THE STATE OF SOUTH CAROLINA

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SC Court of Appeals

In the Court of Appeals

APPEAL FROM LAURENS COUNTY

Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Trial Case No. 2011-CP-30-1138
Appellate Case No. 2014-002516

Lisa Dennie and Jeffrey Dennie

....Respondents

v.

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

Of Whom, Byron A. Brown, MD and Laurens County Obstetrics and Gynecology, LLC, a South Carolina Limited Liability Corporation are

,,,,,,,,,,,,,,,,,,.. Appellants

INITIAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. INTRODUCTION

This is a medical negligence action for damages arising out of negligence of Byron A. Brown, MD in the performance of female surgery on Lisa Dennie at Laurens County Hospital on September 22, 2009. Mrs. Dennie incurred numerous complications from the surgery. The lawsuit resulted in a jury verdict of $1.2 million dollars for Lisa Dennie and $800,000 for her husband, Jeffrey Dennie. After adjustments for the cap on noneconomic damages and prejudgment interest, judgment was entered for Lisa Dennie in the amount of $728,625 and Jeffrey Dennie in the amount of $880,820.19. (Verdict and Judgment)

II. FACTUAL BACKGROUND

A. Byron A. Brown, MD Negligence – Deviations from the Standard of Care

Elizabeth Mueller, MD, a board-certified physician in female pelvic medicine and reconstructive surgery and medical/fellowship director of the division of female pelvic medicine and reconstructive surgery at Loyola University Medical Center in Chicago, Illinois, testified on behalf of Mr. and Mrs. Dennie. The testimony concerning the background of Dr. Mueller demonstrates that she is imminently qualified. (Tr. page 123, l 19 to page 124, l 2; page 125, l 4 to page 126, l 3; page 127 l 23 to page 130, l 7)

Dr. Mueller testified that Dr. Brown was negligent and deviated from the standard of care in several respects:

1. failing to include in the medical records any discussion with Mrs. Dennie of the material risks of ovary removal at age 45 and the alternatives to ovary removal (Tr. page 131, l 16 to page 137, l 9);

2. failing to protect and cutting the right ureter during the surgery (Tr. page 140, l 13 to page 142, l 13);

3. failing to examine for leakage of urine intraoperatively and failing to use blue dye to determine whether or not there was leakage since usage not documented in operative report (Tr. page 142, l 14 to page 145, l 12);

4. failing to ascertain the cause of the leaking urine into the vagina prior to discharging Mrs. Dennie from the hospital (Tr. page 145, l 13 to page 147, l 5);

5. by operating with medical equipment that was not scanned for defects since Dr. Brown stated in his letter to the hospital CEO that he had concerns "about recent thermal complications in surgery 'causing injury to *other patients*'" (Exhibit H-6; Tr. page 227 ll 15-18; page 147, l 6 to page 148, l 11);

6. performing the hysterectomy and ovary removal (Tr. page 148, ll 12-22; page 235, l 19 to page 236, l 8); and

7. failing to inspect the electrocautery device prior to performing the surgery if Dr. Brown knew the device was damaged as alleged in his letter (Tr. page 154, ll 18-24).

Michael Stribling, MD, a board-certified urologist (Tr. page 301, ll 1-8), was Chief of Surgery at Laurens County Hospital during the latter part of 2009 (Tr. page 302, ll 19-21), and was the subsequent treating physician for the complications Dr. Brown caused to Mrs. Dennie. (Tr. page 303, ll 16-21) Dr. Stribling testified that the injury to the ureter of Mrs. Dennie was not caused by a defective monopolar hook device (Tr. page 330, ll 8-21); that no other doctor made a complaint about defective monopolar hook devices (Tr. page 330, l 22 to page 331, l 1); that Dr. Brown, in his conversations with Dr. Stribling, did not mention that there was defective equipment or that the hooks were at fault in causing injury to Mrs. Dennie (page 327, ll 8-18); that Dr. Brown raised defective monopolar hook devices as injuring Mrs. Dennie and *other patients* "after the fact", i.e., after his privileges were suspended by Laurens County Hospital (Tr. page 329, l 12 to page 330, l 5); and that the partner of Dr. Brown never made a complaint that monopolar hook devices or a defective instrument caused injury to any patient of their practice. (Tr. page 332, ll 5-12)

B. Byron A. Brown, MD – Defenses

Dr. Brown raised several defenses – general denial, his actions did not directly or proximately cause or contribute to the alleged injuries and damages

(paragraph 42 of Answer), third party liability (paragraph 44 of Answer), and other defenses not relevant to this appeal.

