

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Spartanburg County Court of Common Pleas
Roger L. Couch, Circuit Court Judge

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SC Court of Appeals

Case No. 2012-CP-42-3125

Angela Dawn Simmons, ...Respondent,

v.

Spartanburg Regional Healthcare System, d/b/a Spartanburg Regional Medical Center¹,
Foothills Anesthesia Consultants, P.C. and Adam D. Evec, D.O., Defendants,

of whom Foothills Anesthesia Consultants, P.C. and Adam D. Evec, D.O.
are the Appellants.

APPELLANTS' RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

The Court should deny Respondent's motion to dismiss because the trial court's order denying Appellants' motion to consolidate for trial the Respondent's medical malpractice and loss of consortium actions may be appealed—and, in fact, must be appealed—under S.C. Code Ann. Section 14-3-330(2) because the order denying consolidation "affects a substantial right."

- 1. The order denying consolidation must be appealed immediately because it affects the mode of trial by depriving Appellants (in the event of an adverse verdict in the loss of consortium action) of their right to a jury trial on the issue of liability in Respondent's subsequent medical malpractice action.**

¹ Spartanburg Regional Healthcare System was dismissed with prejudice on February 4, 2015, but the case caption has not been properly amended to reflect the dismissal.

“[O]rders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330(2) (1977) and must, therefore, be appealed immediately.”² When a party fails to timely appeal an order affecting the mode of trial, he waives the right to appeal that issue.³ The South Carolina appellate courts have repeatedly held that the denial of a party’s right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2).⁴ Moreover, the Supreme Court has heard an interlocutory appeal of an order denying a motion to consolidate two tort cases based on the appellant’s assertion that the order denied (affected) a substantial right.⁵

“Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.”⁶ “The party asserting collateral estoppel must demonstrate

² *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (citing *Foggie v. CSX Transp.*, 315 S.C. 17, 431 S.E.2d 587 (1993) (“Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable.”)) (in action by attorney to recover sums owed under a fee agreement, client waived right to appeal trial court’s order denying motion for jury trial when client failed to file an immediate appeal); accord *Frampton v. S.C. DOT*, 406 S.C. 377, 385-86, 752 S.E.2d 269, 274 (Ct. App. 2013) (DOT waived its right to appeal the trial court’s order denying a non-jury trial during takings phase of inverse condemnation case by not filing an immediate appeal).

³ *Id.* (citing *Edwards v. Timmons*, 297 S.C. 314, 377 S.E.2d 97 (1988) (where appellant did not appeal the order referring matter to master in equity, she could not complain after final order that she was deprived of her right to a trial by jury); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (where appellant failed to timely appeal an order referring dispute to master in equity, appellant could not later complain that he had been entitled to a trial by jury)).

⁴ *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) (citing *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (order referring case to master in equity affects the mode of trial, a substantial right, and party waived his objection to the reference and his right to jury trial by failing to immediately appeal the order); and *Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004) (purpose of immediate appeal on right to particular mode of trial is to preserve party’s constitutional right to trial by jury which would otherwise be lost)).

⁵ *McKinney v. Greenville Ice & Fuel Co.*, 232 S.C. 257, 101 S.E.2d 659 (1958).

⁶ *State v. Hewins*, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014) (quoting *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009)).

that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.”⁷ Mutuality of parties “is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue.”⁸

Here, the trial court’s order denying Appellants’ motion to consolidate would effectively deprive them of their constitutional right to a jury trial in Respondent’s medical malpractice action because—in the event that Respondent obtains a verdict against Appellants in her loss of consortium case (to be tried first)—Respondent could preclude (collaterally estop) Appellants from relitigating the issue of their alleged liability in the subsequent medical malpractice action and only the issue of damages would be submitted to the jury. The operation of collateral estoppel under the circumstances present here would work a manifest injustice in the medical malpractice case, amounting to a deprivation of Appellants’ right to trial by jury, as explained below. Appellants filed this appeal immediately so as not to waive their right.

Respondent filed two closely related actions on the same day, July 26, 2012: one, an action for medical malpractice on behalf of her husband, Jerry Dale Simmons, as his guardian (2012-CP-42-3127), and the other, her own loss of consortium claim (2012-CP-42-3125).⁹ The two cases contain identical allegations of negligence on the part of the defendants.¹⁰ Jerry Dale

⁷ *Id.*

⁸ *Id.*

⁹ The complaints named Spartanburg Regional Healthcare System as the sole defendant. Respondent filed an amended complaint in each case on January 3, 2013, joining Foothills Anesthesia Consultants, P.C. and Troy McKinney, MD. Later, Adam Evec, DO was substituted for Troy McKinney, MD with the Appellants’ consent.

¹⁰ See amended complaints, attached hereto as Exhibits A and B.

Simmons suffered a congenital aortic coarctation and underwent three surgeries by cardiothoracic surgeon Tuan Nguyenduy, M.D. at Spartanburg Regional on August 23, 25, and 28, 2010. During the third procedure, Appellant Dr. Evec, an anesthesiologist, became involved in Mr. Simmons' care. Dr. Evec transported Mr. Simmons to the operating room, where he coded soon thereafter. Dr. Evec immediately undertook resuscitative measures according to ACLS protocol while Dr. Nguyenduy performed external CPR and an internal heart massage by hand. By these extraordinary efforts, Mr. Simmons' life was saved. These are the facts on which the medical malpractice and loss of consortium claims are based.

At a hearing on May 8, 2015, after recently learning that Respondent's counsel intended to separately try the loss of consortium and medical malpractice actions, Appellants moved that the two cases be consolidated for trial pursuant to Rule 42, SCRCF.¹¹ That same afternoon, Judge Couch's law clerk informed the parties that Judge Couch had denied the motion to consolidate.¹² Appellants contend that it was a clear abuse of discretion to deny their motion to consolidate. Given that the trial was scheduled to begin on May 18th, that it was unknown to Appellants when Judge Couch might issue a written order on their motion, and that by May 12th no written order had been issued (still no written order has been issued), Appellants filed this appeal in good faith to protect their rights.

The true but unspoken reason Respondent opposed consolidation is clear; her strategy is simple. Respondent filed her loss of consortium action first and insisted that it be tried first, before her husband's medical malpractice action, so that she can seek a very modest recovery in the loss of consortium case and then, if she obtains a verdict against Appellants, collaterally

¹¹ See Affidavit of Ashby W. Davis.

¹² See Exhibit B to Affidavit of Pope D. Johnson, III.

estop Appellants from relitigating the issue of liability in the second trial and seek a huge recovery, claiming economic damages in excess of seventeen and a half million dollars (\$17,500,000) (present value) in lost earnings and future medical expenses, plus substantial noneconomic damages.¹³ She opposes consolidation because she knows that in this case, where Dr. Evec's liability is highly doubtful, it would be difficult to obtain a verdict against Dr. Evec and his practice (on the sole basis of vicarious liability) when the economic stakes are so high. Analogously, in the criminal context, a jury is very unlikely to convict one accused of murder, knowing he could face the death penalty or life in prison, when there is *any* doubt that he committed the crime. If Respondent were allowed to try the loss of consortium action first, the jury would be blind to the magnitude of the damages sought in the related medical malpractice claim and to the consequences of their verdict on the subsequent action. This would be unfair to Appellants and would effectively deprive them of their substantial right to a jury trial in the subsequent medical malpractice action. Therefore, this immediate appeal is necessary and mandatory.

- 2. The order denying consolidation *may* be appealed immediately because it affects the substantial right of Appellants to consolidate for trial closely related actions based on the same exact facts, thereby avoiding unnecessary costs and delay, when there is no sufficient or compelling reason for denying consolidation and when the trial court's abuse of discretion in denying consolidation cannot be remedied by a later appeal. An immediate appeal of the pre-trial order denying consolidation is the only recourse.**

Rule 1 of the South Carolina Rules of Civil Procedure makes clear that all of the rules are intended "to secure the just, speedy, and inexpensive determination of every action." Rule 42(a), SCRPC provides, "When actions involving a common question of law or fact are pending before

¹³ See Affidavit of Ashby W. Davis.

the court,...it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

While the South Carolina appellate courts have not held explicitly that the denial of a party’s motion to consolidate affects a substantial right under section 14-3-330(2) and is therefore immediately appealable, that much is implied by the Supreme Court’s decision in *McKinney*, where the Court heard an interlocutory appeal of an order denying a motion to consolidate two tort cases based on the same auto accident.¹⁴

Our Supreme Court has held in *Senter v. Piggly Wiggly Carolina Co.*¹⁵ that an order denying bifurcation of the issues of liability and damages in a single personal injury case does not affect the mode of trial and is not immediately appealable pursuant to section 14-3-330(2), but *Senter* is readily distinguished from the present case. In *Senter* the Court reasoned that the trial court’s order was discretionary and an abuse of discretion, if any, which deprived petitioner of a fair trial could be corrected on appeal following trial on all issues.¹⁶ Here, while the trial court’s order appears from the text of Rule 42(a) to be discretionary (“When actions involving a common question of law or fact are pending before the court,...it *may* order all the actions consolidated...”), a trial judge’s abuse of discretion in denying consolidation cannot be remedied on appeal following the trial of two (or more) cases after the party has already incurred the unnecessary expense and delay of a second trial. Without the right to immediately appeal the pre-trial order denying consolidation, the moving party’s substantial right to consolidation of closely

¹⁴ *McKinney v. Greenville Ice & Fuel Co.*, 232 S.C. 257, 101 S.E.2d 659 (1958) (affirming the trial court’s denial of the defendant’s motion to consolidate because under prevailing common law the two separate cases could not be consolidated except by the parties’ consent).

¹⁵ 341 S.C. 74, 533 S.E.2d 575 (2000).

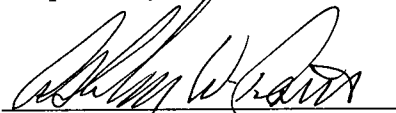
¹⁶ *Id.* at 77-79, 533 S.E.2d at 577.

related cases (in the absence of sufficient reason not to consolidate the actions) and avoidance of unnecessary cost and delay cannot be safeguarded.¹⁷

CONCLUSION

Appellants are *required* to immediately appeal the trial court's order denying consolidation because it affects the mode of trial in that it effectively deprives Appellants of their constitutional right to trial by jury in the subsequent medical malpractice case in the event that Respondent obtains a verdict against Appellants in her loss of consortium action and Appellants are collaterally estopped from relitigating the issue of their alleged liability. Appellants are *permitted* to immediately appeal the order because it affects (denies) the substantial right of Appellants to have these cases consolidated under Rule 42 where the cases are so closely related and are based on the same facts and contain the identical allegations of liability against them and where there are no sufficient reasons not to consolidate the cases. The Court should deny the motion to dismiss.

Respectfully submitted,



Ashby W. Davis
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Davis, Snyder & Williford, PA
5 Hawthorne Park Court
Greenville, SC 29615
(864) 335-3500
Attorneys for Appellants

¹⁷ At this time Appellants are unaware of any controlling authority on the issue of whether a party's right to have closely related actions consolidated, in the absence of a sufficient reason against consolidation, in order to avoid unnecessary cost and delay is a "substantial right" as defined under section 14-3-330(2), but Appellants argue in good faith that it is a substantial right and a right that can only be safeguarded by the right to immediate appeal. *McKinney* is not controlling in this regard because while the Court did not find that defendant had a substantial right to consolidation, the law then governing consolidation of separate cases was markedly different than the current rule of procedure governing consolidation. Under Rule 42(a), the trial court can order consolidation of separate cases involving a common question of law or fact over a party's objection.

EXHIBIT “A”

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LAW OFFICES
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Pope D. Johnson, III

E-Mail: pdjohnson@johnsonbarnette.com

January 3, 2013

Honorable M. Hope Blackley
Clerk of Court
Spartanburg County Judicial Center
P.O. Box 3483
Spartanburg, SC 29304

RE: Angela Dawn Simmons v. Spartanburg Regional Healthcare System d/b/a Spartanburg
Regional Medical Center, etal.
Civil Action No. 2012-CP-42-3125

Angela Dawn Simmons, as general guardian for Jerry Dale Simmons v. Spartanburg
Regional Healthcare System d/b/a Spartanburg Regional Medical Center
Civil Action No. 2012-CP-42-3127

Dear Ms. Blackley:

Enclosed herewith are the original and a copy of the Amended Summons and Complaints regarding the above-referenced actions. Please file the original of each and clock and return the additional copies to me in the self-addressed envelope provided.

