, 699 S.E.2d at 180. "If these preliminary requirements are not met, as a matter of law, the trial court may not permit the jury to consider the evidence." *Id*.

B. Doctrine of *Res Ipsa Loquitor*

The trial court correctly ruled that Dr. Wikas relied on the doctrine of *res ipsa loquitor*, which is not recognized under South Carolina law. The trial court relied on this Court's decision in *Fletcher v. Medical University of South Carolina*, 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010). In that case, the plaintiff sued a physician who performed a subclavian bypass, alleging that the injury to her phrenic nerve and thoracic duct were the result of the physician's negligence. The plaintiff's expert testified that the physician was negligent, but then proceeded to say that he could not point to any technique in the procedure that was deficient. Instead, the

plaintiff "asks us to conclude that the occurrence of a complication is itself evidence of negligence." 702 S.E.2d at 374. In rejecting that argument, this Court relied on the fact that South Carolina law does not recognize the doctrine of *res ipsa loquitur*. In affirming a directed verdict for the physician, this Court held that the plaintiff was responsible for showing precisely how the physician deviated from the standard of care, and that the occurrence of a complication is not evidence of negligence.

This Court in *Fletcher* also cited to the case of *Bowie v. Hearn*, 292 S.C. 223, 355 S.E.2d 550 (Ct. App. 1987), with the following analysis:

> Bowie sued the physician who delivered him via cesarean section because he was cut on the cheek during the procedure, resulting in a scar. Bowie's expert testified the standard of care required the physician not to cut the baby. In analyzing the sufficiency of this testimony, the court alluded to another oft-cited medical malpractice case [*Cox v. Lund*, 286 S.C. 410, 334 S.E.2d 116 (1985)] and stated: "Under the plaintiff's reasoning in this case [Bowie I] the doctors in *Cox* could simply have testified that normally colons are not perforated during colonoscopies, the standard of care, therefore, is a doctor should not perforate the colon, and to do so violates the standard of care. Such reasoning would, in effect, make a doctor an insurer of [a] perfect result in every surgical procedure. A doctor is not an insurer of health and negligence may not be inferred."

Fletcher, 702 S.E.2d at 374-375, citing *Bowie*, 355 S.E.2d at 552. These principles of law were reiterated by the Supreme Court in *Watson, supra*., where the Court explained that a plaintiff "may not rely solely on the fact that an accident occurred to prove … their case under a negligence theory since South Carolina does not follows the doctrine of *res ipsa loquitor*." *Watson*, 699 S.E.2d at 179.

As the trial court correctly found, the reasoning in *Fletcher* is on point. Dr. Wikas's trial testimony reflects beyond dispute that he was relying on the doctrine of *res ipsa loquitur* to opine that the Appellant's injury itself demonstrates negligence. The trial court cited to the following excerpts from Dr. Wikas's trial testimony in making that finding:

Q. Dr. Wikas, as I understand your opinion in this case, your opinion is that you see a depression or atrophy on Tara Gurry's leg, correct?

A. Correct.

Q. And your opinion is that something must have been done wrong to have caused that atrophy, correct?

A. Correct.

Q. You don't know exactly what, but something had to have been done wrong, correct?

A. I thought it was due to the injection of excessive concentration, excessive volume of Kenalog.

Q. All right. Because I think the way you explained in your deposition is the thing speaks for itself.

A. Correct.

Q. Okay. Basically, a res ipsa loquitur. … In fact, it's kind of a legal term, res ipsa loquitur, that the fact that there's been an injury, somebody must have done something wrong to have caused that, correct?

A. In this case, yes.

(Wikas Trial Dep., pp. 59-60). Dr. Wikas further testified as follows:

Q. ... And you would agree though that if Nurse Practitioner Hussey had administered 3.3 milligrams per cc of an intralesional steroid for a hypertrophic scar, that would be an appropriate amount and concentration, correct?

A. Correct.

Q. So, based on the medical record of May the 3rd, 2016, that was the amount and the concentration of intralesional steroid that was documented in the record, correct?

A. Correct.

Q. So, what Nurse Practitioner Hussey documented as far as what she injected, that would be acceptable and that meets

the standard of care, but you just don't believe that she did that, correct?

