

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS
THE HONORABLE BRIAN M. GIBBONS
CIRCUIT COURT JUDGE

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SC Court of Appeals

APPELLATE CASE NO. 2017-001271
CIVIL ACTION NO. 2015-CP-46-2454

Wayne H. Copeland as the PR of the Estate of
Dorothy H. Copeland, deceased,

APPELLANT,

versus

Carolina Pulmonary Physicians, P.A.,

RESPONDENT.

INITIAL BRIEF OF RESPONDENT

Barbara A. Chesley
Carmen V. Ganjehsani
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
**ATTORNEYS FOR RESPONDENT
CAROLINA PULMONARY
PHYSICIANS, P.A.**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF ISSUES ON APPEAL	1
COUNTERSTATEMENT OF THE CASE.....	2
COUNTERSTATEMENT OF FACTS	4
STANDARD OF REVIEW.....	13
ARGUMENT.....	14
The Trial Court properly directed a verdict in favor of Defendant Carolina Pulmonary on the allegations of the Complaint because Appellant failed to prove or set forth any evidence that Carolina Pulmonary and/or its employee deviated from the standard of care for weighing a patient by placing the patient on the weighing scale and walking away and only offered speculative and conjectural theories as to how the patient fell	14
CONCLUSION.....	20

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Ellison v. Heritage Dodge, Inc.</u> , 283 S.C. 21, 320 S.E.2d 716 (Ct. App. 1984)	16
<u>First State Sav. & Loan v. Phelps</u> , 299 S.C. 441, 385 S.E.2d 821 (1989)	13
<u>Fletcher v. Med. Univ. of South Carolina</u> , 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010)	18
<u>Guffey v. Columbia/Colleton Reg'l Hosp., Inc.</u> , 364 S.C. 158, 612 S.E.2d 695 (2005)	13, 14, 16, 19
<u>Hoard ex rel. Hoard v. Roper Hosp., Inc.</u> , 387 S.C. 539, 694 S.E.2d 1 (2010)	14
<u>LePrince v. McLeod</u> , 171 So.2d 189 (Fla. Dist. Ct. App. 1965)	18
<u>Martasin v. Hilton Head Health Sys.</u> , 364 S.C. 430, 613 S.E.2d 795 (Ct. App. 2005)	13
<u>McMillan v. Oconee Mem'l Hosp., Inc.</u> , 367 S.C. 559, 626 S.E.2d 884 (2006)	13
<u>Miller v. FerrellGas, L.P.</u> , 392 S.C. 295, 709 S.E.2d 616 (2011)	13
<u>Parrish v. Allison</u> , 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007)	13
<u>Small v. Pioneer Machinery, Inc.</u> , 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997)	18
 <u>RULES</u>	
Rule 15, SCRCPC	17

COUNTERSTATEMENT OF ISSUES ON APPEAL

The Trial Court properly directed a verdict in favor of Defendant Carolina Pulmonary on the allegations of the Complaint because Appellant failed to prove or set forth any evidence that Carolina Pulmonary and/or its employee deviated from the standard of care for weighing a patient by placing the patient on the weighing scale and walking away and only offered speculative and conjectural theories as to how the patient fell.

COUNTERSTATEMENT OF THE CASE

On August 14, 2015, Appellant Wayne H. Copeland, as the Personal Representative of the Estate of Dorothy H. Copeland, deceased, filed this medical malpractice action in the Court of Common Pleas for York County against Respondent Carolina Pulmonary Physicians, P.A. (“Carolina Pulmonary”). [R.pp. ___; Complaint.] Appellant alleged that on May 17, 2012, while Dorothy H. Copeland (“Dorothy”) was a patient at Carolina Pulmonary, she was “assisted onto a weighing scale by Joan Edge” and “[o]nce [Dorothy] was on the scale, Ms. Edge turned her back to [Dorothy] and walked away from her and the scale and went to the opposite side of the room.” Appellant further alleged that “[w]hile left alone on the scale, [Dorothy] fell onto the floor and suffered severe injuries to her body.” [R.p. ___; *Id.* at p. 2, ¶¶ 4-5.]

Appellant asserted that Carolina Pulmonary committed medical malpractice and failed to comply with the applicable standard of care because a staff member left Dorothy on the weighing scale unattended. [R.p. ___; *Id.* at p. 3, ¶¶ 9, 13.] As a result of Carolina Pulmonary’s alleged medical malpractice, Appellant sought damages for personal injury, pain and suffering, medical expenses, and diminished quality of life. [R.p. ___; *Id.* at p. 4, ¶ 14.] Appellant did not contend that the fall contributed to Dorothy’s subsequent death and rather noted that Dorothy’s death on March 7, 2014 was caused by conditions not related to the fall. [R.p. ___; *Id.* at p. 3, ¶ 8.]

