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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY COURT OF COMMON PLEAS
Frank R. Addy, Jr., Circuit Court Judge

Civil Action No. 2011-CP-30-1138

Appellate Case No. 2014-002516

Lisa Dennie and Jeffrey Dennie, ... Respondents,

v.

Byron A. Brown, MD, Laurens County Obstetrics and Gynecology, LLC, and Laurens County Healthcare System, d/b/a Laurens County Hospital, Defendants,

of whom Byron A. Brown, MD and Laurens County Obstetrics and Gynecology, LLC are the ..... Appellants.

INITIAL BRIEF OF APPELLANTS

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1. **Did the trial court err in admitting a letter relating to Brown's peer review and in allowing testimony from multiple witnesses about the letter and its contents in violation of the peer review confidentiality statute?**

2. **Did the trial court err in admitting a letter and allowing testimony relating to surgical complications suffered by nonparty patients of Brown?**

STATEMENT OF THE CASE

Lisa and Jeffrey Dennie filed this medical malpractice action in Laurens County on December 9, 2011 against Byron A. Brown, M.D. (Brown), Laurens County Obstetrics and Gynecology, LLC (LCOG) (Brown's medical practice), and Laurens County Healthcare System d/b/a Laurens County Hospital, alleging surgical negligence resulting in complications of gynecological surgery performed by Brown on September 22, 2009. All defendants filed answers denying liability. The case was tried by jury before the Honorable Frank R. Addy, Jr. on August 25-29, 2014. The jury found for Plaintiffs and against Brown and LCOG and awarded Lisa Dennie $300,000 in economic damages and $900,000 in noneconomic damages and awarded Jeffrey Dennie $300,000 in economic damages and $500,000 in noneconomic damages on his loss of consortium claim.[1] The verdict was reduced in accordance with the South Carolina Noneconomic Damage Awards Act of 2005, S.C. Code §§ 15-32-200 *et seq.*, and on or about October 17, 2014, judgment was entered for Lisa Dennie in the amount of $728,625.00 and for Jeffrey Dennie in the amount of $880,820.19.[2]

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[1] Verdict, pp. 3-4, ROA __.

[2] Order Entering Judgment, pp. 1-2, ROA __.

Brown and LCOG timely moved for a new trial on the grounds that the trial court (1) improperly admitted documents and allowed testimony related to Brown's peer review in violation of the peer review confidentiality statute and (2) improperly admitted documents and allowed testimony referring to surgical complications suffered by nonparty patients of Brown, which were irrelevant under South Carolina common law or, if relevant, were inadmissible under Rule 403 and common law. On October 16, 2014, Judge Addy heard argument on Brown's and LCOG's post-trial motions and denied them all. On October 22, 2014, Brown and LCOG received written notice of the entry of Judge Addy's order denying their post-trial motions and entering judgment against them. On November 18, 2014, Brown and LCOG timely served a Notice of Appeal.

SUMMARY OF THE FACTS

Lisa Dennie first saw Brown because she was having heavy menstrual cycles, passing blood clots, having irregular cycles, and feeling pain in her uterus.[3] A prior endometrial ablation had helped her symptoms, but her heavy menstruations returned.[4] Brown recommended, and she elected to undergo, a laparoscopically assisted vaginal hysterectomy and bilateral salpingo-oophorectomy (removal of ovaries and fallopian tubes) on September 22, 2009.[5] After surgery Dennie noticed that she was leaking urine.[6] On October 5, 2009, Brown examined her, found no obvious source of leaking, and referred her to a urologist, Michael Stribling, M.D., as Brown thought she may have developed a vesicovaginal fistula.[7]

On October 6, 2009, Dr. Stribling took Dennie to the operating room and performed a cystoscopy to inspect her bladder and ureters. The bladder appeared normal, but when he injected x-ray contrast into her right ureter, some of the contrast leaked out.[8] Stribling testified that he found a "little hole" which "didn't appear for ten days or two weeks" after the surgery.[9] Stribling explained that a little hole such as this, appearing ten days or two weeks after surgery, could be caused either by a stitch placed through the ureter or by a thermal burn from a cautery tool that burns tissue.[10] Stribling attempted to pass a stent from the bladder up through the right ureter into the kidney. He

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[3] Tr., p. 515, lines 20-25, ROA __.

