

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 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, 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.

Final Reply Brief of Appellant/Respondent Grand Strand Regional Medical
Center, LLC, d/b/a South Strand Ambulatory Care Center

C. Mitchell Brown
William C. Wood, Jr.
Michael J. Anzelmo
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

RECEIVED
MAY 24 2013
SC Court of Appeals

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

Table of Contents

	<u>Page</u>
Table of Authorities	ii
Argument	1
I. The trial court committed reversible error when it charged the jury that Grand Strand owed an “absolute duty” of care to Plaintiff Fay	1
A. The trial court failed to charge the correct law on the duty owed by Grand Strand	1
B. Grand Strand suffered prejudice from the erroneous “absolute duty” charge because the charge related to the seminal liability issue before the jury	3
II. The trial court committed reversible error by excluding evidence of Husband’s extramarital affair	6
Conclusion	9

Table of Authorities

	<u>Page</u>
<u>CASES</u>	
Cole v. Raut, 378 S.C. 398, 663 S.E.2d 30 (2008)	2
I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716, 724 (2000)	8
Simmons v. Tuomey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct. App. 1998)	2
Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000)	1, 2
Sulton v. Health South, No. 27192 (S.C. Sup. Ct. filed November 21, 2012) (Shearouse Adv. Sh. No. 42 at 74)	4, 5
Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000)	7
Wooten v. Amspacher, 279 S.C. 325, 307 S.E.2d 232 (1983)	7
<u>RULES</u>	
Rules 208(b)(2) and 220(c)	8

Argument

I. The trial court committed reversible error when it charged the jury that Grand Strand owed an “absolute duty” of care to Plaintiff Fay.

Plaintiff Fay makes two arguments in defense of the jury charge given by the trial court. First, Plaintiff Fay alleges that the trial court’s charge was “not erroneous.” {Resp. Br. of Plaintiff Fay p. 3; 7}. Second, Plaintiff Fay argues that Grand Strand suffered no prejudice because the charge as a whole was correct. {Resp. Br. of Plaintiff Fay p. 8-15}. This Court should reject both arguments. The trial court’s charge to the jury that Grand Strand had an “absolute duty” does not reflect the law of South Carolina. Rather, the charge erroneously elevated the applicable standard of care and invited the jury to find Grand Strand liable based upon an alleged failure to meet this elevated standard of care. Grand Strand suffered prejudice because the charge related to the seminal issue before the jury. Therefore, the trial court committed error in giving this charge and the judgment must be reversed in this matter and a new trial ordered.

A. The trial court failed to charge the correct law on the duty owed by Grand Strand.

Plaintiff Fay alleges that the jury charge given by the trial court was not erroneous because the “absolute duty” charge was inapplicable to the facts of this action. {Resp. Br. of Plaintiff Fay p. 3; 7}. Plaintiff Fay proposes that the Supreme Court’s decision in Simmons II¹ to reject the imposition of an “absolute duty” on hospitals was limited to situations when a hospital’s liability was based on the negligence of an independent contractor. {Resp. Br. of Plaintiff Fay p. 7}. Plaintiff

¹ Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000), commonly known as Simmons II.

Fay then concludes that the trial court's decision to charge this "absolute duty" was meaningless in this action and that the charge was thus correct. *{Id.}*. This Court should not be persuaded.

Notably, Plaintiff Fay admits that the trial court improperly charged the "absolute duty" standard to the jury from Simmons v. Tuomey Regional Medical Center, 330 S.C. 115, 119-20, 498 S.E.2d 408, 410 (Ct. App. 1998)² (reversed by Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000), commonly known as Simmons II). Plaintiff Fay admits that "[t]here is no need to go through the Simmons analysis" in this matter because "the issue of nondelegable duty was not before [the jury]." {Resp. Br. of Plaintiff Fay p. 3; 7}. Plaintiff Fay thus concedes that the trial court charged the jury with irrelevant and inapplicable principles when it charged the jury with the Simmons I "absolute duty" principle. This constitutes error. See, e.g., Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (holding that 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").

The fact that the trial court elected to expand the erroneous holding of Simmons I to a situation where the hospital's liability was premised on direct negligence does not obviate the charging error. Whether the hospital's liability is premised on the negligence of the independent contractor or direct employees, the result remains the same. The hospital owes no heightened standard in the form of an "absolute" duty in either scenario.

