THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case Nos. 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, 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,

Of whom Stephen W. Law, D.O., is . . . . . Respondent/Appellant,
and
Of whom Richard Young, M.D., and
Grand Strand Urology, LLP are . . . . . Respondents.

INITIAL REPLY BRIEF OF RESPONDENT/APPELLANT SEAN D. FAY

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I. THE CROSS APPEAL WAS PROPERLY AND TIMELY SERVED

Dr. Young and Grand Strand Urology ("GSU") contend that Plaintiff's cross-appeal is untimely and should be dismissed. The arguments they advance, however, should not be persuasive.

As noted in the Plaintiff's Brief of Appellant, the trial court issued an oral ruling granting a directed verdict for Respondents Dr. Young and his practice, GSU, at the close of the evidence. The case proceeded against the remaining defendants and on May 27, 2010, the jury returned a verdict finding liability on behalf of Grand Strand Regional Medical Center ("Grand Strand") and Dr. Stephen Law (96% total, but assigning Grand Strand 90% and Dr. Law 6%) for the loss, and comparative negligence of 4% by the Plaintiff. The jury awarded the Plaintiff $3,000,000.00 actual damages. The verdict was enrolled for Plaintiff in the amount of $2,880,000.00.

On June 7, 2010, both Grand Strand and Dr. Law filed several post-trial motions. Dr. Law also moved to have the judgment enrolled using the percentages assigned by the jury. Plaintiff filed oppositions to all motions. On June 24, 2010, the trial court entered an order denying the motions filed by Grand Strand and Dr. Law, and both received written notice of the entry of the order on July 12, 2010. On July 21, 2010, Dr. Law filed a subsequent motion pursuant to Rule 59, SCRCP, asking the trial court to address several issues Dr. Law raised in the earlier Rule 59 motion.

On July 21, 2010, Grand Strand filed and served a notice of appeal from the trial court's order denying its post-trial motions. Grand Strand had received written notice of

the entry of that order on July 12, 2010. On July 26, 2010, Grand Strand filed and served an amended Notice of Appeal from the order denying post-trial motions. This amended Notice of Appeal was still timely in view of the date Grand Strand received written notice of the entry of the order denying its post-trial motions.

Four (4) days later, on July 30, 2010, Plaintiff filed and served a Notice of Cross-Appeal. Plaintiff appealed the trial court's ruling dismissing Dr. Young and Grand Strand Urology, LLP, as defendants after the close of all of the evidence at trial. Plaintiff also appealed several other trial rulings. On August 6, 2010, Grand Strand filed its second amended Notice of Appeal.

On August 10, 2010, Plaintiff moved this Court to stay the time limits in light of the pending motion for reconsideration filed by Dr. Law. On August 20, 2010, Dr. Law filed a return indicating no opposition to the stay and suggesting the Court dismiss the appeal and cross-appeal without prejudice until the trial court ruled on Dr. Law's motion for reconsideration. Dr. Law filed separately a motion to dismiss the appeals without prejudice or, alternatively, to stay and remand.

On August 24, 2010, Grand Strand filed a return in which it consented to the stay as to the appeal and cross-appeal. Grand Strand filed a separate return to the motion to dismiss requesting that the Court deny that motion while staying all time limits until the trial court ruled on Dr. Law's pending motion for reconsideration.

On September 24, 2010, this Court issued an order denying Dr. Law's motion to dismiss the appeal and cross-appeal. The Court also ruled that the appeals would be held in abeyance pending the trial court's ruling on Dr. Law's motion.

On August 17, 2011, the circuit court issued an order denying in part and granting in part Dr. Law's pending motion for reconsideration. The only portion of the motion the court granted was to reform the verdict based upon the percentages of fault assigned by the jury.

On August 22, 2011, Plaintiff moved the trial court to reconsider its ruling and deny Dr. Law's motion in its entirety. Following a hearing the trial court issued a new order on August 26, 2011, granting Plaintiff's motion, rescinding that portion of the order which had entered judgment as to each defendant according to the percentages of fault assigned by the jury, and ordering the original verdict be re-enrolled, *nunc pro tunc,* against all defendants jointly and severally.

On September 23, 2011, Dr. Law filed and served his notice of appeal from the judgment entered May 28, 2010 as well as the post-verdict orders entered on June 24, 2010, August 17, 2010, and August 26, 2010.

On October 6, 2010, Dr. Young and GSU moved the Court of Appeals to dismiss Plaintiff's cross-appeal against Dr. Young and GSU. They contended that the Notice of Appeal as to them was not timely served. Plaintiff filed a Return to the motion on October 17, 2011, and Movants filed a Reply on October 21, 2011. On December 5, 2011, this Court denied the motion to dismiss without prejudice and requested the parties address the timeliness in the briefs. (Order of December 5, 2011).

The pertinent time-line is therefore as follows:

May 26, 2010 The trial court entered oral ruling directing a verdict for Dr. Young and GSU - trial proceeded

May 28, 2010 Jury returned verdict for Plaintiff against Dr. Law and Grand Strand

June 7, 2010 Dr. Law and Grand Strand filed post-trial motions (10 days after verdict)

June 24, 2010 The trial court entered orders denying all post-trial motions

July 12, 2010 Dr. Law and Grand Strand received written notice of the entry of the orders denying post-trial motions

July 21, 2010 Dr. Law filed subsequent Rule 59 motion
Grand Strand served its first notice of appeal

July 26, 2010 Grand Strand served an amended notice of appeal (i.e., 5 days after the first notice but within 30 days from receiving notice of the entry of the order denying post-verdict motions)

July 30, 2010 Plaintiff Fay served his notice of cross-appeal (4 days after the emended notice)

Dr. Young and GSU contend the appeal period for the cross-appeal began on May 26, 2010, when the directed verdict was announced, or at the latest on May 28, 2010, when the Form 4 Order and verdict were entered. (Respondent's Brief, p. 25, n. 6). Dr. Young and GSU also contend that because Plaintiff moved to dismiss Dr. Law's appeal as untimely in view of successive motions for reconsideration pursuant to Rule 59, SCRCP, then Plaintiff may not argue that Dr. Law's second post-trial motion stayed the time for appeal. (Resp. Br. p. 26). Finally, Dr. Young and GSU contend that the thirty (30) day time period for Plaintiff to serve a notice of appeal from the directed verdict began to run on May 26, 2010, the date the trial court dismissed then from the case. (Resp. Br. p. 28) These arguments should not be persuasive.