With a copy of this letter to all counsel of record, I am serving them with copies of the Amended Summons and Complaints, along with the First Set of Interrogatories, First Request for Production, and First Request for Admission directed to Defendants Foothills Anesthesia Consultants, P.C. and Troy F. McKinney, M.D.

Sincerely,


Pope D. Johnson, III

PDJIII/sww
Enclosures

cc: Perry D. Boulter, Esquire
Ashby W. Davis, Esquire

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Angela Dawn Simmons,)
Plaintiff.)

Civil Action No. 2012-CP-42-3125

vs.)

AMENDED SUMMONS

(Jury Trial Demanded)

Spartanburg Regional Healthcare)
System d/b/a Spartanburg Regional)
Medical Center, Foothills Anesthesia)
Consultants, P.C., and Troy F.)
McKinney, M.D.,)
Defendants.)

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Amended Complaint in this action. A copy of the Amended Complaint is attached to this Amended Summons and is herewith served upon you. Your answer must be in writing and signed by you or by your attorney and must state your address or the address of your attorney if signed by your attorney. Your answer must be served upon the undersigned attorneys for the plaintiff within thirty (30) days after the service hereof, exclusive of the day of service at 1230 Richland Street, Columbia, SC 29201.

YOU ARE HEREBY GIVEN NOTICE FURTHER that, if you fail to appear and defend and fail to answer the Amended Complaint as required by this Amended Summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Amended Complaint.



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Attorney for the Plaintiff

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Columbia, South Carolina
January 3, 2013

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
Angela Dawn Simmons,	)	Civil Action No. 2012-CP-42-3125
	)	
Plaintiff,	)	
	)	AMENDED COMPLAINT
vs.	)	
	)	(Jury Trial Demanded)
Spartanburg Regional Healthcare	)	
System d/b/a Spartanburg Regional	)	
Medical Center, Foothills Anesthesia	)	
Consultants, P.C., and Troy F.	)	
McKinney, M.D.,	)	
	)	
Defendants.	)	
_____	)	

The plaintiff above named, complaining of the defendants herein, allege as follows:

FOR A FIRST CAUSE OF ACTION

1. That the plaintiff is the wife of Jerry Dale Simmons.
2. That Jerry Dale Simmons heretofore sought medical care and treatment from Spartanburg Regional Healthcare System d/b/a Spartanburg Regional Medical Center ("Spartanburg Regional") for a longstanding history of hypertension, as a result of a congenital severe coarctation (narrowing and hardening) of the descending thoracic aorta.
3. That Jerry Dale Simmons was placed under Dr. Tuan Nguyenduy, an employee of Spartanburg Regional.
4. That Dr. Nguyenduy proposed to perform an angioplasty.
5. That Dr. Nguyenduy performed the angioplasty on August 23, 2010. He performed an emergent repair of a leak in the descending aorta coarctation on August 24, 2010, and initiated a third procedure on August 28, 2010.
6. That Foothills Anesthesia Consultants, P.C. and its employee, Troy F. McKinney, M.D., provided anesthesiology services for the third procedure on August 28, 2010.
7. That Jerry Dale Simmons coded in the last procedure on August 28, 2010 and is now brain dead.

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8. That Dr. Nguyenduy, acting as an employee and agent of Spartanburg Regional and within the scope of his employment, failed to exercise that degree of care and skill which is ordinarily performed by the profession generally, under similar conditions and in like surrounding circumstances in connection with the care and treatment he provided to Jerry Dale Simmons.

9. That Dr. McKinney, acting as an employee and agent of Defendant Foothills Anesthesia Consultants, P.C. and within the scope of his employment, failed to exercise that degree of care and skill which is ordinarily performed by the profession generally, under similar conditions and in like surrounding circumstances in connection with the care and treatment he provided to Jerry Dale Simmons.

10. That Spartanburg Regional, acting through its employee and agent, Dr. Nguyenduy, deviated from the standard of care and treatment of Jerry Dale Simmons and was negligent and reckless in his care and treatment in the following particulars:

- a. in allowing Dr. Nguyenduy to perform the angioplasty procedure to correct the congenital severe coarctation which, upon information and belief, he lacked the necessary degree of professional learning, skill, experience and ability to perform;
- b. In allowing Dr. Nguyenduy to treat and perform angioplasty surgery to correct the congenital severe coarctation when procedures to correct such coarctation in adults such as Jerry Dale Simmons were not performed at the defendant's hospital and/or regularly performed.
- c. In proposing to perform and in performing an angioplasty while Jerry Dale Simmons was under anesthesia and unconscious rather than perform bypass surgery;
- d. In recommending and in performing angioplasty, which was the wrong procedure to correct the congenital severe coarctation, given his age, condition and medical problems;
- e. In failing to recommend and perform bypass surgery, which while more costly, was the proper procedure to correct the congenital severe coarctation of Jerry Dale Simmons;
- f. In failing to explain the proposed angioplasty procedure and to obtain his consent to perform the procedure;
- g. In failing to refer Jerry Dale Simmons to a physician and/or hospital that had the skill, training and experience to treat the congenital severe coarctation of Jerry Dale Simmons;
- h. In failing to identify in a timely fashion after angioplasty, the leaking aorta

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and formation of a pseudoaneurysm which led to additional hemorrhaging which could have been avoided;

- i. In failing to monitor Jerry Dale Simmons, a high risk patient, more closely and in failing to timely identify and treat the leaking aorta;
- j. In delaying the third procedure, which incurred the risk of complications; and
- k. In failing to anticipate and be prepared for a Code Blue and in allowing Jerry Dale Simmons to be without oxygen for 17 minutes, which left him brain dead.

11. That Defendant Foothills Anesthesia Consultants, P.C. and its employee and agent, Dr. McKinney, deviated from the standard of care and treatment of Jerry Dale Simmons and was negligent and reckless in his care and treatment in the following particulars:

- a. In failing to anticipate and be prepared for a Code Blue and in allowing Jerry Dale Simmons to be without oxygen for an extended period of time, which left him brain dead.

12. That Spartanburg Regional, through its agent and employee, had a duty to disclose and inform Jerry Dale Simmons of the diagnosis, the general nature of the contemplated procedure, the material risk involved in the procedure, the possibility of success associated with the procedure, the prognosis if the procedure was not carried out, and the existence of any alternatives to the procedure, and the defendant's agent and employee failed to do so and the consent for the angioplasty of aorta coarctation, possible stent dated August 12, 2010 is invalid.

13. That, upon information and belief, had Dr. Nguyenduy properly explained the proposed angioplasty procedure and advised Jerry Dale Simmons of the risk of the recommended procedure, the alternative forms of treatment and their risk, the risk if no procedure was performed, the doctor's experience in performing the recommended procedure, and the facilities' ability to handle and facilitate the procedure, Jerry Dale Simmons would have declined the angioplasty and elected another treatment method.

14. That attached hereto and incorporated herein are the Affidavits of Robert M. Kennerly, M.D., the plaintiff's expert, which further address the negligence of the defendants.

15. That as a direct and proximate result of the negligent acts of the defendants set forth above, Jerry Dale Simmons was deprived of oxygen and was without oxygen for an extended period of time and suffered brain damage which has left him in a permanent vegetative state, all to his damage.

16. That the plaintiff has suffered actual damages as a result of the negligent care and treatment of Jerry Dale Simmons by the defendants, to include the support and services of Jerry Dale Simmons, the love, companionship, affection and society of Jerry Dale Simmons, the

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sexual relations with Jerry Dale Simmons, and the comfort solace and guidance of Jerry Dale Simmons.

17. That on June 8, 2012 the plaintiff filed and thereafter served a Notice of Intent to File Suit against Spartanburg Regional Healthcare System d/b/a Spartanburg Regional Medical Center, Answers to Interrogatories and Affidavit of Robert M. Kennerly, M.D.

18. That on August 21, 2012 the plaintiff filed and thereafter served a Notice of Intent to File Suit against Foothills Anesthesia Consultants, P.C. and Troy F. McKinney, M.D., Answers to Interrogatories and Affidavit of Robert M. Kennerly, M.D.

19. That a pre-suit mediation was held with Defendant Spartanburg Regional Healthcare System d/b/a Spartanburg Regional Medical Center and an impasse was declared on July 26, 2012.

20. That a pre-suit mediation was held with Defendants Foothills Anesthesia Consultants, P.C. and Troy F. McKinney, M.D. and an impasse was declared on November 20, 2012.

FOR A SECOND CAUSE OF ACTION

21. That the allegations of paragraphs 1 through 20 are realleged and incorporated herein by reference.

22. That since the consent for the angioplasty as alleged above was invalid, the defendant's performance of the angioplasty and subsequent procedures was unauthorized and constitute an unlawful, unauthorized touching and operative procedure, all to the plaintiff's damage as set forth above.

WHEREFORE, the plaintiff prays for a judgment against Defendant Spartanburg Regional Healthcare System d/b/a Spartanburg Regional Medical Center for actual damages and against Foothills Anesthesia Consultants, P.C. and Troy F. McKinney, M.D. for actual damages and punitive damages and for the costs of this action and for such other and further relief as may be just and proper.


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Attorney for the Plaintiff

Columbia, South Carolina
January 3, 2013

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IN THE COURT OF COMMON PLEAS

2012-CP-42-2425

**AFFIDAVIT OF
ROBERT M. KENNERLY, M.D.
S.C. Code Ann. §15-36-100**

**Spartanburg Regional Healthcare
System d/b/a Spartanburg Regional
Medical Center,**

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who being duly

who being duly sworn, depose and say that

and accurate
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n Simmons as
offer opinions
burg Regional

- daughter and Dr. **VOIDED FOR LATE DEPOSITION**
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 ging work up **SPARTANBURG COUNTY**
 e finding a **ALVIN L. BLACKNEY**
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- k. Notes from OR regarding second surgery starting at 22:16 on 8/24/10 and concluding at 2 am on 8/25/10 which was done on an emergent basis
- l. Dr. Nguyenduy's report of second surgery
- m. Report of third surgery 8/28/10 and code blue
- n. Neurological consult report dated 8/31/10 by Dr. Zortea
- o. Discharge summary for discharge date of 2/16/2011

4. I have been advised that Dr. Nguyenduy was an employee of the Spartanburg Regional Medical Center at the time he treated and cared for Jerry Dale Simmons.

5. Mr. Simmons was a 40 year old man, with a long standing history of hypertension, as a result of a congenital severe coarctation (narrowing and hardening) of the descending thoracic aorta. This was the cause of his longstanding high blood pressure problems. This is a serious condition and medical problem. I am familiar with and knowledgeable of the standard of care for diagnosis and treatment of this condition. I believe that my education, training and experience qualify me to render expert opinions in regard to the care and treatment rendered to Jerry Simmons by Dr. Nguyenduy.

6. Dr. Nguyenduy met with Mr. Simmons to explain the angioplasty he proposed to perform and to obtain Mr. Simmons' consent for the procedure. Dr. Nguyenduy performed the angioplasty on August 23, 2010, performed an emergent repair of a leak in the descending aorta coarctation on August 24, 2010, and initiated a third procedure on August 28, 2010. Mr. Simmons coded in the last procedure on August 28, 2010 and is now, in layman's terms, brain dead.

7. Treating a congenital severe coarctation in a 40 year old patient requires special training and substantial experience on the part of the surgeon. It is a high risk procedure.

