

THE STATE OF SOUTH CAROLINA
In The Court of Common Pleas

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OCT 12 2015

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Roger M. Young, Jr., Circuit Court Judge

Case No. 2013-CP-10-5902
Appellate Case No. 2015-001853

Leanna Loud and William Loud,Respondents,

v.

Jeffrey Short, MD, individually, and
Charleston Radiologists, PA,Appellants.

AFFIDAVIT OF JOHN ERIC FULDA

PERSONALLY APPEARED BEFORE ME, John Eric Fulda, who being duly sworn,
deposes and says that:

1. I am one of the attorneys for Respondents Leanna Loud and William Loud.
2. Attached as Exhibit A is a true and correct copy of the transcript of hearing before the Hon. Roger Young on August 27, 2015.
3. As a result of the last-minute cancellation of the day-certain trial in the within matter and defending against the frivolous appeal taken by Appellants, Respondents incurred the following costs:

The Mills House Cancellations Costs (rooms and meeting room): \$ 2,353.54

Jury Research: \$ 600.00

Airline Ticket Change Fees (2 tickets): \$ 400.00 (minimum)

UPS costs: \$ 110.93

Postage: \$ 24.65

Photocopies: \$ 843.50

Lexis/Nexis Research: \$ 485.47

4. As a result of the last-minute cancellation of the day certain trial in the within matter and defending against the frivolous appeal by Appellants, Respondents' counsel have and will expend significant additional time and effort, such as (1) analyzing jury information that is no longer relevant; (2) the need to travel to Charleston for a repeat hearing on pre-trial Motions; (3) the need to travel to Charleston for a repeat status conference to re-set the trial; (4) paralegal time spent scheduling rooms, equipment rental, travel arrangements for witnesses that will have to be re-done. A conservative estimate of time expended in regard to the above matters is 20 hours attorney time and 8 hours paralegal time.

5. As a result of the last-minute cancellation of the day certain trial in the within matter and defending against the frivolous appeal taken by Appellants, Respondents' counsel expended significant time and effort in securing dismissal of the appeal. A conservative estimate of attorney time expended in research, review and drafting is 25 hours.

FURTHER DEPONENT SAYETH NOT.



John Eric Fulda

SWORN to before me this
12 day of October, 2015.



Louise Chishaw (L.S.)
My Commission Expires: 2/29/16

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Leanna Loud and William Loud,Respondents,

v.

Jeffrey Short, MD, individually, and
Charleston Radiologists, PA,Appellants.

CERTIFICATE OF SERVICE

I certify that on this 12th day of October, 2015, I served the Affidavit of John Eric Fulda on Appellants, Jeffrey Short, MD, individually and Charleston Radiologists, PA, by email as well as by depositing a true and correct copy of the same in the United States mail, postage prepaid, return address clearly printed on the envelope and addressed to:

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October 12, 2015

Columbia, South Carolina

EXHIBIT

A

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON 2013-CP-10-05902

LEANNA LOUD and)
WILLIAM LOUD,)
)
Plaintiffs,) TRANSCRIPT OF RECORD
)
-vs-) August 27, 2015
)
JEFFREY SHORT, M.D.,)
Individually, and CHARLESTON) Charleston, South Carolina
RADIOLOGISTS, PA,)
)
Defendants.)

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

A P P E A R A N C E S:

Charles W. Whetstone, Jr., Esquire
Cheryl F. Perkins, Esquire
John Eric Fulda, Esquire
Attorneys for the Plaintiffs

Molly H. Craig, Esquire
Brian E. Johnson, Esquire
Caroline R. Niland, Esquire
Attorney for the Defendant

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1 (August 27, 2015.)

2 THE COURT: I'm trying to sort through all
3 these things that you've been filing and e-mailing at the
4 last minute. I especially love the ones at the end of
5 the day yesterday. That makes me real happy to get.
6 Let's try to sort through something that makes sense of
7 the way these are filed, and I guess the first thing to
8 do is deal with this motion to amend your answer.

9 From what I gathered, you filed the motion
10 back in March, and then back in May, I think, when you
11 were statusing it in front of Judge Dennis, decided not
12 to assert comparative negligence and now you've changed
13 your mind?

14 MS. CRAIG: Yes.

15 THE COURT: What's that all about?

16 MS. CRAIG: Good morning, Your Honor.

17 We filed a motion to amend. We did withdraw
18 the previous motion to amend without prejudice, and the
19 basis of that is, actually, the testimony of the expert
20 witnesses for the plaintiff.

21 I mean, as you can imagine in a case as
22 sympathetic as this one, we struggled over whether or not
23 to assert the comparative negligence, but based on the
24 testimony of the plaintiffs' own experts, which we
25 believe will give us a very, very strong motion for

1 directed verdict, Your Honor, we have no choice but to
2 ask the Court to amend the pleadings, and, of course,
3 under Rule 15, that is freely granted unless there is
4 prejudice to the plaintiffs.

5 THE COURT: What did the experts say that
6 would force you to file this motion?

7 MS. CRAIG: Yes, sir. That's very
8 interesting.

9 So at issue here is a 2008 mammogram, and the
10 allegation is that in the 2008 mammogram, there was some
11 indication that there was cancer and there should have
12 been follow-up studies. Our position is there are benign
13 findings on the 20808 mammogram. The plaintiff's own
14 experts -- now, they testify that in 2008, there was
15 indication of cancer, or suspicious findings, and that in
16 2008, if further studies had been done, then this cancer
17 would have been detected.

18 The next step is in 2009, the plaintiff, it's
19 undisputed, did not go back for a one-year annual
20 mammogram, just like every woman who is over the age of
21 40 is instructed to do by their doctors and by written
22 notification on the mammogram reports. It's undisputed
23 in this case that in 2009 that the plaintiff did not do
24 that. She did not return for a follow-up mammogram as
25 she was instructed to do in 2008 until 2010.

1 THE COURT: Her doctor instructed her to?

2 MS. CRAIG: Yes, sir.

3 THE COURT: Because I really wasn't clear
4 whether or not he instructed it to her or you were
5 relying on some kind of, you know, national
6 recommendation that you go and get it done every year.
7 It's one thing to have a recommendation out there; it's
8 another thing to say your doctor told to you to do this
9 and you didn't do it.

