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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas
The Honorable J. Michael Baxley

Case No.: 2001-CP-16-00813

Ruth J. Person, Appellant,

v.

Carolina Pines
Regional Medical Center, Respondent.

BRIEF OF RESPONDENT

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ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN IMPLICITLY HOLDING THAT SOUTH CAROLINA COUNTENANCED A CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING?

II. DID APPELLANT, IN FAILING TO INCLUDE AN ISSUE ON APPEAL AS TO RESPONDENT'S PURPORTED NEGLIGENCE, ABANDON THAT ISSUE?

III. DID THE APPELLANT PRESERVE FOR APPEAL THE DENIAL OF ITS POST-TRIAL MOTION WHEN THAT MOTION WAS UNTIMELY AND THE TRIAL COURT WAS WITHOUT SUBJECT MATTER JURISDICTION TO ENTERTAIN IT?

IV. IS THE APPELLANT ENTITLED TO A NEW TRIAL BECASE OF THE ALLEGED FAILURE TO PRODUCE DOCUMENTS IN DISCOVERY WHEN THERE IS NO EVIDENCE OF BAD FAITH BY RESPONDENT IN ITS PRODUCTION OF REQUESTED DOCUMENTS?

V. WAS THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR A NEW TRIAL CORRECT WHEN THE JURY WAS PRESENTED EVIDENCE THAT RESPONDENT WAS NOT NEGLIGENT IN GRANTING PRIVILEGES TO DR. MINCHEFF; THAT ANY NEGLIGENCE IN CREDENTIALING WAS NOT THE PROXIMATE CAUSE OF INJURY TO APPELLANT; AND THAT DR. MINCHEFF WAS NOT NEGLIGENT IN HIS TREATMENT OF APPELLANT?

STATEMENT OF THE CASE

This is a case in which Appellant asserts that Respondent Carolina Pines Regional Medical Center ("Carolina Pines") was negligent in providing credentials to Thomas B. Mincheff, M.D. Dr. Mincheff was the surgeon chosen by Appellant, who suffered severe Gastroesophocal Reflux Disease ("GERDS"). R. p. 1160, lines 11-16; p. 1605, line 20 – p. 1606, line 1; p. 1721, lines 16-20. Appellant Person had presented at the Carolina Pines emergency room on April 7, 2001, complaining of flu-like symptoms. R. p. 1601, lines 16 – 23. Her treating physician, Dr. Gary A. Barker, obtained a consultation for Ms. Person with a pulmonologist who specializes in lung diseases, Dr. Alan Smith. R. p.

1602, lines 5 – 14. His diagnosis was that she was suffering from aspiration pneumonia caused by her GERDS. R. 1603, lines 1 - 17. Some of her stomach contents were entering her lungs. Id., lines 9-11. It was determined that she needed a surgical evaluation. R. p. 1604, lines 7 – 13.

Ms. Person specifically requested that Dr. Mincheff, who had operated on her previously[1], conduct her surgical evaluation and perform any required surgery. R. p. 1259, lines 15 - 24.

Dr. Mincheff told Appellant Person that, "we will have to get you over the pneumonia before we can do an operation." R. p. 1725, lines 2 - 5. After Ms. Person's pneumonia had been cured, on April 25, 2001, Dr. Mincheff, assisted by D.B. Bannister, M.D., began what he intended to be a laparoscopic Nissen fundoplication[2] for her, after explaining the operation and its risks. R. p. 1726, lines 4 - 23.

When Doctors Mincheff and Bannister started the laparoscopic Nissen fundoplication to relieve Ms. Person's GERDS, they ran into difficulty because of her exceptionally large liver and swollen colon. They could not get exposure to the area of her body to which they needed access, a small area beneath the liver. R. p. 1727, line 23 – p. 1728, line 7. Because they could not make the necessary progress using the laparoscopic technique, they converted the process into a conventional surgery, called an "open abdomen" or "open" procedure. R. p. 1728, line 12 – p. 1729, line 10. Even using the conventional procedure, it was a difficult surgery. Dr. Mincheff testified as follows:

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[1] Dr. Mincheff had previously surgically performed a hysterectomy, a laparoscopic appendectomy, and an oophorectomy for Ms. Person. He also did a colonoscopy for her. R. p. 1165, lines 4 - 8.

> ...[H]er colon was markedly dilated. Her liver was enlarged. Even during open ... – it was a very very difficult operation. We tried to deflect the colon down. Also, you had to deflect the stomach down in order to get up there. In the process of trying to deflect those organs, the stomach and the colon down, we unfortunately avulsed several of the small fragile vessels between the stomach and the spleen, so we had to get the bleeding under control. We finally got that under control, unfortunately there was a significant amount of bleeding up to 1300 ccs. But we got the bleeding under control and then proceeded with the procedure.
>
> I first went ahead and did the Nissen Fundoplication. I noted that there was a little tension on the repair, and I elected to take it down, and then elected to do a Hill Procedure[3], which is also an anti-reflux procedure, it is just a modification of the Nissen.

R. p. 1730, line 19 – p. 1731, line 11 (footnote added).

After completing the Hill procedure for Ms. Person, Dr. Mincheff had her put in the intensive care unit, and he watched her there. R. p. 1732, lines 3-7. While Ms. Person was in the ICU, Dr. Mincheff noticed that there was a fluid build-up in her chest. He elected to tap her chest by inserting a needle and a catheter and drawing off some fluid, which he sent for analysis. R. p. 1732, lines 13-19. The fluid sample was reported to be very, very high in amylase, which made Dr. Mincheff very suspicious that there was something wrong with Ms. Person's pancreas. R. p. 1732, lines 19-21. After fluid started collecting in another part of her abdomen, he sent Ms. Person to the Radiology Department for insertion of a catheter into the space around her spleen. R. p. 1732, line 21- p. 1733, line 2. The same type fluid was found to be in that location, making Dr.

[2] Laparoscopic surgery is a surgical approach that uses small incisions, rather than making a large cut in the patient's body, facilitating their more rapid recovery. A Nissen fundoplication is a surgical process which involves wrapping a part of the stomach around the esophagus to prevent acid from entering the esophagus. *See*, *infra*., n.3.

[3] "[The Nissen and Hill Procedures] are similar in the fact that the dissection is the same, you have to do the same repair on the hiatus, which is the muscles around the esophagus, you have to gain control around the esophagus. The only difference is a wrap. The Nissen involves wrapping the stomach around 360-degrees and sewing it internally, whereas the Hill Procedure is securing the stomach to the ligament that is close to the aorta, and also doing an interior type of wrap." R. p. 1786, lines 15-23.

Mincheff "very concerned that there was something wrong with her pancreas." R. p. 1733, lines 2-5. He, therefore, started making phone calls to specialists in Charleston and Columbia, most particularly Dr. Bynoe at Palmetto Richland Hospital. R. p. 1733, lines 5-9. At that time, Dr. Mincheff was "very, very concerned" that Ms. Person had an injury to a duct in the pancreas, though he did not know where the injury might be. R. p. 1733, lines 9-23. His calls to specialists in Charleston and Columbia were to see if they could evaluate and then treat Ms. Person. R. p. 1733, lines 23 - 24.

Ms. Person was accepted by Dr. Bynoe for evaluation and treatment at Palmetto Richland Hospital in Columbia. Prior to Ms. Person's departure from Carolina Pines, Dr. Mincheff explained to her, and wrote in her treatment record, that there may have been an injury to her spleen or pancreas during the Hill fundoplication. R. p. 1734, line 18 – p. 1735, line 2; p. 1740, lines 5 -11. It is uncontested that she had pancreatitis[4] when she left Carolina Pines. R. p. 1752, lines 15-23.

Ms. Person's treatment at Palmetto Richland caused injury to her. The testimony at trial, to which there was no objection, was as follows:

> Q. Then when she arrived at Richland you were describing for the jury, that they made some choices, in the treatment of her pancreatitis, correct?
>
> A. Yes, they elected not to do anything immediately. They observed her for close to thirteen or fourteen days. In that time frame they did remove her drain, for whatever reason they decided to remove the drain. Then they fed her, and then she got sick again. Then according to the records she developed some fluid in her abdomen. They went in to explore her, and that is when they actually—When they went in they made a hole in her stomach. They recognized it, and they repaired it, and they examined her pancreas. She did have pancreatitis. She did not have a laceration to her pancreas. She did not have any lacerations to her spleen which had been alleged. Her spleen was fine. There's nothing in the reports that show that

[4] Pancreatitis is an inflammation of the pancreas.

she had a splenic injury, but she did have pancreatitis. And they had to do a debridement of that.

Q. Just for the jury's benefit, what do you mean when you say they had to do a debridement?

A. Debridement, removing any tissue around the pancreas that is non-viable.

Q. Was there any other injury that was suffered at Richland Memorial Hospital?

A. About two or three days later they went back in to do another washout, and that's when they got into her colon. They perforated her colon, and then all the colonic contents, stools were spilled out into her abdominal cavity. Well, you can't close the abdomen when that happens. They had to remove a part of her colon and actually bring out the colon as a colostomy over to the side. They had to leave her open.

Q. Okay. So the pictures that we have seen, the injury that Ms. Person has described, we have seen those, were those the choices made by Richland Memorial Hospital?

