

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Case No. 2013-CP-29-1339
Appellate Case No. 2015-002653

RECEIVED
JUN 30 2016
SC Court of Appeals

Johnnie Mae Reed, as Personal Representative of the
Estate of Sandra Gilbert,Appellant,

v.

CareNet, Inc. of Lancaster and Nimal A. Perera, M.D., Respondents.

**FINAL BRIEF OF RESPONDENTS CARENET, INC.
OF LANCASTER AND NIMAL A. PERERA, M.D.**

George C. Beighley
George C. Beighley, Jr.
Richardson Plowden & Robinson, P.A.
P.O. Box 7788
Columbia, SC 29202
(803) 771-4400
gbeighley@RichardsonPlowden.com
gbeighleyjr@RichardsonPlowden.com

Attorneys for the Respondent Nimal A.
Perera

Perry D. Boulrier
Joshua T. Thompson
Holcombe Bomar, P.A.
P.O. Drawer 1897
Spartanburg, SC 29304
(864) 594-5300
pboulrier@holcombebomar.com
jthompson@holcombebomar.com

Attorneys for Respondent CareNet, Inc.
of Lancaster

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	i
Statement of the Issues on Appeal.....	1
Statement of the Case	1
Statement of the Facts	3
Standard of Review.....	6
Argument.....	8
I. Appellant failed to proffer excluded testimony concerning the circumstances of Dr. Perera's resignation from CareNet, meaning that Appellant has failed to preserve this issue for post-trial or appellate review.	8
II. The trial court properly excluded testimony that Dr. Perera resigned his employment from CareNet due in part to issues with the care of Ms. Gilbert pursuant to Rule 403, SCRE. Alternatively, the alleged error in excluding this testimony was harmless.	11
Conclusion	18

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<u>Baber v. Greenville County,</u> 327 S.C. 31, 488 S.E.2d 314 (1997)	10, 11, 12
<u>Burroughs v. Worsham,</u> 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002)	15, 16, 17, 18
<u>City of Columbia v. Ervin,</u> 330 S.C. 516, 500 S.E.2d 483 (1998)	7, 9
<u>Covington v. George,</u> 359 S.C. 100, 597 S.E.2d 142 (2004)	14, 15
<u>Fields v. Regional Medical Center Orangeburg,</u> 363 S.C. 19, 609 S.E.2d 506 (2005)	16, 17, 18
<u>Henning v. Kaye,</u> 307 S.C. 436, 415 S.E.2d 794 (1992)	1
<u>I'On, LLC v. Town of Mt. Pleasant,</u> 338 S.C. 406, 526 S.E.2d 716 (2000)	8, 15
<u>Jones v. Lott,</u> 387 S.C. 339, 692 S.E.2d 900 (2010)	8
<u>Mains v. K-Mart Corp.,</u> 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988)	9
<u>State v. Adams,</u> 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003)	7, 8, 12
<u>State v. Cabbagestalk,</u> 281 S.C. 35, 314 S.E.2d 10 (1984)	7, 9
<u>State v. Culbreath,</u> 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008)	2
<u>State v. Curry,</u> 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006)	7
<u>State v. Floyd,</u> 295 S.C. 518, 369 S.E.2d 842 (1988)	9

<u>State v. Gaskins,</u> 284 S.C. 105, 326 S.E.2d 132 (1985)	7
<u>State v. Roper,</u> 274 S.C. 14, 260 S.E.2d 705 (1979)	10
<u>State v. Stokes,</u> 381 S.C. 390, 673 S.E.2d 434 (2009)	12
<u>State v. Torrence,</u> 305 S.C. 45, 406 S.E.2d 315 (1991)	7

STATUTES AND RULES

Rule 208, SCACR.....	1
Rule 30, SCRCP.....	5, 10, 13
Rule 59, SCRCP.....	3
Rule 103, SCORE.....	9
Rule 401, SCORE.....	1
Rule 402, SCORE.....	1
Rule 403, SCORE.....	1, 2, 3, 8, 11, 12, 13, 14, 15, 19
Rule 404, SCORE.....	1

STATEMENT OF THE ISSUES ON APPEAL

- I. Whether Appellant failed to preserve her right to argue post-trial or on appeal that the trial court improperly excluded evidence concerning the circumstances of Respondent Nimal Perera, M.D.'s resignation from Respondent CareNet, Inc. of Lancaster when Appellant failed to proffer the excluded testimony during trial.
- II. Whether the trial court properly denied Appellant's Motion for a New Trial on the basis of excluded evidence that Respondent Nimal Perera, M.D. resigned from Respondent CareNet, Inc. of Lancaster because of issues in Sandra Gilbert's care when the probative value of the excluded evidence was substantially outweighed by its prejudicial effect or, alternatively, on the basis that any error in excluding the testimony was harmless.

STATEMENT OF THE CASE¹

On October 17, 2013, Sandra Gilbert ("Ms. Gilbert") filed her Complaint against Nimal A. Perera, M.D. ("Dr. Perera") and the medical practice which employed him, CareNet, Inc. of Lancaster. ("CareNet") (collectively, "Respondents"). [R. p. 5.] Ms. Gilbert alleged that Dr. Perera, acting as an agent of CareNet, committed medical malpractice with regard to care provided in 2010 and 2011. [R. pp. 5-8.] Dr. Perera and CareNet timely answered on November 22, 2013, denying liability. [R. pp. 9-11.] Due to Ms. Gilbert's death, an Amended Complaint was filed on June 11, 2014 which substituted Johnnie Mae Reed, as Personal Representative of the Estate of Sandra Gilbert, as the Plaintiff ("Appellant"). [R. p. 12.] The Amended Complaint added an allegation that Dr. Perera's care caused Ms. Gilbert's death. [R. p. 14, ¶ 13.] Dr. Perera and CareNet timely answered Appellant's Amended Complaint. [R. p. 17; R. p. 20.]