Further, Dr. Brown alleged in answer to Request for Admission #11 that the complications from the surgery were caused as a "result of a defect in the surgical equipment" (Tr. page 304, ll 11-17; RFA #11, Attachment 8 to Response of Plaintiffs to Post-Trial Motions of Defendants) and in answer to Request for Admission #12 that "a defect in a monopolar hook device caused electrical damage which caused or contributed to the leakage" (Tr. page 304, ll 18-24; RFA #12, Attachment 8 to Response of Plaintiffs to Post-Trial Motions of Defendants) and in answer to Request for Admission #13 that Dr. Stribling was negligent during the surgery he performed on Mrs. Dennie. (Tr. page 304, l 25 to page 305, l 4; RFA #13, Attachment 8 of Response of Plaintiffs to Post-Trial Motions of Defendants)

Further, Dr. Brown documented his contentions in a letter to the hospital CEO that the cause of the injuries to Mrs. Dennie and to *other patients* from "recent thermal complications in surgery" was due to defects in the monopolar hook devices which "is a very serious defect as it would allow electrical damage to occur to bowel, bladder, and structures along the pelvic side wall like ureters and blood vessels unseen by the operator. A visible defect on the monopolar hook means electricity is escaping from the device, because defects even not visible can allow current to escape." (Exhibit 23; Exhibit H-6)

Further, the attorney for Dr. Brown questioned Dr. Stribling about the potential of the leak being caused by a thermal burn (Tr. page 334, ll 1-16) and

presented expert testimony that the injury was caused from an insulation defect on the monopolar hook device. (Tr. page 751, l 19 to page 752, l 13; page 755, l 17 to page 757, l 16; page 792, ll 15-25) The expert also testified that the hospital records revealed defects in surgical equipment that could have caused injury during *other surgeries*. (Tr. page 765, l 6 to page 766, l 10; page 768, l 11 to page 769, l 15; page 769, l 21 to page 770, l 4)

Dr. Brown contended that the injury suffered by Mrs. Dennie resulted from a defective medical instrument supplied by Laurens County Hospital that caused thermal burns. This contention was documented in a letter to the hospital CEO that the defective equipment had caused injuries to *other surgery* patients of Dr. Brown. (Exhibit 23; Exhibit H-6) The expert for Dr. Brown agreed that this was a serious representation about the defect in the electrical equipment used by Laurens County Hospital. (Tr. page 807, ll 21-24) Also, that the person in charge of the department, Tonya Miller, was responsible for the equipment. (Tr. page 807, l 25 to page 808, l 3) The letter states that Dr. Brown "was called back that afternoon by Tonya Miller, from central sterile, who told me that one of the monopolar hooks had a visible crack in the insulation along the shaft of the hook." Also, an entry into the medical records of Mrs. Dennie was made by Dr. Brown on December 17, 2009, after he learned of the demand of Dr. Stribling in the December 14, 2009 letter for Dr. Brown to "temporarily relinquish his privileges to doing all pelvic surgery until the cases can be reviewed by an outside reviewer." (Tr. page 609, ll 5-24; Exhibit 75; Exhibit 36, Exhibit H-6)

Ms. Miller, who is no longer an employee of Laurens County Hospital, denied telling Dr. Brown that there were any defects or a visible crack in the insulation along the shaft. She further testified that no other physician had ever raised suspicions or concerns about the monopolar hooks, no physician had stated that any patient had been injured by monopolar hook devices, and she has no knowledge of anyone claiming injury from the monopolar hook devices. (Tr. page 608, l 1 to page 609, l 13)

There were allegations by Dr. Brown that Dr. Stribling was negligent and caused the injury to Mrs. Dennie; that Laurens County Hospital was negligent in supplying defective equipment that caused thermal burns to Mrs. Dennie; and that thermal burns were the cause of injuries to *other patients* of Dr. Brown. Thus, the credibility of Dr. Brown versus Dr. Stribling and the credibility of Dr. Brown versus Laurens County Hospital regarding the material issue of causation of the injuries of Mrs. Dennie were put in issue by Dr. Brown.

C. Sequence of Events

On September 22, 2009, Byron A. Brown, MD performed female surgery on Lisa Dennie at Laurens County Hospital which resulted in serious injuries and complications.

