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GREENVILLE, SC 29615

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May 27, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

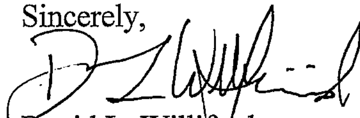
Re: Angela Dawn Simmons, Individually and as General Guardian for Jerry Dale Simmons, v. Spartanburg Regional Healthcare System d/b/a Spartanburg Regional Medical Center, Foothills Anesthesia Consultants, P.C. and Adam Evec, D.O.

C.A. No.: 2012-CP-42-3127
Appellate Case No.: 2015-001049

Dear Ms. Kitchings:

Enclosed are the original and seven (7) copies of Appellants' Return to Respondent's Request for Sanctions. Please file the original and six (6) copies of the Return and clock and return the additional copy to me.

Sincerely,



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

DLW/cwl
Enclosures

cc: Pope D. Johnson, III (w/encl.) (via Email and US Mail)
Chief Judge John C. Few (w/encl.) (via Email and US Mail)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2012-CP-42-3127

Angela Dawn Simmons, Individually and as General Guardian for
Jerry Dale 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.

APPELLANTS' RETURN TO RESPONDENT'S REQUEST FOR SANCTIONS

The Court should not sanction Appellants under Rule 269, SCACR because this appeal was not frivolous or taken for purposes of delay.

1. **The appeal was not taken for purposes of delay.**

This consortium case and the related medical malpractice case were scheduled for date certain trial beginning May 18, 2015. 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.[1] This prompted Appellants to file a motion to consolidate during a hearing before Judge Couch on Friday, May 8, 2015. Prior to that time, Appellants' counsel considered it a foregone conclusion that the two actions would be consolidated for trial since they are based on the same facts and the allegations of liability on the

[1] Williford Aff. ¶ 4 (attached hereto as Exhibit A), Davis Aff. ¶ 4 (attached hereto as Exhibit B).

part of Appellants are identical.[2] Judge Couch's law clerk notified Appellants by Email on the afternoon of May 8, 2015 that Judge Couch had decided to deny the motion to consolidate. Appellants waited a couple of days for a written order while they contemplated filing a notice of appeal. On Tuesday, May 12, 2015, having no written order and uncertain when Judge Couch may issue a written order denying consolidation, Appellants took this appeal to protect their rights and to avoid waiving their right to appeal the denial of the motion to consolidate.[3] Appellants nevertheless continued preparing for trial and were fully prepared to begin trial on May 18, 2015, as scheduled.[4] Appellants had no desire to delay trial. To the contrary, Appellants wanted to proceed to trial as soon as possible, but insisted as a matter of right that the cases be consolidated for a single trial.[5]

2. **The appeal was not frivolous. Appellants have a good faith argument, supported by authority and reason, that the trial court abused its discretion in denying the motion to consolidate. Appellants also have a good faith basis, supported by authority and reason, that the trial court's order denying consolidation must be appealed immediately, before trial, because it affects the mode of trial, and that on other grounds the order may be immediately appealed under section 14-3-330(2) because the order affects a substantial right.**

Appellants' good faith argument for consolidation (and that it would be an abuse of discretion to deny consolidation) is set forth in their Motion for Reconsideration, attached hereto as Exhibit C and incorporated herein by reference, which Appellants served in the court below on May 22, 2015, after this appeal had been dismissed. Judge Couch heard Defendants' motion for reconsideration on Monday, May 26, 2015, and he granted the motion and consolidated the two actions for a single trial.

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[2] *Id.*

[3] Ex. A, ¶ 4; Ex. B, ¶ 4.

[4] Ex. A, ¶ 5.

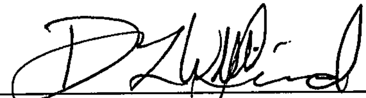
[5] Ex. A, ¶ 6.

Appellant's good faith argument for taking an immediate appeal is set forth in their previously filed Return to Respondent's Motion to Dismiss Appeal, attached hereto as Exhibit D and incorporated herein by reference.

CONCLUSION

This appeal was not frivolous, and Appellants did not take this appeal for purposes of delay. The Court should deny Respondent's request for sanctions.

Respectfully submitted,



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

Exhibit A

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2012-CP-42-3125
Appellate Case No. 2015-001047

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.

