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, 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,

Of whom Stephen W. Law, D.O., is ..... Respondent/Appellant,
and
Of whom Richard Young, M.D., and
Grand Strand Urology, LLP are ..... Respondents.

APPELLANT'S BRIEF OF RESPONDENT/APPELLANT SEAN D. FAY

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STATEMENT OF THE ISSUE ON APPEAL

Did the trial court err in granting a directed verdict for Dr. Young on the ground that under the public policy of South Carolina Dr. Young had no responsibility in this case because he had a right to rely, as a matter of law, on any information given to him by Dr. Law, whom the trial court described as a competent, capable, and board certified emergency physician?

STATEMENT OF THE CASE

This is a medical negligence case. Sean Fay, as personal representative of the estate of Kelly L. Fay, brought an action against Grand Strand Regional Medical Center, LLC, d/b/a South Strand Ambulatory Care Center, Stephen W. Law, D.O., Dr. Richard Young, M.D., and Grand Strand Urology, LLP, for medical negligence resulting in Kelly Fay's death. At the close of the evidence Dr. Young and his practice, Grand Strand Urology, LLP, moved for a directed verdict, which the trial court granted by an oral ruling. The case proceeded against the remaining defendants and on May 27, 2010, the jury returned a verdict finding negligence on behalf of Grand Strand Regional Medical Center and Dr. Stephen Law (96% total, but assigning Grand Strand 90% and Dr. Law 6%), and comparative negligence of 4% by the Plaintiff. The jury awarded the Plaintiff $3,000,000.00 actual damages. The verdict was enrolled for Plaintiff in the amount of $2,880,000.00.

On June 7, 2010, Grand Strand Regional Medical Center filed several motions pursuant to Rules 50 and 59, SCRCP, including a motion for JNOV, for New Trial, and for New Trial Nisi Remittitur. That same date Dr. Law filed several post-trial motions, including a motion for JNOV, for New Trial, for New Trial Nisi Remittitur, and to have the judgment enrolled using the percentages assigned by the jury. Plaintiff Fay filed oppositions to all motions.

On June 24, 2010, the trial court entered an order denying Grand Strand's motions. That same date the trial court denied the motions filed by Dr. Law, who received written notice of the entry of the order on July 12, 2010. On July 21, 2010, Dr. Law filed

a subsequent motion pursuant to Rule 59, SCRCP, asking the trial court to address several issues raised by Dr. Law's earlier Rule 59 motion.

On July 21, 2010, Grand Strand Regional Medical Center appealed the trial court's order denying its post-trial motions. Grand Strand had received written notice of the entry of that order on July 12, 2010. On July 26, 2010, Grand Strand Regional Medical Center filed and served an amended Notice of Appeal from the order denying post-trial motions.

On July 30, 2010, Plaintiff Fay filed and served a Notice of Cross-Appeal. Plaintiff appealed the trial court's ruling dismissing Dr. Young and Grand Strand Urology, LLP, as defendants after the close of the evidence. Plaintiff also appealed several other trial rulings.

On August 6, 2010, Grand Strand Regional Medical Center filed its second amended Notice of Appeal. On August 10, 2010, Plaintiff Fay moved this Court to stay the time limits in light of the pending motion for reconsideration filed by Dr. Law. On August 20, 2010, Dr. Law filed a return indicating no opposition and suggesting the Court dismiss the appeal and cross-appeal without prejudice until the trial court ruled on Dr. Law's motion for reconsideration. Dr. Law filed separately a motion to dismiss the appeals without prejudice or, alternatively, to stay and remand.

On August 24, 2010, Grand Strand Regional Medical Center filed a return in which it consented to the stay as to the appeal and cross-appeal. Grand Strand filed a separate return to the motion to dismiss requesting that the Court deny that motion while staying all time limits until the trial court ruled on Dr. Law's pending motion for

reconsideration.

On September 24, 2010, this Court issued an order denying Dr. Law's motion to dismiss the appeal and cross-appeal. The Court also ruled that the appeals would be held in abeyance pending the trial court's ruling on Dr. Law's motion. On August 17, 2011, the circuit court issued an order denying in part and granting in part Dr. Law's pending motion for reconsideration. The only portion of the motion the court granted was to reform the verdict based upon the percentages of fault assigned by the jury.

On August 22, 2011, Plaintiff Fay moved the trial court to reconsider its ruling and deny Dr. Law's motion in its entirety. Following a hearing the trial court issued a new order on August 26, 2011, granting Plaintiff Fay's motion, rescinding that portion of the order which had entered judgment as to each defendant according to the percentages of fault assigned by the jury, and ordering the original verdict be re-enrolled, *nunc pro tunc,* against all defendants jointly and severally. On September 23, 2011, Dr. Law filed and served his notice of appeal from the judgment entered May 28, 2010 as well as the post-verdict orders entered on June 24, 2010, August 17, 2010, and August 26, 2010.

