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 RESPONDENT'S BRIEF OF RESPONDENT/APPELLANT SEAN D. FAY TO THE APPELLANT STEPHEN W. LAW, DO

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COUNTER-STATEMENT OF THE CASE

In January 2002, twenty-five year old Kelly L. Fay died as the result of medical negligence by medical professionals at Grand Strand Regional Medical Center ("GSRMC") in Horry County. Mrs. Fay's husband, Sean D. Fay, brought an action as the personal representative of her estate against GSRMC d/b/a South Strand Ambulatory Care Center, Dr. Stephen W. Law, D.O., Carolina Health Specialists, Dr. Richard Young, M.D., and Grand Strand Urology, LLP ("GSU"). Following discovery the case was tried for ten (10) days from May 17, 2010 through May 28, 2010. At the close of the plaintiff's case the trial court directed a verdict for defendant GSU but denied all other dispositive motions. At the close of all of the evidence the trial court directed a verdict for Dr. Young.

A jury awarded a verdict against the remaining defendants GSRMC and Dr. Law in the amount of $3 million dollars. The jury found Plaintiff Fay 4% at fault and at the request of the parties the jury assigned fault among the defendants at 90% for GSRMC and 6% for Dr. Law. The trial court initially entered judgment according to the assigned percentages of fault. However, upon motion for reconsideration by plaintiff, the court withdrew that order and ordered judgment against both defendants, jointly and severally, for 96%. The court denied all other post-trial motions.

GSRMC, Dr. Law and Plaintiff Fay have all separately appealed. This brief involves Plaintiff Fay's response to the Brief of Appellant filed by Dr. Law.

ARGUMENTS

I. DR. LAW'S APPEAL IS UNTIMELY AND IS NOT PROPERLY BEFORE THIS COURT

Mr. Fay previously moved to dismiss Dr. Law's appeal, asserting that Dr. Law did not timely serve a notice of appeal. The Court denied the motion, but because this is a jurisdictional issue, *see Quality Trailer Products, Inc. v. CSL Equipment Co.*, 349 S.C. 216, 562 S.E.2d 615 (2002) (timely service of notice of intent to appeal is a jurisdictional requirement, and Court has no authority to extend or expand the time in which the notice of intent to appeal must be served), Plaintiff Fay raises the point again.

The case was tried in late May 2010. 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. Plaintiff Fay cross-appealed that ruling.

The case proceeded against the remaining defendants and on May 28, 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. (First Rule 59 motion). 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. (Law Motion of July 21, 2010, p. 1). 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. On July 30, 2010, Plaintiff filed and served a Notice of Cross-Appeal. On August 6, 2010, Grand Strand filed its second amended Notice of Appeal.

On September 24, 2010, this Court issued an order denying Dr. Law's motion to

dismiss the appeal and cross-appeal pending resolution of Dr. Law's second post-trial motion. 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 November 15, 2011, Plaintiff Fay moved this Court to dismiss Dr. Law's appeal. Plaintiff Fay asserted Dr. Law failed to timely serve his notice of appeal. Dr. Law filed a Return to the motion on December 8, 2011, and Plaintiff Fay filed a Reply on December 15, 2011. On February 6, 2012, this Court denied the motion to dismiss, finding the second Rule 59 motion challenged perceived deficiencies in the order denying post-trial motions and that "Dr. Law did not merely recaption his JNOV/new trial motions and resubmit them as an identical Rule 59(e) motion." (Order of February 6,

2012, p. 3). 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 entirely 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

Aug. 6, 2010 Grand Strand filed its second amended Notice of Appeal

Aug. 17, 2011 The trial court entered order denying in part and granting in part Dr. Law's subsequent Rule 59 motion - trial court ordered verdict entered based upon percentages of fault the jury assigned.

Aug. 22, 2011 Plaintiff Fay moved the trial court to reconsider its ruling and deny Dr. Law's motion in its entirety.

Aug. 26, 2011 Trial court granted Plaintiff's motion, rescinded that portion of the order entering judgment according to jury's percentages, and ordered the verdict enrolled against all defendants, *nunc pro tunc*.

Sept. 23, 2011 Dr. Law filed and served notice of appeal from all rulings.

Feb. 6, 2012 This Court denied the motion to dismiss Dr. Law's appeal.

Although this Court has already rejected the argument that the appeal is untimely,

Respondent Fay reasserts his arguments here that Dr. Law's appeal is untimely because this issue involves this Court's jurisdiction to reach the issues Dr. Law raises on appeal.

Dr. Law first requested a JNOV but alternatively sought a new trial on the following contentions: (1) the trial court erred in excluding evidence of Plaintiff's marital affair; (2) the trial court erred in excluding evidence of Plaintiff's remarriage after the death of Plaintiff's decedent; (3) the trial court erred in limiting the testimony of Plaintiff's decedent's mother, stepfather and brother; (4) the amount of the verdict was so excessive that it was "clearly actuated by passion, caprice, and prejudice"; (5) the verdict was "so excessive that it must have been influenced by matters outside the evidence or is so excessive that the jury must have been unable to follow the Court's instructions or charges in rendering its verdict"; (6) "the only reasonable inference that can be drawn from all of the evidence is that the negligence of the plaintiff is 50% and is greater than any negligence on the part of the Defendant Dr. Law"; and (7) as a thirteenth juror, the court should conclude that the evidence and facts do not justify the verdict. (Law Post-trial Motion of 6/7/10, pp. 7-8). Dr. Law also moved for a new trial nisi remittitur. As an alternative, Dr. Law stated as part of his motion:

> Should the Court fail to grant the Motion for Judgment Notwithstanding the Verdict, or in the alternative, the Motion for New Trial, or in the alternative, the Motion to Alter, Amend and Vacate the Verdict, or for Remittitur, then Dr. Law requests the judgment be enrolled using the percentage of combined negligence that the jury concluded proximately caused the Plaintiff's injuries:
>
> Plaintiff 4%
>
> Defendant Dr. Law 6%

Defendant Grand Strand 90%

(Law Post-trial Motion of 6/7/10, p. 9). The trial court responded by issuing an order denying the post-trial motions. (Order filed 6/24/10).

Dr. Law received the Order denying his initial Rule 59 motion on July 12, 2010. (Law Second Post-trial Motion of 7/21/10, p. 1). Dr. Law then filed a Motion to Alter or Amend the Judgment And/Or Motion for Reconsideration. *Id.* Dr. Law asserted only that the order failed to address grounds for relief Dr. Law previously raised in his Rule 59(a) motion.

The trial court then issued another order filed August 17, 2011, noting the matter was before the court on Dr. Law's motion "for reconsideration of a previous Order denying Defendant Law's post-trial motions, signed June 23, 2010." (Order of 8/15/11). The order outlined the following four issues raised in the second Rule 59 motion: (1) Law's JNOV motion; (2) Law's motion for a new trial based upon the exclusion of evidence; (3) Law's new trial/thirteenth juror motion; and (4) Law's motion for new trial *nisi remittitur*. The court stated, "As to each of the four above-listed issues, this Court denies the Rule 59(e) motion, finding that these issues were either directly addressed in the Court's previous ruling, or clearly addressed by implication in the denial of all post-trial motions." (Order of 8/15/11, p. 1). The trial court then noted Dr. Law's motion to reform the verdict based upon the percentages of negligence the jury assigned and stated "this issue was not addressed in the Court's previous Order denying post-trial motions." *Id.* The court granted that portion of the motion and ordered the verdicts so enrolled.

Plaintiff Fay and co-defendant Grand Strand requested the trial court reconsider

the decision as it was contrary to South Carolina law. Following a hearing the court agreed that there was no basis for it to direct the clerk to enroll the verdict as Dr. Law had contended. The court stated "the result of this amended Order is that all of Defendant Law's post-trial motions remain denied, and the motion to reconsider that decision is fully denied." (Order of 8/24/11, p. 1)

The situation analogous to *Collins Music Co. v. IGT*, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002), reaffirmed in *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) and *Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 28, 609 S.E.2d 506, 511 (2005). Dr. Law stated specific grounds in his Rule 59(a) motion, which the trial court denied. He then filed a Rule 59(e) motion in which he simply sought specific rulings on the grounds he had already raised. While he was permitted to do so, the Supreme Court warned litigants such as Dr. Law to pay attention to the exceptions set forth in *Coward Hund Constr. Co. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), *Quality Trailer Products, Inc.*, and *Collins Music*.

In *Collins Music*, the appellant made a new trial motion which was denied. The appellant then made a Rule 59 motion which was almost a duplicate of the first motion. That motion was also denied. The Supreme Court held the second motion did not toll the time for an appeal because it was a successive motion in that it raised issues already raised to and ruled upon by the trial court. The *Quality Trailer* Court agreed with *Coward Hund* and held that successive new trial motions do not toll the time for serving the notice of appeal. That is precisely what happened in this case.

A trial judge in South Carolina is not required to state specific grounds for

denying a motion. *See, e.g., Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009) (noting order which does not restate grounds on which motion is based is sufficient to preserve issue for appeal where the order explicitly rules on grounds raised, and Rule 59 motion not required); *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006) (noting issue preserved when trial court "summarily denied" Rule 59 motion); *Collins Music* (stating circuit judge not required to provide detailed analysis respecting each of grounds offered in support of JNOV, new trial and new trial nisi motion). In this case, Dr. Law's subsequent Rule 59 motion sought an explicit ruling on each of the grounds he had already raised, and the trial court reaffirmed its denial of the motion on those grounds.

Accordingly, the Court should review this issue and find that the successive Rule 59 motion Dr. Law filed did not stay the time for him to serve a notice of appeal. Thus, the notice of appeal Dr. Law filed in September 2011 was not timely. The Court should dismiss the appeal as to Dr. Law.

II. THE CIRCUIT COURT CORRECTLY DENIED DR. LAW'S MOTION FOR JNOV BECAUSE WHEN VIEWED MOST FAVORABLY FOR MR. FAY, THE NONMOVING PARTY, THE RECORD CONTAINS SOME EVIDENCE OF DR. LAW'S BREACH OF THE STANDARD OF CARE THAT PROXIMATELY CAUSED KELLY FAY'S DEATH

Dr. Law first contends the trial court erred in denying his motion for judgment notwithstanding the verdict (JNOV). (App. Br. pp. 6-10). This Court should affirm.

When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). The trial court must deny a

motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994). Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App.2000). In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Id.* at 300, 536 S.E.2d at 419.

Dr. Law argues two grounds in urging this Court to reverse and order judgment for him. First, Dr. Law claims that the only reasonable inference to be drawn from the evidence is that Dr. Law complied with all accepted standards of care for an emergency physician and did not cause harm to Plaintiff Fay or the Decedent, Kelly Fay. (App. Br. pp. 6-9) Second, Dr. Law contends that the only reasonable inference to be drawn from the evidence if that the proximate cause of Mrs. Fay's death was the Fays' failure to follow the discharge instructions to return to the ER with any fever or chills. (App. Br. pp. 6, 10). These arguments should not be persuasive.

A. THESE ARGUMENTS ARE NOT PRESERVED FOR APPEAL

Dr. Law's arguments are not preserved for this Court's review. At the close of the plaintiff's case, Dr. Law moved for DV on the ground that Mr. Fay's sole negligence was the cause of Mrs. Fay's death, and any negligence on his part exceeded any negligence on

Dr. Law's part. (Tr. p. 1219, l. 23 - p. 1220, l. 25). The trial court viewed the argument as raising that the intervening and superseding negligence of Mr. Fay to cut off Dr. Law's liability and denied the motion for directed verdict. (Tr. p. 1222, l. 21 - p. 1223, l. 6). This was the only basis Dr. Law argued for directed verdict. (Tr. p. 1226, ll. 1-3).

Dr. Law restated his DV motion at the close of all of the evidence, again only on the ground that Mr. Fay's intervening negligence superseded any negligence by Dr. Law as a matter of law. (Tr. p. 1824, l. 7 - p. 1825, l. 6).Once again the trial court ruled the matter presented a question for the jury. (Tr. p. 1825, ll. 7-11).