Prior to trial, on August 17, 2015, Respondents moved in limine pursuant to Rules 401, 402, 403, and 404, SCRE to exclude evidence on five issues, only one of which is at issue in this

¹ As an initial matter, Respondents bring to the Court's attention that Appellant's Brief fails to include references to the record in violation of Rule 208(b)(4), SCACR. This defect in and of itself is grounds for dismissal of Appellant's appeal. See Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) ("[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State....[T]his Court would be completely justified in dismissing this appeal based on appellant's numerous violations of the Rules,....").

appeal: the circumstances surrounding Dr. Perera's resignation from CareNet. [R. p. 222.] The parties prepared and presented detailed memoranda of law addressing the Motion in Limine. [R. p. 224; R. p. 232.] On August 18, 2015, the Honorable Daniel D. Hall (the "trial court") heard the Motion. On August 19, 2015, the trial court preliminarily denied the Motion as to the circumstances surrounding Dr. Perera's resignation.² [R. p. 2.]

This matter was tried before a jury in Lancaster County on August 24 – 27, 2015. Judge Hall presided. [R. p. 24.] At the outset, counsel for CareNet sought clarification on trial court's ruling in preparation for the testimony of CareNet's Chief Operating Officer Stewart Barre, M.D. [R. p. 25, line 17 – p. 26, line 16.] After discussion on the record [R. p. 26, line 17 – p. 29, line 2, R. p. 41, line 2 – p. 51, line 17], the trial court granted Respondents' Motion in Limine as to the circumstances surrounding Dr. Perera's resignation pursuant to Rule 403, SCRE on the grounds that the probative value of testimony and documentary evidence on those topics was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. [R. p. 50, line 10 – p. 51, line 1.] The trial court made it clear that the Court's ruling was on Respondents' Motion in Limine and that Appellant should raise her objection to the ruling when Dr. Barre took the stand to preserve the issue for post-trial motions and appeal. [R. p. 51, lines 9 – 16.]

Appellant did not proffer testimony concerning the circumstances of Dr. Perera's resignation, or in any way raise an objection to the trial court's ruling on this topic, during the

² The trial court granted Respondents' Motion in Limine as to any references to a second medical malpractice lawsuit involving Dr. Perera and CareNet, including any references to an allegation that Dr. Perera altered the medical chart in that case. Appellant does not appeal the trial court's ruling on those topics. As such, any argument concerning that ruling is not before this Court on appeal. See State v. Culbreath, 377 S.C. 326, 332, 659 S.E.2d 268, 271 (Ct.App. 2008) ("In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal.").

trial testimony of Dr. Barre. [R. p. 137, line 14 – p. 211, line 22.] On August 27, 2015, the jury returned a verdict in favor of Respondents. [R. p. 214, lines 14 – 23.]

Relevant to this appeal, on September 8, 2015, Appellant timely moved for a new trial pursuant to Rule 59, SCRCP on the ground that the trial court improperly excluded testimony concerning the circumstances surrounding Dr. Perera's resignation from CareNet. [R. p. 256.] On November 30, 2015, Respondents filed a Memorandum in Opposition to Appellant's Motion for a New Trial. [R. p. 259.] Respondents argued that Appellant failed to preserve the issue for post-trial review by failing to proffer the excluded testimony at trial and, alternatively, that the trial court properly excluded testimony concerning Dr. Perera's resignation pursuant to Rule 403, SCRE. [R. p. 259 – 263.] On November 30, 2015, the trial court heard Appellant's Motion for a New Trial. The trial court denied Appellant's Motion on December 8, 2015. [R. p. 4.]

On December 30, 2015, Appellant filed her Notice of Appeal. Her sole issue on appeal relates to the trial court's exclusion of testimony concerning the circumstances of Dr. Perera's resignation. Specifically, Appellant argues that the trial court erroneously denied her Motion for a New Trial on the basis of excluding testimony that Dr. Perera resigned his employment from CareNet in part because of issues in the care of Ms. Gilbert. [Appellant's Brief, p. i, 7.]

STATEMENT OF THE FACTS

Dr. Perera, a primary care physician and former employee of CareNet, saw Ms. Gilbert periodically from 2008 until 2011 at CareNet. [R. p. 54, lines 20 – 23.] In August 2010, Ms. Gilbert was hospitalized for severe onset diabetes. [R. p. 31, lines 2, 8 – 12; R. p. 55, lines 14 – 16.] During that hospitalization, Ms. Gilbert was under the care of physicians not associated with Dr. Perera or CareNet. One of Ms. Gilbert's incidental lab values was microcytosis, or a smaller than normal red blood cell size. [R. p. 30, lines 17 – 23; R. p. 58, lines 21 – 25.] Ms. Gilbert's

hospital-based physicians considered this an incidental finding, made no diagnosis concerning this condition, did not order further studies, and did not render any treatment. [R. p. 31, lines 2 – 8; R. p. 78, lines 16 – 21.]