Carolina Pulmonary filed its Answer on September 28, 2015, denying the material allegations of the Complaint and maintaining that “at all times relevant to the matters set forth in the Complaint, all health care providers employed by [Carolina Pulmonary] complied with generally accepted standards of care applicable to health care providers

treating patients for the same or similar condition under the same or similar circumstances” [R.pp. ___; Answer.]

The case proceeded to trial before the Honorable Brian M. Gibbons on February 13 through 15, 2017. [R.p. ___; Trial Tr. p. 1.] At the conclusion of Appellant’s case, Carolina Pulmonary moved for a directed verdict on the ground that Appellant failed to prove the allegations stated in the Complaint and failed to prove that Carolina Pulmonary’s employee deviated from the standard of care by placing Dorothy on the weighing scale and then walking away leaving Dorothy unattended. Carolina Pulmonary further argued that there was nothing in the record besides sheer speculation that Dorothy fell because of any alleged action or inaction of its employee. [R.pp. ___; ___; Trial Tr. pp. 281, l. 9 – 287, l. 13; Mtn for Directed Verdict and Memorandum of Law in Support.]

The Trial Court, based upon Carolina Pulmonary’s Motion for Directed Verdict and its Memorandum of Law in Support as well as the testimony presented and the arguments of counsel, granted the motion for a directed verdict in favor of Carolina Pulmonary. [R.p. ___; Trial Tr., p. 287, ll. 17-23.] The Trial Court issued a Form 4 order on February 15, 2017 memorializing the grant of the directed verdict. [R.pp. ___; Form 4.]

On February 20, 2017, Appellant filed a Motion for Reconsideration of the Court’s Order Granting Defendant’s Directed Verdict Motion and Motion for a New Trial Pursuant to SCRCP 59. [R.pp. ___; Post-Trial Mtn.] Carolina Pulmonary filed its Response in Opposition to Appellant’s post-trial motion on May 5, 2017. [R.pp. ___; Response.]

On May 8, 2017, the Trial Court held a hearing on Appellant's post-trial motion. [R.pp. ___; Hearing Tr.] The Trial Court denied Appellant's post-trial motion in a Form 4 order filed May 12, 2017. [R.pp. ___; Form 4.]

Appellant filed and served his Notice of Appeal with this Court on or about May 19, 2017.

COUNTERSTATEMENT OF FACTS

Appellant's suit against Carolina Pulmonary arose out of Dorothy's fall which occurred on May 17, 2012 while she was visiting Carolina Pulmonary's office for a scheduled medical visit. According to the Complaint, Dorothy, a ninety-year old female, was accompanied by her daughter-in-law, Deborah Copeland ("Deborah"). Appellant asserted that Dorothy and Deborah were led into an examination room by Joan Edge, an employee of Carolina Pulmonary. [R.p. ___; Complaint, p. 2, ¶ 4.]

Appellant explicitly alleged in the Complaint that "[d]uring the course of her examination, [Dorothy] was assisted onto a weighing scale by Joan Edge." Appellant further contended that "[o]nce [Dorothy] was on the scale, Ms. Edge turned her back to [Dorothy] and walked away from her and the scale and went to the opposite side of the room." [R.p. ___; Id.] Appellant averred that "[w]hile left alone on the scale, [Dorothy] fell onto the floor and suffered severe injuries to her body." [R.p. ___; Id. at p. 2, ¶ 5.] Finally, Appellant alleged in the Complaint that Carolina Pulmonary breached the applicable standard by leaving Dorothy unattended on the weighing scale. [R.p. ___; Id. at p. 3, ¶¶ 9, 13.]

The allegations in the Complaint were contradicted by the evidence presented during the trial. The testimonies and exhibits introduced at trial divulged the following:

Carolina Pulmonary is a specialty clinic treating patients with pulmonary (lung-related) type diseases. [R.p. ___; Trial Tr. p. 53, ll. 6-10.] Joan Edge had been a registered medical assistant for forty-three years and an employee with Carolina Pulmonary since 2001 until her retirement in June 2015. [R.pp. ___; ___; Id. at pp. 46, l. 5 – 47, l. 2; 88, l. 21 – 89, l. 23.] According to Joan, the general role of a medical assistant included assisting the physician, taking the vitals of patients such as their blood pressure, weight, and oxygen, drawing blood, and giving injections. [R.pp. ___; Id. at pp. 89, l. 24 – 90, l. 9.]

