

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35543

JAMES D. MACDONALD AND DEBBIE MACDONALD,

APPELLANTS/PLAINTIFFS,

v.

CITY HOSPITAL, INC. AND SAYEED AHMED, M.D.,

APPELLEES/DEFENDANTS.

**FROM THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 07-C-150**

**REPLY BRIEF OF
APPELLEE CITY HOSPITAL, INC.**

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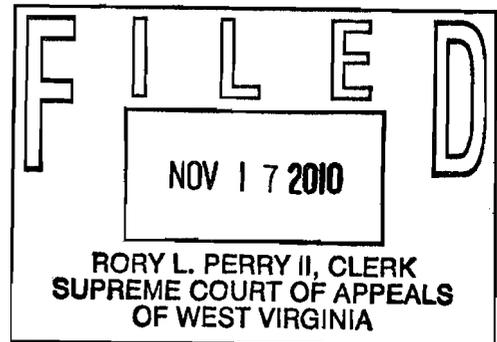


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I. INTRODUCTION

City Hospital, Inc. (“City Hospital”), Defendant below and Appellee, files this reply brief in support of its cross appeal of the rulings of the Circuit Court of Berkeley County, which committed reversible error by denying City Hospital’s Motion for Summary Judgment, Motion for Judgment as a Matter of Law, and Motion for a New Trial because Plaintiffs did not prove a breach of the standard of care causing Mr. MacDonald’s injury. City Hospital also asserts the Circuit Court erred when it denied the Defendants’ Motion to Alter or Amend Judgment and applied the \$500,000 limitation to Plaintiffs’ noneconomic damages award, instead of the \$250,000 limitation, by order dated August 20, 2009, and joins with Dr. Sayeed Ahmed (“Dr. Ahmed”) in urging reversal of the Circuit Court’s order.

II. DISCUSSION OF LAW

A. **Because Appellants Failed to Establish the Essential Elements of a *Prima Facie* Case of Negligence Against City Hospital, the Circuit Court Erred When it Denied City Hospital’s Motion for Summary Judgment, Motion for Judgment as a Matter of Law and Motion for New Trial.**

Without a single citation to the record, Appellants claim there was sufficient evidence of causation against City Hospital because the jury and Circuit Court said so. In other words, because the jury found City Hospital liable, there must have been evidence of causation. This is nothing more than an “ends justify the means (*exitus acta probat*)” argument, which does nothing but rest on the erroneous rulings of the Circuit Court to justify Appellants’ failure to establish the essential elements of a medical negligence action against City Hospital.

Appellants do not dispute that an essential element of a plaintiff’s burden of proof in a medical professional liability action is that an expert must testify that the health care provider’s deviation from the standard of care was a proximate cause of the plaintiff’s injury. *See* W. Va. Code § 55-7B-3(a)(2); *Short v. Appalachian OH-9, Inc.*, 203 W. Va. 246, 507 S.E.2d

124, Syl. Pt. 4 (1998) (plaintiff must not only prove negligence but must also show that such negligence was the proximate cause of injury); *Farley v. Shook*, 218 W. Va. 680, 685, 629 S.E.2d 739, 744 (2006) (“[E]xpert testimony is required for [plaintiffs] to meet their burden of proving negligence and lack of skill on the part of the physician and the causal connection of that negligence to their injuries.”). *See also Adams v. Sparacio*, 156 W. Va. 678, 196 S.E.2d 647, Syl. Pt. 1 (1973); *Louk v. Isuzu Motors*, 198 W. Va. 250, 262, 479 S.E.2d 911, 923 (1996); *Tolliver v. Shumate*, 151 W. Va. 105, 150 S.E.2d 579, Syl. Pt. 2 (1966); *Taylor v. Cabell Huntington Hosp., Inc.*, 208 W. Va. 128, 538 S.E.2d 719, Syl. Pt. 1 (2000) (per curiam).

Proximate cause has been defined by this Court as “the last negligent act contributing to the injury and without which the injury would not have occurred” and as “that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred.” *Spencer v. McClure*, 217 W. Va. 442, 618 S.E.2d 451, Syl. Pt. 3, 4 (2005) (per curiam). *See also Mays v. Chang*, 213 W. Va. 220, 579 S.E.2d 561, Syl. Pt. 1 (2003) (per curiam).

Appellants’ theory at trial was that if City Hospital’s pharmacy had warned Dr. Ahmed about the risks of Lipitor, he would not have prescribed it, or would have stopped it earlier. However, Dr. Ahmed testified at trial that: 1) he understood there was a potential risk that Mr. MacDonald could develop rhabdomyolysis while taking Lipitor in combination with the other drugs he had ordered for Mr. MacDonald and that 2) in his medical judgment, the benefits of the drug regimen he ordered for Mr. MacDonald outweighed such risk. I Tr., Nov. 21, 2008, at 79, 82-105; II Tr., Nov. 21, 2008, at 10-11, 22-23; I Tr., Nov. 21, 2008, at 75-77. Appellants ask this Court to speculate that the jury did not believe this unequivocal, unchallenged testimony.

