THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
J. Michael Baxley, Circuit Court Judge

Case Nos. 2008-CP-26-9047
2008-CP-26-9368

Sean D. Fay, as Personal Representative for the Estate of Kelly L. Fay, deceased,.....Respondent/Appellant,

v.

Grand Strand Regional Medical Center, LLC, d/b/a South Strand Ambulatory Care Center and Stepehn W. Law, D.O., Dr. Richard Young, M.D., and Grand Strand Urology, LLP, ...Defendants,

Of whom, Grand Strand Regional Medical Center, LLC, d/b/a South Strand Ambulatory Care Center is, ...Appellant/Respondent,

And of whom Stephen W. Law, D.O. is .....Respondent/Appellant,

And of whom Dr. Richard Young, M.D., and Grand Strand Urology, LLP, are, ...Respondents.

INITIAL RESPONDENTS' BRIEF OF DR. RICHARD YOUNG, M.D., AND GRAND STRAND UROLOGY, LLP

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Statement of the Case

This appeal involves a wrongful death and survival action brought by Sean D. Fay, as Personal Representative for the Estate of Kelly L. Fay, Deceased, against Grand Strand Regional Medical Center, LLC d/b/a South Strand Ambulatory Care Center ("Hospital"), Stephen W. Law, D.O. ("Dr. Law"), Richard Young, M.D. ("Dr. Young"), and Grand Strand Urology, LLP ("Grand Strand Urology"). The action was initiated on January 27, 2004, with the filing of a Complaint by the decedent's husband, Sean D. Fay, and an Amended Complaint was subsequently filed on November 3, 2008. [Amended Complaint filed November 3, 2008; R. p. ___.]

On May 17, 2010, a jury trial began in Horry County with the Honorable J. Michael Baxley presiding. Prior to the beginning of trial, Judge Baxley heard Dr. Young and Grand Strand Urology's motion for summary judgment, which was based on the grounds that 1) no physician-patient relationship existed between Dr. Young and Kelly Fay and 2) Plaintiff's position that a physician-patient relationship existed between Dr. Young and Kelly Fay is contrary to public policy. [Tr. p. 14-55.] Judge Baxley denied the motion for summary judgment. [Id.]

On May 26, 2010, during the Defendants' case in chief, Dr. Young and Grand Strand Urology moved for a directed verdict on the grounds, among others, that there was no evidence of negligence on the part of Dr. Young and also that a physician-patient relationship between Dr. Young and Kelly Fay was never created. [Trial Transcript pg. 1807-1811, 1815.] The trial court granted the motion for a directed verdict, concluding there was no evidence of negligence on the part of Dr. Young or his practice with respect to Plaintiff's claims. [Trial Transcript p. 1815-1817.] The

trial court stated that it need not reach the issue of whether a physician-patient relationship was established. [Id.]

The trial proceeded against Dr. Law and the Hospital the next day with closing arguments, jury charges, and the beginning of jury deliberations on May 27, 2010. The jury returned a verdict of $3 million against the Hospital and Dr. Law on May 28, 2010, and the trial court later reduced the verdict to $2.88 million based on the jury's finding of comparative fault against Plaintiff. [Form 4 Order with attached verdict form.] Dr. Law and the Hospital filed post-trial motions, which were denied by the trial court. Dr. Law and the Hospital each appealed the verdicts entered against them, and Plaintiff then filed a cross-appeal, challenging the directed verdict in favor of Dr. Young and Grand Strand Urology.

Statement of Facts

Kelly Fay presented to the Hospital's emergency room at 8:00 a.m. on Saturday, January 26, 2002, complaining of right flank pain. [Transcript, p. 216; p. 280; Emergency Room Chart, p. 4.] Ms. Fay, who was accompanied by her husband Sean Fay, was seen by emergency room physician Dr. Steven Law at 8:04 a.m., four minutes after her arrival. [Transcript, p. 216-217, Emergency Room Chart, p. 6.] Ms. Fay complained of mild nausea but had no vomiting. [Tr. p. 1264-65; Medical records from South Strand Ambulatory Care Center.] She denied fevers, chills, dysuria, hematuria, or menstrual irregularities. [Id.]

Fay's medical history included a prior kidney stone, and she believed the pain she was experiencing to be similar. [Transcript, p. 214-216; 225; 279; 1265.] Dr. Law examined Ms. Fay and noted that she did not have a fever and her vital signs

were stable. [Transcript, p. 1268; Emergency Room Chart, p. 4.] Her temperature was 98.1°, and when Dr. Law examined Fay, she did not present symptoms of being feverish. [Tr. p. 1401, p. 1268; Emergency Room Chart, p. 4, 6.]

She described her pain at that time as a seven or eight on a scale of one to ten. [Transcript p. 1261; Emergency Room Chart, p. 4-6.] Dr. Law gave her pain medication to treat the pain, and Ms. Fay later indicated at the emergency room that her level of pain had dropped to a four or five out of ten. [Transcript p. 251; p. 300; Tr. p. 1270; Emergency Room Chart, p. 4.]

Dr. Law's examination of Fay's abdomen revealed moderate-to-severe flank tenderness on the right side; however, the abdomen was soft, non-tender, and non-distended without rebound, rigidity, or guarding, and he noted active bowel sounds. [Tr. p. 1270, Emergency Room Chart, p. 4.] A urinalysis was performed to check for potential infection, but the results were normal with no blood or bacteria in the urine. [Tr. p. 299; 1278.] Dr. Law also ordered a kidney, urethra, bladder (KUB) x-ray which revealed a moderate-sized stone in the right kidney. [Tr. p. 299; 1275; 1278.] A CT Scan of the abdomen revealed a .5 cm diameter stone within the ureter of the right kidney. [Tr. p. 283; 1278; 1280; Emergency Room Chart, p. 4, p. 10.]

After receiving these test results and deciding that the patient was stable for discharge with urologic follow-up, Dr. Law telephoned on-call urologist Dr. Richard Young to make sure that Dr. Young would be able to see the patient on Monday. [Tr. p. 1394; p. 254; 310; 1195; 1286; 1400, lines 15-18.] **Dr. Law testified that he was not calling Dr. Young to admit the patient, and he was not calling to ask Dr. Young to come in and evaluate the patient at the emergency room.** [Tr. p. 1395,

lines 9-13.] **Nor did he call to get Dr. Young's advice on the patient.** [Tr. p. 1395, lines 5-8].