Joan also testified that patients of Carolina Pulmonary were almost always accompanied by a family member or care provider to the doctor's office, particularly because most of Carolina Pulmonary's patients were elderly. [R.pp. ___; Id. at pp. 90, l. 23 – 91, l. 8.] Family members were allowed back into the triage and exam rooms and frequently assisted by giving patient information to Carolina Pulmonary staff and by physically assisting the patient by walking the patient to the room, assisting the patient onto the scale, assisting with changing the patient into a gown, and assisting the patient to the restroom. [R.pp. ___; ___; Id. at pp. 91, l. 19 – 92, l. 3; 161, l. 24 – 162, l. 22.]

On May 17, 2012, Joan was working at Carolina Pulmonary and went to the waiting room to call Dorothy back. She noticed that Dorothy was an elderly woman and saw after looking at the chart that Dorothy was ninety years old. [R.pp. ___; Id. at pp. 94, l. 24 – 95, l. 3.] Joan further observed that Dorothy was accompanied by another woman, Deborah. [R.p. ___; Id. at p. 95, ll. 5-6.] Joan called Dorothy's name and started to walk towards her. As Joan walked towards Dorothy, Deborah stood up to help Dorothy stand. [R.p. ___; Id. at p. 95, ll. 7-11.] Joan said hello to Dorothy and Deborah and

advised that they were going to be headed to the triage room. [R.p. ____; Id. at p. 95, ll. 13-14.] Deborah held onto Dorothy, and the three of them walked down the hall to the triage room with Joan in front and Dorothy and Deborah walking just behind her as Joan led them to the triage room. The hallway was small so only two people could walk side by side down the hall at the same time. [R.p. ____; ____; ____; ____; Id. at pp. 66, ll. 9-16; 95, ll. 15-20; 97, ll. 3-6; 214, ll. 21-24.]

The trio made their way to the triage room where Joan walked in first and Deborah and Dorothy followed together right behind Joan. [R.pp. ____; ____; Id. at pp. 65, l. 25 – 66, l. 8; 97, ll. 6-10.] The triage room was small. Upon entering the doorway, immediately to the right was a step-up digital weighing scale close to the doorway and pushed back a little from the wall. Next to the digital scale were two chairs usually used by family members. On the wall adjacent to the two chairs was office shelving and a computer station. On the other side of the room across from the scale was a vital monitor with a chair beside it where a patient would sit while the vitals were taken. [R.pp. ____; ____; ____; ____; ____; ____; Id. at pp. 48, l. 25 – 49, l. 11; 49, l. 23 – 50, l. 2; 50, ll. 9-25; 59, ll. 1-4; 97, ll. 19-24; Photographs.]

The triage room is where the medical assistant obtains the patient's weight and vitals such as blood pressure, oxygen saturation, and temperature. The medical assistant will also review the patient's medications and any changes in medical history and determine the reason for the office visit. [R.pp. ____; ____; Trial Tr. pp. 93, ll. 2-9; 159, ll. 10-24.]

There is typically a particular order in which the medical assistant conducts the triage activities. [R.p. ____; Id. at p. 93, ll. 10-12.] The medical assistant usually takes

the patient's weight first because the scale is right at the door. Because many of Carolina Pulmonary's patients have lung and breathing problems, it is ideal to take the patient's weight first so the patient will not have to sit down and get back up to be weighed. After the patient's weight is taken, the medical assistant has the patient sit down by the vital monitor for the taking of the patient's vitals. [R.pp. ___; ___; ___; Id. at pp. 58, ll. 9 – 24; 93, ll. 13 – 24; 159, l. 25 – 160, l. 11.] Once the medical assistant has obtained all the patient's vitals, the medical assistant would then take the patient into an examination room. [R.p. ___; Id. at p. 59, ll. 19-20.]

Joan described at trial how a patient's weight was usually obtained. The digital weighing scale is approximately two inches off the ground. [R.pp. ___; ___; Id. at p. 51, ll. 4 – 13; Photograph.] Some patients are able to step up onto the weighing scale on their own. The medical assistant will stand at the scale to obtain the digital reading displayed on the wall monitor of the scale. The medical assistant will then log the weight in the patient's chart. It is the medical assistant's job to obtain or record the weight. Stepping up onto the scale, however, is not considered obtaining the patient's weight. Family members frequently assist with helping a patient step up onto the scale. [R.pp. ___; ___; ___; Trial Tr. pp. 93, l. 25 – 94, l. 15; 101, l. 16 – 102, l. 1; 163, ll. 13-23.]