ARGUMENT

Scope of Review

In an appeal from the grant of a directed verdict, the appellate court must view the evidence in a light most favorable to the non-movant. *Miller v. FerrellGas, L.P., Inc.*, 392 S.C. 295, 709 S.E.2d 616 (2011). *See also Baggerly v. CSX Transp. Inc.*, 370 S.C. 362, 368, 635 S.E.2d 97, 100 (2006) ("[T]he evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party against whom the verdict was directed."). When viewed in that light, if there is any evidence that may be reasonably construed as creating a question of fact, the motion must be denied and the matter submitted to the jury. *Miller v. FerrellGas, L.P.*, citing *Baggerly*, 635 S.E.2d at 100–101 ("If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury.").

The Trial Court Erroneously Directed a Verdict for Dr. Young on the Ground of Public Policy

The issue in this case is whether, when viewed in the light most favorable for Plaintiff Sean Fay, there is any evidence, or reasonable inferences from the evidence, from which a jury might find for Plaintiff Fay, the non-moving party, against Dr. Young. The following evidence meets this test.

At trial, Mr. Fay was asked if Dr. Law spoke with him other than telling him the X-ray revealed Mrs. Fay had a kidney stone, and he stated:

> A. He did. He - - he was back and forth once or twice, and he had mentioned that he had talked to Dr. Young, the

urologist on call, who had said that they both agreed that based on Kelly's health, being [young], healthy, and her pain management, that she would be okay [til] Monday to release her and follow up with the urologist on Monday.

And he kind of gave me the impression that he had talked to him more than once, so between the X-ray and the urinalysis to after the CAT scan, or CT scan, sorry. I don't know if that's the same.

Q. All right. But is that a specific recollection you have, that he said that both he and Dr. Young agreed - -

A. Yes. Specifically he told me - - yes, he said that he and Dr. Young agreed, based on her age, her health, and that they could deal with the pain management, that she would be okay to release, and - - the most - - the biggest concern was her pain, if they could control her pain - - I don't know what to assume, but if they could control her pain she could wait [til] Monday. That was the gist of the conversation. But yes, he did say they both agreed.

(R. p. 289, l. 13 - p. 290, l. 11; see also p. 303, ll. 4-7; p. 317, ll. 3-8).

Mr. Fay never saw anyone take Mrs. Fay's temperature the entire time they were there. (R. p. 295, l. 25 - p. 229, l. 5). No one ever told him that "fever and a kidney stone could cause Kelly to die." (R. p. 302, ll. 21-23). Dr. Law performed some tests on Mrs. Fay and told Mr. Fay "that it seemed really odd because it was too clean, and there wasn't any blood or bacteria, and that's when he ordered the CT...." (R. p. 336, ll. 17-20).

Mr. Fay stated they were told to follow up with Dr. Young the following Monday, and they released Mrs. Fay's medical records to Dr. Young's office because Dr. Young was familiar with her case. (R. p. 306, l. 13 - p. 240, l. 1). When they called Dr. Young's office on Monday morning he was not available because he had surgeries scheduled, and they were told to wait until 3:00 p.m. to come in. (R. p. 323, ll. 5-25).

As they were leaving the hospital Mrs. Fay was "flush" and complained about chills and fever. (R. p. 337, ll. 9-13; p. 363, ll. 9-16). Mr. Fay took Mrs. Fay's temperature about 45 minutes after they left the hospital and it was over 101°. (R. p. 301, l. 7 - p. 302, l. 6; p. 307, ll. 8-19; p. 365, ll. 14-15; p. 369, ll. 6-12). Mr. Fay assumed the hospital staff were aware that Mrs. Fay had the fever. (R. p. 307, l. 20 p. 308, l. 8).

Dr. Mike B. Siroky is a board certified urologist who testified for the Plaintiff as an expert in urology. (R. p. 474, l. 13 - 475, l. 2). He testified at length about his education and credentials. (R. p. 475, l. 3 - p. 477, l. 8; p. 480, ll. 8-20). Without objection the trial court qualified him as an expert in urology and the treatment of kidney stones. (R. p. 477, l. 19 - p. 478, l. 5).

Dr. Siroky stated he was qualified to give opinions about the standard of care of urologists as well as emergency room physicians treating a kidney stone patient. (R. p. 480, l. 21 - p. 481, l. 4; p. 484, ll. 12-19; p. 487, l. 7 - p. 489, l. 8; p. 550, l. 18 - p. 551, l. 3). Dr. Siroky agreed that he was stating his opinions to a reasonable degree of medical certainty. (R. p. 478, ll. 8-15; p. 489, l. 21 - p. 490. l. 1).