Dr. Law explained that he called Dr. Young simply to make sure that Dr. Young would be in town on Monday and that he would have time available to see the patient then. [Tr. p. 1395, lines 7-8; Tr. p. 1343-1344; Tr. 1400, lines 15-18.] Dr. Law made it clear during his testimony that by the time he called Dr. Young, he had already made the decision that the patient could go home. [Tr. p. 1286; p. 1343.] Dr. Law testified:

> My decision was to send her home. She had gotten adequate pain relief. She did have a stone that was seen on a CT scan which explains her pain. Of course there was still a concern that she may have an obstructing stone because she didn't have any blood in her urine, but I felt that she was clinically well enough to go home ...

[Tr. 1287.]

Dr. Law testified that he has seen thousands of kidney stone patients [Tr. 1398, lines 2-4], and there was nothing about the patient's presentation that morning that led him to believe she needed to be admitted to the hospital rather than discharged to go home. [Tr. p. 1395, lines 14-17.] Dr. Law testified that he gave Dr. Young a "thumbnail sketch of the case so he would know what to expect when she came into the office." [Tr. p. 1395, p. 1343; Tr. 1398, line 20.] Dr. Law advised Dr. Young that the patient had a five millimeter kidney stone in the uteropelvic junction (UPJ) area, the stone was moderately to severely obstructing, her pain was well controlled, her lab work was normal, she was afebrile, and he planned to send her home. [Tr. p. 1398, line 20 – p. 1399, line 13.] The term "afebrile" means the patient does not have a fever. [Tr. p. 1267.] Dr. Law testified that the patient did not look

flushed or sweaty, and she did not complain of being cold, or hot, or feeling feverish. [Tr. 1401, lines 2-7; Tr. 1401, lines 10-15.]

After Dr. Law advised Dr. Young of the patient's clinical symptoms, he told Dr. Young that he was going to discharge the patient. [Tr. p. 1399, lines 12-13.] Dr. Young agreed to see the patient on Monday and he told Dr. Law, "as long as she's afebrile and feeling better, she's fine to go home ... ." [Tr. p. 1530.] Dr. Young testified:

> [Dr. Law] decided to send her home. He presented the case to me, and I agreed with him it sounded like she was okay to go home ... This patient appeared to be like many patients we have with kidney stones. There was no sign of infection when she was in the emergency room. She didn't have a fever. Her pain was well-controlled, and ....those patients are sent home. They are not admitted.

[Tr. p. 1574.]

At no time did Dr. Young see the patient or make a treatment decision regarding the care she received in the hospital emergency room. Dr. Young provided neither a recommendation nor advice to Dr. Law about the patient. Based upon the information provided to him by Dr. Law – specifically, that the patient was stable and afebrile – Dr. Young merely agreed with the decision that had already been made by Dr. Law to discharge the patient.

Plaintiff has attempted to portray the decision to discharge Kelly Fay as a mutual decision between Dr. Law and Dr. Young. However, the authority to discharge rested with Dr. Law, the patient's treating emergency room physician. Dr. Young had no authority to discharge the patient from the emergency room. Furthermore, Dr. Law had already decided to send her home when he called Dr.

Young. Dr. Law testified that the purpose of calling Dr. Young was not to seek his advice or have him evaluate the patient, but rather the call was made in order to find out whether Dr. Young would be available to see the patient on the following Monday. [Tr. p. 1394; p. 254; 310; 1195; 1286; 1400, lines 15-18.; Tr. p. 1395, lines 9-13; Tr. p. 1395, lines 5-8.] When they spoke, Dr. Law advised Dr. Young that the patient was afebrile, her vital signs were stable, and her pain was well-controlled. [Tr. p. 1398, line 20 – p. 1399, line 13.] There was no independent evaluation and decision by Dr. Young to send the patient home, and Dr. Young's concurrence with Dr. Law's decision to send the patient home was specifically based upon Dr. Law's representation that the patient was stable and afebrile.

Dr. Law subsequently discharged Kelly Fay from the emergency room around 11:30 a.m. [Tr. p. 1292.] Dr. Law instructed her upon discharge that that she was to return to the emergency department immediately if her pain became out of control or if she had increasing nausea, vomiting, or any fevers or chills. [Tr. p. 303-04; 1288; Emergency Room Chart, p. 5.] The written discharge instructions given to Ms. Fay recited that she should call or go to the emergency room right away if she developed fever, more intense pain, or repeated vomiting. [Written Discharge Instructions from Grand Strand.] The instructions stated, "If you do not continue to improve or if your condition worsens, please call your doctor or the emergency department right away so you can be examined." [Id.] The patient's discharge instructions directed Fay to call Dr. Young's office at 8:30 a.m. on Monday, January 28, 2002. [Id.] Following her discharge, Kelly Fay returned home with her husband.

Sean Fay testified that later on Saturday, his wife told him that she was "feeling hot" and a "little feverish." [Tr. p. 240.] He took his wife's temperature and it varied between 101.3° and 101.6.° [Tr. p. 240.] He stated that his wife felt nauseous throughout the day on Saturday. [Tr. p. 241.]

Sean Fay also testified that on the following morning, his wife awoke "screaming" and "yelling", and that she was shivering and having chills. [Tr. p. 242.] She was using five blankets to keep warm [Tr. p. 242], and he admitted that she vomited at least once on Sunday [Tr. p. 241.] Sean Fay testified that he was home on Sunday watching football, updating his blog and visiting with friends. [Tr. p. 248, 252, 289, 307, 308, 321.] On one of his blog entries for that Sunday, he wrote that his wife had a "high fever." [Tr. p. 318-19.] Yet despite Kelly Fay's fever, chills, nausea and pain, the Fays never returned to the emergency room. [Tr. p. 245; p. 288-89; 321.]