10 MS. CRAIG: Yes, sir, both. If you look at
11 the mammogram report that was issued from East Cooper
12 Medical Center -- and when a woman has a mammogram, the
13 report actually goes to the ordering doctor, so the
14 report goes to the ordering doctor and then the woman
15 receives a letter from the institution, wherever she goes
16 for the mammogram, here it was East Cooper Hospital, and
17 that institution sends her a letter to tell her the
18 findings of the mammogram, and they said the findings
19 were benign.

20 In that letter from East Cooper, it says
21 recommended follow-up one year. It actually has the date
22 on when she is supposed to follow up in 2009. It's
23 undisputed she did not do so, so if you follow the logic
24 of the plaintiffs' experts in this case, that the cancer
25 was diagnosable in 2009, if she had gone back for a

1 mammogram in 2009, it would have been diagnosed, by the
2 testimony of her own experts, and it would have been
3 discovered. She failed to do so, so on
4 cross-examination, I would like to elicit that
5 information from the plaintiffs' own experts and use that
6 information --

7 THE COURT: Did you take the deposition of
8 the experts?

9 MS. CRAIG: Yes, sir.

10 THE COURT: And the expert said what?

11 MS. CRAIG: They said that she should have
12 gone back for a follow-up mammogram within one year, and
13 I can give you page line designations for that if you
14 like.

15 THE COURT: Did you have somebody say it
16 would have been discovered?

17 MS. CRAIG: She said -- well, Your Honor -- I
18 don't know --

19 THE COURT: It's one thing to go back for a
20 follow-up, but it's another to say even if she had, we
21 wouldn't have found it.

22 MS. CRAIG: Well, under their own opinions,
23 Your Honor, 2008 is when it would have been discovered.
24 So in 2009, certainly, under their theory, it would have
25 been discovered.

1 Now, to answer that specific question, I
2 hadn't thought about that, but I have to go back through
3 the transcript and see if that was asked specifically,
4 but each of them were asked whether or not she should
5 have gone back for the one-year annual visit as
6 instructed to do so, and they said yes.

7 So under the plaintiff's own theory in this
8 case, we have a very strong comparative claim that we
9 would like to assert --

10 THE COURT: There was one more step. Even if
11 the expert said she should have gone back and even if
12 they say it would have been discovered, the real question
13 is, would it have been treatable?

14 MS. CRAIG: Correct. Would it have made a
15 difference? And their experts, again, have testified
16 that yes, it would have changed the course of treatment
17 because the cancer would have been found earlier in 2009
18 versus 2010 and her clinical course would be different.
19 Unfortunately, she does have stage four metastatic
20 cancer.

21 So that's their whole damages claim, Your
22 Honor. If this had been caught earlier, under their
23 theory, in 2008, she wouldn't be in a terminal situation
24 as she is today. All of this testimony is from the
25 plaintiffs' own experts. It is not prejudicial to them.

1 It's not a surprise. It's all in their depositions and
2 their discovery depositions that we've taken, and under
3 Rule 15, Your Honor has complete discretion to amend the
4 pleadings to conform with the evidence.

5 And in prior experience in dealing with this,
6 if the plaintiffs are now saying that is prejudicial, the
7 remedy for them is to request a continuance, and I don't
8 think any of us want a continuance. We're all lined up,
9 ready to go with our experts, and we're ready to try this
10 case next week, but that is their remedy if they say they
11 are prejudiced. Although there is not new material,
12 their remedy --

13 THE COURT: When did you come up with this?

14 MS. CRAIG: The remedy is a continuance?

15 THE COURT: The new information from the
16 experts.

17 MS. CRAIG: It's not new information, Your
18 Honor. What it is, is going through in trial prep and
19 really focussing on whether or not this is a strategic
20 decision whether or not to pursue a comparative claim
21 against a dying woman.

22 THE COURT: I understand that, but it's not
23 information that you didn't have back in May or whenever
24 when you were talking to Judge Dennis about a trial date?

25 MS. CRAIG: I need to know when the -- when

1 the depositions had been taken in consultation with our
2 experts in trial preparation, this issue came to light.
3 Again, there is no prejudice. There is nothing new that
4 they have to respond to.

5 I mean, clearly, they don't want a
6 comparative claim because it's compelling. Everyone
7 knows that a woman over the age of 40 years old needs to
8 have a mammogram, but that is very important in this case
9 based on their own theory of liability, and we've got to
10 respond to it, so we've made the difficult decision to
11 pursue a comparative negligence claim against a woman who
12 has stage metastatic cancer.

13 THE COURT: All right. Who wants to respond?

14 MS. PERKINS: Your Honor, Cheryl Perkins.
15 I'll respond for the plaintiffs.

16 Your Honor, first, I would note this is, in
17 fact, a motion that's based on screening guidelines. The
18 letter -- and I can hand it up. It's attached to our
19 response.

20 The letter that was sent to Mrs. Loud said
21 recommended follow-up in a year but specifically cited a
22 normal result and stated, Current American Cancer Society
23 guidelines recommend screening mammograms and physical
24 breast exam every year beginning at age 40.

25 Ms. Loud wasn't even 40 when this occurred.

1 She wouldn't turn 40 for six or eight months after this.
2 This is nothing more than written recommendations that
3 goes out in every single letter. There is dispute
4 regarding screening recommendations, and that's what our
5 experts agree and their experts.

6 Around the same time, the American College of
7 Radiologists recommends an annual one year at age 40.
8 Again, she wasn't 40 yet. The American Cancer Society
9 recommends guidelines of one year.

10 In 2009, the U.S. Preventive Task Force came
11 out with a large policy report that stated, We think it
12 should be every two years, and there was a huge
13 controversy around that. Ms. Loud testified to that,
14 that that was a part of her decision to go two years
15 instead of one year.

16 I think it is a huge, slippery slope to
17 acknowledge comparative negligence based on nothing more
18 than screening guidelines, and that's what our experts
19 testified to. They recommend these screening guidelines
20 based on the American College of Radiology guidelines.