8. In my opinion and to a reasonable degree of medical certainty, Dr. Nguyenduy deviated from the standard of care in his treatment of Mr. Simmons and was negligent in his care and treatment of Mr. Simmons in the following ways:

- a. In my opinion, Dr. Nguyenduy deviated from the standard of care in proposing to perform and in performing an angioplasty while the patient was under anesthesia and unconscious rather than perform bypass surgery. Angioplasty involves expanding the artery with a balloon and is normally done with the patient being awake so if the patient experiences pain, the procedure can be stopped. Since the angioplasty is not an open surgery, it is difficult to determine if the procedure has caused a blood leak, as it did here. Leaks can occur as a result of an angioplasty. Other complications include restenosis, pseudoaneurysm, dissection and other common vascular complications. If a leak occurs from an angioplasty, the patient has to bleed for a sufficient period of time to manifest signs of leakage before the leak can be addressed. Leaks weaken the patient and can lead to respiratory problems such as occurred here, as well as other problems. Here, given Mr. Simmons' age, health and condition, bypass surgery was the surgical procedure which

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should have been recommended and performed. It does not appear the bypass surgery was even discussed or offered as an option. Angioplasty is unlikely to provide long term relief. With angioplasty, the ballooned artery frequently becomes restenosed which necessitates additional procedures in the future. Additional procedures mean additional risks. In my opinion and given the foregoing considerations, treating Mr. Simmons' problem by performing an angioplasty was a deviation in the standard of care. In my opinion, bypass surgery should have been performed. In my opinion, a bypass surgery, if performed, would have most likely been successfully treated/resolved Mr. Simmons' medical problems.

- b. Dr. Nguyenduy met with Mr. Simmons to explain the proposed angioplasty procedure and to obtain his consent to perform the procedure. In my opinion, the standard of care requires that the doctor explain the risks of the recommended procedure, alternative possible forms of treatment and their risks, the risk if no procedure is performed, the doctor's experience in performing the recommended procedure and the facilities ability to handle and facilitate the procedure. Mr. Simmons could have been continued on medication. However, statistics show that he would have likely had a shortened life expectancy. Other treatment methods include bypass surgery, angioplasty with a stent, and angioplasty, with angioplasty being the least preferable treatment method of the three. If the patient's condition is such that he can undergo surgery, as Mr. Simmons was, bypass surgery is the procedure that should be recommended and performed. All three of these methods of treatment have risks for the patient. The patient is entitled to know the positives, negatives and risks of each method of treatment. In my opinion, the standard of care requires the doctor, who is the expert and knows or should know the positives, negatives and risks of each method of treatment, to inform the patient as to each method of treatment and the positives, negatives and risks of each so the patient can make an informed decision. Although the transcript of the conference between Mr. Simmons, his daughter, and Dr. Nguyenduy is difficult to hear, it appears that Dr. Nguyenduy did not provide Mr. Simmons with anything like sufficient information for Mr. Simmons to make an informed decision to undergo the angioplasty. He did not even discuss or offer bypass surgery. He minimized the risks of the angioplasty procedure. He provided virtually no information of the risks of the angioplasty. In my opinion, had Dr. Nguyenduy properly informed Mr. Simmons of the positives and negatives of each of these treatment options, Mr. Simmons would have declined the angioplasty procedure and elected another treatment method. This was a deviation in the standard of care.
- c. In my opinion, the leaking aorta and formation of a pseudoaneurysm was not identified in a timely fashion which led to additional hemorrhaging which could have been avoided. This high risk patient should have been monitored

more closely. The CT scan, which was not done and read until 5:40 p.m. on the day following the angioplasty, should have been done and read by Dr. Nguyenduy early that morning. The diagnosis of the leak was unreasonably delayed. Blood leaks in the chest cavity are extremely debilitating. When a patient has a leak like Mr. Simmons had, each passing minute of leaking exposes the patient to more difficulties and problems and increases the chances of further complications. Long, unrecognized bleeding such as occurred here weakens the patient, causes respiratory problems such as Mr. Simmons experienced and increases the chance of further complications. This delay in diagnosis of the leak was a deviation in the standard of care.

- d. In my opinion, Dr. Nguyenduy deviated from the standard of care in the delay of the third procedure which increased the likelihood of complications at the time of the procedure. The procedure should have been performed sooner. At the point in time that the third procedure was initiated, Mr. Simmons was in an extremely weakened condition with life threatening respiratory difficulty. His situation was critical but still salvageable. A complication, a code blue, occurred. The high risk of a code blue, which occurred before the surgery was started, should have been anticipated. It was not and was mishandled once it occurred. The patient was without oxygen for 17 minutes. This indicates that there was no preparation to deal with the possibility of a code blue. After Mr. Simmons was without oxygen for 17 minutes, his situation was no longer salvageable. In my opinion, Dr. Nguyenduy deviated from the standard of care in his delay in performing the third procedure, in his failure to anticipate and prepare for the possibility of a code blue, and in his mishandling of the code blue.

In my opinion, these deviations in the standard of care on the part of Dr. Nguyenduy were the direct and proximate causes of the injuries and brain damage suffered by Jerry Simmons.

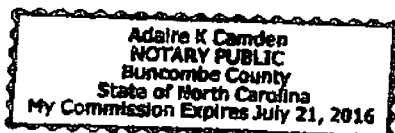
9. I reserve the right to amend and/or supplement these opinions if additional medical records, documents, depositions and/or information are provided.

SWORN TO AND SUBSCRIBED BEFORE ME

this 15th day of May, 2012

[Signature]
Notary Public for North Carolina

My Commission Expires: 07/21/16



[Signature]
Robert M. Kennerly, M.D.

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BUNCOMBE COUNTY
N.C.

Kennerly Surgical PLLC

Dr. Mike Kennerly
5 White Oak Road
Asheville, NC 28803

R. Michael Kennerly, MD

Phone office 828-348-0303 cell 304-812-7810 fax 304-521-2114
Email: mikekennerly@aol.com

Education:

- Georgetown University 1964-68 BS Biology, Chemistry & Physics
- Georgetown University Medical School MD degree 1968-72

Surgical Training

Internship: General Surgery Medical College of Virginia 1972-73 Dr. David Hume
Chief

General Surgery Residency: Medical College of Virginia Richmond VA 1973-75

General Surgery Residency: Loyola of Chicago 1975-77 Dr. Freeark Chief

Chief Resident General Surgery Loyola of Chicago 1977

Cardiovascular Residency: Medical College of Georgia 1977 to 79 Dr. Robert Ellison
Chief

Chief Resident CV Surgery 1979 Medical College of Georgia

Private Practice: 1979 to 1985 Savannah Georgia performing cardiac, thoracic,
vascular, esophageal and general surgery

Cardiac Transplant Fellowship: Des Moines Iowa Mercy Hospital 1985 to 88 Dr Steve
Phillips chief

Private Practice: 1988 to 2008 Asheville, NC doing cardiac, thoracic, esophageal,
vascular and general surgery. Also doing Spine access surgery with neurosurgery
and orthopedic spine surgeons.

Hospital based practice Pleasant Valley Hospital to set up a vascular and thoracic
surgical program 2008 to 2010.

Phone 828-348-0303 Fax 304-521-2114 Cell 304-812-7810

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KIMBERLY L. HANLEY

Kennerly Surgical PLLC

Solo practice 2010 to present doing non cardiac thoracic, vascular, esophageal and general surgery. I also operate a vascular lab for non-invasive vascular studies, carotid ultrasound, venous DVT studies, sclerotherapy and varicose vein ablation surgery using radiofrequency VNUS Closure Procedures.

Certification:

American Board of Surgery with recertification Dec 2007

American Board of Thoracic Surgery with recertification Dec 2007

Hospitals: Pleasant Valley Hospital Point Pleasant, WV

Memberships: American College of Surgeons, Society of Thoracic Surgeons, Southern Thoracic Society, AMA, West VA Medical Society, Rotary

Interests: I have multiple surgical interests encompassed by my Board certifications including anterior spine surgery access surgeon which I have done for over 20 years, a free standing vein clinic and vascular lab, and all aspects of vascular and thoracic surgery. I am interested in AAA surgery both thoracic and abdominal, VATS and other minimally invasive procedures in the chest and abdomen, laparoscopic surgery, ICU post op care management including vent care and more recently VNUS radiofrequency varicose vein closure techniques.

My hobbies include music, flying, hiking, scuba and amateur radio among others.

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IN THE COURT OF COMMON PLEAS

Angela Dawn Simmons,)
)
 Plaintiff,)

VS.

Foothills Anesthesia Consultants,
P.C. and Troy F. McKinney, M.D.,
Defendant.

2012-CP-42-3551

**AFFIDAVIT OF
ROBERT M. KENNERLY, M.D.
S.C. Code Ann. §15-36-100**

PERSONALLY APPEARED BEFORE ME, Robert M. Kennerly, M.D., who being duly sworn, deposes and says:

1. I am Robert M. Kennerly, M.D.
2. Attached hereto is an Affidavit I gave May 16, 2012, which I incorporate herein by reference.

3. I have been retained as an expert witness on behalf of Angela Dawn Simmons as a general guardian of Jerry Dale Simmons and Angela Dawn Simmons individually to offer opinions regarding the care and treatment of Jerry Dale Simmons received at the Spartanburg Regional Medical Center, while under the care of Dr. Tuan Nguyenduy. I have also been asked to offer opinions regarding the care and treatment and response of Foothills Anesthesia Consultants, P.C. and its physician, Troy F. McKinney, M.D. I have been advised that Dr. McKinney, an employee of Foothills Anesthesia Consultants, P.C. and Foothills Anesthesia Consultants, P.C. were involved in the care of Jerry Dale Simmons when the Code Blue occurred and participated in the response to the Code Blue involving Jerry Dale Simmons. I have assumed this to be true for purposes of this affidavit.

4. Hospital patients, on occasion, suffer an arrest and stop breathing. This occurs and is foreseeable to the physician and the hospital. As a result, there is a standard procedure called a Code Blue that is to be followed if a patient arrests and stops breathing. Most critical is the prompt restoration of respiration and the restoring of oxygen to the patient. I have education, training and experience in the proper response to a Code Blue. I am qualified to render opinions regarding the response of Foothills Anesthesia Consultants, P.C. and Troy F. McKinney, M.D.

5. In my opinion and to a reasonable degree of medical certainty, Dr. McKinney deviated from the standard of care in directing the Code Blue response when Mr. Simmons stopped breathing

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and was negligent in his care and treatment of Mr. Simmons. According to the records, Mr. Simmons was without oxygen for 17 minutes. This indicates that there was no preparation to deal with the possibility of a Code Blue. After Mr. Simmons was without oxygen for 17 minutes, his situation was no longer salvageable. In my opinion, Dr. McKinney and Foothills Anesthesia Consultants, P.C. deviated from the standard of care in the failure to anticipate and prepare for the possibility of a Code Blue, and in mishandling of the Code Blue. In my opinion, these deviations in the standard of care on the part of Dr. McKinney and Foothills Anesthesia Consultants, P.C. were direct and proximate causes of the injuries and brain damage suffered by Jerry Dale Simmons.

6. I reserve the right to amend and/or supplement these opinions if additional medical records, documents, depositions and/or information are provided.

SWORN TO AND SUBSCRIBED BEFORE ME

this 21 day of August, 2012

Raye D. Johnson III
Notary Public for North Carolina

My Commission Expires: 7/5/15

Robert M. Kennerly, M.D.
Robert M. Kennerly, M.D.

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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Angela Dawn Simmons,)

Plaintiff,)

vs.)

Spartanburg Regional Healthcare)
System d/b/a Spartanburg Regional)
Medical Center,)

Defendant.)

IN THE COURT OF COMMON PLEAS

2012-CP-42-2427

AFFIDAVIT OF

ROBERT M. KENNERLY, M.D.

S.C. Code Ann. §15-36-100

PERSONALLY APPEARED BEFORE ME, Robert M. Kennerly, M.D., who being duly sworn, deposes and says:

1. I am Robert M. Kennerly, M.D. Attached as Exhibit A is a true and accurate curriculum vitae that outlines my professional qualifications, including my board certification.

2. I have been retained as an expert witness on behalf of Angela Dawn Simmons as general guardian of Jerry Dale Simmons and Angela Dawn Simmons individually to offer opinions regarding the care and treatment of Jerry Dale Simmons received at the Spartanburg Regional Medical Center, while under the care of Dr. Tuan Nguyenduy.

