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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.

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

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II. Did the Circuit Court err 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?

III. Did the Circuit Court err 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?

IV. Did the Circuit Court err in refusing to enroll the judgment against Dr. Stephen W. Law 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?

STATEMENT OF THE CASE

This is a medical malpractice action. The Respondent-Appellant Sean D. Fay, as the Personal Representative of the Estate of Kelly L. Fay, brought a wrongful death and survival action against several medical providers including the Respondent-Appellant Stephen W. Law, D.O., Grand Strand Regional Medical Center, LLC d/b/a South Strand Ambulatory Care Center ("Hospital"), Richard Young, M.D., and Grand Strand Urology, LLP.

A trial was held in Horry County beginning on May 17, 2010, before Circuit Court Judge J. Michael Baxley and a jury. During the trial, Sean Fay contended that Dr. Law deviated from the accepted standard of care by failing to ensure that Kelly Fay's temperature was taken a second time by the nursing staff prior to discharge. Dr. Law made motions for a directed verdict at the close of Fay's case-in-chief and the Defendants' case-in-chief. Those motions were denied. Judge Baxley did, however, grant a directed verdict for Dr. Young and his medical practice.

The claims against Dr. Law and the Hospital were submitted to the jury, as was the Defendants' comparative negligence defense. The jury ultimately rendered a verdict in favor of Sean Fay in the amount of $3 million actual damages. The jury apportioned fault with the Fays held four percent at fault, Dr. Law held six percent at fault, and the Hospital held ninety percent at fault. (R. 21). Judge Baxley reduced that verdict to $2.88 million based on the finding of four percent comparative fault by the Fays. (R. 21).

Dr. Law and the Hospital filed post-trial motions including a motion for judgment notwithstanding the verdict (JNOV), a motion for new trial absolute, and a motion for new trial nisi remittitur. Judge Baxley denied those motions in orders filed June 24, 2010. (R. 1-2, 4-5).

Because Judge Baxley had not addressed each of the grounds raised in Dr. Law's post-trial motions, Dr. Law filed a Rule 59(e) motion to preserve those grounds for appellate review. 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. He then proceeded to grant Dr. Law the relief that he sought and reformed the verdict. Judge Baxley explained as follows: "Notwithstanding the law of joint and several liability in effect at the time of the incident which gave rise to this claim, the parties agreed to submit the matter to the jury requesting a finding of specific percentages of negligence, agreeing to be bound thereby and the Court enrolls the verdict accordingly." (R. 9). 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. Following a phone conference with counsel but no hearing, 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." In his Order filed August 26, 2011, Judge Baxley reversed his previous ruling by relying upon a purported objection by the Hospital's counsel that was never stated on the record at trial. (R. 11). He thus denied Dr. Law's motion to reform the verdict and reinstated the original judgment. (R. 11).

Following the issuance of the Order filed August 26, 2011, which finally adjudicated his post-trial motions, Dr. Law timely served and filed a Notice of Appeal on September 23, 2011. The Hospital had already filed a Notice of Appeal as well. In addition, Fay has appealed from the dismissal at directed verdict of Dr. Young and his medical practice.

STATEMENT OF FACTS

In accordance with Rule 208(b)(6), SCACR, the Respondent-Appellant Stephen W. Law, D.O. hereby adopts by reference and incorporates herein the "Statement of Facts" included in the brief filed by the Appellant-Respondent Grand Strand Regional Medical Center.[1]

[1] Rule 208(b)(6), SCACR, provides: "In cases involving more than one appellant or respondent ... any party may adopt by reference all of any part of the brief of another." Rule 208(b)(6), SCACR.