21 As far as prejudice, of course we're
22 prejudiced. This motion was made. It was made after
23 their experts testified and testified that she was not to
24 blame. Every single defense expert said she is not to
25 blame, and the defense experts further said it would not

1 have made a difference. Contrary to what Ms. Craig said,
2 our plaintiffs' expert on causation does not say that
3 diagnosis in 2009 would have made a difference. That's a
4 key element to comparative negligence. They can assert
5 the negligence. They can assert some type of standard --

6 THE COURT: They've got experts that say it
7 would have made a difference.

8 MS. PERKINS: They say it would not have made
9 a difference, Your Honor, and we have cited their
10 testimony in our response. Each and every expert either
11 said it would not have made a difference in 2009. It
12 would have made a difference in 2008, which is when our
13 case all focuses on.

14 They all say either one of two things: It
15 would not have made a difference in 2009; or there's no
16 way to know. There's no way to know is not a sufficient
17 proof to prove an affirmative defense.

18 In 2009, the data is not there to show
19 whether the cancer would have metastasized or not
20 metastasized. We have the data in 2008 that it was stage
21 one or in situ, and that's what our experts are
22 testifying on in terms of survivable. A year later it's
23 either speculation, or if their experts say she was dead
24 anyway.

25 THE COURT: Help me get my layman's head

1 around what you said. If they would have known it in
2 2008, it would have made a difference, but it wouldn't
3 have made a difference in 2009?

4 MS. PERKINS: Yes.

5 THE COURT: On the surface, that doesn't make
6 any sense to me. Help me understand what you just said.

7 MS. PERKINS: Your Honor, as time goes on,
8 cancer advances. We know from the radiologic evidence in
9 2008 that there was a very tiny issue. It was in situ,
10 at best.

11 THE COURT: What does that mean, in situ?

12 MS. PERKINS: It means less than stage one,
13 which is the lowest stage for cancer, and these stages
14 are what determine survivability. As cancer advances to
15 stage two, stage three, stage four, the statistics on
16 survivability decrease. The smaller the cancer, the
17 better the chance of survival. Our experts say at what
18 they, in their opinion to a reasonable degree of medical
19 certainty, believed the cancer was in 2008, it would have
20 been 95 percent or above survivable.

21 Time goes on. A year down the road, this is
22 halfway between the 2008 focus of our case and in 2010
23 when she was actually diagnosed. We know in 2010 it was
24 too late because the proof has been it metastasized and
25 she was terminal, so the metastasis occurred sometime

1 between when we have radiological evidence of the breast
2 in 2008 and 2010 when it very clearly was too late.

3 The experts on the defense side say one of
4 two things: That going backwards a year from when we
5 know she was already terminal would not have made a
6 difference, or they say you can't tell. It would be
7 sheer speculation because there's not data to pinpoint
8 that 2009 would have made a difference.

9 So the burden of proof is on the defendants
10 to show every element of comparative negligence. If
11 there was, in fact, any type of negligence, they can't
12 meet their burden of proving causation, that more
13 probable than not, to a reasonable degree of medical
14 certainty, had she gone in in 2009, her cancer would have
15 been curable, and I think that is something that they
16 cannot do. There is no testimony to that, and I think
17 that's a critical element.

18 Going forward and having all of this in front
19 of the jury to speculate, when there is no medical
20 testimony sufficient to support causation, is incredibly
21 prejudicial to the plaintiffs. Other areas of
22 prejudice -- the task force report that Mrs. Loud looked
23 to for the two-year recommendation, had we known this was
24 going to be an issue at trial, we would have explored it
25 further. We would have looked into other recommendations

1 out there to support her decision that women have a right
2 to look at all of the data and make their own decision on
3 screening guidelines. That's the defense to this
4 comparative negligence.

5 It's two weeks before the trial they filed a
6 motion. I think it's too late, obviously, if we're going
7 into a trial with a major comparative negligence out
8 there, trial preparation for opening, direct, cross, all
9 of that has to weed through the entire trial preparation,
10 and its simply unfair and prejudicial to file the motion.
11 There is no new evidence out there since they withdrew
12 the motion in May, and then to resurrect it immediately
13 prior to trial, I think that is a huge prejudice to the
14 plaintiffs.

15 THE COURT: What would you have to do if I
16 allowed this amendment to get ready for trial?

17 MS. PERKINS: Your Honor, I think we have to
18 redo the opening, redo the direct examination of the
19 witnesses to weed this in, rethink cross-examination.
20 We're going to have to research, additionally, besides
21 the task force report, additional recommendations, how
22 they were received, what was out there that guided her in
23 making her decision in terms of not going back in a year,
24 but going back in two years, the risks of radiation
25 exposure versus one year or two. She had two mammograms

1 before she was age 40, so radiation is going to be a
2 concern for a woman in that category.

3 THE COURT: She's not in the courtroom today,
4 right?

5 MS. PERKINS: No, Your Honor. We didn't
6 think it would help her.

7 THE COURT: What is her health status now? I
8 think I heard it's stage four. What is her prognosis for
9 survival?

10 MS. PERKINS: She will die. When is unknown.
11 This cancer metastasizes to the bone. Once it's in the
12 bone, it can be stable. You can do things to try to beat
13 it back. You can't cure it. She's done everything
14 that's available, experimental, everything, to buy time
15 to be with her children.

16 Her five-year survival is about 13 percent,
17 but there is no cure. It will eventually go beyond the
18 bones to the brain or liver or other organs. It has not
19 done that yet, but she has the cancer in her sternum, in
20 her spine, and various locations.

21 THE COURT: All right.

22 Ms. Craig, point me to something that says if
23 she followed -- if she would have gone back that would
24 have made a difference, because what I'm hearing -- she's
25 saying your experts go, Yeah, we would have recommended

1 it, maybe, but nobody is willing to say that would have
2 made a difference, but that doesn't seem to be what
3 you're saying. You're saying your experts say something
4 else, so tell me what your experts say on that issue.

5 MS. CRAIG: Yes, sir. Actually, plaintiffs'
6 counsel made our argument for us. We're relying on the
7 testimony of their experts.

