

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case Nos. 2008-CP-26-9047 and 2008-CP-26-9368

Sean D. Fay, as Personal Representative for the
Estate of Kelly L. Fay, Deceased, ... Respondent/Appellant,

v.

Grand Strand Regional Medical Center, LLC, d/b/a
South Strand Ambulatory Care Center, and Stephen
W. Law, D.O., Dr. Richard Young, M.D., and
Grand Strand Urology, LLP, ... Defendants,

Of whom Grand Strand Regional Medical Center,
LLC d/b/a South Strand Ambulatory Care Center is, ... Appellant/Respondent.

And Of Whom Stephen W. Law, D.O. is, ... Respondent/Appellant,

And Of Whom Dr. Richard Young, M.D., and
Grand Strand Urology, LLP, are, ... Respondents.

SUPPLEMENTAL RECORD ON APPEAL

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**SUPPLEMENTAL RECORD ON APPEAL
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Certificate of Counsel

1 consideration to doing something to relieve that pressure and
2 the urologists have different things they do and I'm not an
3 expert in that. That's just the part in which as an E.R..
4 doctor I can pick up the phone and call a urologist and say
5 I've got a kidney stone with a fever and they jump all over
6 that.

7 A white blood count, probably the least useful in that
8 you can have a high white count just from the kidney stone but
9 if it's really high, which it typically is if you've got an
10 infection, it's more evidence that you've got an infection
11 going on, so the things you need to do are a urinalysis. You
12 need to do a temperature, preferably several, and you need to
13 do a white blood count.

14 The other thing you can do, which was done in this case,
15 is a CAT scan that tells you how badly obstructed this is.

16 Q. Can I stop you right there?

17 A. Sure.

18 Q. Well, go ahead and we'll go back through the records in
19 a minute. Go ahead. I don't want to interrupt you.

20 A. The other thing that was striking about this case is
21 that she had a perfectly normal urinalysis, that is there was
22 no blood, nothing in the urine. With a stone, about ninety
23 plus percent of the time you have blood so if you have a big
24 stone sitting in the ureter and no blood, that's an indicator
25 that you've probably got a complete obstruction, that is

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Sean D. Fay, as Personal Representative for the Estate
of Kelly L. Fay, Deceased, ... Respondent/Appellant,

v.

Grand Strand Regional Medical Center, LLC, d/b/a
South Strand Ambulatory Care Center, and Stephen
W. Law, D.O., ... Defendants,

Of whom

Grand Strand Regional Medical Center, LLC d/b/a
South Strand Ambulatory Care Center is, ... Appellant/Respondent.

Of Whom Stephen W. Law, D.O. is, ... Respondent/Appellant.

Motion to Dismiss Appeal of Respondent/Appellant Steven W. Law, D.O.

Pursuant to Rules 260(a) and 240(a) of the South Carolina Appellate Court Rules, Respondent/Appellant Sean D. Fay, as Personal Representative for the Estate of Kelly L. Fay, Deceased ("Plaintiff Fay"), hereby moves this Court for an order dismissing the appeal filed by Respondent/Appellant Stephen W. Law, D.O. ("Defendant Law"). The ground for this motion is that this Court lacks jurisdiction over this appeal because Defendant Law failed to timely serve his notice of appeal. This jurisdictional defect requires this Court to dismiss Defendant Law's appeal in its entirety.

Factual Background/Procedural History

A brief recap of the procedural history of this medical negligence action establishes that Defendant Law's notice of appeal was untimely. The judgment enrolling the jury verdict against Defendant Grand Strand Regional Medical Center, LLC, d/b/a South Strand Ambulatory Care Center ("Grand Strand") and Defendant Law was entered on May 28, 2010. Defendant Law filed a timely post-trial motion seeking JNOV, New Trial Absolute, New Trial *Nisi Remittitur*, and to have the judgment enrolled using the percentages allocated by the jury. See Post-Trial Motion of Defendant Law dated June 7, 2010, attached hereto as Exhibit A. The trial court denied Defendant Law's motion on June 24, 2010. See Order Denying Defendant Law's Post-Trial Motions attached hereto as Exhibit B.¹ Defendant Law received written notice of that order on July 12, 2010. Defendant Law did not appeal from this order denying his post-trial motions.

Instead, Defendant Law filed a subsequent post-trial motion pursuant to Rule 59, SCRCP, urging the trial court to issue specific rulings on each issue raised in his initial post-trial motions for JNOV, new trial, and new trial *nisi remittitur*. See Motion to Alter or Amend Judgment and/or Reconsideration filed July 21, 2010, attached hereto as Exhibit C. The motion did nothing more than ask the trial court to specifically rule on the issues previously raised in his initial post-trial motion. It likewise failed to raise any new issue to the trial court.

¹ Defendant Grand Strand also filed post-trial motions seeking JNOV, new trial, and new trial *nisi remittitur* on June 7, 2010—the same day as Defendant Law. The trial court also denied Grand Strand's motion on June 24, 2010. As a result of this denial of its post-trial motions, Grand Strand filed and served a timely notice of appeal with this Court on July 26, 2010, challenging, *inter alia*, the jury verdict and denial of the post-trial motions.

Ultimately, the trial court denied Defendant Law's second post-trial motion.² See Order dated August 26, 2011, attached hereto as Exhibit D. Defendant Law then filed and served his notice of appeal on September 23, 2011. This motion to dismiss follows.

