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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from the York County Court of Common Pleas
for the Sixteenth Judicial Circuit

Honorable William A. McKinnon, Presiding Judge

Appellate Case No. 2021-000907
Circuit Case No. 2019-CP-46-01736

Thomas Lovelace & Carol Lovelace,

Respondents,

v.

The Center for Oral and Maxillofacial
Surgery, P.A., & Mark Billman, DMD, MD,

Appellants.

FINAL INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court commit reversible error when it refused to notify the jury that information had been redacted from a doctor's medical records, making it appear as if the doctor had not engaged in a thorough examination of the patient?

II. Did the trial court commit reversible error when it charged the jury that a later treating physician's negligence is foreseeable, when the instruction is not supported by the facts of this case and, when applied to this case, is an incorrect statement of the law?

STATEMENT OF THE CASE

In this medical malpractice case, Appellee Thomas Lovelace (“Mr. Lovelace”)¹ claims that Appellant Dr. Mark Billman, DMD, MD (“Dr. Billman”) and his practice, The Center for Oral and Maxillofacial Surgery, P.A. (sometimes collectively referred to as “Appellants”), were negligent in their treatment of a lesion that developed on the back of his tongue near one of his wisdom teeth.

A. Dr. Renner’s examination of the lesion on Mr. Lovelace’s tongue.

Dr. Robert Renner (“Dr. Renner”) is one of Mr. Lovelace’s general dentists, and during an examination of Mr. Lovelace’s mouth in April of 2015, Mr. Lovelace told Dr. Renner that he had bit his tongue and the sore had not healed. (R. pp. 212-13; R. p. 34, lines 11 – 22; R. p. 118, lines 4 – 7). The lesion was next to Mr. Lovelace’s lower right wisdom tooth – tooth number 32 – which was inclined toward Mr. Lovelace’s tongue and had a sharp point on it. (R. p. 36, lines 2 – 6). Dr. Renner thought that the lesion on Mr. Lovelace’s tongue looked suspicious for cancer, but he was not particularly worried about it. He simply believed it needed further evaluation and follow up. (R. p. 35, lines 2 – 12). Although he believed the lesion might be cancerous, and even though he is trained to identify suspicious lesions in his patients’ mouths and tongues, Dr. Renner did not tell Mr. Lovelace that the lesion could be cancer because he did not want Mr. Lovelace to be worried about the sore. (R. p. 37, line 9 – p. 38, line 2; R. p. 44, lines 2 – 10). Instead, Dr. Renner referred Mr. Lovelace to Dr. Billman to evaluate the lesion. But in his referral to Dr. Billman, Dr. Renner did not mention his suspicion about cancer. Nor did he tell Mr. Lovelace or Dr. Billman that a biopsy should be performed. (R. p. 214; R. p. 38, lines 7 – 15).

B. Dr. Billman’s examination of the lesion.

¹ Mr. Lovelace’s wife, Carol Lovelace, asserted a claim for loss of consortium, but the jury did not award her any damages for that claim. (R. p. 171, lines 8 – 20). Mrs. Lovelace has not filed an appeal.

In May of 2015, Mr. Lovelace met with Dr. Billman, who performed an approximately 20-minute examination of the lesion on Mr. Lovelace's tongue. (R. p. 77, lines 5 – 15). Dr. Billman determined that it was most likely that the lesion was caused by Mr. Lovelace's inclined and sharp wisdom tooth adjacent to the lesion, so he told Mr. Lovelace that he could have that tooth either smoothed or extracted. (R. p. 123, lines 2 – 13). Mr. Lovelace preferred to have the tooth smoothed first and to then try an extraction, if smoothing the tooth did not resolve the lesion, which is the plan that Dr. Billman told him they would follow. (R. p. 78, line 21 – p. 79, line 4).

Mr. Lovelace does not remember whether Dr. Billman told him that the lesion could possibly be cancerous. (R. p. 80, line 18 – p. 83, line 2). But Dr. Billman is certain that he told Mr. Lovelace about the possibility of cancer, although he would not have made a big deal about it; he simply would have told him that they would not do a biopsy to determine whether the lesion might be cancer until they had ruled out a traumatic cause for the ulcer, i.e., the sharp and inclined wisdom tooth. (R. p. 80, line 18 – p. 83, line 2; R. p. 124, line 13 – p. 125, line 8).

