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May 7, 2012

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MAY 07 2012
SC Court of Appeals

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: Sean Fay, et al. v. Grand Strand Regional Medical Center, LLC, dba South
Strand Ambulatory Care Center, et al.
Case Nos. 2008-CP-26-9047 and 2008-CP-26-9368
SC Court of Appeals Case Tracking No. 2010167127
Our File No. 00458/01554

Dear Ms. Kitchings:

Enclosed please find an original and one copy of Initial Appellant's Brief of Appellant/Respondent Grand Strand Regional Medical Center, LLC, d/b/a South Strand Ambulatory Care Center in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, we are hereby serving opposing counsel.

Very truly yours,



Michael J. Anzelmo

MJA:jlee
Enclosures

cc: Ruskin C. Foster, Esquire	J. Boone Aiken III, Esquire
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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MAY 07 2012

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

SC Court of Appeals

Case No. 2008-CP-26-9047 and 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 Stephen
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 Appellant's Brief of Appellant/Respondent Grand Strand Regional Medical
Center, LLC, d/b/a South Strand Ambulatory Care Center**

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Statement of Issues on Appeal

- I.** The trial court committed reversible error when it charged the jury that Grand Strand owed an “absolute duty” of care to Plaintiff Fay.

- II.** The trial court committed reversible error by excluding evidence of Husband’s extramarital affair.

Statement of the Case and Facts

This appeal involves a wrongful death action brought by Respondent/Appellant Sean D. Fay, as Personal Representative for the Estate of Kelly L. Fay, Deceased ("Plaintiff Fay" in reference to Kelly L. Fay and her estate, and "Husband" in reference to Sean D. Fay) against Appellant/Respondent Grand Strand Regional Medical Center, LLC d/b/a South Strand Ambulatory Care Center ("Grand Strand"), Stephen W. Law, D.O. ("Dr. Law"), Richard Young, M.D. ("Dr. Young"), and Grand Strand Urology, LLP ("Grand Strand"). {Amended Complaint filed November 3, 2008; R. ___}.

On Saturday, January 26, 2002, Plaintiff Fay began experiencing intense pain on the lower right flank of her body and abdomen. {Transcript p. 519; 520; 665; 1261-62; Emergency Room Chart from Grand Strand p. 4; R. ___}. Plaintiff Fay had experienced pain associated with a kidney stone prior to this event and believed the pain to be similar in nature. {Transcript p. 166; 214-15; 216; 225; 279; 1265; Emergency Room Chart from Grand Strand p. 4; R. ___}. As a result, Plaintiff Fay presented to the emergency room at Grand Strand for medical care. {Transcript p. 216; 280; R. ___}. Husband accompanied her to the emergency room. {Transcript p. 216; R. ___}. At 8:04 a.m., four minutes after her arrival, Dr. Law began his exam of Plaintiff Fay. {Transcript p. 217; Emergency Room Chart from Grand Strand p. 6; R. ___}. At that time, Plaintiff Fay complained of pain and mild nausea but denied any vomiting, fever, or chills. {Transcript p. 225; 284; 310; 314-15; 1264; 1265; 1267; Emergency Room Chart from Grand Strand p. 4; R. ___}. She described her pain at that time as eight on a scale to ten. {Transcript p. 1261; Emergency Room Chart from

Grand Strand p. 4; R.____}. Dr. Law treated the pain with pain medication. {Transcript p. 251; 300; R.____}. While still in the emergency room, Plaintiff Fay later reduced her level of pain to a four or five out of ten. {Transcript p. 1270; Emergency Room Chart from Grand Strand p. 4; R.____}.

Dr. Law's examination revealed moderate to severe flank tenderness on the right side of Plaintiff Fay's abdomen. {Transcript p. 1270; Emergency Room Chart from Grand Strand, p. 4; R.____}. The examination also noted Plaintiff Fay did not have a fever, as her temperature was 98.1 degrees. {Transcript p. 1268; Emergency Room Chart from Grand Strand p. 4, 6; R.____}. Plaintiff Fay's vital signs were stable as of 10:20 a.m. {Id.; R.____}.