Argument

This Court lacks the jurisdiction necessary to address Defendant Law's appeal because his notice of appeal was not timely served. Defendant Law's second post-trial motion did not toll the time to appeal because that motion merely restated the arguments Defendant Law made in his initial post-trial motion. The trial court's denial of the initial JNOV, new trial, and new trial *nisi remittitur* motions constituted a ruling on all issues and preserved those issues for appellate review. Defendant Law failed to appeal from that order in a timely fashion, and thus, his appeal must be dismissed.

Rule 203 of the South Carolina Appellate Court Rules controls the timely filing of a notice of appeal. The rule provides, in relevant part, that:

A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

Rule 203(b)(1), SCACR (emphasis added). That rule allows the filing of a timely post-trial motion to toll the thirty-day time limit to file the notice of appeal. Id.

This Court and our Supreme Court³ have construed the tolling provision of this rule in the context of a party filing successive post-trial motions, which is the situation in

² The trial court initially granted part of Defendant Law's second post-trial motion via order dated August 17, 2011. However, once the trial court realized he had done so mistakenly, the trial court issued the August 26, 2011 Order denying Defendant Law's second post-trial motion in full.

this appeal. Both courts have held that the filing of a successive post-trial motion does not toll the time to file an appeal under Rule 203, SCACR, when the successive post-trial motion merely reargues the issues previously raised to the trial court in the initial post-trial motion or requests a specific ruling on each ground from the trial court. In short, the successive motion cannot simply recite arguments made in the initial post-trial motion and ask the trial court for a specific ruling on each argument. This is precisely what Defendant Law did in this matter. Thus, he failed to timely file his notice of appeal per Rule 203, SCACR.

This Court's precedent in Collins Music Co., Inc. v. IGT, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002), is analogous to this matter and establishes that Defendant Law's appeal is untimely. In Collins Music, the jury returned a verdict in favor of plaintiff. Collins Music, 353 S.C. at 560, 579 S.E.2d at 524. Defendant then timely filed written post-trial motions for JNOV, new trial, and new trial *nisi remittitur*.⁴ Id. at 560-561, 579 S.E.2d at 524. The trial court denied all of defendant's post-trial motions, but did not specifically address each of the arguments set forth by defendant. Id. at 560, 579 S.E.2d at 524. Defendant did not appeal from that order. Instead, defendant served a "virtually identical" Rule 59(e), SCRCP, motion to alter or amend the judgment, restating the arguments previously made and requesting the trial court make specific rulings on each ground raised by defendant in its previous JNOV, new trial, and *nisi remittitur* motions. Id. at 563, 579 S.E.2d at 526. This Court held that defendant's Rule 59(e),

³ The Supreme Court has acknowledged the efficacy of Collins Music in Elam v. SCDOT, 361 S.C. 9, 602 S.E.2d 772 (2004). See also Fields v. Regional Medical Center Orangeburg, 363 S.C. 19, 28 n. 3, 609 S.E.2d 506, 511 n. 3 (2005) (acknowledging the rule regarding successive motions for reconsideration set forth in Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) and reaffirming Collins Music and Quality Trailer Products, Inc. v. CSL Equip. Co., 349 S.C. 216, 562 S.E.2d 615 (2002)).

⁴ Defendant Law sought this identical relief in his initial, written post-trial motion.

SCRCP, motion only restated the same grounds and arguments previously presented to the trial court in defendants' JNOV, new trial, and *nisi remittitur* motions. Id. at 565, 579 S.E.2d at 526-527. This Court concluded that because the trial court denied the initial post-trial motions then the successive Rule 59(e), SCRCP, post-trial motion did not toll the time to file a notice of appeal. Id. at 566, 579 S.E.2d at 527. As a result, this Court held that the time to appeal began to run from the date defendant received written notice of the order denying its initial post-trial motions. Id. at 566, 579 S.E.2d at 527. Consequently, this Court dismissed the appeal. Id. at 566, 579 S.E.2d at 527.

Here, Defendant Law improperly utilized his post-trial motions in the same manner as the defendant in Collins Music. A comparison of the arguments presented in the initial post-trial motions and the successive Rule 59, SCRCP, motion establish that the successive motion only requested specific rulings on each ground raised by Defendant Law in his initial JNOV, new trial, and *nisi remittitur* motions.

In his initial post-trial motion, Defendant Law asserted JNOV was warranted for these reasons: (1) "[t]he only reasonable inference to be drawn from the evidence is that Dr. Law honored all accepted standards of care for an emergency room physician and did not harm Plaintiff or Plaintiff's decedent in any way;" (2) "the proximate cause of the decedent's death was the failure of the Plaintiff to follow Dr. Law's discharge instructions to take the decedent immediately back to the emergency department;" and (3) "the only reasonable inference to be drawn from the evidence is that the Plaintiff was either solely responsible for the decedent's death or at a minimum at least 51% at fault."

See Post-Trial Motion of Defendant Law dated June 7, 2010, at pp. 2-3. These

arguments are repeated nearly verbatim in Defendant Law's successive Rule 59, SCRCP, motion.