A. Correct.

(Wikas Trial Dep., pp. 60-61).

Q. So, Doctor, you would agree that the amount of approximately 1 cc of a 3.3 milligram of intralesional steroid, that should not cause the depression like what you see in Ms. Gurry's leg, correct?

A. Yes, you're correct.

Q. Okay. So the amount, you would not expect that to cause the depression or atrophy if you're giving 1 cc of about 3.3 milligrams of Kenalog?

A. That's correct.

Q. And, in fact, you've never seen, you've never heard, you've never even seen it anywhere in the literature that approximately 1 cc of 3.3 milligrams of an intralesional steroid would cause a depression like what Ms. Gurry had, correct?

A. Correct.

(Wikas Trial Dep., pp. 62-63).

Q. You've never seen ever that 1 cc of 3.3 milligrams of Kenalog is going to cause what you see in Tara Gurry's leg, correct?

A. Correct.

Q. You've never heard of something like that happening, correct?

A. Correct.

Q. You've never seen anything in any literature that would describe that type of result with about 1 cc of 3.3 milligrams of Kenalog, correct?

A. Correct.

Q. And you yourself, as you've testified, you give intralesional steroid Kenalog in your patients, correct?

A. Yes.

Q. And you've done that hundreds of times, correct?

A. Yes.

Q. And you've given that medication in doses that could even be higher than 3.3 milligrams, correct?

A. Yes.

Q. And you have never had any depression ever, correct?

A. Correct.

(Wikas Trial Dep., pp. 63-64).

Q. … So your testimony is the fact of the result, she had to have done something wrong?

A. Yes.

(Wikas Trial Dep., p. 102).

The Appellant is critical that defense counsel "baited" Dr. Wikas to admit to relying on *res ipsa loquitor* as the basis for his opinions on causation. However, on his direct examination in response to questions from the *pro se* Appellant herself and before any cross examination took place, Dr. Wikas was asked for his opinions on "the preparation and injection of the corticosteroid," and he replied: "*I think the results speak for themselves*. I've never see – Ms. Hussey said she injected 3.3 milligrams of the corticosteroid into the incision site. I've injected that amount in concentration many, many times, literally at least hundreds of times, and I've never seen a wound implode." (Wikas Trial Dep., p. 21). (Emphasis added). That is the classic application of the doctrine of *res ipsa loquitor*. There was no error committed by the trial court, and certainly no

showing of any abuse of discretion that warrants a reversal.

C. No Testimony of "Significant Causal Link"

Additionally, the trial court concluded that "Dr. Wikas did not once testify to a reasonable degree of medical certainty that the Kenalog injected by the Defendant Nurse Practitioner Hussey was most probably the cause of the Plaintiff's atrophy or other alleged side-effects." (Order, p. 7). Notably, the Appellant does not challenge this ruling on causation. The record shows that the trial court's ruling is correct and should be affirmed.

"In South Carolina a medical malpractice plaintiff who relies on expert testimony must introduce evidence that the defendant's negligence *most probably* resulted in the injuries alleged." *Jones v. Owings*, 318 S.C. 72, 456 S.E.2d 371, 372 (1995). (Emphasis in original). "When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence." *Ellis v. Oliver*, 323 S.C. 121, 473 S.E.2d 793, 795 (1996). "The reason for this rule is the highly technical nature of malpractice litigation. Since many malpractice suits involve ailments and treatments outside the realm of ordinary lay knowledge, expert testimony is generally necessary." *Id.* "Therefore, the expert testimony as to proximate cause must provide a significant causal link between the alleged negligence and the injuries suffered, rather than a tenuous and hypothetical connection." *Martasin v. Hilton Head Health System, L.P.*, 364 S.C. 430, 613 S.E.2d 795, 800 (Ct. App. 2005).

