

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case Nos. 2008-CP-26-9047
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., 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 Richard Young, M.D. and
Grand Strand Urology, LLP are, ... Respondents.

REPLY BRIEF OF RESPONDENT-APPELLANT STEPHEN W. LAW, D.O.

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ARGUMENTS

I. Dr. Stephen W. Law filed a timely appeal to the Court of Appeals, and the earlier jurisdictional ruling made on that issue by the Court of Appeals should not be reheard.

In his respondent's brief, the Respondent-Appellant Sean D. Fay, as Personal Representative for the Estate of Kelly L. Fay, expends seven pages to re-argue a jurisdictional issue on which he has already lost. Earlier in the appeals process, Fay filed a motion to dismiss the appeal filed by the Appellant-Respondent Stephen W. Law, D.O. The parties fully briefed the jurisdictional issues raised, and on February 6, 2012, this Court issued an order ruling that Dr. Law's appeal was timely. This Court thereby denied Fay's motion to dismiss. (R. 13-16). There is no basis for Fay to re-litigate that decision. In fact, Rule 240(i), SCACR, provides that "[t]he court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." *See*, Rule 240(i), SCACR. Consequently, there is no basis for the Court to re-hear or reconsider the previous dispositive ruling made on the motion to dismiss.

Nonetheless, if the Court finds that it is proper for Fay to re-assert the jurisdictional issue on which the Court has already ruled, Dr. Law will re-address the issue. Following the jury's verdict, Dr. Law and Grand Strand Regional Medical Center ("Hospital") filed post-trial motions including a JNOV motion, a motion for new trial absolute, and a motion for new trial nisi remittitur.

On July 12, 2010, counsel for Dr. Law received the Order Denying Defendant Law's Post Trial Motions issued by Circuit Court Judge Michael Baxley. Because Judge Baxley had not addressed each of the grounds raised in Dr. Law's post-trial motions, it was necessary to file a Rule 59(e) motion to preserve those grounds for potential appellate review. Counsel for Dr. Law

filed and served the Motion to Alter or Amend Judgment and/or Motion for Reconsideration on July 21, 2010, which was timely under Rule 59(e). (R. 1160-1162).

In his Rule 59(e) motion, Dr. Law pointed out that the Order Denying Defendant Law's Post Trial Motions did not address each of grounds for relief as set forth in Dr. Law's post-trial motions. Specifically, Judge Baxley had 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 Fay or his decedent. He had 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 Fays to follow the discharge instructions to take the decedent back to the emergency department. Further, Judge Baxley had not addressed Dr. Law's position that the only reasonable inference to be drawn from the evidence is that the Fays were either solely responsible for the decedent's death or was more than fifty percent at fault as a matter of law. Judge Baxley had also not addressed the excessiveness of the verdict or Dr. Law's request for relief under the Thirteenth Juror Doctrine. Finally, Judge Baxley had 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 of the damages awarded by the jury. (R. 1160-1162).

On August 17, 2011, Judge Baxley filed an Order Denying in Part and Granting in Part Defendant Law's Motion for Reconsideration of Denial of Post Trial Motion. In that order, Judge Baxley denied the Rule 59(e) motion "finding that these issues were either directly addressed in the Court's previous ruling, or clearly addressed by implication in the denial of all the post-trial motions." (R. 9). Nonetheless, Judge Baxley also determined that the request to reform the verdict based on the percentages of fault as determined by the jury *had not been*

addressed in his earlier order, either directly or by implication. He specifically wrote: "Defendant Law also moves this Court to reform the verdict based upon the percentages of negligence assigned to the Defendants by the jury. This issue was not addressed in the Court's previous Order denying post-trial motions." (R. 9). Judge Baxley then proceeded to grant Dr. Law the relief that he sought and reformed the verdict. An amended judgment was subsequently entered at Judge Baxley's direction.

Both Fay and the Hospital subsequently filed Motions for Reconsideration with respect to the August 17, 2011 Order. In adjudication of those motions, Judge Baxley issued an order captioned "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." He then denied Dr. Law's motion to reform the verdict and reinstated the original judgment. (R. 11-12).