Dr. Siroky reviewed Ms. Fay's medical records as well as depositions in the case. (R. p. 478, l. 20 - p. 480, l. 7). When asked if he had an opinion whether Dr. Young deviated from the standard of care in his care and treatment of Mrs. Fay, Dr. Siroky stated that he did, and explained:

> My opinion is that Dr. Young failed to properly account for the possibility of a[n] infected renal system in this patient, failed to take account of the size of the stone, failed to take account of the location of the stone, failed to take account of the obstruction caused by this stone, and the risk that it caused, rather, the risk that it posed to this patient's well

being and - - and life, and due to that failure, deviated from the standard of care.

(R. p. 490, l. 2-18). Dr. Siroky testified about several other deviations from the standard of care by other defendants, but agreed that "each and every one of those deviations from the standard of care...contributed to Kelly Fay's death." (R. p. 491, l. 5 - p. 492, l. 22).

Dr. Siroky was asked whether Ms. Fay should have been admitted or sent home on January 26, 2002, and he replied:

> This is, I think, the crux of the case. Because of the size of this stone, because of [its] location, because it had extremely low chance of passing on its own, and because it was completely obstructing, this patient should have been admitted. After admission she could have either been observed for a while, or she could have been taken to the operating room for a stint placement, or even lithotripsy, although that's usually not done on weekends. But if - - had that been done her outcome would have been different.

(R. p. 493, l. 16 - p. 494, l. 3). Dr. Siroky based his opinion that she should have been admitted on the following:

> I base it on the fact that she had a large stone that was wedged into the ureter, just below the ureteropelvic junction, as was drawn earlier today for the jury, which had, as I said - - I characterized it as a very low chance - - I would say almost no chance of passing on its own, and was causing a complete obstruction as evidenced by certain changes on the KUB film, and certain changes on the CAT scan film.
>
> Having established that fact something has to be done in an emergent fashion to relieve that obstruction, because with a total obstruction not only do you run two major risk[s] - - one risk is the risk of an infection in this closed space, which then becomes like an abscess, the second risk is damage to that kidney, because complete obstruction - - and we don't know exactly how long that complete obstruction can - - can be present before irreversible damage takes place, but there is a risk of permanently damaging that kidney because the urine has no place to go. So you have an obstructed system that can either become infected and/or can cause damage to the kidney because of the obstruction. For those two

> reasons, that obstruction has to be relieved in a, let's say, timely manner. I'm not going to say it has to be within four hours or twenty-four hours, but it has to be done in a timely manner to relieve that obstruction... and that's the standard of care.

(R. p. 494, l. 7 - p. 495, l. 6). Dr. Siroky was then asked whether the emergency room physician "and/or urologist, or both have - - if one is consulted, have a duty - - do you know - - do you have an opinion as to whether or not they have a duty to rule out infection before that patient is sent home?" to which he responded "Absolutely....yes, absolutely, they do." (R. p. 495, ll. 7-14). When asked the various ways to rule out infection, Dr. Siroky stated, "Well, starting with vital signs, including temperature, the white cell count, and the urinalysis, and/or dip-stick, whatever is the practice in that hospital." (R. p. 495, ll. 15-19).

Dr. Siroky stated Mrs. Fay presented at the emergency room with a kidney stone that was obstructing the passage between the kidney and the bladder, blocking the flow of urine. (R. p. 495, l. 24 - p. 496, l. 8). The treatment of this type of obstructing kidney stone is different from the treatment for "an every day kidney stone." (R. p. 496, l. 9 - p. 497, l. 17). The size of the stone was "considerable" and the location "makes it difficult for the stone to pass because it was wedged in the upper ureter, indicating that it had not made very much progress down the ureter." (R. p. 498, ll. 3-16).

Dr. Siroky described the chemical reagent sticks known as "dip sticks." (R. p. 499, l. 10 - p. 500, l. 22). A microscopic examination would be more accurate because the dip sticks can yield "false negative" results. (R. p. 500, l. 23 - p. 501, l. 19). The dip stick test on Mrs. Fay indicated no blood, which is "extremely unusual in the presence of a

stone...." (R. p. 501, l. 22-24). The result revealed "there is a complete obstruction from the stone and none of the abnormal urine can get by it, therefore, it can't be detected...." (R. p. 502, ll. 1-12). The normal dip stick result should have sent up a "red flag" to the physician "in the face of a stone." (R. p. 502, l. 13 - p. 503, l. 10).

Dr. Siroky stated that a urine culture test result would not have been available for some time, and a microscopic exam would have also been negative. (R. p. 504, l. 16 - p. 505, l. 5). When asked what must be done to comply with the standard of care, Dr. Siroky stated:

> Again, physical exam, which includes the vital signs, extremely important to look for any signs of infection at that moment and time, when the patient is in the emergency room, but also when you have to have a high level of suspicion. You have to put things together, and come to the realization that you've got an obstructing stone, which is causing high pressure on the kidney, which is not going to pass on its own, and is high risk of becoming infected, so since you know that infection would be potentially life threatening, you've got to use all you resources to try to rule it out, and failing that you've got to protect the patient by admitting the patient for observation.