Given Plaintiff Fay's history of a kidney stone, Dr. Law ordered a KUB x-ray to examine the flat plate of Plaintiff Fay's abdomen, and, in particular, the kidneys, ureters, and bladder. {Transcript p. 283; 298; 1273; 1277; Emergency Room Chart from Grand Strand p. 4; R.____}. The x-ray revealed a moderate sized kidney stone in the right kidney. {Transcript p. 299; 1275; 1278; Emergency Room Chart from Grand Strand p. 4; R.____}. A CT scan indicated a 0.5 centimeter diameter stone in the ureter of the right kidney. {Transcript p. 283; 1278; 1280; Emergency Room Chart from Grand Strand p. 4; 10; R.____}. Dr. Law ordered a urinalysis to check for potential infection. {Transcript p. 299; 1278; R.____}. That test returned normal results with no blood, white blood cells, nitrites, or bacteria in the urine. {Transcript p. 300; 1274; R.____}. Ultimately, Dr. Law diagnosed Plaintiff Fay with a kidney stone in the ureter

of the right kidney.¹ {Transcript p. 299; 1278; Emergency Room Chart from Grand Strand p. 4; R. ____}. Plaintiff Fay was then discharged. {Transcript p. 303; 636; 1286-87; R. ____}.

Prior to discharge, Dr. Law dictated that:

I did explain to the patient, however, that if her pain becomes out of control or if she has increasing nausea, vomiting, any fevers or chills, that she is to return to the emergency department immediately.

{Transcript p. 303-04; 1288; Emergency Room Chart from Grand Strand p. 5; R. ____}.

Additionally, the written discharge instruction signed by Plaintiff Fay stated:

See your doctor for follow-up or as advised. Call or go to the Emergency Room right away if you develop fever, or intense pain, or repeated vomiting. . . . If you do not continue to improve, or if your condition worsens, please call your doctor or the Emergency Room right away so you can be examined.

{Written Discharge Instructions from Grand Strand; R. ____}.

Upon discharge, Plaintiff Fay returned home with Husband. On Sunday morning, January 27th, Plaintiff Fay developed an elevated fever of 101.3 to 101.6 degrees, severe chills, nausea, and vomiting. {Transcript p. 240; 241; 242-43; 304; 318-19; 320; 327; R. ____}. Despite these symptoms being in line with the oral and written discharge instructions, Plaintiff Fay did not return to the emergency room. {Transcript p. 245; 288-89; 321; R. ____}. Further, Husband was home on Sunday watching football, updating his blog, and visiting with friends, but he did not take

¹ Prior to discharge of Plaintiff Fay, Dr. Law discussed the matter with Dr. Young, the on-call urologist. Dr. Young requested to see Plaintiff Fay on the morning of Monday, January 28th. {Transcript p. 254; 310; 1195; 1286; R. ____}.

Plaintiff Fay back to the emergency room. {Transcript p. 248; 252; 289; 307; 308; R. ____}.

On Monday morning, January 28th, Husband called Dr. Young to schedule the follow-up appointment for 3 p.m. that day. {Transcript p. 254; 290; R. ____}. Again, Plaintiff Fay did not return to the emergency room at that time. Husband then left for work. {Transcript p. 256; R. ____}. Husband called home three times to check on Plaintiff Fay, but she failed to answer the calls. {Transcript p. 257; R. ____}. At approximately, 2 p.m. Husband returned home to find Plaintiff Fay in distress and unresponsive. {Transcript p. 257-58; R. ____}. EMS responded to the Husband's call to find Plaintiff Fay on the floor, hot to the touch, with shallow rapid breathing. {EMR Report p. 2; R. ____}. The EMS report notes that Husband reported Plaintiff Fay had a fever of 101 degrees that began the night before. {Id.; R. ____}.

EMS transported Plaintiff Fay to the emergency room. {Id. at p. 1; R. ____}. Her temperature was noted to be 105 degrees. {Transcript p. 489; R. ____}. After arriving at the emergency room, Plaintiff Fay went into cardiac arrest and passed away. {Transcript p. 490; R. ____}. The autopsy revealed Plaintiff Fay died of overwhelming clinical sepsis. {Transcript p. 490; 871; R. ____}.