8 She just explained that their expert is going
9 to say the cancer was diagnosable in 2008, and in 2009 --
10 under that theory, if it's diagnosable in 2008, it's
11 diagnosable in 2009. Their experts testified that she
12 should have followed up, and their theory is that if in
13 2008 if it had been diagnosed, as they say it should
14 have, then the cancer would have been treatable, and she
15 would not be in the situation that she is now.

16 It's on the testimony of their experts. The
17 comparative claim was actually -- the plaintiffs had
18 notification as far back as I think November of 2014 in
19 our responses to interrogatories. This also goes -- and
20 I've got, actually, Your Honor, if you want to see it --
21 I have got a copy of the report from East Cooper, the
22 letter to the plaintiff, telling her for the recommended
23 follow-up and sending this to her referring physician.

24 Not only was she supposed to have a follow-up
25 mammogram within a year, she was also supposed to go talk

1 to her doctor, Dr. Granger Osborne, and she never did
2 that, so she never followed up with the doctor who
3 ordered the mammogram, and she never had the mammogram
4 within one year.

5 Now, these, Your Honor, are undisputed facts,
6 and I would also like to point out this also goes to our
7 statute of limitations claim, because if the jury
8 believes that the cancer was diagnosable in 2008, then it
9 was logically diagnosable in 2009 and would have been
10 diagnosed if she had come back, as instructed to do, for
11 a follow-up mammo, then the statute of limitations run in
12 2012, a year before this case was filed.

13 So these are significant affirmative
14 defenses, and the testimony that we're relying upon is
15 the testimony of their expert witnesses.

16 Thank you, Your Honor.

17 THE COURT: So your case basically is going
18 to be, one, we didn't miss the diagnosis, but if we did,
19 we missed it in 2008, and even if we did miss it, which
20 was negligence, you were negligent in not coming back a
21 year later.

22 MS. CRAIG: Not in so many words.

23 THE COURT: That's what comparative
24 negligence is. You got to say you did something
25 negligent..

1 MS. CRAIG: I'm going to tell the jury that
2 in 2008 -- I'm going to show them the films, say, In
3 2008, these findings are benign, but if you don't believe
4 that, if you believe that what you see on the 2010
5 mammogram is the same thing you see on the 2008
6 mammogram, I'm going to make that argument.

7 If you believe the plaintiffs' case it should
8 have been diagnosed in 2008, then it would have been
9 diagnosed in 2009 if she had come back for the mammogram.

10 That's the argument.

11 THE COURT: That's a risky argument.

12 MS. CRAIG: It is. That's why I don't take
13 it lightly, but in light of the testimony that the
14 experts of the plaintiff have brought forward, I think it
15 is a strong argument, particularly on a motion for
16 directed verdict.

17 THE COURT: Did you want to say something?

18 MS. PERKINS: The one thing she didn't
19 address is curability. She pointed to Dr. Villa. If it
20 was diagnosable in 2008 -- if it's diagnosable in 2008,
21 it's diagnosable in 2009. It was obviously diagnosable
22 in 2010. She was terminal. He did not say it was
23 curable in 2009.

24 Ms. Craig's expert -- I will read from -- I
25 believe it was Dr. Smith: So even if Leanna Loud's

1 cancer had been diagnosed in April of 2009, it's still
2 your opinion her condition was terminal, even then?

3 Yes.

4 That's their expert.

5 Their other medical oncologist was asked the
6 same question, and his response: I don't think there is
7 any way honestly we can say one way or the other whether
8 she was or was not curable in April 2009.

9 Your Honor, the comparative negligence is
10 only causative if she was curable in 2009. It would have
11 made a difference.

12 THE COURT: Isn't that --

13 MS. PERKINS: Our expert does not say.
14 Theirs says the opposite.

15 THE COURT: I think that's what I asked a
16 little bit ago, would it have made a difference?

17 MS. CRAIG: Your Honor, if they're willing to
18 make that concession and they're willing to make a
19 stipulation like that, they can concede they can't prove
20 proximate cause. Their expert has to testify to that,
21 has to, otherwise they can't meet the burden of proof.

22 They got to say it was curable and it would
23 have changed her course, and that's been the whole case
24 from the beginning, that if it was diagnosed in 2008, you
25 get it early. The cancer doesn't grow, and so it's not

1 going to be as bad, so that's the whole damages claim.
2 They don't do that, they can't prove causation in this
3 case.

4 MS. PERKINS: Your Honor, causation is 2008,
5 not 2009. Our causation is 2008 it would have made a
6 difference. Their comparative negligence is 2009. We're
7 talking a year later.

8 THE COURT: Their theory is it wouldn't have
9 made a difference if it had been diagnosed in 2009. Your
10 theory has to be it would have made a difference had it
11 been diagnosed in 2009, so give me some testimony that
12 backs that up; otherwise, we're just having a theoretical
13 argument, because you got to show not only was she
14 negligent by not going and getting that follow-up, but,
15 had she gone, it would have been discovered and it would
16 have been presumably curable or treatable.

17 You got to show that. Their theory is it
18 wouldn't have made a difference. It was too late.

19 MS. CRAIG: Yes, sir, and I have a very hard
20 time believing that their expert witness would not
21 concede that on cross-examination, but I will go --

22 THE COURT: I mean, you had a chance to take
23 their expert's deposition, right?

24 MS. CRAIG: Yes, sir.

25 THE COURT: And what did he or she say?

1 MS. CRAIG: I don't remember specifically. I
2 would have to go back through the deposition, which I
3 would be happy to and give you an answer today.

4 THE COURT: Well, it seems like an important
5 point.

6 MS. CRAIG: As to the statute of limitations,
7 under their theory, the statute then started running in
8 2008.

9 THE COURT: Maybe, but we're not talking
10 about that yet.

11 MS. CRAIG: I'm sorry. It's just part of the
12 same motion.

13 THE COURT: I've been focussing on
14 comparative negligence, so to get to comparative
15 negligence, you've got to show duty breached and damages
16 proximately caused, and I'm not hearing that yet, where a
17 diagnosis in 2009 would have caught it.

18 MS. CRAIG: So their expert, I guess, is
19 going to say that if it had been caught in 2008 versus
20 2009, it would have made a difference?