(R. p. 505, ll. 8-19).

Dr. Siroky reviewed Dr. Law's emergency room note which stated, "case was discussed with Dr. Richard Young, on-call urologist...." (R. p. 505, l. 22 - p. 506, l. 5). Dr. Siroky was asked his opinion as to "what should have transpired in that conversation" for "Dr. Young and Dr. Law to have complied with the standard of care," and he responded:

> Well, to start with there should have been a description of the patient, the description of her situation, the transmittal of all relevant facts, so that the consultant urologist, Dr. Young, could make a decision about her - - about her disposition, and a decision-making process to decide

whether it's safe, or not safe, to send the patient home.

(R. p. 506, ll. 8-17; see also p. 525, ll. 14-24). Dr. Siroky reviewed the depositions of Dr. Law and Dr. Young and it was his impression "there was joint decision-making" with regard to Mrs. Fay's treatment. (R. p. 506, ll. 18-20; p. 517, l. 19 - p. 518, l. 2). The following colloquy then took place:

> Q. Do you have an opinion as to whether or not Dr. Law, first of all, had a duty to relay all pertinent information to Dr. Young on the phone when he called him?
>
> A. Yes, he did.
>
> Q. All right, if Dr. Law did not relay all pertinent information to Dr. Young on the phone, what should Dr. Young have done, if anything?
>
> A. Well Dr. Young should have his own standards for what is safe for the patient, so if he does not obtain the information that he wants he should ask for it, or arrange to have it done. So, for example, if he's interested in a temperature and they tell him that they haven't taken the temperature he should ask that the temperature be taken. If he thinks that the white cell count is going to be important in his decision-making and there isn't one, he should say, let's get a white count before we send this patient home.

(R. p. 506, l. 21 - p. 507, l.11).

Dr. Siroky also stated that a kidney stone and a fever is an emergency. (R. p. 508, ll. 20-23). When asked what the most pertinent pieces of information that should have been relayed between Dr. Young and Dr. Law, Dr. Siroky stated:

> Well, the temperature is obviously one of the most important, because it determines whether a patient has a fever or doesn't have a fever, and as we've already heard this morning, fever can be due to infection, it can be due to other things as well. It can be due to the stone itself. But fever certainly is an extremely important alarm that infection may be present, so I don't know what the two most important things are, but

certainly temperature is one of the things I would want to know.

(R. p. 509, ll. 14-25). Dr. Siroky stated that if an emergency room physician called him and said he or she had a patient with a kidney stone:

> I would want to know, first, the size of the stone, and all of [its] three dimensions, if possible. I want to know the location of the stone in the urinary tract. I want to know if there's any indication of obstruction as manifesting on the x-ray films, and I would want to know if the patient has any manifestations of infection at the time, as shown by temperature, and also by white cell count.

(R. p. 510, ll. 12-21). Dr. Siroky stated "that is the standard of care." (R. p. 511, l. 1).

Dr. Siroky stated Mrs. Fay's records did not contain any temperature measure at the time Dr. Law was discussing the case with Dr. Young. (R. p. 511, ll. 7-9). Dr. Siroky testified that the standard of care required Dr. Young to ask Dr. Law if Dr. Law did not tell Dr. Young a temperature measurement. (R. p. 511, ll. 10-12).

Dr. Siroky stated "temperature is critical to determining whether the patient can be discharged." (R. p. 512, ll. 6-7). Dr. Siroky noted that a "fever" is a temperature of anything over 100.5°. (R. p. 515, ll. 4-9). Based upon his review of Mr. Fay's testimony regarding Mrs. Fay's condition when they arrived home from the hospital, Dr. Siroky had the opinion that Mrs. Fay had an elevated temperature in the early afternoon of January 26, 2002, and "it's more likely than not that she had a temperature on leaving the emergency room."(R. p. 520, ll. 1-9).

Dr. Siroky also opined that Dr. Young had a "doctor/patient" relationship with Mrs. Fay once he made a medical decision to send her home, and then requested that Mrs. Fay see him the following Monday morning. (R. p. 515, l. 16 - p. 516, l. 16). Dr. Siroky

added that the fact that the hospital had Mrs. Fay sign an authorization for the hospital to send her records to Dr. Young indicated that Dr. Young had accepted her as his patient at that time. (R. p. 516, l. 22 - p. 517, l. 13).