On Monday morning, Kelly Fay's condition remained the same. Sean Fay testified that his wife looked tired and "a little warm." [Tr. p. 256.] Sean called Dr. Young's office and spoke with a nurse about setting up an appointment for later that day. [Tr. p. 1536-37.] Sean Fay admitted at trial that when he spoke with Dr. Young's office about setting up an appointment for his wife, he never mentioned the symptoms that Kelly experienced. [Tr. p. 334-35.] He was told by a member of the office staff that Dr. Young had various surgeries scheduled and that Kelly Fay should come into the office at 3:00 p.m. [Tr. p. 255, lines 5-25.] If Sean Fay had informed the office that Kelly had fevers or chills, he would have been instructed by Dr. Young's office to take his wife to the emergency room or to Dr. Young's office

immediately. [Tr. p. 1537.] Sean Fay went to work Monday morning and returned home around 1:00 p.m., where he found his wife unconscious, convulsing, and gagging. [Tr. pp. 257-258.]

At 1:59 p.m., EMS received a call from Sean Fay. When EMS arrived at the home, they found Ms. Fay lying on the floor, very hot to the touch, and cyanotic with shallow rapid respirations and vomit in her mouth. [EMS Report.] EMS transported Ms. Fay to the Hospital's emergency room where the patient's urine and blood cultures revealed evidence of proteus mirabilis bacteria. Her temperature when she arrived in the emergency room was noted to be 105°. [Tr. p. 489.] She went into cardiac arrest and was pronounced dead at 10:00 p.m. [Tr. p. 490.] An autopsy revealed that the patient died as a result of overwhelming clinical sepsis due to proteus species bacteria. [Tr. p. 490, 871.]

Plaintiff Sean Fay filed this lawsuit against the Defendants on January 27, 2004, alleging wrongful death and survival causes of action. At trial, Plaintiff contended that Dr. Law and the Hospital deviated from the accepted standard of care by failing to take Kelly Fay's temperature prior to discharge. Plaintiff's theory of liability against Dr. Young was that he was negligent in failing to request that Dr. Law take an additional reading on Kelly Fay's temperature. However, there was uncontroverted evidence that when Dr. Law and Dr. Young spoke by telephone, Dr. Law had specifically advised Dr. Young that Kelly Fay was afebrile and her vital signs were stable. [Tr. p. 1351, line 24 - p. 1352, line 6.] In other words, there would have been no reason at all for Dr. Young to ask Dr. Law to take another temperature reading when, just moments before, he was advised that the patient was afebrile.

Moreover, there was uncontroverted testimony from Dr. Law that by the time he called Dr. Young, he had already decided that Kelly Fay could go home. [Tr. p. 1286; p. 1343.]

During the Defendants' case in chief, the trial judge granted Dr. Young's and Grand Strand Urology's motion for a directed verdict on the grounds that Plaintiff failed to demonstrate negligence on the part of Dr. Young. Judge Baxley, explained the grounds for his decision as follows:

> Every weekend, there are hundreds of physicians who are on call for various specialties throughout this state, and what the evidence shows here is that Dr. Young took a phone call. He had a telephone conversation, and then he made an appointment or at least [] suggested that the person, now deceased, [] call Monday morning to have an appointment with him. That was, I think, ostensibly, just looking at the big picture, that was the involvement that Dr. Young had, without getting into specifics.
>
> I can tell you again, still looking at the big picture, that this Court cannot enact judicially or support a public policy that would require a physician that every time that specialist or physician takes a phone call with regard to a patient, that he is automatically locked in for responsibility for whatever the outcome may be ... [I]t's not the way medicine is practiced in South Carolina and it cannot be that our courts would set up a system where the doctor would have liability for what simply occurs in the course of a telephone call when [] the on-call physician is really not the one who is making the decisions here.
>
> ... [N]ow getting down to the little picture of this specific case, [Plaintiff] complain[s] that the hospital didn't take a discharge temperature. You theorize from that, and there is testimony to the effect that she must have had a temperature, although there's evidence to the contrary, but that because there was no discharge temperature, she was febrile at the time she left, she had an infection, she went home, and she died from that. This is the Plaintiff's theory. Well, if there was a mistake that was made, the mistake was made by the hospital or by Dr. Law []... but not by Dr. Young.
>
> South Carolina's public policy has to be that an on-call specialist must be able to rely on the information given to him by a competent, capable, and certified emergency room physician. Otherwise, again, there'd be no end to the duty on the physicians,

> that is those who are on call, the specialists, to verify every piece of information that they are given in a telephone conversation, and the practice of [] medicine [] just simply can't permit that ...
>
> ...it just seems to me that we cannot support a policy that would put that kind of burden on a specialist or on a physician who is on call ...

[Tr. 1663-1665.]

Standard of Review

In ruling on a motion for directed verdict, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Gilliland v. Doe, 357 S.C. 197, 199, 592 S.E.2d 626, 627 (2004). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied. Martasin v. Hilton Head Health System, 364 S.C. 430, 437, 613 S.E.2d 795, 799 (Ct. App. 2005). However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. Id.

The court must determine the elements of the action alleged and whether any evidence existed on each element. First State Sav. & Loan v. Phelps, 299 S.C. 441, 446, 385 S.E.2d 821, 824 (1989). "A directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability." Guffey v. Columbia/Colleton Reg'l Hosp., Inc., 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). On review, an appellate court will affirm the granting of a directed verdict in favor of the defendant when there is no evidence on any one element of the alleged cause of action. Id.

Argument

I. The trial judge correctly granted a directed verdict in favor of Dr. Young and Grand Strand Urology because there is no evidence that Dr. Young deviated from the standard of care.

The trial judge properly ruled that there was no evidence of negligence on the part of Dr. Young. A plaintiff alleging medical malpractice must provide evidence showing (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the defendants' field of medicine under the same or similar circumstances (2) that the defendants departed from the recognized and generally accepted standards, and (3) that the defendants' departure from such generally recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages. David v. McLeod Regional Medical Center, 367 S.C. 242, 247-48, 626 S.E.2d 1, 4 (2006). A plaintiff ordinarily must provide expert testimony to establish both the required standard of care and the defendant's failure to conform to that standard. Id.