² Commonly known as "Simmons I."

Grand Strand's liability in this matter depended entirely on the applicable standard of care owed to Plaintiff Fay. The trial court did not charge a correct statement of law related to the hospital's standard of care. Instead, the charge instructed the jury with outdated, obsolete, and irrelevant law that had been explicitly reversed by the Supreme Court. This error of law affected the trial because it forced the jury to apply a legally deficient and irrelevant charge to the determinative issue of Grand Strand's liability. The erroneous charge incorrectly elevated the standard of care owed by a hospital in a medical malpractice action in contravention of South Carolina law. As a result, this Court should find the jury charge constitutes reversible error.

B. Grand Strand suffered prejudice from the erroneous “absolute duty” charge because the charge related to the seminal liability issue before the jury.

Plaintiff Fay next claims that Grand Strand was not prejudiced by the erroneous jury charge. He contends that under the “holistic approach” to jury instructions any error with the “absolute duty” jury charge must be considered along with the charge as a whole, and thus, the charge cannot prejudice Grand Strand. {Resp. Br. of Plaintiff Fay pp. 8-15}. This argument overlooks the fact that the erroneous instruction related directly to the heart of the case—whether Grand Strand breached its duty—and could not be cured by the fact that other portions of the charge correctly stated the law.

Here, the trial court's erroneous instruction made it more likely that the jury would find that otherwise reasonable conduct breached this “absolute” legal duty owed. Whether Grand Strand breached its duty was the essential determination made by the jury in this case with respect to liability. As a result, this Court should reject Plaintiff Fay's position and reverse and remand this matter to the trial court for a new trial.

Our Supreme Court very recently addressed this issue. In Sulton v. Health South, No. 27192 (S.C. Sup. Ct. filed November 21, 2012) (Shearouse Adv. Sh. No. 42 at 74), the Court addressed South Carolina's holistic approach to jury instructions in the context of an erroneous charge that incorrectly elevated the duty of care owed by a hospital in a medical malpractice action. The Supreme Court held that, despite the holistic approach to jury instructions, the Court would reverse and remand where an erroneous instruction went to the heart of the case. Sulton, No. 27192 at 77-78.

In Sulton, the plaintiff brought a medical malpractice action against Health South based on the direct negligence of the hospital and its nurses.³ Id. at 75. The seminal issue at trial was the duty of care owed by Health South. Id. at 77. The trial court's duty of care instruction stated that the "greater the risk of the condition to the patient the greater the duty of the healthcare provider to respond appropriately and to provide appropriate treatment." Id. at 76. Health South argued the charge constituted error and prejudiced Health South because the erroneous charge "went to the heart of the case" and could not be cured by other correctly-stated parts of the charge. Id. at 77. The plaintiff in Sulton, just as here, argued that under the holistic approach to jury instructions, Health South suffered no prejudice from the erroneous charge because "the trial court also advised the jury of the proper standard at several points." Id.

The Supreme Court rejected plaintiff's argument. First, the Supreme Court held the trial court's charge improperly elevated the standard of care owed by Health South. Id. at 76. The court reiterated that the proper charge for the duty of care owed by the hospital, *viz.*:

³ This is the same posture at issue in this matter. Plaintiff Fay alleged the direct negligence of Grand Strand, through its nurses, caused the damages sustained by his wife.

In a medical malpractice action, the duty of care under South Carolina law is that of an average, competent practitioner acting in the same or similar circumstances.

Id. (internal quotations and citations omitted). Next, the court rejected plaintiff's argument that because the charge as whole conveyed the correct standard of care, the erroneous single charge could be disregarded. Id. at 77-78. The Court applied the holistic approach of "South Carolina jurisprudence regarding jury instructions, which analyzes jury instructions as a whole and emphasizes prejudice" to the charge presented to the jury. The court held that even applying this standard, the charge still constituted prejudicial error. The court held:

[W]e agree that, in this case, the erroneous instruction went to the heart of the case and was not cured by the fact that in other portions of the charge the law was correctly stated because [Health South] introduced evidence to demonstrate that they did exercise reasonable care"

Id. at 77. The court reasoned that reversal was necessary because "if the jurors believed that the law imposed a heightened duty on [Health South] . . . their perception of the egregiousness of [Health South's] breach of that duty would likely have been correspondingly exaggerated." Id. at 78.