Following the verdict, Dr. Law moved for JNOV on two grounds. First, Dr. Law contended the only reasonable inference to be drawn from the evidence was that Dr. Law "honored all accepted standards of care for an emergency physician and did not harm the Plaintiff or the Plaintiff's decedent in any way." (Motion of 6/7/10, p. 5). This ground was new – it was not stated as a basis for Dr. Law's motion for directed verdict.

A JNOV is limited to the grounds stated in the motion for directed verdict. *RFT Mgmt. Co., LLC v. Tinsley & Adams LLP*, ___ S.C. ___, 732 S.E.2d 166, 170-171 (2012) (only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion). Thus, Dr. Law's argument that the only reasonable inference from the evidence is that he complied with all applicable standards of care was not available to Dr. Law in his JNOV motion, and this Court should not address this ground on appeal.

B. THE TRIAL COURT CORRECTLY SUBMITTED THE ISSUE OF DR. LAW'S NEGLIGENCE TO THE JURY

As noted, the only ground Dr. Law argued in support of his DV motion was the Fays' intervening and superseding negligence. Even if Dr. Law had made this argument at the DV stage and preserved it for his JNOV motion, the trial court properly submitted the issue of his negligence to the jury. Dr. Law contends Mr. Fay failed to present evidence to establish a breach of the standard of care by Dr. Law that proximately caused Mrs. Fay's death. (Dr. Law's App. Br. p. 8). The Court should affirm.

Viewing the evidence in a light most favorable to Mr. Fay, the following supports the jury's finding that Dr. Law committed medical malpractice that was a proximate cause of Mrs. Fay's death.

Dr. Charles Sheppard. Mr. Fay offered Dr. Charles Sheppard without objection as an expert witness in the fields of emergency medicine and the very narrow field of nursing as it applies to emergency medicine. (Tr.p. 581, l. 13 - p. 585, l. 14). Dr. Sheppard opined that the care Mrs. Fay received was below the standard of care. (Tr.p. 586, ll. 17-20; p. 587, ll. 4-15; p. 590, ll. 1-4). Dr. Sheppard stated that in a kidney stone patient temperature was the most important vital sign. (Tr.p. 595, ll. 1-10; p. 597, l. 6 - p. 598, l. 16). Dr. Sheppard reviewed the entries and stated he could not tell what Mrs. Fay's temperature was for each. (Tr.p. 595, l. 16 - p. 596, l. 16; p. 670, l. 17 - p. 671, l. 11). Dr. Sheppard stated Mrs. Fay should not have been sent home without knowing whether the stone obstructed to the point that urine was leaking from the kidney. (Tr.p. 600, ll. 6-14; p. 601, ll. 7-8). The emergency department physician was responsible for sending Mrs.

Fay home, although the nurse usually physically discharges the patient. (Tr.p. 622, l. 24 - p. 623, l. 8). It was a deviation from the standard of care not to take Mrs. Fay's temperature to determine whether she had a fever. (Tr.p. 676, l. 9 - p. 677, l. 2).

On cross examination, Dr. Sheppard agreed that Mrs. Fay's temperature was taken on admission and was 98.1°, which was normal. (Tr.p. 634, l. 18 - p. 635, l. 9). Dr. Sheppard stated that if Mr. Fay's testimony that thirty minutes after leaving the hospital Mrs. Fay had a fever of 101.3° then she had to have had a fever when she left the hospital. (Tr.p. 636, ll. 6-18). Dr. Sheppard also testified that Mrs. Fay's temperature should have been taken on discharge. (Tr.p. 648, ll. 21-24; p. 649, ll. 5-6). Dr. Sheppard agreed that increased heart rate indicates fever, but added that treatment for pain will lower heart rate, which is why heart rate is not a reliable indicator. (Tr.p. 656, l. 14 - p. 657, l. 18). On redirect Dr. Sheppard stated that patients with fever may not have increased heart rate or even feel hot, and the person taking the vital signs should have taken Mrs. Fay's temperature. (Tr.p. 671, l. 12 - p. 673, l. 25). He stated that the medication contained acetaminophen, which would depress fever. (Tr.p. 678, ll. 11-13).

Dr. Sheppard noted Dr. Law did not have privileges to admit Mrs. Fay to the hospital. (Tr.p. 602, ll. 4-9). In this case, Dr. Young would have had to have admitted her. (Tr.p. 602, ll. 10-14). Dr. Sheppard stated that although the records indicate Dr. Law advised the Fays to return to the ER if Mrs. Fay displayed certain symptoms, there was a factual dispute over whether the instruction was actually given. (Tr.p. 607, l. 20 - p. 608, l. 11). The records also indicated Dr. Law suspected "infection in the kidney," which is precisely what killed Mrs. Fay. (Tr.p. 609, l. 12 - p. 610, l. 4).

Dr. Sheppard reviewed the discharge instructions and agreed the Fays were instructed to "call or go to the emergency room" if Mrs. Fay developed fever, more intense pain, or repeated vomiting. (Tr.p. 611, l. 11 - p. 612, l. 5). He felt it was unusual to recommend that a patient call instead of instruct them to just go to the emergency department. (Tr.p. 612, ll. 6-13). Dr. Sheppard added that the advice Mr. Fay received (to come in if she feels like she needs to come back in) when he did call on Sunday were confusing. (Tr.p. 613, l. 11 - p. 615, l. 8).

Dr. Sheppard opined that Dr. Law, in conjunction with the treating nurse and discharge nurse, deviated from the standard of care in Mrs. Fay's treatment. (Tr.p. 624, ll. 9-19).

Christina L. Knight. Christina Knight testified without objection as an expert in the fields of nursing and emergency room nursing. (Tr.p. 680, l. 19 - p. 683, l. 5). She opined the nurses deviated from the standard of care in Mrs. Fay's treatment by not obtaining a "full set" of vital signs and further by not clearly describing the discharge instructions to the Fays. (Tr.p. 684, l. 19 - p. 685, l. 3; p. 694, l. 22 - p. 695, l. 5; p. 706, ll. 4-11). She described vital signs as "part of assessing the patient." (Tr.p. 697, ll. 3-24; p. 732, l. 21 - p. 733, l. 1).

Ms. Knight stated that a partial set of vital signs was taken each time. (Tr.p. 685, l. 23 - p. 686, l. 6). The most important vital sign for a kidney stone would be temperature because a stone plus a fever is an "emergent situation." (Tr.p. 686, ll. 7-13; p. 691, ll. 12-18). Ms. Knight did not see where Mrs. Fay's temperature was checked after triage. (Tr.p. 686, ll. 14-16; p. 691, l. 19 - p. 692, l. 4). Furthermore, the records do not reveal what any

of Mrs. Fay's vital signs were at the time of discharge, which Ms. Knight described as "willful disregard just to not do it." (Tr.p. 692, ll. 5-17; p. 695, ll. 11-15). There was also nothing in the records that would have impeded the taking of Mrs. Fay's temperature. (Tr.p. 695, l. 24 - p. 696, l. 15; p. 700, l. 18 - p. 701; l. 1).

Ms. Knight stated that Mary Beth Doolittle, the discharge nurse, admitted that there was a deviation in the standard of care in not have two complete sets of vital signs, to include temperature. (Tr.p. 686, l. 24 - p. 687, l. 20). The most accurate way to determine if someone has a fever is to use a thermometer. (Tr.p. 687, ll. 5-8). There were thermometers throughout the emergency department. (Tr.p. 695, ll. 6-23).

Ms. Knight described Grand Strand's policy and procedures regarding vital signs. (Tr.p. 697, l. 25 - p. 698, l. 14; Pl. Ex. No. 4). The policy and procedures are the "bare minimum" required for safe care. (Tr.p. 698, ll. 15-24). The nurses have a duty to follow those policies and procedures. (Tr.p. 699, ll. 5-21). Grand Strand's policies and procedures required a minimum of two sets of vital signs reported for a patient who complains of chest pain or abdominal pain. (Tr.p. 699, l. 22 - p. 700, l. 7).

Ms. Knight stated that had Mrs. Fay's temperature been 99.9° or 100° at 10:20 when vital signs other than temperature were checked, her temperature would have been trending upward which would have been a cause for concern. (Tr.p. 701, ll. 2-14). This is because kidney stones and a fever are an emergency situation. (Tr.p. 701, ll. 15-17).

Ms. Knight reviewed the discharge instructions. (Tr.p. 688, ll. 9-22). She stated that part of the nurse's obligation is to reiterate to the patient "what the importance of the discharge instructions are...." (Tr.p. 689, ll. 1-3). The instructions in this case advised the

Fays to call, which "would be one of the first things I would do, would be to call." (Tr.p. 689, ll. 7-11). The specific instructions regarding kidney stones are buried down in the document, which minimizes its importance. (Tr.p. 689, ll. 12-19). The nurse must come in and say "this is very important to understand, that if you have any of those symptoms that are described here you have to come back, or call, according to these instructions." (Tr.p. 689, ll. 20-23). If the patient does call then the person with whom the patient speaks "should address the problem, especially since they were seen the day before." (Tr.p. 690, ll. 6-13).

Ms. Knight stated there was a factual dispute over whether Dr. Law gave specific instructions for Mrs. Fay to return to the emergency room. (Tr.p. 693, ll. 1-25). She added that even if Dr. Law had given those instructions they would have conflicted with the written discharge instructions, which advised Mr. Fay to call instead of come in. (Tr.p. 694, ll. 1-17). The response Mr. Fay obtained when he called the Emergency Department that Sunday fell below the standard of care. (Tr.p. 702, l. 2 - p. 706, l. 3).

Mike B. Siroky, MD. Dr. Mike Siroky testified without objection as an expert in urology and the treatment of kidney stones. (Tr.p. 742, l. 19 - p. 743, l. 5). He agreed that all of his opinions were to a reasonable degree of medical certainty being more likely than not to have occurred. (Tr.p. 743, ll. 8-15; p. 753, l. 21 - p. 754, l. 1). Dr. Siroky was also qualified over Dr. Law's objection to render opinions on the standard of care for emergency room physicians in treating kidney stones. (Tr.p. 745, l. 21 - p. 752, l. 25). He stated he was also qualified to render opinions regarding whether the nurses deviated from the standard of care. (Tr.p. 753, ll. 15-20).

Dr. Siroky was asked his opinion about the actions of the emergency room physician, Dr. Law. Dr. Siroky stated:

> Well, as far as the care in the emergency room it was - - it deviated from the standard of care in, again, not documenting the temperature of the patient on discharge, or near the time of discharge, as we've already heard, not obtaining a white cell count to rule out an infection, and discharging the patient without any antibiotics, and failing to take adequate precautions for an infected renal system.

(Tr.p. 755, ll. 1-11). He opined that "temperature is critical to determining whether the patient can be discharged." (Tr.p. 776, ll. 3-7).

Dr. Siroky also had the opinion that Mrs. Fay should have been admitted to the hospital when she was seen on Saturday, January 26, 2002. He described the stone as large and "obstructing." (Tr.p. 760, l. 7 - p. 762, l. 8). He testified:

> This is, I think, the crux of the case. Because of the size of the stone, because of its location, because it had extremely low chance of passing on its own, and because it was completely obstructing, this patient should have been admitted. After admission she could have either been observed for a while, or she could have been taken to the operating room for a stint placement, or even lithotripsy, although that's usually not done on weekends. But if - - had that been done her outcome would have been different.

(Tr.p. 757, l. 20 - p. 758, l. 3; p. 801, l. 18 - p. 802, l. 16). Because of the size of the stone it had "almost no chance of passing on its own" and was causing a complete obstruction. (Tr.p. 758, ll. 7-13; p. 762, l. 10 - p. 763, l. 3; p. 819, l. 8 - p. 824, l. 12). Something had to be done "in an emergent fashion to relieve the obstruction" because of the risk of infection as well as the risk of irreversible damage to the kidney. (Tr.p. 758, ll. 14-25; p. 760, ll. 9-21; p. 777, ll. 2-17). The standard of care required efforts to relieve the obstruction within twenty-four hours. (Tr.p. 758, l. 25 - p. 759, l. 6). He added that to

rule out infection:

> Again, physical exam, which includes the vital signs, extremely important to look for any signs of infection at that moment and time, when the patient is in the emergency room, but also you have to have a high level of suspicion. You have to put things together, and come to the realization that you've got an obstructing stone, which is causing high pressure on the kidney, which is not going to pass on its own, and is a high risk of becoming infected, so since you know that infection would be potentially life threatening, you've got to use all your resources to try to rule it out, and failing that you've got to protect the patient by admitting the patient for observation.