Appellant's Reply Br., pp. 36-37. This speculation cannot take the place of an evidentiary basis supporting a conclusion that Dr. Ahmed was not being truthful.

“Juries will not be permitted to base their findings upon conjecture or speculation.” *Addair v. Motors Ins. Corp.*, 157 W. Va. 1013, 207 S.E.2d 163, Syl. Pt. 4 (1974). “[I]t is the province of the jury to resolve conflicting inferences from circumstantial evidence . . . it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.” *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60 n.10, 459 S.E.2d 329, 337 n.10 (1995) (citation omitted). *See also Tolley v. ACF Industries, Inc.*, 212 W. Va. 548, 558, 575 S.E.2d 158, 168 (2002) (per curiam) (“[T]he law is clear that a mere possibility of causation is not sufficient to allow a reasonable jury to find causation.”); *Lewis v. St. Paul Fire and Marine Ins. Co.*, 155 W. Va. 178, 182 S.E.2d 44, Syl. Pt. 1 (1971) (“The verdict of a jury in favor of a plaintiff, based on testimony which does nothing more than furnish grounds for conjecture or speculation as to the proper verdict to be returned, cannot be justified, and will be set aside by this Court.”).¹

The jury's conclusion is unsupported by and in fact simply contrary to the evidence at trial.² Dr. Ahmed's testimony proved he weighed the risks associated with Lipitor—including rhabdomyolysis—and concluded they were outweighed by its benefit to Mr. MacDonald. Dr. Ahmed monitored Mr. MacDonald and once the laboratory values indicated

¹ With respect to a plaintiff's burden of proof at the summary judgment stage, *see Williams*, 194 W. Va. at 61 n.14, 459 S.E.2d at 338 n.14 (“...a nonmoving party cannot avoid summary judgment merely by asserting that the moving party is lying. Rather, Rule 56 requires a nonmoving party to produce specific facts that cast doubt on a moving party's claims or raise significant issues of credibility...Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuition, or rumors.”).

² Even Appellants' own expert knew better than to engage in speculation about how a warning from the City Hospital pharmacy would have changed Dr. Ahmed's actions in this case. II Tr. Nov. 19, 2008, at 109; II Tr., Nov. 19, 2008, at 11.

muscle breakdown, Dr. Ahmed, in consultation with other medical specialists, ordered the Lipitor be discontinued without any input from the City Hospital pharmacy.

Question by Mr. Brooks: And when the CK came back at 18,870 what decision was made with regard to the Lipitor?

Answer by Dr. Ahmed: The decision made to discontinue the Lipitor because—

Question: At any time prior to that, was there any indication that the Lipitor needed to be discontinued?

Answer: None at all. As I've explained to you, there were 10 conditions that were needed. Not one, two, three, four, five, six—10 conditions. Out of those 10 conditions, six of them could be fatal conditions as opposed to only one condition that is rhabdomyolysis.

Question: And when—

Answer: And that is not a fatal condition...

Question: And then there were —so on November 9th or 10th, the risk benefit analysis changed; didn't it?

Answer: Definitely sir.

Question: And when the risk benefit analysis changed, you and your consultants took action to discontinue the Lipitor?

Answer: Yes. When the analysis changed, we need to do some action.

II Tr. Nov. 21, 2008, at 10-11.

Dr. Ahmed exercised medical judgment with respect to the use of Lipitor. It cannot be disputed that he was aware Lipitor and Diflucan could combine to cause rhabdomyolysis; he did not need to be informed of this fact by the City Hospital pharmacy. A failure to provide a warning creates no liability where it will be of no avail, where it will be impractical, or where the lack thereof does not contribute to the accident. 65 C.J.S. *Negligence* § 76 (2010), citing *Stedman v. Spiros*, 23 Ill. App. 2d 69, 161 N.E.2d 590 (1959); *Heston v. Jefferson Bldg. Corp.*, 332 Ill. App. 585, 76 N.E.2d 248 (1947). See also *Gill v. Foster*, 157 Ill. 2d 304, 626 N.E.2d 190 (1993) (nurse's failure to inform a treating physician of patient's

complaint of chest pain while being discharged from the hospital did not proximately cause delay in correct diagnosis of patient's condition because the physician was already aware of patient's complaints of chest pain).

Moreover, there was no credible evidence from which a reasonable jury could have found that even if City Hospital informed Dr. Ahmed of potential risks associated with the drug regimen prescribed for Mr. MacDonald, it would have changed his decision. Plainly, Dr. Ahmed was aware that Lipitor and Diflucan might interact to cause rhabdomyolysis, but, despite this risk, continued these and other drugs based on his risk-benefit analysis and medical judgment. Consequently, there is no evidentiary basis for the jury or the Circuit Court to have reached a conclusion that any warning by the City Hospital pharmacy to Dr. Ahmed about the potential risks associated with the drug regimen he prescribed would have changed his planned course of drug therapy for Mr. MacDonald.

Realizing the weakness of this argument, Appellants try to create an evidentiary controversy which does not exist by claiming the City Hospital pharmacy had a duty to warn Dr. Ahmed of the severity of the potential interaction between Lipitor and the other drugs he ordered for Mr. MacDonald. However, a review of the trial testimony from Appellants' own expert does not support such assertion.