On December 14, 2009, Dr. Stribling delivered a copy of the letter to Dr. Brown expressing his concern "for what appears to be a continuing pattern of surgical misadventures by Dr. Brown" and "requested Dr. Brown to temporarily relinquish his privileges to doing all pelvic surgery." (Exhibit 36; Exhibit H-6)

The following day, December 15, 2009, Dr. Brown submitted a letter temporarily relinquishing pelvic surgery privileges. (Exhibit 16; Tr. page 242, ll 8-22; page 841, ll 6-16)

Shortly thereafter, on December 17, 2009, Dr. Brown delivered the letter to the CEO of Laurens County Hospital contending that the cause of the injuries to Mrs. Dennie and the *other patients* during surgery was due to defective medical equipment. (Exhibit 23; Exhibit 75) A reasonable inference from the evidence is that Dr. Brown was attempting to deflect responsibility for injuries to Mrs. Dennie and *other patients* from himself to Laurens County Hospital in an effort to retain privileges for pelvic surgery.

On February 17, 2010, Dr. Brown and Laurens County Hospital entered into an Agreement limiting the clinical privileges of Dr. Brown. This Agreement was later amended by ADDENDUM dated May 21, 2010, wherein Dr. Brown resigned the clinical privileges listed on Attachment 1 and agreed to the designated response to all employment/medical staff membership/licensure requests. (Exhibit 18 {redacted}) Subsequently, Dr. Brown resigned all privileges at Laurens County Hospital and filed a lawsuit in Richland County against Laurens County Hospital, Richard D'Alberto (CEO of hospital), Dr. Stribling (Chief of Surgery), Brian Weaver, MD (Chief of Staff), and Fleming Mattox, MD (a doctor practicing in Greenville). The lawsuit alleged damages suffered by Dr. Brown from tortious interference, civil conspiracy, and unfair trade practices. The hospital countersued for the balance of $257,778 owed by Dr. Brown from advances given to Dr. Brown that had not been written off. (*Byron A. Brown, MD*

vs. Laurens County Health Care System, et al. CA File No.: 2011-CP-40-6800; Tr. page 239, ll 1-19; page 288, l 14-22; page 331, ll 7-24, Exhibit 61)

The court noted that Exhibit 22 – To Whom It May Concern letter by Dr. Brown was also evidence of the "bad blood between Laurens County Hospital and Byron Brown". (Tr. page 266, l 17 to page 268, l 21; Exhibit 22 {redacted}) Further, that "the discord between the hospital and Dr. Brown interposed a corollary issue not found in a typical medical malpractice type of action." (Tr. page 273, l 13 to page 274, l 23)

The appellants have not raised an issue nor argued in their brief that the introduction of any of the following evidence was in error:

* that Dr. Brown temporarily relinquished pelvic surgery privileges or that Laurens County hospital summarily suspended the OB/GYN surgical privileges of Dr. Brown;

* that Dr. Brown and Laurens County hospital entered into an Agreement dated February 17, 2010 and the terms of the agreement;

* that the Agreement was later amended by ADDENDUM dated May 21, 2010;

* that subsequently Dr. Brown resigned all privileges at Laurens County Hospital;

* that Dr. Brown filed a lawsuit for money damages against Laurens County Hospital and others for tortious interference, civil conspiracy, and unfair trade practices; and

* that Laurens County Hospital countersued Dr. Brown for $257,778.

An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court. *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E. 2d 486, 497 (Ct. App. 2006).

III. THE STRIBLING LETTER IS NOT CONFIDENTIAL NOR A PEER REVIEW DOCUMENT

The Court addressed this issue on several occasions before, during, and after the trial.

Early on in discovery, Judge Addy issued a discovery order dated December 31, 2012. Among other things, the order addressed the South Carolina Confidentiality Statute, *S.C. Code Ann. § 40-71-10 to 30 (1976)*, and the requirement that if a party asserts a claim of confidentiality of any document under the statute, then the party must file the document with the court under seal along with filing and serving a privilege log. The Order also addressed the Consent Confidentiality Order filed in the Richland County lawsuit between Dr. Brown and Laurens County Hospital, et al. (Order of Judge Addy 12/31/12)

The counsel for Dr. Brown in the Richland County lawsuit introduced numerous documents during depositions (see especially list of Exhibits 1 through 69 attached to Weaver deposition which is Attachment 4 to Response of Plaintiffs to Post-Trial Motions of Defendants). Additionally, documents were filed with the Clerk of Court for Richland County as attachments to motions and briefs that were not marked confidential. (See J1 to J5 Joint Exhibits Under Seal {retained by Laurens County Clerk of Court}).