(Tr.p. 769, ll. 8-19).

Both the ER physician and the urologist "absolutely" had a duty to rule out infection before sending Mrs. Fay home. (Tr.p. 759, ll. 7-14). They should have started with Mrs. Fay's vital signs, including temperature, white cell count, the urinalysis, and/or dip stick. (Tr.p. 759, ll. 17-19). The dip-stick test in Mrs. Fay's case was "as negative as you can get" which is "so unusual that someone would wonder how did this urine become so normal in the face of the stone." (Tr.p. 763, l. 10 - p. 767, l. 10).

Dr. Siroky agreed that Dr. Law had a duty to relay all pertinent information to Dr. Young on the telephone. (Tr.p. 770, ll. 21-24). One of the most important pieces of information would have been temperature because it determines whether a patient has a fever, which can be due to infection. (Tr.p. 773, ll. 17-25). Dr. Siroky stated if he were consulted by an ER physician he would want to know the size of the stone, its location, if there is indication of obstruction, and if the patient manifests symptoms of infection as shown by temperature and white cell count. (Tr.p. 774, ll. 1-21). This is the standard of care. (Tr.p. 774, l. 22 - p. 775, l. 1).

Dr. Siroky had the opinion that Mrs. Fay was febrile at the time she was discharged. (Tr.p. 784, ll. 1-9). Even though Dr. Law told Dr. Young that Mrs. Fay was afebrile (Tr.p. 790, ll. 1-21), Dr. Law could not tell Dr. Young whether Mrs. Fay was febrile at the time because there was no temperature measurement when Dr. Law spoke with Dr. Young. (Tr.p. 775, ll. 2-9). Although Dr. Law had already made the decision to discharge Mrs. Fay when he called Dr. Young (Tr.p. 809, ll. 14-19), Dr. Siroky described Mrs. Fay's treatment as "joint decision-making" between Dr. Law and Dr. Young. (Tr.p. 782, l. 2).

With regard to the Sunday telephone call, Dr. Siroky paraphrased the instructions Mr. Fay received to be "if Mrs. Fay feels like she needs to come in then she should come in, otherwise she should continue with the instructions she received." (Tr.p. 776, ll. 11-22). Dr. Siroky stated that the employee who spoke with Mr. Fay when he called the ER on that Sunday also breached the appropriate standard of care. (Tr.p. 755, l. 25 - p. 756, l. 14). Dr. Siroky stated:

> when a patient who has been in the emergency room the previous day, and has a record available for review, calls back as they were told to call back, then that patient should be offered some medical advice and my opinion what they were told, according to what I read in the depositions, did not constitute medical advice.

(Tr.p. 756, ll. 9-14). Dr. Siroky opined that each of the deviations from the standard of care contributed to Mrs. Fay's death. (Tr.p. 756, ll. 15-23).

Dr. Law was asked whether Mrs. Fay would be alive had Mr. Fay taken her to the ER on Sunday, and he stated:

> I can't answer that, because he took her to the emergency room on

> Saturday, and she was sent home. She could have been sent home on Sunday. We don't know what the outcome would have been, but as I say, my answer is that, if she had had intervention, yes, she would be alive.

(Tr.p. 817, ll. 6-19).

Dr. Charles Stratton. Dr. Stratton was qualified as an expert in internal medicine, infectious diseases, medical microbiology and pathology without objection. (Tr.p. 1076, ll. 19-24; p. 1080, ll. 16-23). His opinions were given "with a reasonable degree of medical certainty, more likely than not." (Tr.p. 1082, l. 18 - p. 1083, l. 3).

Dr. Stratton described the formation of types of kidney stones and the process of passing a stone. (Tr.p. 1084, l. 22 - p. 1087, l. 20). He also explained how the infection occurs. (Tr.p. 1087, l. 21 - p. 1093, l. 21). With regard to Mrs. Fay, Dr. Stratton stated:

> So what I note in reviewing the medical records of this young woman is that she has a proteus mirabilis, which is associated with these struvite stones, so more likely than not, her stone was already colonized when it dropped into the ureter on Saturday morning, and within hours there was infection in the urine. Again, it was ureteritis, meaning there was infection in the urine, but it was not in the kidneys at that time.

(Tr.p. 1093, l. 22 - p. 1094, l. 4; see also p. 1117, ll. 2-18). Dr. Stratton added:

> there was infection by the time she left the hospital, and she would have been febrile because, in fact, forty-five minutes to an hour later, when she gets home, she has a temperature of a hundred and one point two, so more likely than not she would have had an elevated temperature while she was in the hospital, because she was there from eight in the morning till noon, so during that time period - - she did not have a temperature when she came in, but more likely than not she would have, had a temperature been repeated because, in fact, she was noted by her husband to be febrile at around forty-five minutes to an hour after she left the hospital and returned home.

(Tr.p. 1094, ll. 10-20; see also Tr.p. 1099, l. 8 - p. 1100, l. 20). Had Mrs. Fay been admitted to the hospital on Saturday instead of being sent home she would not have died.

(Tr.p. 1102, l. 24 - p. 1103, l. 5; p. 1164, ll. 9-12). Had she been admitted on Sunday she would not have died. (Tr.p. 1103, ll. 6-10). The same is true had she been admitted earlier that Monday. (Tr.p. 1103, ll. 11-16; p. 1156, ll. 15-19; p. 1165, ll. 11-20).

Dr. Stratton opined that Mrs. Fay died from "urosepsis and septic shock caused by a bacteria known as proteus mirabilis." (Tr.p. 1083, l. 16 - p. 1084, l. 16). A patient with a stone and a fever is considered "a urologic emergency." (Tr.p. 1085, ll. 9-11).

Dr. Law. In his deposition, Dr. Law agreed that after he consulted with Dr. Young he told Mr. Fay that Mrs. Fay would be "fine until Monday with pain management or pain medicine...." (Tr.p. 1189, l. 18 - p. 1190, l. 2). Dr. Law also agreed that it sounded reasonable to him that he told Mr. Fay that Dr. Law had spoken with Dr. Young and "after talking to Dr. Young" they both agreed to send Mrs. Fay home. (Tr.p. 1189, l. 20 - p. 1191, l. 25). Dr. Law also did not recall asking Dr. Young if he thought Mrs. Fay needed to be admitted. (Tr.p. 1195, ll. 7-10).

Dr. Law also stated that standard protocol for a kidney stone was to order a CBC, a chemistry panel, a urinalysis and a KUB. (Tr.p. 1309, ll. 7-20; p. 1345, ll. 17-20). However, at trial he noted that he never ordered all of those tests. (Tr.p. 1310, l. 16 - p. 1311, l. 24).

In his live testimony, Dr. Law agreed that "temperature is considered part of the vital signs" and that he did not order Mrs. Fay's temperature to be taken. (Tr.p. 1292, ll. 9-16; p. 1335, l. 24 - p. 1336, l. 3). He also agreed that "fever and kidney stone" is a "urologic emergency," as is "infection and kidney stone...." (Tr.p. 1293, ll. 2-5; p. 1318, l. 24 - p. 1319, l. 11). He stated "in order to determine if somebody has a fever, you have to

take their temperature." (Tr.p. 1335, ll. 22-23). He added, "with her presentation, another set of - - another temperature should have been checked." (Tr.p. 1336, ll. 2-3). He agreed he did not order the nurses to do so. (Tr.p. 1292, ll. 9-13; p. 1336, ll. 4-5). Had he been told that Mrs. Fay had a fever he would not have let her leave. (Tr.p. 1336, ll. 8-11; p. 1365, ll. 9-12).

Dr. Law stated that he discussed the case with Dr. Young, who requested to see Mrs. Fay the following Monday. (Tr.p. 1286, ll. 20-22). Dr. Law's decision was to send Mrs. Fay home. (Tr.p. 1287, ll. 2-11). Dr. Young was aware of the CT results. (Tr.p. 1351, ll. 12-20). When asked if Dr. Young inquired about fever, Dr. Law stated:

> I don't believe he asked. That wouldn't be - - but I would mention to him as part of my discussion the patient is afebrile, which means without a fever, and that she has stable vital signs, and that I believe that she could be discharged home.

(Tr.p. 1351, l. 24 - p. 1352, l. 6). The following colloquy then took place:

> Q. Dr. Law, the truth is if you told him she was afebrile, that was not true, was it, unless you told him she was afebrile at eight o'clock in the morning because nobody knew what her temperature was after eight o'clock in the morning?
>
> A. That's correct. To - - you know, we don't have a number. We don't have a number to show you or the jury that this was her temperature at discharge. We have other information based on her clinical exam and based upon her other vital signs that she did not have a fever at discharge.
>
> Q. All of which could be affected by medication?
>
> A. Yes.
>
> Q. And I think you agree there's a thermometer in every room and it doesn't cost anything to stick a thermometer in their mouth, does it?

A. That is correct.

Q. And it was hospital policy, was it not, on abdominal pain patients they get at least two sets of vitals?

A. Right.

Q. Everybody agrees temperature is a vital?

A. Yes, it is.

(Tr.p. 1352, l. 7 - p. 1353, l. 1). Dr. Law testified that ultimately it was his duty to determine whether a patient was stable for discharge. (Tr.p. 1333, ll. 22-25; p. 1394, ll. 20-25). He added the decision to send Mrs. Fay home was a "joint decision between" him and Dr. Young. (Tr.p. 1344, ll. 1-4; p. 1349, ll. 3-11). If Mrs. Fay was to be admitted, Dr. Young would have had to have been the one to do so. (Tr.p. 1356, ll. 7-14).

Finally, Dr. Law agreed that he did not explain to Mr. Fay that Mrs. Fay could die from a fever and a kidney stone. (Tr.p. 1349, l. 21 - p. 1350, l. 24).

Dr. Young. In his deposition, Dr. Young agreed that he would have had to have been the one to order Mrs. Fay's admission to the hospital. (Tr.p. 1197, ll. 4-9). Dr. Young also stated:

> Again, I don't remember the specifics of the conversation, but I remember him saying that he had a patient in the Emergency Room with a stone that he saw on the CAT scan, and that he thought the pain was well-controlled and he was going to send them home, and that he didn't think there was any sign of a fever, and he thought that she would be okay to go home, but he said the stone was about five or six millimeters in size, and he thought that she would probably need follow-up.

(Tr.p. 1199, ll. 4-12).

In his live testimony, Dr. Young agreed that the standard of care in evaluating a

patient with a kidney stone requires the examining physician to rule out infection. (Tr.p. 1585, ll. 15-20). He added, "when someone has a kidney stone, we always check their temperature." (Tr.p. 1585, ll. 24-25). Dr. Young was asked if Dr. Law "specifically told you that she was afebrile" and he responded, "No, that's something we always talk about." (Tr.p. 1548, ll. 1-4). He agreed that the chart revealed no temperature was taken after eight o'clock in the morning. (Tr.p. 1549, ll. 4-5; p. 1591, ll. 13-18). Dr. Young stated that if a patient has a kidney stone and a fever "they're almost certainly going to be admitted to the hospital...." (Tr.p. 1551, ll. 2-4; p. 1552, ll. 19-24; p. 1576, ll. 7-9). Dr. Young agreed that detecting a fever in a patient with a kidney stone is key in finding an infection. (Tr.p. 1584, l. 16 - p. 1585, l. 1).

Dr. Young stated that Dr. Law did not have admitting privileges and Dr. Young would have had to have admitted Mrs. Fay. (Tr.p. 1573, l. 19 - p. 1574, l. 1). Dr. Young agreed with Dr. Law that Mrs. Fay could go home. (Tr.p. 1574, ll. 2-19; p. 1594, ll. 15-18). 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).