ARGUMENTS

I. 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, the Respondent-Appellant Stephen W. Law, D.O. moved for a judgment notwithstanding the verdict (JNOV) on the basis that the only reasonable inference to be drawn from the evidence is that Dr. Law complied with all accepted standards of care for an emergency physician and did not cause harm to the Respondent-Appellant Sean Fay or the decedent. Dr. Law further argued that the only reasonable inference that can be drawn from the evidence is that the proximate cause of Kelly Fay's death was the failure of the Fays to follow the discharge instructions to return to the emergency department with any fever or chills. Judge Baxley never addressed these grounds in adjudicating the post-trial motions. Dr. Law subsequently filed a Rule 59(e) motion, which was denied -- again without addressing the merits of Dr. Law's position.

A JNOV motion "requires a court to determine the sufficiency of the evidence." *Rogers v. Norfolk Southern Corp.*, 356 S.C. 85, 588 S.E.2d 87, 89 (2003). The South Carolina Supreme Court has held that "[a] trial court should grant JNOV when the evidence is insufficient to support the verdict." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485, 487 (2005). A JNOV motion must be granted where no reasonable jury could have reached the challenged verdict. *Boddie-Noell Properties, Inc. v. 42 Magnolia Partnership*, 344 S.C. 474, 544 S.E.2d 279, 283 (Ct. App. 2000). *See also*, *Catawba Ins. Co. v. Smith*, 336 S.C. 33, 518 S.E.2d 291, 293-94 (Ct. App. 1999) (reversing trial court's denial of JNOV because there was

"insufficient evidence of implied consent for the trial court to have submitted the issue to the jury").

South Carolina law requires a plaintiff in a medical malpractice case to present: "(1) evidence of the generally recognized practice and procedures that would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances; and (2) evidence that the defendant doctor departed from the recognized and generally accepted standards, practices, and procedures in the manner alleged by the plaintiff." *Gooding v. St. Francis Xavier Hospital*, 326 S.C. 248, 487 S.E.2d 596, 599 (1997). In addition, "the plaintiff must show that the defendants' departure from such generally recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages." *David v. McLeod Regional Medical Center*, 367 S.C. 242, 626 S.E.2d 1, 4 (2006).

"In South Carolina a medical malpractice plaintiff who relies on expert testimony must introduce evidence that the defendant's negligence *most probably* resulted in the injuries alleged." *Jones v. Owings*, 318 S.C. 72, 456 S.E.2d 371, 372 (1995). (Emphasis in original). "When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence." *Ellis v. Oliver*, 323 S.C. 121, 473 S.E.2d 793, 795 (1996). "The reason for this rule is the highly technical nature of malpractice litigation. Since many malpractice suits involve ailments and treatments outside the realm of ordinary lay knowledge, expert testimony is generally necessary." *Id.* "Therefore, the expert testimony as to proximate cause must provide a significant causal link between the alleged negligence and the injuries suffered, rather than a tenuous and hypothetical connection." *Martasin v. Hilton Head Health System, L.P.*, 364 S.C.

430, 613 S.E.2d 795, 800 (Ct. App. 2005).

In the present case, the evidence presented at trial was insufficient to support the verdict against Dr. Law. Sean Fay simply did not present evidence to establish a breach of the standard of care by Dr. Law that proximately caused the death of Kelly Fay. Fay presented the expert testimony of Dr. Charles W. Sheppard, an emergency medicine physician from Springfield, Missouri. Dr. Sheppard was critical of the nursing staff that Kelly Fay's temperature was not taken but once during her ER visit. He acknowledged that her temperature was taken along with other vital signs at the outset of her ER visit, but he testified that the failure to re-take the patient's temperature a second time was below the standard of care. (R. 408, 426-427). Dr. Sheppard was then critical of Dr. Law for discharging Mrs. Fay without her temperature having been re-taken. (R. 411-412). However, Dr. Sheppard was unable to testify with the requisite medical certainty that Mrs. Fay had a fever at any time that she was in the ER or at the time of her discharge. He acknowledged that her temperature was normal when taken in the ER. (R. 427). He further opined that if Mrs. Fay had a fever within thirty minutes of leaving the ER, she more than likely had a fever when she was discharged. (R. 428). Yet, because he had no evidence that Mrs. Fay had a fever (which he describes as 100.5 degrees) within thirty minutes of her discharge, he conceded that he was unable to testify to a reasonable degree of certainty that she had a fever at the time of her discharge. (R. 429). He agreed that the thirty minutes was critical to his analysis. According to Dr. Sheppard, if Mrs. Fay had a fever within thirty minutes of discharge, then she most probably had a fever at discharge. (R. 428). Yet, Dr. Sheppard could not offer the opinion that Mrs. Fay had a fever at discharge or while in the ER. Dr. Sheppard further conceded that Mrs. Fay did not show any signs of having a fever during her ER visit. (R. 427-428). In sum, because Dr. Sheppard was unable to testify with the requisite