C. Dr. Billman's records of his May 2015 examination of Mr. Lovelace.

Dr. Billman testified at trial that he was certain he discussed with Mr. Lovelace the possibility that the lesion might be cancerous. (R. p. 124, line 13 – p. 125, line 8). Dr. Billman did not note in his records that the lesion might be cancerous, however, because his records are for his practice only and his diagnosis and treatment plan here was very common, making such a note in his records unnecessary. (R. p. 122, lines 1 – 12).

But because Mr. Lovelace could not state definitively whether the topic of cancer came up during his May 2015 examination, Mr. Lovelace's counsel used this explainable absence in Dr. Billman's records to argue that Dr. Billman did not tell Mr. Lovelace that the lesion could possibly be cancerous. In fact, because Mr. Lovelace's experts both agreed that Dr. Billman's initial

diagnosis and treatment plan did not violate the standard of care (R. p. 60, line 23 – p. 61, line 4; R. p. 68, line 24 – p. 69, line 5), Mr. Lovelace’s negligence claim rested primarily on the allegation that Dr. Billman failed to tell Mr. Lovelace that the lesion might be cancerous, which in turn made the absence of the word “cancer” in Dr. Billman’s May 2015 records the key piece of evidence for Mr. Lovelace’s case.

Accordingly, Mr. Lovelace’s counsel repeatedly argued at trial, both in their opening statements and in their closing arguments, that Dr. Billman’s record keeping was poor, telling the jury to “look carefully at Doctor Billman’s records” because they are missing things that allegedly should be there. (R. p. 32, lines 13 – 25; R. p. 33, lines 3 – 7). One of plaintiffs’ experts testified that the records lacked any evidence of consideration of any other potential causes for the lesion on Mr. Lovelace’s tongue because “that’s all [Dr. Billman] wrote down.” (R. p. 66, lines 6 – 14). Mr. Lovelace’s counsel made similar arguments throughout the trial. (R. p. 26, lines 1 – 8; R. p. 27, lines 20 – 25; R. p. 28, lines 3 – 8; R. p. 30, line 19 – p. 31, line 1; R. p. 155, line 16; R. p. 157, lines 9 – 17; R. p. 157, line 20 – R. p. 158, line 6; R. p. 168, lines 2 – 3; R. p. 169, lines 15 – 20).

At trial, the jury was given a redacted version of Dr. Billman’s records with significant areas of Dr. Billman’s notes whited out because the trial court had previously ruled that evidence of Mr. Lovelace’s history of smoking and drinking was not admissible. (R. p. 178; R. p. 25, lines 10 – 14). After it became clear that Mr. Lovelace was going to make the allegedly missing items from Dr. Billman’s records the centerpiece of his case, Dr. Billman asked the trial court to admit a version of Dr. Billman’s records that noted where things had been redacted, so the jury would not infer that Dr. Billman did not do a complete examination of Mr. Lovelace. (R. p. 90, line 10 – p. 91, line 7). The trial court denied that request, stating that it was “not an important point” and

having black redactions on the document would call attention to the removed portions of the files. (R. p. 92, lines 21 – 23; R. p. 96, lines 7 – 12).

D. The undisputed negligence of Dr. Renner and his colleagues, Dr. Greiner and Dr. Perlow.

Dr. Billman did not have the tools necessary to smooth or recontour the sharp point on the tooth, so he sent Mr. Lovelace back to Dr. Renner, who would manage the decision about whether the tooth would be extracted. (R. p. 216; R. p. 45, lines 22 – 24; R. p. 59, lines 6 – 10). Mr. Lovelace did not return to Dr. Renner’s practice for this procedure for several months, waiting until November of 2015 to have his tooth smoothed. (R. p. 212; R. p. 83, lines 8 – 12).