AND

Case No. 2012-CP-42-3127
Appellate Case No. 2015-001049

Angela Dawn Simmons, Individually and as General Guardian for
Jerry Dale 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.

AFFIDAVIT OF DAVID L. WILLIFORD

COMES NOW the undersigned, David L. Williford, Esq., and after being duly sworn, does hereby depose as follows:

1. My name is David L. Williford. 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 2006. I am also 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 a 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 Request for Sanctions. 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, which prompted Appellants to file a 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 experience practicing in the area of medical malpractice, not once having tried

medical malpractice and loss of consortium actions separately. This appeal was not taken for purposes of delay; it was taken to protect my clients' rights and to avoid waiving their right to appeal the denial of their motion to consolidate. Our legal research indicated that failing to immediately appeal and proceeding with the first trial would waive the right to appeal the order denying consolidation.

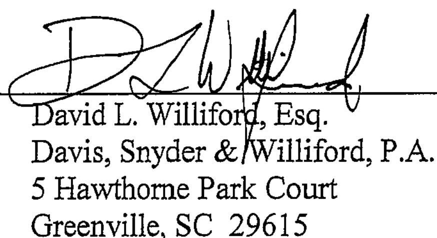
5. Even as we served a notice of appeal on May 12, 2015, we continued preparing for trial and were fully prepared to begin trial on May 18, 2015, as scheduled.

6. My clients have no desire to delay trial. To the contrary, they want to proceed to trial as soon as the cases are consolidated for a single trial.

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

FURTHER, AFFIANT SAYETH NOT.

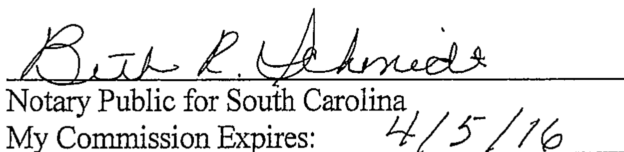
I, David L. Williford, Esq., do hereby swear that I am of lawful age and capacity, and that the facts contained in this affidavit are true of my own knowledge, except as to those matters stated upon information and belief, and as to those matters I believe them to be true. This affidavit is made under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

Signed: 

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

SWORN TO AND SUBSCRIBED BEFORE ME

this 22nd day of May, 2015.



Notary Public for South Carolina
My Commission Expires: 4/5/16

Exhibit B

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG) 7th JUDICIAL CIRCUIT

Angela Dawn Simmons,) C.A. No.: 2012-CP-42-3125

Plaintiff,

v.

Foothills Anesthesia Consultants, P.C., and Adam D. Evec, D.O.,

Defendants.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG) 7TH JUDICIAL CIRCUIT

Angela Dawn Simmons, as General Guardian for Jerry Dale Simmons,) C.A. No.: 2012-CP-42-3127

Plaintiff,

v.

Foothills Anesthesia Consultants, P.C., and Adam D. Evec, D.O.,

Defendants.

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.

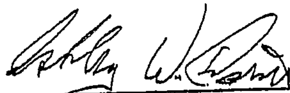
5. In my 45 years of practicing law, and in my 29 years of representing defendants in medical malpractice actions, I have never had a judge deny consolidation of a medical malpractice claim and a loss of consortium claim where the underlying facts and allegations of negligence are identical and only 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 C

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Angela Dawn Simmons,

Plaintiff,

v.

Foothills Anesthesia Consultants, P.C. and
Adam D. Evec, D.O.,

Defendants.

Civil Action No. 2012-CP-42-3125
(Loss of Consortium Action)

Angela Dawn Simmons, as general guardian of
Jerry Dale Simmons

Plaintiff,

v.

Foothills Anesthesia Consultants, P.C. and
Adam D. Evec, D.O.,

Defendants.

Civil Action No. 2012-CP-42-3127
(Medical Malpractice Action)

SPARTANBURG COUNTY
2015 MAY 26 AM 9:08
M. HOPE BLACKLEY

MOTION FOR RECONSIDERATION

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendants move the court to reconsider its May 21, 2015 order denying Defendants' Rule 42(a) motion to consolidate the above-captioned cases. In this motion, Defendants restate their previous arguments and set forth additional arguments and authorities.