certainty that Mrs. Fay had a fever while at the ER, he is unable to establish proximate cause. Indeed, Dr. Sheppard actually admitted that he was not offering any opinions on proximate cause. (R. 425). Thus, Fay's emergency medicine expert failed to establish the requisite causal connection between his criticism of Dr. Law's care and the death of Kelly Fay.

Fay also presented the expert testimony of Dr. Mike Siroky, a urologist from Boston, Massachusetts. Similar to Dr. Sheppard, Dr. Siroky was also critical that Kelly Fay's temperature was not taken a second time prior to discharge and that a white blood count was not obtained to determine whether she had an infection. However, most significantly, Dr. Siroky was unable to establish proximate cause. Like Dr. Sheppard, he was unable to testify with the requisite certainty that Mrs. Fay had an infection at the ER. (R. 530-531). Dr. Siroky testified as follows:

> Q. So how do you know she had a proteus infection on January 26, 2002?
>
> A. I didn't say she did.
>
> Q. Do you know what kind of in – are you saying – was she infected in the ER on January 26, 2002?
>
> A. I don't think there's any way to know for sure.

(R. 530-531). Dr. Siroky then further confirmed that he was unable to testify that "most probably" Mrs. Fay had an infection on January 26, 2002 in the ER. (R. 531).

In *David v. McLeod Regional Medical Center*, 367 S.C. 242, 626 S.E.2d 1 (2006), the Supreme Court warned against a "speculative hypothetical" serving "as the standard of care in an action for medical malpractice." 626 S.E.2d at 4. The Court held that "[i]n South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture." *Id.* This admonition was repeated in *Hoard v. Roper Hospital, Inc.*, 387 S.C. 539, 694 S.E.2d 1

(2010), where the Court examined a proximate cause argument similar to that in the present case. Thus, the Supreme Court has been clear that a medical malpractice plaintiff cannot rely on supposition or conjecture or a "speculative hypothetical" in other to establish the critical element of proximate causation.

In sum, Sean Fay failed to present sufficient evidence to support his claim of medical malpractice against Dr. Law. While the experts were critical that the nursing staff failed to take Mrs. Fay's temperature a second time during her ER visit and that Dr. Law discharged her under such conditions, Fay's experts also could not establish a causal link. They were unable to testify to a reasonable degree of medical certainty that most probably Mrs. Fay did have a fever prior to her discharge. The failure to prove that critical fact is fatal to the claims against Dr. Law. At best, their opinions against Dr. Law were merely supposition and speculation. But, without *actual* proof that Mrs. Fay had a fever in the ER, the fact that she was discharged did not proximately cause her death. Instead, as discussed below, the only reasonable inference that the jury could have concluded based on the evidence presented was that the failure of Mrs. Fay to return to the ER *after* she developed a fever was the proximate cause of her death. Judge Baxley therefore erred in failing to even address Dr. Law's JNOV motion and more importantly in failing to grant that motion given the lack of evidence of proximate cause.

II. 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 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. In his note, which was dictated prior to discharge, Dr. Law wrote: "I did explain to the patient, however, that if her pain becomes out of control or if she has increasing nausea, vomiting, any fevers or chills, that she is to return to the emergency department immediately." (R. 905). The written discharge instructions, which were signed by Kelly Fay, also informed the Fays to "[c]all or go to the emergency room right away if you develop fever, more intense pain, or repeated vomiting." (R. 902).