A. They were made by Richland.

Q. And that was not her ...condition when she left Carolina Pines?

A. No, it was not.

R. p. 1737, line 23 – p. 1739, line 13.

The evidence is that, while Ms. Person's pancreatitis manifested itself while she was at Carolina Pines, no injury to any of her internal organs occurred at that hospital. As to the pancreatitis, it can develop from several sources. Even Appellant's own expert medical witness, Dr. DeMaria, provided as follows:

Q. Let's talk about how pancreatitis can result. There are many ways that pancreatitis can result during an operation that did not mean the physician was negligent, isn't that true?

A. Yes, sir....

Q. All right. Now there is such a thing as idiopathic pancreatitis, is that not correct?

A. Yeah, I believe we talked about it in my deposition.

Q. Yes, sir. That happens with no instigating factors that can be identified at all, isn't that correct?

A. Yes, sir.

Q. It is a spontaneous event that takes place whereby pancreatic fluid appears and nobody knows why. Isn't that right?

A. Yes.

Q. That can happen, isn't that true?

A. It can happen.
Q. All right. There is also post operative pancreatitis in patients who have shock or low blood flow, isn't that correct?
A. Yes, sir.
Q. And you can get shock many ways, one of them is by a loss of blood, is that correct?
A. Yes, sir.
Q. And just because a patient loses blood does not mean there was medical negligence, isn't that true?
A. Yes, it is true.
Q. All right....[P]ancreatitis can result from blunt pressure or retraction on the pancreas where the pancreas is simply being manipulated and pancreatitis occurs, isn't that right?
A. Yes, that is true.
Q. Now in all three of those incidences it is not below the standard of care if they appear, is that not true?
A. So the three are idiopathic, post operative with blood loss, and pressure or retraction of the pancreas?
Q. Sure.
A. Yes, I would say that all three of those are circumstances in which pancreatitis can develop in which there is no negligence and certainly no deviation from the standard of care.

R. p. 1364, lines 9 -13; p. 1365, line 9 – p. 1366, line 19.

Dr. Mincheff acknowledges that Ms. Person developed post-operation pancreatitis, but made the point that there was no laceration of the pancreas, but a contusion. R. p. 1768, lines 17-19. He testified that his actions in inferably causing that contusion did not fall below that standard of care. R. p. 1768, lines 19-22. Given Dr. DeMaria's testimony, quoted above, it is a reasonable inference that even Appellant's expert would agree with Dr. Mincheff's assessment.

Ms. Person initiated this action against Dr. Mincheff and Carolina Pines in December, 2001. She settled with Dr. Mincheff. Her cause of action against Carolina Pines sounds in negligent credentialing, specifically in granting Dr. Mincheff privileges to perform the laparoscopic Nissen fundoplication.

At the time of Ms. Person's operation at Carolina Pines, Dr. Mincheff had privileges from that hospital to do both laparoscopic and open Nissen fundoplication procedures. R. p. 1710, lines 16-23. He had had privileges to do the open procedure at Carolina Pines since 1993 and the laparoscopic procedure since 1995. R. p. 1718, lines 17-23.

At the time of the trial in 2006, Dr. Mincheff had, in the thirteen (13) years he had been in his surgery practice in Hartsville, performed close to eight thousand (8,000) operations. In a normal week, he performs three to five laparoscopic procedures, six or seven endoscopic procedures and "a good number" of conventional, open procedures. R. p. 1705, lines 2-16. During his residency, which ended in 1991, he had done forty-two (42) esophageal gastric type surgeries. R. p. 1706, line 13 – p. 1707, line 6. He had been Chief of Surgery at an Air Force hospital in Rome, N.Y., from 1999 to 1993, after his two general surgery residencies were completed. R. p. 1698, lines 5 - 21.

When Dr. Mincheff came to Hartsville, S.C., after completing eight years in the Air Force, he went into private practice with Dr. Robert Harris, with whom he worked for six years. R. p. 1698, line 22 – p. 1699, line 9. He became board-certified in general surgery in 1993, the same year he came to Darlington County, and was recertified in 2001. R. p. 1700, lines 17-25.

Dr. Mincheff had started receiving training in laparoscopic surgical technique in 1992, receiving training through Harvard Medical School at Massachusetts General Hospital in Boston, where he was trained by Dr. Andrew Warshaw, one of the top practitioners of the laparoscopic procedure. R. p. 1708, lines 9-15. Still in the Air Force,

he returned to his base in Rome, N.Y. and started doing laparoscopic surgeries along with a colleague who had experience in laparoscopic techniques. R. p. 1708, lines 16-19.

As to the specific operation performed on Ms. Person, a Nissen (or its variant, a Hill procedure) fundoplication, Dr. Mincheff performed such operations, open, even during his residency. During his residency, he did ten or eleven. After his residency, and before he operated on Ms. Person, he had done hundreds of gastro-esophageal type operations. That operation has not changed in decades. R. p. 1709, line 20 –p. 1710, line 12. Appellant has not claimed that Dr. Mincheff should not have had privileges to do the open Nissen procedure.

After his training in laparoscopic techniques in Massachusetts, when he came to Hartsville, he went to Duke Medical School twice to learn specifically how to do the Nissen Fundoplication using a laparoscopic approach. The operation itself was the same as with the open procedure; the difference was in the size of the incisions and the use of smaller tools. R. p. 1711, line 1 – p. 1712, line 7. After going to Duke twice, he came and observed – on three occasions – the techniques of a top specialist in South Carolina, Dr. Longaker at Palmetto Richland Hospital. R. p. 1713, line 17 – p. 1714, line 13. [note: Longaker is misspelled in the transcript].

Having received privileges to perform open surgery – including Nissens – in 1993, Dr. Mincheff was credentialed to do laparoscopic surgery, including Nissens, in 1995. R. p. 1718, lines 17-23. Dr. Mincheff performed several varieties of surgery using the laparoscopic technique, including ventral hernias, inguinal hernias, appendectomies, and oophorectomies, as well as Nissens. Dr. Mincheff had, prior to Appellant Person's Nissen procedure, performed two operations for her using

laparoscopic techniques, an appendectomy and an oophorectomy. R. p. 1713, lines 1-9. Prior to initiating the laparoscopic Nissen procedure for Ms. Person, Dr. Mincheff had done ten laparoscopic anti-reflux procedures, eight Nissens and two Hills. R. p. 1715, lines 10-18.

There is no allegation that any injury to Ms. Person occurred during the laparoscopic phase of her procedure, which had to be terminated shortly after it was initiated because Dr. Mincheff could not see the critical area of her body. R. p. 1727, line 23 – p.1728, line 21. The only reasonable inference is that if there was any contusion on Ms. Person's pancreas, it occurred during the open phase of the procedure, as Dr. Mincheff was deflecting various organs to gain access to the critical area. R. p. 1728, lines 15-21.

During the operation, neither Dr. Mincheff nor Dr. Bannister saw any injury to Ms. Person's organs. R. p. 1731, lines 12-15; p. 1599, line 21-p. 1600, line 14; p. 1804, lines 5-7; p. 1806, lines 8-10. There is evidence in the Record that when she was later operated on at Palmetto Richland that there had been no prior injury to the duct of Ms. Person's pancreas. R. p. 1736, lines 1-5. There is also evidence that reports from Palmetto Richland indicated that there were no slices or lacerations to Ms. Person's spleen. R. p. 1761, lines 14-17.

Ms. Person initiated her action against Carolina Pines, Doctor Bannister and Hartsville Surgical Center on or about April 13, 2004. Complaint, R. 33. Her claims against Doctor Bannister and Hartsville Surgical Center were settled before trial. Her claim against Carolina Pines sounded in negligent credentialing. Inasmuch as no South Carolina case has held that South Carolina recognized such a cause of action and given

the strong public policy in favor of maintaining the confidentiality of the process of credentialing physicians, manifested in S. C. Code Ann. § 40-71-20(1976), Carolina Pines, on November 10, 2004, moved for summary judgment, R. p. 61, supported by a memorandum of law. R. pp. 64 - 72. The Trial Court denied Respondent's motion by letter of September 22, 2006, R. pp. 1926 - 1926, which was followed by a formal order. R. pp. 6 – 20. On October 31, 2006, Respondent filed with the South Carolina Supreme Court and served a Petition for a Writ of Mandamus or for a Writ of Certiorari, R. pp. 85 - 87, and a Memorandum in support of that Petition. R. pp. 88 - 101. By Order of November 2, 2006, our Supreme Court denied Respondent's Petition. R. p. 5.

Ms. Person's case against Carolina Pines was tried over the period of November 6-14, 2006. At the conclusion of the evidence and after the closing arguments, the Trial Court gave its charge on the law, including the following:

> To prevail on that claim, the Plaintiff must establish two things to your satisfaction. First, the Plaintiff must establish that Carolina Pines, by granting privileges to Dr. Mincheff to perform the operation on its premises, breached a duty of care to her, and that the hospital's privileging of Dr. Mincheff was a proximate cause of her damages.... The second thing that the Plaintiff must establish is that Dr. Mincheff's conduct of the operation itself was negligent. And that that negligence caused the Plaintiff's injury.

R. p. 1880, line 22 – p. 1881, line 4; p. 1881, lines 20-23.

At the conclusion of the charge on the law, the Trial Court asked for exceptions and there were none. Appellant replied, in fact, "Masterful charge, no exceptions." R. p. 1906, lines 6-8.

On November 14, 2006, the jury unanimously held for Defendant Carolina Pines. R. p. 1909, lines 1-13.