3. I have reviewed the following, which are the basis of my opinions:

- a. An audio of the conversation between Mr. Simmons, his daughter and Dr. Nguyenduy
- b. Records from 5/10/10 to 5/25/10 including lab work
- c. Records of ER visit on 7/19/10 in Rutherfordton
- d. Records of admission to Spartanburg Regional on July 21, 2010 for further testing and nuclear stress test with admission notes
- e. Results of labs from 7/19/10 to 7/23/10 and results from imaging work up - cardiologist Dr. Lopaz
- f. Report of Dr. Lopaz dated July 21, 2010
- g. 7/21/10 in hospital consultation by Dr. Nguyenduy after the finding of a cotation of the aorta
- h. Cardiovascular consultation 8/12/10 for admission on 8/23/10
- i. Radiology reports
- j. Records regarding first surgical report on August 23, 2010

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- k. Notes from OR regarding second surgery starting at 22:16 on 8/24/10 and concluding at 2 am on 8/25/10 which was done on an emergent basis
- l. Dr. Nguyenduy's report of second surgery
- m. Report of third surgery 8/28/10 and code blue
- n. Neurological consult report dated 8/31/10 by Dr. Zortea
- o. Discharge summary for discharge date of 2/16/2011

4. I have been advised that Dr. Nguyenduy was an employee of the Spartanburg Regional Medical Center at the time he treated and cared for Jerry Dale Simmons.

5. Mr. Simmons was a 40 year old man, with a long standing history of hypertension, as a result of a congenital severe coarctation (narrowing and hardening) of the descending thoracic aorta. This was the cause of his longstanding high blood pressure problems. This is a serious condition and medical problem. I am familiar with and knowledgeable of the standard of care for diagnosis and treatment of this condition. I believe that my education, training and experience qualify me to render expert opinions in regard to the care and treatment rendered to Jerry Simmons by Dr. Nguyenduy.

6. Dr. Nguyenduy met with Mr. Simmons to explain the angioplasty he proposed to perform and to obtain Mr. Simmons' consent for the procedure. Dr. Nguyenduy performed the angioplasty on August 23, 2010, performed an emergent repair of a leak in the descending aorta coarctation on August 24, 2010, and initiated a third procedure on August 28, 2010. Mr. Simmons coded in the last procedure on August 28, 2010 and is now, in layman's terms, brain dead.

7. Treating a congenital severe coarctation in a 40 year old patient requires special training and substantial experience on the part of the surgeon. It is a high risk procedure.

8. In my opinion and to a reasonable degree of medical certainty, Dr. Nguyenduy deviated from the standard of care in his treatment of Mr. Simmons and was negligent in his care and treatment of Mr. Simmons in the following ways:

- a. In my opinion, Dr. Nguyenduy deviated from the standard of care in proposing to perform and in performing an angioplasty while the patient was under anesthesia and unconscious rather than perform bypass surgery. Angioplasty involves expanding the artery with a balloon and is normally done with the patient being awake so if the patient experiences pain, the procedure can be stopped. Since the angioplasty is not an open surgery, it is difficult to determine if the procedure has caused a blood leak, as it did here. Leaks can occur as a result of an angioplasty. Other complications include restenosis, pseudoaneurysm, dissection and other common vascular complications. If a leak occurs from an angioplasty, the patient has to bleed for a sufficient period of time to manifest signs of leakage before the leak can be addressed. Leaks weaken the patient and can lead to respiratory problems such as occurred here, as well as other problems. Here, given Mr. Simmons' age, health and condition, bypass surgery was the surgical procedure which

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should have been recommended and performed. It does not appear the bypass surgery was even discussed or offered as an option. Angioplasty is unlikely to provide long term relief. With angioplasty, the ballooned artery frequently becomes restenosed which necessitates additional procedures in the future. Additional procedures mean additional risks. In my opinion and given the foregoing considerations, treating Mr. Simmons' problem by performing an angioplasty was a deviation in the standard of care. In my opinion, bypass surgery should have been performed. In my opinion, a bypass surgery, if performed, would have most likely been successfully treated/resolved Mr. Simmons' medical problems.

- b. Dr. Nguyenduy met with Mr. Simmons to explain the proposed angioplasty procedure and to obtain his consent to perform the procedure. In my opinion, the standard of care requires that the doctor explain the risks of the recommended procedure, alternative possible forms of treatment and their risks, the risk if no procedure is performed, the doctor's experience in performing the recommended procedure and the facilities ability to handle and facilitate the procedure. Mr. Simmons could have been continued on medication. However, statistics show that he would have likely had a shortened life expectancy. Other treatment methods include bypass surgery, angioplasty with a stent, and angioplasty, with angioplasty being the least preferable treatment method of the three. If the patient's condition is such that he can undergo surgery, as Mr. Simmons was, bypass surgery is the procedure that should be recommended and performed. All three of these methods of treatment have risks for the patient. The patient is entitled to know the positives, negatives and risks of each method of treatment. In my opinion, the standard of care requires the doctor, who is the expert and knows or should know the positives, negatives and risks of each method of treatment, to inform the patient as to each method of treatment and the positives, negatives and risks of each so the patient can make an informed decision. Although the transcript of the conference between Mr. Simmons, his daughter, and Dr. Nguyenduy is difficult to hear, it appears that Dr. Nguyenduy did not provide Mr. Simmons with anything like sufficient information for Mr. Simmons to make an informed decision to undergo the angioplasty. He did not even discuss or offer bypass surgery. He minimized the risks of the angioplasty procedure. He provided virtually no information of the risks of the angioplasty. In my opinion, had Dr. Nguyenduy properly informed Mr. Simmons of the positives and negatives of each of these treatment options, Mr. Simmons would have declined the angioplasty procedure and elected another treatment method. This was a deviation in the standard of care.
- c. In my opinion, the leaking aorta and formation of a pseudoaneurysm was not identified in a timely fashion which led to additional hemorrhaging which could have been avoided. This high risk patient should have been monitored

more closely. The CT scan, which was not done and read until 5:40 p.m. on the day following the angioplasty, should have been done and read by Dr. Nguyenduy early that morning. The diagnosis of the leak was unreasonably delayed. Blood leaks in the chest cavity are extremely debilitating. When a patient has a leak like Mr. Simmons had, each passing minute of leaking exposes the patient to more difficulties and problems and increases the chances of further complications. Long, unrecognized bleeding such as occurred here weakens the patient, causes respiratory problems such as Mr. Simmons experienced and increases the chance of further complications. This delay in diagnosis of the leak was a deviation in the standard of care.

- d. In my opinion, Dr. Nguyenduy deviated from the standard of care in the delay of the third procedure which increased the likelihood of complications at the time of the procedure. The procedure should have been performed sooner. At the point in time that the third procedure was initiated, Mr. Simmons was in an extremely weakened condition with life threatening respiratory difficulty. His situation was critical but still salvageable. A complication, a code blue, occurred. The high risk of a code blue, which occurred before the surgery was started, should have been anticipated. It was not and was mishandled once it occurred. The patient was without oxygen for 17 minutes. This indicates that there was no preparation to deal with the possibility of a code blue. After Mr. Simmons was without oxygen for 17 minutes, his situation was no longer salvageable. In my opinion, Dr. Nguyenduy deviated from the standard of care in his delay in performing the third procedure, in his failure to anticipate and prepare for the possibility of a code blue, and in his mishandling of the code blue.

In my opinion, these deviations in the standard of care on the part of Dr. Nguyenduy were the direct and proximate causes of the injuries and brain damage suffered by Jerry Simmons.

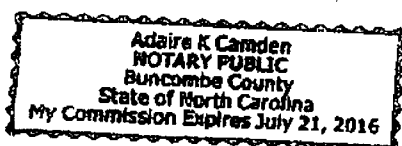
9. I reserve the right to amend and/or supplement these opinions if additional medical records, documents, depositions and/or information are provided.

SWORN TO AND SUBSCRIBED BEFORE ME

this 10th day of May, 2012

[Signature]
Notary Public for North Carolina

My Commission Expires: 07/21/16



[Signature]
Robert M. Kennerly, M.D.

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JUN 12 2012
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COUNTY

Kennerly Surgical PLLC

Dr. Mike Kennerly
5 White Oak Road
Asheville, NC 28803

R. Michael Kennerly, MD

Phone office 828-348-0303 cell 304-812-7810 fax 304-521-2114

Email mikekennerly@aol.com

Education:

- Georgetown University 1964-66 BS Biology, Chemistry & Physics
- Georgetown University Medical School MD degree 1966-72

Surgical Training

Internship: General Surgery Medical College of Virginia 1972-73 Dr. David Hume
Chief

General Surgery Residency: Medical College of Virginia Richmond VA 1973-75

General Surgery Residency: Loyola of Chicago 1975-77 Dr. Freeark Chief

Chief Resident General Surgery Loyola of Chicago 1977

Cardiovascular Residency: Medical College of Georgia 1977 to 79 Dr. Robert Ellison
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Chief Resident CV Surgery 1979 Medical College of Georgia

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Phillips chief

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and orthopedic spine surgeons.

Hospital based practice Pleasant Valley Hospital to set up a vascular and thoracic
surgical program 2008 to 2010.

Phone 828-348-0303 Fax 304-521-2114 Cell 304-812-7810

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PROBATE CLERK

Kennerty Surgical PLLC

Solo practice 2010 to present doing non cardiac thoracic, vascular, esophageal and general surgery. I also operate a vascular lab for non-invasive vascular studies, carotid ultrasound, venous DVT studies, sclerotherapy and varicose vein ablation surgery using radiofrequency VNUS Closure Procedures.

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American Board of Surgery with recertification Dec 2007

American Board of Thoracic Surgery with recertification Dec 2007

Hospitals: Pleasant Valley Hospital Point Pleasant WV

Memberships: American College of Surgeons, Society of Thoracic Surgeons, Southern Thoracic Society, AMA, West VA Medical Society, Rotary

Interests: I have multiple surgical interests encompassed by my Board certifications including anterior spine surgery access surgeon which I have done for over 20 years, a free standing vein clinic and vascular lab, and all aspects of vascular and thoracic surgery. I am interested in AAA surgery both thoracic and abdominal, VATS and other minimally invasive procedures in the chest and abdomen, laparoscopic surgery, ICU post op care management including vent care and more recently VNUS radiofrequency varicose vein closure techniques.

My hobbies include music, flying, hiking, scuba and amateur radio among others.

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H. ROBERT JACKSON

EXHIBIT “B”

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Angela Dawn Simmons, as general)
Guardian for Jerry Dale Simmons,)
Plaintiff,)

Civil Action No. 2012-CP-42-3127

vs.)

AMENDED SUMMONS

(Jury Trial Demanded)

Spartanburg Regional Healthcare)
System d/b/a Spartanburg Regional)
Medical Center, Foothills Anesthesia)
Consultants, P.C., and Troy F.)
McKinney, M.D.,)
Defendants.)

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Amended Complaint in this action. A copy of the Amended Complaint is attached to this Amended Summons and is herewith served upon you. Your answer must be in writing and signed by you or by your attorney and must state your address or the address of your attorney if signed by your attorney. Your answer must be served upon the undersigned attorneys for the plaintiff within thirty (30) days after the service hereof, exclusive of the day of service at 1230 Richland Street, Columbia, SC 29201.

YOU ARE HEREBY GIVEN NOTICE FURTHER that, if you fail to appear and defend and fail to answer the Amended Complaint as required by this Amended Summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Amended Complaint.


Pope D. Johnson, III
Johnson & Barnette, LLP
P.O. Drawer 11209
Columbia, SC 29211-1209
803-799-9791
803-253-6084 (fax)
pdjohnson@johnsonbarnette.com
Attorney for the Plaintiff

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

Columbia, South Carolina
January 3, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Angela Dawn Simmons, as general
guardian for Jerry Dale Simmons.)

Civil Action No. 2012-CP-42-3127

Plaintiff,)

AMENDED COMPLAINT

vs.)

(Jury Trial Demanded)

Spartanburg Regional Healthcare)
System d/b/a Spartanburg Regional)
Medical Center, Foothills Anesthesia)
Consultants, P.C., and Troy F.)
McKinney, M.D.,)

Defendants.)

The plaintiff above named, complaining of the defendants herein, allege as follows:

FOR A FIRST CAUSE OF ACTION

1. That the plaintiff is the wife and the duly appointed general guardian for Jerry Dale Simmons.

2. That Jerry Dale Simmons heretofore sought medical care and treatment from Defendant Spartanburg Regional Healthcare System d/b/a Spartanburg Regional Medical Center ("Spartanburg Regional") for a longstanding history of hypertension, as a result of a congenital severe coarctation (narrowing and hardening) of the descending thoracic aorta.