When Ms. Gilbert returned to Dr. Perera for follow-up on September 1, 2010, Dr. Perera considered her new diagnoses of diabetes and diabetic ketoacidosis to be her most immediate, life-threatening problems and set about a plan to help Ms. Gilbert manage these conditions. [R. p. 31, lines 8 – 12; R. p. 55, lines 14 – 16; R. p. 60, lines 5 – 13.] Dr. Perera referred her to a diabetes education clinic and instructed her about managing her diabetic condition. [R. p. 30, lines 8 – 12; R. p. 56, line 23 – p. 57, line 1.] Ms. Gilbert failed to keep all of the scheduled diabetic education appointments. [R. p. 57, lines 9 – 23.] Dr. Perera referred her to an ophthalmologist for evaluation of diabetic issues related to her vision, but Ms. Gilbert did not keep that appointment. [R. p. 30, lines 12 – 16.] Dr. Perera considered the microcytosis, along with slightly low hemoglobin, as an incidental finding most likely due to mild anemia. [R. p. 59, lines 19 – 22.] As such, he elected to concentrate treatment on her severe diabetes. [R. p. 31, lines 8 – 12; R. p. 60, lines 5 – 13.]

Importantly, during the September 1, 2010 appointment, Dr. Perera attempted to discuss preventative health care, which included recommendations for a colonoscopy, a mammogram and a pap smear. However, Ms. Gilbert did not want to listen at that time and, the discussion was postponed. [R. p. 34, lines 4 – 5; R. p. 52, lines 11 – 18.] He directed Ms. Gilbert to return on March 1, 2011 to follow up of her new onset diabetes, her chronic high blood pressure and elevated cholesterol, and her labs, including the microcytosis. [R. p. 31, lines 8 – 16; R. p. 60, lines 1 – 4.]

Ms. Gilbert failed to return as directed in March 2011. [R. p. 61, lines 4 – 5.] On May 16,

2011, she was hospitalized for large amounts of rectal bleeding. [R. p. 31, lines 17 – 19; R. p. 53, lines 14 – 22; R. p. 62, lines 2 – 5.] Ms. Gilbert’s gastroenterologist, Dr. Amato, explained to her that she needed to follow up with a colonoscopy in his office shortly after discharge from the hospital. [R. p. 81, lines 20 – 24.] He explained to her that it was critical that the nature of her bleeding be diagnosed and that it could indicate colon cancer. [R. p. 90, lines 8 – 14.] A specific appointment was set to see Dr. Amato about a colonoscopy. Despite Dr. Amato’s conversation with Ms. Gilbert about the critical need to determine the nature of her bleeding, Ms. Gilbert did not keep that appointment or otherwise follow up with Dr. Amato. [R. p. 32, lines 7 – 14; R. p. 115, lines 6 – 8.]

In October 2011, Ms. Gilbert was diagnosed with colon cancer at the VA Hospital in Columbia, South Carolina. [R. p. 32, lines 19 - 24.] The cancer was surgically removed, and she was determined to be cancer free. [R. p. 32, line 25 – p. 33, line 1; R. p. 83, lines 12 – 24.] One year later, she developed metastatic disease and again resumed treatments. [R. p. 213, lines 15 – 17.] These treatments were unsuccessful, and Ms. Gilbert died on March 1, 2014. [R. p. 212, lines 9 – 12.]

During discovery, CareNet testified through its Rule 30(b)(6), SCRCF deponent, Dr. Barre, that Dr. Perera resigned from CareNet in January 2014. [R. p. 218, lines 1 – 5.] CareNet testified that Dr. Perera resigned under pressure due to a multitude of factors, including CareNet’s perceptions that Dr. Perera had put the organization at risk through his actions in this lawsuit and another pending medical malpractice lawsuit and that Dr. Perera’s professional goal of working part-time conflicted with CareNet’s model. [R. p. 218, line 6 – p. 219, line 4.] CareNet clarified that Dr. Perera had been accused of altering a medical chart in the other pending lawsuit, that allegation had caused CareNet’s insurance provider to issue a reservation-

of-rights letter, and that allegation was a contributing factor to CareNet's decision that Dr. Perera had placed CareNet at risk. [R. p. 220, line 18 – p. 221, line 17.] CareNet was clear, however, that it *did not* believe that Dr. Perera deviated from the standard of care in his treatment of Ms. Gilbert. [R. p. 219, lines 5 – 8.]

Relevant to this appeal, Respondents filed a pre-trial Motion in Limine to exclude evidence concerning the circumstances of Dr. Perera's resignation from CareNet. [R. p. 222.] Appellant's counsel argued that it should be allowed to ask Dr. Barre whether Dr. Perera resigned in part to issues with his care of Ms. Gilbert. [R. p. 43, line 24 – p. 44, line 7.] Respondents' counsel argued in reply that such a line of questioning would be highly prejudicial in that it would place undue emphasis on only one aspect of a multitude of reasons that Dr. Perera was asked to resign and would give the impression to the jury that CareNet believed that Dr. Perera did something wrong in treating Ms. Gilbert. [R. p. 44, lines 10 – 13; R. p. 45, line 23 – p. 47, line 2.]

Having heard from counsel of record, the trial court recessed for the day to give the issue further consideration. After giving the matter great consideration, the trial court granted Respondents' Motion in Limine as to the circumstances surrounding Dr. Perera's resignation. [R. p. 50, line 10 – p. 51, line 16.] Specifically, the trial court reasoned that Appellant's proposed line of questioning as to whether Dr. Perera's care of Ms. Gilbert contributed to his resignation would be more prejudicial than probative and would create confusion for the jury as to the issue of whether Dr. Perera's care of Ms. Gilbert met the standard of care. [R. p. 50, line 10 – p. 51, line 1.]