Under our jurisprudence, an injured patient may bring a medical malpractice claim against a physician where the physician's negligence in rendering medical care proximately causes the patient's injury. *Linog v. Yampolsky*, 376 S.C. 182, 656 S.E.2d 355 (2008). A plaintiff alleging medical malpractice must provide evidence showing: (1) the generally recognized and accepted practices and procedures that would be followed by

the average, competent physician in the defendant's field of medicine under the same or similar circumstances, and (2) the defendant departed from the recognized and generally accepted standards. *Hoard ex rel. Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010). Additionally, the plaintiff must demonstrate the defendant's departure from such generally recognized practices and procedures proximately caused the plaintiff's alleged injuries and damages. *Id.*

In this case the jury heard all of the evidence described above. Of course, Dr. Law presents testimony and evidence in his brief that he did not breach the standard of care and did not cause Mrs. Fay's death. But as shown above, the evidence was not one-sided. Mr. Fay presented evidence that, when viewed most favorably for him, more than supports the jury's verdict.

Dr. Law asserts that his JNOV motion requires the Court to judge "the sufficiency of the evidence," implying this Court must weigh the evidence, citing to *Rogers v. Norfolk Southern Corp.*, 356 S.C. 85, 588 S.E.2d 87 (2003) for this rule. (Dr. Law App. Br. pp. 6-7). However, *Rogers* applied the federal standard in a FELA case, and the state standard is different. The Supreme Court explained that "under the state standard the trial court should not grant JNOV where the evidence yields more than one inference. An appellate court may not overturn the decision of the trial court, under the state standard, if there is any evidence to support the trial court's ruling." *Gilliland v. Doe*, 357 S.C. 197, 199, 592 S.E.2d 626, 627 (2004). Hence, it is not this Court's job to judge sufficiency of the evidence; it is for the jury to sort through the evidence and decide whom to believe, whom not to believe, and what evidence to accept.

Assuming the arguments Dr. Law makes on appeal are preserved for review, this Court should reject the arguments and affirm the trial court's denial of Dr. Law's motion for JNOV.

C. THE TRIAL COURT CORRECTLY DENIED DR. LAW'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE ASSERTION THAT MR. FAY'S INTERVENING AND SUPERSEDING ACTS BROKE THE CAUSAL CHAIN BETWEEN DR. LAW'S NEGLIGENCE AND MRS. FAY'S DEATH

The second ground Dr. Law stated was that "the only reasonable inference that can be drawn from the evidence" was Mr. Fay's intervening negligence which superseded any negligence by Dr. Law. (Motion of 6/7/10, p. 6). Dr. Law added "the only reasonable inference to be drawn from the evidence is that the Plaintiff was either solely responsible for the decedent's death or at a minimum at least 51% at fault." (Motion of 6/7/10, p. 6). This was a restatement of the arguments in the directed verdict motion.

In his Brief, Dr. Law makes a conclusory argument on the "intervening negligence" ground. His entire argument on this point is as follows:

> Instead, as discussed below, the only reasonable inference that the jury could have concluded based on the evidence presented was that the failure of Mrs. Fay to return to the ER *after* she developed a fever was the proximate cause of her death.

(App. Br. p. 10). There is also no citation of authority regarding this ground. *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012) (conclusory argument deemed abandoned); *Transportation Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 699 S.E.2d 687 (2010) (short, conclusory statements made without supporting authority deemed abandoned on appeal and not preserved for review).

Even so, the trial court properly denied Dr. Law's motion. Though an intervening force may be a superseding cause that relieves an actor from liability, in order for there to be relief from liability on this basis, that intervening cause must be one that could not have been reasonably foreseen or anticipated. *Rife v. Hitachi Const. Mach. Co.*, 363 S.C. 209, 217, 609 S.E.2d 565, 569 (Ct. App.2005). *See also Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 463 S.E.2d 636 (Ct. App.1995)(for an intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be unforeseeable). "The intervening negligence of a third person will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care. In such case, the original negligence still remains active, and a contributing cause of the injury." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998). A primary wrongdoer's action "is a legal cause of an injury if either the intervening act or the injury itself was foreseeable as a natural and probable consequence of that action." *Bramlette v. Charter–Med.–Cola.*, 302 S.C. 68, 73, 393 S.E.2d 914, 917 (1990).

The test for determining if the negligent conduct of the original wrongdoer is to be insulated, as a matter of law, "by the independent negligent conduct of another is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in light of the attendant circumstances." *Id.* One is not charged with foreseeing that which is unpredictable or which could not be expected to happen, and, thus, when it appears the negligence merely "brought about a condition of affairs, or a situation in which another

and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause." *Stone v. Bethea*, 251 S.C. 157, 161–62, 161 S.E.2d 171, 173 (1968). The final result of a wrongful act, as well as every intermediate cause, will be considered to be the proximate result of the first wrongful cause if intervening acts are set in motion by the original wrongful act and are normal and foreseeable results of the original act. *Wallace v. Owens–Illinois, Inc.*, 300 S.C. 518, 521, 389 S.E.2d 155, 157 (Ct. App.1989).

In this case, any negligence by Mr. or Mrs. Fay in not returning to the ER was predictable and therefore foreseeable as a natural and probable consequence of Dr. Law's actions in not verifying Mrs. Fay's temperature before discharge and not seeking Mrs. Fay's admission to the hospital, in light of the attendant circumstances. At trial, Mr. Fay testified he never saw anyone take Mrs. Fay's temperature the entire time they were there other than when they first arrived. (Tr.p. 228, l. 25 - p. 229, l. 5). No one ever told him that "fever and a kidney stone could cause Kelly to die." (Tr.p. 235, ll. 21-23). Dr. Law performed some tests on Mrs. Fay and told Mr. Fay "that it seemed really odd because it was too clean, and there wasn't any blood or bacteria, and that's when he ordered the CT...." (Tr.p. 283, ll. 17-20).

Mr. Fay stated they were told to follow up with Dr. Young the following Monday, and the hospital released Mrs. Fay's medical records to Dr. Young's office because Dr. Young was familiar with her case. (Tr.p. 239, l. 13 - p. 240, l. 1). When they called Dr. Young's office on Monday morning he was not available because he had surgeries scheduled, and they were told to wait until 3:00 p.m. to come in. (Tr.p. 255, ll. 5-25).

As they were leaving the hospital Mrs. Fay was "flush" and complained about chills and fever. (Tr.p. 284, ll. 9-13; p. 315, ll. 9-16). Mr. Fay took Mrs. Fay's temperature about 45 minutes after they left the hospital and it was over 101°. (Tr.p. 234, l. 7 - p. 235, l. 6; p. 240, ll. 8-19; p. 317, ll. 14-15; p. 321, ll. 6-12). Mr. Fay assumed the hospital staff were aware that Mrs. Fay had the fever. (Tr.p. 240, l. 20 p. 241, l. 8).

The following day (Sunday) Mr. Fay called the number on the discharge instructions to speak with a doctor. (Tr.p. 243, ll. 16-22). Mr. Fay spoke with someone and told the person that Mrs. Fay had a fever of 101.3° to 101.6° and "relayed everything that happened, and she had these chills, what should we do." (Tr.p. 243, l. 24 - p. 244, l. 7). Mr. Fay was told to give Mrs. Fay pain medication, lots of fluids and follow up with the urologist the next day (Monday). (Tr.p. 244, ll. 7-10). The person added "if you think you need to come in then bring her in." (Tr.p. 244, ll. 10-12, 18-22). By that time Mrs. Fay was feeling better and decided to wait for the appointment the following morning. (Tr.p. 244, l. 25 - p. 245, l. 20). Neither of them felt any urgency to go to the ER. (Tr.p. 246, ll. 2-11). Mr. Fay stated, "If they had told me it was an emergency, if I knew it was an emergency I would have went to the hospital." (Tr.p. 249, ll. 8-10). Mr. Fay did not have "a clue" that Mrs. Fay was in an emergency situation, adding:

> Again, he never told me - - Dr. Law never said fever, chills, you got to come in right away, oh, my gosh it's an emergency, never, never once. We've all been to doctors. Does anybody ever see that happening, I doubt it. Too, when the nurse gave us the discharge instructions again, what happens, they come in, you get the discharge instructions, you need to sign here, sign here, here's your discharge. They don't go over that, at least I don't ever recall that ever, and that was just how it is. It wasn't like it was careless and, and - - it just was like a normal routine thing for them. They gave us the discharge papers, he did come and say ... Dr. Young and

> I talked, with the pain management, her age, her health, she should be okay till Monday, and he did say you need to follow up, you know, on Monday because if you don't there could be problems and complications with a kidney sto - - that's what he told me, and I remember specifically him saying that, thinking, oh, man, we're not going to wait, you know, cause - - and again, I think back to a year prior, with the other kidney stone, that - - I mean she had already passed it but this one she still had so I mean, you know, I knew it was important, we had to make sure we called, and that's why on Monday we did call at 8:30.

(Tr.p. 249, l. 15- p. 250, l. 14). Thus, it was foreseeable that Mrs. Fay's condition might deteriorate and Mr. Fay was instructed to call with concerns, which he did. Based upon the instructions he received, the Fays waited until they could see Dr. Young on Monday morning. Thus, any intervening fault on their part, if any, would not supersede Dr. Law's negligence in this case.

Furthermore, the question of whether Mr. or Mrs. Fay's actions intervened and superseded Dr. Law's negligence was for the jury to decide. *Keeter v. Alpine Towers Intern., Inc.*, 399 S.C. 179, 730 S.E.2d 890 (Ct. App. 2012). *See also Ramey v. Carolina Life Ins. Co.*, 244 S.C. 16, 135 S.E.2d 362 (1964) (whether or not an intervening act is foreseeable so that it does not break the chain of proximate cause between the defendant's actions and the plaintiff's harm is a matter for the jury). By finding in favor of Mr. Fay, the jury necessarily found the actions of Mr. and Mrs. Fay were foreseeable, and therefore the chain of causation was not broken to insulate Dr. Law from liability. *Keeter*, at 194, 730 S.E.2d at 898 (citing *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 621–22, 720 S.E.2d 473, 479 (Ct. App.2011) ("Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law.... If there may be a fair difference of opinion regarding whose act proximately caused the injury, then the question of

proximate cause must be submitted to the jury.")).

Accordingly, if the Court reaches this issue, the Court should affirm the trial court's denial of Dr. Law's motion for JNOV on these grounds.

III. THE CIRCUIT COURT CORRECTLY DENIED DR. LAW'S MOTION FOR JNOV BECAUSE WHEN VIEWED MOST FAVORABLY FOR MR. FAY, THE EVIDENCE DOES NOT ESTABLISH MR. FAY'S DEGREE OF FAULT EXCEEDED FIFTY PERCENT SO AS TO BAR THE WRONGFUL DEATH AND SURVIVAL CLAIMS

Dr. Law contends that the only evidence in the record on appeal establishes that any negligence on his fault was outweighed by the negligence of Mr. Fay. Dr. Law contends that the only evidence in the record "demonstrates conclusively that if the Fays had followed the discharge instructions to take Mrs. Fay back to the emergency department if she developed any fevers or chills, then she would not have died." (Dr. Law App. Br. p. 12). Dr. Law asserts this precludes submitting this case to the jury. This argument should not be persuasive.

When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994). Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v.*

Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App.2000). In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Id.* at 300, 536 S.E.2d at 419.

In support of his argument, Dr. Law presents the evidence in the light most favorable to himself (App. Br. pp. 10-14), which is not appropriate under this Court's standard of review. Instead, this Court must view the evidence as well as *all* reasonable inferences therefrom in a light most favorable to Mr. Fay. Viewed in that manner, the trial court correctly denied Dr. Law's motion.

Mr. Fay testified as follows. Mrs. Fay woke up in pain early Saturday morning. (Tr.p. 214, ll. 22-23; p. 216, ll. 6-11). She was experiencing abdominal and back pain. (Tr.p. 225, ll. 5-7). She recognized the pain because she had had a kidney stone once before. (Tr.p. 214, l. 25 - p. 215, l. 7). Mr. Fay took her to the hospital about ten minutes away and they arrived around 8:00 a.m. (Tr.p. 216, l. 12 - p. 217, l. 9). This was about a half of an hour after she woke that morning. (Tr.p. 225, ll. 12-14).