As the court is well aware, Plaintiff's medical malpractice and loss of consortium actions involve *substantial* common questions of fact, namely, the ultimate question (in all its complexity)

of whether or not Dr. Evec is liable for medical negligence in treating Jerry Dale Simmons.[1] The allegations of medical negligence in the two complaints are identical. The only questions of fact which differ between the two cases concern *damages*.

These cases were designated as complex and assigned to Judge Couch. The parties conducted discovery in the two actions simultaneously. Discovery is complete, and *both cases are ready for trial*.

Only days before the hearing on May 8, 2015, Defendants learned that Plaintiff's counsel, Pope Johnson, intended to separately try the loss of consortium and medical malpractice actions. We misunderstood his intentions and assumed that these cases would be tried together, as in our experience, they always are (medical malpractice and loss of consortium actions). Defendants' motion to consolidate, therefore, was not late by design and certainly was not a dilatory tactic. Nevertheless, making the motion ten days prior to trial neither prejudiced Plaintiff nor undermined the motion's merit.

Defendants accept the burden, as the moving party, of persuading the court that consolidation is desirable.[2] Defendants agree with the court that when deciding a motion to consolidate two actions, the court should analyze and weigh the risk of prejudice and possible confusion against (1) "the risk of inconsistent adjudications of common factual and legal issues," (2) "the burden on parties, witnesses, and available judicial resources posed by multiple [cases]," (3) "the length of time required to conclude multiple [cases] as against a single one," and (4) "the

[1] Plaintiff alleges only vicarious liability against Foothills, so its liability hinges on the liability of Evec.

[2] *Keels v. Pierce*, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993).

relative expense to all concerned of the single-trial, multiple-trial alternatives."[3] These factors are addressed below.

1. Length of time

Trying these cases together would undeniably save time. Tried together, the cases could be concluded in one week. Tried separately, each case would likely require approximately one week. So, it would take twice as long to try them separately. Taking the length of time required to try the medical malpractice case as a baseline, the additional time it would take Plaintiff to offer evidence (documents and testimony) of her loss of consortium damages should be very modest—a matter of only a few hours, or less.

2. Burden on parties, witnesses, and judicial resources

The parties are the same, the witnesses are the same, and the judge is the same for both cases. It would *double* the burden—the cost and the inconvenience—on the parties, witnesses (including three expert witnesses who must take time away from their medical practices), and this court to separately try these cases.

3. Relative expense to all concerned

Doubling the time required to try these cases will double the cost—at least that is true for the legal costs of the defense. Plaintiff too must concede that trying the cases separately will multiply litigation expenses. Expert witnesses, if made to appear twice, will charge for two appearances, and that would represent significant additional and unnecessary cost for both sides. Moreover, the costs would multiply not only by requiring an additional week of trial, but also by necessitating additional preparation for a second trial.

[3] Order, p. 3 (quoting *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186 (4th Cir. 1982)).

4. Risk of inconsistent adjudications

Defendants respectfully disagree with the court's conclusion in the Order that consolidating these cases would not ensure consistent results. (The Email we received from the court yesterday afternoon indicates, however, that the court is on its own initiative already reconsidering whether consolidation would minimize or prevent the risk of inconsistent results.) Defendants' argument is simple and unassailable. **If the cases are tried together, the jury will return only *one verdict* on the issue of Defendants' negligence.** The jury would answer either "yes" or "no" to the question (however it may be phrased) "Do you find that Dr. Evec committed medical malpractice?"[4] If they answered "yes," they would then determine the amount of damages awarded to Mr. Simmons on his claim and the amount of damages awarded to Mrs. Simmons on her loss of consortium claim. If they answered "no", then no damages would be awarded on either claim. A proper verdict form would *eliminate* the possibility that the jury might inconsistently decide the issue of *liability* (whether Evec committed malpractice) in the two cases (i.e. that Evec was negligent in the med mal action, but not negligent in the loss of consortium action, or vice versa).

Plaintiff, relying on *Lee v. Bunch*[5] and *Burroughs v. Worsham*[6], contends that the court need not be concerned with the possibility of inconsistent results if the cases are tried separately because loss of consortium actions are independent, not derivative. Yet, these two cases do not stand for the proposition that because the actions are independent inconsistent verdicts are *not possible*. If the cases were tried separately, two juries absolutely *could* return inconsistent verdicts on the issue of liability. The first jury could determine that Dr. Evec *did* commit malpractice and *is* liable to Mrs.