Following the issuance of the Order filed August 26, 2011, which finally adjudicated Dr. Law's post-trial motions including the apportioned judgment issue that Judge Baxley agreed had not been addressed directly or implicitly in his original Order Denying Defendant Law's Post Trial Motions, Dr. Law served and filed a Notice of Appeal on September 23, 2011. That Notice of Appeal was timely filed within thirty days of the issuance of Judge Baxley's August 26, 2011 Order.

Nonetheless, despite this Court's order to the contrary, Fay continues to maintain that Dr. Law's appeal was untimely and that this Court lacks appellate jurisdiction. Fay maintains that Dr. Law's Rule 59(e) motion was a successive post-trial motion that did not toll the time to file an appeal under Rule 203, SCACR. As this Court has previously ruled, Fay's position is incorrect.

In the seminal case of *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court set out the standard for determining whether a Rule 59(e) motion should be deemed successive. The Supreme Court held:

We conclude a party usually is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely. In essence, *we view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's "single bite at the apple" in presenting his case to the trial court.*

602 S.E.2d at 778. (Emphasis added).

Fay's reliance on such pre-*Elam* cases such as *Collins Music Co. v. IGT*, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002), is misplaced. Here, Dr. Law did not take his original post-trial motions and simply re-caption those motions as a motion for reconsideration. Likewise, Dr. Law's Rule 59(e) motion is not virtually identical to the original post-trial motions. Instead, the Rule 59(e) motion was directed solely at the issues raised but not discussed in Judge Baxley's original Order Denying Defendant Law's Post Trial Motions. In fact, the Rule 59(e) motion was directed at issues that the original Order Denying Defendant Law's Post Trial Motions did not even mention as being raised. Indeed, in his subsequent Order filed August 17, 2011, Judge Baxley himself recognized that Dr. Law's request to reform the verdict based upon the percentages of negligence assigned by the jury "was not addressed in the Court's previous Order denying post-trial motions." (R. 9). In short, Dr. Law was legitimately concerned that, without using a Rule 59(e) motion to request that Judge Baxley issue a ruling on those grounds not addressed in his original order, he faced the real likelihood that an appellate court would

conclude that those issues were not preserved for appellate review. That is the very purpose and use of a Rule 59(e) motion.

This very point was made by the Supreme Court in *Elam*, where the Court wrote:

A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam, 602 S.E.2d at 780. (Emphasis in original). The Supreme Court then stated: "Our mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely." *Id.*

The Supreme Court in *Elam* also cautioned about placing the appellant between the "proverbial rock and a hard place" in deciding whether a Rule 59(e) motion is needed. This discussion is pertinent here. The Court wrote:

[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party, but a careful consideration of this issue has led us to conclude that is precisely the effect of an unwarranted expansion of *Quality Trailer*. ... If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. But in filing the motion, he may unwittingly forfeit the right to an appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling. We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place.

Elam, 602 S.E.2d at 780-81.

Like the appellant in *Elam*, Dr. Law reasonably believed that a Rule 59(e) motion was necessary and appropriate because Judge Baxley's original Order Denying Defendant Law's Post

Trial Motions did not address several of the issues raised in Dr. Law's post-trial motions. Dr. Law did not want to face the likelihood that those issues would later be deemed not preserved because a Rule 59(e) motion had not been filed. Again, it bears repeating that Judge Baxley indeed agreed that he did not adjudicate at least one issue raised in Dr. Law's post-trial motions. (R. 9). On that issue, Judge Baxley initially ruled in Dr. Law's favor only to then reverse himself after ironically it was Fay and the Hospital that filed Rule 59(e) motions.