Sean Fay testified that, upon discharge from the ER on January 26, 2002 at approximately noon, he dropped off a prescription at the Wal-Mart and then drove his wife home. (R. 301). He then returned to the Wal-Mart, picked up the prescription, and returned home. (R. 301). After arriving home, Fay testified that his wife told him that she was "feeling hot" and a "little feverish." (R. 307). Fay took his wife's temperature and it varied between 101.3 and 101.6. (R. 307). He further admitted taking her temperature "roughly four times" that day and it was the same. (R. 307). Fay also admitted that his wife "felt nauseous all through Saturday." (R. 308). Yet, at no time on that Saturday, after returning home from the ER and developing what was clearly a fever that persisted the remainder of the day as well as nausea, did the Fays return to the ER as instructed or even call the hospital.

Moreover, on the following morning, Fay testified that his wife awoke "screaming" and "yelling." (R. 309). He described her as "shivering" and having chills. (R. 309). He covered her with five blankets and held her to warm her. (R. 309). He testified that "it was the weirdest thing I'd ever seen." (R. 309). Fay also testified that his wife vomited at least once on Sunday. (R. 308). He described in a blog that he wrote that his wife had a "major fever." (R. 354-355). Yet, the Fays did not return to the emergency department. Sean Fay contends that he called the

hospital that Sunday morning and spoke to an unidentified person who told him, "if you think you need to come in, or if she thinks she needs to come in, then bring her in." (R. 311). There is no record of that phone call nor did Fay present any phone records to verify that it occurred. Nonetheless, it is undisputed that the Fays did not return to the hospital on that Sunday.

On Monday morning, conditions had not changed. Fay testified that his wife looked tired and "a little warm." (R. 324). He took her temperature and "it's the same temperature that was giving all weekend," meaning she had fever. (R. 324). Yet, the Fays did not return to the hospital as instructed. Instead, Sean Fay went to work. (R. 325). He called his wife three times while at work and never received an answer, but he did not return home to check on her. (R. 325). When he did return home at 1:00 p.m. to pick her up for her scheduled appointment with the urologist, he found her "unconscious," "convulsing," and gagging" with "white stuff coming out of her mouth." (R. 326). She had defecated and urinated on herself. (R. 326). Fay called 911, and his wife was rushed to the hospital but died later that day.

Dr. Charles Stratton, who was Fay's infectious disease expert, testified that had Kelly Fay returned to the hospital on Saturday, Sunday or even by 10:00 a.m. on Monday, she would have survived. (R. 594, 600). Similarly, Dr. Siroky agreed that if Mrs. Fay had returned to the hospital on Sunday and been treated, she would have survived. (R. 553-554).

In short, the lay and expert evidence presented demonstrates conclusively that if the Fays had followed the discharge instructions to take Mrs. Fay back to the emergency department if she developed any fevers or chills, then she would not have died. The failure to return to the ER as instructed was clearly negligent and proximately resulted in Mrs. Fay's death. A reasonable jury could not find otherwise, and indeed this jury did find the Fays to have been negligent. However, this jury was not reasonable in assessing only four percent of the fault to the Fays. A

reasonable jury would have concluded that the Fays' degree of fault exceeded fifty percent thereby barring Fay's claims.

Recognizing that the comparison of the plaintiff's negligence with that of the defendant is typically a question for the jury, the Supreme Court in *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000), explained that a circuit court may find a plaintiff's claim is barred as a matter of law "if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." 529 S.E.2d at 713. The *Bloom* Court ruled that the evidence even when viewed in a light favorable to the plaintiff demonstrated that the plaintiff was more than fifty percent negligent.