A. PLAINTIFF WAS NOT REQUIRED TO SERVE THE NOTICE OF CROSS-APPEAL UNTIL AFTER FINAL JUDGMENT

In general, appeals in South Carolina are governed by Section 14-3-330 of the South Carolina Code of Laws. Section 14-3-330 provides, in part:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> > (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(emphasis added). *See also Link v. School Dist. of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990) (noting Section 14-3-330(1) allows a party to wait until final judgment to appeal intermediate orders "necessarily affecting the judgment not before appealed from.").

In this case, the trial court's directed verdict ruling as to Dr. Young and GSU was an intermediate order – it did not finally dispose of the whole of the case. *See Culbertson v. Clemens*, 322 S.C. 20, 471 S.E.2d 163 (1996) (any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final). Although Plaintiff could have immediately served a notice of appeal from the ruling, under the plain language of Section 14-3-330, Plaintiff was permitted to wait until the final judgment on the remainder of the case was entered.

Had the co-defendants not appealed the verdict Plaintiff may have elected not to

appeal the dismissal of Dr. Young and GSU. Because the co-defendants signaled their intent to seek post-verdict relief and then appeal, Plaintiff was entitled to await service of those notices of appeal to determine whether to seek review by cross-appeal of the trial court's directed verdict ruling in favor of Dr. Young and GSU. Section 14-3-330 allowed Plaintiff, who prevailed at trial against the co-defendants, to wait until one of them served a notice of appeal before pursing an appeal of his own.

B. PLAINTIFF'S FILING OF THE MOTION TO DISMISS DR. LAW'S APPEAL IS NOT A "CONCESSION" THAT BINDS PLAINTIFF IN THIS CROSS-APPEAL

Dr. Young and GSU assert that in his motion to dismiss Dr. Lawy's appeal, Plaintiff took the position that "Dr. Law's second post-trial motion did not toll the time limits available to the parties for initiating an appeal." (Resp. Br. p. 26). Dr. Young and GSU contend this amounts to a "concession" and this "concession" precludes Plaintiff from arguing that his Notice of Cross-Appeal was timely. (Resp. Br. p. 26). The Court should reject this argument.

First, the argument mis-characterizes Plaintiff's Motion to Dismiss Dr. Law's appeal. The basis of that motion was that Dr. Law had filed successive motions pursuant to Rule 59, SCRCP, raising the identical issues and that the second Rule 59 motion did not stay *his* time to serve an appeal. Plaintiff's motion to dismiss did not contend that the second Rule 59 motion affected the right to appeal of *any* other party, only Dr. Law. (Motion, p. 3).

Second, even if there was a "concession," that concession would not impact the

position Plaintiff is taking on the issue of whether his Notice of Cross-Appeal was timely. As a recap, the pertinent time-line is as follows:

May 26, 2010 The trial court entered oral ruling directing a verdict for Dr. Young and GSU - trial continued

May 28, 2010 Jury returned verdict for Plaintiff against Dr. Law and Grand Strand

June 7, 2010 Dr. Law and Grand Strand filed post-trial motions (10 days after verdict)

June 24, 2010 The trial court entered orders denying all post-trial motions

July 12, 2010 Dr. Law and Grand Strand received written notice of the entry of the orders denying post-trial motions

July 21, 2010 Dr. Law filed subsequent Rule 59 motion
Grand Strand served its first notice of appeal

July 26, 2010 Grand Strand served an amended notice of appeal (i.e., 5 days after the first notice but within 30 days from receiving notice of the entry of the order denying post-verdict motions)

July 30, 2010 Plaintiff Fay served his notice of cross-appeal (4 days after the emended notice)

The position Plaintiff took in the motion to dismiss Dr. Law's appeal was that the July 21 motion by Dr. Law did not stay the time to appeal; instead, the time to appeal began to run from July 12, when the defendants received written notice of the entry of the orders denying post-trial motions. Grand Strand timely appealed on July 21 and then filed an amended notice on July 26, both actions within 30 days of the date Grand Strand received written notice of the entry of the order denying its post-trial motion. Once Grand Strand appealed, Plaintiff was entitled to serve a notice of cross-appeal within five (5) days, pursuant to Rule 203, SCACR. That is precisely what Plaintiff did.

Dr. Young and GSU cite to *Thomas v. Dootson*, 377 S.C. 293, 659 S.E.2d 253 (Ct. App. 2008) in support of their position that Plaintiff is precluded by his "concession" from claiming his appeal is timely. (Resp. Br. p. 26, 28-29). *Thomas*, however, does not preclude Plaintiff from taking the position that his cross-appeal is timely.

In *Thomas*, Thomas sued Dr. Dootson for medical malpractice. The issue on appeal was whether Dr. Dootson had notice that a surgical drill overheated prior to the injury to Thomas during oral surgery. In his opening statement at trial, Dr. Dootson's counsel stated "there was an equipment malfunction" and that the drill overheated and burned Mr. Thomas's mouth. Dr. Dootson's counsel reiterated the concession on appeal, and claimed the issue was whether Dr. Dootson breach the standard of care by using the defective drill during surgery. On appeal, Dr. Dootson also attempted to resurrect the need for expert testimony and to recast the issue to call into question whether there was evidence the drill operated properly. The Court of Appeals held Dr. Dootson was bound by the concession his counsel made in oral argument and in the brief that the drill was defective. That is, the point Dr. Dootson contended was a central point in the appeal (whether the drill was defective) had been conceded at trial in lieu of a strategy of arguing that Dr. Dootson did not violate his standard of care in using the defective drill.