Plaintiff's brief suggests that Dr. Young deviated from the standard of care by failing to obtain adequate information from Dr. Law regarding the patient's condition. However, Plaintiff presented no evidence, only unsupported speculation, that Dr. Young deviated from the standard of care. Plaintiff's brief relies primarily on excerpts from the testimony of his expert, Dr. Mike Siroky, who testified that when an emergency room physician calls a urologist and says he has a patient with a kidney stone, the standard of care requires the urologist to find out the size of the stone, its location, whether there's an obstruction, and whether the patient has any manifestations of infection as shown by temperature. [Tr. 774, lines 12-21.] Dr. Siroky stated, "that is the standard of care." [Tr. 775, line 1.]

There was uncontroverted testimony from Dr. Young that during his conversation with Dr. Law, he found out the size and location of the stone, whether there was an obstruction, and whether the patient had a fever. [Tr. p. 1533.] Dr. Young testified that he remembers Dr. Law "saying he had a patient with a stone, that he was getting ready to send her home, he thought that [the] stone would need further care ... [i]t was five or six millimeters in size, was in the – at the UPJ [uteropelvic junction]... ." [Tr. p. 1530.] Dr. Young also testified, "He told me she was afebrile" and that she "had a normal urinalysis." [Tr. p. 1532, lines 10-11; lines 20-21.] He further testified that Dr. Law told him the CT scan showed a moderately to severely obstructing stone. [Tr. p. 1533.] Thus, Dr. Young complied with the standard of care as described by Plaintiff's own expert since Dr. Young was aware of the stone's size, its location, the degree of obstruction and whether the patient had a fever.

Testimony from Dr. Law also confirmed there was no deviation from the standard of care by Dr. Young. Dr. Law testified that when he spoke with Dr. Young, he advised Dr. Young that the patient had a five millimeter kidney stone in the UPJ area, the stone was moderately to severely obstructing, her pain was well controlled, her lab work was normal, she was afebrile, and he planned to send her home. [Tr. p. 1398, line 20 – p. 1399, line 13.]

There is no evidence in the record that would support Plaintiff's theory that Dr. Young deviated from the standard of care by failing to obtain adequate information from Dr. Law regarding the patient's condition. Incontrovertible testimony from both Dr. Young and Dr. Law conclusively demonstrates that Dr.

Young obtained all of the information that Dr. Siroky maintains Dr. Young was required to find out to satisfy the standard of care.

Plaintiff also argues Dr. Young had a duty as an on-call urologist to question the accuracy of medical information he received from the treating emergency room physician, Dr. Law. Plaintiff contends Dr. Young fell below the required standard of conduct by not questioning and investigating Dr. Law's statement that the patient was afebrile. Plaintiff's brief cites to opinion testimony from Dr. Siroky that a consulting urologist would have a duty to rule out infection before a patient with a kidney stone is sent home. [Appellant's Brief, pp. 9-10.] Plaintiff points to Siroky's statement that the way to rule out infection would be to consider the patient's vital signs, including temperature. [Id.] Plaintiff's brief emphasizes testimony given by Dr. Siroky that the most critical information to be considered in determining whether a kidney stone patient should be discharged is whether the patient has a fever.

Here, Dr. Law expressly advised Dr. Young that the patient was afebrile and her vital signs were stable. Nevertheless, Plaintiff contends that even though Dr. Law had just informed Dr. Young that the patient was afebrile, Dr. Young should have ordered Dr. Law to take another temperature reading.[1] However, there was no reason for Dr. Young to instruct Dr. Law to take another temperature reading since Dr. Young had been told, only moments before, that the patient was afebrile. It is axiomatic that an on-call specialist physician must be able to reasonably rely upon information supplied to him by a treating physician in the absence of any unusual

[1] Dr. Law testified that he has never had a doctor question when a patient's temperature was taken after he has just informed the doctor that the patient is afebrile. Accordingly, he stated that he would not have expected Dr. Young to ask for a precise time when the patient's temperature was taken after Dr. Young had just been informed that the patient was afebrile. [Tr. p. 1399-1400.]

circumstances suggesting the unreliability thereof. An on-call physician is not required to routinely question the accuracy of information provided by treating physicians or to automatically suspect the negligent character of such information.

There was no evidence presented at trial to suggest that Dr. Young had any reason to question the accuracy of medical information provided to him by Dr. Law, who is a board certified emergency room physician. [Tr. p. 1253, line 10 – p. 1254, line 13.] When Dr. Law informed Dr. Young that the patient was afebrile, Dr. Young had a right to rely upon the accuracy of this information. It would be impractical to impose a standard of care that requires on-call specialists to interrogate emergency room doctors who provide medical information about a patient. Dr. Young, as well as all on-call specialists, should be entitled to accept information from emergency room doctors as accurate, without being held to an unrealistic standard that would require them to check behind a treating physician every time information is conveyed to them.

To require an on-call physician to verify every piece of information supplied by an emergency room doctor, when no reason appears to cause him or her to doubt its accuracy, would be unworkable and would seriously impede the efficient practice of emergency medicine in this State. For this reason, the trial judge properly ruled that as a matter of public policy, an on-call specialist must be able to rely on the information given by a treating emergency room physician. The trial judge succinctly stated: "South Carolina's public policy has to be that an on-call specialist must be able to rely on the information given to him by a competent, capable, and certified emergency room physician. Otherwise, again, there'd be no end to the duty on

physicians, that is those who are on call, the specialists, to verify every piece of information that they are given in a telephone conversation ..." [Tr. 1664, lines 17 - 23.]

Additionally, as Dr. Young argued in his summary judgment and directed verdict motions, public policy considerations also weigh heavily against imposing liability on an on-call specialist whose involvement is limited to taking a phone call from a treating physician who is calling merely to arrange follow-up care for a patient. Dr. Law was not asking Dr. Young for a diagnosis or for advice on Kelly Fay's care and treatment; rather, Dr. Law was calling to see if Dr. Young could see the patient on Monday. Dr. Law testified that he provided a "thumbnail sketch of the case" to Dr. Young simply so that Dr. Young "would know what to expect when she came into the office" on Monday. [Tr. p. 1343; Tr. p. 1398, line 20; Tr. p. 1395.]