---

[4] The allegations of liability against Foothills are grounded solely upon vicarious liability, and Defendants admit that Evec was acting within the course and scope of his employment with Foothills.

[5] 373 S.C. 654, 647 S.E.2d 197 (2007).

[6] 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002).

Simmons for loss of consortium, and the second jury could determine that Dr. Evec *did not* commit malpractice and *is not* liable to Mr. Simmons on his claims, or vice versa. Either way, the two verdicts would be patently inconsistent. Neither *Burroughs* nor *Lee* undermine this argument or contradict it.

In *Burroughs*, a widowed wife brought wrongful death, survival, and loss of consortium claims (in the same action), alleging that her husband's family physician failed to diagnose his colon cancer. The jury awarded $3,500,000 each for the survival and wrongful death actions. The jury determined that the husband and the doctor were each fifty percent at fault. The jury found for the doctor on the wife's loss of consortium claim. On appeal the doctor argued that the verdict was inconsistent. The Court of Appeals found that the argument was not preserved, but that it failed on the merits anyway. The Court reiterated that in South Carolina, loss of consortium is "an independent action, not derivative."[7] The Court found that while loss of consortium is one factor among others to consider for damages in a wrongful death action, "this is not sufficient to say that a plaintiff's verdict on wrongful death and a defense verdict on loss of consortium are inconsistent" because "the parties benefiting from the actions may be separate and distinct" and because the wrongful death and loss of consortium statutes serve different purposes.[8] Therefore, the Court held that "[v]erdicts awarding damages for wrongful death, but finding for the defense on loss of consortium, are not inconsistent."[9]

The *Burroughs* court failed to clarify, however, precisely why the verdicts were not inconsistent. There is no indication in the opinion that the jury determined that the doctor was

2015 MAY 26 AM 08
HOPE BLACKLEY

[7] 352 S.C. at 405, 574 S.E.2d at 227.

[8] *Id.* at 406, 574 S.E.2d at 227.

[9] *Id.*

negligent (i.e. that he departed from the standard of care in failing to diagnose the colon cancer) for purposes of the wrongful death and survival actions but *not negligent* (i.e. that he met the standard of care) for purposes of the loss of consortium claim. Rather, the difference was in the jury's determination of damages. It was the jury's prerogative to find the wife's evidence of loss of consortium damages wanting and to deny her claim on that basis.

In *Lee*, the Supreme Court again held that "it is not inconsistent for the jury to return a verdict for the injured spouse on the primary claim and a verdict for the defendant on the loss of consortium claim."[10] The *Lee* Court cited authorities which explain the basic rationale for this proposition. In *Craven v. Cunningham*[11], the jury's award to the injured spouse while denying his wife's consortium claim was deemed consistent because "the wife's claim was contested throughout trial"[12] and she did not establish damage to the marriage relationship.[13] In *Daves v. Cleary*[14], the jury's award to the injured husband on his medical malpractice claim was not inconsistent with a verdict for defendant on the wife's consortium claim because "the jury could have found sufficient evidence to have awarded [her] damages if they had believed her testimony" but "the jury obviously rejected her testimony, as was their prerogative."[15]

In *Lee*, a motorcyclist and his wife filed suit against a driver for personal injuries resulting from an auto accident and for loss of consortium. The driver alleged comparative negligence and

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M. HOPE B. ACKLEY
SPARTANBURG COUNTY

[10] 373 S.C. at 662, 647 S.E.2d at 201.

[11] 292 S.C. 441, 357 S.E.2d 23 (1987).

[12] *Lee*, 373 S.C. at 662, 647 S.E.2d at 201-02.

[13] *See Craven*, 292 S.C. at 443, 357 S.E.2d at 25.

[14] 355 S.C. 216, 233, 584 S.E.2d 423, 432 (Ct. App. 2003); *Lee*, 373 S.C. at 662-63, 647 S.E.2d at 202.