Here, the only "concession" Plaintiff made was that Dr. Law's second Rule 59 motion did not stay the time for Dr. Law to file and serve a notice of appeal. Whether that is true has no relevance to the issue Dr. Young and GSU argue, that is, that the *first* Rule 59 motion Dr. Law and Grand Strand filed stayed the time to appeal and to cross-appeal any trial ruling. The rule from *Thomas* does not control.

The Court should reject the argument by Dr. Young and GSU that Plaintiff is precluded by a binding concession from taking the position that his cross-appeal is timely.

C. PLAINTIFF FAY'S NOTICE IS NOT UNTIMELY FOR THE REASON THAT PLAINTIFF FAILED TO SERVE NOTICE OF CROSS-APPEAL WITHIN 30 DAYS OF THE TRIAL JUDGE'S ORDER DENYING THE POST-TRIAL MOTIONS OF GRAND STRAND REGIONAL AND DR. LAW

Dr. Young and GSU contend that Plaintiff's failure to serve the Notice of Cross-Appeal within 30 days of the denial of the post-trial motions filed by Grand Strand and Dr. Law renders the cross-appeal untimely. This argument should not be persuasive.

Rule 203, SCACR, provides:

> **(c) Cross-Appeals.** A respondent may institute a cross-appeal by serving a notice of appeal on all adverse parties, or in the case of an appeal from the administrative tribunal, by serving a notice of appeal on the agency, the administrative law court (if it has been involved in the case) and all parties of record, within five (5) days after receipt of appellant's notice of appeal, or within the time prescribed by Rule 203(b), whichever period last expires.

(Underline added).

Once again, as a recap, the pertinent time-line is as follows:

May 26, 2010 The trial court entered oral ruling directing a verdict for Dr. Young and GSU - trial continued

May 28, 2010 Jury returned verdict for Plaintiff against Dr. Law and Grand Strand

June 7, 2010 Dr. Law and Grand Strand filed post-trial motions (10 days after verdict)

June 24, 2010 The trial court entered orders denying all post-trial motions

July 12, 2010 Dr. Law and Grand Strand received written notice of the entry

of the orders denying post-trial motions

July 21, 2010 Dr. Law filed subsequent Rule 59 motion
Grand Strand served its first notice of appeal

July 26, 2010 Grand Strand served an amended notice of appeal (i.e., 5 days after the first notice but within 30 days from receiving notice of the entry of the order denying post-verdict motions)

July 30, 2010 Plaintiff Fay served his notice of cross-appeal (4 days after the emended notice)

There is no dispute that in this case, on July 12, 2010, the trial court gave written notice that it had entered orders denying all post-trial motions. There is also no dispute that on July 26, 2010, defendant Grand Strand filed and served an amended Notice of Appeal from the order denying post-trial motions. On July 30, 2010 (i.e., within 5 days of receipt of the Amended Notice of Appeal and within 30 days of the trial court's ruling on the post-trial motions), Plaintiff Fay filed and served a Notice of Cross-Appeal, appealing the trial court's ruling dismissing Dr. Young and GSU as defendants after the close of the evidence as well as several other trial rulings. That notice was served on all adverse parties, including Dr. Young and GSU. Under the plain, clear and unambiguous language of Rule 203(c), Plaintiff has served properly the notice of cross-appeal "on all adverse parties ... within five (5) days after receipt of appellant's notice of appeal..." See *Whitehead v. State*, 310 S.C. 532, 426 S.E.2d 315 (1992) (rules of procedure, like statutes, should be given their plain meaning; when the text of a rule is clear and unambiguous, judicial inquiry is complete).

Additionally, Plaintiff served his notice of appeal within 30 days of the trial court's disposition of the post-trial motions. Rule 203(b)(1), SCACR, provides in part:

> When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

(Emphasis added). Thus, so long as one of the enumerated motions "has been made," the time for appeal "for all parties" is stayed until the parties received written notice of entry of the order ruling on that motion.

In this case, timely motions pursuant to Rules 50 and 59 "had been made," and therefore the time for appeal for *all* parties, including Plaintiff, was stayed and did not begin to run until the parties received notice that the trial court had denied those motions. Notice of the entry of the order did not take place until July 12, 2010; thus, all parties had until August 11, 2010, to serve notice of appeal. Plaintiff's notice of cross-appeal, served on July 30, 2010, was well within the time period set forth in Rule 203(b)(1).

Finally, the Supreme Court has instructed that courts should not interpret procedural rules to create a trap for unwary lawyers. *In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 640 n 4, 686 S.E.2d 683, 688 n 4 (2009), citing *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) (holding civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party). *See also James v. South Carolina Dept. of Transp.*, 393 S.C. 440, 711 S.E.2d 919 (Ct. App. 2011) (appellate rules should not be interpreted to create a trap for the unwary lawyer or party); *Clark v. Aiken County Government*, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005) (rules of appellate procedure should not be interpreted to create a trap for the unwary). Dr. Young and GSU advocate a rule that would shut the

door on an appellant who followed the literal language of Rule 203, thereby setting an appealability trap. The Court should reject their position.

In this case, appellants Grand Strand and Dr. Law might not have appealed the verdict. Plaintiff would then have collected the judgment from those defendants, rendering moot the necessity of an appeal of the order dismissing Dr. Young and GSU because Plaintiff may not recover more than once for the damages awarded by the jury. *E.g.*, *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012)(there can be only one satisfaction for an injury or wrong). Once the remaining defendants took their appeals, however, Plaintiff undertook to cross-appeal all adverse rulings that were favorable to all adverse parties, and served the notice of cross-appeal on *all* adverse parties, including Dr. Young and GSU.