STANDARD OF REVIEW

The sole basis of Appellant's appeal is a challenge to the trial court's ruling on

Appellant's Motion for a New Trial based upon alleged error in excluding testimony from Dr. Barre that Dr. Perera's resignation from CareNet was due in part to his conduct in the care of Ms. Gilbert. Appellant must properly preserve this issue for appeal. "Failure to make an offer of proof precludes the appellant from raising the issue on appeal." State v. Cabbagestalk, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984) (citations omitted). See also City of Columbia v. Ervin, 330 S.C. 516, 520, 500 S.E.2d 483, 485 (1998) (alleged error in excluding trial testimony was not preserved for appellate review where appellant failed to proffer the excluded testimony).

Assuming, *arguendo*, that Appellant had properly preserved her issue on appeal, the "admission or exclusion of evidence is left to the sound discretion of the trial judge." State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) (citations omitted). Where, as here, a trial court's decision regarding the comparative probative value and prejudicial effect of evidence is under review, it "should be reversed only in exceptional circumstances." Id. at 378, 580 S.E.2d at 794 (citation omitted). Thus, appellate courts are "obligated to give great deference to a trial court's judgment." Adams, 354 S.C. at 378, 580 S.E.2d at 794 (citation omitted).

Consequently, a "court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice...." Id. at 377, 580 S.E.2d at 793 (citations omitted). "[H]armless error does not require a new trial." State v. Gaskins, 284 S.C. 105, 120, 326 S.E.2d 132, 141 (1985), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Among other circumstances, error is harmless where, considering the case's particular facts, the excluded testimony was cumulative or the proponent otherwise was able to elicit testimony on the issue. State v. Curry, 370 S.C. 674, 680, 636 S.E.2d 649, 652 (Ct. App. 2006) (citations omitted).

ARGUMENT

I. Appellant failed to proffer excluded testimony concerning the circumstances of Dr. Perera's resignation from CareNet, meaning that Appellant has failed to preserve this issue for post-trial or appellate review.^{3 4}

Appellant argues that the trial court erred in excluding testimony that Dr. Perera resigned from CareNet in part due to concerns with the care of Ms. Gilbert. [Appellant's Brief, p. i, 7.] However, Appellant ignores two key facts. First, this testimony was excluded pursuant to Respondents' Motion in Limine. Second, Appellant failed to proffer the testimony at trial. Unfortunately for Appellant, these facts preclude this Court's consideration of her issue on appeal.

The record is clear. When the trial court excluded testimony on the circumstances surrounding Dr. Perera's resignation, it unambiguously stated that its ruling was on Respondents' Motion in Limine. [R. p. 51, lines 14 – 16.] In fact, when Appellant's counsel's suggested that he wanted to preserve the issue for appeal, the trial court expressly stated that Appellant would want

³ Respondents understand that the trial court denied Appellant's Motion for a New Trial based upon both arguments in opposition raised by Respondents: (1) the trial court's grant of Respondents' Motion in Limine was not subject to post-trial review because Appellant failed to proffer the excluded testimony; and (2) the trial court properly granted Respondents' Motion in Limine based upon Rule 403, SCRE. [R. p. 232.] To the extent that this Court disagrees, Respondents raise this argument as an additional sustaining ground found within the record on appeal. See I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("[A] respondent...may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.").

⁴ As set forth in Footnote 3, Respondents raised two arguments in opposition to Appellant's Motion for a New Trial. [R. p. 232.] By Form 4 Order, the trial court denied Appellant's Motion for a New Trial. [R. p. 4.] Appellant's failure to address Respondents' argument that Appellant failed to preserve the issue on appeal or post-trial review in Appellant's Brief implicates the "two-issue rule." See Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.").

to proffer the excluded testimony when Dr. Barre took the stand. The following colloquy from the trial court demonstrates this point:

MR. RAVENEL: I would just comment for the record that I want to preserve that, and I think it is preserved but I just want to say - - I just want for the record to say that we take the position that we should be entitled to make those - - to inquire into that area.

THE COURT: Okay. And I note your objection. It might be proper, too, that whenever - - or whoever calls Dr. Barre that you might want to make that - - make your objection known when he takes the stand, or at least put something on the record then, you don't need me to tell you how to preserve the record. But at this point it is a motion in limine, in the Court's opinion to preserve it further you might want to do that when he takes the stand.

[R. p. 51, lines 4 – 16.]

The trial court's guidance to Appellant to proffer the excluded testimony is well-grounded in South Carolina law. The South Carolina Supreme Court has warned the Bar that rulings on motions in limine are not final: "We caution Bench and Bar that these pre-trial motions are granted to prevent prejudicial matter from being revealed to the jury, but do not constitute final rulings on the admissibility of evidence." State v. Floyd, 295 S.C. 518, 521, 369 S.E.2d 842, 843 (1988). Because such rulings are merely preliminary, the law of this State is abundantly clear: the proponent must proffer excluded testimony *during trial* to preserve review by way of post-trial motion or appeal. See, e.g., Ervin, 330 S.C. at 520, 500 S.E.2d at 485 (1998) (alleged error in excluding trial testimony was not preserved for appellate review where appellant failed to proffer the excluded testimony); Cabbagestalk, 281 S.C. at 36, 314 S.E.2d at 11 ("Failure to make an offer of proof precludes the appellant from raising the issue on appeal."); Mains v. K Mart Corp., 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988) ("[N]o authority is required for the proposition that an attorney must, after moving that the jury be excused, proffer for the record testimony to which an objection has been sustained."); Rule 103(a)(2), SCRE

(error may not be predicated on a ruling which excludes evidence unless the party proffers both the substance of the evidence and the specific evidentiary basis supporting admission).