Husband initiated this wrongful death action as personal representative for Plaintiff Fay's estate. {Amended Complaint filed November 3, 2008; R. ____}. The matter proceeded to trial. At trial, Plaintiff Fay contended that Grand Strand and Dr. Law deviated from the accepted standard of care by failing to take her temperature prior to her discharge. Plaintiff Fay's experts focused on this discharge temperature as the deviation from the standard of care. {Transcript p. 687; 755; 769; 976; 978; 1094-

95; 1103; R.____}. This discharge temperature argument became the key liability issue as to Grand Strand. Plaintiff Fay framed the case to the jury around this issue. In the opening, counsel argued that “[n]obody ever took her temperature again You will hear expert testimony, testimony coming from the stand, from our doctors, that that is not good enough, that just doesn’t cut it” {Transcript p. 139; R.____}. He continued:

You will hear from the stand, you will hear from our experts what the standard of care is to rule out infection, to make sure, to make absolutely positive that you—as positive as you can be, that before you send somebody home with a kidney stone they don’t have a fever or an infection. A fever is only important because it’s a sign of infection, okay, and that’s why you’ve got to know.

{Transcript p. 140; R.____}. In closing, counsel again put this issue directly to the jury, stating:

A fever, or an infection and kidney stone is a true urologic emergency, and the patient should be taken to the O.R. and emergently treated Once you figured that out, I mean, common sense tells you that you don’t take a temperature on somebody when they come into the hospital when you know a fever and a kidney stone is an emergency, and then send them home without ever taking their temperature again.

{Transcript p. 1840; R.____; see also Transcript p. 1841; R.____}. The jury heard that “the facts we do have is that nobody took her temperature again. It didn’t cost anything. It wasn’t hard. It was a simple thing to do. Nobody ever took her temperature again, except for Sean when he got her home.” {Transcript p. 1847; R.____}. Additionally, the jury heard that:

[A]nd this is very important, ladies and gentlemen. I hate to put another—I hate to put this back up. You’ve seen this thing too many times already, but this is very

important. Not only was what they did a breach of the standard of care, what a normally prudent nurse or physician would do, but it was also a breach of their own internal policy, their own internal policy. Abdominal patients will have a minimum of two vital signs recorded You can't take one temperature and say, well, that temperature is good forever.

{Transcript p. 1850-51; R. ____}. This re-enforcing of the deviation of the standard of care by failing to take the discharge temperature continued thorough closing. {Transcript p. 1852-1856; R. ____ (“the only common sense conclusion I think you can come to is they're rolling the dice with her life. That's exactly what they did by not taking her temperature. They rolled the dice and they lost.”)}. The trial court recognized this was the key issue as well. {Transcript p. 1821; R. ____}.

During trial, Plaintiff Fay sought to exclude any evidence of Husband's extramarital affair that took place during the marriage. {Transcript 66-69; R. ____}. Grand Strand opposed the exclusion of the evidence of the affair. {Transcript p. 70-71; R. ____}. Grand Strand argued such evidence was relevant to the issue of damages, and, in particular, the loss of companionship element of damages for a wrongful death action. {Transcript p. 71; R. ____}. The trial court noted that “[t]his issue of an affair really goes to damages . . . and whether or not the loss of the spouse is as great as one may perceive that it is.” {Transcript p. 191; R. ____}. Despite this finding, the trial court excluded the evidence of the affair. {Transcript p. 192; R. ____}.

Ultimately, the trial court submitted the issue of Grand Strand's liability to the jury. The trial court's jury charge on the standard of care applicable to Grand Strand stated:

I further charge you under South Carolina law that a hospital has an absolute duty to provide competent

medical care in its emergency room and this duty cannot be delegated to someone else.

{Transcript p. 1929, R. ____}. Grand Strand objected to the charge, arguing it improperly elevated the standard of care owed to Plaintiff Fay. {Transcript p. ____; R. ____}. After objection, the trial court found the absolute duty charge was proper. {Transcript p. 1954, 1956; R. ____}. The jury returned a verdict of \$3 million dollars against Grand Strand and Dr. Law. {Judgment and Verdict Form; R. ____}. The trial court reduced the verdict to \$2.88 million based on the jury's finding of comparative fault against Plaintiff Fay. {Id.; R. ____}.