Dr. Brown did not identify any documents produced or received by Dr. Brown in discovery in the Richland County lawsuit as requested in Interrogatory 51, nor produce any documents as requested in Request for Production 22 (See Attachments 2 and 3 to Response of Plaintiffs to Post-Trial Motions of Defendants).

Additionally, Dr. Brown did not file any documents with the court under seal nor file and serve a privilege log. Laurens County Hospital did file documents under seal and did file and serve a privilege log.

Since the records of the Clerk of Court of Richland County are public records, counsel for Dennie obtained numerous documents including Exhibit 36 from the Clerk of Court. During discovery in this case, counsel for Dr. Brown objected to use of documents obtained from the public records. The objections were heard by Judge Addy who issued several pretrial orders on the use of documents.

The pretrial Order dated September 6, 2013 held, in part, as follows:

> Concerning the Peer Review documents obtained by Plaintiff, it appears that the documents were obtained by reviewing the file in the Richland County litigation and by other means which are not suspect. The court finds that the witnesses may be questioned concerning these documents during depositions, however, no ruling has been had concerning whether these documents, or any questions related to these documents, may be used at trial or for impeachment. (Order of Judge Addy 9/6/13)

The pretrial Order dated November 17, 2013 held that Plaintiff could use certain documents during depositions although the ruling "is not a final ruling concerning whether said documents would be admissible at trial." Document L is Exhibit 36 which is the letter from Dr. Stribling to Dr. Weaver dated December 14, 2009 "which predated the formal peer review process." The Court set forth the reasons for permitting the documents to be used during discovery as follows:

> First, the Peer Review Statute provides that documents generated during the course of peer review are "not subject to discovery, subpoena, or introduction into evidence in any civil case ..." This statute, however, governs or restricts how the documents can be

> obtained and used. In this case, (the designated documents) were obtained by Plaintiff through the public records in Richland County and were not subject to any subpoena or discovery in the present case. Plaintiff and Defendants in the Richland Litigation had obtained a confidentiality order after the litigation was concluded. Having made their way to the clerk of court's file, and no attempt at sealing the file having taken place post-litigation, Plaintiff was entitled to obtain these documents from a source which is, by definition, open and available to any member of the public. Accordingly, the manner in which Plaintiff obtained the records is apparently legitimate and was not subject to "discovery or subpoena" in the present case. (Order of Judge Addy 11/17/13)

During the trial, Judge Addy ruled on several occasions that Exhibit 36 was not covered by the confidentiality statute. He further ruled that the exhibit was given *Rule 403, SCRE* evaluation and found that the probative value was not substantially outweighed by a danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Specifically, Judge Addy ruled that Dr. Stribling was author of the letter, that one of the cases referenced in the letter involved Mrs. Dennie, that Dr. Stribling's testimony is that the letter and action taken predated peer review, that Dr. Stribling is a first person witness and as such can testify as to the contents of the letter as well as what he observed with Mrs. Dennie. (Tr. page 316, l 4 to page 318, l 4)

The testimony to which Judge Addy referred was the deposition testimony of Dr. Stribling where he testified he had not been involved with the Peer Review Committee prior to writing the letter; that he doesn't know if he even met with the peer review committee after writing the letter; and Dr. Stribling was not aware of a peer review process ongoing with Dr. Brown at the time the letter was written. (Deposition Tr. page 17, ll 16-20; page 18, ll 13-18; page 19, ll 11-14 of Dr.

Stribling's deposition; Attachment 6 to Response of Plaintiffs to Post-Trial Motions of Defendants)

Judge Addy offered to give a limiting instruction about the use of the letter; but, counsel for Dr. Brown did not make a request for a limiting instruction. (Tr. page 318, ll 11-12)

There are several statements in the Brief of Appellants which are not supported by the evidence or the record and are as follows:

* "Dr. Stribling's letter initiated a peer review process at Laurens County Hospital" - the only evidence is that Dr. Stribling was not involved in any peer review process and was acting in his capacity as Chief of Surgery; (page 9 of Brief of Appellants)

* Dr. Stribling sent the letter "for the purpose of initiating a peer review process"; (page 11 of Brief of Appellants)

* Dr. Stribling was a member of the peer review committee; (page 12 of Brief of Appellants); and

* Dr. Stribling wrote the letter for the express purpose of launching a peer review of Brown's surgical cases. (page 14 of Brief of Appellants)