Despite the trial court's warning and against the weight of authority, Appellant failed to proffer the excluded testimony at issue while Dr. Barre was on the stand.⁵ [R. p. 137, line 14 – p. 211, line 22.] Appellant does claim otherwise. [Appellant's Brief.] Appellant, therefore, did not properly preserve her issue on appeal.

Appellant did not ignore a mere procedural technicality in failing to proffer the excluded testimony. The substantive purpose behind the requirement is to create a record on which the appellate court can determine the impact of the excluded testimony. See, e.g., Baber v. Greenville County, 327 S.C. 31, 41, 488 S.E.2d 314, 319 (1997) (“Absent a proffer, it is impossible for this Court to determine the effect of the excluded testimony.”); State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979) (“It is well settled that a reviewing court may not consider error alleged in exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been.”).

Appellant's Brief demonstrates why creating a record for the appellate court's review is essential. Addressing the exclusion of testimony that Dr. Perera resigned his employment from CareNet due in part to issues with Ms. Gilbert's, Appellant cites to a brief snippet of CareNet's Rule 30(b)(6), SCRCF deposition. Appellant also alludes to what she believes would have been implied in Dr. Barre's trial testimony—that CareNet believed that Dr. Perera deviated from the standard of care. [Appellant's Brief, p. 5, 8.] During arguments on Respondents' Motion in

⁵ It is noteworthy that in regards to a separate ruling wherein the trial court excluded from evidence a scholarly article, Appellant *did* proffer the excluded evidence at the suggestion and advice of the trial court. [R. p. 35, line 9 – p. 40, line 20.]

Limine, Appellant's counsel, however, conceded that the present lawsuit is "one of a multitude of other issues" concerning Dr. Perera's forced resignation. [R. p. 43, lines 4 – 7.]

Appellant's failure to proffer the substance of the excluded testimony as it would have been presented *at trial* and the specific evidentiary basis supporting admission *at trial* deprived the trial court from fully considering Appellant's arguments in support of admission. Likewise—and just as critically, Appellant's failure to proffer the testimony prevented Respondents' counsel from eliciting rebuttal testimony during the proffer to fully develop the circumstances of Dr. Perera's resignation from CareNet for the Court's consideration.⁶ Appellant, therefore, violated the very purpose behind the proffer requirement by depriving the trial court of the ability to conclusively rule in light of all the pertinent and relevant evidence as it would have been presented *at trial to the jury*. For the same reasons, Appellant's failure to proffer the excluded testimony makes it "impossible for this Court to determine the effect of the excluded testimony." Baber, 327 S.C. at 41, 488 S.E.2d at 319.

Appellant failed to heed the trial court's warning and the weight of authority when she decided not to proffer Dr. Barre's excluded testimony at trial. As such, this Court is precluded from reviewing her issue on appeal.

II. The trial court properly excluded testimony that Dr. Perera resigned his employment from CareNet due in part to issues with the care of Ms. Gilbert pursuant to Rule 403, SCRE. Alternatively, the alleged error in excluding this testimony was harmless.

Appellant argues that the trial court erroneously excluded testimony that Dr. Perera resigned his employment from CareNet due in part to concerns about the care of Ms. Gilbert.

⁶ The multitude of factors leading to Dr. Perera's resignation included the highly prejudicial allegation that Dr. Perera had altered a medical chart in another pending medical malpractice claim, thereby placing CareNet at risk by its insurer defending that matter under a reservation of rights. [R. p. 220, line 18 – p. 221, line 17.]

While Appellant argues that the testimony is “relevant to whether a standard of care violation occurred” and “corroborated the testimony of Appellant’s expert witnesses” that a standard of care violation occurred [Appellant’s Brief, p. 8 – 9], appellant fails to address the trial court’s well-reasoned determination pursuant to Rule 403, SCRE that any probative value associated with the excluded testimony was substantially outweighed by the danger of unfair prejudice. Likewise, even if the trial court had erred in excluding the testimony at issue, Appellant has failed to establish any prejudice she suffered as a result of the ruling.

a. Any probative value to the excluded testimony was substantially outweighed by the danger of unfair prejudice.

The trial court’s ruling on Appellant’s Motion for a New Trial should be affirmed because the trial court appropriately recognized the dangers of allowing testimony on the circumstances of Dr. Perera’s resignation from CareNet as required by Rule 403, SCRE.

That rule provides the trial court with wide-ranging discretion to exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE. “Unfair prejudice means an undue tendency to suggest decision on an improper basis.” State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009) (citation omitted). “[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case.” Id. (citation omitted). A trial court’s “decision regarding the comparative probative value and prejudicial effect” is given “great deference” and “should be reversed only in exceptional circumstances.” Adams, 354 S.C. at 378, 580 S.E.2d at 794 (citations omitted).

Exercising its discretion under Rule 403, SCRE, the trial court carefully weighed the anticipated testimony that Dr. Perera resigned from CareNet due in part to issues in the care of

Ms. Gilbert. [R. p. 26, line 17 – p. 29, line 2; R. p. 41, line 2 – p. 51, line 17.] As the trial court talked through the issue, Appellant’s counsel conceded that the present lawsuit was “one of a multitude of other issues” leading to Dr. Perera’s resignation. [R. p. 43, lines 4 – 7.]