On cross-examination, Dr. Siroky stated that although Dr. Law testified that he told Dr. Young that the patient "was afebrile," meaning "did not have a fever," Dr. Young should have asked what the temperature reading in fact was. (R. p. 526, l. 1 - p. 527, l. 4). Dr. Young must make his own determination regarding whether the patient is febrile or not. (R. p. 527, ll. 5-8). If Dr. Law had said "this temperature was taken that morning," Dr. Siroky testified that was "not enough" because "they don't have a white count, and the urinalysis, or such as they did, the dip-stick, was remarkably negative." (R. p. 527, ll. 21-25).

Dr. Siroky stated that Dr. Law and Dr. Young should have made sure Mrs. Fay was admitted because she had an obstructive kidney stone. (R. p. 537, ll. 18-22). Had they done so, Mrs. Fay was not have suffered the generalized sepsis throughout her body. (R. p. 538, ll. 8-16).

Dr. Charles W. Sheppard testified for the plaintiff. (R. p. 397, ll. 13-21). He stated that in examining a patient in Mrs. Fay's position "you need to do a temperature, preferably several, and you need to do a white blood count." (Supp. R. p. 1, ll. 7-13). He agreed that an order to "take vitals" would include taking the patient's temperature. (R. p. 405, ll. 19-24; 408, ll. 6-11). In light of Mrs. Fay's condition Dr. Sheppard stated if he only had information on one vital he would "take a temperature, particularly a young, healthy kidney stone patient." (R. p. 406, ll. 1-10).

Dr. Sheppard reviewed the nurse's notes covering Mrs. Fay's visit to the emergency room on Saturday, January 26, 2002, and saw no entries for temperature other than the initial triage note, when her temperature was 98.1°, which is normal. (R. p. 406, l. 22 - p. 407, l. 16; p. 427, ll. 2-9). The following colloquy then took place:

> Q. Dr. Sheppard, do you have an opinion as to whether or not Kelly Fay should have been sent home without Dr. Law, and Dr. Young, and the nurses knowing whether or not she had a fever?
>
> A. No, sir, she should not have been sent home without knowing that.
>
> Q. And is that a deviation from the standard of care in your opinion?
>
> A. Yes, sir.

(R. p. 411, ll. 6-14; see also R. p. 407, l. 20 - p. 408, l. 2; p. 441, l. 9 - 442, l. 2). Dr. Sheppard opined that Mrs. Fay had a fever when she was discharged based upon Mr. Fay's testimony that her temperature was 101.3° at 45 minutes later. (R. p. 428, ll. 6-18).

Dr. Sheppard knew that Dr. Law did not have admitting privileges so as to admit Mrs. Fay to the hospital from the emergency room. (R. p. 413, ll. 4-9). Dr. Young would have been the person to make the decision to admit her. (R. p. 413, ll. 10-14). The notes indicated Dr. Law "discussed the case" with Dr. Young, who requested to see Mrs. Fay the following Monday. (R. p. 414, l. 17 - p. 415, l. 1).

Dr. Charles Stratton testified as an expert in internal medicine, infectious disease, medical microbiology and pathology. (R. p. 573, ll. 19-21; p. 574, ll. 22-23). Dr. Stratton testified:

> I believe she would have been febrile before twelve noon because, in fact, she was in the Emergency Room for four hours, and the stone dropped at least thirty minutes, and maybe as much as an hour or so before

> that....[B]y the time she gets home, forty-five minutes to an hour after she leaves at noon, that she's got a temperature of a hundred and one point two, so I believe that her stone was colonized, that the urine became infected within hours after it dropped, and that by ten o'clock in the morning, for example, she would have been febrile had her temperature been taken.

(R. p. 591, ll. 1-20). Dr. Stratton stated that had Mrs. Fay been admitted to the hospital on that Saturday she would not have died. (R. p. 594, ll. 2-5).

In his deposition, Dr. Law stated that Dr. Young "agreed with" Dr. Law, "based upon [Mrs. Fay's] age and pain control, that she was appropriate to discharge...." (R. p. 604, ll. 9-17). Dr. Law also agreed that it sounded reasonable to him that he told Mr. Fay that Dr. Law had spoken with Dr. Young and "after talking to Dr. Young" they both agreed to send Mrs. Fay home. (R. p. 604, l. 20 - p. 606, l. 25). Dr. Law added that Dr. Young agreed to accept Mrs. Fay as a patient. (R. p. 607, l. 17 - p. 608, l. 4; p. 609, ll. 6-10). Dr. Law repeatedly stated that he did not recall the specifics of his conversation with Dr. Young, but testified as to his normal practice. (R. p. 605, ll. 3-9, 19-21; p. 607, ll. 3-5, 6-8, 13-14, 16-17).