Further, the questions cited by Mr. Parkinson, counsel for Laurens County Hospital, and the answers of Dr. Stribling regarding the number of complications involving ureters cited on page 13 of Appellants' Brief were objected to by counsel for Dr. Brown. Judge Addy sustained the objection and instructed the jury to disregard the last question and answer. (Tr. page 328, ll 13-20)

The questions of Mr. Parkinson and answers of Dr. Stribling regarding other injuries cited on page 14 of Brief of Appellants were not objected to by counsel for Dr. Brown. (Tr. page 328 l 21 to page 329, l 9; page 14 of Brief of Appellants)

The references by Dr. Brown to "recent thermal complications in surgery" is an apparent reference to significant injuries that he caused to *other patients*. These injuries were known by both Dr. Brown and the hospital staff/employees. As an example, there were six cases filed against Dr. Brown that were designated as complex cases and The Honorable Frank R. Addy, Jr. was assigned the cases for all pretrial issues and trials. The case list and status of each is as follows:

*	Neighbors, et al v. Brown, MD, et al C.A. File No. 11-CP-30-1137 Judgment: $1,115,464.33 (Pamela)	 On Appeal $10,000 (Carroll)
*	Dennie, et al v. Brown, MD, et al C.A. File No. 11-CP-30-1138 Judgment: $728,625 (Lisa)	 On Appeal $880,820.19 (Jeffrey)
*	Mitchell (deceased) v. Brown, et al C.A. File No. 11-CP-30-1139	 Trial Scheduled August, 2015
*	Ward, et al v. Brown, et al C.A. File No. 11-CP-30-1140	 Trial Scheduled August 2015
*	McCord, et al v. Brown, MD, et al C.A. File No. 11-CP-30-1141 Judgment: $1,740,692.95 (Chris)	 Final Judgment $58,789.04 (Christopher)
*	Sherfield, et al v. Brown, MD, et al C.A. File No. 11-CP-1142 Judgment: $1,468,80 (Janice)	 Final Judgment $50,000 (Jerry)

IV. LEGAL ANALYSIS

The following is a legal analysis of the issues raised by Appellants in this appeal.

A. The Stribling letter is not a document protected by the South Carolina Confidentiality Statute *SC Code Annotated §40-71-10 to §40-71-30 (1976)* ("Confidentiality Statute").

The reasons that the Stribling letter is not a document protected by the Confidentiality Statute are as follows:

1- the letter written by Dr. Stribling was written before any "peer review" process began and Dr. Stribling was not a part of any "peer review" process according to this testimony (Tr. page 316, l 4 to page 318, l 4, Deposition Tr. page 17, ll 16-20; page 18, ll 13-18; page 19, ll 11-14 of Dr. Stribling's deposition; Attachment 6 to Response of Plaintiffs to Post-Trial Motions of Defendants);

2- the letter was not obtained from "the committee" referenced in *§40-71-20* which is defined in *§40-71-10*; but, was obtained from the public records of the Clerk of Court of Richland County (Attachments 2 and 3 to Response of Plaintiffs to Post-Trial Motions of Defendants); ;

3- the letter was not filed under seal with Judge Addy by Dr. Brown nor did Dr. Brown claim privilege by filing and serving a privilege log as required in the Discovery Order dated December 31, 2011 (Order of Judge Addy 12/31/12) and required by *§40-71-20* of the Confidentiality Statute;

4- the letter was not identified as confidential in response to Interrogatory 51 nor Request for Production 22 (Attachments 2 and 3 to Response of Plaintiffs to Post-Trial Motions of Defendants);

5- the author of the letter was Dr. Stribling who testified that he had personal knowledge of the contents of the letter, was the author of the letter, and the letter referenced Mrs. Dennie; thus, the information contained in the letter was from an "original source" and as such is "not immune from discovery or use in a civil action" nor shall any witness be prevented from testifying in a civil action as to matters of which he has knowledge apart from committee proceedings or revealing such matters to third persons (S.C. Code

Ann. § 40-71-20(A), Order of Judge Addy 11/17/13, Tr. page 316, l 4 to page 318, l 4); and

6- Dr. Brown, through his legal counsel, filed a lawsuit in Richland County against Laurens County Hospital and others for money damages and entered the letter and other documents as exhibits to depositions, motions and briefs filed in the public records of Richland County and thus waived any confidentiality to the letter. (Attachment 4 and Attachment 6 to Response of Plaintiffs to Post-Trial Motions of Defendants)

The ruling by Judge Addy on this issue was as follows :