[15] *Lee*, 373 S.C. at 662-63, 647 S.E.2d at 201-02.

introduced evidence that the motorcyclist had consumed alcohol prior to the accident. The jury found that the motorcyclist was 70 percent at fault and that the driver was only 30 percent at fault. The jury found for the defendant driver on the consortium claim. The trial court ruled that the verdicts were inconsistent because the wife was entitled to recover damages due to the jury's finding that the driver was partially negligent. The Supreme Court disagreed and held that the defendant "should not be forced to pay all of [the wife's] damages if he only contributed 30% to the accident."[16]

Notably, the Supreme Court then held for the first time, "Generally, a plaintiff spouse's claim for loss of consortium *fails if the impaired spouse's claim fails*, whether the claim is considered separate and independent from the impaired spouse's claim or derivative in nature."[17] This suggests that, as a matter of law in South Carolina, if Mr. Simmons' claim fails, Mrs. Simmons' loss of consortium claim fails.

This analysis makes it crystal clear that consolidation is desirable. Consolidation can *eliminate* the substantial risk of inconsistent verdicts that would exist if the cases were separately tried.

5. Risk of prejudice and possible confusion

Mr. Johnson protested to the court that consolidation would confuse the jury, yet he failed to articulate any sound reason for thinking that the jury would be confused by considering concurrently the issues of damages for medical malpractice and loss of consortium. Of course, the jury would be adequately instructed on the law of damages pertinent to both claims, and Mr. Johnson could offer

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S.C. OPELAND

[16] 373 S.C. at 663, 647 S.E.2d at 202.

[17] *Id.* (quoting 41 Am.Jur.2d *Husband and Wife* § 227 (2007) (citing *Smith v. Ridgeway Chem., Inc.*, 302 S.C. 303, 395 S.E.2d 742 (Ct. App. 1990) (holding husband could not recover on loss of consortium because the jury found that the wife was not entitled to recover on her strict liability claim)) (emphasis added).

his own explanation of damages in closing argument. The simple fact—which we believe this court would readily acknowledge—is that personal injury actions and loss of consortium actions are tried concurrently *all the time*, and juries do a pretty fair job of weighing the evidence of damages presented and returning fair verdicts. In seeking to consolidate these cases, Defendants are not asking the court for anything novel or unusual. Courts frequently have consolidated loss of consortium actions with their related personal injury actions.[18] And courts have determined that the risk of prejudice or confusion, if any, does not outweigh the advantages of consolidation.[19]

CONCLUSION

In sum, a rigorous analysis demonstrates that *all* of the *Arnold* factors the court must consider in ruling upon Defendants' motion for consolidation weigh in favor of consolidating these medical malpractice and loss of consortium cases for a single trial. Defendants have carried their burden under Rule 42(a), SCRCP to establish that consolidation is desirable. Defendants respectfully ask this court to reconsider its previous order and grant Defendants' motion for consolidation.

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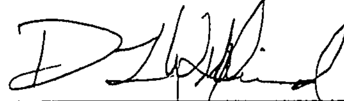
[18] *See, e.g., Kelley v. U.S.*, 580 F. Supp. 2d 490, (2008) (loss of consortium and personal injury claims consolidated for trial involving injuries sustained after a plane crash); *Musumeci v. Penn's Landing Corp.*, 433 Pa. Super. 146 (1994) (multiple tort and loss of consortium claims consolidated for trial involving injuries stemming from cruise ship collapse); *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (2006) ("loss of consortium actions are encouraged to be brought in a single action") (personal injury, products liability, and loss of consortium claims consolidated for trial in tobacco case); *Stenger v. Grimes*, 260 Ga. 838, 400 S.E.2d 318 (1991) (denial of motion for consolidation of loss of consortium and personal injury claims involving injuries from a serious automobile accident was an abuse of discretion since the defendant would be "subject to a 'substantial risk of incurring double, multiple, or otherwise inconsistent obligations' by reason of the two claims made against him" if tried separately, particularly when they involve the same occurrence).

[19] *See, e.g., Kelley*, 580 F. Supp. 2d 490 ("added costs of resources outweighs the impact on prejudice or confusion").

Respectfully submitted,

DAVIS, SNYDER & WILLIFORD, P.A.



Ashby W. Davis, Esquire (SC Bar #1560)
David L. Williford, Esquire (SC Bar #73129)
DAVIS, SNYDER & WILLIFORD, P.A.
5 Hawthorne Park Court
Greenville, SC 29615
(864) 335-3500

ATTORNEYS FOR DEFENDANTS FOOTHILLS ANESTHESIA CONSULTANTS, P.A. AND ADAM D. EVEC, D.O.