Thereafter, Grand Strand timely sought, *inter alia*, a new trial absolute because the trial court improperly charged the jury on the seminal standard of care issue and improperly excluded evidence of Husband's affair. {Grand Strand's Post-Trial Motion; R. ____}. The trial court denied these motions. {Order denying post-trial motions; R. ____}. This appeal followed. {Notice of Appeal; R. ____}.

Argument

The trial court committed reversible error. First, the trial court erred by incorrectly elevating the standard of care owed by a hospital, such as Grand Stand, in its charge to the jury. Second, the trial court committed reversible error by excluding evidence of Husband's extramarital affair that was relevant to the issue of damages and loss of companionship. Both errors warrant reversal and remand for a new trial absolute.

I. The trial court committed reversible error when it charged the jury that Grand Strand owed an “absolute duty” of care to Plaintiff Fay.

The jury charge in this matter improperly elevated the standard of care owed by a hospital in a medical malpractice action and contradicts the law of South Carolina. Further, this matter hinged exclusively on the standard of care owed to Plaintiff Fay. By incorrectly charging the jury on the seminal issue, the charge forced the jury to apply a legally deficient standard to the facts, and, thus, Grand Strand suffered prejudice from the erroneous charge. This Court should reverse and grant a new trial absolute.

The trial court must charge only the current and correct law of South Carolina when instructing the jury. Dixon v. Ford, 362 S.C. 608, 619, 608 S.E.2d 879, 882 (Ct. App. 2005). The trial court has a duty to give a charge that correctly states the law applicable to the issues and evidence. Id. An appellate court will reverse the trial court’s jury charge when the trial court commits an abuse of discretion. Berberich v. Jack, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011). An abuse of discretion occurs when the trial court’s decision is based on an error of law or is not supported by the evidence. Id. A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error when the erroneous charge affects the outcome of the trial. Id. The erroneous charge must also cause prejudice to the appealing party. Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). The erroneous charge given satisfies these considerations. The charge failed to convey the current and correct law as set forth by our Supreme Court and affected the outcome of the trial, prejudicing Grand Strand.

First, the charge constituted error. Grand Strand's liability in this matter depended entirely on the applicable standard of care owed to Plaintiff Fay. The seminal issue was whether the applicable standard of care required Grand Strand to take Plaintiff Fay's temperature prior to discharge from the emergency room. The trial court recognized this was the key issue, noting that "you are embroiled in a tremendous battle over whether or not the failure to take her temperature was negligence to begin with" {Transcript p. 1821; R. ____}. The trial court further recognized that "this is the battleground of the case and that is the issue for the jury" {Transcript p. 1822, R. ____} (emphasis added). Thus, it was critical for the jury charge to correctly convey the law for the jury to apply to these facts because Grand Strand's liability hinged on this standard of care issue. The trial court did not charge a correct statement of law related to the hospital's standard of care.

The charge given on this seminal issue stated:

I further charge you under South Carolina law that a hospital has an absolute duty to provide competent medical care in its emergency room and this duty cannot be delegated to someone else.

{Transcript p. 1929, R. ____}. After objection, the trial court found the absolute duty charge was proper:

Plaintiff Fay's Attorney: Simmons v. Tuomey, we think that's good law, Your Honor, and that a hospital does have an absolute duty to provide competent medical care in its emergency room

Court: All right. The Court found those were appropriate and applicable under the facts of the case and decided to charge those.

{Transcript p. 1954, 1956; R. ____}.

This charge was error for several reasons. It incorrectly elevated the standard of care owed by a hospital in a medical malpractice action in contravention of South Carolina law. The charge elevated Grand Strand to a guarantor of the care provided in its emergency room, requiring the jury to impose liability. A hospital does not owe an **absolute duty** to provide competent medical care in an emergency room.

The Supreme Court has specifically rejected the notion that a hospital owes an absolute duty to provide competent medical care in its emergency room. The Court of Appeals created this absolute duty standard of care in Simmons v. Tuomey Regional Medical Center, 330 S.C. 115, 119-20, 498 S.E.2d 408, 410 (Ct. App. 1998), commonly known as Simmons I. However, the Supreme Court explicitly *reversed* this holding of Simmons I in Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000), commonly known as Simmons II.