After the verdict was rendered, Appellant Person did not, either before the jury was dismissed or afterwards, make a motion for a new trial or ask for ten days to make such a motion. R. p. 1909, line 13 – p. 1911, line 13. The colloquy between the Court and counsel after the jury was dismissed was as follows:

The Court:	...The door is closed. The jury has departed the courtroom. Now, out of the presence of the jury, are there any Motions for which a Court response would be necessary, from the plaintiff?
Mr. Corbin:	None.
The Court:	From the Defendant?
Mr. Driggers:	None, Your Honor.
The Court:	All right. Then ladies and gentlemen, I will say to you again, what I said in front of the jury. I want to say to you I appreciate the way this case has been tried. I appreciate the dignity Ms. Person that you have shown. I appreciate the professionalism that Carolina Pines have shown, and the dignity also the physicians did and the surgeons did. I wish you well as we move on from this day, and life goes on for everyone. I just wish both sides well. This case has been an interesting one, a challenging one, and I now declare this record adjourned.

-- END OF TRANSCRIPT --

(Whereupon, this trial was concluded on 3:15 p.m. on Tuesday, November 14, 2006.)

R. p. 1910, line 18 – p. 1911, line 13.

Despite the fact that no motion for a new trial had been made and that no additional time to make such a motion had been requested at the end of trial, the Trial Court allowed Appellant to file a motion for a new trial. In a later order ordering post-trial discovery, filed April 4, 2007, the Trial Court explained its decision, as follows:

> At the immediate close of the trial after dismissal of the jury, Plaintiff's counsel did not request ten (10) days to file a Rule 59 Motion for a New Trial. However, the next morning Plaintiff's counsel by facsimile transmitted to the Court a request for ten (10) days to file a Rule 59 Motion. In response, the Court granted the request for the following reasons:

(1) The trial lasted almost two (2) weeks;
(2) The trial was uniquely exhausting and complex given its novel negligent credentialing cause of action and the nature of Plaintiff's physical and emotional injuries;
(3) Plaintiff is obviously disabled and the jury verdict appeared to the Court to confuse, upset, and surprise her;
(4) After the jury verdict, defense counsel promptly left the courtroom while Plaintiff's counsel conferred with her about the verdict;
(5) In the absence of defense counsel, Plaintiff's counsel could not in an adversarial setting formally request ten (10) days to file a Rule 59 Motion after conferring with his client;
(6) The morning after the verdict, Plaintiff's counsel requested from the Court ten (10) days to file a Rule 59 Motion; and
(7) In the interests of justice and fairness, the Court concluded the Plaintiff should have the benefit of ten (10) days to thoughtfully consider whether to file a Rule 59 Motion for a New Trial.

R. p. 22.

On November 27, 2006, Appellant Person filed her motion under Rule 59 for a new trial absolute. R. p. 103. To support her claim for a new trial, Appellant alleged discovery abuses and that Respondent's counsel did not inform Appellant's counsel the night previously that Respondent was not going to call its named expert as a witness on the following day. Appellant's motion mentioned no motions to compel and did not address the evidence that was presented to the jury.

Respondent Carolina Pines challenged both the timeliness of Appellant's requesting ten (10) days to make a post trial motion and her timeliness of actually making the motion. R. p. 767, line 24 – p. 770, line 11; pp. 130 – 150.

By Order of April 4, 2007, R. pp. 21 - 22, the Trial Court rejected, without citation, Carolina Pine's challenges to the procedural deficiencies in Appellant's post-trial motion. The Court also failed to quash a subpoena issued by Appellant <u>after</u> the trial to a records storage facility, Iron Mountain; Respondent had made the motion to quash

that subpoena. The Court instead allowed Appellant to obtain all the documents encompassed in the subpoena and to depose an employee of Iron Mountain, Bambi Parnell. The Court held in abeyance its decision about Appellant's motion for a new trial until the discovery it ordered had been accomplished. R. p. 26.

In September and October, 2007, almost a year after the conclusion of the trial and after the post-trial discovery had been concluded, the parties filed and served memoranda regarding the effect of the post-trial discovery an its effect on the motion for a new trial.

On April 7, 2008, the Court signed an Order (re-signed on April 26, 2009), R. pp. 28 - 30, denying Appellant's motion for a new trial. The Order made the points that the discovery dispute was irrelevant to the verdict; "[t]here is no proof that any of these records would reveal some sort of medical negligence supporting Plaintiff's claims"; and "[i]t is this Court's firm opinion that the jury verdict for the Hospital resulted from significant evidence put forth by the Defendant at trial that Dr. Mincheff did not commit medical negligence in Plaintiff's surgery, which is fatal to Plaintiff's claim for negligent credentialing against the Hospital." R. p. 30.

Appellant timely filed her notice of appeal and on May 1, 2009 filed and served her initial brief. Neither Appellant's "Issues on Appeal" nor the substance of her brief addresses the Trial Court's holdings that there was no proof that any documents sought, but not provided, would reveal medical malpractice, or that there was sufficient evidence for the jury to hold that Dr. Mincheff had not committed medical negligence during his operation for Ms. Person.

ARGUMENT

I. THE JURY'S VERDICT IS TO BE AFFIRMED IF THERE IS ANY EVIDENCE TO SUPPORT IT.

This Court, citing several cases, has addressed a reviewing court's duty with respect to issues of fact, such as whether a party was negligent. Scott v. Greenville Housing Authority, 353 S.C. 639, 579 S.E.2d 151 (Ct.App.2003). The Court held as follows:

> We will not disturb the jury's factual findings unless a review of the record discloses there is no evidence which reasonably supports the jury's findings. Townes, 266 S.C. at 85, 221 S.E.2d at 775; Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct.App.1997); see also York v. Conway Ford, Inc., 325 S.C. 170, 480 S.E.2d 726 (1997) (Court has no power to review matters of fact in action law except to determine if verdict is wholly unsupported by evidence); Cohens v. Atkins, 333 S.C. 345, 509 S.E.2d 286 (Ct.App.1998) (in action at law on appeal of case tried by jury, jurisdiction of Court of Appeals extends merely to correction of errors of law, and factual finding of jury will not be disturbed unless review of record discloses there is no evidence which reasonably supports jury's findings).

353 S.C. at 645, 579 S.E.2d at 154. As addressed below, and as assessed by the Trial Court, there is substantial evidence upon which the jury could reasonably grant a verdict for Carolina Pines.

II THE TRIAL COURT ERRED IN HOLDING THAT SOUTH CAROLINA LAW COUNTENANCED A CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING.

Appellant's claim against Carolina Pines was that the Hospital was negligent in providing credentials to Dr. Mincheff that allowed him to operate on Ms. Person. Respondent's position is that the Trial Court erred in holding that South Carolina law allowed such a cause of action. The issue was brought to the Court's attention, R. pp. 61 - 72, and ruled on by the Court. R. pp. 6 - 20. This State's strong public policy is to protect

the confidentiality of the peer review process under which physicians are provided credentials to offer medical treatment in a given hospital, as manifested in S.C. CODE ANN. § 40-71-20. Allowing a civil action for negligent credentialing would work directly against this public policy; would create –and has in this case created – innumerable discovery disputes; and would erode the confidence of the medical community that peer review proceedings can be kept confidential. Once that confidence is lost, which will inevitably happen as various claimants and their attorneys "push the envelope," it will be practically impossible to regain and the long-term effect will be diminished candor in the credentialing process and medical care of inferior quality in South Carolina hospitals.

A. The Public Policy of South Carolina, as reflected in both statutory and case law, is to protect the confidentiality of the Process of Credentialing Physicians.

The linchpin of maintaining the confidentiality of medical credentialing/ privileging committee proceedings in this State is S.C. CODE ANN.§ 40-71-20, which provides, in pertinent part, as follows:

> **§40-71-20. Confidentiality of certain proceedings, records and information.**
>
> All proceedings of and all data and information acquired by the committee referred to in Section 40-71-10 in the exercise of its duties are confidential unless a respondent in the proceeding requests in writing that they be made public. These proceedings and documents are not subject to discovery, subpoena, or introduction into evidence in any civil action except upon appeal from the committee action. Information, documents, or records which are otherwise available from original sources are not immune from discovery or use in a civil action merely because they were presented during the committee proceedings nor shall any complainant or witness before the committee be prevented from testifying in a civil action as to matters of which he has knowledge apart from the committee proceedings or revealing such matters to third persons.

Our Supreme Court has directly addressed the public policy underlying this statute and the associated § 40-71-10. McGee v. Bruce Hospital System, 312 S.C. 58, 439 S.E.2d 257 (1993). The Court's discussion of the legislature's intent and public policy makes plain that this is a matter of serious import for the State. It held as follows:

> **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.** *See* State ex rel Shroades v. Henry, 187 W.Va. 723, 421 S.E.2d 264 (1992). **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.** Cruger v. Love, 599 So.2d 111 (Fla.1992). We adopt the Florida Supreme Court's reasoning in *Cruger* that:
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>> [t]he policy of encouraging full candor in peer review proceedings is advanced only if all documents considered by the committee ... during the peer review or credentialing process are protected. Committee members and those providing information to the committee must be able to operate without fear of reprisal. Similarly, it is essential that doctors seeking hospital privileges disclose all pertinent information to the committee. Physicians who fear that information provided in an application might someday be used against them by a third party will be reluctant to fully detail matters that the committee should consider. Id.
>
> We find that the public interest in candid professional peer review proceedings should prevail over the litigant's need for information from the most convenient source. *See* Humana Hospital Desert Valley v. Superior Court, 154 Ariz. 396, 742 P.2d 1382 (Ct.App.1987); Holly v. Auld, 450 So.2d 217 (Fla.1984); Hollowell v. Jove, 247 Ga. 678, 279 S.E.2d 430 (1981).
>
> We interpret the legislative intent to protect not only documents generated by the committee, but also documents acquired by the committee in the course of its proceedings. The express language of the statute provides that "all proceedings of and all data and information *acquired* by the committee ... are confidential." (Emphasis added.) Accordingly, we hold that the privilege provided by sections 40-71-10 and -20 protects all information, documents, or records acquired by the committee as part of its decision-making process. Thus, the physicians' applications for staff

privileges and supporting documentation submitted to the committee are records of the committee for the purposes of the statutory privilege.