In sum, a comparison of Dr. Law's post-trial motions and his Rule 59(e) motion clearly demonstrates that the two motions are not "virtually identical." One motion is ten pages in length; the other is three pages. One sets forth more grounds than the other. The Rule 59(e) motion was intended and does raise only those grounds that were not addressed in Judge Baxley's original Order Denying Defendant Law's Post Trial Motions. That motion was intended to ensure that those issues were properly preserved for appellate review. Dr. Law used that Rule 59(e) motion to request that Judge Baxley address those issues so that Fay could not later argue that those issues were not addressed by Judge Baxley and thus are not preserved for appeal. Dr. Law's Rule 59(e) motion is not a successive post-trial motion; it is a proper Rule 59(e) motion consistent with the Supreme Court's holdings in *Elam*.

As such, Dr. Law's Notice of Appeal which appeals from all three of Judge Baxley's post-trial orders was timely filed. This Court has appellate jurisdiction. Fay's attempt to re-litigate this issue should be rejected.

II. The Circuit Court erred in denying Dr. Stephen W. Law's motion for judgment notwithstanding the verdict because Sean Fay failed to present sufficient evidence to establish a breach of the standard of care by Dr. Law that proximately caused the death of Kelly Fay.

Following the jury's verdict, Dr. Law moved for a judgment notwithstanding the verdict (JNOV) on the basis that that Sean Fay had failed to present sufficient evidence to establish that any alleged breach of the standard of care by Dr. Law proximately caused the death of Kelly Fay.¹ In response to that argument, Fay presents testimony that he contends supports a finding that Dr. Law breached the standard of care. However, it is quite telling that Fay, despite the many pages purportedly devoted to this issue on appeal, barely addresses the proximate cause issue raised.

Specifically, Fay summarizes in detail the testimony that was elicited from various experts to argue a breach of the standard of care of not only Dr. Law but also every other defendant including the Hospital personnel. He even outlines the expert testimony of Christina Knight, his nursing expert who was not qualified to and did not offer any opinions on medical causation. Similarly, Dr. Law summarizes the expert testimony of Dr. Charles W. Sheppard, who is his emergency medicine expert, but nowhere in that summary is there any opinion offered by Dr. Sheppard on the issue of causation. The reason for that: Dr. Sheppard offered no opinions on causation and actually admitted that he was not offering any opinions on that issue. (R. 425).

¹ Fay initially argues that this issue is not preserved for judicial review. Dr. Law disagrees. The issue of causation was raised and ruled upon by Judge Baxley at the directed verdict stage. (R. 633-634). Moreover, Dr. Law's counsel joined in the argument made by the other defendants at the directed verdict stage. (R. 623).

As for Dr. Siroky, Fay does not even refute, let alone address, Dr. Siroky's admission that that he was unable to testify that "most probably" Kelly Fay had an infection on January 26, 2002 before her discharge from the ER. (R. 531).

Nevertheless, Fay discusses the testimony of Dr. Charles Stratton and cites to testimony where Dr. Stratton offered the opinion that Mrs. Fay more likely than not had a fever before her discharge from the ER. (R. 588). Yet, Fay fails to mention that Dr. Stratton admitted on cross-examination that he was making assumptions to offer that opinion and that he could not verify those assumptions. In particular, in initially offering the opinion that Mrs. Fay's infection had begun prior to discharge, he was relying on the assumption that the infection would have begun "probably closer to one hour" after a colonized stone dropped into the ureter. (R. 590). That short time frame compelled his conclusion that the infection more likely than not began prior to her discharge. However, on cross-examination, Dr. Stratton was impeached with his deposition testimony. (R. 595-598). Dr. Stratton conceded that he does not know the time frame because he does not know how many organisms were colonizing the stone. (R. 597). Dr. Stratton testified, "I don't know how many organisms were colonizing the stone. I just know that, in fact when I did the math, after our deposition, it basically should say between one hour and four hours and forty minutes, if you do the math." (R. 597). He further testified as follows: "I don't know how many organisms there were, but even if you assume one, then it's going to be four hours and forty minutes. If you assume more than one, which is what I would assume, but I don't know, then it's going to be closer to one hour." (R. 597). In sum, Dr. Stratton offered the following concession that negates his earlier opinion on causation:

Q. So Doctor, isn't it fair to say, you really can't say whether it's one hour, four hours and forty-five minutes, or whichever your calculations were, you really can't say as you sit here today, isn't that correct?