21 THE COURT: I guess.

22 MS. CRAIG: That's interesting testimony. I
23 would like to go back through the transcript, and, Your
24 Honor, I would like to be able to cross-examine -- I find
25 that absolutely incredible, if an expert is going to

1 testify to that as an oncologist.

2 THE COURT: Well, I want to hear what your
3 experts had to say because she's saying your expert kind
4 of was, like, well, it wouldn't have mattered.

5 MS. CRAIG: In all candor to the Court, our
6 experts are not addressing this. We are proving this
7 through the plaintiffs' case. There is testimony -- the
8 undisputed facts that are involved in this case and the
9 testimony from their depositions is how we're going to
10 prove the comparative and move for motion for directed
11 verdict on comparative. It's not through our experts.
12 That is correct.

13 THE COURT: Now, as far as the statute of
14 limitation issues go, isn't it when they found out they
15 had a disease, which was 2010? The statute wouldn't
16 begin running in 2008 or 2009, it would have been when
17 somebody said, You got cancer?

18 MS. CRAIG: Yes, sir.

19 THE COURT: It might have been that it could
20 have been caught back in '08, but she wouldn't know that.

21 MS. CRAIG: Under the discovery rule, as Your
22 Honor knows, is when it was diagnosed, or when it was
23 known or should have known to the exercise of reasonable
24 diligence, and if the plaintiff in this case had
25 exercised reasonable diligence, as she was instructed to

1 do by East Cooper Hospital --

2 THE COURT: It wasn't instructed. It was
3 recommended. It cites a recommendation. Nobody in there
4 says, You should do it. They're just saying,
5 Recommendations are you get it done annually.

6 MS. CRAIG: It's a pretty strong
7 recommendation to a woman who is over the age of 40, if
8 you get a letter from a hospital that says to have --
9 it's recommended that a mammogram and a physical breast
10 examination -- we haven't talked about that, that wasn't
11 done either -- an annual physical breast examination
12 every year beginning at the age of 40, and then in the
13 right-hand corner, it says recommended follow-up, and it
14 has the specific date, April 2nd, 2009, and this is sent
15 to her referring doctor who would have discussed it with
16 her if she gone back to see her referring doctor.

17 THE COURT: Well, that's some proof, but even
18 if you get over the proof part that she had, arguably,
19 somebody said, You should have done this, you still got
20 to show that it would have made a difference.

21 And from what I'm hearing, your experts
22 aren't willing to go out on a limb and say, If she had
23 gone back in 2009, it would have been discovered and it
24 would have been treatable, had anybody discovered it in
25 2009; otherwise, it's kind of like a theoretical problem.

1 MS. CRAIG: Your Honor, it's not in our case
2 in chief. It's not with our experts. All of this is
3 being proved in the plaintiffs' case in teeing up a
4 motion for a directed verdict. This is about as strong
5 as I can give in a medical malpractice case.

6 THE COURT: I get it, but your experts aren't
7 willing to say that, so you keep saying, Well, her
8 experts are going to prove my point.

9 And I don't hear that her experts are willing
10 to say that. In fact, it sounds like their experts are
11 going to say the same thing yours is, is who knows?

12 MS. CRAIG: They give us negligence. I would
13 like to answer your specific question on whether that
14 would have changed -- your specific question, I've got it
15 written down, and I'll address that, but I just have a
16 very difficult time, if this is a credible expert, that
17 he's going to say that in 2009 it wouldn't have made a
18 difference, as opposed to in 2010, a year later, when the
19 big focus on this case is diagnosed early, early, early,
20 2008, 2008, but when you get to 2009, it doesn't really
21 matter.

22 THE COURT: Well, I don't know what they're
23 going to say on cross-examination, but y'all have had
24 two, three, four years, whatever it is, to ask them that.

25 MS. CRAIG: Well, some things I wait till

1 trial to ask because it's that critical, and I don't
2 know. I need to look at that transcript and see if I can
3 answer that specific question, but I would like that --

4 THE COURT: Would you like a short break to
5 try to find it? Because it's a pretty important thing to
6 me.

7 MS. CRAIG: I would be happy to.

8 THE COURT: I've got to have somebody that is
9 going to say, if we're going to go through all this, that
10 it would have made a difference; otherwise, it's just one
11 of those kind of hypothetical questions, and that's not
12 what we do here, deal with hypotheticals.

13 MS. CRAIG: Yes, sir. I understand.

14 THE COURT: We've got to have somebody say if
15 she had gone back in 2009, per the recommendations, it
16 would have been caught, or probably would have been
17 caught, more likely than not would have been caught, and
18 it would have been treatable and it would have made a
19 difference.

20 That's what I need to know, if that evidence
21 is out there. Otherwise, I don't see where you get
22 causation.

23 MS. CRAIG: I'll be happy to look through the
24 transcript, but -- Lord knows we have a bunch of motions.

25 THE COURT: Well, it's a pretty important

1 point before we get to all this other stuff, so why don't
2 we take 15 minutes, and if you find it before then, I'm
3 right there.

4 MS. CRAIG: Sounds good. Thank you.

5 (Recess taken.)

6 THE COURT: All right. We got everybody back
7 in?

8 Ms. Craig, what you got for me?

9 MS. CRAIG: Yes, sir. So I've been reading
10 as fast as I can on this Iphone the transcript, and even
11 with my reading glasses, it's a bit of a challenge, and
12 to answer your question, their expert flip-flops. There
13 is testimony on page 24 of his deposition --

14 THE COURT: Of who?

15 MS. CRAIG: This is plaintiffs' expert,
16 Dr. Villa, but, anyway -- and he says -- let me find the
17 exact language.

18 Okay. I'm sorry. So it says -- so he had a
19 handwritten note that he produced during his deposition,
20 his handwritten note that he must have taken when he was
21 reviewing the case, so he was being asked about a
22 handwritten note.

23 And he says: It says, interpreting his note,
24 April 2008, either situ or minimally invasive; October
25 2008, the same. October '10, after chemo in spite of

1 excellent remission, incurable. If complete path
2 responds, good care raised, and there is a lot of
3 underlining. Here is the note I wrote. It's pretty much
4 the same. This is key stuff.