In the Rule 59(e), SCRCP, motion, Defendant Law based his motion upon the fact that the trial court "has not addressed each of the grounds for relief as set forth in the Defendant Law's Post-Trial Motions." See Motion to Alter or Amend Judgment and/or Reconsideration filed July 21, 2010, at p. 1.⁵ Then Defendant Law repeats arguments made in the JNOV motion. First, he alleges "the Court has not addressed Dr. Law's position that the only reasonable inference to be drawn from the evidence is that Dr. Law complied with all accepted standards of care for an emergency physician and did not cause harm to the Plaintiff or his decedent." Id. at 2. Second, he repeats his JNOV argument that "the Court has also not addressed Dr. Law's position that the only reasonable inference that can be drawn from the evidence is that the proximate cause of the decedent's death was the failure of the Plaintiff to follow the discharge instructions to take the decedent immediately back to the emergency department." Id. He also re-argues his third JNOV ground, stating "the only reasonable inference to be drawn from the evidence is that the Plaintiff was either solely responsible for the decedent's death or was more than fifty percent at fault as a matter of law." As is evident, these Rule 59(e), SCRCP, arguments are "virtually identical" to the arguments previously presented in the initial JNOV motion that the trial court denied. Further, the only relief sought in the successive Rule 59(e), SCRCP, motion was for the trial court "to alter or amend its current Order to specifically address the Defendant Law's JNOV Motion." Id. (emphasis added). Thus, the successive Rule 59(e), SCRCP, motion is "virtually identical" to the

⁵ He further notes that "[t]he Court failed to address the basis for the Defendant Law's JNOV motion." See Motion to Alter or Amend Judgment and/or Reconsideration filed July 21, 2010, at p. 1-2.

initial JNOV motion that was already denied by the trial court. Defendant Law used the Rule 59(e), SCRCp, motion in a manner that was found improper by this Court in Collins Music—to only request the trial court make specific rulings on each ground raised by defendant in its previous JNOV motion.

Next, Defendant Law uses the successive Rule 59(e), SCRCp, motion to reargue the same grounds presented in this initial new trial motion. He argues that the trial court “alter or amend its current Order to specifically address these grounds for a new trial[.]” claiming “the Court has not addressed the excessiveness of the verdict or the Defendant’s request for relief under the Thirteenth Juror Doctrine.” See Motion to Alter or Amend Judgment and/or Reconsideration filed July 21, 2010, at p. 2 (emphasis added). This again runs afoul of the Collins Music rule by using the successive Rule 59(e), SCRCp, motion to merely request the trial court to specifically address an issue that the trial court previously denied in the initial post-trial motion.

Lastly, Defendant Law’s successive Rule 59(e), SCRCp, motion requests that the trial court specifically address his remaining grounds set forth in the initial post-trial motion. He claims the trial court did not address his new trial nisi remittitur motion or his motion to enroll the judgment and requests the trial court “alter or amend its current Order to specifically address these motions.” See Motion to Alter or Amend Judgment and/or Reconsideration filed July 21, 2010, at p. 2-3 (emphasis added). This too is an improper usage of a successive post-trial motion as found by this Court in Collins Music.

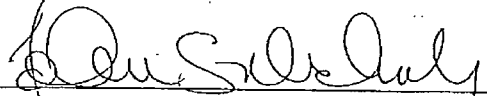
As is evident from the above, the successive Rule 59(e), SCRCp, motion was used in a manner analogous to the defendant in Collins Music. The successive motion sets forth issues previously raised to and ruled upon by the trial court in the order denying

in his prior JNOV, new trial, and new trial *nisi remittitur* post-trial motions and merely requests a more specific ruling from the trial court. As a result, the successive post-trial motion does not toll the time limits for Defendant Law to file a notice of appeal. Thus, this Court's precedent of Collins Music establishes that Defendant Law's appeal is untimely and must be dismissed for lack of jurisdiction.

Conclusion

Based on the foregoing, Defendant Law's appeal is untimely, and this Court lacks the jurisdiction to entertain his appeal. As a result, the appeal must be dismissed.

Respectfully submitted,

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Deceased

November 15, 2011

Exhibit A

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO.: 2008-CP-26-9047 and
2008-CP-26-9368

Sean D. Fay, as Personal)
Representative for the Estate)
of Kelly L. Fay, Deceased,)

Plaintiff,)

vs.)

Grand Strand Regional Medical)
Center, LLC d/b/a South Strand)
Ambulatory Care Center, Jane)
Doe, an unidentified nurse)
employed with Grand Strand)
Regional Medical Center, LLC,)
Stephen W. Law, D.O., Carolina)
Health Specialists, Dr. Richard)
Young, M.D., and Grand Strand)
Urology, LLP,)

Defendants.)

DEFENDANT STEPHEN W. LAW, D.O.'S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, MOTION
FOR NEW TRIAL, OR, IN THE ALTERNATIVE, MOTION TO ALTER, AMEND
AND VACATE THE VERDICT, OR FOR REMITTITUR, OR, IN THE
ALTERNATIVE FOR THE JUDGMENT TO BE ENROLLED USING THE
PERCENTAGE OF COMBINED NEGLIGENCE THAT THE JURY
CONCLUDED CAUSED THE PLAINTIFF'S INJURIES

PLEASE TAKE NOTICE that, pursuant to Rule 50 of the *South Carolina Rules of Civil Procedure*, Defendant Stephen W. Law, D.O. (hereinafter "Dr. Law"), respectfully requests that the Court enter judgment for Dr. Law notwithstanding the verdict. In the alternative, Dr. Law respectfully requests, pursuant to Rule 59(a) of the *South Carolina Rules of Civil Procedure*, that the Court grant him a new trial or, in the alternative, that the Court alter or amend the

judgment and vacate or remit the amount of the jury's compensatory damage award.