Indeed, Dr. Barre testified as CareNet’s Rule 30(b)(6), SCRCP deponent that Dr. Perera’s forced resignation was due to at least three factors: (-) CareNet’s perceptions that Dr. Perera had put the organization at risk through his actions in this lawsuit and another pending medical malpractice lawsuit; (-) an allegation in the other pending medical malpractice allegation that Dr. Perera had altered a medical chart, causing CareNet’s insurance provider to issue a reservation-of-rights letter; and (-) Dr. Perera’s professional goal of working part-time conflicted with CareNet’s model. [R. p. 218, line 6 – p. 219, line 4; R. p. 220, line 18 – p. 221, line 17.] Respondent’s Motion in Limine as to any references to the other pending medical malpractice case and the alleged alteration of medical records was granted, and Appellant has not challenged that ruling on appeal. (See, supra, Fn. 2.)

Still, Appellant sought unfairly to present testimony on only one factor leading to Dr. Perera’s forced resignation: that Dr. Perera resigned due in part to his conduct in the care of Ms. Gilbert. [R. p. 43, line 24 – p. 44, line 8.] Respondents’ counsel correctly argued in reply that such a line of questioning would be highly prejudicial in that it would place undue emphasis on only one aspect of a multitude of reasons that Dr. Perera was asked to resign and would give the impression to the jury that CareNet believed that Dr. Perera did something wrong in treating Ms. Gilbert. [R. p. 44, lines 10 – 13; R. p. 45, line 23 – p. 47, line 2.] After consideration, the trial court agreed with Respondents, finding pursuant to Rule 403, SCRE that presentation of Dr. Barre’s anticipated testimony would create the danger of unfair prejudice and the dangers of confusion of the issues and misleading the jury by leading to “a mini-trial within the trial” and

going “beyond the issue of standard of care in Dr. Perera’s care of [Ms. Gilbert].” [R. p. 50, line 10 – p. 51, line 1.] The trial court therefore properly granted Respondents’ Motion in Limine as to Dr. Barre’s anticipated testimony. [R. p. 50, line 10 – p. 51, line 1.]

Not only is the trial court’s well-reasoned determination of admissibility pursuant to Rule 403, SCRE entitled to great deference, but it is supported by the applicable case law. For example, in Covington v. George, a personal injury case, the defendant proffered testimony that the plaintiff’s treating provider accepted an amount less than what the provider billed. 359 S.C. 100, 597 S.E.2d 142 (2004). The trial court excluded the testimony pursuant to Rule 403, SCRE on the grounds that the testimony would confuse the jury. Id. at 102, 597 S.E.2d at 143. On appeal, the defendant attempted to skirt the collateral source rule by arguing that he was attempting to introduce the fact, not the source, of the compromised payment. The Supreme Court reasoned that introduction of the compromised payment, without explanation, would confuse the jury. The Court further reasoned that any attempt by the plaintiff to explain the compromised payment “would necessarily lead to the existence of a collateral source.” Id. at 104, 597 S.E.2d at 144. The Supreme Court, therefore, concluded that the trial court properly applied Rule 403, SCRE to exclude the evidence.

The application of Rule 403 in Covington is on point with the present matter. Like in Covington, Respondents would have had to introduce highly prejudicial and previously excluded testimony to fully explain to the jury all factors leading to Dr. Perera’s resignation. This would have been necessary to allow the jury to give fair weight to those factors and avoid overly-emphasizing the role played by Dr. Perera’s care of Ms. Gilbert. As set forth above, this damaging testimony would have included testimony on the other medical malpractice case, the allegations that Dr. Perera altered the medical records in that case, and the fact that Dr. Perera’s

actions in the other medical malpractice case jeopardized CareNet's insurance coverage. Just as the Covington Court concluded, to force Respondents to introduce evidence on those topics to put Dr. Perera's resignation in context would have led to the exact dangers of unfair prejudice, confusion of the issues, and misleading the jury that the trial court sought to avoid in granting Respondents' Motion in Limine.

Simply, the trial court appropriately exercised its discretion in excluding testimony that Dr. Perera resigned in part due to issues in the care of Ms. Gilbert based upon the entire record, Rule 403, SCRE, and the applicable case law.

- b. Even if the trial court had committed error in excluding testimony that Dr. Perera's resignation was due in part to issues with his care of Ms. Gilbert, the error would be harmless and would not support reversal.⁷**

Appellant argues that testimony that Dr. Perera's care of Ms. Gilbert played a role in his resignation from CareNet should have been admitted because the testimony is "relevant to whether a standard of care violation occurred" and "corroborated the testimony of Appellant's expert witnesses" that a standard of care violation occurred. [Appellant's Brief, p. 8 – 9.] Appellant expressly acknowledges the fact that she presented standard of care testimony through two well-qualified experts at trial. [Appellant's Brief, p. 9.] She, therefore, suffered no prejudice amounting to an abuse of discretion and is not entitled to a new trial.

To establish her right to a new trial, Appellant must establish that the trial court abused its discretion in excluding the testimony at issue. See Burroughs v. Worsham, 352 S.C. 382, 391, 574 S.E.2d 215, 219 (Ct. App. 2002) (the trial court's exercise of discretion in excluding testimony "will not be disturbed on appeal absent an abuse of that discretion.") (citation

⁷ Respondents' argument in this section is based upon the applicable standard of review and the threshold for reversal based upon error in excluding testimony. To the extent that this Court considers this to be an additional sustaining ground found within the record, Respondents raise this argument pursuant to I'On, LLC, 338 S.C. 406, 526 S.E.2d 716 (see, supra, Fn. 3).

omitted). “Generally, there is no abuse of discretion where the excluded testimony is merely cumulative of other evidence proffered to the jury.” *Id.* at 400, 574 S.E.2d at 224 (citation omitted).