5 I said at first mammogram either in situ or
6 minimally invasive. A year later invasive, but not
7 detectable metastatic disease, therefore curable. Then I
8 said one to three nodes, two centimeters, ER positive,
9 and, he talks about the actual -- the tumor description.

10 That's on page 24, but later in his
11 deposition, he does testify that he can't say one way or
12 the other, so typical expert, flip-flops, so that's what
13 I would like to cross-examine him about.

14 THE COURT: I'm trying to figure out what is
15 he going to testify to?

16 MS. CRAIG: That's a good question. Page 24
17 of his deposition, the lines I just read, 2009 curable.
18 Later in his testimony, he does say that he can't say one
19 way or the other, so they're conflicting excerpts out of
20 his deposition.

21 THE COURT: So early on, he seemed to make a
22 statement that said it might have been curable if it had
23 been discovered in 2009, but later on, he clarified it to
24 say he couldn't tell?

25 MS. CRAIG: He said a year later, and that

1 would be -- let's say 2009, but he says a year later
2 invasive but not detectable metastatic disease, therefore
3 curable.

4 So he's referring to 2009, but, yes, sir,
5 later in his deposition he flips, and then he says, I
6 can't tell you one way or the other.

7 So we have two inconsistent parts of the
8 deposition. So what I'd like to do is ask him that
9 question, and then he's going to say something opposite
10 now, and I would like to impeach him, based on page 24 of
11 his testimony.

12 THE COURT: How would y'all like to respond?

13 MS. PERKINS: Your Honor, the quote on page
14 24 is him deciphering his notes. He goes on a few
15 sentences later and says, I will explain this in more
16 detail.

17 As the questions progress, the specific
18 question was asked regarding 2009, and he says: We can
19 speculate, but I don't think there is any way I can say
20 whether she was or was not curable in 2009 with the
21 information that I have.

22 The following page, he said: I don't think
23 there is any way honestly that we can say one way or the
24 other whether she was or was not curable in the middle,
25 April 2009.

1 Your Honor, again, Ms. Craig, before she
2 comes into court with an affirmative defense, if she has
3 the burden of proof in showing, she has the burden of
4 showing to a reasonable degree of medical certainty that
5 a 2009 diagnosis would have made the difference. She
6 can't show that. There is no testimony whatsoever to a
7 reasonable degree of medical certainty, and the only
8 expert she's relying on says it's speculation.

9 Your Honor, that is not scientific medical
10 proof of causation acceptable in any court in this state.
11 We can't go into court and throw around allegations in
12 something so serious as accusing the plaintiff in this
13 case of being the master of her own demise based on
14 speculation, and I think it would be highly inappropriate
15 to allow a cross-examination aimed at somehow proving a
16 defense that she has the burden of proof on, and we know
17 now this man is not going to say to a reasonable degree
18 of medical certainty there is causation.

19 He has already committed that it is
20 speculation, and I think it would simply be not in
21 accordance with the law and the burden of proof that is
22 established in this state to bring this defense in,
23 simply to prejudice the jury.

24 THE COURT: You don't have any experts that
25 will say anything more definitive, of yours?

1 MS. CRAIG: Your Honor --

2 THE COURT: Do you have anybody that will
3 testify to a reasonable degree of medical certainty that
4 if she had gone back in 2009 it would have been detected
5 and treatable and/or curable? It would have been
6 treatable, obviously, but curable?

7 MS. CRAIG: Not our experts.

8 THE COURT: The only thing you got is Dr.
9 Villa's statement that you just gave me?

10 MS. CRAIG: Who flip-flops and says it's
11 curable, and then he says he's speculating, and I think
12 that that is prime cross-examination for us to --

13 THE COURT: Well, it's definitely impeachable
14 material, but if his opinion is ultimately not going to
15 rise to the level of reasonable degree of medical
16 certainty, which is what you have to do for causation in
17 a medical malpractice case, you don't have it.

18 All you've got is him later on saying, Oh, I
19 can't say that, and you want to be able to bootstrap on
20 an earlier statement that he made in that for impeachment
21 purposes, but you don't have any medical professional
22 willing to say, to a reasonable degree of medical
23 certainty, it would have made a difference because you
24 have the burden of proof on the counterclaim, or the
25 affirmative defense of comparative negligence, then you

1 don't have causation if you don't have somebody who is
2 willing to stand up and say, To a reasonable degree of
3 medical certainty, if she had gone back, we would have
4 found it, or somebody would have found it, and it would
5 have been curable, so --

6 MS. CRAIG: I believe I have that testimony,
7 page 24 of his deposition, where he says --

8 THE COURT: I don't think that rises to that.
9 I think you have impeachable testimony which may be able
10 to knock his down from -- I don't know of anywhere in
11 here he said reasonable degree of medical certainty -- I
12 can't say, it sounds like, is the best he was willing to
13 say, knocking his statement down from, I can't say,
14 doesn't make the opposite, Yes, I could say it would have
15 been discoverable.

16 Even if the only thing was the page 24
17 material, he doesn't anywhere say, To a reasonable degree
18 of medical certain that's my opinion.

19 I try to keep it simple as you know. I'm
20 wearing my blue socks, but I don't think you got it, so
21 I'm going to have to deny your motion to amend. Okay?

22 MS. CRAIG: Yes, sir.

23 THE COURT: Now, before we go through all of
24 these other things that you have, that's a pretty
25 important ruling. If you're going to appeal, let me

1 know, and we can stop and you can go take it up on
2 appeal.

3 MS. CRAIG: Before I make that decision,
4 could we get a ruling on the statute of limitations?

5 THE COURT: Well, I think we already, in
6 essence, talked about that, and my feelings are it wasn't
7 discovered until 2010, and that's when she was on notice,
8 so that's when the statute of limitations began to run,
9 so I would deny your motion to amend to raise that as
10 well.