The rule Dr. Young and GSU advocate is also not based upon sound policy or reasonable appellate practice. Dr. Young and GSU would require a plaintiff to immediately file and serve a notice of appeal from a ruling dismissing some, but not all, of the defendants in the case, even in a case like this one, where the plaintiff ultimately prevails against a remaining defendant. Where that remaining defendant then makes post-trial motions, the plaintiff would become the primary appellant from a judgment where that plaintiff prevailed. Rule 206, SCACR. This would give rise to two (2) absurd results: (1) a plaintiff who takes such an appeal would shoulder the entire burden of all duties of an appellant even though the remaining defendants may ultimately appeal following the denial of those post-verdict motions; and (2) a plaintiff who takes such an appeal will have that appeal subject to dismissal as moot if the remaining defendants do not appeal

and instead pay the judgment, thereby exposing that plaintiff to an award of costs and fees to the remaining respondent in the appeal. Rule 222(a), SCACR. Neither the General Assembly nor the Supreme Court could have intended to create such a trap in the rules governing appeals in South Carolina. Instead, the more reasonable rule is to hold that Plaintiff Fay could wait until he knew he was facing a direct appeal by one of the remaining defendants to then cross-appeal all adverse rulings, including the ruling that dismissed Dr. Young and GSU from the case.

Accordingly, the Court should reject the argument that Plaintiff's cross-appeal of the trial court's directed verdict for Dr. Young and GSU is untimely and should address the merits of that cross-appeal.

II. THE TRIAL COURT ERRONEOUSLY DIRECTED A VERDICT FOR DR. YOUNG ON THE GROUND OF PUBLIC POLICY

Respondent-Appellant Fay stands on the arguments he made in his Brief of Appellant. However, he responds here to certain assertions Dr. Young and GSU made in their joint Respondents' Brief.

Initially, although these Respondents note the correct scope of appellate review from the grant of a directed verdict (that the evidence must be viewed most favorably for Mr. Fay) (Resp. Br. p. 11), the Respondents then present a recitation of the record in the light most favorable to Dr. Young and GSU. The Court should not be persuaded to do the same. Mr. Fay presented testimony and evidence as outlined in his Brief of Appellant that, viewed in a light most favorable to him, required that the claims against Dr. Young

and GSU be submitted to the jury.

Further, the trial court ruled solely on the ground that public policy prevented claims against a physician who was on call for questions arising from a hospital emergency room. The judge was ruling as a matter of law, not because the trial judge felt Plaintiff Fay failed to present sufficient evidence of Dr. Young's breach of the standard of care.

Respondents Dr. Young and GSU point to testimony they assert require a directed verdict for Dr. Young. They dismiss the testimony of Dr. Siroky, pointing to testimony by Dr. Young and Dr. Law that they contend exonerates Dr. Young. (Resp. Br. pp. 12-13). However, as Plaintiff Fay pointed out in his Brief of Cross Appellant, Dr. Siroky positively testified that Dr. Young breached the applicable standard of care. (Cross-App. Br. pp. 7-13). Dr. Sheppard concurred. (Cross-App. Br. pp. 13-14). So did Dr. Stratton. (Cross-App. Br. pp. 14-15).

Additionally, neither Dr. Young nor Dr. Law testified positively that they actually discussed whether Mrs. Fay was "afebrile," as suggested by Dr. Young in his Brief. Instead, both doctors testified they could not recall the precise conversation but that this was something they "would have discussed." (Dr. Law at trial, (Tr. p. 1351, l. 24 - p. 1353, l. 1; Dr. Young at trial, Tr. p. 1548, ll. 1-4). As noted in the prior brief, when asked whether he inquired about whether Mrs. Fay actually had a fever, Dr. Young stated, "I just have to remind you, Mr. Foster, that again I don't remember the specifics of the conversation, and that's what it says right there in the deposition you just read." (Tr. p. 1577, ll. 4-10). In his deposition, Dr. Law repeatedly stated that he did not recall the

specifics of his conversation with Dr. Young, but testified as to his normal practice. (Tr. p. 1190, ll. 3-9, 19-21; p. 1192, ll. 3-5, 6-8, 13-14, 16-17).

At bottom, it was for the jury to decide the credibility of all of this evidence and to sort out whether these physicians failed to discuss Mrs. Fay's fever when they conversed about sending her home. It was also for the jury to decide whether to believe Plaintiff's experts, and to figure out exactly what happened in this instance. They could have accepted that the doctors testified truthfully about their regular practice, and could have found the doctors followed that practice in this time. Or they could have rejected these assertions. The trial court removed that task from them, however, by directing a verdict for Dr. Young and GSU.

Dr. Young contends:

> 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.

(Resp. Br. p. 15). The Court should not be persuaded by this argument.

If the standard of care requires that the physician who makes the call about admitting a patient know certain vital signs before releasing that patient, and the physician does not receive information about that vital sign, then public policy should require that physician to ask. It is not "every piece of information" an ER doctor supplies, but the critical information required to make life and death decisions about a patient. It is also that "no reason appeared" to require Dr. Young to "doubt its accuracy," for there is evidence that Dr. Young did not get, nor did he ask for, a critical piece of information in

Mrs. Fay's care. It would not "seriously impede" emergency room practice in South Carolina to require the only physician who has the ability to admit the patient to make sure he has all of the information required by the standard of care before sending that patient home to her death.

Dr. Young also contends that public policy considerations "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." (Resp. Br. p. 16). This argument ignores the critical fact that Dr. Law had no power to admit Kelly Fay to the hospital – he relied on Dr. Young to make that joint decision because only Dr. Young could have admitted her. (Dr. Law testimony at Tr. p. 1356, ll. 7-14; Dr. Young testimony at Tr. p. 1573, l. 19 - p. 1574, l. 1).

For these reasons and the reasons stated in the Brief of Cross-Appellant, the Court should reverse the trial court's grant of a directed verdict for Dr. Young and GSU on the basis that it is not against public policy to hold these Respondents liable for Mrs. Fay's death in this case.

III. THE COURT SHOULD NOT AFFIRM ON THE ALTERNATIVE GROUND THAT DR. YOUNG DID NOT OWE KELLY FAY A DUTY OF CARE

Respondents Dr. Young and GSU assert as an additional sustaining ground for affirming the trial court's directed verdict that a physician-patient relationship was never created between Dr. Young and Mrs. Fay so that Dr. Young did not owe a legal duty as a matter of law. (Resp. Br. pp. 17-25). The Court should not find this argument to be persuasive as a basis for affirming the trial court's ruling.