As set forth above, Appellant presented trial testimony from two medical experts that Dr. Perera violated the applicable standard of care in his treatment of Ms. Gilbert. Dr. Mark Yoffe, an oncologist who is board-certified in internal medicine, testified that Dr. Perera deviated from the applicable standard of care by prescribing iron to Ms. Gilbert and failing to have a colonoscopy performed. [R. p. 63, lines 9 – 25; R. p. 71, lines 14 – 24.] Likewise, Dr. Carol Ruppe, a board-certified family medicine physician, testified that Dr. Perera failed to meet the standard of care by failing to order a colonoscopy for Ms. Gilbert. [R. p. 97, lines 4 – 7; R. p. 109, lines 17 – 20.]

Considering the testimony which Appellant elicited from Drs. Yoffe and Ruppe, she was able to present standard of care testimony to the jury, notwithstanding the trial court’s ruling on Respondents’ Motion in Limine. Additional testimony from Dr. Barre for Appellant’s stated purpose of evidencing a standard of care violation would have been cumulative, at best.

Applicable South Carolina case law supports Respondents’ position that in such a circumstance, the appealing party has not suffered prejudice and is not entitled to a new trial. For example, in Fields v. Regional Medical Center of Orangeburg, et al., the plaintiff claimed that an emergency room physician committed medical malpractice in failing to diagnose her husband’s heart condition. 363 S.C. 19, 609 S.E.2d 506 (2005). The plaintiff presented trial testimony to that effect from two expert witnesses. *Id.* at 25, 609 S.E.2d at 509. Following a defense verdict, the plaintiff argued on appeal that the trial court erred in excluding testimony that one of her experts was not board-certified in emergency medicine because he helped develop

the certification exam and would have had a conflict in taking it. The expert in question did testify that he had practiced emergency medicine for twenty-five years and was instrumental in developing the board examination. Id. at 29 – 30, 609 S.E.2d at 511 – 12.

The Court noted that when evidence is erroneously excluded, the appellate court engages in a two-step inquiry to determine whether the appellant suffered prejudice. Id. at 31, 609 S.E.2d at 512. First, the appellate court considers “whether the error may be deemed harmless because equivalent or cumulative evidence or testimony was offered” or because “the aggrieved party still managed to accomplish his primary objective, such as eliciting testimony about an issue....” Id. at 31 – 32, 609 S.E.2d at 512. Next, the appellate court considers “whether, viewing a case as a whole, the wrongly excluded evidence or testimony was so crucial and important in proving the aggrieved party's claim or defense that its exclusion constitutes prejudicial error, i.e., the aggrieved party demonstrates there is a reasonable probability the jury's verdict was influenced by the lack of the challenged evidence.” Id. at 32 – 33, 609 S.E.2d at 513. The Court concluded that the plaintiff failed to demonstrate prejudice because she was able to accomplish her primary objective in demonstrating her expert's credentials through his testimony on his tenure of emergency medicine practice and his involvement in developing the applicable board test. Id. at 33, 609 S.E.2d at 513.

In Burroughs, the plaintiff sued the defendant family physician for medical malpractice resulting from her husband's missed colon cancer diagnosis. 352 S.C. at 387 – 90, 574 S.E.2d at 217 – 19. The trial court admitted testimony from a surgeon to whom the husband had been referred by the defendant physician that the husband failed to return for his scheduled follow-up visit. The trial court, however, excluded the defendant physician's testimony to the same effect based upon his review of the surgeon's records. The defendant physician appealed a jury verdict

for the plaintiff, in part based upon his above-described excluded testimony. Id. at 400 – 01, 574 S.E.2d at 224.

The Court of Appeals noted, “Generally, there is no abuse of discretion where the excluded testimony is merely cumulative of other evidence proffered to the jury.” Id. at 400, 574 S.E.2d at 224. The Court observed that the point that the plaintiff’s husband failed to return for his follow-up visit with the surgeon was “brought out several times” during the surgeon’s testimony. Id. Because “the excluded would have been merely cumulative to testimony already in the record,” the Court concluded that the trial court did not abuse its discretion in excluding the defendant physician’s testimony on the subject. Id. at 400 – 01, 574 S.E.2d at 224.

As set forth above, the present case presents an appellate issue similar to those presented in both Fields and Burroughs. The point which Appellant claims she was entitled to make through the excluded testimony—that Dr. Perera deviated from the standard of care—was presented to the jury through the testimony of her two expert witnesses. [R. p. 63, line 8 – p. 94, line 19; R. p. 95, line 8 – p. 137, line 5.] Viewed through the lens of Fields, Appellant was able to accomplish her primary objective by presenting standard of care testimony through these experts. Alternatively, like in Burroughs, the excluded testimony of Dr. Barre would have been cumulative as to the point Appellant sought to make because Appellant’s two expert witnesses both testified that Dr. Perera breached the standard of care.

Simply, Appellant placed standard of care testimony before the jury. Just as the courts in Fields and Burroughs reasoned, any error in excluding Dr. Barre’s testimony at issue was harmless and did not with reasonable probability impact the jury’s verdict.

CONCLUSION

Appellant alleges that the trial court erred in granting Respondents’ Motion in Limine

and excluding testimony that Dr. Perera resigned in part due to the care he provided to Ms. Gilbert. However, this issue was not properly preserved for appeal because Appellant failed to proffer the excluded testimony at trial. Even if Appellant had preserved the issue for appeal, the trial court appropriately exercised its discretion pursuant to Rule 403, SCRE, and the Appellant suffered no prejudice requiring a new trial. For these reasons, this Court should uphold the trial court's denial of Appellant's Motion for a New Trial.