Simmons presented the novel question of whether a hospital could be liable for the medical malpractice of emergency room physicians hired as independent contractors rather than hospital employees. Simmons II, 341 S.C. at 35, 533 S.E.2d at 314. In first deciding this question, the Court of Appeals held that hospitals “have a nondelegable duty to provide competent emergency room services,” and, as such, would be liable for the medical malpractice of its independent contractor physicians that provide the medical care. Simmons I, 330 S.C. at 119-20, 498 S.E.2d at 410. Notably, the Court of Appeals found this newly established rule “created an absolute

duty for hospitals to provide competent medical care in their emergency rooms.” Id. at 122, 498 S.E.2d at 411.²

The Supreme Court granted certiorari to review the Court of Appeals’ decision. The court analyzed the nature of the agency relationship between the hospital and the independent contractor emergency room physicians. Simmons II, 341 S.C. at 39-44, 533 S.E.2d at 316-318. The court ultimately agreed with the Court of Appeals that hospitals can be liable for the medical malpractice of its independent contractor physicians. Id. at 44, 533 S.E.2d at 318. That, however, did not end the analysis. Id. The court then analyzed the Court of Appeals’ decision to impose an absolute duty on hospitals. Id. at 50-51, 533 S.E.2d at 322. The Supreme Court reversed the imposition of an absolute duty for hospitals to provide competent medical care in their emergency rooms. Id. The Supreme Court unequivocally “concluded it is not necessary, as the Court of Appeals did in the case at hand, to impose an *absolute nondelegable duty on hospitals.*” Id. at 50, 533 S.E.2d at 322 (emphasis in original).³

Thus, the trial court failed to charge the correct law related to the standard of care.⁴ Instead, the charge instructed the jury with outdated and obsolete law that had

² The charge given by the trial court here restates, almost verbatim, the absolute duty holding of Simmons I.

³ Rather than imposing an absolute duty, the Supreme Court adopted the test espoused in Restatement (Second) of Torts § 529. Simmons II, 341 S.C. at 51, 533 S.E.2d at 322.

⁴ Absolute or elevated standards of care are disfavored in South Carolina. Our appellate courts have rejected a trial court’s imposition of an absolute or elevated standard of care in other instances. See Rogers v. Norfolk Southern Corp., 356 S.C. 85, 588 S.E.2d 87 (2003) (rejecting claim that an employer has an absolute duty to provide employees with a safe work environment); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) (recognizing that a physician owes a patient a duty of care regarding confidential information but noting that duty is not absolute); Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001) (rejecting claim that handicapped Accessibility Act created a heightened duty of care above that normally owed by merchants to all disabled customers).

been explicitly reversed by the Supreme Court. This error of law affected the trial because it forced the jury to apply a legally deficient charge to the determinative issue of Grand Strand's liability. As a result, this Court should find the jury charge constitutes reversible error.

Second, Grand Strand suffered prejudice as a result of the elevated standard of care erroneously charged to the jury. The erroneous jury charge related to the seminal issue before the jury. Both this Court and the Supreme Court have held that a charge error is per se prejudicial when the charge relates to a seminal issue before the jury.

In Ellison v. Parts Distributors, Inc., 302 S.C. 299, 302, 395 S.E.2d 740, 741 (Ct. App. 1990), this Court held an error in charging the jury causes prejudice when the error relates to the key liability issue before the jury. This Court recognized the seminal issue was whether the circumstantial evidence presented at trial sufficiently established whether payment had been made. Ellison, 302 S.C. at 301-02, 395 S.E.2d at 741. Appellant argued the trial court's failure to charge the jury that circumstantial evidence could be used to establish payment was prejudicial and required reversal. Id. at 302, 395 S.E.2d at 741. This Court agreed and held prejudice resulted from the erroneous charge on the seminal issue, noting "[i]t was critical that the jury be instructed on circumstantial evidence" given the nature of the issue in the case. Id.

Our Supreme Court reaffirmed this rationale in State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298 (2002). There, the court relied on Ellison to hold that a jury charge error related to the dispositive issue before the jury prejudices the appellant and warrants reversal. Burkhardt, 350 S.C. at 264-265, 565 S.E.2d at 304 (holding "the

trial judge's failure to properly instruct the jury on [the seminal issue] to be prejudicial, warranting reversal").