One of Dr. Renner’s colleagues at his practice, Dr. Greiner, is the one who actually performed the smoothing of the tooth. (R. pp. 212-13; R. p. 83, lines 8 – 12). There is nothing in Dr. Renner’s or Dr. Greiner’s records showing that Dr. Greiner told Mr. Lovelace he needed to come back for a follow up visit after the tooth was smoothed, which is something that Dr. Renner would have made sure was done. (R. p. 39, line 11 – p. 40, line 9). Dr. Renner would have expected Dr. Greiner to tell Mr. Lovelace to come back in to look at the spot on Mr. Lovelace’s tongue, which Dr. Greiner called “angry” or “ugly.” (R. p. 46, lines 4 – 21). But Dr. Renner cannot say whether that actually happened here. (R. p. 48, lines 15 – 22). In fact, Mr. Lovelace does not remember Dr. Greiner telling him that the lesion on his tongue looked bad. (R. p. 84, lines 17 – 22). Dr. Renner’s practice did not set up a return appointment with Mr. Lovelace at that time. (R. p. 48, line 23 – p. 49, line 2). Additionally, the records for the November 2015 visit say that Dr. Greiner examined Mr. Lovelace’s entire mouth and did not find anything significant, but Dr. Renner admits that that was not a correct statement in the records and that Dr. Greiner made a mistake in documenting his visit. (R. p. 47, line 21 – p. 48, line 1; R. p. 50, lines 17 – 24). Mr. Lovelace confirmed that, after Dr. Greiner smoothed Mr. Lovelace’s teeth, Dr. Greiner did not tell

him to return for an examination or to go see Dr. Billman. (R. p. 71, lines 20 – 25; R. p. 72, line 20 – p. 73, line 5).

Mr. Lovelace did not return to see anyone about the lesion until the summer of 2016 (i.e., over a year after he first saw Dr. Billman in May of 2015), after the lesion had become painful. Mr. Lovelace did not go back to Dr. Billman, however. Instead, he went to Dr. Renner’s practice and asked another colleague of Dr. Renner, Dr. Perlow, for a prescription of an antibiotic rinse. Dr. Perlow gave Mr. Lovelace the prescription without even asking to see the smoothed tooth or the lesion. (R. p. 41, line 9 – p. 42, line 7). Dr. Perlow simply met Mr. Lovelace at the reception desk and gave him the prescription he was asking for. (R. p. 74, line 20 – p. 76, line 1). Like her colleague Dr. Greiner, Dr. Perlow also did not tell Mr. Lovelace that he should return to see them for further examination. (R. p. 85, lines 4 – 8).

Mr. Lovelace’s own experts were critical of these failures by Dr. Greiner and Dr. Perlow. (R. p. 70, lines 4 – 7). One of plaintiff’s experts even testified that Dr. Renner and Dr. Greiner were “lazy” in their practice and engaged in a “very disappointing breach of the standard of care.” (R. p. 62, lines 1 – 7). He was also critical of Dr. Perlow for prescribing an antibiotic rinse without examining Mr. Lovelace. (R. p. 62, lines 15 – 20).

When Mr. Lovelace finally visited Dr. Renner in August of 2016 about the now painful sore on his tongue, Dr. Renner referred him to Dr. Billman to have the tooth extracted. (R. p. 43, lines 18 – 20; R. p. 217). Dr. Billman performed the extraction and also had a biopsy of the lesion done, which revealed that the lesion was unfortunately cancerous.

Despite the repeated negligence of Dr. Renner, Dr. Greiner, and Dr. Perlow, and even though their treatment of Mr. Lovelace was ongoing and occurred in conjunction with Dr. Billman’s treatment, the trial court insisted on giving an instruction to the jury that:

[T]he intervening negligence of a third party person will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care. The negligence of a later treating doctor is foreseeable. Further, even if an intervening act is not foreseeable, the first wrongdoer is nevertheless still liable if the intervening act is a natural and probable consequence of the original actor's conduct.”

(R. p. 141, line 23 – p. 142, line 10). Defendants objected to this portion of the charge. (R. p. 127, line 8 – p. 128, line 6; R. p. 154, lines 20 – 22).

E. The jury's verdict.

The jury found that Dr. Billman was negligent and that his negligence was the proximate cause of Mr. Lovelace's injuries. (R. p. 170, line 23 – p. 171, line 1). They also found that Mr. Lovelace was negligent and that his negligence was a proximate cause of his injuries, assigning 40% of the blame to Mr. Lovelace and 60% to Dr. Billman. (R. p. 171, lines 1 – 6). The jury awarded Mr. Lovelace \$2 million in damages. (R. p. 171, lines 8 – 12). This appeal followed.