In his deposition, Dr. Young agreed that he would have had to have been the one to order Mrs. Fay's admission to the hospital. (R. p. 612, ll. 4-9). Dr. Young also stated:

> Again, I don't remember the specifics of the conversation, but I remember him saying that he had a patient in the Emergency Room with a stone that he saw on the CAT scan, and that he thought the pain was well-controlled and he was going to send them home, and that he didn't think there was any sign of a fever, and he thought that she would be okay to go home, but he said the stone was about five or six millimeters in size, and he thought that she would probably need follow-up.

(R. p. 614, ll. 4-12).

In his live testimony, Dr. Law stated that he discussed the case with Dr. Young, who requested to see Mrs. Fay the following Monday. (R. p. 678, ll. 20-22). Dr. Law agreed that "temperature is considered part of the vital signs" and that he did not order Mrs. Fay's temperature to be taken. (R. p. 684, ll. 9-16). He also agreed that "fever and kidney stone" is a "urologic emergency," as is "infection and kidney stone...." (R. p. 685, ll. 2-5; p. 692, l. 24 - p. 693, l. 11). He stated "in order to determine if somebody has a fever, you have to take their temperature." (R. p. 696, ll. 22-23). He added, "with her presentation, another set of - - another temperature should have been checked." (R. p. 697, ll. 2-3). He agreed he did not order the nurses to do so. (R. p. 697, ll. 4-5). Had he been told that Mrs. Fay had a fever he would not have let her leave. (R. p. 697, ll. 8-11; p. 715, ll. 9-12).

Dr. Law described the conversation he had with Dr. Young on the morning of January 26, 2002. Dr. Young was aware of the CT results. (R. p. 709, ll. 12-20). When asked if Dr. Young inquired about fever, Dr. Law stated:

> I don't believe he asked. That wouldn't be - - but I would mention to him as part of my discussion the patient is afebrile, which means without a fever, and that she has stable vital signs, and that I believe that she could be discharged home.

(R. p. 709, l. 24 - p. 710, l. 6). The following colloquy then took place:

> Q. Dr. Law, the truth is if you told him she was afebrile, that was not true, was it, unless you told him she was afebrile at eight o'clock in the morning because nobody knew what her temperature was after eight o'clock in the morning?
>
> A. That's correct. To - - you know, we don't have a number. We don't have a number to show you or the jury that this was her temperature at discharge. We have other information based on her

clinical exam and based upon her other vital signs that she did not have a fever at discharge.

Q. All of which could be affected by medication?

A. Yes.

Q. And I think you agree there's a thermometer in every room and it doesn't cost anything to stick a thermometer in their mouth, does it?

A. That is correct.

Q. And it was hospital policy, was it not, on abdominal pain patients they get at least two sets of vitals?

A. Right.

Q. Everybody agrees temperature is a vital?

A. Yes, it is.

(R. p. 710, l. 7 - p. 711, l. 1).

Dr. Law stated the decision to send Mrs. Fay home was a "joint decision between" him and Dr. Young. (R. p. 705, ll. 1-4; p. 707, ll. 3-11). If Mrs. Fay was to be admitted, Dr. Young would have had to have been the one to do so. (R. p. 714, ll. 7-14).

In his live testimony, Dr. Young agreed that the standard of care in evaluating a patient with a kidney stone requires the examining physician to rule out infection. (R. p. 806, ll. 15-20). He added, "when someone has a kidney stone, we always check their temperature." (R. p. 806, ll. 24-25). Dr. Young was asked if Dr. Law "specifically told you that she was afebrile" and he responded, "No, that's something we always talk about." (R. p. 795, ll. 1-4). He agreed that the chart revealed no temperature was taken after eight o'clock in the morning. (R. p. 796, ll. 4-5; p. 807, ll. 13-18). Dr. Young stated

that if a patient has a kidney stone and a fever "they're almost certainly going to be admitted to the hospital...." (R. p. 798, ll. 2-4; p. 799, ll. 19-24; p. 803, ll. 7-9). Dr. Young agreed that detecting a fever in a patient with a kidney stone is key in finding an infection. (R. p. 805, l. 16 - p. 806, l. 1).

Dr. Young stated that Dr. Law did not have admitting privileges and Dr. Young would have had to have admitted Mrs. Fay. (R. p. 800, l. 19 - p. 801, l. 1). Dr. Young agreed with Dr. Law that Mrs. Fay could go home. (R. p. 801, ll. 2-19; p. 808, ll. 15-18). When asked whether he inquired about whether Mrs. Fay actually had a fever, Dr. Young stated, "I just have to remind you, Mr. Foster, that again I don't remember the specifics of the conversation, and that's what it says right there in the deposition you just read." (R. p. 804, ll. 4-10).