STATEMENT OF FACTS

Kelly Fay was a 25-year-old, married, female who presented to the emergency room of South Strand Ambulatory Care Center, Myrtle Beach, South Carolina, at 8:00 A.M., on Saturday, January, 26, 2002, complaining of a sudden onset of right flank pain that began, depending on whose records you use, either 30 minutes or 1 and ½ hours prior to arrival. Mrs. Fay was accompanied by her husband, the Plaintiff Sean Fay. According to the medical records from South Strand Ambulatory Care Center, Mrs. Fay complained to emergency room physician Dr. Stephen Law of mild nausea, but she denied vomiting, fevers, chills, dysuria, hematuria, or menstrual irregularities.

Dr. Law examined the patient and noted that she did not have a fever (98.1°) and her vital signs were stable. Dr. Law's examination of the patient's abdomen revealed moderate-to-severe flank tenderness on the right side. The patient had a normal urinalysis with no blood, white blood cells, nitrites, or bacteria in the urine. Dr. Law ordered a KUB x-ray (flat plate of the abdomen that examines the kidneys, ureters, and bladder) which revealed a moderate-sized stone in the region of the right ureteropelvic junction (the kidney end of the ureter). A CT Scan of the abdomen revealed a 0.5 cm diameter stone within the proximal ureter that was lying at or close to the level of the ureteropelvic junction, with mild hydronephrosis. Radiologist Dr. John Chomyn noted that there was

minimal pyelosinus extravasation of urine on the CT Scan and that the ureter had a normal caliber.

Prior to discharge, Dr. Law discussed this case with Dr. Richard Young, on-call urologist, who requested to see the patient on Monday since the patient's pain was under control. Dr. Law then set forth in his dictated note:

"I did explain to the patient, however, that if her pain becomes out of control or if she has increasing nausea, vomiting, any fevers or chills, that she is to return to the emergency department immediately."

Kelly Fay left the hospital with good pain control and without any clinical signs of infection.

Mr. Fay has testified that on Sunday morning, January 27, 2002, Kelly Fay woke him up because "she was having chills — extreme chills — just real bad shivering . . . she got sick once or twice." Mr. Fay has further testified that Sunday evening, probably like 10:00 P.M., she had brief chills. Also, Mr. Fay has testified that basically all weekend his wife ran a fever of between 101.3 and 101.6.

On Monday, January 28, 2002, at approximately 8:30 A.M., Mr. Fay called Dr. Young's office for an appointment. He was advised to report to Dr. Young's office at 3:00 P.M. Mr. Fay then left for work and has testified that he called home probably 3 times that morning to check on his wife but the telephone was not answered.

Also, on Monday, January 28, 2002, at 1:59 P.M., EMS received a call from the patient's husband. When EMS arrived at their home, they found Mrs. Fay lying on the floor, very hot to the touch, cyanotic, with shallow, rapid

respirations and vomit in her mouth. They noted that she had been incontinent of urine and feces. According to the EMS records, the patient's husband reported to EMS paramedics that his wife had been febrile the night before at 101°. Sean Fay also reported to EMS that when he came home from work he found his wife lying on the floor unresponsive making gurgling noises.

EMS transported the patient to Grand Strand Regional Medical Center where the patient's urine and blood cultures revealed evidence of proteus mirabilis bacteria. Her temperature when she arrived in the emergency room was noted to be 107° rectally. The ER records indicate that the Plaintiff, patient's husband, reported to emergency room physician Dr. Chi that the patient had done well since she left the emergency room on Saturday, with the exception of having a mild temperature elevation along with some fever and chills. After arriving at the hospital, the patient went into cardiac arrest and was pronounced dead at 10:00 P.M. An autopsy revealed that the patient died as a result of overwhelming clinical sepsis due to proteus species bacteria.

ARGUMENT

This Court Should Enter Judgment for Dr. Law Notwithstanding the Verdict

Pursuant to Rule 50(b) of the *South Carolina Rules of Civil Procedure*, the Court should set aside the verdict in this case and enter judgment for Dr. Law notwithstanding the verdict ("JNOV"). A court should grant a JNOV when the evidence presented at trial is insufficient to support the jury's verdict. See *Rogers v. Norfolk Southern Corp.*, 343 S.C. 52, 59, 538 S.E.2d 664, 668 (Ct. App. 2001), *aff'd as modified*, 356 S.C. 85, 588 S.E.2d 87 (2003). In other

words, a motion for JNOV should be granted where no reasonable jury could have reached the verdict being challenged. See *id.* (reversing trial court's denial of JNOV because the only reasonable inference that would be drawn from the evidence in the record was that there was no negligence).¹

Here, the evidence presented at trial is insufficient to support the jury's verdict either on liability or damages. Indeed, because the weight of the evidence is so overwhelmingly against Plaintiff, it was not possible for a reasonable jury to assess liability against Dr. Law.

The only reasonable inference to be drawn from the evidence is that Dr. Law honored all accepted standards of care for an emergency physician and did not harm the Plaintiff or Plaintiff's decedent in any way.