On the day of the incident, after Joan, Deborah, and Dorothy reached the triage room and walked in, Joan said she told Deborah that she needed to take Dorothy's weight. Joan testified that Deborah immediately went ahead and stepped Dorothy up onto the scale. Joan went to lay her chart down by the computer adjacent to the chairs next to the scale, and as she turned around, she saw Deborah standing by a chair and

Dorothy lying on the floor with her feet towards the scale. Dorothy had fallen off the scale. [R.pp. ___; ___; Id. at pp. 66, l. 17-67, l. 20; 97, l. 25 – 98, l. 25.] Joan maintained that the events from the time the three walked through the door of the triage room to Dorothy's fall "happened so quickly . . . really fast." [R.p. ___; Id. at p. 98, ll. 12-13, 21-25.]

Right away, Joan went to Dorothy, squatted down, and asked if she was alright. Joan said Dorothy was complaining about her wrist. Joan ensured that Dorothy did not move before Dr. Alleyne, a physician at Carolina Pulmonary who was in the next room at the time, could check Dorothy. Dr. Alleyne came in to check on Dorothy as soon as he was called. Denise Taylor, the office manager, also came to the room after Dorothy's fall. A wheelchair was brought to the room, and after Dr. Alleyne checked Dorothy, he lifted her into the wheelchair. [R.pp. ___; ___; ___; ___; ___; Id. at pp. 71, ll. 3 – 13; 72, ll. 15-21; 99, ll. 2 – 24; 164, l. 12-165, l. 14; 166, ll. 1-2.] Dr. Creagh, another physician at Carolina Pulmonary, also came to check on Dorothy. [R.p. ___; Id. at p. 100, ll. 9-24.] The staff at Carolina Pulmonary arranged for Dorothy to be taken to an orthopedic physician. [R.pp. ___; ___; ___; Id. at pp. 149, ll. 1-18; 166, l. 15 – 168, l. 1; 198, l. 18 – 199, l. 2.] Dorothy was diagnosed with a broken wrist and a pelvis fracture. [R.p. ___; Id. at p. 201, ll. 17-20.]

At trial, Joan testified that she never at any point asked Deborah to put Dorothy on the scale. [R.pp. ___; ___; Id. at pp. 74, ll. 15-19; 101, ll. 13-15.] When Joan saw Deborah put Dorothy on the scale without being asked to do so, Joan did not have any concern because it was very common for family members to assist patients onto the scale.

Joan observed that Deborah was taking care of Dorothy at that moment. [R.pp. ___; ___; ___; Id. at pp. 69, ll. 9-14; 70, l. 4 – 71, l. 2; 78, l. 22 – 79, l. 2; 101, ll. 16-22.]

Deborah, Dorothy's daughter-in-law, also testified at trial. She acknowledged being Dorothy's main care giver. [R.p. ___; Id. at p. 185, ll. 6-8.] On the day of the incident, Deborah picked Dorothy up from her assisted living facility. [R.p. ___; Id. at p. 189, ll. 3 – 19.] They drove to the office of Carolina Pulmonary where Deborah pulled the vehicle under the portico on the outside of the building where vehicles can drive underneath and drop off patients. [R.pp. ___; ___; Id. at pp. 124, ll. 16-25; 190, ll. 3-7.]

Deborah assisted Dorothy out of the vehicle, took Dorothy inside the building, and assisted Dorothy into a chair in the waiting room. Deborah told Dorothy to wait on her and that she would be right back, and then Deborah went back outside to park the vehicle in the parking lot. Then Deborah came back in the office and sat down beside Dorothy. [R.p. ___; Id. at p. 190, ll. 3-11.]

After sitting in the waiting room, Joan called Dorothy back to the triage room. Deborah assisted Dorothy out of the chair and held Dorothy's arm as they walked down the hallway to the triage room. [R.p. ___; Id. at p. 191, ll. 15-25.] Deborah said she was carrying her purse, Dorothy's purse, and an umbrella. [R.pp. ___; Id. at pp. 190, l. 12 – 191, l. 14.] Deborah testified that it was her usual practice to assist Dorothy down the hall to the triage room on their visits to Carolina Pulmonary. [R.p. ___; Id. at p. 214, ll. 15-24.]