McGee, 312 S.C. at 61-62, 439 S.E.2d at 259-60 (emphasis added).

This Court must decide whether this State recognizes a cause of action that will necessarily cause hospitals to open to view and explain their credentialing decisions. Such explanation will, at some point in some case, require invasion of the confidentiality accorded the process that decides whether a physician is qualified to practice. This invasion will solely benefit individual plaintiffs who can achieve full recovery from the independent contractor doctors (as Mrs. Person did here) whose act or omission is alleged to have directly caused the injury. It is inconsistent with the public policy of South Carolina as articulated in McGee and the inferable intention of our legislature to allow a windfall to some few claimants at the expense of lower quality medical care for other citizens of the State.

South Carolina has heretofore recognized a claim against the employer of an independent contractor in very limited situations. In the medical field, this Court has limited such claims to those cognizable under Restatement (Second) of Torts: Employers of Contractors § 429 (1965). Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000) *reh'g denied.* The Court explained that section's application in hospitals in this State as follows:

> Although the present cases involve emergency room physicians, our decision is not necessarily limited to such physicians. It is limited, however, to those situations in which a patient seeks services at the hospital as an institution, and is treated by a physician who reasonably appears to be a hospital employee. Our holding does not extend to situations in which the patient is treated in an emergency room by the patient's own physician after arranging to meet the physician here. Nor does our holding encompass situations in which a patient is admitted to a hospital by a private, independent physician whose only connection to a

> particular hospital is that he or she has staff privileges to admit patients to the hospital. Such patients could not reasonably believe his or her physician is a hospital employee. *See Ward v. Lutheran Hosps. & Homes Soc. of America, Inc.*, 963 P.2d 1031 (Alaska 1998) (reaffirming *Jackson*, *supra*, and holding that hospital was not liable under nondelegable duty or apparent agency doctrines for allegedly negligent acts of private, independent physicians who had staff privileges to treat their patients at hospital); *Menzie v. Windham Comm. Mem'ol Hosp.*, 774 F.Supp. 91 (D.Conn.1991); *Jackson*, 743 P.2d at 1385; *Richmond County Hosp. Auth.*, 361 S.E.2d at 166.

Simmons, 341 S.C. at 52, 533 S.E.2d at 323. In Simmons, the Supreme Court rejected the Court of Appeals' imposition of an absolute non-delegable duty on the hospital. It should similarly reject the idea that the Hospital here has an absolute duty regarding credentialing to Mrs. Person. Section 429 of the Restatement of Torts, as the Supreme Court has already held, adequately protects the interests of patients and hospitals. For the Hospital to be held liable for actions alleged to have been performed by the hand of a non-employee physician, it is implicit under the "fault" requirement of our tort law that the physician must be an agent of the hospital. If the physician is not the employee or agent of the hospital, there is no nexus between the hospital and the alleged injury. The physician must, in the absence of any other indication of agency, be an ostensible agent, which brings the claim directly within the purview of § 429, Restatement (Second) of Torts and Simmons. Recognizing a cause of action for negligent credentialing would *de facto* circumvent the Supreme Court's holding in Simmons.

In the case at hand, as pointed out *supra.*, Mrs. Person personally selected the doctor to perform the operation, after having been his private patient for years. R. p.1259, lines 19-24. She could not reasonably have believed that he was an employee of the Hospital.

Because it is contrary to the public policy of this State, as articulated in Simmons and McGee, the Court should declare that South Carolina does not recognize "negligent credentialing" as a tort. There is, moreover, no evidence in our statutes that the legislature intended that such a tort be recognized.

B. There are other good reasons to reject the establishment of a cause of action for "negligent credentialing," especially given the facts in the case at hand.

1. There is a Statutory Exemption from Civil Liability for the Actions of a Credentialing/Privileging/Peer Review Committee.

S.C. CODE ANN. § 40-71-10(B) provides an exemption from civil liability for doctors who directly serve on credentialing/privileging/peer review committees and for the committee that reviews the committee's decision on behalf of the hospital. The review committee appears to be a "professional [medical] society," as defined by S.C. CODE ANN. § 40-71-10(A) fully as much as the first-level committee. The Credentials/Peer Review process used by the Hospital includes Hospital Executives in the review of a physician's credentials. R. p. 1577, lines 4-20; p. 1580, lines 3-24. Hospitals, therefore, should be shielded from liability by S.C. CODE ANN. § 40-71-20, even as its agents, participants in the credentialing committee, are.

The intention of the Legislature that can be inferred from the words of § 40-71-20 are that the reviewing body must have the same protections as the determining body. It would make no sense to provide protection to the peer-review committee's proceedings – including protection from discovery, subpoena and testimony providing evidence at trial – if such information and documents are not protected when they reach the review level. In the case at hand, the final reviewing authority of credentialing decisions at Carolina

Pines is the Board of Trustees, which includes approximately six physicians. R. p. 1580, lines 15-24.

Reading the statute to hold that the hospital reviewing the work of the credentialing committee was not protected would work to diminish the thoroughness of the Hospital's review. The hospital in having to give records of proceedings and other documents up in discovery or in response to subpoena would create unhealthy pressure not to forward documents to the hospital's reviewing body. If the hospital's reviewing body does not get all the documents, as is likely if it is not shielded, its review will necessarily be less thorough. The purpose of the confidentiality statutes, to "encourage health care professionals to monitor the competency and professional conduct ... to safeguard and improve the quality of patient care," McGee, 312 S.C. at 61, 439 S.E.2d at 259, will be obviated in that one level of monitoring will be significantly less effective. That cannot have been the Legislature's intention.

Courts in other jurisdictions have held that such confidentiality statutes shield the hospital's decision-making body as well as the participants in the credentialing/ privileging committee. *See, e.g.*, Columbia/JFK Medical Center Limited Partnership v. Sanguonchitte, 920 So.2d 711, 712 (Fla. Ct. App. 2006) ("The court held that these statutes protect any document that is considered by the review committee or board as part of its decision making process" citing Cruger v. Love, 599 So.2d 111, 114 (Fla. 1992), which was cited favorably by this Court in McGee).

The Hospital, therefore, has the same protections as individual/participants in the credentialing/privileging process and one of these protections is not to be held

accountable in court for credentialing/privileging decisions, which the legislature believes are best left to the medical profession.

2. The Confidentiality Statutes Inhibit, and potentially Cripple, a Hospital's Defense of a "Negligent Credentialing" Claim.

A plaintiff's claim for negligent credentialing or privileging is *de facto* a claim that the hospital did not properly assess a doctor's qualifications. A plaintiff can, using the original source provision, depose the doctor and determine, as in the case at hand, how many times the doctor has performed the specified operation in a given period of time. The plaintiff can then invariably find an expert witness who will testify that the doctor has not done the operation enough times or frequently enough in the past month or year. Very frequently doctors who practice in hospitals in rural areas – and it is common knowledge that rural areas are often underserved by medical professionals – will not have met that expert's definition of what constitutes adequate, current experience. To defend itself, the Hospital needs to be able to explain why it gave the doctor credentials or privileges to do that operation. To adequately explain why the doctor was credentialed/ privileged, the hospital needs virtually to recreate the credentialing process. To do that is to violate the confidentiality statute. To not do it lessens the chance that the hospital can adequately explain its actions to the jury.

3. Negligent Credentialing Actions Have Other Potentially Adverse Effects.

Recognizing a cause of action for negligent credentialing could have other adverse effects. It may be expected that every medical malpractice claim will be accompanied by a negligent credentialing claim. Evidence of a physician's "prior bad acts" could come in, and influence, the trial of a negligence claim against him. A

settlement with a doctor could require that the doctor waive his right to confidentiality and thereby cause the hospital to be required to divulge the contents of its credentialing file, thereby subverting the intention of eliciting candor from participants in the process. A patient, moreover, can recover fully from the doctor who committed malpractice without *de facto* making the hospital vicariously liable for the doctor's actions. Because of the tension between the confidentiality requirements of S.C. Code Ann.§ 40-71-20 and the broad scope of discovery provided by the SCRCP, there will in all likelihood be serious discovery disputes in all medical malpractice actions. The trials of negligent credentialing claims may be expected to be long and arduous, as here, where there were seven days of trial. Judicial economy will suffer both from the protracted discovery disputes and the lengthy trials.

III. APPELLANT, IN FAILING TO INCLUDE ANY ISSUE ON APPEAL AS TO RESPONDENT'S PURPORTED NEGLIGENCE, HAS ABANDONED THAT ISSUE.