[4] Tr., p. 516, lines 1-5, 14-17, ROA __.

[5] Ex. B-1, p. 4, ROA __.

[6] Tr., pp. 523-25, ROA __.

[7] Tr., pp. 527-28, 553, ROA __; Ex. B-1, p. 14, ROA __.

[8] Tr., pp. 306-07, 528-29, ROA __.

[9] Tr., p. 307, ROA __.

[10] Tr., p. 307, ROA __.

explained that sometimes the stent will allow the ureter to heal naturally without need for a surgical repair. When placing the stent through the ureter, he encountered resistance, and he wasn't sure whether the stent made it all the way up into the kidney. He saw Dennie the following day and, because she was leaking even worse, he knew that the stent was not in the proper place and would not solve the problem. Stribling then referred Dennie to Dr. Rames at MUSC.[11]

Rames determined that Dennie had a ureterovaginal fistula, and on October 20, 2009, he removed the stent implanted by Stribling and placed a new stent in her ureter.[12] After her ureter healed and the stent was removed, Dennie developed a stricture or narrowing of the ureter, which was treated with a laser procedure and placement of another stent on February 16, 2010.[13] In May 2010, her stent was removed, and she made a good recovery.[14]

Brown suspected that the initial injury to Dennie's ureter at the time of the hysterectomy was due to a delayed thermal injury from an electrocautery instrument called a monopolar hook. Brown asked the nurse manager of the operating room at Laurens County Hospital to inspect the monopolar hooks. Brown was later informed that some of them had cracks or defects in the insulation which could allow electrical current to escape and cause injury.[15] In December 2009, Brown told Richard D'Alberto, the CEO of Laurens County Hospital, that he thought there was a defect in the monopolar hooks.[16] D'Alberto instructed the nurse manager to confiscate the hooks

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[11] Tr., pp. 307-310, ROA __.

[12] Ex. B-5, p. 9, ROA __.

[13] Ex. B-5, pp. 28-29, ROA __.

[14] Ex. B-5, p. 39, ROA __.

[15] Ex. P-23, ROA __; Ex. B-1, p. 16, ROA __.

[16] Tr., pp. 241-42, ROA ___.

and have them "checked out."[17] In January 2010, when the instruments were inspected, it was determined that 3 instruments needed repair.[18]

On December 14, 2009, Stribling, then Chief of Surgery at Laurens County Hospital, delivered a letter to Dr. Weaver, Chief of Staff at the hospital, expressing concerns about recent complications resulting from surgeries performed by Brown, including the injury to Dennie's ureter (the "Stribling letter").[19] Stribling wrote:

> As Chief of Surgery, I need to make you aware of a situation that is of great concern to me.
>
> I worry greatly about what appears to be a continuing pattern of surgical misadventure by Dr. Byron Brown.
>
> To my knowledge, within the last year Dr. Brown has damaged a ureter on 3 separate occasions. He also perforated a colon (twice in the same patient) which lead to tremendous complications.
>
> The first damaged ureter I recall presented with an obstruction of the ureter and I was able to coax a ureteral stent past the damaged area. It is unusual to be able to pass a stent in that manner, but with luck it did go up.
>
> The second case was not so lucky. With great difficulty I passed a stent up what appeared to be the ureter, but the patient kept leaking urine from the vagina. I therefore recommended that she go to MUSC because of the reconstruction that would be needed.
>
> The last case was this past Friday. This was another cut ureter that required a ureteral reimplant into the bladder.
>
> The case with the perforated colon can be better described by Dr. Watkins who repaired that.
>
> The reason this is such a worrisome pattern is that a cut ureter is a fearsome complication. It rarely heals well; often requiring revisions and can result in reflux, scarring, kidney infection/damage, and stone formation. Needless to say this is a

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[17] Tr., p. 242, ROA __.

[18] Tr., p. 248, ROA __; Ex. P-24, ROA __.

[19] Ex. P-36, ROA __; Tr., pp. 313-14, ROA __.