11 MS. CRAIG: Okay. Your Honor, for -- in
12 terms of appeal, I need to discuss that with my clients.

13 THE COURT: Well, it affects how I'm going to
14 spend the rest of my day. The rest of the motions, I'll
15 go through them if we're going to go through with the
16 trial on Monday, but if you're going to file an appeal
17 this afternoon or tomorrow, well, some of these are
18 things that can work themselves through by you -- after
19 you get an answer one way or another from the Court of
20 Appeals, you know, like we want you to answer
21 discovery -- I don't remember whether it was you or they
22 that filed a request for admissions. They want them
23 answered by tomorrow.

24 MS. CRAIG: That was not me.

25 THE COURT: I can't recall, but stuff like

1 that, so you want to take a few minutes and decide if
2 that's what you want to do?

3 MS. CRAIG: I think we've made the correct
4 record, and you'll let me proffer what I want to for
5 purposes of appeal.

6 We do have appellate counsel in the office.
7 I want to make sure I have done everything to preserve, I
8 think that I have, for an appeal, if necessary, at a
9 later time. I don't think -- I don't want to do anything
10 to postpone this trial. Everybody is ready to have it
11 tried, but --

12 THE COURT: Okay. I wasn't sure if you were
13 going to -- I guess what I was asking you is some people
14 would say, We think that's pretty important, and we think
15 you're wrong, so they're going to appeal.

16 It doesn't hurt my feelings. You're doing
17 your job, so if you're going to do that, then I would
18 just rather not deal with all these other motions because
19 that means we're not going to have a trial on Monday.

20 But if you're going to say, Well, I think you
21 were wrong, respectfully, and all that other nice,
22 flowery language and you we'll deal with that on appeal
23 if we need to, then that's another thing.

24 MS. CRAIG: I do have my clients here.

25 THE COURT: Sure. Why don't I give you ten

1 minutes.

2 (Recess taken.)

3 THE COURT: All right. What did you decide?

4 MS. CRAIG: Well, Your Honor, before I get to
5 that, I understand Your Honor's ruling with comparative,
6 with the statute of limitations. I just want to make
7 sure my record is clear. The other expert of the
8 plaintiff is Dr. Chinitz.

9 THE COURT: That's the first time I've heard
10 this name. We just talked about Villa.

11 MS. CRAIG: Villa is an oncologist. Chinitz
12 is a radiologist, and her testimony was when asked, Do
13 you believe that a screening mammogram of April 2nd, 2009
14 would have diagnosed cancer or would have been suspicious
15 for cancer?

16 Her answer, on page 75, line one, was yes.

17 THE COURT: Okay.

18 MS. CRAIG: And the question was: Are you
19 critical she did not return the following year?

20 And her answer was: She should have. You
21 know, if you're going to have annual mammograms, you
22 should return.

23 So on that basis as well, Your Honor, we
24 would argue that the statute of limitations begins to run
25 in 2009 as opposed to 2010 because the standard is when

1 it was discovered or should have been discovered by
2 reasonable diligence, and their own expert concedes that
3 she should have returned for the follow-up mammogram in
4 2009, did not, and it's critical of her not doing so.

5 THE COURT: Do you want to respond?

6 MS. PERKINS: Again, the line of questioning
7 is on the recommendation. The recommendations are for
8 women over age 40. Leanna Loud was not 40. Leanna Loud
9 was 39 and a few months. She didn't even fall within the
10 one-year annual recommended mammogram screening
11 recommendations, and, again, this statute of limitations
12 is knew or should have known.

13 I just don't think you can start a failure to
14 diagnose cancer case backing up on speculation of when
15 you should have done -- you don't know you have cancer
16 until you have cancer. Their own experts said the cancer
17 isn't there until you're diagnosed. She had no way to
18 file a complaint in 2009. I think this is stretching it
19 incredibly beyond statute of limitations law, and, again,
20 all of this has been known the entire case, and we are
21 two weeks before trial.

22 THE COURT: Two days.

23 MS. PERKINS: Well, the motion was filed two
24 weeks.

25 THE COURT: All right. Do you want to

1 respond to what she just said?

2 MS. CRAIG: Sure. Her date of birth is
3 November 6, 1968. She was 40 years old in 2009, and the
4 testimony of their own expert is that she would have --
5 they would have diagnosed cancer in 2009 and that she
6 should have gone for annual mammography. She should have
7 returned.

8 That is their own expert, that is 2009, and
9 we contend that's when the statute began to run because
10 if she was exercising reasonable diligence, she would
11 follow the recommendation to have the annual mammograms
12 since she was over the age of 40.

13 And, by the way, she's a nurse. We're not
14 dealing with people -- someone that doesn't know. She's
15 a nurse that worked for the medical university for a
16 certain time, then went to the VA, and then went back to
17 the medical university. She knows. Every woman over 40
18 knows you're supposed to get a mammogram.

19 THE COURT: Well, I'm hearing that
20 recommendation is somewhat up for debate within the
21 medical community.

22 MS. CRAIG: No, sir.

23 THE COURT: Didn't I hear two years is now
24 being considered the norm? Whatever it is, I think to
25 bootstrap that recommendation in to a knew or should have

1 known argument, that's a little bit tenuous. I'm not
2 sure that it's even within the spirit of what should have
3 known.

4 I would think that they should have known
5 would be didn't you -- you know, if you felt bad or a
6 felt a lump in your breast, or whatever, then that's
7 what -- should have known, I believe, means that
8 something that put you on notice that you had something
9 wrong with you and should have done something about it
10 and not waited longer, is what I think the law requires,
11 not that there was this, you know, AMA recommendation
12 that you get an annual breast examination once you hit a
13 certain age.

14 So I'm still denying it, but if that's what
15 you needed to put on for the purposes of your record, you
16 have done so.

17 MS. CRAIG: Thank you.

18 THE COURT: All right.

19 MS. CRAIG: I tried to contact our appellate
20 lawyer. I apologize, Your Honor, but I have not been
21 able to get in touch with him. My office is trying to
22 find her. I know that there are a lot of motions and
23 that Your Honor would rather not, and it makes sense, go
24 through them all if we're going to file an appeal.

25 Your Honor, I just need -- in order to

1 properly advise my clients, I've got to get that advice
2 and talk to her. Would it be possible for us to
3 reconvene with Your Honor tomorrow, if --

4 THE COURT: We could do it later this
5 afternoon, if that -- I've got this afternoon free, and
6 it's almost lunchtime, so what if we just came back at
7 1:30, and by then you would have an answer, presumably.