The evidence shows:

- Dr. Law saw Kelly Fay on the morning of January 26, 2002, at South Strand Ambulatory Care Center emergency department within minutes of her presentation;
- Dr. Law performed an appropriate physical examination;
- Dr. Law ordered appropriate, reasonable and responsible tests;
- Dr. Law relieved the decedent's pain;
- Dr. Law made the correct diagnosis;
- Dr. Law issued appropriate and responsible discharge instructions:

"I did explain to the patient, however, that if her pain becomes

¹ See also *Catawba Ins. Co. v. Smith*, 336 S.C. 33, 38-39, 518 S.E.2d 291, 293-94 (Ct. App. 1999) (reversing trial court's denial of JNOV because there was "insufficient evidence of implied consent for the trial court to have submitted the issue to the jury"); *Gastineau v. Murphy*, 331 S.C. 565, 569, 503 S.E.2d 712, 714 (1998) (reversing trial court's denial of JNOV because, based on the evidence introduced at trial, no reasonable jury could have come to the conclusion reached by the jury). In ruling on motions for JNOV, the trial court must consider the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. *Gastineau*, 331 S.C. at 568, 503 S.E.2d at 713.

out of control or if she has increasing nausea, vomiting, any fevers or chills, that she is to return to the emergency department immediately."

Dr. Law dictated this note on January 26, 2002, at 11:38:20 A.M. and Kelly Fay was discharged at 12:00 Noon on January 26, 2002. There was no evidence attacking the integrity and credibility of Dr. Law's discharge typewritten note.

Further, the only reasonable inference that can be drawn from the evidence is that the decedent's physical condition deteriorated over the weekend and the proximate cause of the decedent's death was the failure of the Plaintiff to follow Dr. Law's discharge instructions to take the decedent immediately back to the emergency department. Even Plaintiff's expert, Charles Stratton, M.D., testified that if the decedent had been taken back to the emergency department by 10:00 A.M. on January 28, 2002 (date of death) then Kelly Fay would have survived.

Therefore, the only reasonable inference to be drawn from the evidence is that the Plaintiff was either solely responsible for the decedent's death or at a minimum at least 51% at fault.

In the Alternative, This Court Should Order a New Trial

In the event that the Court does not grant a JNOV with respect to all of Plaintiff's claims, this Court should order a new trial. Pursuant to Rule 59 of the *South Carolina Rules of Civil Procedure*, the trial court can grant a new trial on the ground that the verdict is excessive. See *Krepps v. Ausen*, 324 S.C. 597, 607, 479 S.E.2d 290, 295 (Ct. App. 1996). When a party moves for a new trial based on a challenge that the verdict is excessive, the trial court must distinguish

between awards that are merely unduly liberal and awards that are actuated by passion, caprice or prejudice. See *id.* The trial court must set aside a verdict and grant a new trial absolute when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, partiality, corruption, or other considerations not reflected by the evidence affected the amount awarded. See *Sanders v. Prince*, 304 S.C. 236, 238-39, 403 S.E.2d 640, 642 (1991) (reversing trial court's denial of a new trial because jury verdict was so grossly excessive as to indicate passion, prejudice, or other improper motive); *Small v. Springs Indus. Inc.*, 292 S.C. 481, 487, 357 S.E.2d 452, 455 (1987) (it is the duty of the court to remand for a new trial where jury's verdict was excessive and based upon improper considerations not found in the evidence). The failure of the trial court to grant a new trial absolute in this situation amounts to an abuse of discretion. See *Krepps*, 324 S.C. at 607, 479 S.E.2d at 295.²

The reasons requiring a new trial absolute are as follows:

- (1) The Court erred in excluding evidence of the Plaintiff's marital affair.

² Separately, under the "thirteenth juror" doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. See *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) (affirming trial court's order granting a new trial under the thirteenth juror doctrine); *McEntire v. Mooregard Exterminating Svcs., Inc.*, 353 S.C. 629, 631, 578 S.E.2d 746, 747 (Ct. App. 2003) (same); *Sorin Equipment Co., Inc. v. Firm, Inc.*, 323 S.C. 359, 363-64, 474 S.E.2d 819, 822 (Ct. App. 1996) (same). The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. See, e.g., *id.* Essentially, as the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. See *Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002).

(2) The Court erred in excluding evidence of the Plaintiff's remarriage after the death of the Plaintiff's decedent.

(3) The Court erred in limiting the testimony of the Plaintiff's decedent's mother, stepfather, and brother.

(4) The amount of the verdict in this case is so excessive that it was clearly actuated by passion, caprice, and prejudice. Thus, it is this Court's duty to set aside this verdict absolutely.

(5) The jury verdict is so excessive that it must have been influenced by matters outside the evidence or is so excessive that the jury must have been unable to follow the Court's instructions or charges in rendering its verdict.

(6) The Court should also grant a new trial because the only reasonable inference that can be drawn from all of the evidence is that the negligence of the plaintiff is 50% and is greater than any negligence on the part of the Defendant Dr. Law.

(7) The Court, sitting as a thirteenth juror, should conclude that the evidence and facts do not justify the verdict in this case and should grant a new trial absolute.