3. That Jerry Dale Simmons was placed under Dr. Tuan Nguyenduy, an employee of Spartanburg Regional.

4. That Dr. Nguyenduy proposed to perform an angioplasty.

5. That Dr. Nguyenduy performed the angioplasty on August 23, 2010, performed an emergent repair of a leak in the descending aorta coarctation on August 24, 2010, and initiated a third procedure on August 28, 2010.

6. That Foothills Anesthesia Consultants, P.C. and its employee, Troy McKinney, M.D., provided anesthesiology services for the third procedure on August 28, 2010.

7. That Jerry Dale Simmons coded in the last procedure on August 28, 2010 and is

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now brain dead.

8. That Dr. Nguyenduy, acting as an employee and agent of Spartanburg Regional and within the scope of his employment, failed to exercise that degree of care and skill which is ordinarily performed by the profession generally, under similar conditions and in like surrounding circumstances in connection with the care and treatment he provided to Jerry Dale Simmons.

9. That Dr. McKinney, acting as an employee and agent of Defendant Foothills Anesthesia Consultants, P.C. and within the scope of his employment, failed to exercise that degree of care and skill which is ordinarily performed by the profession generally, under similar conditions and in like surrounding circumstances in connection with the care and treatment he provided to Jerry Dale Simmons.

10. That Spartanburg Regional, acting through its employee and agent, Dr. Nguyenduy, deviated from the standard of care and treatment of Jerry Dale Simmons and was negligent and reckless in his care and treatment in the following particulars:

- a. in allowing Dr. Nguyenduy to perform the angioplasty procedure to correct the congenital severe coarctation which, upon information and belief, he lacked the necessary degree of professional learning, skill, experience and ability to perform;
- b. In allowing Dr. Nguyenduy to treat and perform angioplasty surgery to correct the congenital severe coarctation when procedures to correct such coarctation in adults such as Jerry Dale Simmons were not performed at the defendant's hospital and/or regularly performed.
- c. In proposing to perform and in performing an angioplasty while Jerry Dale Simmons was under anesthesia and unconscious rather than perform bypass surgery;
- d. In recommending and in performing angioplasty, which was the wrong procedure to correct the congenital severe coarctation, given his age, condition and medical problems;
- e. In failing to recommend and perform bypass surgery, which while more costly, was the proper procedure to correct the congenital severe coarctation of Jerry Dale Simmons;
- f. In failing to explain the proposed angioplasty procedure and to obtain his consent to perform the procedure;
- g. In failing to refer Jerry Dale Simmons to a physician and/or hospital that had the skill, training and experience to treat the congenital severe coarctation of Jerry Dale Simmons;

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- h. In failing to identify in a timely fashion after angioplasty, the leaking aorta and formation of a pseudoaneurysm which led to additional hemorrhaging which could have been avoided;
- i. In failing to monitor Jerry Dale Simmons, a high risk patient, more closely and in failing to timely identify and treat the leaking aorta;
- j. In delaying the third procedure, which incurred the risk of complications; and
- k. In failing to anticipate and be prepared for a Code Blue and in allowing Jerry Dale Simmons to be without oxygen for 17 minutes, which left him brain dead.

11. That Defendant Foothills Anesthesia Consultants, P.C. and its employee and agent, Dr. McKinney, deviated from the standard of care and treatment of Jerry Dale Simmons and was negligent and reckless in his care and treatment in the following particulars:

- a. In failing to anticipate and be prepared for a Code Blue and in allowing Jerry Dale Simmons to be without oxygen for an extended period of time, which left him brain dead.

12. That Spartanburg Regional, through its agent and employee, had a duty to disclose and inform Jerry Dale Simmons of the diagnosis, the general nature of the contemplated procedure, the material risk involved in the procedure, the possibility of success associated with the procedure, the prognosis if the procedure was not carried out, and the existence of any alternatives to the procedure, and the defendant's agent and employee failed to do so and the consent for the angioplasty of aorta coarctation, possible stent dated August 12, 2010 is invalid.

13. That, upon information and belief, had Dr. Nguyenduy properly explained the proposed angioplasty procedure and advised Jerry Dale Simmons of the risk of the recommended procedure, the alternative forms of treatment and their risk, the risk if no procedure was performed, the doctor's experience in performing the recommended procedure, and the facilities' ability to handle and facilitate the procedure, Jerry Dale Simmons would have declined the angioplasty and elected another treatment method.

14. That attached hereto and incorporated herein are the Affidavits of Robert M. Kennerly, M.D., the plaintiff's expert, which further address the negligence of the defendants.

15. That as a direct and proximate result of the negligent acts of the defendants as set forth above, Jerry Dale Simmons was deprived of oxygen and was without oxygen for an extended period of time and suffered brain damage which has left him in a permanent vegetative state, all to his damage.

16. That Jerry Dale Simmons has suffered actual damages as a result of the negligent

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care and treatment provided by the defendants, as set forth above, to include loss of income, impairment of earning capacity, out of pocket expenses, medical expenses, alteration of life style, psychological trauma, mental anguish, pain and suffering and loss of enjoyment of life, and such other damages as may be proved at the trial.

17. That on June 8, 2012 the plaintiff filed and thereafter served a Notice of Intent to File Suit against Spartanburg Regional Healthcare System d/b/a Spartanburg Regional Medical Center, Answers to Interrogatories and Affidavit of Robert M. Kennerly, M.D.

18. That on August 21, 2012 the plaintiff filed and thereafter served a Notice of Intent to File Suit against Foothills Anesthesia Consultants, P.C. and Troy F. McKinney, M.D., Answers to Interrogatories and Affidavit of Robert M. Kennerly, M.D.

19. That a pre-suit mediation was held with Defendant Spartanburg Regional Healthcare System d/b/a Spartanburg Regional Medical Center and an impasse was declared on July 26, 2012.

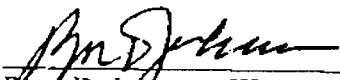
20. That a pre-suit mediation was held with Defendants Foothills Anesthesia Consultants, P.C. and Troy F. McKinney, M.D. and an impasse was declared on November 20, 2012.

FOR A SECOND CAUSE OF ACTION

21. That the allegations of paragraphs 1 through 20 are realleged and incorporated herein by reference.

22. That since the consent for the angioplasty as alleged above was invalid, Defendant Spartanburg Regional Healthcare System d/b/a Spartanburg Regional Medical Center's performance of the angioplasty and subsequent procedures was unauthorized and constitute an unlawful, unauthorized touching and operative procedure, all to the damage of Jerry Dale Simmons, as set forth above.

WHEREFORE, the plaintiff prays for a judgment against Defendant Spartanburg Regional Healthcare System d/b/a Spartanburg Regional Medical Center for actual damages and against Foothills Anesthesia Consultants, P.C. and Troy F. McKinney, M.D. for actual damages and punitive damages and for the costs of this action and for such other and further relief as may be just and proper.


Pope D. Johnson, III
Johnson & Barnette, LLP
P.O. Drawer 11209
Columbia, SC 29211-1209
803-799-9791
803-253-6084 (fax)

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MICHELLE BLACKLEY

Columbia, South Carolina
January 3, 2013

pdjohnson@johnsonbarnette.com
Attorney for the Plaintiff

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2013 JAN - 7 AM 9:53
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Angela Dawn Simmons, as)
general guardian for Jerry Dale)
Simmons,)
Plaintiff,)

vs.)

Spartanburg Regional Healthcare)
System d/b/a Spartanburg Regional)
Medical Center,)
Defendant.)

2012-CP-42- 2479

AFFIDAVIT OF
ROBERT M. KENNERLY, M.D.
S.C. Code Ann. §15-36-100

PERSONALLY APPEARED BEFORE ME, Robert M. Kennerly, M.D., who being duly sworn, deposes and says:

1. I am Robert M. Kennerly, M.D. Attached as Exhibit A is a true and accurate curriculum vitae that outlines my professional qualifications, including my board certification.

2. I have been retained as an expert witness on behalf of Angela Dawn Simmons as general guardian of Jerry Dale Simmons and Angela Dawn Simmons individually to offer opinions regarding the care and treatment of Jerry Dale Simmons received at the Spartanburg Regional Medical Center, while under the care of Dr. Tuan Nguyenduy.

3. I have reviewed the following, which are the basis of my opinions:

- a. An audio of the conversation between Mr. Simmons, his daughter and Dr. Nguyenduy
- b. Records from 5/10/10 to 5/25/10 including lab work
- c. Records of ER visit on 7/19/10 in Rutherfordton
- d. Records of admission to Spartanburg Regional on July 21, 2010 for further testing and nuclear stress test with admission notes
- e. Results of labs from 7/19/10 to 7/23/10 and results from imaging work up by cardiologist Dr. Lopaz
- f. Report of Dr. Lopaz dated July 21, 2010
- g. 7/21/10 in hospital consultation by Dr. Nguyenduy after the finding of aortic dissection of the aorta
- h. Cardiovascular consultation 8/12/10 for admission on 8/23/10
- i. Radiology reports

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OR
JUDGE
H. ROPE BLACKLEY

- j. Records regarding first surgical report on August 23, 2010
- k. Notes from OR regarding second surgery starting at 22:16 on 8/24/10 and concluding at 2 am on 8/25/10 which was done on an emergent basis
- l. Dr. Nguyenduy's report of second surgery
- m. Report of third surgery 8/28/10 and code blue
- n. Neurological consult report dated 8/31/10 by Dr. Zortea
- o. Discharge summary for discharge date of 2/16/2011

4. I have been advised that Dr. Nguyenduy was an employee of the Spartanburg Regional Medical Center at the time he treated and cared for Jerry Dale Simmons.

5. Mr. Simmons was a 40 year old man, with a long standing history of hypertension, as a result of a congenital severe coarctation (narrowing and hardening) of the descending thoracic aorta. This was the cause of his longstanding high blood pressure problems. This is a serious condition and medical problem. I am familiar with and knowledgeable of the standard of care for diagnosis and treatment of this condition. I believe that my education, training and experience qualify me to render expert opinions in regard to the care and treatment rendered to Jerry Simmons by Dr. Nguyenduy.

6. Dr. Nguyenduy met with Mr. Simmons to explain the angioplasty he proposed to perform and to obtain Mr. Simmons' consent for the procedure. Dr. Nguyenduy performed the angioplasty on August 23, 2010, performed an emergent repair of a leak in the descending aorta coarctation on August 24, 2010, and initiated a third procedure on August 28, 2010. Mr. Simmons coded in the last procedure on August 28, 2010 and is now, in layman's terms, brain dead.

7. Treating a congenital severe coarctation in a 40 year old patient requires special training and substantial experience on the part of the surgeon. It is a high risk procedure.

8. In my opinion and to a reasonable degree of medical certainty, Dr. Nguyenduy deviated from the standard of care in his treatment of Mr. Simmons and was negligent in his care and treatment of Mr. Simmons in the following ways:

- a. In my opinion, Dr. Nguyenduy deviated from the standard of care in proposing to perform and in performing an angioplasty while the patient was under anesthesia and unconscious rather than perform bypass surgery. Angioplasty involves expanding the artery with a balloon and is normally done with the patient being awake so if the patient experiences pain, the procedure can be stopped. Since the angioplasty is not an open surgery, it is difficult to determine if the procedure has caused a blood leak, as it did here. Leaks can occur as a result of an angioplasty. Other complications include restenosis, pseudoaneurysm, dissection and other common vascular complications. If a leak occurs from an angioplasty, the patient has to bleed for a sufficient period of time to manifest signs of leakage before the leak can be addressed. Leaks weaken the patient and can lead to respiratory problems such as occurred here, as well as other problems. Here, given Mr. Simmons'

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age, health and condition, bypass surgery was the surgical procedure which should have been recommended and performed. It does not appear the bypass surgery was even discussed or offered as an option. Angioplasty is unlikely to provide long term relief. With angioplasty, the ballooned artery frequently becomes restenosed which necessitates additional procedures in the future. Additional procedures mean additional risks. In my opinion and given the foregoing considerations, treating Mr. Simmons' problem by performing an angioplasty was a deviation in the standard of care. In my opinion, bypass surgery should have been performed. In my opinion, a bypass surgery, if performed, would have most likely been successfully treated/resolved Mr. Simmons' medical problems.