These types of informal conversations take place on a frequent basis in the medical profession and are vital to the treatment of patients. See Irvin v. Smith, 31 P.3d 934 (Kan. 2001) ("The type of telephone conversation that took place here [i.e., an informal consultation] takes place on a frequent basis in the medical profession and is vital to the treatment of patients. For the courts to discourage such conversations is not to the patients' or the public's best interests.") Any judicial ruling that has the effect of discouraging such conversations would not be in the public's best interests. Courts in other jurisdictions have recognized that imposing liability based upon an informal consultation would "have a chilling effect upon the practice of medicine" and "would stifle communication, education, and professional association, all to the detriment of the patient." Reynolds v. Decatur Memorial

Hospital, 660 N.E.2d 235 (Ill. Ct. App. 1996); see also Irvin, 31 P.3d at 943; Rainer v. Grossman, 31 Cal.App.3d 539, 544 (1973); Lopez v. Aziz, 852 S.W.2d 303, 306 (Tex. App. 1993); Hill by Burston v. Kokosky, 463 N.W.2d 265 (1990). Accordingly, the grant of a directed verdict in favor of Dr. Young and Grand Strand Urology is consistent with sound public policy considerations.

Plaintiff's brief also discusses testimony offered by Dr. Charles W. Sheppard, who, in testifying as an expert witness for the Plaintiff, opined that Dr. Law, Dr. Young, and the hospital nurses deviated from the standard of care by sending Kelly Fay home without knowing her temperature. [Appellant's Brief, p. 14.] Again, there could be no deviation from the standard of care by Dr. Young in this regard because he was specifically told by Kelly Fay's treating physician, Dr. Law, that she was afebrile. There was no reasonable basis for Dr. Young to question the accuracy of the information conveyed to him over the phone by Dr. Law regarding the patient being afebrile.

Therefore, for the foregoing reasons, the trial judge properly granted a directed verdict in favor of Dr. Young and Grand Strand Urology on the basis that there was no evidence of negligence on Dr. Young's part.

II. Dr. Young did not owe a legal duty to Kelly Fay because a physician-patient relationship was never created.

As an additional sustaining ground for affirming the trial court's directed verdict ruling, a physician-patient relationship between Dr. Young and Kelly Fay was never created, and thus, no legal duty was owed by Dr. Young.[2] "The establishment

[2] This issue was raised to the trial judge as one of the grounds for summary judgment and for a directed verdict, but the trial court stated on the record that it need not reach the issue. [Tr. p. 1667.]

of a doctor/patient relationship is a prerequisite to a claim of medical malpractice." Roberts v. Hunter, 310 S.C. 364, 366, 426 S.E.2d 797, 799 (1993). "The relationship is a consensual one wherein the patient knowingly seeks the assistance of a physician and the physician knowingly accepts him as a patient." Id. "Whether the law recognizes a particular duty is an issue of law to be determined by the court." Ellis by Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996).[3] "If there is no duty, then the defendant in a negligence action is entitled to a directed verdict." Id.

Here, Dr. Young never saw the patient, he never spoke with her, and he never saw her lab results, radiology films, or chart. He did not treat or diagnose the patient, and there is no evidence that he undertook to perform any services on the patient's behalf. See Ellis by Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996) (holding Plaintiff had failed to establish the existence of a duty owed to patient by surgeon who told treating physician "to proceed" with course of treatment but never undertook the actual care of the patient).

Dr. Young merely agreed to see the patient on Monday when asked to do so by her treating physician. "A physician-patient relationship is not established by the mere act of a physician agreeing to see a patient at a later time." 61 Am. Jur. 2d Physicians, Surgeons, Etc. § 130 (2012). Thus, a physician's acceptance of a request for a future evaluation of a patient, with no affirmative act of treatment or diagnosis,

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[3] Plaintiff's brief cites to testimony of their expert, Dr. Siroky, who opined that he believes a physician-patient relationship existed. However, the determination of a legal duty is a question of law for the court to decide. In addition, his opinion is invalid in that it is conclusory. The Illinois Court of Appeals recognized that experts may try to circumvent the rule of law in their testimony on this issue: "The proffered opinion of Plaintiff's expert transcends the bounds of his competence and intrudes on the exclusive province of the Court. Plaintiffs may not, in the guise of offering expert medical opinion, arrogate themselves a judicial function and obviate a ruling on the existence of or extent of a legal duty which might be owed by a physician to a patient." Reynolds v. Decatur Memorial Hospital, 660 N.E.2d 235, 239 (Ill. Ct. App. 1996).

does not create a physician-patient relationship or a duty as is necessary for a medical malpractice action.

Under South Carolina law, a physician-patient relationship is not established by the type of informal consultation that took place when Dr. Law briefly spoke with Dr. Young by telephone.[4] In Roberts v. Hunter, 310 S.C. 364, 426 S.E.2d 797 (1993), the South Carolina Supreme Court examined the novel issue of whether a doctor-patient relationship may exist when the patient has not been examined or treated by that physician. There, a neurologist, Dr. Hayes, was with other patients in the hospital when he was contacted by an ER physician to examine a patient, Roberts, who was complaining of pain in his neck and shoulder after falling from a scaffold. Id. at 365, 426 S.E.2d at 798. The neurologist agreed to come to the ER to examine the patient; however, the patient left the hospital before the neurologist had an opportunity to examine him. Id. The patient returned to the hospital approximately 2½ hours later with right-sided paralysis as a result of stroke. Id.

The patient then sued the neurologist for medical malpractice, claiming that a doctor-patient relationship existed with him such that he had a duty to immediately come to the emergency room and his failure to do so resulted in the patient's subsequent stroke. Id. at 366, 426 S.E.2d at 799. The South Carolina Supreme Court disagreed and found no doctor-patient relationship existed. Id. In affirming the trial court's directed verdict in favor of the neurologist, the Supreme Court noted "it is undisputed that Dr. Hayes neither examined Roberts nor reviewed his file." Id. at 367, 426 S.E.2d at 799. The Court concluded, "Based upon these circumstances, we hold

[4] Dr. Law testified that his call to Dr. Young could be described as an informal consult. [Tr. p. 1195.]

that no doctor/patient relationship existed and, accordingly, directed verdict in favor of Dr. Hayes was proper." Id.