The Appellant attempted to rely on expert medical testimony to prove her medical malpractice claim. Thus, she was required to show a "significant causal link" between the

alleged breach of the standard of care and the injuries suffered. That is accomplished by having the expert opine with reasonable medical certainty that the injuries sustained were most probably caused by an alleged deviation from the standard of care. The Appellant never showed that "significant causal link" with the trial testimony offered by Dr. Wikas. Instead, Dr. Wikas discussed hypotheses and "potential" causes. In fact, while denying that he was "guessing," Dr. Wikas nonetheless admitted in his own words that he was looking at "potential" causes:

> I'm just saying that something happened, and with 3 milligrams injected, you're not going to see that change. So I'm thinking, what are the potential things that cause this kind of catastrophic event, and the only things that I can think of was too large a concentration, too large of volume, those are the kinds of things I'm thinking about.

(Wikas Trial Dep., p. 79. That was followed by the following concession:

> Q. But let's talk about this about too large of a concentration or too large of a volume. You would agree, you cannot say what specifically it was; these are just kind of your hypotheses as to what potentially could have caused this, correct?
>
> A. Yes.

(Wikas Trial Dep., p. 79).

In sum, in addition to improperly relying on the doctrine of *res ipsa loquitor,* the Appellant also failed to present expert medical testimony that to a reasonable degree of medical certainty her injuries were most probably caused by a deviation from the standard of care by the Respondents. The Appellant had no other causation expert. Accordingly, the rulings as to the admissibility of Dr. Wikas's opinions should be affirmed, as should be the summary judgment entered for the Respondents.

D. *State v. Council* Test

Finally, in its gatekeeping role under Rule 702, SCRE, the trial court also ruled that "Dr. Wikas's opinions regarding the occurrence of Plaintiff's alleged injury from an intralesional Kenalog injection are not based upon reliable medicine or science making them unreliable." (Order, p. 18). The court further explained that "Dr. Wikas's singular reliance on his own hypothetical depiction of this event is too speculative, and therefore, is inadmissible under Rule 702, SCRE. (Order, p. 19). On appeal, the Appellant does not even attempt to show that Dr. Wikas's trial testimony satisfies the *State v. Council* test. Instead, she argues that the test is not applicable. She incorrectly insists upon some exemption because "Rule 702 does not mention medical literature or research, as these are not requirements for an expert witness to opine." *See*, Appellant's Brief, p. 17. She nonetheless concedes that Dr. Wikas cannot satisfy the *Council* factors, but she argues that "Dr. Wikas explains why these were not used in his testimony for this case." *See*, Appellant's Brief, p. 17.

The trial court recognized that Dr Wikas "suggested that the intralesional steroid being injected by NP Hussey was in an improper location, in an improper concentration, and/or in improper volume and caused the Plaintiff's atrophy. However, he has failed to conduct any research to establish that such an improper location, concentration, or volume would even create the alleged injury. Similarly, he has not identified any peer review literature which indicates such is even a possibility." (Order, p. 19). The record fully supports that conclusion. As discussed above, Dr. Wikas addressed "potential" causes and agreed that he had only described "hypotheses as to what potentially could have caused this." (Wikas Trial Dep., p. 79). He then conceded that his hypotheses were not supported by any testing or peer-reviewed literature. (Wikas Trial Dep., pp. 81-82). Therefore, the trial court did not abuse its discretion in

concluding that Dr. Wikas's causation testimony did not satisfy the *State v. Council* test and hence was not reliable.

In sum, the Appellant has not demonstrated on appeal that the trial court's multi-prong conclusions as to the unreliability and inadmissibility of Dr. Wikas's causation testimony was unsupported in the record or based upon an error of law. The Appellant focuses instead on Dr. Wikas's opinions on other elements of a medical malpractice cause of action, namely the deviation from the standard of care. But, given the absence of reliable and admissible evidence of causation, the Appellant's medical malpractice claim fails. Causation is obviously a critical and indispensable element of the cause of action. Thus, the trial court necessarily focused on the evidence of causation, and for at least three different and independent reasons, the court concluded that Dr. Wikas had not offered admissible and reliable opinions on causation. Given the Appellant's lack of another causation expert, that failure required the exclusion of Dr. Wikas's trial testimony. The trial court did not abuse its discretion in rendering those evidentiary rulings on causation.

III. The trial court correctly ruled that the Respondents were entitled to judgment as a matter of law once the causation testimony of the Appellant's expert witness was excluded.