This matter is directly analogous to Sulton. Whether Grand Strand breached the standard of care was the determinative liability issue before the jury. Thus, it was critical that the jury be instructed with the proper standard of care applicable to Grand Strand. All agree that the trial court failed to instruct the jury with the correct and current law to apply to this critical issue. Rather, the trial court charged the jury with an erroneous instruction respecting Grand Strand's duty of care. This bad charge would have led the jury to believe that the law imposed a heightened duty on Grand

Strand, other than that which in fact existed. Such error prejudiced Grand Strand's ability to receive a fair verdict based on the correct law from the jury. This is especially true where Grand Strand presented ample evidence and expert testimony that it did exercise reasonable care in treating Plaintiff Fay.

In conclusion, the purpose of viewing the charges as a whole is to prevent statements in charges from being taken out of their complete context. It does not excuse a clearly erroneous instruction relating to a seminal issue just because a correct instruction on the same subject is given elsewhere. In such circumstances, unless expressly cured by the trial court, an erroneous charge would still cause prejudice and jury confusion. The fact that the correct law was charged elsewhere during the overall jury instructions did not remedy the error regarding the imposition of a supposed "absolute duty" on Grand Strand, when Grand Strand had introduced evidence to demonstrate that it did exercise reasonable care in treating Plaintiff Fay. Therefore, Grand Strand suffered prejudice from this erroneous instruction and a new trial absolute should be granted.

II. The trial court committed reversible error by excluding evidence of Husband's extramarital affair.

Plaintiff Fay alleges the trial court properly excluded evidence of Husband's extramarital affair, and Grand Strand did not suffer prejudice from the exclusion of the affair evidence. {Resp. Br. of Plaintiff Fay p. 17-31}. Both positions lack merit. The trial court erred in excluding evidence of Husband's affair because it was relevant to his credibility in both the wrongful death and survival causes of action as well as relevant

to the loss of companionship element of damages.⁴ Grand Strand suffered prejudice when the trial court precluded the jury from considering evidence related to these key issues. This Court should find reversible error and remand for new trial.

Plaintiff Fay first claims that Wooten v. Amspacher, 279 S.C. 325, 307 S.E.2d 232 (1983), supports the trial court's decision to exclude the evidence of Husband's affair. {Resp. Br. of Plaintiff Fay p. 17}. Wooten does not control this matter. Wooten addressed the admission of evidence of the surviving wife having separated from her husband prior to his death. 279 S.C. at 326, 307 S.E.2d at 235. Importantly, Wooten addressed the issue in the context of a survival action. The case did not contain a wrongful death action. Loss of companionship is not an element of damages in a survival action. Welch v. Epstein, 342 S.C. 279, 304, 536 S.E.2d 408, 420-21 (Ct. App. 2000) (holding that "[a]ppropriate damages in a survival action include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased"). In this matter, Grand Strand argued the evidence of the affair was relevant to the loss of companionship element of damages present in the wrongful death claim.⁵ Wooten is further distinguishable because the court did not address the admission of evidence of an affair; instead, the court limited its analysis to the separation issue. Therefore, Wooten cannot support the decision of the trial court to exclude the affair evidence.

Plaintiff Fay next alleges that the trial court properly excluded the affair evidence because Plaintiff Fay "forgave [Husband] and condoned the action." {Resp.

⁴ {Trans. p. 69-71; R.136-138}.

⁵ Further, the evidence of the affair related to the credibility of Sean Fay as to both the survival and wrongful death actions. {Trans. p. 69-71; R.136-138}.

Br. of Plaintiff Fay p. 18}. Plaintiff Fay then argues condonation under a traditional family court analysis. {Id. at 18-19}. Plaintiff Fay did not argue condonation at any time to the trial court, nor was condonation proven at trial. Thus, the argument is not properly before this court, even as an additional sustaining ground. See Rules 208(b)(2) and 220(c), SCACR (limiting additional sustaining arguments to those “ground(s) **appearing** in the Record on Appeal”); see also I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) (holding that the appellate court is “likely to ignore” any additional sustaining grounds not presented to the trial court).