In holding that no doctor-patient relationship existed, the Supreme Court in Roberts cited with approval four appellate court decisions from other jurisdictions, and commented, "under facts similar to those here, other jurisdictions have concluded that the relationship was not established." Id. at 366, 426 S.E.2d at 799. These cases, relied upon by the Roberts Court, also support the conclusion that Dr. Young's informal consultation with Dr. Law did not create a physician-patient relationship between Dr. Young and Kelly Fay. The Supreme Court summarized these cases as follows:

> In Hill by Burston v. Kokosky, 186 Mich.App. 300, 463 N.W.2d 265 (1990), it was held that a treating physician's informal consultation with another physician did not give rise to a relationship: "There has been no showing that the respondent (consulting physician) had any contact with the patient, saw any records relating to the case, or even knew the patient's name." 463 N.W.2d at 267. See also Sullenger v. Setco Northwest, 74 Or.App. 345, 702 P.2d 1139 (Or.Ct.App.1985) (No relationship where defendant, upon entering patient's room, was asked whether he would like to manage the case and doctor declined). Similarly, in Oliver v. Brock, 342 So.2d 1 (Ala.1977), no relationship was found when a consulting physician gave to the treating physician his opinion of the patient's condition, which opinion was relayed to the patient's mother. The court held that there was no evidence "from which it could be concluded that (consulting physician) has consented to treat the child, or any from which it could be inferred that he consented to act in a consulting capacity." 342 So.2d at 4.
>
> In Mozingo by Thomas v. Memorial Hospital, 101 N.C.App. 578, 400 S.E.2d 747, rev. den. 329 N.C. 498, 407 S.E.2d 537, (1991) aff'd 331 N.C. 182, 415 S.E.2d 341 (1992), it was held that no relationship was established between an obstetrics patient and a physician who supervised the patient's treating physician. In Mozingo, the treating physician, a resident doctor, had called the supervising physician, reporting complications with the patient. When the supervising physician arrived at the hospital, the baby

> was already born with disabilities. The court held that the absence of any contact with the patient prior to the alleged malpractice negated any doctor/patient relationship.

Id. at 366-67, 426 S.E.2d at 799.

In the present matter, there are no facts which can support the conclusion that the relationship of physician-patient ever existed between Dr. Young and Kelly Fay. "[A] physician cannot be liable for medical malpractice if he merely consults with a treating physician and does nothing more." 61 Am. Jur. 2d Physicians, Surgeons, Etc. § 131 (2012); Oliver v. Brock, 342 So. 2d 1 (Ala. 1976); Rainer v. Grossman, 31 Cal. App. 3d 539, 107 Cal. Rptr. 469 (2d Dist. 1973); Irvin v. Smith, 31 P.3d 934 (Kan. 2001). Informal consultations, such as the one that took place between Dr. Law and Dr. Young, occur on a frequent basis in the medical profession and are vital to the treatment of patients. An on-call physician should be able to engage in an informal consultation with a patient's treating physician without fear of future reprisal. These informal consultations serve an important function in that they facilitate and improve patient care. To impose liability on Dr. Young in this case, when he did not provide treatment, diagnosis or advice, would stifle the free exchange of knowledge amongst physician colleagues, which is critical to the decision-making process of a treating physician, particularly in those situations when there may not be enough time or adequate resources to consult literature or refer to a textbook. One appellate court discussed the important public policy aspects of shielding physicians from liability when only an informal consultation has occurred:

> Plaintiffs suggest what needs to be done is to find a physician-patient relationship to result from every such conversation. The consequences of such a role would be significant. It would have a chilling effect upon the practice of medicine. It would stifle

> communication, education, and professional association, all to the detriment of the patient. The likely effect in adopting plaintiffs' argument also would be that such informal conferences would no longer occur.

Oja v. Kin, 581 N.W.2d 739, 743 (Mich. Ct. App. 1998) (citing Reynolds v. Decatur Memorial Hospital, 660 N.E.2d 235 (Ill. Ct. App. 1996)).

Numerous reported decisions from other jurisdictions have adopted a similar view, including the Kansas Supreme Court's decision in Irvin v. Smith, 31 P.3d 934 (Kan. 2001), which involved a twelve year old patient who had been born with hydrocephalus and had had surgical placement of a shunt. After the patient began suffering seizures and other health problems, her treating physician made a telephone call to obtain a neurological consult from Dr. Gilmartin, a child neurologist. Id. at 939. During the lengthy call in which they discussed in detail the condition, care, and treatment of the child, it was agreed that Dr. Gilmartin would see the patient the next morning and would assist the treating physician in performing a shuntogram. Id. Neither the treating physician nor Dr. Gilmartin believed her symptoms indicated an impending shunt malfunction. Id. However, prior to any tests or procedures being performed, the patient's condition worsened and she suffered permanent and severe brain damage as a result of lack of oxygen to the brain. Id.

After suit was filed, the trial court granted summary judgment to Dr. Gilmartin on the basis that no physician-patient relationship existed. Id. The Kansas Supreme Court affirmed, recognizing that "[a] physician who gives an 'informal opinion' [] at the request of a treating physician, does not owe a duty to the patient because no physician-patient relationship is created." Id. at 934. The Court, in

concluding that a doctor's consent to a later formal patient consultation by itself does not begin the relationship between doctor and patient, explained:

> Courts have used great caution when responding to requests that they recognize legal duties within this medically important but legally ambiguous world of the curbside consultation. Indeed, the published decisions are unanimous in agreeing that extension of the physician-patient relationship to include this type of informal consultation would be contrary to public policy. 'Imposition of liability under these circumstances would not be prophylactic but instead counter-productive by stifling efforts at improving medical knowledge.'

Id. at 943 (quoting Rainer v. Grossman, 107 Cal.Rptr. 469 (1973)).