Appellants' pharmacy expert, James Backes, Ph.D., repeatedly and consistently characterized the risk of rhabdomyolysis caused by Lipitor as "rare." II Tr. Nov. 18, 2008, at 41-42, 46, 62-63, 109, 123, 127. Although he testified the risk of rhabdomyolysis increased when Lipitor was combined with other drugs, Dr. Backes also testified he would not have expected Dr. Ahmed to discontinue Diflucan or Cyclosporin, despite the increased risk of rhabdomyolysis, because these drugs were necessary to treat Mr. MacDonald's pneumonia (Diflucan) and to

prevent rejection of his transplanted kidney (Cyclosporin). II Tr. Nov. 18, 2008, at 45, 92-93, 97.

Dr. Backes did not characterize any of the known potential drug interactions as “severe” in 2004 when Mr. MacDonald was treated at City Hospital. Rather, in 2008, Dr. Backes, in preparation for his deposition, used Meditech computer software to determine how the potential interactions between Lipitor and Cyclosporin would be characterized. Dr. Backes testified that in 2008 the MediTech system characterized the potential interaction between Lipitor and Cyclosporin as “severe,” but that the standard of care did not require the City Hospital pharmacy to notify Dr. Ahmed of this potential interaction since these were medications Mr. MacDonald had been taking at home. II Tr. Nov. 18, 2008, at 92, 97. Dr. Backes could not testify to a reasonable degree of medical probability that Diflucan would have been discontinued based on a warning from the City Hospital pharmacy of a potential “severe” interaction between Diflucan and Cyclosporin because Diflucan was necessary to treat Mr. MacDonald’s pneumonia and Cyclosporin was necessary to prevent rejection of his transplanted kidney. II Tr. Nov. 18, 2008, at 93. Dr. Backes did not use the 2008 Meditech system to check the potential drug to drug interaction between Lipitor and Diflucan, so he could not testify that a warning regarding the potential interaction between these two medications would have been characterized as “severe” in 2008. Nor did he attempt to re-create the warnings that would have appeared in the Meditech software in 2004. II Tr. Nov. 18, 2008, at 95.

Regardless of the severity of any potential interaction, the risk of rhabdomyolysis was still “rare.” II Tr. Nov. 18, 2008, at 41-42, 46, 62-63, 109, 123, 127. And the City Hospital pharmacy was not in a position to perform the risk-benefit analysis for each drug and each

combination of drugs necessary to treat Mr. MacDonald's various chronic and acute medical conditions. Appellants' own expert conceded as much. II Tr. Nov. 18, 2008, at 111, 118-119.

Since there was no evidence that a warning by the City Hospital pharmacy to Dr. Ahmed would have changed Mr. MacDonald's drug regimen, plaintiffs failed to demonstrate proximate cause. The Circuit Court should have granted City Hospital's motion for summary judgment or Rule 50 motions, and its failure to do so constitutes reversible error.

B. The Circuit Court Erred When it Denied City Hospital's Motion to Alter or Amend Judgment.

The Circuit Court committed reversible error when it denied the Defendants' motion to alter or amend the judgment and applied the \$500,000 limitation on noneconomic damages instead of the \$250,000 limit.

The limitation on noneconomic damages under W. Va. Code § 55-7B-8 increases from \$250,000 to \$500,000 in three limited circumstances: "(1) Wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities." W. Va. Code § 55-7B-8(b).

These circumstances simply did not exist here. This was not a wrongful death case, and there was simply no evidence supporting a finding that Mr. MacDonald suffered permanent and substantial physical deformity; loss of use of a limb; loss of a bodily organ system; or permanent physical or mental functional injury that permanently prevents him from being able to independently care for himself and perform life sustaining activities. As set forth in Dr. Ahmed's reply brief, Mr. MacDonald can walk without assistance, prepare meals, perform household chores, regularly work out at a gym, drive a car, work in a grocery store, teach school,

and go on cruises. Reply Brief of Appellee Dr. Sayeed Ahmed, M.D. at 5-6. The recitation of trial testimony proving that Mr. MacDonald is not entitled to the \$500,000 limitation has been thoroughly set forth in Dr. Ahmed's reply brief, which City Hospital, in order to avoid redundancy, incorporates and adopts by reference.

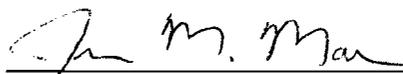
III. CONCLUSION

The evidence below, at summary judgment and at trial, failed to establish proximate cause between actions of City Hospital and Mr. MacDonald's injuries. The Circuit Court's ruling denying summary judgment and City Hospital's post trial motions should therefore be reversed.

Similarly, as to noneconomic damages, Appellants failed to prove entitlement to the increased limitation of \$500,000 under W. Va. Code § 55-7B-8, and the Circuit Court's ruling should be reversed.

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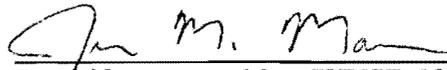
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