NEW TRIAL NISI REMITTITUR

If the Court chooses not to grant JNOV to Dr. Law and chooses not to grant a new trial absolute, then this court should grant a new trial *nisi remittitur*. This Defendant is entitled to a new trial *nisi remittitur* for the reasons set forth herein previously. In South Carolina, the trial judge "has the power, and with it the responsibility" of reducing a damage award that is "unduly liberal" or "merely

excessive." *Easler v. Hejaz Temple of Greenville*, 829 S.E.2d 753, 758 (S.C. 1985) See also *Becker v. Wal-Mart Stores, Inc.*, 529 S.E.2d 758, 762 (S.C. Ct. App. 2000) (upholding the trial court's decision to reduce an award of \$1.75 million to \$525,000 for a plaintiff's partially paralyzed foot because the jury award was "merely excessive" and "unduly liberal.") In this case, the jury verdict is unduly liberal and excessive and should be reduced by this court. This is especially true because the Court, unlike the jury, has information regarding the Plaintiff's marital affair and subsequent remarriage. Furthermore, the verdict is well in excess of the Plaintiff's economic losses set forth by the Plaintiff's expert and should be reduced by this court.

ENROLLMENT OF JUDGMENT

Should the Court fail to grant the Motion for Judgment Notwithstanding the Verdict, or in the alternative, the Motion for New Trial, or in the alternative, the Motion to Alter, Amend and Vacate the Verdict, or for Remittitur, then Dr. Law requests the judgment be enrolled using the percentage of combined negligence that the jury concluded proximately caused the Plaintiff's injuries:

Plaintiff 4%

Defendant Dr. Law 6%

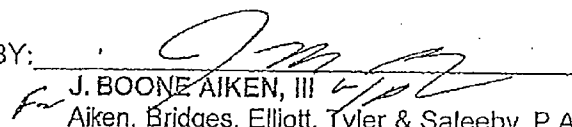
Defendant Grand Strand 90%

CONCLUSION

For the foregoing reasons, Dr. Law respectfully requests that the Court enter judgment for him notwithstanding the verdict. In the alternative, Dr. Law respectfully requests that the Court grant him a new trial or, in the alternative,

that the Court alter or amend the judgment and vacate or remit the amount of the jury's compensatory awards. In the alternative, Dr. Law respectfully requests that the Court enter judgment in the percentages as set forth above. Finally, Dr. Law requests oral argument on these Motions.

Respectfully submitted,

BY: 

J. BOONE AIKEN, III
Aiken, Bridges, Elliott, Tyler & Saleeby, P.A.
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PO Drawer 1931
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ATTORNEYS FOR THE DEFENDANT,
STEPHEN W. LAW, D.O.

Florence, South Carolina

June 7, 2010

(22108)

Exhibit B

FORM 4

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

Sean D. Fay, as Personal
Representative for the Estate of
Kelly L. Fay, Deceased,

Plaintiff,

vs.

Grand Strand Regional Medical
Center, LLC, d/b/a South Strand
Ambulatory Care Center, and
Stephen W. Law, D.O.,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTEENTH JUDICIAL CIRCUIT

DOCKET NO.: 08-CP-26-9047
08-CP-26-9368

ORDER DENYING DEFENDANT HOSPITAL'S
POST TRIAL MOTIONS

FILED
JUL 24 PM 3:15
CLERK OF COURT
HARRIS COUNTY

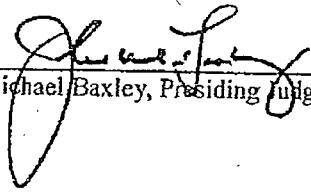
Defendant Grand Strand Regional Medical Center, LLC moves pursuant to Rules 50 and 59, SCRCF, for judgment notwithstanding the verdict, a new trial absolute, or in the alternative, a new trial *nisi remittitur*. This medical negligence case was tried before the Court May 24 through 28, 2010. The jury rendered a verdict in favor of the Plaintiff for \$3 million dollars actual damages, attributing to Defendant Hospital ninety (90%) percent comparative negligence. The Defendant Hospital claims that the jury verdict is excessive and cannot reasonably be based on the evidence submitted at trial. Further, Defendant states that the Court erred in excluding testimony of the decedent's husband's extra-marital affair some two years prior to decedent's death, his subsequent remarriage after decedent's death, and for limiting testimony of the decedent's mother, stepfather, and brother, all appearing for the Defendants.

Prior to trial, the Court conducted hearings on Plaintiff's motion in limine to exclude the testimony of the Plaintiff's extramarital affair and subsequent remarriage. The Court ruled in favor of the Plaintiff because the remarriage of the Plaintiff after his wife's death is clearly excluded under longstanding South Carolina law and has no relevance to the matter at issue in the trial. Wooten v. Amspacher, 307 S.E.2d 232 (1983). Plaintiff's extramarital affair has no bearing on whether the Defendants' negligence was the cause of decedent's death, which was the real battleground of this case, and thus was far more prejudicial than probative. The Court limited the testimony of the decedent's family at trial because it was duplicative, in an already lengthy trial, and did not go to the cause of the decedent's death. The verdict and its amount were not contrary to the evidence presented at trial, which involved the unexpected death of an otherwise healthy twenty-five year old. The jury in this case deliberated for approximately twelve hours over two days, and this Court is disinclined to disturb their findings.

After further review of the evidence presented at trial, the in limine motions, the jury charges, and Defendant Hospital's post trial motions, the Defendant Hospital's post trial motions are hereby **DENIED**, and the jury verdict confirmed.