As her final issue on appeal, the Appellant contends that the trial court erred in entering an order granting summary judgment for the Respondents. However, for the reasons discussed above, in the absence of expert medical evidence establishing causation, the Appellant could not prevail in this case as a matter of law. Once the causation testimony of Dr. Wikas was excluded, and given that the Appellant did not present any alternative witness to establish causation, the trial court correctly granted summary judgment.

The exclusion of Dr. Wikas's causation testimony occurred pre-trial based on rulings in limine. The trial court was willing to allow the Appellant to proceed with the trial and then address the causation issue at the directed verdict stage. However, as the hearing transcript shows, the Appellant made the choice not to proceed forward to trial and rather looked for the trial court to grant judgment to the Respondents to allow her to proceed with this appeal. (Tr. 60). The Appellant thus consented to the procedure that was followed, in particular, the trial court's entry of summary judgment rather than waiting until the directed verdict stage.

IV. The trial court correctly ruled that Dr. Schield Wikas's expert testimony on causation demonstrated that the injuries sustained by the Appellant were not legally foreseeable, which provides an additional basis for affirming the summary judgment for the Respondents.

As discussed above, the trial court alternatively found that Dr. Wikas's testimony on causation demonstrated that the injuries sustained by the Appellant were not legally foreseeable, resulting in no liability. (Order, p. 13). That is supported by the record and provides an additional basis for upholding the summary judgment.

Under South Carolina law, proximate cause requires evidence of causation in fact and legal cause. *McKnight v. South Carolina Department of Corrections*, 385 S.C. 380, 684 S.E.2d 566, 569 (Ct. App. 2009). "[L]egal cause is proved by establishing foreseeability." *Id*. "Conduct is the proximate cause of an injury if that injury is within the scope of reasonably foreseeable risks of the conduct." *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236, 246 (Ct. App. 2008). "A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's act." *Id*.

In *Stone v. Bethea*, 251 S.C. 157, 161 S.E.2d 171 (1968), the Supreme Court explained that "[t]he law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability. One is not charged with foreseeing that which is *unpredictable or that which could not be expected to happen*." 161 S.E.2d at 173. (Emphasis added). This Court adopted the same analysis in *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989): "Foreseeability is to be judged from the perspective of the defendant at the time of the negligent act, not after the injury has occurred." 387 S.E.2d at 717. "Where the injury complained of is not reasonably foreseeable there is no liability." *Id*. *See also, McKenzie v. Leeke*, 292 S.C. 568, 357 S.E.2d 721, 722 (Ct. App. 1987) (Court found the shooting of an inmate was not "reasonably foreseeable as a matter of law"); *Hubbard v. Taylor*, 339 S.C. 582, 529 S.E.2d 549 (Ct. App. 2000) (Court found that leaving antifreeze in an unlocked car where it was accessed and drunk by a mentally unstable resident at a nursing home was "not reasonably foreseeable" as a matter of law); *Eadie v. Krause*, 381 S.C. 55, 671 S.E.2d 389 (Ct. App. 2008) (in legal malpractice case, it was not "reasonably foreseeable" as a matter of law for counsel to recognize that pursuit of a workers' compensation claim in South Carolina constituted a binding election of remedies under Tennessee law thereby barring a subsequent workers' compensation claim in that state).

The leading case on foreseeability is *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978), in which the Supreme Court found that a boat mechanic's repair of a steering cable by splicing was not reasonably foreseeable to the boat manufacturer. The Supreme Court explained that "[t]he standard by which foreseeability is determined is that of looking to the natural and probable consequences of the complained of act." 242 S.E.2d at 675. Importantly, "[t]he actor cannot be charged with that which is unpredictable or that which could not be

expected to happen." 242 S.E.2d at 676. "In determining whether a consequence is one that is natural and probable, the actor's conduct must be viewed in the light of the attendant circumstances." *Id*. Similarly, the Supreme Court explained that "[t]he actor's conduct may only be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court *highly extraordinary* that it should have brought about the harm." 242 S.E.2d at 677. (Emphasis added). The Supreme Court ultimately focused on what it described as "the highly extraordinary character of [the boat mechanic's] actions" in finding the absence of foreseeability. *Id*.