After filling out the insurance forms, Mrs. Fay went into a room to change into a gown, and then Mr. Fay and Dr. Law went in together. (Tr.p. 219, ll. 3-9). Mrs. Fay was taken for an X-ray and when Dr. Law showed Mr. Law the X-Ray he said "congratulations, it's a kidney stone." (Tr.p. 219, ll. 15-22). The staff then did a urinalysis exam and Mr. Fay stepped out of the room as they catheterized Mrs. Fay. (Tr.p. 220, ll. 5-12). Once the urinalysis results came back, Dr. Law came into the room and said the

results seemed "odd" as it came back "very clean, there's no bacteria, no blood, it came back too clean, it seemed a little odd to him, and then that's when he wanted to do a CT scan...." (Tr.p. 220, l. 23 - p. 221, l. 2; p. 226, ll. 7-8; p. 300, ll. 15-17).

Eventually Dr. Law came into the room and mentioned he had spoken with Dr. Young, the urologist on call. (Tr.p. 222, ll. 17-19). Dr. Law said he and Dr. Young "agreed that based on Kelly's health, being [young], healthy, and he pain management, that she would be okay till Monday to release her and follow up with the urologist on Monday." (Tr.p. 222, ll. 19-22; p. 223, ll. 4-7; p. 250, ll. 3-14). Dr. Law told Mr. Fay that the main concern was Mrs. Fay's pain, and if they could control her pain she could wait until Monday. (Tr.p. 223, ll. 7-11; p. 227, ll. 12-19). Mrs. Fay felt much better after she received an IV of Dilaudid. (Tr.p. 226, ll. 13-16; p. 286, ll. 2-8).

Mr. Fay does not have medical training. (Tr.p. 223, ll. 12-15). Mr. Fay was unaware that a fever and a kidney stone was an emergency. (Tr.p. 220, ll. 13-16). Mr. Fay did not know the significance of the urine tests that Dr. Law discussed with him. (Tr.p. 226, ll. 8-12). He also did not know that a kidney stone with an infection was an emergency. (Tr.p. 220, ll. 17-20). He stated, "I had never heard of ... somebody dying from a kidney stone before. I didn't know it was possible. I just thought they were really painful but something you got through." (Tr.p. 223, ll. 22-25). Mr. Fay did not have "a clue" that Mrs. Fay might be in an emergency situation. (Tr.p. 249, ll. 15-17). No one at the hospital mentioned "it was an obstructing kidney stone" and that Mrs. Fay was "leaking urine out into her retroperitoneal cavity." (Tr.p. 347, ll. 2-16). There was nothing that led Mr. Fay to believe Mrs. Fay had anything other than "a simple kidney stone."

(Tr.p. 345, ll. 15-22).

Although the medical records indicated Dr. Law had advised him to return to the ER Department "immediately" if Mrs. Fay's experienced increased pain, increased nausea, vomiting, any fevers or chills, Mr. Fay recounted his version of the conversation. (Tr.p. 227, ll. 3-19). The primary concern was pain management. Dr. Law told Mr. Fay:

> don't wait a week, don't wait two weeks, this is important, because if not the kidney stone could cause a problem, it's a larger stone she's probably going to need...lithotripsy, but don't wait long because there could be complications, and ... you need to call on Monday, but any of that - - he never said any of that. His thing was pain management.

(Tr.p. 227, ll. 13-19; p. 236, ll. 4-16; p. 239, ll. 4-14; p. 316, ll. 22-24; 317, ll. 6-10). Dr. Law advised them to follow up with the urology for the lithotripsy. (Tr.p. 227, l. 23-p. 228, l. 1).

Mr. Fay did not recall Dr. Law speaking privately with Mrs. Fay. (Tr.p. 227, ll. 2-14). No one, not even Dr. Law, advised Mr. Fay that a fever was an emergency and he had to get Mrs. Fay back to the ER immediately. (Tr.p. 235, ll. 7-20). No one ever stressed to Mr. Fay that "fever and a kidney stone could cause Kelly to die." (Tr.p. 235, ll. 21-23). No sense of urgency was every pressed upon them in any way about returning to the ER immediately if Mrs. Fay had a fever. (Tr.p. 235, l. 24 - p. 236, l. 16).

Mr. Fay stated that although the medical record indicates Mrs. Fay's temperature was taken which indicated 98.1°, Mr. Fay was not in the room and never saw anyone take her temperature. (Tr.p. 218, ll. 17-23; p. 228, l. 22 - p. 229, l. 5; p. 297, ll. 13-15). He agreed that he was not with Mrs. Fay during triage as he was checking her in with the insurance. (Tr.p. 229, ll. 4-9). Interestingly, when Mr. Fay was cross-examined about

Mrs. Fay's records he agreed that the records reflected that readings were taken on several vital signs (blood pressure, pulse and respiration) but there was no mention of temperature after the initial reading taken at intake. (Tr.p. 297, ll. 13-15; p. 300, ll. 4-6; p. 301, ll. 9-11).

Mr. Fay stated the nurse gave them the discharge instructions and Mrs. Fay signed them. (Tr.p. 229, ll. 13-14). The nurse "never went line by line" over the instructions. (Tr.p. 236, ll. 10-12; p. 249, l. 21 - p. 250, l. 2). Mrs. Fay retrieved her own blood samples from the examination room and handed them to the nurses at the station (Tr.p. 221, l. 19 - p. 222, l. 12; p. 229, ll. 14-15), and the nurse gave Mrs. Fay a note to be out of work. (Tr.p. 229, ll. 15-17). The nurse told the Fays "to follow up with Dr. Young on Monday, he was aware of the case, call at 8:30, and Dr. Law did say...call at 8:30, you need to call on Monday, and it's important not to let this go out, you need to call Dr. Young 'cause he's aware of the case." (Tr.p. 230, ll. 2-6; p. 239, ll. 4-8). Dr. Law also advised Mr. Fay to call Dr. Young's office at 8:30 a.m. on Monday. (Tr.p. 311, ll. 6-10). The staff gave the Fays Dr. Young's telephone number. (Tr.p. 230, ll. 10-13).

The next day, Sunday, Mr. Fay read the discharge instructions again which provided, "if you do not continue to improve or your condition worsens please call your doctor or the emergency room right away so you can be examined." (Tr.p. 230, ll. 14-20) (emphasis added). The instructions provided a telephone number and stated, "instructions for Fay, Kelly. Please call us if you have any questions about your medical problem. We're here to serve you." (Tr.p. 232, ll. 4-8; p. 285, ll. 4-9). The instructions generally described kidney stones (Tr.p. 232, l. 11- p. 233, l. 5) and added, "call or go to the

emergency room right away if you develop fever, more intense pain, or repeated vomiting." (Tr.p. 233, ll. 6-16).

When the Fays left the ER they went to fill the prescription for pain medication they had been given. (Tr.p. 233, ll. 20-25). As they were walking out of the ER to the car Mrs. Fay "was a little flush, a little red, she looked a little warm." (Tr.p. 234, ll. 4-9; p. 284, ll. 12-13; p. 315, ll. 7-20; p. 342, ll. 10-15). Mr. Fay drove to Wal-Mart, and Mrs. Fay stayed in the car while Mr. Fay dropped the prescription off at the pharmacy. (Tr.p. 234, ll. 10-13). He then drove her home, got her settled, and then returned to Wal-Mart to get the prescription. (Tr.p. 234, ll. 14-17). When Mr. Fay returned home with the prescription about 45 to 50 minutes had elapsed since they left the ER. (Tr.p. 234, l. 18 - p. 235, l. 6).

Mr. Fay gave Mrs. Fay her first pain pill and she told him she felt hot. (Tr.p. 240, ll. 10-13). Mr. Fay took her temperature several times during the weekend and it was between 101.3° and 101.6°. (Tr.p. 240, ll. 13-19; p. 317, ll. 19-25). When asked if that concerned him, Mr. Fay stated:

> No, cause I didn't know - - when we left with the discharge instructions, while it said that nobody said that to me specifically. If they said it to Kelly I don't know, I didn't hear, and she didn't say anything to me, so I didn't know.... My thoughts were when we left she must have had the fever, and they must have known then, otherwise - - you know, I don't know, but it didn't concern me because it wasn't at a - - I don't know at what point is a high fever, what point's a low fever to the doctors, you know. I know that it's a fever but I don't know that - - is that emergency, is that - - I don't know, so it wasn't overly alarming. It was just yet a fever; we had just come from the hospital, would they have known, was our thoughts.

(Tr.p. 240, l. 20 - p. 241, l. 8). Although Mrs. Fay had nausea and vomited on Sunday, the

instructions warned that this was a side effect of the narcotics. (Tr.p. 241, ll. 9-25).

About 8:30 a.m. on Sunday Mrs. Fay woke Mr. Fay up screaming because she had "the shakes." (Tr.p. 242, ll. 9-12). She was shivering and had chills. (Tr.p. 242, ll. 17-25). The chills subsided after about 15 minutes. (Tr.p. 243, ll. 1-2). About an hour later she had a similar episode that lasted 10 minutes. (Tr.p. 243, ll. 6-11). They looked at the discharge instructions and saw they mentioned nausea and chills. (Tr.p. 243, ll. 11-14). Mr. Fay noted the instructions said to call so he called and asked to speak with the doctor on call. (Tr.p. 243, ll. 16-19). Mr. Fay explained to the person on the phone that they had been there the day before for Mrs. Fay's kidney stone, she had seen Dr. Law, she received pain medication, she was supposed to follow up with the urologist, and she had a fever of 101.3° to 101.6°. (Tr.p. 243, l. 24 - p. 244, l. 4). Mr. Fay stated:

> their response was, you need to follow up - - first take the pain medicine for pain as needed, drink lots of fluids, that's important, follow up with the urologist on Monday, and if you think you need to come in, or if she thinks she needs to come in then bring her in, and that was the gist of the phone call. It wasn't very long. I don't know if she ever identified herself. I'm sure if she said her name it just escaped me at the time cause I ... didn't think to write it down, and then that was the end of that phone call.

(Tr.p. 244, ll. 7-22; p. 252, ll. 12-16). The person did not tell Mr. Fay that the situation was an emergency. (Tr.p. 246, ll. 6-8). The telephone call was at about 10:30 a.m. (Tr.p. 246, ll. 12-17).

Mrs. Fay was better at that time and took a shower. (Tr.p. 244, l. 23 - p. 245, l. 4). She informed Mr. Fay that she was feeling better and she thought the chills may have broken up the kidney stone. (Tr.p. 245, ll. 8-13). She wanted "to wait on going to the hospital" to see if the chills happened again. (Tr.p. 245, ll. 15-20; p. 287, l. 18 -p. 289, l.

1; p. 333, ll. 1-3). They believed they would see Dr. Young on Monday morning. (Tr.p. 245, l. 21 - p. 246, l. 1). They did not feel any sense of urgency at that time. (Tr.p. 246, ll. 2-11). Mr. Fay took Mrs. Fay's temperature several times that day and it remained between 101.1° and 101.3°. (Tr.p. 248, ll. 1-8).

Some friends came over on Sunday to watch football games with the Fays. (Tr.p. 248, ll. 11-19). Mrs. Fay did not feel like joining them because she was in sweats and "her hair was all whatever from lying down...." (Tr.p. 248, ll. 22-25; p. 253, ll. 6-8). Mr. Fay stated, "had they told me it was an emergency, if I knew it was an emergency I would have went to the hospital." (Tr.p. 249, ll. 8-10). Dr. Law never advised them that it was an emergency or that fever and chills meant "you got to come in right away...." (Tr.p. 249, ll. 18-20).

After the friends left Mrs. Fay did not eat. (Tr.p. 250, ll. 15-17). She had stopped taking the pain medication because she thought it was making her nauseous. (Tr.p. 251, ll. 5-10; p. 286, l. 21 - p. 287, l. 14). Also, her pain was about the same as when she got home from the hospital. (Tr.p. 251, ll. 9-15; p. 286, ll. 9-13). Mrs. Fay ate some soup the friends had brought and she felt better. (Tr.p. 251, ll. 17-23). They both believed she was getting better. (Tr.p. 251, l. 25 - p. 252, l. 3). Because it was late on Sunday night they felt they could wait until Monday morning to see the urologist. (Tr.p. 252, ll. 5-11).