It is true that, generally, a respondent may argue any additional reasons why an appellate court should affirm the appealed ruling, "regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). The appellate court may in its discretion review the additional reasons presented by the respondent and "if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* at 420, 526 S.E.2d at 723. However, the appellate court may decline to do so. *State v. Humphries*, 354 S.C. 87, 579 S.E.2d 613 (2003).

In this case, the trial court made a very narrow ruling, stating:

> The Court is prepared to rule, and my ruling is the same from our discussion that we had earlier today. First of all, it's not necessary to reach, and, therefore, I do not reach the issue of whether or not there was a physician/patient relationship established between Dr. Young and Ms. Fay.
>
> The Court just finds as a matter of law that there is, first of all, there is no negligence on the part of Dr. Young who has a right to rely on any information given to him by a competent, capable, and board certified emergency physician. To hold otherwise would turn the practice of medicine on its head in South Carolina, but furthermore, I am going to permit the parties, Dr. Young specifically, to amend his pleadings to allege superseding or intervening negligence.

> There's really no surprise here because this came before the testimony, the motion did, before the testimony of Dr. Young and Dr. Law and thus could have been explored during the time they were on the stand, but furthermore, it cannot - - does not seem to the Court that that could be a shock or surprise because that issue sort of permeates the factual scenario from which arose this unfortunate event, and thus for all these reasons, the Court is going to grant dismissal to Dr. Young at this time, and it is so ordered.

(Tr. p. 1815, l. 23 - p. 1816, l. 20). Thus, the only ruling the trial court made was that as a matter of public policy a physician contacted by an emergency room doctor could not be liable for the harm to the patient. The trial court specifically declined to address whether a physician-patient relationship existed. *See State v. Bennett*, 375 S.C. 165, 650 S.E.2d 490 (Ct. App. 2007) (where issue was raised to but not ruled upon by the trial court, court of appeals declined to address additional sustaining ground).

Under these circumstances the Court should exercise its discretion and decline to address this argument as an additional reason to affirm the trial court's ruling.

A. A PHYSICIAN-PATIENT RELATIONSHIP EXISTED BETWEEN DR. YOUNG AND DECEDENT KELLY FAY AT THE TIME OF HER DEATH

In the event the Court decides to address this additional reason to affirm, the Court should reject Respondents' argument that there was no evidence from which a jury could have found the existence of a doctor-patient relationship between Dr. Young and Mrs. Fay.

1. THE EXISTENCE OF A PHYSICIAN-PATIENT RELATIONSHIP IS A QUESTION FOR THE JURY

The establishment of a doctor patient relationship is a prerequisite to a claim of medical malpractice. *Roberts v. Hunter*, 310 S.C. 364, 426 S.E.2d 797 (1993). "The

relation is a consensual one wherein the patient knowingly seeks the assistance of a physician and the physician knowingly accepts him as a patient." *Id.* at 366, 426 S.E.2d at 799 (quoting 61 Am. Jur. 2d *Physicians & Surgeons* § 158 at 290 (1981)). Furthermore, the existence of a physician-patient relationship is a question of fact for the jury. *Tumblin v. Ball-Incon Glass Packaging Corp.*, 324 S.C. 359, 478 S.E.2d 81 (Ct. App. 1996); *see also Fuller v. Blanchard*, 358 S.C. 536, 595 S.E.2d 831 (Ct. App. 2004) ("[t]he existence of a physician-patient relationship is a question of fact for the jury").

Plaintiff Fay presented evidence that there was a relationship of cooperation and teamwork between Dr. Law, the emergency room physician, and Dr. Young in which Dr. Young collaborated with Dr. Law on the diagnosis and course of treatment for Mrs. Fay, thereby establishing a physician-patient relationship between Dr. Young and Mrs. Fay. The jury could have found a patient-physician relationship existed as Dr. Young was the on-call urologist at Grand Strand Regional Medical Center, knowingly accepted Mrs. Fay as a patient, and participated in her diagnosis and course of treatment. Whether a physician-patient relationship existed between Dr. Young and Fay was an issue to be resolved by the jury. See also Rule 50, SCRCP ("[w]hen upon a trial the case presents only questions of law the judge may direct a verdict.").

Although Dr. Young did not examine Mrs. Fay, the fact that a physician does not deal directly with a patient does not necessarily preclude the existence of a physician-patient relationship. *Lection v. Dyll*, 65 S.W.3d 696 (Tex App. Dallas 2001). *See also St. John v. Pope*, 901 S.W.2d 420 (Tex. 1995) (creation of the physician-patient relationship does not require the formalities of a contract; the fact that a physician does

not deal directly with a patient does not necessarily preclude the existence of a physician-patient relationship). Likewise, physical contact between Dr. Young and Fay was not necessary to create a physician-patient relationship. *Lection v. Dyll. See also Mead v. Legacy Health System*, 352 Or. 267, 283 P.3d 904 (2012) (courts have begun to recognized that the fact that a physician does not deal directly with a patient does not necessarily preclude the existence of a physician-patient relationship).

Whether or not the collaboration between Dr. Law and Dr. Young concerning the diagnosis and treatment of Mrs. Fay constitutes a physician-patient relationship between Dr. Young and Mrs. Fay was, at a minimum, a question of fact for the jury to decide. The trial court should not have directed a verdict for Dr. Young and GSU.

2. DR. YOUNG'S AFFIRMATIVE ACT OF PARTICIPATING IN THE DIAGNOSIS AND COURSE OF TREATMENT OF FAY AS THE ON-CALL UROLOGIST ESTABLISHED A PHYSICIAN-PATIENT RELATIONSHIP

Whether a physician-patient relationship exists between an emergency room patient and an on-call physician contacted by telephone for consultation appears in large part to be a novel issue in South Carolina.