During the defense case the court indicated it intended to dismiss the case against Dr. Young. (R. p. 809, l. 22 - p. 810, l. 8). Plaintiff contended Dr. Siroky's testimony provided sufficient evidence of Dr. Young's negligence to permit the jury to decide the matter. (R. p. 810, l. 11 - p. 812, l. 25). The trial court noted that the "big picture" of an on-call physician incurring liability for having "a telephone conversation" would violate public policy. (R. p.813, l. 1 - p. 814, l. 5). The court stated:

> South Carolina's public policy has to be that an on-call specialist must be able to rely on the information given him by a competent, capable, and certified emergency room physician. Otherwise, again, there'd be no end to the duty on physicians, that is those who are on call, the specialists, to verify every piece of information that they are given in a telephone conversation, and the practice of law - - well, the practice of medicine, nor does the practice of law for that matter, although I misstated it, just simply can't permit that and, the Court's ruling - - and, I don't have all the evidence in.

I just tipped, if you want to put it that way, the lawyers to the point that it appeared to me that Dr. Young was going to be released from this case at the end of all the evidence so that he would not feel it necessary to call additional witnesses in his favor, but it just seems to me that we cannot support a policy that would put that kind burden on a specialist or on a physician who is on call, and now, of course, the decision - - this issue about whether or not there was a mistake made by Dr. Law, well, the hospital, again, that - - this is where the battleground in this case is, not what Dr. Young did.

The only evidence in the record that would tend to make it appear that Dr. Young had something to do with this decision and what came from Dr. Law on a leading question from you, which was appropriate on cross-examination, you said wasn't this really a joint decision between the two of you that should could go home, and the response of that was yes.

Now, when I have - - have these issues, before I take the evidence I have to give every inference to the non-moving party. However, when I've heard the evidence, there's not a lot of inferences to simply be given because I've heard what the evidence is, and the evidence on that point is that - - and perhaps - - and this is consistent with construing what Dr. Law's testimony was when he called it a joint decision.

I think he probably was saying that Dr. Young might have - - he might have given Dr. Young the credence to reverse the decision to release her, but it was his decision to release her. Dr. Law testified to that, and Dr. Young has testified to that. There's no evidence to the contrary, and thus for that reason, Dr. Young has no responsibility here.

And then finally, just like Dr. Law cannot discharge - - excuse me, cannot admit someone to the hospital, well, Dr. Young can't discharge someone from the emergency room when they're being treated by Dr. Law. Obviously the decision to discharge was Dr. Law's, and thus therein is where your complaint lies, not with Dr. Young.

These are the reasons that the Court would intend at the appropriate time to release Dr. Young from the case upon appropriate motion.

I just simply have that discussion with you now so that the record would be clear and in the event of appellate review of that decision, your position, as well as the Court's position, would be stated.

* * *

> I probably didn't say this, but the decision is not based on the patient/physician issue. The Court does not reach that issue. It's not necessary to determination here. I find as a matter of law there's no negligence on the part of Dr. Young and don't even reach the patient/physician issue...simply because there's no underlying negligence on which a recovery could be grounded.

(R. p. 814, l. 17 - p. 817, l. 25). The court added:

> One other thing I did not say in my - - my soliloquy was Dr. Siroky's testimony about Dr. Young having the necessity of going beyond what he's told by Dr. Law in checking about what time was the temperature given and checking behind the other facts establishes a standard that is simply not the law of South Carolina, and thus the Court rejects Dr. Siroky's testimony on that point as against being inappropriate under South Carolina law and thus not a ground[] to hold Dr. Young in the suit.

(R. p. 819, ll. 9-17).

At the close of the evidence Dr. Young once again moved for a directed verdict. (R. p. 821, l. 9 - 825, l. 23). Plaintiff responded that Dr. Young's liability was a question for the jury under the testimony presented. (R. p. 826, l. 3 - p. 829, l. 9). The trial court responded:

> The Court is prepared to rule, and my ruling is the same from our discussion that we had earlier today. First of all, it's not necessary to reach, and, therefore, I do not reach the issue of whether or not there was a physician/patient relationship established between Dr. Young and Ms. Fay.
>
> The Court just finds as a matter of law that there is, first of all, there is no negligence on the part of Dr. Young who has a right to rely on any information given to him by a competent, capable, and board certified emergency physician. To hold otherwise would turn the practice of medicine on its head in South Carolina, but furthermore, I am going to permit the parties, Dr. Young specifically, to amend his pleadings to allege superseding or intervening negligence.

> There's really no surprise here because this came before the testimony, the motion did, before the testimony of Dr. Young and Dr. Law and thus could have been explored during the time they were on the stand, but furthermore, it cannot - - does not seem to the Court that that could be a shock or surprise because that issue sort of permeates the factual scenario from which arose this unfortunate event, and thus for all these reasons, the Court is going to grant dismissal to Dr. Young at this time, and it is so ordered.

(R. p. 829, l. 23 - p. 830, l. 20).