STANDARD OF REVIEW

The trial court's decision to admit or exclude evidence is subject to an "abuse of discretion" standard of review. *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011). An abuse of discretion occurs "when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

This Court reviews an appeal of an issue regarding jury instructions under an abuse of discretion standard, and such an abuse occurs "when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

ARGUMENT

I. The trial court erred when it failed to make clear to the jury that information had been redacted from Dr. Billman's records.

The trial court erroneously admitted Dr. Billman's records with misleading redactions that improperly supported Mr. Lovelace's argument that Dr. Billman did not do a full examination of the lesion on Mr. Lovelace's tongue. *See* Rule 403, SCRE (providing for the exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"). Because the redactions were not obvious, making it look like there were blanks in Dr. Billman's records, the jury could have easily concluded that Dr. Billman did not even complete basic portions of his examination that were "required" by his own record. (*See* R. p. 178).

Prior to trial, the trial court ruled that evidence of Mr. Lovelace's history of smoking and drinking was not admissible, and in Dr. Billman's "Examination Form" there is a line for "Pertinent FMH [family history] / SHX [social history]" on which Dr. Billman wrote about Mr. Lovelace's 12-year use of tobacco, among other things. (*See* R. p. 226). In Defendant's Trial Exhibit No. 2, that information is whited out so effectively as to leave no indication that any information was removed, leaving a blank after a line that begins with the word "Pertinent." (*See* R. p. 178]). There are only a handful of lines on the Examination Form, and the jury was urged by Mr. Lovelace's counsel to carefully inspect Dr. Billman's records and would have seen *no* information contained on the line for "[p]ertinent" family and social history, implying that Dr. Billman simply skipped that part of his examination of Mr. Lovelace. The removal of that information and the resulting blank in the records made it look like Dr. Billman's examination was incomplete or hurried, which is exactly what Mr. Lovelace's counsel argued at trial. In other words, the way the records were redacted played right into the incorrect picture that Mr. Lovelace's

counsel attempted to paint of Dr. Billman: a rushed doctor trying to get through as many patients as he could.

Although the redaction of irrelevant information from trial exhibits is not *per se* erroneous, when redactions are misleading, they are improper. A trial court's redactions of a document cannot create the risk of misinterpretation of the remaining text of the document. For example, this Court has held that a special master improperly admitted into evidence redacted letters containing alleged admissions of liability, when the redactions removed the context necessary to see that the purported admissions were made in connection with an effort to compromise a disputed claim, "result[ing] in a false interpretation of statements taken out of context." *Fesmire v. Digh*, 385 S.C. 296, 305-06, 683 S.E.2d 803, 808 (Ct. App. 2009).

In the present case, the redactions of Dr. Billman's records similarly created the false impression that Dr. Billman did not do a complete examination of Mr. Lovelace, thereby improperly supporting the main theme of Mr. Lovelace's case at trial. During closing arguments, Mr. Lovelace's counsel argued:

You have to document your chart. That's what the standard of care requires and the reason you document your chart is not just to have a nice pristine chart that nobody sees. This chart is like a checklist when you document it. You document what you did so you know that you did it. . . . Documenting is important for patient care and patient safety.

(R. p. 156, lines 10 – 12). They then argued:

And he [Dr. Billman] didn't document in his chart. Doctor Billman didn't document in his chart these things that he should have done. ***There's nothing there.*** You know, a document is a checklist to make sure that you've done something that you said that you are going to do.

(R. p. 162, lines 9 – 14 [emphasis added]). When the jury then took the close look at Dr. Billman's records that Mr. Lovelace's counsel asked them to do, they found blank portions of the records that Dr. Billman had actually completed, and based on what they had heard during closing

arguments, could have easily inferred that Dr. Billman did not do a complete examination of Mr. Lovelace. If the trial court had allowed the jury to know that the redactions had occurred, it would have been much less likely that the jury would have made such an inference.

The trial court refused to notify the jury about the redactions because, according to the trial court, it would draw too much attention to the redacted portions of the records. (R. p. 96, lines 7 – 12). But the trial court gave a curative charge to the jury that instructed them not to infer anything based on redactions. (R. p. 135, lines 7 – 15 [“During the presentation of the case you may have noticed that occasionally parts of . . . documents that were presented have been redacted Please do not speculate as to what may or may not have been contained in these portions of the documents . . . and you are not to hold those portions against either party.”]).