The *Bloom* Court also reaffirmed the decision of this Court in *Hopson v. Clary*, 321 S.C. 312, 468 S.E.2d 305 (Ct. App. 1996). In *Hopson*, this Court affirmed the trial court's grant of a directed verdict where the evidence demonstrated that the plaintiff's negligence was greater than any potential negligence of the defendant. Similarly, this Court in *Bass v. Gopal, Inc.*, 384 S.C. 38, 680 S.E.2d 917 (Ct. App. 2009), concluded as a matter of law that the plaintiff's negligence claim was barred because the only reasonable inference to be drawn from the evidence was that the plaintiff's actions in leaving his hotel room and confronting his assailant exceeded the defendant innkeeper's possible negligence.[2]

Like the *Bloom*, *Hopson* and *Bass* cases, the present case is also very appropriate for a judicial determination as a matter of law that the plaintiff's degree of fault exceeds fifty percent. As the above recitation of the evidence from Sean Fay himself and his experts unequivocally

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[2] In *Bass v. Gopal, Inc.*, 395 S.C. 129, 716 S.E.2d 910 (2011), the Supreme Court affirmed this Court on different grounds. The Supreme Court did not reach or comment on the comparative negligence defense. Justice Pleicones, however, concurred by concluding "that the Court of Appeals correctly affirmed the grant of summary judgment on the comparative negligence ground." 716 S.E.2d at 917.

reflects, there can be no reasonable inference which may be drawn from the evidence in this record that the Fays' fault was fifty percent or less. Instead, it is clear from the evidence presented that the Fays' negligence exceeded any negligence by the medical providers. No reasonable jury would place the Fays' degree of fault at less than fifty percent, and for that reason, Dr. Law is entitled to a judgment notwithstanding the verdict.

III. 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. Under South Carolina law, "[d]amages recoverable for wrongful death are the damages sustained by the statutory beneficiaries resulting from the death of the decedent, including pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship." *Ballard v. Ballard*, 314 S.C. 40, 443 S.E.2d 802, 802 (1994). The extramarital affair is relevant like any other evidence tending to show the nature of the relationship between the decedent and beneficiary. After taking the motion under advisement, Judge Baxley granted the motion 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).

While the case was in part "about liability" as Judge Baxley recognized, damages remained a relevant subject matter as well. In fact, earlier during his colloquy with counsel regarding this very motion in limine, Judge Baxley noted as follows: "Obviously the Plaintiff is going to testify he suffered a great loss, and part of the damages is the comfort, society and the loss of that with his spouse." (R. 134-135). Judge Baxley was, in fact, correct. 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. "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. *See also*, *Anderson v. Buonforte*, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005) ("[a]ny evidence that assists in getting at the truth of the issue is relevant and admissible"). Thus, evidence that reflects on the love, affection, and nature of the marital relationship is clearly relevant in any marital consortium claim. Consortium has been described as "the conjugal society, comfort, companionship, and affection of each other." *Panhorst v. Panhorst*, 301 S.C. 100, 390 S.E.2d 376, 378 (Ct. App. 1990). Hence, 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. The exclusion of the evidence on the basis stated by Judge Baxley was an error of law and, in light of the substantial damages awarded by the jury, that error was critical and merits a new trial.

In moving in limine to exclude the evidence of his 1999 extramarital affair, Sean Fay cited only the South Carolina case of *Wooten v. Amspacher*, 279 S.C. 325, 307 S.E.2d 232 (1983). That case is inapposite. In *Wooten*, the Supreme Court held that evidence regarding the surviving spouse's separation from her husband and subsequent remarriage were not relevant in a *survival* action because a survival action attempted to recover for the decedent's damages, not for the beneficiary's damages. As the Court found, "[wife's] separation from her husband and her subsequent remarriage are not relevant to any damages her husband suffered." 307 S.E.2d at 233. Furthermore, *Wooten* does not address the relevance of an extramarital affair.