- b. Dr. Nguyenduy met with Mr. Simmons to explain the proposed angioplasty procedure and to obtain his consent to perform the procedure. In my opinion, the standard of care requires that the doctor explain the risks of the recommended procedure, alternative possible forms of treatment and their risks, the risk if no procedure is performed, the doctor's experience in performing the recommended procedure and the facilities ability to handle and facilitate the procedure. Mr. Simmons could have been continued on medication. However, statistics show that he would have likely had a shortened life expectancy. Other treatment methods include bypass surgery, angioplasty with a stent, and angioplasty, with angioplasty being the least preferable treatment method of the three. If the patient's condition is such that he can undergo surgery, as Mr. Simmons was, bypass surgery is the procedure that should be recommended and performed. All three of these methods of treatment have risks for the patient. The patient is entitled to know the positives, negatives and risks of each method of treatment. In my opinion, the standard of care requires the doctor, who is the expert and knows or should know the positives, negatives and risks of each method of treatment, to inform the patient as to each method of treatment and the positives, negatives and risks of each so the patient can make an informed decision. Although the transcript of the conference between Mr. Simmons, his daughter, and Dr. Nguyenduy is difficult to hear, it appears that Dr. Nguyenduy did not provide Mr. Simmons with anything like sufficient information for Mr. Simmons to make an informed decision to undergo the angioplasty. He did not even discuss or offer bypass surgery. He minimized the risks of the angioplasty procedure. He provided virtually no information of the risks of the angioplasty. In my opinion, had Dr. Nguyenduy properly informed Mr. Simmons of the positives and negatives of each of these treatment options, Mr. Simmons would have declined the angioplasty procedure and elected another treatment method. This was a deviation in the standard of care.
- c. In my opinion, the leaking aorta and formation of a pseudoaneurysm was not identified in a timely fashion which led to additional hemorrhaging which

could have been avoided. This high risk patient should have been monitored more closely. The CT scan, which was not done and read until 5:40 p.m. on the day following the angioplasty, should have been done and read by Dr. Nguyenduy early that morning. The diagnosis of the leak was unreasonably delayed. Blood leaks in the chest cavity are extremely debilitating. When a patient has a leak like Mr. Simmons had, each passing minute of leaking exposes the patient to more difficulties and problems and increases the chances of further complications. Long, unrecognized bleeding such as occurred here weakens the patient, causes respiratory problems such as Mr. Simmons experienced and increases the chance of further complications. This delay in diagnosis of the leak was a deviation in the standard of care.

- d. In my opinion, Dr. Nguyenduy deviated from the standard of care in the delay of the third procedure which increased the likelihood of complications at the time of the procedure. The procedure should have been performed sooner. At the point in time that the third procedure was initiated, Mr. Simmons was in an extremely weakened condition with life threatening respiratory difficulty. His situation was critical but still salvageable. A complication, a code blue, occurred. The high risk of a code blue, which occurred before the surgery was started, should have been anticipated. It was not and was mishandled once it occurred. The patient was without oxygen for 17 minutes. This indicates that there was no preparation to deal with the possibility of a code blue. After Mr. Simmons was without oxygen for 17 minutes, his situation was no longer salvageable. In my opinion, Dr. Nguyenduy deviated from the standard of care in his delay in performing the third procedure, in his failure to anticipate and prepare for the possibility of a code blue, and in his mishandling of the code blue.

In my opinion, these deviations in the standard of care on the part of Dr. Nguyenduy were the direct and proximate causes of the injuries and brain damage suffered by Jerry Simmons.

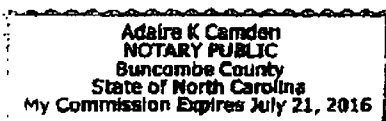
9. I reserve the right to amend and/or supplement these opinions if additional medical records, documents, depositions and/or information are provided.

SWORN TO AND SUBSCRIBED BEFORE ME

this 16th day of May, 2012

Adalra K. Camden
Notary Public for North Carolina

My Commission Expires: 7/21/16



Robert M. Kennerly
Robert M. Kennerly, M.D.

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Kennerly Surgical PLLC

Dr. Mike Kennerly
5 White Oak Road
Asheville, NC 28803

R. Michael Kennerly, MD

Phone office 828-348-0303 cell 304-812-7810 fax 304-521-2114

Email mikenkennerly@aol.com

Education:

- Georgetown University 1964-68 BS Biology, Chemistry & Physics
- Georgetown University Medical School MD degree 1968-72

Surgical Training

Internship: General Surgery Medical College of Virginia 1972-73 Dr. David Hume Chief

General Surgery Residency: Medical College of Virginia Richmond VA 1973-75

General Surgery Residency: Loyola of Chicago 1975-77 Dr. Freeark Chief

Chief Resident General Surgery Loyola of Chicago 1977

Cardiovascular Residency: Medical College of Georgia 1977 to 79 Dr. Robert Ellis Chief

Chief Resident CV Surgery 1979 Medical College of Georgia

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Cardiac Transplant Fellowship: Des Moines Iowa Mercy Hospital 1985 to 88 Dr Steve Phillips chief

Private Practice: 1988 to 2008 Asheville, NC doing cardiac, thoracic, esophageal, vascular and general surgery. Also doing Spine access surgery with neurosurgery and orthopedic spine surgeons.

Hospital based practice Pleasant Valley Hospital to set up a vascular and thoracic surgical program 2008 to 2010.

Phone 828-348-0303 Fax 304-521-2114 Cell 304-812-7810

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Kennerly Surgical PLLC

Solo practice 2010 to present doing non cardiac thoracic, vascular, esophageal and general surgery. I also operate a vascular lab for non-invasive vascular studies, carotid ultrasound, venous DVT studies, sclerotherapy and varicose vein ablation surgery using radiofrequency VNUS Closure Procedures.

Certification:

American Board of Surgery with recertification Dec 2007

American Board of Thoracic Surgery with recertification Dec 2007

Hospitals: Pleasant Valley Hospital Point Pleasant, WV

Memberships: American College of Surgeons, Society of Thoracic Surgeons, Southern Thoracic Society, AMA, West VA Medical Society, Rotary

Interests: I have multiple surgical interests encompassed by my Board certifications including anterior spine surgery access surgeon which I have done for over 20 years a free standing vein clinic and vascular lab, and all aspects of vascular and thoracic surgery. I am interested in AAA surgery both thoracic and abdominal, VATS and other minimally invasive procedures in the chest and abdomen, laparoscopic surgery, ICU post op care management including vent care and more recently VNUS radiofrequency varicose vein closure techniques.

My hobbies include music, flying, hiking, scuba and amateur radio among others.

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Angela Dawn Simmons, as)
general guardian for Jerry Dale)
Simmons,)
Plaintiff,)

2012-CP-42-3552

vs.)

AFFIDAVIT OF
ROBERT M. KENNERLY, M.D.
S.C. Code Ann. §15-36-100

Foothills Anesthesia Consultants,)
P.C., and Troy F. McKinney, M.D.,)
Defendants.)

PERSONALLY APPEARED BEFORE ME, Robert M. Kennerly, M.D., who being duly sworn, deposes and says:

1. I am Robert M. Kennerly, M.D.
2. Attached hereto is an Affidavit I gave May 16, 2012, which I incorporate herein by reference.
3. I have been retained as an expert witness on behalf of Angela Dawn Simmons as general guardian of Jerry Dale Simmons and Angela Dawn Simmons individually to offer opinions regarding the care and treatment of Jerry Dale Simmons received at the Spartanburg Regional Medical Center, while under the care of Dr. Tuan Nguyenduy. I have also been asked to offer opinions regarding the care and treatment and response of Foothills Anesthesia Consultants, P.C. and its physician, Troy F. McKinney, M.D. I have been advised that Dr. McKinney, an employee of Foothills Anesthesia Consultants, P.C. and Foothills Anesthesia Consultants, P.C. were involved in the care of Jerry Dale Simmons when the Code Blue occurred and participated in the response to the Code Blue involving Jerry Dale Simmons. I have assumed this to be true for purposes of this affidavit.
4. Hospital patients, on occasion, suffer an arrest and stop breathing. This occurs and is foreseeable to the physician and the hospital. As a result, there is a standard procedure called a Code Blue that is to be followed if a patient arrests and stops breathing. Most critical is the prompt restoration of respiration and the restoring of oxygen to the patient. I have education, training and experience in the proper response to a Code Blue. I am qualified to render opinions regarding the response of Foothills Anesthesia Consultants, P.C. and Troy F. McKinney, M.D.
5. In my opinion and to a reasonable degree of medical certainty, Dr. McKinney deviated

from the standard of care in directing the Code Blue response when Mr. Simmons stopped breathing and was negligent in his care and treatment of Mr. Simmons. According to the records, Mr. Simmons was without oxygen for 17 minutes. This indicates that there was no preparation to deal with the possibility of a Code Blue. After Mr. Simmons was without oxygen for 17 minutes, his situation was no longer salvageable. In my opinion, Dr. McKinney and Foothills Anesthesia Consultants, P.C. deviated from the standard of care in the failure to anticipate and prepare for the possibility of a Code Blue, and in mishandling of the Code Blue. In my opinion, these deviations in the standard of care on the part of Dr. McKinney and Foothills Anesthesia Consultants, P.C. were direct and proximate causes of the injuries and brain damage suffered by Jerry Dale Simmons.

6. I reserve the right to amend and/or supplement these opinions if additional medical records, documents, depositions and/or information are provided.

SWORN TO AND SUBSCRIBED BEFORE ME

this 28 day of August, 2012

[Signature]
Notary Public for North Carolina

My Commission Expires: 2/5/13

[Signature]
Robert M. Kennerly, M.D.

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H. HOPE BLACALEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Angela Dawn Simmons, as)
general guardian for Jerry Dale)
Simmons,)
Plaintiff,)

vs.)

Spartanburg Regional Healthcare)
System d/b/a Spartanburg Regional)
Medical Center,)
Defendant.)

2012-CP-42- 2429

AFFIDAVIT OF
ROBERT M. KENNERLY, M.D.
S.C. Code Ann. §15-36-100

PERSONALLY APPEARED BEFORE ME, Robert M. Kennerly, M.D., who being duly sworn, deposes and says:

1. I am Robert M. Kennerly, M.D. Attached as Exhibit A is a true and accurate curriculum vitae that outlines my professional qualifications, including my board certification.

2. I have been retained as an expert witness on behalf of Angela Dawn Simmons as general guardian of Jerry Dale Simmons and Angela Dawn Simmons individually to offer opinions regarding the care and treatment of Jerry Dale Simmons received at the Spartanburg Regional Medical Center, while under the care of Dr. Tuan Nguyenduy.

3. I have reviewed the following, which are the basis of my opinions:

- a. An audio of the conversation between Mr. Simmons, his daughter and Dr. Nguyenduy
- b. Records from 5/10/10 to 5/25/10 including lab work
- c. Records of ER visit on 7/19/10 in Rutherfordton
- d. Records of admission to Spartanburg Regional on July 21, 2010 for further testing and nuclear stress test with admission notes
- e. Results of labs from 7/19/10 to 7/23/10 and results from imaging work up - cardiologist Dr. Lopaz
- f. Report of Dr. Lopaz dated July 21, 2010
- g. 7/21/10 in hospital consultation by Dr. Nguyenduy after the finding of a cortation of the aorta
- h. Cardiovascular consultation 8/12/10 for admission on 8/23/10
- i. Radiology reports

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- j. Records regarding first surgical report on August 23, 2010
- k. Notes from OR regarding second surgery starting at 22:16 on 8/24/10 and concluding at 2 am on 8/25/10 which was done on an emergent basis
- l. Dr. Nguyenduy's report of second surgery
- m. Report of third surgery 8/28/10 and code blue
- n. Neurological consult report dated 8/31/10 by Dr. Zortea
- o. Discharge summary for discharge date of 2/16/2011

4. I have been advised that Dr. Nguyenduy was an employee of the Spartanburg Regional Medical Center at the time he treated and cared for Jerry Dale Simmons.

5. Mr. Simmons was a 40 year old man, with a long standing history of hypertension, as a result of a congenital severe coarctation (narrowing and hardening) of the descending thoracic aorta. This was the cause of his longstanding high blood pressure problems. This is a serious condition and medical problem. I am familiar with and knowledgeable of the standard of care for diagnosis and treatment of this condition. I believe that my education, training and experience qualify me to render expert opinions in regard to the care and treatment rendered to Jerry Simmons by Dr. Nguyenduy.