> terrible injury and has huge implications to the urologist who has to repair the damage.
>
> In nearly 20 years of practice in NC, among multiple gynecologists and numerous general surgeons I had to repair exactly ZERO damaged ureters. This is not an insignificant statement; it is a telling revelation of how careful surgeons and gynecologists are operating in the vicinity of the ureter. They realize what a fearsome injury it is.
>
> Because of what appears to me to [be] a worrisome pattern of complications, I will, as Chief of Surgery, respectfully ask Dr. Brown to temporarily relinquish his privileges to doing all pelvic surgery until the cases can be reviewed by an outside reviewer. If Dr. Brown chooses not to do this I will request an emergency meeting of the MEC [Medical Executive Committee] to decide whether official action should be considered regarding his operating privileges.[20]

Stribling was mistaken when he stated that Brown had injured three ureters. Stribling later was corrected and admitted in his trial testimony that Brown's partner had caused one of the three ureteral injuries mentioned in the letter.[21] (The plaintiffs' expert in female pelvic medicine and reconstructive surgery, Dr. Mueller, acknowledged that ureteral injury is a known complication of hysterectomy and that the risk of ureteral injury is higher with laparoscopic surgery than with open surgery.[22])

Stribling's letter initiated a peer review process at Laurens County Hospital. Stribling met with Brown and discussed his concerns and asked Brown to temporarily relinquish some of his surgical privileges, pending the outcome of the peer review, and Brown did so.[23] Brown wrote a letter to Weaver stating, "I would like to temporarily relinquish privileges to perform

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[20] Ex. P-36, ROA __.

[21] Tr., pp. 327-28, ROA __.

[22] Tr., p. 172, ROA __.

[23] Tr., pp. 325-29, ROA ___.

hysterectomies, anterior and posterior repairs, and urethral slings until the beginning of 2010."[24] On February 17, 2010, Brown and Laurens County Hospital entered into an Agreement whereby Brown voluntarily resigned certain surgical privileges and retained others, and on May 21, 2010, the parties signed an Addendum supplementing the original Agreement.[25]

When Brown later applied for hospital privileges at several other hospitals, Laurens County Hospital refused to provide certain information contained in or related to Brown's peer review and/or credentialing file. Without such information, these hospitals could not complete their credentialing process. Brown then sued Laurens County Hospital, Mr. D'Alberto, Dr. Weaver, Dr. Stribling, and others for tortious interference, restraint of trade, and conspiracy.[26] In the course of that litigation, the hospital filed certain documents (unsealed) with the court in Richland County which either were contained in Brown's peer review file or were related to the peer review that began in December 2009, including the Stribling letter. Dennie's counsel obtained these documents from the Richland County court.

Over Appellants' repeated objections, the trial court admitted the Stribling letter into evidence and allowed testimony from multiple witnesses about the letter and its contents, as set forth in detail in the argument below.

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[24] Ex. P-16, ROA __.

[25] Ex. P-18, ROA __.

[26] Tr., pp. 237, 331, ROA __.

ARGUMENT

1. The trial court erred in admitting the Stribling letter and allowing testimony relating to Brown's peer review in violation of the peer review confidentiality statute.

The "proceedings and all data and information acquired by" a hospital peer review committee are "confidential" and "not subject to discovery, subpoena, or *introduction into evidence in any civil action* except upon appeal from the committee action" (the "confidentiality statute").[27] "The overriding public policy of the confidentiality statute is to encourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care."[28] All documents *generated* or *acquired* by a hospital peer review committee are protected under this law.[29]

The Stribling letter falls within the ambit of the confidentiality statute and, despite how it was discovered or obtained by the plaintiffs, was erroneously admitted into evidence. The letter is protected by the statute because it was authored by Stribling in his capacity as the hospital medical staff's Chief of Surgery (a member of the Medical Executive Committee[30]—a peer review committee) and addressed to Weaver in his capacity as the Chief of Staff for the purpose of *initiating a peer review process* either by the voluntary agreement of Brown or by official action of the Medical Executive Committee (MEC). He wrote:

> Because of what appears to me to [be] a worrisome pattern of complications, I will, as Chief of Surgery, respectfully ask Dr. Brown to temporarily relinquish his privileges to doing all pelvic surgery *until the cases can be reviewed by an outside reviewer*. If Dr. Brown chooses not to do this *I will request an emergency meeting of*

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[27] S.C. Code § 40-71-20 (emphasis added). This section applies to hospital peer review proceedings and documents pertaining to incidents predating June 26, 2012, the effective date of 2012 South Carolina Laws Act 275 (H.B. 4008), which amended section 40-71-20 and added section 44-7-392 to govern the hospital peer review process.