May 22, 2015
Greenville, South Carolina

SPARTANBURG COUNTY
2015 MAY 26 AM 9:09
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG)

Angela Dawn Simmons,) C.A. No.: 2012-CP-42-3125

Plaintiff,)

v.)

Foothills Anesthesia Consultants, P.C., and Adam D. Evec, D.O.,)

Defendants.)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG)

Angela Dawn Simmons, as General Guardian for Jerry Dale Simmons,) C.A. No.: 2012-CP-42-3127

Plaintiff,)

v.)

CERTIFICATE OF SERVICE

Foothills Anesthesia Consultants, P.C., and Adam D. Evec, D.O.,)

Defendants.)

SPARTANBURG COUNTY
2015 MAY 26 AM 9:09
HOPE BLACKLEY

I hereby certify that I have this date served a copy of the within and foregoing **Defendants' Motion for Reconsideration** upon the Plaintiff ***via email*** and by depositing a copy of the same in the United States Mail with first class postage addressed to:

Pope D. Johnson, III, Esquire
1230 Richland Street
Columbia, SC 29201

This 22nd day of May, 2015.

By: [signature]
DAVIS, SNYDER & WILLIFORD, P.A.

Greenville, South Carolina.

Exhibit D

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2012-CP-42-3127

Angela Dawn Simmons, Individually and as General Guardian for Jerry Dale 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.

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.**

"[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."[1] When a party fails to timely

[1] *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

appeal an order affecting the mode of trial, he waives the right to appeal that issue.[2] 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).[3] 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.[4]

"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."[5] "The party asserting collateral estoppel must demonstrate 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."[6] Mutuality of

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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).

[2] *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)).

[3] *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)).

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

[5] *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)).

[6] *Id.*

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."[7]

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).[8] The two cases contain identical allegations of negligence on the part of the defendants.[9] Jerry Dale 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

[7] *Id.*

[8] 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.

[9] See amended complaints, attached hereto as Exhibits A and B.

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, SCRCP.[10] That same afternoon, Judge Couch's law clerk informed the parties that Judge Couch had denied the motion to consolidate.[11] 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 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

[10] See Affidavit of Ashby W. Davis.

[11] See Exhibit B to Affidavit of Pope D. Johnson, III.

noneconomic damages.[12] 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), SCRCP provides, "When actions involving a common question of law or fact are pending before 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

[12] See Affidavit of Ashby W. Davis.

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.[13]

Our Supreme Court has held in *Senter v. Piggly Wiggly Carolina Co.*[14] 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.[15] 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 related cases (in the absence of sufficient reason not to consolidate the actions) and avoidance of unnecessary cost and delay cannot be safeguarded.[16]

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[13] *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).

[14] 341 S.C. 74, 533 S.E.2d 575 (2000).

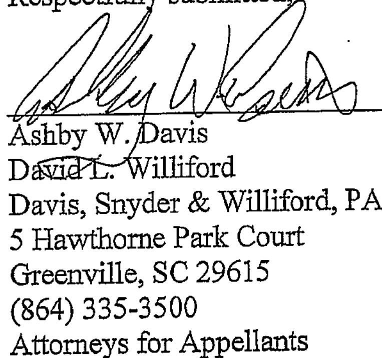
[15] *Id.* at 77-79, 533 S.E.2d at 577.

[16] 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

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,



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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.

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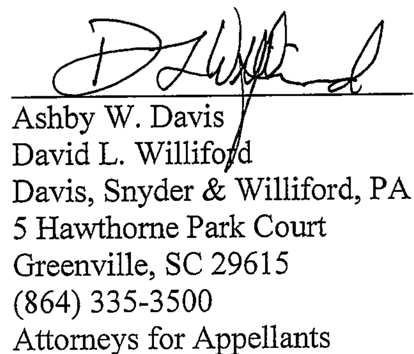
of whom Foothills Anesthesia Consultants, P.C. and Adam D. Evec, D.O.
are the.. Appellants.

PROOF OF SERVICE

I certify that I have served the Appellants' Return to Respondent's Request for Sanctions 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 27, 2015, addressed to her attorney of record, Pope D. Johnson, III, Attorney at Law, 1230 Richland Street, Columbia, SC, 29201.

May 27, 2015



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