6. Dr. Nguyenduy met with Mr. Simmons to explain the angioplasty he proposed to perform and to obtain Mr. Simmons' consent for the procedure. Dr. Nguyenduy performed the angioplasty on August 23, 2010, performed an emergent repair of a leak in the descending aorta coarctation on August 24, 2010, and initiated a third procedure on August 28, 2010. Mr. Simmons coded in the last procedure on August 28, 2010 and is now, in layman's terms, brain dead.

7. Treating a congenital severe coarctation in a 40 year old patient requires special training and substantial experience on the part of the surgeon. It is a high risk procedure.

8. In my opinion and to a reasonable degree of medical certainty, Dr. Nguyenduy deviated from the standard of care in his treatment of Mr. Simmons and was negligent in his care and treatment of Mr. Simmons in the following ways:

- a. In my opinion, Dr. Nguyenduy deviated from the standard of care in proposing to perform and in performing an angioplasty while the patient was under anesthesia and unconscious rather than perform bypass surgery. Angioplasty involves expanding the artery with a balloon and is normally done with the patient being awake so if the patient experiences pain, the procedure can be stopped. Since the angioplasty is not an open surgery, it is difficult to determine if the procedure has caused a blood leak, as it did here. Leaks can occur as a result of an angioplasty. Other complications include restenosis, pseudoaneurysm, dissection and other common vascular complications. If a leak occurs from an angioplasty, the patient has to bleed for a sufficient period of time to manifest signs of leakage before the leak can be addressed. Leaks weaken the patient and can lead to respiratory problems such as occurred here, as well as other problems. Here, given Mr. Simmons'

age, health and condition, bypass surgery was the surgical procedure which should have been recommended and performed. It does not appear the bypass surgery was even discussed or offered as an option. Angioplasty is unlikely to provide long term relief. With angioplasty, the ballooned artery frequently becomes restenosed which necessitates additional procedures in the future. Additional procedures mean additional risks. In my opinion and given the foregoing considerations, treating Mr. Simmons' problem by performing an angioplasty was a deviation in the standard of care. In my opinion, bypass surgery should have been performed. In my opinion, a bypass surgery, if performed, would have most likely been successfully treated/resolved Mr. Simmons' medical problems.

- b. Dr. Nguyenduy met with Mr. Simmons to explain the proposed angioplasty procedure and to obtain his consent to perform the procedure. In my opinion, the standard of care requires that the doctor explain the risks of the recommended procedure, alternative possible forms of treatment and their risks, the risk if no procedure is performed, the doctor's experience in performing the recommended procedure and the facilities ability to handle and facilitate the procedure. Mr. Simmons could have been continued on medication. However, statistics show that he would have likely had a shortened life expectancy. Other treatment methods include bypass surgery, angioplasty with a stent, and angioplasty, with angioplasty being the least preferable treatment method of the three. If the patient's condition is such that he can undergo surgery, as Mr. Simmons was, bypass surgery is the procedure that should be recommended and performed. All three of these methods of treatment have risks for the patient. The patient is entitled to know the positives, negatives and risks of each method of treatment. In my opinion, the standard of care requires the doctor, who is the expert and knows or should know the positives, negatives and risks of each method of treatment, to inform the patient as to each method of treatment and the positives, negatives and risks of each so the patient can make an informed decision. Although the transcript of the conference between Mr. Simmons, his daughter, and Dr. Nguyenduy is difficult to hear, it appears that Dr. Nguyenduy did not provide Mr. Simmons with anything like sufficient information for Mr. Simmons to make an informed decision to undergo the angioplasty. He did not even discuss or offer bypass surgery. He minimized the risks of the angioplasty procedure. He provided virtually no information of the risks of the angioplasty. In my opinion, had Dr. Nguyenduy properly informed Mr. Simmons of the positives and negatives of each of these treatment options, Mr. Simmons would have declined the angioplasty procedure and elected another treatment method. This was a deviation in the standard of care.
- c. In my opinion, the leaking aorta and formation of a pseudoaneurysm was not identified in a timely fashion which led to additional hemorrhaging which

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could have been avoided. This high risk patient should have been monitored more closely. The CT scan, which was not done and read until 5:40 p.m. on the day following the angioplasty, should have been done and read by Dr. Nguyenduy early that morning. The diagnosis of the leak was unreasonably delayed. Blood leaks in the chest cavity are extremely debilitating. When a patient has a leak like Mr. Simmons had, each passing minute of leaking exposes the patient to more difficulties and problems and increases the chances of further complications. Long, unrecognized bleeding such as occurred here weakens the patient, causes respiratory problems such as Mr. Simmons experienced and increases the chance of further complications. This delay in diagnosis of the leak was a deviation in the standard of care.

- d. In my opinion, Dr. Nguyenduy deviated from the standard of care in the delay of the third procedure which increased the likelihood of complications at the time of the procedure. The procedure should have been performed sooner. At the point in time that the third procedure was initiated, Mr. Simmons was in an extremely weakened condition with life threatening respiratory difficulty. His situation was critical but still salvageable. A complication, a code blue, occurred. The high risk of a code blue, which occurred before the surgery was started, should have been anticipated. It was not and was mishandled once it occurred. The patient was without oxygen for 17 minutes. This indicates that there was no preparation to deal with the possibility of a code blue. After Mr. Simmons was without oxygen for 17 minutes, his situation was no longer salvageable. In my opinion, Dr. Nguyenduy deviated from the standard of care in his delay in performing the third procedure, in his failure to anticipate and prepare for the possibility of a code blue, and in his mishandling of the code blue.

In my opinion, these deviations in the standard of care on the part of Dr. Nguyenduy were the direct and proximate causes of the injuries and brain damage suffered by Jerry Simmons.

9. I reserve the right to amend and/or supplement these opinions if additional medical records, documents, depositions and/or information are provided.

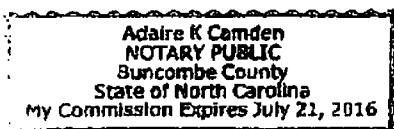
SWORN TO AND SUBSCRIBED BEFORE ME

this 18th day of May, 2012

Adaire K. Camden
Notary Public for North Carolina

My Commission Expires: 7/21/16

Robert M. Kennerly
Robert M. Kennerly, M.D.



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Kennerly Surgical PLLC

Dr. Mike Kennerly
5 White Oak Road
Asheville, NC 28803

R. Michael Kennerly, MD

Phone office 828-348-0303 cell 304-812-7810 fax 304-521-2114

Email mikenkennerly@aol.com

Education:

- Georgetown University 1964-68 BS Biology, Chemistry & Physics
- Georgetown University Medical School MD degree 1968-72

Surgical Training

Internship: General Surgery Medical College of Virginia 1972-73 Dr. David Hume Chief

General Surgery Residency: Medical College of Virginia Richmond VA 1973-75

General Surgery Residency: Loyola of Chicago 1975-77 Dr. Freeark Chief

Chief Resident General Surgery Loyola of Chicago 1977

Cardiovascular Residency: Medical College of Georgia 1977 to 79 Dr. Robert Ellison Chief

Chief Resident CV Surgery 1979 Medical College of Georgia

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Phone 828-348-0303 Fax 304-521-2114 Cell 304-812-7810

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Kennerly Surgical PLLC

Solo practice 2010 to present doing non cardiac thoracic, vascular esophageal and general surgery. I also operate a vascular lab for non-invasive vascular studies, carotid ultrasound, venous DVT studies, sclerotherapy and varicose vein ablation surgery using radiofrequency VNUS Closure Procedures.

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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Angela Dawn Simmons,)
)
Plaintiff,)
)
v.)
)
Foothills Anesthesia Consultants, P.C.,)
and Adam D. Evec, D.O.,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
7th JUDICIAL CIRCUIT
C.A. No.: 2012-CP-42-3125

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Angela Dawn Simmons, as General)
Guardian for Jerry Dale Simmons,)
)
Plaintiff,)
)
v.)
)
Foothills Anesthesia Consultants, P.C.,)
and Adam D. Evec, D.O.,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
7TH JUDICIAL CIRCUIT
C.A. No.: 2012-CP-42-3127

AFFIDAVIT OF ASHBY W. DAVIS

COMES NOW the undersigned, Ashby W. Davis, Esq., and after being duly sworn, does hereby depose as follows:

1. My name is Ashby W. Davis. I am a citizen and resident of the State of South Carolina. I am above the age of twenty-one years, of sound mind, and am in all ways competent to make this oath. All of the statements and opinions expressed herein are true and correct and based upon my personal knowledge; as to those matters of opinion, such statements are based upon my professional experience and knowledge as an attorney and I believe them to be reasonable.

2. I have been a licensed attorney and member of the State Bar of South Carolina since 1970. I am also a member of the Bar of the State of Georgia, a member of the United States Court of Military Appeals, a member of the Bar of the United States District Court for the District of South Carolina, a member of the Bar of the United States Court of Appeals for the Fourth Circuit, and a member of the Bar of the United States Supreme Court. I am the senior partner of the law firm of Davis, Snyder & Williford, P.A. in Greenville, South Carolina.

3. I submit this affidavit in support of Appellants' Return to Respondent's Motion to Dismiss Appeal pending in the South Carolina Court of Appeals. Through my representation of the Appellants, I am familiar with the facts and legal issues involved in this matter.

4. This appeal was not taken for purposes of delay. During the week of May 4, 2015, Respondent's counsel for the first time indicated that he intended to separately try Mrs. Simmons' loss of consortium action and the related medical malpractice action on behalf of Mr. Simmons and that he would oppose the defendants' motion to consolidate. Prior to that time, I considered it a foregone conclusion that the medical malpractice and loss of consortium actions would be consolidated for trial since they are based on the same exact facts and the allegations of liability on the part of defendants are identical. My expectation that these cases would be consolidated for trial was based on my long experience practicing in the area of medical malpractice, not once having tried medical malpractice and loss of consortium actions separately.

5. In my 45 years of practicing law, and in my 29 years of representing defendants in medical malpractice actions, I have never had a judge deny consolidation of a medical malpractice claim and a loss of consortium claim where the underlying facts and allegations of negligence are identical and only the claimed damages are different. Here too, I fully expected that these claims would be consolidated for one trial.

6. Respondent's counsel informed me that Respondent's evidence of damages to be offered in the loss of consortium case includes \$97,344.61 in medical expenses, plus noneconomic damages for loss of consortium (*see* Exhibit A attached hereto). In the medical malpractice case brought by Respondent on behalf of her husband, Respondent intends to introduce evidence of economic damages in the amount of \$16,566,097 in future medical expenses (the claimed present value of the life care plan for Mr. Simmons) (*see* G. Richard Thompson, Ph.D.'s filed Economic Analysis Report as Exhibit B attached hereto), in the amount of \$1,019,018 (present value) for loss of future earnings (Exhibit B), in the amount of \$919,938.23 in hospital bills from Spartanburg Regional (Exhibit A), plus noneconomic damages.

7. I am prepared to testify under oath as to my statements and opinions in this matter.

FURTHER, AFFIANT SAYETH NOT.

I, Ashby W. Davis, Esq., do hereby swear that I am of lawful age and capacity, and that the facts contained in this affidavit are true of my own knowledge, except as to those matters stated upon information and belief, and as to those matters I believe them to be true. This affidavit is made under oath and made subject to the penalty of perjury.

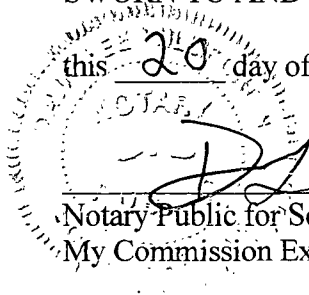
Signed: _____



Ashby W. Davis, Esq.
Davis, Snyder & Williford, P.A.
5 Hawthorne Park Court
Greenville, SC 29615

SWORN TO AND SUBSCRIBED BEFORE ME

this 20 day of May, 2015.