[28] *McGee v. Bruce Hospital System*, 312 S.C. 58, 61, 439 S.E.2d 257, 259 (1993).

[29] *McGee*, 312 S.C. at 62, 439 S.E.2d at 260.

[30] Stribling Dep., p. 118, lines 2-6, ROA__.

the MEC to decide whether official action should be considered regarding his operating privileges.[31]

This letter was essentially *generated* by a member of the peer review committee and directed to and *acquired* by another member of the committee, so it is protected under the statute and *McGee*. Here, also, Stribling—Brown's peer—expressed his candid concerns about a "continuing pattern of surgical misadventure," referencing no less than *four* surgical cases in which Brown allegedly caused injury to his patients. As our Supreme Court declared in *McGee*, "The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussion among participants in the peer review process"—precisely the sort of candor reflected in Stribling's letter.[32]

Judge Addy apparently concluded that the letter pre-dated the peer review and therefore the peer review confidentiality statute did not apply.[33] The plaintiffs moved to admit the letter into evidence after Stribling identified it and affirmed that he authored it and that it pertained in part to Dennie.[34] Appellants objected on the grounds that the letter was subject to the peer review confidentiality statute and that the letter referred to other "patient cases" and was thus inadmissible under Rules 402 and 403 of the Rules of Evidence[35] (incorporating arguments made in pre-trial motions[36]). Judge Addy overruled the objections and admitted the letter.[37] Dennie's counsel then

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[31] Ex. P-36, ROA __.

[32] 312 S.C. at 61, 439 S.E.2d at 259.

[33] Tr., pp. 316-17, ROA __.

[34] Tr., pp. 313-14, ROA __.

[35] Tr., pp. 314-15, ROA __.

[36] Tr., pp. 14-41, ROA __.

[37] Tr., pp. 316-18, ROA __.

published the entire body of the letter to the jury[38] and asked Stribling only two substantive questions about it:

> Q. In writing that letter, Doctor, would it be fair to say that you were taking action that you felt to be in the best interest of the patients at Laurens County Hospital?
>
> A. Yes, sir.
>
> Q. Would it be fair to say that in taking this action you felt like if you did not take that action that the safety of the patients in the operating suites would be in danger?
>
> A. That's correct.[39]

Then, the hospital's lawyer, Brown Parkinson, questioned Stribling about the letter more extensively.[40] After acknowledging that one of the ureteral injuries mentioned in the letter was not caused by Brown but rather by Brown's partner, Stribling testified, "So that was definitely a mistake. I said three. He was responsible [implying negligence] for two. His partner did the other, but there were *a lot of other[s] that I didn't mention here* just to keep the letter clean and precise."[41] Mr. Parkinson echoed,

> Q. So you didn't mention other ones, but were there *a number of other complications involving ureters and Dr. Brown* that you just didn't itemize in the letter?
>
> A. That's correct.[42]

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[38] Tr., pp. 322-23, ROA __.

[39] Tr., p. 323, ROA __.

[40] Tr., pp. 325-29, ROA __.

[41] Tr., p. 328, ROA __.

[42] *Id.*

Brown's counsel, Mr. Snyder, objected, saying "That's outside of the Court's ruling." Judge Addy sustained the objection and instructed the jury, "Ladies and gentlemen, you will disregard that last question and that last answer."[43] But the damage could not be undone.

Mr. Parkinson continued,

> Q. Up here it says, "A continuing pattern of surgical misadventures by Dr. Brown," and you're talking about cut ureters, so the frequency of cut ureters was bothering you.
>
> A. It wasn't just the ureters. It was other things as well.
>
> Q. Okay. And you mention[ed] a case in here that involves a bowel injury.
>
> A. That's correct.
>
> Q. Were you involved in dealing with that case?
>
> A. Yes, sir.
>
> Q. Was Dr. Rufus Watkins, a general surgeon, did he later come in and find that there was a perforated bowel in that case?
>
> A. Yes. He did.[44]

Stribling's letter and testimony was devastating to Brown's case, and it clearly never should have come in to evidence because it was a peer review letter. Stribling, as Chief of Surgery, wrote the letter for the *express purpose* of launching a peer review of Brown's surgical cases, which it did. The trial court too narrowly construed the scope of South Carolina's peer review confidentiality statute and erroneously admitted evidence and testimony that was not just mildly prejudicial, but devastating.