8 There are some motions that -- some appeals
9 that you can take and some you can't. I can never
10 decide -- I can never keep it all straight which are
11 interlocutory, and this seems to affect the mode of
12 trial, so it seems to me that it's one of those that
13 could be appealable, but that's not my deal, so I'll give
14 you till -- how about we reconvene at 1:30, and if you
15 guys say you want to appeal, you appeal, and, if not,
16 we'll work our way through the rest of them.

17 MS. CRAIG: I would appreciate that.

18 THE COURT: Okay. See you at 1:30.

19 (Recess taken.)

20 A F T E R N O O N S E S S I O N

21 THE COURT: All right. We got everybody
22 back?

23 MS. CRAIG: Yes, sir.

24 THE COURT: Okay. What did you decide?

25 MS. CRAIG: Your Honor, we will be filing a

1 notice of appeal with regards to the statute of
2 limitations.

3 May I add some additional information for the
4 record?

5 THE COURT: Okay.

6 MS. CRAIG: I would like to file with the
7 Court the original deposition transcripts of Dr. Chinitz.
8 I've already referenced Dr. Chinitz's testimony earlier
9 for Your Honor with regard to her testimony that the
10 cancer was diagnosable in 2009 and that the patient
11 should have returned for a mammogram in 2009.

12 I'd like to add the deposition of
13 Dr. Woodruff, another expert of the plaintiff, who
14 testified that it was diagnosable in 2009, and also the
15 deposition transcript of Dr. Villa, the plaintiffs'
16 expert, saying it was diagnosable in 2009 and she should
17 have returned for a screening mammogram, as well as the
18 deposition of our expert, Dr. Newberry, who testified
19 that it was diagnosable in 2009.

20 Your Honor, in doing the legal research we
21 could in the limited time we had, we found case law to
22 say that a motion to amend, the denial of the motion to
23 amend to add affirmative defense, is not immediately
24 appealable, so we're not going to file a notice of appeal
25 for the comparable claim. The problem is is the statute

1 of limitations is outcome determinative. We could find
2 no case law in South Carolina that said whether it was
3 immediately appealable or not when the statute of
4 limitations defense is denied.

5 We couldn't find anything in South Carolina
6 or in the Fourth Circuit. We did find a Pennsylvania
7 case, Horowitz vs. Universal Underwriters Insurance, that
8 did say the statute of limitations defense, the denial of
9 that as an affirmative defense, is immediately
10 appealable.

11 Based on that information, we have advised
12 our client that it is in his best interest, because it is
13 outcome determinative, to file a notice of appeal with
14 regard to the statute of limitations defense.

15 THE COURT: Okay. Anything y'all want to
16 say?

17 MS. PERKINS: Your Honor, if they're going to
18 file, they'll file. Our research indicates it's not
19 appealable, and I think at this stage, a great deal of
20 money has been spent.

21 Our client is dying. This may be her only
22 opportunity to go to trial. There has been no hint of
23 statute of limitation defense until two weeks before
24 trial when it was actually filed. It was -- every single
25 fact regarding this case that they're claiming has been

1 known since the case was filed. This is all based on
2 medical records. The experts were deposed 2014 and early
3 2015, and to stop the trial now on this basis, I think,
4 is frivolous.

5 THE COURT: Well, you know, I don't know
6 whether it is or it isn't. I know my law clerk did some
7 research and came up with the same law that Ms. Craig did
8 about motion to amend on the comparative negligence, but
9 I think it's perhaps a novel issue on the statute of
10 limitations.

11 It certainly seems to be one of those things
12 that is outcome determinative, but I imagine they're
13 going to file an appeal either this afternoon or
14 tomorrow, and then y'all can argue to Court of Appeals
15 that this needs to be dismissed and dismissed right away
16 because it's interlocutory, and, if they agree with you,
17 come back, and we'll get you another trial date as soon
18 as we can.

19 All right? There is really no reason to do
20 the rest of the motions today, so just keep us informed,
21 and when y'all hear something, I'm sure I'll hear
22 something.

23 MS. PERKINS: One further request: Since the
24 record has been supplemented here at the hearing, none of
25 these depositions were filed with the motion. Could we

1 have till the end of the day, if we chose to supplement
2 the record as well?

3 THE COURT: Sure.

4 MS. PERKINS: Just to cover ourselves?

5 THE COURT: Fair enough. Okay? All right.

6 MS. CRAIG: Thank you, Your Honor.

7 THE COURT: Thank you.

8 - - -

9 (Whereupon, the proceedings were concluded.)

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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 27th of August.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 3, 2015

Amanda K. Haffenden

Circuit Court Reporter

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PALMER FREEMAN, JR.

October 12, 2015
Reply to Columbia

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29211

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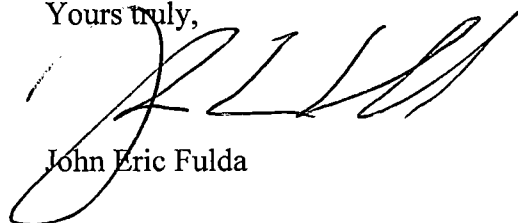
RE: Leanna Loud v. Jeffrey Short, M.D.
Appellate Case No.: 2015-001853

Dear Ms. Kitchings:

Enclosed for filing is the original and seven (7) copies of the Respondents' Motion for Sanctions and Costs in the above matter. Also, enclosed is the original and seven (7) copies of the Affidavit of John Eric Fulda to be filed in support of the Motion. We would greatly appreciate your filing the same and returning to us the file-stamped extra copies. As shown by the Certificate of Service, these documents are being served on counsel for the Appellants via email as well as by U.S. Mail.

We appreciate your consideration in this matter. With kind regards, I am

Yours truly,



John Eric Fulda

JEF:lrc
Enclosures

cc: Mary Agnes Craig, Esquire
Deborah Harrison Sheffield, Esquire
Brian Edward Johnson, Esquire
Caroline Rinehart Niland, Esquire
David L. Savage, Esquire
J. Rutledge Young, III Esquire