Respectfully submitted,

Richardson Plowden & Robinson, PA

Holcombe Bomar, P.A.

George C. Beighley (by JTT w/ permission)

George C. Beighley
George C. Beighley, Jr.
P.O. Box 7788
Columbia, SC 29202
(803) 771-4400
gbeighley@RichardsonPlowden.com
gbeighleyjr@RichardsonPlowden.com

Attorneys for the Respondent Nimal A.
Perera

Joshua T. Thompson

Perry D. Boulrier
Joshua T. Thompson
P.O. Drawer 1897
Spartanburg, SC 29304
(864) 594-5300
pboulrier@holcombebomar.com
jthompson@holcombebomar.com

Attorneys for Respondent CareNet, Inc.
of Lancaster

Rule 211(b) Certification

The undersigned attorneys for the Respondents certify that this Final Respondents' Brief complies with Rule 211(b), SCACR.

Richardson Plowden & Robinson, PA

Holcombe Bomar, P.A.

George C. Beighley (by JTT w/ permission)

George C. Beighley
George C. Beighley, Jr.
P.O. Box 7788
Columbia, SC 29202
(803) 771-4400
gbeighley@RichardsonPlowden.com
gbeighleyjr@RichardsonPlowden.com

Attorneys for the Respondent Nimal A.
Perera

Joshua T. Thompson

Perry D. Boulrier
Joshua T. Thompson
P.O. Drawer 1897
Spartanburg, SC 29304
(864) 594-5300
pboulrier@holcombebomar.com
jthompson@holcombebomar.com

Attorneys for Respondent CareNet, Inc.
of Lancaster

RECEIVED

JUN 30 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Case No. 2013-CP-29-1339
Appellate Case No. 2015-002653

RECEIVED
JUN 30 2016
SC Court of Appeals

Johnnie Mae Reed, as Personal Representative of the
Estate of Sandra Gilbert, Appellant,

v.

CareNet, Inc. of Lancaster and Nimal A. Perera, M.D., Respondents.

PROOF OF SERVICE

The undersigned, attorneys in this matter for Respondents CareNet, Inc. of Lancaster and Nimal A. Perera, M.D., certify that we have this 30th day of June 2016 served copies of the **FINAL BRIEF OF RESPONDENTS CARENET, INC. OF LANCASTER AND NIMAL A. PERERA, M.D.** upon counsel of record for the Appellant by causing them to be deposited in the United States mail with sufficient postage attached, addressed to D. Cravens Ravenel, Esq., Baker, Ravenel & Bender, L.L.P., Post Office Box 8057, Columbia, South Carolina 29202.

[Signature blocks on next page.]

Richardson Plowden & Robinson, PA

George C. Beighley (by JTT w/ permission)

George C. Beighley

George C. Beighley, Jr.

P.O. Box 7788

Columbia, SC 29202

(803) 771-4400

gbeighley@RichardsonPlowden.com

gbeighleyjr@RichardsonPlowden.com

Attorneys for the Respondent Nimal A.
Perera

Holcombe Bomar, P.A.

Joshua T. Thompson

Perry D. Boulter

Joshua T. Thompson

P.O. Drawer 1897

Spartanburg, SC 29304

(864) 594-5300

pboulter@holcombebomar.com

jthompson@holcombebomar.com

Attorneys for Respondent CareNet, Inc.
of Lancaster



Holcombe Bomar, P.A.

100 Dunbar Street, Suite 200
Spartanburg, SC 29306
P.O. Box 1897
Spartanburg, SC 29304

phone (864) 594-5300
fax (864) 585-3844
Direct Dial: (864) 594-5307

www.holcombebomar.com

jthompson@holcombebomar.com

William U. Gunn
Koger M. Bradford
Perry D. Boulter
William B. Darwin, Jr.
W. McElhaney White
A. Todd Darwin
Joshua T. Thompson
Kyle T. Clelland
J. Hollis Inabinet

June 29, 2015

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
JUN 30 2015
SC Court of Appeals
Neville Holcombe, 1902-1983
Horace L. Bomar, 1912-1994

RE: Johnnie Mae Reed, as Personal Representative of the Estate of Sandra Gilbert, Appellant, v. CareNet, Inc. of Lancaster and Nimal A. Perera, M.D., Respondents
Appellate Case No: 2015-002653
HB File No. 13362

Dear Ms. Kitchings:

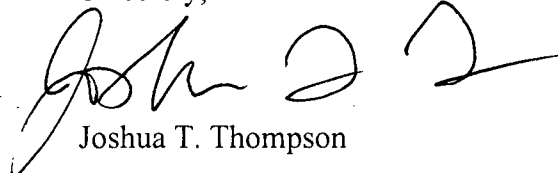
I enclose (1) one unbound original and fifteen bound copies of the Final Brief of Respondents CareNet, Inc. of Lancaster and Nimal A. Perera, M.D., which include the required Certificate of Counsel; and (2) one original and one copy of the Proof of Service reflecting service of the above Final Brief on counsel of record for Appellant.

I would appreciate it if you would file the original and copies and return a clocked copy of each filing to me by way of my firm's courier.

By copy of this letter, I am serving a copy of the above Final Brief on counsel of record for Appellant.

Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,



Joshua T. Thompson

Enclosures

C: D. Cravens Ravenel, Esq.
George C. Beighley, Esq.