After the three walked into the triage room, Deborah testified that Joan said she needed to get Dorothy on the scale. [R.p. ___; Id. at p. 194, ll. 19-22.] Deborah said she and Dorothy turned toward the scale and walked in front of it. [R.p. ___; Id. at p. 194, ll.

22-24.] Deborah noticed the chairs beside the scale. Deborah then “let go of [Dorothy’s] arm and walked toward the chair, to put everything down, so [she - Deborah] could be whatever, be there.” [R.p. ___; Id. at p. 195, ll. 2-6.] The next thing Deborah knew:

[W]hen I turned around, [Dorothy] was laying in the floor, she had already fallen. She was falling as I looked around, and there - - she was just - - she was there. Her - - she - - her legs were pointed in toward that - - that chair over against that other wall, and her head - - her head was sort of in the doorway.

[R.p. ___; Id. at p. 195, ll. 7-12.]

During her direct examination at trial, Deborah claimed that she never placed Dorothy on the scale as Joan had testified. [R.pp. ___; ___; Id. at pp. 175, ll. 19-22; 196, ll. 8-9.] She also acknowledged that Joan had not asked her to place Dorothy on the scale. [R.p. ___; Id. at p. 196, ll. 13-14.]

Prior to trial, Deborah executed an affidavit in which she averred that on May 17, 2012, she took Dorothy to a follow-up visit she had with her doctor at Carolina Pulmonary. Deborah further stated in the affidavit that after sitting in the waiting room, Joan called for them and led them to an examination room. The room had a step-up scale near the door and some chairs next to the scale. Deborah averred in the affidavit that “[upon entering the room, [she] proceeded to place [her] purses and umbrella near one of the chairs in the exam room,” and “[a]fter putting the purses and umbrella down, [she] turned towards Dorothy and the scale, [she] saw Dorothy fall off of the scale and violently hit the floor.” Deborah alleged that “[a]t the time Dorothy fell, Ms. Edge was on the other side of the room.” [R.pp. ___; ___; D. Copeland Aff; Trial Tr. pp. 215, l. 1 – 216, l. 1.]

Deborah's trial testimony contradicted the testimony of her affidavit because at trial Deborah admitted that she never saw Dorothy fall off of the scale. In fact, Deborah admitted that she never saw Dorothy step up onto the scale and never saw Joan put Dorothy on the scale. Deborah did not know if Dorothy was even on the scale when she fell:

Q: Do you recall telling me that you did not actually see Mrs. Copeland [Dorothy] get up on the scale?

A: **I did not see her get on the scale.**

Q: [A]nd do you recall telling me that **you did not see Joan Edge put her [Dorothy] on the scale?**

A: **I did not.**

Q: You didn't see - -

...

A: **I did not see her.**

...

Q: And I believe you testified that it all happened so fast, it was like an instant.

A: It did happen very quickly.

...

Q: So, sitting here today - - and I just wanted to be sure, because in your affidavit, you had stated I saw Dorothy fall off the scale. And so, I'm just trying to be sure I understand what your testimony is today.

...

[I]s it fair to say that you do not have any recollection or knowledge of Mrs. Copeland [Dorothy] ever being on the scale?

A: **I did not see her on the scale.**

[R.pp. ___; Trial Tr. pp. 216, l. 20 – 218, l. 8. (emphasis added).]

Susan Davies testified as the Appellant's expert. She is a registered nurse and was qualified as an expert in the area of medical assistant triage. [R.pp. ___; ___; Id. at pp. 251, ll. 2-3, 17-18; 256, ll. 13-19.] Davies rendered an opinion on the standard of care for weighing a patient in an office setting. She testified that the medical assistant should hold one of the patient's arms with the assistant's other arm around the patient's waist or very close to the patient's back to assist the patient up onto the scale. The medical assistant would then need to let go of a patient to take the weight in order for the weight to be accurate but that the assistant should leave the assistant's hands in place up near the patient for the patient to grab should the patient become unsteady. Once the patient's weight is obtained, Davies testified the medical assistant should grab the patient's hand, extend the hand in front of the patient, and place the assistant's other hand on the patient's back and have the patient step backwards, one foot at a time, to make sure the patient was stable when stepping down from the scale. [R.pp. ___; Id. at pp. 264, l. 6 – 265, l. 8.]

During her cross-examination, Davies admitted that her opinion was narrow and was limited only to the standard of care related to weighing a patient in an office setting.