Jurisdictions that have considered the issue, however, have held that, if the consulted physician is contacted because he or she is on call, that communication is not in the category of an "informal consult," especially if the physician's on-call obligation is contractual or a condition for hospital privileges. Even so, a relationship with the patient generally will not be implied when the on-call physician expressly declines to participate in the patient's care or makes no diagnosis when the recommended treatment is rejected

by the treating physicians. *See Miller v. Martig*, 754 N.E.2d 41 (Ind. App.2001) (physician-patient relationship did not exist between on-call doctor and obstetric patient where doctor did not make recommendations about patient's condition or treatment and did not participate in any course of treatment, but informed patient that doctor would not take patient's case because he was not qualified to do so); *Majzoub v. Appling*, 95 S.W.3d 432, 438 (Tex. App.2002) (no physician-patient relationship arises where on-call doctor does not make a diagnosis or any medical decisions with regard to patient). Thus, the on-call status of a physician in and of itself does not establish a physician-patient relationship with every patient who comes into the emergency room. *See, e.g., Corbet v. McKinney*, 980 S.W.2d 166, 170 (Mo. App.1998) (a physician's on-call status, without more, does not give rise to liability); *Fought v. Solce*, 821 S.W.2d 218, 220 (Tex. App.1991) (physician volunteering to be on call did not have duty to treat patient who came into emergency room); *Anderson v. Houser*, 240 Ga. App. 613, 618, 523 S.E.2d 342, 347 (1999) (patient not intended third-party beneficiary of physician's contract with hospital).

However, if an emergency room physician contacts the on-call physician, who affirmatively undertakes to diagnose or treat the patient, and such direction is acted upon by the physician, a physician-patient relationship arises by implication between the on-call physician and the patient, even if the on-call physician does not personally examine the patient or seek to admit the patient within the physician's service. *See, e.g., Sterling v. Johns Hopkins Hospital*, 145 Md. App. 161, 187, 802 A.2d 440 (2002) ("In the final analysis, we take it as well-settled that a physician-patient relationship may arise

by implication where the doctor takes affirmative action to participate in the care and treatment of a patient."); *Oja v. Kin*, 229 Mich. App. 184, 191, 581 N.W.2d 739 (1998) (a physician-patient relationship can exist by implication between an emergency room patient and an on call physician who is consulted by the patient's physician but who has never met, spoken with, or consulted the patient when the on call physician (1) participates in the diagnosis of the patient's condition, (2) participates in or prescribes a course of treatment for the patient, and (3) owes a duty to the hospital, staff or patient for whose benefit he is on call); *Lection v. Dyll*, 65 S.W.3d 696 (Tex. App.2001) (on-call physician's evaluation of information provided by emergency room doctor and medical decision concerning the patient's need for treatment and admission to the hospital, and emergency room physician's reliance on the on-call physician's diagnosis and treatment plan, were sufficient to create a question of fact as to whether on-call physician took affirmative acts necessary to create a physician-patient relationship).

As the Supreme Court of Oregon recently stated:

> Historically, an implied physician-patient "relationship [has been] limited to physicians seen directly by the patient; the physician-patient relationship typically does not exist between the patient and physicians consulted by the patient's personal physician." Louisell & Williams, 1 *Medical Malpractice* § 8.03[2][a] at 8–19–8–22 (footnotes omitted). More recently, however, courts have recognized that "[t]he fact that a physician does not deal directly with a patient does not necessarily preclude the existence of a physician-patient relationship." *St. John v. Pope*, 901 S.W.2d 420, 424 (Tex.1995); see *McKinney v. Schlatter*, 118 Ohio App.3d 328, 692 N.E.2d 1045, 1050–51 (1997), *overruled on other grounds by Lownsbury v. VanBuren*, 94 Ohio St.3d 231, 762 N.E.2d 354, 362 (2002) (holding that it was a question of fact for the jury whether an on-call cardiologist who had discussed a patient's symptoms and test results with an emergency room physician entered into a physician-patient relationship with the person seeking treatment). As one court has observed,

> "In light of the increasing complexity of the health care system, in which patients routinely are diagnosed by pathologists or radiologists or other consulting physicians who might not ever see the patient face-to-face, it is simply unrealistic to apply a narrow definition of the physician-patient relationship in determining whether such a relationship exists for purposes of a medical malpractice case."

Kelley v. Middle Tennessee Emergency Physicians, 133 S.W.3d 587, 596 (Tenn 2004); *cf. Eads v. Borman*, 351 Or. 729, 743–44, 277 P.3d 503 (2012) (noting that changes in the way health care is delivered affect apparent agency analysis); *id.* at 759–60, 277 P.3d 503 (De Muniz, C.J., specially concurring) (same).

As the court recognized in *Kelley*, with increasing specialization in the medical profession, hospitals or medical groups may divide responsibility for providing medical services among a team of physicians, with some of the physicians responsible for performing only discrete medical services for the patient. A radiologist, for example, may interpret a patient's x-rays and relay that interpretation to the patient's primary care physician, who uses the radiologist's interpretation to determine the course of the patient's treatment. That division of responsibility for the patient's care may arise as a result of custom or practice, without a formal referral or request for consultation. Faced with that division of services, some courts have sought to determine when a physician who has not personally examined a patient will enter into an implied physician-patient relationship by asking whether the physician has undertaken to provide a particular medical service to a patient. In Kelley, the court explained that "a physician-patient relationship may be implied when a physician affirmatively undertakes to diagnose and/or treat a patient, or affirmatively participates in such diagnosis and/or treatment." 133 S.W.3d at 596.

The standard articulated in *Kelley* depends, as an initial matter, on classifying a physician's actions as either the "diagnosis" or the "treatment" of a patient's condition. Some tasks that physicians perform, such as interpreting an x-ray, may be relatively easy to classify. Others, such as diagnosis, may pose more difficulty. As explained below, not every opinion that one physician offers another constitutes a diagnosis; indeed, the same statement may be a diagnosis when made in one context but not when made in another. That is, the question whether a physician's expression of an opinion constitutes a diagnosis will vary depending on,

> among other things, the customary practice within the relevant medical community, the degree and the level of formality with which one physician has assumed (or the other physician has ceded) responsibility for the diagnosis or treatment, the relative expertise of the two physicians, and the reasonable expectations, if any, of the patient under the circumstances.
>
> In our view, the standard should not be whether a judge or a jury would classify a statement as a diagnosis or the provision of treatment. Rather, it should be whether a physician who has not personally seen a patient either knows or reasonably should know that he or she is diagnosing a patient's condition or treating the patient. If the jury finds that, in light of the factors identified above, the physician either knew or reasonably should have known that he or she was diagnosing the patient's condition or providing treatment to the patient, then an implied physician-patient relationship exists and the physician owes the patient a duty of reasonable care.