Mr. Lovelace’s counsel argued at trial that Dr. Billman had waived any objection he had to the way his records were redacted because it was Dr. Billman’s own counsel who made the redactions. But as the trial court properly held, there was no such waiver because Dr. Billman objected to the redactions at the beginning of the trial. (R. p. 96, lines 2 – 7). Moreover, it was not until after the redacted documents were presented to the trial court that it became clear Mr. Lovelace’s attorneys and experts would make allegedly missing items from Dr. Billman’s records the centerpiece of their case. (R. p. 64, lines 10 – 14 [discussion regarding the admission of the redacted exhibits before Mr. Lovelace’s opening statement even occurred]).

Accordingly, the trial court committed reversible error when it refused to indicate to the jury where redactions had been made in Dr. Billman’s records.

II. The trial court should not have instructed the jury that a later treating physician’s negligence is foreseeable.

The trial court improperly instructed the jury that “[t]he negligence of a later treating doctor is foreseeable” because that instruction was not applicable to the facts of this case and is contrary

to South Carolina law allowing a defendant to argue that some other tortfeasor is responsible for the plaintiff's alleged injuries. (R. p. 142, lines 5 – 6).

“A trial court must charge the current and correct law. . . . [J]ury instructions should be confined to issues made by the pleadings and supported by the evidence.” *Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 197–98, 781 S.E.2d 534, 542 (2015). “A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial.” *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008).

The facts established at trial do not support the charge the trial court gave because Dr. Renner, Dr. Greiner, and Dr. Perlow were not “later treating physicians.” This Court has held that a trial court should give this instruction to a jury when the negligence of another doctor occurs *after* the defendant's alleged negligence and contributes to the injury caused by the defendant's negligence. *Howard v. State Farm Mut. Auto Ins. Co.*, 316 S.C. 445, 450, 450 S.E.2d 582, 585 (1994) (holding that the trial court properly gave the subject instruction to the jury when there was evidence that the plaintiff's injury was aggravated by a later treating chiropractor); *Fairchild v. South Carolina Dept. of Transp.*, 398 S.C. 90, 103-04, 727 S.E.2d 407, 413-14 (2012) (holding that the trial court erred in refusing to instruct the jury on this principle when the defendant argued at trial that some of the plaintiff's symptoms were caused by a later treating physician who overprescribed pain medication to the plaintiff); *Payton v. Kearse*, 319 S.C. 188, 211, 460 S.E.2d 220, 233-34 (Ct. App. 1995) (defendant argued that some of the plaintiff's injuries were caused by an improper diagnostic procedure performed by a neurologist to whom the defendant had referred the plaintiff), *reversed on other grounds by* 329 S.C. 51, 495 S.E.2d 205 (1998); *Graham v. Whitaker*, 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984) (plaintiff's injuries were aggravated by the

deterioration of a pin placed in the plaintiff's hip in an attempt to correct injuries caused by the defendant's alleged negligence). In other words, this principle applies only when the defendant was the cause of the plaintiff's injuries and the defendant is arguing that a *later* treating physician aggravated the injury.

Dr. Renner's treatment of Mr. Lovelace began *before* Dr. Billman examined the lesion at issue and continued after that examination, with Dr. Renner's colleagues Dr. Greiner and Dr. Perlow providing additional treatment. In fact, one of plaintiff's experts agreed that Dr. Renner's office was responsible for managing the decisions about smoothing or extracting the tooth after Dr. Billman made his diagnosis. (R. p. 59, lines 6 – 10). In other words, Mr. Lovelace was not seen by a series of doctors and dentists, with Dr. Billman being the first treating physician. Rather, Mr. Lovelace was seen by a team who were working together to treat the lesion in his mouth. Accordingly, the concept of a "later treating physician" simply does not apply here.

Moreover, the charge as applied in this case is contrary to the law. South Carolina's Contribution Among Tortfeasors Act expressly states that "[a] defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." S.C. Code Ann. § 15-38-15(D). When the trial court instructed the jury that "[t]he negligence of a later treating doctor is foreseeable," the trial court effectively stripped Dr. Billman of his statutory right to assert that a nonparty tortfeasor contributed to or caused Plaintiff's injury. Accordingly, the trial court committed reversible error when it instructed the jury that the negligence of a "later treating physician" is foreseeable.

CONCLUSION

For the foregoing reasons, Appellants ask this Honorable Court to reverse the judgment entered by the trial court on the jury's verdict and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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