[R.pp. ___; Id. at pp. 272, l. 21 – 273, l. 6.] Davies testified:

Q: Am I correct that your opinions in this case are only based on the standard of care related to weighing a patient in an office setting? I asked you that question in your deposition.

A: Uh-huh. Can you repeat that, please?

Q: Sure. Are your opinions in this case, they're focused, they're based on the standard of care related to weighing a patient in the office setting?

A: Yes.

[R.pp. ___; Id.]

STANDARD OF REVIEW

In an appeal from the grant of a directed verdict, the appellate court must, like the trial court, view the evidence in a light most favorable to the non-movant. Miller v. FerrellGas, L.P., 392 S.C. 295, 297, 709 S.E.2d 616, 617 (2011). See McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006) (“In ruling on motions for directed verdict . . ., the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions.”). “When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” Parrish v. Allison, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). “The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror.” Id. “Yet, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury.” Id. at 319–20, 656 S.E.2d at 388.

The court must determine whether any evidence existed on each element of the cause of action. First State Sav. & Loan v. Phelps, 299 S.C. 441, 446, 385 S.E.2d 821, 824 (1989). “If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied.” Martasin v. Hilton Head Health Sys., 364 S.C. 430, 437, 613 S.E.2d 795, 799 (Ct. App. 2005). However, “[a] directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability.” Guffey v. Columbia/Colleton Reg'l Hosp., Inc., 364 S.C. 158,

163, 612 S.E.2d 695, 697 (2005). A directed verdict is warranted “when there is no evidence on any one element of the alleged cause of action.” Id.

ARGUMENT

The Trial Court properly directed a verdict in favor of Defendant Carolina Pulmonary on the allegations of the Complaint because Appellant failed to prove or set forth any evidence that Carolina Pulmonary and/or its employee deviated from the standard of care for weighing a patient by placing the patient on the weighing scale and walking away and only offered speculative and conjectural theories as to how the patient fell.

The Trial Court correctly directed a verdict in favor of Carolina Pulmonary on the claims set forth in Appellant’s Complaint because during his case at trial, Appellant did not offer any evidence that Carolina Pulmonary and/or its employee deviated from the standard of care for weighing a patient by placing Dorothy on the weighing scale and walking away. Instead, the evidence Appellant presented during his case at trial showed that Appellant did not know how Dorothy fell and rather wanted the jury to speculate among at least seven different theories as to how Dorothy fell. By refusing to send the case to the jury, the Trial Court properly adhered to the law that a trial court may not submit speculative, theoretical, and hypothetical views to a jury.

A plaintiff in a medical malpractice case must present (1) evidence of the generally recognized practices and procedures that would be exercised by competent practitioners in a defendant’s field of medicine under the same or similar circumstances, (2) evidence that the defendant departed from the recognized and generally accepted standards, practices, and procedures in the manner alleged by the plaintiff, and (3) evidence that the defendant’s departure from the generally accepted standards and practices was the proximate cause of the plaintiff’s injuries and damages. Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 546, 694 S.E.2d 1, 4–5 (2010).

The theory set forth in Appellant's Complaint was that Carolina Pulmonary and/or its employee departed from the recognized and generally accepted standards, practices, and procedures by placing Dorothy on the weighing scale and then leaving her unattended. [R.pp. ___; Complaint, pp. 2-3, ¶¶ 4-5, 9, 13.] During trial, however, Appellant offered no evidence during his case that Carolina Pulmonary's employee placed and then left Dorothy unattended on the scale.

Instead, Deborah Copeland conceded at trial that she never observed Dorothy stepping onto the scale, never observed Joan Edge placing Dorothy on the scale, and did not even know if Dorothy was on the scale when she fell. [R.pp. ___; Trial Tr. pp. 216, l. 20 – 218, l. 8.] According to Deborah, the fall occurred quickly and in an instant. Deborah only remembered letting Dorothy's arm go, setting down her purses and umbrella, and then looking back and seeing that Dorothy had fallen. [R.pp. ___; ___; *Id.* at pp. 195, ll. 2-12; 216, l. 20 – 218, l. 8.] Deborah never testified that she handed Dorothy off to Joan so that Joan could begin weighing Dorothy. Rather, Deborah knew no one had Dorothy when Deborah walked away from Dorothy. There was simply no testimony presented during Appellant's case that Joan had begun the process of weighing Dorothy, including placing Dorothy on the scale, when Dorothy fell.