However, the admissibility of an extramarital affair in a *wrongful death* action has been addressed by other courts. For example, the case of *Countryman v. County of Winnebago*, 135 Ill. App.3d 384, 481 N.E.2d 1255 (1985), is instructive. In *Countryman*, which was a wrongful death action, the Illinois Appellate Court held that evidence of an extramarital affair by the deceased husband, of which his wife was aware, was relevant and admissible on the issue of the value of the consortium lost by the wife. The Court found that the evidence of the extramarital affair was relevant because it clearly had the "tendency to establish that the consortium was worth less than if that event had not occurred." 481 N.E.2d at 1259. The Court further explained:

> In fact, the evidence was relevant on this issue regardless of which side of the relationship is focused upon. First, it had some tendency to establish that Mr. Countryman's affection for his wife and the companionship he was giving her were less than if the incident had never occurred. His indiscretion, in other words, is some evidence that the marriage may not have been an ideal one for him and so some evidence that his contributions to the emotional, intangible aspects of the relationship may not have been of as much value as they might have been without the indiscretion. The evidence thus, depending upon the weight given to it by the trier of fact, could support a finding that the consortium lost was less valuable than it would have been in the absence of the

evidence.

Id. The Court further found that "[t]he exclusion of this evidence cannot be justified on the ground that its prejudicial effect would have been greater than its probative value. It was highly probative, albeit not conclusive, on the issue of the value of the consortium lost." 481 N.E.2d at 1259-60.

Similarly, in *Morales v. Superior Court of Kern County*, 99 Cal.App.3d 283, 160 Cal. Rptr. 194 (1980), the California Court of Appeals held that an inquiry as to an extramarital affair by the surviving spouse was relevant to damages issues in a wrongful death action. The Court explained:

> The question of whether extramarital sexual conduct affected the relationship is one of fact to be decided by the trier of fact. Evidence of such conduct is relevant to the nature of the personal relationship and thus as to whether there was any loss of love, companionship, comfort, affection, society, solace, moral support or enjoyment of sexual relations.

160 Cal. Rptr. at 197. *See also, Strelecki v. Firemans Ins. Co.*, 88 Wis.2d 464, 276 N.W.2d 794, 801 (1979) (evidence of extramarital activities is relevant to surviving spouse's claim for loss of society and companionship in wrongful death action).

In sum, Dr. Law contends that evidence of Sean Fay's extramarital affair in 1999 was relevant and admissible to an issue in controversy, i.e., the loss of society and companionship. In a search for the truth, the jury should have been informed of this evidence so that it could determine what effect, if any, that affair – which was admitted by Fay – impacted Fay's loss. The *Countryman* and *Strelecki* cases involved extramarital affairs by the deceased spouse, and still the court found that such evidence was relevant. However, it is particularly important that the jury be informed of the extramarital affair where the unfaithful spouse is the surviving spouse seeking damages for loss of the marital relationship. The evidence of the extramarital affair will

allow for the jury to properly consider not only the value of the marital relationship to Sean Fay but also the effects of the affair on the marital relationship. Kelly's reaction to the affair and the detrimental effects it had on the marital relationship, i.e., potential loss of affection and trust, are equally probative in assessing the loss of society and companionship. An affair arguably could erode that society and companionship to the point that it has a substantially lesser value. A search for the truth extends not only to issues of liability but to issues of damages as well. Dr. Law and the other Defendants were deprived of that search by Judge Baxley's erroneous ruling in limine. A new trial absolute should result.

IV. The Circuit Court erred in refusing to enroll the judgment against Dr. Stephen W. Law 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.

The jury returned an apportioned verdict. The jury allocated fault as follows: the Fays were four percent at fault, Dr. Law was six percent at fault, and the Hospital was ninety percent at fault. (R. 20-21). Dr. Law moved for the judgment to be enrolled using the percentages of fault as found by the jury. Initially, Judge Baxley agreed with Dr. Law's position and issued a post-trial order enrolling judgment against the Defendants using the percentages of fault as found by the jury. (R. 9). Judge Baxley explained as follows: "Notwithstanding the law of joint and several liability in effect at the time of the incident which gave rise to this claim, the parties agreed to submit the matter to the jury requesting a finding of specific percentages of negligence, agreeing to be bound thereby and the Court enrolls the verdict accordingly." (R. 9). Thereafter, Fay and the Hospital filed motions to reconsider. Judge Baxley reversed his previous ruling by

relying upon an objection by the Hospital's counsel that was never stated on the record at trial. (R. 11).