Similarly in El Majzoub v. Appling, 95 S.W.3d 432, 436 (Tex. App. 2002), a Texas appellate court held that there must be some affirmative action on the part of the physician to treat the patient to create a physician-patient relationship. In that case, a patient went to the emergency room complaining of difficulty breathing and was examined by the ER physician who then telephoned an on-call otolaryngologist to report his findings and the patient's symptoms. Id. at 434-35. A telephone conversation took place wherein the otolaryngologist told the ER physician what he would normally do with a patient who presented to him with the same symptoms. Id. at 434-35. The otolaryngologist advised the ER physician that "it probably would not hurt" to give additional medication to the patient and to observe the patient for a period of time after the additional treatment was given, and then he asked the ER physician to call him back after the treatment was finished. Id. at 435. Finally, the ER physician told the otolaryngologist that he was going to refer the patient to him, and the otolaryngologist then suggested that the ER physician should have the patient call his office to set up an appointment for later that morning. However, soon after their

conversation concluded, the patient stopped breathing. Id. The otolaryngologist was then called to assist the ER physician. When the otolaryngologist arrived at the hospital, he examined the patient for the very first time and transferred him to the intensive care unit where he died three days later. Id.

The plaintiff attempted to argue that the recommendations made by the otolaryngologist to the ER physician over the telephone, his requests to be updated on the patient's status, and his consent to see the patient in his office that morning were affirmative acts establishing the existence of a physician-patient relationship. Id. at 437. The Texas court, relying on the reasoning of the Michigan Court of Appeals' opinion in Hill by Burston v. Kokosky (a case cited by the South Carolina Supreme Court with approval in Roberts) rejected plaintiff's arguments:

> Defendants' medical opinions were addressed directly to (the treating physician) as a colleague, and not indirectly to plaintiffs as patients. *The opinions were not in the nature of prescribed course of treatment, but were recommendations to be accepted or rejected by the (treating physician) as he saw fit.* In short, the telephone conversations between (the treating physician) and defendants did not give rise to a physician patient relationship....

Id. (emphasis in original).[5]

[5] In addition to the legal authority cited above, numerous other cases also support the conclusion that no patient-physician relationship existed between Dr. Young and Kelly Fay. See, e.g., Newborn v United States, 238 F.Supp.2d 145 (D.D.C.2002) (Informal advice given by consulting doctor did not give rise to patient-physician relationship); Reynolds v. Decatur Mem. Hosp., 660 N.E.2d 235 (Ill.App.1996) (No patient-physician relationship with consulting doctor who discussed patient's case over telephone); Sterling v. Johns Hopkins Hosp., 802 A.2d 440 (Md.App. 2002) (No patient-physician relationship between patient and a physician at the defendant hospital who agreed to the transfer of the patient from another facility to the hospital); Corbet v. McKinney, 980 S.W.2d 166 (Mo.Ct.App. 1998) (No duty owed by specialist who only offered recommendation for treatment to the attending physician); Webb v. Nash Hosp., Inc., 516 S.E.2d 191 (N.C.App.1999) (Patient had no claim against on-call physician who discussed patient's condition with attending physician); St. John v. Pope, 901 S.W.2d 420 (Tex.1995) (On-call physician did not form patient-physician relationship by giving opinion that patient should be transferred to another facility).

In the instant case, even taking the evidence and inferences in the light most favorable to the Plaintiff, as a matter of law a physician-patient relationship between Dr. Young and Kelly Fay did not arise because Dr. Young never saw, treated, diagnosed, advised, offered an opinion, or directed the care of the patient. Accordingly, the trial court's grant of a directed verdict in favor of Dr. Young and his practice should be affirmed as there was no legal duty owed by Dr. Young to Ms. Fay.

III. Plaintiff's Notice of Cross-Appeal should be dismissed because it was not timely served in compliance with the requirements of Rule 203 of the South Carolina Appellate Court Rules.

Plaintiff's cross-appeal against Dr. Young and Grand Strand Urology should be dismissed because the Notice of Cross-Appeal was not timely served.

On May 26, 2010, during the Defendants' case in chief, Judge Baxley granted the directed verdict motion of Dr. Young and Grand Strand Urology, and verbally entered judgment on the record for these Defendants.[6] [Tr. p. 1807-1817.] The trial proceeded against Dr. Law and the Hospital, and the jury returned a verdict against the Hospital and Dr. Law on May 28, 2010. Judge Baxley entered judgment against Dr. Law and the Hospital on May 28, 2010, with the filing of a Form 4 Order and attached verdict form. [Form 4 Order with attached verdict form.]

[6]Judge Baxley did not sign a written order reflecting that Dr. Young and Grand Strand Urology, LLP had been dismissed. However, the Form Four Order filed May 28, 2010, with attached Jury Verdict indicates that Dr. Young and Grand Strand Urology, LLP, had been removed as Defendants in the caption on the verdict form. [Form 4 Order with attached verdict form.] Therefore, the appeal period began on May 26 when the directed verdict was announced on the record, or alternatively, at the very latest on May 28, 2010, when the Form 4 and verdict were entered.

The Hospital and Dr. Law filed post-trial motions for a new trial on or about June 8, 2010. [Post-trial motions filed by Hospital and Dr. Law.] Judge Baxley denied those motions by separate Orders served on June 23 and filed June 24, 2010. [Order Denying Hospital's Post Trial Motions dated June 24, 2010.] Judge Baxley did not send a copy of his orders denying these post-trial motions to counsel for Dr. Young and Grand Strand Urology, as he evidently considered that they had already been dismissed from the case, and the post-trial motions and orders did not pertain to them. [Id. at p. 2.]

Dr. Law then filed an additional post-trial motion pursuant to Rule 59, SCRCP, on July 21, 2010. [Dr. Law's Notice of Motion and Motion To Alter or Amend Judgment and/or Motion for Reconsideration.] However, in previous filings with the Court of Appeals, Plaintiff has taken the position that Dr. Law's second post-trial motion did not toll the time limits available to the parties for initiating an appeal. [Plaintiff's Motion to Dismiss Appeal of Respondent/Appellant Steven W. Law, D.O.] Plaintiff has asserted "Defendant Law's second post-trial motion did not toll the time to appeal because that motion merely restated the arguments Defendant Law made in his initial post-trial motion." [Plaintiff's Motion to Dismiss Appeal of Respondent/Appellant Steven W. Law, D.O., p. 3.] A party is bound by his concessions, Thomas v. Dootson, 377 S.C. 293, 296, 659 S.E.2d 253, 254 (Ct. App. 2008), and Plaintiff should therefore be bound by the position that the second post-trial motion filed by Dr. Law did not act to stay the time for appeal.