The next morning the Fays woke up around 8:00 a.m. (Tr.p. 255, ll. 7-8). Mr. Fay called the urologist at 8:30 a.m. but was told Dr. Young was not available because he had surgery and could not fit them into his schedule. (Tr.p. 255, ll. 7-16). Mr. Fay advised the person that:

> we were referred there from Saturday, he's aware of the case and we were told to call and ask...specifically for him, and she said, okay, well let me check, and she goes, well he can see you at three and I said, okay, 3 o'clock, and she goes 3 o'clock is good, and I said do I need to bring anything...should I bring the stuff from South Strand and she said, yes, pick up the x-rays, and so that was it, that was the end of the phone call as far as talking to the doctor's office.

(Tr.p. 255, ll. 17-25).

Mrs. Fay did not seem to be in any danger at the time. (Tr.p. 256, ll. 15-17). Mrs. Fay seemed groggy and tired, but had washed up and gotten ready for the day. (Tr.p. 256, ll. 1-9). Mr. Fay took her temperature and it was the same as it had been all weekend. (Tr.p. 256, ll. 19-20; p. 335, ll. 5-10). She laid down and said she would be fine. (Tr.p. 256, ll. 9-10). Mr. Fay told her he would pick her up at 2:00 p.m., they would go get the X-rays, and then go to Grand Strand Urology. (Tr.p. 256, ll. 11-13; p. 257, ll. 1-4).

Mr. Fay then got ready for work. (Tr.p. 256, ll. 13-14). Nothing seemed abnormal when he left at 9:30 a.m. (Tr.p. 256, ll. 23-24; p. 257, l. 6). This was the last time Mr. Fay spoke with Mrs. Fay. (Tr.p. 257, ll. 3-4).

Mr. Fay called the house several times but Mrs. Fay did not answer. (Tr.p. 257, ll. 6-17; p. 335, ll. 21-23). He assumed she was sleeping and would be fine. (Tr.p. 257, ll. 7-14; p. 336, ll. 1-2). Mr. Fay left work at 1:30 p.m. to go check on Mrs. Fay. (Tr.p. 257, ll. 22-24). When he arrived Mrs. Fay was laying on the couch, convulsing and gagging. (Tr.p. 258, ll. 1-4). She was unconscious and had defecated and urinated on herself. (Tr.p. 258, ll. 4-5). Mr. Fay grabbed her to the floor and noticed she was choking. (Tr.p. 258, ll. 6-9). He then called "9-1-1." (Tr.p. 258, ll. 10-11).

The emergency personnel arrived, placed Mrs. Fay on a gurney, and drove on to

Grand Strand. (Tr.p. 258, ll. 13-21). Mr. Fay felt "shell shocked." (Tr.p. 258, ll. 21-22). He changed his clothes and then drove to the hospital. (Tr.p. 259, ll. 3-8). He began calling family and friends to tell them what was happening – he called the friends who had come over the day before, and they came to the ER to sit with him. (Tr.p. 258, l. 15 - p. 259, l. 1; p. 265, ll. 3-4). The treating physician, Dr. Chi, came out to take a history and was concerned Mrs. Fay may have meningitis. (Tr.p. 260, ll. 1-22; p. 261, l. 15 - p. 262, l. 7). Dr. Law was also present at the ER. (Tr.p. 261, ll. 7-9; p. 264, ll. 7-11). Dr. Law said to him, "I'm sorry, Mr. Fay, I didn't think this would happen, I didn't expect this to happen." (Tr.p. 261, ll. 11-13). Dr. Law "seemed at a general loss of words, like shocked." (Tr.p. 261, ll. 13-14).

The medical personnel induced Mrs. Fay into a coma and attempted to "cool her down." (Tr.p. 265, ll. 5-7). She was not responsive. (Tr.p. 265, ll. 17-19). During the night Mrs. Fay "coded" twice. (Tr.p. 265, l. 22 - p. 266, l. 16). Mrs. Fay did not recover from the second code. (Tr.p. 266, ll. 15-16).

Under South Carolina's comparative negligence system, all forms of conduct amounting to negligence in any form, including, but not limited to, ordinary negligence, gross negligence, and reckless, willful, or wanton conduct, may be compared to and offset by any conduct that falls short of conduct intended to cause injury or damage. *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011). In a comparative negligence case, the trial court should grant the motion for a directed verdict if the sole reasonable inference from the evidence is the non-moving party's negligence exceeded fifty percent. *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000). Because the term is relative and

dependant on the facts of a particular case, comparing the negligence of two parties is ordinarily a question of fact for the jury. *Creech v. South Carolina Wildlife and Marine Res. Dep't*, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997); *Mahaffey v. Ahl*, 264 S.C. 241, 214 S.E.2d 119 (1975). *See also Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004) (plaintiff's negligence, under a theory of comparative negligence, is a question for the jury). For these reasons, the Supreme Court is reticent to endorse directed verdicts in cases involving comparative negligence. *Thomasko v. Poole*, 349 S.C. 7, 561 S.E.2d 597 (2002).

Dr. Law cites to three cases in support of its assertion that the only reasonable inference in this case is that the Fays' negligence exceeded that of Dr. Law as a matter of law. *See Bloom v. Ravoira*; *Hopson v. Clary*, 321 S.C. 312, 468 S.E.2d 305 (Ct. App. 1996);*Bass v. Gopal, Inc.*, 384 S.C. 38, 680 S.E.2d 917 (Ct. App. 2009), affirmed on other grounds *Bass v. Gopal, Inc.*, 395 S.C. 129, 716 S.E.2d 910 (2011). Each of these cases, however, are meaningfully distinct from this case.

In *Hopson*, plaintiff was driving down a street and defendant was driving behind her. Plaintiff slowed down, pulled to the right, and then attempted a U-turn. Defendant's vehicle collided with plaintiff's vehicle. The trial court granted a directed verdict for defendant finding, as a matter of law, that plaintiff's own negligence was greater than any potential negligence by defendant. In affirming, the Court of Appeals found the evidence showed "Hopson attempted an inherently precarious maneuver without ascertaining whether she could do so safely." *Hopson*, at 315, 468 S.E.2d at 308. Importantly, the plaintiff "conceded she was at fault," but argued that defendant was at fault as well in

attempting to go beyond the yellow lines to pass her and in speeding. *Hopson*, at 314, 468 S.E.2d at 307. Further, plaintiff "failed to present any evidence Clary's speed was a proximate cause of the accident." *Id.*, at 315, 468 S.E.2d at 307. There was also no evidence offered that defendant actually crossed the double yellow line. *Id.* The Court of Appeals concluded "we find Hopson simply failed to present any evidence establishing negligence on the part of Clary." *Id.*, at 316, 468 S.E.2d at 308. The Court added that even if Clary was guilty of some negligent act, Hopson's own negligence as a matter of law was greater than any negligence attributable to Clary and "the more determinative factor in causing the accident." *Id.*

Unlike *Hopson*, Mr. Fay presented some evidence of Dr. Law's negligence, as outlined above. Furthermore, the jury assessed fault against the plaintiff, Mrs. Fay, of 4%. Fay presented evidence sufficient to overcome Dr. Law's contention that the only inference was that his negligence exceeded Dr. Law's fault as a matter of law.

In *Bloom*, a pedestrian was struck by a driver when the pedestrian jay-walked across Meeting Street in Charleston in a misty rain after dark (6:30 p.m. in December). The pedestrian was wearing a dark jacket a jeans. He looked left then right, but did not look left again before running into the street from between two parked cars, and he was struck immediately. The trial court granted summary judgment in favor of the driver because the only evidence presented was that the pedestrian was at fault for entering the street quickly and without warning to the drivers. Although the Court of Appeals reversed, the Supreme Court granted review and reversed, stating "any factual issues which might exist as to Ravoira's fault in this accident cannot alter the inescapable

conclusion that, as a matter of law, Bloom's fault exceeded fifty percent." 339 S.C. at 424, 529 S.E.2d at 714. The only evidence was that Bloom violated the jaywalking statute, failed to keep a proper lookout, and failed to yield to the right-of-way of vehicles in the roadway. The Court assumed some fault on Ravoira's part, but held the evidence showed that Bloom was more than fifty percent negligent. Citing *Hopson*, the Court held "where evidence of the plaintiff's greater negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to the jury." *Id.*

Unlike *Bloom*, the evidence in this case does not yield to only one inference, that is, that any fault by Mrs. Fay exceeded Dr. Law's fault as a matter of law. There was no causative violation of an applicable safety statute, nor was the evidence only susceptible of Mrs. Fay's greater negligence as opposed to Dr. Law's "slight" negligence. The jury in this case found Dr. Law's negligence exceeded any fault by Mrs. Fay.

Finally, Dr. Law cites to *Bass v. Gopal, Inc.*, 384 S.C. 238, 680 S.E.2d 917 (Ct. App. 2009), Bass was a guest in a motel owned by Gopal, Inc. A stranger repeatedly knocked on the door, and the third time Bass went outside and confronted the stranger. The stranger demanded money but Bass refused, and the stranger shot Bass. Bass sued Gopal for failing to provide adequate security. The trial court granted summary judgment, however, finding Gopal owed no duty and that Bass's negligence exceeded any negligence by Gopal. The Court of Appeals affirmed, noting that Bass's own expert admitted that Bass would have stayed safe in his room and he should have stayed in his room and telephoned assistance. The Court added that "there was no probative evidence

that Gopal ... breached any duty of care to Bass. Based on the foregoing, the only reasonable inference that may be drawn from the evidence is that Bass' negligence in stepping outside of his room and confronting the assailant exceeded any possible innkeeper negligence." 384 S.C. at 247, 680 S.E.2d at 922.

The Supreme Court granted review and affirmed. *Bass v. Gopal, Inc.*, 395 S.C. 129, 716 S.E.2d 910 (2011). The Court first stated that the facts were undisputed, and affirmed the finding that Gopal did not have a duty to protect Bass from the criminal act of a third party because there was no evidence of a "foreseeable" risk of harm under the "balancing approach" to whether a business owner has a duty to protect its invitees from criminal acts of third parties. Justice Pleicones concurred in result and would have affirmed "on the ground that petitioner's negligence in leaving the safety of his motel room exceeded respondent's negligence, if any, as a matter of law, citing to *Bass*.

What is clear is that the trial court, the Court of Appeals and the Supreme Court all felt that there was no evidence of a duty the hotel owed to the guest in *Bass*. In this case, however, it is undisputed that Dr. Law owed the Fays a duty of care.

Further, there was no evidence of any negligence by the hotel in *Bass*, but if there were, the only evidence was that the actions by the guest in leaving his room essentially superseded any fault by the hotel. That is, the only evidence was that had plaintiff not left "the safety of his room" he would not have been hurt no matter how much the hotel may have been at fault. In this case, although the jury assigned some fault to Mrs. Fay, the jury found Dr. Law's fault exceeded Mrs. Fay's fault. Mrs. Fay presented evidence through expert and lay testimony that Dr. Law breached the applicable standard of care, and that

breach proximately caused Kelly Fay's death.

In sum, none of the cases Dr. Law cites supports his argument that the only reasonable inference to be drawn from the evidence, even when viewed most favorably for the Fays, is that Kelly Fay's negligence exceeded Dr. Law's fault.

Assuming this issue is properly preserved, the trial court properly denied Dr. Law's motion for JNOV, and this Court should affirm.

IV. THE CIRCUIT COURT CORRECTLY DENIED DR. LAW'S MOTION FOR A NEW TRIAL ON THE GROUND THAT THE CIRCUIT COURT ERRONEOUSLY EXCLUDED EVIDENCE OF MR. FAY'S EXTRAMARITAL AFFAIR

Dr. Law contends the trial court erred in excluding evidence of Mr. Fay's admitted extramarital affair which Dr. Law contends was relevant to the issue of damages recoverable in a wrongful death case. (Dr. Law App. Br. pp. 14-18). The Court should not find this argument persuasive.