The record reflects that Sean Fay's counsel requested an apportioned verdict, but that was initially denied by Judge Baxley. (R. 892). Later, during the jury's deliberations, the verdict form was the subject of an inquiry by the jury, and as a result, the jury was allowed to allocate fault among the parties, including both Defendants, by finding specific percentages of negligence by each party. Fay and Dr. Law agreed with the allocation approach. The Hospital objected to that approach in chambers, but no objection was ever placed on the trial record. In responding to post-trial motions, the Hospital attempted to supplement the trial record *post hoc* to raise an objection to the verdict form and specifically to the apportioned verdict. However, it is well settled that an objection made in chambers or off-the-record at a side bar has no substantive effect. In the case of *Benton v. Davis*, 248 S.C. 402, 150 S.E.2d 235 (1966), the Supreme Court rejected a party's claim that an objection to jury charges made in a chambers conference is sufficient. The Court explained that "[t]he duty to make timely objection to portions of the charge considered erroneous is not discharged by an objection made at an informal conference in the judge's chambers which is not recorded as a part of the record." 150 S.E.2d at 239. The Court ruled in that manner despite the concession by the defense counsel that an objection was raised in chambers. The holding from *Benton* has subsequently been reaffirmed in *York v. Conway Ford, Inc.*, 325 S.C. 170, 480 S.E.2d 726 (1997), where the Court wrote: "An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review." 480 S.E.2d at 728.

Therefore, as Dr. Law argued in his post-trial motions, the only proper evidence of an objection to the use of the verdict form is an objection made on the record in open court. In

response to Judge Baxley's allowance of an apportioned verdict per Fay's request, the Hospital made no objection on the record. Indeed, the Hospital's ultimate position at trial is really not known. While the Hospital objected to the allocation of fault in chambers, it is possible that the Hospital's counsel had a change of heart and decided the allocation approach was appropriate and chose not to put its position on the record thereby waiving that objection. That is why a contemporaneous, on-the-record objection is always required and why in-chambers and side-bar conferences have been held as having no substantive effect. Without an on-the-record objection, the Hospital's ultimate position is unknown and unclear.

Yet, what is clear from the record is Fay's agreement to accept an apportioned verdict. As a result, under these unique circumstances, Fay should not be able to benefit from the confusion that he created, and he should not be allowed to avoid being bound by the apportioned verdict that he agreed to. Therefore, equity dictates that Dr. Law's share of the verdict should not exceed six percent of the total damages or $180,000.00, irregardless of whether the Hospital is ultimately held liable for the full remaining ninety percent or instead the lesser amount that equals the Hospital's maximum liability assuming joint and several liability were applicable. In effect, Fay should not be entitled to recover in excess of the damages resulting from the six percent of fault that the jury allocated to Dr. Law – an allocation in principle that Fay suggested and agreed to accept. Alternatively, Dr. Law submits that this dispute regarding the verdict form, the apportioned verdict and whether joint and several liability applies to this judgment is further evidence that a new trial absolute is justified and warranted.[3]

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[3] In accordance with Rule 208(b)(6), SCACR, Dr. Law adopts and incorporates herein the arguments made by the Hospital to the extent not inconsistent herewith. The Hospital has appealed in part based on the jury charge addressing the standard of care owed by a hospital under South Carolina law. To the extent that the Court finds reversible error, Dr. Law submits that the entire verdict must be overturned and a new trial absolute ordered.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent-Appellant Stephen W. Law, D.O. respectfully requests 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.

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent-Appellant Stephen W. Law, D.O. certifies that the Final Appellant's 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 Appellant's 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 **Appellant's 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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