Also on July 21, 2010, the Hospital filed a Notice of Appeal with the Court of Appeals, but Dr. Young and Grand Strand Urology were never served with this

Notice of Appeal. [Hospital's Notice of Appeal.] The Hospital then filed an Amended Notice of Appeal on or about July 26, 2010; again, Dr. Young and Grand Strand Urology were never served. [Hospital's Amended Notice of Appeal.]

On July 30, 2010, Plaintiff filed and served a Notice of Cross-Appeal appealing Judge Baxley's directed verdict and dismissal of Dr. Young and Grand Strand Urology. [Notice of Cross-Appeal.] Plaintiff's Notice of Cross-Appeal does not state when Plaintiff received the Hospital's original Notice of Appeal. In addition, Plaintiff's Notice of Cross-Appeal does not state when Plaintiff received Judge Baxley's orders denying the post-trial motions.

Dr. Young and Grand Strand Urology subsequently filed a motion to dismiss Plaintiff's cross-appeal on the grounds that it was untimely. On December 5, 2011, Judge Short, on behalf of the Court of Appeals, issued an Order that denied the motion to dismiss without prejudice and also directed the parties to address the issue of the timeliness of Plaintiff's cross-appeal in their briefs.

Pursuant to Rule 203(b), a notice of appeal must be served in civil cases within thirty (30) days after receipt of written notice of entry of final order. See Rule 203(b)(1), SCACR; Holroyd v. Requa, 361 S.C. 43, 54, 603 S.E.2d 417, 422 (Ct. App. 2006). Rule 203(c) provides that a respondent may serve a cross-appeal within five days after receipt of an appellant's notice of appeal or within the time prescribed by Rule 203(b). See Rule 203(c), SCACR. There is no language within Rule 203(c) that extends the period available to a respondent for filing a cross-appeal beyond the original five day period in situations, such as here, when an appellant files a Notice of Appeal and then later files an Amended Notice of Appeal.

The failure to timely serve a notice of appeal "divests [the appellate court] of subject matter jurisdiction and results in dismissal of the appeal." Holroyd, 361 S.C. at 54, 603 S.E.2d at 423. Furthermore, "the timely service of an appeal is a jurisdictional requirement that cannot be waived." Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 214, 544 S.E.2d 38, 48 (Ct. App. 2000).

The thirty (30) day time period for Plaintiff to serve his notice of appeal on Dr. Young and Grand Strand Urology began to run from the date of the verbal ruling granting the directed verdict on May 26, 2010. The trial court's granting of a directed verdict on May 26, 2010, was a final ruling, rather than an interlocutory or intermediate order, because the ruling dismissed Dr. Young and Grand Strand Urology with finality from the case. See S.C. Code Ann. § 14-3-330 (1976) (addressing the appealability of final judgments). Judge Baxley did not direct any of the parties to prepare a written order; nor did he advise the parties that a written order would later be entered on the directed verdict. This ruling adjudicated Plaintiff's entire claim against Dr. Young and Grand Strand Urology and completely determined the rights of Plaintiff as to these defendants. "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final." Adickes v. Allison & Bratton, 21 S.C. 245, 259 (1883).

Plaintiff did not serve his cross-appeal until July 30, 2010, which was after the appeal period provided by Rule 203(b) had ended. Though the initial post-trial motions that were filed by the hospital and Dr. Law may have tolled the time limits

for the filing of an appeal, Plaintiff has previously taken the position in the present appeal that the second post-trial motion filed by Dr. Law did not toll the time limits for an appeal, and accordingly, Plaintiff should therefore be bound by this position.

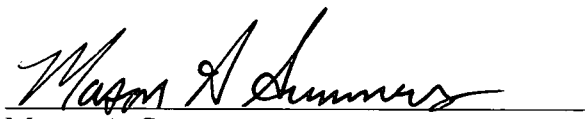
Moreover, Plaintiff's serving of a cross-appeal on July 30, 2010, was not timely under Rule 203(c) because this was nine days after the Hospital filed and served its original Notice of Appeal on July 21, 2010. As stated above, there is no language within Rule 203(c) that extends the period available to a respondent for filing a cross-appeal beyond the original five day period where an appellant later files an Amended Notice of Appeal. Also, Plaintiff's Notice of Cross-Appeal fails to state when Plaintiff received the Hospital's original Notice of Appeal.

Accordingly, Plaintiff's cross-appeal against Dr. Young and Grand Strand Urology should be dismissed as untimely.

Conclusion

There was no evidence presented at trial that Dr. Young deviated from the standard of care. In addition, as a matter of law, there was no physician-patient relationship between Dr. Young and Kelly Fay because Dr. Young never undertook to treat, diagnose or otherwise provide services for her. Furthermore, Plaintiff's cross-appeal was untimely brought. Accordingly, the trial court's decision to grant a directed verdict in favor of Dr. Young and Grand Strand Urology should be affirmed.

Respectfully submitted,



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Columbia, South Carolina
August 22, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
J. Michael Baxley, Circuit Court Judge

Case Nos. 2008-CP-26-9047
2008-CP-26-9368

Sean D. Fay, as Personal Representative for the
Estate of Kelly L. Fay,
deceased,.....Respondent/Appellant,

v.

Grand Strand Regional Medical Center, LLC,
d/b/a South Strand Ambulatory Care Center
and Stepehn W. Law, D.O., Dr. Richard Young, M.D.,
and Grand Strand Urology, LLP, ...Defendants,

Of whom, Grand Strand Regional Medical
Center, LLC, d/b/a South Strand Ambulatory
Care Center is, ...Appellant/Respondent,

And of whom Stephen W. Law, D.O. is .....Respondent/Appellant,

And of whom Dr. Richard Young, M.D., and
Grand Strand Urology, LLP, are, ...Respondents.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., attorneys for Respondents Richard Young, M.D., and Grand Strand Urology, LLP, do hereby certify that I have this date served the foregoing **Initial Brief of Respondents**, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the following:

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