This matter is analogous to Ellison and Burkhart. Whether Grand Strand breached the standard of care was the determinative liability issue before the jury. Thus, it was "critical that the jury be instructed on" the proper standard of care applicable to Grand Strand. However, the trial court failed to instruct the jury with the correct and current law to apply to this critical issue. Rather, the trial court provided the jury with an outdated and obsolete instruction to determine Grand Strand's liability. Such error prejudiced Grand Strand's ability to receive a fair verdict based on the correct law from the jury. This Court should find reversible error and remand for a new trial absolute.

II. The trial court committed reversible error by excluding evidence of Husband's extramarital affair.

There was evidence of Husband's affair during the marriage, which was relevant to the issue of damages and loss of companionship. The trial court excluded the evidence. The jury should have been able to weigh the affair in its deliberations. The exclusion prejudiced Grand Strand. Thus, the trial court abused its discretion by excluding this evidence. This Court should reverse and remand for a new trial absolute.

Evidence is relevant and admissible if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. See Rules 401, 402, SCRE. This Court reviews the trial court's decision regarding the admission or exclusion of

evidence under an abuse of discretion standard. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 375 (2005). An abuse of discretion occurs when the trial court improperly excludes relevant evidence to the prejudice of the appellant. Id. at 484-85, 623 S.E.2d at 378.

Here, Grand Strand sought to admit evidence of Husband's extramarital affair. Grand Strand argued such evidence was relevant to the issue of damages, in particular, the element of loss of companionship. {Transcript p. 71; R. ____}. The trial court noted that "[t]his issue of an affair really goes to damages . . . and whether or not the loss of the spouse is as great as one may perceive that it is." {Transcript p. 191; R. ____}. Despite this finding, the trial court ultimately excluded the evidence of the affair. {Transcript p. 192; R. ____}. This was error.

The evidence of the affair was directly relevant to the issue of damages. A key question before the jury was whether Husband was entitled to damages for loss of companionship, and, if so, what amount was proper. The trial court instructed the jury that damages potentially included loss of companionship. {Transcript p. 1940-41}. The excluded evidence related directly to this issue. The jury could have viewed the affair evidence as proof that Husband did not value Plaintiff Fay's companionship during the marriage, and, as a result, valued Husband's loss of companionship accordingly. The jury could have declined to award damages for this element, or awarded damages in a smaller amount. However, the trial court's ruling precluded the jury from considering the affair at all. Thus, the exclusion of the evidence of the affair influenced the jury verdict and precluded the jury from properly analyzing and

weighing the affair in rendering its verdict. This Court should reverse and remand for a new trial absolute.

This Court's previous precedent provides an analogous situation and illustrates why exclusion of such evidence constitutes reversible error in a wrongful death action. In Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991), appellant claimed the trial court improperly allowed evidence of the surviving spouse's prior guilty plea to a criminal charge of marijuana possession—a guilty plea regarding which the surviving wife had no knowledge—to reach the jury. Vereen, 306 S.C. at 430, 412 S.E.2d at 430. The surviving wife argued the criminal charge was irrelevant in the wrongful death action. Id. This Court disagreed and found such evidence was relevant to the issue of loss of companionship. The wife had testified the couple had a close relationship, that “they talked about everything, and he [the decedent] was in no trouble.” Id. The Court held that:

[T]he existence of [surviving spouse's] guilty plea . . . could have been viewed by the jury as evidence that [surviving spouse] and his wife were not as close as she claimed. Such evidence was relevant to the issue of damages.

Id. This rationale applies to this matter.

As in Vereen, the issue of wrongful death damages was before the jury. The jury was apprised of the marital relationship and that Husband testified that he loved Plaintiff Fay. {Transcript p. 131; 154; 257; R. ___}. However, the jury was not presented with the contrasting evidence of the affair. As this Court found in Vereen, the jury could have viewed the affair as evidence that Husband did not value the companionship of Plaintiff Fay, or did not value it as much as he claimed, despite his

testimony to the contrary. Thus, as in Vereen, this evidence was relevant to the issue of damages, particularly how the jury should value the loss of companionship element of damages.