To begin with, this issue is not preserved. As Dr. Law points out, the trial court granted Mr. Fay's motion in limine to exclude any evidence of an acknowledged extramarital affair that occurred in 1999. (Dr. Law App. Br. p. 14). That motion was made prior to the opening statements and the trial court took it under advisement. (Tr.p. 65, l. 23 - p. 73, l. 23). Following opening statements, the trial court made the following ruling:

> There has also been an issue of whether or not the Plaintiff's alleged affair can be brought into evidence on the issue of credibility and believability. I'm going to deny the Defendants the right to bring that evidence in, and exclude that evidence. I do that for this reason, it's clear from the opening arguments that this case is really about liability. It's not

> about damages. This issue of an affair really goes to damages, in the Court's opinion, and whether or not the loss of the spouse is as great as one may perceive that it is. This is not for the Court to say, this is just how I believe – in other words what I'm saying is, the Court is not saying that if there was an affair the loss is less. That's not an appropriate analysis. I'm just simply saying that that issue goes mainly to damages, not really to liability, but if it does go to liability, if the Defendants take the position that the truth of Mr. Fay and the reliability is directly an issue, credibility and reliability are directly an issue, I find under Rule 403 that that is so prejudicial that it is inappropriate because it is of minimal probative value, but high prejudicial value, and thus I'm going to exclude it.

(Tr.p. 191, l. 10 - p. 192, l. 4). Although Dr. Young (Tr.p. 350, l. 17 - p. 351, l. 21) and Grand Strand (Tr.p. 353, ll. 12-19) both raised the issue later in the trial and Grand Strand proffered some evidence on the issue (Tr.p. 71, l. 7 - p. 72, l. 8), at no point did Dr. Law proffer any evidence on this issue.

Dr. Law's failure to proffer the evidence during the trial means that this issue is not preserved for review. A ruling on a motion *in limine* is generally not considered a final order on the admissibility of evidence. *See, e.g. State v. Floyd*, 295 S.C. 518, 369 S.E.2d 842 (1988) (rulings *in limine* do not constitute final determinations on admissibility of evidence). This is because a ruling on a motion *in limine* is subject to change based upon developments during the trial. *State v. Smith*, 383 S.C. 159, 679 S.E.2d 176 (2009). This is true even as to rulings that grant a motion *in limine*. *See South Carolina Dept. of Highways and Public Transp. v. Galbreath*, 315 S.C. 82, 83 n. 2, 431 S.E.2d 625, 627 n. 2 (Ct. App. 1993) (even where a motion *in limine* is granted, it is not the final ruling on the admissibility of the evidence; appellant must proffer the excluded evidence at trial).

In this case, Mr. Fay moved *in limine* to exclude the evidence and the trial court

granted that motion. When Mr. Fay testified, there was no attempt by Dr. Law to proffer what the evidence would have been had the trial court permitted the examination regarding the affair. There was also no proffer by Dr. Law of any other evidence of the 1999 extramarital affair. This failure is fatal to preservation of any argument by Dr. Law about the *in limine* ruling. *South Carolina Dept. of Highways and Public Transp. v. Galbreath.*

Insofar as the co-defendants, Dr. Young and Grand Strand, may have proffered argument on what the evidence they would have pursued would have been, Dr. Law cannot benefit from their arguments. *Cf., e.g., Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187, 190 n. 3 (1997) (appellant cannot bootstrap an issue for appeal by way of a co-defendant's objection); *Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47, 416 S.E.2d 655 (Ct. App. 1992) (where record did not indicate litigants stipulated before or during trial that objection of one defense attorney would be objection of all issue of admissibility of evidence not preserved for appeal). *See also State v. Carriker*, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) (a party may not use the objection of another party to gain appellate review of an issue).

Furthermore, Dr. Law does not challenge the trial court's Rule 403 analysis. In fact, there is simply no mention of the Rule 403, SCRE, analysis in Dr. Law's brief. *See Hunter v. Staples*, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999) (indicating issue regarding Rule 403 balancing not preserved where not mentioned in opening brief and mentioned for first time in reply brief). Because the trial court grounded its ruling in Rule 403, this argument is not preserved for appellate review.

Even if preserved, the arguments on the merits should not be persuasive. The Defendants sought to admit evidence of an extramarital affair Mr. Fay had in 1999 with a co-worker three years prior to Mrs. Fay's death. Although Dr. Law did not proffer any specifics about the affair, Mr. Fay's counsel noted that the only evidence was that the affair was brief, Mr. Fay was not "caught" but instead confessed the affair to Mrs. Fay, they went to marriage counseling, and at the time of her death, the Fays had gotten past the affair and were once again happily married. (Tr.p. 68, l. 19 - p. 69, l. 5; p. 71, l. 10 - 73, l. 7).

Whether to admit or exclude this evidence was within the trial court's sound discretion. See *North Greenville College v. Sherman Construction Co., Inc.*, 270 S.C. 553, 557, 243 S.E.2d 441, 442 (1978) (trial court has broad discretion to determine the admissibility of evidence, and its decisions are reversed only when they constitute an abuse of discretion that amounts to an error of law).

South Carolina case law supports the trial court's decision. In *Wooten v. Amspacher*, a survival action, the Supreme Court noted that it had held evidence of a deceased spouse's remarriage was not admissible in a wrongful death action where the issue was the widow's or widower's damages. 279 S.C. 325, 326, 307 S.E.2d 232, 233 (1983), citing *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470, 472 (1972). Otherwise, the evidence would require a speculative comparison of the merits of the first spouse and the second spouse. *Wooten. See also Moultrie v. Medical University of South Carolina*, 280 S.C. 159, 311 S.E.2d 730 (1984) (citing *Smith* and *Wooten*). Like the evidence of remarriage in *Wooten* and *Smith*, the evidence that three years before Mrs. Fay's death

Mr. Fay had an extramarital affair would permit the jury to engage in speculation and perhaps decide the case on an improper basis.

Next, the only proffer of evidence was that Mr. Fay confessed his infidelity and Mrs. Fay forgave him and condoned the action. Condonation means "forgiveness, express or implied, by one spouse for a breach of marital duty by the other." *Nemeth v. Nemeth*, 325 S.C. 480, 481 S.E.2d 181 (Ct. App. 1997). It is the forgiveness of an antecedent matrimonial offense on condition that it shall not be repeated, and that the offender shall thereafter treat the forgiving party with conjugal kindness. *Nemeth*, citing *McLaughlin v. McLaughlin*, 244 S.C. 265, 136 S.E.2d 537 (1964). To establish condonation, there generally must be proof of reconciliation, "which implies normal cohabitation of the husband and wife in the family home." *Langston v. Langston*, 250 S.C. 363, 373, 157 S.E.2d 858, 863 (1967).

At the time of her death, Mrs. Fay was still married to Mr. Fay and was living in the same home with him. It was Mr. Fay who took Mrs. Fay to the emergency room for treatment on the fateful day in 2002. There is no question but that Mrs. Fay was made aware of the affair in December 1999, and yet was still married and living with Mr. Fay in 2002. It would have been speculation on the jury's part to consider the details of an affair three years earlier that by all accounts was known to the offended party, Mrs. Fay, and was condoned in the eyes of the law.

Finally, the trial court's decision under Rule 403, SCRE, is sound. *See* Rule 403 (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). "Evidence is unfairly prejudicial if it has

an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). The appellate court will uphold a trial court's application of Rule 403 unless it finds the trial court has committed an abuse of discretion. *Hunter v. Staples*. This is true even if this Court may have reached a different result. As this Court noted in *Hunter*:

> * * * Even though we may have reached a different result, this alone is not sufficient to reverse the trial judge's decision. *See United States v. Green*, 887 F.2d 25, 27 (1st Cir.1989) (A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in "exceptional circumstances."); *United States v. Long*, 574 F.2d 761 (3rd Cir.), *cert. denied*, 439 U.S. 985, 99 S. Ct. 577, 58 L.Ed.2d 657 (1978) (A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence.); *Id.* at 767 ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.").

Hunter, at 102-103, 515 S.E.2d at 266. Dr. Law does not make a compelling case that the trial court abused its discretion in excluding the evidence under Rule 403. In fact, as noted above, Dr. Law does not even mention Rule 403 in his brief.

Dr. Law cites to *Countryman v. County of Winnebago*, 135 Ill. App.3d 384, 481 N.E.2d 1255 (1985) as instructive on this issue. (Dr. Law App. Br. pp. 16-17). *Countryman*, however, is meaningfully distinct from this case.

In *Countryman*, the evidence the defendant sought to admit was that the decedent was having an affair with another woman at the time of his death and the decedent's wife found out about it. In fact, the Illinois Court phrased the issue as follows: "The narrow question then is whether evidence that Margaret Countryman had found Richard

Countryman in bed with another woman had any tendency to establish that the consortium was worth less than if that event had not occurred." 135 Ill. App.3d at 388, 481 N.E.2d at 1259. The Illinois Court of Appeals added:

> In fact, the evidence was relevant on this issue regardless of which side of the relationship is focused upon. First, it had some tendency to establish that Mr. Countryman's affection for his wife and the companionship he was giving her were less than if the incident had never occurred. His indiscretion, in other words, is some evidence that the marriage may not have been an ideal one for him and so some evidence that his contributions to the emotional, intangible aspects of the relationship may not have been of as much value as they might have been without the indiscretion. The evidence thus, depending upon the weight given to it by the trier of fact, could support a finding that the consortium lost was less valuable than it would have been in the absence of the evidence.
>
> Second, it would be hard to overstate the potential corrosive effect of finding one's spouse in bed with another person on the feelings of the finder. Reaction to it could be so extreme as to completely destroy the marriage or to profoundly change the nature of the relationship because of a severe loss of affection and trust and a deep sense of hurt on the part of the wronged spouse. While such extreme reactions are not inevitable, and it is even possible that such an event would not harm a relationship under some circumstances, there is a sufficient tendency for the event to have such an effect to make it relevant on the question of the value of the consortium lost.

135 Ill. App.3d at 388-389, 481 N.E.2d at 1259.

In this case, the only evidence was that the affair had occurred three years prior, that Mr. Fay had confessed the affair to Mrs. Fay, and they had put the affair behind them at the time Mrs. Fay died at the hands of the defendants. Unlike the situation in *Countryman*, the affair was not ongoing and Mrs. Fay did not find Mr. Fay in bed with his paramour. The trial court appropriately excluded the evidence and denied the new trial.

Dr. Law also cites to *Morales v. Superior Court*, 99 Cal. App.3d 283, 160 Cal.

Rptr. 194 (1979) in support of his argument. (Dr. Law App. Br. p. 17). Once again, however, *Morales* is also meaningfully distinct from this case.

In *Morales*, the California appellate court had before it the question of whether the husband in a suit for the wrongful death of his wife had to answer interrogatories regarding women with whom he had sexual relations with during the marriage. As Dr. Law points out, the California Court of Appeals stated:

> The question of whether extramarital sexual conduct affected the relationship is one of fact to be decided by the trier of fact. Evidence of such conduct is relevant to the nature of the personal relationship and thus as to whether there was any loss of love, companionship, comfort, affection, society, solace, moral support or enjoyment of sexual relations.

99 Cal. App.3d at 288, 160 Cal. Rptr. at 197. What Dr. Law neglected to include, however, was the Court's discussion that followed this statement:

> However, not all such evidence is necessarily relevant. Some limitation of the time to be covered by the discovery may properly be required. What happened 10 years before the decedent's death may or may not have relevance. This is so because *the appropriate inquiry in the wrongful death case is the nature of the relationship at date of death.* We do not attempt to say [w]hat period is proper. What is proper in a given case depends upon the facts of the case. The two-year limitation imposed by the trial court in this case does not appear to us to be unreasonable or improper. *Of course, we are discussing this matter for purposes of discovery only.* As observed in *Fults v. Superior Court* (1979) 88 Cal.App.3d 899 at page 902, 152 Cal.Rptr. 210 at page 212. " . . . relevancy at trial and relevancy for purposes of discovery are two different things. 'An appellate court cannot reverse a trial court's grant of discovery under a "relevancy" attack unless it concludes that the answers sought by a given line of questioning cannot as a reasonable possibility lead to the discovery of admissible evidence or be helpful in preparation for trial.' (*Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 173, 84 Cal.Rptr. 718, 727, 465 P.2d 854, 863; Code Civ.Proc., ss 2016(b), 2031.)" (*Fults v. Superior Court*, supra, 88 Cal.App.3d 899, 902, 152 Cal.Rptr. 210, 212.)