Rule 208 (b)(1)(B) states that, "[o]rdinarily, no point will be considered which is not set forth in the statement of issues on appeal." This Court has repeatedly held that an issue which is not argued in a party's brief is deemed to be abandoned for purposes of appeal. Collins Entertainment, Inc. v. White, 363 S.C. 546, 559, 611 S.E.2d 262, 268 (Ct.App.2005); Bell v. Bennett, 307 S.C. 286, 294, 414 S.E.2d 786, 791 (Ct.App.1992); McGann v. Mungo, 287 S.C. 561, 575, 340 S.E.2d 154, 161 (Ct.App.1986); Cudd v. John Hancock Mut. Life Ins. Co., 279 S.C. 623, 630, 310 S.E.2d 830, 834 (Ct.App.1983).

Appellant has, therefore, abandoned any argument that Carolina Pines was negligent in credentialing or that Dr. Mincheff was negligent in conducting the Hill fundoplication for her. She has also abandoned any argument that the allegedly withheld

documents would have been evidence of negligence on the part of Carolina Pines or Dr. Mincheff. As the Trial Court pointed out, there is no proof that the documents sought would provide evidence of malpractice. All of the documents sought by Appellant addressed her credentialing claim, while none addressed the issue of Dr. Mincheff's negligence. Even if Appellant had gotten evidence of prior delicts by Dr. Mincheff, though there was none, that would not address the jury's implicit holding that Dr. Mincheff was not negligent in Ms. Person's operation. Appellant's failure to contest and argue this issue causes it to be abandoned and necessarily breaks any nexus between the discovery allegations and the actual claims in Appellant's litigation.

IV. THE TRIAL COURT ERRED IN CONSIDERING APPELLANT'S POST-TRIAL MOTION, AS NO REQUEST FOR TEN (10) DAYS TO MAKE SUCH A MOTION WAS TIMELY MADE AND THE MOTION ITSELF WAS NOT TIMELY MADE. THE TRIAL COURT, THEREFORE, DID NOT HAVE SUBJECT MATTER JURISDICTION TO ENTERTAIN APPELLANT'S MOTION FOR A NEW TRIAL.

A. Appellant's Request for ten (10) Days in which to make a Post-Trial Motion was Untimely.

As pointed out *supra.*, p. 11, the transcript of trial reveals that, while Appellant was given clear opportunities to make a post-trial motion before the dismissal of the jury and prior to the conclusion of the trial and the closing of the record, she did not do so. R. p. 1909, line 13 – p. 1911, line 13. Having failed to make a post trial motion, or to request ten (10) days in which to do so, promptly after the jury was dismissed, Appellant waived her right to make such a motion. Boone v. Goodwin, 314 S.C. 374, 444 S.E.2d

524 (1994) *reh'g denied.* The Boone Court, construing Rule 59 (b), SCRCP, and the Reporter's Note following Rule 59[5], held as follows:

> Respondent urges us to apply the holding in Buxton v. Thompson Dental Co., 307 S.C. 523, 415 S.E.3d 844 (Ct.App.1992). In that case, the Court of Appeals interpreted Rule 59(b) so that if a party did not timely move for a new trial promptly after the jury was discharged, the trial court could in its discretion hear the motion if it were made within the ten-day period. Our Rule 59(b) differs from the federal rule in that the federal rule allows a party to serve a motion for a new trial not later than ten days after entry of the judgment. Under the Court of Appeals' analysis, there is no difference in our rule 59(b) and the federal rule. We do not agree with this analysis. We hold a party **must** make a motion for a new trial promptly after the jury is discharged or request ten days within which to make a motion. To the extent Buxton is inconsistent with this opinion, it is overruled. The order granting a new trial is
>
> REVERSED.

314 S.C. at 376, 444 S.E.2d at 525 (emphasis added). The trial court in Boone did not have discretion—or power, which equates to jurisdiction—to order a new trial when the appellant had not made the motion, or requested ten (10) days to do so, at the end of the trial. The Trial Court here likewise did not have the discretion or jurisdiction to order a new trial when the motion was not made at the end of trial or, **at that time**, did not request the ten (10) day extension. The Trial Court's explanation of why he granted the motion, quoted *supra.*, p. 12, makes plain that it believed that it had discretion which it, in fact, did not have. The Court, thereby, made an error. *See also* Camden v. Hilton, 360 S.C. 164, 172, 600 S.E.2d 88, 92 (Ct.App.2004) (in inconsistent verdict case, this Court held that, "[w]e find the trial court erred in entertaining Respondent's post-trial motion, as the motion was not presented to the court prior to the jury being discharged"). Here,

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[5] The Reporter's Note states in pertinent part that, "In jury trials, post trial motions are made promptly at the end of the trial, or **at the time**, the court, upon motion may grant an additional ten days to make them" (emphasis added).

the Appellant did not simply fail to make a timely motion, she expressly declined the opportunity to do so.

Even if the issue of the untimely request to make a post-trial motion does not implicate subject matter jurisdiction, the fact that the Trial Court allowed, contrary to the holding of Boone, an untimely request for ten (10) days to make the new trial motion constitutes an additional ground for sustaining the jury's verdict. Rule 220 (c), SCACR; I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 419-20, 526 S.E.2d 716, 722-23 (2000).

B. Even if the Ten-Day Extension to make a Post-Trial Motion Was Timely, though it was not, Appellant did not make the Motion in the Requisite Time.

The trial of this matter ended on Tuesday, November 14, 2006. R. p. 1911, lines 12 -13. The ten days within which to make the post-trial motion, therefore, expired on Friday, November 24. Appellant filed and apparently served[6] the motion on November 27, 2006.

Respondent presented this issue to the Trial Court in opposition to Appellant's motion for a new trial. The Trial Court rejected Respondent's argument in its Order of April 4, 2007, based on the date of *filing* the motion, holding as follows:

> Defendant's argument that Plaintiff's counsel failed to timely file a Rule 59 Motion in accordance with the Court's instruction no later than ten (10) days after the November 14, 2006, jury verdict has no merit. The tenth day after the jury verdict was Friday, November 24, 2006, the day after Thanksgiving. In fact, November 24, 2006, was a national holiday on which the Darlington County Courthouse was closed. Further, November 25 and November 26, 2006, were a Saturday and Sunday, respectively. Plaintiff's counsel timely filed the Rule 59 Motion on the first business day the courthouse was open ten (10) days following the November 14,

[6] Respondent has no certificate of service. This inference is drawn from the fact that the motion was signed on November 27 and the motion cover sheet is dated November 27.

> 2006, verdict. In short, Plaintiff's counsel timely filed the Rule 59 Motion.

R. pp. 22-23.

There are two errors in the Trial Court's analysis. First, the date when a motion for a new trial is "made" under Rule 59(b) is when it is *served*, that is when it is put in the mail. Curtis v. Blake, 381 S.C. 189, 672 S.E.2d 576 (2009). The Supreme Court held as follows:

> Although Rule 50(b) does not define the term "made," other portions of Rule 59 utilize service as the effective date. For example, Rule 59(c) sets for the Time for Serving Affidavits, stating, "[w]hen a motion for a new trial is based upon affidavits they shall be served with the motion." Similarly, Rule 59(d) permits a court on its own initiative to "grant a motion for a new trial, timely served…" Under Rule 59(e), "a motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."
>
> Furthermore, this Court has previously held Rule 59(b) requires service of post trial motions within ten days after judgment. See Diamond Jewelers v. Naegele Outdoor Advertising, 290 S.C. 260, 349 S.E.2d 888 (1985) (recognizing post-trial motions to amend, alter and for a new trial must be served not later than ten days after entry of judgment).

381 S.E.2d at 191-92, 672 S.E.2d at 577-78.

Second, the fact that the Darlington County Courthouse was closed on the day after Thanksgiving could not have prevented Appellant from making her 59(b) motion, as she could have put it in the U.S. Mail that day and accomplished service on November 24, the last day of the ten-day period. In failing to do so, her motion was made untimely.

The failure to make a timely motion for a new trial is an additional ground for sustaining the jury's verdict.

V. THERE IS NO EVIDENCE OF ANY BAD FAITH FAILURE BY CAROLINA PINES TO PRODUCE DOCUMENTS, AND NO EVIDENCE THAT ANY SUCH DOCUMENTS WOULD SUPPORT APPELLANT'S ASSERTIONS OF NEGLIGENCE, SO A NEW TRIAL SHOULD NOT BE GRANTED ON THAT BASIS.

Appellant's claim for "negligent credentialing," if, in fact, South Carolina recognizes such a tort, which is uncertain, was destined to lead to discovery disputes inasmuch as Appellant sought material about the credentialing process for Dr. Mincheff at Carolina Pines that infringed the confidentiality provisions of S.C. CODE ANN. § 40-71-20 (2001); R. pp. 1921 - 1924. A strong accusatory tone was set early in this litigation and continues to be manifested in Appellant's brief, which asserts – with no evidence – purposeful, invidious violation of the rules of discovery.