Plaintiff Fay next claims Grand Strand suffered no prejudice from the exclusion of the affair evidence because the jury rendered a general verdict. {Resp. Br. of Plaintiff Fay p. 21}. This claim misapprehends the fact that this evidence related to both the wrongful death and survival causes of action—it was relevant to the credibility of Husband in both actions. Fay’s credibility was relevant to his testimony regarding his claims of the nature of the parties’ relationship, the love and affection between the couple, the events concerning his wife’s death, and the value the jury could assess as to issues in both claims. Thus, this Court should reject Plaintiff Fay’s general verdict argument.

Lastly, Plaintiff Fay attempts to distinguish the cases cited by Grand Strand that demonstrated introduction of such affair evidence was proper in analogous matters. {Resp. Br. of Plaintiff Fay p. 21-31}. Plaintiff Fay purports to distinguish the cases based on minor, immaterial factual distinctions in an attempt to distract from the true holdings in those cases. Each case stands for the proposition that exclusion of affair

evidence constitutes reversible error in a wrongful death action. This court should, therefore, adhere to those well-reasoned precedents and hold the trial court committed reversible error by excluding the relevant evidence of Husband's affair.

Conclusion

Based on the foregoing, this Court should find that the trial court's jury charge constituted reversible error and that the trial court improperly excluded evidence of Husband's extramarital affair. This Court should reverse and remand this matter for a new trial absolute.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____


C. Mitchell Brown
William C. Wood, Jr.
Michael J. Anzelmo
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Monteith P. Todd
Sowell Gray Stepp & Laffitte, LLC
Post Office Box 11449
Columbia, South Carolina 29211

Randolph P. Lee
Batten Lee PLLC
8000 Weston Parkway, Suite 340
Cary, North Carolina 27513

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

May 24, 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

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 certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

C. Mitchell Brown

William C. Wood, Jr.

Michael J. Anzelmo

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

Monteith P. Todd
Sowell Gray Stepp & Laffitte, LLC
Post Office Box 11449
Columbia, South Carolina 29211

Randolph P. Lee
Batten Lee PLLC
8000 Weston Parkway, Suite 340
Cary, North Carolina 27513

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

May 24, 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

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):

RECEIVED
MAY 24 2013
SC Court of Appeals

Pleadings:

Final Reply Brief of Appellant/Respondent Grand Strand
Regional Medical Center, LLC, d/b/a South Strand
Ambulatory Care Center

Counsel Served:

Ruskin C. Foster
rfoster@mklawgroup.com
Brad D. Hewett
bhewett@mklawgroup.com
Mike Kelly Law Group, LLC
500 Taylor Street
Post Office Box 8113
Columbia, SC 29202
*Attorneys for Sean D. Fay, as Personal Representative for
the Estate of Kelly L. Fay, Deceased*

J. Boone Aiken, III, Esquire
Aiken Bridges Elliott Tyler & Saleeby, PA
Post Office Drawer 1931
Florence, SC 29503
jba@aikenbridges.com
*Attorneys for Stephen W. Law, DO and Carolina Health
Specialists*

Andrew F. Lindemann, Esquire
Davidson & Lindemann, P.A.
Post Office Box 8568
Columbia, SC 29202-8568
alindermann@dml-law.com
Attorneys for Stephen W. Law, DO

Marian Scalise, Esquire
Lydia McGee, Esquire
Richardson Plowden Carpenter & Robinson, PA
2103 Farlow Street
P.O. Drawer 3646 (29578)
Myrtle Beach, SC 29577
mscalise@richardsonplowden.com
*Attorneys for Defendants Richard Young, MD and Grand
Strand Urology, LLP*

Monteith P. Todd, Esquire
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449 (29211)

Columbia, SC 29202

mtodd@sowell.com

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

Randolph L. Lee, Esquire

Batten Lee PLLC

8000 Weston Parkway, Suite 340

Cary, NC 27513

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

John S. Nichols, Esquire

Bluestein, Nichols, Thompson & Delgado, LLC

Post Office Box 7965

Columbia, SC 29202

jsnichols@bntdlaw.com

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

Mason A. Summers

Richardson Plowden & Robinson, PA

1900 Barnwell Street

Columbia, SC 29201

Msummers@richardsonplowden.com



Jennifer B. Lee

Administrative Assistant

May 24, 2013