IT IS SO ORDERED.

June 23, 2010


J. Michael Baxley, Presiding Judge

This judgment was entered on the ____ day of June 2010, and a copy mailed first class this ____ day of June, 2010 to attorneys of record or to parties as follows:

Attorney for Plaintiff

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Mike Kelly Law Group, LLC
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Columbia, SC 29201

Attorney for Defendant Hospital

Monteith P. Todd, Esquire
Sowell, Gray, Stepp, & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

Randolph L. Lee, Esquire
Bappen Lee
8000 Western Parkway, Suite 340
Cary, NC 27513

Attorney for Defendant Dr. Law

J. Boone Aiken, III, Esquire
Aiken, Bridges, Elliott, Tyler, & Saleeby, PA
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Florence, SC 29503

CLERK OF COURT

Exhibit C

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

Sean D. Fay, as Personal Representative
for the Estate of Kelly L. Fay, deceased,

Plaintiff,

v.

Grand Strand Regional Medical
Center, LLC, d/b/a South Strand
Ambulatory Care Center,
Stephen W. Law, D.O., and
Richard Young, M.D.,

Defendants.

Civil Action Nos. 2008-CP-26-9047
2008-CP-26-9368

NOTICE OF MOTION AND
MOTION TO ALTER OR AMEND
JUDGMENT AND/OR MOTION
FOR RECONSIDERATION

TO: THE HONORABLE J. MICHAEL BAXLEY

RUSKIN C. FOSTER, ESQUIRE, COUNSEL FOR PLAINTIFF

MONTEITH P. TODD, ESQUIRE, RANDOLPH L. LEE, ESQUIRE, COUNSEL FOR
DEFENDANT GRAND STRAND REGIONAL MEDICAL CENTER, LLC

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for the Defendant Stephen W. Law, D.O., will move before the Honorable J. Michael Baxley at such time and place as may be set by the Court, for an Order, pursuant to Rule 59(e), SCRPC, altering, amending, and/or reconsidering the Order Denying Defendant Law's Post Trial Motions, filed June 24, 2010. Counsel for the Defendant Law received written notice of entry of the Order on July 12, 2010.

The Defendant Law's motion is based upon the following grounds:

1. The Order Denying Defendant Law's Post Trial Motions has not addressed each of the grounds for relief as set forth in the Defendant Law's Post-Trial Motions. The Court failed

to address the basis for the Defendant Law's JNOV Motion. Specifically, the Court has not addressed Dr. Law's position that the only reasonable inference to be drawn from the evidence is that Dr. Law complied with all accepted standards of care for an emergency physician and did not cause harm to the Plaintiff or his decedent. The Court has also not addressed Dr. Law's position that the only reasonable inference that can be drawn from the evidence is that the proximate cause of the decedent's death was the failure of the Plaintiff to follow the discharge instructions to take the decedent back to the emergency department. Likewise, the Court has not addressed Dr. Law's position that the only reasonable inference to be drawn from the evidence is that the Plaintiff was either solely responsible for the decedent's death or was more than fifty percent at fault as a matter of law. The Court is respectfully requested to alter or amend its current Order to specifically address the Defendant Law's JNOV Motion.

2. In its Order Denying Defendant Law's Post Trial Motions, the Court has addressed only portions of the Defendant Law's Motion for New Trial, specifically the exclusion of evidence of the Plaintiff's extramarital affair and subsequent remarriage and the limiting of the testimony of the decedent's mother, stepfather and brother. The Court has not addressed the excessiveness of the verdict or the Defendant's request for relief under the Thirteenth Juror Doctrine. The Court is respectfully requested to alter or amend its current Order to specifically address these grounds for a new trial.

3. In its Order Denying Defendant Law's Post Trial Motions, the Court has not addressed the Defendant Law's Motion for New Trial Nisi Remittitur. The Court has also not addressed Dr. Law's request that the judgment be enrolled using the percentage of fault as found by the jury and specifically that the judgment against Dr. Law be enrolled as six percent (6%) of

the damages awarded by the jury. The Court is respectfully requested to alter or amend its current Order to specifically address these motions.

The Defendant's motion is based upon the pleadings filed in this case; the trial record; the Order Denying Defendant Law's Post Trial Motions, filed June 24, 2010; the Defendant Law's Post-Trial Motions; the rules of court; and such other matters as may be properly presented to the Court at the time of the hearing.

Respectfully submitted,

BY:

J. Boone Aiken III

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Counsel for Defendant Stephen W. Law, D.O.

Florence, South Carolina

July 21, 2010

(22108)

Exhibit D

FORM 4

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

2008-CP-26-09047; 09368

Sean D. Fay, as Personal
Representative for the Estate of
Kelly L. Fay, Deceased,

Plaintiff,

vs.

Grand Strand Regional Medical
Center, LLC, d/b/a South Strand
Ambulatory Care Center, Stephen
W. Law, D.O.,

Defendants.