Other jurisdictions hold such evidence is relevant and admissible on the issue of damages. See, e.g., Carroll v. Morgan, 17 F.3d 787 (5th Cir. 1994) (holding evidence of marital discord is relevant and probative on the issue of the surviving spouse's noneconomic damages in a wrongful death action); Hiatt v. U.S., 910 F.2d 737 (11th Cir. 1990) (holding such evidence is admissible on the amount of damages of the surviving spouse in a wrongful death action); Countryman v. Winnebago County, 481 N.E.2d 1255 (2d. Dist. 1985) (determining that evidence of extramarital affair by husband of which wife was aware was admissible in wife's wrongful death action because the evidence had a tendency to establish that husband's affection for wife was less than had the affair never occurred, even if the affair occurred between five and seventeen months before husband's death); Morales v. Superior Court, 99 Cal.App.3d 283 (5th Dist. 1979) (finding that evidence of extramarital sexual conduct was relevant to the nature of the personal relationship between the husband and wife, and, thus, to whether there was loss of love, companionship, society, etc. by reason of wrongful death of wife). Therefore, the trial court erred in excluding the evidence of the affair, and this Court should remand for a new trial absolute.

Moreover, the trial court erred in excluding the evidence of the affair under Rule 403, SCRE. The admission of such evidence is necessary to provide the jury the full picture of the marital relationship between the decedent and the surviving spouse. Without this evidence, the jury is forced to award loss of companionship damages based

on an incomplete understanding of the marital relationship. Courts analyzing this issue have found that the admission of evidence of an affair in a wrongful death action is not unduly prejudicial.

The Florida Court of Appeals has noted that the exclusion of such evidence “would authorize the perpetration of fraud upon the jury.” Adkins v. Seaboard Coast Line R.R. Co., 351 So.2d 1088, 1093 (Fla. Ct. App. 1977). The court noted the “importance of allowing the presentation of an honest and accurate picture of the marriage relationship between the decedent and the surviving spouse.” Id. The court held that it “cannot allow the wrongful death claimant to paint a rosy picture of the marital relationship while the defendant’s hands are bound, preventing rebuttal.” Id. The court noted that admission of such evidence does not unduly prejudice the surviving spouse because that party is afforded “many safeguards” to the admission of the affair. Id. The surviving spouse may impeach the witness or offer rebuttal evidence to counter the evidence of the affair.⁵ Id. Therefore, the court found the court was not unduly prejudicial. Id.; see also Countryman, 481 N.E.2d at 1259 (rejecting an argument that the admission of evidence of the surviving spouse’s affair was unduly prejudicial because the issue was directly relevant to the jury’s valuation of the loss of companionship damages).

The trial court’s decision to exclude this evidence allowed only a one-sided picture of the marriage to be presented to the jury in this matter. That, as recognized in the other jurisdictions referenced, is improper. Thus, this Court should reverse remand for a new trial absolute.


⁵ For instance, the Florida court allowed the surviving spouse to introduce “a moving letter” written by the decedent shortly before death that reaffirmed the love for his spouse and family. Id.

Conclusion

Based on the foregoing, this Court should find that the trial court's jury charge constituted reversible error and that the trial court improperly excluded evidence of Husband's extramarital affair. This Court should reverse and remand this matter for a new trial absolute.

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May 7, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2008-CP-26-9047 and 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, Jane Doe and
unidentified nurse employed with Grand Strand
Regional Medical Center, LLC, Stephen W. Law,
D.O., Carolina Health Specialists, Dr. Richard
Young, M.D. and Grand Strand Urology, LLP, Defendants

of whom

Richard Young M.D., Grand Strand Urology, LLP
and Stephen W. Law, D.O. are Respondents

and

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson
Mullins Riley & Scarborough LLP, attorneys for Grand Strand Regional Medical
Center, LLC d/b/a South Strand Ambulatory Care Center, do hereby certify that I have
served all counsel in this action with a copy of the pleading(s) hereinbelow specified by
mailing a copy of the same by United States Mail, postage prepaid, to the following
address(es):

Pleadings:

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