- A. I can't say because I don't know how many organisms were colonizing the stone, no.

(R. 597).

In short, Fay fails with his lengthy discussion of the trial testimony to point to any specific opinion that any expert held establishing the requisite causal link between the alleged negligence of Dr. Law and Mrs. Fay's death. At best, the opinions by Fay's experts against Dr. Law were merely supposition and speculation – with reliance on assumptions, not facts. As the Supreme Court held, "[i]n South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture." *David v. McLeod Regional Medical Center*, 367 S.C. 242, 626 S.E.2d 1, 4 (2006). In the case at bar, without *actual* proof that Mrs. Fay had a fever in the ER rather than mere supposition that she did, her discharge from the ER did not proximately cause her death.

III. The Circuit Court erred in denying Dr. Stephen W. Law's motion for judgment notwithstanding the verdict where the only reasonable inference to be drawn from the evidence was that the Fays' degree of fault exceeded fifty percent thereby barring the wrongful death and survival claims.

In support of his JNOV motion, Dr. Law further argued that the proximate cause of Kelly Fay's death was her failure and the failure of Sean Fay to follow the discharge instructions requiring Mrs. Fay to return to the emergency department if she developed any fevers or chills. On this issue, Dr. Law will rely on the arguments in his opening brief; however, one point in reply is warranted. In his brief, Fay contends that on this comparative negligence issue "Dr. Law presents the evidence in a light most favorable to himself" which is contrary to the prevailing standard. That is, of course, not accurate. The Court is urged to closely scrutinize the factual

support for Dr. Law's position. That factual support is exclusively the testimony of Sean Fay himself. Dr. Law was careful not to rely on the testimony of anyone other than Mr. Fay for this very reason. Without question, the factual support for Dr. Law's position on comparative negligence comes from Mr. Fay's testimony and is taken in a light most favorable to the non-moving party. Mr. Fay cannot avoid his own testimony which shows that he and his wife were more than fifty percent at fault, thereby barring their claims as a matter of law.

IV. The Circuit Court erred in excluding evidence of Sean Fay's admitted extramarital affair which was relevant evidence on the issue of damages recoverable in the wrongful death action.

At the commencement of the trial, Judge Baxley granted Sean Fay's motion in limine to exclude any evidence of an acknowledged extramarital affair which he had in 1999 with a co-worker and family friend. The Defendants, including Dr. Law, took the position that evidence of the extramarital affair was relevant on the issue of damages recoverable in the wrongful death action. (R. 132-140).

As a threshold issue in an attempt to avoid the merits, Fay argues that this issue is not preserved as to Dr. Law because he did not proffer evidence of Fay's extramarital affair during the trial. The Defendants, however, reiterated their collective intent to present evidence of the extramarital affair after Judge Baxley's in limine ruling. In addition, a proffer of a *joint exhibit* was made that included evidence of the affair. (R. 1062-1074). That joint exhibit was rejected by Judge Baxley but was made a court exhibit expressly "for purposes of appellate review." (Second Supp. R. 2). Consequently, there is no question that the evidentiary issue regarding the admissibility of the affair was re-asserted during the trial, and that the judge reaffirmed his ruling in limine. (R. 388-390; Second Supp. R. 1-4). Dr. Law's counsel participated in the colloquy

with the trial judge, and it is clear from a reading of the exchange that the issue was re-asserted by all Defendants, including Dr. Law. The issue should be deemed preserved for all Defendants. Any other reading of the record would constitute a hyper-technical application of the issue preservation rules which disallows the practicalities of co-counsel for several parties from proceeding on common issues in a joint manner before the trial judge. The Supreme Court has stressed the "need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640, 644 (2011). *See also, Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting) ("an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice").