Furthermore, the opinion of Appellant's expert, Susan Davies, on the standard of care required of Joan Edge was restricted to the standard of care for the protocols to be followed while weighing a patient, including the procedure for assisting the patient onto the weighing scale and attending to the patient while on the scale. [R.pp. ___; ___; *Id.* at pp. 264, l. 6 – 265, l. 8; 272, l. 21 – 273, l. 6.] Yet there was a complete failure by Appellant at trial to present evidence that Joan had begun the process of weighing

Dorothy or had ever placed or assisted Dorothy onto the weighing scale. Therefore, because Appellant did not present any evidence during his case that Joan placed Dorothy on the scale and subsequently left Dorothy unattended, Appellant failed to establish a deviation from the standard of care by Joan Edge.

The entirety of Appellant's medical malpractice claim – that Joan Edge departed from the required standard of care by placing Dorothy onto the weighing scale and then walking away – failed for a complete lack of evidentiary proof at trial. [R.pp. ___; Complaint, pp. 2-3, ¶¶ 4, 5, 9, 13.] As such, the Trial Court properly directed a verdict in favor of Carolina Pulmonary as a matter of law. See Guffey v. Columbia/Colleton Reg'l Hosp., Inc., 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005); see also Ellison v. Heritage Dodge, Inc., 283 S.C. 21, 320 S.E.2d 716 (Ct. App. 1984) (holding trial court correctly refused to submit a plaintiff's claim to the jury where the plaintiff failed to prove the material allegations of the complaint).

On appeal, Appellant sets forth two primary arguments against the Trial Court's grant of a directed verdict to Carolina Pulmonary. Appellant first contends that even though the Complaint specifically alleges that Joan Edge assisted Dorothy onto the weighing scale and then walked away, leaving Dorothy alone on the scale which

allegedly led to her fall¹, Appellant did not need to prove those precise allegations to prevail on the medical malpractice claim at trial.

Appellant claims that the exact location of Dorothy's fall or how Dorothy fell is not relevant to Appellant's medical malpractice claim. It is enough, Appellant argues, for the jury to consider that Dorothy fell because she was perhaps left unattended somewhere by someone in the triage room.

There are two fallacies with this argument. First, by arguing that it is open ended as to how and where Dorothy fell and that Appellant is not restricted to the allegations set forth in the Complaint, Appellant is merely asking this Court to submit multiple speculative scenarios to the jury. In fact, Appellant contends the jury could have considered at least **seven** different theories as to how Dorothy fell, including that Deborah assisted Dorothy onto the scale and left Dorothy alone causing Dorothy to fall; Deborah erroneously thought Joan had taken control of Dorothy and was in the process of assisting Dorothy onto the scale; Dorothy fell before she got on the scale; Dorothy fell off the scale; Dorothy fell because she was left unattended in the triage room; Dorothy fell because both Joan and Deborah were at fault; or Dorothy fell through no one's fault.

¹ Appellant never sought to amend the Complaint under Rule 15, SCRCF to raise different issues or theories. Any implied request of Appellant to now amend is not preserved for appellate review. There was also no indication at trial that the parties agreed to try by implied consent expanded theories of medical malpractice or negligence. The examination of the witnesses centered on the weighing scale and the weighing process. The cross-examination of the witnesses, including Appellant's expert, by Carolina Pulmonary's counsel demonstrated the intent of Carolina Pulmonary to try the case on the allegation asserted in the Complaint – that Joan placed Dorothy on the scale and walked away. In particular, under questioning by Carolina Pulmonary's counsel, Appellant's expert was forced to concede that her opinion on the standard of care was limited to the weighing process. The Record does not show that the parties tried any theories other than the one raised in the Complaint at trial.

Appellant is asking this Court to allow the jury to engage in a guessing game. See LePrince v. McLeod, 171 So.2d 189 (Fla. Dist. Ct. App. 1965) (holding that “inviting the jury to engage in a guessing game” is not permitted). Appellant has no idea how Dorothy fell, and his one theory in the Complaint, that Joan placed Dorothy on the scale and walked away, was disproven during his case at trial because there was no evidence that Joan placed Dorothy on the scale and left her there alone. Speculative, theoretical, and hypothetical views may not be submitted to a jury, and a verdict may not be permitted to rest upon surmise, conjecture, or speculation. Small v. Pioneer Machinery, Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997). A defendant’s liability cannot rest on such speculation, and thus, the Trial Court correctly directed a verdict in favor of Carolina Pulmonary. See Fletcher v. Med. Univ. of South Carolina, 390 S.C. 458, 463-64, 702 S.E.2d 372, 374 (Ct. App. 2010) (prohibiting speculation that a patient’s misfortune was the result of negligence in the absence of any evidence as to how the medical professional deviated from the standard of care).