THE COURT: I'm looking at the letter. This is a letter that I am intimately familiar with. I've seen it many many many times. The letter, of course, dated December 14, 2009. Dr. Stribling, of course, is the author of the letter. He's testified to that. One of the cases referenced in the letter does involve this plaintiff. The fact that another case referenced in this letter relates to another doctor, that's certainly fodder for cross-examination. The court is also aware, and perhaps this is a foundational issue that Mr. Wright may choose to explore, but the court is also aware as a matter of general practice, it is extremely unusual for one physician to make a report of this nature on another physician. Certainly, a single instance, as Mr. Snyder has correctly pointed out, a single instance, of a mistake being made is usually in this court's experience in dealing with these types of things that's not normally enough to prompt another doctor to note his concerns to the Chief of Staff of the hospital. There has to be a pattern. More often than not there has to be more than one incident of error or mistake, so the fact that there are other cases referenced is certainly relevant why Dr. Stribling, in this case, in my opinion – I'm sure Mr. Wright, you'll probably be making this argument – that's relevant to the question of why Dr. Stribling took it upon himself or found it necessary to alert Dr. Weaver. For those reasons, I do not find under a 403 analysis. I do not find the prejudicial effect outweighs the probative value of the document as a whole. The court will allow 36 into evidence over Defendant Brown's objection for those reasons. The court was also provided a transcript, of course, of Dr. Stribling where he states that this does pre-date peer review. Again, I know the reason for peer review. I've said it many times. This is something that he authored. He is a first person witness and so he can testify as to the contents of the letter as well as what he observed with Ms. Dennie.
(Tr. page 316, l 4 to page 317, l 14)

Additionally, Judge added noted that:

> Once, however, something makes it into the public realm, it becomes a public document filed with the court. And interestingly, if the parties, or the lawyers, or the other individuals involved in that Richland litigation were so anxious for this information to remain confidential, I still have not heard them intervene or ask that the court enforce the confidentiality order. I have not had a motion filed along those lines in this action referencing that confidentiality order. And so far as I'm aware, I can send my clerk 60 miles south to Columbia today, have her look in the Richland County litigation file and find exactly the same thing that was disclosed in these other cases, including the Neighbors case, and for whatever reason, not only is the cat out of the bag but they're leaving the bag open. So that's where we are.
> (Tr. page 276, l 13 to page 277, l 2)

B. The admission of the Stribling letter and testimony concerning the contents of the letter were within the trial judge's discretion and not prejudicial.

The recent case of *Johnson v. Sam English Grading, Inc.* (2015 WL 2088824) contains an excellent statement on the admission of evidence, as follows:

> "The admission of evidence is within the trial courts discretion." (citation omitted). "The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." (citation omitted) "The trial court has broad discretion in the admission or rejection of evidence and will not be overturned unless it abuses that discretion." (citation omitted). "An abuse of discretion occurs when the ruling is based on an error of law or factual conclusion that is without evidentiary support." (citation omitted). "To warrant reversal based on admission of evidence, the appellant must show both error and resulting prejudice." (citations omitted).
> The trial court has wide discretion in determining the relevancy of evidence. (citation omitted). "Evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue." (citation omitted). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or

needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." (citation omitted).

The analysis by Judge Addy clearly shows the relevancy of the letter from Dr. Stribling who was the author of the letter and referenced Mrs. Dennie. Additionally, Judge Addy noted that Exhibit 36 was relevant for the jury to know the dynamic that was ongoing between Dr. Brown and the hospital, to determine the credibility of Dr. Brown and witnesses on behalf of the hospital. Judge Addy stated that:

> "But I think you would have to agree that the dynamic between the parties, Dr. -- and I'm talking about the folks sitting on my left side of the courtroom. The dynamic between Brown and the hospital is clearly an issue in this case. It relates to credibility. It relates to whether Brown concocted this story. It relates to the whole issue that Brown had with the hospital about this -- at this point in time. That goes to prejudice. That goes to bias. That goes to incentive to fabricate, or maybe the hospital's incentive to bury evidence. I don't know. We're going to have to see where the evidence goes."
> (Tr. page 37, l 17 to page 38, l 3)

Further, Judge Addy did not find under a *Rule 403, SCRE* analysis that the "prejudicial effect outweighs the probative value of the document as a whole." (Tr. page 316, l 4 to page 317, l 14) Further, Judge Addy found that the "court conducted these trials in a manner that did not prejudice the defendant in any way, shape or form." (Tr. of Record October 16, 2014 on Post-Trial Motions of Defendants, page 51, ll 7-24)

Consequently, the admission of the Stribling letter and testimony concerning the contents of the letter were within the trial judge's discretion and not prejudicial.