Despite Appellant's implying bad faith by Carolina Pines, her brief provides absolutely no evidence of such bad faith. Appellant's counsel asserts repeatedly that Carolina Pines "disobeyed" the Court's orders to produce various documents; that, in fact, is the sum and substance of the entire brief. Carolina Pines could not, however, produce what it did not have. Respondent's counsel explained its position to the Court as follows:

> Yes, sir, your Honor. Again, we have given everything that we have and can get our hands on.... They are just boxed in warehouses and places that we can't get and comb through in the space of ten days while other activities are going on, other documents are trying to be produced, other witnesses are trying to be arranged, and we have given everything— We aren't going to be walking in here with anything, and materials, that Mr. Corbin doesn't have. We have witnesses, who he has had available to him, meaning the physicians in this case, who have been deposed....
>
> I can't produce simply what I don't have. I have given him everything that I know to do. It is not—it is not from any kind of obfuscation, or it is not any type of – or to keep anything from him. I have given him all the documents that we have. If he had asked us for them, you know, when this litigation started, or even six months ago, or three

> months ago, then it would be a different story. He asked us for these[7]— Again, the Order is again October 26, not—a little more than a week— And, that is what I've got....
>
> I understand his frustrations. I am frustrated too that I can't find them, but we will have the physicians here to testify. And, he can ask them how many he had done, and if he doesn't believe them, do you have records to back that up. The doctors have their own independent ways of counting for what they do.

R. p. 1550, line 1 - p. 1551, line 4 (footnote added); *see also*, R. p. 1427, line 21 – p. 1428, line 15; R.

Upon query by the Court, counsel for Carolina Pines addressed how its documents are stored, as follows:

> The Court: Where does Carolina Pines keep their Discharge Summaries?
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> Mr. Driggers: They are kept according to year, if they don't have some age on them, there is a facility called Iron Mountain in Florence. It is document production, or document holding company. They not only do it for Carolina Pines, they do it for other places. That is who maintains and keeps their stored documents, and they are in warehouses. I am not sure how many warehouses there are I am sure there are several. But, they are the ones that they contract to do that with.
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> The Court: These documents now, present day documents digitally produced and are stored electronically, or are you still on a paper system?
>
> Mr. Driggers: They are still on a paper system, as far as I know.

R. p. 1551, lines 7-22.

The Trial Court, after the multi-month, post-trial discovery that it had ordered was completed with no evidence that Carolina was intentionally withholding any documents, memorialized the continuing intractable discovery dispute. Order of 4/26/09; R. p. 30. In that Order, the Court stated that, "Plaintiff continues to maintain that medical records

[7] Appellant's counsel did not request records regarding Dr. Mincheff's prior surgical procedures until October 13, 2006, when he – improperly – issued a subpoena to Carolina Pines' CFO. R. pp. 363, 1927 - 1931. The trial was scheduled to start, and did start, in some three weeks.

were actually in the possession of the Hospital and not provided to Plaintiff under a claim that such were not available, while the Defendant continues to deny these allegations." R. p. 30.

Appellant's brief provides no evidence of any intentional withholding of evidence by Carolina Pines. Appellant provides not one shred of evidence of any purposefully withheld document. Instead, Appellant's brief offers, similar to its conduct throughout the litigation, a cornucopia of allegations of "abuse." Such unsupported allegations are not sufficient to merit the granting of a new trial.

Furthermore, the information sought by Appellant was available through other sources throughout the litigation. Specifically, Appellant sought records from Dr. Mincheff's prior esophageal surgical procedures. Rather than waiting to subpoena such information from the hospital three weeks before trial, Appellant could have at any point in time during the course of the litigation subpoenaed the information from Dr. Mincheff or his practice directly. Mincheff Affidavit; R. pp. 1962 – 1963. However, at no point in time, either when Dr. Mincheff was a party to the litigation or after his dismissal, did Appellant attempt to obtain the disputed information until three weeks before the trial of the case, Subpoena for Documents, 10/13/2006; R. p. 1927. The trial was set for a date certain on November 6, 2006. Form 4 Order, 05/05/2006; R. p. 4.

Germane to this issue also is the fact that Appellant, prior to trial, was offered the opportunity for a continuance and declined it. R. p. 881, lines 3-23. Having waived the opportunity to postpone the trial and having had the extraordinary opportunity of post-trial discovery to prove her claims of discovery abuse – which she failed to do – Appellant should not now be heard to demand a new trial. The Appellant's brief,

moreover, fails to provide any evidence that further litigation would likely uncover additional relevant evidence of negligence by the Hospital in providing credentials for Dr. Mincheff or of negligence by Dr. Mincheff in conducting the operation on Ms. Person. Our Supreme Court and this Court have held that in arguing for more time for discovery, the party seeking such time must "demonstrate that further discovery will likely uncover additional relevant evidence." Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54, 677 S.E.2d 32, 36 (Ct. App. 2009) *citing* Dawkins v. Fields, 354 S.C. 58, 71, 580 S.E.2d 433, 440 (2003), *citing* Baughman v. American Tel. and Tel., 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991). None of the documents that Appellant has sought, moreover, are related to the issue of Dr. Mincheff's operating on Ms. Person, which Appellant must also prove.

As the Trial Court held, moreover, the discovery allegations are "not dispositive of the case," R. p. 30, because of evidence put forth to the jury by Carolina Pines.

VI. THERE IS A WEALTH OF EVIDENCE TO SUPPORT THE JURY'S VERDICT.

As the Trial Court charged the jury, R. p. 1880, line 22 – p. 1881, line 3; p. 1881, lines 19-23, to prevail, the Appellant had to convince the jury of two things: 1) that Carolina Pines was negligent in granting privileges to Dr. Mincheff and 2) that Dr. Mincheff's medical negligence was the proximate cause of Ms. Person's injury. If Carolina Pines prevailed on either of these issues, it would prevail in the litigation.

The jury returned a general verdict for Defendant Carolina Pines, not specifying whether it prevailed on both, or one of, the two cited issues. R. p. 1909, lines 5-7. Under the "two issue" rule, if there is evidence of record to support either of two dispositive issues, the verdict should not be reversed on appeal. Triple E, Inc. v. Hendrix

and Dail, Inc., 344 S.C. 186, 190, 543 S.E.2d 245, 247 (Ct.App.2001) *reh'g denied* ("[i]f the jury's verdict is supported as to at least one issue, the verdict will not be reversed on appeal").

In the case at hand, as addressed below, there is evidence from which the jury could have held for Carolina Pines on both issues. Inasmuch as the only issue is whether there is evidence from which the jury could have held for Carolina Pines, no contrary evidence will be addressed and superior credibility is assumed for Defendant's witnesses.

A. There is Substantial Evidence that Carolina Pines was not Negligent in Providing Credentials to Dr. Mincheff.

1. He was Qualified to Receive Credentials to Perform Open Nissen Procedures, which is the only qualification related to Ms. Person's injuries.

When Dr. Mincheff initially applied for credentials with Carolina Pines in 1993, he was a surgeon with approximately 10 years experience as a general surgeon. His 10 years of experience included residencies at NYU and New York Downtown Hospital and in the U.S. Air Force, in which he served for approximately eight years. His service in the Air Force culminated in his serving as Chief of Surgery at an Air Force hospital in Rome, N.Y. R. p. 1698, lines 1-24.

Dr. Mincheff became board-certified in general surgery in 1993; such certification entails having the medical board review a log of all a surgeon's operations, after he has completed a surgical residency, and an oral examination. R. p. 1700, line 20 - p. 1701, line 12. Such board certification is the seal of approval, by other physicians in that specialty, of the surgeon who has applied.

Carolina Pines' by-laws do not require that, to receive privileges to operate at the hospital, a surgeon have performed a specific number of each operation that he will have

privileges to perform. R. p. 1581, lines 10-14. The Chief of the Medical Staff at Carolina Pines, Dr. Gary A. Barker, testified that no hospital at which he had worked required that for a doctor to perform a particular operation, he had to have previously performed a set number of that procedure. R. 1581, lines 15-18.

Though Carolina Pines did not require that he have performed a certain number of open Nissen fundoplications prior to receiving privileges from the Hospital, Dr. Mincheff had, in fact, performed several such operations, among many other surgeries, prior to applying with Carolina Pines. He testified that he had done "a large number of surgeries" during his residency, R. p. 1706, lines 13-15, including 42 esophageal gastric type surgeries. R. p. 1706, line 24 – p. 1707, line 6.

The Appellant's expert, Dr. DeMaria, provided an opinion that a surgeon who had performed 20-30 gastric and esophageal surgeries could be credentialed by a hospital to perform open Nissen procedures. R. p. 1400, line 9 – p. 1401, line 14. The jury could clearly draw a reasonable inference from this testimony that Carolina Pines was not negligent in credentialing Dr. Mincheff to perform open Nissen procedures.

Dr. DeMaria also gave his opinion that Ms. Person's injury occurred during the open phase of her Nissen procedure, and agreed that credentialing criteria for performing the laparoscopic procedure were irrelevant. His testimony was as follows:

> Q. All right. So SAGES would only be the mechanism by which you evaluate whether a person can do the laparoscopic to begin with, correct?
>
> A. Yes, Usually the SAGES Guidelines will include some statement that the surgeon should be credentialed and privileged to perform the open type of procedure as a platform for the laparoscopic procedure.
>
> Q. I understand that but in terms of its criteria...
> [i]t implies the laparoscopic, is that not true?
>
> A. Yes. Yes.

Q. And in a sense that is irrelevant, because if the injury occurs like you say it occurred, it occurred during the open operation not a laparoscopic operation, correct?
A. Yes, that is my belief, yes, sir.
Q. So all the talk we're doing here about the laparoscopic operations in a sense, is not all that critical, is that right?
A. I agree.