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[43] *Id.*

[44] Tr., pp. 328-29, ROA __.

2. The trial court erred in admitting the Stribling letter and allowing testimony relating to surgical complications suffered by nonparty patients of Brown.

In a medical malpractice action the plaintiff must establish (1) the generally recognized practices and procedures which would be exercised by competent practitioners in the defendant's field of medicine under the same or similar circumstances, (2) that the defendant deviated from the recognized and generally accepted standards, practices and procedures, and (3) that the defendant's failure to adhere to the standard of care proximately caused the complained of injury.[45] In *Hollman v. Woolfson*, our Supreme Court held that evidence relating to a defendant doctor's treatment of nonparty patients is *irrelevant* to a plaintiff's medical malpractice claims in that it cannot be used to show that the defendant breached the standard of care in rendering medical care to the plaintiff.[46]

The bright-line rule of law stated in *Hollman* clearly applies to the present medical malpractice case. In other contexts, such as products liability, the South Carolina courts have held that evidence of similar accidents, transactions or happenings is admissible where there is some special relation between them tending to prove or disprove some fact in dispute. Yet, because evidence of other accidents may be highly prejudicial, a plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue.[47] It appears that the rule stated in *Whaley* and *Watson* has not been applied by South Carolina courts to a medical malpractice case, and Appellants contend it should not be applied to this or any medical malpractice case because it directly contradicts *Hollman*. Even if the rule were applied here,

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[45] *Fletcher v. Med. Univ.*, 390 S.C. 458, 462-463, 702 S.E.2d 372, 374 (Ct. App. 2010).

[46] *Hollman v. Woolfson*, 384 S.C. 571, 579, 683 S.E.2d 495, 499 (2009).

[47] *Watson v. Ford Motor Co.*, 389 S.C. 434, 452, 699 S.E.2d 169, 179 (2010) (holding that the trial court erred in admitting evidence of similar incidents involving sudden acceleration in Ford Explorers); *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005) (holding that the trial court erred in admitting evidence that CSX had received 97 employee complaints about heat in CSX locomotive cabs because the plaintiff did not establish that the reported complaints and injuries stemmed from the same or similar circumstances as his injuries).

though, the trial court erred in admitting the Stribling letter and related testimony about the surgical complications experienced by other patients of Brown because the plaintiffs failed to establish that those complications stemmed from the same or similar circumstances as Dennie's injury.

The Stribling letter was devastating because it described a series of surgical complications suffered by at least 3 other patients of Brown, and according to Stribling's testimony, there were more ureteral and other complications for which Brown was responsible which Stribling omitted from the letter. *Hollman* provides that evidence relating to the defendant's treatment of nonparty patients—including similar complications they may have suffered—is *irrelevant* and may not be used to prove that the defendant deviated from the standard of care and thereby injured the plaintiff. The rationale behind the rule is obvious and compelling: such evidence would be highly prejudicial—*unfairly* prejudicial—because the jury might well rest its decision on whether the defendant doctor negligently treated the plaintiff-patient not on the basis of the medical evidence presented in the plaintiff's case but on the improper basis of other bad outcomes (or other evidence that the doctor departed from the standard of care on those occasions) having nothing to do with the care that the defendant exercised in treating the plaintiff. Undeniably, a surgeon can exercise due care and meet the standard of care in performing a hysterectomy on Patient A on one day and then depart from the standard of care in performing a hysterectomy on Patient B on another day (or the same day). *Each case must be decided on its own merits*, and that is precisely the principle that the Supreme Court has laid down as the law.