C. The admission of the Stribling letter and testimony relating to surgical complications suffered by non-party patients of Dr. Brown was within the trial judge's discretion and not prejudicial.

It is important to note that, prior to trial and at trial, it was Dr. Brown who raised the issue of other patients being injured during his surgical procedures. The letter from Dr. Brown to the hospital CEO, Mr. D'Alberto (delivered December 16, 2009) states, in part, "Due to concerns about recent thermal complications in surgery...". (Exhibit 23) Dr. Brown also placed a notation in the medical records of Mrs. Dennie about "Due to concerns about cause of any of the thermal injury .... one of the hooks had an exposed portion of the shaft where insulation should cover". (Exhibit 75) This letter and the notation were used to support the defense of Dr. Brown that the injuries to Mrs. Dennie were caused from defective medical equipment provided by the hospital.

The manager of Central Sterile, Tonya Miller, denied that any equipment was defective and testified that no reports had been made by other doctors about defective equipment nor had Dr. Brown raised an issue of defective equipment causing injury. (Tr. page 637, l 2 to page 641, l 2) Her testimony of no defective equipment is supported by testimony of Dr. Stribling . (Tr. page 330, ll 8-21).

A reasonable inference from the evidence is that Dr. Brown manufactured this issue to evade investigation into the injuries he had caused to other surgical patients. Further, that Dr. Brown knew that his surgical privileges were in jeopardy when he received the letter from Dr. Stribling. Two days later Dr. Brown delivered his letter to Mr. D'Alberto and placed a notation in the medical record chart of Mrs. Dennie attempting to blame Laurens County Hospital for the

injuries to Mrs. Dennie and *other patients*. For these reasons, the past relationship between Dr. Brown and Laurens County Hospital/Dr. Stribling was relevant.

The relationship was further compounded when Dr. Brown blamed Dr. Stribling with negligence in his treatment of Mrs. Dennie and significantly more compounded when Dr. Brown sued Laurens County Hospital, its CEO, Dr. Stribling, Dr. Weaver, and Dr. Mattox for money damages alleging tortious interference, civil conspiracy, and unfair trade practices. Judge Addy ruled that this evidence was relevant to show the "bad blood between Dr. Brown and the hospital". (Tr. page 267, ll 15-22; page 273, l 13 to page 274, l 4).

Dr. Brown argues that Dennie was using the letter "to show that the defendant breached the standard of care in rending medical care to the plaintiff" and cited *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009), in support. However, the argument of Dr. Brown is misplaced. The letter from Dr. Stribling (Exhibit 36 and Exhibit H-6) was relevant evidence to lay a foundation of what prompted the allegations from Dr. Brown in his letter to the hospital CEO that defective equipment supplied by the hospital was the cause of the injuries to the surgical patients of Dr. Brown, specifically Mrs. Dennie. Further, the letter was evidence to support the testimony of Dr. Stribling that the injuries to Mrs. Dennie were not caused by defective equipment and the *other patients* injured by Dr. Brown were not injured because of defective equipment.

The Brief of Appellants alleges four instances that were improper and prejudicial which were as follows:

1) question to Dr. Stribling by hospital counsel and answers regarding "a number of other complications involving ureters and Dr. Brown" (pages 13-14 of Brief of Appellants);

2) questions to Dr. Stribling by hospital counsel and answers regarding "a continuing pattern of surgical misadventures by Dr. Brown (page 14 of Brief of Appellants);

3) question to Dr. O'Dell by Respondent's counsel regarding the letter of Dr. Stribling (page 17 of Brief of Appellants); and

4) comments made by Respondent's counsel and hospital counsel during closing arguments. (pages 17-18 of Brief of Appellants)

The first instance is the question to Dr. Stribling by hospital counsel regarding "a number of other complications involving ureters and Dr. Brown" and the answer of Dr. Stribling. Counsel for Dr. Brown made an objection which was sustained by the trial judge and the jury was instructed to "disregard the last question and that last answer." An instruction to disregard incompetent evidence is usually deemed to have cured the error in admission and, even if the evidence is prejudicial, reversal on appeal is only required where a substantial right of a party has been affected and where it could have affected the results of the trial. *State v. White*, 371 S.C. 439, 447, 639 S.E.2d 160, 164 (Ct. App. 2006) (citing *Rule 103, SCRE* "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of party is affected ..."). The cited question and answer has not been shown to affect a substantial right nor affected the results of the trial especially since the issue of the cause of the injuries to *other patients* was raised by Dr. Brown.