Notary Public for South Carolina

My Commission Expires: 11/09/17

EXHIBIT “A”

David Williford

From: Pope Johnson <pope@popejohnsonlaw.com>
Sent: Thursday, May 14, 2015 10:26 AM
To: Trip Lehn
Cc: Ashby Davis; David Williford
Subject: RE: Simmons -- Medical Bills

I do intend to offer the hospital bill in the personal injury case but not the consortium, case.

Pope D. Johnson, III
Attorney at Law
1230 Richland Street
Columbia, SC 29201
803-799-9791
803-376-8965 (direct)
803-730-1078 (cell)
803-253-6084 (fax)

From: Trip Lehn [mailto:TLehn@davissnyder.com]
Sent: Thursday, May 14, 2015 10:17 AM
To: Pope Johnson
Cc: Ashby Davis; David Williford
Subject: Simmons -- Medical Bills

Pope:

It is our understanding, based on your demand letter of April 23, 2015, that the medical expenses you are claiming as damages total \$97,344.61. Would you kindly confirm that you do not intend to claim as damages the \$919,938.23 in hospital bills from SRHS which the hospital wrote off (as reflected in SRHS Billing 1 – 226)? Would you also confirm that you do not intend to offer these hospital bills into evidence?

Thank you,

Trip

Collie W. "Trip" Lehn, Jr.
Davis, Snyder & Williford, P.A.
5 Hawthorne Park Court
Greenville, SC 29615
(864) 335-3500 (office)
tlehn@davissnyder.com

EXHIBIT “B”

**ECONOMIC ANALYSIS OF THE PRESENT VALUE OF
the Future Earnings of
Mr. Jerry D. Simmons**

Prepared for
Johnson & Barnett, LLP
Attorneys at Law

by
G. Richard Thompson, Ph.D.
April 28, 2012

FILED
CLERK OF COURT
2012 JUN -8 PM 2:16
H. ROBERT ALBURY

P. O. Box 1203 • Clemson, SC 29633

Voice: (864) 654-6494 • Fax: (864) 624-9470

INTRODUCTION

Mr. Jerry D. Simmons is vocationally impaired as the result of injuries received in an incident that occurred on August 23, 2010. He was born on July 21, 1969, and was 40 years of age at the time he was injured. Mr. Simmons had recently completed a course from Cleveland Community College in HVACR Technology. He was actively seeking employment and it is anticipated that he would have begun working as of January 1, 2011.

The purpose of this analysis is to ascertain, using acceptable economic principles, the present value of the future earnings that Mr. Simmons would have been expected to earn had he not been injured.

METHODOLOGY

There are several methods that are used by economists to estimate the present value of the future earnings of an individual. Two of these methods have been suggested by the Supreme Court in *Pfeifer*.¹ These two methods should arrive at the same conclusions and differ only in their treatment of inflation. These two methods are referred to in this report as the "below-market-discount" method and the "inflation-included" method. The former uses a "real" growth rate in earnings and a "real" interest rate to discount the earnings back to present value. These real rates are simply those rates that would exist in the economy in the absence of inflation. The latter method uses the same growth rate and discount rate, but includes the effects of inflation on both. Given that

¹Jones and Laughlin Steel Corporation v Pfeifer, 462 U.S. 523, (1983)

the rates in either method are taken from the same time period, the present values arrived at in these methods should be the same. The method used in this analysis is the "inflation-included" method. This method assumes that the individual's earnings would have continued to increase yearly at a specified growth rate. The growth rate in earnings would include all factors that affect future wage increases, e.g., inflation, promotions, productivity, seniority, and any other individual or societal factors that may affect future increases in earnings.

Since this method includes price level effects in the growth rate of expected earnings, it likewise includes the effects of inflation in the discount rate. Market rates of interest are determined as the sum of the real rate of interest, risk, and anticipated inflation. It is not the purpose of this analysis to make risk decisions for Mr. Simmons, therefore the safest, most risk-free discount rate will be used. This rate must be adjusted for taxes to arrive at an after-tax discount rate.

Both the growth rate and discount rate must be determined from data taken from the same period of time. This insures that the effects of inflation, influenced the growth rate in earnings and the interest rate in the same manner. Ideally these rates will be determined from long periods of time in the U.S. economy so that the resulting rates will be ones that would be expected to prevail over the long-run in the economy.

In summary, this method uses market determined growth and discount rates that would normally be expected to exist over the long-run in the U.S.

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FRAMEWORK FOR ANALYSIS

There are three steps that must be taken in order to determine the economic loss suffered by Mr. Simmons. (1) A base earning capacity for Mr. Simmons must be established. (2) This base earning capacity must be projected over his expected working life. (3) These yearly earnings, net of expected taxes, must be discounted to their present values and summed to determine the total present value of his economic loss.

1. The base earning capacity is one that represents a fair measure of Mr. Simmons' earning ability at the time he was injured. This can be established as his expected annual earnings had he been able to begin working on January 1, 2011.

2. Projecting Mr. Simmons' earnings over his expected working life gives a series of figures that represent the amount of earnings that he would have been capable of earning each year until his retirement. It is expected that his earnings would not have remained constant for the rest of his life but would have continued to increase yearly. This takes into account the fact that earnings in the United States have historically increased due to expanding output, as well as the fact that workers tend to become more productive over time. Summing these yearly earnings figures gives the total, expressed in future dollars, that Mr. Simmons would have been expected to earn in his lifetime. The growth rate that will be applied to Mr. Simmons' earnings will be chosen as the rate of change in nominal earnings in the U.S. economy as well as any change due to factors that are directly attributable to Mr. Simmons. The growth rate has been chosen so as to be temporally consistent with the discount rate.

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DATA USED IN THIS ANALYSIS

1. Mr. Simmons was born on July 21, 1969. Prior to his injuries he was expected to live a normal life until the year 2048, i.e., his life expectancy was 38.33 years at the age of 40.²
2. Mr. Simmons was capable of being an active participant in the labor force until the year 2036, i.e., it is anticipated that he would be capable of working until the normal retirement age of 67.³

²Code of Laws of South Carolina, 19-1-150, "Life Expectancy Tables."

³Social Security Administration, "Full Retirement Age is Increasing," <http://www.ssa.gov/retirechartred.htm>

3. A fair representation of Mr. Simmons' annual earning capacity, measured in 2011 dollars, ranges from \$27,330 to \$39,470. This is based on his expected earnings as an HVAC Technician.⁴

4. The rate of increase in nominal earnings in the U.S. economy has averaged 5.25% for the period 1960-10.⁵

5. Treasury securities are the safest, most risk-free investment available in the U.S. economy. The market yield on three month Treasury Bills for the period 1960-10 averaged 5.24%. The after-tax yield for the same period ranged from 4.80% to 5.0%. This is the average market yield on Treasury Bills for that time period adjusted for the effect of taxes that would be paid on future interest.⁶

6. The effective federal and state income tax rate of all persons at Mr. Simmons' earnings level ranged from 4.58% to 8.42%. The federal tax component ranged from 2.89% to 5.39% and the North Carolina state tax component ranged from 1.72% to 3.03%.

⁴U.S. Bureau of Labor Statistics, "Occupational Employment Statistics," SOC Code 4990021. The 10th percentile annual earnings \$27,330 and the annual median earnings (50th percentile) was \$39,470.

⁵Council of Economic Advisors, "Economic Report of the President," February, 2011, Table B-50.

⁶Council of Economic Advisors, "Economic Report of the President," February, 2011, Table B-73.

CONCLUSIONS OF THIS ANALYSIS

The conclusions of this analysis project Mr. Simmons' earnings from January 1, 2011, until the date he would be expected to retire. Likewise, they discount his expected net earnings back to the present using an appropriate discount rate.

SUMMARY

The following tables summarize the conclusions of this analysis:

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Table I

Jerry D. Simmons
Annual Earnings = \$27,330

Expected Lifetime Earnings	\$1,404,192
After-tax Lifetime Earnings	1,339,880
Present Value of Net Earnings	719,130

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Table II

Jerry D. Simmons
Annual Earnings = \$39,470

Expected Lifetime Earnings	\$2,027,935
After-tax Lifetime Earnings	1,857,183
Present Value of Net Earnings	1,019,018

MATHEMATICAL FORMULAS

The figure for expected future earnings is given by the formula:

$$(1) \quad E_x = \sum_{n=1}^n E_0 (1 + g)^n$$

where, E_x = expected earnings in year x .

E_0 = base year's earning capacity.

g = growth rate in earnings.

n = number of years.

The figure for present value is given by the formula:

$$(2) \quad P_x = \sum_{i=1}^n (E_x (1/(1 + r)^n))$$

where, P_x = present value of expected earnings in year X .

E_x = expected earnings in year X .

r = discount rate.

n = number of years.

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**ECONOMIC ANALYSIS OF THE PRESENT VALUE OF
the Future Medical and Related Costs of
Mr. Jerry D. Simmons**

**Prepared for
Johnson & Barnett, LLP
Attorneys at Law**

**by
G. Richard Thompson, Ph.D.
April 28, 2012**

**FILED
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STAFFORD COUNTY
2012 JUN -8 PM 2:16
M. HOPE BLANCHETT**

P. O. Box 1203 • Clemson, SC 29633

Voice: (864) 654-6494 • Fax: (864) 624-9470

This report calculates the present value of the future cost of the medical and related expenses for Mr. Jerry D. Simmons. This report is based on all of the pertinent information contained in the previously submitted report "Economic Analysis of the Present Value of the Future Earnings of Mr. Jerry D. Simmons" dated April 28, 2012, as well as the report prepared by Bruce Holt of Armstrong & Associates.¹ In addition it uses the following information:

1. Medical care costs have grown at an annual rate of 5.87% during the period 1960-10.²
2. The Consumer Price Index (CPI) has grown at an annual rate of 4.06% for the period 1960-10.³
3. A discount rate of 5.24% was used to reduce the future values to the present.⁴

Mr. Simmons's expected medical and related costs were projected forward over his life expectancy using either a growth rate of 5.87% or 4.06% depending on the category of costs and discounted back to the present using a discount rate of 5.24%. The following table summarizes the conclusions of this analysis:

¹Bruce Holt, RN, CCM, CLCP, Armstrong & Associates, P.O. Box 470637, Charlotte, NC 28247, dated 4/4/12.

²Council of Economic Advisors, "Economic Report of the President," February, 2011, Table B-64.

³Ibid.

⁴Ibid. B-73.

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SPRINGFIELD, MO 65703

**Economic Analysis of the Life Care Plan
for
Jerry Simmons**

	Future Value	Present Value
Diagnostic Testing	\$ 61,084	\$ 26,867
Wheelchair Needs	213,138	72,212
Wheelchair Accessories and Maintenance	12,100	4,627
Aids to Independent Living	70,639	24,690
Supplies	896,992	325,556
Medications	113,092	40,485
Home Care	43,965,761	15,738,957
Future Medical Care Routine	81,543	29,191
Future Medical Care/Surgical Intervention/ Aggressive Treatment	22,000	22,000
Transportation	591,393	255,012
Architectural Renovations	32,500	32,500
Totals:	\$ 46,060,242	\$ 16,566,097

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Spartanburg County Court of Common Pleas
Roger L. Couch, Circuit Court Judge

RECEIVED
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SCC Court of Appeals

Case No. 2012-CP-42-3125

Angela Dawn Simmons, ...Respondent,

v.

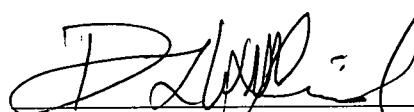
Spartanburg Regional Healthcare System, d/b/a Spartanburg Regional Medical Center*,
Foothills Anesthesia Consultants, P.C. and Adam D. Evec, D.O., Defendants,

of whom Foothills Anesthesia Consultants, P.C. and Adam D. Evec, D.O.
are the Appellants.

PROOF OF SERVICE

I certify that I have served the Appellants' Return to Respondent's Motion to Dismiss Appeal on Angela Dawn Simmons by Email to Respondent's attorney and by depositing a copy of it in the United States Mail, postage prepaid, on May 20, 2015, addressed to her attorney of record, Pope D. Johnson, III, Attorney at Law, 1230 Richland Street, Columbia, SC, 29201.

May 20, 2015


Ashby W. Davis
David L. Williford
Davis, Snyder & Williford, PA
5 Hawthorne Park Court
Greenville, SC 29615
(864) 335-3500
Attorneys for Appellants