ORDER VACATING THAT PORTION OF
THE FORM 4 ORDER OF 8/15/11
GRANTING IN PART

DEFENDANT LAW'S MOTION FOR
RECONSIDERATION OF DENIAL OF POST
TRIAL MOTIONS

AND NOW DENYING THOSE MOTIONS IN FULL
(Instructing Clerk to Reinstate Original Judgment)

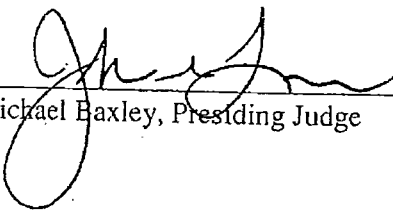
This Court issued an Order dated August 15, 2011 that partially granted a motion to reconsider this Court's original Order denying all of Defendant Law's post-trial motions. This August 15 Order stated "[n]otwithstanding the law of joint and several liability in effect at the time of the incident which gave rise to this claim, the parties agreed to submit the matter to the jury requesting a finding of specific percentages of negligence, agreeing to be bound thereby." Accordingly, in the previous Order, the Court directed the Clerk "to amend the judgment against Dr. Law and enroll judgment at six percent (6%) of the total damages awarded by the jury, the sum of one hundred eighty thousand (\$180,000) dollars, and to amend the judgment against Grand Strand Regional Medical Center, LLC, d/b/a South Strand Ambulatory Care Center and enroll that judgment at ninety (90%) percent of the total damages awarded by the jury, the sum of two million seven hundred thousand (\$2,700,000) dollars."

The Court is now aware that the previous Order was incorrect when it stated that the parties agreed to be bound by the allocation of specific percentages of negligence found by the jury. The Court recognized its mistake after conducting a phone conference involving counsel for all the parties. Therefore, there was no basis for the Court to direct the Clerk to reform the verdict based upon these percentages of negligence and to enroll the verdict accordingly. The law in effect at the time of the incident that gave rise to this suit requires joint and several liability, and in absence of agreement to the contrary, this Court must follow that law.

As a result, the Court now rescinds that portion of its previous Order reforming the verdict, and now Orders that the original jury verdict be re-enrolled, *nunc pro tunc*, against both Defendants jointly and severally. All other portions of the previous Order remain in effect. The result of this amended Order is that all of Defendant Law's post-trial motions remain denied, and the motion to reconsider that decision is fully denied. This case is now ended at the circuit level.

IT IS SO ORDERED.

August 24, 2011


J. Michael Baxley, Presiding Judge

This judgment was entered on the 26 day of August 2011, and a copy mailed first class this 30th day of August, 2011 to attorneys of record or to parties as follows:

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Attorney for Defendant Hosptial

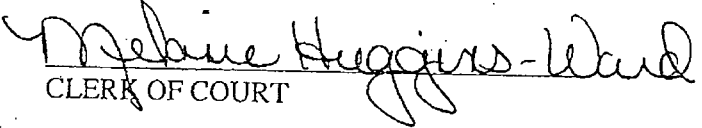
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CLERK OF COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

Case Nos. 2008-CP-26-9047 and 2008-CP-26-9368

Sean D. Fay, as Personal Representative for the
Estate of Kelly L. Fay, Deceased, ... Respondent/Appellant,

v.

Grand Strand Regional Medical Center, LLC, d/b/a
South Strand Ambulatory Care Center, and Stephen
W. Law, D.O., Dr. Richard Young, M.D., and
Grand Strand Urology, LLP, ... Defendants,

Of whom Grand Strand Regional Medical Center,
LLC d/b/a South Strand Ambulatory Care Center is, ... Appellant/Respondent.

And Of Whom Stephen W. Law, D.O. is, ... Respondent/Appellant,

And Of Whom Dr. Richard Young, M.D., and
Grand Strand Urology, LLP, are, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Supplemental Record on Appeal
contains all material proposed to be included by any of the parties and not any other
material.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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William C. Wood, Jr.

Michael J. Anzelmo

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Attorneys for Grand Strand Regional Medical Center,
LLC d/b/a South Strand Ambulatory Care Center

May 23, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

RECEIVED
MAY 23 2013

SC Court of Appeals

Case No. 2008-CP-26-9047 and 2008-CP-26-9368

Sean D. Fay, as Personal Representative for the Estate
of Kelly L. Fay, Deceased, ... Respondent/Appellant,

v.

Grand Strand Regional Medical Center, LLC, d/b/a
South Strand Ambulatory Care Center, Jane Doe and
unidentified nurse employed with Grand Strand
Regional Medical Center, LLC, Stephen W. Law,
D.O., Carolina Health Specialists, Dr. Richard
Young, M.D. and Grand Strand Urology, LLP, ... Defendants

of whom

Richard Young M.D., Grand Strand Urology, LLP
and Stephen W. Law, D.O. are Respondents

and

Grand Strand Regional Medical Center, LLC d/b/a
South Strand Ambulatory Care Center is Appellant/Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson
Mullins Riley & Scarborough LLP, attorneys for Grand Strand Regional Medical
Center, LLC d/b/a South Strand Ambulatory Care Center, do hereby certify that I have
served all counsel in this action with a copy of the pleading(s) hereinbelow specified by
electronic mail and mailing a copy of the same by United States Mail, postage prepaid,
to the following address(es):

ORIGINAL

Pleadings:

Supplemental Record on Appeal

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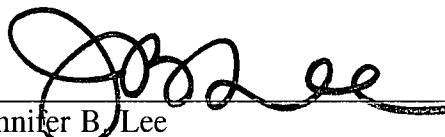
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Jennifer B. Lee
Administrative Assistant

May 23, 2013