Mead v. Legacy Health System, 352 Or. 267, 277-279, 283 P.3d 904, 909-910 (2012).

The Court concluded:

> In our view, the standard should not be whether a judge or a jury would classify a statement as a diagnosis or the provision of treatment. Rather, it should be whether a physician who has not personally seen a patient either knows or reasonably should know that he or she is diagnosing a patient's condition or treating the patient. If the jury finds that, in light of the factors identified above, the physician either knew or reasonably should have known that he or she was diagnosing the patient's condition or providing treatment to the patient, then an implied physician-patient relationship exists and the physician owes the patient a duty of reasonable care.

352 Or. at 279, 283 P.3d at 910.

As the on-call urologist for Grand Strand Regional Medical Center, Dr. Young undertook to diagnose and treat Mrs. Fay, agreeing to her discharge and scheduling an appointment for the following Monday, thereby establishing a physician-patient relationship. The Court should not affirm the trial court's ruling on Dr. Young's contention that there was no evidence from which a jury could have found the existence

of a doctor-patient relationship.

In *Roberts v. Hunter*, the Supreme Court of South Carolina affirmed a ruling which directed a verdict for a "consulted" physician on the premise that a physician-patient relationship did not exist. In *Roberts*, the patient sued a "consulted" physician after leaving an emergency room without being seen by the consulted physician. The plaintiff in *Roberts* was being treated by the emergency room physicians when his vision became blurred and he began to see spots before his eyes. 426 S.E.2d at 798. The emergency room physician contacted a neurologist who was busy seeing another patient at the hospital, but who said he would examine Roberts. The evidence was uncontroverted that Roberts left the hospital before the neurologist could examine him. Roberts suffered a stroke a few hours later.

Unlike the physician in *Roberts*, Dr. Young assisted in proffering a diagnosis, recommending a course or treatment or approving the lack of treatment, and scheduled a follow up appointment with the patient. *Roberts* is meaningfully distinguishable from this case as Dr. Young was consulted by Dr. Law on the course of treatment for Mrs. Fay and participated in the diagnosis and treatment of Mrs. Fay by agreeing with Dr. Law that Mrs. Fay did not need to be admitted and could be discharged without any further testing.

In *Oja v. Kin*, the Michigan Court of Appeals addressed this issue and set forth a general principle to assist in the determination of whether a physician-patient relationship existed:

> [M]erely listening to another physician's description of a patient's problem and offering a professional opinion regarding the proper course of treatment is not enough. Under those circumstances, a doctor is not

> agreeing to enter into a contract with the patient. Instead, she is simply offering informal assistance to a colleague. At the other end of the spectrum, a doctor who is on call and who, on the phone or in person, receives a description of a patient's condition and then essentially directs the course of that patient's treatment, has consented to a physician-patient relationship.

581 N.W.2d at 743.

In this case, Dr. Young's participation in the diagnosis and treatment of Mrs. Fay constitutes evidence of consent to a physician-patient relationship. Dr. Young was the on-call urologist, fielded a call from the emergency room physician, and participated in the diagnosis of Mrs. Fay and the decision to release Mrs. Fay from Grand Strand.

If no prior relationship existed between physician and patient, an on-call physician may assume a duty to the patient if he takes some affirmative action to treat the patient. *Reynosa v. Huff*, 21 S.W.3d 510 (Tex App. San Antonio 2000); *Day v. Harkins & Munoz*, 961 S.W.2d 278 (Tex. App. Houston 1st Dist. 1997).

Subsequent to the conversation between Dr. Young and Dr. Law, but prior to being released from GSMRC, Mrs. Fay signed an authorization for her medical records to be released to Dr. Young. By Saturday evening, Dr. Young, as the on-call urologist, agreed with Dr. Law to release Mrs. Fay from the hospital, had scheduled an appointment for the following Monday, and an authorization had been completed by Mrs. Fay enabling Dr. Young to receive her records. These actions provide evidence from which a jury could have found that a physician-patient relationship between Dr. Young and Mrs. Fay had been established.

A physician-patient relationship can arise when a physician gives advice to a

patient, even if the advice is communicated through another health care professional. *Quirk v. Zuckerman*, 196 Misc. 2d 496 (N.Y. Sup. Ct. 2003); *Cogswell v. Chapman*, 249 A.D.2d 865 (N.Y. App. Div. 3rd Dept. 1998). In *Quirk*, the patient went to the hospital emergency room where he was treated by the doctor and nurse practitioner. The patient's malpractice cause of action against the doctor was derived from his consultation with the co-defendant, the nurse practitioner. Although the doctor did not perform a physical exam upon the patient in *Quirk*, he collaborated with the nurse practitioner who performed the full physical examination. The *Quirk* court denied the doctor's motion for summary judgment, finding that whether or not the collaboration between the doctor and nurse practitioner constituted a physician-patient relationship between the doctor and claimant was a question of fact for the jury to decide.

In *Wheeler v. Yettie Kersting Memorial Hosp.*, the court held that an on-call physician at a rural hospital had a physician-patient relationship with a laboring woman, for the purpose of a medical malpractice action, even though the physician's only connection with the woman was one phone call from a nurse, of which the woman was not aware, because during the call, the physician evaluated the status of the woman's labor and gave approval for the woman's transfer to a distant medical facility. 866 S.W.2d 32 (Tex. App. Houston 1st Dist. 1993). Similar to *Wheeler*, Dr. Young's connection to Mrs. Fay was through a phone call from Dr. Law. However, an even more compelling argument that a physician-patient relationship existed in this matter considering that a follow up appointment was scheduled and an authorization for Dr. Young to review Mrs. Fay's medical records was executed.