(Emphasis added). Thus, the California court expressly limited its discussion in two ways: (1) a cutoff point of two years was acceptable in that case because the appropriate inquiry is the nature of the relationship at date of death, and (2) relevancy during discovery is different (i.e., broader) from relevancy at trial. This case supports the trial court's decision to exclude evidence of an admitted affair that occurred during a brief period three years before Mrs. Fay was killed.

Dr. Law next cites to *Strelecki v. Firemans Ins. Co.*, 88 Wis.2d 464, 276 N.W.2d 794, 801 (1979) for the rule that "evidence of extramarital activities is relevant to [a] surviving spouse's claim for loss of society and companionship in [a] wrongful death action." (Dr. Law App. Br. p. 17). *Strelecki* is distinct from this case in a meaningful way.

In *Strelecki*, the decedent died in a drunken fall while visiting a neighbor. His wife brought a wrongful death action against the homeowner and the jury found him completely responsible for his own death. They awarded his widow, however, $10,000 for her pecuniary loss but $0 for loss of consortium under Wisconsin law. There was no question that Mr. Strelecki's alcohol abuse was the source of his own demise as well as the actions that damaged his relationship with his wife. Importantly, the issue on appeal was whether the trial court had erred in admitting the evidence. Deferring to the trial court's discretion (including an analysis similar to Rule 403), the Supreme Court of Wisconsin affirmed. The Court stated:

> In the application to the present appeal we hold that the evidence regarding Strelecki's personal conduct dealing with his periodic hospitalization for alcoholism, his fighting and assaulting his wife, mother and son, his extramarital activities, his attempts to molest his daughter, his suicidal tendencies and the lack of marital sex with Mrs. Strelecki to be

> relevant to the determination of Mrs. Strelecki's claim for loss of society and companionship.

88 Wis.2d at 480, 276 N.W.2d at 801. Even so, the Wisconsin court found error in the admission of certain other evidence regarding his son, but concluded:

> The overwhelming credible evidence in this case when applied to the totality of the sufficient credible evidence test supports the jury verdict. Consequently, we hold that the appellant's claim of being denied a fair determination of the wrongful death claim by the introduction of the prejudicial nature of certain evidence is without merit.

88 Wis.2d at 481-482, 276 N.W.2d at 802.

Unlike *Strelecki*, however, this case involved evidence of an affair that had occurred three years prior, and that the trial court excluded under a Rule 403 analysis. *Strelecki* does not aid Dr. Law.

In sum, these cases from other jurisdictions do not support reversal of the denial of Dr. Law's new trial motion. As the Supreme Court of Vermont stated:

> The breadth of matters relevant to the issue of damages in a wrongful death action suggests that evidence of an extramarital affair may be admissible to rebut or discredit a claim that the decedent's death deprived the surviving spouse of a faithful, loving companion. Indeed, a number of courts have so held. *See, e.g., Morales v. Superior Court*, 99 Cal.App.3d 283, 160 Cal.Rptr. 194, 197 (1979); *Countryman v. County of Winnebago*, 135 Ill.App.3d 384, 90 Ill.Dec. 344, 481 N.E.2d 1255, 1259-60 (1985); *Strelecki v. Firemans Ins. Co.*, 88 Wis.2d 464, 276 N.W.2d 794, 801 (1979). * * *
>
> That some aspects of a decedent's family relations may be relevant and admissible in a wrongful death action does not, however, mean that all aspects of family relations are relevant and admissible. There is a line to be drawn when the potentially inflammatory nature of the information exceeds its probative value. See V.R.E. 403; *Haynes v. Golub Corp.*, 166 Vt. 228, 236, 692 A.2d 377, 382 (1997). A trial court's duty is to balance these factors, to ensure that the primary purpose or effect of disputed evidence is to advance an issue in the case rather than "to appeal to a

> jury's sympathies, 'arous[e] its sense of horror, provok[e] its instinct to punish, or trigge[r] other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case.'" *State v. Bruyette*, 158 Vt. 21, 31, 604 A.2d 1270, 1274 (1992) (quoting 1 J. Weinstein & M. Berger, *Weinstein's Evidence* § 403[03], at 403-33-39 (1991)).
>
> The trial court is accorded wide latitude in making such evidentiary rulings, and we will not disturb its decision absent a showing of abuse of discretion. See *State v. Webster*, 165 Vt. 54, 56, 675 A.2d 1330, 1332 (1996).

Mears v. Colvin, 171 Vt. 655, 658, 768 A.2d 1264, 1267-1268 (2000).

The decision whether to grant or deny a new trial rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 569, 658 S.E.2d 80, 93 (2008). For the reasons stated, this Court should affirm the trial court's discretionary decision to deny Dr. Law's motion for a new trial on the grounds that the trial court appropriately excluded the evidence of the affair under Rule 403, SCRE.

V. THE CIRCUIT COURT PROPERLY DENIED DR. LAW'S MOTION TO ENROLL THE JUDGMENT IN THIS CASE ACCORDING TO THE PERCENTAGES OF FAULT ASSIGNED TO EACH PARTY

Dr. Law essentially contends that because Plaintiff Fay agreed to allow the jurors to assign percentages of fault among the parties, then the trial court was required to order that the judgment be enrolled accordingly. This argument should not be persuasive.

Dr. Law first asserts that Plaintiff Fay "requested an apportioned verdict...." (Dr. Law App. Br. P. 19). This assertion is misleading. Although Plaintiff Fay agreed to permit the jury to assign fault between the defendants on the verdict form, Plaintiff Fay

did not advocate the entry of the verdict under those percentages. As the trial court itself noted, this case was an "old law" case and it was unnecessary for the jury to apportion fault between the defendants. (Tr. p. 1953, ll. 14-18).

Furthermore, Dr. Law concedes in his brief that Grand Strand objected in chambers to the "allocation approach" but then contends that because the objection is not on the record, the objection is not available. (Dr. Law App. Br. Pp. 19-20). This is not the law. *See Shorb v. Shorb*, 372 S.C. 623, 628 n. 3, 643 S.E.2d 124, 127 n. 3 (Ct. App.2007) (holding a party is bound by a concession in his brief). In any event, the trial court's decision to reverse itself and enter the judgment according to the apportionment of 4% for Plaintiff Fay and 96% for the defendants jointly was correct.

The injury in this case occurred in January 2002. Under the law that applies to this case, where two defendants are jointly and severally liable for the harm, they are liable for the entire harm, and upon recovery of a judgment against both, the plaintiff may, at his election, collect the full amount from just one of them. *Rourk v. Selvey*, 252 S.C. 25, 164 S.E.2d 909 (1968). That is, each defendant is totally liable for the entire judgment, although any recovery against one would extinguish the judgment against the other to the amount of that recovery. *Rourk v. Selvey.*

In 2005, the Legislature passed a number of changes to the tort system in this State. Act No. 27, 2005 S.C. Acts. As part of this comprehensive change in the law, the Legislature enacted S.C. Code Ann. §15-38-15 (Supp.2008), which changed the rules applicable to joint tortfeasors in South Carolina. Under that statute, the jury must make a determination of percentages of fault among the defendants and any defendant whose

fault is found to be less than 50% of the "total fault for the indivisible damages" as compared to fault assign to all other parties "shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact." S.C. Code Ann. § 15-38-15(A)(1). This provision changed the law in this State, adopting a new scheme for apportioning fault.

The statute is found in Section 6 of Act No. 27, which took effect July 1, 2005 and only applies "to causes of action arising on or after that date..." Act No. 27, 2005 S.C. Acts, § 16(4). See also *Branham v. Ford Motor Co.*, 390 S.C. 203, 236 n. 21, 701 S.E.2d 5, 22 n. 21 (2010) (the current version of the Contribution Among Tortfeasors Act became effective for cases arising after July 1, 2005; the 2005 amendment to the Act provides that a "less than fifty percent" at-fault defendant "shall only be liable for that percentage of the indivisible damages determined by the jury"). The *Branham* Court noted that a provision of the Act applicable in 2001 (when the injury in *Branham* occurred) provided that "[i]n determining the pro rata shares of tortfeasors in the entire liability ... [,] their relative degrees of fault *shall not be considered.*" S.C. Code Ann. § 15–38–30 (2005) (emphasis added).

In *Branham*, the Supreme Court also noted that because the pre-2005 version of "joint and several liability" existed, allocating fault among the joint tortfeasors in that case "served no legitimate purpose." *Branham*, 390 S.C. at 236, 701 S.E.2d at 22. This is because prior to 2005, "multiple tortfeasors were jointly and severally responsible for all damages." *Branham*, 390 S.C. at 235, 701 S.E.2d at 22 (noting that was the rule in 2001, when the injury occurred in *Branham*). See also *Fernanders v. Marks Const. of South*

Carolina, Inc., 330 S.C. 470, 477, 499 S.E.2d 509, 513 (Ct. App. 1998) ("joint and several liability could never be a factor in apportioning negligence because a plaintiff's ability to collect a judgment has no bearing on a defendant's relative degree of negligence").

Therefore, the version of "joint and several" liability that applies to this case renders Dr. Law liable for the entire verdict, subject to a reduction only for the percentage of fault assigned to the Plaintiff Fay. Although the jury made a finding as to each defendant's individual fault, as *Branham* and *Fernanders* instruct, such an apportionment has no bearing on Dr. Law's responsibility to the Plaintiff and should not be considered when entering the judgment.

Plaintiff Fay contests whether he agreed to the Court permitting the jury to apportion fault among the defendants. However, assuming *arguendo* that there was such an agreement, the only effect that apportionment would have would be a gratuitous determination of percentages of fault, an apportionment that may be important for contribution purposes among the joint tortfeasors. That determination would not, however, relieve each defendant from operation of the joint and several law applicable to the case. Each defendant would still be totally and completely responsible for the entire judgment no matter what that defendant's percentage of fault is found to be.

What Dr. Law's counsel did was to effectively persuade the trial court to improperly apply the post-July 2005 law applicable to joint and several liability to this case. However, the legislation provides that it does not apply where the claim arose prior to July 1, 2005, as the injury in this case. Entering a judgment for Dr. Law for only 6% of

the verdict was not proper under the rules applicable to this case, and resulted in an error of law that the trial court itself corrected. This Court should affirm that ruling.

Next, Dr. Law contends "this dispute regarding the verdict form, the apportioned verdict and whether joint and several liability applies to this judgment is further evidence that a new trial absolute is justified and warranted." (Dr. Law App. Br. p. 20). First, Dr. Law did not make this argument below in support of his new trial motion and it is not available on appeal. Second, the argument is conclusory, appearing in one sentence in the brief without any citation of authority, and is thus abandoned. Finally, the assertion is misleading as there is no real dispute here – nobody agreed to entry of the judgment according to various percentages, and the law applicable to the case did not permit such.

Lastly, Dr. Law "adopts and incorporates" all of the arguments made by Grand Strand "to the extent not inconsistent herewith, ostensibly under the authority of Rule 208(b)(6), SCACR. (Dr. Law App. Br. p. 20, n. 3). Rule 208(b)(6) provides:

> **(6) Joining in Briefs.** In cases involving more than one appellant or respondent, including cases consolidated for appeal, any number of parties may join in a single brief, and any party may adopt by reference all or any part of the brief of another.

There is no provision in this Rule that allows a party to include such a blanket adoption of another brief. The Rule requires a party to adopt portions or all of the other brief "by reference," without requiring this Court to compare the two briefs, sort through the arguments, and include only those parts that the Court deems to be consistent with Dr. Law's arguments. The party must either join the entire brief of the other person or provide specific references to the portions to which the party joins.

This Court should reject Dr. Law's blanket adoption of Grand Strand's brief but only where "not inconsistent herewith" without explaining what those portions are. The Appellate Court Rules are designed to facilitate the orderly processing of an appeal, and does not contemplate this kind of argument which requires this Court to "grope in the dark" to divine what arguments an appellant intends to make. *Cf. Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) (every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to "grope in the dark" to ascertain the precise point at issue).

The trial court correctly ordered that the verdict be entered according to the law that applied to this case. This Court should affirm.

CONCLUSION

For the reasons stated the Court should dismiss this appeal as untimely. Alternatively, the Court should affirm the trial court's rulings regarding Dr. Law's motions for DV and JNOV, the evidentiary rulings, and the order entering the judgment.

Respectfully submitted,

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