Furthermore, Fay attempts to assert the "two-issue" rule against Dr. Law on this issue; however, that attempt is based on a misreading or misunderstanding of Judge Baxley's ruling in limine. Judge Baxley granted Fay's motion in limine with the following explanation:

There also has been an issue of whether or not the Plaintiff's alleged affair can be brought into evidence on the issue of credibility and believability. I'm going to deny the Defendants the right to bring that evidence in, and exclude that evidence. I do that for this reason, it's clear from the opening arguments that this case is really about liability. It's not about damages. This issue of an affair really goes to damages, in the Court's opinion, and whether or not the loss of the spouse is as great as one may perceive that it is. This is not for the Court to say, this is just how I believe -- in other words what I'm saying is, the Court is not saying that if there was an affair the loss is less. That's not an appropriate analysis. I'm just simply saying that that issue goes mainly to damages, not really to liability.

(R. 258). That is the specific ruling that Dr. Law challenges on appeal. Judge Baxley did proceed as follows:

[B]ut if it does go to liability, *if the Defendants take the position that the truth of Mr. Fay and the reliability is directly an issue*, credibility and reliability are directly an issue, I find under Rule 403 that that is so prejudicial that it is inappropriate because it is of minimal probative value, but high prejudicial value, and thus I'm going to exclude it.

(R. 258-259). (Emphasis added). That additional ruling is secondary and applies (as the italicized language indicates) only if the Defendants take the position that the evidence of Fay's extramarital affair is to be presented on a liability issue. Dr. Law, however, does not take the position that the evidence of Fay's extramarital affair is relevant on any issue of liability – only on the issue of damages as discussed at length in Dr. Law's opening brief. Consequently, given Dr. Law's position that the evidence was not relevant to any liability issue, there was no need to appeal Judge Baxley's ruling on that contingency, and the "two-issue" rule has no applicability.

In sum, because Sean Fay was seeking damages for the loss of society and companionship of his wife, it is very relevant for the jury to hear evidence regarding the marital relationship. Dr. Law submits that the existence of marital discord, including evidence of an extramarital affair, is particularly relevant and probative in assessing damages for the loss of society and companionship of a spouse.²

The evidentiary issue regarding the inadmissibility of Sean Fay's acknowledged extramarital affair which he had in 1999 with a co-worker and family friend was properly raised and ruled upon in the lower court. In addition, the issue is properly preserved for review by this Court and is an important issue for adjudication by this Court.

² To the extent that Fay is now relying on the defense of condonation to support the ruling in limine, Dr. Law would note that that issue was not raised in the trial court, and there was no evidence presented to support that defense. Furthermore, evidence of condonation would not make evidence of the affair absolutely irrelevant and inadmissible. Instead, the evidence of condonation would be considered by the jury, together with the evidence of the affair, in evaluating Fay's claim for loss of society and companionship of his wife.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent-Appellant Stephen W. Law, D.O. respectfully renews his request that this Court reverse the orders of Judge J. Michael Baxley denying Dr. Law's post-trial motions and order that judgment be entered in favor of Dr. Law or a new trial absolute. In the alternative, Dr. Law requests that the Court remand with instructions that the judgment against Dr. Law be reformed to reflect the jury's allocation of fault.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent-Appellant Stephen W. Law, D.O. certifies that the Final Reply Brief of Respondent-Appellant Stephen W. Law, D.O. complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent-Appellant Stephen W. Law, D.O. certifies that the Final Reply Brief of Respondent-Appellant Stephen W. Law, D.O. complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent-Appellant, Stephen W. Law, D.O., does hereby certify that service of the **Reply Brief of Respondent-Appellant Stephen W. Law, D.O.** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 5th day of August 2013:

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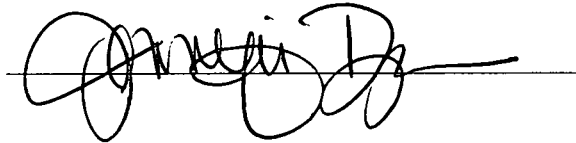
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A handwritten signature in black ink, appearing to read "Monteith P. Todd", is written over a horizontal line.