The second instance occurred after Judge Addy sustained the objection of Appellants' and instructed the jury to disregard the question and answer, the

hospital attorney asked several questions involving a continuing pattern of surgical misadventures by Dr. Brown and cut ureters. (page 13-14 of Brief of Appellants) These questions were relevant to rebut the claim of Dr. Brown that defective medical devices were causing injury to *other patients*, including Mrs. Dennie, as set forth in his letter to the hospital CEO and the notation in Mrs. Dennie's medical chart. (Exhibit 36, Exhibit 75) Additionally, Appellants did not object to these questions. (Tr. page 328, l 21 to page 330, l 21) Since no contemporaneous objections were made by Appellants' counsel to the questions and answers, then this issue was not preserved for appellate review. *Webb v. CSX Transportation, Inc. et al.*, 364 S.C. 639, 654, 657, 615 S.E.2d 440, 449, 450 (2005). Further, Judge Addy offered to give a curative instruction; however, counsel for Appellants did not make the request. (Tr. page 318, ll 3-22) Curative instructions usually cure any prejudice caused by the admission of incompetent evidence. *State v. Dawkins*, 297 S.C. 388, 377 S.E.2d 298, 302 (1989).

The third instance is the question by Respondents' counsel to the expert witness asking if the Stribling letter sets forth what he believes to be the surgical competence of Dr. Brown. There was no objection to the question. (Tr. page 816, ll 5-12) Further, this same letter had been introduced without objection as Exhibit H-6 (Exhibit H-6; Tr. page 227, ll 1-18), so the question was a proper line of questioning on cross-examination.

The fourth instance is to closing arguments by Respondents' counsel (Brief of Appellants page 17; Tr. page 904, ll 7-12) and hospital counsel (Brief of Appellants page 18; Transcript page 916 ll 5-14); however, no contemporaneous

objections were made by Appellants' counsel to either closing argument so the issue was not preserved for appellate review.

CONCLUSION

The Stribling letter was not subject to the South Carolina Confidentiality Statute, the probative value of the letter was not outweighed by any prejudice to Dr. Brown, and the purpose of the introduction of the letter was to counteract the allegations of Dr. Brown that defective equipment supplied by the hospital caused injuries to *other patients* of Dr. Brown, including Mrs. Dennie.

For the reasons set forth, there was no error in admitting the Stribling letter, no error in admitting testimony relating to the letter, and no error admitting testimony relating to surgical complications of *other patients* since the cause of these related injuries was raised by Dr. Brown.

Accordingly, Respondents request that the judgment of the court be AFFIRMED.

Respectfully submitted,

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Attorney for Respondents

June 10, 2015

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LAURENS COUNTY

Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Trial Case No. 2011-CP-30-1138
Appellate Case No. 2014-002516

RECEIVED
JUN 12 2015
SC Court of Appeals

Lisa Dennie and Jeffrey Dennie

.....Respondents

v.

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

Of Whom, Byron A. Brown, MD and Laurens County Obstetrics and Gynecology, LLC, a South Carolina Limited Liability Corporation are the

..... Appellants

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents on Byron A. Brown, MD and Laurens County Obstetrics and Gynecology, LLC, a South Carolina Limited Liability Corporation by depositing a copy in the United States Mail, postage prepaid, on June 10, 2015, addressed to their attorney of record, Collie W. "Tripp" Lehn, Jr., Davis, Snyder & Williford, PA, #5 Hawthorne Park Court, Greenville, SC 29615.

June 10, 2015

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June 10, 2015

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

Re: Lisa Dennie v. Byron A. Brown, MD
Appellate Case No. 2014-002516

Dear Madam Clerk:

Enclosed for filing is the Initial Brief of Respondents with Proof of Service.

Also, enclosed for filing is the Designation of Matter to be Included in the Record on Appeal with Proof of Service.

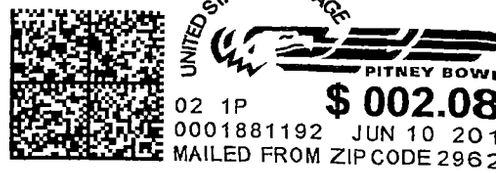
Thank you in advance for your cooperation.

Very truly yours,

McGowan, Hood & Felder, LLC

Joseph G. Wright, III

JGWIII/tda
Enclosures as Noted
Cc: Collie W. "Trip" Lehn, Jr., Esq.



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