Dr. Young admitted in his Answer to Plaintiff's Complaint that he was the on-call urologist and consulted with Dr. Law about Fay. (See Answer, paragraph 12). As a result of Dr. Young's participation in the course of treatment for Mrs. Fay pursuant to his obligations as the on-call urologist at GSRMC and his testimony that he agreed with the decision to release Mrs. Fay from Grand Strand, the jury could have found a physician-patient relationship existed between Dr. Young and Mrs. Fay.

B. DR. YOUNG WAS CONTRACTUALLY OBLIGATED TO PROVIDE EMERGENCY CALL SERVICE TO GSRMC WHICH REQUIRED HIM TO RENDER ASSISTANCE AND CARE TO DECEDENT FAY

In addition to affirmatively acting to treat Mrs. Fay, Dr. Young was obligated pursuant to Grand Strand's Bylaws to provide emergency call service and provide assistance and care to a patient when contacted about the patient's condition. (GSRMC Bylaws, pg. 118). Consequently, Dr. Young was contractually bound to provide emergency call services and was required to be "on-call" to maintain staff privileges, thereby assuming a general duty to Grand Strand emergency room patients. In some circumstances, a consulting physician may undertake by contract to take the affirmative action to participate in the care and treatment of a patient, and thus, may establish a physician-patient relationship for purposes of medical malpractice. *Sterling v. Johns Hopkins Hosp.*, 802 A.2d 440 (Md. Ct. Spec. App. 2002).

The *Sterling* court also stated:

> We hold that, unless the 'on call' agreement between a hospital and a physician provides otherwise, an 'on call' physician who has not accepted a patient or has not, pursuant to his 'on call' status, consulted

> with a treating or attending physician in regards to the patient, or has not been summonsed pursuant to his 'on call' agreement to consult with an attending physician or attend or treat a patient, is not liable for the negligence of others occurring during the 'on call' but unsummonsed period. Were we to hold otherwise, we would be imposing the threat of liability on every physician for all patients that are treated at the Hospital during the time they are 'on call.'
>
> * * *
>
> In the final analysis, we take it as well-settled that a physician-patient relationship may arise by implication where the doctor takes affirmative action to participate in the care and treatment of a patient. An 'on call' physician may be in the position to direct the care of a patient whom he has never seen, so that his or her instructions are followed, the results of which are manifest in the ensuing course of the patient's treatment.

Id., 802 A.2d at 455.

In *Lection v. Dyll*, the Texas Court of Appeals for the Fifth District considered a case in which an on-duty physician determined he needed the advice and assistance of the neurologist who was required to service on a rotating on-call basis. 65 S.W.3d 696 (Tex App. Dallas 2001). The on-call neurologist in *Lection* telephoned the on-duty physician and listened to a description of the patient's condition and responded with a diagnosis, stated a medical opinion of the treatment of the patient, and suggested that the on-duty physician have the patient call the neurologist the following Monday. The on-duty physician relied upon the neurologist's expertise and advice and had the nurse telephone the patient's home with this information.

The *Lection* court found that a physician-patient relationship existed between the claimant and the neurologist. After a review of similar cases, the *Lection* court distinguished its case by referencing the hospital by-laws, which required the neurologist

serve as an on-call physician to the emergency room to maintain staff privileges. The on-call physician in *Lection* could make the determination whether an emergency-room patient should be admitted to the hospital, but was not required to provide further treatment to the patient if the patient was not admitted to hospital. The hospital rules and regulations in *Lection* required a consultation in all cases where the diagnosis was obscure and there was doubt as to the best therapeutic measures to be taken for the patient.

In *Lownsbury v. VanBuren*, the Supreme Court of Ohio found that a reasonable jury could conclude the requisite relationship had arisen between a supervisory doctor at a teaching hospital and a patient. 762 N.E.2d 354 (Ohio 2002). Through his contractual agreement to supervise residents, the doctor in *Lownsbury* assumed a duty to patients treated by resident physicians. As a result, the *Lownsbury* court held that granting summary judgment in favor of the doctor was improper and emphasized that a physician patient relationship may exist without any direct contact between the patient and the doctor.

Similar to the hospital in *Lection*, Grand Strand requires members of its active staff to serve on emergency room call and assist emergency room physicians with their patients. At the time of Fay's death, Dr. Young maintained privileges at Grand Strand and was ineligible to voluntarily discontinue emergency room call services. As an active staff member providing on-call service, Dr. Young was required by Grand Strand's By-laws to "actively participate in patient care evaluation." (GSRMC Bylaws, pg. 23). Lastly, Dr. Young was required to actively participate in the emergency services referral

program and be available to answer any questions of an emergency physician. (GSRMC Bylaws, pg. 24).

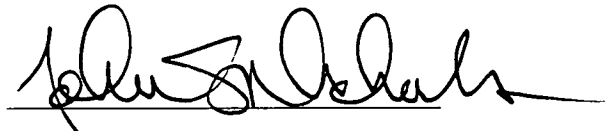
The jury could have found that a physician-patient relationship existed between Dr. Young and Mrs. Fay pursuant to Dr. Young's contractual obligations and affirmative action in the diagnosis and course of treatment for Mrs. Fay. As an active staff member providing on-call service, Dr. Young was bound to participate in the care and evaluation of Mrs. Fay.

Accordingly, this Court should not affirm the trial court's ruling directing a verdict for Dr. Young and GSU on the ground that there is no basis from which a jury could have found a physician-patient relationship existed between Dr. Young and Mrs. Fay.

CONCLUSION

This Court should rule that the cross-appeal was timely filed. Furthermore, the Court should reverse the trial court's order directing a verdict for defendants Young and GSU. Finally, the Court should decline to address the additional sustaining ground asserted by the Respondents Dr. Young and GSU. If the Court reaches the issue, the Court should rule that there was evidence from which a jury could find a doctor-patient relationship existed between Dr. Young and Mrs. Fay.

Respectfully submitted,



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