R. p. 1398, lines 5-12, 14-25. Dr. Mincheff reiterated the same point in his testimony, agreeing that any laparoscopic training was completely irrelevant when the surgeons started the open procedure. R. p. 1729, lines 20-22. Even if Carolina Pines' credentialing of Dr. Mincheff to perform laparoscopic Nissens beached a duty to Ms. Person, which is denied, as addressed below, the jury could reasonably conclude that it was irrelevant because any deficiency was not the proximate cause of injury to Ms. Person.

There is a wealth of other evidence, in five categories, from which a juror could decide that Carolina Pines' credentialing of Dr. Mincheff – for both laparoscopic and open Nissens – was not negligent. First, Dr. Mincheff's exemplary practice of surgery after receiving privileges validates the granting of those privileges. Since receiving open privileges in 1993 and laparoscopic privileges in 1995, he had performed almost 8,000 operations; R. p. 1705, lines 2-5, and at the time of trial was doing two or three open procedures, three to five laparoscopic procedures and six or seven endoscopic procedures per week. R. p. 1705, lines 6-16. The only reasonable inference to be drawn from this active surgical practice is that Dr. Mincheff had an excellent professional reputation among both referring physicians and patients. The fact that Ms. Person, upon whom Dr. Mincheff had operated two or three times previously, requested that he do her anti-reflux

procedure, R. p. 1259, lines 22-24, also is evidence of the excellent reputation he had attained after being credentialed.

Second, the exemplary performance of Carolina Pines in inspections of its credentialing process is evidence which could reasonably influence a juror to believe that the Hospital had not been negligent in credentialing Dr. Mincheff. Dr. Barker testified that Carolina Pines had received the highest rating for credentialing from the Joint Commission of Accreditation of Health Organizations—which is the agency that specifically reviews credentialing—in 1997, 2000 and 2003. R. p. 1580, lines 19 -24;p. 1583, lines 14-15; p. 1583, line 19 – p. 1584, line 17;p. 1586, lines 7-21;p. 1587, lines 6-16. Inasmuch as only fifty (50) percent of hospitals received a "one," the highest mark for credentialing in any given year, R. p. 1587, lines 17-19, the fact that Carolina Pines received that mark for three consecutive tri-year inspections is evidence that the Hospital has an excellent credentialing procedure. Evidence of such an exemplary record would not be lost on jurors.

Third, there is evidence of the high regard that other doctors and surgeons have for Dr. Mincheff's professional abilities. People within a profession are able to evaluate the capabilities of others in the profession, as in the Martindell-Hubbell ratings of attorneys, and it should not be assumed that jurors are unaware of the value of "insider" ratings. The evidence from the other two physicians who practice at Carolina Pines was to the effect that Dr. Mincheff was an excellent surgeon. Dr. Barker, the chief of Carolina Pines' medical staff, testified as follows:

> Q. What's your opinion of Dr. Mincheff, as a surgeon?
> A. [H]e's quite compassionate. He is very competent, and he is pretty conservative.

R. p. 1606, lines 16-18. Dr. Bannister, who had even more experience than Dr. Mincheff, R. p. 1742, lines 21-24, assessed Dr. Mincheff's surgical skill and other qualities as follows:

> Q. All right. What is your opinion of him as a surgeon?
> A. Dr. Mincheff, I think, is a very excellent surgeon. As was stated, we were competitors when he initially got here. Later on he joined Doctor Cooler and myself at Hartsville Surgical Center. I have had the pleasure of working along side him. I would have no qualms about him operating on me or any of my family. And I know that not only is he a good surgeon, but he is really a decent, caring, and honest man.

R. p. 1800, lines 13-21. Mincheff's earning the reputation reflected in his peers' comments is clear evidence that the credentialing process was not negligent, but did exactly what it should have done regarding Dr. Mincheff.

Fourth, Dr. Mincheff's own testimony was that he did not fault Carolina Pines for giving him privileges to perform Nissen procedures. He replied, "not at all" to a question as to whether he found fault with the Hospital granting him such privileges. R. p. 1720, lines 7-9. That response presents to a juror evidence of solid confidence, with no doubt, on the part of Dr. Mincheff.

Finally, the credentialing process for Dr. Mincheff is validated by the prestigious professional organizations to which he has been admitted since receiving credentials from Carolina Pines. His testimony as to his memberships was as follows:

> Q. You had performed surgeries prior to that in Texas and New York, correct?
> A. That is correct.
> Q. Okay. Doctor, tell the jury just a little bit about what memberships you have in any professional societies.

A. I have several memberships. I'm a Fellow of the American College of Surgeons, and also a Fellow of the International College of Surgeons. I'm also a Fellow of the Southeastern Surgical Congress. I'm a member of the South Carolina Surgical Society, the South Carolina Medical Association, the American Society of General Surgeons, also the Society of American Gastricendoscopic Surgeons, which is SAGES, and also the Laparoendoscopy Surgery society.

Q. .... [H]ow does one become a Fellow of the American College of Surgeons?

A. In order to become a Fellow you have to send in an application, you have to have several letters of reference from several other surgeons in your field. Also, you have to send in a log of many of your surgeries.

Q. Those would be open surgeries?

A. Open, laparoscopic, all together.

R. p. 1699, line 14 – p. 1700, line 3; p. 1700, lines 7-15. An inference to be drawn from this is that if Dr. Mincheff had not been qualified when he was credentialed, and performed poorly for a period of time after his credentialing, he would not be a Fellow of the American College of Surgeons or be a member of other associations of surgeons.

There was, therefore, plenty of evidence from which a juror could hold that Carolina Pines was not negligent in granting privileges to Dr. Mincheff to conduct open Nissen fundoplication procedures—which is the operation in which Appellant alleges that Ms. Person suffered her injury.

2. There is also Evidence that Dr. Mincheff was also Qualified to Receive Privileges from Carolina Pines to Conduct Laparoscopic Nissen Procedures.

As pointed out above, the evidence is that none of Ms. Person's injuries occurred during the laparoscopic phase of her operation. A juror could reasonably hold, therefore, that any qualification to perform the Nissen laparoscopically was irrelevant as any deficiency in laparoscopic technique could not have been the proximate cause of Appellant's injuries.

Even if such qualification were not considered irrelevant, however, there is plenty of evidence to support a jury holding that Dr. Mincheff was qualified to be credentialed to perform laparoscopic Nissens when Carolina granted him such privileges in 1995. As suggested *supra*, pp.33-36, Dr. Mincheff's post-credentialing performance as a surgeon is evidence that validates Carolina Pine's granting him privileges to do the laparoscopic procedure, even as it validates his credentialing for open procedures. There is also evidence about his training and experience in laparoscopic surgery that suggests that Carolina Pines was not negligent in granting him privileges in 1995 to perform laparoscopic procedures. *Supra.,* pp. 7-9.

The training and proctoring Dr. Mincheff received in laparoscopic techniques is outlined *supra.*, pp. 8-9. He knew the requirements for the Nissen and Hill fundoplication from having performed them open on at least forty-two (42) occasions during his residency. R. p. 1706, line 24 – p. 1707, line 6. He went for further training specifically to learn how to use laparoscopic techniques to do the same operation. His testimony as to his specific training in this regard was as follows:

A. I came here and then in 94 I went to my first course up at Duke. There at the time was Dr. Steve Eubanks and Ted Pappas, and learned to do the Laparoscopic Nissen in addition to several of the other procedures like appendectomies and so forth. Then I went back again in 95 to a larger course over a several day period, and did again the Nissen Fundoplication....

Q. Explain to the jury what goes on when you take these courses for these procedures.

A. Well, the course involves lecturing as well as hands on experience. In these courses you are using both hands, you are learning to use laparoscopic equipment. You became more familiar with the equipment. And as technology progresses we also progress....

Q. There was another occasion at the University of Cincinnati, is that correct?

A. That was later on I did inguinal hernias.

Q. You said you had instructors there that were teaching you the laparoscopic—

A. Yes, sir.

Q. The laparoscopic procedure, right?

A. This is the laparoscopic approach to a previously open procedure.

Q. Again, you were continuing to do the Open Nissen, correct?

A. That's correct.

Q. Which the procedure had not changed since—

A. --It has not changed for decades.

Q. Okay. When you took these courses, did any of your instructors ever tell you not to go back and perform these procedures until you had done a certain number, or until you had had a certain amount of proctoring, preceptors, any of those standards we have heard about?

A. No. We had talked about the learning curve being twenty. But you have to look at the learning curve as a comfort level.

Q. Okay.

A. If you are doing advanced laparoscopic procedures already, and if twenty is chosen as an arbitrary number, and twenty may be the amount needed for somebody who is not really experienced in laparoscopic procedures. But, somebody who is already doing laparoscopic procedures, that feels comfortable doing laparoscopic procedures after two or three you feel comfortable doing them.

Q. How did you continue your training in South Carolina for Laparoscopic Nissen?

A. I kept going to the courses and then continuing my practice.

Q. When you had the occasion to observe Dr. Dale Abbott?

A. That was after the second time I went to Duke. At that time there were not enough qualified proctors at that time—the laparoscopic procedure was in its infancy, so there weren't really a lot of qualified proctors; so I did the second best thing. I went to Dr. Lawmaker [*sic*, Longaker], who was at that time the top man in South Carolina.