Second, during trial, Appellant’s expert, Susan Davies, conceded her opinion on the standard of care was narrow and limited to the standard of care for weighing a patient in an office setting. [R.pp. ___; Trial Tr. pp. 272, l. 21 – 273, l. 6.] Appellant did not establish that this standard of care was violated by Joan Edge because Appellant presented absolutely no evidence that Dorothy fell while Joan was engaged in the process of weighing Dorothy.

As a second argument, Appellant suggests that an issue of fact arises as to whether Dorothy was on the weighing scale when she fell because Joan Edge testified that Deborah placed Dorothy onto the scale. Once more, this argument does not account

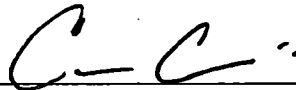
for the limited standard of care opinion rendered by Appellant's expert at trial which only concerned the protocols for weighing a patient. Under Joan's testimony, Deborah placed Dorothy on the scale on her own volition. Joan neither asked nor expected Deborah to place Dorothy on the scale. [R.pp ___; ___; Trial Tr. pp. 74, ll. 15-19; 101, ll. 13-15.] Appellant's expert limited her opinion on the standard of care to the procedure for weighing a patient, which included how to assist a patient onto the scale. [R.pp. ___; Id. at pp. 272, l. 21 – 273, l. 6.] Joan's version of events does not create any disputed issue of fact with respect to the standard of care offered at trial because it is clear under Joan's testimony that she had not begun the weighing process for Dorothy. The testimony of Joan Edge raises no issue of fact with respect to whether Carolina Pulmonary and/or its employee violated the standard of care.

The Complaint sets forth only one theory of medical malpractice - that Carolina Pulmonary and/or its employee deviated from the standard of care for weighing a patient by placing Dorothy on the weighing scale and walking away. Appellant failed to offer any proof of this allegation during his case at trial. "A directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability." Guffey v. Columbia/Colleton Reg'l Hosp., Inc., 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). Accordingly, the Trial Court properly directed a verdict in favor of Carolina Pulmonary.

CONCLUSION

For the reasons set forth herein, Respondent Carolina Pulmonary Physicians, P.A. respectfully requests this Court to affirm the Trial Court's grant of the directed verdict for Carolina Pulmonary.

Respectfully submitted,



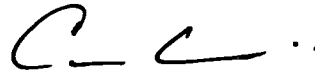
Barbara A. Chesley
Carmen V. Ganjehsani
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
**ATTORNEYS FOR RESPONDENT
CAROLINA PULMONARY
PHYSICIANS, P.A.**

November 29, 2017.

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondent Carolina Pulmonary Physicians, P.A., do hereby certify that I have this date served the foregoing Initial Respondent's Brief, dated November 29, 2017, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

David A. Manzi
SCHILLER & HAMILTON
1057 Red Ventures Drive, Suite 145
Fort Mill, SC 29707
Attorney for Appellant



Carmen V. Ganjehsani
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
**ATTORNEYS FOR RESPONDENT
CAROLINA PULMONARY
PHYSICIANS, P.A.**

Dated: November 29, 2017.

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Reply to: **Carmen V. Ganjehsani**
Direct Dial: 803-253-8692
cganjehsani@richardsonplowden.com

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November 29, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Copeland v. Carolina Pulmonary Physicians, P.A.*
Appellate Case No. 2017-001271
RPR File No.: 4180-135

Dear Ms. Kitchings:

Enclosed for filing are the original Initial Brief of Respondent Carolina Pulmonary Physicians, P.A. and the Respondent's Designation of Matter to be Included in the Record on Appeal in the above referenced matter, along with our original Certificates of Service.

By copy of this letter, we are this day serving a copy of our Initial Brief and Designations on counsel for Appellant.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,



Carmen V. Ganjehsani

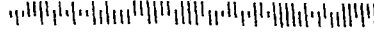
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Encs.

cc: David A. Manzi
Barbara A. Chesley (FYI)

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RICHARDSON
RICHARDSON PLOWDEN ROBINSON, P.A.
PLOWDEN
ATTORNEYS AT LAW



COLUMBIA P.O. Drawer 7788 • Columbia, SC 29202

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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