Here, Dennie used the Stribling letter solely to persuade the jury that the complications suffered by Brown's other patients proved that Brown was negligent in Dennie's case and responsible for her injury. The plaintiffs insinuated that, because Stribling thought Brown was incompetent and responsible for negligently injuring numerous patients, the jury should draw the

same conclusion and hold Brown liable for Dennie's injury. This is evident from Dennie's counsel's questioning of Stribling (quoted above) and Appellants' expert witness, Dr. O'Dell. Mr. Wright asked O'Dell the following:

> Q. But [Stribling's letter] also gives an overview of at least what the surgical staff at Laurens County Hospital feels of Dr. Brown.
>
> MR. SNYDER: Objection, Your Honor. It's one man's letter. One man's—
>
> THE COURT: Sustained. It's limited to the author of the letter, so far as I can reason, so.
>
> Q. Let me rephrase the question. Would you agree that the letter sets forth what the chief of surgery at Laurens County Hospital believes to be the surgical competence, if you will, of Dr. Brown?
>
> A. That's what this letter is about, yes.[48]

Mr. Wright also emphasized Stribling's letter in his closing argument, saying:

> Now, for surgical competence the chief of surgery wrote a letter that he was concerned about a continuing pattern of surgical misadventures of Dr. Brown and that he has created a worrisome pattern of complications. *I think that's evidence of whether or not [the] proper standard was used in this particular case.*[49]

Mr. Wright's last statement is *diametrically opposed* to the law of this state as set forth in *Hollman*. Evidence of complications suffered by other patients, even a "pattern" of complications, cannot be admitted to prove that Brown deviated from the standard of care.

To make matters worse, the hospital's lawyer, Brown Parkinson, re-emphasized Stribling's letter in his closing to smear Brown, who had attributed the ureteral injury sustained by Dennie to a defect in the insulation on the electrocautery instrument (monopolar hook) provided by the hospital. Mr. Parkinson referred to Stribling's letter as a "pretty scathing letter" and asked the jury the

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[48] Tr., pp. 815-16, ROA __.

[49] Tr., p. 904, ROA __.

rhetorical question, "Who would write a letter like that unless they were really, really upset and concerned?" Mr. Parkinson answered,

> Dr. Stribling did that. I've never written a letter about another human being that said things like that, certainly not about their job performance or professional performance, *that they shouldn't be allowed to put their hands on a patient in my hospital*. That's what Dr. Stribling said.[50]

It is all too obvious how highly prejudicial these comments were to Brown.

The Stribling letter, all the testimony about the letter, and the repeated references to the letter and to the other complications Brown allegedly caused were crushing to Brown, and improper admission of this evidence made it impossible for Brown to get a fair trial.

CONCLUSION

Because the trial court erred in admitting the Stribling letter and Stribling's testimony about the letter and its contents, including irrelevant and highly prejudicial evidence about numerous surgical complications suffered by nonparty patients of Brown, this Court should grant Brown and LCOG a new trial.

Respectfully submitted,

April 17, 2015

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[50] Tr., p. 916, ROA __.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Frank R. Addy, Jr., Circuit Court Judge

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of whom Byron A. Brown, MD and Laurens County Obstetrics and Gynecology, LLC are the ..... Appellants.

PROOF OF SERVICE

I certify that I have served Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal on Lisa and Jeffrey Dennie by depositing a copy of same in the United States Mail, postage prepaid, on April 17, 2015, addressed to their attorney of record, Joseph G. Wright, III, Post Office Drawer 1778, Anderson, South Carolina 29622-1778.

April 17, 2015

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April 17, 2015

The Honorable Jenny Abbott Kitchings
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Re: Lisa Dennie v. Byron A. Brown
Appellate Case No. 2014-002516

Dear Ms. Kitchings:

Enclosed for filing is the original and one copy of the Initial Brief of Appellants, Designation of Matter to be Included in the Record on Appeal, and Proof of Service. Please return a clocked-in copy to me. Thank you for your assistance.

Sincerely,

Trip Lehn

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Enclosures
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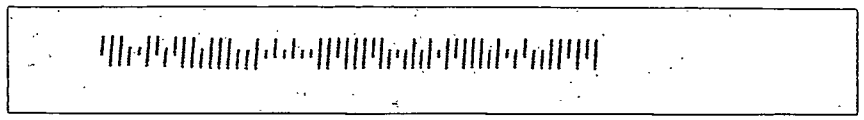

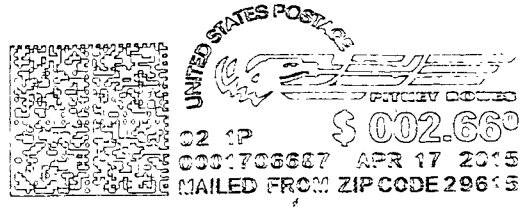

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