Thus, in analyzing the issue of foreseeability, courts focus on whether the resulting harm would occur "in the ordinary and normal course of events" as opposed to falling "within the category of the unusual or extraordinary." *Nelson v. Piggly Wiggly, Inc.*, 390 S.C. 382, 701 S.E.2d 776, 782 (Ct. App. 2010). In *Wickersham v. Ford Motor Co*., 432 S.C. 384, 853 S.E.2d 329 (2020), the Supreme Court recently observed that "[i]n causation, as in other contexts, 'proximate' is the opposite of 'remote.'" 853 S.E.2d at 332, *citing Stone*, 161 S.E.2d at 173. Causation cannot be remote or based on mere possibilities. *Nguyen v. Uniflex Corp.*, 312 S.C. 417, 440 S.E.2d 887, 889 (Ct. App. 1993) ("causation … must be based on probabilities not mere possibilities"). Thus, when an occurrence is remote or unusual or extraordinary or unprecedented, then it is *not reasonably foreseeable* in contemplation of the law and does not satisfy the requirement of proximate cause.

That is precisely the circumstances in this case, according to Dr. Wikas. He testified as follows:

> Q. And you would agree that injecting 1 cc of 3.3 milligrams of Kenalog, it would not be foreseeable that that's going to cause the depression that Tara Gurry has, correct?
>
> A. Yes.

Q. That would not be a natural or probable consequence of injecting that amount of steroid into a scar, correct?

A. Correct.

Q. It would be highly unusual, would it not?

A. Yes.

Q. Very abnormal, correct?

A. Correct.

(Wikas Trial Dep., p. 65). Later, in his own words, Dr. Wikas confirmed that the injuries sustained by the Appellant were a "very rare event." (Wikas Trial Dep., p. 103).

In sum, even if Dr. Wikas's causation testimony would have been admitted, the same result would have occurred – the Respondents would be entitled to judgment as a matter of law because the Appellant cannot prove legal causation. Dr. Wikas makes it clear that what occurred to the Appellant is not legally foreseeable. It is precisely one of those occurrences that fall "within the category of the unusual or extraordinary." *Nelson*, 701 S.E.2d at 782. To again quote Dr. Wikas, it was a "very rare event." (Wikas Trial Dep., p. 103). But a "very rare event" or extraordinary occurrence is not actionable in the absence of legal causation. In short, the summary judgment in favor of the Respondents was correctly entered on this additional basis and should be affirmed on appeal.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents Myrtle Beach Dermatology, LLC, Shannon Hussey, and Richard Hussey, M.D. respectfully request that the Court affirm the exclusion of Dr. Wikas's expert testimony as ruled by Circuit Court Judge Benjamin H. Culberson, as well as the entry of summary judgment in the Respondents' favor.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

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March 7, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2021-000838
Case No. 2018-CP-26-5438

Tara Gurry,..... Appellant,

v.

Myrtle Beach Dermatology, LLC, Shannon Hussey,
and Richard Hussey, M.D.,..... Respondents.

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, the undersigned employee of Lindemann & Davis, P.A., counsel for the Respondents Myrtle Beach Dermatology, LLC, Shannon Hussey, and Richard Hussey, M.D., does hereby certify that service of the **Initial Brief of Respondents** and **Respondents' Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record via email only and upon the *pro se* Appellant via email and by a placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 7th day of March 2022:

Via Email and U.S. Mail

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March 7, 2022

Via Email Only
The Honorable Jenny Abbott Kitchings
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South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Tara Gurry v. Myrtle Beach Dermatology, LLC, Shannon Hussey, and Richard Hussey, M.D.
Appellate Case Number: 2021-000838
Civil Action Number: 2018-CP-26-5438
Claim Number: CB188769M
Our File Number: 22.20498

Dear Ms. Kitchings:

In accordance with Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, please find enclosed for filing by email only the **Initial Brief of Respondents** and **Respondents' Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. In accordance with Section (d)(1) of this same order, I am hereby serving copies on the *pro se* Appellant by email and U.S. Mail and upon all counsel of record by email only.

If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosures)

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