Q. Where did he practice?

A. Columbia, South Carolina....

Q. What did you do with Dr. Lawmaker [*sic*]?

A. I went there and observed him. I went there three times on three different occasions, closed my office to go there and learned his technique.

Q. Did Dr. Lawmaker [*sic*], ever warn you or tell you not to go back and begin doing there procedures after he had shown you his techniques?

A. No, not at all.

R. p. 1711, lines 1-16; p. 1711, line 19 – p. 1712, line 25; p. 1713, lines 12-25; p. 1714, lines 3 -10. Dr. Mincheff also testified directly that he "felt very comfortable with the procedure" and "felt very comfortable using two hands to do intracarpal and extracorporeal knot tying." R. p. 1748, lines 9-17. Therefore, he was confident both of his laparoscopic skills and of the requirements for the Nissen or Hill operation.

The clear evidence is that Dr. Mincheff made a particular effort to get training in the laparoscopic Nissen; that he did receive training in that operation; and that apparently Dr. Longaker, Dr. Mincheff's trainer and "the top man in South Carolina" in that procedure, gave him tacit approval to begin doing the procedure.

Given this evidence, and the evidence that Dr. Mincheff had done ten laparoscopic anti-reflux procedures prior to starting such a procedure on Ms. Person, R. p. 1715, lines 10-18, a reasonable juror could certainly conclude that Carolina Pines had not breached a duty to Person in granting Dr. Mincheff privileges to conduct laparoscopic Nissen procedures.

The jury's verdict for Carolina Pines should be affirmed based on evidence in the record that the Hospital was not negligent in credentialing Dr. Mincheff to perform laparoscopic Nissen fundoplications or—and more to the point for this case—open Nissens.

B. There Was a Wealth of Evidence in the Record from which the Jury could Reasonably Conclude that Dr. Mincheff did not Commit Medical Negligence in Operating on Ms. Person.

Even if there was no evidence to exonerate Carolina Pines of negligence in credentialing Dr. Mincheff – though, as addressed above, that is not the case – there is plenty of evidence in the record from which a reasonable juror could conclude that Dr.

Mincheff was not negligent in performing the operation on Ms. Person. One objective observer of the trial, who heard all the evidence, the Trial Court itself, assessed the state of the evidence presented as follows: "It is this Court's firm opinion that the jury verdict for the Hospital resulted from significant evidence put forth by the Defendant at trial that Dr. Mincheff did not commit medical negligence in Plaintiff's surgery...." Order of 4/26/09; R. p. 30. Nothing in Appellant's brief appeals or challenges this statement, so it is the law of the case, ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997); Straight v. Goss, 383 S.C. 180, 208, 678 S.E.2d 443, 458 (Ct. App. 2009). Appellant, by failing to address this issue in her "Issues on Appeal" or brief, has likewise abandoned the issue, Wright v. Craft, 371 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct.App.2006), so this Court, with no challenge to the Trial Court's holding on this issue, should affirm the Trial Court.

Even if Appellant did contest the issue, there is a wealth of evidence from which the jury could reasonably determine that Dr. Mincheff did not commit medical malpractice in his care and treatment of Ms. Person.

First, it is unquestioned that the problem that caused Ms. Person's complications was pancreatitis, as testified to by Appellant's expert, Dr. DeMaria. R. p. 1368, lines 2-5. It is also uncontested that there are many possible causes of pancreatitis, several of which do not suggest any breach of the standard of care by the surgeon. R. p. 1365, line 9 – p. 1366, line 19. The germane testimony from Appellant's expert, Dr. DeMaria, was as follows:

Q. And just because a patient loses blood does not mean there was medical negligence, isn't that true?

A. Yes, it is true.

Q. All right. Nor it can result—pancreatitis can result from blunt pressure or retraction on the pancreas where the pancreas is simply being manipulated and pancreatitis occurs, isn't that right?
A. Yes, that is true.
Q. Now in all three of those incidences it is not below the standard of care if they appear, is that not true?
A. So the three are idiopathic, post operative with blood loss, and pressure or retraction of the pancreas?
Q. Sure.
A. Yes, I would say that all three of those are circumstances in which pancreatitis can develop in which there is no negligence and certainly no deviation from the standard of care.

R. p. 1366, lines 3-19.

Evidence was presented that none of Ms. Person's organs, including the pancreas, spleen and colon, had been lacerated while she was at Carolina Pines. R. p. 1711, lines 12-15; p. 1736, lines 1-6; p. 1738, lines 9-15; p. 1761, lines 14-24; p. 1787, lines 15-17; p. 1799, lines 24-25; p. 1800, lines 1-8. The eyewitness to the operation testified that he did not see anything done wrong in Dr. Mincheff's procedure on Ms. Person. R. p.1800, lines 9-12.

There is, however, evidence that Ms. Person's injuries were caused at Palmetto Richland Hospital. A hole was made in her stomach there. R. p. 1738, lines 7-9. They perforated her colon, allowing the contents of the colon to spill into her body cavity, R. p. 1738, line 25 – p. 1739, line 13, causing removal of part of her colon and a subsequent colostomy.

Dr. Mincheff testified that Ms. Person did lose blood during the operation and that there was a possibility that a contusion or bruise was caused on her pancreas as they were trying to manipulate her organs to achieve visibility of the critical area for the anti-reflux procedure. R. p. 1731, lines 1-5; p. 1734, lines 11-12.

Neither of these consequences of a "very very difficult" operation, R. 1728, lines 18-19, are below the standard of care, as Appellant's expert, Dr. DeMaria, testified, quoted *supra*., pp. 40-41. Dr. Mincheff also testified that causing a contusion does not violate the standard of care. R. p. 1767, lines 19-22; p. 1768, lines 18-22; p. 1769, lines 3-4, 11-13. The jury could readily have believed that pancreatitis being caused by a contusion would be "a rare complication," R. p. 1768, lines 20-22, the occurrence of which was not the result of a violation of the standard of care. Even Dr. DeMaria testified that pancreatitis is " a very uncommon complication" to an operation. R. p. 1335, line 7.

The brief summary of evidence presented above makes plain that there is evidence in the record from which a jury could very reasonably decide that it was not negligence on Dr. Mincheff's part that caused Ms. Person's pancreatitis or the subsequent injuries that she suffered at the follow-on hospital. The jury was, of course, in a position to observe the demeanor and hear the tone of voice of the parties. Their verdict indicated that they believed Dr. Mincheff's explanation of what happened and why. The statement of the Trial Court regarding the evidence, quoted *supra*, p. 40, manifests its acceptance of the credibility of Dr. Mincheff.

The jury's verdict should be affirmed.

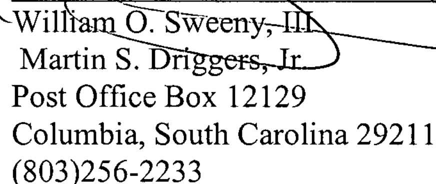
CONCLUSION

The jury's verdict should be affirmed. The Court should hold, as an additional sustaining ground, that South Carolina does not recognize a cause of accident for negligent credentialing. It was error for the Trial Court to allow Appellant to proceed on this cause of action, which has such adverse potential for the State. The Trial Court

should have affirmed the jury's verdict without granting post-trial discovery. The post-trial discovery period of several months yielded no evidence that any action taken in discovery by Carolina Pines, which was concomitantly trying to protect the confidentiality of its credentialing process, was taken in bad faith or in intentional defiance of discovery rules. Appellant has also not demonstrated that additional litigation would yield probative evidence, especially evidence that would be dispositive as to both issues upon which the Appellant must prevail. At trial, Respondent Carolina Pines presented substantial evidence that it was not negligent in providing surgical privileges to Dr. Mincheff. It also provided substantial evidence that Dr. Mincheff was not negligent in performing the open abdomen Nissen fundoplication procedure on Ms. Person. Under the "two-issue" rule, the jury's verdict should be affirmed if Respondent provided evidence to support either of these issues. Carolina Pines, in fact, provided adequate evidence to support both. The Appellant has abandoned any argument that either Carolina Pines, or especially, Dr. Mincheff, was negligent. The Jury's verdict for Carolina Pines should be affirmed.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.



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September 29, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas
The Honorable J. Michael Baxley

Case No.: 2001-CP-16-00813

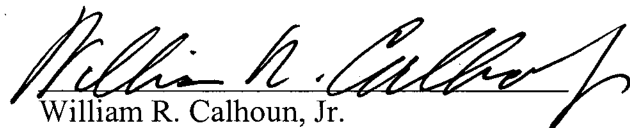
Ruth J. Person, Appellant,

v.

Carolina Pines
Regional Medical Center, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, and with The South Carolina Supreme Court's Order of August 13, 2007.



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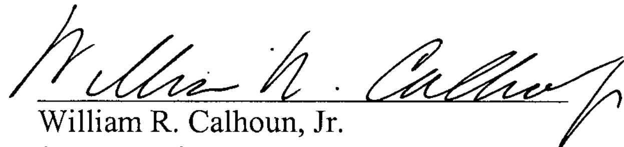
PROOF OF SERVICE

The undersigned certifies that Respondent's Final Brief was served on Ruth J. Person by depositing a copy of it, on the date annotated below, in the United States Mail, postage prepaid, addressed to her attorney of record, Daryl J. Corbin at the Corbin Law Firm, Post Office Box 447, Florence, S.C. 29503.



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