The trial court's public policy ruling is contrary to both the law of South Carolina and the facts of this case. This was a medical negligence case, and Plaintiff presented expert and lay testimony from which a jury could have found Dr. Young liable beyond simply accepting a telephone call from Dr. Law during a medical emergency.

In South Carolina, a claim for malpractice requires a showing of the standard of care, a breach of the standard of care, proximate cause, and damages. *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009). The standard of care which must be observed by a physician is that of an average, competent practitioner acting in the same or similar circumstances. *Id. See also Guffey v. Columbia/Colleton Regional Hosp., Inc.*, 364 S.C. 158, 612 S.E.2d 695 (2005) (plaintiff may present both expert testimony and circumstantial evidence of a physician's culpability, and inquiry need only be whether there is sufficient competent evidence from which jury may infer causal connection between the physician's conduct and the injury).

In this case, Plaintiff presented abundant evidence described above from which a jury could have found that Dr. Young was partly responsible for Kelly Fay's death. Dr. Siroky stated that standard of care required Dr. Young to ask specifically about Mrs.

Fay's temperature when Dr. Law failed to provide that testimony. Dr. Law would have reported that the temperature nearly four (4) hours earlier was 98.1°, but that the chart demonstrated the temperature had not been taken since. Dr. Siroky stated the standard of care then required Dr. Young to ask that a new reading on Mrs. Fay's temperature be taken. Abundant evidence leads to the inference that such a measurement would have revealed the fever, which would have indicated the presence of the infection which killed Mrs. Fay.

It is true that the record contains other evidence that there was no indication of fever at the time Mrs. Fay was discharged. But that is not the test when reviewing the grant of a directed verdict. Instead, this Court must view the evidence in the light most favorable to Plaintiff, and if there is any evidence from which a jury could have held Dr. Young responsible, then directed verdict was not appropriate. As this Court has stated:

> [I]t is not unusual for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve. Under such circumstances, it is not the function of this Court to weigh the evidence and determine the credibility of the witnesses.

Thomas v. Dootson, 377 S.C. 293, 297, 659 S.E.2d 253, 255 (Ct. App. 2008) (reversing directed verdict in medical negligence case).

The trial court's decision was affected by an error of law in that the court applied a standard for liability that is not embraced within the statutory or case law of South Carolina. The trial court announced that the public policy of this State relieved Dr. Young of any responsibility for his actions even against the backdrop of evidence, including

expert evidence, that Dr. Young breached the applicable standard of care when he concurred in Dr. Law's decision to send Kelly Fay home without *knowing* what her body temperature was. Everyone agreed that fever is the best indicator of infection, and a kidney stone in the presence of a fever is a true medical emergency that required Mrs. Fay's admission. Everyone also agreed that only Dr. Young could order that admission, but he made that fatal decision in this case without having all of the facts the standard of care required that he have, and without obtaining the facts the standard of care required that he obtain.

This Court should hold that the record contained evidence which, viewed in a light most favorable for the Plaintiff as non-moving party, gave rise to a jury question as to whether Dr. Young breached the applicable standard of care in this case. The Court should reverse the trial court's grant of a directed verdict for Dr. Young.

CONCLUSION

For the reasons stated this Court should reverse the directed verdict for Dr. Young and should remand this matter for a new trial as to his liability for the death of Kelly Fay from sepsis following treatment for a kidney stone.

May 24, 2013

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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, Stephen W. Law, D.O.,
Dr. Richard Young, M.D., and Grand Strand Urology, LLP, ... Defendants,

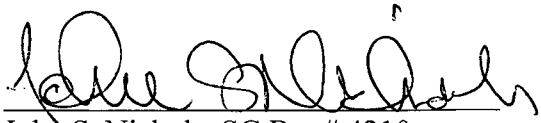
Of whom Grand Strand Regional Medical Center, LLC, d/b/a
South Strand Ambulatory Care Center is . . . . . Appellant/Respondent,

Of whom Stephen W. Law, D.O., is . . . . . Respondent/Appellant,
and
Of whom Richard Young, M.D., and
Grand Strand Urology, LLP are . . . . . Respondents.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Appellant's Brief, Reply Brief, Respondent's Brief to Appellant Stephen W. Law, D.O., and Respondent's Brief to Appellant Grand Strand Regional Medical Center, LLC* of Respondent/Appellant Fay comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,



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May 28, 2013

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In the Court of Appeals

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Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

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South Strand Ambulatory Care Center is . . . . . Appellant/Respondent,

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

and

Of whom Richard Young, M.D., and
Grand Strand Urology, LLP are . . . . . Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel of record with a copy of *Respondent/Appellant Sean D. Fay's final Appellant's Brief, Reply Brief, Respondent's Brief to Appellant Stephen W. Law, D.O., and Respondent's Brief to Appellant Grand Strand Regional Medical Center, LLC* by mailing copies of the same by United States Mail with first class postage prepaid to the following

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